STATE OF WISCONSIN CIRCUIT COURT BRANCH 1 WAUKESHA COUNTY

Richard Teigen, *et al.*,

Plaintiffs,

vs.

Wisconsin Elections Commission,

Defendant,

and

Democratic Senatorial Campaign Committee, *et al.*,

Defendant-Intervenors.

Case No. 2021CV0958
Case Code: 30701
Hon. Michael O. Bohren

INTERVENOR-DEFENDANT DSCC'S BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND REQUEST FOR ENTRY OF JUDGMENT AGAINST PLAINTIFFS UNDER WIS. STAT. § 802.08(6)

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INTRODUCTION AND SUMMARY OF ARGUMENT

Wis. Stat. § 6.87(4)(b)1 requires voters to mark and return their absentee ballots in sealed envelopes "mailed by the elector[s], or **delivered in person, to the municipal clerk** issuing the ballot or ballots" (emphasis added). Defendant Wisconsin Elections Commission (WEC) interprets this language to mean that voters may deliver their voted sealed ballots to the municipal clerk by (1) handing them to the clerk or one of the clerk's duly authorized representatives, or (2) depositing them into secure receptacles designated and maintained by the clerk and under the clerk's jurisdiction, control, and supervision. This eminently reasonable interpretation of delivery "to the municipal clerk" is well within WEC's authority to administer Wisconsin's election laws and provide guidance to local election officials. *See* Wis. Stat. § 5.05(1), (2w), (5t), (6a).

Plaintiffs insist WEC's reading violates the supposedly "plain language" of Section 6.87(4)(b)1, but their arguments have changed dramatically during this litigation. Plaintiffs initially insisted that municipal clerks may *never* use drop boxes under *any* circumstances—no matter how safe and secure such boxes might be; how rigorously clerks might monitor and supervise their use; how closely such boxes might adhere to best-industry practices; or how much such drop boxes might facilitate the safe, secure, and convenient "in person" return by voters of their voted ballots "to" municipal clerks and their authorized representatives, in the manner prescribed by the clerks. Plaintiffs argued the statute literally requires the voter to "**hand[] the envelope containing the ballot in person to the municipal clerk**" (or an "authorized representative" under the definition of "municipal clerk" in Wis. Stat. § 5.02(10)). Compl. ¶ 4 (emphasis added); *see id.* ¶¶ 11, 34, 38, 56.[1]

[1] Section 5.02(10) provides: "'Municipal clerk' means the city clerk, town clerk, village clerk and the executive director of the city election commission *and their authorized representatives*. Where applicable, 'municipal clerk' also includes the clerk of a school district" (emphasis added).

Plaintiffs' rationale bordered on the sarcastic: "Certainly an inanimate object like a drop box is not the 'municipal clerk' and cannot be classified as an 'authorized representative' of the municipal clerk." *Id.* ¶ 36. And "[o]bviously, a drop box will never have been the entity that 'issu[ed] the ballot.'" *Id.* ¶ 37; *see also id.* ¶ 11 ("But a drop box is not the 'municipal clerk.'"). Plaintiffs were unequivocal and unqualified, seeking a declaration that the statutory language literally requires "the voter **handing the envelope containing the ballot in person to the municipal clerk at the office of the municipal clerk** or at an alternate site designated under Wis. Stat. § 6.855." Compl. at 11 (emphasis added).

But no longer. In their motion for summary judgment, plaintiffs significantly retreat from their initial *per se* opposition and now concede the validity of many of the absentee-ballot drop boxes they earlier challenged. Buried in a footnote deep in their brief, they assert:

> Plaintiffs do not challenge a drop box that is staffed and located at the municipal clerk's office (or a properly designated alternate site). Putting a ballot into a secure box, if the clerk or an authorized representative is present, is "in person" delivery.

SJ Br. at 11 n.2.

This is an enormously consequential concession. Many drop boxes operated throughout the state fall into this precise category—located in clerk's offices and "alternate" (*i.e.*, early voting) sites under the watchful eyes of clerks and their staffs—and thus presumably are no longer in dispute. Moreover, plaintiffs' concession that drop boxes are lawful in *some* circumstances knocks the legs out from their "plain language" statutory construction arguments. If drop boxes *sometimes* comply with Section 6.87(4)(b)1 even though they are "inanimate object[s]" that "certainly" are not "municipal clerks" or their "authorized representatives" and "[o]bviously" did not themselves "issue" the ballots that are being returned, why is their permitted use limited to boxes that "are staffed and located at the municipal clerk's office," as plaintiffs now insist? SJ Br. at 11 n.2.

It is plaintiffs, not WEC or the intervenor-defendants, who are attempting to rewrite the relevant statutory language. If deposit into a secure, monitored drop box constitutes the "in person" return of the sealed ballot envelope "to the municipal clerk"—as plaintiffs now concede—nothing in Section 6.87(4)(b)1 or elsewhere requires that such drop boxes must necessarily be *inside* the clerk's office. "[D]elivery in person, to the municipal clerk" also can be accomplished outside the clerk's office, such as into an after-hours deposit drawer on the outside wall of the office or a secure metal fixture bolted to the sidewalk, similar to a U.S. mailbox. In-person deliveries also can occur at temporary return sites designated by the clerk, such as staffed drive-through sites and curbside pickups by the clerk's authorized representatives.

Though plaintiffs now concede the legality of drop boxes under some circumstances, their efforts to impose requirements that such boxes always be "staffed and located at the municipal clerk's office" must be rejected. The relevant statutes impose no such restrictions. Section 6.87(4)(b)1 requires delivery of sealed ballot envelopes "in person, to the municipal clerk," not "to the municipal clerk inside the clerk's office in the presence of the clerk or an authorized representative." Returning a sealed ballot envelope to a safe, secure, and monitored location designated by the clerk is return "to the municipal clerk." None of plaintiffs' arguments to the contrary hold up under analysis.

That is reason enough to deny plaintiffs' motion in its entirety and to enter summary judgment under Wis. Stat. § 802.08(6) rejecting plaintiffs' core statutory claims. DSCC agrees with WEC and the other defendant-intervenors that plaintiffs' motions for summary judgment and a preliminary injunction should be denied on numerous additional jurisdictional, equitable, and procedural grounds. DSCC also agrees that the two challenged WEC guidance memos did not

themselves constitute "rules" subject to the formal rulemaking requirements of Wis. Stat. ch. 227. DSCC joins in full in these arguments by WEC and the other defendant-intervenors.

This brief focuses on two key points. First, Wisconsin's ballot-return statutes allow municipal clerks to use secure drop boxes as a means to help facilitate voters' in-person delivery of their sealed ballot envelopes back to the clerks who issued the ballots. Second, and in any event, plaintiffs do not have standing to pursue this litigation, especially now they have conceded that drop boxes are not *per se* barred under the governing statutes. The question is no longer "whether," but "under what circumstances" drop boxes may be used. Plaintiffs have neither "voter standing" nor "taxpayer standing" to pursue a declaratory judgment that seeks, in essence, an advisory opinion on the proper siting, monitoring, and use of drop boxes in all 72 counties and 1,850 municipal voting jurisdictions throughout the state.

BACKGROUND

Although the November 2020 election occurred during the worst global pandemic in over a century, it also simultaneously saw one of the highest turnouts of Wisconsin voters in 70 years, with nearly 73% of Wisconsin's voting-age citizens casting ballots and making themselves heard. *See* Ex. 1 to accompanying Affidavit of Will M. Conley ("Conley Aff.") at 2. That extraordinary turnout in the midst of an unprecedented public-health crisis was facilitated in part by the widespread availability of carefully monitored secure drop boxes, in which voters could safely deposit their voted ballots, confident that those ballots would reach election officials in time to be counted. "[T]he use of secure absentee ballot drop boxes is an accepted elections practice in the United States that far predates the 2020 elections cycle"; "[t]he majority of states employ drop boxes and many states have been using them for years." *Id.* Ex. 2 at 1. As described by the WEC:

> A ballot drop box provides a secure and convenient means for voters to return their by mail absentee ballot. A drop box is a secure, locked structure operated by local election officials. Voters may deposit their ballot in a drop box at any time after they receive it in the mail up

> to the time of the last ballot collection Election Day. Ballot drop boxes can be staffed or unstaffed, temporary or permanent. … Ballot drop boxes and drop-off locations allow voters to deliver their ballots in person.

Id. Ex. 3 at 1. Drop boxes were used in Wisconsin's 2020 elections in a variety of locations, including inside municipal clerk's offices and other government buildings, at drive-through and curbside locations staffed by election officials, and in the form of steel boxes "permanently cemented into the ground" in high-demand areas, under video surveillance. *Id.* at 1-3.

Municipal clerks and voters turned to secure drop boxes for many reasons. Such boxes enabled voters (including those particularly at risk, such as senior citizens, voters with immune disorders, those with disabilities, parents of young children, health-care and elder-care workers, *et al.*) to participate in the election without having to risk exposure (or risk exposing others) to COVID-19. *See id.* Ex. 4 at 1. Many voters also relied on drop boxes because they "lack[ed] trust in the postal process, fear[ed] that their ballot could be tampered with," and were "concerned about ensuring that their ballot [was] returned in time to be counted." *Id.* Ex. 3 at 1. There were serious breakdowns in mail delivery by the U.S. Postal Service in connection with Wisconsin's April 2020 primary—service problems that continued through the year and were the subject of scathing reports by the USPS Office of Inspector General.[2] USPS warned of a "significant risk" that ballots sent through the mail in the weeks leading up to the November election might be late and go uncounted. *Id.* Ex. 8 at 2.

[2] *See id.* Exs. 5-6. These postal problems caused the late delivery of literally tens of thousands of ballots throughout the state in the April 2020 election—ballots that would have been disqualified but for a federal court order extending by six days the ballot-receipt deadline for ballots postmarked on or before election day. *See DNC v. Bostelmann,* 451 F. Supp. 3d 952, 975-77, 983 (W.D. Wis. 2020), *stayed in part,* Nos. 20-1538 *et al.*, 2020 WL 3619499 (7th Cir. Apr. 3, 2020), *stayed in part*, 140 S. Ct. 1205 (2020). The WEC determined after the spring election that the six-day extension (as modified on appeal) had prevented the disqualification of nearly 80,000 valid ballots that had been timely cast on or before election day but not received until after. *See* Conley Aff. Ex. 7 at 7.

Plaintiffs' complaint and briefs attempt to create a picture of "unstaffed," "unsupervised," and "untended" drop boxes "invit[ing] fraud and abuse." Compl. ¶¶ 11, 52. Nothing could be further from the truth. Many drop boxes throughout the state were located inside clerk's offices and monitored by authorized personnel "in real time"; many others were fully staffed and monitored by election officials *outside* of clerks' offices, such as temporary drive-through ballot drop-off locations. Conley Aff. Ex. 3 at 2-3. WEC's guidance for "unstaffed" drop boxes followed "best practices [that were] based on advice from the Department of Homeland Security's Cybersecurity and Infrastructure Security Agency [CISA] and included instructions about drop box security and chain of custody procedures for securely emptying the drop boxes on a regular basis." *Id.* Ex. 9 at 1; *see also id.* Ex. 3 at 1, Ex. 10 at 1 (CISA guidance "on how to administer and secure election infrastructure in light of the COVID-19 pandemic"). These "best practices" included using secure locks, sealing "all drop boxes … with one or more tamper evident seals," monitoring drop-box sites with "video surveillance cameras" or local law enforcement surveillance, using "Election signage," and securely collecting and transporting ballots to the clerk's office. *Id.* Ex. 3 at 2-4.

Secure drop boxes were popular with Wisconsin election officials and voters throughout the state. Over 500 secure drop boxes were used in nearly all 72 counties in the weeks leading up to the November election. Compl. ¶ 13; *see* Conley Aff. Ex. 11 at 46-48. Plaintiffs have failed to allege or prove a single instance of attempted ballot-tampering, ballot theft, or other abuses related to the use of ballot drop boxes during last year's elections. The closest they come is claiming that drop boxes "cast doubt on the integrity of upcoming elections" and "erode confidence in the process"—without providing evidence of specific problems or addressing WEC's many safeguards to ensure ballot security, election integrity, and voter confidence. SJ Br. at 3. But these

are not new or novel claims. Following the November 2020 election, several lawsuits challenged drop-box voting. All failed.[3]

Secure drop boxes were among the few things that most Democrats, Republicans, and Independents seem to have agreed upon during last year's historically contentious elections. *See* Chris Rickert, *Despite objections from conservatives, clerks in Trump country embraced ballot drop boxes, too*, Wis. State J. (Nov. 1, 2021), reprinted as Conley Aff. Ex. 12. In late September 2020, State Assembly Speaker Robin Vos and then-State Senate Majority Leader Scott Fitzgerald publicly emphasized they "***wholeheartedly support[ed]*** voters' use" of "authorized 'drop boxes,'" praising such boxes as a "convenient, secure, and ***expressly authorized*** absentee-ballot-return method[]." Letter from Misha Tseytlin to Maribeth Witzel-Behl, City Clerk, City of Madison (Sept. 25, 2020) (boldface added), reprinted as Conley Aff. Ex. 13 at 1. And in defending against challenges to other aspects of Wisconsin's election laws, the Wisconsin Legislature itself represented to the U.S. Supreme Court that "Wisconsin law gives all eligible voters multiple avenues to vote," *including* by "return[ing] their ballots … via a 'drop box' where available." *Id.* Ex. 14 at 15; *see also id.* at 16. At no point did the Legislature suggest that reliance on such drop boxes might actually be illegal under Wisconsin law. The Legislature's arguments led Justice Gorsuch to praise Wisconsin's reliance on secure drop boxes, both indoors and out:

> Returning an absentee ballot in Wisconsin is also easy. ... Until election day, voters may, for example, hand-deliver their absentee ballots to the municipal clerk's office or other designated site, or they may place their absentee ballots in a secure absentee ballot drop box. **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**.

DNC v. Wis. State Legislature, 141 S. Ct. 28, 36 (2020) (Gorsuch J., concurring) (emphasis added).

[3] *See, e.g., Mueller v. Jacobs*, 2020AP1958-OA (Wis. Dec. 3, 2020); *Trump v. Wis. Elections Comm'n*, 506 F. Supp. 3d 620 (E.D. Wis. 2020), *aff'd*, 983 F.3d 919 (7th Cir. 2020), *cert. denied*, 141 S. Ct. 1516 (2021), *Fabick v. Wis. Elections Comm'n*, No. 2021AP428-OA (Wis. June 25, 2021).

ARGUMENT

I. Plaintiffs' statutory challenges to WEC's guidance documents fail.

A. Drop boxes are an appropriate means for voters to return their absentee ballots to municipal clerks and their authorized representatives.

Plaintiffs now concede that drop boxes are entirely permissible in at least some circumstances, even though such boxes are "inanimate object[s]," "certainly" are not "municipal clerks" or their "authorized representatives," and "[o]bviously" do not themselves "issue" the ballots that are returned. Br. at 11 n.2; Compl. ¶¶ 36-37. Instead, plaintiffs now argue that drop boxes are permissible, but only when (1) placed *inside* a municipal clerk's office, and (2) staffed at all times by "election officials" within the meaning of Wis. Stat. § 7.30. Neither of these purported conditions finds any support in Section 6.87(4)(b)1.

1. There is no statutory requirement that a drop box be located inside the clerk's office.

Plaintiffs claim that Wis. Stat. § 6.87(4)(b)1 requires delivery to occur *inside* the municipal clerk's office, but the statute says nothing of the sort. It requires "deliver[y] in person, to the municipal clerk," not "to the municipal clerk inside the clerk's office." A court must not "read into the statute words the legislature did not see fit to write." *Dawson v. Town of Jackson*, 2011 WI 77, ¶ 42, 336 Wis. 2d 318, 801 N.W.2d 316; *see also State ex rel. CityDeck Landin g LLC v. Cir. Ct. for Brown Cnty.*, 2019 WI 15, ¶ 33, 385 Wis. 2d 516, 922 N.W.2d 832 ("A fundamental canon of statutory construction provides that '[n]othing is to be added to what the text states or reasonably implies[.]'") (citation omitted).

Section 6.87(4)(b)1's failure to say anything about "the clerk's office" contrasts sharply with the many other provisions in Wisconsin's election code (Chapters 5-12) that expressly require certain deliveries "*to,*" or actions "*at*" or "*in*," the "office of the municipal clerk," the "office of

the clerk," or the "clerk's office."[4] Simply put, if the Legislature had wanted to require absentee ballots to be returned only "to the clerk's office," it would have said so expressly, as it has repeatedly in these related statutes. Instead, the Legislature required only "deliver[y] in person, to the municipal clerk," without restricting where that "delivery" may occur.

It is an elementary principle of statutory construction that "[i]f a word or words are used in one subsection but are not used in another subsection, [a court] must conclude that the legislature specifically intended a different meaning.'" *Responsible Use of Rural and Agric. Land v. Pub.*

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[4] *See, e.g.*, Wis. Stat. § 5.81(3) (re use of "paper ballots and envelopes voted in person **in the office of the municipal clerk** or voted by mail"); *id.* § 6.15(2)(bm) (procedures regarding "application in person **at the office of the municipal clerk**"); *id.* § 6.18 ("This [application] form shall be returned **to the municipal clerk's office**."); *id.* § 6.28(b) (various provisions re registration "**at the office of the municipal clerk**"); *id.* § 6.29(2)(a) (re late registration "**at the office of the municipal clerk** and at the office of the clerk's agent if the clerk delegates responsibility for electronic maintenance of the registration list to an agent"); *id.* § 6.30(4) (voter registration form "shall be available **in the municipal clerk's office**"); *id.* § 6.32(2) (re "request that the elector appear **at the clerk's office** or another registration location"); *id.* § 6.32(3) (re registration "**at the clerk's office**"); *id.* § 6.35(3) ("Original registration forms shall be maintained **in the office of the municipal clerk** or board of election commissioners at all times."); *id.* § 6.45(1m) ("any person may copy the registration list **at the office of the clerk**"); *id.* § 6.47(2) (provision regarding "[a] physically disabled individual who appears personally **at the office of the municipal clerk** accompanied by another elector of this state"); *id.* § 6.50(1) (return of signed statement "**to the office of the municipal clerk**"); *id.* § 6.55(2)(cm) (registration "**at the office of the municipal clerk** of the municipality where the elector resides"); *id.* § 6.56(4) (re change in registration status "unless the person contacts **the office of the clerk** to clarify the matter"); *id.* § 6.855 (re notices to be "displayed **at the office of the clerk**"); *id.* § 6.86(1)(a)2 (re absentee ballot applications made "[i]n person **at the office of the municipal clerk** or at an alternate site under s. 6.855, if applicable"); *id.* § 6.86(3)(c) (application and form "may be filed in person **at the office of the municipal clerk**"); *id.* § 6.87(3)(a) (re delivery by the clerk "to the elector personally **at the clerk's office**"); *id.* § 6.87(4)(b)4 (re "voting **at the office of the municipal clerk**"); *id.* § 6.875(4)(ar) (option of voter who lives in residential care facility or qualified retirement home to vote "in person **at the office of the municipal clerk** or board of election commissioners"); *id.* § 6.88(1) (ballot-storage procedures that apply "[w]hen an absentee ballot arrives **at the office of the municipal clerk**"); *id.* § 6.97(3)(b) (requirement to provide proof of identification "**at the office of the municipal clerk** or board of election commissioners no later than 4 p.m. on the Friday after the election"); *id.* § 7.41(1) (right of public to "be present at any polling place, **in the office of any municipal clerk** whose office is located in a public building on any day that absentee ballots may be cast in that office, or at an alternate site under s. 6.855 on any day that absentee ballots may be cast at that site"); *id.* §§ 7.53(1)(b), (2)(d) (re filing of certain documents "**in the office of the municipal clerk**"); *id.* § 8.10(6)(c) (filing of certain nomination papers "**in the office of the municipal clerk** or board of election commissioners"); *id.* § 12.03(1)-(2) (various prohibitions against "electioneering **in the municipal clerk's office** or at an alternate site under s. 6.855" during voting hours); *id.* § 12.035(3)(c) (prohibition against posting or distribution of "any election-related material **at the office of the municipal clerk** or at an alternate site under s. 6.855 during hours that absentee ballots may be cast"). All emphases in the parentheticals in this footnote have been added.

Serv. Comm'n of Wis., 2000 WI 129, ¶ 39, 239 Wis. 2d 660, 619 N.W.2d 888 (citation omitted); *see also Gister v. Am. Fam. Mut. Ins. Co.*, 2012 WI 86, ¶ 39, 342 Wis. 2d 496, 818 N.W.2d 880 ("Where the legislature includes a word in one provision and omits it from a similar, parallel provision within the same statute, we are even more reluctant to diminish the independent significance of the word."). The Legislature knows how to specify that certain deliveries be made "to," or that certain actions take place "at" or "in," the "clerk's office" when that is what it means. It failed to include such a limitation here. That should end the matter.[5]

2. There is no statutory requirement that a drop box be "staffed" at all times, let alone by "election officials."

Nor is there anything in Wis. Stat. § 6.87(4)(b)1 requiring that absentee-ballot drop boxes be "staffed" at all times no matter how secure and closely monitored those boxes may be. Consider an after-hours depository drawer on the outside wall of the clerk's office, similar to those used by other government offices and banks to receive payments and deposits, which are emptied every morning by the clerk's authorized representatives.[6] Plaintiffs have offered no reason to believe such depositories might be any less secure and reliable than a staffed drop box during business hours. Consider also that one of the authorized methods for returning an absentee ballot is by placing it into a U.S. mailbox, which typically is "unstaffed." There is no reason why a secure, locked metal drop box cemented into the ground cannot be just as secure as a U.S. mailbox.

[5] *See also Hamdan v. Rumsfeld*, 548 U.S. 557, 578 (2006) ("A familiar principle of statutory construction … is that a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute."); *Russello v. United States*, 464 U.S. 16, 23 (1983) ("'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion'") (citation omitted).

[6] Many drop boxes used throughout the state in 2020 were, in fact, "repurpos[ed]" preexisting "municipal return slots" already "set up for secure collection of payment and materials," such as tax and utility payments. Conley Aff. Ex. 3 at 1-2; *id.* Ex. 11 at 47. WEC encouraged use of such preexisting "infrastructure," subject to numerous recommendations regarding proper signage, security, oversight by election officials, and chain-of-custody procedures. *Id.* Ex. 3 at 1-4.

Indeed, WEC's emphasis on using video surveillance cameras and law enforcement monitoring suggests that outdoor unstaffed drop boxes often will be much *more* secure and reliable than many U.S. mailboxes. Nothing in the statutes *requires* the staffing of drop boxes that are the functional equivalents of U.S. mailboxes and demonstrably safe from tampering.

Of course, many drop boxes *are* staffed by clerks' "authorized representatives," many of whom are "election officials" within the meaning of Wis. Stat. §§ 5.02(4e) and 7.30. Indeed, the challenged WEC guidance memos instruct that drop boxes are to be "operated by local election officials." Conley Aff. Ex. 3 at 1. Even the City of Madison's controversial "Democracy in the Park" events in September and October 2020, in which many voters returned their completed absentee ballots to various city parks, were all staffed by "[s]worn election officials," who were the only individuals authorized to collect sealed ballots and were required to maintain strict "chain of custody" over all ballots collected. *Id.* Ex. 15 at 1; *see also Trump v. Biden*, 2020 WI 91, ¶ 19, 394 Wis. 2d 629, 951 N.W.2d 568 ("sworn city election inspectors collected completed absentee ballots" at these events). Plaintiffs have offered no evidence that municipal clerks are allowing people other than "election officials" or "election inspectors" to collect sealed ballots and remove them from drop boxes, and any such instances would *violate* WEC's guidance.

B. Wis. Stat. § 6.855 does not govern the location of drop boxes, but applies only to the very different issue of early in-person absentee voting sites.

Having now conceded that Wis. Stat. § 6.87(4)(b)1 allows municipal clerks to use drop boxes in at least some circumstances, plaintiffs argue that a separate provision, Wis. Stat. § 6.855, restricts the location of such drop boxes to "the office of the municipal clerk or board of election commissioners" or an "alternate absentee ballot site" designated under the terms and conditions of that section. *See* SJ Br. at 11-14. Plaintiffs' argument mixes up the process of early voting—also

known as "in-person absentee voting"—with the return of marked and sealed ballots to election officials. These are two entirely distinct activities subject to separate statutory requirements.

Section 6.855—titled "Alternate absentee ballot site"—regulates "the location from which electors of the municipality may **request and vote absentee ballots** and to which voted absentee ballots shall be returned." Wis. Stat. § 6.855(1) (emphasis added). This is known as "early voting," in which a voter goes to a designated site, obtains an absentee ballot, marks and seals the ballot, and returns it to the clerk's authorized representatives before leaving. *See Luft v. Evers*, 963 F.3d 665, 674 (7th Cir. 2020); *see also* Wis. Stat. § 6.87(3)(a) ("If 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."). Early voting involves obtaining, marking, and returning an absentee ballot in a single visit to a single site. "Currently the state allows in-person absentee voting (which is to say, early voting) from 14 days before the election through the Sunday preceding it, without any restriction on the number of hours per day that a municipality may choose to keep its offices open." *Luft*, 963 F.3d at 669.

Some history may further help put Section 6.855 into its proper context. From 2005 until late 2018, the provision limited each municipality to a single site "from which electors of the municipality may request and vote absentee ballots" prior to an election. If the municipality had an "alternate absentee ballot site" within the meaning of Section 6.855, "no function related to voting and return of absentee ballots that is to be conducted at the alternate site may be conducted in the office of the municipal clerk or board of election commissioners." It was an either/or proposition—either a municipality could conduct early voting at the clerk's office, or it could conduct early voting at an appropriate "alternate" site, but it could not do both.

In 2016, the U.S. District Court for the Western District of Wisconsin held this so-called "one-location rule" violated the First and Fourteenth Amendments to the U.S. Constitution as well as Section 2 of the Voting Rights Act. *See One Wis. Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 931-35, 956 (W.D. Wis. 2016). While that decision was on appeal, the Wisconsin Legislature amended Section 6.855 in December 2018 to provide that a municipality "may designate more than one alternate site"—thereby repealing the one-location rule. Wis. Stat. § 6.855(5). The Seventh Circuit held this part of the appeal was moot since the statute had been amended to give plaintiffs what they sought—multiple early voting sites. *Luft*, 963 F.3d at 674.

A drop box is not an early voting site. It lacks one of the two essential attributes of such a site: absentee voters may "return" a completed ballot to a drop box, but cannot "request and vote" a ballot from one. Wis. Stat. § 6.855(1). Rather, a drop box is a secure receptacle designated by the clerk for the return of absentee ballots *previously* obtained by a voter through the mail and then marked and sealed by the voter before delivery "in person" to the clerk's drop box.

That is precisely the conclusion reached last year by Justice Brian Hagedorn in his persuasive concurring opinion in *Trump v. Biden*, 2020 WI 91 ¶¶ 53-57, 394 Wis. 2d 629, 951 N.W.2d 568. The majority decision (also authored by Justice Hagedorn) held that President Trump's post-election challenge to the so-called "Democracy in the Park" events in Madison was barred under the doctrine of laches and accordingly did not reach the merits. *Id.* ¶¶ 10-31. Justice Hagedorn (joined by Justice Ann Walsh Bradley) went on in his separate concurrence to reject the President's argument that these events were "illegal in-person absentee voting sites that failed to meet the statutory requirements under Wis. Stat. § 6.855." 2020 WI 91 ¶ 55. He reasoned:

> An alternative absentee ballot site, then, must be a location not only where voters may return absentee ballots, but also a location where voters "may request and vote" absentee ballots. … On the facts before the court, this is not what occurred at "Democracy in the Park" locations. Ballots were not requested or distributed. Therefore, Wis. Stat. § 6.855 is not on point.

2020 WI 91 ¶ 56. The same conclusion follows here: because absentee ballots are not "requested or distributed" from drop boxes, Section 6.855 "is not on point."

Plaintiffs urge this Court to make policy and hold that drop boxes must be classified as "alternate absentee ballot sites" to ensure that (1) clerks do not locate drop boxes in "locations politically advantageous to one side or the other" (such as a "union hall" or "party headquarters"); (2) clerks are held to the rules that apply to alternate absentee ballot sites to provide "[n]otice and clear designation of [drop-box] locations"; and (3) Wisconsin does not allow just "*anyone* [to] man a drop box—*even partisan volunteers*." Br. at 13-14 (emphases added). But these arguments are built on rank speculation and ignore that the challenged WEC guidance memos themselves emphasize the need to use objective, nonpartisan siting criteria; explain the importance of publicizing drop box locations and hours of operation; and instruct that drop boxes be "operated by local election officials." Conley Aff. Ex. 16 at 1-2; *id.* Ex. 3 at 1-4. Moreover, a variety of statutes and regulations require what plaintiffs describe as "the transparency the public expects of the election process" and prohibit municipal clerks and other election officials from using the machinery of voting (including the siting and staffing of drop boxes) for partisan advantage.[7]

C. The statutory validity of drop boxes is not affected by plaintiffs' so-called "ballot harvesting" arguments.

Plaintiffs also complain that WEC's March 31, 2020 guidance memo—issued just as the COVID-19 crisis was hitting Wisconsin, shortly after Governor Evers' first stay-at-home order while absentee voting was underway for the April 7 primary—contained a single sentence stating

[7] *See, e.g.,* Wis. Stat. § 19.59(1)(br) ("No public official … may …provide ... any service or other thing of value, to or for the benefit of a candidate [or] political party …"); *see* Wis. Stat. §§ 5.05(12)-(13), 7.15(9) (voter education responsibilities of WEC and municipal clerks); WEC, *Election Administration Manual for Municipal Clerks* at 123-39 (Sept. 2020), reprinted as Conley Aff. Ex. 17.

that, in the context of what was happening, "[a] family member or another person may also return the ballot on behalf of the voter." Conley Aff. Ex. 16 at 1. Plaintiffs call this "ballot harvesting," SJ Br. at 6, a derogatory term generally used to imply malfeasance (*e.g.*, fraudulently voting on behalf of another), but provide no reason to believe that any such activity has occurred in Wisconsin. Many states explicitly permit persons other than voters to return ballots, and for good reason: it helps ensure that voters whose ballots may be subject to mail delays beyond their control, or who are otherwise unable to return the ballots themselves, are not disenfranchised as a result. Moreover, any person who altered a ballot or voted someone else's ballot would be subject to criminal prosecution in Wisconsin. *See, e.g.*, Wis. Stat. § 12.13. But in any event, the issue of who may return ballots for voters in Wisconsin has nothing to do with the validity of drop boxes, the central focus of plaintiffs' complaint. The statutory validity of drop boxes should be addressed on its own terms, not mixed up with the distinct issue of who may return sealed ballot envelopes at the request and on behalf of voters unable to do so themselves. This part of plaintiffs' case, in particular, smacks of a request for an advisory opinion based solely on a single sentence in a guidance memo issued in the early days of the pandemic.[8]

II. Plaintiffs are not entitled to summary judgment because they lack standing.

For the reasons set forth above, plaintiffs are wrong on the merits. But this Court need not reach those questions because, as DSCC has stressed from the outset, plaintiffs lack standing. That

[8] It is also not well founded. There is no explicit prohibition against ballot collection and return by third parties in Wisconsin and Section 6.87(4)(b)1 does not provide for "deliver[y] in person ***by the elector*** to the municipal clerk"; it provides that "[t]he envelope shall by mailed ***by the elector,*** or delivered in person, to the municipal clerk" (emphases added). Under the principles of statutory construction discussed above, the failure to require delivery "by the elector" when that requirement was applied to other types of ballot return shows the Legislature did not adopt plaintiffs' reading. *See* pp. 8-10 *supra.* DSCC does not suggest that the phrase "mailed by the elector" always requires an elector to be the last person in the chain to put their ballot in the mail, as some voters may necessarily have to give their ballots to others to mail in order to return them (including, *e.g.,* voters who are in poor health, hospitalized, or live at addresses not served by the postal service). But in any event, none of these questions are before this Court.

is especially true now that plaintiffs have conceded that drop boxes *are* legal in some situations; now the question is where and under what circumstances, which can vary enormously among Wisconsin's 72 counties and 1,850 municipal voting jurisdictions. Plaintiffs are simply two voters and taxpayers who now concede that clerks may sometimes lawfully use secure drop boxes, but who seek to exercise a roving commission through this litigation to micromanage the siting, operation, and monitoring of every drop box throughout the state to ensure that all such boxes conform to their sensibilities. We are unaware of any case holding that individual voters in one municipal voting jurisdiction have standing to challenge the voting practices and procedures in any of the other 1,850+ voting jurisdictions around the state, and plaintiffs cite to none.

Wisconsin's rules of standing are broad, but they are not "limitless" or eliminate "the concept of standing as a meaningful requirement." *Wis. Mfrs. & Com. v. Evers*, 2021 WI App 35, ¶ 32, 960 N.W.2d 442 ("if we were to adopt the limitless version of judicial economy standing argued by [plaintiffs], the concept of standing as a meaningful requirement that must be satisfied would be effectively eliminated"); *see also Krier v. Vilione*, 2009 WI 45, ¶ 20, 317 Wis. 2d 288, 766 N.W.2d 517 (rejecting standing arguments that would open state courts to a "universe of entities or people … without bounds"). Plaintiffs present no more than a "'generalized grievance[]' about the administration" of the election statutes in question. *Cornwell Pers. Assocs., Ltd. v. Dep't of Indus., Lab. & Hum. Rels.*, 92 Wis. 2d 53, 62, 284 N.W.2d 706 (App. 1979). They "claim[] only harm to [their] and every citizen's interest in proper application of [these] laws," and the relief they seek "no more directly and tangibly benefits [them] than it does the public at large . . . ." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573-74 (1992).

That is not sufficient for standing. Plaintiffs have not demonstrated "a *personal stake* in the outcome of the controversy" separate and apart from the public at large, nor have they shown

they have "suffered or [are] threatened with an injury to an interest that is *legally protectable*." *Marx v. Morris*, 2019 WI 34, ¶ 35, 386 Wis. 2d 122, 925 N.W.2d 112 (emphasis added); *Krier*, 2009 WI 45, ¶ 20 (emphasis added). Nor have they established an "injury in fact" to a personal interest "within the zone of interests to be protected or regulated by the statute[s] … in question." *Coyne v. Walker*, 2015 WI App 21, ¶ 7, 361 Wis.2d 225, 862 N.W.2d 606. What plaintiffs really seek is an "advisory opinion" on how the relevant statutes should be applied in various hypothetical scenarios that may arise somewhere around the state. *State v. Steffes*, 2013 WI 53, ¶ 27, 347 Wis. 2d 683, 832 N.W.2d 101; *see Blasing v. Zurich Am. Ins. Co*., 2014 WI 73, ¶ 73, 356 Wis. 2d 63, 850 N.W.2d 138 ("This court does not issue advisory opinions based on non-existent facts.").

None of plaintiffs' specific standing arguments come close to satisfying these standards. *First*, in their complaint, plaintiffs claimed they *might* use drop boxes to cast their ballots in the future in reliance on the WEC's advice, but they worried that if the WEC is wrong "their vote may be illegal and not counted." Compl. ¶ 52. But neither plaintiff appears to live in a voting jurisdiction that uses drop boxes outside of clerks' offices, so they do not have this option, and plaintiff Teigen also testified he will not use drop boxes even if such boxes are legal and available. *See* Conley Aff. Ex. 18 at 56-57 (Teigen). And in any event, plaintiffs and any other voters thinking about using drop boxes in reliance on their local clerks' directions can be confident their votes will *not* be retroactively invalidated. The Supreme Court of Wisconsin held just last year that courts may *not* strike the ballots of voters who simply "dropped off their ballot[s] where their local election officials told them they could." *Trump v. Biden*, 2020 WI 91, ¶ 27 (*re* Madison's "Democracy in the Park" ballot-collection program: "Striking these ballots would disenfranchise voters who did nothing wrong when they dropped off their ballot where their local election officials

told them they could."). Plaintiffs thus are at no risk of disenfranchisement for doing what their local election officials tell them they may do.

Second, plaintiffs complain the "value" of their own votes will be "diminishe[d]" if even a single voter—anyone, anywhere in the State—is able "to vote other than in strict compliance with the law." Compl. ¶ 53. To be clear, plaintiffs do not limit this claim to voters who are *unqualified* to vote in Wisconsin, nor do they provide any credible reason to believe these entirely hypothetical voters who voted "other than in strict compliance with the law" would actually cause plaintiffs any injury. To the contrary, it is equally likely that any such voters may vote for the same candidates who plaintiffs support, which would seem to benefit, not harm them. This identical theory of "vote dilution" was pushed in numerous lawsuits that attempted to discredit or undo the November 2020 election results, and courts throughout the country resoundingly rejected them.[9] And the Supreme Court of Wisconsin has cautioned that it is "troubled" by claims of "broad general voter standing," holding that such claims will be "fit for adjudication" only in "*unique circumstances*" not present here. *McConkey v. Van Hollen*, 2010 WI 57, ¶ 17, 326 Wis. 2d 1, 783 N.W.2d 855 (emphasis added). *McConkey* involved a voter challenge to the process by which a constitutional amendment was adopted; the dispute involved a straight-up-or-down question of law. *Id.* ¶ 18. Plaintiffs here

[9] *See, e.g., Hotze v. Hudspeth*, No. 20-20574, 2021 WL 4947327, *1 (5th Cir. Oct. 25, 2021) (voters' claim "that drive-thru voting hurt the 'integrity' of the election process" was "far too generalized to warrant standing"); *Wood v. Raffensperger*, 981 F.3d 1307, 1314 (11th Cir. 2020) (claimed injury to the right "to require that the government be administered according to the law" is "a generalized grievance" that "cannot support standing"; voter's "interest in compliance with state election laws is [no] different from that of any other person"), *cert. denied*, 141 S. Ct. 1379 (2021); *Bognet v. Sec'y Commonwealth of Pa.*, 980 F.3d 336, 356-57 (3d Cir. 2020) (claimed "vote dilution" resulting from counting of allegedly improper ballots is a "paradigmatic generalized grievance that cannot support standing"; "[t]he courts to consider this issue are in accord" that "[s]uch an alleged 'dilution' is suffered equally by all voters and is not 'particularized' for standing purposes"), *vacated as moot sub nom. Bognet v. Degraffenreid*, 141 S. Ct. 2508 (2021); *Feehan v. Wis. Elections Comm'n*, 506 F. Supp. 3d 596, 608-09 (E.D. Wis. 2020) (rejecting "theory that a single voter has standing to sue as a result of his vote being diluted by the possibility of unlawful or invalid ballots being counted"; "plaintiff's alleged injuries are injuries that any Wisconsin voter suffers if the Wisconsin election process" allows illegal votes to be cast, as opposed to "a particularized, concrete injury"), *appeal dismissed*, Nos. 20-3396 *et al.*, 2020 WL 9936901 (7th Cir. Dec. 21, 2020).

concede they no longer challenge *all* drop boxes, just some boxes in some circumstances, which invites a wide-ranging inquiry into local election administration throughout the state. Plaintiffs' voting rights are in no sense "diluted" by other voters' reliance on carefully monitored secure drop boxes under local municipal clerks' jurisdiction, custody, and control.

Third, plaintiffs claim "taxpayer standing," reasoning that "WEC spent substantial staff time and resources to prepare, promulgate and distribute" the two challenged memos. Compl. ¶ 56. But taxpayer standing does not arise just because a challenged memo was prepared by state employees using state resources; that would give any taxpayer standing to challenge any guidance issued by any state employee on any topic. Taxpayer standing requires proof of *expenditures* made as the result of the allegedly illegal guidance. "[I]t must be alleged that the complaining taxpayer and taxpayers as a class have sustained, or will sustain, some pecuniary loss" separate and apart from the public as a whole. *S.D. Realty Co. v. Sewerage Comm'n of City of Milwaukee*, 15 Wis. 2d 15, 21-22, 112 N.W.2d 177 (1961). Plaintiffs must demonstrate an "'illegal *disbursement*'" of state taxpayer funds to carry out the challenged government decision. *Id.* at 22 (emphasis added, citation omitted). There must be "a greater expenditure of public funds" caused by the challenged decision, resulting "either in the governmental unit having less money to spend for legitimate governmental objectives, or in the levy of additional taxes to make up for the loss resulting from the expenditure." *Id.* Plaintiffs have neither alleged nor proved any expenditure of state taxpayer funds pursuant to the two challenged WEC guidance memos, and WEC's acts of providing guidance were not unlawful. To the contrary, WEC is statutorily charged with providing guidance to local election officials. *See* Wis. Stat. § 5.05.

The most recent application of Wisconsin's taxpayer standing doctrine was in *Fabick v. Evers*, 2021 WI 28, 396 Wis. 2d 231, 956 N.W.2d 856, in which the Supreme Court struck down

two of Governor Evers' declarations of public health emergencies due to the pandemic. The Court held that, "[a]s a taxpayer, under our well-established law, [petitioner] has a legal interest (should taxpayer standing be satisfied) to contest governmental actions *leading to an illegal expenditure of taxpayer funds*." 2021 WI 28, ¶ 10 (emphasis added). The Court found "the National Guard had been deployed pursuant to the emergency declarations," resulting in an "expenditure of taxpayer funds" that gave the taxpayer-petitioner standing to challenge the Governor's emergency declarations. *Id.* ¶ 11. Plaintiffs here have neither alleged nor proved a cognizable "expenditure" of state taxpayer funds necessary to establish taxpayer standing.[10]

CONCLUSION

For these reasons and those in the other defendants' briefs, this Court should (1) deny plaintiffs' motion for summary judgment, and (2) enter summary judgment under Wis. Stat. § 802.08(6) declaring that (a) Wis. Stat. §§ 6.855 and 6.87(4)(b)1 do not prohibit municipal clerks from using secure drop boxes to facilitate the return of sealed, voted absentee ballots; (b) clerks are not restricted to locating such drop boxes inside their offices; and (c) clerks are not required to staff such drop boxes at all times with "election officials" appointed under Wis. Stat. § 7.30.

Dated this 15th day of November, 2021.

Respectfully submitted,

[10] The majority and dissenting opinions in *Fabick* emphasize the "expenditure" must be of *state* taxpayer funds in order to have "taxpayer standing" in a Wisconsin state court. The dissent claimed there was no state taxpayer standing because of a "new policy" by the federal government providing "100 percent federal reimbursement for states' National Guard expenses," so that state taxpayers would not have to foot the bill for these expenses. 2021 WI 28, ¶ 104; *see id.* ¶¶ 89-105. The majority agreed there must be an expenditure of *state* taxpayer funds, but concluded that state taxpayer funds "have already been spent in support of National Guard deployments pursuant to" the Governor's orders, and that there was an "imminent threat of unreimbursed costs" that would be borne by state taxpayers. *Id.* ¶ 11 n.5. Thus, WEC's assistance in distributing *federal* CARES Act funds and grants to municipal governments seeking to purchase and improve drop boxes does not create *state* taxpayer standing. *See* Conley Aff. Exs. 2, 4.

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