

RECEIVED

MAR 23 2022

Appeal No. 2022AP91

CLERK OF SUPREME COURT
OF WISCONSIN

In the Supreme Court of Wisconsin

RICHARD TEIGEN
and RICHARD THOM,

Plaintiffs-Respondents-Petitioners,

v.

WISCONSIN ELECTIONS COMMISSION,
Defendant-Co-Appellant,

DEMOCRATIC SENATORIAL CAMPAIGN
COMMITTEE,

Intervenor-Defendant-Co-Appellant,

DISABILITY RIGHTS WISCONSIN,
WISCONSIN FAITH VOICES FOR JUSTICE, and
LEAGUE OF WOMEN VOTERS OF WISCONSIN,
Intervenors-Defendants-Appellants.

ON APPEAL FROM THE WAUKESHA COUNTY CIRCUIT COURT,
THE HONORABLE MICHAEL O. BOHREN, PRESIDING
WAUKESHA COUNTY CASE NO. 2021CV000958

**NON-PARTY BRIEF OF THE REPUBLICAN NATIONAL COMMITTEE,
THE NATIONAL REPUBLICAN SENATORIAL COMMITTEE, AND THE
REPUBLICAN PARTY OF WISCONSIN AS *AMICUS CURIAE* IN
SUPPORT OF PLAINTIFFS-RESPONDENTS-PETITIONERS**

CONWAY, OLEJNICZAK & JERRY S.C.

KURT A. GOEHRE
231 South Adams Street
P.O. Box 23200
Green Bay, WI 54305-3200
(920) 437-0476
E-mail: kag@lcojlaw.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES3

INTRODUCTION5

STATEMENT OF INTEREST6

ARGUMENT7

 I. Wisconsin’s Election Laws Provide For Two Methods Of
 Absentee Ballot Delivery: By Mail Or In Person.7

 II. WEC’s Attempt To Authorize New Methods Of Absentee Ballot
 Delivery Exceeds The Commission’s Statutory Authority.9

 III. WEC’s Attempt To Authorize New Methods Of Absentee Ballot
 Delivery Violates The Separation Of Powers.13

 IV. WEC’s Attempt To Authorize New Methods Of Absentee Ballot
 Delivery Was Procedurally Improper.14

CONCLUSION15

CERTIFICATION16

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)17

CERTIFICATION OF MAILING AND SERVICE18

TABLE OF AUTHORITIES

Cases

<i>James v. Heinrich</i> , 2021 WI 58, 397 Wis. 2d 517, 960 N.W.2d 350	13
<i>Koschkee v. Taylor</i> , 2019 WI 76, 387 Wis. 2d 552, 929 N.W.2d 600	9
<i>League of Women Voters of Wisconsin Educ. Network, Inc. v. Walker</i> , 2013 WI App 77, 348 Wis. 2d 714, 834 N.W.2d 393	13
<i>Lee v. Paulson</i> , 2001 WI App 19, 241 Wis. 2d 38, 623 N.W.2d 577	10
<i>Olson v. Lindberg</i> , 2 Wis. 2d 229, 85 N.W.2d 775 (1957)	11
<i>Ritter v. Farrow</i> , 2021 WI 14, 395 Wis. 2d 787, 955 N.W.2d 122	9
<i>Schmidt v. Department of Resource Development</i> , 39 Wis. 2d 46, 158 N.W.2d 306 (1968).....	9
<i>SEIU v. Vos</i> , 2020 WI 67, 393 Wis. 2d 38, 946 N.W.2d 35	13, 15
<i>State ex rel. Kalal v. Cir. Ct. for Dane Cty.</i> , 2004 WI 58, 271 Wis. 2d 633, 681 N.W.2d 110	7, 8
<i>State ex rel. Zignego v. Wisconsin Elections Comm'n</i> , 2021 WI 32, 396 Wis. 2d 391, 957 N.W.2d 208	9
<i>Wis. Legislature v. Palm</i> , 2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900	14

Statutes

Wis. Stat. § 5.02(4e)	8
Wis. Stat. § 5.02(10)	7
Wis. Stat. § 5.025	9
Wis. Stat. § 5.05(1)	9
Wis. Stat. § 5.05(1)(f)	14
Wis. Stat. § 5.05(2w)	9
Wis. Stat. § 6.84(1)	10, 12
Wis. Stat. § 6.84(2)	10, 12
Wis. Stat. § 6.855	8
Wis. Stat. § 6.86(1)(b)	8
Wis. Stat. § 6.86(3)(c)	8

Wis. Stat. § 6.86(6).....	7
Wis. Stat. § 6.87	10
Wis. Stat. § 6.87(4)(b)1	passim
Wis. Stat. § 6.875(6)(c).....	8
Wis. Stat. § 6.875(6)(d)	8
Wis. Stat. § 6.88	10
Wis. Stat. § 12.13(3)(n)	8
Wis. Stat. § 15.01(2).....	9
Wis. Stat. § 15.01(9).....	9
Wis. Stat. § 15.61	9
Wis. Stat. § 227.01(13).....	14

Constitutional Provisions

Wis. Const. Art. III, § 2.....	13
Wis. Const. Art. IV, § 1	13

Other Authorities

COMM'N ON FED. ELECTION REFORM, Building Confidence in U.S. Elections, Report of the Commission on Federal Election Reform (Sept. 2005)	10
WEC, <i>Absentee Voting in Wisconsin</i> at 2 (2021)	12
WEC, <i>Absentee Voting How to Fact Sheet</i> at 3 (2020).....	12
WEC, Form EL-122 Absentee Ballot Application/Certification (rev. 2020-08).....	12

INTRODUCTION

Elections are one of the most important features of our Republic, and upholding the rules and procedures prescribed for elections, according to the laws enacted by the Legislature, reinforces the sanctity of the rule of law and reassures all Americans of the integrity of our elections. The matters at issue in this appeal go to the heart of these core attributes of our Republic. In particular, this appeal poses two fundamental legal questions concerning our elections: (1) Do our state statutes governing the methods for delivery of completed absentee ballots mean what they say?; and (2) can the Wisconsin Elections Commission (“WEC”) ignore these statutes which strictly define the general methods of delivery of completed absentee ballots, and simply create its own methods for delivering completed absentee ballots?

To answer these questions, one must only look to the explicit choices our Legislature made concerning how the State will conduct its elections, including a choice to treat absentee voting with great caution and guard it with specific and mandatory rules. In particular, and within the realm of our mandatory absentee voting rules, the Legislature has determined that a completed absentee ballot shall be delivered to the municipal clerk issuing the ballot by mail or in person, by the elector. WEC’s contrary interpretation creating new methods of delivery—adopted through its March 31, 2020 and August 19, 2020 memoranda—exceeds WEC’s statutory authority, violates the separation of powers, and are procedurally invalid. As the circuit court correctly held, WEC has unilaterally created new methods of delivery of a completed absentee ballot—methods that have no trace in the Wisconsin Statutes—despite almost simultaneously publishing

contradictory information to the public on the very same topic. In doing so, WEC has embraced and promoted violations of Wisconsin election laws, created significant confusion about the absentee ballot voting process, and has usurped a core legislative function, or at the very least, failed to follow mandatory rule-making procedures.

The circuit court should be affirmed.

STATEMENT OF INTEREST

The Republican National Committee ("RNC") is the national party committee responsible for the general management of the Republican Party. The Republican Party of Wisconsin ("RPW") is the duly authorized and officially recognized Republican Party of the State of Wisconsin. Both are unincorporated associations in which individuals and members have joined together to support and advance common political beliefs and support common political candidates.

The National Republican Senatorial Committee ("NRSC") is the principal national political party committee focused on electing Republican candidates to the United States Senate. Members of the NRSC include all incumbent Republican Members of the United States Senate. The Chairman of the NRSC is elected every two years by the Republican Senate caucus. The NRSC is registered with the Federal Election Commission ("FEC") as a "political committee," and is recognized by the FEC as a national political party committee.

The RNC, NRSC, and RPW have an interest in ensuring the integrity of Wisconsin elections. As such, the RNC, NRSC, and RPW spend considerable time and expense to ensure that their voters know the correct and lawful methods to vote for candidates in Wisconsin, as

well as work to prevent the dilution of lawful votes due to illegal ballots or violations of election laws.

ARGUMENT

I. Wisconsin's Election Laws Provide For Two Methods Of Absentee Ballot Delivery: By Mail Or In Person.

Wisconsin's election laws provide that an absentee ballot "shall be mailed by the elector, or delivered in person, to the municipal clerk issuing the ballot or ballots." Wis. Stats. § 6.87(4)(b)1. *See also* Wis. Stats. § 6.86(6) ("an elector mails or personally delivers an absentee ballot to the municipal clerk"). The statute does not authorize any other methods of absentee ballot delivery.

WEC and the intervenors spend considerable ink in their opening briefs attempting to reconstruct § 6.87(4)(b)1 in a way that may open an avenue to additional or new methods of delivery of a completed absentee ballot (*i.e.*, utilizing ballot drop boxes or delivery utilizing a third party, sometimes referred to as "ballot harvesting"). For example, they argue that anybody can mail or deliver another elector's completed ballot, or that the completed ballot can be returned to any place, object, or person as long as authorized by the municipal clerk. However, their interpretation is directly contrary to the plain language of the statute, which defines "municipal clerk" as "the city clerk, town clerk, village clerk, . . . and their authorized representatives"—not a location, structure, or inanimate object. Wis. Stats. § 5.02(10). *See State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 663, 681 N.W.2d 110, 124 ("Statutory language is given its common, ordinary, and accepted meaning" except that defined words are given their "special definitional meaning.")

Their mistaken “interpretation” would do away with almost every statutory procedure and safeguard for returning a completed absentee ballot that is currently on the books. This mistaken interpretation would also result in surplusage. It renders meaningless the requirement that the elector mail or deliver in person the completed absentee ballot, and that the absentee ballot be delivered to the municipal clerk, as defined. *Kalal*, 2004 WI 58, ¶ 46. It also renders meaningless the express prohibition against giving a “ballot to a person other than the election official in charge.” Wis. Stat. § 12.13(3)(n); see *also* Wis. Stat. § 5.02(4e) (an election official “means an individual who is charged with any duties relating to the conduct of an election.”)

No one disputes that the specific, enumerated exceptions the Legislature provided are inapplicable here. For example, the Legislature enacted different rules related to delivery or third-party assistance with returning completed absentee ballots for nursing home residents, voters who are hospitalized, those subject to jury duty, and when a municipality approves an absentee ballot location other than the municipal clerk’s office. Wis. Stat. §§ 6.875(6)(c)-(d)(special voting deputies shall oversee voting at the facility and return absentee ballots to the clerk), 6.86(3)(c)(allowing delivery “by mail or by personal delivery of the agent”), 6.86(1)(b)(a judge “shall deliver the ballot to the clerk”), and 6.855 (properly designated alternate absentee ballot sites staffed by the municipal clerk). Outside of those exceptions, the general methods of delivery under § 6.87(4)(b)1 are clear and finite—making no mention of any of the alternative methods of delivery noted in Wis. Stat. §§ 6.875(6)(c)-(d), 6.86(3)(c), 6.86(1)(b), or 6.855. Accordingly, the general methods of delivery in § 6.87(4)(b)1 exclude other similar

methods of delivery that are not expressly mentioned therein. *Ritter v. Farrow*, 2021 WI 14, ¶ 34, 395 Wis. 2d 787, 805, 955 N.W.2d 122, 131 (this “is a well-established principle of statutory interpretation”). The contrary interpretation argued by WEC and the intervenors is unreasonable, contrary to the rules of statutory construction, and should therefore be rejected.

II. WEC’s Attempt To Authorize New Methods Of Absentee Ballot Delivery Exceeds The Commission’s Statutory Authority.

WEC was created by the Wisconsin Legislature as an agency of the Executive Branch. Wis. Stat. §§ 5.05(1), 5.025, 15.01(2), 15.01(9), and 15.61. As a creature of statute, WEC only has “those powers . . . expressly conferred . . . by the statutes under which [it] operate[s].” *Koschkee v. Taylor*, 2019 WI 76, ¶ 14, 387 Wis. 2d 552, 929 N.W.2d 600; *Schmidt v. Department of Resource Development*, 39 Wis. 2d 46, 56-57, 158 N.W.2d 306, 312 (1968). Specifically, WEC is only authorized to administer and enforce chs. 5-10 and 12 of the Wisconsin Statutes, as expressly set forth by the Legislature, but has no authority to promulgate new election-related laws. Wis. §§ 5.05(1), (2w). See *State ex rel. Zignego v. Wisconsin Elections Comm’n*, 2021 WI 32, ¶¶ 18, 39 n.17, 396 Wis. 2d 391, 402, 411, 957 N.W.2d 208, 213, 217 (noting the “limited” duties and powers of WEC). In particular, WEC is not authorized to promulgate new methods of delivering completed absentee ballots.

Indeed, the Legislature had good reason to withhold that authority from WEC. Voting by absentee ballot has always presented an increased risk of illegalities, which is why the Wisconsin Legislature went to great lengths to limit the terms and conditions of its use. As

noted in the bipartisan Carter-Baker Report, “[a]bsentee ballots remain the largest source of potential voter fraud” and citizens who vote in places other than their established precinct or clerk’s office are, among other things, “more susceptible to pressure, overt and subtle, or to intimidation.” COMM’N ON FED. ELECTION REFORM, Building Confidence in U.S. Elections, Report of the Commission on Federal Election Reform at p. 46 (Sept. 2005)(Co-Chair President Jimmy Carter and Co-Chair James Baker, III). As a result, other than the express exceptions noted above, absentee ballot voting and related chain of custody procedures only contemplate ballots being delivered from the elector to the municipal clerk and thereafter secured only in the municipal clerk’s office. Wis. Stat. §§ 6.87 and 6.88.

To the contrary, WEC’s new methods of delivery of completed absentee ballots—untethered to any legislative grant, authorization, or safeguards—are ripe for fraud, undue influence, or similar abuse, which is exactly what the Legislature expressly intended to prevent when it authorized voting by absentee ballot:

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). This is also why the Legislature indicated that the “absent voting procedure,” as set forth in § 6.87(4)(b)1, among others, is “mandatory” and that any “[b]allots cast in contravention of the procedures specified in those provisions may not be counted.” *Id.* § 6.84(2). See *Lee v. Paulson*, 2001 WI App 19, ¶¶ 7-8, 241 Wis. 2d 38, 623 N.W.2d 577 (This is a “strict construction requirement, applicable

to statutes relating to the absentee ballot process” and “is consistent with the guarded attitude with which the legislature views that process.”); *see also Olson v. Lindberg*, 2 Wis. 2d 229, 236, 85 N.W.2d 775, 780 (1957)(under a prior statute, the Court held that by “prohibiting the count of an absentee ballot which was not delivered to the clerk’s office or mailed there, the legislature intended to indicate public opposition to the solicitation of voters by a clerk charged with . . . receiving the delivery in person [or] by mail of absentee ballots”).

The new methods of delivery created and promoted by WEC would only further trample on the public policy of “carefully regulat[ing]” voting by absentee ballot. Perhaps this is why WEC has, and continues, to publish contradictory instructions expressly indicating that voters must either mail or personally deliver their ballots to the municipal clerk, which is unquestionably contrary to its position in this case and the March 2020 and August 2020 memoranda at issue. For example, WEC’s current website includes the “Absentee Guide for Clerks and Voters Spring 2021,” which indicates that the methods to return an absentee ballot are by mail or personal delivery to your municipal clerk:

HOW DO I RETURN MY ABSENTEE BALLOT?

You must return your absentee ballot in the COMPLETED absentee ballot certificate envelope that was provided to you with your ballot by your municipal clerk. If your ballot certificate envelope is not complete, your ballot will not be counted.

You may return your ballot either by mail or by personal delivery to your municipal clerk’s office.

- If you are returning your absentee ballot to your municipal clerk by mail or delivering your completed absentee ballot to your municipal clerk’s office, it must be received no later than 8:00 p.m. on February 16, 2021 for the Spring Primary and April 6, 2021 for the Spring Election.

WEC, *Absentee Voting in Wisconsin* at 2 (2021), available at: <https://elections.wi.gov/sites/elections/files/2021-01/Absentee%20Guide%20for%20Clerks%20and%20Voters%20Spring%202021.pdf>. See also WEC, *Absentee Voting How to Fact Sheet* at 2 (2020), available at: https://elections.wi.gov/sites/elections/files/2020-09/2020%20WI%20AV%20How-To%20Fact%20Sheet_0.pdf (under “Step 4: Delivering your completed ballot,” WEC only identifies mailing to your clerk’s office or personally delivering the ballot to your clerk’s office or polling location).

In fact, even the “Official” Absentee Ballot Application and Certification Form EL-122 created and provided by WEC, in relation to returning an absentee ballot, references only that “an elector . . . mails or personally delivers an absentee ballot to the municipal clerk.” WEC, Form EL-122 Absentee Ballot Application/Certification (rev. 2020-08), available at: <https://elections.wi.gov/sites/elections/files/2020-08/EL-122%20Standard%20Absentee%20Ballot%20Certificate-portrait%20%28rev.%202020-08%29.pdf>.

Rather than conjure up new methods of delivering completed absentee ballots, WEC should have adhered to its other published instructions noted above, which more closely reflect the express requirements of § 6.87(4)(b)1 and the safeguards provided by the Legislature through the election laws. However, WEC opted to depart from the law in its March 2020 and August 2020 memoranda, with no procedural safeguards or chain of custody mechanisms in place, which is directly contrary to the public policy set forth in Wis. Stat. §§ 6.84(1) and (2).

III. WEC's Attempt To Authorize New Methods Of Absentee Ballot Delivery Violates The Separation Of Powers.

WEC's unilateral attempt to create new methods of delivering completed absentee ballots (*i.e.*, absentee ballot drop boxes and delivery of completed absentee ballots by third parties) through their March and August 2020 memoranda not only violates Wisconsin Statutes, but also infringes on the Legislature's core legislative function in violation of the separation of powers. The Wisconsin Constitution provides that the "legislative power shall be vested in a senate and assembly," Wis. Const. Art. IV, § 1, and expressly confirms that the Legislature may enact laws concerning "suffrage" and "[p]roviding for absentee voting." Wis. Const. Art. III, § 2. *See, e.g., League of Women Voters of Wisconsin Educ. Network, Inc. v. Walker*, 2013 WI App 77, ¶ 72, 348 Wis. 2d 714, 750, 834 N.W.2d 393, 411, *aff'd*, 2014 WI 97, ¶ 72, 357 Wis. 2d 360, 851 N.W.2d 302 (The right of citizens to vote " 'is a right . . . subject to *reasonable* regulation by the legislature.' "). Put simply, creating new methods of delivery of completed absentee ballots is a core legislative function. *SEIU v. Vos*, 2020 WI 67, ¶ 35, 393 Wis. 2d 38, 946 N.W.2d 35 ("If a power is core, 'no other branch may take it up and use it as its own.' " (citation omitted)).

WEC has no authority to create law, but that is exactly what it did in its March 2020 and August 2020 memoranda by creating new methods of delivering or returning completed absentee ballots. This is not an instance of shared power or authority, and the Legislature did not delegate such authority to WEC. "[I]f the legislature did not specifically confer a power, the exercise of that power is not authorized." *James v. Heinrich*, 2021 WI 58, ¶ 18, 397 Wis. 2d 517, 960 N.W.2d 350. WEC's actions go well beyond even the most liberal

understanding of “interpreting or implementing” statutes in connection with WEC’s limited authority to promulgate rules under ch. 227. Wis. Stat. § 5.05(1)(f). Rather, WEC is doing what no other branch may do, except for the Legislature—it is creating new laws concerning the absentee voting process. WEC’s actions, and the memoranda at issue, should be soundly rejected for that reason.

IV. WEC’s Attempt To Authorize New Methods Of Absentee Ballot Delivery Was Procedurally Improper.

Even if, *arguendo*, WEC has the authority to create new methods of delivery of completed absentee ballots, under the guise of interpreting the election laws, its failure to comply with the rule-making process violates ch. 227 and core democratic values intended to prevent governmental agencies from exceeding their limited authority. As stated above, WEC has only the authority to “[p]romulgate rules under ch. 227 . . . for the purpose of interpreting or implementing the laws regulating the conduct of elections.” Wis. Stat. § 5.05(1)(f). As such, WEC has no authority to provide such new methods of delivery.

Regardless, even if it had such authority, the memoranda at issue are undoubtedly “rules” for purposes of ch. 227. Wis. Stat. § 227.01(13); *Wis. Legislature v. Palm*, 2020 WI 42, ¶ 22, 391 Wis. 2d 497, 942 N.W.2d 900 (citation omitted). But they were not correctly promulgated as rules. In Wisconsin, an administrative rule must be “published in official registers” after “public hearings, written input, and a series of complicated bureaucratic checks before being implemented” to ensure that an agency is acting within the bounds of its statutory authority and in an otherwise reasonable manner. *Palm*, 2020 WI 42, ¶ 217 (Hagedorn, J., dissenting).

WEC's statewide memoranda authorizes new methods of delivery of completed absentee ballots. These memoranda created, at the very least, new methods and policies for delivering completed absentee ballots—certainly well beyond the traditional understanding of “guidance” documents. *SEIU*, 2020 WI 67, ¶ 105 (a guidance cannot create policy). Moreover, the memoranda have the effect of law, since the clerks rely on WEC's pronouncement that the new methods of delivery are authorized and lawful. As such, it is a rule, and it is undisputed that WEC failed to follow the rule-making process.

CONCLUSION

For the reasons stated above, amici RNC, NRSC, and RPW respectfully request that this Court affirm the circuit court's decision.

Respectfully submitted this 23rd day of March, 2022.

CONWAY, OLEJNICZAK & JERRY, S.C.,
Attorneys for the Republican National Committee,
the National Republican Senatorial Committee &
the Republican Party of Wisconsin.

By: 
Kurt A. Goehre
State Bar No. 1068003

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(7), (8)(b), (bm), and (c)3 for a brief produced with a proportional serif font. The length of this Brief is 2,880 words.

Dated this 23rd day of March 2022.

CONWAY, OLEJNICZAK & JERRY, S.C.,
Attorneys for the Republican National Committee,
the National Republican Senatorial Committee, &
the Republican Party of Wisconsin.

By: 
Kurt A. Goehre
State Bar No. 1068003

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

I hereby certify that:

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

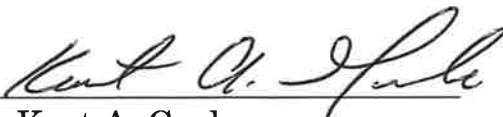
I further certify that:

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

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

Dated this 23rd day of March, 2022.

CONWAY, OLEJNICZAK & JERRY, S.C.,
Attorneys for the Republican National Committee,
the National Republican Senatorial Committee, &
the Republican Party of Wisconsin.

By: 
Kurt A. Goehre
State Bar No. 1068003

CERTIFICATION OF MAILING AND SERVICE

I certify that a paper original and 21 paper copies of the foregoing Brief of Amicus Curiae the Republican National Committee, the National Republican Senatorial Committee, and the Republican Party of Wisconsin were hand-delivered to the Clerk of the Supreme Court on March 23, 2022.

I further certify that on March 23, 2022, I sent true and correct copies of the foregoing Brief of Amicus Curiae to all counsel of record.

Dated this 23rd day of March, 2022.

CONWAY, OLEJNICZAK & JERRY, S.C.,
Attorneys for the Republican National Committee,
the National Republican Senatorial Committee, &
the Republican Party of Wisconsin.

By: 
Kurt A. Goehre
State Bar No. 1068003