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SUPREME COURT OF WISCONSIN

MARK JEFFERSON and THE REPUBLICAN PARTY OF WISCONSIN,

Petitioners,

v.

DANE COUNTY, WISCONSIN and SCOTT MCDONNELL, in his official capacity as Dane County Clerk,

Respondents.

Appeal No. 2020AP557-OA

Original Action in the Wisconsin Supreme Court

INITIAL BRIEF AND APPENDIX OF PETITIONERS MARK JEFFERSON AND THE REPUBLICAN PARTY OF WISCONSIN

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ISSUES

1. Do Respondents have the authority to issue an interpretation of Wisconsin's election law allowing voters in Dane County to vote absentee without a photo ID?

By their concession in their response to the original action petition and their stipulation filed in this action, Respondents concede that they lack the authority to issue an interpretation of Wisconsin's election law allowing voters in Dane County to vote absentee without a photo ID.

2. Does Emergency Order #12, the "Safer at Home" Order, authorize all Wisconsin voters—regardless of whether they are actually "indefinitely confined" or actually suffering a "physical illness or infirmity" due to COVID-19—to vote absentee without a photo ID?

By their concession in their response to the original action petition and their stipulation filed in this action, Respondents concede that Emergency Order #12 does not authorize all Wisconsin voters—regardless of whether they are actually "indefinitely confined" or actually suffering a "physical illness or infirmity" due to COVID-19—to vote absentee without a photo ID.

3. May an elector who is not indefinitely confined because of age, physical illness or infirmity and who is not disabled for an indefinite period obtain an absentee ballot under Wis. Stat. § 6.86(2)(a) due to the COVID-19 pandemic?

Respondents assert that their statements concerning obtaining an absentee ballot by claiming "indefinitely confined" voter status are consistent with the statutes, Wis. Stat. §§ 6.86 and 6.87. That legal issue is presented by this original action, is disputed, and is therefore ripe for decision by the Court.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This case will meet the criteria for publication because a decision of the Supreme Court considering and applying the "indefinitely confined" elector language of Wis. Stat. § 6.86(2)(a) will be of statewide interest beyond simply the parties to this action and will provide guidance that will be of interest and assistance in future elections for municipal clerks, voters, the Wisconsin Elections Commission, and others in Wisconsin.

Oral argument is not necessary for determination of this original action, as two of the issues are conceded, and the remaining statutory interpretation issue can readily be decided on the briefs. Petitioners ask the Court to decide this case on the briefs.

STATEMENT OF THE CASE

The original action petition granted by this Court presents issues of compelling statewide concern involving the April 7 election and the rules that govern the conduct of elections in Wisconsin. Respondents, government officials with actual and apparent authority to administer the election, issued statements advising electors that they may obtain absentee ballots without providing photo identification on the basis that they are "indefinitely confined" because of age, physical illness, infirmity, or disability, due to the COVID-19 pandemic and based upon Executive branch orders issued in response to the pandemic.

As a result of these widely distributed statements, voters submitted applications for absentee ballots on the "indefinitely confined" basis, and obtained absentee ballots without providing a photo ID, even though they were not themselves physically ill, infirm, elderly, or disabled.

Claiming that status without a basis to do so constitutes a false certification in the ballot application, which is a violation of the Wisconsin Statutes. Further, all of these persons are now designated indefinitely confined voters, meaning that absentee ballots will be sent to them automatically for every future election unless the indefinitely confined certification is withdrawn by the voter.

1. Proceedings in This Action

On March 27, 2020, Petitioners Mark Jefferson and the Republican Party of Wisconsin filed an emergency petition for leave to commence an original action in the Supreme Court along with a motion for temporary injunction and a memorandum supporting the petition. This action involves public statements made by Scott McDonell in his official capacity as Dane County Clerk (the "Clerk" or "Respondent McDonell") that the Safer at Home Emergency Order #12 issued by the Department of Health Services allows all voters to declare they are "indefinitely confined" under Wis. Stat. § 6.86(2)(a) and, thus, vote absentee without providing a photo ID regardless of whether they are actually suffering a "physical illness or infirmity."

Petitioners have asked this Court to issue a declaratory judgment that Emergency Order #12 does not and cannot affect the rules and procedures under Wisconsin's election laws, that Respondents lack the authority to issue an interpretation of Wisconsin's election laws allowing voters in Dane County to vote absentee without providing a photo ID, and that Emergency Order #12, in fact, does not authorize all Wisconsin voters to vote absentee without a photo ID where the statutory definition of indefinite confinement is not satisfied. Petitioners also requested a preliminary injunction ordering the Dane County Clerk to remove his erroneous interpretation from public display and to issue new statements correcting that interpretation.

On March 30, 2020, Respondents filed a response to the original action petition and motion for temporary injunction. While Respondents conceded some of the fundamental premises of Petitioners' position (see below), they opposed the petition and the injunction request. They argued that this matter does not qualify for this Court's original jurisdiction, raising issues of exhaustion of remedies and mootness. As directed by the Court, Petitioners

responded to those issues in a reply brief filed on April 7, 2020.

The Court, unpersuaded by Respondents' points of opposition, unanimously determined that the matters presented by this action were appropriate for the Court's immediate determination, and granted Petitioners' motion for injunctive relief. In its order issued on March 31, 2020, the Court explained the requested relief:

> The temporary injunction the petitioners seek would order respondent, Scott McDonell, the Dane County Clerk, to remove a March 25, 2020 Facebook post in which he indicated, inter alia, that all Dane County voters could declare themselves to be "indefinitely confined" under Wis. Stat. § 6.86(2) due to illness solely because of the Wisconsin Department of Health Services Emergency Order #12 (the Safer at Home Order) and difficulties in presenting or uploading a valid proof of identification, thereby avoiding the legal requirement to present or upload a copy of the voter's proof of identification when requesting an absentee ballot. The petitioners further ask this court to order respondent McDonell and respondent Dane County to issue new statements setting forth the statutory interpretation proposed by the petitioners.

(App.2); (3/31/2020 Order at 2) (footnote omitted).

In its March 31st Order, the Court granted the motion for temporary injunction and ordered Respondent McDonell "to refrain from posting advice as the County Clerk for Dane County inconsistent with … WEC guidance." (App.3);

(3/31/2020 Order at 3). The Court further concluded, in part, "that clarification of the purpose and proper use of the indefinitely confined status pursuant to Wis. Stat. § 6.86(2) … [is] warranted." (App.2); (3/31/2020 Order at 2). The Court stated that the guidance of the Wisconsin Elections Commission ("WEC") published on March 29, 2020 "provides the clarification on the purpose and proper use of the indefinitely confined status that is required at this time." (*Id.*)

On April 1, 2020, the Court issued an order granting the petition for leave to commence an original action and ordered, among other things, that Petitioners file a reply to Respondents' response brief. (App.4); (4/1/2020 Order).

On April 2, 2020, Respondents filed a pleading entitled "Stipulation of Dane County as to Issues of Law Raised by Petitioner." (App.7). In that pleading, Respondents reference the statement of issues presented in the original action petition and Respondents "stipulate that the two propositions … are an accurate statement of the law." (App.8); (4/2/2020 Stipulation at 2).

> Specifically, Respondents stipulate:
>
> (1) that Respondents lack the authority to issue an interpretation of Wisconsin's election law allowing voters in Dane County to vote absentee without a photo ID; and
>
> (2) that the Governor's Emergency Order 12, Safer at Home Order, does not authorize all Wisconsin voters—regardless of whether they are actually "indefinitely confined" or actually suffering a "physical illness or infirmity" due to COVID-19 to vote absentee without a photo ID.

(*Id.*).

2. <u>The April 7 Election.</u>

Wisconsin's Spring Election was held on April 7, 2020. *See* WEC, Spring 2020 Election and Presidential Preference Primary, at https://elections.wi.gov/; *see also* (App.51); (App.52).

By late March 2020, the Spring Election was already well underway. As of March 27, 2020, Wisconsin had received more than 750,000 absentee ballot requests. *See* WEC, Absentee Requests for April 7 Spring Election (Mar. 27, 2020), available at https://elections.wi.gov/node/6783; Craig Gilbert, "In a state used to political drama, Wisconsin's April 7 election is awash in doubt, dispute and uncertainty," *Milwaukee J. Sent.* (Mar. 26, 2020), available at https://www.jsonline.com/story/news/politics/analysis/2020/0

3/26/wisconsin-election-becomes-test-case-voting-coronavirus-crisis/2916908001/. Registered voters were permitted to continue requesting absentee ballots through April 3, 2020. *See* WEC, Federal Court Order Affects Spring Election –Absentee Ballot Request and Receipt Deadlines Extended COVID-19, available at https://elections.wi.gov/node/6807 (April 2 deadline extended to April 3 by federal district court ruling).

In March 2020, states across the country began taking measures to address the spread of COVID-19 (the coronavirus). On March 24, 2020, the Department of Health Services ("DHS") issued Emergency Order #12, the "Safer at Home Order." *See* (App.9-24); (EO #12). That Order provides that "individuals present within the State of Wisconsin are ordered to stay at home or at their place of residence." (App.10); (EO #12, § 1).

Emergency Order #12, however, includes numerous exceptions to the direction to stay at home. Individuals in Wisconsin may, for example, leave their homes to get groceries and household products, travel to and work at businesses that provide essential services, and engage in outdoor leisure activities. (App.1, 10-20, 23-24).

Individuals may leave their homes for essential government functions (broadly defined to include "all services provided by the State, tribal, or local governments needed to ensure the continuing operation of the government body and provide and support the health, safety, and welfare of the public"). (App.16; EO #12 § 12). Residents also may leave home to get groceries and household products, travel to and work at businesses that provide essential services, and engage in outdoor leisure activities. (App.10, 15-16); (EO #12 §§ 1, 11).

3. Respondents' Statement Concerning Requesting Absentee Ballots on Indefinitely Confined Voter Grounds.

On March 25, 2020, the next day, Respondent Dane County Clerk Scott McDonell issued the following statement on his Facebook page:

> I have informed Dane County Municipal Clerks that during this emergency and based on the Governors Stay at Home order I am declaring all Dane County voters may indicate as needed that they are indefinitely confined due to illness. This declaration will make it easier for Dane County voters to participate in this election by mail in these difficult times. I urge all voters who request a ballot and have trouble presenting [a] valid ID to indicate that they are indefinitely confined.

> People are reluctant to check the box that says they are indefinitely confined but this is a pandemic….
>
> The process works like this:
>
> • A voter visits myvote.wi.gov to request a ballot.
>
> • A voter can select a box that reads "I certify that I am indefinitely confined due to age illness, infirmity or disability and request ballots be sent to me for every election until I am on longer confined or fail to return a ballot.["]
>
> • The voter is then able to skip the step of uploading an ID in order to receive a ballot for the April 7 election.
>
> Voters are confined due to the COVID-19 illness. When the Stay at Home order by the Governor is lifted, the voter can change their designation back by contacting their clerk or updating their information in myvote.wi.gov.
>
> Voters who are able to provide a copy of their ID should do so and not indicate that they are indefinitely confined.

(App.25) (emphasis added). On March 25, the Clerk also e-mailed the same announcement and instructions to all clerks responsible for administering elections in the municipalities within Dane County. (App.47).

Later in the day on March 25, 2020, Milwaukee County Clerk George L. Christenson issued a similar

statement on the Office of the Milwaukee County Clerk's Facebook page:

> I have informed municipal clerks in Milwaukee County that during this emergency, and based on the Governor's Safer at Home Order as well as guidance from the Wisconsin Election Commission, that it is appropriate that Milwaukee County voters requesting an absentee ballot may declare themselves as indefinitely confined to their homes. By declaring themselves indefinitely confined, it will be easier for Milwaukee County voters to participate in this election by mail in these difficult times.
>
> I urge all voters who request a ballot and do not have the ability or equipment to upload a valid ID to indicate that they are indefinitely confined. Voters should not be reluctant to check the box that says they are indefinitely confined because this is a pandemic and this option exists in state law to help preserve everyone's right to vote.
>
> The process works like this:
>
> • A voter visits myvote.wi.gov to request a ballot.
>
> • A voter can select a box that reads "I certify that I am indefinitely confined due to age, illness, infirmity, or disability and request ballots to be sent to me for every election until I am no longer confined or fail to return a allot."
>
> • The voter is then able to skip the step of uploading an ID in order to receive a ballot for April 7th election.
>
> Voters are confined to their homes due to COVID-19 illness. When the Safer at Home Order by the Governor is lifted, the voter can

> change the designation back by contacting their municipal clerk or by updating their information on myvote.wi.gov.

(App.30-31) (emphasis added). This announcement appeared on Milwaukee County letterhead, and apparently it was circulated to all clerks responsible for elections in all the municipalities within the county. *See* (App.46).

Prior to March 27, 2020, the WEC did not issue any similar pronouncements concerning the indefinitely confined voter issue. *See generally* Wisconsin Elections Commission, "Recent Clerk Communications," at https://elections.wi.gov/clerks/recent-communications; *see also* Wisconsin Elections Commission, "COVID-19 FAQs and Updates: Online Voter Registration, Absentee Voting, Envelopes, Sanitizer and Poll Worker Recruitment" (Mar. 22, 2020), available at https://elections.wi.gov/node/6764.

4. Official WEC Guidance on Indefinitely Confined Electors.

The Dane County Clerk's and the Milwaukee County Clerk's announcements apparently were widely circulated, and they engendered confusion, giving rise to many questions. *See* (App.36, 40); (App.43, 44) (noting that as of March 27, WEC received "numerous inquiries regarding the

application of the indefinitely confined designation for absentee voters . . . .” and it received “numerous questions from clerks about the increase in voters requesting absentee ballots as indefinitely confined.”)

The WEC promptly acted to clear up this confusion. As noted in Respondents’ Response to the petition for original action (“Resp.”), WEC met in emergency session on March 27 to issue “new guidance” concerning the indefinitely confined voter issue. (App.34-37) (hereafter, “WEC Proposed Guidance”). The WEC Proposed Guidance was discussed at the March 27 meeting. The Proposed Guidance reported that WEC staff received “numerous questions” from clerks about the increase in the voters requesting absentee ballots as indefinitely confined. (App.36); (App.40).

The WEC Proposed Guidance “propose[d] the following additional guidance intended to clarify the purpose and proper use of the indefinitely confined status under Wis. Stat. § 6.86(2).” (App.36). That Proposed Guidance included the following explanations:

1. Designation of indefinitely confined status is for each individual voter to make based upon their current circumstance. It does not require permanent or total inability to travel outside of the residence. The designation is appropriate for electors who are

indefinitely confined because of age, physical illness or infirmity or are disabled for an indefinite period.

2. Indefinitely confined status shall not be used by electors simply as a means to avoid the photo ID requirement without regard to whether they are indefinitely confined because of age, physical illness, infirmity or disability.

(App.36); (App.41).

Points 1 and 2 of the WEC Proposed Guidance were adopted by the WEC and are included in WEC's Memorandum "Guidance on Indefinitely Confined Voters" (Mar. 29, 2020). (App.43). *See* Clerk Communications, March 29, 2020 Memorandum, at https://elections.wi.gov/node/6788); *see also* Memorandum, available at https://elections.wi.gov/sites/elections.wi.gov/files/2020-03/Clerk%20comm%20re.%20Indefinitely%20Confined%203.29.20.pdf)

The March 29 Memorandum setting forth the guidance adopted by the WEC is referred to as "the Official WEC Guidance." The Official WEC Guidance states that it "is based upon applicable statutes." (App.44). It further states: "An elector who is indefinitely confined because of age, physical illness or infirmity or is disabled for an indefinite

period may be signing a statement to that effect require that an absentee ballot be sent to the elector automatically for every election. *Wis. Stat. § 6.86(2)(a).*" (*Id.*)

The Official WEC Guidance notes that voters "self-certify" whether they meet the definition of "indefinitely confined." (App.44). "The absentee ballot request form asks voters to certify to their indefinitely confined status." (*Id.*)[1] It notes that the statutes do not establish an option to require proof or documentation (*i.e.*, photo ID) from indefinitely confined voters. (*Id.*) The Official WEC Guidance provides that voters should not claim indefinitely confined status as a means to avoid the photo ID requirement otherwise applicable to absentee ballot applications. *See* (App.43).

5. WEC Declined to Connect Indefinitely Confined Voter Status to the Ability to Obtain a Copy of the Voter's Photo ID.

The WEC Proposed Guidance included the following explanation connecting "indefinitely confined" status to the inability to obtain a copy of the voter's photo ID:

> 3. Under the unique circumstances of the current public health crisis which includes a global pandemic and official restrictions on the travel of Wisconsin residents, In [sic] cases where an elector may possess a

[1] Form EL-121, Wisconsin Application for Absentee Ballot, is included in the Appendix. (App.60).

> photo ID, but does not have the technology to upload a copy or access to a printer or scanner to provide a copy of their ID, the voter may make the individual determination that they qualify as indefinitely confined. If required, electors should attempt to provide a photo ID with their request for an absentee ballot. Submitting an absentee ballot request without a photo ID should be reserved for electors in this category who do not have a valid photo ID and who are unable to obtain one for reasons of age, illness, infirmity or disability or who are unable to obtain a copy to submit with their request or upload an image of the ID with their electronic request.

(App.36); (App.41).

Point 3 of the WEC Proposed Guidance was not adopted by the WEC, and thus that proposal did not become part of the Official WEC Guidance. *Compare* (App.41) *to* (App.43-45). The Official WEC Guidance does not suggest that indefinitely confined status may be claimed based upon the voter's inability to obtain a photo ID or a copy of such ID. *See* (*id.*)

6. WEC Declined to Open an Investigation Into the Clerk's Statements Concerning Indefinitely Confined Voter Status.

At its March 27th meeting, WEC members inquired whether an investigation against the Clerk should proceed on the issue of the Clerk's pronouncement concerning the indefinitely confined voter issue. However, a majority of the WEC declined to vote to open up or rule upon such matter.

See WEC March 27, 2020 meeting recording, at https://wiseye.org/2020/03/27/wisconsin-elections-commission-special-teleconference-meeting-on-covid-19-3/ (discussing the indefinitely confined voter issue; see discussing beginning at 01:18:00 mark in the meeting, and particularly the discussion at the 01:32:00-01:36-00 mark).

Further, WEC's March 29th meeting had on the agenda whether to open an investigation into complaints that the Milwaukee County Clerk and the Dane County Clerk failed to comply with the law or abused their discretion for their statements regarding the indefinitely confined voter issue. *See* (App.38-49) (WEC Notice of Mar. 29, 2020 Meeting and meeting materials). The WEC received complaints on this issue. *See* (App.48-49); (App.46-47).

7. Respondents' Further Statements on the Indefinitely Confined Voter Issue.

Respondents contend that they "posted WEC's guidance and expressly stated that it should be followed." (Resp. at 4). After WEC's March 27th meeting, the Clerk issued a follow up statement on his Facebook page, stating that he is "[g]rateful" that the WEC "voted to agree" with his March 25th statement on the indefinitely confined voter issue:

> Grateful that the Wisconsin Election Commission voted to agree with me that the designation of indefinitely confined status is for each individual voter to make based upon their current circumstance. It does not require permanent or total inability to travel outside the residence. Clerks may not request or require proof of an individual's self-designated status.

(App.32); (Resp. at 18) (emphasis added).

Later in the evening of March 27, 2020, the Clerk again posted the following on his Facebook page:

> More from me on this topic. The Wisconsin Election Commission met on Friday [March 27] and issued further guidance to clarify the purpose and proper use of the indefinitely confined status under Wis. Stats. s. 6.86(2) as follows:
>
> [quoting points 1. and 2. from the Official WEC Guidance].
>
> Voters should follow this guidance when determining whether they qualify to claim that they are indefinitely confined as a result of the COVID-19 pandemic and declared public health emergency.

(App.33-34); (Resp. at 18-19) (emphasis added). The first and last paragraphs are not part of the Official WEC Guidance. For example, contrary to Respondent's statement, the Official WEC Guidance does not suggest that voters may be "indefinitely confined as a result of the COVID-19 pandemic and declared public health emergency." *See* (App.33); *compare* (App.43-45).

8. Respondents Assert That Their Statements on the Indefinitely Confined Voter Issue Were Consistent With Wisconsin Law.

Respondents maintain that "all of the guidance provided by the Clerk was consistent with state law." (Resp. at 2, 5). Respondents argue: "None of the guidance given by the Clerk regarding the indefinitely confined provision was inconsistent with state law or the guidance given by WEC." (Resp. at 6). They further assert that the Clerk's statements "did not say anything that was directly contrary to state law or WEC guidance." (Resp. at 24).

9. The Erroneous Pronouncements Concerning the Indefinitely Confined Voter Issue Affected the Election.

The statements of the Dane County Clerk and those of the Milwaukee County Clerk presumably had a significant impact on the April 7 election. There are 57 municipalities within Dane County and 19 municipalities within Milwaukee County. https://www.countyofdane.com/municipalities); (App.46); https://county.milwaukee.gov/EN/Municipalities . By population, Dane and Milwaukee Counties are the two largest counties in Wisconsin. *See* https://www.wisconsin-demographics.com/counties_by_population

Unofficially, of all the votes cast in the election, 72% were by absentee ballot. (App.51; App.54).[2] Of the 1,296,243 total absentee ballot applications received in the April 7 election, 382,898 of them were received from Dane County and Milwaukee County combined. (App.52-54). That is, 29.5% of all absentee ballot applications in the election came from Dane County or Milwaukee County. (*Id.*) Of the absentee ballots actually voted, a total of 1,117,328 absentee ballots were actually returned in the April 7th election. (App.54). Of those, a total of 324,077 returned absentee ballots were from Dane County and Milwaukee County combined. (App.52, 53). Thus, 29% of all absentee ballots cast in the April 7th election were from Dane County and Milwaukee County. *See* (App.52-54).

Absentee voting is a three-step process. First, voters send or submit an absentee ballot application; second, the municipality then sends out the requested absentee ballots; and finally, if the voter chooses, the absentee ballot is completed and sent back to be counted in the election. In the April 7 election, a very large percentage of voters returned

[2] A total of 1,551,711 votes were cast, of which 1,117,328 were votes by absentee ballot. (App.51; App.54).

their absentee ballots. In Dane County, 86.94% of absentee ballots sent to voters were sent back to be counted in the election. (App.52). Milwaukee County similarly had a substantial return rate, with 83.22% of all absentee ballots returned by voters. (App.53).

STANDARD OF REVIEW

This action presents issues of statutory construction, which are determined de novo by the Court. *Moustakis v. State of Wis. Dep't of Justice*, 2016 WL 42, ¶ 16, 368 Wis. 2d 677, 880 N.W.2d 142. The Court decides those issues without deference to WEC's interpretation of the statutes at hand. The Court will decide the interpretation of the statutes separate and apart from the Official WEC Guidance. *See Lamar Cent. Outdoor, LLC v. Div. of Hearings & Appeals*, 2019 WI 109, ¶ 9, 389 Wis. 2d 486, 936 N.W.2d 573 ("[W]e 'accord no deference to the agency's interpretation of law.' § 227.57(11)"); *see also Myers v. Wisconsin Dep't of Nat. Res.*, 2019 WI 5, ¶ 17, 385 Wis. 2d 176, 922 N.W.2d 47 ("We have ended our practice of deferring to administrative agencies' conclusions of law. *Tetra Tech EC, Inc. v. DOR*, 2018 WI 75, ¶ 3, 382 Wis. 2d 496, 914 N.W.2d 21.")

Additionally, by statute, the WEC is required to modify and update its guidance to reflect the decision of this Court. Wis. Stat. § 5.05(5t) ("Within 2 months following the publication of a decision of a state or federal court that is binding on the commission and this state, the commission shall issue updated guidance or formal advisory opinions ....")

ARGUMENT

This original action presents issues of compelling statewide concern involving the April 7 election and the rules that govern the conduct of elections in Wisconsin. The failure to comply with those rules by government officials with actual or apparent authority to administer the election can have detrimental consequences on the fairness of the election and the validity of votes that are cast in contravention of those rules. If what Respondents have done by their "Stipulation" is to concede judgment, which Respondents would not oppose, the Court should grant such judgment. The Court should award the judgment requested herein.

Respondents concede that they lacked authority to issue an interpretation of Wisconsin's election law. They also concede that Emergency Order #12, the Safer at Home Order, does not authorize all Wisconsin voters to vote absentee

without a photo ID regardless of whether they are actually "indefinitely confined" or whether they are actually suffering a physical illness, infirmity, or disability.

This action also presents the question whether the Clerk's statements concerning the use of indefinitely confined voter status to obtain an absentee ballot were consistent with Wis. Stats. §§ 6.86 and 6.87. Respondents contend that their statements were "consistent" with the statutes.

On the contrary, Respondents' statements concerning Sections 6.86 and 6.87 were inconsistent with the statutes. Respondents advised voters that they could apply for an absentee ballot on the basis of "indefinitely confined" elector status, Section 6.86(2)(a), even where the elector was not indefinitely confined because of "age, physical illness or infirmity" or indefinite "disability." Respondents improperly advised voters that they could claim "indefinitely confined" voter status as a result of COVID-19, regardless whether the voter was actually physically ill, infirm, or disabled.

These broadly distributed statements certainly lead to voter confusion and caused some voters to obtain and vote absentee ballots by means of an erroneous indefinite confinement certification. To remedy this error, the Court

should direct the Clerk to take corrective action to communicate with voters so that improperly certified voters are removed from the absentee voter rolls.

The Court properly granted this original action to decide these important issues of substantial statewide concern.

I. The Absentee Ballot Rules, Including the Indefinitely Confined Voter Exception to Voter ID, Are Strictly Applied.

This action presents issues concerning the Clerk's application of the absentee ballot rules and voter ID requirement in the context of the administration of the April 7 election. Part I first discusses the system for election administration in Wisconsin, and then turns to the applicable rules.

A. Municipal Clerks Administer Elections in Wisconsin.

In Wisconsin, elections are administered by municipal clerks for each municipality holding an election. Under Wis. Stat. § 7.15(1), each "municipal clerk has charge and supervision of elections and registration in the municipality." Among the duties of municipal clerks is to prepare and send official absentee ballots to each requestor who has requested a

ballot consistent with statute. *See Coleman v. Cty. of Racine*, No. 16-cv-892, 2017 WL 3172543, at *2 (E.D. Wis. July 26, 2017) (County clerks are responsible for "administering elections"); Wis. Stat. § 59.23(2)(i) (County clerks are charged with "perform[ing] all duties that are imposed" on them "in relation to the preparation and distribution of ballots and the canvass and return of votes at general, judicial, and special elections.")

Wisconsin's election system is decentralized, administered on a municipality-by-municipality basis under uniform state election laws. Jenny Peek, "From Kitchen Tables To Town Halls, How Municipal Clerks Power Wisconsin's Elections," https://www.wpr.org/kitchen-tables-town-halls-how-municipal-clerks-power-wisconsins-elections ; *see also* Edward B. Foley, Steven F. Huefner, Daniel P. Tokaji, Nathan A. Cemenska, "From Registration to Recounts: The Election Ecosystems of Five Midwestern States," Chapter 6 ("Wisconsin's Election Ecosystem") (2007).[3]

[3] Available at https://moritzlaw.osu.edu/electionlaw/projects/registration-to-recounts/chapter6_111-135.pdf

The WEC has responsibility for the administration of the election laws, chapters 5 to 10 and 12 of the Wisconsin Statutes. Wis. Stat. § 5.05(2w). WEC is an administrative agency that provides guidance concerning elections. That guidance must be updated when courts issue binding decisions regarding Wisconsin election laws. *See* Wis. Stat. § 5.05(5t). Section 5.05(7), Wis. Stats., requires WEC to provide education opportunities to election clerks across the state to, among other things, "promote uniform procedures." Wisconsin Statute Section 6.869 requires "uniform instructions" for absentee ballots. *See also* WEC, "Frequently Asked Questions," at https://elections.wi.gov/faq

Chapter 6 of the Wisconsin Statutes, governing "Electors," contains requirements for voting, including who may vote (Subch. I), voter registration (Subch. III), voting (Subch. III), voting absentee (Subch. IV), and challenging electors (Subch. V). At certain points in the process, voters are required to provide proof of identification, such as to vote in person, or to obtain an absentee ballot. Proof of identification includes a state-issued driver's license or a state-issued identification card. Wis. Stat. § 5.02(6m), (16c).

B. Voting by Absentee Ballot is a "Privilege," the Statutory Requirements for Which are "Mandatory" and Thus Strictly Applied.

The Wisconsin Legislature expressly stated its intent concerning the interpretation of election laws governing absentee ballots. Subchapter IV, which governs "Voting Absentee," sets out a rule of "Construction." Wis. Stat. § 6.84. Section 6.84(1) recognizes that voting is a "constitutional right," while voting by absentee ballot is a "privilege" and such voting is subject to potential fraud and abuse:

> **(1) Legislative policy.** The legislature finds that voting is a constitutional right, the vigorous exercise of which should be strongly encouraged. In contrast, voting by absentee ballot is a privilege exercised wholly outside the traditional safeguards of the polling place. The legislature finds that the privilege of voting by absentee ballot must be carefully regulated to prevent the potential for fraud or abuse; to prevent overzealous solicitation of absent electors who may prefer not to participate in an election; to prevent undue influence on an absent elector to vote for or against a candidate or to cast a particular vote in a referendum; or other similar abuses.

Wis. Stat. § 6.84(1) (emphasis added).

The Legislature finds that the "privilege" of voting by absentee ballot "must be carefully regulated." (*Id.*) Section 6.84(2) thus includes a rule of "Interpretation." The rule is

that Wis. Stat. § 6.86 and 6.87(3) to (7) "shall be construed as mandatory" "with respect to matters relating to the absentee ballot process." Wis. Stat. § 6.84(2) (emphasis added). Therefore, all requirements of Section 6.86, including Subsection (2)(a) concerning indefinitely confined voters, are "mandatory." Thus, they must be strictly applied. *See State ex rel. Ahlgrimm v. State Elections Bd.*, 82 Wis. 2d 585, 595-96, 263 N.W.2d 152 (1978) (Strict compliance is required for a mandatory election statute; substantial compliance is sufficient for a directory statute.); *Petition of Anderson*, 12 Wis. 2d 530, 533–34, 107 N.W.2d 496 (1961) (Mandatory election statutes must be strictly complied with.); *Schaut v. Joint Sch. Dist. No. 6, Towns of Lena & Little River*, 191 Wis. 104, 210 N.W. 270, 272 (1926) ("mandatory" statutes "must be strictly complied with").[4]

Noncompliance with these mandatory requirements leads to voiding the vote: "Ballots counted in contravention of

[4] *See In re Chairman in Town of Worcester*, 29 Wis. 2d 674, 681, 139 N.W.2d 557 (1966) ("'The difference between mandatory and directory provisions of election statutes lies in the consequence of nonobservance: An act done in violation of a mandatory provision is void . . . .'"); *Clapp v. Joint Sch. Dist. No. 1 of Villages of Hammond & Roberts*, 21 Wis. 2d 473, 479, 481, 124 N.W.2d 678 (1963) (Where statutory provisions relating to elections are directory rather than mandatory, substantial compliance therewith is sufficient.) ; *Matter of Hayden*, 105 Wis. 2d 468, 483, 313 N.W.2d 869, 876 (Ct. App. 1981) (absentee ballot case; "Strict compliance with a directory statute is not required.")

the procedures specified in those provisions may not be included in the certified result of any election." Wis. Stat. § 6.84(2).

C. A Photo ID is Required to Request an Absentee Ballot, Subject to Specific Limited Exceptions.

Under Wisconsin election laws, an eligible elector must present documentary proof of ID to register to vote and vote. Wis. Stats. §§ 6.79(2)(a), 6.87(1). Wisconsin requires photo ID for absentee voting. Wis. Stats. §§ 6.86(1)(ac), (ar), 6.87(1). To obtain an absentee ballot, the voter must provide photo ID along with the application for an absentee ballot. (*Id.*); *see also* (App.60-61) (Form EL-121, Wisconsin Application for Absentee Ballot).

Wisconsin law provides certain exceptions to these requirements. Relevant here, the photo ID requirements do not apply to an absentee voter "who is indefinitely confined because of age, physical illness or infirmity or is disabled for an indefinite period." Wis. Stat. § 6.86(2)(a). A voter who meets that definition "may by signing a statement to that effect require that an absentee ballot be sent to the elector automatically for every election." (*Id.*) And, "if the absentee elector has applied for and qualified to receive absentee

ballots automatically" under Section 6.86(2)(a), "the elector may, in lieu of providing proof of identification, submit with his or her absentee ballot a statement … which contains the name and address of the elector and verifies that the name and address are correct." Wis. Stat. § 6.87(4)(b)2.

D. The Words of the Indefinitely Confined Voter Exception are Plain and Unambiguous.

Section 6.86(2)(a), in conjunction with Section 6.87(4)(b)2., excuses an absentee voter from providing a photo ID if the voter qualifies to request an absentee ballot under Section 6.86(2)(a).

The interpretation of a statute must begin with the words of the statute itself, in their context. *Sorenson v. Batchelder*, 2016 WI 34, ¶ 11, 368 Wis. 2d 140, 885 N.W.2d 362 ("[S]tatutory interpretation 'begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.'") (quoting *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis.2d 633, 681 N.W.2d 110).

Wisconsin Statute Section 6.86(2)(a) provides:

> (2)(a) <u>An elector who is indefinitely confined because of age, physical illness or infirmity or is disabled for an indefinite period</u> may by

> signing a statement to that effect require that an absentee ballot be sent to the elector automatically for every election. The application form and instructions shall be prescribed by the commission, and furnished upon request to any elector by each municipality. The envelope containing the absentee ballot shall be clearly marked as not forwardable. If any elector is no longer indefinitely confined, the elector shall so notify the municipal clerk.

(Emphasis added).

The person requesting an absentee ballot must be an elector, that is a person qualified to vote.[5] The elector must sign "a statement" attesting that he or she "is indefinitely confined because of age, physical illness or infirmity or is disabled for an indefinite period." Wis. Stat. § 6.86(2)(a).

The statute thus sets out two conditions: the absentee voter must be "elderly, infirm or disabled and indefinitely confined." *Frank v. Walker*, 17 F. Supp. 3d 837, 844 (E.D. Wis. Apr 29, 2014) (emphasis added), *rev'd on other grounds*, 768 F.3d 744 (7th Cir. 2014). Under the statute, the voter must be "indefinitely confined" because of age, physical illness, or infirmity or confined due to a disability.

[5] "Elector" means a person who is qualified to vote under Wisconsin law. Wis. Stat. §§ 6.02, 6.10. A person is qualified to vote who is 18 years old or older, and who has resided in the voting ward for the requisite number of days before the election. Wis. Stat. § 6.02; Wis. Stat. § 6.10.

The words "indefinitely confined," "age," "physical illness," "infirmity," and "disability" are not defined by the statute. A dictionary can be consulted to confirm the meaning of these commonly used words. *See State v. McKellips*, 2016 WI 51, ¶¶ 32-33, 369 Wis. 2d 437, 881 N.W.2d 258 (The Court applies "the ordinary and accepted meaning of [a statutory] term unless it has a technical or special definition. *See State ex rel. Kalal*, [2004 WI 58], ¶ 45."). In doing so, we may use a dictionary to establish the common meaning of an undefined statutory term.")

1. The Voter Must Be Indefinitely Confined.

An absentee ballot may be requested on this basis if the voter is, him or herself, "indefinitely confined" because of physical illness, infirmity, or age. The statute provides: "An elector who is indefinitely confined because of . . . ."

To meet these criteria, the voter must be "confined." That means the voter is housebound – the voter cannot leave home. The dictionary defines "confined" to mean "limited to a particular location." *See* https://www.merriam-webster.com/dictionary/confined "Confined" is also used to describe "housebound." https://www.merriam-

webster.com/dictionary/housebound (Definition of housebound: "confined to the house"). Another dictionary defines "confined" to mean "unable to leave a place because of illness, imprisonment, etc." https://www.dictionary.com/browse/confined

Further, to claim "indefinitely confined" status, the voter's "confinement" must be "indefinite." "Indefinite" means "not definite; without a fixed or specified limit; unlimited."[6]

On the issue of indefinitely "confined," the Official WEC Guidance does not define "confined." It simply notes that this confinement need not be "permanent" and it does not require "total inability to travel outside home." (App.43).

However, other WEC publications incorrectly state that "indefinitely confined" "mean[s]" the voter has "a difficult time getting to the polls."[7] This misstates the

[6] https://www.dictionary.com/browse/indefinitely; *see also* https://www.merriam-webster.com/dictionary/indefinitely ("indefinitely" means "having no exact limits").

[7] *See* WEC, "I want to vote absentee," at https://elections.wi.gov/voters/absentee ("Voters who are indefinitely confined, meaning they have a difficult time getting to the polls due to age, illness, infirmity, or disability, may request that a ballot be automatically sent to them for each election."). WEC, "Elderly Voters and Voters with Disabilities - Guide to Voting in Wisconsin," at https://elections.wi.gov/index.php/node/3614 ("Voters who have a hard time getting to the polls due to age, illness, infirmity or disability can request to receive and absentee ballot for every election.")

statutory requirement. The voter must be "confined," not merely have challenges in getting to the polls. WEC's statements (*see* footnote 7) do not accurately set forth the statutory requirements and they should be corrected to make them consistent with the statute.

2. The Voter's Indefinite Confinement Must Be Because of the Voter's Age, Physical Illness, Infirmity, or Disability.

A voter may request an absentee ballot under Wis. Stat. § 6.86(2)(a) only if the voter is confined to a particular location for an unlimited time period, "because of" the voter's age, physical illness, or infirmity, or because the voter is "disabled" for an indefinite period. The voter must be indefinitely confined because of one of these reasons.

For example, the voter must be confined because the voter is physically ill, meaning the voter is physically sick, and that illness causes the voter to be indefinitely confined. "Physical" means "of or relating to the body." *https://www.merriam-webster.com/dictionary/physical* ; *https://www.dictionary.com/browse/physical* "Illness" means "sickness," "an unhealthy condition of body." *https://www.merriam-webster.com/dictionary/illness*; *see also*

https://www.dictionary.com/browse/illness ("illness" means "unhealthy condition; poor health; indisposition; sickness.")

Alternatively, to obtain an absentee ballot under Subsection (2)(a), the voter must be indefinitely confined because of the voter's "infirmity." The word "infirmity" means "feeble" or "frail[]." https://www.merriam-webster.com/dictionary/infirmity. Another dictionary defines "infirmity" to mean "a physical weakness or ailment" or "lack of strength."[8] It is often associated with age.[9]

Likewise, Subsection (2)(a) applies if the voter is indefinitely confined because of the voter's "age." For example, due to the voter's advanced age, he or she is unable to leave home.

An absentee ballot also may be requested under Subsection (2)(a) if the voter is "disabled" for an "indefinite period." The word "disabled" means "impaired or limited by a physical, mental, cognitive, or developmental condition: affected by disability" or "incapacitated by illness or injury." https://www.merriam-webster.com/dictionary/disabled. *See also* https://www.dictionary.com/browse/disabled

[8] "Infirmity," defined at https://www.dictionary.com/browse/infirmity

[9] *See id.* ("the infirmities of age.")

("disabled" means "physically or mentally impaired, injured, or incapacitated.") The Official WEC Guidance cites a voter with a "broken leg" or "recovering from surgery" as examples of indefinite illnesses or disabilities. (App.44).

II. Respondents' Statements Were Inconsistent With Section 6.86(2)(a).

Given that Wisconsin's elections are administered by municipal clerks in a decentralized election system, it is vitally important that municipal clerks such as the Dane County Clerk act at all times in conformity with the election laws. It is equally important that such persons accurately communicate the requirements of the election laws. Local clerks cannot interpret the law as they wish, and declare their own positions on the requirements of election law, without regard to what the law actually provides. To permit municipal clerks to effectively freelance in this regard would lead to chaos and destroy the uniformity required by the election laws.

A. Wisconsin's Election Laws Must Be Uniformly Communicated and Applied to Avoid Chaos and Confusion.

The Wisconsin election laws create uniformity and clarity by setting forth the mandatory requirements for

registration and voting. Without uniformity, there would be mass voter confusion, disenfranchisement,[10] and even tacit enabling of voter fraud.

As recognized by the Legislature in Wis. Stat. § 6.84(1), uniformity and speaking with one voice are critically important in the area of absentee ballots, given the danger of voter fraud. *See* Building Confidence in U.S. Elections: Report of the Commission on Federal Election Reform at 46 (2005) ("Absentee ballots remain the largest source of potential voter fraud."), available at https://www.legislationline.org/download/id/1472/file/3b50795b2d0374cbef5c29766256.pdf .

Indeed, Wisconsin Statute Section 6.869 provides that the WEC "shall prescribe uniform instructions for municipalities to provide to absentee electors. . . . The instructions shall include information concerning whether proof of identification is required to be presented or elected."

Voting in the April 7 election was particularly challenging given the COVID-19 pandemic and the Safer at

[10] There could be disenfranchisement if an absentee ballot application was made in reliance upon Respondents' statements, and contrary to the statutory requirements, resulting in an invalid vote cast by the ballot, which is subject to being set aside. Wis. Stat. § 6.84(2).

Home directives of Emergency Order #12. Voters were concerned about following the Safer at Home Order and observing the recommendations for social distancing to reduce the spread of COVID-19. Compounding those extraordinary circumstances was the rapidly changing legal environment surrounding the election in the weeks and days before the election. Statutory voter registration and absentee ballot deadlines were modified by a federal court, with some modifications surviving further challenge on appeal and some reversed by higher courts in the days before the election.[11] Further, the day before the election, Governor Evers issued an Executive Order #74 moving the election to June.[12] Later that day, however, this Court enjoined that order as invalid so that the election proceeded on April 7 as scheduled. *See* https://www.wicourts.gov/news/docs/2020AP608.pdf

[11] *See* U.S. Supreme Court April 6th decision granting emergency stay, at https://www.supremecourt.gov/opinions/19pdf/19a1016_o759.pdf (to be counted, requiring mail-in ballots to be postmarked by April 7; allowing absentee ballots to be mailed after Election Day would "fundamentally alter[] the nature of the election"). On April 3rd, the Seventh Circuit had declined to grant an emergency stay on that ground. That Court stayed the district court's holding that would have allowed non-compliance with the witness requirement for absentee ballots for certain voters. https://elections.wi.gov/sites/elections.wi.gov/files/2020-04/7th%20Circuit%20Order%20on%20Stay%20-%207pm.pdf

[12] Executive Order #74 https://evers.wi.gov/Documents/COVID19/EO074-SuspendingInPersonVotingAndSpecialSession2.pdf

Given this context, it is important for the Court to reaffirm the principle of uniformity of Wisconsin's election laws, and in this instance, the requirements for absentee ballots, specifically the "indefinitely confined" voter provision, Wis. Stat. § 6.86(2)(a).

B. Respondents' Statements Concerning Indefinitely Confined Voter Status.

On May 25, 2020, less than two weeks before Election Day, Respondent McDonell issued a pronouncement that voters could broadly declare themselves to be "indefinitely confined" persons, as a method to obtain an absentee ballot but to not have to provide the voter's photo ID:

> I have informed Dane County Municipal Clerks that during this emergency and based on the Governors Stay at Home order I am declaring all Dane County voters may indicate as needed that they are indefinitely confined due to illness. This declaration will make it easier for Dane County voters to participate in this election by mail in these difficult times. I urge all voters who request a ballot and have trouble presenting [a] valid ID to indicate that they are indefinitely confined.
>
> People are reluctant to check the box that says they are indefinitely confined but this is a pandemic. . . .

(App.25-29) (McDonell Facebook Post (Mar. 25, 2020).) (emphasis added). The Clerk's statement then gives specific

instructions on how to request an absentee ballot. (*Id.*) Later the same day, the Milwaukee County Clerk issued a similar pronouncement. (App.30-31) (Christenson Facebook Post (Mar. 25, 2020).)

After the WEC met on March 27 to consider the Proposed Guidance on the "indefinitely confined" voter issue, and adopted the Official WEC Guidance, which demonstrates that the Clerk's pronouncement and instructions were incorrect (*see* (App.43-45)), the Dane County Clerk later doubled-down on his error, saying in a public Facebook post on March 27 that he was "[g]rateful" that the WEC "voted to agree with me" concerning his original advice. (App.32); (McDonell Facebook Post (Mar. 27, 2020)); (Resp. at 18).

Later that night, the Clerk again compounded the confusion, posting the two adopted points of the Official WEC Guidance, but connecting the issue of "indefinitely confined" status to COVID-19. The Clerk's statement announced:

> More from me on this topic. The Wisconsin Election Commission met on Friday [March 27] and issued further guidance to clarify the purpose and proper use of the indefinitely confined status under Wis. Stats. s. 6.86(2) as follows:

1. Designation of indefinitely confined status is for each individual voter to make based upon their current circumstances. It does not require permanent or total inability to travel outside of the residence. The designation is appropriate for electors who are indefinitely confined because of age, physical illness or infirmity or are disabled for an indefinite period of time.

2. Indefinitely confined status shall not be used by electors simply as a means to avoid the photo ID requirement without regard to whether they are indefinitely confined because of age, physical illness, infirmity, or disability.

(App.33-34); (Resp. at 18-19). The Clerk then advised:

> Voters should follow this guidance when determining whether they qualify to claim that <u>they are indefinitely confined as a result of the COVID-19 pandemic and declared public health emergency.</u>

(App.33-34); (Resp. at 18-19) (emphasis added).

This pronouncement suggests that "the COVID-19 pandemic" and public health emergency provide the voter a basis to certify him or herself to be "indefinitely confined" because of "physical illness." The Clerk suggested that voters could "claim" that they are "indefinitely confined" "as a result of" COVID-19. (App.33-34).

C. Respondents' Statements Were Contrary to Wisconsin Law.

In these statements, Respondents declared that all Wisconsin voters—regardless of whether they are actually

"indefinitely confined" or actually suffering a "physical illness or infirmity" due to COVID-19—could vote absentee in the April 7 election without presenting a photo ID. The Clerk's March 25th statement also suggests that the determination whether the voter is "indefinitely confined" may turn upon whether the voter has the ability to obtain a photo ID or a scanned or photographic copy of the ID.

Respondents' statements were contrary to Wis. Stats. §§ 6.86(2)(a and 6.87 for several reasons. Respondents' advice was improper because it misstates the determination for indefinitely confined status and it effectively re-writes the statutes.

1. Voters Cannot Be Advised to Claim Indefinitely Confined Status on a Blanket Basis.

The Clerk advised that "all Dane County voters" could certify themselves to be "indefinitely confined" on the basis of the COVID-19 pandemic and the Safer at Home Order without each voter determining whether he or she truly meets the requirements for an indefinitely confined voter under Wis. Stat. § 6.86(2)(a). *See* (App.25). This was contrary to the statute.

The "indefinitely confined" determination is for each elector to make, and the elector him or herself must be indefinitely confined because of his or her own age, physical illness, or infirmity, or the voter must be indefinitely disabled.[13] As the Official WEC Guidance explains, that determination "is for each individual voter to make based upon their current circumstances."[14] (App.43). Under the statutes, voters "self-certify whether they meet the definition of indefinitely confined." (App.44). And, if the voter is "no longer indefinitely confined," the voter "shall so notify the municipal clerk. *Wis. Stat. § 6.86(2)(a).*" (App.45) (emphasis in original).

2. A Voter Who is Not Physically Ill, Infirm, or Disabled Cannot Claim the Exception Due to Other Persons' Illness.

Respondents' statements are contrary to law because they dispense with the requirement that the voter is indefinitely confined because of physical illness, age,

[13] The Official WEC Guidance states that when election clerks are contacted by voters who are indefinitely confined due to physical illness, age, infirmity, or disability, the clerk may make "the voter aware of the criteria for qualifying as an indefinitely confined elector." (App.44-45). Voters then must determine whether they personally meet the criteria.

[14] The Official WEC Guidance observes: "During the current public health crisis, many voters of a certain age or in at-risk populations may meet that standard of indefinitely confined until the crisis abates." (App.44).

infirmity, or disability. To obtain a ballot under Subsection (2)(a), the voter must be physically ill, infirm, or disabled, or unable to leave home due to age. If the individual voter meets none of these criteria, the voter cannot properly certify him or herself an indefinitely confined person.

Respondents' statements disregard the plain language of § 6.86(2)(a), allowing a voter to claim indefinitely confined status because of the COVID-19 pandemic. A voter cannot claim this status out of a fear of exposure to another's illness and to avoid becoming ill. The voter must be indefinitely confined due to the voter's own age, illness, infirmity, or disability.

This tracks the plain language of Subsection (2)(a). The statute applies to an elector "who is indefinitely confined because of age, physical illness or infirmity . . . ." Wis. Stat. § 6.86(2)(a). This necessarily means the voter's own age, physical illness, or infirmity. For example, a voter could not logically be indefinitely confined due to another person's "age" or "infirmity."

The context of the statute makes plain that it exempts an individual elector because the elector suffers from "physical illness or infirmity"—not because other individuals

are afflicted with some malady. Moreover, this phrase must be read in context with its statutory partners: "age" and "disability." *See Bank Mut. v. S.J. Boyer Const., Inc.*, 2010 WI 74, ¶ 24, 326 Wis. 2d 521, 785 N.W.2d 462 ("We do not read the text of a statute in isolation, but look at the overall context in which it is used. When looking at the context, we read the text as part of a whole; in relation to the language of surrounding or closely-related statutes.") (internal quotation and citation omitted). It would make no sense to read the statute such that the age or disability of some other individual could excuse an elector from the State's photo ID requirement. Thus, the statute cannot be read in that manner as to "physical illness or infirmity," especially given the Legislature's rule of strict application of the absentee ballot laws. *See* Wis. Stat. § 6.84(2).

Nor can individuals certify that they are "physically ill[] or infirm[]" due to the pandemic nature of COVID-19. Wis. Stat. § 6.86(2)(a). This interpretation suffers from the same flaw; it would not comport with the express statutory language requiring that the elector himself or herself suffer from a "physical illness or infirmity." To construe the statute to allow every voter to satisfy this condition by relying upon

other persons' illnesses or infirmities, would be to read the condition out of the statute entirely. That construction of the statute thus fails, *see Marotz v. Hallman*, 2007 WI 89, ¶ 18, 302 Wis. 2d 428, 734 N.W.2d 411 ("In interpreting a statute, courts give effect to every word so that no portion of the statute is rendered superfluous.")

3. The Safer at Home Order Does Not Cause Voters to be "Confined."

Also, Respondent's statements wrongly assume that all voters are "indefinitely confined" due to the Safer at Home Order. "Confined" means "housebound," and "limited to a particular location." *See* pages 33 to 35, above. Voters are not "confined" by Emergency Order #12. The Order contains numerous exceptions: to obtain or participate in essential governmental functions, to buy groceries or household products or supplies from hardware stores, to go to the bank, to pick up take-out meals, to perform work at various types of businesses and locations, to obtain services from health care providers, and to engage in outdoor activity (including walking, biking, hiking, or running). (App.10, 13, 15-22); (EO #12 §§ 1, 8, 11, 12, 13). Any person who has these

capabilities is not "confined" within the meaning of the statute. Respondents were wrong to contend otherwise.

As the Wisconsin Legislative Reference Bureau recently concluded, "Emergency Order 12 by its very terms does not render all Wisconsin residents indefinitely confined." *See* (App.59) (Memorandum, Wisconsin Legislative Reference Bureau, "Questions Related to 'Indefinitely Confined' Absentee Ballots," *at* 5 (Mar. 26, 2020)), available at http://legis.wisconsin.gov/senate/13/fitzgerald/media/1401/absenteeballotquestions_fitzgerald_03262020.pdf. Thus, municipal clerks had no legal authority "to encourage voters to claim to be indefinitely confined because of the governor's 'safer at home' order as a way to avoid presenting voter identification when requesting an absentee ballot." (App.57) (*id.* at 3).

4. Inability to Obtain a Scanned Copy of a Photo ID Does Not Render the Voter Indefinitely Confined.

Respondents argue that the Clerk's statements were "not inconsistent with the statute or WEC's guidance." (Resp. at 34-41). On the application of "indefinitely confined due to age, physical illness or infirmity," Respondents

suggest that the interpretation of "indefinitely confined" can turn on whether the voter should leave their home to obtain a copy of their ID to submit an absentee ballot. (Resp. at 38).

Section 6.86(2)(a) does not permit an elector to claim "indefinitely confined" status because the circumstances make it difficult to obtain a copy of the elector's photo ID and to provide it along with the absentee ballot application.

The statute makes no such connection. The indefinite confinement must be because of illness, infirmity, or disability. An elector who is not ill, infirm, or disabled, but who is unable to obtain a scanned copy of the voter's photo ID, does not meet the criteria of Section 6.86(2)(a). Subsection (2)(a) does not grant an exception on the basis of inability to obtain a copy of a photo ID.

Indeed, the WEC apparently agreed it would be improper to suggest any such connection to municipal clerks or voters. The WEC declined to adopt Proposed Guidance that drew a connection between claiming "indefinitely confined" status and the ability to obtain a scanned copy of a photo ID. *See* pages 16 to 17, above. Accordingly, the Official WEC Guidance on Wis. Stat. § 6.86(2)(a) does not

draw any such connection. (App.43-45); *see* pages 13-17, above.

III. The Court Should Require Corrective Action to Remedy the Harm Caused by the Clerk's Erroneous Statements.

The Clerk's erroneous statements on March 25 encouraging voters to broadly claim indefinitely confined status on the basis of COVID-19 and his subsequent statements of March 27 reaffirming his position were contrary to law and likely affected the election process, causing voters to obtain absentee ballots on that basis when they were not ill, aged, infirm, or disabled. The statements caused at least some voters[15] to falsely certify that they are indefinitely confined because of illness, age, infirmity, or disability. Such certifications are contrary to law. Moreover, they are ongoing, as these voters "automatically" will be sent absentee ballots for future elections so long as they voted absentee in the April 7 election. Wis. Stat. § 6.86(2)(a), (b); *see* (App.60) (absentee ballot application form). Thus, they will affect

[15] Comments on the Clerk's Facebook posts demonstrate that the statements were received and accepted by the public. *See* (App.25-28); (App.32); (App.34); *see also* (App.30-31) (comments on Milwaukee County Clerk's similar Facebook announcement).

future elections unless and until the erroneous certifications are withdrawn.

The Court should require the Clerk to undertake corrective action to remedy these errors and to ensure that improperly certified persons are removed from each municipality's indefinitely confined voter lists.

A. To Falsely Claim Indefinite Confinement is a Criminal Violation and Can Invalidate the Ballot.

Voters cannot be advised to act contrary to election law to make voting easier, such as to avoid photo ID requirements. Respondents' erroneous statements could have and likely did lead to voter confusion in the weeks before Election Day, and they did not help minimize chaos from the unique circumstances caused by the COVID-19 pandemic and the rapidly changing election landscape due to the varied court rulings in the weeks and days before the election.

By statute, voters themselves make the determination of qualification for "indefinitely confined" status. The voter must "certify" in a statement in the absentee ballot application that the voter is indefinitely confined "because of" age,

physical illness, or infirmity, or is indefinitely disabled. (App.60)[16] (absentee ballot application form).

If the voter made that certification but he or she was not in fact physically ill, infirm, or disabled, that constitutes a false statement on the absentee ballot application. A false statement on an application for an absentee ballot is a crime, exposing the voter to a fine and potentially imprisonment. Wis. Stat. § 12.13(3)(i). Indeed, in the check-off for indefinitely confined status on the absentee ballot application, immediately following the certification of "indefinitely confined because of age, illness, infirmity or disability" is the warning that: *"Anyone who makes false statements in order to obtain an absentee ballot may be fined not more than $1,000 or imprisoned not more than 6 months or both. Wis. Stats. §§ 12.13(3)(i), 12.60(1)(b).*" (App.60) (emphasis in original).

Requesting an absentee ballot on the basis of indefinitely confined status when the voter is not indefinitely confined or physically ill, infirm, or disabled also could lead

[16] EL-121, Wisconsin Application for Absentee Ballot, available at https://elections.wi.gov/sites/elections.wi.gov/files/2020-03/EL-121%20Application%20for%20Absentee%20Ballot%20%282018-10%29.pdf

to disenfranchisement of the voter. It could lead to the ballot being invalidated. *See* Wis. Stat. § 6.84(2).

B. The Court Should Order Corrective Action to Remedy the Harm From the Clerk's Erroneous Statements and to Correct the Absentee Voter Rolls.

The Court should correct the Clerk's erroneous statements in a decision providing clarification and guidance to minimize the chances of similar confusion in future elections. These are not simply theoretical matters, as the effects of the Clerk's erroneous advice will be ongoing unless corrected. The Court should order the Clerk to undertake corrective measures to eliminate the harm and correct and update the absentee voter rolls.

Assuming that some number of voters followed the Clerk's pronouncements encouraging voters to claim indefinitely confined status on the basis of the COVID-19 pandemic even though they themselves were not physically ill, infirm, elderly, or disabled, returning an absentee ballot application claiming indefinite confinement, this means that there are voters incorrectly on the indefinitely confined voter lists of the 57 municipalities in Dane County. Those voters submitted applications for absentee ballots on the

"indefinitely confined" basis, and obtained absentee ballots without providing a photo ID, even though they were not physically ill, infirm, elderly, or disabled. As noted, claiming that status without a basis to do so constitutes a false certification in the ballot application, which is a violation of the Wisconsin Statutes. Further, all of these persons are now designated indefinitely confined voters, meaning that absentee ballots will be sent to them "automatically" for every future election if they voted by absentee ballot in the April 7 election. Wis. Stat. § 6.86(2)(a).[17]

Persons improperly certified as indefinitely confined voters may not be aware their certification was improper. The erroneous certifications should be addressed and remedied by requiring the Clerk to send a communication to indefinitely confined voters notifying them they are listed as an indefinitely confined voter. The communication should advise that only persons who are indefinitely confined because of their age, physical illness, or infirmity, or are

[17] If the absentee ballot obtained on an indefinitely confined voter certification was not returned by the voter in the election, then by statute the clerk must send a letter notifying the voter that his or her name will be removed from the absentee ballot mailing list unless a renewal absentee ballot application is submitted within 30 days of the election. Wis. Stat. § 6.86(2)(b).

indefinitely disabled, may obtain absentee ballots on the basis of indefinite confinement status. It should advise voters that if they are not presently indefinitely confined because of age, physical illness, or infirmity, and if they are not indefinitely disabled, they must send back a form so indicating so the voter can be removed from the indefinitely confined voter lists. The communication can advise that the voter may submit a new absentee voter application for future elections.

IV. Respondents Concede That They Did Not Have Authority to Issue Statements Inconsistent With Section 6.86(2)(a).

In this original action, Petitioners asked the Court to declare that:

(1) Respondents lack the authority to issue an interpretation of Wisconsin's election law allowing voters in Dane County to vote absentee without a photo ID; and

(2) Emergency Order #12, the Safer at Home Order, does not authorize all Wisconsin voters—regardless of whether they are actually "indefinitely confined" or actually suffering a "physical illness or infirmity" due to COVID-19 to vote absentee without a photo ID.

By their Stipulation, Respondents concede that these two propositions "are an accurate statement of the law."

(App.8) (4/2/2020 Stipulation at 2). Accordingly, the Court should issue a decision and enter judgment as requested in this action.

CONCLUSION

Petitioners request the Court to issue a decision applying the plain language of Wis. Stat. § 6.86(2)(a) to the undisputed facts of this action. In addition, Petitioners request the Court to enter judgment in this action ordering that:

1. Respondents' statements concerning the "indefinitely confined" language of Section 6.86(2)(a) were inconsistent with the plain language of that statute. An elector may not obtain an absentee ballot under Section 6.86(2)(a) if he or she is not "indefinitely confined because of age, physical illness or infirmity" and is not "disabled for an indefinite period." If an elector does not meet those criteria, the elector cannot obtain an absentee ballot under Section 6.86(2)(a) on the basis of the COVID-19 pandemic.

2. Respondents lack the authority to issue an interpretation of Wisconsin's election law allowing voters in Dane County to vote absentee without a photo ID.

3. Emergency Order #12, the Safer at Home Order, does not authorize all Wisconsin voters—regardless of whether they are actually "indefinitely confined" or actually suffering a "physical illness or infirmity" due to COVID-19—to vote absentee without a photo ID.

4. To remedy this error, the Clerk shall take corrective action to communicate with voters so that improperly certified voters are removed from the indefinitely confined voter lists.

Dated this 24th day of April, 2020.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced with a proportional serif font: Min. printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 10,237 words.

Dated this 24th day of April, 2020.

By: s/ Lisa M. Lawless

CERTIFICATE OF COMPLIANCE WITH RULE 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 § 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 24th day of April, 2020.

By: s/ Lisa M. Lawless

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum, if applicable: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 24th day of April, 2020.

By: s/ Lisa M. Lawless

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(13)

I certify that: I have submitted an electronic copy of this appendix, which complies with the requirements of § 809.19(13).

I further certify that: This electronic appendix is identical in content to the printed form of the appendix filed as of this date.

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

Dated this 24th day of April, 2020.

By: s/ Lisa M. Lawless

CERTIFICATION OF THIRD-PARTY COMMERCIAL DELIVERY AND CERTIFICATE OF SERVICE

I certify that on April 24, 2020, this brief and appendix were delivered to a third-party commercial carrier for delivery to the Clerk of the Supreme Court within 3 calendar days. I further certify that the brief and appendix were correctly addressed.

I certify that on April 24, 2020, I caused three copies of this brief and appendix to be mailed by first-class postage prepaid mail to counsel for the Respondents and the amicus party.

Dated this 24th day of April, 2020.

By: s/ Lisa M. Lawless

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