

Richard Teigen
3520 Nagawicka Road
Hartland, WI 53209

Richard Thom
W152 N7894 Countryside Dr.
Menomonee Falls, WI 53051

Plaintiffs

Case Code: 30701

Case Type: Declaratory Judgment

v.

Case No:

Wisconsin Election Commission
212 E Washington Ave 3rd Floor
Madison, WI 53703

Defendant

COMPLAINT

The Plaintiffs, by their undersigned counsel, hereby allege as follows:

1. This is an action against the Wisconsin Election Commission (“WEC”) seeking a declaratory judgment regarding the proper construction of the state statutes that set forth the legal methods for Wisconsin voters to cast absentee ballots, including Wis. Stat. §§ 6.84, 6.855, 6.87(4)(b)1 and 12.13.

2. Wis. Stat. § 6.84(1) provides that while voting is a constitutional right, the vigorous exercise of which should be strongly encouraged, “voting by absentee ballot is a privilege exercised wholly outside the traditional safeguards of the polling place.” As a result, in § 6.84(1), the Legislature concluded “that the privilege of voting by absentee ballot must be carefully regulated to prevent the potential for fraud or abuse.”

3. As part of those regulations to prevent fraud or abuse, Wis. Stat. § 6.87(4)(b)1 provides that voters casting their votes through an absentee ballot must place their ballot in an envelope and that “[t]he envelope shall be mailed by the elector, or delivered in person, to the municipal clerk issuing the ballot or ballots.”

4. Under § 6.87(4)(b)1, there are only two methods allowed for casting an absentee ballot: (1) the U.S. Mail, and (2) handing the envelope containing the ballot in person to the municipal clerk.

5. This requirement with respect to how to cast an absentee ballot must be read in conjunction with Wis. Stat. § 12.13(3)(n) which provides that no person may “receive a ballot from or give a ballot to a person other than the election official in charge.”

6. Together these statutes require that the *voter* shall mail the envelope containing the ballot, or the *voter* shall deliver it “in person” to the municipal clerk. There is no statutory basis to permit a third person to take possession of the ballot to mail it or to deliver it in person.

7. This is further confirmed by Wis. Stat. § 6.855, which discusses alternate absentee ballot sites and provides that “[t]he governing body of a municipality may elect to designate a site . . . as the location . . . to which voted absentee ballots shall be returned *by electors* for any election.” (Emphasis added.) Again, it is the voter, himself or herself, who must return the ballot and not a third party.

8. Despite the clarity of the law, WEC sent a memo to municipal clerks regarding the return of absentee ballots dated March 31, 2020 (the “March 2020 WEC Memo”). In paragraph 2 of the March 2020 WEC Memo it states that third persons other than the voter may return a voter’s absentee ballot. Specifically, the memo says that “A family member or another person

may also return the ballot on behalf of the voter.” (A true and correct copy of the March 2020 WEC Memo is attached hereto as Exhibit A.)

9. In addition, the statutes require that if the ballot is not returned by U.S. Mail then it must be returned by the voter “in person, *to the municipal clerk.*” Wis. Stat. § 6.87(4)(b)1.

10. Despite this requirement in the statutes, WEC Commissioners sent a memo to municipal clerks dated August 19, 2020, (the “August 2020 WEC Memo”) stating that absentee ballots do not need to be mailed by the voter or delivered by the voter, in person, to the municipal clerk but instead could be dropped into a drop box and that the ballot drop boxes could be unstaffed, temporary, or permanent. (A true and correct copy of the August 2020 WEC Memo is attached hereto as Exhibit B.)

11. But a drop box is not the “municipal clerk.” It is an unsupervised, inanimate object. Allowing ballots to be cast by placing them into an unsupervised, inanimate object invites the fraud and abuse that the Legislature was attempting to prevent by requiring strict compliance with the requirement that absentee ballots could only be cast by the two methods allowed under § 6.87(4)(b)1: (1) the U.S. Mail, and (2) handing the envelope containing the ballot in person to the municipal clerk.

12. Both the March 2020 Memo and the August 2020 WEC Memo are incorrect statements of the law by WEC and have led to local election officials in Wisconsin administering elections incorrectly under Wisconsin law.

13. For example, in the 2020 general election, municipal clerks, relying upon the August 2020 WEC Memo authorized and used over 500 drop boxes for voters to cast absentee ballots.

14. By telling municipal clerks that absentee ballots can be cast in this fashion and by allowing votes to be cast in this fashion, WEC put votes cast by voters in jeopardy of not being counted because they are not being cast in strict compliance with the statutes.

15. The Plaintiffs disagree with the interpretation of the relevant statutes by WEC and seek a declaration as to the correct interpretation of the statutes.

16. The question here is *Quis custodiet ipsos custodes?*¹ If WEC will not administer elections as required by the statutes, then who will require them to do so such that the future votes cast by Wisconsin voters are not placed in jeopardy?

THE PARTIES

17. Plaintiff, Richard Teigen, is a registered Wisconsin voter and a taxpayer residing at 3520 Nagawicka Road, Hartland, in Waukesha County, Wisconsin.

18. Plaintiff, Richard Thom, is a registered Wisconsin voter and a taxpayer residing at W152 N7894 Countryside Road, Menomonee Falls in Waukesha County, Wisconsin.

19. The Defendant, Wisconsin Election Commission, is a governmental agency created under Wis. Stat. § 5.05 and charged with the responsibility for the administration of Chapters 5 through 10 and 12 of the Wisconsin Statutes. The Wisconsin Election Commission has its offices and principal place of business at 212 E. Wisconsin, 3rd Floor, Madison, WI 53703.

JURISDICTION AND VENUE

20. This court has jurisdiction pursuant to either or both Wis. Stat. §§ 806.04 and 227.40.

21. Wis. Stat. § 806.04 provides that any person “whose rights, status or other legal relations are affected by a statute ... may have determined any question of construction or validity

¹ Who watches the watchmen?

arising under the ... statute ... and obtain a declaration of rights, status or other legal relations thereunder.”

22. The Plaintiffs’ voting rights are affected by the statutes at issue here and the Plaintiffs seek to have the correct construction of those statutes declared by this Court.

23. Wis. Stat. § 227.40 specifically provides that a plaintiff may challenge the validity of any rule or guidance document by declaratory judgment. If Wis. Stat. § 227.40 is applicable to either or both the March 2020 and August 2020 WEC Memo, then Plaintiffs’ action herein against WEC with respect to those documents is intended to be brought under that statute as well as or as an alternative to Wis. Stat. § 806.04.

24. Venue is proper in this Court pursuant to Wis. Stat. §§ 801.50 and/or 227.40(1).

CAUSE OF ACTION FOR A DECLARATORY JUDGMENT

25. Wis. Stat. § 6.84(1) provides that the while voting is a constitutional right, the vigorous exercise of which should be strongly encouraged, “voting by absentee ballot is a privilege exercised wholly outside the traditional safeguards of the polling place.” As a result, in § 6.84(1), the Legislature concluded “that the privilege of voting by absentee ballot must be carefully regulated to prevent the potential for fraud or abuse.”

26. To further implement this finding, Wis. Stat. § 6.84(2) specifically directs that the provisions of § 6.87(3) to (7) (which would obviously include § 6.87(4)(b)1) “shall be construed as mandatory.”

27. The Wisconsin Supreme Court has held that where an election statute is mandatory, its exercise requires strict compliance (citing *State ex rel. Ahlgrimm v. State Elections Bd.*, 82 Wis. 2d 585, 597, 263 N.W.2d 152 (1978)) and that consequently, “[b]allots counted in contravention

of the procedures ... 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.

28. Wis. Stat. § 6.87(4)(b)1 requires that when voting an absentee ballot “[t]he envelope [containing the ballot] shall be mailed by the elector, or delivered in person, to the municipal clerk issuing the ballot or ballots,” and under § 6.84(2), the requirements in this provision are mandatory.

29. Notwithstanding these clear and mandatory provisions of Wisconsin law, WEC issued the March 2020 and August 2020 Memos both of which are inconsistent with and contradict the express and mandatory requirements of the statutes.

30. Further, WEC did not promulgate its interpretations of these election statutes as required under Chapter 227 of the Wisconsin Statutes, even though Wis. Stat. 227.10(1) specifically requires that each interpretation of a statute which an agency adopts to govern its administration of a statute shall be promulgated as a rule.

31. The March 2020 and August 2020 Memos are invalid because they exceed the statutory authority of WEC and because they were promulgated without compliance with statutory procedures.

32. WEC’s interpretations of these statutes are entitled to no deference by this Court. Wis. Stat. § 227.57(11); see also *Lamar Cent. Outdoor, LLC v. Div. of Hearings & Appeals*, 2019 WI 109, ¶ 9, 389 Wis. 2d 486, 936 N.W.2d 573. Instead, courts follow the plain meaning rule when interpreting statutes. *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110.

33. WEC sent the March 2020 WEC Memo and the August 2020 WEC Memo to each of the 1,850 municipal clerks in the State of Wisconsin. Given that WEC has the statutory authority

to enforce and administer the election laws set forth in Chapters 5 through 10 and Chapter 12 of the statutes, municipal clerks typically follow the interpretation of those statutes as set forth by WEC.

34. For example, consistent with the August 2020 Memo, municipal clerks set up over 500 drop boxes around the state and allowed voters to cast absentee ballots by depositing them into such drop boxes rather than placing them in the U.S. Mail or handing them in person to the municipal clerk. *See* Nora Eckert, *Search for a ballot drop box in your community using this tool*, Wisconsin Watch (Oct 27th, 2020), <https://wisconsinwatch.org/2020/10/Wisconsin-absentee-ballot-drop-box-search/>.

35. The phrase “municipal clerk” is defined in the election statutes as “the city clerk, town clerk, village clerk and the executive director of the city election commission and their authorized representatives.” *See* Wis. Stat. § 5.02(10).

36. 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.

37. Even if a drop box could be classified as an “authorized representative,” Wis. Stat. § 6.87(4)(b)1 further qualifies the term “municipal clerk,” requiring in this instance that the elector return the ballot “to the municipal clerk *issuing the ballot or ballots*.” (Emphasis added.) Obviously, a drop box will never have been the entity that “issu[ed] the ballot.”

38. Thus, putting an absentee ballot into a drop box does not satisfy the mandatory requirements for casting an absentee ballot set forth in § 6.87(4)(b)1.

39. In addition, in order to ensure that elections are being properly administered in Wisconsin, the question of what persons qualify as an “authorized representative” of the clerk must be answered.

40. At a minimum, because Wis. Stat. § 12.13 provides that no person may “Receive a ballot from or give a ballot to a person other than the election official in charge,” the only person who can be authorized to receive absentee ballots must be an “election official.”

41. Pursuant to Wis. Stat. § 5.02(4e) election official “means an individual who is charged with any duties relating to the conduct of an election.”

42. Pursuant to Wis. Stat. § 7.30(2)(a), “[o]nly election officials appointed under this section or s. 6.875 may conduct an election.”

43. Thus, because ballots can only be given to an “election official” and all election officials who conduct an election must be appointed under § 7.30(2)(a) (section 6.875 is an exception that applies only to special voting deputies in residential care facilities and nursing home and is not pertinent here), the “authorized representatives” of the municipal clerk under § 5.02(10) must be election officials appointed under § 7.30.

44. Further, in order to ensure that elections are being properly administered in Wisconsin, the question of where absentee ballots may be returned by voters must be answered.

45. Wis. Stat. § 6.855 answers this question. Pursuant to § 6.855, the office of the municipal clerk is the default location “to which voted absentee ballots shall be returned by electors for any election.”

46. Any other location must be designated in the manner set forth in § 6.855 and “The designated site shall be located as near as practicable to the office of the municipal clerk or board of election commissioners and no site may be designated that affords an advantage to any political party.”

47. Further, if the governing body of a municipality makes an election to designate an alternate site to the clerk’s office under this section, then “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.”

48. The result of this provision of the statutes is that all absentee ballots must be returned by the voter to the office of the municipal clerk, unless a different site is designated under § 6.855. In which case, absentee ballots must be returned to the designated location and not to the municipal clerk’s office.

49. The municipal clerk may not accept absentee ballots at any other location. Not at a drop box; not in some other part of City Hall; not at the library and not in a park.

50. The requirements of §§ 6.84, 6.855 and 6.87(4)(b)1, are the established policy of the State of Wisconsin as mandated by the Legislature.

51. WEC does not have the power to set aside the policy decisions of the Wisconsin Legislature in this regard.

52. WEC’s incorrect interpretation of the election statutes harms the Plaintiffs in several ways. The Plaintiffs are harmed as voters because they are uncertain as to the lawful method to cast absentee ballots in future elections. If they cast their absentee ballot as approved by WEC, such as placing it in an untended drop box, as opposed to placing it in the U.S. Mail or handing it in person to the municipal clerk, then their vote may be illegal and not counted. The Plaintiffs are entitled to certainty as to the lawful methods in which to cast an absentee ballot in Wisconsin.

53. Further, the Plaintiffs are harmed as voters because allowing other voters to vote other than in strict compliance with the law diminishes the value of the Plaintiffs’ votes. Only legally cast votes should count and counting illegally cast votes diminishes the value of those cast legally.

54. The Plaintiffs, as voters, are entitled to have the elections in which they participate administered properly under the law. Allowing WEC to administer the 2022 elections in a manner other than that required by law causes doubts about the fairness of the elections and erodes voter confidence in the electoral process.

55. The Plaintiffs are also harmed as taxpayers. Here, WEC spent substantial staff time and resources to prepare, promulgate and distribute the March 2020 WEC Memo and the August 2020 WEC Memo and WEC will spend substantial taxpayer funds in administering the 2022 primary and general elections and, unless the statutes are properly interpreted, will do so in a manner consistent with the March 2020 WEC Memo and the August 2020 WEC Memo, but illegal under the Wisconsin statutes.

56. As a result, the Plaintiffs are entitled to a declaratory judgment that: (a) absentee ballots can be cast only by the two methods allowed under § 6.87(4)(b)1: (1) by the voter placing the envelope containing the ballot in the U.S. Mail, or (2) 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 ; and (b) that handing the envelope containing the ballot to the municipal clerk means handing it to the actual municipal clerk or to an election official appointed pursuant to Wis. Stat. § 7.30 to act as the authorized representative of the municipal clerk.

57. The time to decide the questions presented herein is now – during 2021 – a non-election year. In *Trump v. Biden*, 2020 WI 91, 951 N.W.2d 568, decided just four months ago, the Wisconsin Supreme Court said that the time to challenge election policies is not after ballots have been cast but rather such challenges should occur outside the context of a close and challenged election. *Id.*, ¶ 22, 951 N.W.2d 575–76.

58. In *Trump v. Biden*, among other claims, the Supreme Court refused to decide a dispute regarding allegedly illegal election administration by the City of Madison in September and October 2020, even though the Trump campaign filed its action in November 2020 (barely a month after the alleged illegal conduct). The Supreme Court refused to hear the dispute based on laches because even though very little time had passed since the alleged illegal conduct, the plaintiffs in that case waited until after the votes had been cast to bring the challenge.

59. A related principle of not deciding election law cases close to an election known as the Purcell Principle was announced by the U.S. Supreme Court in 2006 in *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (*per curiam*).

60. The rationale for the Purcell Principle is that courts should not change election law rules shortly before an election because of the confusion that such a change could cause both among voters and those administering the election.

61. To avoid those situations here, the Plaintiffs bring this case now, so that a determination can be made well before the next election and Wisconsin voters can be informed as to the lawful ways in which to cast an absentee ballot long before the election season begins.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiffs request the following relief:

A. A declaration as follows:

1. Absentee ballots can be cast only by the two methods allowed under § 6.87(4)(b)1: (a) by the voter placing the envelope containing the ballot in the U.S. Mail addressed to the municipal clerk, or (b) 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; and

2. That handing the envelope containing the ballot in person to the municipal clerk means handing it to the actual municipal clerk or to an election official appointed pursuant to Wis. Stat. § 7.30 to act as the authorized representative of the municipal clerk.

B. A permanent injunction requiring that WEC cease and desist from failing to enforce Wis. Stat. §§ 6.84, 6.855 and 6.87(4)(b)1.

C. Such equitable or other relief as is just and appropriate.

Dated: June 28, 2021.

Respectfully submitted,

Rick Esenberg (SBN 1005622)
(414) 727-6367
rick@will-law.org

Brian McGrath (SBN 1016840)
414-727-7412
brian@will-law.org

Electronically signed by Luke N. Berg
Luke N. Berg (SBN 1095644)
(414) 727-7361
luke@will-law.org

Katherine D. Spitz (SBN 1066375)
(414) 727-9455
kate@will-law.org

Wisconsin Institute for Law & Liberty
330 E. Kilbourn Ave., Suite 725
Milwaukee, WI 53202
Telephone: (414) 727-9455
Attorneys for Plaintiffs