



September 30, 2024

VIA EMAIL

Dear Wisconsin Election Officials:

Campaign Legal Center (CLC) writes to provide you with information regarding how Wisconsin municipal clerks and election inspectors 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.<sup>1</sup>

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 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.<sup>2</sup>

In recent election cycles, partisan actors have relied on faulty databases to bring hundreds of thousands of challenges to voter eligibility across the nation.<sup>3</sup> These

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

<sup>2</sup> See, e.g., Nick Corasaniti & Alexandra Berzon, *Trump's Allies Ramp Up Campaign Targeting Voter Rolls*, N.Y. Times (Mar. 3, 2024), <https://www.nytimes.com/2024/03/03/us/politics/trump-voter-rolls.html> (noting the recent wave of voter eligibility challenges in states such as Georgia, Michigan, and Nevada); David Gilbert, *Election Deniers are Ramping Up Efforts to Disenfranchise Voters*, Wired (Jul. 31, 2024), <https://www.wired.com/story/election-deniers-efforts-disenfranchise-voters>.

<sup>3</sup> See Robyn Sanders & Alice Clapman, *Protections Against Mass Challenges*, Brennan Ctr. for Just. (July 17, 2024), <https://www.brennancenter.org/our-work/research-reports/protections-against-mass-challenges-voter-eligibility>. One common database is Eagle AI, which experts have criticized for its frequent identification of eligible voters as ineligible. See Alice Clapman

databases attempt to match voter registration records with publicly available information, but that information is almost always incomplete or out of date, making the database matches unreliable.<sup>4</sup> They also often improperly flag registered voters with the same name as ineligible individuals, voters who are temporarily staying in another place but remain qualified at the address at which they are registered, and households where some but not all residents have moved.<sup>5</sup> As a result, mass challenge lists almost always include significant numbers of eligible voters who should not be removed from the rolls.<sup>6</sup>

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 2024 elections. We recognize that many election offices have lost their most experienced officials because of threats and volatility in the wake of the 2020 election and that this will be the first presidential election for new staff. We hope this letter will assist you as you provide guidance to your staff and volunteers regarding the rules for voter challenges and their responsibilities in dismissing challenges without cause, allowing your office to ensure a fair and orderly election, safeguard voters from intimidation, and minimize administrative disruption.

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 your development of uniform processes for processing voter eligibility challenges in compliance with the following requirements of Wisconsin and federal law.

## I. Challenges to Election Day Votes by Election Inspectors

As you are likely aware, Wisconsin law permits election inspectors to challenge voters seeking to cast their ballots in person only in limited, specified circumstances and prescribes the procedure for handling these 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:<sup>7</sup>**

- The challenged voter is not a U.S. citizen;
- The challenged voter is not at least 18;

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& Andrew Garber, *A New Antidemocracy Tool*, Brennan Ctr. for Just. (Sept. 5, 2023), <https://www.brennancenter.org/our-work/analysis-opinion/new-antidemocracy-tool>.

<sup>4</sup> See Sanders & Clapman, *supra* note 3.

<sup>5</sup> See *id.*

<sup>6</sup> See *id.*

<sup>7</sup> Wis. Stat. § 6.92; see also *Luft v. Evers*, 963 F.3d 665, 676 (7th Cir. 2020) (upholding extension of durational residency requirement from ten to twenty-eight days); Wis. Admin. Code EL § 9.01.

- The challenged voter has not resided in the election district for at least twenty-eight days;<sup>8</sup>
- 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.

After a challenge has been made, a different election inspector must follow the procedure set out in the code. They must 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, only those of the following questions appropriate to test the person’s qualifications based on the cause for the challenge:

- Are you a United States citizen?
- Are you at least 18 years of age?
- For at least the [28] 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?<sup>9</sup>

If the challenged voter affirms their eligibility, and the inspector withdraws the challenge, the voter is issued a ballot and allowed to vote.<sup>10</sup> 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 28 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.<sup>11</sup>

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 affirmation of eligibility.<sup>12</sup> If

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<sup>8</sup> A voter can vote for president and vice president if they have resided in Wisconsin for less than 28 days and are otherwise qualified to vote under state law. *See* Wisc. Stat § 6.15(1).

<sup>9</sup> Wis. Stat. § 9.01(1)-(2); *Luft*, 963 F.3d at 676; Wis. Admin. Code EL § 9.01.

<sup>10</sup> Wis. Stat. § 6.94; Wis. Admin. Code EL § 9.01(3).

<sup>11</sup> Wis. Stat. § 6.94; Wis. Admin. Code EL § 9.01(4).

<sup>12</sup> Wis. Admin. Code EL § 9.05.

the challenged voter refuses to take either oath or answer the inspector's questions, they are not permitted to vote.<sup>13</sup>

The challenges described above must be made on the basis of individualized knowledge and considered on a per-voter basis. **Lists or spreadsheets alleging that large numbers of voters are ineligible due to address changes—such as those based upon information from 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 removal, 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.<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup>

## II. Challenges to Election Day Votes by Other Voters

In addition to inspectors, other registered voters can challenge a voter casting their ballot in person if the challenger personally knows or suspects that the challenged voter is not qualified on the grounds listed above.<sup>17</sup> An inspector then proceeds to ask the same questions and administer the same oaths as if the inspector had raised the challenge—the challenger does not question the challenged voter.<sup>18</sup> **The inspector must also examine the challenger under oath about the reasons they believe the challenged voter to be ineligible.**<sup>19</sup> Importantly, a challenger abusing the process may be removed from the polling place if they are deemed to be disruptive or to be engaged in electioneering at the polling site.<sup>20</sup> Any voter found to have provided a false statement to the inspector commits a Class I felony, punishable by up to 3.5 years in state prison and fines of up to \$10,000.<sup>21</sup>

## III. Challenges to Absentee Ballots

Ballots submitted by mail or absentee ballots submitted in person may also be challenged for cause by an inspector or another voter.<sup>22</sup> 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

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<sup>13</sup> Wis. Stat. § 6.94; Wis. Admin. Code EL § 9.01(5), (6).

<sup>14</sup> 52 U.S.C. § 20507(c)(2)(A).

<sup>15</sup> Wis. Stat. § 6.95; Wis. Admin. Code EL §§ 9.05, 9.06.

<sup>16</sup> Wis. Stat. §§ 6.95, 7.51(2)(c), (3)(c).

<sup>17</sup> *Id.*; Wis. Admin. Code EL § 9.02.

<sup>18</sup> *Id.* § 9.02(1)-(2).

<sup>19</sup> Wis. Stat. § 6.925; Wis. Admin. Code at 9.02(1).

<sup>20</sup> Wis. Stat. § 7.41(3); Wis. Admin. Code EL § 9.02(1).

<sup>21</sup> Wis. Stat. §§ 12.13(1)(b), 12.60(1)(a).

<sup>22</sup> Wis. Stat. § 6.93; Wis. Admin. Code EL § 9.04.

challenger.<sup>23</sup> 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.<sup>24</sup> To minimize disruption to election administration and avoid erroneously or unlawfully denying eligible Wisconsin voters the right to vote, **municipal clerks should direct inspectors and boards of absentee ballot canvassers only to investigate challenges supported by sufficient evidence and made on the basis of personal knowledge.**<sup>25</sup>

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 or absentee ballot to its citizens, as Wisconsin has done, voters have a constitutionally protected liberty interest in having their mail ballot counted, and States “must afford appropriate due process protections to the use of [mail-in] absentee ballots.”<sup>26</sup>

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.”<sup>27</sup> Because “there is no possibility of meaningful postdeprivation process when a voter’s ballot is rejected . . . sufficient predeprivation process is the constitutional imperative.”<sup>28</sup> **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. Standard of Proof

The standard of proof necessary to disqualify a voter under Wisconsin law is “**beyond a reasonable doubt.**”<sup>29</sup> Before a voter may be disqualified, the evidence must establish beyond a reasonable doubt that the voter is not qualified. Beyond providing the documents and answering the questions as provided for in law, **the burden is**

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<sup>23</sup> *Id.*

<sup>24</sup> Wis. Stat. §§ 6.93, 7.52(5)(b).

<sup>25</sup> *See id.* § 7.52(5)(b) (“the board of absentee ballot canvassers may call before it any person whose absentee ballot is challenged ...”).

<sup>26</sup> *See, e.g., 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); *Raetzel 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).

<sup>27</sup> *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

<sup>28</sup> *Self Advocacy Solutions N.D. v. Jaeger*, 464 F.Supp.3d 1039, 1052 (D.N.D. 2020).

<sup>29</sup> Wis. Stat. § 6.325.

**not on the voter to establish their eligibility, but is on the challenger to demonstrate that the challenged voter is not eligible.**<sup>30</sup>

## V. 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 in bulk—must therefore comply with all federal and state laws, as well as the U.S. Constitution. As such, all Wisconsin election officials have the responsibility 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 historically disenfranchised communities in an attempt to intimidate or deter members of those communities from voting.<sup>31</sup> Sustaining such discriminatory challenges could violate the U.S. Constitution and federal law. Taken together, the Equal Protection Clause of the Fourteenth Amendment<sup>32</sup> and Section 2 of the Voting Rights Act<sup>33</sup> prohibit 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.”<sup>34</sup> Because these are often the exact groups targeted by mass challenges, clerks and other local election 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

Baseless mass challenges to voter eligibility could constitute voter intimidation, because such challenges are often made in bad faith to deter eligible citizens—including members of historically disenfranchised 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.<sup>35</sup> Additionally, several federal statutes impose civil liability for voter intimidation. Section 11(b) of the Voting Rights Act makes it unlawful to “intimidate,

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<sup>30</sup> See Wis JI 140.

<sup>31</sup> See, e.g., Nicolas Riley, *Voter Challenges*, Brennan Ctr. for Just. at 11-12 (2012), [https://www.brennancenter.org/sites/default/files/legacy/publications/Voter\\_Challengers.pdf](https://www.brennancenter.org/sites/default/files/legacy/publications/Voter_Challengers.pdf).

<sup>32</sup> U.S. Const. amend XIV, § 1.

<sup>33</sup> 52 U.S.C. 10301.

<sup>34</sup> See *Guidance Under Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, for Redistricting and Methods of Electing Government Bodies*, U.S. Dept. of Justice (Sept. 1, 2021), <https://www.justice.gov/opa/press-release/file/1429486/download>.

<sup>35</sup> 18 U.S.C. § 594.

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.”<sup>36</sup> In 2016, a federal court determined that voter challenges that intentionally target geographic areas with a large percentage of racial or ethnic minorities and that had the purpose or effect of deterring qualified members of those minority groups from voting violated a court order in a case involving claims under Section 11(b).<sup>37</sup> Further, the U.S. Department of Justice has cautioned that challenges made with the intention of or that have the effect of intimidating a reasonable voter can violate Section 11(b).<sup>38</sup> And 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 their choice.<sup>39</sup>

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.<sup>40</sup> The aggressive use or threat of a challenge to a voter’s eligibility when there is no cause could fall under this provision.

### C. Uniform and Nondiscriminatory Standards

The U.S. Constitution and federal law require that each state and political subdivision use uniform, nondiscriminatory standards and processes for evaluating voter eligibility challenges.<sup>41</sup> Under the U.S. Constitution, counties in the same state are prohibited from “us[ing] varying standards to determine what [i]s a legal vote” when processing ballots in presidential elections.<sup>42</sup> Similarly, the NVRA mandates that any voter registration list maintenance activity be “uniform, nondiscriminatory, and in compliance with the Voting Rights Act[.]”<sup>43</sup> including “any list maintenance activity based on third party submissions.”<sup>44</sup> The U.S. Department of Justice has advised that numerous list maintenance methods commonly used in mass voter eligibility challenges might violate the NVRA, including “comparing voter files to outdated or inaccurate records or databases, taking action that erroneously affects a particular class of voters (such as newly naturalized citizens), or matching records based solely on first name, last name, and date of birth.”<sup>45</sup>

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<sup>36</sup> 52 U.S.C. § 10307(b).

<sup>37</sup> See *Democratic Nat’l Comm. v. Republican Nat’l Comm.*, No. CV 81-03876, 2016 WL 6584915, at \*2 (D.N.J. Nov. 5, 2016).

<sup>38</sup> See *Voter Registration List Maintenance: Guidance under Section 8 of the National Voter Registration Act*, 52 U.S.C. § 20507, U.S. Dept. of Justice at 3 (Sept. 2024), <https://www.justice.gov/crt/media/1366561/dl> [hereinafter “DOJ Guidance”].

<sup>39</sup> 42 U.S.C. § 1985(3).

<sup>40</sup> 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>.

<sup>41</sup> 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).

<sup>42</sup> *Id.* at 107.

<sup>43</sup> 52 U.S.C. § 20507(b).

<sup>44</sup> DOJ Guidance at 3.

<sup>45</sup> *Id.*

The NVRA further mandates that election officials may not “systematically remove” ineligible voters from voter registration rolls within 90 days preceding an election for federal office.<sup>46</sup> According to the U.S. Department of Justice, this restriction “applies to list maintenance programs based on third-party challenges derived from any large, computerized data-matching process.”<sup>47</sup>

Local election officials should work to eliminate any meaningful divergence among them in the standards and processes used to evaluate voter challenges in different municipalities and replace them with uniform standards and processes. By doing so, Wisconsin voter challenge processes can avoid the “arbitrary and disparate treatment” of challenged ballots that violates the U.S. Constitution.<sup>48</sup>

#### D. Removals Based on Change of Address

The NVRA strictly regulates the process for removing a registered voter from the voter registration rolls based on suspected change of address, including when removals are triggered by mass eligibility voter challenges.<sup>49</sup> Election officials may only remove a voter from the list of registered voters based on change in residence when: (1) the voter confirms in writing that they have moved outside of the jurisdiction; or (2) election officials have satisfied the process outlined in Section 8(d)(2) of the NVRA.<sup>50</sup> The United States Department of Justice has cautioned that “[a] third-party submission—such as a submission of another individual’s information via an online portal or a challenge based solely on public database information—is not confirmation by the registrant of a change of address.”<sup>51</sup> Consequently, **removing individuals from the list of registered voters due to suspected change of address on the basis of mass voter eligibility challenges alone likely violates the NVRA.**<sup>52</sup>

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By ensuring compliance with the processes, requirements, and limitations of Wisconsin’s voter challenge laws, you can mitigate the potential harm and disruption caused by frivolous voter eligibility challenges. Our hope is that this summary of the relevant law will help you 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.

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<sup>46</sup> 52 U.S.C. § 20507(b)(1).

<sup>47</sup> DOJ Guidance at 4.

<sup>48</sup> *Bush*, 531 U.S. at 104-05.

<sup>49</sup> *See* 52 U.S.C. § 20507(b); DOJ Guidance at 4-6.

<sup>50</sup> *See* 52 U.S.C. § 20507(b)-(d); DOJ Guidance at 4. The DOJ Guidance also provides detailed information on the requirements of Section 8(d)(2). Election officials may only remove a voter under Section 8(d)(2) of the NVRA if that voter: (1) does not vote in any election between the date the notice was sent and the second general election following the notice; and (2) does not respond to the notice. 52 U.S.C. § 20507(d)(2).

<sup>51</sup> DOJ Guidance at 4.

<sup>52</sup> DOJ Guidance 4-5.



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

Sincerely,

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