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SUPREME COURT

No. 2022AP0091

IN THE WISCONSIN SUPREME COURT

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.

NON-PARTY BRIEF OF HONEST ELECTIONS PROJECT IN SUPPORT OF PLAINTIFFS-RESPONDENTS

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INTRODUCTION & SUMMARY OF ARGUMENT

The rules that the Wisconsin Legislature has enacted for absentee voting are clear and specific. Voters must deliver absentee ballots by mail or "in person, to the municipal clerk issuing the ballot or ballots." Wis. Stat. §6.87(4)(b)1. In-person deliveries must go to the municipal clerk's office or an alternative "designated site" staffed by the clerk's representative. *Id.* §6.855(1).

Plaintiffs are correct that the text unambiguously forecloses the executive actions challenged here. The Legislature specified these methods and no others. The Wisconsin Elections Commission thus could not allow "another person" to deliver an absentee voter's ballot or authorize unstaffed "drop boxes" for the collection of ballots. JA20-26.

Amicus, the Honest Elections Project, writes to explain why this Court should not deviate from the plain text in the name of constitutional avoidance or any similar doctrine. Reasonable minds can differ about the wisdom of third-party ballot collection and unmanned drop boxes. But nothing about that debate implicates the federal *constitutional* right to vote. And the resolution of that debate is up to the Legislature. In fact, contorting the relevant statutes would present its own constitutional problem: it would violate the Legislature's constitutional authority over elections. *See* U.S. Const. art. I, §4 cl. 1; art. II, §1 cl. 2.

ARGUMENT

This Court has no basis to read the relevant statutes favorably to WEC, for the sake of safeguarding the right to vote. That constitutional right is simply not at stake here. The federal Constitution guarantees the right to vote at least one way, and Wisconsin law secures this right by allowing Wisconsinites to vote the way most Americans always have: casting a ballot in person on Election Day. "[T]here is no constitutional right to an absentee ballot." *Mays v. LaRose*, 951 F.3d 775, 792 (6th Cir. 2020); *see McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 807 (1969). And limits on absentee voting "do[] not implicate the right to vote at all." *New Ga. Proj. v. Raffensperger*, 976 F.3d 1278, 1281 (11th Cir. 2020).

In fact, far from ensuring compliance with the Constitution, reading the relevant statutes unfairly would lead this Court to violate the Elections and Presidential Electors Clauses. U.S. Const. art. I, §4 cl. 1; art. II, §1 cl. 2. These provisions make state legislatures responsible for determining how to conduct all federal elections. They forbid other state governmental entities from contravening the Legislature's judgment. Text, history, and precedent reveal that these clauses confer plenary authority over elections on state legislatures.

The Elections Clause forbids the Court from endorsing WEC's memos, which plainly conflict with the Legislature's statutes. Close cases might exist where it's difficult to distinguish faithfully applying a legislature's elections laws from overriding them. But this

case is not close. The relevant statutes are unambiguous: an absentee ballot must be mailed to the municipal clerk, or else delivered personally by the voter to the clerk's office or a designated site staffed by his representative. The WEC memos allow anyone to return anyone else's ballot, at any number of staffed and unstaffed "drop box" sites. The conflict with the Legislature is irreconcilable.

This Court should affirm.

I. Rules regarding the collection of absentee ballots do not implicate the constitutional right to vote.

For most of the nation's history, States provided nearly all voters with only one method of voting: in person on Election Day. *See Brnovich v. Democratic Nat'l Cmte.*, 141 S. Ct. 2321, 2339 (2021). With or without WEC's memos, in-person voting remains as available as ever, unaltered even in the slightest. Because in-person voting remains fully available, "the right to vote is not 'at stake'" here. *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 404 (5th Cir. 2020) (quoting *McDonald*, 394 U.S. at 807).

The Constitution guarantees one method of voting; "there is no constitutional right to an absentee ballot." *Mays*, 951 F.3d at 792. When States impose a limit on absentee voting, but not in-person voting, "[i]t is … not the right to vote that is at stake … but a claimed right to receive absentee ballots"—which is not a constitutional right at all. *McDonald*, 394 U.S. at 807. The Constitution is not violated "unless the state has 'in

fact absolutely prohibited' the plaintiff from voting." *Tex. Democratic Party*, 961 F.3d at 404. And "permit[ting] the plaintiffs to vote in person" on election day, as Wisconsin does, "is the exact opposite of 'absolutely prohibit[ing]' them from doing so." *Id.*; *accord Tully v. Okeson*, 977 F.3d 608, 611 (7th Cir. 2020) ("[U]nless a state's actions make it harder to cast a ballot at all, the right to vote is not at stake.").

McDonald clarifies this beyond doubt. There, Illinois law allowed some classes of voters to cast absentee ballots, but not people in jail. 394 U.S. at 803-04. When inmates who couldn't post bail challenged the law, the Court unanimously held that "the right to vote" was not "at stake." *Id.* at 807. There is no "right to receive absentee ballots." *Id.* Illinois' rules on absentee voting "d[id] not themselves deny … the exercise of the franchise" because they only "ma[d]e voting more available to some groups." *Id.* at 807-08 (emphasis added). And Illinois' election code "as a whole" did not "deny … the exercise of the franchise" either. *Id.* Illinois had not "precluded [the inmates] from voting" because the inmates had potential options to vote in person. *Id.* at 808 & n.6.

McDonald remains good law, cited by numerous courts nationwide for the proposition that regulation of absentee voting does not "*implicate* the right to vote *at all*." *New Ga. Proj.*, 976 F.3d at 1281 (emphases added); *e.g.*, *Tully*, 977 F.3d at 611 ("[T]he fundamental right to vote does not extend to a claimed right to cast an absentee ballot by mail."); *Richardson v. Texas Sec'y of State*, 978 F.3d 220, 232 (5th Cir. 2020) ("no

right" to vote absentee); *Mays*, 951 F.3d at 792 ("there is no constitutional right to an absentee ballot"). Still today, the "fundamental right to vote" is "the ability to cast *a* ballot" — "not the right to do so in a voter's preferred manner." *Tully*, 977 F.3d at 613 (emphasis added).

Loosening restrictions on absentee ballots, as WEC has done, has no implications for the right to vote. The Constitution would not be offended even if absentee voting "disappeared tomorrow." *Tully*, 977 F.3d at 614. So it certainly would not be offended if absentee voting was allowed but subject to the parameters of Wisconsin's statutes.

To the extent that WEC or any other party argues that these memos protect the right to vote, those arguments fail. The Court can and should decide this case without any consideration of the constitutional right to vote.

II. The state legislature must prescribe the "Manner" of voting, and displacement of legislative policy by other branches of government violates the U.S. Constitution.

While the federal constitutional right to vote is not implicated in this case, other constitutional provisions are. The Constitution, through the Elections Clause of Article I and the Presidential Electors Clause of Article II, delegates the task of prescribing rules for federal elections to state *legislatures*. *See* U.S. Const. art. I, §4 cl. 1 (providing that "The Times, Places and Manner" of congressional elections "shall be prescribed in each State by the Legislature thereof"); art. II §1 cl. 2

(directing appointment of each State's presidential electors "in such Manner as the Legislature thereof may direct"). These provisions give plenary authority over the regulation of federal elections to state legislatures—not state election commissions, and not state courts. This Court and the WEC therefore have a constitutional obligation to give effect to the legislature's choices.

A. The Constitution charges state legislatures with regulating federal elections.

The Constitution "could have said that [federal-election] rules are to be prescribed 'by each State,' which would have left it up to each State to decide which branch, component, or officer of the state government should exercise that power." *Moore v. Harper*, 142 S. Ct. 1089, 1090 (2022) (Alito, J., dissenting from the denial of application for stay). "But that is not what the Elections Clause says. Its language specifies a particular organ of a state government, and we must take that language seriously." *Id.*

As used in the Elections Clause, "Legislature" is no uncertain term. Nor can it be taken as a stand-in for the state government as a whole. When Article V authorizes ratification by the "Legislatures" of three fourths of the states, all agree that the term means the legislature specifically. And "every state constitution from the Founding Era that used the term legislature defined it as a distinct multimember entity comprised of representatives." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 828 (2015) (Roberts, C.J., dissenting) (quoting Morley, *The*

Intratextual Independent "Legislature" and the Elections Clause, 109 Nw. U. L. Rev. Online 131, 147, & n.101 (2015)).

History confirms that the Constitution makes a special delegation to state legislatures. "The U.S. Supreme Court, several state supreme courts, and both chambers of Congress employed this doctrine during the nineteenth century." Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 Georgia L. Rev. 1, 9 (2020). Indeed, "[a]s early as the Massachusetts Constitutional Convention of 1820, it was understood that state constitutions were legally incapable of limiting the state legislature's power over congressional and presidential elections." *Id.* at 38. When a delegate introduced a provision to "limit" the state legislature's "exercise of [] discretion" in redistricting, another delegate—Justice Joseph Story—explained that the Convention had no "right to insert in [the state] constitution a provision which controls or destroys a discretion ... which must be exercised by the Legislature, in virtue of powers confided to it by the constitution of the United States." *Id.* at 40 (quoting *Journal of Debates and Proceedings in the Convention of Delegates, Chosen to Revise the Constitution of Massachusetts* 3 (Boston Daily Advertiser, rev. ed. 1853)). This argument defeated the amendment. *Id.*

Michigan Supreme Court Justice Thomas Cooley also endorsed this view in his 1890 treatise: "So far as the election of representatives in Congress and electors of president and vice president is concerned, the

State constitutions cannot preclude the legislature from prescribing the 'times, places, and manner of holding' the same, as allowed by the national Constitution." *Id.* at 9 (citing Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 754 n.1 (6th ed. 1890)).

Further examples abound throughout the nineteenth century in States across the nation. *See id.* at 37-45. One is particularly compelling here. In 1864, the New Hampshire Supreme Court held that the legislature could amend an absentee-voting practice—allowing soldiers to vote absentee—despite a state constitutional provision to the contrary. The court found federal elections were "governed wholly by the Constitution of the United States as the paramount law, and the Constitution of this State ha[d] no concern with the question." *Id.* at 43 (quoting *Opinion of the Justices*, 45 N.H. 595, 599 (1864). Rather, because of the Constitution's delegation of power, the legislature had "unlimited authority" and "unqualified discretion"—authority and discretion that were "untrammeled" even by the State's own fundamental law. *Id.* at 41-42 (quoting *Opinion of the Justices*, 45 N.H. at 600, 605).

The U.S. Supreme Court has maintained this interpretation more recently, too. "For more than a century, [the] Court has recognized that the Constitution 'operat[es] as a limitation upon the State in respect of any attempt to circumscribe the legislative power' to regulate federal elections." *Republican Party* of *Penn. v. Degraffenreid*, 141 S. Ct. 732, 733 (2021) (Thomas,

J., dissenting from denial of certiorari) (quoting *McPherson v. Blacker*, 146 U.S. 1, 25 (1892)). The Court has held that the "comprehensive words" of the Elections Clause:

> embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.

Smiley v. Holm, 285 U.S. 355, 366 (1932) (cleaned up); *see also* Morley, 55 Ga. L. Rev. at 16; *see also Ariz. State Legislature*, 576 U.S. at 839-40 (Roberts, C.J., dissenting) ("[T]he plain text of the Presidential Electors Clause vests the power to determine the manner of appointment in 'the Legislature' of the State. That power ... '*can neither be taken away nor abdicated*.'" (quoting *McPherson*, 146 U.S. at 35)).

The Court reaffirmed this principle unanimously in 2000, when reviewing a ruling by the Florida Supreme Court on the 2000 presidential recount. In *Bush v. Palm Beach County Canvassing Bd.*, the Court reaffirmed *McPherson* and expressed the concern that the Florida Supreme Court may have "construed the Florida Election Code without regard to the extent to which the Florida Constitution could, consistent with

Art. II, § 1, cl. 2, 'circumscribe the legislative power.'" 531 U.S. 70, 76-77 (2000) (quoting *McPherson*, 146 U.S. at 25). Because the Florida Supreme Court's application of the statutory law might have been tainted by consideration of the state constitution, the Court vacated the state-court ruling and remanded. *Id.* at 78.

Later that same term, the Court reiterated that the Constitution vests state legislatures with "plenary" authority over federal elections. *Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam). As Chief Justice Rehnquist wrote in his concurrence, with words equally applicable to all federal elections, "A significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question." *Id.* at 112.

In sum, the Legislature enjoys a "direct grant of authority under the United States Constitution" and alone "has plenary authority to establish the manner of conducting" federal elections in Wisconsin. *Carson v. Simon*, 978 F.3d 1051, 1060 (8th Cir. 2020) (per curiam) (quoting *Palm Beach*, 531 U.S. at 76). "Reasonable people can disagree about the wisdom or folly of" various voting rules and procedures, but "[t]he place for that debate is in the Legislature. Once the dispute enters [the] courts, however, the only question is what the law commands." *Hotze v. Hudspeth*, 16 F.4th 1121, 1130 (5th Cir. 2021) (Oldham, J., concurring).

B. Any reading of the Legislature's statutes that allows the challenged practices would be the kind of "significant departure" that violates the Constitution.

A state court or other nonlegislative branch of government violates the Election Clause by implementing a "significant departure" from the election scheme enacted by the Legislature. *Bush v. Gore*, 531 U.S. at 113 (Rehnquist, C.J., concurring). "Such a departure occurs when the 'general coherence' of the legislative scheme is 'altered' or 'wholly change[d]' by officials outside the Legislature." *Hotze*, 16 F.4th at 1128 (Oldham, J., concurring) (quoting *Bush v. Gore*, 531 U.S. at 114 (Rehnquist, C.J., concurring)).

The manner in which ballots are delivered and collected is precisely the kind of question that the Constitution delegates to state legislatures, and WEC's memos manifestly displace the Wisconsin Legislature's choices. At minimum, they are a "significant departure" from state law and disrupt the "general coherence" of the legislature's enactments. Bending the statutes to allow these practices would violate the Constitution.

Under state law, an absentee voter must 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." Wis. Stat. §6.87(4)(b)1. And in-person deliveries must go to the municipal clerk's office or an alternative "designated site" staffed by the clerk's representative. *Id.* §6.855(1). But in 2020, WEC determined that ballots

could be delivered by "a family member or another person." JA20. Moreover, rather than mail or hand delivery to the municipal clerk, WEC has allowed delivery to drop boxes which can be placed just about anywhere, need not be staffed at all, and are mentioned nowhere in statute. JA23-26 (confirming that drop boxes may be "staffed or unstaffed, temporary or permanent" and encouraging municipalities to consider partnering with "public libraries to use book and media drop slots" or "with business or locations … such as grocery stores and banks."); JA56 (finding "no specific authorization for drop boxes"). Over 500 boxes were used in the 2020 election. R. 121, ¶¶4-5.

The Legislature did not authorize these practices. And its non-authorization was no accident. As it explained, "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). Further, the Legislature made explicit that its requirements for absentee voting "shall be construed as mandatory" and that "[b]allots cast in contravention of the procedures specified in those provisions may not be counted." *Id.* §6.84(2). The Legislature could scarcely have been clearer that, through the statutes, it said what it meant and meant what it said.

Given the clarity of these statutes, the notion that WEC has a free hand to revamp absentee voting

"notwithstanding the Legislature's express instructions to the contrary" is indeed a "remarkable position." *Hotze*, 16 F.4th at 1128 (Oldham, J., concurring.). If municipalities can freely erect unstaffed drop boxes to collect ballots, and anyone can return anyone's absentee ballot, then there is simply nothing left of the Legislature's carefully drawn regime. While another case might present closer questions as to whether another state actor is "countermand[ing] actions taken by state legislatures when they are prescribing rules for the conduct of federal elections," *Moore*, 142 S. Ct. at 1091 (Alito, J., dissenting), this case is not one of them.

CONCLUSION

The judgment of the circuit court should be affirmed.

Dated this 21st day of March, 2022.

Respectfully submitted,

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CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced using the following font:

Proportional serif font: Min. printing resolution of 20 dots per inch, 13-point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this Brief is 13 pages and 2,988 words.

Dated this 21st day of March, 2022.

By: *Electronically signed by Matthew M. Fernholz*
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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 § 809.19(12). 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.

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