

FILED
10-07-2022
CLERK OF WISCONSIN
COURT OF APPEALS

**STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV**

NANCY KORMANIK,

Plaintiff-Respondent,

vs.

Appeal No.
2022-AP-

WISCONSIN ELECTIONS
COMMISSION,

Circuit Court Case No.
2022-CV-1395

Defendant,

RISE, INC.,

Intervenor-Defendant-
Petitioner,

DEMOCRATIC NATIONAL
COMMITTEE,

Intervenor-Defendant-
Petitioner.

**BRIEF IN SUPPORT OF EMERGENCY REQUEST FOR STAY
OF TEMPORARY INJUNCTION PENDING DISPOSITION OF
PETITION**

On Appeal from the Circuit Court for
Waukesha County Case No. 2022CV001395
The Honorable Brad Schimel, Presiding

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Intervenor-Defendant Rise, Inc., by its attorneys, submits this brief in support of its motion for a stay pending appeal of the circuit court's October 7, 2022 Order, App. 20.

I. INTRODUCTION

Intervenor-Defendant-Petitioner Rise, Inc. ("Rise"), by its undersigned counsel, respectfully seeks an emergency stay of the Temporary Injunction entered by Waukesha County Circuit Judge Brad D. Schimel earlier today ordering Defendant Wisconsin Elections Commission ("WEC") to "withdraw," by 7 p.m., Monday, October 10, 2022, a guidance document governing important aspects of the absentee-voting process that is already underway in the run-up to the November 8 federal and state general election. *See* App. 20-22. The guidance addresses the procedure by which a municipal clerk or local election official may return a completed and submitted absentee ballot to an elector, and the procedures by which a municipal clerk or local election official may "spoil" an absentee ballot at an elector's request. The challenged guidance was issued by WEC on August 1 and 2, 2022—over nine weeks ago—and is materially identical to guidance WEC has provided for at least the last seven statewide elections in Wisconsin over the past two years, and apparently much longer.

Rise respectfully asks the Court to immediately stay the circuit court's Temporary Injunction ordering WEC to "withdraw" its guidance by 7 p.m. Monday, so that this Court has time to request and consider responses from the other parties below and to make a considered decision whether to grant parties leave to appeal from today's Temporary Injunction order (and to extend the stay pending appeal, if leave to appeal is granted). Rise's counsel is notifying all counsel of record of this request for temporary relief pending disposition of the petition. Wis. Stat. §§ 808.03, 808.07(2). Rise respectfully requests that, if necessary, this Court grant an *ex parte* stay of the Temporary Injunction until at least early next week so that this Court can give this petition and stay request appropriate consideration.

II. BACKGROUND

Wisconsin law provides that “if an elector mails or personally delivers an absentee ballot to the municipal clerk,” the clerk may “not return the ballot to the elector” “[e]xcept as authorized in sub. (5) and 6.87(9).” Wis. Stat. § 6.86(6) (emphasis added). Section 6.86(5) requires clerks to issue a new ballot to an elector “[w]henever an elector returns a spoiled or damaged absentee ballot to the municipal clerk,” so long as any request for a replacement ballot is made “within the applicable time limits under subs. (1) and (3)(c).”¹ *Id.* § 6.86(5). Section 6.87(9), in turn, provides that “[i]f a municipal clerk receives an absentee ballot with an improperly completed certificate or with no certificate, the clerk may return the ballot to the elector . . . whenever time permits the elector to correct the defect and return the ballot.”

Consistent with those statutory directives, for at least the last seven statewide elections, WEC has issued guidance (the “Absentee Ballot Guidance”) setting forth the process and rules by which voters can “spoil” absentee ballots. The most recent Absentee Ballot Guidance providing these rules and processes was issued by WEC more than two months ago on August 1, 2022. Compl., Exh. A; Wis. Elections Comm’n, *Spoiling Absentee Guidance for the 2022 Partisan Primary* (Aug. 1, 2022), available at <https://elections.wi.gov/memo/spoiling-absentee-guidance-2022-partisan-primary>; Compl. Exh. B; Wis. Elections Comm’n, *Rules about ‘Spoiling’ Your Ballot* (Aug. 2, 2022), available at <https://elections.wi.gov/news/rules-about-spoiling-your-ballot-0>. The Absentee Ballot Guidance governed the partisan primary that took place in August and is materially identical to the WEC guidance that governed the November 2020 general election and

¹ Those time limits provide that mailed requests for a new ballot must be received “no later than 5 p.m. on the 5th day immediately preceding the election,” while in-person requests must be made “no earlier than 14 days preceding the election and no later than the Sunday preceding the election.” Wis. Stat. § 6.86(1)(b).

every state election that has been held since then. *See* Wis. Elections Comm’n, *Rules about ‘Spoiling’ Your Ballot* (Oct. 29, 2020).²

The Absentee Ballot Guidance provides, among other things:

- A voter who returned an absentee ballot may request in writing or in-person that their returned absentee ballot be spoiled so they can either (i) vote a new one, or (ii) vote on election day.
- A voter cannot appear at the polls on election day and spoil their absentee ballot at that time.
- A voter who mailed an absentee ballot to the clerk cannot vote at the polls on election day if the voter has not spoiled their ballot by the applicable deadline, even if the clerk has not received the ballot.
- A voter who received an absentee ballot but did not return the ballot can vote in person.
- A voter can spoil their election day ballot in person at the polls.

See Rules about ‘Spoiling Your Ballot at 1–2, Compl. Exh. B, pp. 1–2; *Spoiling Absentee Guidance for the 2022 Partisan Primary* at 1–2, Compl. Exh. A, pp. 1–2.

Absentee voting for the 2022 general election is now well underway. Clerks were required to send absentee ballots by September 22 to all electors with valid requests on file, *see* Wis. Stat. §§ 7.10(3), 7.15(1)(c), (cm), and by September 24 to all military and overseas voters with valid requests on file, 52 U.S.C. § 20302(a)(8). As of Monday, October 3, over 350,000 absentee ballots had been created and almost 65,000 absentee ballots had been returned to election clerks. App. 40-43.

Nearly two months after WEC issued the most recent Absentee Ballot Guidance—and after the absentee voting process had already begun—Plaintiff filed this suit. Plaintiff seeks to drastically limit the ability of Wisconsin voters to cure defects in their absentee ballots or

² Available at <https://elections.wi.gov/news/rules-about-spoiling-your-ballot>.

accompanying certifications. The crux of her complaint is an allegation that WEC's guidance—which voters have relied on, in some form, since at least the 2020 general election, including in the most recent 2022 primary election held in August—is inconsistent with several provisions of Wisconsin law. Specifically, Plaintiff alleges that the guidance impermissibly allows municipal clerks to (1) return a ballot to a voter in some circumstances, and (2) spoil a ballot upon the voter's request. Compl. ¶¶15, 16. Plaintiff further sought a temporary injunction to enjoin the Absentee Ballot Guidance and to require WEC to “promptly” issue so-called “corrected guidance” setting new rules for absentee voting, including that (1) a clerk is prohibited from returning a previously completed and submitted absentee ballot to a voter; (2) a clerk has no power to “spoil” a voter's previously submitted absentee ballot; and (3) in order to spoil an absentee ballot, a voter must spoil the ballot before requesting a new absentee ballot. App. 45.

Rise, Inc. promptly filed a motion to intervene on September 29. The Court granted that motion on October 7. App. 20.

The Court granted Plaintiff's motion for a temporary injunction on October 7. *Id.* Specifically, the Court entered an injunction stating, among other things, that WEC:

- (1) is enjoined from “advising, guiding, instructing, publishing, or otherwise communicating information related to spoiling absentee ballots and/or returning absentee ballots to electors that contravenes Wis. Stat. §§ 6.84, 6.86(1)(ar), 6.86(5) and 6.86(6), except as otherwise provided in Wis. Stat. § 6.87(9).”
- (2) is enjoined from displaying its August 1, 2022 memorandum titled “Spoiling Absentee Guidance for the 2022 Partisan Primary,” its August 2, 2022 publication titled “Rules about ‘Spoiling’ Your Ballot,” or “any other publication that communicates information contrary to Wis. Stat. §§ 6.86(5) and 6.86(6), including prohibiting the dissemination or publication of the following information: (i) that a municipal clerk or local election official may return a previously completed and submitted absentee ballot to an elector, except as otherwise provided in Wis. Stat. §6.87(9); or (ii) that a municipal clerk or local election official is authorized to spoil an absentee ballot on behalf of an elector.”

- (3) “shall notify all Wisconsin municipal clerks and local election officials that the August 1st Published Memorandum and August 2nd Published Memorandum have been withdrawn.”

App. 20-22. The Court ordered WEC to comply with these directives by 7 p.m. on Monday, October 10. The Court entered that order even though absentee balloting had, at that point, been underway in Wisconsin for 15 days and counting. Rise immediately filed an appeal on October 7, and now moves this Court for an immediate stay of the Order pending appeal.

III. LEGAL STANDARD

A stay during “the pendency of an appeal” is appropriate where the movant: (1) “makes a strong showing that it is likely to succeed on the merits of the appeal”; (2) “shows that, unless a stay is granted, it will suffer irreparable injury” while the appeal is pending; (3) “shows that no substantial harm will come to other interested parties” while the appeal is pending; and (4) “shows that a stay will do no harm to the public interest.” *Waity v. LeMahieu*, 2022 WI 6, ¶6, 400 Wis. 2d 356, 969 N.W.2d 263. These four considerations are not indispensable elements, but rather “interrelated considerations that must be balanced together.” *Id.*

IV. ARGUMENT

The Court should stay the trial court’s October 7 Order pending appeal for at least the following four reasons. *First*, if a stay is not granted, Rise will have to take immediate steps to educate its target voters about the new processes, and will therefore be irreparably harmed. The resources expended in that effort will not be recoverable even if Rise prevails on appeal. Voters, too, will suffer irreparable harm, as some will be rendered unable to have their absentee ballots cured. *Second*, a stay, which will only return the parties to the status quo, will cause no substantial harm to Plaintiff, WEC, or Intervenor-Defendants the DNC—who filed an appeal and emergency stay earlier today. Plaintiff has yet to make any showing that the pre-Order cure processes are contributing to fraud, confusion, or any other concrete injury to Wisconsin’s election system, never

mind to Plaintiff herself. *Third*, Rise is likely to succeed on the merits of an appeal, because Wisconsin law clearly supports WEC's soon-to-be invalidated Absentee Ballot Guidance. *Fourth*, it is in the public interest not to change ballot-cure rules mid-stream by court order, then to change them again days or weeks later if the appellate courts take a different view of the merits. The best course of action is to maintain the pre-Order status quo by granting a stay.

A. Rise—and Wisconsin voters—will suffer irreparable harm absent a stay.

A stay is necessary to prevent irreparable injury to Rise, and to Wisconsin voters writ large. Because many of Rise's target voters plan to vote absentee, Rise will need to take immediate action in response to the Court's Order. First, it will need to suddenly divert significant resources to voter reeducation, to update any voters who—by choice or necessity—still plan to vote absentee. Second, it will need to divert significant resources toward encouraging voters to vote in-person on election day, to minimize the risk that any of its target voters casts an absentee ballot in a way that is no longer curable under the court's Order. These injuries cannot be redressed post-appeal because Rise has limited time remaining to achieve its organizational goals—every day brings the election closer. Nor can Rise recoup its limited resources that will be unnecessarily expended in the event a stay is not issued.

A stay is also necessary to prevent irreparable injury to Wisconsin voters. By definition, the Court's order will make it impossible for some absentee voters to cure their ballots—that is the whole point of Plaintiff's lawsuit. If Rise prevails on appeal, those voters will have been disenfranchised in violation of Wisconsin law. And “[i]t is axiomatic that there is no post hoc remedy for a violation of the right to vote.” *Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1310 (N.D. Ga. 2018).

Both these harms justify a stay pending appeal.

B. Neither Plaintiff nor any other interested party will be harmed by a stay.

Plaintiff has yet to establish that she is being harmed by WEC's guidance at all, never mind that she will be harmed by a brief delay in its invalidation. The only supposed harm Plaintiff cites—"potential disenfranchisement by identity theft and voter fraud," App. 56—remains both speculative and unsubstantiated. Materially identical guidance governed both the November 2020 general election and the August 2022 partisan primary—and every election in between. Yet Plaintiff still has not identified a single instance of identity theft or voter fraud that resulted from that guidance—not in her complaint, not in her motion or brief, and not at the hearing. Nor has the Court made any factual findings that such fraud is occurring. It therefore is impossible to say that Plaintiff needs relief now to avoid irreparable injury. This should have been dispositive.

Underscoring this point, Plaintiff tarried significantly in bringing her lawsuit. WEC issued the challenged guidance on August 1 and 2, 2022, in advance of the partisan primary held that month. This guidance was nothing new; rather, it was materially identical to that WEC issued in advance of the 2020 election, and which has governed every election since. Plaintiff did not challenge the guidance in 2020. She did not challenge the guidance when WEC re-issued it in advance of the August primary. Instead, she waited until after absentee voting for the November election had already begun to come to the Court and ask for extraordinary preliminary relief. While the Court has elected to look past this delay, at a minimum it means Plaintiff cannot credibly claim a need for immediate relief. If things were as urgent as Plaintiff says, her lawsuit would have been brought and resolved months or years ago. As it was not, the Court should stay its order to give the appellate courts time to weigh in.

No other interested party will be harmed by a stay. The other parties before the Court all agree that a stay is appropriate.

C. Rise is likely to succeed on the merits of its appeal.

Rise is likely to succeed in showing that the circuit court abused its discretion in issuing a temporary injunction, and incorporates by reference the arguments in its Petition for Leave to Appeal, filed concurrently with this motion.

D. A stay is in the public interest.

A stay would benefit both local election officials and, by extension, Wisconsin voters. Absent a stay, widespread confusion among election officials about how to participate in and administer an absentee voting process that has already begun is certain. Local officials have already started conducting absentee voting using the now-enjoined processes. Clerks used the same processes to administer the recent primary election and used similar processes during past election cycles. Reliance, in short, could not be higher.

Against that backdrop, the Court's Order amounts to a sea-change in Wisconsin election law, revoking guidance that has been in effect for years. And because Wisconsin election administration is decentralized—overseen by more than 1800 municipalities and their local officials—application of this Court's order is certain to be inconsistent. Wisconsin's election officials simply are not equipped to learn about, analyze, and apply a sweeping judicial intervention overnight, while already busy running an ongoing election. The likely result of the Court's Order, absent a stay, is inconsistent and confusing cure processes around the state over the coming weeks. And municipalities will be forced to commit scarce resources and municipal attorney time to time-sensitive analysis of this Court's order, any subsequent WEC action in compliance, and Rise's likelihood of success on appeal.

All this will harm voters as well as officials. Voters rely on the existence of settled, publicly disseminated processes this far into the election cycle. Many have already made plans to vote. Most no doubt assumed the accuracy of then-lawful information at the time they made those plans.

Few voters monitor the news for late-breaking judicial interventions in election administration. Absent a stay, absentee voters are likely to be disenfranchised—a result that is decidedly not in the public interest.

V. CONCLUSION

For the foregoing reasons, Rise respectfully moves the Court to grant a stay of the circuit court's entire October 7, 2022 Order pending appeal.

Dated: October 7, 2022

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