No. 22AP91

In the Wisconsin Supreme Court

RICHARD TEIGEN AND RICHARD THOM,
PLAINTIFFS-RESPONDENTS-PETITIONERS,

v.

WISCONSIN ELECTION COMMISSION,
DEFENDANT-CO-APPELLANT-RESPONDENT

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE,
INTERVENOR-DEFENDANT-CO-APPELLANT-RESPONDENT,

DISABILITY RIGHTS WISCONSIN, WISCONSIN FAITH VOICES FOR JUSTICE, LEAGUE OF WOMEN VOTERS OF WISCONSIN,
INTERVENORS-DEFENDANTS-APPELLANTS-RESPONDENTS

On Appeal from the Decision of the Circuit Court
of Waukesha County, Honorable Michael Bohren Presiding
Circuit Court Case No. 21-cv-958

COMBINED MEMORANDUM IN SUPPORT OF EMERGENCY MOTION TO VACATE STAY AND EMERGENCY PETITION FOR BYPASS

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INTRODUCTION

This case is about whether upcoming elections will be conducted in accordance with state law, or under conflicting rules announced in two memos by the Wisconsin Elections Commission (WEC). State law says that absentee ballots must be returned "by the elector," Wis. Stat. § 6.87(4)(b)(1); 6.855(1) ("shall be returned by electors"), and cannot be given to anyone else, Wis. Stat. § 12.13(3)(n), yet WEC has told clerks around this State that *any person* may return anyone else's ballot, effectively authorizing ballot harvesting. R. 2:15. State law also permits only two methods of returning absentee ballots, "mail[ing]" them or "deliver[ing] [them] *in person* to the municipal clerk." *Id.* And if delivered in person, absentee ballots "shall be returned by electors" to the "office of the municipal clerk," unless an alternate site is designated under § 6.855. Nevertheless, WEC has told clerks that they can use drop boxes for returning absentee ballots, whether "staffed or unstaffed, temporary or permanent," and that these boxes can go anywhere, including "libraries," "businesses," "grocery stores," and "banks," R. 2:18–19, violating both the "in person" delivery requirement under Wis. Stat. § 6.87(4)(b)(1) and the location requirement under Wis. Stat. § 6.855.

Not only do WEC's memos violate the clear text of these statutes, they also conflict with the Legislature's instruction that absentee voting procedures are "mandatory," and therefore to be "strictly enforced," "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); *State ex rel. Ahlgrimm v. State Elections Bd.*, 82 Wis. 2d 585, 597, 263 N.W.2d 152 (1978).

On January 13, the Circuit Court held that WEC's memos not only violated these state laws, but also were not properly adopted as rules under Chapter 227. It ordered WEC to withdraw them and issue accurate direction to clerks in time for the upcoming spring primary on February 15. The Circuit Court also properly denied a stay, concluding

that Respondents had no likelihood of success on appeal, that the harm and public interest factors cut against a stay, and that WEC and clerks had been given adequate time in advance of the upcoming election. App. 64–75.

Yet on January 23, one day before the deadline for absentee ballots to be sent out, the Court of Appeals issued an emergency stay that reinstated those unlawful memos, committing multiple well-recognized errors in the process. First, the Court of Appeals did not identify any abuse of discretion by the Circuit Court—it couldn't, it didn't even have the transcript, App. 3–4—but applied the stay factors on its own in the first instance. *Contra State v. Gudenschwager*, 191 Wis. 2d 431, 439–40, 529 N.W.2d 225 (1995). Second, the Court of Appeals "decline[d]" to explain why the Respondents were likely to succeed on appeal, but simply announced that they were and moved on, App. 4 ("[W]e decline to discuss specific issues or our analysis more generally at this time, so as not to affect the briefing."), vi olating this Court's direction that an appellate court must "explain its discretionary decision-making to ensure the soundness of that decision-making and to facilitate judicial review." *State v. Scott*, 2018 WI 74, ¶ 40, 382 Wis. 2d 476, 914 N.W.2d 141. Worse yet, it resolved the likelihood-of-success factor even though the Respondents *did not even brief* their likelihood of success in their motions to Court of Appeals, as the Court acknowledged. App. 4.[1]

This Court should, as soon as possible, grant the Emergency Petition for Bypass and vacate the Court of Appeals stay, to ensure that the upcoming election is conducted in accordance with state law, as it did in *Jefferson v. Dane County*, 2020 WI 90, ¶ 9, 394 Wis. 2d 602, 951 N.W.2d 556, when the Madison and Milwaukee clerks issued guidance

[1] The Court of Appeals relied on Respondents' reply briefs for the merits, App. 4—giving Petitioners no opportunity to respond—violating the "well-established rule that an appellate court will not consider arguments made for the first time in a reply brief." *Munger v. Seehafer*, 2016 WI App 89, ¶ 70 n. 20, 372 Wis. 2d 749, 890 N.W.2d 22.

in conflict with state election laws. Although absentee voting has already begun, an order from this Court vacating the stay will not cause significant problems. This case is solely about how absentee ballots can be *returned*. Any ballots received through drop boxes or by persons other than the elector prior to any order from this Court of course can and should be counted. After this Court issues an order vacating the stay, clerks can easily remove or cover any illegal drop boxes, and post signs on them and notices on websites that ballots must be mailed or delivered in person to the clerk, and by the elector. This Court can even give clerks a few days to make that change. Any voters who do not receive the notification and attempt to return a ballot to a drop box can simply read the sign and then drop it into a mailbox or deliver it to the clerk's office.

Even if this Court concludes that it is too late at this point to vacate the stay for the February 15 primary, it should nevertheless grant the Petition for Bypass. The issues in this case need to be resolved, if not immediately, then certainly in time for the spring election in April, and they ultimately need to be resolved by this Court. These issues require this Court's "law defining and law development" role, *see Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997), and only this Court can "provide a clear, definitive and controlling ruling" as to the proper interpretation of Wis. Stat. §§ 6.87, 6.855 and related statutes, *see* Certification Opinion at 22, *State v. Mattox*, No. 2015AP158 (Feb. 10, 2016). If this Court does not take the case now, this case will require another emergency request to this Court, with a compressed timeline for review, in the run-up to the April election. Indeed, just yesterday, the Court of Appeals issued an order requesting a schedule that would allow it to "issue an opinion fourteen days before [the April] election process starts," *see* Order Dated 1-25-22, all but ensuring that there will be insufficient time to come to this Court after that decision, as whichever party loses inevitably will. This Court should take the case now so that these issues can be resolved definitively by this Court before further elections are conducted in violation of state law.

ISSUES PRESENTED

1. Whether Wis. Stat. § 6.87(4)(b)1, which requires "the elector" to return his or her own ballot by U.S. mail or delivering it "in person to the municipal clerk," can be properly interpreted as allowing "a family member or another person [to] return the ballot on behalf of the voter," R. 2:15.

2. Whether placing an absentee ballot into an unattended drop box qualifies as "deliver[y] *in person* to the municipal clerk" under Wis. Stat. § 6.87(4)(b)1.

3. Whether WEC's direction that municipalities can install drop boxes anywhere, including "libraries," "businesses," "grocery stores," and "banks," R. 2:18–19, violates Wis. Stat. § 6.855, which provides that "the office of the municipal clerk ... [i]s *the* location ... to which voted absentee ballots *shall be returned* by electors," unless an alternate site is designated under the procedures in that section.

4. Whether memoranda issued to all municipal clerks on March 31, 2020 and August 19, 2020 purporting to provide direction on the issues above should have been promulgated as administrative rules.

The Circuit Court decided the first three questions in the negative and the fourth in the affirmative, issuing an oral ruling to this effect on January 13, 2022 and signing a written order granting Petitioners' request for a declaratory judgment and permanent injunction on January 20, 2022.

BACKGROUND

A. Factual Background

The Wisconsin Legislature has specifically directed 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 the election" and "to prevent undue influence on an absent elector." Wis. Stat. § 6.84(1). Additionally, the Legislature has explicitly specified that the provisions of Wis. Stat. §§ 6.87(3) to (7)—a statutory range which includes Wis. Stat. § 6.87(4)(b)1, the provision primarily at issue in this case—"shall be construed as mandatory." Wis. Stat. § 6.84(2). 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.)

Where an election statute is mandatory, strict compliance with the terms of the statutory text is required, even where the result may seem draconian. *Ahlgrimm*, 82 Wis. 2d at 597 (judicial candidate who had mistakenly filed nomination papers with the county instead of the State Elections Board could not appear on the ballot even where this meant no candidate would appear on the ballot for that office *at all*).

On March 31, 2020 ("March Memo") and August 19, 2020 ("August Memo"), WEC issued memoranda to municipal clerks across the state of Wisconsin. In the March Memo, sent to municipal clerks just seven days before the April 7 Election Day, WEC stated that a "family member or another person may return [an absentee] ballot on behalf of [another] voter." R. 2:15. 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, temporarily or permanent," and could go anywhere, including in "libraries," "businesses," "grocery stores," and "banks," R. 2:18–19.

In reliance on both Memos, clerks set up over 500 such drop boxes across the state for absentee ballots. Wisconsin statutes provide two methods for returning absentee ballots—U.S. mail or the returning the ballot in person to the municipal clerk. Language concerning drop boxes occurs nowhere in the statutes or administrative rules.

B. The Parties

Petitioners Richard Teigen and Richard Thom are taxpayers and registered voters in Waukesha County. Defendant Wisconsin Elections Commission is the state agency charged with administering and enforcing Wisconsin's election laws.

The Circuit Court also permitted several interest groups (the Democratic Senatorial Campaign Committee, Faith Voices for Justice, the League of Women Voters, and Disability Rights Wisconsin) to intervene in this litigation as intervenor-defendants. They are referred to collectively as the "Intervenors."

C. Procedural Background

This case is not the first time that voters in Wisconsin have attempted to raise concerns regarding WEC's authority to unilaterally alter election procedures through the Memos. In the spring of 2021, a Wisconsin voter filed an original action petition challenging the use of drop boxes and harvesting in advance of the April elections. *Fabick v. Wisconsin Elections Commission*, No. 21AP428 (Mar. 15, 2021). The Court rejected the petition, expressing the desire that arguments be developed through the Circuit Court.

On June 28, 2021, just three days after this Court denied the *Fabick* original action, Petitioners filed suit in Waukesha County Circuit Court, a full seven and a half months out from any contested elections. Petitioners properly framed the inquiry as a purely legal issue—whether WEC's March and August 2020 Memos exceeded the agency's authority under Wisconsin's elections statutes. Petitioners sought a declaration that the March and August Memos contravened Wisconsin law, as well as an injunction requiring WEC to cease and desist from failing to enforce the law as written. R. 2. The DSCC sought to intervene on July 13, 2021, R. 6–8, and the remaining Intervenors filed to intervene on August 13, 2021, R. 24.

On August 19, 2021, the Court held a status and scheduling conference during which Petitioners' counsel emphasized the purely legal questions at play and indicated they were prepared to file immediately for summary judgment in order to allow the Court ample time to rule in advance of the 2022 election cycle. The Intervenors (notably, not WEC, the defendant and real party in interest) argued that they wished to take discovery from Petitioners and that in any event their intervention motions should be decided before any summary judgment motions were even briefed. R.73.

Ultimately, the Court set a briefing schedule on the intervention motions and granted those motions on October 14, 2021. R. 45. The Court permitted Intervenors to take their requested discovery. WEC did not issue any discovery or appear for Petitioners' depositions. R.105–106. The day after intervention was granted, Petitioners filed their summary judgment and preliminary injunction motions, noting once again the urgency of having these issues decided in advance of the 2022 elections. R. 62–68.

On January 13, 2021, the Circuit Court held a hearing and orally granted Petitioners' motion for summary judgment in full. App. 16–37. The Court declared that WEC's interpretation of the law in the March and August Memos was inconsistent with state law, and specifically that: (1) an elector must personally mail or deliver his or her own absentee ballot, except where the law explicitly authorizes an agent to do so on the elector's behalf; (2) the only lawful methods for casting an absentee ballot are those spelled out in Wis. Stat. § 6.87(4)(b)(1); and (3) the use of drop boxes is not permitted unless the drop box is staffed by the clerk and located at the clerk's office or a properly designated alternate site under Wis. Stat. § 6.855. App. 11–13. The Court further enjoined WEC from issuing any further interpretations of the law that conflict with Wis. Stats. §§ 6.87 and 6.855 and, in light of the upcoming spring primary and general elections, directed that no later than

January 27, 2022, WEC must withdraw the Memos and issue a statement to clerks notifying them that its interpretation in the Memos had been declared invalid by the Court. *Id.*

The Circuit Court's timing—a month before the next election and two weeks before the deadline to mail absentee ballots—was more than adequate, but the Intervenors filed a motion for an emergency stay arguing to the contrary (tellingly, WEC did not file such a motion, but orally joined the Intervenors' motion). R. 135. Notably, the Intervenors' motion did not brief or address the factors for a stay at all, but relied entirely on *Purcell*. *Id.* The Court held a hearing on January 21, 2022, and denied the motion. During that hearing, the Court also adjusted its ruling on the preliminary injunction in light of the February 15, 2022 spring primary, requiring WEC to withdraw its illegal directives via a communication to clerks on or before January 24, 2022 so that the directive would be given prior to the deadline by which absentee ballots were to be mailed for the February 15 primary. App. 14–15.

The Court signed a written order reflecting its January 13 ruling on January 20, 2022. App. 11–13.[2] Intervenors filed a notice of appeal to the Court of Appeals the same day. On Friday, January 21, 2022, all Intervenors but DSCC filed an ex parte motion for an emergency stay of the Circuit Court's ruling. WEC filed its own notice of appeal on January 21, 2022. The Court of Appeals acknowledged the filing on Saturday January 22, and provided Petitioners 24 hours to respond. The Court then granted the stay on Monday, January 24, to extend through February 15, 2022, noting that it would entertain future motions to extend the stay later. App. 1–10.

[2] Petitioners sent Respondents a draft order the day after the January 13 hearing, but Respondents waited four days to provide any feedback on the form of the order.

ARGUMENT

I. This Court Should Vacate the Court of Appeals' Stay

The test for a stay pending appeal is well-established. Wisconsin courts consider the movant's likelihood of success on appeal, the balance of harms whether a stay is granted or denied, and whether a stay is in the public interest. *Gudenschwager*, 191 Wis. 2d at 440. Whether to grant a stay is committed to the discretion of the Circuit Court. *Id.* Appellate courts do not apply the stay factors in the first instance, but review the Circuit Court's decision for an abuse of discretion, considering whether the Circuit 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." *Id.*

The Court of Appeals' decision granting a stay committed multiple, well-recognized errors. First, it did not identify any abuse of discretion by the Circuit Court, but applied the stay factors on its own in the first instance, App. 3–4, in conflict with *Gudenschwager*'s holding that the decision whether to grant is stay is committed primarily to the discretion of the Circuit Court. 191 Wis. 2d at 439–40. Second, in its own application of stay factors, the Court of Appeals "decline[d]" to explain why the Respondents were likely to succeed on appeal, App. 4, violating this Court's direction in *Scott* that appellate courts, like Circuit Courts, must "explain [their] discretionary decision-making to ensure the soundness of that decision-making and to facilitate judicial review." 2018 WI 74, ¶ 40. Finally, the Court allowed Respondents to wait until their reply briefs to discuss their likelihood of success, giving Petitioners no opportunity to respond, violating the "well-established rule that an appellate court will not consider arguments made for the first time in a reply brief." *Munger*, 2016 WI App 89, ¶ 70 n. 20. These errors alone warrant vacating the Court of Appeals' stay.

The Circuit Court, for its part, properly analyzed the stay factors. It found that Respondents did not have "a great likelihood of success ... as to the merits and the substance of the Court's decision," given that the statutes "are unambiguous" and "there is no basis for the guidance issued by the [WEC]," that the public "is not harmed" in "following the statutes," but instead "is really benefited by the statutes being administered according to what they say," and that "there's sufficient time for the [WEC] to act." App. 68–71, 72. The Court also emphasized that "voter confusion" had "never been an issue in this case" until the Intervenors attempted to raise it at the eleventh hour (four days *after* their stay motion, R. 137–38), but there had been "no fact-finding on it" and "no conclusions drawn" because it was filed so late. App. 64–65. Thus, the Circuit Court clearly "examined the relevant facts," "applied a proper standard of law," and "using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." *Gudenschwager*, 191 Wis. 2d at 440.

Even putting the Court of Appeals' errors aside and considering the stay factors anew, it is clear that a stay was not warranted, but instead those factors warrant immediately vacating the stay.

A. Respondents Are Not Likely to Succeed on Appeal

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. Where, as here, 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. *See State ex rel. Castaneda v. Welch*, 2007 WI 103, ¶¶ 70-71, 303 Wis. 2d 570,735 N.W.2d 131.

The issues in this case are not complicated, and Wisconsin law is clear. Wisconsin law explicitly requires electors to mail or deliver their own absentee ballots in person to the municipal clerk. The Circuit Court

correctly found that the methods set forth in the statutes, and not the additional return methods in the Memos, were the exclusive means by which an elector can validly cast an absentee ballot.

1. Absentee Ballots Must Be Returned "By the Elector"

Wisconsin law is clear that absentee ballots must be "mailed *by the elector*, or delivered in person, to the municipal clerk." Wis. Stat. § 6.87(4)(b)(1); *see also* § 6.855 ("voted absentee ballots shall be returned *by electors* for any election."). This requirement is consistent with how voting is conducted on election day at the polls—each voter must cast his or her own vote. This ensures that it is actually the elector's vote, that voters take the exercise of the franchise seriously, and that there is no "overzealous solicitation of" or "undue influence on" absentee electors "who may prefer not to participate in an election." Wis. Stat. § 6.84(1).

There are many situations under state law where the Legislature has authorized an agent to act on a voter's behalf—none of which are called into question in this case—but in each the Legislature says so explicitly and provides protections, requirements, and limitations. *E.g.*, Wis. Stats. §§ 6.82; 6.875; 6.86(1)(b), 6.86(3). To give one example, the *very next subsection*, § 6.87(5), explicitly allows voters who are unable to read or write to "select any individual ... to assist in marking the ballot." But it imposes various restrictions: the voter must make a declaration that they are unable to read or write, the agent must sign the ballot, and there are limitations on who can act as an agent. *Id.* By contrast, there is nothing anywhere in the text of the law that allows *any* "other person" to return anyone else's ballot.

WEC's interpretation is also inconsistent with Wis. Stat. § 12.13(3)(n), which prohibits "receiv[ing] a ballot from or giv[ing] a ballot to a person other than the election official in charge." If electors can give their ballots to anyone else to return them, that provision would

effectively be nullified. Requiring *the elector* to mail or deliver the ballot in person furthers the Legislature's purpose in preventing fraud, abuse, and coercion in the absentee process. Wis. Stat. § 6.84(2).

Perhaps close family members should be permitted to return one another's absentee ballots. Perhaps there are voters who, for some reason, cannot hand a ballot to a mail carrier but can give one to a third party. But these are ultimately policy questions for the Legislature. The question in this case is the default rule under state law for returning an absentee ballot, and state law is clear that electors must return their own ballots, except where there is an explicit exception.

2. Drop Boxes Violate Both § 6.87 and § 6.855

Petitioners also have a high probability of success on the merits of their challenge to drop boxes in light of the plain language of the law. The Legislature could have authorized drop boxes in the law or delegated authority to WEC to promulgate rules for such an option—but it did not. No reference to drop boxes can be found anywhere in the election statutes. The Legislature provided two and only two methods of return: (1) by mail; and (2) delivery in person to the municipal clerk. Wis. Stat. § 6.87(4)(b)(1).

WEC's interpretation authorizing unattended drop boxes violates the requirement in § 6.87 that ballots 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 deliver their ballot to another person, namely the "municipal clerk" (or an "authorized representative," per the definition of "municipal clerk," Wis. Stat. § 5.02(10)).

WEC's interpretation is also inconsistent with the requirement that the ballot be delivered "*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."

The requirement that a ballot be "delivered in person, to the municipal clerk," is important to ensure that the other requirement discussed above—that *electors* deliver their own ballot and only their ballot—is followed. If one person delivers multiple ballots at the same time, it would immediately raise concerns to a clerk.

Drop boxes also violate the location requirements in Wis. Stat. § 6.855. That section provides that a municipality "may elect to designate a site other than *the office of the municipal clerk* ... as the location ... to which absentee ballots *shall be returned* by electors for any election." In other words, the default location "to which absentee ballots shall be returned" is "the office of the municipal clerk," unless a municipality follows the procedure and requirements for such alternate sites.

Wis. Stat. § 6.855 imposes 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.

A foundational principle of statutory interpretation is that the "express mention of one matter excludes other similar matters [that are] not mentioned." *James v. Heinrich*, 2021 WI 58, ¶ 18, 397 Wis. 2d 517,

960 N.W.2d 35 (holding that local health officials lacked power to "close schools" because the statutes granted that authority only to the state health department.). Under that doctrine, "if the legislature did not specifically confer a power, the exercise of that power is not authorized." *Id.* Section 6.855 is the *exclusive* means to designate an alternate location "to which voted absentee ballots shall be returned." There is no other provision anywhere in state law for alternate locations, yet Respondents argue, in effect, that municipalities can ignore the requirements of § 6.855 by creating an unauthorized alternate location where only a subset of the absentee voting process is permitted.[3]

If, as WEC argues, absentee ballots can be returned *anywhere*, then there are no principled restrictions on where ballots can be gathered. A clerk could designate a union hall, the local Republican party headquarters, or a park in a historically Democratic-leaning neighborhood as a drop site. A municipality could even use a "mobile election vehicle" to drive around and collect ballots, as Racine has recently done.[4] It's not hard to see the potential for abuse of such a scheme.

WEC's directives leave open the possibility for unattended, unsecured containers to be scattered throughout a community, with no meaningful limits as to available locations, means of security, or

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[3] Petitioners' argument under Wis. Stat. § 6.855 is not the same argument raised in *Trump v. Biden*, 2020 WI 91, 394 Wis. 2d 629, 951 N.W.2d 568. The argument there, as framed to the Court, was that certain park events *"were* illegal in-person absentee voting sites." *Id.* ¶ 55 (Hagedorn, J., concurring). The argument here is not that drop boxes *are* alternate sites under Wis. Stat. § 6.855, but that 6.855 is the exclusive means under state law to establish a new location, other than the "municipal clerk's office," "to which voted absentee ballots shall be returned." Wis. Stat. § 6.855(1).

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

(assuming a drop box is secured or staffed) who may staff them or retrieve the ballots from within. It provides no directives as to who may collect ballots, whether and how the number of ballots in a box are to be documented and whether and how records regarding the return of ballots from each box are to be created. The absence of such guidance is, perhaps, not surprising since WEC is making up the entire process. There is no statutory authorization for drop boxes.

The agency's interpretation in the Memos writes the safeguards the Legislature put in place for alternate voting locations other than the municipal clerk's office (such as a prohibition on locating an alternate site in a place advantageous to one political party) completely out of the law. Wis. Stat. § 6.855. WEC's interpretation also undercuts the safeguards on who may participate in the election and its administration—for example, by retrieving ballots from the drop boxes and returning them to the clerk's office—because the Memos do not require (as the statutes do, Wis. Stat. §§ 5.02(4e), 7.30(2)) that only election officials and the electors themselves participate in voting process. [5]

3. WEC's Memos are Unlawful, Unpromulgated Rules

Finally, Petitioners will likely succeed on the merits, as the Circuit Court recognized, because even if WEC had the authority to issue the directives it did in the Memos (and it did not), the agency undisputedly

[5] As noted above, the Legislature, in special circumstances such as facilitating voting in senior living communities, has created specific exceptions for individuals such as special voting deputies to assist with voting. *E.g.* Wis. Stat. § 6.875. Those exceptions are not at issue here, and are unaffected by the Circuit Court's ruling. There is no legislatively authorized exception permitting a librarian, grocery store employee, or other person who is *not* an election official to collect or keep custody of ballots for the municipal clerk.

failed to promulgate the general instructions to all clerks as administrative rules, as required under Wisconsin law.

There can be no real dispute that, if drop boxes were authorized, WEC's Memos would represent the agency's "interpretation of a statute," requiring rulemaking under Wis. Stat. § 227.10(1).[6] WEC did not merely quote the plain language of the statutes; the agency decided that the statutory language meant something different altogether, then gave municipal clerks throughout the state the green light to act in accordance with its interpretation. Yet WEC followed neither the traditional rulemaking process nor the emergency process before issuing the Memos, and both WEC and the Intervenors seek to keep these directives in place for future elections.

WEC's Memos also have the "effect of law." While they do not *require* clerks to use drop boxes or *prohibit* anything, there are different kinds of laws—some impose duties, others prohibit conduct, and still others *authorize* conduct. WEC's memos fall into the latter category—they purport to authorize drop boxes and return of absentee ballots by any person. Given that WEC is charged with administering *and enforcing* Wisconsin's election laws, when WEC gives the green light to something, it has the "effect of law." Wis. Stats. §§ 5.05(1), (7), (12); Wis. Admin. Code § EL 12.04. More to the point, WEC trains clerks and election workers, and has responsibility for educating voters about voting procedures, so its memos directly affect how elections are conducted. The Memos authorized methods of ballot return not found in

[6] 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).

statute and these methods should have been promulgated as rules subject to public oversight.

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[7] who drafted the Memos), 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.

The Court of Appeals' decision to keep these unlawful directives in place is contrary to law, and perpetuating these methods of voting without legislative authorization undermines the integrity of each election held as long as the illegal instructions are in place.

B. The Public Interest and Irreparable Harm from Allowing the Court of Appeals' Stay to Remain in Place

Both the irreparable harm and public interest factors also cut heavily against a stay and in favor of vacating the Court of Appeals' stay. In *Jefferson v. Dane Cty.*, 2020 WI 90, 94 Wis. 2d 602, 951 N.W.2d 556, this Court swiftly—and unanimously—enjoined election guidance issued by the Madison and Milwaukee clerks that conflicted with state law.[8] This Court subsequently explained that "[t]he erroneous interpretation and application of [Wisconsin's election laws] affect matters of great public importance." *Id.* ¶ 15. The United States Supreme Court has also recognized—in the very case Respondents primarily invoked below—

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[7] 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.

[8] Order Granting Temporary Injunction, *Jefferson v. Dane County*, 2020AP557 (March 31, 2020).

that States "indisputably ha[ve] a compelling interest in preserving the integrity of its election process." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). The Legislature has also stated explicitly that strict adherence to the absentee voting procedures is a matter of great public importance:

> The legislature finds that voting is a constitutional right, the vigorous exercise of which should be strongly encouraged. In contrast, voting by absentee ballot is a privilege exercised wholly outside the traditional safeguards of the polling place. The legislature finds that the privilege of voting by absentee ballot must be carefully regulated to prevent the potential for fraud or abuse; to prevent overzealous solicitation of absent electors who may prefer not to participate in an election; to prevent undue influence on an absent elector to vote for or against a candidate or to cast a particular vote in a referendum; or other similar abuses.

Wis. Stat. § 6.84(1).

Petitioners, like all Wisconsin voters, have an interest in elections being held in accordance with state law, so that they and all other voters will have the benefit of the safeguards and procedural evenhandedness that the Legislature long ago determined were appropriate. That interest is conclusively violated by a stay, as a stay effectively keeps in place illegal directives that encourage clerks to administer elections in a manner not in accordance with the law. And there is no repair for that harm, since an election conducted in violation of state law cannot be undone. *See Trump v. Biden*, 2020 WI 91, ¶ 1.

C. There is No Irreparable Harm from Vacating the Stay

There is no harm from requiring the February 15 election to be conducted in accordance with state law. WEC's memos were adopted recently, during COVID. Numerous elections were conducted under state law prior to COVID, and without significant problems. Voters can

still easily return their absentee ballots by mailing them or returning them in person to the clerk's office or an alternate site under § 6.855, as they could before WEC's memos attempted to change the methods for returning absentee ballots. The idea that numerous voters around Wisconsin will be disenfranchised if drop boxes are removed—which were not an option until recently—defies belief. No have or could Respondents contend that Wisconsin voters were disenfranchised in every election prior to 2020 because there were no drop boxes.

Nor is there any serious challenge for clerks or risk of confusion that warranted a stay, as the Circuit Court concluded. App. 64–65. The Circuit Court's oral order, issued on January 13, gave WEC and clerks more than enough time to adjust before the February 15 election.[9] Even now, after absentee ballots have been sent out, clerks can easily respond to an order from this Court vacating the stay. This Court can give clerks a few days to respond to an order vacating the stay, and make clear that any ballots received prior to that date can and should be counted. Clerks can then adjust by posting notices on their websites of the two lawful options for returning absentee ballots (mailing or in-person delivery), removing or covering any illegal drop boxes, and posting signs on drop boxes (or in locations where they used to be) that ballots must be mailed

[9] Respondents likely will heavily emphasize the timing of the Circuit Court's decision, arguing that it came too late. It did not, but even so, that timing is largely Respondents' own doing. Petitioners filed this lawsuit in June of a non-election year and noted during an early scheduling conference that they intended to move for summary judgment promptly in August on the purely legal issues presented. R. 73:4. But the Intervenors sought to delay summary judgment briefing until after their intervention motions were resolved, and then requested a discovery period—and took Petitioners' depositions—for information that was neither necessary nor relevant to the case, thus narrowing the timeframe between when summary judgment resolved and the upcoming elections. As to the order memorializing the Circuit Court's oral ruling, Petitioners sent Respondents a draft order the day after the hearing, but Respondents waited four days to respond, delaying entry of that order by the Circuit Court.

or delivered in person to the clerk. Any voters who attempt to return an absentee ballot to a drop box after that date can simply read the sign and then drop it into a mailbox or deliver it to the clerk's office (or an alternate site under 6.855).

The Circuit Court's ruling merely reminds clerks to apply the procedures that were in place for years before WEC issued its contrary interpretations. Notably, in the case of WEC's March Memo first authorizing ballot harvesting and drop boxes, the agency issued those new directions just seven days before a statewide election that included a hotly contested race for a seat on this Court. At that point, thousands of ballots had already been sent out and returned, and confusion was apparently not an issue, despite these directives being *entirely new* and located nowhere in the statutes or administrative rules. R. 2:15.

Respondents have, and undoubtedly will, raise the spectre of voters who "cannot walk to a mailbox or to the clerk's office to personally deliver their absentee ballots." *E.g.*, WEC Mot. 11. Respondents do not and cannot explain why a voter who could use a drop box cannot instead use a mailbox, which is presumably located nearer their own homes and, unlike drop boxes, is authorized by law. As to the requirement that voters must return their own ballots, state law provides numerous exceptions and carve-outs for voters with physical challenges, and the Circuit Court's ruling does nothing to alter those many provisions. *E.g.*, Wis. Stat. §§ 6.82; 6.86(1)(ag); 6.86(2); 6.86(3); 6.87(5); 6.875. The U.S. Postal Service also has a special door service for people who cannot physically get to their mailbox.[10] Furthermore, despite having the opportunity to raise this issue in the Circuit Court for months, neither WEC nor the Intervenors attempted to do so prior to receiving an adverse ruling. The allegations regarding the extent to which voters with

[10] *If I have Hardship or Medical Problems, how do I request Door Delivery?*, United States Postal Service (Apr. 7, 2020), https://faq.usps.com/s/article/If-I-have-Hardship-or-Medical-Problems-how-do-I-request-Door-Delivery.

disabilities have difficulties in voting were not alleged in any claim pending in this case, were not litigated in this case and are not relevant to the correct legal interpretation of the statutes in issue. Moreover, even in a case where the claims were alleged and litigated, they would require, at most, an as-applied exception for those situations, not a wholesale change to state law for *all* voters.

Again, the question in this case is the general rule under state law for returning an absentee ballot. The law requires electors to return their own ballots, just like voters are required to cast their own votes at the polls on election day (except where the law explicitly allows an agent to act on a voter's behalf). A stay would retain WEC's unlawful direction to clerks that *anyone* may return any other person's ballot—including political operatives—regardless of who that person is, their relationship to the voter, or any circumstances of the voter. Perhaps close family members should be permitted to return one another's absentee ballots, but that is ultimately a policy question for the Legislature to resolve. And it certainly doesn't warrant disregarding the clear text of state law for everyone.

In sum, Respondents have little to no likelihood of success on appeal; allowing further elections under WEC's made-up rules, rather than state law, will do irreparable harm and is heavily against the public interest; and there is no serious risk of harm from following state law.

D. Purcell Does Not Apply, and Regardless There is No Risk of Confusion Here.

Respondents below invoked *Purcell v. Gonzalez* and related cases, which hold "that lower *federal courts* should ordinarily not *alter* the election rules on the eve of an election," *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020. *Purcell* does not apply here for two reasons: first, it applies only to federal courts, not state courts; and second, *Purcell* is designed to prevent federal courts

from *changing* state laws, not to stop state courts from enforcing election laws when an unelected agency has attempted to change them. Even if *Purcell* applied, it does not call for a stay here because there is no serious risk of voter confusion.

Purcell does not apply to state courts. The Fourth Circuit, *en banc*, recently held exactly that: "*Purcell* is about *federal court* intervention" in state election rules. *Wise v. Circosta*, 978 F.3d 93, 99 (4th Cir. 2020).[11]

Notably, the U.S. Supreme Court recently *denied* a stay after the Pennsylvania Supreme Court made certain changes to its election rules shortly before the 2020 election, while simultaneously granting a stay of a *federal court* injunction that modified Wisconsin's elections rules. *Compare DNC v. Wis. State Legislature*, 141 S. Ct. 28, *with Republican Party of Pennsylvania v. Boockvar*, 141 S. Ct. 1 (2020). Chief Justice Roberts explained the difference in a short concurrence: "While the Pennsylvania applications implicated the authority of state courts to apply their own constitutions to election regulations, this case involves federal intrusion on state lawmaking processes. Different bodies of law and different precedents govern these two situations and require, in these particular circumstances, that we allow the modification of election rules in Pennsylvania but not Wisconsin." *DNC v. Wis. State Legislature*, 141 S. Ct. 28, 28 (2020) (Roberts, J., concurring).[12]

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[11] The three dissenters in the Fourth Circuit argued that *Purcell* could apply when a state court or state agency unilaterally changes election rules on the eve of an election, but they emphasized that *state law* is the baseline and the goal is to avoid changes to those laws right before an election. 978 F.3d at 117 ("The status quo, properly understood, is an election run under the General Assembly's rules."). As explained further below, that is the second reason *Purcell* does not apply—this case is about *enforcing* Wisconsin's election laws, not altering them.

[12] Three Justices wrote separately in the Pennsylvania case, but, like the *Wise* dissenters discussed in footnote 3 above, their concern was that a state court had *changed* a state *law*—which is the second reason *Purcell* does not apply here, *see infra*.

Justice Kavanaugh too has repeatedly emphasized federalism concerns in *Purcell*-related stays. As he explained in *Andino v. Middleton*, 141 S. Ct. 9, 10 (2020) (Kavanaugh, J., concurring), "the Constitution principally entrusts the safety and the health of the people to the politically accountable officials of the States ... It follows that a State legislature's decision either to keep or to make changes to election rules to address COVID–19 ordinarily should not be subject to second-guessing by an unelected federal judiciary, which lacks the background, competence, and expertise to assess public health and is not accountable to the people." (citations omitted). *See also DNC v. Wis. State Legislature*, 141 S. Ct. 28, 30–33 (2020) (Kavanaugh, J., concurring) ("In short, state legislatures, not federal courts, primarily decide whether and how to adjust election rules in light of the pandemic."). And *Purcell* itself emphasized that "[a] State indisputably has a compelling interest in preserving the integrity of its election process." *Purcell*, 549 U.S. at 4.

Respondents have not cited any Wisconsin cases—nor are there any—holding that *Purcell* applies in Wisconsin courts.[13] But even if it did, for the reasons described above, *Purcell* would not apply in a scenario in which a ruling merely restates existing election laws.

Republican Party of Pennsylvania v. Boockvar, 141 S. Ct. 1, 2 (2020) (statement of Justice Alito, joined by Thomas and Gorsuch) ("The provisions of the Federal Constitution confer[ ] on state legislatures, not state courts, the authority to make rules governing federal elections.").

[13] WEC has cited *Hawkins v. Wisconsin Elections Comm'n*, 2020 WI 75, 393 Wis. 2d 629, 948 N.W.2d 877, but that case is not relevant. In that case, two green party candidates sought a court order that their names be added to the ballot—but they waited to file two weeks after WEC excluded them from the ballot, and by the time they filed the case, many ballots had already been printed and sent out. *Id.* ¶¶ 3–10. The "confusion" the Court referred to had to do with that resulting from "send[ing] a second round of ballots to voters who already received, and potentially already voted, their first ballot." This case is only about how ballots are *returned*, and as already explained, there is a simple solution, even in the middle of the election.

Purcell also does not apply because its focus is on court orders that attempt to make *changes* to state law, whereas the Circuit Court's order simply requires upcoming elections to be conducted in *accordance* with Wisconsin's elections laws. Justice Kavanaugh has summarized the *Purcell* principle as follows: "Federal courts ordinarily should not *alter state election laws* in the period close to an election." *DNC v. Wis. State Legislature*, 141 S. Ct. 28, 30 (2020). The Seventh Circuit, too, has recognized that "[t]here is a profound difference between compelling a state to depart from its rules close to the election (*Purcell*) and allowing a state to implement its own statutes (this case)." *Frank v. Walker*, 769 F.3d 494, 497 (7th Cir. 2014).[14]

And, as described above, those Judges and Justices who have argued that *Purcell* should apply to some state court decisions, *supra* nn. 1–2, have emphasized that the point is to *preserve state law* from last-minute changes by courts or agencies. *See Boockvar*, 141 S. Ct. at 2 (2020) (statement of Justice Alito, joined by Thomas and Gorsuch) ("[T]here is a strong likelihood that the State Supreme Court decision violates the Federal Constitution. The provisions of the Federal Constitution conferring *on state legislatures, not state courts*, the authority to make rules governing federal elections would be meaningless if a state court could override the rules adopted by the legislature simply by claiming that a state constitutional provision gave the courts the authority to make whatever rules it thought appropriate

[14] While the Supreme Court vacated the Seventh Circuit's stay in *Frank*, that decision was driven by unique circumstances that are not present here: the district court had enjoined Wisconsin's voter identification requirement for absentee voting in April; the Seventh Circuit's stay re-instated it in September, *after* "absentee ballots ha[d] been sent out without any notation that proof of photo identification must be submitted," and there was evidence that roughly 9% of registered voters did not have valid ID, and would not be able to get one in time, which even the dissenting Justices found "particularly troubling." *Frank v. Walker*, 574 U.S. 929 (2014) (Alito, J., dissenting); *Frank v. Walker*, 769 F.3d 494, 498 (7th Cir. 2014) (Williams, J., dissenting) (describing the evidence).

for the conduct of a fair election."); *Wise*, 978 F.3d at 117 (Wilkinson, J., dissenting) ("Therefore, we conclude that *Purcell* requires granting an injunction pending appeal in this case. The status quo, properly understood, *is an election run under the General Assembly's rules*—the very rules that have been governing this election since it began in September. The Board and the North Carolina Superior Court for the County of Wake impermissibly departed from that status quo approving changes to the election rules in a consent decree in the middle of an election.")

Even if the *Purcell* principle applied here (and it does not), it does not warrant the stay the Court of Appeals has entered. The primary concern in *Purcell* is avoiding "voter confusion." 127 S. Ct. at *5. As described above, there is little risk of confusion here, for many reasons. There are two very easy options for returning an absentee ballot that are authorized under state law—mailing it, or delivering it in person to the municipal clerk. Clerks can notify voters about any decision by this Court—it can even give clerks a few days to do so—and clerks can remove or cover any illegal drop boxes and post signs directing voters to mail or deliver their ballots. There is more than enough time for clerks to comply with state law before the spring primary election is over. And to be clear, this Court can clarify that any ballots received before this Court vacates the stay can and should be counted.

II. Whether or Not This Court Vacates the Stay, It Should Take This Case on Bypass and Resolve It on an Expedited Basis

Regardless of whether it decides to vacate the Court of Appeals' stay, this Court should take this case on bypass and set an expedited schedule to resolve it before the April election, or, at the very latest, the August and November elections. This case meets this Court's criteria for bypass, and there is great need for urgency.

First, the issues in this case require this Court's "law defining and law development" role, *see Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997). Only this Court can "provide a clear, definitive and controlling ruling" as to the proper interpretation of Wis. Stat. §§ 6.87 and 6.855. *See* Certification Opinion at 22, *State v. Mattox*, No. 2015AP158 (Feb. 10, 2016). This matter also fulfills this Court's criteria for granting a petition for review, namely, "[t]he question presented is a novel one, the resolution of which will have a statewide impact," and "[a] decision by [this Court] will help develop, clarify, or harmonize the law." *See.* Wis. Stat. § 809.62(1r)(c).

The issues in this case are ultimately bound for this Court "regardless of how the Court of Appeals might decide the issues." *See* IOP at 8. The issues bear on the fundamental right to vote, the integrity of the election process, and public trust in our democratic system of government. Various individuals and groups have asked this Court to address these issues over the course of multiple election cycles, including a petition for original action currently pending before this Court. *Rebecca Kleefisch v. Wisconsin Elections Commission*, No. 21AP1976.

Finally, "there is a clear need to hasten the ultimate appellate decision." IOP 8. Given that the Wisconsin Court of Appeals has granted a stay, only this Court can ensure that the February 15 election will be conducted in accordance with state law. If, as the Circuit Court recognized, the March and August Memos contravene Wisconsin law, no further elections should be held under the guise of these unlawful directives.

Even if this Court decides that the Court of Appeals' stay was warranted, granting bypass now is critical to ensuring that the issues in this case are resolved in an orderly fashion before the next elections, including the April election, the August primary, and the November election. If this Court does not take this case now, but waits until the Court of Appeals decision—which it has indicated will come "fourteen

days" before the April election process, *see* Order Dated 1-25-22—it will force another emergency bypass petition to this Court in the run-up to the April election, regardless of which way the Court of Appeals rules, shortening the time for this Court to resolve the issues herein. Waiting until then may not even leave sufficient time for this Court to resolve the important issues before the August and November elections.[15]

Because "[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy," *Purcell*, 549 U.S. at 4, there are few (if any) more important issues that the Court could take up this term. Taking immediate jurisdiction over this appeal would not only provide certainty for municipal clerks and voters alike, but would serve the equally important purpose of maintaining the fundamental separation and balance of powers in Wisconsin between the Legislature, which passes the laws, and executive agencies like WEC that are intended to enforce them, rather than promulgate different laws of their own making.

Dated: January 26, 2022.

Respectfully submitted,

[15] While this Court typically will not grant a bypass petition before briefing on the merits is completed in the Court of Appeals, *Milwaukee Brewers Baseball Club v. DHSS*, 130 Wis. 2d 56, 62–63, 387 N.W.2d 245 (1986), it has made exceptions where the "unique circumstances" of a case require urgency. *E.g.*, *Kaul v. Prehn*, No. 21AP1673 at 3 (Dallet, J., concurring); *Waity v. LeMahieu*, No. 21AP802 (Jul. 15, 2021). This case easily meets that test.

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CERTIFICATION

I hereby certify that this memorandum conforms to the rules contained in Wis. Stat. §§ 809.81 for a document produced with a proportional serif font. The length of this memorandum is 8,985 words.

Dated: January 26, 2022.

LUKE N. BERG

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this memorandum, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic memorandum is identical in content and format to the printed form of the memorandum filed as of this date.

A copy of this certificate has been served with the paper copies of this petition filed with the court and served on all opposing parties.

Dated: January 26, 2022.

LUKE N. BERG