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May 4, 2026

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VIA EMAIL

Dane County Board of Canvassers
City-County Building
210 Martin Luther King, Jr. Blvd., Rm. 106
Madison, WI 53703

RE: 2026 Spring Election, WEC Decision April 30, 2026

Dear Members of the Board of Canvassers:

At the Spring election on April 7, 2026, 23 absentee ballots were delivered to polling places by the Madison City Clerk after 8:00 p.m. All of these ballots were delivered by the respective voters to the City Clerk no later than Monday, April 6, 2026, in conformance with all statutory provisions for casting an absentee ballot. These ballots were counted in the vote total on election day. The Madison Municipal Board of Canvassers and the Dane County Board of Canvassers both decided to count these votes. On April 30, 2026, the Wisconsin Election Commission (WEC) issued a decision that concluded “that Madison Municipal Board of Canvassers and the Dane County Board of Canvassers both abused their discretion in violation of Wis. Stat. § 5.06(1) when they decided to include the 23 absentee ballots in their canvass of the results of the April 7, 2026, Spring Election.” Part One of WEC’s Order states that the Board of Canvassers is ordered to conform their conduct to the interpretation of § 6.87(6) in the Order, and are restrained from taking any action inconsistent with that interpretation of law in future elections. In my opinion, WEC misconstrued Wis. Stat. § 6.87(6), and the subject ballots were properly counted by the Board of Canvassers. The Board of Canvassers has standing to appeal WEC’s Order to circuit court.

The Madison City Clerk issued a statement on April 10, 2026 that stated all of the subject ballots were in the custody of the Clerk’s office by the evening of April 6, 2026. “The ballots were either collected from secure drop boxes after 5 p.m. on Monday or arrived from the USPS late in the day on Monday.” Although the ballots were in the custody of the City Clerk all day on election day, they were not delivered to the respective polling places until after the polls closed at 8 p.m. The City Clerk also made the same statement to the Board of Canvassers when it convened on April 13, 2026. Wisconsin Stat. § 6.87(6) states the following regarding absentee ballots: “The ballot shall be returned so it is delivered to the polling place no later than 8 p.m. on election day... if the municipal clerk receives an absentee ballot on election day, the clerk shall secure the ballot and cause the ballot to be delivered to the polling place serving the elector’s residence before 8 p.m. Any ballot not mailed or delivered as provided in this subsection may not be counted.” If the ballot is received by the municipal clerk before election day it is to be stored at the clerk’s office and delivered to the polling place on election day. Wis. Stat. § 6.88(1 & 2). Wisconsin Stat. § 6.84(2) states that the provisions of § 6.87(6) are mandatory, and “ballots **cast** in contravention of the procedures specified in those provisions may not be counted.”

(emphasis added) Although there is no statutory definition of “cast,” the context in which it is used means act of selecting a candidate on the ballot and returning the ballot to the municipal clerk in conformance with all statutory requirements.

Wisconsin Stat. § 6.87(6) must be interpreted in the context of the “whole text” of the statute and in conformance with the rules of statutory interpretation. Statutory interpretation centers on the ‘ascertainment of meaning’ not the recitation of words in isolation. *Brey v. State Farm Mutual Automobile Ins. Co.*, 2022 WI 7, ¶ 13. Our Supreme Court has held that “statutory language is interpreted in the context in which it is used, not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably to avoid absurd or unreasonable results.” *Kalal v. Circuit Ct. for Dane County*, 2004 WI 58 ¶47. To ascertain the meaning of a statute, courts rely upon the whole-text canon “which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts.” *Brey*, 2022 WI 7 ¶13.

The statutory scheme of Wis. Stat. § 6.87(6) contemplates two specific actions. First the elector must return the ballot to the municipal clerk. Second, the clerk must deliver the ballot to the appropriate polling place by 8 p.m. on election day. The statutory language specifically addresses what should happen if the ballot is returned to the clerk on election day. The legislature apparently presumed that if a ballot was returned to the clerk prior to election day it would be delivered to the polling place in a timely fashion as required by Wis. Stat. § 6.88(1&2). The language “ballots cast in contravention of the procedures specified in those provisions may not be counted,” should not be interpreted to apply to this situation. In this situation all of the ballots were “cast” in strict conformance with all of the applicable statutes. The ballots were in the possession of the City Clerk the day before the election. The City Clerk simply failed to deliver the ballots to the respective polling places in a timely manner. In my opinion, the language in § 6.87(6) prohibiting counting ballots delivered to the polling place after 8 p.m. on election day does not apply because that provision only applies by its express terms to absentee ballots received by the clerk on election day. Likewise, the language prohibiting counting absentee ballots in § 6.84(2) does not apply because the ballots were not cast in contravention of the procedures specified in § 6.87. The voters cast their votes in a timely manner in conformance with all of the statutory procedural provisions.

Under these circumstances, the guidance in Wis. Stat. § 5.01 must be applied to give effect to the will of the voters. The Supreme Court has held that failure on the part of election officials to perform their duties should not deprive the voters of their constitutional right to vote. *Roth v. LaFarge School Dist. Board of Canvassers*, 2004 WI 6, ¶ 23, 268 Wis. 2d 335, 677 N.W.2d 599. The Legislature stated in Wis. Stat. § 6.84(1) 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.” But that is not the case here. The Supreme Court has held: “if the record in this case indicated the slightest evidence of any fraud, connivance or attempted undue influence, we would have no hesitancy in declaring the absentee voters’ ballot invalid. However, we are not inclined to disenfranchise these voters who acted in conformance with the statutory requirements.” *Lanser v. Koconis*, 62 Wis. 2d 86, 93, 214 N.W.2d 425 (1974).

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Our courts have recognized a constitutional right to vote. As a matter of policy, the legislature has stated that absentee voting is a privilege rather than a right. But the language of Wis. Stat. § 6.87 is ambiguous at best. By specifically addressing ballots returned on election day, it seems clear that ballots properly returned before election day must be counted. Additionally, § 6.87(6) should not be construed to disenfranchise an elector who has strictly complied with all statutory requirements to cast an absentee ballot. Such a construction would, in my opinion, be unconstitutional as applied to the facts of this case where the elector properly returned the ballot in a timely fashion but the clerk failed to deliver it to the polling place on time.

Wisconsin Stat. § 5.06(8) states that any election official who is aggrieved by WEC's April 30, 2026 Order may appeal WEC's decision to the Dane County Circuit Court no later than 30 days after issuance of the Order. The court shall hear and determine all contested issues of law and shall affirm, reverse or modify WEC's determination. The County Clerk and the Board of Canvassers have standing to appeal WEC's April 30, 2026 Order to Circuit Court.

Please contact me if I can provide further assistance on this matter.

Sincerely,

David R. Gault

David R. Gault
Deputy Corporation Counsel