

WISCONSIN ELECTIONS COMMISSION

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ERIN WEBSTER,

Complainant,

v.

Case No. EL 24-91

SUZANNE PINNOW

TOWN CLERK, TOWN OF THORNAPPLE,

Respondent.

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**RESPONSIVE PLEADING**

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Respondent Town of Thornapple (the “Town”),<sup>1</sup> by and through its undersigned attorneys, hereby responds to the Complaint in this matter as follows:

The Town respectfully requests that this Complaint be dismissed for the following reasons:

**I. The Complaint Was Filed Untimely, and Names the Wrong Responding Party.**

Under Wis. Stat. § 5.06, a complaint relating to “election administration or conduct of elections” in Wisconsin “shall be filed promptly so as not to prejudice the rights of any other party.” Wis. Stat. §§ 5.06(1), (3). Specifically, “[i]n no case” may such a complaint relating to ballot preparation be filed “later than 10 days after the complainant knew or should have known” of an actual or proposed violation. *See* Wis. Stat. § 5.06(3).

In this case, Complainant Erin Webster (“Complainant”) asserts that she observed alleged violations of Wisconsin law regarding the Town’s use of paper ballots on April 2, 2024. Despite this knowledge, Complainant waited over five months—over 150 days—before filing the

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<sup>1</sup> As articulated in Section II, the proper Respondent to this Complaint appears to be the Town of Thornapple.

Complaint, in clear violation of § 5.06(3) requiring her to do so within 10 days. This untimely filing alone warrants dismissal.

Complainant names Suzanne Pinnow, the former Town Clerk of Thornapple, instead of the appropriate entity—the Town of Thornapple—as the Respondent. However, Complainant appears to focus its allegations on decisions made by the Town in relation to its election administration, relying for example, on multiple subparts of a Wisconsin state statute pertaining to actions or decisions by “the governing body of a municipality.” *See, e.g.*, Compl. ¶ 38 (citing Wis. Stat. § 5.40(1)); Compl. ¶ (citing Wis. Stat. § 5.40(5m)). Ms. Pinnow is neither a “governing body” of the Town, nor does Complainant assert that Ms. Pinnow singlehandedly enjoys authority equivalent to the “governing body” as applicable here. Thus, the appropriate named party here appears to be the Town of Thornapple.

### **III. The Town is Not Required to Use Electronic Voting Machines under Wisconsin Law.**

#### **A. As a Municipality with a Population under 7,500, the Town May Use Electronic Voting Machines in Any Election.**

Under Wis. Stat. § 5.40(1), municipalities with populations of 7,500 or more “shall require the use of voting machines or electronic voting systems . . . at every election.” Wis. Stat. § 5.40(1). “Any other governing body” of a municipality “may adopt . . . voting machines or electronic voting system for use in any ward in the municipality at any election.” *See id.* In other words, small municipalities, like Thornapple, with a population of 721,<sup>2</sup> have the option to use electronic voting machines each time there is an election. Complainant appears to acknowledge that similarly

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<sup>2</sup> *See Thornapple town, Rusk County, Wisconsin*, 2020 United States Census, available at [https://data.census.gov/profile/Thornapple\\_town,\\_Rusk\\_County,\\_Wisconsin?g=060XX00US5510779575](https://data.census.gov/profile/Thornapple_town,_Rusk_County,_Wisconsin?g=060XX00US5510779575) (last accessed Sept. 27, 2024).

situated municipalities have that choice, stating that the Town was “authorized” to “adopt the use of electronic voting systems.” *See* Compl., ¶ 44 (citing Wis. Stat. § 5.40(1)).

Notably, Wis. Stat. § 5.40(1) provides that larger municipalities “*shall*” use “voting machines or electronic voting systems . . . at every election,” while smaller municipalities “*may*” use such machines or systems “at any election.” *See* Wis. Stat. § 5.40(1) (emphasis added). It is axiomatic that “statutory language is given its common, ordinary, and accepted meaning” and “if the meaning of the statute is plain, we ordinarily stop the inquiry.” *State ex rel. Kalal v. Circuit Ct. for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis.2d 633, 681 N.W.2d 110. “In other words, fundamentally, we must presume that the legislature means what it says.” *State v. Rector*, 2023 WI 41, ¶ 40, 407 Wis.2d 321, 990 N.W.2d 213.

Here, the statutory language contains two meaningful comparisons between larger and smaller municipalities. First, the statute directs that larger municipalities “shall” use electronic voting, while smaller municipalities “may” do so. *See* Wis. Stat. § 5.40(1). Second, the statute provides that the larger municipalities use electronic voting at “every” election, while smaller municipalities do so at “any” election. *See id.* Each comparison will be addressed in turn.

First, in comparing “shall” and “may,” the Wisconsin Supreme Court has explained that “the word ‘shall’ is presumed mandatory when it appears in a statute.” *State v. Cox*, 2018 WI 67, ¶ 11, 382 Wis. 2d 338, 913 N.W.2d 780 (quoting *Karow v. Milwaukee Cty. Civil Serv. Comm’n*, 82 Wis. 2d 565, 570, 263 N.W.2d 214 (1978)); *Bank of New York Mellon v. Carson*, 2015 WI 15, ¶ 21, 361 Wis. 2d 23, 859 N.W.2d 422). Meanwhile, “[t]he word ‘may’ is ordinarily used to grant permission or to indicate possibility.” *Heritage Farms, Inc. v. Markel Ins. Co.*, 2012 WI 26, ¶ 32, 339 Wis. 2d 125, 810 N.W.2d 465 (citing *The American Heritage Dictionary* 1112 (3d ed. 1992)); *see also Zellner v. Cedarburg Sch. Dist.*, 2007 WI 53, ¶ 54, 300 Wis. 2d 290, 731 N.W.2d

240; *Grafft v. Wis. Dep't of Nat. Res.*, 2000 WI App 187, ¶ 9 n.5, 238 Wis. 2d 750, 618 N.W.2d 897 (“The word ‘may’ is generally construed as permissive or discretionary.” (citing *Kotecki & Radtke, S.C. v. Johnson*, 192 Wis. 2d 429, 447–48, 531 N.W.2d 606 (Ct. App. 1995))).

“The distinction is particularly significant when the words ‘may’ and ‘shall’ are used in the same statutory section.” *Heritage Farms*, 2012 WI at ¶ 32 (quoting *Karow*, 82 Wis. 2d at 571); *see also Cox*, 382 Wis. 2d 338, ¶ 13 (“We have long said that ‘[w]hen the words “shall” and “may” are used in the same section of a statute, one can infer that the legislature was aware of the different denotations and intended the words to have their precise meanings.’”); *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 171 (2016) (“Unlike the word ‘may,’ which implies discretion, the word ‘shall’ usually connotes a requirement.”). As a result, Wis. Stat. § 540(1) should be interpreted such that municipalities within a population of 7,500 or more are required to use electronic voting, while municipalities with a population below 7,500 enjoy “discretion” to use paper or electronic voting. *See id.*

Second, and relatedly, in using “any” and “every” within the same statutory section, “the legislature was aware of the different denotations and intended the words to have their precise meanings.” *Heritage Farms*, 2012 WI at ¶ 32 (quoting *Karow*, 82 Wis. 2d at 571). The word “any” is first defined in the American Heritage Dictionary as “one or some; no matter which.” *See Any*, Am. Heritage Dictionary, <https://www.ahdictionary.com/word/search.html?q=any> (last accessed Sept. 27, 2024).<sup>3</sup> Conversely, “every” is first defined as “constituting each and all members of a group without exception.” *See Every*, Am. Heritage Dictionary, <https://www.ahdictionary.com/word/search.html?q=every> (last accessed Sept. 27, 2024). By

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<sup>3</sup> “Wisconsin courts routinely reference other dictionaries to ascertain the ordinary meaning of a statute, including both the Merriam-Webster dictionary and the American Heritage Dictionary.” *Rise, Inc. v. Wis. Elections Comm.*, 2024 WI App. 48, ¶ 29 n. 14, 2024 WL 3373576 (citing *Noffke ex rel. Swenson v. Bakke*, 2009 WI 10, ¶ 19, 315 Wis. 2d 350, 760 N.W.2d 156; *State v. Kizer*, 2022 WI 58, ¶ 13, 403 Wis. 2d 142, 976 N.W.2d 356)).

placing these two distinct terms in the section, the Wisconsin legislature thus intended “every” to apply to all elections in larger municipalities, “without exception,” while the word “any” to apply to “one or some” elections in smaller municipalities. As a result, Wis. Stat. § 540(1) should be interpreted to require municipalities with a population of 7,500 or more to use electronic voting, while municipalities with a population below 7,500 may use electronic voting in “one or some” elections of their choice.

**B. The Town is Not Required to Seek WEC’s Permission to Use Paper Ballots.**

Complainant also alleges that, under Wis. Stat. § 5.40(5m), Thornapple was required to secure WEC approval before reverting to hand counting paper ballots. However, under the approval provision of Wis. Stat. § 5.40(5m) only applies to municipalities with a population equal to or greater than 7,500. Wis. Stat. § 5.40(5m) provides:

(5m) Notwithstanding sub. (1), the governing body of a municipality which uses voting machines or an electronic voting system may petition the commission for permission to use paper ballots and voting booths for a specific election, and the commission may grant such a request.

As noted above, *see supra* Section III.A., while municipalities with populations of 7,500 or above must use electronic voting for *every* election, smaller populations may do so in *any* election—i.e., in any one election or number of elections. The complaint overlooks the significance of Wis. Stat. § 5.40(5m) using the word “notwithstanding” in relation to subsection (1). This necessarily limits the paper ballot permission provision to entities under subsection (1) that are otherwise *required* to use machines due to population size, thus excluding the Town. Webster’s Third New International Dictionary defines “notwithstanding” as “without prevention or obstruction from or by: in spite of.” The only entities that subsection (1) that obstructs or prevents from using paper ballots are those with 7,500 people or more. Permission from WEC can only be “in spite of”

subsection (1) when that permission is granted to an entity that, unlike the Town, *must* otherwise use a machine. Thus, the “opt-out” mechanism for “specific” elections within Section 5(m) necessarily applies only to jurisdictions that use machines in “every” election, rather than small municipalities that use electronic machines in “any” election or elections of their choice.

#### **IV. Thornapple’s Paper Ballots Comply with Wisconsin Statutes.**

The Town fully complies with Wisconsin statutes ensuring the needs of disabled voters are met. Specifically, Wisconsin law envisions that disabled voters will be casting ballots in jurisdictions that do not use voting machines as well as those that do, and accounts for how these respective election officials will handle such votes. Wis. Stat. § 6.82(2)(a) provides guidance and draws a clear comparison between the use of voting machines and paper ballots, requiring that “[t]he selected individual [i.e., assistant] shall certify on the back of the ballot that it was *marked with his or her assistance*. Where voting machines are used, certification shall be made on the registration list”). *Id.* (emphasis added).

The Town’s election process aligns with these statutory provisions, which include the following safeguards:

- Disabled voters may request assistance in marking their ballots (Wis. Stat. § 6.82(2)(a));
- Specific limitations on who may serve as an assistant (*Id.*);
- Mandatory notation indicating that a ballot was marked with assistance (*Id.*);
- Guidelines for how assistants must communicate with voters regarding their ballot preferences (Wis. Stat. § 6.82(2)(b));
- Requirements that election officials record the use of an assistant (Wis. Stat. § 6.82(2)(d)).

In addition to these measures, The Town offers curbside voting for disabled voters who prefer not to enter the polling place. Election administrators inside the polling station are also available to assist voters in compliance with the statutory provisions as outlined above.

V. **Wis. Stat. § 5.25(4)(a) Does Not Apply to Thornapple's Paper Ballots.**

While Wis. Stat. § 5.25(4)(a) mandates that voting systems must allow disabled voters to cast ballots independently and with the same privacy as nondisabled voters, this requirement applies only to jurisdictions using mechanical, electromechanical, or electronic voting systems, as defined by Wis. Stat. § 5.02(24w). The Town does not use such systems; instead, it uses simple paper ballots, which are not regulated by § 5.25(4)(a). Therefore, the Complainant's demand for compliance with § 5.25(4)(a) is misplaced, as The Town does not employ the type of voting system governed by this statute. The Town's procedures, which use paper ballots, remain fully consistent with Wisconsin law, ensuring that disabled voters can cast their ballots fairly and transparently, with proper assistance as needed.

**Conclusion**

For these reasons, Complainant's assertion that The Town is required to use electronic voting machines is incorrect. The Town's use of paper ballots is lawful and appropriately meets the needs of all voters, including those with disabilities, without violating Wisconsin election statutes. Moreover, the Complaint was not timely filed. Accordingly, the Town requests that the Wisconsin Election Commission dismiss the Complaint.

Dated this 27th day of September, 2024.

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By:



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