FILED
06-11-2024
CLERK OF WISCONSIN
SUPREME COURT

OFFICE OF THE CLERK
Supreme Court of Wisconsin
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WI 53701-1688

TELEPHONE (608) 266-1880
FACSIMILE (608) 267-0640
Web Site: www.wicourts.gov

June 11, 2024

To:

Hon. Eugene A. Gasiorkiewicz
Circuit Court Judge
Electronic Notice

Amy Vanderhoef
Clerk of Circuit Court
Racine County Courthouse
Electronic Notice

Charles G. Curtis
Electronic Notice

John Devaney
Electronic Notice

T.R. Edwards
Electronic Notice

*Distribution list continued on Page 12

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

No. 2024AP232 Brown v. WEC, L.C.#2022CV1324

On May 3, 2024, this court entered an order granting the petitions for bypass in the above-captioned matter. In this order we address the Wisconsin Elections Commission's ("WEC") motion for a stay of the circuit court's decision pending appeal, which has been joined by intervenor-co-appellant-cross-respondent, the Democratic National Committee ("DNC"); defendant-appellant-cross-respondent, Racine City Clerk Tara McMenamin (the "Clerk"); and intervenor-co-appellant-cross-respondent, Black Leaders Organizing for Communities ("BLOC"). Collectively, we refer to these parties as the "movants."

Kenneth Brown filed an administrative complaint with WEC pursuant to Wis. Stat. § 5.06 alleging that certain actions relating to absentee balloting taken by the Clerk during the August 2022 primary election violated Wis. Stat. §§ 5.25 and 6.855. Specifically, Brown took issue with the locations the City designated as alternate absentee ballot sites and with its use of a van, referred to as a "mobile election unit," for absentee balloting. Among other things, Brown asked that WEC instruct the Clerk that alternate absentee ballot sites must "be in locations that confer no partisan advantage" and must not "be permitted at a mobile location." WEC dismissed Brown's complaint, finding that he had failed to show probable cause that a violation of law or abuse of discretion had occurred.

Brown appealed that decision pursuant to Wis. Stat. § 5.06(8) by filing a complaint in Racine County Circuit Court. Among other forms of relief, Brown sought declarations that the Clerk "used alternate absentee ballot sites that 'afford[ed] an advantage to [a] political party,' in violation of Wis. Stat. § 6.855" and that the Clerk "used mobile alternate absentee ballot sites, in violation of Wis. Stat. § 6.855 and other related Wisconsin statutes."

On January 10, 2024, the circuit court issued a decision and order reversing WEC's decision. As pertinent here, the circuit court held, first, that the City of Racine's (the "City") selection of alternate absentee ballot sites violated what the parties refer to as the "partisan advantage" provision of Wis. Stat. § 6.855(1), which provides that "no site may be designated that affords an advantage to any political party." In doing so, the circuit court relied on a statistical study submitted by Brown that it said "indicated that the alternate sites chosen clearly favored members of the Democratic Party or those with known Democratic Party leanings." The circuit court held that WEC's determination that the designated sites did not violate the partisan-advantage provision in § 6.855(1) constituted an "error in interpretation of law by WEC." The circuit court held, second, that the City's use of the mobile election unit was not authorized by relevant election statutes, which it characterized as "refer[ring] to physical structures such as specifically geographically located buildings or structures." See Wis. Stat. § 5.25(1). The circuit court held that WEC's determination that the use of the mobile election unit was permissible "was and is contrary to law."

WEC and DNC filed motions in the circuit court for a stay of its decision pending appeal. Those motions were subsequently joined by the Clerk and BLOC. Brown opposed both stay motions.

On April 1, 2024, the circuit court denied the motions for stay pending appeal. In its decision, the circuit court noted that pursuant to Wis. Stat. §§ 808.07(2)(a)1., 809.12, and this court's decision in Waity v. LeMahieu, 2022 WI 6, ¶49, 400 Wis. 2d 356, 969 N.W.2d 263, it was required to consider four factors in evaluating the motions for stay pending appeal: (1) whether the movants made a strong showing of a likelihood of success on the merits pending appeal; (2) whether the movants showed that absent the stay, they would suffer irreparable injury; (3) whether the movant demonstrated no substantial harm will result to other parties if the stay were granted; and (4) whether the movant showed that a stay would not harm the public's interest. These factors are, as the circuit court acknowledged, not prerequisites, but rather interrelated considerations that must be balanced together. See State v. Gudenschwager, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995).

Before evaluating these factors, the circuit court emphasized what it believed to be the limited scope of its decision on the merits. It explained that it "did not announce any general rule of law other than reciting existing law to govern municipalities' future alternate site designations." Instead, the circuit court "held only that on the administrative record before it, WEC's decision" dismissing Brown's complaint "was in error."

Turning to the factors in Waity, the circuit court explained that the movants had not demonstrated a strong likelihood of success on appeal because "[t]his Court correctly applied [an]

unambiguous legislative mandate with applicable case law to the issues currently on appeal[,]" and stated that its decision "was based on sound principles of legislative interpretation[.]" The circuit court also concluded that the movants would not suffer irreparable harm in the absence of a stay because its decision "does not prevent the use of absentee ballot locations so long as they are in compliance with applicable law." It went on to state that "[t]he City Clerk can continue to utilize more than one location for early in-person absentee voting. Those locations must be selected in accordance with the applicable statute and cannot utilize a [mobile election unit]." Next, the circuit court concluded that Brown would suffer harm if a stay were granted because "[i]n essence, the movants' request for a stay would allow the City Clerk to violate what this Court has ruled as illegal activity while the appeal proceeds." Finally, the circuit court held that the public interest weighed against granting a stay because Brown, "and indeed all Wisconsin voters, have a strong interest in elections being conducted in accordance with state law."

WEC filed a motion in this court seeking a stay of the circuit court's decision pending appeal. As mentioned, this motion has been joined by the DNC, the Clerk, and BLOC. The movants insist that a timely stay is needed prior to the June 12, 2024 deadline for municipalities to designate alternate absentee ballot sites prior to the August 2024 primary election (and, in turn, the November 2024 general election). Moreover, the movants argue that the circuit court's decision gave short shrift to its likelihood of success on appeal, noting that the circuit court relied heavily on its own assessment of the merits of its ruling in evaluating that part of the stay analysis. This, the movants say, was an erroneous exercise of discretion. Properly applied, the movants contend that the relevant factors weigh in favor of temporarily staying both parts of the circuit court's decision: that is, its rulings that the City's designation of alternate absentee ballot sites violated the partisan-advantage language in Wis. Stat. § 6.855(1) and that the use of the mobile election unit for absentee balloting was not authorized by statute.

"On appeal, a circuit court's decision to grant or deny a motion to stay is reviewed under the erroneous exercise of discretion standard." Waity, 400 Wis. 2d 356, ¶50. One way a circuit court may erroneously exercise its discretion is by applying an incorrect legal standard. Id.

We conclude that the circuit court erroneously exercised its discretion in denying the motions for stay pending appeal because while it articulated the correct legal standard under Waity, it did not apply that standard correctly. In Waity, we instructed that "[w]hen reviewing a motion for a stay, a circuit court cannot simply input its own judgment on the merits of the case and conclude that a stay is not warranted." Id., ¶52; see also League of Women Voters of Wis. v. Evers, No. 2019AP559, unpublished order at 7 (Wis. Apr. 30, 2019). Instead, a circuit court must "consider[] how other reasonable jurists on appeal may . . . interpret[] the relevant law and whether they may . . . come to a different conclusion." Waity, 400 Wis. 2d 356, ¶53 (footnote omitted). This the circuit court did not do, choosing instead to express certainty that "[t]he issue in this case is not complicated"; that "Wisconsin statutory law and applicable case law is clear"; and that the court had "correctly applied [an] unambiguous legislative mandate with applicable case law to the issues currently on appeal." This sort of uncritical review is insufficient under Waity. That error then tainted the circuit court's analysis of the other stay factors, as it concluded that because its merits decision was clearly correct, the movants would not suffer irreparable injury without a stay, whereas Brown and the public interest would be harmed by a stay because it would allow activities

the circuit court said were unlawful to continue pending appeal. Overall, then, the circuit court failed to "acknowledge that its determination was the first word, not the last word, on the interpretation of the relevant . . . statutes." League of Women Voters of Wis. v. Evers, No. 2019AP559, unpublished order at 7 (Wis. Apr. 30, 2019) (footnote omitted).

Having concluded that the circuit court erred in denying the motions for stay pending appeal, we now must independently evaluate the factors to determine whether the movants are entitled to a stay. See Waity, 400 Wis. 2d 356, ¶¶52-60. Before doing so, however, we first acknowledge that there is considerable uncertainty about the scope of the circuit court's ruling. Procedurally, this case arises out of an appeal of an administrative decision by WEC pursuant to Wis. Stat. § 5.06(8). In the context of such an appeal, the circuit court may only "affirm, reverse or modify the determination of the commission." See § 5.06(9). At times, the circuit court appeared to acknowledge these limitations on the scope of its review. For example, it concluded its merits decision with the straightforward mandate "that the determination of WEC in this matter is reversed as not being in conformity with the election laws of this State." And in its order declining to issue a stay pending appeal, the circuit court explained that its merits decision "held only that on the administrative record before it, WEC's decision was in error" and that "[t]he remedy . . . chosen by this Court was to just reverse WEC's determination." The circuit court also stated that it did not "announce any general rule of law." These narrow statements are in significant tension, however, with some of the circuit court's broader pronouncements, such as the statement in its order denying a stay that "[t]he City of Racine can continue to offer early in-person absentee voting at multiple locations, it just may not do so as it did in August of 2022, at locations which conferred an illegal partisan advantage, and it must do so without the use of a [mobile election unit]" (footnote omitted). Reviewing the circuit court's rulings as a whole, it appears that the circuit court intended its decision to amount to a declaration that Racine's designation of alternate absentee ballot locations and its use of a mobile vehicle for absentee voting in 2022 violated the absentee voting statutes, and thus that doing so in the 2024 elections would likewise violate the statutes. Indeed, the best evidence for this conclusion is that both Brown and WEC appear to agree that the circuit court's decision announced broad rules of law that will govern absentee balloting in the future.

With that understanding in mind, we first apply the stay factors to the circuit court's ruling that Racine's designation of alternate absentee balloting sites violated the partisan-advantage language of Wis. Stat. § 6.855(1). We conclude that the movants have shown that they are likely to succeed on the merits of the appeal of that ruling. In its decision, the circuit court appears to have implicitly accepted Brown's position that § 6.855(1) requires that alternate absentee ballot sites must be located in wards with similar—and preferably, the same—political demographics as the ward in which the municipal clerk's office is located, as measured by historical voting patterns. This interpretation of the partisan-advantage language in § 6.855(1) is questionable because the statute does not reference wards at all, but rather "sites," and because this interpretation runs the risk of reinstating the requirement that municipalities could designate just one alternate absentee ballot location—a rule that was held unconstitutional in One Wisconsin Institute, Inc. v. Thomsen,

198 F. Supp. 3d 896, 963 (W.D. Wis. 2016),[1] and was repealed by the legislature in 2017 Wis. Act 369 § 1JS. This risk exists because, according to the movants, it would be impossible for the City of Racine (and other municipalities) to locate alternate voting sites in wards with political demographics that match the ward in which the municipal clerk's office is located because no such wards exist. Thus, municipalities would be limited to providing a single alternative site in the same ward in which the municipal clerk's office is located.

We likewise conclude that the second and third factors, which require us to balance the relative harms of granting a stay to the movants and Brown, weigh in favor of staying the circuit court's ruling about designating alternate absentee ballot sites. See Gudenschwager, 191 Wis. 2d at 440. Again, the movants argue that through its apparent, implicit adoption of Brown's view of the partisan-advantage provision in § 6.855(1), the circuit court dramatically curtailed the number of locations municipalities may designate as alternate absentee ballot sites and effectively reinstated the one-location rule struck down in One Wisconsin. This view could have dramatic effects across the state as few municipalities, especially large cities, possess multiple wards with political demographics that match those of the ward in which the clerk's office located. By contrast, the harm to Brown if a stay is granted is minimal, since granting a stay would maintain the status quo that has governed every election since 2016, when the one-location rule was struck down.

Finally, we conclude that public interest weighs heavily in favor of staying the circuit court's ruling regarding designating alternate absentee ballot sites. At this stage, just months before the August primary and November general elections, there is a risk that the circuit court's ruling will disrupt ongoing preparations for those elections by creating uncertainty about which sites may be designated as alternate absentee balloting locations. Granting a stay will, as mentioned previously, simply ensure that the status quo since 2016 continues to govern through the next election. See, e.g., Purcell v. Gonzalez, 549 U.S. 1, 4-5 (2006) (per curiam) ("Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.").

With respect to the circuit court's ruling regarding Racine's use of a mobile election unit, however, we conclude that the stay factors weigh against staying the circuit court's ruling. Although the movants raise questions about the correctness of the circuit court's statutory interpretation, see, e.g., Wis. Stat. § 7.15(1) (granting municipal clerks discretion over the conduct of local elections), there are counterarguments that diminish the movants' likelihood of success on appeal on this issue. See, e.g., Wis. Stat. § 5.25(1) (providing that all polling places chosen "shall be public buildings, unless the use of a public building . . . is impracticable or the use of a nonpublic building better serves the needs of the electorate"). Turning to the balance of the harms and the public interest, we likewise conclude these factors weigh against granting a stay. Unlike the circuit court's conclusion about alternate absentee ballot sites, this part of the circuit court's

[1] Affirmed in part, reversed in part, and vacated in part by Luft v. Evers, 963 F.3d 665 (7th Cir. 2020).

ruling does not restrict the ability of Racine (or any other municipality) to designate multiple alternate absentee ballot locations. Moreover, as noted by the circuit court in its order denying a stay, Racine appears to be the only municipality in the state that used a mobile election unit. For these reasons, there is little risk that denying a stay will result in widespread confusion, or will otherwise disrupt preparations for upcoming elections. Accordingly,

IT IS ORDERED that the motion for stay pending appeal is granted as to that part of the circuit court's decision that reversed the Wisconsin Elections Commission's ruling regarding the Clerk's compliance with applicable law in selecting alternate absentee ballot sites; and

IT IS FURTHER ORDERED that the motion for stay pending appeal is denied as to that part of the circuit court's decision that reversed the Wisconsin Elections Commission's ruling regarding the Clerk's compliance with applicable law in approving the use of a mobile election unit as an alternate absentee ballot site.

REBECCA FRANK DALLET, J. (*concurring*). I join the court's order partially granting a stay of the circuit court's decision concluding that Racine's designation of alternate absentee balloting sites violated the partisan-advantage language of Wis. Stat. § 6.855(1). As the order correctly explains, the circuit court's decision appears to be a declaratory judgment about two distinct legal questions: (1) whether Racine's designation of alternate absentee balloting sites violated the partisan-advantage language of Wis. Stat. § 6.855(1); and (2) whether Racine's use of a mobile vehicle for absentee voting in 2022 violated the absentee balloting statutes. When, as here, a trial court makes multiple legal rulings, there is nothing unusual about staying some, but not all, of those rulings. See, e.g., Trump v. United States, No. 22-13005, 2022 WL 4366684, at *1 (11th Cir. Sept. 21, 2022) (holding that the United States was entitled to a partial stay of a district court order to the extent it required the submission of certain documents to a special master and prevented the United States from using those documents in a pending criminal investigation); Russell v. Lundergan-Grimes, 769 F.3d 919, 921-22 (6th Cir. 2014) (staying a district court's preliminary injunction against a law creating buffer zones against campaign activity near polling places solely to extent it applied on public property).

I write separately to point out, as I've done previously, that our case law governing the likelihood of success on appeal prong of the stay analysis is flawed. See, e.g., Waity v. LeMahieu, 2022 WI 6, ¶¶89-93, 400 Wis. 2d 356, 969 N.W.2d 263 (Dallet, J., dissenting). That case law holds that "[w]hen reviewing a motion for a stay, a circuit court cannot simply input its own judgment on the merits of the case and conclude that a stay is not warranted." Waity, 400 Wis. 2d 356, ¶52. Instead, circuit courts must "consider[] how other reasonable jurists on appeal may . . . interpret[] the relevant law and whether they may . . . come to a different conclusion" in light of the de novo standard of review. Id., ¶53 (footnote omitted). As I've written before, it's "hard to make sense of [this] claim," since "de novo appellate review, on its own, says nothing about whether a party has 'more than a mere possibility of success' on appeal . . . ." Id., ¶¶91-92 (Dallet, J., dissenting) (quoting State v. Gudenschwager, 191 Wis. 2d 431, 441, 529 N.W.2d 225 (1995)). And as my colleague Justice Rebecca Grassl Bradley rightly points out, this standard forces "circuit courts [to] peer into the minds" of an appellate court "to divine how they would

interpret a statute." Justice Rebecca Grassl Bradley's dissent at 10. This, as she says, "puts Wisconsin circuit courts in an untenable position." Id.

Nevertheless, no one asked us to revisit our stay-pending-appeal jurisprudence in this case. And as the court's order states, although the circuit court articulated the correct legal standard, it nonetheless failed to apply it correctly. Applying our law as it currently stands, the movants are entitled to a partial stay pending appeal. Accordingly, I respectfully concur.

I am authorized to state that Justice JILL J. KAROFSKY joins this concurrence.

REBECCA GRASSL BRADLEY, J. (*concurring in part, dissenting in part*). In its ongoing effort to resolve cases in a manner benefitting its preferred political party, the majority enters a bewildering order heretofore unheard of in the legal realm. While the majority (correctly) denies the motion to stay the circuit court's order, the majority "stays" a portion of the circuit court's legal analysis. This is not a "thing" under the law.

The majority denies the motion filed by the Wisconsin Election Commission ("WEC") to stay the order of the Racine County Circuit Court regarding the use of so-called mobile election units ("MEUs"). I concur with the court's unanimous denial of the motion. The majority veers off the judicial rails by ostensibly granting a "stay" of the circuit court's legal analysis, which is not, of course, something the circuit court "ordered." A first-year law student understands that courts stay orders, not reasoning. What does it mean to "stay" an analysis? The majority doesn't explain, but it obviously wants everyone to know it does not like the circuit court's analysis, even if it cannot find fault with the circuit court's actual order. The majority wreaks havoc with the law governing motions to stay, and egregiously misrepresents the circuit court's decision. I dissent from the order so that the parties and the public understand the motion to stay the circuit court's order is denied, which means the circuit court's order is in effect. The law prohibits the use of MEUs. The rest of the majority's order has no practical effect.

Kenneth Brown filed a complaint with WEC after he observed the use of a MEU[2] for absentee voting purposes during the 2022 August primary election. Brown filed his complaint with WEC, in accordance with Wis. Stat. § 5.06(1), alleging the Racine City Clerk violated the law because MEUs are not authorized "alternative ballot sites" under Wis. Stat. § 6.855(1). After WEC dismissed his complaint for lack of probable cause, Brown sought review of WEC's

---

[2] It is undisputed the Racine City Clerk employed a van to service twenty-two locations selected to operate as absentee ballot sites. These twenty-two locations chosen by the City Clerk were not buildings. Instead, the MEU would park at a particular location and absentee voting occurred within the MEU.

determination in the Racine County Circuit Court.[3] In its Amended Decision and Order, the circuit court said, "this Court will determine whether the use of the van was either lawful or unlawful during the primary election cycle of 2022 at issue under the applicable election law statutes." As its sole order, the circuit court ruled "that the determination of WEC in this matter is reversed as not being in conformity with the election laws of this State." The circuit court determined that the Racine City Clerk's use of MEUs violated § 6.855(1). The Democratic National Committee ("DNC"), WEC, and other interveners have asked this court to stay the circuit court's order.

The decision to grant or deny a stay pending appeal under Wis. Stat. § 809.12 is a "discretionary act" of the circuit court. State v. Gudenschwager, 191 Wis. 2d 431, 439, 529 N.W.2d 225 (1995) (per curiam). Appellate courts review a decision to grant or deny a stay pending appeal "under the erroneous exercise of discretion standard." Waity v. LeMahieu, 2022 WI 6, ¶50, 400 Wis. 2d 356, 969 N.W.2d 263 (citing Gudenschwager, 191 Wis. 2d at 439). Courts consider four factors:

> (1) whether the movant makes a strong showing it is likely to succeed on the merits of the appeal;
>
> (2) whether the movant shows that, unless a stay is granted, it will suffer irreparable injury;
>
> (3) whether the movant demonstrates that no substantial harm will come to other interested parties; and
>
> (4) whether the movant shows a stay will not harm the public interest.

Id., ¶49 (citing State v. Scott, 2018 WI 74, ¶46, 382 Wis. 2d 476, 914 N.W.2d 141). "[T]he message to courts moving forward is that the likelihood of success on appeal is a flexible, sliding-scale factor to be balanced against the relevant harms." Id., ¶68 (Hagedorn, J., concurring).

In addressing the circuit court's legal reasoning, the majority misrepresents the circuit court's decision and then manipulates the factors to be considered when assessing a stay pending appeal, most recently articulated in Waity.

Under Wis. Stat. § 6.855(1), "no site may be designated that affords an advantage to any political party." Despite unrebutted evidence showing the locations selected for the MEUs unlawfully "and clearly afforded an advantage to members of the Democratic Party or those having

---

[3] Wisconsin Stat. § 5.06(9) governs the circuit court review procedure if WEC denies a complainant relief. The statute directs the circuit court to accept "any findings of fact or factual matters upon which the commission has made a determination." § 5.06(9). The circuit court "shall summarily hear and determine all contested issues of law and shall affirm, reverse or modify the determination of the commission, according due weight to the experience, technical competence and specialized knowledge of the commission." § 5.06(9).

Democratic Party leaning,"[4] the majority stays the circuit court's analysis on that point—not the court's order—effectively erasing the circuit court's finding. This makes no sense. Courts stay orders, not interpretations. Undeterred by this basic rule, the majority stays the circuit court's interpretation of § 6.855's language on "partisan advantage," not the order itself, and simply assumes the circuit court adopted a view of the statute it never proffered——either woefully misreading, or intentionally misrepresenting, the circuit court's written ruling. The circuit court's initial merits ruling addressed the "partisan advantage" language of Wis. Stat. § 6.855(1) only because it related to the question of whether the sites selected to be serviced by the MEU unfairly imposed a partisan advantage for one political party. The circuit court's order, however, decides MEUs are not authorized under Wis. Stat. § 6.855(1)—that is all. Whether the chosen sites for the MEUs unlawfully imposed a partisan advantage is immaterial to the circuit court's order declaring that the law prohibits their use as absentee ballot sites.

The majority critiques the circuit court's application of the statutory requirements for absentee voting sites to the factual allegations and claims the circuit court "erroneously exercised its discretion in denying the motions for stay pending appeal because while it articulated the correct legal standard under Waity, it did not apply that standard correctly." The majority suggests the circuit court did not consider how other jurists would interpret and apply the statutes to the facts, and claims the circuit court's analysis of the stay factors was thereby "tainted." The majority grossly misrepresents the circuit court's order denying the stay motion.

Contrary to the majority's distortions of the circuit court's decision, the circuit court acknowledged "[i]t is axiomatic that this Court consider that appellate courts may reasonably disagree with its legal analysis." The circuit court further noted that while appellate courts would review a question of statutory interpretation under a de novo standard of review, the mere possibility that a different court would disagree with its statutory interpretation did not outweigh the substantial harm of conducting an election in contravention of legal requirements governing absentee voting sites. The circuit court appropriately exercised its discretion in weighing the potential irreparable harm[5] stemming from an election conducted contrary to state law if a stay were not granted, against the likelihood of success on an appeal. The majority improperly replaces the circuit court's discretionary decision with its own.

The majority "appears to have accepted" the movants' argument that the circuit court "dramatically curtailed the number of locations municipalities may designate as alternate absentee ballot sites and effectively reinstated the one-location rule struck down in One Wisconsin."

---

[4] The twenty-two absentee voting sites selected by the Racine County Clerk for the 2022 August primary election were all serviced by the MEU and the circuit court found each location favored the Democratic Party, a factual allegation WEC failed to rebut before the circuit court.

[5] Waity v. LeMahieu, 2022 WI 6, 400 Wis. 2d 356, 969 N.W.2d 263 ("When considering potential harm, circuit courts must consider whether the harm can be undone if, on appeal, the circuit court's decision is reversed. If the harm cannot be mitigated or remedied upon conclusion of the appeal, that fact must weigh in favor of the movant.") (internal quotations omitted).

Nothing could be further from the truth. In its initial merits order, the circuit court extensively discussed the federal case striking down the one-location rule.[6] In its denial of the stay motion, the circuit court again reaffirmed its order does not reinstate the one-location rule. The circuit court's order has no effect on voters' ability to cast a ballot in the upcoming elections. Nor does the circuit court order limit the Racine City Clerk's authority to select and oversee absentee ballot sites for the upcoming elections.

The majority seems to suggest that circuit courts must peer into the minds of the four members it comprises to divine how they would interpret a statute. In her concurrence, Justice Rebecca Frank Dallet casts blame for the majority's misstep in this case on Waity, but the problem lies with the majority's misapplication of its holding in this order. The majority's novel dictate puts Wisconsin circuit courts in an untenable position and materially refashions established precedent governing how courts should assess stay motions pending appeal. The majority performs its own mindreading feat, asserting "the circuit court appears to have implicitly accepted Brown's position that § 6.855(1) requires that alternate absentee ballot sites must be located in wards with similar—and preferably, the same—political demographics as the ward in which the municipal clerk's office is located[.]" (Emphasis added). The stay factors, however, do not permit speculating about the subjective internal considerations of the circuit court. Even if this were permissible, the circuit court's order belies the majority's mischaracterization of it. The circuit court's order does not even reference Brown's interpretation of the statute—nowhere does the word "wards" appear—rather, the circuit court applied our well-established framework for interpreting a statute, examined the statutory text, considered the factual evidence presented, and determined the absentee ballot sites conferred a partisan advantage for the Democratic Party in violation of Wis. Stat. § 6.855(1). Applying the plain text of the statute to the undisputed facts before it, the circuit court acted appropriately and well within its discretion in denying the stay motion.

Staying a circuit court's interpretation of statutory language but not the circuit court's actual order is without precedent, and for good reason—doing so is nonsensical. In effect, the majority addresses a tertiary question answered by the circuit court but beyond the circuit court's actual order. Had the majority focused on the factual and procedural record before us and read the circuit court's order for what it actually says rather than how someone, somewhere might read it, the majority would have simply denied the motion for a stay. The circuit court considered that appellate courts may disagree with its analysis but determined the harm of affirming an election conducted via unlawful procedures outweighs the movant's likelihood of success on appeal. This reasoned assessment comports with the legal standard by which we judge circuit courts' handling of stay motions and leaves no reasonable room for the majority to conclude otherwise. The court

---

[6] In 2016, a federal district court struck down a previous version of Wis. Stat. § 6.855, which limited municipalities to selecting only one location other than the clerk's office for absentee voting purposes, as a violation of the Voting Rights Act and the First and Fourteenth Amendments. One Wis. Inst., Inc. v. Thomsen, 198 F. Supp. 3d 896, 963 (W.D. Wis. 2016). After that decision, the legislature amended the statute to permit multiple in-person absentee voting locations within a single municipality. Given this amendment, the Seventh Circuit deemed the issue moot. Luft v. Evers, 963 F.3d 665, 674 (7th Cir. 2020).

should deny the stay motion without sharing its irrelevant musings about how the circuit court's analysis might be misinterpreted. To the extent the majority qualifies its denial of the motion by effectively erasing portions of the circuit court's written decision, I dissent.

I am authorized to state that Chief Justice ANNETTE KINGSLAND ZIEGLER joins this separate writing.

BRIAN HAGEDORN, J. (*concurring in part, dissenting in part*). In her writing, Justice Rebecca Grassl Bradley explains why granting this partial stay is confusing and incorrect. We stay orders, so I don't know what it means to stay one interpretation of one portion of the legal analysis underlying an order we unanimously allow to remain in effect. At the end of the day, the circuit court's decision reversing the Wisconsin Elections Commission and concluding that "mobile election units" are unlawful remains in effect pending our full examination of the merits of the case. For this reason, I respectfully dissent in part.

I am authorized to state the Chief Justice ANNETTE KINGSLAND ZIEGLER joins this separate writing.

Samuel A. Christensen
Clerk of Supreme Court

Distribution List Continued:

Richard M. Esenberg
Electronic Notice

Christina A. Ford
Electronic Notice

David R. Fox
Electronic Notice

Carly Gerads
Electronic Notice

Gabe Johnson-Karp
Electronic Notice

Steven C. Kilpatrick
Electronic Notice

Daniel S. Lenz
Electronic Notice

Scott R. Letteney
Electronic Notice

Jeffrey A. Mandell
Electronic Notice

Renata O'Donnell
Electronic Notice

Ian Pomplin
Electronic Notice

Scott B. Thompson
Electronic Notice

Lucas Thomas Vebber
Electronic Notice

Samuel Tucker Ward-Packard
Electronic Notice

Diane M. Welsh
Electronic Notice

Nathalie E. Burmeister
Electronic Notice