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DISTRICT II/IV

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
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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
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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