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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
State Bar #1025452

THOMAS C. BELLAVIA
Assistant Attorney General
State Bar #1030182

Attorneys for Defendant-Co-Appellant Wisconsin Elections Commission

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1792 (SCK)
(608) 266-8690 (TCB)
(608) 294-2907 (Fax)
kilpatricksc@doj.state.wi.us

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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

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[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.

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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,

JOSHUA L. KAUL
Attorney General of Wisconsin

STEVEN C. KILPATRICK
Assistant Attorney General
State Bar #1025452

THOMAS C. BELLAVIA
Assistant Attorney General
State Bar #1030182

Attorneys for Defendant-Co-Appellant Wisconsin Elections Commission

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1792 (SCK)
(608) 266-8690 (TCB)
(608) 294-2907 (Fax)
kilpatricksc@doj.state.wi.us
bellaviatc@doj.state.wi.us

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.

STEVEN C. KILPATRICK
Assistant Attorney General

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.

STEVEN C. KILPATRICK
Assistant Attorney General