STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY
BRANCH 1

RICHARD TEIGEN, et al.,

Plaintiffs,

v.

WISCONSIN ELECTIONS COMMISSION,

Defendant,

Case No. 21-CV-958

and

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE, et al.,

Defendant-Intervenors.

BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

NATURE OF THE CASE

"Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). This case concerns the proper interpretation of Wisconsin's existing laws regarding the rules for casting an absentee ballot in this State. It is about whether the Wisconsin Elections Commission (WEC) has the authority to interpret those laws in ways that contravene the language of the statutes themselves and then to pass that interpretation on to the 1,850 municipal clerks throughout the state who have the responsibility to administer elections and who, by statute, WEC is obligated to ensure comply with the law. Absent a ruling by this Court about the proper interpretation of

the law, public confidence in upcoming elections will be shaken—regardless of what party or candidate wins any particular race.

RELEVANT FACTS AND PROCEDURAL STATUS

Plaintiffs are taxpayers and registered voters who live in Waukesha County. Teigen Aff. ¶ 2; Thom Aff. ¶ 2. WEC is a state agency charged with administering Chapters 5 through 10 and 12 of the Wisconsin Statutes. WEC provides training and statutory interpretations to local clerks, and WEC is responsible for ensuring that clerks follow the laws with respect to election administration. Wis. Stat. § 5.06.

WEC periodically issues written communications to municipal clerks and the general public concerning election issues. Of particular interest to this action are two memoranda dated March 31, 2020 ("March Memo") and August 19, 2020 ("August Memo") (collectively "Memos"). *See* Spitz Aff. ¶¶ 2-3, Exs. 1 and 2. In the March Memo, WEC stated that "[a] family member or another person may [ ] return [an absentee] ballot on behalf of [another] voter." Ex. 1 at 1. In the August Memo, WEC stated that absentee ballots need not be mailed by the voter or delivered in person to the municipal clerk, but instead could be dropped into a drop box and that such drop boxes could be "staffed or unstaffed, temporary or permanent." Ex. 2.

In reliance upon the Memos, municipal clerks set up over 500 such drop boxes across the state to collect absentee ballots.[1] The March and August Memos

[1] *See* https://wisconsinwatch.org/2020/10/wisconsin-absentee-ballot-drop-box-search/ (last visited October 14, 2021).

contravene the statutory text, exceed WEC's authority, and were not properly promulgated as rules. They are therefore invalid.

Wisconsin statutes provide two methods (and only two methods) for returning absentee ballots: 1) the voter may return the ballot in person to the municipal clerk; or 2) the voter may return the ballot by U.S. mail. Wis. Stat. § 6.87(4)(b)1. The statutes do not authorize drop boxes or even mention them at all. WEC has not promulgated any administrative rules pertaining to either the return of ballots by a person other than the voter or the use of drop boxes to collect absentee ballots.

Plaintiffs seek a declaration and injunction, as specified below, to ensure that Wisconsin's election laws are followed. As voters, Plaintiffs are entitled to participate in elections that are administered properly. Further, they are entitled to know the correct way to cast an absentee ballot under the law to be sure their vote will count. WEC's Memos, which are in conflict with the statutes, cast doubt on the integrity of upcoming elections, erode confidence in the process, and leave Plaintiffs uncertain as to the legal methods for casting an absentee ballot.

ARGUMENT

I. Standard of Review and the Legislature's Policy as Codified

Resolving a conflict between statute and an interpretive rule requires statutory interpretation, a purely legal issue appropriate for summary judgment. *See Seider v. O'Connell*, 2000 WI 76, ¶ 26, 236 Wis. 2d 211, 612 N.W.2d 659 (citation omitted). "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 procedures." Wis. Stat. § 227.40(4)(a). WEC's interpretations of Wis. Stats. §§ 6.84, 6.855, and 6.87(4)(b)1 exceed the agency's authority and in any event were not properly promulgated as rules as required by state law.

In the election context, "voting by absentee ballot is a privilege exercised wholly outside the traditional safeguards of the polling place" and, as such, the Legislature has explicitly declared "that the privilege of voting by absentee ballot must be carefully regulated to prevent the potential for fraud and abuse," including the need "to prevent overzealous solicitation of absent electors who may prefer not to participate in an election" and "to prevent undue influence on an absent elector." Wis. Stat. § 6.84(1). Moreover, the Legislature has specifically directed that the provisions of Wis. Stat. §§ 6.87(3) to (7) "shall be construed as mandatory." Wis. Stat. § 6.84(2). This directive includes Wis. Stat. § 6.87(4)(b)1, the statute primarily at issue here.

Where an election statute is mandatory, strict compliance with the terms of the statutory text is required, even where the result may seem draconian. *State ex rel. Ahlgrimm v. State Elections Bd.*, 82 Wis. 2d 585, 597, 263 N.W.2d 152 (1978) (holding that a judicial candidate who had mistakenly filed nomination papers with the county instead of the State Elections Board could not appear on the ballot even though this led to the "unfortunate and regrettable" result that no candidate would appear on the ballot for that office *at all*). Because the Legislature has unequivocally stated that Wis. Stat. § 6.87(4)(b)1 is mandatory, any ballots cast in a manner

inconsistent with that statute "may not be included in the certified result of any election." *Jefferson v. Dane Cty.*, 2020 WI 90, ¶ 16, 394 Wis. 2d 602, 951 N.W.2d 556.

II. WEC's interpretation of the applicable laws is inconsistent with the plain language of the statutory text.

Wis. Stat. § 6.87(4)(b)1 states, in pertinent part, that an absentee ballot "shall be mailed *by the elector, or delivered in person, to the municipal clerk issuing the ballot or ballots*. . . ." (Emphasis added.) As noted above, WEC has interpreted the language "by the elector" to include not only the voter but also "a family member or another person," March Memo at 1, and the language "in person, to the municipal clerk issuing the ballot or ballots" to allow drop boxes, Ex. 1 at 1. Both interpretations are contrary to the plain language of the statute.

Courts have a "solemn obligation" to "faithfully give effect to the laws enacted by the legislature." *State ex rel. Kalal v. Circuit Ct. for Dane Cty.*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. Statutory interpretation begins with the language of the statute, and if the meaning is plain, the inquiry ends. *Id.* ¶ 45. Where the plain language of a statute provides a limited number of options for compliance, the agency may not create an additional avenue in conflict with the Legislature's intent. For example, in *State ex rel. Castaneda v. Welch*, 2007 WI 103, 303 Wis. 2d 570, 735 N.W.2d 131, the Wisconsin Supreme Court was asked to consider whether an administrative rule that sought to implement procedures for handling citizen complaints about police officers and firefighters in Milwaukee was invalid as exceeding the board's statutory authority. The court concluded that most of the rule could not stand for several reasons, one of which was that the plain language of the

enabling statute provided the commission with only two options for dealing with complaints: dismiss the complaint for failure to set forth sufficient cause for removal or set a date for trial and investigation of the charges in the complaint. The rule at issue would have referred the complaint to the fire or police department for disposition of the complaint, an outcome that should not occur absent a dismissal on purely legal grounds. *Id.* ¶¶ 70–71. The court observed that the statutory directive "reflect[ed] a legislative intent that complaints be directed from the chief to the Board, not vice versa." *Id.* ¶ 71. The court concluded that the rule was "in direct contravention of" the statute "because it allows the Board to take actions that are not authorized by the text of the statute."

A. WEC's directive permitting any person to return an absentee ballot contradicts statutory language requiring return "by the elector."

WEC's construction of Wis. Stat. § 6.87(4)(b)1 to allow a "family member or another person" to return an elector's ballot (sometimes called ballot harvesting) is contrary to the language in the statute requiring the ballot to be returned "by the elector." The Legislature specified two methods of returning absentee ballots: 1) by U.S. mail; or 2) delivered in person, to the municipal clerk. WEC's interpretation that "another person" (literally anyone—a spouse, a child, a paid campaign worker, or a volunteer for an advocacy organization) can return the ballot on behalf of the voter is completely contrary to the Legislature's decision to specify "the elector" in the statutory text. While the Legislature certainly could have chosen to specify that "a family member" could return an elector's ballot, it did not do so; it chose to require *the elector* to return the ballot "in person," a decision consistent with its expressed

concern that the absentee ballot process be designed to "avoid the potential for fraud or abuse," in particular regarding "overzealous solicitation of absent electors who may prefer not to participate in an election" and preventing "undue influence on an absent elector to vote for or against a candidate or to cast a particular vote in a referendum." Wis. Stat. § 6.84(1). Requiring *the elector* to mail or deliver the ballot in person furthers this explicitly stated purpose by ensuring that the elector is the person deciding to cast the ballot (rather than simply caving into pressure from a "family member or another person" to do so); reading the words "by the elector" out of the statute does not comport with the text or the Legislature's stated intent behind it.

WEC's interpretation of "the elector" is simply wrong and borders on the absurd. Permitting any "[ ]other person" to return a ballot, without even limiting who that person is or what that person must do to ensure that the ballot is securely delivered to the clerk, is contrary to legislative intent for at least three reasons. First, to also include the universe of "another person" in the interpretation of "by the elector" means that literally anyone can return the elector's ballot, with no safeguards required. Such ballot harvesting reads "by the elector" out of the statute in violation of long-established canons of statutory interpretation. *Donaldson v. State*, 93 Wis. 2d 306, 315, 286 N.W.2d 817 (1980) ("A statute should be construed so that no word or clause shall be rendered surplusage and every word if possible should be given effect.") (citation omitted); *Kalal*, 2004 WI 58, ¶ 44; *see also* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts § 26 at 174-179 (1st ed. 2012). Here, the Legislature carefully specified that the *elector* must return the ballot.

As in *Castaneda*, the agency's decision to create an alternative avenue for compliance out of whole cloth is in contravention of both the text and the legislative intent as spelled out in the statutes.

Second, the text of the statute needs to be read in the framework of the whole, namely the Legislature's expressed concerns with fraud and coercion of absentee voters. Under Wisconsin law, statutes and regulations related to the same subject matter or having a common purpose must be read, applied, and construed "in a manner that harmonizes them in order to give each full force and effect." *In re Jeremiah C.*, 2003 WI App 40, ¶ 17, 260 Wis. 2d 359, 659 N.W.2d 193 (citation omitted). The election statutes fall into this category. *See Roth v. LaFarge Sch. Dist. Bd. of Canvassers*, 2002 WI App 309, ¶ 8, 259 Wis. 2d 349, 655 N.W.2d 471. If the elector does not wish to return the ballot by mail (which is always an option in cases where returning the ballot in person might prove difficult), the Legislature has identified procedures for those specific situations that necessarily require a third party to return an absentee voter's ballot, including for those who reside in retirement communities, those who are hospitalized, and even a procedure for sequestered jurors. All of these permit and encourage voting among those who might otherwise have a difficult time casting a ballot, but all such procedures have safeguards to prevent fraud or coercion. *See* Wis. Stats. §§ 6.875 (discussing use of special voting deputies in retirement communities, including limitations on who may and may not assist the voter, signature and sealing requirements for the collection of ballots, and a defined timeframe for their return to the clerk); 6.86(1)(b) (sequestered juror to vote

with judge as witness, with ballot returned by judge to the clerk), 6.86(3) (permitting hospitalized electors to both register and vote through an agent who attests to certain information, including identification requirements). WEC's declaration that any voter can give his or her ballot to anyone for delivery to the clerk for any reason—whether due to infirmity, inconvenience, or because the third party insisted upon returning the ballot on the elector's behalf—goes against the carefully crafted balance between the paramount importance of the franchise and the need for integrity for each and every ballot.

Third, WEC's proposed construction violates a related statute, Wisconsin's prohibition on voter fraud as codified in Wis. Stat. § 12.13(3)(n). That section prohibits "receiv[ing] a ballot from or giv[ing] a ballot to a person other than the election official in charge," and imposes a fine of up to $1,000, imprisonment for up to six months, and/or a prohibition on acting as an election official for five years. Wis. Stat. § 12.60(1)(b), (3). WEC's statement that an elector may supply his or her ballot to "another person" to deliver to the clerk violates these provisions and effectively invites electors to commit voter fraud as that term is defined in Section 12.13(3)(n), presumably in the name of administrative convenience. But whatever justification WEC may offer, its pronouncements blessing ballot harvesting by "another person" exceed the agency's authority under the statute.

B. WEC's interpretation to allow unstaffed drop boxes contradicts the terms of the statute and exceeds the agency's authority.

WEC's interpretation that state law permits absentee voters to drop their ballots into unstaffed drop boxes also violates state law for multiple reasons. First,

WEC's interpretation is inconsistent with the requirement in Wis. Stat. § 6.87(4)(b) that an absentee ballot must be "delivered *in person*, to the municipal clerk." Dropping a ballot into an "unstaffed" drop box is not delivery "in person," as that phrase is commonly understood. Rather, an "in person" delivery requires the elector to hand their ballot to another person, namely the "municipal clerk" (or an "authorized representative," per the definition of "municipal clerk," Wis. Stat. § 5.02(10)). Section 5.02(10) of the statutes provides that a "municipal clerk" is "the city clerk, town clerk, village clerk and executive director of the city election commission and their authorized representatives." Unattended containers do not fit within this definition.

WEC's interpretation is also inconsistent with the requirement that the ballot be "delivered in person, *to the municipal clerk* issuing the ballot or ballots." A drop box undoubtedly is not the "municipal clerk." While the definition of "municipal clerk" includes the clerk's "authorized representatives," in no manner of speaking can an inanimate object be considered an "authorized representative." By what process does the clerk "authorize" the box to "represent" the clerk and perform his or her duties? Furthermore, the remainder of the clause ("issuing the ballot or ballots") makes no sense if a drop box is substituted for the municipal clerk. Neither a drop box nor a "mail slot at [a] municipal facilit[y]" (Ex. 1 at 1) has the capacity to "issu[e] the ballot" that an elector will use to vote. WEC's interpretation in this regard is at crosshairs with common sense. Again, if the Legislature wished to include a drop box as a method of returning an absentee ballot, it could easily have done so by passing a law

to that effect, or it could have delegated authority to WEC to promulgate rules concerning the return of absentee ballots. The Legislature did neither. It set out two methods for the return of general absentee ballots absent special circumstances: 1) by mail; and 2) in person to the municipal clerk. Both the absence of any references to drop boxes from the statute and the failure of logic that results from shoehorning a drop box into the definition of "municipal clerk" conclusively demonstrate that WEC's interpretation departs from the Legislature's intent. [2]

C. WEC's interpretation unlawfully authorizes staffed drop boxes in locations other than the municipal clerk's office or sites designated under Wis. Stat. § 6.855.

WEC's Memos also authorize staffed drop boxes in locations other than the clerk's office. The March Memo suggests clerks can "use mail slots at municipal facilities when residents submit tax or utility payments for the return of ballots" or "book return slots at municipal libraries . . . as long as clerk staff have regular access to these facilities to collect ballots." The August Memo provides timelines for registration "at a satellite voting location run by your municipal clerk" and in-person absentee voting at the clerk's "office or a satellite location."

Allowing staffed drop boxes at locations other than the municipal clerk's office or an alternate site designated under Wis. Stat. § 6.855 violates state law. As noted in Section II.A, *supra*, the election statutes are read in conjunction with one another rather than in isolation.

[2] 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.

Section 6.855(1) provides that a municipality "may elect to designate a site other than *the office of the municipal clerk* . . . as the location from which electors of the municipality may request and vote absentee ballots and to which absentee ballots *shall be returned* by electors for any election." Thus, the default location to return absentee ballots is "the office of the municipal clerk," and, unless a municipality follows the procedure and requirements for such alternate sites, absentee ballots "shall be returned" to the clerk's office. Thus, a staffed dropped box can only be located at the clerk's office or an alternate site designated under Wis. Stat. § 6.855.

Wis. Stat. § 6.855 imposes certain important restrictions on alternate sites. First, if an alternate site is designated, "*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" (emphasis added). The clerk must "prominently display a notice of the designation of the alternate site selected." The alternate site "shall be staffed by the municipal clerk . . . or employees of the clerk." And, importantly, the sites must be "as near as practicable to the office of the municipal clerk" and "no site may be designated that affords an advantage to any political party."

These restrictions demonstrate that alternate sites are to be narrow exceptions to the general rule that absentee ballots are to be mailed or returned in person to the municipal clerk's office. Why would the Legislature provide for such specific conditions? It is conceivable that the building housing the clerk's office or the streets around it could be under construction and difficult to access, or the clerk's office may be so small that it is impractical to hold absentee voting there. Section 6.855 permits

absentee voting to be moved to locations such as a nearby city hall or the municipality's board room in the same building where public meetings are held so that municipalities and their electors need not be unduly burdened by these practical difficulties—but it does not sanction a drop box on every street corner (or even at every location that serves as a polling place on Election Day—another alternative the Legislature could have enacted but did not).

If, as WEC's Memos suggest, clerks and municipalities can allow the return of absentee ballots at *any* location without following the procedure in Wis. Stat. § 6.855, then multiple important protections and requirements imposed by that section would be eviscerated.

First, and most importantly, Wis. Stat. § 6.855 requires that "no site may be designated that affords an advantage to any political party." If a drop box, even a staffed one, does not implicate Wis. Stat. § 6.855, the statutory restriction on alternate sites not providing an advantage to any political party presumably does not apply either. But then what is to stop a clerk from designating a union hall, the local Republican party headquarters, or a park in a historically Democratic-leaning neighborhood as a drop site, or even a *mobile* site, such as Racine's "mobile election vehicle," which could easily be driven around to locations politically advantageous to one side or the other?[3] If Section 6.855 does not apply, there can be no principled restriction on the locations local authorities may designate for drop boxes.

[3] Adam Rogan, *First of its kind in Wisconsin | Racine now has its mobile election vehicle, thanks to CTCL grant*, The Journal Times (June 27, 2021), https://journaltimes.com/news/local/govt-and-politics/elections/first-of-its-kind-in-wisconsin-

Second, if Section 6.855 does not apply, it is unclear whether a municipality would even have a duty to notify the public about the alternate site. *See* Wis. Stat. § 6.855(2) (requiring clerk to "prominently display a notice of the alternate site" and publish information on its website). Notice and clear designation of locations is important for election observers, who have a statutory right to be present on both Election Day and any day at any location where absentee voting is taking place. Wis. Stat. § 7.41(1). Lack of public notification is entirely inconsistent with the transparency the public expects of the election process.

Third, Section 6.855 also requires that an alternate site be staffed by the clerk or "employees of the clerk." Yet WEC's memos, in addition to allowing *unstaffed* drop boxes, place no restrictions on who may man a drop box, effectively allowing *anyone* to man a drop box—even partisan volunteers. Ex. 1 at 1,2; Ex. 2 at 2.

D. Only election officials appointed under Wis. Stat. § 7.30 can staff a drop box.

In addition to allowing staffed drop boxes virtually *anywhere*, WEC's Memos place no limits on who may staff a drop box. *See* Ex. 1 at 1 (encouraging use of libraries as drop sites). While Wis. Stat. § 6.87(4) allows in-person delivery to the "clerk" or an "authorized representative" of the clerk (via the definition of clerk in Wis. Stat. § 5.02(10)), the only reasonable interpretation of the term "authorized representative" is an "election official" appointed under Wis. Stat. § 7.30.

racine-now-has-its-mobile-election-vehicle-thanks-to/article_c8581f0e-cbd2-54b4-8200-fa134ede78c9.html

Again, the election statutes must be read in conjunction and consistently with each other. Wisconsin's voter fraud statute requires that the "election official in charge" receive an elector's ballot; the elector violates the statute if he or she hands the ballot off to a third party. *See* Wis. Stat. § 12.13(3)(n). "Election officials," appointed under the provisions of Wis. Stat. § 7.30(2)(a), are the only individuals (other than the electors themselves) who are authorized under law to directly participate in the voting process. Election officials, by statute, are the only people who are authorized to conduct an election. Wis. Stat. § 7.30(2)(a). An election official is defined by statute as "an individual who is charged with *any duties* relating to the conduct of an election." Wis. Stat. § 5.02(4e). In light of this statutory requirement and definition, the "authorized representatives" of the municipal clerk for purposes of Wis. Stat. § 5.02(10) must also be election officials appointed under Wis. Stat. § 7.30—the statute does not make sense read any other way. Interpreting the statute in this manner means that election officials—who are subject to mandatory training by WEC and oversight by the clerk—would be the only ones eligible to staff these locations. If an election official is *not* the only category of person who could staff a drop box, it is once again unclear what other principled line the WEC could draw. And if it is true that the individual staffing the drop box could conceivably be anyone the clerk selects—a volunteer in a park, a union steward, a political party representative—that reading is once again inconsistent with the legislative policy of ensuring the integrity of absentee balloting in Wisconsin that has been on the books for over three decades.

III. WEC's interpretations are invalid because the agency did not promulgate them as rules, as required by state law.

Even if this Court were to determine that WEC had the authority to interpret the applicable statutes in the manner it has, this Court must still afford Plaintiffs the relief they seek because WEC did not follow the statutory rulemaking process.

Section 227.10(1) provides, "Each agency shall promulgate as a rule each statement of general policy and each interpretation of a statute which it specifically adopts to govern its enforcement or administration of that statute." The Legislature used the word "shall," indicating that the language of this section is mandatory. *Karow v. Milw. Cty. Civil Serv. Comm'n*, 82 Wis. 2d 565, 570, 263 N.W.2d 214 (1978) (citation omitted). Rulemaking ensures that "controlling, subjective judgments asserted by . . . unelected official[s]" are not imposed by abandoning statutory rulemaking procedures. *Wis. Legislature v. Palm*, 2020 WI 42, ¶ 28, 391 Wis. 2d 497, 942 N.W.2d 900. In situations where an agency must act quickly, emergency rules "can guide the administration and enforcement of a statute under an agency's purview when a threat to the public peace, health, safety, or welfare necessitates expediency." *Tavern League of Wis., Inc. v. Palm*, 2021 WI 33, ¶ 24, 396 Wis. 2d 434, 957 N.W.2d 261 (plurality opinion) (citing Wis. Stat. § 227.24(1)).

There can be no real dispute that WEC's Memos represent the agency's "interpretation of a statute."[4] WEC did not merely quote the plain language of the

[4] There is also no question that its interpretation "govern[ed] its enforcement or administration of that statute." WEC is responsible "for the administration of chs. 5 to 10 and 12 and other laws relating to elections and election campaigns," Wis. Stat. § 5.05(1), and is charged with investigating and correcting violations of the elections laws, *id.* § 5.05(2m).

statutes (as noted above, it could not do so to reach the outcome it did); the agency decided that the statutory language meant something different altogether, then directed municipal clerks throughout the state to act in accordance with its interpretation. Yet WEC followed neither the traditional rulemaking process nor the emergency process before issuing the Memos. The agency simply issued its interpretation of Wis. Stat. § 6.87(4)(b)1, and the clerks relied on that interpretation to establish over 500 drop boxes throughout the state.

As the Wisconsin Supreme Court recently confirmed, a rule 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. *Palm*, 2020 WI 42, ¶ 22, (quoting *Citizens for Sensible Zoning, Inc. v. DNR*, 90 Wis. 2d 804, 814, 280 N.W2d 702 (1979)). An order issued by an agency is considered a rule if the class of people to be regulated is described in general terms and new members can be added to the class. *Id.* The March Memo was addressed to election commissioners and county and municipal clerks; new individuals can be added to this class as elections bring new people into these positions. The August Memo was addressed to all Wisconsin election officials—a class of individuals that changes constantly as new poll workers and election inspectors are trained. Similarly, the rule regulates the conducts of electors, a general class that constantly receives new members.

Moreover, WEC has authority over the municipal clerks with respect to the administration of the election law. Not only is WEC charged by the Legislature with

the general power and duty to administer the election laws (*See,* Wis. Stat. § 5.05(1)) but WEC also has the duty and power generally to investigate and prosecute civil violations of those laws (Wis. Stat. § 5.05(2m)) and specifically the power and the duty to order local election officials to conform their conduct to the law and enjoin violations of the law by municipal clerks (Wis. Stat. § 5.06(1)). Given WEC's broad powers with respect to election administration, its interpretations of the election statutes, especially when given to the municipal clerks which it regulates under Wis. Stat. § 5.06(1), have the force of law. The two Memos at issue in this case are therefore rules—regulations or orders of general application as defined in *Palm*, represented to have the force of law, and issued by WEC to implement the election statutes it is charged with administering.

As described in detail above, Plaintiffs maintain that WEC would have exceeded its authority even if it had promulgated these directives as rules, but even if this Court determines that WEC *could* have engaged in such rulemaking, it did not. Statutory rulemaking procedures do not simply throw up arbitrary roadblocks to agency action. They serve the important purpose of ensuring that if an administrative agency is going to act with the force of law in a manner that affects the substantive rights of Wisconsin citizens, the public will have the right to notice of those actions and an opportunity to comment on them. Perhaps nowhere else is this consideration more important than in the administration of free and fair elections for all Wisconsin citizens, in which all citizens can have confidence.

The directives in the Memos are not minor refinements of existing, well-established policies set out in statute; they represent a fundamental shift away from the policy choices enshrined in statute over three decades ago. If WEC need not engage in rulemaking—which provides the public notice and an opportunity to comment on the lawfulness of the proposed rules—and can simply create new election procedures through a written memo (which is itself not subject to any check or balance—the public cannot vote out the Administrator[5]), there is little to stop the agency from imposing or telling the municipal clerk that they need not enforce any other election requirement at its whim. For example, what would stop WEC from telling municipal clerks that they need not require voters to show Voter ID or that they need not allow election observers in the polling place?

Statutory rulemaking procedures may seem cumbersome, but to the extent they are, such obstacles are intended as a check on arbitrary administrative power. *Palm*, 2020 WI 42, ¶ 35 ("Rulemaking provides the ascertainable standards that hinder arbitrary or oppressive conduct by an agency."). "Because the legislature has the authority to take away an administrative agency's rulemaking authority completely, it follows that the legislature may place limitations and conditions on an agency's exercise of rulemaking authority, including establishing the procedures by which agencies may promulgate rules." *Koschkee v. Taylor*, 2019 WI 76, ¶ 20, 387 Wis. 2d 552, 929 N.W.2d 600. WEC failed to follow these procedures when issuing the

[5] Like most of the election directives WEC issues, the Memos were not issued by the six appointed members of WEC. The March Memo was issued by Administrator Meagan Wolfe, while the August Memo was issued by Wolfe and Assistant Administrator Richard Rydecki.

Memos, and this Court should afford Plaintiffs the relief they seek because the agency did not promulgate their directives as rules.

CONCLUSION

For the foregoing reasons, Plaintiffs request that this Court declare that WEC's directives and interpretations to municipal clerks that contradict the text of Wisconsin's election laws are illegal and of no force and effect, and that absentee ballots may be returned only under the two methods authorized by statute to be counted. Plaintiffs also seek an injunction barring WEC from continuing to publish its incorrect interpretation of the law or otherwise communicating this misinterpretation to clerks, and requiring WEC to correct its prior misstatements of the law by notifying clerks of the proper interpretation of the law within ten (10) days.

Dated: October 15, 2021.

Respectfully Submitted,

WISCONSIN INSTITUTE FOR LAW & LIBERTY

/s/ *Electronically signed by Katherine D. Spitz*

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