

FILED
06-06-2022
Clerk of Circuit Court
Waukesha County
2021CV001710

STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY
BRANCH 3

MICHAEL J. GABLEMAN,

Petitioner,

v.

Case No. 2021-CV-1710

Code: Unclassified

ERIC GENRICH, et al.

Respondents.

MUNICIPAL RESPONDENTS' BRIEF IN RESPONSE

TABLE OF CONTENTS

<i>TABLE OF AUTHORITIES</i>	<i>iv</i>
<i>INTRODUCTION</i>	1
<i>FACTS</i>	3
1. Background.....	3
2. City of Green Bay	4
a. The Genrich Subpoena.....	4
b. Communications between the City of Green Bay and Mr. Gableman.....	5
i. Green Bay and the Office of Special Counsel agree to document production in lieu of testimony, and the City produces documents in reliance on that agreement.	5
ii. Without explanation or effective notice, Mr. Gableman tries to reverse course on the parties’ agreement and seeks testimony from the City.	6
3. City of Madison.....	8
a. Subpoenas to Madison officials	8
b. Communications between Mr. Gableman’s office and the City of Madison	9
4. City of Milwaukee.....	13
a. Henke and Bubacz Subpoenas	13
b. Communications between Mr. Gableman and the City of Milwaukee... ..	15
i. The City of Milwaukee timely responds to the Henke and Bubacz document subpoenas.	15
ii. The Special Counsel’s associate requests a meeting; the City of Milwaukee responds affirmatively; the Special Counsel’s associate falls silent.	16
iii. The City of Milwaukee supplements its response to Henke Subpoena I.	17

iv.	The City of Milwaukee and the Special Counsel exchange correspondence regarding the February 16, 2022, subpoena return dates.....	17
5.	City of Racine.....	19
a.	Department of Information Services subpoenas.....	19
b.	There is no December 28, 2021 subpoena naming City of Racine Mayor Cory Mason.....	21
6.	Public Comments by Mr. Gableman.....	22
7.	Mr. Gableman’s Appearances before the Committee and Reports.....	24
8.	Mr. Gableman’s Contracts with and Relationship to the Legislature	25
	<i>PROCEDURAL POSTURE</i>	28
	<i>ARGUMENT</i>	31
I.	Chapter 885 Cannot Be Used to Enforce the Legislative Subpoenas at Issue.	31
A.	Wisconsin precedent and rules of statutory interpretation foreclose Mr. Gableman’s construction of Chapters 13 and 885.	31
B.	The statutory history and historical use of Wis. Stat. § 885.12 confirm that it does not apply to legislative subpoenas.....	37
C.	Mr. Gableman’s argument that Wis. Stat. § 885.12 provides alternative remedies is both irrelevant and incorrect.	39
D.	The sole remedy available under Wis. Stat. § 885.12 cannot be applied in this case.....	41
II.	Mr. Gableman Has Not Demonstrated That the Municipal Respondents Acted “Without Reasonable Excuse.”	43
A.	Wis. Stat. § 885.12 requires specific facts showing that a witness resisting a subpoena had no reasonable excuse for doing so.....	44
B.	Mr. Gableman provided no facts to support his Petition as to any of the Municipal Respondents, and no such facts exist.	44
C.	Mayor Genrich always acted reasonably, and Mr. Gableman has not provided any facts to the contrary.....	45

i.	Mr. Gableman’s Office Agreed No Testimony Would Be Required.....	48
ii.	Mr. Gableman Did Not Expect Mayor Genrich to Testify	50
D.	Mayor Rhodes-Conway acted reasonably.....	52
E.	Milwaukee officials Henke and Bubacz acted reasonably.....	55
F.	Mayor Mason acted reasonably.	57
G.	There was and continues to be litigation regarding the validity of this type of legislative subpoena.....	58
III.	The Subpoenas Are Invalid and Cannot Be Enforced.....	59
A.	The Subpoenas and their quasi-deposition demand are not authorized by the provisions of Chapter 13.	59
B.	Even if the Subpoenas were statutorily compliant, they are too vague for due process purposes.....	63
C.	The Genrich Subpoena and the Rhodes-Conway Subpoena are unreasonably broad and burdensome.....	66
IV.	Additional Procedural Defects Are Fatal to Mr. Gableman’s Petitions.....	67
A.	The original and Amended Petitions must be dismissed pursuant to Wis. Stat. § 801.02.....	67
B.	Neither the original Petition nor the Amended Petition states a claim involving Clerk Jeffreys or Clerk Witzel-Behl.	69
	<i>CONCLUSION</i>	70

TABLE OF AUTHORITIES

Cases

<i>Am. Fam. Mut. Ins. Co. v. Royal Ins. Co.</i> , 167 Wis. 2d 524, 481 N.W.2d 629 (1992).....	68
<i>Archambault v. A-C Prod. Liab. Tr.</i> , 205 Wis. 2d 400, 556 N.W.2d 392 (Ct. App. 1996)	68
<i>Brown Cnty. Sheriff's Dep't Non-supervisory Labor Ass'n v. Brown Cnty.</i> , Decision No. 31367-C, 2005 WL 6453898 (WERC Nov. 21, 2005)	39, 44
<i>Butts v. Fenelon</i> , 38 Wis. 664 (1875) (per curiam).....	69
<i>Carlstedt v. Wolfe</i> , WEC Case No. EL 21-24 (Dec. 8, 2021).....	3
<i>Data Key Partners v. Permira Advisers LLC</i> , 2014 WI 86, 356 Wis. 2d 665, 849 N.W.2d 693	46, 69
<i>Dawson v. Goldammer</i> , 2006 WI App 158, 295 Wis. 2d 728, 722 N.W.2d 106	46
<i>Feehan v. Wis. Elections Comm'n</i> , 506 F. Supp. 3d 596 (E.D. Wis. 2020), <i>petitions for extraordinary relief denied</i> , No. 20-859 (U.S. Mar. 1, 2021), <i>vacated on remand after appeal dismissed as moot</i> , No. 20-cv-1771-PP, ECF No. 95 (E.D. Wis. Mar. 16, 2021)	3
<i>Force ex rel. Welcenbach v. Am. Fam. Mut. Ins. Co.</i> , 2014 WI 82, 356 Wis. 2d 582, 850 N.W.2d 866	43
<i>Gabler v. Crime Victims Rights Bd.</i> , 2017 WI 67, 376 Wis. 2d 147, 897 N.W.2d 384	36
<i>Goldman v. Olson</i> , 286 F. Supp. 35 (W.D. Wis. 1968).....	63, 64
<i>Groppi v. Leslie</i> , 404 U.S. 496 (1972)	42
<i>Hagar v. Reclamation Dist., No. 108</i> , 111 U.S. 701 (1884)	65

<i>Hopper v. City of Madison</i> , 79 Wis. 2d 120, 256 N.W.2d 139 (1977).....	36
<i>In re Doe Petition</i> , 2008 WI 67, 310 Wis. 2d 342, 750 N.W.2d 873, <i>opinion modified on denial of reconsideration sub nom.</i> <i>In re Doe</i> , 2008 WI 118, 314 Wis. 2d 67, 756 N.W.2d 34 (per curiam).....	34
<i>In re Falvey</i> , 7 Wis. 630 (1859).....	63
<i>Jefferson v. Dane Cty.</i> , 2020 WI 90, 394 Wis. 2d 602, 951 N.W.2d 556	41
<i>Joint Anti-Fascist Refugee Comm. v. McGrath</i> , 341 U.S. 123 (1951)	65
<i>Liu v. Wolfe</i> , WEC Case No. EL 21-33 (Dec. 8, 2021), <i>aff'd sub nom</i> <i>Liu et al. v. Wisconsin Elections Comm'n</i> , Dane Cnty. Cir. Ct. Case No. 2022CV46 (Oral Decision, June 1, 2022).....	3
<i>Marder v. Bd. of Regents of Univ. of Wis.</i> , 2005 WI 159, 286 Wis. 2d 252, 706 N.W.2d 110	34
<i>Martinez v. DILHR</i> , 165 Wis. 2d 687, 478 N.W.2d 582 (1992).....	35, 43
<i>Next Level Plan. & Wealth Mgmt., LLC v. Prudential Ins. Co. of Am.</i> , No. 18-MC-65-PP, 2019 WL 1466049 (E.D. Wis. Apr. 3, 2019).....	59
<i>Outagamie Cnty. v. Smith</i> , 38 Wis. 2d 24, 155 N.W.2d 639 (1968).....	36
<i>Prujansky v. Wolfe</i> , WEC Case No. EL 21-29 (Dec. 8, 2021).....	3
<i>Rossmiller v. Rossmiller</i> , 151 Wis. 2d 386, 444 N.W.2d 445 (Ct. App. 1989)	37
<i>State ex rel. Lanning v. Lonsdale</i> , 48 Wis. 348, 4 N.W. 390 (1880).....	33, 34, 44
<i>State ex rel. Ozanne v. Fitzgerald</i> , 2011 WI 43, 334 Wis. 2d 70, 798 N.W.2d 436	35, 43

<i>State ex rel. St. Mary’s Hosp. v. Indus. Comm’n</i> , 250 Wis. 516, 27 N.W.2d 478 (1947).....	39
<i>State ex. rel. Kalal v. Circuit Court for Dane County</i> , 2004 WI 58, 271 Wis. 2d 633, 681 N.W.2d. 110	43
<i>State v. Balistrieri</i> , 55 Wis. 2d 513, 219 N.W.2d 585 (1972).....	39, 44
<i>State v. Beno</i> , 116 Wis. 2d 122, 341 N.W.2d 668 (1984).....	48
<i>State v. Lopez</i> , 2019 WI 101, 389 Wis. 2d 156, 936 N.W.2d 125	40
<i>State v. Schaefer</i> , 2008 WI 25, 308 Wis. 2d 279, 746 N.W.2d 457	35, 37
<i>State v. Zivcic</i> , 229 Wis. 2d 119, 598 N.W.2d. 565 (Ct. App. 1999)	41
<i>Thomas v. Wolfe</i> , WEC Case No. EL 21-30 (Dec. 8, 2021).....	3
<i>Tobler v. Door Cnty.</i> , 158 Wis. 2d 19, 461 N.W.2d 775 (1990).....	68
<i>Town of Rib Mountain v. Marathon Cnty.</i> , 2019 WI 50, 386 Wis. 2d 632, 926 N.W.2d 731	41
<i>Trump v. Biden</i> , 2020 WI 91, 394 Wis. 2d 629, 951 N.W.2d 568	3
<i>Trump v. Evers</i> , No. 2020AP1971-OA (Wis. Dec. 3, 2020).....	3
<i>Trump v. Wis. Elections Comm’n</i> , 506 F. Supp. 3d 620 (E.D. Wis. 2020), <i>aff’d</i> , 983 F.3d 919 (7th Cir. 2020), <i>cert. denied</i> , 141 S.Ct. 1516 (2021)	3
<i>U.S. v. Salerno</i> , 481 U.S. 739 (1987)	65
<i>United States v. Brown</i> , 521 F. Supp. 511 (W.D. Wis. 1981).....	48

<i>Watkins v. United States</i> , 354 U.S. 178 (1957)	63
<i>Werner v. Wolfe</i> , WEC Case No. EL 21-31 (Dec. 8, 2021).....	3
<i>Wis. Voters Alliance v. Pence</i> , 514 F. Supp. 3d 117 (D.D.C. 2021)	3
<i>Wis. Voters Alliance v. Wis. Elections Comm'n</i> , No. 2020AP1930-OA (Wis. Dec. 4, 2020).....	3

Statutes and Constitutional Provisions

1997 Wis. Act 187	68
U.S. Const. Amend. XIV	65
Wis. Admin. Code § Ins. 5.27.....	39
Wis. Const. art. IV	35, 43, 62
Wis. Const. art. XIII	42
Wis. Stat. § 13.02	62
Wis. Stat. § 13.26	35, 37, 60
Wis. Stat. § 13.27	35, 37
Wis. Stat. § 13.31	<i>passim</i>
Wis. Stat. § 13.32	41, 42, 61
Wis. Stat. § 13.34	35, 61
Wis. Stat. § 13.35	61
Wis. Stat. § 16.004	38
Wis. Stat. § 19.81	36
Wis. Stat. §§ 19.81-19.98	62
Wis. Stat. § 19.87	62

Wis. Stat. § 59.28	41
Wis. Stat. § 115.80	38
Wis. Stat. § 136.03	38
Wis. Stat. § 186.015	38
Wis. Stat. § 220.035	38
Wis. Stat. § 785.04	40
Wis. Stat. § 801.01	68
Wis. Stat. § 801.012	68
Wis. Stat. § 801.02	67, 68, 69
Wis. Stat. § 801.15	68
Wis. Stat. § 802.01	68, 70
Wis. Stat. § 802.02	69
Wis. Stat. § 802.06	70
Wis. Stat. § 802.08	44
Wis. Stat. § 802.09	30
Wis. Stat. § 885.12	<i>passim</i>
Wis. Stat. § 887.01	47
Wis. Stat. § 4053 (Sanborn & Berryman 1889)	38

Other Authorities

1927 Wis. Sess. Laws 766	38
20 Wis. Op. Atty. Gen. 765 (1931)	34
Assembly Rule 3	61
Joint Rule 84	63
Judicial Council Note—sec. 13, ch. 289, Laws of 1981	68

Leg. Audit Bureau, *Elections Administration*, Report 21-19 (Oct. 2021)..... 3

Local Court Rule 3.3 1

INTRODUCTION

Petitioner Michael Gableman’s attempt to obtain Writs of Attachment depends on a profoundly flawed understanding of his own—and this Court’s—authority. He lacks the ability to enforce the subpoenas at issue, and this Court cannot issue the writs requested. Respondents Eric Genrich, Mayor of the City of Green Bay; Satya Rhodes-Conway, Mayor of the City of Madison; David Henke, Chief Information Officer (“CIO”) of the City of Milwaukee; Hannah Bubacz, employee of the City of Milwaukee; and Cory Mason, Mayor of the City of Racine (collectively, the “Municipal Respondents”) respectfully request that this Court deny Mr. Gableman’s Petitions.¹

First, because Mr. Gableman claims to be enforcing *legislative* subpoenas, he cannot seek attachment under Wis. Stat. § 885.12.² Under every relevant rule of statutory construction, the exclusive authority for enforcing legislative subpoenas is Wisconsin Statutes Chapter 13 (“Chapter 13”), the chapter describing legislative processes, including legislative subpoenas. Indeed, the subpoenas themselves refer to Chapter 13 as their sole enforcement mechanism. Mr. Gableman does not, and cannot, contend that this Court can issue the writs if Chapter 13 applies here; he admits that Chapter 13 requires the Legislature to enforce its subpoenas through transparent legislative processes. He therefore complains that Chapter 13’s

¹ On April 1, 2022, during a hearing in this matter, this Court orally granted Mayor Genrich’s request to file an oversized brief. *See* Waukesha County Civil Court Division, Local Court Rule 3.3. To avoid duplicative arguments, and in the interest of judicial economy, the Municipal Respondents submit this single response to the original Petition and Amended Petition, and to the briefs Mr. Gableman filed.

² Unless otherwise specified, all references are to the updated 2019-2020 Wisconsin Statutes.

enforcement mechanisms are unduly burdensome—ignoring that they are burdensome by design, in service of accountability and transparency. The fact that the Legislature has so far declined to use Chapter 13’s enforcement procedures, standing alone, should end this proceeding.

Second, even if Mr. Gableman were correct that Wis. Stat. § 885.12 is applicable here, he has failed to meet its requirements. Attachment is available under § 885.12 *only* where there is “no reasonable excuse” for a witness’s failure to comply with a subpoena. But each respondent had more than a “reasonable excuse” for any alleged failure to comply. In different ways, each of the Municipal Respondents communicated with and made agreements with Mr. Gableman and his office. Mr. Gableman responded with silence, except for public comments that he was not seeking testimony of municipal officials, until he filed this *ex parte* action.

Third, the subpoenas were invalid from the start. The subpoenas contemplate a non-public, quasi-deposition procedure that Chapter 13 does not authorize and that violates the fundamental mandate for the Legislature to conduct its business in public. The subpoenas are also unconstitutionally overbroad and fail to comply with the requirements of Chapter 13.

Finally, basic procedural deficiencies in Mr. Gableman’s Petitions are fatal to his case.

This Court should deny the Petition and the Amended Petition as to the Municipal Respondents.

FACTS

1. Background

Wisconsin's 2020 General Election was safe, secure, fair, and transparent. Every court and administrative agency to review the matter has affirmed that Wisconsin administered the 2020 General Election successfully and without any meaningful fraud.³

Nonetheless, Wisconsin State Assembly Resolution 15 directed the Assembly Committee on Campaigns and Elections (the "Committee") "to investigate the administration of elections in Wisconsin, focusing on elections conducted after January 1, 2019." [Dkt. No. 7, pp. 2-3.] The Committee thereafter authorized the Speaker of the Assembly, Robin Vos ("Speaker Vos" or "Vos"), to hire a special counsel to conduct its investigation. [Dkt. No. 7, pp. 4-5.] Speaker Vos, on behalf of the Wisconsin Assembly, entered into a Coordinating Attorney Independent Contractor Agreement with Consultare, LLC. [Dkt. No. 7, pp. 6-9.] Mr. Gableman is the president of Consultare. [Dkt. No. 7, p. 8.]

³ See, e.g., *Trump v. Wis. Elections Comm'n*, 506 F. Supp. 3d 620 (E.D. Wis. 2020), *aff'd*, 983 F.3d 919 (7th Cir. 2020), *cert. denied*, 141 S.Ct. 1516 (2021); *Feehan v. Wis. Elections Comm'n*, 506 F. Supp. 3d 596 (E.D. Wis. 2020), *petitions for extraordinary relief denied*, No. 20-859 (U.S. Mar. 1, 2021), *vacated on remand after appeal dismissed as moot*, No. 20-cv-1771-PP, ECF No. 95 (E.D. Wis. Mar. 16, 2021); *Wis. Voters Alliance v. Pence*, 514 F. Supp. 3d 117 (D.D.C. 2021); *Trump v. Biden*, 2020 WI 91, 394 Wis. 2d 629, 951 N.W.2d 568; *Wis. Voters Alliance v. Wis. Elections Comm'n*, No. 2020AP1930-OA (Wis. Dec. 4, 2020); *Trump v. Evers*, No. 2020AP1971-OA (Wis. Dec. 3, 2020); *Prujansky v. Wolfe*, WEC Case No. EL 21-29 (Dec. 8, 2021); *Werner v. Wolfe*, WEC Case No. EL 21-31 (Dec. 8, 2021); *Thomas v. Wolfe*, WEC Case No. EL 21-30 (Dec. 8, 2021); *Liu v. Wolfe*, WEC Case No. EL 21-33 (Dec. 8, 2021), *aff'd sub nom Liu et al. v. Wisconsin Elections Comm'n*, Dane Cnty. Cir. Ct. Case No. 2022CV46 (Oral Decision, June 1, 2022); *Carlstedt v. Wolfe*, WEC Case No. EL 21-24 (Dec. 8, 2021); Leg. Audit Bureau, *Elections Administration*, Report 21-19 (Oct. 2021).

Months after Speaker Vos entered into the contract with Mr. Gableman, the Assembly, by Vos, began issuing legislative subpoenas related to the investigation. The subpoenas at issue here fall into two categories. One set, issued to Mayor Rhodes-Conway and Mayor Genrich in October 2021, purports to require in-person testimony and the production of documents. But for the names of the officials and the cities, those two subpoenas are identical in form. The second type of subpoena, issued to Ms. Bubacz and CIO Henke on December 28, 2021,⁴ purports to require testimony only. These two subpoenas are also identical in form.

2. City of Green Bay

a. The Genrich Subpoena

On October 4, 2021, Speaker Vos and Edward A. Blazel, Chief Clerk of the Wisconsin State Assembly, signed a “Subpoena *Duces Tecum*” pursuant to Wis. Stat. § 13.31 and directed to Mayor Genrich (the “Genrich Subpoena”). [Dkt. No. 6.] The Genrich Subpoena purportedly required Mayor Genrich to provide testimony regarding “potential irregularities and/or illegalities related to the [November 2020 General] Election” on October 22, 2021, at a private office. [Dkt. No. 6, p. 2.] It also demanded “all documents contained in your files and/or in your custody, possession, or control, pertaining to the [November 2020 General] Election.” [Dkt. No. 6, p. 2.]⁵

⁴ As discussed below, Mr. Gableman has also named Mayor Mason, who did not receive any subpoena connected to this case, as a respondent. Clerks Witzel-Behl and Jeffreys are named in the caption, but nowhere in the body, of Mr. Gableman’s Amended Petition. [Dkt. No. 75.] Those two clerks received subpoenas identical to those sent to Mayors Rhodes-Conway and Genrich. [Dkt. 107, pp. 3-4.]

⁵ Speaker Vos and Mr. Blazel also signed subpoenas directed to the City Clerk of the City of Green Bay as well as to the City itself. [Mandell Aff., ¶2, Exhs. A & B.] The subpoena to the

The Genrich Subpoena stated:

FAILURE TO COMPLY WITH THIS SUBPOENA MAY CONSTITUTE CONTEMPT OF THE LEGISLATURE, PURSUANT TO WIS. STAT. § 13.26(1)(C) AND IS SUBJECT TO PUNISHMENT, INCLUDING IMPRISONMENT, PURSUANT TO WIS. STAT. § 13.27.

[Dkt. No. 6, p. 2 (emphasis original).]

b. Communications between the City of Green Bay and Mr. Gableman

i. Green Bay and the Office of Special Counsel agree to document production in lieu of testimony, and the City produces documents in reliance on that agreement.

Immediately after the subpoenas were signed, on October 5, 2021, the City of Green Bay Common Council voted to retain Law Forward, Stafford Rosenbaum LLP, and States United Democracy Center (collectively, “Outside Counsel”) as outside counsel to the City regarding investigations into the 2020 General Election. [Mandell Aff., ¶3.]⁶ Shortly afterward, Attorney Jeffrey A. Mandell of Stafford Rosenbaum LLP contacted Attorney Andrew Kloster, an attorney in the Office of the Special Counsel, to discuss the various subpoenas issued to the City, the City Clerk, and Mayor Genrich. [Mandell Aff., ¶4.]

Mr. Mandell and Mr. Kloster agreed that the City of Green Bay would voluntarily produce to Mr. Gableman all documents that had been produced in

City of Green Bay is also dated October 4 and purportedly compels the testimony of “the person most knowledgeable in regard to the November 2020 General Election in Wisconsin.” [Mandell Aff., ¶2, Exh. B]. A subpoena directed to the City Clerk is labeled “Subpoena Duces Tecum” and purports to compel the Clerk, Celestine Jeffreys, to appear and give testimony at a private office in Brookfield. [Mandell Aff., ¶2, Exh. A.]

⁶ The affidavits of Jamie Fuge, Daniel S. Lenz, Vanessa R. Chavez and Jeffrey A. Mandell were filed on January 4, 2022. [Dkt. Nos. 51, 52, 56, 57.] Mr. Lenz is filing a second affidavit (referred to herein as “Second Lenz Aff.”) along with this brief.

response to open records requests regarding the November 2020 General Election, as well as additional public documents regarding the City's administration of that election. [Mandell Aff., ¶5.] In exchange, they agreed that none of the legislative subpoenas directed to the City of Green Bay or its officials would be enforced. [Mandell Aff., ¶6.] This agreement expressly included an understanding that no one from Green Bay would be produced to provide testimony until the Office of Special Counsel had reviewed the documents produced and identified specific topics on which further inquiry was necessary. [Mandell Aff., ¶7.] Mr. Mandell also requested that communications between the Office of the Special Counsel and Green Bay be directed to Outside Counsel, rather than to City officials. [Mandell Aff., ¶9.]

Pursuant to the agreement, on October 14, 2021, Outside Counsel sent a flash drive containing nearly 20,000 pages of documents to Mr. Gableman, along with a transmittal letter confirming the discussion between Mr. Gableman's office and Outside Counsel. [Mandell Aff., ¶8, Exh. C.] The transmittal letter also reiterated the request that Mr. Gableman contact an attorney at Law Forward directly with any questions regarding the City of Green Bay's response and memorialized Outside Counsel's agreement with Mr. Kloster that "neither further document production nor witness attendance is necessary at this time . . ." [Mandell Aff., ¶8, Exh. C.]

ii. Without explanation or effective notice, Mr. Gableman tries to reverse course on the parties' agreement and seeks testimony from the City.

While Green Bay upheld its end of the bargain, Mr. Gableman and his staff did not. They continued to attempt to obtain testimony from Green Bay—and they did so by communicating directly with Green Bay officials and staff and without

acknowledging the deal that they struck with Outside Counsel to obtain documents in this matter. On October 20 and 21, 2021, Mr. Gableman's office sent two emails to Vanessa Chavez, then the City Attorney of the City of Green Bay, confusingly stating that Mr. Gableman wished to change the date for testimony pursuant to the subpoenas. The emails did not name Mayor Genrich. The originating email addresses for these emails did not reveal the names of their senders,⁷ and both emails went directly into Ms. Chavez's spam folder. [Chavez Aff., ¶¶9-12.] Because Mr. Gableman's office had made an agreement with Outside Counsel that it would not seek testimony, Ms. Chavez would have had no reason to expect that there would be any further communications on this issue—especially not any communications directed only to her. Mr. Gableman's office did not communicate or follow up with Outside Counsel, with whom the agreement regarding the subpoenas had been negotiated. [Mandell Aff., ¶10.]

As part of her transition out of the office of City Attorney, Ms. Chavez discovered the emails. [Chavez Aff., ¶9.] On November 23, Outside Counsel sent another letter to Mr. Gableman, informing him that the emails had been caught in the spam filter, and reiterating the request that his office address the City of Green Bay through its Outside Counsel. [First Lenz Aff. ¶3 & Exh. B.] At the same time, Outside Counsel supplemented Green Bay's document production. [First Lenz Aff. ¶3 & Exh. B.]

⁷ One email was from "Coms <Coms@wispecialcounsel.org>" and the other was from "3 <3@wispecialcounsel.org>".

Mr. Gableman's office failed to follow up on this communication. No one from Mr. Gableman's office communicated with Outside Counsel between the initial conversations between Mr. Mandell and Mr. Kloster in early October and December 9 when an attorney transmitted a letter and proposed motion for sanctions to Mr. Mandell. [Mandell Aff., ¶11.] Other than the October 20 and 21, 2021 emails to Ms. Chavez, no one from Mr. Gableman's office provided additional details about how, when, or where he expected to take testimony, or the topics he sought to discuss.⁸ [Mandell Aff., ¶¶11-12; First Lenz Aff. ¶¶4-5.] Mr. Gableman did, however, file the original Petition in this matter, *ex parte*, seeking to jail Mayor Genrich. [Dkt. No. 5.] Since then, Mayor Genrich has confirmed in writing that he is willing to testify before the Committee. [Second Lenz Aff., ¶3, Exh. B.]

3. City of Madison

a. Subpoenas to Madison officials

On September 28, 2021, Speaker Vos and Clerk Blazel signed a subpoena *duces tecum* pursuant to Wis. Stat. § 13.31 directed to Mayor Rhodes-Conway (the "Rhodes-Conway Subpoena"). The Rhodes-Conway Subpoena purported to require Mayor Rhodes-Conway to provide testimony regarding "potential irregularities and/or illegalities related to the [November 2020 General] Election" on October 22, 2021, at

⁸ Mr. Gableman did not stop trying to contact City staff directly. On December 3, 2021, two individuals identifying themselves as investigators with the Office of Special Counsel called an employee in the City Clerk's office. [Fuge Aff., ¶¶2-3.] In response, the City's Outside Counsel requested, again, that Mr. Gableman cease this improper behavior. [First Lenz Aff. ¶2, Exh. A.]

a private office. [Dkt. No. 2, p. 3]. Like the Genrich Subpoena, the Rhodes-Conway Subpoena stated:

FAILURE TO COMPLY WITH THIS SUBPOENA MAY CONSTITUTE CONTEMPT OF THE LEGISLATURE, PURSUANT TO WIS. STAT. § 13.26(1)(C) AND IS SUBJECT TO PUNISHMENT, INCLUDING IMPRISONMENT, PURSUANT TO WIS. STAT. § 13.27.

[Dkt. No. 2, p. 3 (emphasis original).]

On October 1, 2021, Clerk Witzel-Behl was served with a subpoena *duces tecum* (the “Witzel-Behl Subpoena”) which purportedly required her appearance on October 15, 2021. [Haas Aff., ¶3, Exh. 1.] On October 6, 2021, Mayor Rhodes-Conway was served with the Rhodes-Conway Subpoena. [Dkt. No. 2.]

On October 6, 2021, the City of Madison was also served with a Subpoena for Deposition issued by Mr. Gableman’s office which purportedly required the appearance of “the person most knowledgeable in regard to the November 2020 General Election in Wisconsin” (“PMK”) on October 22, 2021. [Haas Aff., ¶5, Exh. 3.] In response to these subpoenas and four additional subpoenas issued in December of 2021, the City of Madison provided over 16,000 pages of documents to Mr. Gableman’s office. [Haas Aff., ¶¶6-10.]

b. Communications between Mr. Gableman’s office and the City of Madison

On October 5, 2021, Madison City Attorney Michael Haas contacted Mr. Gableman’s office to clarify the information being requested and the scope of the Witzel-Behl Subpoena. [Haas Aff. ¶11, Exh. 8.] Having received no response by October 7, 2021, Mr. Haas contacted Mr. Gableman’s office by telephone and email with regard to the Witzel-Behl Subpoena as well as the additional subpoenas issued

to Mayor Rhodes-Conway and the PMK. Mr. Haas requested an extension of the return dates for the three subpoenas due to the extremely large volume of potentially responsive records, as well as significant questions regarding the scope of the subpoenas that required clarification. Mr. Haas also requested a joint meeting with Mr. Gableman's office and legal counsel representing the four other municipalities which had received similar subpoenas, "to provide an opportunity to get our questions answered and to work towards resolving outstanding issues." [Haas Aff. ¶12, Exh. 9.]

Later in the day of October 7, 2021, Mr. Kloster, on behalf of Mr. Gableman, contacted Mr. Haas by telephone. Mr. Kloster indicated that, for the time being, Mr. Gableman requested that the City of Madison provide copies of records which the City had previously produced in response to separate public records requests related to the 2020 General Election from various parties. Mr. Kloster indicated that Mr. Gableman's office would review the documents and decide whether any additional documents or testimony would be requested. Mr. Kloster also stated that no City of Madison officials would need to appear on the October 15 or 22, 2021 return dates indicated on the subpoenas issued to Mayor Rhodes-Conway, Clerk Witzel-Behl, and the PMK. [Haas Aff. ¶13.]

On October 7, 2021, Mr. Gableman publicly confirmed that he had canceled the requested interviews with the mayors and clerks who were issued subpoenas, and that those officials could satisfy the subpoenas by providing copies of records made available to others pursuant to public records requests. [Haas Aff. ¶14, Exh. 10.]

On October 8, 2021, Mr. Kloster and Mr. Haas exchanged email messages to confirm the substance of the telephone conversation the previous day. While the email communications describe a disagreement regarding the records to be produced, the correspondence confirmed that Mr. Gableman reserved the right to request additional documents and schedule interviews with City officials after reviewing the documents to be produced. Mr. Kloster's email stated:

As we have already discussed your record-retention and production policies, the individual from your office who delivers the physical copy will not need to spend any substantial time with us--merely sign in and confirm delivery of the physical copy. We understand that there has been some public misinformation out there on this point.

[Haas Aff. ¶15, Exh. 11.]

Later in the afternoon of October 8, 2021, Mr. Gableman contacted Mr. Haas by telephone. In that conversation, Mr. Gableman specifically stated that he viewed the requested appearances by Clerk Witzel-Behl and Mayor Rhodes-Conway in response to their respective subpoenas *duces tecum* as being necessary only for the purpose of producing the requested records. In contrast, in referring to the subpoena for testimony issued to the PMK, Mr. Gableman indicated he may want to interview that person at some point in the future. [Haas Aff. ¶16.]

On October 14, 2021, the City of Madison conveyed numerous documents to Mr. Gableman's office in response to the subpoenas *duces tecum* issued to Clerk Witzel-Behl and Mayor Rhodes-Conway. Mr. Haas included a transmittal letter in which he reiterated the City's understanding that neither Clerk Witzel-Behl nor Mayor Rhodes-Conway would appear for interviews on October 15 or 22, 2021, as the production of documents fulfilled the subpoenas issued to those officials. The

correspondence also indicated that the City of Madison would await communication from Mr. Gableman's office regarding whether it still wished to schedule an interview with the PMK, and that the City would need to receive details about the location and forum for any such interview, as well as specific topics Mr. Gableman would like to explore. [Haas Aff. ¶17, Exh. 12.]

On October 21, 2021, Mr. Gableman sent an email to Mr. Haas stating that his office wished to continue the return date of the subpoena to the PMK from October 22, 2021 to November 15, 2021. The email did not indicate that Mr. Gableman's office wished to continue the return date of Mayor Rhodes-Conway, which was also scheduled for October 22, 2021, nor mention any remaining obligation of Mayor Rhodes-Conway to respond to the Rhodes-Conway Subpoena. [Haas Aff. ¶18, Exhibit 13.]

By letter dated November 2, 2021, Mr. Haas reiterated the City of Madison's understanding that no City official was required to appear on November 15, 2021, unless the City was provided with a more specific scope of inquiry and the parties reached an agreement on interview details such as format and length. Mr. Haas noted that the scheduled interview was only two weeks away and that separate court action had been initiated which may affect the enforcement of similar subpoenas, as well as the format of any interview. [Haas Aff. ¶19, Exh. 14.]

Mr. Gableman's office did not respond to the correspondence from Mr. Haas dated November 2, 2021. Before Mr. Gableman filed this action, the City of Madison received no communication from Mr. Gableman's office stating, contrary to the

understanding of the parties and Mr. Gableman's public statements, that it still wished to interview Mayor Rhodes-Conway. [Haas Aff. ¶20.]

At the time Mr. Gableman initiated this action, Clerk Witzel-Behl and Mayor Rhodes-Conway had fulfilled the requests of the subpoenas *duces tecum* issued to each of them. The only outstanding subpoena for testimony purportedly required the appearance of the PMK for the City of Madison. The "person most knowledgeable in regard to the November 2020 General Election" is not the same as the Mayor of Madison, whose primary involvement with the conduct of the 2020 General Election involved communications regarding the City's application for and receipt of election grant funds from the Center for Tech and Civic Life and not the administration of the 2020 General Election for the City of Madison. [Haas Aff. ¶21.]

4. City of Milwaukee

a. Henke and Bubacz Subpoenas

Speaker Vos and Chief Clerk Blazel signed two documents on December 28, 2021, directed to CIO Henke, both titled "Legislative Subpoena and Subpoena *Duces Tecum*" and purportedly requiring CIO Henke to produce documents and/or appear, "pursuant to law," before the Special Counsel at 200 South Executive Drive, Ste. 101, Brookfield, Wisconsin. CIO Henke is, and was at all relevant times, the City of Milwaukee's Chief Information Officer ("CIO"). [Carroll Aff., ¶2.] Both subpoenas stated that "Failure to comply with the subpoena may constitute contempt of the legislature and is subject to punishment, including incarceration or the levy of attorney's fees and costs." The documents differ only in their stated return dates and the types of documents requested, the latter of which were enumerated in attached

schedules. One document included a return date of January 13, 2022, at 9:30 a.m. (“Henke Subpoena I”), while the other included a return date of January 19, 2022, at 9:30 a.m. (“Henke Subpoena II”). [Carroll Aff., ¶4, Exhs. A-B.] Neither Henke Subpoena I nor Henke Subpoena II is at issue in this case.

A third document directed to CIO Henke and signed by Speaker Vos and Chief Clerk Blazel on December 28, 2021, was titled “Legislative Subpoena” (“Henke Subpoena III”). Unlike the first two subpoenas, which focused on document production, this third subpoena purported to require CIO Henke to appear at the Office of Special Counsel to give testimony under oath. As with the document subpoenas directed to CIO Henke, this document stated that “Failure to comply with the subpoena may constitute contempt of the legislature and is subject to punishment, including incarceration or the levy of attorney’s fees and costs.” [Dkt. No. 107, p. 14.]

Speaker Vos and Chief Clerk Blazel also signed two purported subpoenas on December 28, 2021, directed to City of Milwaukee employee Hannah Bubacz. [Dkt. No. 107, p. 15; Carroll Aff., ¶¶5-6, Exhs. E-F.] Ms. Bubacz is, and was at all relevant times, an employee in the City of Milwaukee’s Information Technology Management Division. [Carroll Aff., ¶3.] One of the documents, titled “Legislative Subpoena *Duces Tecum*,” focuses on documents and is essentially identical in form to Henke Subpoena II except for the return date, which was the later of January 18, 2022 or ten days following receipt—which, in this instance, was January 21, 2022—at 9:30 a.m. (“Bubacz Subpoena I”). [Carroll Aff., ¶5, Exh. D.] The other, titled “Legislative

Subpoena,” sought in-person testimony and is essentially identical in form to Henke Subpoena III except for the return date, which is February 16, 2022, at 3:00 p.m. (“Bubacz Subpoena II”). [Dkt. No. 107, p. 15.] Both documents include non-compliance language identical to that in the Henke Subpoenas. [Dkt. No. 107, p. 15; Carroll Aff., ¶5, Exh. D.] Only Henke Subpoena III and Bubacz Subpoena II are at issue in this case.

b. Communications between Mr. Gableman and the City of Milwaukee

i. The City of Milwaukee timely responds to the Henke and Bubacz document subpoenas.

CIO Henke’s counsel, Milwaukee City Attorney Tearman Spencer, by Assistant City Attorney James M. Carroll, timely responded to Henke Subpoena I by emailing a letter to Mr. Gableman on January 13, 2022, the stated return date. In the letter, Mr. Carroll raised a variety of objections to the relevant document requests, including objections regarding Mr. Gableman’s jurisdiction, the validity of the subpoenas, and the breadth and proportion of the requests relative to the purported scope of the Special Counsel’s investigation. Nevertheless, Mr. Carroll provided responsive documents while also noting that other documents were either unavailable or still being researched. Mr. Carroll’s letter confirmed his client’s intent to respond in good faith and to supplement the responses as appropriate. [Carroll Aff., ¶6, Exh. F.]

Mr. Carroll timely responded to Henke Subpoena II by emailing a letter to Mr. Gableman on January 19, 2022, the stated return date. As in his January 13, 2022, letter, Mr. Carroll raised objections, indicated which responsive documents were

unavailable, and confirmed his client's intent to supplement the responses as necessary. Mr. Carroll also sought clarification regarding some document requests. [Carroll Aff., ¶7, Exh. G.]

Mr. Carroll also timely responded to Bubacz Subpoena I by emailing a letter to Mr. Gableman on January 21, 2022, the applicable return date. Again, Mr. Carroll raised objections, indicated which responsive documents were unavailable, requested some clarifications, and stated his client's intent to supplement the responses as necessary. [Carroll Aff., ¶8, Exh. H.]

ii. The Special Counsel's associate requests a meeting; the City of Milwaukee responds affirmatively; the Special Counsel's associate falls silent.

On Saturday, January 22, 2022, at 8:18 p.m., Mr. Carroll received an email from the address 7@wispecialcounsel.org that read as follows:

Mr. Carr [*sic*],

My name is Clint Lancaster. I work for the Special Counsel. We received your letter with objections and seeking clarification of the subpoenas. Would you be available to discuss the subpoena to Ms. Bubacz on Wednesday? If so, can I call you at any time or would you prefer that we schedule a time to talk instead?

Thanks.

Clinton W. Lancaster, Esq.

OFFICE OF THE SPECIAL COUNSEL
P.O. Box 510766
New Berlin, WI 53151
7@wispecialcounsel.org

[Carroll Aff., ¶9, Exh. I.] Mr. Carroll, who was out of the office ill on Monday, January 24, 2022, responded by email to Mr. Lancaster on January 25, 2022:

Mr. Lancaster,

Thanks for your email. I am available tomorrow (Wednesday 1/26) between 8:30-10 AM or after 1 PM.

Thanks,
Jim

[Carroll Aff., ¶10, Exh. J.] Mr. Carroll received no follow up email or telephone call from Mr. Lancaster at any point thereafter regarding the discussion that Mr. Lancaster had proposed. [Carroll Aff., ¶11.]

iii. The City of Milwaukee supplements its response to Henke Subpoena I.

On February 4, 2022, having heard nothing further from Mr. Lancaster or anyone else with the Special Counsel's office, Mr. Carroll sent a letter to Mr. Gableman via email. The letter was accompanied by additional documents responsive to Henke Subpoena I. Mr. Carroll again raised a variety of objections and reiterated the City of Milwaukee's desire to cooperate in good faith and to supplement responses as needed. [Carroll Aff., ¶12, Exh. K.]

iv. The City of Milwaukee and the Special Counsel exchange correspondence regarding the February 16, 2022, subpoena return dates.

On February 11, 2022, Mr. Carroll sent a letter to Mr. Gableman via email regarding the upcoming February 16, 2022, return date for Henke Subpoena III and Bubacz Subpoena II. Mr. Carroll explained that in-person testimony by either CIO Henke or Ms. Bubacz on February 16, 2022, was premature for multiple reasons, but noted that the City of Milwaukee was not precluding the possibility of witness

testimony in the future. There were numerous reasons for the City of Milwaukee's position, including that: (a) the scope of and appropriate forum for any in-person testimony remained outstanding issues in ongoing litigation in Dane County Circuit Court; (b) the Special Counsel had provided no information regarding the scope/format of any in-person testimony; (c) Mr. Lancaster had not followed up after requesting a meeting on January 26, 2022; (d) to the City of Milwaukee's knowledge, Mr. Gableman's contract with Speaker Vos had expired on December 31, 2021, and had not been extended or renewed; and (e) the February 16, 2022, date immediately followed the February 15, 2022, mayoral special election primary in the City of Milwaukee. [Carroll Aff., ¶13, Exh. L.]

The following day, on February 12, 2022, Mr. Lancaster sent a letter to Mr. Carroll via email. The letter stated that the Special Counsel was not waiving its expectation that CIO Henke and Ms. Bubacz appear to testify in person on the afternoon of February 16. It indicated that "the subpoenas are validly issued and we intend to move forward by talking to the appropriate representative from Milwaukee regarding the 2020 election investigation." Mr. Lancaster also noted that "[w]e anticipate that these will not be long interviews, but they are important to the Special Counsel and the Committee's investigations." Mr. Lancaster attached an undated document to his letter, purporting to show that "the Committee on Campaigns and Elections authorizes the type of testimony contemplated by the subpoenas." [Carroll Aff., ¶14, Exh. M.]

Mr. Carroll emailed the following to Mr. Lancaster at 8:56 a.m. on February 16, 2022:

Mr. Lancaster,

In response to your February 12 letter, please note that the [sic] for the reasons stated in my February 11 letter the City of Milwaukee will not be producing Mr. Henke or Ms. Bubacz for testimony this afternoon. As previously noted, the City of Milwaukee is not foreclosing the possibility of witness testimony in the future, assuming that the issues raised in my letter have been adequately addressed/resolved. We have received no information regarding the anticipated topics of testimony for these individuals or the format of the questioning, nor have we received confirmation that Justice Gableman's contract with the legislature has been extended beyond December 31 of last year.

[Carroll Aff., ¶15, Exh. N.] Consistent with Mr. Carroll's February 11 and February 16 communications to Mr. Lancaster, neither CIO Henke nor Ms. Bubacz appeared to testify on February 16, 2022. [Carroll Aff., ¶16.]

5. City of Racine

No person named in this action associated with the City of Racine government has been issued or served a subpoena that is the subject of the Amended Petition.

a. Department of Information Services subpoenas

Speaker Vos and Chief Clerk Blazel signed two documents on December 28, 2021, directed to City of Racine Department of Information Services, both titled "Legislative Subpoena and Subpoena *Duces Tecum*" and purportedly requiring City of Racine Department of Information Services to produce documents and/or appear, "pursuant to law," before the Special Counsel at 200 South Executive Drive, Ste. 101,

Brookfield, Wisconsin.⁹ Both subpoenas stated that “Failure to comply with the subpoena may constitute contempt of the legislature and is subject to punishment, including incarceration or the levy of attorney’s fees and costs.” The documents differ only in their stated return dates and the types of documents requested, the latter of which were enumerated in an attached schedule. One document included a return date of January 13, 2022, at 9:30 a.m., while the other included a return date of January 19, 2022, at 9:30 a.m. [Letteney Aff., ¶5.]

A third document directed to the City of Racine Department of Information Services and signed by Speaker Vos and Chief Clerk Blazel on December 28, 2021, was titled “Legislative Subpoena.” Unlike the first two subpoenas, which focused on document production, this third subpoena purported to require the Person Most Knowledgeable from the City of Racine Department of Information Services to appear at the Office of Special Counsel to give testimony under oath. As with the document subpoenas directed to the City of Racine Department of Information Services, this document stated that “Failure to comply with the subpoena may constitute contempt of the legislature and is subject to punishment, including incarceration or the levy of attorney’s fees and costs.” [Dkt. No. 107, p. 5.]

⁹ The City of Racine does not have a department called the “Department of Information Services.” However, the City of Racine has a “Department of Management Information Systems.” [Letteney Aff., ¶7.] It is uncertain whether that is the department to which these subpoenas were intended to be directed.

b. There is no December 28, 2021 subpoena naming City of Racine Mayor Cory Mason

In his Amended Petition for Writ of Attachment, Mr. Gableman named City of Racine Mayor Cory Mason as a Respondent. The Amended Petition states, “[t]hat the [C]ity of Racine was served the subpoena attached as exhibit eight.” [Dkt. 75, ¶12.] The Amended Petition does not allege that Mayor Mason, individually, was ever issued or served a subpoena. Further, there is no attached “exhibit eight,” nor any attached exhibit, so it is impossible to determine from the Amended Petition who or what was served. [Dkt. 75.]

Moreover, and contrary to the statements made in the Brief of Petitioner Regarding the Court’s Orders of January 21, 2022, and April 1, 2022, the exhibits filed with that Brief demonstrate that Mayor Mason was not issued or served a subpoena at issue in the Amended Petition.¹⁰ [Dkt. No. 106.] The last paragraph of page five of the Brief states, “[o]n December 28, 2021, at the request of the Special Counsel, the legislature issued subpoenas to ... Racine Mayor Cory Mason Exhibits I–P.” However, none of the exhibits attached to that Brief includes a subpoena naming Mayor Mason. [Dkt. No. 107.] The only exhibit referencing any representative of the City of Racine is Exhibit N, which names the City of Racine

¹⁰ A subpoena naming Mayor Mason was signed by Speaker Vos and Chief Clerk Blazel on October 4, 2021, purporting to command the appearance of Mayor Mason before Mr. Gableman on October 22, 2021. However, that subpoena is not at issue in the instant case. In the Brief of Petitioner Regarding the Court’s Orders of January 21, 2022, Mr. Gableman stated: “[s]ubpoenas were also issued [on October 4, 2021] and served upon the officials of the cities of Kenosha, Racine, and Milwaukee. However, those entities either satisfactorily complied with the subpoenas or made alternative arrangements with the OSC.” [Dkt. 76, p. 4, fn. 1.]

“Department of Information Services,” as addressed *supra*, and seeks testimony from “the person most knowledgeable to the City of Racine’s Department of Information Services.” [Letteney Aff., ¶6; Dkt No. 107, p. 16.]

There is no “Department of Information Services” within the structure of the City of Racine government. There is a Department of Management Information Systems. [Letteney Aff., ¶7.] However, Mayor Mason does not work for or within that department. [Letteney Aff., ¶8.]

6. Public Comments by Mr. Gableman

Almost immediately after the Legislature issued the first set of subpoenas signed by Speaker Vos and Mr. Blazel, Mr. Gableman publicly dismissed the idea that any city officials would be required to testify.¹¹ On October 15, 2021, Mr. Gableman agreed that the subpoenas had been complied with: “We are grateful that all the cities so far, the Wisconsin Elections Commission and Josh Kaul have all voluntarily complied with our subpoenas as we have worked closely with each of them to try to make this as efficient and convenient as possible for everyone concerned.”¹²

¹¹ Emilee Fannon, *Gableman Puts Elections Subpoenas on Hold, Cancels Interviews with Clerks and Mayors*, WDJT-Milwaukee (Oct. 7, 2021), available at <https://www.cbs58.com/news/gableman-puts-election-subpoenas-on-hold-cancels-interviews-with-clerks-and-mayors> (last visited June 3, 2022); A.J. Bayatpour, *Gableman Backs Off Request For Testimony From City Officials*, wkow.com (Oct. 7, 2021) available at https://www.wkow.com/news/gableman-backs-off-request-for-testimony-from-city-officials/article_e249c854-27ba-11ec-82c5-7b5f2c67ef13.html (last visited June 3, 2022).

¹² Matt Smith, *GOP Election Attorney Signals Eventual Testimony, Possible Subpoenas For Voting Machines*, wisn.com (Oct. 15, 2021), available at <https://www.wisn.com/article/gableman-signals-eventual-testimony-possible-subpoenas-for-election-machines-in-12-news-interview/37973875#> (last visited June 3, 2022).

Mr. Gableman indicated that any testimony would be scheduled after his office finished its review.

He persisted with this type of messaging:

- On October 7, according to media reports, acting on behalf of Mr. Gableman, Mr. Kloster contacted attorneys in the cities of Madison, Milwaukee, Green Bay, Racine, and Kenosha and told them that Mr. Gableman was no longer planning to take testimony on October 15 or 22. Mr. Kloster said Mr. Gableman was focusing on reviewing documents produced in response to open records requests.¹³
- On October 14, Mr. Gableman released a YouTube video entitled “Wisconsin Special Counsel explains subpoena process.”¹⁴ He said: “In order to facilitate faster responses and address concerns that the terms of those subpoenas were too burdensome, we offered the customary opportunity to proceed informally....” He also referred to an “understanding that additional information would be provided on a mutually agreeable timeline” so long as officials were willing to work with his office and referenced potential future efforts to enforce subpoenas if necessary. Mr. Gableman did not refer to the Municipal Respondents or any other specific official.¹⁵
- Also on October 14, the press reported that Mr. Gableman had reached an agreement with the Attorney General’s office that no one from the Wisconsin Elections Commission (“WEC”) would testify on October 15.¹⁶
- On November 10, Mr. Gableman appeared before the Committee to deliver prepared remarks and answer questions.¹⁷ Mr.

¹³ Bayatpour, *Gableman Backs Off Request For Testimony From City Officials*, *supra* n. 11.

¹⁴ Available at <https://www.youtube.com/watch?v=AD9G9Aq2a0I&t=4s> (last visited June 3, 2022).

¹⁵ *Id.*

¹⁶ Fannon, *Gableman Puts Elections Subpoenas on Hold, Cancels Interviews with Clerks and Mayors*, *supra* n. 11.

¹⁷ Available at <https://wiseeye.org/2021/11/10/assembly-committee-on-campaigns-and-elections-21/> (beginning at 2:06:30) (subscription required) (last visited Dec. 8, 2021).

Gableman made no reference to his expecting testimony in mid-November.

- Also on November 10, Mr. Gableman submitted a “First Interim Report” to the Assembly.¹⁸ This report does not reference the Municipal Respondents or expected testimony from those individuals. It does discuss the subpoenas, noting that Mr. Gableman had received some “voluntary” compliance and that the subpoenas were subject to pending litigation.

7. Mr. Gableman’s Appearances before the Committee and Reports

Between October 1, 2021 and the present, Mr. Gableman appeared three times before the Committee. Mr. Gableman issued his First Interim Report and testified at length before the Committee on November 10. [Mandell Aff., ¶13.] Neither that testimony nor the Interim Report referenced imminent testimony of any official. [Mandell Aff., ¶13.] Mr. Gableman did, however, acknowledge that the City of Green Bay had hired outside attorneys.¹⁹

Mr. Gableman appeared before the Committee again on December 1, 2021, and revealed for the first time that he had initiated this proceeding against Mayors

¹⁸ Available at <https://legis.wisconsin.gov/assembly/22/brandtjen/media/1525/gableman-interim-report.pdf> (last visited June 3, 2022)

¹⁹ See Patrick Marley & Molly Beck, *Michael Gableman Reveals One More Staffer For His Election Review In Testimony Before Lawmakers*, Milwaukee Journal Sentinel (Nov. 10, 2021), available at <https://www.jsonline.com/story/news/politics/2021/11/10/michael-gableman-reveals-another-staffers-name-election-review/6371829001/> (last visited Dec. 9, 2021); Anthony Dabruzzi, *Gableman Testifies On GOP Election Probe But Gives Lawmakers Few Specifics*, Spectrum News 1 (Nov. 11, 2021), available at <https://spectrumnews1.com/wi/madison/politics/2021/11/11/gableman-gives-testimony-on-gop-election-probe> (last visited June 3, 2022) (“[W]e have the City of Green Bay hiring the three law firms, so I don’t even know who I am allowed to talk with there.”)

Genrich and Rhodes-Conway.²⁰ Mr. Gableman falsely claimed: “Of all the clerks and of all the Mayors, those two simply failed without reason or excuse to appear for their depositions and answer questions about how and to what extent they allowed Mark Zuckerberg’s employees to plan and administer their city’s election in November 2020.”²¹

Mr. Gableman appeared before the Committee once more on March 2, 2022, to present his “Second Interim Report.”²² Mr. Gableman testified for approximately three-and-a-half hours.

8. Mr. Gableman’s Contracts with and Relationship to the Legislature

Mr. Gableman’s agreements with the Legislature establishing his role, his relationship to the Legislature, and his purported authority to pursue this matter are confusing and discontinuous. [See Dkt. No. 7, pp. 2-17 (documents cited by Mr. Gableman without explanation in support of his authority).] It appears that Mr. Gableman initially acted under a “Coordinating Attorney Independent Contractor

²⁰ Available at <https://wiseye.org/2021/12/01/assembly-committee-on-campaigns-and-elections-22/>.

²¹ Will Kenneally, *Gableman heads to court over Madison and Green Bay subpoenas*, PBS Wisconsin (Dec. 2, 2021), available at <https://pbswisconsin.org/news-item/gableman-heads-to-court-over-madison-and-green-bay-subpoenas/> (last visited June 3, 2022). Mr. Gableman’s implication that anyone other than city employees ran the election in the Cities of Green Bay or Madison is false. As described in Attorney Chavez’s exhaustive post-election report, available at <https://greenbaywi.gov/DocumentCenter/View/6657/Report-of-2020-Election-Season-PDF?bidId=>, the City of Green Bay ran a successful election thanks to the efforts of city staff, poll workers and volunteers. There is also no evidence in the record that anyone other than City of Madison staff and election inspectors planned and conducted the November 2020 General Election.

²² Available at <https://legis.wisconsin.gov/assembly/22/brandtjen/media/1552/osc-second-interim-report.pdf>.

Agreement,” signed by Mr. Gableman and Speaker Vos, with a term expiring on October 31, 2021. [Dkt. 7, pp. 6-9.] While Mr. Gableman and Speaker Voss contemplated an amendment to that agreement to extend its term, on March 2, 2022, the Dane County Circuit Court found that this amendment was not lawfully executed. [*American Oversight v. Office of Special Counsel*, Dane Cty. Cir. Ct. Case No. 21CV3007, Decision & Order, March 2, 2022, p. 19.] This means Mr. Gableman’s contract expired no later than October 31, 2021, approximately one month before he filed his petitions in this case, purporting to stand in the place of the Assembly. [Dkt. No. 7, p. 6; Dkt. No. 1; Dkt. No. 5.] On March 8, the parties executed a “Second Amendment to Agreement” (“Second Amendment”). [Dane Cty. Cir. Ct. Case No. 21CV3007, Dkt. No. 176.] The Second Amendment contained no effective date but expired on April 30, 2022. [*Id.*] None of these agreements—not the initial contract, the First Amendment, or the Second Amendment—authorized litigation. Neither did Motion 1, adopted by the Committee on January 19, 2022.²³

²³ Similarly, throughout this litigation, Mr. Gableman has obfuscated the identity of the real party in interest. In his initial Petition, he named himself as the petitioner, and claimed to be acting on behalf of the Wisconsin State Assembly. [Dkt. No. 5 (referring to “Petitioner Michael J. Mr. Gableman, in his official capacity as Special Counsel to, and on behalf, of the Wisconsin State Assembly”).] On February 18, 2022, Mr. Gableman filed an “Amended Petition for Writ of Attachment,” indicating that he had previously been acting on behalf of the Assembly Committee on Campaigns and Elections. [Dkt. No. 75, ¶2.] Sometime between November 29, 2021, and February 18, 2022, Mr. Gableman changed his title from “Special Counsel to the Wisconsin Assembly” to “Special Counsel to the Wis[consin] Assembly Comm[ittee] on Campaigns and Elections.” [Dkt. No. 5, p. 2; Dkt. No. 75, p. 10.]

Mr. Gableman and Speaker Vos entered yet another contract²⁴ on May 1, 2022.²⁵ The May 1 contract became the sole agreement between those parties and superseded all prior contracts. The current agreement is not tethered to any legislative action. It makes clear that Mr. Gableman's only remaining service on behalf of the Assembly is to "prosecute a series of lawsuits," and makes no provision for any further reporting to the Committee, the Assembly, or the Legislature.

Nor could the agreement authorize any additional action on behalf of the Legislature or one of its committees. The Assembly Committee on Campaigns and Elections, for whom Mr. Gableman was allegedly working, is not considering legislation, and did not consider such legislation in relation to Mr. Gableman's reports. Prior to the release of Mr. Gableman's Second Interim Report, the Assembly finished its business for the session, including the disposition of several election-related bills. On February 16, 2022, Speaker Vos referred all election-related bills to the Assembly Committee on State Affairs, rather than to the Committee on Campaigns and Elections.²⁶ On February 24, 2022, the Assembly stood adjourned

²⁴ Available at <https://www.documentcloud.org/documents/21986703-agreement-for-legal-services-with-consultare-51022> (last visited June 3, 2022).

²⁵ Patrick Marley, *Michael Gableman to receive \$5,500 a month even as work on Wisconsin's Republican-led election review is paused*, Milwaukee Journal Sentinel (May 11, 2022), available at <https://www.jsonline.com/story/news/politics/elections/2022/05/11/gableman-get-5-500-month-wisconsin-election-review-pauses/9704709002/> (last visited June 3, 2022).

²⁶ Molly Beck & Patrick Marley, *Robin Vos says local Republicans are 'incorrect' to blame him over handling of 2020 election review*, Milwaukee Journal-Sentinel (Feb. 17, 2022), available at <https://www.jsonline.com/story/news/politics/elections/2022/02/17/robin-vos-says-local-republicans-anger-toward-him-over-2020-election-review-incorrect/6815244001/> (last visited June 3, 2022).

after passing many of these bills.²⁷ The State Senate stood adjourned on March 8, 2022.²⁸ This Legislature does not plan to convene again, as there are no further floor sessions scheduled for the session.²⁹ Pursuant to a joint resolution of both houses of the Legislature, the final floor period for legislative business ended on May 18, 2022. 2021 Senate Joint Res. 1.³⁰

PROCEDURAL POSTURE

Mr. Gableman filed two petitions on November 29, 2021. One named City of Green Bay Mayor Eric Genrich as a respondent, and the other named City of Madison Mayor Satya Rhodes-Conway. But for the names, the Petitions are identical. Without stating or citing any facts, the petitions allege that the mayors failed to appear and deliver testimony and documents in Waukesha County “without justification.” [Dkt. Nos. 5, 1.] Although each Petition references only a single exhibit—the subpoenas issued to Mayors Genrich and Rhodes-Conway, respectively—Mr. Gableman attached a number of other documents to each. [Dkt Nos. 2-4; 6-8.] Mr. Gableman also submitted a proposed writ “of attachment of the person” for each mayor, which

²⁷ Assembly Journal for February 24, 2022 available at <https://docs.legis.wisconsin.gov/2021/related/journals/assembly/20220224> (last visited June 3, 2022).

²⁸ Senate Journal for March 8, 2022 available at <https://docs.legis.wisconsin.gov/2021/related/journals/senate/20220308mr2> (last visited June 3, 2022).

²⁹ Available at https://docs.legis.wisconsin.gov/2021/related/session_calendar/calendar (last visited June 3, 2022).

³⁰ Available at <https://docs.legis.wisconsin.gov/2021/related/enrolled/sjr1> (last visited June 3, 2022).

would require them to produce documents and testimony within 45 days. [Dkt. Nos. 9-10.]

Well before Mr. Gableman initiated this action, the Wisconsin Department of Justice, on behalf of the WEC and its Administrator, Meagan Wolfe, sued Mr. Gableman, the Committee, the Committee Chair, Representative Brandtjen, the Assembly, and Speaker Vos, asking the Dane County Circuit Court to enjoin enforcement of subpoenas issued to WEC and Administrator Wolfe. [*Wis. Elections Comm'n. v. Wis. Assembly*, Dane Cty. Cir. Ct. Case No. 2021CV2552 (filed October 21, 2021).] That case remains ongoing.

Mayors Genrich and Rhodes-Conway learned of the Petitions on December 1 when Mr. Gableman testified before the Committee. Mr. Gableman had not then—and still has not—effectuated service on Mayor Genrich or Mayor Rhodes-Conway. [Second Lenz Aff., ¶2; Haas Aff., ¶21.] On December 2, 2021, the City of Green Bay and Mayor Genrich, by Outside Counsel, filed a letter with the Court. [Dkt No. 13.] On December 9, the City of Madison and Mayor Rhodes-Conway, by Madison City Attorney Mike Haas, did the same. [Dkt. No. 27.] The Court held a scheduling conference on December 10 and adjourned the matter. At another scheduling conference on January 21, 2022, the Court ordered the parties, beginning with Mr. Gableman, to submit briefs to the Court addressing: (1) the Court's authority to issue the writs; (2) the correct procedure to follow; and (3) the factual basis of the writs. [Minute Entry, Jan. 21, 2022.]

On February 18, 2022, without requesting leave of the Court, Mr. Gableman filed an “Amended Petition.” *But see* Wis. Stat. § 802.09(4). The Amended Petition purported to name additional respondents, including Mayor Mason, CIO Henke, and Ms. Bubacz, along with Ann Jacobs, Chair of the Wisconsin Elections Commission, and two state employees. The Amended Petition also included Clerk Witzel-Behl and Clerk Jeffreys in the caption but made no allegations against them. [Dkt. No 75.] Shortly after, Mr. Gableman filed his brief in response to the Court’s January 21 order. [Dkt. No. 76.] The additional parties, by counsel, appeared in this case and asked to be heard. [Dkt. Nos. 83, 85, 88.] On April 1, 2022, this Court held another scheduling conference and established a new briefing schedule. [Minute Entry, Apr. 1, 2022.] Mr. Gableman’s counsel requested 45 days to file a new brief that would combine the arguments made in their merits brief against the original respondents with arguments against the new respondents named in the Amended Petition. Like Mayors Genrich and Rhodes-Conway, the additional Municipal Respondents have not been personally served. [Carroll Aff., ¶17; Letteny Aff., ¶9.]

On May 4, 2022, Mr. Gableman filed a Motion to Supplement the Petitions, in which he characterizes the Amended Petition as a Supplemental Petition, and requests that the Court grant leave to supplement the original Petitions. Neither Clerk Jeffreys nor Clerk Witzel-Behl is named anywhere in this document as an additional proposed respondent. [Dkt. No. 108.] On the same day, Mr. Gableman filed his additional brief, which is substantively identical to his brief filed in February and makes no additional merits arguments. [Dkt. No. 106.]

ARGUMENT

I. Chapter 885 Cannot Be Used to Enforce the Legislative Subpoenas at Issue.

Mr. Gableman claims that, even though the subpoenas here were issued under Chapter 13, he can enforce them under Chapter 885—specifically, Wis. Stat. § 885.12. But § 885.12 is not available to enforce a legislative subpoena. Chapter 13 and Chapter 885 are distinct regimes for issuing and enforcing separate and distinct types of subpoenas. Chapter 13, entitled “Legislative Branch,” sets out, among other things, the methods by which the Legislature may issue and enforce subpoenas. Chapter 885, on the other hand, titled “Witnesses and Oral Testimony,” sets out procedures for, among other things, issuance of subpoenas by arbitrators, coroners, medical examiners, and others authorized to take testimony. Wis. Stat. § 885.12.

Chapter 885 does not apply in these circumstances. Chapter 13, which is specific to action by the Legislature, has its own enforcement mechanism requiring action by elected officials and, ultimately, a vote of either or both houses of the Legislature—not the unilateral action of a single contractor. These restrictions ensure legislative transparency and accountability, and they must govern here. Neither Chapter 13 nor Chapter 885 provides that Mr. Gableman can cast aside these restrictions; his attempt to do so is inconsistent with the rules of interpretation, statutory history, and common sense.

A. Wisconsin precedent and rules of statutory interpretation foreclose Mr. Gableman’s construction of Chapters 13 and 885.

The subpoenas here acknowledge that they were issued pursuant to Chapter 13, specifically Wis. Stat. § 13.31. [Dkt. No. 6, p. 1.] The Genrich and Rhodes-Conway

Subpoenas also accurately state that Chapter 13 sets out the potential penalties for failure to comply:

FAILURE TO COMPLY WITH THIS SUBPOENA MAY CONSTITUTE CONTEMPT OF THE LEGISLATURE, PURSUANT TO WIS. STAT. § 13.26(1)(c) AND IS SUBJECT TO PUNISHMENT, INCLUDING IMPRISONMENT, PURSUANT TO WIS. STAT. § 13.27.

[Dkt. No. 6, p. 2 (Mayor Genrich); Dkt. No. 2, p. 3 (Mayor Rhodes-Conway) (italics added).] Henke Subpoena III and Bubacz Subpoena II, both titled “Legislative Subpoena” similarly specify that failure to comply may “constitute contempt of the legislature and is subject to punishment.” [Dkt. No. 107, p. 14 (Henke Subpoena III); p. 15 (Bubacz Subpoena II).]

Mr. Gableman attempts to avoid the procedures that the subpoenas specifically invoke, claiming that Wis. Stat. § 885.12 can substitute for the enforcement procedures of Chapter 13. In what he characterizes as a “plain language” reading, he claims that § 885.12’s reference to “other officer or person authorized to take testimony” authorizes him to evade the Chapter 13 procedures for subpoena enforcement. But this sweeping interpretation of the language of § 885.12 has been repeatedly rejected.³¹

As far back as 1880, the Wisconsin Supreme Court confirmed that the virtually identical language of a previous version of the statute, which referred to “other person authorized to examine witnesses or hear testimony,” does not refer, as Mr. Gableman

³¹ Nor is Mr. Gableman a person authorized to take testimony, because the subpoenas were not validly issued. *See infra*, Section III.

contends, to anyone authorized to take testimony under any circumstances. *State ex rel. Lanning v. Lonsdale*, 48 Wis. 348, 4 N.W. 390, 393 (1880). In *Lanning*, the court found that then-section 4066 (now Wis. Stat. § 885.12) was not available in the context of judicial proceedings. The Court’s reasoning is instructive here: It found that “[t]he language of section [885.12], although quite general,” is inapplicable in judicial proceedings because the section “contains no express mention of testimony taken to be used in a judicial proceeding in the courts,” and that those proceedings would have been expressly included had their inclusion been intended. *Id.* at 393-94. The same reasoning applies here. There is no reference to the Legislature in § 885.12. But it is clear from the existence of Chapter 13, which is explicitly directed to compelling testimony in response to Legislative subpoenas, that the Legislature knew how include itself in subpoena enforcement regimes—and would have done so here, if that was is what it intended.

Lanning also bars Mr. Gableman’s reading because it forecloses reading § 885 to embrace subpoenas issued by non-enumerated entities. Because the statute is penal, strict construction is required: “It must be remembered that this is a penal statute, and, for that reason, must be strictly construed.” *Id.* at 394. As a result, the court refused to broadly construe “general words” such as “other person” to embrace officers and types of testimony not expressly mentioned. *Id.*³²

³² To the extent that Mr. Gableman attempts to rely on the statute’s reference to “board” or “committee,” those terms do not assist Mr. Gableman. Both of these terms refer “exclusively to witnesses and testimony in proceedings before municipal boards or bodies, or before committees appointed by them.” *Id.* at 393.

Mr. Gableman’s reading of the statute is also inconsistent with *In re Doe Petition*, 2008 WI 67, ¶41, 310 Wis. 2d 342, 750 N.W.2d 873, *opinion modified on denial of reconsideration sub nom. In re Doe*, 2008 WI 118, 314 Wis. 2d 67, 756 N.W.2d 34 (per curiam). In that case, as here, the party seeking a subpoena attempted to substitute the broad provisions of Chapter 885 for the more specific and burdensome subpoena procedures applicable in a specific context—there, a John Doe proceeding. *Id.*, ¶¶12-13, 26. The court rejected this gambit, finding that specific subpoena enforcement procedures are exclusive of more general procedures. *Id.*, ¶51. The court concluded that Wisconsin courts do not “apply[] a more general statute regarding subpoenas where there is a more specific statute controlling subpoenas” that applies to the specific context at issue. *Id.*, ¶41. Permitting the use of the more general statute is “contrary to the principle of statutory construction that where two statutes applying to the same subject conflict, the more specific statute is controlling.” *Id.* This is consistent with the general rule of statutory construction that, “where a specific statutory provision leads in one direction and a general statutory provision in another, the specific statutory provision controls.” *Marder v. Bd. of Regents of Univ. of Wis.*, 2005 WI 159, ¶23, 286 Wis. 2d 252, 706 N.W.2d 110.³³ See also *State v.*

³³ The only apparent authority linking legislative subpoenas and Wis. Stat. § 885.12 is a single sentence contained in an Attorney General opinion from 90 years ago. 20 Wis. Op. Atty. Gen. 765 (1931). This is the sole basis upon which the Legislative Reference Bureau relied in its August 5, 2021, memo, which the Special Counsel attached to the Petition. [Dkt. No. 8, p. 6.] To the extent that this particular Attorney General opinion ever had persuasive power, despite being at odds with *Lanning*, it was abrogated by the Court’s decision in *In re Doe Petition* in 2008.

Schaefer, 2008 WI 25, ¶46, 308 Wis. 2d 279, 746 N.W.2d 457 (general subpoena power cannot be construed to conflict with specific statutory provision governing discovery).

These decisions, applying Wisconsin rules of statutory construction, apply with special force here: Failure to apply them would undermine important governance principles and raise significant separation-of-powers concerns. The requirements of Chapter 13 are not arbitrary; they serve purposes central to the role and function of the Legislature, requiring specific action, in a specific form, by elected officials. As the subpoenas note, failure to testify in response to a legislative subpoena can subject the witness to penalties for contempt, including imprisonment under Wis. Stat. §§ 13.26 and 13.27. Before such penalties can be imposed, however, the chair of the legislative committee that requested the testimony must certify the failure to appear. Wis. Stat. § 13.34. Then, either the entire Legislature or one of its houses must vote on a finding of contempt. Wis. Stat. § 13.26. This ensures that any action in connection with the subpoenas is taken *by the Legislature* and complies with principles of transparency and accountability governing legislative action in Wisconsin—including the requirement that such action be undertaken by elected officials through public meetings and by a public vote of the whole.³⁴ Wis. Const. art. IV, § 10; *see also*, *Martinez v. DILHR*, 165 Wis. 2d 687, 701, 478 N.W.2d 582 (1992) (importance of “legislative accountability”); *State ex rel. Ozanne v. Fitzgerald*, 2011 WI 43, ¶67, 334 Wis. 2d 70, 798 N.W.2d 436 (“The manifest purpose of [article IV,

³⁴ This arrangement also ensures that the elected officials who initiated the investigation take responsibility for a step as drastic as a finding of contempt within that investigation.

section 10] is to prevent *state* legislative business from being conducted in secret except in extremely limited circumstances.” (emphasis in original); Wis. Stat. § 19.81 (3) (“In conformance with article IV, section 10, of the constitution . . . it is declared to be the intent of the legislature to comply to the fullest extent with [the Open Meetings Law].”).

In other words, the elements of Chapter 13 that Mr. Gableman characterizes as unduly burdensome are vital parts of the statutory design and necessary adjuncts to the Legislature’s constitutional role, not mere impediments to be cast aside when they prove inconvenient. Failure to honor these requirements would invade the prerogatives of the Legislature, substituting the judgment of Mr. Gableman for that of the Committee chair and the Assembly. They are the relevant actors for subpoenas under Chapter 13—but they have chosen not to act. Permitting Mr. Gableman to use this Court’s authority in the way he proposes could present significant separation-of-powers issues. *See, e.g., Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, ¶32, 376 Wis. 2d 147, 897 N.W.2d 384 (quoting *Outagamie Cnty. v. Smith*, 38 Wis. 2d 24, 39-40, 155 N.W.2d 639 (1968)) (“[O]ne branch of the government has no authority to compel a co-ordinate branch to perform functions of judgment and discretion that are lawfully delegated to it by the constitution.”). Wisconsin statutory construction principles preclude a reading that would create such a significant constitutional issue. *See, e.g., Hopper v. City of Madison*, 79 Wis. 2d 120, 128, 256 N.W.2d 139 (1977) (“[I]t is the duty of this court, if possible, to construe a legislative enactment as to find it in harmony with constitutional principles.”).

Finally, Mr. Gableman's reading of the statute would nullify Wis. Stat. §§ 13.26 and 13.27. "Statutes involving the same subject matter must be construed in a manner that harmonizes them in order to give each full force and effect." *State v. Schaefer*, 2008 WI 25, ¶55, 308 Wis. 2d 279, 746 N.W.2d 457 (internal citation omitted). Permitting the general subpoena authority in Chapter 885 to wipe out limiting conditions in a more specific statute would not be harmonizing the statutes. *See id.* Instead, under Mr. Gableman's view, neither the Legislature nor anyone purporting to act on its behalf would ever be constrained by Chapter 13 or bound to uphold principles of legislative transparency and accountability (even where, as here, the legislature expressly incorporated Chapter 13 into its subpoenas); to the contrary, anyone purporting to act on the Legislature's behalf could reach instead for provisions that were not designed for use by the Legislature. It is difficult to see under what possible circumstances Wis. Stat. § 13.27 would still apply. Indeed, under this reading, any individual member of a committee could pursue an action under Wis. Stat. § 885.12. This is not a sound or permissible reading under Wisconsin rules of statutory construction. *See, e.g., Rossmiller v. Rossmiller*, 151 Wis. 2d 386, 390, 444 N.W.2d 445 (Ct. App. 1989) (court will not construe statute to nullify another, and the specific governs the general).

B. *The statutory history and historical use of Wis. Stat. § 885.12 confirm that it does not apply to legislative subpoenas.*

Mr. Gableman also presents an argument regarding purported statutory history. But while the Legislature has expanded the scope of Wis. Stat. § 885.12 over time, there is no indication that either its original or expanded forms were intended

to displace or nullify Chapter 13's remedies or procedures. To the contrary, through all the statute's changes, it has never been expanded to expressly include a body that is subject to Chapter 13. And there is nothing in the statutory history to suggest that inclusion of such a body was intended.

The original version of Wis. Stat. § 885.01, enacted in the nineteenth century, granted subpoena power only to judges, the attorney general, and boards of counties or other state subdivisions; it did not provide power to the Legislature. *See* Wis. Stat. § 4053 (Sanborn & Berryman 1889). A new subsection, added in 1927, broadened the section's subpoena authority to include "any arbitrator, coroner, board, commission, commissioner, examiner, committee, or other person authorized to take testimony . . . and likewise [to] the secretary of the state civil service commission, of the state tax commission, and of the state board of dental examiners, and [to] any agent of the department of markets." 1927 Wis. Sess. Laws 766. But none of these expansions included the state Legislature, or any entity whose subpoena enforcement authority is subject to the restrictions of Chapter 13.

Other statutory provisions confirm that the attachment power in Wis. Stat. § 885.12 is a tool of executive and administrative agencies, not the Legislature. Many statutes expressly permit invoking § 885.12, but these statutes apply to executive offices and administrative agencies. *See, e.g.*, Wis. Stat. §§ 16.004(3)(b) (Department of Administration); 115.80(5)(a) (concerning due process hearings for schoolchildren with disabilities); 136.03(1) (Department of Agriculture, Trade and Consumer Protection); 186.015(3r)(b) (Credit Union Review Board); 220.035(1)(c) (Banking

Institutions Review Board); *see also, e.g.*, Wis. Admin. Code § Ins. 5.27 (4) (Commissioner of Insurance). No provision of Chapter 13 contains such a reference to § 885.12.

Nor has counsel been able to identify any prior reported case in which the attachment power in Wis. Stat. § 885.12 has been used by the Legislature. Instead, § 885.12 has been used to compel witnesses before *executive branch* entities. For example, it has been used for proceedings before the Wisconsin Department of Revenue. *See State v. Alioto*, 64 Wis. 2d 354, 356-57, 219 N.W.2d 585 (1974); *State v. Balistrieri*, 55 Wis. 2d 513, 515-16, 219 N.W.2d 585 (1972). In *Balistrieri*, the Supreme Court of Wisconsin explained that the writ is available for contempt of an administrative agency and distinguished it from other forms of contempt. *Balistrieri*, 55 Wis. 2d at 520-21. The § 885.12 procedure has also arisen in proceedings before the Industrial Commission of Wisconsin. *See State ex rel. St. Mary's Hosp. v. Indus. Comm'n*, 250 Wis. 516, 520, 27 N.W.2d 478 (1947) (construing prior version of § 885.12). Finally, a writ pursuant to § 885.12 was the “potentially harsh procedure[]” available to enforce subpoenas of the Wisconsin Employment Relations Commission. *See Brown Cnty. Sheriff's Dep't Non-supervisory Labor Ass'n v. Brown Cnty.*, Decision No. 31367-C, 2005 WL 6453898, at *4 (WERC Nov. 21, 2005). The use proposed here—to compel action before the Legislature—appears to be wholly unprecedented.

C. *Mr. Gableman's argument that Wis. Stat. § 885.12 provides alternative remedies is both irrelevant and incorrect.*

Mr. Gableman argues that Wis. Stat. § 885.12 is the preferable enforcement mechanism for the subpoenas because it gives the Court alternatives to incarcerating

the Municipal Respondents, whereas under Chapter 13, the Assembly would have no option but to jail them. [Dkt. No. 60, pp. 4-5.]³⁵ This argument is, as discussed above, irrelevant because this Court cannot substitute the provisions of Wis. Stat. § 885.12 for those of Chapter 13, even if the provisions of section 885.12 were preferable as a matter of policy. It is also wrong on its face.

In his letter-brief of January 20, 2022,³⁶ Mr. Gableman emphasized that Wis. Stat. § 885.12 authorizes, but does not require, a court to confine a recalcitrant witness in jail, using the word “may” to describe the court’s authority. Based on the word “may” alone, Mr. Gableman concluded that the court could “impose any number of alternative remedial penalties, including imposing monetary or other sanctions.” [Dkt. No. 60, p. 4.] But the statute does not reference any alternative penalties. In contrast, in Wis. Stat. § 785.04, which governs contempt of court, the Legislature authorized a range of possible sanctions. If the Legislature wanted courts to have options for how to enforce subpoenas under Wis. Stat. § 885.12, it would have said so explicitly. *See, e.g., State v. Lopez*, 2019 WI 101, ¶21, 389 Wis. 2d 156, 936 N.W.2d 125. It did not, and Mr. Gableman cites no precedent—or anything but his own assertion—to suggest that multiple remedies are available under § 885.12. The fact that § 885.12 is worded permissively with respect to confinement does not mean it automatically sanctions alternative remedies. Finding such remedies would require rewriting the statute. *See Town of Rib Mountain v. Marathon Cnty.*, 2019 WI 50, ¶24,

³⁵ Mr. Gableman incorporated this argument by reference in his brief. [Dkt. No. 106, p. 22.]

³⁶ The letter is misdated January 20, 2021.

386 Wis. 2d 632, 926 N.W.2d 731 (declining to interpret a statute in a way that would effectively require adding words); *Jefferson v. Dane Cty.*, 2020 WI 90, ¶25, 394 Wis. 2d 602, 951 N.W.2d 556 (“We will not add words into a statute that the legislature did not see fit to employ.”).

D. *The sole remedy available under Wis. Stat. § 885.12 cannot be applied in this case.*

The discrepancy between what is authorized by law and what Mr. Gableman asks this Court to do is highlighted by the fact that Mr. Gableman’s proposed remedy would require this Court to violate numerous other statutes. The Court would have to order the Waukesha County Sheriff to arrest various elected officials and municipal employees in Brown, Milwaukee, Dane, and Racine Counties. That is what Mr. Gableman requested in his Petition, and the sole remedy afforded by § 885.12, notwithstanding his ungrounded insistence elsewhere that he wants to avoid jailing the subjects of his subpoenas. [Dkt. No. 60.] But the Waukesha County Sheriff has jurisdiction in Waukesha County, and nowhere else. *See* Wis. Stat. § 59.28; *State v. Zivcic*, 229 Wis. 2d 119, 126-27, 598 N.W.2d. 565 (Ct. App. 1999). Mr. Gableman cites no authority that would allow the sheriff of Waukesha County to arrest—in another county—any citizen of such county, let alone the elected Mayors and other duly appointed officials and employees of four municipalities.

But Chapter 13 does provide a statewide remedy. Section 13.32 details a process for the leaders of the Assembly to enforce their own subpoenas using their own law enforcement officers. First, the chairperson of the Committee on Campaigns and Elections must certify that witnesses failed to respond to subpoenas, and then

the Assembly's Speaker and Chief Clerk must sign the summary process to compel those witnesses to appear and testify to the Committee. Wis. Stat. § 13.32. The Assembly would direct the Sergeant at Arms to detain the subject of the subpoena "in the name of the state of Wisconsin," and to keep them in custody if necessary. Wis. Stat. § 13.32(2)-(3). The Sergeant at Arms is a constitutional officer who serves the Assembly, which governs the entire state. Wis. Const. art. XIII § 6.³⁷ A county sheriff lacks such authority.

Unlike Wis. Stat. § 885.12, Chapter 13 provides the Assembly and the Committee alternative remedies. The Assembly could direct Mr. Gableman to follow up with the appropriate counsel for the Municipal Respondents to work through disagreements about the relevant subpoenas. The Committee could hold a public hearing to discuss potential testimony. Assemb. Rule 14. And of course, the Assembly could, and would be required to, provide the Municipal Respondents with due process in the form of a hearing before finding them in contempt—something Mr. Gableman sought to avoid here. *See Groppi v. Leslie*, 404 U.S. 496, 505-07 (1972) (when allegedly contemptuous behavior takes place out of sight of the Legislature the alleged contemnor must be granted a hearing with a chance to defend himself). If none of these options appeals to Mr. Gableman or the Committee, they can ask the Legislature to amend Chapter 13.

³⁷ Because Mr. Gableman does not seek to enforce his subpoena under Chapter 13, this brief does not discuss, nor does the Court need to address, whether the Sergeant at Arms has authority to arrest a sitting mayor.

Wisconsin courts disfavor absurd readings of statutes that contradict legislative intent. “[S]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results.” *State ex. rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d. 110; *see also Force ex rel. Welcenbach v. Am. Fam. Mut. Ins. Co.*, 2014 WI 82, ¶30, 356 Wis. 2d 582, 850 N.W.2d 866 (“Words are given meaning to avoid absurd, unreasonable, or implausible results and results that are clearly at odds with the legislature’s purpose.”). It would be absurd to read Wis. Stat. § 885.12 as granting the sheriff of any county—or rather, of the county of the petitioner’s choice—statewide arrest powers in service of legislative business, when Chapter 13 creates a specific mechanism for the Legislature to enforce its own subpoenas and would require the Assembly to act in a way that is (1) transparent and open to the public and (2) politically accountable. *See, e.g., Martinez*, 165 Wis. 2d at 701; Wis. Const. art. IV, § 10; *Ozanne*, 2011 WI 43, ¶67; Wis. Stat. § 19.81(3).

II. Mr. Gableman Has Not Demonstrated That the Municipal Respondents Acted “Without Reasonable Excuse.”

Even if Mr. Gableman’s basic premise is correct and Wis. Stat. § 885.12 were an available method for a party to compel deposition-like testimony pursuant to a legislative subpoena *and* the subpoenas at issue in this case were lawful, Mr. Gableman did not, and cannot, demonstrate that the Municipal Respondents acted “without reasonable excuse” by not appearing to testify on the dates and times specified in their respective subpoenas. Therefore, the Petition must be denied.

A. *Wis. Stat. § 885.12 requires specific facts showing that a witness resisting a subpoena had no reasonable excuse for doing so.*

Mr. Gableman contends that Wis. Stat. § 885.12 authorizes this action. Because it is a penal statute, Wisconsin jurisprudence requires narrow, strict construction of § 885.12 and close adherence to the statutory text. *Lanning*, 4 N.W. at 394 (construing prior version of § 885.12). It is available only where the witness's failure to appear amounts to contempt or recalcitrance. *Id.* at 393; *Balistrieri*, 55 Wis. 2d at 521. Accordingly, Wis. Stat. § 885.12 requires Mr. Gableman to demonstrate (1) with specific facts that (2) the Municipal Respondents had “no reasonable excuse” for not testifying:

If any person, *without reasonable excuse*, fails to attend as a witness ... any judge of a court of record or a circuit court commissioner in the county where the person was obliged to attend may, *upon sworn proof of the facts*, issue an attachment for the person ...

Wis. Stat. § 885.12 (emphases added).

B. *Mr. Gableman provided no facts to support his Petition as to any of the Municipal Respondents, and no such facts exist.*

Despite the clear directives of Wis. Stat. § 885.12 and this Court, Mr. Gableman has failed to present any evidence of facts supporting his request for an extraordinary remedy. Wis. Stat. § 885.12 (attachment under this section available only “upon sworn proof of the facts...”); [Minute Entry, Jan. 21, 2022 (“parties to brief the matter as to...the factual basis of the Writs.”)]. A party seeking relief, either as a plaintiff or a movant, is required to present evidence to support their claims. *See e.g.*, Wis. Stat. § 802.08(2); *Sloan v. Brown Cnty. State Bank*, 174 Wis. 36, 182 N.W. 363, 364 (1921) (“The burden of proof was upon plaintiff to establish his case, not...upon

the defendant to disprove it.”). The Petitions lack detail about the circumstances surrounding each Municipal Respondent’s alleged failure to appear. In fact, the only sworn “evidence” Mr. Gableman has presented related to the Municipal Respondents’ nonappearance is his own bare assertion that each failed to appear without justification, or “willfully failed to comply.” [Dkt. Nos. 1, 5, 75.]³⁸ Such claims, unsupported by any facts in the record, fall far short of meeting Mr. Gableman’s burden of proof to justify a writ of attachment.

C. *Mayor Genrich always acted reasonably, and Mr. Gableman has not provided any facts to the contrary.*

The only information contained in the Petition for Writ of Attachment of the Person against Mayor Genrich, which is the only sworn pleading³⁹ involving Mayor Genrich, is (1) information regarding the Genrich Subpoena; (2) a bare allegation that the time and date for testimony was “unilaterally continued” to November 15, 2021 at 9:00 a.m. in Waukesha County;⁴⁰ and (3) the conclusory assertion that “Eric

³⁸ Mr. Gableman’s Amended Petition references, but does not attach, correspondence from the Cities of Milwaukee and Racine, which Mr. Gableman indicated were attached as exhibits seven and nine, respectively. [Dkt. 75, ¶¶11, 13.] On May 4, 2022, Mr. Gableman filed exhibits labelled “Exhibit One” and “Exhibit A” through “Exhibit S.” [Dkt. No. 107.] “Exhibit S” is a February 15, 2022, email from Scott Letteny, City Attorney, indicating that no person from the City of Racine would appear for an interview on February 16. [Dkt. No. 107, p. 31.] Mr. Gableman provided no additional detail about what actually occurred with each Municipal Respondent.

³⁹ None of the exhibits filed with the Petition, or in connection with Mr. Gableman’s more recent brief, described the alleged circumstances of Mayor Genrich’s non-appearance. [Dkt. Nos. 6-8, 107.]

⁴⁰ Even these scant sworn allegations are inconsistent with the documents Mr. Gableman attached to his Petition. Exhibit B, the inappropriate and undelivered email upon which Mr. Gableman relies, refers only to November 17. [Dkt No. 6, p. 9.] Similarly, the Petition identifies the Genrich Subpoena as being dated October 22, 2021. It was not. [Dkt. No. 6.] It was served on October 6. And the email to City Attorney Chavez was dated October 21, 2021. [Dkt. No. 6, p. 9.]

Genrich did fail to appear on November 15, 2021 without justification.” [Dkt. No. 5.] Mr. Gableman produced no further sworn statement, or any actual evidence, about Mayor Genrich or his alleged failure to appear on November 15th or 17th. The single sentence in the Petition about Mayor Genrich’s appearance provides no facts that the Court may rely on in a proceeding under Wis. Stat. § 885.12, and constitutes only a bald legal conclusion, which is “not entitled to consideration.” *Dawson v. Goldammer*, 2006 WI App 158, ¶32, 295 Wis. 2d 728, 722 N.W.2d 106; *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶19, 356 Wis. 2d 665, 849 N.W.2d 693 (“legal conclusions stated in the complaint are not accepted as true, and they are insufficient to enable a complaint to withstand a motion to dismiss.”).

Even if the Court were to give some weight to this single sentence, on which the entire Petition hangs, it does not state the correct legal standard. Mr. Gableman does not aver that Mayor Genrich did not appear “without reasonable excuse”; he says Mayor Genrich did not appear “without justification.” [Dkt. No. 5.] Even if it were sufficient under Wis. Stat. § 885.12 for a petitioner to merely recite the elements of the statute in a sworn pleading (it is not), Mr. Gableman failed to meet that standard. He did not swear to one of the few elements required for a finding under Wis. Stat. § 885.12. There is a meaningful distinction between what Mr. Gableman included in his Petition and what the statute requires; the statute does not require “justification,” but the much lower showing of any “reasonable excuse.”

Mr. Gableman’s brief, which is neither a sworn statement nor evidence, cannot fill this fatal gap. Despite this Court’s instructions, Mr. Gableman produced no

evidentiary support. He filed no affidavits. A brief is not “sworn proof of the facts,” so Mr. Gableman has not met his burden. *See* Wis. Stat. § 887.01. And the brief does not attempt to address Mr. Gableman’s own conduct or what actually occurred surrounding his attempt to compel a quasi-deposition, which is described in Sections II through V of the Facts, *supra*. [Dkt. No. 106, pp. 4-6.] Based on this repeated failure, the Petition must be denied.

Further, Mr. Gableman’s failure to provide evidence that Mayor Genrich acted unreasonably is no coincidence. No such evidence exists.⁴¹ Mayor Genrich always acted reasonably in connection with the Genrich Subpoena. While Mayor Genrich knew of the existence of the subpoena, Mr. Gableman’s office agreed to forego any obligation for anyone from the City to provide live testimony. Mr. Gableman’s office assured the City that, if the City produced documents, no testimony would be required under the subpoenas without further negotiation. Mayor Genrich had no reason to assume that Mr. Gableman’s office would ignore the parties’ agreement after the City performed its end of the bargain. Even after Mayor Genrich learned that Mr. Gableman intended to ignore the parties’ agreement, given that the City believes in good faith that Mr. Gableman does not have the authority to mandate testimony from the City, its negotiation of the agreement here was reasonable, as was the Mayor’s decision to rely on that agreement.

⁴¹ Many of these facts, and supporting documents, were presented in Mayor Genrich’s January 4, 2022 motion for sanctions and accompanying brief. [Dkt. Nos. 51-58.] Mr. Gableman has chosen not to respond to any portion of these filings or the facts they contain.

i. Mr. Gableman's Office Agreed No Testimony Would Be Required.

Mr. Gableman's repeated public statements indicating he was not expecting to take testimony were unsurprising, since his office had agreed that there would be no such testimony. This type of agreement is common. *See, e.g., United States v. Brown*, 521 F. Supp. 511, 527 (W.D. Wis. 1981). Here, the agreement benefited both parties. Because the subpoenas are unenforceable given their overbreadth and other issues, *see* Section III, *infra*, the City might not have agreed to cooperate in any way without a limiting agreement like the one the parties reached. However, it agreed in good faith to partially cooperate. As a result of the agreement, the City obtained certainty about the scope and limitations of the subpoenas. Mr. Gableman's office, on the other hand, obtained significant and expeditious document production. Limiting agreements are especially common and appropriate in situations like this one. *See, e.g., State v. Beno*, 116 Wis. 2d 122, 128, 341 N.W.2d 668 (1984) (agreement to use written interrogatories in lieu of live testimony in the context of a dispute over the enforceability of a subpoena implicating the legislative privilege).

In this case, the parties agreed that Green Bay would produce almost 20,000 pages of documents *in lieu of testimony or other document production*. That decision was not made unilaterally but was the outcome of negotiations between Mr. Gableman's office and the City's Outside Counsel. That agreement was memorialized in writing and sent to Mr. Gableman: "Per our discussions...neither further document production nor witness attendance is necessary at this time." [Mandell Aff., ¶8, Exh. C.] In the same letter, Green Bay memorialized the parties' agreement that if Mr.

Gableman wished to seek testimony in the future, any such request must be the subject of negotiation. [Mandell Aff., ¶8, Exh. C (“In the event that the Special Counsel at a later date seeks any additional documents from Green Bay or any witness testimony on behalf of Green Bay or any of its officials, such a request should include information regarding specific topics on which information is sought, the timeframe to be covered in any testimony, and the venue and timing in which any testimony is requested.”).] The subpoena’s scheduled time for testimony, even had it been enforceable, was not continued but adjourned completely. Pursuant to the parties’ agreement, neither Mayor Genrich nor anyone else at the City could have expected to be required to produce any testimony or information on November 17. To the contrary, it was their stated expectation that no such testimony would *ever* occur absent further negotiations with the City’s Outside Counsel.

Mr. Gableman did not object to this summary of the parties’ agreement, nor did he ever attempt to follow up on these communications. He certainly made no effort one expects from an attorney seeking testimony—including contacting Outside Counsel to confirm attendance. To the contrary, in numerous public statements, he made clear that he did not expect to take testimony from City officials.⁴² While Mr. Gableman’s office sent two emails in October seeking to continue the dates of the

⁴² See Fannon, *Gableman Puts Elections Subpoenas on Hold, Cancels Interviews with Clerks and Mayors*, *supra* n. 11; Bayatpour, *Gableman Backs Off Request For Testimony From City Officials*, *supra* n. 11; Smith, *GOP Election Attorney Signals Eventual Testimony, Possible Subpoenas For Voting Machines*, *supra* n.12. He communicated the same to the Wisconsin Department of Justice. [See Dane Cty. Cir. Ct. Case No. 21CV2552, Dkt. No. 88, pp. 73-74 (noting that Mr. Gableman’s staff “recently confirmed” the DOJ’s understanding that Mr. Gableman was “effectively withdrawing the subpoenas” to the municipal officials and “only seeking reproduction of documents.”).]

already-adjourned subpoenas, those emails were directed to the wrong person and were caught in the City's spam filter. And after the City discovered and responded to these emails, notifying Mr. Gableman that they were mis-directed and had been caught in the spam folder, Mr. Gableman never made any attempt to follow up or negotiate any further to obtain testimony—instead, he unilaterally initiated this *ex parte* action.

In sum, before December 1, 2021, when Mr. Gableman announced that he had filed this case days earlier, the City and Mayor Genrich had no reason to believe that there was *any* pending subpoena for Mayor Genrich's testimony, or for any testimony from anyone from the City. Mr. Gableman has never explained or justified his decision to seek testimony after his office agreed that documents would suffice, the City produced documents in reliance on that agreement, and he made no effort to renegotiate the agreement with the City. (Indeed, this action has now been pending for more than seven months, and Mayor Genrich has repeatedly outlined his recitation of the facts; at no point, however, has Mr. Gableman reached out to the City's Outside Counsel about negotiating testimony.) It was reasonable for Mayor Genrich and the City to rely on that agreement. Accordingly, Mayor Genrich had more than a "reasonable excuse" for any purported non-attendance at the return date specified in the subpoenas.

ii. Mr. Gableman Did Not Expect Mayor Genrich to Testify

Finally, although he now says that Mayor Genrich acted without "justification" in failing to appear for an extra-legal deposition on November 17, 2021, recently revealed documents show that Mr. Gableman himself had no such expectation. Public

records from Mr. Gableman's office include a transcript, dated November 17, 2021, variously titled "Statement of Nonappearance" and "Statement of Nonappearance of Vanessa Chavez." Attorney Nicholas Morgan, ostensibly acting on Mr. Gableman's behalf,⁴³ went on the record and stated, "It is Wednesday, November 17th, 2021, 10:21 a.m., and in response to our subpoena, the Most Knowledgeable Person from the City of Green Bay has failed to appear to answer questions from myself or members of the Special Counsel." [Second Lenz Aff., ¶4, Exh. B.; Dkt. No. 144, p. 18, Dane Cty. Cir. Ct. Case No. 2021CV3007.]

Mr. Gableman and his colleagues apparently understood that he was scheduling the testimony of the "person most knowledgeable" at the City of Green Bay. That is consistent with the inappropriate email he sent to Attorney Chavez. [Dkt. No. 6, p. 9.] If even Mr. Gableman's office had no expectation that Mayor Genrich was scheduled to appear, it follows that Mayor Genrich's nonappearance cannot be characterized as "without justification."

Mr. Gableman's own actions underscore that Mayor Genrich always acted reasonably in connection with the subpoenas. Mr. Gableman has not and cannot come forward with any evidence to the contrary, as he must to carry his burden. The Petition should be denied.

⁴³ Mr. Morgan was an attorney with Mohrman, Kaardal & Erickson, P.A., a Minnesota law firm. [Dkt. No. 144, p. 18, Dane Cty. Cir. Ct. Case No. 2021CV3007.] He has not been identified as a member of Mr. Gableman's staff and does not appear as a Wisconsin-licensed attorney on the State Bar's Lawyer Search. [Second Lenz Aff. ¶5.]

D. Mayor Rhodes-Conway acted reasonably.

Mr. Gableman's communications with the City of Madison supported Mayor Rhodes-Conway's reasonable excuse to not appear for an interview.

Mr. Gableman has also failed to demonstrate that Mayor Rhodes-Conway acted “without reasonable excuse.” To the contrary, the facts in the record show that, in light of Mr. Gableman's statements and actions prior to and since filing this action, Mayor Rhodes-Conway acted reasonably.

From the beginning, the City of Madison has contacted Mr. Gableman and his office in good faith to clarify both what was being requested and the positions of both Mr. Gableman and the City regarding the status of the subpoenas. The Petition for Writ of Attachment references “negotiations with the City Attorney” related to the subpoena issued to Mayor Rhodes-Conway. As stated above, the significant aspects of those “negotiations” were the following:

1. On October 7, 2021, Mr. Kloster communicated to Mr. Haas that Mr. Gableman's office would accept records which had been previously released to satisfy the Rhodes-Conway Subpoena and Witzel-Behl Subpoena, and that no City of Madison officials would need to appear on the October 15 or 22, 2021 return dates.
2. On October 7, 2021, Mr. Gableman publicly confirmed that he had canceled the requested interviews with Mayor Rhodes-Conway and Clerk Witzel-Behl and that those officials could satisfy the subpoenas by providing copies of records that previously had been made available pursuant to public records requests.
3. On October 8, 2021, Mr. Kloster stated that the individual who delivers documents to Mr. Gableman's office “will not need to spend any substantial time with us--merely sign in and confirm delivery of the physical copy.” On the same day, Mr. Gableman told Mr. Haas that the requested appearances by Mayor Rhodes-Conway and Clerk Witzel-Behl were necessary only for the

purpose of producing the requested records, and that he may want to interview the City's PMK at some point.

4. In his letter dated October 14, 2021, Mr. Haas reiterated to Mr. Gableman the City of Madison's understanding that neither its mayor nor clerk would appear for interviews on October 15 or 22, 2021, and that the City would await further communication from Mr. Gableman as to whether it wished to schedule an interview with the PMK. The letter also stated that the City would need to receive details about the location and the format of any such interview, as well as specific topics Mr. Gableman would like to explore.
5. On October 21, 2021, Mr. Gableman informed Mr. Haas that he wished to continue the return date of the PMK from October 22, 2021 to November 15, 2021. He made no mention of a continuing obligation of Mayor Rhodes-Conway or rescheduling her interview.
6. On November 2, 2021, Mr. Haas reiterated to Mr. Gableman that no City official was required to appear on November 15, 2021 unless the City received a more specific scope of inquiry and the parties reached an agreement on the format and length of any interview.

The next thing Mr. Gableman did was file the Petition against Mayor Rhodes-Conway on November 29, 2021. [Dkt. No. 1.] The City of Madison received no response or objection to its statements outlining the parties' understanding of the status of the various subpoenas. Mr. Gableman's office did not respond to the City's assertion on October 14, 2021, that the Mayor was not required to appear on October 15 or 22, 2021, and from that point forward Mr. Gableman's only communication related to the continuation of the PMK's interview to November 15, 2021. Furthermore, Mr. Gableman's office did not even respond to the City's invitation to discuss the details of the PMK's interview. On multiple occasions Mr. Gableman's office either confirmed or let stand the City's understanding that Mayor Rhodes-

Conway was not required to appear for an interview and affirmatively acted as if the PMK's subpoena for deposition was the only outstanding request of the City of Madison.

The City of Madison had confirmed with Mr. Gableman's office that the purpose of the subpoena *duces tecum* was for Mayor Rhodes-Conway and Clerk Witzel-Behl to produce documents, which is, after all, the commonly accepted understanding of the term "Subpoena *Duces Tecum*." The titles for these subpoenas were also in contrast to the "Subpoena For Deposition" issued to the PMK for the City of Madison. This difference in the subpoena headings justifiably contributed to Mayor Rhodes-Conway's understanding of her obligations in responding to the Subpoena *Duces Tecum*, specifically that her only obligation was to produce records, not to present testimony in a private setting.

The totality of these facts clearly refutes Mr. Gableman's conclusory statement in the Petition and Brief that Mayor Rhodes-Conway acted "without justification" or, given the language in Wis. Stat. § 885.12, "without reasonable excuse." Simply put, Mayor Rhodes-Conway's reasonable excuse for not appearing for an interview was that all of Mr. Gableman's statements and actions were consistent with the City's understanding that she was not required to appear, and Mr. Gableman took no affirmative steps to either contradict that understanding or to try to reach an agreement regarding the time, place, forum and scope of an interview. A simple phone call or email from Mr. Gableman's office could have clarified its position regarding Mayor Rhodes-Conway's obligation, but neither Mr. Gableman nor anyone on his

staff ever took that reasonable step, leaving Mayor Rhodes-Conway with the reasonable understanding that she was not required to appear for a deposition.

While unknown to the City, according to internal documents from Mr. Gableman's office, his staff purported to appear for an interview of the PMK from the City of Madison on November 16, 2021, and it documented that the PMK did not appear at that time. [Second Lenz Aff., ¶4, Exh. B.; Dkt. No. 144, p. 18, Dane Cty. Cir. Ct. Case No. 2021CV3007.] Setting aside the fact that Mr. Gableman had previously continued that interview to November 15, 2021, and not November 16, 2021, this document highlights that there is no similar evidence in the record illustrating that Mr. Gableman expected Mayor Rhodes-Conway to appear on October 22, 2021, or any other date. With Mr. Gableman lacking such evidence and expectation, and given the communications between his office and the Madison City Attorney, Mayor Rhodes-Conway's alleged nonappearance was clearly with "reasonable excuse."

E. *Milwaukee officials Henke and Bubacz acted reasonably.*

Neither Mr. Gableman's Amended Petition nor his subsequent brief demonstrates that Milwaukee CIO Henke or Ms. Bubacz failed to appear on February 16, 2022 "without reasonable excuse." In light of the issues raised by Mr. Carroll in his February 11 and February 16, 2022, communications to Mr. Lancaster, their conduct was completely reasonable. [Carroll Aff., ¶13, Exh. L; ¶15, Exh. N.]

Most notably, and despite Mr. Lancaster's purported interest in discussing the scope and format of testimony, the Special Counsel's office provided CIO Henke and Ms. Bubacz's attorney with no such information. [Carroll Aff., ¶11; ¶14, Exh. M.] Mr.

Lancaster proposed a meeting to occur on January 26, 2022, and Mr. Carroll provided his availability on that date (including the entire afternoon after 1:00 p.m.), yet neither Mr. Lancaster nor anyone else in the Special Counsel's office followed up. [Carroll Aff., ¶11.] When Mr. Carroll raised questions about the scope and format of in-person testimony in his February 11, 2022, correspondence to Mr. Lancaster, Mr. Lancaster's response on the following day did not address those issues at all, stating only that the "interviews" would "not be long." [Carroll Aff., ¶14, Exh. M.] Ms. Bubacz and CIO Henke, by their counsel, were hardly unreasonable in seeking information about what they would be asked, by whom, and in what format, before appearing to testify.

The lack of clarity from Mr. Gableman's office regarding the scope and format of the "interviews" was particularly problematic in light of contemporaneous litigation regarding those issues. As Mr. Carroll also emphasized in his February 11, 2022, letter to Mr. Lancaster, the Dane County Circuit Court in Case No. 21CV002552 was considering—but had not yet decided—questions about the appropriate forum for testimony subject to the Legislature's subpoenas and, indeed, Mr. Gableman's authority pursuant to such subpoenas. [Carroll Aff., ¶13, Exh. L.] It was thus reasonable and appropriate for Ms. Bubacz and CIO Henke to potentially delay their testimony pending resolution of such critical issues by the courts.

Additionally, though Mr. Carroll expressly requested documentation showing that Mr. Gableman's investigation was authorized to continue beyond the expiration of his contract with Speaker Vos on December 31, 2021, no such documentation was

provided. [Carroll Aff., ¶13, Ehx. L; ¶14, Exh. M.] Such a request warranted—but did not receive—a meaningful response, particularly since the highest levels of transparency and accountability can and should be expected of Mr. Gableman’s taxpayer-funded investigation.

CIO Henke and Ms. Bubacz, by their counsel, repeatedly emphasized that they were acting in good faith and that they were not categorically refusing to testify. They reviewed the Legislature’s document requests and their counsel provided responsive materials to some of those requests, while raising objections and/or seeking clarifications regarding others. What they were not willing to do was to appear for “interviews” absent any clear indication of what those interviews would look like or whether they were even lawfully compelled. CIO Henke’s and Ms. Bubacz’s conduct was reasonable pursuant to Wis. Stat. § 885.12, and Mr. Gableman has provided scant evidence to suggest otherwise. For this reason alone, his Amended Petition should be denied.

F. *Mayor Mason acted reasonably.*

As to Racine Mayor Mason, no subpoena that is a subject of the instant Amended Petition was ever issued to or served upon him. [Letteney Aff., ¶4.] The only subpoena in the papers filed in this action that references any representative of the City of Racine appears in Exhibit N to Brief of Petitioner Regarding the Court’s Orders of January 21, 2022 and April 1, 2022, which names the City of Racine “Department of Information Services” (which does not exist) and seeks testimony from “the person most knowledgeable to the City of Racine’s Department of Information Services [*sic*].” While Mayor Mason is, indeed, the Mayor of Racine, he

does not work for or within the City of Racine's Department of Management Information Systems. Respondents have searched and have been unable to locate any law suggesting that that any person may be subject to attachment because a different, non-specifically named person did not appear in response to a subpoena, much less an extra-legal subpoena. Given that Mayor Mason was not specifically named in nor served with any subpoena directed toward the City of Racine, his purported non-appearance at the return date on any such subpoena cannot be said to have been "without reasonable excuse."

G. *There was and continues to be litigation regarding the validity of this type of legislative subpoena.*

Before Mr. Gableman filed this case, the Dane County Circuit Court chose not to adjudicate a request for a temporary restraining order requested by the Wisconsin Department of Justice in part because Mr. Gableman had backed away from imminently seeking testimony.⁴⁴ As of November 2021, the parties in the Dane County case were in the middle of briefing various motions. The State plaintiffs, represented by the Wisconsin Department of Justice, raised serious challenges to legislative subpoenas issued on Mr. Gableman's behalf, including several of the arguments included in Section III, *infra*. Mr. Gableman did not inform the Dane County Circuit Court that he intended or expected to receive testimony a few weeks later. That case remains pending.

⁴⁴ Patrick Marley, *The Attorney Tasked With Reviewing The 2020 Election Has Hired A Lawyer At Taxpayer Expense To Try To Keep The Effort Alive*, Milwaukee Journal Sentinel (Oct. 25, 2021), available at <https://www.jsonline.com/story/news/politics/2021/10/25/michael-gableman-hires-attorney-try-keep-wisconsin-election-review-alive/6172449001/> (last visited June 3, 2021).

The existence of that case, and the arguments raised by WEC, raised serious doubts as to whether this type of legislative subpoena was enforceable at all, and, while the Municipal Respondents and their respective cities attempted to cooperate with Mr. Gableman in good faith throughout this process, given the serious questions regarding the subpoenas, it was reasonable for the Municipal Respondents to suspend further compliance with Mr. Gableman's demands until these issues were resolved.

III. The Subpoenas Are Invalid and Cannot Be Enforced.

Mr. Gableman's premise—that the Municipal Respondents “failed to appear” for an interview or quasi-deposition—includes an implicit assertion that the underlying subpoenas were valid. If not, they are unenforceable, regardless of the mechanism used. *See e.g., Next Level Plan. & Wealth Mgmt., LLC v. Prudential Ins. Co. of Am.*, No. 18-MC-65-PP, 2019 WL 1466049, at *2 (E.D. Wis. Apr. 3, 2019) (subpoena issued without authority is not enforceable). An unlawful subpoena cannot be the basis of an enforcement action under Wis. Stat. § 885.12, which allows for the incarceration of a person who “fails to attend as a witness, or to testify as *lawfully required*.” Wis. Stat. § 885.12 (emphasis added). The subpoenas' flaws render them unlawful and without an enforcement mechanism in Chapter 885 or Chapter 13.

A. *The Subpoenas and their quasi-deposition demand are not authorized by the provisions of Chapter 13.*

As discussed above, each subpoena facially invokes the Legislature's express authority under Chapter 13. However, a look at the plain language of that statutory chapter, as well as other related, surrounding statutes, makes clear that Chapter 13 does not authorize the issuance of these subpoenas or their quasi-deposition demand.

Wisconsin Stat. § 13.31 provides that a witness may be compelled to testify and to produce documents “*before any committee of the legislature, or of either house thereof, appointed to investigate any subject matter*” (emphasis added). The enforcement provision, Wis. Stat. § 13.26(1)(c), provides that “refusing to attend or be examined as a witness, either *before the house or a committee*, or before any person authorized to take testimony *in legislative proceedings*, or to produce any books, records, documents, papers or keys according to the exigency of any subpoena” may result in a charge of contempt of the legislature” (emphases added).⁴⁵

In contrast, the subpoenas issued to Mayors Genrich and Rhodes-Conway purportedly required them to appear “in person before the Special Counsel or his designee” to “give evidence and testimony with regard to the November 2020 General Election in Wisconsin (the ‘Election’) including, *but not limited to*, potential irregularities and/or illegalities related to the Election.” The subpoenas issued to CIO Henke and Ms. Bubacz for in-person testimony on February 16, 2022, purported to require them “to appear and give testimony, under oath, before the SPECIAL COUNSEL and/or his attorney(s).” The location provided on each subpoena was 200 South Executive Drive, Suite 101, Brookfield, WI 53005. The Genrich Subpoena and Rhodes-Conway Subpoena also purportedly required those Mayors or their designees

⁴⁵ Mr. Gableman could be a “person authorized to take testimony in legislative proceedings” if, for example, he conducted questioning in a legislative hearing that otherwise comports with the requirements for such hearings. But nothing in Chapter 13 permits Mr. Gableman or the Committee to invent new types of proceedings that run afoul of statute, the Wisconsin constitution, and the citizens’ expectations of transparent governance. As a result, Mr. Gableman is neither a person authorized to take testimony under Wis. Stat. § 13.31 *nor* a person “authorized to take testimony” pursuant to Wis. Stat. § 885.12. There is no authority for the quasi-deposition he is pursuing.

to bring “all documents contained in your files and/or in your custody, possession, or control, pertaining to the [November 2020 General] Election.” [Dkt. No. 6, pp. 2, 8; Dkt. No. 2, p. 3 (emphasis original).]

These subpoenas are unauthorized. They purport to require private, in-person testimony and document production to a private individual, or his staff, working out of an office in Brookfield, Wisconsin, not to the Legislature or any house or committee thereof, nor as part of a legislative proceeding. While Mr. Gableman and his staff were assisting the Assembly Committee on Campaigns and Elections, they are not themselves a house of the Legislature or a legislative committee, and the contemplated testimony was not part of a Committee meeting. The plain language of Wis. Stat. § 13.31 empowers the Legislature to use subpoenas to compel witnesses to appear *before it* and authorizes the production of documents in a limited manner, directly to a committee. The Assembly, by rule, has only authorized subpoenas for attendance “before any assembly committee.” Assembly Rule 3(1)(o).

In addition to the plain language of Wis. Stat. § 13.31, other surrounding statutes within Chapter 13 confirm that legislative subpoenas issued pursuant to Wis. Stat. § 13.31 may compel a witness to appear only before the Legislature, or an individual house or committee thereof. *See* Wis. Stat. §§ 13.32(1) (providing for summary process when a witness “failed or neglected to appear before *the committee*”) (emphasis added); 13.34 (requiring that refusals to testify “before any committee included within s. 13.31” be certified to proper house); 13.35 (providing immunity to

any “person who is required to testify before *either house of the legislature or a committee thereof...*”) (emphasis added).

Similarly, the procedure described in the subpoenas is unprecedented and unsupported. The contemplated non-public appearances appear to possess all the characteristics of a deposition procedure typically employed to examine a witness in the context of a judicial proceeding. But, as described above, Chapter 13 plainly contemplates compelling a witness to testify in a *legislative* proceeding, not a judicial proceeding or other closed proceeding before an attorney.

The Legislature has not provided any mechanism for compelling a witness to provide sworn testimony as part of a closed deposition process before an attorney in a *non-public* forum and with no connection to any public committee proceeding. There is also no evidence in the record establishing that such subpoenas requiring secret legislative depositions have ever been authorized or issued previously in Wisconsin’s history. Except as otherwise expressly provided by law, “[a]ll meetings of the senate and assembly and the committees” are required to be held in public. Wis. Stat. § 19.87. Wisconsin’s Opening Meeting Law, Wis. Stat. §§ 19.81-19.98, codifies the principle 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). Pursuant to the Wisconsin Constitution and statutes, the Legislature may meet only “at the seat of government,” unless called into special session by the Governor. Wis. Const. art. IV, § 11; *see also* Wis. Stat. § 13.02 (requiring the Legislature to convene

in regular session “in the capitol”); Joint Rule 84(1) (allowing testimony “in the capitol” and subject to “due public notice”). Since there is no statutory or constitutional support for Mr. Gableman’s proposed use of a civil procedure mechanism in a non-judicial, legislative proceeding, this Court must reject his attempt to flout the rules and investigate anyone and everyone and in any manner he chooses.⁴⁶

B. *Even if the Subpoenas were statutorily compliant, they are too vague for due process purposes.*

Due process requires that the subject matter of a legislative investigation be “defined with sufficient explicitness and clarity to provide a reasonable basis for judgment by the witness whether a specific question put to him is pertinent to that subject matter.” *Goldman v. Olson*, 286 F. Supp. 35, 43 (W.D. Wis. 1968). As in any other situation wherein a witness is required to testify under oath and subject to penalty of perjury, due process requires that the subject be informed of the subject of questioning “with the same degree of explicitness and clarity that the Due Process Clause requires in the expression of any element of a criminal offense.” *Watkins v. United States*, 354 U.S. 178, 209 (1957).

⁴⁶ Mr. Gableman, Speaker Vos, and the Assembly previously argued in *Wisconsin Elections Commission v. Wisconsin Assembly* that courts are without any power to consider arguments regarding the Legislature’s compliance with its own procedural rules because, they say, it is part of the “legislative process” and therefore beyond judicial review. [Dane Cty. Cir. Ct. Case No. 21CV2552, Dkt. 27 at 10-15, Dkt. 38 at 14-15.] That argument is deeply flawed in the first instance, but certainly does not apply here, where Mr. Gableman has chosen to invoke the Court’s jurisdiction in an effort to enforce his subpoenas. Having done so, Mr. Gableman cannot now say that this Court should merely act as a cat’s paw for the Legislature and effectuate requests not authorized by law. Fortunately, Mr. Gableman appears to agree. He has conceded that this Court clearly does have the authority to determine “whether the investigation could be made in the manner contemplated by the resolution.” [Dkt. 106, p. 19 (*citing In re Falvey*, 7 Wis. 630, 635 (1859).)]

Neither Assembly Resolution 15 nor the subpoenas are sufficiently clear or definite to satisfy the demands of due process. The Resolution broadly directs the Committee to “investigate the administration of elections in Wisconsin,” which, even limited to a single election, comprises locally administered elections in all of Wisconsin’s 72 counties and 1,850 municipalities. The subpoenas similarly fail to provide the explicitness and clarity necessary to compel the Municipal Respondents’ testimony. Although the Genrich Subpoena and Rhodes-Conway Subpoena, unlike the Resolution, seek evidence related only to the November 2020 General Election, they cite as possible topics of inquiry “potential irregularities and/or illegalities related to the Election.” Such a broad and sweeping directive failed to afford Mayors Genrich and Rhodes-Conway with the “sufficient explicitness and clarity” regarding potential areas of inquiry that are essential to due process. *Goldman*, 286 F. Supp. at 43. This is especially true given that 1) they were in no position to testify regarding potential irregularities and illegalities related to the 2020 General Election, much less the administration of the election, and 2) Mr. Gableman’s office repeatedly declined to acknowledge or respond to the requests of the Cities of Green Bay and Madison.

Both these subpoenas and the underlying Resolution are of such sweeping and uncertain scope that they fail to inform Mayors Genrich and Rhodes-Conway of the subjects of questioning with sufficient clarity and definiteness to satisfy the constitutional requirement of due process.

The subpoenas for in-person testimony directed to Ms. Bubacz, CIO Henke, and Mayor Mason are somehow even more vague, as they include no information on the topics of testimony *at all*. Henke Subpoena III and Bubacz Subpoena II merely direct their subjects “to appear and give testimony, under oath,” with no further elaboration. Further, attempts by counsel for CIO Henke and Ms. Bubacz to obtain specifics regarding topics of testimony were unavailing.

If the Court declines to declare these subpoenas invalid, it would be empowering the Legislature to use this Court to jail the Respondents without legal authority and violate the Fourteenth Amendment. U.S. Const. Amend. XIV (“nor shall any state deprive any person of life, liberty, or property, without due process of law.”); *U.S. v. Salerno*, 481 U.S. 739, 748-49 (1987) (government’s ability to deprive individuals of liberty subject to the Due Process Clause).⁴⁷ Accepting Mr. Gableman’s invitation to deprive the Municipal Respondents of their liberty—by forcing them into the Hobson’s choice between sitting for lawless quasi-depositions or being jailed—without authorization in Wisconsin law would violate the Constitution. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 161-62 (1951) (quoting *Hagar v. Reclamation Dist., No. 108*, 111 U.S. 701, 708 (1884)) (Due Process “must be pursued in the ordinary mode prescribed by the law”).

⁴⁷ Any argument that Mayors Genrich or Rhodes-Conway or any other public official lack due process rights due to their public office is misplaced. They are still “persons” entitled to the protection of the Constitution. The Court need not address this argument, if raised, since Mr. Gableman named Mayors Genrich and Rhodes-Conway in both their official and personal capacities. [Dkt Nos. 1, 5.]

C. *The Genrich Subpoena and the Rhodes-Conway Subpoena are unreasonably broad and burdensome.*

The Genrich Subpoena and Rhodes-Conway Subpoena are also unenforceable because their demands for testimony and document production are unreasonably overbroad and burdensome.

Mr. Gableman fails to acknowledge the breadth of information requested in these subpoenas. They demand documents and testimony “including, but not limited to, potential irregularities and/or illegalities related to the [2020 General] Election.” The use of “but not limited to” explodes this (already broad) demand to one unlimited in scope. In particular, the command that Mayors Genrich and Rhodes-Conway produce “all documents contained in your files and/or in your custody, possession, or control, pertaining to the Election” could contain hundreds of thousands of documents, particularly if one considers the capacious definition of “Your” which includes “your employees, agents, representatives, consultants, accountants and attorneys.” [Dkt. No. 6, p. 7; Dkt. No. 2, p. 3.] That request sweeps far more broadly than the purposes of the Resolution and imposes an extreme burden on both Mayors, both in terms of effectively preparing to give testimony and in terms of the impossible logistics of producing such a substantial number of documents.

Even the relatively more specific requests enumerated in Exhibit A to the Genrich and Rhodes-Conway Subpoenas, which but for the names of the cities are identical, are unreasonably overbroad. Exhibit A demands six different types of documentation, including, but not limited to, communications between (1) employees of each city and officials and/or employees of Green Bay, Racine, Kenosha, Madison,

and Milwaukee; (2) employees of each city and the WEC; and (3) employees of each city and various other non-governmental persons and organizations “regarding or in any way related to the Election.” [Dkt. No. 6, p. 8; Dkt. No. 2, p. 9.] Exhibit A also attempts to identify the communications in question as involving not only specified city employees and officials, as well as specified non-governmental persons and organizations, but also communications with “any other employee, representative agent or other person affiliated with them.” [Dkt. No. 6, p. 8; Dkt. No. 2, p. 9.] These demands are also unreasonably overbroad and imprecise. They would implicate hundreds if not thousands of people and require massive searches for records that would disrupt basic government functions in the City of Green Bay and the City of Madison. They would also produce a multitude of records that are unrelated to the election topics on which Mr. Gableman has focused his attention. These demands must be narrowed and clarified before Mayor Genrich or Mayor Rhodes-Conway can reasonably be required to comply with the Subpoena.

IV. Additional Procedural Defects Are Fatal to Mr. Gableman’s Petitions.

A. *The original and Amended Petitions must be dismissed pursuant to Wis. Stat. § 801.02.*

To commence *any* civil action in Wisconsin, a plaintiff must file a summons and complaint with the court and provide service of authenticated copies of those documents on the defendant within 90 days. Wis. Stat. § 801.02. Since 1981, that same procedure has applied to petitions for writs.⁴⁸ *Tobler v. Door Cnty.*, 158 Wis. 2d

⁴⁸ Mr. Gableman styled his request a Petition for a Writ of Attachment of the Person. Wisconsin law recognizes and defines a “writ of attachment,” but it has nothing to do with

19, 24, 461 N.W.2d 775 (1990); Judicial Council Note—sec. 13, ch. 289, Laws of 1981.

The 90-day period cannot be enlarged. Wis. Stat. § 801.15(2)(a). As our Supreme Court has explained:

[A] fundamental defect or error occurs where the complainant fails, if challenged, to meet the burden specified under sec. 801.02(1), Stats., *i.e.*, . . . where the service of the authenticated copy of the Summons and Complaint is not made within 60⁴⁹ days after filing. Substantial compliance is not a factor. Complainant must show compliance with the burden of sec. 801.02(1), Stats.

Am. Fam. Mut. Ins. Co. v. Royal Ins. Co., 167 Wis. 2d 524, 533-34, 481 N.W.2d 629 (1992). Failure to abide by the requirements of Wis. Stat. § 801.02(1) requires dismissal, regardless of whether there was prejudice. *Archambault v. A-C Prod. Liab. Tr.*, 205 Wis. 2d 400, 406, 556 N.W.2d 392 (Ct. App. 1996).

Although Mayor Genrich, by counsel, raised the issue of service as early as December 2, 2021, Mr. Gableman has not complied with Wis. Stat. § 801.02(1). [Second Lenz Aff., ¶2; Haas Aff. ¶21.] To the contrary, Mr. Gableman's attorneys indicated their belief that this should be an *ex parte* proceeding. *Ex parte* proceedings are constitutionally suspect and disfavored. *See, e.g., Butts v. Fenelon*, 38 Wis. 664,

this matter and does not authorize the relief sought here. *See* Wis. Stat. ch. 811. In his Motion to Supplement the Petitions, Mr. Gableman indicates without explanation that his Petition is not a pleading within the meaning of Wis. Stat. § 802.01. [Dkt. No. 108, ¶11.] Pursuant to *Tobler*, even if true, this would not relieve him of the obligations of Wis. Stat. § 801.012(1). *Tobler* admits of one other possible method to obtain a writ without using a summons and complaint, but that method still requires service of an original writ, which Mr. Gableman has not accomplished. *Tobler*, 158 Wis. 2d at 24. There is nothing in Wis. Stat. § 885.12 to indicate that it is exempt from the requirements of Wis. Stat. § 801.02. Chapter 801 applies to “all civil actions and special proceedings whether cognizable as cases at law, in equity or of statutory origin except where different procedure is prescribed by statute or rule.” Wis. Stat. § 801.01(2).

⁴⁹ A previous version of Wis. Stat. § 801.02 contained a shorter time limit. 1997 Wis. Act 187.

665 (1875) (per curiam) (“It is dangerous to pass upon grave questions, such as are presumably involved in cases brought here, upon *ex parte* argument; and the court is unwilling to do so when it can be avoided.”). Mr. Gableman presented no argument as to why such a proceeding would be appropriate in this instance, and he did not comply with Wis. Stat. § 801.02(1) by (1) serving the respondents within 90 days and (2) filing an affidavit of service. Mr. Gableman’s 90 days expired no later than March 1, 2022, for Mayors Genrich and Rhodes-Conway, and May 19, 2022, for the other Municipal Respondents. Accordingly, the Petitions should be dismissed.

B. *Neither the original Petition nor the Amended Petition states a claim involving Clerk Jeffreys or Clerk Witzel-Behl.*

If Mr. Gableman is seeking a writ involving Clerk Jeffreys or Clerk Witzel-Behl, he has neglected to include any allegations to that effect in his pleadings. Wisconsin Stat. § 802.02(1) requires that “a pleading ... that sets forth a claim for relief . . . shall contain all of the following: (a) A short and plain statement of the claim, identifying the transaction or occurrence or series of transactions or occurrences out of which the claim arises and showing that the pleader is entitled to relief.” “In order to satisfy Wis. Stat. § 802.02(1)(a), a complaint must plead facts, which if true, would entitle the plaintiff to relief.” *Data Key Partners*, 2014 WI 86, ¶21.

Neither of Mr. Gableman’s original Petitions names Clerk Jeffreys or Clerk Witzel-Behl as a respondent. [Dkt. Nos. 1, 5.] Mr. Gableman’s “Amended Petition” names both clerks in the caption but contains no actual allegations about them, and they are not included in the description of parties. [Dkt. No. 75.] Only Mr. Gableman’s

brief contains language involving Clerk Jeffreys or Clerk Witzel Behl: “Celestine Jeffreys was required to appear and testify before the Special Counsel on October 15, 2021,” “Neither the Mayor nor the City Clerk appeared and testified on [November 17, 2021],” “Maribeth Witzel-Behl was required to appear and testify on October 15, 2021,” “Also, like Green Bay, neither the Mayor nor the City Clerk appeared and testified on that date.” [Dkt. No. 106, p. 5.]

Briefs are not pleadings within the meaning of Wis. Stat. § 802.01, however, and there is nothing in any of the pleadings that implicates Clerk Jeffreys or Clerk Witzel-Behl. Moreover, even if one accepts that Wis. Stat. § 885.12 is the appropriate method to compel compliance with such a subpoena, any such allegation must be sworn, and Mr. Gableman’s briefs have not met this criterion. Wis. Stat. § 885.12. Nor did Mr. Gableman include Clerk Jeffreys or Clerk Witzel-Behl in his Motion to Supplement the Petitions, although he described each party that he sought to add as a Respondent. [Dkt. No. 108.]

Had Mr. Gableman named Clerk Jeffreys or Clerk Witzel-Behl as respondents, the arguments in this brief would apply as forcefully to them as they do to the Municipal Respondents, and any request for such writs would have to be denied. Because, however, Mr. Gableman has failed to put forth any allegations pertaining to Clerk Jeffreys or Clerk Witzel-Behl, they should be dismissed from the case pursuant to Wis. Stat. § 802.06 and the caption amended accordingly.

CONCLUSION

Mr. Gableman’s Amended Petition for a Writ of Attachment against the Municipal Respondents cannot survive even a cursory review. Mr. Gableman’s

reliance on Wis. Stat. § 885.12 violates every relevant rule of statutory construction, is unsupported by the legislative history, and runs afoul of basic expectations for how the Legislature must operate. As a factual matter, Mr. Gableman's various filings have not, and cannot, establish that the Municipal Respondents violated any obligation or that they acted unreasonably. The subpoenas forming the basis of this suit are unlawful in a number of ways. Finally, basic procedural rules bar Mr. Gableman's Petitions.

For the reasons stated herein, the Municipal Respondents respectfully request that this Honorable Court DISMISS the original Petitions and Amended Petition and schedule a hearing on Mayor Genrich's pending Motion for Sanctions.

Respectfully submitted this 6th day of June, 2022

Electronically signed by Daniel S. Lenz

Daniel S. Lenz (State Bar No. 1082058)

LAW FORWARD, INC.

P.O. Box 326

Madison, WI 53703-0326

Telephone: (608) 556-9120

dlenz@lawforward.org

Jeffrey A. Mandell (State Bar No. 1100406)

STAFFORD ROSENBAUM LLP

P.O. Box 1784

Madison, WI 53701-1784

608.256.0226

jmandell@staffordlaw.com

Dax Luce Goldstein (admitted *pro hac vice*)

Christine P. Sun (admitted *pro hac vice*)

STATES UNITED DEMOCRACY CENTER

3749 Buchanan St., No. 475165

San Francisco, CA 94147-3103

Telephone: (415) 938-6481 (DLG)

Telephone: (615) 574-9108 (CPS)
christine@statesuniteddemocracy.org
dax@statesuniteddemocracy.org

*Attorneys for Eric Genrich, Mayor of the City of Green Bay*⁵⁰

s/ Michael R. Haas
Michael R. Haas (State Bar No. 1020889)
CITY OF MADISON
Office of the City Attorney
City-County Building, Room 401
210 Martin Luther King, Jr. Boulevard
Madison, WI 53703-3345
Telephone: (608) 266-4511
Facsimile: (608) 267-8715
mhaas@cityofmadison.com

*Attorneys for Satya Rhodes-Conway, Mayor of the City of Madison*⁵¹

s/ Kathryn Z. Block
Kathryn Z. Block (State Bar No. 1029749)
James M. Carroll (State Bar No. 1068910)
CITY OF MILWAUKEE
Milwaukee City Attorney's Office
200 E. Wells Street, Room 800
Milwaukee, WI 53202-3515
Telephone: (414) 286-2601
Facsimile: (414) 286-8550
kblock@milwaukee.gov
jmcarr@milwaukee.gov

Attorneys for David Henke, Chief Information Officer of the City of Milwaukee and Hannah Bubacz, employee of the City of Milwaukee

s/ Scott R. Letteney
Scott R. Letteney (State Bar No. 1000559)
CITY OF RACINE
730 Washington Avenue, Room 201
Racine, WI 53403

⁵⁰ As discussed in Section IV.b, *supra*, Clerk Jeffreys is not a party to this case. To the extent required, however, these attorneys represent that individual as well.

⁵¹ As discussed in Section IV.b, *supra*, Clerk Witzel-Behl is not a party to this case. To the extent required, however, these attorneys represent that individual as well.

Telephone: (262) 636-9115

Facsimile: (262) 636-9570

scott.letteney@cityofracine.org

Attorneys for Cory Mason, Mayor of the City of Racine