

**FILED**  
**02-08-2024**  
**CLERK OF WISCONSIN**  
**COURT OF APPEALS**



OFFICE OF THE CLERK  
**WISCONSIN COURT OF APPEALS**

110 EAST MAIN STREET, SUITE 215  
P.O. BOX 1688  
MADISON, WISCONSIN 53701-1688  
Telephone (608) 266-1880  
TTY: (800) 947-3529  
Facsimile (608) 267-0640  
Web Site: [www.wicourts.gov](http://www.wicourts.gov)

**DISTRICT I**

February 8, 2024

To:

Hon. Ryan D. Nilsestuen  
Circuit Court Judge  
Electronic Notice

Jeff Okazaki  
Clerk of Circuit Court  
Dane County Courthouse  
Electronic Notice

Thomas C. Bellavia  
Electronic Notice

Christine Donahoe  
Electronic Notice

Steven C. Kilpatrick  
Electronic Notice

Kevin M. LeRoy  
Electronic Notice

Daniel S. Lenz  
Electronic Notice

Lynn Kristine Lodahl  
Electronic Notice

Jeffrey A. Mandell  
Electronic Notice

Emily O'Brien  
Electronic Notice

Douglas M. Poland  
Electronic Notice

Jon Sherman  
Fair Elections Center  
1825 K. St. NW, Suite 701  
Washington, DC 20006

Misha Tseytlin  
Electronic Notice

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

---

2024AP166

League of Women Voters of Wisconsin v. Wisconsin Elections  
Commission (L.C. # 2022CV2472)

Before Donald, P.J., Geenen and Colón, JJ.

This case involves an appeal and cross-appeal from the Dane County Circuit Court's  
January 30, 2024 declaratory judgment and permanent injunction, which required the Wisconsin

Elections Commission to issue guidance related to WIS. STAT. § 6.87(6d)(2021-22).<sup>1</sup> That statute provides that where a witness certificate on an absentee ballot “is missing the address of a witness, the ballot may not be counted.” The circuit court, concluding federal law applied, required the Commission to issue guidance on application of that statute “such that no absentee ballot may be rejected based upon witness certification bearing witness-address information meeting any of” four specified sets of criteria. The Legislature has moved this court for a stay of that judgment and injunction pending disposition of the appeal and cross-appeal. For the reasons that follow, the request for a stay is denied.

During the pendency of an appeal, the circuit court or appellate court may stay execution or enforcement of a judgment or order; suspend, modify, restore or grant an injunction; or make any order appropriate to preserve the existing state of affairs or the effectiveness of the judgment subsequently to be entered. WIS. STAT. § 808.07(2)(a). The rules of appellate procedure require a person seeking relief under § 808.07 to first seek relief from the circuit court unless impractical. WIS. STAT. RULE 809.12. Thus, when we are presented with a motion for relief pending appeal that has first been presented to the circuit court, we review the circuit court’s decision for an erroneous exercise of discretion rather than conducting a new analysis. *See Doe 1 v. Madison Metro. Sch. Dist.*, 2022 WI 65, ¶31, 406 Wis. 2d 369, 976 N.W.2d 584. In this review, we look “for a reasonable basis to sustain a circuit court’s discretionary decision.” *Id.*

As an initial matter, we note that the parties disagree over whether it is the state test or federal test that should be applied to the Legislature’s motion for relief. Under Wisconsin’s test,

---

<sup>1</sup> All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

which the Legislature argues applies, we consider four factors when reviewing a request for a stay pending appeal: “Courts must consider four factors when reviewing a request to stay an order pending appeal:

- (1) whether the movant makes a strong showing that 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 shows that no substantial harm will come to other interested parties; and
- (4) whether the movant shows that a stay will do no harm to the public interest.

*Waity v. LeMahieu*, 2022 WI 6, ¶49, 400 Wis. 2d 356, 969 N.W.2d 263. Under the test established by the United States Supreme Court, which the League contends is applicable, the considerations are:

- (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

*Nken v. Holder*, 556 U.S. 418, 434 (2009). It is not necessary for us to resolve which is presently applicable because we conclude that neither has been satisfied by the Legislature as the movant.<sup>2</sup>

---

<sup>2</sup> We note that no party has provided us with a transcript. We recognize that the Legislature did make an effort to have the transcript’s preparation expedited but, for whatever reason, the transcript did not materialize. We do not penalize the Legislature for the lack of a transcript, and we further note that the parties appear to agree as to the general underlying facts of what constitutes the circuit court’s decision on the motion for relief.

With response to the strong showing of likely success, a movant must show more than the mere possibility of success on the merits. *See id.* at 434-35; *Waity*, 400 Wis. 2d 356, ¶54. We acknowledge that, at least under the Wisconsin standard, “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, and we ultimately conclude that the circuit court relied on more than its own judgment, having noted similar conclusions in other jurisdictions.

The circuit court concluded the Legislature would not suffer irreparable harm absent a stay. In its argument to us, the Legislature claims that it will necessarily “suffer a substantial and irreparable harm for the first magnitude when a statute ... is declared unenforceable and enjoined before any appellate review can occur.” (Alteration in original.) However, the circuit court’s injunction has not declared any statute unenforceable but rather directs how the statute should be applied in four specific instances.

Conversely, the circuit court concluded that the League and its members would suffer substantial injury if their ballots were rejected contrary to federal law. Indeed, we note that the political franchise of voting is a fundamental political right, because it is preservative of all rights. *See Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964). **There is no government without the consent of the governed.** *See* WIS. CONST. art. I, § 1.

Finally, the circuit court explained that the public interest was more likely to be harmed by a stay than to benefit from it, noting among other things a strong public interest in preserving constitutional rights.

Based on the foregoing, we are unpersuaded that the circuit court erroneously exercised its discretion in denying a stay of its judgment and injunction pending appeal. Accordingly, we deny the stay as well.

IT IS ORDERED that the motion for relief pending appeal, in the form of a stay of the circuit court's January 30, 2024 declaratory judgment and permanent injunction, is denied.

---

*Samuel A. Christensen*  
*Clerk of Court of Appeals*