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SUPREME COURT

STATE OF WISCONSIN
SUPREME COURT
APPEAL No. 2022AP91

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.

LEAGUE OF WISCONSIN MUNICIPALITIES' AMICUS CURIAE BRIEF

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INTRODUCTION

The League of Wisconsin Municipalities (“League”) is a non-profit, non-partisan, voluntary association of cities and villages cooperating to improve local government. The League’s current membership consists of all of Wisconsin’s 190 cities and 407 of Wisconsin’s 415 villages. The League sought permission to file a non-party brief because we believe the circuit court erred in its interpretation of Wis. Stat. § 6.87(4)(b)1 and left clerks with a great deal of uncertainty regarding how to carry out their extensive election duties. For the reasons stated below, we urge this Court to reverse the circuit court’s order.

ARGUMENT

Wisconsin municipal clerks have “charge and supervision of elections” in the municipality. Wis. Stat. § 7.15(1). This is an enormous responsibility, and no small task. The lengthy list of mandatory election-related responsibilities laid out for clerks in Wis. Stat. § 7.15 reveals the magnitude of the task. In the past two years, administering elections has been particularly challenging, both because of the pandemic and because of our country’s highly charged and contentious political environment.

In early 2020, when COVID-19 was little understood and no vaccines existed, many municipal facilities were closing or restricting public access due to the need to limit face-to-face contact with the public. Clerks were forced to figure out how to safely hold elections in the face of a public health crisis marked by tremendous uncertainty and rapidly changing conditions. The Wisconsin Election Commission (WEC) staff's leadership and guidance issued during that very difficult time was a lifeline for municipal clerks. The same is true for the WEC guidance issued in August 2020. The guidance did not require municipalities to use drop boxes but provided those that were already using them and those that desired to use them with good information on how to do so in a safe and secure manner that would protect public health without compromising the integrity of the election. The League believes the circuit court erred in concluding that the WEC guidance conflicted with state law and erred in concluding that the guidance constituted a rule requiring promulgation under Ch. 227. We agree with the arguments made by WEC and the Intervenors in that regard. In the interest of avoiding undue repetition, we do not repeat those arguments.

Our primary reasons for seeking to participate as amicus in this case is because we are concerned that common practice in municipalities across Wisconsin does not comport with the Waukesha

County Circuit Court's order ("Order"), and because the Order leaves clerks in an untenable position with many unanswered questions and the prospect of being sued by opposing sides regardless of what action they take. Clerks need certainty and direction regarding how to deal with certain situations to ensure elections are administered in a uniform and fair manner.

The Order provides that "an elector must personally mail or deliver his or her own absentee ballot, unless the law explicitly authorizes an agent to act on the elector's behalf." *Teigen v. Wis. Elections Comm'n*, No. 2022AP91, Order at 2 (Jan. 20, 2022). In addition to the specific instances set forth in Wisconsin law, federal laws explicitly authorize third-party assistance with voting. The federal Voting Rights Act ("VRA") provides that "[a]ny voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or an agent of that employer or officer or agent of the voter's union." 52 U.S.C. § 10508. Additionally, Title II of the Americans with Disabilities Act ("ADA") provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subject to discrimination by any such entity." 42 U.S.C. § 12132. The U.S. Department of Justice

interprets the ADA's provisions to "apply to all aspects of voting . . . and the casting of ballots, whether on Election Day or during an early voting process."¹ This would logically include ballot delivery. However, this explicit authorization does not provide what clerks should do in situations where persons say they are returning a ballot on behalf of a disabled person.

What should clerks do in situations where persons say they are returning a ballot on behalf of a disabled person? In contrast to the certification procedures found in Wisconsin law where third-party delivery is explicitly authorized – e.g., hospitalized voters, sequestered jurors, residential care facilities – the VRA and ADA do not provide the same safeguards. Under Wisconsin law, there is no affirmative obligation for clerks to ensure veracity of the assertion or to request additional information relating to the disability. Although a clerk may be able to make a limited inquiry under federal law,² are clerks obliged to do so or can they take someone at their word?

Despite the breadth of the various provisions authorizing third party assistance in voting, the law does not address every situation in which voters may need assistance. Third-party delivery is not explicitly authorized for situations where an elector may be unable to deliver his

¹ U.S. Dep't of Justice, "The Americans with Disabilities Act and Other Federal Laws Protecting the Rights of Voters with Disabilities," available at <https://www.justice.gov/file/69411/download>.

² The Americans with Disabilities Act, Title II Technical Assistance Manual, Covering State and Local Government Programs and Services, Section II-3.5300, available at <https://www.ada.gov/taman2.html#II-3.5300>.

or her own ballot, either in person or by mail. For example, the law does not explicitly authorize ballot assistance for those voters who may be temporarily homebound but who can read and write and are not disabled. Voters who are ill may not be disabled or unable to complete their ballots but may nonetheless be unable to leave their residence. Moreover, studies show that Wisconsin has an aging population that is projected to continue over the coming years.³ Elderly voters who struggle with mobility may face unique challenges in a state where elections often take place during inclement weather. A voter who cannot leave their residence cannot personally deliver their ballot to the clerk and may not even be able to personally mail their ballot. Those voters must turn to a third party for assistance returning their ballot.

The reality for clerks is that, by interpreting the law to require voters to personally mail or deliver their ballot, the Order raises several difficult questions for clerks regardless of whether third-party delivery is legally authorized. Clerks should not be expected to police voters' ballots in situations where state law neither requires nor authorizes them to do so. They need guidance to know what their obligations are when an individual is returning more than one ballot or a ballot the clerk has reason to believe is not their own. Clerks should not be expected to request identification to determine every person is, in fact,

³ Wisconsin Department of Administration, Demographic Services, 2010-2040 Population Projections available at <https://www.dhs.wisconsin.gov/publications/p01803.pdf>.

delivering their own ballot. If they do so, they are arguably imposing additional voter qualifications and state law only requires that they request identification when the absentee ballot is originally requested. If clerks accept all ballots upon a claim of third-party assistance, they may be accused of facilitating or committing voter fraud under Wis. Stat. § 12.13(2)(a) or (b)(7) or find themselves the subject of complaints to the Wisconsin Elections Commission if third-party delivery was not explicitly authorized for any of those ballots.

Moreover, without uniform guidance, there will be inconsistencies in administration of elections; clerks will inevitably handle similar situations differently. In attempting to follow the law, one clerk may feel it's necessary to request identification from anyone returning an absentee ballot while another may be uncomfortable requesting identification where there is no statutory authorization for doing so. Another might deny a ballot from someone returning on behalf of their grandparent who struggles with mobility because there is no specific authorization in the law for such situations. And yet another clerk might request proof of a voter's disability from a third-party delivering the ballot while a different clerk in the same situation does not. Clerks and voters need consistency and clarity in our elections.

Confusion also surrounds drop boxes and how they may legally be used for absentee ballot returns. The Order interpreted the requirement

in Wis. Stat. § 6.87(4)(b)1 that ballots “shall be mailed by the elector, or delivered in person, to the municipal clerk” to mean that drop boxes may only be used if they are “staffed” and “located at the office of the clerk. . . .” However, the Order provides no guidance on what it means for a drop box to be staffed and located at the clerk’s office. Does a staffed drop box mean the clerk, or their authorized representative, is standing at the drop box any time it is open for use? Does it mean the clerk or authorized representative must be within eyesight of the drop box? Is a drop box located at the clerk’s office if it is placed in the same building but outside the door to the clerk’s office? Or does it need to be within the four walls of the clerk’s office?

Given this uncertainty, clerks may decide to forgo using drop boxes for ballot returns. But that may not be a complete solution. Many municipalities use drop boxes for other purposes such as utility payments. In municipalities that choose to keep those boxes operational during elections, voters may end up returning ballots in those boxes despite clerks’ best efforts to prevent such use. Wisconsin Stat. § 6.84(2) prohibits a clerk from counting ballots cast in contravention of § 6.87(4)(b)1, so ballots delivered to an improper drop box cannot be counted. However, the statutes do not instruct clerks what to with improperly delivered ballots. A clerk may want to contact the voter and ask if they want to spoil the ballot so that the voter could recast their

vote properly. But there is no statutory authority for doing so. Clerks might also attempt to return the ballot to the voter so they may remedy the defect and properly cast their ballot. There is no specific statutory authority for this practice either, but Wis. Stat. § 6.87(9) establishes a similar practice that allows clerks to reach out to voters to offer them an opportunity to correct mistakes relating to absentee ballot certificates. However, without guidance, clerks face yet another challenge in navigating an elections process that is increasingly fraught with controversy.

Finally, with regard to both drop boxes and in-person delivery, the Order does not comport with the common practice in municipalities across Wisconsin. Many clerks have not understood the law to prohibit someone from returning an absentee ballot on behalf of a spouse or family member. Clerks are in the business of helping electors cast their votes. Under the circuit court's interpretation of Wis. Stat. § 6.87(4)(b)1, clerks are put in a position of raising impediments to voting in situations where the reasons for carefully regulating absentee voting, set forth in Wis. Stat. § 6.84(1), are not implicated. Voters are frustrated with these types of impediments and clerks feel they are not providing voters with good customer service.

CONCLUSION

This Court should reverse the circuit court. The circuit court erred in concluding WEC's guidance constituted unpromulgated rules, and that the guidance conflicted with state law. If this Court upholds the circuit court's decision, we ask that the Court provide clerks with adequate guidance for handling drop boxes and situations involving third-party delivery of absentee ballots.

Respectfully submitted March 30, 2022

League of Wisconsin Municipalities

By:

A handwritten signature in black ink, appearing to be 'Claire Silverman', written over a horizontal line.

Claire Silverman (State Bar #1018898)

Maria Davis (State Bar #1099072)

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of the brief is 1865 words.

I further certify that the electronic brief submitted in compliance with the requirements of sec. 809.19(12) is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate is included with the paper copies of this brief filed with the Court and mailed this day to all parties.

Dated: March 30, 2022.

A handwritten signature in black ink, appearing to read 'Claire Silverman', is written over a horizontal line.

Claire Silverman