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STATE OF WISCONSIN      CIRCUIT COURT      MILWAUKEE COUNTY

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DONALD J. TRUMP, et al.,

Petitioners/Appellants

v.

Case No. 20 CV 7092

JOSEPH R. BIDEN, et al.

Respondents/Appellees.

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**BRIEF OF DANE COUNTY CLERK AND DANE COUNTY BOARD OF CANVASSERS**

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**INTRODUCTION**

The Petitioners seek to disenfranchise thousands of electors in Dane and Milwaukee Counties who choose to submit absentee ballots in the midst of the greatest public health emergency in over a century. These votes were cast in compliance with state law and long standing guidance from the Wisconsin Election Commission (WEC) and its predecessor agencies. The Petitioners’ challenges to absentee voting procedures in general, including absentee ballot applications and issues regarding absentee ballot envelopes have been briefed addressed by the Department of Justice on behalf of WEC. The Dane County Clerk and Board of Canvassers joins in the arguments made by the Department of Justice on those issues. This Brief will address two issues raised by the Petitioners specific to Dane County, indefinitely confined electors and Democracy in the Park.

**STATEMENT OF FACTS**

The Petitioners rely upon a social media post made by the Dane County Clerk on March 25, 2020 as a basis to claim that “all indefinitely confined absentee ballots issued to those claiming

that status after March 25, 2020, without the required photo identification, were issued in violation of law and must be excluded from any certified results of the Election.” (Dane County Complaint, Para. 61.)<sup>1</sup> That post was made prior to the Statewide Spring election at the time the COVID-19 pandemic was first sweeping the nation and Wisconsin. The circumstances surrounding that social media post at the time are relevant to the Petitioners’ claim.

The facts surrounding the COVID-19 pandemic are well known and need not be recited here. On March 24, 2020, the Secretary-designee of the Wisconsin Department of Health Services issued Emergency Order #12 “Safer At Home Order.” ([https://content.govdelivery.com/attachments/WIGOV/2020/03/24/file\\_attachments/1409408/Health%20Order%20%2312%20Safer%20At%20Home.pdf](https://content.govdelivery.com/attachments/WIGOV/2020/03/24/file_attachments/1409408/Health%20Order%20%2312%20Safer%20At%20Home.pdf)) The provisions of that 16 page Order are well documented, but after extensive findings, the basic provision of the Order stated: “**Stay at home or place of residence.** All individuals present within the State of Wisconsin are ordered to stay home or at their place of residence...” The Safer at Home Order was in effect at the time of the Spring election. The order had only limited exceptions for critical services.

In addition to the state’s order, Federal Public Health officials were advising the public to stay home. On March 23, 2020, the Surgeon General of the United States, James Adams, M.D., stated: “Everyone needs to act as if they have the virus right now. So, test or no test, we need you all to understand you could be spreading it to someone else. Or you could be getting it from someone else. Stay at home.” ([www.cidrap.umn.edu/news-perspective/2020/03/surgeon-general-covid-19-week-its-going-get-bad](http://www.cidrap.umn.edu/news-perspective/2020/03/surgeon-general-covid-19-week-its-going-get-bad))

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<sup>1</sup> The issue of the Dane County Clerk’s Facebook post has been fully litigated before the Wisconsin Supreme Court prior to the election and is pending decision. *Jefferson, et al. v. Dane County, et al.* Case No. 20 AP 0557-OA.

Prior to the Spring election the Wisconsin Election Commission (WEC) received numerous questions about an increase in voters requesting absentee ballots as indefinitely confined due to the COVID-19 pandemic. On March 23, 2020, the Wisconsin Election Commission issued guidance to Wisconsin County Clerks, Wisconsin Municipal Clerks, City of Milwaukee Election Commission and Milwaukee County Election Commission entitled “COVID-19 FAQs and Updates: Online Voter Registration, Absentee Voting, Envelopes, Sanitizer and Poll Worker Recruitment.” That guidance specifically addressed “Indefinitely Confined Absentee Applications” that stated:

*WEC staff has received numerous questions from clerks about the increase in voters requesting absentee ballots as indefinitely confined.* Wisconsin Statutes provide the option for a voter to self-certify whether they meet the definition of indefinitely confined. The statutory definition of "age, illness, infirmity or disability" does not require any voter to meet a threshold for qualification and indefinitely confined status need not be permanent. A voter with a broken leg or one recovering from surgery may be temporarily indefinitely confined and may use that status when voting during that period of time.

We understand the concern over the use of indefinitely confined status and do not condone abuse of that option as it is an invaluable accommodation for many voters in Wisconsin. *During the current public health crisis, many voters of a certain age or in at-risk populations may meet that standard of indefinitely confined until the crisis abates.* We have told clerks if they do not believe a voter understood the declaration they made when requesting an absentee ballot, they can contact the voter for confirmation of their status. They should do so using appropriate discretion as voters are still entitled to privacy concerning their medical and disability status. Any request for confirmation of indefinitely confined status should not be accusatory in nature.

(Def. App. p. 221)

After WEC issued its guidance on March 23, 2020, the Dane County Clerk posted the following on his Facebook page:

I have informed Dane County Municipal Clerks that during this emergency and based on the Governors Stay at home order I am declaring all Dane County voters may indicate *as needed* that they are indefinitely confined due to illness. This declaration will make it easier for Dane County voters to participate in this election

by mail in these difficult times. I urge all voters who request a ballot and have trouble presenting an valid ID to indicate that they are indefinitely confined. (The phrase “as needed” is integral to the entire post.)

People are reluctant to check the box that says they are indefinitely confined but this is a pandemic. This feature in our law is here to help preserve everyone’s right to vote.

The process works like this:

- A voter visit’s myvote.wi.gov to request a ballot.
- A voter can select a box that reads “I certify that I am indefinitely confined due to age, illness, infirmity or disability and request ballots be sent to me for every election until I am no longer confined or fail to return a ballot.
- The voter is then able to skip the step of uploading an ID in order to receive a ballot for the April 7 election.

Voters are confined due to the COVID-19 illness. When the Stay at Home order by the Governor is lifted, the voter can change their designation back by contacting their clerk or updating their information in myvote.wi.gov

***Voters who are able to provide a copy of their ID should do so and not indicate that they are indefinitely confined.”***

If you have an ID, please upload it if possible. Here is a good link: <https://asgoeswisconsin.com>.

**I am relying on my counsel. I will defer to WEC. This is for the few, mostly seniors who are struggling to vote absentee and be safe.**

We are all “sick” which is the definition in law because we have no tests and we are forced to assume that everyone is sick including ourselves.

**Regardless, if you can upload your photo by law you must.** I have talked several voters through the process and they were successful. Others had no way to do it...

(Ex. 1)

On March 27, 2020, WEC scheduled an emergency meeting to deal with the indefinitely confined issue and other issues regarding the Spring election. After extensive debate, WEC adopted the following guidance to clarify the purpose and proper use of the indefinitely confined status under Wis. Stat. § 6.86(2):

1. Designation of indefinitely confined status is for each individual voter to make based upon their current circumstance. It does not require permanent or total inability to travel outside of the residence. The designation is appropriate for electors who are indefinitely confined because of age, physical illness or infirmity or are disabled for an indefinite period.
2. Indefinitely confined status shall not be used by electors simply as a means to avoid the photo ID requirement without regard to whether they are indefinitely confined because of age, physical illness, infirmity or disability.

That guidance was formally communicated to local election officials on March 29, 2020. (Def. App. p. 61)

Immediately following the WEC meeting on March 27, 2020 the Dane County Clerk posted on his Facebook page:

Grateful that the Wisconsin Election Commission **voted to agree with me that the designation of indefinitely confined status is for each individual voter to make based upon their current circumstance.** It does not require permanent or total inability to travel outside the residence. Clerks may not request or require proof of an individual's self-designated status.

Later that night the Dane County Clerk posted the WEC guidance verbatim:

More from me on this topic. The Wisconsin Election Commission met on Friday and issued further guidance to clarify the purpose and proper use of the indefinitely confined status under Wis. Stat. § 6.86(2) as follows:

1. Designation of indefinitely confined status is for each individual voter to make based upon their current circumstances. It does not require permanent or total inability to travel outside of the residence. The designation is appropriate for electors who are indefinitely confined because of age, physical illness or infirmity or are disabled for an indefinite period of time.
  2. Indefinitely confined status shall not be used by electors simply as a means to avoid the photo ID requirement without regard to whether they are indefinitely confined because of age, physical illness, infirmity, or disability.
- Voters should follow this guidance when determining whether they qualify to claim that they are indefinitely confined as a result of the COVID-19 pandemic and declared public health emergency.

(Ex. 2)

On March 27, 2020, Mark Jefferson and the Republican Party of Wisconsin brought a Petition for Original Action with the Wisconsin Supreme Court against Dane County and its

County Clerk regarding the March 25, 2020 Facebook post. *Jefferson, et al. v. Dane County, et al.*, Case No. 20 AP 0557-OA. On March 31, 2020, the Supreme Court entered an Order that enjoined the Dane County Clerk from “posting advice as the County Clerk of Dane County inconsistent with the above quote from the WEC guidance.” The court had earlier in the Order quoted the March 29, 2020 WEC guidance set forth above, and further stated that: “We conclude that the WEC’s guidance quoted above provides the clarification on the purpose and proper use of the indefinitely confined status that is required at this time.” (Def. App. p. 65)

The Dane County Clerk deleted his March 25, 2020 Facebook post immediately following the issuance of the court’s Order on March 31, 2020. That was 217 days before the November 3, 2020 General Election. After March 25, 2020, the only guidance provided by the Dane County Clerk regarding indefinitely confined status was that WEC guidance should be followed.

In the 2020 General Election, the number of voters declaring themselves indefinitely confined increased exponentially statewide. In the 2016 General Election 56,978 voters declared themselves indefinitely confined for absentee voting. In the 2020 election, 215,713 voters declared indefinite confinement, an increase of 278% statewide. (Def. App. pp. 214-217) This increase was not limited to Dane County (392% increase) and Milwaukee County (281%), but rather every county large or small, rural or urban. For instance, Adams County had a 500% increase, Bayfield County 569%, Dodge County 317%, Lafayette County 343%, Racine County 491%, and Waukesha County 214%. (Id.) This increase statewide is not the result of a six day Facebook post by the Dane County Clerk in March, 217 days before the General Election. It was the result of the COVID pandemic, and a decision by these voters to avail themselves of an option specifically provided the Legislature.

In advance of the 2020 General Election, the public health emergency and fear of contracting COVID-19 led to an unprecedented number of requests for absentee ballots from voters in the City of Madison. In an attempt to enable safe voting options during an unprecedented pandemic, the City of Madison Clerk implemented an event called “Democracy in the Park” on September 26 and October 3, 2020. In designing the program, the City Clerk sought to accommodate an unprecedented demand for absentee ballots, address concerns about the capacity of the U.S. Postal Service to deliver ballots by Election Day, and provide the City of Madison voters with secure and convenient means of returning their completed ballots.

The Democracy in the Park program utilized only sworn election inspectors who were fully trained. These sworn election inspectors deployed to 206 City of Madison parks and collected completed, sealed, and properly witnessed absentee ballots that had been previously issued by mail by the City Clerk. Applications for absentee ballots were not received, and absentee ballots were not issued. The inspectors also served as witnesses for absentee voters who brought with them unsealed, blank ballots they had previously received by mail. After absentee ballots were collected, they were transported to the City Clerk’s office and securely stored with all absentee ballots received by mail. Strict chain of custody was maintained at all times. A total of 17,271 absentee ballots were collected during the Democracy in the Park events. (Def. App. pp. 208-210)

On September 25, 2020, nearly four weeks after the City announced the Democracy in the Park event, Attorney Misha Tseytlin, counsel for Assembly Speaker Robin Vos and Senate Majority Leader Scott Fitzgerald, sent a letter to the City Clerk. The letter alleged broadly, without citation to any relevant statute or explanation that the City’s Democracy in the Park event was not compliant with Wisconsin law such that “there is a grave risk that all ballots you [the City] collect through this campaign will be challenged in court and ultimately invalidated.” The letter urged

the City to cancel the events “in order to avoid the threat of invalidated ballots and needless litigation.” On September 26, 2020, Madison City Attorney Michael Haas responded and explained why Democracy in the Park did not violate state statutes and why absentee ballots returned at the event would not be invalidated. The City of Madison received no response from Attorney Tseytlin or his clients, and no complaint was filed with WEC as was their statutory remedy. (Def. App. pp. 201-207)

### ARGUMENT

I. THE LEGISLATURE HAS EXPRESSLY AUTHORIZED THOSE INDEFINITELY CONFINED TO VOTE ABSENTEE WITHOUT SUBMITTING A VOTER ID.

Wis. Stat. § 6.86(2)(a) provides an option for voters who are “indefinitely confined” to obtain and submit an absentee ballot. This provision has existed in state statute for 43 years, and substantially unchanged for the past 35 years. It is a recognition by the legislature that some voters, due to their individual circumstances, are precluded from voting in person or even the normal process of obtaining an absentee ballot by submitting a copy of a voter ID. In spite of the fact that the legislature has expressly sanctioned this process, the Petitioners seek to exclude all indefinitely confined absentee voters in Dane and Milwaukee Counties<sup>2</sup> on a totally unsubstantiated claim of fraud.

Wis. Stat. § 6.86(2)(a) states:

An elector who is indefinitely confined because of age, physical illness or infirmity or is disabled for an indefinite period may by signing a statement to that effect require that an absentee ballot be sent to the elector automatically for every election. The application form and instructions shall be prescribed by the commission, and furnished upon request to the elector by each municipality. The envelope containing the absentee ballot shall be clearly marked as not forwardable. If any elector is no longer indefinitely confined, the elector shall so notify the municipal clerk.

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<sup>2</sup> 215,713 voters in all 72 counties in Wisconsin followed the same procedures for indefinitely confined absentee voters.

Indefinitely confined status is an expressly recognized exception to the voter ID requirement. Wis. Stat. § 6.87(4)(b)2 provides that an indefinitely confined voter “may, in lieu of providing proof of identification, submit with his or her absentee ballot a statement signed by the same individual who witnesses voting of the ballot which contains the name and address of the elector and verifies that the name and address are correct.”

The statutory history shows that the Legislature has repeatedly broadened the scope of voters who qualify as “indefinitely confined.” Prior to 1977, there was a narrow exception for absentee voting for those hospitalized with a physical impairment. Wis. Stat. § 6.86(2) (1975) In 1977, the Legislature recognized a separate accommodation for those “indefinitely confined because of physical illness or infirmity or disabled for an indefinite period.” Wis. Stat. § 6.86(2) (1977) It provided that an indefinitely confined voter “may by signing an affidavit to that effect require an absentee ballot to be sent to the elector automatically for every election.” The Legislature eliminated the affidavit requirement in 1985. Wis. Stat. § 6.86(2) (1985) That amendment adopted the current language requiring the absentee voter to sign an unsworn statement verifying their indefinitely confined status. The statutory language has remained unchanged for the past 35 years.

Since 2011, the Legislature has adopted rigorous voter identification requirements and other substantial modifications to Wisconsin’s Election Laws. *See* 2011 Wis. Act 23, 2011 Wis. Act 227, 2013 Wis. Act 146, 2013 Wis. Act 159, 2015 Wis. Act 39, Wis. Act 261, 2019 Wis. Act 48. Yet, the Legislature has chosen not to impose stricter voter ID requirements or otherwise modify the indefinitely confined provisions. “The legislature is presumed to act with full knowledge of existing laws.” *State v. Roling*, 191 Wis. 2d 754, 762, 530 N.W.2d 434 (Ct. App. 1995), citing *State v. Gordon*, 111 Wis. 2d 133, 145, 330 N.W.2d 564 (1983). If the Legislature

had wanted to impose stricter requirements on indefinitely confined absentee voting, they had ample opportunity. The Petitioners ask this court to rewrite a statute that has served Wisconsin voters well for 35 years.

The Petitioners place great reliance upon the U.S. District Court's decision in *Frank v. Walker*, 17 F. Supp. 3d 837 (E.D. Wis. 2014) *rev'd on other grounds*, 768 F.3d 744 (7<sup>th</sup> Cir. 2014). In that case Judge Edelman characterized Wis. Stat. § 6.86(2)(a) as applying to "absentee voters who are elderly, infirm or disabled and indefinitely confined to their homes or certain care facilities." But, *Frank* was clearly not a definitive interpretation of § 6.86(2)(a). Indeed, the meaning of § 6.86(2)(a) was not even at issue in that case. Rather, the court was merely paraphrasing this section as one of a number of statutory provisions that provide exceptions to the voter ID requirements.

II. THE WISCONSIN ELECTION COMMISSION HAS PROVIDED GUIDANCE ON THE PURPOSE AND PROPER USE OF INDEFINITELY CONFINED STATUS UNDER WIS. STAT. § 6.86(2)(a)

The Wisconsin Election Commission (WEC) has statutory authority for administering Wisconsin's election laws. Wis. Stat. § 5.05(1) In furtherance of those duties the Commission provides guidance to local election officials. WEC and its predecessors have consistently interpreted indefinite confinement under Wis. Stat. § 6.86(2)(a) to be a decision for each individual voter to make based upon their current circumstances. Under the express language of the statute, the voter may self-certify through an unsworn declaration that they are indefinitely confined.

Prior to the 2020 Spring Election, WEC issued guidance regarding indefinite confinement that was consistent with prior WEC and Government Accountability Board guidance. On March 23, 2020, WEC issued guidance to Wisconsin County Clerks, Wisconsin Municipal Clerks, City of Milwaukee Election Commission and Milwaukee County Election Commission entitled

“COVID-19 FAQs and Updates: Online Voter Registration, Absentee Voting, Envelopes, Sanitizer and Poll Worker Recruitment.” That guidance specifically addressed “Indefinitely Confined Absentee Applications” that stated:

WEC staff has received numerous questions from clerks about the increase in voters requesting absentee ballots as indefinitely confined. Wisconsin Statutes provide the option for a voter to self-certify whether they meet the definition of indefinitely confined. The statutory definition of "age, illness, infirmity or disability" does not require any voter to meet a threshold for qualification and indefinitely confined status need not be permanent. A voter with a broken leg or one recovering from surgery may be temporarily indefinitely confined and may use that status when voting during that period of time.

We understand the concern over the use of indefinitely confined status and do not condone abuse of that option as it is an invaluable accommodation for many voters in Wisconsin. ***During the current public health crisis, many voters of a certain age or in at-risk populations may meet that standard of indefinitely confined until the crisis abates.*** We have told clerks if they do not believe a voter understood the declaration they made when requesting an absentee ballot, they can contact the voter for confirmation of their status. They should do so using appropriate discretion as voters are still entitled to privacy concerning their medical and disability status. Any request for confirmation of indefinitely confined status should not be accusatory in nature.

There may be a need to do some review of the absentee voting rolls after this election to confirm voters who met the definition of indefinitely confined during the public health crisis would like to continue that status. WEC staff has already discussed this possibility and may be able to provide resources to assist clerks with these efforts.

(Def. App. p. 221) (emphasis added)

On March 27, 2020, WEC met and issued further guidance. That guidance was communicated local election officials on March 29, 2020 as “Guidance for Indefinitely Confined Electors COVID-19” and stated:

Due to the continuing spread of COVID-19, staff of the Wisconsin Elections Commission (WEC) has received numerous inquiries regarding the application of the indefinitely confined designation for absentee voters under Wisconsin Statutes. At its meeting of March 27, 2020, the Commission discussed this issue and adopted the following guidance related to the use of indefinitely confined status to assist local election officials working with absentee voters:

1. Designation of indefinitely confined status is for each individual voter to make based upon their current circumstance. It does not require permanent or total inability to travel outside of the residence. The designation is appropriate for electors who are indefinitely confined because of age, physical illness or infirmity or are disabled for an indefinite period.
2. Indefinitely confined status shall not be used by electors simply as a means to avoid the photo ID requirement without regard to whether they are indefinitely confined because of age, physical illness, infirmity or disability.

(Def. App. p. 61)

On March 31, 2020, in *Jefferson v. Dane County*, 2020AP557-OA, the Wisconsin Supreme Court entered an Order that found that the WEC March 29, 2020 guidance quoted above “provides the clarification on the purpose and proper use of the indefinitely confined status that is required at this time.” (Def. App. p. 65) The court has subsequently entered no order or decision that altered that finding.

### III. THE PETITIONERS STATE NO FACTUAL OR LEGAL BASIS FOR DISENFRANCHISING INDEFINITELY CONFINED VOTERS.

Whether a person is indefinitely confined for purposes of Wis. Stat. § 6.86(2)(a) is a decision made by the individual voter based on their current circumstances. The Petitioners preposterously claim that 28,395 indefinitely confined absentee ballots in Dane and Milwaukee County should not be counted. They base this solely on unsubstantiated allegations that all of these people fraudulently voted as a result of a Facebook post seven months earlier on March 25, 2020. In support of this conclusion they rely on the fact that there was a substantial increase in the number of people claiming indefinitely confined status. But, they ignore the fact that this election was conducted in the midst of an international pandemic that has killed thousands in this state and hundreds of thousands nationwide, and that the number of voters claiming indefinitely confined status increased exponentially statewide.

The Petitioners conveniently focus on the increase in indefinitely confined voters in Dane County and Milwaukee County without recognition that the numbers of indefinitely confined voters increased exponentially statewide. Data from WEC establishes that indefinitely confined absentee voting in Dane County increased by 392% from 2016 to 2020, and Milwaukee County by 281%. Yet, statewide indefinitely confined voters increased 278% from 2016 to 2020 (56,978 in 2016 and 215,713 in 2020). Several counties both rural and urban, north and south, increased by over 500%. (Def. App. pp. 214-217)

The Petitioners seek a bizarre and extreme remedy. They ask that every voter in Dane and Milwaukee Counties who received an indefinitely confined absentee ballot after March 25, 2020 be disenfranchised. (Dane County Complaint, Para. 61) They claim that every voter who registered for indefinitely confined status after March 25, 2020 “were necessarily suspect.” (Id., Para. 59) With no proof, they request that all 28,395 of these ballots were issued in violation of law and must be excluded from any certified results of the Election. However, this claim must fail, because the Petitioners presented no evidence to establish that a single voter improperly claimed indefinitely confined status. Their allegations simply defy the facts and common sense.

WEC issued guidance to local election officials regarding indefinitely confined absentee applications on March 23, 2020. (Def. App. p. 221) Subsequently, on March 25, 2020, the Dane County Clerk posted information on his Facebook page regarding use of indefinite confinement. (Ex. 1) On March 29, 2020, WEC adopted the further guidance to clarify the purpose and proper use of the indefinitely confined status under Wis. Stat. § 6.86(2)(a):

1. Designation of indefinitely confined status is for each individual voter to make based upon their current circumstance. It does not require permanent or total inability to travel outside of the residence. The designation is appropriate for electors who are indefinitely confined because of age, physical illness or infirmity or are disabled for an indefinite period.

2. Indefinitely confined status shall not be used by electors simply as a means to avoid the photo ID requirement without regard to whether they are indefinitely confined because of age, physical illness, infirmity or disability.

(Def. App. p.61) Following the issuance of an Order by the Wisconsin Supreme Court on March 31, 2020 in *Jefferson v. Dane County*, the Dane County Clerk permanently deleted his March 25, 2020 Facebook post. Subsequent to March 31, 2020, the only guidance provided by the Clerk was that the WEC guidance should be followed.

The Dane County Clerk's March 25, 2020 post was online for 6 days until March 31, 2020. It was deleted 217 days before the General Election on November 3, 2020. The argument that a single Facebook post over seven months before the General Election should result in the exclusion of thousands of absentee ballots simply defies logic and the facts.

Most significantly, the Petitioners have presented no evidence that the Dane County Clerk's Facebook post induced a single voter to improperly, indeed illegally, claim indefinitely confined status. Their claim is based on total speculation. But, their allegation is totally refuted by the WEC data on indefinitely confined voters and common sense. If the increase in indefinitely confined voters was unique to Dane County perhaps it could be assumed that there was some correlation. But the increase was statewide. Do the Petitioners really believe that the increase by 569% in Bayfield County or the 491% increase in Racine County was the result of a Facebook post by the Dane County Clerk for 6 days, 7 months before the election? Quite honestly that is absurd, and should be summarily rejected by the court.

Finally, the Petitioners disparage municipal clerks and claim they failed to do their job. Wis. Stat. § 6.86(2)(b) states: "the clerk shall remove the name of any other elector from the list...upon receipt of reliable information that an elector no longer qualifies for the service [mailing list for those who have requested indefinitely confined absentee ballots.] The Petitioners allege

that every voter who declared themselves indefinitely confined was “necessarily suspect” and that clerks were derelict in failing to expunge them. Yet the Petitioners make this allegation without a shred of evidence that any clerk had “reliable evidence” that a voter was not qualified for indefinitely confined status.

Wisconsin law provides an alternate method for voters to obtain a mail-in absentee ballot if they are indefinitely confined. Wis. Stat. § 6.82(2)(a) does not excuse those voters from additional safeguards that apply to all mail-in absentee votes, including the requirement that each ballot be signed by the voter, witnessed by an adult U.S. citizen, and opened, reviewed, and tabulated during a public canvas. Wis. Stat. §§ 6.87, 6.88 But, the law allows the voter to individually certify that they are indefinitely confined based upon their current circumstances. The number of indefinitely confined voters increased in the 2020 election due to the COVID-19 pandemic statewide. The Petitioners do not like that, but it is the fact, and such votes were expressly authorized by state law.

#### IV. THE CITY OF MADISON’S “DEMOCRACY IN THE PARK” COMPLIED WITH STATE LAW.

In the face of a global pandemic, an unprecedented volume of mail-in absentee ballot requests, and a struggling postal system, Wisconsin municipalities sought creative solutions to ensure that all eligible citizens who wanted to vote in the 2020 General Election had a meaningful opportunity to do so. In response to requests from local voters for options to return their absentee ballots in person, the City of Madison (“City”) held an event called “Democracy in the Park.” On September 26 and October 3, voters were provided an opportunity to safely submit absentee ballots to sworn poll workers throughout the City’s 206 parks. A total of 17,271 absentee ballots were

collected at the Democracy in the Park events. (Def. App. p. 210) This event was a huge success and was in complete compliance with state law.

The Democracy in the Park Program was conducted in complete compliance with Wisconsin's voting laws. Only sworn and trained election inspectors were used during the events. Inspectors did not distribute absentee ballots and did not accept absentee ballot applications. The election inspectors collected completed, sealed and properly witnessed absentee ballots. After the absentee ballots were collected, they were transported to the City Clerk's office and securely stored with all absentee ballots received by mail. Strict chain of custody was maintained at all times. (Def. App. p. 209).

On Friday, September 25, 2020—nearly four weeks after the City announced its Democracy in the Park event and less than 24 hours before the event was to begin—counsel for Assembly Speaker Robin Vos and State Senate Majority Leader Scott Fitzgerald, Attorney Misha Tseytlin, sent a letter to City Clerk Maribeth Witzel-Behl with the following subject line: “The City of Madison’s ‘Democracy in the Park’ Campaign’s Illegal Collection of Absentee Ballots.” The letter alleged broadly, without citation or explanation, that the City’s Democracy in the Park event was not compliant with Wisconsin law such that “there is a grave risk that all ballots you [the City] collect through this campaign will be challenged in court and ultimately invalidated.” The letter urged the City to cancel the events “in order to avoid the threat of invalidated ballots and needless litigation.” On September 26th, Madison City Attorney Michael Haas responded to the letter, explaining why absentee ballots returned at Democracy in the Park would not be invalid solely because they were submitted at that event. The City of Madison received no response from Attorney Tseytlin or his clients, and no complaint was filed with WEC<sup>3</sup>. (Def. App. pp. 202-203)

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<sup>3</sup> A complaint could have been filed with WEC prior to the election. Wis. Stat. § 5.05(2m).

Indeed the Petitioners have been true to Attorney Tseytlin's word, as they are now engaging in "needless litigation" over this event. The Petitioners claim that Democracy in the Park violated Wis. Stat. § 6.87(4)(b)1 because the absentee ballots were not delivered to the municipal clerk's office. However, § 6.87(4)(b)1 does not require delivery to the clerk's office. Rather, the plain language of the statute states: "The envelope shall be mailed by the elector, or delivered in person, *to the municipal clerk* issuing the ballot or ballots." (emphasis added) The Petitioners also cite *Olson v. Lindberg*, 2 Wis. 2d 229, 236 (1957) in support of their argument. However, *Olson* is distinguishable and does not support their argument. That case not only involved a prior statute, but different facts. In that case the clerk *delivered* absentee ballots to voters' homes in violation of that statute.

The Petitioners also claim that Democracy in the Park violated Wis. Stat. § 6.855(1). They claim that a clerk "may have only one place where ballots are received." (Memorandum. P. 20) However, Section 6.855 does not apply to an absentee ballot drop off site. Rather, it concerns "alternate absentee ballot sites," which are defined by sub (1) as:

a site other than the office of the municipal clerk or board of election commissioners as the location from which electors of the municipality may *request and vote absentee ballots* and to which absentee ballots shall be returned by electors for any election. (emphasis added)

By its express terms Section 6.855 only applies to a site where an absentee ballot can be requested and issued. It applies to a site that is an alternative to the municipal clerk's office for in-person absentee voting where an elector "may *request and vote absentee ballots*." Democracy in the Park afforded no opportunity for electors to request an absentee ballot. It simply provided safe drop off sites for absentee ballots that had previously been requested and received by mail.

The Petitioners can cite to no statute that prohibited Democracy in the Park, because none exists. It was simply a safe method of dropping off absentee ballots received by mail. The Petitioners' claim has no merit and should be dismissed.

### **CONCLUSION**

For the reasons set forth herein, the court should deny all relief requested by the Petitioners. The Legislature has expressly provided indefinitely confined voters a process to obtain a mail-in absentee ballot. The statute allows the voter to individually certify that they are indefinitely confined based upon their current circumstances. WEC has provided guidance as to the purpose and proper use of indefinitely confined status, which the Supreme Court has approved as adequate. All counties in Wisconsin followed that guidance for the 2020 election including Dane and Milwaukee Counties. Not surprisingly the number of voters claiming indefinitely confined status increased dramatically statewide due to the COVID-19 pandemic. The Petitioners have presented no evidence that any absentee voter improperly claimed indefinitely confined status. 28,395 voters in Dane and Milwaukee Counties should not be disenfranchised due to unsubstantiated speculation.

The City of Madison's Democracy in the Park program was a well-planned and well-executed event that provided voters in the City of Madison a safe way to drop off previously issued absentee ballots. It did not create an alternate absentee ballot site pursuant to Wis. Stat. § 6.855(1) as it did not create an alternate to the City Clerk's Office to request and vote in-person absentee

ballots. Rather, it was simply a drop off site for absentee ballots issued by mail and the ballots were returned to the municipal clerk in compliance with Wis. Stat. § 6.87(4)(b).

Dated this 9<sup>th</sup> day of December 2020.

DANE COUNTY CORPORATION COUNSEL

/s/ electronically signed David R. Gault  
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Scott McDonell

Yesterday at 11:48 AM · 🌐

I have informed Dane County Municipal Clerks that during this emergency and based on the Governors Stay at Home order I am declaring all Dane County voters may indicate as needed that they are indefinitely confined due to illness. This declaration will make it easier for Dane County voters to participate in this election by mail in these difficult times. I urge all voters who request a ballot and have trouble presenting an valid ID to indicate that they are indefinitely confined.

People are reluctant to check the box that says they are indefinitely confined but this is a pandemic. This feature in our law is here to help preserve everyone's right to vote.

The process works like this:

- A voter visit's myvote.wi.gov to request a ballot.
- A voter can select a box that reads "I certify that I am indefinitely confined due to age illness, infirmity or disability and request ballots be sent to me for every election until I am no longer confined or fail to return a ballot.
- The voter is then able to skip the step of uploading an ID in order to receive a ballot for the April 7 election.

Voters are confined due to the COVID-19 illness. When the Stay at Home order by the Governor is lifted, the voter can change their designation back by contacting their clerk or updating their information in myvote.wi.gov

Voters who are able to provide a copy of their ID should do so and not indicate that they are indefinitely confined.

👍❤️ 134

53 Comments 168 Shares

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Joel Rivlin Thank you for your leadership Scott!

1d



Linda Ketcham What if we requested an absentee ballot and the packet arrived with the return envelope but no ballot? K ow if at least four instances of this counting me.

1d



Scott McDonell let your city clerk know asap

1d



Rachel Rodriguez Linda Ketcham There were some ballots in the City of Madison that they know this happened to. Please call their office ASAP and they'll arrange for a replacement.

1d



👉 View 3 more replies



Kate Stalker Thank you!

1d



David J. Benforado

1d

17





Joseph Fenrick Thank you

1d



Jeff Spitzer-Resnick Thanks for providing the leadership our Governor has not. Now Evers needs to mandate mailing ballots to every registered voter and delay the election by 3 weeks so the ballots can be processed.

1d



Chris Astrella Three weeks isn't enough!

22h



Jeff Spitzer-Resnick Fine, how much delay is needed.

22h

View 5 more replies



Tamara Packard Thank you, Scott.

1d



Jeanne Leccia Erickson Thank you Scott

1d



Catherine Friedl Thank you Scott!

1d



Scott McDonell I just helped an elderly woman with no internet vote! She has mailed a letter to the city clerk requesting a ballot and she indicated she was indefinitely confined. I am kicking myself because I forgot to mention the window trick for witness signature. Next time.

23h



Liz McCredie Scott McDonell I did the window trick today for a resident who didn't have anyone to witness her ballot and didn't want to leave the house. So easy!!

17h



Dana West So if we want an absentee ballot without uploading our ID we check the box for indefinitely confined?

23h



Scott McDonell if you have an ID, please upload it if possible. Here is a good link: <https://asgoeswisconsin.com/>



ASGOESWISCONSIN.COM  
As Goes Wisconsin

23h



Dana West Scott McDonell - ok - thanks!

23h



Lindsey Johnson This is awesome. Thank you for making municipal clerk's life a lot easier all while protecting our well being and health! Our voters are so appreciative.

23h · Edited



Benjamin Mayhew What if I need to register still?

21h

 **Jon Becker** If you reside in Madison, walk, bicycle, or drive up to the city-county building 8a-6p, for curbside registration (bring Proof of Residence)and voting (bring an approved photo ID). If you live elsewhere, call your municipal clerk for advice.

21h  1

 **Ann Jacobs Benjamin Mayhew** On line registration is back up - go to myvote.wi.gov and you can register.



MYVOTE.WI.GOV  
Home

21h  2

 **Paula L. Martinelli** Thank you, I will try again. I have no way to up load my l'd. Tried 4 times and it doesn't work.

21h

 **George Christenson** Thank you for your leadership Scott!

20h  1

 **Denise Jess Scott**, thank you for your leadership!

20h  1

 **Mitch** Theoretically, let's say someone has one name, so they cant use myvote.wi.gov because it requires a first and a last name like all people have euro-centric formatted names. And let's say that this person also emailed their clerk two weeks ago for an absentee ballot and hasn't received one. How should registered voters like that vote, without exposing themselves and poll workers, to risk of infection?



MYVOTE.WI.GOV  
Home

 **Rachel Rodriguez** Mitch Your application was entered on 3/22 and mailing label printed 3/23. Likely went in the mail yesterday or today.

17h · Edited  2

 **Judy Nowak** Mitch and I'm the person who entered it 😊.

9h  1

 **Scott McDonell** They are catching up with requests. If you want to message me I can look into it

18h

 **Deb Sutinen** You are doing an excellent job. Clear, concise, practical advice.

18h  1

 **Steve Hiniker** Scott for governor!

18h  1

 **Billie Johnson** Steve Hiniker or at least Dane County Executive.

18h   4

 Michael Butkus-Bonier A good intermediate step, this...  
17h

 Kathleen Bernier Don't you think that this should have been direction through WEC? So it is consistent State wide?' Scott McDonell  
17h · Edited  1

 Scott McDonell Kathleen Bernier also I love Kathy bernier.  
16h

 Scott McDonell I am relying on my counsel. I will defer to WEC. This is for the few, mostly seniors who are struggling to vote absentee and be safe  
16h  4

 Linda Baldwin Scott, I got my absentee envelope without a ballot. My husband hasn't received his. Whats the best way for us to vote?  
16h

 Rachel Rodriguez Linda Baldwin Please call the Clerk's office tomorrow. They will send you a ballot. Your husband's request is like in the queue of thousands waiting to be processed. They are making more progress on those each day.  
15h  1

 Mark Clear ^ city clerk, not county clerk  
7h

 View 1 more reply

 Fred Schepartz Thanks oh and BTW, FU RE!  
14h

 WM Clausius Thanks for this information Scott!  
4h

 Spencer Black Excellent and I'm glad that Milwaukee has followed your lead. I've seen some objection from right wingers about the term "indefinitely" but they are wrong. Indefinitely does not mean forever. It means without a known or defined end which certainly fits the current situation  
3h  1

 Scott McDonell we are all "sick" which is the definition in law because we have no tests and we are forced to assume that everyone is sick including ourselves  
3h

 Scott McDonell Regardless, if you can upload your photo by law you must. I have talked several voters through the process and they were successful. Others had no way to do it..  
3h

3/28/2020

Scott McDonell

Scott McDonell

Dave Home Create



Scott McDonell

Friends

Following

Message

Timeline About Friends 3 Mutual Photos More

Intro

Chair at Wisconsin Progress Institute
Dane County Clerk at Dane County
Lives in Madison, Wisconsin
From Bethesda, Maryland
Joined April 2008

Manages Scott McDonell for Dane County Clerk



Photos



Create Post Photo/Video

Write something to Scott...

Photo/Video Tag Friends Feeling/Activ...

Post

Scott McDonell 10 hrs ·

More from me on this topic. The Wisconsin Election Commission met on Friday and issued further guidance to clarify the purpose and proper use of the indefinitely confined status under Wis, Stats. s. 6.86(2) as follows:

- 1. Designation of indefinitely confined status is for each individual voter to make based upon their current circumstances. It does not require permanent or total inability to travel outside of the residence. The designation is appropriate for electors who are indefinitely confined because of age, physical illness or infirmity or are disabled for an indefinite period of time.
2. Indefinitely confined status shall not be used by electors simply as a means to avoid the photo ID requirement without regard to whether they are indefinitely confined because of age, physical illness, infirmity, or disability.

Voters should follow this guidance when determining whether they qualify to claim that they are indefinitely confined as a result of the COVID-19 pandemic and declared public health emergency.

14 2 Comments 1 Share

Like Comment Share

Vicky Selkove I really appreciate your leadership on this, Scott. Municipal clerks and their staffs around the state - and all other municipal employees who are stepping in to assist them right now - are among the unsung (s)heroes (theyroes?) of this part of the pandemic in WI. Thanks for fighting to keep people healthy AND to maintain access to the franchise.

Like · Reply · 9h

Chuck Blohm Still unclear. Does sheltering at home for those at risk, qualify to claim indefinitely confined status?

Like · Reply · 8h

Write a comment...