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September 8, 2022

via email – kelly.mccormick@wisconsin.gov

Wisconsin Elections Commission
c/o Attorney Kelly McCormick
201 West Washington Avenue
Madison, Wis. 53703

Re: *Wojciechowski v. Grill*
Case No. EL 22-58

To the Wisconsin Elections Commission:

On behalf of the Complainant Eugene Wojciechowski, enclosed for filing in this matter please find a Sworn Reply.

We are providing a copy of the same to counsel for the Respondent.

If you need any additional information, please do not hesitate to contact me. I can be reached at 608-556-9120 or at dlenz@lawforward.org. We look forward to the Commission's decision.

Sincerely,

Electronically signed by Daniel S. Lenz

Daniel S. Lenz
Staff Counsel
Law Forward

Enc.

CC: City Attorney Kail Decker

STATE OF WISCONSIN
WISCONSIN ELECTIONS COMMISSION

EUGENE WOJCIECHOWSKI,

Complainant,

v.

Case No. EL 22-58

REBECCA GRILL,
CITY CLERK FOR THE CITY
OF WEST ALLIS, WISCONSIN

Respondent.

SWORN REPLY

Pursuant to Wis. Stat. § 5.06, Eugene Wojciechowski (“Complainant”), alleges under oath as follows:

INTRODUCTION

Based on the information contained in Clerk Grill’s Response, it appears the City of West Allis has changed how it is addressing absentee ballot returns. However, even as modified, the West Allis policy of requesting if a person is “willing to show identification” and then recording, on the certificate envelope if no identification is provided (the “New West Allis Policy”), still violates Wis. Stat. §§ 6.87(4)(b)3 and § 6.02.

It is undoubtedly true that Clerk Grill and her office are doing what they can to make sure each absentee ballot is counted. Unfortunately, by creating an additional obstacle in the absentee ballot voting process, Clerk Grill has violated

Wisconsin law and is acting contrary to the federal district court’s recent order and injunction in *Carey v. Wisconsin Elections Commission*, No. 3:22-CV-402-jdp (W.D. Wis. Aug. 31, 2022).¹ The Commission should issue an appropriate order pursuant to Wis. Stat. § 5.06 to end this practice.

ARGUMENT

Even as modified, the New West Allis Policy (1) violates Wis. Stat. § 6.87(4)(b)3; (2) represents an additional voter qualification or procedure beyond what is authorized by Wisconsin law; and (3) is contrary to the federal court’s order in *Carey*.

I. The New West Allis Policy violates Wis. Stat. § 6.87(4)(b)3.

Clerk Grill does not dispute that Wis. Stat. § 6.87(4)(b)3, on its face, prohibits the municipal clerk from asking for photo identification from someone returning an absentee ballot. *See* Wis. Stat. § 6.87(4)(b)3 (Answer at 3 (“Read out of context, [Wis. Stat. § 6.87(4)(b)3] appears to prohibit the clerk’s office from requiring proof of identification for certain repeat absentee voters *at any time.*”) (emphasis added).) This is enough to end the inquiry. “[W]e have repeatedly 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 Cnty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 663, 681 N.W.2d 110, 124 (cleaned up). The statute is clear: If (1) the absentee elector received their absentee ballot from the municipal clerk by

¹ Available at <https://static1.squarespace.com/static/5f88891b1bd57b085dc121d1/t/630fa0748487cf083875db3a/1661968500669/R.+39+SJ+Op.pdf>

mail (necessarily true if the voter is returning the ballot); (2) has provided proof of identification with that ballot (they would have been required to do pursuant to Wis. Stat. § 6.79); and (3) they have not moved or changed their name (requiring re-registration, *see e.g.* Wis. Stat. § 6.33(5)(a)1), then voter is not required to provide their identification again. Wis. Stat. § 6.87(4)(b)3. The New West Allis Policy, however, still prompts² those voters to show their identification again, in violation of the clear direction of the statute: Voters who meet the three conditions of Wis. Stat. § 6.87(4)(b)3 need not present their identification at any other time.

Viewing the statute in context does not save the New West Allis Policy. Clerk Grill argues that Wis. Stat. § 6.87(4)(b)3 applies only “at the moment in which an absentee elector normally must provide proof of identification: upon applying for a new absentee ballot.” (Answer at 3.). But this is not what the statute says. It says, “at any time.” Wis. Stat. § 6.87(4)(b)3. Moreover, if read in the context of Chapter 6 of the statutes, the prohibition against such a policy makes even more sense: by the time the elector returns their absentee ballot, they have already proven their identity at least three times. *First*, to register by mail or in person, the voter must have provided specific information, including either their driver’s license number or the last four digits of their social security number, in addition to providing proof of

² While West Allis’s change to its policy is understandable, it appears to be a distinction without a difference. Clerk Grill and her staff are still asking voters to show ID when the statute says the voter does not have to. At a minimum, this will have a chilling effect on voters attempting to return their ballot to the clerk, although they are entitled to do so. Wis. Stat. § 6.87(4)(b)1. It also puts the voter in an unfortunate position: They can either (1) present their identification, though the law says they do not have to; or (2) have their ballot certificate envelope treated differently—designated as “No ID Verified,” which is not a normal notation on the certificate. Wis. Stat. § 6.88(1), (3)(b).

residence. Wis. Stat. §§ 6.30(1), (4); 6.33(1); 6.34(3). If a person registers online, their identification is confirmed via verification with the Wisconsin Department of Motor Vehicles. Wis. Stat. § 6.30(5). *Second*, to request an absentee ballot, the voter must upload their photo identification via MyVote or otherwise provide it to the municipal clerk. Wis. Stat. §§ 6.86(1)(ac), (ar), 6.87(1). *Third and finally*, as part of the absentee voting process, both the voter and a witness must attest that the voter is the person who requested the ballot, as well as to their qualifications to vote in the election. Wis. Stat. § 6.87(2), (4)(b); Wis. Elec. Comm. Form EL-122. Making false statements in this process is a crime. Wis. Stat. §§ 12.13(1)(b), (3)(i), (g); 12.60(1).

Within that larger context of Chapter 6, Wis. Stat. § 6.87(4)(b)3 relieves the voter of any further obligation to prove their identity *again*—they have already done so multiple times. This context also makes clear that where the Legislature sought to impose an identification procedure, it knew how to do so. There is no such procedure for returning absentee ballots to the municipal clerk, and the New West Allis Policy violates the plain language of Wis. Stat. § 6.87(4)(b)3.

II. The New West Allis Policy also violates Wis. Stat. § 6.02.

Clerk Grill agrees that no statute authorizes or requires the New West Allis Policy but argues that it is nevertheless appropriate because it is implied by Wis. Stat. § 6.87(4)(b)1 and the Wisconsin Supreme Court’s decision in *Teigen*. (Answer at 2, 4) (“Although there appears to be no explicit statutory language ... binding precedent imposes what appears to be an implicit duty”; “The only reasonable way to verify that this law is followed is by requiring proof of identification.”)

The decisions of the circuit court and Wisconsin Supreme Court in *Teigen* undoubtedly created widespread confusion among municipal clerks, election workers, and voters. See *Carey v. Wis. Elec. Comm'n*, No. 3:22-CV-402-jdp, Dkt. 39, slip op. at 22 (W.D. Wis. Aug. 31, 2022) (referencing ongoing confusion over absentee ballot return assistance following *Teigen*). Those decisions did not, however, alter the fundamental nature of Wisconsin election law: Election procedures are prescribed through laws, passed by the Legislature subject to the Governor's veto, and implemented and enforced by the Commission uniformly throughout the state. Wis. Const. art. III, § 2; Wis. Const. art. V, § 10; *State ex rel. La Follette v. Kohler*, 200 Wis. 518, 548, 228 N.W. 895 (1930). Under our system, no one may create new voter qualifications except through constitutional amendment, and only the Legislature (subject to the Governor's veto) and this Commission, when acting within its statutory authority, may create new voter procedures or rules.

The Legislature did not impose a requirement or option for clerks to request photo identification when an absentee ballot is returned. The Supreme Court's decision in *Teigen* contained no such procedure, nor did the circuit court's initial injunction. *Teigen v. Wis. Elec. Comm'n.*, 2022 WI 64, ¶178, ___ Wis.2d ___, 976 N.W.2d 519; See *Teigen v. Wisconsin Elections Comm'n*, No. 21-CV-958 (Waukesha Cty. Cir. Ct.) (Order, Jan. 20, 2022). Finally, this Commission did not issue any such guidance or opinion or include this procedure in its uniform absentee voting instructions following *Teigen*. Wis. Stat. §§ 5.05(5t), 6.869. Clerk Grill does not have the authority to establish new voter qualifications or procedures, which is what the

New West Allis Policy does. This policy infringes on what is squarely a legislative activity, to be conducted within the bounds of the Wisconsin and U.S. Constitutions. “[I]t is clearly within [the Legislature's] province to require any person offering to vote[] to furnish such proof as it deems requisite[] that he is a qualif[i]ed elector.” *Cothren v. Lean*, 9 Wis. 254 279, 283-84 (1859); *see also League of Women Voters of Wisconsin Educ. Network, Inc. v. Walker*, 2014 WI 97, ¶4, 357 Wis. 2d 360, 365–66, 851 N.W.2d 302, 305. Absent such a requirement, clerks administering elections in accordance with the laws must permit the voter to return their absentee ballot without additional barriers between them and the ballot box. Wis. Stat. § 5.01(1).

Clerk Grill’s argument that the New West Allis Policy is logically required by Wis. Stat. § 6.87(4)(b)3 as interpreted by *Teigen* also falls flat. Just because the law requires that a specific individual do something does not inherently mean *presenting photo identification* is required. The most salient example is voting. Prior to 2011 Act 23, Wisconsin voters were not required to present photo identification to vote, though it was still a crime to impersonate someone else for purposes of voting. *See LWWI Educ. Network v. Walker*, 2014 WI 97, ¶¶7-9; Wis. Stat. § 12.13(1)(d) (2009-10). There was no implied requirement that clerks or poll workers check identifications before the Legislature imposed such a requirement. Wisconsin and federal law require individuals to do any number of things: Appear in court when summoned, appear to serve on a jury, renew vehicle registrations, etc. It does not necessarily follow that

the individual must be consistently asked for photo identification when performing these tasks.

Because the New West Allis Policy is an additional voting procedure or qualification beyond what is found in Wisconsin law, it violates Wis. Stat. § 6.02.

III. The New West Allis Policy conflicts with the recent federal court order in *Carey*.

On August 31, 2022, while this matter was pending, the federal district court for the Western District of Wisconsin entered a declaration of law and imposed a permanent injunction requiring the Wisconsin Elections Commission to take specific steps to protect the rights of Wisconsin voters with disabilities. This included the following declaration:

Under the Voting Rights Act, 52 U.S.C. § 10508, voters who require assistance with mailing *or delivering* their absentee ballot to the municipal clerk because of a disability are entitled to 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. To the extent that Wis. Stat. § 6.87(4)(b)1 prohibits such assistance, it is preempted by § 10508.

Carey v. Wis. Elec. Comm'n, Dkt. 40, No. 3:22-CV-402-jdp (W.D. Wis. Aug. 31, 2022) (emphasis added).

While Clerk Grill's response assumed that the requirements of federal law would not apply (Answer at 2, n.1), that assumption has now been abrogated by a federal court. The *Carey* decision and order highlights an additional problem with the New West Allis Policy—it would put Clerk Grill on the wrong side of federal law. The *Carey* decision confirms that voters with disabilities are entitled to receive assistance of their choice returning their ballot. As described, the New West Allis Policy makes

no provision for this assistance, nor is it clear what Clerk Grill would do if someone provided such assistance by returning the ballot of a voter with a disability. If Clerk Grill were to reject such a ballot because the identification did not match the name on the ballot, she would violate 52 U.S.C. § 10508 and likely other federal laws. If Clerk Grill were to separate these ballots, make an additional notation on the certificate, or otherwise treat them differently she would be denying those voters the “full and equal opportunity to vote” in violation of the Americans with Disabilities Act. *See* U.S. Dep’t of Justice, “The Americans with Disabilities Act and Other Federal Laws Protecting the Rights of Voters with Disabilities.”³ *Carey* confirms that the Voting Rights Act entitles voters to use the exact type of assistance that the New West Allis Policy would frustrate. This policy therefore cannot survive state or federal law.

Most recently, the Commission met on September 6, 2022 to approve instructions to the municipal clerks in light of, and consistent with Judge Peterson’s order in, *Carey*.⁴ The Commission approved a motion⁵ which directly forecloses the New West Allis Policy and Clerk Grill’s arguments in support of that policy. Specifically, the Commission approved the following:

Do I [the municipal clerk] need to confirm the disabled voter or agent’s identity, or otherwise request additional information?

No. If the agent answers the above bullet-point questions correctly, the ballot should be accepted. Nothing in the statutes provides for otherwise confirming the agent’s identity or requesting additional information. As

³ Available at https://www.ada.gov/ada_voting/ada_voting_ta.htm.

⁴ Available at <https://wiseye.org/player/?clientID=2789595964&eventID=2022091014> (subscription required).

⁵ The Commission’s official guidance was not available at the time of this writing.

for the disabled voter, she will have provided any statutorily necessary identification and residency information prior to the absentee ballot request. The statutes do not require a second presentation of that information.

In short, the Commission has agreed that there is no need after *Teigen* for clerks to request photo identification from anyone returning a ballot in person and that no statute authorizes the clerk to do so. The motion also makes clear that clerks need not, and should not, attempt to confirm if a voter has a disability, beyond asking three straightforward questions. Because the New West Allis Policy goes well beyond these bounds, the Commission should enter an appropriate order pursuant to Wis. Stat. § 5.06.

CONCLUSION

For the reasons stated herein and in the Sworn Complaint, the Complainant, Eugene Wojciechowski respectfully requests that the Wisconsin Elections Commission do the following pursuant to Wis. Stat. § 5.06:

- A. Issue an order requiring Clerk Grill and any other election official in the City of West Allis to stop requiring or requesting that electors or anyone else present or provide their photo identification when returning their absentee ballot to the office of the municipal clerk or to an alternate site under Wis. Stat. § 6.855.
- B. Issue an order requiring Clerk Grill to update any policies or procedures for the City of West Allis that require or request electors or anyone else present or provide their photo identification when returning absentee

ballots to the office of the municipal clerk or to an alternate site under Wis. Stat. § 6.855.⁶

- C. Take any other action that has the effect of restraining Clerk Grill from acting contrary to law as described in the Complaint.

Dated this 7th day of September, 2022.

Electronically Signed By: /s/Daniel S. Lenz

Daniel S. Lenz, SBN 1082058

Mel Barnes, SBN 1096012

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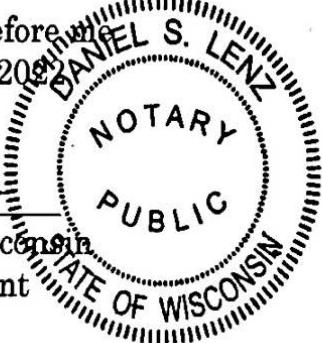
608.556.9120

Attorneys for Eugene Wojciechowski

I, Eugene Wojciechowski, being first duly sworn, state that I personally read the above reply, and that the information contained within is true based on my personal knowledge and, as to those stated on information and belief, I believe them to be true.


Eugene Wojciechowski

Subscribed and sworn to before me this 7th day of September, 2022


Notary Public, State of Wisconsin
My commission is permanent

⁶ The Complainant has modified the requested order slightly in light of (1) the change in Clerk Grill's policy following this Complaint and (2) the *Carey* order.