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Clerk of Circuit Court
Waukesha County
2021CV000958

STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY
BRANCH 1

RICHARD TEIGEN and
RICHARD THOM,

Plaintiffs,

v.

Case No. 2021CV0958
Declaratory Judgment: 30701

WISCONSIN ELECTIONS
COMMISSION,

Defendant, and

DEMOCRATIC SENATE CAMPAIGN
COMMITTEE, DISABILITY RIGHTS
WISCONSIN, WISCONSIN FAITH VOICE FOR
JUSTICE, and LEAGUE OF WOMEN VOTERS,

Intervenors-Defendants.

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**DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

Plaintiffs purport to challenge four pieces of guidance provided by Defendant Wisconsin Elections Commission (the "Commission") in two advisory memoranda to local officials issued on March 31 and August 19, 2020. (Dkt. 2 ¶¶ 8, 10 (complaint), Ex. A & B; 19 ¶¶ 8, 10 (Commission answer).) They seek a declaration that the challenged guidance is contrary to statute or, in the alternative, that it is invalid as an unpromulgated administrative rule. (Dkt. 62–63.) They ask the Court to enjoin the Commission from continuing to communicate that guidance to clerks, and to order the Commission to correct prior misstatements of the law. (Dkt. 2:13–14.) Plaintiffs should be denied summary judgment on all claims because the Court lacks competency to proceed on those claims and because, even assuming competency, the claims fail as a matter of law.

## LEGAL STANDARD

Wisconsin's election statutes are typically construed as directory, rather than mandatory, so as to preserve the will of the elector. *See* Wis. Stat. § 5.01(1); *In re Chairman in Town of Worcester*, 29 Wis. 2d 674, 681, 139 N.W.2d 557 (1966). "The difference between mandatory and directory provisions of election statutes lies in the consequence of *nonobservance*: An act done in violation of a mandatory provision is void, whereas an act done in violation of a directory provision, while improper, may nevertheless be valid." *Id.* (emphasis added) (citation omitted). Plaintiffs here purport to rely on a statutory exception to that rule which provides that certain procedural requirements for absentee voting—including the requirements of section 6.87(4)(b)1. at issue here—"shall be construed as mandatory," and that "[b]allots cast in contravention of the procedures specified in those provisions may not be counted." Wis. Stat. § 6.84(2).

Plaintiffs' reliance on Wis. Stat. § 6.84(2), however, is erroneous because the issues they raise relate not to determining the consequence of failing to follow a statutory requirement, but rather to the logically prior question of construing a statute so as to determine what it does and does not require. Where a statute has been determined to require action X, Wis. Stat. § 6.84(2) provides that a ballot cast without that action shall not be counted. However, section 6.84(2) does not provide a standard for resolving whether a statute actually requires action X. Rather, for purposes of determining what are the statutory procedural requirements for absentee voting, the ordinary principles of statutory construction apply.

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## ARGUMENT

### I. This Court lacks competency over all Plaintiffs' claims and summary judgment should be entered for Defendant.

The Legislature has made clear that "the exclusive means of judicial review of the validity of a rule or guidance document shall be an action for declaratory judgment as to the validity of the

rule or guidance document brought in the circuit court for the county where the party asserting the invalidity of the rule or guidance document resides." Wis. Stat. § 227.40(1) Plaintiffs have filed such an action here, asking the Court to declare the challenged Commission guidance invalid pursuant to Wis. Stat. § 227.40(4)(a).[1] However, their claims fail at the threshold because the Court lacks competency over them.[2]

While the circuit courts have subject matter jurisdiction over "all matters civil and criminal[,]" Wis. Const. art. VIII, § 8, that jurisdiction may be limited through a litigant's "noncompliance with statutory requirements pertaining to the invocation of that jurisdiction." *Vill. of Trempealeau v. Mikrut*, 2004 WI 79, ¶ 2, 273 Wis. 2d 76, 681 N.W.2d 190. The failure to comply with statutory requirements deprives the court of competency and "if a court lacks competency[,] . . . the appropriate remedy is dismissal." *DWD v. LIRC*, 2016 WI App 21, ¶ 22, 367 Wis. 2d 609, 877 N.W.2d 620.

A plaintiff bringing an action under Wis. Stat. § 227.40 must serve a copy of the pleadings on the Wisconsin Legislature's joint committee for review of administrative rules ("JCRAR"). JCRAR thereafter may "be made a party and be entitled to be heard," if it first obtains approval from the joint committee on legislative organization. Wis. Stat. § 227.40(5). Failure to serve JCRAR in such an action deprives the circuit court of competency to proceed. *Richards v. Young*,

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[1] Wisconsin Stat. § 227.40(4)(a) states: "In any proceeding pursuant to this section for judicial review of a rule or guidance document, the court shall declare the rule or guidance document invalid if it finds that it violates constitutional provisions or exceeds the statutory authority of the agency or was promulgated or adopted without compliance with statutory rule-making or adoption procedures."

[2] Plaintiffs' contention that their claims are brought under Wis. Stat. § 806.04, as well as under Wis. Stat. § 227.40, should be rejected. It is clear that a declaratory judgment action under Wis. Stat. § 227.40 is the exclusive method for challenging agency guidance documents like the Commission memoranda at issue here. *See* Wis. Stat. § 227.40(1).

150 Wis. 2d 549, 551–544, 558, 441 N.W.2d 742 (1989). In other words, the JCRAR service requirements are "not permissive, but rather are mandatory." *Id.* at 555.

The JCRAR service requirements apply not only to actions challenging promulgated rules, *id.* at 557, but also to actions challenging policies that are alleged to be unpromulgated rules, *Heritage Credit Union v. Office of Credit Unions*, 2001 WI App 213, ¶¶ 22–25, 247 Wis. 2d 589, 634 N.W.2d 593.[3] That is because section 227.40 encompasses situations where a rule "was promulgated or adopted without compliance with statutory rule-making or adoption procedures." Wis. Stat. § 227.40(4)(a). For example, in *Mata v. DCF*, 2014 WI App 69, ¶¶ 9–10, 354 Wis. 2d 486, 849 N.W.2d 908, the court lacked competency to decide whether an agency policy was an unpromulgated rule because the plaintiffs failed to serve JCRAR within the requisite time. The JCRAR requirements likewise apply to actions challenging rules or guidance documents alleged to be contrary to a statute. *See Mata*, 354 Wis. 2d 486, ¶ 12.

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Here, it cannot be disputed that Plaintiffs did not serve JCRAR. The docket contains certificates showing service on other parties, but none for JCRAR. Further, Plaintiffs filed their complaint more than 90 days ago, which means they did not serve JCRAR within 90 days of filing, as required by the supreme court in *Richards*. Because Plaintiffs did not timely serve JCRAR, this Court lacks competency to proceed. *Mata*, 354 Wis. 2d 486, ¶ 10 ("the consequence for Mata's failure to properly serve the Joint Committee is lack of jurisdiction to hear the case"); *Kruczek v. DWD*, 2005 WI App 12, ¶ 46, 278 Wis. 2d 563, 692 N.W.2d 286 ("Failure to serve the committee deprives the court of jurisdiction to hear a challenge to the rule.").

[3] The JCRAR requirements also apply to challenges to guidance documents. Wis. Stat. § 227.40(1), (4)(a), (5).

Because the Court lacks (and cannot obtain) competency over any of Plaintiffs' declaratory judgment claims, summary judgment should be entered for the Commission.

## II. Even assuming competency, the challenged Commission guidance is not contrary to statute.

Plaintiffs purport to challenge four pieces of guidance in the two Commission memoranda as contrary to statute. Their first three claims fail as a matter of law, while the fourth is not properly before the Court.

First, in the March 31, 2020, memorandum, the Commission advised, in part, that a completed absentee ballot may be placed in the mail or personally returned to the municipal clerk by a family member or another person acting on behalf of the voter. (Dkt. 2 ¶ 8, Ex. A.) Plaintiffs claim this guidance is invalid because, under Wis. Stat. § 6.87(4)(b)1., a ballot can be mailed or delivered to the clerk only by the absentee voter him-or-herself, and not by a third person. (Dkt. 63:6–9) That claim fails because when an agent acting on behalf of an absentee voter mails or otherwise delivers the voter's ballot to the clerk, that ballot has been "mailed by the elector, or delivered in person, to the municipal clerk," within the meaning of Wis. Stat. § 6.87(4)(b)1.

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Second, in both memoranda, the Commission advised that drop boxes in public locations authorized by the clerk can be used for returning completed absentee ballots, subject to multiple necessary measures to ensure ballot security. (Dkt. 2 ¶¶ 8, 10, Ex. A & B.) Plaintiffs claim this guidance is invalid because allowing completed absentee ballots to be personally deposited in unstaffed drop boxes violates the requirement that a ballot be "delivered in person, to the municipal clerk." Wis. Stat. § 6.87(4)(b)1. (Dkt. 63:9–11 (emphasis omitted)). That claim fails because when an absentee ballot is placed in a secure drop box that is authorized by the clerk and operated in accordance with the Commission's guidance, that ballot has been "delivered in person, to the municipal clerk," within the meaning of Wis. Stat. § 6.87(4)(b)1.

Third, the memoranda advised that clerks may authorize drop box locations outside the clerk's office, without reference to the process for a municipality to designate an alternate absentee ballot site under Wis. Stat. § 6.855. (Dkt. 2 ¶¶ 8, 10, Ex. A & B.) Plaintiffs, in addition to claiming that all unstaffed drop boxes are unlawful, also claim that even a drop box that is staffed by an authorized representative of the clerk[4]—which would be legally equivalent to directly returning the ballot to the clerk—is permissible only if the staffed drop-off location is situated either in the clerk's office or at an alternate absentee ballot site designated under Wis. Stat. § 6.855.[5] (Dkt. 63:11–14.) This claim fails because Wis. Stat. § 6.855 only applies to designating an alternate site for conducting early *in-person* absentee voting and does not apply to locations where already completed absentee ballots are merely dropped off with an authorized representative of the clerk.

Fourth, although the memoranda did not specifically address this issue, Plaintiffs claim that a staffed drop-off location for absentee ballots cannot be staffed by just anyone whom a clerk might designate, but only by an election official appointed under Wis. Stat. § 7.30. (Dkt. 63:14–15.) This claim is not properly before the Court. The guidance documents challenged here did not address whether every authorized representative of a clerk who may receive delivery of absentee ballots must be an election official appointed under Wis. Stat. § 7.30. This issue,

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[4] As used in Wisconsin's election statutes, the term "municipal clerk" is statutorily defined as including not only a city, town, or village clerk, but also the clerk's "authorized representatives." Wis. Stat. § 5.02(10). Delivering an absentee ballot to such a representative is thus statutorily equivalent to delivering it personally to the municipal clerk.

[5] The March 31 and August 19, 2020, memoranda did not specifically provide guidance about staffed drop boxes, but they did advise that clerks could authorize drop box locations (whether staffed or unstaffed), without reference to the alternate absentee ballot site process under Wis. Stat. § 6.855. (Dkt. 2 ¶¶ 8, 10, Ex. A & B.)

therefore, does not present a justiciable claim for a declaration on the validity of any Commission guidance, but rather impermissibly seeks a purely advisory opinion.

Because all of the claims above fail as a matter of law, Plaintiffs' motion for summary judgment on those claims must be denied.

### A. The Commission correctly advised that a completed absentee ballot may be placed in the mail or personally returned to the clerk by a family member or another person acting on behalf of the voter.

#### 1. The Commission's guidance is consistent with the language of Wis. Stat. § 6.87(4)(b)1.

After a voter completes an absentee ballot and a witness certifies it, it must be sealed in an envelope and returned for counting. Wisconsin Stat. § 6.87(4)(b)1. provides that "[t]he envelope shall be mailed by the elector, or delivered in person, to the municipal clerk issuing the ballot or ballots." In the March 31, 2020, memorandum, the Commission advised that "[a] family member or another person may also return the ballot on behalf of the voter." (Dkt. 2 ¶ 8, Ex. A.) Plaintiffs claim that allowing such action by an individual other than the voter is contrary to that statute. (Dkt. 63:6–9.)

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Plaintiffs are incorrect. Wisconsin Stat. § 6.87(4)(b)1. does not specify whether an absentee ballot is "mailed by the elector" only if the elector personally places it in a mailbox, nor does it specify whether a ballot can be "delivered in person" to the clerk only by the voter him-or-herself. The plain language of the statute provides two options: (1) "The envelope shall be mailed by the elector . . . to the municipal clerk;" and (2) "The envelope shall be . . . delivered in person[] to the municipal clerk." *Id.* These options are satisfied when an agent acting on behalf of an absentee voter mails or otherwise delivers the voter's ballot to the clerk or an authorized representative.

As to the first statutory option, a ballot is "mailed by the elector," if the elector gives it to an agent, directs the agent to place it in the mail, and the agent does so. Statutory terms that are

not statutorily defined and that do not have a technical or peculiar legal meaning are to be interpreted according to common and approved usage. Wis. Stat. § 990.01(1). Common and approved usage can be found in recognized dictionaries. *Town of Madison v. Cty. of Dane*, 2008 WI 83, ¶ 17, 311 Wis. 2d 402, 752 N.W.2d 260.

The word "mail," when used as a verb, means "to send by mail," meaning to send by the "nation's postal system." *See* "Mail," *Merriam-Webster*, https://www.merriam-webster.com /dictionary/mail (last visited Nov. 15, 2021). The word "send" means "to cause (a letter, an e-mail, a package, etc.) to go or to be carried from one place or person to another." "Send," *Merriam-Webster*, https://www.merriam-webster.com/dictionary/send (last visited Nov. 15, 2021). Applying these definitions together to interpret Wis. Stat. § 6.87(4)(b)1., the statutory phrase "the envelope shall be mailed by the elector . . . to the municipal clerk" means that the elector shall cause the envelope to be carried to the municipal clerk by the United States Postal Service. That conclusion is also consistent with common-sense English usage, under which a person who directs a trusted agent to place an item in a mailbox on the person's behalf would understand that he or she has mailed that item.

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When an elector gives to an agent his or her absentee ballot envelope, addressed to the clerk's office, directs the agent to place the envelope in the mail, and the agent does so, the elector has thereby caused the ballot to be carried to the municipal clerk by the United States Postal Service. The language of statutory option (1) is thus satisfied where a ballot is placed in the mail by an agent, rather than personally by the elector.

As to the second statutory option, the statute expressly permits a ballot to be "delivered in person" to the clerk. Contrary to Plaintiffs' contention, the language of the statute does not require that a ballot "delivered in person" must be delivered only "by the elector." Wis. Stat.

§ 6.87(4)(b)1. The statutory phrase "by the elector" modifies the phrase "shall be mailed by," but it does not apply to the phrase "or delivered in person." *Id.* By placing the phrase "or delivered in person" between commas, the Legislature separated it from the phrase "by the elector." *Id.* Moreover, because the Legislature chose to include the phrase "by the elector" within the initial clause, but not within the clause between the commas, the latter clause cannot be read to require that the envelope must be delivered in person to the municipal clerk "by the elector." *Id.* The language of statutory option (2) thus is also satisfied where a ballot is delivered to the clerk or an authorized representative by an agent, rather than personally by the elector.

In addition, under Plaintiffs' overly narrow interpretation, Wis. Stat. § 6.87(4)(b)1. would be vulnerable to attack for placing an unconstitutional burden on the right to vote, at least as applied to voters who are physically unable to personally get to a mailbox or to the clerk's office. It is well established that a court should avoid interpreting a statute in a way that would raise doubts about its constitutionality, when there is a reasonable interpretation that would avoid the constitutional problem. *See Am. Family Mut. Ins. v. DOR*, 222 Wis. 2d 650, 667, 586 N.W.2d 872 (1998); *Norquist v. Zeuske*, 211 Wis. 2d 241, 250, 564 N.W.2d 748 (1997); *Baird v. La Follette*, 72 Wis. 2d 1, 5, 239 N.W.2d 536 (1976). Here, any potential burden on the constitutional rights of voters with restricted physical mobility is easily avoided by construing Wis. Stat. § 6.87(4)(b)1. as permitting a completed absentee ballot to be either placed in the mail or personally returned to the clerk's office by a family member or another person acting on behalf of the voter.

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**2. Plaintiffs' interpretation of Wis. Stat. § 6.87(4)(b)1. is not supported by the related statutes on which they rely.**

In support of their narrow interpretation of Wis. Stat. § 6.87(4)(b)1., Plaintiffs argue that that provision's requirements for returning an absentee ballot must be read in the context of other statutory procedures for absentee voting by electors in special circumstances that make it

burdensome for them to personally return their own absentee ballot—such as voters residing in certain retirement and residential care facilities (Wis. Stat. § 6.875); sequestered jurors (Wis. Stat. § 6.86(1)(b)); or hospitalized voters (Wis. Stat. § 6.86(3)). According to Plaintiffs, those procedures include safeguards to prevent fraud or coercion that are inconsistent with a reading of Wis. Stat. § 6.87(4)(b)1. that generally permits an absentee voter's ballot to be placed in the mail or returned to the clerk by a person other than the voter. This argument fails because the statutory procedures on which Plaintiffs rely are all distinguishable.

First, the special procedural safeguards to which Plaintiffs point in Wis. Stat. § 6.875 do not relate to regular absentee voting—*i.e.*, to receiving and completing an absentee ballot at a location other than a polling place and then mailing or delivering the ballot to the clerk—but rather to a special *in-person* absentee voting procedure under which voters residing in certain retirement and residential care facilities can receive, complete, and return an absentee ballot within the facility via a special voting deputy. *See* Wis. Stat. § 6.875(6)(a)–(d). Returning a *regular* absentee ballot by mail or delivery to the clerk, however, does not require the same kinds of safeguards as does such in-person absentee voting. To the contrary, Wis. Stat. § 6.875(6)(e) specifically allows voters who reside in these facilities to alternatively use regular absentee voting if they have been unable to use the special voting deputy process. Plainly, the Legislature did not intend to require that the special safeguards of the special voting deputy procedure must always apply.

Second, the provision for hospitalized voters to which Plaintiffs point similarly allows the voter not merely to return an absentee ballot via an agent, but also to use an agent to apply for and obtain an absentee ballot, to register to vote, and even sign ballot or registration documents, if the voter is unable to sign due to a physical disability. *See* Wis. Stat. § 6.86(3)(a)–(c). It thus makes

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sense that there are special procedures for a hospitalized elector's agent that need not apply generally to agents for other absentee voters.

Third, absentee voting by sequestered jurors obviously requires its own special safeguards, not because of concerns about the general vulnerability of absentee voting to fraud or coercion, but because any contact of a sequestered juror with third persons must be carefully restricted to protect the integrity of the *judicial* process. *See* Wis. Stat. § 6.86(1)(b). That is why the statute specifies that the judge shall act as the agent for a sequestered juror. Again, the concerns giving rise to such special procedures for sequestered jurors have no significant parallel for absentee voters in general.

The special absentee voting statutes to which Plaintiffs point are distinguishable and thus do not support their narrow reading of Wis. Stat. § 6.87(4)(b)1.

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### 3. The criminal prohibition of ballot fraud in Wis. Stat. § 12.13(3)(n) does not support Plaintiffs' interpretation of Wis. Stat. § 6.87(4)(b)1.

Finally, Plaintiffs rely in part on Wis. Stat. § 12.13(3)(n), which make it a crime to "receive a ballot from or give a ballot to a person other than the election official in charge." According to Plaintiffs, that prohibition is violated if an absentee voter permits a third party either to place the voter's completed ballot into a mailbox or to personally deliver the ballot to an authorized representative of the clerk.

That argument fails because, for the reasons shown above, the language of Wis. Stat. § 6.87(4)(b)1. permits an agent acting on behalf of an elector either to place the elector's absentee ballot into a mailbox or to personally deliver the ballot to an authorized representative of the clerk. That provision also expressly allows employees of the U.S. Postal Service to receive and deliver absentee ballots. Section 12.13(3)(n) cannot be construed as criminalizing behavior that is affirmatively authorized by other election statutes. If that were the case, then it would also

criminalize the special absentee voting procedures on which Plaintiffs rely that were discussed in the preceding section. *See, e.g.,* Wis. Stat. §§ 6.86(3)(c) (authorizing an agent of a hospitalized elector to deliver the elector's ballot to the elector's polling place); 6.86(1)(b) (authorizing a judge to return a sequestered juror's absentee ballot to an authorized representative of the clerk). The criminal prohibition in Wis. Stat. § 12.13(3)(n) thus does not support Plaintiffs' interpretation of Wis. Stat. § 6.87(4)(b)1.

### B. The Commission correctly advised that, subject to specific security measures, drop boxes in public locations authorized by a municipal clerk can be used for voters to return completed absentee ballots.

The March 31, 2020, memorandum, advised that "drop boxes can be used for voters to return ballots but clerks should ensure they are secure, can be monitored for security purposes, and should be regularly emptied." (Dkt. 2 ¶ 8, Ex. A.) The Commission gave further guidance on drop boxes in the August 19, 2020, memorandum. The information there was adapted from a resource developed by the U.S. Cybersecurity and Infrastructure Security Agency ("CISA"), Elections Infrastructure Government Coordinating Council, and Sector Coordinating Council's Joint COVID Working Group. (Wolfe Aff. ¶ 7.) That resource provides standards for increasing the efficacy and security of ballot drop boxes. (Dkt. 2 ¶ 10, Ex. B.)

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The August 19, 2020, memorandum outlined multiple necessary measures to ensure the security and proper chain of custody of completed absentee ballots:

- [D]rop boxes must be "secured and locked at all times" such that "[o]nly an election official or a designated ballot drop box collection team should have access" to them.
- "In addition to locks, all drop boxes should be sealed with one or more tamper evident seals."
- "Chain of custody logs must be completed every time ballots are collected."
- "All ballot collection boxes/bags should be numbered to ensure all boxes are returned at the end of the shift, day, and on election night."

- "Team members should sign the log and record the date and time, security seal number at opening, and security seal number when the box is locked and sealed again."

(Dkt. 2 ¶ 10, Ex. B.)

Plaintiffs claim that Wis. Stat. § 6.87(4)(b)1. does not allow absentee ballots to be deposited into unstaffed drop boxes, and that the Commission's guidance contravenes that statute. The claim fails because, when an absentee ballot is placed in a secure drop box that is authorized by the clerk and operated in accordance with the Commission's guidance, that ballot has been "delivered in person, to the municipal clerk," within the meaning of Wis. Stat. § 6.87(4)(b)1.

Wisconsin Stat. § 6.87(4)(b)1. permits absentee ballots to be returned by "deliver[y] in person, to the municipal clerk." Drop boxes accomplish exactly that. An absentee ballot is personally delivered to a municipal clerk by placing it in an authorized and secure drop box in a location authorized by the clerk. Under the Commission's guidance, ballots are to be retrieved from drop boxes and returned to the clerk's office by authorized representatives of the clerk who are election officials under Wis. Stat. § 5.02(4e), and who are legally equivalent to the clerk under Wis. Stat. § 5.02(10). Section 6.87(4)(b)1. plainly permits such persons to receive absentee ballots on behalf of the clerk. After ballots are collected from a drop box, the clerk or authorized representative places them in a secure storage location until Election Day, just as with absentee ballots returned by mail or delivered to the clerk's office. *See* Wis. Stat. § 6.88. A ballot deposited in a secure drop box that is properly administered in accordance with the Commission's guidance, therefore, has been "delivered in person, to the municipal clerk," within the meaning of Wis. Stat. § 6.87(4)(b)1.

Plaintiffs seem to assume that Wis. Stat. § 6.87(4)(b)1. requires in-person delivery of a ballot to occur at the office of the municipal clerk, rather than at a remote drop box location, but

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the statutory language is silent as to the location where delivery to the clerk may occur. That silence contrasts with other statutes that expressly require certain actions to occur at the clerk's "office"—language that is notably absent from Wis. Stat. § 6.87(4)(b)1. *See, e.g.*, Wis. Stat. §§ 6.86(1)(a)2. (absentee ballot applications made "at the office of the . . . clerk"), 6.87(3)(a) (absentee ballots delivered "at the clerk's office"). The Legislature clearly knew how to specify the clerk's "office" when that is what it meant. If it had wanted in-person return of absentee ballots to take place only at the clerk's office, it would have said so expressly, as it did in those related statutes.

Plaintiffs also make policy arguments that drop boxes are less secure than mailing a ballot to the clerk's office or placing it directly into the hands of an authorized representative of the clerk. Plaintiffs are incorrect. The Commission's guidance included detailed guidelines about how to use drop boxes in a secure and uniform fashion. (Dkt. 2 ¶ 10, Ex. B.)

Finally, hundreds of drop boxes were used statewide to conduct the November election. (Meagan Wolfe Aff., ¶ 4.) The Speaker of the Assembly and the Senate Majority Leader endorsed drop-boxes as lawful and "wholeheartedly support[ed]" their use.[6] This overt approval of drop boxes from state legislative leaders who are well-known to be concerned to protect the security of absentee voting controverts Plaintiffs' suggestion that drop boxes somehow violate bright-line security requirements already contained in the absentee voting statutes. Moreover, the use of drop boxes has become an increasing accepted practice, and they have been used in a significant majority of states, particularly in response to the COVID-19 pandemic. (Wolfe Aff., ¶¶ 5, 9.) Such widespread use further undermines any suggestion that drop boxes are inherently insecure.

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[6] Letter from Misha Tseytlin to Madison City Clerk Maribeth Witzel-Behl (Sept. 25, 2020), http://www.thewheelerreport.com/wheeler_docs/files/092520troutman.pdf.

For all these reasons, the Court should hold that the Commission correctly advised that, subject to specific security measures, drop boxes in public locations authorized by a municipal clerk can be used for voters to return completed absentee ballots.

### C. Properly authorized drop box locations are not subject to the process for designating an alternate absentee ballot site under Wis. Stat. § 6.855.

In addition to claiming that all unstaffed drop boxes are unlawful, Plaintiffs also claim that even a drop box that is staffed by an authorized representative of the clerk—which is legally equivalent to directly returning the ballot to the clerk—is permissible only if the staffed drop-off location is situated either in the clerk's office or at an alternate absentee ballot site designated under Wis. Stat. § 6.855. The Commission's memoranda did not specifically provide guidance about staffed drop boxes, but they did advise that clerks could authorize drop box locations (whether staffed or unstaffed), without reference to the alternate absentee ballot site process under Wis. Stat. § 6.855.

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Plaintiffs' claim under Wis. Stat. § 6.855 fails because that statute only applies to designating an alternate site for conducting early *in-person* absentee voting and does not apply to locations where completed absentee ballots are merely dropped off with an authorized representative of the clerk. The phrase "absentee voting" in Wisconsin election law includes two distinct voting procedures for an elector who wants to vote but does not plan to vote in person at his or her designated polling place on Election Day.

First, there is what may be called "true" absentee voting, in which the voter—within a statutorily designated time period—requests an absentee ballot from the clerk's office, receives the ballot from the clerk by mail, and then prior to Election Day returns the completed ballot to the clerk either by mail or in-person delivery. *See* Wis. Stat. § 6.87(4)(b)1. Second, there is early in-person absentee voting, in which—within a statutorily designated time period prior to election

day—the elector votes an absentee ballot in person either at the clerk's office or at an alternate voting site designated by the municipality under Wis. Stat. § 6.855. Under this procedure, the elector goes to the voting site, requests and receives an absentee ballot from an authorized representative of the clerk at that site, completes the absentee voting process while at the site, and then returns the completed ballot to an authorized representative of the clerk before leaving the site. *See* Wis. Stat. § 6.855(1).

Plaintiffs argue that staffed drop box locations outside the clerk's office, at which absentee ballots are simply deposited into a secure box, are alternate ballot sites subject to Wis. Stat. § 6.855. That is incorrect. Wisconsin Stat. § 6.855 does not apply to drop boxes. It applies only to alternate absentee ballot sites where the entire in-person absentee voting process takes place—*i.e.*, a location where "electors of the municipality may *request and vote* absentee ballots *and* to which voted absentee ballots shall be returned." (emphasis added). If those activities are to occur at a location outside the office of the municipal clerk (or board of election commissioners), then the municipality's governing body must "designate" that location in accordance with the procedures in the statute. *Id*. But a location subject to those procedures "must be a location not only where voters may return absentee ballots, but also a location where voters 'may request and vote absentee ballots." *Trump v. Biden*, 2020 WI 91, ¶ 56, 394 Wis. 2d 629, 951 N.W.2d 568 (Hagedorn, J., concurring) (citation omitted). It is the ability to request *and* vote absentee ballots in person—activities that would otherwise be confined to the municipal clerk's office—that requires an alternate site designation.

Drop boxes, in contrast, lack one of the two required attributes of alternate absentee ballot sites under Wis. Stat. § 6.855(1). Although absentee voters "return" completed ballots to a drop box, they do not "request and vote" a ballot from a drop box. The Commission's guidance,

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therefore, did not err when it advised that clerks could authorize drop box locations, without reference to the alternate absentee ballot site process under Wis. Stat. § 6.855.

This interpretation of Wis. Stat. § 6.855 is also supported by Wis. Stat. § 6.87(3)(a), which provides that "[i]f the ballot is delivered to the elector at the clerk's office, or an alternate site under s. 6.855, the ballot shall be voted at the office or alternate site and may not be removed by the elector therefrom." That provision and Wis. Stat. § 6.855 clearly refer to situations in which electors are not receiving their absentee ballots by mail, but rather are receiving unsealed ballots and voting those ballots at the same location. The Commission guidance challenged by Plaintiffs does not relate to such in-person absentee voting, so Wis. Stat. § 6.855 is not applicable here.

### D. Plaintiffs' claim under Wis. Stat. § 7.30 seeks an impermissible advisory opinion and is not properly before the Court.

Plaintiffs' final statutory claim is that a staffed drop box can be staffed only by an election official appointed under Wis. Stat. § 7.30. Stated more broadly, Plaintiffs contend that an "authorized representative[]" of a clerk under Wis. Stat. § 5.02(10), who may receive a returned absentee ballot on behalf of the clerk under Wis. Stat. § 6.87(4)(b)1., must be an election official appointed under Wis. Stat. § 7.30.

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This claim is not properly before the Court. Plaintiffs seek a declaratory judgment as to the validity of certain guidance documents issued by the Commission, pursuant to Wis. Stat. § 227.40. It is well established that a declaratory judgment action may not be maintained unless a justiciable controversy exists. *See Loy v. Bunderson*, 107 Wis. 2d 400, 409–10, 320 N.W.2d 175 (1982). A controversy is justiciable when the following factors are present: (1) a controversy in which a claim of right is asserted against one who has an interest in contesting it; (2) the controversy must be between persons whose interests are adverse; (3) the party seeking declaratory relief must have a legal interest in the controversy-that is to say, a legally protectable interest; and (4) the issue

involved in the controversy must be ripe for judicial determination. *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶ 29, 309 Wis. 2d 365, 749 N.W.2d 211. Absent such a justiciable controversy, a court will not enter a declaratory judgment that would be a mere advisory opinion. *See State ex rel. La Follette v. Dammann*, 220 Wis. 17, 22–23, 264 N.W. 627 (1936).

Plaintiffs' fourth claim here does not present a justiciable controversy. The challenged guidance documents did not address whether every authorized representative of a clerk who may receive delivery of absentee ballots on the clerk's behalf must be an election official appointed under Wis. Stat. § 7.30. Plaintiffs seem to suggest that, under the Commission's guidance, a staffed drop-off location for absentee ballots could be staffed by anyone whom a clerk might designate, even if that person is not an election official appointed under Wis. Stat. § 7.30. (Dkt. 63:14–15.) But they have pointed to nothing in the Memos that actually says that.

Absent some actual guidance concerning Wis. Stat. § 7.30 for this Court to review, Plaintiffs' claim presents no ripe controversy, no genuine adversity between the parties, and no claim of right or legally protectible interest of the Plaintiffs. *See Olson*, 309 Wis. 2d 365, ¶ 29. Their request for an advisory opinion about the applicability of Wis. Stat. § 7.30 to the return of absentee ballots thus should be dismissed and judgment granted to the defendants.

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## III. Even assuming competency, the challenged Commission guidance is not an unpromulgated administrative rule.

Plaintiffs' unpromulgated-rule claim also fails on its merits. The memoranda are not administrative "rules" under ch. 227.

"[A] rule for purposes of ch. 227 is (1) a regulation, standard, statement of policy or general order; (2) of general application; (3) having the effect of law; (4) issued by an agency; (5) to implement, interpret or make specific legislation enforced or administered by such agency as to

govern the interpretation or procedure of such agency." *Wisconsin Legislature v. Palm*, 2020 WI 42, ¶ 22, 391 Wis. 2d 497, 942 N.W.2d 900.

The memoranda are not rules because they do not have "the effect of law." *Id.* Plaintiffs contend that the memoranda "direct" the municipal clerks to act. (Dkt. 63:17.) Not true. Plaintiffs provide this Court with no language from either memo showing that the Commission "directs" or "orders" local election officials to act. (Dkt. 63:17–18.) That is because there is none. Indeed, the first sentence in the August 2020 Memo states, "This document is intended to provide information and guidance." (Dkt. 2 ¶ 10, Ex. B.) That language does not order or direct. Thus, the memoranda are unlike the emergency order addressed in *Tavern League of Wisconsin, Inc. v. Palm*, which "imposed statewide restrictions on public gatherings." 2021 WI 33, ¶ 26, 396 Wis. 2d 434, 957 N.W.2d 261. And unlike the rules Plaintiffs referenced in the *Palm*, *Tavern League*, and *Chovin* cases, in which the supreme court found the "effect of law" requirement met, the Commission memoranda do not impose any criminal or civil forfeitures for violations. *Id.* ¶ 32.

Plaintiffs contend that because the Commission may order a municipal clerk to conform her conduct to comply with state election laws under Wis. Stat. §§ 5.05 and 5.06(1), these memoranda have the effect of law. (Dkt. 63:18.) This argument misses the mark. As explained above, the memoranda do not order municipal clerks to conform their conduct to the law. Only a Commission order issued at the conclusion of a Wis. Stat. § 5.06 complaint process would do that. *See* Wis. Stat. §5.06(6). But there is no section 5.06 order at issue here. *Cf. Barry Labs., Inc. v. State Bd. of Pharm.*, 26 Wis. 2d 505, 514–15, 132 N.W.2d 833 (1965) (opinions expressed in a board's letters were not rules where the board lacked authority to enforce compliance).

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Rather than "rules" under ch. 227, the memoranda are mere "guidance documents." As noted above, the memoranda "guide" local election officials, they do not "order" or "direct" them.[7] And guidance documents, unlike rules, do not have the effect of law. *See* Wis. Stat. § 227.112(3) ("A guidance document does not have the force of law and does not provide the authority for implementing or enforcing a standard, requirement, or threshold."); *Serv. Emps. Int'l Union, Loc. 1 v. Vos*, 2020 WI 67, ¶ 102, 393 Wis. 2d 38, 946 N.W.2d 35 ("*SEIU*") (interpreting Wis. Stat. § 227.01(3m) to define guidance document as having no "force or effect of law").

Lastly, and importantly, guidance documents do not have to be promulgated like rules. And an agency does not have to follow any procedural requirement at all to issue one. That is because the Wisconsin Supreme Court held that the statutory procedure governing the creation of guidance documents violated the constitutional separation of powers. *SEIU*, 393 Wis. 2d 38, ¶¶ 90, 105–08.

For all these reasons, any lack of "promulgation" of these memoranda is irrelevant to Plaintiffs' declaratory judgment claims. The memoranda are guidance documents and not rules.

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## CONCLUSION

Defendant respectfully asks this Court to deny Plaintiffs' motion for summary judgment and grant summary judgment to it under Wis. Stat. § 802.08(6).

[7] The March 31, 2020, guidance poses a question asked by a local election official, "*Can* I establish drop boxes . . . ?" The Commission answers, "Yes." (Dkt. 2 ¶ 8, Ex. A.) This Q&A does not reveal that the Commission is *requiring* that local election officials establish drop boxes.

Dated this 15th day of November 2021.

Respectfully submitted,

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