In the Wisconsin Court of Appeals

DISTRICT IV

RICHARD TEIGEN AND RICHARD THOM,
PLAINTIFFS-RESPONDENTS,

v.

WISCONSIN ELECTION COMMISSION,
DEFENDANT-CO-APPELLANT,

DEMOCRATIC SENATE CAMPAIGN COMMITTEE,
INTERVENOR-DEFENDANT,

DISABILITY RIGHTS WISCONSIN, WISCONSIN FAITH VOICES FOR JUSTICE, AND LEAGUE OF WOMEN VOTERS OF WISCONSIN,
INTERVENORS-DEFENDANTS-APPELLANTS

On Appeal from the Waukesha County Circuit Court,
The Honorable Michael O. Bohren, Presiding,
Case No. 21CV958

PLAINTIFFS-RESPONDENTS' RESPONSE TO EMERGENCY STAY MOTIONS

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ARGUMENT

The Wisconsin Elections Commission and three Intervenors (collectively Movants) make an extraordinary request to this Court. They ask this Court to enter an emergency stay of a circuit court order that simply enforces Wisconsin's election laws. Yet they don't even attempt to apply the well-established test for stay, entirely skipping their likelihood of success on appeal. The Commission's motion tells this Court that it will file a brief "that addresses all" of the stay factors (including, significantly, their chance of success on appeal) later in the week, by Thursday. WEC Motion at 9.

As for the Intervenors, while they accuse the circuit court of misapplying the likelihood of success factor, Intervenors Motion at 10–13, they themselves don't apply that factor at all. Nowhere in their emergency motion to this Court do they explain why they are likely to succeed on appeal. Nor did they in their motion for a stay to the circuit court.[1] Their motion cited only *Purcell* (which does not apply here for multiple reasons and in any event does not require a stay, *see infra*), failing entirely to discuss or apply the test for stay in Wisconsin courts. Dkt. 135. The transcript of the circuit court's reasons for its denial of their stay motion is also not available yet, making it impossible for this Court to confirm whether their characterization of the circuit court's rationale is accurate. It is not. The circuit court properly applied the stay factors under *Gudenschwager* (at *Plaintiffs-Respondents*' request, Dkt. 143:6–11), holding that Movants have no likelihood of success *on appeal* (along with properly applying the rest of the stay factors).[2]

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[1] The Commission didn't even move for a stay in the circuit court, but just orally joined the Intervenors motion.

[2] Even if the circuit court had misapplied the stay standard in some nuanced way, as in *Waity* (and, to be clear, it did not), *see* Intervenors Mot. 11, the Movants cannot

And the circuit court was correct that Movants have little to no likelihood of success on appeal. The issues in this case are not complicated, and Wisconsin law is clear. Absentee ballots must be "mailed by the elector, or delivered in person, to the municipal clerk." Wis. Stat. § 6.87(4)(b)(1). And when delivered "in person," *id*., "absentee ballots shall be returned by electors" to "the office of the municipal clerk" unless "the governing body of a municipality … elect[s] to designate a site other than [that] office." Wis. Stat. § 6.855.[3] The Legislature has also directed that these absentee voting procedures are "mandatory," and therefore to be "strictly enforced," "to prevent overzealous solicitation of absent electors who may prefer not to participate in an election" and "to prevent undue influence on an absent elector." Wis. Stat. § 6.84(1); *State ex rel. Ahlgrimm v. State Elections Bd.*, 82 Wis. 2d 585, 597, 263 N.W.2d 152 (1978).

Notwithstanding the clear statutory requirement that "the elector" return his or her own ballot, the Commission has told clerks around this State that *any person* may return anyone else's ballot. Dkt. 2:15 ("A family member or another person may also return the ballot on behalf of the voter."). The Commission has also told clerks that they can use drop boxes for returning absentee ballots, whether "staffed or unstaffed, temporary or permanent," and that these boxes can go anywhere, including "libraries," "businesses," "grocery stores," and "banks," Dkt. 2:18–19, violating both the "in person" delivery requirement under Wis.

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raise such an error for the first time here. Again, the Intervenors' stay motion below did not even discuss or apply the stay factors, but instead relied entirely on *Purcell*. And the Commission did not even file a stay motion. Arguing now that the circuit court misapplied a standard that they themselves did not apply, explain, or discuss before the circuit court is the epitome of sandbagging and is barred by the forfeiture rule. *E.g.*, *State v. Counihan*, 2020 WI 12, ¶ 27, 390 Wis. 2d 172, 938 N.W.2d 530.

[3] Wis. Stat. § 6.855 imposes a variety of requirements on alternate sites, including that "no site may be designated that affords an advantage to any political party." And alternate sites under that section are a substitute for the clerk's office. WEC's memo telling clerks that they can use drop boxes anywhere circumvents all of these important protections on alternate sites.

Stat. § 6.87(4)(b)(1) and the location requirement under Wis. Stat. § 6.855. In short, there are only two authorized methods for returning absentee ballots under Wisconsin law: mailing it, or "in person" delivery to municipal clerk at the "office of the municipal clerk" or an alternate site designated under Wis. Stat. § 6.855.

Both the irreparable harm and public interest factors also cut heavily against a stay here. In *Jefferson v. Dane Cty.*, 2020 WI 90, 94 Wis. 2d 602, 951 N.W.2d 556, the Wisconsin Supreme Court swiftly—and unanimously—enjoined election guidance issued by the Madison and Milwaukee clerks that conflicted with state law.[4] The Court subsequently explained that "[t]he erroneous interpretation and application of [Wisconsin's election laws] affect matters of great public importance." *Id.* ¶ 15. The United States Supreme Court has also recognized—in the very case Movants primarily invoke—that States "indisputably ha[ve] a compelling interest in preserving the integrity of its election process." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). The Legislature has also stated explicitly that strict adherence to the absentee voting procedures is a matter of great public importance:

> The legislature finds that voting is a constitutional right, the vigorous exercise of which should be strongly encouraged. In contrast, voting by absentee ballot is a privilege exercised wholly outside the traditional safeguards of the polling place. The legislature finds that the privilege of voting by absentee ballot must be carefully regulated to prevent the potential for fraud or abuse; to prevent overzealous solicitation of absent electors who may prefer not to participate in an election; to prevent undue influence on an

[4] Order Granting Temporary Injunction, *Jefferson v. Dane County*, 2020AP557 (March 31, 2020), available at https://www.wpr.org/sites/default/files/2020ap557-oa_3-31-20_order.pdf.

> absent elector to vote for or against a candidate or to cast a particular vote in a referendum; or other similar abuses.

Wis. Stat. Ann. § 6.84(1).

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. That interest will be conclusively violated by a stay. And there is no repair for that harm, since an election conducted in violation of state law cannot be undone. *See Trump v. Biden*, 2020 WI 91, ¶ 1, 394 Wis. 2d 629, 951 N.W.2d 568.

Two recent Wisconsin Supreme Court cases illustrate that the bar for allowing an ultra vires policy or law to remain in place is, and should be, very high. In *Wisconsin Legislature v. Palm*, 2020 WI 42, ¶ 10, 391 Wis. 2d 497, 942 N.W.2d 900, the Wisconsin Legislature challenged Governor Evers' stay-at-home order as an unlawful, unpromulgated rule. Although the Legislature *itself* asked the Court to stay any injunction against the order "for at least six days," the Court declined to do so. *Id.* ¶ 56. Justice Kelly, joined by Justice Bradley, explained: "The petition requested a declaration of rights. Our opinion declares those rights ... today. What would it mean to stay that declaration? Would everyone have to act like they hadn't read our decision until the end of the stay? Would there be an embargo on reporting on our decision until that date?" *Id.* ¶ 120 n. 10.

Similarly, in *Serv. Emps. Int'l Union, Loc. 1 v. Vos*, 2020 WI 67, 393 Wis. 2d 38, 946 N.W.2d 35, the Court considered a constitutional challenge to certain laws, in an appeal from a decision granting a temporary injunction. *Id.* ¶ 5. A majority of the Court found some of the laws unconstitutional and declared them so, without considering the remaining injunction factors: "[A]nalyz[ing] the remaining factors makes

sense only if there are circumstances under which it would be appropriate to continue enforcing a law we have already decided is unconstitutional. If we concluded that the movant would not suffer irreparable harm, would that make it acceptable for the executive to enforce an unconstitutional law? … If the status quo would not change without a temporary injunction, would that mean the unconstitutional law could remain in effect? Obviously not." *Id.* ¶ 117.

There also is no harm from the circuit court's order, which simply requires upcoming elections to be conducted in accordance with state law. The Commission's memos were adopted recently, during COVID. Numerous elections were conducted under state law prior to COVID, and without significant problems. Voters can still easily return their absentee ballots by mailing them or returning them in person to the clerk's office or an alternate site under § 6.855, as they could before the Commission's memos attempted to change the methods for returning absentee ballots. The idea that numerous voters around Wisconsin will be disenfranchised if drop boxes are removed—which were not even an option until recently—defies belief.

Nor is there any serious challenge for clerks or risk of confusion in the upcoming election. Clerks can easily respond to the circuit court's order by notifying voters of the two lawful options for returning absentee ballots (mailing or in-person delivery), removing or covering any illegal drop boxes, and posting signs on drop boxes (or where they used to be) that ballots must be mailed or delivered in person to the clerk. Any voters who do not receive the notification and attempt to return a ballot to a drop box can simply read the sign and then drop it into a mailbox or deliver it to the clerk's office (or an alternate site under 6.855). The circuit court issued its oral decision in this case on January 13, giving clerks well over a month to respond to it—and almost two weeks before absentee ballots will be sent out. And the decision has been widely reported in the media.

While Movants heavily emphasize the timing of the circuit court's decision, the timing is largely their own doing. Plaintiffs filed this lawsuit in June and noted during an early scheduling conference that they intended to move for summary judgment promptly in August on the purely legal issues presented. Dkt. 73:4. But the Intervenors sought to delay summary judgment briefing until after their intervention motions were resolved, and then requested a discovery period—and took Plaintiffs depositions—for information that was neither necessary nor relevant to the case, thus narrowing the timeframe between when summary judgment resolved and the upcoming elections (notably, Movants do not point to anything found in discovery that is relevant to the purely legal issues raised in this case).

The Commission's motion suggests that absentee ballots may have already been sent to voters and returned via drop boxes. WEC Motion at 12. There has been no evidence of that; the Commission certainly didn't present any, and it should know. It simply told the circuit court that January 25 is the deadline for municipal clerks to mail out absentee ballots. *Compare* Intervenors Motion at 2. That was exactly why the circuit court ordered the Commission to issue a corrected statement to clerks by January 24, so that that statement would issue *before* ballots are sent out. The Commission has also known about the circuit court's decision—and that it would be required to withdraw its Memos and issue a corrected statement—since January 13, when the circuit court ruled orally. Any harm from waiting until the last day to comply with the circuit court's order is on the Commission. That decision has also been widely reported, so undoubtedly most clerks are already aware of it.

Movants also briefly raise the spectre of voters who "cannot walk to a mailbox or to the clerk's office to personally deliver their absentee ballots." *E.g.*, WEC Mot. 11. As an initial matter, this argument is not relevant to the drop box half of this case. The Movants do not and cannot explain why a voter who could use a drop box cannot instead use a mailbox, which, unlike drop boxes, is authorized by law. As to the

requirement that voters must return their own ballots, state law provides numerous exceptions and carve-outs for voters with physical challenges. *E.g.*, Wis. Stat. §§ 6.82; 6.86(1)(ag); 6.86(2); 6.86(3); 6.87(5); 6.875. The U.S. Postal Service also has a special door service for people who cannot get to their mailbox.[5] The Commission argues that some voters will "fall through the cracks of [the] protections afforded [to] disabled [voters]," WEC Mot. 12, but, as the circuit court held, they have not established as a factual matter that this is a real problem, or, if it is, how extensive it is, and in any event, that problem would require, at most, an as-applied exception for those situations, not a wholesale change to state law for *all* voters.

Again, the question in this case is the general rule under state law for returning an absentee ballot. The law requires electors to return their own ballots, Wis. Stat. §§ 6.87(4)(b)(1) ("shall be mailed *by the elector*"); 6.855 ("…to which voted absentee ballots shall be returned *by electors*")—just like voters are required to cast their own votes at the polls on election day (except where the law explicitly allows an agent to act on a voter's behalf, as in the many statutory exceptions cited above). A stay would retain the Commission's unlawful direction to clerks that *anyone* may return any other person's ballot—including political operatives—regardless of who that person is, their relationship to the voter, or any circumstances of the voter. Perhaps close family members should be permitted to return one another's absentee ballots, but that is ultimately a policy question for the Legislature to resolve. And it certainly doesn't warrant disregarding the clear text of state law for everyone. In sum, movants have little to no likelihood of success on appeal; allowing further elections under the Commission's made-up rules, rather than state law,

[5] *If I have Hardship or Medical Problems, how do I request Door Delivery?*, United States Postal Service (Apr. 7, 2020), https://faq.usps.com/s/article/If-I-have-Hardship-or-Medical-Problems-how-do-I-request-Door-Delivery.

will do irreparable harm and is heavily against the public interest; and there is no serious risk of harm from following state law.

Movants also invoke *Purcell v. Gonzalez* and related cases, in which the United States Supreme Court has emphasized "that lower *federal courts* should ordinarily not *alter* the election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (citing *Purcell*, 549 U.S. 1). *Purcell* does not apply here for two reasons: first, it applies only to federal courts, not state courts; and second, *Purcell* is designed to prevent federal courts from *changing* state laws, not to stop state courts from enforcing election laws when an unelected agency has attempted to change them. Even if *Purcell* applied, it does not call for a stay here because there is no serious risk of voter confusion, for the reasons already explained.

Purcell does not apply to state courts. The Fourth Circuit, *en banc*, recently held exactly that: "*Purcell* is about *federal court* intervention" in state election rules, and does not apply to state courts. *Wise v. Circosta*, 978 F.3d 93, 99 (4th Cir. 2020).[6]

Notably, the U.S. Supreme Court recently *denied* a stay after the Pennsylvania Supreme Court made certain changes to its election rules shortly before the 2020 election, while simultaneously granting a stay of a *federal court* injunction that modified Wisconsin's elections rules. *Compare DNC v. Wis. State Legislature*, 141 S. Ct. 28, *with Republican Party of Pennsylvania v. Boockvar*, 141 S. Ct. 1 (2020). Chief Justice

[6] The three dissenters in the Fourth Circuit argued that *Purcell* could apply when a state court or state agency unilaterally changes election rules on the eve of an election, but they emphasized that *state law* is the baseline and the goal is to avoid changes to those laws right before an election. 978 F.3d at 117 ("The status quo, properly understood, is an election run under the General Assembly's rules."). As explained further below, that is the second reason *Purcell* does not apply—this case is about *enforcing* Wisconsin's election laws, not altering them.

Roberts explained the difference in a short concurrence: "While the Pennsylvania applications implicated the authority of state courts to apply their own constitutions to election regulations, this case involves federal intrusion on state lawmaking processes. Different bodies of law and different precedents govern these two situations and require, in these particular circumstances, that we allow the modification of election rules in Pennsylvania but not Wisconsin." *DNC v. Wis. State Legislature*, 141 S. Ct. 28, 28 (2020) (Roberts, J., concurring).[7]

Justice Kavanaugh, to give another example, has repeatedly emphasized federalism concerns in *Purcell*-related stays. As he explained in *Andino v. Middleton*, 141 S. Ct. 9, 10 (2020) (Kavanaugh, J., concurring), "the Constitution principally entrusts the safety and the health of the people to the politically accountable officials of the States … It follows that a State legislature's decision either to keep or to make changes to election rules to address COVID–19 ordinarily should not be subject to second-guessing by an unelected federal judiciary, which lacks the background, competence, and expertise to assess public health and is not accountable to the people." (citations omitted). *See also DNC v. Wis. State Legislature*, 141 S. Ct. 28, 30–33 (2020) (Kavanaugh, J., concurring) ("In short, state legislatures, not federal courts, primarily decide whether and how to adjust election rules in light of the pandemic."). And *Purcell* itself emphasized that "[a] State indisputably has a compelling interest in preserving the integrity of its election process." *Purcell*, 549 U.S. at 4.

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[7] Three Justices wrote separately in the Pennsylvania case, but, like the *Wise* dissenters discussed in footnote 3 above, their concern was that a state court had *changed* a state *law*—which is the second reason *Purcell* does not apply here, *see infra*. *Republican Party of Pennsylvania v. Boockvar*, 141 S. Ct. 1, 2 (2020) (statement of Justice Alito, joined by Thomas and Gorsuch) ("The provisions of the Federal Constitution confer[ ] on state legislatures, not state courts, the authority to make rules governing federal elections.").

Movants do not cite any Wisconsin cases—nor are there any—holding that *Purcell* applies in Wisconsin courts.[8]

Purcell also does not apply because its focus is on court orders that attempt to make *changes* to state law, whereas the circuit court's order simply requires upcoming elections to be conducted in *accordance* with Wisconsin's elections laws. Justice Kavanaugh has summarized the *Purcell* principle as follows: "Federal courts ordinarily should not *alter state election laws* in the period close to an election." *DNC v. Wis. State Legislature*, 141 S. Ct. 28, 30 (2020). The Seventh Circuit, too, has recognized that "[t]here is a profound difference between compelling a state to depart from its rules close to the election (*Purcell*) and allowing a state to implement its own statutes (this case)." *Frank v. Walker*, 769 F.3d 494, 497 (7th Cir. 2014).[9]

And, as described above, those Judges and Justices who have argued that *Purcell* should apply to some state court decisions, *supra* nn. 1–2, have emphasized that the point is to *preserve state law* from last-minute changes by courts or agencies. *See Boockvar*, 141 S. Ct. at 2

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[8] *Hawkins v. Wisconsin Elections Comm'n*, 2020 WI 75, 393 Wis. 2d 629, 948 N.W.2d 877, is not relevant. WEC Motion at 10. In that case, two green party candidates sought a court order that their names be added to the ballot—but they waited to file two weeks after WEC excluded them from the ballot, and by the time they filed the case, many ballots had already been printed and sent out. *Id.* ¶¶ 3–10. The "confusion" the Court referred to had to do with that resulting from "send[ing] a second round of ballots to voters who already received, and potentially already voted, their first ballot."

[9] While the Supreme Court vacated the Seventh Circuit's stay in *Frank*, that decision was driven by unique circumstances that are not present here: the district court had enjoined Wisconsin's voter identification requirement for absentee voting in April; the Seventh Circuit's stay re-instated it in September, *after* "absentee ballots ha[d] been sent out without any notation that proof of photo identification must be submitted," and there was evidence that roughly 9% of registered voters did not have valid ID, and would not be able to get one in time, which even the dissenting Justices found "particularly troubling." *Frank v. Walker*, 574 U.S. 929 (2014) (Alito, J., dissenting); *Frank v. Walker*, 769 F.3d 494, 498 (7th Cir. 2014) (Williams, J., dissenting) (describing the evidence).

(2020) (statement of Justice Alito, joined by Thomas and Gorsuch) ("[T]here is a strong likelihood that the State Supreme Court decision violates the Federal Constitution. The provisions of the Federal Constitution conferring *on state legislatures, not state courts*, the authority to make rules governing federal elections would be meaningless if a state court could override the rules adopted by the legislature simply by claiming that a state constitutional provision gave the courts the authority to make whatever rules it thought appropriate for the conduct of a fair election."); *Wise*, 978 F.3d at 117 (Wilkinson, J., dissenting) ("Therefore, we conclude that *Purcell* requires granting an injunction pending appeal in this case. The status quo, properly understood, *is an election run under the General Assembly's rules*—the very rules that have been governing this election since it began in September. The Board and the North Carolina Superior Court for the County of Wake impermissibly departed from that status quo approving changes to the election rules in a consent decree in the middle of an election.")

Even if the *Purcell* principle applied here (and it does not), it would not warrant a stay in this case. The primary concern in *Purcell* is avoiding "voter confusion." 127 S. Ct. at *5. There is little risk of confusion here, for many reasons. There are two very easy options for returning an absentee ballot that are authorized under state law—mailing it, or delivering it in person to the municipal clerk. Clerks can notify voters before ballots are sent out, remove drop boxes, and post signs directing voters to mail or deliver their ballots. There is more than enough time for clerks to comply with state law before the election on February 15.

Dated: January 23, 2022.

Respectfully submitted,

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