

Supreme Court of Wisconsin

NO. 22AP91

RICHARD TEIGEN and RICHARD THOM

Plaintiffs-Respondents-Petitioners

vs.

WISCONSIN ELECTIONS COMMISSION,

Defendant-Co-Appellant-Respondent

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE

Intervenor-Defendant-Co-Appellant-Respondent

DISABILITY RIGHTS WISCONSIN, WISCONSIN FAITH
VOICES FOR JUSTICE and LEAGUE OF WOMEN VOTERS OF
WISCONSIN

Intervenors-Defendants-Appellants-Respondents.

Appeal No. 2022AP91

Waukesha County Circuit Court Case No. 2021CV958

**INTERVENOR-DEFENDANT-CO-APPELLANT-
RESPONDENT DSCC'S RESPONSE TO THE EMERGENCY
MOTION TO VACATE STAY AND EMERGENCY
PETITION TO BYPASS**

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Introduction

Respondent-Appellant Democratic Senatorial Campaign Committee (“DSCC”), submits this Response to Petitioner-Appellees’ Emergency Motion to Stay and Emergency Petition to Bypass pursuant to the Court’s Order of January 26, 2022. DSCC limits this Response to whether the Wisconsin Court of Appeals properly stayed the Circuit Court’s order requiring the Wisconsin Election Commission (“WEC”) to withdraw by January 24, 2022 -- *while an election is underway* -- guidance issued to election administrators statewide relating to the use of secure drop boxes for voters to return absentee ballots. With respect to Petitioners’ Emergency Petition for Bypass, DSCC adopts the arguments of the other Respondents in opposition to bypass and, to avoid duplication, does not repeat those arguments here.

The Wisconsin Court of Appeals properly stayed the Circuit Court’s order. Among other things, it correctly found that Respondents have “more than the mere ‘possibility’ of success on the merits. The Court of Appeals is correct. 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”. The 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).

Petitioners concede that Wis. Stat. § 6.87(4)(b)1 permits the use of staffed drop boxes inside clerk's offices, arguing that these secure receptacles are prohibited only when located outside a clerk's office or when they are unstaffed. But there are no such requirements in Wis. Stat. § 6.87(4)(b)1, even though in many cases drop boxes actually are staffed by clerk's offices. Petitioners also 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. But this 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.

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. 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). 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." At no point did the Legislature suggest that reliance on such drop boxes might actually be illegal under Wisconsin law.

By their own admission, Petitioners' Motion to Stay is a request for this Court to change the rules for how Wisconsin voters can deliver their absentee ballots *while Wisconsin's Spring Primary is already underway* and at the very time that voters are returning their ballots. As Petitioners' counsel publicly declared yesterday, Petitioners are asking this Court to make "a change mid-process" while "we have an

election underway.”¹ Indeed, at this very moment, municipalities across the state are making secure drop boxes available for voters to return their absentee ballots, and voters throughout the state are, in all likelihood, relying on those drop boxes to return their ballots, just as they have in all of Wisconsin’s most recent six statewide elections. If this Court were to lift the Court of Appeals’ stay and prohibit the use of drop boxes while voting is ongoing, the resulting harm would be both certain and severe. Some voters would be denied a method of voting that was available to others; local election officials would have to inform voters mid-election that drop boxes are no longer available; voters who used drop boxes after the lifting of the stay would be at risk of having their votes thrown out and being disenfranchised; clerks would have to determine which ballots deposited into drop boxes are permissible and which are not; and local election officials would be required to physically remove drop boxes or otherwise make them unavailable to voters while trying to administer an election.

These are just some of the harms that would befall Wisconsin voters and election officials if the Court were to grant Petitioners’ Motion

¹ Jason Calvi, “Ballot box drop challenge asks Wisconsin Supreme Court to rule”, FOX6 MILWAUKEE (January 26, 2022), available at: <https://www.fox6now.com/news/ballot-box-legal-challenge-wisconsin-supreme-court>

for Stay, and it is why the Court of Appeals acted properly in staying the Circuit Court's order. If ensuring public confidence in the electoral process and the results of elections is a compelling interest, as it surely is, it is hard to imagine anything more at odds with that interest than changing voting rules mid-stream.

Petitioners' attempt to minimize the harm that would result by asserting cavalierly that "clerks can easily remove or cover any illegal drop boxes" and also "post signs on them" to inform voters that the drop boxes cannot be used. Petitioners' Br. at 5. It does not take much imagination to recognize that this haphazard approach would be rife with logistical challenges and inconsistencies from one municipality to the next. Moreover, Petitioners never address what would happen to the votes of Wisconsinites who used drop boxes after the stay was lifted, either because election officials did not remove them or because voters did not receive notice that drop boxes were no longer available. In short, there can be no serious question that eliminating drop boxes mid-election would lead to significant harms, and Petitioners have no meaningful response to how those harms would be addressed.

Under the legal framework for granting stays that this Court clarified just today in *Waity v. Lemahieu*, it is clear that the Court of Appeals acted properly in staying the Circuit Court's order and that the

stay should remain in place at least through Wisconsin's April 5 Spring Election, which will provide the Court of Appeals with sufficient time to fully consider Petitioners' claims and the Circuit Court's decision and for election officials and voters to adapt to the outcome of the legal proceedings. As demonstrated below, each of the four factors discussed in *Waity* overwhelmingly support this result.

Argument²

I. The governing legal standard as clarified in *Waity*.

An appellate court reviews a trial court's decision on a stay for "an erroneous exercise of discretion." *State v. Gudenschwager*, 191 Wis. 2d 431, 439, 529 N.W.2d 225, 228 (1995). *See also* Wis. Stat. §§ 808.07(2)(a)1. and (Rule) 809.12. An appellate court will sustain a discretionary act if it concludes the trial court (1) examined the relevant facts; (2) applied a proper standard of law; and (3) using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. *Gudenschwager*, 191 Wis. 2d at 440.

A stay can be granted if a movant has made a showing of (1) more than the mere "possibility" of success on the merits; (2) unless a stay is

² In this brief DSCC does not address Petitioners' arguments related to return of ballots by persons other than the voter, nor Petitioners' arguments on bypass, but agrees with and adopts the arguments of the other Defendant-Co-Appellant-Respondents.

granted, the moving party will suffer irreparable injury; (3) no substantial harm will come to other interested parties; and (4) the stay will do no harm to the public interest. *Gudenschwager*, 191 Wis. 2d at 440–41; *see also Waity v. Lemahieu*, 2022 WI 6, ¶¶ 49, 54. The movant need not satisfy “each of the four” factors as if they were “tests.” *Scullion v. Wis. Power & Light Co.*, 2000 WI App 120, ¶ 25 n.15, 237 Wis. 2d 498, 614 N.W.2d 565. Instead, the court must “balance the relative strength of each.” *Id.* “These factors are not prerequisites but rather are interrelated considerations that must be balanced together.” *Gudenschwager*, 191 Wis. 2d at 440. The *Gudenschwager* standard is a sliding scale; “more of one factor excuses less of the other.” *Id.* at 441.

Finally, as stated in *Waity*, “[a]t times, this court has also noted that “[t]emporary injunctions are to be issued only when necessary to preserve the status quo.” 2022 WI 6, ¶ 49 (quoting *Werner v. A.L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520, 529 N.W.2d 225 (1977)). Here, the Circuit Court’s preliminary injunction reversed the status quo by eliminating the availability of drop boxes for the upcoming elections, after they had been available in at least each of the last six statewide elections. This is an additional reason why the Court of Appeals acted properly in staying the Circuit Court’s order.

II. The Court of Appeals' stay is supported by the *Waity* factors for granting stays of preliminary injunctions.

A. Appellants' likelihood of success on the merits.

When reviewing the likelihood of success on appeal, “the probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury the plaintiff will suffer absent the stay. Thus, the greater the potential injury, the less a movant must prove in terms of success on appeal.” *Waity*, 2022 WI 6, ¶ 54 (citing *Gudenschwager*, 191 Wis. 2d at 441). Here, given the significant harm described above that would result from changing voting procedures mid-election, Respondents need show only “more than the mere probability of success on the merits,” which is easily satisfied here. *Id.* ¶ 57.

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”. The 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). Respondents thus have, at a minimum, “more than the mere probability of success on the merits.”

Petitioners argued in the Circuit Court that WEC’s reading violates the supposedly “plain language” of Section 6.87(4)(b)1, but their arguments changed significantly during that proceeding. Petitioners 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. Petitioners argued the statute literally requires the voter to hand the envelope containing the ballot in person to the municipal clerk.

In their proposed and signed order before the Circuit Court, however, Petitioners retreated from their initial per se opposition and now concede the validity of many of the absentee-ballot drop boxes they earlier challenged. Specifically, they requested that a permitted drop box

is “staffed by the clerk and located at the office of the clerk or a properly designated alternate site under Wis. Stat. § 6.855.” Pet. App. 12.

This is a 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, Petitioners’ concession that drop boxes are lawful in some circumstances contradicts their “plain language” statutory construction arguments. If deposit into a secure, monitored drop box constitutes the “in person” return of the sealed ballot envelope “to the municipal clerk”—as Petitioners acknowledge—nothing in Section 6.87(4)(b)1 or elsewhere requires that such drop boxes must necessarily be inside the clerk’s office.

“[D]elivered 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.

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

While Petitioners argue that Wis. Stat. § 6.87(4)(b)¹ requires delivery to occur inside the municipal clerk's office, 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 Landing 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)'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."³ Simply put, if the Legislature had

³ *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**

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

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.

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. 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.*, 2012 WI 86, ¶ 33, 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 Court emphasized this rule of construction today in *Waity*, stating that “statutory language is interpreted in the context in which it is used; not in isolation but as a part of a whole; in relation to the language of surrounding or closely-related statutes” *Waity*, 2022 WI 6, ¶ 18 (quoting *State ex. rel. Kalal v. Cir. Ct. for Dane County*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633). 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.

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. Petitioners 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. 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." Even the City of Madison's "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 "sworn election inspectors," who were the only individuals authorized to collect sealed ballots and were required to maintain strict chain of custody over all ballots collected. See *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). Petitioners 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.

3. 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 acknowledged that Wis. Stat. § 6.87(4)(b)1 allows municipal clerks to use drop boxes in at least some circumstances, Petitioners 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. Petitioners' 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). Absentee in-person voting, also known as “early voting,” is when 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), *aff’d in part, vacated in part*, 963 F.3d 665 (7th Cir. 2020). 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 Hagedorn in his persuasive concurring opinion in *Trump v. Biden*, 2020

WI 91, ¶¶ 53-57. 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."

Petitioners urged the Circuit 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.” 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.” Moreover, a variety of statutes and regulations require what Petitioners 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.

B. Severe irreparable harm would result in the absence of a stay, compared to an absence of any substantial harm that will befall Plaintiffs.

Vacation of the stay will bring irreparable harm on electors and the Defendant-Respondents, whereas no such harm will befall Petitioners. On the one hand, removal of drop boxes during an election (including where some have already been used to vote) will potentially disenfranchise voters and cause immense confusion. On the other hand, Petitioners, who have testified they have never used drop boxes and have no intention of doing so, have pointed to no harm that will befall them if

the stay is vacated. In addition, while Petitioners asserted “taxpayer” standing in the Circuit Court, this Court’s reasoning in *Waity* is analogous: “As [two] individuals out of a state population of 5.8 million, [Petitioners’] harm as taxpayers [is] orders of magnitude less than” the concerns of the Defendants-Respondents (who will expend substantial time and resources to alleviate the mass confusion caused by vacation of the stay) and of the State’s countless eligible voters who may be disenfranchised. *Waity*, 2022 WI 6, ¶ 59. Here, Petitioners claimed harm resulting from the costs of the WEC preparing the challenged -- just the time of employees and the costs of printing. Those costs are no doubt even less than the harm the plaintiffs alleged in *Waity*.

Relatedly, Petitioners’ continued assertion of alleged harm is not the type of particularized, personal risk of irreparable injury that they must prove to be entitled to relief. They 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, 711 (Ct. 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). These claims of harm

are insufficient to give plaintiffs standing (DSCC Summ. J. Opp'n at 18), but even if that were not the case, they are clearly insufficient to meet the high burden for injunctive relief.

Last, there is no evidence whatsoever that the use of drop boxes in prior elections resulted in any voter fraud or election irregularities or in any way harmed Petitioners. Petitioners provided no evidence that even indicates that continuing that practice threatens plaintiffs with harm in the future. This failure of proof itself requires rejection of their claims.

C. A stay is in the public interest.

A stay continues to also be in the public interest. In contrast to the absence of any harm to plaintiffs resulting from the stay, granting a preliminary injunction would materially harm Wisconsin voters and defendants and would undermine the public interest. Specifically, by eliminating drop boxes for the 2022 elections, including the *ongoing* election, voters would be disenfranchised, including those who have disabilities and rely on drop boxes to access the ballot box, as shown by affidavits submitted by Co-Appellant-Respondents.

Eliminating drop boxes would also create serious voter confusion. Voters would be told that a method of absentee voting relied upon by at least tens of thousands of Wisconsinites in recent elections and for at least a portion of the ongoing election is no longer available.

What's more, reversal of the stay would require WEC and local election officials to re-educate voters about the sudden unavailability of this voting method, including, potentially, persons who have *already voted*.

This potential harm stands heavily in contrast to the absence of any harm to plaintiffs who have never used a drop box to return a ballot—nor plan to—nor who can point to any particularized harm that might befall them from the use of drop boxes in elections. Even on the merits of the ultimate form of relief, plaintiffs (by their own admission) are seeking to make it more difficult to access the ballot box with no corresponding benefit to the public. An injunction resulting in likely disenfranchisement of eligible voters would not serve the public interest. “By definition, ‘[t]he public interest . . . favors permitting as many qualified voters to vote as possible.’” *League of Women Voters v. N. Carolina*, 769 F.3d 224, 247-248 (4th Cir. 2014) (alterations in original) (quoting *Obama for Am. v. Husted*, 697 F.3d 423, 437 (6th Cir. 2012)). For these reasons, the balance of equities and the public interest weigh heavily in favor of denying Plaintiffs’ Motion for a Preliminary Injunction.

Conclusion

DSCC respectfully asks that this Court deny Petitioners' request to vacate the stay and bypass the Court of Appeals.

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CERTIFICATE OF SERVICE

I certify that on this 27th day of January, 2022, I caused a copy of this brief to be served upon counsel for each of the parties via e-mail.

Dated: January 27, 2022


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