STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY

MICHAEL J. GABLEMAN, IN HIS OFFICIAL CAPACITY AS SPECIAL COUNSEL TO THE WISCONSIN ASSEMBLY EX REL. WISCONSIN STATE ASSEMBLY

Petitioner,

v.

ERIC GENRICH et al.,

Respondent,

Case No. 2021-CV-001710

BRIEF OF PETITIONER REGARDING THE COURT'S ORDER OF JANUARY 21, 2022

INTRODUCTION

At the status conference held on January 21, 2022, the Court ordered that the parties brief the following issues—

- **The factual basis for seeking Writs of Attachment;**
- **The Court's Authority to issue Writs of Attachment per Wis. Stat, § 885.12; and**
- **The Correct procedure to follow regarding enforcement of the instant subpoenas (whether through Wis. Stat. § 885.12 or through the tenets of Wisconsin Statutes Chapter 13).**

Below is the brief of Petitioner Michael J. Gableman, in his Official Capacity as Special Counsel to the Wisconsin Assembly ex rel. Wisconsin State Assembly ("Special Counsel") regarding the above-identified issues.

OVERVIEW

Wisconsin law has long endorsed legislative subpoenas as a function of

oversight and investigation into its own legislation. The Wisconsin Legislature issued subpoenas to the respondents in this matter as part of its investigation and oversight into election laws in the State of Wisconsin, particularly as they related to the conduct of the November 2020 election in this state. The subpoenas were served upon the respondents. The respondents failed to fully respond and/or comply with the subpoenas.

Through Wis. Stat. § 885.12 Circuit Courts are empowered to enforce subpoenas issued in this state. Broadly worded, that statutory section, and Chapter 885 as a whole, is intended to apply to practically any situation where a witness must be compelled to give testimony and for punishment of those who refuse to comply. Legislative history and the long-standing opinion of the Wisconsin Attorney General support the utilization of Wis. Stat. § 885.12 to enforce legislative subpoenas.

Rather than the tenets of Chapter 13, Wis. Stat. § 885.12 is the proper vehicle by which to seek compliance with the subpoenas. Chapter 13 provides an impractical and burdensome alternative. The United States Supreme Court frowned upon the use of Chapter 13's contempt enforcement mechanisms other than in situations relating to a contemptuous act immediately before the legislature. As the use of Chapter 13's contempt remedies would likely involve the judicial system regardless and would require the legislature to spend valuable time addressing the issue of contempt, Chapter 13's remedies provide an impractical mechanism for dealing with the case of a recalcitrant witness. Wis. Stat. § 885.12 provides a much

more direct and efficient mechanism for addressing the factual situation at hand.

The subpoenas were properly issued. The witnesses failed to comply with them. The Special Counsel has sought assistance from the Court to enforce the subpoenas through Wis. Stat. § 885.12 because it is the most efficient and least invasive statutory mechanism by which to do so. The Special Counsel urges the Court to utilize the power granted to it by Wis. Stat. § 885.12 and issue Writs of Attachment so that the recalcitrant witnesses may be compelled to satisfy their legal obligation to appear and give testimony.

FACTS

The Wisconsin Assembly passed a resolution on March 23, 2021, charging the Committee on Campaigns and Elections to investigate the 2020 elections. Exhibit One. On August 30, 2020, the Speaker of the Assembly formed the Office of the Special Counsel and named retired Supreme Court Justice Michael Gableman as the Special Counsel. Speaker Vos charged the OSC with investigating the 2020 elections and assisting the Committee with its investigation.

Subpoenas to Original Respondents

On September 28, 2021, the legislature, at the request of the Special Counsel, issued legislative subpoenas to the Madison City Clerk, Maribeth Witzel-Behl and the Green Bay City Clerk, Celestine Jefferys. *See* exhibits A and B. On October 4, 2021, the legislature issued subpoenas to Green Bay Mayor Eric Genrich, the City of Green Bay, the Wisconsin Elections Commission, and Madison Mayor Satya

Rhodes-Conway.[1] *See* exhibits C–F All these subpoenas were served, and service of the subpoenas is not an issue in the case at bar.

The legislative subpoenas called for the production of documents and for the witnesses to appear and give deposition testimony to Special Counsel at his offices in Brookfield, Wisconsin. *Id.* The respondents produced documents requested by the subpoena. However, the subpoena also had a testimonial component. *Id.*

Celestine Jefferys was required to appear and testify before the Special Counsel on October 15, 2021. Exhibit B. Mayor Genrich was required to appear and testify on October 22, 2021. Exhibit C. That appearance was extended by the Special Counsel to November 17, 2021, at 9:30 a.m. Exhibit G. Neither the Mayor nor the City Clerk appeared and testified on that date. These defendants have admitted that they received the email extending the deposition date.

Maribeth Witzel-Behl was required to appear and testify on October 15, 2021. Exhibit A. Mayor Rhodes-Conway was required to appear and testify on October 22, 2021. Exhibit F. Like Green Bay, those depositions were extended to November 15, 2021, at 9:30 a.m. Exhibit H. Also, like Green Bay, neither the Mayor nor the City Clerk appeared and testified on that date. The City of Madison has not disputed that it was aware of the deposition extension.

[1] Subpoenas were also issued 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.

Subpoenas to Additional Respondents

On December 28, 2021, at the request of the Special Counsel, the legislature issued subpoenas to Ann Jacobs, Trina Zanow, Sarah Linske, David Henke, Hannah Bubacz, Racine Mayor Cory Mason, officials with the Green Bay, and officials with the City of Kenosha. Exhibits I–P. All the subpoenas required the production of documents and an appearance in front of the Special Counsel during the week of February 14, 2022, through February 18, 2022. *Id.*

While all of these respondents at least produced some documents, only the City of Kenosha appeared at the depositions. All other recipients, though admitting that they had been served the subpoenas, stated that they would not appear or further comply with the subpoenas. Exhibits Q–S.

ARGUMENT

I. THE LEGISLATURE HAS THE POWER TO ISSUE SUBPOENAS WHICH WERE VALIDLY ISSUED IN THIS MATTER.

Legislative subpoena power has been codified at Wis. Stat. § 13.31. "The attendance of witnesses before any committee of the legislature, or of either house thereof, appointed to investigate any subject matter, may be procured by subpoenas signed by the presiding officer and chief clerk of the senate or assembly." *Id.* A legislative subpoena must "state when, where, and before whom the witness is required to appear." *Id.* The legislative subpoena may also require the production of "books, records, documents, and papers" as designated by the subpoenas. *Id.*

The subpoenas in this case were validly issued. The Wisconsin Assembly resolved on March 17, 2021, and directed "the Assembly Committee on Campaigns

and Elections to investigate the administration of elections in Wisconsin, focusing in particular on elections conducted after January 1, 2019."

The Office of the Special Counsel was created, and Justice Gableman was appointed the Special Counsel on August 21, 2021, by the Speaker of the Assembly to "direct an elections integrity investigation, assist the Elections and Campaigns Committee, and hire investigators and other staff to assist in the investigation." The legislative subpoenas were signed by the presiding officer of the Assembly, Speaker Robin Vos, and the chief clerk of the Assembly. As such, the legislative subpoenas which commanded an appearance for a deposition before the Special Counsel were a demand to appear and give testimony before the authorized agent of the Committee on Campaigns and Elections as part of its investigation pursuant to 2021 Assembly Resolution 15. While the respondents partially performed by providing documents, they did not appear and give testimony. Enforcement is now ripe as to those depositions.

II. WIS. STAT. § 885.12 GRANTS THIS COURT AUTHORITY TO ISSUE WRITS OF ATTACHMENT TO ENFORCE LEGISLATIVE SUBPOENAS.

A. Analysis of Section 885.12.

The question posed by the Court—whether it possesses the power to issue writs of attachment via Wis. Stat. § 885.12 regarding legislative subpoenas—is essentially one of statutory construction. In other words, does the statute grant the Court the power to perform the act requested the Special Counsel? An analysis of the statute's plain language yields a definitive "yes" to that question.

1. Legal Standard

Wisconsin courts begin an analysis of statutory language by conducting a plain meaning analysis. *See State ex rel. Kalal v. Circuit Ct. for Dane Cnty.*, 2004 WI 58, ¶ 44, 271 Wis.2d 633, 681 N.W.2d 110 ("Judicial deference to the policy choices enacted into law by the legislature requires that statutory interpretation focus primarily on the language of the statute. We assume that the legislature's intent is expressed in the statutory language.") Words found in the statute are to be given their "common, ordinary, and accepted meaning," *Id.*, ¶ 45, Otherwise stated, words are be assigned meaning "that proper grammar and usage would assign them." *State v. Arberry*, 2018 WI 7, ¶ 19, 379 Wis.2d 254, 905 N.W.2d 832. In addition, statutory language must be 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." *Kalal*, 271 Wis.2d 633, ¶ 46. "'If this process of analysis yields a plain, clear statutory meaning, then there is no ambiguity, and the statute is applied according to this ascertainment of its meaning.'" Id. (quoting *Bruno v. Milwaukee Cnty.*, 2003 WI 28, ¶ 20, 260 Wis. 2d 633, 660 N.W.2d 656).

2. Sections 885.01 and 885.12.

Wis. Stat. § 885.12 is part of Wisconsin Statutes Chapter 885, entitled "Witnesses and Oral Testimony." Wis. Stat. § 885.01 sets forth the general authority to issue subpoenas in the state and provides in relevant part—

> **885.01 Subpoenas, who may issue.** The subpoena need not be sealed, and may be signed and issued as follows:

> …
>
> **(4)** By any arbitrator, coroner, medical examiner, board, commission, commissioner, examiner, committee or other person authorized to take testimony, or by any member of a board, commission, authority or committee which is authorized to take testimony, within their jurisdictions, to require the attendance of witnesses, and their production of documentary evidence before them, respectively, in any matter, proceeding or examination authorized by law; and likewise by the secretary of revenue and by any agent of the department of agriculture, trade and consumer protection.

Wis. Stat. § 885.12 provides—

> If any person, without reasonable excuse, fails to attend as a witness, or to testify as lawfully required before any arbitrator, coroner, medical examiner, board, commission, commissioner, examiner, committee, or other officer or person authorized to take testimony, or to produce a book or paper which the person was lawfully directed to bring, or to subscribe the person's deposition when correctly reduced to writing, 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, and unless the person shall purge the contempt and go and testify or do such other act as required by law, may commit the person to close confinement in the county jail until the person shall so testify or do such act, or be discharged according to law. The sheriff of the county shall execute the commitment.

(Emphasis added).

3. The Common, Ordinary and Accepted Meaning of the Language of Section 885.12 Encompasses Enforcement of the Subpoenas at issue.

Both Wis. Stat. § 885.12 and 885.01 employ a near-identical version of the extremely broad catch-all phrase of applicability "or other person authorized to take testimony." This phrase plainly includes the Special Counsel as he has been authorized to take testimony on behalf of the legislature regarding its investigation and oversight of the 2020 election.

The legislature possesses the plenary, inherent and "broad discretionary power to investigate any subject respecting which it may desire information in aid of the proper discharge of its function to make or unmake written laws, or perform any other act delegated to it by the fundamental law, state or national." *Goldman v. Olson*. 286 F. Supp. 35, 43 (W.D. Wis. 1968) (quoting *State ex rel. Rosenhein v. Frear*, 138 Wis. 173, 176-77 (1909)). Once the legislature decided on the necessity of an investigation, it had similar plenary power to determine how the investigation was to be conducted. *Falvev*, 7 Wis. at 638 (1858)("For if the legislature have the power to investigate at all, it has the power of choosing how the investigation shall be had.")

Assembly Resolution 15 directs the Assembly Committee on Campaigns and Elections to "investigate the administration of elections in Wisconsin, focusing on elections conducted after January 1, 2019" (the "Resolution"). The Resolution does not establish a process by which or set constraints on the Elections Committee as to the way it is to conduct to conduct such investigation (the "Investigation").

To conduct the Investigation, the legislature commissioned the Special Counsel to "oversee an Office of Special Counsel [which] shall direct an elections integrity investigation…" Thus, the power to conduct the investigation was delegated to the Special Counsel. The discretion as to the way it is to be conducted has been delegated as well as he is empowered to "oversee" and "direct" the investigation, and to "hire investigators and other staff to assist in the investigation."

The upshot is that the Special Counsel has been delegated the authority to conduct any examination he deems appropriate for the purpose of furthering his legislative commission. This includes the taking of testimony pursuant to the subpoenas at issue, and as a result the Special Counsel squarely falls under the ambit of a "person authorized to take testimony." As a result, by its "plain and ordinary meaning" Wis. Stat. § 885.12 is applicable to a witness's failure to attend a deposition set by the Special Counsel.

4. The Statutory and Legislative History of Sections 885.01 and 885.12 confirm the Plain Meaning that this Court may issue Writs of Attachment to enforce Legislative Subpoenas.

A "plain meaning" analysis ordinarily ends with a finding that a statute's language is unambiguous. *Kalal*, 2004 WI 58, ¶ 51. "We have repeatedly emphasized that 'traditionally, resort to legislative history is not appropriate in the absence of a finding of ambiguity.'" *Id.* (quoting *Seider v. O' Connell*, 2000 WI 76, ¶ 50, 236 Wis. 2d 211, 612 N.W. 2d 659). Courts may not look to legislative history "to show that an unambiguous statute is ambiguous." *Seider*, 2000 WI 6 at ¶ 51.

However, "there is no converse rule that statutory history cannot be used to reinforce and demonstrate that a statute plain on its face, when viewed historically, is indeed unambiguous.'" *Id.* (quoting *State v. Martin*, 470 N.W.2d 900, 162 Wis.2d 883 (Wis. 1991)).

Here, the legislative and statutory history of sections 885.01 and 885.12 confirm the plain reading of the statutes that they grant this Court the authority to issue writs of attachment to enforce legislative subpoenas.

Initially, the statutes that would become sections 885.01 and 885.12 were of limited applicability. The catch-all language "or other person authorized to take testimony" was intentionally added to Chapter 885 in order to broaden the chapter's applicability to "practically all" situations involving the enforcement of subpoenas in this state.

The seminal version of Wis. Stat. §§ 885.01 and 885.12 originally did not include language relating to "other persons," and only applied to limited situations. The original statute was enacted pursuant to the Laws of 1860, Chapter 125 and provided—

> SECTION 1. The chairman of any committee appointed by the authority of the common council, or by the board of councillors, or the board of aldermen of any city, the board of supervisors of any county, or the board of trustees of any incorporated village, in this State, to make investigation into the affairs of any such city, county, or incorporated village, or into the official conduct of any officer of any such city., county, or incorporated village, shall have power to issue subpoenas for, and compel the attendance of, witnesses before such committee, and to administer oaths.
>
> Sec. 2. It any person shall refuse or neglect to appear and testify, as required by the preceding section, upon proof of service of the subpoena, and of such refusal to appear, or testify, it shall be the duty of any Judge of any court of record of the county in which such investigation may be had, on the application of the mayor of such city, the board of supervisors of such county, or the president of the board of trustees of such incorporated village or of the committee making such investigation to issue a summary process, either in term or vacation, to bring such defaulting witness before him ; and then, unless such defaulting witness shall purge himself of the contempt, and go before each committee and testify, as required by the subpoena, to commit him to the common Jail of such county, there to remain in close confinement until he shall so testify as required, or be discharged by such committee, or by the body by whose authority such committee shall be appointed ; and the jailor of such county is hereby required to secure and keep such person, pursuant to any such commitment.

(Emphasis added). As can be seen above, the statute in its initial form only applied to subpoenas issued by county or municipal authorities and their committees.

In 1927, Wis. Stat. §§ 885.01 was broadened to include the language found in section 885.01(4). The purpose of this legislative change was stated as follows—

> The object is to collect and consolidate in this Chapter **practically all provisions for compelling the attendance of witnesses and punishing for refusal to attend or to testify**.

1927 Senate Bill 10, s. 2 (emphasis added).

In other words, in 1927, the legislature specifically broadened the reach of Chapter 885 to include all subpoenas issued from whatever source. This includes subpoenas issued by *any* "person authorized to take testimony," or *any* member of a board, commission, authority or committee which is authorized to take testimony, within their jurisdictions."

This statutory and legislative history confirms the plain meaning of Wis. Stat. § 885.12, which is that it is intended to be applicable to the legislative subpoenas at issue and that the section grants this Court the authority to issue writs of attachment to enforce those subpoenas.

B. The Long-Standing Opinion of the Wisconsin Attorney General is that Section 885.12 applies to Legislative Subpoenas.

Use of Wis. Stat. § 885.12 has been the recommended method of enforcement of legislative subpoenas in Wisconsin since 1931.

In 20 Wis. Opp, Att'y Gen. 765, the Attorney General was asked to opine whether, under an Assembly Resolution that issued a subpoena, it was required to

pay a witness travel fees, and if none are paid, whether a witness may then refuse to appear. 20 Wis. Opp, Att'y Gen. 765. As to the first question the Attorney General answered no. *Id.* at 767. As to the second question, the Attorney General noted that the Resolution's provision that a refusal to attend was punishable by contempt "did not have the force of law" as it was only a Resolution and not an enacted statute. *Id.*

However, the Attorney General still opined that the witnesses were obliged to attend and testify. *Id.* at 769. The Attorney General stated: "In case the witness shall fail to attend and testify, I advise you to proceed under [section 325.12, the predecessor to section 885.12]" because "[t]hat section provides ample authority in judicial officers to compel attendance by attachment and commit the witness until he shall purge himself of his contempt by testifying."

As such, the opinion of the Attorney General, unchallenged since 1931, is that Wis. Stat. § 885.12 grants Circuit Courts the authority to enforce legislative subpoenas by issuing writs of attachment. It is noteworthy that this opinion did come after the 1927 revision of the predecessor to Chapter 885, which broadened the Chapter's applicability. The Attorney General's opinion is entirely consistent with the plain meaning of the statutory sections at issue, as well as the legislative and statutory history.

III. WIS. STAT. § 885.12 IS THE PROPER STATUTORY MECHANISM BY WHICH TO ENFORCE THE SUBPOENAS AT ISSUE.

The question of what the proper statutory mechanism is to apply in this case is answered in large part by the above analysis. Wis. Stat. § 885.12 has been

enacted and interpreted to apply to all subpoenas issued in the State of Wisconsin. It is clearly the appropriate judicial remedy to apply when a witness has refused to appear and testify in relation to any type of subpoena.

However, the tenets of Chapter 13, particularly the sections dealing with contempt and summary process, also have relevance to the instant facts. Even though these statutory sections may technically be applicable, in the interest of fairness and economy, Wis. Stat. § 885.12 is still the preferred remedy and should be utilized in this matter.

A. Applicable Sections of Chapter 13.

Wis. Stat. § 13.26 provides—

13.26 Contempt.

(1) Each house may punish as a contempt, by imprisonment, a breach of its privileges or the privileges of its members; but only for one or more of the following offenses:

(a) Arresting a member or officer of the house, or procuring such member or officer to be arrested in violation of the member's privilege from arrest.

(b) Disorderly conduct in the immediate view of either house or of any committee thereof and directly tending to interrupt its proceedings.

(c) 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.

(d) Giving or offering a bribe to a member, or attempting by menace or other corrupt means or device to control or influence a member's vote or to prevent the member from voting.

(2) The term of imprisonment a house may impose under this section shall not extend beyond the same session of the legislature.

(Emphasis added)

Wis. Stat. § 13.27 provides—

13.27 Punishment for contempt.

(1) Whenever either house of the legislature orders the imprisonment of any person for contempt under s. 13.26 such person shall be committed to the Dane County jail, and the jailer shall receive and detain the person in close confinement for the term specified in the order of imprisonment, unless the person is sooner discharged by the order of such house or by due course of law.

(2) Any person who is adjudged guilty of any contempt of the legislature or either house thereof shall be deemed guilty also of a misdemeanor, and after the adjournment of such legislature, may be prosecuted therefor in Dane County, and may be fined not more than $200 or imprisoned not more than one year in the county jail.

(Emphasis added)

Wis. Stat. § 13.32 provides—

13.32 Summary process; custody of witness.

(1) Upon the return of a subpoena issued under s. 13.31, duly served, and upon filing with the presiding officer of the house from which the subpoena issued a certificate of the chairperson of the committee certifying that any person named therein failed or neglected to appear before the committee in obedience to the mandate of such subpoena, summary process to compel the attendance of such person shall be issued.

(2) Such summary process shall be signed by the presiding officer and chief clerk of the house which issued the subpoena, and shall be directed to the sergeant at arms thereof commanding the sergeant at arms "in the name of the state of Wisconsin" to take the body of the person so failing to attend, naming that person, and bring the person forthwith before the house whose subpoena the person disobeyed. When so arrested the person shall be taken before the committee desiring to examine the

> person as a witness, or to obtain from the person books, records, documents or papers for their use as evidence, and when before such committee such person shall testify as to the matters concerning which the person is interrogated.
>
> (3) When such person is not on examination before such committee the person shall remain in the custody of the sergeant at arms or in the custody of some person specially deputed for that purpose; and the officer having charge of the person shall from time to time take the person before such committee until the chairperson of the committee certifies that the committee does not wish to examine such person further. Thereupon such witness shall be taken before the house which issued the summary process and that house shall order the release of the witness, or may proceed to punish the witness for any contempt of such house in not complying with the requirement of this chapter or of any writ issued or served as herein provided.

(Emphasis added)

B. Wisconsin Courts have historically had a role in evaluating and enforcing Legislative Subpoenas.

The seminal version of Wis. Stat. § 13.31 was enacted by Wisconsin Laws of 1858 Act 4. In the original version of the statute, enforcement of legislative subpoenas was specifically set out as a concurrent effort between the legislature and the judiciary. Section 2 of that Act provided—

> Any person summoned to give testimony, or produce books, records, documents or papers as provided in the foregoing section, who shall willfully neglect or refuse to appear in obedience to such writ of subpoena, or appearing, shall refuse to am1wer any question pertinent to the matter of inquiry before such committee, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by imprisonment in the common jail not more than one year, nor less than three months, or by a fine not exceeding one thousand dollars, nor less than two hundred dollars, or both such fine and imprisonment in the discretion of the court. The circuit court of the county in which

> the subpoena was served, shall have jurisdiction of the misdemeanor.

1858 Act 4, s. 2 (emphasis added).

While the Circuit Court was granted authority to enforce such legislative subpoenas, the legislature was also granted concurrent power to deem a failure to comply as a contempt—

> Such neglect or refusal to appear, or refusal to answer, shall also be deemed a contempt of the house of the legislature whose process has been disobeyed, and shall also be punished by such house, as a breach of its privileges, as provided in section three of chapter eight of the revised statutes.

Id. (emphasis added).

The first reported case in Wisconsin challenging a legislative subpoena was in 1859. *In re Falvey*, 7 Wis. 630 (1859). In *Falvey*, the legislature appointed a committee to investigate allegations of fraud, bribery, and corruption of legislators or in legislative acts. *Id.* at 631. As a result, the legislature issued subpoenas to Thomas Falvey using the same requirements contained in § 13.31. *Id.* at 632–33. Falvey failed to appear before the committee and give testimony. *Id.* at 633. Falvey was arrested for contempt and petitioned the Wisconsin judiciary for his release. *Id.* at 633–34. He argued to the court that the legislature did not have the power to resolve and direct an investigation or issue subpoenas. *Id.* at 634.

The Wisconsin Supreme Court held that the judiciary has the authority to inquire into the authority of the legislature to conduct investigations, whether the subject matter at issue "was a proper subject for the investigation of the legislature," and "whether the investigation could be made in the manner contemplated by the resolution." *Id.* at 635. The Wisconsin Supreme Court

recognized the ability of the legislature to issue subpoenas in furtherance of its own investigation. *Id.* It found that a legislative subpoena not only requires a witness to appear but that the refusal to appear or answer questions is "a breach of the privileges of the body issuing the subpoena." *Id.* at 639.

The upshot is that, from the very beginning, the tenets of Chapter 13 have never been viewed as an "exclusive remedy" available to the Legislature to punish contempt of its processes, with no role for the judiciary. Whether as an agent of direct enforcement, or as a potential check on the authority of the legislature in compelling testimony and punishing a refusal to appear, the judiciary has always played a role in the enforcement of legislative subpoenas in Wisconsin.

C. While the United States Supreme Court has held that Courts may ensure that Legislative Subpoenas comply with Due Process, it has also recognized that Legislatures are ill-equipped to provide said Due Process.

The United States Supreme Court expressly recognizes the power of the houses of the Congress to punish contemptuous conduct and leave little question that the Constitution imposes no general barriers to the legislative exercise of such power. *Groppi v. Leslie*, 404 U.S. 496, 499–500 (1972) (citing *Jurney v. MacCracken*, 294 U.S. 125 (1935); *Anderson v. Dunn*, 6 Wheat. 204 (1821)). The Court's only concern is with the procedures that the Due Process Clause of the Federal Constitution requires a state legislature to meet in imposing punishment for contemptuous conduct in the presence of a committee. *Id.* The panoply of procedural rights that are accorded a respondent in a criminal trial has never been thought necessary in legislative contempt proceedings. *Id.* at 501.

Regardless, the Court has held that reasonable notice of a charge and an opportunity to be heard in defense before punishment is imposed are basic in our system of jurisprudence. *Id.* at 502 (citations omitted). This fundamental principle has been emphasized where rights of less standing than personal liberty were at stake. *Id.* (citing *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); *Morgan v. United States*, 304 U.S. 1, 18 (1938); *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)). "'Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.'" *Id.* at 502–03 (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, (1950)).

In other words, while compliance with a legislative subpoena is mandatory, punishment can only come after notice and an opportunity to be heard.

While a legislature may provide the notice and opportunity to be heard necessary, the Supreme Court recognized that doing so is extremely burdensome for a legislative body.

In *Groppi*, the plaintiff, a Wisconsin activist and former priest, was arrested and jailed by the Wisconsin legislature for contempt. *Id.* at 497. He was jailed under Wis. Stat. § 13.27. *Id.* at n. 1. Groppi appealed his contempt citation. The United States Supreme Court reversed. *Id.* at 506.

The Court held that use of § 13.27 is unconstitutional when used by the legislature to punish contempt that does not occur in its presence or chambers

because it does not afford a contemnor notice and an opportunity to be heard. *Id.* at 505. Crucial to the Court's holding was the fact that Groppi's contempt did not occur in the presence of the Assembly and while the contemnor was in the legislative chamber. *Id.* at 507. The Court specifically found that a contempt finding in the absence of those circumstances is beyond the scope of legitimate legislative power. Id.

The Supreme Court noted that, while the legislature could provide the proper notice and opportunity, doing so could have "[t]he potential for disrupting or immobilizing the vital legislative processes of State and Federal Governments." Id. at 500. As such, the Court cautioned that "Courts must be sensitive to the nature of a legislative contempt proceeding and the 'possible burden on that proceeding' that a given procedure might entail." *Id.* At the same time, it noted that contempt that occurs outside the presence of the legislative body may be subject to a heightened requirement of due process as compared to attempts to punish contempt that occurs in directly in the presence of the legislature. *Id.* at 500-01.

In the case at bar, these respondents were not contemptuous in the presence of the Assembly. Instead, the Assembly designated that their testimony occur before the Special Counsel, who was a "person authorized to take testimony" including in a legislative proceeding. Wis. Stat. § 885.12. *See also* Wis. Stat. § 13.26(1)(c). Because the contemptuous conduct occurred before the Special Counsel and not in a chamber of the legislature, the amount of due process necessary before punishment can be imposed is heightened pursuant to *Groppi*.

Asking the legislature to determine what process that may entail, and then actually carry out the necessary process is unduly burdensome on the legislature given the availability of the enforcement mechanism of Wis. Stat. § 885.12. enforcement is proper in this court pursuant to § 885.12. As noted in Groppi, "Legislatures are not constituted to conduct full-scale trials or quasi-judicial proceedings." *Id.* at 500.

Regardless of what process was afforded, if the legislature were to conduct a quasi-trial and find the witnesses in contempt, the practical reality is that such action would be challenged by the recalcitrant witnesses as insufficient under due process in the courts. By pursuing the remedy available under Wis. Stat. § 885.12, the Special Counsel believes that there will be no concerns of due process, as the Circuit Court is well-equipped to see that whatever notice and opportunity to be heard that is necessary will be provided. By utilizing Wis. Stat. § 885.12 as opposed to the contempt remedies of Chapter 13, both fairness and economy are promoted.

D. As is noted in the Special Counsel's Letter to the Court dated January 20, 2022, Section 885.12 is the least invasive Remedy available.

The Special Counsel filed his letter dated January 20, 2022, as Document # 60. In it, the Special Counsel noted that one of the primary purposes in seeking a remedy pursuant to Wis. Stat. § 885.12 as opposed to the tenets of Chapter 13 was "to avoid (if possible) the incarceration of any official involved in this matter." *Id.*, p. 1 of 5. The Special Counsel noted—

> In contrast to the remedies provided by Chapter 13, which mandate immediate incarceration of a witness found to be in

> contempt, the plain language and historic application of Wis. Stat § 885.12 provide for a discretionary process where a recalcitrant witness is provided the opportunity to purge any finding of contempt or make a showing that the subpoena with which he or she has been served is invalid prior to imposition of any sanction.

Id.

The Special Counsel incorporates the arguments made in Document # 60 and continues to assert that Wis. Stat. § 885.12 provides the fairest and least invasive process by which the Special Counsel can seek enforcement of the subpoenas.

CONCLUSION

The legislature properly issued the subpoenas. The witnesses were served and refused to appear for testimony. To discharge his duty to the legislature, the Special Counsel must seek enforcement of the subpoenas.

Wis. Stat. § 885.12 is the proper mechanism by which to seek enforcement. The plain language of the statute, as confirmed by its statutory and legislative history, sets forth that it is applicable to practically every situation in which a witness is compelled to testify in the State of Wisconsin, refuses to do so, and punishment for such failure is at issue.

Chapter 13's contempt remedies are a burdensome, inefficient, and overly invasive alternative. There is no good reason to force the legislature to conduct a quasi-trial about the enforcement of the subpoenas when a judicial remedy has been specifically created by the legislature to address matters of recalcitrant witnesses. Doing so would simply add inevitable process, time, and expense.

This Court has the authority to enforce the subpoenas pursuant to Wis. Stat.

§ 885.12 and should proceed to conduct whatever proceedings are necessary to apply that statute to the facts at hand.

Dated this 21st day of February, 2022.

MICHAEL J. GABLEMAN, IN HIS OFFICIAL CAPACITY AS SPECIAL COUNSEL TO THE WISCONSIN ASSEMBLY EX REL. WISCONSIN STATE ASSEMBLY.

By: *Electronically signed by Kevin M. Scott*
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