

FILED  
05-06-2024  
Clerk of Court  
Marinette County  
2024CV000043

**STATE OF WISCONSIN    CIRCUIT COURT    MARINETTE COUNTY**

THOMAS OLDENBURG,

Plaintiff,

Case No. 24-CV-43

v.

Case Code: 30701

WISCONSIN ELECTIONS COMMISSION, et al.

Defendants.

---

**BRIEF IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS**

---

The admissions of Defendants Wisconsin Elections Commission (“WEC”) and Meagan Wolfe in their Answer (Document # 22) foreclose any result in this case other than declaratory judgment as requested by Plaintiff.

Defendants admit that all absentee ballots requested through the website maintained by WEC—myvote.wi.gov (“MyVote”)—are “electronic mail” requests as set out in Wis. Stat. § 6.86(1)(a)(6). They further admit that, in such cases the document that constitutes the actual “request” for the absentee ballot is the “EL-121” generated and attached to the email from the MyVote system that is sent to the municipal clerk. Wisconsin statutes plainly require that anyone returning an absentee ballot to the clerk for voting must include “in the envelope” with the ballot a copy of the “request” for that ballot bearing an original signature.

Therefore, Plaintiff’s request for the following declaratory judgment must be granted based on Defendants’ admissions and unambiguous Wisconsin law—

- A voter who requests an absentee ballot through MyVote is making an “electronic mail” request pursuant to Wis. Stat. § 6.86(1)(a)6.;
- Any voter who requests an absentee ballot through MyVote must include in the envelope a duplicate copy of the “EL-121” automatically generated by the MyVote system when the requester completes the online request process

bearing an original signature of the voter, pursuant to the mandates of Wis. Stat. §§ 6.86(1)(ac) and 6.87(4); and that

- Any voter who returns a ballot requested through MyVote without including in the return envelope an originally-signed duplicate copy of the “EL-121” automatically generated by the MyVote system when the requester completes the online request process shall not be counted in any election and/or shall not be included in the certified count of any election.

Further, based on Defendants’ admissions, WEC’s recently approved new absentee ballot-return envelopes—designated as form “EL-122”—violate Wisconsin law. The newly-approved EL-122 asks persons returning absentee ballots to certify “subject to the penalties for false statements of Wis. Stat. § 12.60(1)(b),” that *the EL-122 itself* “is the original or a copy of” the “request” for the absentee ballot. As a matter of law, if the absentee ballot was requested via MyVote, it is not.

Therefore, based on Defendants’ admissions and unambiguous Wisconsin law, the Court must also declare the following—

- Adoption of the New EL-122 violated Wisconsin law by mandating the making of false statements by voters subject to the penalty of Wis. Stat. § 12.60(2)(b) and that the New EL-122 shall not be used by any election official or voter in any upcoming election.

### **ADMITTED FACTS<sup>1</sup>**

**Facts Establishing that Requests for Absentee Ballots are “Electronic Mail” Requests as defined by Wisconsin Law, and that the document that constitutes the “Request” for such ballots is the “EL-121” Form generated by the MyVote Computer System.**

WEC maintains a system whereby voters can request absentee ballots for upcoming elections through the website myvote.wi.gov (“MyVote”). (Document # 3, ¶ 17, Document # 22, ¶ 17). WEC’s statutory authority to do so was recently challenged in the matter Scott Sidney v. Wisconsin Elections Commission, et al. Ozaukee County Case No. 2022CV000300 (“Sidney”). (Document # 3, ¶ 18, Document # 22, ¶ 18).

In *Sidney*, Plaintiff averred that Wis. Stat. § 6.86 provided the exclusive means by which a Wisconsin voter may request an absentee ballot, and that nowhere in that statute was any provision that allowed requests for absentee ballots to be made through the website portal MyVote, and asked that the Circuit Court of Ozaukee County declare as such. (Document # 3, ¶ 19, Document # 22, ¶ 19). WEC argued in turn that such requests were authorized as “electronic mail” requests pursuant to Wis. Stat. § 6.86(1)(a)(6). (Document # 3, ¶ 20, Document # 22, ¶ 20).

WEC asserted that utilizing MyVote to generate an email request for an absentee ballot was no different than the voter utilizing Outlook or any other computer mail program to do the same. (Document # 3, ¶ 21, Document # 22, ¶ 21). WEC further asserted that its maintenance of MyVote was simply a way to “assist” voters in sending an email ballot request under section 6.86(a)(1)6. (Document # 3, ¶ 22, Document # 22, ¶ 22).

---

<sup>1</sup> All facts set forth in this section have been admitted by Defendants.

In a sworn affidavit filed as Document # 41 in Sidney (the “Kehoe Affidavit”), Robert Kehoe—the Deputy Administrator of WEC—testified as to the process involved when a “requester” requests an absentee ballot through MyVote. (Document # 3, ¶ 23, Document # 22, ¶ 23). A true and correct copy of the Kehoe Affidavit was attached to the Complaint as **Exhibit A** and filed as Document # 4. (Document # 3, ¶ 24, Document # 22, ¶ 24).

1. Mr. Kehoe testified in the Kehoe Affidavit that—

- 23. The MyVote online absentee ballot request feature is a **software tool that helps registered voters prepare and deliver an email request** to their municipal clerk.  
...
- 30. When a valid requester completes the online request process, **the MyVote system automatically generates for the requester a completed EL-121 absentee ballot request form** using information the requester had previously submitted with their registration application. This is the same form used for handwritten absentee ballot requests.
- 31. **The MyVote system then attaches that completed form to an email and sends it to the requester’s appropriate municipal clerk.** The email may also include an image of the photo ID uploaded by the applicant. The municipal clerk will then process that application and, if approved, mail an absentee ballot to the address specified by the requester.
- 32. This MyVote request process has several advantages over manual requests in which requesters themselves fill out and submit form EL-121 to municipal clerks...the MyVote process assures municipal clerks that **electronic absentee ballot requests** are coming from an official, verified source (i.e. the MyVote system)...

(Document # 3, ¶ 25, Document # 4, pp. 7, 9 (emphasis added), Document # 22, ¶ 25).

In turn, Mr. Sidney provided copies of what the MyVote system generated in response to a “requester” that completes the online absentee ballot request process at MyVote. (Document # 3, ¶ 26, Document # 22, ¶ 26). These copies were attached to sworn affidavits and filed as Documents ## 44 and 48 in Sidney. (Document # 3, ¶ 27,

Document # 22, ¶ 27). True and correct copies of Documents ## 44 and 48 filed in Sidney were attached to the Complaint as **Exhibit B** and filed as Document # 5.

(Document # 3, ¶ 28, Document # 22, ¶ 28).

In response to a request for an absentee ballot made via MyVote, the MyVote system generates an email, not from the elector directly, but from noreply.WEC@wi.gov. (the “MyVote Email”) that provides in pertinent part—

An absentee ballot request has been received from MyVote from a voter in your municipality! Please review **the attached request** and pay particular attention to the type of voter. **The request** may be from a military or a permanent overseas voter. The voter making **this request** is not required to provide a photo ID or has already provided a photo ID with a previous absentee ballot request. A record of **this request** has been created in WisVote.

Record and process **the attached absentee ballot request** received from MyVote the same way as an absentee ballot request received by email.

”

If you have any questions about how to process **this absentee ballot request** please contact the Wisconsin Elections Commission at elections@wi.gov or at (608) 266-8005.

(Document # 3, ¶ 29, Document # 5, pp. 1-2, 5-6, 9-10, 13-14, 17-18, 20-21, 23-24

(emphasis added) Document # 22, ¶ 29).

An example of the “request” that is attached to the MyVote emails , and what Mr. Kehoe referred to as the “completed EL-121 absentee ballot request form” in the Kehoe Affidavit as being automatically generated by MyVote is below—

Wisconsin Application for Absentee Ballot					
Confidential Elector ID# (#NDI - sequential #)(Office Use Only)					
<b>VOTER INFORMATION</b>					
1	Municipality <input type="checkbox"/> Town <input type="checkbox"/> Village <input checked="" type="checkbox"/> City	CITY OF KENOSHA - KENOSHA COUNTY		County	Kenosha County
2	Last Name	Acevedo	First Name	Mabel	
	Middle Name	S	Suffix(e.g. Jr, II, etc.)	Voter Registration #:	700996906
	Phone		Fax	Email	
3	Residence Address: Street Number & Name	1547 17Th Ave			
	Apt. Number		City, State & Zip	Kenosha, 53140	
4	If you are a military or permanent overseas elector, fill in the appropriate circle (see instructions for definitions): <input type="checkbox"/> Military <input type="checkbox"/> Permanent Overseas				
<b>I PREFER TO RECEIVE MY ABSENTEE BALLOT BY: (Ballot will be mailed to the address above if no preference is indicated)</b>					
5	<input checked="" type="checkbox"/> MAIL	Mailing Address: Street Number & Name			
	<input type="checkbox"/> FAX	Apt. Number		City, State & Zip	
	<input type="checkbox"/> EMAIL	Fax Number			
	<input type="checkbox"/> ONLINE	Email Address			
<b>I REQUEST AN ABSENTEE BALLOT BE SENT TO ME FOR: (mark only one)</b>					
6	<input type="checkbox"/> The following elections: <input checked="" type="checkbox"/> All elections from today's date through the end of the current calendar year (ending 12/31). <input type="checkbox"/> 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				
I certify that the application is made on request and by authorization of the named elector, who is unable to sign the application due to physical disability.					
<b>ASSISTANT DECLARATION / CERTIFICATION (if required)</b>					
Assistant Signature	X	Today's Date			
<b>VOTER DECLARATION / CERTIFICATION</b>					
Voter Signature	X Not Required	Today's Date		9/22/2022	

(Document # 3, ¶ 30, Document # 5, p. 4, Document # 22, ¶ 30).

The parties both moved for summary judgment in Sidney, and Judge Stephen Cain of Ozaukee County delivered an oral ruling on the motions on January 5, 2024. (Document # 3, ¶ 30, Document # 22, ¶ 30). A true and correct copy of Judge Cain's oral ruling in Sidney was attached as Exhibit C to the Complaint and filed as Document # 6 (the "Ruling"). (Document # 3, ¶ 32, Document # 22, ¶ 32).

In the Ruling, Judge Cain agreed with WEC, holding that—

MyVote in the Court's estimation is not meaningfully different than someone using Outlook or some other available method to send an email. The Court does believe that the email from the voter to the

municipal clerk is what's expected from the statute and from the process.

(Document # 3, ¶ 33, Document # 6, p. 19 of 23, Document # 22, ¶ 33). Judge Cain further relied on and adopted the testimony of Mr. Kehoe in holding that WEC was acting properly by maintaining MyVote to assist voters in making electronic mail requests for absentee ballots—

Again, going to Mr. Kehoe's affidavit, this is document 41 in the record, he outlines the process of obtaining an absentee ballot. **MyVote allows data entry and then compiles that EL-121 request form.** 6.86(1)(ar) says the written application, not the email, must be received from the registered voter. Mr. Sidney makes issue that -- makes an issue of the fact that the email address from which the clerk receives comes from myvote@wi.gov. It's not coming from, for instance, joesmith@gmail.com. But the statute expects that the written application, not the email, must be received from the voter. To focus on the return email address I think loses sight of the fact that the written application is from the voter. And that's what the statute expects.

(Document # 3, ¶ 34, Document # 6, p. 17-18 of 23 (emphasis added) Document # 22, ¶ 34).

Every single absentee ballot requested by a voter through MyVote is definitively an “electronic mail” request under Wisconsin Statutes. (Document # 3, ¶ 35, Document # 22, ¶ 35). Further, based on Mr. Kehoe's sworn testimony, which was relied on and adopted by Judge Cain in granting WEC summary judgment in Sidney, the request for an absentee ballot is the EL-121 generated and attached to the email from the MyVote system that is sent to the municipal clerk, based on the “requester” completing the online request process as outlined in the Kehoe Affidavit. (Document # 3, ¶ 36, Document # 22, ¶ 36).



### **Admitted Facts Establishing the Adoption of New Absentee Ballot Return Envelopes by WEC**

In August of 2023 WEC approved the design of new “Absentee Certificate Envelope” forms designated form EL-122. (Document # 3, ¶¶ 41-43, Document # 22, ¶¶ 41-43). According to a WEC press release dated August 11, 2023, entitled “ICYMI: Absentee Envelopes Get an Upgrade” (the “Press Release”), new absentee ballot envelopes approved by WEC at the August 4, 2023 meeting “will provide voters with a more user-friendly way to vote absentee in upcoming elections.” (Document # 3, ¶ 43, Document # 22, ¶ 43). According to the Press Release, the EL-122 is “the Absentee Certificate Envelope (EL-122), the inside envelope in which the voter returns his or her voted absentee ballot to the clerk,” and was one of the envelopes updated by WEC. (Document # 3, ¶¶ 44-45, Document # 22, ¶¶ 44-45).

A true and correct copy of the new EL-122 as approved by WEC at the August 4, 2023 meeting was attached to the Complaint as **Exhibit F** and filed as Document # 9 (the “New EL-122”). (Document # 3, ¶ 47, Document # 22, ¶ 47). In contrast to the previously-approved version of the EL-122, the version approved by WEC at the August 4, 2023 meeting provides that the voter must certify “subject to the penalties for false statements of Wis. Stat. § 12.60(1)(b),” that “I requested this ballot and this is the original or a copy of that request.” (Document # 3, ¶ 49, Document # 22, ¶ 49).

On August 9, 2023, WEC sent a communication to Wisconsin Municipal Clerks, Wisconsin County Clerks, the City of Milwaukee Election Commission, and the Milwaukee County Elections Commission (collectively “the Clerks”) (the “August 9 Communication”) that stated the following in part—

3. Reminders. Clerks should keep a few items in mind as they begin to order new envelopes:



**a) The new designs attached to this communication must be used for the elections in 2024 and beyond. Old envelopes may not be used per the Commission's June 1 directive.**

(Document # 3, ¶ 63, Document # 22, ¶ 63)(emphasis added). A true and correct copy of the August 9 Communication was attached to the Complaint as Exhibit G and filed as Document # 10. (Document # 3, ¶ 64, Document # 22, ¶ 64).

On September 29, 2023, WEC sent another communication to the Clerks (the "September 29, Communication") that stated the following in part—

**EL-120 and EL-122 are state templates, prescribed by unanimous vote of the Commission in accordance with state statute, for mandatory use in Wisconsin absentee voting processes.** The Commission authorizes no changes to the forms, other than those associated with the varied postage practices of local election officials.

(Document # 3, ¶ 65, Document # 22, ¶ 65)(emphasis original) A true and correct copy of the September 29 Communication was attached to the Complaint as Exhibit H and filed as Document # 11. (Document # 3, ¶ 66, Document # 22, ¶ 66).

### **ARGUMENT**

Defendants admit that a request for an absentee ballot made via MyVote is an "electronic mail" request. They also admit that the actual document that constitutes the "request" for the ballot is the "EL-121" document generated by the MyVote system and sent to the Clerks. Defendants not only admit as such, they also admit they presented sworn testimony to another Circuit Court this was the fact of the matter, and obtained a favorable ruling based on that testimony. The nature of a request for an absentee ballot made through MyVote and what document constitutes the actual "request" for that ballot are not in dispute.

Based on Defendants' admissions, Wisconsin law requires that for an absentee ballot requested through MyVote to be counted in any election and/or to be included in any certified count, that an elector returning such a ballot **must** return, **in the envelope** containing the returned ballot, a copy of the EL-121 generated by the MyVote system bearing an original signature.

Despite the above, WEC has approved of new absentee ballot return envelopes that violate Wisconsin law and ignore WEC's own legal admissions. These envelopes, known as "EL-122s," require an elector to falsely certify that ***the envelope itself*** is a "copy" of the elector's "request" for the absentee ballot. But the EL-122 is in no way a "copy" of the EL-121. It is a separate form, with a different designation, and contains different information entirely.

Inducing electors to falsely certify that the EL-122 is a "copy" of the EL-121 is election fraud as defined by Wisconsin Statutes. Allowing the EL-122s to be used in elections puts both electors and election officials at risk of criminal penalties. Therefore, this Court must also declare that adoption of the New EL-122 violated Wisconsin law and they shall not be used by any election official or voter in any upcoming election.

## **I. JUDGMENT ON THE PLEADINGS**

"[I]t has been observed that 'a judgment on the pleadings is, in reality, a summary judgment minus affidavits and other supporting documents.'..." *Schuster v. Altenberg*, 144 Wis.2d 223, 228, 424 N.W.2d 159 (1988)(quoting Clausen & Lowe, The New Wisconsin Rules of Civil Procedure Chapters 801-803, 59 MARQ.L.REV. 1, 55-56 (1976)). In deciding such a motion the Court essentially applies the first two steps of summary judgment methodology. *Id.* As observed by the Wisconsin Supreme Court—

First, we examine the complaint to determine whether a claim for relief has been stated. In determining the legal sufficiency of the complaint, "the facts pleaded by the plaintiff, and all reasonable inferences therefrom, are accepted as true." *Prah v. Maretti*, 108 Wis.2d 223, 229, 321 N.W.2d 182 (1982). The complaint should be found legally insufficient only if " 'it is quite clear that under no circumstances can the plaintiff recover.' " *Id.* (quoting *Clausen & Lowe*, supra at 54). If a claim for relief has been stated, we then turn to the responsive pleadings to determine whether a material factual issue exists. Finally, if no genuine issue of material fact exists, the court may determine that the moving party is entitled to a judgment as a matter of law.

*Id.*

## **II. THE COMPLAINT STATES A CLAIM FOR RELIEF, AND NO GENUINE ISSUE OF FACT IS PRESENT.**

### **A. The Complaint States a Claim for Relief.**

"In order to maintain a declaratory judgment action under Wis. Stat. § 806.04, a justiciable controversy must exist." *Lake Country Racquet and Athletic Club v. Vil. of Hartland*, 2002 WI App 301, ¶ 15, 259 Wis.2d 107, 655 N.W.2d 189 (citing *Loy v. Bunderson*, 107 Wis. 2d 400, 409-410, 320 N.W.2d 175 (1982)). A justiciable controversy is present when the following four factors are satisfied:

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 protectible interest;
4. The issue involved in the controversy must be ripe for judicial determination.

*Id.* (citing *Putnam v. Time Warner Cable*, 2002 WI 108, ¶ 41, 255 Wis. 2d 457, 649 N.W.2d 626). The third element of justiciability is often expressed in terms of "standing" to bring the action. *Id.* "In order to have standing to bring an action for declaratory judgment, a party must have a personal stake in the outcome and must be directly

affected by the issues in controversy." *Id.* (citing *Village of Slinger v. City of Hartford*, 2002 WI App 187, ¶ 9, 256 Wis. 2d 859, 650 N.W.2d 81).

WEC will concede that there is a controversy that is between adverse parties that is ripe for judicial determination. WEC has indicated in its Defenses that Plaintiff lacks standing to bring this action, putting the third element at issue. However, Plaintiff has standing for two reasons.

**i. Plaintiff has sufficient standing as an Elector.**

"[S]tanding in Wisconsin is not a matter of jurisdiction, but of sound judicial policy." *Friends of the Black River Forest v. Kohler Co.*, 2022 WI 52, ¶ 17, 402 Wis.2d 587, 977 N.W.2d 342 (quoting *McConkey v. Hollen*, 2010 WI 57, ¶ 15, 783 N.W.2d 855, 326 Wis. 2d 1). "The law of standing in Wisconsin is construed liberally, and 'even an injury to a trifling interest' may suffice." *McConkey*, 2010 WI 57, ¶ 15, 783 N.W.2d 855, 326 Wis. 2d 1 (quoting *Fox v. Wisconsin Dept. of Health and Social Services*, 112 Wis.2d 514, 524, 334 N.W.2d 532 (1983)). "Standing requirements in Wisconsin are aimed at ensuring that the issues and arguments presented will be carefully developed and zealously argued, as well as informing the court of the consequences of its decision." *McConkey*, 2010 WI 57, ¶ 16. "The purpose of the requirement of standing is to ensure that a concrete case informs the court of the consequences of its decision and that people who are directly concerned and are truly adverse will genuinely present opposing petitions to the court..." *In re Carl F.S.*, 2001 WI App 97, ¶ 5, 242 Wis.2d 605, 626 N.W.2d 330.

In *Teigen v. Wis. Elections Comm'n*, 2022 WI 64, 976 N.W.2d 519, a plurality of the Wisconsin Supreme Court held that an individual that alleges a violation of the right to vote because WEC failed to administer elections in a manner other than authorized

by law has standing to challenge WEC's actions in that regard." *Teigen*, 2022 WI 64, ¶¶ 17-24, 164-166. Whether by the majority reasoning or that of Justice Hagedorn in his concurrence, Plaintiff is in the same factual position as the Plaintiffs in *Teigen*, and has standing for similar reasons.

As noted in *Teigen*—"Judicial policy favors hearing cases presenting 'carefully developed and zealously argued' issues. *Teigen*, 2022 WI 64, ¶ 17 (quoting *McConkey*, 326 Wis. 2d 1, ¶16). Plaintiff avers that the issues here are being zealously argued and presented in a developed manner for the court's consideration. This weighs in favor of Plaintiff having standing as well.

**ii. Plaintiff has Standing as a Taxpayer.**

Individual taxpayers have "a legal interest to contest governmental actions leading to an illegal expenditure of government funds." *Fabick v. Evers*, 2021 WI 28, ¶ 10, 396 Wis. 2d 231, 956 N.W.2d 856. "In order to maintain a taxpayer's action, it must be alleged that the complaining taxpayer and taxpayers as a class have sustained, or will sustain, some pecuniary loss; otherwise the action [can] only be brought by a public officer." *S.D. Realty Co. v. Sewerage Comm.*, 15 Wis. 2d 15, 21-22, 112 N.W.2d 177 (1961).

Plaintiff has taxpayer standing. First, Plaintiff alleges he is a taxpayer. Second, he alleges that WEC has approved ballot return envelopes that violate Wisconsin law. Construing the allegations of the Complaint broadly, as the court must, Plaintiff has standing to challenge the illegal expenditure of government funds on the purchase of these envelopes for use in elections. *Schuster*, 144 Wis. 2d at 228 (When deciding a motion for judgment on the pleadings, "the facts pleaded by the plaintiff, and all reasonable inferences therefrom, are accepted as true" and "[t]he complaint should be

found legally insufficient only if ‘it is quite clear that under no circumstances can the plaintiff recover.’”); also see *Peterson v. Volkswagen of America, Inc.*, 2004 WI App 76, ¶ 2, 272 Wis. 2d 676, 679 N.W. 2d 840 (Ct. App. 2004)(A court must construe the facts set forth in the complaint and all reasonable inferences that may be drawn from those facts in favor of stating a claim). Plaintiff has taxpayer standing as well, and has stated a claim in the Complaint.

**B. There is no Genuine Issue of Fact Present.**

As can be seen from the “Admitted Facts” section above, the majority of the operative facts alleged in the complaint are not in dispute. WEC admits the allegations regarding the actions of the parties in the *Sidney* matter, as well as the actions it has taken relating to the approval of the new EL-122. See *pp. 2-8 supra*.

Essentially, there are only two facts, admitted by Defendants, that make this case ripe for determination—

35. As a result of WEC asserting, and Judge Cain explicitly adopting WEC’s position in *Sidney*, every single absentee ballot requested by a voter through MyVote is definitively an “electronic mail” request under Wisconsin Statutes.

36. Further, based on Mr. Kehoe’s sworn testimony, which was relied on and adopted by Judge Cain in granting WEC summary judgment in *Sidney*, the request for an absentee ballot is the EL-121 generated and attached to the email from the MyVote system that is sent to the municipal clerk, based on the “requester” completing the online request process as outlined in the Kehoe Affidavit.

(Document # 3, ¶¶ 35-36, Document # 22, ¶¶ 35-36). The application of these two facts to Wisconsin Statutes regarding absentee balloting forms the basis of the judgment requested in this action, as argued below.

### **III. PLAINTIFF IS ENTITLED TO JUDGMENT AS A MATTER OF LAW.**

There is no dispute that absentee ballot requests made through MyVote are “electronic mail” requests. There is also no dispute that the “request” for such ballots is the “EL-121” generated by the MyVote system and sent to the clerk. Therefore, based on plain duties outlined in Wisconsin Statutes, Plaintiff is entitled to judgment declaring that when an absentee ballot requested through MyVote is returned to the Clerk by the voter, copy of the “EL-121” automatically generated by the MyVote system, bearing an original signature of the voter, must be included “in the envelope” in which the return ballot is placed pursuant to the mandates of Wis. Stat. §§ 6.86(1)(ac) and 6.87(4).

Based on those same facts, Plaintiff should be granted declaratory judgment that any absentee ballot returned by an elector, that was requested through MyVote, *without* including in the return envelope an originally-signed duplicate copy of the “EL-121” automatically generated by the MyVote system shall not be counted in any election and/or shall not be included in the certified count of any election pursuant to Wis. Stat. § 6.84(2).

Further, as there is no dispute regarding the above facts, this Court must declare that the promulgation of the new EL-122 violated Wisconsin law. The new EL-122 foments election fraud by mandating the making of false statements by voters subject to the penalty of Wis. Stat. § 12.60(2)(b). This is because the new EL-122 requires an elector to certify that the *EL-122 is itself* the original, or is a copy of, the elector’s “request” for the ballot. However, there is no dispute the “request” is the “EL-121”



generated by the MyVote system. The EL-122 is neither the original, nor a copy of the EL-121. Attesting to same is a false statement and punishable as a crime. The new EL-122s must be invalidated, and this Court must Order that they shall not be used by any election official or voter in any upcoming election.

#### **A. Applicable law.**

Wisconsin Statutes directly state that absentee voting is not a right for any elector but is a privilege that requires careful regulation to protect not only the electors from abuse but also the 1,852 local clerks who are charged with administering fair and accurate elections. To that end, Wis. Stat. § 6.84 provides—

#### **SUBCHAPTER IV VOTING ABSENTEE**

##### **6.84 Construction.**

- (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. (Emphasis added).
- (2) INTERPRETATION.** Notwithstanding s. 5.01(1), **with respect to matters relating to the absentee ballot process, ss. 6.86, 6.87(3) to (7) to and 9.01(1)(b) 2. and 4. shall be construed as mandatory. Ballots cast in contravention of the procedures specified in those provisions may not be counted. Ballots counted in contravention of the procedures specified in those provisions may not be included in the certified result of any election.**

(emphasis added)

Wis. Stat. § 6.86 sets forth the specific and exclusive methods by which an elector may request an absentee ballot for any election. Wis. Stat. § 6.86(1)(a)6. provides—

**(1)**

- (a) Any elector of a municipality who is registered to vote whenever required and who qualifies under ss. 6.20 and 6.85 as an absent elector may make written application to the municipal clerk of that municipality for an official ballot by one of the following methods:

...

**6. By electronic mail** or facsimile transmission as provided in par. (ac).

(emphasis added). Wis. Stat. § 6.86(1)(ac) provides in pertinent part—

(ac) Any elector qualifying under par. (a) may make written application to the municipal clerk for an official ballot by means of ... electronic mail. Any application under this paragraph need not contain a copy of the applicant's original signature. An elector requesting a ballot under this paragraph **shall return with the voted ballot a copy of the request bearing an original signature of the elector as provided in s. 6.87(4).** (emphasis added)

Wis. Stat. § 6.87(4) provides in pertinent part—

If the elector requested a ballot by means of ... electronic mail under s. 6.86(1)(ac), **the elector shall enclose in the envelope a copy of the request which bears an original signature of the elector.**

(emphasis added). Wis. Stat. § 6.84(2) explicitly provides that ballots cast in contravention of sections 6.86(1)(ac) and 6.87(4) may not be counted, and if counted, may not be included in the certified result of any election.

These statutory provisions protect both Wisconsin voters as well as the State's 1,852 local clerks by ensuring that any absentee ballot received by any requesting elector is, in fact, being voluntarily cast by that elector and nobody else.

**B. Plaintiff is entitled to Judgment declaring that Absentee Ballots Requested through MyVote must be returned with a signed copy of the "EL-121" generated by the MyVote System.**

As WEC admits that a request for an absentee ballot through MyVote is an "electronic mail" request, Wis. Stat. § 6.86(1)(ac) mandates that an elector "shall return with the voted (absentee ballot requested by electronic mail) a copy of the request (for the ballot) bearing an original signature of the elector as provided in s. 6.87(4)."

Section 6.87(4) provides that “the elector **shall enclose in the envelope a copy of the request which bears an original signature of the elector.**” WEC admits that the “request” for such a ballot is the “EL-121” form generated by the MyVote system.

WEC’s admissions in this matter foreclose any other interpretation as to what the law requires when returning such a ballot—Wis. Stat. §§ 6.86(1)(ac) and 6.87(4) require that when returning an absentee ballot requested via MyVote that the elector must also return “in the envelope” a copy of the “EL-121” form generated by the MyVote system bearing an original signature of the elector.

Any other interpretation would lead to absurd results. See *State ex rel. Sielen v. Circuit Court for Milwaukee County*, 176 Wis.2d 101, 109, 499 N.W.2d 657, 660 (1993) (courts should interpret statutes to avoid absurd outcomes). The statutes require that a signed copy of the request be returned “in the envelope” in which the voted ballot is returned. WEC admits the EL-121 is the request. The EL-122 is the envelope in which the ballot is returned. The EL-122 is not a “copy” of the EL-121. It would be plainly absurd to interpret otherwise.

Further, WEC’s admission that the EL-121 constitutes the “request” for an absentee ballot forecloses any further argument or explanation on the subject from WEC. “For a statement to constitute a judicial admission, it must be clear, deliberate and unequivocal, and it must be a statement of fact rather than opinion.” *Kuzmic*, 100 Wis.2d at 51-52 (citing *Hedge v. Bryan*, 425 S.W.2d 866, 868 (Tex.Civ.App.1968)). “A judicial admission is conclusive on the party making it. Once made it not only forecloses the admitter from contradicting the admission, but also may foreclose the opposing party from offering additional supporting or explanatory evidence, for such evidence by

reason of the admission is immaterial surplusage.” *Fletcher v. Eagle River Memorial Hosp., Inc.*, 156 Wis. 2d 165, 177, 456 N.W.2d 788 (1990).

As WEC has admitted that the EL-121 is the request for an absentee ballot made through MyVote. WEC may not now argue that there is some other document that constitutes the request, or that the EL-122 constitutes a “copy” of the EL-121. It’s judicial admission that the EL-121 constitutes the request for an absentee ballot forecloses any such argument and Plaintiff is entitled to judgment as demanded.

**C. Plaintiff is entitled to Judgment declaring that Absentee Ballots Requested through MyVote that are not returned with a signed copy of the “EL-121” generated by the MyVote System cannot be counted in any election.**

Wis. Stat. § 6.84(1) expresses the legislative policy of this state regarding absentee balloting. The legislature recognized that absentee balloting is a privilege, and that the practice must be “carefully regulated” to prevent a whole host of abuses. Wis. Stat. § 6.84(2) is the “enforcement” mechanism that the legislature has put forth regarding absentee balloting, stating that the “careful regulations” surrounding absentee balloting found in the statutes are “mandatory” in nature, and that casting a ballot in contravention to any of them means that a) the ballot may not be counted, and b) if counted may not be included in the certified result of any election.

Although the holding of the case was superseded by Wis. Stat. § 6.84, in *Sommerfeld v. Board of Canvassers of City of St. Francis*, 269 Wis. 299, 303, 69 N.W.2d 235 (Wis. 1954), the Wisconsin Supreme Court discussed the effect of noncompliance with a “mandatory” election statute—

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**, whereas an act done in violation of a directory provision, while improper, may

nevertheless be valid. Deviations from directory provisions of election statutes are usually termed 'irregularities,' and, as has been shown in the preceding subdivision, such irregularities do not vitiate an election. Statutes giving directions as to the mode and manner of conducting elections will be construed by the courts as directory, unless a noncompliance with their terms is expressly declared to be fatal, or will change or render doubtful the result, as where the statute merely provides that certain things shall be done in a given manner and time without declaring that conformity to such provisions is essential to the validity of the election.

*Id.* (quoting 29 C.J.S., Elections, § 214, p. 310)(emphasis added).

Through Wis. Stat. § 6.84(2), sections 6.86(1)(ac) and 6.87(4) are expressly declared “mandatory.” In other words, unless complied with the act of voting absentee is void. Further, the statute expressly states the effect of nonconformity with those statutes, which is that ballots cast and/or counted in contravention of those sections “may not be included in the certified result of any election.”

Read together, the admitted facts and the unambiguous statutory law mandate that Plaintiff’s request for a declaration that any absentee ballot, requested through MyVote, that does not include in the envelope that is used to return the voted ballot a copy of the “EL-121” document generated by the MyVote system bearing an original signature of a voter may not be counted in any election, and/or may not be included in the certified count of any election, must be granted.

**D. Plaintiff is entitled to Judgment declaring that the EL-122 adopted by WEC is an invalid Administrative Rule.**

**i. The New EL-122 is a “Rule” as defined by Wisconsin Law.**

Wis Stat. § 227.23 provides that, generally, an agency may prescribe forms that qualify as a “rule” as set forth in Chapter 227. Wis. Stat. § 227.01(13) defines a “rule” as “a regulation, standard, statement of policy, or general order of general application that has the force of law and that is issued by an agency to implement, interpret, or make

specific legislation enforced or administered by the agency or to govern the organization or procedure of the agency. “ The Wisconsin Supreme Court has developed a five-part test to determine if an agency policy meets the definition of a rule found in section 227.01(13). The test is whether the policy or action is—

(1) a regulation, standard, statement of policy or general order; (2) of general application; (3) having the effect of law; (4) issued by an agency; (5) to implement, interpret or make specific legislation enforced or administered by such agency as to govern the interpretation of procedure of such agency.

*Wis. Manufacturers & Commerce v. Wis. Dept. of Nat. Res.*, 2022AP718 ¶ 24, (Wis. App. Mar 06, 2024)(citing *Citizens for Sensible Zoning, Inc. v. Department of Natural Resources, Columbia County*, 90 Wis.2d 804, 814, 280 N.W.2d 702 (1979). Per Wis. Stat. § 227.40(4)(a), a rule is invalid if it “was promulgated or adopted without compliance with statutory rule-making or adoption procedures.”

Here, the EL-122 adopted by WEC is a form that qualifies a “rule.” There is little controversy about four of the five elements, It is a “standard” as it was adopted to be the uniform envelope to be utilized when returning absentee ballots and meets the first element. It is of “general application” as it is to be utilized with every absentee ballot in every election, and meets the second element. It was “issued by an agency” and meets the fourth element. It was also “issued to interpret or make specific legislation enforced or administered by such agency as to govern the interpretation of procedure of such agency.” In this case, it was issued to implement requirements under the absentee balloting statutes identified above.

The third element, whether the EL-122 “has the force of law,” is met as well. “An agency regulation, standard, statement of policy or general order has been held to have the ‘effect of law’ where criminal or civil sanctions can result as a violation; where

licensure can be denied; and where the interest of individuals in a class can be legally affected through enforcement of the agency action.” *Cholvin v. Dept. of Health & Fam. Services*, 2008 WI App 127, ¶ 26, 313 Wis. 2d 749, 758 N.W.2d 118 (Ct. App. 2008)(emphasis added). Further, when a policy has “mandatory language” that is more than informational, “the agency speaks with an official voice intended to have the effect of law.” *Milwaukee Area Joint Plumbing Apprenticeship Comm. v. DILHR*, 172 Wis. 2d 299, 321 n.12, 493 N.W.2d 744 (Ct. App. 1992).

Defendants affirmatively allege in their Answer—

Defendants admit that WEC passed a motion on April 28, 2023, requiring Wisconsin municipalities to use the new EL-122 envelopes when the redesign project was complete and confirmed that the old versions of EL-122 were not authorized after the February 20, 2024, election.

Document 22, p. 13, ¶ 81. WEC admits it is mandatory for municipalities to use the new EL-122. WEC also admits that any other version is “not authorized.” This is “mandatory language” that has the effect of law. Further, using the EL-122 affects the “interest of individuals in a class.” Those being voters returning absentee ballots. The EL-122 is a “rule” under Chapter 227.

**ii. The EL-122 Violates Wisconsin Law by Fomenting Election Fraud and must be declared invalid.**

Wis. Stat. § 227.10(2) provides that “[n]o agency may promulgate a rule which conflicts with state law.” But the New EL-122 encourages and induces election fraud—as defined by Wisconsin Statutes—in that it asks a voter to certify subject to penalty of law that the New EL-122 *itself* is an original or a copy of the request for an absentee ballot when, in fact, it is not. As such the EL-122 “conflicts with state law” and must be declared invalid.



Wis. Stat. § 12.60(1)(b) provides in pertinent part—

**12.60 Penalties.**

**(1)**

...

**(b)** Whoever violates s. ... 12.13...(3)...(i) may be fined not more than \$1,000, or imprisoned not more than 6 months or both.

Wis. Stat. 12.13(3)(i) provides in pertinent part—

**12.13 Election Fraud**

**(3) PROHIBITED ACTS.** No person may:

...

**(i)** Falsely make any statement for the purpose of obtaining or voting an absentee ballot under ss. 6.85 to 6.87.

Read together, sections 12.13(3)(i) and 12.60(1)(b) provide that if a voter makes any false statement for the purpose of obtaining or voting an absentee ballot, that person may be fined up to \$1,000 and imprisoned for up to six months.

WEC's creation of the new EL-122 has put Wisconsin voters who request an absentee ballot through MyVote in jeopardy of a criminal violation for which they may be imprisoned. The New EL-122 asks them to certify that *the EL-122 itself* is “an original or a copy of the “request” for the absentee ballot that is being returned. However, the New EL-122 is neither. As such, by returning an absentee ballot requested via MyVote utilizing the New EL-122, and certifying that the New EL-122 is “an original or a copy” of the voter's request for an absentee ballot, the voter is “[f]alsely mak[ing a] statement for the purpose of obtaining or voting an absentee ballot under ss. 6.85 to 6.87” and is subject to the penalty of section 12.60(1)(b).

In addition, by approving for use the New EL-122, and thus encouraging voters to falsely certify that the New EL-122 is an original or a copy of a voter's request for an

absentee ballot through MyVote, if any voter does so WEC officials are guilty of election fraud as defined by Wisconsin law.

Wis. Stat. § 12.13(2)(b) provides in pertinent part—

**12.13 Election Fraud**

**(2) ELECTION OFFICIALS.**

...

**(b)** No election official may:

**4.** Intentionally assist or cause to be made a false statement, canvass, certificate or return of the votes cast at any election.

...

**7.** In the course of the person's official duties or on account of the person's official position, intentionally violate or intentionally cause any other person to violate any provision of chs. 5 to 12 for which no other penalty is expressly prescribed.

Wis. Stat. § 12.60(1)(a) provides in pertinent part—

**12.60 Penalties.**

**(1)**

...

**(a)** Whoever violates s. ... 12.13...(2)(b)1. to 7. ...is guilty of a Class I felony.

A class I felony under Wisconsin Law carries a penalty of a fine not to exceed \$10,000 or imprisonment not to exceed 3 years and 6 months, or both. Wis. Stat. § 939.50(3)(i).

In sum, WEC is *mandating* that the State's clerks utilize a version of an EL-122 that foments election fraud as defined by Wisconsin Statutes. In doing so, WEC is putting Clerks who print and provide New EL-122s to voters in a situation where they could be liable for violating Wis. Stat. § 12.13(2)(b) and subject to the penalties of Wis. Stat. § 12.60(1)(a). WEC's actions in approving and mandating the use of the New EL-122—which violates Wisconsin law and foments the violation of law by voters and Clerks—are beyond the scope of its authority to administrate "chs. 5 to 10 and 12 and

other laws relating to elections and election campaigns, other than laws relating to campaign financing.” Wis. Stat. § 5.05(1).

This Court must declare as such and halt the use of the new EL-122s in this state to prevent widespread election fraud—as defined by Wisconsin Statutes—from occurring in upcoming elections.

### **CONCLUSION**

For the reasons stated above, Plaintiff should be granted judgment, pursuant to Wis. Stat. §§ 806.04 and 227.40, declaring the following—

1. A voter who requests an absentee ballot through MyVote is making an “electronic mail” request pursuant to Wis. Stat. § 6.86(1)(a)6.;
2. Any voter who requests an absentee ballot through MyVote must comply with Wis. Stat. §§ 6.86(1)(ac) and 6.87(4);
3. To comply with the mandates of Wis. Stat. §§ 6.86(1)(ac) and 6.87(4), a voter returning a voted ballot requested via MyVote must include in the envelope a duplicate copy of the WEC approved and mandated “EL-121” automatically generated by the MyVote system when the requester completes the online request process bearing an original signature of the voter, pursuant to the mandates of Wis. Stat. §§ 6.86(1)(ac) and 6.87(4);
4. Any voter who returns a ballot requested through MyVote that is returned without including in the return envelope an originally signed duplicate copy of the “EL-121” automatically generated by the MyVote system when the requester completes the online request process shall not be counted in any election and/or shall not be included in the certified count of any election.
5. A further declaration that adoption of the New EL-122 violated Wisconsin law by mandating the making of false statements by voters subject to the penalty of Wis. Stat. § 12.60(2)(b) and in violation of Wis. Stat. § 12.13(2)(b)4. and 7., and that the New EL-122 shall not be used by any election official or voter in any upcoming election.

Dated at New Berlin, Wisconsin, this 6th day of May, 2024.

*Electronically signed by Kevin M. Scott, Esq.*

Kevin M. Scott (SBN 1036825)

THE LAW OFFICE OF KEVIN M. SCOTT LLC

2665 S. Moorland Road

Suite 200

New Berlin, WI 53151

Telephone: (414) 899-8273

Facsimile: (262) 785-1729

Email: [kevin@kevinscottlaw.com](mailto:kevin@kevinscottlaw.com)

*Electronically signed by Daniel J. Eastman, Esq.*

Daniel J. Eastman (SBN 1011433)

EASTMAN LAW, LLC

P.O. Box 158

Mequon, WI 53092

Telephone: (414) 881-9383

Email: [dan@attorneyeastman.com](mailto:dan@attorneyeastman.com)

Attorneys for Plaintiff