

STATE OF WISCONSIN  
IN THE SUPREME COURT

No. \_\_\_\_\_

---

REBECCA KLEEFISCH,  
in her official capacity as candidate for Governor,

*Petitioner,*

v.

WISCONSIN ELECTIONS COMMISSION,

*Respondent.*

---

PETITION AND MEMORANDUM  
FOR LEAVE TO COMMENCE ORIGINAL ACTION

---

Steven M. Biskupic, SBN 101821  
BISKUPIC & JACOBS, S.C.  
1045 W. Glen Oaks Lane, Suite 106  
Mequon, WI 53092  
Phone: (262) 241-0033  
Fax: (866) 700-7640  
sbiskupic@biskupicjacobs.com

*Counsel for Petitioner*

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	3
PETITION FOR LEAVE TO COMMENCE ORIGINAL ACTION .....	5
STATEMENT OF ISSUES .....	7
STATEMENT OF FACTS.....	7
A. Parties.....	7
B. Unattended Drop Boxes.....	9
C. Special Voting Deputies.....	12
D. Consolidated Polling Places.....	16
STATEMENT OF RELIEF SOUGHT.....	17
STATEMENT OF REASONS FOR JURISDICTION.....	18
MEMORANDUM IN SUPPORT OF PETITION .....	20
A. Jurisdiction and Standing .....	20
B. Standard of Review .....	23
C. WEC guidance on drop boxes is contrary to Wisconsin law. ....	23
D. WEC guidance on special voting deputies is contrary to Wisconsin law.....	25
E. WEC guidance on consolidated polling places is contrary to Wisconsin law.....	27
F. WEC is required to undertake formal rulemaking. ....	28
G. This Court should grant injunctive or other equitable relief. ...	30
CONCLUSION.....	31
CERTIFICATE OF FORM AND LENGTH .....	32
CERTIFICATE OF SERVICE .....	33
CERTIFICATE OF DELIVERY FOR FILING.....	34

## TABLE OF AUTHORITIES

### Cases

<i>Am. Med. Servs. v. Mut. Fed. Sav. &amp; Loan Ass'n</i> , 52 Wis. 2d 198, 188 N.W.2d 529 (1971) .....	30
<i>Attorney General v. Chi. &amp; N.W. Ry. Co.</i> , 35 Wis. 425 (1874) .....	23
<i>Democratic Nat'l Comm. v. Bostelmann</i> , 488 F. Supp. 3d 776 (W.D. Wis. 2020) .....	17
<i>Election Bd. of State of Wis. v. Wis. Mfrs. &amp; Commerce</i> , 227 Wis. 2d 650, 597 N.W. 2d 721 (1999) .....	29
<i>Fabick v. Wis. Elections Comm'n</i> , No. 2021AP428 (June 25, 2021) .....	19, 21
<i>Hawkins v. Wis. Elections Comm'n</i> , 2020 WI 75, 393 Wis. 2d 629, 948 N.W.2d 877 .....	30
<i>Jefferson v. Dane County</i> , 2020 WI 90, 394 Wis. 2d 602, 951 N.W.2d 556 .....	passim
<i>State ex rel. Wood v. Baker</i> , 38 Wis. 71 (1875) .....	23
<i>State ex rel. Zignego v. Wis. Elections Comm'n</i> , 2021 WI 32, 396 Wis. 2d 39, 957 N.W.2d 208 .....	30
<i>Tavern League of Wis. v. Palm</i> , 2021 WI 33, 396 Wis. 2d 434, 957 N.W.2d 261 .....	27, 29
<i>Teigen v. Wis. Elections Comm'n</i> , No. 2021CV958 (Waukesha County) .....	18
<i>Trump v. Biden</i> , 2020 WI 91, 394 Wis. 2d 629, 951 N.W.2d 568 .....	passim
<i>Trump v. Wis. Elections Comm'n</i> , 983 F.3d 919 (7th Cir. 2020) .....	19, 20
<i>Wis. Legislature v. Palm</i> , 2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900 .....	27, 28

### Statutes

Wis. Stat. § 5.05 .....	12
Wis. Stat. § 5.06 .....	19
Wis. Stat. § 5.25 .....	16, 27
Wis. Stat. § 6.84 .....	9
Wis. Stat. § 6.85 .....	9
Wis. Stat. § 6.875 .....	12, 13, 25, 26
Wis. Stat. § 227.05 .....	22
Wis. Stat. § 227.19 .....	12

Wis. Stat. § 227.40.....	19
18 U.S.C. § 1341 .....	24
18 U.S.C. § 1701 .....	24

#### **Other Authorities**

1985 Wis. Act 304.....	13, 25
2011 Wis. Act 21 .....	22

## **PETITION FOR LEAVE TO COMMENCE ORIGINAL ACTION**

1. The rulemaking and policy authority of the Wisconsin Elections Commission (WEC) is in disarray and will remain so until this Court accepts jurisdiction and timely answers disputed issues of law necessary for a fair and orderly 2022 election.

2. In October 2021, the Legislative Audit Bureau (LAB) issued a detailed report, outlining current WEC actions that are contrary to Wisconsin law. The issues in dispute include: (a) the propriety of unattended drop boxes; (b) the role of special voting deputies at residential care facilities and qualified retirement homes; (c) the consolidation of polling places; and (d) whether WEC must follow statutorily mandated rulemaking regarding these issues.

3. On its website and in public statements of its chair, WEC disputes whether it is violating state law on these issues. Accordingly, candidates for public office in the upcoming 2022 election are left in limbo as to whether current WEC guidance should be followed.

4. Petitioner Rebecca Kleefisch, a candidate for Governor in the 2022 election, respectfully requests that this Court take the following action:

- (a) accept original jurisdiction of this matter;
- (b) issue a declaratory judgment that the WEC guidance at issue here is contrary to Wisconsin law, and that any such guidance must be enacted through administrative rulemaking; and
- (c) enjoin or otherwise direct WEC to timely abide by the rulings of this Court to ensure an orderly and fair 2022 election.

5. Original jurisdiction in this Court is necessary because there simply is insufficient time for Petitioner, a recently declared candidate, or any other impacted candidate, to obtain meaningful relief through a lower court. Any such relief granted by a lower court undoubtedly will take months to implement, likely will be challenged further on appeal, and will remain unsettled unless and until the issues reach this Court. Such procedures undoubtedly will run out the clock for the 2022 election and leave candidates to operate in an untenable, legally deficient limbo.

6. As this Court stated just one year ago, “The time to challenge election polices such as these is not after all ballots have been cast and the votes tallied.” *Trump v. Biden*, 2020 WI 91, ¶ 22, 394 Wis. 2d 629, 951 N.W.2d 568. This Petition seeks to avoid a 2022 repeat of a similar situation.

## STATEMENT OF ISSUES

7. Whether this Court should grant leave to commence an original action, where such an action is necessary to ensure timely relief for a fair and orderly 2022 election.

8. Whether this Court should declare that WEC guidance as to unattended drop boxes is contrary to law and any such guidance must be enacted through administrative rulemaking.

9. Whether this Court should declare that WEC guidance as to special voting deputies acting at residential care facilities and qualified retirement homes is contrary to law and any such guidance must be enacted through administrative rulemaking.

10. Whether this Court should declare that WEC guidance as to consolidated polling places is contrary to law and any such guidance must be enacted through administrative rulemaking.

11. Whether injunctive or other equitable relief is necessary to enforce the determinations of this Court.

## STATEMENT OF FACTS

### A. Parties

12. Petitioner Rebecca Kleefisch is a candidate for Wisconsin Governor, in an election to be held in the fall of 2022.

13. Kleefisch declared her candidacy through the filing of an amended registration submitted on August 24, 2021, which preceded a September 9, 2021 public announcement.

14. As a candidate, Kleefisch operates through People for Rebecca, a candidate committee authorized pursuant to Wis. Stat. §§ 11.0101(1), 11.0201, *et seq.*

15. As a candidate, it is essential that Kleefisch and her campaign committee instruct supporters on the legally proper voting methods for candidacy. It is equally essential that any such votes be cast in a legal manner.

16. The address for the Kleefisch candidate committee is P.O. Box 628284, Middleton, WI 53562.

17. Respondent Wisconsin Elections Commission (WEC) is a Wisconsin governmental agency created and operating pursuant to Wis. Stat. § 5.05 and Ch. 227.

18. WEC is charged with administration of Wisconsin elections.

19. WEC has administrative rulemaking authority pursuant to Wis. Stat. § 5.05(1)(f).

20. WEC is located at 212 E. Washington Avenue, Third Floor, Madison, WI 53707.



## B. Unattended Drop Boxes

21. Wisconsin's use of absentee ballots is set forth in Wis. Stat. § 6.84 *et seq.* and was summarized by Justice Hagedorn in a concurring opinion in *Trump v. Biden*, 2020 WI 91.

22. While rules relating to in-person voting are to be liberally construed to give effect to ascertaining the will of the voter, absentee voting is viewed "quite a bit more skeptically." *Id.* ¶¶ 38-39.

23. Absentee ballots must be cast in conformance with statutory requirements, and if they are not, the rules require that such votes be discarded. *Id.* ¶ 40.

24. Any otherwise qualified elector may seek to vote via absentee ballot "for any reason." Wis. Stat. § 6.85(1).

25. To do so, the elector must first make written application. *Trump*, ¶¶ 42-44.

26. Second, the absentee ballot must be witnessed. *Id.* ¶ 48.

27. Third, the absentee ballot must be returned in the statutorily prescribed manner. *Id.* ¶ 54.

28. "[T]he 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)." *Id.* (emphasis in opinion).

29. In a March 2020 memorandum (**Appendix A**), WEC issued guidance to municipal clerks on the processing of absentee ballots. Specifically, WEC stated that "in person" return of the ballot need not be done by the voter, but instead could be returned by a third person.<sup>1</sup>

30. In an August 2020 memorandum (**Appendix B**), WEC issued further guidance on the processing of absentee ballots. Specifically, WEC stated that the "in person" return of the ballot need not be done "to the municipal clerk" but instead could be done through delivery to an "unstaffed" drop box, provided that the drop box was a "secure, locked structure operated by local election officials."<sup>2</sup>

31. In October 2021, the Legislative Audit Bureau (LAB), a non-partisan, independent agency of the state legislature, issued

---

<sup>1</sup> See <https://elections.wi.gov/sites/elections.wi.gov/files/2020-03/Ballot%20Return%20Options%203.31.2020.pdf> (last visited Nov. 11, 2021).

<sup>2</sup> See <https://elections.wi.gov/sites/elections.wi.gov/files/2020-08/Drop%20Box%20Final.pdf> (last visited Nov. 11, 2021).

Report 21-19, Elections Administration, an evaluation of 2020 election administration issues (the “LAB Report”).<sup>3</sup>

32. According to the LAB Report, in the November 2020 general election, almost 2 million votes were cast in Wisconsin using absentee ballots. *Id.* at 38.

33. The LAB Report also determined that, in the November 2020 general election, 245 municipality or county voting entities (28.7 percent of the total) utilized drop boxes, most in unattended fashion, to collect absentee ballots. *Id.* at 46-48.

34. The LAB Report found that the use of drop boxes under the guidance of WEC memoranda was contrary to state law requiring that the ballot either be: (a) mailed and accompanied by a certificate; or (b) delivered in person to the municipal clerk who issued the ballot. *Id.*

35. The LAB Report also found that, because Wisconsin law “does not permit or prohibit ballot drop boxes,” WEC must go through administrative rulemaking to permit clerks to establish procedures for the proper use of drop boxes. *Id.*

36. WEC has disputed the findings of the LAB Report. <sup>4</sup>

---

<sup>3</sup> See <https://legis.wisconsin.gov/lab/media/3288/21-19full.pdf> (last visited Nov. 11, 2021).

<sup>4</sup> See <https://elections.wi.gov/2020-ElectionQuestions> (last visited Nov. 11, 2021).

37. Specifically, WEC's website currently states: "As of now, no Wisconsin court has foreclosed the idea of lawfully using absentee ballot drop boxes in the state, and the WEC continues to view the use of secure absentee ballot drop boxes as a decision to be made by local elections officials in coordination with their counsel."<sup>5</sup>

38. WEC is empowered to engage in formal rulemaking regarding election procedures. Wis. Stat. § 5.05(1)(f). That rulemaking authority, however, involves review by the state legislature. Wis. Stat. § 227.19.

39. In response to the LAB report, the chair of WEC stated that she did not want to go through administrative rulemaking because that process involved oversight by Republicans in the state legislature.<sup>6</sup>

### **C. Special Voting Deputies**

40. Wis. Stat. § 6.875 contains a special subset of requirements for absentee voting for individuals living in residential care facilities and qualified retirement homes. In essence, the statute empowers

---

<sup>5</sup> See <https://elections.wi.gov/node/7538> (last visited Nov. 11, 2021).

<sup>6</sup> See "Audit finds voting machines worked properly, offers recommendations to improve elections," [https://www.wkow.com/news/election/audit-finds-voting-machines-worked-properly-offers-recommendations-to-improve-elections/article\\_dcdbd8664-3386-11ec-a9d0-a30718a9356b.html](https://www.wkow.com/news/election/audit-finds-voting-machines-worked-properly-offers-recommendations-to-improve-elections/article_dcdbd8664-3386-11ec-a9d0-a30718a9356b.html) ("Jacobs said she resists the idea of establishing those actions as rules because they would then fall under the purview of the legislature's committee on administrative rules, which is controlled by the Republican majority.") (Oct. 22, 2021).

“special voting deputies” to enter such facilities and affirmatively assist qualified residents with voting. The facility is then treated as the equivalent of a “polling place.” *Id.* § 6.875(6)(b).

41. The statute was enacted in 1985 to encourage and assist elderly residents with voting, while also guarding against the potential for fraud and coercion that might otherwise take place in these situations. *See* 1985 Wis. Act 304, § 68n.

42. Because of the sensitive nature of this work, special voting deputies are required by statute to take an oath acknowledging that, “his or her sacred obligation will be to fully and fairly implement the absentee voting law and seek to have the intent of the electors ascertained.” Wis. Stat. § 6.875(5).

43. The procedures set forth in Wis. Stat. § 6.875 are mandatory and exclusive:

Absentee voting in person inside residential care facilities and qualified retirement homes shall be conducted by municipalities only in the manner prescribed in this section. At any residential care facility or qualified retirement home where a municipality dispatches special voting deputies to conduct absentee voting in person under this section, the procedures described in this section are the exclusive means of absentee voting in person inside that facility or home for electors who are occupants of the facility or home.

Wis. Stat. § 6.875(2)(a).

44. In a June 2020 memorandum (**Appendix C**), WEC sent guidance to clerks indicating that, because of the COVID-19 pandemic, special voting deputies should not be sent to any such residential care facilities and qualified retirement homes.<sup>7</sup> Instead, WEC instructed that absentee ballots be sent to any resident who requested a ballot or to residents with active requests on file. In July 2020, WEC issued an additional memorandum (**Appendix D**), suggesting that, in lieu of the on-site, sworn special voting deputies, the staff at such facilities should assist the potential electors with absentee ballots.<sup>8</sup>

45. The LAB Report determined that this guidance was contrary to state law and impacted about 40 percent of the voting jurisdictions in the state during the 2020 election. LAB Report at 52.

46. In February 2021, the legislature's Joint Committee for Review of Administrative Rules (JCRAR) also determined that WEC's guidance violated state law. JCRAR directed WEC to promulgate an emergency rule within 30 days. Thereafter, in March 2021, WEC issued new written guidance and also issued a "scope statement" for a

---

<sup>7</sup> See <https://elections.wi.gov/sites/elections.wi.gov/files/2020-06/WEC%20Directs%20No%20SVD%20Voting%20for%20Remaining%202020%20Elections%2006-24-2020.pdf> (last visited Nov. 11, 2021).

<sup>8</sup> See <https://elections.wi.gov/sites/elections.wi.gov/files/2020-07/Clerk%20Memo%20Care%20Facilities.pdf> (last visited Nov. 11, 2021).

proposed emergency rule based on the new guidance. In April 2021, WEC let the “scope statement” lapse because no further elections were scheduled in 2021. *Id.* at 53.

47. Contrary to WEC’s guidance, the LAB Report maintained that a modification of the requirement on special voting deputies, even in light of COVID-19, is only permissible through administrative rulemaking. *Id.* at 52-53.

48. WEC has not withdrawn its guidance on special voting deputies at nursing home or residential care facilities and maintains that administrative rulemaking is not necessary.<sup>9</sup> On November 9, 2021, WEC administrator Meagan Wolfe testified before the Joint Legislative Audit Committee, stating that guidance on special voting deputies “may be revisited” through rulemaking or other procedures, but, as with the other issues raised in the LAB Report, the matter was subject to consideration by WEC.<sup>10</sup>

49. To repeat, in response to the LAB Report, the chair of WEC stated that she did not want to go through administrative rulemaking

---

<sup>9</sup> See <https://elections.wi.gov/node/7537> (last visited Nov. 11, 2021).

<sup>10</sup> See [https://elections.wi.gov/sites/elections.wi.gov/files/2021-11/PDF\\_WRITTEN%20Testimony%20of%20Meagan%20Wolfe%20Legislative%20Hearing%2011.9.21\\_0.pdf](https://elections.wi.gov/sites/elections.wi.gov/files/2021-11/PDF_WRITTEN%20Testimony%20of%20Meagan%20Wolfe%20Legislative%20Hearing%2011.9.21_0.pdf) (last visited Nov. 11, 2021).

because that process involved oversight by Republicans in the state legislature.

50. In October 2021, the Racine County Sheriff contended that WEC guidance with respect to the residential care facilities and qualified retirement homes constituted criminal violations. The WEC vigorously has disputed that contention.<sup>11</sup>

#### **D. Consolidated Polling Places**

51. Wis. Stat. § 5.25(3) states, “Polling places shall be established for each election at least 30 days before the election.”

52. The decision as to polling-place locations, depending on population size, is to be made by either a board of election commissioners or a governing body of the jurisdiction. *Id.* § 5.25(2).

53. In guidance issued in late March 2020 (**Appendix E**), WEC told clerks that, because of COVID-19, polling places could be changed and consolidated on the authority of municipal election clerks alone.<sup>12</sup> This instruction was within the 30-day period prior to the Spring 2020 election (April 7, 2020).

---

<sup>11</sup> See “WEC: Statement from commissioners regarding Racine County Sheriff’s Department press conference,” <https://www.wispolitics.com/2021/wec-statement-from-commissioners-regarding-racine-county-sheriffs-department-press-conference/> (last visited Nov. 11, 2021).

<sup>12</sup> See <https://elections.wi.gov/sites/elections.wi.gov/files/2020-03/Consolidated%20Polling%20Places.pdf> (last visited Nov. 11, 2021).



54. In the April 7, 2020 election, Milwaukee reduced the number of polling sites from 180 to 5, and Green Bay reduced its number from 31 to 2. *Democratic Nat'l Comm. v. Bostelmann*, 488 F. Supp. 3d 776, 790 (W.D. Wis. 2020).

55. The LAB Report indicated that the March 2020 WEC guidance on reducing polling places was contrary to state law, but had not been retracted. LAB Report at 62-63.

#### **STATEMENT OF RELIEF SOUGHT**

56. This Court should accept jurisdiction of this original action pursuant to Article VII, § 3(2) of the Wisconsin Constitution and Wis. Stat. § 809.70.

57. This Court should enter a declaratory judgment, pursuant to Wis. Stat. §§ 227.40, 806.04, that the WEC guidance as to drop boxes, special voting deputies, and consolidated polling places discussed above is contrary to law, and that any such guidance must be enacted through administrative rulemaking.

58. This Court should enter injunctive or other equitable relief as necessary to enforce the determinations of this Court.

## STATEMENT OF REASONS FOR JURISDICTION

59. The issues raised in this petition impact the integrity of the Fall 2022 election. A judgment on these important issues would significantly affect the community at large.

60. These issues are ongoing and similar to those raised in *Jefferson v. Dane County*, 2020 WI 90, 394 Wis. 2d 602, 951 N.W.2d 556, where this Court exercised original jurisdiction.

61. Meaningful relief cannot be obtained through other means. Any relief granted by a lower court undoubtedly will take months to implement, likely will be challenged on appeal, and will remain unsettled unless and until the issues reach this Court, which will effectively run out the clock for the 2022 election and leave candidates to operate in an untenable, legally deficient limbo. *See Trump*, 2020 WI 91, ¶ 22 (“The time to challenge election policies such as these is not after all ballots have been cast and the votes tallied.”).

62. A related, pending lower-court case demonstrates why original jurisdiction should be granted here. In *Teigen v. Wisconsin Elections Commission*, No. 2021CV958 (Waukesha County) three electors are challenging WEC drop-box guidance (but not its guidance on special voting deputies).<sup>13</sup> The circuit court has set a briefing

---

<sup>13</sup> The case was filed before Petitioner declared her candidacy for Governor.

schedule that runs through the end of November, and a motion hearing has been set for December 16. Even assuming that the circuit court enters a final judgment at the hearing, valuable time will have been lost, the issues likely will be appealed, and any administrative rulemaking thereafter would take months. As a candidate for Governor, Petitioner is entitled to litigate these important issues directly, efficiently, and (most importantly) timely, before this Court.

63. In *Fabick v. Wisconsin Elections Commission*, No. 2021AP428 (June 25, 2021), this Court discussed, but did not decide, whether its original jurisdiction is limited by either Wis. Stat. §§ 5.06 or 227.40. Neither section prevents this Court from acting in this matter. The procedures of § 5.06 are not at issue here, and the limiting language of § 227.40(1) involves venue, not jurisdiction.

64. The Fall 2022 primary election is a mere 10 months away, and the general election will take place in less than a year. The time to correct election requirements is now. See *Trump*, 2020 WI 91, ¶ 22; see also *Trump v. Wis. Elections Comm'n*, 983 F.3d 919, 925 (7th Cir. 2020) (finding that courts “should avoid announcing or requiring changes in election law and procedures close in time to voting”).

## MEMORANDUM IN SUPPORT OF PETITION

### A. Jurisdiction and Standing

This Court may take original jurisdiction pursuant to Art VII, § 3(2) of the Wisconsin Constitution and Wis. Stat. § 809.70. *Jefferson v. Dane County*, 2020 WI 90, ¶ 12, 394 Wis. 2d 602, 951 N.W.2d 556. “Within our original jurisdiction, we have granted declaratory judgment when a judgment by the court significantly affects the community at large.” *Id.* (internal quotation omitted).

This dispute involves significant, important, and ongoing election issues. WEC guidance and the LAB Report are in direct opposition on the election issues raised here. A county sheriff even contends that WEC advice on special voting deputies is criminal. WEC admits that, as a result of existing audits and investigations, it “has received numerous questions.”<sup>14</sup> Without timely intervention by this Court, the role of WEC in ensuring a fair and impartial 2022 election is in doubt.

Standing is also satisfied here. A candidate for public office suffers a “concrete and particularized harm” when the administration of elections is conducted in an unlawful manner. *Trump*, 983 F.3d at 924. The issues here directly impact the potential legality, accuracy, and fairness of the votes in the 2022 election, in which Petitioner is a

---

<sup>14</sup> See <https://elections.wi.gov/2020-ElectionQuestions> (last visited Nov. 11, 2021).

candidate. This Court recently has cautioned candidates that challenges to WEC actions should be timely raised before, not after, an election. *Trump v. Biden*, 2020 WI 91, ¶ 22, 394 Wis. 2d 629, 951 N.W.2d 568.

In *Fabick v. Wisconsin Elections Commission*, No. 2021AP428 (June 25, 2021), this Court discussed, but did not decide whether its original jurisdiction is limited by either Wis. Stat. §§ 5.06 or 227.40.<sup>15</sup> Neither section prevents this Court from acting in this matter. Section 5.06 involves cases where an elector challenged the actions of a local election official through a sworn complaint with WEC. These circumstances and procedures are not at issue here. Section 227.40 is relevant here, but that statute does not limit this Court's original jurisdiction. As the legislative history confirms, the limiting language of § 227.40(1) involves venue, not jurisdiction.<sup>16</sup>

---

<sup>15</sup> *Fabick* also questioned whether the petitioner had standing. Here, as explained above, Petitioner is a candidate for Governor and has the requisite standing.

<sup>16</sup> Wis. Stat. § 227.40(1) provides, in pertinent part:

(1) Except as provided in sub. (2), the exclusive means of judicial review of the validity of a rule or guidance document shall be an action for declaratory judgment as to the validity of the rule or guidance document brought in the circuit court for the county where the party asserting the invalidity of the rule or guidance document resides or has its principal place of business or, if that party is a nonresident or does not have its principal place of business in this state, in the circuit court for the county where the dispute arose. . . .

Judicial review of administrative actions through declaratory judgment has been in place in Wisconsin since 1943. Wis. Stat. § 227.05 (1943). As explained by the Wisconsin Legislative Council, the statutory language addressing the scope of review as declaratory judgment was intended to address confusion over whether other remedies (such as common-law writs) were still available. See Wis. Legis. Council, *Research Report on Administrative Rule Making*, Vol. II, Part II, 116-21 (Dec. 1954).<sup>17</sup> The remaining language involved venue, directing court filings first to Dane County, and after 2011, to any county where the complainant resides or does business. See 2011 Wis. Act 21, § 62. In fact, the Legislative Reference Bureau and the Wisconsin Legislative Council both referred to the 2011 change as one impacting venue.<sup>18</sup>

Furthermore, nothing in the long legislative history of the administrative statutes suggests that the legislature intended to limit this Court's original jurisdiction. That jurisdiction was constitutionally established well before 1943 as an "independent and distinct ground"

---

<sup>17</sup> See <https://babel.hathitrust.org/cgi/pt?id=wu.89096557475&view=1up&seq=40> (last visited Nov. 11, 2021).

<sup>18</sup> See [https://docs.legis.wisconsin.gov/2011/related/proposals/jr1\\_sb8.pdf](https://docs.legis.wisconsin.gov/2011/related/proposals/jr1_sb8.pdf) (LRB analysis); [https://docs.legis.wisconsin.gov/2011/related/lcamendmemo/jr1\\_ab8.pdf](https://docs.legis.wisconsin.gov/2011/related/lcamendmemo/jr1_ab8.pdf) (WLC memo) (last visited Nov. 11, 2021).

for this Court to preside in place of a circuit court over any matter in law or equity in the first instance. *See Attorney General v. Chi. & N.W. Ry. Co.*, 35 Wis. 425, 517-18 (1874). Indeed, for almost 150 years, this Court has used its original jurisdiction to address election disputes, even when those disputes involved jury trials and quasi-criminal proceedings. *See, e.g., State ex rel. Wood v. Baker*, 38 Wis. 71 (1875).

This Court should not hesitate to exercise its original jurisdiction in this case.

#### **B. Standard of Review**

The interpretation and application of the state's election laws are questions of law that this Court reviews independently. *Jefferson*, 2020 WI 90, ¶ 13. This Court reviews WEC guidance without deference to that agency's determination. *Id.*

#### **C. WEC guidance on drop boxes is contrary to Wisconsin law.**

Wisconsin's use of absentee ballots is subject to strict interpretation. *Trump*, 2020 WI 91, ¶¶ 38-39 (Hagedorn, J., concurring). While rules relating to in-person voting are to be liberally construed to give effect to ascertaining the will of the voter, absentee voting is viewed "quite a bit more skeptically." *Id.* ¶ 39. Absentee ballots must be cast in conformance with statutory requirements, otherwise the rules require that such votes be discarded. *Id.* ¶ 40.



The return of absentee ballots is prescribed as follows:

[T]he 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).

*Id.* ¶ 54 (emphasis in opinion).

The August 2020 WEC memorandum instructed clerks that the “in person” return of the ballot need not be done “to the municipal clerk” but instead could be done through delivery to an “unstaffed” drop box. This guidance is directly contrary to the statute, which requires a person-to-person interaction for the return of an absentee ballot (unless the ballot is returned by U.S. Mail<sup>19</sup>). *Cf. id.* (finding statutory requirement met by hand delivery of ballot to authorized representative of city clerk).

Simply put, delivery to an unstaffed drop box does not meet the requirements of the statute. WEC has disputed the findings of the LAB Report on this issue, and continues to view the use of absentee ballot drop boxes as a decision to be made by local elections officials, not

---

<sup>19</sup> The use of U.S. Mail relies upon the security of that process. Interfering with or falsifying the delivery of U.S. Mail is a criminal offense under federal law. See 18 U.S.C. §§ 1341, 1701 *et seq.*



through formal rulemaking. When WEC election guidance is erroneous, this Court has issued a declaratory judgment correcting the guidance. *See, e.g., Jefferson*, 2020 WI 90, ¶¶ 39-40 (declaring WEC guidance on “indefinitely confined” electors to be contrary to state law).

**D. WEC guidance on special voting deputies is contrary to Wisconsin law.**

Wis. Stat. § 6.875 is a special subset of requirements for absentee voting for individuals in a residential care facility or qualified retirement home. In essence, the statute empowers “special voting deputies” to enter these facilities and affirmatively assist qualified residents with voting. The facility is then treated as the equivalent of a “polling place.” *Id.* § 6.875(6)(b).

The statute was enacted in 1985 to encourage and assist elderly residents with voting, while also guarding against the potential for fraud and coercion that might otherwise take place at such locations. *See* 1985 Wis. Act 304, § 68n. Because of the sensitive nature of this work, special voting deputies are required by statute to take an oath, acknowledging “his or her *sacred obligation* will be to fully and fairly implement the absentee voting law and seek to have the intent of the electors ascertained.” Wis. Stat. § 6.875(5) (emphasis added).

The procedures set forth in § 6.875 are mandatory and exclusive:

Absentee voting in person inside residential care facilities and qualified retirement homes shall be conducted by municipalities only in the manner prescribed in this section. At any residential care facility and qualified retirement home where a municipality dispatches special voting deputies to conduct absentee voting in person under this section, the procedures described in this section are the exclusive means of absentee voting in person inside that facility or home for electors who are occupants of the facility or home.

Wis. Stat. § 6.875(2)(a) (emphasis added).

In June 2020, WEC sent guidance to clerks indicating that, because of COVID-19, special voting deputies should not be sent to any such residential care facilities and qualified retirement homes. Instead, WEC instructed that absentee ballots be sent to any resident who requested a ballot or to residents with active requests on file. An additional WEC memorandum was issued the following month, essentially instructing the staff of residential care facilities and qualified retirement homes to act in place of the deputies.

The totality of this guidance is contrary to the strict requirements set forth in the statute, which detail the mandatory, direct interaction with potential electors under delineated step-by-step procedures. *See* Wis. Stat. § 6.875(6). Using COVID-19 as justification, WEC swept away an entire statutory construct and imposed its own

alternative procedure via memoranda. This action was contrary to law, especially where, as here, administrative rulemaking was available.

*See generally Tavern League of Wis. v. Palm*, 2021 WI 33, 396 Wis. 2d 434, 957 N.W.2d 261 (concluding that DHS order limiting indoor public gatherings during COVID-19 met the definition of a rule, and therefore should have been promulgated according to rulemaking procedures set forth in Wis. Stat. ch. 227); *Wis. Legislature v. Palm*, 2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900 (same, with respect to DHS stay-at-home order).

WEC has not withdrawn its guidance on special voting deputies at nursing home or residential care facilities and maintains that administrative rulemaking is not necessary. Again, when WEC election guidance is erroneous, this Court has issued declarations correcting the guidance. *See, e.g., Jefferson*, 2020 WI 90, ¶¶ 39-40.

**E. WEC guidance on consolidated polling places is contrary to Wisconsin law.**

Wis. Stat. § 5.25(3) states, “Polling places shall be established for each election at least 30 days before the election.” The decision as to polling place locations, depending on population size, is to be made by either a board of election commissioners or a governing body of the jurisdiction. *Id.* § 5.25(2). However, in guidance issued March 30,

2020—that is, within 30 days of the Spring 2020 election—WEC told clerks that, because of COVID-19, polling places could be changed and consolidated on the authority of municipal election clerks alone.

WEC's guidance is directly contrary to the statutory requirement that polling places be set no later than 30 days before an election, and that the decision as to polling place location is delegated not to election clerks, but to either election commissioners or a governing body.

Nevertheless, this guidance has not been retracted. At the very least, any change to these requirements because of the pandemic (or any other emergency) should be subject to administrative rule making.

**F. WEC is required to undertake formal rulemaking.**

WEC must engage in formal rulemaking to address the use of drop boxes and deviations from statutorily required practices discussed above. Under Wis. Stat. § 227.61(13), a rule is “(1) a regulation, standard, statement of policy or general order; (2) of general application; (3) having the effect of law; (4) issued by an agency; (5) to implement, interpret or make specific legislation enforced or administered by such agency as to govern the interpretation or procedure of such agency.” *Wis. Legislature*, 2020 WI 42, ¶ 22 (internal quotations omitted).

This Court previously has held that, because of First Amendment concerns, changes to election law should be clear and unequivocal. See *Election Bd. of State of Wis. v. Wis. Mfrs. & Commerce*, 227 Wis. 2d 650, 677-78, 597 N.W. 2d 721 (1999) (holding that agency change to interpretation of “express advocacy” should have been done via rulemaking or through legislation). As a result, WEC (and its predecessor) appropriately has conducted formal rulemaking with respect to, among other issues, voter registration (Ch. EL-2), challenges at polling places (Ch. EL-9), and voter identification (Ch. EL-10).

Wisconsin statutes do not authorize the use of drop boxes for absentee voting and do not delineate when deviations may take place from the required actions of special voting deputies at residential care facilities and qualified retirement homes, nor from the requirements for polling-place sites. At the very least, WEC should be required to engage in formal rulemaking when addressing these issues, given that their previous guidance was not consistent with the statutes. *Cf. Tavern League*, 2021 WI 33, ¶¶ 73-75 (Ann Walsh Bradley, J., dissenting) (finding that rulemaking is not required when statute is unambiguous and agency simply effectuates the will of the legislature).

**G. This Court should grant injunctive or other equitable relief.**

This Court has the traditional power in equity “to adapt its remedies to the exigencies and the needs of the case.” *Am. Med. Servs. v. Mut. Fed. Sav. & Loan Ass’n*, 52 Wis. 2d 198, 205, 188 N.W.2d 529 (1971); *see also State ex rel. Zignego v. Wis. Elections Comm’n*, 2021 WI 32, 396 Wis. 2d 39, 957 N.W.2d 208 (dissolving writ of mandamus against WEC regarding voter registration lists); *Hawkins v. Wis. Elections Comm’n*, 2020 WI 75, 393 Wis. 2d 629, 948 N.W.2d 877 (declining to find that relief was warranted for candidates seeking to be placed on ballots).

This Court should grant injunctive or other equitable relief to ensure compliance with its determinations in this case. If this Court finds that administrative rulemaking is required, this Court should order that rulemaking be done forthwith, so the candidates (and voters) have fair and timely notice of the rules pertaining to the 2022 elections.

## CONCLUSION

Based on the foregoing, Petitioner respectfully requests that this Court: (a) accept original jurisdiction of this matter; (b) issue a declaratory judgment that the WEC guidance at issue here is contrary to Wisconsin law; (c) order WEC to follow statutorily mandated rulemaking when issuing binding guidance on these issues; and (d) enjoin or otherwise direct WEC to timely abide by the determinations of this Court to insure an orderly and fair 2022 election.

Respectfully submitted this 12<sup>th</sup> day of November, 2021.

BISKUPIC & JACOBS, S.C. ,

By: 

Steven M. Biskupic, SBN 101821  
1045 W. Glen Oaks Lane, Suite 106  
Mequon, WI 53092  
Phone: (262) 241-0033  
Fax: (866) 700-7640  
sbiskupic@biskupicjacobs.com

*Counsel for Petitioner*



## CERTIFICATE OF FORM AND LENGTH

I hereby certify that this petition and memorandum conforms to the rules contained in Wis. Stat. ch. 809 for a document produced with a proportional serif font. The length of the portions of this brief subject to the word-count requirement is 5,233 words. The word count was determined using Microsoft Word.

Dated this 12<sup>th</sup> day of November, 2021.

BISKUPIC & JACOBS, S.C.

By: Steven M. Biskupic vke  
Steven M. Biskupic, SBN 101821  
1045 W. Glen Oaks Lane, Suite 106  
Mequon, WI 53092  
Phone: (262) 241-0033  
Fax: (866) 700-7640  
sbiskupic@biskupicjacobs.com

*Counsel for Petitioner*



## CERTIFICATE OF SERVICE

I hereby certify that, on November 15, 2021, a copy of the petition and memorandum, and a copy of the appendix, will be served via electronic mail on the Wisconsin Department of Justice, pursuant to the direction on its website,<sup>20</sup> the WEC, and the Joint Audit Committee. If any party does not consent to such service, it will be served with these documents via traditional means, and Petitioner will file an amended certificate.

Dated this 12<sup>th</sup> day of November, 2021.

BISKUPIC & JACOBS, S.C.

By: Steven M. Biskupic vke  
Steven M. Biskupic, SBN 101821  
1045 W. Glen Oaks Lane, Suite 106  
Mequon, WI 53092  
Phone: (262) 241-0033  
Fax: (866) 700-7640  
sbiskupic@biskupicjacobs.com

*Counsel for Petitioner*

---

<sup>20</sup> <https://www.doj.state.wi.us/dls/service-process> (last visited Nov. 9, 2021).

### CERTIFICATE OF DELIVERY FOR FILING

I hereby certify that, on November 15, 2021, 10 copies of the petition and memorandum, and 10 copies of the appendix, will be hand-delivered to the Clerk of the Wisconsin Supreme Court, 110 E. Main Street, Suite 215, Madison, Wisconsin 53701.

Dated this 12<sup>th</sup> day of November, 2021.

BISKUPIC & JACOBS, S.C.

By: Steven M. Biskupic *me*  
Steven M. Biskupic, SBN 101821  
1045 W. Glen Oaks Lane, Suite 106  
Mequon, WI 53092  
Phone: (262) 241-0033  
Fax: (866) 700-7640  
sbiskupic@biskupicjacobs.com

*Counsel for Petitioner*