

¶36 BRIAN HAGEDORN, J. (*concurring*). I agree, of course, with the majority opinion I authored holding that the petitioners¹ (collectively, the "Campaign") are not entitled to the relief they seek. But I understand the desire for at least some clarity regarding the underlying election administration issues. A comprehensive analysis is not possible or appropriate in light of the abbreviated nature of this review and the limited factual record in an action under Wis. Stat. § 9.01 (2017-18).² However, I do think we can be of some assistance, and will endeavor to address in some measure the categories of ballots the majority opinion properly applies laches to.

¶37 Beyond its challenge to indefinitely confined voters, an issue the court's opinion quickly and appropriately dispenses with, the Campaign raises challenges to three categories of ballots: (1) all in-person absentee ballots in Dane and Milwaukee Counties for want of an absentee ballot application; (2) all absentee ballots in Dane and Milwaukee Counties where municipal officials added witness address information on the certification; and (3) all ballots collected at two City of Madison "Democracy in the Park" events occurring in late September and early October. I begin with some background, and address each while remaining mindful of the limited nature of this review.

¹ The petitioners are Donald J. Trump, Michael R. Pence, and Donald J. Trump for President, Inc.

² All subsequent references to the Wisconsin Statutes are to the 2017-18 version.

I. LEGAL BACKGROUND

¶38 Elections in Wisconsin are governed by Chapters five through 12 of the Wisconsin Statutes. In applying these laws, we have a long history of construing them to give effect to the ascertainable will of the voter, notwithstanding technical noncompliance with the statutes. Roth v. Lafarge Sch. Dist. Bd. of Canvassers, 2004 WI 6, ¶19, 268 Wis.2d 335, 677 N.W.2d 599.³ This longstanding practice is confirmed in statute. Wisconsin Stat. § 5.01(1) says, "Except as otherwise provided, chs. 5 to 12 shall be construed to give effect to the will of the electors, if that can be ascertained from the proceedings, notwithstanding informality or failure to fully comply with some of their provisions." So generally, when ballots are challenged, they are counted if the will of the voter can be ascertained.

¶39 Wisconsin looks quite a bit more skeptically, however, at absentee ballots. Wisconsin Stat. § 6.84(2) provides:

³ See also State ex rel. Wood v. Baker, 38 Wis. 71, 89 (1875) ("It would be a fraud on the constitution to hold them disfranchised without notice or fault. They went to the election clothed with a constitutional right of which no statute could strip them, without some voluntary failure on their own part to furnish statutory proof of right. And it would be monstrous in us to give such an effect to the registry law, against its own spirit and in violation of the letter and spirit of the constitution."); State ex rel. Blodgett v. Eagan, 115 Wis. 2d 417, 421, 91 N.W. 984 (1902) ("when the intention of the voter is clear, and there is no provision of statute declaring that such votes shall not be counted, such intention shall prevail"); Roth v. Lafarge Sch. Dist. Bd. of Canvassers, 2004 WI 6, ¶¶19-25, 268 Wis. 2d 335, 677 N.W.2d 599 (collecting cases).

Notwithstanding [Wis. Stat. §] 5.01(1), with respect to matters relating to the absentee ballot process, [Wis. Stat. §§] 6.86, 6.87(3) to (7) and 9.01(1)(b)2. and 4. shall be construed as mandatory. Ballots cast in contravention of the procedures specified in those provisions may not be counted. Ballots counted in contravention of the procedures specified in those provisions may not be included in the certified result of any election.

This tells us that, to the extent an absentee ballot does not comply with certain statutory requirements, it may not be counted.⁴

¶40 Our review in this case is of the determinations of the board of canvassers and elections commission. The determination shall be "set aside or modif[ied]" if the board of canvassers or elections commission "has erroneously interpreted a provision of law and a correct interpretation compels a particular action." § 9.01(8)(d). We "may not substitute [our] judgment for that of the board of canvassers . . . as to the weight of the evidence on any disputed findings of fact." Id. However, findings of fact "not supported by substantial evidence" shall be set aside. Id. Legal conclusions made by the board of canvassers or elections commission are reviewed independently. Roth, 268 Wis. 2d 335, ¶15.

¶41 With this framework in mind, I turn to the three specific categories of ballots challenged here.

⁴ Wisconsin courts have had few opportunities to opine on this statute. The court appeals noted in a 2001 case: "Section 6.84(2)'s strict construction requirement, applicable to statutes relating to the absentee ballot process, is consistent with the guarded attitude with which the legislature views that process." Lee v. Paulson, 2001 WI App 19, ¶7, 241 Wis. 2d 38, 623 N.W.2d 577.

II. IN-PERSON ABSENTEE BALLOT APPLICATIONS

¶42 Wisconsin Stat. § 6.86(1)(ar) says that "the municipal clerk shall not issue an absentee ballot unless the clerk receives a written application therefor from a qualified elector of the municipality." The mandatory requirement is that each ballot be matched with an application.

¶43 The Wisconsin Elections Commission (WEC) has designed, approved, and distributed forms for statewide use by local election officials. Among the forms are a separate absentee ballot application (form EL-121) and a combined application and certification (form EL-122). Milwaukee and Dane Counties, like many other communities around the state, use form EL-122 for in-person absentee voters. The Campaign argues that form EL-122 is not an application, and that all 170,140 in-person absentee ballots cast in Dane and Milwaukee Counties therefore lacked the required "written application." This argument is incorrect.

¶44 "Written application" is not specially defined in the election statutes, nor is any particular content prescribed. EL-122 is entitled "Official Absentee Ballot Application/Certification." (Emphasis added). Beyond containing basic voter information also present on EL-121, Form EL-122 requires the elector to sign, stating: "I further certify that I requested this ballot." This would appear to satisfy the ordinary meaning of a written ballot application. See Quick Charge Kiosk LLC v. Kaul, 2020 WI 54, ¶18, 392 Wis. 2d 35, 944 N.W.2d 598 ("When statutory language is not specially defined or

technical, it is given its 'common, ordinary, and accepted meaning.'" (quoting State ex rel. Kalal v. Circuit Court for Dane Cnty., 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110)).

¶45 The record further bears out its function as an application. In both Milwaukee and Dane Counties, voters completed the application portion of EL-122 and showed it to an election official before receiving a ballot.⁵ Then, after completing the ballot, the voter signed the certification portion of the form, which the clerk witnessed. Section 6.86(1)(ar) contains no requirement that the application and certification appear on separate documents, and the facts demonstrate that the application was completed before voters received a ballot. As best I can discern from this record, EL-122 is a "written application" within the meaning of § 6.86(1)(ar). That it also serves as a ballot certification form does not change its status as an application.⁶

⁵ The Campaign appears to suggest a different sequence of events, but that is not what the record before us reflects.

⁶ It is not unusual or inherently problematic for administrative forms to have multiple functions. The MV1, for example, serves as both an application for registration under Wis. Stat. § 341.08 and an application for a certificate of title under Wis. Stat. § 342.06. See <https://wisconsin.gov/Documents/formdocs/mv1.pdf>.

¶46 Therefore, on the merits and the record before us, in-person absentee voters using form EL-122 in Dane and Milwaukee Counties did so in compliance with Wisconsin law.⁷

III. WITNESS ADDRESSES

¶47 The Campaign also challenges several thousand absentee ballots cast in Milwaukee and Dane Counties where election officials added missing witness address information to the certification. This challenge is oddly postured and seems to miss the statutory requirements.

¶48 Absentee ballots cast in Wisconsin must be witnessed. Wis. Stat. § 6.87(4)(b)1. In order to comply with this requirement, voters place absentee ballots in an unsealed envelope, the back of which includes a certificate. § 6.87(2). The certificate must include a statement for the witness to certify, along with space for the witness's signature, printed name, and "[a]ddress." Id. The law states that the "witness shall execute" the relevant witness information—including, one would presume, the required address. Id. "If a certificate is missing the address of a witness, the ballot may not be counted." § 6.87(6d).

⁷ It is presently unclear whether the statutes would be better or more clearly effectuated by separating the application and certification, or whether certain retention practices may be problematic. The expedited nature of our review of this case does not permit a full examination of this question. But the mandatory procedure insofar as the voter is concerned—that he or she fill out a written application—is surely satisfied.

¶49 Although Wis. Stat. § 6.87(6d) requires an address, § 6.87(2) and (6d) are silent on precisely what makes an address sufficient. This is in stark contrast to other provisions of the election statutes that are more specific. For example, Wis. Stat. § 6.34(3)(b)2. requires an identifying document to contain "[a] current and complete residential address, including a numbered street address, if any, and the name of the municipality" for the document to be considered proof of residence. Similarly, Wis. Stat. § 6.18 requires former residents to swear or affirm their Wisconsin address as follows: "formerly residing at . . . in the . . . ward . . . aldermanic district (city, town, village) of . . . County of" ⁸ While the world has surely faced more pressing questions, the contours of what makes an address an address has real impact. Would a street address be enough, but no municipality? Is the state necessary? Zip code too? Does it matter if the witness uses their mailing address and not the residential address (which can be different)?

¶50 Based on the record before the court, it is not clear what information election officials added to what number of certifications. Wisconsin Stat. § 6.87(6d) would clearly prohibit counting a ballot if the entire address is absent from

⁸ "And 'absent textual or structural clues to the contrary' a particular word or phrase used more than once in the same act is understood 'to carry the same meaning each time.'" Town of Delafield v. Central Transport Kriewaldt, 2020 WI 61, ¶15 n.6, 392 Wis. 2d 427, 944 N.W.2d 819 (quoting State ex rel. DNR v. Wis. Court of Appeals, Dist. IV, 2018 WI 25, ¶30, 380 Wis. 2d 354, 909 N.W.2d 114).

the certification. However, if the witness provided only part of the address—for example, a street address and municipality, but no state name or zip code—it is at least arguable that this would satisfy § 6.87(6d)'s address requirement. And, to the extent clerks completed addresses that were already sufficient under the statute, I am not aware of any authority that would allow such votes to be struck.⁹

¶51 The parties did not present comprehensive arguments regarding which components of an address are necessary under the statute. It would not be wise to fully address that question now. But I do not believe the Campaign has established that all ballots where clerks added witness address information were necessarily insufficient and invalid; the addresses provided directly by the witnesses may very well have satisfied the statutory directive. The circuit court's findings of fact reflect that many of these ballots contained additions of the state name and/or zip code. I conclude the Campaign failed to provide sufficient information to show all the witness

⁹ The statute seems to suggest only the witness should fill in the information necessary to comply with the statute. See Wis. Stat. § 6.87(2) ("the witness shall execute . . . "). If a zip code is not required under the statute, for example, I'm not sure clerks would be prohibited from adding the zip code. Then again, I'm not sure why they would want to add anything to an already sufficient ballot, or what their authority would be to do so. It's possible WEC guidance to add witness information is aimed at complying with related WEC guidance that all aspects of a mailing address—including city, state, and zip code—should be included in the witness certification (arguably, information the statute does not always require). Regardless, this case is not well-postured to answer these questions.

certifications in the group identified were improper, or moreover, that any particular number of ballots were improper.

¶52 Although I do not believe the Campaign has offered sufficient proof on this record to strike ballots, this broader issue appears to be a valid election administration concern. WEC, other election officials, the legislature, and others may wish to examine the requirements of the statute and measure them against the guidance and practice currently in place to avoid future problems.

IV. DEMOCRACY IN THE PARK

¶53 Finally, the Campaign challenges 17,271 ballots the City of Madison collected at "Democracy in the Park" events on September 27, 2020, and October 3, 2020. According to the record, at these events, sworn city election inspectors collected already completed absentee ballots and served as witnesses for absentee voters who brought an unsealed, blank ballot with them. During the events, no absentee ballots were distributed, and no absentee ballot applications were distributed or received.

¶54 Under the law, when a voter requests an absentee ballot, the voter must return the absentee ballot in a sealed envelope by mail or "in person, to the municipal clerk issuing the ballot or ballots." Wis. Stat. § 6.87(4)(b)1. The phrase "municipal clerk" has a specific meaning in the election statutes. It is defined as "the city clerk, town clerk, village clerk and the executive director of the city election commission

and their authorized representatives." Wis. Stat. § 5.02(10) (emphasis added).¹⁰ A sworn city election inspector sent by the clerk to collect ballots would seem to be an authorized representative as provided in the definition. Even if "municipal clerk" were not a specially-defined term, the only reasonable reading of the law would allow those acting on a clerk's behalf to receive absentee ballots, not just the clerk by him or herself. After all, many clerks manage a full office of staff to assist them in carrying out their duties. Accordingly, voters who returned ballots to city election inspectors at the direction of the clerk returned their absentee ballots "in person, to the municipal clerk" as required by § 6.87(4)(b)1.

¶55 The Campaign, however, asserts that the "Democracy in the Park" events were illegal in-person absentee voting sites that failed to meet the statutory requirements under Wis. Stat. § 6.855. Section 6.855(1) provides in relevant part:

The governing body of a municipality may elect to designate a site other than the office of the municipal clerk or board of election commissioners as the location from which electors of the municipality may request and vote absentee ballots and to which voted absentee ballots shall be returned by electors for any election. . . . If the governing body of a municipality makes an election under this section, 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.

¹⁰ When words are "specially-defined" they are given their "special definitional meaning." State ex rel. Kalal v. Circuit Court for Dane Cnty., 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110.

§ 6.855(1) (emphasis added).

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

¶57 In short, based on the record before the court and the arguments presented, I see no basis to conclude the ballots collected at "Democracy in the Park" events were cast in contravention of Wisconsin law. This challenge fails.

V. CONCLUSION

¶58 The people of Wisconsin deserve confidence that our elections are free and fair and conducted in compliance with the law. Our elected leaders and election officials, including those at WEC, should continue to earn the trust of all Wisconsinites. The claims made by the Campaign in this case are not of widespread fraud or serious election improprieties. These are ordinary sorts of election administration issues—for example, challenging whether an "application" form in use statewide for a decade constitutes a sufficient application (it does). While this does not diminish the importance of the election procedures the legislature has chosen, Wisconsin's electorate should be encouraged that the issues raised in this

case are focused on rather technical issues such as whether a witness must include their zip code as part of their address.

¶59 That does not mean there is nothing to improve or clarify or correct. But as explained in the majority opinion, the Campaign waited far too long to challenge guidance and practices established weeks, months, or years earlier. Laches rightly bars the relief the Campaign seeks. Even on the merits, however, the Campaign is either incorrect on the law, or does not provide sufficient proof to identify particular ballots that were improperly cast. At the end of the day, nothing in this case casts any legitimate doubt that the people of Wisconsin lawfully chose Vice President Biden and Senator Harris to be the next leaders of our great country. While the Campaign has every right to challenge ballots cast out of compliance with the law, its efforts to make that showing in this case do not succeed.

¶60 I am authorized to state that Justice ANN WALSH BRADLEY join this concurrence.