STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
Branch 8

AMERICAN OVERSIGHT,

Petitioner,

v.

ASSEMBLY OFFICE OF SPECIAL COUNSEL,
ROBIN VOS, in his official capacity,
EDWARD BLAZEL, in his official capacity,
and WISCONSIN STATE ASSEMBLY,

Respondents.

Case No.: 21-CV-3007
Petition for Writ of Mandamus
Case Code: 30952

PETITIONER'S BRIEF IN OPPOSITION TO MOTION OF THE OFFICE OF THE SPECIAL COUNSEL FOR STAY PENDING APPEAL

On February 17, 2022, Respondent Assembly Office of Special Counsel ("OSC") submitted a Motion for a stay pending appeal of any order of this Court to release documents in response to Petitioner American Oversight's ("Petitioner") open records requests. (Doc. 153.) OSC's Motion, which was filed before this Court issued any appealable ruling, does not, in any event, provide any basis to further delay release of the records to which Petitioner and the public are entitled. OSC's Motion should be denied.

BACKGROUND[1]

On February 17, 2022, OSC filed two motions at the same time: (1) a motion for an order permitting *ex parte* argument regarding the documents OSC had submitted for *in*

[1] Additional background may be found in Petitioner's Opposition to the Office of Special Counsel's Motion to Quash (Doc. 125) and Petitioner's Revised Opposition to Motion of the Office of the Special Counsel for Order Permitting *Ex Parte* Argument Regarding Documents Submitted for Individualized *In Camera* Review (Doc. 159).

camera review nearly three weeks prior ("Motion for *Ex Parte* Argument"), and (2) pursuant to Wis. Stat. §§ 808.07(2) and 809.12, a motion for a stay pending appeal of the Court's yet-to-be-issued ruling on the merits ("Motion for a Stay Pending Appeal" or simply "the Motion"). (Doc. 152; *see also* Doc. 153.) Petitioner has already responded to the Motion for *Ex Parte* Argument (*see* Doc. 159), and, on March 2, 2022, the Court denied that motion. (Doc. 165 at 9–10.)

OSC's Motion for a Stay Pending Appeal was premature when it was filed—there was no appeal pending, which is a prerequisite for relief in the rules OSC cites. There was thus no need to address it until the Court ordered release of any withheld records,[2] and Petitioner advised that it would respond to OSC's Motion for a Stay Pending Appeal during or shortly after the March 8 hearing, once the Court has issued its ruling on OSC's motion to quash and/or in relation to the Court's *in camera* review, or on such other schedule as the Court deemed appropriate. (Doc. 159 at 3 & n.3.)

On March 2, 2022, the Court issued a Decision and Order, ruling, *inter alia*, that OSC's motion to quash was denied and that the records the Court reviewed *in camera* must be released. (Doc. 165 at 50–51.) The Court ruled that it would hold the OSC's Motion for a Stay Pending Appeal "in abeyance until the conclusion of oral arguments at the March 8, 2022 hearing" and that its aforementioned orders were stayed until that time. (*Id.* at 3; *see also id*. at 52.) As of filing of this brief, OSC has not filed an appeal of the Court's Decision and Order—and thus its Motion remains premature—but because the Court has indicated it

[2] This Court had already stated at the January 21, 2022, show cause hearing that it would "hear the parties on the question of what, if anything, should be the further order of the Court if [the Court] come[s] to a point where [it] disagrees with" OSC's view that its records should not be produced. (Doc. 148 at 62:2-4.)

intends to rule as early as the March 8 hearing, Petitioner now submits a brief in response to OSC's Motion.[3]

While this brief addresses OSC's Motion for a Stay Pending Appeal, Petitioner notes that there are a number of issues in this case that have not yet been addressed in briefing or by the Court—and that could not, in any event, be subject to any appeal OSC might file. These issues include, but are not limited to, whether the submission of records for *in camera* review are the complete set of "records, documents, and things responsive to Petitioners' requests under the Open Records law" (Doc. 110 at 2) and whether any records that should have been retained have been deleted. As noted below, *see* note 9, *infra*, the information Petitioner has received to date indicates that significant numbers of records may be missing from OSC's production to the Court.[4]

ARGUMENT

OSC requests that the Court stay release of "any documents or portions of documents . . . pending appeal for 30 days." (Doc. 153 at 7.) For the reasons explained below, OSC's Motion for a Stay Pending Appeal should be denied.[5]

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[3] On March 3, 2022, following the Court's Decision and Order, OSC's counsel submitted a letter to the Court stating: "[W]e will not submit reply briefing on the motion to stay on behalf of our client. The [Court's March 2] Decision addresses the underlying claims, and further briefing on the stay would be largely duplicative." (Doc. 167.) As such, OSC's Motion for a Stay Pending Appeal will indisputably be fully briefed upon submission of this opposition brief.

[4] In addition, OSC has not responded to a number of Petitioner's other requests, which may also be subject to this Court's orders.

[5] OSC requests a stay of release pending appeal of "30 days or such other time as the Court of Appeals may order." (Doc. 153 at 7.) As explained *infra*, OSC's Motion would have no more merit if it requested a one-day stay than if it had requested an indefinite one. Moreover, if the court of appeals determines a stay should be issued, it issues the stay itself and does not direct this Court to enter the stay. *See* Wis. Stat. § 809.12.

Wis. Stat. § 808.07 gives circuit courts "a wide range of discretion in deciding whether to grant a stay, and, if so, under what conditions." *Scullion v. Wis. Power & Light Co.*, 2000 WI App 120, ¶ 31, 237 Wis. 2d 498, 614 N.W.2d 565. 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;
>
> (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 relevant factors 'are not prerequisites but rather are interrelated considerations that must be balanced together.'" *Id.* (citing *State v. Gudenschwager*, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995)). A "decision to grant or deny a motion to stay . . . must be affirmed [on appeal] if [the court] 'examined the relevant facts, applied a proper standard of law, and using a demonstrative rational process, reached a conclusion that a reasonable judge could reach.'" *Id.* ¶ 50 (quoting *Lane v. Sharp Packaging Sys., Inc.*, 2002 WI 28, ¶ 19, 251 Wis. 2d 68, 640 N.W.2d 788).

OSC has failed to meet their burden of showing any of the *Waity* factors are satisfied, let alone that balancing them together suggests that this Court should grant their motion for a stay and further delay the release of records that American Oversight and the public are entitled to by law.

I. OSC Does Not Make a Strong Showing that it is Likely to Succeed on the Merits of the Appeal.

First, OSC has not made—and cannot make—"a strong showing that it is likely to succeed on the merits of the appeal," and the first factor thus weighs against a stay. *Waity*, 400 Wis. 2d 356, ¶ 49.

A. *Factors for the Circuit Court's Analysis of Likelihood of Success on Appeal.*

"When reviewing the likelihood of success on appeal, 'the probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury the [movant] will suffer absent the stay.' . . . Thus, the greater the potential injury, the less a movant must prove in terms of success on appeal." *Waity*, 400 Wis. 2d 356, ¶ 54 (quoting *Gudenschwager*, 191 Wis. 2d at 441). "However, 'the movant is always required to demonstrate more than the mere possibility of success on the merits.'" *Id.* (quoting *Gudenschwager*, 191 Wis. 2d at 441).

In assessing the likelihood of success on appeal, a circuit court cannot simply rely on or refer to its own merits decision, *Waity,* 400 Wis. 2d 356, ¶¶ 51–52, but instead must consider "the possibility that appellate courts may reasonably disagree with its legal analysis," *id.* ¶ 53; *see also id*. (providing a "circuit court should [] consider[] how other reasonable jurists on appeal may have interpreted the relevant law and whether they may have come to a different conclusion").

Central to this assessment is the standard of review for the issues in the case. *Id*. ¶ 53 & n.16; *see also id*. ¶ 66 (observing the circuit court's stay analysis "should account for the standard of review") (Hagedorn, J., concurring). Decisions that are discretionary with the circuit court have a smaller likelihood of success on appeal than decisions requiring de novo interpretation of statutes. *Id*. ¶ 53 & n.16. Other factors that may be relevant to a circuit

court's analysis of the likelihood of success on appeal include: whether the legal questions involved in the case are novel or have previously been addressed by the appellate courts, *see id*. ¶ 53, and whether any of the parties have supported or advanced the reasoning of the circuit court, *id*. ¶ 67 & n.7 (Hagedorn, J., concurring).

B. *The Court's Decision is Based on Well-Established Appellate Precedent and Involves No Novel Legal Issues.*

OSC does not have a strong likelihood of success on the merits of its claim given the Open Records law's presumption in favor of access and the large body of well-established law—which Petitioner cited to the Court—that defeats OSC's position.

In this case, the Court properly treated the motion to quash as a motion to dismiss and, consistent with precedent, accepted all facts in the complaint as true. (Doc. 165 at 6–7.) The review of a motion to dismiss is de novo. *State* ex rel. *Myers v. Swenson*, 2004 WI App 224, ¶ 6, 277 Wis. 2d 749, 691 N.W.2d 357. Moreover, "[t]he application of the Open Records Law to undisputed facts is a question of law that [an appellate court] review[s] de novo, benefiting from the analyses of the circuit court." *Hempel v. City of Baraboo*, 2005 WI 120, ¶ 21, 284 Wis. 2d 162, 699 N.W.2d 551.

While appellate review upon appeal may thus be de novo, the Open Records law's stated policy is for virtually unfettered access to the affairs of government:

> In recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them. Further, providing persons with such information is declared to be an essential function of a representative government and an integral part of the routine duties of officers and employees whose responsibility it is to provide such information.

Wis. Stat. § 19.31. "This statement of public policy in § 19.31 is one of the strongest declarations of policy to be found in the Wisconsin statutes." *Zellner v. Cedarburg Sch. Dist.*, 2007 WI 53, ¶ 49, 300 Wis. 2d 290, 731 N.W.2d 240 (citation omitted).

The presumption in favor of access creates rules for any court's interpretation of the law. To serve the objectives identified in Wis. Stat. § 19.31, "ss. 19.32 to 19.37 shall be construed in every instance with a *presumption of complete public access*, consistent with the conduct of governmental business," and "*only in an exceptional case may access be denied*." Wis. Stat. § 19.31 (emphases added). Based on that clear, underlying statutory law, OSC is already hard-pressed to meet its burden on the merits before analyzing the weaknesses of OSC's particular arguments here.

The likelihood of success tips even further against OSC given the specific legal issues raised in this case. First, OSC waived many of its arguments by not making them in OSC's pre-litigation denial, but rather by vaguely citing "strategic" considerations for withholding. (*See* Doc. 27.) Under well-settled law, an authority's reasons for withholding records must be set forth in the initial denial of records. As the Wisconsin Supreme Court held in *Newspapers, Inc. v. Breier*:

> The duty of the custodian is to specify reasons for nondisclosure and the court's role is to decide whether the reasons asserted are sufficient. It is not the trial court's or this court's role to hypothesize reasons or to consider reasons for not allowing inspection which were not asserted by the custodian.

89 Wis. 2d 417, 427, 279 N.W.2d 179 (1979). The only possible bases for withholding records that can be preserved even if not initially identified are "clear statutory exceptions," as such exemptions are "not uniquely within the custodian's knowledge" and represent a legislative weighing of competing public interests. *State* ex rel. *Blum v. Bd. of Educ.*, 209 Wis.

2d 377, 387–88, 565 N.W.2d 140 (Ct. App. 1997); *see also Mastel v. Sch. Dist. of Elmbrook*, 2021 WI App 78, ¶ 14 n.3, 399 Wis. 2d 797, 967 N.W.2d 176.

Yet, in its Motion for a Stay Pending Appeal, OSC does not claim any "clear statutory exception" as a basis for OSC's likelihood of success on the merits. In fact, the lone argument OSC's Motion makes on the "likelihood of success" factor is based on what OSC claims is an "exemption for ongoing and/or closed investigation records" based on the *Foust*, *Spencer*, and *Journal/Sentinel* cases.[6] (Doc. 153 at 7–9.) As described *supra*, OSC waived that common law argument by failing to raise it in its initial denial of Petitioner's open records requests. (*See* Doc. 27.) Regardless, even if that argument had not been waived, no court could reasonably find that any such exemption applies to this case. *Spencer* pre-dated the modern Open Records law by several decades and addressed disclosure under a different statute altogether. Likewise, *Journal/Sentinel* was a *balancing test* case (not a common law exemption case) and concerned requests for reports filled out when police officers discharged their weapons (not an investigation). Even in that case, the court concluded that "[f]actual material gathered in connection with an investigation of police conduct is generally subject to public inspection" and that the records should be released, subject to redacting supervisory statements and police officer home addresses based on policy considerations not relevant here. *Journal/Sentinel*, 207 Wis. 2d at 514, 519 (citation omitted).

[6] Respectively, these are *State ex rel. Richards v. Foust*, 165 Wis. 2d 429, 436 N.W.2d 608 (1991); *State ex rel. Spencer v. Freedy*, 198 Wis. 388, 223 N.W. 861 (1929); and *State* ex rel. *J./Sentinel, Inc., Anne Bothwell v. Philip Arreola, Chief of Police, City of Milwaukee*, 207 Wis. 2d 496, 558 N.W.2d 670 (Ct. App. 1996).

Of OSC's cited cases, only *Foust* recognizes a common law exemption—one that is limited to "prosecutor files" and plainly addresses policy considerations that are not at issue outside of the law enforcement context. 165 Wis. 2d at 435–36 ("The file may contain . . . anonymous statements, informants' statements, or neighborhood investigations at the scene of the crime—all of which are to be protected if continuing cooperation of the populace in criminal investigations is to be expected.").[7] This case arises far outside of the law enforcement context. Legislative investigations may uncover wrongdoing as an incident to their larger objective of informing legislation, but neither the Assembly itself nor OSC can charge individuals with crimes. As such, the incentives to somehow use revealed information about the investigation to change its direction do not exist in the context of a legislative investigation in the way it might in the context of a criminal investigation. OSC's actions have been consistent with this reality.

Additionally, the OSC has proactively published two different websites, one with copies of submitted "election integrity reports" (Doc. 133) and another with over 2,700 pages of records collected in the investigation (Doc. 160 at ¶ 3), as well as two "interim" reports describing its work, including most recently a 136-page report released on March 1 (Doc. 135; Westerberg Aff., Ex. A). Special Counsel Gableman has made periodic

[7] The other cases cited in *Foust* that OSC relied on in its prior briefing are all, by the OSC's own admission, related to "prosecutor's files." (Doc. 99 at 17.) Moreover, only one of those cases addresses the Open Records law—and even that case does not have applicability here except to underscore that the exemption is focused on criminal prosecutorial files. *Wis. Fam. Counseling Servs., Inc. v. State*, 95 Wis. 2d 670, 673, 291 N.W.2d 631, 634 (Ct. App. 1980) (describing the limits of Wisconsin's public records statute so the state may "effectively prosecute and punish criminals and protect society from criminal ravaging.") In addition, *Spencer* involved records related to potential criminal investigations, and in relevant part dealt with a claim to records access based on a statute that was entirely different from, and narrower in scope than, the forerunner of today's Open Records Law. 223 N.W. at 861.

YouTube videos (*see* Westerberg Aff., ¶ 4), and, earlier this week, gave a three-hour presentation about OSC's March 1 report and the election investigation to the Assembly Committee on Campaigns and Elections (*see id.* ¶ 5). This is not the conduct of a prosecutor investigating a crime.

Even if OSC *were* a prosecutor, its conclusion that all "[i]nvestigation records are exempt from disclosure" would *still* be inaccurate. (*See* Doc. 99 at 18.) Under decades-long precedent, there is no "bright-line rule" that establishes a blanket exemption for *every* document generated by a prosecutor. *Nichols v. Bennett*, 199 Wis. 2d 268, 274, 544 N.W.2d 428, 430–31 (1996) ("A prosecutor cannot shield documents subject to the open records law simply by placing them into a 'prosecutorial file.'"). It is the "nature of the documents" and their "substance" that determines whether they are subject to public disclosure. *Id*. at 274–75. Thus, even if OSC could avail itself of the protections afforded to records possessed by prosecutors, and even if it had not waived such protections with its initial denial, it would still be required to review the records and determine which contain information that should be protected. Moreover, to the extent OSC argues that its work may *lead* to prosecution by a different branch of Wisconsin government, the exemption for prosecutor's records under *Foust* applies only to records in a prosecutor's possession—not copies of those records held in other entities or individuals' files. *See Portage Daily Reg. v. Columbia Cty. Sheriff's Dep't*, 2008 WI App. 30, ¶¶ 17–18, 308 Wis. 2d 357, 746 N.W.2d 525 (noting that the *Foust* exemption cannot be asserted by the sheriff's department because that exemption is "exclusive to the records of another custodian"). These are not novel concepts, and OSC's attempt to dramatically expand the law enforcement exception are counter to its very foundations.

In short, OSC's claim that "[t]he exemption for ongoing and/or closed investigation records is well-established" (Doc. 153 at 8) is simply not accurate outside of *Foust*, but even it were, it would not provide the blanket protection OSC claims. No reasonable appellate court is likely to rule in OSC's favor on the only argument OSC advances in its Motion for a stay pending appeal. This is not a "close call;" consequently, "the likelihood of success on appeal will be low." *Waity,* 400 Wis. 2d 356, ¶ 67, n.7 (Hagadorn, J., concurring).

Finally, OSC vaguely asserts that the "sensitivity of the subject matter" demanded a denial at the time of its response and presumably demands a stay now. (Doc. 153 at 7–8.) This is akin to its initial denial stating "[s]ome documents that contain strategic information to our investigation will continue to be help [sic] until the conclusion of our investigation." (Doc. 27.) Even ignoring OSC's waiver of its arguments both in its initial denial and due to the undeveloped nature of this assertion in its Motion, *see Clean Wis., Inc. v. Public Serv. Comm.,* 2005 WI 93, ¶ 180 n. 40, 282 Wis. 2d 250, 700 N.W.2d 768 ("We will not address undeveloped arguments.") the law is well-settled that any given reasons that lack specificity do not justify denial. *See, e.g., Mayfair Chrysler-Plymouth, Inc. v. Baldarotta*, 162 Wis. 2d 142, 160, 469 N.W.2d 638 (1991); *Breier*, 89 Wis. 2d at 427; *Vill. of Butler v. Cohen*, 163 Wis. 2d 819, 826, 472 N.W.2d 579 (1991). The same is true for stays that would continue that denial. Otherwise, an authority could assert a legally insufficient denial, and continue to deny access to the disputed records by litigating the same or similar defective denial and seeking serial stays from the circuit and appellate courts.[8]

[8] Regardless, the information is not "sensitive" as this Court has explained (Doc. 165 at 35–45) and as Petitioner further explains below, Part II, *infra*.

In sum, OSC has presented this Court with no "clue that another court might read the [law] differently," let alone enough clues to tip the balance in favor of a stay. *Waity*, 400 Wis. 2d 356, ¶ 67, n.7 (Hagedorn, J., concurring). For a reviewing court on a de novo review to conclude that the Court was wrong on the law, the reviewing court would have to ignore Wis. Stat. § 19.31's presumption in favor of access and overrule a large body of settled law, which would make it unlikely that the appellants would have a strong probability of success on the merits of an appeal.

II. Release of the Records Will Not Cause OSC Irreparable Harm.

OSC claims that it will be irreparably injured if the Court "were to release documents or portions of a document[s] in dispute" because "[t]here would be no possible way to 'un-ring the bell.'" (Doc. 153 at 9.) While it is true that circuit courts must "consider whether the harm can be undone, if, on appeal, the circuit court's decision is reversed," *Waity,* 400 Wis. 2d 356, ¶ 57, many of the records are apparently already in the public domain (Doc. 165 at 36–45), and OSC has already chosen to release much of the relevant information about the investigation on its own, including through the 136-page report issued on March 1, 2022, and Special Counsel Gableman's three-hour public presentation of that report on the same day.

Specifically, as indicated in this Court's Decision and Order, it appears that many of the records are already in the public domain and/or outside of OSC, including court records (Doc. 165 at 37–38, 39), copies of agency correspondence or OSC's own correspondence with outside requesters (*id*. at 38, 42, 44), documents related to the interim report that was publicly released (*id*. at 41), rules and motions of the Assembly and printed copies of statutes (*id*. at 43), reports prepared by other entities (*id*. at 43–44), and a news article (*id*. at 44). To

use OSC's analogy, the bell has already been rung as to these records, and there can be no harm to OSC from releasing them. Indeed, the Open Records law recognizes that if information being withheld is already public, this "tends to . . . weigh in favor of release." *See Linzmeyer v. Forcey*, 2002 WI 84, ¶ 37, 254 Wis. 2d 306, 646 N.W.2d 811.

Furthermore, OSC has already repeatedly demonstrated that there is no reason to withhold these records by itself putting information about the investigation and records into the public domain. OSC has published at least two websites ostensibly to inform the public about the investigation: wifraud.com and wielectionreview.org. Both websites publish records that are likely responsive to American Oversight's requests, including "Submitted Election Integrity Reports" purportedly submitted on July 28, 2021 (Doc. 133) and electronic documents used in the investigation from several Wisconsin counties and the Wisconsin Elections Commission, totaling more than 2,700 pages of records (Doc. 160 ¶ 3). In addition, after publishing an initial "interim" report in November 2021 (Doc. 135), OSC on March 1, 2022, submitted to the Assembly what it is calling its "Second Interim Investigative Report," which consists of 136 pages of information about the investigation that OSC has put in the public domain. (Westerberg Aff. Ex. A.)[9] On the same day, Special

[9] Though the March 1 report is labeled "interim," an OSC employee described the report before it was released as "the final report." Mitchell Schmidt, *Gableman's Report on 2020 Election in Wisconsin to be Released Tuesday*, Wis. State J., March 1, 2022, https://madison.com/news/local/govt-and-politics/gablemans-report-on-2020-election-in-wisconsin-to-be-released-this-week/article_35d57f4f-a532-5e45-a06f-d81bf3cd8bde.html#tracking-source=home-top-story.

As indicated in earlier filings, American Oversight has significant concerns that the records provided to this Court for *in camera* review are not complete. Based on the Court's description of the records, it appears that nearly half of the pages submitted by OSC consist of reports produced by other entities (Doc. 165 at 43), meaning that at most less than approximately 400 pages of actual OSC documents were produced to the Court. This number seems very small in light of the nature of Petitioner's requests and the fact that

Counsel Gableman testified about the report before the Assembly Committee on Campaigns and Elections.[10]

As Petitioner has previously argued, OSC is not a law enforcement entity and therefore cannot avail itself of any common-law law enforcement exception to the Open Records law. (Doc. 125 at 16–20; *see also* Part I, *supra*.) However, even if a tenuous, hypothetical connection to "potential violations of election laws that may constitute criminal conduct" (Doc. 153 at 8) were enough to establish any relevant prosecutorial exemption, OSC still would not be able to avail itself of that exemption as it has put the relevant information into the public domain *itself*. In fact, giving the Assembly and the public information regarding "the administration of elections in Wisconsin, focusing in particular on elections conducted after January 1, 2019" is the *entire purpose* of the investigation. (Doc. 101 at 2.) It is telling that not one of the cases OSC cites for the proposition that release of records should be stayed in open records disputes pending appeal involve a governmental body proactively sharing the information with the general public, while simultaneously attempting to prevent disclosure to a requester. *See Zellner*, 300 Wis. 2d 290, ¶ 49; *State ex rel. Bilder v. Delavan Twp.*, 112 Wis. 2d 539, 334 N.W.2d 252 (1983); *Kroeplin v. Wis. Dep't of Nat. Res.*, 2006 WI App 227, 297 Wis. 2d 254, 725 N.W.2d 286; *State*

OSC's investigation has been underway since last summer. (*See* Doc. 159 at 12-13.) The Second Interim Report also describes multiple types of records that are not described in the Court's opinion about the released records. For example, the Report mentions that OSC audited "the votes of several nursing homes in five counties," but the Court's opinion makes no mention of any records of nursing home audits. (Westerberg Aff., Ex. A at 82.)

[10] Brian Kerhin, *Gableman Testifies on Results of Wisconsin 2020 Election Report*, Fox 11 News, March 1, 2022, https://fox11online.com/news/state/michael-gableman-releases-report-on-wisconsin-2020-election.

ex rel. Milwaukee Police Ass'n v. Jones, 2000 WI App 146, 237 Wis. 2d 840, 615 N.W.2d 190; *Vill. of Butler v. Cohen*, 163 Wis. 2d 819, 472 N.W.2d 579 (Ct. App. 1991).

OSC cannot claim that it must maintain the secrecy of an investigation while simultaneously broadcasting information it chooses to release about the conduct and results of the investigation to the public. For example, OSC refuses to release to Petitioner ten pages of emails involving Wisconsin Voter Alliance President Ron Heuer. (Doc. 165 at 37.) At the same time, Special Counsel Gableman has described Heuer, in testimony that was live streamed to any member of the public, as "essential" to the process of identifying individuals in long-term care facilities for the investigation to interview.[11] As for the remaining records that have not already been released, the Court has described them as general, run-of-the mill office documents, coming nowhere close to justifying the veil of secrecy OSC has erected around them. (Doc. 165 at 35–45.)

Because many of the records OSC seeks to keep secret are already publicly available, and because OSC has further chosen to publicize its activities in significant detail, release of the records at issue cannot cause irreparable injury to OSC.

III. Staying Release of the Records Would Substantially Harm American Oversight by Further Delaying Production of Records It is Entitled to By Law.

On the other hand, granting a stay of the order to release the records in this action will cause "substantial harm" to the other party in this case, American Oversight. *Gudenschwager*, 191 Wis. 2d at 440. On this prong, the Court must "consider the extent of harm the non-movant will experience if a stay is entered, but the non-movant is ultimately

[11] *See* Westerberg Aff., ¶ 5; *see also* Assembly Committee on Campaigns and Elections, WisconsinEye (March 1, 2022) at 2:30:00, https://wiseye.org/2022/03/01/assembly-committee-on-campaigns-and-elections-27/ ("Mr. Heuer, from Kewaunee County, helped. I mean he was, he was, essential to that process.").

'successful in having the . . . injunction affirmed' and reinstated." *Waity,* 400 Wis. 2d 356, ¶ 58. Here, that harm is substantial: Each day of delay further harms Petitioner by delaying resolution of this case and decreasing the value of the information sought in its open records requests.

At every step of the way, from taking months to make even an initial response to American Oversight's requests, to withholding responsive records based on a vague "strategic information" rationale (Doc. 165 at 4), to procedural tactics after Petitioner was forced to commence this lawsuit (*e.g.*, *id*. at 5–6), OSC has delayed complying with its basic statutory obligation to produce all public records in a timely manner. *See* Wis. Stat. §§ 19.35(1)(a), 19.35(4)(a). Even after this Court thoroughly reviewed the records *in camera* and concluded that OSC had no basis to withhold *any* of the records it refuses to release, (Doc. 165 at 35–45), OSC apparently intends to continue to harm Petitioner by refusing to comply with its fundamental duty of timely public records disclosure.

A timely response is critical to ensuring a requester's right of access to public records. The statute itself recognizes this fact when it requires a response "as soon as practicable and without delay," Wis. Stat. § 19.35(4)(a), and permits suit for a delayed response to records requests, Wis. Stat. § 19.37(1); *see also WTMJ, Inc. v. Sullivan*, 204 Wis. 2d 452, 457, 555 N.W.2d 140 (Ct. App. 1996) (recognizing policy set forth in statute). In short, "delay defeats the purpose of the open records [law]." *State* ex rel. *Auchinleck v. Town of LaGrange*, 200 Wis. 2d. 585, 595, 547 N.W.2d. 587 (1996) (holding that the notice provisions of Wis. Stat. § 893.80(1) do not apply to an open records suit, because otherwise "access to public records pertinent to governmental decision making may be delayed 120 days, in effect eliminating that information from the public debate"). Similarly, courts have recognized in the federal

Freedom of Information Act context that "stale information is of little value." *Ctr. for Pub. Integrity v. United States Dep't of Def.*, 411 F. Supp. 3d 5, 12 (D.D.C. 2019) (quoting *Payne Enterprises, Inc. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988)).

The reason delay is so harmful is clear in the text of the Open Records law itself. Wis. Stat. § 19.31 provides that a "representative government is dependent upon an informed electorate." If timely information about the affairs of government is not made available to the public, members of the public cannot make informed choices about who to vote for, which policies to support, or what individual actions to take in their homes, workplaces, or communities. This harm strikes at the heart of democracy. It is nothing like the "dollars and cents" at issue in *Waity*, 400 Wis. 2d 356, ¶ 67 (Hagedorn, J., concurring) and the loss—loss of citizen oversight of public officials—cannot be compensated in monetary damages or future disgorgement, *see id*. ¶ 59.

Thus, any delay for "the period of time that the case is on appeal," *Waity*, 400 Wis. 2d 356, ¶ 58—whether the thirty days OSC seeks (Doc. 153 at 2) or some other period of time—increases the harm to Petitioner, which has already waited months for the requested records.

OSC does not make separate arguments on the third and fourth *Waity* factors, but implies that there is no harm to American Oversight because Petitioner is not based in Wisconsin. (Doc. 153 at 10.)[12] Wisconsin does not limit its Open Records law to citizens of the state. Wis. Stat. § 19.32(3). As a technical matter, if the Wisconsin legislature wished to

[12] It also relies on mischaracterizations about American Oversight from its own answer to the complaint, including a long screed that is unsupported by any evidentiary facts or admissible evidence. (Doc. 153 at 10–11.) The Court should disregard it.

restrict disclosure of information to Wisconsin citizens, rather than "any person who requests inspection or copies of a record," *id.*, the Assembly could have done so.[13] Instead, as OSC recognizes, the Wisconsin legislature could not have been clearer that "the public policy of this state is that ***all persons*** are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them." Wis. Stat. § 19.31 (emphasis added).

Indeed, the Open Records law specifically makes the identity of the requester irrelevant to the ability to access records. As Wis. Stat. § 19.35(1)(i) states, "no request . . . may be refused because the person making the request is unwilling to be identified or to state the purpose of the request." Doubtless, one reason for this provision is the legislature's recognition that all members of the public benefit when the government releases records, because those records may inform multiple people, and because government employees and officials are incentivized to perform better when they know records may be requested, regardless of who is doing the requesting. OSC's position is directly contrary to the statute and its policy objectives.

Even if its purpose or identity were relevant, American Oversight is a nonpartisan, nonprofit watchdog organization that seeks records to inform the general public—both the Wisconsin public and the broader general public—about the activities and operations of all levels of government. As part of its commitment to transparency, American Oversight posts the records it obtains through open records requests on its website for any member of the

[13] Indeed, several states do establish residency requirements for public records requesters, including Alabama, Arkansas, Kentucky, Tennessee, and Virginia. *See* Ala. Atty. Gen. Opp. 2018-030; Ark. Code § 25-19-105(a)(1)(A); Ky. Rev. Stat. § 61.872; Tenn. Code § 10-7-503(a)(2)(A); Va. Code § 2.2-3704(A).

public to view.[14] The Wisconsin public benefits significantly from the information provided in response to American Oversight's open records requests, which allows Wisconsin citizens to monitor the government in accordance with the very foundations of the Open Records law. Indeed, courts have previously recognized that the public's right in understanding the affairs of government and official acts "include[s] the public's ability to evaluate the use of public resources." *Schill*, 2010 WI 86, ¶ 81. "Taxpayers of a community have the right to know how and why their money is spent." *Journal/Sentinel, Inc. v. Sch. Bd. of Sch. Dist. of Shorewood*, 186 Wis. 2d 443, 459, 521 N.W.2d 165, 172 (Ct. App. 1994). Further, citizens have a right to hold government employees accountable for the job they do, both in executing their jobs and, as applicable, supervising other employees. *Id*.

Based on records obtained by Petitioner and posted publicly, Wisconsin citizens have gained access to information including, for example, the cost to taxpayers of Special Counsel Gableman and his staff's trips to Arizona and South Dakota,[15] as well as the cost to taxpayers of OSC's hiring of Indiana attorneys to deal with legal challenges to subpoenas.[16]

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[14] About, American Oversight, https://www.americanoversight.org/about ("Through our online documents library, we make available the requests we submit, the lawsuits we file, and the government records we receive in response."). For an example of the types of information posted by American Oversight, see the thirty-one requests sent to the Wisconsin Elections Commission since 2019 and their corresponding responses. Documents Archive, American Oversight, https://www.americanoversight.org/documents?document_filter=true&entities%5B%5D=Wisconsin+Elections+Commission&facet_sort=default&document_keyword=&foia_number=&document_filter=true.

[15] Patrick Marley, *Taxpayers Bankrolled Michael Gableman's Arizona Trip After Vos Said They Wouldn't Have to Cover Those Costs*, Milwaukee J. Sent., Nov. 30, 2021, https://www.jsonline.com/story/news/politics/2021/11/30/wisconsin-election-review-taxpayers-bankrolled-gableman-arizona-trip/8797452002/.

[16] Mitchell Schmidt, *Gableman Contracts Lawyers to Fight AG Lawsuit Against Election Subpoenas*, Wis. State J., Dec. 7, 2021, https://madison.com/wsj/news/local/govt-and-

These facts have been reported by Wisconsin news outlets directly to Wisconsin citizens, allowing them to assess the use of taxpayer funds. Information yet to be released may also further assist the public in understanding how the significant taxpayer resources allocated to OSC are being spent and whether OSC's review is being conducted fairly and competently, independently of the records and information OSC choses to release and any self-serving characterization or political tilt it provides related to that information. OSC's claim that American Oversight's geographical location somehow makes disclosing public information to the organization "*antithetical* to the public interest of Wisconsin citizens" (Doc. 153 at 10) (emphasis in original), is both nonsensical and contradicted by clear evidence.

In contrast to this clear showing of harm to Petitioner, OSC has made no showing that this factor counsels in favor of a stay. OSC states, without evidence, that the OSC's investigation is "confidential" and somehow "entitled to the presumption" that it is in the public interest because it is a "legislative act taken on behalf of the people." (*Id.*) But as a threshold matter, even assuming the legislature itself could summarily withhold all responsive records on this same basis—which it cannot—OSC has not, as this Court has observed, been able to "show that it has *any agreement* with the assembly, let alone one which contemplates this extraordinary transfer of power." (Doc. 165 at 48) (emphasis in original). Moreover, despite OSC's proclamations that it somehow is entitled to total secrecy because it was formed by the legislature, "there is no evidence that the assembly cared about confidentiality" when establishing the office. (*Id.* at 49.)

politics/gableman-contracts-lawyers-to-fight-ag-lawsuit-against-election-subpoenas/article_78e169e5-3bb5-5dca-84c6-14476e6b0cd1.html.

Even if OSC was entitled to a presumption that its investigation (and the *confidentiality* thereof) was in the public interest, that public interest cannot outweigh the fundamental public interest in a policy that allows the people to monitor governmental actions. In fact, the case OSC cites in support of this point undermines its argument and underscores Petitioner's. *Wisconsin Carry, Inc. v. City of Madison* states that resolutions like the one that created the OSC are "informal . . . legislative acts." 2017 WI 19, ¶ 25, 373 Wis. 2d 543, 562, 892 N.W.2d 233, 241. An "informal" act by one house of the legislature cannot possibly override "one of the strongest declarations of policy to be found in the Wisconsin statutes," *Zellner*, 300 Wis. 2d 290, ¶ 49: that "all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them." Wis. Stat. § 19.31. It defies logic to claim that a mere informal legislative act could create a novel exception to Open Records law.

This is no "exceptional case" (Doc. 153 at 10), and the Court should not indulge OSC's attempts to muddy the waters by proclaiming that a legislative resolution that does not mention the Open Records law or its exemptions, or a contract of questionable validity that does not even set clear terms of confidentiality, should supersede settled Wisconsin law. It cannot, and OSC's spurious claims to the contrary cannot overcome the clear harm its requested relief will cause Petitioner. Granting a motion to stay release of the records to which American Oversight is entitled will only serve to further delay OSC's compliance with Open Records law and the disclosure of all public information requested by American Oversight.

IV. Staying Release of the Records Would Harm the Public Interest.

Not only will OSC's requested stay substantially harm American Oversight, but it will also do harm to the general public. *See* Section III, *supra*. As OSC admits, "disclosure is ordinarily presumed to be in the public interest" (Doc. 153 at 10) and this case presents no reason to deviate from this well-established principle. As the Wisconsin Supreme Court has repeatedly emphasized, "[t]he Law reaffirms that the people have not only the opportunity but also the right to know what the government is doing and to monitor the government." *Milwaukee J. Sentinel v. City of Milwaukee*, 2012 WI 65, ¶ 4, 341 Wis. 2d 607, 815 N.W.2d 367.

OSC's attempt to thwart public access, by attempting to shield from disclosure records that have already been determined, after thorough *in camera* review, to constitute public information, is "contrary to the public interest." *Id*. (quoting Wis. Stat. § 19.31). As this Court recognizes, the Wisconsin "public has waited long enough to see the affairs of its government." (Doc. 165 at 10.) The citizens of Wisconsin deserve this public information without further delay.

CONCLUSION

For the reasons explained above, Petitioner respectfully requests that the Court deny OSC's motion for a stay pending appeal.

Respectfully submitted this 4th day of March, 2022.

PINES BACH LLP

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**Appearing Pro Hac Vice*

STATE OF WISCONSIN | CIRCUIT COURT BRANCH 8 | DANE COUNTY

American Oversight,

Petitioner,

Case No. 21-CV-3007

vs.

Assembly Office of Special Counsel, et al.,

Respondents.

AFFIDAVIT OF CHRISTA O. WESTERBERG

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

Christa O. Westerberg, being first duly sworn on oath, deposes and says:

1. I am an adult resident of the State of Wisconsin, licensed to practice law therein and am counsel of record for the Petitioner in the above-captioned matter.

2. I make this Affidavit on the basis of my personal knowledge of the facts set forth herein.

3. On March 4, 2022, I retrieved a copy of the Office of Special Counsel's Second Interim Investigative Report On the Apparatus & Procedures of the Wisconsin Elections System, Delivered to the Wisconsin State Assembly on March 1, 2022, from the following website: https://legis.wisconsin.gov/assembly/22/brandtjen/media/1552/osc-second-interim-report.pdf A true and correct copy of the report is attached hereto as Exhibit A.

4. I have visited a YouTube channel created by the Office of Special Counsel, which is available at https://www.youtube.com/channel/UCKwqBQwoC3mQQuys4Gk4Hlg

5. Earlier this week, Mr. Gableman gave a three-hour presentation about the Office of

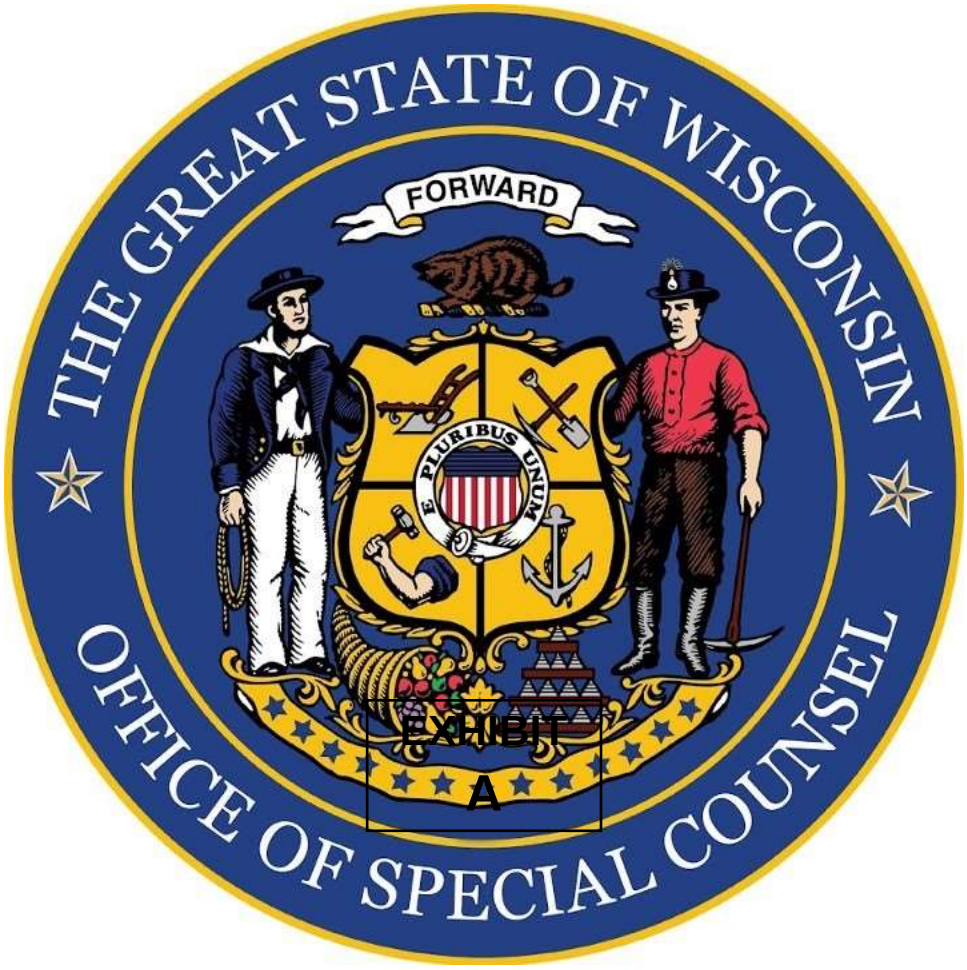
Special Counsel's March 1 report and the election investigation to the Assembly Committee on Campaigns and Elections Committee, which can be viewed by creating an account on WisconsinEye, https://wiseye.org/2022/03/01/assembly-committee-on-campaigns-and-elections-27/

Christa O. Westerberg

Subscribed and sworn to before me
this 4th day of March, 2022.
Margaret J. Funck
State of Wisconsin, Notary Public
My Commission Expires 8/16/2023

MARGARET J. FUNCK NOTARY PUBLIC STATE OF WISCONSIN

FILED
03-04-2022
CIRCUIT COURT
DANE COUNTY, WI
2021CV003007



Office of the Special Counsel

Second Interim Investigative Report

On the Apparatus & Procedures of the Wisconsin Elections System

Delivered to the Wisconsin State Assembly on March 1, 2022

EXHIBIT
A

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Introduction

The Office of the Special Counsel files this Investigative Report on Wisconsin's administration of the 2020 elections as a first step to begin restoring faith in America's elections. This effort is undertaken because Americans' faith in its election system was shaken by events both before and after the November 2020 Presidential election. For example, a January 2022 ABC/Ipsos poll revealed that only 20% of the public is very confident about the integrity of our national election system. This 20% number is a significant drop from 37% from a similar ABC poll conducted one year earlier. America's doubts about its election system crosses partisan lines. Among Democrats, only 30% say they are "very confident" in the U.S. election systems overall. Among independents, only 20% consider themselves "very confident" in the nation's elections. Among Republicans, only 13% are "very confident" with America's elections.

This shaken faith is not a result of legitimate legislative inquiries into election administration, nor is it a result of lawful contests lodged by any candidate or party. Rather, it is largely a function of opaque, confusing, and often botched election processes that could have been corrected, and still can be corrected, with concerted effort on the part of lawmakers and conscientious civil servants who work for Wisconsin State government. Helping correct these processes for future elections is the major purpose of this Report.

On November 10, 2021, the Office of the Special Counsel (OSC) outlined the preliminary steps it had taken to undertake a fully comprehensive review of the 2020 elections in the State of Wisconsin. That document outlined the constitutional authority of the people of the State of Wisconsin, through their Legislature, to investigate their own

government. That Interim Report also outlined the initial roadblocks to a full investigation, and expressed the expectation that the information necessary to provide democratic accountability for and oversight of Wisconsin election proceedings was forthcoming. As outlined in Appendix I, OSC and the Assembly continue to be blocked from investigating portions of the Wisconsin government. Not only has the Wisconsin Attorney General intervened (and lost) in court to block certain subpoenas, and not only have left-wing groups provided support adverse to Wisconsin taxpayers—for instance by providing legal support to government employees seeking to keep their work secret, filing dilatory open records requests, and advancing frivolous complaints before various boards—but the Administrator of the Wisconsin Elections Commission (WEC) has explicitly stated to the Chairwoman of the Assembly Committee on Campaigns and Elections that she is prohibited by law and by private contract from turning over certain public records. Until these lawsuits are resolved, there appears to be no way to fully vindicate the right of the people of the State of Wisconsin to know how their government is run. Such lawsuits have proved a costly and time-wasting exercise.

Nevertheless, the OSC has continued to investigate available records, interview witnesses, and make substantial headway on several issues contained in this report. Further, good work by citizens' groups has provided the Assembly and the OSC with useful leads on how best to cure various systemic problems in the State.

While WEC and the State Attorney General have refused to cooperate with the Legislature's investigation and actively obstructed it, this Report is final in the sense that

it provides a list of recommendations with enough time for the Legislature to act before the close of its session in March. However, the Assembly continues to authorize the OSC to operate past the final adjudication, on the merits, of the various legal challenges to the valid legislative subpoenas we have issued. Following any favorable adjudication, the OSC will manage and process the voluminous responsive records, and will facilitate any available audits.

Despite this cover-up, or perhaps because of it, the OSC can still reach certain conclusions about the integrity of election administration in the State of Wisconsin, and we can still make baseline recommendations. While we cannot, for example, recommend certain server protocols because we have been unable to obtain government records detailing precisely what the numerous electronic systems entail (Wisconsin uses numerous machine and system vendors) or precisely how the existing systems were used in 2020, we do have information relating to how confusing and opaque the system is. It is beyond doubt that no single governmental person or entity in the State of Wisconsin has a handle on these systems—that is a damning indictment on its own. Elections systems must be readily understandable by voters and newly elected county clerks—confusing systems harm voter confidence and tend to facilitate fraud.

The facts contained in this report are substantiated by records the OSC has made available to the Assembly and other public information. To the extent that any of these facts are disputable, the OSC encourages any individual named in this Report, any subject

of validly issued legislative subpoenas, or any other fact witness to make themselves available to the OSC for interview.

Accordingly, at this stage, the recommendations included in this Report largely fall within the umbrella of enabling oversight and transparency of our election systems. It draws no conclusions about specific, unauthorized outside interference or insider threats to machine voting, but it does provide numerous examples of security gaps that tend to enable bad actors to operate in the shadows. Absent access to these systems, it would not be unfair for any citizens to conclude the worst, however. It is a commonplace in the law for it to assume the worst about the nature and impact of hidden or destroyed evidence, and it is up to government to justify its actions to the people, not the other way around.

A few additional recommendations in this Report fall within the second umbrella—maintaining political accountability. While it is clear that the outside groups and the bureaucrats in Madison who run our elections have not been accountable to the voters or the state government, there are some measures that can help return our State to a functional democracy.

This Report has another purpose: to catalog the numerous questionable and unlawful actions of various actors in the 2020 election.

Some unlawful conduct and irregularities outlined in this Report include:

1. Election officials' use of absentee ballot drop boxes in violation of Wis. Stat. § 6.87(4)(b)1 and § 6.855;

2. The Center for Tech and Civic Life's $8,800,000 Zuckerberg Plan Grants being run in the Cities of Milwaukee, Madison, Racine,

Kenosha and Green Bay constituting Election Bribery Under Wis. Stat. § 12.11;

3. WEC's failing to maintain a sufficiently accurate WisVote voter database, as determined by the Legislative Audit Bureau;

4. The Cities of Milwaukee, Madison, Racine, Kenosha and Green Bay engaging private companies in election administration in unprecedented ways, including tolerating unauthorized users and unauthorized uses of WisVote private voter data under Wisconsin Elections Commission (WEC) policies, such as sharing voter data for free that would have cost the public $12,500;

5. As the Racine County Sheriff's Office has concluded, WEC unlawfully directed the municipal clerks not to send out the legally required special voting deputies to nursing homes, resulting in many nursing homes' registered residents voting at 100% rates and many ineligible residents voting, despite a guardianship order or incapacity;

6. Unlawful voting by wards-under-guardianship left unchecked by Wisconsin election officials, where WEC failed to record that information in the State's WisVote voter database, despite its availability through the circuit courts—all in violation of the federal Help America Vote Act.

7. WEC's failure to record non-citizens in the WisVote voter database, thereby permitting non-citizens to vote, even though Wisconsin law requires citizenship to vote—all in violation of the Help America Vote Act. Unlawful voting by non-citizens left unchecked by Wisconsin election officials, with WEC failing to record that information in the State's WisVote voter database; and

8. Wisconsin election officials' and WEC's violation of Federal and Wisconsin Equal Protection Clauses by failing to treat all voters the same in the same election.

It is important to state what this Report is not. This Report is not intended to re-analyze the re-count that occurred in late 2020. And the purpose of this Report is not to challenge certification of the Presidential election, though in Appendix II we do sketch how that might be done. Any decisions in that vein must be made by the elected

representatives of the people, that is, the Wisconsin Legislature. Yet it is clear that Wisconsin election officials' unlawful conduct in the 2020 Presidential election casts grave doubt on Wisconsin's 2020 Presidential election certification. This Report thus does surface very big questions: how should Presidential election certification occur in Wisconsin going forward and would the Legislature have any remedies to decertify if it wanted to do so?

In 2020 in Wisconsin, the certification of its Presidential election spanned two steps and to a large extent operated in a legal vacuum. *First*, on November 30, 2020, Wisconsin Elections Commission (WEC) Chairperson Ann Jacobs, on her own and without a full Commission vote, signed the "determination of the recount and the presidential contest." This unilateral action led one of the sidelined Commissioners to call for Jacobs' resignation. *Second*, a few hours later, Governor Tony Evers certified the results of the state's November 3 election by signing the Certificate of Ascertainment that approved the slate of electors for President-elect Joe Biden and Vice President-elect Kamala Harris.

Neither the WEC Chairperson nor the Governor had an incentive to proceed with greater deliberation and address the serious concerns of citizens and other Commissioners. This is a serious gap in the legal structure governing elections that should be corrected as far in advance of the 2024 presidential election as possible. In the meantime, many of the doubts relating to large categories of ballots are continuing to be both broadened and deepened. Recently, a Wisconsin court invalidated the use of drop boxes. Additionally,

this Report flags systematic problems with voting in elder care facilities, an issue that was also recently blown wide open by the Racine County Sheriff.

There are other issues outlined in this Report, many of which could justify post-election administrative correction by WEC under Wis. Stat. § 5.06, which authorizes exactly such a post-certification process to correct mistakes made by election officials. Administrative corrections under Wis. Stat. § 5.06 would flush out election officials' unlawful conduct. Such a post-certification administrative correction will not de-certify the election on a self-executing basis, but these challenges, which can be filed by any voter in an election (or by district attorneys or the Attorney General of the State), are a worthwhile step to take. However, as noted, these complaints are directed *to* WEC. But complaints *about* WEC cannot fairly be adjudicated by this body—another legal gap.

It is the duty of all citizens of our State and our nation to work hard to secure our democracy for this generation and the next. This Report is one small step towards fulfilling that duty we all share. And without the tireless work of concerned citizens, and dedicated public servants such as the Sheriff of Racine County, much of what is made public in this Report would not have been exposed to the light. In our own way, we can each do our part, whether by voting, or by volunteering, or by leading campaigns to improve the integrity of our elections. The true story of the 2020 elections in Wisconsin might never be fully known—as noted, the constitutional duty of the Legislature is still imperiled in the state courts—but the recommendations in this Report constitute a good beginning.

Statement of Progress

The Special Counsel has been maintaining an active investigation and continuing to fight for the Legislature's right to conduct an election-integrity investigation. Since the first Interim report, the Special Counsel has issued 76 new subpoenas. This brings the total subpoenas issued by the OSC to 90. These subpoenas were served upon entities named in this report, including Dominion Voting Systems, Inc., Electronic System and Software, LLC (ESS), Quickbase, Inc., USDR, CTCL, NVAHI, The Elections Group, and others.

The subpoenas were also served upon or sent to some of the persons who had the most information about the role of private companies and individuals in Wisconsin's election. This included Michael Spitzer Rubenstein, Tiana Epps-Johnson, Ari Steinberg, and Harrison Hersch. Finally, the subpoenas were served on local persons such as Hannah Bubacz, a Milwaukee city employee, and Sarah Linske, an IT employee for WEC.

To the extent that individuals responded to subpoena, it was to produce documents. Some recipients, including the major private companies and individuals, did not comply at all. They either informed the OSC that they would not comply with the subpoena or attend the depositions or embroiled the OSC in litigation. As of the writing of this Report, the litigation surrounding the investigation of the 2020 election has been pervasive and time-consuming.

The Special Counsel has been sued three different times in three different cases in Dane County Circuit Court. The OSC has defended against a lawsuit brought by the Wisconsin Attorney General in which he asked the court to declare that the OSC did not have the authority to conduct the investigation. Two additional lawsuits related to open

records requests to the OSC were filed by organizations supported by Democrat-backed labor unions.

In Waukesha County, the OSC filed a petition to enforce the legislative subpoenas. Initially, the lawsuit included only four defendants. Six additional defendants were later added, bringing the total to ten. Two attorneys from the OSC are assigned to that case and briefing is underway. Prosecuting the enforcement action detracts from the OSC's ability to conduct and complete its investigation.

The OSC did receive a large quantity of documents from the Zuckerberg 5. Those documents were electronic in form. The process of organizing and reviewing them has required a significant expenditure of time and resources, and that will continue to be the case as OSC receives additional documents.

The OSC launched a major investigation into nursing home abuse. Attorneys and investigators were dispatched to multiple nursing homes across the State. They identified and met with multiple residents who voted, despite the fact they were clearly incapable of voting and/ or not legally permitted to vote because of a guardianship order. The OSC representatives made detailed notes and videos of these residents for evidentiary purposes.

The Special Counsel intended to use a professional statistician in the nursing home setting. Using a controlled environment, the OSC could take a detailed sampling of nursing home abuse and voting irregularities to determine, statewide, the number of improperly cast ballots in residential care facilities. The OSC was not able to complete this task by the time this Report was due. Instead, the personnel conducting the nursing home investigation were also repurposed to assist in the drafting of this Report.

The OSC received information that an entity had cellphone pinging data related to the City of Milwaukee and its absentee ballot drop boxes. As of the time of this Report, the OSC has not been able to run to ground all the issues relating to obtaining this data.

The OSC consulted with multiple computer security experts regarding voting machines. Two major machine manufacturers were identified in Wisconsin, Dominion Voting and ESS. The OSC viewed extensive reporting about the integrity of the machines. The OSC learned that some Dominion machines are extremely vulnerable to hacking and manipulation. These specific machines can be manipulated to alter actual votes cast—either surreptitiously or by the machine technicians.

The Special Counsel reviewed extensive reporting of a Dominion machine failure event in another State. The OSC was able to identify, through the reports of experts, that the failed machine recorded two anonymous and unauthorized access events from its VPN. This means, contrary to what Dominion has publicly stated, that at least some machines had access to the internet on election night. Shortly after the unauthorized access was recorded, the machine failed and was reset, wiping all voting history and forcing that election administrator to rely on unverifiable paper printouts from the failed machine.

ESS machines were equally problematic. The central problem is that several of the machines are made with a 4G wireless modem installed, enabling them to connect to the internet through a Wi-Fi hotspot. One municipality under investigation in Wisconsin by the OSC admitted that these machines had these modems and were connected to the internet on election night. The reason given was to "transmit data" about votes to the county clerks.

The OSC learned that all machines in Green Bay were ESS machines and were connected to a secret, hidden Wi-Fi access point at the Grand Hyatt hotel, which was the location used by the City of Green Bay on the day of the 2020 Presidential election. The OSC discovered the Wi-Fi, machines, and ballots were controlled by a single individual who was not a government employee but an agent of a special interest group operating in Wisconsin.

The OSC began a comprehensive investigation of voting machines in Wisconsin. As part of that investigation, subpoenas were sent to Dominion, ESS, and Command Central, LLC, a Dominion reseller and servicer. The information sought included information about who, when, where, and what updates the machines were provided. The OSC learned that one machine company representative stated that the voting machines were "wiped" during updates, meaning they did not retain federally required voter data.

It was discovered that Command Central, LLC, received images of cast ballots on election night using the internet. Command Central is alleged to be holding actual ballots cast on election night at its offices in Minnesota in violation of Wisconsin law. The OSC was not able to complete this portion of its investigation, however.

As of the date of this Report, the voting machine companies have refused to comply with the OSC's legislative subpoenas, and have provided no data. The OSC considers this investigation incomplete but ongoing.

The OSC also sought information about the machines in Wisconsin used on election night from the clerks. The clerks either did not possess the data sought by the OSC or refused to provide it, with Green Bay and Madison insinuating that providing secure voting machine data to the OSC would somehow compromise election integrity. In other words,

these cities claim that it is impossible to verify the integrity of the voting machines because doing that would jeopardize the integrity of both the machines and future elections. The Special Counsel intends to resolve this issue as the investigation moves forward.

The OSC's investigation discovered the use of a ballot tracking and harvesting application in Wisconsin. An extensive amount of time and effort went into this portion of the investigation. The OSC became attuned to the possibility of an application when reviewing email exchanges between the Zuckerberg 5 and third parties. This involved tracking applications in Georgia and Pennsylvania.

The OSC discovered ballot tracking programs in both Georgia and Pennsylvania. The OSC was able to locate and identify the developer of both programs in those States. The OSC obtained the source code for the Pennsylvania application. Ultimately, that data and source code would not prove to be helpful to discovering information about the Wisconsin application.

However, the OSC still located the Wisconsin application and its developers. In the course of that investigation, the OSC documented multiple misrepresentations of material facts by WEC administrator Meagan Wolfe. For example, Ms. Wolfe told the Assembly Committee on Campaigns and Elections both that she did not know about the CTCL grants and that cities did not have access to statewide WisVote or BadgerBooks data. Both of these statements are demonstrably untrue.

Ms. Wolfe also told the Commission that there was no API (Application Programming Interface that allows direct access) into the WisVote or BadgerBooks system. Yet cities have provided information that they *do* have access to statewide WisVote and BadgerBooks data. At least one city apparently provided an API to the WisVote and

BadgerBooks systems, which provided real time, free information to special interest groups who used that information for selective, racially-targeted get-out-the-vote purposes under the contracts. That application may still have an active API and may remain viable, so that it might be used by the private groups in future elections.

Moving forward, the OSC will continue working to obtain answers to the important questions raised by these findings. The tasks remaining include:

1. Vindicating the legislature's subpoena and investigative authority through ongoing litigation;
2. Compelling witnesses (individual or institutional) with crucial information about Wisconsin elections to provide testimony. This includes Meagan Wolfe, Ann Jacobs, Michael Spitzer Rubenstein, Tiana Epps-Johnson, Trina Zanow, Sarah Linske, Hannah Bubacz, Harrison Hersch, Dominion, ESS, and the Zuckerberg 5 through ongoing litigation.
3. Determining the identities of any groups or individuals engaged in ballot harvesting in Wisconsin;
4. Verifying the integrity of Wisconsin's voting machines;
5. Identifying additional votes cast unlawfully as a consequence of WEC's directives to clerks regarding SVDs;
6. Providing additional reporting as necessary, possibly including a more robust roadmap to the outside groups and leadership that interfered with the administration of past Wisconsin elections.

Chapter 1

The Center for Tech and Civic Life's $8,800,000 Zuckerberg Plan Grant with the Cities of Milwaukee, Madison, Racine, Kenosha and Green Bay (the Zuckerberg 5) Facially Violates Wisconsin Law Prohibiting Election Bribery.

The Cities of Milwaukee, Madison, Racine, Kenosha and Green Bay entered into an agreement with Center for Tech and Civic Life (CTCL). In the agreement, the Cities took CTCL's money to facilitate in-person and absentee voting within their respective city. The agreement documents included the Wisconsin Safe Voting Plan (WSVP), the CTCL worksheets and the CTCL acceptance letters, which were conditioned on the Cities spending CTCL's transferred money in accordance with the WSVP. These documents are in the accompanying appendix: App. 7-27 (WSVP); App. 513-519, (CTCL worksheet blank form), 520-537 (Green Bay worksheet), 538-551 (Kenosha worksheet), 552-563 (Madison worksheet), 564-575 (Milwaukee worksheet), 576-587 (Racine worksheet); 588-601 (CTCL grant application acceptance letters for Milwaukee, Madison, Kenosha, Green Bay and Racine).

Any Agreement Where a City's Election Officials Receive CTCL or Other's Private Money to Facilitate In-Person and Absentee Voting Within a City Facially Violates Wis. Stat. § 12.11's Prohibition on Election Bribery Under Wis. Stat. § 12.11.

The CTCL agreement facially violates the election bribery prohibition of Wis. Stat. § 12.11 because the participating cities and public officials received private money to facilitate in-person or absentee voting within such a city. Any similar agreements in the 2022 and 2024 election cycle would also be prohibited election bribery.

Wis. Stat. § 12.11, in relevant part, prohibits a city from receiving money to facilitate electors going to the polls or to facilitate electors to voting by absentee ballot:

> Election bribery
>
> (1) In this section, "anything of value" includes any amount of money, or any object which has utility independent of any political message it contains and the value of which exceeds $1…
>
> (1m) Any person who does any of the following violates this chapter:
>
> 1. Offers, gives, lends or promises to give or lend, or endeavors to procure, anything of value, or any office or employment or any privilege or immunity to, or for, any elector, or *to or for any other person, in order to induce any elector to*:
>
> 1. *Go to … the polls*.
>
> 2. *Vote*….

Wis. Stat. § 12.11 (emphasis added). Although the word "person" is not defined in section 12.11, it is defined elsewhere to include "bodies politic," which also includes municipalities. *See* Wis. Stat. § 990.01(26). Although the word "induce" is not defined in Wis. Stat. § 12.11, it is commonly defined to mean "to call forth or bring about by influence or stimulation."

Wis. Stat. § 12.11 requires three elements for a municipality or its officials to engage in "election bribery:" (1) the definition of "anything of value" must be met; (2) the thing of value must be received by a municipality or its election officials; and (3) the municipality must receive the thing of value in order to facilitate electors going to the polls or voting by absentee ballot. With respect to the first element, Wis. Stat. § 12.11 defines "anything of value" to mean "any amount of money, or any object which has utility independent of any political message it contains and the value of which exceeds $1." To

meet the second element, Wis. Stat. § 12.11 requires that the item of value be received by a municipality. Finally, the city must receive the item of value in order to facilitate electors to go to the polls or in order to facilitate electors to vote.

1. Conception of the Election Bribery Scheme

The record created by public document requests shows that CTCL, a private company headquartered in Chicago[3], engaged in an election bribery scheme. CTCL reached out to the City of Racine to allow CTCL to provide grant money to certain handpicked cities in Wisconsin to facilitate increased in-person and absentee voting in the cities. App. 402. This first grant of $100,000 was to be split among the five largest cities in Wisconsin at $10,000 per city, plus an extra $50,000 to Racine for organizing the five cities. App. 402. This first grant required the mayors of the five largest cities in Wisconsin and their respective staffs to complete CTCL election administration forms, including goals and plans to facilitate increased in-person and absentee voting in their respective cities and "communities of color" and develop a joint plan for elections only in these cities and not statewide. App. 297.

Christie Baumel (a City of Madison employee) wrote on June 9, 2020, regarding CTCL and "Election Cost Grant:"

> My understanding is that this is a small planning grant that Racine received from the Center for Tech & Civic Life to produce, by June 15th, a proposal for safe and secure election administration, according to the **needs identified by the five largest municipalities**. In other words, this information informs the Center for Tech & Civic Life in their consideration of where and how to support complete, safe, secure [sic] elections in Wisconsin.

App. 603 (emphasis added.)

As part of the election bribery scheme, CTCL was reaching out to the five largest cities in Wisconsin, and CTCL wanted information from those cities in determining how to provide money to those cities to facilitate increased in-person and absentee voting. *Id.* This program and the larger amount of grant money was not available to any cities or counties in Wisconsin other than the five largest cities. These five cities began to identify themselves and to be identified by CTCL as the "Zuckerberg 5," including a letterhead with the five cities' seals.[4] App. 7, 141-143. Whitney May, Director of Government Services at CTCL, wrote to representatives of the other Zuckerberg 5 cities on August 18, 2020, stating, "You are the famous WI-5 … excited to see November be an even bigger success for you and your teams." *Id.*; App. 375-376.

The attempt of CTCL to target the five largest cities in Wisconsin for election support to facilitate increased in-person and absentee voting had been ongoing since early 2020, as indicated in emails and invitations from Vicky Selkowe, a Racine employee who opposed Trump and those that voted for him,[5] to Kenosha, Madison, Milwaukee, and Green Bay mayors, and a few other city officials from the Zuckerberg 5. App. 331-349; 392-401; 481-487. Only those four cities plus Racine were invited to "[a]pply for a COVID-19 grant" from CTCL and to thus be in on the "plan" to accept CTCL's private money to facilitate increased in-person and absentee voting in the 2020 election. App. 603-604.

The CTCL Agreement required the Zuckerberg 5 Mayors and their respective staffs to develop a joint plan for the Zuckerberg 5's elections pursuant to the agreement by June 15, 2020:

> The City of Racine, and any cities granted funds under paragraph 4, shall produce, by June 15th, 2020, a plan for a safe and secure election

> administration in each such city in 2020, including election administration needs, budget estimates for such assessment, and an assessment of the impact of the plan on voters.

App. 2. The carrot for the Zuckerberg 5 to provide this information for CTCL was to get part of a $100,000 grant. Once the Zuckerberg 5 expressed interest in receiving the $10,000 grants from CTCL, they quickly provided information to Ms. Selkowe and CTCL on CTCL's form so they could develop a "comprehensive plan" for election administration for their "national funding partner, the Center for Tech & Civic Life" by June 15, 2020. App. 604 (emphasis added).

Following the expected "Council approval" on June 2, Ms. Selkowe of Racine sought to "immediately" connect with "municipal clerks and other relevant staff" to "swiftly gather information about" the cities' "election administration needs." App. 604. Ms. Selkowe obtained the information from the Zuckerberg 5 through the five completed CTCL forms, then either Racine or CTCL used that information to prepare the WSVP, as requested by CTCL. App. 513-519, (CTCL blank form), 520-537 (Green Bay), 538-551 (Kenosha), 552-563 (Madison), 564-575 (Milwaukee), 576-587 (Racine). Ms. Selkowe made clear that she was the point person for communicating with the different city staffs to gather information to prepare this plan. *Id.* at 604.

2. The First Contract Between CTCL and the Zuckerberg 5

On about May 28, 2020, the Racine Common Council approved, and signed, the CTCL conditional grant in the amount of $100,000 to recruit and later coordinate with the Zuckerberg 5 to join the WSVP 2020 submitted to CTCL on June 15, 2020. App. 325-349, 402-405. The grant and distribution to the Zuckerberg 5 was not random, rather it was the

intentional culmination of meetings or virtual meetings on May 16, 2020, June 13, 2020, and August 14, 2020. *Id.* These meetings were also secretive. The mayors and their staff were invited to the meeting. However, neither the Common Council members nor the public were informed that the meetings were even set to occur. *Id.* The Common Council members of Racine were later asked to vote only to approve what was decided at the secret meetings. App. 486-487.

It is not believed that the Common Councils of the other four cities of the Zuckerberg 5 were asked to vote on the $100,000 grant, except perhaps long after they had already received the money and committed to accepting the larger grant and its conditions. *Id.* For example, the City of Madison received the $10,000 even though on July 13, 2020, Maribeth Witzel-Behl, the Madison City Clerk, wrote that "Common Council has yet to accept the $10,000" from CTCL. App. 605-606.

The grant approved by the Racine Common Council stated, "[t]he grant funds must be used exclusively for the public purpose of planning safe and secure election administration in the City of Racine in 2020 and coordinating such planning." App. 404. Thus, the consideration for the Zuckerberg 5 to receive the first, small grant, was that they provide information for CTCL to use in preparing the WSVP for the large grant. *Id.*

3. The WSVP and CTCL's Grant Acceptance Letter Incorporating the WSVP Is the Agreement Where the City Agreed to Take CTCL's Private Money to Facilitate Increased In-Person Voting and to Facilitate Absentee Voting.

The WSVP and CTCL's grant acceptance letter incorporating the WSVP is the agreement in which the City agreed to take CTCL's private money to facilitate increased

in-person voting and to facilitate absentee voting. The WSVP was developed ostensibly "in the midst of the COVID-19 Pandemic" to ensure voting could be "done in accordance with prevailing public health requirements" to "reduce the risk of exposure to coronavirus." Further, it was intended to assist with "a scramble to procure enough PPE to keep polling locations clean and disinfected." App. 7-27.

However, another election purpose existed as evidenced by the documents obtained by the Special Counsel. That other election purpose was to fuse together the CTCL, their allied private corporations, the Zuckerberg 5, and $8.8 million of private funding into joint operations in that group of cities, where the focus would be on facilitating increased in-person and absentee voting, particularly in their "communities of color." *See, e.g., App*. 7-27 (WSVP). From the beginning, the purpose of the WSVP contract and its private funding was for the Zuckerberg 5 to use CTCL's private money to facilitate greater in-person voting and greater absentee voting, particularly in targeted neighborhoods.

4. Having Agreed to the Initial $10,000 Per City Grants (Plus $50,000 Extra for Racine), the Zuckerberg 5 Entered New Grant Agreements for Larger Grants Which Included CTCL's "Conditions" and Performance Requirements Under WSVP.

On or about July 6, 2020, Ms. Selkowe announced that the WSVP had been fully approved for funding by the Center for Tech & Civic Life; the initial $10,000 grant was just the first step for the Zuckerberg 5 to get an even larger grant from CTCL. *See, e.g.,* App. 1-27. Also, on July 6, Tiana Epps-Johnson of CTCL emailed Ms. Selkowe stating CTCL intends to fund each of the Zuckerberg 5 with far larger sums of money: Green Bay—$1,093,400; Kenosha—$862,779; Madison—$1,271,788; Milwaukee—

$2,154,500; and Racine—$942,100. App. 11. This brought the total grants to the Zuckerberg 5 to $6,324,567.00. *Id.* Each of the Zuckerberg 5, expressly or impliedly, accepted the large grant money. For example, sometime in July 2020 the City of Madison accepted $1,271,788 by vote of Common Council. App. 605.

Concurrently with CTCL's plans to provide the Zuckerberg 5 with $6,324,567.00 in grant money, CTCL agents began to inform the Zuckerberg 5 of the conditions and the consideration for that grant money. App. 588-601. In other words, the grants were not for purely altruistic purposes as "strings" were clearly attached. On July 10, 2020, Ms. Selkowe started contacting each of the Zuckerberg 5 to let them know Tiana Epps-Johnson would contact them to start introducing the Zuckerberg 5 to CTCL's "partners." App. 463-464. "Tiana and her team have arranged for extensive expert technical assistance from fantastic and knowledgeable partners across the country, to help each City implement our parts of the Plan." *Id.* Tiana will send a "draft grant agreement" for the city's review and "approval on Monday." *Id.* It was assumed that each City would vote to accept the money, and the terms of the agreement were not important. *Id.*

On July 10, 2020, Ms. Selkowe sent an email to Celestine Jeffreys and copied Tiana Epps-Johnson, stating that Green Bay should work with CTCL, along with several of the other largest Wisconsin cities, to "implement our parts of the Plan," and to allow the City of Green Bay to "understand the resources she's [Tiana Epps-Johnson of CTCL] bringing to each of our Cities [the "cities" of Milwaukee, Racine, Madison, Kenosha and hopefully Green Bay] to successfully and quickly implement the components of our Plan." App. 261-262. By approximately July 24, 2020, each of the Zuckerberg 5 had agreed to contracts with CTCL, along with the conditions, rules, and regulations CTCL attached to the grants.

App. 32-33 (Green Bay), 3-5 (Racine), 371-373 (Kenosha), 392-401 (Milwaukee), 406-410 (Madison).

5. The Grant Agreements and the WSVP Between CTCL and the Zuckerberg 5 Contain Conditions Regarding the City Facilitating Increased In-Person and Absentee Voting.

In addition to being informed that the Zuckerberg 5 should work with CTCL's "partners," the grant agreement contained express conditions that each of the Zuckerberg 5 had to follow in order to receive and keep the grant funds. *Id.* The grant agreement incorporated the WSVP and its provisions:

> The grant funds must be used exclusively for the public purpose of planning and operationalizing safe and secure election administration in the City of _____ in accordance with the Wisconsin Safe Voting Plan 2020.

Id. The consideration for the second contract heavily implied that the Zuckerberg 5 were to use CTCL's "partners" for election administration. By the time the second contracts and grants came to be issued, the Zuckerberg 5 were deeply embedded in election administration, especially in Green Bay and Milwaukee. Michael Spitzer Rubenstein was listed as a "CTCL grant mentor" who was directing election administration in Green Bay. The contracts for the Zuckerberg 5 required the cities to report to CTCL its spending, not make changes to their spending, or pay the grant money back to CTCL. *Id.*

Specifically, the conditions in the second contract included:

a. The grant funds must be used exclusively for the public purpose of planning and operationalizing safe and secure election administration in the City of _____ in accordance with the Wisconsin Safe Voting Plan 2020.

b. Requiring each city or county receiving the funds to report back to CTCL by January 31, 2021 regarding the moneys used to conduct federal elections;

> c. The City of _____shall not reduce or otherwise modify planned municipal spending on 2020 elections, including the budget of the City Clerk of _____ ('the Clerk') or fail to appropriate or provide previously budgeted funds to the Clerk for the term of this grant. Any amount reduced or not provided in contravention of this paragraph shall be repaid to CTCL up to the total amount of this grant.
>
> d. The City of _____ shall not use any part of this grant to give a grant to another organization unless CTCL agrees to the specific sub-recipient in advance, in writing.

App. 588-589 (Milwaukee), 591-592 (Madison), 595-596 (Kenosha), 598-599 (Green Bay), 3-4 (Racine). CTCL provided a grant tracking form to the Zuckerberg 5 to keep track of their expenditures, which they would later have to report to CTCL. App. 609.

Thus, the text of the grant document provides the conditions clearly: the grant funds had to be used for "planning and operationalizing … election administration." App. 3-4, 588-589, 591-592, 595-596, 598-599. The Zuckerberg 5 had to "report back to CTCL by January 31, 2021" regarding the moneys they used. Any moneys used "in contravention" of the grant agreement would have to be "repaid to CTCL" up to the whole amount of the grant. *Id.* The Zuckerberg 5 were not allowed to pay any part of the grant money to another organization "unless CTCL agrees … in advance, in writing." *Id.*

The Zuckerberg 5 have admitted that these were "conditions" and that generally the money from CTCL was "conditional." To underscore the conditions on the grant money, on July 24, 2020, Dennis Granadas of CTCL wrote Celestine Jeffreys of Green Bay:

> Please find attached the revised grant agreement for review and signature. Please note that we made a few edits to clean up language, but this did not change the substance of the agreement, unless an update was requested. If you have any concerns please let me know. In addition, we also updated Section 7 for clarity to the following (changes highlighted in bold): "**The City of Green Bay shall not reduce** or otherwise modify planned municipal spending on 2020 elections, including the budget of the City Clerk of Green

> Bay ('the Clerk') or fail to appropriate or provide previously budgeted funds to the Clerk for the term of this grant. Any amount reduced or not provided in contravention of this paragraph shall be repaid to CTCL up to the total amount of this grant." I look forward to receiving the signed agreement. Please let me know if you have any questions/concerns. Have a great weekend.

App. 611 (emphasis added).

These provisions requiring repayment of the grant moneys are referred to as "claw-back" provisions and require the Zuckerberg 5 to return the moneys to CTCL, if CTCL disagreed with how the Zuckerberg 5 spent the money and conducted their 2020 elections. App. 4, 589, 592, 596, 599. After the election in November 2020, CTCL demanded that the Zuckerberg 5 submit forms to CTCL to prove they complied with the grant conditions by January 31, 2021. App. 609. These conditions, including the WSVP provisions to facilitate increased in-person and absentee voting in each participating city, were not merely "boilerplate" provisions. Instead, CTCL intended to, and did, enforce its contractual requirements on the Zuckerberg 5. *Id.*

6. The Grant Agreements and the WSVP Between CTCL and the Zuckerberg 5 Contain Conditions Requiring Participant Cities to Place CTCL-Funded Absentee Ballot Drop Boxes in Targeted Neighborhoods, Even Though Absentee Ballot Drop Boxes Are Unlawful in Wisconsin.

The WSVP and CTCL's grant acceptance letter incorporated the agreement where the cities agreed to take CTCL's private money to purchase and place absentee drop boxes in targeted neighborhoods. App. 10, 16-17. The WSVP provided Green Bay $50,000, Kenosha $40,000, Madison $50,000, Milwaukee $58,500, and Racine $18,000 for absentee ballot drop boxes. App. 17. The WSVP provided at total of $216,500 for absentee ballot drop boxes in the Zuckerberg 5. App. 17. The use of absentee ballot drop boxes, outside

of narrow exceptions, has been successfully challenged as being a violation of Wisconsin law.

In a case in the Wisconsin Circuit Court for Waukesha County, the plaintiffs sued the WEC to challenge 2020 guidance memos that the WEC issued to municipal clerks. Complaint, *Teigen v. Wisconsin Elections Commission*, No. 21-CV-958 (Wis. Cir. Ct. for Waukesha Cnty. June 28, 2021) (under review by the Wisconsin Supreme Court), available at App. 649-660. In particular, the plaintiffs challenged a memorandum that purported to authorize unstaffed ballot drop boxes:

> Despite this requirement in the statutes [i.e., the requirement that an absentee ballot either be returned by mail or be returned by the voter "in person, to the municipal clerk." Wis. Stat. § 6.87(4)(b)1], WEC Commissioners sent a memo to municipal clerks dated August 19, 2020, (the "August 2020 WEC Memo") stating that absentee ballots do not need to be mailed by the voter or delivered by the voter, in person, to the municipal clerk but instead could be dropped into a drop box *and that the ballot drop boxes could be unstaffed*, temporary, or permanent. (A true and correct copy of the August 2020 WEC Memo is attached hereto as Exhibit B.)

Id. ¶ 10, available at App. 651 (emphasis added).

The Waukesha County Circuit Court granted summary judgment to the plaintiffs and declared the use of ballot drop boxes, outside of narrow exceptions, to be inconsistent with Wisconsin law:

> For the reasons set forth by the Court on the record at the January 13, 2022 hearing, the Court hereby declares that WEC's interpretation of state statutes in the Memos is inconsistent with state law, to the extent they conflict with the following: (1) an elector must personally mail or deliver his or her own absentee ballot, except where the law explicitly authorizes an agent to act on an elector's behalf, (2) the only lawful methods for casting an absentee ballot pursuant to Wis. Stat. § 6.87(4)(b)1. are for the elector to place the envelope containing the ballot in the mail or for the elector to deliver the ballot in person to the municipal clerk, (3) *the use of drop boxes, as described in the Memos, is not permitted under Wisconsin law unless the drop box is staffed*

> *by the clerk and located at the office of the clerk or a properly designated alternate site under Wis. Stat. § 6.855.*

Order Granting Summary Judgment for Plaintiffs, *Teigen v. Wisconsin Elections Commission*, No. 21-CV-958 (Wis. Cir. Ct. for Waukesha Cnty. January 20, 2020), available at App. 66 (emphasis added). The Zuckerberg 5's privately funded absentee ballot drop boxes in the 2020 election were legally unauthorized under Wisconsin law. This makes the Zuckerberg 5 and CTCL's agreement for CTCL-funded purchase and placement of absentee ballot drop boxes a void contract provision as against state law and public policy.

7. Other Entities Have Reported About CTCL's Selective Funding to the Zuckerberg 5.

It is important to note that two non-profit corporations have analyzed the Zuckerberg 5's acceptance and use of the CTCL moneys and published analytical reports in 2021. App. 488-512. Both reports are consistent with our conclusions here. *Id. First*, the Wisconsin Institute for Law & Liberty (WILL) in a June 9, 2021, report titled "Finger on the Scale: Examining Private Funding of Elections in Wisconsin." That report had the following "key takeaways:"

1. WILL received records from 196 communities that received a total $10.3 million in funding from CTCL. These grants ranged from a high of $3.4 million for the City of Milwaukee to $2,212 for the Town of Mountain in Oconto County.

2. The largest five cities in the state (Milwaukee, Madison, Green Bay, Kenosha, and Racine) received nearly 86% of all CTCL grant funds in Wisconsin.

3. While most small towns used CTCL resources for voting equipment

and COVID-related equipment, Milwaukee, Green Bay, and Madison spent close to or above $100,000 on ostensibly "non-partisan" voter education efforts.

4. Areas of the state that received grants saw statistically significant increases in turnout for Democrats. Increases in turnout were not seen for Donald Trump.

5. This WILL report highlights the inequitable distribution of private resources that came into the state during the 2020 election. Reforms that are designed to ensure that any grant money is distributed in a per capita manner across the state will go a long way in increasing faith that our elections are being conducted in an open and honest manner.

App. 491.

The WILL report also calculated the CTCL funding per 2016 voter in Wisconsin's ten largest cities. It showed a huge amount of CTCL funding went to the Zuckerberg 5 per voter and in total showed only a small amount of CTCL funding went to the Wisconsin cities which were not among the Zuckerberg 5:

Municipality	CTCL Funding Per 2016 Voter	Total CTCL Grant Amount
Milwaukee*	$13.82	$3,409,500
Madison*	$8.30	$1,271,788
Green Bay*	$36.00	$1,600,000
Kenosha*	$20.94	$862,799
Racine*	$53.41	$1,699,100
Appleton	$0.51	$18,330
Waukesha	$1.18	$42,100

Eau Claire	$2.01	$71,000
Oshkosh	$0.00	$0.00
Janesville	$6.11	$183,292

App. 500 (" * " denotes a Zuckerberg 5 City).

Notably, the WILL Report concluded that the CTCL funding affected Wisconsin's 2020 election outcomes in favor of candidate Biden over then-President Trump by at least 8,000 votes:

> For candidate Biden there was a statistically significant increase in turnout in cities that received CTCL grants. In those cities, candidate Biden received approximately 41 more votes on average. While the coefficient was also positive for then-President Trump, it did not reach traditional levels of statistical significance. This means that we cannot say that turnout for Republicans in CTCL receiving areas swas any different than it would have been without the grants. Given the number of municipalities in the state that received grants, this is a potential electoral impact of more than 8,000 votes in the direction of candidate Biden.

App. 503.

Second, the Foundation for Government Accountability (FGA) in a June 14, 2021 report titled "How Zuckerbucks Infiltrated the Wisconsin Election" made five key findings:

1. More than 200 Wisconsin jurisdictions received "Zuckerbucks" for the 2020 election, totaling more than $9 million;

2. Nearly $3.5 million was funneled into the City of Milwaukee via two grants;

3. Green Bay spent only 0.8 percent of funds on personal protective equipment—instead purchasing two new 2020 Ford 550s and paying a public relations firm nearly $150,000 for voter outreach;

4. A representative of CTCL had behind-the-scenes access to election administration in Green Bay and Milwaukee; and,

5. A former staff member for Governor Evers worked for the grantor to coordinate grant applications in Eau Claire.

App. 508. The FGS report contends that "Wisconsin can—and should—prohibit local jurisdictions from accepting private money for election administration." *Id.* The relative funding levels for personal protective equipment also gives the lie to a claim that the extraordinary injection of "Zuckerbucks" into this election was necessitated by or intended primarily to ensure the election did not worsen the public health as opposed to influencing voting patterns.

The Zuckerberg 5 Agreed to the Wisconsin Safe Voting Plan Which Contains Geographic and Demographic Classifications to Increase In-person Voting and Absentee Voting for Targeted Areas and Groups—the Kinds of Efforts Typically Associated with Campaigning.

According to the CTCL website, CTCL is not "a grantmaking organization" in "normal years."[6] The WSVP contains provisions to increase in-person voting and absentee voting for targeted areas and groups. These groups met particular demographic criteria, which not-coincidentally, matched that of the Biden-voter profile. App. 7-27. Typically, candidates and campaigns, not cities, engage in get-out-the-vote efforts targeting areas and groups; CTCL provided the Zuckerberg 5 about $8.8 million to carry out the WSVP provisions. App. 493.

The following WSVP provisions are geographic and demographic classifications designed not for safe voting during COVID but to increase in-person voting for targeted

areas and groups, increase absentee voting for targeted areas and groups, or both. App. 7-27. Additionally, these provisions are privately funded and disfavor Wisconsinites outside of the Zuckerberg 5. *Id.*

1. "[T]o be intentional and strategic in reaching our historically disenfranchised residents and communities"

On page one, the WSVP requires the Zuckerberg 5 to "be intentional and strategic in reaching our historically disenfranchised residents and communities; and, above all, ensure the right to vote in our dense and diverse communities" within the Zuckerberg 5. App. 7. This election administration provision, promoting in-person voting and absentee voting, is privately funded, disfavors Wisconsinites outside the Zuckerberg 5, and favors black and minority voters as opposed to the rest of the residents and communities within the Zuckerberg 5. *Id.*

2. "[E]ncourage and increase … in-person" and "absentee voting by mail and early" voting

On pages 5 and 6, the Zuckerberg Plan states that about one-half of the grant money will be used by the Zuckerberg 5 to "encourage and increase … in-person" voting and "dramatically expand strategic voter education & outreach efforts"—"particularly to historically disenfranchised residents" within the Zuckerberg 5. App. 11-12. The remainder was slated to be used to encourage and increase absentee voting by mail and early voting" and "dramatically expand strategic voter education & outreach efforts"—"particularly to historically disenfranchised residents" as opposed to the rest of the residents and communities within the Zuckerberg 5. *Id.*; App. 11-12.

Goal	Green Bay	Kenosha	Madison	Milwaukee	Racine	Totals
Encourage and Increase Absentee Voting By Mail and Early, In-Person	$277,000	$455,239	$548,500	$998,500	$293,600	$2,572,839
Dramatically Expand Strategic Voter Education & Outreach Efforts	$215,000	$58,000	$175,000	$280,000	$337,000	$1,065,000
Totals:	$1,093,400	$862,779	$1,271,788	$2,154,500	$942,100	$6,324,567

One way the Zuckerberg 5 were to accomplish this feat was through a specific and targeted campaign directed at black and minority voters.

3. "Dramatically Expand Voter & Community Education & Outreach, Particularly to Historically Disenfranchised Residents"

On page fifteen, the WSVP calls for the cities to specifically target "[h]istorically [d]isenfranchised [r]esidents" within the Zuckerberg 5. The WSVP and CTCL defined "historically disenfranchised voters" to mean:

> All five municipalities expressed strong and clear needs for resources to conduct voter outreach and education to their communities, with a particular emphasis on reaching **voters of color, low-income voters without reliable access to internet, voters with disabilities, and voters whose primary language is not English.**

App. 21 (emphasis added). Each of the Zuckerberg 5 had their own plans to "target" certain residents and communities for higher in-person voter turnout.

Green Bay wanted private grant funds to "be distributed in partnership with key community organizations including churches, educational institutions, and organizations serving African immigrants, "LatinX" residents, and African Americans." App. 21-22. Green Bay wanted to reach out to the Hmong, Somali and Spanish-communities with targeted mail, geo-fencing, posters (billboards), radio, television and streaming PSAs, digital advertising, automated calls and automated texts, [sic] as well as voter-navigators. App. 544. Green Bay's goal was to increase voter participation in these select, race-based groups by 25% for the November 2020 elections. *Id.* Green Bay's privately funded get-out-the-vote effort did not include electors who did not live in Green Bay or electors in Green Bay who were not members of preferred racial groups.

In Kenosha, grant funds would be used "for social media advertising, including on online media like Hulu, Spotify, and Pandora ($10,000), targeted radio and print advertising ($6,000), and large graphic posters ($3,000) to display in low-income neighborhoods, on City buses, and at bus stations, and at libraries ($5000)." App. 22. Kenosha's privately funded get-out-the-vote effort did not include electors who did not live in Kenosha or electors in Kenosha who did not live in low-income neighborhoods. *Id.*

In Madison, private funds would support partnering "with community organizations and run ads on local Spanish-language radio, in the Spanish-language newspapers, on local hip hop radio stations, in African American-focused printed publications, and in online publications run by and for our communities of color (advertising total $100,000)." App. 22. Madison's privately funded get-out-the-vote effort did not include electors who did not live in Madison, were not Spanish-speaking, did not listen to hip hop radio stations, read

African American-focused printed publications, or online publications run by and for Madison's preferred racial groups. *Id.*

Milwaukee stated that it intended to use these private funds to "get-out-the-vote" based on race, criminal status, and harnessing "current protests" related to the Black Lives Matter movement. App. 571. The City used the private funds to support a "communications effort [that] would focus on appealing to a variety of communities within Milwaukee, including historically underrepresented communities such as LatinX and African Americans, and would include a specific focus on the re-enfranchisement of voters who are no longer on probation or parole for a felony." App. 22-23. Milwaukee's privately funded get-out-the-vote efforts did not include electors who did not live in Milwaukee or electors who are not members of preferred racial groupings. *Id.*

In Racine, the private funds supported renting "billboards in key parts of the City ($5,000) to place messages in Spanish to reach Spanish-speaking voters" and "targeted outreach aimed at City residents with criminal records to encourage them to see if they are not eligible to vote." App. 23. Racine's privately funded get-out-the-vote efforts did not include either electors who did not live in Racine or electors who were not Spanish-speaking. *Id.*

Additionally, in Racine, private funds were to be used "to purchase a Mobile Voting Precinct so the City can travel around the City to community centers and strategically chosen partner locations and enable people to vote in this accessible (ADA-compliant), secure, and completely portable polling booth on wheels, an investment that the City will be able to use for years to come." *Id.* This privately funded get-out-the-vote effort excluded

electors who did not live in Racine and those who did not live near "strategically chosen partner locations." *Id.*

Individually and collectively, these privately funded election administration provisions promoting in-person voting classifications disfavor Wisconsinites outside the Zuckerberg 5 and favor only selectively defined minorities. App. 21-23.

4. WSVP's "Absentee Voting" provisions.

On page four, the WSVP requires the Zuckerberg 5 to take specific actions with early voting:

> Absentee Voting (By Mail and Early, In-Person)
>
> 1. Provide assistance to help voters comply with absentee ballot requests & certification requirements;
> 2. Utilize secure drop-boxes to facilitate return of absentee ballots;
> 3. Deploy additional staff and/or technology improvements to expedite & improve accuracy of absentee ballot processing; and,
> 4. Expand In-Person Early Voting (Including Curbside Voting)

App. 10. This election administration provision, promoting absentee voting, is privately funded and disfavors Wisconsinites outside of the Zuckerberg 5. Only electors in the Zuckerberg 5 benefit from the "assistance," "drop-boxes," "improvement," and increased "early voting." *Id.*

5. "Provide assistance to help voters comply with absentee ballot request & certification requirements"

On pages nine and ten, the WSVP requires that the Zuckerberg 5, "[p]rovide assistance to help voters comply with absentee ballot request & [sic] certification requirements." App. 15-16. None of the private funding in this regard would benefit residents outside the Zuckerberg 5. *Id.* Instead, it targeted only the "Biden profile voter."

In Green Bay, the City would use the private money to fund bilingual LTE "voter navigators" to help Green Bay residents properly upload a valid photo ID, complete their ballots, comply with certification requirements, offer witness signatures, and assist voters prior to the elections. App. 15. Green Bay would also utilize the private funds to pay for social media and local print and radio advertising to educate and direct Green Bay voters so they could upload photo IDs and request and complete absentee ballots. *Id.* In Kenosha, the City would use the private money to have Clerk's staff train Kenosha library staff on how to help Kenosha residents request and complete absentee ballots. *Id.*

6. "Utilize Secure Drop-Boxes to Facilitate Return of Absentee Ballots"

On pages ten and eleven, the WSVP requires the Zuckerberg 5 to establish and use ballot drop boxes. App. 16-17. In Green Bay, the City intended to use private money to add ballot drop-boxes, at a minimum, at the transit center and two fire stations. *Id.* at 16. This was in addition to the one already in use at City Hall. *Id.* Green Bay intended to possibly use the drop boxes at its libraries, police community buildings, major grocery stores, gas stations, the University of Wisconsin Green Bay, and Northern Wisconsin Technical College. *Id.*

In Kenosha, the City intended to use the private money to install four additional internal security boxes at Kenosha libraries and the Kenosha Water Utility to provide easy access to each side of the City to ballot drop-boxes. *Id.* at 16. Madison intended to use the private money to place and maintain one secure drop box for every 15,000 voters, or twelve drop boxes total, and to provide a potential absentee ballot witness at each drop box. *Id.* at 16. Milwaukee intended to use the private money to install secure 24-hour drop boxes at all thirteen of its public library branches, while Racine intended to use the private money to have three additional drop boxes to be installed at key locations around the city. *Id.* at 16–17.

7. "Expand In-Person Early Voting (Including Curbside Voting)"

On pages twelve through fourteen, the WSVP set out the plan to expand in-person absentee voting. App. 18-20. Green Bay used private money to expand and establish at least three EIPEV sites in trusted locations, ideally on the east (potentially UWGB) and west sides (potentially NWTC or an Oneida Nation facility) of the City, as well as at City Hall. *Id.* at 18. The city also used the private money to print additional ballots, signage, and materials to have available at these early voting sites. *Id.* Kenosha used private money to offer early drive-thru voting on City Hall property and for staffing for drive-thru early voting. *Id*.

In Madison, the City intended to use private money to provide eighteen in-person absentee voting locations for the two weeks leading up to the August election and for the four weeks leading up to the November election. *Id*. The City purchased and utilized tents for the curbside voting locations in order to protect the ballots, staff, and equipment from getting wet or damaged. Additionally, it purchased and utilized large feather flags to identify the curbside voting sites. *Id*.

Milwaukee also used private money to set up three in-person early voting locations for two weeks prior to the August election and fifteen in-person early voting locations and one drive-thru location. *Id.* at 18-19. Racine used private money to offer a total of three EIPAV satellite locations for one week prior to the August election as well as offering a curbside in-person early voting option. *Id.* at 19. For the November election, Racine intended to use private money to offer EIPAV at four satellite locations two weeks prior to the election and at the Clerk's office six weeks prior. *Id.*

Chapter 2

The Motive for These Grants Was Impermissible and Partisan Get – Out-the-Vote Effort (GOTV)

While it is clear that the statute prohibiting election bribery was violated, the reader may be asking (to put it simply): "*So what? Aren't we told all the time that voting is a good thing and that we should encourage more people to vote? Isn't that what American democracy is all about? Why should we care if outside groups came in and used their financial resources to get more people to vote? Isn't it just sour grapes to allege that this effort to "fortify" the election crossed over into bribery?*

These questions, and others like it, have been presented to the Wisconsin public by the outside groups who came here and by their advocates in the press and elsewhere as a sort of prophylactic defense of the entire bribery scheme. The outside groups know that their questions act as a potent offensive weapon used to discourage the kind of public scrutiny this Report reflects. This is so because anyone who asks critical questions will immediately be put back on their heels: "Tell us why you don't want more people to vote. What do you have against more *people of color* voting in our elections—are you *racist*?" For the record, all those concerned with this Report are, all things being equal, in favor of more people voting and no one has considered race as a factor one way or the other except to the extent necessary to determine the partisan motives of the private groups who designed and implemented this scheme and who are now cynically and hypocritically

deploying the charge of racism in an attempt to shield their misconduct from the light of day.

The scheme designed and implemented by Zuckerberg's CTCL had its origins in a man named David Plouffe. Plouffe's political track record and savvy were likely taken into account by Mark Zuckerberg and his wife Pricilla when they hired David Plouffe to run their political operation-- the [Pricilla] Chan [and Mark] Zuckerberg Initiative— for the purpose of electing Joe Biden president and defeating then-President Trump.

Writing about President-elect Trump's first public appearance after his 2016 presidential victory, Plouffe had this to say: "It's not that we were simply horrified by the reality show performer and his grifter family appearing on stage as America's next first family—though what a horrifying sight it was." (p. xiii) Writing his book in late summer of 2019, Plouffe tells the reader he does not care who the Democratic nominee will be because it does not matter: the goal for everybody should be to defeat President Trump. And Plouffe knew just how to do it: "**We'll do it through turnout**—growing the overall number of people who walk the walk and actually cast votes. Democracy isn't a metaphor or a game. This year especially it's a deadly serious test." (p. xiv (emphasis added))

Turnout, otherwise known as "getting out the vote," (GOTV) has before 2020 been an exclusively partisan phrase (CITE) used by partisan campaigns to (1) identify; (2) locate; (3) inform; (4) persuade; and, (5) facilitate increasing the number of votes for the candidate that *they favor*. The same is true of efforts to get their ballots into the hands of

a "voter navigator," or ballot harvester, or into a drop box (another concept largely unknown prior to November 2020).

The Zuckerberg-funded CTCL/ Zuckerberg 5 scheme would prove to be an effective way to accomplish the partisan effort to "turnout" their desired voters and it was done with the active support of the very people and the governmental institution (WEC) that were supposed to be guarding the Wisconsin elections administrative process from the partisan activities they facilitated.

Chapter 3

Government Oversight Has Been Obstructed by Governmental and Outside Corporate Collusion

WEC and the State Attorney General have failed to cooperate with this investigation. In fact, WEC and the State Attorney General each have actively resisted and obstructed the investigation's search for the truth. Wisconsin law requires that actions taken by WEC be accomplished by a majority vote, at a publicly noticed meeting. Wis. Stat. 5.05 (1e); Wis. Stat. § 5.05(5s)(a). Yet WEC, aided by the State Attorney General, has impeded this investigation through obstructive litigation carried on without any record of an approval by the majority of the Commission at a public meeting of the Commission.

These actions of WEC continue a pattern of misconduct by the agency that rose to new heights during the 2020 election cycle, in which new election related polices were spread throughout the state (such as the expanded use of unlawful "drop boxes" and the fraudulent use of the "indefinitely confined" status) without having been approved by either the administrative rule-making process, ensuring that changes in law are vetted in properly noticed public meetings, or by receiving a majority vote of the Commission.

Following initial compliance with the valid Assembly subpoenas, the OSC subsequently faced numerous dilatory actions constituting obstruction of this investigation. Such actions include:

1. Instructions by the Governor to governmental actors not to comply with Legislative oversight;

2. Frivolous and subsequently dismissed ethics complaints against OSC staff;

3. Voluminous open record requests by outside, dark money nonprofits;

4. Free, dark money attorneys provided to various governmental actors;

5. Private investigators looking into the private lives of OSC staff, and outside hacks of devices;

6. Coordinated media campaigns against Legislative oversight and the OSC;

7. Intervention in lawsuits by the Attorney General on behalf of individuals and adverse to the mission of his Office; and,

8. Withholding and destruction of evidence, often poorly justified by claimed contractual obligations with commercial vendors, placing private business ahead of the public interest.

Chapter 4

This Collusion and Entanglement Also Caused a Host of Questionable Actions by the Zuckerberg 5

Wisconsin engaged private companies in election administration in unlawful ways for the 2020 Presidential election.

1. Wisconsin law and WEC's 250-page Election Administration Manual for Wisconsin Municipal Clerks do not legally authorize CTCL and its "partners" to participate in Zuckerberg 5's election administration.

2. WEC's WisVote security policies do not legally authorize the Zuckerberg 5 election officials to share WisVote data with CTCL and its partners.

3. The security of WisVote FIDO Keys required by WEC for WisVote access is unacceptable and an invitation to fraud as the ability to properly track all of the access points and personnel is a key feature required to maintain voting integrity.

4. CTCL pushed onto the Zuckerberg 5 the CTCL "partners" who would unlawfully administer aspects of the election.

5. The projects that CTCL's partners promoted had nothing to do with Covid-19 safety.

6. After the Zuckerberg 5 agreed to the large grants, and CTCL convinced the Zuckerberg 5 to utilize CTCL's "partners," CTCL sought to unlawfully embed those "partners" into the Zuckerberg 5's election administration.

7. Given a blank check to run the election, CTCL and its "partners" took full advantage of the opportunity to administer the election in at least one of the Zuckerberg 5.

8. The "private corporate partners" were from out of state, and not necessarily knowledgeable about Wisconsin election law, or concerned about it.

9. Safe voting was a pretext—the real reason for CTCL's WSVP grants was to facilitate increased in-person and absentee voting in specific targeted areas inside the Zuckerberg 5.

10. The Zuckerberg 5 became beholden to CTCL as a result of the WSVP's private funding and the WSVP's provisions.

11. The Zuckerberg 5 ceded administrative control over the election to CTCL and its private partners, including WisVote data sharing, so they could collectively facilitate increased in-person and absentee voting in the 2020 election.

1. Wisconsin Law and WEC's 250-Page Election Administration Manual for Wisconsin Municipal Clerks Cannot Legally Authorize CTCL and Its "Partners" to Participate in Zuckerberg 5's Election Administration.

Wisconsin's municipal clerks are provided training on administering elections, including being provided WEC's 250-page Election Administration Manual for Wisconsin Municipal Clerks. This Manual also illustrates why the WSVP, CTCL and its "partners" participating in the Zuckerberg 5's election administration for the 2020 Presidential Election was not legally authorized.

According to the Manual, "The municipal clerk's election duties include, but are not limited to, supervision of elections and voter registration in the municipality, equipping polling places, purchasing and maintaining election equipment, preparing ballots and notices, and conducting and tracking the training of other election officials."

The Manual reserves those duties to municipal clerks, and nowhere does it authorize CTCL and its "partners," to engage in Zuckerberg 5's election administration. We also have seen no evidence that personnel from CTCL or its partners were trained in Wisconsin election law, as is required of the municipal clerks.

2. WEC's WisVote Security Policies Do Not Legally Authorize the Zuckerberg 5 Election Officials to Share WisVote Data with CTCL and Its Partners.

WEC's policies on WisVote security are written so that municipal clerks do not work hand-in-hand with private companies to administer the elections. So, the Zuckerberg 5's municipal clerks jeopardized WisVote security when data sharing with CTCL and its partners.

The WisVote system is the Statewide Voter Registration System (SVRS) that originated in 2006 and provided key tools for the former State Elections Board to carry out its critical election business practices. In early 2016, SVRS was replaced by WisVote, which reportedly improved usability and functionality and lowered costs.

Three fundamental goals served as the strategic vision for the WisVote system: improved usability for clerks, reduced costs, and creating a stable and supportable system.

WisVote is not simply a voter registration list, but a full elections administration package. The system is accessed by more than 1,600 users in 700 separate locations across the State. Users connect to the system using the internet. Some locations in Wisconsin do not have high-speed internet access available, in which case, the municipal clerk relies on another clerk (usually the county clerk) to perform data entry functions. The system includes several confidential fields, including driver license numbers, dates of birth, partial social security numbers and voters who are under a protective order, which must be protected by statute.

There are four security to gain access to the WisVote system:

1. User must have a viable computer that can access the internet. That computer must have a "Fast Identity Online" (FIDO) user authentication key applet downloaded to the system

2. User must have an assigned User Name

3. User must have an assigned password

4. User must possess a WEC issued FIDO Key

WEC controls the username and password access.

There are four levels of access to the WisVote system:

1. Clerk: this access certification was developed to train new staff in the complete WisVote system application. This access level allows users to perform all WisVote functions, including printing poll books, mapping, and other election administration duties.

2. Data Entry: this access certification was developed to train new staff to enter voter registration applications, update voter status, and record voter participation. This access level will not allow users to merge voters, print poll books, or perform other election administration duties unless the user completes the full WisVote system training.

3. WEDC Entry: this role does not require additional WisVote training other than the WisVote Introduction tutorials and the Security Series videos; however, the clerk, or authorized designee, must still submit the Request to Add Authorized Users form to ensure users receive the correct WisVote permissions. These users can view municipal data and Election Reconciliation information, but only have the ability to modify or edit Inspectors' Statement and EDR Postcard data.

4. Read Only: this role does not require any additional WisVote training other than the WisVote Introduction tutorials and the Security Series videos; however, the clerk, or authorized designee, must still submit the Request to Add Authorized Users form to ensure users receive the correct WisVote permissions. These users can view municipal data, but will not have the ability to add, delete, or modify data in WisVote.

WEC's WisVote security rules do not contemplate or authorize non-governmental outside parties receiving WisVote data shared by Zuckerberg 5's election officials.

Further, WEC's rules provide a specific process to obtain access to WisVote data:

To obtain access to WisVote, the clerk, or authorized designee, will complete the following process:

> 1) Email a completed and signed copy of the Request to Add Authorized Users in The Learning Center (TLC) to Elections Help Desk (elections@wi.gov). Identify the role type for each user identified on the form. There are four user access levels in WisVote from which to choose:
>
> 2) Upon receipt of the completed Request to Add Authorized Users in TLC form, the Elections Help Desk will create and issue a login and password for the user to obtain access to TLC website to allow for the new users to complete the following training:
>
> a. Securing WisVote: this is a series of electronic learning modules located under the Election Security Awareness tile in TLC. All WisVote users are required to complete this training regardless of their access level (please also note that this specific training may also be made available and accessed by individuals identified by the clerk, or an authorized designee, who do not require WisVote access and still wish to participate in this cybersecurity educational opportunity—indicate Requested WisVote Access Level as "Not Applicable" on the Request to Add Authorized Users in TLC form); *AND* The training associated with the access levels listed above, if applicable.
>
> 3) Once new users complete the Securing WisVote training series AND all required training related to their WisVote Access Level, if applicable, an email shall be sent to the Elections Help Desk (elections@wi.gov). The email should state that the Securing WisVote series was completed and should also contain the appropriate Access Certification document (also found on this page), as an attachment. Upon receipt, WEC staff will issue a WisVote username and password.
>
> 4) When logging into WisVote for the first time, new users will see the WisVote User Agreement and the WisVote Confidentiality Agreement, in electronic

format. To acknowledge and accept the terms of these agreements, the user will click the "I agree" button when prompted with each agreement.

CTCL and its partners did not follow this process and yet obtained WisVote data from Zuckerberg 5's election officials. By contrast, the public receives WisVote only as WEC updates the information and for a charge of $12,500 for a daily snapshot of statewide data. Accordingly, under Wisconsin Elections Commission's security policies, CTCL's and its partners were allowed to access to WisVote in this way, opening the system up to unauthorized uses by unauthorized users. The Zuckerberg 5's WisVote data sharing with CTCL and its partners was thus unlawful.

5. The Security of WisVote FIDO Keys Required by WEC for Wisvote Access Is Unacceptable.

The security of WisVote FIDO Keys, required by WEC for WisVote security is unacceptable. Under WEC's policies for a multi-factor authentication, three things are needed for WisVote access: login in name; password; and FIDO Key. The FIDO Key is contained in a flash drive that is inserted into a personal computer.

In 2018, WEC mass-issued FIDO Keys across the State to counties and municipalities. The instructions received from WEC to the key recipients were unclear as to security protocols. For example, one county indicated they had requested 2 FIDO Keys and they received 15 keys. When the clerk received the 15 keys, she called WEC and asked, "what should I do with the additional 13 keys you sent that I didn't request?" WEC said, "hold on to them just in case you need another or one breaks." One would think that at the time these FIDO Keys were issued, WEC would have a master record of custody as

to how many FIDO Keys had been shipped. If that was the case, WEC cannot apparently find it now.

In mid-September 2021, an open records request was sent to the WEC requesting the total number of FIDO Keys that had been issued by WEC to the various counties and municipalities across the State. The request also asked for a list of individuals to whom the keys were issued. WEC initially issued a copy of a 2020 list of FIDO Key users. Knowing this list changes monthly, a second request was made to determine how many of those users had changed. The 2020 list listed 3,137 FIDO Key users across the State. Of that list, 404 active users had been disabled leaving a balance of 2,733 active users. The updated list indicated that205 active users had been added two weeks later and accounted for a total of 2,938 keys. Of those 2,938 active keys, 1,929, or 66% were issued with clerk access.

WEC apparently does not know how many FIDO Keys they have actually issued because individual county or municipal clerks have FIDO Keys that were not assigned or listed on WEC's list. For example, WEC issued a total of 36 FIDO Keys to the Fond du Lac County Clerk, who issued 12 keys to various municipalities and still has 24 in her possession. In contrast, WEC's list confirms 12 keys that were issued without accounting for the 24 keys that remain in the Clerk's possession. WEC's records similarly reflect two of the 15 FIDO Keys that WEC issued to the Kewaunee County Clerk and that the Clerk then issued, but they fail to reflect the other 13 FIDO Keys that WEC issued to the Clerk that remain in the Clerk's filing cabinet. Our investigation repeatedly found that counties

and municipalities have more keys than WEC can account for. Yet, the FIDO Keys are supposed to be a major part of WEC's security policy for WisVote data.

There does not seem to be a meaningful pattern as to how FIDO Keys are used to counties or municipalities. For example, as mentioned in the previous paragraphs, clerks have different methods of distributing the keys that they receive from WEC. Some clerks manage their municipality or county WisVote data entry very carefully. For example, the Kewaunee County Clerk only allows 2 people to make entries or adjustments in the WisVote system. Fond du Lac County allows 12 people in the entire County to enter data or make changes to the data. A close look at the Zuckerberg 5 cities of Madison, Milwaukee, Kenosha, Green Bay and Racine shows a remarkable array of differences in how the FIDO Keys are issued and ultimately used.

There is no known explanation as to why there is such diversity of FIDO Key distribution and accountability in the different cities. The chart below lists the Zuckerberg 5 cities where large sums of CTCL money was applied. It is unclear why 64% of FIDO Keys assigned to one city consist of keys with clerk-level access that would allow unfettered access to the entire WisVote database and enable the user to activate and deactivate voters.

FIDO Keys by Zuckerberg 5 Cities per April 2021 WEC Report

City	Population over 18 yrs	Total Keys	Clerk Keys	% of Keys for Clerks	Data Entry Keys	Other Key Types	One Key for every X residents
Madison	214,180	124	17	14%	107	N/A	1,727
Kenosha	74,766	23	6	26%	17		3,251
Milwaukee	450,233	306	196	64%	108	2	1,471
Green Bay	78,777	13	4	31%	8	1	6,060
Racine	60,123	98	22	22%	76		614

In talking to various clerks across the State, it is known that employees of municipalities that have been issued FIDO Keys will often allow other employees in their organization to use their computer, username, password, and FIDO Key to access the WisVote system and make entries. During the 2020 election, this type of usage was extended to third parties in the Zuckerberg 5 cities as further detailed below. FIDO Keys are an area of concern and require more investigation and attention overall.

1. CTCL Pushed Onto the Zuckerberg 5 the CTCL "Partners" Who Would Unlawfully Administer Aspects of the Election.

As part of the WSVP, CTCL pushed onto the Zuckerberg 5 the CTCL "partners" who would effectively administer aspects of the election in an unlawful manner. Under the WSVP, CTCL promoted to the Zuckerberg 5 numerous entities~~,~~ CTCL's "partners.~~,~~" CTCL would then recommend that the Zuckerberg 5 connect with and use those partners in the administration of the election. App. 39-52, 53-69, 78-80. However, since the Zuckerberg 5 were contractually bound to use only the "organizations" that CTCL approved "in advance, in writing," the "partner" referrals that CTCL made were more than mere "suggestions," they were part of the CTCL's binding contractual agreement with the Zuckerberg 5. App. 4, 589, 592, 596, 599.

In late July 2020, CTCL Director of Government Services Whitney May hosted a series of separate "kick off" calls for each of the Zuckerberg 5 city's public officials, where she introduced and provided an overview of CTCL's allied corporations (sometimes-called "technical partners") to inject themselves into that city's election administration. App. 454-459, 480. CTCL's "partners" introduced to the Zuckerberg 5 were private corporations that would act to unlawfully aid or administer the relevant city's election administration:

1. The National Vote At Home Institute ("VoteAtHome" or "NVAHI") was represented by CTCL as a "technical assistance partner" that could consult about, among other things, "support outreach around absentee voting," voting machines and "curing absentee ballots," and to even take the duty of curing absentee ballots off the city's hands. App. 39-52, 53-69. The NVAHI also offered advice and guidance on accepting ballots and streaming central count during election night and on the day of the count. App. 70-77.

2. The Elections Group and Ryan Chew were represented to be able to provide "technical assistance partners to support your office" and "will be connecting

with you in the coming days regarding drop boxes" and technical assistance to "support your office," and worked on "voter outreach." App. 78-80, 81-83, 171. Elections Group Guide to Ballot Boxes. App. 84-124.

3. Ideas42 was represented by CTCL as using "behavioral science insights" to help with communications. App. 324.

4. Power the Polls was represented by CTCL to help recruit poll workers. -App. 124.

5. The Mikva Challenge was recommended to recruit Chicago-based high school age students to be Zuckerberg 5 poll workers. App. 127.

6. US Digital Response was suggested to help with and then take over "absentee ballot curing," and to "help streamline the hiring, onboarding, and management" of Green Bay's poll workers. App. 130-138.

7. Center for Civic Design was tapped to design absentee ballots and the absentee voting instructions. App. 196.

8. Eric Ming, the Communications Director for CSME, was selected to serve as a "communications consultant to review your [City of Green Bay] advertising plan for November." App. 43, 158-159.

9. The Brennan Center, which focuses on "election integrity" including "post-election audits and cybersecurity" was involved. App. 160.

10. HVS Productions added "voter navigator" FAQs and Election Countdown Copy for the city of Green Bay. App. 163-168.

11. Modern Elections was picked to address Spanish language issues. App. 169-171.

Importantly, none of the referenced "partners" mandated by CTCL were health or medical experts that one might expect for efforts allegedly tied to the COVID pandemic; rather, as the grant contracts required, these were "experts" in "election administration." *See* App. 454-462, 480. Further, several clerks did inform the OSC that actions by these representatives adversely affected the public health safety of staff and voters.

Former Green Bay Clerk Kris Teske has described this usurpation by CTCL and its "partners" of election administration. She stated in her Answer in a prior WEC proceeding:

1. "Others in the Mayor's office began to hold meetings and make decisions relating to the election outside of the Clerk's office." App. 674.

2. "This caused planning for the election to become VERY dysfunctional and caused great confusion in the Clerk's office as many of the meetings and decisions were driven by the Mayor's chief of staff and other senior officials without the knowledge or consent of the Clerk's office." *Id.*

3. "I wrote several emails outlining my concerns with meetings that excluded the Clerk's office and decisions that were made without consulting the Clerk's office." App. 675.

4. "[T]he office's [Clerk's office] ability to fulfill the obligations for the election were greatly hindered and diminished by outside interference." App. 677.

As Teske asserted, Wisconsin law and WEC's Election Administration Manual for Wisconsin Municipal Clerks did not legally authorize CTCL and its partners to engage in Zuckerberg 5's election administration.

12. The Projects That CTCL's Partners Promoted Had Nothing to Do with Covid-19 Safety.

CTCL's partners had nothing to do with Covid-19 safety. Neither CTCL nor its "partners" were medical or health professionals. Instead, CTCL boasted that it had a "network of current and former election administrators and election experts available" to "scale up your vote by mail processes," and "ensure forms, envelopes, and other materials are understood and completed correctly by voters." App. 38.

On July 31, 2020, shortly after the grant agreements were negotiated and executed CTCL's Director of Government Services wrote to Madison employee Maribeth Witzel-Behl about the "projects" CTCL required:

> Hi Maribeth:
>
> Reflecting on your Safe Voting Plan and the kickoff call last week. I wanted to get your feedback about the **projects** our technical partners should tackle first. What are the most urgent areas where you'd like support from the partners? Here's what we captured in our notes as the likely top 3-4:
>
> 1. **Adding satellite locations and drop boxes**—help site locations and provide tailored guidelines and implementation support (Elections Group)
> 2. **Printing materials for mail ballots** – redesign bilingual **absentee ballot** instruction sheet and letter (Center for Civic Design, who is working with WEC on envelope design)
> 3. **Targeting communities with election information** – NVAHA is launching a communications toolkit on August 5 to support **outreach** around **absentee voting** (National Vote at Home Institute), share research insights about how to engage people who might not trust the **vote by mail** process (Center for Civic Design)
> 4. **Training election officials**—review quick guides and other training materials (Elections Group)

App. 479 (emphasis added).

Explaining this "targeting" of communications, Celestine Jeffreys wrote to Whitney May of CTCL on August 27, 2020 that "[t]here are probably 5 organizations that are focused on working with disadvantaged populations and/or with voters directly." App. 37, 45.

CTCL, when working with the Zuckerberg 5, had other conditions that had nothing to do with COVID prevention, including:

1. Employing "voter navigators" to help voters "complete their ballots." App. 34-35.

2. The "voter navigators" would later be "trained and utilized as election inspectors." App. 35.

3. "Utilize paid social media" and "print and radio advertising" to direct voters "to request and complete absentee ballots." App. 34.

4. "enter new voter registrations and assist with all election certification tasks." App. 34.

5. "reach voters and potential voters through a multi-prong strategy utilizing 'every door direct mail,' targeted mail, geo-fencing, billboards radio, television, and streaming-service PSAs, digital advertising, and automated calls and texts," and direct mail to "eligible but not registered voters." App. 36.

6. Assist new voters to "obtain required documents" to get valid state ID needed for voting, targeting African immigrants, LatinX residents, and African Americans. *Id.*

7. "facilitate Election day Registrations and verification of photo ID." App. 36.

Thus, after the grant agreements commenced, CTCL promoted election activities having nothing to do with Covid-19 safety. CTCL instead focused on targeting voter outreach and absentee voting. CTCL also required the Zuckerberg 5 to target specific geographic and demographic voter characteristics. App. 7-27. Using the grant funds to target voter outreach was required by CTCL as one of the WSVP conditions. App. 3, 7-27.

Again, CTCL and its partners had no specific medical or health experience, and the WSVP "projects" had nothing to do with Covid-19 safety. App. 7-27.

5. After the Zuckerberg 5 Agreed to the Large Grants, and CTCL Convinced the Zuckerberg 5 to Utilize CTCL's "Partners," CTCL Sought to Unlawfully Embed Those "Partners" into the Zuckerberg 5's Election Administration.

After the Zuckerberg 5 agreed to the large grants, CTCL offered Milwaukee to provide "an experienced elections staffer [from the Elections Group] that could potentially embed with your staff in Milwaukee in a matter of days and fill that kind of a role." App. 382 (emphasis added).

CTCL and its partners pushed to get involved with, and take over, other parts of the election administration, as well. One of CTCL's recommended "partners" was the National Vote at Home Institute ("NVAHI"). Michael Spitzer Rubenstein, NVAHI's employee, wrote to Claire Woodall-Vogg, the Executive Director of the City of Milwaukee Election Commission: "[C]an you connect me to Reid Magney and anyone else who might make sense at the WEC? Would you also be able to make the connection with the Milwaukee County Clerk?" App. 381.

CTCL and its "partners" made many other attempts to access information to which private entities were obviously not entitled. *Id.* The following communications demonstrate such efforts, not authorized by the governing law:

1. **If you could send the procedures manual and any instructions for *ballot reconstruction,* I'd appreciate that**. On my end: · By Monday, **I'll have our edits on the absentee voter instructions.** · We're pushing Quickbase to get their system up and running and I'll keep you updated. · I'll revise the planning tool to accurately reflect the process. App. 381 (Michael Spitzer Rubenstein emailing to Claire Woodall-Vogg of Milwaukee).

2. I'll create a flowchart for the VBM [vote by mail] processing that we will be able to share with both inspectors and also observers. · **I'll take a look at the reconstruction process** and try to figure out ways to make sure it's followed. App. 381 (Michael Spitzer-Rubenstein emailing to Claire Woodall-Vogg of Milwaukee)

3. "That sounds like a real pain. It would be helpful to just understand the system and maybe the USDR folks can figure out a way to simplify something for you. … if it's okay with you, **they'd also like to record the screen-share to refer back to, if needed.**" **We're hoping there's an easier way to get the data out of WisVote than you having to manually export it every day or week**. To that end, we have two questions: 1**. Would you or someone else on your team be able to do a screen-share so we can see the process for an export**? 2. **Do you know if WisVote has an API or anything similar so that it can connect with other software apps**? **That would be the holy grail** (but I'm not expecting it to be that easy). App. 389 (Michael Spitzer-Rubenstein to Claire Woodall-Vogg).

4. I know you won't have the final data on absentee ballots until Monday night but I imagine you'll want to set things up beforehand. **Just let me know your timeline for doing so and if you get me the absentee data a day ahead of time and I can set things up. And as a reminder, here's what I'll need: 1) Number of ballot preparation teams 2) Number of**

returned ballots per ward 3) Number of outstanding ballots per ward. App. 390 (Michael Spitzer-Rubenstein to Claire Woodall-Vogg).

5. **In order to get the data by ward, are you able to run a summary in WisVote or do you have to download all the active voters, absentee applications, etc. and then do an Excel pivot table or something similar**? We added Census data and zip codes to the map and so now we're moving to figure out how we'll update this. Also, **if you can send these reports (whether in summary form or just the raw data), we can put them in: Active voters, Absentee applications, Ballots received, Ballots rejected/returned to be cured**. App. 391, Michael Spitzer Rubenstein to Claire Woodall-Vogg.

6. "I'll try and do a better job clarifying the current need. We are not actually using anything visual right now (though will in the future). In the state of affairs now, **we are just looking for raw data. The end result of this data will be some formulas, algorithms and reports that cross reference information about ballots and the census data**. For example, **we want to deliver to Milwaukee + Voteathome answers to questions like "How many of age residents are also registered to vote?" or "what percentage of ballots are unreturned in areas with predominantly minorities?**" To do that, we need a clear link between address + Census Tract. We need this for all ~300k voters and the ~200k+ absentee ballots, and it needs to be able automatic as we perform more

> inserts. To accomplish this, we were making calls to the Census API. They allow you to pass in an address and get the Census Tract. That solution "works", but is far too slow. Their batch solution isn't working either." App. 388 (emphasis added).

CTCL and its partners were influencing public officials while those officials were doing their jobs to administer the election. *See, e.g.*, App. 381, 383-388, 390-391. Although some of these attempts by CTCL and its partners to tamper with, or take over the Zuckerberg 5's election administration, may have been rebuffed, others were not *Id.* The Zuckerberg 5 apparently agreed that some of CTCL's attempts would have been too egregious. App. 389. For example, Claire Woodall-Vogg responded:

> While I completely understand and appreciate the assistance that is trying to be provided*, I am definitely not comfortable having a non-staff member involved in the functions of our voter database, much less recording it.* While it is a pain to have to remember to generate a report each night and less than ideal, it takes me less than 5 minutes. Without consulting with the state, which I know they don't have the capacity or interest in right now, I don't think I'm comfortable having USDR get involved when it comes to our voter database. I hope you can see where I am coming from – this is our secure database that is certainly already receiving hacking attempts from outside forces.

App. 389 (Claire Woodall-Vogg to Michael Spitzer Rubenstein) (emphasis added).

Kris Teske confirmed that CTCL and its "partners" sought to improperly interject or "embed" themselves into the election administration. App. 674. She stated in her answer in a prior WEC proceeding: "A further complicating factor arose when outside (private) organizations were engaged to participate in the planning and administration of the election." *Id.*

Another example of embedding is in Milwaukee. The Elections Group employee Ryan Chew wrote at 4:07 a.m. on November 4, 2020, the day after the Presidential election, to Milwaukee election official Claire Woodall-Vogg:

> Damn Claire, you have a flair for drama, delivering just the margin needed at 3:00 a.m. I bet you had those votes counted at midnight, and just wanted to keep the world waiting.

App. 610. Woodall-Vogg responded, "LOL. I just wanted to say I had been awake for a full 24 hours." *Id.*

1. Given a Blank Check to Run the Election, CTCL and Its "Partners" Took Full Advantage of the Opportunity to Administer the Election in at Least One of the Zuckerberg 5.

The Zuckerberg 5 used (at a minimum) the following group of CTCL's allied corporations to engage in election administration: Center for Civic Design, App. 451-453, 467-471, 474-475, 478; Vote at Home Institute, App. 447, 449, 465-466, 477; Voter Participation Center, App. 476; healthyvoting.org, App. 445; Elections Group, App. 444; Brennan Center, App. 440; Simon and Company, Inc., App. 448, 450. CTCL and its partners assumed numerous aspects of administration of Zuckerberg 5's election processes.

See, e.g., App. at 451-453, 467-471. For example, in Green Bay, the private corporations and their employees engaged in the following aspects of election administration:

a. Vote at Home volunteered to take the curing of ballots off of a municipality's plate; (*id.* at 172-174);

b. Elections Group offered to "lend a hand" to Central Count stations (*id.* at 175-76);

c. Offered to connect a municipality to "partners like Power the Polls" to recruit poll workers and to partner with CTCL to send out e-mails to recruit poll workers; (*id.* at 177);

d. Advised the City as to using DS200 voting machines; (*id.* at 178);

e. Provided a "voter navigator" job description; (*id.* at 182);

f. Advised a municipality regarding moving the "Central Count" from City Hall to a different location, which was wired to provide election results directly to private corporate employees; (*id.* at 262);

g. The Center for Civic Design offered a municipality to design the absentee voting instructions and the absentee envelopes; (*id.* at 184-196);

h. The Elections Group issued a Guide to Ballot Drop Boxes, a report on Planning Drop Boxes, Voter Outreach, and Communication; (*id.* at 197-236);

i. Provided advice about procedures for challenging an elector's ballot; (*id.* at 232-236); and

j. Conservation Voices and curing. (*id.* at 237-240).

Whitney May of CTCL advised Milwaukee's Information Coordinator, Michelle Nelson, on how to request additional funding for election administration from the City and encouraged her to consult with other Zuckerberg 5 clerks:

> Below is some language I drafted along with 2 links that may help you frame the need for more staff. And have you asked Kris in Green Bay or Tara in Racine about their staffing levels? If they have similar numbers of registered voters as Kenosha, but more staff than Kenosha, then I think that's also a way to make your case to Admin.

App. 377. This email raises the concern that CTCL was drafting documents regarding municipal funding for election administration for the Zuckerberg 5. *Id.* Based on CTCL contact with the Commission, the CTCL and its partners may have drafted documents for Commission staff as well. *Id.*

Kris Teske saw these acts of usurpation as well, describing them in her communications. App. 318-319. As early as July, she claimed that the Mayor's office was diverting her authority as a result of the CTCL Contract. She wrote in an e-mail:

> I haven't been in any discussions or emails as to what they are going to do with the money. I only know what has been on the news/in the media... Again, I feel I am being left out of the discussions and not listened to at the meetings.

Id. at 318. Kris Teske also wrote, "Celestine also talked about having advisors from the organization giving the grant who will be 'helping us' with the election and I don't know anything about that." *Id.* at 319. "I don't understand how people who don't have the

knowledge of the process can tell us how to manage the election." *Id.* Teske expressed concern that voting laws may be being broken. She wrote:

> I just attended the Ad Hoc meeting on Elections…. I also asked when these people from the grant give us advisors who is going to be determining if their advice is legal or not…I don't think it pays to talk to the Mayor because he sides with Celestine, so I know this is what he wants. I just don't know where the Clerk's Office fits in anymore.

Id. at 318-319.

Some of the most aggressive and egregious usurpation of election administration was performed by Michael Spitzer Rubenstein of NVAHI. Mr. Spitzer Rubenstein performed tasks such as:

a. Providing instructions to the Central Count workers (App. 241-242);

b. Augmenting the City of Green Bay's "guide with the DS450" voting machine instructions; issuing a purchase order (*id.* at 49); asking about 62001 openers (*id.* at 243);

c. Corresponding with the Green Bay City Attorney and other employees to interpret Wisconsin law and even to develop absentee voting protocols potentially inconsistent with Wisconsin Law (App. 73);

d. Offering to take "curing ballots" off of the City of Green Bay's plate (*id.* at 135, 137, 138, 172-173);

e. "[H]elping Milwaukee assign inspectors to Central Count stations," and offering to do the same for Green Bay (*id.* at 244);

f. Setting up the voting machines and patterns in the Central Count location (App. 175, 178, 179-195);

g. Offering "additional resources" such as "funding available, both from ourselves, and the Center for Tech and Civic Life (thanks to Priscilla Chan and Mark Zuckerberg)" (*id.* at 124);

h. Determining whether to accept ballots after the deadline of 8 pm (*id.* at 291-292);

i. Allocating poll workers on election day (App. 252);

j. Teske stating finance person does not want NVAHI person in office, but Chief of Staff is running show (*id.* at 249-251);

k. Sharing Central Count guidance # of poll workers (*id.* at 252).

Further: "Michael Spitzer Rubenstein will be the on-site contact for the group [on Election Day]." App. 257-261. Mr. Spitzer Rubenstein was one of three people providing "supervision and check-in duties" for workers on the days of the election and subsequent vote counting. App. 306.

One of the functions of Mr. Spitzer Rubenstein's service as "on-site contact" was to coordinate with the contractor staff at the Hyatt Regency and KI Convention Center to set up wireless networks for Election Day operations. At Mr. Spitzer Rubenstein's instruction, there were three WiFi networks available. One was the general conference facility public network that would be available to members of the press and others. That network was password-protected, but the password was widely available. A second password-protected WiFi network was created for Central Count staff. Mr. Spitzer Rubenstein also directed that a third WiFi network be established, but that network was to be hidden and it was not

to be password-protected. Spitzer Rubenstein also ensured that "both networks reach[ed] [his] hotel room on the 8th floor" (App. 262-266).

Spitzer Rubenstein had unfettered access to the Central Count, ballots, and ballot counting:

1. Spitzer Rubenstein developed a diagram and map of the "Central Count" area of the election and developed roles for the staff to handle and count ballots, and Central Count procedures (App. 267-288);
2. Assigned inspectors for vote counting and polling places (App. 244);
3. Pushed for control of ballot curing process (App. 172-173);
4. Provided advice to Green Bay's City Attorney regarding interpretation of Wis. Stat. governing the timing and receipt of ballots (App. 289-292);
5. Instructed "pull the numbers on the absentee ballots returned and outstanding per ward" information on vote results so he could determine which wards were on which voting machines (App. 293-295);
6. Created a "poll worker needs" spreadsheet (App. 296-298);
7. Put himself in charge of transporting ballots to City Hall and then to Central Count on election day; and then counting them. (Discussion of "moving ballot boxes in the morning and evening." November, 2, 2020 (App. 280, 299-301);
8. Stated "I'm putting together instructions for the Central Count

workers, …" (App. 302);

9. Corresponded with Saralynn Flynn, also of Vote at Home, who wrote: "here is the document I made to hand out to central count observers." (App. 241) The "document" he created warned Election Observers to "NOT interfere in any way with the election process," while CTCL personnel, partners, "pollworkers" and others deputized by CTCL, transported ballots, counted ballots, and "cured" defective mail in and absentee ballots, and otherwise exercised considerable control over the election process (App. 303);

10. Had unrestricted access on election day to the Central Count floor (App. 304).

On election day, Spitzer Rubenstein had access to ballots and determined which ones would be counted or not counted. Spitzer Rubenstein wrote to Vanessa Chavez, Green Bay City Attorney, on November 3, 2020 at 9:29 pm: "Be prepared: ballots delayed." The text stated: "I think we're probably okay; I don't think anyone challenged the ballots when they came in." App. 304 (emphasis added). Spitzer Rubenstein explained that someone "prevented one of the drop box deliveries from getting to City Hall by 8 PM," so the ballots were "delayed," i.e., did not arrive on time as required by law. Forty-seven boxes of ballots were expected to be delivered and apparently, according to Spitzer Rubenstein's email, some of them were late but he decided that despite some of them being late, they were to be counted anyway because no one "challenged them." *Id.*

1. The "Private Corporate Partners" Were from Out of State, and Not Necessarily Knowledgeable About Wisconsin Election Law, or Concerned About It.

Notably, CTCL's "private corporate partners" were from out of State, and not necessarily knowledgeable about Wisconsin election law, or concerned about it. Ryan Chew of the Elections Group was located outside of Wisconsin. Further, Chew was described by Whitney May of CTCL as having "decades of election experience working with the Cook County Clerk in Illinois. They [Mr. Chew and Gail, also from the Elections Group] are available to discuss your drop box plans (and more!)." App. 374. CTCL is headquartered in Illinois. Spitzer Rubenstein is a lawyer who lives in Brooklyn. Kris Teske stated in her answer that "[m]any of these [election administration] decisions were made by persons who were not authorized to do so and some were made by people not qualified to make them as, again, election laws need to be followed to ensure the integrity of the election." App. 676.

2. Safe Voting Was a Pretext—The Real Reason for CTCL's WSVP Grants was to Facilitate Increased In-Person and Absentee Voting in Specific Targeted Areas Inside the Zuckerberg 5.

The real reason for CTCL's WSVP grants was to facilitate increased in-person and absentee voting in specific targeted areas inside the Zuckerberg 5. App. 7-27. Safe voting was merely a pretext.

On June 10, 2020, Vicky Selkowe informed the representatives of the other Zuckerberg 5 that: "[o]ur national funding partner, the Center for Tech & Civic Life, has one additional question area they'd like answered: "What steps can you take to update

registered voters' addresses before November? What steps can you take to register new voters? How much would each cost?" App. 604.

3. The Zuckerberg 5 Became Beholden to CTCL as a Result of the WSVP's Private Funding and the WSVP's Provisions.

The documents show that the Zuckerberg 5 became beholden to CTCL as a result of the WSVP's private funding and the WSVP's provisions.

On August 1, 2020, Maggie McClain of Madison emailed Maribeth Witzel-Behl stating: "is there an approval/letter giving the go-ahead for this? Or an okay from CTCL saying the *grant funds could be used for this*? I need something to attach to the requisition." App. 607.

On August 31, 2020, Kenosha sought and obtained CTCL permission for purchasing 3 DS450 high speed ballot tabulators for use at absentee central count locations at an amended cost of $180,000 instead of $172,000. App. 378-380. Madison sought similar approval from CTCL regarding election administration financing. App. 437-439, 441-443, 446, 450, 472-473.

On September 22, 2020, Karalyn Kratowitz, the interim deputy mayor of Madison, asked CTCL for instruction on and permission as to how to spend the money. App. 446.

On January 7, 2021, pursuant to the agreement, CTCL told Madison to report by January 31, 2021. App. 609.

The Zuckerberg 5 were periodically required to report to CTCL on election administration. All the Zuckerberg 5 were required to report to CTCL on their expenditures

by January 31, 2021. App. 4 (Racine), 589 (Milwaukee), 592 (Madison), 596 (Kenosha), 599 (Green Bay).

4. The Zuckerberg 5 Ceded Administrative Control Over the Election to CTCL and its Private Partners, Including WisVote Data Sharing, so they Could Collectively Facilitate Increased In-Person and Absentee Voting in the 2020 Election.

As set forth above, CTCL's stated and implied conditions led to the Zuckerberg 5's municipal clerks and other staff to sometimes eagerly step aside, and other times to be pushed aside, to let CTCL and its private corporate partners engage in aspects of election administration—including exclusive free access to WisVote data not available to the public and not for free (e.g., $12,500 for copy of statewide WisVote data). *See, e.g.*, App. 7-27. CTCL and the private corporations, as revealed by the documents, had an ulterior motive in the WSVP to facilitate increased in-person and absentee voting in the Zuckerberg 5 and among their preferred racial groups. *Id.*

Chapter 5
Corporate Legal Defense to Facilitate Obstruction Might Violate the Wisconsin Ethics Code

The unlawful actions of various Wisconsin election officials has opened them up to legal liability. In certain contexts, Wisconsin's election officials can enjoy legal immunity; in others, they can be represented by government attorneys or government-financed attorneys. Finally, in some contexts, unlawful actions of officials can place them in a position where they-- just like any other members of the public-- may have to hire and pay their own attorneys to defend themselves.

CEIR's Election Officials Legal Defense Network (EOLDN), announced in December of 2021, provides legal services for government officials on the hook for misconduct. In Wisconsin, this is not a solution to these election officials' legal problems. In fact, accepting EOLDN's legal services may get these election officials into more jeopardy, because the EOLDN system facially violates Wis. Stat. § 19.59 (1)(b), prohibiting such transactions. Wis. Stat. § 19.59 (1)(b) provides:

> (b) No person may offer or give to a local public official, directly or indirectly, and no local public official may solicit or accept from any person, directly or indirectly, anything of value if it could reasonably be expected to influence the local public official's vote, official actions or judgment, or could reasonably be considered as a reward for any official action or inaction on the part of the local public official.

The problem is that CTCL and CEIR are Zuckerberg-Chan financed entities that worked together as a joint venture in the 2020 election. CTCL received $350 million for the 2020 election. CEIR received $69 million for the 2020 election. CTCL funded the $8.8

million Wisconsin Safe Voting Plan (WSVP), which the cities of Milwaukee, Madison, Green Bay, Racine and Kenosha used to purchase illegal drop boxes and the provision of those funds constitutes election bribery under Wis. Stat. § 12.11.

EOLDN's three leaders: David Becker, Bob Bauer and Ben Ginsberg have different roles regarding the Zuckerbergs' CTCL and WSVP. Becker, as President of CEIR, received $69 million from Zuckerberg-Chan. Bauer and Ginsberg are election law attorneys who likely represent-- or are being paid by-- CEIR, CTCL, or related entities. Not surprisingly, all three—Becker, Bauer and Ginsberg—have publicly supported CTCL's distributions in Wisconsin as lawful.

EOLDN should know that CTCL and CEIR are potential parties or witnesses to future illegal drop box or election bribery litigation or prosecutions. In turn, CEIR and related entities are disqualified from providing attorneys for Wisconsin election bribery defendants because they are potential parties, potential witnesses or biased due to previous representation of related parties. Further, it appears, EOLDN, on behalf of Zuckerberg and Chan, are improperly coordinating legal defenses of election officials to protect CTCL, CEIR, Zuckerberg, Chan and related entities and individuals.

By providing free legal defense services for election officials in these subject areas, EOLDN may be violating the first part of Wis. Stat. § 19.59 (1)(b), which prohibits such transactions:

> No person may offer or give to a local public official, directly or indirectly, and no local public official may solicit or accept from any person, directly or

> indirectly, anything of value if it could reasonably be expected to influence the local public official's vote, official actions or judgment.

The law applies to these circumstances as follows. The "person" is EOLDN or their attorney. The local public official is the election official receiving free EOLDN legal services. The "anything of value" provided is the free legal defense services provided by EOLDN. The gift of the free legal services could reasonably be expected to influence the election officials' official actions or judgment. Since EOLDN's free legal services will have foremost in mind protecting the interests of CTCL, CEIR, Zuckerberg and Chan, it will influence the election officials' official actions and judgment in defending Wis. Stat. § 5.06 administrative corrections and related criminal prosecutions. So, all the elements are satisfied for the transaction to be deemed prohibited.

By providing free legal defense services for election officials in these subject areas, EOLDN may be violating the second part of Wis. Stat. § 19.59 (1)(b) prohibiting such transactions:

> No person may offer or give to a local public official, directly or indirectly, and no local public official may solicit or accept from any person, directly or indirectly, anything of value if it …could reasonably be considered as a reward for any official action or inaction on the part of the local public official

The law applies to the circumstances as follows. The "person" is EOLDN or their attorney. The local public official is the election official receiving free EOLDN legal services. The "anything of value" provided is the free legal defense services provided by EOLDN. EOLDN or its attorney's gift of the legal services could reasonably be considered a reward for the official's actions regarding the illegal drop boxes, election bribery and/or violating

the special voting deputies law. Recall CTCL, Zuckerberg and Chan financed the illegal drop boxes and election bribery, so EOLDN's free legal services to the election officials could be reasonably seen as a "reward" for their participation in unlawful actions related to the election.

Chapter 6

Wisconsin Election Officials' Widespread Use of Absentee Ballot Drop Boxes Facially Violated Wisconsin Law

In Wisconsin, election officials' unprecedented use of absentee ballot drop boxes facially violated Wisconsin law. This practice of unlawful absentee ballot drop boxes was particularly pervasive in the cities of Milwaukee, Madison, Kenosha, Racine and Green Bay. These bulk absentee ballot drop boxes were privately financed by Center for Tech and Civic Life (CTCL). The WSVP and CTCL's grant acceptance letter incorporating the WSVP is the agreement in which the city agreed to take CTCL's money to purchase and place absentee drop boxes in targeted neighborhoods. App. 10, 16-17.

In total, the WSVP provided $216,500 for unlawful absentee ballot drop boxes in the Zuckerberg 5. App. 17. The WSVP provided Green Bay $50,000 for absentee ballot drop boxes. App. 16. The WSVP provided Kenosha $40,000 for absentee ballot drop boxes. App. 16. The WSVP provided Madison $50,000 for absentee ballot drop boxes. App. 16. The WSVP provided Milwaukee $58,500 for absentee ballot drop boxes. App. 16. The WSVP provided Racine $18,000 for absentee ballot drop boxes. App. 17.

The use of absentee ballot drop boxes has been successfully challenged in state court as being unlawful. In a case in the Waukesha County Circuit Court, the plaintiffs sued the WEC to challenge 2020 guidance memos that the WEC issued to municipal clerks. Complaint, Teigen v. Wisconsin Elections Commission, No. 21-CV-958 (Wis. Cir. Ct. for Waukesha Cnty. June 28, 2021) (under review by the Wisconsin Supreme Court), available

at App. 649-660. In particular, the plaintiffs challenged a memorandum that purported to authorize unstaffed ballot drop boxes:

> Despite this requirement in the statutes [i.e., the requirement that an absentee ballot either be returned by mail or be returned by the voter "in person, to the municipal clerk." Wis. Stat. § 6.87(4)(b)1], WEC Commissioners sent a memo to municipal clerks dated August 19, 2020, (the "August 2020 WEC Memo") stating that absentee ballots do not need to be mailed by the voter or delivered by the voter, in person, to the municipal clerk but instead could be dropped into a drop box and that the ballot drop boxes could be unstaffed, temporary, or permanent. (A true and correct copy of the August 2020 WEC Memo is attached hereto as Exhibit B.).
>
> Id. ¶ 10, available at App. 651.

The court granted the plaintiffs motion for summary judgment and declared the use of ballot drop boxes, outside of narrow exceptions, to be inconsistent with Wisconsin law:

> For the reasons set forth by the Court on the record at the January 13, 2022 hearing, the Court hereby declares that WEC's interpretation of state statutes in the Memos is inconsistent with state law, to the extent they conflict with the following: (1) an elector must personally mail or deliver his or her own absentee ballot, except where the law explicitly authorizes an agent to act on an elector's behalf, (2) the only lawful methods for casting an absentee ballot pursuant to Wis. Stat. § 6.87(4)(b)1. are for the elector to place the envelope containing the ballot in the mail or for the elector to deliver the ballot in person to the municipal clerk, (3) the use of drop boxes, as described in the Memos, is not permitted under Wisconsin law unless the drop box is staffed by the clerk and located at the office of the clerk or a properly designated alternate site under Wis. Stat. § 6.855.
>
> Order Granting Summary Judgment for Plaintiffs, Teigen v. Wisconsin Elections Commission, No. 21-CV-958 (Wis. Cir. Ct. for Waukesha Cnty. January 20, 2020), available at App. 66.

Accordingly, the Zuckerberg 5's privately funded absentee ballot drop boxes in the 2020 election were unlawful under Wis. Stat. § 6.87(4)(b)1 and § 6.855. Thus, the

Zuckerberg 5 and CTCL's agreement for CTCL-funded purchase and placement of absentee ballot drop boxes was also unlawful and contrary to public policy. We suggest below legislative action that would make this prohibition even more clear.

Chapter 7

The Wisconsin Elections Commission (WEC) Unlawfully Directed Clerks to Violate Rules Protecting Nursing Home Residents, Resulting in a 100% Voting Rate in Many Nursing Homes in 2020, Including Many Ineligible Voters

Contrary to statements made by several groups and media sources over the past months, the OSC has uncovered evidence of election fraud in the November 2020 election. Rampant fraud and abuse occurred statewide at Wisconsin's nursing homes and other residential care facilities in relation to absentee voting at these facilities. This fraud and abuse was the ultimate result of unlawful acts by WEC's members and its staff, the end results being:

1. Residents were illegally assisted with "marking" their ballots by nursing home staff and administrators;
2. Absentee ballots for residents were illegally handled by facility staff and administrators;
3. Resident absentee ballots were illegally "witnessed" by nursing home staff and administrators;
4. Suspected forger of resident signatures by nursing home staff and administrators;
5. Improbably high voting rates for residents at nursing homes; and
6. Ballots cast by residents—
    1. Where those residents were unaware of their surroundings, with whom they are speaking at any given time, or what year it is; and/or

2. Where those residents' right to vote had been taken away by court order because they have been adjudicated as mentally incompetent.

Through these acts, the members and staff of WEC mandated widespread election fraud to take place where our most vulnerable adult citizens reside.

The OSC has spent significant time and resources investigating the fraud and abuse that occurred at Wisconsin's nursing homes. However, that part of the investigation is nowhere near complete. While the OSC has been able to audit the votes of several nursing homes in five counties, and has interviewed the families of many residents who have been abused, the OSC believes a state-wide, complete audit of all absentee votes from all facilities governed by Wis. Stat 6.875 is necessary. The OSC is continuing to pursue this avenue of the investigation with an eye towards completing that audit.

There are four distinct types of Elderly Care Facilities in Wisconsin, Assisted Living (including assisted living apartments), Adult Day Care Centers, Nursing Homes and Memory Care Units. Many of the memory care units are operated within the Nursing Home environment. In total, there are about 92,000 people in Wisconsin who reside in these facilities.

Wisconsin law defines "election fraud" at Wis. Stat. § 12.13. That section provides in pertinent part—

"12.13 Election Fraud

(1) ELECTORS. Whoever intentionally does any of the following violates this chapter:

…

(h) Procures, assists or advises someone to do any of the acts prohibited by this subsection.

(2) ELECTION OFFICIALS.

…

(b) No election official may:

…

3. Permit registration or receipt of a vote from a person who the official knows is not a legally qualified elector or who has refused after being challenged to make the oath or to properly answer the necessary questions pertaining to the requisite requirements and residence; or put into the ballot box a ballot other than the official's own or other one lawfully received.

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

…

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

(3) PROHIBITED ACTS. No person may:

…

(L) When not authorized, during or after an election, break open or violate the seals or locks on a ballot box containing ballots of that election or obtain unlawful possession of a ballot box with official ballots; conceal, withhold or destroy ballots or ballot boxes; willfully, fraudulently or forcibly add to or diminish the number of ballots legally deposited in a ballot box; or aid or abet any person in doing any of the acts prohibited by this paragraph.

…

(N) Receive a ballot from or give a ballot to a person other than the election official in charge.

…

(P) Receive a completed ballot from a voter unless qualified to do so."

Wisconsin has enacted rules specifically related to the conduct of absentee voting in nursing homes and other residential care facilities. These rules are found in Wis. Stat. § 6.875. Wis.. Sat. § 6.875(2)(a) specifically states—

> Absentee voting in person inside residential care facilities and qualified retirement homes shall be conducted by municipalities only in the manner prescribed in this section. At any residential care facility or qualified retirement home where a municipality dispatches special voting deputies to conduct absentee voting in person under this section, the procedures prescribed in this section are the exclusive means of absentee voting in person inside that facility or home for electors who are occupants of the facility or home.

Among the rules that must be followed are that municipal clerks or boards of election commissioners must designate "Special Voting Deputies" (SVDs) for the purpose of supervising absentee voting in qualified retirement homes and residential care facilities, and that these SVDs must be dispatched to nursing homes to supervise absentee voting in those facilities, except in very limited circumstances.

If a resident at a nursing home or other residential care facility requests an absentee ballot, and SVDs are dispatched to that facility (which again must happen except in very limited circumstances) the law provides that the clerks or the board of electors must give the ballot to the SVDs "who shall personally deliver the ballot to the elector" when the SVDs visit the facility.

Once the ballot is delivered, the SVDs may assist the resident with "marking" the ballot. Importantly, the only people authorized by Wisconsin law to assist a resident in

"marking" an absentee ballot are SVDs and "immediate family members." It is illegal for anyone else under any circumstances to do so. Further, the law specifically provides that "the [SVDs] **shall not accept** an absentee ballot submitted by an elector whose ballot was not issued to the elector by the [SVDs]" and that "[a]ll voting shall be conducted in the presence of the [SVDs]."

Once voting is complete on the day of an SVD's visit to the facility, Wisconsin law provides—

> **(d)** Upon completion of the voting on each day at each residential care facility or qualified retirement home, the deputies shall seal the absentee ballot envelopes and any absentee ballot applications inside a carrier envelope and shall seal the carrier envelope and sign their names to the seal. The deputies shall place the envelope inside a ballot bag or container. As soon as possible after visiting each residential care facility or retirement home, but not later than 18 hours after the visit, the deputies shall deliver the ballot bag or container to the clerk or board of election commissioners of the municipality in which the elector casting the ballot resides.

There is no provision in Wis. Stat. § 6.875 for absentee ballots from nursing home residents to be returned by mail, except in the case of a voter that "maintains a residence outside the facility or home" in which case the voter may request and return an absentee ballot in the standard manner as provided for elsewhere in the statutes. Wis. Stat. § 6.875(ar)2.

Despite the clear mandates of Wisconsin law, in a June 24, 2020 memorandum directed to all clerks of the state, WEC directed clerks not to send SVDs to facilities, and to instead mail ballots to voters in those facilities. WEC further stated that "The regular rules for absentee voting by mail will apply to ballots sent by mail to care facility voters."

On September 25, 2020, WEC forwarded to all clerks of the State two documents, a "Sample Nursing Home and Care Facility Letter" (the "Facility Letter") and a training document entitled "Absentee Voting at Nursing Homes and Care Facilities" (the "Training Document").

The Facility Letter was provided to clerks as a template for letters to be sent by the clerks to nursing homes in their jurisdiction, directing those facilities as to the purported new rules for absentee voting for the November 2020 election. In the Facility Letter, WEC told the clerks to advise facilities that the normal restrictions against facility staff assisting residents with voting will not be in place "because of SVDs being restricted from visiting." It further provided that "[r]esidents who receive ballots will have to vote their ballot, have a witness provide required information on the return envelope, and return their ballot by mail in order to participate." The letter also stated that facility staff may assist residents in "completing the information required on the voter registration form" and completing absentee ballot request forms.

In addition to providing further details as to how facility staff could assist residents with registration, absentee ballot application, and voting, the Training Document stated—

> As a care facility administrator or staff member, you are able to:
>
> 1. Assist residents in filling out their ballots or certificate envelopes.
> 2. Assist residents in completing voter registration forms and absentee requests.
> 3. Sign the special certificate envelope (EL-122sp) if necessary (see below for explanation).
> 4. Witness ballots.

The Training Document also provided certain "Absentee Voting FAQs" with answers thereto, including—

> Q: How do residents of my facility return their ballot? We used to have people (SVDs) come to the facility and administer the voting and take the ballots back. Now what is expected?
>
> A: Ballots should be mailed back to the clerk using the postage-paid return envelope provided by the clerk with the voter's ballot. They can also be returned to the clerk's office in-person at the request of the voter.
>
> Q: Who can assist the voter in voting their ballot?
>
> A: Anyone can assist the voter in reading and/or marking their ballot, except the voter's employer, including care facility staff and family. Normally, care facility staff are restricted from assisting voters, but this restriction is not in effect because the voter is casting their ballot by mail. Wis. Stat. § 6.87(5)
>
> Q: Can a resident's ballot be returned using a drop box at the Town/Village/City Hall?
>
> A: Yes, the ballot may be returned to a drop box or directly to the clerk's office at the request of the voter. All ballots must be received by 8:00 PM on election day in order to be counted. Not all municipalities offer drop boxes, so you should check with the clerk to see if one is available for ballot return.

Each and every WEC directive identified above in regard to absentee voting in nursing homes and other resident care facilities is a direct violation of Wisconsin law, and ultimately encouraged widespread fraud in regard to absentee voting at these facilities.

In addition to other violations, WEC's directives were illegal in the following ways:

1. Directing that facility staff may assist voters in registering to vote, applying for an absentee ballot and/or assisting the voter in marking the ballot are all violations of provisions of Wis. Stat. § 6.875;

2. Directing that clerks not send SVDs to any facilities violated the basic tenets of Wis. Stat. § 6.875 that absentee voting in nursing homes "shall" be conducted in compliance with that statute and that all absentee voting at nursing homes must be conducted "in the presence of [SVDs];"

3. Directing clerks to mail ballots directly to nursing home residents violated the rule that absentee ballots requested by facility residents must be given first to SVDs, and then the SVDs are the only persons authorized to then give those ballots to the residents;

4. Directing that absentee ballots may be returned by mail, by placing them in a ballot drop box, and/or by returning them directly to the clerk (by someone other than an SVD) "at the request of the voter" all violate the rule that these absentee ballots are to be returned only to an SVD, who then must place them in a ballot bag or container and return them to the clerk within 18 hours.

Ultimately, WEC's directives mandated that widespread "election fraud" be undertaken in relation to the November 2020 election. As is noted above, "election fraud" occurs when ballots are given to, or received by anyone other than "the election official in charge" or when a person receives a completed ballot from a person "unless qualified to do so."

WEC's directives caused ballots to be mailed directly to nursing home residents rather than the "election officials in charge"—who would have been the SVDs. By the same token, it caused completed ballots to be illegally given to facility staff or returned by mail rather than the SVDs, violating both the rule that ballots cannot be given to anyone other than the "election official in charge" as well as the prohibition against receiving a completed ballot from someone "unless qualified to do so."

The only persons qualified to receive completed ballots from nursing home residents are, and were, SVDs. The law did not change before or after the November 2020 election, and WEC's directives were in direct violation thereof. As a result, WEC's directors and

staff committed election fraud themselves by mandating and/or encouraging others to commit acts prohibited by the election fraud statute.

The OSC has evidence that facility staff and directors—

1. Assisted residents in completing ballots;
2. Assisted residents in obtaining absentee ballots;
3. Pressured residents to vote;
4. Collected completed ballots from residents;
5. Forged signatures of residents;
6. Illegally returned residents' ballots to the municipal clerks by mail, by placing the ballots in drop boxes, and/or delivering them directly to the clerks;
7. Pressured and/or assisted incompetent persons to complete and cast ballots in the November 2020 election, up to and including persons who have had their right to vote take away by court order due to mental incompetence.

Not only did WEC's directives mandate and/or encourage violations of Wis. Stat. § 6.875 and the election fraud statute: it led to absurd results relating to nursing home voting in the November 2020 election. The following chart shows the registered voting rates in the November 2020 election for nursing homes that were vetted by the OSC in Milwaukee, Racine, Dane, Kenosha, and Brown Counties:

County	# of Nursing Homes Vettted	# of Registered Voters	# of Voters Nov 2020	% of Registered Voters that Voted
Milwaukee	30	1084	1084	100%
Racine	12	348	348	100%
Dane	24	723	723	100%
Kenosha	9	866	841	97%
Brown	16	280	265	95%

It is important to note that the above chart only reflects voting at the nursing homes that the OSC has been able to vet to this juncture. There are more facilities in these counties, and after auditing the votes from other facilities, the above percentages may change. Further, as is noted above, the OSC believes a complete state-wide audit of absentee ballots sourced from nursing home and other residential care facility residents is necessary.

Election fraud is a crime. The Racine County Sheriff's Office recommended criminal prosecution of certain members of WEC relating to their instructions to municipal clerks not to send SVDs to nursing homes for the November 2020 Presidential election. Specifically, the Sheriff recommended charges for WEC Commissioners Margaret Bostelmann, Julie Glancey, Ann Jacobs, Dean Knudson, and Mark Thomsen. The recommended charges are the same for each Commissioner, and include:

1. Misconduct in Public Office in violation of Wis. Stat. § 946.12(2) (Felony);
2. Election Fraud—Election Official Assisting with Violations in violation of Wis. Stat. § 12.13(2)(b)7 (Felony);
3. Party to the Crime of Election Fraud—Receive Ballot Non-Election Official

in violation of Wis. Stat. § 12.13(3)(n) (Misdemeanor);

4. Party to the Crime of Election Fraud—Illegal Ballot Receipt in violation of Wis. Stat. § 12.13(3)(p) (Misdemeanor);

5. Party to the Crime of Election Fraud—Solicit Assistance in violation of Wis. Stat. § 12.13(3)(s) (Misdemeanor)

In a recent letter, Racine County District Attorney Patricia Hanson, after stating she did not have jurisdiction to prosecute, stated to Sheriff Christopher Schmaling that, in her expert legal opinion, multiple members of WEC acted "contrary" to Wisconsin Elections laws. District Attorney Hanson stated:

> Despite knowing that what they were doing was contrary to law and despite being told by the Governor's Office that they were exceeding their authority, the WEC instructed municipal and county clerks to eliminate the SVD process for elections in 2020. Proof of this comes directly from the recordings of the WEC meetings that can be found on their website and their recorded meetings.

District Attorney Hanson further stated:

> It is appalling to me that an appointed, unelected group of volunteers, has enough authority to change how some of our most vulnerable citizens access voting. Dispensing with the mandatory process created by the legislature of using sworn and trained SVDs to assist citizens in nursing homes, directly led to what occurred at Ridgewood Care Center in Racine County. Residents who did not request ballots voted because someone else made a request for a ballot on their behalf and then voted on their behalf. If even one person's right to freely choose to vote or not to vote was diminished, then a travesty of justice has occurred.

While the Racine County District Attorney has decided not to prosecute on jurisdictional grounds, the OISC has learned that the Racine County Sheriff's Office has forwarded referrals to the District Attorneys for the resident counties of the above-noted

WEC members—St. Croix, Sheboygan, Green Lake and Milwaukee Counties. No decision has been made by those District Attorneys regarding prosecution as of this writing.

In an October 28, 2021 press release, WEC Chairman Ann Jacobs inaccurately denied that anyone at WEC broke the law and attempted to justify WEC's possibly unlawful acts by stating that had they not performed them, "many residents in Wisconsin care facilities could have and would have been disenfranchised and not able to vote in the 2020 elections." The OSC finds this statement to be no excuse.

WEC's solution to the potential "disenfranchisement" of nursing home residents who wished to vote absentee (a privilege under the law) was to completely strip away the protections afforded to those persons by Wisconsin law and allow nursing home residents to be subjected to undue influence, overzealous solicitation, and outright fraud.

Under Wisconsin law, while voting is a right, voting by absentee ballot is a privilege. Wisconsin law specifically provides that "the privilege of voting by absentee ballot must be carefully regulated to prevent the potential for fraud or abuse; to prevent overzealous solicitation of absent electors who may prefer not to participate in an election; to prevent undue influence on an absent elector to vote for or against a candidate or to cast a particular vote in a referendum; or other similar abuses." Beyond the stringent safeguards of absentee voting in general, absentee voting in nursing homes requires specialized supervision precisely because those facilities house our state's most vulnerable residents.

In stark contrast to what Wisconsin law seeks to prevent, WECs directives led to the abuse of some of our State's most vulnerable citizens. Many residents were pressured

to vote when there is no scenario under which that should have ever happened legally or morally. The OSC conducted interviews with the families of several facility residents who were extremely vulnerable, and yet cast ballots in the November 2020 election. Among the stories we were told were—

1. In Brown County Facility 1, 20 absentee ballots were cast. A study of the Absentee Ballot Envelopes obtained through open records request revealed all 20 of the envelopes were witnessed by the same person. At this facility, Resident A voted, and Resident A's family provided copies of that resident's signature against the signature on the absentee envelope, and they do not match. Further, Resident A does not have the mental capacity to vote as is evinced in a video interview.

2. At the same facility, Resident B, according to WisVote data, voted twice, both by absentee ballot.

3. In Brown County Facility 2, Resident C voted in 2020. According to family, Resident C was not of sound mind for over 10 years. This is documented in a video interview;

4. In Brown County Facility 3, Resident D was taken from the facility to vote by family and guardian to Resident D's assigned polling location. Resident D had registered to vote at this location on Oct 29th as well. When Resident D presented herself to vote on election day, the Resident D was told that Resident D had already voted. After questioning from family, Resident D recollected that someone at the nursing home had come around talking about voting at the nursing home, however, Resident D denied voting at the home. WisVote shows her voting absentee;

5. In Dane County Facility 1, Resident E, who has been adjudicated incompetent since 1972, voted in 2020. Video of Resident E shows Resident E is clearly not mentally capable of voting;

6. In Dane County Facility 2, Resident F never requested an absentee ballot for the November 2020 election, yet received one. Resident F's guardian intercepted the ballot and subsequently Resident F did not vote. The guardian notified the nursing home that Resident F was no longer going to be voting yet in the Spring of 2021, WisVote records reveal that Resident F voted again;

7. In Kenosha Facility 1, Resident G voted absentee in the Nov 2020 election. Resident G was interviewed on video and it shows she is clearly incapable of voting;

8. In Kenosha Facility 2, Resident H voted absentee in November of 2020. Resident H's guardian reported it as Resident H is incapable of voting as Resident H suffered from severe dementia. However, WisVote records indicate Resident H voted throughout the calendar year 2020;

9. In Milwaukee County Facility 1, WisVote data shows 3 adjudicated incompetent voters voted in the November 2020 election. However, it was actually 2 individuals with one casting two ballots;

10. In Milwaukee County Facility 2, Resident I is 104 years old and clearly incompetent. Resident I's family indicated Resident I had been incompetent for several years. This is an extremely egregious case as shown by video of Resident I with family. Resident I cannot comprehend anything;

11. In Outagamie County facility 1, Resident J, who has been adjudicated incompetent not only voted in the November 2020 election, but she also voted in February 2021. The video of Resident J verifies the fact that Resident J is incompetent.

12. In Washington County Facility 1, Resident K was found incompetent in 2018 by two separate doctors. Resident K cast a ballot in the November 2020 Presidential election. Resident K passed in November of 2021.

It is "disenfranchisement" when electors are pressured to fill out ballots they did not wish to or in a way they don't desire or even understand. It is "disenfranchisement" when ballots are illegally cast on behalf of persons who have had their right to vote taken away by the courts of this State due to their mental incompetence. In no way was WEC's mandating illegal activity a "solution" to "disenfranchisement" and to suggest that WEC's actions were a good faith effort at doing so ignores the facts and the law.

WEC's unlawful activities facilitated and encouraged possible widespread criminality and election fraud. Aside from the fact that they were legally and morally

wrong, these acts led to 100% voting rates in many nursing homes in Brown, Dane, Kenosha, Milwaukee and Racine Counties and incapacitated people voting statewide. Given that there are approximately 92,000 residents of facilities governed by Wis. Stat. § 6.875 statewide, the fact that tens of thousands of illegal ballots from these facilities were counted casts doubt on the 2020 Presidential election result.

Chapter 8

WEC Also Unlawfully Encouraged Evasion of Ballot Security Measures Related to "Indefinitely Confined" Voters at the Behest of Outside Corporations

Wisconsin, like many States, has strict absentee voting laws. These laws are designed to avoid the many prevalent dangers of fraud or abuse that are inherent in an absentee setting. It was never the intention of the Legislature to make absentee voting easily accessible from one's home without meeting voting identification requirements and complying with stringent voter protection laws. However, the Legislature made a special, narrow exception for indefinitely confined voters.

This exception for voting absentee applies when voters are confined to their homes and declare themselves to be indefinitely confined. An elector who is indefinitely confined because of age, physical illness, or infirmity, or is disabled for an indefinite period may, by signing a statement to that effect, require that an absentee ballot be sent to the elector automatically for every election. There are two requirements to vote indefinitely confined. The voter must be indefinitely confined to their home, and the reason for this confinement must be the voter's age, physical illness, sickness, or disability. While one can indefinitely confine themselves to their home for any reason, that confinement does not qualify for an absentee ballot unless the confinement is for a statutory reason—not including a reasonable or unreasonable fear of becoming ill from COVID.

This statute was grossly misconstrued by the Dane and Milwaukee County clerks. Both clerks issued statements that they would send absentee ballots to voters who were indefinitely confined to their homes because of a fear of contracting COVID. The Wisconsin Supreme Court corrected this legally erroneous statement. However, during the time the clerks made their announcement until the judiciary forced the clerks to stop their announcements, the number of newly designated indefinitely confined voters skyrocketed. The clerks did nothing to remove these voters or determine which voters met the true legal definition of "indefinitely confined." Instead, the clerks sent these registrants absentee ballots. In doing so, they not only gave ballots to unqualified indefinitely confined voters but skirted a very important protection for election fraud.

Voter identification is required for every ballot issued in Wisconsin except to the indefinitely confined voter.

Instead, the voter "may, in lieu of providing proof of identification, submit with his or her absentee ballot a statement . . . which contains the name and address of the elector and verifies that the name and address are correct." Wis. Stat. § 6.87. This feature of indefinitely confined voting was also abused. In one documented incident from the Dane County recount, a voter reported that he called the clerk's office and requested an absentee ballot. He was asked if he had identification that had his current address. Having just moved to the city, he responded that he had not obtained a new identification card. He was told not to worry, that he could still get a ballot by declaring himself to be indefinitely confined. Then, he was instructed to say that he would provide proof of his address by statement.

The clerk's office said not only would it send him a ballot for the 2020 general election, but they would send him a ballot to his home every year after without his having to request the ballot and without the necessity for identification until he stopped voting or reported that he was no longer indefinitely confined. The voter, an honest individual, declined the clerk's suggestion and reported his experience.

This was not the only abuse of the indefinitely confined voting law. A flagrant example is that of State Senator Patricia Schachtner. Schachtner and her husband signed statements indicating that they were indefinitely confined voters for the November 2020 election and opted to receive absentee ballots pursuant to Wis. Stat. § 6.87(2). However, social media showed the Schachtner family to be active outside their home in the months prior to and during the election both for personal recreation and as Schachtner campaigned for reelection. Additionally, Schachtner was named to be a Presidential elector to cast electoral college votes for Biden at the Wisconsin Capitol on December 14, 2020, approximately one month after the election for which she was indefinitely confined.

This is an egregious violation of the indefinitely confined status. One cannot be confined to one's home for a length of time with no definite end because of age, physical illness or infirmity, or disability and also campaign for reelection, enjoy social and family life, and appear at the Wisconsin Capitol to vote. Clearly, Schachtner and her husband were not indefinitely confined to their home when she requested and cast her ballot in the 2020 election. Schachtner and many others failed to follow our election law and no enforcement action was taken.

Our Republic and way of life is in danger if we fail to follow and enforce the law. The rule of law requires that legal rules be publicly known, consistently enforced, and even-handedly applied. Violating the rule of law can lead to uncertainty. Uncertainty provides opportunities for arbitrary power. Without the rule of law, citizens may be tempted to take justice into their own hands.

My investigation will determine why the clerks failed to act on their obligation to review and expunge from the voter rolls those claiming to be indefinitely confined voters when the clerk has "reliable information that [the] . . . elector no longer qualifies for the service." Wis. Stat. § 6.86(2)(b). I am concerned that the electors who claimed they were indefinitely confined, but were not physically ill, infirm, elderly, or disabled failed to take steps to remove themselves from that status prior to the November 3, 2020, election. *See* Wis. Stat. § 6.86(2)(a). I am even more concerned that ineligible voters might have taken advantage of that status in order to vote without the need to properly identify themselves. I expect to issue another report that includes the impact of indefinitely confined voting abuses and how the Legislature can prevent these abuses in the future to restore confidence in the rule of law.

Chapter 9

Wards Under Guardianship Order Voted Unimpeded by Wisconsin's Election Officials as They Are Not Recorded in the WisVote Voter Database, Even Though the Circuit Courts Have This Information.

Wis. Stat. § 6.03 disqualifies from voting those citizens who are incapable of understanding the voting process or are under court-ordered guardianship, unless the court has determined that the right to vote is preserved. The statute states:

> 6.03 Disqualification of electors.
> (1) The following persons shall not be allowed to vote in any election and any attempt to vote shall be rejected:`
> (a) Any person who is incapable of understanding the objective of the elective process or who is under guardianship, unless the court has determined that the person is competent to exercise the right to vote.
> (b) Any person convicted of treason, felony or bribery, unless the person's right to vote is restored through a pardon or under s. 304.078 (3).
> (2) No person shall be allowed to vote in any election in which the person has made or become interested, directly or indirectly, in any bet or wager depending upon the result of the election.
> (3) No person may be denied the right to register to vote or the right to vote by reason that the person is alleged to be incapable of understanding the objective of the elective process unless the person has been adjudicated incompetent in this state. If a determination of incompetency of the person has already been made, or if a determination of limited incompetency has been made that does not include a specific finding that the subject is competent to exercise the right to vote, and a guardian has been appointed as a result of any such determination, then no determination of incapacity of understanding the objective of the elective process is required unless the guardianship is terminated or modified under s. 54.64.

The Help America Vote Act, section 21083, provides "if a State is described in section 4(b) of the National Voter Registration Act of 1993 (42 U.S.C. §§ 1973gg–2(b))

[now 52 U.S.C. § 20503(b)], that State shall remove the names of ineligible voters from the computerized list in accordance with State law." Wisconsin is described in section 20503(b); so, section 21083 requires the state's election officials to follow state law on removal of ineligible voters from the computerized list. Accordingly, section 21083 requires that WEC remove the names of ineligible voters from the computerized list, WisVote, in accordance with Wisconsin law.

In Wisconsin, ineligibility information about wards under guardianship without the right to vote is available from the circuit courts. Information about persons who are incapable of understanding the objective of the elective process is available from family, friends, medical authorities and nursing homes.

Under federal law, WEC is legally required to include in WisVote ineligibility information about ineligible wards and incapacitated persons. WEC is also legally required under federal law to distribute to the State's municipal clerks lists of wards and incapacitated person so as to prevent these ineligible non-citizens from election day registration and voting.

In violation of its federal and state legal duties, Wisconsin election officials failed to prevent wards and incapacitated persons from voting in the 2020 Presidential election—casting doubt on the election result.

Chapter 10

Non-citizens Voted Unimpeded by Wisconsin's Election Officials, as They Are not Recorded in the WisVote Voter Database, Even Though Wisconsin Law Requires Citizenship to Vote.

Wis. Stat. § 6.02 requires citizenship to be qualified as an elector. The statute states:

> 6.02 Qualifications, general.
> (1) Every U.S. citizen age 18 or older who has resided in an election district or ward for 28 consecutive days before any election where the citizen offers to vote is an eligible elector.
> (2) Any U.S. citizen age 18 or older who moves within this state later than 28 days before an election shall vote at his or her previous ward or election district if the person is otherwise qualified. If the elector can comply with the 28-day residence requirement at the new address and is otherwise qualified, he or she may vote in the new ward or election district.

Section 21083 of the Help America Vote Act provides "if a State is described in section 4(b) of the National Voter Registration Act of 1993 (42 U.S.C. §§ 1973gg–2(b)) [now 52 U.S.C. § 20503(b)], that State shall remove the names of ineligible voters from the computerized list in accordance with State law." Wisconsin is described in section 20503(b); so, section 21083 requires the state's election officials to follow state law on removal of ineligible voters from the computerized list. Accordingly, section 21083 requires that WEC remove the names of non-citizens, who are by definition ineligible voters, from the computerized list, WisVote, in accordance with Wisconsin law.

In Wisconsin, ineligibility information about non-citizens is available from the Department of Transportation. The Department of Transportation issues driver licenses to non-citizens who qualify. Under federal law, WEC is legally required to include in

WisVote ineligibility information about non-citizens from the Department of Transportation. WEC is also legally required under federal law to distribute to the state's municipal clerks lists of non-citizens so as to prevent these ineligible non-citizens from election day registration and voting.

In violation of its federal and state legal obligations, Wisconsin election officials failed to prevent non-citizens from voting in the 2020 Presidential election—casting doubt on the election result.

Chapter 11

Milwaukee, Madison, Racine, Kenosha, and Green Bay Election Officials May Have Violated the Federal and Wisconsin Equal Protection Clauses by Not Treating All Voters Equally in the Same Election.

Importantly, the Zuckerberg 5 election officials violated Federal and Wisconsin Equal Protection Clauses by not treating all voters the same in the same election. Treating all voters equally in the same election is a bedrock principle of election law.

The public record shows that the public's right to vote was unjustifiably burdened by the Zuckerberg 5 targeting geographic and demographic groups for increased voting. The Zuckerberg 5's conduct promoting voting for certain voter groups affected election outcomes—as concluded by WILL's 2021 analytical report. The Zuckerberg 5 in the WSVP crossed the line between election administration and campaigning and that never should have never occurred.

The appropriate standard of review for Equal Protection Clause analysis is Anderson-Burdick scrutiny for the disparate treatment of voters and, also, here, strict scrutiny of the government's rationale. When a plaintiff alleges that a state has burdened voting rights through the disparate treatment of voters, the legal standard used is generally found in *Anderson v. Celebrezze*, 460 U.S. 780 (1983) and *Burdick v. Takushi*, 504 U.S. 428 (1992). *See also Clements v. Fashing*, 457 U.S. 957, 965

(1982). Although *Anderson* and *Burdick* were both ballot-access cases, the Supreme Court has confirmed their vitality in a much broader range of voting rights contexts. *See Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 204 (2008) (Scalia, J., concurring.) ("To evaluate a law respecting the right to vote—whether it governs voter qualifications, candidate selection, or the voting process—we use the approach set out in Burdick.... "). The *Burdick* Court stated the standard as follows:

> A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiffs' rights."

Burdick, 504 U.S. at 434, (quoting *Anderson,* 460 U.S. at 789). This standard is sufficiently flexible to accommodate the complexities of state election regulations while also protecting the fundamental importance of the right to vote. *Obama for America v. Husted*, 697 F.3d 423, 428–30 (6th Cir. 2012). There is no "litmus test" to separate valid from invalid voting regulations; courts must weigh the burden on voters against the State's asserted justifications and "make the 'hard judgment' that our adversary system demands." *Crawford,* 553 U.S. at 190 (Stevens, J., announcing the judgment of the Court).

Similar to the federal constitution, Wisconsin's Constitution requires equality from the government, including the Zuckerberg 5 when it takes on a government function:

> Equality; inherent rights. Section 1. All people are born equally free and independent, and have certain inherent rights; among these are life, liberty

> and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed.

Art. I, sec. 1. The same legal standard of review applies for state constitutional claims.

The *Anderson–Burdick* standard, therefore, applies.

Additionally, when a state's classification "severely" burdens the fundamental right to vote, strict scrutiny is the appropriate standard. *Burdick,* 504 U.S. at 434 (1992). The federal courts "have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined." *Harper v. Va. Bd. of Educ.,* 383 U.S. 663, 670 (1966). Here, it is the CTCLs private funding of the Zuckerberg Plan's governmental classifications that treat voters differently in the same elections, which triggers strict scrutiny.

Nothing could be more repugnant to democracy than private corporations paying to increase voting access for targeted demographic groups, so that they can manipulate election outcomes—something that will occur repeatedly under the auspices of the WSVP provisions. Private corporations were paying money to affect the election outcome. So strict scrutiny must apply when private funding of election administration targeting voter groups is involved—because the credibility of our federal elections is at stake

Additionally, in *Bush v. Gore*, the U.S. Supreme Court emphasized that equal protection restrictions apply not only to the "initial allocation of the franchise," but "to the manner of its exercise" as well. *Bush*, 531 U.S. 98, *at* 104 (2000). The State may not subject voters to "arbitrary and disparate treatment" that "value[s] one person's vote over that of

another." *Id.* This equal protection prohibition on "arbitrary and disparate treatment" of different voters participating in the same election is what at least one commentator calls *Bush's* "Uniformity Principle." Michael T. Morley, *Bush v. Gore's Uniformity Principle and the Equal Protection Right to Vote,* 28 Geo. Mason L. Rev. 229 (Fall 2020).

Courts have applied the Uniformity Principle to intentional discrimination concerning in-person voting opportunities. For example, in *Obama for America v. Husted,* 697 F.3d 423 (6th Cir. 2012), the Sixth Circuit held that it was unconstitutional for the State of Ohio to allow only domestic military voters to cast ballots in person over the weekend before Election Day. *Id.* at 437. The court noted that, although military voters can face unexpected emergencies that prevent them from voting in person on Election Day, other voters may face similar contingencies:

> At any time, personal contingencies like medical emergencies or sudden business trips could arise, and police officers, firefighters and other first responders could be suddenly called to serve at a moment's notice. There is no reason to provide these voters with fewer opportunities to vote than military voters .... *Id.* at 435. The court concluded that the Equal Protection Clause therefore prohibited the state from making special accommodations only for military voters. *Id.* at 436. The court added that it would be "worrisome ... if states were permitted to pick and choose among groups of similarly situated voters to dole out special voting privileges."

Id. at 435.

Similarly, the Zuckerberg 5's WSVP was their collective effort "to pick and choose among groups of similarly situated voters to dole out special voting privileges"—which, when the Zuckerberg 5 is taking on a government function, violates the Equal Protection

Clause. *Id.* at 435. Accordingly, a post-certification administrative correction for the 2020 Presidential election should be made that the Zuckerberg 5 violated the federal and state Equal Protection Clauses.

Chapter 12

Recommendations

As noted above, OSC respectfully submits the following recommendations to the Wisconsin Assembly for its consideration, and its staff is pleased to provide additional information, testimony, and technical assistance. These recommendations fall into two categories: those facilitating transparency, and those facilitating political accountability. However, there is a strong positive synergy between the two goals: *i.e.*, the more transparent a process, the more politically accountable, and vice versa.

The OSC also submits a number of recommendations for WEC, as currently constituted, and for clerks. As the Administrator of WEC has noted, however, advice from WEC does not provide a legal safe harbor for clerks, and neither does advice from the OSC or any other merely persuasive authority in this area. Ultimately, it is incumbent upon the approximately 1,852 municipal clerks, the primary agents of election supervision in the State, to consult with their available counsel and make their own independent legal determinations in every case.

Legislative Recommendations to Serve Transparency

1. **Eliminate the Wisconsin Elections Commission**. As outlined in the Interim Report and above, replacing the disgraced and abolished Government Accountability Board with WEC has continued many of the same abuses of secrecy and confusion. The staff remains deeply connected to special interest groups and fails to adequately respond to voter and clerk complaints. Its biennial appropriation is over $10 million, money which could be spent to

support municipal and county clerk operations. In addition, as its Administrator has noted, WEC provides no authoritative legal safe harbor for clerks: eliminating WEC would help clarify the constitutional and statutory authority of popularly elected officials and the voters in handling election matters. Any functions of WEC that might arguably be required by various federal laws could lawfully be handled by an empowered executive branch office of the Secretary of State, or by a collective body of county clerks themselves, or by some other structure. Currently, Wisconsin is only one of two States with a politically unaccountable bureaucracy tasked with providing guidance in election administration.

2. **Eliminate or Reduce Fees for Voter Registration Data**. Currently, voter registration information, including addresses, names, and voter history, are available for purchase. WEC sells that information for $12,500. However, this information is not available in real-time and, worse yet, the fees are waived by contract with special interest groups. This fee should be eliminated or reduced by statute to a token fee (say, $40 as it is in Arizona) to put all citizens on equal footing, and to allow for citizens to help keep the system up-to-date. It is important that the names and addresses of those who voted—with certain exceptions—are made freely available so that anyone so interested could compare, at no, or low cost, the names and addresses of those eligible to vote with those who, in fact voted. This would remove much of the opacity of the current system and bolster public faith in elections.

3. **Maintain a Single Statewide Voter Registration Database, and Make it Publicly Available and Secure**. As it stands, Wisconsin maintains several competing sets of interlocking databases and access systems. Clerks have noted that they were often given

superfluous sets of access keys, and that these systems are theoretically accessible out of state or out of the United States. WEC has also complained to the Assembly that providing comparisons between data sets on certain dates is extremely expensive. Making the information publicly available would place all individuals and parties on an equal footing and allow academic institutions (for example) to compare data sets over time. This would facilitate data quality and transparency with no cost to voter privacy.

1. **Set Up An Office to Engage in Auditing and Oversight of Elections**. Currently, there is no office in the State of Wisconsin with an ongoing charge to audit elections, or to systematically intake and respond to citizen complaints. The Legislature could consider setting up an office whose role is distinct from the Legislative Audit Bureau (LAB) and which merely undertakes periodic and random auditing of elections in various jurisdictions and delivering those results to the Legislature. This should professionalize and standardize oversight and facilitate long-term improvement and data quality. In addition, the Legislature could consider appropriating funds to enable the Attorney General to vigorously engage in investigation and prosecution of election law violations.

2. **Standardize a Process for Post-Election Contest**. Inevitably, elections will be contested. The Legislature should consider reviewing remedies to enable losers of elections to audit a small number of wards for a nominal cost, or for free. It should consider other remedies, including injunctive relief, to preserve the *status quo* while electoral contests are investigated.

3. **Prohibit Certain Contractual Terms in Government Contracts**. The Legislature should consider prohibiting certain vendor contractual terms as a matter of public policy.

For example, it should limit the use and release of sensitive voter data by vendors. It should prohibit terms that block Wisconsin governmental entities from obtaining or releasing data they paid for. And it should prohibit contracting with entities that do not timely respond to governmental requests for information, such as valid criminal or legislative subpoenas.

4. **Minimize Pre-Voting**. It is evident that widespread use of absentee and absentee-in-person voting renders public participation and oversight of counting impossible. Guidance by WEC "enabling" clerks to open envelopes prior to the statutorily mandated deadline denies citizens their right to observe that process. If public oversight of absentee voting is too burdensome, a better option is to prioritize traditional, in-person voting.

5. **Encourage In-House Technical Support**. Each clerk OSC spoke with made clear that their office simply does not have the technical ability to service various electronic voting machines. They simply do not and cannot understand how the various machines work. In the past, municipal public works departments maintained expertise in servicing analog machines. The Legislature should consider funding a program to bring technical expertise in-house, including considering a single state-wide machine system or single-client vendor.

6. **Exit the Electronic Registration Information Center (ERIC)**. The State of Wisconsin pays this outside group six figures per year to assist it in cleaning up our voter rolls, but receives little to no benefit from it. In fact, as was recently noted in testimony before the Assembly, the contract with ERIC ties the hands of election officials in numerous ways. The State can seek lawful, bilateral agreements with States to ensure only lawful voters are on the rolls, without the concerns about partisanship.

Legislative Recommendations to Serve Political Accountability

1. **Provide a Method in Law for Private Challenge to Wisconsin Voter Rolls.** As it stands, there is no clear method for individuals with facial evidence of inaccurate voter rolls to enter state court and seek to fix that problem. The Assembly could consider various legal methods to enable citizens or civil rights groups to help maintain election database integrity in this way. Such a cause of action should take into account administrative burdens, and could even provide nominal rewards for successful voter roll challenges.

2. **Locate Certification of Presidential Electors in a Politically Accountable Body**. In 2020, the presidential electors were certified by a single member of WEC and the Governor. As a political action, certification of electors cannot be subject to the whim of the courts, or purely legal processes. Legitimate contests have occurred in the past and will occur again. To ensure widespread bipartisan confidence in the system, state law should explicitly authorize the contingent creation by campaigns of alternative slates of electors, and could consider penalties for certain actions of those alternates if results are not contested. In the event of widespread contest, the thumb should be on the scale in favor of withholding certification of electors. As noted in the Interim Report, "Hasty certification of electors in a tightly contested election may disenfranchise voters to the same extent as missing a deadline and failing to certify electors at all. While hasty certification may violate the state constitutional duties of the Legislature, delaying certification of electors until resolution of relevant issues does no such violence to our legal system." Finally, placing certification of electors in a politically accountable body, such an association of elected county clerks, could restore confidence in the results of even a closely contested

presidential contest in the State.

3. **Provide a Method for Pre- and Post-Certification Challenges to Presidential Elections.** As noted in Appendix II, certification of electors in a Presidential election is a quintessentially political act, delegated by the state and federal constitutions to our elected state Legislature. However, the Legislature can consider establishing processes for standardizing challenges both pre-and post-certification. Such processes might establish administrative or legal rights, or establish opportunities to raise or expedite decertification procedures on the floor of the Assembly or Senate. The Legislature might also consider formalizing the ability of candidates to assemble alternative slates of electors, to ratify an already lawful process.

4. **Prohibit Outside Funding and Staff in Elections Administration**. OSC concurs in the recommendation of numerous clerks that outside money be prohibited in the administration of Wisconsin elections. Our State has a deep, progressive history and is suspicious of private entities engaging in governmental activity. Clerk's offices should be (and in 2020 were) adequately funded by state and federal entities, as appropriate, but outside grants should be disfavored or prohibited, especially where those grants have any conditions on them. Further, outside volunteers and observers should all be treated on equal footing.

Recommendations for the Wisconsin Elections Commission

(as currently constituted)

1. **Comply with Legislative Audit Bureau Recommendations**. In particular, promulgate statutorily required administrative rules prescribing the contents of training that municipal clerks provide to special voting deputies and election inspectors; eliminate all statutorily non-compliant guidance.

2. **Enter Into Data-Sharing Agreement with Wisconsin Department of Transportation**. In particular, execute with the Department of Transportation a new written data-sharing agreement that includes provisions for verifying the information provided by individuals who register to vote by all methods and that specifies the procedures for verifying this information; establish a system to regularly review and update the data-sharing agreement; and comply with statutes by working with the Department of Transportation to obtain the electronic signatures of individuals who register online to vote. An enforcement mechanism to align the data, such as by citizen suit, perhaps accompanied by a small monetary bounty, would also be a useful supplement to this reform.

1. **Enter Into Data-Sharing Agreement with Wisconsin Department of Health Services**. In order to ensure that our most vulnerable are not exploited, and to facilitate accurate voter rolls, WEC should work to execute a new written data-sharing agreement with the Department of Health Services and establish a system to regularly review and update the data-sharing agreement. Again, a citizen suit and bounty reform could be added on here as well to ensure data-sharing occurs properly.

2. **Enter Into Data-Sharing Agreement with Wisconsin Department of Corrections (DOC)**. In order to ensure that only eligible voters are registered, WEC should work with DOC to execute a new data-sharing agreement and implementation system. Again, a citizen suit and bounty reform could be added on here as well to ensure data-sharing occurs properly.

3. **Provide Additional Training to Clerks**. If there is one function that an independent election administration can perform well, it is training. WEC should consider providing additional training to clerks along several dimensions: providing training for clerks related to machine certification, security, and statutorily mandated pre-election testing; training related to reviewing Election Day forms after each election and investigating relevant issues, including those related to tamper-evident seals; and training on ensuring that ballots are counted accurately when paper jams occur in electronic voting equipment.

Recommendations for Clerks

1. **Familiarize Yourself with Your Wisconsin Code Authority**. Surprisingly, many clerks have expressed to the OSC that they are under the impression that WEC guidance is binding, even when they believe such guidance (say, on drop boxes) is unlawful. Clerks and whatever counsel they have available should review their authority ahead of any conflict.

2. **Make Independent Assessments**. In circumstances where WEC guidance is contrary to law, clerks are empowered to make independent assessments, as they are the elected officials responsible for elections administration. As the Administrator of WEC has noted,

WEC guidance provides no legal safe harbor or immunity for clerks: it is true that clerks are on the legal hook for their own assessments, and should develop good relationships with corporate or outside counsel.

3. **Carefully Review Outside Contracts**. Clerks and other election officials should be careful not to enter into contractual arrangements with outside groups that do not serve the public interest, even when these agreements sound attractive or come with funding grants. As we saw in 2020, these contracts can be leveraged to coerce election officials and cause them to violate their oaths of office. When clerks do enter into outside contracts, they should endeavor to make those contracts public in their entirety. In the interests of transparency, clerks should endeavor to obtain comparable contracts, and donor lists, from nonprofits before engaging them.

4. **Explicitly Prohibit Your Staff from Engaging in Get-Out-The-Vote (GOTV) Operations**. In 2020, we did see widespread GOTV operations engaged in by municipal clerk's offices. This is inappropriate, as GOTV is a partisan activity, historically (and currently) engaged in by candidates and their parties. Staff should be apprised that even when described as "voter education," encouraging voting by any group is not the duty of a busy and potentially underfunded clerk's office.

5. **Consider Robust Voter Roll Review in Your Jurisdiction**. County and municipal clerks are responsible for maintaining the integrity of the voting rolls. Even in election years, federal law does not prohibit Wisconsin officials from removing ineligible voters from the rolls.

6. **Maintain An Exhaustive and Clear List of Election Day Personnel**. Under Wisconsin law, there are two classes of person on election day: election workers, and the general public. There is no third category. Election workers are bound by legal and ethical norms. Do not permit unauthorized individuals to operate under the color of state law.

7. **Catalog All Absentee Ballots Sent Out and Match These with Ballots Returned.** Some voters have reported receiving as many as four absentee ballots leading up to the November 3, 2020 election.

8. **Do Not Engage in Ballot Curing for Absentee Ballots Missing Requisite Voter Data.** Neither state nor federal law mandate curing ballots that are legally incomplete: clerks can take reasonable efforts to contact voters to remedy seemingly minor defects, but should be mindful of their own resources and state law.

Chapter 13

Conclusion

As noted at the outset, this Report by no means represents a "full audit" of the 2020 elections in the State of Wisconsin. Instead, it represents a snapshot of various issues identified by the OSC, other governmental actors, and citizens in the State, and makes a number of recommendations to fix them. Without full transparency by governmental actors, without a fully equipped office to investigate, and without time, some degree of triage by OSC was necessary. A full audit would undoubtedly take a look not just at evidence of major issues and draw inferences, but would take a comprehensive look at election processes, contracts, and machines, to stress test and run other technical reviews. This office has engaged with outside contractors and entered preliminary steps in the government procurement process. However, these auditors have let us know that without full access to information, they are unable to provide robust conclusions.

Again, as discussed by the Committee of Jurisdiction and the Speaker in public, the work of the Office of the Special Counsel is just getting started. The Office will remain authorized during the pendency of litigation to ensure that once the Wisconsin Supreme Court vindicates the right of the people to know what their own government is up to, we can expeditiously run necessary tests.

In the meantime, the major issues identified with compliance and oversight, especially at a time when the federal Congress is making known that legislative oversight is critical to lawmaking, are themselves cause for concern. The Special Counsel hopes that

the Assembly and the public can continue to fight to hold our election administration accountable and to ensure it is secure and efficient.

Finally, the Special Counsel would like to thank the concerned citizens and citizen groups, the numerous clerks and other public servants who have cooperated with the investigation, and the staff, contractors, and partners of the OSC and Assembly for their hard work and dedication to improving our democratic system.

Appendix I: Litigation Summary

As noted throughout, this Report regarding the administration of the 2020 election in Wisconsin is incomplete because the Office of the Special Counsel has received little to no cooperation in its investigation from the government officials and others that were responsible for conducting the election. As part of its investigation, the OSC has sent out ninety subpoenas for witness testimony. While we have conducted numerous interviews with voluntary witnesses, including governmental witnesses, due to public pressure from the Governor and out-of-state actors, word has gone out that the government does not need to respond to the elected Assembly. Instead, the OSC has been embroiled in litigation relative to those subpoenas since late 2020.

1. Dane County Case Number 2021CV002552, *Wisconsin Elections Commission et al. vs. Wisconsin State Assembly et al.*

On October 21, 2020 WEC and its Administrator—Meagan Wolfe—sued the OSC and the Wisconsin Assembly in Dane County Circuit Court seeking an order that OSC subpoenas with which they had been served were invalid as impinging upon her personal rights. In doing so, WEC aims at the authorized mission of the OSC to investigate whether officials "have failed to adhere to our election laws by, at various times, ignoring, violating, and encouraging noncompliance with bright-line rules established by the statutes and regulations governing the administration of elections in Wisconsin."

Notably, WEC took the unprecedented step of employing the Wisconsin Department of Justice as its attorneys in the lawsuit against the OSC and the Assembly.

Until this lawsuit, never before in the history of the State had one arm of the executive branch of Wisconsin's state government (WEC) used another arm of the executive branch (the DOJ) to seek a ruling from a separate branch (the judiciary) that an action by a third branch of state government was invalid and unenforceable (the subpoenas issued by OSC via the Assembly). In short, taxpayer money is being used by the Attorney General to block routine oversight by the duly-elected legislative body in the State, leading to a great waste of taxpayer money.

On October 25, 2021, the Attorney General lost, as Dane County Circuit Court Judge Rhonda Lanford ruled that WEC was not entitled to an emergency injunction invalidating the subpoenas or preventing OSC from seeking to enforce them. After further litigation, on January 10 2022, Judge Lanford ruled that while WEC did have the authority to bring the lawsuit and it would not be dismissed outright, WEC had not established that it was entitled to a temporary or permanent injunction against enforcement of the subpoenas. The matter was held open for further proceedings to address the WEC's overall complaint that the subpoenas are an invalid exercise of legislative authority.

Since that time, WEC has filed an Amended Complaint setting forth additional facts in support of its claims that the subpoenas are invalid, and other parties have sought to intervene and participate in the matter. A hearing is scheduled for March 17, 2022 on the proposed intervention of these other parties, but there is no other scheduled court activity.

In the meantime, neither WEC or Ms. Wolfe have voluntarily agreed to present their testimony to the OSC. It is likely that unless and until the matter is resolved by the Dane

County Circuit Court (and then all potential appeals are exhausted) the subpoenas for WEC and Ms. Wolfe will remain unsatisfied.

2. Waukesha County Case Number 2021CV001710, *Michael J. Gableman vs. Eric Genrich et al.*

Among the parties that have been subpoenaed for their testimony are the Mayor of Green Bay—Eric Genrich—and the Mayor of Madison—Satya Rhodes-Conway. In response to subpoenas with which they were served, the mayors did provide some documents that were requested, but at the same time neither agreed to appear to testify as required by the subpoenas. As a result, the OSC was put in a position of having to seek judicial assistance to direct that the mayors provide that testimony.

To do so, the OSC filed petitions for "writs of assistance" from the Waukesha County Circuit Court to require the mayors to appear and give the required testimony. A judicial writ of assistance is provided for by Wisconsin's statutes. When a judge issues one, a witness must appear for testimony required by a subpoena. If the witness does not, the judge may order that the recalcitrant witness be subjected to punitive action, up to and including incarceration. However, before that can happen, the witness has the opportunity to appear before the court and argue that he or she is excused from appearing because the subpoena is invalid or for any number of other reasons.

The OSC filed for writs of assistance in Waukesha County Circuit Court as the statute setting forth the procedure for obtaining such writs commands that the writ be

sought "in the county where the person was obliged to attend." Wis. Stat. § 885.12. As the mayors' testimony was compelled by the subpoenas to occur in Waukesha County, the OSC was mandated to seek writs of assistance from the Waukesha County Circuit Court.

Before there was any substantive court appearance or action of any kind, Mayor Genrich appeared in the action represented by two law firms—Stafford Rosenbaum. LLP and Law Forward, Inc. Stafford Rosenbaum is a Madison-based law firm with over 50 attorneys, and Law Forward is an "impact litigation firm committed to protecting and advancing democracy and to restoring Wisconsin's pragmatic progressive tradition." Law Forward has a "Legal Advisory Council" that is comprised of, among others, prominent Democrat politicians, including former United States Senator Russ Feingold, and former Lt. Governor Barbara Lawton. There are no current or former elected officials on Law Forward's advisory council that identified as Republican over the course of their respective careers. There are also several attorneys on the Council that have written about, and advocated for, progressive political causes, but none that appear to have ever advocated for conservative ones.

Mayor Genrich is now additionally represented by two more attorneys—Aaron Scherzer and Christine P. Sun. Mr. Scherzer and Ms. Sun are associated with the "States United Democracy Center," an organization whose professed mission is "advancing free, fair, and secure elections," focusing on "connecting State officials, law enforcement leaders, and pro-democracy partners across America with the tools and expertise they need to safeguard our democracy."

Mayor Rhodes-Conway appeared by two lawyers for the City of Madison.

At the very outset, the mayors' attorneys portrayed the actions of the OSC as—

3. "lacking in legal merit;"
4. a "gross distortion of the relevant facts" and "a gross mischaracterization of the facts;"
5. "departing so greatly from legal standards" so that the Special Counsel should be sanctioned by the Court;
6. "an abuse of process;" and
7. "a bad-faith effort to publicly harass local officials with no legal basis."

None of these statements are remotely true, of course, but the OSC has been forced to respond to these scurrilous accusations both in the press and in court.

Shortly afterward, the representatives of WEC and the mayors began "cross-pollinating" the Dane County matter with the Waukesha County matter by filing letters with the respective courts smearing the OSC and improperly attempting to influence the respective judges. The Wisconsin Department of Justice filed a letter in the Waukesha County matter, arguing that the subpoenas were invalid and that the validity of the subpoenas addressed to the mayors would be addressed in large part by the court in the Dane County matter discussed above. In addition, mayor Genrich's representatives attempted to influence the outcome of the Dane County matter by filing a letter with that court arguing that the OSC had made "misrepresentations" to the Waukesha County court and that the subpoenas were "unauthorized, quasi-depositions of mayors and elections officials throughout Wisconsin."

As of this writing, written briefs are being submitted to the Court regarding the following inquiries submitted by the Court:

1. The Court's authority to issue the writs;
2. The correct procedure to follow; and
3. The factual basis of the writs.

A hearing is scheduled on those issues on April 22, 2022. While the Court has asked that these issues be addressed, it is only a preliminary inquiry. The Court has additionally stated that it will not be addressing the actual issuance of the writs or whether the mayors have a reasonable excuse for their failure to comply with the subpoenas. Those issues will be addressed subsequently.

As with the Dane County matter, the Waukesha County matter is nowhere near resolution. First, all issues will need to be addressed by the Circuit Court judge, and then it is likely that any decision will be appealed up to the Wisconsin Supreme Court (and potentially the United States Supreme Court). In the meantime, as with WEC and Ms. Wolfe, neither mayor has voluntarily agreed to give testimony, and it is likely their subpoenas will remain unsatisfied until the conclusion of all litigation.

1. Dane County Case Number 2021CV003007, *American Oversight vs. Assembly Office of Special Counsel et al.*

In addition to the above, the OSC has been forced into litigation over issues surrounding the voluminous requests for documents it has received pursuant to Wisconsin's Open Records law. While these requests and the attendant litigation have not

directly affected the OSC's ability to obtain necessary information—as the lack of cooperation and litigation over the subpoenas has done—at the same time, it has strained the OSC's resources and indirectly affected the OSC's work in a very significant way.

In Dane County Case Number 2021CV003007, a group called American Oversight has sued the OSC, along with the Wisconsin State Assembly, Speaker of the Assembly Robin Vos, and Wisconsin State Senate Sergeant-at-Arms Edward Blazel over purportedly insufficient responses to requests made to the OSC and the other defendants under Wisconsin's Open Records law.

Before the work of the OSC has finished, or even begun in large part, American Oversight has referred to the OSC's efforts on behalf of the Assembly as "baseless," that the OSC is "perpetuating Trump's big lie that the election was somehow stolen," and that the real purpose of the OSC's work is to "create a pretext for enacting new restrictions on voting rights."

Pursuant to their efforts to establish their narrative prior to the work of the OSC coming to fruition, American Oversight has served numerous open records requests upon the OSC, including the following—

2. A September 15, 2021, demand for all "organizing materials," of the OSC, including contracts, agreements, scopes of work, and other documents related to the "scope of investigative authority" of the OSC;

3. A September 15, 2021, demand for all "work product" materials, including "interim reports, analyses, notifications, or other work product produced or collected by individuals or entities under contract to investigate" the November 2020 election, or any other;

4. A September 15, 2021, demand for all "communications" between "former justice Michael Gableman, or anyone communicating on his behalf, such as an administrative assistant, or any individual designated or engaged as an investigator, including, but not limited to Steven Page, and (ii) any other contractor or agent of the Wisconsin Assembly charged with investigating the November 2020 election," as well as all "calendar entries" maintained by any investigators;

5. An October 15, 2021 demand for "external communications" between the OSC and a list of 30 individuals and/or entities;

6. An October 26, 2021, demand for "organizing materials" similar to the one served in September of 2021;

7. An October 26, 2021, demand for "work product" similar to the one served in September of 2021; and

8. An October 26, 2021, demand for "communications" similar to the one served in September of 2021.

All of the above open records requests are currently part of the litigation pending in Dane County.

In addition, American Oversight has served four additional open records requests, dated January 18, 2022, and February 1, 2022, that are still being processed by the OSC, and are not part of any litigation as of yet.

Beyond those served by American Oversight, the *Milwaukee Journal Sentinel*, via reporter Patrick Marley, served an open records request dated February 7, 2022, in which the following records were demanded:

— The call log showing all calls to and from all cell phones used by Gableman;

—The call log showing all calls to and from all cell phones used by any of Gableman's staff (including direct employees, contractors and subcontractors);

— All paper and electronic calendars for Gableman;

— All emails and/or text messages between Gableman and Rudy Giuliani;

— All emails and/or text messages between Gableman and John Eastman;

— All emails and/or text messages between Gableman and Phill Kline;

— All emails and/or text messages between Gableman and Erick Kaardal;

— All emails and/or text messages between Gableman and Phil Waldron;

— All emails and/or text messages between Gableman and James Troupis;

— All emails and/or text messages between Gableman and Kenneth Chesebro;

— All emails and/or text messages between Gableman and David Clarke;

— All emails and/or text messages between Gableman and Rep. Janel Brandtjen;

— All emails and/or text messages between Gableman and Rep. Timothy Ramthun;

In addition, I am requesting the following documents since Sept. 28, 2021:

— All emails and/or text messages between Gableman and Robin Vos;

— All emails and/or text messages between Gableman and Reince Priebus;

— All emails and/or text messages between Gableman and Nick Boerke;

— All emails and/or text messages between Gableman and Andrew Kloster;

— All emails and/or text messages between Gableman and Harry Wait;

— All emails and/or text messages between Gableman and Gary Wait;

— All emails and/or text messages between Gableman and Peter Bernegger;

— All emails and/or text messages between Gableman and Jefferson Davis;

— All emails and/or text messages between Gableman and Mike Lindell;

— All emails and/or text messages between Gableman and Steve Bannon;

— All emails and/or text messages between Gableman and Seth Keshel;

— All emails and/or text messages between Gableman and Shiva Ayyadurai;

— All emails and/or text messages between Gableman and Ron Heuer;

— The computer security protocols for the Office of Special Counsel;

— Transcripts of witness interviews;

— Audio and/or video recordings of witness interviews;

— All submissions to wifraud.com.

The Special Counsel believes in governmental transparency and is making every effort to comply with the above demands.

However, including the Special Counsel himself, the OSC has a full-time staff of two persons. It also has five part-time staff members consisting of four attorneys and an investigator. Simply responding to these voluminous open records requests is a task that has taken up a tremendous amount of staff time. In addition, the Assembly has engaged outside counsel to defend the American Oversight lawsuit and will likely have to hire counsel to defend further lawsuits if the responses provided to the outstanding demands do not satisfy American Oversight or the *Milwaukee Journal Sentinel*.

While the OSC will continue to see that its duties under Wisconsin's open records law are fulfilled, doing so has, and will continue to materially hamper the ability of the OSC staff to address the substantive issues with which it was charged with investigating and reporting upon to the Wisconsin State Assembly.

Appendix II: Decertification and the Electoral Count Act

Certification of electors in a state is a quintessentially political act, delegated by the United States Constitution to state legislatures, which may voluntarily adopt revocable and defeasible rules to guide the process. Wisconsin election law does not explicitly authorize the decertification of electors. But neither does it prohibit it. For this reason, the U.S. Constitution and the gap-filling common law against which backdrop the federal and Wisconsin Constitutions were adopted provide the ultimate guidance. And under those two documents, it is clear that the Wisconsin Legislature could lawfully take steps to decertify electors in any Presidential election, for example in light of violations of state election law that did or likely could have affected the outcome of the election. Furthermore, notwithstanding the current debate over amending the federal Electoral Count Act, the supreme responsibility for running state elections in Wisconsin is vested in our state Legislature—not any other state instrumentality, and not the federal government.

The U.S. Constitution provides in relevant respect that "Each State shall appoint, *in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress* ...." U.S. Const., art. II., § 1, cl. 2. This is a direct delegation to each state legislature. It is not a delegation to the Wisconsin Governor (or WEC) *and* its Legislature. The Framers knew how to delegate to, respectively, state legislatures or state executives, or to both acting concurrently. *Compare, e.g., id. with id.* at art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government, and shall

protect each of them against Invasion; *and on Application of the Legislature, or of the Executive* (when the Legislature cannot be convened) against domestic Violence.") (emphasis added) *and id*. at XVII amend. ("When vacancies happen in the representation of any State in the Senate, *the executive authority of such State* shall issue writs of election to fill such vacancies: *Provided, That the legislature of any State may empower the executive thereof* to make temporary appointments until the people fill the vacancies by election as the legislature may direct.") (emphases added).

The direct constitutional delegation to state legislatures here operates as a "plenary" power. *See McPherson v. Blecker*, 146 U.S. 1, 35 (1892); *see also Bush v. Gore*, 531 U.S. 98, 104 (2000) ("The State, of course, after granting the franchise in the special context of Article II, can take back the power to appoint electors."). Pursuant to that plenary power, it is true that after 1824 most state legislatures began to delegate, in effect, their plenary power to *a process of popular selection of the presidential electors* carried out under a suite of state law provisions. Yet, as applied here, these delegations and self-imposed statutory processes by the Wisconsin legislature are not irrevocable. An election of presidential electors that violates Wisconsin (or any other state legislature's relevant laws) is both void and voidable.

This Report has documented not just one, but a great collection of Wisconsin election law violations. As a political matter, the actions of state actors certifying electors in any Presidential election can be reconsidered as the Wisconsin Legislature sees fit using its plenary power under Article II of the federal Constitution, as recognized in *McPherson*

and *Bush v. Gore*. Indeed, *McPherson* noted that "there is no doubt of the right of the legislature to resume the power *at any time*." *McPherson*, 146 U.S. at 35 (emphasis added).

The process of presidential elections can be conceived of as having five steps: (1) certification pursuant to state law; (2) the arrival of the "safe harbor" date specified in the Electoral Count Act ("ECA"), 3 U.S.C. § 5, purporting to make "conclusive" the determination of election contests in the courts "or other methods and procedures" before that date; (3) the date when state-certified electors meet and cast their votes in their respective States; (4) the opening by the Vice President and counting of electoral votes pursuant to the ECA, 3 U.S.C. § 15, on January 6 of the year following a presidential election; and (5) the inauguration of the President on January 20 of that same year at noon, per the Twentieth Amendment to the Constitution. However, that Article II of the U.S. Constitution assigns to Congress only the power to "determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States." Hence, the relevance of the ECA should not be overstated. The powers to set the time for choosing electors and the day thereof is not the power for Congress to override the plenary power of state legislators to select the State's electors or to act to correct mistakenly certified electors who were certified only because state law was violated in the process.

Two legal analyses from Legislative Council and the Legislative Reference Bureau argue that various events on that five-step process timeline, coupled with silence or the lack of specificity in various sources of law, means that state legislatures cannot decertify.

This logic of those pieces is defective. They ignore the full logical implications of the "plenary" power of the state legislatures to act "at any time" to determine proper electors. For example, when electors were wrongly certified in Hawaii in the 1960 presidential election for Vice President Nixon, that problem was retroactively corrected and Hawaii's electoral votes were counted for John F. Kennedy.

As to the initial method for selecting the President, it matters what system of state law is put in place to select electors and when, relative to that system, new election laws are adopted. No one would support the Wisconsin Legislature allowing an election to be run using one set of election laws and then, just because a majority of both houses thereof did not like the tally of the people's votes occurring within the proper confines of Wisconsin law, adopting a new set of legislative rules and applying them to an already conducted popular election as if that had always been the law.

But the premise of the use of the method of popularly electing elections is inherently, and unavoidably, that such elections be conducted *without violation* of the relevant State's election laws to the extent that the outcome of the election did or likley could swing based on such violations of state law. If an election were purportedly run using the *ex ante* set of legislative election rules (or some of those rules), but *in reality*, the election was run in flat violation of those laws, then the decision of which set of electors to certify (or decertify) devolves back upon the Wisconsin Legislature, where the plenary power to select electors was initially reposed. This is particularly true when the courts do not reach the merits of election disputes brought to them for resolution of whether the *ex*

ante rules were actually followed, dismissing challenges, for instance, on grounds of lack of standing, laches, and the like, as is the case in Wisconsin regarding numerous legal challenges.

The ECA is not constitutional law and it cannot be used to strip state legislatures of their Article II plenary power over elector selection, especially when evidence of widespread violations of state election law become clear only late in an election cycle or even after an election cycle is over. At that point, the principle that comes into play is the common law principle that fraud or illegality vitiate results rendered under an illegal or fraudulent process. *See, e.g., United States v. Throckmorton*, 98 U.S. 61, 64 (1878) ("Fraud vitiates even the most solemn contracts, documents, and even judgments."); *see also United States v. Bradley*, 35 U.S. 343, 360 (1836) (citing *Pigot's Case*, 11 Co. Lit. 27b (1614)). To take just one example, the Third Circuit recognized more than a quarter century ago that an illegally certified candidate who was already sitting in the Pennsylvania Legislature and had been sworn in must be stripped of his office based on violations of that State's election laws. *See Marks v. Stinson*, No. Civ. A. 93-6157, 1994 WL 47710, at *15-16 (E.D. Pa. Feb. 18, 1994), *vacated in part*, 19 F.3d 873 (3d Cir.), *aff'd after remand*, 37 F.3d 1487 (3d Cir.). And this occurred where there was no mechanism in the Pennsylvania Constitution for explicitly applying such a remedy. The Legislative Council and Reference Bureau do not take account of this precedent, logic, or history.

Thus it is clear that the Wisconsin Legislature (acting without the concurrence of the Governor, *see supra*), could decertify the certified electors in the 2020 presidential

election. Two steps would be required for it to do so. *First*, the Legislature would need a majority in both houses to pass a resolution concluding that the 2020 election was (a) held in violation of state law, as detailed in this Report (or other sources), in one or more respects; and (b) the degree of violation of state law in place on November 3, 2020 rose to the level that fraud or other illegality under Wisconsin law could have affected the outcome, using any evidentiary test for certainty the Legislature agreed should apply (for instance, a preponderance, etc.). And *second*, the Legislature would need to invoke and then exercise its plenary power to designate the slate of electors it thought best accorded with the outcome of the election, had it been run legally in accord with the state election laws in effect on November 3, 2020. This would lead to decertifying the relevant electors, if the Legislature concluded that they were not the slate of electors that best accorded with the election if run consistent with all relevant Wisconsin laws in effect on election day.

However, this action would not, on its own, have any other legal consequence under state or federal law. It would not, for example, change who the current President is.