

Memo at 1, directly violates the statutory requirement that “the *elector*” must mail or deliver the ballot “in person” to the clerk. Pls. Br. 6–9.

Defendants’ main counter is that the phrase “by the elector” only applies to *mailing* an absentee ballot, and therefore, they argue, anyone can deliver a ballot. WEC Br. 8–9; DRW Br. 7–8. This interpretation cannot square with the text, which reads: “The envelope shall be mailed by the elector, or delivered in person, to the municipal clerk.” On the view of WEC and the Intervenors, “delivered in person” can mean delivery by anyone or to anyone (or even to no one, i.e., an unattended drop box). The sentence could be better drafted—the passive voice is often unclear—but that doesn’t mean that one interpretation is good as another. Context matters. The paragraph in which this is found defines the process to be followed “by the elector”: “[the] elector ... shall make and subscribe to the certification”; “[t]he absent elector ... shall mark the ballot”; “[t]he elector shall ... fold the ballot[]”; “the elector shall also enclose proof of residence”; etc. Then, in the relevant sentence, the phrase “delivered in person” *immediately follows* the phrase “by the elector.” In this context, the only reasonable reading is that the “person” who must deliver the ballot “in person” is “the elector.” The argument that the “person” in the phrase “delivered in person” can be read to apply to any person whatsoever is simply not plausible.

WEC also argues that the statute allows any “agent” of the elector to mail or deliver the ballot. WEC Br. 7–8. But it cites nothing to support this assertion. There is no definition of the word “elector” that includes an authorized agent. By contrast, there *is* such a definition for the phrase “municipal clerk,” showing the Legislature

knew to include that when that is what it intended. Wis. Stat. § 5.02(10) (definition includes “authorized representatives”). Nor is there any reference anywhere in § 6.87(4)(b) to an “agent” of the elector performing any of the requirements in that subsection. Notably, the *very next subsection*, (5), *does* explicitly allow an agent in certain circumstances: electors who are unable to read or write can “select any individual ... to assist in marking the ballot,” with certain limits. *Id.* § 6.87(5). In this context of voting—where the legislature is properly concerned that a vote be the free and independent choice of the elector—it cannot be presumed that an elector can delegate some or all of her rights and responsibilities to others.

WEC briefly suggests, without developing an argument, that following the statutory text could cause “constitutional problem[s]” for voters who are “physically unable” to mail or deliver their ballot. WEC Br. 9. Similarly, the nonprofits raise various “hypothetical” challenges, like “temporarily paralyzed” voters. DRW Br. 9–11. None of these situations are part of this case or relevant to interpreting the text of § 6.87(4)(b). The statutes provide numerous exceptions, carve-outs, and alternatives for voters with physical challenges, *e.g.* Wis. Stat. §§ 6.86(2)(a); 6.86(3); 6.87(5); 6.875. If these statutory exceptions are constitutionally insufficient in some cases, that would have to be litigated separately, and would require, at most, an as-applied exception, not a wholesale disregard of the text.

Finally, WEC’s reading is inconsistent with Wis. Stat. § 12.13(3)(n), which prohibits “giv[ing] a ballot to a person other than the election official in charge.” Pls. Br. 9. WEC points to other statutory sections that allow intermediaries in certain

circumstances, WEC Br. 11–12. But those exceptions are *explicitly authorized* in the text, and specific authorizations always trump general prohibitions. *E.g.*, *James v. Heinrich*, 2021 WI 58, ¶ 22, 960 N.W.2d 350. WEC can point to no specific text that allows any “[]other person” to return someone else’s absentee ballot; and such an interpretation would render the general prohibition in § 12.13(3)(n) a nullity.

B. Dropping a ballot into an unstaffed drop box is not mailing or “in person” delivery.

As Plaintiffs explained, WEC’s memo greenlighting drop boxes conflicts with the statutory requirement—to be strictly construed—that a ballot must either be mailed or “delivered *in person*, to the municipal clerk.” Pls. Br. 9–11. Dropping a ballot into an unstaffed drop box is not “in person” delivery in any sense.¹

Defendants have no meaningful textual response. The closest they come is the *ipse dixit* assertion that dropping a ballot into a box *is* “personal[] deliver[y] to a municipal clerk.” WEC Br. 13. But they do not explain how dropping a ballot into a box *with no other person present* is “in person” delivery “to the municipal clerk.”

The requirement that a ballot be “delivered in person, to the municipal clerk,” is important to ensure that the other requirement discussed above—that *electors*

¹ Intervenors argue that Plaintiffs’ “concession” in footnote 2—that clerks can have a secure receptacle for voters to place their ballots into when they deliver them in person—somehow defeats their statutory argument. DSCC Br. 2; DRW Br. 12–14. Hardly. The statute requires “in person” delivery “to the municipal clerk,” such that both the elector and the clerk (or an authorized representative) must be physically present when the elector returns his or her ballot. Whether the voter physically places the ballot into the clerk’s hand or into some receptacle in the presence and view of the clerk is not a detail that the statute addresses. But dropping a ballot into a box without a person present—whether the drop box is in a park, on the street in front of the clerk’s office, or used “after hours”—is not “in person” delivery.

personally deliver their ballots—is followed. If one person delivers multiple ballots at the same time, it would immediately raise concerns to a clerk. Unstaffed drop boxes, on the other hand, not only enable ballot harvesting, they make it undiscoverable.

Perhaps realizing they have no good textual response, Defendants rely primarily on policy arguments or sources that have no bearing on the statute. WEC begins, for example, by emphasizing how safe and secure drop boxes are, as do the Interveners. WEC Br. 12–13; DSCC Br. 1, 10. But even if, as WEC and the Interveners claim, “many” clerks adopted a variety of security techniques in “operating” drop boxes, the guidance did not require them. Whether or not clerks tried to be careful is irrelevant to whether drop boxes are legal.

Defendants argue that drop boxes are somehow similar to mailboxes. DSCC Br. 10–11. But the legislature said otherwise. A mailbox is not a drop box. Mailing a ballot is authorized by the statute, whereas drop boxes are not. Even if it mattered, there *are* meaningful differences between a mailbox and an unstaffed drop box: a drop box contains only ballots, and lots of them in one place at the same time, making it a prime target for would-be tamperers, whereas mailboxes may or may not contain ballots at any given time; mail boxes are also operated by an official agency of the U.S. Government, and it is a crime to use the mail to commit fraud. 18 USC § 1341.

Defendants also heavily emphasize a letter and brief from a lawyer on behalf of Wisconsin legislators, seemingly endorsing drop boxes. WEC Br. 14; DSCC Br. 7. But a single lawyer is not the Legislature or the law, nor can his statements control the interpretation of state law. Regardless, that lawyer’s statement was a throw-

away sentence in a list of examples to show how easy voting is in Wisconsin (which is true even without drop boxes), and was not a careful analysis of whether drop boxes are legal.² Even statements by legislators cannot change or add to existing law. Our Constitution explains how a bill becomes law. Sending letters is not included.

C. Absentee ballots must be returned to the clerk's office or an alternate site under § 6.855.

As Plaintiffs explained, § 6.855 makes clear that “the office of the municipal clerk” is the default location “to which absentee ballots *shall be returned*,” unless alternate sites are designated under that section. Pls. Br. 11–14.

Defendants respond that a drop box does not meet the definition of an alternate voting site under § 6.855 because voters cannot vote *in-person* at a drop box. WEC Br. 15–17; DSCC Br. 11–14. This response misses the point. Defendants are correct that there is a distinction between in-person absentee voting and what WEC calls “true” absentee voting, but § 6.855 is not *solely* about *in-person* absentee voting; it covers *both*, allowing an alternate site where electors “may request *and vote* absentee ballots [in-person absentee voting] *and to which voted absentee ballots shall be returned* [‘true’ absentee voting].” Given that § 6.855 authorizes a municipality “to designate a site *other than the office of the municipal clerk*” for *both* in-person and “true” absentee

² Likewise, passing comments from two Supreme Court Justices in concurrences to the denial of a stay have no bearing on state law. DSCC Br. 7 (citing *DNC v. Wis. State Legislature*, 141 S. Ct. 28, 36 (2020)); DRW Br. 12. And those comments were made in reliance on the very memo challenged here, in a case where the legal validity of that memo was not at issue. 141 S. Ct. at 36 (citing August Memo).

voting, the obvious implication is that, without such a designation, the only place “to which absentee ballots shall be returned” is “the office of the municipal clerk.”

A foundational principle of statutory interpretation is that the “express mention of one matter excludes other similar matters [that are] not mentioned.” *James*, 2021 WI 58, ¶ 18 (holding that local health officials lacked power to “close schools” because the statutes granted that authority only to the state health department.). Section 6.855 is the *exclusive* means to designate an alternate location. There is no other, yet Defendants argue, in effect, that municipalities can ignore the requirements of § 6.855 by creating an unauthorized alternate location where only a subset of the absentee voting process is permitted.³

Finally, Intervenors argue that, having authorized absentee voting in some form, the Legislature cannot “impose procedures that ... treat absentee ballots as a lesser class of ballot.” The Legislature has done no such thing. It has simply recognized that while voting is a right, absentee voting is a privilege, and certain safeguards are necessary to ensure the integrity of elections. Wis. Stat. § 6.84(1). It has made clear that the statutes’ specified processes are mandatory. Wis. Stat. § 6.84(2). The Legislature has provided two, and only two, valid methods for returning an absentee ballot. Taken to its logical conclusion, the Intervenors’

³ WEC also cites Wis. Stat. § 6.87(3)(a), but that provision supports Plaintiffs’ interpretation. It provides that a ballot received at the clerk’s office or an alternate site for in-person absentee voting “may not be removed by the elector therefrom.” Thus, when § 6.855 references the clerk’s office or a designated site as the location “to which voted absentee ballots *shall be returned*,” it is clearly referring to “true” or normal absentee ballots, since *in-person* absentee ballots cannot leave the site.

argument that *any* requirements for absentee voting that would be unnecessary for in-person voting would be unconstitutional. That argument, to put it mildly, cannot be right, but regardless it is underdeveloped and need not be considered here.

D. Only election officials appointed under § 7.30 can receive an absentee ballot

Neither WEC nor the Intervenors meaningfully dispute Plaintiffs' argument on this point. Instead WEC asserts solely that this issue is not properly before this Court. WEC Br. 17–18. WEC is wrong. Its memos endorse drop boxes, whether “staffed or unstaffed,” and its August Memo in particular purports to outline the requirements for drop boxes (according to WEC). The Memo does not note any limits on who can “staff” them, implying anyone can. On their view, a clerk could designate any number of “sworn” persons to conduct an election anywhere or nowhere. The statutes say otherwise. Resolving this issue is especially important if drop boxes can go *anywhere*, because who staffs them would be the only meaningful constraint.

II. WEC's interpretations are invalid because the agency did not promulgate them as rules, as required by state law.

Plaintiffs argue primarily that the Memos are contrary to law. But if this Court disagrees, the Memos constitute unpromulgated rules and should have been subject to the oversight provided by the rulemaking process. Pls. Br. 16–20. WEC argues that the Memos do not have the “effect of law” because they do not *require* clerks to use drop boxes or *prohibit* anything. But there are different kinds of laws—some impose duties, others prohibit conduct, and still others *authorize* conduct. WEC's memos fall into the latter category—they purport to authorize drop boxes and return of absentee ballots by any person. And given that WEC is charged with administering *and*

enforcing Wisconsin's election laws, when WEC gives the green light to something, it has the "effect of law." Wis. Stats. §§ 5.05(1), (7), (12); Wis. Admin. Code §EL 12.04. More to the point, WEC trains clerks and election workers, and has responsibility for educating voters about voting procedures, so its memos directly affect how elections are conducted. The Memos authorized methods of ballot return not found in statute and these methods should have been promulgated as rules subject to public oversight.

III. Plaintiffs have standing

Standing in Wisconsin "is construed liberally"; even "a trifling interest may suffice." *McConkey v. Van Hollen*, 2010 WI 57, ¶ 15–16, 326 Wis. 2d 1, 783 N.W.2d 855 (citation omitted). It "is not a matter of jurisdiction," but "sound judicial policy," to ensure the issues are "carefully developed and zealously argued." *Id.* In a Chapter 227 action, standing "depends on whether the challenger comes within the statute authorizing judicial review." *Wis. Hosp. Ass'n v. Nat. Resources Bd.*, 156 Wis. 2d 688, 700-01, 457 N.W.2d 879 (Ct. App. 1990). Plaintiffs satisfy both the policy considerations and statutory requirements of standing here. If two registered voters and taxpayers do not have standing to challenge unlawful government conduct relating to elections, it is difficult to identify who would ever be able to challenge unlawful WEC guidance, and its illegal guidance would be immune from judicial review. Fortunately, the Legislature explicitly authorized facial challenges to documents like the Memos in § 227.40(1).

Plaintiffs have standing as registered voters. The Memos "interfere[] with or impair[]" their ability to vote, and "threaten[] to interfere with or impair" their voting rights in the future, both because the conflict between the statute and the

Memos makes them unsure whether they *can* cast an absentee ballot by drop box and because counting ballots that are not validly cast dilutes votes that were lawfully cast.⁴ Wis. Stat. § 227.40(1). Wisconsin voters also have the “right” and “privilege” to a lawful election process, so they can have confidence in the integrity of the results.

Plaintiffs also have standing as taxpayers. Even a “slight loss” of taxpayer funds is sufficient. *City of Appleton v. Town of Menasha*, 142 Wis. 2d 870, 419 N.W.2d 249(1988); *Fabick v. Evers*, 2021 WI 28, ¶ 9–11, 396 Wis. 2d 231, 956 N.W.2d 856. There is no dispute WEC personnel (whose salaries are paid by taxpayers, including Plaintiffs) wrote and issued the Memos, which are posted on WEC’s official website, and that state resources were used to create these documents and distribute them to the clerks as part of WEC’s statutory duties to administer elections.⁵ That Plaintiffs cannot quantify a financial cost or financial loss specific to which employees were involved does not defeat taxpayer standing.

CONCLUSION

This Court should grant Plaintiffs’ motion for summary judgment.

Dated: November 24, 2021.

Respectfully Submitted,

⁴ The federal cases DSCC cites rejecting standing based on vote dilution are irrelevant; standing in Wisconsin is broader than in federal courts. *McConkey*, 2010 WI 57, ¶ 15.

⁵ The Intervenors seem to argue that because Plaintiffs have no personal knowledge that the Memos were sent to the municipal clerks or that the Memos will be used in future, their claims fail. WEC admitted both that the Memos were sent to all the clerks and that the clerks relied on them to establish over 500 drop boxes across the State. (Dkt. 19, ¶¶ 8, 10, 13.) Those judicial admissions of fact are binding. *Fletcher v. Eagle River Mem. Hosp. Inc.*, 156 Wis. 2d 165, 177, 456 N.W.2d 788 (1990). And it is undisputed that WEC has not revoked or revised the Memos, or otherwise limited their use to the 2020 elections.

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