STATE OF WISCONSIN CIRCUIT COURT MARINETTE COUNTY
BRANCH 2

THOMAS OLDENBURG,

Plaintiff,

v. Case No. 24-CV-0043

WISCONSIN ELECTIONS COMMISSION, et al.,

Defendants.

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS AND BRIEF IN SUPPORT OF THEIR CROSS-MOTION FOR JUDGMENT ON THE PLEADINGS

JOSHUA L. KAUL
Attorney General of Wisconsin

COLIN T. ROTH
Assistant Attorney General
State Bar #1103985

BRIAN P. KEENAN
Assistant Attorney General
State Bar #1056525

Attorneys for Defendants

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-7636 CTR
(608) 266-0020 BPK
(608) 294-2907 (Fax)
rothct1@doj.state.wi.us
keenanbp@doj.state.wi.us

TABLE OF CONTENTS

INTRODUCTION

Not every interesting question of state election law can be resolved through declaratory judgment claims like the ones Plaintiff asserts here. Such a question must present a justiciable controversy before a court can resolve it. Without one, courts risk issuing abstract advisory opinions, a function our judiciary may not perform. For a plaintiff to show that they seek a valid declaratory judgment rather than an improper advisory opinion, they must establish their standing, identify actual adversity with the defendant, and pinpoint a ripe dispute with that defendant.

The plaintiff here—purportedly a Wisconsin elector and taxpayer—has done none of these things. First, he lacks any sort of injury that could support standing. Nothing the Wisconsin Elections Commission (WEC) and its administrator have done harms him in any way, whether as an elector or a taxpayer. Moreover, he asks the Court to opine on the meaning of various absentee voting statutes, but he never identifies any concrete and current dispute with WEC over these questions. At best, Plaintiff has a quibble with one line of language on a WEC form—but that narrow quarrel cannot support the much broader declarations he seeks about how absentee voting laws should be interpreted and applied. Those broader declarations involve precisely the kind of abstract, hypothetical legal questions that courts decline to resolve due to the lack of a justiciable controversy.

Plaintiff's arguments fare no better on the merits. At bottom, they rely on misreading the broader word "copy" to mean the narrower term "duplicate." Absentee voters who request their ballot electronically properly certify that the return envelope is a "copy" of their request. That is true because the envelope contains all the material information from the request that is needed to identify the voter and confirm they requested the ballot in the first place. Alternatively, the EL-122 form itself qualifies as a request by mail that does not trigger the statutory "copy" requirements on which Plaintiff relies.

If the Court, however, were to disagree on both points and grant judgment to Plaintiff, the effect of any such order should be stayed pending appeal. Given quickly approaching elections this summer and fall, it is too late to revise absentee voting procedures to conform to Plaintiff's request. Trying to do so now would risk disenfranchising tens or even hundreds of thousands of Wisconsin voters in upcoming elections, a stunningly undemocratic result that could not be undone even if Defendants were to prevail on appeal.

STATEMENT OF THE CASE

I. The MyVote system helps electors request absentee ballots.

The State maintains a database with voter registration records (the "Database") that supports the MyVote system. In addition to its voter registration functions, MyVote also has a software tool that helps registered voters to request an absentee ballot from their municipal clerk. Generally,

when a valid requester completes the online request process, the MyVote system automatically generates a completed absentee ballot request form. The MyVote system then attaches that completed form to an email and sends it to the requester's appropriate municipal clerk.[1] (Declaration of Robert Kehoe ¶ 59 (hereafter, "Kehoe Decl.").)

The Ozaukee County Circuit Court held that this system qualifies as a valid form of request by electronic mail under Wis. Stat. § 6.86(1)(a)6. (Doc. 3:12 ¶ 35; *see generally* Doc. 6 (transcript of oral ruling).)

II. Wisconsin statutes allow electors to request absentee ballots by email.

Absentee voting in Wisconsin is primarily governed by Wis. Stat. §§ 6.86 and 6.87. The former statute provides, among other things, the various methods by which registered electors may obtain absentee ballots. Generally, they can "make written application" to their municipal clerk using a few different methods, including "by mail" and "by electronic mail." Wis. Stat. § 6.86(1)(a)1., 6. The statute does not specify further what kind of information that "written application" must contain.

[1] Plaintiff attaches to his complaint an example of the forms that MyVote generates for an elector and sends to their municipal clerk. (Doc. 5:1–4.)

Wisconsin Stat. § 6.86(1)(ac) states that electors who request an absentee ballot by electronic mail "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)." In turn, Wis. Stat. § 6.87(4) provides that such electors "shall enclose in the envelope a copy of the request which bears an original signature of the elector."

III. Absentee voters return their completed ballots using a WEC-designed envelope that contains a certification and application.

WEC has created the EL-122, a form return envelope for municipal clerks to provide to absentee voters along with their ballot. (Doc. 9.) The most recent version of the EL-122 was adopted in August 2023. (Doc. 22:7 ¶ 42.) The first page of the form (which is printed on one side of a ballot return envelope) is titled "Official Absentee Ballot Certificate & Application." The first section contains fields for identifying information about the absentee voter, including their name and address. The second section contains a certification with a series of statements that the voter must certify, "subject to the penalties for false statements of Wis. Stat. § 12.60(1)(b)," with their signature. If an absentee voter signs the certification, they are attesting (among other things) that "I requested this ballot and this is the original or a copy of that request." (Doc. 9.)

IV. Plaintiff files this case and moves for judgment on the pleadings.

Plaintiff—purportedly a resident of Marinette County (Doc. 3:5 ¶ 1)—filed a complaint against WEC and its administrator alleging two declaratory judgment claims under Wis. Stat. § 806.04. (*See generally* Doc. 3.)

First, Plaintiff requests a series of four declarations regarding the proper interpretation and application of Wis. Stat. §§ 6.86(1)(ac) and 6.87(4) for electors who request an absentee ballot by email and then return it. (Doc. 3:18–19 ¶¶ 71–74; 3:21.) He primarily wants a declaration stating that,

> [t]o 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 mandat[e]s of Wis. Stat. §§ 6.86(1)(ac) and 6.87(4).

(Doc. 3:21.) He also asks for a declaration that any such absentee ballots cast another way "shall not be counted in any election." (Doc. 3:21.)

Second, Plaintiff requests a declaration that the EL-122 form, and specifically the certification language stating that "I requested this ballot and this is the original or a copy of that request"—"violate[s] Wisconsin law by mandating the making of false statements by voters." (Doc. 3:19–21 ¶¶ 75–90.) He also requests an injunction "barring the use of the New EL-122 by anyone in relation to any upcoming Wisconsin election." (Doc. 3:22.)

After Defendants answered the complaint (Doc. 22), Plaintiff filed a motion for judgment on the pleadings seeking judgment in his favor on both declaratory judgment claims (Doc. 23–24).[2]

ARGUMENT

I. Defendants are entitled to judgment on the pleadings on Plaintiff's first claim for a declaratory judgment.

Plaintiff's first declaratory judgment claim, again, seeks a declaration about what Wis. Stat. §§ 6.86(1)(ac) and 6.87(4) require of absentee voters who request a ballot via MyVote (although their underlying theory would apply to all electronic requests made under Wis. Stat. § 6.86(1)(a)6., not just those made through MyVote). This claim fails because it is both not justiciable and wrong on the merits.

A. Plaintiff's first declaratory judgment claim is not justiciable.

"To obtain declaratory relief, a justiciable controversy must exist." *Fabick v. Evers*, 2021 WI 28, ¶ 9, 396 Wis. 2d 231, 956 N.W.2d 856. "A controversy is justiciable when four conditions are met: (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

[2] Plaintiff accurately summarizes the legal standard for motions for judgment on the pleadings (Doc. 24:10–11), and so Defendants will not repeat it here.

controversy—that is to say, a legally protectable interest'; and (4) 'The issue involved in the controversy must be ripe for judicial determination.'" *Id.* (citation omitted).

Plaintiff's first declaratory judgment claim fails to satisfy any of these four justiciability conditions.[3]

1. Plaintiff lacks standing to pursue their first claim.

The first justiciability defect is Plaintiff's lack of standing. "A party's standing to bring a declaratory judgment action is generally analyzed under the third factor"—i.e. a "legally protectible interest." *Voters with Facts v. City of Eau Claire*, 2017 WI App 35, ¶ 15, 376 Wis. 2d 479, 899 N.W.2d 706. Plaintiff argues that he has standing both as an elector and a taxpayer, but he is wrong on both counts.

[3] WEC does not "concede" that the justiciability conditions aside from standing are met, as Plaintiff predicts. (Pl.'s Br. 12.) Although WEC specifically pleaded only standing as an affirmative defense (Doc. 22:14), it had no obligation to plead justiciability defects as affirmative defenses. The four justiciability factors are "requisite precedent facts or conditions" that a plaintiff must show exist "in order that declaratory relief may be obtained." *Loy v. Bunderson*, 107 Wis. 2d 400, 409, 320 N.W.2d 175 (1982) (citation omitted). So, they are elements of Plaintiff's declaratory judgment cause of action that *he* must prove to obtain relief. *See, e.g.*, *Voters with Facts v. City of Eau Claire*, 2017 WI App 35, ¶ 31 n.10, 376 Wis. 2d 479, 899 N.W.2d 706 (describing first justiciability factor as "the first element necessary for a valid declaratory judgment claim"); *Sipl v. Sentry Indem. Co.*, 146 Wis. 2d 459, 464, 431 N.W.2d 685 (Ct. App. 1988) (referring to these factors as the "[f]our elements [that] comprise the concept of 'justiciability' and must be present"). And Defendants pleaded that Plaintiff "fails to state a claim" (Doc. 22:14), which encompasses all these arguments. In any event, Defendants are within the six-month period during which they can amend a pleading as a matter of course under Wis. Stat. § 802.09(1). If the Court believes these justiciability defects must be specifically pleaded as affirmative defenses, Defendants will simply amend their responsive pleading to do so.

a. Generalized grievances cannot support standing.

A plaintiff must have standing to bring a declaratory action by showing a substantial and direct injury to his legally protected interests. To establish standing, a plaintiff must meet a two-step test. A plaintiff must demonstrate (1) an injury in fact (2) to an interest which the law recognizes or seeks to regulate or protect. *Friends of Black River Forest v. Kohler Co.*, 2022 WI 52, ¶¶ 18, 23, 402 Wis. 2d 587, 977 N.W.2d 342.

To meet the "injury" requirement, a plaintiff must have "suffered 'some threatened or actual injury resulting from the putatively illegal action.'" *Seemo First Nat. Bank of Wis. Rapids*, 95 Wis. 2d 303, 308, 290 N.W.2d 321 (1980) (quoting *Warth v. Seldin*, 422 U.S. 490,499 (1975)). This requires the plaintiff to show a "personal stake in the outcome of the controversy." *First National Bank*, 95 Wis. 2d at 308–09 (citation omitted). Abstract, hypothetical, and conjectural injury "is not enough." *Fox v. DHSS*, 112 Wis. 2d 514, 525, 334 N.W.2d 532 (1983) (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983).) Nor is a mere disagreement or frustration with the defendant's conduct. *See Hollingsworth v. Perry*, 570 U.S. 693, 700 (2013).[4] Rather, a plaintiff must show that he or she "'has sustained or is immediately in danger of sustaining some

[4] "Wisconsin has largely embraced federal standing requirements" and so our state courts "look to federal case law as persuasive authority regarding standing questions." *Friends of Black River Forest v. Kohler Co.*, 2022 WI 52, ¶ 17, 402 Wis. 2d 587, 977 N.W.2d 342.

direct injury' as the result of the challenged official conduct." *Fox*, 112 Wis. 2d 525 (quoting *Lyons*, 461 U.S. at 101).

Generalized grievances about the administration of government are therefore insufficient to support standing. *Cornwell Pers. Assocs., Ltd. v. DILHR*, 92 Wis. 2d 53, 62, 284 N.W.2d 706 (Ct. App. 1979). A plaintiff "raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large"—does not state an injury sufficient to confer standing. *Hollingsworth*, 570 U.S. at 706 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573–74 (1992)); *see also Allen v. Wright*, 468 U.S. 737, 754 (1984) (recognizing that "an asserted right to have the Government act in accordance with law" is not sufficient to establish an injury for purposes of standing).

b. Plaintiff lacks elector standing for his first declaratory judgment claim.

Plaintiff first argues he has standing because he is an elector alleging that "WEC failed to administer elections in a manner other than authorized by law has standing to challenge WEC's actions in that regard." (Pl.'s Br. 12–13.) That is a quintessential generalized grievance that cannot support standing—every Wisconsinite might assert the same claim, which means that Plaintiff

has not shown the necessary "personal stake in the outcome of the controversy." *First National Bank*, 95 Wis. 2d at 308–09 (citation omitted). Simply put, he faces no "direct injury," *Fox*, 112 Wis. 2d 525, as an elector and he therefore lacks standing.

Ignoring the injury requirement entirely, Plaintiff suggests that standing requirements are met whenever arguments are "carefully developed and zealously argued." (Pl.'s Br. 12 (citing *McConkey v. Hollen*, 2010 WI 57, ¶ 15, 783 N.W.2d 855, 326 Wis. 2d 1).) Whether standing in Wisconsin is jurisdictional or a matter of sound judicial policy, courts uniformly require some particularized injury, and Plaintiff's mere status as an elector does not demonstrate one.

Nor can the fractured decision in *Teigen v. Wisconsin Elections Commission*, 2022 WI 64, 403 Wis. 2d 607, 976 N.W.2d 519, support Plaintiff's elector standing arguments. Contrary to Plaintiff's suggestion, there was no "majority reasoning" in *Teigen* regarding standing. (Pl.'s Br. 13.) Rather, there was a three-justice plurality, *see Teigen*, ¶¶ 14–36, with which the concurring justice "disagree[d]," *id.* ¶ 32. *See also id.* ¶ 167 (noting that plurality's standing "analysis is unpersuasive and does not garner the support of four members of [the supreme] court") (Hagedorn, J., concurring). Likewise, the three-justice plurality opined that Justice Hagedorn's standing analysis "can't" be correct. *Id.* ¶ 32.

Lacking a four-justice majority, *Teigen* therefore does not represent the current state of the law on elector standing in Wisconsin. That leaves the fundamental principle that some real, direct injury is required to create standing: "Although the magnitude of the injury is not determinative of standing, the fact of injury is." *Fox*, 112 Wis. 2d at 525; *see also First Nat. Bank*, 95 Wis. 2d at 309. Plaintiff lacks any such injury as an elector.

c. Plaintiff lacks taxpayer standing for his first declaratory judgment claim.

Taxpayers sometimes have a legal right "to contest governmental actions leading to an illegal expenditure of taxpayer funds." *See Fabick*, 396 Wis. 2d 231, ¶ 10. To establish taxpayer standing, "the taxpayer must allege and prove a direct and personal pecuniary loss, a damage to himself different in character from the damage sustained by the general public." *City of Appleton v. Town of Menasha*, 142 Wis. 2d 870, 877, 419 N.W.2d 249 (1988). This means that there must be an actual expenditure of tax dollars resulting from the government action the taxpayer plaintiff wishes to challenge. *Fabick*, 396 Wis. 2d 231, ¶ 11 (expenditure on deployment of National Guard gave taxpayer standing to challenge Governor's emergency declaration). A taxpayer plaintiff therefore does not have standing to challenge government action merely because he or she disagrees with it.

Moreover, taxpayer standing must be evaluated as to each individual claim. *See Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008) ("'[A] plaintiff must demonstrate standing for each claim he seeks to press' and 'for each form of relief' that is sought." (citation omitted)); *Lewis v. Casey*, 518 U.S. 343, 358 n. 6 (1996) ("[S]tanding is not dispensed in gross . . . 'nor does a plaintiff who has been subject to injurious conduct of one kind possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject.'" (citation omitted)). Even if a plaintiff might have taxpayer standing to pursue one claim, that does not necessarily mean they have taxpayer standing to pursue a different claim. So, a plaintiff relying on taxpayer standing must show an unlawful expenditure of tax dollars resulting from each challenged action.

Here, Plaintiff has no conceivable taxpayer standing for his declaratory judgment claim targeting the proper interpretation and application of Wis. Stat. §§ 6.86(1)(ac) and 6.87(4). Through this claim, he asks the Court to declare that when absentee voters request their ballots through MyVote, the voter "must include" when returning a completed ballot "a copy of the 'EL-121' automatically generated by the MyVote system." (Doc. 3:19 ¶ 74.)

Nowhere here does Plaintiff even hint at an alleged illegal expenditure of taxpayer money. Indeed, this claim does not even purport to target unlawful government conduct. Rather, Plaintiff asks this Court to declare what voters

must do when returning absentee ballots and how clerks should act when counting them. But none of that has anything to do with a government entity spending money illegally. Voters obviously do not spend government money when filling out and returning their ballots. Nor do clerks make any specific expenditures when they collect, nor do poll workers when they count, absentee ballots.

Although Plaintiff tries to head off taxpayer standing defects in his opening brief, his argument is notable for what it omits. He contends only that "WEC has approved ballot return envelopes that violate Wisconsin law" and that he thus has "standing to challenge the illegal expenditure of government funds on the purchase of [the challenged] envelopes for use in elections." (Pl.'s Br. 13.) This argument could conceivably relate to Plaintiff's *second* declaratory judgment claim that specifically targets the EL-122 form, which will be addressed below. But Plaintiff says nothing at all about how he could have taxpayer standing for his abstract claim about what Wis. Stat. §§ 6.86(1)(ac) and 6.87(4) require.

2. Plaintiff's first claim does not satisfy any of the other justiciability requirements.

Plaintiff's declaratory judgment claim asking the Court to issue an advisory opinion about the meaning of Wis. Stat. §§ 6.86(1)(ac) and 6.87(4) also is not justiciable based on the other three justiciability factors.

First, there is no "controversy in which a claim of right is asserted against one who has an interest in contesting it." *Fabick*, 396 Wis. 2d 231, ¶ 9 (citation omitted). Such a claim "must assert 'present and fixed rights' rather than 'hypothetical or future rights.'" *Id.* (citation omitted.) Plaintiff's first declaratory judgment claim rests entirely on an abstract hypothetical—what a hypothetical absentee voter who requests an absentee ballot using MyVote must do to comply with Wis. Stat. §§ 6.86(1)(ac) and 6.87(4). (*See* Doc. 3:19 ¶ 74.) Plaintiff does not allege that any particular voter (including himself) has failed to comply with these laws in any particular election, let alone in a way that harmed Plaintiff. Instead, he seems to say that some voter *might* violate these provisions in *some* way in a *future* election and that local election officials might *someday* count votes in violation of the law. That is not enough to demonstrate a "present and fixed right" that demands immediate judicial resolution.

Second, there is no "controversy . . . between persons whose interests are adverse." *Fabick*, 396 Wis. 2d 231, ¶ 9 (citation omitted). At least in his first claim, Plaintiff does not even allege that WEC has done anything wrong. Rather, he suggests that a *voter* (or maybe a *clerk* or other election official) might someday do something wrong by failing to comply with various absentee voting laws. Whether or not that might be true, Plaintiff's speculation fails to create any concrete adversity between WEC and Plaintiff.

Finally, the issue Plaintiff presents is not "ripe for judicial determination." *Fabick*, 396 Wis. 2d 231, ¶ 9 (citation omitted). This factor examines whether a court is being asked to "entangle[ ] [itself] in abstract disagreements over administrative or legislative policies." *Tooley v. O'Connell*, 77 Wis. 2d 422, 439, 253 N.W.2d 335, 342 (1977). That is precisely what Plaintiff asks this Court to do: declare, in the abstract, what voters must do to comply with the law. (*See, e.g.*, Doc. 3:21 ¶ A.1.–4.)

Considered together, Plaintiff's first declaratory judgment claim asks for a classic advisory opinion. He asks for the Court's view on "how a statute could be interpreted to different factual scenarios in future cases." *State v. Steffes*, 2013 WI 53, ¶ 27, 347 Wis. 2d 683, 832 N.W.2d 101. But "[a]dvisory opinions should not be given under the guise of a declaration of rights." *Am. Med. Servs., Inc. v. Mut. Fed. Sav. & Loan Ass'n*, 52 Wis. 2d 198, 203, 188 N.W.2d 529 (1971). Plaintiff's first declaratory judgment claim fails for this fundamental reason.

B. Plaintiff's first declaratory judgment claim fails on the merits.

Setting aside the justiciability defects in Plaintiff's first declaratory judgment claim, it also fails on the merits. Plaintiff contends that, for voters who have requested an absentee ballot via MyVote, the only way to comply with Wis. Stat. §§ 6.86(1)(ac) and 6.87(4) is to include with the completed ballot

"a copy of the 'EL-121' automatically generated by the MyVote system when the requester completes the online request process." (Doc. 3:19 ¶ 74.) He also argues that the EL-122 form that voters complete does not satisfy this statutory requirement because "[t]he EL-122 is ***not*** a 'copy' of the EL-121." (Doc. 24:18.) So, Plaintiff seems to say that these absentee voters can comply with Wis. Stat. §§ 6.86(1)(ac) and 6.87(4) only by enclosing in the return envelope an exact printed copy of the MyVote-generated EL-121.

Plaintiff is wrong for two reasons. First, the EL-122 qualifies as a "copy" of the request generated by MyVote. Second, and alternatively, the EL-122 form can be seen as its own separate request "by mail" under Wis. Stat. § 6.86(1)(a)1., which does not trigger the "copy" requirement under either Wis. Stat. §§ 6.86(1)(ac) or 6.87(4).

1. The EL-122 form qualifies as a "copy" of requests made through MyVote.

Plaintiff's argument first rests on the mistaken assumption that the statutory term "copy" in Wis. Stat. §§ 6.86(1)(ac) and 6.87(4) requires an exact duplicate of the EL-121 form that MyVote generates and sends to a municipal clerk. Because election statutes do not define the word "copy" (*see* Wis. Stat. § 5.02 (defining terms used in chapters 5 to 12 but not the term "copy")), the word must be "given its common, ordinary, and 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. To determine this meaning, courts may consult dictionaries. *Id.* ¶¶ 53–54.

Dictionaries and other courts do not require that a "copy" be an exact duplicate. For instance, New York's highest court observes that "'copy' is generally defined as 'a thing made to be *similar or identical* to another.'" *People v. Williams*, 177 N.E.3d 1283, 1286 (2021) (emphasis added) (quoting Lexico, U.S. Dictionary, copy [https://www.lexico.com/en/definition/copy]). Thus, a copy can be "similar" to the original, even if not "identical." That definition aligns with other dictionaries, which say that a copy can mean an "imitation" of an original.[5]

Words other than "copy" carry the meaning Plaintiff would ascribe to it, including "facsimile"—"an *exact* copy, as of a book, painting, or manuscript"[6]—and "duplicate"—"a copy *exactly like* an original."[7] Indeed, even Plaintiff seems to realize that "copy" and "duplicate" mean different things. He contends that absentee ballots requested by email must be returned with a "*duplicate* copy" of the MyVote-generated request. (Doc. 3:4, 15, 21.) If the Legislature had

[5] *See, e.g.*, *copy*, Dictionary.com, https://www.dictionary.com/browse/copy (last visited May 31, 2024) ("an imitation, reproduction, or transcript of an original"); Merriam-Webster.com, https://merriam-webster.com/dictionary/copy (last visited May 31, 2024) ("an imitation, transcript, or reproduction of an original work").

[6] *Facsimile*, Dictionary.com, https://www.dictionary.com/browse/facsimile (last visited May 31, 2024).

[7] *Duplicate*, Dictionary.com, https://dictionary.com/browse/duplicate (last visited May 31, 2024).

wanted to impose such a specific requirement, it would have used the word "duplicate" rather than just "copy." But it did not, and "[c]ourts may not 'add words to a statute to give it a certain meaning.'" *Westra v. State Farm Mut. Auto. Ins. Co.*, 2013 WI App 93, ¶ 18, 349 Wis. 2d 409, 835 N.W.2d 280 (citation omitted).

The context of the absentee voting statutes further show that a "copy" of the email request need not be an exact duplicate or a facsimile. The statutes do not require an absentee ballot application to take any particular form. *See generally* Wis. Stat. § 6.86(1)(a). Rather, they merely require a "written application." *Id.* There is therefore no good reason why the "copy" of that "written application" would need to exactly match the original, given how the original need not contain any statutorily required pieces of information.

Here, the EL-122 qualifies as a "copy" of the EL-121 because the two are very similar and imitate each other. Most simply, the EL-122 contains all the material information from the EL-121 request. Both contain the municipality name, the voter's name, and the voter's address. That is the key information a clerk needs to validate an absentee ballot request (which again, need not contain any particular information). Indeed, this information is all that is necessary to fulfill the purpose Plaintiff sees in the "copy" requirement: to "ensur[e] that any absentee ballot received by any requesting elector is, in fact, being voluntarily cast by that elector and no one else." (Doc. 24:17.) When

voters sign the EL-122 certification, they attest that "I requested this ballot" (Doc. 9:1), which is exactly the function Plaintiff says the signed "copy" needs to serve.

As for the language in Wis. Stat. § 6.87(4) that this "copy" of the request should be "in the envelope" with the completed ballot, that language cannot be read to discriminate between copies that are "on" the envelope rather than "in" it without producing "absurd results" that the "legislature could not have intended." *State v. Matthews*, 2019 WI App 44, ¶ 17, 933 N.W.2d 152 (citation omitted). If an elector returns with their absentee ballot the "copy" that the statute requires, there is no conceivable reason why the legislature would have intended for such a ballot to be thrown out simply because the copy was "on" the envelope rather than "in" it. That is especially true given the language of Wis. Stat. § 6.86(1)(ac), which simply provides that the voter "shall return *with* the voted ballot a copy of the request." That looser language indicates that the legislature had no real preference about how exactly the copy be returned "with" the ballot, so long as the voter did, in fact, provide a copy.

Moreover, Plaintiff's interpretation of 6.87(4) would spin an entirely new absentee voting process out of a single small preposition: "in." Plaintiff's interpretation would potentially require the voter (or the clerk) to print a hard copy of the voter's absentee request (which was submitted electronically in the first place), and include it inside the envelope with their ballot in order to have

their ballot counted. The need for a process like this is not mentioned—nor even alluded to—anywhere else in chapters 5 through 10 or 12 of our statutes. Congress does not "hide elephants in mouseholes," and neither does the Wisconsin Legislature. *Whitman v. American Trucking Assns.*, Inc., 531 U.S. 457, 468 (2001).

2. The EL-122 is itself a request "by mail" that does not trigger the copy requirement.

Even if the EL-122 form does not satisfy the requirements of Wis. Stat. §§ 6.86(1)(ac) and 6.87(4), then it should be seen as its own separate request "by mail" that does not even trigger the "copy" requirement in those provisions. Again, those provisions only require absentee voters to return with their ballots a signed copy of requests made by "electronic mail" under Wis. Stat. § 6.86(1)(a)6. For absentee ballots requested by any other method (for example, by mail), no such "copy" requirement applies.

A completed EL-122 form itself qualifies as a valid request "by mail" under Wis. Stat. § 6.86(1)(a)1. The form itself is titled "Official Absentee Ballot Certificate & Application" (Doc. 9), which indicates that it is meant to function as an application. And the form contains all the information needed to process an absentee ballot request, including the applicant's name and address. Because the term "'[w]ritten application' is not specially defined in the election statutes, nor is any particular content prescribed," *Trump v. Biden*, 2020 WI

91, ¶ 44, 394 Wis. 2d 629, 951 N.W.2d 568 (Hagedorn, J., concurring), the EL-122 does everything it needs to do to qualify as a valid request. *See id.* (noting that the EL-122 form "appear[s] to satisfy the ordinary meaning of a written ballot application").

II. Defendants are entitled to judgment on the pleadings on Plaintiff's second claim for relief.

Plaintiff's second declaratory judgment claim also fails, this time both on the merits and because Plaintiff lacks standing. Here, again, Plaintiff seeks a declaration that WEC's "new EL-122 [form] violates Wisconsin law" because the "EL-122 *itself* is [not] an original or a copy of the request for an absentee ballot." (Doc. 3:20–21 ¶¶ 85, 90.)

A. Plaintiff lacks standing to pursue his second declaratory judgment claim.

Like with his first declaratory judgment claim, Plaintiff again contends that he has standing for this second one both as an elector and a taxpayer. Those same arguments fail here too.

1. Plaintiff lacks elector standing for his second declaratory judgment claim.

So-called "elector standing" cannot support Plaintiff's second declaratory judgment claim for the same reasons discussed above in Argument. I.A.1.b.

In addition, Plaintiff's claim under Wis. Stat. § 227.40 is based on the allegation that EL-122 "impos[es] a requirement which meets the definition of

a rule." Wis. Stat. § 227.23. But Plaintiff has not alleged that he is an absentee voter or intends to vote absentee via a MyVote absentee ballot request, meaning that the EL-122 could not conceivably impose any requirement *on him* (assuming the form imposes a requirement at all, which it does not, as explained below). As a result, he lacks standing to challenge the form as a rule.

2. Plaintiff lacks taxpayer standing for his second declaratory judgment claim.

Plaintiff also lacks taxpayer standing for his second declaratory judgment claim. Again, taxpayer standing requires an alleged "illegal expenditure of taxpayer funds." *Fabick*, 396 Wis. 2d 231, ¶ 9. Plaintiff contends that the "ballot return envelopes" themselves "violate Wisconsin law" and that the "illegal expenditure of government funds on the purchase of these envelopes" creates taxpayer standing. (Pl.'s Br. 13.)

But that misstates in a crucial way what exactly Plaintiff challenges. He does not allege that the *entire* EL-122 form is unlawful. Instead, he targets one single line from the certification portion of the EL-122 form: "I requested this ballot and this is the original or a copy of that request." (Doc. 3:20 ¶ 82.)

It is critical for taxpayer standing purposes that Plaintiff challenges only one line on the EL-122 rather than the EL-122 itself. To see why, consider the facts of *S.D. Realty Co. v. Sewerage Commission of City of Milwaukee*, 15 Wis. 2d 15, 22, 112 N.W.2d 177 (1961), a foundational taxpayer standing case.

There, taxpayers challenged the legality of spending public funds on a tunnel meant to redirect a river. *Id.* at 19. Those taxpayers had standing because they alleged that "a greater expenditure of public funds [would] be required to construct the tunnel" compared to an alternate method, and that this "additional expense" was unlawful. *Id.* at 22. In other words, because the alleged illegality caused "a greater expenditure of public funds" than if the illegal act hadn't occurred, the taxpayers had standing.

Applying that approach here, Plaintiff's challenge to one line on the EL-122 does not support taxpayer standing. Nothing suggests that adding this one line to the form—even if that one line is allegedly unlawful—leads to a "greater expenditure of public funds." Unlike in *S.D. Realty* where the challenged tunnel generated an unlawful "additional expense" compared to lawful method, the extra line on the EL-122 does not generate any "additional expense." Taxpayer money would be spent on printing EL-122s with or without the challenged language, and there is no plausible reason to suspect (nor does Plaintiff allege) that printing the EL-122s somehow cost more due to the single disputed line. Without an "additional expense," there is no "illegal expenditure of public funds [that] directly affects taxpayers and causes them to sustain a pecuniary loss." *S.D. Realty Co.*, 15 Wis. 2d 22. Plaintiff therefore lacks taxpayer standing for his second declaratory judgment claim, too.

B. Plaintiff's second declaratory judgment claim fails on the merits.

Plaintiff's challenge to this one line on the EL-122 fails on the merits for two reasons. First, that line does not represent an administrative rule that can be challenged through Wis. Stat. § 227.40. Second, even if it did, the challenged line complies with state law.

1. The challenged line on the EL-122 is not a "rule."

Plaintiff's first mistake is to frame his rulemaking claim as challenging the EL-122 form as a whole. As explained above, he does not actually challenge the whole form. Rather, his complaint only targets a single line, arguing that this single line is unlawful and should be omitted. (Doc. 3:20 ¶¶ 82, 85.) So, the proper place to start when analyzing whether Plaintiff has stated a valid rulemaking claim under Wis. Stat. § 227.40 is that challenged line, not the EL-122 as a whole.

To show that this single line on the EL-122 is somehow a "rule," Plaintiff points to Wis. Stat. § 227.23, which says that "[a] form imposing a requirement which meets the definition of a rule shall be treated as a rule." (Pl.'s Br. 20.)

The problem with Plaintiff's position is that the line in dispute is not a "requirement which meets the definition of a rule." He correctly identifies the five necessary components of a rule:

> (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 or procedure of such agency.

Wis. Stat. § 227.01(13) (numbering added); *Citizens for Sensible Zoning, Inc. v. Dep't of Nat. Res.*, 90 Wis. 2d 804, 814, 280 N.W.2d 702 (1979). But at least four of these requirements are not met here.

Regulation, standard, statement of policy or general order.

First, the challenged line is not a "regulation, standard, statement of policy or general order." Government action in this category affirmatively *requires* people to act in a certain way. *See, e.g.*, *Wis. Legislature v. Palm*, 2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900 (holding that COVID-era DHS order directing people to stay at home and closing businesses was a "rule"); *Tavern League of Wis., Inc. v. Palm*, 2021 WI 33, 396 Wis. 2d 434, 957 N.W.2d 261 (same, for DHS order limiting size of indoor public gatherings); *Citizens for Sensible Zoning, Inc.*, 90 Wis. 2d at 815 (same, for flood plain zoning ordinance that "restrict[ed] . . . conduct").

That kind of affirmative requirement is not what is happening here. Rather, WEC has added a line to a form—"I requested this ballot and this is the original or a copy of that request"—and an absentee voter avers that this is true by choosing to sign the certification on the form. In other words, Plaintiff challenges language that simply describes a fact in the world, not language that purports to restrict or regulate how a person acts.

Plaintiff assumes this line somehow represents a "standard" because the EL-122 form "was adopted to be the uniform envelope to be utilized when returning absentee ballots." (Pl.'s Br. 21.) But that confuses two meanings of the word "standard."

Plaintiff wrongly assumes the word here means "an approved model."[8] But the definition of a rule in Wis. Stat. § 227.01(13) uses the word "standard" in a different sense: as "a rule or principle that is used as a basis for judgment."[9] The words surrounding "standard" in Wis. Stat. § 227.01(13) confirm that the latter definition is the relevant one here. Statutory terms "should be understood in the same sense as the words immediately surrounding or coupled with it." *Benson v. City of Madison*, 2017 WI 65, ¶ 31, 376 Wis. 2d 35, 897 N.W.2d 16. The words surrounding "standard" in Wis. Stat. § 227.01(13) are "regulations" and "orders," words that also are "rules or principles" that are "used for the basis for judgment."

In short, the form itself may be "standard" in that everyone uses the same version, but neither the form nor the line at issue itself *imposes* a "standard" within the meaning of Wis. Stat. § 227.01(13).

---

[8] *Standard*, Dictionary.com, https://www.dictionary.com/browse/standard (last visited May 31, 2024).

[9] *Id.*

General application.

The challenged line also is not of "general application," the second "rule" criteria. As courts have explained, a "regulation, standard, statement of policy or general order" is of "general application" when "the class of people regulated . . . 'is described in general terms and new members can be added to the class.'" *Tavern League of Wis.*, 396 Wis. 2d 434, ¶¶ 19–20. A line that describes a factual circumstance to which a voter avers simply cannot be of "general application." The line does not "apply" to anyone, let alone a "class of people" who are "described in general terms"; rather, individual voters simply certify that the line is true when returning their absentee ballots.

Again, Plaintiff says the line is of "general application" because the EL-122 "is to be utilized with every absentee ballot in every election." (Pl.'s Br. 21.) But this repeats Plaintiff's same mistake as with the word "standard." The question is not whether all absentee voters use the same form (or aver to the challenged language), but whether the form imposes a rule or principle that a general class of people must follow.

Effect of law.

Nor does the challenged line have the "effect of law," the third "rule" criteria. The inquiry here is whether, through the line that Plaintiff challenges, the "interest of individuals in a class can be legally affected through enforcement of the agency action." *Tavern League of Wis.*, 396 Wis. 2d 434,

¶ 21. Again, it makes no sense to say that the challenged line could be "enforced" in a way that "legally affects" anyone's interest. Rather, absentee voters use the line to certify that a fact about the world is true—nothing in the form is "enforced" against them.

Plaintiff first contends that it is "mandatory for municipalities to use the new EL-122." (Pl.'s Br. 22.) Even if true, that has nothing to do with whether the challenged line itself has the effect of law. As Wis. Stat. § 227.23 indicates, the pertinent question is whether the form "impos[es] a requirement." This language implies that a form is a rule only if something in the form requires action, not simply because it is a form that everyone must use.

Plaintiff's other argument is too vague to make much sense of. He says that "using the EL-122 affects the 'interest of individuals in a class,'" that is, "voters returning absentee ballots." (Pl.'s Br. 22.) It is unclear how a line that absentee voters certify is true legally "affects the interest" of absentee voters, and Plaintiff does not elaborate.

Implements legislation.

Nor does the challenged language on the EL-122 "implement, interpret or make specific legislation enforced or administered by such agency," the final "rule" criteria. The two statutes to which Plaintiff points—Wis. Stat. §§ 6.86(1)(ac) and 6.87(4)—do not require any action by WEC to "implement" them. The statutes simply require voters to do certain things when returning

their completed absentee ballots. There is nothing WEC needs to do to "implement" those requirements—a voter either complies with them or they don't. Plaintiff says little about this element, except to state in conclusory fashion that the challenged language "implement[s] requirements" under the relevant absentee voting provisions. (Pl.'s Br. 21.) That explains nothing about how exactly WEC is "implementing" a law that requires nothing further from the agency to take effect.

* * *

In sum, the challenged language does not meet at least four of the five "rule" criteria. The unifying defect in Plaintiff's theory is that they do not challenge language on a form that itself purports to regulate a class of individuals in a way that affects their legal interests. Rather, they attack a statement of fact that absentee voters certify is true when they return their absentee ballots. That is not like any "rule" Wisconsin courts have recognized. Because Plaintiff has failed to identify any "rule" that is subject to challenge under Wis. Stat. § 227.40, the Court need go no further and can reject his second declaratory judgment claim on this basis alone.

2. The challenged language does not conflict with state law.

Even if the challenged language on the EL-122—"I requested this ballot and this is the original or a copy of that request"—were a "rule" subject to a Wis. Stat. § 227.40 challenge, the language does not "encourage[ ] and induce[ ] election fraud." (Doc. 3:20 ¶ 85.) Plaintiff says this language does so because 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." (Doc. 3:20 ¶ 85.) That is incorrect.

First, Plaintiff ignores two other pieces of important language in that challenged line. A voter also certifies that "I requested this ballot," which—unless they did not—is true. And an in-person absentee voter might also be certifying that the EL-122 is their "original" absentee ballot request, which is undisputedly true. *See generally Trump*, 394 Wis. 2d 629, ¶¶ 44–45 (Hagedorn, J., concurring). So, Plaintiff offers no argument for why the challenged line is somehow necessarily false for all absentee voters. That defeats Plaintiff's facial challenge to the rule—he asks for the rule to be invalidated in its entirety—since "the challenging party must show that the [law] cannot be enforced 'under any circumstances.'" *Serv. Emps. Int'l Union, Loc. 1 v. Vos*, 2020 WI 67, ¶ 38, 393 Wis. 2d 38, 946 N.W.2d 35.

Second, for all the reasons explained above in Argument I.B., the EL-122 *is* in fact a "copy" of the request for other absentee voters because it contains

all the same material information as their initial request (plus a signature).[10] Alternatively, the EL-122 itself is an original request by mail that does not trigger the "copy" requirements in Wis. Stat. §§ 6.86(1)(ac) and 6.87(4).

III. If the Court grants judgment to Plaintiff on either claim, it should stay the effect of its decision pending appeal.

As explained above, Defendants are entitled to judgment on both of Plaintiff's declaratory judgment claims. But if the Court disagrees on either one, it should stay the effect of its order pending appeal.

Defendants further note that Plaintiff has not requested a permanent injunction in its motion and has not even attempted to show that it meets the requirements for an injunction, so this Court cannot grant a permanent injunction. *See Pure Milk Prod. Co-op. v. Nat'l Farmers Org.*, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979) (noting that "[p]ermanent injunctions are not to be issued lightly" and that "[t]he cause must be substantial").

A. Legal standard for stays pending appeal.

"Courts must consider four factors when reviewing a request to stay an order pending appeal:

> (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;

[10] The "in the envelope" issue is irrelevant here, because the challenged EL-122 certification language says nothing one way or the other about whether a "copy" has been placed "in the envelope."

> (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. These factors "are not prerequisites," *Id.* ¶ 49 (citation omitted), and so a stronger showing on "one factor excuses less of the other," *State v. Gudenschwager*, 191 Wis. 2d 431, 441, 529 N.W.2d 225 (1995).

On the merits factor, a court reviewing a stay request "cannot simply input its own judgment on the merits of the case and conclude that a stay is not warranted." *Waity*, 400 Wis. 2d 356, ¶ 52. In other words, the stay inquiry cannot simply consist of the circuit court rehashing its merits analysis. *Id.* Instead, the court must consider "how other reasonable jurists on appeal may . . . interpret[ ] the relevant law and whether they may . . . come to a different conclusion." *Id.* ¶ 53. The standard by which the appellate courts will review the merits of the case matters here. Legal questions like the statutory issues and the issue of standing presented here are reviewed *de novo*, and a circuit court deciding whether to grant a stay must consider the likelihood that "appellate courts may reasonably disagree with its legal analysis." *Id.*

As to the second factor, irreparable harm, the court "must consider whether the harm can be undone" if the merits decision ultimately is reversed on appeal. *Id.* ¶ 57. If the harm "cannot be 'mitigated or remedied upon

conclusion of the appeal,' that fact *must* weigh in favor of the movant." *Id.* (emphasis added) (quoting *Waity v. LeMahieu*, No. 2021AP0802, Order 11 (Wis. Ct. App. July 15, 2021) (unpublished)). Where significant harm could occur absent a stay, the movant must show "only 'more than the mere possibility of success on the merits'" to obtain a stay. *Id.* (quoting *Gudenschwager*, 191 Wis. 2d at 441).

B. The public interest will suffer significant irreparable harm if a judgment for Plaintiff takes effect and later is overturned on appeal.

The basic problem with Plaintiff's claims is that they threaten to disrupt long-standing absentee voting procedures on the eve of multiple elections.

First, there are two upcoming elections for a state senate seat, with a primary set for July 2, 2024, and the general set for July 30, 2024. Absentee ballots will start being sent out for these elections any day. (Kehoe Decl. ¶¶ 2–3.)

Second, there is a partisan primary election set for August 13, 2024. For that election, the deadline to send out absentee ballots to voters with an active request on file is June 27, 2024. Ballots could be mailed out for this August primary any time after WEC meets on June 10, 2024, to determine who will qualify for the August primary ballot. (Kehoe Decl. ¶¶ 4–5.)

Third, the 2024 general election will take place on November 5, 2024, and absentee ballots must be sent out by September 19, 2024, to voters with an active request on file. (Kehoe Decl. ¶ 6.)

Fourth, depending on the results of the ongoing effort to recall Assembly Speaker Robin Vos, there could also be two more elections for Speaker Vos's assembly seat—a primary in August and a general election in September. The exact dates of these elections cannot yet be determined. However, the mailing of absentee ballots for those elections would be on roughly the same timeline as the elections discussed above. (Kehoe Decl. ¶ 7.)

Both the U.S. Supreme Court and Wisconsin Supreme Court have explained the serious problems associated with modifying election procedures this close to elections. "Court orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006). Indeed, even "seemingly innocuous late-in-the-day" changes can "interfere with administration of an election and cause unanticipated consequences." *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring). As Justice Kavanaugh rightly observed, "election administrators must first understand the court's injunction, then devise plans to implement that late-breaking injunction, and then determine as necessary how best to inform voters, as well

as state and local election officials and volunteers, about those last-minute changes." *Id.* Similarly, the Wisconsin Supreme Court has noted that late changes can "cause confusion and undue damage to . . . the Wisconsin electors who want to vote." *Hawkins v. Wis. Elections Comm'n*, 2020 WI 75, ¶ 5, 393 Wis. 2d 629, 948 N.W.2d 877.

All these upcoming elections are close enough to justify a stay. Indeed, the U.S. Supreme Court has stayed orders impacting elections that were as much as four months away. *See Merrill v. Milligan*, 142 S. Ct. 879, 888 (2022) (Kagan, J., dissenting).[11]

1. Plaintiff is asking for a significant change in how Wisconsin electors cast absentee ballots that they requested electronically.

Plaintiff will presumably argue that he is not asking for a late "change," but rather for an order that existing law be followed. But that would mask how, practically speaking, he is asking for a major change in how absentee voting is administered in Wisconsin.

Absentee ballot requests via email have been allowed since at least 2006. (Kehoe Decl. ¶ 8.) MyVote has facilitated absentee ballot requests to clerks since 2012 for military and overseas civilian electors, and since 2016 for all

[11] *See also Thompson v. Dewine*, 959 F.3d 804, 813 (6th Cir.) (per curiam) (noting that a stay was warranted in light of *Purcell* notwithstanding its observation that the election was "months away"), *motion to vacate stay denied*, —— U.S. ——, —— S.Ct. ——, 207 L.Ed.2d 1094, 2020 WL 3456705 (2020).

Wisconsin electors. (Kehoe Decl. ¶ 9.) WEC and its predecessor agency have prescribed the absentee ballot return envelope form through EL-122 templates since at least 2000. WEC and its predecessor have always treated the EL-122 as satisfying all statutory obligations absentee voters have to return a valid, completed absentee ballot. (Kehoe Decl. ¶ 10.)

However, WEC has never instructed absentee voters that, if they requested their ballot by an electronic method authorized by Wis. Stat. § 6.86(1)(a)6., they must insert a separate sheet of paper inside their ballot return envelope that contains a signed "copy" of their request. (Kehoe Decl. ¶ 12.) Nor has WEC ever instructed voters that, if they fail to do so, their vote cannot be counted. (Kehoe Decl. ¶ 13.) And WEC has never instructed clerks that either of things is true, either. (Kehoe Decl. ¶ 14.) And Plaintiff has pointed to no evidence that any ballot (whether when Donald Trump won the state in 2016 or Joe Biden won the state in 2020) that has been rejected due to the failure to comply with Plaintiff's view of the statutes.

The upshot is that absentee voters have never understood that they need to return their completed absentee ballots in the way Plaintiff wants, which means he is, in fact, asking for a major change in real-world voting procedures.

And the change he is asking for would affect many absentee voters. It is important to first note that if an absentee voter failed to comply with such a procedure, it would be virtually impossible for them to cure that failure. State

law requires that returned absentee ballots envelopes are not to be opened until election day. A municipal clerk therefore could not discover an absentee voter's failure to comply with this procedure until a poll worker opened the return envelope on election day. By then, it would likely be too late to contact the voter, alert them of the issue, and have them fix it. (Kehoe Decl. ¶ 15.)[12]

In the 2020 general election, around 1,968,527 Wisconsinites voted using an absentee ballot process (including in-person absentee voting). (Kehoe Decl. ¶ 17.) Of those 1,968,527 absentee voters, 982,287 (roughly half) had requested their ballot by an electronic method authorized by Wis. Stat. § 6.86(1)(a)6.—258,016 through traditional email, 724,271 through a MyVote-generated email, and 1,494 by fax. (Kehoe Decl. ¶ 18.)[13] Military voters would be particularly affected—around 80% of them request their ballots by an electronic method. (Kehoe Decl. ¶ 19.) Overall, that is a huge number of voters who have relied on the current process and would be surprised by the change that Plaintiff requests.

[12] That is unlike virtually every other absentee voting mistake, since those generally can be identified and fixed well before election day. For instance, a mistake in filling out the witness certification on the outside of the ballot return envelope can be identified before the envelope is opened on election day, thereby giving the voter a chance to fix the mistake. (Kehoe Decl. ¶ 16.)

[13] Although Plaintiff's complaint only expressly targets requests generated by MyVote, the relief they seek could potentially affect all absentee ballots requested under Wis. Stat. § 6.86(1)(a)6.

So, even if compliance rates with Plaintiff's proposed new procedure were, say, 85% (which is likely an optimistic figure), and assuming similar absentee voting statistics for the 2024 general election, that would still mean around 150,000 ballots could be thrown out statewide.

2. The EL-122 forms cannot be redesigned and reprinted in time for the upcoming elections.

To the extent Plaintiff seeks a redesign of the EL-122 form, it is far too late for that to happen for upcoming elections.

WEC approved a redesigned EL-122 form at an August 4, 2023, meeting through a 6–0 vote. This redesign was the result of a sixteen-month-long redesign effort that began in March 2022. (Kehoe Decl. ¶¶ 21–22.) If WEC were required to redesign the EL-122 form now, the redesign process could take as long as this most recent redesign. (Kehoe Decl. ¶ 25.)

The redesign of the EL-122 forms began with the formation of an internal project team in March of 2022. This team spent months working on the creation of several unique templates for different absentee voter types. These efforts included researching voter types and statutory requirements, redesigning the envelope formatting, discussing with clerks and print vendors the feasibility of design and sizing, coordinating with the United States Postal Service on the compliance of the changes with mail procedures, and then extensive clerk and

voter user testing throughout the state between May and July of 2023. (Kehoe Decl. ¶¶ 23–24.)

Moreover, requiring municipal clerks to reprint all their EL-122s for upcoming elections would be practically impossible given time and budgetary constraints. (Kehoe Decl. ¶ 30.) Wisconsin's clerks started ordering new EL-122 printed forms almost immediately after the Commission's approval. Printing is a volatile industry, and clerks must often order in bulk, well in advance of elections, to ensure EL-122 forms are ready in sufficient quantities for the next election. Paper stock itself has been subject to regular shortages in the last several years. Color and complicated print jobs like the EL-122 forms are even more costly and time-intensive than average print jobs. For those reasons, election planning often involves purchasing a year or more of EL-122 forms in advance, which also helps leverage bulk pricing incentives. (Kehoe Decl. ¶ 26.) By now, virtually all clerks have already printed (and paid for) all the EL-122 absentee ballot envelopes they will need through the end of the year, including for the November general election. (Kehoe Decl. ¶ 27.)

Previous shortages or time-sensitive needs for large-scale election printing have shown that there is insufficient infrastructure to print or reprint entirely new materials for the whole of the state on short notice. (Kehoe Decl. ¶ 29.)

3. Retraining clerks and educating voters on a new process cannot be effectively done before the upcoming elections.

Leaving aside a redesign of the EL-122 form, Plaintiff also seeks a significant change in absentee voting procedures. There are only two conceivable ways to comply with his reading of the statutes, both of which would pose significant logistical challenges. (Kehoe Decl. ¶ 32.)

Hypothetical compliance method #1.

The first hypothetical compliance method is that voters would themselves print out a copy of their original request, sign it, and include it in their return envelope. But this method is currently impossible for voters who make requests using MyVote, because those voters do not receive a copy of the request that MyVote generates and sends to their municipal clerk on their behalf. Rather, MyVote sends the request directly to the voter's municipal clerk, who then mails the voter an absentee ballot. (Kehoe Decl. ¶¶ 33–34.)

Although MyVote could be modified to send the requester a copy of the email that is currently sent to the municipal clerk, technical changes to election systems carry many risks and are not made lightly. The time required to complete any one project is influenced by the software development process, by Department of Administration IT infrastructure policies, and the limited staff available to perform the work. The typical development cycle for even the

most minor change generally requires 2–3 months of work under ideal conditions. (Kehoe Decl. ¶ 35.)

Moreover, the Wisconsin Elections Commission must adhere to the Department of Administration, Division of Enterprise Technology's Change Management Policy to avoid disruption and minimize risks to state IT infrastructure. An essential part of the DET Change Management Policy is the use of change freeze periods, which prohibit modification of IT infrastructure during defined timeframes. These periods exist to ensure: (1) availability of DET technical staff to support a change; (2) a stable environment to meet customer objectives; and (3) predictable schedules to facilitate personnel management. In calendar year 2024, change freeze periods exist around all legal holidays and for the 30 days ahead of all scheduled elections. For this reason, most elections software development occurs in odd-numbered years, when there are no fall elections. (Kehoe Decl. ¶ 36.)

Another problem with this hypothetical compliance method is that some share of absentee voters surely do not own printers and may not have easy access to a printer elsewhere, especially if they are disabled. Such voters would have no practical way to print a copy of their request, even if MyVote were configured to send them an electronic copy. (Kehoe Decl. ¶ 37.)

Moreover, such a change would also require educating absentee voters on their new obligation to print a copy of their electronic request, sign it, and include it in the ballot return envelope. There would not be enough time remaining before any of the upcoming elections this year for WEC to educate voters statewide about this new obligation. (Kehoe Decl. ¶¶ 39, 43.)

Typically when significant changes like this one occur, WEC conducts statewide voter education campaigns. For instance, when voter identification requirements were first rolled out, it took WEC over a year to retain a third-party marketing vendor and work with them to develop and roll out this kind of statewide voter education campaign. Smaller recent voter education campaigns have still taken around six months to prepare and release for public consumption. (Kehoe Decl. ¶ 40.)

To educate voters of this change, WEC also would have to update the uniform absentee voting instructions document that is mandated under Wis. Stat. § 6.869 and included in every absentee ballot mailing. That uniform instruction document is like the EL-122 return envelope form in that redesigning the form takes significant time and effort. Formatting the document to include all necessary information in a readable manner is a challenge, and WEC would need to conduct significant usability testing to ensure that the document is understandable to voters. (Kehoe Decl. ¶¶ 41–42.)

Hypothetical compliance method #2.

The second hypothetical compliance method is that clerks would print the requests that they receive from MyVote and include those printed requests in the mailings to voters with absentee ballots, and then voters would sign those requests and return them with their completed ballots. This would pose a similar problem for voters, who would still need to be reeducated on how to return their absentee ballots and would still likely have high rates of unintentional non-compliance. (Kehoe Decl. ¶ 44.)

One practical problem with this second method involves how clerks currently prepare absentee ballot mailings. Right now, clerks do not prepare individualized mailings for each absentee ballot requester. Rather, all requesters within a given ward receive the exact same materials: a ballot and uniform instructions. By contrast, this method would require clerks to enclose in each individual requester's envelope a copy of that specific voter's electronic request. This process would introduce a significant risk of error, in that clerks could inadvertently enclose a copy of John Smith's request in Jane Doe's envelope. (Kehoe Decl. ¶ 45.)

Another significant practical problem with this method is that clerks do not have systems in place to print absentee ballot requests. Right now, clerks do very little of their own printing in connection with their election administration duties. Instead, municipalities receive their absentee envelopes

and ballots from various print vendors. Orders are typically placed many months in advance, with individual municipalities responsible for estimating demand. In many cases, counties place bulk orders on behalf of their municipalities and distribute supplies centrally. In all cases, WEC has no role in the routine printing of these election materials. (Kehoe Decl. ¶¶ 46–48.)

This system whereby clerks contract out election-related printing duties to third-party vendors would be a poor fit for the kind of printing needed for this second hypothetical compliance method. The kind of contract printing that clerks currently do works well for large-scale jobs that can be completed all at once—which is exactly what happens when clerks print in bulk blank ballots, ballot envelopes, and the like. This second hypothetical compliance method, by contrast, would require clerks to print electronic requests as they come in, so as not to delay sending absentee ballots out to voters. It is unlikely that print vendors would accommodate rolling printing requests of this nature. (Kehoe Decl. ¶¶ 49–50.)

And even if print vendors would accommodate such requests, they likely could not send the printed requests back to municipal clerks in time to comply with Wis. Stat. § 7.15(1)(cm), which requires clerks to mail an absentee ballot within one business day of a valid request. (Kehoe Decl. ¶ 51.)

The only alternative to using third-party vendors would be for clerks to themselves print ballot requests. But it is unclear whether clerks have the

printing equipment (including both printers and toner) on hand to accomplish large-scale printing of this nature. Clerks for small municipalities may not even have an office, and even those that do likely do not have significant printing resources on-hand. And even clerks for larger municipalities may not have the printing resources needed to handle the large number of electronic absentee ballot requests they receive. For instance, the City of Madison received around 81,521 electronic absentee ballot requests for the 2020 general election, and the City of Milwaukee received around 109,338 electronic requests. (Kehoe Decl. ¶¶ 52–54.)

Moreover, shifting to this clerk-printing method would again require significant training of both clerks and voters. There are around 1,850 municipal clerks across Wisconsin's 72 counties, and all of them (plus their staff, likely over another 1,000 people) would need to receive training on how to administer this new printing procedure. There would not be enough time remaining before any of the upcoming elections this year for WEC to educate voters and train clerks statewide about this new obligation. (Kehoe Decl. ¶¶ 55–57.)

4. Plaintiff exacerbated these difficulties through his own delay.

All these time pressures have been exacerbated by Plaintiff's "delay[ ] in seeking relief in a situation with very short deadlines." *Hawkins*, 393 Wis. 2d 629, ¶ 5.

Electronic requests were first authorized in 2006, and ever since then WEC and its predecessors have used the EL-122 form to facilitate compliance with relevant statutory requirements. Plaintiff could have brought his challenge regarding how these absentee voters comply with Wis. Stat. §§ 6.86(1)(ac) and 6.87(4) anytime after 2006. And as for Plaintiff's specific complaints about MyVote, that system first started facilitating absentee ballot requests since 2012—his specific challenge to how MyVote operates could have been brought anytime after that.

And even if Plaintiff says he needed to wait for the *Sidney* decision—which he did not—he received an adverse decision there on January 5, 2024. But he didn't file the complaint in this case until February 15, 2024. (Doc. 3.) After WEC filed an answer on April 4, 2024 (Doc. 22), Plaintiff waited until May 6, 2024, to file a motion for judgment on the pleadings. (Doc. 23.) This introduced two months of delay that has pushed this case even closer to upcoming elections.

Given that this case could have been filed years ago, the impossible timing issues that Plaintiff's challenge creates are entirely problems of his own making.

C. Defendants have shown an adequate chance of success on appeal, especially given the significant harm to the public interest.

Again, the public interest would suffer extremely significant, irreparable harm if a judgment for Plaintiff is *not* stayed and then overturned on appeal. Well over 100,000 votes could be thrown out in the 2024 general election (and thus potentially swing the results from one candidate to another), a harm that could never be undone even if a decision for Plaintiff is overturned on appeal.

Given this incalculable harm, Defendants must show only "more than the mere possibility of success on the merits." *Waity*, 400 Wis. 2d 356, ¶ 57 (citation omitted). As shown above, Plaintiff's two declaratory judgment claims should fail because they do not present a justiciable controversy and are wrong on the merits.

Even if this Court finds that Plaintiff should be granted judgment, that does not mean Defendants have failed to make an adequate showing on the merits to justify a stay. *See id.* ¶ 52. This Court's decision will be reviewed de novo, and "reasonable judges on appeal could easily . . . disagree[ ] with [this] [C]ourt's holdings." *Id.* ¶ 53. That, combined with the significant harm of

disenfranchising potentially tens or even hundreds of thousands of Wisconsinites during upcoming elections, easily suffices to justify a stay.

CONCLUSION

Defendants should be granted judgment on both of Plaintiff's claims. And if Plaintiff is instead granted judgment, this Court should stay the effect of its decision pending appeal.

Dated this 31st day of May 2024.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by Colin T. Roth
COLIN T. ROTH
Assistant Attorney General
State Bar #1103985

BRIAN P. KEENAN
Assistant Attorney General
State Bar #1056525

Attorneys for Defendants

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-7636 CTR
(608) 266-0020 BPK
(608) 294-2907 (Fax)
rothct1@doj.state.wi.us
keenanbp@doj.state.wi.us

CERTIFICATE OF SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed *Defendants' Opposition to Plaintiff's Motion for Judgment on the Pleadings and Brief in Support of their Cross-Motion for Judgment on the Pleadings* with the clerk of court using the Wisconsin Circuit Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 31st day of May 2024.

Electronically signed by Colin T. Roth
COLIN T. ROTH
Assistant Attorney General