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01-28-2022  
Clerk of Circuit Court  
Waukesha County  
2021CV000958

STATE OF WISCONSIN

CIRCUIT COURT  
Branch 1

WAUKESHA COUNTY

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RICHARD TEIGEN, et al.,

Plaintiff,

-vs-

File No. 2021-CV-000958

WISCONSIN ELECTION COMMISSION,

Defendant.

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MOTION HEARING

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Proceeding held on January 13, 2022

BEFORE THE HONORABLE MICHAEL O. BOHREN  
CIRCUIT COURT JUDGE, PRESIDING

A P P E A R A N C E S

LUKE N. BERG, Attorney at Law, appeared on behalf of the Plaintiffs.

STEVEN CARL KILPATRICK, Attorney at Law, appeared on behalf of Defendant, Wisconsin Election Commission.

JOHN M. DEVANEY and CHARLES GRANT CURTIS, JR., Attorneys at Law, appeared on behalf of Defendant, Democratic Senate Campaign Committee.

SCOTT THOMPSON, Attorney at Law, appeared on behalf of Defendants, Disability Rights of Wisconsin, Faith Voices for Justice, and the League of Women Voters of Wisconsin.

**ORIGINAL**

ROSE MARIE RODERICK  
Official Court Reporter

**TRANSCRIPT OF PROCEEDINGS**

1  
2 THE COURT: I'll call the matter of Richard  
3 Teigen and Richard Thom versus Wisconsin Election  
4 Commission; Intervener, Democratic Senate Campaign  
5 Committee, Intervener, Women Voters of Wisconsin;  
6 Disability Rights of Wisconsin; Faith Voices for Justice,  
7 and I think it might be League of Women Voters of  
8 Wisconsin.

9 That's Case Number 21-CV-958. It's here  
10 for a motion hearing and oral arguments. All appearances  
11 today are by Zoom. We are, however, in open court. The  
12 matter is being live streamed as well through  
13 WICourts.gov. However, just for the note, there is no one  
14 in the courtroom but court personnel. So it's the  
15 attorneys by Zoom and whoever is witnessing the activity  
16 through live stream.

17 With that being said, who appears  
18 today for the Plaintiff?

19 MR. BERG: Luke Berg with the Wisconsin  
20 Institute for Law and Liberty on behalf of the Plaintiffs,  
21 Your Honor.

22 THE COURT: Thank you. Good afternoon.  
23 Who appears on behalf of the Election Commission?  
24 Anybody here on behalf of the Election Commission? We may  
25 be missing somebody then. Who is here for the Democratic

1 Senate Campaign Committee?

2 MR. DEVANEY: Your Honor, John Devaney.

3 And I believe my colleague, Chuck Curtis, is on as well.

4 THE COURT: Mr. Curtis, are you here?

5 MR. CURTIS: Yes, Your Honor, this is  
6 Charles Curtis. I am present, speaking from Madison.

7 THE COURT: We're not seeing you on the  
8 Zoom. Are you here by telephone?

9 MR. CURTIS: I'm sorry, Your Honor. I just  
10 turned on the video.

11 THE COURT: There you go. Well, good  
12 afternoon. All right. Thank you. And then who is here  
13 for the Women Voters of Wisconsin?

14 MR. THOMPSON: Your Honor, that would be  
15 me, Scott Thompson from Law Forward. I represent the  
16 League of Women Voters of Wisconsin, Disability Rights of  
17 Wisconsin as well as Wisconsin Faith Voices for Justice.  
18 Good afternoon.

19 THE COURT: Thank you. At my CCAP list of  
20 parties for Mr. Thompson's clients it lists in the  
21 beginning Women Voters of Wisconsin and then at the very  
22 end it says League of, so I'm sorry if I misstated your  
23 client's identity. Now, we have to locate the  
24 representative for the State. Do we have anybody else in  
25 the waiting room? We have to call them then.

1 MR. CURTIS: Your Honor, this is Charles  
2 Curtis for the DFCC. I know from having spoken with  
3 lawyers from the Department of Justice that they, of  
4 course, intend to be present. There may be some technical  
5 issues going on with the links and so forth, but I am  
6 absolutely confident they're trying to get in right now.

7 THE COURT: Well, I'm sure that's the case.  
8 I'm sure it's one of our issues. I don't have a CCAP  
9 phone number for them though. Mr. Devaney, where are you  
10 located? Are you in Ohio or Washington?

11 MR. DEVANEY: Is that for me, John Devaney?

12 THE COURT: I asked where you're located.

13 MR. DEVANEY: I'm based in D.C., but I'm  
14 actually in South Carolina.

15 THE COURT: You've got some nice weather  
16 then.

17 MR. DEVANEY: Yes, I do. I'm fortunate.

18 MR. BERG: Your Honor, I just got an e-mail  
19 from the commission's attorney. He was having trouble  
20 logging on.

21 THE COURT: He's coming in now, so we've  
22 called the case. Just to be clear, we've called the case  
23 of Teigen and Thom versus Wisconsin Election Commission.  
24 All the appearances have been made but for the election  
25 commission. Who appears today for the election

1 commission?

2 MR. KILPATRICK: Good afternoon, Your  
3 Honor. My name is Steven Kilpatrick on behalf of the  
4 Defendant, Wisconsin Election Commission. I apologize for  
5 being late and having trouble logging on.

6 THE COURT: I'm glad you were able to make  
7 it. We were actually just discussing what all people  
8 discuss when there's nothing else to do, the weather. So  
9 we're glad to have you come in.

10 So as I indicated, all persons are by Zoom  
11 today. As I reported earlier, we're in open court, on the  
12 record. Our courtroom is empty, as you may see by the  
13 video presentation. The Court is in a new courtroom in a  
14 courthouse addition that was recently opened in Waukesha,  
15 so our electronic and technology should be up-to-date,  
16 although we've had issues with it as well.

17 We do -- as I indicated earlier, we are  
18 live streaming the proceedings at WICourts.gov and we've  
19 had a number of media outlets contacting the court. And I  
20 think they're witnessing and following along through the  
21 live streaming. With that then, I think we're prepared to  
22 proceed today. I'll just report that I've had the briefs  
23 and I've read them. I have the main briefs. I reviewed  
24 the complaint, obviously. I have the brief in support of  
25 the motion for summary judgment by the Plaintiffs. I've

1 got the commission's brief in opposition. I have the  
2 intervener DFCC's brief in opposition. I have the League  
3 of Women Voters, et al.'s brief in opposition. I have  
4 Plaintiff's reply brief in support of the motion.

5 I kept -- I copied -- for my purposes here  
6 in court today, I copied the Katherine Spitz affidavit  
7 because it has attached to it the memos that are at issue,  
8 and I wanted to keep those where I could see them. So  
9 with that, I'm prepared to proceed with the arguments  
10 today. So that would be Attorney Berg?

11 MR. BERG: Your Honor, I just want to begin  
12 by noting that we have two motions pending, both the  
13 motion for summary judgment and a motion for a preliminary  
14 injunction. My understanding from reading the briefs is  
15 that we are all in agreement that the case can be decided  
16 on the merits now on summary judgment, so I intend to  
17 focus my argument on the merits. If that's not the case,  
18 I will address the preliminary injunction factors later,  
19 but for now, I will focus on the merits and the  
20 simultaneous motion.

21 THE COURT: Yes, thank you.

22 MR. BERG: Your Honor, this case is  
23 ultimately about the Rule of Law, the integrity and the  
24 consistency of the election process, and requiring the  
25 Election Commission to follow and enforce the rules set by

1 the legislature. I'm going to start with the purpose for  
2 the provisions that we'll be talking about because I'm  
3 going to keep coming back to it throughout the argument.

4 In 6.84, the legislature explained that  
5 while voting is a right, absentee voting is a privilege  
6 that comes with certain risks that are not present for  
7 in-person voting on election day. Two of those risks the  
8 legislature called out specifically, overzealous  
9 solicitation of and undue influence on absent electors.  
10 In other words, the legislature's intention is to ensure  
11 there's no undue pressure on absent electors, that this is  
12 actually their vote. In light of that, the legislature  
13 has made clear that the absentee voting procedures are  
14 mandatory and must be strictly construed.

15 Now, under the law there are two and only  
16 two ways to return an absentee ballot: By mailing it or  
17 delivering it in person to the Municipal clerk. The law  
18 also makes clear that voters themselves must do the final  
19 act of casting their ballots. They must be the ones to  
20 mail it or deliver it. Now, the commission's two memos  
21 attempt to expand the ways that voters can return and vote  
22 their absentee ballots.

23 So there's two main questions in this case:  
24 The first is, who can return an absentee ballot. Is it  
25 the voter him or herself or is it anyone, which is the

1 commission's position. Second, are drop boxes legal.

2 There are three aspects to the drop boxes and I'll get to  
3 that later.

4 The question I'm going to start with is the  
5 first one, who can return an absentee ballot. The text of  
6 the statute says that a ballot shall be mailed by the  
7 elector or delivered in person to the municipal clerk.  
8 Our position is the text is abundantly clear, it has to be  
9 the elector. Now, the main argument made in response to  
10 that on the other side is that the phrase "by the elector"  
11 only applies to mailing a ballot.

12 Now, there are six reasons why that's not  
13 right. First is the placement within the sentence of the  
14 phrase "delivered in person." Obviously, a delivery in  
15 person assumed that there is a person involved. So the  
16 obvious question is, who is that person. The phrase  
17 "delivered in person" immediately follows elector and  
18 immediately precedes the phrase "to the municipal clerk."  
19 So the elector is the deliverer, and the clerk is the  
20 recipient. There is no other person mentioned in the  
21 sentence anywhere or anywhere nearby, so the idea that the  
22 person can be anyone whatsoever is simply not a plausible  
23 reason.

24 Second, the full context of the paragraph  
25 surrounding that sentence, the whole paragraph focuses on



1 requirements on the elector, what the elector must do.  
2 The elector has to make a certification. The elector has  
3 to mark a ballot. The elector has to fold the ballot.  
4 The elector has to enclose proof of residence. Then the  
5 ballot has to be mailed by the elector or delivered in  
6 person. Read in context of the whole paragraph, it's very  
7 clear this is all about what the elector has to do.

8 Third, expanding the context even further  
9 to other statutes makes clear that when the legislature  
10 intends to allow voters to delegate some of their  
11 responsibilities related to voting to someone else, it  
12 says so specifically and clearly and it provides  
13 limitations, procedures and restrictions on those  
14 exceptions.

15 So to give an example, the very next  
16 subsection in 6.87(5) allows electors who have a hard time  
17 reading or writing to use someone to help them mark the  
18 ballot. But importantly, this is limited. There's  
19 criteria that only applies to voters who have a hard time  
20 reading or writing. It also requires a declaration by the  
21 elector that they have a hard time reading or writing. It  
22 imposes restrictions on who that agent can be. It can't  
23 be the elector's employer, and the agent is required to  
24 sign the ballot.

25 Other examples include hospitalized

1 electors, that's in 6.86(3); electors in nursing homes and  
2 retirement communities, 6.875; there are separate  
3 procedures for disabled electors in 6.82; separate  
4 procedures for indefinitely confined electors in 6.86(2).  
5 All of these have specific criteria, procedures and  
6 protections which strongly indicate that when the  
7 legislature wants to allow an agent, it says so  
8 specifically.

9 Fourth, our interpretation is consistent  
10 with the expressly declared legislative purpose of  
11 ensuring that this is the elector's vote. Voting should  
12 be easy, no doubt, but should also require some effort on  
13 behalf of the voters so we know that this is actually  
14 their vote. This is how voting happens at the polling  
15 place on the election day. Each voter has to cast their  
16 own vote. The same thing is true of absentee votes. The  
17 voter has to cast their vote by being the one to put it in  
18 the mail or deliver it in person.

19 Fifth, the legislature has told us the  
20 procedures have to be strictly interpreted. When the law  
21 says body elector, it means body elector.

22 Six, our position is consistent with 12.13  
23 (3n), which makes it a crime to receive a ballot from or  
24 give a ballot to a person other than the election official  
25 in charge. Now, their position is that anyone can receive

1 a ballot or an elector can give their ballot to anyone  
2 else for any reason. If that is the case, that provision,  
3 12.13, effectively has no meaning and no weight.

4 Now, the other side undoubtedly is going to  
5 attempt to frame this case around hypotheticals that might  
6 at first seem sympathetic. Why can't a spouse put their  
7 spouse's ballot in the mail. But I want to be clear and I  
8 want to emphasize that the issue in the case is not  
9 limited to that. There are only two options in this case:  
10 Either "by the elector" means what it says, by the  
11 elector, or the commission's position is true, that anyone  
12 and everyone can return an absentee ballot. There is no  
13 text in the statute anywhere that would cover limited  
14 hypotheticals, so it's either all or nothing.

15 But that would mean if the commission's  
16 position is correct, what that would mean is that I can go  
17 around my neighborhood collecting ballots from my  
18 neighbors and deliver them. It also means that a  
19 political operative can go around collecting ballots and  
20 delivering them. That can't be what the statute means.

21 I would also say with respect to any  
22 hypotheticals the other side raises, our position is  
23 consistent with what happens on voting day. We don't  
24 allow spouses to vote for each other on election day in  
25 person at the polling places. The same is true for

1 absentee ballots.

2 The other argument that the commission  
3 makes and interveners sort of briefly wave at is that the  
4 statutes allows for electors to pick an agent who can drop  
5 their ballot in the mail or deliver it in person. I would  
6 note that that argument contradicts their first argument.  
7 Their first argument is the phrase "by the elector" only  
8 applies to mailing, but then they say actually the phrase  
9 "by the elector" doesn't even apply to mailing either  
10 because the elector can simply select an agent to mail the  
11 ballot for them.

12 Nothing in the text whatsoever supports  
13 that argument. There's no suggestion anywhere that an  
14 elector can select an agent. There's no definition of  
15 elector that includes an agent. There is, by the way, a  
16 definition of municipal clerk that includes an agent,  
17 showing that the legislature knew how to do that and  
18 that's what it intended.

19 And then, of course, there are all those  
20 other situations that I already mentioned where the  
21 legislature allows an agent for hospitalized electors,  
22 electors in nursing homes and all the other ones. So I  
23 think it is simply implausible and contrary to the strict  
24 interpretation mandate to read in, without any textual  
25 support, a position that an elector can delegate their

1 responsibility to be the one to cast their vote. So  
2 unless there are questions about that, I'm going to turn  
3 to the drop boxes portion now.

4 THE COURT: You can proceed.

5 MR. BERG: So with respect to drop boxes,  
6 Your Honor, I want to start at the high level. There's  
7 nothing anywhere in state law that mentions or authorizes  
8 drop boxes. You can search the statutes and you will not  
9 find the word drop box anywhere in any statute. What that  
10 means is there are no procedures, there are no  
11 requirements, there are no limitations on drop boxes if  
12 they are allowed. There are no restrictions on where they  
13 can go, on how many there can be, on how secure they  
14 should be, how frequently they should be checked, on who  
15 can check them, on how they should be monitored.

16 Now, the commission's memos have some  
17 suggested best practices for the drop boxes, but the  
18 defendants even argue in response to our rule making  
19 argument that nothing in the memos is binding. So none of  
20 these best practices, as they argue, are required because  
21 they're not in law anymore.

22 The upshot of their argument, the result,  
23 if this Court accepts their argument, then effectively a  
24 shoe box on a bench in a park would be legal for  
25 collecting ballots. Now, that's absurd, of course, but

1 that's the logical consequence of the position that the  
2 commission is taking and the interveners are taking. That  
3 can't possibly be right, especially given the strict  
4 construction that's required. Every other time that the  
5 legislature has authorized an alternative method of  
6 voting, it has provided careful procedures, criteria and  
7 requirements. There's nothing in the state law that  
8 allows for drop boxes.

9 Now, before I get into the weeds, I want to  
10 briefly address a footnote in our brief that the  
11 interveners makes a big deal out of. They argue that we  
12 have conceded away our case, that we admit that drop boxes  
13 are permissible in some situations and not others. I just  
14 wanted to clarify, the sole purpose of that drop box was  
15 to address one single, very narrow situation. So if I  
16 bring in my absentee ballot, I have to personally deliver  
17 it to the clerk --

18 THE COURT: Let me just get to the  
19 footnote. What page is that on? Is that Page 11?

20 MR. BERG: Yes. So the circumstance that  
21 we were thinking about there is, if I bring in my absentee  
22 ballot to the clerk's office and the clerk is sitting at  
23 her desk and I say, Here is my ballot; and the clerk says,  
24 Okay, put the ballot into this secure receptacle right  
25 next to me, that is permissible. There's nothing under

1 state law that permits that. That's the only time where  
2 a, quote, unquote, drop box would be allowed. All the  
3 other examples that we're talking about, a drop box in the  
4 park, on the street corner, at a library, even outside the  
5 clerk's office overnight, all of that conflicts with  
6 multiple state laws.

7 So there are three different laws at play  
8 when it comes to drop boxes. I'm going to split our  
9 arguments into three different categories to make the  
10 analysis more clear. First, we've argued that an  
11 unattended drop box, a drop box with no one present,  
12 violates the in-person delivery requirements in 6.87. The  
13 text again says that a ballot shall be delivered in person  
14 to the municipal clerk.

15 Dropping the ballot into a box with no one  
16 else nearby is not in-person delivery under any reasonable  
17 interpretation of that phrase. Coming back to the  
18 purpose, the purpose of the in-person requirement is to  
19 ensure that the elector him or herself is actually  
20 returning his or her own ballot and only his or her own  
21 ballot.

22 It's much harder to drop off someone else's  
23 ballot if there's a person there to receive it. It's  
24 almost impossible to return multiple ballots. If somebody  
25 showed up at the clerk's office with ten ballots in hand,

1 that immediately raises questions to the clerk. Drop  
2 boxes, on the other hand, make this easy and impossible to  
3 detect.

4 The other side has no good textual  
5 counterclaim. Their whole argument is that dropping the  
6 ballots into a box is in-person delivery, but that's just  
7 asserting the conclusion. They don't explain. In-person  
8 delivery means there are two people present, the deliverer  
9 and the recipient. That interpretation is supported by  
10 the placement of that phrase in the sentence as well.  
11 Delivery in person to the clerk immediately precedes to  
12 the municipal clerk, so the municipal clerk or an  
13 authorized representative has to be present, not just the  
14 elector.

15 The second way that drop boxes violate  
16 state law is the location where they go. 6.855 provides a  
17 mechanism by which local municipalities can designate an  
18 alternate location for absentee voting. That provision  
19 clearly establishes that the office of the municipal clerk  
20 is the default location to which absentee ballots need to  
21 be returned. So I'm going to read the text of the  
22 statute. I'll skip a couple of sections. It says, "A  
23 municipality" --

24 THE COURT: Counsel, Mr. Berg, try reading  
25 a little slower. Remember, the reporter has to take



1 things down. Just slow the pace. That's fine. Thank  
2 you.

3 MR. BERG: The text of 6.855 says, "A  
4 municipality may elect to designate the site other than  
5 the office of the municipal clerk," skipping ahead  
6 briefly, "as the location," skipping ahead, "to which  
7 voted absentee ballots shall be returned by electors for  
8 any election." You just flip the order of that sentence,  
9 the obvious implication is that the voted absentee ballots  
10 shall be returned to the office of the municipal clerk  
11 unless an alternate site is designated.

12 Now, this is a simple application of the  
13 *expressio unius doctrine*, that the expression of one thing  
14 implies the exclusion of others. The legislature has  
15 provided one and only one method for alternate locations  
16 other than the office of the municipal clerk, and it  
17 hasn't provided any other methods. So unless a clerk --  
18 or a municipality, sorry, follows that process, no other  
19 locations are authorized.

20 Now, the Wisconsin Supreme Court this  
21 summer in a case called *James v. Heinrich*, 2021 WI 58,  
22 applied this principle in a very similar situation. So  
23 the issue in that case was whether local health officers  
24 have the authority to close schools.

25 The statute surveying their authority

1 didn't say anything about closing schools, but an adjacent  
2 statute for state health officials said they have the  
3 authority to close schools. And the Supreme Court held  
4 that because the statutes assign that power to state  
5 officials but not to local officials, local officials did  
6 not have that power.

7 The key holding is in Paragraph 18 where  
8 the court said, "If the legislature did not specifically  
9 confer a power, the exercise of that power is not  
10 authorized." That's exactly the case here. The  
11 legislature has specifically authorized one and only one  
12 method for designating an alternate site under 6.855. And  
13 it even says specifically that if one is not authorized,  
14 the default is the office of the municipal clerk.

15 Now, this requirement also imposes  
16 important restrictions. So under 6.855, clerks are  
17 required to give notice of alternate sites. There are  
18 restrictions on who can staff an alternate site.  
19 Accordingly, the statute says that no alternate sites can  
20 be designated that would give a political advantage. Now,  
21 the commission's position is that drop boxes can  
22 effectively go anywhere. If that's true, what that means  
23 is that locations could be designated that would confer  
24 political advantage.

25 So I'll just give one real world example.

1 The City of Racine recently authorized mobile voting  
2 units, an RV that they intend to drive around the city to  
3 collect ballots. It's not hard to see how that could be  
4 abused for political advantage. But if the commission's  
5 position is correct, that's perfectly authorized. A city  
6 can drive a vehicle around to wherever it wants collecting  
7 ballots.

8 Now, the commission argues that this  
9 section doesn't apply because the drop box doesn't allow  
10 for in-person absentee voting, but that completely misses  
11 the point. Essentially what they're arguing is that  
12 because we didn't follow all of 6.85, we don't have to  
13 follow any of it. That's not how the law works. 6.855 is  
14 the exclusive method to designate an alternate site. Drop  
15 boxes don't fit in that method; therefore, the only place  
16 that absentee ballots can be returned is either to the  
17 office of the municipal clerk or an alternate site  
18 properly designated under 6.855.

19 Finally, the third issue is who can receive  
20 an absentee ballot. Now, 6.855 says that it has to be  
21 delivered to the municipal clerk, and the definition  
22 includes authorized representative but it doesn't define  
23 who the authorized representative can be. But there are  
24 two other relevant statutes at play. One is 7.302(a),  
25 which says, Only election officials appointed under this

1 section may conduct an election; and 12.13(3)(n), which I  
2 have already discussed, which makes it a crime for any  
3 person to receive a ballot from or give a ballot to a  
4 person other than the election official in charge.

5 In light of those two statutes, the only  
6 reasonable interpretation is that the only authorized  
7 representatives that -- that authorized representatives  
8 can only be election officials under 7.30, and that  
9 statute provides important restrictions, as before. It  
10 imposes certain training requirements under 7.30(2)c). It  
11 requires an oath of office, under 7.30(5). And it  
12 requires that the official be the qualified elector in the  
13 jurisdiction.

14 Finally, our alternative argument is that  
15 the memos are unpromulgated and unlawful. So even if this  
16 court rejects all the other arguments, the memos are still  
17 invalid and this Court should still declare them invalid  
18 and unlawful, because they were not promulgated as rules.  
19 Now, the Supreme Court has set forth a five-part test for  
20 determining what is a rule. I'm not going to go through  
21 all those parts, they're in our brief, but there's only  
22 one part that the parties disagree about.

23 And the commission's position is that its  
24 memos do not have the effect of law and therefore they are  
25 not rules. They say it doesn't have the effect of law

1 because it doesn't bind anything. It doesn't require  
2 clerks to have drop boxes. That's not the only type of  
3 law. There are laws that prohibit things. There are laws  
4 that require things. But then there are laws that  
5 authorize and that is the type that the commission's memos  
6 fall into.

7 The commission is charged with overseeing  
8 elections in the state. It is charged with administering  
9 the election laws. It is charged with providing guidance  
10 to clerks. So when it says something is lawful, municipal  
11 clerks follow its lead. It has said in these memos that  
12 drop boxes are lawful and it is lawful for anyone and  
13 everyone to return someone else's ballot. So when it says  
14 that, that has the effect of law, and therefore, it should  
15 have been promulgated as a rule.

16 So I will leave off there. I will just say  
17 one thing about remedy. We're asking this Court to do  
18 four things: We're asking it to declare that the memos  
19 are inconsistent with the law. We're asking it to issue  
20 an injunction that does three separate things: First,  
21 that it requires the commission to remove its prior memos  
22 from its website; to refrain from issuing further  
23 statements for guidance, that's inconsistent with the law;  
24 and third, to correct its prior guidance within ten days.

25 So we ask the Court to grant Plaintiff

1 summary judgment and to issue a remedy as I just outlined.  
2 Thank you.

3 THE COURT: Thank you. I'll turn to the  
4 State, to the Election Commission.

5 MR. KILPATRICK: Thank you, Your Honor.  
6 Again, my name is Steven Kilpatrick. I am the attorney  
7 for the Defendant in this case, the Wisconsin Election  
8 Commission. I met with counsel for intervener defendants  
9 about how best to prepare arguments for today. We thought  
10 that rather than hearing from each party on all subjects,  
11 we want to limit redundant arguments for you and we  
12 propose a plan and I'm wondering if the Court will indulge  
13 that plan for a bit.

14 THE COURT: Go ahead. I like the idea of a  
15 plan.

16 MR. KILPATRICK: First, there are two  
17 threshold questions that should be addressed before  
18 reaching the merits of the Plaintiff's claim. One is with  
19 regard to a directive issued to the commission by the  
20 legislature's Joint Committee for Review of Administrative  
21 Rules. Yesterday you received a letter from Attorney  
22 Scott Thompson, counsel for Disability Rights of Wisconsin  
23 and Wisconsin Faith Voices for Justice and the League of  
24 Women Voters of Wisconsin, and Attorney Thompson would  
25 like to address that directive and how it may affect the

1 Plaintiff's claims in that case.

2 Second, defendant intervener Democrat  
3 Senatorial Campaign Committee put forth an argument  
4 asserting that the Plaintiffs lacked standing to bring  
5 their claims. And we believe it makes sense for Attorney  
6 John Devaney, counsel for DFCC, to make that threshold  
7 issue before reaching a discussion on the merits.

8 Then after those threshold issues are  
9 addressed, we thought that we would divide up some time to  
10 address the merits as to both of the claims. We will do  
11 our best not to make redundant arguments, but the  
12 commission would go first as defendant and then the  
13 intervener defendants would go next and try not to make  
14 redundant arguments. If that is a plan that's okay with  
15 you, it would be great if I could turn it over to Attorney  
16 Thompson.

17 THE COURT: We can proceed on that basis.  
18 I'll accept the plan.

19 MR. KILPATRICK: Thank you, Your Honor.

20 THE COURT: Attorney Thompson?

21 MR. THOMPSON: Thank you, Your Honor. Your  
22 Honor, I'm not certain if the Court was able to digest the  
23 letter I sent in late yesterday afternoon.

24 THE COURT: I have it in front of me  
25 though. I haven't studied it, but I have it in front of

1 me.

2 MR. THOMPSON: Very well. Let me tell you  
3 the gist of why we brought that to the Court today. So  
4 state statute specifically 227.26(2)(b) describes a  
5 mechanism by which the Joint Committee for Review of  
6 Administrative Rules, which people often call JCRAR, can  
7 perform something that on its face seems akin to something  
8 like a judicial function. But I would like to read that  
9 provision to the Court so we're all on the same page.

10 THE COURT: Let me get out the statutes and  
11 then I can follow along with that.

12 MR. THOMPSON: Perfect.

13 THE COURT: 227.26?

14 MR. THOMPSON: Correct. And then it's  
15 (2)(b).

16 MR. DEVANEY: The provision that I'm  
17 referring to, Your Honor, reads as follows: "If the  
18 committee," the JCRAR, "determines that a statement of  
19 policy or an interpretation of a statute meets the  
20 definition of a rule, it may direct the agency to  
21 promulgate the statement or interpretation as an emergency  
22 rule under Section 227.24(1)(a) within 30 days after the  
23 committee's action."

24 So why am I bringing this up, Your Honor.  
25 Well, on Monday of this week JCRAR moved and passed said



1 motion that, in part, addressed the guidance at issue here  
2 concerning drop boxes. That motion, as I identified in a  
3 letter to the Court, described that the committee appears  
4 to have determined that the guidance qualifies as a rule,  
5 and the past motion, on its face, appears to instruct the  
6 Defendant, Wisconsin Elections Commission, now to  
7 promulgate such an emergency rule under the provision  
8 identified in the statute.

9 So why does this matter. Well,  
10 Your Honor --

11 THE COURT: Let me just -- wait, let me  
12 read -- I believe in your letter you stated what the  
13 wording of the motion was, so let me read that. Did  
14 you -- let me just look at the entire submission. What  
15 was submitted was only the letter, correct?

16 MR. DEVANEY: Correct.

17 THE COURT: Did you submit -- do you have  
18 what the legislative committee was addressing when they  
19 passed the motion?

20 MR. THOMPSON: Well, Your Honor, I believe  
21 that is identified by the language of the motion. It  
22 says, "The written guidance relating to the return of  
23 absentee ballots to drop boxes." The other motion, which  
24 I'm not certain applies for present purposes, concerns  
25 address correction of errors and omissions. But it's our

1 at least preliminary understanding that this is the  
2 guidance that is at issue in this case, and that's why we  
3 thought it most prudent for this Court to at least digest  
4 this from the outset, because at this point what the  
5 statutes at least suggest is that a legislative mechanism  
6 has been triggered, which has simultaneously forced an  
7 executive function through the Elections Commission.

8 So what does that mean? I think there is a  
9 lot of uncertainty, Your Honor, about how the emergency  
10 rule promulgation process would complicate any final  
11 judgment or order that this court would issue. It seems  
12 as if it's not necessarily a cart-before-the-horse  
13 problem, but almost as if this court is stuck between the  
14 cart and the horse, Your Honor.

15 So it seems, given the uncertainty,  
16 I confess that I'm not even certain the Elections  
17 Commission has had time to confer with their counsel on  
18 how they're going to respond to this direction from JCRAR.  
19 It seems that perhaps in deference to the coordinate  
20 branches of government and in the interests of economy,  
21 resources allocation, that it could be prudent to withhold  
22 any sort of final judgment in this matter while this newly  
23 initiated action is pending.

24 THE COURT: All right. Thank you. The  
25 question I was raising was in your letter as to the first

1 bullet point, which would be the motion that you focused  
2 on. It does state that as the preliminary part move, that  
3 the joint committee pursuant to stats, quote, determines  
4 that the written guidance of the Wisconsin Elections  
5 Commission relating to the return of absentee ballots to  
6 drop boxes as described by the Legislative Audit Bureau  
7 below meets the definition of a rule under Chapter 227,  
8 unquote.

9 I'm concerned about what that guidance is  
10 actually. I understand what the concept is and the  
11 concept might very well be the same, but I would think  
12 that in order for my court to have an analysis and  
13 evaluation of it, I'd want to see what they actually  
14 consider, what the wording was, and what they're talking  
15 about. But that we can --

16 MR. THOMPSON: Your Honor --

17 THE COURT: Go ahead.

18 MR. THOMPSON: I was just going to say I do  
19 not think it would be very difficult for us to ascertain  
20 whatever you're looking for and to provide it to Your  
21 Honor. My interest in sending you the letter yesterday  
22 was simply to flag it as quickly as our office could. If  
23 it would be of interest, I'm sure we can make sure those  
24 documents are submitted.

25 THE COURT: I will allow you to pursue any

1 course you wish to pursue, but thank you for the  
2 information.

3 MR. KILPATRICK: Your Honor, if I may, this  
4 is Attorney Kilpatrick. I just wanted to let you know  
5 that I've been in conversation with in-house counsel for  
6 the commission and there is at this point a meeting of the  
7 commissioners, I believe, on January 28<sup>th</sup> in which this  
8 issue is going to be addressed. So I do not think that  
9 the commission has had the opportunity to yet meet with  
10 counsel and discuss this directive from JCRAR, but it is  
11 going to happen before the end of the month. I just  
12 wanted to let you know.

13 THE COURT: All right. Thank you.  
14 I appreciate that information as well.

15 MR. BERG: Your Honor, would you like me to  
16 address this issue now or would you like me to address it  
17 after all of the other issues?

18 THE COURT: I think we should cover it all  
19 at one time. So if we address the issue at the same time,  
20 let's hold back to regular rebuttal argument.

21 MR. BERG: Sounds good.

22 THE COURT: So with that then, if Attorney  
23 Thompson is complete on his position, then we'd move on to  
24 Attorney Devaney with regard to standing.

25 MR. DEVANEY: Yes, thank you, Your Honor.

1 Your Honor, I want to thank the Court for allowing me to  
2 appear pro hac vice. Your Honor, as the Court is aware,  
3 municipal election officials in Wisconsin have significant  
4 discretion. In the 1,850 jurisdictions, municipalities --  
5 actually plus that -- in Wisconsin, there is significant  
6 discretion given to local election officials.

7 And in the context of standing, Your Honor,  
8 there is no case establishing that voters in one municipal  
9 jurisdiction have standing to challenge the voting  
10 practices and procedures in any of the other 1,850 voting  
11 jurisdictions in Wisconsin.

12 Here, Plaintiffs do not even live in  
13 jurisdictions that have drop boxes, they've never used  
14 drop boxes, and at least one of the Plaintiffs, Plaintiff  
15 Teigen, has testified in deposition he has no intention of  
16 using a drop box.

17 Plaintiffs present no more than generalized  
18 grievance about the administration of the election  
19 statutes in question. They claim only harm to their and  
20 every other citizen's interest in proper application of  
21 these laws. This argument, Your Honor, is insufficient  
22 for standing purposes. It is Plaintiff's burden to  
23 demonstrate a personal stake in the outcome of the  
24 controversy separate and apart from the public at large.

25 They have not done that and they cannot do

1 so, and Your Honor, what they're essentially asking you to  
2 do is give an advisory opinion on how the statutes and  
3 questions should be applied using various hypothetical  
4 scenarios.

5 Now, in response to --

6 THE COURT: Now, just before you go  
7 further, I've read the pleadings up to this time as being  
8 directed at the Election Commission, not being directed at  
9 any particular local election official, county clerk or  
10 municipal clerk. You've obviously read it a different  
11 way?

12 MR. DEVANEY: No, Your Honor, that is  
13 correct, but the point with respect to standing is local  
14 municipalities have significant discretion as to how to  
15 administer elections. And what essentially these  
16 Plaintiffs are asking you to do is to -- they're alleging  
17 that you ought to give an opinion that affects how that  
18 discretion ought to be exercised.

19 But the point is, they're not in  
20 jurisdictions where they have drop boxes, they don't use  
21 drop boxes, they have no personalized harm that is  
22 triggered by the statutes that they're challenging.  
23 That's the point for standing, Your Honor.

24 THE COURT: Do you object to standing of  
25 the two plaintiffs to file their suit relative to what the

1 State Elections Commission does?

2 MR. DEVANEY: Yes, Your Honor, we do,  
3 again, because all they're asserting is a generalized harm  
4 to the public. They're not asserting any particularized  
5 harm to themselves. For that reason, they don't satisfy  
6 the Article III standing.

7 And Your Honor, they make three arguments  
8 in their intent to establish standing, none of which holds  
9 water. The first is that they might suffer potential  
10 personalized injury if they used drop boxes because if  
11 drop boxes are later declared to be invalid, then their  
12 vote would not count.

13 There are two problems with that argument:  
14 First, they're not in jurisdictions where there are drop  
15 boxes. One plaintiff has said he will not use one, but  
16 more important than that, Your Honor, in 2020 the Supreme  
17 Court of Wisconsin in *Trump v. Biden* made it very clear  
18 that if a voter -- and this is a quote -- dropped off  
19 their ballots where their local election officials told  
20 them they should, then those votes will count even if the  
21 method is later declared to be unlawful. And that's in  
22 *Trump v. Biden* at Paragraph 27.

23 And so even if drop boxes were declared  
24 unlawful after Plaintiffs theoretically voted by using a  
25 drop box, their votes would not be discounted or thrown

1 away. *Trump v. Biden* makes that very clear, so there's no  
2 personalized particular harm that is established by that  
3 argument.

4 Their next argument, in an attempt to show  
5 standing, is that the value of their votes will be diluted  
6 or diminished, that even a single voter, anyone, anywhere  
7 in the state, is able to vote using a drop box. They  
8 don't limit this claim to voters who are unqualified to  
9 vote in Wisconsin, nor do they provide any credible reason  
10 to believe that these hypothetical voters who would vote,  
11 in Plaintiff's terms, "not in compliance with the law,"  
12 would actually cause Plaintiffs any personal injury.

13 This identical theory of vote dilution has  
14 been pursued in many lawsuits around the country,  
15 particularly in trying to undo the November 2020 election  
16 results. And courts throughout the country, Your Honor,  
17 have uniformly rejected this vote dilution theory as  
18 raising the type of particularized personal harm necessary  
19 to establish standing. And in our brief, Your Honor, we  
20 cite a string of cases that make that point clear.

21 The last basis for standing that Plaintiffs  
22 allege, Your Honor, is so-called taxpayer standing, and  
23 they argue that the WEC essentially spent resources in  
24 preparing the two memos in question. And it goes that  
25 expenditure resources create harm for that, basically



1 state employees preparing memos.

2 Your Honor, there are a few problems with  
3 this argument. The first is if that could confer  
4 standing, then any taxpayer would have the ability to  
5 challenge in court any guidance issued by any state  
6 official, by even a memo by a state employee, because  
7 resources are used to prepare memos, of course. There is  
8 just no limiting principle if that were the law.

9 Taxpayer standing also requires proof, Your  
10 Honor, that there's been an unlawful expenditure, not just  
11 an expenditure, but one that is unlawful. And this is a  
12 quote, It must be alleged that the complaining taxpayer  
13 has sustained or will sustain some pecuniary loss separate  
14 and apart from the public as a whole. That's from the  
15 *S.D. Realty v. Sewerage Commission* case.

16 But the important point too is that  
17 expenditure, as I said, must be one that is unlawful.  
18 Here there's no question that the WEC as the agency  
19 charged with administering election laws, had the  
20 discretion to issue guidance. Now, of course, Plaintiffs  
21 disagree with the lawfulness of the guidance, but the WEC  
22 wasn't acting unlawfully in issuing guidance; therefore,  
23 any expenditure of time or money -- which, by the way, has  
24 not been quantified -- in connection with those memos  
25 doesn't create an injury because it's not an unlawful

1 expenditure, your Honor. So taxpayer standing also fails  
2 as a basis for standing.

3 My final point on taxpayer standing, Your  
4 Honor, is I would cite to the Court, as we did in our  
5 brief, to the decision of the Supreme Court of Wisconsin,  
6 *Fabick v. Evers*, which is this state's most recent  
7 application of the Taxpayer Standing Doctrine. In that  
8 case, what was being challenged or struck down were two of  
9 Governor Evers' declarations relating to public health  
10 emergencies associated with the pandemic.

11 In finding in that case that there was  
12 standing, the court held that there's a legal interest to  
13 contest governmental actions that lead to an illegal  
14 expenditure of government funds. In that case, Your  
15 Honor, that expenditure that was deemed illegal and that  
16 conferred standing was the calling out of the National  
17 Guard at the cost of about -- I think it was about a half  
18 of a million dollars. And the court cited that as a  
19 sufficient volume or a level of spending for an unlawful  
20 purpose that was sufficiently conferred as standing.

21 Here we have nothing close to that, nothing  
22 like that, nothing as that, as I've said, is unlawful and  
23 nothing that is indeed even quantifiable. So taxpayer  
24 standing also fails. And Your Honor, for these reasons  
25 that I've articulated, Plaintiffs don't have standing and

1 the Court should not reach the merits of their claims.

2 THE COURT: Thank you. Then we would move  
3 on to the merits arguments. Attorney Kilpatrick?

4 MR. KILPATRICK: Your Honor, yes. Thank  
5 you. As representing the Defendant, Wisconsin Elections  
6 Commission, I'm going to go first and I'm going to try to  
7 be quick so that we're not providing redundant arguments.  
8 I'm going to first go in reverse order and address drop  
9 boxes.

10 I think as my friend on the other side  
11 agrees, that the commission is not advocating or  
12 recommending that municipal clerks leave a shoe box on a  
13 park bench to collect absentee ballots. But on the  
14 contrary, the commission's guidance states that clerks  
15 should ensure that drop boxes are secure, can be  
16 monitored, and be regularly emptied and other more  
17 specific security measures adapted from the standards of  
18 the U.S. Cyber Security and Infrastructure Security Agency  
19 are followed.

20 In the August 19<sup>th</sup> memo, the commission  
21 stated that clerks should use drop boxes with these  
22 secured measures: Drop box must be secured and locked at  
23 all times such that only an election official or  
24 designated drop box team should have access to them, drop  
25 boxes should have locks and be sealed with one or more

1 tamper-evidence seals, chain of custody laws must be  
2 completed every time the ballots are collected, all ballot  
3 collection boxes should be numbered to make sure all the  
4 boxes are returned by the end of the day to ship and not  
5 election night. Those collecting should sign the log and  
6 record the date and time, security seal numbers and  
7 opening, and security seal numbers on the boxes locked and  
8 sealed again. So the commission is advocating for secure  
9 drop boxes.

10 More importantly, the plain language of the  
11 statute at issue, 6.87(4)(b)1, does not require the  
12 elector to return his absentee ballot at the office of the  
13 municipal clerk, as my opponent has said. There are  
14 several other statutes in the Wisconsin statutes that  
15 specifically reference the office of the clerk, and that  
16 is not in the statute at issue here. The legislature did  
17 not require that the return of an absentee ballot  
18 necessarily take place at the clerk's office. Thus, the  
19 location to where the ballot can be delivered in person  
20 can be a drop box in a place other than the clerk's  
21 office.

22 Plaintiffs also reference Wis. Stat. 6.855  
23 in their argument and addressed it today, but that statute  
24 is simply inapplicable. There was no reason for the  
25 commission to consider it in its memorandum. This statute

1 governs alternative building sites. It does not apply to  
2 drop boxes. It does not apply to 6.87.

3 6.855 governs absentee voting procedures  
4 where the elector goes to the voting sites, requests and  
5 receives an absentee ballot from an authorized  
6 representative of the clerk, completes the absentee ballot  
7 voting process while at the site, and then returns the  
8 completed ballot to the authorized representative.

9 That can happen under 6.855, and that is  
10 not the procedure at 6.87. So again, that is not an  
11 applicable statute, and the commission did not error in  
12 not providing citations in that in its memo. So again,  
13 the commission's guidance is proper. It permits the  
14 clerks the use of absentee ballot drop boxes.

15 Because of this, the Plaintiffs have no  
16 reasonable probability of success on the merits with their  
17 temporary injunction motion. So that can be denied, and  
18 their summary judgment motion can also be denied. As the  
19 Court sees fit, it can grant summary judgment to the  
20 Defendant.

21 I next want to address the next issue  
22 regarding who can return the absentee ballot. As we said  
23 in our brief, 6.87 provides two options for an elector for  
24 return of the absentee ballot: One is the envelope shall  
25 be mailed by the elector to the municipal clerk; and

1 option two is the envelope, which contains the ballot,  
2 shall be delivered in person to the municipal clerk. The  
3 statute does not specify whether the elector must  
4 personally place the envelope in a U.S. Postal Service  
5 mailbox or give to a postal service employee, and the  
6 statute does not specify whether a ballot must be  
7 delivered to the clerk -- that is, the person -- or by the  
8 voter himself.

9 The plain language of 6.87(4)(b)(1) is  
10 satisfied when an agent acting on behalf of the absentee  
11 ballot mails or otherwise delivers that ballot to the  
12 clerk or an authorized representative of the clerk.  
13 Option one allows an agent of the elector to place it, the  
14 absentee ballot, in the mailbox. And as we explained in  
15 our brief, that is based on the language that the  
16 legislature used "to mail," which means to send by the  
17 nation's postal system. And "to send" means to cause a  
18 letter or a package to go or to be carried from one place  
19 or person then to another.

20 So the statutory language of "mailed by the  
21 elector" is satisfied when a ballot in the envelope is  
22 placed in the mail either by the elector or an agent of  
23 that elector.

24 Option 2, that allows an agent of the  
25 elector to deliver the absentee ballot to the clerk by the

1 elector, does not modify delivered in person, so there is  
2 no plain language requirement that the delivery of the  
3 ballot be made by the elector. The legislature chose not  
4 to use "by the elector" in reference to the delivery  
5 option, or rather a different phrase, in person.

6 Plaintiffs claim that the statutes do not  
7 reference agent of the elector, but as just explained, it  
8 is the statute's uses of verbs mailed -- the verb  
9 "mailed," which includes to send, that allows someone  
10 other than the elector to deposit the ballot in a mailbox  
11 or hand it over to a postal employee. Plaintiff's view of  
12 the phrase "in person" simply incorrectly requires that  
13 there be two persons in the transaction, the elector and  
14 the clerk. The phrase can mean the elector physically  
15 delivering the absentee ballot the way drop is  
16 administered by the clerk.

17 I don't want to go into so much detail, but  
18 there were several, maybe three, statutes that my opponent  
19 raised: 6.875, 6.86(3) and 6.86(1)(b). Those are  
20 specific statutes that talk about safeguards, and those  
21 are created to protect and require special safeguards that  
22 are different. For instance, the 6.86(1)(b) governs  
23 voting for sequestered jurors, which requires its own  
24 special safeguard. The judge acts as the agent for the  
25 elector because of the need to protect the integrity of

1 the judicial process. This concerned giving rise to  
2 special procedures for sequestered jurors has no  
3 significant parallel for absentee voters in general.

4 Next is statute 12.13(c)(n). That says, No  
5 person may receive a ballot from or give a ballot to  
6 another person, other than being an election official in  
7 charge. This statute does not criminalize what is  
8 permitted under 6.87 or (b)1. Postal service employees  
9 would all be criminals under the statute's reading, would  
10 be criminal for special absentee ballot procedures under  
11 which the point is referenced under this statute.

12 The plaintiffs point to no language in 6.86  
13 or 6.875 that are explicit exceptions to the election  
14 broad statute of 12.13(s)(n).

15 Finally, quickly, addressing the last  
16 alternative claim of the Plaintiff's regarding the rule  
17 making, Plaintiff's rule-making claims simply fail. To be  
18 considered a rule under Chapter 227, the policy needs to  
19 have the effect of law. The language of the memo,  
20 actually of both memos, do not show that the commission  
21 was directing or ordering the municipal clerk to act in  
22 any way.

23 The first sentence of the August 2020 memo  
24 states, This document is intended to provide information  
25 and guidance. And the March 2020 memo is in a



1 question-and-answer format where the first question is by  
2 the municipal clerk, Can I establish drop boxes? The  
3 commission answers, Yes. This is not language that orders  
4 for direct municipal clerks to do anything. These memos  
5 are not like the COVID-19 related emergency order in the  
6 *Tavern League* Supreme Court case, which imposed statewide  
7 restrictions on public gatherings.

8 All these memos do is suggest and guide  
9 clerks. These memorandums also do not impose any criminal  
10 or civil forfeitures on the clerks for not following them.  
11 Plaintiffs argue and have argued today that the commission  
12 has the power to order clerks to confirm their conduct to  
13 state law. That is true but only under Wis. Stats 5.06,  
14 5.05. These memoranda are not administrative orders by  
15 the commission under those statutes. The commission is  
16 not taking the position that it has the authority to  
17 enforce compliance through any mechanism other than those  
18 in 5.06 and 5.05.

19 Finally, Plaintiffs make the novel argument  
20 that because state statutes charge the commission with  
21 administering and enforcing laws, when WEC gives the green  
22 light to something, it has the effect of law. That's  
23 Docket 127, Page 9.

24 This argument should be disregarded because  
25 the Plaintiffs unsurprisingly provide no legal authority

1 for that novel assertion. These memos are guidance  
2 documents because they guide local election officials.  
3 They do not order them to do anything. Because the memos  
4 are guidance documents, they are not rules, and because  
5 they are not rules, they do not have to be promulgated.  
6 That concludes my argument, unless you have any questions,  
7 and I'll turn it over to the intervener defendants.

8 THE COURT: Thank you. Now, the intervener  
9 defendants started with Attorney Thompson, is that what  
10 the method is now?

11 MR. THOMPSON: Yes, Your Honor.

12 THE COURT: All right. Then Attorney  
13 Thompson, go ahead.

14 MR. THOMPSON: Thank you, Your Honor.  
15 First and foremost, I would like to acknowledge that  
16 I recognize this Court appreciates the severity of the  
17 remedy requested here, that's summary judgment and an  
18 injunction. However, I think it's important for the Court  
19 to understand that based on their deposition testimony,  
20 it's clear that the Plaintiffs have little understanding  
21 of, or at least contradict, the positions that are being  
22 advanced in this court.

23 Let me explain what I mean by that to kind  
24 of frame my argument. As Your Honor is aware, at the  
25 epicenter of this case are two guidance documents. The

1 following deposition testimony from Plaintiff Toms  
2 suggests he has no idea that that's the case. I asked  
3 him, "Have you ever seen that document, Exhibit A to your  
4 complaint before today?"

5 "ANSWER: No.

6 "QUESTION: A similar question, I'm showing  
7 you what's Exhibit B to your complaint. It starts on Page  
8 18 of Docket Number 2 filed in this matter. I want to  
9 just scroll down so you can see it. QUESTION: I scrolled  
10 to the end of Exhibit B, your complaint. Before today,  
11 have you ever seen this document?

12 "ANSWER: Not to my knowledge, no."

13 Similarly, I ask Plaintiff Thom about his  
14 understanding of just the Election Commission in general.

15 "QUESTION: Have you ever spoken with  
16 anyone from the Wisconsin Elections Commission.

17 "ANSWER: No.

18 "QUESTION: Do you know what the Wisconsin  
19 Elections Commission is?

20 "ANSWER: No."

21 So Your Honor, I'd like to start my  
22 conversation with the Court here today about just the  
23 provision at issue at the base of all this. Frankly, it's  
24 21 words about an envelope. It reads, "The envelope shall  
25 be mailed by the elector or delivered in person to the

1 municipal clerk issuing the ballot or" -- key here --  
2 "ballots," plural.

3 So Plaintiffs would like this court to  
4 believe that compliance with this statute is possible only  
5 in one granular fashion at the expense of all others. As  
6 a matter of statutory interpretation, this argument falls  
7 for several reasons. First and foremost, the statute just  
8 does not say what Plaintiffs imply it suggests. The  
9 statute does not prohibit specific methods of compliance.  
10 The statute never prohibits certain methods or people on  
11 how they can return these documents. It never says that  
12 the ballot must be handed directly between the elector and  
13 the municipal clerk. It also says that -- it never says  
14 that the municipal clerk is prohibited from accepting  
15 in-person returns to a drop box that is set up by the  
16 municipal clerk. None of this is prohibited.

17 As I am sure counsel for Plaintiffs would  
18 concede, the legislature could have authored such clear  
19 prohibitions. It never did so. Now, counsel for  
20 Plaintiffs continuously moved back to 6.84's prescription  
21 that this chapter on absentee ballots must be construed in  
22 a mandatory and strict fashion. What Plaintiff's counsel  
23 has refused to inform this court is that that is not the  
24 general rule.

25 I'd like to quote from Justice Hagedorn's

1 *Trump v. Biden* decision on that, "Elections in Wisconsin  
2 are governed by Chapters 5 through 12 of the Wisconsin  
3 statutes. In applying these laws, we had a long history  
4 of construing them to give effect to the ascertainable  
5 will of the voter, notwithstanding technical noncompliance  
6 with the statutes."

7 Your Honor, that's key here because  
8 Plaintiffs are relying on a web of other statutes that  
9 stretch outside of just Chapter 6. The definition of  
10 municipal clerk is in Chapter 5, for example. The  
11 prohibition on voter fraud is in, I believe, Chapter 12.  
12 These other provisions that the Plaintiffs are relying on  
13 do not face the mandatory construction provision from  
14 Section 6.

15 Your Honor, that is just not true. They  
16 follow Wisconsin's long-standing tradition of broad  
17 application in favor of the will of the voters, again as  
18 Justice Hagedorn said, notwithstanding technical  
19 noncompliance.

20 Now again, back to the depositions, Your  
21 Honor, Plaintiff Teigen himself conceded that the level of  
22 granularity he's advancing in this lawsuit, it doesn't  
23 make sense. He testified, "Well, you know this is one of  
24 those issues where common sense has to prevail, and the  
25 statute really doesn't have to be so specific to say that

1 the ballot, at one point in time, has to touch both my  
2 hands and the clerk's hands.

3 "QUESTION: So common sense is important,  
4 correct?

5 "ANSWER: Well, I think in statutory  
6 construction common sense is important."

7 And frankly, Your Honor, I couldn't agree  
8 more. Plaintiffs have recently argued that there is no  
9 textual support for our argument. That's also just not  
10 true. Again, I would look back to the 21 words we keep  
11 talking about, The envelope shall be mailed by the elector  
12 or delivered in person to the municipal clerk issuing the  
13 ballot or ballots, plural.

14 Now, counsel for Plaintiffs has argued that  
15 the only mechanism that is appropriate is one in which  
16 someone is allowed to return his or her own ballot,  
17 singular. The statute itself contravenes that argument,  
18 and frankly, there's no way to see it otherwise, ballot or  
19 ballots. It presumes the ability of someone, Your Honor,  
20 to bring back more than just your own.

21 As Plaintiff's counsel identified, we are  
22 certainly going to be talking about the absurd results  
23 that their interpretation of the statute would bring  
24 about. And as I'm sure this Court is aware, such absurd  
25 results are to be avoided as we're interpreting statute.

1 A voter, for example, who accompanies their spouse to the  
2 municipal clerk's office would be disenfranchised if they  
3 handed their ballot to their husband or wife and said,  
4 Hey, would you mind giving this to the clerk immediately  
5 in front of us so I can vote.

6 That would be an invalid vote here in  
7 Wisconsin, according to the Plaintiffs. This is not  
8 hypothetical. This is exactly what the Plaintiffs are  
9 encouraging this court to do, again, from the deposition:  
10 "What if my girlfriend and I both walk to the mailbox  
11 together and I handed it to her under this hypothetical  
12 and said, Here, could you put this in the mail for me, and  
13 then she just dropped it in there. In that situation, do  
14 you believe that I have violated the law?"

15 Answer from Plaintiff Thom, "Yes."

16 So this is not hypothetical, Your Honor.  
17 The Plaintiffs are advancing an interpretation of the  
18 statute that is almost guaranteed to lead to absurd  
19 results. Again, from Plaintiff Thom's deposition: "Does  
20 the voter, as you understand it, have to actually put the  
21 ballot into the clerk's hands?"

22 "ANSWER: Yes.

23 "So for example, if I went to the clerk  
24 with my absentee ballot and the clerk was on the other  
25 side of side of the desk and I placed the absentee ballot

1 onto the desk and then the clerk picked it up, that would  
2 not follow the law under your interpretation, correct?"

3 Answer from Plaintiff Thom, "Yes."

4 So again, Your Honor, the language of the  
5 law is not in the Plaintiff's favor and the absurd results  
6 it would trigger are not in Plaintiff's favor. If this  
7 was not enough, the law itself under their interpretation  
8 would directly conflict with federal law. Under  
9 52USC10508, any voter who requires assistance to vote by  
10 reason of disability may be given assistance by a person  
11 of the voter's choice.

12 The interpretation of the statute that  
13 Plaintiffs advance today would render Wisconsin's entire  
14 statutory scheme in conflict with federal law simply  
15 because of this unique application of 21 words codified in  
16 a subsection to a subsection. That simply just cannot be  
17 the case. If this were not enough, undisputed in the  
18 record before the court today, Your Honor, is the fact  
19 that Plaintiff's interpretation would affirmatively  
20 preclude certain Wisconsinites from voting, and I would  
21 ask Your Honor to turn to Docket Number 117, Paragraphs 7  
22 through 9, which I will read, which come from Barbara  
23 Becker, my client, Disability Rights Wisconsin. There  
24 are --

25 THE COURT: Now, wait, wait, you asked me



1 to turn to it, so then I have to have time to do it. So  
2 that was Docket 117?

3 MR. THOMPSON: 117, Your Honor.

4 THE COURT: All right. I'm there.

5 MR. THOMPSON: Thank you. Paragraphs 7  
6 through 9 are, I think, of acute concern. They read,  
7 "There are a wide range of disabling and chronic health  
8 conditions, such as multiple sclerosis, cerebral palsy,  
9 and paralysis, which prevent these individuals from  
10 returning their absentee ballots without the assistance  
11 of another person. At the voter's request, in these  
12 situations, a person other than the voter will place the  
13 absentee ballot in the mail or return it to the local  
14 clerk on the voter's behalf." Paragraph 9 C-1, "Without  
15 the assistance of another person, these individuals would  
16 be unable to return their absentee ballots."

17 Now, what does this mean? It means that  
18 the undisputed record before the court on this question is  
19 that if the Court were to rule either on the injunction or  
20 on summary judgment in Plaintiff's favor, that a  
21 significant portion of Wisconsin's eligible voters would  
22 not be able to vote. That simply conflicts with what  
23 Wisconsin longstanding law is to give effect to the will  
24 of the voters.

25 I'm trying to scroll through my argument

1 here to make sure I don't say anything too redundant. I  
2 think it's important that the Court understands that the  
3 recent most relevant instructions from the Supreme Court  
4 of Wisconsin and comments from the United States Supreme  
5 Court approve of drop boxes. Justice Hagedorn again in  
6 *Trump v. Biden* determined that those acting on a clerk's  
7 behalf may certainly receive absentee ballots, for  
8 example, in a public park, the hypothetical that  
9 Plaintiff's counsel advanced here today.

10 Justice Hagedorn's concurrence to the  
11 majority opinion of *Trump v. Biden* makes it quite clear  
12 that the most likely outcome if this question were to be  
13 sent to the Supreme Court was that this type of receptacle  
14 or drop box is certainly within the ambit of the statute.  
15 That's the United States Supreme Court's understanding as  
16 well.

17 As Justice Gorsuch explained, "Voters may  
18 return their ballots to various no-touch drop boxes staged  
19 locally." That comes from *Democratic National Committee*  
20 *v. Wisconsin State Legislature*, 141 S.C. 28, 36.

21 Now, Your Honor, if that was not all  
22 enough, the actual procedural mechanism by which the  
23 Plaintiffs have brought this case to this court is fraught  
24 with errors that should preclude any entry of judgment at  
25 this point. In Wisconsin, a voter who believes an

1 election official has administered the election in a way  
2 that is noncompliant with the law, they have to first  
3 exhaust their administrative remedies by filing a sworn  
4 complaint with the Wisconsin Election Commission.

5 Now Your Honor, I can represent to you that  
6 there is another case pending in Waukesha County before  
7 Judge Aprahamian where that procedure was followed. But  
8 here it's undisputed it wasn't. The Plaintiff did not  
9 file their proper complaint with the Election Commission.  
10 Now, in reply, Plaintiff suggests that, oh, this can't be  
11 the case because then the Elections Commission would be  
12 judging its own misconduct.

13 That argument is a nonstarter for two  
14 reasons: First, as the Court is aware, this case is  
15 really about two guidance documents. It's clear that the  
16 author of those guidance documents, the Chief Election  
17 Official for the State of Wisconsin, Meegan Wolfe, her  
18 conduct is certainly within the purview of a complaint,  
19 the Elections Commission. If that was not enough, to take  
20 a step back, the Plaintiffs have a sovereign immunity  
21 problem. In actions filed against the state agencies, the  
22 State is conceding on some level to be sued.

23 As the Supreme Court of Wisconsin said in  
24 its unanimous decision, *PRN Associates v. the Department*  
25 *of Administration*, 2009 WI 52, "In claims against state

1 agencies, the complaining party must follow the conditions  
2 precedent for bringing suit, less the entire claim be  
3 barred by the doctrine of sovereign immunity."

4 So no matter what sort of practical  
5 implications or questions the Plaintiffs may have,  
6 sovereign immunity steps in to prevent this suit, unless  
7 they follow the proper procedure, and frankly they didn't  
8 do that.

9 Your Honor, I believe the rest of the  
10 points I intended to make have already been articulated by  
11 Mr. Kilpatrick or I believe they will be articulate by  
12 Attorney Devaney, so I will concede the rest of my time.  
13 Thank you.

14 THE COURT: All right. Thank you. We'll  
15 turn to Attorney Devaney. I think we'll take a break at  
16 this point. Let's see, I've got 3:00, okay. We'll be  
17 back at 3:15. We want to brace ourselves for the next  
18 argument.

19 (Whereupon, a brief recess was taken.)

20 THE COURT: I think we're back on the  
21 record. Can everybody hear the Court? We're all set.  
22 I took the opportunity to do some technical work with the  
23 computer as well, so we're back in the system.

24 Then Mr. Devaney, we're ready for you.  
25 Thank you for taking the break by the way, appreciate

1 that.

2 MR. DEVANEY: Thank you, Your Honor. I  
3 will do my best to supplement the statutory arguments that  
4 were made by my co-counsel and hopefully not repeat them  
5 too much. I want to level set by going back to Wisconsin  
6 Statute 6.874 (b)1, which provides, of course, that voters  
7 shall mark and return their absentee ballots in sealed  
8 envelopes, mailed to the electors or delivered in person  
9 to the municipal clerk issuing the ballot or ballots.  
10 Fundamentally what this case is about is the WEC has  
11 reasonably interpreted that language to allow voters to  
12 deliver their voted, sealed ballots to the municipal clerk  
13 by either, one, handing them to the clerk or one of the  
14 clerk's authorized representatives; or two, depositing  
15 them into secure receptacles designated and maintained by  
16 the clerk and under the clerk's jurisdiction, control and  
17 supervision.

18 And the WEC, Your Honor, has significant  
19 authority, of course, to implement Wisconsin's election  
20 laws under multiple statutes, including Wisconsin Statute  
21 5.051 in the series of subsections within that section.  
22 Just a very broad point is that as the expert agency in  
23 the administration of election law as established by  
24 statute, the WEC is entitled to deference in administering  
25 statutes, and that deference should apply here and it --

1 THE COURT: Is that a deference -- there  
2 was a case recently that, at least my understanding is,  
3 indicated that deference isn't afforded to administrative  
4 agencies. I think I've got the cite here, *Tetra Tech EC*  
5 *V. Wisconsin Department of Revenue*, 2018 WI 75.

6 MR. DEVANEY: Your Honor, I'm not familiar  
7 with that case, but I will just say that the  
8 interpretation of this agency is a very reasonable  
9 interpretation of the language. And it is important to  
10 appreciate that the Plaintiffs have conceded that drop  
11 boxes are permissible in at least one circumstance, and  
12 that is as stated in their brief, when the drop box is  
13 located in a municipal clerk's office and is staffed by  
14 someone in that office.

15 And as we say in our brief, that is a  
16 meaningful movement from their complaint, and we now have  
17 a concession, the drop boxes are lawful in that  
18 circumstance. So the question then becomes, if drop boxes  
19 are not per se unlawful, under what circumstances are they  
20 lawful?

21 And, Your Honor, the acknowledgment that  
22 the use of drop boxes in clerk's offices where they are  
23 staffed is lawful is very significant because that  
24 accounts for a significant number of the drop boxes that  
25 are in use in Wisconsin. So we just want to point out the

1 importance of that recognition on the lawfulness of those  
2 drop boxes.

3 THE COURT: See, I sense -- I'll allow  
4 counsel, Attorney Berg, to respond to the arguments, but  
5 I sense that the Plaintiff's position as it's developed on  
6 drop boxes is that when it's in the municipal clerk's  
7 office, it's essentially staffed by the clerk. There's  
8 somebody there, that the issue comes up when it's not in  
9 the clerk's office and it's not staffed by a clerk person.

10 I recognize there's a difference between  
11 having a box in the clerk's office with clerks around and  
12 people coming to drop it in. It's in a government  
13 building, it's sealed, the clerk is there. I can see that  
14 versus some other situation where the box is anyplace.  
15 But that's how I understood the distinction. Maybe I'm  
16 wrong on that and we'll hear about it, but that's how  
17 I saw it.

18 MR. DEVANEY: Your Honor, I think your  
19 understanding is consistent with mine, which is that they  
20 are acknowledging that the use of drop boxes in the  
21 clerk's office where there is a staff member is lawful.  
22 And my point is that 2.1 is that means that a significant  
23 percentage of drop boxes in Wisconsin have to be lawful;  
24 and number two, the question then becomes, if drop boxes  
25 are lawful, under what circumstances must they be used in

1 order to be lawful.

2 And the argument of the Plaintiffs is that  
3 the drop boxes cannot be outside the clerk's office, that  
4 the use of the drop boxes must be in the clerk's office.  
5 And Mr. Kilpatrick discussed this in his argument about  
6 the legislature's ability to state what it means when it  
7 comes to where activities take place. And I just want to  
8 expand on that, Your Honor.

9 At Pages 8 to 10 of our brief, we make the  
10 point that when the legislature wants to say where an  
11 activity should occur in connection with the clerk's  
12 office, it knows how to do it. We cite 27 examples in our  
13 brief of the legislature using language that says an  
14 activity should take place in or at the clerk's office.  
15 No such language was used here. So in just basic  
16 statutory interpretation, when you look at the  
17 legislature's use of that language in other contexts and  
18 its decision not to use that language here, one has to  
19 conclude that there's no limits to the use of drop boxes  
20 just in a clerk's office.

21 And Your Honor, the other argument of the  
22 Plaintiffs is that a drop box must be staffed at all  
23 times, and there's also no statutory language requiring  
24 staffing. There are drop boxes used by municipal clerks,  
25 for example, that are appended outside the clerk's office



1 building for after-hours deposits where clerks then pick  
2 up the ballots in the morning and take them inside. As  
3 Mr. Kilpatrick described, the WEC's guidance on the use of  
4 these drop boxes and other unstaffed drop boxes is very  
5 clear and very consistent with the Homeland Security  
6 Guidelines on the use of drop boxes.

7 Your Honor, tellingly, the Plaintiffs don't  
8 cite even one instance of the alleged misuse of a drop  
9 box, there's no allegation of fraud or voting irregularity  
10 in the record relating to the use of the drop box, and  
11 consistent with that, the WEC's interpretation and  
12 guidance is entirely in line with what's happening around  
13 the rest of the country where there's pervasive use of  
14 drop boxes.

15 The other point I wanted to make, Your  
16 Honor, is -- again trying not to repeat arguments that  
17 have already been made -- there's a discussion by  
18 Plaintiff's counsel about whether drop boxes are alternate  
19 voting sites. And Justice Hagedorn in his decision in  
20 *Trump v. Biden* made it very clear that there's a  
21 distinction between the equivalent of a drop box and an  
22 alternate voting site.

23 In *Trump v. Biden*, I think it's worth  
24 reading this because he's so clear about the distinction,  
25 he said, "An alternative absentee ballot site, which is

1 that the Plaintiffs are claiming the drop box is under the  
2 WEC's guidance, must be a location not only where voters  
3 may return absentee ballots but also a location where  
4 voters may request and vote absentee ballots."

5 Of the facts before the court, this is not  
6 what occurred in the Democracy in the Park Elections.  
7 Ballots were not requested or distributed; therefore,  
8 Wisconsin Statute 6.855 is not on point. For that same  
9 reason, Your Honor, it's not on point here, because of  
10 course, a drop box is only a place where one can deposit a  
11 sealed envelope. It's not a place where one can receive  
12 an absentee ballot, fill it out, and then return it  
13 immediately to the clerk. So Plaintiff's reliance on that  
14 particular statute is misplaced.

15 Your Honor, the other points that I would  
16 like to make briefly that other counsel did not address  
17 just go to the preliminary injunction that the Plaintiffs  
18 are seeking. And Your Honor has our papers, and I won't  
19 dive too deeply into the requirements for preliminary  
20 injunction, but a few points worth emphasizing. One is  
21 that preliminary injunctions under Wisconsin law are  
22 designed to preserve the status quo. Here drop boxes have  
23 been in use for at least the last six statewide elections  
24 and drop boxes were in use even before that. And right  
25 now the WEC guidance is that drop boxes may be used by

1 local election officials, so the preliminary injunction  
2 seeks to actually reverse the status quo.

3 And the prongs for preliminary injunctive  
4 relief are not met here. Likelihood of success, for the  
5 reasons we all articulated about statutory interpretation,  
6 their interpretation does not support striking down the  
7 WEC's advice relating to the use of drop boxes, nor is  
8 there any irreparable harm that has been proven. For the  
9 same reasons, Your Honor, that I articulated in connection  
10 with standing, there's no irreparable harm to the  
11 Plaintiffs here that would justify a preliminary  
12 injunction.

13 And then last, although these are not  
14 formal factors under Wisconsin law, they're factors that  
15 many courts do look at, and that is balancing the equities  
16 of the public interest. Here eliminating drop boxes would  
17 remove a form of voting that voters have come to rely upon  
18 over multiple past elections. It would require election  
19 officials to reeducate voters at a time when elections are  
20 right around the corner and to divert resources to  
21 reeducating voters that this pervasive form of voting is  
22 no longer available to them. So the public interest  
23 actually weighs in favor of not granting the injunction.

24 So for those reasons, Your Honor, we ask  
25 that the Court both deny summary judgment motion and enter

1 summary judgment for the Defendants and relatedly deny the  
2 motion for the preliminary injunction.

3 THE COURT: Thank you. I appreciate your  
4 additional arguments as well as addressing the injunction  
5 issue. We'll turn to Attorney Berg for rebuttal argument.

6 MR. BERG: Thank you, Your honor. I'm  
7 going to try to cover the points one by one, but it may  
8 take me a little while.

9 THE COURT: I want you to cover all the  
10 points, so that's good.

11 MR. BERG: I'm going to start, Your Honor,  
12 with the JCRAR letter that the intervener referenced.

13 THE COURT: Go ahead. I've got it here.

14 MR. BERG: Your Honor, that letter is not  
15 relevant in any way to this case, except that it may  
16 actually support our rule-making argument. It shows the  
17 legislature's view that this be the policies in these  
18 memos require ruling. So it supports that argument. Now,  
19 the intervener invoked it as a reason to delay our case or  
20 postpone our case until that process is resolved, but it  
21 is no reason whatsoever to delay this case for multiple  
22 reasons.

23 First is that our primary argument in this  
24 case is that the policies and the memos conflict with  
25 state law. So it doesn't even matter if the commission

1 does adopt a rule, it would still be unlawful because it  
2 conflicts with the statute. So even if the commission  
3 were to follow JCRAR and issue a rule, the main issue in  
4 this case would still be live, which is whether those  
5 policies conflict with the statute.

6 Second, what will end up happening with  
7 that JCRAR process is tentative and hypothetical. So if  
8 JCRAR ordered the commission to issue a rule in 30 days,  
9 the commission may simply choose to ignore JCRAR. And if  
10 it does, the next thing that would have to happen is the  
11 legislature or the committee would have to file a lawsuit  
12 and that may or may not happen. This happened actually  
13 recently in another context. The JCRAR ordered the UW  
14 system to issue a rule on a topic related to vaccine  
15 mandates. The UW system didn't do anything, and the  
16 legislature never followed up.

17 This may come to nothing so it provides no  
18 reason to delay this case, which has been fully keyed up,  
19 fully briefed and is fully prepared for a decision by this  
20 court.

21 I'll move next to standing. So counsel for  
22 the DFCC interveners, I heard him mention Article III,  
23 standing. That may be a slip-up, but I want to call  
24 attention to that because this is not a federal case.  
25 This is a state case, and standing in state courts is very

1 different than in federal courts. State courts are not  
2 subject to Article III, but the Wisconsin Supreme Court  
3 has made that very clear.

4 In *McConkey*, the case that all of the  
5 parties have cited, it talks about this extensively, that  
6 the state court's standing is ultimately a policy issue  
7 and it's up to the judgment of the courts. So all of  
8 their federal case law and all of the arguments they make  
9 that's based on federal cases are completely irrelevant to  
10 standing here.

11 Now, our basis for standing is based on our  
12 Plaintiffs being both voters and taxpayers. With respect  
13 to their standing as voters, I would call this Court's  
14 attention to two cases. First, *Jefferson v. Dane County*,  
15 2020 WI 90, that case is very similar to this case. In  
16 fact, the facts in that case are that the Dane County  
17 clerk issued some guidance that was inconsistent with  
18 state law, issued some statements on FaceBook that were  
19 inconsistent with state law.

20 Two Plaintiffs sued, one the Republican  
21 party but the other was just a voter. And the voter's  
22 basis for standing was, I am a voter and this is a  
23 statement that is inconsistent with the rules and process  
24 for elections. The court ruled on the merits in that  
25 case, and not a single justice questioned the plaintiff's

1 standing.

2 Similarly, in *McConkey*, that's the other  
3 case I mentioned, that's 2020 WI 57, the plaintiff was a  
4 voter who objected to the process by which a certain  
5 amendment was passed. And the court emphasized that even  
6 a trifling interest suffices and ultimately ruled on the  
7 case. So those two cases, I would ask the court to look  
8 at those two cases in terms of standing.

9 I want to also just point out that if their  
10 position is accepted by this court, the question I would  
11 ask the court to think about is who can challenge the  
12 commission's guidance. When the commission issues  
13 guidance that is inconsistent with state law, someone has  
14 to be able to challenge it, otherwise the commission would  
15 be immune and would have an unchecked ability to change  
16 election proceedings.

17 I would also point this court to 5.06.  
18 That statute gives electors a statutory right to challenge  
19 election law violations. Now, that process doesn't apply  
20 in this case for reasons I'll get to later, but I think it  
21 shows that the legislature believes that voters should be  
22 able to challenge election law violations.

23 I would also point this Court to 227.40,  
24 which provides a statutory right to challenge an unlawful  
25 and unpromulgated rule and follow that process. No one

1 has alleged that we have not, so our Plaintiffs have  
2 standing under that statute as well.

3 With respect to taxpayer standing, counsel  
4 on the other side I think again is thinking in terms of  
5 federal law rather than state law. The state courts have  
6 been very clear that, "Even a slight loss," that's a quote  
7 from *Appleton v. Menasha*, "Even a slight loss to taxpayer  
8 funds is sufficient for taxpayer standing." As counsel  
9 for the other side conceded, it costs money to gripe and  
10 issue these memos and to preserve them on their websites,  
11 so the slight loss requirement is clearly met here.

12 Counsel for the interveners also talked  
13 about other jurisdictions and how voters shouldn't be  
14 allowed to challenge the rules in other jurisdictions.  
15 This is not about other jurisdictions, as this Court  
16 noted. This is about the statewide rules for elections.  
17 The Election Commission is charged with administering  
18 elections and issuing guidance about the statewide rule,  
19 and it has done so consistent with state law. That's what  
20 this case is about.

21 The final point I want to make is counsel  
22 emphasized that none of the Plaintiffs have drop boxes in  
23 their jurisdiction. That's not actually true. Plaintiff  
24 is titling in Delafield. They have drop boxes. I was on  
25 their website this morning. You can go on the website and



1 see that Delafield has drop boxes. That is judicially  
2 noticeable. The Plaintiff may have said otherwise in his  
3 deposition, but he was mistaken.

4 I'll turn from there to the merits. With  
5 respect to drop boxes, the commission and the interveners  
6 heavily emphasize all the security measures in the  
7 commission's memos, but the important point is all this is  
8 made up. This is just made up by the commission. Their  
9 position even is that none of this is binding on the  
10 clerks. The memos are not binding. None of the security  
11 measures in the memos are required.

12 If this Court accepts their position, drop  
13 boxes don't need to follow any of these security measures.  
14 Maybe we should have drop boxes, maybe it's a good idea,  
15 but the legislature ultimately needs to be the one to  
16 decide that. And in every situation where the legislature  
17 has authorized an alternative method of voting, it does so  
18 carefully. It sets criteria. It sets processes. It sets  
19 rules. It sets the types of safeguards and restrictions  
20 that opposing counsel wants this Court to believe are  
21 required in drop boxes, but aren't, if this court accepts  
22 their position that they are authorized without any text  
23 in any statute anywhere mentioning drop boxes.

24 I would also note that in none of the  
25 arguments this Court heard, no one has been able to

1 explain how putting a ballot into a drop box counts as  
2 in-person delivery. There is no person present when a  
3 drop box is alone in a park with no one else around.

4 Turning to the location requirement under  
5 6.855, both the commission and the interveners emphasize  
6 that 6.87 does not say clerk's office anywhere and that's  
7 true. But 6.855 does say that. It does say clerk's  
8 office, so I'm just going to read the text again. It  
9 says, "The office" -- it says, "The governing body of a  
10 municipality may elect to designate a site other than the  
11 office of the municipal clerk" -- there's the phrase --  
12 "as the location to which voted absentee ballots shall be  
13 returned by electors."

14 So our argument with respect to the ballots  
15 needing to be returned to the clerk's office is not based  
16 on 6.87, it's based on 6.855, which does use the phrase of  
17 "office of the municipal clerk." So I agree with the  
18 intervener's position pointing to all those other  
19 statutes, but I think it supports our argument.

20 I want to address briefly the concession of  
21 the footnote which the interveners argue is a significant  
22 concession. As the colloquy between the Court and counsel  
23 indicated, our concession is limited to a very narrow  
24 circumstance and it's only a concession based on the laws  
25 as they apply. We have two main arguments with respect to

1 drop boxes. First, that ballots, absentee ballots, have  
2 to meet the in-person delivery reliability. That's under  
3 6.87. And they have to be returned to the office of the  
4 municipal clerk under 6.855, or an alternate designated  
5 site.

6 Those two requirements are met when a  
7 person brings a ballot to the office of the municipal  
8 clerk, walks it to the clerk. And when the clerk says,  
9 Here's a secure container that you can put it in, that  
10 would be in-person and that would be in the office. But  
11 every other circumstance, not the majority of  
12 circumstances, that we're talking about do not qualify  
13 under the law.

14 Finally, I want to address Hagedorn's  
15 concurrence in *Trump v. Biden*, which multiple of the  
16 parties highlighted. That was a two-justice concurrence.  
17 So only two of the justices signed on to that concurrence,  
18 so it's not the majority of the court. So it is not the  
19 law and this court cannot rely on it, and I would also  
20 emphasize that even Justice Hagedorn hedged repeatedly  
21 throughout that opinion. In his very first paragraph, he  
22 begins by saying, "A comprehensive analysis is not  
23 possible or appropriate in light of the abbreviated nature  
24 of this review and the limited factual record."

25 And in conclusion to the relevant section

1 about the Democracy in the Park event, he said, "This  
2 conclusion is based on the record before the court and the  
3 arguments presented to the court." So the arguments in  
4 that case are different than what is going on here.

5 As I understand it, as Justice Hagedorn  
6 understood them and as he characterized them in this case,  
7 the parties there argued that the Democracy in the Park  
8 events were legal in-person absentee ballot voting sites.  
9 That's not exactly our argument. Our argument is not that  
10 drop boxes are 6.855 alternate sites. 6.855 is the only  
11 and exclusive method to establish alternate sites, and  
12 drop boxes don't qualify. It's a slightly different  
13 argument that may not have even been presented to the  
14 justice. In any event, it was a two-justice concurrence.  
15 That's not law.

16 Turning to the other issue in the case  
17 about who can return ballots, the other side just in  
18 attempts to read out the phrase by the elector, the  
19 statute says the ballot shall be mailed by the elector or  
20 delivered in person to the municipal clerk. They try and  
21 read in an agency procedure under that, but there's no  
22 text anywhere in the statute that allows for that.

23 And as we've pointed out, there are  
24 multiple other provisions that do allow for agents in a  
25 lot of different situations. Now, counsel for the

1 commission emphasized that those alternate agency  
2 requirements have special safeguards for different  
3 situations that aren't applicable here, but that's exactly  
4 our point. The point is, anytime the legislature  
5 authorizes an agent, it creates very clear and very  
6 specific processes and restrictions and it didn't do so  
7 here. There's nothing in the text that allows someone  
8 else to return someone else's.

9 Finally, the nonprofit interveners argued  
10 that lots of people would not be able to vote or would be  
11 disfranchised if this court accepts our argument that  
12 voters must cast their own ballots. One of the examples  
13 he gave is himself going to the polling place where -- to  
14 the postal office with his girlfriend and asking his  
15 girlfriend to put the ballot into the post office for him.  
16 There's an obvious simple solution to that, which is each  
17 of them put their ballot in the mail themselves.

18 He also raises the specter of electors who  
19 may not be able to get their ballot to a mailbox or to  
20 deliver it, but as I mentioned earlier, there are numerous  
21 exceptions under the law for voters who have physical  
22 challenges. So 6.87(5), 6.86(3), 6.875, 6.82(2), there's  
23 a whole lot of different exceptions and rules for various  
24 situations.

25 The interveners have not carefully

1 explained a situation that would not be covered under one  
2 of these alternative procedures, but even if there is a  
3 narrow circumstance where some voters wouldn't fit into  
4 one of these special exceptions, that should not be  
5 relevant to the outcome in this case. That can be  
6 addressed separately in a bill by the legislature if there  
7 is some gap or it could be addressed in a separate case if  
8 another party could identify such a situation. But this  
9 case is about interpreting the statute and what is the  
10 default. And the default rule under the law is that the  
11 voters must cast their own ballots, and this court should  
12 not set the default rule that anyone can cast anyone's  
13 ballot because of hypothetical narrow situations that may  
14 not even be --

15 THE COURT: You trailed off at the end so  
16 if you could repeat your last comment.

17 MR. BERG: The court should not change the  
18 default rule under the statute to allow anyone to cast and  
19 return anyone else's ballot just because of some  
20 hypothetical scenario that may or may not even be real and  
21 may be covered by other provisions in that rule. The  
22 question in this case is, what is the default rule. And  
23 the default rule under the text of the statute clearly is  
24 the elector has to mail their ballot or the elector has to  
25 deliver it in person.

1 I want to turn to the nonprofit  
2 interveners' argument that Plaintiffs have failed to  
3 exhaust their administrative remedies by following the  
4 5.06 process --

5 THE COURT: Just before you go there, I  
6 wanted to go back to your discussion of the various other  
7 options for voting for individuals. You ran through a  
8 series of statutes and Attorney Devaney did as well.  
9 I wasn't able to make a note of them, at least during the  
10 argument. I've got the statute called up now, just run  
11 through them again for me.

12 MR. BERG: 6.87(5) applies to voters who  
13 are unable to read or write; 6.86(3) applies to voters who  
14 are hospitalized; 6.875 provides procedures for voters who  
15 are in nursing homes or sick; 6.82 provides procedures for  
16 disabled electors; and 6.86(2) provides special rules for  
17 the indefinitely confined voters.

18 THE COURT: All right. Thank you.

19 MR. BERG: So now I'd like to turn to the  
20 nonprofit interveners' argument that we failed to exhaust  
21 our administrative remedies by not following the 5.06  
22 process. So I'd like to begin by noting that the  
23 commission itself doesn't even make this argument, that's  
24 because the 5.06 process very clearly doesn't apply to the  
25 commission itself.

1           The statutory text distinguishes between  
2           the commission and the election official alleged to have  
3           violated the law. And the process would make no sense to  
4           have the commission review its own violation of the  
5           election laws. It's a quasi-judicial process that would  
6           effectively make the commission a judge over its own  
7           errors, which would have significant due process concerns.

8           Also, 227.40 provides a separate and  
9           exclusive process to challenge unlawful rules by these  
10          documents, and we clearly followed that process and no one  
11          has alleged that we have not. But even if this Court  
12          concludes that 5.06 does cover the commission and that the  
13          Plaintiff should follow that, ordinarily, notwithstanding  
14          227.40's exclusive process, it still should not dismiss  
15          the case on this ground because the exhaustion doctrine  
16          has multiple exceptions.

17          So we cited the *Nodell* case, it's in  
18          Footnote 12 of that case. The court lists numerous  
19          exceptions to the exhaustion requirement, and I am going  
20          to read some of those exceptions. And every single one of  
21          them that I'm going to read is going to apply here. The  
22          first exception is when recourse to the administrative  
23          agency would be a futile or useless act. Obviously true,  
24          because we know the commission's position. When the  
25          agency has already informed the party of its position on a



1 question of law, we know that, they put it in a memo.  
2 When the agency has no jurisdiction to act or when the  
3 administrative action is fatally void, also true here.  
4 The commission's memos directly conflict with state law.

5 Exhaustion is not required when the  
6 administrative remedy is inadequate to avoid irreparable  
7 harm. The instructions are clear, and as counsel for the  
8 interveners noted, another case was filed nearly five  
9 months ago by a voter and it took a long time for the  
10 commission to rule on it, so there's clear irreparable  
11 harm if the voters have to wait for the commission to rule  
12 on its own errors.

13 Finally, the last exception is when there's  
14 a question of law involved in which the agency's expertise  
15 is not an important factor. Again that's also true. So  
16 even if this Court thought that the 5.06 process applied  
17 to the commission, it doesn't. There are numerous  
18 exceptions to the typical questions.

19 Finally, I heard a brief mention of  
20 sovereign immunity. That's the first time that I heard  
21 anything about sovereign immunity. It was not raised in  
22 the briefs, so any mention of that is waived and this  
23 Court should not consider that.

24 I would also just say something briefly  
25 about Mr. Thompson's repeated references to the

1 depositions of the Plaintiffs. During those depositions,  
2 he treated those as if it was an oral argument  
3 essentially. He's asking the Plaintiffs questions, legal  
4 questions, nuanced legal questions, and that's not the  
5 purpose of the deposition. It's not the client's role in  
6 the case. That's my role as the lawyer, our roles as  
7 lawyers, so I would just ask this Court to disregard any  
8 of those references to that. They're not relevant to the  
9 questions in this case. This is a purely legal question,  
10 whether the commission's memos conflict with state law,  
11 and this Court can decide those questions for itself.

12 Finally, briefly with respect to the  
13 temporary injunction, I have not heard anything today that  
14 would give this Court reason why it cannot simply rule on  
15 summary judgment, but I wanted to address two issues very  
16 briefly if this Court concludes it cannot, for any reason.  
17 First, with respect to irreparable harm, the question in  
18 this case is whether elections will be conducted in  
19 accordance with state law. That can't be undone after an  
20 election has occurred. That is clear irreparable harm to  
21 support a temporary injunction.

22 And we know that because the Supreme Court  
23 granted a temporary injunction in *Jefferson v. Dane*  
24 *County*, which I already described is a very similar case  
25 to this one. The statement of guidance that was issued by

1 the clerk was inconsistent with state law, and the court  
2 promptly issued a temporary injunction and an injunction  
3 very similar to the one we're asking for here, ordering  
4 the clerks not to issue further guidance inconsistent with  
5 the law.

6 And then with respect to the status quo,  
7 that is not really a hard requirement for an injunction.  
8 That's our position. The Supreme Court has been very  
9 inconsistent about that requirement. It sometimes  
10 mentions, it sometimes does not. We've cited a lot of  
11 different cases. And in any event, the court has been  
12 clear that the factors for an injunction are interrelated  
13 considerations that need to be balanced together. At  
14 most, it's a factor, but it's not a hard prerequisite.

15 And I would also just finally reference a  
16 quote from the Supreme Court in SCIU, this is Paragraph  
17 117, the case is 2020 WI 67, the court said, If the status  
18 quo would not change without a temporary injunction, would  
19 that mean the unconstitutional law could remain in effect?  
20 Obviously not.

21 That's also true here. It cannot be the  
22 case that an illegal statement by the commission becomes  
23 immune from an injunction and becomes the status quo such  
24 that an injunction cannot be issued. The status quo here  
25 is state law. The commission changed that, and the

1 injunction is warranted if this court decides that summary  
2 judgment -- it cannot issue summary judgment. So for all  
3 those reasons, we would ask the Court to rule in  
4 Plaintiff's favor on summary judgment, or in the  
5 alternative, to grant a temporary injunction. Thank you.

6 THE COURT: Thank you.

7 MR. THOMPSON: Your Honor, this is Attorney  
8 Thompson. Would you entertain just a very, very brief  
9 response to his comments there?

10 THE COURT: That's fine, I'll give everyone  
11 a chance to make a brief response if they'd like.  
12 Attorney Thompson, what would you like to add?

13 MR. THOMPSON: Thank you, Your Honor, just  
14 a couple of quick things. Attorney Berg's reference to  
15 the waiver of the sovereign immunity question deserves  
16 comment. Sovereign immunity is a question of  
17 jurisdiction. Certainly an argument that cannot be waived  
18 and can be raised at any point, I believe even sua sponte  
19 by the court, as to the interplay between Chapter 5 and  
20 Chapter 227, which Attorney Berg referenced as perhaps the  
21 proper alternative mechanism to challenge agency action,  
22 Chapter 5 is much newer than Chapter 227, created in 2015,  
23 and it expressly requires a job exhaustion, so it  
24 controls.

25 Finally, the contention or the suggestion

1 that I was asking complicated legal questions of Attorney  
2 Berg's clients is simply not true. Just a reminder, all  
3 I asked was, "Do you know who the Elections Commission  
4 is?" And the answer was, "No." Thank you.

5 THE COURT: All right. Thank you.  
6 Attorney Kilpatrick, anything else you'd like to add?

7 MR. KILPATRICK: Just briefly, Your Honor.  
8 Thank you, Your Honor. With regard to Plaintiff's  
9 arguments about the irreparable harm, they all seem to be  
10 premised on the assumption that they have a probability of  
11 success on the merits, that there is an unlawful memo or  
12 memos, therefore, there is irreparable harm. But that's  
13 not always the case.

14 Our position is that the memos are not  
15 unlawful; and therefore, there would not be irreparable  
16 harm. That's all I wanted to make a point of. Thank you.

17 THE COURT: Thank you. Attorney Devaney,  
18 do you have anything you'd like to add?

19 MR. DEVANEY: Yes, Your Honor. Thank you.  
20 Very briefly on the standing issue, counsel for the  
21 Plaintiffs is correct, I slipped when I said Article III,  
22 because this is a state law issue with respect to  
23 standing. But I wanted to make the point that when you  
24 read our brief, you will see that we cite substantial  
25 Wisconsin law that demonstrates the various grounds for

1 standing that the Plaintiffs are asserting are not  
2 supported by Wisconsin law.

3 And we do cite some federal cases,  
4 particularly with the vote dilution claim for standing as  
5 guidance for the Court, as something for the Court to  
6 refer to. Of course, that's not binding on the Court, but  
7 the point is that a significant number of courts,  
8 including federal courts, have wrestled with this question  
9 quite a bit over the last few years. And we think that is  
10 good guidance for the Court to consider. That's all I  
11 have, Your Honor.

12 THE COURT: Thank you. Attorney Berg, I'll  
13 give you the final word.

14 MR. BERG: Nothing further, Your Honor, I  
15 think it's all been covered.

16 THE COURT: All right. Thank you. I want  
17 to take just a few minutes to review the arguments, the  
18 briefs, and some of the documents that I have. So I've  
19 got about 4:00, so I'm going to take a recess until about  
20 4:15 and then come back. So then we'll go off the record  
21 with that.

22 MR. BERG: Thank you, Your Honor.

23 MR. CURTIS: Thank you.

24 MR. THOMPSON: Thank you.

25 (Whereupon, a brief recess was taken.)

1 THE COURT: We should be back on the record  
2 in the Teigen, et al. versus the Wisconsin Elections  
3 Commission, et al., file 21-CV-958. I see everybody, so  
4 I'm assuming everybody can hear the Court. I see  
5 acknowledgments on it, so thank you.

6 During the brief recess we had, I took the  
7 opportunity to review my notes, read through the  
8 documents, read the memos again, looked at the statutes  
9 and reflected on the status of the case and I'm prepared  
10 to enter a ruling. During the course of my ruling, I'll  
11 refer to the statutes involved and to the memos as well.

12 But I just want to begin with the issue of  
13 standing. I'm satisfied that standing is controlled by  
14 Section 227.40, declaratory judgment proceedings. When I  
15 look at the -- just going to the two memos involved or the  
16 two documents that really bring the matter to court is  
17 that August 19, 2020 memorandum or memo or document from  
18 the Elections Commission, and a March 31, 2020 document.

19 When I referenced at the beginning of the  
20 hearing, I mentioned I had the affidavit with the two  
21 documents attached to it. Actually, the affidavit doesn't  
22 attach the August memorandum to it, so I have those  
23 documents from the complaint. So just it's clear, I have  
24 the right documents, the March 31, 2020 document and the  
25 August 19, 2020 document.

1                   In the March 31, 2020 document it talks  
2                   about -- it begins, "Due to the increase in by-mail  
3                   absentee ballots, clerks have inquired about options for  
4                   ensuring that the maximum number of ballots are returned  
5                   to be counted for the April 7, 2020 election. There are  
6                   several options the clerks can use to make the ballot  
7                   return more accessible and efficient. It is recommended  
8                   the clerks do the best they are able. To publicize  
9                   dropoff locations and options for voters, it's further  
10                  recommended that it be publicized to voters that under  
11                  state law ballots need to be received by 8 p.m. on  
12                  election day to be counted."

13                  It then goes through a number of items. It  
14                  doesn't call it a guidance or a memo. It doesn't really  
15                  say anything. It just says, Here's the information, but  
16                  I'm satisfied it's a guidance issued by the commission.  
17                  The August 19<sup>th</sup> document that has been forwarded begins,  
18                  "This document is intended to provide information and  
19                  guidance on drop box options for secure absentee ballot  
20                  return for voters." So there the word guidance is used  
21                  specifically.

22                  I refer to that because when you look at  
23                  Section 227.40(1), "Except as provided in (2), the  
24                  exclusive means of judicial review of the validity of a  
25                  rule or guidance document shall be an action for



1 declaratory judgment as to the validity of the rule for a  
2 guidance document brought in to the circuit court for the  
3 county where the party asserting the invalidity is."

4 I'm satisfied when I look at that and look  
5 at the documents that are involved, the proper method to  
6 proceed is under 227.40. That's the venue or the avenue  
7 that was used to bring the lawsuit, so I'm satisfied that  
8 the standing issue is met and the plaintiff prevails with  
9 regard to the standing matter.

10 In looking then at the issues, we're  
11 addressing how the elections are administered, and in  
12 particular, we're referring to two particular statutes.  
13 We're looking at Section 6.87(4)(b)1; and also 6.855.  
14 Those are the two that I looked at and that the parties  
15 concentrated on.

16 The language in Section 6.88 is -- it's a  
17 long statute, but we've concentrated only on I think it  
18 was 21 words that were used during the argument. And  
19 that's toward the end of Subsection (1) and it says -- it  
20 talks about the envelopes and how it's done, and then it  
21 says, just looking at the pertinent language, The return  
22 envelope shall then be sealed. The witness may not be a  
23 candidate.

24 And then it goes on and states, "The  
25 envelope" -- that's the envelope with the ballot, the

1 absentee ballot -- "The envelope shall be mailed by the  
2 elector or delivered in person to the municipal clerk  
3 issuing the ballot or ballots."

4 The second statute that's involved is  
5 6.855. That deals with alternate absentee ballot sites,  
6 and that states in Subsection (1), "The governing body of  
7 a municipality may elect to designate a site other than  
8 the office of the municipal clerk or board of election  
9 commissioners as the location from which electors of the  
10 municipality may request and vote absentee ballots and  
11 which to voted absentee ballots shall be returned by  
12 electors for any election. The designated site shall be  
13 located as near as practicable to the office of the  
14 municipal clerk or board of commissioners, and no site may  
15 be designated to afford an advantage to any political  
16 party."

17 In Subsection (3) it states, "An alternate  
18 site under one shall be staffed by the municipal clerk or  
19 the executive director of the board of election  
20 commissioners or employees or the clerk or the board of  
21 commissioners."

22 Sub. (4) significantly states, "An  
23 alternate site under one shall be accessible to all of the  
24 individuals with disabilities."

25 Sub. (5) states, "The governing body may

1 designate more than one alternate site under Sub. (1), but  
2 there's a clear procedure. They call it alternate sites  
3 to collect ballots, other than at what may be the actual  
4 office of the municipal clerk.

5 There's another section that's important,  
6 and that's Section 6.84. That address construction of the  
7 election statutes. We talked about it briefly during the  
8 presentation, but I want to emphasize the language in it,  
9 and the public policy that the legislature has set forth  
10 for the election statutes.

11 First, it says in Sub.(1), 6.84(1),  
12 Legislative Policy, the legislature finds that voting is a  
13 constitutional right, the rigorous exercising of which  
14 shall be strongly encouraged. In contrast, voting by  
15 absentee ballot is a privilege exercised wholly outside  
16 the traditional safeguards of the polling place.

17 The legislature finds that the privilege of  
18 voting by absentee ballot must be carefully regulated to  
19 prevent the potential for fraud or abuse, to prevent  
20 overzealous solicitation of absent electors who may prefer  
21 not to participate in an election, to prevent undue  
22 influence on the absent elector to vote for or against a  
23 candidate, or to cast a particular vote in a referendum or  
24 other similar abuses.

25 Subsection (2) is entitled Interpretation.

1 It states, "Notwithstanding section 5.01(1) with respect  
2 to matters relating to the absentee voting process,  
3 Section 6.86, 6.87(3) to (7); and 9.01(1)(b) (2) and (4),  
4 shall be construed as mandatory. Ballots cast in  
5 contravention of the procedures specified in those  
6 provisions may not be counted. Ballots counted in  
7 contravention of the procedures specified in those  
8 provisions may not be included in the certified result  
9 then of any election.

10 All important policy considerations to be  
11 considered by the Court and by the attorneys in making the  
12 arguments in this case. Certainly I want to thank the  
13 attorneys for the briefing that was done, the intense  
14 briefing and intense arguments today, the arguments, the  
15 strength of the arguments from all parties is appreciated,  
16 and I think it's been very well presented.

17 Your respective clients have been well  
18 represented by each of the attorneys in presenting their  
19 case today. We focused -- today we focus on absentee  
20 ballots and how they're received and how they come to the  
21 clerk. When I read through Section 6.84 on the  
22 construction issue, I particularly look to what happens at  
23 an election when they talk about the vigorous exercise --  
24 voting is a constitutional right, the vigorous exercise of  
25 which should be strongly encouraged.

1 I think then about voting. We haven't  
2 talked about the process of in-person voting, but it's  
3 really an adjunct to our process today. When a person  
4 goes to vote, the person identifies who that person is,  
5 checked off, the person is given a ballot. And I'm old  
6 enough, I used to vote with paper ballots. They'd give me  
7 a paper ballot, we'd go into the booth with a pencil and  
8 check off what we wanted to do with the vote, and then  
9 turn it back in. But we turned it in and it went into the  
10 receptacle.

11 Today when we vote, it's usually by  
12 electronic voting machines, but after you've been checked  
13 in and been identified, the clerk gives the person the  
14 ballot. The person goes in and votes, checks off whatever  
15 they want to check off, do the voting, and then the person  
16 comes back and the person puts it through the electronic  
17 voting machine. He doesn't hand it to anybody else, puts  
18 it through the voting machine. So the elector, the voter,  
19 is always in possession of that ballot as it functions and  
20 as it goes into the ballot box.

21 With absentee ballots, as the legislative  
22 policy notes, they consider that a privilege. It's not  
23 the same as coming in person. They're giving the ballot  
24 to a person, the person votes, not at the voting place but  
25 usually at their home or some other location, and then

1 that ballot has to get back to the voting operation, to  
2 the municipal clerk, to the ballot clerk. That's what  
3 we're talking about today and how important that process  
4 is.

5 In looking at the first statute that we've  
6 dealt with, which is (1) of 6.87, I have the wording  
7 again, The envelope shall be mailed -- shall be mailed by  
8 the elector or delivered in person to the municipal clerk.  
9 There's been some disagreement between the parties as to  
10 what delivered means.

11 I'm satisfied in reading that sentence that  
12 when it says, "the envelope shall be mailed by the elector  
13 or delivered in person," that means that it's the elector  
14 that delivers it in person, not somebody else. I don't  
15 see any language in the statute that provides a basis for  
16 having agents, somebody other than the elector, actually  
17 deliver the ballot.

18 And that's been a controversy that is key  
19 to the Plaintiff's case and it's certainly key to the  
20 Defense, to the Election Commissions's case and those that  
21 support the commission. In reading that statute and  
22 looking at the, if you will, the ritual for voting in  
23 person, and if you will, the ritual for voting by  
24 absentee, it requires the elector to be principally  
25 involved. It doesn't require other people to be involved.

1                   And one of the concerns with certainly the  
2 public policy in 684 is that the elector has to control  
3 the ballot and control how its cast. And on that basis  
4 then, I'm satisfied that the provisions in the memorandums  
5 that permit other individuals to take -- to receive the  
6 ballot and then to bring it back into the municipal  
7 clerk's office is contrary to the statute.

8                   In the March 31, 2020 memo, on Page 1,  
9 Section 2, the title of it is, Can voters return an  
10 absentee ballot they received by mail in person at the  
11 clerk's office, in-person absentee site, or polling place  
12 on election day. In that paragraph that follows, it says  
13 that ballots can be returned to the clerk's office in  
14 person, absentee, or early voting site or the voter's  
15 polling place on election day.

16                   Then quoting, A family member or another  
17 person may also return the ballot on behalf of the voter.  
18 I don't see anything in the statute that says that. In  
19 reading the statute, the statute is clear. It's not  
20 ambiguous. It's not necessary to go to outside sources to  
21 determine how that return of the ballot -- return of the  
22 ballot is addressed.

23                   In looking back a few minutes ago in my  
24 discussion of the electoral process and the importance of  
25 the elector's personal involvement in delivering the

1 ballot, to permit other people to bring the ballot in is  
2 contrary to what I think is the clear wording of the  
3 statute but also contrary to the policy behind the statute  
4 and as it's worded.

5 So I'm satisfied that in that respect,  
6 those portions of the memorandum that address that other  
7 people may bring the ballot in, it doesn't have to be the  
8 elector, are contrary to the statute.

9 What we spent considerable time on is the  
10 issue of drop boxes. In looking at the statutes, there is  
11 no specific authorization for drop boxes. The closest  
12 that the Court has heard is that the statute for the  
13 alternate ballot placement, the alternate sites, under  
14 6.855 is an alternate ballot site, and the practicality of  
15 proceeding with a ballot, with a secure ballot box in a  
16 clerk's office, that's manned by a staffer or an alternate  
17 absentee ballot site that's manned by a person from the  
18 clerk's office or the voting governing body's office.

19 There's nothing else that authorizes the  
20 use of a drop box. Now, when I look at, in particular,  
21 both memos address drop boxes with some detail. There is  
22 a -- somebody well thought out the issue of drop boxes,  
23 well-thought-out issues then with regard to the security  
24 of drop boxes, how they're to be managed in the August 19,  
25 2020 memo. There's just details about how drop box are



1 handled, where they're put, types of drop boxes, outdoor  
2 action -- outdoor options. I'm not going to read  
3 everything that's in the memo, but it's the subtitles.  
4 What is an absentee ballot drop box.

5 In looking at that first section, what is  
6 an absentee ballot drop box, it never talks about it  
7 really being in the clerk's office or the municipality's  
8 office. It says, A ballot drop box provides a secure and  
9 convenient means for voters to return their by-mail  
10 absentee ballot. A drop box is a secure, locked structure  
11 operated by local election officials.

12 It doesn't say where it is. It doesn't  
13 follow the statute with regard to an alternate site. It  
14 really, as we've talked today, it could be virtually  
15 anyplace. Then it talks about the repurposing options,  
16 then it goes to types of drop boxes, outdoor options,  
17 indoor options, then security.

18 And then it shows, for instance, on Page 3  
19 of the August 19 memo is a picture apparently from the  
20 City of Waukesha of an official absentee drop box. All of  
21 that is good and nice, but there's no authority to do it.  
22 It would appear that the election laws in Wisconsin are  
23 very specific, very detailed as to what happens. It's  
24 not -- the law in the statutes don't say, we'll have an  
25 election at certain times and we'll have ballots, and the

1           municipal clerk, it's up to the clerks to figure out how  
2           to do it. That's really not the case. These are very  
3           specific statutes on how to do things, primarily to  
4           protect the integrity of the system.

5                        I go back to the ritual, if you will, of  
6           voting in person. It's really carried over to a great  
7           extent to the ritual of voting with an absentee ballot.  
8           So I'm satisfied there's no authority, no statutory  
9           authority, to issue -- to have drop boxes used for the  
10          collection of absentee ballots, other than as an alternate  
11          absentee ballot site and following that process under  
12          6.855.

13                       In looking then at the nature of this  
14          lawsuit, I'm satisfied that the Plaintiffs prevail on  
15          their motion for summary judgment. I'm satisfied there's  
16          no basis under the statutes. The statutes control for the  
17          method to have others bring the ballots in, for the  
18          elector, and to use drop boxes other than as set forth in  
19          7.855.

20                       I'm also concerned with the issue of the --  
21          we've talked to some extent about the rule designations  
22          and about making up a rule. I'm satisfied that this issue  
23          is that the memorandums, that the guidance memorandums,  
24          both that we've dealt with in this case are actually  
25          rules, unpromulgated rules by the Elections Commission.

1 They should have gone through the process set forth in  
2 Chapter 227, in particular in Section 227.10.

3 I'm just taking a moment to -- I just want  
4 to review the issues with regard to the rule promulgation.  
5 When you read the documents that the Elections Commission  
6 issued, it really is a rule on how to conduct elections;  
7 in particular, how in particular to conduct and collect  
8 absentee ballots. With the specificity and the integrity  
9 with which the legislature has addressed the issue of  
10 absentee ballots, that the commission should be required  
11 and ought to be required to more carefully follow the  
12 traditional mandates of Wisconsin law when they make major  
13 policy decisions.

14 And I see nothing other than the issue as  
15 to who turns the ballot in and the drop boxes are major  
16 policy decisions that alter how our absentee ballot  
17 process operates. When I looked at these two memos and  
18 the documents and the rules and the guidance that are  
19 contained within them, I'm satisfied that they do  
20 constitute a standard statement of policy and a general  
21 order. I'm satisfied that they have general application.  
22 They really cover elections across the state and they  
23 cover them very specifically, altering what has been and  
24 setting a new standard, if you will, and a new policy for  
25 how absentee ballots are then collected.

1                   They have the effect of law. Although it's  
2                   been argued and I think it's true that the municipal  
3                   clerks can follow or not follow it, but remember the  
4                   clerk, if they do it, they're going to say, I have this  
5                   memo that says I can do it. They're going to rely upon it  
6                   as a statement of law.

7                   I'm satisfied these policy statements by  
8                   the commission were issued as, in fact, their view of  
9                   interpreting what the statute means and has the force of  
10                  law with regard to their interpretation. I'm satisfied  
11                  that reasonable municipal clerks who address elections  
12                  will adhere to those policies. I think as we went through  
13                  some of the briefing and the statements by others as to  
14                  how these policies have been implemented, that's what the  
15                  clerks did.

16                  There is certainly -- it's issued by an  
17                  agency and it was issued to implement, interpret or make  
18                  specific legislative action enforced or administered by  
19                  the agency, but there is no legislation. There's nothing  
20                  there. This matter should have come through a rule, the  
21                  rule-making process. That is really to a great extent set  
22                  forth in -- there are two *Palm* decisions, *Tavern League v.*  
23                  *Palm*, 2021 WI 33, there's also one from 2020.

24                  I looked at the case, the 2021 WI 33,  
25                  particularly at Paragraph 19, talks about these very

1 issues and the need to have documents like this policy  
2 statement by agencies, either not used or adopted as a  
3 rule, and give the legislative process and the entire  
4 government an opportunity to review what the agency is  
5 doing.

6 I just want to take a moment to look at the  
7 *Palm* case. In Paragraph 19 of the *Palm* decision, the  
8 court said, quoting, We further -- they're now referring  
9 back to the first *Palm* decision in 2020 -- "We further  
10 explained that agency action that exhibits all of the  
11 following criteria meets the definition of a rule: One, a  
12 regulation, standard, statement of policy, or general  
13 order; two, of general application; three, having the  
14 effect of law; four, issued by an agency; five, to  
15 implement, interpret, or make specific legislation  
16 enforced or administered by such agency."

17 That's clearly what happened in both of  
18 these memos. They fit the definition of a rule exactly.  
19 There was some discussion about when we talked about  
20 standing as to the issues as to local municipalities  
21 acting versus the State of Wisconsin Election Commission  
22 acting. Well, here the commission regulates and governs  
23 elections.

24 They issued these memos, I can only assume,  
25 not because they had nothing better do, but they issued it

1 to give specific instructions to municipalities on how  
2 they should conduct elections, and in particular, how to  
3 collect absentee ballots, a critical issue obviously and a  
4 critical issue from the standpoint of the intervening  
5 parties in this case as well. The issue of election  
6 security, the issue of election integrity is key, and when  
7 you deal with -- when you address absentee ballots, it's  
8 even more critical for all of the reasons that you have  
9 absentee ballots.

10 So I'm satisfied that it is a rule. They  
11 were proposed rules and they should have gone through the  
12 rule-making policy. It's another basis for the Court to  
13 grant summary judgment to the Plaintiff. I'll grant their  
14 motion. I'll deny the motions for summary judgment filed  
15 by the Defendant.

16 As part of the complaint, the Plaintiff's  
17 complaint, they've also requested an affirmative  
18 injunction requiring that the Wisconsin Elections  
19 Commission cease and desist from failing to enforce 6.84,  
20 6.855, and 6.87(4)(b)1. I'll include that in my order and  
21 I grant that injunction. So ordered.

22 I'll ask Attorney Berg to draft the  
23 necessary order and submit it to the court. I hold orders  
24 for ten calendar days if they come in without a statement  
25 that the other parties agree to it as to form or the other

1 parties communicate that they agree to it as to form.  
2 Otherwise, I hold it for ten calendar days. Keep in mind  
3 our system is all electronic, so when it comes in, if it  
4 comes in without an assertion that it's been agreed to as  
5 to form, it just gets put into the holding pattern in the  
6 digital system.

7 So any questions from the Plaintiff?

8 MR. BERG: So the Court just articulated  
9 the scope of the injunction that it intends to issue, so I  
10 can fully represent that in an order?

11 THE COURT: Yes. You asked me, you said I  
12 did or I should?

13 MR. BERG: Can you?

14 THE COURT: Well, the injunction I'm  
15 issuing is to require the enforcement of the statute named  
16 in your complaint. I'll prohibit -- part of the  
17 injunction is I will prohibit the further distribution of  
18 the two memos and further prohibit the distribution and  
19 promulgation of the guidance contained in those two  
20 memorandums.

21 Some of the wording in the memorandums may  
22 not be objectionable. Most of the statements contained in  
23 the memorandums are contrary to the Court's ruling today.  
24 So ordered.

25 Anything from the commission?

1 MR. BERG: Your Honor, one more thing.

2 THE COURT: Go ahead.

3 MR. BERG: One further thing we requested  
4 in our injunction is to order the commission to correct  
5 their statement to the clerks within a certain amount of  
6 time.

7 THE COURT: I'll require that the  
8 commission promulgate a statement that the policy guidance  
9 contained in the two memorandums is withdrawn and do so  
10 within 30 days of today's date. So ordered. Thank you.

11 Anything from the commission?

12 MR. KILPATRICK: With that clarification,  
13 Your Honor, no, nothing from the commission.

14 THE COURT: Anything from the Democratic  
15 Senate Campaign Committee, Attorney Devaney?

16 MR. DEVANEY: No, thank you, Your Honor.

17 THE COURT: Anything from Mr. Thompson?

18 MR. THOMPSON: Yes, Your Honor. I  
19 understand that this Court's order is -- well, let me  
20 phrase it as a question. The interveners identified  
21 *Purcell*, a United States Supreme Court decision regarding  
22 election administration rulings that are issued  
23 immediately prior to an election. As I am sure the Court  
24 is aware, we're about 30 days from the upcoming spring  
25 election, and the whole purpose of *Purcell* is sort of



1 avoiding confusion amongst the electorate as they go to  
2 cast ballots.

3 So I am curious if the Court, based on that  
4 30-day timeline that was just referenced, intends for any  
5 sort of order to go into place before or after the spring  
6 election?

7 THE COURT: Well, the spring election is,  
8 what, the 16<sup>th</sup> or the 17<sup>th</sup> of February?

9 MR. THOMPSON: It's right around there.

10 THE COURT: Let me just look. It's a  
11 Tuesday, so is it the third Tuesday of February?

12 MR. BERG: February 15<sup>th</sup>.

13 THE COURT: Well, I'm going to order that  
14 the memorandum, the order withdrawing their statements  
15 contained in these two memos -- I'm looking for my  
16 calendar -- I'm going to order that it be issued within  
17 14 days of today's date. That puts it closer to the  
18 election, but I think within practicality I have to give  
19 the commission time to work through it and get the  
20 paperwork ready.

21 Fourteen days from today date, today is the  
22 13<sup>th</sup>, that would be January 27<sup>th</sup>. Let me see what I've  
23 got here, today is the 13<sup>th</sup>, so January 27<sup>th</sup> is a  
24 Thursday. The election day is the 15<sup>th</sup>. That's the  
25 third Tuesday. So I'm satisfied it gives sufficient time

1 for the clerks to get the message and to follow the  
2 statutes.

3 You know, in reality, the statutes are not  
4 difficult to follow. They may have -- clerks may have  
5 perhaps improvidently focused on these memorandums without  
6 thinking it through, but they now have fairly clear  
7 guidance, so thank you.

8 MR. THOMPSON: Your Honor?

9 THE COURT: Do you have anything else,  
10 Attorney Thompson?

11 MR. THOMPSON: Your Honor, I was just going  
12 to say in order to preserve the record, that the  
13 intervener defendants I represent would submit that such  
14 an order is too adjacent or close to the upcoming election  
15 to survive that *Purcell* decision. Thank you.

16 THE COURT: I am hopeful that our clerks  
17 will be diligent and the Election Commission -- actually,  
18 this is an Election Commission issue and that the Election  
19 Commission will be diligent in moving forward.

20 Thank you again. The briefing was  
21 excellent. The arguments were very good. From an  
22 intellectual standpoint, I enjoyed the arguments and the  
23 briefing. It's a good issue. It's a very important  
24 issue. I want to thank you for your assistance with it.  
25 Thank you. With that, everybody have a good week and stay

1 healthy.

2 MR. BERG: Thank you, Your Honor.

3 MR. CURTIS: Thank you, Your Honor.

4 MR. DEVANEY: Thank you, Judge.

5 MR. THOMPSON: Thank you.

6 THE COURT: We'll end the hearing then.

7 (Whereupon, proceedings were concluded.)

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9 I, ROSE MARIE RODERICK, certify that I am  
10 the official court reporter assigned to report the  
11 proceedings herein for the Circuit Court; that the  
12 foregoing pages, numbered 1 through 100 inclusive, have  
13 been carefully compared by me with my stenographic notes;  
14 that the same is a true and correct transcript of all such  
15 proceedings taken on the 13<sup>th</sup> day of January, 2022.

16 Dated this 20<sup>th</sup> day of January, 2022.  
17  
18  
19

20 ELECTRONICALLY SIGNED BY:

21 *Rose Marie Roderick*  
22

23 ROSE MARIE RODERICK  
24 Official Court Reporter  
25