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No. 2024AP164

In the Supreme Court of Wisconsin

PRIORITIES USA;
WISCONSIN ALLIANCE FOR RETIRED AMERICANS;
AND WILLIAM FRANKS, JR.,

v.

THE WISCONSIN ELECTIONS COMMISSION,
DEFENDANT-APPELLEE-RESPONDENT

AND

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

NON-PARTY BRIEF OF CENTER FOR ELECTION CONFIDENCE

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STATEMENT OF INTEREST

Center for Election Confidence (CEC) is a non-profit organization that promotes ethics, integrity, and professionalism in the electoral process. CEC works to ensure that all citizens can vote freely within an election system of reasonable procedures that promote election integrity, prevent vote dilution and disenfranchisement, and instill public confidence in election procedures and outcomes. To accomplish this, CEC conducts, funds, and publishes research and analysis regarding the effectiveness of current and proposed election methods. CEC is a resource for lawyers, journalists, policymakers, courts, and others interested in the electoral process. CEC also periodically engages in public-interest litigation to uphold the rule of law, voting rights and election integrity and files *amicus* briefs in cases where its expertise and national perspective may illuminate the issues under consideration. For example, CEC (previously known as Lawyers Democracy Fund) participated as *amicus curiae* in the U.S. Supreme Court in *Ritter v. Migliori*, 143 S. Ct. 297 (2022). In *Ball v. Chapman*, 289 A.3d 1 (Pa. 2023), CEC advocated that the Supreme Court of Pennsylvania respect the state's General Assembly policy judgments and enforce the signature and date requirement for absentee ballots. Both courts ruled in favor of the positions advocated by CEC.

INTRODUCTION

The use of ballot drop boxes during elections is not a novel idea, but it has been a controversial one. For that reason, drop boxes were not widely used until the COVID-19 pandemic and the 2020 federal elections. Before the pandemic, only eight states had laws expressly permitting drop box use. Elaine S. Povich, *Rise in Use of Ballot Drop Boxes Sparks Partisan Battles*, STATELINE (October 16, 2020)¹ (identifying Arizona, California, Colorado, Hawaii, Montana, New Mexico, Oregon, and Washington statutes expressly permitting drop boxes); BALLOTPEdia,

¹ Available online at <https://stateline.org/2020/10/16/rise-in-use-of-ballot-drop-boxes-sparks-partisan-battles/>.

*Changes to Absentee/Mail-in Voting Procedures in Response to the Coronavirus (COVID-19) Pandemic, 2020.*²

Where state laws did not expressly authorize drop boxes for use during the 2020 pandemic election, state and local election officials acted to implement them through executive action or by court approval – often with doubtful legal authority. See, e.g., *Teigen v. Wisconsin Election Commission*, 403 Wis. 2d 607, ¶4, 976 N.W.2d 519, 525 (2022); *In re Georgia Senate Bill 202*, 2023 WL 6628601, *2 (6th Cir. 2023); *A. Philip Randolph Institute of Ohio v. LaRose*, 831 Fed.Appx. 188, 190 (6th Cir. 2020). After the pandemic subsided, legislatures considered laws expressly approving the use of drop boxes and rules regulating their use. E.g., Samuel Wonacott, *More Absentee Ballot Drop Box Legislation Introduced in 2023 Than At This Point In 2022*, BALLOTPEDIA (May 23, 2023).³ Significantly, after this Court ruled that Wisconsin law did not permit drop box voting in *Teigen*, the Wisconsin Legislature, fully cognizant of the Court’s ruling, did not act to amend its statutes.

In addition to explicit statutory authorizations, whether other statutes even contemplate the use of drop boxes is instructive for courts. State statutes permitting drop boxes almost invariably provide for their security and adopt other measures designed to instill confidence in the electorate. If a legislature has contemplated the use of drop boxes, then its statutes will prescribe security and confidence measures for their use. Conversely, states that do not authorize drop boxes have no reason to adopt rules for their use.

This brief examines drop box legislation in neighboring Midwest states and compares those laws to Wisconsin’s statutes. It first examines those states explicitly permitting drop boxes and then turns to the lone state – Indiana – that does not permit them. Either way, in Wisconsin and throughout the Midwest, voters have numerous options to return absentee ballots, including through mail (USPS), in

²Available online at [https://ballotpedia.org/Changes_to_absentee/mail-in_voting_procedures_in_response_to_the_coronavirus_\(COVID-19\)_pandemic,_2020](https://ballotpedia.org/Changes_to_absentee/mail-in_voting_procedures_in_response_to_the_coronavirus_(COVID-19)_pandemic,_2020).

³ Available online at <https://news.ballotpedia.org/2023/05/23/more-absentee-ballot-drop-box-legislation-introduced-in-2023-than-at-this-point-in-2022/>.

person to the designated official, via immediate family members, or – in some limited cases – specified third-party individuals. Of course, all these methods are in addition to in-person voting options for electors, including early voting and election day.

ARGUMENT

Rules of statutory construction, a comparison of Wisconsin's laws to neighboring state's drop box legislative schemes, and the Legislature's decision not to act after *Teigen* are evidence that the Wisconsin Legislature never intended to authorize drop boxes as a way for absentee voters to return their ballots.

I. Wisconsin Absentee Ballot Return Standards

Voting is a constitutional right. WIS. STAT. § 6.84. Voting by absentee ballot is a privilege that “must be carefully regulated to prevent the potential for fraud or abuse.” *Id.* As a privilege, there is no constitutional right to an absentee ballot. *A. Philip Randolph Institute of Ohio*, 831 Fed.Appx. at 191, *citing Mays v. LaRose*, 951 F.3d 775, 792 (6th Cir. 2020).

When seeking to interpret statutes, courts should endeavor to “ascertain and give effect to the intent of the legislature.” *State v. Cole*, 262 Wis. 2d 167, ¶13, 663 N.W.2d 700, 703 (2003). Statutory interpretation does not appear in a vacuum, either, as courts must examine “the relevant language in the entire statute.” *Landis v. Physicians Ins. Co. of Wisconsin, Inc.*, 245 Wis. 2d 1, ¶16, 628 N.W.2d 893, 898 (2001).

Two Wisconsin statutes operate together as a legislative bar on drop box use. The first, WIS. STAT. § 6.87(4)(b)(1) requires voters, among other things, to enclose the ballot in an outer envelope. Such ballot “shall be mailed by the elector, or delivered in person, to the municipal clerk issue the ballot or ballots.” Similarly, WIS. STAT. § 6.855(1) provides that a municipality’s governing body may “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.” *Id.*

According to this Court in *Teigen*, both statutes preclude drop boxes because (1) any alternative site must be “staffed by the municipal clerk or the executive director of the board of election commissioners, or employees of the clerk or the board of election commissioners”; (2) any alternative site must allow voters to both request and vote absentee at the site; and (3) voters must return their completed absentee ballots “to the municipal clerk” and a ballot box is an “inanimate object.” *Teigen*, 403 Wis. 2d ¶¶55-57.

II. Drop Box Laws in Other Midwest States

In the Midwest, where states permit drop boxes, their legislatures have addressed drop box voting expressly in statute. These states include Illinois, Iowa, Michigan, Minnesota, and Ohio.⁴ These legislatures also enacted language ensuring public confidence in the electoral use of drop boxes. Some of confidence building measures include, for example, design of the drop boxes, video monitoring requirements, and who may return absentee ballots – often limiting returns to voters, their immediate family members, or specifically designated individuals. Iowa, for example, includes the requirement that drop boxes are subject to around-the-clock video surveillance within the authorizing statute. *See*, IOWA CODE § 53.17(c). Similarly, Ohio’s drop box authorizing statute includes limitations on who may return absentee ballots, where the boxes must be placed, video surveillance requirements, and more. *See*, OH. REV. CODE ANN. § 3509.05. Such statutory

⁴ While this brief focuses on the Midwest, several states permit drop boxes and regulate their use. For a more comprehensive summary, *see*, *Voting Outside the Polling Place: Absentee, All-Mail and Other Voting at Home Options, Table 9: Ballot Drop Box Laws*, NATIONAL CONFERENCE OF STATE LEGISLATURES (NCSL) (January 28, 2024), <https://www.ncsl.org/elections-and-campaigns/table-9-ballot-drop-box-laws>.

provisions confirm the legislature's contemplation of drop boxes and are therefore significant to statutory construction, because courts should read statutes in proper context.⁵

By contrast, states without legislation expressly authorizing drop boxes, or providing rules for their use, lack any statutory basis for interpreting drop box authority into existence. Because drop boxes are vulnerable to abuse, the absence of a legislature's provision of integrity measures indicates the legislature did not contemplate or approve of their use. Wisconsin and Indiana statutes are examples. Indeed, in response to *Teigen*, the Wisconsin Legislature chose not to amend its statutes to correct what it viewed as an erroneous interpretation of its statutes. That is very telling.

A. States Authorizing Drop Box Use Often Include Security and Confidence Measures

A comparison of neighboring state laws addressing drop boxes illuminates the absence of legislative authority in Wisconsin. Wisconsin's statutes are most like Indiana's, where drop boxes are not authorized.

Illinois

Since the early 1980s, Illinois statutes have permitted the use of drop boxes as a way for absentee voters to return ballots. 10 ILL. COMP. STAT. § 5/15-1; *see also, DuPage County Board of Election Commissioners v. Village of Lombard*, 510 N.E.2d 571, 572 (Ill. App. Ct. 1987) (referencing changes to the state Election Code

⁵ *Wisconsin v. Morford*, 268 Wis.2d 300, ¶21, 674 N.W.2d 349, 353 (2004) ("Statutory interpretation begins with the language of the statute. Each word should be looked at so as not to render any portion of the statute superfluous. But courts must not look at a single, isolated sentence or portion of a sentence instead of the relevant language of the entire statute. Furthermore, a statutory provision must be read in the context of the whole statute to avoid an unreasonable or absurd interpretation.") (internal quotes omitted). *See also*, Antonin Scalia & Bryan A. Garner, *READING LAW*, 167-169 (2012) (Ch. 24 "Whole-Text Canon").

providing municipal authorities with greater control over, among other things, “providing ballot boxes”). The statutory authorization for ballot boxes may predate *DuPage County* by nearly a decade, with very few amendments to the underlying law since its adoption in 1971. *See generally*, 10 ILL. COMP. STAT. § 5/15-1 (annotations referencing original adoption as [Ill.] Laws 1943, vol. 2, p. 1 § 15-1 and the only substantial amendment as [Ill.] Pub. Acts 77-6, § 1 (1971)).

Significantly, the Illinois statute that permits drop box use also provides for the security of such boxes by requiring county election boards to “provide a sufficient number of ballot boxes” and provide basic security requirements. *Id.* at § 5/15-1(a). Among the security protections listed in the statute and related provisions are design requirements mandating security by lock and key, openings designed to permit only one ballot to be inserted at a time, and limitations on who may return the ballot other than the voter. *See id.* and 10 ILL. COMP. STAT. § 5/19-6.

Iowa

Iowa amended its election law to permit drop boxes in 2021.⁶ 2021 Iowa Legis. Serv. Ch. 12 (West). Prior to 2021, absentee voters could return completed ballots only by mail, hand delivery to election officials, or via a statutorily defined designee. *E.g.* IOWA CODE § 53.17(1)(a), (4)-(5), 2019 Iowa Legis. Serv. Ch. 148 (West).⁷ After the amendment of 2021, local election officials are expressly permitted, but not required, to establish drop boxes. IOWA CODE § 53.17(1)(c).⁸

⁶ Since the Iowa Legislature amended the law in 2021, there have been no suits challenging the law or its implementation. Suits filed prior – most of them in 2020 – challenged other aspects of existing absentee ballot laws. *League of United Latin American Citizens of Iowa v. Pate*, 950 N.W.2d 204 (Ia. 2020), *Democratic Senatorial Campaign Committee v. Pate*, 950 N.W.2d 1 (Ia. 2020).

⁷ *See* IOWA CODE § 53.33 for limitations on who, other than a qualified voter, may return absentee ballots.

⁸ The law provides, in pertinent part, that a voter may return a completed absentee ballot “to a ballot drop box established by the commissioner no later than the time the polls are closed on election day... A commissioner is not required to establish a ballot drop box.” IOWA CODE §53.17(c).

When officials opt to use drop boxes, the law places a number of security obligations on them, including use of video surveillance systems, which “shall be used to monitor all activity at the ballot drop box at all times while [the box] is in place”; physically securing the box to a “stationary surface”; and more. *Id.* at 53.17(c)(1)-(10).

Michigan

Michigan is the only state to protect both absentee voting and drop boxes in its state constitution:

The right, once registered, to vote an absent voter ballot without giving a reason, during the forty (40) days before an election, and the right to choose whether the absent voter ballot is applied for, received and submitted in person or by mail.

MICH. CONST. ART. II, § 4(h), *Michigan Alliance for Retired Americans v. Secretary of State*, 964 N.W.2d 816, 821-822 (Mich. Ct. App. 2020), *see also*, *League of Women Voters of Michigan v. Secretary of State*, 959 N.W.2d 1 (Mich. Ct. App. 2020).

As part of the absentee voting process, the state constitution also guarantees:

The right to at least one (1) **state-funded secure drop-box** for every municipality, and for municipalities with more than fifteen thousand (15,000) registered voters at least one (1) **drop-box** for every fifteen thousand (15,000) registered voters, for the return of completed absent voter ballot applications and voted absent voter ballots. Secure **drop-boxes** shall be distributed equitably throughout the municipality and shall be accessible twenty-four (24) hours per day during the forty (40) days prior to any election and until eight (8) pm on election day.

MICH. CONST. ART. II, § 4(j) (emphasis added).

Michigan’s electorate adopted drop box use in 2018, before the COVID pandemic.⁹ No doubt one reason that drop boxes were implemented by express

⁹ Since Michigan’s constitutional provisions and laws are new, there has been little chance to litigate them. The few cases filed relate to deadlines for the receipt of absentee ballots and statutes limiting the transportation of voters. *E.g. Michigan Alliance for Retired Americans and Priorities USA v. Nessel*, 978 F.3d 976 (6th Cir. 2020).

constitutional amendment is because of the Michigan courts' restrained approach to conjuring election rules. *Michigan Alliance for Retired Americans*, 964 N.W.2d at 258 (“designing adjustments to our election integrity laws is the responsibility of our elected policymakers, not the judiciary”). The Michigan Legislature adopted enabling legislation in 2023, well after the pandemic, approving language nearly identical to the constitutional provisions. *See* MICH. COMP. LAWS § 168.761d, 2023 Mich. Legis. Serv. Pub. Act 85 (H.B. 4697) (West).

Minnesota

In 2021, the Minnesota Legislature authorized the use of drop boxes. *See* 2021 Minn. Sess. Law Serv., 1st Spec. Sess., Ch. 12, § 5 (S.F. 2)(West). The law leaves the use of drop boxes to the discretion of the relevant election official, stating that she “may provide locations at which a voter may deposit a completed absentee ballot... in a secure drop box.” MINN. STAT. § 203B.082(Subd. 2). It also sets rigorous security standards, including the continual recording of “each drop box... during the absentee voting period,” measures to prevent unauthorized access or tampering, and physically securing the box to the ground. *Id.*

Ohio

Ohio's drop box regime started with guidance issued by the Secretary of State. During the 2020 pandemic election, Secretary LaRose issued guidance to county boards of elections limiting the number of drop boxes used to one per county and set other standards for use. The guidance was challenged in court. The Ohio Court of Appeals observed a critical ambiguity in state law, noting that the law did not limit the number of drop boxes, but it also did not mandate the use of boxes. In light of that ambiguity, the court could not conclude that the legislature intended to deprive the Secretary of the authority to issue guidance, regardless of its

reasonableness. *Ohio Democratic Party v. LaRose*, 159 N.E.3d 1241, 1254-1255 (Oh. Ct. App. 2020); *see also, Northeast Ohio Coalition for the Homeless v. LaRose*, 2024 WL 83036 (N.D. Ohio 2024).

During the 2022 legislative session, the Ohio Legislature resolved the ambiguity by largely codifying Secretary LaRose's 2020 guidance, limiting drop boxes to one per county, dictating the location of each box, and establishing other security measures to ensure public confidence in the electoral process. OHIO REV. CODE ANN. § 3509.05; *see also, Northeast Ohio Coalition for the Homeless, supra*, and 2022 Oh. Laws File 175 (H.B. 458), 2022 Oh. Laws File 176 (H.B. 45). That ended the debate regarding drop box use in Ohio. Wisconsin's Legislature, by comparison, has not done the same after *Teigen*.

B. States Not Authorizing Drop Boxes

Indiana's Legislature has not enacted express statutory drop box authorization. While Indiana law permits voters to cast early ballots up to twenty-eight days before Election Day, they must be cast in person. *See*, IND. CODE § 3-11-10-26(f) and *Common Cause Indiana v. Lawson*, 977 F.3d 663, 665 (7th Cir. 2020). Further, Indiana provides several ways for absentee voters to cast ballots, including early in-person voting, mailing the completed absentee ballot to the appropriate election office, and delivery of the completed ballot in person to the relevant official. IND. CODE § 3-11-4-1.

Notably, Indiana imposes additional regulations on absentee voting not found in other Midwest states. Specifically, it is an "excuse only" absentee jurisdiction, requiring prospective absentee voters to assert that they have "a specific, reasonable expectation of being absent from the county on election day during the entire twelve (12) hours that the polls are open," a disability that prevents them from voting in person or other health problem, or falls within certain other statutory allowances. IND. CODE § 3-11-10-24.

Like Indiana, Wisconsin's Legislature has not authorized drop boxes or established any rules for their use in statute.

CONCLUSION

As this Court considers whether to reverse its 2022 decision in *Teigen*, it should respect the policy decisions made by the Wisconsin Legislature to prescribe the time, place and manner of elections in Wisconsin and sustain *Teigen*.

Dated this 24th day of April, 2024

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) and (d) for a brief produced with a proportional serif font. The length of this brief is 2,936 words.

Dated this 24th day of April, 2024

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