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SUPREME COURT

No. 2022AP91

In the Supreme Court of Wisconsin

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 Appeal from the Waukesha County Circuit Court,
The Honorable Michael O. Bohren, Presiding,
Case No. 21cv958

RESPONSE BRIEF OF PLAINTIFFS-RESPONDENTS

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ISSUES PRESENTED

1. Whether Wis. Stat. § 6.87(4)(b)1, which requires "the elector" to return his or her own ballot by U.S. mail or by delivering it in person to the municipal clerk, can be properly interpreted to allow any third person to return another voter's ballot.

The Circuit Court answered no.

2. Whether placing an absentee ballot into an unattended drop box qualifies as "deliver[y] in person, to the municipal clerk" under Wis. Stat. § 6.87(4)(b)1.

The Circuit Court answered no.

3. Whether WEC's direction that municipalities can install drop boxes in any location, including "libraries," "businesses," "grocery stores," and "banks," is permissible under Wis. Stat. § 6.855, which provides that the municipal clerk's office is "the location … to which voted absentee ballots shall be returned by electors" unless an alternate site is designated under the procedures in that section.

The Circuit Court answered no.

4. Whether the memoranda WEC issued to all clerks statewide on March 31, 2020, and August 19, 2020, providing direction on the issues above should have been promulgated as administrative rules.

The Circuit Court answered yes.

INTRODUCTION

Quis custodiet ipsos custodes? ("Who watches the watchmen?") —Juvenal

The Wisconsin Elections Commission ("WEC") is responsible for administering Wisconsin's election laws as promulgated by the Legislature, and it has the power and duty to ensure that local election officials comply with those laws. *See* Wis. Stats. §§ 5.05(1), 5.06. Under § 5.06(6), WEC may, "by order, require any election official to conform his or her conduct to the law, restrain an official from taking any action inconsistent with the law, or require an official to correct any action or decision inconsistent with the law." WEC is the watchman of Wisconsin elections. The question here is what happens when the watchman fails to enforce the rules and, instead, changes the rules adopted by the Legislature.

This case is not about whether drop boxes or third-party return of another voter's ballot are good policy ideas. It is not about voter suppression or questioning the results of past elections. Nothing in this case affects the undisputed constitutional right of any eligible elector to cast a ballot in person at the polling place on Election Day.

The fundamental question in this case is what branch of Wisconsin's government has the authority to create or alter the laws governing the return of absentee ballots—whether the plain language of the laws enacted by the Legislature govern or whether WEC may instead unilaterally add to or alter those laws.

ORAL ARGUMENT AND PUBLICATION

By granting the petition for bypass, this Court has indicated that the case is appropriate for oral argument and publication.

STATEMENT OF THE CASE

Wis. Stat. § 6.87(4)(b)1 requires an elector voting by absentee ballot to place his or her ballot in an envelope, which "shall be mailed by the elector, or delivered in person, to the municipal clerk issuing the ballot or ballots." The municipal clerk's office is the default location "to which voted absentee ballots shall be returned by electors," unless an alternative site is designated under Wis. Stat. § 6.855(1). Section 6.855 imposes important restrictions on such alternate sites, including, most significantly, that alternate sites may not "afford[ ] an advantage to any political party" and "shall be staffed by the municipal clerk or the executive director of the board of election commissioners, or employees of the clerk or the board of election commissioners." Wis. Stat. § 6.855(1), (3). The Legislature has also made clear that, unlike voting in person, "voting by absentee ballot is a privilege exercised wholly outside the traditional safeguards of the polling place" that "must be carefully regulated to prevent the potential for fraud or abuse" and "to prevent undue influence on" or "overzealous solicitation of absent electors who may prefer not to participate in an election." Wis. Stat. § 6.84(1).

On March 31, 2020, in the midst of the early voting period for the April 7, 2020, statewide election, WEC issued its first Memo on the issues in this case. JA20–22. In it, WEC for the first time told municipal clerks across the state that "drop boxes can be used for voters to return ballots," and that "[c]lerks can also use mail slots at municipal facilities when residents submit tax or utility payments for the return of ballots," as well as "book return slots at municipal libraries" if ballots are collected at least daily. *Id.* The Memo also instructed clerks that "[a] family member or another person may … return the [absentee] ballot on behalf of a voter." JA20. The Memo included a template that clerks could use to instruct voters on these new methods of return when issuing absentee ballots in the final days leading up to the election. JA22.

On August 19, 2020, WEC issued a second Memo confirming that drop boxes for absentee ballots could be "staffed or unstaffed, temporary or permanent." JA23–26. WEC encouraged "creative solutions" to facilitate the use of drop boxes, including "partnering with public libraries to use book and media drop slots for ballot collection" and "partnering with business or locations … such as grocery stores and banks." JA24. WEC directed clerks that, "[a]t a minimum, you should have a drop box at your primary municipal building, such as the village hall," and recommended that clerks set up a drop box for every 15,000–20,000 registered voters, and to "consider adding more drop boxes to areas where there may be communities with historically low absentee ballot return rates." JA26. As a consequence of the Memos, over 500 drop boxes were set up throughout the State for the November 2020 election—despite the fact that neither the term "drop box" nor anything like it appears anywhere in the statutes governing Wisconsin elections or WEC's administrative rules. R. 121, ¶¶ 4–5.

On June 28, 2021, shortly after this Court denied the petition for an original action in *Fabick* v. *Wisconsin Elections Commission*, No. 21AP428, Plaintiffs-Respondents Richard Teigen and Richard Thom ("Respondents") filed suit in Waukesha County Circuit Court seeking a declaratory judgment that WEC's Memos violated Wisconsin law and a permanent injunction requiring WEC to withdraw the unlawful instructions and forbidding the agency from issuing further unlawful directives to clerks. R. 2. The Democratic Senatorial Campaign Committee ("DSCC") sought to intervene on July 13, 2021, with the remaining intervenors—Disability Rights Wisconsin, Wisconsin Faith Voices for Justice, and the League of Women Voters of Wisconsin (collectively "DRW") seeking intervention on August 13, 2021, the same

date WEC filed its answer.[1] R. 6–8, 19–24. Both motions were granted on October 14, 2021. R. 58.

Respondents then immediately moved for summary judgment and a temporary injunction. On January 13, 2021, the Circuit Court held a hearing and orally granted Respondents' summary judgment motion in full. JA555–71. The Circuit Court declared that WEC's Memos are inconsistent with state law and specifically found that: (1) an elector must personally mail or deliver his or her own absentee ballot, except when otherwise authorized by law; (2) the only lawful methods for casting an absentee ballot are spelled out in Wis. Stat. § 6.87(4)(b)1; and (3) the use of drop boxes is not permitted unless staffed by the clerk and located in the clerk's office or a properly designated alternate site under Wis. Stat. § 6.85. JA639–41. Judge Bohren also enjoined WEC from issuing further interpretations of the law that conflict with the two statutes and directed WEC to withdraw the Memos and issue a statement to clerks notifying them that the interpretation in the Memos had been declared invalid by the Court. *Id.*

The Circuit Court denied a motion to stay on January 20, 2022. JA800–01. The Intervenors and WEC appealed, R. 144; R. 149, and the Court of Appeals granted a stay on Monday, January 24, staying the Circuit Court's ruling through February 15, 2022. JA751–60.

Respondents filed an emergency motion to bypass and to vacate the Court of Appeals' stay decision on January 26, 2022. This Court granted the bypass petition and denied the motion to lift the stay, noting that the stay would remain in place through February 15, 2022, as ordered by the Court of Appeals. Appellants then filed a motion to extend the stay, which this Court denied on February 11, 2022.

[1] Where appropriate, WEC and the various intervenors are referred to collectively as "Appellants." Arguments made by one party are identified throughout.

STANDARD OF REVIEW

Whether the Circuit Court properly granted summary judgment is a question of law, which this Court reviews de novo. *Waity v. LeMahieu*, 2022 WI 6, ¶ 17, 969 N.W.2d 263; *Serv. Emps. Int'l Union, Loc. 1 v. Vos*, 2020 WI 67, ¶ 28, 393 Wis. 2d 38, 946 N.W.2d 35.

SUMMARY OF ARGUMENT

It is the policy of the Legislature, codified in statute for over thirty-five years, that "voting is a constitutional right, the vigorous exercise of which should be strongly encouraged. *In contrast*, voting by absentee ballot is a *privilege exercised wholly outside the traditional safeguards of the polling place*." Wis. Stat. § 6.84(1) (emphasis added). As such, absentee voting is required to be "carefully regulated to prevent the potential for fraud or abuse; to prevent overzealous solicitation of absent electors who may prefer not to participate in an election; to prevent undue influence on an absent elector to vote for or against a candidate … or other similar abuses." The Legislature believed in this dichotomy so strongly as to expressly instruct that "matters relating to the absentee ballot process," including § 6.87(4), "shall be construed as mandatory." Wis. Stat. § 6.84(2).

Wisconsin courts have held that where an election statute is mandatory, strict compliance with the statutory text is required, even if the result seems draconian. In *State ex rel. Ahlgrimm v. State Elections Bd.*, 82 Wis. 2d 585, 597, 263 N.W.2d 152 (1978), a judicial candidate who filed his nomination papers with the county instead of the State Elections Board, as required by statute, could not appear on the ballot—despite the "unfortunate and regrettable" result that no candidate would appear on the ballot for that office as a result.

Appellants would prefer that these clear legislative commands not exist. But Section 6.84 is as much a part of Wisconsin law as is the requirement that an elector be at least eighteen years of age, meet

certain residency requirements, or present identification to vote. Wis. Stats. §§ 6.05, 6.10(3), 6.34; 6.79(2)(a). The statutes governing Wisconsin's election laws are interpreted in a manner to give meaning to each of them and to each word within them—not as a hodgepodge to be selectively applied for the sake of convenience or a desire to achieve certain policy objectives the Legislature chose not to include.

WEC's Memos fundamentally modified the procedures available for returning an absentee ballot in Wisconsin, directing municipal clerks statewide just one week before the spring statewide election in 2020 (authorizing drop boxes, including "mail slots at municipal facilities" for "tax or utility payments" and empowering a "family member or another person" to deliver any elector's ballot). WEC then renewed these instructions prior to the 2020 general election in the fall. JA23–26.

WEC's Memos conflict with the statutes, which only authorize two methods of returning an absentee ballot for most voters.[2] An absentee ballot may be delivered "by the elector" in person to the municipal clerk (or a properly designated alternate site under Wis. Stat. § 6.855), or the elector may return the ballot via U.S. mail. Wis. Stat. § 6.87(4)(b)1. No other methods of returning absentee ballots are authorized. Because the election procedures are to be strictly construed and read in conjunction with each other and with the remaining election statutes, WEC had no authority to fashion new methods of returning absentee ballots.

Requiring Wisconsin's elections to be held in accordance with established law promotes public confidence in the election process and does nothing to undermine the right of each qualified elector to cast a ballot. If lawmakers determine that drop boxes or other new methods of

[2] The Legislature has also provided for unique situations to ensure full access to the franchise for those who cannot vote on Election Day, such as those voters who reside in senior living facilities, those who are hospitalized, or those who are serving as sequestered jurors. Wis. Stats. §§ 6.875; 6.86(1)(b), (3)(a). These codified exceptions are not at issue in this case.

casting ballots serve a public good, the Legislature is free to pass such laws. The voters of this state could then hold their lawmakers accountable for the changes through the election process if they either did not wish to see the law changed or wanted different changes. WEC's Memos, issued by an unelected administrator of a state agency, provide no such accountability.

ARGUMENT

Courts have a "solemn obligation" to "faithfully give effect to the laws enacted by the legislature." *State ex rel. Kalal v. Circuit Ct. for Dane Cty.*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. Statutory interpretation begins with the language of the statute, and if the meaning is plain, the inquiry ends. *Id.* ¶ 45. Where the plain language of a statute provides a limited number of options for compliance, the agency may not create an additional avenue in conflict with the Legislature's intent.

In *State ex rel. Castaneda v. Welch*, 2007 WI 103, 303 Wis. 2d 570, 735 N.W.2d 131, for example, this Court considered whether an administrative rule that adopted procedures for handling citizen complaints about police officers and firefighters in Milwaukee exceeded the board's statutory authority. The Court concluded that most of the rule could not stand for several reasons, one of which was that the plain language of the enabling statute provided the commission with only two options for dealing with complaints: dismiss the complaint for failure to set forth sufficient cause for removal or set a date for trial and investigation of the charges in the complaint. The rule would have referred the complaint to the fire or police department for disposition, an outcome that should not occur absent a dismissal on purely legal grounds. *Id.* ¶¶ 70–71. The Court observed that the statutory directive "reflect[ed] a legislative intent that complaints be directed from the chief to the Board, not vice versa." *Id.* ¶ 71. The Court concluded that the rule

was "in direct contravention of" the statute "because it allows the Board to take actions that are not authorized by the text of the statute."

As described below, WEC's Memos purporting to interpret the relevant statutes are not grounded in the statutory text and, if accepted, directly undermine the protections the Legislature put in place to prevent fraud and coercion in the absentee voting process.

I. WEC's Directive Permitting Any Person to Return Any Other Elector's Absentee Ballot Violates the Requirement That Ballots Be Returned "by the Elector."

Section 6.87(4)(b)1 provides that absentee ballots "shall be mailed *by the elector*, or delivered in person, to the municipal clerk" (emphasis added). Section 6.855 contains similar language: "[V]oted absentee ballots shall be returned *by electors* for any election" (emphasis added). Notwithstanding this clear text, WEC's March Memo says that "a family member or another person may also return the ballot on behalf of the voter." JA20. In WEC's view, literally any "[ ]other person" may return anyone else's absentee ballot, effectively authorizing ballot harvesting in this State. DRW Br. 48 n. 12 (arguing that "ballot harvesting is lawful in Wisconsin"). WEC's interpretation is wrong for at least six different reasons.

First, and most obviously, WEC's interpretation directly conflicts with the text, which says that absentee ballots must be returned "by the elector." WEC reads the phrase "by the elector" out of the statute, violating basic canons of statutory construction. *Donaldson v. State*, 93 Wis. 2d 306, 315, 286 N.W.2d 817 (1980) ("A statute should be construed so that no word or clause shall be rendered surplusage and every word if possible should be given effect.") (citation omitted); *Kalal*, 2004 WI 58, ¶ 44; *see also* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts § 26 at 174–79 (1st ed. 2012).

Second, WEC's interpretation conflicts with the strict rule of construction for absentee voting procedures in Wis. Stat. § 6.84. That statute provides that sections "6.87(3) to (7) … shall be construed as mandatory." *Id.* § 6.84(2). And "mandatory" election requirements must be "must be strictly adhered to" and "strictly observed," *Ahlgrimm*, 82 Wis. 2d at 593.

Third, WEC's interpretation runs against the Legislature's declared purpose of avoiding "overzealous solicitation of" and "undue influence on" absentee electors "who may prefer not to participate in an election." Wis. Stat. § 6.84(1). Even the U.S. Supreme Court recently recognized that "third-party ballot collection can lead to pressure and intimidation." *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2347 (2021). Requiring electors to return their own absentee ballots ensures that it is actually the elector's vote and that voters take the exercise of the franchise seriously. This requirement is consistent with how voting is conducted at the polls, where each voter must cast his or her own vote—even close family members cannot cast votes for each other. Mailing or delivering the ballot in person is the final act of casting an absentee vote, thus it must be done by the elector.

Fourth, WEC's interpretation is at odds with the broader statutory context and related provisions. *Kalal*, 2004 WI 58, ¶ 46. There are many situations under state law where the Legislature has authorized an agent to act on a voter's behalf—none of which are called into question in this case—but in each the Legislature says so explicitly and provides specific requirements, limitations, and protections. The *very next subsection*, for example, § 6.87(5), explicitly allows voters who are unable to read or write to "select any individual … to assist in marking the ballot." But it imposes various restrictions: the voter must make a declaration that they are unable to read or write, the agent must sign the ballot, and there are limits on who can act as an agent. *Id.* Wisconsin's statutes also allow agents to assist voters who are hospitalized, Wis. Stat. § 6.86(3), in a nursing or retirement home, *id.*

§ 6.875, disabled, *id.* § 6.82, or serving on a sequestered jury, *id.* § 6.86(1)(b)—but in each case there are procedural requirements and protections, *e.g. id.* § 6.86(3) (agent must sign ballot and "attest" to certain things); § 6.875(5), (6)(d), (7) (special voting deputies must swear an oath, must secure ballots in a sealed carrier envelope, must sign the envelope, must return ballots within a short time, and must allow observers from each political party). By contrast, as the Circuit Court correctly observed, there is "[no] language in the statute that provides a basis for having agents, somebody other than the elector, actually deliver the ballot." JA562.

Fifth, and relatedly, WEC's interpretation leads to absurd results that could not have been intended by the Legislature. If any "[ ]other person" can return anyone else's absentee ballot, that would include paid campaign staff, employers, volunteers for advocacy organizations, union representatives, and the list goes on. Thus, political operatives could go through neighborhoods harvesting ballots and returning them on behalf of voters—without any protections to ensure that all are returned and none tampered with. Appellants mostly focus on more sympathetic hypotheticals, like a spouse mailing the other's ballot, *but see* DRW Br. 48 n. 12 ("ballot harvesting is lawful in Wisconsin"), but there is no text that would allow for the latter but not the former. There is no middle ground. Either "by the elector" means what it says, such that "the elector has to control the ballot and control how [it is] cast," JA563, or all bets are off and *anyone* can return anyone else's ballot.

Sixth, and finally, WEC's interpretation is inconsistent with Wis. Stat. § 12.13(3)(n), which prohibits, as a form of "election fraud," "receiv[ing] a ballot from or giv[ing] a ballot to a person other than the election official in charge." If electors can give their ballots to anyone else to deliver to the clerk, that provision would effectively be nullified.

Appellants' main counter is that the phrase "by the elector" only applies to *mailing* an absentee ballot, and therefore, they argue, anyone

can *deliver* a ballot. WEC Br. 19–20; DRW Br. 40–42. This interpretation cannot square with the text, which reads: "The envelope shall be mailed by the elector, or delivered in person, to the municipal clerk." Wis. Stat. § 6.87(4)(a)(1). In Appellants' view, "delivered in person" can mean delivery by anyone or to anyone (or even to no one, i.e., an unattended drop box). The sentence could be better drafted—the passive voice is often unclear—but that doesn't mean that one interpretation is good as another. Context matters. The entire paragraph describes the process to be followed "by the elector": "[the] elector … shall make and subscribe to the certification," "[t]he absent elector … shall mark the ballot," "[t]he elector shall … fold the ballot[ ]," "the elector shall also enclose proof of residence," etc. In the relevant sentence, the phrase "delivered in person" *immediately follows* the phrase "by the elector." In this context, the only reasonable reading is that the "person" who must deliver the ballot "in person" is "the elector." The argument that "person" can be read to apply to any person whatsoever—with no reference to anyone else nearby—is simply not plausible.

Appellants also argue, in conflict with their first argument, that the statute allows any "agent" of the elector to deliver or mail the ballot on an elector's behalf. WEC Br. 18–19; DRW Br. 39. But, as the Circuit Court noted, they cite nothing in the text to support this assertion. JA562 ("I don't see any language in the statute that provides a basis for having agents."). There is no definition of the word "elector" that includes an authorized agent. By contrast, there *is* such a definition for the term "municipal clerk," showing the Legislature knew to include a reference to agents or representatives when that's what it intended. Wis. Stat. § 5.02(10) (definition includes "authorized representatives"). Nor is there any reference anywhere in § 6.87(4)(b) to an "agent" of the elector performing any of the requirements in that subsection. As noted above, the *very next subsection*, (5), *does* explicitly allow an agent for electors who are unable to read or write, but with certain limits. *Id*. § 6.87(5). In the context of voting—where the Legislature is properly concerned that

a vote be the free and independent choice of the elector—it cannot be presumed that an elector can delegate some or all of her responsibilities to others.[3]

DRW (and only DRW) places great weight on *Sommerfeld v. Bd. of Canvassers of City of St. Francis*, 269 Wis. 299, 69 N.W.2d 235 (1955), DRW Br. 39–40, but that case was decided before the Legislature adopted Wis. Stat. § 6.84, establishing a strict rule of construction for absentee voting procedures, *see* 1985 Wis. Act 304, § 68n. The majority in *Sommerfeld* (over a 3-Justice dissent) relied heavily on its view that absentee voting procedures should *not* be strictly construed, but instead should be construed liberally "to give effect to the will of the electors … notwithstanding informality or failure to comply with some of [the election-related] provisions." *Id.* at 301–03 (citing Wis. Stat. § 5.011 (1955)). But § 6.84 fundamentally changed the rule of construction, establishing that, unlike in-person voting, absentee voting is "a privilege exercised wholly outside the traditional safeguards of the polling place" that "must be carefully regulated to prevent the potential for fraud or abuse." In short, *Sommerfeld* was abrogated by § 6.84. Indeed, its main holding has not been cited in Wisconsin since § 6.84 was adopted in 1985.

Finally, Appellants argue that following the statutory text would "disenfranchise" voters who are physically unable to mail or deliver their ballot. WEC Br. 25–27; DSCC Br. 35–36; DRW Br. 44. As a preliminary matter, there is no evidence in this case that requiring electors to return their own ballots would be a real problem for any voters, much less the

[3] Relatedly, Appellants argue that the passive voice in the relevant sentence shows "indifference to the actor." WEC Br. 21 (citations omitted); DRW Br. 39. But this argument ignores the phrase "*by the elector*," proving that the Legislature was *not* "indifferent to the actor," even though it switched to the passive voice.

extent of the problem if there were one.[4] Wisconsin's absentee voting procedures have been in place for decades, *see* 1971 Wis. Act 242, and WEC only recently endorsed return of absentee ballots by "another person." The idea that many voters around Wisconsin will be disenfranchised if state law is followed defies belief.

State law provides numerous exceptions and carve-outs for voters with physical challenges, none of which are at issue or called into question in this case. *E.g.*, Wis. Stat. §§ 6.82; 6.86(1)(ag); 6.86(2); 6.86(3); 6.87(5); 6.875. The U.S. Postal Service also has a special door service for people who cannot get to their mailbox.[5] Even if there is some gap under state law, such that some voters do not fit into any of these exceptions and truly cannot vote in any way under the various methods authorized by state law—even though apparently this was not a problem before March 2020—that would need to be resolved either by the Legislature or in a separate case where the facts and details of those particular voters could be tested and litigated. And the result would be, at most, an as-applied exception for those situations—not altering state law entirely for *all* voters, which is effectively what Appellants seek. The question in this case is the default rule under state law for all voters. Appellants ask this Court to retain a policy, *for all voters*, that conflicts with state law.

In the same vein, Appellants briefly argue that following state law would violate section 208 of the Voting Rights Act, WEC Br. 21–22; DRW Br. 49–50, which provides that "[a]ny voter who requires assistance to

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[4] Intervenors submitted some affidavits to that effect at the 11th hour, *after* they filed their post-judgment stay motion in the Circuit Court, leaving Respondents no real opportunity to address them, R. 138, and prompting the Circuit Court to emphasize that there had "been no fact-finding on" them. JA692. In any event, most are irrelevant on their face—for example, many assert they do not "trust the Post Office," obviously an insufficient basis for an exception to state law. R. 138:8, 10, 14, 18, 34, 56.

[5] *If I have Hardship or Medical Problems, how do I request Door Delivery?*, United States Postal Service (Apr. 7, 2020), https://faq.usps.com/s/article/If-I-have-Hardship-or-Medical-Problems-how-do-I-request-Door-Delivery.

vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union." 52 U.S.C. § 10508. This case is not the right vehicle to resolve whether and to what extent that statute applies to Wisconsin's absentee voting procedures, especially in light of Appellants' undeveloped argument. A full analysis would require this Court to analyze, among other things, whether Section 208 applies to state elections, *e.g.*, *Qualkinbush v. Skubisz*, 357 Ill. App. 3d 594, 606, 826 N.E.2d 1181 (2004) (suggesting it does not); *In re Thirteen Ballots Cast in 1985 Gen. Election in Burlington Cty.*, 209 N.J. Super. 286, 289, 507 A.2d 314 (Law. Div. 1985) (same), whether it applies to *returning absentee ballots*, *see Qualkinbush*, 357 Ill. App. 3d at 610–11 (giving reasons it might not), and a detailed preemption analysis given the many authorized forms of assistance for disabled electors under state law, *see id.* at 606–612 (concluding that Congress did not "intend[ ] to preempt the rights of state legislatures to restrict absentee voting, and, particularly, who may return absentee ballots"). Resolving these questions is especially inappropriate here because, even if this provision applies, it at most creates an exception for *disabled* voters—and *only* disabled voters—and would impose limits not found in WEC's memo (e.g., the agent cannot be "the voter's employer or agent of that employer or officer or agent of the voter's union."). Again, the question in this case is the default rule for *all voters*, and state law is clear that absentee ballots must be returned "by the elector."[6]

[6] DSCC argues, confusingly, that this issue is not actually at issue in this case. DSCC Br. 35–37. It does not dispute that WEC's Memo says any "[ ]other person" may return someone else's ballot, but argues this was just a "single sentence" during the COVID-19 crisis and therefore, somehow, the Court should not decide whether that sentence is consistent with state law. If this truly was not WEC's interpretation of the law, it simply could have said so in response to this lawsuit, or withdrawn that language when public health conditions improved. Instead, it has defended the

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Perhaps "family, friends, and neighbors," DSCC Br. 35, should be allowed to return each other's absentee ballots. But this is ultimately a policy question for the Legislature. The question in this case is the default rule under state law for returning an absentee ballot, and state law is clear that electors must return their own ballots, except where there is an explicit exception.

II. Drop Boxes Are Not Authorized by Wisconsin Law

WEC's memos also violate state law by authorizing drop boxes, whether "staffed or unstaffed, temporary or permanent," and anywhere, including "libraries," "businesses," "grocery stores," and "banks," JA23–24.

As an initial matter, WEC simply has no authority to create any new methods for returning absentee ballots. Agencies like WEC are "creatures of the legislature" and have "only those powers expressly conferred or necessarily implied by the statutory provisions under which it operates." *Myers v. Wisconsin Dep't of Nat. Res.*, 2019 WI 5, ¶ 21, 385 Wis. 2d 176, 922 N.W.2d 47. And the Legislature has recently "impos[ed] an 'explicit authority requirement' on [courts'] interpretations of agency powers." *Wisconsin Legislature v. Palm*, 2020 WI 42, ¶ 51, 391 Wis. 2d 497, 942 N.W.2d 900 (quoting Kirsten Koschnick, Comment, *Making "Explicit Authority" Explicit Deciphering Wis. Act 21's Prescriptions for Agency Rulemaking Authority*, 2019 Wis. L. Rev. 993, 997 (2019)).

No reference to drop boxes can be found anywhere in the election statutes. JA564 (Circuit Court finding "no specific authorization for drop boxes"). The Legislature has not authorized drop boxes or delegated authority to WEC to promulgate rules for drop boxes. Instead, the

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position that anyone can return anyone else's ballot all the way to this Court—and *so has DSCC*, DSCC Br. 35—so the idea that this is not a live issue is hard to understand.

Legislature provided two and only two methods for returning absentee ballots: (1) by mail; and (2) delivery in person to the municipal clerk. Wis. Stat. § 6.87(4)(b)1. Because drop boxes are not referenced anywhere in state law, there necessarily are no rules about them—like where they can go, how they must be secured and monitored, who may collect ballots from them, or how custody of ballots should be recorded and documented during transfer—all things the Legislature presumably would address were it to authorize drop boxes. The absence of such rules is unsurprising because WEC is making up the entire process.

While WEC's Memos provide various suggestions for how to implement and secure drop boxes, WEC itself argues, in response to Respondents' rulemaking argument, *infra* Part III, that none of this is binding on any clerks. WEC Br. 36 ("The memoranda … do not 'order' or 'direct' [clerks]."); DRW Br. 68 ("They do not impose obligations or standards."). If that combination of arguments prevails—that drop boxes are permitted under the law without any statute authorizing them and that there are no binding requirements—then a shoebox on a park bench would be a lawful method for accepting absentee ballots. Obviously that example is ludicrous, but it is the logical consequence of Appellants' position. As the Circuit Court noted, Wisconsin's election laws don't just leave it "up to the clerks to figure out how to do [an election]." JA566. Rather, there are "very detailed" and "specific" processes "to protect the integrity of the system." JA565–66. And there simply is "no statutory authority" for drop boxes. JA566.

Not only does WEC lack authority to unilaterally authorize drop boxes, its memos also violate two separate provisions of state law.

A. Dropping a Ballot into an Unattended Drop Box Is Not "In Person" Delivery to the Municipal Clerk

WEC's interpretation authorizing unattended drop boxes violates Wis. Stat. § 6.87, which requires ballots to be "delivered *in person*, to the municipal clerk." Dropping a ballot into an "unstaffed" drop box is not

delivery "in person," as that phrase is commonly understood. Rather, an "in person" delivery requires the elector to deliver their ballot to another person, namely the "municipal clerk" (or an "authorized representative," per the definition of "municipal clerk," Wis. Stat. § 5.02(10)).

WEC's interpretation is also inconsistent with the requirement that the ballot be delivered "*to the municipal clerk* issuing the ballot or ballots." A drop box is not the "municipal clerk," and while the definition of "municipal clerk" includes the clerk's "authorized representatives," in no manner of speaking can an inanimate object be considered an "authorized representative."

Requiring ballots to be "delivered in person, to the municipal clerk," is important to ensure that the other requirement discussed above—that *electors* deliver their own ballot and only their ballot—is followed. If one person delivers multiple ballots at the same time, it would immediately raise concerns to a clerk, whereas unattended drop boxes make this nearly impossible to detect.

Defendants have no meaningful textual response. The closest they come is the *ipse dixit* assertion that dropping a ballot into a box *is* "personal[ ] deliver[y] to a municipal clerk." WEC Br. 28–29. But they do not explain how dropping a ballot into a box *with no other person present* is "in person" delivery "to the municipal clerk."

Perhaps realizing they have no good textual response, Appellants rely primarily on policy arguments or sources that have no bearing on the statute. They heavily emphasize, for example, how safe and secure they believe drop boxes are. WEC Br. 9; DSCC Br. 13, 17–19, 32–33. But even if clerks have kept drop boxes relatively secure (though there has been no fact-finding in this case establishing that), neither WEC's memos nor anything else in the law requires this—because the law doesn't authorize them, it imposes no rules or requirements on their use.

Whether or not clerks tried to be careful is irrelevant to whether drop boxes are legal.

Appellants also argue that drop boxes are similar to mailboxes. DSCC 32–33. But a drop box is not a mailbox, and the relevant difference, of course, is that mailing a ballot is authorized by Wisconsin law, whereas drop boxes are not. Even if it mattered, there *are* meaningful differences between a mailbox and an unattended drop box: a drop box contains only ballots, and lots of them in one place at the same time, making it a prime target for would-be tamperers, whereas mailboxes may or may not contain ballots at any given time. And the U.S. Postal System is a well-established and secure means to transmit a document from one location to another; it is operated by an official agency of the U.S. Government, and there are additional laws and protections that ensure the integrity of that system, *see* 18 U.S.C. § 1341. A system of drop boxes could, in theory, be as secure as the postal system, but that's not guaranteed—and even WEC argues that the security recommendations in its memos are merely "guidance" and not binding on clerks. WEC Br. 36.

Intervenors argue that Respondents "conceded" that clerks can have a secure receptacle for voters to place their ballots into when they deliver them in person at the clerk's office—and that this somehow defeats their statutory argument. *E.g.*, DSCC Br. 14–15. Hardly. The statute requires "in person" delivery "to the municipal clerk," such that both the elector and the clerk (or an authorized representative) must be physically present when the elector returns his or her ballot. The Respondents simply agree to the proposition that whether the voter physically places the ballot into the clerk's hand or into some receptacle in the presence and view of the clerk is not a significant difference and that both could be considered in person delivery. But dropping a ballot into a box without a person present—whether the drop box is in a park, on the street in front of the clerk's office, or used "after hours"—is not "in person" delivery.

Intervenors emphasize a letter and brief from a lawyer on behalf of certain Wisconsin legislators, seemingly endorsing drop boxes. DSCC Br. 20–21; DRW Br. 58–59. But a single lawyer is not the Legislature or the law, nor can his statements control the interpretation of state law. *Wis. So. Gas Co., Inc. v. Pub. Serv. Comm'n*, 57 Wis. 2d 643, 651–52, 205 N.W.2d 403 (1973) (citing *Cartwright v. Sharpe*, 40 Wis. 2d 494, 508–09, 162 N.W.2d 5 (1968)). Our Constitution explains how a bill becomes law. Sending letters or emails is not included. Regardless, that lawyer's statement was a passing reference to how easy voting is in Wisconsin (which is true even without drop boxes), and was not a careful analysis of whether drop boxes are legal.[7]

Finally, DRW asserts that there is an "extensive history of drop boxes in Wisconsin," primarily citing Meagan Wolfe's affidavit. DRW Br. 61. The statement they cite does not support an "extensive history" of drop boxes in Wisconsin. R. 121, ¶ 9. Regardless, even if a few jurisdictions were violating the law before WEC's Memos, that is irrelevant to the proper interpretation of the text. That someone has previously violated the law without detection or consequence does not authorize otherwise unlawful conduct.

B. The Only Locations "to Which Absentee Ballots Shall Be Returned" Are the Clerk's Office and Alternate Sites Designated Under § 6.855

Drop boxes also violate the location requirements in Wis. Stat. § 6.855. That section provides that a municipality "may elect to designate a site other than *the office of the municipal clerk* … as the location … to which absentee ballots *shall be returned* by electors for any election." In other words, the default location "to which absentee ballots shall be

[7] Likewise, passing comments from two Supreme Court Justices in concurrences to the denial of a stay have no bearing on state law. DSCC Br. 21 (citing *DNC v. Wis. State Legislature*, 141 S. Ct. 28, 36 (2020)); DRW Br. 59 (same). And those comments were made in reliance on the very memo challenged here, in a case where the legal validity of that memo was not at issue. 141 S. Ct. at 36 (citing August Memo).

returned" is "the office of the municipal clerk," unless a municipality follows the procedure and requirements for such alternate sites.

Wis. Stat. § 6.855 imposes important limits and rules for alternate sites. *See* JA565 ("[T]he election laws in Wisconsin are very specific, very detailed as to what happens."). Most importantly, "no site may be designated that affords an advantage to any political party." The site must also "be staffed by the municipal clerk … or employees of the clerk," and the clerk must "prominently display a notice of the designation of the alternate site selected." Finally, if an alternate site or sites are designated, "no function related to voting and return of absentee ballots that is to be conducted at the alternate site may be conducted in the office of the municipal clerk." These restrictions show that alternate sites are to be narrow exceptions to the general rule that absentee ballots are to be mailed or returned in person to the municipal clerk's office.

A foundational principle of statutory interpretation is that the "express mention of one matter excludes other similar matters [that are] not mentioned." *James v. Heinrich*, 2021 WI 58, ¶ 18, 397 Wis. 2d 517, 960 N.W.2d 35. In *James*, this Court held that local health officials lacked the power to "close schools" because the statutes granted that authority only to the state health department. This Court summarized the principle as follows: "[i]f the legislature did not specifically confer a power, the exercise of that power is not authorized." *Id*. Similarly, § 6.855 is the *exclusive* means under state law to designate a location other than the clerk's office "to which voted absentee ballots shall be returned." There is no other provision anywhere in state law for alternate locations, yet Appellants argue, in effect, that municipalities can ignore the requirements of § 6.855 by creating an unauthorized alternate location where only a subset of the absentee voting process is permitted. That is not how statutory interpretation works.

If, as Appellants argue, absentee ballots can be returned *anywhere*, then there are no principled restrictions on where ballots can be

gathered. A clerk could designate a union hall, the local Republican Party headquarters, or a park in a historically Democratic-leaning neighborhood as a drop site. A municipality could even use a "mobile election vehicle" to drive around and collect ballots, as Racine has recently done.[8] It's not hard to see the potential for abuse of such a scheme. WEC's Memos write the safeguards the Legislature put in place for alternate voting locations (such as who staffs them and prohibiting locations advantageous to one political party) completely out of the law. Wis. Stat. § 6.855.

Appellants' primary response is that a drop box does not meet the definition of an alternate voting site under § 6.855 because voters cannot vote *in-person* at a drop box. WEC Br. 31–32; DSCC Br. 25–26; DRW Br. 62. This response misses the point. Appellants are correct that there is a distinction between in-person absentee voting and what they call "true" absentee voting, but § 6.855 is not *solely* about *in-person* absentee voting; it covers *both*, allowing an alternate site where electors "may request *and vote* absentee ballots [in-person absentee voting] *and to which voted absentee ballots shall be returned* ['true' absentee voting]." Given that § 6.855 authorizes a municipality "to designate a site *other than the office of the municipal clerk*" for *both* in-person and "true" absentee voting, the obvious implication is that, without such a designation, the only place "to which absentee ballots shall be returned" is "the office of the municipal clerk."

Appellants also cite Wis. Stat. § 6.87(3)(a), WEC Br. 32–33, but that provision supports Respondents' interpretation. It provides that a ballot received at the clerk's office or an alternate site for in-person absentee voting "may not be removed by the elector therefrom." Thus,

[8] Adam Rogan, *First of its kind in Wisconsin | Racine now has its mobile election vehicle, thanks to CTCL grant*, The Journal Times (June 27, 2021), https://journaltimes.com/news/local/govt-and-politics/elections/first-of-its-kind-in-wisconsin-racine-now-has-its-mobile-election-vehicle-thanks-to/article_c8581f0e-cbd2-54b4-8200-fa134ede78c9.html

when § 6.855 references the clerk's office or a designated site as the location "to which voted absentee ballots *shall be returned*," it is clearly referring to normal absentee ballots, since *in-person* absentee ballots cannot leave the site.

Appellants argue that Respondents' argument under § 6.855 is the same argument that this Court considered and two Justices tentatively rejected in a concurrence in *Trump v. Biden*, 2020 WI 91, 394 Wis.2d 629, 951 N.W.2d 568. *E.g.*, DSCC Br. 24–25, 26–28. They are wrong. The argument there, as framed to the Court, was that certain park events *"were* illegal in-person absentee voting sites." *Id.* ¶ 55 (Hagedorn, J., concurring). The argument here is not that drop boxes *are* alternate sites under Wis. Stat. § 6.855, but that § 6.855 is the exclusive means under state law to establish a new location, other than the "municipal clerk's office," "to which voted absentee ballots shall be returned." Wis. Stat. § 6.855(1). In any event, the concurring Justices there explained that "[a] comprehensive analysis [was] not possible or appropriate in light of the abbreviated nature of th[e] review and the limited factual record," and again that its discussion of the § 6.855 issue was "based on the record before the court and the arguments presented." *Id.* ¶¶ 36, 57 (Hagedorn, J., concurring).

Finally, DRW argues that, having authorized absentee voting in some form, the Legislature cannot "treat absentee ballots as a lesser class of ballot." DRW Br. 63–66. The Legislature has done no such thing. It has simply recognized that while in-person voting is a right, absentee voting is a privilege, and certain safeguards are necessary to ensure the integrity of elections. Wis. Stat. § 6.84(1). Even the Supreme Court has recognized that absentee voting comes with greater risks of fraud and abuse. *Brnovich*, 141 S. Ct. at 2347–48; *see also Republican Party of Pennsylvania v. Degraffenreid*, 141 S. Ct. 732, 735 (2021) (Thomas, J. dissenting from denial of certiorari) ("[E]lection administrators have long agreed [that] the risk of fraud is 'vastly more prevalent' for mail-in ballots." (listing various sources)). Taken to its logical conclusion, DRW's

argument would mean that *any* requirements for absentee voting that don't apply to in-person voting (such as the requirement for a witness's signature on the absentee ballot envelope) would be unconstitutional. That argument cannot possibly be right, but regardless, DRW's argument is not fully developed and need not be considered further.

C. Only "Election Officials" Appointed Under § 7.30 Can Handle Absentee Ballots

Respondents argued below, in the alternative, that WEC's Memos also conflict with state law by suggesting that anyone can "staff" a drop box, rather than only election officials appointed under Wis. Stat. § 7.30. R. 63:14–15; 127:8. The Circuit Court did not address this issue—it did not need to—because it held that the only locations to which absentee ballots can be returned are the municipal clerk's office or a site designated under § 6.855, which, as noted above, must "be staffed by the municipal clerk or the executive director of the board of election commissioners, or employees of the clerk or the board of election commissioners." For the same reason, if this Court agrees with the Circuit Court and Respondents on the § 6.855 issue, *supra* Part II.B, it does not need to address this issue.

If, however, this Court agrees with Appellants that clerks can install absentee ballot drop boxes anywhere, including in "libraries," "businesses," "grocery stores," and "banks," JA23–24, then it should hold that only election officials appointed under § 7.30 can staff and operate drop boxes and access the ballots therein. WEC's Memo purports to outline the requirements for drop boxes, but places no limits on who can "staff" or access them, despite multiple references to a "team staffing the site" and a "designated ballot drop box collection team." JA24–25.

Wis. Stat. § 7.30(2)(a) provides that "[o]nly election officials appointed under this section or s. 6.875 may conduct an election." Likewise, Wis. Stat. § 12.13(3)(n) prohibits "giv[ing] a ballot to a person other than the election official in charge." *See also* Wis. Stat. § 5.02(4e)

(defining "election official" as any "individual who is charged with any duties relating to the conduct of an election.").

Section 7.30 establishes important prerequisites to serving as an election official. Under that section, every election official must be "a qualified elector of a county in which the municipality where the official serves is located." *Id.* § 7.30(2)(a). The official must "file [an] official oath with the municipal clerk … before receiving any ballots." *Id.* § 7.30(5). And all election officials are subject to various training requirements and oversight by the municipal clerk. *Id.* § 7.30(2)(c), 7.15(1)(e).

The statute pertaining to special voting deputies, Wis. Stat. § 6.875, further reinforces that only specially appointed officials can handle ballots. Notably, it is the only exception to the general rule in § 7.30. *Id.* § 7.30(2)(a). And, like election officials under § 7.30, special voting deputies must "file [an] oath" swearing that the official "is qualified to act as a deputy," "has read" and "understands" "the proper absentee voting procedure," acknowledges "her sacred obligation [ ] to fully and fairly implement the absentee voting law," and, significantly, "understands the penalties for noncompliance with the procedure under s. 12.13" (which includes giving a ballot to anyone other than an election official, § 12.13(3)(n)).

While Wis. Stat. § 6.87(4)(b)1 only requires ballots to be delivered "to the municipal clerk" or an "authorized representative" (per the definition in Wis. Stat. § 5.02(10)), without further defining who can serve as a "representative," it is a bedrock principle of statutory construction that statutes must be interpreted "as part of a whole," and "not in isolation." *Kalal*, 2004 WI 58, ¶ 46. When read in conjunction with these other statutes just discussed, it is clear that only "election officials" can serve as "authorized representatives" of the clerk for purposes of receiving absentee ballots. Were it otherwise, there would be no safeguards in place whatsoever to ensure that ballots are accessed and handled only by appropriately vetted individuals. There is simply no

legislatively authorized exception permitting a librarian, grocery store employee, or other person who has not been appointed as an election official to collect or keep custody of ballots for the municipal clerk.

Appellants' only response below, and their likely counter in reply, will be that this issue is not presented in this case because the Memos do not explicitly say that anyone can staff a drop box and access the ballots within. But the Memos discuss "team staffing" of drop box sites and something called a "designated ballot drop box collection team" (a phrase made up by WEC), JA24–25, all without specifying who can serve on such teams, strongly implying that anyone can. Resolving this issue is especially important if drop boxes can go *anywhere*, because who staffs and accesses them would be the only meaningful constraint.

III. WEC's Memos Are Unlawful, Unpromulgated Rules

Finally, even if WEC did have the authority to issue the directives in its Memos (and it did not), it undisputedly failed to promulgate these interpretations as administrative rules, as required by Chapter 227. As the Circuit Court recognized, WEC's memos "really [are] rule[s] on how to conduct elections," and "how in particular to conduct and collect absentee ballots." JA567.

Section 227.10(1) requires "[e]ach agency [to] promulgate as a rule each statement of general policy and each interpretation of a statute which it specifically adopts to govern its enforcement or administration of that statute." Rulemaking ensures that "controlling, subjective judgments asserted by … unelected official[s]" are not imposed without notice or an opportunity for input. *Palm*, 2020 WI 42, ¶ 28. Rulemaking procedures may seem cumbersome, but they are intended as a check on arbitrary administrative power. *Palm*, 2020 WI 42, ¶ 35 ("Rulemaking [procedures] … hinder arbitrary or oppressive conduct by an agency.").

As this Court recently explained, a rule 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 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." *Palm*, 2020 WI 42, ¶ 22, (quoting *Citizens for Sensible Zoning, Inc. v. DNR*, 90 Wis. 2d 804, 814, 280 N.W2d 702 (1979)).

There is no dispute in this case that WEC's Memos meet requirements (1), (2), (4), and (5). *See* WEC Br. 33–34. They are "statements of policy," of "general application," issued by WEC to "interpret" laws "enforced or administered" by WEC. WEC is responsible "for the administration of chs. 5 to 10 and 12 and other laws relating to elections and election campaigns," Wis. Stat. § 5.05(1), and WEC interpreted the statutory language to mean something different altogether, then gave municipal clerks throughout the state the green light to act in accordance with its interpretation.

WEC's Memos also have the "effect of law." WEC has authority over municipal clerks with respect to elections. Not only is WEC generally responsible for "administ[ering]" the election laws, Wis. Stat. § 5.05(1), it also has the duty and power to investigate and prosecute violations of those laws, Wis. Stat. § 5.05(2m), and to order local election officials to conform their conduct to the law and to enjoin violations of election laws, Wis. Stat. § 5.06(1). WEC also trains clerks and election workers and is responsible for educating voters about voting procedures, so its memos directly affect how elections are conducted. Given WEC's broad powers with respect to election administration, its interpretations of the election statutes, especially when distributed to all municipal clerks around the state, have the force of law.

Appellants' only counter argument is that the Memos do not have the "effect of law" because they do not *require* clerks to use drop boxes or *prohibit* anything. WEC Br. 34–36; DRW Br. 67–69. But there are different kinds of laws—some impose duties, others prohibit conduct, and still others *authorize* conduct. *See*, *e.g.*, *Brown Cty. v. Dep't of Health*

& Soc. Servs., 103 Wis. 2d 37, 48–49, 307 N.W.2d 247 (1981) (agency powers are limited to those "expressly authorized"). WEC's memos fall into the latter category—they purport to authorize drop boxes and return of absentee ballots by any person. Given that WEC is the primary *enforcer* of Wisconsin's election laws, when WEC gives the green light to something, it has the "effect of law." Wis. Stats. §§ 5.05(1), (7), (12); Wis. Admin. Code § EL 12.04.

If WEC need not engage in rulemaking—which provides the public notice and an opportunity to comment on the lawfulness of the proposed rules—and can simply create new election procedures through a written memo not subject to any check or balance (the public cannot vote out the Administrator[9]), there is little to stop the agency from imposing or telling the municipal clerk that they need not enforce any other election requirement at its whim.

IV. Intervenors' Other Reasons to Avoid the Merits Are Baseless

The Intervenors raise various arguments for why this Court should avoid the merits, but all are meritless.

A. Respondents Have Standing

DSCC argues that Respondents lack standing to bring this case, DSCC Br. 37–43, but it is wrong.

Standing in Wisconsin "is construed liberally"; even "a trifling interest may suffice." *McConkey v. Van Hollen*, 2010 WI 57, ¶ 15–16, 326 Wis. 2d 1, 783 N.W.2d 855 (citation omitted). It "is not a matter of jurisdiction," but "sound judicial policy," to ensure the issues are "carefully developed and zealously argued." *Id*. In a Chapter 227 action,

[9] Like most of the election directives WEC issues, the Memos were not issued by the six appointed members of WEC. The March Memo was issued by Administrator Meagan Wolfe, while the August Memo was issued by Wolfe and Assistant Administrator Richard Rydecki.

standing "depends on whether the challenger comes within the statute authorizing judicial review." *Wis. Hosp. Ass'n v. Nat. Resources Bd.*, 156 Wis. 2d 688, 700–01, 457 N.W.2d 879 (Ct. App. 1990). Respondents satisfy both the policy considerations and statutory requirements of standing here. If two registered voters and taxpayers do not have standing to challenge unlawful government conduct relating to elections, it is difficult to identify who would ever be able to challenge unlawful WEC guidance, and its illegal guidance would be immune from judicial review. Fortunately, the Legislature explicitly authorized facial challenges to documents like the Memos in § 227.40(1).

Respondents have standing as registered voters. R. 65, ¶¶ 2–3; R. 66, ¶¶ 2–3. In *Jefferson v. Dane Cty.*, 2020 WI 90, 394 Wis. 2d 602, 951 N.W.2d 556, this Court considered a very similar challenge, brought by a single voter (and the Republican Party), to unlawful interpretations of election laws by the Dane and Milwaukee County clerks, and not a single Justice questioned the voter's standing. Instead, the Court emphasized that the "erroneous interpretation and application of [Wisconsin's election laws] affect matters of great public importance." *Id.* ¶ 15. Moreover, Wis. Stat. § 5.06 recognizes that "any elector" has an interest in raising violations of the election laws.[10] The Memos also "interfere[ ] with or impair[ ]" Respondents' ability to vote, and "threaten[ ] to interfere with or impair" their voting rights in the future because counting ballots that are not validly cast dilutes votes that were lawfully cast.[11] Wis. Stat. § 227.40(1). Wisconsin voters must have a right to ensure a lawful election process, so they can have confidence in the integrity of the results.

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[10] The § 5.06 *process* does not apply here, for reasons explained below, *infra* Part IV.B, but § 5.06 shows that electors have a "right" and interest in elections conducted in accordance with state law.

[11] The federal cases DSCC cites rejecting standing based on vote dilution are irrelevant; standing in Wisconsin is broader than in federal courts. *McConkey*, 2010 WI 57, ¶ 15.

Respondents also have standing as taxpayers. Even a "slight loss" of taxpayer funds is sufficient. *City of Appleton v. Town of Menasha*, 142 Wis. 2d 870, 878, 419 N.W.2d 249 (1988); *Fabick v. Evers*, 2021 WI 28, ¶ 9–11, 396 Wis. 2d 231, 956 N.W.2d 856. There can be no dispute that WEC personnel (whose salaries are paid by taxpayers) wrote and issued the Memos, which are posted and preserved on WEC's official website, and that state resources were used to create these documents and distribute them to the clerks as part of WEC's statutory duties to administer elections. That Respondents cannot quantify a financial cost or financial loss specific to which employees were involved does not defeat taxpayer standing.

B. The § 5.06 Process Does Not Apply to Violations by WEC Itself, and Regardless § 227.40 is the Method to Challenge Unlawful Unpromulgated Rules

DRW argues that this whole case should be dismissed because Respondents did not first file a complaint *with* WEC under Wis. Stat. § 5.06. DRW Br. 25–33. This argument was not properly raised below,[12] but in any event, it is meritless, for multiple reasons (notably, *WEC itself* does not make this argument).

First, the complaint process in § 5.06(1) does not apply when WEC violates the law. That section's text clearly distinguishes between the "election official" alleged to have violated the elections laws and "the commission," which acts on the complaint. Section 5.06 is a quasi-judicial process. It would make no sense—and likely violate due process—for WEC to sit as judge over its own actions. Even the remedies available under § 5.06 would be incoherent. Is WEC supposed to issue an order

[12] DRW raised this issue below only in their response to Respondents' *preliminary injunction* motion, R. 119:2–4, to which Respondents objected, R. 126:6–7. They could have filed their own motion to dismiss or summary judgment motion and raised this issue there, but they chose not to.

"restrain[ing]" itself or ordering itself to "conform [its] conduct to the law"? *Id.* § 5.06(1).

Even if § 5.06 did apply, this Court has recognized "numerous exceptions" to exhaustion requirements, nearly all of which would apply here. *Nodell Inv. Corp. v. City of Glendale, Milwaukee Cty.*, 78 Wis. 2d 416, 425 n. 12, 254 N.W.2d 310 (1977). For example, "[r]ecourse to the administrative agency would be a futile or useless act" (one exception, *id.*), because "the agency has already informed the party of its position on a question of law" (another), *Metz v. Veterinary Examining Bd.*, 2007 WI App 220, ¶ 15, 305 Wis. 2d 788, 741 N.W.2d 244. WEC also had "no jurisdiction to" create new methods of ballot return (a third exception, *Nodell*, 78 Wis. 2d at 425 n.12), its attempt to do so through memos "is fatally void" (a fourth, *id.*), and this case involves a "question of law in which the administrative agency's expertise is not an important factor" (a fifth, *id.*). This is also a situation where "[t]he administrative remedy [would have been] inadequate to avoid irreparable harm," (a sixth, *id.*): notably, another elector *did* file a § 5.06 complaint against a local clerk (not WEC) and WEC took over five months to rule on that complaint. *Pellegrini v. Igl*, Case No. EL 21-35 (filed June 30, 2021, decided December 6, 2021).[13]

Even putting aside the scope of § 5.06, Wis. Stat. § 227.40 provides a separate—and exclusive—process to challenge an illegal rule or guidance document, and there is no dispute that plaintiffs have followed that process here. *See* WEC Br. 33 n.7 (arguing that "Wis. Stat. § 227.40 is the 'exclusive' method for challenging agency guidance documents like the Commission memoranda at issue here.").

Finally, *Kuechmann v. Sch. Dist. of La Crosse*, 170 Wis. 2d 218, 487 N.W.2d 639 (Ct. App. 1992) does not support DRW's argument. DRW

[13] https://elections.wi.gov/node/7462

Br. 27. That case did not concern an unlawful action by WEC itself, nor did it involve a challenge to an unpromulgated rule or guidance document.

CONCLUSION

The Circuit Court's decision should be affirmed.

Dated: March 9, 2022.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 10,246 words.

Dated: March 9, 2022.

LUKE N. BERG

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I hereby certify that:

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

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Dated: March 9, 2022.

LUKE N. BERG