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Clerk of Court
Marinette County
2024CV000043

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH II

MARINETTE COUNTY

THOMAS OLDENBURG,
Plaintiff,

v.

WISCONSIN ELECTIONS COMMISSION,
Marge Bostelmann, Carrie Riepl,
Ann S. Jacobs, Donald Millis,
Robert F. Spindell, Jr.,
Mark L. Thomsen, Commissioners,

Case No. 24-CV-43

Case Code: 30701

and

MEAGAN WOLFE,
as Administrator of the
Wisconsin Elections Commission,

Defendants.

**RESPONSE TO PLAINTIFF'S MOTION FOR JUDGMENT ON THE
PLEADINGS BY INTERVENOR-DEFENDANTS DISABILITY RIGHTS
WISCONSIN AND THE LEAGUE OF WOMEN VOTERS OF WISCONSIN**

INTRODUCTION

The Legislature enacted 2005 Wisconsin Act 451, which created the statutory provisions at the center of Plaintiff Thomas Oldenburg's case on May 25, 2006, almost exactly 18 years ago. Since then, millions of eligible Wisconsin voters have exercised their constitutional right to vote via absentee ballot. They comply with the statutes through use of a combined absentee ballot application and certificate envelope, which Defendant Wisconsin Elections Commission recently redesigned at the behest of the Legislative Audit Bureau and increase usability.

Although the basic procedures Oldenburg now challenges have been in place in Wisconsin for almost two decades, and the redesign has taken place over a period of years, Oldenburg now comes to this Court shortly before the 2024 partisan primary election and a special election begin, requesting sweeping relief that would upend absentee balloting and risk disenfranchising voters. Oldenburg does not have standing to make such claims or demand such relief. Moreover, because he brought this case too late, it is barred by the doctrine of laches and other equitable doctrines. Oldenburg is also wrong on the merits. Finally, even if this Court were inclined to agree with Oldenburg, it should stay the effect of any declaratory judgment granted pending appeal of the judgment.

ARGUMENT

I. Legal standard

"A judgment on the pleadings is essentially a 'summary judgment minus affidavits and other supporting documents.'" *Freedom from Religion Found., Inc. v.*

Thompson, 164 Wis. 2d 736, 741, 476 N.W.2d 318 (Ct. App. 1991) (quoting *Schuster v. Altenberg*, 144 Wis. 2d 223, 228, 424 N.W.2d 159 (1988)). Therefore, courts apply the same methodology to such motions as they do to summary judgment: “First, we examine the complaint to determine whether it states a claim on which relief can be granted. If so, we determine whether the answer shows the existence of a material factual dispute.” *New Richmond News v. City of New Richmond*, 2016 WI App 43, ¶128, 370 Wis. 2d 75, 881 N.W.2d 339.¹ As the movant, Oldenburg has the burden to establish that he is entitled to judgment. *Southport Commons, LLC v. Wisconsin Dep’t of Transportation*, 2021 WI 52, ¶56, 397 Wis. 2d 362, 960 N.W.2d 17. To succeed on a motion for judgment on the pleadings, a “plaintiff must demonstrate that there are no sufficient legal defenses set forth in either the denials or the matters of affirmative defense alleged in the answer.” *All Elec. Serv., Inc. v. Matousek*, 46 Wis. 2d 194, 200, 174 N.W.2d 511 (1970).

I. Oldenburg lacks standing.

Oldenburg lacks standing to pursue his claims. *First*, Oldenburg has failed to allege any harm whatsoever to himself, either in his Complaint or in his Motion, and the analysis of harms in *Teigen v. Wisconsin Elections Commission*, 2022 WI 64, 403 Wis. 2d 607, 976 N.W.2d 519, *reconsideration denied*, 2022 WI 104, does not give Oldenburg standing. *Second*, Oldenburg has not established taxpayer standing

¹ For this reason, this Court can, and should, dismiss the case even though Oldenburg is the movant. Wis. Stat. § 802.08(6) (“If it shall appear to the court that the party against whom a motion for summary judgment is asserted is entitled to a summary judgment, the summary judgment may be awarded to such party even though the party has not moved therefor.”).

because he has neither claimed an unlawful expenditure of taxpayer funds nor that he suffered any pecuniary loss.

A. Oldenburg lacks standing to pursue generalized grievances about election law.

Oldenburg brings two claims for declaratory judgment, under Wis. Stat. §§ 806.04 and 227.40. To determine whether a plaintiff has standing to challenge an agency decision, courts conduct a two-step analysis, asking first, “whether the decision of the agency directly causes injury to the interest of the petitioner and second whether the interest asserted is recognized by law.” *Friends of the Black River Forest v. Kohler Co.*, 2022 WI 52, ¶18, 402 Wis. 2d 587, 977 N.W.2d 342 (cleaned up), *reconsideration denied sub nom. Friends of Black River Forest v. DNR*, 2022 WI 104. And “while standing is to be liberally construed, the claim asserted must be legally recognizable in Wisconsin jurisprudence.” *Id.* ¶19 (cleaned up). To demonstrate that the plaintiff’s injured interest is protected by law, the plaintiff must identify a statute with “substantive criteria” under which the party can challenge the agency’s decision. *Chenequa Land Conservancy, Inc. v. Vill. of Hartland*, 2004 WI App 144, ¶¶21–22, 275 Wis. 2d 533, 685 N.W.2d 573 (analyzing standing for a declaratory-judgment action).

The standing analysis prescribed in *Chenequa* and applied more broadly in *Black River Forest* should apply here. *See, e.g., Black River Forest*, 2022 WI 52, ¶¶12, 46. *Black River Forest* involved a suit under Wis. Stat. §§ 227.52 and 227.53, which govern petitions for review of administrative decisions. *Id.*, ¶¶1, 39 n.20. To have

standing in an action under chapter 227, the plaintiff must allege a direct injury to the plaintiff's interest and show that the interest is protected by Wisconsin law.

Teigen, on which Oldenburg relies, does not help him, because there was no majority rationale in *Teigen* for why the plaintiffs had standing to pursue their claims. *See State v. Elam*, 195 Wis. 2d 683, 685, 538 N.W.2d 249 (1995) (citing *State v. Dowe*, 120 Wis. 2d 192, 194–95, 352 N.W.2d 660 (1984) (per curiam)). Four Justices agreed that *Teigen* and *Thom* had standing, but they did not agree on any rationale.²

Oldenburg nonetheless relies on the “plurality” rationale from *Teigen* for the proposition that he has standing based on alleged injuries to his “right to vote.” (Dkt. 24, Mtn. at 12–13, *citing Teigen*, 2022 WI 64, ¶¶17–24 (lead op.) and 164–166 (Hagedorn, J., concurring).) As Oldenburg admits, this is not the rule in Wisconsin. The paragraphs Oldenburg cites never garnered support from a majority of the Court and, therefore, are not the law.

Moreover, Oldenburg has not alleged any harm to himself or any other person. The only allegation about Oldenburg is in Paragraph 1, which states his address and recites that he is an “adult resident, elector, and taxpayer of the State of Wisconsin.”

² The headnote to *Teigen* explains that Justice R.G. Bradley's lead opinion delivers the Court's *majority* opinion with respect only to ¶¶4–10, 12–13, 52–63, and 73–85. Justice Bradley's standing analysis is laid out in ¶¶14–36, none of which garnered majority support. Justice Hagedorn's concurrence offers a separate standing analysis. *Teigen*, 2022 WI 64, ¶¶158–67 (Hagedorn, J., concurring). Justice Hagedorn flatly rejects the lead opinion's vote-dilution theory of standing, saying it is “unpersuasive and does not garner the support of four members of this court.” *Id.*, ¶167. Without support from a majority of the Court, the analysis is not a holding and does not alter Wisconsin law, thereby leaving *Black River Forest* as the Supreme Court's most recent pronouncement on standing law in Wisconsin.

(Dkt. 3, Complaint, ¶5.) Even if that is true,³ it is not the same as alleging in any way that he has been, or would be, harmed by WEC's actions. The Complaint is devoid of any allegation that *anyone* would be harmed, let alone that Oldenburg has suffered the type of harm that would give him standing to pursue his claims.

Oldenburg also lacks standing under Wis. Stat. § 227.40, which is the basis of Count II. That statute contains the following limitation:

The court shall render a declaratory judgment in the action *only when* it appears from the complaint and the supporting evidence that the rule or guidance document or its threatened application interferes with or impairs, or threatens to interfere with or impair, the legal rights and privileges of the plaintiff.

Wis. Stat. § 227.40(1) (emphasis added). This accords with the general principle that a “party seeking declaratory relief must have a legal interest in the controversy—that is to say, a legally protectable interest.” *Fabick v. Evers*, 2021 WI 28, ¶9, 396 Wis. 2d 231, 956 N.W.2d 856 (cleaned up). This requirement is “often voiced in terms of standing.” *Id.* ¶11. Here too, Oldenburg's Complaint fails. He never alleges any way in which WEC's conduct would, or could, threaten his legal rights.

B. Oldenburg lacks taxpayer standing.

Oldenburg has also failed to allege pecuniary loss, as required for taxpayer standing. “In order to maintain a taxpayers' action, it must be alleged that the complaining taxpayer and taxpayers as a class have sustained, or will sustain, some

³ No party, including intervenors, had the opportunity to test any of his allegations through discovery, and his motion has the effect of staying any effort to do so. Wis. Stat. § 802.06(1)(b). WEC and Intervenors denied knowledge sufficient to determine whether Oldenburg is either an elector or a taxpayer, making this issue inappropriate for resolution on the pleadings alone. (Dkt. 22, Ans. & Aff. Def., ¶1; dkt. 42, Int. Ans. & Aff. Def., ¶1); *Matousek*, 46 Wis. 2d at 200.

pecuniary loss; otherwise the action could only be brought by a public officer.” *S.D. Realty Co. v. Sewerage Comm’n of City of Milwaukee*, 15 Wis. 2d 15, 21–22, 112 N.W.2d 177 (1961). While Wisconsin does not require a specific amount of allegedly unlawful spending to confer taxpayer standing, there must be some allegation of pecuniary loss: “the successful invocation of taxpayer standing requires an allegation of either direct harm to the plaintiff’s property or a risk of pecuniary loss or substantial injury.” *Voters with Facts v. City of Eau Claire*, 2017 WI App 35, ¶17, 376 Wis. 2d 479, 899 N.W.2d 706.

The Complaint and the Motion contain no allegations that Oldenburg suffered any pecuniary loss. The Complaint merely alleges that Oldenburg is a taxpayer but alleges no nexus to any of the conduct at issue. There are no allegations about whether, and how, WEC or any other entity spent taxpayer funds. That is not sufficient to allege taxpayer standing.

The Motion fares no better. This is a judgment on the pleadings, so Oldenburg limited himself to what he included in his Complaint. *Schuster v. Altenberg*, 144 Wis. 2d at 228. Oldenburg claims he has standing “to challenge the illegal expenditure of government funds on the purchase of these envelopes for us in elections.” (Dkt. 24, Mtn. at 13.) But the Complaint is devoid of any such allegations. Oldenburg seems to recognize this and suggests (without authority) that the Court must read the Complaint “broadly.” (*Id.*). He is wrong. When a court determines whether a claim for relief has been stated, “the facts pleaded by the plaintiff, and all reasonable inferences therefrom, are accepted as true.” *Schuster*, 144 Wis. 2d at 228. Oldenburg however is

not asking the Court to make inferences or accept well-pleaded allegations as true. Rather, he is asking the Court to insert words—and additional facts—into the Complaint. And Oldenburg makes no attempt in the Motion to tie his status as a taxpayer to his claim that absentee voters must return a separate, signed EL-121 with their absentee ballot. He thereby waives any argument that he might have taxpayer status on that issue.

Even if Oldenburg were correct, however, this would be enough only to survive dismissal. To be entitled to judgment, Oldenburg must demonstrate that there is no genuine issue of material fact such that he is entitled to judgment as a matter of law. *Id.* He has failed to do this. He has not alleged sufficient facts such that any party could admit or deny them, nor has he developed the record to make any showing of proof. Because Oldenburg lacks standing to pursue these claims, his Complaint must be dismissed.

II. Oldenburg's claims are barred by laches.

Oldenburg's Complaint must also be dismissed because it is barred by laches. Under the common law doctrine of laches, parties may not sit on their rights. Parties must timely bring election challenges. *Trump v. Biden*, 2020 WI 91, ¶13, 394 Wis. 2d 629, 951 N.W.2d 568. A party asserting the defense of laches must prove that: “(1) a party unreasonably delays in bringing a claim; (2) a second party lacks knowledge that the first party would raise that claim; and (3) the second party is prejudiced by the delay.” *Wisconsin Small Businesses United, Inc. v. Brennan*, 2020 WI 69, ¶12, 393 Wis. 2d 308, 946 N.W.2d 101. Oldenburg waited through WEC's entire three-year

process to redesign EL-121, and even longer (18 years) to bring his claim that an additional copy of the EL-121 must be enclosed in the absentee envelope. All three elements of laches are met here, and the Court should exercise its discretion to apply the doctrine here insofar as this Complaint seeks relief for the remaining 2024 elections.

A. Oldenburg unreasonably delayed in bringing his Complaint.

Oldenburg's delay was unreasonable. "Where the question of laches is in issue, the plaintiff is chargeable with such knowledge as he might have obtained upon inquiry, provided the facts already known by him were such as to put a man of ordinary prudence upon inquiry." *State ex rel. Wren v. Richardson*, 2019 WI 110, ¶20, 389 Wis. 2d 516, 936 N.W.2d 587 (cleaned up). The need to act promptly is acute in election law. *Trump*, 2020 WI 91, ¶11 (quoting 29 C.J.S. Elections § 459 (2020) (footnotes omitted)).

1. Oldenburg unreasonably delayed bringing his claim regarding the new EL-122.

Oldenburg's delay challenging EL-122 was unreasonable. Although WEC finalized the redesign of the EL-122 absentee application and certificate envelope on August 9, 2023, the redesign process continued for much longer. As part of the Legislative Audit Bureau's October 2021 report on Election Administration, the LAB recommended WEC revise the certificate envelope to include a field for a witness's printed name.⁴ The agency almost immediately began considering a redesign to the

⁴ Legislative Audit Bureau, *Report 21-19, Election Administration*, *45 (Oct. 2021), <https://legis.wisconsin.gov/lab/pdfs/viewer.html?file=/media/3288/21-19full.pdf>.

certificate envelopes.⁵ By April 28, 2023, WEC had a new design that the agency deemed statutorily compliant.⁶ At that point, the process shifted to “testing and refining” the redesigned envelopes “with input from voters and election officials.”⁷

Intervenors were directly involved in this process. Intervenor The League of Women Voters of Wisconsin was one of the advocacy organizations the Legislative Audit Bureau interviewed as part of its 2021 audit, in which it recommended redesigning the EL-122. The League monitored public WEC meetings concerning redesign and provided written and oral feedback on design issues. League staff had multiple meetings, conversations, and emails with WEC staff about the redesign and provided input on the process. The League also helped WEC staff find voters to participate in WEC's usability tests of the redesigned envelopes. (Dkt. 44, Newcomer Dec., ¶18.) Intervenor Disability Rights Wisconsin was also actively involved. DRW submitted comments affirming and praising the increased accessibility and usability offered by the updated design. DRW also proposed additional changes to improve accessibility. (Dkt. 45, Kerschensteiner Dec., ¶11.)

⁵ See Wisconsin Elections Commission, *Update on Implementation of LAB Recommendations re: Election Administration*, *21 (Mar. 31, 2022), <https://legis.wisconsin.gov/lab/media/3365/wec-follow-up-to-report-21-19.pdf>; see also Wisconsin Elections Commission, *December 1, 2021 Open Session Minutes*, *9, <https://elections.wi.gov/sites/default/files/legacy/2022-01/December%25201%252C%25202021%2520Open%2520Session%2520Minutes%2520%2528Final%2529.pdf>.

⁶ Wisconsin Elections Commission, *April 28, 2023 Open Meeting Minutes*, *7, <https://elections.wi.gov/sites/default/files/documents/Open%20Session%20Minutes%20April%2028%2C%202023%20APPROVED.pdf>.

⁷ Wisconsin Elections Commission, *Absentee Envelope Redesign Update* (May 2, 2023), <https://elections.wi.gov/sites/default/files/documents/May%202%202023%20Absentee%20Envelope%20Redesign%20Update.pdf>.

Oldenburg could have contributed at many points and in many ways. All these proceedings were open to the public, and WEC also accepted written and oral testimony. The media reported on the process and the new envelope designs, including noting that WEC made changes based on testing results and input.⁸ On August 4, 2023, after receiving input from Intervenor and others, WEC approved the EL-122 redesign.⁹

All of this establishes that the process of redesigning the EL-122, which Oldenburg now challenges, had been going on publicly for approximately two years *before* WEC approved the envelopes. Nothing in his Complaint suggests that Oldenburg did anything to challenge or get involved in that process when it occurred. To the contrary, he waited *six additional months* to bring this lawsuit, and then waited *three more months* to move for any sort of relief. In the interim, municipal and county clerks began acquiring and using the new EL-122 design in elections. In the context of election-related litigation, particularly given that Oldenburg is seeking declaratory rulings that would affect imminent elections, this is an unreasonable delay. Even assuming that Oldenburg was not able to bring suit until the process was

⁸ See Tyler Katzenberger, *Elections leaders approve redesign of absentee ballot envelopes aimed at making them easier to read and complete*, Milwaukee Journal Sentinel (Aug. 7, 2023), <https://www.jsonline.com/story/news/politics/2023/08/07/wisconsin-elections-officials-approve-redesign-of-absentee-ballots/70529959007/>; Margaret Faust, *Clerks say new absentee ballot envelopes will prevent mistakes*, WPR (Aug. 10, 2023), <https://www.wpr.org/politics/wisconsin-election-clerks-absentee-ballot-envelopes-mistakes-votes-count>.

⁹ Wisconsin Elections Commission, *August 4, 2023 Open Meeting Minutes*, *2, <https://elections.wi.gov/sites/default/files/documents/August%204%2C%202023%20Open%20Session%20Minutes%20APPROVED.pdf>.

finalized (and that it was reasonable for him to otherwise not voice his objections),¹⁰ there is no excuse for his waiting until May in an election year to bring this Motion to challenge a widely publicized event.

2. Oldenburg unreasonably delayed bringing his claim regarding absentee ballot practices.

Oldenburg's delay in seeking a declaratory judgment regarding the need to include another copy of the EL-121 in the absentee envelope is somehow even more extreme.¹¹ The process of using a combined application and certification like the EL-122 without the need for a separate application pre-dates even WEC. (Kennedy Dec. ¶7.) Voters have used, and elections officials have counted, ballots accompanied by the EL-122 entire time since the requirements of Wis. Stat. §§ 6.88(1)(ac) and 6.87(4)(b)1 at issue in this case were added to the statute, eighteen years ago (Kennedy Dec. ¶¶5–6.)

The previous design, approved in August 2022 and copied below, reflected the same process:

¹⁰ The Court should not assume this. WEC determined that the redesigned EL-122 met the statutory requirements no later than April 28, 2023. Wisconsin Elections Commission, *August 4, 2023 Open Meeting Minutes*, *2, <https://elections.wi.gov/sites/default/files/documents/August%204%2C%202023%20Open%20Session%20Minutes%20APPROVED.pdf>.

¹¹ Nor is it the case that Oldenburg could not bring this case before the proceedings in *Sidney v. Wisconsin Election Commission*, Ozaukee Cnty. Case No. 22CV300 (filed Aug. 26, 2022), *appeal docketed* Case No. 2024AP190 (Wis. Ct. App. Feb. 1, 2024). WEC and its predecessor, the Government Accountability Board, published the fact that MyVote generates an email long before Judge Cain's decision. *See, e.g., Wisconsin Government Accountability Board, MyVote Wisconsin: A Guide to the MyVote Website for Voters and Clerks*, *41 (rev. Jan. 2017) (providing a copy of the email and application a clerk receives following a request through MyVote), https://elections.wi.gov/sites/default/files/legacy/publication/myvote_manual_updated_january_2017.pdf 16346.pdf.

OFFICIAL ABSENTEE BALLOT APPLICATION/CERTIFICATION			
(Official Use Only) The voter has met or is exempt from the photo ID requirement. Municipal or Deputy Clerk initial here: _____			
Note: With certain exceptions, an elector who mails or personally delivers an absentee ballot to the municipal clerk at an election is not permitted to vote in person at the same election on Election Day. Wis. Stat. §5.86(5).			
Voter: Please complete steps 1 through 5 below, in the presence of your witness.			
1 Place your voted ballot inside the envelope and seal it. Do not use tape or glue.			
2 Complete the section below if not completed by the clerk. Provide your VOTING address.			
Date of Election (month, day, year)		County	
Municipality (check type and list name) Town <input type="checkbox"/> Village <input type="checkbox"/> City <input type="checkbox"/> of _____			
Voter's Name (Last, First, Middle) including suffix (Please print legibly)			
Street Address—Provide house number and street name or fire number and street name. OR			
If your rural address does not include a house number/fire number and street name, provide rural route number and box no.			
City		WI	Zip Code
Official use only:	Ward #	District (if applicable)	Voted in clerk's office <input type="checkbox"/>
3 Sign and date this section.			
CERTIFICATION OF VOTER (Required)			
I certify, subject to the penalties for false statements of Wis. Stat. § 12.60(1)(b), that I am a resident of the ward of the municipality in the county of the state of Wisconsin indicated hereon, and am entitled to vote in the ward at the election indicated hereon; that I am not voting at any other location in this election; that I am unable or unwilling to appear at the polling place in the ward on election day, or I have changed my residence within the state from one ward to another later than 28 days before the election. I certify that I exhibited the enclosed ballot, unmarked, to the witness, that I then in the presence of the witness and in the presence of no other person marked the ballot and enclosed and sealed the ballot in this envelope in a manner that no one but myself and any person providing assistance under Wis. Stat. § 6.87(5), if I requested assistance, could know how I voted. I further certify that I requested this ballot.			
X _____		Today's Date _____	
▲ Signature of Voter ▲ (All voters must sign.)			
REQUIRED OF MILITARY AND OVERSEAS VOTER ONLY: I further certify my birth date is: _____			
4 Have your witness sign and write their address below.			
CERTIFICATION OF WITNESS (signature and address of witness are required)			
I, the undersigned witness, subject to the penalties for false statements of Wis. Stat. § 12.60(1)(b), certify that I am an adult U.S. Citizen and that the above statements are true and the voting procedure was executed as stated. I am not a candidate for any office on the enclosed ballot (except in the case of an incumbent municipal clerk). I did not solicit or advise the voter to vote for or against any candidate or measure. I further certify that the name and address of the voter is correct as shown.			
1. _____			
▲ Signature of ONE adult U.S. citizen witness ▲			
2. _____			
▲ If witnesses are Special Voting Deputies, both must sign. ▲			
▼ Address of witness or addresses of both SVDs ▼			
1. _____			
2. _____			
Provide house number and street name or fire number and street name, city, state and zip code. OR If your rural address does not include a house number/fire number and street name, provide rural route number and box number, city, state and zip code.			
CERTIFICATION OF ASSISTANT (if applicable) - assistant may also be witness			
I certify that the voter named on this certificate is unable to sign his/her name or make his/her mark due to a physical disability and that I signed the voter's name at the direction and request of the voter.			
X _____			
▲ Signature of Assistant ▲			
5 Mail back your ballot. Allow 4-5 days for delivery to ensure your ballot is received by Election Day. Ballots received after Election Day will NOT be counted.			

The idea that a voter, in the context of in-person absentee voting, must submit a separate application was litigated in *Trump v. Biden*. 2020 WI 91, ¶9. The Court held that the delay of the claim was “plainly unreasonable” because the combined application and certification had been “in use statewide for at least a decade.” *Id.* ¶16. Oldenburg managed to wait even longer, an additional three years, to challenge what amounts to the same process—the use of a combined application and certification. *See also* Trump, 2020 WI 91, ¶¶14–16. And he waited until an election was underway to file the instant motion. If a decade is too long (and it was), another three years is even more unreasonable.

B. Intervenors did not know, and could not have known, that they would need to defend the EL-122 or long-standing absentee practices.

For many of the same reasons, Intervenors did not know, and could not have known, that they would need to defend either the new EL-122 or the long-standing practice of using a combined application and certification in lieu of the voter including a separate application with their absentee ballot.

The new EL-122 had undergone an extensive development process dating back to the issues LAB raised in 2021. Before approval, it was subject to input and testing from various actors, as well as WEC’s own internal processes. Intervenors actively participated in the development process. Only then was it approved, unanimously, by the bipartisan Commission.¹² Oldenburg then waited *six more months* to bring suit.

¹² Wisconsin Elections Commission, *August 4, 2023 Open Meeting Minutes*, *2, <https://elections.wi.gov/sites/default/files/documents/August%204%2C%202023%20Open%20Session%20Minutes%20APPROVED.pdf>.

During that time, Intervenors had no reason to believe that there would be a challenge to the redesigned EL-122. To the contrary, by the time Oldenburg brought suit, voters were actively using the EL-122 for the February 20, 2024 Spring Primary. *See* Wis. Stat. §§ 5.02(22) (setting date of primary), 7.15(1)(cm) (municipal clerks required to issue absentee ballots to voters with requests on file no later than 21 days before).

The same is true for the process of using the certification in lieu of a separate application for ballots requested electronically or via facsimile. That process had been in place for at least 17 years by the time Oldenburg filed this lawsuit. Voters and election officials had relied on this process in dozens of elections. As mentioned, the Supreme Court rejected a challenge to a parallel process over three years ago. *Trump*, 2020 WI 91, ¶16. Moreover, in a separate case, another plaintiff represented by Oldenburg's attorneys challenged the use of MyVote to request absentee ballots. (Dkt. 3, Compl., ¶¶18–19 (describing *Sidney v. Wisconsin Election Commission*, Ozaukee Cnty. Case No. 22CV300).)¹³ The Circuit Court of Ozaukee County rejected that claim. (*Id.*, ¶¶32–34.)

By the time Oldenburg filed this case, WEC had completed a lengthy redesign process, which included public input. It had approved that redesign unanimously. Both the idea of a separate application for absentee ballots *and* the validity of MyVote had been litigated. There has been various other litigation over the rules surrounding

¹³ Information regarding Sidney's counsel may be found via the Wisconsin Circuit Court Access Program.

absentee ballots in which Intervenor participants participated, but Oldenburg did not. *See e.g. Teigen*, 2022 WI 64; *White v. Wisconsin Elections Comm’n*, Waukesha Cnty. Case No. 22CV1008 (filed Jul. 12, 2022); *Carey v. Wisconsin Elections Comm’n*, 624 F. Supp. 3d 1020, 1027 (W.D. Wis. 2022); *Priorities USA v. Wisconsin Elections Comm’n*, Case No. 2024AP164 (Wis. filed Jan. 30, 2024); *Rise, Inc. v. Wisconsin Elections Comm’n*, Case No. 2024AP165 (Wis. Ct. App. filed Jan. 30, 2024); *League of Women Voters of Wis. v. Wisconsin Elections Comm’n*, Case No. 2024AP166 (Wis. Ct. App. filed Jan. 30, 2024). Elections using these forms, and processes, were underway. Intervenor participants had no reason to believe they would nonetheless need to come to court to defend these practices and, in turn, the ability of eligible Wisconsin voters to cast an absentee ballot and exercise their fundamental right to vote.¹⁴

C. The delay in bringing this Complaint prejudices Intervenor participants.

Oldenburg’s unreasonable delay prejudices the interests of Intervenor participants. “What amounts to prejudice, such as will bar the right to assert a claim after the passage of time pursuant to laches, depends upon the facts and circumstances of each case, but it is generally held to be anything that places the party in a less favorable position” for purposes of litigation. *Wren*, 2019 WI 110, ¶32.

Oldenburg’s delay in bringing this Complaint and Motion prejudices Intervenor participants such that laches applies. Because he did not act timely, Oldenburg now forces Intervenor participants, the other parties, and the Court to address these issues on a

¹⁴ There are various categories of voters who can *only* exercise their right to vote via absentee ballot. This includes certain voters with disabilities, as well as voters who will not be in Wisconsin on election day because they are located overseas and/or are a member of the armed forces. *See Carey*, 624 F. Supp. 3d at 1027; *see also* Wis. Stat. §§ 6.22–6.24.

compressed timeline during a presidential election year. As a result, the Court has already been required to adjudicate a motion for a temporary injunction in 24 hours and without the benefit of adversarial briefing. And despite the paucity of the Complaint, Oldenburg's delay (and now rush) forces the parties to litigate this case without the benefits of the normal process, including discovery. Moreover, should he prevail, Oldenburg's decision to sit on his hands will further prejudice Intervenor, who will be forced to spend money, time, and other resources to respond to significant changes in absentee balloting in the middle of an election season, with absentee ballots scheduled to go out within days of the hearing on the Motion. This could include, but would not be limited to, increases and changes in their efforts to educate voters; changes to trainings, resources, websites, and other materials; and additional work with clerks around the state. These changes will necessarily divert resources from Intervenor's other efforts surrounding the 2024 elections.

More importantly, Oldenburg's requested declaratory judgment, particularly insofar as it seeks to have more ballots thrown out, will impact the right to vote of Intervenor's members and constituents, and of all Wisconsin voters. For example, under Wisconsin law, voters "who [are] indefinitely confined because of age, physical illness or infirmity or [are] disabled for an indefinite period" may request to receive an absentee ballot for each election. Wis. Stat. § 6.86(2)(a); *Jefferson v. Dane Cnty.*, 2020 WI 90, ¶20, 394 Wis. 2d 602, 951 N.W.2d 556. Those voters' absentee requests may be years old, but under Oldenburg's theory, they would have to re-sign that application with every ballot or be disenfranchised, even if an absentee ballot is the

only way they are able to vote. This risk to the fundamental rights of Wisconsin citizens, guaranteed by the Wisconsin Constitution, is prejudice of the first order. *See State v. Cir. Ct. for Marathon Cnty.*, 178 Wis. 468, 190 N.W. 563, 565 (1922).

D. The Court should exercise its discretion to apply the doctrine of laches to this case.

The doctrine of laches bars this complaint as to the upcoming general election.

As the Wisconsin Supreme Court recently explained:

Parties bringing election-related claims have a special duty to bring their claims in a timely manner. Unreasonable delay in the election context poses a particular danger—not just to municipalities, candidates, and voters, but to the entire administration of justice. ... Failure to do so affects everyone, causing needless litigation and undermining confidence in the election results.

Trump, 2020 WI 91, ¶30. This is true even for claims the Court may ultimately determine have merit. *Compare id.*, ¶2 (noting that the campaign challenged ballots submitted via Madison's Democracy in the Park event but denying the claim based on laches) *with Teigen*, 2022 WI 64, ¶4; *see also Teigen*, 2020 WI 64, ¶181 n.14 (Hagedorn, J., concurring) (explaining that following his concurrence in *Trump*, Justice Hagedorn determined that the Democracy in the Park events were not authorized, but "this conclusion would not have changed the court's decision in *Trump*"). The Wisconsin Supreme Court's precedent must be followed here. The Motion must be denied insofar as it seeks relief for the remaining elections in 2024.

III. The Court should not grant the relief requested when elections are imminent.

Oldenburg's delay is fatal in another respect. Having waited until elections were already imminent,¹⁵ Oldenburg now asks the Court to violate the general proscription against courts tinkering with election mechanics close to an election. As the U.S. Supreme Court has observed, "[c]ourt orders affecting elections ... can themselves result in voter confusion and consequent incentive to remain away from the polls." *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006) (per curiam). "[C]ourts ordinarily should not alter state election laws in the period close to an election—a principle often referred to as the *Purcell* principle." *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 30 (2020) (Kavanaugh, J. concurring (citing *Purcell*, 549 U.S. 1)).

The Wisconsin Supreme Court has articulated a similar rule in denying relief where plaintiffs unduly delayed, such that the relief sought would interfere with an approaching election. *Hawkins v. Wisconsin Elections Comm'n*, 2020 WI 75, ¶5, 393 Wis. 2d 629, 948 N.W.2d 877 (per curiam) (it was "too late" for court "to grant [] any form of relief that would be feasible and that would not cause confusion and undue damage to both the Wisconsin electors who want to vote and the other candidates in all of the various races on the general election ballot"); accord *Teigen v. Wisconsin Elections Comm'n*, No. 22AP91, unpublished order granting emergency stay, *6–8 (Wis. Ct. App. , Jan. 24, 2022), *mot. to vacate stay denied*, unpublished order at *3

¹⁵ If not already underway. Nomination papers are due for the August and November Elections on June 3, 2024, two days before the hearing on the Motion. Wis. Stat. §§ 8.15(1), 8.20(8)(a).

(Wis. Jan. 28, 2022) (“Vacating the stay would also likely cause substantial harm to the defendants and the public interest. The February 2022 election process is already underway.”). As Justice Hagedorn wrote, “this court should not muddy the waters during an ongoing election.” *Teigen*, No. 22AP91, unpublished order at *4 (Wis. Jan. 28, 2022) (citing *Hawkins*, 2020 WI 75, ¶5) (Hagedorn, J., concurring).

Oldenburg did not file suit until February 2024. He then waited until May 6, 2024 to file the Motion, and waited another eight days to seek a temporary injunction. This is simply too late. The 2024 election season is already underway, with nomination papers having begun to circulate on April 15, 2024 and due on June 3, 2024. Wis. Stat. §§ 8.15(1), 8.20(8)(a). Municipal clerks need to begin sending absentee ballots to voters for the upcoming special elections¹⁶ on June 11, 2024, only *six days* after the hearing. Wis. Stat. §§ 5.02(21), 7.15(1)(cm). County clerks must deliver ballots and supplies to the municipal clerks for the August partisan primary on June 26. Wis. Stat. § 7.10 (1), (3). There is nowhere near enough time for WEC, municipal clerks, candidates, and voters to adjust to the complete reorganization of absentee balloting that Oldenburg would have this Court impose. Moreover, given the high likelihood of appellate review, it is not enough time for the court of appeals or, if necessary, the Wisconsin Supreme Court to address the procedural, prudential, and merits issues in this case.

¹⁶ Gov. Evers, *Executive Order #225 Relating to a Special Election for the Fourth Senate District* (May 14, 2024), available at https://content.govdelivery.com/attachments/WIGOV/2024/05/13/file_attachments/2876458/EO225%20-%20Special%20Election%20SD4.pdf.

IV. Oldenburg's claims fail on the merits.

For the reasons stated in Sections I through III, *supra*, Oldenburg has failed to present a case that this Court should address on the merits. Even if the Court were to reach the merits, however, Oldenburg's Complaint fails.

Sections 6.86(6)(ac) and 6.87(4) do not, as Oldenburg suggests, require voters to include a printout of their online MyVote absentee ballot request with their ballot, nor are they contrary to the new EL-122. The text of the statutes, the doctrine of substantial compliance, and historical practice show that a broader reading—one that effectuates the will of the voter—is appropriate here. First, 'copy' is a general term, whose definition includes something similar to or an imitation of the item identified. It is not otherwise defined in the statutes, so this Court should give it its generally accepted meaning. *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. Section 6.87(4)'s requirement that the copy be "in" the envelope should not foreclose voters from including the copy *on* the envelope because in this context the difference between 'in' and 'on' has no meaningful distinction.

Even if these provisions were interpreted as Oldenburg asks, substantial compliance applies, and absentee voters substantially comply with Wis. Stat. §§ 6.86(6)(ac) and 6.87(4)(b)1 by including with their ballots, the critical information regarding their requests for absentee ballots. Finally, if any ambiguity remains about the statutory text in these provisions, this Court should consider that these provisions have existed for 18 years, been amended multiple times, and no one has read the

statutes to require an exact duplicate of the online request be printed and put inside the voter's envelope.

A. “Copy” in Wis. Stat. §§ 6.86(6)(ac) and 6.87(4) means something other than an exact copy or duplicate.

Wisconsin Stat. §§ 6.86(6)(ac) and 6.87(4)(b1) do not require voters (or clerks) to include exact copies or duplicates of their MyVote applications but rather something similar, such as reiteration of the voter's request on EL-122 and the critical voter information. Courts often turn to dictionary definitions to clarify the meaning of commonly used terms, such as “copy.” Dictionaries define “copy” generally to include imitations and similar things. Black's Law Dictionary defines “copy” as “[a]n imitation or reproduction of an original.” COPY, Black's Law Dictionary (11th ed. 2019) (emphasis added). Oxford Languages defines “copy” as “a thing made to be similar or identical to another.” COPY, Oxford Languages Dictionary (emphasis added).

Importantly, these definitions distinguish “similar” from “identical” and “imitation” from “reproduction,”—and the definition of “copy” includes the more expansive term from each of those pairs. This contrasts with the definitions for “certified copy” and “conformed copy,” which are defined as “[a] duplicate of an original ... certified as an exact reproduction ...” and “[a]n exact copy ...” respectively. *Id.* Black's also includes definitions for “archival copy,” “attested copy,” “examined copy,” “exemplified copy,” “true copy,” and “verified copy,” which illustrates just how unspecific the word “copy,” standing alone, is. “Copy,” without any modifiers, should therefore be read liberally include something “similar” and an “imitation.”

The Wisconsin Supreme Court analyzed the meaning of “reproduction” and defined it to include “a counterpart, an image, *or a copy*.” *Milwaukee J. Sentinel v. City of Milwaukee*, 2012 WI 65, ¶31, 341 Wis. 2d 607, 815 N.W.2d 367 (emphasis added). The Court held, “[e]xamples of ‘reproduction’ under the Law might occur when a custodian prints out a copy of a record that is stored electronically.” *Id.* Thus ‘copy’ is not synonymous with ‘reproduction.’

In this case, the certificate envelope serves as a copy of the voter’s application for an absentee ballot because it includes the same key elements as the online submission. The envelope, form EL-122, is titled, “Official Absentee Ballot Certificate & Application.” (Dkt. 9 at 1 (emphasis added).) The envelope also requires the voter to include all the information necessary to receive an absentee ballot. It includes fields for the voter’s name and address, ward, and alder district. *Id.* It requires the voter to certify that they are eligible to vote absentee and that they voted in the presence of the witness. *Id.* Finally, the envelope requires the voter to certify (by signing) that “I requested this ballot and this is the original or a copy of that request.” *Id.*

In his concurrence in *Trump*, Justice Hagedorn found EL-122 to qualify as a written application as required for in-person absentee ballots. 2020 WI 91, ¶44. “‘Written application’ is not specially defined in the election statutes, nor is any particular content prescribed.” *Id.* Justice Hagedorn reasoned that, because the form contained basic voter information and required the voter to certify that they requested the ballot, the ordinary meaning of a “written application” was satisfied.

Id. Just as the EL-122 satisfied the definition of “written application” in *Trump*, so too does it satisfy the definition of “copy” in this case.

“Copy” is not defined in Wis. Stat. §§ 6.86(6)(ac) or 6.87(4), nor is any particular content for the copy prescribed. Oldenburg cannot now try to add a specialized meaning into the election statutes: “if the legislature had intended to accomplish what a party is urging on the court,” like requiring that voters include a reproduction, exact copy, identical copy, or duplicate of their MyVote absentee ballot requests with their ballots, “the legislature knew how to draft that language and could have done so had it wished.” *Milwaukee Journal Sentinel*, 2012 WI 65, ¶36.

B. The requirement that the copy be included “in the envelope” should be read broadly to include “on” the envelope.

The requirement in Wis. Stat. § 6.87(4) that “the elector shall enclose *in* the envelope a copy of the request” should be read broadly to include information included *on* the envelope. (Emphasis added.) The copy of the request is included on the new EL-122. This is sufficient under § 6.87(4) because the preposition “in” indicates inclusion—that the copy of the request be included with the ballot—not location. The location or position of the ballot request is not at issue in, or relevant to, this case—Oldenburg does not make claims about the privacy of voter information or clerks’ inability to locate the necessary information. Instead, he claims that what is included with the ballot is not sufficient.

Affixing the relevant information to the outside of the envelope ensures that the copy of the request does not fall out and get lost. Would it satisfy Oldenburg’s interpretation of § 6.87(4) if EL-122 were printed on the *inside* of the envelope, such

that clerks had to tear open the envelope to read any of the information? That would be absurd. So too would it be absurd to require a separate printout, to be stuffed inside the envelope with the ballot, when the EL-122 envelope can (and does) deliver the same information in a more efficient and secure way. To throw out absentee ballots, and thereby disenfranchise voters, because the copies of the requests are *on* the envelope instead of *in* the envelope would elevate form over function in a way that denies citizens their constitutional right to vote.

C. Even if Oldenburg's interpretation of Wis. Stat. §§ 6.86(6)(ac) and 6.87(4)(b1) were correct, voters substantially comply by submitting a completed EL-122 with their absentee ballots.

Even if Wis. Stat. §§ 6.86(6)(ac) and 6.87(4)(b1) do require the printout of WEC's email, stuffed inside the absentee ballot envelope, as Oldenburg argues, absentee voters substantially comply with the statutes by submitting the completed EL-122 envelope with their absentee ballots. Laws governing the process for voting "shall be construed to give effect to the will of the electors, if that can be ascertained from the proceedings, notwithstanding informality or failure to fully comply with some of their provisions." Wis. Stat. § 5.01(1).

Accordingly, the doctrine of substantial compliance applies, and courts should overlook a voter's technical error if the voter has "actual[ly] compli[ed] in respect to the substance essential to every reasonable objective of the statute. *Midwest Mut. Ins. Co. v. Nicolazzi*, 138 Wis. 2d 192, 200, 405 N.W.2d 732 (Ct. App. 1987) (citation omitted); *McNally v. Tollander*, 100 Wis. 2d 490, 497, 302 N.W.2d 440 (1981). This "give[s] effect to the ascertainable will of the voter, notwithstanding technical

noncompliance with the statutes. *Trump*, 2020 WI 91, ¶38 (Hagedorn, J., concurring) (citation omitted). To “preserve the will of the electors” courts thus “constru[e] election provisions as directory if there has been substantial compliance with their terms,” *McNally*, 100 Wis. 2d at 497 (citation omitted). This voter-first principle applies to election laws in Chapters 5 through 12 and reflects the importance of the right to vote. Wis. Stat. § 5.01(2); see Section IV.F, *infra*. Wis. Stat. §§ 6.86(1)(ac) and 6.87(4) are therefore directory, not mandatory.

Wis. Stat. § 6.84(2) purports to make these provisions governing the absentee balloting process mandatory, but Wis. Stat. § 6.84 is unconstitutional and therefore invalid. (See *infra* Section V.) Since § 6.84 is invalid, Wis. Stat. §§ 6.86 and 6.87 must be read as directory and construed to preserve the will of the voters.

Wisconsin law contains many steps at which the voter, and others, must prove, re-prove, verify, or certify who they are and that they are qualified to vote, and it prescribes penalties for anyone who attempts to circumvent the system.¹⁷ By election day, voters have already taken the following steps to vote:

- Registered to vote under Wis. Stat. § 6.27 *et seq.*¹⁸ This includes completing a form (either electronically or on paper) with all of the following: “name; date; residence location; location of previous residence immediately before moving to current residence location; citizenship; date of birth; age; the number of a current and valid operator's license issued to the elector under ch. 343 or

¹⁷ Voting fraud is exceedingly rare, as a Republican appointee to WEC recently explained. Don Millis, *Voter fraud is rare. Your ballot is protected for Wisconsin spring election*, Milwaukee Journal Sentinel (Mar. 29, 2024), <https://www.jsonline.com/story/opinion/2024/03/29/wisconsin-election-voter-fraud-ballot/73134459007/>.

¹⁸ Military voters, as defined in the statutes, are exempt from the registration requirement. Wis. Stat. § 6.22(3).

the last 4 digits of the elector's social security account number; whether the elector has resided within the ward or election district for the number of consecutive days specified in s. 6.02 (1); whether the elector has been convicted of a felony for which he or she has not been pardoned, and if so, whether the elector is incarcerated, or on parole, probation, or extended supervision; whether the elector is disqualified on any other ground from voting; and whether the elector is currently registered to vote at any other location." Wis. Stat. § 6.33(1).

- Provided proof of residence as part of the registration process, either by providing one of the identifying documents enumerated in statute or by providing a current Wisconsin driver's license number.¹⁹ Wis. Stat. § 6.34(2).
- Requested a ballot via the MyVote website. Wis. Stat. §§ 6.86(1)(a)6, (ar).
- As part of the request, provided proof of identification. Wis. Stat. §§ 6.87(1), 6.86(1)(ar).²⁰
- Marked the ballot in front of at least one witness,²¹ then sealed it in the certificate envelope. Wis. Stat. § 6.87(4)(b)1. The voter and the witness then must certify, under the explicit penalty of perjury, that, among other things, identifying information about the voter is true. Wis. Stat. § 6.87(2).
- Returned the ballot to the municipal clerk no later than 8:00 PM on election day. Wis. Stat. § 6.87(4)(b)1, (6).

And consequences are severe for anyone who commits fraud at any point during this process. Any person who makes false statements, or assists or advises another to make false statements, in these processes is guilty of a crime. Wis. Stat. §§

¹⁹ Military and overseas voters are exempt from this requirement. Wis. Stat. § 6.34(2).

²⁰ Voters who are indefinitely confined due to "age, physical illness or infirmity or is disabled for an indefinite period" and certify as such are exempt from this requirement. Wis. Stat. §§ 6.87(1), 4(b)2, Voters who are indefinitely confined are subject to a separate verification procedure. Wis. Stat. § 6.87(4)(b)2.

²¹ Voters who are residents of certain facilities and use special voting deputies vote in the presence of the two deputies. Wis. Stat. § 6.875(6)(c)1.

12.13(1)(b), (h), 946.31. All these steps, and the severe consequences for committing fraud, sufficiently ensure the integrity of absentee voting.

Voters substantially comply with Wis. Stat. §§ 6.86(6)(ac) and 6.87(4)(b1) when they fill out, sign, and submit an EL-122 with their absentee ballots because the will of the voters can be “ascertained by the proceedings,” Wis. Stat. § 5.01(1), and the voters have “actual[ly] compli[ed] in respect to the substance essential to every reasonable objective of the statute[s].” *Nicolazzi*, 138 Wis. 2d at 200. The substance essential to an application for an absentee ballot is contained within the EL-122. Oldenburg argues that the purpose of Wis. Stat. §§ 6.86(6)(ac) and 6.87(4)(b1) are to confirm the identity and eligibility of the absentee voter. (Dkt. 24, Mtn. at 17.) The EL-122 form provides all the substance essential to do that. Putting the voter application information *on* the ballot, instead of *in* the ballot, and reproducing the application for an absentee ballot on the EL-122 instead of including an exact reproduction, should at most be considered, *at most*, “technical noncompliance.” See *Trump*, 2020 WI 91, ¶38.

D. Historical practice indicates that this statute should not be read to require the exact form, signed by the voter, be included with the ballot.

To the extent that there is even a question over the interpretation of Wis. Stat. §§ 6.86(6)(ac) and 6.87(4)(b1), the historical absentee voting practices—all of which indicate that the current practice suffices and Oldenburg’s reading of the statutes is incorrect—are relevant. Statutory history is relevant to the textual analysis the court must undertake. *Richards v. Badger Mut. Ins. Co.*, 2008 WI 52, ¶22, 309 Wis. 2d 541,

749 N.W.2d 581. Here, both provisions were enacted in 2006, through 2005 Wisconsin Act 451. The Legislature has amended Wis. Stat. §§ 6.86 and 6.87 two and four times, respectively, since they were enacted. In the 18 years that the provisions at issue in this case have existed, during which these statutes have been amended, neither clerks nor voters have ever done what Oldenburg claims is required—printed the online request form and included it in the envelope with the ballot. There is no indication that ballots were rejected on that basis. (See Kennedy Dec. ¶¶5–6.) And at no point was the standard practice challenged, nor did LAB identify it as a concern in their 2021 report and recommendations.

E. Oldenburg’s construction of the statute because would likely result in constitutional violations.

Oldenburg’s interpretation of the statutes would likely violate the Wisconsin Constitution. Wisconsin courts strongly prefer to avoid unnecessarily addressing constitutional issues. See *Kenosha Cnty. Dep’t of Human Servs. v. Jodie W.*, 2006 WI 93, ¶20, 293 Wis. 2d 530, 716 N.W.2d 845 (“Where the constitutionality of a statute is at issue, courts attempt to avoid an interpretation that creates constitutional infirmities.” (cleaned up)). To that end, if there is a construction of a statute that avoids a constitutional issue, a court should adopt it. *Lab. & Farm Party v. Elections Bd.*, 117 Wis. 2d 351, 354, 344 N.W.2d 177 (1984) (citing *Kollasch v. Adamany*, 104 Wis. 2d 552, 561, 313 N.W.2d 47 (1981); *Baird v. La Follette*, 72 Wis. 1, 5, 239 N.W.2d 536 (1976) (same)).

Oldenburg’s construction would necessarily impose a heightened burden on absentee voters and, by the plain terms of his requested relief, increase the likelihood

of disenfranchisement. This would create a host of issues under the Wisconsin Constitution and federal law and should thereby be avoided. For example, the Americans with Disabilities Act (ADA) mandates that states must treat all disabled persons equitably and places affirmative obligations upon municipalities to ensure that voters with disabilities enjoy the franchise in all aspects of voting. 42 U.S.C. §§ 12131–12134; 28 C.F.R. §§ 35.101–35.190. Under Oldenburg’s theory, however, voters with disabilities who must vote absentee will face additional burdens on their right to vote. For example, voters who are indefinitely confined may have submitted their absentee application years ago. *See* Wis. Stat. § 6.84(4)(b)2. Would they need to re-sign and send it each time? Similarly, by imposing an absurd restriction on the right without any plausible justification,²² Oldenburg’s requested relief would run afoul of the rights to vote guaranteed by both the U.S. and Wisconsin Constitutions. *See Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)); Wis. Const. art. III, § 1.

F. Wis. Stat. § 6.84(2), on which Oldenburg relies, is unconstitutional.

In his Complaint and Motion, Oldenburg explicitly relies on Wis. Stat. § 6.84, which is unconstitutional. Oldenburg claims that, under Wis. Stat. § 6.84, the provisions at issue in this case must be read as “mandatory” and to support the extraordinary relief requested—the disenfranchisement of eligible Wisconsin voters. (Dkt. 24, Mot. at 17, 20; dkt. 3, Compl. at 7–8, 18.) Wisconsin has long disfavored

²² Oldenburg’s only proffered justification is that this process confirms that the voter is, in fact, who they say they are. (Dkt. 24, Mot. at 17.) But, as demonstrated above, absentee voters in Wisconsin must already prove this in many ways.

legislative action infringing on the right to vote, and the Wisconsin Constitution does not permit the diminution of the right to vote into a “mere privilege.” Yet, this is exactly what Wis. Stat. § 6.84(1) expresses and what § 6.84(2) carries out.

Although absentee ballots themselves are not constitutionally guaranteed to all voters, Wisconsinites are nevertheless exercising their *right to vote* whenever, and however, they cast their ballots. Any regulation that withers the franchise into a privilege cannot be squared with the Wisconsin Constitution. Because this is precisely what Wis. Stat. § 6.84 tries to accomplish with voters who choose to vote absentee, it is unconstitutional, which is yet another reason to deny Oldenburg’s motion.

The right to vote is broadly, and repeatedly, protected throughout the Wisconsin Constitution:

[T]he right to vote is... guaranteed by the declaration of rights and by section 1, art. 3, of the Constitution. It has an element other than that of mere privilege. It is guaranteed both by the Bill of Rights, and the exclusive instrument of voting power contained in section 1, art. 3, of the Constitution, and by the fundamentally declared purpose of government; and the express and implied inhibitions of class legislation, as well. Such declared purpose and the declaration of rights, so far as they go, and the equality clauses,—constitute inhibitions of legislative interference by implication, and with quite as much efficiency as would express limitations, as this court has often held.

State ex rel. McGrael v. Phelps, 144 Wis. 1, 128 N.W. 1041, 1046 (1910). The framers “[placed] the right of suffrage upon the high plane of removal from the field of mere legislative material impairment.” *Id.* It “may not under our Constitution and laws be destroyed or even unreasonably restricted.” *State v. Cir. Ct. for Marathon Cnty.*, 178 Wis. 468, 190 N.W. 563, 565 (1922).

The Supreme Court has not wavered from *Phelps* and its sweeping declarations. “Because the right to vote is so central to our system of government, this Court has consistently sought to protect its free exercise.” *McNally v. Tollander*, 100 Wis. 2d 490, 502, 302 N.W.2d 440 (1981). Echoing that sentiment, members of the Court have described the right to vote as “a sacred right of the highest character,” “fundamental,” and “preservative of all rights.” *League of Women Voters of Wis. Educ. Network, Inc. v. Walker*, 2014 WI 97, ¶72, 357 Wis. 2d 360, 851 N.W.2d 302 (Abrahamson, C.J., dissenting) (citing *Phelps*, 144 Wis. at 15); *Jefferson*, 2020 WI 90, ¶51 (Bradley, A.W., concurring in part); Order, *O’Bright v. Lynch*, No. 2020AP1761-OA, ¶¶1–2, 11 (Oct. 29, 2020) (Roggensack, C.J., concurring). Exercising this right is “the hard work of democracy.” *Teigen*, 2022 WI 64, ¶151 (Hagedorn, J., concurring). And that hard work is the driving force behind the advancement of our shared democracy. “[D]emocracy goes forward by great leaps and bounds, supported by the franchises of a free people.” *State v. Kohler*, 200 Wis. 518, 228 N.W. 895, 913 (1930). The Court has explicitly extended this logic to absentee voting. *See State v. Barnett*, 182 Wis. 114, 195 N.W. 707, 711 (1923); *see also Roth v. Lafarge Sch. Dist. Bd. of Canvassers*, 2004 WI 6, ¶21, 268 Wis. 2d 335, 677 N.W.2d 599 (“We noted that to disqualify the [absentee] ballots would deprive the voters of their constitutional rights.”); *Petition of Anderson*, 12 Wis. 2d 530, 534, 107 N.W.2d 496 (1961); *Trump*, 2020 WI 91, ¶27 (“Striking these ballots would disenfranchise voters.”).

Although the Legislature may regulate the right to vote, that authority ends when any statute reduces the right to vote, as guaranteed by the Wisconsin

constitution, into a mere privilege. This question was authoritatively resolved over 100 years ago. “[I]n *McGrael v. Phelps* ... we concluded that voting was a right, not a privilege.” *League of Women Voters of Wisconsin Educ. Network, Inc. v. Walker*, 2014 WI 97, ¶19. The Legislature’s unconstitutional “privilege” decree Wis. Stat. § 6.84(1) is carried out in subsection (2). For similar reasons, this second subsection cannot be squared with the right to vote.

The two sections of the statute are inseverable—they must fall together. Whether the Legislature is proclaiming to diminish a right (Wis. Stat. § 6.84(1)) or effectuating that proclamation (Wis. Stat. § 6.84(2)), it does not disturb the essential formula: the Wisconsin Constitution does not permit the transformation of the right to vote into a privilege. It follows that if Wis. Stat. § 6.84(1) is unconstitutional—and it is—then Wis. Stat. § 6.84(2) must face the same fate. Regardless, subsection (2)’s unlimited and exacting encumbrances on the right to vote are independently unconstitutional, as this Court’s precedent in *Barnett* confirms.

In *Barnett* the Supreme Court counted the votes of absentee voters whose ballots were cast in contravention of two different mandatory voting provisions. *First*, registration lists. The relator alleged that 64 absentee voters cast their ballots illegally because their names did not appear on the relevant registration lists. *Barnett*, 195 N.W. at 711. It was settled law that Wisconsin’s voter registration laws “are mandatory; and that one whose name is not on the registration list should not be permitted to vote.” *Id.* at 712. Yet the Court held that the 64 votes must be counted. In construing the law to permit those votes, the Court recognized that requiring

disenfranchisement in that instance would “place our registration regulations perilously near the border line of unconstitutionality.” *Id.* at 712.

Second, the Court similarly rejected the relator’s challenge based on the lack of clerk indorsement. Wisconsin Stat. § 6.41 (1921–23) required that “any ballot which is not indorsed ... shall be void, not counted, and be treated and preserved as a defective ballot.” Again, the Court refused to order the statutorily prescribed disenfranchisement on constitutional grounds: “Their constitutional right cannot be baffled by latent official failure or defect.” 195 N.W. at 713 (1923) (quoting *State ex rel. Wood v. Baker*, 38 Wis. 71, 89 (1875)).

The Supreme Court went further in *Ollmann v. Kowalewski*, 238 Wis. 574, 300 N.W. 183, 185 (1941). Like *Barnett*, *Ollman* considered the same statutory demand that a ballot missing a clerk’s signature be “void, not counted, and be treated and preserved as a defective ballot.” *Id.* at 185. The Court unanimously held:

[N]ot to count his vote for no fault of his own would deprive him of his constitutional right to vote. Any statute that purported to authorize refusal to count ballots cast under the instant circumstance would be unconstitutional. A statute purporting so to operate would be void, rather than the ballots. And the ballots not being void, should be counted notwithstanding the statute. Voting is a constitutional right. Art III, § 1, Const., and any statute that denies a qualified elector the right to vote is unconstitutional and void.

Id.

Wis. Stat. § 6.84(2) cannot withstand the weight of contrary constitutional authority.²³ *Phelps* and its progeny recognize that the right to vote is not, as a settled

²³ There is a line of cases, beginning with *Clapp v. Joint School District No. 1 of Villages of Hammond & Roberts*, 21 Wis. 2d 473, 481, 124 N.W.2d 678 (1963), which reflexively conclude that absentee

matter of constitutional law, a privilege in Wisconsin. At the same time, *Burnett* and related cases construe the right to vote as exercised by those who vote by absentee ballot. And in those same cases, this Court found it unconstitutional for the Legislature to disenfranchise those absentee voters who do not meet some draconian standard for statutory compliance. It follows that our Constitution does Wis. Stat. § 6.84(2) contravenes the Wisconsin Constitution. To require that Wisconsin's absentee voters follow every jot and tittle of our labyrinthine absentee ballot provisions is inconsistent with the Wisconsin Constitution and its protections for the right to vote. Wisconsin Stat. § 6.84 is plainly unconstitutional. This is yet another reason that the basic claims in Oldenburg's Complaint and Motion fail.

V. If the Court grants Oldenburg's Motion, such an order should immediately be stayed pending appeal.

An Order granting Oldenburg's Motion should be stayed pending appeal. For the reasons already stated, Oldenburg has failed to demonstrate that judgment is merited. His Motion must be denied, and his Complaint dismissed. Should the Court disagree and grant the Motion, however, Intervenor respectfully request that the Court immediately stay any order pending an appeal.

voting is a privilege. But there was trouble with *Clapp* from the start. *Clapp* relied exclusively on *Sommerfeld v. Board of Canvassers* 269 Wis. 299, 69 N.W.2d 235 (1955), in opining that absentee voting is a privilege. But the *Sommerfeld* majority said no such thing, and instead acknowledged only that "in some states absentee voting is held to be a privilege ... [i]n other states such laws are given a liberal construction." 269 Wis. 301–02, 69 N.W.2d 237 (1955). It was the non-binding *Sommerfeld* dissent that stated "[a]bsentee voting is a privilege." *Id.* at 302 (Gehl J., dissenting). Other precedent (*infra*) rejects the notion that voting can be a privilege. *Clapp* also cites *Petition of Anderson*, 12 Wis. 2d 530, in its discussion of absentee voting. But *Petition of Anderson* supports Intervenor's position by acknowledging that absentee voters would be "deprived of their right to vote" if their ballots were disregarded for mere technical violations. *Id.* at 534. This is what Wis. Stat. § 6.84 does, by demanding exactly such a deprivation to the right to vote. *Clapp's* hasty proclamation should not overwhelm the clear weight of contrary authority.

The Court must consider four factors in analyzing a request for a stay: (1) whether the movant makes a strong showing that it is likely to succeed on the merits of the appeal; (2) whether the movant shows that, unless a stay is granted, it will suffer irreparable injury; (3) whether the movant shows that no substantial harm will come to other interested parties; and (4) whether the movant shows that a stay will do no harm to the public interest. *Waity v. LeMahieu*, 2022 WI 6, ¶49, 400 Wis. 2d 356, 969 N.W.2d 263. The movant need not satisfy “each of the four” factors as if they were “tests.” *Scullion v. Wis. Power & Light Co.*, 2000 WI App 120, ¶25 n.15, 237 Wis. 2d 498, 614 N.W.2d 565. Instead, the court must “balance the relative strength of each.” *Id.* “These factors are not prerequisites but rather are interrelated considerations that must be balanced together.” *State v. Gudenschwager*, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995) (per curiam). A court should issue a stay when necessary to preserve the *status quo*. *Banach v. City of Milwaukee*, 31 Wis. 2d 320, 331, 143 N.W.2d 13 (1966).

Should the Court grant the Motion, Intervenor will meet all four factors. *First*, there is a likelihood of success on the merits. “When reviewing a motion for a stay, a circuit court cannot simply input its own judgment on the merits of the case and conclude that a stay is not warranted. The relevant inquiry is whether the movant made a strong showing of success on appeal.” *Waity*, 2022 WI 6, ¶52 (emphasis original). “For questions of statutory interpretation, as are presented in this case, appellate courts consider the issues de novo.” *Id.*, ¶53 & n.16. Similarly, appellate

courts review a trial court's grant of summary judgment *de novo*. *Id.*, ¶17. This *de novo* review, alone, is sufficient to satisfy this factor. *Id.*

Second, Intervenor will suffer irreparable harm absent a stay. As Intervenor addressed in their brief in support of intervention, the remedy requested would impair Intervenor's core interest of ensuring the voting rights of their members and the individuals on whose behalf the organizations work. (Dkt. 41, Br. at 10–12; Dkt. 45, Kerschensteiner Dec. ¶¶4, 9–11, 14; dkt. 44, Newcomer Dec., ¶¶4–5, 7–15). The imminence of upcoming special elections and the remaining statewide 2024 elections only magnify this harm to Intervenor. Additionally, other parties not before the Court, particularly the thousands of poll workers, chief inspectors, municipal clerks, and county clerks who will administer the upcoming elections, will be harmed by the confusion this relief would cause. Finally, and most seriously, countless eligible Wisconsin voters would be at risk of having their votes disregarded, which is a harm of the first order.

Third, no party would be harmed by a stay. As discussed at length herein, Oldenburg has alleged *no harm whatsoever* that he has suffered or would suffer absent the relief requested. There is no theory of harm stated, let alone record support for the notion that such harm would outweigh the significant benefits of a stay.

Fourth, a stay will only promote the public interest. Both the United States and Wisconsin Supreme Courts have repeatedly recognized the public interest in the stability of election rules and administration, particularly in the context of an ongoing or imminent election. *Purcell*, 549 U.S. at 1; *Hawkins*, 2020 WI 75, ¶5. Particularly

given the disruption the relief requested would cause, the public interest weighs overwhelmingly in favor of a stay pending appeal.

CONCLUSION

For the reasons stated herein, the Oldenburg's Motion for Judgment on the Pleadings should be denied. Furthermore, because Oldenburg lacks standing and the Complaint fails to state a claim for relief, the case should be dismissed. Finally, if the Court grants the Motion, it should immediately stay its judgment pending appeal.

Dated this 31st day of May 2024.

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