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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2022AP0091

RICHARD TEIGEN
and RICHARD THOM,

Plaintiffs-Respondents-Petitioners,

v.

WISCONSIN ELECTIONS
COMMISSION,

Defendant-Co-Appellant,

DEMOCRATIC SENATORIAL CAMPAIGN
COMMITTEE,

Intervenor-Defendant-Co-Appellant,

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

Intervenors-Defendants-Appellants.

ON BYPASS FROM A FINAL ORDER OF THE
WAUKESHA COUNTY CIRCUIT COURT, THE
HONORABLE MICHAEL O. BOHREN, PRESIDING

# REPLY BRIEF OF DEFENDANT CO-APPELLANT WISCONSIN ELECTIONS COMMISSION

JOSHUA L. KAUL
Attorney General of Wisconsin

STEVEN C. KILPATRICK
Assistant Attorney General
State Bar #1025452

THOMAS C. BELLAVIA
Assistant Attorney General
State Bar #1030182

Attorneys for Defendant-Co-Appellant Wisconsin Elections Commission

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

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Wisconsin's election statutes permit voters to designate an agent to place their voted ballot into the U.S. mail or drop it off with the clerk, and the statutes also allow clerks to designate a drop box for the return of completed ballots. The Commission's guidance to clerks on those issues was consistent with law, and it was not an administrative rule: the challenged memoranda were simply guidance documents. Plaintiffs' arguments to the contrary both ignore the language of the statutes and common sense.

## I. The plain language of Wis. Stat. § 6.87(4)(b)1. permits an elector to direct another person to deposit her absentee ballot into a mailbox or to return it in person to the clerk.

In its brief in chief, the Commission demonstrated that the plain language of Wis. Stat. § 6.87(4)(b)1. permits an elector to direct another person to deposit her completed absentee ballot envelope into a mailbox or return it in person to the municipal clerk. Plaintiffs' counter arguments are unavailing.

First, Plaintiffs argue "WEC reads the phrase 'by the elector' out of the statute" (Resp. Br. 14.) Not true.

Under the common and approved meaning of the statutory terms, the phrase "[t]he envelope shall be mailed by the elector . . . to the municipal clerk" in Wis. Stat. § 6.87(4)(b)1. means that the elector must cause the envelope to be transmitted to the clerk via the postal system. (WEC Br. 18–19.) The phrase "by the elector" performs the vital function of directing that the elector must personally cause the ballot to be sent to the clerk via the postal system. Without that phrase, the statute would merely provide that "the envelope shall be mailed to the clerk," without requiring personal direction from the elector. The Commission's reading gives important meaning to the relevant phrase.

Second, Plaintiffs argue that the Commission's interpretation conflicts with the legislative purpose to avoid overzealous solicitation and undue influence on absentee voters. (Resp. Br. 15 (citing Wis. Stat. § 6.84).)[1] Plaintiffs offer *no* support for their assumption that section 6.84 sets out a rule of statutory construction for how to interpret the procedural requirements in the statute. To the contrary, all that section 6.84 accomplishes is to provide that certain procedural requirements are mandatory rather than directory.

Wisconsin's election statutes are typically construed as directory, rather than mandatory, so as to preserve the will of the elector. *See* Wis. Stat. § 5.01(1); *In re Chairman in Town of Worcester*, 29 Wis. 2d 674, 681, 139 N.W.2d 557 (1966). Where an election statute is construed as directory, a ballot cast without strict statutory compliance may be counted, as long as there was substantial compliance, the ballot's integrity has been preserved, and the voter's intention can be discerned. *E.g.*, *State ex rel. Graves v. Wiegand*, 212 Wis. 286, 292, 295–96, 249 N.W. 537 (1933); *see also Roth v. Lafarge Sch. Dist. Bd. of Canvassers*, 2004 WI 6, ¶¶ 19–25, 268 Wis. 2d 335, 677 N.W.2d 599 (discussing cases). Section 6.84 expresses a legislative judgment that, because absentee voting lacks some of the procedural safeguards of a polling place, certain procedural requirements for absentee voting—including the requirements at issue here—shall be construed as mandatory, and ballots cast in contravention of them may not be counted. Wis. Stat. § 6.84(2).

[1] Plaintiffs present this argument as two arguments, denominated second and third. They make the same basic point and are treated here as a single argument.

But that is all the statute does. Nowhere does Wis. Stat. § 6.84 provide a standard of statutory construction for how to construe the procedural requirements.

Under Plaintiffs' erroneous view, a court presented with two alternative interpretations of a statute establishing an absentee voting procedure must choose the interpretation that places more restrictions on absentee voting. But section 6.84 is not an invitation to the courts to read into statutes procedural safeguards the Legislature did not include. It simply provides that an absentee ballot may be counted only if it has been cast in strict compliance with the applicable procedures. It does not tell the courts how to determine what those procedures are. For the latter purpose, the ordinary principles of statutory construction apply.

Third, Plaintiffs argue their reading of Wis. Stat. § 6.87(4)(b)1. is supported by statutes that expressly allow an agent to act on behalf of absentee voters who are hospitalized or sequestered as jurors, or who reside in certain retirement or residential care facilities. (Resp. Br. 15–16 (citing Wis. Stat. §§ 6.86(1)(b), 6.86(3), 6.875).) But as the Commission showed in its opening brief, those statutes are distinguishable because they address situations where agents assist with aspects of voting far beyond merely placing a ballot envelope into a mailbox or returning it to a clerk's office. (WEC Br. 22–24.) That participation is in no way analogous to dropping off a ballot in a mailbox, and so those statutes are not analogous to section 6.87(4)(b)1. Plaintiffs have provided no response to the Commission's arguments distinguishing those statutes.

Fourth, Plaintiffs argue that because section 6.87(4)(b)1. does not restrict whom an elector may choose as an agent, it leads to the allegedly absurd result of allowing absentee ballots to be collected in bulk and delivered by partisan organizations. (Resp. Br. 16.) There is nothing

absurd, however, about allowing a voter to decide who she wants to ask to mail or deliver her ballot. Indeed, Plaintiffs' argument proves too much: Wis. Stat. § 6.86(3), on which Plaintiffs rely, allows agents to assist hospitalized voters with all aspects of absentee voting, but does not restrict who may be such an agent. Under Plaintiffs' reading, that statute would lead to the same "absurd" result.

Allowing absentee voters to designate someone to deposit their ballots into a mailbox or deliver them to the clerk is not an absurd result in any way. Plaintiffs simply think it is a bad policy or that the Legislature must not have intended it. This Court's job, however, is to determine the meaning of the statutory text—not to make policy choices or to guess what legislators might have intended when they created Wis. Stat. § 6.87 in 1965 Wis. Act 666, § 1.[2] *See State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110 ("It is the enacted law, not the unenacted intent, that is binding on the public."); *Mayo v. Wis. Injured Patients & Fams. Comp. Fund*, 2018 WI 78, ¶ 26, 383 Wis. 2d 1, 914 N.W.2d 678 (supreme court does not "reweigh the policy choices of the legislature").

Fifth, Plaintiffs argue the Commission's interpretation would authorize behavior prohibited by Wis. Stat. § 12.13(3)(n), which makes it a crime to "[r]eceive a ballot from or give a ballot to a person other than the election official in charge." Plaintiffs put the cart before the horse. Criminal statutes must be narrowly construed. *See State v. Bohacheff*, 114 Wis. 2d 402, 417, 338 N.W.2d 466 (1983). Plaintiffs erroneously construe section 12.13(3)(n) in a broad way that would criminalize behavior authorized by other elections

[2] The statutory language at issue here is substantially unchanged since the statute was created. *See* Wis. Stat. § 6.87(4) (1966–67).

statutes, including not only section 6.87(4)(b)1., but also statutes on which Plaintiffs themselves rely. (*See* WEC Br. 24.) Plaintiffs have not refuted this argument.

Finally, Plaintiffs do not deny that their restrictive reading of section 6.87(4)(b)1. would disenfranchise voters who have physical illnesses or disabilities that prevent them from personally traveling to a mailbox or a clerk's office. Instead, they dismiss such disenfranchisement as a mere "gap" in existing law that should be addressed either through new legislation or through as-applied court challenges. (Resp. Br. 19–20.) Again, this puts the cart before the horse. When facing competing interpretations of a statute, one of which would create "gaps" that would impair the constitutional rights of voters (and possibly violate a federal statute),[3] the Court should favor the interpretation that avoids unnecessary constitutional questions. *See Wis. Legislature v. Palm*, 2020 WI 42, ¶ 31, 391 Wis. 2d 497, 942 N.W.2d 900. Here, it is the Commission's interpretation that avoids constitutional problems.

## II. Wisconsin Stat. § 6.87(4)(b)1. permits municipal clerks to use drop boxes for returning absentee ballots.

Plaintiffs also err in their objections to clerks' use of drop boxes for returning absentee ballots. The Commission did not create drop boxes; Plaintiffs' arguments contradict their own concessions about boxes they consider legal; drop boxes are not alternate voting sites under § 6.855; and Plaintiffs' arguments about the staffing of drop boxes are not properly before the Court.

[3] *See* WEC Br. 21–22, 27–28 (*citing* 52 U.S.C. § 10508).

### A. The Commission did not create drop boxes; it simply responded to clerks' inquiries about their use.

Plaintiffs initially assert drop boxes are a new, Commission-created method for returning absentee ballots. (Resp. Br. 21.) That is incorrect. First, the Commission did not create drop boxes. The March 2020 memorandum provided guidance *in response to* clerks' inquiries about their use, and there is testamentary evidence that drop boxes were used in Wisconsin before the August 2020 memorandum, (*see* R. 64:3; 91:2; 96:2; 121–2 (Wolfe Affidavit). Second, the language of section 6.87(4) permits an elector to return an absentee ballot to the "clerk" and clerks have designated drop boxes for that purpose. Third, as explained further in section III, the memoranda do not direct or order municipal clerks to use drop boxes. The Commission has not created a new method for returning absentee ballots and has never stated that it has such authority.

### B. Plaintiffs' argument contradicts their own concessions about boxes they assert are legal.

Plaintiffs contend the statutes are silent about drop boxes. (Resp. Br. 21.) While that is true, it is not dispositive. Section 6.87(4) requires the return of absentee ballots to the clerk, and some clerks have decided to use drop boxes to assist them in accepting those ballots.

Notably, Plaintiffs concede that clerks may employ a "receptacle in the presence and view of the clerk" for the return of absentee ballots, even though the statutes do not explicitly provide for those, either. (Resp. Br. 24.) Plaintiffs offer no explanation for why drop boxes are "significant[ly] differen[t]" from placing them into the clerk's hands, but their

"receptacle" method is not. Plaintiffs' basic argument is that drop boxes violate the "in person" delivery requirement on the theory that a box is not a person (Resp. Br. 22–23), but their concession that drop boxes may be used inside clerks' offices shows they know that argument is wrong.

Plaintiffs suggest that if the Commission's guidance does not have the force of law, it would permit the concededly "ludicrous" example of a clerk establishing a shoebox on a park bench as a drop box. (Resp. Br. 22.) That suggestion is incorrect for two reasons. First, apart from any Commission guidance, receiving votes in an unattended shoebox would violate the clerk's duty to ensure that elections are "honestly, efficiently and uniformly conducted." Wis. Stat. § 7.15(1)(e). Second, the commission memoranda did not authorize such insecure practices, but rather strongly recommended that clerks who use drop boxes should securely administer them in accordance with the Cybersecurity and Infrastructure Security Agency's best practices. (WEC Br. 30; R. 2:18–21; 121-2.)

### C. Drop boxes are not alternate voting sites under Wis. Stat. § 6.855.

Plaintiffs argue drop boxes are not lawful on the theory that Wis. Stat. § 6.855 makes "the office of the municipal clerk" the default location "to which absentee ballots shall be returned." (Resp. Br. 25–26) (emphasis omitted). This argument is unpersuasive because section 6.855 applies only to alternate absentee voting sites, and no voting occurs at a drop box.

As shown in the Commission's opening brief, section 6.855 allows a municipality to establish an alternate absentee voting site at which an elector may request an absentee ballot, vote that ballot, and return it. (WEC Br. 31–32.) Plaintiffs are simply wrong in contending that the statute applies to the

return of absentee ballots previously received by mail and completed elsewhere. (Resp. Br. 27.) And merely returning a completed ballot is not statutorily equivalent to voting. To the contrary, the statutory language expressly distinguishes the separate acts of requesting a ballot, voting, and returning the ballot. *See* Wis. Stat. § 6.855(1).

Plaintiffs also contend their interpretation of section 6.855 is supported by Wis. Stat. § 6.87(3)(a), which provides that if an absentee "ballot is delivered to the elector at the clerk's office, or an alternate site under s. 6.855, the ballot shall be voted at the office or alternate site and may not be removed by the elector therefrom." Plaintiffs suggest that if a ballot cannot be removed, then it need not be returned, and the statutory reference to returning a ballot must therefore refer to a ballot received by mail. (Resp. Br. 27–28.) That is absurd. As used in both sections 6.87(3)(a) and 6.855, "return" clearly means returning a ballot from the voter's possession to the clerk's possession, not returning it from some other place.

Section 6.855 governs only alternate sites where in-person absentee voting occurs. Because no voting occurs at a drop box, the Commission memoranda correctly permits clerks to establish drop boxes without consideration of section 6.855.

### D. Plaintiffs' issue about staffing drop boxes is not properly before this Court.

Plaintiffs also raise an issue the circuit court did not address: whether only election officials appointed under Wis. Stat. § 7.30 can staff a drop box. (Resp. Br. 29.) This issue is not properly before this Court. The Commission memoranda challenged here did not address what it means to staff a drop box or who may staff a drop box and access the ballots within.

On summary judgment, Plaintiffs established no facts regarding the staffing of drop boxes. (*See* R. 62–66.)

## III. The Commission memoranda are "guidance documents.

The dispositive issue in Plaintiffs' Wis. Stat. § 227.40 declaratory judgment claim is whether the Commission memoranda have the force of law. (Resp. Br. 32–33.) They do not.

Plaintiffs assert the memoranda have the force of law because the Commission "has broad powers with respect to election administration," including the general responsibility for administering election laws (Resp. Br. 32 (citing Wis. Stat. § 5.05(1)).) They cite laws that grant the Commission the power to investigate and prosecute violations of election laws, *see* Wis. Stat. § 5.05(2m), and to order local election officials to confirm their conduct to the law and enjoin violations of election law, *see* Wis. Stat. § 5.06(1). (Resp. Br. 32.) But no authority supports the notion that the Commission exercised those statutory powers in giving guidance to local clerks. As discussed in the Commission's opening brief, such a holding would foreclose the Commission's ability to issue "guidance documents," which are specifically defined as *not* having the force of law. (WEC Br. 36.) The Court should reject such an unreasonable outcome.

Plaintiffs further contend that although the memoranda do not direct municipal clerks to use drop boxes or require allowing the return of absentee ballots by agents, the memoranda nonetheless have the force of law simply because they *authorize* local clerks to use those practices. Plaintiffs assert that "when WEC gives the green light to something, it has the 'effect of law.'" (Resp. Br. 32–33.) This erroneously gives a Commission memorandum the legal effect of an order issued in a complaint proceeding under Wis. Stat.

§ 5.06, or of an advisory opinion issued under Wis. Stat. § 5.05(6a). The statutes specifically provide, however, that those actions—unlike a Commission memorandum—do have the force of law.

In a complaint proceeding under section 5.06, the Commission may investigate, conduct a hearing, determine whether an election official has failed to comply with the law, and "by order, require any election official to conform his or her conduct to the law." Wis. Stat. § 5.06(6). Any official or complainant aggrieved by such an order may seek judicial review under section 5.06(8).

Similarly, the Commission may authorize local election official's conduct through an advisory opinion under section 5.05(6a). An individual may request such an opinion regarding "the propriety under chs. 5 to 10 or 12 of any matter to which the person is or may become a party." Wis. Stat. § 5.05(6a)(a)1. Such an advisory opinion may have "legal force and effect," but only if it is "supported by specific legal authority," includes citations to all such authority, and "specifically articulate[s] or explain[s] which parts of the cited authority are relevant to the commission's conclusion and why they are relevant." Wis. Stat. § 5.05(6a)(a)2. Notably, even for this procedure, the Legislature limited the type of opinions that have the force of law to those following the procedure under section 5.05(6a)(a)2.; advisory opinions issued by the administrator under section 5.05(6a)(b), in contrast, do not have the force of law.

The memoranda at issue here have none of the characteristics of either an order under section 5.06(6) or an advisory opinion under section 5.05(6a)(a)2., and so they lack the "legal force and effect" of such action.

The Commission memoranda are guidance documents, not administrative rules as defined in Wis. Stat. § 227.01(13).

## CONCLUSION

Defendant-Co-Appellant Wisconsin Elections Commission respectfully asks this Court to reverse the final order of the circuit court and grant the Commission summary judgment.

Dated this 21st day of March 2022.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

STEVEN C. KILPATRICK
Assistant Attorney General
State Bar #1025452

THOMAS C. BELLAVIA
Assistant Attorney General
State Bar #1030182

Attorneys for Defendant-Co-Appellant Wisconsin Elections Commission

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

## FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,898 words.

Dated this 21st day of March 2022.

STEVEN C. KILPATRICK
Assistant Attorney General

## CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12) (2019–2020)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12) (2019–20).

I further certify that:

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

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 21st day of March 2022.

STEVEN C. KILPATRICK
Assistant Attorney General