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**STATE OF WISCONSIN
SUPREME COURT**

**MARK JEFFERSON AND THE REPUBLICAN PARTY
OF WISCONSIN,
Petitioners,**

v.

Case No. 20 AP 0557-OA

**DANE COUNTY, WISCONSIN, AND
SCOTT MCDONELL, IN HIS OFFICIAL
CAPACITY AS DANE COUNTY CLERK,
Respondents.**

RESPONDENTS' BRIEF AND APPENDIX

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TABLE OF CONTENTS

<u>Description</u>	<u>Page</u>
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
STATEMENT ON ORAL ARGUMENT AND PUBLICATION.....	1
INTRODUCTION.....	1
STATEMENT OF THE CASE	4
ARGUMENT	16
I. THIS CASE IS MOOT AND SHOULD BE DISMISSED	16
II. THE PETITIONERS' THIRD ISSUE AND CLAIM FOR "CORRECTIVE ACTION" ARE NOT JUSTICIABLE.....	20
A. Petitioners' Remaining Claims Are Not Ripe For Adjudication.....	22
B. Dane County Is Not The Proper Party To Defend The Claim For Declaratory Judgment	26
III. THE PETITIONERS' REQUEST FOR CORRECTIVE ACTION IS UNSUPPORTIVE BY ANY FACTS IN THE RECORD.....	31
CONCLUSION	34

CERTIFICATION REGARDING LENGTH	36
CERTIFICATION REGARDING COMPLIANCE WITH § 809.19(12)	37
CERTIFICATION REGARDING APPENDIX	38
TABLE OF CONTENTS – APPENDIX	39

TABLE OF AUTHORITIES

<u>Wisconsin Cases</u>	<u>Page</u>
<i>Fort Howard Paper Co., v. Fort Howard Corp.</i> , 273 Wis. 2d 356, 77 N.W.2d 773 (1956)	17
<i>Malkowski v. Malkowski</i> , 52 Wis. 2d 731, 190 N.W.2d 924 (1971)	32
<i>Matter of Commitment of J.W.K.</i> , 2019 WI 54, 386 Wis. 2d 672, 927 N.W.2d 509	16
<i>Miller Brands-Milwaukee, Inc. v. Case</i> , 162 Wis. 2d 684, 470 N.W.2d 290 (1991)	21, 23, 27
<i>PRN Assocs. LLC v. DOA</i> , 2019 WI 53, 317 Wis. 2d 656, 766 N.W.2d 559	16
<i>Skowan v. Skowan</i> , 259 Wis. 17, 47 N.W. 326 (1951)	22
<i>State v. Waste Management of Wisconsin, Inc.</i> , 81 Wis. 2d 555, 261 N.W.2d 147 (1978) <i>Cert denied</i> , 439 U.S. 865, 99 S. Ct. 189 (1978)	31
<i>Waukesha Memorial Hospital, Inc. v. Baird</i> , 45 Wis. 2d 629, 173 N.W.2d 700 (1970)	21, 23-25
<i>Wisconsin Pharmaceutical Ass’n v. Lee</i> , 264 Wis. 325, 58 N.W.2d 700 (1952)	27-28

Wisconsin Statutes

Wis. Stat. § 5.05 (2017-2018)	3, 27
Wis. Stat. § 6.86 (2017-2018)	2, 10, 14-15, 20, 25-26, 28, 30, 34
Wis. Stat. § 806.04 (2017-2018)	22
Wis. Stat. § 806.06 (2017-2018)	29
Wis. Stat. § 809.19 (2017-2018)	32

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This case will meet the criteria for publication because a decision of the Supreme Court applying the doctrines of mootness and justiciability in the context of an original action will provide guidance on when it is appropriate to invoke or continue to invoke the court's original jurisdiction.

Oral argument is not requested. The application of the doctrine of mootness and justiciability to the circumstances of this case are clear. Because the Petitioners seek an advisory opinion, oral argument is not necessary on Petitioners' claims.

INTRODUCTION

This case presents a text book example mootness and should be dismissed. The Petition for Original Action sought a declaratory judgment on two issues:

- (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.

(Emergency Petition for Original Action, p.10) After this court took jurisdiction of this case, Dane County and Clerk McDonnell (“Clerk”) filed a Stipulation stating that the two propositions, as posed by the Petitioners, are accurate statements of the law. That should be the end of the matter.

Realizing that the case as pled was moot, the Petitioners now attempt to expand the scope of this case. They now want the court to issue an advisory opinion based upon hypothetical facts. Although acknowledging that the Wisconsin Election Commission (WEC) issued guidance stating “[d]esignation of indefinitely confined status is for each individual voter to make based upon their current circumstance,” the Petitioners now seek a blanket declaration regarding the application of Wis. Stat. § 6.86(2)(a). The Petitioners rely solely on speculation and cite to no facts in the record. This new argument is not ripe for judicial determination, seeks an advisory opinion, and should be dismissed.

The Petitioners also now for the first time seek “corrective action” to remedy an alleged harm for which they have no proof. The Petitioners make repeated assertions that the actions of the Clerk significantly impacted the election and that as a result an undisclosed number of voters cast absentee ballots in violation of state statute. Yet, they cite no facts to support these allegations. Rather they say “apparently” or “presumably” these things happened. The fact is they don’t have a shred of evidence that a single voter was influenced by the Clerk’s statement or more importantly that a single elector voted in violation of state statute as a result of those statements.

The 2020 Spring election is over. Any arguments regarding the indefinitely confined status as applied to future elections is strictly hypothetical. WEC is responsible for administering the state election laws and to provide guidance. Wis. Stat. § 5.05(1). WEC issued specific guidance regarding absentee ballots immediately prior to the spring election. The Clerk specifically posted on social media that this guidance should be followed. If the Petitioners are claiming that WEC

guidance is wrong, WEC is an indispensable party to this action. Otherwise, this court should defer to WEC for consideration of hypothetical questions regarding future elections.

STATEMENT OF THE CASE

The facts regarding the COVID-19 pandemic and the history of state Stay At Home Orders is well documented and need not be recited in detail here. Significantly, on March 24, 2020 the Secretary-designee of the Wisconsin Department of Health Services issued Emergency Order #12 “Safer At Home Order.” The provisions of that 16 page Order are well documented, but after extensive findings the basic provision of the Order stated “**Stay at home or place of residence.** All individuals present within the State of Wisconsin are ordered to stay home or at their place of residence...” (App., pp. 201-216) This order was in effect at the time of the spring election.

Immediately prior to the election it was a well-established fact that any person going out in the community may contract or carry the COVID-19 virus and infect anyone

they come in contact with. Indeed, the Surgeon General of the United States, Jerome Adams, M.D., stated on March 23, 2020: “Everyone needs to act as if they have the virus right now. So, test or no test, we need you all to understand you could be spreading it to someone else. Or you could be getting it from someone else. Stay at home.” (App., p. 217)

The Petitioners incorrectly claim that prior to March 27, 2020, the WEC did not issue any “pronouncements concerning the indefinitely confined voter status.” (Pet. Brief, p. 13) Indeed on March 23, 2020 the WEC issued guidance to Wisconsin County Clerks, Wisconsin Municipal Clerks, City of Milwaukee Election Commission and Milwaukee County Election Commission entitled “COVID-19 FAQs and Updates: Online Voter Registration, Absentee Voting, Envelopes, Sanitizer and Poll Worker Recruitment.” That guidance specifically addressed “Indefinitely Confined Absentee Applications” that stated:

WEC staff has received numerous questions from clerks about the increase in voters requesting absentee ballots as indefinitely confined. Wisconsin Statutes provide the option

for a voter to self-certify whether they meet the definition of indefinitely confined. The statutory definition of "age, illness, infirmity or disability" does not require any voter to meet a threshold for qualification and indefinitely confined status need not be permanent. A voter with a broken leg or one recovering from surgery may be temporarily indefinitely confined and may use that status when voting during that period of time.

We understand the concern over the use of indefinitely confined status and do not condone abuse of that option as it is an invaluable accommodation for many voters in Wisconsin. ***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.*** We have told clerks if they do not believe a voter understood the declaration they made when requesting an absentee ballot, they can contact the voter for confirmation of their status. They should do so using appropriate discretion as voters are still entitled to privacy concerning their medical and disability status. Any request for confirmation of indefinitely confined status should not be accusatory in nature.

There may be a need to do some review of the absentee voting rolls after this election to confirm voters who met the definition of indefinitely confined during the public health crisis would like to continue that status. WEC staff has already discussed this possibility and may be able to provide resources to assist clerks with these efforts.

(App., pp. 218-222) (emphasis added)

Two days later, on March 25, 2020, the Clerk posted a comment on Facebook that stated:

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*¹ 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. This feature in our law is here to help preserve everyone's right to vote.

The process works like this:

- A voter visit's myvote.wi.gov to request a ballot.

¹ The Petitioners have consistently ignored this "as needed" language which provides important context to the Clerk's Post.

- 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 no 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., p. 223) (emphasis added). In response to questions posted to his comments on Facebook, the Clerk responded as follows:

If you have an ID, please upload it if possible. Here is a good link:
<https://asgoeswisconsin.com>.

I am relying on my counsel. **I will defer to WEC. This is for the few, mostly seniors who are struggling to vote absentee and be safe.**

We are all “sick” which is the definition in law because we have no tests and we are forced to assume that everyone is sick including ourselves.

Regardless, if you can upload your photo by law you must. I have talked several voters through the process and they were successful. Others had no way to do it...

(App., pp. 224-226)(emphasis added).

WEC continued receiving many inquiries regarding the application of the indefinitely confined provisions to the COVID-19 pandemic and the increased risk of exposure. In response the WEC scheduled an emergency meeting on March 27, 2020 to consider this and other issues regarding the election. In preparation, WEC staff prepared a Memo regarding “Guidance Regarding Indefinitely Confined Voters.

(App., pp. 227-230) That Memo included the following:

It is important to note that indefinitely confined status does not require medical documentation and it does not require that the elector is completely restricted to their residence and unable to travel outside the residence. The statutory provision requires that the individual is “indefinitely confined because of age, physical illness or infirmity or is disabled for an indefinite period. . . .”

In recent weeks several organizations have publicized the option for electors to designate themselves as indefinitely confined in light of the public health circumstances. This week the Dane County Clerk and the Milwaukee County

Election Commission issued statements regarding this issue which drew increased attention to the indefinitely confined option. Staff has received several inquiries requesting confirmation of the WEC's guidance and whether the statements issued by Dane and Milwaukee Counties were consistent with the WEC's guidance.

In the opinion of WEC staff, the designation of indefinitely confined should be an individual designation left to each voter who must determine whether they are confined to their residence because of age, physical illness, infirmity or disability. The question is whether "because of physical illness" may include individuals who have not been diagnosed with COVID-19 and yet believe they are confined due to the potential for being exposed or exposed to others with the virus.

After extensive debate, WEC adopted the following guidance to clarify the purpose and proper use of the indefinitely confined status under Wis. Stat. § 6.86(2):

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.

That guidance was formally communicated to local election officials on March 29, 2020. (App., pp. 231-233)

Immediately following the WEC meeting, the Clerk posted on Facebook:

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.

As soon as the details of WEC's action were known on March 27th, the Clerk subsequently posted on Facebook:

More from me on this topic. The Wisconsin Election Commission met on Friday and issued further guidance to clarify the purpose and proper use of the indefinitely confined status under Wis. Stat. § 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.

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., p. 234)

The Petitioners filed an Emergency Petition for Original Action on March 27, 2020. That Petition specifically sought the following declaratory relief:

(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.

(Petition, p. 10) On April 1, 2020 the court entered an Order granting leave to commence an original action and

assuming jurisdiction of the case. In response, on April 2, 2020 Dane County filed a Stipulation As To Issues of Law Raised by Petitioners. That Stipulation stated “Dane County and the Dane County Clerk stipulate that the two propositions, as stated by the Petitioners are an accurate statement of the law.” (App. pp. 235-236).

Because the issues initially raised by the Petitioners were mooted by the County’s Stipulation, the Petitioners now attempt to recast this case and litigate the results of the spring election. The Petitioners now make multiple assertions in their Brief claiming the Clerk’s postings had a “significant impact” on the election, none of which are supported by facts. They include the following:

- As a result of these widely distributed statements, voters submitted applications for absentee ballots without providing a photo ID, even though they were not themselves physically ill, infirm, elderly, or disabled. (Pet. Brief p. 3)
- 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. (Pet. Brief, p. 13 emphasis added).

- The statements of the Dane County Clerk and those of Milwaukee County Clerk *presumably* had a significant impact on the April 7 election. (Pet. Brief, p. 20)
- 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. (Pet. Brief p. 24)
- 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 to falsely certify that they are indefinitely confined because of illness, age, infirmity, or disability. (Pet. Brief, p. 50 emphasis added).

Based upon these unsupported allegations, the Petitioners have now inserted a third issue not included in their Petition: "May an elector who is not indefinitely confined because of age, physical illness or infirmity and who is not disabled for an indefinitely period obtain an absentee ballot under Wis. Stat. § 6.86(2)(a) due to COVID-19 pandemic?" (Pet. Brief, p.2) This question as posed seems innocuous enough. The County certainly agrees that a voter who is **not**

indefinitely confined because of age, physical illness or infirmity due to the COVID-19 pandemic should not cast an absentee ballot under Wis. Stat. § 6.86(2)(a). But upon reading the Petitioners' Brief, it becomes clear that what they want is much broader. Although they acknowledge WEC's guidance that indefinitely confined is an individual decision, they want this court to make a blanket declaration regarding a voter's ability to declare themselves indefinitely confined.

The Petitioners' also seek "corrective action" to require the Clerk to communicate with indefinitely confined voters:

The communication should advise that only persons who are indefinitely confined because of age, physical illness, or infirmity, or are indefinitely disabled, may obtain absentee ballots on the basis of indefinite confinement status. It should advise voters that if they are not presently 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 list.

(Pet. Brief, pp. 54-55) This request presumes without any factual basis that any voter illegally cast an absentee ballot by claiming indefinitely confined status. It also presumes that an

indefinitely confined voter would fail to notify their municipal clerk when they are no longer indefinitely confined as required by law. There simply is no factual basis for these assertions and they are impossible for the Petitioners to prove.

ARGUMENT

I. THIS CASE IS MOOT AND SHOULD BE DISMISSED.

This case meets the classic definition of mootness and should be dismissed. “Appellate courts generally decline to reach moot issues, and if all issues on appeal are moot, the appeal should be dismissed.” *Matter of Commitment of J.W.K.*, 2019 WI 54, § 12, 386 Wis. 2d 672, 927 N.W.2d 509, citing, *PRN Assocs. LLC v. DOA*, 2009 WI 53 ¶¶ 25, 29, 317 Wis. 2d 656, 766 N.W.2d 559. “An issue is moot when its resolution will have no practical effect on the underlying controversy.” *Id.*, ¶ 11, quoting, *PRN Assocs. LLC*, 317 N.W.2d 656 ¶ 25, 766 N.W.2d 559, and citing *City of Racine v. J-T Enters. of Am., Inc.*, 64 Wis. 2d 691, 700, 221 N.W.2d 869 (1974). The court has also held that a question is moot when

“circumstances have rendered it purely academic. *PRN Assocs. LLC*, 317 N.W.2d 656, ¶ 29, 766 N.W.2d 559, quoting *State ex rel. Olson v. Litscher*, 2000 WI App 61 ¶ 3, 233 Wis. 2d 685, 608 N.W.2d 425. Perhaps the most relevant articulation of the mootness doctrine is found in *Fort Howard Paper Co. v. Fort Howard Corp.*, 273 Wis. 356, 360, 77 N.W.2d 773 (1956), quoting *Wisconsin Employment Relations Board v. Allis-Chalmers Workers Union*, 252 Wis. 436, 440, 32 N.W.2d 190 (1948):

A moot case has been defined as one which seeks to determine an abstract question which does not rest upon existing facts or rights, or which seeks a judgment in a pretend controversy when in reality there is none, or one which seeks a decision in advance about a right before it has actually been asserted or contested, or a judgment upon some matter which when rendered for any cause cannot have any practical legal effect upon the existing controversy.

The Petitioners brought this case in relation to statements made by the Clerk in reference to absentee voting in the spring general election. Those statements related to the unique circumstances of the COVID-19 pandemic. The issues raised by the Petitioners were clarified by guidance issued by

WEC the same day this case was filed. (App. pp. 231-233) Even if there was some confusion caused by the original post, the Clerk immediately posted the guidance adopted by WEC on March 27th and included the statement “[v]oters 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., p. 234) This was raised in the County’s Response to Emergency Petition for Original Action. (County Response, p. 27) After the court granted the Petition and took jurisdiction of the original action, the County filed a Stipulation that the admitted that the two propositions for which the Petitioners sought declaratory relief were accurate statements of the law. (App., pp. 235-236)

All that remains in this case is a newly contrived issue that is purely academic. The Petitioners seek a declaration of an abstract question that is not based on any existing facts, and is based on a hypothetical question. Furthermore, they seek “corrective action” for a pretend controversy when in fact there

is none. They cite to no evidence to establish that any voter inappropriately claimed indefinitely confined status, and they compound that by presuming that such a voter would not duly notify their municipal clerk when they are no longer so confined as required by law.

This case resulted from a post on social media regarding the unique circumstances of the spring election. Hopefully we never have an election under the same circumstances we just encountered. To the extent it caused any confusion, it was cured by guidance issued by WEC. The Clerk promptly deleted his original post and stated that voters should follow WEC's guidance when determining whether they were indefinitely confined. Furthermore on March 31, 2020 this court issued an Order prohibiting the Clerk from posting any guidance as Dane County Clerk inconsistent with the WEC guidance. (Order dated March 31, 2020, p. 3) If that did not resolve the case, the County stipulated to all of the relief sought in the Petition. Now the Petitioners seek to litigate a new issue

that is based upon a hypothetical for which there is no factual support.

This case is moot. There is no live controversy. It does not meet any of the five exceptions under which the court may elect to address moot issues. *Matter of Commitment of J.W.K.*, 386 Wis.2d 672, ¶12. Of course issues regarding elections are of great public importance. But, if guidance is needed in the future regarding indefinitely confined voters, WEC should be allowed to perform its statutory function. The court should not entertain a hypothetical controversy. This court should dismiss the third issue raised by Petitioners and their request for corrective action because they are moot, abstract and not supported by any facts or existing controversy.

II. THE PETITIONERS' THIRD ISSUE AND CLAIM FOR "CORRECTIVE ACTION" ARE NOT JUSTICIABLE.

The Petitioners request a declaration regarding the application of Wis. Stat. § 6.86(2)(a) to future elections based upon hypothetical "facts." They also seek corrective action regarding voters who may have claimed indefinitely confined

status for the 2020 spring election based upon totally unsupported allegations. These allegations are not ripe for adjudication. Additionally, the Dane County Respondents are not the proper party to contest the Petitioners' claims, and this case is missing indispensable parties.

A court must determine a controversy is justiciable before considering the merits of a claim. *Waukesha Memorial Hospital, Inc. v. Baird*, 45 Wis. 2d 629, 633, 173 N.W.2d 700 (1970). Four factors must exist before a request for declaratory relief is justiciable:

- (1) A controversy in which a claim of right is asserted against one who has an interest in contesting it.
- (2) The controversy must be between persons whose interests are adverse.
- (3) The party seeking declaratory relief must have a legal interest in the controversy – that is to say, a legally protectable interest.
- (4) The issue involved in the controversy must be ripe for judicial determination.

Miller Brands –Milwaukee, Inc. v. Case, 162 Wis. 2d 684, 694, 470 N.W.2d 290 (1991), citing *Loy v. Bunderson*, 107 Wis. 2d 400, 410, 320 N.W.2d 175 (1982). All four of these factors

must be satisfied before a controversy is justiciable and “proper for a court to entertain an action for declaratory judgment.” *Id.*

A. Petitioners Remaining Claims Are Not Ripe For Adjudication.

The Petitioners third request for declaratory judgment is based upon hypothetical and assumed facts and is not ripe for adjudication. What the Petitioners seek is an advisory opinion, which this court should not entertain.

It is well settled that the Uniform Declaratory Judgment Act, Wis. Stat. § 806.04, “does not compel or permit the courts to give advisory opinions and they properly refuse judgments unless the pleadings present a justiciable controversy ripe for judicial determination.” *Skowan v. Skowan*, 259 Wis. 17, 19, 47 N.W.2d 326 (1951). “Courts will not declare rights until they have become fixed under any existing state of facts nor will they determine future rights in anticipation of an event that may never happen. *Id.*, citing, *Heller v. Shapiro*, 208 Wis. 310, 242 N.W. 174 (1932); *Village of Sun Prairie v. Wisconsin Power & Light Co.*, 213 Wis. 277, 251 N.W. 605 (1933). See also, *State ex rel. Wisconsin Senate v. Thompson*, 144 Wis. 2d

429, 432, n.1, 424 N.W.2d 385 (1988) [Issue raised in original action not a justiciable controversy because not ripe for adjudication.]

The ripeness component of justiciability “requires that the facts be sufficiently developed to avoid courts entangling themselves in abstract disagreements.” All adjudicatory facts need not be certain, but they cannot be “so contingent and uncertain.” *Miller Brands-Milwaukee, Inc.*, 162 Wis. 2d at 694-95, 470 N.W.2d 290, citing *Loy*, 107 Wis. 2d at 412, 414.

In *Miller Brands-Milwaukee, Inc.*, the “facts” provided by Miller-Brands were generalizations of practices in the brewing industry, but did not include any specific factual allegation. *Id.*, at 689-90. The court held that the case was not ripe for adjudication because the “facts” provided the court were merely hypothetical. *Id.*, at 695. The court concluded that the “‘facts’ provided by Miller Brands may or may not have occurred.” *Id.*, at 696.

In *Waukesha Memorial Hospital*, the court also considered the “factual circumstances” necessary for a ripe

controversy. In that case hospital staff brought an action against police officers in Waukesha County requesting a declaratory judgment that law enforcement did not have the right to order physicians and their employees to take blood specimens to determine a person's blood alcohol level. *Waukesha Memorial Hospital*, 45 Wis. 2d at 631-32. Hospital personnel had been threatened with prosecution for refusing to aid an officer under Wis. Stat. § 946.40. The court noted "that statute is highly subjective in nature." *Id.*, at 641. The language of that statute is particularly relevant to the application of that case's holding:

946.40 Refusing to aid officer. (1) Whoever, without reasonable excuse, refuses or fails, upon command, to aid any person known to him to be a peace officer may be fined not more than \$100. (2) This section does not apply if under the circumstances the officer was not authorized to command such assistance.

The court found that "it is clear that we are not informed of facts, even hypothetically, which would enable this court to satisfactorily resolve the question of 'reasonable excuse' 'under the circumstances.'" *Id.* The court concluded that "[i]t

is clear what the plaintiffs ask is for an advisory opinion in which they wish the court to assume various hypothetical states of facts and determine their liability prospectively under each of these states of facts.” *Id.*, 643.

Like the statute in question in *Waukesha Memorial Hospital*, Wis. Stat. § 6.86(2)(a) is highly subjective in nature. WEC issued guidance regarding § 6.86(2)(a) that stated “[designation if indefinitely confined status is for the individual voter to make based upon their current circumstances.” (App., p. 232) The Respondents do not contest the validity of that guidance. Therefore, each individual voter must determine whether, under their unique circumstances, they are “indefinitely confined” due to “age,” “physical illness,” or “infirmity.” This is not a situation that is ripe for a one size fits all blanket declaration of law. What the Petitioners request is more abstract than *Waukesha Memorial Hospital*. They seek an advisory opinion in which they wish the court to assume various hypothetical states of facts, to

determine whether a hypothetical future voter could be indefinitely confined under the statute.

The Petitioners request for declaratory judgment on the remaining issue is abstract, and based totally on hypothetical facts. As in *Miller Brands*, the “facts” asserted by the Petitioners may or may not have occurred. What they request is an advisory opinion as to when a voter can be indefinitely confined under a myriad of possible factual scenarios that at the end of the day are a subjective individual decision. The case is not ripe and is not justiciable, and should therefore be dismissed.

B. Dane County Is Not The Proper Party To Defend The Claim For Declaratory Judgment.

Dane County and the Clerk are not the proper party to contest the Petitioners’ claim for declaratory relief. At most there is a difference of opinion between Petitioners and the County as to the application of Wis. Stat. § 6.86(2)(a). The Petitioners seek to impose their position on every voter in this state who may need to make their individual decision as to whether they are indefinitely confined due to age, physical

illness, or infirmity. WEC is charged with administration of Wisconsin election laws. Wis. Stat. § 5.05(1). It may well be that they are an indispensable party to this action.

An action for declaratory judgment is only justiciable if: (1) it is “a controversy in which a claim of right is asserted against one who has an interest in contesting it;” and (2) ‘the controversy must be between persons whose interests are adverse.’ *Miller Brands–Milwaukee, Inc.*, 162 Wis. 2d at 694. In *Wisconsin Pharmaceutical Ass’n v. Lee*, 264 Wis. 325, 58 N.W.2d 700 (1952), this court considered whether those factors were met under analogous circumstances. In that case, the pharmacists’ association sued the State Board of Pharmacy and its individual members to obtain a declaratory judgment interpreting a regulatory statute. The association sought to establish that the statute prohibited a practice whereby allegedly “unqualified employees of physicians were allowed to dispense drugs.” *Id.*, at 328. The court determined that it was not a justiciable controversy because it was “not against one who has an interest in contesting it, nor is it a controversy

between persons whose interests are adverse.” *Id.* at 330. The court stated that “[a]t most there is a difference of opinion between the plaintiffs and defendants concerning the violation of a penal statute by persons not parties to this action.” *Id.* Most significantly the court noted that “[t]he opinion of the defendants...is not conclusive as to whether or not the statute has been violated.” *Id.* Rather, the court held that “[t]he real controversy is between plaintiffs and the physicians and employees” [those alleged to have violated the statute]. *Id.*

In this case neither the opinion of the Clerk or any County official is conclusive on whether a voter may claim indefinitely confined status under Wis. Stat § 6.86(2)(a). At most this is a difference of opinion between the Petitioners and the Respondents as to the meaning and application of the statute. The Petitioners case has not been brought against one who has an interest in contesting it, nor is it a controversy between persons whose interests are adverse, as this court has construed those factors.

In *Wisconsin Pharmaceutical Ass'n* the court also determined that “there is a defect in the parties defendant.” They determined that the indispensable party was missing. *Id.* The court quoted Section 11 of the declaratory judgment statute. *Id.*, at 331. That language is now found verbatim at Wis. Stat. § 806.06(2)(a):

When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration may prejudice the right of persons not parties to the proceeding.

The court also quoted at length Borchard, *Declaratory Judgments*, pp. 104-107:

Aside from the necessity for proper parties plaintiff and defendant having conflicting legal interests in the controversy to be adjudicated, the procedure for a declaratory judgment vests in the courts a wide discretion to insist upon joining and impleading all parties they deem interested or likely to be affected by the decision, and to dismiss, usually without prejudice, a declaratory proceeding instituted without the presence of, or service upon, all such interested persons...

Id., 331. The court has repeatedly held “that real parties in interest must be made parties before a declaratory judgment can be obtained.” *Id.*, at 332, citing, *City of Madison v.*

Wisowaty, 211 Wis. 23, 247 N.W. 527 (1933); *Riebs Co. v. Mortenson*, 219 Wis. 393, 263 N.W. 169 (1935) and *State ex rel. Joyce v. Farr*, 236 Wis. 323, 295 N.W. 21 (1940).

Potentially every voter in Wisconsin has rights under Wis. Stat. § 6.86(2)(a). It is an individual decision for each voter to determine whether they are indefinitely confined for purposes of absentee voting. They alone should have the right to contest whether they meet the requirements of that statute. *Id.*, at 332. If the Petitioners know of a voter who they believe submitted an absentee ballot in violation of § 6.86(2)(a) they should bring an action against that person or persons. That would provide the concrete facts and a proper party to meet the requirements for justiciability. Dane County or its Clerk is not that proper party. This case is simply a request by a political party for an advisory opinion in an attempt to secure an advantage in future elections. As such, it should be dismissed.

III. THE PETITIONERS' REQUEST FOR CORRECTIVE ACTION IS UNSUPPORTED BY ANY FACTS IN THE RECORD.

Without any support in the record, the Petitioners request that this court order that the Clerk “take corrective action to communicate with voters so that improperly certified voters are removed from the indefinitely confined voter list.” (Pet. Brief, p. 57) This request is based upon an assumption of fact not in the record, namely that any voters “improperly” claimed indefinitely confined status as a result of the Clerk’s statements. Relief based upon assertions in a brief, not supported by evidence in the record, should not be granted.

This court has recognized that it “is not a performing bear, required to dance to each and every tune played on an appeal.” The court can ignore those issues “deemed to lack sufficient merit or importance to warrant individual attention.” *State v. Waste Management of Wisconsin, Inc.*, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978), cert denied, 439 U.S. 865, 99 S. Ct. 189 (1978); *Libertarian Party of Wis. v. State*, 199 Wis. 2d

790, 801, 546 N.W.2d 424 (1996). The Petitioners' request for corrective action should fall within that category.

Wis. Stat. Rule 809.19(1)(d) and (e) requires that arguments raised in briefs have citations to facts in the record. This court "cannot consider facts outside the record even though stated as such in briefs." *Keplin v. Hardware Mut. Ins. Co.*, 24 Wis. 2d 319, 326, 129 N.W.2d 321 (1964); *Malkowski v. Malkowski*, 52 Wis. 2d 731, 733, 190 N.W.2d 924 (1971).

The Petitioners request for corrective action cites to no evidence in the record. That is because it does not exist. They simply assume that voters "improperly" (also unlawfully) certified themselves as indefinitely confined. They also assume that there are voters who were indefinitely confined that will not notify their clerk when that impediment ends, in violation of the law. The Petitioners now make multiple assertions in their Brief which are not supported by any facts. They include the following:

- As a result of these widely distributed statements, voters submitted applications for absentee ballots without providing a photo ID, even though they were not themselves

physically ill, infirm, elderly, or disabled. (Pet. Brief, p. 3)

- 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. (Pet. Brief, p. 13 emphasis added).
- The statements of the Dane County Clerk and those of Milwaukee County Clerk *presumably* had a significant impact on the April 7 election. (Pet. Brief, p. 20)
- 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. (Pet. Brief, p. 24)
- 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 to falsely certify that they are indefinitely confined because of illness, age, infirmity, or disability. (Pet. Brief, p. 50; emphasis added).

The Petitioners cannot make unsubstantiated factual allegations in their brief and make them so. This court does not consider alleged facts outside the record just because a party includes them in a brief. This court should refuse to

consider the Petitioners' request for corrective action simply because it lacks sufficient merit to warrant attention.

CONCLUSION

The County has stipulated to the two requests for declaratory judgment raised in the Petition for Original Action. The additional issue raised by the Petitioners in their brief and the request for corrective action are based upon a "house of cards" of assumed facts that have no support in the record. The Petitioners request an advisory opinion seeking a blanket declaration regarding the application of Wis. Stat. § 6.86(2)(a) to hypothetical voters in a future election. Their request for corrective action also is dependent on assumed facts not in the record and should not be considered.

The determination of whether a voter is indefinitely confined due to age, physical illness, or infirmity is a subjective one that the individual voter must make. Dane County and its Clerk are not the proper parties to defend the Petitioners' claims. The Petitioners need to join a party, a voter

or voters that they claim have improperly claimed indefinitely confined status.

This case is moot and is not ripe for adjudication. For the foregoing reasons it should be dismissed.

Dated this 1st day of May, 2020.

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CERTIFICATION REGARDING COMPLIANCE WITH
RULE § 809.19(8)(b) and (c)

I hereby certify that this document conforms to the rules contained in s. 809.19(8)(b) and (c) for a response produced with a proportional serif font. The length of this response is 6,267 words.

Dated this 1st day of May, 2020.

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CERTIFICATION REGARDING COMPLIANCE
WITH RULE § 809.19(12)

I hereby certify that I have submitted an electronic copy of this response, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic response is identical to the text of the paper copy of the response filed as of this date. A copy of this certificate has been served with the paper copies of this response filed with the court and served on all opposing parties.

Dated this 1st day of May, 2020.

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CERTIFICATION

I hereby certify that filed with this response, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains:

- (1) a table of contents.

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 1st day of May, 2020.

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TABLE OF CONTENTS - APPENDIX

Emergency Order #12 Safer at Home Order Dated March 24, 2020	201-216
U.S. Surgeon General's Comments on COVID-19: "This week it's going to get bad," via cidrap.umn.edu Dated March 23, 2020	217
Wisconsin Elections Commission's COVID-19 FAQs and Updates Dated March 23, 2020	218-222
Dane County Clerk Scott McDonnell's Facebook post Dated March 27, 2020	223-226
Wisconsin Elections Commission Memo Dated March 27, 2020	227-230
Wisconsin Elections Commission Guidance for Indefinitely Confined Electors / COVID-19 Dated March 29, 2020	231-233
Dane County Clerk Scott McDonnell's Facebook post Dated March 27, 2020	234
Stipulation of Dane County as to Issues of Law Raised by Petitioner Dated April 2, 2020	235-236