STATE BAR OF WISCONSIN
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AMC 2023

Session 3

Elections, Engagement, and Employment: How the Pandemic Changed the Public's Expectations of Government

Hon. Paul F. Reilly, Concurrence ADR, Waukesha
Nathan J. Bayer, Crivello Carlson, S.C., Milwaukee
Mark S. Kapocius, von Briesen & Roper, S.C., Milwaukee
Lisa M. Lawless, Husch Blackwell, Milwaukee
Michael W. O'Neill, Fox, O'Neill, & Shannon, S.C., Milwaukee
James Witecha, Wisconsin Elections Commission, Madison

About the Presenters...

Hon. Paul F. Reilly (Ret.) served on the Wisconsin Court of Appeals, District II, from 2010-2022, and on the Waukesha County Circuit Court from 2003-2010. Judge Reilly is a member of the Wisconsin Judicial Faculty (2005-present); a member of the Wisconsin Civil Jury Instruction Committee (2008-2022, emeritus); and was a member of the Wisconsin Judicial Commission (2010-2016, Chair 2015). Prior to taking the bench in 2003, Judge Reilly was in private practice with an emphasis in civil litigation (AV rating) and municipal law (New Berlin City Attorney,1997–2002). Judge Reilly completed the "***Mediating The Litigated Case"*** at the Straus Institute for Dispute Resolution at Pepperdine Law School in 2022 preilly@concurrenceadr.com, 262-844-0641.

Nathan J. Bayer is a shareholder at Crivello Carlson in Milwaukee. He received his undergraduate degree from UW-Whitewater in political science, with a double minor in history and philosophy, and his law degree from Marquette University. His practice focuses mainly on municipal law, acting as municipal attorney for the Villages of Shorewood, Brown Deer and Mukwonago, and the City of Glendale. He also defends municipalities around the state through their carriers, including the League of Wisconsin Municipalities. He has authored articles for The Municipality, Wisconsin Defense Counsel, and has presented for the National Business Institute. He sits on the State Bar's steering committee for the mock trial program and has coached Shorewood High School's team since 2002.

Mark Kapocius is a school attorney with more than twenty years of experience working in administrative leadership roles for school districts in Wisconsin. As a Shareholder in the Government Law Group and School Law Section, Mark focuses his practice on school law and advising other public-sector entities on labor and employment matters, governance issues, collective bargaining, public records and open meetings compliance. Mark has extensive experience assisting school districts with special education, pupil records, policy and curriculum, and educator and administrator employment-issues involving recruiting, retention, contracting, discipline and nonrenewal, and compensation and benefits issues. Mark brings a unique and innovative perspective to solutions based on his in-house work as the Director of Human Resources for the School Districts of Greenfield, Whitefish Bay, Germantown and Elmbrook. Since 2012, Mark has served as an impartial hearing officer for school districts, counties and municipalities on matters involving employee grievances. He is also an elected municipal judge for the Village of Greendale, where he presides over appearances and trials for civil ordinance violations.

Lisa M. Lawless, Senior Counsel, Husch Blackwell LLP, Milwaukee. Lisa is a litigator who worked on election litigation in 2020 during the COVID-19 pandemic including federal court actions seeking to move the Wisconsin April election, representing the Wisconsin Legislature, *Democratic National Committee v. Bostelmann*, and a challenge in the Wisconsin Supreme Court to the actions of the Dane County clerk in March 2020 regarding the use of indefinitely confined voter status as an exception to the voter ID requirements for absentee ballots, *Jefferson v. Dane County*. With a litigation practice spanning from constitutional, statutory, and governmental issues to land use and administrative law, through commercial litigation, and defense of consumer litigation on behalf of lenders and consumer goods and services providers, Lisa has 30 years of experience in state and federal courts at all levels, as well as in arbitrations. Lisa has substantial appellate experience in state and federal appellate courts, focusing a substantial portion of her practice handling appeals. Most notably, Lisa has argued in the Wisconsin Supreme Court five times in the last 13 years, including winning a significant victory in a case interpreting the Wisconsin Consumer Act in 2019. Most recently, Lisa prevailed in the Wisconsin Court of Appeals in a takings case on appeal on behalf of land owners, *Fassett v. City of Brookfield*. Active in her community and the bar, Lisa is an elected member of the Board of Governors of the State Bar of Wisconsin, is on the Boards of Directors of the Tosa Kickers Soccer Club and Wild Space Company, and is a mentor for Wauwatosa West High School's "We the People" program. For seven years, she authored Wisconsin Lawyer magazine's annual review of Wisconsin Supreme Court decisions. Most recently, she published, "(L)end to End: Applicability of ECOA to the Life Cycle of a Credit Transaction," in Vol. 76, Conference on Consumer Finance Law Quarterly Report (June 2023). Lisa is a *summa cum laude* graduate of Indiana University Maurer School of Law and has a B.A. in History and American Studies from University of Virginia. Lisa.Lawless@huschblackwell.com.

Matthew W. O'Neill is a shareholder at Fox, O'Neill & Shannon, S.C. His practice spans commercial litigation, arbitration, employment law, election and campaign finance law, and appeals. Matt graduated from Marquette Law School in 1991 and clerked for Wisconsin Supreme Court Chief Justice Nathan S. Heffernan. Matt is a past President of the Eastern District of Wisconsin Bar Association and serves on the Board of Legal Action of Wisconsin. When released from the office, Matt enjoys time with his family, his dogs, a crackling fire, running in costume, cooking, and extremely challenging crossword puzzles.

Jim Witecha is the Chief Legal Counsel at the Wisconsin Elections Commission. Jim holds a BA in Political Science and Sociology from UW Stevens Point, an MBA from UW Milwaukee, and a JD from Marquette University Law School. He has been with the WEC since September, 2020. Jim also served as the Principle Assistant Corporation Counsel in Sauk County before joining the WEC. Prior to that, he worked in other transactional and legal positions in the public and private sectors. He currently serves as a Village of Prairie du Sac trustee, volunteers his time in various capacities, and enjoys spending time with his family.

Elections, Engagements, and Employment:
How the Pandemic Changed the Public's Expectations of Government
June 15, 2023 – 1:35 pm to 2:50 p.m.

1. Emergency orders of government -- emergency powers statute (Lisa Lawless)
    a. State wide level / Local Level
    b. The shut-down order and other orders -- timeline
    c. Wis Supreme Court decisions on emergency orders (brief summary)

2. Explanation of Wisconsin's elections -- (James Witecha)
    a. Wisconsin Elections Commission -- myvote etc.
    b. Decentralized etc. Local clerks.
    c. How it works.
    d. Rulemaking/ Rules adopted in last year/two.

3. Elections -- registration law, voter ID, and absentee ballots (Lawless)
    a. Federal cases asking rules to be changed due to COVID
    b. Wis Supreme Court order re moving the election
    c. Jefferson v. Dane County -- Wis Supreme Court decision -- voter ID exception for absentee ballots based upon "indefinitely confined" voters

4. Absentee ballot processing and challenges to elections -- recounts, etc. (Matt O'Neill)
    a. During COVID and before
    b. Requirements for recount etc. When do you qualify, what's involved, etc.
    c. Outcome of recounts
    d. Decision in Trump case of Wisconsin Supreme Court

5. Expectations of Government (municipal governance, citizen engagement) (Nate Bayer /Mark Kapocius)
    a. Effect of Zoom
    b. Open meetings
    c. Citizen comment period/ expanded participation
    d. Engagement of citizens and expectations of government

6. Effect of COVID era on employment with municipalities (Kapoucius / Witecha)
    a. Work from home
    b. Vaccination requirements
    c. Elections Commission – as example

7. Takeaways from COVID era (each panel member can give one)

The COVID-19 Pandemic & the 2020 Wisconsin Elections

Lisa M. Lawless - Husch Blackwell LLP
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1

COVID-19 Timeline

Jan. 20 – CDC reports first confirmed COVID case in US

Feb. 11 – COVID-19 named by WHO

Mar. 11 – WHO declares it a pandemic

Mar. 13 – President declares nationwide emergency; issues travel ban

Mar. 15 – US States begin shutdowns

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2

Wisconsin COVID-19 Orders
Exec Order 12: Safer at Home Order

- **Governor Evers declares state of emergency**
- March 24, 2020: DHS Secretary-Designee issues Safer at Home Order, EO 12
- April 2020: DHS secretary-designee adopted Executive Order 28 prohibiting all forms of travel except essential

State of Wisconsin
Department of Health Services
Tony Evers, Governor
Andrea Palm, Secretary

EMERGENCY ORDER #12
SAFER AT HOME ORDER

WHEREAS, in December, 2019, a novel strain of the co
detected, now named COVID-19, and it has spread throughou
including every state in the United States;

WHEREAS, on January 30, 2020, the World Health Org
declared COVID-19 to be a Public Health Emergency of Intern

WHEREAS, on March 12, 2020, Governor Tony Evers d
health emergency to direct all resources needed to respond to
COVID-19 in Wisconsin;

WHEREAS, Governor Evers designated the Department
Services as the lead agency to respond to the emergency and
Department to take all necessary and appropriate measures
respond to incidents of COVID-19 in Wisconsin;

WHEREAS, on March 13, 2020, President Donald Trum
National Emergency concerning COVID-19;

WHEREAS, as of March 23, 2020, 332,930 people arou
tested positive for COVID-19, including 33,404 in the United
Wisconsin;

3

Wisconsin COVID-19 Orders
Exec Order 28: Safer at Home

- Original action granted (Wis Supreme Court)
- Decision issued May 13, 2020
- EO 28 "unlawful, invalid, and unenforceable"
- Order confining all people to their homes, forbidding travel & closing businesses exceeded authority of Wis. Stat. § 252.02.

Wisconsin Legislature v. Palm, 2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900 (May 13, 2020)

State of Wisconsin
Department of Health Services
Tony Evers, Governor
Andrea Palm, Secretary

EMERGENCY ORDER #28
Safer at Home Order

WHEREAS, in December, 2019, a novel strain of the coronavirus was detected, now named COVID-19, and it has spread throughout the world, including every state in the United States;

WHEREAS, on January 30, 2020, the World Health Organization declared COVID-19 to be a Public Health Emergency of International Concern;

WHEREAS, on March 12, 2020, Governor Tony Evers declared a public health emergency and directed all agencies support to efforts to respond to and contain COVID-19 in Wisconsin;

WHEREAS, on March 13, 2020, President Donald Trump proclaimed a National Emergency concerning COVID-19;

WHEREAS, as of April 15, 2020, 1,914,916 people around the world have tested positive for COVID-19, including 605,390 in the United States and 3,721 in Wisconsin;

WHEREAS, COVID-19 is present throughout Wisconsin, with people testing positive for COVID-19 in 65 of 72 counties as of April 15, 2020;

4

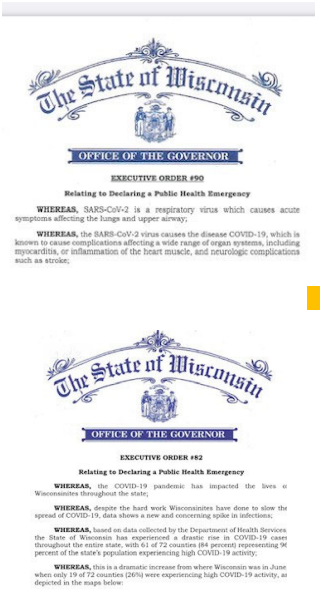
Wisconsin COVID-19 Orders

Governor declared states of emergency on an ongoing basis:

- July 2020 – EO 82
- Sept 2020 – EO 90
- Feb. 4, 2021 – Legislature revoked EO 104
- Feb. 4, 2021 – EO 105 adopted
- EO 82, 92, and 105 held invalid.

H: No state of emergency may last longer than 60 days absent joint legislative resolution, Wis. Stat. § 323.10

Fabick v. Evers, 2021 WI 28, 396 Wis. 2d 231, 956 N.W.2d 856 (March 31, 2021)


The State of Wisconsin

OFFICE OF THE GOVERNOR

EXECUTIVE ORDER #90

Relating to Declaring a Public Health Emergency

WHEREAS, SARS-CoV-2 is a respiratory virus which causes acute symptoms affecting the lungs and upper airway;

WHEREAS, the SARS-CoV-2 virus causes the disease COVID-19, which is known to cause complications affecting a wide range of organ systems, including myocarditis, or inflammation of the heart muscle, and neurologic complications such as stroke;

The State of Wisconsin

OFFICE OF THE GOVERNOR

EXECUTIVE ORDER #82

Relating to Declaring a Public Health Emergency

WHEREAS, the COVID-19 pandemic has impacted the lives o Wisconsinites throughout the state;

WHEREAS, despite the hard work Wisconsinites have done to slow the spread of COVID-19, data shows a new and concerning spike in infections;

WHEREAS, based on data collected by the Department of Health Services the State of Wisconsin has experienced a drastic rise in COVID-19 cases throughout the entire state, with 61 of 72 counties (84 percent) representing 9 percent of the state's population experiencing high COVID-19 activity;

WHEREAS, this is a dramatic increase from where Wisconsin was in June when only 19 of 72 counties (26%) were experiencing high COVID-19 activity, as depicted in the maps below:

5

Wisconsin COVID-19 Orders: Capacity Limitations

TAVERN LEAGUE OF WISCONSIN Est. 1935

Oct. 6, 2020 – Exec Order 3

Limited size of public gatherings to 25% of capacity or to 10 people if there was no set capacity.

- Under *Palm*, Wis S Ct held Executive Order 3 constitutes an administrative rule and should have been promulgated under Wis. Stat. chapter 227 rulemaking procedures.

- It was not. EO 3 was not validly enacted and was unenforceable.

Tavern League of Wisconsin Inc. v. Palm, 2021 WI 33, 396 Wis. 2d 434, 957 N.W.2d 261 (April 14, 2021)

6

Wisconsin COVID-19 Orders: School Closures

- For Fall 2020, Madison & Dane County issued emergency order (Exec Order 9) closing all schools for in-person instruction due to COVID pandemic.
- Wis S Ct: granted original action petition on Sept. 10, 2020 & temporarily enjoined the prohibition of in-person instruction at schools.
- On the merits: Wis S Ct held that EO 9 exceeded the local officer's statutory authority under Wis. Stat. § 252.03
- And it violated petitioners' constitutional right to the free exercise of religion.

James v. Heinrich, 2021 WI 58, 397 Wis. 2d 517, 960 N.W.2d 350 (June 11, 2021)

7

Elections, Engagements, and Employment: How the Pandemic Changed the Public's Expectations of Government

Wisconsin Elections Commission Discussion

Jim Witecha – Chief Legal Counsel

1

Background on Wisconsin's Elections

Decentralization is key to understanding Wisconsin

- Wis. Stat. Chapter 5 – WEC administers Chapters 5-10, 12
  - Wis. Stat. § 6.36(1)(a) The commission shall compile and maintain electronically an official registration list…
  - WisVote, MyVote, Badger Voters
- Wis. Stat. § 7.15(1) Each municipal clerk has charge and supervision of elections and registration in the municipality…
- Wis. Stat. § 7.10: County Clerk roles are more specified/ancillary in Wisconsin (By contrast to most state structures)

2

Background on Wisconsin's Elections, Continued

How decentralization works in practice

- Training and outreach becomes a key consideration
- Case law and informal WEC guidance must be independently considered by each local clerk/counsel, which may lead to a lack of uniformity in some election practices
- WEC's vehicles for formal advice and decisions have become key, agency must shift focus to administrative rulemaking
  - Examples of rules prompted by COVID and landscape shifts

3

Effect of COVID era on public employment

Changes in the employment landscape

- Work from home
- Vaccination requirements
- State of Wisconsin policy shifts
  - Initial vaccination policy
  - Work from home standards
  - Current LAB audit

4

Questions?

5

Thank you!

For further information, contact WEC.

PH: 608-266-8005 Email: elections@wi.gov

6

ELECTIONS vs. THE PANDEMIC

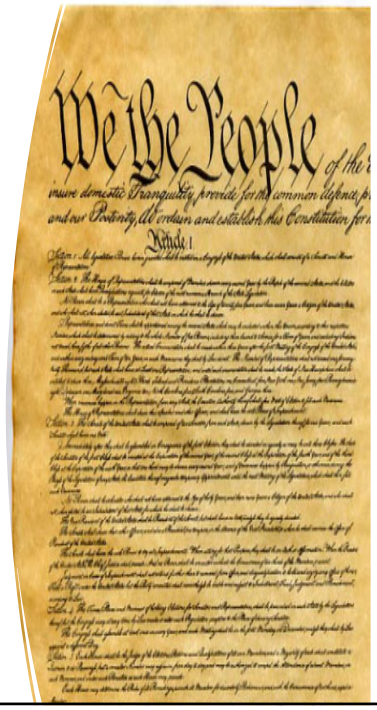
in Wisconsin

Lisa M. Lawless - Husch Blackwell LLP
Lisa.lawless@huschblackwell.com

1

The Law of Elections

- U.S. Constitution entrusts elections to the States
  - Article I, Sec. 4, Clause 1 (time, place, and manner)
  - Article II, Sec. 1, Clause 2 ("Elector's Clause")
- Wisconsin's statutory scheme
  - Chapters 5, 6, 7, Wis. Stats.
  - E.g., Voter Registration, Voter ID, Absentee Ballots, Early Voting



2

Wisconsin Election Laws

- **Absentee voting – how is it done?**
  - Complete, return written request
  - Voter ID
- **Complete ballot in front of witness**
- **Return by deadline, mail or in person**
- **Early voting**

3

Wisconsin Election Litigation During COVID (Apr 7 election)

- Registration deadline extended
- Deadline for return absentee ballots extended to 4/13th
- Created exception to witness requirement for absentee ballots
- 7th Circuit stayed the witness exception
- U.S. Supreme Court: AB's must be postmarked on/before election day, 4/7th

DNC v. Bostelmann, 451 F. Supp. 3d 952 (WD WI, Apr. 2, 2020), *stayed in part*, 2020 WL 3619499 (7th Cir. Apr. 3, 2020)

RNC v. DNC, 140 S. Ct. 1205 (Apr. 6, 2020)

REPUBLICAN NATIONAL COMMITTEE, et al.

v.

DEMOCRATIC NATIONAL COMMITTEE, et al.

No. 19A1016

Supreme Court of the United States.

April 6, 2020

Background: Democratic National Committee (DNC) and Democratic Party of Wisconsin brought actions against members of Wisconsin Elections Commission, asserting rights of their members who faced burdens in voting in upcoming primary election during COVID-19 pandemic, and seeking to bar enforcement of state statutory election requirements, including deadlines for electronic and mail-in voter registration and for state's receipt of absentee ballots, and voter ID requirements. The United States District Court for the Western District of Wisconsin, William M. Conley, J., 2020 WL 1320819, granted temporary restraining order (TRO) extending deadline for electronic voter registration, and later allowed Wisconsin Legislature and Republican Party of Wisconsin to intervene as defendants, 2020 WL 1505640,

4

Wisconsin Election Litigation During COVID

- April 6, 2020: Governor issued order postponing election ‘til June
- April 6, 2020: Wisconsin Supreme Court invalidated
- April 7, 2020: Election occurred
- April 13, 202: Results were final

POLITICO

2020 ELECTIONS

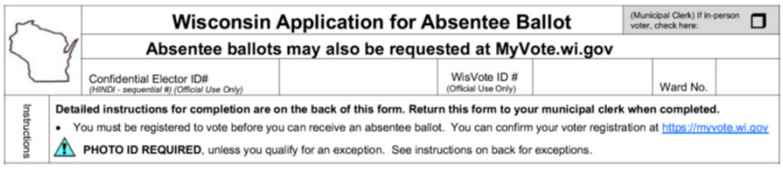
Wisconsin Supreme Court overturns governor, orders Tuesday elections to proceed

The U.S. Supreme Court also overturned a lower court's order extending the absentee ballot deadline in the state.

5

Wisconsin Election Laws

- **Exception to Voter ID: Indefinitely Confined Voters (EL-121)**
  - Wis. Stat. § §6.86(2)(a), 6.87(4)(b)2



Wisconsin Application for Absentee Ballot

(Municipal Clerk) If in-person voter, check here: ☐

Absentee ballots may also be requested at MyVote.wi.gov

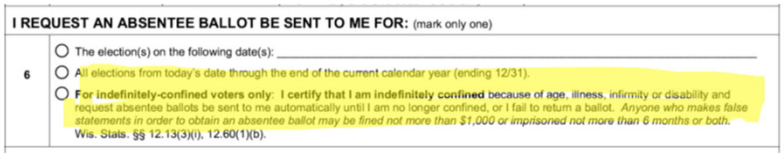
Confidential Elector ID# (HINDI - sequential #) (Official Use Only) | WisVote ID # (Official Use Only) | Ward No.

Instructions

Detailed instructions for completion are on the back of this form. Return this form to your municipal clerk when completed.

- You must be registered to vote before you can receive an absentee ballot. You can confirm your voter registration at https://myvote.wi.gov

PHOTO ID REQUIRED, unless you qualify for an exception. See instructions on back for exceptions.



I REQUEST AN ABSENTEE BALLOT BE SENT TO ME FOR: (mark only one)

6

- ○ The election(s) on the following date(s): _____
- ○ All elections from today's date through the end of the current calendar year (ending 12/31).
- ○ **For indefinitely-confined voters only: I certify that I am indefinitely confined because of age, illness,** infirmity or disability and request absentee ballots be sent to me automatically until I am no longer confined, or I fail to return a ballot. *Anyone who makes false statements in order to obtain an absentee ballot may be fined not more than $1,000 or imprisoned not more than 6 months or both.* Wis. Stats. §§ 12.13(3)(i), 12.60(1)(b).

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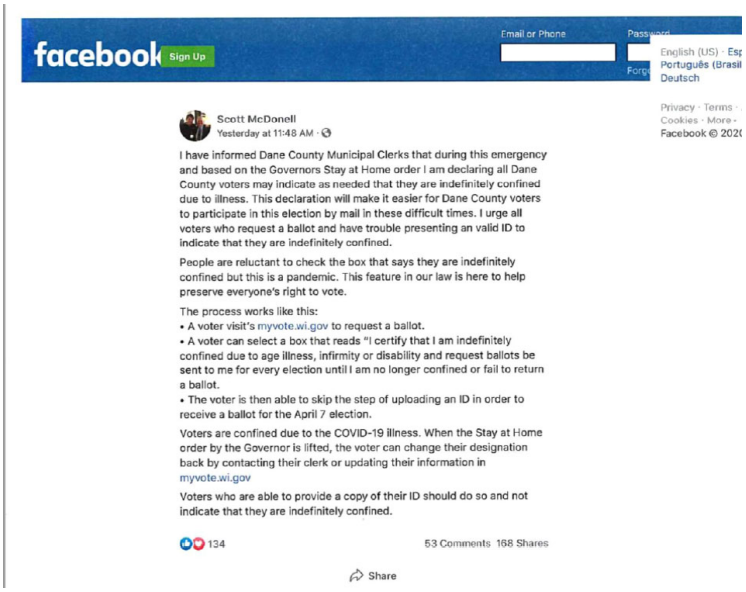
Wisconsin Elections During COVID-19



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Wisconsin Elections During COVID-19

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Wisconsin Election During COVID-19

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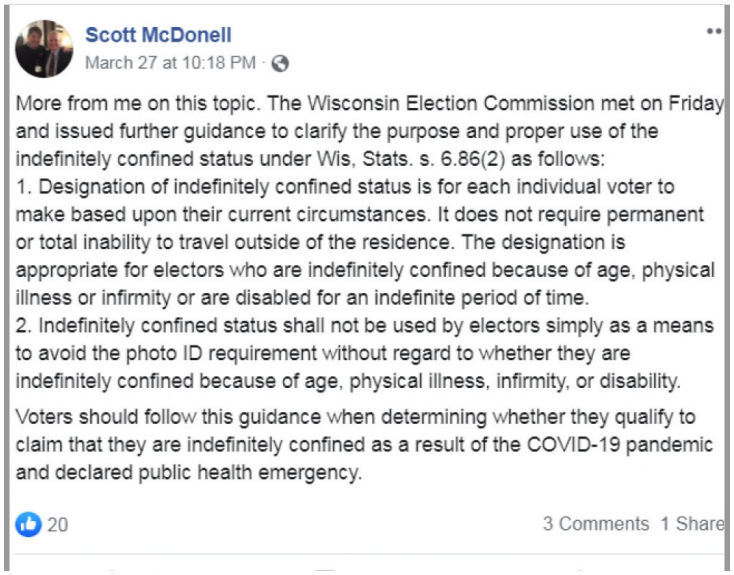

Scott McDonell
March 27 at 10:18 PM ·

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.

20 3 Comments 1 Share

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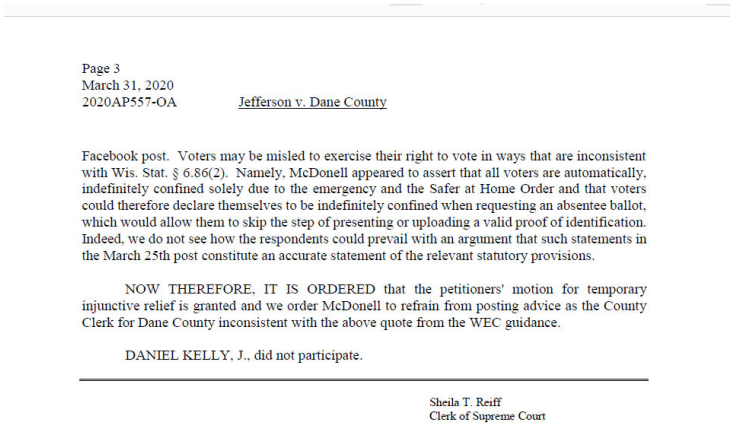
Wisconsin Elections During COVID-19



Page 3
March 31, 2020
2020AP557-OA Jefferson v. Dane County

Facebook post. Voters may be misled to exercise their right to vote in ways that are inconsistent with Wis. Stat. § 6.86(2). Namely, McDonell appeared to assert that all voters are automatically, indefinitely confined solely due to the emergency and the Safer at Home Order and that voters could therefore declare themselves to be indefinitely confined when requesting an absentee ballot, which would allow them to skip the step of presenting or uploading a valid proof of identification. Indeed, we do not see how the respondents could prevail with an argument that such statements in the March 25th post constitute an accurate statement of the relevant statutory provisions.

NOW THEREFORE, IT IS ORDERED that the petitioners' motion for temporary injunctive relief is granted and we order McDonell to refrain from posting advice as the County Clerk for Dane County inconsistent with the above quote from the WEC guidance.

DANIEL KELLY, J., did not participate.

Sheila T. Reiff
Clerk of Supreme Court

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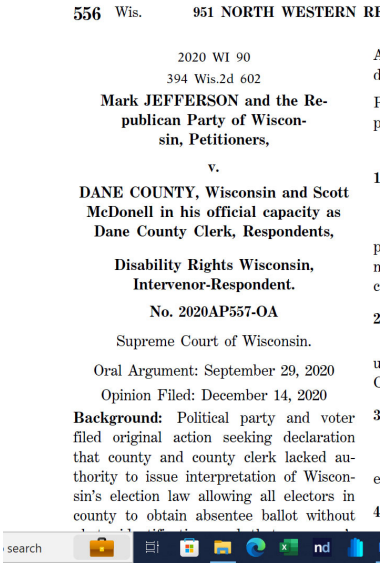


556 Wis. 951 NORTH WESTERN RI

2020 WI 90
394 Wis.2d 602

Mark JEFFERSON and the Republican Party of Wisconsin, Petitioners,

v.

DANE COUNTY, Wisconsin and Scott McDonell in his official capacity as Dane County Clerk, Respondents,

Disability Rights Wisconsin, Intervenor-Respondent.

No. 2020AP557-OA

Supreme Court of Wisconsin.

Oral Argument: September 29, 2020

Opinion Filed: December 14, 2020

Background: Political party and voter filed original action seeking declaration that county and county clerk lacked authority to issue interpretation of Wisconsin's election law allowing all electors in county to obtain absentee ballot without

search

Wisconsin Elections Litigation During COVID

Jefferson v. Dane County

- March 31, 2020: Wis S Ct enjoined advice on "indefinitely confined" voter exception due to COVID
- Sept. 2020: Merits argued
- Dec. 14, 2020: Decision issued
  - Indefinitely confined is based upon the individual assessment of voters
  - COVID-19 does not make all voters indefinitely confined

2020 WI 90, 394 Wis. 2d 602, 951 N.W.2d 556

11

QUESTIONS?

Lisa M. Lawless - Husch Blackwell LLP
Lisa.lawless@huschblackwell.com

12

Wisconsin Recounts PRE-COVID

Note all the people crammed into a small space

1

Recount Petition

- Any candidate can request a recount
- Petition due 3 business days after final canvass
- Specify which wards will be recounted
- Opposing candidate can request additional or all wards
- Free if margin is 0.25% or less

2

2

Recount Process

- WEC advises all candidates and counties involved
- Recount begins the second day after notice
- Can declare the start and then adjourn
- Candidates have right to participate

3

3

Recount Process

For each reporting unit (Town, Village, ward):

- Reconcile Poll Lists
- Review Absentee Ballots and Materials
- Reconcile Ballot Count
- Review Provisional Ballots
- Count the Votes
- Secure Original Materials
- Prepare New Canvass Statement

4

4

Absentee Ballots

Primary Source of Changes in Recounts

Step 1: Determine number of absentee voters from:

- Poll lists
- Absentee ballot certificate envelopes
- Inspectors Statement
- Absentee ballot log

5

5

Absentee Ballots

Primary Source of Changes in Recounts

Step 2: Review Absentee Ballots and Materials

- Examine written absentee applications
- Goal is to match each absentee voter with an application, or confirm the voter was in-person absentee
- No votes rejected if no application located
- All discrepancies noted

6

6

Absentee Ballots

Primary Source of Changes in Recounts

Step 3: Review Rejected Absentee Ballots

- Determine if rejection was proper
- Improperly rejected added to count pile
- Number of voters is increased for each
- Errors noted in minutes

7

7

Absentee Ballots

Primary Source of Changes in Recounts

Step 4: Examine Used Absentee Ballot Envelopes

- Voter name, signature and address
- Witness signature and address
- Wis. Stat. § 6.87(6d) – absentee ballot "may not be counted" if no witness address

8

8

Absentee Ballots

Primary Source of Changes in Recounts

Step 5: Draw Down for Improper Absentee Ballot Envelopes

- Mix up all absentee ballots
- Randomly draw out ballot for each invalid envelope
- High drama
- Completely random

9

9

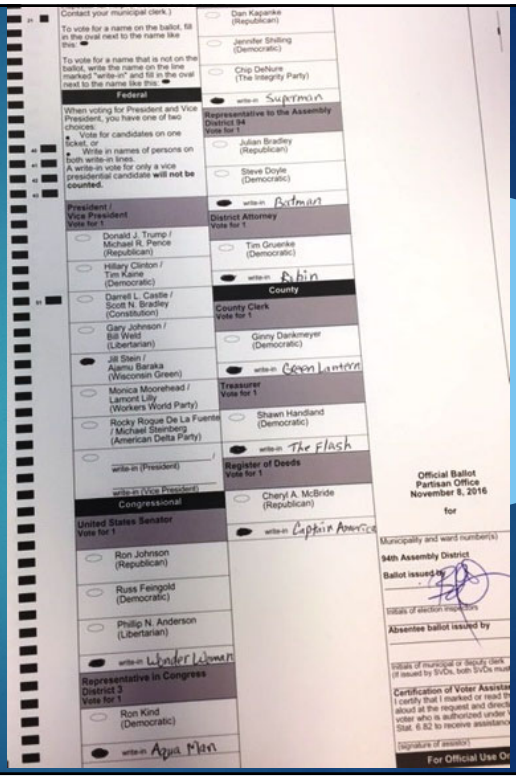
I kid you not, this is Democracy at work

10

10

Keep watch for the good write-ins.

Here is one serious Jill Stein voter



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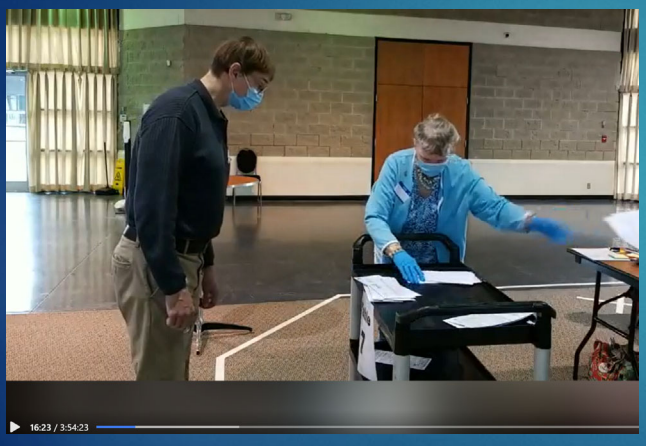
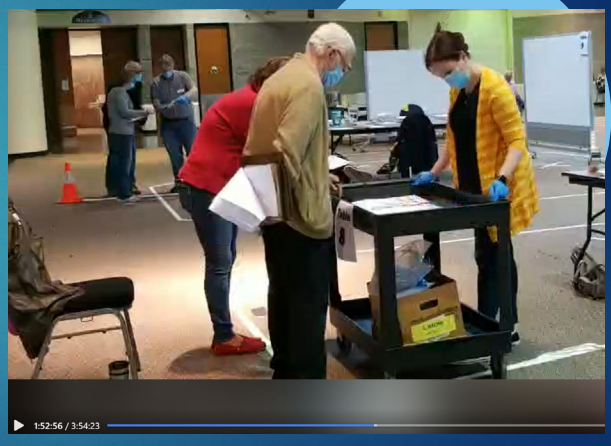
Wisconsin Recounts DURING COVID





12

April 2020 Election – Safer At Home

13

- Recount must be conducted publicly
- Candidates and the public must be able to witness all aspects of the recount
- Required careful planning and multiple safety precautions

13

April 2020 Election – Safer At Home

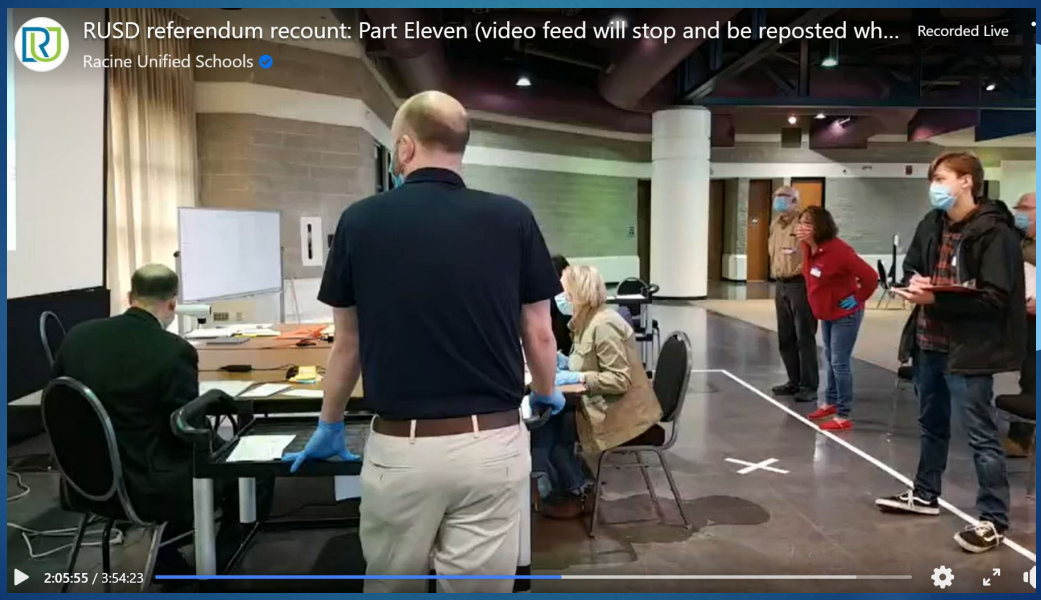
14

- Set up multiple tables in large space
- Taped off observation area to keep 6 feet between observers and officials
- Masks required for all, anyone handling ballots had to wear gloves
- Broadcast recount on Facebook Live to let public view proceedings
- Large screen and projector to review Absentee Ballots

14

April 2020 Election – Safer At Home

15



15

April 2020 Election – Safer At Home

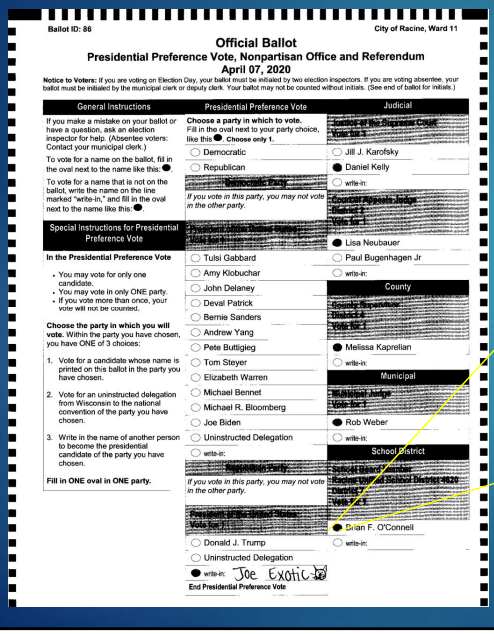
16

- Highlight was the number of voters who wrote-in "Tiger King" or "Joe Exotic" for various races

16

April 2020 Election – Safer At Home

17



Ballot ID: 86 — City of Racine, Ward 11

Official Ballot

Presidential Preference Vote, Nonpartisan Office and Referendum

April 07, 2020

Notice to Voters: If you are voting on Election Day, your ballot must be initialed by two election inspectors. If you are voting absentee, your ballot must be initialed by the municipal clerk or deputy clerk. Your ballot may not be counted without initials. (See end of ballot for initials.)

General Instructions

If you make a mistake on your ballot or have a question, ask an election inspector for help. (Absentee voters: Contact your municipal clerk.)

To vote for a name on the ballot, fill in the oval next to the name like this: ●.

To vote for a name that is not on the ballot, write the name on the line marked "write-in," and fill in the oval next to the name like this: ●.

Special Instructions for Presidential Preference Vote

In the Presidential Preference Vote

- You may vote for only one candidate.
- You may vote in only ONE party.
- If you vote more than once, your vote will not be counted.

Choose the party in which you will vote. Within the party you have chosen, you have ONE of 3 choices:

1. Vote for a candidate whose name is printed on this ballot in the party you have chosen.
2. Vote for an uninstructed delegation from Wisconsin to the national convention of the party you have chosen.
3. Write in the name of another person to become the presidential candidate of the party you have chosen.

Fill in ONE oval in ONE party.

Presidential Preference Vote

Choose a party in which to vote. Fill in the oval next to your party choice, like this ●. **Choose only 1.**

- ○ Democratic
- ○ Republican

If you vote in this party, you may not vote in the other party.

- ○ Tulsi Gabbard
- ○ Amy Klobuchar
- ○ John Delaney
- ○ Deval Patrick
- ○ Bernie Sanders
- ○ Andrew Yang
- ○ Pete Buttigieg
- ○ Tom Steyer
- ○ Elizabeth Warren
- ○ Michael Bennet
- ○ Michael R. Bloomberg
- ○ Joe Biden
- ○ Uninstructed Delegation
- ○ write-in:

If you vote in this party, you may not vote in the other party.

- ○ Donald J. Trump
- ○ Uninstructed Delegation
- ● write-in: Joe Exotic

End Presidential Preference Vote

Judicial

- ○ Jill J. Karofsky
- ● Daniel Kelly
- ○ write-in:

- ● Lisa Neubauer
- ○ Paul Bugenhagen Jr
- ○ write-in:

County

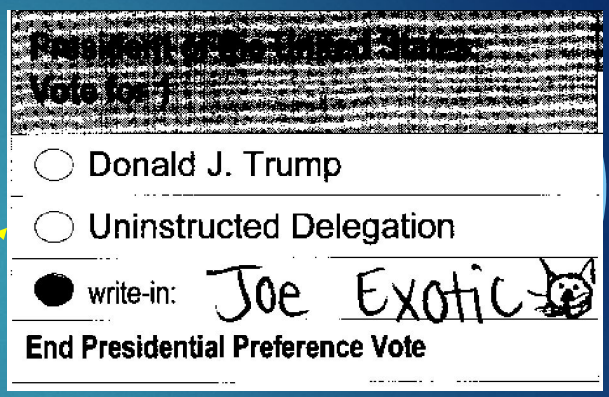
- ● Melissa Kaprelian
- ○ write-in:

Municipal

- ● Rob Weber
- ○ write-in:

School District

- ● Brian F. O'Connell
- ○ write-in:



Vote for 1

- ○ Donald J. Trump
- ○ Uninstructed Delegation
- ● write-in: Joe Exotic

End Presidential Preference Vote

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April 2020 Election – Safer At Home

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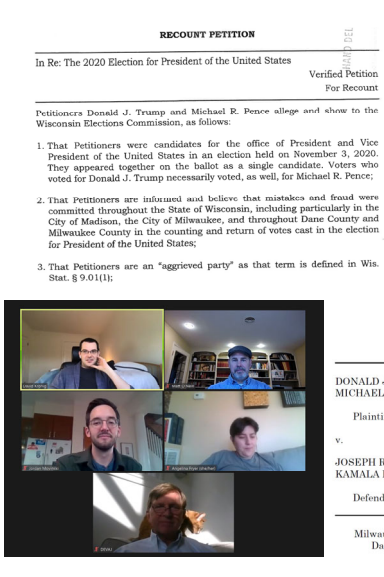
- Several observers during the recount came down with COVID
- The process was as efficient and as transparent as it could be.
- Ultimately the recount was upheld 7-0 by the Wisconsin Supreme Court. *Sewell v. Racine Unified School District*, 2022 WI 18

18

The Wisconsin Whirlwind Covid Recount



RECOUNT PETITION

In Re: The 2020 Election for President of the United States

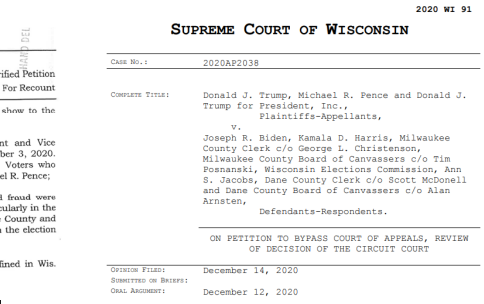
Verified Petition
For Recount

Petitioners Donald J. Trump and Michael R. Pence allege and show to the Wisconsin Elections Commission, as follows:

1. That Petitioners were candidates for the office of President and Vice President of the United States in an election held on November 3, 2020. They appeared together on the ballot as a single candidate. Voters who voted for Donald J. Trump necessarily voted, as well, for Michael R. Pence;

2. That Petitioners are informed and believe that mistakes and fraud were committed throughout the State of Wisconsin, including particularly in the City of Madison, the City of Milwaukee, and throughout Dane County and Milwaukee County in the counting and return of votes cast in the election for President of the United States;

3. That Petitioners are an "aggrieved party" as that term is defined in Wis. Stat. § 9.01(1);



2020 WI 91

SUPREME COURT OF WISCONSIN

CASE NO.: 2020AP2038

COMPLETE TITLE: Donald J. Trump, Michael R. Pence and Donald J. Trump for President, Inc., Plaintiffs-Appellants, v. Joseph R. Biden, Kamala D. Harris, Milwaukee County Clerk c/o George L. Christenson, Milwaukee County Board of Canvassers c/o Tim Posnanski, Wisconsin Elections Commission, Ann S. Jacobs, Dane County Clerk c/o Scott McDonell and Dane County Board of Canvassers c/o Alan Arnsten, Defendants-Respondents.

ON PETITION TO BYPASS COURT OF APPEALS, REVIEW OF DECISION OF THE CIRCUIT COURT

OPINION FILED: December 14, 2020
SUBMITTED ON BRIEFS:
ORAL ARGUMENT: December 12, 2020

STATE OF WISCONSIN
CIRCUIT COURT
MILWAUKEE COUNTY

DONALD J. TRUMP,
MICHAEL R. PENCE, et al.

Plaintiffs/Appellants,

v.

JOSEPH R. BIDEN,
KAMALA D. HARRIS, et al.

Defendants/Appellees,

Milwaukee County Case No.: 2020CV7092
Dane County Case No.: 2020CV2514

FINAL ORDER

IN THE
Supreme Court of the United States

DONALD J. TRUMP, ET AL., *Petitioners,*

v.

JOSEPH R. BIDEN, ET AL., *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

PETITION FOR A WRIT OF CERTIORARI

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The Wisconsin Whirlwind Covid Recount

Key Challenges by Trump Campaign

1. In-Person Absentee voters did not submit separate "written application" for absentee ballot
2. All "indefinitely confined" voters were suspect
3. Clerks adding witness address information was illegal
4. "Democracy in the Park" events in Madison violated absentee voting statutes

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The Wisconsin Whirlwind Covid Recount

Date		Event
Tues.	Nov. 3	Election Day
Tues.	Nov. 17	Last County certifies results – Biden wins by 20,427 votes
Wed.	Nov. 18	Petition for Recount of Dane and Milwaukee Counties
Thu.	Nov. 19	WEC orders recount to start Nov. 20
Fri.	Nov. 20	Recount starts in Dane and Milwaukee Counties
Thu.	Nov. 26	Thanksgiving Day – recount halted for one day
Fri.	Nov. 27	Milwaukee County recount finishes
Sun.	Nov. 29	Dane County recount finishes
Mon.	Nov. 30	WEC Chair certifies results of recount – Biden wins by 20,682 votes (a gain of 255 votes)

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The Wisconsin Whirlwind Covid Recount

Date		Event
Tues.	Dec. 1	9:30 am – Pres. Trump files Petition for Original Action in Wisconsin Supreme Court
		1:00 pm – Wisconsin Supreme Court orders respondents to file responses by 8:30 p.m.
		8:30 pm – Respondents file responses to OA-Petition
Thu.	Dec. 3	Wisconsin Supreme Court denies Trump OA-Petition
		Pres. Trump files Notices of Appeal under Wis. Stat. § 9.01(6)
		Chief Justice Roggensack consolidates appeals and assigns to Ret. Judge Steve Simanek
Fri.	Dec. 4	Judge Simanek orders recount materials impounded
		Judge Simanek holds scheduling conference and sets one-week schedule
Mon.	Dec. 7	Pres. Trump files 2 complaints, brief, proposed findings, and appendix
Wed.	Dec. 9	Defendants file 2 answers, briefs, joint proposed findings and joint appendix

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The Wisconsin Whirlwind Covid Recount

Date		Event
Fri.	Dec. 11	8:45 am – Hearing before Judge Simanek
		11:00 am - Judge Simanek issues decision from the bench
		11:30 am – Proposed Order filed
		12:30 pm – Judge Simanek enters final Order
		1:45 pm – Pres. Trump files Notice of Appeal and Petition for Bypass
		2:00 pm - Defendants stipulate to immediate bypass to Wisconsin Supreme Court
		4:15 pm – Supreme Court orders Defendants to file brief by 10:00 p.m.
		10:00 pm – Response briefs filed
Sat.	Dec. 12	Noon - Oral Argument before Wisconsin Supreme Court
Mon.	Dec. 14	11:00 am – Wisconsin Supreme Court issues 4-3 decision upholding recount
		Noon - Biden/Harris slate of Electors meets and casts electoral ballots

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COVID ORAL ARGUMENT

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The Wisconsin Whirlwind Covid Recount

Wisconsin Supreme Court Decision

1. 7-0: The challenge to "indefinitely confined" voters had no evidence to support it
2. 4-3: The remaining challenges were rejected on equitable laches grounds, as the challenged practices were known and could have been challenged before the election
3. Hagedorn/A. Bradley: remaining challenges would fail on the merits
4. Roggensack/Ziegler/R. Bradley: Witness address issue and Democracy in the Park were wrong – did not spell out their proposed remedy

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The Wisconsin Whirlwind Covid Recount

Date		Event
Tue.	Dec. 29	Trump files Petition for Writ of Certiorari
Mon.	Jan. 4	SCOTUS puts Petition on Docket; response due 2/3/21
Wed.	Jan. 6	Congress certifies Electoral College results

- Biden and other parties waived their right to respond
- Petition denied February 22, 2021

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Josh Kaul
Wisconsin Attorney General

P.O. Box 7857
Madison, WI 53707-7857

FOR IMMEDIATE RELEASE

March 16, 2020

Office of Open Government Advisory: Coronavirus Disease 2019 (COVID-19) and Open Meetings

MADISON, Wis. – The Wisconsin Department of Justice's (DOJ) Office of Open Government (OOG) has prepared the following advisory in response to inquiries as to the applicability of the Wisconsin's open meetings law, Wis. Stat. §§ 19.81 to 19.98, in light of current public health concerns regarding COVID-19. This advisory is provided pursuant to Wis. Stat. § 19.98.

As explained below, governmental bodies typically can meet their open meetings obligations, while practicing social distancing to help protect public health, by conducting meetings via telephone conference calls if the public is provided with an effective way to monitor such calls (such as public distribution, at least 24 hours in advance, of dial-in information for a conference call).

The open meetings law states: "[I]t is declared to be the policy of this state that the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business." Wis. Stat. § 19.81(1). To that end, the law requires that "all meetings of all state and local governmental bodies shall be publicly held in places reasonably accessible to members of the public and shall be open to all citizens at all times unless otherwise expressly provided by law." Wis. Stat. § 19.81(2). A meeting must be preceded by notice providing the time, date, place, and subject matter of the meeting, generally, at least 24 hours before it begins. Wis. Stat. § 19.84.

The open meetings law "does not require that all meetings be held in publicly owned places but rather in places 'reasonably accessible to members of the public.'" 69 Op. Att'y Gen. 143, 144 (1980) (quoting 47 Op. Att'y Gen. 126 (1978)). As such, DOJ's longstanding advice is that a telephone conference call can be an acceptable method of convening a meeting of a governmental body. *Id.* at 146. More recently, DOJ guidance deemed video conference calls acceptable as well. Wis. Dep't of Justice,

Wisconsin Open Meetings Law Compliance Guide 11 (May 2019), https://www.doj.state.wi.us/sites/default/files/office-open-government/Resources/OML-GUIDE.pdf.

When an open meeting is held by teleconference or video conference, the public must have a means of monitoring the meeting. DOJ concludes that, under the present circumstances, a governmental body will typically be able to meet this obligation by providing the public with information (in accordance with notice requirements) for joining the meeting remotely, even if there is no central location at which the public can convene for the meeting. A governmental body conducting a meeting remotely should be mindful of the possibility that it may be particularly burdensome or even infeasible for one or more individuals who would like to observe a meeting to do so remotely—for example, for people without telephone or internet access or who are deaf or hard of hearing—and appropriate accommodations should be made to facilitate reasonable access to the meeting for such individuals.

To be clear, providing only remote access to an open meeting is not always permissible, as past DOJ guidance shows. Where a complex plan, drawing, or chart is needed for display or the demeanor of a witness is significant, a meeting held by telephone conference likely would not be "reasonably accessible" to the public because important aspects of the discussion or deliberation would not be communicated to the public. *See* 69 Op. Att'y Gen. at 145. Further, the type of access that constitutes reasonable access in the present circumstances, in which health officials are encouraging social distancing (including avoiding large public gatherings) in order to mitigate the impact of COVID-19, may be different from the type of access required in other circumstances. Ultimately, whether a meeting is "reasonably accessible" is a factual question that must be determined on a case-by-case basis. *Id.*

If you have questions or concerns regarding the application of the open meetings law, please contact the Office of Open Government at (608) 267-2220.

Josh Kaul
Wisconsin Attorney General

P.O. Box 7857
Madison, WI 53707-7857

NEWS FOR IMMEDIATE RELEASE

March 20, 2020

Office of Open Government Advisory: Additional Information Regarding Coronavirus Disease 2019 (COVID-19) and Open Meetings

MADISON, Wis. – The Wisconsin Department of Justice's (DOJ) Office of Open Government (OOG) continues to prepare additional information in response to inquiries as to the applicability of the Wisconsin's open meetings law, Wis. Stat. §§ 19.81 to 19.98, in light of current public health concerns regarding COVID-19. This advisory is provided pursuant to Wis. Stat. § 19.98.

Conducting open meetings remotely can pose a number of technological and practical issues that governmental bodies should consider in advance, including, among other things, the following:

- Governmental bodies must ensure that they follow the notice requirements of Wis. Stat. § 19.84 and such notice should inform the public that the meeting will be held remotely and provide all information necessary for the public to monitor the meeting.
- Notices should provide instructions for how the public may access the remote meeting, whether it is to be held via telephone conference call or video conference call. This includes providing the telephone number, video conference link, and any necessary passcodes or other login information.
- As DOJ's Office of Open Government advised in its March 17, 2020 advisory, a governmental body conducting a meeting remotely should be mindful of the possibility that it may be particularly burdensome or even infeasible for one or more individuals who would like to observe a meeting to do so remotely—for example, for people without telephone or internet access or who are deaf or

DOJ Communications Office DOJCommunications@doj.state.wi.us (608) 266-1220

hard of hearing—and appropriate accommodations should be made to facilitate reasonable access to the meeting for such individuals.

- When conducting a videoconference or internet-based meeting, the governmental body should strongly consider providing the public with an alternative telephone dial-in option for observing such a meeting so that lack of internet access is not a barrier to observing the meeting.
- At the beginning of each meeting conducted remotely, the chair of the governmental body should encourage all body members to identify themselves before they begin speaking and not to speak over one another. This will help all those listening to the meeting better understand who is speaking.
- When possible, a governmental body may wish to consider recording the meeting and posting it on its website as soon as practicable after the meeting concludes.
- As a bottom line, governmental bodies meeting remotely can and should consider steps that ensure that their meetings remain open and accessible to the public.

If you have questions or concerns regarding the application of the open meetings law, please contact the Office of Open Government at (608) 267-2220.

See also:
March 17, 2020 – Office of Open Government Advisory: Coronavirus Disease 2019 (COVID-19) and Open Meetings

DOJ Communications Office DOJCommunications@doj.state.wi.us (608) 266-1220

Dear Jenni: The League of Wisconsin Municipalities requests that Governor Evers consider issuing an executive order providing local governmental bodies with flexibility for complying with the open meetings law during the COVID-19 emergency. We have received many questions from our members about the ability of municipal governing bodies to dissuade the public from attending otherwise open meetings and/or use technology to conduct virtual meetings during the health emergency. We urge the Governor to issue an executive order relaxing certain aspects of the state's open meetings law during the COVID-19 health emergency, similar to what the Massachusetts Governor issued late last week. The Massachusetts' order allows governmental bodies to conduct virtual meetings or to post recorded videos or copies of meeting transcripts on municipal websites as soon as practicable after each meeting, instead of requiring that meetings be held in a public place that is open and physically accessible to the public. More information is here: https://www.mma.org/gov-signs-order-suspending-parts-of-open-meeting-law-to-enable-local-decision-making-during-covid-19-emergency/.

I've pasted below the questions and comments the League attorneys have written on this issue. We urge the Governor to take action as quickly as possible. Thanks for considering our request.

How does the Open Meetings Law apply in a pandemic situation created by a highly-contagious virus? Wisconsin's Open Meetings Law (OML), in conjunction with the COVID-19 pandemic, puts governmental bodies in a uniquely difficult situation in terms of trying to comply with public health advisories to practice "social distancing" while also trying to ensure compliance with OML requirements. Wisconsin Stat. § 19.83(1) requires that all meetings of governmental bodies be held in open session. Wisconsin Stat. § 19.82(3) defines "open session" as "a meeting which is held in a place reasonably accessible to members of the public and open to all citizens at all times."

Due to public health advisories regarding COVID-19, governmental bodies are concerned about holding meetings where large members of the public may be in attendance. There is also a concern about vulnerable governmental body members being required to convene physically to conduct essential business, particularly business required to address the current public health emergency. Additionally, some governmental bodies may have the capabilities to convene electronically and live broadcast their meetings, but there are numerous governmental bodies that will not have such capabilities. In light of these unique challenges, below are the League of Wisconsin Municipalities' suggestions for the Governor to consider as part of an order on open meetings in response to this emergency situation, which are based on the approach recently taken by Massachusetts.

- A governmental body, as defined in Wis. Stat. § 19.82(1), is hereby relieved from the requirements of Wis. Stat. §§ 19.82(3) and 19.83(1) that it conduct its meetings in a place that is reasonably accessible to members of the public and open to all citizens at all times, provided that the governmental body makes provisions to ensure public access to the meeting for members of the public through adequate, alternative means.

- Adequate, alternative means of public access shall mean measures that provide transparency and permit timely and effective public access to the meeting of the governmental body. Such means may include, without limitation, providing public access through telephone, internet, or satellite-enabled audio or video conferencing or any other technology that enables the public to clearly follow the governmental body's meeting while such meeting is occurring.
- Where allowing for active, real-time participation by members of the public is a specific requirement of a general or special law or regulation, or a local ordinance or by-law, pursuant to which the meeting is conducted, any alternative means of public access must provide for such participation.
- A governmental body that for reasons of economic hardship, and despite best efforts, is unable to provide alternative means of public access that will enable the public to follow the governmental body's meeting in real time may instead post on its governmental website a full and complete transcript, recording, or other comprehensive record of the meeting as soon as practicable upon the meeting's conclusion. This paragraph shall not apply to meetings that are conducted pursuant to a general or special law or regulation, or a local ordinance or by-law, that requires allowance for active participation by members of the public.
- A public body must offer its selected alternative means of access to its meetings without subscription, toll, or similar charge to the public.
- These changes should be made effective immediately and should remain in effect until rescinded or until the State of Emergency in Wisconsin is terminated, whichever happens first.

****

Curt Witynski, J.D.
Deputy Executive Director
League of Wisconsin Municipalities
office: (608) 267-3294
cell: (608) 354-3003
www.lwm-info.org

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Curt Witynski, J.D.
Deputy Executive Director
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SJC-13284

LOUISE BARRON & others[1] vs. DANIEL L. KOLENDA[2] & another.[3]

Worcester. November 2, 2022. – March 7, 2023.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, & Wendlandt, JJ.

Open Meeting Law. Municipal Corporations, Open meetings, Selectmen, Governmental immunity. Constitutional Law, Right to assemble, Right to petition government, Freedom of speech and press. Governmental Immunity. Massachusetts Civil Rights Act. Civil Rights, Availability of remedy, Immunity of public official. Declaratory Relief.

Civil action commenced in the Superior Court Department on April 3, 2020.

The case was heard by Shannon Frison, J., on a motion for judgment on the pleadings.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Ginny Sinkel Kremer for the plaintiffs.
John J. Davis for the defendants.
The following submitted briefs for amici curiae:

[1] Jack Barron and Arthur St. Andre.

[2] Individually and as a member of the board of selectmen of Southborough.

[3] Town of Southborough.

John Foskett for Massachusetts Association of School Committees.

Ruth A. Bourquin for American Civil Liberties Union of Massachusetts, Inc.

Maura E. O'Keefe, Town Counsel, & Rosemary Crowley for Massachusetts Municipal Lawyers Association.

Frank J. Bailey, Selena Fitanides, & John C. La Liberte for PioneerLegal, LLC.

KAFKER, J. After objecting to open meeting law violations and other municipal actions in a public comment session at a meeting of the board of selectmen of Southborough (board), the plaintiff Louise Barron was accused of violating the board's "public participation at public meetings" policy (public comment policy or civility code) and eventually threatened with physical removal from the meeting. Thereafter, she and two other plaintiffs brought State constitutional challenges to the policy, claiming in particular that she had exercised her constitutionally protected right under art. 19 of the Massachusetts Declaration of Rights "to assemble, speak in a peaceable manner, and petition her town leaders for redress."

In the plaintiffs' request for declaratory relief, seeking to have the public comment policy declared unconstitutional, they also used terminology associated with free speech claims brought under art. 16 of the Massachusetts Declaration of Rights, as amended by art. 77 of the Amendments to the Constitution, and the First Amendment to the United States Constitution, although they voluntarily withdrew their First

Amendment and other Federal claims, eliminating the Federal constitutional basis that had justified removal of the case from State to Federal court. Finally, Barron claims that the threat to remove her from the meeting for exercising her State constitutional rights violated the Massachusetts Civil Rights Act (MCRA), G. L. c. 12, §§ 11H-11I.

For the reasons set forth infra, we conclude that the public comment policy of the town of Southborough (town) violates rights protected by art. 19 and, to the extent it is argued, art. 16. Under both arts. 19 and 16, such civility restraints on the content of speech at a public comment session in a public meeting are forbidden. Although civility, of course, is to be encouraged, it cannot be required regarding the content of what may be said in a public comment session of a governmental meeting without violating both provisions of the Massachusetts Declaration of Rights, which provide for a robust protection of public criticism of governmental action and officials. What can be required is that the public comment session be conducted in an "orderly and peaceable" manner, including designating when public comment shall be allowed in the governmental meeting, the time limits for each person speaking, and rules preventing speakers from disrupting others, and removing those speakers if they do. We have concluded that such time, place, and manner restrictions do not violate either

the right to assembly under art. 19 or the right to free speech under art. 16. See Desrosiers v. Governor, 486 Mass. 369, 390-391 (2020), cert. denied, 142 S. Ct. 83 (2021) (permitting time, place, and manner restrictions under art. 19); Mendoza v. Licensing Bd. of Fall River, 444 Mass. 188, 197-198 (2005) (discussing time, place, and manner restrictions under art. 16).

Furthermore, when Barron alleged that the chair threatened to have her physically removed from a public comment session of a public meeting after she criticized town officials about undisputed violations of the open meeting laws, she properly alleged that he threatened to interfere with her exercise of State constitutional rights protected by arts. 16 and 19 in violation of the MCRA. There is also no qualified immunity, as there is a clearly established State constitutional right under arts. 16 and 19 to object (and even to do so vigorously) to the violation of the law by government officials in a public comment session of a public meeting. We therefore reverse the Superior Court judgment entered in favor of board member Daniel L. Kolenda. We also direct the Superior Court to enter a judgment declaring the town's public comment policy unconstitutional in violation of arts. 19 and 16.[4]

[4] We acknowledge the amicus briefs submitted by the Massachusetts Association of School Committees; American Civil Liberties Union of Massachusetts, Inc.; Massachusetts Municipal Lawyers Association; and PioneerLegal, LLC.

Background. 1. Public meeting. We draw the facts from the plaintiffs' complaint, while also considering the board's public comment policy and the video recording of the board's December 4, 2018 meeting, both of which were included in the record and considered by the judge below. See Mullins v. Corcoran, 488 Mass. 275, 281 (2021), quoting Schaer v. Brandeis Univ., 432 Mass. 474, 477 (2000) ("In deciding [a motion for judgment on the pleadings], all facts pleaded by the nonmoving party must be accepted as true. . . . We also may rely on 'matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint'"); Rosenberg v. JPMorgan Chase & Co., 487 Mass. 403, 408 (2021) (in reviewing motion to dismiss, we may consider extrinsic documents plaintiff relied on in framing complaint).

Barron is a town resident and a longtime participant in local government. The board consists of five elected members. Kolenda was a longtime member of the board. The board is subject to "the Massachusetts open meeting law, G. L. c. 30A, §§ 18 and 20 (a), which generally requires public bodies to make their meetings, including 'deliberations,' open to the public." Boelter v. Selectmen of Wayland, 479 Mass. 233, 234 (2018). The board's public comment policy outlines the public comment portion of its meetings where town residents may address the board.[5] In 2018, the Attorney General determined that the board

had committed dozens of open meeting law violations and ordered each member of the board to attend in-person open meeting law training.

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[5] The public comment policy states in full:

"The [board of selectmen] recognizes the importance of active public participation at all public meetings, at the discretion of the [c]hair, on items on the official agenda as well as items not on the official agenda. All comments from the public should be directed to or through the [c]hair once the speaker is recognized, and all parties (including members of the presiding [b]oard) act in a professional and courteous manner when either addressing the [b]oard, or in responding to the public. Once recognized by the [c]hair, all persons addressing the [b]oard shall state their name and address prior to speaking. It is the role of the [c]hair to set time limitations and maintain order during public meetings, as it is important that the [b]oard allow themselves enough time to conduct their official town business.

"If included on the meeting agenda by the [c]hair, '[p]ublic [c]omment' is a time when town residents can bring matters before the [b]oard that are not on the official agenda. Comments should be short and to the point, with the [c]hair ultimately responsible to control the time available to individual speakers. Except in unusual circumstances, any matter presented under '[p]ublic [c]omment' will not be debated or acted upon by the [b]oard at the time it is presented.

"All remarks and dialogue in public meetings must be respectful and courteous, free of rude, personal or slanderous remarks. Inappropriate language and/or shouting will not be tolerated. Furthermore, no person may offer comment without permission of the [c]hair, and all persons shall, at the request of the [c]hair, be silent. No person shall disrupt the proceedings of a meeting.

"Finally, while it true that State law provides that the [c]hair may order a disruptive person to withdraw from a meeting (and, if the person does not withdraw, the [c]hair may authorize a constable or other officer to remove the person from the meeting), it is the position of the [board] that no meeting should ever come to that point."

Barron attended the board's meeting on December 4, 2018, where Kolenda was acting as the chair. The board members discussed a number of topics, including the town budget, which, if approved, would result in increased real estate taxes for town residents. The board also discussed the possibility of elevating the town administrator to the position of town manager. The board also briefly addressed the open meeting law violations. During the discussion on this point, Kolenda stated that the board is "a group of volunteers," and further characterized its members as "public servants" who "do their best."

After approximately two and one-half hours of business, Kolenda announced that the board would be moving to public comment. Kolenda then stated, paraphrasing from the public comment policy:

> "And before we go to public comment, just a reminder for anyone who wants to make public comment. It's a time when town residents can bring matters before the board of selectmen that are not on the official agenda. We do have these posted for all boards and committees. Comments should be short and to the point and remarks must be respectful and courteous, free of rude, personal, or slanderous remarks, and the guidelines go on for a couple of pages, but if anyone has any questions on that feel free to ask us. If not, public comment please."

Barron then approached the podium holding a sign that stated "Stop Spending" on one side and "Stop Breaking Open Meeting Law" on the other. Barron began her comments by critiquing the proposed budget increases, opining that the town "ha[d] been

spending like drunken sailors" and was "in trouble." She argued for a moratorium on hiring and inquired about the benefits of hiring a town manager as opposed to a town administrator. Kolenda responded that questions would not be answered as the board was "not going to have a back and forth discussion during public comment." Barron began moving to her next topic of concern but another board member responded to her question, indicating that the issue of a town manager would be considered by a committee and "ha[d] nothing to do with [the] upcoming town meeting."

After the board member's response, Barron began to critique the board for its open meeting law violations. Barron and Kolenda then had the following exchange:

> Barron: "And the next thing I want to say is you said that you were just merely volunteers, and I appreciate that, but you've still broken the law with open meeting law, and that is not the best you can do. And . . . when you say that . . . this is the best we could do, I know it's not easy to be volunteers in town but breaking the law is breaking the law and --"
>
> Kolenda: "So ma'am if you want to slander town officials who are doing their very best --"
>
> Barron: "I'm not slandering."
>
> Kolenda: "-- then then we're gonna go ahead and stop the public comment session now and go into recess."

When Kolenda said the word "now," Barron interjected and, simultaneously to Kolenda saying, "go into recess," Barron stated, "Look, you need to stop being a Hitler." Barron

continued: "You're a Hitler. I can say what I want." After Barron's second reference to Hitler, Kolenda said: "Alright, we are moving into recess. Thank you."

The audio recording on the public broadcast then stopped. A message on the screen stated, "The Board of Selectmen is taking a brief recess and will return shortly," but the video recording continued to show the board members for approximately thirteen seconds.

Kolenda turned off his microphone, stood up, and began pointing in Barron's direction, repeatedly yelling at her, "You're disgusting!" Kolenda told Barron that he would have her "escorted out" of the meeting if she did not leave. Concerned that Kolenda would follow through with his threat, Barron left the meeting.

2. Procedural history. In April 2020, Barron, her husband, and a third resident of the town filed a complaint in the Superior Court alleging both Federal and State causes of action relating to the board's December 4, 2018 meeting. The defendants removed the case to Federal court, but it was remanded to the Superior Court after the plaintiffs withdrew the Federal claims. The plaintiffs' amended complaint sought a judgment declaring that a portion of the policy was unconstitutional under the Massachusetts Declaration of Rights to the extent that the policy disallows criticism of the board

members and their decisions. They also sought relief against Kolenda in his individual capacity under the MCRA, G. L. c. 12, §§ 11H-11I, for violation of art. 19.[6] Article 19 is the only provision of the Declaration of Rights that is expressly referenced in the complaint, although the request for declaratory relief is more open-ended and uses the terminology associated with free speech claims.

Prior to discovery, the defendants filed a motion for judgment on the pleadings. The motion was allowed as to all counts, and the plaintiffs appealed. We transferred the case here on our own motion.

Discussion. In the instant case, we are confronted with a State, not a Federal, constitutional challenge. It is also a challenge expressly premised on art. 19, a provision that has not been the focus of much attention in recent case law, despite its illustrious past. Notably, this provision has served an important, independent purpose for much of the history of

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[6] The plaintiffs also brought an MCRA claim against Kolenda in his official capacity; MCRA claims against two other board members in their official and individual capacities; and claims against the board members for violating the open meeting law. Barron individually brought several common-law claims against Kolenda. The judge dismissed all of Barron's and the plaintiffs' claims. On appeal, the plaintiffs challenge only the dismissals of their claim for a declaratory judgment and the MCRA claim against Kolenda. The plaintiffs do not argue against the dismissal of the MCRA claim against Kolenda in his official capacity. Consequently, we do not review the dismissal of the other claims. See Lyons v. Secretary of the Commonwealth, 490 Mass. 560, 593 n.42 (2022) (claims not argued in brief are waived).

Massachusetts government, as there was no free speech provision in the original Declaration of Rights. In fact, such a provision was not added to the Massachusetts Constitution until 1948, when it was amended to include express free speech protections. See art. 16 of the Massachusetts Declaration of Rights, as amended by art. 77 of the Amendments to the Constitution.

As the text of art. 19, which was drafted by John Adams with some assistance from his cousin Samuel Adams,[7] along with its illuminating constitutional history, is directly applicable and dispositive of the claims here, we focus on art. 19 first. Because the request for declaratory relief is more open-ended and uses the terminology associated with art. 16 and First Amendment claims, we address art. 16 as well.

1. Standard of review. "We review the allowance of a motion for judgment on the pleadings de novo." Mullins, 488 Mass. at 281. We accept as true "all facts pleaded by the nonmoving party" and "draw every reasonable inference in [that party's] favor" to determine whether the "factual allegations plausibly suggest[]" that the nonmoving party is entitled to relief. Id., quoting UBS Fin. Servs., Inc. v. Aliberti, 483 Mass. 396, 405 (2019). This standard applies to our review of

[7] The Adams cousins were two of the three members of the subcommittee at the constitutional convention charged with drafting the Massachusetts Constitution. See S.E. Morison, History of the Constitution of Massachusetts 20 (1917).

the allowance of the motion for judgment on the pleadings with regard to the claim of a violation of the MCRA. Our review of the request for a declaratory judgment, however, differs. The plaintiffs seek a declaration that the town's public comment policy is unconstitutional. We review this as a facial challenge based on the uncontested language of the policy itself. This presents a question of law for the court requiring de novo review. See Commonwealth v. McGhee, 472 Mass. 405, 412 (2015) (facial challenge to statute "present[s] questions of law that we review de novo").

2. Article 19. The text of art. 19 provides: "The people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good; give instructions to their representatives, and to request of the legislative body, by the way of addresses, petitions, or remonstrances, redress of the wrongs done them, and of the grievances they suffer." As written, this provision expressly envisions a politically active and engaged, even aggrieved and angry, populace.

The text of art. 19 thus encompasses the plaintiffs' complaint here. Barron assembled with others at the public comment session of the board meeting to request redress of the wrongs they claimed had been done to them and the grievances they claimed to have suffered by town official actions, including the town's noncompliance with the open meeting law.

The text of this provision has also not been interpreted to be limited to State representatives or legislative bodies, despite some wording to that effect, but rather has been interpreted to be directed at the people's interaction with government officials more generally, including in particular town officials. See Kobrin v. Gastfriend, 443 Mass. 327, 333 (2005) (statutory right to petition is coextensive with art. 19 and applies where "a party seeks some redress from the government"); MacKeen v. Canton, 379 Mass. 514, 521-522 (1980) (evaluating whether town meeting procedures were consistent with art. 19); Fuller v. Mayor of Medford, 224 Mass. 176, 178 (1916) (right to assemble under art. 19 "enable[s] the [town] voters to have full and free discussion and consultation upon the merits of candidates for public office and of measures proposed in the public interests").

The provision also has a distinct, identifiable history and a close connection to public participation in town government that is uniquely informative in this case. As more fully explained infra, art. 19 reflects the lessons and the spirit of the American Revolution. The assembly provision arose out of fierce opposition to governmental authority, and it was designed to protect such opposition, even if it was rude, personal, and disrespectful to public figures, as the colonists eventually were to the king and his representatives in Massachusetts.

Our interpretation of the text, history, and purpose of art. 19 is further informed by the words and actions of Samuel and John Adams, who not only theorized and commented upon the right, but were historic actors well versed in its application during the revolutionary period, particularly in the towns. Both Adams cousins emphasized in their correspondence and their actions the importance of the right to assemble. See Bowie, The Constitutional Right of Self-Government, 130 Yale L.J. 1652, 1727-1728 (2021). Samuel Adams wielded it to great effect in his attempt to "procure a Redress of Grievances" when the British governor of the colony attempted to exercise control over assemblies after the Boston Massacre. Id. at 1680, quoting Report of the Committee to Prepare an Answer to Thomas Hutchinson's Speech (July 31, 1770), in 47 Journals of the House of Representatives of Massachusetts 1770-1771, at 63, 69 (1978).

More philosophically, John Adams explained that the right of assembly was a most important principle and institution of self-government, as it allowed "[every] Man, high and low . . . [to speak his senti]ments of public Affairs." Bowie, supra at 1708, quoting Letter from John Adams to Edmé Jacques Genet (May 28, 1780), in 9 Papers of John Adams 350, 353 (G.L. Lint et al. eds., 1996). Town inhabitants, he wrote, "are invested with . . . the right to assemble, whenever they are summoned by their selectmen, in their town halls, there to deliberate upon the

public affairs of the town." Letter from John Adams to the Abbé de Mably (1782), in 5 Works of John Adams 492, 495 (C.F. Adams ed. 1851). "The consequences" of the right of assembly, in Adams's words, were that "the inhabitants . . . acquired . . . the habit of discussing, of deliberating, and of judging of public affairs," and thus, "it was in these assemblies of towns . . . that the sentiments of the people were formed . . . and their resolutions were taken from the beginning to the end of the disputes . . . with Great Britain." Id. Alexis de Tocqueville made a similar point in Democracy in America: "Town-meetings are to liberty what primary schools are to science; they bring it within the people's reach, they teach men how to use and how to enjoy it." 1 A. de Tocqueville, Democracy in America 55 (H. Reeve trans. 1862).

Our own case law interpreting art. 19 confirms Adams's insights regarding the critical role of the right of assembly in the towns in cultivating the spirit and practice of self-government. As Justice Rugg wrote in Wheelock v. Lowell, 196 Mass. 220, 227 (1907):

> "It is hard to overestimate the historic significance and patriotic influence of the public meetings held in all the towns of Massachusetts before and during the Revolution. No small part of the capacity for honest and efficient local government manifested by the people of this Commonwealth has been due to the training of citizens in the form of the town meeting. The jealous care to preserve the means for exercising the right of assembling for discussion of public topics . . . demonstrates that a vital

> appreciation of the importance of the opportunity to exercise the right still survives."

From the beginning, our cases have also emphasized that "the fullest and freest discussion" seems to be "sanctioned and encouraged by the admirable passage in the constitution," Commonwealth v. Porter, 1 Gray 476, 478, 480 (1854), so long as the right is exercised in "an orderly and peaceable manner," id. at 478. In fact, the drafters of art. 19 tracked the language of the Pennsylvania Constitution but with the specific addition of the clause providing that such assembly shall be done "in an orderly and peaceable manner." Bowie, 130 Yale L.J. at 1707.

Further clarifying the type of limitations that ensure an "orderly and peaceable" assembly, our more recent case law has drawn on well-understood First Amendment principles and provided for reasonable time, place, and manner restrictions. As we stated:

> "States may impose reasonable restrictions on the time, place, or manner of protected speech and assembly 'provided the restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information."'"

Desrosiers, 486 Mass. at 390-391, quoting Boston v. Back Bay Cultural Ass'n, 418 Mass. 175, 178-179 (1994).

3. The application of art. 19 to the civility code. The question then becomes whether the enforcement of the town's civility code passes muster under art. 19. The code provides:

> "All remarks and dialogue in public meetings must be respectful and courteous, free of rude, personal, or slanderous remarks. Inappropriate language and/or shouting will not be tolerated. Furthermore, no person may offer comment without permission of the [c]hair, and all persons shall, at the request of the [c]hair, be silent. No person shall disrupt the proceedings of a meeting."

As explained supra, the text, history, and case law surrounding art. 19 provide for the "fullest and freest" discussion of public matters, including protection of fierce criticism of governmental action and actors, so long as that criticism is done in a peaceable and orderly manner and is consistent with time, place, and manner restrictions. Porter, 1 Gray at 478. See Desrosiers, 486 Mass. at 390-391. "Peaceable and orderly" is not the same as "respectful and courteous." There was nothing respectful or courteous about the public assemblies of the revolutionary period. There was also much that was rude and personal, especially when it was directed at the representatives of the king and the king himself.[8] See Bowie, 130 Yale L.J. at 1677 ("in London, a columnist called Boston's town meetings a 'declaration of war' and criticized

[8] The policy's prohibition on slander raises a different set of questions that we need not resolve here. In Commonwealth v. Surridge, 265 Mass. 425, 427 (1929), this court expressly carved out slander from protection under art. 19. However, at least under First Amendment principles, slander directed at public officials requires actual malice. See Edwards v. Commonwealth, 477 Mass. 254, 263 (2017), S.C., 488 Mass. 555 (2021), citing New York Times Co. v. Sullivan, 376 U.S. 254, 279-280 (1964).

Boston's leaders for 'working up the populace to such a frenzy of rage'").

Here, the town expressly provided a place for public comment: the meeting of the board. The town also set the time, after the conclusion of the regular meeting, as was the town's right. Barron presented her grievances at the established time and place.[9] The town nonetheless then sought to control the content of the public comment, which directly implicates and restricts the exercise of the art. 19 right of the people to request "redress of the wrongs done them, and of the grievances they suffer."[10] The content sought to be prohibited -- discourteous, rude, disrespectful, or personal speech about

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[9] A manner regulation restricts the way in which a speaker communicates, i.e., the medium of communication or aspects of that medium like the size of signs or the volume of audio. See Regan v. Time, Inc., 468 U.S. 641, 656 (1984) (plurality opinion) (manner regulations include "size and color limitations" on photographs, "decibel level restrictions," and "size and height limitations on outdoor signs"); Back Bay Cultural Ass'n, 418 Mass. at 183 (ban on "forms of entertainment" that "create the type of noise the city legitimately seeks to eliminate" would be permissible). We are not presented with disputed manner restrictions in the instant case.

[10] This is not a case in which the public meeting was limited to a particular item or items. Although that would be content based, in order to function efficiently, towns must be able to hold public meetings limited to a particular subject without violating art. 19, so long as the town provides other opportunities to exercise this right, as it did in the instant case. Cf. Madison Joint Sch. Dist. No. 8 v. Wisconsin Employment Relations Comm'n, 429 U.S. 167, 175 n.8 (1976) ("Plainly, public bodies may confine their meetings to specified subject matter and may hold nonpublic sessions to transact business").

government officials and governmental actions -- is clearly protected by art. 19, and thus the prohibition is impermissible. In sum, the town's civility code is contradicted by the letter and purpose of art. 19.[11]

4. Article 16. Assuming that the request for declaratory relief also includes a claim based on art. 16, as well as art. 19, we also conclude that art. 16 is violated.

In their request for declaratory relief, the plaintiffs state:

> "The [c]ourt should declare that the [d]efendants may not regulate protected speech during any time period designated for speech by the public based on the content of the message of the speaker, the view point of the speaker, or their desire to avoid criticism, ensure 'proper decorum', or avoid 'personal' or derogatory or even defamatory

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[11] Given the detailed and emphatic text, history, and case law, there is no reason to conclude that the State constitutional right protected by art. 19 would be any less protective than the right of assembly protected by the First Amendment. Throughout most of its history, the right of assembly clause in the First Amendment, although not interpreted as being "identical" to the right of free speech, has not been given much independent significance. See National Ass'n for the Advancement of Colored People v. Claiborne Hardware Co., 458 U.S. 886, 911-912 (1982); Thomas v. Collins, 323 U.S. 516, 530 (1945) (rights to freedom of speech, assembly, and press, "though not identical, are inseparable"). See also Blackhawk, Lobbying and the Petition Clause, 68 Stan. L. Rev. 1131 (2016); Bowie, 130 Yale L.J. at 1655; El-Haj, The Neglected Right of Assembly, 56 UCLA L. Rev. 543 (2009); Inazu, The Forgotten Freedom of Assembly, 84 Tul. L. Rev. 565, 570 (2010). Although the Supreme Court's more recent decision in Duryea v. Guarneri, 564 U.S. 379, 394 (2011), somewhat reinvigorated the provision, Blackhawk, supra at 1181, the vigor of art. 19 is unquestionable as reflected in its text, history, and case law. Indeed, the clear thrust of that text, history, and case law interpreting art. 19 compels the conclusion that the town's civility code is unconstitutional.

> statements, unless such regulation is the least restrictive means necessary to achieve a compelling government interest."

Our cases interpreting art. 16 clearly support this request for relief. They also do so without any need to survey, as the parties do, the contested Federal case law distinguishing limited and designated public forums and the different standards of review applicable to these forums under the First Amendment. As this court expressly stated in Walker v. Georgetown Hous. Auth., 424 Mass. 671, 675 (1997): "We need not decide whether we would find the [United States] Supreme Court's public, nonpublic, and limited public forum classifications instructive in resolving free speech rights under our Declaration of Rights" in the instant case. Indeed, "we need not enter that fray because, under our Declaration of Rights, the applicable standard for content-based restrictions on political speech is clearly strict scrutiny." Commonwealth v. Lucas, 472 Mass. 387, 397 (2015). See Massachusetts Coalition for the Homeless v. Fall River, 486 Mass. 437, 441-442 (2020) (holding that strict scrutiny applies to content-based regulation of protected speech); Bachrach v. Secretary of the Commonwealth, 382 Mass. 268, 276 (1981) ("As a substantial restriction of political expression and association . . . the legislation at bar should attract 'strict scrutiny'").[12]

There is no question that this civility code is directed at political speech, as it regulates speech in a public comment session of a meeting of the board, and that it is content based, as it requires us to examine what was said. See Opinion of the Justices, 436 Mass. 1201, 1206 (2002) ("if the applicability of the bill's requirements can only be determined by reviewing the contents of the proposed expression, the bill is a content-based regulation of speech"). As such, it must withstand strict scrutiny, which means it must be "both 'necessary to serve a compelling [S]tate interest and . . . narrowly drawn to achieve that end.'" Lucas, 472 Mass. at 398, quoting Opinion of the Justices, supra. It is neither. Although civility can and should be encouraged in political discourse, it cannot be

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[12] As we apply strict scrutiny here, the protection provided by the State Constitution is at least as great if not greater than the protection provided by the First Amendment for content-based governmental restrictions. As noted supra, we are not confronted with a public meeting limited to a particular item or items. We recognize that even though a public meeting limited to a particular purpose may require a content-based restriction on comments, government must be able to hold such meetings to function efficiently. Whether the government's right to hold such meetings satisfies strict scrutiny or some lesser standard under art. 16, we need not decide. Cf. Rowe v. Cocoa, 358 F.3d 800, 803 (11th Cir. 2004) ("There is a significant governmental interest in conducting orderly, efficient meetings of public bodies," which may be done via "confin[ing] their meetings to specified subject matter"); White v. Norwalk, 900 F.2d 1421, 1425 (9th Cir. 1990) ("the Council does not violate the first amendment when it restricts public speakers to the subject at hand"); Smith vs. Middletown, U.S. Dist. Ct., No. 3:09-CV-1431 (D. Conn. Sept. 1, 2011), aff'd sub nom. Smith v. Santangelo, 518 Fed. Appx. 16 (2d Cir. 2013) ("The restriction of public comment to items on the agenda is also reasonable because it . . . facilitate[s] the official business of the Council").

required. In this country, we have never concluded that there is a compelling need to mandate that political discourse with those with whom we strongly disagree be courteous and respectful. Rather, we have concluded that political speech must remain "uninhibited, robust, and wide-open." Van Liew v. Stansfield, 474 Mass. 31, 39 (2016), quoting New York Times Co. v. Sullivan, 374 U.S. 254, 270 (1964). This civility code is also drafted with an extraordinarily broad brush. It is certainly not narrowly tailored.

Finally, the policy's requirement that the speech directed at government officials "be respectful and courteous, [and] free of rude . . . remarks" appears to cross the line into viewpoint discrimination: allowing lavish praise but disallowing harsh criticism of government officials.[13] As the Supreme Court has explained, "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995). See Shurtleff v. Boston, 142 S. Ct. 1583, 1587

[13] At the same time, as between members of the public taking opposite positions, a requirement that the comments be respectful and courteous appears not to be viewpoint based, but rather only content based. An example would be if a town official told both sides debating a tax increase to fully express their views but to do so courteously. Although still impermissible, because it is content based, the restriction would not be viewpoint based.

(2022) ("When the government encourages diverse expression -- say, by creating a forum for debate -- the [right to free speech] prevents it from discriminating against speakers based on their viewpoint"). Although we have not been required to precisely define what constitutes viewpoint discrimination in our case law, art. 16, like the First Amendment, certainly does not permit viewpoint discrimination. See Roman v. Trustees of Tufts College, 461 Mass. 707, 716-717 (2012); Opinion of the Justices, 430 Mass. 1205, 1209 (2000).[14]

A provision "that public officials [can] be praised but not condemned" is "the essence of viewpoint discrimination." Matal v. Tam, 582 U.S. 218, 249 (2017) (Kennedy, J., concurring). Speech that politely praises public officials or their actions is allowed by the policy, but speech that rudely or disrespectfully criticizes public officials or their actions is not. This constitutes viewpoint discrimination.

In sum, this civility code is unconstitutional under art. 16 as well as art. 19.

5. Overbreadth, vagueness, and permissible restrictions. In the instant case, we have not been asked, nor should we attempt on our own, to separate the unconstitutional from the constitutional aspects of the town's civility code. We conclude that it is so overbroad, so vague, and so subject to

[14] The same is true for art. 19.

manipulation on its face that it is not salvageable or severable. See Massachusetts Coalition for the Homeless, 486 Mass. at 447 (statute declared facially invalid under art. 16 in its entirety because we discerned an "unacceptable risk of a chilling effect"); Lucas, 472 Mass. at 404 (statute declared unconstitutional in its entirely because "even under a narrow construction, there is a genuine risk that the operation of [statute] will cast an unacceptable chill on core political speech").

This is not to say that restrictions cannot be imposed on public comment sessions consistent with arts. 16 and 19. Reasonable time, place, and manner restrictions could include designating when and where a public comment session may occur, how long it might last, the time limits for each person speaking during the public comment session, and rules preventing speakers from disrupting others and removing those who do.

6. MCRA claim. We also have no difficulty concluding that the dismissal of the MCRA claim should be reversed. Taking the facts in the light most favorable to the plaintiffs, Kolenda "interfere[d]" with Barron's clearly established constitutional right under arts. 19 and 16 via "threats, intimidation or coercion." G. L. c. 12, § 11H. As such, there was a violation of the MCRA and no qualified immunity.

"To establish a claim under the [MCRA], 'a plaintiff must prove that (1) the exercise or enjoyment of some constitutional or statutory right; (2) has been interfered with, or attempted to be interfered with; and (3) such interference was by threats, intimidation, or coercion.'" Glovsky v. Roche Bros. Supermkts., Inc., 469 Mass. 752, 762 (2014), quoting Currier v. National Bd. of Med. Examiners, 462 Mass. 1, 12 (2012). In the instant case, the video recording shows that, first, Barron complained about the open meeting law violations; then, Kolenda accused her of slander and said, "[W]e're gonna go ahead and stop the public comment session now"; next, Barron said, "[Y]ou need to stop being a Hitler"; and finally, Kolenda ended the meeting and the audio stopped. Subsequently, Kolenda stood up and started yelling and aggressively pointing at Barron. The plaintiffs' complaint alleges that Kolenda shouted, "You're disgusting," and threatened to have her "escorted out" of the meeting. The video recording does not show Barron after the end of the audio portion.

Taking the facts, including the video recording, in the light most favorable to the plaintiffs, Barron exercised her constitutional right under arts. 19 and 16 to address the meeting of the board and complain about the open meeting law violations. Her comparison between Kolenda and Hitler was, at least in the light most favorable to the plaintiffs, simply

hyperbole, describing Kolenda as behaving in a dictatorial manner, that is, domineering or authoritarian. Although a comparison to Hitler is certainly rude and insulting, it is still speech protected by art. 16.[15]

In addition, the plaintiffs' allegations plausibly suggest that Barron's rights were interfered with via threats, intimidation, or coercion. Kolenda's response is not fully captured by the video recording, but, accepting the plaintiffs' account as true, Kolenda told Barron to stop speaking, started screaming at her, and threatened to have her removed from the meeting in response to her protected speech. If this is proved at trial, she could establish a violation of the MCRA. See

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[15] We note that personally insulting comments may rise to the level of fighting words, that is, "face-to-face personal insults that are so personally abusive that they are plainly likely to provoke a violent reaction and cause a breach of the peace," which are not protected speech. O'Brien v. Borowski, 461 Mass. 415, 423 (2012). See also Cohen v. California, 403 U.S. 15, 20 (1971) (fighting words are "personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction"). We have also explained that "the fighting words exception [to free speech] is 'an extremely narrow one.'" O'Brien, supra, quoting Johnson v. Campbell, 332 F.3d 199, 212 (3d Cir. 2003). We further emphasize that elected officials are expected to be able to respond to insulting comments about their job performance without violence. See Commonwealth v. Bigelow, 475 Mass. 554, 562 (2016) ("personal insults and allegations concerning [selectman's] alleged criminal past" were "constitutionally protected political speech" because "central thrust is criticism of him as a selectman"). Although not presented in the instant case, we recognize that fighting words from one public speaker may trigger a disturbance from another member of the public, which may require action by government officials.

Batchelder v. Allied Stores Corp., 393 Mass. 819, 823 (1985) ("sufficient intimidation or coercion" where "security officer ordered [plaintiff] to stop soliciting and distributing his political handbills"); Sarvis v. Boston Safe Deposit & Trust Co., 47 Mass. App. Ct. 86, 93 (1999) (third element of MCRA satisfied where "defendants attempted to interfere with the plaintiffs' right to a summary process hearing by threatening them with arrest and then bringing about their arrests").

On the facts alleged, Kolenda is also not entitled to qualified immunity. As we have explained: "[G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." LaChance v. Commissioner of Correction, 463 Mass. 767, 777 (2012), S.C., 475 Mass. 757 (2016), quoting Rodrigues v. Furtado, 410 Mass. 878, 882 (1991). More specifically, "[a] right is only clearly established if, at the time of the alleged violation, 'the contours of the right allegedly violated [were] sufficiently definite so that a reasonable official would appreciate that the conduct in question was unlawful.'" LaChance, supra, quoting Longval v. Commissioner of Correction, 448 Mass. 412, 419 (2007). Nevertheless, "it is not necessary for the courts to have previously considered a particular

situation identical to the one faced by the government official." Caron v. Silvia, 32 Mass. App. Ct. 271, 273 (1992). "It is enough, rather, that there existed case law sufficient to clearly establish that, if a court were presented with such a situation, the court would find that the plaintiff's rights were violated." Id., quoting Hall v. Ochs, 817 F.2d 920, 925 (1st Cir. 1987). In the instant case, the contours of the rights are sufficiently clear, and a reasonable public official would understand that his response to the exercise of those rights was unlawful.

As discussed supra, the "full and free" discussion in town meetings protected by art. 19 has a long and distinguished history in Massachusetts. Fuller, 224 Mass. at 178. It is also well established that restrictions on the content of political speech must be "necessary to serve a compelling [S]tate interest and . . . narrowly drawn to achieve that end" to satisfy the requirements of art. 16, Opinion of the Justices, 436 Mass. at 1206, and that viewpoint discrimination is absolutely prohibited, Rosenberger, 515 U.S. at 829.

At a public comment session in a meeting of the board, a resident of the town thus clearly has the right to accurately complain about violations of law committed by town officials and object to other town actions, including its spending practices, and to express her views vehemently, critically, and personally

to the government officials involved. Such a right is clearly protected by art. 19 as well as art. 16 for the reasons discussed supra. When a government official responds to a resident's exercise of those rights by accusing her of slandering the board, screaming at her, and threatening her physical removal, it should be clear to him that his conduct is unlawful. Thus, there is no basis for qualified immunity.

Conclusion. The order of judgment on the pleadings is reversed, and the case is remanded for further proceedings consistent with this opinion, including entry of a judgment declaring that the town's public comment policy is unconstitutional.

So ordered.

Department of Workforce Development

COVID-19 Workplace FAQ

As an employer, can I require my employees to get a COVID-19 vaccine?

Yes, you can. As an employer, you can mandate that your employees receive the COVID-19 vaccine before returning to work on site. However, if one of your employees objects because of the possibility of interactions with a disability, their strongly held religious or ethical beliefs or because the employee is pregnant, you may be required to engage in an interactive process to determine whether reasonable accommodations are available (such as telework).

The accommodation requirements for disability and religious or ethical beliefs are very different, but unless your employee's failure to vaccinate poses a direct threat to others, an accommodation may be required.

It's important to note that employers should be cautious when enforcing vaccine mandates, since enforcement may result in the employer receiving medical information related to a disability. If such information is received, the law requires that employers maintain those records separately from any personnel records related to job performance. Find more information on reasonable accommodations.

Can my employer require me to prove I'm vaccinated?

Yes, they can. An employer can ask an employee if they've been vaccinated. However, an employee has the right to refuse the vaccination for a few different reasons. These include possible interactions with a disability, strongly held religious or ethical beliefs against the vaccine and pregnancy. If any of these conditions apply, the employee has the right to refuse the vaccination and

possibly request a reasonable accommodation. Find more information on reasonable accommodations.

Can I receive unemployment insurance benefits if I quit my job to avoid complying with my employer's vaccine requirements or if I am fired for refusing to comply with my employer's vaccine requirements?

The answer depends on the circumstances of the separation. The facts of each unemployment insurance claim will determine whether benefits are payable. The one thing that is certain is that if there is a separation the case of the separation must be investigated on the claim. Generally, if a person quits a job, the presumption is benefits are not payable unless an exception outlined in state law applies.

Also, individuals are denied benefits until six times their weekly benefit is earned in covered employment. If an individual is aware of a condition to maintain employment (such as complying with a vaccine requirement) and fails to take action to maintain their employment, they may not be eligible for unemployment insurance benefits. All factors related to the employee's separation will be considered in determining eligibility, including whether the person is unable to receive the vaccine for medical or religious beliefs. Find more information on unemployment benefits.

Additional Information

- Printable Version of COVID-19 Workplace FAQ

Related Information

- Civil Rights Disability Information
- Unemployment Insurance - Handbook for Employers: Eligibility Issues

Elections, Engagement, and Employment: how the Pandemic Changed the Public's Expectations of Government – Additional Materials

https://www.governing.com/now/the-case-for-making-virtual-public-meetings-permanent.html

https://www.youtube.com/watch?v=lGOofzZOyl8

https://www.youtube.com/watch?v=SCjMB_GUAFE

From: Secretary Brennan
To: WI DL All State Employees
Subject: Reminder: COVID-19 Vaccine Status Reporting
Date: Tuesday, August 31, 2021 2:02:28 PM
Attachments: image002.png

Dear Colleagues:

As a follow-up to DOA's directive last week, we want to remind everyone of the **upcoming Sept 9th deadline to submit your COVID-19 vaccination status in the STAR HR system.** Thank you to the 44% of state employees who have provided their vaccination status over the past week.

The guidance announced last week applies to all executive branch employees, contractors, interns, and volunteers. If you work for a state agency (outside of the legislature and the courts), the guidance includes your role. As we have done throughout the COVID-19 pandemic, we are using data to guide decisions and to thoughtfully promote the interests of state employees and the constituents we serve. The information gathered regarding vaccination rates among state employees will assist us as we consider future steps to create and maintain a safe working environment for our colleagues and Wisconsin residents.

Submit Your Vaccine Status:

If you need help submitting your status in STAR/PeopleSoft, there is a tutorial available here to guide you through the process. I submitted mine last week, and it only took a few minutes. If you don't have access to the STAR HR system or need assistance, please work with your HR representative, supervisor, or team leader to submit this information.

Reminder on Vaccine Incentives and Clinics:

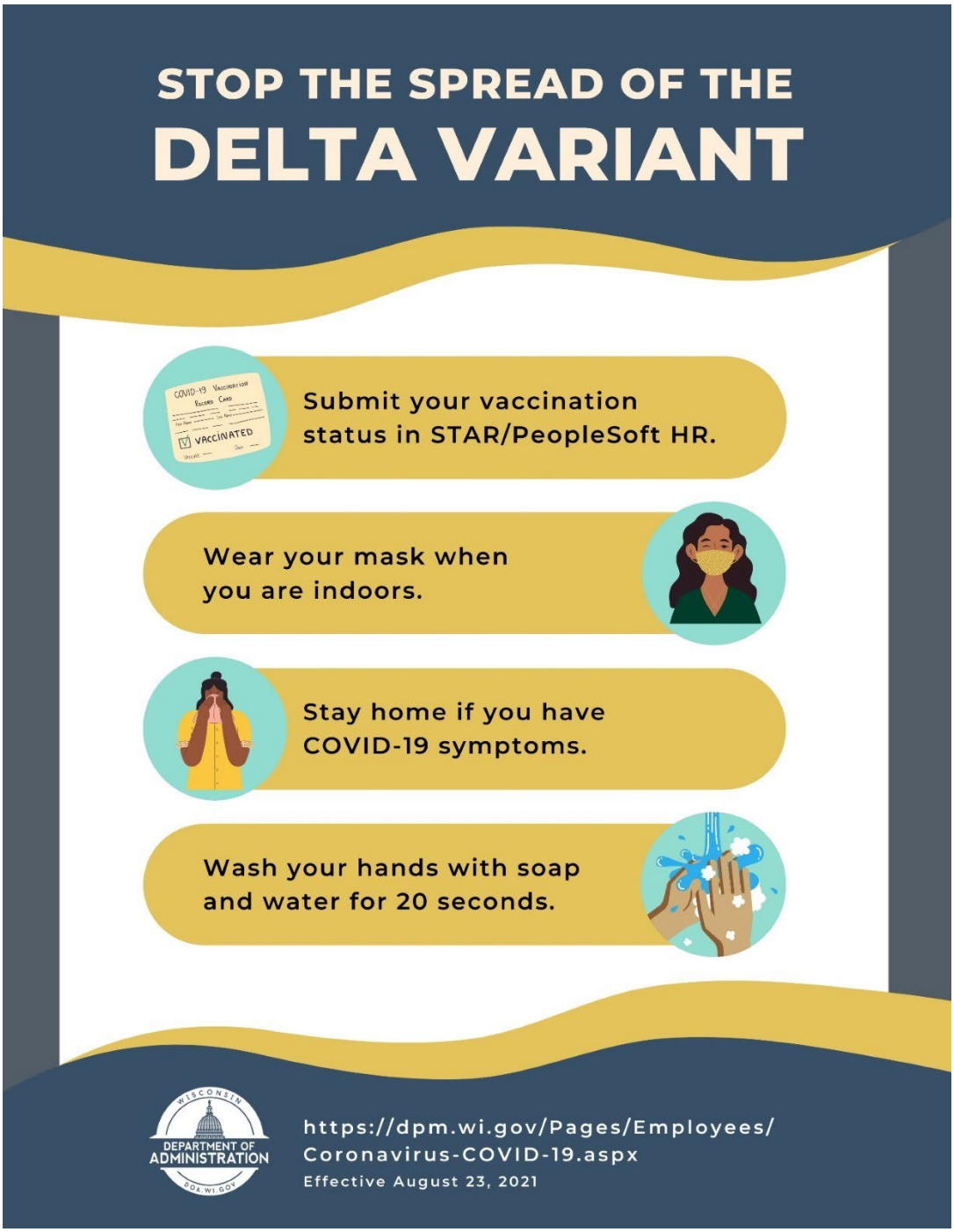
As a reminder, employees, contractors, interns, and volunteers who receive their first dose of the vaccine between August 20 and September 6 are eligible for a **$100 Visa gift card through the COVID-19 Rewards Program.**

Please take advantage of the FREE state-sponsored vaccination clinics for state employees and their families. Check the schedule below. You can also register and schedule a vaccine using vaccines.gov to search for a local provider.

We all look forward to the day when masking and vaccinations are no longer top of mind, but we're not there yet. Please check out the attached infographic for a quick reminder on how we can do our part to stop the spread. We are grateful for your continued commitment, including masking up at work, and doing what's needed so we can keep ourselves and our colleagues safe and healthy.

Thank you,

Joel Brennan



<u>Upcoming Vaccine Clinics</u>

The free vaccine clinics will be run by AMI Expeditionary Healthcare and open to everyone 12 years of age and older. Appointments are not needed. The Pfizer and Johnson & Johnson COVID-19 vaccines will be available.

Dodge Correctional Building

September 2 and 23

1 W. Lincoln Street, Waupun, WI

3 p.m. – 6 p.m.

Drive-through clinic

Hill Farms State Office Building

September 8

4822 Madison Yards Way, Madison, WI

11 a.m. - 2 p.m.

Department of Revenue Building

September 14

2135 Rimrock Road, Madison, WI

11 a.m. - 2 p.m.

Drive-through clinic *(walk-in option also available)*

Department of Corrections Building

September 16

3099 E. Washington Ave, Madison, WI

8 a.m. – 11 a.m.

Drive-through clinic *(walk-in option also available)*

JOEL BRENNAN | **Secretary**
Department of Administration
101 East Wilson Street
P.O. Box 7864
Madison, WI 53707-7864
Main: (608) 266-1741

What's New – Effective March 1, 2022, guidance has been updated to reflect modified requirements regarding face masks for employees in non-congregate care settings. Additionally, effective March 13, 2022, the weekly COVID-19 employee testing program is being suspended. The isolation/quarantine and vaccination reporting requirements for employees remain unchanged.

Wisconsin state government continues to apply COVID-19-related workplace policies consistent with guidance from the U.S. Centers for Disease Control and Prevention (CDC), the Wisconsin Department of Health Services (DHS), and local public health officials. Our goal is to provide a safe environment for Wisconsin state employees, contractors, interns, volunteers, and members of the public.

This change in guidance reflects the current public health environment including:

- The number of new confirmed COVID-19 cases and the test positivity rates have decreased to levels not seen since summer 2021. Additionally, Wisconsin's COVID-like illness activity is currently at a medium level and our influenza-like illness activity is low.
- The number of hospitalized COVID-19 patients is dramatically declining, and Wisconsin's hospital and ICU capacity has decreased to summer 2021 levels.
- Over 77% of Wisconsin state employees have completed their COVID-19 vaccination series. Vaccines are readily available and remain highly effective. In cases where vaccinated people are infected, their symptoms tend to be milder and their risk for hospitalization and death is far, far lower than if they were not vaccinated. Getting vaccinated and boosted could save your life and the lives of your loved ones.
- COVID-19 tests are readily available allowing for rapid testing and identification of positive individuals. Additionally, high quality face masks are readily available and other mitigation steps are in place across the workplace.

This guidance will continue to be updated based on additional information provided by federal, state, and local public health experts.

VACCINATION, TESTING & MASK REQUIREMENT

VACCINATION STATUS. All executive branch employees are required to provide information on their COVID-19 vaccination status. Employees shall utilize the STAR HR system to update their vaccination status and upload documentation verifying their completed vaccination status. Use the following instructions to access the STAR HR system for this purpose.

TESTING. The weekly COVID-19 testing program will continue to be required through March 12, 2022, for all executive branch employees. Executive branch state employees and interns are exempted from this testing requirement if they are fully vaccinated from COVID-19 and have provided their vaccination status. This requirement also does not apply to individuals who have an approved agreement in place to work 100% of the time at home and have no expectation, under any circumstances, to be physically present in a state facility or have contact with other state employees or members of the public while performing their duties.

For employees and interns who are not exempted, the state is providing an at-home test kit that can be done while in-work status. In addition to the state-provided test kits, employees will also have the option of obtaining a weekly test on their own time via their health care provider, pharmacy, local public health office, or community-based testing location. Employees and interns who opt to use a non-state-provided testing provider will be responsible for any costs associated with the test and are responsible for uploading testing information and documentation into the STAR HR System within 24 hours of completing the test and/or receiving their results.

MASKS. Effective March 1, 2022, except as outlined below, employees and other individuals not experiencing symptoms of respiratory illness may continue to wear masks but are not generally required to do so while in state facilities or indoors. Employees of the Departments of Corrections, Health Services, and Veteran's Affairs, who work in congregate care facilities, shall continue to wear masks until at least April 1, 2022. The CDC's mask guidance may inform individual decision-making on mask wearing. Agencies will continue to make KN95 or N95 respirator masks available to any individual requesting one.

Employees who have concerns regarding face-covering compliance are encouraged to discuss their concerns with their supervisor or human resources. Employees and supervisors are prohibited from discriminating against individuals who choose to wear a face covering or those who choose not to wear a face covering regardless of the reason.

EMPLOYEES SEEKING VACCINATION. COVID-19 vaccines are *safe and effective*. COVID-19 vaccines have consistently been shown to protect against serious illness, hospitalization, and death from COVID-19, including good protection against the worst consequences of the Omicron variant. Unvaccinated employees and vaccinated employees who have not obtained a booster are encouraged to register and schedule a vaccine using vaccines.gov to search for a local provider. Vaccines.gov provides search options by vaccine type and location, including information about the availability of the COVID-19 vaccine at:

- Your doctor or health care provider,
- Pharmacies,
- Community-based vaccination clinics, and
- On-site vaccination clinics.

Additional information about how to locate a vaccine can be found here.

To further reduce barriers for those employees that would like to be vaccinated, agencies and supervisors shall, to the maximum extent operationally feasible, accommodate requests by individuals to receive the COVID-19 vaccine during working hours. Accommodations may include allowing the individual to remain in pay status, providing flexible work schedules, allowing short notice requests for leave, and/or other flexibilities at the discretion of the agency.

QUARANTINE & ISOLATION GUIDELINES

CDC guidance reflects the current science demonstrating that most transmission of the virus that causes COVID-19 occurs early in the course of illness, generally in the 1-2 days prior to onset of symptoms and the 2-3 days after. Per the CDC guidance, all employees and contract staff shall adhere to the below guidance. Please note the additional guidance below for corrections and health care personnel in congregate living facilities.

Isolation and Quarantine Guidance for General State Employees

If You Have COVID-19 Symptoms (Isolate)

- Get a test and stay home until you receive your test results.
- If you test negative and you have been fever-free for 24 hours (without the use of fever-reducing medication), you can return to work.
- If you test positive, follow isolation recommendations below.

If You Test Positive for COVID-19 (Isolate)

Everyone, regardless of vaccination status.

- Stay home for 5 days.
- If, after 5 days, you have no symptoms or your symptoms are resolving and you have been fever-free for 24 hours (without the use of fever-reducing medication), you can return to work.
- Continue to wear a mask around others for 5 additional days.

If You Were Exposed to Someone with COVID-19 (Quarantine)

If you:
Have been boosted
OR
Completed the primary series of Pfizer or Moderna vaccine within the last 5 months
OR
Completed the primary series of J&J vaccine within the last 2 months

- Wear a mask around others for 10 days.
- Test **on day 5,** if possible.
- If you develop symptoms, get tested immediately and isolate until you receive your test results.
- If you test positive, follow isolation recommendations.

If you:
Completed the primary series of Pfizer or Moderna vaccine over 5 months ago and are not boosted
OR
Completed the primary series of J&J over 2 months ago and are not boosted
OR
Are unvaccinated

- Stay home for 5 days. After that continue to wear a mask around others for 5 additional days.
- Test **on day 5,** if possible.
- If you develop symptoms get tested immediately and isolate until you receive your test results.
- If you test positive, follow isolation recommendations.

Isolation and Quarantine Guidance for Healthcare & Corrections Personnel in Congregate Living Facilities

(Note: These guidelines reflect CDC contingency recommendations for healthcare & correctional facilities)

You Have COVID-19 Symptoms (Isolate)

Everyone, regardless of vaccination status.	➢ Get a test and stay home until you receive your test results. ➢ If you test negative and you have been fever-free for 24 hours (without the use of fever-reducing medication), you can return to work. ➢ If you test positive, follow isolation recommendations below.

If You Test Positive for COVID-19 (Isolate)

Everyone, regardless of vaccination status.	➢ Stay home for 5 days. ➢ If, after 5 days, you have no symptoms or your symptoms are resolving and you have been fever-free for 24 hours (without the use of fever-reducing medication), you can return to work. ➢ Continue to wear a mask around others for 5 additional days.

If You Were Exposed to Someone with COVID-19 (Quarantine)

If you: *Have been boosted* *OR* *Completed the primary series of Pfizer or Moderna vaccine within the last 5 months* *OR* *Completed the primary series of J&J vaccine within the last 2 months*	➢ Wear a mask around others for 10 days. ➢ Test **on day 5,** if possible. ➢ If you develop symptoms, get tested immediately and isolate until you receive your test results. ➢ If you test positive, follow isolation recommendations.
If you: *Completed the primary series of Pfizer or Moderna vaccine over 5 months ago and are not boosted* *OR* *Completed the primary series of J&J over 2 months ago and are not boosted* *OR* *Are unvaccinated*	➢ Wear a mask around others for 10 days. ➢ Test **on days 1,2,3, and 5-7.** ➢ If you develop symptoms get tested immediately and isolate until you receive your test results. ➢ If you test positive, follow isolation recommendations.

Note: All employees, regardless of vaccination status, are required to follow all federal, state, local, tribal, or territorial laws, rules, and regulations, including business guidance, when working on non-state property. Failure to follow this guidance or any law, rule, or regulation may result in disciplinary action.

The Departments of Corrections, Health Services, and Veterans Affairs may issue additional requirements for their employees, residents, and visitors of congregate living facilities. Additionally, any agency may issue additional requirements, if necessary, to comply with federal regulations. All agency rules or guidance require approval by the Division of Personnel Management Administrator prior to implementation.

State of Wisconsin

DOA – DIVISION OF PERSONNEL MANAGEMENT

- OFFICE OF THE ADMINISTRATOR BULLETIN -

Date:	March 15, 2020	**Subject:**	Short-Term Telecommuting Policy Guidelines
Locator No.	DPM-0517-AO		

I. PURPOSE

The purpose of this bulletin is to provide guidance to agencies and appointing authorities to develop and implement a Short-Term Telecommuting (STT) policy for employees. STT arrangements may be useful during emergency situations, such as a pandemic or building closure, when the state needs to maintain operations while minimizing health risks to employees. Permanent or standard work-at-home arrangements must be addressed under agencies' policies on Telecommuting. While this document is intended to address STT situations related to pandemic or COOP/COG events, agencies may use the document to establish STT policies for non-emergency situations (see Section II, Sub Section C – Eligibility).

Agencies are encouraged to consider implementing a STT policy that can be used during a critical event to ensure the maintenance of mission essential functions.

II. TEMPLATE FOR SHORT-TERM TELECOMMUTING POLICY

A *sample template is provided below to assist in the development of an agency STT policy. Agencies should modify the template to reflect operational needs.*

A. Policy

A Short-Term Telecommuting (STT) policy enables agency managers to authorize temporary work at home arrangements. Such policy is not intended to accommodate space problems or temporary employment or permit employees to carry out routine work functions in their homes on an ongoing basis.

The duties and responsibilities of some positions may preclude participation in a STT program. Because the circumstances may vary depending on the employee's situation, each request will be handled on a case-by-case basis. Staff who are normally deemed essential employees in emergency situations, are typically unable to participate in telework.

The STT program will be administered in accordance with the provisions of the Fair Labor Standards Act, Americans with Disabilities Act, federal Family and Medical Leave Act (FMLA), Wisconsin Family and Medical Leave Act (WFMLA), Wisconsin Administrative Code, and collective bargaining agreements, as applicable.

NOTE: The terms and conditions of this policy may be modified in the event of a declared emergency, at which time the Governor, or the agency head acting in accord with the Office of the Governor, may issue specific short-term directives.

B. Approval of Requests

The following process will be used to request and authorize STT agreements and notify Human Resources (HR).

1. Requests for temporary work at home for **three days or less** require only verbal approval by the Supervisor.

2. Requests of **four days to two weeks** (ten consecutive workdays) require a formal written agreement signed by the employee, the supervisor, and sent to HR for placement in the p-file.

3. Requests exceeding two weeks also require the written approval by the appointing authority, or designee. The signed copy is sent to HR and placed in the p-file.

Employees may not telework without prior supervisory approval.

C. Eligibility

1. Only employees whose essential job duties can be fulfilled from a remote location are eligible for short-term telecommuting agreement.

2. STT is only available to employees who have all tools required for their job available to them at the remote location. This may include, but is not limited to: a computer with all necessary software, a reliable internet connection, a telephone at which the employee can receive calls, a workspace free from distractions or hazards, a smoke detector, a surge protector, and any other routinely needed tools or equipment. The agency will not provide or reimburse an employee for required equipment needed for STT agreements. All equipment, space, utilities and other services for the remove workspace must be provided by the employee at their own expense as a conduction of the agreement.

D. Criteria

1. Employees on a STT agreement are expected to work their normal work schedule for the duration of the agreement unless otherwise directed or approved by the supervisor or management.

2. Employees who are not FLSA-exempt must report actual hours worked. All employees may not work overtime or generate differentials (night/weekend pay, etc.) without supervisor approval in advance of the overtime work being performed.

3. In all cases of work at home, the employee will be covered by the agency's work rules and the Code of Ethics. Work-related accidents must be reported to the

supervisor as soon as possible

4. Employees on a short-term telecommuting agreement must be available by telephone during their normal work hours.

5. Sick leave and other paid time off may be used during a STT agreement, subject to the same notification, approval and reporting requirement as if the employee were working at their regular work location.

6. Employees may not host business functions or visitors in their home during the STT arrangement.

7. The agreement may be terminated at any time by the supervisor. An employee may request [early] termination of the agreement at any time, but the decision to terminate the agreement early will be made by the supervisor.

E. Agreement/Procedures

An employee and their supervisor will develop a written STT agreement prior to beginning telework. The agreement requirements and approval will consider factors such as: specific duties and responsibilities of the job, existing workload demands, adequate staffing, work safety, customer service, employee performance, ability to monitor work product, and any other operational needs of the agency.

1. **Initiation**: Employees wishing to work at home shall contact their supervisor and discuss the work to be done and the need to be away from the normal work site.

2. **Duration**: An agreement may be terminated at any time by the employee or by the supervisor due concerns related work quality, productivity, customer service, or communication , or that the operational needs have changed and the employee is needed at work or the event that lead to the STT has ended and normal operations have resumed.

3. **Work Scheduling**: The employee and supervisor will establish a written schedule specifying the number of work hours, days and locations of work.

4. **Performance Standards/Work Activities**: STT agreements covering more than three days require a written plan. The Supervisor will establish a written list of tasks and objectives, expected completion times and/or dates, and standards to measure the completed work product. Expectations and standards must be explained and acknowledged by the employee. Written agreements will specify when and how supervisory reviews of work progress and products will be conducted and documented.

   Privacy policy and standards will be adhered to during the transportation, storage and communication of any work resource or product. The employer will provide the employee with materials and supplies necessary to complete work assignments, to the extent possible, based on need and availability.

These basic considerations will be contained or referenced in STT agreements. The agreements must be jointly signed by the employee, supervisor, and appointing authority, or designee, when required. All STT agreements will contain the anticipated work schedule and assignments.

(See Attachment 1, "Sample Agreement" made part of this bulletin.)

Questions regarding this directive may be directed to Nicole Rute at (608) 267-1019 or Nicole.Rute@wisconsin.gov.

Malika S. Evanco, Administrator
Division of Personnel Management

ATTACHMENT 1

***SAMPLE* – SHORT-TERM TELECOMMUTING AGREEMENT**

Employee Name: _____ **Title:** _____
Supervisor: _____ **Department:** _____

This document specifies the details of an individual's telecommuting work arrangement with their agency. Individuals should read the Telecommuting Policy before signing. When all signatures are present, the employee is authorized to begin telecommuting**. <u>This Telecommuting Agreement may be discontinued by either the employee or the agency at any time without cause.</u>**

I. Telecommuting Duration, Schedule, Work Hours, & Designated Workplace

A. Telecommuting Duration & Days

Begin Date: _____ End Date: _____
Days of the Week (check all that apply): ☐ Monday ☐ Tuesday ☐ Wednesday ☐ Thursday ☐ Friday

B. Telecommuting Hours

Core Working Hours: Begin: _____ End _____ Lunch/Break: Begin: _____ End _____
Call-in procedures for variance from schedule

C. Designated Workplace

Street Address _____
City _____ State _____ Zip _____
Employee Contact Phone: _____

If personal phone number, employee and supervisor authorize the following people to have this number and to contact the employee for business purposes only on telecommuting days:

Other designated directions/procedures/emergency contacts:

II. Work Assignments

Work Assignments
(Identify specific list of tasks, objectives, dates for completion, and how work assignments will be transferred. Identify what mechanisms will be used to ensure work is completed, and when and how supervisory reviews of work progress and products will be conducted and documented.)

III. Telecommunications & Equipment Costs

Employee acknowledges that employee is responsible for providing all telecommunications, workspace and equipment needed for short-term telecommuting and is solely responsible for these costs under this agreement. The employee is also responsible for ensuring that the employee's computer and/or internet connection to any State network complies with all IT security requirements of the Agency.

(Note any expenses which the employer will cover and use of agency telephone credit card when making long distance phone calls from home. Note any equipment the employer will provide any commitment of resources to connect computers to office, etc.)

IV. Confidentiality of Data & Records Management

The employee shall take all necessary measures, including those listed below, to ensure confidentiality of data and to preserve and retain records. The employee will
Comply with all State Laws, Administrative Codes, State policies, and agency specific policies regarding record retention, storage, and confidentiality.

V. Signature

By signing below, the employee agrees that s/he has received, has read, understands, and will abide by the Telecommuting Policy & Procedures, that s/he will participate and complete program training, surveys, and other evaluation measures, and certifies that s/he understands the policies and procedures of the Telecommuting Program, including the specific provisions listed above.

Personal Waiver of Liability to Comply with Requirements of Temporary Work at Home Policy. In consideration for being allowed to work at home, and except as otherwise provided by law, I and my heirs and

assigns hereby agree to release the State of Wisconsin and [agency] and all its officers, employees, and agents from any and all liability, including claims, demands, losses, costs, damages, and expenses of every kind and description including injury, death, or damage to my property, which arises out of, in connection with, or occurs during my participation in this program.

I understand that I am subject to all work rules during the period of this agreement and all injuries should be reported promptly to my supervisor.

I understand and agree to the terms and conditions of this authorization. I also understand that any changes in the work arrangement must be in writing and must be signed by the employee, supervisor, and appropriate management representative.

EMPLOYEE SIGNATURE	DATE SIGNED
SUPERVISOR SIGNATURE	DATE SIGNED
APPOINTING AUTHORITY SIGNATURE (if required)	DATE SIGNED