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VIA EMAIL

Dear President Moe and Director Elford:

Campaign Legal Center (“CLC”) writes to provide you with information regarding how Wisconsin municipal clerks can adjudicate frivolous challenges to voter eligibility under Wis. Stat. § 6.92 to minimize the burden on election administration and protect the rights of voters, including important guidance on limitations imposed by federal law.¹

CLC is a nonpartisan, nonprofit organization working to protect and strengthen the U.S. democratic process across all levels of government through litigation, policy analysis, and public education. CLC seeks a future in which the American political process is accessible to all citizens, resulting in representative, responsive, and accountable government. Consistent with that mission, we have worked with election officials across the nation to improve

¹ This letter is not legal advice; it is intended to present a summary of relevant Wisconsin and federal law.

their administrative policies, protect the freedom to vote of citizens within their jurisdictions, and strengthen the democratic process.

To that end, CLC is concerned about the potential for mass eligibility challenges during the upcoming election, which have become increasingly common throughout the country.²

Mass eligibility challenges organized by partisan challengers and submitted with insufficient evidence risk disenfranchising eligible voters and causing unnecessary disruption to the orderly administration of the 2022 elections—particularly in jurisdictions with fewer veteran election officials. Reminding municipal clerks, their staffs and volunteers of the rules for voter challenges and their responsibilities in dismissing challenges lodged without cause will ensure a fair and orderly election and will safeguard voters from intimidation.

To mitigate the potential harms to both voters and election administrators caused by such baseless challenges, CLC provides the election law summary below to support clerks' development of uniform processes for processing voter eligibility challenges in compliance with the following requirements of Wisconsin and federal law. We ask that you share this letter with Wisconsin municipal clerks and their staffs.

I. Challenges to Election Day Votes by Inspectors

As you are aware, Wisconsin law permits election inspectors and other voters to challenge voters seeking to cast their ballots in person only in limited, specified circumstances and prescribes the procedure to follow when handling those challenges. Aggressive and false challenges are considered voter intimidation and are subject to criminal penalties.

A voter can be challenged for cause by an election inspector based on personal knowledge or suspicion that the voter is not a qualified elector only on the following grounds:

- The challenged voter is not a citizen;
- The challenged voter is not 18;
- The challenged voter has not resided in the election district for at least ten days;

² See, e.g., Nick Corasaniti & Alexandra Berzon, *Activists Flood Election Offices with Challenges*, N.Y. Times (Sept. 28, 2022) <https://www.nytimes.com/2022/09/28/us/politics/election-activists-voter-challenges.html?action=click&module=RelatedLinks&pgtype=Article> (noting the recent wave of voter eligibility challenges in states such as Michigan, Georgia, and Texas).

- The challenged voter has a felony conviction and has not had their civil rights restored;
- The challenged voter has been adjudicated incompetent; or
- The challenged voter has voted previously in the same election.³

After a challenge has been made, a different election inspector must follow the procedure set out in the code. They shall administer an oath to the challenged voter (“You do solemnly swear (or affirm) that you will fully and truly answer all questions put to you regarding your place of residence and qualifications as an elector of this election.”) and ask, in yes-or-no form, these specific questions:

- Are you a United States citizen?
- Are you at least 18 years of age?
- For at least the 10 days before this election, have you resided in, or been a resident of, the ward or election district from which you seek to vote?
- Are you currently disqualified from voting for any of the following reasons:
 - A felony conviction for which you are still serving probation or are on parole or extended supervision?
 - A judge's ruling that you are incapable of voting?
 - Having made a bet or wager on this election?
 - Having voted previously in this election?⁴

If the challenged voter affirms their eligibility, and the inspector withdraws the challenge, the voter is issued a ballot and allowed to vote.⁵ Should the inspector refuse to withdraw the challenge, the voter must take another oath attesting they meet all eligibility criteria (“You do solemnly swear (or affirm) that: you are 18 years of age; you are a citizen of the United States; you are now and for 10 days have been a resident of this ward except under § 6.02(2), you have not voted at this election; you have not made any bet or wager or become directly or indirectly interested in any bet or wager depending upon the result of this election; you are not on any other ground disqualified to vote at this election.”), after which the inspector must permit the voter to cast a ballot.⁶

All challenges are recorded, including the name and address of both the challenger and challenged voter, the cause for the challenge, the questions asked of the challenged voter and their responses, whether or not the challenge was withdrawn, and whether or not the challenged voter took the oath or

³ Wis. Stat. § 6.92; Wis. Admin. Code EL § 9.01.

⁴ Id. § 9.01(1)-(2).

⁵ Wis. Stat. § 6.94; Wis. Admin. Code EL § 9.01(3).

⁶ Wis. Stat. § 6.94; Wis. Admin. Code EL § 9.01(4).

affirmation of eligibility.⁷ If the challenged voter refuses to take either oath or answer the inspector's questions, they are not permitted to vote.⁸

The challenges described above must be made on the basis of individualized knowledge and considered on a per-voter basis. Lists or spreadsheets alleging large numbers of voters are ineligible due to an address change—such as information based upon the National Change of Address database—are not a sufficient basis to challenge an individual voter's eligibility. Sustaining challenges on the basis of such data sets could constitute systematic list maintenance, which is governed in part by the National Voter Registration Act (NVRA). As you know, the NVRA prohibits the systematic removal of voters from the registration rolls on the grounds of a change in residence within 90 days of a federal election.⁹

During the canvass process the municipal or county board of canvassers, as applicable, is permitted, but not required, to subsequently review the eligibility of challenged voters whose ballots were marked as disputed.¹⁰ In the absence of an adverse finding by the board of canvassers, the ballot is counted the same as any other ballot in the canvass.¹¹

II. Challenges to Election Day Votes by Other Electors

In addition to inspectors, other registered voters can challenge a voter in person *if* the challenger personally knows or suspects that the challenged voter is not qualified on the grounds listed above.¹² An inspector then proceeds to ask the same questions and administer the oaths as if the inspector had raised the challenge—the challenger does not question the challenged voter.¹³ The inspector also examines the challenger, under oath, about the reasons they believe the challenged voter to be ineligible.¹⁴

Importantly, a challenger abusing the privilege may be removed from the polling place if they are deemed to be disruptive or engaged in electioneering at the polling site.¹⁵ Any elector found to have provided a false statement to

⁷ Wis. Admin. Code EL § 9.05.

⁸ Wis. Stat. § 6.94; Wis. Admin. Code EL § 9.01(5), (6).

⁹ 52 U.S.C. § 20507(c)(2)(A).

¹⁰ Wis. Stat. § 6.95; Wis. Admin. Code EL §§ 9.05, 9.06.

¹¹ Wis. Stat. §§ 6.95, 7.51(2)(c), (3)(c)

¹² Wis. Stat. § 6.925; Wis. Admin. Code EL § 9.02.

¹³ Wis. Admin. Code EL § 9.02(1)-(2).

¹⁴ Wis. Stat. § 6.925; Wis. Admin. Code at 9.02(1).

¹⁵ Wis. Stat. § 7.41(3); Wis. Admin. Code EL § 9.02(1).

the inspector commits a Class I felony, punishable by up to 3.5 years in state prison and fines of up to \$10,000.¹⁶

III. Challenges to Absentee Ballots

The votes of electors submitting mail ballots or voting absentee ballots in person may also be challenged for cause by an inspector or another elector.¹⁷ The statutes treat both types of ballots as if they were voted in person on election day, and inspectors have all the same powers described above, including the ability to administer an oath to the challenger.¹⁸ However, if the voter is not present to answer questions (because they voted by mail), the inspectors or board of absentee ballot canvassers, as applicable, have the discretion to summon the absent voter and ask the questions and administer the oath as they deem appropriate.¹⁹ To minimize disruption to election administration and avoid erroneously or unlawfully denying eligible Wisconsinites the right to vote, municipal clerks should direct inspectors and boards of absentee ballot canvassers only to credit and investigate challenges supported by sufficient evidence and made on the basis of personal knowledge.²⁰

Moreover, to ensure that no voter is unconstitutionally deprived of their constitutional right to vote, no challenge to an absentee ballot should be sustained without the voter being provided notice and a meaningful opportunity to confirm their eligibility. Federal courts around the country (including in the Seventh Circuit) have held that once a state extends the ability to vote by mail-in or absentee ballot to its citizens, as Wisconsin has done, voters have a constitutionally protected liberty interest in having their mail-in ballot counted, and States “must afford appropriate due process protections to the use of [mail-in] absentee ballots.”²¹

The U.S. Supreme Court has held that the “fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.”²² Because “there is no possibility of meaningful

¹⁶ Wis. Stat. §§ 12.13(1)(b), 12.60(1)(a).

¹⁷ Wis. Stat. § 6.93; Wis. Admin. Code EL § 9.04.

¹⁸ *Id.*

¹⁹ Wis. Stat. §§ 6.93, 7.52(5)(b).

²⁰ *See id.* § 7.52(5)(b) (“the board of absentee ballot canvassers *may* call before it any person whose absentee ballot is challenged...”)

²¹ *Frederick v. Lawson*, 481 F.Supp.3d 774, 793 (S.D. Ind. 2020); *Democracy North Carolina v. North Carolina State Board of Elections*, 476 F.Supp.3d 158, 227 (M.D.N.C. 2020); *Martin v. Kemp*, 341 F.Supp.3d 1326, 1338 (N.D. Ga. 2018); *Saucedo v. Gardner*, 335 F.Supp.3d 202, 217 (D.N.H. 2018); *Raetzl v. Parks/Bellefont Absentee Election Board*, 762 F.Supp. 1354, 1358 (D. Ariz. 1990); *Zessar v. Helander*, No. 05 C 1917, 2006 WL 642646, at *6 (N.D. Ill. Mar. 13, 2006).

²² *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

postdeprivation process when a voter’s ballot is rejected . . . sufficient predeprivation process is the constitutional imperative.”²³ Municipal clerks should endeavor to ensure that any voter whose mail-in absentee ballot is challenged receives adequate notice of the challenge and its potential consequences, as well as a meaningful opportunity to refute the challenge and assert their eligibility to vote. Failure to do so risks violating the Due Process Clause of the U.S. Constitution.

IV. Other Legal Requirements

As you know, both federal and Wisconsin law provide robust protection against voter intimidation and other forms of infringement on the fundamental right to vote. The process for responding to voter challenges—especially those conducted en masse—must therefore comply with all such federal and state laws, as well as the U.S. Constitution. As such, we want to reiterate that all municipal clerks have the responsibility and discretion to protect Wisconsin voters from baseless and discriminatory challenges and ensure that the adjudication of all voter challenges complies with both state and federal law.

A. Racially Discriminatory Challenges

Organized challengers frequently target voters from marginalized communities in an attempt to intimidate or deter members of those communities from voting.²⁴ Sustaining such discriminatory challenges could violate the U.S. Constitution and federal law. Taken together, the Equal Protection Clause of the Fourteenth Amendment²⁵ and Section 2 of the Voting Rights Act²⁶ prohibits the use of voting practices that result in citizens being denied equal access to the democratic process on account of “race, color, or membership in a language minority group.”²⁷ Since these are often the exact groups targeted by discriminatory challenges, clerks and other local elections officials should consider carefully whether granting mass challenges brought before them would have the effect of unlawfully disadvantaging voters because of their race.

B. Voter Intimidation

²³ *Self Advocacy Solutions N.D. v. Jaeger*, 464 F.Supp.3d XXXX, 1052 (D.N.D. 2020).

²⁴ See, e.g., Nicolas Riley, Brennan Ctr. for Just., *Voter Challenges* 11-12 (2012), https://www.brennancenter.org/sites/default/files/legacy/publications/Voter_Challengers.pdf.

²⁵ U.S. Const. amend XIV, § 1.

²⁶ 52 U.S.C. 10301

²⁷ See U.S. Dept. of Justice, *Guidance Under Section 2 of the Voting Rights Act*, 52 U.S.C. § 10301, for *Redistricting and Methods of Electing Government Bodies* (Sept. 1, 2021) <https://www.justice.gov/opa/press-release/file/1429486/download>.

Baseless mass challenges to voter eligibility could constitute voter intimidation since such challenges are often made in bad faith to deter eligible citizens—including members of historically marginalized groups—from voting. Such voter intimidation is illegal under both federal and Wisconsin law.

Federal law provides that anyone who “intimidates, threatens, coerces, or attempts to intimidate, threaten, or coerce, any other person for the purpose of interfering with the right of such other person to vote” in a federal election has committed a federal crime.²⁸ Additionally, several federal statutes impose civil liability for voter intimidation. Section 11(b) of the Voting Rights Act makes it unlawful to “intimidate, threaten, or coerce” another person, or attempt to do so, “for voting or attempting to vote” or “for urging or aiding any person to vote or attempt to vote.”²⁹ And Section 2 of the Ku Klux Klan Act of 1871 makes it unlawful for “two or more persons to conspire to prevent by force, intimidation, or threat,” any voter from casting a ballot for the candidate of his or her choice.³⁰

Similarly, Wisconsin law makes voter intimidation, the use or threat of “force, violence, or restraint” to “compel any person to vote or refrain from voting at an election” a felony.³¹ The aggressive use or threat of a challenge to a voter’s eligibility when there is no cause to would fall under this provision.

To that end, each municipal clerk, their staffs, and volunteers should review their duties and responsibilities to maintain peaceful and orderly polling places and ensure that chief election inspectors are prepared to exercise their authority to remove any challengers who fail to abide by state and/or federal law prohibiting voter intimidation. Clerks and election inspectors should not hesitate to refer incidents of voter intimidation, including repeated impermissible voter challenges orchestrated by partisan outside groups, to the Wisconsin Attorney General’s Office³² and U.S. Department of Justice (DOJ).³³

C. Uniform and Nondiscriminatory Standards

²⁸ 18 U.S.C. § 594.

²⁹ 52 U.S.C. § 10307(b).

³⁰ 42 U.S.C. § 1985(3).

³¹ Wis. Stat. § 12.09(1); See Wisc. Dept. of Justice, *How to Recognize and Report Voter Intimidation in Wisconsin* (Oct. 29, 2020) <https://www.doj.state.wi.us/news-releases/how-recognize-and-report-voter-intimidation-wisconsin>.

³² The Wisconsin Department of Justice can be reached at (608) 266-1221.

³³ The DOJ Civil Rights Division can be reached at 800-253-3931, and voter intimidation reports can be submitted online at <https://civilrights.justice.gov/report>. More information on DOJ’s resources to protect voting access can be found at <https://www.justice.gov/opa/pr/justice-department-releases-information-efforts-protect-right-vote>.

The Constitution requires that each state and political subdivision use uniform, nondiscriminatory standards, and processes for evaluating voter eligibility challenges.³⁴ For example, in the 2000 presidential election, the Supreme Court found unconstitutional a process by which Florida counties “used varying standards to determine what was a legal vote.”³⁵

Municipal clerks should ensure election officials are following the process prescribed in the administrative code so there is no divergence in the standards and processes used to evaluate voter challenges in different municipalities. By doing so, Wisconsin’s challenge voter challenge processes can avoid the “arbitrary and disparate treatment” of challenged ballots that violates the Constitution.³⁶

By ensuring compliance with the processes, requirements, and limitations of Wisconsin’s voter challenge laws, municipal clerks can mitigate the potential harm and disruption caused by frivolous voter eligibility challenges. This summary of the relevant law should help them to prepare proactively to develop written procedures and policies for adjudicating such challenges and train your staff, volunteers, and election inspectors on the requirements of Wisconsin and federal law applicable to voter eligibility challenges.

Please do not hesitate to reach out with any questions. We stand ready to assist you in upholding federal and state law and protecting Wisconsin’s freedom to vote.

Sincerely,

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³⁴ See *Bush v. Gore*, 531 U.S. 98, 104 (2000) (finding that the lack of uniform standards across counties for when to count a ballot violates the Constitution’s Equal Protection Clause).

³⁵ *Id.* at 107.

³⁶ *Bush*, 531 U.S. at 104-05.