Chairperson Bernier and Committee Members:

Thank you for the opportunity to provide testimony on Assembly Bill 637. We appreciate that the author and the clerks supporting the bill have involved our staff in the conversation as the bill has been developed and invited our feedback. While there is broad agreement that it is a challenge for some municipalities to process all absentee ballots on Election Day for high turnout elections, permitting municipalities to use voting equipment in the clerk’s office before Election Day has a ripple effect on other processes and is not as simple of a solution as it might first appear.

The Wisconsin Elections Commission discussed this bill at its meeting in September but has not taken a position on it due to the significant policy decisions and implementation issues involved. Therefore, I am testifying for information purposes to highlight significant policy changes contained in the bill as well as administrative issues which our staff believes have not been fully resolved.

Uniformity

Before addressing specific provisions of the bill, I would note a general issue which may be worth some legal research in advance. That is the question of whether the proposed alternative process for casting an absentee ballot might create inconsistencies in the treatment of ballots and voters in different municipalities to such an extent that it might invite legal challenges as to its constitutionality.

Statutes are presumed to be constitutional, of course, and the Legislature has wide latitude in making policy decisions. But the bill creates several significant differences in the treatment of ballots and voters, and those differences would be due to the discretion of a municipal governing body rather than the voter’s choice of voting method. Seeing or hearing of voters in a neighboring municipality using voting equipment when voting in the clerk’s office may not only create some voter confusion, but some of the changes in the process described below
may also prompt legal concerns regarding the uniformity of the voting process throughout the State.

**Significant Policy and Procedural Changes**

Under current law all absentee ballots are returned by the voter in a certificate envelope signed by the voter and a witness. When the ballot is voted in the clerk’s office, the clerk signs as the witness. If either signature is missing, the ballot is sent to the polling place with instructions for the election inspectors to reject the ballot. At the polling place, inspectors separate properly completed envelopes from their ballots, issue voter numbers and announce the voter’s name before depositing the ballot into the voting equipment or ballot box. Any challenge to the ballot is made at the polling place when the voter’s name is read.

In municipalities which adopt the alternative process of AB 637, absentee ballots submitted by mail would still follow the process of being returned in a certificate envelope. But absentee ballots completed in the clerk’s office would be deposited immediately into the voting equipment as they are at the polls on Election Day, without the use of a certificate envelope.

In these municipalities, in-person absentee voters would be able to immediately see whether the voting equipment detected errors such as overvotes or crossover votes, and to cast a corrected ballot if an error was made. Those voters would not be permitted to spoil their ballot and request a new one after voting. In contrast, voters submitting an absentee ballot by mail in the same community, and all absentee voters in communities not adopting the AB 637 process, would still have the option to spoil their ballot and request a new one in a timely manner, but would not have the same assurance that their ballot was able to be counted by the voting equipment prior to Election Day.

While the voter using voting equipment in the clerk’s office would benefit from knowing immediately whether the ballot will be counted, that benefit will be restricted to specific municipalities that qualify for and also choose the alternative process. The in-person absentee voting process used, and the associated rights and consequences, would be determined by the majority vote of individual municipal governing bodies. In addition, the bill would also restrict the opportunity to use the alternative process to municipalities which have purchased newer voting equipment that includes the functionality to tabulate write-in votes, and that the Elections Commission determines to be prepared to implement the new procedures.

Elections Commission staff has identified several other significant policy and procedural changes to current law which the Legislature should be aware of, including the following:

1. The bill creates Subchapter VI in Chapter 6 to establish the administration of the alternative absentee voting process. These provisions would exist outside of Subchapter IV which contains the main statutes related to absentee voting. For the most part, the bill includes appropriate cross references to incorporate relevant sections. But it does not incorporate the guiding legal principles of interpretation described in Section 6.84, specifically that absentee voting is a privilege rather than a
right, and that the absentee ballot processes shall be construed as mandatory. These principles inform the administration of absentee voting processes and have been cited in court decisions interpreting absentee voting statutes. Their omission from Subchapter VI may create some doubt as to whether the alternative absentee voting process should be applied and considered by courts within the traditional legal framework.

2. The bill shifts the responsibility of processing in-person absentee ballots from election inspectors to municipal clerks and their staffs. This would involve new training and procedures for both clerks and for inspectors. In addition, because the major political parties have a statutory right to nominate individuals to serve as election inspectors, this seems to represent a policy change related to the respective roles of local election officials as much as an administrative change.

3. For county clerks that program voting equipment, Section 6.982(2) would require the county clerk to schedule the programming at an earlier date as determined by municipalities which choose to conduct the alternate process. This may force counties to program voting equipment on an expedited schedule for all municipalities regardless of how many use the alternate process. Ensuring that the voting equipment is available for use at least 15 days before Election Day may also create time pressures to program the equipment, especially between the Spring Primary and Spring Election. It would also lengthen the time period between equipment programming and Election Day during which the programmed voting equipment needs to be secured. While the bill permits the alternative absentee process for a two-week period, the outcome of the pending One Wisconsin Institute litigation could require expanding that time window.

4. Currently, all absentee ballots are secured by municipal clerks and transported to the polling place for processing on Election Day. This permits observers to see the processing of all absentee ballots and to hear the names of voters when they are announced. Wis. Stat. Section 6.982(6)(a) would require clerks to retain the in-person absentee ballots and transmit all other absentee ballots to the polling place for processing. This may affect perceptions related to transparency of the process, particularly regarding write-in votes, and also requires different processes for different absentee ballots.

5. Similarly, the challenge process would be modified under Section 6.982(8). Challenges related to in-person absentee voters would be initiated at the clerk’s office, meaning that potential challengers would need to attend voting hours for up to two weeks rather than only on Election Day. Any challenges made at the clerk’s office would require the clerk to send the ballot to the polling place where the challenge would be resolved. Challenges to absentee ballots submitted by mail or through Special Voting Deputies would still be initiated at the polling place.

6. The bill adds a new requirement for voting equipment to be approved for use in Wisconsin, specifically that it include a write-in report functionality. This would be
true even for voting equipment to be used by municipalities that do not adopt the alternate absentee voting process. It could also potentially limit the variety of voting systems approved for use in Wisconsin if the equipment does not include the write-in report functionality or it does not comply with the statutory sections governing the tallying of write-in votes. Currently, Wis. Stat. Section 5.85(2)(a) requires election officials to examine ballots for write-in votes and to count and tabulate the write-in votes. AB 637 does not alter this provision, meaning either there would be a conflict in the statutes related to tallying write-in votes using the alternate process, or write-in votes would be processed differently depending upon the method that the ballot is cast and the municipality of the voter.

7. Under current law, if a clerk becomes aware that a voter has died after submitting an absentee ballot, the ballot is identified using the certificate envelope and is rejected. In some cases the fact of the voter’s death does not become known until after the official canvass, but the rule is the same for all ballots. Under AB 637, because in-person absentee voters would immediately insert their ballots into the voting equipment, it would be impossible to identify the ballot of such a voter who subsequently dies before Election Day, and therefore the ballot would presumably be counted. However, the current rule would remain for voters in the same municipality who return absentee voters by mail or via Special Voting Deputies, and for all absentee voters in municipalities which do not adopt the alternate voting process. Depending upon the outcome of the One Wisconsin Institute case, it is also possible that a ballot could be counted for a voter who dies a month or more before Election Day.

Outstanding Administrative Issues

Elections Commission staff has also identified several administrative and technical issues that should be considered or remain unresolved in the current draft of AB 637, including the following:

1. Commission staff has not confirmed that the write-in report functionalities of existing voting systems properly tally write-in votes according to the specific requirements of Wis. Stat. Section 7.50, as would be required under Section 3 of the bill. There may be situations in which the write-in report functionality tallies votes improperly and in ways that are inconsistent with the tally of write-in votes tabulated by election inspectors’ visual review.

2. In the newly-created Section 6.981 of the bill, there may be ambiguity in the language stating that clerks shall “allow” the use of the alternate process if the governing body adopts an ordinance or resolution to “allow” such voting. The provision could be read to require the alternative process if all of the conditions are met, or to allow both the current and alternative method of in-person absentee voting. If the latter interpretation is intended, even in-person absentee voters in the same municipality may use different procedures, some using voting equipment and others using certificate envelopes.
3. Section 6.982(1)(c) would state that the municipal clerk shall reconcile the number of ballots cast each day with the number of ballots issued each day using the alternative process. If those numbers do not match, the bill requires that reconciliation shall be completed as outlined in current Statutes. The bill does not clarify certain details, however, such as whether the reconciliation shall include ballots only for the specific day involved or all ballots cast with the alternative process, and whether the reconciliation is to be performed by the clerk or the local board of canvassers at the polling place.

4. Wis. Stat. Section 6.982(4) would require the Elections Commission to program the statewide voter registration system so that ballots issued during the alternative absentee voting process are tracked by sequentially numbering the absentee ballot certification and request log. Commission staff has not evaluated the feasibility or expense of making any required changes to the voter registration system. In addition, adding such functionalities may create confusion for other clerks using the system whose municipalities do not adopt the alternative process.

5. While Section 6.982(8) would permit challenges to be made during in-person absentee voting, there is no requirement that voters state their name during that process as they do at the polling place. Potential challengers would have no opportunity to hear the voter’s name in order to determine whether a challenge should be initiated.

6. Wis. Stat. Section 6.982(9) would require the Elections Commission to establish procedures for certifying municipalities to use the alternative absentee voting process. This provision also requires the Commission to certify municipalities to use the alternative process if it determines that the municipality “is capable of adequately securing all equipment and ballots consistent with this subchapter and of satisfying all other requirements set forth in this subchapter.” This general language omits specific standards and requirements which the Commission can objectively implement and evaluate to determine whether a municipality is capable of and prepared to implement the alternative process. For instance, it is unclear whether the Commission would be responsible for evaluating the number and expertise of municipal staff in addition to the voting equipment available for the process.

Thank you for the opportunity to share our thoughts with you. I hope this testimony will help inform the Legislature’s consideration of this bill. As always, we would be glad to answer questions and work with you to address any questions or issues related to the bill.

Respectfully submitted,

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