IN THE SUPREME COURT OF WISCONSIN
No. 2020AP1271-AC

JAMES SEWELL AND GEORGE MEYERS,

Petitioners-Appellants-Petitioners,

DENNIS MONTEY,

Petitioner-Appellant,

v.

RACINE UNIFIED SCHOOL DISTRICT BOARD OF CANVASSERS, YES FOR OUR CHILDREN, A REFERENDUM COMMITTEE, CHELSEA POWELL, and THE RACINE UNIFIED SCHOOL DISTRICT,

Respondents-Respondents.

On Appeal from Racine County Circuit Court, case 2020CV1023,
The Honorable Michael J. Piontek, Presiding

BRIEF OF *AMICUS CURIAE* LAW FORWARD, INC.

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INTERESTS OF AMICUS CURIAE

Law Forward, Inc. is a nonprofit, nonpartisan law firm that exists to protect and advance democracy in Wisconsin. Law Forward works to promote fundamental democratic principles, to revive Wisconsin's traditional commitment to clean and open government, and to advance a progressive vision through impact litigation, administrative process, and public education. Law Forward partners with other nonprofits and legal scholars to make the law and government accessible to every Wisconsinite. Law Forward has a strong interest in ensuring the integrity of the electoral process, including the mechanisms and methods available for resolution of election-related disputes.

INTRODUCTION

Democracy is inherently fragile. "Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Purcell v.*

Gonzalez, 549 U.S. 1, 4 (2006). Key to preserving faith in the electoral process and preserving the right to vote are investigations of alleged electoral misconduct. To that end, the Civil Rights Act of 1960 imposes strict requirements for the preservation of election records. Responsibility for complying with these requirements rests with election officials, a majority of whom in Wisconsin are city, village, town, and county officials and appointees. While this case arises from a local, not a federal, election, in construing Wis. Stat. § 7.54, this Court should consider how its interpretation may interact with, and potentially conflict with or be preempted by, long-settled provisions of federal law.

ARGUMENT

Wisconsin law sets forth a detailed recount procedure, which "constitutes the exclusive judicial remedy for testing … the result of an alleged irregularity, defect or mistake committed during the voting or canvassing process." Wis. Stat.

§ 9.01(11). Here, Petitioners, who availed themselves of the recount procedure set forth in section 9.01, now ask this Court to declare that a separate provision of Wisconsin law, section 7.54, confers upon a party contesting an election the absolute right to have ballots opened, reviewed, and corrected by a court—separate and apart from section 9.01's exclusive recount procedures. *Amicus curiae* takes no position on the ultimate disposition of this lawsuit, but writes to alert the Court to dangers inherent in the argument Petitioners advance here. For one thing, Petitioners' reading contravenes the plain text of section 9.01(11). For another, it also ignores this Court's precedents on the exclusivity of the recount procedure. *State ex. Rel. Shroble v. Prusener*, 185 Wis. 2d 102, 110-12, 517 N.W.2d 169 (1994) (recount is exclusive remedy for testing the right to hold an office, precluding actions brought in *quo warranto*); *accord Trump v. Evers*, No. 2020AP1971-OA, Order at *2 (Dec. 3, 2020) (denying petition for original action)

(Hagedorn, J., concurring) (recount procedure offers exclusive judicial remedy). And it would create an unnecessary conflict between state and federal law. To the extent that section 7.54 means what Petitioners say, it would conflict with—and therefore be preempted by—federal law applicable to all ballots used in federal elections. This is not a mere technicality; allowing individuals other than those election officials responsible under federal law to take possession of, review, and modify ballots risks calling into question the integrity of a given election and undermining the public's faith in the electoral process as a whole.

I. ELECTION OFFICIALS MUST RETAIN AND PRESERVE ELECTION RECORDS.

With very limited exceptions, federal law imposes upon "[e]very officer of election" an obligation to "retain and preserve … all records and papers which come into his possession" relating to any "act requisite to voting" for twenty-

two months after the conduct of any "general, special, or primary election" at which citizens vote for a federal candidate. 52 U.S.C. § 20701. "[W]hen required by law," an officer of election may deliver such election records to another officer of election or to a custodian, if state law designates a custodian "to retain and preserve" election records "at a specified place." *Id*. The U.S. Department of Justice has interpreted section 20701's retention-and-preservation requirement to mean that all election records must "be retained either physically by election officials themselves, or under their direct administrative supervision." U.S. Dep't of Justice, *Federal Prosecution of Election Offenses* 79 (Richard C. Pilger ed., 8th ed. 2017).[1] An officer of election or custodian who willfully fails to comply with the retention-and-preservation requirement shall be fined up to $1,000, imprisoned for up to

[1] Available at https://www.justice.gov/criminal/file/1029066/download.

one year, or both. 52 U.S.C. § 20701. An "officer of election" is "any person who, under color of any Federal, State, … or local law, statute, ordinance, regulation, authority, custom, or usage, performs or is authorized to perform any function, duty, or task in connection with an application, registration, payment of poll tax, or other act requisite to voting in any general, special, or primary election at which votes are cast for candidates for" federal office. *Id.* § 20706.

Wisconsin's election system is highly decentralized.[2] Consequently, under the definition in section 20706, a significant majority of "officers of election" in Wisconsin are municipal and county officials and appointees. Wisconsin judges and court clerks are not "officers of election," as they

[2] *See, e.g.*, Meghan Wolfe, Mem. to Wis. Elections Comm'n re: Summary of April 7, 2020 Election, at *1 (describing Wisconsin as "the most decentralized state for election administration," with "1,850 municipal election officials and 72 county election officials"), available at https://elections.wi.gov/sites/elections.wi.gov/files/2020-04/April%207%20Election%20Summary%20and%20Next%20Steps.pdf (last visited August 15, 2021).

are not charged under Wisconsin law with the performance of "any function, duty, or task in connection with an application, registration, payment of poll tax, or other act requisite to voting." *Id.* Under Wisconsin law, courts become involved in elections only to resolve recount appeals, *see* Wis. Stat. § 9.01(6)-(9), or other administrative disputes. Wisconsin courts are not "officers of election" as defined by federal law; nor are they generally custodians, specially charged by state law "to retain and preserve" election records. 52 U.S.C. § 20701. It follows that federal law does not authorize Wisconsin courts to take possession of election records from any election at which a federal race was on the ballot. *See id.*

An argument can be made that judges and court clerks may be designated custodians under state law for federal election record-related purposes in only one limited circumstance. When the results of a recount conducted under Wisconsin law are appealed to circuit court, the court must

issue an order directing that "all ballots, papers and records affecting the appeal" be transmitted to the court clerk "or to impound and secure such ballots, papers, and records, or both." Wis. Stat. § 9.01(7)(a). If this provision qualifies as a custodial designation under federal law, then "the duty to retain and preserve" the election records devolves upon the court clerk upon receipt. 52 U.S.C. § 20701. And because a clerk's express statutory power to possess election records exists only during a recount appeal, upon resolution of the case, the court must return the election records to the relevant officer(s) of election.

That federal law requires an officer of election or custodian to retain physical custody of election records and to preserve them without alteration is clear. "Any person … who willfully steals, destroys conceals, mutilates, or alters any" election record "shall be fined not more than $1,000 or imprisoned not more than one year, or both." *Id.* § 20702. And, access to election records is strictly

controlled. Notably, the only party to whom access to federal election records is expressly granted is the United States Attorney General, but only if the Attorney General first submits a written demand explaining the basis and purpose for access. *Id.* § 20703. And even under such circumstances, the officer of election or custodian who possesses the records does not relinquish custody, but instead must make the records "available for inspection, reproduction, and copying at" their "principal office." *Id*.

In sum, federal law sets clear standards for the custody and control of election records, and it underscores the seriousness with which Congress regards the issue by applying significant criminal penalties for violation of the retention-and-preservation requirements. This has been settled law for more than 60 years. *See* Civil Rights Act of 1960, Pub. L. No. 86-449, Title III (codified at 52 U.S.C. §§ 20701-06); *see also*,

U.S. Dep't of Justice, *Federal Law Constraints on Post-Election "Audits,"* at *2-*4 (July 28, 2021).[3]

II. FEDERAL LAW PREEMPTS CONFLICTING STATE LAW AS APPLIED TO FEDERAL ELECTIONS.

In any area where Congress has jurisdiction, federal law trumps its state counterpart. U.S. Const. art. VI, ¶2. State law is in conflict with and is preempted by federal law when: (1) it is impossible for regulated parties to comply with both state and federal law; or (2) state law is an obstacle to the objectives and purpose of Congress in enacting a federal law.

A. It is impossible to comply with both Petitioners' interpretation of Wis. Stat. § 7.54 and federal law.

"Where state and federal law 'directly conflict,' state law must give way." *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 617-18 (2011) (citing *Wyeth v. Levine*, 555 U.S. 555, 583

[3] Available at https://www.justice.gov/opa/press-release/file/1417796/download.

(2009) (Thomas, J., concurring in judgment); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000) ("[S]tate law is naturally preempted to the extent of any conflict with a federal statute")). "[S]tate and federal law conflict where it is 'impossible for a private party to comply with both state and federal requirements.'" *Id*. at 618 (quoting *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995); *see also*, *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963) ("A holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility").

Here, Petitioners ask this Court to interpret Wis. Stat. § 7.54 to give all parties who contest the results of an election the right to have ballots "opened" (whatever exactly that means) and potentially "corrected" (again, whatever exactly that might mean) in a public court proceeding. Yet, federal law

requires that custody of election records associated with a federal election remain with and in the principal office of an officer of election or designated custodian. *See, e.g.*, 52 U.S.C. § 20703 (permitting Attorney General access to records only for purposes of inspection, reproduction, or copying and only in custodian's principal office). And, willfully altering any election record is subject to criminal penalties. *Id.* § 20702. Therein lies the rub.[4]

As discussed above, in Wisconsin neither a judge nor a court clerk is an officer of election. Nor, in general, is a judge or court clerk a custodian designated under state law to retain and preserve election records. Unless a court were to find that, pursuant to Wis. Stat. § 9.01(7), a judge or court clerk is a designated custodian for the duration of a recount appeal, a

[4] While this case arose from a challenge to a local funding referendum, the election at which voters cast their ballots on that referendum was also a presidential primary election. Because candidates for President of the United States appeared on the ballot, the election records related to that election fall within the scope of the Civil Rights Act of 1960.

judge or court clerk may not take possession of federal election records. Further, an officer of election ordered by a state court to transmit federal election records to a court clerk would violate federal law by and risk criminal penalty for relinquishing custody of those records to the court. Moreover, a judge or court clerk who alters federal election records, ostensibly in compliance with Petitioners' reading of Wis. Stat. § 7.54, may be found in violation of 52 U.S.C. § 20702 and subject to criminal penalties.

Thus, it is impossible for Wisconsin officers of election, judges, and court clerks to comply with both the retention-and-preservation requirements Congress has prescribed for election materials and with Petitioners' interpretation of Wis. Stat. § 7.54. It follows that if section 7.54 were construed as Petitioners' advocate, the provision would necessarily be preempted by federal law.

B. Petitioners' interpretation of Wis. Stat. § 7.54 would frustrate the objectives and purpose of congressional retention-and-preservation requirements for election materials.

Where compliance with both state and federal law is not impossible, but compliance with state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," federal law controls. *Hughes v. Talen Energy Mktg., LLC*, --- U.S. ---, 136 S. Ct. 1288, 1297 (2016) (quoting *Crosby*, 530 U.S. at 373). Here, the purpose of the "preservation and retention requirements for federal elections records" under the Civil Rights Act of 1960 "is to secure a more effective protection of the right to vote." U.S. Dep't of Justice, *Federal Law Constraints on Post-Election "Audits,"* at *2 (quoting *State of Ala. ex rel. Gallion v. Rogers*, 187 F. Supp. 848, 853 (M.D. Ala. 1960), *aff'd sub nom. Dinkens v. Atty. Gen.*, 285 F.2d 430 (5th Cir. 1961) (per curiam)). Retaining and preserving election records serves this

purpose because "[t]he detection, investigation, and proof of election crimes—and in many instances Voting Rights Act violations—often depend[s] on documentation generated during the voter registration, voting, tabulation, and election certification processes." *Id*. at *2 (quoting U.S. Dep't of Justice, *Federal Prosecution of Election Offenses*, at 78).

To allow access to election records by persons other than officers of election, except as permitted by federal law, puts at risk the integrity of those records, and, by extension, the validity of the election itself. This principle applies with greater force to allowing any potential alteration of election records, which federal law ***never*** permits. Congress has considered these issues and ensured that such actions and the attendant risks are directly contrary to the plain language and purpose of federal law. It follows that there cannot be a correct and valid interpretation of Wis. Stat. § 7.54 that contravenes the principles enshrined in the Civil Rights Act of 1960.

CONCLUSION

Petitioners ask this Court not only to give them another opportunity to challenge the results of an election already subject to recount procedures, but also to open the ballots for inspection and potential alteration in court. This procedure, if allowed, would place state law squarely in conflict with federal law, and would frustrate the purpose of the federal election records retention and preservation requirements. While the parties in this case dispute the interpretation and application of state law in only a single local election, the Court's decision here will impact all elections, local, state and federal, going forward, and therefore should be very carefully considered. Without taking any position on the ultimate disposition of this lawsuit, *amicus curiae* respectfully requests that this Court construe Wis. Stat. § 7.54 in compliance and alignment with federal law.

Dated: August 18, 2021.

By _____

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FORM AND LENGTH CERTIFICATION

I certify that the foregoing brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of the foregoing brief, exclusive of the caption, Table of Contents, and Table of Authorities, is 2,448 words.

Dated: August 18, 2021.

Jeffrey A. Mandell

CERTIFICATION OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

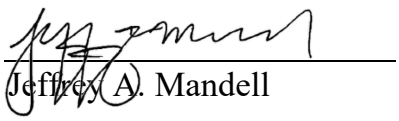
I hereby certify that:

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). 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: August 18, 2021.



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CERTIFICATION OF MAILING AND SERVICE

I certify that 22 paper copies of the foregoing Brief of *amicus curiae* Law Forward, Inc. were hand-delivered to the Clerk of the Supreme Court on August 18, 2021.

I further certify that on August 18, 2021, I sent true and correct email copies as well as three paper copies, by first-class mail, postage prepaid, of the foregoing Brief of *amicus curiae* Law Forward, Inc. to the following counsel of record:

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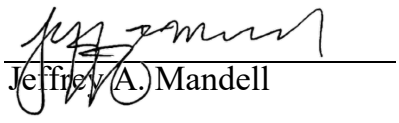

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