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SUPREME COURT

SUPREME COURT OF WISCONSIN
No. 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.

Appeal from Waukesha County Circuit Court
The Honorable Michael O. Bohren, Presiding
Circuit Court Case No. 2021CV0958

BRIEF OF INTERVENORS-DEFENDANTS-APPELLANTS DISABILITY RIGHTS WISCONSIN, WISCONSIN FAITH VOICES FOR JUSTICE & LEAGUE OF WOMEN VOTERS OF WISCONSIN

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Does the doctrine of sovereign immunity bar this suit, given that Plaintiffs did not first file their complaint with the Wisconsin Elections Commission as required by Wis. Stat. ch. 5?

Answer below: Though this threshold issue was raised and briefed below, the circuit court failed to address it.

Appellants' answer: Yes.

2. Does Wisconsin law prohibit eligible Wisconsin voters from receiving assistance in returning their valid, completed absentee ballots?

Answer below: Yes.

Appellants' answer: No.

3. Does Wisconsin law prohibit municipal clerks from establishing secure drop boxes for the return of valid, completed absentee ballots?

Answer below: Yes.

Appellants' answer: No.

4. Are the Wisconsin Elections Commission memos challenged in this matter invalid guidance documents that were instead required by Wisconsin law to be promulgated through the rulemaking process?

Answer below: Yes.

Appellants' answer: No.

STATUTORY PROVISIONS IMPLICATED

Wis. Stat. § 5.01(1)

Construction of chs. 5 to 12. Except as otherwise provided, chs. 5 to 12 shall be construed to give effect to the will of the electors, if that can be ascertained from the proceedings, notwithstanding informality or failure to fully comply with some of their provisions.

Wis. Stat. § 5.05(2m)

Enforcement.

(a) The commission shall investigate violations of laws administered by the commission and may prosecute alleged civil violations of those laws, directly or through its agents under this subsection, pursuant to all statutes granting or assigning that authority or responsibility to the commission. Prosecution of alleged criminal violations investigated by the commission may be brought only as provided in par. (c)11., 14., 15., and 16. and s. 978.05(1). For purposes of this subsection, the commission may only initiate an investigation of an alleged violation of chs. 5 to 10 and 12, other than an offense described under par. (c)12., based on a sworn complaint filed with the commission, as provided under par. (c). Neither the commission nor any member or employee of the commission, including the commission administrator, may file a sworn complaint for purposes of this subsection.

(c)

2.

a. Any person may file a complaint with the commission alleging a violation of chs. 5 to 10 or 12. No later than 5 days after receiving a complaint, the commission shall notify each person who or which the complaint alleges committed such a violation. Before voting on whether to take any action regarding the complaint, other than to dismiss, the commission shall give each person receiving a notice under this subd. 2.a. an opportunity to demonstrate to the

commission, in writing and within 15 days after receiving the notice, that the commission should take no action against the person on the basis of the complaint. The commission may not conduct any investigation or take any other action under this subsection solely on the basis of a complaint by an unidentified complainant.

…

(k) The commission's power to initiate civil actions under this subsection for the enforcement of chs. 5 to 10 or 12 shall be the exclusive remedy for alleged civil violations of chs. 5 to 10 or 12.

Wis. Stat. § 5.06

(1) Whenever any elector of a jurisdiction or district served by an election official believes that a decision or action of the official or the failure of the official to act with respect to any matter concerning nominations, qualifications of candidates, voting qualifications, including residence, ward division and numbering, recall, ballot preparation, election administration or conduct of elections is contrary to law, or the official has abused the discretion vested in him or her by law with respect to any such matter, the elector may file a written sworn complaint with the commission requesting that the official be required to conform his or her conduct to the law, be restrained from taking any action inconsistent with the law or be required to correct any action or decision inconsistent with the law or any abuse of the discretion vested in him or her by law. The complaint shall set forth such facts as are within the knowledge of the complainant to show probable cause to believe that a violation of law or abuse of discretion has occurred or will occur. The complaint may be accompanied by relevant supporting documents. The commission may conduct a hearing on the matter in the manner prescribed for treatment of contested cases under ch. 227 if it believes such action to be appropriate.

(2) No person who is authorized to file a complaint under sub. (1), other than the attorney general or a district attorney, may commence an action or proceeding to test

the validity of any decision, action or failure to act on the part of any election official with respect to any matter specified in sub. (1) without first filing a complaint under sub. (1), nor prior to disposition of the complaint by the commission. A complaint is deemed disposed of if the commission fails to transmit an acknowledgment of receipt of the complaint within 5 business days from the date of its receipt or if the commission concludes its investigation without a formal decision.

(3) A complaint under this section shall be filed promptly so as not to prejudice the rights of any other party. In no case may a complaint relating to nominations, qualifications of candidates or ballot preparation be filed later than 10 days after the complainant knew or should have known that a violation of law or abuse of discretion occurred or was proposed to occur.

…

(6) The commission may, after such investigation as it deems appropriate, summarily decide the matter before it and, by order, require any election official to conform his or her conduct to the law, restrain an official from taking any action inconsistent with the law or require an official to correct any action or decision inconsistent with the law. The commission shall immediately transmit a copy of the order to the official. An order issued under this subsection is effective immediately or at such later time as may be specified in the order.

…

(8) Any election official or complainant who is aggrieved by an order issued under sub. (6) may appeal the decision of the commission to circuit court for the county where the official conducts business or the complainant resides no later than 30 days after issuance of the order. Pendency of an appeal does not stay the effect of an order unless the court so orders.

(9) The court may not conduct a de novo proceeding with respect to any findings of fact or factual matters upon which the commission has made a determination, or could have made a determination if the parties had properly presented the disputed matters to the commission for its consideration. The court shall summarily hear and determine all contested issues of law and shall affirm,

reverse or modify the determination of the commission, according due weight to the experience, technical competence and specialized knowledge of the commission, pursuant to the applicable standards for review of agency decisions under s. 227.57.

(10) This section does not apply to matters arising in connection with a recount under s. 9.01.

Wis. Stat. § 6.84

(1) 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.

(2) Interpretation. Notwithstanding s. 5.01(1), with respect to matters relating to the absentee ballot process, ss. 6.86, 6.87(3) to (7) and 9.01(1)(b)2. and 4. shall be construed as mandatory. Ballots cast in contravention of the procedures specified in those provisions may not be counted. Ballots counted in contravention of the procedures specified in those provisions may not be included in the certified result of any election.

Wis. Stat. § 6.855(1)

The governing body of a municipality may elect to designate a site other than the office of the municipal clerk or board of election commissioners as the location from which electors of the municipality may request and vote absentee ballots and to which voted absentee ballots shall be returned by electors for any election. The designated site shall be located as near as practicable to the office of the municipal clerk or board of election commissioners

and no site may be designated that affords an advantage to any political party. An election by a governing body to designate an alternate site under this section shall be made no fewer than 14 days prior to the time that absentee ballots are available for the primary under s. 7.15(1)(cm), if a primary is scheduled to be held, or at least 14 days prior to the time that absentee ballots are available for the election under s. 7.15(1)(cm), if a primary is not scheduled to be held, and shall remain in effect until at least the day after the election. If the governing body of a municipality makes an election under this section, no function related to voting and return of absentee ballots that is to be conducted at the alternate site may be conducted in the office of the municipal clerk or board of election commissioners.

Wis. Stat. § 6.87(4)(b)1. (portion at issue emphasized)

Except as otherwise provided in s. 6.875, an elector voting absentee, other than a military elector or an overseas elector, shall make and subscribe to the certification before one witness who is an adult U.S. citizen. A military elector or an overseas elector voting absentee, regardless of whether the elector qualifies as a resident of this state under s. 6.10, shall make and subscribe to the certification before one witness who is an adult but who need not be a U.S. citizen. The absent elector, in the presence of the witness, shall mark the ballot in a manner that will not disclose how the elector's vote is cast. The elector shall then, still in the presence of the witness, fold the ballots so each is separate and so that the elector conceals the markings thereon and deposit them in the proper envelope. If a consolidated ballot under s. 5.655 is used, the elector shall fold the ballot so that the elector conceals the markings thereon and deposit the ballot in the proper envelope. If proof of residence under s. 6.34 is required and the document enclosed by the elector under this subdivision does not constitute proof of residence under s. 6.34, the elector shall also enclose proof of residence under s. 6.34 in the envelope. Except as provided in s. 6.34(2m), proof of residence is required if the elector is not a military elector or an overseas elector and the elector registered by mail or by electronic application and has not voted in an election in this state. If the elector requested a

ballot by means of facsimile transmission or electronic mail under s. 6.86(1)(ac), the elector shall enclose in the envelope a copy of the request which bears an original signature of the elector. The elector may receive assistance under sub. (5). The return envelope shall then be sealed. The witness may not be a candidate. **The envelope shall be mailed by the elector, or delivered in person, to the municipal clerk issuing the ballot or ballots.** If the envelope is mailed from a location outside the United States, the elector shall affix sufficient postage unless the ballot qualifies for delivery free of postage under federal law. Failure to return an unused ballot in a primary does not invalidate the ballot on which the elector's votes are cast. Return of more than one marked ballot in a primary or return of a ballot prepared under s. 5.655 or a ballot used with an electronic voting system in a primary which is marked for candidates of more than one party invalidates all votes cast by the elector for candidates in the primary.

42 U.S.C. § 12132

Subject to the provisions of this subchapter, 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 subjected to discrimination by any such entity.

52 U.S.C. § 10508

Any 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 agent of that employer or officer or agent of the voter's union.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is warranted in this matter under the standards in Wis. Stat. § (Rule) 809.22(2). Publication is proper under the standards in Wis. Stat. § (Rule) 809.23(1) because the issues raised here are of statewide import and will provide guidance relevant to future elections administration and litigation.

INTRODUCTION

Over the past two years, the popularity of absentee voting skyrocketed. Public debate followed suit: controversy, skepticism, and outright derision of absentee voting grew in proportion to its popularity. But this Court's role is to apply existing law, not to set policy.

Existing law requires reversing the judgment below. As a threshold matter, the circuit court ignored a significant jurisdictional flaw. Because this case was initiated without exhausting mandatory administrative remedies, sovereign immunity bars adjudication of the merits.

Even if this Court reaches the merits, they similarly necessitate reversal. The relevant statutory text—one sentence buried in Wis. Stat. § 6.87(4)(b)1.—is unambiguous and does not support the circuit court judgment. Settled precedent, context, and history all confirm the plain-text meaning. The circuit court's interpretation also creates unnecessary conflicts with federal law and constitutional guarantees.

Finally, the circuit court erred in defining the guidance documents at issue as binding rules.

The Court should reverse the circuit court order.

STATEMENT OF THE CASE

Plaintiffs Richard Teigen and Richard Thom (together "Teigen") filed this suit for declaratory judgment in the Waukesha County Circuit Court. (J. App. 6-19)[1] The suit challenged two memos issued by the Wisconsin Elections Commission ("WEC"), the statewide agency charged with administering Wisconsin election law. Wis. Stat. § 5.05(1). Those memos, issued in March and August of 2020, respectively, provided guidance to municipal election officials on questions related to absentee-ballot-return assistance and the use of secure drop boxes. (J. App. 20-26)

The WEC memos did not break new ground. Indeed, case law and record evidence indicate that both ballot-return assistance and drop boxes had been used in Wisconsin, without

[1] All cites to J. App. are to the two-volume Joint Appendix filed concurrently by DRW, DSCC, and WEC with this brief.

challenge, for years prior to 2020.[2] But the outbreak of the COVID-19 pandemic in March 2020, shortly before Wisconsin's spring 2020 general election and presidential preference primary, significantly increased demand for absentee ballots. Wis. Elections Comm'n, Nov. 3, 2020 Election Data Report at 11 & Table 11 (Feb. 3, 2021).[3] Indeed, in the November 2020 general election, Wisconsin set new records for total voter participation and for the number of votes cast absentee. *Id.* at 3-4 & Table 1.

Disability Rights Wisconsin, the League of Women Voters of Wisconsin, and Wisconsin Faith Voices for Justice (collectively "DRW") petitioned to intervene, as did the Democratic Senatorial Campaign Committee ("DSCC"). (J. App. 42-43, 67-71) WEC took no position on intervention, but Teigen opposed it. (J. App. 72) After briefing and a hearing, the circuit court granted the intervention motions and set an

[2] Simultaneously with this brief, DRW has filed a motion for leave to supplement the record. If that motion is granted, the supplemental information will shed additional light on this factual assertion.

[3] Available at https://elections.wi.gov/node/7329.

expedited schedule for Teigen to move for a temporary injunction and for summary judgment. (J. App. 73-74, 107-108) After all parties briefed Teigen's motions for temporary injunction and for summary judgment, the circuit court twice delayed, on its own initiative and for its own reasons, the hearing on those motions. (J. App. 473-476)

On Thursday, January 13, 2022, the circuit court heard argument on Teigen's motions and issued an oral ruling. (J. App. 477-576) Though argument was lengthy and thorough, there were several key issues that had been briefed—including sovereign immunity, federal preemption, and constitutional conflict—that the circuit court chose not to address in its oral ruling. (J. App. 555-571)

Monday, January 17 was Martin Luther King, Jr. Day. On Tuesday, January 18, DRW filed an emergency motion to stay the order, which had not yet been reduced to written form. (J. App. 577-580) DRW also filed dozens of sworn statements attesting to disenfranchisement that would result from the circuit court's ruling. (J. App. 581-638) On Thursday, January

20, the circuit court entered its written order, granting summary judgment for Teigen, declaring the law, instructing WEC to rescind the guidance memos within one week, and denying Teigen's temporary injunction motion as moot. (J. App. 639-641) DRW promptly appealed. (J. App. 653-660) WEC and DSCC followed suit. (J. App. 661-665, 795-799)

On the afternoon of Friday, January 21, the circuit court held a hearing on DRW's motion. (J. App. 666-705) WEC and DSCC joined DRW's motion. (J. App. 680, 682) After hearing arguments, the circuit court denied DRW's motion for a stay. (J. App. 696-99) Recognizing the imminence of the February 15 election, the circuit court *sua sponte* modified its prior order to accelerate the deadline for WEC to rescind the memos. (J. App. 699-700) The circuit court memorialized that ruling in a written order. (J. App. 800-01)

Late on Friday, January 21, DRW moved the court of appeals for an emergency stay of the circuit court's order through the pendency of the appeal. (J. App. 706-719) WEC then filed its own emergency stay request, seeking relief

through the February 15 nonpartisan primary. (J. App. 720-732) The court of appeals directed expedited briefing over the weekend. (J. App. 733-737) On Monday, January 24, the court of appeals entered a stay through the February 15 election, holding the question of a longer stay in abeyance. (J. App. 751-760)

On Tuesday, January 25, Teigen filed a petition for bypass with this Court and a motion to vacate the court of appeals' stay. (J. App. 802-805) Following expedited briefing, this Court granted bypass and denied the motion to vacate the stay. (J. App. 806-811) In the same order, the Court set an expedited schedule for merits briefing. (*Id.*) The Court subsequently denied DRW and WEC's motions to extend the stay through the latter of the April 5 election or the conclusion of this appeal. *Teigen v. Wis. Elections Comm'n*, No. 2022AP91, Order at 3 (Wis. Feb. 11, 2022).

On February 16, in accord with the circuit court order, WEC rescinded the challenged memos.[4]

[4] Meeting available at https://wiseye.org/2022/02/16/wisconsin-

STANDARD OF REVIEW

This Court reviews *de novo* all issues presented here. Failure to exhaust remedies in an action brought against a state agency presents a question of law, which this Court reviews *de novo*. *PRN Assocs. LLC v. DOA*, 2009 WI 53, ¶61, 317 Wis. 2d 656, 766 N.W.2d 559. This Court reviews summary judgment decisions *de novo*. *Waity v. Lemahieu*, 2022 WI 6, ¶17, --- Wis. 2d ---, --- N.W.2d --- (cited source omitted). Proper interpretation of a statute "is a question of law [reviewed] *de novo*." *Id.*, ¶18 (quoted source omitted). If, as here, the interpretation adopted calls into question the statute's constitutionality, that presents an issue of law subject to *de novo* review. *Metro. Assocs. v. City of Milwaukee*, 2011 WI 20, ¶21, 332 Wis. 2d 85, 796 N.W.2d 717. Finally, the interpretation and proper classification of administrative agency pronouncements presents a question of law that this Court reviews *de novo*. *Papa v. DHS*, 2020 WI 66, ¶19, 393 Wis. 2d 1, 946 N.W.2d 17 (quote source omitted).

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elections-commission-special-meeting-2/.

ARGUMENT

I. Teigen's Failure To Exhaust Administrative Remedies Requires Vacating The Circuit Court's Order Under The Doctrine Of Sovereign Immunity.

Under the constitutional doctrine of sovereign immunity, the State of Wisconsin, including its administrative agencies and officials in their official capacities, "cannot be sued without its consent." *Lister v. Bd. of Regents of Univ. of Wis. Sys.*, 72 Wis. 2d 282, 291, 240 N.W.2d 610 (1976). In accord with Wis. Const. art. IV, § 27, the Legislature has expressly prescribed through the Wisconsin Statutes a mandatory process governing how allegations of election-related misconduct must be filed, reviewed, and adjudicated.

As this Court has recognized, "[t]he rule requiring exhaustion of administrative remedies before initiating judicial proceedings is a doctrine of judicial restraint justified by good policy reasons." *State ex rel. Mentek v. Schwarz*, 2001 WI 32, ¶8, 242 Wis. 2d 94, 624 N.W.2d 150. Here, however, the Legislature has formalized that rule by requiring in statute a

specific administrative process that must be followed before seeking judicial review.

A voter who believes an "election official" (as defined in Wis. Stat. § 5.02(2f)) administered or conducted an election in violation of state law is required to first file "a written sworn complaint" with WEC "promptly … after the complainant knew or should have known that a violation of law or abuse of discretion occurred or was proposed to occur." Wis. Stat. § 5.06 (1), (3). Until such a complaint has been filed and then disposed of by WEC, no voter "may commence an action or proceeding to test the validity of any decision, action or failure to act on the part of any election official." Wis. Stat. § 5.06(2). Only after WEC adjudication may a complainant aggrieved by the disposition appeal to the circuit court. Wis. Stat. § 5.06(8).

Teigen instituted this suit alleging that WEC distributed two memoranda to municipal clerks relating to the return of absentee ballots, one in March 2020 and one in August 2020, that purportedly misstate the law. (J. App. 9-10) Although he also alleges that municipal clerks relied upon these incorrect

statements of law to administer the 2020 general election in violation of state statutes (J. App. 10-11), Teigen provided no facts to support this allegation in his complaint, failed to pursue any discovery to develop this evidence, and provided no evidence of this in his summary judgment motion. (J. App. 6-26, 75-94, 462-472) In effect, Teigen complained that WEC—or, more precisely, memo signatory WEC Administrator Meagan Wolfe, and all municipal clerks who relied upon WEC guidance—conducted the 2020 elections in violation of state election law. Each of these actors is an "election official" as defined in Wis. Stat. § 5.02(4e).

A complaint alleging election-related misconduct by election officials, even where styled as a declaratory judgment action, remains subject to WEC's exclusive review under Wis. Stat. § 5.06 before it is ripe for judicial review. *Kuechmann v. Sch. Dist. of La Crosse*, 170 Wis. 2d 218, 224-25, 487 N.W.2d 639 (Ct. App. 1992) (holding that circuit court lacked jurisdiction over election-related complaint filed not under Wis. Stat. § 5.06, but instead as an action for declaratory and

injunctive relief). This Court recently reiterated that "the legislature can establish limitations on judicial review for the circuit court." *Fabick v. Wis. Elections Comm'n*, No. 2021AP0428-OA, Order at 3 n.4 (Wis. June 25, 2021). Those limitations cannot be shrugged off or wished away just because a circuit court ignores them and this Court grants review. That would run afoul of this Court's recognition that "judicial process matters. Whether and when the judicial power may be exercised is also a matter of law. It would be inappropriate to disregard this law simply because we are presented with legal questions we would like to address." *Id.* at 3.

Even if Teigen's arguments are construed as complaints about violations of state election law rather than complaints directed at statewide election officials, Wisconsin law required Teigen to first bring those issues to WEC for resolution before suing in circuit court. Such complaints trigger WEC's authority to investigate and prosecute alleged civil violations of state election laws. Wis. Stat. § 5.05(2m)(a). The Legislature gave WEC "power to initiate civil actions" that redress the wrongs

identified in such complaints, and it decreed that WEC's civil enforcement power is "*the exclusive remedy* for alleged civil violations of" Wisconsin's election code. Wis. Stat. § 5.05(2m)(k) (emphasis added).

Taken together, Wis. Stat. §§ 5.05 and 5.06 foreclose voters from seeking judicial review in the first instance. But, rather than comply with this well-established and obvious statutory requirement, Teigen ran straight to the courts. Indeed, he recently boasted that he "filed this case three days after the *Fabick* original action was denied." (J. App. 865) Teigen's failure to exhaust administrative remedies dooms his case. This is "not just a matter of judicial formalism," but a necessary safeguard to ensure the judiciary is "no less subject to the rule of law than the other branches of government." *Fabick*, Order at 4.

Where, as here, applicable statutes mandate a method for administrative review, that method is exclusive and must be pursued before a court may exercise jurisdiction. *Kuechmann*, 170 Wis. 2d at 224. In *Kuechmann*, plaintiffs

brought an original action for declaratory and injunctive relief, rather than waiting for and seeking review of a decision by the State Elections Board (a WEC predecessor) under Wis. Stat. § 5.06. *Id.* at 222. Their failure to comply with § 5.06 "deprived the circuit court of jurisdiction." *Id.* at 224 ("When the legislature prescribes the method to review alleged deficiencies in election procedure, the legislature must deem that procedure to provide an adequate review.").[5]

These same principles preclude Teigen's lawsuit, which alleges that WEC and election officials throughout the state administered the 2020 general election in violation of Wisconsin law. But Teigen never filed a complaint with WEC, even though the statutes required him to do so before suing. Wis. Stat. §§ 5.05(2m)(c)2.a., 5.06(1). His failure to follow the prescribed procedure precludes his action. Wis. Stat. §§ 5.05(2m)(k), 5.06(2).

[5] *Fabick* characterizes the limitation here as one "go[ing] to competency, not jurisdiction." Order at 3 n.4 (citing *Village of Trempeleau v. Mikrut*, 2004 WI 79, ¶9, 273 Wis. 2d 76, 681 N.W.2d 190). But sovereign immunity is a constitutional bar against suit, which courts have traditionally understood in jurisdictional terms. Wis. Const. art. IV, § 27; *Kuechmann*, 170 Wis. 2d at 224.

DRW raised this issue below. (J. App. 65, 399-401) Teigen responded with three arguments, all unavailing.

First, Teigen contended that the argument was not properly raised. (J. App. 459) This is both false and irrelevant. The jurisdictional objection was not newly raised in response to the injunction motion because DRW expressly pleaded it as an affirmative defense in answering the complaint. (J. App. 65) And, because sovereign immunity is a jurisdictional bar to the court's jurisdiction, it is properly raised at any juncture, and, once raised, must be adjudicated before the merits. *See Bartus v. DHSS*, 176 Wis. 2d 1063, 1082-83, 501 N.W.2d 419 (1993); *Harrigan v. Gilchrist*, 121 Wis. 127, 224-225, 99 N.W. 909 (1904). The circuit court never even acknowledged this threshold issue. (J. App. 477-576)

Second, Teigen claims that he followed the process set out in Wis. Stat. § 227.40. (J. App. 460) That, too, is both incorrect and beside the point. For one thing, § 227.40 applies "only when" the challenged guidance document "interferes with or impairs … the legal rights and privileges of the

plaintiff." Teigen makes no such showing here.[6] Moreover, a specific statute—like those requiring complaints to WEC—controls over a general one. *See, e.g.*, *Marder v. Bd. of Regents of Univ. of Wis. Sys.*, 2005 WI 159, ¶23, 286 Wis. 2d 252, 706 N.W.2d 110. It follows that § 227.40 cannot excuse Teigen's failure to exhaust his administrative remedies under the specific provisions of the election code. The *Kuechmann* case, decided years after the adoption of § 227.40, underscores the weakness of Teigen's argument.

Third, Teigen claims that someone else's proper process of filing a complaint with WEC absolves his procedural shortcuts. (J. App. 460) That is nonsensical. Another voter—also represented by Teigen's lawyers—filed a WEC complaint about the same issues raised here. *See Pellegrini v. Igl*, No. EL 21-35 (WEC June 29, 2021).[7] Now that WEC dismissed that

[6] DSCC challenged Teigen's standing below (J. App. 304-309, 504-511) and is addressing that issue in its merits brief before this Court.

[7] Notably, the fact that Teigen's counsel represent another plaintiff who did file a WEC complaint about the same issues raised here belies Teigen's argument that Wis. Stat. § 5.06(1) cannot reach complaints about WEC itself. That argument flies in the face of Wis. Stat. § 5.02(4)'s broad definition of "election official." It also ignores the similarly broad scope of Wis. Stat. § 5.05(2m)(c)2.a., which, as explained above, also requires

complaint, Pellegrini is pursuing judicial review. *See Pellegrini v. Wis. Elections Comm'n*, No. 2022CV4 (Waukesha Cnty. Cir. Ct., filed Jan. 4, 2022). But neither Pellegrini's adherence to proper process nor the involvement of Teigen's counsel in that case excuses the flaws fatal to this matter.

* * *

Teigen's overt failure to exhaust administrative remedies, which is mandatory under Wisconsin law, dooms his case. Because Teigen has not followed the statutorily prescribed exclusive procedure, the Legislature has not waived sovereign immunity. Accordingly, this Court should vacate the circuit court order and remand with instructions to dismiss.

II. The Circuit Court Ruling Is Based On Incorrect Interpretations Of Relevant Statutory Text.

Even if this Court reaches the merits of Teigen's statutory argument, his claims fail on the merits.

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administrative exhaustion before judicial review. And it is legally insufficient regardless, as this Court refuses to create "futility" exceptions not included in exhaustion requirements. *State ex rel. Hensley v. Endicott*, 2001 WI 105, ¶9, 245 Wis. 2d 607, 629 N.W.2d 686.

A. Wisconsin's statutory construction rules are clear.

"The purpose of statutory interpretation and application is to apply the meaning of the words the legislature chose." *Jefferson v. Dane Cnty.*, 2020 WI 90, ¶21, 394 Wis. 2d. 602, 951 N.W.2d 556 (citing *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶44, 271 Wis. 2d 633, 681 N.W.2d 110). "[S]tatutory interpretation 'begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.'" *Kalal*, 2004 WI 58, ¶45 (quoting *Seider v. O'Connell*, 2001 WI 76, ¶43, 236 Wis. 2d 211, 612 N.W.2d 659). "Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning. *Id.* (citing *Bruno v. Milwaukee Cnty.,* 2003 WI 28, ¶¶8, 20, 260 Wis. 2d 633, 660 N.W.2d 656).

"In construing or interpreting a statute the court is not at liberty to disregard the plain, clear words of the statute." *Id.*, ¶46 (quoting *State v. Pratt,* 36 Wis. 2d 312, 317, 153 N.W.2d 18 (1967)). However, the Court recently unanimously rejected

a "literalistic" approach to statutory interpretation, recognizing that "literalness may strangle meaning." *Brey v. State Farm Mut. Auto. Ins. Co.*, 2022 WI 7, ¶11, --- Wis. 2d ---, --- N.W.2d --- (quoted sources omitted); *accord id.*, ¶13 ("Statutory interpretation centers on the "ascertainment of meaning," not the recitation of words in isolation"). "Properly applied, the plain-meaning approach is not 'literalistic'; rather, the ascertainment of meaning involves a 'process of analysis' focused on deriving the fair meaning of the text itself." *Id.*, ¶11 (cited sources omitted). The Court noted that "no interpretive fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts." *Id.*, ¶13 (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012)).

Similarly, the Court has consistently stressed both that "[c]ontext is important" and that statutory language is interpreted "not in isolation but as part of a whole; in relation

to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Id.* (citing *State v. Delaney,* 2003 WI 9, ¶13, 259 Wis. 2d 77, 658 N.W.2d 416; *Landis v. Physicians Ins. Co. of Wis.*, 2001 WI 86, ¶16, 245 Wis. 2d 1, 628 N.W.2d 893; *Seider*, 2001 WI 76, ¶43).

The Court "will not add words into a statute that the legislature did not see fit to employ." *Jefferson*, 2020 WI 90, ¶25 (citing *Dawson v. Town of Jackson*, 2011 WI 77, ¶42, 336 Wis. 2d 318, 801 N.W.2d 316); *see also, e.g.*, *County of Dane v. LIRC*, 2009 WI 9, ¶33, 315 Wis. 2d 293, 759 N.W.2d 571; *C. Coakley Relocation Sys., Inc. v. City of Milwaukee*, 2008 WI 68, ¶24 & n.10, 310 Wis. 2d 456, 750 N.W.2d 900. This accords with "the maxim[] of statutory construction [] that courts should not add words to a statute to give it a certain meaning." *DOC v. Schwarz*, 2005 WI 34, ¶20, 279 Wis. 2d 223, 693 N.W.2d 703 (internal quotation marks and citations omitted).

B. Wisconsin law, properly construed, does not prohibit voters from receiving assistance returning their completed absentee ballots.

Applying these settled interpretive principles reveals the circuit court's interpretation of the statutes at issue as unsustainable. The plain statutory text does not support the circuit court's approach. Neither does context, nor history. And, if the unanimous verdict of these principles is not sufficient, the circuit court's construction creates a conflict between Wisconsin law and federal law, which would necessitate preemption.

1. Wisconsin Stat. § 6.87(4)(b)1.'s plain text does not prohibit ballot-return assistance.

With respect to ballot-return assistance, the relevant statutory text reads: "The [absentee-ballot] envelope 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. The circuit court declared this to mean that "an elector must personally mail or deliver his or her own absentee ballot, except where the law explicitly authorizes an agent to act on an elector's behalf," such that "the only lawful methods for

casting an absentee ballot pursuant to Wis. Stat. § 6.87(4)(b)1. are for the elector to place the envelope containing the ballot in the mail or for the elector to deliver the ballot in person to the municipal clerk." (J. App. 640)

The circuit court's declaration presumes that the statute says, "The envelope shall be mailed by the elector in person." But the statute does not say that. And the circuit court never explained how it derived this ruling from the actual text of the statute. This is the entirety of the circuit court's reasoning:

> I'm satisfied that in reading that sentence that when it says, "the envelope shall be mailed by the elector or delivered in person," that means that it's the elector that delivers it in person, not somebody else. I don't see any language in the statute that provides a basis for having agents, somebody other than the elector, actually deliver the ballot.
>
> And that's been a controversy that is key to the Plaintiff[s'] case and it's certainly key to the [d]efense, to the Election Commission's case and those that support the [C]ommission. In reading that statute and looking at the, if you will, the ritual for voting in person, and if you will, the ritual for voting by absentee, it requires the elector to be principally involved. It doesn't require other people to be involved.

(J. App. 562)

The circuit court's rationale cannot withstand scrutiny. This is primarily true because the circuit court incorrectly

framed the issue; the question is not, as the circuit court put it, whether the statute "require[s] other people to be involved," but whether the statute can abide other people being involved where necessary. The answer to the proper question is yes, because nothing in the statute precludes others from helping an elector return their validly voted absentee ballot.

Plain text dictates this conclusion. The Legislature chose to use the passive voice—"the envelope shall be mailed"—which makes it hard to determine exactly who the statute expects to undertake an action. But the clear guidance here comes from binding precedent, which construes this precise text as allowing ballot-return assistance. In *Sommerfeld v. Board of Canvassers of City of St. Francis*, 269 Wis. 299, 69 N.W.2d 235 (1955), this Court confronted the same statutory phrase, which then appeared in a predecessor statute. The Court determined that the text could not be logically read as Teigen demands:

> If our statute is construed to mean that the voter shall himself mail the ballot or personally deliver it to the clerk, then the statute would defeat itself in the case of those who are sick or physically disabled. They would be unable to mail ballots except through an agent. Having

> made provision that these unfortunate people can vote, we cannot believe that the legislature meant to disenfranchise them by providing a condition that they could not possibly perform.

Id. at 303. The circuit court here not only disregarded this Court's binding precedent in *Sommerfeld*—which has been the law in Wisconsin for almost 70 years—but rooted its error in an appeal to history: "the ritual for voting by absentee."[8] That explanation underscores that nothing in the plain text of the statute clearly prohibits ballot-return assistance.

Moreover, the punctuation within the statutory sentence underscores this conclusion and dooms Teigen's insistence that the circuit court conducted a plain-text reading. Indeed, "the meaning of a statute will typically heed the commands of its punctuation." Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* at 139 (quoting *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 454 (1993)). It is commonly understood that "[p]unctuation in a legal text" often determines "whether a modifying phrase or

[8] Notably, the circuit court's reliance on "ritual" has no basis in the record, in any party's arguments, or in applicable legal authority; it is a tangential frolic pursued *sua sponte*.

clause applies to all that preceded it or only to a part." *Id.* In fact, "the body of a legal instrument cannot be found to have a 'clear meaning' without taking account of its punctuation," which is "often integral to the sense of written language." *Id.*

Relevant here, commas surround the phrase "or delivered in person," requiring that phrase be read as a whole. Consequently, the adverbial phrase "in person" modifies only the verb "delivered" and does not modify the separate, preceding phrase, "mailed by the elector." If the commas set off only the first two words—so that the text read "The envelope shall be mailed by the elector, or delivered, in person"—then the adverbial phrase "in person" would modify both "mailed" and "delivered," as necessary to credit Teigen's position. But the actual text authorizes two independent options for submitting an absentee ballot: "mailed by the elector" or "delivered in person." The "in person" qualifier does not apply to mailing.

Furthermore, as this Court held in *Sommerfeld*, even though the "in person" qualifier modifies the verb "delivered,"

the statutory text does not actually require the elector to personally deliver their absentee ballot to the clerk. The *Sommerfeld* Court held that this text allowed someone else to return an elector's absentee ballot. This Court has repeatedly held that the Legislature "is presumed to be aware of existing laws and the courts' interpretations of those laws." *Schill v. Wis. Rapids Sch. Dist.*, 2010 WI 86, ¶103, 327 Wis. 2d 572, 786 N.W.2d 177. In this instance, no such presumption is necessary; the Legislature was clearly aware, as demonstrated by introduction and consideration of bills to amend this aspect of the law.[9] If the Legislature disagrees with this Court's construction of a statute, the Legislature then bears the onus of amending the statute.

Here, in the wake of *Sommerfeld*, the Legislature significantly amended and reorganized the election code but retained the identical statutory language at issue in *Sommerfeld*

[9] For example, 2019 AB 247, among other pre-2020 proposals, sought to codify a crime for obtaining an absentee ballot from another person and then failing to deliver it to the clerk for counting. That necessarily recognizes that actually delivering the ballot to the clerk on behalf of another person is proper and already lawful.

and now again here. It follows that the plain text provides no basis for reversing *Sommerfeld* as would be necessary to accept the circuit court's adoption of Teigen's position. Indeed, where, as here, "a word or phrase has been authoritatively interpreted by the highest court in a jurisdiction, or has been given a uniform interpretation by inferior courts or the responsible agency, a later version of that act perpetuating the wording is presumed to carry forward that interpretation." Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* at 247.[10]

[10] Admittedly, decades after the *Sommerfeld* decision, the Legislature promulgated Wis. Stat. § 6.84(2), which says certain provisions, including Wis. Stat. § 6.87, should be strictly construed. This does not change the analysis for two reasons. *First*, the instruction in § 6.84(2) does not displace this Court's binding interpretation in *Sommerfeld*; if the Legislature wanted to establish that no one but the elector could have any role in returning the elector's absentee ballot, it would have needed to clarify the statutory language about ballot return, which had been definitively interpreted by this Court. The Legislature chose not to do so. *Second*, as discussed in Part II.D below, applying § 6.84(2) as the circuit court did below renders that provision unconstitutional.

2. The construction adopted below cannot be correct because it leads to untenable and absurd results.

The circuit court's interpretation should also be rejected because it fails to consider the interaction between Wis. Stat. § 6.87(4)(b)1. and the whole of Wisconsin's election code, thereby creating absurd and unreasonable results, as discussed below. This is contrary to Wisconsin law. *See Kalal*, 2004 WI 58, ¶46 (citing *Delaney,* 2003 WI 9, ¶13; *Landis*, 2001 WI 86, ¶16; *Seider*, 2001 WI 76, ¶43).

Throughout this case, Teigen has highlighted a bevy of Wisconsin statutes that authorize assistance for certain classes of Wisconsin voters completing their ballots. (J. App. 82-83, 485-486, 545-547, 744-745, 857, 876-877) None of those statutes, as Teigen has emphasized, authorizes ballot-return assistance. (J. App. 82-83) But these other provisions do not support the circuit court's construction of Wis. Stat. § 6.87(4)(b)1. To the contrary, considering § 6.87(4)(b)1. in this broader context makes clear that the circuit court's cramped construction cannot stand. As the *Sommerfeld* Court

concluded decades ago, it defies belief to read the election code as containing both express provisions that help those in need to complete their ballots and a provision forbidding any help for those same voters to return their ballots so that they can be counted. 269 Wis. at 303. Such an absurd construction cannot stand. The circuit court erred by adopting a hyper-literal approach and construing § 6.87(4)(b)1. in isolation, rather than in the context of the election code as a whole. *See Brey*, 2022 WI 7, ¶14 n.6 (rejecting an "atextual narrow reasoning by disregarding" other portions "of the same … statutory scheme"). Wisconsin Stat. § 6.87(4)(b)1. must be harmonized with other provisions of the election code to create a cogent whole. Such "a 'process of analysis' focused on deriving the fair meaning of the text," *Brey*, 2022 WI 7, ¶11, requires recognizing that ballot-return assistance is lawful.

The circuit court's cramped construction also creates other practical difficulties that are unreasonable. The order below puts election administrators in an impossible situation. It interprets Wis. Stat. § 6.87(4)(b)1. as allowing return of an

absentee ballot only by the voter to whom the ballot was issued. But it provides no clarity on how an election official should comply with that statute. If the election official does not know an individual voter by sight, there is no obvious way to ensure that the person returning the ballot is the person who voted the ballot.

It may seem that a potential solution is for the election official to check the voter's identification, but that is not prescribed in the statute and is therefore not permitted. As WEC has recognized, "only the Legislature can establish individual voter qualifications." Wis. Elections Comm'n, Memo at 1 (July 31, 2020).[11] It follows that "WEC, along with state agencies, county or local governing bodies and/or election officials, cannot pass ordinances or establish rules that add qualifications for an eligible elector to cast a ballot." *Id.* Absentee voters must meet ID requirements to obtain their ballots. Having done so, they cannot be required to show identification again to return their ballot—at least not without

[11] Available at https://elections.wi.gov/node/6981.

an express statutory mandate. The absence of such a mandate—and the Hobson's choice facing election officials who want to comply with the circuit court's order and honor their obligations not to impose unauthorized obstacles to voting—confirms that the Legislature could not have intended the circuit court's interpretation of Wis. Stat. § 6.87(4)(b)1.

Reading Wis. Stat. § 6.87(4)(b)1. in context reveals the circuit court's construction to be both unreasonable and absurd. It must be rejected.

3. Settled precedent confirms that ballot-return assistance is established, lawful practice in Wisconsin elections, and the political branches have chosen not to prohibit that practice.

As noted above, the *Sommerfeld* Court held almost 70 years ago that the statutory text—which has not changed—authorizes ballot-return assistance. This is particularly notable because *Sommerfeld* dealt with an extreme example of ballot-return assistance, akin to Teigen's hypothetical complaint about "ballot harvesting." In *Sommerfeld*, the parties stipulated to the fact that one individual collected completed absentee

ballots from 18 electors who all lived in the same building and returned them in a single bundle to the city clerk. 269 Wis. at 301. Here, Teigen has made no effort to substantiate anything similar as an actual practice in present-day elections; he rails against so-called "ballot harvesting" but provides rhetorical heat rather than clarifying light.[12]

While *Sommerfeld*'s approval of ballot-return assistance is binding precedent, it is not the only relevant history here. The Legislature recently considered bills to prohibit ballot-return assistance. *See* 2021 Senate Bill 203 and Assembly Bill 192.[13] Those proposals have not become law. But the existence of such proposals—and the fact that a majority of the Legislature voted for such a proposal last year—evidences the Legislature's recognition that current law authorizes ballot-return assistance. If, as Teigen contends,

[12] To be clear, what Teigen calls "ballot harvesting" is lawful in Wisconsin under Wis. Stat. § 6.87(4)(b)1. and *Sommerfeld*. But even if returning absentee ballots for groups of voters were held to be unlawful, that would not necessarily support the circuit court order, which prohibits *all* absentee ballot-return assistance.

[13] https://docs.legis.wisconsin.gov/2021/related/proposals/sb203; https://docs.legis.wisconsin.gov/2021/related/proposals/ab192.

current law already forbids ballot-return assistance, these proposed amendments would be unnecessary and nonsensical. That a majority of the Legislature voted for a bill to outlaw ballot-return assistance underscores that such assistance is allowed under current law.[14]

4. Federal law preempts the circuit court's construction with respect to ballot-return assistance.

Text, punctuation, context, and history uniformly require reversing the circuit court's order barring ballot-return assistance. An additional factor also necessitates reversal: interaction between state and federal law.

Federal voting-rights law guarantees that "[a]ny voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance

[14] Indeed, even former Lieutenant Governor Rebecca Kleefisch, who recently petitioned this Court to exercise original jurisdiction over several issues, including the ones raised here, has acknowledged that ballot-return assistance is allowed under current law. *See* Molly Beck, *'As dumb as a bag of hammers': Kevin Nicholson goes after fellow Republican Rebecca Kleefisch on 'ballot harvesting' strategy*, Milwaukee Journal Sentinel (Oct. 27, 2021), available at https://www.jsonline.com/story/news/politics/elections/2021/10/27/republican-governor-rivals-kevin-nicholson-rebecca-kleefisch-tangle-over-ballot-harvesting-plan/8552648002.

by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union." 52 U.S.C. § 10508. The assistance addressed here is not limited to completing an absentee ballot but also extends to returning that ballot so it may be counted. *See* S. Rep. No. 417, 97th Cong., 2d Sess. at 62-63 (explaining that a state law may not, consistent with § 10508, "deny assistance at some stages of the voting process during which assistance was needed"). To say otherwise renders the statute absurd and its guarantee illusory, in the same way that this Court's *Sommerfeld* decision recognized in 1955 with respect to Wisconsin law.

The Americans with Disabilities Act ("ADA") similarly requires allowance of ballot-return assistance for those who need that help due to disability. Title II of the ADA addresses state and local government programs, including the administration of elections. Title II's "primary mandate" is 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 subjected to discrimination by any such entity.'" *Lacy v. Cook Cnty.*, 897 F.3d 847, 852 (7th Cir. 2018) (quoting 42 U.S.C. § 12132). "Voting is a quintessential public activity." *NFIB v. Lamone*, 813 F.3d 494, 507 (4th Cir. 2016); *see also Disabled in Action v. Bd. of Elections in City of N.Y.*, 752 F.3d 189, 199 (2d Cir. 2014). "Title II of the ADA requires state and local governments … to ensure that people with disabilities have a full and equal opportunity to vote." U.S. Dep't of Justice, "The Americans with Disabilities Act and Other Federal Laws Protecting the Rights of Voters with Disabilities."[15] For that reason, courts have repeatedly held that "[t]he ADA's provisions apply to all aspects of voting, including voter registration, site selection, and the casting of ballots, whether on Election Day or during an early voting process." *Id.*

Were this Court to construe Wis. Stat. § 6.87(4)(b)1. in a way that conflicts with the Voting Rights Act and/or the

[15] Available at https://www.justice.gov/file/69411/download.

ADA, the resulting conflict would necessarily preempt the state law. U.S. Const. art. VI, ¶2; Zachary Wyatt, *Federal Preemption of State Law*, Wis. Legis. Reference Bureau, Reading the Constitution Vol. 2, No. 1 (Apr. 2017) ("[W]here federal and state laws conflict, federal law will supersede state law.").[16]

This precise concern was briefed below (J. App. 384), but the circuit court never addressed it. Avoiding pre-emption is an independent reason that this Court should construe Wis. Stat. § 6.87(4)(b)1. to allow ballot-return assistance.

C. Wisconsin law, properly construed, does not prohibit municipal clerks from using secure drop boxes as an additional option for voters to return their completed absentee ballots.

The black-letter principles of statutory interpretation similarly doom the circuit court's ruling against absentee-ballot drop boxes. Here, too, plain text, history, and context all align against the circuit court's construction.

[16] Available at https://docs.legis.wisconsin.gov/misc/lrb/reading_the_constitution/reading_the_constitution_2_1.pdf.

1. The plain text of Wis Stat. § 6.87(4)(b)1. does not prohibit clerks using secure drop boxes as one means of facilitating return of absentee ballots.

With respect to drop boxes, the relevant statutory text is the same: "The [absentee-ballot] envelope 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. The circuit court declared this to mean that "the use of drop boxes, … is not permitted under Wisconsin law unless the drop box is staffed by the clerk and located at the office of the clerk or a properly designated alternate site under Wis. Stat. § 6.855." (J. App. 640) Once again, there is no textual basis for this ruling.

The circuit court articulated that it understood the statute to forbid drop boxes solely because "[i]n looking at the statutes, there is no specific authorization for drop boxes." (J. App. 564) The circuit court repeated this conclusion:

> It would appear that the election laws in Wisconsin are very specific, very detailed as to what happens. It's not—the law in the statutes don't say, we'll have an election at certain times and we'll have ballots, and the municipal clerk, it's up to the clerks to figure out how to do it. That's really not the case. These are very specific statutes on how to do things, primarily to protect the integrity of the system.

> I go back to the ritual, if you will, of voting in person. It's really carried over to a great extent to the ritual of voting with an absentee ballot. So I'm satisfied there's no authority, no statutory authority, to issue—to have drop boxes used for the collection of absentee ballots, other than as an alternate absentee ballot side and following that process under 6.855.

(*Id.* at 565-566)

As with ballot-return assistance, the circuit court imports into its reading of the delivery option a requirement absent from the statutory text. For ballot-return assistance, that is applying the "in person" modifier that does not apply. For delivery, the circuit court invents a distinction between staffed and unstaffed drop boxes. The text provides no support for such a distinction. It simply requires the elector to deliver their absentee ballot to the municipal clerk. The "in person" modifier applies here, but it modifies the elector, not the clerk. That is, the statute requires an in-person return to the clerk, not a return to the in-person clerk. As above, both the plain text of the sentence and its punctuation necessitate this interpretation.

Furthermore, the circuit court erred in holding that the statutory text unambiguously requires return to the clerk's office, rather than to the clerk through a mechanism authorized

by the clerk. Several other provisions within the statutes expressly require certain deliveries "to" or actions "in" or "at" the office of the municipal clerk. *See, e.g.*, Wis. Stat. §§ 6.15(2)(bm), 6.28(1)(a), 6.35(3), 6.45(1m), 6.47(2), 6.855. Had the Legislature intended to require absentee ballots be returned only to the clerk's office, it could and would have expressly said so, as it has done in related statutes. The absence of such an explicit requirement underscores that the plain text here grants clerks greater flexibility, including in designating secure drop boxes for collection by the clerk or the clerk's designee as a means of returning absentee ballots.

Nonetheless, the circuit court asserted, on the basis of what it called "ritual"—again, without support in the record or legal authority—that drop boxes are generally unlawful because they are not themselves clerks. But this Court has already cautioned against theories that narrow voting rights based on importing into the statutes a cramped definition of the term "municipal clerk." In *Trump v. Biden*, 2020 WI 91, 394

Wis. 2d 629, 951 N.W.2d 568, Justice Hagedorn's concurrence explained that

> the only reasonable reading of the law would allow those acting on a clerk's behalf to receive absentee ballots, not just the clerk by him or herself. After all, many clerks manage a full office of staff to assist them in carrying out their duties. Accordingly, voters who returned ballots to city election inspectors at the direction of the clerk returned their absentee ballots "in person, to the municipal clerk" as required by § 6.87(4)(b)1.

Id., ¶54 (Hagedorn, J., concurring). By the same logic, absentee ballots placed into a secure drop box designated by the municipal clerk satisfy Wis. Stat. § 6.87(4)(b)1. so long as the ballots are retrieved by "those acting on a clerk's behalf."

Saying otherwise, as Teigen convinced the circuit court to do, veers into the unreasonable, or even the absurd, in the precise way rejected by Justice Hagedorn's concurrence. It constrains clerks from allowing delivery of absentee ballots to their offices at moments no one is available to accept them—even if only because all staff are in a meeting, at lunch, or handling another matter. Thom testified in deposition testimony that he reads Wis. Stat. § 6.87(4)(b)1. to require rejection of any ballot returned in person that is not placed

directly in the hand of the municipal clerk; he went so far as to reject a ballot slid across a counter or a table to the clerk because it was not transferred directly from the elector's hand to the clerk's hand. (J. App. 358) Such an absurdity cannot possibly be the law. *Kalal*, 2004 WI 58, ¶46. This hyper-literal approach to statutory interpretation must be rejected in this case, as it was in *Brey*, 2022 WI 7. Teigen himself recognized the absurdity of this hyper-literal approach. He testified at deposition that "common sense has to prevail. And the statute really doesn't have to be so specific as to say the ballot at one point in time has to touch both my hand and the clerk's hand." (J. App. 339)

Only after the two plaintiffs disagreed on the statute's meaning did they first posit the staffed-unstaffed distinction that the circuit court ultimately adopted. (*Compare* J. App. 85 *with* J. App. 14) But that distinction has no basis in the statutory text, which requires only return to the municipal clerk. As Justice Hagedorn acknowledged in *Trump*, "municipal clerk" is a defined term that includes expressly listed additional

agents "and their authorized representatives." Wis. Stat. § 5.02(10). So the definition expands who the elector must deliver their ballot to; it never says the ballot must be handed directly to someone within that definition. If an elector returns their ballot to a secure drop box designated by the municipal clerk for that person and one of the clerk's authorized representatives collects the ballots from that secure drop box, then Wis. Stat. § 6.87(4)(b)1. has been satisfied. No reasonable reading of the statute supports a contrary conclusion.

Indeed, both Wisconsin legislative leaders and the United States Supreme Court agree with this reasonable interpretation. In a brief filed in June 2020, in reference to in-person absentee voting and "the use of drop boxes for the return of absentee ballots," the Legislature noted that "local officials may elect to provide those additional methods of voting." *Swenson v. Bostelmann*, 3:20-cv-00459-wmc, Dkt. 28 (W.D. Wis. June 6, 2020). Shortly before the November 2020 election, former Wisconsin Solicitor General Misha Tseytlin wrote a letter setting forth the position of Assembly Speaker

Robin Vos and then-Senate Majority Leader Scott Fitzgerald, consistent with the Legislature's stated position. In that letter, he expressed their "wholehearted[] support" for secure drop boxes as a "convenient, secure, ***and expressly authorized*** absentee-ballot-return method[]." (J. App. 233-235) One month later, the U.S. Supreme Court agreed:

> Returning an absentee ballot in Wisconsin is also easy. … [A]bsentee voters who do not want to rely on the mail have several other options. … [T]hey may place their absentee ballots in a secure absentee ballot drop box. Some absentee ballot drop boxes are located outdoors, either for drive-through or walk-up access, and some are indoors at a location like a municipal clerk's office.

Democractic Natl'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 36 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay); *accord id.* at 29 ("[V]oters may return their ballots [to] various "no touch" drop boxes staged locally.") (Gorsuch, J., concurring).[17]

[17] Notably, affirming the circuit court's ruling could have broad effects on the application of other Wisconsin election laws. The Seventh Circuit has held that, in challenges to election laws under the *Anderson-Burdick* framework, individual electoral provisions must be examined in the context of "the state's election code as a whole." *Luft v. Evers*, 963 F.3d 665, 671-72 (7th Cir. 2020). Shortly after *Luft*, the Seventh Circuit stayed an injunction altering several Wisconsin election laws for the 2020 general election. *See Democratic Nat'l Comm. v. Bostelmann*, 977 F.3d 639 (7th Cir. 2020). The Supreme Court affirmed, in part because drop boxes, among other measures, made it easy for Wisconsin voters to cast

Even more recently, the Legislature has considered proposals to rewrite the election code in a way that would significantly limit the use of drop boxes. *See* 2021 Wisconsin Senate Bill 209 and Assembly Bill 177.[18] These proposals, which would rewrite the statute in a way consonant with the circuit court order, have not been enacted into law. In the absence of such amendments, existing law continues to allow clerks to designate drop boxes as a means for electors to securely effectuate in-person return of their absentee ballots.

2. The extensive history of drop boxes in Wisconsin underscores the proper plain-text interpretation.

In lieu of textual exegesis, the circuit court relied on history. The circuit court referred repeatedly to the "ritual of voting." (J. App. 566) In the absence of any textual basis for the circuit court's prescription of ritual, this appears to be an

their ballots without the district court's remedies. 141 S. Ct. at 35 (Kavanaugh, J., concurring) ("To help voters meet the deadlines, Wisconsin makes it easy to vote absentee."). Were this Court to affirm the circuit court order eliminating drop boxes as one safeguard that underpinned the *Bostelmann* decisions, that reinterpretation of Wisconsin law would affect the *Anderson-Burdick* analysis in future cases.

[18] https://docs.legis.wisconsin.gov/2021/related/proposals/sb209; https://docs.legis.wisconsin.gov/2021/related/proposals/ab177.

invocation of history and personal experience. It is not informed by ***any*** record evidence. Indeed, while Teigen repeatedly asserted that drop boxes were a recent innovation in Wisconsin law (J. App. 95, 682; Teigen Br. in Supp. of Pet. for Bypass at 7), he adduced no evidence for this erroneous proposition. The only record evidence was both to the contrary and unchallenged. (J. App. 773 (citing Aff. Of Meagan Wolfe, Cir. Ct. Dkt. 121, ¶9))[19] The circuit court erroneously adopted Teigen's ahistorical assertions and characterized the WEC memo on drop boxes as "altering what has been and setting … a new policy for how absentee ballots are [] collected." (J. App. 567) This is incorrect, and it invalidates the circuit court's summary judgment decision.

The historical truth that Wisconsin municipal clerks were using drop boxes before 2020 reinforces the plain-text interpretation of Wis. Stat. § 6.87(4)(b)1., demonstrating that

[19] If the Court grants DRW's motion to supplement the record, the supplemental information provides additional evidence contrary to Teigen's repeated assertions. DRW's explanation for providing that evidence at this juncture is presented in the motion.

across different years, different municipalities, different personnel, different state elections agencies, and different contexts, clerks have consistently understood Wis. Stat. § 6.87(4)(b)1. to allow electors to return their absentee ballots via drop box.

3. Wisconsin Stat. § 6.855 is inapposite here, because drop boxes are not locations where ballots are distributed.

As part of its fabricated distinction between staffed and unstaffed drop boxes, the circuit court referenced Wis. Stat. § 6.855(1) to allow that staffed drop boxes are permissible at alternate voting locations. But drop boxes serve solely as repositories, designated by clerks as a secure way for electors to return their ballots to the clerk without relying upon the mail. Drop boxes are not mechanisms for electors to request or receive blank absentee ballots. For that reason, § 6.855(1)—which addresses locations "from which electors of the municipality may request and vote absentee ballots and to which voted absentee ballots shall be returned by electors for any election"—is inapposite and sheds no light here.

D. The canon of constitutional avoidance further militates against the circuit court's reading of Wis. Stat. § 6.87(4)(b)1.

The circuit court relied heavily on Wis. Stat. § 6.84 to guide its thinking. Indeed, when announcing its ruling, the circuit court began its explanation with § 6.84 and returned to it several times. (J. App. 559-564, 570) The centrality of § 6.84 to the circuit court order is problematic, because that provision, as applied by the circuit court, violates the promise of equal protection found in both the state and federal constitutions.

The problem is that Wis. Stat. § 6.84 treats absentee ballots (and the voters who cast them) as less desirable and less reliable than in-person ballots (and the voters who cast those). Wisconsin's election code begins with the overarching principal that election statutes should be construed to give effect to the will of the voter. Wis. Stat. § 5.01(1). The purpose of § 6.84(2) is to exempt certain provisions governing absentee voting from that principle. But, having authorized absentee balloting, the Legislature cannot now impose procedures that make one authorized method of exercising the "fundamental,

inherent right" to vote, *State v. Cir. Ct. for Marathon Cnty.*, 178 Wis. 468, 473, 190 N.W. 563 (1922), more difficult than another, nor may it treat absentee ballots as a lesser class of ballot. Such differential treatment, at minimum, raises serious constitutional concerns under the Equal Protection Clause of both the Wisconsin and the U.S. Constitutions. Wis. Const. art. I, § 1; U.S. Const. amend. XIV, § 1.

It follows that, before interpreting any provision of the election code through the prism of Wis. Stat. § 6.84(2), a court must consider how to harmonize Wis. Stat. §§ 5.01(1) and 6.84 to avoid constitutional conflict. *See Kenosha Cnty. Dep't of Human Servs. v. Jodie W.*, 2006 WI 93, ¶20, 293 Wis. 2d 530, 716 N.W.2d 845 ("Where the constitutionality of a statute is at issue, courts attempt to avoid an interpretation that creates constitutional infirmities") (internal citation and quotation marks omitted); *see also* Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* at 197 (quoted source omitted) (recognizing as "'beyond debate'" the interpretive principle that "[a] statute should be interpreted in a way that avoids

placing its constitutionality in doubt"). Here, this issue was raised with the circuit court (J. App. 387-388), which ignored it entirely and made no effort to consider the constitutional implications of its order.

Moreover, the circuit court order also construes Wis. Stat. § 6.87(4)(b)1. in a way that conflicts with Wis. Const. art. III, § 2. That provision enumerates the only kinds of statutes the Legislature may pass that limit voting rights. *Id.* And it specifically limits to two the categories of Wisconsinites who can be excluded from the franchise: those "(a) Convicted of a felony, unless restored to civil rights" or "(b) Adjudged by a court to be incompetent or partially incompetent, unless the judgment specifies that the person is capable of understanding the objective of the elective process or the judgment is set aside." *Id.*, cl. 4. Nothing in this provision authorizes the Legislature to enact a law "[e]xcluding from the right of suffrage persons" on the basis of disability. *Id.* Yet, by allowing assistance to complete a ballot but not to return a ballot, the circuit court's cramped interpretation of

§ 6.87(4)(b)1. makes it impossible for some Wisconsinites to vote and thereby exceeds the limitations that the people of Wisconsin have set on who may be disenfranchised.

Any one of these constitutional conflicts alone is grounds for this Court to vacate the circuit court's order and remand for a complete ruling that addresses all relevant issues.

III. The WEC Memos At Issue Here Are Guidance Documents And Did Not Need To Be Promulgated Through The Rulemaking Process.

The circuit court also held that Wisconsin law required WEC to go through the statutory rulemaking procedure before adopting the guidance in the memos at issue here. This holding is in error because simple guidance documents—nothing more than "best practice" statements summarizing longstanding practices in response to questions from local clerks planning the 2020 elections in the midst of a deadly worldwide pandemic—do not require formal rulemaking.

This Court recently reaffirmed the propriety of "guidance documents" in *Service Employees International Union, Local 1 v. Vos* ("*SEIU*"), 2020 WI 67, ¶89, 393 Wis. 2d

38, 946 N.W.2d 35.[20] The Legislature has defined a "guidance document" as:

> any formal or official document or communication issued by an agency, including a manual, handbook, directive, or informational bulletin, that does any of the following:
>
> 1. Explains the agency's implementation of a statute or rule enforced or administered by the agency, including the current or proposed operating procedure of the agency.
>
> 2. Provides guidance or advice with respect to how the agency is likely to apply a statute or rule enforced or administered by the agency, if that guidance or advice is likely to apply to a class of persons similarly affected.

Id. (quoting 2017 Wis. Act. 369, § 31). As the *SEIU* Court made clear, a guidance document:

> - "does not have the force or effect of law";
>
> - "impose[s] no obligations, set no standards, and bind no one. They are communications about the law—they are not the law itself. They communicate intended applications of the law—they are not the actual execution of the law … they represent nothing more than the knowledge and intentions of their authors"; and

[20] *SEIU* involved several constitutional challenges to 2017 Wisconsin Act 369 and 2017 Wisconsin Act 370. There were two separate majority opinions. Justice Kelly authored the majority opinion, referenced here, regarding the set of provisions dealing with "guidance documents." That opinion concluded that two provisions, including one that sought to impose extensive procedures that an agency would have to follow before issuing guidance documents, violated separation-of-powers principles so broadly as to render the provisions facially unconstitutional.

- "cannot affect what the law is, cannot create a policy, cannot impose a standard, and cannot bind anyone to anything."

Id., ¶¶100, 102, 105 (emphasis in original). Separately, this Court has also recently affirmed that WEC "is responsible for guidance in the administration and enforcement of Wisconsin's election laws." *Jefferson*, 2020 WI 90, ¶24.

The WEC memos challenged here neither order nor instruct municipal clerks to take any action. They do not impose obligations or standards upon municipal clerks statewide. And they do not have the force of law or affect what the law is. In fact, the memos expressly state that any identified actions regarding drop boxes are suggestions that municipalities have discretion to follow or not: "*If* a municipality chooses to do alternate drop off boxes or locations for ballots it should be publicized to voters where they can go to deliver their ballots" and "drop boxes *can* be used." (J. App. 20 (emphases added)) The circuit court expressly recognized that "it's true that the municipal clerks can follow [] or not follow" the memos, even as it reached the contradictory holding that the memos "have the effect of law." (J. App. 568)

The memos clearly establish that they were written in response to questions WEC received from on-the-ground election officials in advance of the 2020 elections. WEC published the March Memo in response to "clerks [who] have inquired about options for ensuring that the maximum number of ballots are returned to be counted for the April 7, 2020 election." (J. App. 20) Additionally, the August Memo opens by asserting that "[t]his document is intended to provide information and guidance on drop box options for secure absentee ballot returns for voters." (J. App. 23)

The only record evidence contradicts Teigen's theories that, through the memos, WEC dictated election procedures. Teigen himself conceded that the memos were "not mandatory compliance documents" and that municipal clerks—rather than WEC—ultimately decided whether to apply the drop box guidance from WEC: Regardless of what the document says, the clerks can choose what they want to do. (J. App. 339) Teigen offered no evidence of a single clerk who understood

the memos as mandatory or who relied upon them as definitive statements of law.[21]

The memos logically cannot dictate policy, given that they were issued in 2020 and both ballot-return assistance and drop boxes were in widespread use earlier than that. *See* Parts II.B.2 and II.C.2 above. The circuit court's rationale—that the memos had "general application," "altering what has been and setting a new standard, if you will, and a new policy" (J. App. 567)—simply cannot be sustained given that the memos were nothing more than answers to questions posed by clerks about policies that long predated the issuance of the memos.

These memos are the type of agency guidance communications that *SEIU* confirmed fall squarely within the executive branch's authority and do not require rulemaking.

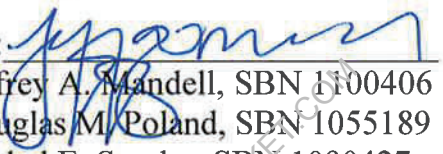
[21] If the Court grants DRW's motion to supplement the record, the supplemental information provides additional evidence contrary to Teigen's theories and the circuit court's assumption. DRW's explanation for providing that evidence at this juncture is presented in the motion.

CONCLUSION

For the foregoing reasons, the circuit court's order is legally unsupported and should be vacated for lack or jurisdiction or reversed on the merits.

Dated: February 17, 2022

STAFFORD ROSENBAUM LLP

By: 

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CERTIFICATION OF COMPLIANCE WITH WIS. STAT. § 809.19(8g)(a)

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm), and (c) for a brief. The length of this brief is 9,862 words.

Signed:

Jeffrey A. Mandell

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 Wis. Stat. § 809.19(12)(f).

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 along with the paper copies of this brief filed with the court and sent to all parties.

Dated this 17th day of February, 2022.

Jeffrey A. Mandell

CERTIFICATION OF MAILING AND SERVICE

I certify that a paper original and 22 paper copies of the foregoing Brief Of Intervenors-Defendants-Appellants Disability Rights Wisconsin, Wisconsin Faith Voices For Justice & League Of Women Voters Of Wisconsin and Joint Appendix were hand-delivered to the Clerk of the Supreme Court on February 17, 2022.

I further certify that on February 17, 2022, I sent true and correct copies by email of the foregoing Brief Of Intervenors-Defendants-Appellants Disability Rights Wisconsin, Wisconsin Faith Voices For Justice & League Of Women Voters Of Wisconsin and Joint Appendix to all counsel of record.

Jeffrey A. Mandell