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SUPREME COURT

Supreme Court of Wisconsin

NO. 22AP91

RICHARD TEIGEN and RICHARD THOM,

Plaintiffs-Respondents-Petitioners,

vs.

WISCONSIN ELECTIONS COMMISSION,

Defendant-Co-Appellant,

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE,

Intervenor-Defendant-Co-Appellant, and

DISABILITY RIGHTS WISCONSIN, WISCONSIN FAITH VOICES FOR JUSTICE and LEAGUE OF WOMEN VOTERS OF WISCONSIN,

Intervenors-Defendants-Appellants.

On Appeal from the Circuit Court for Waukesha County
The Honorable Michael O. Bohren, Presiding
Circuit Court Case No. 2021CV958

REPLY BRIEF OF
INTERVENOR-DEFENDANT-CO-APPELLANT
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ARGUMENT[1]

I. Wisconsin law allows voted absentee ballots to be delivered to municipal clerks outside of their offices and "alternate absentee ballot sites."

Messrs. Teigen and Thom argue that, because "drop boxes are not referenced anywhere in state law," they are illegal. Resp. Br. 22. But they simultaneously "agree" that drop boxes *are* lawful *if* staffed and located *inside* a municipal clerk's office or "alternate absentee ballot site" established under Wis. Stat. § 6.855. Resp. Br. 24. In such circumstances, they reason, drop boxes are permissible even though "*not a detail that the statute addresses.*" Plaintiffs' SJ Reply Br. 4 n.1, Jt. App. 465 (emphasis added). This argument is inherently contradictory: there is nothing in the statutes that requires drop boxes—which Teigen and Thom concede are *sometimes* lawful—to be located only *inside* a clerk's office or an alternate absentee ballot site and staffed at all times. To accept this argument would be to find that Wisconsin does authorize drop boxes, but only under certain conditions that Teigen and Thom have invented. The only justifiable conclusion is that there is nothing in Wisconsin law prohibiting the use of drop boxes, and Wisconsin's historical use of drop boxes, consistent with guidance issued by the WEC, is entirely lawful and appropriate. Indeed, in papers submitted to the U.S. Supreme Court in October 2020, the Wisconsin Legislature lauded the use of drop boxes. DSCC Br. 21; Jt. App. 238-39. There is no basis to now find that use is illegal.

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[1] As in its opening brief, DSCC joins in the arguments of the Wisconsin Elections Commission (WEC) and Disability Rights Wisconsin (DRW), and has sought in this reply to minimize duplication of their arguments.

A. Wis. Stat. § 6.87(4)(b)1 only requires delivery "to the municipal clerk" or the clerk's authorized representatives, not "to the office of the municipal clerk."

Wis. Stat. § 6.87(4)(b)1 requires voters to mark and return their absentee ballots in sealed envelopes "mailed by the elector[s], or *delivered in person, to the municipal clerk* issuing the ballot or ballots" (emphasis added). This language requires delivery to the *clerk* (or an "authorized representative," per Wis. Stat. § 5.02(10)), rather than to the clerk's *office*. Courts "will not add words into a statute that the legislature did not see fit to employ." *Jefferson v. Dane County*, 2020 WI 90, ¶ 25, 394 Wis. 2d 602, 951 N.W.2d 556.

Section 6.87(4)(b)1's failure to say anything about "the clerk's office" stands in striking contrast to language used throughout the rest of Wisconsin's election code. There are dozens of provisions in Chapters 5-12 requiring that certain deliveries be made "*to,*" or that certain actions occur "*at*" or "*in*," the "office of the municipal clerk," the "office of the clerk," or the "clerk's office." DSCC Br. 30-31 n.6.[2] "Where the legislature includes a word in one provision and omits it from a similar, parallel provision within the same statute, we are even more reluctant to diminish the independent significance of the word." *Gister v. Am. Fam. Mut. Ins.*, 2012 WI 86, ¶ 33, 342 Wis. 2d 496, 818 N.W.2d 880; *see also James v. Heinrich,* 2021 WI 58, ¶¶ 18-20, 397 Wis. 2d 517, 960 N.W.2d 350 (applying doctrine of *expressio unius est exclusio alterius* and related canons of construction); *Jefferson*, 2020 WI 90, ¶ 29; *State ex rel.*

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[2] In addition to the 27 examples discussed in DSCC Br. 30-31 n.6, *see also, e.g.*, Wis. Stat. § 5.62(4)(ar) ("clerk's office"); *id.* § 7.60(1) (same); *id.* § 8.05(1)(b) (same); *id.* § 10.01(2)(e) ("municipal clerk's office").

DNR v. Wis. Ct. of App., Dist. IV, 2018 WI 25, ¶ 28, 380 Wis.2d 354, 909 N.W.2d 114; Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170 (2012) ("[A] material variation in terms suggests a variation in meaning.").

Section 6.87(4)(b)1 permits delivery "to the municipal *clerk*," in "stark" and "conspicuous" contrast to the dozens of other references throughout the election code to the "*office* of the municipal clerk." *James*, 2021 WI 58, ¶ 19. Respondents nowhere acknowledge this critical distinction. If deposit into a staffed drop box *inside* a clerk's office is lawful—as respondents now concede—there is no valid reason to require a different result with respect to staffed drop boxes *outside* the clerk's office (such as at drive-through and curbside locations or in high-traffic pedestrian areas).

B. Wis. Stat. § 6.855 applies only to early in-person absentee voting sites, not drop boxes.

Messrs. Teigen and Thom argue that Section 6.87(4)(b)1 has been modified by "implication" by Section 6.855. Resp. Br. 27. But the latter provision governs the designation and operation of early in-person absentee voting sites—locations where voters may request, vote, *and* return their ballots in a single visit. DSCC Br. 24-29. DSCC's opening brief relied heavily on Justice Hagedorn's persuasive reading of Section 6.855 in *Trump v. Biden*, 2020 WI 91, 394 Wis. 2d 629, 951 N.W.2d 568, *cert. denied*, 141 S. Ct. 1387 (2021), which emphasized "[a]n alternative absentee ballot site . . . must be a location not only where voters may return absentee ballots, but also a location where voters 'may request and vote' absentee ballots." 2020 WI 91, ¶ 56 (concurring opinion). For the same reasons that Democracy in the Park sites were not subject to Section 6.855, neither are drop boxes.

Teigen and Thom argue "[t]his response misses the point." Resp. Br. 27. They concede that neither Democracy in the Park sites nor drop boxes are "alternate absentee ballot sites." But they claim Section 6.855 establishes by "implication" that voted absentee ballots must be delivered to "the office of the municipal clerk" even though that is not what Section 6.87(4)(b)1 itself says. Resp. Br. 27. They contend that, since an "alternate absentee ballot site" is defined as a "location from which electors … may request and vote absentee ballots *and to which absentee ballots shall be returned by electors*," the clerk's office *implicitly* must be the "default location" to which absentee ballots are returned even though Section 6.87(4)(b)1 only requires delivery "to the municipal clerk." Resp. Br. 8, 25.

One answer to this argument is that the whole point of the canons of construction discussed above—which respondents entirely ignore—is to avoid reading "implied" terms into statutory language when those same terms are used "expressly" and extensively in other parts of the same statutory scheme. If the Legislature had intended Section 6.87(4)(b)1 to permit "deliver[y]" only to the clerk's *office*, it would have used that language, as it has done repeatedly elsewhere in the election code.

The argument also mischaracterizes *Trump v. Biden*. Teigen and Thom contend:

> The argument [in *Trump v. Biden*], as framed to the Court, was that certain park events "*were* illegal in-person absentee voting sites." The argument here is not that drop boxes *are* alternative 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."

Resp. Br. 28 (emphasis in original). But that is *not* how President Trump "framed" his argument to this Court. He contended that "a municipal clerk must have only one place where ballots are received and if an alternate location is preferable, for in-person voting and the like, then the clerk must comply with very stringent rules described in Wis. Stat. § 6.855(1)[.]"[3] He continued:

> Wisconsin Statutes contemplate only limited ways in which an absentee ballot may be returned. It is either mailed or it is delivered in person to the clerk's office. Wis. Stat. § 6.87(4)(b). So, the dilemma for Madison was that these [Democracy in the Park] sites were either considered additional clerk's offices, in which case they were barred by Wis. Stat. § 6.855(1), *or they were not clerk's offices, in which case they run afoul of the allowable methods for delivery of such ballots and run afoul of rules barring ballot delivery at places other than the clerk's office.*[4]

This is *precisely* the argument Teigen and Thom make here, and it fails for all the reasons discussed in Justice Hagedorn's *Trump v. Biden* concurrence. That concurrence not only rejected the applicability of Section 6.855 to Democracy in the Park sites, but emphasized that "voters who returned ballots to city election inspectors" at those sites "returned their absentee ballots 'in person, to the municipal clerk' as required by § 6.87(4)(b)1." 2020 WI 91, ¶ 54.

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[3] President Trump's "Memorandum in Support of Judgment on Notice of Appeal and Complaint" at 20, Doc. No. 45, *Trump v. Biden*, Nos. 2020CV2514 & 2020CV7092 (Milwaukee Cnty. Cir. Ct. Dec. 7, 2020), filed with and relied upon by this Court pursuant to Order at 2, *Trump v. Biden*, No. 2020AP2038 (Wis. S. Ct. Dec. 11, 2020).

[4] "Memorandum in Support," note 3 *supra*, at 22 (emphasis added).

C. Wis. Stat. § 6.87(4)(b)1 does not prohibit unstaffed drop boxes in all circumstances.

DSCC's opening brief also demonstrated that depositing a sealed ballot into a secure drop box designated by the clerk constitutes "deliver[y]" to the clerk; there is no statutory requirement that drop boxes be "staffed" at all times no matter how secure and closely monitored those boxes may be. DSCC Br. 32-35. Teigen and Thom's response is to offer what they concede are "*ludicrous*" examples, such as using "a shoebox on a park bench … for accepting absentee ballots." Resp. Br. 22 (emphasis added). Yet the WEC's detailed guidance to clerks, which emphasizes rigorous drop-box security measures (including locks and seals), video and law-enforcement surveillance, and chain-of-custody safeguards, in no way authorizes such "ludicrous" practices. WEC's guidance cannot be challenged as *permitting* what that guidance expressly *condemns*. A local clerk following such "ludicrous" practices would violate not only the challenged WEC guidance but numerous provisions of state election law requiring the proper "supervision of elections" to ensure they are "honestly, efficiently and uniformly conducted." Wis. Stat. § 7.15(1)(e); *see also id.* § 12.13(2)-(3).

II. This Court should not render an advisory opinion on the "ballot return assistance" challenge.

Messrs. Teigen and Thom devote just one footnote to DSCC's discussion of the "ballot return assistance" issue, dismissing DSCC's arguments as "confusing[]" and "hard to understand." Resp. Br. 20-21 n.6. DSCC's position is straightforward: DSCC agrees with the other appellants on the merits of the "ballot return assistance" issue, *if the Court reaches that issue*, but believes the Court should consider vacating this part of the judgment below as an ill-considered advisory opinion

resting on a woefully inadequate factual record that fails to consider actual ballot-return assistance realities and the likely scope and impacts of its application.

The declaratory relief that Teigen and Thom seek is permissible only if "the facts [are] sufficiently developed to allow a conclusive adjudication" so that courts do not "'entangl[e] themselves in abstract disagreements'" involving "contingent or uncertain" facts. *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶ 43, 309 Wis. 2d 365, 749 N.W.2d 211. The conduct addressed in a declaratory judgment must be a "'real, precise, and immediate' certainty," not "'hypothetical, abstract or remote.'" 2008 WI 51, ¶¶ 67, 69 (citation omitted); *see also State ex rel. Collison v. City of Milwaukee Bd. of Rev.,* 2021 WI 48, ¶ 46, 397 Wis. 2d 246, 960 N.W.2d 1 (declining to "offer an advisory opinion or make a pronouncement based on hypothetical facts"); DSCC Br. 36-37 (citing additional decisions eschewing advisory opinions).

Teigen and Thom argue their requested declaratory relief barring *any* ballot return assistance (except where expressly authorized by statute) is necessary to prevent "paid campaign staff, employers, volunteers for advocacy organizations, union representatives," and "political operatives" from "go[ing] through neighborhoods harvesting ballots and returning them on behalf of voters." Resp. Br. 16. Yet there is not even a *hint* in the record of any such actual or potential activities—they all are "hypothetical, abstract [and] remote." *Olson,* 2008 WI 51, ¶ 67. At the same time, Teigen and Thom urge the Court to ignore what they call "more sympathetic hypotheticals" (like a husband mailing his bedridden wife's voted ballot for her) because "there is no evidence" in the record this might be "a real problem." Resp. Br. 16, 18. Likewise,

they urge the Court to ignore any potential problems under the federal Voting Rights Act, 52 U.S.C. § 10508, because, given the state of the record, this case would not be "the right vehicle" to address those issues. Respondents seek to have it both ways, battling against hypotheticals when it suits them and ignoring others when it does not.

III. Teigen and Thom lack standing.

Although Wisconsin's rules of standing are liberal, this Court has cautioned it is "troubled" by claims of "broad general voter standing," emphasizing that such claims will be "fit for adjudication" only in "*unique circumstances*" not present here. *McConkey v. Van Hollen*, 2010 WI 57, ¶ 17, 326 Wis. 2d 1, 783 N.W.2d 855 (emphasis added); *see* Order at 4, *Fabick v. WEC*, No. 2021AP428-OA (Wis. Jun. 25, 2001) ("[S]omeone making a claim must have some recognized legal interest he or she seeks to vindicate, and standing to raise that claim."). Respondents' theories of "vote dilution standing" and "taxpayer standing" would open Wisconsin courts to a "universe of entities or people . . . without bounds." *Krier v. Vilione*, 2009 WI 45, ¶ 20, 317 Wis. 2d 288, 766 N.W.2d 517.[5]

First, Teigen and Thom claim the "value" of their own votes will be diluted if other voters—anyone, anywhere in the state—are allowed "to vote other than in strict compliance with the law." Compl. ¶ 53, Jt. App. 16; *see* Resp. Br. 34. DSCC demonstrated in its opening brief (at 40-42 & n.9) that this broad theory of "vote dilution standing" has *consistently*

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[5] Teigen and Thom also argued below that they had standing because, if they used drop boxes in reliance on WEC's guidance, their own ballots might be rejected. DSCC demonstrated this theory fails on multiple grounds. DSCC Br. 40. Respondents no longer mention this theory and have thereby abandoned it.

been rejected by courts throughout the country. *See especially Feehan v. WEC*, 506 F. Supp. 3d 596 (E.D. Wis. 2020), *appeal dismissed*, Nos. 20-3396, 20-3448, 2020 WL 9936901 (7th Cir. Dec. 21, 2020), in which a Wisconsin federal court rejected the identical argument "that a single voter has standing to sue as a result of his vote being diluted by the possibility of unlawful or invalid ballots being counted," characterizing "plaintiff's alleged injuries [as] injuries that any Wisconsin voter suffers if the Wisconsin election process" allows illegal votes to be cast, as opposed to "a particularized, concrete injury" necessary for standing. *Id.* at 608-09 (citing numerous authorities).

Respondents dismiss these many decisions in a footnote as "*irrelevant*" because they were decided by federal courts, and "standing in Wisconsin is broader than in federal courts." Resp. Br. 34 n.11 (emphasis added). But this Court has emphasized it "look[s] to federal case law as *persuasive authority* regarding standing questions." *McConkey*, 2010 WI 57, ¶ 15 n.7 (emphasis added); *see also Wisconsin's Env't Decade, Inc. v. PSC*, 69 Wis. 2d 1, 11, 230 N.W.2d 243 (1975) (same). Teigen and Thom's response to all this "persuasive authority" rejecting their vote-dilution claims is simply to ignore it.

Respondents also claim standing under Wis. Stat. § 5.06(1), which they contend "recognizes that '*any elector*' has an interest in raising violations of the election laws." Resp. Br. 34 (emphasis added). But that provision is restricted to claims for *administrative* review by the WEC, subject to a limited circuit court appeal by any complainant who is "aggrieved" by a Commission order. Wis. Stat. § 5.06(2), (8)-(9). The

provision expressly forbids any *de novo* challenge in circuit court, which is what Teigen and Thom pursued here.[6]

Second, Messrs. Teigen and Thom claim "taxpayer standing," but they rely solely on the argument that "state resources were used to create these documents and distribute them to the clerks." Resp. Br. 35. DSCC demonstrated in its opening brief that this is insufficient: the challenged guidance must "*lead[] to an illegal expenditure of taxpayer funds*." *Fabick v. Evers*, 2021 WI 28, ¶ 10, 396 Wis. 2d 231, 956 N.W.2d 856 (emphasis added); *see also S.D. Realty Co. v. Sewerage Comm'n of Milwaukee*, 15 Wis. 2d 15, 22, 112 N.W.2d 177 (1961) (requiring an "illegal *disbursement"* of state taxpayer funds to implement the challenged decision) (emphasis added). Respondents repeatedly have failed to point to any such "disbursement" or "expenditure" of state taxpayer funds to carry out the challenged WEC guidance. Taxpayer standing does not arise simply because a challenged memo was prepared by state employees on state time using state resources; otherwise, any

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[6] Teigen and Thom also rely on *Jefferson v. Dane County,* reasoning that "not a single Justice questioned the voter's standing in that case." Resp. Br. 34. But the Republican Party of Wisconsin (RPW) also was a petitioner there, arguing that Dane County's looser application of "indefinite confinement" requirements would cause RPW competitive harm in statewide elections. Courts throughout the country repeatedly have recognized that political parties have "competitive standing" to challenge official actions that threaten their "electoral prospects." *Pavek v. Simon*, 467 F. Supp. 3d 718, 742-44 (D. Minn. 2020) (citing numerous authorities). Given the presence of a party that clearly had standing, *silence* about individual "vote dilution" claims cannot be taken as an *endorsement* of such claims, especially where no other case ever has recognized such a theory of standing.

taxpayer would have standing to challenge any guidance issued by any state employee on any topic.[7]

CONCLUSION

This Court should reverse the Circuit Court's January 20, 2022 Order and Final Judgment.

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[7] Teigen and Thom also ignore DSCC's demonstration that, under both the majority and dissenting opinions in *Fabick,* the WEC's distribution of *federal* CARES Act funds does not constitute the expenditure of *state* taxpayer funds and thus does not create *state* taxpayer standing. DSCC Br. 43-44.

Dated this 21st day of March, 2022.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this reply brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this reply brief is 2,986 words.

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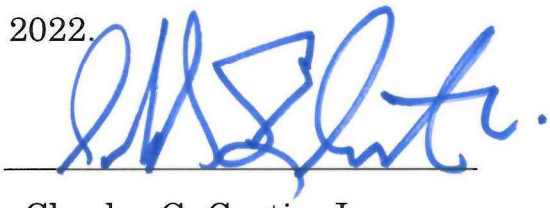

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this reply brief, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

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

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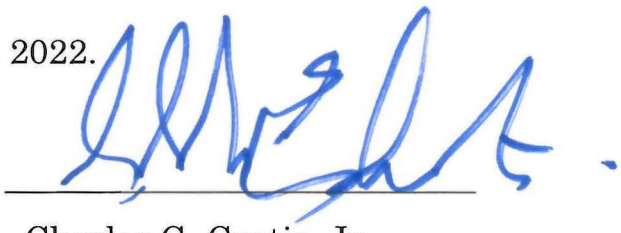

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