

WISCONSIN ELECTIONS COMMISSION
and MEAGAN WOLFE, in her official
capacity as administrator of the Wisconsin
Elections Commission,

Plaintiffs,

v.

Case No. 23-CV-2428

DEVIN LEMAHIEU, in his official capacity
as majority leader of the Wisconsin Senate,
and ROBIN VOS, in his official capacity as
co-chair of the Legislature's Joint Committee
on Legislative Organization,

Defendants.

ANSWER TO DEFENDANTS' COUNTERCLAIM

Plaintiffs Wisconsin Elections Commission and Meagan Wolfe, by their undersigned attorneys, answer the counterclaim of defendants Devin LeMahieu and Chris Kapenga as follows:

1. Plaintiffs admit that this is a declaratory judgment and mandamus action against the Commission regarding construction of Wis. Stat. § 15.61(1)(b)1. The remainder of Paragraph 1 contains legal conclusions to which no response is required. To the extent that this paragraph misstates the law or contains factual allegations, Plaintiffs deny.

2. Paragraph 2 contains legal conclusions to which no response is required. To the extent that this paragraph misstates the law or contains factual allegations, Plaintiffs deny.

3. Plaintiffs admit the allegations in Paragraph 3.

4. Paragraph 4 contains legal conclusions to which no response is required. To the extent that this paragraph misstates the law or contains factual allegations, Plaintiffs deny.

5. Plaintiffs admit that the Commission has not appointed an administrator and that the term of office for the incumbent, Administrator Wolfe, expired on July 1, 2023. Plaintiffs deny the remaining allegations, including the inference the Commission is subject to the “statutory command” alleged.

6. Plaintiffs deny the allegations in Paragraph 6.

7. Paragraph 7 contains legal conclusions to which no response is required. As to the remainder of the paragraph, Plaintiffs deny that Defendants are entitled to the sought-after declaration and writ of mandamus.

8. Plaintiffs admit that Devin LeMahieu and Chris Kapenga are Wisconsin state senators, that the Senate is located at the Wisconsin State Capitol, that the Senate is the upper house of the Wisconsin Legislature, and that the Senate represents citizen-electors across Wisconsin. Plaintiffs lack

personal knowledge of the remainder of the allegations in Paragraph 8 and therefore deny them.

9. Plaintiffs admit the allegations in Paragraph 9.

10. Plaintiffs admit the allegations in Paragraph 10.

JURISDICTION AND VENUE

11. The jurisdictional allegations in Paragraph 11 are legal conclusions to which no response is required. To the extent that this paragraph misstates the law or contains factual allegations, Plaintiffs deny.

12. The jurisdictional allegations in Paragraph 12 are legal conclusions to which no response is required. To the extent that this paragraph misstates the law or contains factual allegations, Plaintiffs deny.

13. The jurisdictional allegations in Paragraph 13 are legal conclusions to which no response is required. To the extent that this paragraph misstates the law or contains factual allegations, Plaintiffs deny.

14. This venue allegations in Paragraph 14 are legal conclusions to which no response is required. To the extent that this paragraph misstates the law, Plaintiffs deny.

FACTUAL ALLEGATIONS

15. Plaintiffs admit the allegations in Paragraph 15.

16. Plaintiffs deny that any of the commissioners “represent[]” either the Democratic Party or the Republican Party, and affirmatively allege that Wis. Stat. § 15.61(a) speaks for itself. Plaintiffs admit the remaining allegations in Paragraph 16.

17. Plaintiffs admit the allegations in Paragraph 17.

18. Plaintiffs admit the allegations in Paragraph 18.

19. Plaintiffs admit the allegations in Paragraph 19.

20. Plaintiffs admit the allegations in Paragraph 20.

21. Plaintiffs admit the allegations in Paragraph 21.

22. Plaintiffs admit the allegations in Paragraph 22.

23. Paragraph 23 contains narrative argument and legal conclusions to which no response is required. Plaintiffs allege that any referenced statutes speak for themselves. To the extent that this paragraph misstates the law, Plaintiffs deny.

24. Paragraph 24 contains narrative argument and legal conclusions to which no response is required. Plaintiffs allege that any referenced statute or citations to Plaintiffs’ court filings in this case speak for themselves. To the extent that this paragraph misstates the law or contains factual allegations, Plaintiffs deny.

25. Paragraph 25 contains narrative argument and legal conclusions to which no response is required. Plaintiffs allege that any referenced statute or citations to Plaintiffs' court filings in this case speak for themselves. To the extent that this paragraph misstates the law or contains factual allegations, Plaintiffs deny.

26. Plaintiffs admit the allegations in Paragraph 26.

27. Plaintiffs deny the factual allegations in Paragraph 27. Plaintiffs affirmatively allege that the administrator does not issue guidance to local election officials without the affirmative approval of the Commission, and further states that the cited case, *Teigen v. WEC*, 2022 WI 64, 403 Wis. 2d 607, 976 N.W.2d 519, speaks for itself. To the extent that Paragraph 27 misstates the cited case, Plaintiffs deny.

28. Plaintiffs deny the allegations in Paragraph 28.

29. Plaintiffs deny the allegations in Paragraph 29.

30. Plaintiffs admit the allegations in Paragraph 30 subject to the clarification that the complete language of the unanimously approved motion from the March 2, 2018, meeting is: "Appoint Meagan Wolfe as Interim Administrator and submit her name to the Senate within 45 days for confirmation." See Wisconsin Elections Commission, *Open Session Minutes*, at 2 (Mar. 2, 2018), <https://perma.cc/J3J9-3QRU>.

31. Plaintiffs admit the allegations in Paragraph 31 subject to the clarification that the March 2, 2018, meeting minutes reflect that Commissioner Jacobs' reference to "appointing Wolfe permanently" was in the context of opposing a motion that would appoint Wolfe as interim administrator only while also "commenc[ing] a national search for a permanent administrator." *See* Wisconsin Elections Commission, *Open Session Minutes*, at 2 (Mar. 2, 2018), <https://perma.cc/J3J9-3QRU>.

32. Plaintiffs admit the allegations in Paragraph 32.

33. Plaintiffs admit that a special meeting was convened on June 27, 2023, and deny the remaining allegations in Paragraph 33. Plaintiffs affirmatively allege that the June 27, 2023, meeting minutes reflect the following agenda item for discussion: "Appointment of an Interim Administrator and an Administrator for the 4-Year Term Expiring on July 1, 2027, Pursuant to Wis. Stat. § 15.61(1)(b) and to Transmit the Appointment of the Administrator to the State Senate Within 7 Days." *See* Wisconsin Elections Commission, *Open Session Minutes* (June 27, 2023), <https://perma.cc/8ELG-D4S2>.

34. Plaintiffs admit the allegations on Paragraph 34.

35. Plaintiffs deny that each abstaining commissioner advanced this "argu[ment]." Plaintiffs admit the remaining allegations in Paragraph 35 to the extent that, pursuant to section 15.61(1)(b)1, an administrator

appointment may only be effectuated through a majority vote of the Commission.

36. Plaintiffs deny the allegation in Paragraph 36.

37. Plaintiffs admit the allegations in Paragraph 37 that correctly transcribe the official public recording. To the extent that this paragraph misstates the recording, Plaintiffs deny.

38. Plaintiffs admit the allegations in Paragraph 38 that correctly transcribe the official recording. To the extent that this paragraph misstates the recording, Plaintiffs deny.

39. Plaintiffs admit the allegations in Paragraph 39 that correctly transcribe the official recording. To the extent that this paragraph misstates the recording, Plaintiffs deny.

40. Plaintiffs lack knowledge or information sufficient to admit or deny the allegations in Paragraph 40, and therefore deny.

41. Plaintiffs admit that the hearing agenda included the topic of Meagan Wolfe, “as Administrator of the Wisconsin Elections Commission, to serve for the term ending July 1, 2027.” Plaintiffs lack knowledge or information sufficient to admit or deny the remaining allegations in Paragraph 41, and therefore deny.

42. Plaintiffs admit that the hearing related to 2023 Senate Resolution 3. Plaintiffs lack knowledge and information sufficient to admit or deny allegations about what the Senate contemplated, and therefore deny the remainder of the allegations.

43. Plaintiffs admit that the resolution states that the Commission “has a history of not submitting the nomination of its administrator to the [S]enate, having failed in 2016 to notify the [S]enate of the nomination of Michael Haas as administrator.” Plaintiffs lack knowledge or information sufficient to admit or deny the remaining allegations in Paragraph 43, and therefore deny.

44. Plaintiffs admit the allegations in Paragraph 44, subject to the clarification that the Commission’s topic of discussion was whether to “[a]uthoriz[e]” the participation of Administrator Wolfe at the hearing referred to in 2023 Senate Resolution 3.

45. Plaintiffs admit that the Commission declined to take a position on whether Administrator Wolfe should testify at the Senate hearing. Plaintiffs deny the remainder of the allegations in Paragraph 45.

46. Plaintiffs admit the allegations in Paragraph 46 that are consistent with the cited meeting recording. To the extent that the allegations misstate the cited meeting recording, Plaintiffs deny.

47. Plaintiffs admit that Administrator Wolfe decided against testifying at the Senate hearing. Plaintiffs deny the remainder of the allegations in Paragraph 47.

48. Plaintiffs deny the allegation in Paragraph 48 Plaintiffs affirmatively allege that Attorney General Kaul sent a letter, dated August 23, 2023, to Anne Sappenfield, Director of the Wisconsin Legislative Council, in which he provided his assessment regarding the relevant Wisconsin law and, based on the law, stated that “the Senate should remove consideration of the WEC administrator from the committee hearing scheduled for August 29.”

49. Plaintiffs admit the allegations in Paragraph 49.

50. Plaintiffs admit the allegations in Paragraph 50.

51. Plaintiffs admit that the cited letter provided the Senate’s opinion regarding whether section 15.61(1)(b)1 imposes “a non-discretionary duty to appoint an administrator every four years upon the expiration of the incumbent’s term in office,” and that the letter provided the Senate’s opinion regarding *Prehn*. Plaintiffs deny the remaining allegations in Paragraph 51.

52. Plaintiffs admit that, on September 11, 2023, the Senate’s election committee voted to reject the “appointment” of Meagan Wolfe as Administrator of the Wisconsin Elections Commission. Plaintiffs deny the characterization of this vote as a “no-confidence vote.” Plaintiffs lack knowledge or information

sufficient to admit or deny the remainder of the allegations in Paragraph 52, and therefore deny.

53. Plaintiffs deny the allegations in Paragraph 53. Plaintiffs affirmatively allege that the Senate voted to reject the “appointment” of Administrator Wolfe.

54. Plaintiffs admit the allegations in Paragraph 54.

55. Plaintiffs admit that they filed a complaint against Defendants in the instant action hours after the Senate’s September 14, 2023, vote regarding Administrator Wolfe. Plaintiffs deny the characterization of this vote as a “no-confidence vote.”

56. Plaintiffs admit that the complaint is designed to keep Administrator Wolfe in office as a lawful holdover. The remainder of Paragraph 56 contains narrative argument and legal conclusions to which no response is required. To the extent that the allegations misstate the law, Plaintiffs deny.

57. Plaintiffs admit that they seek the declaratory relief described in Paragraph 57.

58. Plaintiffs admit the allegations in Paragraph 58.

59. Plaintiffs admit that the parties dispute whether the Commission has a duty to appoint when there is no vacancy and deny the characterization that this case “boils down” to this dispute only.

60. Plaintiffs admit that their complaint seeks the injunctive relief described in Paragraph 60. Plaintiffs affirmatively allege and clarify that they seek additional injunctive relief not included in Paragraph 60.

COUNT I: DECLARATORY JUDGMENT UNDER WIS. STAT. § 806.04

61. Plaintiffs incorporate by reference their answers to paragraphs 1–60.

62. Paragraph 62 contains narrative argument and legal conclusions to which no response is required. To the extent that a response is required, Plaintiffs deny.

63. Plaintiffs admit the allegations in Paragraph 63.

64. Paragraph 64 contains legal conclusions to which no response is required. To the extent that a response is required, Plaintiffs deny. Plaintiffs deny that Wis. Stat. § 15.61(1)(b)1. requires the Commission to appoint an administrator upon the expiration of the incumbent’s term regardless whether a vacancy exists.

65. Paragraph 65 contains legal conclusions to which no response is required. To the extent that a response is required, Plaintiffs deny.

66. Plaintiffs deny the allegations in Paragraph 66.

67. Paragraph 67 contains legal conclusions to which no response is required. To the extent that a response is required, Plaintiffs deny. Plaintiffs deny that that *State ex rel. Kaul v. Prehn*, 2022 WI 50, ¶ 35, 402 Wis. 2d 539,

976 N.W.2d 82, confirms that the Commission must appoint an administrator upon the expiration of the incumbent's term regardless whether a vacancy exists.

68. Paragraph 68 contains legal conclusions to which no response is required. To the extent that a response is required, Plaintiffs admit only that *Prehn* said that the governor has the "prerogative" to make an appointment without a vacancy.

69. Plaintiffs lack knowledge or information sufficient to admit or deny the allegations in Paragraph 69, and therefore deny.

70. Paragraph 70 contains legal conclusions to which no response is required. Plaintiffs therefore deny.

COUNT II: WRIT OF MANDAMUS

71. Plaintiffs incorporate by reference their answers to paragraphs 1–60.

72. Paragraph 72 contains legal conclusions to which no response is necessary. To the extent that a response is required, Plaintiffs admit to the stated mandamus standard.

73. Paragraph 72 contains narrative argument and legal conclusions to which no response is required. To the extent that a response is required, Plaintiffs deny that the Commission has the "positive and plain" duty

described. As for the remainder of the paragraph, Plaintiffs admits only that Wis. Stat. § 15.61(1)(b)1. contains the language quoted.

74. Paragraph 74 contains narrative argument and legal conclusions to which no response is required. To the extent a response is required, Plaintiffs deny.

75. Plaintiffs admit that Administrator Wolfe's term expired on July 1, 2023. The remaining allegations in Paragraph 75 contains narrative argument and legal conclusions to which no response is required, but to the extent a response is required, Plaintiffs deny.

76. Paragraph 76 contains narrative argument and legal conclusions to which no response is required. To the extent a response is required, Plaintiffs deny.

77. Paragraph 77 contains narrative argument and legal conclusions to which no response is required. To the extent that a response is required, Plaintiffs deny.

78. Paragraph 78 contains narrative argument and legal conclusions to which no response is required. To the extent that a response is required, Plaintiffs deny.

79. Paragraph 79 contains narrative argument and legal conclusions to which no response is required. To the extent that a response is required, Plaintiffs deny.

80. Paragraph 80 contains narrative argument and legal conclusions to which no response is required. To the extent that a response is required, Plaintiffs deny.

81. Paragraph 81 contains narrative argument and legal conclusions to which no response is required. To the extent a response is required, Plaintiffs deny.

82. Paragraph 82 contains legal conclusions to which no response is required. To the extent that a response is required, Plaintiffs deny.

83. Plaintiffs admit that Defendants seek the writ of mandamus described in Paragraph 83. Plaintiffs deny that Defendants are entitled to the relief they seek.

PRAYER FOR RELIEF

Plaintiffs deny that Defendants are entitled to the relief they request.

DEFENSES

1. The counterclaim fails to state a claim upon which relief can be granted.

Dated this 6th day of November 2023.

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