

No. _____

In the Supreme Court of Wisconsin

JERÉ FABICK,

Petitioner,

v.

WISCONSIN ELECTIONS COMMISSION; ANN S. JACOBS, IN HER OFFICIAL CAPACITY AS CHAIR OF THE WISCONSIN ELECTIONS COMMISSION; MARK L. THOMSEN, IN HIS OFFICIAL CAPACITY AS VICE-CHAIR OF THE WISCONSIN ELECTIONS COMMISSION; MARGE BOSTELMANN, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE WISCONSIN ELECTIONS COMMISSION; JULIE M. GLANCEY, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF THE WISCONSIN ELECTIONS COMMISSION; DEAN KNUDSON, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE WISCONSIN ELECTIONS COMMISSION; ROBERT F. SPINDELL, JR., IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE WISCONSIN ELECTIONS COMMISSION; MEAGAN WOLFE, IN HER OFFICIAL CAPACITY AS ADMINISTRATOR OF THE WISCONSIN ELECTIONS COMMISSION; CITY OF MADISON; MARIBETH WITZEL-BEHL, IN HER OFFICIAL CAPACITY AS CITY CLERK FOR THE CITY OF MADISON; CITY OF MILWAUKEE; CITY OF MILWAUKEE ELECTION COMMISSION; STEPHANIE D. FINDLEY, IN HER OFFICIAL CAPACITY AS CHAIR OF THE MILWAUKEE ELECTION COMMISSION; CARMEN C. CABRERA, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF THE MILWAUKEE ELECTION COMMISSION; JESS RIPP, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE MILWAUKEE ELECTION COMMISSION; CLAIRE WOODALL-VOGG, IN HER OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE MILWAUKEE ELECTION COMMISSION;

Respondents.

MEMORANDUM IN SUPPORT OF PETITIONER'S MOTION FOR PERMANENT INJUNCTION, OR ALTERNATIVELY A TEMPORARY INJUNCTION

David H. Thompson*
Peter A. Patterson*
COOPER & KIRK, PLLC
1523 New Hampshire Ave., NW
Washington, DC 20036
(202) 220-9600
(202) 220-9601 (Fax)
dthompson@cooperkirk.com
Counsel for Petitioners

Matthew M. Fernholz
Counsel of Record
CRAMER, MULTHAUF, & HAMMES, LLP
1601 East Racine Ave., Ste. 200
P.O. Box 558
Waukesha, WI 51387
(262) 542-4278
(262) 542-4270 (Fax)
mmf@cmhlaw.com

*Applications to appear *pro hac vice* forthcoming.

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	iii
ISSUES PRESENTED	1
INTRODUCTION.....	2
STATEMENT ON ORAL ARGUMENT AND PUBLICATION	4
STATEMENT OF THE CASE	4
STANDARD OF REVIEW.....	16
ARGUMENT	18
I. THIS COURT SHOULD EXERCISE ORIGINAL JURISDICTION.....	18
II. PETITIONER IS LIKELY TO SUCCEED ON THE MERITS OF THE CLAIM.	22
A. Petitioner Is Likely to Succeed in Showing that the Policy and Practice of Rehabilitating Witness Addresses Violates State Law.....	22
B. Petitioner Is Likely to Succeed in Showing that the Policy and Practice of Allowing Ballot Harvesting Violates State Law	27
C. Petitioner Is Likely to Succeed in Showing that the Policy and Practice of Utilizing Unstaffed Drop Boxes Violates State Law.....	34
III. PETITIONER WILL SUFFER IRREPARABLE HARM IN THE ABSENCE OF AN INJUNCTION, AND THE BALANCE OF EQUITIES FAVORS IMMEDIATE INJUNCTIVE RELIEF..	37

CONCLUSION41

RETRIEVED FROM DEMOCRACYDOCKET.COM

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Citizens Util. Bd. v. Klauser</i> , 194 Wis. 2d 484, 534 N.W.2d 608 (1995).....	20
<i>Crawford v. Marion Cnty. Election Bd.</i> , 553 U.S. 181 (2008)	39
<i>FAS, LLC v. Town of Bass Lake</i> , 2007 WI 73, 301 Wis. 2d 321, 733 N.W.2d 287	35
<i>Higher Soc’y of Indiana v. Tippecanoe Cty., Indiana</i> , 858 F.3d 1113 (7th Cir. 2017)	40
<i>In re State ex rel. Attorney General</i> , 220 Wis. 25, 264 N.W. 633 (1936).....	19
<i>Jefferson v. Dane Cnty.</i> , 2020 WI 90, 394 Wis. 2d 602, 951 N.W.2d 556	<i>passim</i>
<i>Joni B. v. State</i> , 202 Wis. 2d 1, 549 N.W.2d 411 (1996)	20
<i>LTD Commodities, Inc. v. Perederij</i> , 699 F.2d 404 (7th Cir. 1983)	38
<i>Panzer v. Doyle</i> , 2004 WI 52, 271 Wis. 2d 295, 680 N.W.2d 666	21
<i>Petition of Heil</i> , 230 Wis. 428, 284 N.W. 42 (1939)	20
<i>Pure Milk Prod. Co-op. v. Nat’l Farmers Org.</i> , 90 Wis. 2d 781, 280 N.W.2d 691 (1979).....	17, 37, 38
<i>Sanchez–Espinoza v. Reagan</i> , 770 F.2d 202 (D.C. Cir. 1985).....	17
<i>Serv. Emps. Int’l Union, Local 1 v. Vos</i> , 2020 WI 67, 393 Wis. 2d 38, 946 N.W.2d 35	17
<i>State ex rel. Dep’t of Nat. Res. v. Wisconsin Ct. of Appeals, Dist. IV</i> , 2018 WI 25, 380 Wis. 2d 354, 909 N.W.2d 114	38
<i>State ex rel. Kalal v. Cir. Ct. for Dane Cnty.</i> , 2004 WI 58, 271 Wis. 2d 633, 681 N.W.2d 110	28, 29, 30, 31, 32
<i>State ex rel. Ozanne v. Fitzgerald</i> , 2011 WI 43, 334 Wis. 2d 70, 798 N.W.2d 436	20, 40
<i>Trump v. Biden</i> , 2020 WI 91, 394 Wis. 2d 629, 951 N.W.2d 568.....	35, 36

<i>Werner v. A. L. Grootemaat & Sons, Inc.</i> , 80 Wis. 2d 513, 259 N.W.2d 310 (1977).....	17, 37
<i>Westinghouse Elec. Corp. v. Free Sewing Mach. Co.</i> , 256 F.2d 806 (7th Cir. 1958)	38
<i>Wisconsin Legislature v. Palm</i> , 2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900	17, 19
<i>Wisconsin Pro. Police Ass’n v. Lightbourn</i> , 2001 WI 59, 243 Wis. 2d 512, 627 N.W.2d 807	18, 19

Statutes

Wis. Stat.

§ 6.84(1).....	22, 39
§ 6.84(2).....	22, 37
§ 6.85(1)(a)2	34
§ 6.86(1)(ac).....	30
§ 6.86(1)(b)	34
§ 6.86(2)(b)	30
§ 6.86(3)(a)1	10, 29
§ 6.86(3)(b)	10, 29
§ 6.86(3)(c)	10, 29
§ 6.86(5).....	31, 32
§ 6.86(6).....	24, 30
§ 6.87(2).....	26
§ 6.87(4)(b)(1).....	1, 9, 11, 13, 27, 32, 33
§ 6.87(6).....	34
§ 6.87(6d).....	1, 7, 23
§ 6.87(9).....	1, 7, 24, 25, 30, 41
§ 6.855.....	34
§ 6.855(1).....	5, 35
§ 6.875(4)(a)	9
§ 6.875(6)(b)	10
§ 6.875(6)(d)	28, 29

Other Authorities

11A WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 2948
(3d ed. 2020) 39

Absentee Ballot Drop-off Sites, CITY OF MILWAUKEE ELECTION
COMMISSION, available at <https://bit.ly/3qyJoQf> (last visited Mar. 10,
2021) 16

Ballot Drop-Off Sites, CITY OF MADISON CITY CLERK’S OFFICE, available
at <https://bit.ly/3la1tmz> (last visited Mar. 10, 2021) 15, 16

Deadlines for 2021 Elections, WISCONSIN ELECTIONS COMMISSION,
available at <https://bit.ly/3vaoqKV> (last visited Mar. 10, 2021) 5, 6

Nora Eckert, *How Wisconsin voters can ‘cure’ the hundreds of ballots
already rejected*, THE CAP TIMES (Oct. 27, 2020), available at
<https://bit.ly/2N4c1ad>..... 9, 25

Press Release, Wisconsin Elections Commission, WEC Releases
Analysis of November 2020 Election Data (Jan. 29, 2021),
available at <https://bit.ly/3t5PrNN> 3, 6

A. SCALIA & B. GARNER, READING LAW: THE INTERPRETATION OF
LEGAL TEXTS 167 (2012) 32, 33

Wisconsin Elections Commission Special Teleconference Meeting,
WISEYE (June 17, 2020), available at <https://bit.ly/3veEvPJ> 13

ISSUES PRESENTED

I. Whether the Wisconsin Elections Commission's policy and the City of Milwaukee's and Madison's practice of rehabilitating missing witness address information is contrary to Wis. Stat. § 6.87(6d) and Wis. Stat. § 6.87(9), and thus diluting lawful votes, including the Petitioner's.

II. Whether the Wisconsin Elections Commission's policy and the City of Milwaukee's and Madison's practice of accepting the return of absentee ballots from individuals other than the electors themselves is contrary to Wis. Stat. § 6.87(4)(b)(1), thus diluting lawful votes, including the Petitioner's.

III. Whether the Wisconsin Elections Commission's policy and the City of Milwaukee's and Madison's practice of accepting the return of absentee ballots from unstaffed drop boxes is contrary to Wis. Stat. § 6.87(4)(b)(1), thus diluting lawful votes, including the Petitioner's.

IV. Whether this Court should issue an order enjoining operation and enforcement of these policies and practices that violate Wisconsin's election statutes.

INTRODUCTION

Petitioner comes before this Court to vindicate the principle that the Wisconsin State Legislature establishes the laws regulating Wisconsin's elections. But the Wisconsin Elections Commission (the "Commission") and municipalities across the State have adopted policies and practices plainly inconsistent with the State's election laws. Among these are three particularly egregious practices: (1) the rehabilitation of missing witness address information by local election officials, (2) the acceptance of absentee ballots from individuals other than the electors who cast those ballots and without lawful exception, and (3) the use of unstaffed drop boxes for the collection of absentee ballots,

This case is not a case about policy. It is not about whether unstaffed drop boxes are a good idea or bad idea. Neither is it about whether certain electoral practices should be adopted in Wisconsin. Instead, this case presents the straightforward—but nonetheless paramount—inquiry into whether the State Legislature has in fact enacted legislation permitting such practices. Petitioner contends the State Legislature quite clearly has not and has expressly forbidden such practices. And since these practices are

unlawful, votes cast using these practices impermissibly dilute the lawfully cast votes of those Wisconsin voters who follow the statutory requirements.

As the Commission recently noted in its post-2020 election report, there was an unprecedented surge in absentee voting in both statewide elections in 2020. The number of Wisconsin citizens utilizing absentee ballots increased exponentially to levels unseen in Wisconsin history or perhaps ever anticipated. This surge brought to light, in the words of the Commission, “previously obscure statutory provisions and administrative procedures” related to absentee balloting. Press Release, Wisconsin Elections Commission, WEC Releases Analysis of November 2020 Election Data (Jan. 29, 2021), available at <https://bit.ly/3t5PrNN>. But the administrative procedures adopted across the State are inconsistent with those statutory provisions.

Now another statewide election is imminent on April 6, 2021. This Court has an opportunity to resolve the pressing legal questions and set the record straight as to who may enact the laws governing the State’s elections: is it the elected State Legislature in conjunction with the Governor? Or instead do the Wisconsin Elections Commission and local election officials

have free rein to shape Wisconsin's electoral procedures in any which way they will?

The Commission and the municipalities of Wisconsin certainly have the authority to administer the State's elections and superintend them under the laws that the State Legislature has enacted. But the power to administrate is not the power to overrule. This Court should exercise original jurisdiction and grant a permanent injunction, or, alternatively, a temporary injunction pending review of the merits.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

To the extent that oral argument by teleconference or videoconference would not delay the prompt resolution of the urgent matters addressed in this Petition and Motion, Petitioner believes that oral argument would be helpful to the Court's consideration of the issues at stake in this case. Petitioner believes the issues presented in this petition warrant publication.

STATEMENT OF THE CASE

In this action, Petitioner Jeré C. Fabick, challenges the policies and practices, occurring statewide, that violate the statutes enacted by the Wisconsin State Legislature. Respondent Wisconsin Elections Commission (the "Commission") is an independent agency responsible for the

administration of the election laws in the State that has promulgated the policies at issue here.¹ Respondents the City of Milwaukee, the City of Milwaukee Election Commission, the Milwaukee Election Commission's Executive Director, the City of Madison, and the City Clerk of the City of Madison are all engaged in implementing the challenged practices.

The next statewide election is imminent, as Election Day is April 6, 2021. On the ballot is the statewide race for Wisconsin State Superintendent of Public Instruction. The deadlines relevant to this election are fast approaching. Wisconsin citizens may register to vote online or via mail until March 17, 2021, and in person in their municipal clerk's office until April 2, 2021. See *Deadlines for 2021 Elections*, WISCONSIN ELECTIONS COMMISSION, available at <https://bit.ly/3vaoqKV> (last visited Mar. 10, 2021). Wisconsin citizens may also register at their polling place on Election Day.

Absentee balloting is also set to start. No later than March 16, 2021, local election officials will mail absentee ballots to those voters with an active request already on file. *Id.* And even after that, most voters have until

¹ Also named as Respondents are the Commission's six individual Commissioners and Administrator.

5:00 pm on April 1, 2021 to request an absentee ballot, military voters and those voters qualifying as indefinitely confined have until 5:00 p.m. on April 2, 2021, to request an absentee ballot, and certain hospitalized voters may request a ballot until 5:00 p.m. on Election Day. *Id.* Certain localities across Wisconsin will also open up for in-person absentee balloting beginning March 23, 2021, and possibly through April 4, 2021. The final deadline to return absentee ballots is 8:00 p.m. on Election Day.

In part because of the coronavirus pandemic, Wisconsin has seen an unprecedented rise in voter's absentee ballots in elections. In the November 2020 election, "clerks in nearly every town, village, and city in Wisconsin processed more absentee ballot requests than ever before—nearly 2 million statewide." Press Release, Wisconsin Elections Commission, WEC Releases Analysis of November 2020 Election Data (Jan. 29, 2021), available at <https://bit.ly/3t5PrNN>. As the Wisconsin Elections Commission itself acknowledged, the exponential increase in absentee voters "revealed public confusion about the process and differing opinions about previously obscure statutory provisions and administrative procedures." *Id.* The practices that came to light during the 2020 elections continue into 2021.

Missing Address Rehabilitation: One of the practices that came to light with the massive increase in absentee balloting is the practice of local election officials to rehabilitate errors in witness address information. In general, absentee ballots must include a certificate. *See* Wis. Stat. § 6.87(2). This certificate provides a space for, among other things, an elector to certify eligibility to vote and the absentee ballot witness to certify that he or she, in fact, witnessed the lawful marking of the ballot. *See id.* In addition to signing and printing his or her name, the witness must provide his or her address. *Id.* Importantly, the statute also mandates: “If a certificate is missing the address of a witness, the ballot may not be counted.” Wis. Stat. § 6.87(6d).

The statute provides a singular means for local election officials to facilitate the correction of missing witness addresses:

If a municipal clerk receives an absentee ballot with an improperly completed certificate or with no certificate, the clerk may return the ballot to the elector, inside the sealed envelope when an envelope is received, together with a new envelope if necessary, whenever time permits the elector to correct the defect and return the ballot [by the applicable deadline].

Wis. Stat. § 6.87(9). Nevertheless, under a policy announced on October 18, 2016, the Commission instructed local election officials on how to “rehabilitat[e] an absentee certificate that does not contain the street number and street name (or P.O. Box) and the municipality of the witness address.”

AMENDED: Missing or Insufficient Witness Address on Absentee Certificate Envelopes, Wisconsin Elections Commission (Oct. 18, 2016), Petitioner's Appendix ("Pet. App.") 2. The Commission provided a number of options for clerks, and among these are options that include the voter and/or witness's confirmation. For instance, the voter or witness can appear in person to add the missing information or provide the address information by phone, fax, email, or mail. *Id.* Or the voter can request that the original certificate be returned and then properly filled in. And the voter may request to spoil the ballot and vote a new one. *Id.*

But then the Commission also expressly provided for local election officials to not include the voter or witness *at all* to fix the ballots. The clerk can fill in information that the clerk can "reasonably discern." *Id.* For instance, if:

- The voter has provided his or her complete address and the clerk has personal knowledge that the witness resides at the same address as the voter.
- The clerk has personal knowledge of the witness and knows his/or her address.
- The voter's complete address appears on the address label, and the witness indicates the same street address as the voter.
- The clerk is able to utilize lists or databases at his or her disposal to determine the witness's address.

Id.

Public reports indicate that Milwaukee is actively engaging in this missing address remediation. As Claire Woodall-Vogg, Executive Director of the Milwaukee Election Commission explained, ““We just do that in a red pen, so that we know it was our office and not the voter providing the address.’” Nora Eckert, *How Wisconsin voters can ‘cure’ the hundreds of ballots already rejected*, THE CAP TIMES (Oct. 27, 2020), <https://bit.ly/2N4c1ad>.

Ballot Harvesting: Wis. Stat. § 6.87 provides that completed absentee ballots “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). Absent exception, therefore, voters must personally return or mail their absentee ballots. The Wisconsin State Legislature has specifically provided for exceptions to this rule. For example, municipalities may authorize special voting deputies to go to qualified retirement homes or residential care facilities to assist with absentee balloting. “The 2 deputies designated to visit each qualified retirement home and residential care facility shall be affiliated with different political parties whenever deputies representing different parties are available.” Wis. Stat. § 6.875(4)(a).

Because the special voting deputies are specifically tasked with *returning* the ballots on behalf of voters, the State Legislature articulated specific steps that the deputies must take. After voting is completed, (1) “deputies shall seal the absentee ballot envelopes and any absentee ballot applications inside a carrier envelope,” (2) then “seal the carrier envelope,” (3) then “sign their names to the seal,” (4) “place the envelope inside a ballot bag or container,” and (5) “[a]s soon as possible after visiting each residential care facility or retirement home, but not later than 18 hours after the visit, the deputies shall deliver the ballot bag.” Wis. Stat. § 6.875(6)(d). And to further assure the integrity of the return process, “the municipal clerk or executive director shall keep a careful record of all ballots issued to the deputies and shall require the deputies to return *every ballot* issued to them.” § 6.875(6)(b) (emphasis added).

The Wisconsin State Legislature also provided for hospitalized electors to have an “agent” return a ballot for them. A hospitalized elector must first fill out an application. Wis. Stat. § 6.86(3)(a)1. If the application is sufficient, then the absentee ballot shall be issued to the named agent. The agent must “present documentation of his or her identity, provide his or her name and address, and attest to a statement that the ballot is received solely

for the benefit of a named elector who is hospitalized, and the agent will promptly transmit the ballot to such person.” § 6.86(3)(b).

The hospitalized elector’s ballot then may be returned “either by mail or by personal delivery of the agent.” § 6.86(3)(c). Here too, the agent has additional responsibilities. “[If] the ballot is returned on the day of the election, the agent shall make personal delivery to the polling place serving the hospitalized elector’s residence before the closing hour or, in [certain] municipalities” using central canvassing of absentee ballots “to the municipal clerk no later than 8 p.m. on election day.” *Id.*

Outside of these exceptions enacted by the State Legislature, Wis. Stat. § 6.87(4)(b)(1) mandates return by the electors themselves. Nevertheless, on March 31, 2020, the Commission distributed a FAQ document, entitled “Absentee Ballot Return Options: USPS Coordination and Drop Boxes.” It was sent from Meagan Wolfe, Administrator of the Commission, to local election officials statewide. *See* Pet. App. 3. The FAQ was a response to inquiries from clerks about how to “ensur[e] the maximum number of ballots are returned to be counted for the April 7, 2020 election.” *Id.*

Among the questions the FAQ answered was “Can voters return an absentee ballot they received by mail in-person at the clerk’s office, in person absentee site or their polling place on election day?” Pet. App. 3. The FAQ explained that “Yes, a voter can hand deliver an absentee ballot they received by mail to the clerk.” *Id.* But the FAQ went further and added that “A family member *or another person* may also return the ballot on behalf of the voter.” *Id.*

On June 8, 2020, the Commission received a “Petition for Rulemaking” from the Wisconsin Institute for Law and Liberty. The petition sought an “administrative rule regarding ‘ballot harvesting’ which [it] define[d] as a third party requesting an absentee ballot for an elector, and/or returning an absentee ballot on behalf of the elector after it ha[d] been completed.” Memorandum: Petition for Administrative Rulemaking on “Ballot Harvesting,” Wisconsin Elections Commission (June 17, 2020), Pet. App. 7. The petition explained to the Commission that “under the current statute” “only the elector shall mail in the ballot or deliver it in person.” Pet. App.7.

After a debate during the Commission’s June 17, 2020 Special Teleconference Meeting, the Commission deadlocked 3-3 on several

motions involving the rulemaking petition on ballot harvesting. *See Wisconsin Elections Commission Special Teleconference Meeting, WISEYE* (June 17, 2020), available at <https://bit.ly/3veEvPJ>. As a consequence of the 3-3 deadlocked vote, Administrator Wolfe explained that the Commission staff had not “received any direction to modify [their] approach.” *Id.* at 2:06:51–2:07:08 (responding to Commissioner Spindell’s question about the Commission staff’s guidance going forward). Thus, the guidance that the Commission’s staff continued to give local election officials was the same as that of the FAQ: anyone can return any other voter’s ballot.

Drop Boxes: Because Wis. Stat. § 6.87 provides that voted absentee ballots “shall be mailed by the elector, or delivered in person, to the municipal clerk issuing the ballot or ballots,” it is evident that there is no drop box return option authorized by statute. Wis. Stat. § 6.87(4)(b)(1). Nevertheless, the Commission created one.

The FAQ issued on March 31, 2020, also answered another question: “Can I establish drop boxes, or other similar options, for voters to return ballots without having to mail them back?” Pet. App. 3. The FAQ authorized drop boxes and provided many ideas for how local election officials could implement drop boxes:

Yes, drop boxes can be used for voters to return ballots but clerks should ensure they are secure, can be monitored for security purposes, and should be regularly emptied. Clerks can also use mail slots at municipal facilities when residents submit tax or utility payments for the return of ballots. These slots should be regularly monitored, and ballots should be collected on a daily basis. Clerks can also use book return slots at municipal libraries for this purpose as well as long as clerk staff have regular access to these facilities to collect ballots on, at least, a daily basis. If there is a final time that ballots will be collected from a drop box location, it should be posted clearly on the drop box when the last pick up will occur to deliver the ballots to the polling place to be counted.

Id.

On August 19, 2020, the Commission provided further guidance and authorization for the statewide deployment of drop boxes for voting. *See* Absentee Ballot Drop Box Information, Wisconsin Elections Commission (Aug 19, 2020), Pet. App. 10. The guidance provided municipalities several kinds of drop boxes that they could install. Municipalities could consider two kinds of outdoor drop boxes: a “Staffed, Temporary Drive-Through Drop Off” or a “Unstaffed, 24-Hour Ballot Drop Box.” Pet. App. 11–12. Municipalities could also consider an “Indoor Option” that could be “Staffed or Unstaffed.” Pet. App. 12.

As many of the drop boxes that municipalities could put up would be unstaffed, the Commission offered security advice. The Commission told clerk’s offices that the “[b]allot drop boxes must be secured and locked at all times. . . . In addition to locks, all drop boxes should be sealed with one or

more tamper evident seals.” Pet. App. 12. “Ideally, unstaffed 24-hour drop boxes should be located in areas with good lighting and be monitored by video surveillance cameras. When this is not feasible, positioning the box close to a nearby camera is a good option.” *Id.* Municipalities could also consider asking local law enforcement to “make regular observations.” *Id.*

The Commission’s guidance said it “ha[d] been adapted from a resource developed as part of the Cybersecurity and Infrastructure Security Agency (CISA) Elections Infrastructure Government Coordinating Council and Sector Coordinating Council’s Joint COVID Working Group.” Pet. App. 10. CISA’s original document conditioned its recommendation for drop boxes on the “review [of] existing laws and requirements” by local election authorities. Pet. App. 16. It thus “depend[ed] on state law.” *Id.* Noticeably absent from the Commission’s August 19 guidance was any citation to Wisconsin state law.

For the April 6, 2021 election, Wisconsin municipalities are continuing the use of Commission-endorsed drop boxes. Specifically, the City of Madison has installed at least fifteen operative drop boxes. *See Ballot Drop-Off Sites*, CITY OF MADISON CITY CLERK’S OFFICE, available at <https://bit.ly/3la1tmz> (last visited Mar. 10, 2021). The majority of these are

located in the environs of fire stations. For instance, one “is located on [the] west side of Grand Teton Pkwy before the station’s back driveway.” Another is “between the bus stop and the station’s back driveway.” *Id.* Or “right across from the badger at Camp Randall. Just beneath the Madison: Solar America City sign.” *Id.*

The City of Milwaukee has established numerous absentee ballot sites throughout its city as well. *See Absentee Ballot Drop-off Sites*, CITY OF MILWAUKEE ELECTION COMMISSION, *available at* <https://bit.ly/3qyJoQf> (last visited Mar. 10, 2021). The city has stated that the drop boxes will become available for voters to use “as soon as ballots are mailed,” and “[t]hey will remain open 24 hours a day until 5:00pm on Election Day.” *Id.*

Given that the above-mentioned policies and practices are plainly inconsistent with state law and with another statewide election imminent, Petitioner filed the petition for original jurisdiction in this Court and accompanying motion for permanent injunctive relief (or, alternatively, a temporary injunction pending review of the merits).

STANDARD OF REVIEW

Entry of an injunction is warranted if Petitioner can establish (1) “a reasonable probability of success on the merits,” (2) that Petitioner is “likely

to suffer irreparable harm” in the absence of injunctive relief, (3) that Petitioner has no “adequate remedy at law,” and (4) that an injunction is “necessary to preserve the status quo.” *Serv. Emps. Int’l Union, Local 1 v. Vos*, 2020 WI 67, ¶93, 393 Wis. 2d 38, 946 N.W.2d 35 (Opinion for the Court by Kelly, J.); *Werner v. A. L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520–21, 259 N.W.2d 310 (1977). Because the issuance of an injunction is discretionary, courts typically consider whether the balance of equities favors issuing the injunction. *See Pure Milk Prod. Co-op. v. Nat’l Farmers Org.*, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979). The same factors govern entry of a permanent injunction and a temporary injunction (though the irreparable harm requirement is less critical for a temporary injunction). *Werner*, 80 Wis. 2d at 521.²

² Since Respondents are governmental entities and Petitioner additionally seeks declaratory relief, any declaratory judgment issued by this Court would be the functional equivalent of an injunction. *See, e.g., Wisconsin Legislature v. Palm*, 2020 WI 42, ¶64, 391 Wis. 2d 497, 535, 942 N.W.2d 900 ((Roggensack, C.J., concurring) (noting that “[t]he oft-stated, oft-repeated legal maxim is clear: declaratory judgments are treated functionally as injunctions, when applied to governmental parties who are bound by the force and meaning of judgments under the law” (quoting *Madison Tchrs., Inc. v. Walker*, 2013 WI 91, ¶43, 351 Wis. 2d 237, 839 N.W.2d. 388 (Abrahamson, C.J., & A.W. Bradley, J., dissenting))); *see also Sanchez–Espinoza v. Reagan*, 770 F.2d 202, 208 n. 8 (D.C. Cir. 1985) (“[T]he discretionary relief of declaratory judgment is, in a context such as this where federal officers are defendants, the practical equivalent of specific relief such as injunction or mandamus, since it must be presumed that federal officers will adhere to the law as declared by the court.”).

The interpretation and application of Wisconsin's election statutes present questions of law that this Court reviews independently. *See Jefferson v. Dane Cnty.*, 2020 WI 90, ¶13, 394 Wis. 2d 602, 951 N.W.2d 556 (citing *Dawson v. Town of Jackson*, 2011 WI 77, ¶17, 336 Wis. 2d 318, 801 N.W.2d 316). Although the Commission has articulated interpretations of the statutes at issue here, this Court reviews statutes “without deference to the agency’s interpretation.” *Id.*

ARGUMENT

I. THIS COURT SHOULD EXERCISE ORIGINAL JURISDICTION.

The matters raised by this Petition and Motion satisfy the criteria for this Court’s exercise of its original jurisdiction under Article VII, Section 3 of the Wisconsin Constitution. This is an “exceptional case[] in which a judgment by the court [would] significantly affect[] the community at large.” *Wisconsin Pro. Police Ass’n v. Lightbourn*, 2001 WI 59, ¶4, 243 Wis. 2d 512, 627 N.W.2d 807. As this Court most recently recognized in *Jefferson v. Dane Cnty.*, 2020 WI 90, 394 Wis. 2d 602, 951 N.W.2d 556, issues revolving around the State’s absentee ballot laws are particularly apt for original jurisdiction given their widespread applicability and the unprecedented expansion of absentee balloting over the past year. *Id.*, ¶12. What the

Commission terms “previously obscure statutory provisions and administrative procedures” merit immediate and statewide resolution by this Court. And there is no question that the reach of the policies at issue in this Petition exceeds the reach and impact of actions that this Court has in the past found sufficiently exceptional to warrant the exercise of original jurisdiction. *See, e.g., id.* ¶10 (resolving issue of “indefinitely confined” voters when 194,544 asserted that status); *Lightbourn*, 2001 WI 59, ¶4 (challenge to public pension system impacting the interests of 460,000 participants); *In re State ex rel. Attorney General*, 220 Wis. 25, 264 N.W. 633, 634 (1936) (noting the propriety of exercising original jurisdiction in case challenging constitutionality of statutes affecting “innumerable members and employees of industry throughout Wisconsin” (citation omitted)).

Beyond the statewide impact of the issues in dispute, this case raises “matter[s] . . . that . . . trigger the institutional responsibilities of the Supreme Court.” *Wisconsin Legislature v. Palm*, 2020 WI 42, ¶10, 391 Wis. 2d 497, 942 N.W.2d 900 (quoting Wis. S. Ct. IOP III (September 12, 2019)). As this Court has previously explained, the Wisconsin Constitution intended to make this Court “a court of last resort on all judicial questions under the

constitution and laws of the state; a court of first resort on all judicial questions affecting the sovereignty of the state, its franchises or prerogatives, or the liberties of its people.” *Petition of Heil*, 230 Wis. 428, 436, 284 N.W. 42, 45 (1939). To that end, original jurisdiction is proper when a “state office has been usurped.” *Id.*, 284 N.W. at 47. Accordingly, this Court has granted original jurisdiction review when “the legislative power which the Wisconsin Constitution grants exclusively to the legislature” has been “usurped.” *State ex rel. Ozanne v. Fitzgerald*, 2011 WI 43, ¶7, 334 Wis. 2d 70, 798 N.W.2d 436; *Cf. Joni B. v. State*, 202 Wis. 2d 1, 549 N.W.2d 411 (1996) (exercising jurisdiction in case raising due process and separation of powers challenge to statute). So too here. With the clear text of the State Legislature’s statutes being violated across the State, Petitioner respectfully submits this Court has an institutional responsibility to address these issues.

With the impending election on April 6, 2021, original jurisdiction is also warranted by the need for a “prompt and authoritative” determination by this Court. *Citizens Util. Bd. v. Klauser*, 194 Wis. 2d 484, 488 n.1, 534 N.W.2d 608 (1995); *see also Petition of Heil*, 230 Wis. 428, 284 N.W. 42, 50 (1938) (exercise of original jurisdiction appropriate when “the questions presented are of such importance as under the circumstances to call for a[]

speedy and authoritative determination by this court in the first instance”). Wisconsin’s 3.79 million active registered voters are returning to the polls once again. Petitioner and every other voter who complies with the text of the State Legislature’s legislative enactments will suffer irreparable injury for every vote that does not similarly comply. Moreover, the Commission has deadlocked 3-3 on several motions involving the rulemaking petition on ballot harvesting. Accordingly, an authoritative ruling by this Court is needed to assess the legitimacy of electoral policies and practices proliferating across the State, and it is needed now before the next election. *See Panzer v. Doyle*, 2004 WI 52, ¶2, 271 Wis. 2d 295, 680 N.W.2d 666 (holding that “[n]ormally” cases “involv[ing] substantial legal questions of more than ordinary importance to the people of the state . . . require prompt and authoritative determination”), *abrogated on other grounds by Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, 295 Wis. 2d 1, 719 N.W.2d 408.

II. PETITIONER IS LIKELY TO SUCCEED ON THE MERITS OF THE CLAIMS.

A. Petitioners Is Likely to Succeed in Showing that the Policy and Practice of Rehabilitating Witness Addresses Violates State Law.

As this Court most recently explained, “[v]oting is a constitutional right, the exercise of which is ‘strongly encouraged.’” *Jefferson*, 2020 WI 90, ¶16 (quoting Wis. Stat. § 6.84(1)). “However, ‘voting by absentee ballot is a privilege exercised wholly outside the traditional safeguards of the polling place.’” *Id.* (quoting Wis. Stat. § 6.84(1)). So, the Wisconsin State Legislature has provided a detailed statutory framework so that absentee voting is “carefully regulated” to prevent “abuses.” Wis. Stat. § 6.84(1). At the same time the Legislature made it easier for all qualified voters to exercise their right to vote by enabling absentee balloting, the Legislature also sought to ensure the integrity of that voting.

To reaffirm that these procedures were not merely advisory directives to the Commission or local election officials, the State Legislature stated that all “matters relating to the absentee ballot process . . . shall be . . . mandatory.” *Id.* at § 6.84(2). This Court has “held that where an election statute is mandatory, its exercise requires strict compliance.” *Jefferson*, 2020 WI 90, ¶16 (citing *State ex rel. Ahlgrimm v. State Elections Bd.*, 82 Wis. 2d

585, 597, 263 N.W.2d 152 (1978). “Consequently, ‘[b]allots counted in contravention of the procedures . . . may not be included in the certified result of any election.” *Id.* (quoting Wis. Stat. § 6.84(2)).

Under the “mandatory” statutory framework that allows voting “outside the traditional safeguards” via absentee ballots, the State Legislature required that absentee ballots be witnessed, *and* the witness provide his or her address. First, “the witness shall execute” a “certificate” that attests to a variety of facts, such as the witness is “an adult U.S. citizen,” the witness is not “a candidate for any office on the enclosed ballot (except in the case of an incumbent municipal clerk), the witness “did not solicit or advise” how the elector should vote, and the elector followed the lawful voting procedure. Wis. Stat. § 6.87(2). The witness must print his or her name and “(Address),” and then sign. *Id.*

The witness’s address on the certificate is not an idle requirement. The State Legislature has determined that it is an essential component of every absentee ballot. Section 6.87(6d) provides that “[i]f a certificate is missing the address of a witness, the ballot may not be counted.” Wis. Stat. § 6.87(6d). And given the general rule that “if an elector mails or personally delivers an absentee ballot to the municipal clerk, the municipal clerk *shall*

not return the ballot to the elector,” Wis. Stat. § 6.86(6), a missing witness address in the certificate would be fatal to an absentee ballot if an elector could not remedy it. Yet the State Legislature specifically provided a mechanism to fix such a defective certificate:

If a municipal clerk receives an absentee ballot with an improperly completed certificate or with no certificate, the clerk may return the ballot to the elector, inside the sealed envelope when an envelope is received, together with a new envelope if necessary, whenever time permits the elector to correct the defect and return the ballot within the period authorized under sub. (6).

Wis. Stat. § 6.87(9). Thus, the municipal clerk is supposed to return the ballot to the elector and then the elector may proceed to correct the defect. The State Legislature thus provided a requirement, indicated its mandatory nature, and provided a means of remedying it. In this way, the State Legislature provided its “careful regulation” of witnesses, their address, and their role in absentee ballots.

The Commission has defined “address” in its guidance as “street number, street name and name of municipality.” Pet. App. 1. When at least one component is missing from the address, the Commission’s guidance instructs that “clerks must take corrective actions in an attempt to remedy a witness address error.” *Id.* But the action the Commission purports to mandate is not the procedure that the State Legislature expressly provided

for—namely sending the ballot back to the elector for correction. *See* Wis. Stat. § 6.87(9). Instead, the Commission devised an extra-legislative solution: the clerk’s offices should just fix it themselves. For instance, the clerks can simply use their own “personal knowledge” about where the witness resides or do a search through “lists or databases at his or her disposal to determine the witness’s address.” Pet. App. 2.

With respect to election statutes, the Commission and municipalities have no legal basis to do that which the State Legislature has not granted them the power to do. *Cf. Jefferson*, 2020 WI 90, ¶ 24 (noting county clerks were not to “interpret Wisconsin’s election laws and make declarations based on those interpretations” because that was “[n]owhere in the[] duties” assigned by the legislature). There is simply no provision that allows the clerk’s offices to mark the certificate instead of the witness. There is certainly no red pen exception. *See* Nora Eckert, *How Wisconsin voters can ‘cure’ the hundreds of ballots already rejected*, THE CAP TIMES (Oct. 27, 2020), available at <https://bit.ly/2N4c1ad> (“‘We just do that in a red pen, so that we know it was our office and not the voter providing the address,’ [Milwaukee Election Commission Chair] Woodall-Vogg said.”). In fact, the State Legislature has carefully explained the instances in which a clerk’s office or

its agents may make markings on absentee ballots or certificates. For example, special voting deputies can mark ballots because they are to serve as the witnesses for those voters in qualified retirement homes. Wis. Stat. § 6.87(2). And the clerk is to initial an absentee ballot when “the absentee elector voted in person under s. 6.86(1)(ar).” *Id.*

Forbidding the clerk’s offices to fill in missing information is consistent not only with the statutory text but also with this Court’s case law. As this Court long ago recognized, “two wrongs cannot make a right.” *Kaufmann v. La Crosse City Bd. of Canvassers*, 8 Wis. 2d 182, 186, 98 N.W.2d 422 (1959). In *Kaufman*, absentee ballots were returned that were missing required signatures. These ballots were insufficient, but instead of rejecting the ballots as such, “the city clerk further complicated the matter by signing her name” to supply the requisite signature. *Id.* at 186. But there was no basis for the clerk to fix an insufficient ballot in that way. So too here.

There may be policy disagreements about the means that the State Legislature provided clerk’s offices to help voters whose ballots are missing addresses or have incomplete certifications. But there can be no doubt that the State Legislature has provided exclusive means. Having established the

rules, the “mandatory” nature of the absentee balloting provisions commands strict compliance from the Commission and local election officials.

B. Petitioner Is Likely to Succeed in Showing that the Policy and Practice of Allowing Ballot Harvesting Violates State Law.

A further “mandatory” procedure is how electors must return their absentee ballots. The State Legislature has provided two means for individual electors to return their absentee ballots: completed absentee ballots “shall be [1] mailed by the elector, or [2] delivered in person, to the municipal clerk issuing the ballot or ballots” Wis. Stat. § 6.87(4)(b)(1). Absent exception, therefore, voters must personally return or mail their absentee ballots.

The Commission’s March 31, 2020 FAQ document allows something different altogether. As explained above, the Commission provided that “[a] family member or another person may also return the ballot on behalf of the voter.” Pet. App. 3. Presumably, the Commission or the municipalities will argue that this is a feature of the way in which Section 6.87(4)(b)(1) is drafted. The Commission may argue that since the clause “shall be mailed” includes “by the elector,” it follows that mailings have to be done personally but the physical return of ballots “in person” can be done by anyone because the phrase “by the elector” is missing from that clause. This interpretation, however, would only account of Section 6.87(4)(b)(1) in isolation.

Such a simplistic approach would violate a cardinal principle of statutory interpretation: context matters. To that end, isolated phrases must not be interpreted standing alone. Rather, “statutory language is interpreted in the context in which it is used; 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.” *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶46, 271 Wis. 2d 633, 663, 681 N.W.2d 110, 124. And within the context of the enacted absentee ballot statutes, the context clearly indicates that electors must personally return their ballots.

First, the State Legislature has provided specific exceptions to the personal return of absentee ballots. For example, the State Legislature has provided that Special Voting Deputies may be hired by municipalities to go to qualified retirement homes or residential care facilities to assist with absentee balloting. And it provided a detailed set of steps to ensure the integrity of the return of those ballots: (1) “[D]eputies shall seal the absentee ballot envelopes and any absentee ballot applications inside a carrier envelope,” (2) then “seal the carrier envelope,” (3) then “sign their names to the seal,” (4) “place the envelope inside a ballot bag or container,” and (5) “[a]s soon as possible after visiting each residential care facility or retirement

home, but not later than 18 hours after the visit, the deputies shall deliver the ballot bag.” Wis. Stat. § 6.875(6)(d). It would be passing strange to require all of these steps, when anyone at any time can return anyone else’s ballot. *See Kalal*, 2004 WI 58, ¶56 (rejecting an interpretation of one subsection that would defeat the purpose of another).

And that would not be the only exception rendered nugatory. The State Legislature also provided for hospitalized electors to have an “agent” return a ballot for them. The agent must show identification that the clerk must confirm and also make a special attestation. *See* Wis. Stat. § 6.86(3)(a)1, (b). And the agent has additional obligations to ensure that the ballot is received on time. *See* § 6.86(3)(c). These exceptions and the detailed procedures to allow for third parties (i.e., neither the voter nor the clerk) to return voted ballots would be superfluous if “[a] family member or another person may also return the ballot on behalf of the voter.” Pet. App. 3; *see Jefferson*, 2020 WI 90, ¶21 (“Important to the meaning of a statute is the context in which it occurs, and we interpret statutes to reasonably give effect to every word.”).

Second, the State Legislature enacted several provisions regarding the return of absentee ballots that clearly indicate that the return must be done

personally by the elector. Thus, the proper interpretation is evident from the “text and structure of the statute itself.” *Kalal*, 2004 WI 58, ¶48. Section 6.86(6) provides that “if an elector mails or *personally delivers* an absentee ballot to the municipal clerk, the municipal clerk shall not return the ballot to the elector [except as otherwise authorized to correct spoiled ballots or incomplete certificates].” (emphasis added). Under Section 6.86(2)(b), “[i]f an elector fails to cast *and return* an absentee ballot received under [the indefinitely confined subsection], the clerk shall notify the elector by 1st class letter or postcard that his or her name will be removed from the mailing list.” (emphasis added). Under Section 6.86(1)(ac), an elector may request an absentee ballot by fax or email. “An elector requesting a ballot under this paragraph *shall return* with the voted ballot a copy of the request bearing an original signature of the elector as provided in s. 6.87(4).” Wis. Stat. § 6.86(1)(ac) (emphasis added). Under Section 6.87(9), “[i]f a municipal clerk receives an absentee ballot with an improperly completed certificate or with no certificate, the clerk may return the ballot to the elector, . . . whenever time permits *the elector* to correct the defect and *return* the ballot within the period authorized.” (Emphasis added). By contrast, under the special

circumstances when an elector requests a ballot as a hospitalized elector, the State Legislature provided something different:

Whenever an elector returns a spoiled or damaged absentee ballot to the municipal clerk, or *an elector's agent* under sub. (3) *returns* a spoiled or damaged ballot to the clerk on behalf of an elector, and the clerk believes that the ballot was issued to or on behalf of the elector who is returning it, the clerk shall issue a new ballot to the elector or elector's agent, and shall destroy the spoiled or damaged ballot.

Wis. Stat. § 6.86(5) (emphasis added).

These provisions all revolve around the return of absentee ballots. Where the return is in the ordinary course, these provisions refer to the personal return by the elector. But when the State Legislature provided the hospitalized voter exception with its corresponding return-by-agent, the State Legislature explicitly made separate accommodation in the text of the statute. Thus, requiring personal delivery in Section 6.87(4)(b)(1) is “reasonable in the statutory context and consistent with the manifest statutory purpose.” *Kalal*, 2004 WI 58, ¶54. The Commission’s FAQ and municipalities’ practices are not.

Interpreting Section 6.87(4)(b)(1) to allow anyone to return absentee ballots would make nonsense of these other statutory provisions. Consider again the spoiled ballot provision under Section 6.86(5). That provision specifies what a clerk may do under only two circumstances: personal return

by the elector or return by a hospitalized voter's agent. *See* Wis. Stat. § 6.86(5) (only referring to delivery by elector or by the hospitalized voter's agent). Thus, if a third party returns a ballot on behalf of an elector, that is not covered by this provision. Outside of the delineated circumstances, the clerk is not authorized to do anything with a spoiled ballot. Is it reasonable to think the State Legislature provided in Section 6.87(4)(b)(1) that anyone could return a ballot, but in Section 6.86(5) then provided that clerks could only remedy a subset of those spoiled ballots based on who delivered them? Plainly no. That would be unreasonable, yet also the inevitable consequence of the Commission's interpretation of Section 6.87(4)(b)(1). But such interpretations are to be avoided. *Kalal*, 2004 WI 58, ¶46 (holding that statutory context should be used to "avoid absurd or unreasonable results"). The way to avoid such an unreasonable consequence is to interpret all the return provisions consistently: personal delivery by the elector, unless otherwise legislatively provided. *See* A. SCALIA & B. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 167 (2012) ("If any section [of a law] be intricate, obscure, or doubtful, the proper mode of discovering its true meaning is by comparing it with the other sections, and finding out the

sense of one clause by the words or obvious intent of the other.” (internal quotation marks omitted)).

In fact, were Section 6.87(4)(b)(1) to mean that anybody could return anyone else’s ballot, then each and every one of the above-mentioned provisions would need to be judicially rewritten, as indicated in bold below:

- [I]f an elector mails or personally delivers **or someone else delivers** an absentee ballot to the municipal clerk, the municipal clerk shall not return the ballot to the elector.
- If an elector fails to cast and return **or someone else fails to return** an absentee ballot under [the indefinitely confined subsection] . . .
- An elector requesting a ballot under this paragraph shall return **or someone else shall return** with the voted ballot a copy of the request bearing an original signature of the elector . . .
- If a municipal clerk receives an absentee ballot with an improperly completed certificate or with no certificate, the clerk may return the ballot to the elector, . . . whenever time permits the elector to correct the defect and return **or permits someone else to return** the ballot within the period authorized.
- Whenever an elector returns **or someone else returns** a spoiled or damaged absentee ballot to the municipal clerk, or an elector’s agent under sub. (3) returns a spoiled or damaged ballot to the clerk on behalf of an elector . . .

Such amendments to the text are beyond the scope of interpretation and border on invention. Here, “[t]he plain language of the statute does not permit persons other than the elector,” *Jefferson*, 2020 WI 90, ¶25, to return ballots outside of limited exceptions. As this Court recently reaffirmed, the Court

“will not add words into a statute that the legislature did not see fit to employ.” *Id.* But the Commission’s FAQ and municipalities’ practices do exactly that. They are thus contrary to enacted text and unlawful.

C. Petitioner Is Likely to Succeed in Showing that the Policy and Practice of Utilizing Unstaffed Drop Boxes Violates State Law.

Independent of who may return absentee ballots is the State Legislature’s requirement for *how* these ballots must be returned. Here too the State Legislature provided select and defined mechanisms for ballots to be returned. But these do not include the unstaffed drop boxes recommended by the Commission and installed by the municipalities. As unstaffed drop boxes are not part of the “mandatory” provisions for absentee balloting in Wisconsin, their use is unlawful.

The State Legislature authorized the return of absentee ballots in the mail. A voter can simultaneously request and cast an absentee ballot at the clerk’s office or other designated site established by “the governing body of [the] municipality” through so-called in-person absentee voting. *See* Wis. Stat. §§ 6.85(1)(a)2, 6.855, 6.86(1)(b). An absentee voter or a hospitalized voter’s agent may return the ballot in person to the voter’s polling place on Election Day. *See* Wis. Stat. §§ 6.87(6), 6.86(3)(c). And the absentee voter or a hospitalized voter’s agent can personally return the ballot to the

municipal clerk's office. *See* Wis. Stat. § 6.86(3)(c). There are thus many options for voters to return their ballots under different circumstances. But no drop boxes. *Cf. FAS, LLC v. Town of Bass Lake*, 2007 WI 73, ¶27, 301 Wis. 2d 321, 733 N.W.2d 287 (“Under the doctrine of *expressio unius est exclusio alterius*, ‘the express mention of one matter excludes other similar matters [that are] not mentioned.’”). Since the absentee balloting statute is mandatory, it “requires strict compliance.” *Jefferson*, 2020 WI 90, ¶16. Allowing new extra-legislative means of returning ballots is not compliance, let alone the strict compliance the statute requires.

It is also evident that there is no statutory provision with which the Commission or municipalities could attempt to shoehorn unstaffed drop boxes into. For example, unstaffed drop boxes are obviously not so-called “alternate sites.” Section 6.855(1) provides in relevant part that an alternate site is a “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.” Wis. Stat. § 6.855(1). Thus, an alternate site “must be a location not only where voters may return absentee ballots, but also a location where voters ‘may request and vote absentee ballots.’” *Trump v. Biden*, 2020 WI 91, ¶56, 394 Wis. 2d 629, 951 N.W.2d 568 (Hagedorn, J.,

concurring), *cert. denied*, 20-882, 2021 WL 666465 (U.S. Feb. 22, 2021). Drop boxes, as their name implies, are solely receptacles for absentee ballots to be *dropped off*, not requested or picked up by voters. Thus, even if the Commission or municipalities were to defend the drop boxes as legitimate alternate sites, they are not. Drop boxes are neither designed nor intended to fulfill *both* of those sites' core functions. *See Trump*, 2020 WI 91, ¶56 (Hagedorn, J., concurring).

Moreover, unstaffed drop boxes cannot be conceived of as a lawful extension of the “municipal clerk.” As discussed, one of the ways that an absentee ballot may be returned is directly to the municipal clerk. “The phrase ‘municipal clerk’ has a specific meaning in the election statutes. It is defined as ‘the city clerk, town clerk, village clerk and the executive director of the city election commission and their authorized representatives.’” *Id.* at ¶54 (Hagedorn, J., concurring) (quoting Wis. Stat. § 5.02(10)) (emphasis removed). An unstaffed drop box is obviously not a clerk nor an executive director. And whatever authorized representative means, it implies, at the very least, a level of sentience that no unstaffed drop box installed on any municipal street corner or fire house driveway could ever have. *See id.* at ¶54 (Hagedorn, J., concurring) (finding that voters “who returned ballots to *city*

election inspectors at the direction of the clerk” fulfilled the statutory obligation) (emphasis added)). Accordingly, unstaffed “[d]rop boxes do not meet the legislature’s mandatory directive.” *Id.* at ¶101 (Roggensack, C.J., dissenting). They are unlawful.

III. PETITIONER WILL SUFFER IRREPARABLE HARM IN THE ABSENCE OF AN INJUNCTION, AND THE BALANCE OF EQUITIES FAVORS IMMEDIATE INJUNCTIVE RELIEF.

In addition to showing a likelihood of success on the merits, a party seeking permanent or temporary injunctive relief must demonstrate that it lacks an adequate remedy at law and would thus likely suffer irreparable harm in the absence of injunctive relief, that an injunction is necessary to preserve the status quo, and that on balance, equity favors issuing the injunction. *See Werner*, 80 Wis. 2d at 520–21; *Pure Milk Prod.*, 90 Wis. 2d at 800. Petitioner meets these remaining requirements.

Petitioner has alleged ongoing violations of Wisconsin’s election statutes as Wisconsin voters cast absentee ballots or head to the polls for the April 6, 2021 statewide election. If these policies and practices persist for another election, Petitioner’s vote will be diluted by votes that the State Legislature has explicitly instructed should not count. *See, e.g.*, Wis. Stat. § 6.84(2). There is no re-vote, and as a consequence, there is no means to

recover an unlawfully diluted vote after the fact. That is self-evidently irreparable harm. *State ex rel. Dep't of Nat. Res. v. Wisconsin Ct. of Appeals, Dist. IV*, 2018 WI 25, ¶47, 380 Wis. 2d 354, 909 N.W.2d 114 (“It is nearly tautological to observe that losing a statutorily-granted right is a harm. Losing the right with no means to recover it makes the harm irreparable.”). And, assuredly, there is no subsequent damages remedy that can make Petitioner or his diluted vote whole. *See Pure Milk Prod.*, 90 Wis. 2d at 800 (an “injury is irreparable” where it is “not adequately compensable in damages”).

Injunctive relief is further appropriate here because Petitioner merely seeks to restore voting practices and policies to those consistent with the State Legislature’s enacted statutes, *i.e.*, restore the status quo that existed before the Commission’s and municipalities’ challenged policies and practices. *Westinghouse Elec. Corp. v. Free Sewing Mach. Co.*, 256 F.2d 806, 808 (7th Cir. 1958) (“The status quo is the last uncontested status which preceded the pending controversy.”); *LTD Commodities, Inc. v. Perederij*, 699 F.2d 404, 406 (7th Cir. 1983) (“[I]t is the last uncontested status preceding the controversy which is to be maintained by the court, rather than a status wrongfully altered by unilateral action after dispute has arisen.”).

The injunctive relief Petitioner requests would do nothing more than “compel defendant[s] to correct injury already inflicted” and thereby maintain the status quo “existing between the parties before the dispute developed.” 11A WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 2948 (3d ed. 2020).

Finally, the balance of equities and the public interest strongly favor the grant of an injunction. The State Legislature enacted the statutes at issue here because of the lack of “traditional safeguards” when votes are cast by absentee ballots. Wis. Stat. § 6.84(1). These procedures were designed “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” and “similar abuses.” *Id.* As the United States Supreme Court recognized in *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008), “public confidence in the integrity of the electoral process has independent significance.” *Id.* at 197. Thus, the public interest would be further served here by an injunction ensuring that the Commission and municipalities across the state abide by the procedures established by the State Legislature.

Just last year, this Court granted a temporary injunction before the April elections, in part, because a local election official was misadvising voters in his jurisdiction about the legal requirements for voting as an indefinitely confined voter. *See* Order, *Jefferson v. Dane Cnty.*, No. 2020AP557-OA (Supreme Ct. Wis. Mar. 31, 2020). Pet. App. 21. As the Court noted at the time, this “erroneous advice” could cause voters to “be misled to exercise their right to vote in ways that [were] inconsistent” with the statutes. Pet. App. 23. As the foregoing merits discussion reveals, so too here as the policies promulgated by the Commission are plainly inconsistent with Wisconsin’s election laws. And it would be unconstitutional for the Commission to assert it could usurp those laws with its own preferred policies. *See State ex rel. Ozanne v. Fitzgerald*, 2011 WI 43, ¶7, 334 Wis. 2d 70, 798 N.W.2d 436 (noting Wisconsin constitution grants “the legislative power . . . exclusively to the legislature”); *cf. Higher Soc’y of Indiana v. Tippecanoe Cnty., Indiana*, 858 F.3d 1113, 1116 (7th Cir. 2017) (“[T]he public interest is not harmed by preliminarily enjoining the enforcement of a statute that is probably unconstitutional.”). Accordingly, the balance of equities and the public interest weigh in favor of granting injunctive relief.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court issue an order permanently enjoining (or, alternatively, temporarily enjoining pending review of the merits) the implementation and enforcement of the following policies and practices, and any other practices to the extent they are related to the implementation and enforcement of such policies and practices:

(1) The policy and practice of permitting local election officials to rehabilitate insufficient witness address information, except as specifically authorized by Wis. Stat. § 6.87(9);

(2) The policy and practice of accepting the return of voted absentee ballots from individuals other than the electors themselves, except to extent specifically authorized by statute;

(3) The policy and practice of accepting the return of voted absentee ballots in unstaffed drop boxes;

The Court should issue a declaration that the above-referenced policies and practices are contrary to the statutes enacted by the State Legislature and unenforceable, and the Court should direct the Commission to promptly issue corrected guidance to all election officials statewide.

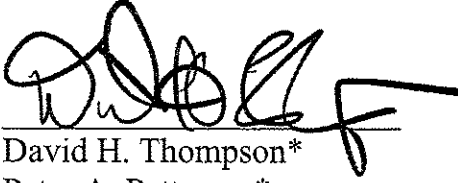
Additionally, the Court should issue any other relief that it considers just and proper.

Finally, the Court should award such other and further relief as is just and proper, including, without limitation and to the extent available, Petitioner's reasonable costs and attorneys' fees.

RETRIEVED FROM DEMOCRACYDOCKET.COM

Dated: March 15, 2021

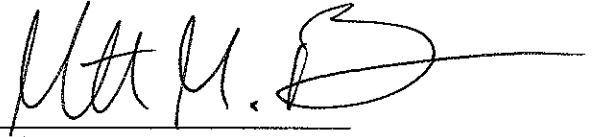
Respectfully submitted,



David H. Thompson*
Peter A. Patterson*
COOPER & KIRK, PLLC
1523 New Hampshire Ave., NW
Washington, DC 20036
(202) 220-9600
(202) 220-9601 (Fax)
dthompson@cooperkirk.com

Counsel for Petitioners

*Applications to appear *pro hac vice*
forthcoming



Matthew M. Fernholz
Counsel of Record
CRAMER, MULTHAUF, &
HAMMES, LLP
1601 East Racine Ave.,
Ste. 200
P.O. Box 558
Waukesha, WI 51387
(262) 542-4278
(262) 542-4270 (Fax)
mmf@cmhlaw.com

RETRIEVED FROM DEMOCRACYDOCKET.COM