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Supreme Court of Wisconsin

No. 2024AP164

PRIORITIES USA;
WISCONSIN ALLIANCE FOR RETIRED AMERICANS;
AND WILLIAM FRANKS, JR.,
v.
THE WISCONSIN ELECTIONS COMMISSION,
DEFENDANT-APPELLEE-RESPONDENT,

THE WISCONSIN STATE LEGISLATURE,
INTERVENOR-DEFENDANT-APPELLEE-RESPONDENT.

BRIEF OF *AMICI CURIAE* WISCONSIN ELECTION OFFICIALS

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STATEMENT OF INTEREST

Amici are county and municipal clerks serving Dane County, Dunn County, Green County, Milwaukee County, City of Madison, City of Milwaukee, City of Stoughton, Town of Vermont, Village of Rib Mountain, and Village of Shorewood Hills.[1] With regard to elections, the primary duty of county and municipal clerks is to ensure that all eligible citizens in their jurisdictions can exercise the right to vote. Under state law, municipal clerks have "charge and supervision of elections and registration" and are given broad duties including "any [duties] which may be necessary to properly conduct elections[.]" Wis. Stat. § 7.15(1). County clerks also play a crucial role in conducting elections, including preparing and providing ballots and election supplies for all "national, state and county elections[.]" Wis. Stat. §§ 7.10(1)–(2). *Amici* have relied on ballot drop boxes in the past as a secure, convenient, and reliable method for voters to submit their absentee ballots and hope to utilize ballot drop boxes for this purpose in the future.

[1] No counsel for a party authored this brief in whole or part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than *amici* or *amici*'s counsel made a monetary contribution to the preparation or submission of this brief. A list of all *amici* is available at Appendix A.

Clerks are deeply tied to the communities they serve and strive to provide the best possible service. This includes providing all eligible voters with convenient and accessible methods of voting and ensuring that voters can be confident in the privacy and security of their ballots. It also includes providing voters with an opportunity to cure any defects in their absentee ballot submissions and minimizing the number of ballots that arrive late due to postal service delays. Ballot drop boxes are an important tool for achieving each of these goals. *Amici* have a strong interest in ensuring that ballot drop boxes once again become an available tool for conducting elections.

SUMMARY OF ARGUMENT

Ballot drop boxes are a secure, convenient, and reliable method for voters to submit their absentee ballots. Before this court's decision in *Teigen v. Wisconsin Elections Commission,* 403 Wis. 2d 607 (2022), municipal clerks across Wisconsin had regularly used ballot drop boxes, many since the 1980s or 1990s. Sixty-six of Wisconsin's seventy-two

counties used drop boxes in 2020[2]—as did 39 U.S. states[3]—without significant issues. Indeed, ballot drop boxes are a particularly secure method of returning absentee ballots because they can be constantly monitored and can be accessed only by the clerk of the jurisdiction or the clerk's staff.

Drop boxes are convenient and efficient, both for voters and for clerks, because they allow voters to return their absentee ballots directly into a receptacle controlled by the municipal clerk without any concern as to whether the ballots will be timely received. The U.S. Postal Service recommends that absentee ballots be mailed at least a week before election day to allow sufficient time for the ballots to traverse through the postal system.[4] Without drop boxes, absentee voters have no reliable means of submitting their ballots within the week before election day

[2] Charles Benson, PolitiFact Wisconsin: *What did state Supreme Court decision say about ballot drop boxes used in 2020 election?* WTMJ-TV Milwaukee (July 29, 2022), https://www.tmj4.com/news/local-news/politifact-wisconsin-what-did-state-supreme-court-decision-say-about-ballot-drop-boxes-used-in-2020-election.

[3] Axel Hufford, *Ballot Drop Boxes in the 2020 Elections*, Stanford-MIT Healthy Elections Project (Mar 10, 2021), https://web.mit.edu/healthyelections/www/sites/default/files/202106/Ballot_Drop_Boxes.pdf.

[4] *Voting by Mail*, USPS (Mar 13, 2023), https://faq.usps.com/s/article/Voting-by-Mail.

except to deliver it to the clerk's office during operating hours.[5] This places an undue burden on residents of rural communities with limited clerk's office hours and on people who work long hours or care for family members. It also places additional burdens on municipal clerks who must both field inquiries about the status of ballots submitted by mail and address confusion surrounding ballots deposited in clerk's office drop boxes intended for other purposes such as submission of utility and tax payments. Wisconsin municipal clerks serve a wide range of communities, varying in size from 22 registered voters to more than 300,000.[6] State law accordingly gives municipal clerks broad authority to take actions "which may be necessary to properly conduct elections." Wis. Stat. § 7.15(1). That authority should include the ability to determine whether to utilize secure drop boxes and where to locate them.

[5] Absentee ballots may also be returned at alternate absentee ballot sites, which must be designated in advance and staffed by employees of the municipal clerk or the executive director of the board of election commissioners. *See Teigen*, 403 Wis. 2d at 647–48. These sites are uncommon outside of Wisconsin's largest cities.

[6] Elections & Voting Information Center, *Stewarding Democracy in a Pandemic: A Profile of the Wisconsin LEOs* (Apr. 7, 2020), https://evic.reed.edu/commentary/stewarding-democracy-in-a-pandemic-a-profile-of-the-wisconsin-leos/.

Most importantly, ballot drop boxes help to ensure that submitted ballots get counted. Many absentee ballots are submitted with superficial defects, such as a forgotten signature or a missing witness address. If these ballots arrive early, clerks are able to contact the voters and give them the opportunity to cure the defects. By eliminating postal service delays, drop boxes help to ensure that ballots arrive early enough to provide an opportunity to cure. Eliminating these delays also helps to reduce the number of absentee ballots that arrive after election day and cannot be counted.

ARGUMENT

I. DROP BOXES ARE SECURE AND RELIABLE FOR THE COLLECTION OF BALLOTS IN WISCONSIN.

Absentee voting in Wisconsin and across the United States is secure in general,[7] and ballot drop boxes are a particularly secure method of returning absentee ballots.

For many decades prior to 2020, municipalities across Wisconsin had utilized drop boxes or mail slots built into the side of clerk's office buildings to allow residents to deliver absentee ballots, utility and tax

[7] Matt Barreto, et al., *Debunking the myth of voter fraud in mail ballots*, UCLA LPPI Voting Rights Project, University of New Mexico Center for Social Policy, & Union of Concerned Scientists (Apr. 14, 2020), https://csp.unm.edu/covid-19/ucla-unm-ucs-voter-fraud-report.pdf; *See also How Wisconsin Delivers Accurate Election Results*, My Vote Wisconsin, https://myvote.wi.gov/en-us/Election-Results-Process.

payments, and other submissions "to the municipal clerk." *See* Wis. Stat. § 6.87(4)(b)(1) (requiring that absentee ballots be mailed or delivered "to the municipal clerk"). In 2020, sixty-six of Wisconsin's seventy-two counties deployed drop boxes. Many of these counties and their municipal clerks used mail slots or drop boxes built into the clerk's offices. Others used drop boxes located throughout the communities, often in front of public buildings such as city halls, libraries, or fire stations.

For unstaffed drop boxes, the Wisconsin Election Commission ("WEC") provided detailed guidance to ensure security.[8] It directed that drop boxes be constructed of durable materials such as steel and, when located outdoors, be permanently cemented into the ground. It further directed that only election officials and their staffs should have access to the drop boxes, and in addition to locks, drop boxes should be sealed with tamper evident seals. Finally, the guidance stated that unstaffed drop boxes should be in areas with good lighting and monitored via video surveillance cameras.[9] The Village of Rib Mountain provides a typical example. There, voters were able to drop their ballots into a narrow slot

[8] *Absentee Ballot Drop Box Information*, Wisconsin Election Commission (Aug. 19, 2020), https://will-law.org/wp-content/uploads/2021/06/Exhibit-B-WEC-August-2020-Drop-Box-Memo.pdf.

[9] *Id.*

in the side of the clerk's office building, which residents also used for other purposes including submission of tax payments. The slot fed ballots into a secure location within the clerk's office and was monitored via outdoor security cameras.

These types of security measures render ballot drop boxes more secure than personal mailboxes or even public Postal Service Blue Boxes. Voters value that additional security. Some voters feel more comfortable depositing their ballots into a drop box rather than into a mailbox because doing so eliminates the opportunity for anyone other than an election official to see or obtain their ballots.[10] That knowledge gives voters confidence that both their personal privacy and the integrity of their ballots will be protected.

Many jurisdictions, both in Wisconsin and across the United States, have long provided voters with the option of returning their ballots via drop boxes. In 2020, the use of drop boxes increased significantly due to the COVID-19 pandemic. With increased usage came increased scrutiny, but studies have found no significant security problems with the use of drop boxes. For instance, a survey of state election officials across the county, conducted by the Associated Press,

[10] *See Id.*

found zero instances of fraud, stolen ballots, or other major issues associated with drop boxes.[11] These findings align with *amici's* experience. Wisconsin clerks are committed to conducting secure elections and, until 2022, ballot drop boxes facilitated those efforts.

II. DROP BOXES ARE CONVENIENT AND THEIR PROHIBITION BURDENS CLERKS AND VOTERS.

Ballot drop boxes are convenient for both voters and election officials, and their prohibition has placed additional burdens on municipal clerks. Without drop boxes, absentee voters who wait until the week before election day to return their ballots or who do not wish to return their ballots via the mail must drop their ballots at their municipal clerk's office or designated alternate site *during operating hours*. This burdens voters in more rural parts of the state and voters who work long hours or have other substantial responsibilities such as caring for a family member. Most of Wisconsin's municipal clerks are part-time employees and work an additional job. Many clerk's offices, particularly in less densely populated parts of the state, are open for only limited hours, making it particularly difficult for these voters to return their ballots directly to the clerk. For instance, the Town of Elcho's office

[11] Anthony Izaguirre & Christina Cassidy, *No major problems with ballot drop boxes in 2020, AP finds*, AP (Jul7 17, 2022), https://apnews.com/article/voting-rights-2022-midterm-elections-covid-health-wisconsin-c61fa93a12a1a51d6d9f4e0a21fa3b75.

hours are limited to Mondays, 9:00 a.m.-1:00 p.m., and Tuesday, 3:30 p.m.-5:30 p.m.[12] The Village of Nichols's hours are limited to Tuesday and Thursday 1:00 p.m.-5:00 p.m.[13]

Even in Wisconsin's cities, residents who work long hours, care for family members, or live far away from the clerk's office, may find it difficult to deliver their ballots during regular business hours. Municipal clerks are given substantial authority to accommodate the varied voting needs of their communities, *see* Wis. Stat. § 7.15(1), and that authority should allow municipal clerks to determine whether their communities would benefit from ballot drop boxes and where to locate any such drop boxes.

"Municipal clerks are the officials primarily responsible for election administration in Wisconsin" and are given "a vast array of duties and responsibilities consistent with" that role. *Zignego v. Wisconsin Elections Comm'n*, 396 Wis. 2d 391, 400 (2021). But conducting elections is just one of many clerk responsibilities and absentee ballots are far from the only documents submitted to clerks. Indeed, accepting submissions from members of the community—whether of license applications, utility or tax payments, or absentee

[12] Town of Elcho, https://www.townofelcho.com/.

[13] Village of Nichols, https://villageofnichols.com/.

ballots—is a core clerk's office function. Clerks' offices have long employed drop boxes or other similar mechanisms to receive such submissions. For instance, in the Town of Westport, the clerk's office had used a drop slot to accept absentee ballots and utility bills for over 35 years prior to 2022. Many municipalities in Washington County had done so for even longer. The prohibition on these submission mechanisms for absentee ballots has created a dilemma for clerks: if they remove the drop boxes, the result is inconvenience and confusion for residents accustomed to dropping their payments in the box, but if they leave the drop boxes in place, voters may improperly place absentee ballots into them.

Different clerks have responded to this dilemma in different ways. Some have closed their drop boxes to all submissions during election season—leading to complaints from residents—while others have left the drop boxes open but added signs to clarify that ballots may not be deposited. The signs have been effective in some cases, but despite clerks' best efforts, some voters have continued to place their ballots in drop boxes intended for other purposes. State law forbids the counting of improperly submitted ballots, Wis. Stat. § 6.84(2), so when a voter improperly places a ballot in a drop box, the clerk is forced to contact the voter to inform them that the ballot cannot be counted unless returned

through a different mechanism. Often, a voter must come to the clerk's office so that the clerk can return the absentee ballot to the voter. The voter can then immediately hand the ballot back to the clerk. This ballot submission two-step might be comical but for the burdens it places on public servants and on citizens' fundamental right to vote. *See* Wis. Const. art. III, § 1 (establishing the right to vote for "[e]very United States citizen age 18 or older"); *State v. Cir. Ct. for Marathon Cnty.*, 178 Wis. 468 (1922) ("Nothing can be clearer under our Constitution and laws than that the right of a citizen to vote is a fundamental, inherent right.").

The inability to use drop boxes burdens municipal clerks in additional ways. Under state law, municipal clerks are required to "maintain a free access information system under which" absentee voters "may ascertain current information concerning whether the elector's vote has been counted, and if the vote will not be counted, the reason that it will not be counted." Wis. Stat. § 7.15(12). Ballots submitted via drop box can be quickly and efficiently logged into this system, providing timely information to voters, and increasing public confidence in the voting system. Ballots sent by mail are likely to require several days to be delivered to the clerk's office and logged into the system. During that time, voters often contact the clerk's office to check whether their ballots have been received. These inquiries are particularly common during the

week leading up to election day when clerks' resources are already stretched thin. If a voter inquires about a ballot that has not yet been processed into the system, the clerk will often undertake a time-consuming process of trying to track down the ballot. Drop boxes largely eliminate the need for such inquiries. Even if a voter does call to check that a ballot submitted via drop box has been received, the ballot is likely to have already been added to the tracking system, making it easy for the clerk to confirm receipt.

III. DROP BOXES HELP TO ENSURE BALLOTS ARE COUNTED.

Every election cycle, hundreds or thousands of absentee ballots are rejected in Wisconsin because they arrive after election day. Thousands more are rejected based on superficial flaws such as a forgotten signature or missing witness address. Clerks strive to minimize these numbers and to ensure that every eligible voter has their ballot counted. Drop boxes are a critical tool in achieving that goal.

Drop boxes help in two important ways. *First*, the availability of drop boxes decreases the number of voters who place their absentee ballots in the mail in the days before the election. Although the postal service recommends sending absentee ballots at least a week before election day, the actual time a mailed ballot spends in transit depends

on various factors and is difficult for voters to predict. In some parts of the state, the postal service generally provides next-day delivery for local priority mail, but in most of the state it does not. In the western portion of the state, local mail is transported to Minnesota for processing before being delivered. In extreme cases, mail service may become almost entirely unavailable. In 2022, staff shortages in Elk Mound resulted in mail service occurring only once per week.[14]

The postal service has taken steps to prioritize the delivery of absentee ballots in the days preceding election day, including appointing personnel to serve as liaisons with local election officials, but these efforts are far from perfect. In 2020 only 689 ballots (0.05% of all returned absentee ballots) were rejected as late. By contrast, in 2022, 1621 ballots (0.36% of all returned absentee ballots) were rejected as late.[15] The prohibition on drop boxes in 2022 was likely a significant

[14] Adam Reed, *Elk Mound Post Office struggles to provide daily mail delivery*, ABC News 18 WQOW (June 29, 2022), https://www.wqow.com/news/elk-mound-post-office-struggles-to-provide-daily-mail-delivery/article_5e2a834e-f738-11ec-8f04-0357472fc680.html.

[15] *2020 & 2022 General Election Voting and Registration Statistics Report*, Wisconsin Election Commission, https://elections.wi.gov/resources/statistics/2020-general-election-voting-and-registration-statistics-report-formerly-el & https://elections.wi.gov/resources/statistics/2022-general-election-voting-and-registration-statistics-report.

factor in increasing the number of late mail ballots.[16] It is without dispute that late arriving ballots are a result of ballots being submitted via the US Postal Service.

Second, drop boxes facilitate the ballot curing process. When a clerk receives a ballot with a superficial defect, the clerk contacts the voter to provide an opportunity to cure the defect.[17] The clerk may cancel the ballot and allow the voter to cast a new ballot, mail the ballot back to the voter (time permitting), or request that the voter come to the clerk's office to remedy the issue. Clerks do their best to ensure that voters have the opportunity to cure their ballots, but the process takes time. Wisconsin does not allow for ballots to be cured after 8:00 p.m. on election day, *see* Wis. Stat. § 6.87(6), so the earlier before election day a ballot is received, the better the chances it can be cured. By cutting out the time ballots spend in the mail, drop boxes help to ensure that voters have sufficient time to cure any defects in their ballots.

[16] The total number of ballots rejected for other reasons decreased slightly from 2553 in 2020 to 2427 in 2022. *Id.*

[17] Unlike in some other states, Wisconsin law does not require clerks to contact voters and allow them to cure defects. Nonetheless, the vast majority of Wisconsin clerks do contact voters to alert them to ballot defects. *See* Nora Eckert, *How Wisconsin voters can 'cure' the hundreds of ballots already rejected*, Wisconsin Watch (Oct. 27, 2020), https://wisconsinwatch.org/2020/10/wisconsin-voters-cure-rejected-absentee-ballots/.

CONCLUSION

For the foregoing reasons, the Court should hold in favor of Plaintiffs and should allow clerks to utilize ballot drop boxes.

Respectfully submitted this 18th day of April, 2024.

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APPENDIX A — List of Amici

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Andrew Mercil
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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 3,386 words.

Dated this 18th day of April, 2024.

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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). A copy of this certificate has been served on all parties to this matter.

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