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SUPREME COURT

IN THE SUPREME COURT OF WISCONSIN

2022AP0091

RICHARD TEIGEN and RICHARD THOM,
Plaintiffs-Respondents-Petitioners,

v.

WISCONSIN ELECTIONS COMMISSION,
Defendant-Co-Appellant,

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE,
Intervenor-Defendant-Co-Appellant,

DISABILITY RIGHTS WISCONSIN, WISCONSIN FAITH VOICES FOR JUSTICE, and LEAGUE OF WOMEN VOTERS OF WISCONSIN,
Intervenors-Defendants-Appellants.

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

BRIEF OF UNITED STATES SENATOR RON JOHNSON AS *AMICUS CURIAE*

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ARGUMENT

Fundamentally, this case must be about restoring confidence in our election system.

The failure of the Courts and Congress to address the shortcomings of the 2020 election has undermined the public confidence in our elections and, in the process, has caused an alarming erosion of faith in our most treasured institutions. For Courts, it was a failure to consider or even address issues raised, *see Trump v. Biden*, 2020 WI 91, ¶ 9, 394 Wis. 2d 629, 635-36, 951 N.W.2d 568, 572, *cert. denied* 141 S.Ct. 1387 (Feb. 22, 2021); *Texas v. Pennsylvania*, 141 S.Ct. 1230 (Mem), 208 L.Ed.2d 478 (Dec. 11, 2020) (denying petition for leave to file petition for an original action). For Congress, it was a failure to undertake a serious examination of legitimate concerns about the integrity of the election. *See* U.S. Senate Committee on Homeland Security and Government Affairs: Examining Irregularities in the 2020 Election.[1]This lack of transparency, and later *ad hominem* attacks accompanied by a refusal to address substantive issues, has now become a scornful dismissal of the concerns expressed by, quite literally, millions of voters.

[1] The full text of member and witness statements are available at https://www.hsgac.senate.gov/examining-irregularities-in-the-2020-election.

This has divided our country as never before, such that a solid majority of Americans – 56 percent in a recent CNN Poll – "said they have little or no confidence that American elections reflect the will of the people." *See* CNN, Jennifer Agiesta: "A growing number of people lack confidence in American elections," (Feb. 11, 2022), *available at* https://www.cnn.com/2022/02/10/politics/cnn-poll-democracy/index.html. "An increasing majority of Americans lack confidence that elections in America today reflect the will of the people." *Id*. This lack of confidence in our elections is shared by Democrats and Republicans: more than 50% of Democrats surveyed and nearly 50% of Republicans believe the results of a future election "will be overturned for partisan reasons." *Id*.

This "bitter division" results, at least in part, from actions that have not gained broad legislative approval, as explained on the Senate floor. "America's politics have spiraled steadily downward into increasingly bitter, tribal partisanship – and our democracy has been strained …. We are divided. It is more likely today that we look at other Americans who have different views and see the 'other,' or even see them as enemies – instead of as fellow countrymen and women who share our core values. It's more common today to demonize someone who thinks differently than us, rather than to seek to understand their views."

Senate Floor Remarks on Voting Rights and America's Divisions, Senator Krysten Sinema (D-AZ) (Jan. 13, 2022), *available at* https://www.sinema.senate.gov/senate-floor-remarks-voting-rights-americas-divisions-and-us-senate.

One need not agree with one or another position on a particular election concern to recognize the importance of actually undertaking a careful and comprehensive examination. The prediction of this Court's now Chief Justice rings very true. *Trump v. Biden*, 2020 WI 91, ¶ 137 ("Therefore, the majority's application of laches here is unfortunate and doomed to create chaos, uncertainty, undermine confidence and spawn needless litigation.")(Ziegler, J, dissenting.)

I. Absentee Voting Requires Precise Rules to Avoid Both the Appearance of and Actual Impropriety; Wisconsin has no such Rules for Drop Boxes.

A. Use of drop boxes without legislative approval, and by evading the rulemaking process, erodes public confidence in elections.

It is indisputable that voting outside the polling place on election day is less secure and less trustworthy than election day voting. This bipartisan conclusion was an essential finding of the Carter/Baker examination of voting and elections. *See Building Confidence in U.S. Elections: Report of the Commission on Federal Election Reform*, at 35-

46 (Sept. 2005) (bipartisan Carter-Baker Commission's finding that absentee balloting has been a major source of fraud and abuse);[2] *see also* U.S. Dep't of Justice, *Federal Prosecution of Election Offenses* at 28-29 (8th ed. Dec. 2017) (absentee ballots across the nation are particularly susceptible to fraud and abuse because they are marked and cast outside the presence of election officials and the structured environment of a polling place). While absentee voting can be done without the undue influence of others, the Election Day presence of poll watchers and election officials provides powerful protection against coercion, fraud and abuse.

Wisconsin acknowledges those indisputable facts in its statutory structure.

> Legislative Policy. The legislature finds 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. The legislature finds that the privilege of voting by absentee ballot must 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 to cast a particular vote in a referendum; or other similar abuses.
>
> Wis. Stat. § 6.84(1).

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[2] The Carter-Baker Report is available at https://www.legislationline.org/download/id/1472/file/3b50795b2d0374cbef5c29766256.pdf

Accordingly, if we are to return to a time when citizens overwhelmingly believed in the integrity of our voting system, then the use of drop boxes for absentee voting must be evaluated with a healthy skepticism. Whatever the merit may have been in Covid-justified drop boxes, those drop boxes enable voting without any of the election day controls that have been the bulwark of a public confidence in election integrity.

Recent reports have detailed how drop boxes, along with other activities, were apparently funded with the purpose of electing particular candidates. *See* Wisconsin Legislature: *Second Interim Report of the Special Counsel* (Mar. 2022).[3] So, when a party here asserts that no election official would consider doing something that would benefit a particular candidate (Brief of Intervenor-Defendant-Co-Appellant Democratic Senatorial Campaign Committee at 28-29, citing Wis. Stat. §19.59(1)(br)) it belies comprehensive national studies, U.S. Department of Justice conclusions, the Legislature's finding in Wis. Stat. §6.84(1) and common sense.

[3] The Second Interim Report is available at https://legis.wisconsin.gov/assembly/22/brandtjen/media/1552/osc-second-interim-report.pdf.

One need not laud or condemn the actions of specific clerks to understand that personal and political bias will affect how clerks and others act. When there are no rules to control the location, type, size, security, or any other aspect of a ballot drop box—as would be the result of adopting the Appellants no holds barred, local discretion drop box interpretation—chaos and distrust of elections will be the inevitable result. [4]

Adhering to the central purpose, admonitions and requirements of Section 6.84 simply acknowledges the inevitability of human frailty and the need to regulate absentee voting. The force of the requirement that treats absentee voting with a high degree of skepticism and imposes hard and fast rules for absentee voting is that it discourages and prevents unlawful actions *before* they occur. As 2020 demonstrates so vividly, anything short of that will result in a continued erosion of public confidence.

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[4] Appellants argue WEC's drop box advice is not binding. Meaning, as there is no statutory mention of drop boxes and no enforceable Rule related to drop boxes, it is a free-for-all. By this reading, a drop box could be placed anywhere, open at any time, be attended or unattended, monitored or not monitored, secure or insecure. The chaos and subsequent distrust such drop box policy will engender can hardly be overstated. The equal protection arguments and lawsuits resulting from absentee ballot policy entirely controlled by independent decisions of more than a thousand local clerks are predictable and will have a catastrophic impact on public trust in our elections.

B. Drop boxes contradict the express legislative intent of Wisconsin's absentee voting law.

Given the Wisconsin Legislature has expressed the intent behind the laws allowing limited voting outside of the polling place, the use of ballot drop boxes directly contradicts that legislative intent. Wisconsin law holds that "with respect to matters relating to the absentee ballot process [the statutory obligations] … shall be construed as mandatory." Wis. Stat. §6.84(2). As the Appellees explain, the statutes provide methods sufficient for every citizen to return a ballot. To read the statutes to allow everything not otherwise prohibited, as the Appellants argue, makes a mockery of the "mandatory" requirement and legislative policy statement.

Perhaps recognizing that it cannot meet the high bar of Section 6.84, the Brief and Joint Appendix of Defendant-Co-Appellant Wisconsin Election Commission does not mention Section 6.84 a *single* time.

Tellingly, no Appellant points to a single reference that would, if their position is adopted, explicitly regulate any aspect of drop box absentee ballot return. They rely, instead, on generalized rules about partisanship or good behavior. Nothing could be further from the explicit statement of legislative policy established in Wis. Stat. § 6.84.

Put differently, while it is, in effect, undisputed that drop box ballot collection takes place "wholly outside the traditional safeguards of the polling place" (Wis. Stat. § 6.84(1)), the Appellants would have this Court ignore the statutory obligation that such methods "must be carefully regulated to prevent the potential for fraud or abuse." Wis. Stat. § 6.84(1). The Appellants would substitute, instead, a Wild West approach to drop boxes in which anything goes that is not explicitly prohibited. Election law cannot be so capricious as to allow such an invitation for chaos and distrust.

II. Failure to Follow Explicit Statutes and Evasion of the Rulemaking Process Enables a Host of Abuses.

The unlawful use of ballot drop boxes is not the only abuse of Wisconsin election law. Additional problems are detailed in the report of the Legislative Audit Bureau, *see* Legislative Audit Bureau**:** "Elections Administration Report 21-19" (Oct. 2021), *https://legis.wisconsin.gov/lab/media/3288/21- 19full .pdf*; repeated in a Wisconsin Institute for Law and Liberty Study, *see* Flanders, Koenen, Essenberg, Diekemper, and Spindt: "A Review of the 2020 Election," https://will-law.org/wp-content/uploads/2021/11/2021ElectionReviewStudy.pdf; verified in legislative reports of the Special Counsel, *supra* n.3; and popularized by

recent books. *See* Mollie Hemingway: *Rigged: How the Media, Big Tech, and the Democrats Seized Our Elections (2021).*

Whatever the cause, and Covid seems to be acknowledged as one on which all agree, WEC's administration of the 2020 election was a nightmare. Again, whatever one's personal view may be of individual matters, there is no doubt that such widespread abuses (as demonstrated by the Zuckerberg activities), failures (as shown in the Legislative Audit) and outright fraud (nursing homes) has shaken public confidence. This case provides the Court an opportunity to re-establish the rule of law by correctly construing Wisconsin law to end the proliferation of Covid-justified use of drop boxes, and, in the process, begin to renew public confidence in our elections.

Even a short list of serious issues surrounding WEC's recent actions is disturbing. Consider:

1) WEC did not follow established law and procedures to update voter registration rolls. *See Zignego v. Wisconsin Elections Commission*, 2021 WI 32, 396 Wis. 2d 391, 957 N.W.2d 208.

2) WEC allowed a partisan outside group, the Center for Tech and Civic Life, to provide money to target essential constituencies of the Democratic Party. *See* Wisconsin Legislature: *Second Interim Report of the Special Counsel*, *supra* n. 3, at 41-43. The Report concludes that this conduct may constitute unlawful election bribery contrary to Wis. Stat. § 12.11. *See id.* at 17. It may also

violate other laws. *See* Democratic Senatorial Campaign Committee Opening Brief, at 28-29 (citing Wis. Stat. §19.59(1) (br) ("No local public official … may … provide … any service or other thing of value, to or for the benefit of a candidate [or] political party …..").

3) WEC allowed the Center for Tech and Civic Life to connect with five large cities, and the CTCL operated in those cities to expressly target potential voters using unlawful racial classifications. *See* Wisconsin Legislature: *Second Interim Report of the Special Counsel*, *supra* n. 3, at 16, 35-35, 73.

4) WEC allowed CTCL to connect with five large cities, and CTCL then embedded private individuals in those cities to take over, unlawfully, various aspects of governmental election administration. *Id.* at 24, 57, 60, 66-72.

5) WEC took steps to encourage "curing" absentee ballot envelopes; failed to control unauthorized voting under the category "indefinitely confined"; and failed to prevent ballot collection parties. *Id.* at 55-56, 65-69, 81-99; *see also Trump v. Biden,* 2020 WI 91, ¶¶63, 68, 75-84, 93, 101, 394 Wis.2d at 690, 951 N.W2d at 598 (Roggensack, C.J., dissenting); *id. at* ¶148 (Bradley, J., dissenting); *Jefferson v. Dane County*, 2020 WI 90, ¶ 7, 394 Wis. 2d 602951 N.W.2d 556.

6) WEC oversaw the wholesale failure to protect vulnerable citizens in nursing homes, many of whom "voted" (*i.e.,* had their ballots cast by someone else) illegally. On February 15, 2022, the Racine County Sheriff disclosed that he has asked the Wisconsin Attorney General to prosecute five of the six members of the Commission for "serious crimes" related to illegal nursing home voting in 2020. The Sheriff also disclosed that he is forwarding criminal charging recommendations to the district attorneys in four counties where the commissioners reside. *See* Racine County Sheriff's Office Statement: Sheriff Calls for Criminal Prosecution of WEC (Feb. 14, 2022), available

at https://www.wispolitics.com/wp-content/uploads/2022/02/220214Racine.pdf *; see also* Wisconsin Legislature: *Second Interim Report of the Special Counsel, supra* n. 3.

7) WEC's Administrator and staffers use "memos" to evade rulemaking requirements and sow confusion for municipal clerks and the public in general. WEC even does so in an attempt to evade review in this case. *See* Brief and Joint Appendix of Defendant-Co-Appellant Wisconsin Elections Commission, at 33 (arguing that claims should be dismissed because the "memos" regarding drop boxes are "merely 'guidance documents'").

Many of these controversies and problems, including drop boxes, could have been avoided had WEC sought to promulgate appropriate Rules. For example, as the Appellants point out, it appears members of the Legislature were prepared to endorse various Covid-based emergency actions. *See* Democratic Senatorial Campaign Committee Opening Brief, at 20. Instead of seeking to establish emergency Covid-based Rules consistent with the legislative intent by working with the Wisconsin Legislature, WEC chose to entirely ignore the statutes and process, and become its own law-making body under the guise of "guidance."[5] The history of the 2020 drop boxes provides a rather stark illustration of WEC's unnecessary and improper approach to an issue.

[5] This Court has insisted that parties in election law cases follow a procedure that first vets issues in circuit and appellate courts before reaching this Court. *See*, *e.g.*, *Kleefisch v. Wisconsin Elections Commission*, 2021AP001976 (Feb. 4, 2022). This

On April 4, 2020, Governor Evers issued an Emergency Order to approve "drop box locations publicly noticed by the municipal clerk as an acceptable depository." *See* 2020 Bill Text WI E.O. 10. The legislature rejected the Governor's Order.

In a second Emergency Order on April 6, 2002, the Governor again attempted to alter WI voting laws. *See* 2020 Bill Text WI E.O. 11. The legislature again rejected the Governor's Order, and asked this Court to enjoin it.

This Court entered an injunction, stating that "[t]he Legislature could have granted the Governor broader emergency powers to suspend elections or statutory mandates .... The Wisconsin Legislature has not done so. The Legislature and Governor also could have moved this election or changed the rules governing it through the ordinary legislative process. They have not done so." *Wisconsin Legislature v. Evers*, No. 2020AP608-OA (April 6, 2020).

Given this history, WEC had less arguable authority to establish drop boxes in August 2020 for the November election than the Governor had just four months before. It nonetheless went ahead with its ill-fated drop box guidance. WEC's conduct flew in the face of the

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Court should require WEC to begin the rulemaking process in the Legislature *before* making any pronouncements regarding the use of drop boxes.

unambiguous statutory language and the legislature's unambiguous affirmation of that language in April 2020.

WEC must be required either to follow the express directives of the legislature or proceed through the rulemaking process. An order from this Court that clearly requires this administrative body to work through the proper channels will provide enormous long-term benefits for everyone. It will go a great distance in renewing public faith in election integrity.

It is ironic and tragic, in light of the damage done to public confidence, that a State agency, created by the Legislature to faithfully administer Wisconsin's election laws, has so vehemently refused to work with the Legislature in a rulemaking process. WEC has the power to "[p]romulgate rules under ch. 227 applicable to all jurisdictions for the purpose of interpreting or implementing the laws regulating the conduct of elections or election campaigns," Wis. Stat. § 5.05(1)(f), yet it refuses to properly exercise that power, coloring it's work as "guidance." Perhaps WEC refuses to do so because it believes it will not be able to successfully shepherd its view of an appropriate Rule through a legitimate administrative process. If that is the case, WEC's refusal is deeply pernicious and it contributes to the division in society and the distrust in Wisconsin's election administration.

This Court must make clear that the Wisconsin Elections Commission has no authority to make law. WEC must proceed through the legislative rulemaking process. *See* Wis. Stat. 5.05(1)(f).

As "[t]he time to challenge election policies such as these is not after all ballots have been cast and the votes tallied," *Trump v. Biden*, 2020 WI 91, ¶22, so too the time for lawful election rules to be solidly in place must be well before election day. There has been, and remains, enough time to complete that process well ahead of the Fall elections.

In short, the encouragement of the use of drop boxes by unelected officials at the Commission – who are not subject to removal by the voters and who claim that their actions are unreviewable in this Court – sows mistrust and division.

CONCLUSION

Drop Boxes are not authorized by any statute or rule. Their emergency use has undermined the foundations of public trust. This Court can begin to restore that public trust in this case by prohibiting the use drop boxes in the 2022 elections.

Respectfully submitted this 18th day of March, 2022

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FORM AND LENGTH CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) and (d) for a brief produced with a proportional serif font. The length of this brief is 2,987 words.

Dated this 18th day of March, 2022.

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

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

I further certify that the 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 18th day of March, 2022.

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