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SUPREME COURT

Supreme Court of Wisconsin
No. 2022AP91

Richard Teigen and Richard Thom,
Plaintiffs-Respondents-Petitioners,

v.

Wisconsin Elections Commission,
Defendant-Co-Appellant,

Democratic Senate Campaign Committee,
Intervenor-Defendant-Co-Appellant,

Disability Rights Wisconsin,
Wisconsin Faith Voices for Justice and
League of Women Voters of Wisconsin,
Intervenors-Defendants-Appellants.

Appeal from Waukesha County Circuit Court
The Honorable Michael O. Bohren, Presiding
Circuit Court Case No. 2021CV0958

REPLY BRIEF OF INTERVENORS-DEFENDANTS-APPELLANTS DISABILITY RIGHTS WISCONSIN, WISCONSIN FAITH VOICES FOR JUSTICE & LEAGUE OF WOMEN VOTERS OF WISCONSIN

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ARGUMENT[1]

Nothing in the law prohibits Wisconsinites from assisting one another, or using drop boxes, to return absentee ballots. Yet Plaintiffs-Respondents Richard Teigen and Richard Thom (together "Teigen") ask this Court to rewrite the law to adopt a prohibition the Legislature never saw fit to include. The Court should decline Teigen's request. For one thing, his suit is not justiciable and should be dismissed. For another, the statutory text does not support Teigen's position. If the Court does reach the merits, it should apply Wis. Stat. § 6.87(4)(b)1. as written, reversing the circuit court decision and leaving the changes Teigen seeks to the legislative process, where they belong.

I. Teigen's Lawsuit Is Not Justiciable.

This case is not justiciable because Teigen failed to follow statutorily prescribed procedures. Such failure triggers sovereign immunity, *PRN Assocs. LLC v. DOA*, 2009 WI 53, ¶61, 317 Wis. 2d 656, 766 N.W.2d 559, and is dispositive because "judicial process matters." *Fabick v. Wis. Elections Comm'n*, No. 2021AP428-OA, Order (Wis. June 25, 2021). Teigen's attempted excuses are easily dispatched.

First, DRW did properly raise below Teigen's failure to comply with Wis. Stat. § 5.06. (J. App. 65, 399-401)

[1] DRW incorporates by reference all arguments raised in its opening brief, and joins those arguments made in reply by Co-Appellants.

Second, Wis. Stat. §§ 5.05 and 5.06 specifically govern disputes under the election code and supersede Wis. Stat. § 227.40, which applies to general disputes about agency pronouncements. *See, e.g.*, *Marder v. Bd. of Regents of Univ. of Wis. Sys.*, 2005 WI 159, ¶23, 286 Wis. 2d 252, 706 N.W.2d 110.

Third, *Kuechmann v. School District of La Crosse*, 170 Wis. 2d 218, 487 N.W.2d 639 (Ct. App. 1992), controls. Courts cannot adjudicate complaints alleging misconduct by election officials until after Wisconsin Elections Commission ("WEC") review. *Id.* at 224-25.

Fourth, Teigen's failure to exhaust administrative remedies is fatal. Neither his projected timeline for WEC resolution nor someone else's similar WEC complaint can excuse Teigen's failure to follow proper procedure.

Moreover, Teigen is wrong to argue that Wis. Stat. § 5.06 does not apply. The statutes define "election official" as someone "charged with *any* duties relating to the conduct of an election." Wis. Stat. § 5.02(4e) (emphasis added). This definition includes the Commissioners who comprise WEC, which has general administrative responsibility for, and fulfills specific duties necessary to, Wisconsin elections. *See, e.g.*, Wis. Stat. §§ 5.05(2w), 5.72, 7.08, 7.70, 10.06. WEC's charge necessarily means its Commissioners are election officials who can be held accountable under § 5.06.

Nor is Teigen's dispute really with WEC. His real target is Administrator Meagan Wolfe, who issued the disputed guidance. (J. App. 93) Teigen admits that the memos he challenges were "issued by [the]

administrator" (Teigen Br. 13), "the chief election officer of this state," Wis. Stat. § 5.05(3g), who is undoubtedly subject to Wis. Stat. § 5.06.[2] A contrary interpretation is both absurd and belied by recent practice. Dean Knudson, a WEC Commissioner and the primary legislative architect of WEC, filed a § 5.06 complaint against Administrator Wolfe, alleging that she had violated Wis. Stat. § 7.70(5). *Knudson v. Wolfe*, EL 20-27 (WEC Apr. 30, 2021).[3] That complaint was handled by outside counsel to preserve due process.

Teigen's insistence that WEC cannot address complaints about its own conduct are unfounded. As in *Knudson*, WEC can retain special counsel to adjudicate disputes inappropriate for its own investigation. But that is not always necessary. Indeed, in the realm of administrative procedure, targeted decision-makers are often responsible for the initial review of a complaint. Consider, for example, the Municipal Administrative Procedure Act, Wis. Stat. ch. 68, which exists "to afford a constitutionally sufficient, fair and orderly administrative procedure and review in connection with determinations by municipal authorities which involve constitutionally protected rights of specific persons which are entitled to due process protections under the 14th amendment to the U.S. Constitution." Wis. Stat. § 68.001. The Act provides for review of administrative determinations; such

[2] Indeed, even if Wis. Stat. § 5.06 does not apply, that does not relieve Teigen of his obligation to exhaust administrative remedies, because he could alternatively have brought a complaint against WEC or Wolfe under Wis. Stat. § 5.05(2m).

[3] Available at https://elections.wi.gov/node/7266.

review may be conducted by the "officer, employee, agent, agency, committee, board, commission or body who made the initial determination." § 68.09(2). A permissible—but not mandatory—alternative is for the municipality to arrange an independent review. § 68.09(3). The initial review decision may be appealed, ultimately leading to judicial review. §§ 68.09-68.13.

So, too, here. Wis. Stat. § 5.06 required Teigen to file his complaint with WEC. Within constitutional limits, WEC could conduct the initial review or arrange independent assistance. Teigen's protestations notwithstanding, it is not "incoherent" (Teigen Br. 35) for WEC to review its guidance, whether issued with direct WEC oversight or independently by its staff; nor is it inconceivable that review would lead WEC to reconsider its position and order itself to "conform [its] conduct to the law." § 5.06(1). Teigen cannot sidestep mandatory procedures simply by disparaging them. Nor can he obviate his obligation to exhaust administrative remedies by labeling that process "futile." This Court does not recognize futility exceptions unless the administrative process at issue recognizes such an exception. *State ex rel. Hensley v. Endicott*, 2001 WI 105, ¶9, 245 Wis. 2d 607, 629 N.W.2d 686. Here, § 5.06 does not provide a futility bypass directly to judicial review.

II. Wisconsin Law, Properly Construed, Does Not Prohibit Helping Voters Return Absentee Ballots.

The governing statutory text, context, history, and conflict-avoidance principles unanimously confirm that Wisconsin voters may receive help with returning their absentee ballots. Teigen's scattershot response to DRW's arguments does not disturb this conclusion.

A. Teigen's arguments against ballot return assistance all fail.

Teigen offers six enumerated reasons that Wisconsin law forbids ballot return assistance. Every proffered reason contravenes statutory text, lacks record support, or both.

1. Teigen claims that DRW reads "by the elector" out of Wis. Stat. § 6.87(4)(b)1. (Teigen Br. 14) Nothing could be further from the truth. DRW and Co-Appellants read the statute to give meaning to the phrase "by the elector" without obviating other words and punctuation. (*See* DRW Br. 33-52) The Legislature chose to use "by the elector" to modify *only* "mailed by"; the Legislature underscored this decision by separating the phrase from the remainder of the sentence with a comma and a distinct clause. § 6.87(4)(b)1. Rejecting myriad other syntactical options that would apply "by the elector" to "mailed by" and "delivered in person" alike, the Legislature chose "by the elector" as a limit only on the means of mailing. Ignoring the Legislature's syntactical decisions risks overriding its policy determinations under the guise of faithful statutory construction.

Teigen's sole, wan response is to suggest that the text written by the Legislature "could be better drafted." (Teigen Br. 17) This Court should not indulge Teigen's desire to rewrite the statute in service of his preferred policy outcome. The Legislature chose to divorce "by the elector" from "delivered in person." Rather than rewriting the statute, this Court should give meaning to the plain language that the Legislature adopted. Nothing in that language prohibits absentee ballot return assistance.

2. Teigen places unbearable weight on the requirement that some absentee balloting procedures "be construed as mandatory." Wis. Stat. § 6.84. Mandatory construction does not necessitate Teigen's favored construction. Strict construction requires precise statutory compliance—no more and no less. That is crucial here, because there are multiple ways to comply with the statute. Teigen's effort to prohibit some compliant actions that he disfavors on policy grounds is not faithful to the statutory text. Reading Teigen's preferred boundaries into the law would violate § 6.84 by writing into the law limitations the Legislature chose not to adopt. Accordingly, § 6.84 subverts, rather than supports, Teigen's argument.[4]

3. Teigen claims that his policy preferences must be read into the statute to effectuate the Legislature's "declared purpose of avoiding

[4] Relatedly, Teigen claims that DRW failed to "fully develop[]" its argument regarding constitutional avoidance and the "lower class" balloting method that Teigen advances on appeal. This is not true. (*See* DRW Br. 63-66) DRW also raised the same argument before the circuit court, which did not address it. (J. App. 388)

overzealous solicitation of and undue influence on absentee electors." (Teigen Br. 15) Nothing in the record supports this outlandish contention. This case is about whether Wisconsinites can help each other return their absentee ballots. If this process somehow caused absentee ballots to be returned under "undue influence," Teigen should be able to show it. He cannot. He has offered literally nothing to support this argument. Lest there be any uncertainty, his own counsel authored a 136-page election review that failed to identify even one example of undue influence under Wis. Stat. § 6.87(4)(b)1.[5] In the absence of any support for Teigen's purpose argument, this Court should reject it outright.

4. Teigen's fourth argument rests on a false equivalence. He identifies a set of other statutory provisions that authorize agents to complete an elector's ballot. Those provisions specify who, how, and under what circumstances, an agent may assist in filling out an elector's ballot. But how a ballot may be *completed* is not at issue in this case; rather, Teigen chose to limit his challenge to how an absentee ballot may be *returned*. It is of no consequence, therefore, that Wis. Stat. § 6.87(4)(b)1. does not offer the same specificity as surrounding statutes. If anything, the purported discrepancy should be read not as a drafting omission but as evidence of a legislative policy decision to leave the absentee ballot return process open to assistance.

[5] Available at https://will-law.org/wp-content/uploads/2021/11/2021ElectionReviewStudy.pdf.

Had the Legislature sought to restrict return assistance, it could and would have promulgated additional restrictions. Its decision not to impose such restrictions here, while doing exactly that in adjacent statutes, reinforces DRW's point that Wisconsin has no statutory prohibition on return assistance.

5. Next, Teigen conjures the specter of "volunteers" storming through "neighborhoods harvesting ballots and returning them" as demonstrating that DRW's interpretation of Wis. Stat. § 6.87(4)(b)1. leads to an "absurd result[] that could not have been intended by the Legislature." (Teigen Br. 16) Hardly. Teigen chose not to conduct discovery to support this theory. And nothing in the record supports his fanciful notion. The only record evidence on return assistance is, as Teigen acknowledges, far "more sympathetic" (*id.*) and demonstrates the propriety of DRW's interpretation of § 6.87(4)(b)1. Unlike Teigen's fictions, these "hypotheticals" *are* found in the record.[6] For example, one Milwaukee "veteran receiving hospice support for military-related terminal illness" expressed that he is "unable to leave the house" and

[6] Contrary to Teigen's assertion, the 29 sworn statements DRW filed (J. App. 581-638) are hardly "irrelevant"; in fact, they clearly contradict Teigen's glib assertion that "[t]he idea that many voters around Wisconsin will be disenfranchised if state law is followed defies belief." (Teigen Br. 19) In these sworn statements, dozens of Wisconsinites averred that they believed the circuit court order would deprive them of the right to vote or render specific Wisconsinites of whom they have personal knowledge unable to vote. Teigen misleadingly cherry-picks a single statement regarding the voter's lack of confidence in USPS's ability to timely deliver ballots. (*Id.* n.4) However, he omits that the chief concern echoed in nearly every affidavit was the voter's inability to walk to their mailbox and/or deposit their ballot into the mailbox by themselves.

requires "assistance to fill out and mail [his] ballot." (J. App. 582) As he put it, "I will be unable to vote based on my understanding of the [circuit court's] January 13, 2022 ruling." (*Id.*) The absurd result is not hypothetical ballot "harvesting" but one where Wisconsin veterans risk their lives for our collective freedom, only to be prohibited from participating in democracy afterward. That result cannot stand.

6. Finally, Teigen suggests assisting with ballot return is a crime. (Teigen Br. 16) Here again, Teigen cannot identify any authority that would suggest any prosecutor, much less a court, has ever adopted his position. This is unsurprising. Teigen's strained interpretation is absurdly overbroad. It violates the rule of lenity, as well as Wis. Stat. § 5.01(1)'s specific requirement that it be construed to "give effect to the will of the electors." If someone needed help to return their ballot, it would be impossible to "give effect to [their] will" if the person they asked for help was subsequently charged with a crime. This argument withers under the slightest scrutiny.

B. The Legislature left the controlling *Sommerfeld* decision undisturbed.

This Court has long held that the text of Wis. Stat. § 6.87(4)(b)1. allows voters to receive help returning their ballots. *Sommerfeld v. Bd. of Canvassers of City of St. Francis*, 269 Wis. 299, 69 N.W.2d 235 (1955). Teigen argues that this Court should disregard *stare decisis* in this instance because "*Sommerfeld* was abrogated by § 6.84." (Teigen Br. 18) There was

no such abrogation, and, absent specific language evincing such intent, this Court should not read an abrogation into the statute.

The Legislature itself just argued to this Court that "[i]t is axiomatic that every statute must be interpreted in light of the common law and the scheme of jurisprudence existing at the time of its enactment." *Kaul v. Prehn,* No. 2021AP1673, Br. of Wis. Legislature at 21 (cleaned up). The current version of Wis. Stat. § 6.87(4)(b)1. retains language nearly identical to that construed in *Sommerfeld.* "Under the doctrine of acquiescence, refusal to pass a measure that would defeat the courts' construction is not an equivocal act." *Id.* at 32 (citing *Zimmerman v. Wis. Elec. Power Co.*, 38 Wis. 2d 626, 634, 157 N.W.2d 648 (1968)). The Legislature could have adopted different language to trigger the abrogation Teigen projects into the law. But it did not do so. By retaining language nearly identical to the text construed in *Sommerfeld*, the Legislature ratified and perpetuated this Court's prior construction.

True, the predecessor statute at issue in *Sommerfeld* was not subject to the "mandatory" construction provision now found in Wis. Stat. § 6.84. Yet this Court's reasoning was primarily based on disabled voters, to whom the Legislature (and Congress) has affirmatively granted the franchise. This Court ruled that "[h]aving made provision that these unfortunate people can vote, we cannot believe that the Legislature meant to disenfranchise them by providing a condition that they could not possibly perform." *Sommerfeld*,

269 Wis. at 303. Unsurprisingly, the Legislature did not disenfranchise disabled voters when it wrote § 6.84. Under the doctrine of acquiescence, this Court should therefore presume that neither § 6.84(1) nor § 6.87(4)(b)1. forecloses Wisconsin's disabled voters from returning their absentee ballots with the assistance of another person.

Incredibly, Teigen believes that disenfranchisement *is* the result the Legislature enacted. He argues that disabled voters' right to vote should be contingent on future lawsuits brought by each individual "where the facts and details of those particular voters could be tested and litigated." (Teigen Br. 19) Given that federal law guarantees the availability of absentee ballot return assistance,[7] Teigen's approach is an unavailing effort to invert the burden of proof. It is also impractical; lest this Court necessitate a tsunami of civil rights lawsuits, it should follow the precedent from *Sommerfeld* and recognize that Wis. Stat. § 6.87(4)(b)1. does not prohibit Wisconsinites from helping each other to return their absentee ballots.

III. Drop Boxes Are Statutorily Permitted.

Even putting aside Teigen's continued denial of reality regarding the usage of drop boxes in Wisconsin in favor of a threadbare fever dream that clerks are allowing ballots to be returned to a "shoebox on a park bench," his statutory argument is fundamentally incorrect. (Teigen Br. 22)

[7] Notably, Teigen does not even mention the Americans with Disabilities Act and thereby concedes the accuracy of DRW's assertions about that statute's content and relevance.

Because he recognizes that the statute does not support his position, Teigen attempts to shoehorn this case into the Court's recent decision in *James v. Heinrich,* 2021 WI 58, 397 Wis. 2d 517, 960 N.W.2d 35. He alleges that DRW seeks to create a *new* means under state law to return an absentee ballot, despite the Legislature designating Wis. Stat. § 6.855 the *exclusive* means. Quoting *James*, Teigen asserts that "[i]f the legislature did not specifically confer a power, the exercise of that power is not authorized." (Teigen Br. 26 (quoting *James*, 2021 WI 58, ¶18)) Teigen's comparison is misplaced and inapt.

James confronted this Court with an express, exclusive grant of "power" from the Legislature to local health officials. Drop boxes are not a similar "power" the Legislature can delegate. Absent an express statutory prohibition, drop boxes can be employed so long as their use is consistent with other statutory provisions. That is precisely the point here. Wisconsin Stat. § 6.855 is inapposite and has never been characterized as the exclusive way to return an absentee ballot. Alternate absentee ballot sites under § 6.855 have several statutorily prescribed conditions, including that an elector be able to "request" an absentee ballot at such a site. It is undisputed that drop boxes are *not* mechanisms for electors to request or receive blank absentee ballots. This renders § 6.855 irrelevant.

That leaves the Court with the plain text of Wis. Stat. § 6.87(4)(b)1., which does not prohibit drop boxes.

CONCLUSION

This Court should vacate the circuit court's order. First and foremost, Teigen's case faces an insurmountable procedural defect: it was initiated without exhausting mandatory administrative remedies, and thus sovereign immunity bars its adjudication. Moreover, even on the merits, Teigen's claims fail, and the Court should not write Teigen's preferred policy choices into the law where the legislative process has not. The plain text of Wis. Stat. § 6.87(4)(b)1., along with relevant context and history, render the circuit court judgment defective, and the circuit court's erroneous statutory interpretation creates unnecessary conflicts with federal law and constitutional guarantees.

Dated: March 21, 2022

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CERTIFICATION OF COMPLIANCE WITH WIS. STAT. § 809.19(8g)(a)

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm), and (c) for a brief. The length of this brief is 2,985 words.

Signed:

Scott B. Thompson

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)(f)

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)(f).

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 along with the paper copies of this brief filed with the court and sent to all parties.

Dated this 21st day of March, 2022.

Scott B. Thompson

CERTIFICATION OF MAILING AND SERVICE

I certify that a paper original and 22 paper copies of the foregoing Reply Brief Of Intervenors-Defendants-Appellants Disability Rights Wisconsin, Wisconsin Faith Voices For Justice & League Of Women Voters Of Wisconsin were hand-delivered to the Clerk of the Supreme Court on March 21, 2022.

I further certify that on March 21, 2022, I sent true and correct copies by email of the foregoing Reply Brief Of Intervenors-Defendants-Appellants Disability Rights Wisconsin, Wisconsin Faith Voices For Justice & League Of Women Voters Of Wisconsin to all counsel of record.

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