



September 24, 2021

Dear County and Municipal Election Officials,

We are aware of existing and prospective efforts by Speaker Vos and members of the Wisconsin Legislature to subpoena voting machines and other election records, including paper ballots, in your possession pertaining to Wisconsin's November 2020 General Election (the "2020 General Election"). Although these requests may be framed as within the scope of legitimate legislative oversight, the proliferating efforts to use third parties to investigate the 2020 General Election may violate state law and the prevailing standards governing legislative inquiries. These kind of third-party reviews also have the potential to violate federal election-security and voter-protection laws, in addition to imposing unreasonable costs on Wisconsin taxpayers. The bottom line is this: Before your office responds to any requests, from any party, for sensitive election information, records, software, or equipment, we encourage you to discuss the issues outlined below with legal counsel.

Wisconsin's 2020 elections have already been subjected to unprecedented scrutiny, scrutiny which has uniformly confirmed that those elections were fair, secure, and accurate. For example, prior to the certification of the results of Wisconsin's Presidential election on November 30, 2020, every lawful vote was counted, and each municipal canvass ensured that the vote totals matched the number of voters who cast ballots. Those municipal canvass results were reviewed and confirmed by county canvasses, whose results were then reviewed and confirmed by the state canvass. Above and beyond that, over six days in November, county and municipal clerks conducted an official audit of more than 145,000 ballots from the November 2020 election. And in Milwaukee and Dane counties, every single ballot was individually recounted as representatives from both the Trump and Biden campaigns watched. In addition, there were at least seven legal challenges to the voting system, the counting process, and the results of the election in Wisconsin. State and federal judges, appointed by both Democrats and Republicans, uniformly rejected these challenges, reaffirming the official results.

This letter spells out the objections that can be raised in the event the Wisconsin Legislature nonetheless persists in its efforts to initiate third-party post-election reviews.¹ We respectfully suggest that counties and municipalities consider the following relevant state and federal laws before formulating any response to those requests.

¹ These third-party "investigations" are distinct from audits performed by government entities operating within their scope, such as the Legislative Audit Bureau's ongoing audit of the 2020 election (also mandated by the Legislature, but performed by a nonpartisan service agency) and the routine audits of equipment by election officials in accord with statutory requirements.

I. ELECTION SECURITY & INTEGRITY

Legislative requests to inspect electronic voting systems, including but not limited to voting machines, software, and other components may violate state and federal laws governing election security.

The Wisconsin Elections Commission (the “WEC” or “Commission”) is charged with overseeing “software components” of electronic voting systems, including “voting-counting source code, table structures, modules, program narratives and other human-readable computer instructions used to count votes with an electronic voting system.”² The WEC is required by law to “secure and maintain” software components in “strict confidence” except as authorized by statute.³ The only authorized exception is during the recount process immediately following a valid petition for a recount filed pursuant to Section 9.01 of the Wisconsin code.⁴ In such circumstances, only two designated individuals are permitted access to software components, both of whom must enter “a written agreement with the [WEC] that obligates the person to exercise the highest degree of reasonable care to maintain the confidentiality of all proprietary information to which the person is provided access[.]”⁵ There is no exception authorizing state legislative committees to examine proprietary information in election software, nor does any exception allow anyone in any circumstance to access that information without entering into a stringent confidentiality agreement with the WEC.

Legislative requests for election records also may run afoul of federal laws, guidance, and best practices concerning election integrity. Under federal law, every election officer must retain and preserve all records for any general, special, or primary election in which federal officeholders are elected, for a period of twenty-two months from the date of an election.⁶ In recent guidance, the U.S. Department of Justice warned “[w]here election records leave the control of elections officials, the systems for maintaining the security, integrity and chain of custody of those records can easily be broken. Moreover, where elections records are no longer under the control of elections officials, this can lead to a significant risk of the records being lost, stolen, altered, compromised, or destroyed.”⁷ As the guidance explains, “the obligation to retain and preserve election records remains intact regardless of who has physical possession of those records. Jurisdictions must ensure that if they conduct post-election ballot examinations, they also continue to comply with [federal] retention and preservation requirements[.]”⁸ Willful failure to comply with this section carries monetary penalties and potential imprisonment for up to one year.⁹ Neither the Legislature nor any third party working at its behest is an election official under Wisconsin law.

² Wis. Stat. § 5.905(1)-(5).

³ *Id.* § 5.905(2).

⁴ *Id.*

⁵ *Id.* § 5.905(4).

⁶ *See* 52 U.S.C. § 20701.

⁷ U.S. Department of Justice, *Federal Law Constraints on Post-Election “Audits”* (July 28, 2021), <https://www.justice.gov/opa/pr/justice-department-issues-guidance-federal-statutes-regarding-voting-methods-and-post>.

⁸ *Id.* at 3 (citing 52 U.S.C. § 20701).

⁹ 52 U.S.C. § 20701.

The third-party contractor that Speaker Vos has hired to conduct his review, former Wisconsin Supreme Court Justice Michael Gableman, has falsely suggested that bureaucrats were allowed “to steal our vote” in 2020¹⁰ and recently traveled (at taxpayer expense) to conspiracy-theorist and MyPillow CEO Mike Lindell’s symposium in South Dakota.¹¹ Gableman recently sent a letter via email to the WEC and then to county officials throughout the state demanding that they retain certain election materials, without any recognition of controlling federal and state legal authority regarding record retention.¹² The letters were sent from a gmail address with the user name “John Delta,” contravening WEC guidance advising against the use of commercial email services in the administration of elections in order to ensure proper security.¹³ Gableman’s failure to use an official state email address resulted in the letters being captured in the spam filters of numerous county clerks’ offices.¹⁴

II. IMPROPER EXERCISE OF AUTHORITY

The Wisconsin Legislature’s efforts to use third parties to investigate alleged criminal activity in connection with the 2020 General Election also may exceed the scope of its authority. Likewise, it is barred from impinging on the civil investigative power that it has granted to the WEC.

It is well established that legislatures are prohibited from using their oversight functions to conduct law-enforcement inquiries.¹⁵ Legislatures, for example, “may not use subpoenas to ‘try’ someone ‘before a committee for any crime or wrongdoing.’”¹⁶ Furthermore, a legislative investigation is not the proper avenue to seek redress on behalf of an aggrieved party for alleged criminal activity.¹⁷ Under Wisconsin law, district attorneys (and in some instances the Attorney General) have

¹⁰ Marley, Patrick, *Michael Gableman said bureaucrats ‘stole our votes’ before he was put in charge of reviewing 2020 election*, Milwaukee Journal Sentinel (August 9, 2021), <https://www.jsonline.com/story/news/politics/2021/08/09/michael-gableman-said-election-stolen-before-put-charge-wisconsin-review/5518815001/>.

¹¹ Marley, Patrick, *Official in charge of Wisconsin’s election review attends conspiracy-fueled symposium hosted by MyPillow’s Mike Lindell*, Milwaukee Journal Sentinel (August 12, 2021), <https://www.jsonline.com/story/news/politics/2021/08/12/wisconsin-election-official-attends-mike-lindell-cyber-symposium/8108850002/>.

¹² Bauer, Scott, *Wisconsin election clerks confused by investigation email*, Associated Press (Sept. 14, 2021), <https://apnews.com/article/elections-wisconsin-voting-presidential-elections-election-2020a30b152f4c7c548b11af00dcb116e3ee>.

¹³ WISPOLITICS.COM, *Gableman requests county clerks preserve records for November election probe* (Sept. 13, 2021), <https://www.wispolitics.com/2021/mon-pm-update-gableman-requests-county-clerks-preserve-records-for-november-election-probe/>.

¹⁴ Bauer, Scott, *Wisconsin election clerks confused by investigation email*, Associated Press (Sept. 14, 2021), <https://apnews.com/article/elections-wisconsin-voting-presidential-elections-election-2020a30b152f4c7c548b11af00dcb116e3ee>.

¹⁵ See, e.g., *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2032 (2020) (“Congress may not issue a subpoena for the purpose of ‘law enforcement,’ because ‘those powers are assigned to the Executive and the Judiciary.’”) (quoting *Quinn v. United States*, 349 U.S. 155, 161 (1955) (“[T]he power to investigate must not be confused with any of the powers of law enforcement . . .”).

¹⁶ *Id.* (quoting *McGrain v. Daugherty*, 237 U.S. 135, 179 (1927)).

¹⁷ See, e.g., *Greenfield v. Russel*, 292 Ill. 392 (1920) (determining legislative subpoena that sought to investigate alleged wrongdoing on behalf of injured party lacked legitimate legislative intent).

responsibility for prosecuting criminal violations of the state’s election code.¹⁸ To the extent the Wisconsin legislature seeks to utilize its investigatory powers to investigate tips of purported election fraud or other crimes,¹⁹ to redress alleged wrongs perpetrated against an aggrieved political candidate, or to pursue other alleged criminal misconduct, this is not a proper exercise of the legislature’s authority.

State legislatures also are prohibited from exercising powers that they have ceded to another branch of state government.²⁰ In 2015, Governor Scott Walker signed a bill passed by the Legislature creating the WEC.²¹ The WEC is a bipartisan regulatory commission whose members are appointed by both the executive and legislative branches to administer and enforce the election laws of the state.²² This includes investigating alleged civil violations of state election laws,²³ auditing the performance of voting systems,²⁴ and regulating or inspecting electronic voting machines,²⁵ paper ballots,²⁶ and other election equipment.²⁷ Importantly, any action taken by the WEC—with the exception of procedural actions—requires the affirmative vote of at least two-thirds of its members.²⁸ The Legislature, and more specifically, the Joint Committee on Legislative

¹⁸ See Wis. Stat. § 978.05(1).

¹⁹ See, e.g., Katie Shepherd, *Despite little evidence of fraud, Wisconsin Republican leader hires retired police to probe 2020 election*, Wash. Post (May 27, 2021), <https://www.washingtonpost.com/nation/2021/05/27/wisconsin-robin-vos-election-fraud/>.

²⁰ See, e.g., *Cusack v. Howlett*, 44 Ill. 2d 233, 234 (1969) (quashing legislative subpoena seeking to investigate judicial impropriety after state legislature passed legislation ceding its authority to govern judicial conduct to state Supreme Court); see also *McLaughlin v. Montana State Legislature*, No. OP 21-0173, 2021 WL 2945034, at *7 (Mont. July 14, 2021) (invalidating legislative subpoenas directed to court administrator on ground that oversight authority of court officials had been delegated to judicial branch).

²¹ See 2015 Wisconsin Act 118; Wis. Stat. § 5.93.

²² See Wis. Stat. § 15.61.

²³ See *id.* § 5.05(2m)(a).

²⁴ *Id.* § 7.08(8).

²⁵ See, e.g., *id.* § 7.08(1)(d) (“The [WEC] shall . . . [p]romulgate rules for the administration of the statutory requirements for voting machines and electronic voting systems and any other voting apparatus which may be introduced in this state for use at elections. Pursuant to such responsibility, the commission may obtain assistance from competent persons to check the machines, systems and apparatus and approve for use those types meeting the statutory requirements[.]”).

²⁶ See, e.g., *id.* § 5.51(8) (“Unless otherwise specifically provided, the form of all ballots shall conform to the ballot forms prescribed by the [WEC] under s. 708(1)(a)”); *id.* § 7.08(1)(a) (“The [WEC] shall . . . [p]rescribe all official ballot forms necessary under chs. 5 to 10 and 12 and revise the official ballot forms to harmonize with legislation and the current official status of the political parties whenever necessary.”).

²⁷ See, e.g., *id.* § 5.91 (“No ballot, voting device, automatic tabulating equipment, or related equipment and materials to be used in an electronic voting system may be utilized in this state unless it is certified by the commission.”); *id.* § 5.905(2) (“The commission shall determine which software components of an electronic voting system it considers to be necessary to enable review and verification of the accuracy of the automatic tabulating equipment used to record and tally the votes cast with the system. The commission shall require each vendor of an electronic voting system that is approved under s. 5.91 to place those software components in escrow with the commission within 90 days of the date of approval of the system and within 10 days of the date of any subsequent change in the components.”).

²⁸ See *id.* § 15.61 (enabling Governor to appoint 2 to 4 members of WEC); *id.* § 5.05(1e) (requiring 2/3rds vote of WEC members to undertake non-procedural actions).

Organization, is intended to perform only an “advisory” role to the WEC in matters relating to its operations.²⁹

In recent weeks, some members of a separate legislative committee, the Assembly Committee on Campaigns and Elections (the “Assembly Elections Committee”), have attempted to exercise non-advisory functions that are reserved to the WEC. Specifically, on August 6, 2021, Representative Janel Brandtjen, chair of the Assembly Elections Committee announced purported subpoenas directed to the clerks of Brown and Milwaukee Counties (the “August 6 Subpoenas”) seeking to conduct a “cyber forensic audit” of their voting equipment, ballots, and election software,³⁰ for the ostensible purpose of determining “the extent to which elections in Wisconsin have been conducted in compliance with the law.”³¹

The Legislature created the WEC and cannot now circumvent its delegation of authority by taking it upon itself, without amending the statutory regime, to investigate unspecified violations of the state’s election laws under the guise of legislative oversight.³² As described in more detail elsewhere in this letter, allowing a legislative committee to exercise the WEC’s authority could pose grave risks to election security, due process, and voter protections.

III. GOOD GOVERNANCE & TRANSPARENCY

Legislative efforts to use private third parties to investigate alleged violations of state election laws may also be inconsistent with state statutes designed to ensure that election laws are administered in a fair and transparent manner.

For example, the WEC, which is charged with investigating violations of the state’s elections laws, is prohibited from hiring or retaining employees, special investigators, or special counsel who are candidates for political office or have made political contributions in the past 12 months.³³ Similarly, the WEC Administrator may not have served as a lobbyist, or in a partisan state or local office.³⁴ Speaker Vos and Representative Brandtjen, in contrast, have not adopted any restraints on the partisan backgrounds of individuals they may hire as investigators. Indeed, former Justice

²⁹ *See id.* §§ 5.05(5f).

³⁰ Press Release, Rep. Janel Brandtjen, Brandtjen Moves Forward with Audit (Aug. 6, 2021), <https://legis.wisconsin.gov/assembly/22/brandtjen/media/1504/brandtjen-moves-forward.pdf>; *see also* <https://legis.wisconsin.gov/assembly/22/brandtjen/media/1503/subpoena-milwaukee-county.pdf>; <https://legis.wisconsin.gov/assembly/22/brandtjen/media/1502/subpoena-brown-county.pdf>; Letter from Milwaukee Office of Corporation Counsel to Rep. Brandtjen (Sept. 3, 2021), <https://s3.documentcloud.org/documents/21055019/20210903-milwaukee-county-response-to-brandtjen-subpoena.pdf>.

³¹ 2021 Assembly Resolution 15.

³² *Cf. Jordan v. Hutcheson*, 323 F.2d 597, 604 (4th Cir. 1963) (“[I]t would be ironic indeed if under the guise of legislative privilege a committee could accomplish the very thing that the Legislature itself was not permitted by direct statutory approach.”); *see also Trump v. Mazars*, 140 S. Ct. at 2033-34 (noting that courts should pay particular attention to legislative investigations that raise separation of powers concerns).

³³ Wis. Stat. § 5.05(2m)(d)2.

³⁴ *Id.* § 5.05(2m)(d)1.

Gableman appears to be collaborating with a former Trump Administration official, Andrew Kloster.³⁵

Similarly, the WEC is required by law to make certain records open to public inspection.³⁶ This includes any finding that “no probable cause exists to believe that a violation of the law has occurred.”³⁷ Third-party investigators working at the behest of Speaker Vos or a state legislative committee are not subject to similarly robust transparency requirements. In the absence of transparency, bad-faith actors may use preliminary, incomplete, or otherwise inaccurate findings from post-election reviews to spread disinformation concerning the integrity of the 2020 General Election. This has been a feature of the ongoing Cyber Ninjas’ election review commissioned by the Arizona State Senate.³⁸

Legislative efforts to conduct a belated, statutorily unauthorized review of the 2020 General Election would be in similar tension with good governance and transparency laws. Wisconsin has numerous safeguards to ensure that one party does not dominate the vote-counting process. For example, the county boards of canvassers, which are charged with canvassing election returns and conducting recounts,³⁹ must be comprised of members of both parties.⁴⁰ In a similar vein, election officials employed at central count locations must be divided equally among members of the two major political parties.⁴¹ There would be no similar restrictions governing a partisan post-election recount overseen by a single legislator, especially when that legislator was contracting with third parties to conduct the review.

Even if this review were to be directed by a full legislative committee (with members of both political parties) the likelihood of party-line votes raises similar concerns of partisan domination. As seen in Arizona, the recount could even be outsourced to private actors funded by political allies of the candidate whose ballots are being counted.⁴² Rep. Timothy Ramthun (R-Campbellsport) has advocated bringing Cyber Ninjas to Wisconsin and funding their work with

³⁵ See Bauer, Scott, *Former Trump official working on Wisconsin election probe*, AP News (Sept. 15, 2021), <https://apnews.com/article/donald-trump-elections-media-wisconsin-election-2020-67dea6f109e0ef8e1c30f275acb0cf1b>.

³⁶ *Id.* § 5.05(5s)(e).

³⁷ *Id.* § 5.05(5s)(e)4.

³⁸ See, e.g., Funke, Daniel, *Fact check: Arizona audit hasn't found 275,000 fraudulent votes*, USA Today (July 29, 2021) (refuting claim from spokeswoman for former-President Donald Trump that Arizona election audit had found 275,000 potentially fraudulent votes in one county), <https://www.usatoday.com/story/news/factcheck/2021/07/29/fact-check-arizona-audit-has-not-found-275-000-fraudulent-votes/5391659001/>; Cooper, Jonathan, *AP Fact Check: Trump makes false claims about Arizona audit*, Associated Press (July 17, 2021) (refuting multiple claims made by former-President Donald Trump that distorted statements by CEO of cyber security company hired to conduct Arizona election review), <https://apnews.com/article/technology-joe-biden-arizona-government-and-politics-ap-fact-check-0e7fad7e5bdf02d953c6b90a474267cc>.

³⁹ Wis. Stat. § 7.60(3), 9.01(1)(b).

⁴⁰ *Id.* § 7.60(2).

⁴¹ *Id.* § 5.86(1).

⁴² Gabbatt, Adam, *Firm leading Arizona audit received millions from Trump supporters*, The Guardian (July 29, 2021), <https://www.theguardian.com/us-news/2021/jul/29/cyber-ninjas-arizona-ballot-audit-donations-trump-supporters>.

private dollars.⁴³ And former Justice Gableman has affirmatively argued that his investigation must include individuals with established partisan bias.⁴⁴

Wisconsin law also requires that the counting and canvassing of votes be conducted in a transparent manner. The tabulation of votes must be “open to the public.”⁴⁵ The county boards of canvassers are required to “publicly examine” election returns.⁴⁶ The WEC Chair conducts the state canvass as an open meeting, noticed in advance and broadcast on WisconsinEye.⁴⁷ Additionally, “all steps” of a recount must be “performed publicly.”⁴⁸ The Legislature (and its contractors), by contrast, could presumably conduct their work, including a potential recount, in secret, with no requirement to make its findings open to the public. Speaker Vos and former Justice Gableman have already been subject to public complaints about the lack of transparency in their investigation, including from those who support a third-party review, such as former Milwaukee Sheriff David Clarke.⁴⁹ Senator Kathleen Bernier (R-Lake Hallie), chair of the Senate Elections Committee, has also noted that former Justice Gableman’s process has not been transparent.⁵⁰ A general lack of transparency has also been a defining feature of the Cyber Ninjas’ post-election review in Arizona.⁵¹ And former Justice Gableman said recently that “speaking about ongoing investigations is reckless and irresponsible,” making clear that he expects to operate his publicly funded investigation in a black box of secrecy.⁵²

IV. DUE PROCESS PROTECTIONS

In addition, legislative subpoenas directed at private individuals may violate those individuals’ due process rights. The U.S. Supreme Court has ruled that state legislatures are required to adhere to

⁴³ Marley, Patrick, *Wisconsin Republican invokes the QAnon theme as he seeks private funding for an Arizona-style election audit*, Milwaukee Journal Sentinel (August 3, 2021), <https://www.jsonline.com/story/news/politics/2021/08/03/republican-timothy-ramthun-seeking-election-review-invokes-qanon-theme-the-calm-before-the-storm/5463451001/>.

⁴⁴ “Wisconsin Office of Special Counsel Outlines Parameters of Investigation” WI Office of Special Counsel on YouTube (September 20, 2021), <https://www.youtube.com/watch?v=hBmPMFWn74E>.

⁴⁵ Wis. Stat. § 5.87(1).

⁴⁶ *Id.* § 7.60(3).

⁴⁷ Press Release, Wisconsin Elections Commission, WEC Chair to Canvass Presidential Election Results Today (Nov. 11, 2020), <https://elections.wi.gov/index.php/node/7258>.

⁴⁸ Wis. Stat. § 9.01(1)(b)11.

⁴⁹ Bauer, Scott *Wisconsin GOP leaders pressured to sign election subpoenas*, Wisconsin State Journal (September 11, 2021), https://madison.com/wsj/news/local/govt-and-politics/wisconsin-gop-leaders-pressured-to-sign-election-subpoenas/article_56924ee2-305f-5064-af75-27f55886f178.html.

⁵⁰ Marley, Patrick, *Michael Gableman, attorney for Assembly Republicans, asks officials to hang onto data about 2020 presidential election*, Milwaukee Journal Sentinel (September 9, 2021), <https://www.jsonline.com/story/news/politics/2021/09/09/michael-gableman-asks-officials-hang-onto-2020-presidential-election-data/8258580002/>.

⁵¹ Brewster, Adam, *Arizona Senate liaison to ballot audit raises transparency concerns, threatens to quit*, CBS News (July 27, 2021), <https://www.cbsnews.com/news/arizona-audit-ken-bennett-senate-liaison-threatens-quit/>.

⁵² “Wisconsin Office of Special Counsel Outlines Parameters of Investigation” WI Office of Special Counsel on YouTube (September 20, 2021), <https://www.youtube.com/watch?v=hBmPMFWn74E>.

due process principles in carrying out their oversight functions.⁵³ The Wisconsin code similarly requires the WEC to adhere to due process principles in investigating violations of the state's election laws.

Under the relevant state statute, the WEC may not initiate an investigation absent a sworn complaint alleging a violation of Chapters 5, 10, or 12 of the state statutes.⁵⁴ The WEC must provide notice to the subject of the complaint within five days of the allegations, as well as an opportunity to respond in writing within 15 days.⁵⁵ If the WEC thereafter concludes that the complaint does not “raise a reasonable suspicion that a violation of the law has occurred,” the Commission must make that finding public.⁵⁶ The Wisconsin Legislature has already falsely alleged that election officials around the state violated “bright-line rules established by the statutes and regulations governing the administration of elections in Wisconsin.”⁵⁷ To the extent the Legislature attributes these violations to specific election officials, due process requires, at a minimum, that the Legislature provide them notice and an opportunity to respond to the allegations.

A legislative inquiry that delegates broad investigatory powers to non-legislative actors may also run afoul of due process principles. The U.S. Supreme Court has previously struck down a witness's contempt conviction after he refused to answer questions from a state official deputized by the legislature to investigate violations of the state's anti-subversive activities laws.⁵⁸ The Court concluded that the state official had been given such a “sweeping mandate” that it was impossible for the witness to know whether the questions asked were in furtherance of a state interest.⁵⁹ The Wisconsin Legislature has passed similarly broad resolutions, including, for example, a resolution authorizing an investigation into “the extent to which elections in Wisconsin have been conducted in compliance with the law[.]”⁶⁰ To the extent non-legislative actors issue subpoenas pursuant to broad authorizing resolutions, objections may be raised on due process grounds.

⁵³ See, e.g., *Raley v. State of Ohio*, 360 U.S. 423, 437 (1959) (overturning convictions for contempt on due process grounds after state legislative committee erroneously informed witnesses that they could assert privilege against self-incrimination); *Sweezy v. State of N.H. by Wyman*, 354 U.S. 234, 254-55 (1957) (striking down subpoena issued in connection with investigation of “subversive activities” authorized by New Hampshire legislature on grounds that it resulted in a “deprivation of the constitutional rights of individuals and a denial of due process of law.”); see also *McLaughlin*, 2021 WL 2945034, at *13 (striking down legislative subpoena that “fail[ed] to safeguard the process that ordinarily attends the issuance of such compelled process”).

⁵⁴ Wis. Stat. §§ 5.05(2m)(a), (2m)(c)2.a.

⁵⁵ *Id.*

⁵⁶ *Id.* § 5.05(5s)(e)3.

⁵⁷ 2021 Assembly Resolution 15.

⁵⁸ *Sweezy*, 354 U.S. at 254.

⁵⁹ *Id.* at 246.

⁶⁰ 2021 Assembly Resolution 15.

In any event, Assembly Speaker Vos has indicated the planned inquiry will conclude by the end of October, leaving scarce time for meaningful due process to occur, especially because the Speaker has not even announced what the process for the review will include.⁶¹

V. VOTER PROTECTION

Legislative probes into the integrity of the 2020 General Election may also risk violating state and federal voter protection laws.

A state legislature operating “under the guise of legislative privilege” may not use its inherent oversight authority to harass or intimidate voters, or to commit what would otherwise be a violation of a voter’s statutory rights.⁶² It is a federal crime to intimidate or attempt to intimidate any person for the purpose of interfering with their right to vote.⁶³ It is a state crime to issue election threats, including, but not limited to, “prevent[ing] the free exercise of the franchise at an election” by “duress, or any fraudulent device or contrivance.”⁶⁴ The Wisconsin Constitution expressly guarantees the secrecy of the ballot,⁶⁵ and Wisconsin law prohibits soliciting a person “to show how his or her vote is cast.”⁶⁶ And yet, a spokesperson for an advocacy group pushing for a “cyber forensic audit” stated at a joint press conference with Rep. Brandtjen and Rep. Ramthun their desire to include “door-to-door inquiries” of voters in the 2020 election as part of the “audit.”⁶⁷

In the event the Wisconsin Legislature, or its third-party investigators, subject any individual voter to scrutiny over that person’s voting choices or behavior, they will likely be in violation of state and federal law. One provision is Section 11(b) of the Voting Rights Act of 1965, which prohibits any government action that intimidates voters, regardless whether the action is intended to intimidate. Section 11(b)’s broad prohibition on voter intimidation applies to *any* acts that intimidate, threaten, or coerce, including not only affirmative steps to intimidate, but also when a government’s failure to protect its citizens results in voter intimidation.⁶⁸

⁶¹ See Marley, Patrick, *Top Assembly Republican Robin Vos is leaving it to an investigator to decide on subpoenas for the election investigation*, Milwaukee Journal Sentinel (Aug. 27, 2021), <https://www.jsonline.com/story/news/politics/2021/08/27/robin-vos-let-gableman-make-call-wisconsin-election-subpoenas/5617382001/>.

⁶² *Cf. Jordan*, 323 F.2d at 604 (explaining state legislative committee was prohibited from using its inherent investigatory power to harass or intimidate witnesses or to commit violations of Civil Rights Act).

⁶³ See 18 U.S.C. § 594.

⁶⁴ Wis. Stat. § 12.09.

⁶⁵ Wis. Const. art. III, § 3 (“All votes shall be by secret ballot.”).

⁶⁶ Wis. Stat. § 12.13(3)(q).

⁶⁷ WISPOLITICS.COM, *Dem lt. gov field slow to materialize; group demands cyber audit of 2020 presidential election* (Sept. 10, 2021), <https://www.wispolitics.com/2021/fri-pm-update-dem-lt-guv-field-slow-to-materialize-group-demands-cyber-audit-of-2020-presidential-election/>.

⁶⁸ See Ben Cady & Tom Glazer, *Voters Strike Back: Litigating Against Modern Voter Intimidation*, 39 N.Y.U. Rev. L. & Soc. Change 173, 204 (2015) (“Section 11(b) does not require a plaintiff to make any showing with regard to the defendant’s intent.”); *accord, e.g., League of United Latin Am. Citizens - Richmond Region Council 4614 v. Pub. Interest Legal Found.*, No. 1:18-CV-00423, 2018 WL 3848404, at *3-4 (E.D. Va. Aug. 13, 2018); *United States v. Clark*, 249 F. Supp. 720, 729 (S.D. Ala. 1965).

VI. INVALID LEGISLATIVE PURPOSE

Federal and state courts generally grant broad deference to legislatures to conduct investigations so long as they have a “valid legislative purpose.”⁶⁹ But courts consistently have held that legislative investigations “conducted solely for the personal aggrandizement of the investigators . . . are indefensible.”⁷⁰ Multiple factors suggest that the subpoenas announced by Rep. Brandtjen last month were not a legitimate attempt at legislative oversight but were instead issued for the personal aggrandizement of Rep. Brandtjen. *First*, the subpoenas that Rep. Brandtjen announced were facially defective, as they lacked the required signatures from both the Speaker of the Assembly and its Chief Clerk. Rep. Brandtjen neglected to secure these signatures despite recent guidance from the nonpartisan Wisconsin Legislative Council affirming that the signature requirements were mandatory.⁷¹ *Second*, Rep. Brandtjen’s subpoenas demanded non-existent records from county clerks, including “forensic images” of “signature matching” equipment. Wisconsin election officials do not use signature matching equipment, as state law does not authorize election officials to compare the voter’s signature on their ballot return envelope to a signature on file for that voter.⁷² Indeed, the purported subpoenas were copied wholesale from subpoenas or requests made in Arizona and Pennsylvania.⁷³ *Finally*, Rep. Brandtjen timed the announcement of the subpoenas to coincide with a political rally titled “Audit the Vote.”⁷⁴ The Associated Press has reported that Rep. Brandtjen gave a speech at the rally “celebrating the subpoenas,” just hours after she had announced them.⁷⁵

The aforementioned defects in the August 6 Subpoenas may undermine efforts by Rep. Brandtjen to issue corrected subpoenas moving forward. They also may infect subsequent investigative efforts where it is clear those efforts are substantively duplicative of the invalid August 6 Subpoenas. While courts are generally reluctant to explore a legislative committee’s motives, courts are “not required to wear blinders,” and may view legislative action in relation to past actions of the committee.⁷⁶ Rep. Brandtjen’s procedurally and substantively defective August 6 Subpoenas could bear on a court’s analysis as to whether any future subpoenas that are actually issued serve a valid legislative purpose.

⁶⁹ *Quinn v. United States*, 349 U.S. 155, 161 (1955).

⁷⁰ *See, e.g., Watkins v. United States*, 354 U.S. 178, 187 (1957); *McLaughlin*, 2021 WL 2945034, at *3.

⁷¹ Memorandum from Peggy Hurley, Wisconsin Legislative Council, to Rep. Mark Spitzer Re: Subpoena Powers and Investigative Authority of a Legislative Committee, (June 10, 2021), https://www.documentcloud.org/documents/21037813-10spreitzer_ph-investigatory-and-subpoena-powers.

⁷² *Behind the Scenes of Mail Voting: The Rules and Procedures for Signature Verification in the 2020 General Election*, Stanford MIT-Health Elections Project, p. 9 (Oct. 28, 2020), https://healthyelections.org/sites/default/files/2020-10/Signature_Verification_0.pdf.

⁷³ *See* Letter from Maricopa County Attorney to Hon. Karen Fann, Ariz. Sen. Pres. (Aug. 18, 2021), <https://www.scribd.com/document/520721410/Notice-of-Claim-Senate-Final>; *see also* Memorandum from Pa. Sen. Doug Mastriano to Pres. Comm’r Julie Wheeler (July 7, 2021), <https://www.scribd.com/document/514665476/York-RFI-and-Exhibit-a-Letter>.

⁷⁴ Richmond, Todd, *Republican issues subpoenas for Wisconsin election info*, Associated Press (Aug. 6, 2021), <https://apnews.com/article/joe-biden-elections-wisconsin-election-2020-subpoenas-3952211bd482a785d3a8f8e9cc4d7c86>.

⁷⁵ *Id.*

⁷⁶ *See Jordan*, 323 F.2d at 603 (concluding that legislative committee was created as part of broader effort to thwart integration of schools).

The timeline of legislative investigations authorized by Speaker Vos also suggests an improper legislative purpose based on personal aggrandizement. Speaker Vos has been the subject of repeated attacks by former-President Donald Trump and his allies for his perceived failure to pursue evidence of election fraud.⁷⁷ On June 25, 2021, former-President Trump released a statement accusing Speaker Vos of “working hard to cover up election corruption in Wisconsin” and threatening to “run [Vos] out of office.”⁷⁸ The following day, Speaker Vos announced—at the Republican Party of Wisconsin’s state convention—that former Justice Gableman would oversee a broad investigation of the 2020 General Election.⁷⁹ Several weeks later, on August 6, an ally of former-President Trump led chants of “Vos has gotta go” at an Audit the Vote rally.⁸⁰ Two weeks later, on August 21, Speaker Vos flew on a private plane to a political rally in Alabama with former-President Trump, later tweeting a photograph of himself with the former President.⁸¹ Vos then explained that that he was going to keep former-President Trump “updated on our investigation.”⁸² Just a few days later, on August 27, Speaker Vos announced plans to expand the existing post-election review overseen by former Justice Gableman and to increase the budget for that investigation nearly ten-fold.⁸³ This sequence of events strongly suggests that Speaker Vos has authorized and expanded these investigations not in furtherance of any valid legislative purpose, but to curtail further damage to his political standing.

Speaker Vos’s recent actions suggest an additional improper legislative purpose. The U.S. Supreme Court has long held that there is “no congressional power to expose for the sake of exposure.”⁸⁴ The Wisconsin Supreme Court has also stated that legislative investigations must be instituted “for the purpose of securing information for legislative guidance” lest it serve a “mere political party purpose and interest.”⁸⁵ On August 21, 2021, Speaker Vos issued a press release vowing that the legislature would do “whatever it takes to help Justice Gableman uncover reports of systematic fraud”⁸⁶—despite the complete absence of any credible allegations of pervasive voter fraud or electoral misconduct and despite the rejection of similar assertions in the numerous reviews that

⁷⁷ Rothschild, Matt, *Vos Kisses Trump’s Ring*, Urban Milwaukee (Aug. 23, 2021), <https://urbanmilwaukee.com/2021/08/23/op-ed-vos-kisses-trumps-ring/>.

⁷⁸ Johnson, Shawn, *Following Warning By Trump, Vos Announces Former Justice Will Lead Assembly GOP Election Probe*, NPR (June 26, 2021), <https://www.wpr.org/following-warning-trump-vos-announces-former-justice-will-lead-assembly-gop-election-probe>.

⁷⁹ *Id.*

⁸⁰ White, Laurel, *‘Audit the Vote’ rally draws thousands to Wisconsin Capitol*, LaCrosse Tribune (Aug. 7, 2021), https://lacrossetribune.com/audit-the-vote-rally-draws-thousands-to-wisconsin-capitol/article_6dedfe8b-bf71-590c-a958-75e65e8cf2ba.html.

⁸¹ Speaker Robin Vos (@SpeakerVos), Twitter (Aug. 23, 2021, 11:15 AM).

⁸² Rogan, Adam, *Vos meets with Trump, vows to keep ex-president ‘updated’ on election investigation*, Wisconsin State Journal (Aug. 22, 2021), https://madison.com/wsj/vos-meets-with-trump-vows-to-keep-ex-president-updated-on-election-investigation/article_c0b14769-08f6-55f5-855a-06d75ad42971.html.

⁸³ Conklin, Melanie, *Vos’ moves to appease conspiracy election-fraud seeking groups appear to be failing*, Wisconsin Examiner (Sept. 1, 2021), <https://wisconsinexaminer.com/2021/09/01/vos-moves-to-appease-conspiracy-election-fraud-seeking-groups-appear-to-be-failing/>.

⁸⁴ *Watkins v. United States*, 354 U.S. 178, 200 (1957).

⁸⁵ *State ex rel. Rosenhein v. Frear*, 138 Wis. 173, 119 N.W. 894, 896 (1909).

⁸⁶ Hailey Koller, *WI State Representative Robin Vos attends Alabama Trump rally*, WMTV (Aug. 21, 2021), <https://www.nbc15.com/2021/08/22/wi-state-representative-robin-vos-attends-alabama-trump-rally/>.

have already occurred. Shortly thereafter, he secured approval to expand former Justice Gableman’s investigation into the 2020 General Election.⁸⁷ There is no indication that this expansion of the election review or former Justice Gableman’s hiring was undertaken to aid in the passage of future legislation. In fact, the letters recently sent from Gableman’s office to the WEC and county clerks appear to have been authored by a former Trump Administration official Andrew Kloster.⁸⁸ The latest expansion of the post-election review thus arguably reflects an improper effort to open an “investigation” in order to cast doubt and manufacture uncertainty about the 2020 presidential election results solely for the purpose of serving the political interests of Vos and former-President Trump.

VII. OVERBREADTH, BURDENSOMENESS & VAGUENESS

Legislative requests that are excessively broad, burdensome, or vague may be subject to challenge.

The U.S. Supreme Court has held that witnesses in congressional investigations cannot be subjected to unreasonable searches and seizures.⁸⁹ State courts have struck down legislative subpoenas on these grounds as well. In so ruling, courts have explained that legislative subpoenas must not be so broad such that they constitute a “fishing expedition,”⁹⁰ nor so burdensome that they constitute a “tool of harassment.”⁹¹

Legislative subpoenas must also be sufficiently definite such that recipients are not required to speculate as to what documents to produce.⁹² In the event subpoenas substantially similar to the August 6 Subpoenas are issued with proper signatures and are served, the broad and sweeping nature of the subpoenas, as well as the ambiguity of many of the requests, may subject them to the aforementioned challenges.

VIII. UNREASONABLE COSTS

Efforts by state legislative committees to investigate or recount the 2020 General Election may also impose unreasonable costs on Wisconsin taxpayers. A duly authorized committee of the Legislature is permitted to incur only “reasonably necessary expenses, payable out of the public funds” in the execution of its oversight functions.⁹³ Multiple factors suggest that the legislative investigations underway impose or are likely to impose excessive costs.

⁸⁷ Conklin, Melanie, *Vos’ moves to appease conspiracy election-fraud seeking groups appear to be failing*, Wisconsin Examiner (Sept. 1, 2021), <https://wisconsinexaminer.com/2021/09/01/vos-moves-to-appease-conspiracy-election-fraud-seeking-groups-appear-to-be-failing/>.

⁸⁸ Bauer, Scott, *Former Trump official working on Wisconsin election probe*, AP News (Sept. 15, 2021), <https://apnews.com/article/donald-trump-elections-media-wisconsin-election-2020-67dea6f109e0ef8e1c30f275acb0cf1b>.

⁸⁹ *Watkins*, 354 U.S. at 188.

⁹⁰ *Lunderstadt v. Pennsylvania House of Representatives Select Comm.*, 513 Pa. 236, 249 (1986).

⁹¹ *Brodsky v. New York Yankees*, 26 Misc. 3d 874, 887 (N.Y. Sup. Ct. 2009).

⁹² *People ex rel. Legislative Comm’n on Low Income Hous. v. Keefe*, 36 Ill. 2d 460, 465 (1967).

⁹³ *See Frear*, 119 N.W. at 895.

First, the Wisconsin Legislature requires petitioners who seek electoral recounts to bear the costs of their requests, unless the vote falls within a particular margin.⁹⁴ Former-President Donald Trump was required to bear the costs of the last recount.⁹⁵ He had the option of seeking a statewide recount but chose instead to limit his request—and his cost—to two counties. He may not now shift the price of an additional recount to Wisconsin taxpayers through the vehicle of a legislative investigation undertaken for his aggrandizement.

Second, the 2020 General Election has already been scrutinized and confirmed as accurate by the local, county, and state canvasses, the recount and its judicial review, the statutorily mandated random machine audit, the Wisconsin Elections Commission’s routine post-election oversight, and the adjudication of multiple challenges in state and federal courts.⁹⁶ The complete absence of any evidence substantiating allegations of pervasive voter fraud or electoral misconduct in these previous reviews demonstrates the futility and wastefulness of additional investigations or recounts.

Third, the Wisconsin Legislature already has requested an additional review by the nonpartisan Legislative Audit Bureau, and that review has been underway for months.⁹⁷ The Legislature did not even wait for the results of that investigation before initiating duplicative reviews of the 2020 General Election. There’s no reason the Legislature should squander taxpayer money on redundant investigations, nor is there is any reason for municipal governments to bear the expense of cooperating with redundant investigations.

Fourth, Speaker Vos has issued contradictory statements on the necessity of additional forensic reviews.⁹⁸ On July 27, 2021, he refused to commit additional resources to the Assembly Elections Committee’s anticipated “comprehensive, forensic examination,” stating that the Legislature was “already doing the forensic audit” and that “he did not know what [the Assembly Elections Committee investigation] would prove.”⁹⁹ Following pressure from party members and a personal meeting with former-President Trump, he has now expanded his existing investigation to more closely align with Rep. Brandtjen’s previous attempt at a subpoena.

Fifth, Speaker Vos does not appear to have capped costs in connection with his latest expansion of former Justice Gableman’s investigation into the 2020 General Election.¹⁰⁰ Former Justice

⁹⁴ See Wis. Stat. §§ 9.01(1)(a)1., 9.01(1)(ag)2.

⁹⁵ Hart, John, *Completed Wisconsin recount confirms Joe Biden's win over Donald Trump*, Associated Press (Sept. 6, 2021), https://madison.com/wsj/news/local/govt-and-politics/elections/completed-wisconsin-recount-confirms-joe-bidens-win-over-donald-trump/article_6335f4cb-4308-5108-ae71-88bf62ce90bf.html.

⁹⁶ Conklin, Melanie, *Vos’ moves to appease conspiracy election-fraud seeking groups appear to be failing*, Wisconsin Examiner (Sept. 1, 2021), <https://wisconsinexaminer.com/2021/09/01/vos-moves-to-appease-conspiracy-election-fraud-seeking-groups-appear-to-be-failing/>.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Bauer, Scott, *Wisconsin GOP leader doesn’t want another election probe*, AP News (July 27, 2021), <https://apnews.com/article/joe-biden-government-and-politics-elections-wisconsin-election-2020-6b8f81692d24dc6aa1836fb57abbc8cd>.

¹⁰⁰ *Id.*

Gableman already has been authorized to spend nearly \$700,000 and conceivably could spend millions of dollars to review the 2020 General Election in the coming months. The lack of any upper limit on spending has the potential to impose unreasonable costs on Wisconsin taxpayers. The Legislature may also be barred from spending *any* taxpayer dollars on these investigations, if they serve a purely private political interest. The Public Purpose Doctrine, recognized by Wisconsin courts since statehood, requires that public funds cannot be spent other than for a public purpose.¹⁰¹ If post-election reviews are advanced for campaign fundraising or other political benefit and not for a legitimate legislative purpose, it is difficult to see how they provide a public benefit appropriate for taxpayer funding. While legislative declarations of a public purpose are given great weight and wide discretion, courts are not bound by a legislative assertion that an expenditure is for public benefit.¹⁰²

Even now, more than ten months later, legislators in Wisconsin have indicated their intent to conduct vague and murky investigations into the November 2020 election. The lack of clarity and transparency makes it difficult for municipal election officials and Wisconsin taxpayers to have any idea what to expect. At this point, what is clear is that one or more of these investigations could include unprecedented legislative subpoenas that raise novel questions of Wisconsin law. Additionally, the anticipated scope of those subpoenas—if recent political rhetoric and document-preservation letters evidently sent by former Justice Gableman are to be believed—may run afoul of established protections that state and federal law provide for voters, election officials, and election materials.

In sum, election officials would be wise to proceed with caution upon receiving any subpoena in connection with investigations of the 2020 General Election. Such subpoenas are almost certain to face significant questions about their validity, both procedurally and substantively. Election officials will also need to weigh their existing legal duties before responding to requests for records or information.

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¹⁰¹ *State ex rel. Hammermill Paper Co. v. La Plante*, 58 Wis. 2d 32, 48-49 (1973) (collecting cases).

¹⁰² *State ex rel. Warren v. Reuter*, 44 Wis. 2d 201, 218 (1969); *Hammermill Paper Co.*, 58 Wis. 2d at 50-51.