BY THE COURT:

DATE SIGNED: February 20, 2023

Electronically signed by Rhonda L. Lanford
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 16

EXPO WISCONSIN, INC.,
and WISDOM, INC. d/b/a WISDOM WISCONSIN
Plaintiffs,

Case No. 23CV279

v.

WISCONSIN ELECTIONS COMMISSION, DON MILLIS,
JULIE M. GLANCEY, ROBERT F. SPINDELL, JR.,
MARK L. THOMSEN, ANN S. JACOBS, MARGE BOSTELMANN,
in their official capacities as members of the Wisconsin Elections Commission,
and MEAGAN WOLFE, in her official capacity as the Administrator
of the Wisconsin Elections Commission,
Defendants,

and

WISCONSIN STATE LEGISLATURE,
Intervenor-Defendant.

DECISION AND ORDER

INTRODUCTION

Plaintiffs EXPO WISCONSIN, INC. and WISDOM, INC. (Plaintiffs) seek emergency declaratory relief and a temporary injunction to "clarify what questions, if

any, clerks will need to include on the April ballot to ensure that the election complies with the plain meaning of Wisconsin law." More specifically, Plaintiffs request:

> (a) An emergency declaratory judgment pursuant to Wis. Stat. §§ 227.40(1) and (4)(a) declaring that the Memorandum and its attachments are invalid because they erroneously assert that Defendant WEC is the appropriate filing official or agency for purposes of Wis. Stat. § 8.37 and that the Resolutions qualify for inclusion on the April 4, 2023 Spring Election;
>
> (b) Temporary injunctions requiring Defendant WEC, Defendants Millis, Glancey, Spindell, Thomsen, Jacobs, and Bostelmann, in their official capacity as members of the Wisconsin Elections Commission, and Defendant Wolfe, in her official capacity as Administrator of the Wisconsin Elections Commission, to rescind the Memorandum and attachments and to instruct Wisconsin's county clerks and MCBEC that the Resolutions are not to be included on the ballot for the April 4, 2023 Spring Election;
>
> (c) An emergency declaratory judgment pursuant to Wis. Stat. § 806.04 declaring that the Resolutions do not qualify for inclusion on the April 4, 2023 Spring Election;
>
> (d) Temporary injunctions requiring Defendant WEC, Defendants Millis, Glancey, Spindell, Thomsen, Jacobs, and Bostelmann, in their official capacity as members of the Wisconsin Elections Commission, and Defendant Wolfe, in her official capacity as Administrator of the Wisconsin Elections Commission, to instruct Wisconsin's county clerks and MCBEC that the Resolutions are not to be included on the ballot for the April 4, 2023 Spring Election; and
>
> (e) Temporary injunctions prohibiting Defendant WEC and Defendant Millis, in his official capacity as Chair of the Wisconsin Elections Commission, from including votes for or against the Resolutions in the statewide canvass for the April 4, 2023 Spring Election.

Doc. 18 at 4-5.

To put it simply, Plaintiffs claim that the Wisconsin State Legislature (Legislature) failed to follow the proper procedure in proposing an amendment to the Wisconsin Constitution and placing an advisory referendum on the official state ballot.

"Under our constitutional order, government derives its power solely from the people. Government actors, therefore, only have the power the people consent to give them." *Serv. Emps. Int'l Un., Local 1 v. Vos,* 2020 WI 67, ¶1, 393 Wis. 2d 38, 946 N.W.2d 35. The people have consented to only one procedure for amending the constitution. Under this procedure, "it shall be the duty of the Legislature to submit such proposed amendment or amendments to the people in such manner and at such time as the Legislature shall prescribe …" Wis. Const. art. XII, § 1 states in full:

> Any amendment or amendments to this constitution may be proposed in either house of the legislature, and if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their journals, with the yeas and nays taken thereon, and referred to the legislature to be chosen at the next general election, and shall be published for three months previous to the time of holding such election;
>
> and if, in the legislature so next chosen, such proposed amendment or amendments shall be agreed to by a majority of all the members elected to each house**, then it shall be the duty of the legislature to submit such proposed amendment or amendments to the people in such manner and at such time as the legislature shall prescribe;**
>
> and if the people shall approve and ratify such amendment or amendments by a majority of the electors voting thereon, such amendment or amendments shall become part of the constitution; provided, that if more than one amendment be submitted, they shall be submitted in such manner that the people may vote for or against such amendments separately.

(emphasis supplied).

Pursuant to this provision in the Wisconsin Constitution, the Legislature promulgated sec. 8.37, Stats. as follows:

> Unless otherwise required by law, all proposed constitutional amendments and any other measure or question that is to be submitted to a vote of the people, or any petitions requesting that a measure or question be submitted to a vote of the people, if applicable, **shall be filed with the official or agency responsible for preparing the ballots for the election no later than 70 days prior to the election** at which the amendment, measure or question will appear on the ballot.
>
> No later than the end of the next business day after a proposed measure is filed with a school district clerk under this section, the clerk shall file a copy of the measure or question with the clerk of each county having territory within the school district.

(emphasis supplied).

Here, all parties agree that the Legislature prescribed a manner and time for submitting amendments when it created sec. 8.37, Stats. That statute prescribes a *manner* for submitting amendments—they "shall be filed with the official or agency responsible for preparing the ballots for the election"—and the statute also prescribes a *time*—"no later than 70 days prior to the election at which the amendment … will appear on the ballot." *Id.*

The dispute between the parties is *who* is the official or agency responsible for preparing the ballots: Plaintiffs claim Wisconsin County Clerks are those "official[s]" and the Milwaukee County Board of Election Commissioners (MCBEC) is that "agency." The Legislature and Wisconsin Elections Commission ("WEC") contend that the "official

or agency responsible" is WEC. If Plaintiffs are correct, the Legislature missed the deadline under sec. 8.37, Stats. to submit the proposed constitutional amendment and referendum question. If the Legislature and WEC are correct, the proposed constitutional amendment and referendum question were timely submitted.

The parties appeared for a temporary injunction hearing on February 14, 2023; all parties appeared by counsel, testimony was taken, exhibits and affidavits received into evidence, and oral argument was considered from all parties.

Based on the Court's receipt and review of all evidence and briefs submitted, as well as the official transcript of the oral argument, the Court makes the following Decision and Order.

STANDARD OF REVIEW

"Injunctions, whether temporary or permanent, are not to be issued lightly. The cause must be substantial." *Werner v. A.L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520, 259 N.W.2d 310 (1977). Injunctions may be granted:

> When it appears from a party's pleading that the party is entitled to judgment and any part thereof consists in restraining some act, the commission or continuance of which during the litigation would injure the party, or when during the litigation it shall appear that a party is doing or threatens or is about to do, or is procuring or suffering some act to be done in violation of the rights of another party and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act.

Wis. Stat. § 813.02(1)(a).

The Court should only grant an injunction when four requirements have been met: 1) the movant is likely to suffer irreparable harm if a preliminary injunction is not issued;

2) the movant has no other adequate remedy at law; 3) a preliminary injunction is necessary to preserve the status quo; and 4) the movant has a reasonable probability of success on the merits. *Werner*, 80 Wis. 2d at 520.

A circuit court's decision to grant a temporary injunction is discretionary, and should only be reversed upon an erroneous exercise of discretion. An appellate court will only find an erroneous exercise of discretion "if the record shows that the trial court failed to exercise its discretion, the facts fail to support the trial court's decision, or [the appellate] court finds that the trial court applied the wrong legal standard." *Oostburg State Bank v. United Sav. & Loan Ass'n*, 130 Wis. 2d 4, 11-12, 386 N.W.2d 53 (1986). As the Supreme Court stated in *Hartung v. Hartung:*

> It is recognized that a trial court in an exercise of its discretion may reasonably reach a conclusion which another judge or another court may not reach, but it must be a decision which a reasonable judge or court could arrive at by the consideration of the relevant law, the facts, and a process of logical reasoning.

102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981).

DECISION

I. STANDING.

As a threshold issue, the WEC contends that the Plaintiffs lack standing to bring this action. Whether a party has standing is a question of law. *Wisconsin Legislature v. Palm*, 2020 WI 42, ¶¶ 12-13, 391 Wis. 2d 497, 942 N.W.2d 900. "Wisconsin courts evaluate standing as a matter of judicial policy rather than as a jurisdictional

prerequisite." *Id*. "One has standing to seek judicial review when one has a stake in the outcome of the controversy and is affected by the issues in controversy." *Id.* "The question is whether the party's asserted injury is to an interest protected by a statutory or constitutional provision." *Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n, Inc.*, 2011 WI 36, ¶55, 333 Wis. 2d 402, 797 N.W.2d 789. The only questions the court should consider when analyzing standing are what interests deserve protection against injury, and what should be enough to constitute an injury. Whether interests deserve legal protection depends upon whether they are sufficiently significant and whether good policy calls for protecting them or for denying them protection. *Id.* ¶41.

"Standing requirements in Wisconsin are aimed at ensuring that the issues and arguments presented will be carefully developed and zealously argued, as well as informing the court of the consequences of its decision." *McConkey v. Van Hollen*, 2010 WI 57, ¶16, 326 Wis. 2d 1, 783 N.W.2d 855. "The purpose of the requirement of standing is to ensure that a concrete case informs the court of the consequences of its decision and that people who are directly concerned and are truly adverse will genuinely present opposing petitions to the court." *In re Carl F.S.*, 2001 WI App 97, ¶5, 242 Wis. 2d 605, 626 N.W.2d 330 (2001). Standing should be liberally construed. *City of Mayville v. Dep't of Admin.*, 2021 WI 57, ¶ 18, 397 Wis. 2d 496, 960 N.W.2d 416.

Generally, on careful analysis of cases addressing standing, it is clear that the essence of the determination of standing, regardless of the nature of the case and the particular terminology used in the test for standing, is that standing depends on (1) whether the party whose standing is challenged has a personal interest in

the controversy (sometimes referred to in the case law as a "personal stake" in the controversy); (2) whether the interest of the party whose standing is challenged will be injured, that is, adversely affected; and (3) whether judicial policy calls for protecting the interest of the party whose standing is challenged. *Foley-Ciccantelli,* 2011 WI 36, ¶40.

Standing in a declaratory judgment action requires a different analysis than standing in other types of lawsuits:

> By definition, the ripeness required in declaratory judgment actions is different from the ripeness required in other actions.... potential defendants 'may seek a construction of a statute or a test of its constitutional validity without subjecting themselves to forfeitures or prosecution.' Thus, a plaintiff seeking a declaratory judgment need not actually suffer an injury before availing himself of the Act. What is required is that the facts be sufficiently developed to allow a conclusive adjudication.

Coyne v. Walker, 2016 WI 38, ¶29, 368 Wis. 2d 444, 879 N.W.2d 520, *overruled on other grounds, Koschkee v. Taylor*, 2019 WI 76, ¶29, 387 Wis. 2d 552, 929 N.W.2d 600 (internal citations omitted).

Here, Plaintiffs have alleged a personal interest in this controversy. They are entities who not only oppose the proposed constitutional amendment, but they also claim that finding that the Legislature failed to comply with sec. 8.37, Stats. allows them additional time to exercise their free speech rights to educate the public on these ballot questions. Second, Plaintiffs claim an injury—that their rights are adversely affected by the timing of the ballot questions. Third, judicial policy calls for protecting parties potentially affected by these ballot questions and when and how they are placed on the

ballot. This is a concrete case that informs the court of the consequences of its decision and that people who are directly concerned and are truly adverse have genuinely presented opposing petitions to the court. *See In re Carl F.S.*, 2001 WI App 97, ¶5 (discussing underlying policy considerations for standing).

Furthermore, the Supreme Court has recognized the right of voters to have constitutional amendments validly submitted for their consideration in certain circumstances:

> We sympathize with the argument that all voters are harmed by an amendment invalidly submitted to the people. Still, it is difficult to determine the precise nature of the injury here, and we are troubled by the broad general voter standing articulated by the circuit court. However, whether as a matter of judicial policy, or because McConkey has at least a trifling interest in his voting rights, we believe the unique circumstances of this case render the merits of McConkey's claim fit for adjudication.

McConkey, 2010 WI 57, ¶17.

A plaintiff seeking a declaratory judgment need not actually suffer an injury before availing himself of the Act. *Id.* Plaintiffs have standing to bring this claim.

II. ANALYSIS OF TEMPORARY INJUNCTION FACTORS.

The law is clear that all four requirements for a temporary injunction must be met for injunctive relief to be granted.

A. Irreparable harm.

The first element of a temporary injunction is that "the movant is likely to suffer irreparable harm if a temporary injunction is not issued." *Milwaukee Deputy Sheriffs'*

Ass'n, 2016 WI App 56, ¶20, 370 Wis. 2d 644, 883 N.W.2d 154. At the temporary injunction stage the requirement of irreparable injury is met by a showing that, without it to preserve the status quo *pendente lite*, the permanent injunction sought would be rendered futile. *Werner,* 80 Wis. 2d at 520.

Plaintiffs claim two types of irreparable harm: 1) Plaintiffs will be forced to continue devoting their resources to opposing these referenda on an unlawfully truncated timeframe; and 2) if the Court cannot resolve this suit on its merits until after the ballots are printed, voters will vote on referenda that should not be on the ballot at all, and while the advisory referendum would have no immediate impact, the proposed constitutional amendment will. At oral argument, Plaintiffs alleged irreparable harm in three ways:

> The first is the organizational harm. And we talked a little bit about this. This is the core of the harm to the plaintiffs. If the Court denies relief here then these ballots -- or these questions will appear on the ballot in April. It has been certified to the clerks that way. And that -- and our clients will be deprived of an entire year of advocacy to share with communities, to share with voters why they should vote against these referenda. They can't recover that. They cannot -- there's nothing this court can afford them that will bring that back.
>
> The work that the plaintiffs have done to date, and I expect we're going to hear that because they've been doing this work then they can't possibly be harmed if they're deprived of the opportunity to do it moving forward, that argument makes no sense. They've been doing the work. They want to continue doing the work. They think by continuing to do this work, engaging the democratic process as they have been, they have the opportunity to change people's minds. And it's up to this court by enforcing the laws to make sure that they're not denied that opportunity.

> The testimony today only sort of underscores that. It underscores what these organizations will be doing moving forward to try to defeat these resolutions they oppose. They're going door to door. They're building networks. They're knocking -- WISDOM is knocking on 1,000 to 1,400 doors a day. They are -- they are asking people to talk to their friends, talk to their families. Same with -- same with Marianne and EXPO, they're doing one-on-ones. They're moving from the legislative process to the direct democracy process, and having an artificially shortened timeline deprives them of the opportunity to do that work.
>
> Both the Legislature and WEC argue that because the plaintiffs are substantively opposed to the amendments that somehow that's irrelevant, but that couldn't be less true. They're certainly substantively opposed to these amendments. They've been working against them for months. They want to continue working against them moving forward. If the Court denies relief then they're suddenly at risk of living under amendments that shouldn't be on the ballot for an entire -- or an amendment and an advisory referendum for an entire year when they shouldn't have to because the Legislature didn't follow the law.

Doc 60 at 29-30.

This is a somewhat strange and counterintuitive argument put before the Court because generally when discussing and deciding irreparable harm, it is an act or failure to act that causes actual harm to plaintiffs. In this case, if the Court decides in favor of the temporary injunction, the Legislature's act or failure to act benefits the Plaintiffs. Through affidavits and live testimony, Plaintiffs made clear that they oppose these ballot questions, and want more time to educate the public in opposition to them. They also testified that they have been lobbying against these ballot items for months, and will continue to do so up until the election when efforts would be "ramped up" to provide more outreach to the public.

The irreparable harm they claim they will suffer is they will not have "the benefit" of an extra year to lobby against the ballot questions. Plaintiffs speculate that they could knock more doors, reach out through social media and other forms of mass communication and try to convince voters to reject the ballot questions. They also testified that with extra time, they could focus on other matters, like the Wisconsin state budget, which actually undercuts their argument that they would use every single day of the upcoming year to lobby against the ballot questions. While the Court agrees they have a right to educate and advocate on behalf of their organizations, they do not have an indefinite right to do so. Furthermore, whether this year or next, the proposed constitutional amendment and advisory referendum will be on the ballot, and will ultimately be decided by the voters.

The only harm Plaintiffs have alleged is that they will not be able to benefit from an extra year to oppose and educate the public on the ballot questions. Plaintiffs have in no way been restrained or prevented from advocating their position, and through testimony and oral argument stated that they have advocating their position for months. Plaintiffs have not shown irreparable harm entitling them to a temporary injunction.

B. No other adequate remedy at law.

While no irreparable harm is fatal to Plaintiffs' request for a temporary injunction, the Court will analyze the remaining elements for purposes of a complete record.

The second element of a temporary injunction is that "the movant has no other adequate remedy at law." *Milwaukee Deputy Sheriffs' Ass'n,* 2016 WI App 56, ¶20. Plaintiff's claim of no adequate remedy is:

> Plaintiffs request modest relief: all they seek is that the Resolutions be presented to voters by referendum in accordance with Wisconsin law. Absent an injunction blocking the unlawful presentation of the Resolutions in the April 4, 2023 Spring Election, there is no available remedy at law for the harms to Plaintiffs, or to those they represent. Not only will Plaintiffs suffer irreparable organizational harm, as described in Section II, supra, but they will be deprived of a lawful election on two issues in which they are deeply invested. Should these questions appear on the ballot, there is no way to unwind that election, and no amount of monetary relief can compensate Plaintiffs. Nor would it be sufficient for this Court to provide relief after the election has occurred, because declaratory and injunctive relief are inherently equitable.

Doc. 19 at 27 (citations omitted). The Court agrees that the only vehicle Plaintiffs have to challenge the inclusion of the ballot questions is through litigation seeking an injunction. No money will compensate Plaintiffs for the alleged harms; no judicial remedy could be crafted to undo the results of an election. None of the parties address adequacy of remedy at the oral argument.

The Court is the only possible avenue for the relief Plaintiffs seek. The Court finds the Plaintiffs have met their burden on no adequate remedy for purposes of a temporary injunction.

C. Status Quo.

The third element of a temporary injunction is that it "is necessary to preserve the status quo." *Milwaukee Deputy Sheriffs' Ass'n,* 2016 WI App 56, ¶20. The purpose of a temporary injunction or restraining order is to maintain the status quo and not to change the position of the parties or compel the doing of acts which constitute all or part of the ultimate relief sought. *Gahl on behalf of Zingsheim v. Aurora Health Care, Inc.*, 2022 WI

App 29, ¶60, 403 Wis. 2d 539, 977 N.W.2d 756.

Parties disagree as to what "status quo" means in this case. Plaintiffs argue:

> I'll briefly touch on status quo. The status quo clearly is that referenda do not appear on the ballot. The Legislature has to follow any number of steps to put them on the ballot. They're not expected. They're not part of the statutory order for spring elections. They're not a mandatory election. That election's held to elect judicial, educational, municipal officers, nonparty county officers, and sewage commissioners under section 5.02(21). It would therefore be a disruption of the status quo to present ballot questions particularly outside the normal constitutional and statutory order.
>
> Second, the legal status quo, that various courts have recognized, is that we expect parties, including the Legislature and also candidates for office, the voters, to follow the law when submitting referenda and nominations. This has been the status quo and the expectations for decades, we stated dating back to *Zimmerman*, but it goes beyond that. We've expected the Legislature follow this process since at least *Timme* in 1882.
>
> And, third, the Court should consider the disruption of the status quo if this challenge has to be brought again after the amend -- after the election. Again, then we're talking about undoing constitutional amendments, which is a more profound disruption of the status quo.
>
> And, finally, because of the nature of the notices that go out, no notice has yet been published advising the public that these referenda will appear. I mean, so, it is not as though we're going to have to rescind information that the public has through the county clerks and WEC advising them that these referenda will be there.

Doc. 60 at 30-32.

On the other hand, Defendants argue status quo means the practice that has been followed by the Legislature for proposed constitutional amendments and advisory referenda:

> But one of the elements that they must prove is that they're not attempting to disrupt the status quo, and the status quo, which is -- this is just a temporary injunction motion that we're here today. And the status quo is clearly practices that have been exercised by everyone. You know, in fact, before 2023, you know, they have some clever -- clever lawyers over at Law Forward, and, you know, I've litigated against them many times. Before the clever lawyers at Law Forward came up with this theory, no one was talking about this and everyone expected, based on the status quo, that the -- that the amendments would appear on the ballot in April. So in terms of the status quo, it all points in one direction, and that's -- and that's reason enough to deny their temporary injunction motion.

Doc. 60 at 37-38.

WEC joined that position:

> Case law says that maintaining the status quo is not just a required element, but it's also the fundamental purpose of a temporary injunction. But plaintiffs undoubtedly fail to meet this requirement, because what they are challenging, again, is a filing procedure. So the proper status quo for the Court to consider is how this filing procedure currently operates. And, here, the record is clear that this procedure is operated in the same way for the past eight years. For every proposed constitutional amendment since at least 2014, the Legislature has understood that the Commission, or its predecessor, the Government Accountability Board, is the filing entity for statewide referenda under section 8.37.
>
> And in every case the Legislature met this deadline by filing the referenda with the Commission in advance of that date. And when the county clerks didn't receive the referenda until after that 70-day mark, as occurred in 2015 and again in 2020,

> it didn't affect the validity of the referenda and the questions were still presented on the ballot.
>
> So what plaintiffs are asking the Court to do with this injunction is to change the policy for when it would be too late for the referenda questions to appear on the ballot for the spring election. This would be upending rather than maintaining the status quo, and their motion can be denied on this basis alone.

Doc. 60 at 59-60.

Merriam-Webster's dictionary defines status quo as "the existing state of affairs." *Black's Law Dictionary* defines it as "the existing or current state of affairs." Under these definitions, the Court agrees that preservation of the status quo requires that the court maintain the existing current state of affairs. The entire dispute between the parties is who the proper official or agency is for receipt of the ballot questions, and as outlined by the briefs, testimony and oral argument, the "status quo" proper official or agency for the receipt of the ballot questions over the past several years has been WEC or its predecessor, the Government Accountability Board (GAB). In both 2015 and 2020, the WEC first received the questions involving constitutional amendments, those questions were then transmitted to the county clerks after the 70-day deadline, and no challenge was made. The Legislature enacted sec. 8.37, Stats., and then interpreted the appropriate official or agency as WEC or its predecessor without challenge. That was the existing state of affairs at the time this lawsuit was filed, and is the status quo in this case.

Plaintiffs cannot meet their burden on maintaining the status quo.

D. LIKELIHOOD OF SUCCESS ON THE MERITS.

The fourth element of a temporary injunction is that "the movant has a reasonable probability of success on the merits." *Milwaukee Deputy Sheriffs' Ass'n,* 2016 WI App 56, ¶20. In other words, Plaintiffs must show that they will likely receive the declaratory and injunctive relief they seek on the merits.

For a complete record, the Court will address this factor. While the dispute is whether the WEC or the county clerks are the proper "officials or agency" under sec. 8.37, Stats. even if the Court found that Plaintiffs correctly identify "county clerks" and the "Milwaukee County Board of Election Commissioners" as the "official or agency responsible for preparing the ballots," Plaintiffs still cannot show a reasonable likelihood of success on the merits because, as discussed *infra*, sec. 8.37, Stats. is a legislative rule of proceeding, and it is directive, not mandatory.

1. Legislative rules of proceeding.

Plaintiffs must show that sec. 8.37, Stats. is not a legislative rule of proceeding. As a general matter, courts do not interfere with the Legislature's rules of proceeding.

a. Legal Standard.

The Wisconsin Constitution empowers the Legislature to "determine the rules of its own proceedings." Wis. Const. art. IV, § 8.[1] "Rules of proceeding have been defined as those rules having 'to do with the process the Legislature uses to propose or pass legislation or

[1] Wis. Const. art. IV, § 8 reads, in full:

> Each house may determine the rules of its own proceedings, punish for contempt and disorderly behavior, and with the concurrence of two−thirds of all the members elected, expel a member; but no member shall be expelled a second time for the same cause.

how it determines the qualifications of its members.'" *Milwaukee J. Sentinel v. DOA*, 2009 WI 79, ¶18, 319 Wis. 2d 439, 768 N.W.2d 700 (quoting *Custodian of Records for the LTSB v. State*, 2004 WI 65, ¶30, 272 Wis. 2d 208, 680 N.W.2d 792). Rules of proceedings are "exclusively within the province of the Legislature, because a legislative failure to follow its own procedural rules is equivalent to an ad hoc repeal of such rules, which the Legislature is free to do at any time." *Id.* (quotation marks and alterations omitted). Courts may interfere in the Legislature's rules of proceeding only when there is "a constitutional mandate to do so or … [the Legislature's] procedures or end result constitutes a deprivation of constitutionally guaranteed rights." *State ex rel. La Follette v. Stitt*, 114 Wis. 2d 358, 367, 338 N.W.2d 684 (1983) (quoting *Outagamie Cnty. v. Smith*, 38 Wis. 2d 24, 41, 155 N.W.2d 639 (1968)). The constitution assigns considerable authority and discretion to the legislature in the way it submits amendments to the people for a vote. *McConkey v. Van Hollen*, 2010 WI 57, ¶ 25, 326 Wis. 2d 1, 15, 783 N.W.2d 855, 862.

The leading case in Wisconsin on legislative rules of proceeding is *State ex rel. La Follette v. Stitt*, 114 Wis. 2d 358, 338 N.W.2d 684 (1983). In that case, two members of the Legislature asked the Wisconsin Supreme Court "to declare [1983 Wisconsin] Act 3 invalid because it was not properly enacted …" *Stitt*, 114 Wis. 2d at 361. Specifically, the legislators argued that "Act 3 is invalid because neither house of the Legislature referred the act to the joint survey committee on debt management as required by sec. 13.49(6)." *Id.* at 363. But the Wisconsin Supreme Court refused to decide what this statute required because this analysis "would imply that this court will review legislative conduct to

ensure the Legislature complied with its own procedural rules or statutes in enacting the legislation." *Id.* at 364. The court continued, at length, to explain:

> Courts are reluctant to inquire into whether the Legislature has complied with legislatively prescribed formalities in enacting a statute. This reluctance stems from separation of power and comity concepts, plus the need for finality and certainty regarding the status of a statute. Although since *Marbury v. Madison* courts have had the authority to review acts of the Legislature for any conflict with the constitution, courts generally consider that the Legislature's adherence to the rules or statutes prescribing procedure is a matter entirely within legislative control and discretion, not subject to judicial review unless the legislative procedure is mandated by the constitution. If the Legislature fails to follow self-adopted procedural rules in enacting legislation, and such rules are not mandated by the constitution, courts will not intervene to declare the legislation invalid. The rationale is that the failure to follow such procedural rules amounts to an implied ad hoc repeal of such rules.
>
> This principle has been expressed … as follows:
>
> > "The decisions are nearly unanimous in holding that an act cannot be declared invalid for failure of the house to observe its own rules. Courts will not inquire whether such rules have been observed in the passage of the act. Likewise, the Legislature by statute or joint resolution cannot bind or restrict itself or its successors as to the procedure to be followed in the passage of legislation."
>
> Wisconsin has long followed this general rule.

Id. at 364-65 (internal citations omitted) (quoting 1 Sutherland, *Statutory Construction* (4th ed.) § 7.04).

Before proceeding to determine whether this rule applies to sec. 8.37, Stats., the Court first surveys several previous decisions on legislative rules of proceeding.

In *McDonald v. State*, 80 Wis. 407, 50 N.W. 185 (1891), two prisoners were

convicted and sentenced by a judge on Wisconsin's Fifteenth Circuit Court.[2] They demanded a new trial on the grounds that the Legislature failed to record "yeas and nays" when creating the Fifteenth Circuit. However, the Supreme Court held that this alleged error did not matter because the journals of the Legislature "show that [the act] was passed in both houses in the usual manner …" *McDonald*, 50 N.W. at 186. So, whether or not the Legislature violated its rules of procedure, the court held: "When it appears that an act was so passed, no inquiry will be permitted to ascertain whether the two houses have or have not complied strictly with their own rules …" *Id.*

In *State v. P. Lorillard Co.*, 181 Wis. 347, 193 N.W. 613 (1923), the attorney general prosecuted two tobacco companies under an antitrust statute. When the tobacco companies sought to invalidate that statute because the Legislature had failed to refer the bill to a statutorily required legislative committee, the Wisconsin Supreme Court responded, as it would later do in *Stitt*, by refusing to consider the Legislature's rules of proceeding: "There is no constitutional requirement involved … This is a question of policy for legislative, and not judicial determination." *P. Lorillard Co.*, 193 N.W. at 622.

In *Outagamie Cnty. v. Smith*, 38 Wis. 2d 24, 155 N.W.2d 639 (1968), the Legislature created "a special site committee" "to recommend a site for a new university in northeastern Wisconsin …" *Id.* at 27. The site committee held a public hearing to choose criteria for its decision. *Id.* at 28. However, a group of plaintiff taxpayers alleged:

> [T]he site committee failed to carry out the mandate of the Legislature by neglecting to evaluate various sites according to its own

[2] Judges on the Fifteenth Circuit traveled between Ashland, Bayfield, Oneida, Price, Sawyer, and Taylor counties. *See* Ch. 488, Laws of 1887.

> established criteria and that it unlawfully changed the final criteria as a result of a meeting in secret session …

Id. at 38. Once again, the Wisconsin Supreme Court refused to intervene. It held that the site committee's task was "clearly an exercise of the legislative function with which the courts should not and will not tamper." *Id.* at 41. So, even though "the plaintiffs were not dealt with complete fairness … no recourse is available in the courts. The grievances of which they complain did not rise to the dignity of an invasion of a constitutional right. … '[T]his decision, simply, is none of our business.'" *Id.* (quoting *State ex rel. Elfers v. Olson,* 26 Wis. 2d 422, 132 N.W.2d 526 (1965)).

In *Custodian of Records for the LTSB,* 2004 WI 65, the custodian of the Legislative Technology Services Bureau sought to quash a subpoena on the grounds that Wis. Stat. § 13.96, which required the LTSB to "observe the confidential nature of the data and information originated, maintained or processed by electronic equipment supported by [the LTSB]," was a legislative rule of proceeding. *Id.* ¶13; *See* Wis. Stat. § 13.96. The Wisconsin Supreme Court rejected the argument, holding that: "Wis. Stat. § 13.96 has nothing to do with the process the Legislature uses to propose or pass legislation … It simply provides for assistance with electronic data …" *Custodian of Records for the LTSB,* 2004 WI 65, ¶30.

In *State ex rel. Ozanne v. Fitzgerald,* 2011 WI 43, 334 Wis. 2d 70, 798 N.W.2d 436, a district attorney challenged an act as "invalid because the legislature did not follow certain notice provisions of the Open Meetings Law for [its] March 9, 2011 meeting … Wis. Stat. § 19.84(3) required 24 hours notice of that meeting and such notice was not

given." *Id.* ¶13. Despite a constitutional requirement that "[t]he doors of each house shall be kept open except when the public welfare shall require secrecy," Wis. Const. art. IV, § 10, the Wisconsin Supreme Court again refused to "intermeddle in what we view, in the absence of constitutional directives to the contrary, to be purely legislative concerns." *Id.* (quoting *Stitt,* 114 Wis. 2d at 364).

Most recently, in *League of Women Voters v. Evers,* 2019 WI 75, 387 Wis. 2d 511, 929 N.W.2d 209, a group of voters challenged the Legislature's use of an "extraordinary session" to pass three acts, despite the fact that the Legislature's scheduled sessions had already concluded without ever scheduling extraordinary sessions. *Id.* ¶10. The constitution tells the Legislature that it "shall meet at the seat of government at such time as shall be provided by law." Wis. Const. art. IV, § 11. Accordingly, the court framed the question as "whether the Legislature convened its December 2018 extraordinary session in accordance with the Wisconsin Constitution." *Id.* ¶13. The court began its discussion by holding that the constitutional phrase "'provided by law' means our statutes." *League of Women Voters,* 2019 WI 75, ¶16. Then, despite the fact that the Legislature passed statutes for when "it shall meet at the seat of government, *see* § 13.02, and despite the fact that those statutes do not mention any 'extraordinary sessions,'" the Wisconsin Supreme Court held that holding unscheduled extraordinary sessions were still a legislative rule of proceeding. *Id.* ¶28. In sum, *League of Women Voters* holds that the Legislature satisfies its constitutional mandate to meet "at such time as shall be provided by law" when it passes a statute allowing it "to construct its own work schedule …", even if it fails to follow that schedule. *Id.* ¶28.

b. Section 8.37, Stats. is a legislative rule of proceeding.

The Court next determines whether, based on the cases summarized above, sec. 8.37, Stats. is a legislative rule of proceeding.

Plaintiffs first argue that, regardless of whether sec. 8.37, Stats. is legislative rule of proceeding, courts may intervene because adherence to that statute is a constitutional mandate. It cites *Milwaukee J. Sentinel*, 2009 WI 79, ¶33, and *Appling v. Walker*, 2014 WI 96, ¶23, 358 Wis. 2d 132, 853 N.W.2d 888 to say that "[p]ermitting the Legislature to propose an amendment outside the manner it prescribed in law would nullify Article XII, § 1's mandate." Doc. 43 at 5.

To explain why this argument is not persuasive, the Court needs only compare the present case and *League of Women Voters.*[3] In both cases, the constitution required the Legislature to prescribe a rule:

- In *League of Women Voters*, Article IV, § 11 required the Legislature to "meet at the seat of government at such time as shall be provided by law."
- Here, Article XII, § 1 required the Legislature submit proposed amendments "in such manner and at such time as the Legislature shall prescribe."

And, in both cases, the Legislature did properly prescribe a rule:

- In *League of Women Voters*, the Legislature created § 13.02(3), which says that "the joint committee on legislative organization shall meet and develop a work schedule for the legislative session …"
- Here, the Legislature created sec. 8.37, Stats. which says that "all proposed constitutional amendments … shall be filed with the official or agency responsible

[3] The Legislature makes the same comparison to *Ozanne*, which follows a similar pattern. The constitution requires the Legislature's doors stay open, Wis. Const. art. IV, § 10, the Legislature prescribed a rule to this effect, Wis. Stat. §§ 19.31, 19.84, et al., and the Legislature violated the prescribed rule. However, our supreme court held there was no constitutional mandate to follow these legislative rules of proceeding, so they could not be challenged. *Ozanne*, 2011 WI 43, ¶13. *See* Tr. of Feb. 14, 2023 Hr'g, dkt. 60:46-47.

> for preparing the ballots for the election no later than 70 days prior to the election …"

Finally, in both cases, the Legislature ignored its own rule:

- In *League of Women Voters,* the Legislature held an unscheduled extraordinary session and also held unscheduled "floorperiods," about which no one complained. 2019 WI 75, ¶¶22-23.

- Here, assuming Plaintiffs correctly interpret "official or agency responsible for preparing the ballots" to mean the "county clerks," the Legislature delayed submitting the referenda until sixty-eight days prior to the election, or until January 26, 2023. Compl. ¶48.

Given these similarities, Plaintiffs do not explain why the result in this case should be any different than the result in *League of Women Voters.* In other words, if the binding precedent of *League of Women Voters* holds that the Legislature fulfills its duty to prescribe a time to meet when it ignores its own work schedule, then the Legislature must also fulfill its duty to propose amendments when it ignores its own schedule for submitting amendments. So, as in *League of Women Voters,* the Legislature's failure to follow its procedure does not create a constitutional mandate and, as a result, "recourse against errors in the execution of the Legislature's own procedures is properly pursued within the political realm." *League of Women Voters,* 2019 WI 75, ¶28.

Plaintiffs' second argument is that even if sec. 8.37, Stats. is not a constitutional mandate, then the court may still provide relief because it "is a generally applicable statute, not an internal operating rule for the Legislature." Doc. 43 at 6. Plaintiffs rely on *State ex rel. Wisconsin Senate v. Thompson,* 144 Wis. 2d 429, 435, 424 N.W. 2d 385 (1988) and *State v. Jensen,* 2004 WI App 89, ¶45, 72 Wis. 2d 707, 681 N.W.2d 230, to

define legislative rules of proceeding as "a 'purely intra-legislative' concern." Doc. 43 at 6. Using this definition, sec. 8.37, Stats. could not be an internal operating rule because it also involves various other officials, for example, county clerks. However, none of these cases attempt to redefine a legislative rule of proceeding as a "purely intra-legislative concern." In fact, the phrase appears only one time in one appellate case as a one-sentence summary of *Stitt. See Thompson,* 144 Wis. 2d at 435 ("We have in the past refused to intermeddle in what we consider to be purely intra-legislative concerns.") This isolated phrase is not a convincing reason to depart from the definition that legislative rules of proceeding are rules "having to do with the process the Legislature uses to propose or pass legislation or how it determines the qualifications of its members." *See Milwaukee J. Sentinel v. DOA,* 2009 WI 79, ¶18 (quoted source omitted).

Finally, Plaintiffs argue that this case, unlike the legislative rules of proceeding cases discussed above, "presents no separation-of-powers or comity concerns." Doc. 43 at 8. It relies on *State ex rel. Postel v. Marcus,* 160 Wis. 354, 152 N.W. 419 (1915) for this quotation:

> In proposing an amendment to the constitution the Legislature does not exercise its legislative function. The authority given by the people to the Legislature to propose amendments to the fundamental law is independent of its inherent power to make law.

Marcus, 152 N.W. at 426, *rev'd on reh'g, id.* at 429.

In *Marcus,* a non-citizen was elected to the office of Trustee of the Village of Muscoda, contrary to Wis. Const. art. III, § 1, which limited officeholders to citizens. Defending a challenge to his office, the Trustee argued the constitutional amendment

creating this citizenship requirement was not valid because the Legislature failed its constitutional duty that "amendments shall be entered on their journals …" *Marcus,* 152 N.W. at 424; *See* Wis. Const. art. XII, § 1. Initially, after examining the scant descriptions of legislative activity in the journals of the Legislature, the Wisconsin Supreme Court held that "[t]he word 'entered' must have a sensible construction to carry out the intent with which it was used …" *Id.* at 426. Thus, the court initially held that "entered" must have meant that "the step mentioned [in the journal] as to the particular matter must be followed with substantial accuracy." *Id*. On rehearing, the court reversed itself and held that "entered" simply meant any "descriptive reference as makes identification certain," so, for example, nothing more was required than "entry by title and number." *Id*. at 431.

Plaintiffs' reliance on *Marcus* for the rules of "fundamental law" are not helpful, but even if Plaintiffs' chosen quotation did help resolve the present case, that quotation is impermissibly drawn from Justice Roujet Marshall's overruled opinion, 152 N.W. at 419-29. Six weeks after Justice Marshall wrote that opinion, the court granted a motion for rehearing and Chief Justice Winslow's resulting opinion on rehearing, 152 N.W. at 429-434, became the only part of this case that remains precedent. *See Kieckhefer Box Co. v. John Strange Paper Co.*, 180 Wis. 367, 193 N.W. 487, 493-94 (1923) (discussing the effect of rehearings); *See also* Wis. Stat. § 809.64 (rehearing has been replaced by reconsideration). Justice Roujet Marshall's ensuing dissent, 152 N.W. at 434, does not

return to any principled discussion of "fundamental law."[4]

In sum, this case is not meaningfully distinguishable from *League of Women Voters, Ozanne, Stitt,* and the other cases in which courts have refused to interfere in the Legislature's rules of proceeding. Accordingly, Plaintiffs fail to show that it has a reasonable probability of success on the merits, and the Court would deny its motion for a temporary injunction. The Court proceeds to discuss the parties' remaining arguments for completeness, only.

2. Section 8.37, Stats. is a directive statute, as opposed to a mandatory statute, and it requires nothing more than substantial compliance.

The parties agree that sec. 8.37, Stats. determines *who* should receive referendum questions: "the official or agency responsible for preparing the ballots …" Plaintiffs argue this means the county clerks, while the Legislature argues this means WEC. The parties also agree that sec. 8.37, Stats. determines *when* the referendum questions should be received: "no later than 70 days prior to the election …" The parties do not appear to dispute that WEC received the referendum questions on January 19, 2023 (75 days prior to the election) nor do they appear to dispute that the county clerks received the referendum questions on January 26, 2023 (68 days prior to the election). Compl. ¶¶46-48.

[4] At oral argument, Plaintiffs stated that that *Marcus* "undid a constitutional amendment and – and I think allowed someone to remain in office who otherwise would have been disqualified by the constitution." Doc. 60 at 16.

On rehearing, the *Marcus* court did *not* undo a constitutional amendment. The *Marcus* court specifically held "[t]hat the amendment to section 1 of article 3 of the Constitution in question in this case was legally adopted." 152 N.W. at 429. The court did allow Marcus to remain in office, but this was only because by the time the case resolved, Marcus appears to have sought citizenship, and was therefore eligible to be a Town Trustee under the new amendment. *Id.* at 434.

Assuming Plaintiffs are correct, that is, even assuming that county clerks are "the official or agency responsible for preparing the ballots," and further assuming the county clerks received the referendum questions two days late, it does not necessarily follow that this violation of sec. 8.37, Stats. entitles Plaintiffs to any relief. To show it is likely to succeed on the merits, Plaintiffs must further show that sec. 8.37, Stats. is not the sort of "directive statute" that allows "substantial compliance."

a. Wis. Stat. § 5.01(1) does not apply because there has been no vote.

Before applying the rules for mandatory and directive statutes to sec. 8.37, Stats., the Legislature asks the Court to automatically read all provisions in Wis. Stat. chs. 5-12 as directive. In support of this argument, the Legislature relies on Wis. Stat. § 5.01(1), which instructs courts to interpret election statutes "to give effect to the will of the electors, if that can be ascertained from the proceedings …" Thus, the Legislature concludes that "unless a particular provision … expressly provides otherwise, the doctrine of substantial compliance applies." Doc. 38 at 29. The problem with this argument is that the Legislature does not explain how the Court is supposed to ascertain the will of the electors before the election. It does not seem possible to do this, so the Court declines to automatically assume that all election statutes must be directive.

b. Legal standard for directive and mandatory statutes.

The substantial compliance doctrine "contemplates actual compliance in respect to the substance essential to every reasonable objective of the statute." *Midwest Mut. Ins. Co. v. Nicolazzi,* 138 Wis. 2d 192, 198, 405 N.W.2d 732 (Ct. App. 1987) (quoted source

omitted). "As a matter of terminology, mandatory statutes are usually said to be imperative and directory statutes permissive." *Id.* (quoted source omitted).

> In determining whether a statutory provision is mandatory or directory in character, we have previously said that a number of factors must be examined. These include the objectives sought to be accomplished by the statute, its history, the consequences which would follow from the alternative interpretations and whether a penalty is imposed for its violation.

Id. (citing *State v. Rosen*, 72 Wis. 2d 200, 207, 240 N.W.2d 168 (1976).).[5] A statute is more likely to be mandatory "[w]here the language is clear and unambiguous …" or where the statute is "accompanied by a penalty for a failure to observe it …" *Id.* at 199.

On the other hand, a statute is more likely to be directory "[i]f a statute is remedial in nature …" or if it is "directed against a public official …" *Id.* at 200. Specific to the present case:

> Statutes giving directions as to the mode and manner of conducting elections will be construed by the courts as directory, unless a noncompliance with their terms is expressly declared to be fatal, or will change or render doubtful the result, as where the statute merely provides that certain things shall be done in a given manner and time without declaring that conformity to such provisions is essential to the validity of the election.

Lanser v. Koconis, 62 Wis. 2d 86, 91, 214 N.W.2d 425 (1974) (citing *Sommerfeld v. Bd. of Canvassers*, 269 Wis. 299, 69 N.W.2d 235 (1955) and *Olson v. Lindberg*, 2 Wis. 2d 229, 235, 85 N.W.2d 775 (1957)).

To summarize the importance of the substantial compliance doctrine, "[a]n act

[5] On this point, the Legislature's brief also relies on and quotes from *Block v. Roberts.* Doc. 39 at 28. However, *Block* is an unpublished, per curiam decision of the court of appeals. *See Block v. Roberts*, No. 89-1665-FT, unpublished slip op. (Wis. Ct. App. Feb. 20, 1990) (per curiam). Unpublished per curiam decisions of the court of appeals cannot be cited for any purpose, and the Court disregards this reference. *See* Wis. Stat. § 809.23(3).

done in violation of a mandatory provision is void, whereas an act done in violation of a directory provision, while improper, may nevertheless be valid:

> The difference between mandatory and directory provisions of election statutes lies in the consequence of nonobservance: An act done in violation of a mandatory provision is void, whereas an act done in violation of a directory provision, while improper, may nevertheless be valid. Deviations from directory provisions of election statutes are usually termed 'irregularities,' and, as has been shown in the preceding subdivision, such irregularities do not vitiate an election. Statutes giving directions as to the mode and manner of conducting elections will be construed by the courts as directory, unless a noncompliance with their terms is expressly declared to be fatal, or will change or render doubtful the result, as where the statute merely provides that certain things shall be done in a given manner and time without declaring that conformity to such provisions is essential to the validity of the election.

Lanser v. Koconis, 62 Wis. 2d 86, 91, 214 N.W.2d 425, 427 (1974). Thus, assuming that the Legislature violated sec. 8.37, Stats., Plaintiffs must show that this section is either mandatory or that, if it is directory, the Legislature failed to substantially comply.

c. The text of sec. 8.37, Stats. indicates that it is directive, not mandatory.

To determine whether sec. 8.37, Stats. is directive or mandatory, the Court begins with the text of the statute itself. *See Kalal*, 2004 WI 58, ¶45. "One of the strongest indications of what construction should be given a statutory provision may be found in the use of negative, prohibitory, or exclusionary words." *Nicolazzi*, 138 Wis. 2d at 199. The word "shall" does appear in 8.37, Stats. —questions "shall be filed with the official or agency responsible …" Thus, there are some indications that sec. 8.37, Stats. was intended to be mandatory.

However, there are also indications that sec. 8.37, Stats. was intended to be directory. Most significantly, the text of the statute contains no express penalty for any failure to observe it. At oral argument, Plaintiffs appeared to argue for a sort of implied penalty:

> 8.37 tells us … you have to get notice to the county clerks 70 days before the election … So if you've missed the deadline, there is an obvious consequence, which is you're set over one election, which is the relief that the plaintiffs are asking here -- for here. That is what the operation of 8.37 affords us.

Doc. 60 at 66. This argument is not persuasive. In order to suggest this statute contains a penalty, the Court would have to add words that the Legislature did not. One of the maxims of statutory construction is that courts should not add words to a statute to give it a certain meaning. *Enbridge Energy Co., Inc. v. Dane Cnty.*, 2019 WI 78, ¶ 23, 387 Wis. 2d 687, 929 N.W.2d 572. A penalty that would require a proposed constitutional amendment to be set out an additional year for failure to comply with the seventy-day rule is a significant penalty. If the Legislature intended this penalty in sec. 8.37, Stats., it would have been fairly simple to add language to that effect. The Legislature did not, and the Court cannot read such a drastic penalty into sec. 8.37, Stats.

There are several other reasons to find this statute directory, not mandatory, based on the factors set forth in *Nicolazzi* and *Rosen*, including the statute's (1) objectives, (2) its history, and (3) the consequences which would follow from the alternative explanation. *Rosen*, 72 Wis. 2d at 207. First, it seems apparent that the objective of this statute is to create a procedure for putting referenda on ballots. Plaintiffs do not explain, if this is the statute's objective, why the difference between a seventy- and sixty-eight-

day notice matters. Based on the evidence presented in this case, it appears that county clerks do not actually prepare the ballots until the WEC provides notice. Second, the history of the statute also supports a directive reading because, until sec. 8.37, Stats. was created, Wisconsin appears to have had no similar time restrictions. *See* 1999 Wisconsin Act 182, § 160 (creating sec. 8.37, Stats.). Plaintiffs do not explain why any history related to this section or to elections in general would suggest that the Legislature intended to depart from a history of "no time limits" by creating a "tightly controlled seventy-day procedure."

Putting aside the text of the statute, Plaintiffs point to *State ex rel. Hudd v. Timme,* 54 Wis. 318, 11 N.W. 785 (1882), and to *State ex rel. Owen v. Donald,* 160 Wis. 21, 151 N.W. 331 (1915), to hold that the Legislature must strictly follow mandates in the constitution. Doc. 43 at 11-12. But sec. 8.37, Stats. is not a mandate in the Constitution—had the seventy-day rule been written in the text of the Constitution, this would be a different analysis. However, these cases cited are not persuasive because *League of Women Voters,* 2019 WI 75, discussed *supra*, compels the conclusion that the Legislature has no constitutional mandate to follow sec. 8.37, Stats.

Finally, Plaintiffs cite cases that have interpreted other election statutes as mandatory. The first such case is *State ex rel. Stearns v. Zimmerman,* 257 Wis. 443, 43 N.W.2d 681 (1950), in which a candidate for secretary of state attempted to file his nominating papers at one minute after the deadline and was properly turned away under a

mandatory reading of § 5.05(1) (1950-51).[6] *Id.* at 444. This case turned entirely on an earlier case, *State ex rel. Conlin v. Zimmerman*, 245 Wis. 475, 15 N.W. 32 (1944), which itself relied on Wis. Stat. § 5.29(1) (1942-43)[7] as fixing the time for opening and closing polls. The *Conlin* court drew an analogy between the nomination papers deadline and the poll closing deadline, then reasoned that if polls had to turn away late voters at a certain time, so too should the secretary of state turn away late nominees:

> If the argument of petitioner is sound the Legislature having failed to prescribe specified hours for opening and closing the polls on the primary, by the same reasoning it would follow that it was the intention of the Legislature that the polls should be open on primary day from midnight to midnight.

Conlin, 15 N.W. at 33. On this basis, the *Conlin* court concluded that the Legislature must have intended the cutoff for nomination papers to be mandatory.

The second case Plaintiffs cite in support of their argument that sec. 8.37, Stats. should be read as mandatory is *State ex rel. Ahlgrimm v. State Elections Bd.*, 82 Wis. 2d 585, 263 N.W.2d 152 (1978), in which a candidate for judge filed his nomination papers seventeen days late. *Id.* at 588. The Wisconsin Supreme Court upheld the strict time

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[6] Wis. Stat. § 5.05(1) (1950-51) reads, in relevant part:

> (1) No candidate's name may be printed upon an official ballot used at any September primary unless not later than 5 p. m. central standard time on the second Tuesday of July of the year in which such primary is to be held a nomination paper has been filed in his behalf as provided in this chapter, with substantially the following wording printed at the top of each sheet: [form wording] … Signatures shall not be counted unless on such sheets.

[7] Wis. Stat. § 5.29(1) (1942-43) reads, in full:

> Except as otherwise specially provided all the provisions of chapter 6 of the statutes, relating to the qualification or registration of electors, notices of or pertaining to elections, poll lists, party challengers and challenges, officers and their duties, hours when the polls are to be opened and closed, canvass and return of votes, the solicitation of voters at the polls or to any other step or proceedings in preparation for or in the conduct of elections, are applicable to primaries in so far as they are consistent with this chapter.

limits, but it also specifically noted that the relevant statutory scheme contained a penalty clause:

> There are no specific provisions in the spring election statute indicating the effects of late filing of nomination papers. Therefore, the statute pertaining to the September primary applies. Section 8.15(1) prescribing nominations for the September primary provides in pertinent part:
>
> "(1) . . . Only those candidates for whom nomination papers containing the necessary signatures acquired within the allotted time and filed before the deadline shall have their names printed on the official . . . ballot."

Id. at 592 n.5.

In sum, Plaintiffs argue that "[i]f those statutes are mandatory, sec. 8.37, Stats. is equally so." Doc. 43 at 12. But the reasons for which nomination statutes are mandatory do not apply here. Simply put, unlike in *Ahlgrimm*, no statute explains the effect of late filing of referendum questions. And, because sec. 8.37, Stats. contains no penalties, and because of its objectives and history, the Court must conclude this statute is not mandatory such that the substantial compliance doctrine applies. The Court turns, next, to whether the Legislature has substantially complied.

d. The Legislature substantially complied with sec. 8.37, Stats.

Having determined that sec. 8.37, Stats. is a directive statute, all that remains is to determine whether the Legislature has substantially complied. The allegations in the complaint allege that the Legislature submitted ballot questions to WEC seventy-five days in advance of the election, and that WEC submitted those referenda to the county clerks sixty-eight days in advance of the election. Compl. ¶¶46-48. There being no

evidence that this two-day delay affected the procedure for preparing ballots, or any reason to suggest sec. 8.37, Stats. had some alternative objectives, the Court must conclude that the Legislature has complied "in respect to the substance essential to every reasonable objective of the statute." *See Nicolazzi,* 138 Wis. 2d at 200.

ORDER

For all of the reasons stated, IT IS HEREBY ORDERED THAT

1. Plaintiffs' motion for a temporary injunction is DENIED;

2. The Legislature's motion for a stay pending appeal is DENIED as moot.