

**STATE OF WISCONSIN
SUPREME COURT**

**MARK JEFFERSON AND THE REPUBLICAN PARTY
OF WISCONSIN,
Petitioners,**

v.

Case No. 20 AP 0557-OA

**DANE COUNTY, WISCONSIN, AND
SCOTT MCDONELL, IN HIS OFFICIAL
CAPACITY AS DANE COUNTY CLERK,
Respondents.**

**DANE COUNTY'S RESPONSE TO MOTION FOR
TEMPORARY INJUNCTION AND
PETITION FOR ORIGINAL ACTION AND APPENDIX**

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INTRODUCTION

In the midst of an international pandemic and national crisis the scope of which none of us have ever experienced, the Petitioners are attempting to invoke an extraordinary remedy for a concocted issue that doesn't exist. They seek a vague and ambiguous injunctive remedy that is unnecessary, impossible to craft, and likely beyond the scope of this court's authority.

The Petitioners bring their Motion for Temporary Injunction ancillary to an Emergency Petition for Original Action. The Respondents are unsure whether the court ordered a response by March 30th to just the Motion for Temporary Injunction or to the Petition for Original Action, since Wis. Stat. § 809.70(2) states that the respondent shall have 14 days after service of an order to respond to a petition for original action. To the extent the court is expecting a response to the Petition for Original Action on such short notice, all of the issues raised herein support the Respondents' position that this court should not take original jurisdiction of this case. This court has held that "[t]he supreme court hears original actions

in cases that involve substantial legal questions of more than ordinary importance to the people of the state. Normally, these questions require prompt and authoritative determination.” *Panzer v. Doyle*, 2004 WI 52, ¶ 2, 271 Wis. 2d 295, 680 N.W.2d 666. As will be established herein, nothing about this case rises to that level.

I. FAILURE TO EXHAUST ADMINISTRATIVE REMEDY.

The Petitioners claim that the Dane County Clerk (Clerk) has attempted to rewrite Wisconsin election laws regarding indefinite confinement of electors found in Wis. Stat. § 6.86(2)(a) and 6.87(4)(b)2 and provided misinformation to local election officials and voters. Although all of the guidance provided by the Clerk was consistent with state law, in swinging for the fence and seeking to invoke this court’s jurisdiction, the Petitioners have failed to exhaust administrative remedies. Wis. Stat. § 5.06(1) expressly grants jurisdiction over any complaints regarding the decisions or actions of an election official regarding administration of elections to the Wisconsin Elections Commission (WEC). Sub

(6) expressly authorizes WEC to “by order, require any election official to conform his or her conduct to the law, restrain an official from taking any action inconsistent with the law or require an official to correct any action or decision inconsistent with the law.” Sub (2) prohibits filing an action in court without first filing a complaint with and disposition by the commission. Sub (8) provides for judicial review, and in Sub (9) the legislature has expressly provided that the court may not conduct a de novo proceeding and can only resolve contested issues of law. In *Kuechmann v. School District of La Crosse*, 170 Wis. 2d 218, 224, 487 N.W.2d 639 (Ct. App. 1992), the Court of Appeals held that “failure to comply with sec. 5.06(2), Stat., and failure to seek judicial review under sec. 5.06(8) and (9), Stat., deprived the circuit court of jurisdiction.” That rationale should apply equally here since this court exercises the same jurisdiction as the circuit court. The Petitioners have an exclusive remedy. They have made no showing that the administrative remedy through WEC is insufficient to resolve this matter. This court should not

intrude upon the exclusion jurisdiction of WEC. This Petition should be dismissed for failure to exhaust express administrative remedies that are jurisdictional.

II. PETITIONERS CLAIM IS MOOT.

The Petitioners claim for relief is essentially moot. The relief they seek is “temporary injunctive relief ordering Respondents to remove their interpretation of the state’s absentee ballot requirements from public display and to issue new statements correcting their interpretation in line with Wisconsin’s election laws.” (Petitioner’s Motion, p. 1) There certainly may be First Amendment Freedom of Expression implications to this request¹, but putting that aside, the Clerk has already posted WEC’s guidance and expressly stated that it should be followed.

¹ Elected Officials do not relinquish their First Amendment rights which protects the speech of public officials to the extent it concerns their official duties. *Melville v. Town of Adams*, 9 F. Supp. 77, 101 (D. Mass. 2014) citing *Bond v. Floyd*, 385 U.S. 116, 135, 87 S. Ct. 339 (1966). Although the Clerk does not have authority to change state law he is not prohibited from making a good faith comment as to what he thinks it says.

III. WEC GUIDANCE HAS RESOLVED ANY AMBIGUITY.

The Petitioners have recognized the primacy of the Wisconsin Election Commission in interpreting election laws and providing guidance to local election officials. (Petitioner's Motion, pp. 13-14) Although the Clerk's previous guidance posted on social media was consistent with state law and WEC's prior guidance, WEC meet in emergency session on March 27th and issued new guidance. Specifically WEC adopted the following guidance to clarify the purpose and proper use of indefinitely confined status under Wis. Stats.

§ 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 or infirmity, or disability.

The Clerk immediately posted the WEC guidance on social media and stated, “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.” (App. p. 6) It’s unclear what further injunctive relief the Petitioners could want or the court could order. In order to obtain injunctive relief the Petitioners have the burden to establish a likelihood of success on the merits. They cannot meet this burden. None of the guidance given by the Clerk regarding the indefinitely confined provision was inconsistent with state law or the guidance given by WEC. The Petitioners disagree with the Clerk’s guidance because they are trying to win an election. This case is about politics and not the law.

IV. PETITIONERS ARE NOT LIKELY TO SUCCEED ON THE MERITS.

The Petitioners complain that the Clerk is trying to rewrite the law. Clearly, a county clerk cannot amend the statute. But, neither can the Petitioners or the Legislative

Reference Bureau. A Clerk must apply the law subject to the guidance of WEC. That's what the Dane County Clerk did.

The plain language of 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.” Wis. Stat. § 6.87(4)(b)2. states that an elector who qualifies as indefinitely confined under § 6.86(2)(a) may satisfy the photo ID requirement by obtaining the signature of a witness on an the absentee certificate envelope. On March 23, 2020 WEC issued guidance to all local election officials entitled “COVID-19 FAQs and Updates: Online Voter Registration, Absentee Voting, Envelopes, Sanitizer and Poll Worker Recruitment.” (App. p. 1) That guidance specifically addressed “Indefinitely Confined Absentee Applications:

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.

On March 25, 2020 the Dane County Clerk posted a comment on Facebook which is the basis of the Petitioners complaint. That comment stated that voters who felt they could not leave home due to the COVID-19 pandemic and the State Safer at Home order “may indicate as needed that they are indefinitely confined.” He stated that voters who are indefinitely confined but “who are able to provide a copy of their ID should do so and not indicate that they are indefinitely postponed.” (Pet. App. p.17)

Sections 6.86(2)(a) and 6.87(4)(b)2. provide no standards for determining when a person is indefinitely postponed due to age, physical illness, infirmity or disability. WEC has said it is an individual decision based on the circumstances. It is entirely reasonable for a voter to conclude they are currently confined to home due to COVID-19 and the Governor’s Order. The U.S. Surgeon General has publicly stated that everyone should act as though they have the virus right now. There was absolutely nothing wrong, or contrary to law, for the clerk to advise voters to use this option “as

needed.” The Petitioners seek to retrain this simply as a political act of voter suppression.

STATEMENT OF FACTS

This state, indeed the country and the world are in the midst of the most serious public health crisis in at least a century. The extent of the COVID-19 pandemic is well documented and certainly well known to this court. Presumably the court can take judicial notice of the circumstances of this situation.

On March 24, 2020 the Secretary-designee of the Wisconsin Department of Health Services issued Emergency Order #12 “Safer At Home Order.” 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...” This Order is in effect until April 24, 2020. No one knows for certain, but it is likely that Order will be extended beyond that date. There are exceptions to the Order

for essential activities and functions. The Petitioners make a point of citing to the Essential Governmental Functions in Paragraph 12 of the Order. This exception is clearly intended to cover essential governmental employees and was not intended to apply to individual citizen or voter. Indeed the Order is silent on voting. This court has already acknowledged the seriousness of the current public health crisis by entering two orders on March 22 regarding jury trials and remote hearings.

The dire circumstances of the COVID-19 was brought home to the citizens of Dane County on March 27 when they received a cell phone alert from Dane County Emergency Management that stated: “Coronavirus (COVID-19) is in our community. Only leave home if it is essential. If you leave home, assume you were exposed to COVID-19. Monitor for fever, cough, shortness of breath, and sore throat. If you develop symptoms, isolate yourself immediately. Visit publichealthmdc.com/covid and follow [publichealthmdc](https://publichealthmdc.com) on social media for more information.

The Respondents either don't understand the seriousness of the situation or don't care. They argue that nothing in the Safer At Home Order prevents a person from leaving their house to vote or get a copy of their ID for purposes of absentee voting. Indeed they are literally correct. But, their position ignores the fact that people SHOULD stay home, particularly senior citizens and people with underlying health conditions. It is a well-established fact that any person going out in the community may contract or carry the COVID-19 virus and infect anyone they come in contact with. Indeed, the Surgeon General of the United States, Jerome Adams, M.D., stated on March 23, 2020: "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." (App. p. 7)

On March 23, 2020 the 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.

(App. pp. 1-5)

On March 25, 2020 the Clerk posted a comment on Facebook that stated:

I have informed Dane County Municipal Clerks that during this emergency and based on the Governor's 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 a 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.

(Pet. App. p.17) (emphasis added.) In response to questions posted to his comments on Facebook, the Clerk responded as follows:

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...

(Pet. App. pp. 17-20) (emphasis added).

WEC received many inquiries regarding the application of the indefinitely confined provisions to the COVID-19 pandemic and the increased risk of exposure. In response the WEC scheduled an emergency meeting on March 27, 2020. In preparation WEC staff prepared a Memo regarding “Guidance Regarding Indefinitely Confined Voters. (App. pp. 8-11) That Memo included the following:

It is important to note that indefinitely confined status does not require medical documentation and it does not require that the elector is completely restricted to their residence and unable to travel outside the residence. The statutory provision requires that the individual is “indefinitely confined because of age, physical illness or infirmity or is disabled for an indefinite period. . . .”

In recent weeks several organizations have publicized the option for electors to designate themselves as indefinitely confined in light of the

public health circumstances. This week the Dane County Clerk and the Milwaukee County Election Commission issued statements regarding this issue which drew increased attention to the indefinitely confined option. Staff has received several inquiries requesting confirmation of the WEC's guidance and whether the statements issued by Dane and Milwaukee Counties were consistent with the WEC's guidance.

In the opinion of WEC staff, the designation of indefinitely confined should be an individual designation left to each voter who must determine whether they are confined to their residence because of age, physical illness, infirmity or disability. The question is whether "because of physical illness" may include individuals who have not been diagnosed with COVID-19 and yet believe they are confined due to the potential for being exposed or exposed to others with the virus.

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.

Immediately following the WEC meeting the Clerk posted on Facebook:

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.

As soon as the details of WEC's action were known the Clerk subsequently posted on Facebook on the evening of March 27th:

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. 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.

(App. p. 6)

Without exhausting administrative remedies as required by Wis. Stat. § 5.06, the Petitioners commenced this case requesting this court to take jurisdiction as an original action on March 27, 2020.

ARGUMENT

I. THE PETITIONERS FAILED TO EXHAUST ADMINISTRATIVE REMEDIES WITH THE WISCONSIN ELECTION COMMISSION.

The Petitioners failed to seek relief with the Wisconsin Election Commission pursuant to Wis. Stat. § 5.06 before

commencing this action.² This exclusive method of review is expressly prescribed by the legislature and failure to exhaust this remedy deprives the court of jurisdiction over this matter.

Wis. Stat. § 5.06(1) provides that whenever any elector of a jurisdiction served by an election official believes that a decision or action of an election official is contrary to law in the administration or conduct of an election, the elector may file a written sworn complaint with the Wisconsin Election Commission requesting that the election official be ordered to conform his or her conduct to the law. Section 5.06(2) provides that:

(2) No person who is authorized to file a complaint under sub. (1), other than the attorney general or a district attorney, may commence an action or proceeding to test the validity of any decision, action or failure to act on the part of any election official with respect to any matter specified in sub. (1) *without first filing a complaint under sub. (1), nor prior to*

² Wis. Stat. § 5.06(1) affords relief to an “elector.” This case has been brought in the name of Mark Jefferson, an elector in Dane County, and the Republican Party of Wisconsin. Clearly Mr. Jefferson is bound by Wis. Stat. § 5.06. The Republican Party can only have standing in this case if one of its members has standing. *Metropolitan Builders Ass’n of Milwaukee v. Village of Germantown*, 2005 WI App 103 ¶¶ 13 & 14, 282 Wis. 2d 458, citing *Wisconsin Environmental Decade, Inc. v. PSC*, 69 Wis. 2d 1,17, 230 N.W.2d 243 (1975).

disposition of the complaint by the commission.

A complaint is deemed disposed of if the commission fails to transmit an acknowledgment of receipt of the complaint within 5 business days from the date of its receipt or if the commission concludes its investigation without a formal decision. (Emphasis added)

Sub. (6) sets forth the relief available from the commission:

(6) The commission may, after such investigation as it deems appropriate, summarily decide the matter before it and, by order, require any election official to conform his or her conduct to the law, restrain an official from taking any action inconsistent with the law or require an official to correct any action or decision inconsistent with the law. The commission shall immediately transmit a copy of the order to the official. An order issued under this subsection is effective immediately or at such later time as may be specified in the order.

Sub (8) provides an exclusive means of judicial review:

(8) Any election official or complainant who is aggrieved by an order issued under sub. (6) may appeal the decision of the commission to circuit court for the county where the official conducts business or the complainant resides no later than 30 days after issuance of the order. Pendency of an appeal does not stay the effect of an order unless the court so orders.

The legislature has mandated the standard of judicial review in

Sub (9):

(9) The court may not conduct a de novo proceeding with respect to any findings of fact or factual matters upon which the commission has made a determination, or could have made a determination if the parties had properly presented the disputed matters to the commission for its consideration. The court shall summarily hear and determine all contested issues of law and shall affirm, reverse or modify the determination of the commission, according due weight to the experience, technical competence and specialized knowledge of the commission, pursuant to the applicable standards for review of agency decisions under s. [227.57](#).

In *Kuechmann v. School Dist. Of LaCrosse*, 170 Wis. 2d 218, 487 N.W.2d 639 (Ct. App. 1992), the Court of Appeals held that failure to comply with Wis. Stat. § 5.06(2), and failure to seek judicial review under §§ 506.2(8) and (9), deprived the circuit court of jurisdiction. *Id.*, at 224, citing *Underwood v. Karns*, 21 Wis. 2d 175, 179-80, 124 N.W.2d 116, 118-19 (1963); *Graney v. Board of Regents*, 92 Wis. 2d 745, 755, 286 N.W.2d 138, 144 (Ct. App. 1979) (abrogated on other grounds); and *Jackson County Iron Co. v. Musolf*, 134 Wis. 2d 95, 101, 396 N.W.2d 323, 325 (1986). In *Graney*, the court recognized that “[w]here a specified method of review is

prescribed by the legislature, that method is exclusive.”

Graney, 92 Wis. 2d at 755.

The legislature has expressly prescribed an exclusive means of review of actions of election officials in Wis. Stat. § 5.06(2), (8) and (9). The Petitioners have not and cannot claim that the remedy afforded in § 5.06 is inadequate. In *Kuechmann*, the court held:

No room exists for an argument that the remedy that of judicial review afforded under sec. 5.06, Stat., is inadequate. When the legislature prescribes the method of review alleged deficiencies in election procedure, the legislature must deem that procedure to provide an adequate review. For a court to suggest that the statutorily mandated review in sec. 5.06(9), Stat., is somehow inadequate would defy the legislature’s decision to the contrary. The summary procedure mandated in the statute evinces the legislature’s knowledge that a speedy review of the board’s decision is necessary. The legislature having decreed that deficiencies in an election will be judicially reviewed as in sec. 5.06(8) and (9), Stat., the circuit court cannot employ some other method of review, such as an independent action for declaratory relief, prohibition or injunction.

Id., at 224-25.

This court “sit[s] as the trial court in an original action.” *Koschkee v. Evers*, 2018 WI 82 § 8 n.1, 382 Wis. 2d 666, 913 N.W.2d 878. In that situation, it is axiomatic that this court stands in the shoes of the circuit court jurisdictionally. The failure of the Petitioners to comply with Wis. Stat. § 5.06 deprives the court of original jurisdiction of the case. For that reason alone, injunctive relief should be denied and this case dismissed.

II. THE PETITIONERS REQUEST RELIEF THAT IS IMPRACTICABLE FOR AN ISSUE THAT IS MOOT.

The Petitioners seek injunctive relief that is impractical to address an issue that doesn’t exist and is moot. They seek “temporary injunctive relief ordering Respondents to remove their interpretation of the State’s absentee ballot requirements from public display and to issue new statements correcting their interpretation in line with Wisconsin’s election laws.” (Petitioner’s Motion p. 1) This case involves a post on social media by the Clerk on March 25, 2020. While that post can be subject to interpretation, it did not say anything that was directly contrary to state law or WEC guidance. But, assuming

there was any confusion caused by that post, when WEC issued new guidance on March 27th, the Clerk immediately posted it and included the following: “[v]oters 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.” (App. p. 6) No further relief is necessary.

Injunctive relief should be tailored to the necessities of the particular case. *Bubolz v. Dane County*, 159 Wis. 2d 284, 296, 464 N.W.2d 67 (Ct. App. 1990), citing *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 61-62, 95 S. Ct. 2069 (1975); *Hoffman v. Wis. Elec. Power Co.*, 2003 WI 64 ¶ 23, 262 Wis. 2d 264, 664 N.W.2d 55. In *Rondeau*, the U.S. Supreme Court noted that “[t]he essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case.” *Rondeau*, 422 U.S. at 61. Furthermore, “[t]he purpose of ‘a temporary injunction is to *maintain the status quo*, not to change the position of the parties or *compel the doing of acts which*

constitute all or part of the ultimate relief sought.’’ School Dist. of Slinger v. Wisconsin Interscholastic Athletic Ass’n., 210 Wis. 2d 365, 373, 563 N.W.2d 585 (Ct. App. 1997), citing Codept, Inc. v. More-Way North Corp., 23 Wis. 2d 165, 173, 127 N.W.2d 29, 34 (1964).

The doctrine of mootness also applies to this case. “An issue is moot when its resolution will have no practical effect on the underlying controversy.” *Matter of D.K.*, 2020 WI 8 ¶ 19, 390 Wis. 2d 50, citing *Portage Cty v. J.W.K.*, 2019 WI 54 ¶ 11, 386 Wis. 2d 672, quoting *PRN Assocs. LLC v. DOA*, 2009 WI 53 ¶ 25, 317 Wis. 2d 656. “Because moot issues do not affect a live controversy, this court generally declines to reach them. *Id.*”

The circumstances of this case do not warrant injunctive (or declaratory) relief. There is no existing controversy that requires action by this court. The Petitioners attempt to invoke the extraordinary jurisdiction of this court over a Facebook post. In that post the Clerk shared his good faith belief regarding the application of the indefinitely confined

provisions of Wis. Stat. § 6.86 in light of a historic public health emergency. His intent was to enfranchise as many people who might not otherwise vote due to legitimate health concerns. There may have been a better choice of words, but what the Clerk said in his post was not inconsistent with the statute or WEC's guidance. The post stated that "voters may indicate as needed that they are indefinitely confined due to illness." It also stated "voters who are able to provide a copy of their ID should do so and not indicate they are indefinitely confined." He subsequently clarified in comments that "I will defer to WEC. This is for the few, mostly seniors who are struggling to vote absentee and be safe." (Pet. App. p.17-20) Even if there was some confusion caused by the original post, the Clerk immediately posted the guidance adopted by WEC on March 27th and included the statement "[v]oters 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." (App. p. 6)

This is not a situation that requires emergency statutory construction of Wis. Stat. § 6.86. The legislature has given WEC the authority to interpret state election laws and provide guidance to local election officials. Wis. Stat. § 5.05. WEC has done this. The Clerk has posted WEC's guidance verbatim and stated that guidance should be used by voters to determine whether they qualify to claim they are indefinitely confined. This is not a live controversy and is moot. Injunctive relief is simply not necessary in this case. For that reason the Petitioners request for relief should be denied.

III. PETITIONERS ARE NOT ENTITLED TO A TEMPORARY INJUNCTION.

As stated above there is no issue or controversy and the Petitioners are certainly not entitled to a temporary injunction. There is no risk of irreparable harm. The matter has been clarified and there is no issue. For that reason the status quo needs no protection. Finally, even if this court takes jurisdiction of this case, the Petitioners are unlikely to succeed on the merits.

“A court may issue a temporary injunction when the moving party demonstrates four elements: (1) the movant is likely to suffer irreparable harm if a temporary injunction is not issued; (2) the movant has no other adequate remedy at law; (3) a temporary in junction is necessary to preserve the status quo; and (4) the movant has a reasonable probability of success on the merits.” *Milwaukee Deputy Sheriffs’ Ass’n. v. Milwaukee County*, 2016 WI App 56, ¶ 20, 370 Wis. 2d 644, 883 N.W.2d 154, citing *Werner v. A.L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520-21, 259 N.W.2d 310 (1977). The Petitioners fail on all four elements.

A. Irreparable Harm.

The Petitioners will not suffer irreparable harm if this court denies relief. Their entire case is based on a comment that the Clerk posted that expressed a good faith belief as to the meaning of the statute. To the extent it created any confusion that issue has been resolved. The Petitioners admit the primacy of WEC in interpreting state election laws and advising local election officials. On March 27th WEC adopted updated

guidance on the purpose and application of the indefinitely confined provision. The Clerk immediately posted that guidance verbatim and stated all voters should follow it.

The Petitioners also claim that “Respondents’ declaration likely will disenfranchise those same voters that the Respondents purport to protect, as those votes that were cast improperly cannot be counted.” (Petitioner’s Motion, p. 3) This is a “red herring” and simply not true. WEC’s guidance is that “designation of indefinitely confined status is for each individual voter to make based upon their current circumstances. (App. p. 13) WEC has also stated that ‘statutes do not establish the option to require proof or documentation from indefinitely confined voters.’” Furthermore, individual electors can only challenge a person who presents themselves to vote and can only challenge whether they are a qualified voter. Wis. Stat. § 9.25. Only an election inspector can challenge a failure to adhere to a voting requirement. Wis. Stat. § 9.2. In that case the election inspector would need first-hand knowledge that the voter was not indefinitely confined, and as

will be discussed *infra*, it may not be unreasonable for any voter to so declare under the current circumstances. There clearly is no irreparable harm, and certainly none that justifies invoking the jurisdiction of the state's highest court.

B. Adequate Remedy at Law.

The Petitioners have an adequate remedy at law. As discussed *supra*, if the Petitioners believe that the Clerk acted contrary to law in the conduct of an election they should file a complaint with WEC pursuant to Wis. Stat. § 5.05. There can be no reasonable argument that remedy is insufficient. *Kuechmann*, 170 Wis. 2d at 224-25.

C. Status Quo.

The status quo is not upset, so relief is not necessary to preserve it. No one is challenging the validity or construction of Wis. Stat. § 6.86. WEC is charged with interpreting election laws and it has issued guidance to voters and local clerks. The Clerk has posted the WEC guidance and stated it should be followed. This is a non-issue that does not deserve the attention of this court.

D. No Reasonable Chance of Success on the Merits.

The Petitioners have no reasonable chance of success on the merits. The Petitioners ask this court to resolve two questions. (1) Whether the Dane County Clerk has authority to issue an interpretation of Wisconsin's election laws allowing all voters in Dane County to request and cast an absentee ballot without providing a photo ID. (2) Whether all Wisconsin voters may forego State requirements to provide a photo ID when requesting an absentee ballot on grounds that Emergency Order #12 makes them "indefinitely confined because of age, physical illness or infirmity." (Emergency Petition for Original Action, p. 1) These are strawmen that the Petitioners have put up for political reasons and they ask this court to knock them down. The answer to both is obviously no, and no one has suggested otherwise.

The Petitioners invite this court to make broad pronouncements based on hypothetical facts. They seek an advisory opinion. *State v. Grandberry*, 2018 WI 29 ¶ 31 n.20, 380 Wis. 2d 541, 910 N.W.2d 214. No one has suggested

every voter in Wisconsin can claim they are indefinitely confined due to COVID-19 and forego providing a photo ID when casting an absentee ballot. To the extent there was any confusion the Clerk has specifically advised all voters to follow WEC's most recent guidance. In *Grandberry*, the court quoted *State v. Steffes*, 2013 WI 53, ¶ 27, 347 Wis. 2d 683:

[T]his court does not issue advisory opinions on how a statute could be interpreted to different factual scenarios in future cases. See [Grotenrath v. Grotenrath](#), 215 Wis. 381, 384, 254 N.W. 631 (1934) (“[C]ourts will not ordinarily render advisory opinions where the questions propounded have not arisen and may never arise.”). Rather, it is our job to adjudicate the dispute in front of us. It is thus not necessary for us to resolve the hypotheticals laid out by [the Defendant].

This court should reject Petitioners request to adjudicate a question based upon the hypothetical facts they pose. In the midst of crisis WEC has exercised their statutory authority and there is no legal issue to resolve.

IV. THE CLERK'S SOCIAL MEDIA POST WAS NOT CONTRARY TO LAW OR WEC GUIDANCE.

Although resolution of this issue is not necessary to resolve this case, the social media post of the County Clerk was

not inconsistent with the statute or WEC's guidance. The Clerk was acting in good faith to enfranchise voters who, due to the COVID-19 pandemic, might not be able to vote. If there was any confusion due to the Clerk's choice of words it has been cured by the WEC's most recent guidance.

Wis. Stat. § 6.86(2)(a) states:

(a) 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 any 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.

The legislature did not define when an elector is indefinitely confined due to age, physical illness or infirmity. In light of the increasingly serious circumstances as a result of the COVID-19 pandemic, WEC exercised its statutory responsibility and issued guidance to local election officials on March 23, 2020 entitled "COVID-19 FAQs and Updates:

Online Voter Registration, Absentee Voting, Envelopes, Sanitizer and Poll Worker Recruitment.” (App. pp. 1-5) That guidance specifically addressed “Indefinitely Confined Absentee Applications;”

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. (emphasis added)

On March 25th the Clerk made a post to Facebook regarding indefinitely confined absentee voters. The entire post is set forth *supra*. Use of the term “declaring” may have been an in-artful choice of words as clearly a clerk does not have authority to make a declaration of law. WEC has the statutory authority to interpret election laws. But, the information provided by the Clerk was not inconsistent with the law and clearly stated:

- “voters may indicate **as needed** that they are indefinitely confined due to illness.
- “Voters who are able to provide a copy of their ID should do so and not indicate that they are indefinitely confined.”
- “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...

These statements were not unreasonable in light of the current circumstances. The global pandemic and public health emergency is unprecedented. Every day local officials are attempting to apply the law to circumstances we’ve never seen and the legislature certainly didn’t contemplate. But whether the indefinitely confined provision of Wis. Stat. § 6.86(2) applies to a voter today must be judged in light of the following:

- The President, CDC, Governor, Department of Health Services and every public health expert had said everyone MUST stay home to the extent possible. The Governor and DHS have ordered it in Emergency Order #12.
- The U.S. Surgeon General has said “Everyone needs to act as if they have the virus right now. So, test or no test, we need you to understand you could be spreading it to someone else. Or you could be getting it from someone else. Stay home.”
- Dane County Emergency Management sent a text message to all cell phones in Dane

County at the request of the State saying: “Coronavirus (COVID-19) is in our community. Only leave home if essential. If you leave home, assume you were exposed to COVID-19. Monitor for fever, cough, shortness of breath, and sore throat. If you develop symptoms, isolate yourself immediately.

Visit publichealthmdc.com/covid and follow publichealthmdc on social media for more information.

It is not unreasonable for a voter to conclude that as a result of the pandemic they are indefinitely confined and can't or shouldn't go outside their home to get a copy of their ID to submit with their absentee ballot. There are actually voters, particularly senior citizens, who don't have copiers or scanners in their home.

Because of a multitude of questions from local election officials regarding indefinitely confined voters WEC held an emergency session on March 27, 2020. The commission adopted recommendations and on March 29 WEC issued “Guidance for Indefinitely Confined Electors COVID-19 to local election officials. (App. pp. 12-14) That guidance states:

Due to the continuing spread of COVID-19, staff of the Wisconsin Election 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 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. This guidance is consistent with and supplements previous statements of the WEC related to absentee voters who may qualify as indefinitely confined or “permanent” absentee voters.

The guidance recited the previous statement issued March 24th

set forth *supra*, and continued:

This guidance is based upon applicable statutes. An elector who is indefinitely confined because of age, physical illness or infirmity or is disabled for an indefinite period may be signing a statement to that effect require that an absentee

ballot be sent to the elector automatically for every election. Wis. Stat. § 6.86(2)(a). The absentee ballot request form asks voters to certify to their indefinitely confined status. Statutes do not establish the option to require proof or documentation from indefinitely confined voters. Clerks may tactfully verify with voters that the voter understood the indefinitely confined status designation when they submitted their request but they may not request or require proof. An elector who qualifies as indefinitely confined “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 of the elector are correct.” Wis. Stat. 6.87(4)(b)2. Thus, indefinitely confined electors may satisfy the photo ID requirement by obtaining the signature of a witness on the absentee ballot certificate envelope.

Electors who are indefinitely confined due to age, physical illness, infirmity or disability, may be unable to obtain a current photo ID or make a copy to submit with their written absentee ballot request or upload an image of their photo ID with their electronic request through MyVote Wisconsin. If a clerk is contacted by an elector in such circumstances, WEC recommends discussing the options and making the voter aware of the criteria for qualifying as an indefinitely confined elector.

The statements made by the Clerk are not inconsistent with the guidance issued by WEC on March 24th and 29th. To the extent

there was any confusion the Clerk has posted the WEC guidance and stated that voters should rely on it to determine if they are indefinitely confined. The statements of the Clerk certainly do not give rise to this cause of action and don't justify invoking this court's extraordinary jurisdiction.

CONCLUSION

For the reasons set forth herein, the court should deny all relief requested by the Petitioners. There is no legitimate legal issue regarding the Clerk's social media post regarding the designation of indefinitely confined by an absentee voter. To the extent there was any confusion that has been clarified by guidance from WEC. If the Petitioners thought they had a legitimate claim they should have filed it with WEC pursuant to Wis. Stat. § 5.06. Nothing about this case warranted attempting to invoke the extraordinary jurisdiction of this court.

Electronically signed by:
David R. Gault, SBN 1016374
Asst. Corporation Counsel
Dane County Corporation Counsel

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COVID-19 FAQs and Updates: Online Voter Registration, Absentee Voting, Envelopes, Sanitizer and Poll Worker Recruitment

Priority

High Priority

Date

March 23, 2020 - 12:30pm

To

Wisconsin County Clerks
Wisconsin Municipal Clerks
City of Milwaukee Election Commission
Milwaukee County Election Commission

From

Meagan Wolfe, Administrator

Attachment	Size
COVID Updates 3_22_2020 - amended re Type E notice.pdf	248.43 KB

This communication summarizes some of the previous guidance we have posted regarding significant issues and common questions the Wisconsin Elections Commission (WEC) continues to receive from local election officials. It includes guidance regarding the extension of online voter registration, the safe administration of in-person and polling place voting, and the availability of hand sanitizer and other cleaning products.

Online Voter Registration Extended Until March 30, 2020

On Friday March 19, 2020, federal Judge William Conley issued an order that online registration prior to the April 7 election shall continue through March 30, 2020. The WEC is currently working on restoring that functionality of MyVote Wisconsin and will alert clerks when online registration resumes. More information can be found here: <https://elections.wi.gov/node/6757>.

In-Person Absentee Voting

1. May a clerk decline to accommodate in-person absentee voting?

No. Under Wis. Stat. § 6.86(1)(b) and the federal court decision in *One Wisconsin Institute*, electors may request an absentee ballot in person at the municipal clerk's office or an alternate location until the Sunday before the election. While the statutes do not mandate specific times or a minimum number of hours where in-person absentee voting must take place, the clear intent is that electors have reasonable opportunities to exercise those rights and that clerks must offer in-person absentee voting.

2. Can we adjust our posted hours for offering in-person absentee voting hours or move to an appointment-only schedule?

Yes, a municipality can alter its hours for in-person absentee voting and voter registration. It also can move to an appointment-only process or limit the number of voters allowed into the voting facility at one time to ensure that appropriate social distancing recommendations can be accommodated.

NEW: The best practice is to publish a new Type E Notice indicating the new hours.

However, if it is not possible to publish a new Type E Notice in a timely manner or the voting hours may again change, clerks may omit publication of the notice and use other means to publicize the new hours, such as posting on a website, issuing a press release, etc. Notice of the new hours should be posted at the entrance to the building where voters may appear during the hours indicated in the original notice.

3. What if my mayor, village board president, town board chair, or local governing body orders restrictions on or the elimination of late registration or in-person absentee voting?

The election laws do not provide local elected officials the authority to place limits on or eliminate registration or voting options established by the statutes absent directives from state or local public health officials. Wis. Stat. § 6.86(1)(b) states that "A municipality shall specify the hours" in the Type E Notice published on the fourth Tuesday prior to the Spring Election. That statute does not specify whether the clerk, governing body or chief executive order designates the hours for each election. Wis. Stat. § 7.15(1) provides that the municipal clerk "has charge and supervision of elections and registration in the municipality." WEC staff has interpreted Wis. Stat. § 7.15(1) to authorize the municipal clerk to authorize absentee voting hours without requiring approval of the local governing body.

4. Can we offer curbside in-person absentee voting?

Yes, many municipalities are offering curbside or drive through in-person absentee voting. Clerks using this option should set up a system to verify each voter's registration information and check their photo ID prior to issuing them a ballot. Election officials should create these processes so that voter privacy and the security of voted ballots is ensured. Any observers should have the ability have to observe these procedures even if they are voting curbside.

Absentee Ballot Witness Requirements

WEC staff has received a number of questions regarding the witness requirements for the absentee ballot return envelope.

1. Is there any exemption to the witness requirement for voters who are quarantined?

No, absentee voters must have someone witness their absentee ballot by signing and providing their address on the certificate envelope (EL-122). The witness signature confirms the voter voted the ballot and placed it in the envelope for return. The witness must also be a U.S. citizen (Note: for military and overseas voters, the witness does not have to be a citizen).

2. What options are there for witnesses for voters who are quarantined and not allowed visitors?

Voters will have to find a way to have their witness provide the required information on the certificate envelope. Where direct interaction is being avoided, we have suggested that a family member, friend or neighbor may watch the vote through a window, the voter may insert the ballot in the envelope and then leave it outside the door for the witness to sign. Other options for witnesses in these situations include, mail delivery persons, grocery or food delivery persons, and medical professionals. As always, spouses or roommates can always witness each other's ballots. If you have a voter who does not think they can meet this requirement, contact the WEC for assistance with determining alternative qualified options.

Absentee Ballot Envelopes

The WEC has placed a large order for both absentee ballot transmittal envelopes and return envelopes and they are expected to arrive in each requesting county this week. Here are the details:

- The WEC is expected to receive a large portion of the envelopes on March 25, 2020, and the envelopes will then be shipped by express delivery directly to each county that placed an order with us.
- Each county will then coordinate with their municipalities on how to pick up their envelopes.
- The WEC placed an order for the most common envelope size configurations: #14 for transmittal of ballots and #12 for ballot return envelopes.
- The return envelopes will have FIM bars on them as that was identified by the U.S. Postal Service as the most effective layout for efficient postal delivery.
- Postage is required for both the transmittal and return envelopes.
- The envelopes themselves will be provided at no cost to the counties or municipalities.
- Clerks were notified of these details in a communication that went out last week:

<https://elections.wi.gov/node/6741>

Many municipalities are currently pursuing or are considering envelope orders outside of the WEC order.

More information about absentee envelope options and frequently asked questions was provided on March 18, 2020 and can be found here: <https://elections.wi.gov/node/6733>.

Poll Worker Recruitment, Usage and Training

Clerks may need to recruit and use additional poll workers for election day due to many veteran poll workers inability to serve during the public health crisis. We have created several resources to assist with these efforts, including a sample news release to alert the public about the need for volunteers and a promo on the MyVote Wisconsin website, both of which can be found here:

<https://elections.wi.gov/COVID-19/recruiting-poll-workers>. Voters viewing the promo on MyVote are encouraged to send you an email with "Poll Worker Applicant" in the subject line to express their interest in serving.

1. Can I use volunteers or other county or municipal staff to assist with line management for in-person absentee and election day voting?

Yes, it is essential that social distancing recommendations (6-foot distances between people) are being followed to minimize the spread of COVID-19. Volunteers can be used to help manage any lines that may form while people are waiting to vote. Volunteers or government staff serving only this function do not need to meet poll worker residency requirements or receive any election-specific training.

2. What is the best way to deploy my poll workers on Election Day?

Public health officials have consistently stated that COVID-19 is spread at a much higher rate through face-to-face interactions than other means. Poll workers who are not in at-risk categories can be assigned to tasks, such as voter registration, that require more personal interactions. Other tasks, such as

processing absentee ballots, may be appropriate for poll workers who need to limit their interactions with others.

3. What training resources are available that I can use to train my new poll workers?

Any of the online training resources, such as Baseline Chief Inspector training or election administration webinars can be used to train new poll workers. The Baseline Chief Inspector training from the Learning Center has been broken out into sections and posted on the agency website here:

<https://elections.wi.gov/clerks/education-training/baseline-ci/>. Trainees do not need a username and password to access the presentations. Previous election administration webinars are also a great resource for remote training and are posted here: <https://elections.wi.gov/clerks/education-training/webinars>. Clerks can identify which specific webinars they would like a trainee to view prior to election day. All webinars are now indexed by topic so clerks can also identify specific sections of webinars relevant to the trainee's expected election day role if necessary.

WEC staff will be publishing a memo that identifies and outlines training resources for use with new volunteers. We will also be offering a webinar for poll workers and clerks on recommended election day procedures designed to keep both voters and election officials safe during voting. More information on this webinar is forthcoming.

Indefinitely Confined Absentee Applications

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.

Sanitizer and Cleaning Product Availability and Options

The Wisconsin Elections Commission (WEC) has received numerous questions regarding the availability of hand sanitizer and other cleaning products necessary for the safe administration of in-person absentee and polling place voting. We also understand that vendors around the state have exhausted their supply of hand sanitizer, disinfectant wipes and other cleaners that can be used for sanitization of both hands and surfaces.

The WEC is currently looking for options to find additional supplies that clerks can use. In the meantime, there are other options you can pursue on the local level to ensure you, your staff and election workers can practice recommended hand hygiene. We encourage you to continue to pursue those options and not rely on potential resources from the WEC or other state agencies. WEC will continue to aggressively pursue options available through the State but we have also been told supplies have been exhausted.

More information about a possible bulk purchase of sanitizer by WEC and information about other options was recently provided in a communication posted here: <https://elections.wi.gov/node/6761>.

Please contact us with any questions or concerns that you may have at elections@wi.gov

[clerks](#)

Wisconsin Elections Commission | 212 East Washington Avenue, Third Floor P.O. Box 7984 | Madison,
Wisconsin 53707-7984

tele (608) 266-8005 | fax (608) 267-0500 | tty 1-800-947-3529 | e-mail elections@wi.gov

Toll-Free Voter Help Line: 1-866-VOTE-WIS

Scott McDonell



Scott McDonell

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Intro

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

Manage Scott McDonell for Dane County Clerk



Photos



Create Post Photo/Video

Write something to Scott...

Photo/Video Tag Friends Feeling/Activity...

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 Salkow 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 (heroes/heroines?) of this part of the pandemic in WI. Thanks for fighting to keep people healthy AND to maintain access to the franchise.

Like Reply @

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

Like Reply @

Write a comment...



Wisconsin Elections Commission

212 East Washington Avenue | Third Floor | P.O. Box 7994 | Madison, WI 53707-7994
(608) 266-8005 | elections@wi.gov | elections.wi.gov

DATE: For the March 27, 2020 Commission Meeting

TO: Members, Wisconsin Elections Commission

FROM: Meagan Wolfe, Administrator
Wisconsin Elections Commission

SUBJECT: **Guidance Regarding Indefinitely Confined Voters**

Wis. Stat. § 6.86(2)(a) states as follows:

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 any 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.

Under Wis. Stat. § 6.87(4)(B)2 an elector who qualifies as indefinitely confined “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.” Thus, indefinitely confined electors may satisfy the photo ID requirement by obtaining the signature of a witness on the absentee ballot certificate envelope.

Staff of the Wisconsin Elections Commission (WEC) have received numerous inquiries from local election officials, voters and organizations regarding the applicability of the indefinitely confined provisions in light of the developing COVID-19 pandemic and increased risk of exposure. In some cases staff has been asked to provide a bright line rule as to when an individual may designate themselves as indefinitely confined. Must the voter be diagnosed with COVID-19? Residing in the same household with someone who has been diagnosed with COVID-19? What about individuals who are self-quarantined because they suspect or are concerned that they may have been exposed but are asymptomatic? And given the recent emergency orders of the Governor and Department of Health Services, and medical advice that asymptomatic individuals may be infected or may be carriers of the virus, may a voter designate themselves as indefinitely confined because they fear being exposed or fear exposing others even though they are asymptomatic?

Building on the guidance historically provided regarding the application of Wis. Stat. 6.86(2), WEC posted the following statement as part of an FAQ document on March 22, 2020:

Wisconsin Elections Commission

Dean Krudson, chair | Marge Bostelmann | Julie M. Glancey | Ann S. Jacobs | Robert Spindell | Mark L. Thomsen

Administrator
Meagan Wolfe

Indefinitely Confined Absentee Applications

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.

It is important to note that indefinitely confined status does not require medical documentation and it does not require that the elector is completely restricted to their residence and unable to travel outside the residence. The statutory provision requires that the individual is "indefinitely confined because of age, physical illness or infirmity or is disabled for an indefinite period. . . ."

In recent weeks several organizations have publicized the option for electors to designate themselves as indefinitely confined in light of the public health circumstances. This week the Dane County Clerk and the Milwaukee County Election Commission issued statements regarding this issue which drew increased attention to the indefinitely confined option. Staff has received several inquiries requesting confirmation of the WEC's guidance and whether the statements issued by Dane and Milwaukee Counties were consistent with the WEC's guidance.

In the opinion of WEC staff, the designation of indefinitely confined should be an individual designation left to each voter who must determine whether they are confined to their residence because of age, physical illness, infirmity or disability. The question is whether "because of physical illness" may include individuals who have not been diagnosed with COVID-19 and yet believe they are confined due to the potential for being exposed or exposed to others with the virus.

The alternative method of complying with the photo ID requirement is a result of the elector's self-designation as indefinitely confined. It also illustrates one of the purposes of the designation which is to allow those individuals to satisfy the photo ID requirement in the event that they do not have a photo ID and will not be able to obtain one in a timely manner, or who have a valid photo ID but are unable to obtain a copy to mail in with their absentee ballot request or upload it with the request through MyVote Wisconsin. As stated in the guidance above, staff does not approve of the use of the indefinitely confined designation simply as a way to avoid the photo ID requirement for individuals who do not qualify for that status. Staff has also spoken with voters who find it impossible to submit a photo ID because they currently do not possess one or are unable to either copy or upload it.

As the Commission is aware, the Governor has declared a public health emergency and the Department of Health Services has issued several emergency orders due to the World Health Organization's declaration of COVID-19 as a global pandemic as well as guidance from the Centers for Disease Control and other public health officials. Emergency Order #12, issued on March 24, 2020, ordered Wisconsin residents to stay at their place of residence except for certain specified purposes. Residents are permitted to travel to engage in essential activities and essential governmental functions, including voting.

To respond to requests for further guidance, Commission staff proposes the following additional guidance intended 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.
3. Under the unique circumstances of the current public health crisis which includes a global pandemic and official restrictions on the travel of Wisconsin residents, in cases where an elector may possess a photo ID, but does not have the technology to upload a copy or access to a printer or scanner to provide a copy of their ID, the voter may make the individual determination that they qualify as indefinitely confined. If required, electors should attempt to provide a photo ID with their request for an absentee ballot. Submitting an absentee ballot request without a photo ID should be reserved for electors in this category who do not have a valid photo ID and are unable to obtain one for reasons of age, illness, infirmity or disability or who are unable to obtain a copy to submit with their request or upload an image of the ID with their electronic request.

Clerks have also asked WEC staff to provide guidance on if they can ask voters for proof or to verify the voter's indefinite confinement status. In the opinion of WEC staff it is not appropriate to require electors to include a separate statement documenting their reason for indefinite confinement, as it relates to their susceptibility to COVID-19 or for any other reason. The absentee ballot request form

asks voters to certify to their indefinitely confined status. Statutes do not establish the option to require proof or documentation from indefinitely confined voters. Staff has advised clerks that they may tactfully verify with voters that the voter understood the indefinitely confined status designation when they submitted their request but they may not request or require proof. WEC staff has also advised that there may be a need to conduct review of the absentee voting rolls after this election to confirm voters who met the definition of indefinitely confined during the public health crisis still feel they qualify upon the conclusion of the crisis.

Recommended Motion

The Commission adopts the recommended guidance related to the use of indefinitely confined status as outlined above. The guidance described in paragraph numbered 3 above is to be implemented only while travel restrictions imposed by the Governor or Department of Health Services are in effect due to the current COVID-19 public health crisis.



WISCONSIN ELECTIONS COMMISSION

Administering Wisconsin's Election Laws

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Guidance for Indefinitely Confined Electors COVID-19

Priority

High Priority

Date

March 29, 2020 - 2:00pm

To

Wisconsin County Clerks
Wisconsin Municipal Clerks
City of Milwaukee Election Commission
Milwaukee County Election Commission

From

Meagan Wolfe, Administrator

Attachment**Size**

[Clerk comm re. Indefinitely Confined 3.29.20.pdf](#) 220.95 KB

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.

This guidance is consistent with and supplements previous statements of the WEC related to absentee voters who may qualify as indefinitely confined or "permanent" absentee voters. For ease of reference, on March 24, 2020, the WEC posted the following guidance in one of its FAQ documents addressing issues related to conducting the Spring Election in the midst of the COVID-19 pandemic:

Indefinitely Confined Absentee Applications

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.

This guidance is based upon applicable statutes. 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. Wis. Stat. § 6.86(2)(a). The absentee ballot request form asks voters to certify to their indefinitely confined status. Statutes do not establish the option to require proof or documentation from indefinitely confined voters. Clerks may tactfully verify with voters that the voter understood the indefinitely confined status designation when they submitted their request but they may not request or require proof.

An elector who qualifies as indefinitely confined “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.” Wis. Stat. 6.87(4)(b)2. Thus, indefinitely confined electors may satisfy the photo ID requirement by obtaining the signature of a witness on the absentee ballot certificate envelope.

Electors who are indefinitely confined due to age, physical illness, infirmity or disability, may be unable to obtain a current photo ID or make a copy to submit with their written absentee ballot request or upload an image of their photo ID with their electronic request through MyVote Wisconsin. If a clerk is contacted by an elector in such circumstances, WEC recommends discussing the options and making the voter aware of the criteria for qualifying as an indefinitely confined elector.

If any elector is no longer indefinitely confined, they shall so notify the municipal clerk. Wis. Stat. 6.86(2)(a). An elector also loses indefinitely confined status if they do not vote in a Spring or General Election and do not respond to a mailing from the municipal clerk asking whether they wish to continue automatically receiving absentee ballots. Wis. Stat. 6.86(2)(b). Finally, the municipal clerk shall remove the name of any elector from the list of indefinitely confined electors upon receipt of reliable information that an elector no longer qualifies for that designation and service. The clerk shall notify the elector of such action not taken at the elector’s request within 5 days, if possible. Wis. Stat. § 6.86(2)(b).

If you have questions regarding this communication, please contact the Help Desk at 608-261-2028 or elections@wi.gov.

[clerks](#)

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