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Waukesha County
2021CV000958

STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY
BRANCH 1

RICHARD TEIGEN and RICHARD THOM,

Plaintiffs,

v.

Case No. 2021CV0958
Code: 30701

WISCONSIN ELECTIONS COMMISSION,

Defendant,

and

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE, DISABILITY RIGHTS WISCONSIN, WISCONSIN FAITH VOICES FOR JUSTICE, and LEAGUE OF WOMEN VOTERS OF WISCONSIN,

Intervenor-Defendants.

INTERVENOR-DEFENDANTS DISABILITY RIGHTS WISCONSIN, WISCONSIN FAITH VOICES FOR JUSTICE, AND LEAGUE OF WOMEN VOTERS OF WISCONSIN'S RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

More than three million Wisconsinites, over seventy percent of the electorate, voted in the November 2020 general election—an extroradinary participation rate during a global pandemic.[1] In large part, absentee voting spurred this historic turnout. Absentee ballots doubled in popularity, growing to 59.7% of all votes cast in the 2020 general election, up from 27.3% in 2016.[2] Convenient absentee-ballot-return options supported this shift. For example, a substantial number of Wisconsin's 1,850 municipal clerks—in voting districts large and small, urban, suburban, and rural—employed absentee-ballot drop boxes; a safe, secure, and effective method of ballot return endorsed by the state's legislative leadership. Other voters asked friends and family members to return absentee ballots on their behalf, which is referred to as "ballot assistance."[3]

Of Wisconsin's approximately 3.3 million voters, two individuals, Plaintiffs Richard Thom and Richard Teigen, target these methods of absentee-ballot return for extirpation. According to Plaintiffs, memoranda from Defendant Wisconsin Elections Commission ("WEC") dated March of 2020 and August of 2020 misled local municipal clerks to employ absentee-ballot drop boxes and to permit ballot assistance in ways Plaintiffs deem unlawful. Plaintiffs now ask this Court to award summary judgment, declaring these memos illegal.

In support, Plaintiffs advance an atextual, cramped reading of Wisconsin election law, especially Wis. Stat. § 6.87(4)(b)1. They ask this Court to rewrite the plain words adopted into

[1] Craig Gilbert, *Here's What was Behind Wisconsin's Record-breaking 2020 Turnout—and What it Means for the War Over Voting Rules,* Milwaukee Journal Sentinel, (March 12, 2021), available at https://www.jsonline.com/story/news/politics/analysis/2021/03/12/wisconsin-had-record-breaking-2020-voter-turnout-heres-what-happened/4664099001/.

[2] wispolitics.com/wp-content/uploads/2021/01/D.-November-2020-Election-Data-Report-Updated.pdf

[3] Plaintiffs refer to this perjoratively as "ballot harvesting." Rhetorically, "ballot assistance" is a less-loaded synonym that Intervenors-Defendants use throughout this brief. Both terms refer to an elector directing a family member, or other person, to return a validly completed absentee ballot on that elector's behalf.

law, and to ignore longstanding Wisconsin practice. Their suit fails on the merits. And for good reason: under Plaintiffs' draconian interpretation, if a married couple stood together in front of their local municipal clerk, one spouse's absentee vote would be disregarded as illegal if the other spouse placed both ballots into the clerk's hand. Wisconsin lawmakers never adopted such an absurd policy, and common sense cannot countenance such a twisted reading of the statutory text.

Even if this Court finds Plaintiffs' arguments to be colorable, summary judgment would be inappropriate. Plaintiffs have made only a paltry attempt to satisfy their evidentiary burden. To support their motion for summary judgment, Plaintiffs offer only two boilerplate affidavits and point to the aforementioned WEC memos. Perhaps this is unsurprising. The minimal discovery undertaken to date reveals that Plaintiffs have no personal knowledge regarding the purported election "misconduct" they allege has occurred and will continue unabated. Strikingly, Plaintiffs offer no proof whatsoever that any municipal clerk ever saw, let alone relied on, the WEC memos they claim triggered the purported "misconduct." In fact, Plaintiff Thom admitted he has no idea what the WEC is, and never saw the WEC memos before his deposition. Affidavit of Scott Thompson ("Thompson Aff."), ¶4, Ex. 2-Deposition of Richard L. Thom, 19:8-20:17. Absent any proof to substantiate their allegations, Plaintiffs cannot obtain summary judgment.[4]

Regardless of the barren record, enormous consequences hang in the balance. Plaintiffs' self-serving interpretation of the law contravenes a bipartisan agreement over the law. Leaders of the major Wisconsin political parties recognize that ballot assistance and drop boxes are legal

[4] Plaintiffs' disinterest in proving their case is particularly noteworthy in context. Earlier this year, in a case brought by the same attorneys representing Plaintiffs here, the Supreme Court of Wisconsin declined to exercise original jurisdiction over these same issues, refusing to accept "that these issues would be cleanly presented [as questions of law] with no obstacles to reaching the merits." Order, *Fabick v. Wis. Elections Comm'n,* No. 2021AP428-OA (Wis. June 25, 2021). The Court denied that case in favor of traditional process that includes developing a factual record in circuit court. Yet, Plaintiffs' submissions here offer little record as a basis for this Court (or any appellate court) to rule on a matter of tremendous public concern.

methods to return ballots. Wisconsin Assembly Speaker Robin Vos and State Senate Majority Leader Scott Fitzgerald have expressed, through counsel, that they "wholeheartedly support voters' use" of "authorized drop boxes," as a "convenient, secure, and expressly-authorized absentee-ballot return method[]."[5] In line with these comments, former Lt. Governor Rebecca Kleefisch recently confirmed that "[b]allot harvesting in Wisconsin is not technically illegal."[6] Current legislators agree. During this legislative session, bills were considered to prohibit both methods of absentee-ballot return that Plaintiffs challenge here.[7] Such proposals would be superfluous if current law already prohibited the challenged practices.

Still, Plaintiffs ask this Court to hold—contrary to the plain text of the statutes and without marshaling any illuminating evidence—that the voters of Wisconsin, their elected officials, and their political leaders are uniformly wrong such that this Court should, on its own and mere weeks before absentee ballots are mailed for Wisconsin's next statewide election, mandate a significant change in Wisconsin election law. Plaintiffs are wrong. Their arguments fail, and their motion for summary judgment should be denied for three reasons:

1. The plain language of Wis. Stat. § 6.87(4)(b)1. permits electors to return their ballots to their municipal clerks via drop boxes and delivery by other individuals;

2. Plaintiffs failed to meet their requisite prima facie burden under Wisconsin's summary judgment procedures; and

3. WEC did not need to engage in the statutory rulemaking process before publishing the two memos at issue.

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[5] Letter from Attorney Misha Tseytlin, on behalf of Wisconsin State Assembly Speaker Robin Vos and Wisconsin State Senate Majority Leader Scott Fitzgerald, to Madison City Clerk Maribeth Witzel-Behl (Sept. 25, 2020), available at http://www.thewheelerreport.com/wheeler_docs/files/092520troutman.pdf.

[6] https://urbanmilwaukee.com/2021/11/03/data-wonk-is-ballot-harvesting-a-problem/.

[7] https://docs.legis.wisconsin.gov/2021/related/proposals/sb209; https://docs.legis.wisconsin.gov/2021/related/proposals/ab177; https://docs.legis.wisconsin.gov/2021/related/proposals/sb203; https://docs.legis.wisconsin.gov/2021/related/proposals/ab192.

UNDISPUTED FACTS

WEC issued a memo dated March 31, 2020 ("the March Memo"). Dkt. 2 at 15-16. The March Memo considered absentee-ballot-return processes for the April 7, 2020 election. *Id.*; Thompson Aff., ¶3, Ex. 1-Deposition of Richard L. Teigen, 42:12-15. The March Memo identified that local clerks have "several options" to consider in overseeing absentee-ballot return, any of which a municipality may "choose" to employ. Dkt. 2 at 15-16. The March Memo never instructed municipal clerks to follow any particular procedure. *Id.* As Plaintiff Richard Teigen admitted, "[r]egardless of what the document says, the clerks can choose what they want to do." Thompson Aff., Ex. 1 at 43:16-23.

The March Memo contained two principal parts. The first part provided responses to four questions, two of which are relevant here:

1. Can I establish drop boxes, or other similar options, for voters to return ballots without having to mail them back?

2. Can voters return an absentee ballot they received by mail in-person at the clerk's office, in-person absentee site or their polling place on election day?

Dkt. 2 at 15. In response to the first question, the March Memo confirmed drop boxes, or similar options like mail slots at municipal facilities, can be utilized for absentee-ballot return. *Id.* at 16. As to ballot assistance, the March Memo's response to the second question contained one sentence referencing absentee voters' ability to return ballots "in-person" at a municipal clerk's office via a family member or other person. *Id.*

The second part of the March Memo contained a template letter clerks could send to electors. In underlined and bolded font, the template encouraged clerks to customize the template as they saw fit. *Id.* at 17. The language of the template asked voters to consider hand-delivering their absentee ballot, returning their absentee ballot to a drop box, or returning their ballot via U.S. mail as soon as possible. *Id.* The template made no mention of ballot assistance.

WEC issued a second memo dated August 19, 2020 (the "August Memo"). Dkt. 2 at 18-21. Plaintiffs understand the August Memo to address voting procedures for the November 2020 election. Thompson Aff., Ex. 1 at 34:1-7. Like the March Memo, the August Memo set forth no requirements municipal clerks had to follow administering the relevant election. *Id.* at 44:15-20. As Plaintiff Teigen confirmed, it is not a "mandatory compliance document." *Id.*

Substantively, the August Memo addressed "secure absentee ballot return," including drop boxes. The August Memo states that drop boxes are "operated by local election officials" and described various containers and other structures that could serve, functionally, as drop boxes for ballot return. Dkt. 2 at 18-21. The August Memo never mentions electors returning a ballot through a different person. *Id.*; Thompson Aff., Ex. 1 at 35:14-18.

Plaintiffs reside in Waukesha County, pay property taxes, are registered to vote, voted in the 2020 general election, and intend to vote in future elections. Dkts. 65, 66. In their depositions, Plaintiffs revealed the following:

- Plaintiff Thom never saw the March or August Memos prior to his deposition, and has no idea who Defendant WEC is. Thompson Aff., Ex. 2 at 19:8-20:17.
- Plaintiffs have no knowledge or proof that the March or August Memos were actually sent to any municipal clerks. *Id.*, Ex. 1 at 26:24-27:3, Ex. 2 at 15:10-16:11.
- Plaintiffs have no knowledge or proof that any clerk relied on the March or August Memos to "authorize and use[] over 500 drop boxes" for voters to cast absentee ballots. *Id.*, Ex. 1 at 25:8-27:3[8], Ex. 2 at 16:20-18:20.
- Plaintiffs have no knowledge or proof about whether ballot assistance or drop boxes will ever be used again. *Id.*, Ex. 1 at 44:24-45:9, Ex. 2. at 21:16-19, 35:17-20.

[8] In his deposition, Plaintiff Teigen identified that he received an article from Wisconsin Watch which supported this claim. Howeveer, this article was produced after his deposition, and makes no substantive reference to it. *See* Thompson Aff., Ex. 1 at 26:24-27:3, Ex. 3.

LEGAL STANDARD FOR SUMMARY JUDGMENT

"[S]ummary judgment is a drastic remedy and should not be granted unless the material facts are not in dispute, no competing inferences can arise, and the law that resolves the issue is clear." *Lecus v. American Mut. Ins. Co.*, 81 Wis. 2d 183, 189, 260 N.W.2d 241 (1997). A motion for summary judgment must be denied unless "the moving party demonstrates a right to a judgment with such clarity as to leave no room for controversy." *Energy Complexes. Inc. v. Eau Claire Cnty.*, 152 Wis. 2d 453, 461-62, 449 N.W.2d 35 (1989). Thus, "[i]f the material presented on the motion is subject to conflicting interpretations or reasonable people might differ as to its significance, it would be improper to grant summary judgment." *Grams v. Boss*, 97 Wis. 2d 332, 339, 294 N.W.2d 473 (1980).

Wisconsin's summary judgment methodology is widely understood; nevertheless, it merits review, as Plaintiffs cannot survive it. The circuit court must first determine whether the pleadings establish a claim for relief. *Baumeister v. Automated Prod., Inc.*, 2004 WI 148, ¶12, 277 Wis. 2d 21, 690 N.W.2d 1. Next, the moving party's proof is examined to determine whether it supports a *prima facie* case. *Id.* If such proof sets forth a *prima facie* case, the opposing party must demonstrate that material facts are in dispute *or* that alternative inferences to undisputed material facts entitle the non-movant to trial. *Id*. A movant's failure at any step is fatal to the motion. *Id*. Moreover "[if] it shall appear to the court that the party against whom a motion for summary judgment is asserted is entitled to a summary judgment, the summary judgment may be awarded to such party even though the party has not moved therefor." Wis. Stat. § 802.08(6).[9]

[9] Intervenor-Defendants expressly reserve the right to file their own motion for summary judgment, if appropriate, once the record in this case is sufficiently developed to do so.

ARGUMENT

I. The Plain Text Of Wis. Stat. § 6.87(4)(B)1. Does Not Support Plaintiffs' Arguments.

A. "[B]y the elector" modifies only the mailing procedure under Wis. Stat. § 6.87(4)(b)1.; construing it otherwise requires additional language and leads to absurd results.

This case presents a question of statutory interpretation. The purpose of statutory interpretation is to "determine what the statute means so that it may be given its full, proper, and intended effect." *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶44, 271 Wis. 2d 633, 681 N.W.2d 110. Analysis of a statute begins with the language of the adopted text. *Id.*, ¶45. "Statutory language is given its common, ordinary, and accepted meaning, except technical or specially-defined words or phrases are given their technical or special definitional meaning." *Id.* This language is "interpreted in the context in which it is used, not in isolation but as part of a whole, in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Id.*, ¶46.

Wisconsin Stat. § 6.87(4)(b)1., the primary statutory provision at issue in this case, reads in part: "The envelope shall be mailed by the elector, or delivered in person, to the municipal clerk issuing the ballot or ballots." According to Plaintiffs, this statutory text restricts the return of absentee ballots to only two methods: (1) "the voter handing the envelope containing the ballot in person to the municipal clerk at the office of the municipal clerk or to an election official appointed pursuant to Wis. Stat. § 7.30 to act as the authorized representative of the municipal clerk" or (2) "the voter placing the envelope containing the ballot in the U.S. Mail." Dkt. 2 at ¶56. In line with their reading of Wis. Stat. § 6.87(4)(b)1., Plaintiffs assert that the express language of the statute does not permit the use of drop boxes to return an absentee ballot, and that it similarly does not permit any third party to return an absentee ballot to the municipal clerk on an elector's behalf. For at least three reasons, that reading must be rejected.

First, Plaintiffs' cramped reading of Wis. Stat. § 6.87(4)(b)1. would improperly insert words into the statute that the legislature did not include. Wisconsin Stat. § 6.87(4)(b)1. provides, "The envelope shall be mailed by the elector, or delivered in person, to the municipal clerk issuing the ballot or ballots." The express language of Wis. Stat. § 6.87(4)(b)1. provides voters with two separate options to return their absentee ballots: 1) the envelope may "be mailed by the elector … to the municipal clerk"; or 2) the envelope may be "delivered in person[] to the municipal clerk." Significantly, the express language of the statute states that the act of mailing must ("shall") be done "by the elector", but there is no such restriction on who returns the ballot "in person" to the municipal clerk. If the Legislature had intended the phrase "by the elector" to modify both the mail and the in-person option, there are numerous ways it could have done so:

- "The envelope shall be mailed by the elector, or delivered in person by the elector, to the municipal clerk issuing the ballot or ballots"; or
- "The envelope shall be mailed by the elector or delivered personally by the elector…"; or
- "The envelope shall be personally mailed or delivered by the elector…"; or
- The elector shall return the envelope to the municipal clerk by any of the following:
    - Mail.
    - Personal delivery.

Yet, the Legislature did not choose to write the statute in any of these ways. Instead, it chose to modify only the mailing provision of Wis. Stat. § 6.87(4)(b)1. with the qualifier "by the elector."

Interpreting the text to require personal delivery by the elector to the municipal clerk would read words into the statute that it does not contain, and thereby breach a bedrock principle of statutory interpretation. *See, e.g.*, *Democratic Nat'l Comm. v. Bostelmann*, 2020 WI 80, ¶11, 394 Wis. 2d 33, 949 N.W.2d 423 (rejecting proffered interpretation that "adds words to the statute"); *State v. Schultz*, 2020 WI 24, ¶52, 390 Wis. 2d 570, 939 N.W.2d 519 ("We do not read words into

the statute that the legislature did not write."); *State v. Lickes*, 2021 WI 60, ¶24, --- Wis. 2d ---, 960 N.W.2d 855 ("[C]ourts may not add to the text. It is a fundamental maxim of statutory interpretation that we do not 'read into [a] statute language that the legislature did not put in.'" (quoted source omitted)); *Jefferson v. Dane Cnty.*, 2020 WI 90, ¶25, 394 Wis. 2d 602, 951 N.W.2d 556 ("We will not add words into a statute that the legislature did not see fit to employ.").

Second, Plaintiffs' construction of the statute violates the common canon of statutory interpretation that language must be interpreted "reasonably, to avoid absurd or unreasonable results." *Kalal*, 2004 WI 58, ¶46. This Court should not "read statutes in a way that produces absurd, implausible, or unreasonable results, or results that are at odds with the legislative purpose." *Anderson v. Aul*, 2015 WI 9, ¶51, 360 Wis. 2d 638, 859 N.W.2d 72; *Teschendorf v. State Farm Ins. Cos.*, 2006 WI 89, ¶¶30-43, 293 Wis. 2d 123, 717 N.W.2d 258 (lead opinion) (rejecting a literal interpretation that both "produce[d] absurd results and defie[d] common sense"). Yet, Plaintiffs' reading of Wis. Stat. § 6.87(4)(b)1. asks the Court to do exactly that. The following hypotheticals crystalize this point:

- A voter who accompanies their spouse to the municipal clerk's office would be disenfranchised if their absentee ballot was ultimately handed over to the clerk or deposited into a drop box by their spouse, even if that voter expressed approval to the clerk as their ballot was returned by their spouse; and
- A temporarily paralyzed voter, who cannot themselves hand-deliver their absentee ballot to the municipal clerk or put their absentee ballot in a drop box, would break the law by returning their ballot through a personal care assistant; and
- A disabled voter who is unable to vote in person because of access issues and designates someone to return their absentee ballot on their behalf to the clerk's office would be committing voter fraud under Plaintiffs' interpretation.

Each of these hypotheticals reaches an absurd result that cannot embody Wisconson law, yet each accords with Plaintiffs' proffered interpretation of Wis. Stat. § 6.87(4)(b)1.

Third, Plaintiffs' construction of Wis. Stat. § 6.87(4)(b)1. is at odds with other state and federal statutes. Wisconsin Stat. § 6.86(2)(a) carves out unique access to absentee ballots for indefinitely confined Wisconsinites. By way of this statute—recently reaffirmed by our Supreme Court in *Jefferson v. Dane County*, 2020 WI 90—the Legislature adopted a policy to make it easier for the indefinitely confined to access absentee ballots. Unlike the general procedure to request an absentee ballot, under Wis. Stat. § 6.86(2)(a) an indefinitely confined person need not supply a copy of photo identification to receive an absentee ballot. *Compare* Wis. Stat. § 6.86(2) *with* § 6.86(1). Yet returning a ballot "in person" can be a practical impossibility. This is true for "Wisconsinites for whom, due to their own age, illness, or disability, either permanent or intermittent, leaving their residence imposes a burden." Affidavit of Barbara Beckert ("Beckert Aff."), ¶4. Third-party assistance is necessary to protect their voting rights. *See id.,* ¶¶1-9.

Regardless, Plaintiffs' interpretation of Wis. Stat. § 6.87(4)(b)1. demands that the Court assume the Legislature intended to restrict Wisconsin's indefinitely confined voters to return their absentee ballot only via the mail. This presumption goes too far. First, there is no statute that affirmatively states any legislative desire to limit absentee-ballot access to the indefinitely confined in this fashion. Moreover, this construction threatens the right to vote altogether for certain indefinitely confined voters. How could an indefinitely confined, paralyzed person utilize the U.S. Mail without some degree of third-party assistance? Quite simply, they could not. Beckert Aff., ¶9. Again, this Court should reject a construction of Wis. Stat. § 6.87(4)(b)1. which is at odds with legislative purpose—as well as the guarantee of equal protection under both the federal and state constitutions. As Plaintiffs' construction of the statute would contravene Wisconsin's absentee-ballot process for the indefinitely confined and render that process unconstitutional, it should be rejected.

Plaintiffs' narrow construction contravenes federal statute as well. Under 52 U.S.C § 10508, "Any voter who requires assistance to vote by reason of … disability … may be given assistance by a person of the voter's choice." Of course, Plaintiffs' construction of Wis. Stat. § 6.87(4)(b)1. would directly conflict with this federal statute, especially as it pertains to those Wisconsinities whose *only way* to vote is by returning an absentee ballot (via mail or otherwise) with the assistance of a third-party. *See* Beckert Aff., ¶¶1-9. Lest a narrow construction trigger federal preemption, Plaintiffs' Wis. Stat. § 6.87(4)(b)1. argument must fail.

B. Plaintiffs' reading of Wis. Stat. § 6.87(4)(b)1. to prohibit drop boxes would lead to absurd results.

Plaintiffs assert that absentee ballot drop boxes are impermissible under Wis. Stat. § 6.87(4)(b)1. because a ballot returned to a drop box cannot be "delivered in person[] to the municipal clerk issuing the ballot or ballots." According to Plaintiffs, a drop box "is not the 'municipal clerk' [and] … in no manner of speaking can an inanimate object be considered an 'authorized representative.'" Dkt. 63 at 10.

Our Supreme Court specifically cautioned against the narrow definition of "municipal clerk" upon which Plaintiffs hinge their argument. Justice Hagedorn authored the majority opinion in *Trump v. Biden*, 2020 WI 91, 394 Wis. 2d 629, 951 N.W.2d 568. In his concurrence to the majority opinion, he rejected the narrow interpretation of "municipal clerk" that Plaintiffs push before this Court. He explained:

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

Id., ¶54 (Hagedorn, J., concurring). It follows that absentee ballots placed into a drop box satisfy Wis. Stat. § 6.87(4)(b)1. so long as the ballots are retrieved by "those acting on a clerk's behalf." The United States Supreme Court agrees:

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

Democractic Natl'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 36 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay); *id.* at 29 ("[V]oters may return their ballots [to] various "no touch" drop boxes staged locally.") (Gorsuch, J., concurring).[10]

Plaintiffs' proffered statutory interpretation also fails because it reads words into the statute and leads to absurd and unreasonable results. Plaintiffs specifically argue that delivery to an "unstaffed" drop box cannot qualify as "in person" delivery. Dkt. 63 at 9-10. This distinction between "staffed" and "unstaffed" drop boxes is noteworthy in that it appears for the first time in Plaintiffs' summary-judgment filings. *See* dkt. 63 at 11, n.2 ("Plaintiffs do not challenge a drop

[10] Notably, were Plaintiffs to succeed in upending the U.S. Supreme Court's understanding that Wisconsin law authorizes the use of absentee-ballot drop boxes, that could have broader effects on the application of other Wisconsin election laws. The Seventh Circuit has held that in challenges to election laws under the *Anderson-Burdick* framework, individual "electoral provisions cannot be assessed in isolation," but instead must be examined in the context of "the state's election code as a whole." *Luft v. Evers*, 963 F.3d 665, 671-72 (7th Cir. 2020). Shortly after *Luft* was decided, a Wisconsin federal court issued a preliminary injunction altering several Wisconsin election laws for the 2020 general election. *See Democratic Nat'l Comm. v. Bostelmann,* 488 F. Supp. 3d 776, 800 (W.D. Wis. 2020). But the Seventh Circuit stayed that injunction, 977 F.3d 639 (7th Cir. 2020), and the U.S. Supreme Court affirmed, in part because absentee ballot drop boxes, among other measures accommodating voters, made it sufficiently easy for Wisconsin voters to cast their ballots without the need for the remedies imposed by the district court. 141 S. Ct. 28, 35 (2020) (Kavanaugh, J., concurring) (observing that "[t]o help voters meet the deadlines, Wisconsin makes it easy to vote absentee and has taken several extraordinary steps this year to inform voters that they should request and return absentee ballots well before election day," including the use of drop boxes). Were this Court to eliminate the safeguards offered by drop boxes that, in part, underpinned the Seventh Circuit's and U.S. Supreme Court's decision in *Bostelmann*, it would impact the *Anderson-Burdick* analysis in future cases assessing Wisconsin election law.

box that is staffed and located at the municipal clerk's office (or properly designated alternate site). Putting a ballot into a secure box, if the clerk or an authorized representative is present, is 'in person' delivery"). Plaintiffs' underlying complaint makes no such distinction.[11] This late-breaking change of heart suggests that Plaintiffs recognize the absurdity of their narrow statutory interpretation.

Again, this Court must interpret the statute "in the context in which it is used" and "reasonably, to avoid absurd or unreasonable results." *Kalal*, 2004 WI 58, ¶46. As described above, Intervenor-Defendants' interpretation of the statute aligns with those from the supreme courts of Wisconsin and the United States. In comparison, even Plaintiff Teigen admitted that Plaintiffs' preferred construction of Wis. Stat. § 6.87(4)(b)1. is absurd: "This is one of those issues where common sense has to prevail. And the statute really doesn't have to be so specific as to say the ballot at one point in time has to touch both my hand and the clerk's hand." Thompson Aff., Ex. 1 at 42:14-21. Indeed, this is Plaintiffs' aim: construing Wis. Stat. § 6.87(4)(b)1. in Plaintiffs' favor would create a nonsensical world wherein the elector would have to literally place her ballot into the clerk's hand. Plaintiff Thom confirmed this is exactly the result he seeks, one where "a voter in Wisconsin [must] actually put the ballot into the clerk's hands." *Id.*, Ex. 2 at 24:15-25.

Yet common sense commands otherwise. The "staffed" or "unstaffed" distinction advanced by Plaintiffs has no statutory basis. Similarly, the statute does not preclude the clerk from designating a drop box as her "authorized representative." Furthermore, the statute never forbids someone acting on a municipal clerk's behalf from retrieving absentee ballots from a drop box. The statute merely states that those acting on the clerks behalf may receive these absentee

[11] "Thus, putting an absentee ballot into a drop box does not satisfy the mandatory requirements for casting an absentee ballot set forth in § 6.87(4)(b)1." Dkt. 2 at ¶38.

ballots. This Court should declined Plaintiffs' invitation to write these prohibitions into law on their behalf.

This is especially true given that the Legislature shares Intervenor-Defendants' understanding of the election statutes. If the Legislature held Plaintiffs' view, it would not have entertained proposals to rewrite the election code in ways that would accomplish what Plaintiffs insist is already law. For example, 2021 Wisconsin Senate Bill 209 and Assembly Bill 177 sought to prohibit the use of drop boxes, other than one box directly adjacent to the primary municipal building.[12] Additionally, 2021 Senate Bill 203 and Assembly Bill 192 sought to limit who may return another voter's absentee ballot.[13] None of these proposals have been enacted into law.

As the Supreme Court of Wisconsin noted over 65 years ago, "[m]odern transportation has greatly affected our social and economic lives and many persons find it necessary or convenient to be away on election day. The number of absentee ballots is increasing rather than decreasing. Where possible our statute should be interpreted to enable these people to vote." *Sommerfeld v. Bd. Of Canvassers of City of St. Francis*, 269 Wis. 299, 302, 69 N.W.2d 235 (1955). Commenting on the predecessor provision to Wis. Stat. § 6.87(4)(b)1., the Court reasoned that

> [i]f our statute is construed to mean that the voter shall himself mail the ballot or personally deliver it to the clerk, then the statute would defeat itself in the case of those who are sick or physically disabled. They would be unable to mail ballots except through an agent. Having made provision that these unfortunate people can vote, we cannot believe that the legislature meant to disenfranchise them by providing a condition that they could not possibly perform.

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

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

Id. at 303. *See also* Wis. Stat. § 5.01 (dictating that "chs. 5 to 12 shall be construed to give effect to the will of the electors.")[14]; *Hubbard v. Messer*, 2003 WI 145, ¶9, 267 Wis. 2d 92, 673 N.W.2d 676 ("A cardinal rule in interpreting statutes is to favor an interpretation that will fulfill the purpose of a statute over an interpretation that defeats the manifest objective of an act.").

C. Wis. Stat. § 6.855 applies only to locations where ballots are collected and distributed.

Plaintiffs argue that absentee-ballot drop boxes must be pre-approved as "alternate absentee ballot sites" under Wis. Stat. § 6.855. *See* Dkt. 63 at 11-14. Once again, Plaintiffs contort the plain language of the statute to reach their desired result. Wisconsin Stat. § 6.855(1) provides the mechanism by which a municipality may designate "the location from which electors of the municipality may request and vote absentee ballots and to which voted absentee ballots shall be returned by electors for any election." This statutory language is fatal to Plaintiffs' argument. "An alternative absentee ballot site … must be a location not only where voters may return absentee ballots, but also a location where voters may request and vote absentee ballots." *Trump*, 2020 WI 91, ¶56 (Hagedorn, J., concurring) (internal quotations omitted). Plaintiffs have not argued that ballot requests or ballot distribution occurred at any drop box. This is dispositive. "Ballots were not requested or distributed. Therefore, Wis. Stat. § 6.855 is not on point." *Id.*

[14] Intervenor-Defendants recognize that Wis. Stat. § 6.84 purports to exclude the absentee ballot process from the overarching principal that election statutes should be construed to give effect to the will of the voter. However, having already authorized voting by absentee ballot, the Legislature cannot now impose procedures that make one authorized method of exercising the fundamental right to vote more difficult than another nor in any way treat absentee ballots as a lesser class of ballot. To do so raises serious constitutional concerns under the Equal Protection Clause of the U.S. Constitution. This Court should reconcile Wis. Stat. §§ 5.01(1) and 6.84, reading them together to avoid constitutional conflict. *In re Termination of Parental Rts. to Max G.W.*, 2006 WI 93, ¶ 20, 293 Wis. 2d 530, 716 N.W.2d 845 ("Where the constitutionality of a statute is at issue, courts attempt to avoid an interpretation that creates constitutional infirmities") (internal citation and quotation marks omitted). Should the Court so direct, Intervenor-Defendants welcome the opportunity to fully brief this issue.

In sum, Plaintiffs' flawed statutory interpretation means they cannot make a *prima facie* case. Thus, their motion for summary judgment must be dismissed.

II. Plaintiffs Have Not Satisfied Their Burden On Summary Judgment.

As described above, Plaintiffs must offer sufficient proof to support their motion. They failed to do so. This is true in several respects, each of which on its own forecloses Plaintiffs' motion.

For a declaratory judgment, Plaintiffs must provide this Court with "the facts … sufficiently developed to avoid courts entangling themselves in abstract disagreements … . The facts on which the court is asked to make a judgment should not be contingent or uncertain" *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶43, 309 Wis. 2d 365, 749 N.W.2d 211 (internal quotations and citations omitted). Plaintiffs never provided sufficiently-developed facts to this Court.

Plaintiffs' central allegation is that "[i]n reliance upon the Memos, municipal clerks set up over 500 … drop boxes across the state to collect absentee ballots." Dkt. 63 at 2. Plaintiffs pled that the Memos "led to local election officials in Wisconsin administering elections incorrectly under Wisconsin law." *Id*. at 12. *See* Dkt. 2 at ¶¶12-14, 33-34. They further asserted that "WEC's incorrect interpretation of the election statutes harm the Plaintiffs in several ways." Dkt. 2 at ¶52. Nothing in the record suggests any of this is true.

Plaintiffs recognize this. Incredibly, they admit that they have no knowledge that these memos were relied upon by any clerk in Wisconsin. Thompson Aff., Ex. 1 at 25:12-26:11, Ex. 2. at 16:20-17:4. They admit they have no knowledge that these memos were sent to the municipal clerks. *Id.*, Ex. 1. at 26:24-27:3, Ex. 2. at 15:10-16:11. They provided no evidence from which anyone could infer that any ballots were cast in reliance on the Memos.

Regardless, Plaintiffs wax grandiose, asking "*Quis custodiet ipsos custodes*? If WEC will not administer elections as required by the statutes, then who will require them to do so such that

the future votes cast by Wisconsin voters are not placed in jeopardy?" Dkt. 2 at ¶16. Plaintiffs ask this Court to police Wisconsin's future elections, but they fail to offer this Court even one shred of evidence that any future votes cast by Wisconsin voters will be subject to either WEC memo. Indeed, both Plaintiffs admit that they have no idea if drop boxes or ballot assistance will ever be used again in an election in Wisconsin. Thompson Aff., Ex. 1 at 44:24-45:9, Ex. 2. at 21:16-19, 35:17-20. The only "proof" to which Plaintiffs point is a third-party news article, one which makes no mention of these issues.[15] Ultimately, Plaintiffs have not demonstrated that the Memos were ever of any consequence, nor have they demonstrated that the Memos might have such consequence in the future.

Without such evidence, Plaintiffs are not entitled to summary judgment. As the moving party, Plaintiffs bear the burden of demonstrating "a right to a judgment with such clarity as to leave no room for controversy." *Energy Complexes, Inc.*, 152 Wis. 2d at 461-62. They have put forth nothing to support their substantive allegations. Instead, Plaintiffs ask this Court to decide an issue of paramount importance to hundreds of thousands of Wisconsin voters based on allegations alone. Such a request should be denied. "Deciding cases on hypothetical facts leads to impermissible advisory opinions, about which our position has been steadfast: we will not do that." *Jefferson*, 2020 WI 90, ¶55 (Dallet, J. concurring in part and dissenting in part) (internal punctuation omitted). The record before this Court is not sufficiently clear to merit summary judgment, Plaintiffs' motion must be denied.

[15] Of course, a newspaper article is archetypal hearsay and merits no weight in the Court's consideration of the pending motion.

III. WEC Did Not Need To Engage In The Statutory Rulemaking Process To Publish The Memos.

In a last-ditch effort to obtain the relief they seek, Plaintiffs insist that the Memos are WEC's interpretation of the law and that Wisconsin law required WEC to go through the statutory rulemaking procedure before issuing the Memos. However, formal rulemaking was not required here because the Memos are simple guidance documents, nothing more than "best practice" statements regarding the 2020 elections issued in response to questions from local clerks in the midst of a deadly worldwide pandemic.

The Wisconsin Supreme Court recently reaffirmed the propriety of "guidance documents" in *Service Employees International Union, Local 1 v. Vos* ("*SEIU*"), 2020 WI 67, ¶89, 393 Wis. 2d 38, 946 N.W.2d 35.[16] The Legislature defined a "guidance document" as:

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

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

- "does not have the force or effect of law";
- "impose[s] no obligations, set no standards, and bind no one. They are communications about the law—they are not the law itself. They communicate

[16] The *SEIU* case involved a series of constitutional challenges to 2017 Wisconsin Act 369 and 2017 Wisconsin Act 370. There were two separate majority opinions. Justice Kelly authored the majority opinion, referenced here, regarding the set of provisions dealing with "guidance documents." That majority opinion concluded that two provisions seeking to limit guidance documents were facially unconstitutional. This included a provision seeking to impose more extensive procedures that an agency would have to follow before issuing guidance documents.

intended applications of the law—they are not the actual execution of the law … they represent nothing more than the knowledge and intentions of their authors"; and

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

Id., ¶¶ 100, 102, 105 (emphasis in original).

The WEC Memos neither order nor instruct municipal clerks to take any action. Nor do the Memos impose obligations or standards upon municipal clerks statewide. Moreover, these informational memos do not have the force of law or affect what the law is. In fact, the Memos expressly state that any identified actions regarding drop boxes are conditional, mere suggestions, and at the sole discretion of municipalities: "If a municipality chooses to do alternate drop off boxes or locations for ballots it should be publicized to voters where they can go to deliver their ballots" and "drop boxes can be used." Dkt. 2 at 15 (emphases added). The information contained in the Memos also makes it clear that the Memos were written with respect to the 2020 elections and in response to questions WEC had received from on-the-ground election officials. WEC published the March Memo in response to "clerks [who] have inquired about options for ensuring that the maximum number of ballots are returned to be counted for the April 7, 2020 election." *Id.* Additionally, the August Memo opens by asserting that "[t]his document is intended to provide information and guidance on drop box options for secure absentee ballot returns for voters." *Id.* at 18.

At his deposition, Plaintiff Teigen even conceded that the Memos were "not mandatory compliance documents" and that the municipal clerks themselves—not WEC—ultimately decided whether they would apply the drop box guidance from WEC: "[r]egardless of what the document says, the clerks can choose what they want to do." Thompson Aff., Ex. 1 at 43:16-23; 44:15-20.

These are the exact type of agency communications that the *SEIU* court addressed and that fall exclusively within the province of the executive branch and do not require rulemaking. [17]

CONCLUSION

As set forth in full in Intervenor-Defendants' Response Brief In Opposition To Plaintiffs' Motion For Temporary Injunction, the Plaintiffs' failed to exhaust their administrative remedies, foreclosing any relief they seek for want of jurisdiction. Further, the relief Plaintiffs' seek is prohibited under *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006). For those reasons, and for those described within this brief, Intervenor-Defendants respectfully request that this court DENY Plaintiffs' motion for summary judgment.

In the event this Court reaches the merits of the case in adjudicating Plaintiffs' motion, Intervenor-Defendants respectfully request that this Court GRANT summary judgment in Intervenor-Defendants' favor under Wis. Stat. § 802.08(6), dismissing the complaint with prejudice.

Dated this 15th day of November, 2021.

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[17] On the date of this filing, Former Lt. Governor Rebecca Kleefisch filed an original action in the Supreme Court of Wisconsin regarding, among other things, WEC's rulemaking authority vis-à-vis absentee ballot drop boxes. Petition, *Kleefisch v. Wis. Elections Comm'n*, No. 2021AP001976–OA (Wis. Nov. 15, 2021).