DeWitt LLP Law Firm

Exhibit A

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December 8, 2021

VIA EMAIL: kaardal@mklaw.com
Erick G. Kaardal, Esq.
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150 South Fifth Street, Suite 3100
Minneapolis, MN 55402

RE: In the Matter of *Carlstedt, et al. v. Wolfe*
Case No. EL 21-24

Dear Mr. Kaardal:

As you know, the law firm of DeWitt LLP ("DeWitt") is retained as special counsel for the Wisconsin Elections Commission ("Commission") with respect to the above-referenced matter. This letter is in response to the Complaint, dated April 8, 2021, which you submitted to the Commission on behalf of your clients, Richard Carlstedt, Sandra Duckett, James Fitzgerald, Thomas Sladek, and Lark Wartenberg (collectively, the "Complainants").

Procedural History

The Complaint, brought pursuant to Wis. Stat. § 5.06, is filed against Meagan Wolfe, Administrator of the Commission; Eric Genrich, Mayor of the City of Green Bay; Celestine Jeffreys, the former Chief of Staff for the Green Bay Mayor and current Clerk for the City of Green Bay; and Kris Teske, the former Clerk for the City of Green Bay. Complainants accompanied the Complaint with an Appendix of nearly 400 pages.

By email to all parties dated May 15, 2021, DeWitt established a deadline of June 15, 2021 for Respondents to respond to the Complaint. On June 15, 2021, Respondents Genrich and Jeffreys filed a joint Answer ("Answer") and supporting Affidavit of Vanessa R. Chavez, Respondent Teske filed a response, the City Attorney for the City of Green filed a separate Motion to Dismiss Respondent Teske, and Respondent Wolfe filed both a Response and a Motion to Dismiss All Claims Against Her, along with a supporting brief.

By email dated June 23, 2021, DeWitt established a deadline of July 28, 2021 for Complainants to reply. On July 28, 2021, Complainants filed a single Memorandum of Law and Appendix in the above-referenced matter and four others (Case Nos. EL 21-29, 21-30, 21-31, and 21-33). Respondents Genrich and Jeffreys objected to the combined Memorandum of Law and Appendix by letter dated August 9, 2021. By email dated August 12, 2021, DeWitt notified all parties that Complainants' combined Memorandum of Law and Appendix were not accepted and were to be considered stricken from the record in this matter. DeWitt permitted Complainants to file a separate reply for this matter by August 19, 2021.

On August 19, 2021, Complainants filed a separate Reply in the above-referenced matter, along with a lengthy Appendix of 1077 pages. Respondents Genrich and Jeffreys again objected to the Reply by letter dated August 24, 2021, arguing that the Reply incorporated new facts and issues not raised in the initial Complaint. By email dated August 30, 2021, DeWitt granted Respondents the opportunity to file a sur-reply brief no later than September 13, 2021, which deadline DeWitt later extended to September 27, 2021 by email dated September 9, 2021. Respondents Genrich and Jeffreys filed a sur-reply brief on September 27, 2021. Also on September 27, 2021, Respondent Wolfe filed a reply brief in support of her motion to dismiss.

The Commission has reviewed the above-identified Complaint; Respondents' various responses, answers, and motions; Complainants' Reply; and Respondents' various sur-reply and reply briefs. The Commission provides the following analysis and decision pursuant to Wis. Stat. § 5.06 and the Delegation of Authority adopted by the Commission in 2018 and most recently amended on February 27, 2020.

In short, the Commission finds that Complainants did not show probable cause to believe that a violation of law or abuse of discretion occurred with regard to the claims asserted in the Complaint.

Complainants' Allegations

The Complaint states that Complainants are all Wisconsin electors residing in Green Bay, Wisconsin. Complaint, ¶¶ 1-5. No respondent has provided any evidence to contest Complainants' residency.

Complainants allege that, beginning in May and June 2020, "the City of Green Bay adopted private corporation conditions on the election process affecting state and federal elections." Complaint, p. 2. Specifically, Complainants object to the City of Green Bay's acceptance of private grants provided by the Center for Tech and Civic Life ("CTCL"), a private non-profit organization headquartered in Chicago, Illinois. Complaint, ¶ 18. The Complaint alleges that the CTCL grant money was issued pursuant to a grant application referred to as the "Wisconsin Safe Voting Plan" ("WSVP"). Complaint, ¶¶ 25, 28. The Complaint alleges that CTCL money was accepted by the City of Green Bay, the City of Racine, the City of Kenosha, the City of Milwaukee, and the City of Madison. Complaint, ¶¶ 25-26, 28. The Complaint refers to these five municipalities as the "WI-5" or "Wisconsin Five." Complaint, ¶ 32.

By accepting the CTCL grant money and working with CTCL representatives, Complainants allege that "Green Bay failed to comply with state laws, including obtaining from the Commission a prior determination of the legality of the private corporate conditions in the election process, and failed to comply with the U.S. Constitution's Elections and Electors Clauses which guarantee the state Legislature the exclusive role in approving Wisconsin's legal conditions relating to federal elections." Complaint, p. 3. *See also* Complaint, ¶¶ 102-108. Complainants argue that the acceptance of the private grant funds led to "the ubiquitous involvement of private corporations in the Wisconsin 5 cities' election administration prior to, during and after the election," for which the City of Green Bay, Complainants assert, had no legal authority. Reply, pp. 3-5.

Complainants also argue that the acceptance of the CTCL grant money by the "Wisconsin Five" "affected [Complainants] as a demographic group." Complaint, ¶ 46 ("[W]ith the added private conditions on Green Bay's election process, the Green Bay Complainants were within a jurisdictional boundary that affected them as a demographic group."). *See also* Complaint ¶ 47 ("[B]y the Wisconsin Five cities contracting with CTCL and allied private corporations, the Wisconsin Five cities chose to favor the Wisconsin Five's demographic groups of urban voters over all other voters in the State of Wisconsin."). In their reply, Complainants went further with this assertion, arguing that "[t]he Wisconsin 5 cities' WSVP provisions violate the Equal Protection Clause because it contains contract provisions picking and choosing among groups of similarly situated voters for improved in-person and absentee voting access." Reply, p. 4.

With respect to Respondent Wolfe, the Complaint alleges that "WEC Administrator Meagan Wolfe … has supported the Wisconsin Five cities' claimed prerogative to adopt private corporate conditions on federal elections without approval by Congress, the state legislature and the Commission." Complaint, ¶ 100. The Complaint generally cites testimony Respondent Wolfe gave on March 31, 2021 before the General Assembly's Campaigns and Elections Committee (although Complainants do not provide any specific quotations from such testimony). In their Reply, Complainants take the position that Respondent Wolfe's "testimony confirms an admission of issuing an unwarranted advisory opinion on a disputed claims when the Commission itself has that sole authority." Reply, p. 87.

The Complaint seeks six essential forms of relief:

- Complainants first request that the Commission "investigate the circumstances and factual allegations asserted in this Complaint regarding the legality of Green Bay's acts and actions juxtaposed against state and federal election laws to ascertain whether those election laws were violated." Complaint, pp. 4, 31.

- Complainants also ask that the Commission "issue an order requiring the Administrator, City of Green Bay and its City Clerk to conform their conduct to Wisconsin Statutes and the Election and Electors Clauses, restrain themselves from taking any action inconsistent with Wisconsin Statutes and the Election and Electors Clauses and require them to correct their actions and decisions inconsistent with Wisconsin Statutes and the Election and Electors Clauses—including prohibiting the placement of private corporate conditions on state and federal elections and the involvement of private corporation and their employees in election administration." Complaint, p. 32.

- Complainants request that the "Commission … issue an order declaring that Green Bay's private conditions on federal elections and engagement of private corporations and their employees in election administration violated state law and federal law." Complaint, p. 32. *See also* Complaint, p. 4.

- Complainants argue that the Commission should "reiterate that the Administrator may not render a decision without the approval of the Commission related to the legality of any agreement between private corporate entities and municipalities related to imposing private

corporate conditions on its elections or related to private corporations and their employees being engaged in the administration of election laws." Complaint, pp. 32-33, 4.

- Complainants ask that the Commission consider "direct[ing] to the proper local or state authorities" "any further prosecutorial investigation." Complaint, pp. 33, 4.

- "Finally, if the Commission determines that election laws were violated or that the law is unclear to provide the Commission itself with the ability to determine the legalities of private corporate conditions directly or indirectly affecting the election process and administration," Complainants ask that "the Commission … make recommendations to the State Legislature for changes to state election laws to ensure the future integrity of the election process." Complaint, pp. 4-5, 33.

Respondents' Asserted Defenses to Complaint

None of Respondents dispute the essential fact that the City of Green Bay accepted and received the CTCL grant money.

Respondents Genrich and Jeffreys assert several defenses to the Complaint, including the following:

- "Complainants fail to point to any law which prohibits the City's acceptance of outside funds in order to provide a safer voting experience for its electorate, or even any law they claim was violated." Answer, p. 2. Respondents Genrich and Jeffreys argue that "[t]he Legislature has acknowledged that current law includes no such provision [prohibiting municipalities from using private grant funds] by its ongoing attempts to enact such a law." Answer, p. 2 (citing 2021 Wis. S.B. 207 and 2021 Wis. A.B. 173).

- "[T]he CTCL grants were issued to municipalities without regard to the partisan make-up of their electorates. In fact, the City was one of 218 municipalities in Wisconsin to receive grant funds from CTCL." Answer, p. 3. Complainants do not contest this fact, although, in their reply, they cite reports from two non-profit organizations contending that "large cities" received the majority of CTCL funds. *See* Reply, pp. 7-9.

- "The Complaint is not timely." Answer, p. 4. *See also* Answer, pp. 5-14.

- The Complaint "does not set forth facts establishing probable cause to believe that a violation of law has occurred." Answer p. 4. *See also* Answer, pp. 14-16.

- "Complainants seek to have the Commission do administratively that which is the sole purview of the legislature: craft new election law." Answer, p. 4. *See also* Answer, pp. 22-23; Sur-Reply, p. 10 ("Complainants['] … true goal … is to have the Commission go beyond its legislatively-created authority to investigate election law violations, and instead create a policy that will apply to future elections. The Commission is an administrative,

not legislative, body. The appropriate forum for Complainants' requested policy changes in therefore the legislature, not the Commission.").

The City Attorney for the City of Green Bay further argues that Respondents Genrich, Jeffreys, and Teske are not proper parties to the Complaint. This argument is presented as follows: "[A]ll of Complainants' legal arguments center around the acceptance of the CTCL grant funds and approval of how those funds were to be used. Neither the Mayor, his Chief of Staff, nor the City Clerk, in any of their professional capacities, had authority to accept the grant. The Common Council took that action. The named Respondents are not synonymous with the entire City government; they have specific roles within it, and those roles do not include authority to accept the CTCL grant funds." Answer, p. 15. *See also* Motion to Dismiss Respondent Teske.

In her Response to the Complaint, Respondent Wolfe admits that she gave legislative hearing testimony before the General Assembly's Campaigns and Elections Committee on March 31, 2021. Response, p. 51. However, Respondent Wolfe asserts several defenses to the Complaint, including the following:

- Respondent Wolfe argues that the mere act of testifying before a legislative committee cannot be unlawful. Brief in Support of Motion to Dismiss, p. 9 (citing Wis. Stat. § 13.35(1)).

- Respondent Wolfe argues that her "legislative testimony on March 31, 2021 cannot possibly have contributed to any illegality in the conduct of the 2020 Presidential election, which had already taken place more than three months earlier." Brief in Support of Motion to Dismiss, p. 10 n.3.

- Respondent Wolfe alleges that, in her legislative hearing testimony, she declined to comment on the lawfulness of the municipalities' actions, stating: "I cannot offer my opinion or speculation on actions of individual municipalities. … It would be outside of my statutory or delegated authority to determine if a municipality has acted lawfully." Brief in Support of Motion to Dismiss, p. 10 n.3. Complainants did not contest the accuracy of this quotation.

- Respondent Wolfe alleges that she "did not make any determinations as to (1) the legality of actions or communications by municipal officials related to municipal acceptance or use of private grant funds; or (2) any relations between municipals officials and outside consultants." Response, p. 52.

- Respondent Wolfe denies "that she has engaged in, supported, or endorsed any activities contrary to federal law, state law, or directives of the Commission." Response, p. 56. She asserts that, despite Complainants' allegations that she "publicly supported" the decision to accept grant funding (Complaint, p. 2 and ¶ 100), Complainants failed to back their assertions with actual facts: "[T]he Complaints do not identify any actual actions through which she purportedly provided such public support, other than legislative committee testimony that she gave almost five months after the 2020 election had taken place, and

even longer after the municipalities had received and used the funds in question. Nor do they allege any facts concerning any non-public actions by the Administrator." Reply Brief in Support of Motion to Dismiss, p. 3.

Commission Authority and Role in Resolving Complaints Under Wis. Stat. § 5.06

The Commission's role in resolving complaints filed under Wis. Stat. § 5.06 is to determine whether an election official acted contrary to applicable election laws or abused their discretion in administering applicable election laws. *See* Wis. Stat. § 5.06(1) ("Whenever any elector of a jurisdiction or district served by an election official believes that a decision or action of the official or the failure of the official to act … is contrary to law, or the official has abused the discretion vested in him or her by law …, the elector may file a written sworn complaint with the commission….").

The Commission has the inherent, general, and specific authority to consider the submissions of the parties to a complaint and summarily decide the issues raised. *See* Wis. Stat. § 5.06(6) ("The commission may, after such investigation as it deems appropriate, summarily decide the matter before it….").

Here, the essential fact underlying all of Complainants' allegations – the City of Green Bay's acceptance of CTCL grant funds – is undisputed. As described below, the Commission concludes that this essential fact fails to give rise to probable cause to find that Respondents committed a violation of law or abuse of discretion. Therefore, the Commission issues this letter, which serves as the Commission's final decision regarding the issues raised in the Complaint.

Commission Findings

A. There Is No Probable Cause To Find That Respondents Committed A Violation Of Law Or An Abuse Of Discretion.

Under Wis. Stat. § 5.06(1), a "complaint shall set forth such facts as are within the knowledge of the complainant to show probable cause to believe that a violation of law or abuse of discretion has occurred or will occur." Probable cause is defined in Wis. Admin. Code EL § 20.02(4) to mean "the facts and reasonable inferences that together are sufficient to justify a reasonable, prudent person, acting with caution, to believe that the matter asserted is probably true." "Information which may establish probable cause includes allegations that set forth which persons are involved; what those persons are alleged to have done; where the activity is believed to have occurred; when the activity is alleged to have occurred and who are the witnesses to the events." Wis. Admin. Code EL § 20.03(3).

Complainants, therefore, have the obligation to set forth sufficient facts to show probable cause to believe that Respondents Genrich, Jeffreys, and Teske committed a violation of law or abuse of discretion as a result of the City of Green Bay's acceptance of CTCL grant money, which allegedly resulted in the adoption of "private corporation conditions on the election process" and the "involvement of private corporations in … election administration."

Complainants also have the obligation to set forth sufficient facts to show probable cause to believe that Respondent Wolfe committed a violation of law or abuse of discretion as a result of allegedly supporting "the Wisconsin Five cities' claimed prerogative to adopt private corporate conditions."

The Commission concludes that Complainants have not set forth sufficient facts to show probable cause as required under Wis. Stat. § 5.06(1), for the reasons discussed below.

i. The Acceptance of Private Grant Money, With Or Without Conditions And Consultant Involvement, Is Not Prohibited By Any Law The Commission Administers.

This is not the first complaint the Commission has received related to the CTCL grant money. On August 28, 2020, another complaint was filed in Case No. 20-18 asserting that several respondents (including Eric Genrich and Kris Teske, who are Respondents in this action) acted contrary to law and/or abused their discretion as a result of acceptance of the CTCL money. The Commission concluded, in part, that the complaint did not state probable cause because "the complaint does not allege any violations of election law that the Commission has authority over to enforce or investigate."

The Commission has "the responsibility for the administration of chs. 5 to 10 and 12 and other laws relating to elections and election campaigns, other than laws relating to campaign financing." Wis. Stat. § 5.05(1). *See also* Wis. Stat. § 5.05(2w). A complaint under Wis. Stat. § 5.06(1) must therefore assert a violation of one of these chapters of the Wisconsin Statutes, or "other laws relating to elections and election campaigns."

The Complaint in this matter cites Wis. Stat. § 7.15(1), the Elections Clause of the United States Constitution, and the Electors Clause of the United States Constitution as the basis for Complainants' action. In their Reply, Complainants also referenced the Equal Protection Clause.

Respondents argue that none of these statutory or constitutional provisions explicitly prohibit the acceptance of private grant monies or the use of outside consultants. Respondents are correct.

Wis. Stat. § 7.15(1) states that municipal clerks have "charge and supervision of elections and registration in [each] municipality." The municipal clerk "shall perform" certain duties specified in subsections (a) through (k) of the statute, as well as "any others which may be necessary to properly conduct elections or registration." Wis. Stat. § 7.15(1). There is no language in section 7.15(1) that prohibits municipal clerks from using private grant money or working with outside consultants in the performance of their duties.

The Elections Clause of the U.S. Constitution states as follows:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

U.S. Const., art. I, § 4, cl. 1 (cited at Complaint, ¶ 13).

The Electors Clause of the U.S. Constitution provides:

> Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress.

U.S. Const., art. II, § 1, cl. 2 (cited at Complaint, ¶ 14).

Complainants argue that the Elections and Electors Clauses "provide no power to municipal governments to adopt private corporate conditions on federal elections or to introduce private corporations and their employees into federal election administration." Complaint, ¶ 15. However, Complainants do not show that either the Elections Clause or the Electors Clause of the U.S. Constitution *prohibit* the adoption of private corporate conditions or the introduction of private corporation employees into the election process.

As Respondents Genrich and Jeffreys note in their Response, two bills introduced in March 2021 demonstrate the absence, in existing law, of any prohibition on the acceptance of private grant money or the use of outside consultants. 2021 Senate Bill 207 and 2021 Assembly Bill 173 would prohibit any official from "apply[ing] for or accept[ing] any donation or grant of private resources" (including "moneys, equipment, materials, or personnel provided by any individual or nongovernmental entity") "for purposes of election administration." The bill would also prohibit the appointment of any poll worker who is an employee of an "issue advocacy group." This language is not currently in any Wisconsin statute; nor was it in the lead up to the November 2020 election.

Furthermore, a number of courts around the country have remarked upon whether the U.S. Constitution or federal election law prohibits the activities to which Complainants are objecting in this action. These courts have not found such prohibitions in the U.S. Constitution or federal laws.

For example, the United States District Court for the Eastern District of Wisconsin previously concluded that a group of plaintiffs (represented by the same attorney as is currently representing Complainants in this matter) failed to show a reasonable likelihood of success on the merits of a claim based upon similar allegations. In *Wisconsin Voters Alliance v. City of Racine,* No. 20-C-1487, 2020 WL 6129510 (E.D. Wis. Oct. 14, 2020), the plaintiffs alleged that various cities (including the City of Green Bay) were prohibited from accepting and using private federal election grants by, among other things, the Elections Clause of the U.S. Constitution. The court declined to grant a temporary restraining order, stating:

> Plaintiffs have presented at most a policy argument for prohibiting municipalities from accepting funds from private parties to help pay the increased costs of conducting safe and efficient elections. The risk of skewing an election by providing additional private funding for conducting the election in certain areas of the State may be real. The record before the Court, however, does not provide the support needed for the Court to make such a determination, especially in light of the fact that over 100 additional Wisconsin

> municipalities received grants as well. Plaintiffs argue that the receipt of private funds for public elections also gives an appearance of impropriety. This may be true, as well. These are all matters that may merit a legislative response but **the Court finds nothing in the statutes Plaintiffs cite, either directly or indirectly, that can be fairly construed as prohibiting the defendant Cities from accepting funds from CTCL.** Absent such a prohibition, the Court lacks the authority to enjoin them from accepting such assistance.

2020 WL 6129510, at *2, *appeal dismissed sub nom. Wisconsin Voters All. v. City of Racine*, No. 20-3002, 2020 WL 9254456 (7th Cir. Nov. 6, 2020) (emphasis added) (internal citations omitted).

Other courts have likewise concluded that no language in the U.S. Constitution or other election-related laws prohibits municipalities from accepting private grant money. *See Election Integrity Fund v. City of Lansing*, No. 1:20-CV-950, 2020 WL 6605985, at *1 (W.D. Mich. Oct. 2, 2020) ("Plaintiffs' complaint and motion allege that the Cities' receipt of grants from CTCL violates the Constitution, the Help America Vote Act, 52 U.S.C. § 20901, *et seq.*, and the National Voters Registration Act, 52 U.S.C. § 20501, *et seq.* But Plaintiffs never identify language in any of those laws that explicitly prohibits cities from accepting private grants to administer elections. On the Court's review, no such explicit prohibition exists.") (denying motion for temporary restraining order); *Iowa Voter All. v. Black Hawk Cty.*, No. C20-2078-LTS, 2020 WL 6151559, at *3-4 (N.D. Iowa Oct. 20, 2020) ("Plaintiffs have not provided any authority, nor have I found any, suggesting that the Elections Clause imposes specific limits or restrictions as to how a federal election must be funded. … There may be valid policy reasons to restrict or regulate the use of private grants to fund elections. However, it is for Congress and/or the Iowa Legislature, not the judicial branch, to make those policy judgments."); *Georgia Voter All. v. Fulton Cty.*, 499 F. Supp. 3d 1250, 1255 (N.D. Ga. 2020) ("Fulton County's acceptance of private funds, standing alone, does not impede Georgia's duty to prescribe the time, place, and manner of elections, and Plaintiffs cite no authority to the contrary.").

The Commission is persuaded by the case law cited above. Complainants have failed to identify any existing state or federal law prohibiting the acceptance of the CTCL grant money or work with outside consultants. Multiple federal courts have failed to find that existing law prohibits such activities, and the Commission likewise does not find such a prohibition to exist.

Unable to cite an explicit prohibition in existing law, Complainants attempt to save their claims with a different argument. Citing *Trump v. Wisconsin Elections Commission ("Trump v. WEC")*, 983 F.3d 919, 927 (7th Cir. 2020), Complainants argue that Respondents violated the Electors Clause by committing a "diversion of … election law authority" when they accepted the CTCL grant money. *See* Complaint, ¶¶ 106-107. However, this citation works against Complainants, not for them.

The *Trump v. WEC* case concerned contested guidance issued by the Commission prior to the election. In its decision, the United States Court of Appeals for the Seventh Circuit examined the scope of the Electors Clause. "By its terms," the court noted, "the Clause could be read as addressing only the manner of appointing electors and thus nothing about the law that governs the administration of an election (polling place operations, voting procedures, vote tallying, and the like)." 983 F.3d at 926. The court acknowledged, however, that the Electors Clause has been

applied more broadly in some instances to "encompass[] acts necessarily antecedent and subsidiary to the method for appointing electors—in short, Wisconsin's conduct of its general election." *Id.*

As examples of the Electors Clause being applied broadly, the court cited both *Bush v. Gore*, 531 U.S. 98 (2000) and *Carson v. Simon*, 978 F.3d 1051 (8th Cir. 2020). In those two cases, courts found violations of the Electors Clause where state actors invaded the province of the legislature *without being granted such authority by the legislature*.

In *Bush v. Gore*, for example, three Justices were critical of a departure from the legislative scheme put in place by the Florida legislature, finding that it violated "a respect for the constitutionally prescribed role of state *legislatures.*" 531 U.S. at 115 (Rehnquist, C.J., concurring) (emphasis original). In *Carson*, the Eighth Circuit concluded that the Minnesota Secretary of State likely violated the Electors Clause by adding a week to the deadline for receipt of absentee ballots. The court remarked that "only the Minnesota Legislature, and not the Secretary, has plenary authority to establish the manner of conducting the presidential election in Minnesota. … Thus, the Secretary's attempt to re-write the laws governing the deadlines for mail-in ballots in the 2020 Minnesota presidential election is invalid." 978 F.3d at 1060.

This line of authority does not support Complainants' position because it is distinguishable from the circumstances now before the Commission. The Seventh Circuit explains the distinction in *Trump v. WEC*. The court remarked that – unlike in *Bush v. Gore* or *Carson* – the Commission had taken actions "under color of authority expressly granted to it by the Legislature." 983 F.3d at 927. Accordingly, "even on a broad reading of the Electors clause," the court could not find that the Commission acted unlawfully. *Id.* The "authority expressly granted to [The Commission] by the Legislature … is not diminished by allegations that the Commission erred in its exercise." *Id.*

Here, as in *Trump v. WEC*, the acceptance and use of CTCL funds was done "under color of authority expressly granted … by the Legislature" for the charge and supervision of elections under Wis. Stat. § 7.15(1). Even if there were errors in the exercise of that authority, those errors do not diminish the authority and do not give rise to a violation of the Electors Clause.

Finally, Complainants attempt to assert a violation of the Equal Protection Clause. However, courts around the country considering similar claims have cast aspersions on the argument that acceptance of CTCL money results in a violation of equal protection law. A federal court in Minnesota, for example, rejected that argument as follows:

> **The City's actions in applying for and accepting the CTCL grant and using the grant money to improve all manners of voting in Minneapolis in the 2020 election affect all Minneapolis voters equally. All individual Plaintiffs are Minneapolis voters.** Plaintiffs fail to explain how they will be uniquely affected by Minneapolis's actions. They assert that, because Minneapolis voters are statistically more likely to be progressive, Minneapolis's actions enhancing voting in general favor progressive voters and thereby suppress Plaintiffs' votes. However, **as Minneapolis residents, Plaintiffs, themselves, are equal recipients of Minneapolis's actions to make voting safer during the pandemic.** The City's grant-funded expenditures will make it easier for the individual

> Plaintiffs to vote safely for the candidates of their choosing and to have those ballots processed promptly, no matter which method of casting a ballot they choose. Grant money will be used to assist with mail-in voting; voting by absentee ballots via a secure drop box; voting in person at early-voting sites; voting in-person on Election Day; and voter education to assist voters in choosing how to vote.

Minnesota Voters All. v. City of Minneapolis, No. CV 20-2049 (MJD/TNL), 2020 WL 6119937, at *7 (D. Minn. Oct. 16, 2020) (emphasis added).

Once again, the Commission finds this case law persuasive. Although use of the CTCL grant money in Green Bay may have resulted in benefit to Green Bay voters over those outside of Green Bay, and although voters within Green Bay may have the tendency to favor a particular political party over another, that does not constitute an equal protection violation. *See Texas Voters All. v. Dallas Cty.*, 495 F. Supp. 3d 441, 469 (E.D. Tex. 2020) ("Ultimately, Plaintiffs' complain that people with different political views will lawfully exercise their fundamental right to vote. That is not a harm. That is democracy."). This is particularly true where other municipalities were free to seek the same grant money as did the City of Green Bay. In fact, it is undisputed that over 200 municipalities in Wisconsin received such funding.

In an attempt to bolster their equal protection argument in their Reply, Complainants point to language in the WSVP to argue that the CTCL grant money was used to disproportionately benefit certain voters from within the City of Green Bay, to the disadvantage of others. However, the WSVP was, as Complainants state, merely the grant application. Complainants provide no facts showing that the CTCL grant money was, in fact, used to disadvantage certain segments of the electorate over others. Absent such facts, Complainants fail to raise probable cause of a potential equal protection violation. As the Eastern District of Wisconsin stated when dismissing the *Wisconsin Voters Alliance* suit:

> Plaintiffs have offered only a political argument for prohibiting municipalities from accepting money from private entities to assist in the funding of elections for public offices. They do not challenge any specific expenditure of the money; only its source. They make no argument that the municipalities that received the funds used them in an unlawful way to favor partisan manner. Their brief is bereft of any legal argument that would support the kind of relief they seek.

Wisconsin Voters All. v. City of Racine, No. 20-C-1487, 2021 WL 179166, at *3 (E.D. Wis. Jan. 19, 2021).

In the absence of existing state or federal law prohibiting the acceptance of private grant money or the use of outside consultants, the Commission cannot find a violation of law or abuse of discretion resulting from the CTCL grant money in the City of Green Bay. To do so would be to essentially create new election law, which is the job of the legislature, not the Commission.

Complainants urge the Commission to act notwithstanding the absence of explicit legal authority, asserting that "the Commission is not impotent" and has been provided by the legislature "with an arsenal of weapons to exercise its powers and duties." Reply, p. 48. Specifically, Complainants cite the Commission's statutory authority to administer laws, investigate, take testimony, bring civil

actions, and sue for injunctive relief. *Id.* This is all true, but Complainants do not and cannot argue that the Commission has the authority to ***create*** law. That is undeniably the province of the legislature.

For all of the above reasons, the Commission finds that there is no probable cause to believe that the acceptance of CTCL grant money was itself or resulted in any violation of law or abuse of discretion.

ii. There Is No Probable Cause To Find A Violation Or Abuse Of Discretion By Respondent Wolfe.

Complainants also fail to state facts sufficient to raise probable cause to believe that Respondent Wolfe committed a violation of law or abuse of discretion, for multiple reasons.

First, although Complainants assert that Respondent Wolfe supported the City of Green Bay's decision to accept the CTCL grant funding, Complainants fail to identify any specific action or statement on the part of Respondent Wolfe in which she allegedly provided such support. The Commission does not know with whom Respondent Wolfe allegedly communicated, what Respondent Wolfe allegedly did, what Respondent Wolfe allegedly stated, or any of the context for such details. Without such information, the Commission finds that "a reasonable, prudent person, acting with caution" could not find that Respondent Wolfe violated the law or abused her discretion. *See* Wis. Admin. Code EL § 20.02(4).

Second, the Commission rejects Complainants' argument (asserted for the first time in their Reply) that Respondent Wolfe issued an unauthorized advisory opinion. Again, Complainants fail to state any actual facts underlying that assertion. Advisory opinions are governed by clear statutory procedures set forth in Wis. Stat. § 5.05(6a)(a). Such opinions must be requested "in writing, electronically, or by telephone" – and there is no allegation that such a request was made. Such opinions must be "written or electronic" – and there is no allegation that Respondent Wolfe issued any physical or electronic writing. Advisory opinions, "[t]o have legal force and effect," must "include a citation to each statute or other law and each case or common law authority upon which the opinion is based" – and there is no allegation that Respondent Wolfe ever provided such citations. Again, given Complainants' allegations, the Commission finds that "a reasonable, prudent person, acting with caution" could not find that Respondent Wolfe issued any unauthorized advisory opinions.

iii. The Commission Need Not Determine The Remaining Issues Raised By Respondents.

In light of its conclusion that there is no probable cause to find that the acceptance of the CTCL grant money violated election law or constituted an abuse of discretion, the Commission need not address Respondents' other defenses, including those concerning timeliness and whether the Mayor, Chief of Staff, and former City Clerk are even proper parties to an action that relates to grant money accepted by the Common Council of the City of Green Bay.

Commission Decision

Based upon the above review and analysis, the Commission finds that the Complaint does not raise probable cause to believe that a violation of law or abuse of discretion has occurred. All claims are hereby dismissed. The Commission will not conduct its own investigation of the circumstances and factual allegations asserted in the Complaint and will not issue an order with the declarations Complainants have requested.

The Commission notes that Complainants also asked that the Commission direct "any further prosecutorial investigation … to the proper local or state authorities" and "make recommendations to the State Legislature for changes to state election laws." Complaint, p. 33. The Commission will not provide either of these forms of relief, both because Complainants failed to establish probable cause and because they are not available forms of relief under Wis. Stat. § 5.06.

A party filing a complainant under Wis. Stat. § 5.06 may only request – and the Commission may only order – that officials be required to conform their conduct to the law, be restrained from taking action inconsistent with the law, or be required to correct any action or decision inconsistent with the law or any abuse of their discretion. *See* Wis. Stat. § 5.06(1) and (6). Referring matters for prosecution and making recommendation to the legislature are not options for relief under section 5.06.

Right to Appeal – Circuit Court

This letter constitutes the Commission's resolution of this complaint. Wis. Stat. § 5.06(2). Pursuant to Wis. Stat. § 5.06(8), any aggrieved party may appeal this decision to circuit court no later than 30 days after the issuance of this decision.

If any of the parties should have questions about this letter or the Commission's decision, please feel free to contact me.

Sincerely,

COMMISSION

By: Jon P. Axelrod
and Deborah C. Meiners
Special Counsel

JPA:sd

cc: Commission Members
Vanessa R. Chavez, Esq.
Lindsay J. Mather, Esq.
Thomas C. Bellavia, Esq.

Steven C. Kilpatrick, Esq.
Ms. Kris Teske

Exhibit B

Wisconsin Elections Commission

212 East Washington Avenue | Third Floor | P.O. Box 7984 | Madison, WI 53707-7984
(608) 266-8005 | elections@wi.gov | elections.wi.gov

April 28, 2022

Mayor Eric Genrich
City Clerk Celestine Jeffries
100 N. Jefferson St.
Green Bay, WI 54301
C/O Attorney Dan Lenz

Village Clerk Kris Teske
2155 Holmgren Way
Ashwaubenon, WI 54304

Sent via email: dlenz@lawforward.org; kteske@new.rr.com

Re: Complaint Filed with Wisconsin Elections Commission
Case No.: EL 22-10: Sipes, et al. v. Genrich, et al.

Dear Respondents and Counsel:

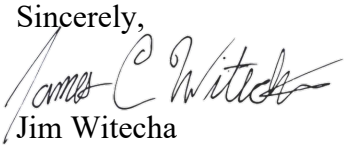
This communication is to inform you that the verified complaint filed by Theresa Sipes and Donald Schneider against you was determined to be precluded from further review by the Wisconsin Elections Commission ("Commission") at its April 20, 2022, meeting.

The Commission passed the following motions in closed session by 5-1 votes:

> **The Wisconsin Elections Commission finds that the complaint of Jay Stone against various individuals, in Stone v. Barrett et al. (EL 21-40), does not present reasonable suspicion that a violation of Wis. Stats. §§ 5.68(1) and (2) or 12.09 occurred, and the matter is hereby dismissed. Additionally, the Commission orders that all future Wis. Stats. §§ 5.05 and 5.06 complaints relating to the acceptance and use of 2020 CTCL election grant funds shall be considered untimely, barred by laches and issue preclusion, or otherwise nonjusticiable under those statutes. This order does not foreclose consideration of similar, future CTCL grant fund complaints under Wis. Stats. §§ 5.05 and 5.06, if CTCL grant funds are newly distributed during future election cycles. All pending complaints solely alleging that acceptance and use of 2020 CTCL grant funds constituted a violation of Wis. Stat. Chapters 5-10 and 12 shall be dismissed, and complaints raising such allegations along with others shall have the CTCL-specific grant fund allegations dismissed without foreclosing the entirety of the complaint.**
>
> and
>
> **Commission staff are directed to place the decisions in the three Stone complaints on the Complaints page of the Wisconsin Elections Commission website and provide a copy of those motions to the parties in the pending CTCL complaints filed with the Commission.**

Based on this finding, WEC staff now present all 2020 CTCL-related closure letters to the Commission for a determination if they wish to hold a special hearing. No such request was made in this instance, and because the CTCL claims were completely intertwined with all other issues, the entirety of the complaint was determined to be precluded by the above motion. If you have questions regarding the discharge of this complaint, please feel free to contact me.

Sincerely,



Jim Witecha

WISCONSIN ELECTIONS COMMISSION

cc: Commission Members
Meagan Wolfe, Commission Administrator

Exhibit C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

WISCONSIN VOTERS ALLIANCE, et al.,

Plaintiffs,

v. Case No. 20-C-1487

CITY OF RACINE, et al.,

Defendants.

ORDER DENYING MOTION FOR PRELIMINARY RELIEF

Plaintiffs Wisconsin Voters Alliance and six of its members filed this action against the Cities of Green Bay, Kenosha, Madison, Milwaukee, and Racine seeking to enjoin the defendant Cities from accepting grants totaling $6,324,527 from The Center for Tech and Civic Life (CTCL), a private non-profit organization, to help pay for the upcoming November 3, 2020 election. Plaintiffs allege that the defendant Cities are prohibited from accepting and using "private federal election grants" by the Elections and Supremacy Clauses of the United States Constitutions, the National Voters Registration Act (NVRA), 52 U.S.C. §§ 20501–20511, the Help America Vote Act (HAVA), 52 U.S.C. §§ 20901–21145, and Section 12.11 of the Wisconsin Statutes, which prohibits election bribery. The case is before the Court on Plaintiffs' Motion for a Temporary Restraining Order. The defendant Cities oppose Plaintiffs' motion and have filed a motion to dismiss for lack of standing. Having reviewed the affidavits and exhibits submitted by the parties and considered the briefs and arguments of counsel, the Court concludes, whether or not Plaintiffs have standing, their Motion for a Temporary Restraining Order should be denied because Plaintiffs have failed to show a reasonable likelihood of success on the merits.

It is important to note that Plaintiffs do not challenge any of the specific expenditures the defendant Cities have made in an effort to ensure safe and efficient elections can take place in the midst of the pandemic that has struck the nation over the last eight months. In other words, Plaintiffs do not claim that the defendant Cities are using funds to encourage only votes in favor of one party. It is the mere acceptance of funds from a private and, in their view, left-leaning organization that Plaintiffs contend is unlawful. Plaintiffs contend that CTCL's grants have been primarily directed to cities and counties in so-called "swing states" with demographics that have progressive voting patterns and are clearly intended to "skew" the outcome of statewide elections by encouraging and facilitating voting by favored demographic groups.

The defendant Cities, on the other hand, note that none of the federal laws Plaintiffs cite prohibit municipalities from accepting funds from private sources to assist them in safely conducting a national election in the midst of the public health emergency created by the COVID-19 pandemic. The defendant Cities also dispute Plaintiffs' allegations concerning their demographic make-up and the predictability of their voting patterns. The defendant Cities note that municipal governments in Wisconsin are nonpartisan and that, in addition to the five cities that are named as defendants, more than 100 other Wisconsin municipalities have been awarded grants from CTCL. The more densely populated areas face more difficult problems in conducting safe elections in the current environment, the defendant Cities contend, and this fact best explains their need for the CTCL grants.

Plaintiffs have presented at most a policy argument for prohibiting municipalities from accepting funds from private parties to help pay the increased costs of conducting safe and efficient elections. The risk of skewing an election by providing additional private funding for conducting the election in certain areas of the State may be real. The record before the Court, however, does

not provide the support needed for the Court to make such a determination, especially in light of the fact that over 100 additional Wisconsin municipalities received grants as well. Decl. of Lindsay J. Mather, Ex. D. Plaintiffs argue that the receipt of private funds for public elections also gives an appearance of impropriety. This may be true, as well. These are all matters that may merit a legislative response but the Court finds nothing in the statutes Plaintiffs cite, either directly or indirectly, that can be fairly construed as prohibiting the defendant Cities from accepting funds from CTCL. Absent such a prohibition, the Court lacks the authority to enjoin them from accepting such assistance. To do so would also run afoul of the Supreme Court's admonition that courts should not change electoral rules close to an election date. *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020).

The Court therefore concludes that Plaintiffs have failed to show a reasonable likelihood of success on the merits. Plaintiffs' Motion for a Temporary Restraining Order and other preliminary relief is therefore **DENIED**. A decision on the defendant Cities' motion to dismiss for lack of standing will await full briefing.

SO ORDERED at Green Bay, Wisconsin this 14th day of October, 2020.

s/ William C. Griesbach
William C. Griesbach
United States District Judge

Exhibit D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

WISCONSIN VOTERS ALLIANCE, et al.,

Plaintiffs,

v. Case No. 20-C-1487

CITY OF RACINE, et al.,

Defendants.

DECISION AND ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

Plaintiffs Wisconsin Voters Alliance and seven of its members filed this action for injunctive and declaratory relief against five Wisconsin cities (Green Bay, Kenosha, Madison, Milwaukee, and Racine) that received grants totaling $6,324,527 from the Center for Tech and Civic Life (CTCL), a private non-profit organization, to help pay for the November 3, 2020 general election. Plaintiffs allege that, in accepting conditional grants from a private corporation to conduct federal elections, the defendant Cities violated the Elections Clause and the First, Ninth, and Fourteenth Amendments to the United States Constitution. Plaintiffs allege that, in unconstitutionally pursuing and using "private conditional moneys to conduct federal elections," the Cities undermined the integrity of "the election process as a social contract to maintain our democratic form of government." Am. Compl. at 1, Dkt. No. 39.

On October 14, 2020, the Court denied Plaintiffs' motion for preliminary relief enjoining the defendant Cities from accepting or using "private federal election grants" on the ground that they failed to show a reasonable likelihood of success on the merits. Order Denying Motion for Preliminary Relief at 1, Dkt. No. 27. The case is now before the Court on the defendant Cities'

motion to dismiss Plaintiffs' Amended Complaint for lack of standing. For the following reasons, the motion will be granted and the case will be dismissed.

BACKGROUND

Plaintiffs consist of the Wisconsin Voters Alliance organization and residents of the various defendant Cities. Am. Compl. ¶¶ 5–11. The Wisconsin Voters Alliance is an organization that seeks to ensure "public confidence in the integrity of Wisconsin's elections, in election results and election systems, processes, procedures, and enforcement, and that public officials act in accordance with the law in exercising their obligations to the people of the State of Wisconsin." *Id.* ¶ 4. "The Wisconsin Voters Alliance also works to protect the rights of its members whenever laws, statutes, rules, regulations, or government actions . . . threaten or impede implied or expressed rights or privileges afforded to them under our constitutions or laws or both." *Id.*

The CTCL is a private non-profit organization, funded by private donations of approximately $350 million, that provides federal election grants to local governments. *Id.* ¶¶ 20–21. The CTCL distributed approximately $6.3 million of federal election grants to the defendant Cities. *Id.* ¶ 23. The CTCL grants provided conditions governing the use of those private moneys, including that each city report back to the CTCL regarding the moneys used to conduct federal elections. *Id.* ¶¶ 89, 35. The local government entities accepted the conditions and agreed to adhere to the CTCL's conditions. *Id.* ¶ 90. Plaintiffs allege that the conditions, as adopted by each defendant City, are additional regulations in the conduct of federal elections. *Id.* ¶ 96.

Plaintiffs allege that the local governments unconstitutionally pursued and used private conditional moneys to conduct federal elections, which undermined the "integrity of the election process as a social contract to maintain our democratic form of government." *Id.* at 1. Plaintiffs claim that the use of conditional grants of private moneys violates the United States Constitution,

namely the Elections Clause under Article 1, Section 4, Clause 1 as well as the First, Ninth, and Fourteenth Amendments.

ANALYSIS

Defendants assert that the amended complaint must be dismissed because Plaintiffs do not have Article III standing to assert claims against them. Standing is not an esoteric doctrine that courts use to avoid difficult decisions. Our system of government is designed to place the power to enact laws and implement policy in the hands of the people and their elected representatives, not unelected federal judges. Article III of the United States Constitution limits the jurisdiction of federal courts to actual "cases" or "controversies" brought by litigants who demonstrate standing. *Groshek v. Time Warner Cable, Inc.*, 865 F.3d 884, 886 (7th Cir. 2017). The doctrine of standing "serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). "In light of this 'overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere, we must put aside the natural urge to proceed directly to the merits of an important dispute and to "settle" it for the sake of convenience and efficiency.'" *Hollingswroth v. Perry*, 570 U.S. 693, 704–05 (2013) (quoting *Raines v. Byrd*, 521 U.S. 811, 820 (1997)) (alterations omitted). "In order to have standing, a litigant must prove that he has suffered a concrete and particularized injury that is fairly traceable to the challenged conduct, and is likely to be redressed by a favorable decision." *Remijas v. Neiman Marcus Grp., LLC*, 794 F.3d 688, 691–92 (7th Cir. 2015) (citation omitted). The plaintiff bears the burden of pleading sufficient factual allegations that "plausibly suggest" each element. *Groshek*, 865 F.3d at 886 (citation omitted). "A case becomes moot when it no longer presents a case or controversy under Article III, Section 2 of the Constitution. 'In general a case becomes moot when the issues presented are no longer live or the parties lack a

legally cognizable interest in the outcome.'" *Eichwedel v. Curry*, 700 F.3d 275, 278 (7th Cir. 2012) (quoting *Murphy v. Hunt*, 455 U.S. 478, 481 (1982)).

A. Individual Plaintiffs

The court concludes that the individual plaintiffs have failed to demonstrate that their injury is likely to be redressed by a favorable decision. "A plaintiff's remedy must be tailored to redress the plaintiff's particular injury." *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018) (citing *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 (2006)). "Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement." *Steel Co.*, 523 U.S. at 107. The plaintiff must demonstrate that it is "likely," not merely "speculative," that the injury he alleges will be "redressed by a favorable decision." *Lujan*, 504 U.S. at 561 (citation omitted).

Plaintiffs assert that they have suffered an injury as a party to the "social contract" entered into between the government and the voter. Plaintiffs explain the social contract as follows: the government has agreed to protect the fundamental right to vote and maintain the integrity of an election as fair, honest, and unbiased, through federal and state election laws, and the voters agree to accept the government's announcement of the winner of an election. Plaintiffs allege that each individual voter resides within the boundaries of a city that has added another regulatory level to elections, by a nongovernmental corporation, by accepting conditions for moneys in the conduct of elections and that they are harmed by the loss of the uniformity in the election process. They claim that, if a congressional house rejects the elected representatives after a finding that the election results are invalidated, the votes of each member of the Wisconsin Voters Alliance and the individual Plaintiffs will not count and they will lose representation in their individual districts. Am. Compl. ¶¶ 127–28. They maintain that, as a result, each voter from the local governmental

entities that accepted private grant moneys is disadvantaged and will suffer an injury. *Id.* ¶ 130. Plaintiffs assert that their disadvantage is not shared by all American people; it arises from the boundary within the city in which they reside and is not shared with voters residing in other cities that did not accept the conditions of nongovernmental corporate entities for conducting the election.

Plaintiffs have not established that any purported harm is likely to be redressed by a favorable decision. Plaintiffs' alleged harm is that the votes in their district may not count if the congressional house invalidates the election results in their districts because the municipalities in which they reside accepted CTCL grants. They request that the Court declare that the defendant Cities' acceptance of private funds through federal election conditional grants is unconstitutional under the Elections Clause, the First and Ninth Amendments of the United States Constitution, and the Equal Protection Clause and issue an injunction enjoining the defendant Cities from accepting or using the CTCL's private federal election grants.

It is unclear whether Plaintiffs have suffered an injury, let alone an injury that may be repeated in the future. A case becomes moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Murphy*, 455 U.S. at 481 (citation omitted). A congressional house did not invalidate the election results or reject Wisconsin's elected representatives. These circumstances forestall any occasion for meaningful relief. In addition, enjoining the defendant Cities from using the funds it has already received and spent will not redress Plaintiffs' purported injuries. The court is unable to grant relief that would effectively redress the alleged injury Plaintiffs claim to suffer.

Plaintiffs' amended complaint raises issues concerning a municipality's acceptance of funds from private parties to help pay for the increased costs of conducting safe and efficient

elections. The receipt of private funds for public elections may give an appearance of impropriety. While this concern may merit a legislative response, the "Federal Judiciary [must respect] 'the proper—and properly limited—role of the courts in a democratic society.'" *Gill*, 138 S. Ct. at 1929 (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984)). The individual Plaintiffs have not established standing.

B. Wisconsin Voters Alliance

As an organizational plaintiff, the Wisconsin Voters Alliance must demonstrate that it has standing "in its own right" because the organization itself has suffered a legally sufficient harm or "as the representative of its members." *Warth v. Seldin*, 422 U.S. 490, 511 (1975). Wisconsin Voters Alliance asserts that it has associational standing. "[S]uch standing exists when: (a) the organization's members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Com. Cause Indiana v. Lawson*, 937 F.3d 944, 957 (7th Cir. 2019) (internal quotation marks, alterations, and citations omitted). Wisconsin Voters Alliance cannot establish associational standing because its members cannot establish standing. Therefore, Wisconsin Voters Alliance lacks standing.

CONCLUSION

Though this is a federal lawsuit seeking relief in a federal court, Plaintiffs have offered only a political argument for prohibiting municipalities from accepting money from private entities to assist in the funding of elections for public offices. They do not challenge any specific expenditure of the money; only its source. They make no argument that the municipalities that received the funds used them in an unlawful way to favor partisan manner. Their brief is bereft of any legal argument that would support the kind of relief they seek. They cite Article I, section 4,

of the United States Constitution, but that section governs the election of senators and representatives, and they fail to explain how, even if they had standing, the Cities' use of funds donated by a private party could have affected any such election. For these reasons, Defendants' motion to dismiss Plaintiffs' complaint for lack of standing (Dkt. No. 23) is **GRANTED**. This case is dismissed. The Clerk is directed to enter judgment accordingly.

SO ORDERED at Green Bay, Wisconsin this 15th day of January, 2021.

s/ William C. Griesbach
William C. Griesbach
United States District Judge

Exhibit E

City of Green Bay Law Department
100 North Jefferson Street • Room 200
Green Bay, Wisconsin 54301-5026
www.greenbaywi.gov

Phone 920.448.3080
Fax 920.448.3081

Ms. Janet Angus
angus.janet@gmail.com

April 5, 2022

DELIVERED VIA E-MAIL

RE: Election Observers in the City Clerk's Office

Pursuant to Section 7.41 of the Wisconsin Statutes, members of the public have a right to be present at any polling place, and in the office of the municipal clerk whose office is located in a public building, on any day that absentee ballots may be cast in that office. This right to observe the casting of absentee ballots, however, is limited. An observer may be removed if that individual disrupts the operation of the polling place or clerk's office. Section 7.52(1) of the Wisconsin Statutes regulates the canvassing of absentee ballots and also extends the right to access such activities to the same the same extent as provided under 7.41

In further, the Wisconsin Election Commission rules provide additional guidance including that observers must comply with the lawful commands of the chief inspector. No observer may engage in any disruptive behavior that threatens the orderly conduct of the election or interferes with voting or contributes to voter intimidation. The Wisconsin Attorney General has provided that voter intimidation includes directly and aggressively challenging voter's qualifications.

The law clearly provides that observers may be present to observe where absentee ballots are being cast or canvassed. There is no authority providing that observers have the right to observe the delivery of ballots or to hear voter statements on their qualifications at the time of absentee ballot delivery.

Based on the foregoing, when the absentee voting period has expired, the City's position is that members of public may be present in the hallway outside of the City Clerk's office, but may not communicate with any voters delivering their ballot and are not privy to any voter statements or communications with Clerk's office staff with respect to the voter qualifications and the delivery of their absentee ballot.

Clerk's office staff have observed that you and other members of your group have communicated with voters while they attempted to deliver their ballots. This behavior is contrary to state law and the City's position on its duties to ensure a safe environment for citizens to exercise their rights. If this behavior continues, the City may consider taking additional actions.

Lastly, while the City Clerk's office is open and accessible to the public, when not conducting in-person absentee activities or absentee ballot canvassing, access to the lobby and waiting area of the office is limited to those who have an appointment or are there to conduct business in the Clerk's office. Loitering in the lobby will not be permitted.

Respectfully,

Joanne Bungert
City Attorney

CC Celestine Jeffreys, Clerk
Joseph Faulds, Chief Operating Officer

Exhibit F

RECEIVED
02-17-2022
CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2022AP0091

RICHARD TEIGEN
and RICHARD THOM,

Plaintiffs-Respondents-Petitioners,

v.

WISCONSIN ELECTIONS COMMISSION,

Defendant-Co-Appellant,

DEMOCRATIC SENATORIAL CAMPAIGN
COMMITTEE,

Intervenor-Defendant-Co-Appellant,

DISABILITY RIGHTS WISCONSIN,
WISCONSIN FAITH VOICES FOR JUSTICE, and
LEAGUE OF WOMEN VOTERS OF WISCONSIN,

Intervenors-Defendants-Appellants.

ON BYPASS FROM A FINAL ORDER OF
THE WAUKESHA COUNTY CIRCUIT COURT,
THE HONORABLE MICHAEL O. BOHREN, PRESIDING

BRIEF AND JOINT APPENDIX OF DEFENDANT-CO-APPELLANT WISCONSIN ELECTIONS COMMISSION

JOSHUA L. KAUL
Attorney General of Wisconsin

STEVEN C. KILPATRICK
Assistant Attorney General
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THOMAS C. BELLAVIA
Assistant Attorney General
State Bar #1030182

Attorneys for Defendant-Co-Appellant Wisconsin Elections Commission

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Cases

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Regulations

INTRODUCTION

Due to municipal clerk inquiries related to the unprecedented increase in voting by absentee ballot across the state, the Wisconsin Elections Commission issued a memorandum before the April 7, 2020, election on the subject of drop boxes and drop-off locations. This March 31 memorandum informed clerks that it was the municipality's choice to establish drop boxes and other drop-off locations, for the return of absentee ballots, such as mail slots at municipal facilities used by residents to submit tax or utility payments. It also advised that these locations should be secure, regularly monitored, and ballots collected from them on a daily basis. The memorandum further stated that a family member or another person could return the absentee ballot on behalf of the elector.

The Commission issued another memorandum, in August 2020, with more specific drop box information. This guidance on drop box options for secure absentee ballot return was adapted from a subunit of the federal Cybersecurity and Infrastructure Security Agency. The memorandum described a ballot drop box as a secure, locked structure operated by local election officials, and advised about chain-of-custody collection. It recognized that some electors may lack trust in the postal process for return of their absentee ballots, including timely delivery.

Two electors filed suit to invalidate the Commission's memoranda and shutter the 500-plus drop boxes and drop-off locations established by municipal clerks across the state. They argue that state statutes do not permit drop boxes and drop-off locations, other than a staffed drop box in the office of the municipal clerk. They also assert that no one other than the elector is permitted to return the sealed absentee ballot envelope in person to the clerk or even place it in a United States Postal Service mailbox, even those electors who are

indefinitely confined or permanently or temporarily physically disabled.

This Court should reject their position. The plain language of Wis. Stat. § 6.87(4)(b)1. allows municipal clerks to establish secure drop boxes and drop-off locations for the return of absentee ballots and no other statute forbids it. And the text of Wis. Stat. § 6.87(4)(b)1. also permits an elector to direct another person to deposit her absentee ballot into a mailbox or return it in person to the clerk. Moreover, a cramped reading of this state statute would disenfranchise disabled electors in the state who possess a federal right to have a person of their choice assist them in voting.

Finally, the Commission memoranda are not administrative "rules," as the circuit court held. Instead, they are mere "guidance documents" because they do not have the force of law and thus, the Commission was not required to promulgate them as rules.

This Court should reverse the circuit court's decision.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Does a March 31, 2020, Commission memorandum provide correct guidance to municipal clerks that a completed absentee ballot may be placed in the mail or personally returned to the municipal clerk by a family member or another person acting on behalf of the elector?

   The circuit court answered no.

   This Court should answer yes.

2. Do March 31 and August 19, 2020, Commission memoranda provide correct guidance to municipal clerks that they may establish secure drop box locations for the return of absentee ballots?

The circuit court answered no.

This Court should answer yes.

3. Are the two 2020 Commission memoranda "guidance documents" rather than administrative "rules" under chapter 227 of the Wisconsin statutes?

The circuit court answered no.

This Court should answer yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Given this Court's acceptance of bypass, oral argument and publication are warranted.

STATEMENT OF THE CASE

I. Nature of the case.

The circuit court granted summary judgment to the plaintiffs, Wisconsin electors, on their Wis. Stat. § 227.40 declaratory judgment claims challenging two 2020 memoranda of the Wisconsin Elections Commission issued to municipal clerks and other local election officials. The final order declared the memoranda in conflict with state law and included a permanent injunction against the Commission, directing it to withdraw the memoranda.

II. Statement of facts

A. The parties.

Plaintiffs Richard Teigen and Richard Thom are registered electors residing in Waukesha County. (J.-App. 11, 76.)[1]

Defendant Wisconsin Elections Commission is charged with administering Chapters 5 through 10 and 12 of the Wisconsin statutes. (J.-App. 11¶ 19, 414 ¶ 19.)

Disability Rights Wisconsin, Wisconsin Faith Voices for Justice, and the League of Women Voters of Wisconsin are nonprofit, nonpartisan organizations devoted to protecting the fundamental right to vote. (J.-App. 68–69.)

DSCC is the national Democratic Party committee, as defined by 52 U.S.C. § 30101(14), with the mission of electing Democratic candidates to the U.S. Senate, including Wisconsin. (*See generally* J.-App. 42–43.)

B. The challenged Commission memoranda.

The Commission issued two memoranda, dated March 31 and August 19, 2020, to municipal clerks and other local election officials.

The March 31, 2020, memorandum advised clerks that a completed absentee ballot may be placed in the mail or personally returned to the municipal clerk by a family member or another person acting on behalf of the voter. (J.-App. 20–22.)

That memorandum also advised that "drop boxes [and drop-off locations] can be used for voters to return ballots but

---

[1] "J.-App." means the Joint Appendix submitted separately. Rather than citing the record, the Commission only cites this Joint Appendix because at the time this brief was being drafted, the circuit court record had not been transmitted to this Court.

clerks should ensure they are secure, can be monitored for security purposes, and should be regularly emptied." (J.-App. 20–22.)

The Commission gave further guidance on drop boxes and drop-off locations in the August 19, 2020, memorandum. (J.-App. 23–26.) The information there was adapted from a resource developed by the U.S. Cybersecurity and Infrastructure Security Agency ("CISA"), Elections Infrastructure Government Coordinating Council, and Sector Coordinating Council's Joint COVID Working Group. (J.-App. 23–26, 113, 204–10.) That resource provides standards for increasing the efficacy and security of absentee ballot drop boxes. (J.-App. 23–26, 204–10.)

The memorandum outlined multiple necessary measures to ensure the security and proper chain of custody of completed absentee ballots, such as:

- [D]rop boxes must be "secured and locked at all times" such that "[o]nly an election official or a designated ballot drop box collection team should have access" to them.

- "In addition to locks, all drop boxes should be sealed with one or more tamper evident seals."

- "Chain of custody logs must be completed every time ballots are collected."

- "All ballot collection boxes/bags should be numbered to ensure all boxes are returned at the end of the shift, day, and on election night."

- "Team members should sign the log and record the date and time, security seal number at opening, and security seal number when the box is locked and sealed again."

(J.-App. 23–26.)

III. Procedural history

On June 28, 2021, Plaintiffs filed a complaint against the Commission with the Waukesha County Circuit Court. Plaintiffs challenged the validity of the two memoranda, alleging that the memoranda did not correctly interpret state election law and were unpromulgated administrative rules. Plaintiffs sought declaratory and injunctive relief. (J.-App. 18–19.)

Later in the litigation, Plaintiffs modified their claims. They no longer challenge staffed drop boxes and drop-off locations situated either in the clerk's office or at an alternate absentee ballot site designated under Wis. Stat. § 6.855. (J.-App. 85 n.2.)

On October 15, the circuit court allowed the following parties to intervene as defendants: the Democratic Senatorial Campaign Committee (DSCC), and Disability Rights Wisconsin (DRW), Wisconsin Faith Voice for Justice, and the League of Women Voters Wisconsin (LWVW) (hereafter collectively "Intervenors-Defendants"). (J.-App. 73–74.)

Plaintiffs filed a motion for summary judgment, a motion for preliminary injunction, and supporting materials, on October 15. (J.-App. 75–106.) Briefing ensued. (J.-App. 107–08 (scheduling order), 284–327 (DSCC's briefs), 369–410 (DRW's briefs), 420–49 (WEC's briefs).) A hearing on the motions took place on January 13, 2022; oral argument was held. (J.-App. 475, 477–576 (transcript).) At the conclusion of that hearing, the court issued an oral ruling, granting summary judgment to Plaintiffs, denying summary judgment to the Commission and Intervenors-Defendants, and directing the Commission to withdraw its memoranda no later than January 27, 2022. (J.-App. 554–75.)

The circuit court signed the final order on January 19, 2022, and entered it the next day, January 20, 2022.

(J.-App. 639.) The final order declared that the Commission memoranda conflict with state election laws, including Wis. Stat. §§ 6.87(4)(b)1. and 6.855, and directed the Commission to withdraw the memoranda no later than January 27, 2022. The order also declares that the two memoranda are administrative "rules" under ch. 227 of the Wisconsin statutes and are invalid because (1) their interpretation of Wisconsin election law is incorrect, and (2) they were not promulgated as "rules," either. (J.-App. 640–41.)

The Commission and the Intervenors-Defendants appealed. (J. App. 653–54, 661–62, 795–96.)

On January 21, the circuit court heard and denied an emergency motion to stay the final order. (J.-App. 666–705, 800–01.)

The court of appeals granted a stay of the final order through February 15, 2022, the date of the Spring Primary election. (J.-App. 751–60.) This Court then granted Plaintiffs' bypass petition and denied their motion to vacate the stay. (J.-App. 806–10.) On February 11, this Court denied the defendant and intervenors-defendants' motions to stay the circuit court's final order pending appeal or April 5, 2022, the date of the Spring Election, whichever is later. (J.-App. 812–15, 827–29; Order, Feb. 11, 2022.) The Commission complied with the circuit court injunction and withdrew the two memoranda on the morning of February 16.[2]

STANDARD OF REVIEW

Judicial review of guidance documents is governed by Wis Stat. § 227.40. Under Wis. Stat. § 227.40(1), "The court shall render a declaratory judgment in the action only when

[2] https://elections.wi.gov/node/7861 (last visited Feb. 16, 2022).

it appears from the complaint and the supporting evidence that the rule or guidance document or its threatened application interferes with or impairs, or threatens to interfere with or impair, the legal rights and privileges of the plaintiff."

This Court reviews the circuit court's grant of summary judgment de novo. *Waity v. LeMahieu*, 2022 WI 6, ¶ 17.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Wis. Stat. § 802.08(2).

Thus, summary methodology has two steps. The first "requires the court to examine the pleadings to determine whether a claim for relief has been stated." *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). "In testing the sufficiency of a complaint, [courts] take all facts pleaded by plaintiff [ ] and all inferences which can reasonably be derived from those facts as true." *Id.* at 317.

Under the second step, "[i]f a claim for relief has been stated, the inquiry then shifts to whether any factual issues exist." *Id.* at 315. Summary judgment "is designed to eliminate unnecessary trials" where "there is no triable issue of fact" to present to a jury. *Maynard v. Port Publ'ns, Inc.*, 98 Wis. 2d 555, 562–563, 297 N.W.2d 500 (1980). The court takes "evidentiary facts in the record as true if not contradicted by opposing proof." *Lambrecht v. Est. of Kaczmarczyk*, 2001 WI 25, ¶ 23, 241 Wis. 2d 804, 623 N.W.2d 751.

ARGUMENT

I. The March 31, 2020, Commission memorandum provides correct guidance to municipal clerks that a completed absentee ballot may be placed in the mail or personally returned to the municipal clerk by a family member or another person acting on behalf of the elector.

A. The Commission's guidance regarding who may return an absentee ballot conforms with state law.

After an elector completes an absentee ballot and a witness certifies it, it must be sealed in an envelope and returned for counting. *See* Wis. Stat. § 6.87(4)(b)1. Then, this statute provides that "[t]he envelope shall be mailed by the elector, or delivered in person, to the municipal clerk issuing the ballot or ballots." The Commission's March 31, 2020, memorandum stated that "[a] family member or another person may also return the ballot on behalf of the voter." (J.-App. 20.) Plaintiffs claim that allowing such action by an individual other than the elector is contrary to that statute. (J.-App. 80–83.) Plaintiffs' reading of the law is incorrect.

This Court has held that "statutory interpretation 'begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.'" *State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110 (quoting *Seider v. O'Connell,* 2000 WI 76, ¶ 43, 236 Wis. 2d 211, 612 N.W.2d 659). "In construing or 'interpreting' a statute the court is not at liberty to disregard the plain, clear words of the statute." *State v. Pratt,* 36 Wis.2d 312, 317, 153 N.W.2d 18 (1967).

Wisconsin Stat. § 6.87(4)(b)1. does not say that an absentee ballot is "mailed by the elector" only if the elector personally deposits it in a mailbox or hands it to a United States Postal Service (USPS) employee, nor does it require

that a ballot be "delivered in person" to the clerk only by the voter herself. The plain language of the statute provides two options: (1) "The envelope shall be mailed by the elector . . . to the municipal clerk;" and (2) "The envelope shall be . . . delivered in person[ ] to the municipal clerk." *Id.* These options are satisfied when an agent acting on the elector's behalf mails or otherwise delivers her absentee ballot to the clerk or an authorized representative.

As to the first statutory option, a ballot is "mailed by the elector" if the elector gives it to an agent, directs the agent to place it in the mail, and the agent does so. Statutory terms that are not statutorily defined and that do not have a technical or peculiar legal meaning are to be interpreted according to common and approved usage. Wis. Stat. § 990.01(1)*; see also Kalal*, 271 Wis. 2d 633, ¶ 45 ("Statutory language is given its common, ordinary, and accepted meaning"). Common and approved usage can be found in recognized dictionaries. *State v. McKellips*, 2016 WI 51, ¶ 32, 369 Wis. 2d 437, 462, 881 N.W.2d 258 ("we may use a dictionary to establish the common meaning of an undefined statutory term").

"To mail" means "[to send by the] nation's postal system."[3] And "to send" means "*to cause* a letter or package to go or to be carried from one place or person to another."[4] That is why it is well understood that mailing an item does not require the sender to personally deposit it into a USPS box—that an agent may carry out that mailing on the sender's behalf.

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[3] *See Mail*, Merriam-Webster, https://www.merriam-webster.com/dictionary/mail (last visited Feb. 16, 2022).

[4] *See Send*, Merriam-Webster, https://www.merriam-webster.com/dictionary/send (last visited Feb 16, 2022) (emphasis added).

The statutory phrase "the envelope shall be mailed by the elector . . . to the municipal clerk" thus means that the elector shall cause the envelope to be carried to the municipal clerk by the USPS. That conclusion is also consistent with commonsense English usage, under which a person who directs a trusted agent to place an item in a mailbox on the person's behalf would understand that she has "mailed" that item. So, as long as the elector begins the mailing process—that is, causing it to be sent through the mail through an agent—she complies with the statute's plain language. Throughout the case, Plaintiffs have offered no other provision of law where an individual must *herself* deposit an envelope inside a USPS mailbox in order to satisfy a statutory mailing or service requirement. The language of statutory option (1)—"mailed by the elector"—is thus satisfied where a ballot is placed in the mail by the elector or an agent.

As to the second statutory option for a ballot to be "delivered in person" to the clerk, the plain language of the statute does not require the ballot to be delivered "by the elector." Wis. Stat. § 6.87(4)(b)1. The statutory phrase "by the elector" modifies the phrase "shall be mailed by," but it does *not* apply to the phrase "or delivered in person." *Id.* By placing the phrase "or delivered in person" between commas, the Legislature separated it from the preceding phrase "by the elector." *Id.*

This linguistic distinction makes sense and ensures comparable treatment of the two methods for returning a ballot. As shown above, the common meaning of "mailed by the elector" includes having an agent deposit one's ballot envelope into the mail. In contrast, if the Legislature had also required that a ballot envelope delivered to the clerk's office must be "delivered in person by the elector," that would require the elector to personally carry out that delivery. If the Legislature had intended to make the requirements for

delivering a ballot envelope to the clerk stricter than the requirements for placing the envelope in the mail, it would have expressed that intent by including the phrase "by the elector" after the phrase "delivered in person." By not including that phrase in that position, the Legislature allowed a ballot envelope to be delivered to the clerk by an agent, just as such an envelope may be deposited in the mail by an agent.

Also, the context and surrounding language of Wis. Stat. § 6.87(4)(b)1. itself supports the Commission's interpretation. "Context is important to meaning. So, too, is the structure of the statute in which the operative language appears. Therefore, statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Kalal*, 271 Wis. 2d 633, ¶ 46.

Throughout the lengthy section 6.87(4)(b)1., the Legislature uses the active voice in describing what action the elector must take in the absentee voting process. A few examples:

- "The absent elector, in the presence of the witness, shall mark the ballot";
- "The elector shall then, still in the presence of the witness, fold the ballots . . . and deposits them in the proper envelope";
- "[T]he elector shall fold the ballot";
- "[T]he elector shall enclose in the envelope";

Wis. Stat. § 6.87(4)(b)1.

But then the Legislature abruptly switches to the passive voice: "The return envelope shall then be sealed . . . . The envelope shall be mailed by the elector, or delivered in person." *Id.* This purposeful switch to and use of passive voice for the acts of mailing and delivering is significant and cannot be overlooked. *See United States v. Wilson*, 503 U.S. 329, 333

(1992) ("Congress' use of a verb tense is significant in construing statutes."); *Flora v. U.S.,* 362 U.S. 145, 150 (1960) (Supreme Court "does not review congressional enactments as a panel of grammarians," but neither does it "regard ordinary principles of English prose as irrelevant to a construction of those enactments."). It reveals that while the Legislature intends the elector to begin the mailing and delivery process; it does not intend to require that *the elector herself* actually deposit the absentee ballot in a mailbox or hand it over to a municipal clerk. That is because "a legislature's use of the passive voice sometimes reflects indifference to the actor." *Rubin v. Islamic Republic of Iran*, 830 F.3d 470, 479 (7th Cir. 2016), *aff'd*, 138 S. Ct. 816 (2018) (citing *Dean v. U. S.*, 556 U.S. 568, 572 (2009). In other words, the Legislature's switch from the active to passive voice regarding mailing and delivery of the absentee ballot reveals its concern with those *acts* rather than the *person* performing those acts. *See Dean*, 556 U.S. at 572 ("The passive voice focuses on an event that occurs without respect to a specific actor . . . . It is whether something happened—not how or why it happened—that matters."); *Watson v. U.S.,* 552 U.S. 74, 81 (2007) (use of passive voice in statutory phrase "to be used" in 18 U.S.C. § 924(d)(1) reflects "agnosticism . . . about who does the using"). So, contrary to Plaintiffs' contention and the circuit court's holding, the plain language of Wis. Stat. § 6.87(4)(b)1. does not demand that only the elector place the envelope in a mailbox or hand deliver it to the clerk. The plain language of the statute shows that the Legislature intended persons other than the elector herself to "mail" and "deliver[ ]" the absentee ballot.

Further, this reading of Wis. Stat. § 6.87(4)(b)1. to allow someone other than the elector to place the absentee ballot in the mailbox or delivery it also conforms it to the federal Voting Rights Act's disability-assistance provision. Section 208 of the

Voting Rights Act provides, in pertinent part, that "[a]ny voter who requires assistance to vote by reason of . . . disability . . . may be given assistance by a person of the voter's choice." 52 U.S.C. § 10508. A disabled Wisconsin elector who is physically unable to personally deliver her absentee ballot to a mailbox or to the clerk has a federal right to choose another person to assist her in submitting her ballot. Plaintiffs' and the circuit court's narrow reading of Wis. Stat. § 6.87(4)(b)1. conflicts with this federal law, but the Commission's does not.

B. Plaintiffs' interpretation of Wis. Stat. § 6.87(4)(b)1. is not supported by the related statutes on which they rely.

1. Wis. Stat. §§ 6.875, 6.86(1)(b) and 6.86(3) do not support Plaintiffs' claim.

In support of their cramped interpretation of Wis. Stat. § 6.87(4)(b)1., Plaintiffs argue that the provision's requirements for returning an absentee ballot must be read in the context of other statutory procedures for absentee voting by electors in special circumstances that make it burdensome for them to personally return their own absentee ballot. Plaintiffs have cited statutes concerning voters residing in certain retirement and residential care facilities (Wis. Stat. § 6.875); sequestered jurors (Wis. Stat. § 6.86(1)(b)); and hospitalized voters (Wis. Stat. § 6.86(3)). (J.-App. 82–83.) According to Plaintiffs, procedures in those statutes include safeguards to prevent fraud or coercion that are inconsistent with the Commission's reading of Wis. Stat. § 6.87(4)(b)1. that generally permits an absentee voter's ballot to be placed in the mail or returned to the clerk by a person other than the elector. (J.-App. 82–83.) This argument fails because the statutory procedures on which Plaintiffs rely are all distinguishable.

First, the special procedural safeguards to which Plaintiffs point in Wis. Stat. § 6.875 do not relate to regular absentee voting—*i.e.*, to receiving and completing an absentee ballot at a location other than a polling place and then mailing or delivering the ballot to the clerk—but rather to a special *in-person* absentee voting procedure under which electors residing in certain retirement and residential care facilities can receive, complete, and return an absentee ballot within the facility via a special voting deputy. *See* Wis. Stat. § 6.875(6)(a)–(d). Returning a *regular* absentee ballot by mail or delivery to the clerk, however, does not require the same kinds of safeguards as does such in-person absentee voting. To the contrary, Wis. Stat. § 6.875(6)(e) specifically allows an elector who resides in such a facility to alternatively use regular absentee voting if she has been unable to use the special voting deputy process. Plainly, the Legislature did not intend to require that the special safeguards of the special voting deputy procedure must *always* apply.

Second, the provision for hospitalized electors to which Plaintiffs point similarly allows the elector not merely to return an absentee ballot via an agent, but also to use an agent to apply for and obtain an absentee ballot, to register to vote, and even sign ballot or registration documents, if the elector is unable to sign due to a physical disability. *See* Wis. Stat. § 6.86(3)(a)–(c). It thus makes sense that there are special procedures for a hospitalized elector's agent that need not apply generally to agents for other absentee electors.

Third, absentee voting by sequestered jurors obviously requires its own special safeguards, not because of concerns about the general vulnerability of absentee voting to fraud or coercion, but because any contact of a sequestered juror with third persons must be carefully restricted to protect the integrity of the *judicial* process. *See* Wis. Stat. § 6.86(1)(b). That is why the statute specifies that the judge shall act as

the agent for a sequestered juror. Again, the concerns giving rise to such special procedures for sequestered jurors have no significant parallel for absentee voters in general.

2. Wisconsin Stat. § 12.13(3)(n) does not criminalize permitted behavior under Wis. Stat. § 6.87(4)(b)1.

Plaintiffs also rely, in part, on Wis. Stat. § 12.13(3)(n), which make it a crime to "receive a ballot from or give a ballot to a person other than the election official in charge." According to Plaintiffs, that prohibition is violated if an absentee elector permits someone else to place her completed absentee ballot into a mailbox or to personally deliver it to an authorized representative of the clerk. (J.-App. 83, 89.)

That argument fails because, for the reasons shown above, the plain language of Wis. Stat. § 6.87(4)(b)1. permits an agent acting on behalf of an elector either to place the elector's absentee ballot into a mailbox or to personally deliver the ballot to an authorized representative of the clerk. That provision also expressly allows employees of the USPS to receive, handle, and deliver absentee ballots. Section 12.13(3)(n) cannot be construed as criminalizing behavior that is affirmatively authorized by other election statutes. If that were the case, then it would also criminalize the special absentee voting procedures on which Plaintiffs rely that were discussed in the preceding section, *see, e.g.,* Wis. Stat. §§ 6.86(3)(c) (authorizing an agent of a hospitalized elector to deliver the elector's ballot to the elector's polling place); 6.86(1)(b) (authorizing a judge to return a sequestered juror's absentee ballot to an authorized representative of the clerk), because Wis. Stat. § 12.13(3)(n) references no other statutes as exceptions.

C. Plaintiffs' interpretation of Wis. Stat. § 6.87(4)(b)1. has a disenfranchising impact on indefinitely confined, disabled, and similarly-situated electors.

Many Wisconsin electors with physical mobility limitations would be disenfranchised if Wis. Stat. § 6.87(4)(b)1. required an elector either to personally place her own ballot into a mailbox or to personally deliver her own ballot to the municipal clerk. This Court may take judicial notice of the indisputable fact that some voters have physical illnesses, infirmities, or disabilities that make it impossible or unduly burdensome for them to personally travel to the location of a mailbox, or to a location at which the municipal clerk may lawfully accept the return of absentee ballots.[5] Under Plaintiffs' reading of Wis. Stat. § 6.87(4)(b)1., however, those are the only legally permissible methods for returning an absentee ballot. Their reading of the statute thus makes it impossible for such restricted-mobility voters to cast their absentee ballots.

Plaintiffs do not deny that the circuit court's decision would have this effect on such electors—instead, they seek to sidestep its impact with ineffective counterarguments. (J.-App. 649–50, 684, 687–88.)

First, they suggest that this Court can safely overlook the disenfranchising impact of their position because state law provides numerous exceptions for voters with physical challenges. (J.-App. 649–51 (*citing* Wis. Stat. §§ 6.82; 6.86(1)(ag), (2), and (3); 6.87(5); and 6.875).) None of those statutory provisions, however, provides meaningful relief to the broad category of absentee electors who would be potentially disenfranchised:

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[5] *See also* J.-App. 581–86 (affidavits of electors submitted by DRW post-judgment.)

- Section 6.82 applies to assisting electors at a polling place. It provides no relief to electors who are physically unable to get to a polling place, a mailbox, or a clerk's office.

- Section 6.86(1)(ag) applies to assisting certain electors in filling out an *application* for an absentee ballot. It provides no relief to electors who are physically unable to personally *deliver* their completed absentee ballot to a mailbox or to a clerk's office.

- Section 6.86(2) provides for absentee ballots to be automatically sent to indefinitely confined voters. It provides no relief to electors who are physically unable to personally *deliver* their completed absentee ballot to a mailbox or to a clerk's office. It also does not apply to electors who have a physical illness, infirmity, or disability that does not entirely confine them to their homes, but that nonetheless makes it impossible or unduly burdensome for them to personally get to a mailbox or to a clerk's office.

- Section 6.86(3) allows a hospitalized elector to have an agent deliver the elector's completed absentee ballot, but it applies only to hospitalized electors, not to those who are not hospitalized, but who nonetheless have a physical illness, infirmity, or disability that makes it impossible or unduly burdensome for them to personally get to a mailbox or to a clerk's office.

- Section 6.87(5) allows some absentee electors to obtain assistance with *marking* their absentee ballot, but it provides no relief to voters who are physically unable to personally *deliver* their completed absentee ballot to a mailbox or to a clerk's office.

- Section 6.875 provides a special in-person absentee voting system for electors in certain residential care facilities and retirement homes and, where such electors are unable to vote using that special in-person

> system, it allows them to vote absentee by mail. However, the statute provides no relief to electors who do not reside in a qualified residential care facility or retirement home. It also provides no relief to an elector who does reside in such a facility, but who is unable to use the special in-person voting system and also is physically unable to personally deliver their completed absentee ballot to a mailbox or to a clerk's office.

Plaintiffs' purported reliance on the above "exceptions and carve-outs" totally misses the mark. Implicitly recognizing that fact, they have suggested that such electors seek a special service from the USPS. (J.-App. 650.) But that service is for *delivery* of mail to one's door, rather than to a curbside mailbox. And according to the website, it requires a doctor's recommendation and an evaluation by the USPS to see whether the applicant qualifies: "write a letter requesting this change and attach a statement from a Doctor. The doctor's statement should indicate you are unable to collect your mail from a curb or centralized mailbox. . . . Final determination on whether or not door delivery will be granted will be made by the Post Office."[6] This process is in no way an adequate or relevant remedy for a disabled absentee voter to personally mail her ballot. If this Court affirms the circuit court's order in full, they will not be able to vote.

Finally, as mentioned above, the federal Voting Rights Act includes a provision that allows disabled voters to obtain assistance in the voting process. 52 U.S.C. § 10508. The circuit court's final order, adopting Plaintiffs' cramped reading of Wis. Stat. § 6.87(4)(b)1. runs headlong into this

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[6] USPS, *If I have Hardship or Medical Problems, how do I request Door Delivery?* http://faq.usps.com/s/article/If-I-have-Hardship-or-Medical-Problems-how-do-I-request-Door-Delivery (last visited Feb. 16, 2022).

preemptive federal statute. This Court should therefore not affirm the circuit court's decision.

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The Commission's March 2020 memorandum correctly states that a family member or other person may place an absentee ballot in a mailbox, drop box, or deliver it in person to the municipal clerk on behalf of the elector under Wis. Stat. § 6.87(4)(b)1. Summary judgment in favor of Plaintiffs on this issue should be reversed.

II. The March 31 and August 19, 2020, Commission memoranda provide correct guidance to municipal clerks that they can use secure drop boxes and drop-off locations for electors to return completed absentee ballots.

A. Wisconsin Stat. § 6.87(4)(b)1. permits drop boxes.

Plaintiffs claim that Wis. Stat. § 6.87(4)(b)1. does not allow absentee ballots to be deposited into unstaffed drop boxes outside the clerk's office, and that the Commission's guidance contravenes that statute. The assertion fails because, when an absentee ballot is placed in a secure drop box authorized by the clerk and operated in accordance with the Commission's guidance, that ballot has been "delivered in person, to the municipal clerk," within the meaning of that statute.

Wisconsin Stat. § 6.87(4)(b)1. permits absentee ballots to be returned by "deliver[y] in person, to the municipal clerk." Secure drop boxes approved by the municipal clerk accomplish that. An absentee ballot is personally delivered to a municipal clerk when it is placed in an authorized and secure drop box in a location authorized by the clerk. Under the Commission's guidance, ballots should be retrieved from drop boxes and returned to the clerk's office by authorized

representatives of the clerk who are election officials under Wis. Stat. § 5.02(4e), and who are legally equivalent to the clerk under Wis. Stat. § 5.02(10). Section 6.87(4)(b)1. plainly permits such persons to receive absentee ballots on behalf of the clerk. After ballots are collected from a drop box, the clerk or authorized representative places them in a secure storage location until Election Day, just as with absentee ballots mailed or delivered to the clerk's office. *See* Wis. Stat. § 6.88. A ballot deposited into a secure drop box that is properly administered in accordance with the Commission's guidance, therefore, has been "delivered in person, to the municipal clerk," within the meaning of Wis. Stat. § 6.87(4)(b)1.

Plaintiffs assert that Wis. Stat. § 6.87(4)(b)1. requires in-person delivery of an absentee ballot to occur at the office of the municipal clerk, rather than at a remote drop box location, but the statutory language is silent as to the location where delivery to the clerk may occur. That silence contrasts with other statutes that expressly require certain actions to occur at the clerk's "office"—language that is notably absent from Wis. Stat. § 6.87(4)(b)1. *See, e.g.*, Wis. Stat. §§ 6.86(1)(a)2. (absentee ballot applications made "at the office of the . . . clerk"); 6.87(3)(a) (absentee ballots delivered "at the clerk's office"). When the legislature uses words in one subsection but not in another, "'we must conclude that the legislature specifically intended a different meaning.'" *See Responsible Use of Rural & Agric. Land v. PSC,* 2000 WI 129, ¶ 39, 239 Wis. 2d 660, 619 N.W.2d 888 (quoted source omitted). The Legislature clearly knew how to specify the clerk's "office" when that is what it meant. If it had wanted in-person delivery of absentee ballots to take place only at the clerk's office, it would have said so expressly in Wis. Stat. § 6.87(4)(b)1., as it did in those related statutes.

Plaintiffs also make a policy argument that drop boxes are less secure than mailing a ballot to the clerk's office or

placing it directly into the hands of an authorized representative of the clerk (J.-App. 860–61), but that is unavailing. The Commission's guidance included detailed guidelines about how municipal clerks should use drop boxes in a secure and uniform fashion. (J.-App. 23–6.) The guidance follows recommendations by a working group of the U.S. Cybersecurity and Infrastructure Security Agency. (J.-App. 23, 117, 203–10.) And while hundreds of drop boxes were used statewide to conduct the November 2020 general election and have been used before and after (J.-App. 113, 117–18, 200, 220–32), Plaintiffs have provided no evidence that their use has made elections less secure. The use of drop boxes has become an increasing accepted practice, and they have been used in a significant majority of states, particularly in response to the COVID-19 pandemic. (J.-App. 213–14.) The dearth of evidence about elections being insecure due to drop boxes, and the abundance of evidence of their widespread use throughout Wisconsin and the nation, further undermines Plaintiffs' suggestion that drop boxes are inherently insecure.

Wisconsin Stat. § 6.87(4)(b)1. does not prohibit municipal clerks from establishing secure drop box locations for the return of absentee ballots in conducting elections.

B. Properly authorized drop box locations are not subject to the process for designating an alternate absentee ballot site under Wis. Stat. § 6.855.

Plaintiffs also claim that even a drop box that is staffed by an authorized representative of the clerk—which is legally equivalent to directly returning the ballot to the clerk—is permissible only if the staffed drop-off location is situated either inside the clerk's office or at an alternate absentee ballot site designated under Wis. Stat. § 6.855. The Commission's memoranda did not specifically provide guidance about staffed drop boxes, but they did advise that

clerks could authorize drop box locations (whether staffed or unstaffed), without reference to the alternate absentee ballot site process under Wis. Stat. § 6.855.

Plaintiffs' claim under Wis. Stat. § 6.855 fails because that statute applies only to designating an alternate site for conducting early *in-person* absentee voting and does not apply to locations where completed absentee ballots are merely dropped off with an authorized representative of the clerk. The phrase "absentee voting" in Wisconsin election law includes two distinct voting procedures for an elector who wants to vote but does not plan to vote in person at her designated polling place on Election Day.

First, there is what may be called "true" absentee voting, in which the elector—within a statutorily designated time period—requests an absentee ballot from the clerk's office, receives the ballot from the clerk by mail, and then prior to Election Day returns the completed ballot to the clerk either by mail or in-person delivery. *See* Wis. Stat. § 6.87(4)(b)1. Second, there is early in-person absentee voting, in which—within a statutorily designated time period prior to election day—the elector votes an absentee ballot in person either at the clerk's office or at an alternate voting site designated by the municipality under Wis. Stat. § 6.855. Under this procedure, the elector goes to the voting site, requests and receives an absentee ballot from an authorized representative of the clerk at that site, completes the absentee voting process while at the site, and then returns the completed ballot to an authorized representative of the clerk before leaving the site. *See* Wis. Stat. § 6.855(1).

Plaintiffs argue that staffed drop box locations outside the clerk's office, at which absentee ballots are simply deposited into a secure box, are alternate ballot sites subject to the requirements for approval under Wis. Stat. § 6.855. That is incorrect. The plain language of Wis. Stat. § 6.855

shows that it does not apply to drop boxes. It applies only to alternate absentee ballot sites where the entire in-person absentee voting process takes place—*i.e.*, a location where "electors of the municipality may *request and vote* absentee ballots *and* to which voted absentee ballots shall be returned." Wis. Stat. § 6.855 (emphasis added). If those activities are to occur at a location outside the office of the municipal clerk, then the municipality's governing body must "designate" that location in accordance with the procedures in the statute. *Id*. But a location subject to those procedures "must be a location not only where voters may return absentee ballots, but also a location where voters 'may request and vote absentee ballots." *Trump v. Biden*, 2020 WI 91, ¶ 56, 394 Wis. 2d 629, 951 N.W.2d 568 (Hagedorn, J., concurring) (citation omitted). It is the ability to request *and* vote absentee ballots in person—activities that would otherwise be confined to the municipal clerk's office—that requires an alternate site designation.

Drop boxes, in contrast, lack one of the two required attributes of alternate absentee ballot sites under Wis. Stat. § 6.855(1). Although absentee voters "return" completed ballots to a drop box, they do not "request and vote" a ballot from a drop box. The Commission's guidance, therefore, was correct in advising that municipal clerks could authorize drop box locations, without reference to the alternate absentee ballot site approval of the governing body under Wis. Stat. § 6.855.

The Commission's interpretation of Wis. Stat. § 6.855 is also supported by Wis. Stat. § 6.87(3)(a), which provides that "[i]f the ballot is delivered to the elector at the clerk's office, or an alternate site under s. 6.855, the ballot shall be voted at the office or alternate site and may not be removed by the elector therefrom." That provision and Wis. Stat. § 6.855 clearly refer to situations in which electors are not receiving

their absentee ballots by mail, but rather are receiving unsealed ballots and voting those ballots at the same location.

The Commission guidance challenged by Plaintiffs does not relate to early in-person absentee voting, so Wis. Stat. § 6.855 simply does not apply.

***

The Commission's memoranda correctly state that municipal clerks may designate drop box locations for return of absentee ballots under Wis. Stat. § 6.87(4)(b)1., without violating Wis. Stat. § 6.855. Summary judgment in favor of Plaintiffs on this issue should be reversed.

III. The Commission memoranda are "guidance documents" and not administrative "rules".

Plaintiffs' Wis. Stat. § 227.40[7] alternative declaratory judgment claim should also have been dismissed by the circuit court, and judgment entered against them, because the two Commission memoranda are merely "guidance documents" and not administrative "rules."

"[A] rule for purposes of ch. 227 is (1) a regulation, standard, statement of policy or general order; (2) of general application; (3) having the effect of law; (4) issued by an

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[7] Plaintiffs' contention that their claims are brought under Wis. Stat. § 806.04, as well as under Wis. Stat. § 227.40, (*see* J.-App. 11–12), should be rejected. A declaratory judgment action under Wis. Stat. § 227.40 is the "exclusive" method for challenging agency guidance documents like the Commission memoranda at issue here. Wis. Stat. § 227.40(1) ("Except as provided in sub. (2), the exclusive means of judicial review of the validity of a rule or guidance document shall be an action for declaratory judgment as to the validity of the rule or guidance document brought in the circuit court for the county where the party asserting the invalidity of the rule or guidance document resides").

agency; (5) to implement, interpret or make specific legislation enforced or administered by such agency as to govern the interpretation or procedure of such agency." *Wis. Legis. v. Palm*, 2020 WI 42, ¶ 22, 391 Wis. 2d 497, 942 N.W.2d 900.

The Commission memoranda at issue here are not rules because they do not have "the force of law." Wis. Stat. § 227.01(13); *Palm*, ¶ 22, 391 Wis. 2d 497 (using phrase "the effect of law").

Plaintiffs have argued that the memoranda direct the municipal clerks to act. (J.-App. 91–92.) Not true. "In determining whether a provision has the 'force of law,' the language of the purported rule will often provide the answer." *Papa v. DHS*, 16AP2082, 17AP634, 2019 WL 3432512 (Wis Ct. App. July 19, 2019) (unpublished), *aff'd in part, rev'd in part*, 2020 WI 66, ¶ 16, 393 Wis. 2d 1, 946 N.W.2d 17. When language in an agency document uses "express mandatory language," it is "more than informational" and is "intended to have the effect of law." *Milwaukee Area Joint Plumbing Apprenticeship Comm'n v. DILHR*, 172 Wis. 2d 299, 321 n.12, 493 N.W.2d 744 (Ct. App. 1992).

Here, there is no express mandatory language contained in either memorandum. On the contrary, the first sentence in the August memorandum states, "This document is intended to provide *information and guidance*." (J.-App. 23 (emphasis added).) In addition, the March memorandum poses a question asked by a local election official, "*Can* I establish drop boxes . . . ?" The Commission answers, "Yes, drop boxes *can* be used for voters to return ballots." (J.-App. 20 (emphasis added).) The memoranda's clear language does not reveal that the Commission is *requiring* that local election officials establish drop boxes.

Another indicator of whether an agency material has the force of law is "where criminal or civil sanctions can result as a violation." *Cholvin v. DHFS*, 2008 WI App 127, ¶ 26, 313 Wis. 2d 749, 758 N.W. 2d 118. Here, the memoranda describe no penalty imposed by the Commission if municipal clerks do not follow the "information and guidance."

Plaintiffs have contended that because the Commission has the general power and duty to administer elections laws and may order a municipal clerk to conform her conduct to comply with state election laws, *see* Wis. Stat. §§ 5.05(1), (2m), (7), (12), 5.06(1), and Wis. Admin. Code EL § 12.04, these memoranda have the effect of law. (J.-App. 90–92.) This argument misses the mark for two reasons.

First, if the mere fact that an agency's general power and duty to administer laws under its jurisdiction is enough to make all guidance by that agency a "rule," the distinction between "guidance documents" and "rules" would be swallowed up. The Legislature's recent definition of "guidance documents" at the same time it amended the definition of "rule" would have been pointless. *See* 2017 Wis. Act 369, §§ 31 & 32. Unsurprisingly, Plaintiffs cite no case law to back up their novel position, so this Court can ignore it. *See Milwaukee Metro. Sewerage Dist. v. City of Milwaukee*, 2005 WI 8, 277 Wis. 2d 635, ¶ 87 n.30, 691 N.W.2d 658 ("An appellate court need not consider arguments that are inadequately briefed." (citing *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633)); *Pettit*, 171 Wis. 2d at 646 ("Arguments unsupported by references to legal authority will not be considered.").

Second, as explained above, the memoranda do not order municipal clerks to conform their conduct to the law. Only a Commission order issued at the conclusion of a complaint process would do that. *See* Wis. Stat. § 5.06. But there is no Commission order at issue here. Given the Commission's permissive language regarding drop boxes, it is

hard to imagine how its guidance could form the basis for a finding under § 5.06.

So, rather than "rules" under ch. 227, the Commission memoranda are "guidance documents." The memoranda merely "guide" local election officials; they do not "order" or "direct" them. Guidance documents, unlike rules, do not have the force of law. *See* Wis. Stat. § 227.112(3) ("A guidance document does not have the force of law and does not provide the authority for implementing or enforcing a standard, requirement, or threshold."); *Serv. Emps. Int'l Union, Loc. 1 v. Vos*, 2020 WI 67, ¶ 102, 393 Wis. 2d 38, 946 N.W.2d 35 ("*SEIU*") (interpreting Wis. Stat. § 227.01(3m) to define guidance document as having no "force or effect of law").

Guidance documents, of course, do not have to be promulgated as rules do. Indeed, this Court held that the statutory procedure created in 2017 Act 369 governing the creation of guidance documents violated the constitutional separation of powers doctrine. *SEIU*, 393 Wis. 2d 38, ¶¶ 90, 105–08. Thus, guidance documents do not have to follow the statutory procedural requirement for adoption—as opposed to promulgation—at all.

For all these reasons, any lack of "promulgation" of the two Commission memoranda is irrelevant to Plaintiffs' "rule" claim.

CONCLUSION

Defendant-Co-Appellant Wisconsin Elections Commission respectfully asks this Court to reverse the final order of the circuit court and grant the Commission summary judgment on all three claims.

Dated this 17th day of February 2022.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,713 words.

Dated this 17th day of February 2022.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12) (2019–2020)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12) (2019–20).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 17th day of February 2022.

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Exhibit G

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CLERK OF WISCONSIN
SUPREME COURT

SUPREME COURT OF WISCONSIN
No. 2022AP0091

Richard Teigen and Richard Thom
Plaintiffs-Respondents-Petitioners,

v.

Wisconsin Elections Commission,
Defendant-Co-Appellant,

Democratic Senatorial Campaign Committee,
Intervenor-Defendant-Co-Appellant,

Disability Rights Wisconsin,
Wisconsin Faith Voices for Justice, and
League of Women Voters of Wisconsin,
Intervenors-Defendants-Appellants.

Appeal from Waukesha County Circuit Court
The Honorable Michael O. Bohren, Presiding
Circuit Court Case No. 2021CV0958

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

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Does the doctrine of sovereign immunity bar this suit, given that Plaintiffs did not first file their complaint with the Wisconsin Elections Commission as required by Wis. Stat. ch. 5?

Answer below: Though this threshold issue was raised and briefed below, the circuit court failed to address it.

Appellants' answer: Yes.

2. Does Wisconsin law prohibit eligible Wisconsin voters from receiving assistance in returning their valid, completed absentee ballots?

Answer below: Yes.

Appellants' answer: No.

3. Does Wisconsin law prohibit municipal clerks from establishing secure drop boxes for the return of valid, completed absentee ballots?

Answer below: Yes.

Appellants' answer: No.

4. Are the Wisconsin Elections Commission memos challenged in this matter invalid guidance documents that were instead required by Wisconsin law to be promulgated through the rulemaking process?

Answer below: Yes.

Appellants' answer: No.

STATUTORY PROVISIONS IMPLICATED

Wis. Stat. § 5.01(1)

Construction of chs. 5 to 12. Except as otherwise provided, chs. 5 to 12 shall be construed to give effect to the will of the electors, if that can be ascertained from the proceedings, notwithstanding informality or failure to fully comply with some of their provisions.

Wis. Stat. § 5.05(2m)

Enforcement.

(a) The commission shall investigate violations of laws administered by the commission and may prosecute alleged civil violations of those laws, directly or through its agents under this subsection, pursuant to all statutes granting or assigning that authority or responsibility to the commission. Prosecution of alleged criminal violations investigated by the commission may be brought only as provided in par. (c)11., 14., 15., and 16. and s. 978.05(1). For purposes of this subsection, the commission may only initiate an investigation of an alleged violation of chs. 5 to 10 and 12, other than an offense described under par. (c)12., based on a sworn complaint filed with the commission, as provided under par. (c). Neither the commission nor any member or employee of the commission, including the commission administrator, may file a sworn complaint for purposes of this subsection.

(c)

2.

a. Any person may file a complaint with the commission alleging a violation of chs. 5 to 10 or 12. No later than 5 days after receiving a complaint, the commission shall notify each person who or which the complaint alleges committed such a violation. Before voting on whether to take any action regarding the complaint, other than to dismiss, the commission shall give each person receiving a notice under this subd. 2.a. an opportunity to demonstrate to the

> commission, in writing and within 15 days after receiving the notice, that the commission should take no action against the person on the basis of the complaint. The commission may not conduct any investigation or take any other action under this subsection solely on the basis of a complaint by an unidentified complainant.
>
> …
>
> **(k)** The commission's power to initiate civil actions under this subsection for the enforcement of chs. 5 to 10 or 12 shall be the exclusive remedy for alleged civil violations of chs. 5 to 10 or 12.

Wis. Stat. § 5.06

> **(1)** Whenever any elector of a jurisdiction or district served by an election official believes that a decision or action of the official or the failure of the official to act with respect to any matter concerning nominations, qualifications of candidates, voting qualifications, including residence, ward division and numbering, recall, ballot preparation, election administration or conduct of elections is contrary to law, or the official has abused the discretion vested in him or her by law with respect to any such matter, the elector may file a written sworn complaint with the commission requesting that the official be required to conform his or her conduct to the law, be restrained from taking any action inconsistent with the law or be required to correct any action or decision inconsistent with the law or any abuse of the discretion vested in him or her by law. The complaint shall set forth such facts as are within the knowledge of the complainant to show probable cause to believe that a violation of law or abuse of discretion has occurred or will occur. The complaint may be accompanied by relevant supporting documents. The commission may conduct a hearing on the matter in the manner prescribed for treatment of contested cases under ch. 227 if it believes such action to be appropriate.
>
> **(2)** No person who is authorized to file a complaint under sub. (1), other than the attorney general or a district attorney, may commence an action or proceeding to test

the validity of any decision, action or failure to act on the part of any election official with respect to any matter specified in sub. (1) without first filing a complaint under sub. (1), nor prior to disposition of the complaint by the commission. A complaint is deemed disposed of if the commission fails to transmit an acknowledgment of receipt of the complaint within 5 business days from the date of its receipt or if the commission concludes its investigation without a formal decision.

(3) A complaint under this section shall be filed promptly so as not to prejudice the rights of any other party. In no case may a complaint relating to nominations, qualifications of candidates or ballot preparation be filed later than 10 days after the complainant knew or should have known that a violation of law or abuse of discretion occurred or was proposed to occur.

…

(6) The commission may, after such investigation as it deems appropriate, summarily decide the matter before it and, by order, require any election official to conform his or her conduct to the law, restrain an official from taking any action inconsistent with the law or require an official to correct any action or decision inconsistent with the law. The commission shall immediately transmit a copy of the order to the official. An order issued under this subsection is effective immediately or at such later time as may be specified in the order.

…

(8) Any election official or complainant who is aggrieved by an order issued under sub. (6) may appeal the decision of the commission to circuit court for the county where the official conducts business or the complainant resides no later than 30 days after issuance of the order. Pendency of an appeal does not stay the effect of an order unless the court so orders.

(9) The court may not conduct a de novo proceeding with respect to any findings of fact or factual matters upon which the commission has made a determination, or could have made a determination if the parties had properly presented the disputed matters to the commission for its consideration. The 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, pursuant to the applicable standards for review of agency decisions under s. 227.57.

(10) This section does not apply to matters arising in connection with a recount under s. 9.01.

Wis. Stat. § 6.84

(1) Legislative policy. 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 absent elector to vote for or against a candidate or to cast a particular vote in a referendum; or other similar abuses.

(2) Interpretation. Notwithstanding s. 5.01(1), with respect to matters relating to the absentee ballot process, ss. 6.86, 6.87(3) to (7) and 9.01(1)(b)2. and 4. shall be construed as mandatory. Ballots cast in contravention of the procedures specified in those provisions may not be counted. Ballots counted in contravention of the procedures specified in those provisions may not be included in the certified result of any election.

Wis. Stat. § 6.855(1)

The governing body of a municipality may elect to designate a site other than the office of the municipal clerk or board of election commissioners as the location from which electors of the municipality may request and vote absentee ballots and to which voted absentee ballots shall be returned by electors for any election. The designated site shall be located as near as practicable to the office of the municipal clerk or board of election commissioners

and no site may be designated that affords an advantage to any political party. An election by a governing body to designate an alternate site under this section shall be made no fewer than 14 days prior to the time that absentee ballots are available for the primary under s. 7.15(1)(cm), if a primary is scheduled to be held, or at least 14 days prior to the time that absentee ballots are available for the election under s. 7.15(1)(cm), if a primary is not scheduled to be held, and shall remain in effect until at least the day after the election. If the governing body of a municipality makes an election under this section, no function related to voting and return of absentee ballots that is to be conducted at the alternate site may be conducted in the office of the municipal clerk or board of election commissioners.

Wis. Stat. § 6.87(4)(b)1. (portion at issue emphasized)

Except as otherwise provided in s. 6.875, an elector voting absentee, other than a military elector or an overseas elector, shall make and subscribe to the certification before one witness who is an adult U.S. citizen. A military elector or an overseas elector voting absentee, regardless of whether the elector qualifies as a resident of this state under s. 6.10, shall make and subscribe to the certification before one witness who is an adult but who need not be a U.S. citizen. The absent elector, in the presence of the witness, shall mark the ballot in a manner that will not disclose how the elector's vote is cast. The elector shall then, still in the presence of the witness, fold the ballots so each is separate and so that the elector conceals the markings thereon and deposit them in the proper envelope. If a consolidated ballot under s. 5.655 is used, the elector shall fold the ballot so that the elector conceals the markings thereon and deposit the ballot in the proper envelope. If proof of residence under s. 6.34 is required and the document enclosed by the elector under this subdivision does not constitute proof of residence under s. 6.34, the elector shall also enclose proof of residence under s. 6.34 in the envelope. Except as provided in s. 6.34(2m), proof of residence is required if the elector is not a military elector or an overseas elector and the elector registered by mail or by electronic application and has not voted in an election in this state. If the elector requested a

ballot by means of facsimile transmission or electronic mail under s. 6.86(1)(ac), the elector shall enclose in the envelope a copy of the request which bears an original signature of the elector. The elector may receive assistance under sub. (5). The return envelope shall then be sealed. The witness may not be a candidate. **The envelope shall be mailed by the elector, or delivered in person, to the municipal clerk issuing the ballot or ballots.** If the envelope is mailed from a location outside the United States, the elector shall affix sufficient postage unless the ballot qualifies for delivery free of postage under federal law. Failure to return an unused ballot in a primary does not invalidate the ballot on which the elector's votes are cast. Return of more than one marked ballot in a primary or return of a ballot prepared under s. 5.655 or a ballot used with an electronic voting system in a primary which is marked for candidates of more than one party invalidates all votes cast by the elector for candidates in the primary.

42 U.S.C. § 12132

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

52 U.S.C. § 10508

Any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is warranted in this matter under the standards in Wis. Stat. § (Rule) 809.22(2). Publication is proper under the standards in Wis. Stat. § (Rule) 809.23(1) because the issues raised here are of statewide import and will provide guidance relevant to future elections administration and litigation.

INTRODUCTION

Over the past two years, the popularity of absentee voting skyrocketed. Public debate followed suit: controversy, skepticism, and outright derision of absentee voting grew in proportion to its popularity. But this Court's role is to apply existing law, not to set policy.

Existing law requires reversing the judgment below. As a threshold matter, the circuit court ignored a significant jurisdictional flaw. Because this case was initiated without exhausting mandatory administrative remedies, sovereign immunity bars adjudication of the merits.

Even if this Court reaches the merits, they similarly necessitate reversal. The relevant statutory text—one sentence buried in Wis. Stat. § 6.87(4)(b)1.—is unambiguous and does not support the circuit court judgment. Settled precedent, context, and history all confirm the plain-text meaning. The circuit court's interpretation also creates unnecessary conflicts with federal law and constitutional guarantees.

Finally, the circuit court erred in defining the guidance documents at issue as binding rules.

The Court should reverse the circuit court order.

STATEMENT OF THE CASE

Plaintiffs Richard Teigen and Richard Thom (together "Teigen") filed this suit for declaratory judgment in the Waukesha County Circuit Court. (J. App. 6-19)[1] The suit challenged two memos issued by the Wisconsin Elections Commission ("WEC"), the statewide agency charged with administering Wisconsin election law. Wis. Stat. § 5.05(1). Those memos, issued in March and August of 2020, respectively, provided guidance to municipal election officials on questions related to absentee-ballot-return assistance and the use of secure drop boxes. (J. App. 20-26)

The WEC memos did not break new ground. Indeed, case law and record evidence indicate that both ballot-return assistance and drop boxes had been used in Wisconsin, without

[1] All cites to J. App. are to the two-volume Joint Appendix filed concurrently by DRW, DSCC, and WEC with this brief.

challenge, for years prior to 2020.[2] But the outbreak of the COVID-19 pandemic in March 2020, shortly before Wisconsin's spring 2020 general election and presidential preference primary, significantly increased demand for absentee ballots. Wis. Elections Comm'n, Nov. 3, 2020 Election Data Report at 11 & Table 11 (Feb. 3, 2021).[3] Indeed, in the November 2020 general election, Wisconsin set new records for total voter participation and for the number of votes cast absentee. *Id.* at 3-4 & Table 1.

Disability Rights Wisconsin, the League of Women Voters of Wisconsin, and Wisconsin Faith Voices for Justice (collectively "DRW") petitioned to intervene, as did the Democratic Senatorial Campaign Committee ("DSCC"). (J. App. 42-43, 67-71) WEC took no position on intervention, but Teigen opposed it. (J. App. 72) After briefing and a hearing, the circuit court granted the intervention motions and set an

[2] Simultaneously with this brief, DRW has filed a motion for leave to supplement the record. If that motion is granted, the supplemental information will shed additional light on this factual assertion.

[3] Available at https://elections.wi.gov/node/7329.

expedited schedule for Teigen to move for a temporary injunction and for summary judgment. (J. App. 73-74, 107-108) After all parties briefed Teigen's motions for temporary injunction and for summary judgment, the circuit court twice delayed, on its own initiative and for its own reasons, the hearing on those motions. (J. App. 473-476)

On Thursday, January 13, 2022, the circuit court heard argument on Teigen's motions and issued an oral ruling. (J. App. 477-576) Though argument was lengthy and thorough, there were several key issues that had been briefed—including sovereign immunity, federal preemption, and constitutional conflict—that the circuit court chose not to address in its oral ruling. (J. App. 555-571)

Monday, January 17 was Martin Luther King, Jr. Day. On Tuesday, January 18, DRW filed an emergency motion to stay the order, which had not yet been reduced to written form. (J. App. 577-580) DRW also filed dozens of sworn statements attesting to disenfranchisement that would result from the circuit court's ruling. (J. App. 581-638) On Thursday, January

20, the circuit court entered its written order, granting summary judgment for Teigen, declaring the law, instructing WEC to rescind the guidance memos within one week, and denying Teigen's temporary injunction motion as moot. (J. App. 639-641) DRW promptly appealed. (J. App. 653-660) WEC and DSCC followed suit. (J. App. 661-665, 795-799)

On the afternoon of Friday, January 21, the circuit court held a hearing on DRW's motion. (J. App. 666-705) WEC and DSCC joined DRW's motion. (J. App. 680, 682) After hearing arguments, the circuit court denied DRW's motion for a stay. (J. App. 696-99) Recognizing the imminence of the February 15 election, the circuit court *sua sponte* modified its prior order to accelerate the deadline for WEC to rescind the memos. (J. App. 699-700) The circuit court memorialized that ruling in a written order. (J. App. 800-01)

Late on Friday, January 21, DRW moved the court of appeals for an emergency stay of the circuit court's order through the pendency of the appeal. (J. App. 706-719) WEC then filed its own emergency stay request, seeking relief

through the February 15 nonpartisan primary. (J. App. 720-732) The court of appeals directed expedited briefing over the weekend. (J. App. 733-737) On Monday, January 24, the court of appeals entered a stay through the February 15 election, holding the question of a longer stay in abeyance. (J. App. 751-760)

On Tuesday, January 25, Teigen filed a petition for bypass with this Court and a motion to vacate the court of appeals' stay. (J. App. 802-805) Following expedited briefing, this Court granted bypass and denied the motion to vacate the stay. (J. App. 806-811) In the same order, the Court set an expedited schedule for merits briefing. (*Id.*) The Court subsequently denied DRW and WEC's motions to extend the stay through the latter of the April 5 election or the conclusion of this appeal. *Teigen v. Wis. Elections Comm'n*, No. 2022AP91, Order at 3 (Wis. Feb. 11, 2022).

On February 16, in accord with the circuit court order, WEC rescinded the challenged memos.[4]

[4] Meeting available at https://wiseye.org/2022/02/16/wisconsin-

STANDARD OF REVIEW

This Court reviews *de novo* all issues presented here. Failure to exhaust remedies in an action brought against a state agency presents a question of law, which this Court reviews *de novo*. *PRN Assocs. LLC v. DOA*, 2009 WI 53, ¶61, 317 Wis. 2d 656, 766 N.W.2d 559. This Court reviews summary judgment decisions *de novo*. *Waity v. Lemahieu*, 2022 WI 6, ¶17, --- Wis. 2d ---, --- N.W.2d --- (cited source omitted). Proper interpretation of a statute "is a question of law [reviewed] *de novo*." *Id.*, ¶18 (quoted source omitted). If, as here, the interpretation adopted calls into question the statute's constitutionality, that presents an issue of law subject to *de novo* review. *Metro. Assocs. v. City of Milwaukee*, 2011 WI 20, ¶21, 332 Wis. 2d 85, 796 N.W.2d 717. Finally, the interpretation and proper classification of administrative agency pronouncements presents a question of law that this Court reviews *de novo*. *Papa v. DHS*, 2020 WI 66, ¶19, 393 Wis. 2d 1, 946 N.W.2d 17 (quote source omitted).

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elections-commission-special-meeting-2/.

ARGUMENT

I. Teigen's Failure To Exhaust Administrative Remedies Requires Vacating The Circuit Court's Order Under The Doctrine Of Sovereign Immunity.

Under the constitutional doctrine of sovereign immunity, the State of Wisconsin, including its administrative agencies and officials in their official capacities, "cannot be sued without its consent." *Lister v. Bd. of Regents of Univ. of Wis. Sys.*, 72 Wis. 2d 282, 291, 240 N.W.2d 610 (1976). In accord with Wis. Const. art. IV, § 27, the Legislature has expressly prescribed through the Wisconsin Statutes a mandatory process governing how allegations of election-related misconduct must be filed, reviewed, and adjudicated.

As this Court has recognized, "[t]he rule requiring exhaustion of administrative remedies before initiating judicial proceedings is a doctrine of judicial restraint justified by good policy reasons." *State ex rel. Mentek v. Schwarz*, 2001 WI 32, ¶8, 242 Wis. 2d 94, 624 N.W.2d 150. Here, however, the Legislature has formalized that rule by requiring in statute a

specific administrative process that must be followed before seeking judicial review.

A voter who believes an "election official" (as defined in Wis. Stat. § 5.02(2f)) administered or conducted an election in violation of state law is required to first file "a written sworn complaint" with WEC "promptly … after the complainant knew or should have known that a violation of law or abuse of discretion occurred or was proposed to occur." Wis. Stat. § 5.06 (1), (3). Until such a complaint has been filed and then disposed of by WEC, no voter "may commence an action or proceeding to test the validity of any decision, action or failure to act on the part of any election official." Wis. Stat. § 5.06(2). Only after WEC adjudication may a complainant aggrieved by the disposition appeal to the circuit court. Wis. Stat. § 5.06(8).

Teigen instituted this suit alleging that WEC distributed two memoranda to municipal clerks relating to the return of absentee ballots, one in March 2020 and one in August 2020, that purportedly misstate the law. (J. App. 9-10) Although he also alleges that municipal clerks relied upon these incorrect

statements of law to administer the 2020 general election in violation of state statutes (J. App. 10-11), Teigen provided no facts to support this allegation in his complaint, failed to pursue any discovery to develop this evidence, and provided no evidence of this in his summary judgment motion. (J. App. 6-26, 75-94, 462-472) In effect, Teigen complained that WEC—or, more precisely, memo signatory WEC Administrator Meagan Wolfe, and all municipal clerks who relied upon WEC guidance—conducted the 2020 elections in violation of state election law. Each of these actors is an "election official" as defined in Wis. Stat. § 5.02(4e).

A complaint alleging election-related misconduct by election officials, even where styled as a declaratory judgment action, remains subject to WEC's exclusive review under Wis. Stat. § 5.06 before it is ripe for judicial review. *Kuechmann v. Sch. Dist. of La Crosse*, 170 Wis. 2d 218, 224-25, 487 N.W.2d 639 (Ct. App. 1992) (holding that circuit court lacked jurisdiction over election-related complaint filed not under Wis. Stat. § 5.06, but instead as an action for declaratory and

injunctive relief). This Court recently reiterated that "the legislature can establish limitations on judicial review for the circuit court." *Fabick v. Wis. Elections Comm'n*, No. 2021AP0428-OA, Order at 3 n.4 (Wis. June 25, 2021). Those limitations cannot be shrugged off or wished away just because a circuit court ignores them and this Court grants review. That would run afoul of this Court's recognition that "judicial process matters. Whether and when the judicial power may be exercised is also a matter of law. It would be inappropriate to disregard this law simply because we are presented with legal questions we would like to address." *Id.* at 3.

Even if Teigen's arguments are construed as complaints about violations of state election law rather than complaints directed at statewide election officials, Wisconsin law required Teigen to first bring those issues to WEC for resolution before suing in circuit court. Such complaints trigger WEC's authority to investigate and prosecute alleged civil violations of state election laws. Wis. Stat. § 5.05(2m)(a). The Legislature gave WEC "power to initiate civil actions" that redress the wrongs

identified in such complaints, and it decreed that WEC's civil enforcement power is "*the exclusive remedy* for alleged civil violations of" Wisconsin's election code. Wis. Stat. § 5.05(2m)(k) (emphasis added).

Taken together, Wis. Stat. §§ 5.05 and 5.06 foreclose voters from seeking judicial review in the first instance. But, rather than comply with this well-established and obvious statutory requirement, Teigen ran straight to the courts. Indeed, he recently boasted that he "filed this case three days after the *Fabick* original action was denied." (J. App. 865) Teigen's failure to exhaust administrative remedies dooms his case. This is "not just a matter of judicial formalism," but a necessary safeguard to ensure the judiciary is "no less subject to the rule of law than the other branches of government." *Fabick*, Order at 4.

Where, as here, applicable statutes mandate a method for administrative review, that method is exclusive and must be pursued before a court may exercise jurisdiction. *Kuechmann*, 170 Wis. 2d at 224. In *Kuechmann*, plaintiffs

brought an original action for declaratory and injunctive relief, rather than waiting for and seeking review of a decision by the State Elections Board (a WEC predecessor) under Wis. Stat. § 5.06. *Id.* at 222. Their failure to comply with § 5.06 "deprived the circuit court of jurisdiction." *Id.* at 224 ("When the legislature prescribes the method to review alleged deficiencies in election procedure, the legislature must deem that procedure to provide an adequate review.").[5]

These same principles preclude Teigen's lawsuit, which alleges that WEC and election officials throughout the state administered the 2020 general election in violation of Wisconsin law. But Teigen never filed a complaint with WEC, even though the statutes required him to do so before suing. Wis. Stat. §§ 5.05(2m)(c)2.a., 5.06(1). His failure to follow the prescribed procedure precludes his action. Wis. Stat. §§ 5.05(2m)(k), 5.06(2).

[5] *Fabick* characterizes the limitation here as one "go[ing] to competency, not jurisdiction." Order at 3 n.4 (citing *Village of Trempeleau v. Mikrut*, 2004 WI 79, ¶9, 273 Wis. 2d 76, 681 N.W.2d 190). But sovereign immunity is a constitutional bar against suit, which courts have traditionally understood in jurisdictional terms. Wis. Const. art. IV, § 27; *Kuechmann*, 170 Wis. 2d at 224.

DRW raised this issue below. (J. App. 65, 399-401) Teigen responded with three arguments, all unavailing.

First, Teigen contended that the argument was not properly raised. (J. App. 459) This is both false and irrelevant. The jurisdictional objection was not newly raised in response to the injunction motion because DRW expressly pleaded it as an affirmative defense in answering the complaint. (J. App. 65) And, because sovereign immunity is a jurisdictional bar to the court's jurisdiction, it is properly raised at any juncture, and, once raised, must be adjudicated before the merits. *See Bartus v. DHSS*, 176 Wis. 2d 1063, 1082-83, 501 N.W.2d 419 (1993); *Harrigan v. Gilchrist*, 121 Wis. 127, 224-225, 99 N.W. 909 (1904). The circuit court never even acknowledged this threshold issue. (J. App. 477-576)

Second, Teigen claims that he followed the process set out in Wis. Stat. § 227.40. (J. App. 460) That, too, is both incorrect and beside the point. For one thing, § 227.40 applies "only when" the challenged guidance document "interferes with or impairs … the legal rights and privileges of the

plaintiff." Teigen makes no such showing here.[6] Moreover, a specific statute—like those requiring complaints to WEC—controls over a general one. *See, e.g.*, *Marder v. Bd. of Regents of Univ. of Wis. Sys.*, 2005 WI 159, ¶23, 286 Wis. 2d 252, 706 N.W.2d 110. It follows that § 227.40 cannot excuse Teigen's failure to exhaust his administrative remedies under the specific provisions of the election code. The *Kuechmann* case, decided years after the adoption of § 227.40, underscores the weakness of Teigen's argument.

Third, Teigen claims that someone else's proper process of filing a complaint with WEC absolves his procedural shortcuts. (J. App. 460) That is nonsensical. Another voter—also represented by Teigen's lawyers—filed a WEC complaint about the same issues raised here. *See Pellegrini v. Igl*, No. EL 21-35 (WEC June 29, 2021).[7] Now that WEC dismissed that

[6] DSCC challenged Teigen's standing below (J. App. 304-309, 504-511) and is addressing that issue in its merits brief before this Court.

[7] Notably, the fact that Teigen's counsel represent another plaintiff who did file a WEC complaint about the same issues raised here belies Teigen's argument that Wis. Stat. § 5.06(1) cannot reach complaints about WEC itself. That argument flies in the face of Wis. Stat. § 5.02(4)'s broad definition of "election official." It also ignores the similarly broad scope of Wis. Stat. § 5.05(2m)(c)2.a., which, as explained above, also requires

complaint, Pellegrini is pursuing judicial review. *See Pellegrini v. Wis. Elections Comm'n*, No. 2022CV4 (Waukesha Cnty. Cir. Ct., filed Jan. 4, 2022). But neither Pellegrini's adherence to proper process nor the involvement of Teigen's counsel in that case excuses the flaws fatal to this matter.

* * *

Teigen's overt failure to exhaust administrative remedies, which is mandatory under Wisconsin law, dooms his case. Because Teigen has not followed the statutorily prescribed exclusive procedure, the Legislature has not waived sovereign immunity. Accordingly, this Court should vacate the circuit court order and remand with instructions to dismiss.

II. The Circuit Court Ruling Is Based On Incorrect Interpretations Of Relevant Statutory Text.

Even if this Court reaches the merits of Teigen's statutory argument, his claims fail on the merits.

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administrative exhaustion before judicial review. And it is legally insufficient regardless, as this Court refuses to create "futility" exceptions not included in exhaustion requirements. *State ex rel. Hensley v. Endicott*, 2001 WI 105, ¶9, 245 Wis. 2d 607, 629 N.W.2d 686.

A. Wisconsin's statutory construction rules are clear.

"The purpose of statutory interpretation and application is to apply the meaning of the words the legislature chose." *Jefferson v. Dane Cnty.*, 2020 WI 90, ¶21, 394 Wis. 2d. 602, 951 N.W.2d 556 (citing *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶44, 271 Wis. 2d 633, 681 N.W.2d 110). "[S]tatutory interpretation 'begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.'" *Kalal*, 2004 WI 58, ¶45 (quoting *Seider v. O'Connell*, 2001 WI 76, ¶43, 236 Wis. 2d 211, 612 N.W.2d 659). "Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning. *Id.* (citing *Bruno v. Milwaukee Cnty.,* 2003 WI 28, ¶¶8, 20, 260 Wis. 2d 633, 660 N.W.2d 656).

"In construing or interpreting a statute the court is not at liberty to disregard the plain, clear words of the statute." *Id.*, ¶46 (quoting *State v. Pratt,* 36 Wis. 2d 312, 317, 153 N.W.2d 18 (1967)). However, the Court recently unanimously rejected

a "literalistic" approach to statutory interpretation, recognizing that "literalness may strangle meaning." *Brey v. State Farm Mut. Auto. Ins. Co.*, 2022 WI 7, ¶11, --- Wis. 2d ---, --- N.W.2d --- (quoted sources omitted); *accord id.*, ¶13 ("Statutory interpretation centers on the "ascertainment of meaning," not the recitation of words in isolation"). "Properly applied, the plain-meaning approach is not 'literalistic'; rather, the ascertainment of meaning involves a 'process of analysis' focused on deriving the fair meaning of the text itself." *Id.*, ¶11 (cited sources omitted). The Court noted that "no interpretive fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts." *Id.*, ¶13 (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012)).

Similarly, the Court has consistently stressed both that "[c]ontext is important" and that statutory language is interpreted "not in isolation but as part of a whole; in relation

to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Id.* (citing *State v. Delaney,* 2003 WI 9, ¶13, 259 Wis. 2d 77, 658 N.W.2d 416; *Landis v. Physicians Ins. Co. of Wis.*, 2001 WI 86, ¶16, 245 Wis. 2d 1, 628 N.W.2d 893; *Seider*, 2001 WI 76, ¶43).

The Court "will not add words into a statute that the legislature did not see fit to employ." *Jefferson*, 2020 WI 90, ¶25 (citing *Dawson v. Town of Jackson*, 2011 WI 77, ¶42, 336 Wis. 2d 318, 801 N.W.2d 316); *see also, e.g.*, *County of Dane v. LIRC*, 2009 WI 9, ¶33, 315 Wis. 2d 293, 759 N.W.2d 571; *C. Coakley Relocation Sys., Inc. v. City of Milwaukee*, 2008 WI 68, ¶24 & n.10, 310 Wis. 2d 456, 750 N.W.2d 900. This accords with "the maxim[] of statutory construction [] that courts should not add words to a statute to give it a certain meaning." *DOC v. Schwarz*, 2005 WI 34, ¶20, 279 Wis. 2d 223, 693 N.W.2d 703 (internal quotation marks and citations omitted).

B. Wisconsin law, properly construed, does not prohibit voters from receiving assistance returning their completed absentee ballots.

Applying these settled interpretive principles reveals the circuit court's interpretation of the statutes at issue as unsustainable. The plain statutory text does not support the circuit court's approach. Neither does context, nor history. And, if the unanimous verdict of these principles is not sufficient, the circuit court's construction creates a conflict between Wisconsin law and federal law, which would necessitate preemption.

1. Wisconsin Stat. § 6.87(4)(b)1.'s plain text does not prohibit ballot-return assistance.

With respect to ballot-return assistance, the relevant statutory text reads: "The [absentee-ballot] envelope shall be mailed by the elector, or delivered in person, to the municipal clerk issuing the ballot or ballots." Wis. Stat. § 6.87(4)(b)1. The circuit court declared this to mean that "an elector must personally mail or deliver his or her own absentee ballot, except where the law explicitly authorizes an agent to act on an elector's behalf," such that "the only lawful methods for

casting an absentee ballot pursuant to Wis. Stat. § 6.87(4)(b)1. are for the elector to place the envelope containing the ballot in the mail or for the elector to deliver the ballot in person to the municipal clerk." (J. App. 640)

The circuit court's declaration presumes that the statute says, "The envelope shall be mailed by the elector in person." But the statute does not say that. And the circuit court never explained how it derived this ruling from the actual text of the statute. This is the entirety of the circuit court's reasoning:

> I'm satisfied that in reading that sentence that when it says, "the envelope shall be mailed by the elector or delivered in person," that means that it's the elector that delivers it in person, not somebody else. I don't see any language in the statute that provides a basis for having agents, somebody other than the elector, actually deliver the ballot.
>
> And that's been a controversy that is key to the Plaintiff[s'] case and it's certainly key to the [d]efense, to the Election Commission's case and those that support the [C]ommission. In reading that statute and looking at the, if you will, the ritual for voting in person, and if you will, the ritual for voting by absentee, it requires the elector to be principally involved. It doesn't require other people to be involved.

(J. App. 562)

The circuit court's rationale cannot withstand scrutiny. This is primarily true because the circuit court incorrectly

framed the issue; the question is not, as the circuit court put it, whether the statute "require[s] other people to be involved," but whether the statute can abide other people being involved where necessary. The answer to the proper question is yes, because nothing in the statute precludes others from helping an elector return their validly voted absentee ballot.

Plain text dictates this conclusion. The Legislature chose to use the passive voice—"the envelope shall be mailed"—which makes it hard to determine exactly who the statute expects to undertake an action. But the clear guidance here comes from binding precedent, which construes this precise text as allowing ballot-return assistance. In *Sommerfeld v. Board of Canvassers of City of St. Francis*, 269 Wis. 299, 69 N.W.2d 235 (1955), this Court confronted the same statutory phrase, which then appeared in a predecessor statute. The Court determined that the text could not be logically read as Teigen demands:

> If our statute is construed to mean that the voter shall himself mail the ballot or personally deliver it to the clerk, then the statute would defeat itself in the case of those who are sick or physically disabled. They would be unable to mail ballots except through an agent. Having

> made provision that these unfortunate people can vote, we cannot believe that the legislature meant to disenfranchise them by providing a condition that they could not possibly perform.

Id. at 303. The circuit court here not only disregarded this Court's binding precedent in *Sommerfeld*—which has been the law in Wisconsin for almost 70 years—but rooted its error in an appeal to history: "the ritual for voting by absentee."[8] That explanation underscores that nothing in the plain text of the statute clearly prohibits ballot-return assistance.

Moreover, the punctuation within the statutory sentence underscores this conclusion and dooms Teigen's insistence that the circuit court conducted a plain-text reading. Indeed, "the meaning of a statute will typically heed the commands of its punctuation." Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* at 139 (quoting *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 454 (1993)). It is commonly understood that "[p]unctuation in a legal text" often determines "whether a modifying phrase or

[8] Notably, the circuit court's reliance on "ritual" has no basis in the record, in any party's arguments, or in applicable legal authority; it is a tangential frolic pursued *sua sponte*.

clause applies to all that preceded it or only to a part." *Id*. In fact, "the body of a legal instrument cannot be found to have a 'clear meaning' without taking account of its punctuation," which is "often integral to the sense of written language." *Id*.

Relevant here, commas surround the phrase "or delivered in person," requiring that phrase be read as a whole. Consequently, the adverbial phrase "in person" modifies only the verb "delivered" and does not modify the separate, preceding phrase, "mailed by the elector." If the commas set off only the first two words—so that the text read "The envelope shall be mailed by the elector, or delivered, in person"—then the adverbial phrase "in person" would modify both "mailed" and "delivered," as necessary to credit Teigen's position. But the actual text authorizes two independent options for submitting an absentee ballot: "mailed by the elector" or "delivered in person." The "in person" qualifier does not apply to mailing.

Furthermore, as this Court held in *Sommerfeld*, even though the "in person" qualifier modifies the verb "delivered,"

the statutory text does not actually require the elector to personally deliver their absentee ballot to the clerk. The *Sommerfeld* Court held that this text allowed someone else to return an elector's absentee ballot. This Court has repeatedly held that the Legislature "is presumed to be aware of existing laws and the courts' interpretations of those laws." *Schill v. Wis. Rapids Sch. Dist.*, 2010 WI 86, ¶103, 327 Wis. 2d 572, 786 N.W.2d 177. In this instance, no such presumption is necessary; the Legislature was clearly aware, as demonstrated by introduction and consideration of bills to amend this aspect of the law.[9] If the Legislature disagrees with this Court's construction of a statute, the Legislature then bears the onus of amending the statute.

Here, in the wake of *Sommerfeld*, the Legislature significantly amended and reorganized the election code but retained the identical statutory language at issue in *Sommerfeld*

[9] For example, 2019 AB 247, among other pre-2020 proposals, sought to codify a crime for obtaining an absentee ballot from another person and then failing to deliver it to the clerk for counting. That necessarily recognizes that actually delivering the ballot to the clerk on behalf of another person is proper and already lawful.

and now again here. It follows that the plain text provides no basis for reversing *Sommerfeld* as would be necessary to accept the circuit court's adoption of Teigen's position. Indeed, where, as here, "a word or phrase has been authoritatively interpreted by the highest court in a jurisdiction, or has been given a uniform interpretation by inferior courts or the responsible agency, a later version of that act perpetuating the wording is presumed to carry forward that interpretation." Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* at 247.[10]

[10] Admittedly, decades after the *Sommerfeld* decision, the Legislature promulgated Wis. Stat. § 6.84(2), which says certain provisions, including Wis. Stat. § 6.87, should be strictly construed. This does not change the analysis for two reasons. *First*, the instruction in § 6.84(2) does not displace this Court's binding interpretation in *Sommerfeld*; if the Legislature wanted to establish that no one but the elector could have any role in returning the elector's absentee ballot, it would have needed to clarify the statutory language about ballot return, which had been definitively interpreted by this Court. The Legislature chose not to do so. *Second*, as discussed in Part II.D below, applying § 6.84(2) as the circuit court did below renders that provision unconstitutional.

2. The construction adopted below cannot be correct because it leads to untenable and absurd results.

The circuit court's interpretation should also be rejected because it fails to consider the interaction between Wis. Stat. § 6.87(4)(b)1. and the whole of Wisconsin's election code, thereby creating absurd and unreasonable results, as discussed below. This is contrary to Wisconsin law. *See Kalal*, 2004 WI 58, ¶46 (citing *Delaney,* 2003 WI 9, ¶13; *Landis*, 2001 WI 86, ¶16; *Seider*, 2001 WI 76, ¶43).

Throughout this case, Teigen has highlighted a bevy of Wisconsin statutes that authorize assistance for certain classes of Wisconsin voters completing their ballots. (J. App. 82-83, 485-486, 545-547, 744-745, 857, 876-877) None of those statutes, as Teigen has emphasized, authorizes ballot-return assistance. (J. App. 82-83) But these other provisions do not support the circuit court's construction of Wis. Stat. § 6.87(4)(b)1. To the contrary, considering § 6.87(4)(b)1. in this broader context makes clear that the circuit court's cramped construction cannot stand. As the *Sommerfeld* Court

concluded decades ago, it defies belief to read the election code as containing both express provisions that help those in need to complete their ballots and a provision forbidding any help for those same voters to return their ballots so that they can be counted. 269 Wis. at 303. Such an absurd construction cannot stand. The circuit court erred by adopting a hyper-literal approach and construing § 6.87(4)(b)1. in isolation, rather than in the context of the election code as a whole. *See Brey*, 2022 WI 7, ¶14 n.6 (rejecting an "atextual narrow reasoning by disregarding" other portions "of the same … statutory scheme"). Wisconsin Stat. § 6.87(4)(b)1. must be harmonized with other provisions of the election code to create a cogent whole. Such "a 'process of analysis' focused on deriving the fair meaning of the text," *Brey*, 2022 WI 7, ¶11, requires recognizing that ballot-return assistance is lawful.

The circuit court's cramped construction also creates other practical difficulties that are unreasonable. The order below puts election administrators in an impossible situation. It interprets Wis. Stat. § 6.87(4)(b)1. as allowing return of an

absentee ballot only by the voter to whom the ballot was issued. But it provides no clarity on how an election official should comply with that statute. If the election official does not know an individual voter by sight, there is no obvious way to ensure that the person returning the ballot is the person who voted the ballot.

It may seem that a potential solution is for the election official to check the voter's identification, but that is not prescribed in the statute and is therefore not permitted. As WEC has recognized, "only the Legislature can establish individual voter qualifications." Wis. Elections Comm'n, Memo at 1 (July 31, 2020).[11] It follows that "WEC, along with state agencies, county or local governing bodies and/or election officials, cannot pass ordinances or establish rules that add qualifications for an eligible elector to cast a ballot." *Id.* Absentee voters must meet ID requirements to obtain their ballots. Having done so, they cannot be required to show identification again to return their ballot—at least not without

[11] Available at https://elections.wi.gov/node/6981.

an express statutory mandate. The absence of such a mandate—and the Hobson's choice facing election officials who want to comply with the circuit court's order and honor their obligations not to impose unauthorized obstacles to voting—confirms that the Legislature could not have intended the circuit court's interpretation of Wis. Stat. § 6.87(4)(b)1.

Reading Wis. Stat. § 6.87(4)(b)1. in context reveals the circuit court's construction to be both unreasonable and absurd. It must be rejected.

3. Settled precedent confirms that ballot-return assistance is established, lawful practice in Wisconsin elections, and the political branches have chosen not to prohibit that practice.

As noted above, the *Sommerfeld* Court held almost 70 years ago that the statutory text—which has not changed—authorizes ballot-return assistance. This is particularly notable because *Sommerfeld* dealt with an extreme example of ballot-return assistance, akin to Teigen's hypothetical complaint about "ballot harvesting." In *Sommerfeld*, the parties stipulated to the fact that one individual collected completed absentee

ballots from 18 electors who all lived in the same building and returned them in a single bundle to the city clerk. 269 Wis. at 301. Here, Teigen has made no effort to substantiate anything similar as an actual practice in present-day elections; he rails against so-called "ballot harvesting" but provides rhetorical heat rather than clarifying light.[12]

While *Sommerfeld*'s approval of ballot-return assistance is binding precedent, it is not the only relevant history here. The Legislature recently considered bills to prohibit ballot-return assistance. *See* 2021 Senate Bill 203 and Assembly Bill 192.[13] Those proposals have not become law. But the existence of such proposals—and the fact that a majority of the Legislature voted for such a proposal last year—evidences the Legislature's recognition that current law authorizes ballot-return assistance. If, as Teigen contends,

[12] To be clear, what Teigen calls "ballot harvesting" is lawful in Wisconsin under Wis. Stat. § 6.87(4)(b)1. and *Sommerfeld*. But even if returning absentee ballots for groups of voters were held to be unlawful, that would not necessarily support the circuit court order, which prohibits *all* absentee ballot-return assistance.

[13] https://docs.legis.wisconsin.gov/2021/related/proposals/sb203; https://docs.legis.wisconsin.gov/2021/related/proposals/ab192.

current law already forbids ballot-return assistance, these proposed amendments would be unnecessary and nonsensical. That a majority of the Legislature voted for a bill to outlaw ballot-return assistance underscores that such assistance is allowed under current law.[14]

4. Federal law preempts the circuit court's construction with respect to ballot-return assistance.

Text, punctuation, context, and history uniformly require reversing the circuit court's order barring ballot-return assistance. An additional factor also necessitates reversal: interaction between state and federal law.

Federal voting-rights law guarantees that "[a]ny voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance

[14] Indeed, even former Lieutenant Governor Rebecca Kleefisch, who recently petitioned this Court to exercise original jurisdiction over several issues, including the ones raised here, has acknowledged that ballot-return assistance is allowed under current law. *See* Molly Beck, *'As dumb as a bag of hammers': Kevin Nicholson goes after fellow Republican Rebecca Kleefisch on 'ballot harvesting' strategy*, Milwaukee Journal Sentinel (Oct. 27, 2021), available at https://www.jsonline.com/story/news/politics/elections/2021/10/27/republican-governor-rivals-kevin-nicholson-rebecca-kleefisch-tangle-over-ballot-harvesting-plan/8552648002.

by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union." 52 U.S.C. § 10508. The assistance addressed here is not limited to completing an absentee ballot but also extends to returning that ballot so it may be counted. *See* S. Rep. No. 417, 97th Cong., 2d Sess. at 62-63 (explaining that a state law may not, consistent with § 10508, "deny assistance at some stages of the voting process during which assistance was needed"). To say otherwise renders the statute absurd and its guarantee illusory, in the same way that this Court's *Sommerfeld* decision recognized in 1955 with respect to Wisconsin law.

The Americans with Disabilities Act ("ADA") similarly requires allowance of ballot-return assistance for those who need that help due to disability. Title II of the ADA addresses state and local government programs, including the administration of elections. Title II's "primary mandate" is that "'no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied

the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.'" *Lacy v. Cook Cnty.*, 897 F.3d 847, 852 (7th Cir. 2018) (quoting 42 U.S.C. § 12132). "Voting is a quintessential public activity." *NFIB v. Lamone*, 813 F.3d 494, 507 (4th Cir. 2016); *see also Disabled in Action v. Bd. of Elections in City of N.Y.*, 752 F.3d 189, 199 (2d Cir. 2014). "Title II of the ADA requires state and local governments … to ensure that people with disabilities have a full and equal opportunity to vote." U.S. Dep't of Justice, "The Americans with Disabilities Act and Other Federal Laws Protecting the Rights of Voters with Disabilities."[15] For that reason, courts have repeatedly held that "[t]he ADA's provisions apply to all aspects of voting, including voter registration, site selection, and the casting of ballots, whether on Election Day or during an early voting process." *Id.*

Were this Court to construe Wis. Stat. § 6.87(4)(b)1. in a way that conflicts with the Voting Rights Act and/or the

[15] Available at https://www.justice.gov/file/69411/download.

ADA, the resulting conflict would necessarily preempt the state law. U.S. Const. art. VI, ¶2; Zachary Wyatt, *Federal Preemption of State Law*, Wis. Legis. Reference Bureau, Reading the Constitution Vol. 2, No. 1 (Apr. 2017) ("[W]here federal and state laws conflict, federal law will supersede state law.").[16]

This precise concern was briefed below (J. App. 384), but the circuit court never addressed it. Avoiding pre-emption is an independent reason that this Court should construe Wis. Stat. § 6.87(4)(b)1. to allow ballot-return assistance.

C. Wisconsin law, properly construed, does not prohibit municipal clerks from using secure drop boxes as an additional option for voters to return their completed absentee ballots.

The black-letter principles of statutory interpretation similarly doom the circuit court's ruling against absentee-ballot drop boxes. Here, too, plain text, history, and context all align against the circuit court's construction.

[16] Available at https://docs.legis.wisconsin.gov/misc/lrb/reading_the_constitution/reading_the_constitution_2_1.pdf.

1. The plain text of Wis Stat. § 6.87(4)(b)1. does not prohibit clerks using secure drop boxes as one means of facilitating return of absentee ballots.

With respect to drop boxes, the relevant statutory text is the same: "The [absentee-ballot] envelope shall be mailed by the elector, or delivered in person, to the municipal clerk issuing the ballot or ballots." Wis. Stat. § 6.87(4)(b)1. The circuit court declared this to mean that "the use of drop boxes, … is not permitted under Wisconsin law unless the drop box is staffed by the clerk and located at the office of the clerk or a properly designated alternate site under Wis. Stat. § 6.855." (J. App. 640) Once again, there is no textual basis for this ruling.

The circuit court articulated that it understood the statute to forbid drop boxes solely because "[i]n looking at the statutes, there is no specific authorization for drop boxes." (J. App. 564) The circuit court repeated this conclusion:

> It would appear that the election laws in Wisconsin are very specific, very detailed as to what happens. It's not—the law in the statutes don't say, we'll have an election at certain times and we'll have ballots, and the municipal clerk, it's up to the clerks to figure out how to do it. That's really not the case. These are very specific statutes on how to do things, primarily to protect the integrity of the system.

> I go back to the ritual, if you will, of voting in person. It's really carried over to a great extent to the ritual of voting with an absentee ballot. So I'm satisfied there's no authority, no statutory authority, to issue—to have drop boxes used for the collection of absentee ballots, other than as an alternate absentee ballot side and following that process under 6.855.

(*Id.* at 565-566)

As with ballot-return assistance, the circuit court imports into its reading of the delivery option a requirement absent from the statutory text. For ballot-return assistance, that is applying the "in person" modifier that does not apply. For delivery, the circuit court invents a distinction between staffed and unstaffed drop boxes. The text provides no support for such a distinction. It simply requires the elector to deliver their absentee ballot to the municipal clerk. The "in person" modifier applies here, but it modifies the elector, not the clerk. That is, the statute requires an in-person return to the clerk, not a return to the in-person clerk. As above, both the plain text of the sentence and its punctuation necessitate this interpretation.

Furthermore, the circuit court erred in holding that the statutory text unambiguously requires return to the clerk's office, rather than to the clerk through a mechanism authorized

by the clerk. Several other provisions within the statutes expressly require certain deliveries "to" or actions "in" or "at" the office of the municipal clerk. *See, e.g.*, Wis. Stat. §§ 6.15(2)(bm), 6.28(1)(a), 6.35(3), 6.45(1m), 6.47(2), 6.855. Had the Legislature intended to require absentee ballots be returned only to the clerk's office, it could and would have expressly said so, as it has done in related statutes. The absence of such an explicit requirement underscores that the plain text here grants clerks greater flexibility, including in designating secure drop boxes for collection by the clerk or the clerk's designee as a means of returning absentee ballots.

Nonetheless, the circuit court asserted, on the basis of what it called "ritual"—again, without support in the record or legal authority—that drop boxes are generally unlawful because they are not themselves clerks. But this Court has already cautioned against theories that narrow voting rights based on importing into the statutes a cramped definition of the term "municipal clerk." In *Trump v. Biden*, 2020 WI 91, 394

Wis. 2d 629, 951 N.W.2d 568, Justice Hagedorn's concurrence explained that

> the only reasonable reading of the law would allow those acting on a clerk's behalf to receive absentee ballots, not just the clerk by him or herself. After all, many clerks manage a full office of staff to assist them in carrying out their duties. Accordingly, voters who returned ballots to city election inspectors at the direction of the clerk returned their absentee ballots "in person, to the municipal clerk" as required by § 6.87(4)(b)1.

Id., ¶54 (Hagedorn, J., concurring). By the same logic, absentee ballots placed into a secure drop box designated by the municipal clerk satisfy Wis. Stat. § 6.87(4)(b)1. so long as the ballots are retrieved by "those acting on a clerk's behalf."

Saying otherwise, as Teigen convinced the circuit court to do, veers into the unreasonable, or even the absurd, in the precise way rejected by Justice Hagedorn's concurrence. It constrains clerks from allowing delivery of absentee ballots to their offices at moments no one is available to accept them—even if only because all staff are in a meeting, at lunch, or handling another matter. Thom testified in deposition testimony that he reads Wis. Stat. § 6.87(4)(b)1. to require rejection of any ballot returned in person that is not placed

directly in the hand of the municipal clerk; he went so far as to reject a ballot slid across a counter or a table to the clerk because it was not transferred directly from the elector's hand to the clerk's hand. (J. App. 358) Such an absurdity cannot possibly be the law. *Kalal*, 2004 WI 58, ¶46. This hyper-literal approach to statutory interpretation must be rejected in this case, as it was in *Brey*, 2022 WI 7. Teigen himself recognized the absurdity of this hyper-literal approach. He testified at deposition that "common sense has to prevail. And the statute really doesn't have to be so specific as to say the ballot at one point in time has to touch both my hand and the clerk's hand." (J. App. 339)

Only after the two plaintiffs disagreed on the statute's meaning did they first posit the staffed-unstaffed distinction that the circuit court ultimately adopted. (*Compare* J. App. 85 *with* J. App. 14) But that distinction has no basis in the statutory text, which requires only return to the municipal clerk. As Justice Hagedorn acknowledged in *Trump*, "municipal clerk" is a defined term that includes expressly listed additional

agents "and their authorized representatives." Wis. Stat. § 5.02(10). So the definition expands who the elector must deliver their ballot to; it never says the ballot must be handed directly to someone within that definition. If an elector returns their ballot to a secure drop box designated by the municipal clerk for that person and one of the clerk's authorized representatives collects the ballots from that secure drop box, then Wis. Stat. § 6.87(4)(b)1. has been satisfied. No reasonable reading of the statute supports a contrary conclusion.

Indeed, both Wisconsin legislative leaders and the United States Supreme Court agree with this reasonable interpretation. In a brief filed in June 2020, in reference to in-person absentee voting and "the use of drop boxes for the return of absentee ballots," the Legislature noted that "local officials may elect to provide those additional methods of voting." *Swenson v. Bostelmann*, 3:20-cv-00459-wmc, Dkt. 28 (W.D. Wis. June 6, 2020). Shortly before the November 2020 election, former Wisconsin Solicitor General Misha Tseytlin wrote a letter setting forth the position of Assembly Speaker

Robin Vos and then-Senate Majority Leader Scott Fitzgerald, consistent with the Legislature's stated position. In that letter, he expressed their "wholehearted[] support" for secure drop boxes as a "convenient, secure, ***and expressly authorized*** absentee-ballot-return method[]." (J. App. 233-235) One month later, the U.S. Supreme Court agreed:

> Returning an absentee ballot in Wisconsin is also easy. … [A]bsentee voters who do not want to rely on the mail have several other options. … [T]hey may place their absentee ballots in a secure absentee ballot drop box. Some absentee ballot drop boxes are located outdoors, either for drive-through or walk-up access, and some are indoors at a location like a municipal clerk's office.

Democractic Natl'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 36 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay); *accord id.* at 29 ("[V]oters may return their ballots [to] various "no touch" drop boxes staged locally.") (Gorsuch, J., concurring).[17]

[17] Notably, affirming the circuit court's ruling could have broad effects on the application of other Wisconsin election laws. The Seventh Circuit has held that, in challenges to election laws under the *Anderson-Burdick* framework, individual electoral provisions must be examined in the context of "the state's election code as a whole." *Luft v. Evers*, 963 F.3d 665, 671-72 (7th Cir. 2020). Shortly after *Luft*, the Seventh Circuit stayed an injunction altering several Wisconsin election laws for the 2020 general election. *See Democratic Nat'l Comm. v. Bostelmann*, 977 F.3d 639 (7th Cir. 2020). The Supreme Court affirmed, in part because drop boxes, among other measures, made it easy for Wisconsin voters to cast

Even more recently, the Legislature has considered proposals to rewrite the election code in a way that would significantly limit the use of drop boxes. *See* 2021 Wisconsin Senate Bill 209 and Assembly Bill 177.[18] These proposals, which would rewrite the statute in a way consonant with the circuit court order, have not been enacted into law. In the absence of such amendments, existing law continues to allow clerks to designate drop boxes as a means for electors to securely effectuate in-person return of their absentee ballots.

2. The extensive history of drop boxes in Wisconsin underscores the proper plain-text interpretation.

In lieu of textual exegesis, the circuit court relied on history. The circuit court referred repeatedly to the "ritual of voting." (J. App. 566) In the absence of any textual basis for the circuit court's prescription of ritual, this appears to be an

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their ballots without the district court's remedies. 141 S. Ct. at 35 (Kavanaugh, J., concurring) ("To help voters meet the deadlines, Wisconsin makes it easy to vote absentee."). Were this Court to affirm the circuit court order eliminating drop boxes as one safeguard that underpinned the *Bostelmann* decisions, that reinterpretation of Wisconsin law would affect the *Anderson-Burdick* analysis in future cases.

[18] https://docs.legis.wisconsin.gov/2021/related/proposals/sb209; https://docs.legis.wisconsin.gov/2021/related/proposals/ab177.

invocation of history and personal experience. It is not informed by ***any*** record evidence. Indeed, while Teigen repeatedly asserted that drop boxes were a recent innovation in Wisconsin law (J. App. 95, 682; Teigen Br. in Supp. of Pet. for Bypass at 7), he adduced no evidence for this erroneous proposition. The only record evidence was both to the contrary and unchallenged. (J. App. 773 (citing Aff. Of Meagan Wolfe, Cir. Ct. Dkt. 121, ¶9))[19] The circuit court erroneously adopted Teigen's ahistorical assertions and characterized the WEC memo on drop boxes as "altering what has been and setting … a new policy for how absentee ballots are [] collected." (J. App. 567) This is incorrect, and it invalidates the circuit court's summary judgment decision.

The historical truth that Wisconsin municipal clerks were using drop boxes before 2020 reinforces the plain-text interpretation of Wis. Stat. § 6.87(4)(b)1., demonstrating that

[19] If the Court grants DRW's motion to supplement the record, the supplemental information provides additional evidence contrary to Teigen's repeated assertions. DRW's explanation for providing that evidence at this juncture is presented in the motion.

across different years, different municipalities, different personnel, different state elections agencies, and different contexts, clerks have consistently understood Wis. Stat. § 6.87(4)(b)1. to allow electors to return their absentee ballots via drop box.

3. Wisconsin Stat. § 6.855 is inapposite here, because drop boxes are not locations where ballots are distributed.

As part of its fabricated distinction between staffed and unstaffed drop boxes, the circuit court referenced Wis. Stat. § 6.855(1) to allow that staffed drop boxes are permissible at alternate voting locations. But drop boxes serve solely as repositories, designated by clerks as a secure way for electors to return their ballots to the clerk without relying upon the mail. Drop boxes are not mechanisms for electors to request or receive blank absentee ballots. For that reason, § 6.855(1)—which addresses locations "from which electors of the municipality may request and vote absentee ballots and to which voted absentee ballots shall be returned by electors for any election"—is inapposite and sheds no light here.

D. The canon of constitutional avoidance further militates against the circuit court's reading of Wis. Stat. § 6.87(4)(b)1.

The circuit court relied heavily on Wis. Stat. § 6.84 to guide its thinking. Indeed, when announcing its ruling, the circuit court began its explanation with § 6.84 and returned to it several times. (J. App. 559-564, 570) The centrality of § 6.84 to the circuit court order is problematic, because that provision, as applied by the circuit court, violates the promise of equal protection found in both the state and federal constitutions.

The problem is that Wis. Stat. § 6.84 treats absentee ballots (and the voters who cast them) as less desirable and less reliable than in-person ballots (and the voters who cast those). Wisconsin's election code begins with the overarching principal that election statutes should be construed to give effect to the will of the voter. Wis. Stat. § 5.01(1). The purpose of § 6.84(2) is to exempt certain provisions governing absentee voting from that principle. But, having authorized absentee balloting, the Legislature cannot now impose procedures that make one authorized method of exercising the "fundamental,

inherent right" to vote, *State v. Cir. Ct. for Marathon Cnty.*, 178 Wis. 468, 473, 190 N.W. 563 (1922), more difficult than another, nor may it treat absentee ballots as a lesser class of ballot. Such differential treatment, at minimum, raises serious constitutional concerns under the Equal Protection Clause of both the Wisconsin and the U.S. Constitutions. Wis. Const. art. I, § 1; U.S. Const. amend. XIV, § 1.

It follows that, before interpreting any provision of the election code through the prism of Wis. Stat. § 6.84(2), a court must consider how to harmonize Wis. Stat. §§ 5.01(1) and 6.84 to avoid constitutional conflict. *See Kenosha Cnty. Dep't of Human Servs. v. Jodie W.*, 2006 WI 93, ¶20, 293 Wis. 2d 530, 716 N.W.2d 845 ("Where the constitutionality of a statute is at issue, courts attempt to avoid an interpretation that creates constitutional infirmities") (internal citation and quotation marks omitted); *see also* Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* at 197 (quoted source omitted) (recognizing as "'beyond debate'" the interpretive principle that "[a] statute should be interpreted in a way that avoids

placing its constitutionality in doubt"). Here, this issue was raised with the circuit court (J. App. 387-388), which ignored it entirely and made no effort to consider the constitutional implications of its order.

Moreover, the circuit court order also construes Wis. Stat. § 6.87(4)(b)1. in a way that conflicts with Wis. Const. art. III, § 2. That provision enumerates the only kinds of statutes the Legislature may pass that limit voting rights. *Id.* And it specifically limits to two the categories of Wisconsinites who can be excluded from the franchise: those "(a) Convicted of a felony, unless restored to civil rights" or "(b) Adjudged by a court to be incompetent or partially incompetent, unless the judgment specifies that the person is capable of understanding the objective of the elective process or the judgment is set aside." *Id.*, cl. 4. Nothing in this provision authorizes the Legislature to enact a law "[e]xcluding from the right of suffrage persons" on the basis of disability. *Id.* Yet, by allowing assistance to complete a ballot but not to return a ballot, the circuit court's cramped interpretation of

§ 6.87(4)(b)1. makes it impossible for some Wisconsinites to vote and thereby exceeds the limitations that the people of Wisconsin have set on who may be disenfranchised.

Any one of these constitutional conflicts alone is grounds for this Court to vacate the circuit court's order and remand for a complete ruling that addresses all relevant issues.

III. The WEC Memos At Issue Here Are Guidance Documents And Did Not Need To Be Promulgated Through The Rulemaking Process.

The circuit court also held that Wisconsin law required WEC to go through the statutory rulemaking procedure before adopting the guidance in the memos at issue here. This holding is in error because simple guidance documents—nothing more than "best practice" statements summarizing longstanding practices in response to questions from local clerks planning the 2020 elections in the midst of a deadly worldwide pandemic—do not require formal rulemaking.

This Court recently reaffirmed the propriety of "guidance documents" in *Service Employees International Union, Local 1 v. Vos* ("*SEIU*"), 2020 WI 67, ¶89, 393 Wis. 2d

38, 946 N.W.2d 35.[20] The Legislature has defined a "guidance document" as:

> any formal or official document or communication issued by an agency, including a manual, handbook, directive, or informational bulletin, that does any of the following:
>
> 1. Explains the agency's implementation of a statute or rule enforced or administered by the agency, including the current or proposed operating procedure of the agency.
>
> 2. Provides guidance or advice with respect to how the agency is likely to apply a statute or rule enforced or administered by the agency, if that guidance or advice is likely to apply to a class of persons similarly affected.

Id. (quoting 2017 Wis. Act. 369, § 31). As the *SEIU* Court made clear, a guidance document:

> - "does not have the force or effect of law";
>
> - "impose[s] no obligations, set no standards, and bind no one. They are communications about the law—they are not the law itself. They communicate intended applications of the law—they are not the actual execution of the law … they represent nothing more than the knowledge and intentions of their authors"; and

[20] *SEIU* involved several constitutional challenges to 2017 Wisconsin Act 369 and 2017 Wisconsin Act 370. There were two separate majority opinions. Justice Kelly authored the majority opinion, referenced here, regarding the set of provisions dealing with "guidance documents." That opinion concluded that two provisions, including one that sought to impose extensive procedures that an agency would have to follow before issuing guidance documents, violated separation-of-powers principles so broadly as to render the provisions facially unconstitutional.

> - "cannot affect what the law is, cannot create a policy, cannot impose a standard, and cannot bind anyone to anything."

Id., ¶¶100, 102, 105 (emphasis in original). Separately, this Court has also recently affirmed that WEC "is responsible for guidance in the administration and enforcement of Wisconsin's election laws." *Jefferson*, 2020 WI 90, ¶24.

The WEC memos challenged here neither order nor instruct municipal clerks to take any action. They do not impose obligations or standards upon municipal clerks statewide. And they do not have the force of law or affect what the law is. In fact, the memos expressly state that any identified actions regarding drop boxes are suggestions that municipalities have discretion to follow or not: "*If* a municipality chooses to do alternate drop off boxes or locations for ballots it should be publicized to voters where they can go to deliver their ballots" and "drop boxes *can* be used." (J. App. 20 (emphases added)) The circuit court expressly recognized that "it's true that the municipal clerks can follow [] or not follow" the memos, even as it reached the contradictory holding that the memos "have the effect of law." (J. App. 568)

The memos clearly establish that they were written in response to questions WEC received from on-the-ground election officials in advance of the 2020 elections. WEC published the March Memo in response to "clerks [who] have inquired about options for ensuring that the maximum number of ballots are returned to be counted for the April 7, 2020 election." (J. App. 20) Additionally, the August Memo opens by asserting that "[t]his document is intended to provide information and guidance on drop box options for secure absentee ballot returns for voters." (J. App. 23)

The only record evidence contradicts Teigen's theories that, through the memos, WEC dictated election procedures. Teigen himself conceded that the memos were "not mandatory compliance documents" and that municipal clerks—rather than WEC—ultimately decided whether to apply the drop box guidance from WEC: Regardless of what the document says, the clerks can choose what they want to do. (J. App. 339) Teigen offered no evidence of a single clerk who understood

the memos as mandatory or who relied upon them as definitive statements of law.[21]

The memos logically cannot dictate policy, given that they were issued in 2020 and both ballot-return assistance and drop boxes were in widespread use earlier than that. *See* Parts II.B.2 and II.C.2 above. The circuit court's rationale—that the memos had "general application," "altering what has been and setting a new standard, if you will, and a new policy" (J. App. 567)—simply cannot be sustained given that the memos were nothing more than answers to questions posed by clerks about policies that long predated the issuance of the memos.

These memos are the type of agency guidance communications that *SEIU* confirmed fall squarely within the executive branch's authority and do not require rulemaking.

[21] If the Court grants DRW's motion to supplement the record, the supplemental information provides additional evidence contrary to Teigen's theories and the circuit court's assumption. DRW's explanation for providing that evidence at this juncture is presented in the motion.

CONCLUSION

For the foregoing reasons, the circuit court's order is legally unsupported and should be vacated for lack or jurisdiction or reversed on the merits.

Dated: February 17, 2022

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CERTIFICATION OF COMPLIANCE WITH WIS. STAT. § 809.19(8g)(a)

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm), and (c) for a brief. The length of this brief is 9,862 words.

Signed:

Jeffrey A. Mandell

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)(F)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12)(f).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served along with the paper copies of this brief filed with the court and sent to all parties.

Dated this 17th day of February, 2022.

Jeffrey A. Mandell

CERTIFICATION OF MAILING AND SERVICE

I certify that a paper original and 22 paper copies of the foregoing Brief Of Intervenors-Defendants-Appellants Disability Rights Wisconsin, Wisconsin Faith Voices For Justice & League Of Women Voters Of Wisconsin and Joint Appendix were hand-delivered to the Clerk of the Supreme Court on February 17, 2022.

I further certify that on February 17, 2022, I sent true and correct copies by email of the foregoing Brief Of Intervenors-Defendants-Appellants Disability Rights Wisconsin, Wisconsin Faith Voices For Justice & League Of Women Voters Of Wisconsin and Joint Appendix to all counsel of record.

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