FILED
08-17-2022
CIRCUIT COURT
DANE COUNTY, WI
2021CV003007

BY THE COURT:

DATE SIGNED: August 17, 2022

Electronically signed by Frank D Remington
Circuit Court Judge

STATE OF WISCONSIN	DANE COUNTY BRANCH 8	CIRCUIT COURT

AMERICAN OVERSIGHT,

Petitioner,

vs. Case No. 21-CV-3007

ASSEMBLY OFFICE OF
SPECIAL COUNSEL, et al.,

Respondents.

SUPPLEMENT TO THE COURT'S JULY 18, 2022 DECISION DENYING OSC'S MOTION TO RECUSE

INTRODUCTION

This is a supplement to the July 18, 2022 decision denying OSC's motion to recuse myself as judge. In that decision, I noted that OSC's "brief contains inaccuracies…" but I did not address those inaccuracies because other substantive matters in this case had already been scheduled that same week.[1] It was important, at that time, to expedite a decision. Having carefully considered OSC's arguments, I concisely expressed my reasoning in a five-page written decision in which I

[1] OSC e-filed its motion sometime in the evening of Friday, July 15, 2022. I could not review the motion until the following Monday, July 18, 2022. Oral arguments on other matters were scheduled for that Thursday, July 21, 2022.

concluded that "I can and have been acting in an impartial manner in this case. I will continue to do so in the future." Decision and Order (July 18, 2022), dkt. 379:4.

The purpose of this decision is not to reexamine that well-founded conclusion. The purpose is to, first, more thoroughly address OSC's arguments, and second, to apply the "safeguards that ensure ethical and competent representation" of out-of-state attorneys. *Filppula-McArthur ex rel. Angus v. Halloin,* 2001 WI 8, ¶36, 241 Wis. 2d 110, 622 N.W.2d 436. I do so by revoking OSC's out-of-state attorneys' admission to practice law *pro hac vice*.

OSC argues that I abused my discretion by not responding more thoroughly to its motion to recuse. OSC Pet., dkt. 401:31. OSC cites no authority in support of its complaint, nor does it explain the standard for thoroughness by which a judicial opinion should be judged.[2] A court's resources are the public's resources, and the public has no stomach for the expenditure of judicial resources spent rebutting the unsupported, illogical, and the outright false. OSC's brief in support of its motion to recuse is, at times, each of those things. If my prior estimation that OSC's brief "contains inaccuracies" was improvident, it was only in the suggestion that OSC's brief also contains accuracies. But to read the brief casually is to witness fiction distilled from the disappointment of a losing party; a fever dream version of the facts of this case.

To read OSC's briefing more closely, one reaches a different conclusion: a pernicious and selfish attempt to repaint the truth. In doing so, OSC denigrates our entire unified court system. Wis. Const. art. VII, § 2. OSC accuses me of threatening a witness, a felony under Wis. Stat. § 940.201. It does these things carelessly, with no regard for the law of the State of Wisconsin or for the facts of this case, and perhaps most perplexingly, OSC never even bothers to invent an

[2] OSC does reference authority. That authority does not support or, on this point, even relate to its argument. In Part B.8.c, I discuss OSC's egregiously misleading citations.

explanation for why I am supposedly biased.

I revoke OSC's out-of-state attorneys' *pro hac vice* admission because the motion to which they have signed their names applies phony legal principles to invented facts. Near every claim they make is frivolous under Wisconsin law. When I granted *pro hac vice* admission, I did so upon the condition they obey the Wisconsin Supreme Court's rules for professional conduct. Revocation of that admission is appropriate upon three factors, including an "unwillingness to abide by the rules of decorum." *Halloin,* 2001 WI 8, ¶36. By filing this frivolous motion, these lawyers have met each of the three factors for revocation, and accordingly, their *pro hac vice* admissions are immediately withdrawn.

I. BACKGROUND

Judges make decisions based on facts. To explain why OSC utterly fails to show any factual reason for recusal requires, first, an explanation of the underlying facts of this case. I therefore begin with the fundamental rules for how a court determines what is true and what is not. I then set forth how I have impartially applied those fundamental rules to this case.

A. Courts make findings of fact based on evidence.

In our constitutional system, "judicial power is the power to interpret and apply the law to disputes between parties." *Serv. Emps. Int'l Union, Local 1(SEIU) v. Vos,* 2020 WI 67, ¶1, 393 Wis. 2d 38, 946 N.W.2d 35. To apply the law to a dispute requires a court to understand the facts of that dispute, which is why the Wisconsin Supreme Court has repeatedly held that "the trial court must make findings of ultimate fact upon which the judgment of the court rests." *Matter of T.R.M.,* 100 Wis. 2d 681, 687, 303 N.W.2d 381 (footnote omitted); *See e.g. SEIU,* 2020 WI 67, ¶37; *Lavota v. Lavota,* 70 Wis. 2d 971, 974, 236 N.W.2d 224 (1975); *L. Rosenheimer Malt & Grain Co. v. Vill. of Kewaskum,* 1 Wis. 2d 558, 560, 85 N.W.2d 336 (1957); *Gersich v. Starich,* 177 Wis. 507, 188

N.W. 492, 492-93 (1922); *Klatt v. Mallon,* 61 Wis. 542, 21 N.W. 532 (1884). Those findings of fact must be based on the record of a particular case, developed through the efforts of the parties to a dispute. "The need to develop all relevant facts in the adversary system is both fundamental and comprehensive." *United States v. Nixon,* 418 U.S. 683, 709 (1974). And, in developing that record, courts look to the rules of evidence so "that the truth may be ascertained and proceedings justly determined." Wis. Stat. § 901.02. Under those rules, every witness "shall be required to declare that the witness will testify truthfully, by oath or affirmation …" Wis. Stat. § 906.03.

This explanation is a long way of making a simple point. Parties must actually prove facts: "it is up to them to make their case." *SEIU,* 2020 WI 67, ¶24. And, as we tell jurors at the beginning of every trial: "Remarks of the attorneys are not evidence." WIS JI-CIVIL 50; *See* WIS JI-CRIMINAL 103.

B. The unabridged factual and procedural history of Dane County Case No. 21-CV-3007.

OSC has set forth its own factual background of threats, favoritism, and bias. It is the tale of an errant judge, somehow arbitrary but also predetermined to punish OSC and its individual counsel. It is compelling and dramatic. It has little basis in either fact or law. To expose its account as fiction, I set forth the unabridged factual and procedural history of this case. I mirror the structure of OSC's briefing, I respond to their arguments, and I analyze the legal and factual grounds, if any, on which those arguments rely.

Before turning to OSC's specific allegations, I observe at the threshold the ambiguous nature of my supposed bias. OSC articulates no internally consistent rationale for why I did what it says I did. This is important because even if OSC could show I demeaned its counsel or made sweeping rulings on irrelevant contracts (it cannot), it would not follow from these dissociated

lamentations that I must have done these things because of "bias." The reason for a judge's bias is central to every case on the matter—without such a reason, OSC is indistinguishable from every other party which loses a lawsuit. *See e.g. Ozanne v. Fitzgerald,* 2012 WI 82, 822 N.W.2d 67 (Mem.) (Judge was allegedly biased because he accepted free legal services from a litigant); *Caperton v. A.T. Massey Coal Co., Inc.,* 556 U.S. 868 (2009) (Judge was allegedly biased because he "received campaign contributions in an extraordinary amount from" a litigant.); *In re Paternity of B.J.M.,* 2020 WI 56, ¶8, 392 Wis. 2d 49, 944 N.W.2d 542 (Judge was allegedly biased because he "friended" a litigant and then allowed ex parte communication through social media.); *State v. American TV and Appliance of Madison, Inc.,* 157 Wis. 2d, 175, 181-82, 443 N.W.2d 662 (1989) (Judge was allegedly biased because he received a discounted price from a litigant.); *State v. Herrmann*, 2015 WI 84, ¶¶48-49, 364 Wis. 2d 336, 867 N.W.2d 772 (Judge was allegedly biased because she had personally been a victim of a similar crime and had discussed her own experience at the sentencing hearing.); *State v. Harrell,* 199 Wis. 2d 654, 656, 546 N.W.2d 115 (1996 (Judge was allegedly biased because his wife worked in the same office as the prosecutor.).

In detail set forth below, I respond to each of the criticisms leveled at me, my conduct, and my decisions.

1. Autumn 2021: the records requests.

This is a public records case. Between September 15, 2021, and October 26, 2021, American Oversight submitted seven records requests to the assembly, Robin Vos, Edward Blazel ("the Legislative Respondents") and OSC. Colombo Aff., Exhs. A-N, dkt. 8-9, 14-25. American Oversight sought from each of the Respondents what they summarize as "organizing materials," "work product," and "communications." These requests sought copies of:

- Any contracts between the Legislative Respondents and the OSC; resumes, applications,

work proposals, and the like; any records related to "the scope of the investigative authority of" OSC; any records "detailing the steps or procedures to be followed in each aspect of the investigation;" invoices in connection to the investigation; and "criteria, schedule, or other guidelines" for completion of the investigation. Colombo Aff. Ex. A, dkt. 9:2-3 (request to Legislative Respondents); Colombo Aff. Ex B, dkt. 8:2-3 (same, but to Michael Gableman (hereinafter "Gableman")).

- An updated request identical to the above but for a new date range. Colombo Aff. Ex. I-J, dkt. 20-21.
- Interim reports, analyses, and other work product related to election fraud. Colombo Aff. Ex. C, dkt. 14:2 (request to Legislative Respondents); Colombo Aff. Ex. D, dkt. 15:2 (same, but to Gableman).
- An updated request identical to the above, but for a new date range. Colombo Aff. Ex. K-L, dkt. 22-23.
- "All electronic communications" between OSC staff, plus any "calendars or calendar entries" relating to the investigation. Colombo Aff. Ex. E, dkt. 16:2 (request to Legislative Respondents); Colombo Aff. Ex. F, dkt. 17:2 (same, but to Gableman).
- An updated request identical to the above, but for a new date range. Colombo Aff. Ex. M-N, dkt. 24-25.
- Communications between the respective authority and forty-four entities, which American Oversight specified by name and email address. Colombo Aff. Ex. G, dkt. 18:2-5 (request to Legislative Respondents); Colombo Aff. Ex. H, dkt. 19:2-5 (same, but to Gableman.)

The assembly and Edward Blazel responded by either producing some records or by telling American Oversight that no responsive records existed. Colombo Aff. Exs. R-X, dkt. 33-39. Robin Vos did not respond, later claiming that because he had already responded to American Oversight's earlier requests for similar records for different time periods, he did not need to respond to these requests, too. Vos Letter, dkt. 138:1.

OSC responded to American Oversight's multiple records requests by this email message, sent December 4, 2021:

Coms has shared OneDrive for Business files with you. To view them, click the links below.

open records part 2.pdf open records part 3.pdf Open records request.pdf

Good Afternoon,

Attached are the open records for the Office of Special Counsel up until December 1st, 2021. Some documents that contain strategic information to our investigation will continue to be help until the conclusion of our investigation. If you have any questions or concerns please feel free to contact our office at coms@wispecialcounsel.org

Very Respectfully,

Zakory Niemierowicz
WI Special Counsel

Colombo Aff., Ex. P, dkt. 27:1.

2. December 20-21, 2021: the alternative writ of mandamus.

On December 20, 2021, American Oversight filed petitions for both a writ of mandamus and an alternative writ of mandamus. The petition for an alternative writ of mandamus sought an order commanding the Respondents to produce records or show cause for the alleged failure to produce records. Pet. for Alternative Writ, dkt. 11. The next day, December 21, 2021, I denied the petition for a writ of mandamus and granted the petition for an alternative writ of mandamus, then scheduled a hearing for the return date of January 21, 2022. Alternative Writ, dkt. 42. The writ commanded the Respondents:

> [T]o immediately on receipt of this writ, release the records responsive to Petitioner's request, or in the alternative to show cause to the contrary before this court … on January 21st at 2:30 p.m.

Dkt. 42:2. OSC finds fault with several parts of this procedure.

OSC's first complaint is that I "summarily signed the writ … without determining that an 'emergency' existed." OSC Br., dkt. 377:4. In support of this argument, OSC cites a section of the Wisconsin Judicial Benchbook for the proposition that "a court may rule ex parte on motion, if

plaintiff establishes an emergency exists." The particular section to which OSC cites is titled "**Non-Writ Procedure.**" OSC Br., dkt. 377:4. If OSC had continued to the next page of the Benchbook, it would see "**Writ Procedure**," under which judges are advised (in the abbreviated fashion in which the Benchbook is written) that "Ct issues alternative writ when … Petition establishes prima facie case." Wisconsin Judicial Benchbook, Vol. II: Civil (7th ed. 2021), CV 28-10. OSC cites no authority for why, under the writ procedure, a judge should make findings about an "emergency."

OSC's second complaint is that I relied on a "conclusory allegation that OSC" withheld records. OSC Br., dkt. 377:4. OSC ignores altogether the veritable mountain of evidence in support of American Oversight's claim of the unlawful withholding of records. This evidence included, but was not limited to:

- The six-page affidavit of Sara Colombo ("Colombo"), in which she avers that she has submitted records requests and that the Respondents failed to respond, or in the case of OSC, responded by unlawfully withholding records.
- The twenty-seven evidentiary exhibits (AA, A-Z) introduced through Colombo's affidavit, showing each of her records requests and each of the Respondents' responses, plus other supporting materials.

I relied on this evidence, not any "conclusory allegation" to find a prima facie case of unlawful withholding of records and, accordingly, I issued the alternative writ.

3. January 19, 2022: OSC's first motion for a continuance.

On the evening of January 18, 2022, OSC filed its first motion for a continuance. OSC First

Mtn. for Continuance, dkt. 80.[3] I could not review the motion until the following morning, January 19. In support of its motion, OSC argued that American Oversight had failed to serve OSC with the writ and it also complained that it was too busy to appear because of the press of other litigation. *Id.*

I denied that motion in a written order. Decision and Order (Jan. 19, 2022), dkt. 82. I explained several reasons why. I first cited the well-settled policy underlying our public records law, which I construed "to suggest that there be prompt judicial attention to subsequent litigation." *Id.* at 1-2. Second, I noted the late hour of the motion for a continuance despite the fact that "the Alternative Writ gave the Respondents about a month to prepare a response." *Id.* at 2. I further noted "this Court does not have time on its calendar to reschedule … before March 8th, 2022," and that a delay of three months would be unacceptable. Finally, I noted that other parties had not had similar difficulty preparing, and that OSC had improperly challenged service in a motion for

[3] OSC has sought to continue every substantive hearing in this case, except those on its own motions. I denied some and granted some others, however, OSC does not complain about any of those decisions:

> OSC Mtn. for Continuance, Jan. 18, 2022, dkt. 80 (OSC "moves the Court for an order (1) granting a continuance of the return date set for the Court's Order to Show, currently January 21, 2022.").
>
> OSC Mtn. for Continuance, Jan. 27, 2022, dkt. 118 (OSC "moves this Court … to amend the scheduling order to require plenary briefing prior to submission of the documents for *in camera* inspection.").
>
> OSC Mtn. for Continuance, Feb. 25, 2022, dkt. 156 (OSC "moves this Court to grant two business days … for the OSC to amend and re-file its Reply.").
>
> OSC Oral Mtn. for Continuance, Tr. of June 10, 2022 Hr'g, dkt. 322:4 (OSC's counsel began the hearing by stating: "we are requesting an adjournment.").
>
> OSC Mtn. for Continuance, June 28, 2022, dkt. 349 (OSC "request[s] that the status conference scheduled for July 13 be removed from the Court's calendar.").
>
> OSC Mtn. for Continuance, July 1, 2022, dkt. 358 (OSC "moves this Court … for an Order continuing the presently set hearing date of July 13, 2022.")
>
> OSC Mtn. for Continuance, July 19, 2022, dkt. 384 (OSC "provides an alternative request to the Court. … we would request to adjourn Thursday's proceedings until August 1 …").

continuance. *See e.g. Lees v. DILHR,* 49 Wis. 2d 491, 500, 182 N.W.2d 245 (1971) ("if a litigant desires to avail himself of want of jurisdiction of his person he must keep out of court for all purposes except that of objecting to jurisdiction …").

OSC complains that this decision contained one misstatement and two material omissions. It first claims I "misstat[ed] that OSC had filed its motion only 24 hours before the 1/21/22 hearing…" OSC Br., dkt. 377:5. In support of this claim, OSC does not cite to any part of my decision because, as will frequently be the case, I did not say what OSC says I did.[4]

OSC next claims I omitted two material facts from my decision. These were that "that OSC counsel had offered to accept service in consideration of a brief continuance…" and that OSC had "delayed filing … per local rules." OSC Br., dkt. 377:5. OSC does not explain why either of these facts would be material to a motion for a continuance. Lawyers may, with consent of their client, choose to accept service or not accept service. *Bergstrom v. Polk Cnty.,* 2011 WI App 20, ¶15, 331 Wis. 2d 678, 795 N.W.2d 482 (quoted source omitted). I imposed no requirement either way. In our adversary system, one party must effect service, Wis. Stat. § 801.05, and the other may challenge service. Wis. Stat. § 801.08. As for "local rules," OSC does not explain what "local rule" it believes required it to delay filing its motion. I know of none. Here is Dane County's local rule on continuances, which is plainly silent as to "delay":

> All stipulated requests for continuance of trial date shall require the consent of the parties in writing or on the record and must be for good cause shown. Non-stipulated requests for continuance must be on motion and hearing and for good cause shown by the party or with the party's written consent. All requests for continuance are subject to the approval of the court.

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[4] I did make a mistake in this order, although OSC does not seem to have noticed. I refer to the hearing scheduled for Jan. 21, 2022 as though it were actually scheduled for the day before, Jan. 20, 2022. The mistake does not matter because two-day-notice is hardly better than one, and my decision relied on three other reasons unrelated to the timing of the motion.

Dane County Local Rule 304, available online at https://courts.countyofdane.com/Prepare/Rules, last visited Aug. 3, 2022.

4. January 20, 2022: The first motions to quash.

The day after I denied OSC's motion for a continuance, January 20, 2022, both OSC and the Legislative Respondents moved to quash the writ. In their brief in support of the motion to quash, the Legislative Respondents cited, as it appeared in their papers:

- *Karcher v. WI Dep't of Health Servs. Div. of Pub. Health*, 2021 WI App 20, ¶ 7, 396 Wis. 2d 703, 958 N.W.2d 168.
- *State ex rel. Richards v. Records Custodian*, 179 Wis. 2d 502, 508 N.W.2d 74 (Ct. App. 1993).
- *State v. Doe,* 120 Wis. 2d 670, 353 N.W.2d 842 (Ct. App. 1984).

In a lawful citation form, these cases are:

- *Karcher v. DHS,* No. 20AP211, 21 WL 608365 (Wis. Ct. App. Feb. 17, 2021) (unpub.).
- *State ex rel. Richards v. Records Custodian,* No. 92-1493, 1993 WL 350053 (Wis. Ct. App. Sep. 16, 1993) (unpub.).
- The "*State v. Doe*" citation is to an index of unpublished opinions, none of which bear this name. There is one unpublished opinion from the year before the cited case, *State v. Doe,* No. 83-585, 1983 WL 161932 (Wis. Ct. App. 1983) (unpub.), although this is similarly unciteable and I decline to speculate about what the Legislative Respondents meant to cite.

Citation to legal authority is a "foundation stone of the rule of law." *Kimble v. Marvel Entertainment, LLC,* 576 U.S. 446, 455 (2015). Not every judicial opinion is legal authority. Under Wisconsin statute, the citation to unpublished decisions of the court of appeals is subject to three rules:

1. Unpublished opinions from before July 1, 2009 are not citeable. Wis. Stat. § 809.23(3)(a).
2. Unpublished, but authored, decisions issued on or after July 1, 2009 are citeable, but only for persuasive value. Wis. Stat. § 809.23(3).

3. "A party citing an unpublished opinion shall file and serve a copy …" Wis. Stat. § 809.23(3)(c).

The Legislative Respondents ignored these statutes. *Richards* and *Doe* should never have been cited. Only *Karcher* was citeable, but no copy was ever served on the Court and the opinion was misrepresented as though it were precedential, instead of a persuasive. Wis. Stat. § 752.41 ("Officially published opinions of the court of appeals shall have statewide precedential effect.").

Because of the Legislative Respondents' repeated, unlawful, and misleading citation, I struck their brief. Decision and Order (Jan. 21, 2022), dkt. 107. I explained this was necessary because, based on the degree to which the Legislative Respondents relied on unlawful authority, "it is impossible to simply strike those improper citations and meaningfully evaluate the remainder of the Legislative Respondents' argument …" *Id.* I further explained the purpose of Wisconsin's limits on citation, which remain valid, and perhaps are more important than ever, now that certain unpublished cases are citeable:

> Erosion of the concept of precedent embodied in published decisional law is too great a price to pay for the sake of informing or persuading a court by means of opinions not designed for citation.

Id. (quoting *In re Amendment of Section 809.23(3), Stats.,* 155 Wis. 2d 832, 456 N.W.2d 783 (1990), *superseded by statutory amendment.*).

OSC says I struck the brief for a different reason. It writes that I struck the brief "for inadvertently citing unpublished authority…" OSC Br., dkt. 377:7. OSC provides no factual basis for the "inadvertence" with which it claims other lawyers wrote other clients' briefing. The only explanation in the record is that, according to the Legislative Respondents' attorney Ronald Stadler: "This one slipped by." Tr. of Jan. 21, 2022 Hr'g, dkt. 148:15.

I pause in my examination of the facts of this case to mark OSC's claim of "inadvertence"

as the first of many wholly unsupported factual statements. Standing alone, it may appear odd, harmless even, that a court would take note of this kind of factual representation. A reasonable lawyer might even construe it, despite an ethical obligation for candor to the tribunal, as a sort of misguided attempt at collegiality. I do not know whether the lawyer who drafted the Legislative Respondents' brief told OSC the circumstances under which it cited unlawful authorities. I do know that no such explanation is part of the record.

So, if there's nothing in the record, why would OSC insert and rely on a descriptive term like "inadvertently" to explain a theory of judicial bias? If the "inadvertence" of unlawful citation mattered, why didn't OSC raise that argument? Under Wisconsin law, what would that argument be? And anyways, how can a lawyer "inadvertently miscite three appellate cases?" Throughout this brief, and in its earlier briefing, too, OSC's continued refusal to factually support its position is literally sophistry.[5] Ultimately, these questions matter little to this case. I pause to raise them only to illustrate the carelessness with which OSC has drafted this fiction.

Returning to the January 21, 2022, motions to quash, OSC next compares the Legislative Respondents' thrice-unlawful citation to an occasion in which I cited to a concurring opinion in a published case. OSC Br., dkt. 377:7. There is no comparison. One citation is prohibited by statute, the other citation is an ordinary part of American jurisprudence. *See e.g. Kyllo v. United States,* 533 U.S. 27, 33 (2001) (Justice Scalia relies on "Justice Harlan's oft-quoted concurrence" in *Katz*

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[5] The words of Socrates to the sophist Meno, who saw no difference between opinion and knowledge:

> Now this is an illustration of the nature of true opinions: while they abide with us they are beautiful and fruitful, but they run away out of the human soul, and do not remain long, and therefore they are not of much value until they are fastened by the tie of the cause; and this fastening of them, friend Meno, is recollection, as you and I have agreed to call it. But when they are bound, in the first place, they have the nature of knowledge; and, in the second place, they are abiding. And this is why knowledge is more honourable and excellent than true opinion, because fastened by a chain.

Plato, *Meno* (Benjamin Jowett trans.) www.classics.mit.edu, last visited Aug. 11, 2022.

v. United States, 389 U.S. 347, 361-62 (1967) (Harlan, J., concurring)). Why else would judges write concurrences, except to properly expound the law? *See e.g. Schill v. Wisconsin Rapids Sch. Dist.,* 2010 WI 86, ¶173, 327 Wis. 2d 572, 786 N.W.2d 177 (Gableman, J., concurring) ("I write further to clarify ...").

5. January 21, 2022: the return date for the alternative writ.

The next day, January 21, 2022, was the return date for the alternative writ of mandamus. I turn to OSC's myriad complaints arising from the events of the hearing itself.

a. There is no evidence that I appeared pre-determined to force OSC to admit jurisdiction.

OSC's first complaint about the January 21, 2022 hearing is that "Remington appeared pre-determined to force OSC to admit jurisdiction." OSC Br., dkt. 377:5. In support of this statement, OSC relies on an unpublished "report and recommendation" of a federal magistrate from the Western District of Washington as well as two transcript excerpts from this case.

The first source OSC cites in support of its allegation of predetermination is *Davis v. Powers,* 2010 WL 2163134 (W.D. Wash. Apr. 16, 2010). In that case, Davis, a person committed to Washington State's sexually violent person's facility, was denied a television set. *Davis,* 2010 WL 2163134 *1. Davis petitioned the Whatcom County court for an ex parte order commanding the facility to return the television. *Id.* *2. The magistrate's report does not explain why the state court granted such an order, but when the facility proved it had never been served, the county court vacated its order. *Id.* *8. OSC does not explain why a federal magistrate's unpublished report concerning Washington State substantive law matters to this case. Even if it had, *Davis* would still be entirely inapposite because, unlike the Whatcom County judge, I did not require OSC to do anything until after I could determine personal jurisdiction. That is why I promptly scheduled a

jurisdictional hearing for January 27, 2022. Scheduling Order (Jan. 25, 2022), dkt. 110:2.

Continuing with its predetermination argument, OSC next cites two excerpts from the transcript of the hearing. OSC Br., dkt. 377:5. The first excerpt is seven pages long. I have reviewed the excerpt and find no bias therein, but I decline to speculate what part exactly is supposed to show "predetermination." The second excerpt is, in full:

> MR. BOPP: Two other items. My second objection to you issuing an order for an in-camera inspection is you have no personal jurisdiction over Special Counsel Gableman, so you have no judicial power to order him to do anything. Now, obviously we're going to deal with that issue. You may decide later that you do. If you do, then you have the authority to issue orders to him. Pending that, you do not.
>
> THE COURT: Okay. Then I'll hedge on that. When are we coming back, Molly?
>
> THE CLERK: For the issue of service?
>
> THE COURT: Right.
>
> THE CLERK: The 27th at 9.
>
> THE COURT: Would you prefer, Mr. Bopp, that instead of giving you ten days from today's date to produce the documents for in-camera inspection, if I find the Court has personal jurisdiction, please be aware that I'm going to give you four days then to produce the record for in-camera inspection.

Tr. of Jan. 21, 2022, Hr'g, dkt. 148:59-60. OSC does not explain what part of this exchange gives the appearance of predetermination "to force OSC to admit jurisdiction." The Court's calendar is limited. At the time, it made sense to schedule a subsequent hearing and, in the meanwhile, resolve the jurisdictional issue.

b. There is no evidence that I ignored OSC's arguments.

OSC next complains that I "ignored Atty. Bopp's *legal* issue, and instead characterized the dispute as one of fact …" OSC Br., dkt. 377:5 (emphasis in original). OSC appears to be jumping

to a different legal argument here, in which it claimed it had never been served under Wis. Stat. § 801.11(4) and (5). Tr. of Jan. 21, 2022, Hr'g, dkt. 148:9. Under those statutes, a "body politic" may be served by leaving a copy of the summons "with the person who is apparently in charge of the office." Wis. Stat. § 801.11(4)(b).

There is no evidence that I "ignored" OSC's argument. The record shows I recognized that American Oversight had demonstrated a factual basis for having served a person "apparently in charge" of OSC's office. Tr. of Jan. 21, 2022, Hr'g, dkt. 148:9. That factual basis was the sworn testimony of a process server. Kegley Aff., dkt. 71. Whether a person is "apparently in charge" is a factual question. *Keske v. Square D Co.,* 58 Wis. 2d 307, 313, 206 N.W.2d 189 (1973) ("The use of the word 'apparently' can only refer to what is apparent to the person actually serving the summons."). Accordingly, the purpose of the scheduled jurisdictional hearing was to determine what was actually apparent to American Oversight's process server, Mr. Kegley, when he served a copy of the summons.

OSC neither analyzes Wis. Stat. § 801.11(4)(b) nor offers any explanation of why service is anything but a factual issue. Instead, it continues with the assumption that I ignored the legal argument and that in doing so I violated "due process principles applicable in construing SCR § 60.04(4). OSC Br., dkt. 377:5. OSC concedes it has no due process right. *Id.* at 2-3 ("Due process protections are not available …"). Nevertheless, it proceeds to cite two cases in support of these unavailable protections.

The first case OSC cites is *Hall v. E. Air Lines, Inc.,* 511 F. 2d 663 (5th Cir. 1975), a three-paragraph per curiam decision of the Fifth Circuit. Hall was an airline worker who was discharged for allegedly leaving work without approval. *Id.* at 663. Hall appealed his discharge, apparently upon evidence of an alibi to prove he had not, in fact, left work. *Id.* A federal agency tasked with

hearing these kinds of appeals rejected the evidence "because [Hall] had not previously presented it." *Id.* at 664. Thus, the Fifth Circuit could easily conclude that while that agency was "entitled to completely reject such evidence after reviewing it on the merits …" it could not summarily reject the evidence outright on what should have been a de novo review. *Id.* OSC does not explain why it cites this case. I did not reject evidence supplied by OSC to prove there had been no service. OSC did not, and never has, offered evidence about whether it was properly served when American Oversight left a summons with a person "apparently in charge" of OSC's office.

The second case OSC cites is *Distiso v. Town of Wolcott,* 352 F. Appx. 478 (2nd Cir. 2009). That case is even further afield. There, a mother alleged racially-motivated abuse by teachers at her son's school. *Id.* at 479. The teachers claimed qualified immunity as government officials. *Id.* The Second Circuit remanded to the district court for further consideration of the qualified immunity defense pursuant to United States Supreme Court precedent on the topic. *See e.g. Saucier v. Katz,* 533 U.S. 194, 201 (2001). The case says nothing useful about due process, let alone as it relates to the standard for recusal under Wisconsin law.

c. There is no evidence that I favored one party over the other.

OSC's third broad complaint is that "with a wink and a nod expression," the Court instructed American Oversight's attorney on how to proceed with the case. OSC Br., dkt. 377:6. In support of this proposition, it "cites WisEye video files, showing J. Remington's tone, demeanor, and bias." *Id.* While it is true that an entity called Wisconsin Eye has videotaped several proceedings in this case, it is not true that those files are part of the record. I am not able to review them, and even if I were, it's not clear what part of the video OSC references.

If OSC's argument is that a court should not advise the parties of its expectations for future hearings, OSC does not explain or support the argument. Judges do this all the time. *See e.g. In re*

Judicial Disciplinary Proceedings Against Gableman, 2010 WI 62, ¶64, 325 Wis. 2d 631, 784 N.W.2d 631 (Prosser, J., op.) (three justices advise a litigant: "we anticipate that … Gableman … promptly will file a motion to dismiss the complaint …"). A judge must exercise some degree of control over proceedings because a judge is tasked to not only administer the law, SCR 60.03(1), but also to do so efficiently and expeditiously. *Puchner v. Hepperla,* 2001 WI App 50, ¶7, 241 Wis. 2d 545, 625 N.W.2d 609 ("A court may exercise its inherent power to ensure that it functions efficiently and effectively to provide the fair administration of justice and to control its docket with economy of time and effort.") (internal citations and quotations omitted).

d. There is no evidence that I ordered OSC to do anything without jurisdiction.

Fourth, OSC appears to complain that I ordered it to produce records without jurisdiction. It cites several transcript excerpts, although it cites no legal authorities and develops no argument on this point. OSC Br., dkt. 377:7.

Before turning to OSC's cited excerpts, I first set forth the principles of Wisconsin's rules for service. Service "confers jurisdiction on the court …" *Am. Family Mut. Ins. Co. v. Royal Ins. Co.*, 167 Wis. 2d 524, 533, 481 N.W.2d 629 (1992). "[F]ailure to comply with the service requirements will result in a dismissal of the action." *Mech v. Borowski,* 116 Wis. 2d 683, 686, 342 N.W.2d 759 (Ct. App. 1983). At a basic level, "[a] state court's assertion of jurisdiction exposes defendants to the State's coercive power, and is therefore subject to review for compatibility with the Fourteenth Amendment's Due Process Clause." *Goodyear Dunlop Tire Ops., S.A., v. Brown*, 564 U.S. 915, 919 (2011). Due process, in turn, relies on "traditional notions of fair play and substantial justice." *Kopke v. A. Hartrodt S.R.L,* 2001 WI 99, ¶24, 245 Wis. 2d 396, 629 N.W.2d 662 (citation omitted).

In the first transcript excerpt OSC cites, I ordered OSC to "file all the documents withheld under seal." Tr. of Jan. 21, 2022, Hr'g, dkt. 148:41. Before explaining this any further, I also reproduce the second excerpt OSC cites.

> [The Court:] So you can use the time now to get ready for it, to start the process of assembling the documents. If I conclude then that there's no personal jurisdiction, then I very well may be -- I'll vacate the order requiring inspection. It's vacating the production for in-camera review. The production for in-camera review will be on the 31st. I'll decide the question of jurisdiction on the 27th. So just to be forewarned is to be forearmed.

Tr. of Jan. 21, 2022 Hr'g, dkt. 149:60.

It is true that at the time I scheduled a due date for the production of records, I had not yet ruled on the issue of service. However, when viewed in their entirety, the excerpts cited by OSC demonstrate a logical ordering of events in which I would first determine service at a hearing scheduled in five-days' time, then, if necessary, require production of records consistent with Wisconsin's strict requirements for service. OSC does not explain what precisely from this sequence of events evinces bias. If OSC means to say that a court must sit absolutely mute until first making a formal finding of proper service and jurisdiction, then it neither develops such an argument nor cites any authority in support of one.

Simply put, after it contested service at the January 21, 2022 hearing, *OSC had one legal obligation*: appear for a jurisdictional hearing scheduled for January 27, 2022. It is true that I also had scheduled a due date for records which, whether or not I ever could have required OSC to actually produce, I could not have determined at the time. However, it would have been self-defeating to reserve ruling on the scheduled deadline to file the sealed records until after resolving the question of service. Put another way, waiting until after January 27th to issue an order would perhaps have produced a neatly linear record, but it would also have cost OSC six additional days

to assemble the withheld records.[6] That wouldn't be fair play. The additional time was presumably helpful, given OSC's later concession that even with the additional time, it still failed to produce all the withheld records. Westerberg Aff. Ex. B, dkt. 200:3 (Atty. Bopp's letter conceding OSC failed to produce all records).

e. There is no evidence that I made any ruling at any time about whether OSC, Michael Gableman, the assembly, or any other persons and entities had any sort of contractual relationship.

OSC's fifth complaint from the January 21, 2022 hearing is that I ruled on the state of its contractual relationships with various entities. OSC begins with the assertion that I "ruled that Gableman's firm, Consultare LLC, had no valid contract with the Assembly …" OSC Br., dkt. 377:7. To show that I made these rulings, OSC cites two transcript excerpts.

Before digging any deeper, I note that OSC's complaint about my "ruling" on contracts is broad and recurring. It is helpful, therefore, to begin this discussion by skipping ahead in the history of this case to explain the only ruling I have ever made regarding OSC's contractual relationships. That ruling was crystal clear: "OSC fails to demonstrate the existence of any enforceable contract …" Decision and Order (Mar. 2, 2022), dkt. 165:21. From this ruling that there was a failure to prove a contract, OSC sees a ruling that there was no contract. This logical fallacy is nothing new. As John Locke[7] would say, "this I call argumentum ad ignorantiam." John

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[6] I had previously scheduled matters for February. The time in which I could adequately review the sealed records and timely produce a decision did not allow, given the Court's calendar, any further delay on the due date of the sealed records. Courts are well within their power to schedule matters to best accomplish their constitutional functions. *See e.g. State v. Schwind,* 2019 WI 48, ¶17, 386 Wis. 2d 526, 926 N.W.2d 742.

Further, even if my schedule allowed a delay, it would only have diminished the objectives of the public records laws, which "require timely access to the affairs of government." *State ex rel. Auchinleck v. Town of LaGrange*, 200 Wis. 2d 585, 597, 547 N.W.2d 587 (1996).

[7] *See e.g. Fabick v. Evers,* 2021 WI 28, ¶55, 396 Wis. 2d 231, 956 N.W.2d 856 (R.G. Bradley, J., concurring) (relying on "John Locke, whose political philosophy greatly influenced the Framer's formation of our Republic…")

Locke, *An Essay Concerning Human Understanding,* Book IV, Ch. XVII of Reason (available online https://www.gutenberg.org/cache/epub/10616/pg10616-images.html). Simply put: failure to prove the existence of a thing is not proof that a thing does not exist. Despite OSC's insistence, I have never ruled on the existence of any contract between OSC, Michael Gableman, Consultare, LLC, or the assembly. In a public records case, why would I?

I now return to the two sources OSC cites for my supposed ruling. The first excerpt OSC cites is two pages from the January 21, 2022 hearing. In that excerpt, Atty. Bopp represented that OSC had a contract with the assembly. Tr. of Jan. 21, 2022 Hr'g, dkt. 148:26-27. I replied: "I would like you to file that by the close of business Monday." *Id.* at 27. If this is the "ruling" to which OSC refers, then how or why could I have ruled a contract was not valid before even seeing it? And why, having ruled OSC had no contract, would I ask Atty. Bopp to file that not-contract?

OSC's second citation to the transcript of the January 21 hearing is vague, but I understand it to be these comments made in response to Atty. Bopp's statement that "contracts can be extended by the conduct of the parties." Tr. of Jan. 21, 2022 Hr'g, dkt. 148:49. Here is what I said in response:

> I spent 24 years in the Attorney General's Office. I would say having spent decades representing state government, the notion that a government employee would extend a contract with the government by some acquiescence or language sort of sends a little shutter down my spine as it related to being a government lawyer.
>
> It's true. The common law principles of contract between two individuals may be one thing, but when dealing with the State of Wisconsin and the utilization and expenditure are public funds and taxpayers' money, I'm not so sure that I'm comfortable extending an oral contract by just acquiescence. That's not quite the way I understood government to operate in the years in which I was representing it.

Id. at 50. OSC does not explain what part of these comments constitutes a ruling as to any contract.

Further, consistent with my earlier request, Atty. Bopp promptly filed the document he purported to be that written contract. OSC never discussed contracts "extended by the conduct of the parties" again. *See generally* OSC's subsequent papers, dkt. 105, 140, 150, 153.

f. There is no evidence that I predetermined whether OSC's records were exempt from disclosure under any test.

OSC's sixth complaint from the January 21, 2022 hearing is that I "appeared to pre-determine the fundamental legal issue—whether records related to OSC's investigation were exempt from disclosure as OSC asserted in its 12/4/21 email to AO." OSC Br., dkt. 377:7. It is true that OSC told American Oversight that "documents that contain strategic information to our investigation will continue to be hel[d] until the conclusion of our investigation." Dkt. 27. It is also true that "documents integral to the criminal investigation and prosecution process are protected 'from being open to public inspection.'" *Nichols v. Bennett,* 199 Wis. 2d 268, 275 n.4, 544 N.W.2d 428 (1996) (quoting *State ex rel. Richards v. Foust,* 165 Wis. 2d 429, 434, 477 N.W.2d 608 (1991)).

However, OSC does not explain why I appeared predetermined to rule on whether this privilege applied to its withheld records. To support its argument that I appeared predetermined, that is, determined prior to even seeing the "strategic" records, OSC relies on two transcript excerpts.

The first excerpt OSC cites does not discuss the investigation privilege. OSC Br., dkt. 377:7. OSC cites a part of the transcript in which the discussion orbited a different privilege under the public policy balancing test and, on the last paragraph of the cited excerpt, the beginning of a discussion of legislative privilege. Tr. of Jan. 21, 2022 Hr'g, dkt. 138:33-34.

The second excerpt OSC cites does discuss the privilege, although it is largely consumed

with a verbatim recitation of the text of *Nichols,* 199 Wis. 2d at 274. Tr. of Jan. 21, 2022 Hr'g, dkt. 148:47. In that excerpt, I expressed no opinion about the application of the privilege, and in fact I told OSC "I'm not deciding the case…" *Id.*

Although OSC does not cite any further, on the next transcript page, I continue by explaining to OSC that "I am unimpressed by the argument that Mr. Gableman is a law enforcement investigation." *Id.* at 48. This was not because of predetermination. Rather, as the Legislative Respondents had only just explained, "the assembly thinks that the purpose [of OSC]… was to assist the legislature in drafting legislation." *Id.* My reliance on the assembly's characterization makes sense because the assembly created OSC. If OSC's maker does not know its purpose, who does? Here's exactly how the assembly explains OSC:

> [OSC] was created by a formal vote in the Committee on Assembly Organizations to assist the Committee in investigating the administration of elections in Wisconsin. The Committee on the Assembly Organization also authorized special counsel to direct an elections integrity investigation, assist the elections and campaign committee, and hire investigators and other staff to assist the investigation.

Legislative Respondents' Amend. Br., dkt. 111:12 (emphasis added) (an identical explanation is contained in the stricken brief I reviewed prior to the hearing).

OSC next complains that I "mischaracterized Atty. Bopp as arguing for 'suspending' application of open records law when Atty. Bopp made no such claim…" OSC Br., dkt. 377:7. OSC cites one transcript excerpt in support of the "mischaracterization." Although OSC does not also cite the source which I supposedly mischaracterized, here is that source:

> [Atty. Bopp:] The legislature has plenty of authority to determine the manner of that investigation. They have not provided within the rules of the investigation that Mr. Gableman is pursuing for any public records, a right to public access to the records of the investigation.

Tr. of Jan. 21, 2022 Hr'g, dkt. 148:34. And here is the supposed mischaracterization:

> [The Court:] So we know, Mr. Bopp, that Chapter 19 applies to the assembly, to the senate, to the senators and the to the assemblymen and women, and that was the law. Now, you say -- you say in this case I should construe that the three documents that I have in front of me is a legislative enactment suspending the application of these statutes and the law to these individuals in this case.

Id. at 38. OSC does not explain why this is a mischaracterization. If the public records law applies to the assembly and its investigators, and then, in Atty. Bopp's words, the assembly chooses to not "provide[] within the rules of the investigation that Mr. Gableman is pursuing for any public records," then hasn't the assembly caused the public records to stop, at least with respect to OSC's investigation? This is precisely what it means "to suspend." Suspend, www.merriam-webster.com/dictionary/, last visited Aug. 4, 2022 (suspend means "to cause to stop temporarily."); Suspend, www.dictionary.cambridge.org., last visited Aug. 4, 2022 (suspend means to "stop something from being active, either temporarily or permanently.").

g. There is no evidence that I unfairly assisted American Oversight's counsel.

OSC's seventh complaint from the January 21, 2022 hearing is that I "repeatedly suggested or provided arguments for AO." OSC Br., dkt. 377:7-8. Here, OSC recites from three transcript excerpts.

In the first excerpt OSC cites, I asked American Oversight how so few documents could have been produced in response to its broad requests. Tr. of Jan. 21, 2022 Hr'g, dkt. 148:20-21. OSC does not explain why this sort of question "assisted" American Oversight. In any event, months later, OSC would answer the question itself: few documents were produced because OSC (1) simply failed to produce the records it actually had, Westerberg Aff. Ex. B, dkt. 200:3 (Atty. Bopp's letter in which he admits OSC "failed to include a few contracts and two calendars."); and (2) OSC routinely destroyed records. *Id.* at 4 ("If the document is irrelevant or useless to the

investigation, the OSC deletes that document.”).

To understand the second cited excerpt requires some background. In its briefing prior to the hearing, OSC had argued that American Oversight sought “remedies not provided for in Wisconsin’s public records law,” namely, OSC argued that American Oversight sought a “declaratory judgment.” OSC Br., dkt. 99:8. OSC said this was grounds for dismissal. *Id.* When OSC persisted with this argument at the hearing, I interrupted to “nip it in the bud …” Tr. of Jan. 21, 2022 Hr’g, dkt. 148:54. I did so by asking American Oversight’s counsel whether her client was seeking a declaratory judgment. *Id.* She said no. *Id.* at 55. OSC did not then, and does not now, explain why that answer was not sufficient. OSC has never offered a principled explanation of why, even if American Oversight sought an inapposite remedy, a court would dismiss a petition which also sought proper remedies.

h. There is no evidence that I demeaned OSC’s counsel.

OSC’s eighth and final complaint is that I “treated Atty. Bopp and his arguments dismissively, calling them ‘strawman arguments’ and ‘misstatements and exaggerations.’” OSC Br., dkt. 377:8. Although OSC places these phrases inside quotation marks, I never said them. However, it is true that I labeled one argument “a strawman”:

> THE COURT: [immediately after American Oversight’s lawyer said she was not seeking a declaratory judgment] I think it's a strawman argument, and it is not a basis from which I would conclude the chapter doesn't apply.

Tr. of Jan. 21, 2022 Hr’g, dkt. 148:55. I also said a premise on which a different argument relied was a “misstatement and exaggeration”:

> Next, you argue, Mr. Bopp, that the assembly has required the Office of Special Counsel to keep investigation records confidential, as is their constitutional right. That's a misstatement and an exaggeration, Mr. Bopp.

Id. I continued with an explanation of precisely why that premise was as I described it:

> I asked you earlier this afternoon, please provide to me where it is that the assembly has required the Office of Special Counsel to keep the investigation records constitutional -- confidential, and the only document that I could find was a contract between Speaker Vos and Mr. Gableman. That's hardly a pronouncement by the assembly itself. Having searched the record and found no other articulation by that house of the Wisconsin Legislature, I do not believe that argument has persuasive value ...

Id.

Terms like "strawman" or "misstatement" are part of a lawyer's vocabulary. *See e.g. State v. Nimmer,* 2022 WI 47, ¶¶48-49, 402 Wis. 2d 416, 975 N.W.2d 598 ("In common parlance, Justice Dallet creates a 'straw man,' meaning a weak or imaginary opposition …"); *State v. Kozel,* 2017 WI 3, ¶61, 373 Wis. 2d 1, 889 N.W.2d 423 (A.W. Bradley, J., dissenting) (The majority "proceeds next to set up a strawman …"). I accurately used these words to describe OSC's unsupported arguments.

OSC next complains that I "responded dismissively and accused [Atty. Bopp] of injecting" politics into the legal discussion. OSC Br., dkt. 377:8. Although it once again does not cite the source to which I offered an allegedly objectionable response, here is that source:

> [Atty. Bopp:] [Gableman] is withholding documents that may be irrelevant, may reveal sources. I mean, there's a million reasons why people would want to attack this investigation. They could be wrongdoers that have violated the law that he might find out about and undermine the elections in Wisconsin –

Tr. of Jan. 21, 2022 Hr'g, dkt. 148:52. I replied:

> [The Court:] Mr. Bopp, I don't want you to save your -- sort of the closing argument for later. None of that is properly before the Court, and I won't be distracted by the politics surrounding this simple legal question.

Id.

It is true that a reasonable person might characterize my interruption as a dismissive response. A dismissive response is the appropriate form of response when a litigant discusses

immaterial issues. At the time Atty. Bopp was speaking, there was no evidence in this case about people who "would want to attack this investigation." There still is not. Nor was there evidence about "wrongdoers that have violated the law," although there is now. *See e.g.,* Decision and Order (Mar. 2, 2022), dkt. 165:50-52.

6. January 26, 2022: OSC accepts service.

On January 26, 2022, despite vehemently contesting the matter five days earlier, OSC accepted service and conceded personal jurisdiction. Michael Dean Letter, dkt. 116. The Court cancelled the jurisdictional hearing scheduled for the following day. OSC does not complain about this.

7. January 31, 2022: OSC's production of records in camera.

OSC's deadline to file its withheld records under seal was Monday, January 31, 2022. Scheduling Order, dkt. 110. On the afternoon of that day, OSC had not still not done so. Here is how, in a later decision, I explained the circumstances by which OSC ultimately filed the records:

> OSC's counsel telephoned the Branch 8 clerk to complain that he did not understand how to e-file records. The Court responded by letter, instructing OSC: "For now, we will accept hard copies." While OSC provided paper copies, as of this decision, OSC still has not e-filed the records.

Decision and Order (Mar. 2, 2022), dkt. 165:6 (citations omitted).

OSC interprets this language as having "impugned Atty. Dean's professional competence…" OSC Br., dkt. 377:13.[8] It says that my "lecture" was "needless, false, and insulting." *Id.* OSC further says that its attorney "had not called to 'complain,' but rather to ask for direction because" of various failures by the Court and "the CCAP desk." *Id.* Altogether, OSC labels this exchange as "remarks that an objective observer would view as gratuitous and

[8] OSC's brief discusses the events of Jan. 31, 2022, under its heading for Mar. 8, 2022.

improvident, evidencing bias …" *Id.* at 14.

At bottom, OSC appears to take issue with my use of the word "complain." OSC does not say what it thinks the word "complain" means. The ordinary definition of "to complain" is "to express grief, pain or discontent." Complain, www.merriam-webster.com/dictionary, last visited Aug. 4, 2022. Using this definition, of course Atty. Dean was complaining—if he was "content" with his interpretation of Wisconsin's filing statutes and the court order to produce records, then why did he call my clerk to ask for direction?

OSC cites no authority to support its version of the manner in which these statutes should be obeyed or in which a judge should comment on their non-compliance. Attorneys must e-file. Wis. Stat. §§ 801.18(2)(c) ("Mandatory users [lawyers] shall be required to use the electronic filing system…") and 801.18(16)(a)2 ("Users are responsible for timely filing of electronic documents to the same extent as filing of paper documents."). Discussion of the law applicable to a particular case is not a "needless" lecture, on the contrary, in our judicial system, "[t]hose who apply the rule to particular cases, must of necessity expound and interpret that rule." *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 177 (1803). The timely production of records has been a central theme of this case, and I will not speculate why OSC thinks citation to the e-filing statutes was "false" or "insulting."

8. March 2, 2022: Decision and Order denying OSC's motion to quash.

After receiving OSC's paper copies of the withheld records, I next reviewed those records in camera. *See State ex rel. Youmans v. Owens,* 28 Wis. 2d 672, 682, 137 N.W.2d 470 (1965). I determined the records should have been released and explained my reasoning in a fifty-two page written decision. Decision and Order (Mar. 2, 2022) dkt. 165. OSC now complains that several parts of that decision evince bias.

a. There is no evidence that I have ever ruled on the existence or validity of OSC's contract.

OSC's first complaint about the March 2, 2022 Decision is that it rules "that Consultare's contract with the Assembly had expired." OSC Br., dkt. 377:8. I have never made any such ruling, *see* Part B.5.e, although OSC now cites to a different part of the record to prove that I did. It first cites the now-three-month-past hearing, in which I have already explained there was no ruling about any contracts. *See* Tr. of Jan. 21, 2022 Hr'g, dkt. 148:23. OSC next cites to two pages from my March 2, 2022, Decision.

First, OSC complains that I "directed Atty. Bopp to file Consultare's 'current contract.'" OSC Br., dkt. 377:8-9 (citing the Mar. 2 Decision, dkt. 165:18.). I did not do this in the decision about which OSC is complaining.[9] But in any event, after Atty. Bopp filed the purported contract (the "First Amendment"), I did analyze that purported contract in my decision. Decision and Order (Mar. 2, 2022), dkt. 165:17-21. I concluded that OSC failed to prove the First Amendment met each of the three elements of a contract. *Id.* at 20. To summarize the evidence, or more accurately, to summarize the lack of evidence on which I relied: (1) no other parties to the contract had provided evidence that Gableman had ever accepted the First Amendment, *id.,* (2) there was no evidence that the confusing "/s/" symbol appended to the First Amendment was made by Gableman, let alone any evidence that Gableman made the symbol with intent to accept the assembly's offer, *id.* at 20-21, and (3) the only relevant evidence of record was that Gableman signed his name in an entirely different way. *Id.* Accordingly, I concluded OSC failed to demonstrate the element of acceptance. *Id.* at 21.

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[9] *See* Part B.5.e (At the January 21, 2022 hearing, Atty. Bopp represented that a contract existed, which contract authorized OSC to withhold what would otherwise be public records. Tr. of Jan. 21, 2022 Hr'g, dkt. 148:27. I directed Atty. Bopp to file that contract, and Atty. Bopp then filed the First Amendment with no further explanation.

OSC does not offer any principled analysis of this decision. It cites neither to evidence that I missed nor to newly discovered evidence to prove me wrong. What it does offer is mystifying: it says that I "refused to contemplate that the '/s' might be a sufficient acceptance." OSC Br., dkt. 377:9 fn. 15. OSC relies further on Wis. Stat. § 183.0107(1g)(b) for the definition of an electronic signature as a "symbol …executed or adopted by a person with intent to authenticate the writing." *Id.*

There are four problems with OSC's complaint about my supposed refusal to contemplate. First, the record shows I clearly did contemplate whether the /s/ symbol was Gableman's signature. The path of that contemplation was shortened considerably by dearth of evidence on which to contemplate. The second problem with OSC's complaint is that the statute OSC cites does not exist—there is no Wis. Stat. § 183.0107(1g)(b)—and nothing in chapter 183, which deals with the rules for limited liability companies, has anything to do with electronic signatures. A third problem is that even if OSC had a point, now, months after the ruling, the matter is forfeit. Fourth, assuming OSC had not forfeited its argument and also assuming it could establish its proposed legal definition of a signature, OSC has never shown any evidence about why the "/s/" appended to the First Amendment was such a signature. In other words, while I agree that "/s/" is definitely a symbol, I do not agree that there has ever been any evidence in this record on which to conclude the /s/ symbol was "executed by a person with intent to authenticate the writing." I still could not find that OSC proved the three elements of a contract, were the argument made today, for precisely the same reasons I rejected it on March 2, 2022.

Finally, after again repeating the baseless assertion that I previously ruled on the existence of a contract, OSC appears to argue that I also ruled on the existence of the First Amendment, or perhaps a separate contract at the March 8, 2022, hearing six days later. OSC Br., dkt. 377:9 fn.

16. In support of this proposition, it cites a three-page-long excerpt from the transcript of that March 8, 2022 hearing. Therein, I do not make any rulings about any contracts. What I did say in that excerpt was that, consistent with my earlier decision, "there is no evidence in this court file that would allow me to conclude factually that Mike Gableman, himself, put the \s\ on the document." Tr. of Mar. 8, 2022 Hr'g, dkt. 182:26.

b. There is no evidence that I intentionally misrepresented the purpose of OSC's investigation.

OSC's second complaint arising from the March 2, 2022 order is difficult to characterize. It begins complaining that I "mischaracterized the OSC investigation as purely advisory…" OSC Br., dkt. 377:10.

I pause to note that OSC does not provide a structured explanation of its functions as a governmental entity. *See* Part B.5.f (discussing the assembly's explanation). OSC does not contrast that structured explanation with my supposed mischaracterization to explain why the words I used were false. Here is what the record shows regarding OSC's function:

- The assembly, the body which created OSC, says that OSC's purpose is "to assist the Committee [on Assembly Organizations] in investigating the administration of elections in Wisconsin." Legislative Respondents' Amend. Br., dkt. 111:12.
- OSC denies it has any prosecutorial authority. Tr. of Mar. 8, 2022 Hr'g, dkt. 182:48-49 (when asked if I was wrong about Gableman retaining "the possibility of prosecuting individuals criminally, Atty. Bopp responded: "Oh did you ever, Your Honor, with all due respect.")

So, if OSC is not prosecuting anyone, what precisely is it doing "to assist the Committee in investigating?" Is OSC advising the Committee? If it is, why was calling OSC's investigation "purely advisory" a misrepresentation? OSC does not explain. The vague functions described in its brief do nothing more than echo the assembly's description. Somehow, OSC is performing non-advisory tasks to "preserv[e] the 'integrity' of elections and the 'legitimacy' of representative

government…" OSC Br., dkt. 377:10. I decline to speculate how OSC is doing those things.

OSC next reasserts its complaint about my use of the word "suspend." OSC Br., dkt. 377:10. It once again offers no definition of the term or an explanation of my alleged misuse. I used this word, which means "to cause to stop temporarily," according to its ordinary and correct meaning. *See* Part B.5.f.

OSC's final argument on the alleged misrepresentation of its purpose is that I "fail[ed] to acknowledge that public interest may require exempting litigation work product investigating unlawful *election* activity …" OSC Br., dkt. 377:11 (emphasis in original). OSC cites no authority in support of the proposition I am supposed to have acknowledged. It does not explain why "litigation work product" is exempt from disclosure or why a subset of litigation work product related to elections would be relevant to the public records law.

The proper analysis is simple: our state government must disclose "the greatest possible information regarding the affairs of government…" Wis. Stat. § 19.31. While there are exemptions to this rule, they must be narrowly interpreted. *Chvala v. Bubolz,* 204 Wis. 2d 82, 88, 552 N.W.2d 892 (Ct. App. 1996). On this record, there are neither any reasons for exemptions, nor any rational argument for a new exemption, for any of the reasons OSC claims.

c. There is no evidence that I ignored OSC's argument for individualized review.

OSC's third complaint arising from my March 2, 2022 order relates to the denial of its motion for ex parte briefing. On February 17, 2022, OSC had asked "to submit ex parte argument in relation to content and context for the Court's in camera review of individual sealed documents …" Dkt. 152. I denied its motion in my March 2, 2022 Decision, citing the discretionary standard under *Milwaukee J. v. Call,* 153 Wis. 2d 313, 320-21, 450 N.W.2d 515 (Ct. App. 1989) as well as

the surfeit of briefing on this topic which OSC had already supplied. Decision and Order (Mar. 2, 2022), dkt. 165:9-10. OSC now complains this decision shows bias. In its words:

> Again displaying bias, [Judge Remington] ignored over 4 pages of citations and argument, Dkt. 153:2-6, falsely stating that "OSC neither cites any authority in support of this argument nor any standard by which the argument should be evaluated. Citing numerous authorities, OSC argued …

OSC Br., dkt. 377:11 (footnote omitted).

A threshold problem with OSC's complaint here is that OSC does not know what a "citation" is. The leading legal dictionary defines citation as: "A reference to a legal precedent or authority, such as a case, statute, or treatise, that either substantiates or contradicts a given position." Citation, *Black's Law Dictionary* (11th ed. 2019). In this sense, OSC frequently fails to "cite" to authorities because the authorities it references neither substantiate nor contradict the given position. In other words, reference to an inapposite legal authority is not a citation at all. However, in this decision, to avoid confusion over when a "reference" is a "citation" and when it is not, I use "citation" in its ordinary sense: as "an act of quoting" or to "mention." Citation, www.merriam-webster.com/dictionary, last visited Aug. 8, 2022. I will refer to each of OSC's references to authority as "citation" even if that reference is inapposite.

I turn now to the brief OSC says I ignored. Although it is twelve pages long, OSC's ex parte brief also addresses an unrelated motion. The substance of OSC's argument is contained only on pages two through six of the brief. Within that limited portion, OSC does not address the concept of an ex parte review until halfway through page four, and it does not present what it labels an "argument regarding in camera review" until the final sentence of page five. OSC ex parte Br., dkt. 153:5. In the specific part of its argument in support of ex parte briefing, OSC cites no authorities except to parenthetically note that under *Foust,* 165 Wis. 2d 429, and *State ex rel.*

J./Sentinel, Inc. v. Arreola, 207 Wis. 2d 496, 558 N.W.2d 670 (Ct. App. 1996), a court must consider the "facts and circumstances of this case…" OSC ex parte Br., dkt. 153:6. Is this the citation OSC now claims it made to "authority in support" of the argument for ex parte review? Why does OSC think these cases support its review? What is the relationship between consideration of the "facts and circumstances" of a case and the offer of ex parte legal briefing from a litigant? Where is the citation OSC now claims it made to the "standard by which its argument should be evaluated?" Neither of the cited cases addressed ex parte briefing.

Instead of answering these questions, OSC cites two sources to show that I ignored its argument. First, it cites a section of the Judicial Benchbook which discusses how to determine whether records were lawfully withheld. OSC Br., dkt. 377:11 fn. 18. That authority provides no discussion of ex parte briefing. Second, OSC string cites to seven cases it had cited in its earlier briefing. *Id.* None of these seven cases even include the phrase "ex parte," let alone provide a principled discussion of how and when to allow ex parte briefing. Being totally inapposite, of course I did not reference them further. But I did not ignore them.

In a glaring omission, OSC does not cite any cases that actually discuss a litigant's role in the court's in camera review. It was up to OSC, and not this court, to argue that these cases applied. *SEIU,* 2020 WI 67, ¶24. I turn to the relevant authority only to point out the hollowness of OSC's position.

One case that discusses ex parte involvement with the in camera review process is *Call,* in which a sheriff and police chief who sought to participate in the court's review ex parte "submitted affidavits describing in some detail why access to each document should be denied…" 153 Wis. 2d at 316. The records requesters in that case appealed on the grounds they should have been allowed to participate in the review, too. *Id.* at 319-20. The court of appeals held that, like any

other factual determination, the trial court's decisions both to allow ex parte affidavits from the authority, while at the same time denying any response from the requester, were discretionary. *Id.* at 320. To summarize the affirmed trial court's reasoning: "the more persons with access to vital information, the more possibility for inadvertent release." *Id.*

Another case discussing a party's involvement with the in camera review procedure is *In re Death of Koy,* 149 Wis. 2d 294, 441 N.W.2d 255 (Ct. App. 1989). In that case, then-judge Crooks allowed counsel to participate in his review pursuant to a structured set of rules. These required, for example, that the requester review the records in the judge's office, that she "may not photocopy or remove any of the materials … but she may takes notes …" and that the custodian may "designate a representative to observe the review…" *Id.* at 299. In affirming Judge Crooks' creative ruleset, the court of appeals noted that he had properly and rationally "ensure[d] continued secrecy pending a final decision." *Id.* at 304.

Here, unlike Police Chief Call, OSC never asked to submit evidence under seal to show certain documents were, in fact, part of a strategic investigation. Even if OSC had done that, like the appellants in either case just discussed, OSC cannot show, and does not even suggest, that I abused my discretion when I set forth three principled reasons[10] why I would disallow ex parte briefing. Decision and Order (Mar. 2, 2022), dkt. 165:9-10. Why then, if my refusal was a proper exercise of discretion, does it follow that I was biased?

d. There is no evidence that I imposed punitive damages for any reason other than those prescribed by Wisconsin law.

OSC's fourth complaint arising from the March 2, 2022 Order is difficult to discern but it

[10] Here are the three reasons I denied OSC's motion for an ex parte brief. First, OSC had already briefed this topic; Second, OSC's request would delay proceedings, further diminishing the purpose of the public records law; Third, OSC's actual argument (the court "cannot conduct … competent review") made no sense. Decision and Order (Mar. 2, 2022), dkt. 165:10.

appears to be based in my determination that OSC's conduct warranted punitive damages. OSC Br., dkt. 377:12-13. OSC says that recusal is warranted here because "a reasonable observer would conclude that only a biased tribunal would tell an attorney with 9 victories in 14 trips to the United States Supreme Court that his arguments were 'arbitrary,' 'capricious,' and without 'rational basis'" *Id.* fn. 20.

I congratulate Atty. Bopp on his high esteem. However, I ascribe no authority to him because of it:

> The first [logical fallacy] is to allege the opinions of men, whose parts, learning, eminency, power, or some other cause has gained a name, and settled their reputation in the common esteem with some kind of authority.

John Locke, *An Essay Concerning Human Understanding,* Book IV, Ch. XVII of Reason (available online https://www.gutenberg.org/cache/epub/10616/pg10616-images.html).[11] I decline to speculate how a "reasonable observer" would parse Atty. Bopp's accomplishments against the principled legal conclusions I have drawn from the evidence of record.

The irony, of course, is that OSC's new argument is even more frivolous than the ones it

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[11] John Locke's unabridged summation of this logical fallacy:

> [I]t may be worth our while a little to reflect on FOUR SORTS OF ARGUMENTS, that men, in their reasonings with others, do ordinarily make use of …
>
> The first is, to allege the opinions of men, whose parts, learning, eminency, power, or some other cause has gained a name, and settled their reputation in the common esteem with some kind of authority. When men are established in any kind of dignity, it is thought a breach of modesty for others to derogate any way from it, and question the authority of men who are in possession of it.
>
> This is apt to be censured, as carrying with it too much pride, when a man does not readily yield to the determination of approved authors, which is wont to be received with respect and submission by others: and it is looked upon as insolence, for a man to set up and adhere to his own opinion against the current stream of antiquity; or to put it in the balance against that of some learned doctor, or otherwise approved writer.
>
> Whoever backs his tenets with such authorities, thinks he ought thereby to carry the cause, and is ready to style it impudence in any one who shall stand out against them. This I think may be called ARGUMENTUM AD VERECUNDIAM.

references. OSC's argument is not only illogical, it's also directly refuted by law. All persons are entitled to the equal protection of the laws. U.S. Const., amend. XIV. This means that courts treat everyone the same. We do not compare lawyers' resumes before passing judgment on a case.

OSC next appears to rely on the statements of its esteemed counsel as proof that it "'believed' in 'good faith' that it had a 'legal basis' for denying access." OSC Br., dkt. 377:12. OSC does not explain why each of these legal terms is in quotation marks. It continues by positing that, having rejected the unsupported statements of its lawyers, I "made it obvious to Gableman and his counsel that he had pre-judged their credibility …" OSC Br., dkt. 377:13. I understand OSC's argument to mean that I should have accepted the argument of its counsel as factual evidence, and that the reason I did not do so was because of a bias.

I reject the argument. OSC's lawyers are not witnesses and their unsworn statements are not evidence. Wis. Stat. § 906.03. Courts do not make factual findings based on the representation of counsel, whose "credibility" I have never had the opportunity to judge. My decision to impose punitive damages was based on the evidence in this record, which I have already summarized:

> To summarize why OSC's decision [for withholding records] would not have been rational even if based on its current legal arguments, the Court retreads those arguments:
>
> [F]irst, OSC argued that the Wisconsin constitution gave it the right to keep documents secret through a contractual confidentiality clause. But OSC cannot show that it has *any agreement* with the assembly, let alone one which contemplates this extraordinary transfer of power.
>
> Next, OSC argued that two statutes prohibited disclosure. One of these statutory arguments ignores the attorney general's thorough explanation of why OSC was wrong, and the other statutory argument simply misquotes the statute on which it relies.
>
> Finally, OSC argued that both a common law investigatory exemption and a public policy balancing test would require secrecy. As the Court's findings

> of facts show, the public has no interest in the secrecy of these records, none of which have the "nature" of the investigatory files contemplated by *Foust.*

Decision and Order (Mar. 2, 2022) dkt. 165:48 (emphasis in original, formatting added).

OSC does not meaningfully analyze any part of this decision. It offers no criticisms rooted in Wisconsin law. Instead, it complains that my decision was "especially vindictive" because I "admitted there was no controlling authority on the issue." OSC Br., dkt. 377:13. This is confusing because I did not admit anything like this in my decision. If I did, why hasn't OSC cited to that part? I relied on numerous legal authorities to properly determine punitive damages, each of which OSC may find in the text of my decision.

Instead of citing those authorities, OSC, still complaining about punitive damages imposed on March 2, 2022, cites back to the January 21, 2022, hearing transcript, at which I made no ruling on punitive damages. Here is the passage OSC cites:

> [The Court:] … the *Foust* case and the other cases I've cited, do they extend to a legislative investigation for the purposes of drafting and enacting legislation? I find no case on that …

Tr. of Jan. 21, 2022 Hr'g, dkt. 148:64. I do not know why OSC cites this passage. I find no "vindictiveness" in asking counsel whether case law supports a legal position, then, three months later, making a decision on that legal position.

9. March 8, 2022: Oral argument on OSC's motion for a stay.

The March 2 order denying OSC's motion to quash did not immediately release any of the sealed records. I stayed the March 2 order until I could rule on OSC's motion for a stay pending appeal. On March 8, 2022, the parties appeared for oral arguments on that motion to stay. After hearing those arguments, I denied the motion for a stay in an oral ruling, then indicated I would also issue a written decision.

OSC complains about several parts of those oral arguments.

a. There is no evidence I demeaned OSC's counsel for not understanding Wisconsin efiling statutes.

OSC's first complaint is that I demeaned its counsel by accurately describing how OSC attempted to comply with Wisconsin's efiling statutes. OSC Br., dkt. 377:13-14. This complaint tracks back to events which took place on January 31 and/or March 2, which I have already discussed. Part B.7 (discussing Atty. Dean's telephone call to the Branch 8 clerk to complain about efiling records.).

b. There is no evidence that I unfairly applied the common law investigatory privilege.

OSC's next complaint does not explicitly say what I did to evince bias, but I understand the complaint to have two broad parts, both relating to the common law investigatory privilege.

OSC begins by reciting the standard for the common law investigatory privilege under *Nichols v. Bennett,* 199 Wis. 2d 268, 544 N.W.2d 428 (1996). OSC says I "responded condescendingly" in the following exchange:

> [MR. BOPP:] [discussing the common law investigatory privilege] Now, they -- and the – the privilege is so powerful that according to the Courts of Appeal in the *Foust* case, a public official doesn't even need to respond to a document request that asks for documents regarding an investigation.
>
> THE COURT: How do you deal with the *Nichols v. Bennett* case?
>
> MR. BOPP: In what aspect of that, Your Honor, are you referring to?
>
> THE COURT: You tell me.
>
> MR. BOPP: Well, I don't remember that case by name.

Tr. of Mar. 8, 2022 Hr'g, dkt. 182:7.

I asked Atty. Bopp to square his argument under *Foust* with the Wisconsin Supreme

Court's later decision in *Nichols* because OSC had never addressed *Nichols* in either its brief-in-chief or reply. OSC's omission of any discussion of *Nichols* is striking because the case is not only relevant to the investigatory privilege, it also interprets at length[12] the earlier decision in *Foust,* 165 Wis. 2d 429. I read from the case at the Jan. 21, 2022 hearing. Tr. of Jan. 21, 2022 Hr'g, dkt. 148:46-48. American Oversight's brief in response to OSC's motion to quash devotes half a page to the case. AO Resp. Br., dkt. 125:19. At oral argument, OSC should have come well-prepared to discuss this on-point Wisconsin Supreme Court opinion.

OSC next complains that I "repeatedly challenged Atty. Bopp to engage in individualized review *in open court* ..." OSC Br., dkt. 377:15 (emphasis in original). It is true that, after Atty. Bopp explained all manner of harm which might befall OSC after release of the sealed records, I asked Atty. Bopp to identify the "best example of a document that exemplifies the parade of horribles that you suggest." Tr. of Mar. 8, 2022 Hr'g, dkt. 182:55.

I asked Atty. Bopp to identify the "best example" because it was a simple, clear, and expeditious way to confirm or reject the conclusion I had confidently reached, six days earlier, that "[n]othing in these particular records bespeaks any investigation at all, let alone one demanding strategic secrecy." Decision and Order (Mar. 2, 2022) dkt. 165:10 fn. 5. I could have also asked OSC to do the same thing in a different way, for example by affidavit, *see Call,* 153 Wis. 2d at 316, or by allowing some structured participation in my review, *Koy,* 149 Wis. 2d 294, but that would have been an unnecessary expenditure of the parties' and the court's resources given the

[12] The second sentence of *Nichols* explains:

> The sole issue is whether open records requests made to a district attorney and the district attorney's responses to those requests are exempt from public inspection under *State ex rel. Richards v. Foust*, 165 Wis.2d 429, 477 N.W.2d 608 (1991), because they are contained in prosecutorial files.

unintelligible assortment of documents OSC filed.[13] I examined those records thoroughly and repeatedly. I concluded none met any exception to disclosure under Wisconsin law. In an abundance of caution, and in the same way a chemist may confirm a thorough examination of a substance with a litmus test, I then asked OSC to show me even one record which was part of a strategy. The test showed that OSC did not even know what documents it had produced.

To explain why this mattered, I back up to explain the nature of the sealed records as I received them, ten weeks earlier. I digitally scanned and filed OSC's now-public records, under seal, as docket entries 141-147, 149, and 161-164. But I did not receive the sealed records in this way. Instead, I had received the records as 761 pages shuffled into a cardboard envelope. Emails were out of order, even with others in chains of correspondence, as though deliberately misplaced. Nothing was chronological or otherwise part of a logical structure, with the exception of perhaps a dozen pages of Ron Heuer's, John Ker's, Harry Wait, and Mike Lindell's emails. *See* Decision and Order (Mar. 2, 2022), dkt. 165:37, 39. These 761 pages ended up on the floor of my office, where, over the course of several weeks, like a jigsaw puzzle, I reassembled them into the format which I could then discuss in my decision.

To summarize: it would come as no surprise if OSC had simply emptied its trash into my office. Maybe that is what happened. *See* Gableman Supp. Aff. ¶6, dkt. 409 ("Regarding where I

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[13] As I noted in my written decision from Mar. 8, included in the "strategic" records demanding secrecy were:

- forty pages of duplicate records, (dkt. 147:39-79);
- a fifty-nine page WEC complaint which spurns basic First Amendment principles Dkt. 164:17 (e.g., seeking government action because "Lin-Manuel Miranda said some of the most hateful comments about President Trump");
- a complete copy of an inapposite chapter of the Wisconsin State Statutes (dkt. 147:34-37);
- countless other already-public records.

See also Decision and Order (Mar. 2, 2022), dkt. 165:43 (discussing "a partial copy of some kind of memo," "documents that appear to show fragments of voter data," and "one-half of a printed email of indeterminate origin and content."

searched for physical documents, I checked every single … trash can …”). Asking OSC to pick one strategic record thus showed, regardless of the merit of any secret strategy, whether OSC had an internally structured strategy at all. Thus, it did not matter which document OSC’s lawyer picked because because he could not even find that one “strategic” record in his own files.

OSC next complains that I “put words in Atty. Bopp’s mouth” by suggesting he accepted my invitation to identify a “best example.” OSC Br., dkt. 377:15. Apparently, OSC thinks Atty. Bopp did not, in fact, accept my invitation to choose a record. Here is how Atty. Bopp responded to my invitation:

> [The Court:] I’m prepared to make a finding of fact, rather than a conclusion of law, that I'm making a finding of fact that there is not a single piece of paper or document in this pile that would undermine -- if disseminate would undermine Mr. Gableman's investigation. … <u>Which document exemplifies the principle that you wish to stay?</u>
>
> MR. BOPP: <u>You've already pointed out to – to us, you already put in your hands and showed a document that does that</u>, and that is the report about public -- private funding of elections. And I discussed that specifically to -- with you.

Tr. of Mar. 8, 2022 Hr’g, dkt. 182:56 (emphasis added) (Atty. Bopp was referring to the *Amistad Journey Report,* dkt. 161:1). If Atty. Bopp did not intend to respond to the question, what did he mean by his response? Ultimately, the point is immaterial. I highlight it only as yet another example of OSC’s careless fiction.

c. There is no evidence that I demeaned Atty. Bopp counsel by giving him a hollow compliment.

OSC’s third complaint from the March 8, 2022 oral argument is that I, once again, demeaned its counsel. OSC Br., dkt. 377:15. This time, OSC cites a transcript excerpt in which it says I complimented Atty. Bopp. *Id.* OSC says that my compliment “rang especially hollow” because I had already imposed punitive damages in the March 2, 2022, Decision. OSC Br., dkt.

377:15.

I offer no response whatsoever, except to note the astounding waste of public resources in the drafting of allegations like this. *See* Tr. of Aug. 1, 2022 Hr'g, dkt. 407:82 (the public pays OSC's out-of-state lawyers up to $450.00 / hr.).

d. There is no evidence that I assisted American Oversight's counsel.

OSC's fourth and fifth complaints are similar so I join them together: each complaint accuses me of "assisting" American Oversight's counsel. OSC Br., dkt. 377:16.

OSC begins by complaining that despite not having been raised by the parties, I asked about the interplay between OSC's asserted investigatory privilege and the ethical guidelines which apply to prosecutors in the State of Wisconsin. *Id.* OSC cites no authority and develops no argument for why a circuit court should not inquire into a lawyer's ethical obligations.

Proceeding with this theory, OSC says that I "falsely described Atty. Bopp as arguing that 'Mr. Gableman is a prosecutor and this is a prosecution.'" OSC Br., dkt. 377:16 (quoting Tr. of Mar. 8, 2022 Hr'g, dkt. 182:34.). This particular citation is to a hypothetical question I posed to American Oversight's counsel, not the sort of bold declaration OSC makes it out to be. It is nevertheless true that during these oral arguments, I inconsistently described OSC's position on the issue of whether it was a prosecutor. OSC does not explain why this matters, except to point out that the judge made a mistake.

OSC next complains that I "coached AO counsel again." OSC Br., dkt. 377:16. It says I gave American Oversight "a roadmap" to continue litigation. *Id.* at 17. I have already explained that judges commonly and properly advise litigants of their expectations for a case. Part B.5.c; *In re Judicial Disciplinary Proceedings Against Gableman,* 2010 WI 62, ¶64, 325 Wis. 2d 631, 784

N.W.2d 631 (Prosser, J., op.) (three justices advise a litigant: "we anticipate that … Gableman … promptly will file a motion to dismiss the complaint …").

10. March 8, 2022: Decision and Order denying OSC's motion for a stay.

Oral arguments on OSC's motion for a stay pending appeal concluded in the morning on March 8, 2022. That afternoon, I issued a written decision denying the motion. Decision and Order (Mar. 8, 2022), dkt. 177. Therein, I applied the factors for a stay under *Waity v. LeMahieu,* 2022 WI 6, ¶49, 400 Wis. 2d 356, 969 N.W.2d 263 and *State v. Gudenschwager,* 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995), concluding that OSC failed to show it was entitled to a stay pending appeal.

OSC complains that several parts of this decision show I am biased.

a. There is no evidence, for the third time, that I have ruled on OSC's contractual relationships.

OSC's first complaint under this section of its brief is difficult to follow, except that it again orbits a supposed ruling on OSC's contractual relationships. OSC Br., dkt. 377:17-18. I have never made any such ruling. Part B.5.e; Part B.8.a.

Nevertheless, OSC once again asserts that I have ruled it has no contractual relationship with various entities. This time, it cites to the part of the March 8 Decision it characterizes as "ruling that Consultare had no contract with the Assembly." OSC Br., dkt. 377:5 (citing Decision and Order (Mar. 8, 2022), dkt. 177:5). Presumably, these are the words to which OSC is referring, in which I discussed whether OSC had shown a "strong likelihood of success on appeal":

> OSC failed to demonstrate the existence of a contract assigning it a constitutional exemption to the public records law. Appellate courts could not reasonably disagree with this finding because they are unlikely to be presented with the issue at all: OSC did not attempt to demonstrate the existence of an enforceable contract except to make the unsupported claim that one might exist.

Decision and Order (Mar. 8, 2022), dkt. 177:5-6 (citations omitted). I once again reject the obvious logical fallacy: failure to prove the existence of a thing is not proof that a thing does not exist.

Although OSC continues under a boldfaced heading purporting to complain about the March 8 Decision, OSC never cites to that decision again. Instead, OSC cites to American Oversight's pleadings, on which OSC says I relied when I "concluded they established a prima facie case and signed the writ." OSC Br., dkt. 377:17. I did not rely on pleadings to find a prima facie case—I relied on the two-dozen-plus affidavits and evidentiary exhibits American Oversight supplied. Part B.2. Hereafter, OSC incoherently discusses parts of the Jan. 21, 2022 hearing, what it perceives to be the "apparent realizations" of opposing counsel, and whether it is acting *ultra vires.* OSC Br., dkt. 377:17-18. OSC may as well speak in tongues—whether or not a court has ruled on the existence of a legally binding contract is a simple question. If such a ruling exists, OSC should just cite to it.

b. There is no evidence that the alternative writ of mandamus was improvidently issued.

OSC's second complaint under the same subheading is, again, difficult to follow because OSC, again, does not cite to the text of the March 8 Decision about which it purports to complain. Instead, it argues that, "[o]bviously, AO's petition should have been dismissed in the absence of a contract." OSC Br., dkt. 377:18. This argument goes nowhere because it relies on the same logical fallacy that failure to prove a thing is proof it does not exist, but in support of this doomed proposition, OSC cites two cases. I turn to them to see if they support OSC's argument.

The first case OSC cites is *In re Utting's Estate,* in which a plaintiff claimed to have contracted with her dead aunt for a significant monthly stipend. 250 Wis. 97, 98-99, 26 N.W. 254 (1947). The Estate denied such a contract existed. *Id.* at 99. Although OSC cites to page 99 of this

decision, the court makes no legal determination therein—it simply provides background. Nevertheless, I will proceed with a discussion of the case to determine if it supports OSC's position. At trial, the judge determined no contract existed based on "considerable evidence by the testimony of a number of other witnesses and by documentary proof…" *Id.* at 100. Thus, having failed to prove any contract existed by the required standard of clear and convincing evidence, the plaintiff's claim was dismissed. *Id.* at 104. The second case OSC cites is the order of a federal magistrate judge in *Faust v. Parke,* No. 96-3881, 1997 WL 284598 (7th Cir., May 22, 1997) (unpublished table decision). Faust was an inmate in the Indiana State Prison, which denied him repairs to word-processing equipment. *Id.* *1. The order dismissing the inmate's complaint has nothing to do with contracts.

Why does OSC cite these cases? Which of American Oversight's claims depends upon proof of a contract? How is American Oversight's demand for public records under Wisconsin law like an Indiana prisoner's demand for typewriter repairs under federal law? It is only OSC's half-baked contractual/constitutional argument that relied on proof of a contract and, in this case, OSC simply failed to supply that proof.

11. April 26, 2022: Scheduling American Oversight's motion for contempt.

At the March 8 hearing, I released the records which had until then been under seal. Ordinarily, a public records case would have ended at that point. In this case, American Oversight filed motions for relief from judgment under Wis. Stat. § 806.07 and for contempt. Dkt. 194, 196. In support of its motions, American Oversight suppled as evidence a letter from OSC in which its attorney concedes it failed to comply with the Court's January 21, 2022, order to produce records. Westerberg Aff. Ex. B, dkt. 200.

OSC's concession was a prima facie showing of a violation of the order. Accordingly, on

April 26, 2022, I scheduled a hearing to give OSC the opportunity to rebut the showing with evidence that its violation was not contemptuous. *See Joint Sch. Dist. v. Wisconsin Rapids Educ. Ass'n.,* 70 Wis. 2d 292, 321, 234 N.W.2d 289 (1975).

OSC complains this scheduling hearing demonstrated my bias in three ways.

a. There is no evidence OSC had rebutted the prima facie case of contempt by the time of the April 26, 2022 hearing.

OSC begins by setting forth the procedural history of the contempt motion, essentially as I have just done. OSC Br., dkt. 377:18-19. It adds a final paragraph to its summary in which it concludes, somehow, that "[b]y April 26, when J. Remington held a scheduling conference … OSC had *already* provided AO with *every* disputed document …" OSC Br., dkt. 377:19 (emphasis in original).

In support of the proposition that OSC actually "provided every document," it cites only "dkt. 225:4." That cited docket entry is OSC's earlier brief in this case, titled "Response in Opposition to Motion …" Dkt. 225:1. The specific part of the brief OSC cites is under a heading it labels "Facts."

I pause to note that while I have, to this point, examined each of the authorities OSC cites and carefully parsed its arguments, I have endeavored to do so thoroughly but not with a hypertechnical eye. Accordingly, if the cited "fact" section in OSC's brief itself cited to the evidence on which OSC sought to rely, I would accept their citation as an excusably practical shortcut. After all, "the entire tenor of modern law is to prevent the avoidance of adjudication on the merits by … technicalities." *Cruz v. DILHR,* 81 Wis. 2d 442, 449, 260 N.W.2d 692 (1978).

The page of "facts" to which OSC cites does not itself contain even a single citation. It is entirely untethered from any basis in evidence and, whether it is true or untrue, I cannot know. I

decline to speculate.

In the final subheading in this section, OSC appears to echo the complaint that it had already purged any contempt before the April 26, 2022 hearing. OSC Br., dkt. 377:21. It explains how it "reiterated Gableman's commitment to release documents," and how it "advised the Court of the detailed procedure it followed complying with [the January 25, 2022] order." OSC Br., dkt. 377:21. OSC does not supply any evidence that it did any of these things. It cites, once again, only to its earlier brief.

b. There is no evidence I assisted American Oversight's counsel.

OSC next repeats its claim that I assisted American Oversight's counsel. OSC Br., dkt. 377:19. This time, it says that I commenced contempt proceedings on my own, "[d]espite AO's intentional decision not to pursue a contempt motion." *Id.* Rather than pick apart OSC's cherrypicked quotations, I defer to the text of American Oversight's written motion. Here's what American Oversight asked me to do:

> II. The Court Should Grant Additional Relief, Including Punitive Damages and Contempt.
>
> …
>
> Finally, because OSC directly violated a Court order made on January 25, the Court should also consider whether to modify its final judgment to include contempt findings.

American Oversight Mtn., dkt. 196:12-13 (emphasis omitted); *See e.g. Evans v. Luebke,* 2003 WI App 207, ¶23, 267 Wis. 2d 596, 671 N.W.2d 304 (an example of a proper motion for sanctions under Wis. Stat. § 785.03(1)(a).).

c. There is no evidence that I demeaned OSC's counsel.

OSC's third complaint from the April 26, 2022 scheduling conference is that I once again

demeaned its counsel. To recap, so far, I have "demeaned" OSC's counsel, first, by labelling one argument "a strawman," Part 5.h; second, by citing to the Wisconsin e-filing statutes, Part 9.a; and third, by paying Atty. Bopp a "hollow compliment." Part 9.c.

This time, OSC says I demeaned its counsel by muting Atty. Bopp "only 9 seconds into his explanation …" OSC Br., dkt. 377:20. Then, after muting Atty. Bopp, I "impugned his conduct" by stating "Please don't speak over the top of me." *Id.* OSC further relies on what "the video shows," but there is no video evidence in this record. *Id.; See* Part 5.c. Here's the transcript to which OSC cites as proof that I "demeaned" its counsel:

> MR. BOPP: You asked whether I had an objection to the temporary order, such as I would like move to -- for you to vacate it, and I said, No. I'm not going to move to vacate a -- the temporary order. I did not agree that it become, in effect, a preliminary order that binds the -- my client for the -- for the future. That is a subject that must be briefed and decided.
>
> THE COURT: Okay. Mr. Bopp.
>
> MR. BOPP: We've had no opportunity –
>
> THE COURT: Mr. Bopp.
>
> MR. BOPP: -- to contest the TRO –
>
> THE COURT: Mr. Bopp. Mr. Bopp –
>
> MR. BOPP: And I did not agree and do not agree that you continue that –
>
> THE COURT: Okay. Mr. Bopp, I've muted you. I would like to maintain some decorum and control over this hearing. Please don't speak over the top of me. You may unmute yourself, Mr. Bopp. I have something to say.

Amend. Tr. of April 26, 2022 Hr'g, dkt. 324:16-17. I then asked Atty. Bopp a question, and he resumed his argument. *Id.* at 17.

OSC cites no authority and develops no rational argument for why this particular exchange "demeaned" or "impugned" its counsel. I will not develop that argument for them. *SEIU,* 2020 WI

67, ¶24; *See e.g. Puchner v. Hepperla,* 2001 WI App 50, ¶7, 241 Wis. 2d 545, 625 N.W.2d 609 ("A court may exercise its inherent power to ensure that it functions efficiently and effectively to provide the fair administration of justice and to control its docket with economy of time and effort.").

12. June 8, 2022: Oral argument on OSC's motion to quash subpoena.

At the conclusion of the April 26, 2022 scheduling conference, I set June 10, 2022, as the date for an evidentiary hearing on the motion for contempt. Amend. Sched. Order, dkt. 209. The only witness OSC had disclosed to appear at that hearing was its only employee other than Gableman, Zakory Niemierowicz ("Niemierowicz"). OSC Witness List, dkt. 224.

American Oversight planned to depose Niemierowicz on June 1, 2022, but had to reschedule for June 6, 2022. Tr. of June 8, 2022 Hr'g, dkt. 314:9 (Atty. Dean explains he was ill on the original date). On June 5, 2022, American Oversight subpoenaed Gableman. Dean Aff. Ex. A, dkt. 256:3-5. OSC moved to quash to subpoena. Dkt. 255. I scheduled a hearing on the motion for June 8, 2022.

After hearing the parties' arguments, I denied the motion to quash in an oral ruling for five reasons. Tr. of June 8, 2022 Hr'g, dkt. 314:42-46. First, I rejected OSC's interpretation that the April 26, 2022 scheduling order put any limits on American Oversight's time to name witnesses. *Id.* at 42. Second, I rejected OSC's argument that it had been unfairly surprised and I noted that if there was surprise, it was due at least in part to OSC's rescheduling of Niemierowicz' deposition. *Id.* at 43. Third, I rejected OSC's argument that the subpoena was prejudicial. *Id.* I found that Gableman had actually sat at Niemierowicz' deposition and that the time remaining before the hearing was sufficient, under these circumstances, to adequately prepare the witness. *Id.* at 43-44. Fourth, I noted that Gableman was not only OSC's record custodian, but he was also the custodian

at all times relevant to this case. *Id.* at 44. I noted that "I would have been puzzled had not the custodian of the records appear in court when it is leveled the accusation of an intentional disobedience for violation of a court order." *Id.* Fifth, and finally, I relied on the representation of counsel "that either Mr. Niemierowicz implicates Mr. Gableman or has imperfect understanding of the facts necessitating Mr. Gableman [testify] …" *Id.* at 45.

OSC complains about several aspects of this hearing.

a. There is no evidence that OSC produced "all remaining documents" prior to the June 8, 2022, hearing.

OSC's first complaint is that prior to the June 8, 2022 hearing, it had already "fully complied with AO's request and [the January 25, 2022] order." OSC Br., dkt. 377:22. It does not cite any evidence in support of this statement. Instead, it cites to "Dkt. 262-298" and several transcript excerpts from the hearing. I turn to those materials.

The documents at court docket numbers 262-298 are not evidentiary proof of compliance with the Court's order to produce records. The documents are not even relevant. OSC attorney Courtney Milbank's affidavit explains what these are. Milbank Aff. dkt. 261. Atty. Milbank describes every one of these documents as one of three things: (1) letters she wrote, (2) "documents received from [Niemierowicz], and produced to counsel …" (3) and, in the case of "Exhibit C" some sort of uninvited and unexplained "response to request for production of documents." Milbank Aff. ¶¶3-5, dkt. 261. Atty. Milbank does not claim any personal knowledge about the substance of any records, let alone how any person searched for those records.

The transcript excerpts OSC cites do not fare better. Rather than examine each, suffice it to say that OSC cites only to the transcript of the June 8, 2022 hearing itself, at which no testimony was taken.

b. There is no evidence that I misrepresented OSC's concessions.

OSC's second complaint from the June 8, 2022 hearing is that I misrepresented OSC's concession of a prima facie case of a violation of a court order. OSC Br., dkt. 377:23. A prima facie case of a violation of a court order is the first step in contempt proceedings. *Joint Sch. Dist.,* 70 Wis. 2d at 321. Whether or not a party has conceded a prima facie case is therefore an important preliminary legal question. Before turning any deeper into OSC's argument here, I first set forth the background of the issue, as it came to me on June 8, 2022.

In an April 8, 2022 letter filed as evidence in support of American Oversight's prima facie case, Atty. Bopp conceded that OSC had not produced the records it was ordered to produce. Westerberg Aff. Ex. B, dkt. 200. Despite his concession in that letter, at the April 26, 2022 scheduling hearing, Atty. Bopp refused to concede a prima facie case.[14] Tr. of April 26, 2022 Hr'g, dkt. 324:27-28 (Atty. Bopp stated: "So we're not agreeing to at this point that there -- there needs to be no evidence presented by the plaintiff to establish a prima facie case at the hearing."). Then, on May 13, 2022, in a footnote in its brief in opposition to the motion for contempt, OSC wrote that it "does not address herein whether AO did [make a prima facie case.]" OSC Br., dkt. 225:7 fn. 9.

Thus, by the time of the June 8 hearing, OSC had appeared to concede a violation in its letter, dkt. 200:3, then it walked back that apparent concession in a hearing, dkt. 324:27, and, finally, cryptically wound up with a footnote about "not addressing" the issue. Dkt. 225:7 fn. 9. It was in this context I asked:

---

[14] To establish what Atty. Bopp said on April 26, 2022, OSC repeatedly cites to a transcript of what Atty. Dean said on June 8, 2022. OSC Br., dkt. 377:23.

> [I]s it now the Office of Special Counsel's position, and does it concede that it violated the Court's order? Or does the Office of Special Counsel want to pursue the matter as suggested by Mr. Bopp at the last hearing?

Tr. of June 8, 2022 Hr'g, dkt. 314:19. When Atty. Dean explained that OSC was, in fact, conceding the prima facie case, I replied:

> The Court acknowledges your concession on this point; but only made until today, Mr. Dean. Up until this point I think a fair characterization of Attorney Bopp's statement was that Office of Special Counsel heretofore had refused to concede the point.

Id. at 20.

OSC says that this was a mischaracterization, and that I "relied on [my] own mischaracterization to conclude that OSC's omission [i.e. violation of the order] was intentional." OSC Br., dkt. 377:23. OSC's intent was important because, in the second step in the contempt process, an alleged contemnor must prove their violation was not intentional. *Joint Sch. Dist.,* 70 Wis. 2d at 321.

In support of the proposition that I relied on my "own mischaracterization to conclude that OSC's omission was intentional," OSC cites to the decision in which I imposed remedial sanctions. OSC Br., dkt. 377:23. Here is the cited portion which OSC says proves I mischaracterized its concessions as an intentional omission:

> [A]lthough OSC did not concede an *intentional* violation of a court order, its concession of a violation was sufficient to establish a prima facie case and advance to the second step of the contempt proceeding.

Decision and Order (June 15, 2022), dkt. 327:8 (italics in original). The cited material speaks for itself.

c. There is no evidence I assisted American Oversight's counsel by misstating evidence.

OSC's third complaint from the June 8, 2022 hearing is that I assisted American

Oversight's counsel by misstating evidence. OSC Br., dkt. 377:23-24. OSC does not say what evidence I misstated. *Id.* Instead, OSC quotes the part of the hearing in which I asked why, if American Oversight requested "documents be produced in digital form… that's not been done; right?" Tr. of June 8, 2022 Hr'g, dkt. 314:13.

OSC says the claim that American Oversight sought records in a "digital form" was "pure invention." OSC Br., dkt. 377:24. I turn to the actual records requests to determine whether I invented American Overisght's request that the records be produced in digital form. Here is how American Oversight asked for records:

> Where possible, please provide responsive material in an electronic format by email. Alternatively, please provide responsive material in native format or in PDF format on a USB drive.

See e.g. dkt. 8:5; Part B.1.

I conclude, therefore, I did not "invent" the requirement. Further, I have never ordered OSC to release records in a digital format. In this litigation, American Oversight has not demanded digital copies beyond the above-cited original request. However, the public records law clearly entitled American Oversight to those records. *See Lueders v. Krug,* 2019 WI App 36, ¶15, 388 Wis. 2d 147, 931 N.W.2d 898 ("access to the paper printouts … was not a satisfactory response to Lueders' subsequent, enhanced request for the e-mails in electronic form. We hold that Lueders is entitled to the e-mails in electronic form …").

The purpose of my question was not to "assist" American Oversight. In all candor, I was stunned by the bold wastefulness of OSC's records practices. In 2022, the digital version of a record can literally be transmitted to a requester with the press of a button. To explain why OSC's contrary practice was so surprising, I must first explain the evidence in this case of how OSC

stores, searches, and produces public records: [15]

i. OSC printed requests for records.

OSC's public records process began when it received a request for records. For some reason, it would print that request onto paper.

> Once an open records request or in multiple cases rounds of three open records requests have been obtained, I would immediately print them and then bring them to the justice's office for immediate review.

Niemierowicz Dep. p. 20, dkt. 317.

ii. Using the printed request, OSC began with records which natively existed as digital documents, for example, emails.

OSC then searched digital records to see if any were responsive:

> We would then immediately start with the open records requests that asked for electronic communications or electronic -- yeah, pretty much communication lines.

Id.

iii. Those digital documents were then printed onto sheets of paper.

If or when OSC found responsive records, it would print those, too:

> [A]nd then I would go print, gather, collect any of the responsive documents.

Id.

iv. The papers were physically stored in OSC's offices, for example, "on the walls," "trash cans," or in filing cabinets.

Niemierowicz and Gableman have offered conflicting answers about where those printed paper records ended up. OSC says it destroyed records "irrelevant or useless to the investigation …" Westerberg Aff. Ex. B, dkt. 200:5 (OSC's letter admitting it deletes records.). It does not offer

[15] OSC routinely deleted records, too. *But see State ex rel. Gehl v. Connors,* 2007 WI App 238, ¶13, 306 Wis. 2d 247, 742 N.W.2d 530 ("failure to keep sought-after records may not be attacked under the public records law.").

any principled explanation about how it could reach this determination, or why an investigation would destroy evidence. Of the records OSC did not destroy, Niemierowicz says these were stored in his office:

> Q [Atty. Westerberg:] Where again are the paper copies maintained? I think you said you had a filing cabinet that you use personally?
>
> A [Niemierowicz:] Yes. I have two filing cabinets in my office.
>
> Q Okay. Are hard copy records maintained anywhere else?
>
> A They are not.
>
> Q So the entire hard copy document collection of the Office of Special Counsel is in the two file cabinets in your office?
>
> A It was in the two file cabinets in my office.

Id. at pp. 165-66. But other evidence suggests the files were kept all over the place, for example, on Gableman's walls:

> THE COURT: [Asking Atty. Bopp how he knew the "/s" document was, in fact, a contract which Gableman had accepted.]
>
> MR. BOPP: I know – [Gableman] took it off his wall. He had that very document in a frame on his wall. … And I said, "Well, where is it? We don't have it," as I recall. And he says, "Well, it's right there on my wall." And I said, "Well, I need a copy of it." That is what he provided. Okay? From his wall.
>
> THE COURT: Well why did he -- …

Tr. of Mar. 8, 2022 Hr'g, dkt. 182:23; or anywhere else they might be, including inside Gableman's trash cans:

> Regarding where I searched for physical documents, I checked every single OSC office, desk, room, filing cabinet, trash can …

Gableman Supp. Aff. ¶6, dkt. 409.

v. <u>By hand, those responsive records were removed from storage, electronically</u>

> scanned back into the digital format in which they originally existed, after which the scanned images of responsive records were converted into the .pdf format for transmission to a requester.

Having found all of the papers responsive to a request, the records would then be scanned back into the digital format from whence they came. *Id.* p. 167. The paper records were returned to storage in Niemierowicz' cabinets, which, at least at the time of his deposition, were "now located in the office of Janel Brandtjen of the Election and Campaign Committee." *Id.* p. 166. Next, the scans could be converted into a .pdf format and sent to requesters. *See* Part B.1 (Niemierowicz' email to American Oversight).

I embarked on this tangential discussion of OSC's records practices not to criticize or distract from the issue at hand. OSC accuses me of bias. It says that, because American Oversight did not also ask about the digital copies, the kind of judge who would ask those questions must be biased. OSC Br., dkt. 377:24. To dispel that specter of bias, I needed to first establish what the evidence in this case shows: OSC took digital records, printed those records into paper, stored those papers in trash cans and on walls, and then scanned the papers *back into the digital format in which they originally existed.* This was mind-bogglingly wasteful. It begged inquiry for a more thorough understanding.

d. There is no evidence I assisted American Oversight's counsel by inventing theories.

OSC's fourth complaint from the June 8, 2022 hearing is that I again assisted American Oversight's counsel. OSC Br., dkt. 377:24-25. OSC says that I invented two theories.

The first theory I supposedly invented is that OSC violated the January 25, 2022 order to produce records by not producing those records in a digital format, as American Oversight requested. OSC Br., dkt. 377:24. I have just discussed why I did not misstate the evidence in

support of this theory. Part B.12.c. OSC cites no authority in support of the proposition that the theory is “invented.” An authority which denies access to digital copies and instead provides paper copies unlawfully withholds public records. *Lueders,* 2019 WI App 36, ¶15. In this case, American Oversight specifically asked for digital copies. *See e.g.* dkt. 8:5; Parts B.1, B.12.c. OSC ignored the request and provided paper copies, and, in doing so, violated Wis. Stat. § 19.35(1)(a).

The second theory I supposedly invented is that Niemierowicz’ planned testimony would be hearsay. OSC Br., dkt. 377:25. Here is the genesis of that theory, in its entirety:

> [Atty. Dean:] Mr. Niemierowicz testified repeatedly that he was -- that he was instructed by Justice Gableman to –
>
> THE COURT: How are you going to get that into evidence?
>
> ATTORNEY DEAN: Pardon?
>
> THE COURT: How are you going to get that into evidence on Friday? Isn't that hearsay?
>
> ATTORNEY DEAN: No. Well, it would be hearsay if it were offered for the truth of the statement. What is not hearsay is the fact of Attorney -- Mr. Niemierowicz's receipt of that instruction and saying, "Yes. In fact, I followed that instruction explicitly." And, therefore, since he was the one that -- that was the only one responsible for collecting and ultimately compiling and producing the document requests, he's the only one who can testify whether or not he, in fact, did so.

Tr. of Jun. 8, 2022 Hr’g, dkt. 314:21-22. I did not invent the rules of evidence. Atty. Dean’s description of the planned testimony about what someone else told Niemierowicz was clearly hearsay. A declarant may not testify about the statements of another to prove the matter asserted. Wis. Stat. § 908.01(3). Atty. Dean agreed so himself: “it would be hearsay if it were offered for the truth of the statement.” *Id.*

The burden on OSC at the contempt hearing was to show its conduct was not contemptuous, that is, to show it had not intentionally violated the Court’s order. Let us assume,

as OSC has, that Gableman instructed Niemierowicz on how to comply with that order. Unless OSC could also prove the content of Gableman's instructions, why would Niemierowicz' testimony even be material? What would it prove? That Niemierowicz was doing "some unverified thing" at the behest of Gableman? Even now, despite devoting a further two pages to this complaint of an invented theory, OSC offers no authority and no principled application of the rules of hearsay to support its complaint.

e. There is no evidence I assisted American Oversight's counsel by misinterpreting a scheduling order requiring witness lists.

OSC's fifth complaint from the June 8 hearing is that I misinterpreted an order requiring OSC to provide a witness list. OSC Br., dkt. 377:25-26. This complaint is strange because OSC immediately proceeds to say this "didn't matter in the end." *Id.* at 26. Judges do not waste public resources responding to things that do not matter. *Doe 1 v. Madison Metro. Sch. Dist.,* 2022 WI 65, ¶29, __Wis. 2d__, __N.W.2d__. Accordingly, I offer no response except to note the astounding waste of public resources in the drafting of allegations like this. *See* Tr. of Aug. 1, 2022 Hr'g, dkt. 407:82 (the public pays OSC's out-of-state lawyers up to $450.00 / hr.).

f. There is no evidence I improperly threatened OSC's witness.

OSC's final complaint from the June 8 hearing is that I threatened its sole witness, OSC employee Niemierowicz. OSC Br., dkt. 377:26-29. OSC cites no legal authority for what it means to threaten a witness or why that kind of threat shows bias. It does not even define what it means to say that I did.

OSC's failure to explain what exactly it thinks I did and why that was wrong is important for two reasons. First, there are at least three ordinary threats all judges make to all witnesses, in all trial courts in this country: (1) the threat of a warrant commanding a sheriff to arrest the witness,

if the witness was served with subpoena but does not appear; (2) the threat of perjury if the witness lies under oath; and (3) the threat that if a witness is not credible, the fact finder will not believe his or her testimony. Second, the lawyer who wildly accuses a judge of "threats" in an effort to discredit a judge or simply to appear sensational does so at the expense of the Wisconsin Rules of Professional Conduct. SCR 20:8.2.

But it's not clear what OSC even means to say. A threat can mean "a declaration of an intention or determination to inflict punishment …" and it also can mean "an indication or warning of probable trouble, or of being at risk of something terrible." Threat, *www.dictionary.com*, last visited Aug. 11, 2022; *See also* Threat, *www.merriam-webster.com/dictionary*, last visited Aug. 11, 2022 ("an indication of something impending."). Which of these meanings of "threaten" does OSC mean to use? Does OSC mean to say I improperly declared an intent to punish Niemierowicz? If I wanted to punish Niemierowicz, why would I declare that intent? Would I declare an intent to punish so that I could keep Niemierowicz from testifying at a hearing at which I would be the sole factfinder? Why would I do that? Or does OSC mean to say that I improperly gave an indication or warning of trouble? Why would I warn OSC, a party against whom I was supposedly biased, about impending trouble? None of these theories are plausible, even as fiction.

I turn now to the words about which OSC complains. It says that I "threatened that Niemierowicz could 'spontaneously' be subject to 'incarceration.'" OSC Br., dkt. 377:26.[16] Although I did use the individual words OSC quotes, I did not use them in the way OSC now presents them. It is perhaps telling of the extent to which OSC must contort what was actually said, that, nine times in two pages, it quotes single words or phrases out of order. OSC Br., dkt. 377:26-

[16] OSC also says I made this threat "gratuitously and recklessly," OSC Br., dkt. 377:26, although OSC does not explain the relevance of the manner in which a threat is made.

27. Here is the actual passage, in full, from which OSC has alleged I made a threat:

> [The Court:] Understanding that one remedial sanction can be incarceration, I wonder whether Mr. Niemierowicz has been apprised of the possibility that he may need to seek independent legal counsel. If, in fact, the strategy of the Office of Special Counsel is to place the failure to comply with the Court's orders squarely upon his shoulders. Because I'm not sure that Mr. Niemierowicz's interests now are -- have not diverged from the interest of Mike Gableman or the Office of the Special Counsel.
>
> I'm not suggesting there's a conflict of interest. I am saying that I also proceed very carefully and extremely cautiously when the question before the Court the contempt, and where one of the sanctions that could be imposed is confinement in the Dane County Jail. I just raise the issue because I don't believe anyone is deserving -- certainly not Mr. Niemierowicz's interest by having this occur to him spontaneously on Friday's hearing. I don't know that it's been discussed. It might not have occurred, but I do think a discussion may be warranted

Tr. of June 8, 2022, Hr'g, dkt. 314:47. The record speaks for itself. I decline further to discuss OSC's incoherent allegations of "cognitive and verbal dissonance."

OSC next says that my discussion of jail as a penalty for contempt was "inconceivable and preposterous." OSC Br., dkt. 377:27. It cites no authority for the conceivability of the statutory penalties for contempt. Presumably, OSC means to say that any penalties for contempt would be inconceivable because it was never, in fact, in contempt. To prove this, it does not cite to any evidence—it cites instead to its previous legal briefing to establish that it "had filed all those [missing] documents under affidavit of counsel the night before. *Id.* (the referenced affidavit is Courtney Milbank's, but that person does not say she had any personal knowledge of OSC's records. Part B.12.a; *See* Milbank Aff., dkt. 261.).

OSC proceeds with three irrelevant complaints about contempt in general. First, OSC complains that American Oversight had, after making its prima facie case in April, not identified any further basis for contempt. OSC Br., dkt. 377:28. This is irrelevant because, under Wisconsin's

contempt procedure, one party makes a prima facie case, after which the burden shifts to the other party to refute the case. *Joint Sch. Dist.,* 70 Wis. 2d at 321. Why would a party, having satisfied its burden to make a prima facie case, need to continually produce evidence of contempt? Second, OSC complains that American Oversight chose not to depose Gableman. *Id.* This is irrelevant for the same reasons. Third, OSC summarily concludes that based on its own review of the record, incarceration would be a disproportionate remedy. This could have been relevant if OSC had supported its conclusion with principled argument, based in legal authority, for the proportionality of a given sanction. OSC did not do this, but I would not have been bound by that argument even if OSC had taken the effort to do so—it is the trial court, not the contemnor, who determines discretionary remedies for contempt. *See e.g. Christensen v. Sullivan,* 2009 WI 87, ¶77 n.18, 320 Wis. 2d 76, 768 N.W.2d 798.

g. There is no evidence I denied OSC due process.

OSC's next complaint from the June 8, 2022 hearing, is that I denied OSC due process. OSC Br., dkt. 377:28-29. This is confusing because OSC concedes it has no due process rights. *Id.* at 2-3 ("Due process protections are not available …"). In any event, in support of the argument that I denied OSC a right it does not have, OSC relies entirely on *Griffin v. Davies,* 929 F.2d 550, 553 (10th Cir. 1991).

Griffin and a co-defendant, McMahan, were accused of robbing two convenience stores then shooting a police officer. *Id.* at 551. At Griffin's trial, McMahan refused to answer questions about any accomplices. *Id.* The judge "threatened the witness with a one-year prison term for criminal contempt for refusing to answer the prosecutor's question." *Id.* When McMahan continued to refuse to answer, or at least appeared to refuse in the judge's opinion, the judge followed through with his threat by imposing contempt sanctions. *Id.* at 552. While this sounds, at

first blush, like it might support OSC's argument, it does not. This is yet another confusing citation because the 10th Circuit found the judge's threats had no effect—it held that "the judge's warnings did not cause the loss or erosion of testimony material and favorable to petitioner." *Id.* at 554.

The case is nevertheless noteworthy because OSC materially misrepresents the legal rule on which the federal circuit court relied. OSC says that "[t]hreatening a witness to the point he refuses to testify denies due process to the party calling the witness." OSC Br., dkt. 377:29. It cites directly to *Griffin* for this proposition. Here is what the 10th Circuit actually had to say:

> To establish a fourteenth amendment due process violation based on the denial of the right to compulsory process, a defendant must establish "more than the mere absence of testimony." There must be a plausible showing that an act by the government caused the loss or erosion of testimony that was both material and favorable to the defense.

Griffin, 929 F.2d at 553 (emphasis added, internal citations omitted) (citing *United States v. Valenzuela-Bernal,* 458 U.S. 858, 867 (1982) and *United States v. Hoffman,* 832 F.2d 1299 (1st Cir. 1987).).

h. There is no evidence I "mumbled sarcastically."

OSC's final complaint is that "J. Remington mumbled sarcastically …" OSC Br., dkt. 377:29 fn. 51. OSC says that after I heard remarks from a different lawyer who represents a different respondent, I "mumbled sarcastically" that I would wait with bated breath. *Id.* In support of this argument, OSC cites two sources.

The first source OSC cites is "6/8/22 WisEye …" Although this hearing was conducted by Zoom, and also broadcast by Wisconsin Eye, there is no video evidence in the record. *See* Part B.5.c.

The second source OSC cites is the transcript of the hearing. Here is that excerpt:

THE COURT: Mr. Stadler?

> ATTORNEY STADLER: The only thing I would add, Judge, is I've been silent today on the issue of the motion to quash. I do intend the argue [sic] on Friday in regard to the issue of contempt given that American Oversight is trying to impute that on my clients.
>
> THE COURT: Well, good. I'll wait with a big breath [sic].

Tr. of Jun. 8, 2022 Hr'g, dkt. 314:53. I agree with OSC that I probably said "bated breath," not "big breath," but I see no evidence that I mumbled those words, let alone mumbled sarcastically. It appears that OSC does not know what the phrase "bated breath" means. It means "eagerly." With bated breath, *www.dictionary.com*, last visited Aug. 11, 2022. I decline to respond further, except to once again note the astounding waste of public resources in the drafting of allegations like this.

13. June 10, 2022: Contempt hearing.

June 10, 2022, was the scheduled date for the evidentiary hearing on American Oversight's motion for contempt. OSC moved for a continuance, which I denied. Gableman, OSC's records custodian, was present under subpoena. American Oversight called him to testify. Gableman refused to testify. When I asked him if he was invoking his Fifth Amendment right to not self-incriminate, he responded "It's the right to silence guaranteed to me under the United States Constitution." In sum, OSC adduced no evidence. I therefore found OSC failed to rebut the prima facie case for contempt and found it to be in contempt, but at that time, I took the matter of sanctions under advisement.

OSC complains about several parts of this hearing.

a. There is no evidence I demeaned OSC's counsel.

OSC's first complaint is that I demeaned its counsel in two ways. OSC Br., dkt. 377:29-30. First, OSC says I insulted Atty. Dean by rejecting his argument that last-minute knowledge of

the penalties for contempt was grounds for a continuance. Here are the words OSC says I used to insult Atty. Dean:

> [After Atty. Dean represented that Niemierowicz chose not to appear because he had very recently discovered the penalties for contempt of court could include imprisonment or forfeiture.]
>
> THE COURT: -- correct me, I guess. But that should have been obvious to any -- certainly every lawyer who can read a statute, consult the Judicial Bench Book to understand what the remedies the Court has available to it under the statute were it to find an intentional violation of the court order.

Tr. of June 10 Hr'g, dkt. 322:8. If this was an insult, and I do not think it was, it was necessary because of Atty. Dean's argument that some sort of surprise legal knowledge was the basis for the nonappearance of a witness. The penalties for contempt are neatly set forth in the statutes. Niemierowicz and Atty. Dean alike are "presumed to know the law ..." *Putnam v. Time Warner Cable,* 2002 WI 108, ¶13 n. 4, 255 Wis. 2d 447, 649 N.W.2d 626 ("equity will not relieve from mistakes of law…") (citations and quotations omitted).

Second, OSC says I insulted Atty. Dean again by, after learning about the nonappearance of his witness, "for not calling [American Oversight's Atty.] Westerberg after business hours the night before …" OSC Br., dkt. 377:30. OSC does not explain why this was an insult. It remains a valid question. As I stated at the hearing, "notice of these kinds of things is of critical importance." Tr. of Jun. 10, 2022 Hr'g, dkt. 322:10. To illustrate why early notice would have been convenient, one need only look to American Oversight's attorney, who had flown across the country to be present. She, her client, and the Court, deserved reasonable advance notice of OSC's motion.

b. There is no evidence I was "talking directly to Atty. Dean" when I said I was not.

OSC's second complaint from the June 10, 2022 hearing is that I told Atty. Dean "I wasn't talking to you." OSC Br., dkt. 377:32. The words OSC ascribes to me in quotes are, once again,

not in the record. In any event, OSC's argument appears to be that, for some reason, I lied about talking to someone else when I really was "talking *directly* to Atty. Dean …" and that shows, somehow, my bias. OSC Br., dkt. 377:32 (emphasis in original). OSC cites no evidence except the part of the transcript which appears to show that I was posing a question to Atty. Stadler. *See* Tr. of Jun. 10, 2022 Hr'g, dkt. 322:31.

I once again decline to respond further, except to once again note the astounding waste of public resources in the drafting of allegations like this.

c. There is no evidence I denied Gableman the right to counsel.

As best I can tell, OSC's third complaint is that I denied Gableman his constitutional right to counsel under the First and Fourteenth Amendments to the United States Constitution. OSC Br., dkt. 377:32-34. In support of this argument, OSC begins with its own summary of Gableman's testimony. Nearly every sentence is self-contradictory:

- OSC says that Gableman "had not yet obtained personal counsel" but in the very same sentence, it proceeds to say that Gableman objected on "advice of counsel (Atty. Dean.)" OSC Br., dkt. 377:32. Which is it? No counsel, or advice of counsel?

- OSC says that Gableman is a "*pro se* party" who I denied "the right of every *pro se litigant* to make his own objections and argument." OSC Br., dkt. 377:33, 34. But Gableman was a witness, not a party.

- OSC says that "Gableman had invoked his right to counsel for the 4th time…" OSC Br., dkt. 377:33. But it also says that "Gableman invoked only federal and state constitutional rights generally." *Id.* Which is it? The right to counsel, or constitutional rights, generally?

I put aside these inconsistencies, for now, and turn to the authorities OSC cites in support of the argument that I denied a witness constitutional rights by compelling him to testify.

OSC cites no authorities in support of the constitutional rights it claims on behalf of Gableman. Simply put: "The duty to testify has long been recognized as a basic obligation that every citizen owes his Government." *United States v. Calandra,* 414 U.S. 338, 345 (1974). OSC

does cite three cases in support of the proposition that "litigants" have a right to counsel. OSC Br., dkt. 377:33 fn. 57. And it also cites a case from a New Jersey appellate court, plus a treatise, both on the rights of pro se litigants. *Id.* at 34. But each of these is inapposite to the question of whether a non-party witness subpoenaed five days in advance of a hearing may stand on the First and Fourteenth Amendments to refuse to testify. Tr. of Jun. 10, 2022 Hr'g, dkt. 322:33 (Gableman testified to have been served with subpoena on June 5, 2022); Dean Aff. ¶3, dkt. 256 (OSC agrees).

Before explaining why Gableman does not have the rights OSC claims, as a threshold matter, "if there were [a constitutional violation], it is not apparent why any one but the witness has right to raise the objection." *State v. Thorson,* 202 Wis. 31, 231 N.W. 155, 156 (1930). In other words, OSC has no standing to object to a violation of Gableman's individual constitutional rights. Standing is "a concept that restricts access to judicial remedy to those who have suffered some injury..." *Krier v. Vilione,* 2009 WI 45, ¶20, 317 Wis. 2d 288, 766 N.W.2d 517. Gableman, if he has suffered some injury, is not a party and has not moved to intervene. Furthermore, his comments of record, as OSC characterizes them, "invoked only federal and state constitutional rights generally." OSC Br., dkt. 377:33. Generally invoking constitutional rights goes nowhere: we "do not decide the validity of constitutional claims that are broadly stated but not specifically argued…" *State v. Nienhardt,* 196 Wis. 2d 161, 168, 537 N.W.2d 123 (Ct. App. 1995); *See In re Paternity of James A.O.,* 182 Wis. 2d 166, 172 n. 2, 513 N.W.2d 410 (Ct. App. 1994) ("constitutional points merely raised but not argued will not be reviewed further.") (quoted source omitted).

Of course, there has been no reason for Gableman to intervene or raise these objections on his own because they are risible. Asking a court to adjourn for three months so a witness could find counsel defies serious discussion. Tr. of June 10, 2022 Hr'g, dkt. 322:5 (OSC claimed

Gablemen needed “at least 90 days” to “locate someone to represent him…”).

The law on the privilege of a witness is clear: absent exception, “no person has a privilege to … refuse to be a witness.” Wis. Stat. § 905.01. It is true that in some limited contexts, a witness may have a First Amendment right to refuse to testify. For example, a journalist’s newsgathering process is privileged under federal and state constitutions. *Branzburg v. Hayes* 408 U.S. 665 (1972); *State ex rel. Green Bay Newspaper Co. v. Cir. Ct., Br. 1, Brown Cnty.,* 113 Wis. 2d 411, 422, 335 N.W.2d 367 (1983). Ordinarily, courts rely on “the ancient proposition of law … that ‘the public has a right to every man’s evidence.’” *United States v. Nixon,* 418 U.S. 683, 709 (1974) (internal citations and ellipse omitted). The Court has explained the public’s right to a witness’ evidence, in detail:

> The duty, so onerous at times, yet so necessary to the administration of justice according to the forms and modes established in our system of government, is subject to mitigation in exceptional circumstances; there is a constitutional exemption from being compelled in any criminal case to be a witness against oneself, entitling the witness to be excused from answering anything that will tend to incriminate him; some confidential matters are shielded from considerations of policy, and perhaps in other cases for special reasons a witness may be excused from telling all that he knows.
>
> But, aside from exceptions and qualifications-and none such is asserted in the present case-the witness is bound not only to attend but to tell what he knows in answer to questions framed for the purpose of bringing out the truth of the matter under inquiry.
>
> He is not entitled to urge objections of incompetency or irrelevancy, such as a party might raise, for this is no concern of his.

Blair v. United States, 250 U.S. 273, 279-82 (1919) (internal citations omitted).[17]

Here are those cases OSC cites, presumably in an attempt to show some kind of witness exception:

- *Denius v. Dunlap,* 209 F.3d 944, 954 (7th Cir. 2000), in which the state of Illinois sought to compel a teacher "to waive his attorney client privilege as a condition of employment."

- *Danny B. ex rel. Elliott v. Raimondo,* 784 F.3d 825, 831 (1st Cir. 2015), in which a

[17] The *Blair* Court explains at length the history of compulsory process of a witness:

> Long before the separation of the American Colonies from the mother country, compulsion of witnesses to appear and testify had become established in England. By Act of 5 Eliz. c. 9, § 12 (1562), provision was made for the service of process out of any court of record, requiring the person served to testify concerning any cause or matter pending in the court, under a penalty of £10, besides damages to be recovered by the party aggrieved. When it was that grand juries first resorted to compulsory process for witnesses is not clear. But as early as 1612, in the Countess of Shrewsbury's Case, Lord Bacon is reported to have declared that—
>
> > 'All subjects, without distinction of degrees, owe to the King tribute and service, not only of their deed and hand, but of their knowledge and discovery.'
>
> And by Act of 7 & 8 Wm. III, c. 3, § 7 (1695), parties indicted for treason or misprision of treason were given the like process to compel their witnesses to appear as was usually granted to compel witnesses to appear against them, clearly evincing that process for crown witnesses was already in familiar use.
> At the foundation of our federal government the inquisitorial function of the grand jury and the compulsion of witnesses were recognized as incidents of the judicial power of the United States.
>
> …
>
> In all of these provisions, as in the general law upon the subject, it is clearly recognized that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the government is bound to perform upon being properly summoned, and for performance of which he is entitled to no further compensation than that which the statutes provide. The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public.
>
> The duty, so onerous at times, yet so necessary to the administration of justice according to the forms and modes established in our system of government, is subject to mitigation in exceptional circumstances; there is a constitutional exemption from being compelled in any criminal case to be a witness against oneself, entitling the witness to be excused from answering anything that will tend to incriminate him; some confidential matters are shielded from considerations of policy, and perhaps in other cases for special reasons a witness may be excused from telling all that he knows.
>
> But, aside from exceptions and qualifications-and none such is asserted in the present case-the witness is bound not only to attend but to tell what he knows in answer to questions framed for the purpose of bringing out the truth of the matter under inquiry.
>
> He is not entitled to urge objections of incompetency or irrelevancy, such as a party might raise, for this is no concern of his.

judge
refused "refused to allow [the minor plaintiffs'] lawyers to meet with them."

- *Potashnick v. Port City Const. Co.,* 609 F.2d 1101, 1118 (5th Cir. 1980), in which a judge "prohibit[ed] a litigant from consulting with his attorney during breaks and recesses in the litigant's testimony."

- *Ridge at Back Brook, LLC v. Klenert,* 96 A.3d 310, 316 (N.J. App. Div. 2014), in which a New Jersey court discussed the same rules Wisconsin has for pro se litigants. *See e.g. bin-Rilla v. Israel*, 113 Wis. 2d 514, 520-21, 335 N.W.2d 384 (1983).

None of these cases remotely address this topic.

In sum, OSC cannot transplant a litigant's right to counsel, a right rooted in legitimate constitutional interests, and assign that right to a witness. Nor can OSC show, even if Gableman had the same rights of a litigant, that he was denied those rights when ordered to testify pursuant to a lawful subpoena.

d. There is no evidence I surprised OSC by requiring it to present evidence at the evidentiary hearing scheduled two months prior.

OSC's fourth complaint from the June 10, 2022 hearing relies on this proposition: "a court may not invoke such authority [to control witnesses] where it results in unfair, fatal surprise, or prejudice." OSC Br., dkt. 377:34. OSC does not define the term "unfair, fatal surprise, and prejudice." A computerized search suggests no Wisconsin appellate court has ever used that phrase—the cases OSC cites in support of this argument certainly do not. To try and find out what OSC means, I turn to the two cases OSC offers in support of the legal proposition on which it relies.

The first case on which OSC relies is *In re Javornik's Estate,* 35 Wis. 2d 741, 746-47, 151 N.W.2d 212 (1978). There, a trial court erred by ordering a new trial upon evidence that failed to meet the proper standard for "newly discovered evidence … to be a basis for a new trial." *Id.* at

746. However, because there was no prejudice from the new trial, the Wisconsin Supreme Court did not reverse. *Id.* at 747. And although the opinion discusses prejudice in a different context, there is no discussion of a judge's authority to control witnesses, let alone any limiting factor based on "unfair, fatal surprise, or prejudice." Of course, there has been no trial in this case, let alone a new trial based on newly discovered evidence. The case is entirely inapposite.

The second case on which OSC relies is *Stivarius v. DiVall,* 121 Wis. 2d 145, 157, 358 N.W.2d 530 (1984). It bears no further discussion because this case, like *In re Javornik's Estate,* has nothing to do with the circuit court's role in controlling the manner and mode in which witnesses testify. *Stivarius,* 121 Wis. 2d at 153 ("The court has both the inherent authority and the express authority … to grant a new trial ... It is upon this basis … that we reverse the court of appeals and order a new hearing.").

Although OSC cannot cite any authority for the legal proposition on which it relies, it continues by arguing that I caused some kind of "fatal surprise and prejudice," and that, in turn, "violates due process standards …" OSC Br., dkt. 377:34. In support of this argument, it relies on *Washington M.A.T.A. v. Amalgamated Transit Union,* 531 F.2d 617, 620 (D.C. Cir. 1976).

In *Washington M.A.T.A*, a trial court held a hearing to determine whether the Amalgamated Transit Union was in contempt, probably not unlike this Court's June 10, 2022 hearing. Here is what happened next:

> At the July 15 hearing, the Union introduced detailed affidavits on substantial compliance and inability to comply. The offered evidence included the efforts of the Union officers to end the strike and interference by the Transit Authority or by outsiders with the Union's attempt to put all of the bus runs back in operation. The trial court made no written or oral findings of fact on these proffered defenses. From the court's comments at the July 15 hearing, it appears that it was of the view that, as a matter of law, the Union's defenses should not even be considered.

Id. at 620-621. This case does not support OSC's position. Unlike the Union, OSC did not offer a "detailed affidavit[]" until I ordered Gableman to do so. Tr. of June 10, 2022 Hr'g, dkt. 322:17 ("MR. DEAN: …. I am not presenting any evidence.") Unlike the D.C. trial court, I did not conclude that evidence "should not even be considered." I considered all of OSC's arguments both orally, *Id.* and in a twenty-five-page written decision. Decision and Order (June 15, 2022), dkt. 327.

At bottom, there's no reason for OSC to invent or misunderstand the authority under which I ordered Gableman to testify. That authority derives from two simple propositions: (1) Gableman was lawfully subpoenaed to testify, Part B.12, and (2) "[t]he judge shall exercise reasonable control over the mode and order of interrogating witness and presenting evidence so as to …" among other things, "[a]void needless consumption of time." Wis. Stat. § 906.11; *See State v. Anthony,* 2015 WI 20, ¶¶75-76, 361 Wis. 2d 116, 860 N.W.2d 10, *cert. denied,* 136 S. Ct. 402 (2015). I clearly explained the reasons why Gableman was called to testify at the June 10 hearing:

> Let me clarify what we're doing here today. This Court has the authority, the inherent authority to control the mode, operation and organization of what happens in this courtroom. We're taking Mr. Gableman's testimony out of order. It's not intended to imply, Mr. Dean, that you don't have the opportunity to move at the appropriate point where if you feel that the American Oversight has not met its burden. For the convenience of this Court and consistent with its inherent authority, we're gonna finish this morning at least what we can get done with regard to Mr. Gableman.

Tr. of June 10, 2022 Hr'g, dkt. 322:31-32.

e. There is no evidence I relied on a non-evidentiary deposition.

OSC's fifth complaint from the June 10, 2022 hearing is that I "violated basic evidentiary procedure by relying on Niemierowicz' deposition, Dkt. 317, to find against OSC." OSC Br., dkt. 377:35. However, at that time, I ruled only that OSC was in contempt because it had produced no

evidence to rebut the prima facie case. It was not until June 15, 2022, that I relied on the deposition as one of four independent grounds demonstrating a pattern of contempt, the proper remedy for which was sanctions. Decision and Order (June 15, 2022), dkt. 327:10-11. Nevertheless, I turn to the two cases on which OSC relies for the "basic evidentiary procedure" I am supposed to have violated.

The first is *Spellbrink v. Bramberg,* 245 Wis. 103, 107, 13 N.W.2d 600 (1944), which holds that a deposition must be moved into evidence to be used at trial. The second case OSC cites is *In re Paternity of J.L.K.,* 151 Wis. 2d 566, 574, 445 N.W.2d 673 (Ct. App. 1989). In that case, the judge sustained objections to the relevancy of blood tests, for the first time, made during a videotaped deposition played at trial. *Id.* The appellant argued these objections were waived when not made during the deposition itself. *Id.* The court of appeals disagreed, holding that "the deficiency could not be cured by supplemental questioning," that is, it would have been impossible to make irrelevant blood evidence relevant with more questions, and therefore, "the objections were not waived pursuant to sec. 804.07(3)(c)." *Id.*

OSC does not explain why it cites either of these cases. *Spellbrink* is inapposite because the purpose of the contempt hearing is to afford the alleged contemnor the opportunity to rebut a prima facie case of contempt. The movant need not re-establish their prima facie case, as they would have at Spellbrink's trial, and furthermore, the deposition which American Oversight submitted into evidence was not even admitted at the contempt hearing. It was efiled the day before, June 9, 2022, and properly became one part of the evidentiary record on which I relied to impose remedial sanctions. *Paternity of J.L.K* is likewise inapposite. OSC has never objected to any part of the Niemierowicz' testimony under Wis. Stat. § 804.07(3)(c).

The actual "basic evidentiary procedure" for the use of depositions at either a trial or at the

hearing of a motion for contempt is governed by statute:

> At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

Wis. Stat. § 804.07(1). Under this procedure, I properly considered the affidavit. OSC was trebly present at the deposition through its lawyer, Atty. Dean, through Gableman, and through the deponent himself, Niemierowicz. Any testimony in that deposition based on Niemierowicz' personal knowledge would be admissible "as though the witness were then present and testifying." *Id.* Accordingly, it was proper to consider the evidence.

f. There is no evidence I improperly admitted irrelevant evidence.

OSC's sixth complaint about the June 10, 2022 hearing is confusing. It titles the subsection "admitting irrelevant records," but it proceeds to complain that I "allowed AO's Attorney Colombo to authenticate Exhibit 2, dkt. 321, conducting the examination himself." OSC Br., dkt. 377:35. Relevancy and authenticity are independent concepts and it's not clear which OSC means to complain about. It continues its complaint by saying that I "admitted Exhibit 2 into evidence over OSC's objection …" *Id.* Here is that objection:

> MR. DEAN: Yes. Again, based on untimeliness, I object. I have not had an opportunity to review these documents and conduct a competent cross-examination.

Tr. of Jun. 10, 2022 Hr'g, dkt. 322:45.

An objection "based on untimeliness" is based on fiction. Objections to the admissibility of evidence in the State of Wisconsin are governed by the Wisconsin Rules of Evidence. Wis. Stat. § 901.01. OSC cites to no rule of evidence which speaks to "untimeliness." No court order,

discovery procedure, or civil procedural statute required American Oversight to share the evidence it planned to present with OSC beforehand, let alone according to the cryptic untimeliness standard on which OSC now relies.

The Wisconsin Supreme Court "has long held that":

> [A]n objection to evidence should be made in terms which apprise the court of the exact grounds upon which the objection is based and that general objections which do not indicate the grounds of inadmissibility will not be sufficient …

Holmes v. State, 76 Wis. 2d 259, 271, 251 N.W.2d 56 (1977). Accordingly, I will not speculate on OSC's behalf whether some other objection would have been appropriate.

g. There is no evidence I "disclaimed" prior statements, although I do not know what OSC means.

OSC's final complaint from the June 10 hearing is incomprehensible. Here is, at least the first part, of OSC's latest argument for why I am biased:

> J. Remington attempted to walk back his improvident June 8 "statements," parsing words and blaming an "issue" that came up "about" his "statements" for causing Niemierowicz "to take actions" and for having that "effect" on Gableman. He then claimed he had intended to "go over the sanctions," and "black letter law" regarding "imprisonment" …

OSC Br., dkt. 377:36 (internal citations omitted). In this page-and-a-half screed, OSC cites no legal authority. It does not explain why certain words are in quotation marks. I offer no response except to note the astounding waste of public resources in the drafting of allegations like this.

14. June 15, 2022: Decision and Order imposing remedial sanctions.

Five days after finding OSC in contempt, I issued a written decision explaining why remedial sanctions were necessary to force compliance with my order to produce records. Decision and Order (June 15, 2022), dkt. 327.

OSC complains about several parts of this written decision, too.

a. There is no evidence I misrepresented any facts in the June 15 Decision.

OSC's first complaint begins by correctly citing the legal standard for remedial sanctions, which are imposed only to cure contempt that is both intentional and continuing. OSC Br., dkt. 377:37; *See e.g. Christensen,* 2009 WI 87, ¶55. OSC then lists seven bullet-point facts it says I relied on in my decision, which facts OSC now says were "selective, diced, and distorted." OSC does not provide any legal authority by which to judge the standard for a circuit court's findings of facts. The phrase it uses, "selective, diced, and distorted," does not appear to have ever been used by any Wisconsin appellate court.

I understand OSC's complaint to be that my June 15, 2022 decision misrepresented seven facts. I turn to those alleged misrepresentations:

The first alleged misrepresentation: "OSC 'adduced no evidence' on June 10." OSC Br., dkt. 377:37 (emphasis omitted). This is not a misrepresentation because it is true that OSC did not adduce any evidence on June 10. Tr. of June 10, 2022 Hr'g, dkt. 322:17 ("MR. DEAN: …. I am not presenting any evidence.").

The second alleged misrepresentation: "Gableman invoked his 5th Amendment rights." OSC Br., dkt. 377:37 (emphasis omitted). Here's what Gableman said about the specific right he was invoking:

> MR. GABLEMAN: I invoke the rights the Honorable Judge Remington just recited.
>
> THE COURT: What rights are those, Mr. Gableman? Is it the Fifth Amendment right to not answer questions?
>
> MR. GABLEMAN: It's the right to silence guaranteed to me under the United States Constitution, Judge Remington, the State of Wisconsin Constitution and all cases interpreting the same.

Tr. of Jun. 10, 2022 Hr'g, dkt. 322:36-37. OSC fails to establish that a witness has any other "right to not answer questions." *See* Part B.13.c; *Blair,* 250 U.S. at 279-82. So if Gableman's only right to silence under the United States Constitution is under the Fifth Amendment and Gableman invokes that right, then it is true that Gableman invoked his Fifth Amendment rights. Ergo, it was not a misrepresentation for me to say so.

The third and fourth alleged misrepresentations are similar. They are, respectively: "OSC's letter admits omitting contracts and calendars," and "OSC's letter admits omitting email attachments." OSC Br., dkt. 377:37-38 (emphasis omitted). Neither of these are misrepresentations because it is true that OSC's letter admits to having omitted contract, calendars, and email attachments. Westerberg Aff. Ex. B, dkt. 200:3 (Atty. Bopp's letter in which he admits OSC "failed to include a few contracts and two calendars" and also "failed to include the attachments to e-mails.").

The fifth alleged misrepresentation: "Even though AO 'does not seek restoration' of redactions, they are still evidence 'that OSC continues to intentionally disobey the court's order.'" OSC Br., dkt. 377:38. This is not a misrepresentation because it is true that OSC redacted information from the omitted records. Westerberg Aff. Ex. B, dkt. 200:3 (Atty. Bopp's letter in which he admits OSC "redacted personal information."). OSC's argument on this point appears to be that even though it made these redactions, it was not evidence of disobedience because "AO stipulated to certain redactions." OSC Br., dkt. 377:38. It is true that American Oversight stipulated to "certain redactions." Specifically, at the March 8, 2022 hearing, the parties stipulated to redact information from a single record, marked as Exhibit 3. Tr. of Mar. 8, 2022 Hr'g, dkt. 192:84. This stipulation was in response to OSC's oral motion to redact information only from that Exhibit. *Id.* at 77. Even if that stipulation broadly and prospectively applied, and there is no evidence or reason

why it would, the information in Exhibit 3 (personal data of citizen complainants) is not remotely the same information OSC redacted from its later records (OSC employee Clint Lancaster's unspecific "personal information."). Accordingly, it was not a misrepresentation to omit a stipulation which OSC now misrepresents as ever having existed.

The sixth alleged misrepresentation: "A 'continuing pattern' of contempt." OSC Br., dkt. 377:38. This is not a misrepresentation because it is true that I found a continuing pattern of contempt, the basis for which I explained in my written decision. Decision and Order (Jun. 15, 2022), dkt. 327:9-12. OSC's argument here is more sophistry: it asks why a letter in which its attorney admits the violation of an order but also denies intent should be proof of the former but not the latter. It offers no principled discussion of the standard of proof for a prima facie case. It discusses no rule of evidence. It offers no basis for the knowledge of the author of the letter, who, as OSC's attorney, must necessarily be allowed to make a legal concession but cannot see into his client's mind to know intent. I decline to speculate further about the nature of an unspecific evidentiary complaint. *Holmes,* 76 Wis. 2d at 271.

The seventh alleged misrepresentation: "'OSC's concession on this point was a deviation from the approach taken at an earlier court hearing.'" OSC Br., dkt. 377:38. This is not a misrepresentation because it is true that OSC's position at the June 8 hearing, in which it conceded a prima facie case for contempt, was a deviation from its position at the April 26 hearing, at which it refused to concede a prima facie case for contempt. *See* Part B.12.b.

b. There is no evidence I improperly relied on the deposition testimony of Niemierowicz.

I have already addressed the substance of OSC's second complaint, which is that I "relied on Niemierowicz' deposition even though it was never admitted into evidence." Part B.13.e. OSC

now repeats this argument with two additional points. Although neither is supported by citation to any legal authority, I address them briefly.

First, OSC complains that I "selectively cite[] the deposition." OSC Br., dkt. 377:38. The deposition transcript is a two-hundred page document. Niemierowicz Dep., dkt. 317. It was not necessary to cite all two-hundred pages to support the conclusions I had drawn therefrom.

Second, OSC complains I "skew[ed] the record." OSC Br., dkt. 377:38-39. It gives three examples, although I address only the first because each is equally frivolous. Here is a side by side comparison of what OSC says is the first example of "skewing the record." First, here's what Niemierowicz said in his deposition:

> [NIEMIEROWICZ]: the 800 documents were collected many months ago, so I do not know the specific origins of each of those documents and who I got it from or where I found it.

Niemierowicz Dep., dkt. 317 p. 130. Now here's how I am characterized that testimony:

> [THE COURT]: Niemierowicz averred to have been responsible for producing records but did "not know the specific origins of each of those documents [he was producing]…"

Decision and Order (Jun. 15, 2022), dkt. 327:11. If this is "skewing" the record, OSC does not explain how.

c. There is no evidence I improperly relied on any other evidence.

OSC's final complaint is that I "relied on OSC's May 23 records response to find contempt," even though "Attorney Colombo admitted she did not know when OSC actually received them." OSC Br., dkt. 377:39. Here, OSC refers to the records admitted into evidence at the June 10 hearing as Exhibit 3, to which OSC's baselessly objected on "untimeliness" grounds. Part B.13.f. OSC now offers evidence which shows Exhibit 3 may not be relevant. The new evidence to which OSC points is Gableman's Affidavit, ¶¶29-30, filed with the court thirteen days

after the contempt hearing. Dkt. 350.

Let us assume I were persuaded by Gableman's affidavit that Exhibit 3 was not relevant, and let us further assume that based on its irrelevancy, I no longer believed remedial sanctions were appropriate. Assuming these things, what procedure does OSC believe entitles it to any relief? Why, if Gableman knew what Exhibit 3 was, did he not say so at the June 10 hearing? The answer is that there is no such procedure. OSC does not even suggest one. As a starting point, "equity aids the vigilant, not those who sleep on their rights." *See e.g. Kenosha Cnty. v. Town of Paris*, 148 Wis. 2d 175, 188, 434 N.W.2d 801 (Ct. App. 1988). To these ends, OSC's argument is entirely baseless because a litigant who seeks relief from a ruling under any theory of law must show *newly-discovered* evidence, not old evidence it chose to ignore. Wis. Stat. §§ 805.15, 806.07(1)(a); *Bauer v. Wisconsin Energy Corp.,* 2022 WI 11, ¶13, 400 Wis. 2d 592, 970 N.W.2d 243.

This final complaint is a fitting capstone for OSC's frivolous brief. The complaint has no legal basis. It seeks to usurp the rules of civil procedure by ignoring evidentiary hearings and then unfairly adducing evidence weeks later. The complaint does not even pretend to disguise itself in Wisconsin law by citation to inapposite cases, as many of OSC's previous complaints have done. The complaint has no factual basis, or rather, its factual basis requires one to believe that evidence submitted after the hearing at which a thing was decided should somehow outweigh the evidence submitted, in accordance with state law, at that hearing.

Like each discussed so far, I reject this final accusation. I conclude OSC has shown no evidence of bias. I turn now to the legal standard against which that lack of evidence must be judged.

II. LEGAL STANDARD FOR RECUSAL

Having set forth the proper factual and procedural background of this case, I next turn to the law on recusal. OSC asserts that "[t]here separate sources govern recusal…" OSC Br., dkt. 377:2. Although I conclude otherwise, I address these sources, in turn.

A. Recusal under Wis. Stat. § 757.19.

Under Wis. Stat. § 757.19(2), a judge must recuse under several circumstances. Only one of those circumstances is relevant to this case: "When a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner." Wis. Stat. § 757.19(2)(g). This determination "concerns not what exists in the external world subject to objective determination, but what exists in the judge's mind." *State v. American TV and Appliance of Madison, Inc.,* 151 Wis. 2d, 175, 181-82, 443 N.W.2d 662 (1989). Simply put, "the determination … is subjective." *Id.* at 182.

Ozanne v. Fitzgerald, 2012 WI 82, 822 N.W.2d 67 (Mem.), is a useful example of the application of this subjective test. In that case, the plaintiff moved the Wisconsin Supreme Court for "Justice Michael J. Gableman individually to recuse himself …" *Id.* ¶1 (Prosser, J., op.). [18] The plaintiff pointed to the "free legal services" Justice Gableman had received from the defendant's law firm. In response to the motion, Justice Gableman thoroughly discussed the applicable law, but did not even address the specific allegations, let alone rebut them with a rational process. *Ozanne v. Fitzgerald,* No. 2011AP1613-LV, Order (Jan. 20, 2012) (Gableman, J.). As Chief Justice Abrahamson characterized Justice Gableman's response: "the Order contains no reasoned basis for the Justice's conclusion that his recusal is 'neither warranted nor justified.'" *Ozanne,* 2012 WI 82, ¶31 (Abrahamson, C.J., op.). The Chief Justice continued:

[18] The Wisconsin Supreme Court did not reach a majority. Justice Prosser and Chief Justice Abrahamson each issued a decision in a 3-3 split.

> The Order inaccurately asserts that the District Attorney seeks recusal because "the Michael Best & Friedrich firm was involved in the cases and had previously represented me." Actually, as I have stated previously, the District Attorney explained in the initial and supplemental filings that he seeks recusal not because Justice Gableman has been personally represented by Michael Best, but rather because Justice Gableman received allegedly free legal services from Michael Best.
>
> Yet, nowhere in Justice Gableman's Order is there any reference to payment (or absence of payment) for legal services, the fee arrangement with Michael Best, free legal services, a gift of legal services, or valuable consideration for the fee arrangement. None of these words, or any synonyms, appears in the Order.
>
> …
>
> None of the prior recusal cases, however, raises the red flag of the challenged Justice's misstating or misunderstanding the allegations.

Id. ¶¶32-33, 37.

In sum, despite providing no basis on which to conclude he even understood the allegations against him, Justice Gableman's "subjective determination" was still sufficient to not warrant recusal under Wis. Stat. § 757.19. This is still the test for recusal under Wisconsin law.

B. Recusal under the Due Process Clause.

OSC next asserts that a judge may need to recuse because of a litigant's constitutional right to due process. OSC Br., dkt. 377:2-3. While OSC is correct that "[t]he right to an impartial judge is fundamental to our notion of due process, *In re Paternity of B.J.M,* 2020 WI 56, ¶15, 392 Wis. 2d 49, 944 N.W.2d 542 (quoted source omitted), due process has no application to this case because, as OSC concedes, "[t]he state is not entitled to due process." *State v. Rochelt,* 165 Wis. 2d 373, 379 n. 1, 477 N.W.2d 659 (Ct. App. 1991) (citations omitted); *See* U.S. Const. amends. V and XIV (a "person" has due process rights); *See Ysursa v. Pocatello Educ. Ass'n,* 555 U.S. 353, 363 (2009) (quoting *Williams v. Mayor of Baltimore,* 289 U.S. 36, 40 (1933) ("a political

subdivision, 'created by a state for the better ordering of government, has no privileges or immunities under the federal constitution …'").

OSC further notes that Gableman may assert a due process right in his individual capacity. *Id.* Gableman has not done so, and indeed he is not a party to this case.

C. Recusal under the Code of Judicial Conduct.

OSC's final theory for why a judge might recuse arises under Wisconsin's Code of Judicial Conduct. OSC Br., dkt. 377:3. There are two premises to this argument: first, that recusal under an objective test is required by SCR ch. 60; and second, that application of that objective test requires a judge to respond, individually and specifically, to every allegation of bias. I address these two premises, in turn.

1. OSC's argument for recusal under SCR ch. 60 has no basis in Wisconsin law.

The initial premise of OSC's argument is that Wisconsin's Code of Judicial Conduct, SCR ch. 60, requires recusal under an objective test. OSC Br., dkt. 377:3. OSC does not address any on point authority, for example, *State v. Carviou,* which holds that a "violation of the Code of Judicial Ethics is not grounds for recusal under sec. 757.19(2), Stats." 154 Wis. 2d 641, 643, 454 N.W.2d 562 (Ct. App. 1990). Instead, OSC relies on the following two cases.

OSC first cites *State v. Henley,* 2010 WI 12, 322 Wis. 2d 1, 778 N.W.2d 853 (Mem.)*,* in which it is true that a defendant "moved for recusal under SCR 60.04(4)." Nothing in that case suggested it was proper to do so. Quite the opposite: the one-justice memorandum opinion "found no case addressing Wis. Stat. § 757.19(2) or SCR 60.04(4) that is bottomed on Henley's assertions." *Henley,* 2010 WI 12, ¶28. The decision did not otherwise address SCR 60.04(4) or its applicability to recusal. Based on OSC's pinpoint citation to an inapposite introductory section of

the decision (¶1), it appears that OSC has simply conflated a summary of Henley's unsuccessful argument with Justice Roggensack's holding.

OSC next cites *Tetra Tech EC, Inc. v. DOR,* 2018 WI 75, 382 Wis. 2d 496, 914 N.W.2d 49, a case which addresses neither recusal nor SCR 60.04(4). This oft-cited case is about how, in the past, courts sometimes deferred to the legal conclusions of administrative agencies. *Tetra Tech,* 2018 WI 75, ¶12. It was in this context that the court discussed whether agency deference was unlawful because it deprived litigants "of an impartial decisionmaker's exercise of independent judgment …" *Id.* ¶63. Thus, while the footnote OSC cites does discuss the Code of Judicial Conduct as enshrining the importance of an impartial decisionmaker, 2018 WI 75, ¶64 n. 37, the court discusses neither the specific provision on which OSC relies nor does it discuss recusal.

2. OSC's argument for consideration of "the total circumstances and record" has no basis in law.

The second premise of OSC's argument is that because its proposed test inquires into objective factors, then application of these "[o]bjective standards *require* application to the 'total circumstances and record.' They do *not* permit Remington discretion to ignore them." OSC Pet., dkt. 401:31 (emphasis in original). Although this premise relies on the first, which I have already rejected, I continue for sake of thoroughness. OSC cites to two appellate decisions it purports to be legal authority in support of its argument.

The first case OSC cites is *State v. Lickes,* 2020 WI App 59, ¶36, 394 Wis. 2d 161, 949 N.W.2d 623, *aff'd* 2021 WI 60, 397 Wis. 2d 586, 960 N.W.2d 855. This case does not include the text OSC ascribes to it in quotations. OSC Pet., dkt. 401:31 fn. 43. It does not even discuss "the total circumstances and record," let alone explain what that phrase means in the context of a motion for recusal. *Lickes* discusses the legal standard for expungement of a criminal conviction under

Wis. Stat. § 973.015(1m). I can find no application to the issue of recusal.

The second case OSC cites is *Wehr Steel Co. v. DILHR,* 106 Wis. 2d 111, 122, 315 N.W.2d 357 (1982). There, a state administrative agency failed to "state all factors on which it relie[d] for its decision." *Id.* While at first blush this sounds relevant, it is not. That agency decision was an application of "[t]he objective test to be applied in determining whether an employee's conduct was 'misconduct' [as] stated in *Universal Foundry Co. v.* [*DILHR*], 86 Wis. 2d 582, 591-92, 273 N.W.2d 324 (1979). OSC does not explain the relationship between an administrative agency's test for employee misconduct and a judge's test for recusal, except perhaps that both tests are objective.

In sum, I reject OSC's novel argument for an objective, particularized test for recusal.

III. DISCUSSION

A. Recusal under Wisconsin law.

As Justice Gableman did in *Ozanne,* 2012 WI 82, I conclude that a Wisconsin judge need do nothing more than make the subjective determination that he or she may act in an impartial manner.

I have considered OSC's arguments and determined I may act in an impartial manner.

B. Recusal under OSC's novel argument for an objective test.

Under existing Wisconsin law, the previous sentence ends the inquiry into recusal. Here, however, OSC explicitly seeks to overrule the subjective test as applied by Justice Gableman in *Ozanne,* 2012 WI 82. OSC Br., dkt. 377:2 ("OSC argues in good faith that the objective test should be restored …") (footnote omitted). For completeness, I proceed by also evaluating whether I may impartially hear this case under an objective test.

To determine whether OSC has demonstrated any objective reasons for my recusal under

its novel argument that *Ozanne* and *American TV* should be overturned, I turn to the evidence OSC supplies in support of its arguments for unfair bias.

Based on my examination of OSC's arguments, above, I find absolutely no such evidence. Accordingly, I would also deny OSC's motion under the objective standard.

IV. CONCLUSION

Five out-of-state attorneys appear *pro hac vice*[19] in this case. Under the ordinary application of this procedure, in which a lawyer not licensed in Wisconsin may nevertheless practice law here with the aid of local counsel, "both client and counsel benefit." *Filppula-McArthur ex rel. Angus v. Halloin,* 2001 WI 8, ¶34, 241 Wis. 2d 110, 622 N.W.2d 436. However, an out-of-state lawyer is not a mercenary, and the law imposes "safeguards that ensure ethical and competent representation." *Id.* ¶35. These safeguards include revocation of *pro hac vice* admission for three reasons:

> (1) manifestation of incompetency to represent a client in a Wisconsin court;
> (2) unwillingness to abide by the rules of professional conduct for attorneys; and
> (3) unwillingness to abide by the rules of decorum.

Id. ¶37. OSC has five out-of-state lawyers, each admitted *pro hac vice.* Attorneys James Bopp, Courtney Milbank, Joseph Maughon, Cassandra Dougherty, and Michael Massie meet each of these factors for revocation.

First, the brief authored by those lawyers is a manifestation of incompetency because it applies phony legal principles to invented facts. Competency requires "legal knowledge, skill, thoroughness and preparation." SCR 20:1.1. This briefing shows none of those qualities. Its

[19] Literally, "for this turn," the phrase means that: "A lawyer may be admitted to practice in a jurisdiction for a particular case only." Pro hac vice, *Black's Law Dictionary* (5th ed. 1979).

authors rely on obvious logical fallacies. Parts B.5.e, 8.a, 10.a. They ignore Wisconsin law and take offense when confronted with it. Parts B.5.h, 9.a, 9.c, 13.a. They ignore the facts of record, or, worse, substitute their own legal arguments as those facts. Parts 11.a, 12.f, inter alia.

Second, consistent with earlier briefing and oral argument, this briefing demonstrates unwillingness to abide the rules of professional conduct because it makes repeated false statements of fact and law. The rules of professional conduct for attorneys require "candor to the tribunal." SCR:20.3.3(a).

Third, these lawyers have demonstrated unwillingness to abide by the rules of decorum because of both the nature of these baseless accusations and also their in-court conduct. *See e.g.* Amend. Tr. of April 26, 2022 Hr'g, dkt. 324:16-17 (Atty. Bopp speaking over the judge); Tr. of Aug. 1, 2022 Hr'g, dkt. 407:70-71 (repeatedly and dismissively referring to Atty. Westerberg as "Westerberg."); etc.

To illustrate the entire case in a point: OSC claims to be an investigator deserving of special privileges under the public records law. To those ends, its lawyers argue that 761 pages of records were too "strategic" for release to the public. Here's one of those strategic records:

Bactual	Tactual	MoV	Win
1,494,581	1,746,469	(251,888)	T

OSC Jan. 31, 2022, sealed records production, dkt. 147:29. An astute reader will rightly be suspicious. They will ask: where is the remainder from which the judge has taken this excerpt? The remainder is an entirely blank page of 8 ½" x 11" paper on which somebody, presumably, photocopied this lone fragment. There are no companion or explanatory records. There are no matching parts which fit the apparently cut-off sections on the left extremity. This is the entire "strategic record," release of which, according to OSC, would have undermined the entire

investigation. There are hundreds like it. *See* Decision and Order (Mar. 8, 2022), dkt. 177:9 fn. 5 (summarizing the contents of OSC's records, which included forty pages of duplicates, a fifty-nine page complaint against numerous film and television actors for criticizing the government, a complete copy of an inapposite chapter of Wisconsin's statutes, and others.).

So if OSC did not create strategic records, then what did OSC do with the resources given to it by the people of the State of Wisconsin?

From August 30 through December 4, 2021, the evidence speaks for itself. OSC accomplished nothing. It kept none of the weekly progress reports the Wisconsin State Assembly required it to keep. It recorded no interviews with witnesses. It gathered no measurable data. It organized no existing data into any analytical format. It generated no reports based on any special expertise. It did commence lawsuits against other parts of our state and local government, although at time of this writing, OSC has received no relief. Instead, it gave its employees code names like "coms" or "3," apparently for the sole purpose of emailing back and forth about news articles and drafts of speeches. It printed copies of reports that better investigators had already written, although there is no evidence any person connected with OSC ever read these reports, let alone critically analyzed their factual and legal bases to draw his or her own principled conclusions.

It does not matter how often OSC repeats its baseless arguments. The time has come and gone for OSC to show its substance. There simply is nothing there. OSC's conduct violated Wis. Stat. § 19.35(1)(a). Its lawyers' arguments are wholly without merit and, together, their disobedience for the rule of law is contemptuous.

If this case were not on appeal, I could sanction OSC and each of its seven lawyers for their specious legal arguments under Wis. Stat. § 802.05(2)(b). I could sanction them doubly for their baseless factual statements under Wis. Stat. § 802.05(2)(c). However, the case is long since passed

to the judges of the court of appeals. I trust, now, in their capable judgment to enforce the will of the legislature that we "deter repetition of such conduct or comparable conduct." Wis. Stat. § 802.05(3)(b).

For this Court to take the final step and impose those sanctions would defeat their very purpose. Instead of deterring repetition, I would invite more baseless accusations at the public's expense, plus, no doubt, new accusations of a kind of self-serving defensiveness. For this reason alone, I stop at the precipice. And although my refutation of OSC's baseless allegations is thorough, it is far from complete. I will ignore the personal insults. I will also ignore the hypocrisy of those who purport to investigate election integrity but refer to me by name—"Remington"—as though I were not myself an elected officer of the State of Wisconsin. I stand firm, however, in opposition to the degradation of the practice of law. I brook no compromise on my expectation that lawyers abide their oath, assert no fact not true, make no argument without a legal basis, and conduct themselves with honor and respect.

Other judges will review my actions and my decisions. It is up to them to opine on these accusations of misconduct. Let this decision set the record straight.

ORDER

For the reasons stated, I order:

1. OSC's motion to recuse myself as judge is denied for these supplementary reasons.

2. Attorney James Bopp's *pro hac vice* admission to practice law in Wisconsin is immediately revoked.

3. Attorney Courtney Milbank's *pro hac vice* admission to practice law in Wisconsin is immediately revoked.

4. Attorney Joseph Maughon's *pro hac vice* admission to practice law in Wisconsin is immediately revoked.

5. Attorney Cassandra Dougherty's *pro hac vice* admission to practice law in Wisconsin is immediately revoked.

6. Attorney Michael Massie's *pro hac vice* admission to practice law in Wisconsin is immediately revoked.

This is not a final order for purpose of appeal.