

**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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**REPLY**

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A municipality that wishes to revert away from 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.” Wis. Stat. § 5.40(5m). The Town of Thornapple never filed such a petition (and, therefore, WEC never did, or could have, granted it). Nevertheless, Respondent Pinnow conducted Thornapple’s election as if its paper ballot system was authorized under the law. Of course, it was not, and voters with disabilities paid the price.

Try as it may, Thornapple has no good excuse to offer for the misconduct, and Pinnow filed nothing in opposition to the pending complaint.<sup>1</sup> Broadly speaking, the response fails for four reasons:

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<sup>1</sup> Under EL § 20.03, “[a]ll complaints, answers and replies shall be in writing and shall be sworn to before a person authorized to administer oaths.” The responsive pleading that was filed, by Thornapple, does not follow this requirement.

1. The complaint is timely because it does not involve “nominations, qualifications of candidates or ballot preparation.” Wis. Stat. § 5.06(3).
2. The complaint is properly filed against the clerk.
3. There is no “small-town” exception to the procedure for reverting away from an electronic voting system, § 5.40(5m). It applies to everyone.
4. The Town of Thornapple operates a voting system, and it must comply with Wis. Stat. § 5.25(4)(a).

**I. The Complaint is timely.**

Without much explanation, the Town of Thornapple feigns “timeliness” as an impediment to Complainant’s requested relief. Not so. Wisconsin Stat. § 5.06(3) creates an exceedingly tight (10-day) deadline for a narrow category of complaints. Namely, those disputing nominations, qualifications, or the preparation of any ballots. What Thornapple leaves out is that none of these are at issue here. The central allegation of this complaint is that Thornapple disadvantaged voters with disabilities when it jettisoned an electronic voting system without seeking (and of course without receiving) leave from WEC to do so under Wis. Stat. § 5.40(5m). For such disputes, the 10-day deadline does not apply.

Any creative interpretation of “ballot preparation” to include the subject matter of this complaint should be rejected. There is nothing in the complaint that describes how ballots are prepared. The allegations here are much more dynamic than that. And the statutory scheme under Wis. Stat. § 5.06 anticipates that such allegations, although appropriate for a formal complaint, need not be filed within ten

days. Under § 5.06(1) the Legislature provided a laundry list of potential issues appropriately adjudicated under § 5.06. The list includes a few items found within § 5.06(3); namely, nominations, qualifications, and ballot preparation. But it also includes subjects conspicuously left out of § 5.06(3). For example, “election administration” and “conduct of elections,” both included in § 5.06(1), were left out of § 5.06(3). The absence of these subjects from the 10-day deadline is no mistake. “[T]he express mention of one matter excludes other similar matters [that are] not mentioned.” *James v. Heinrich*, 2021 WI 58, ¶18, 397 Wis. 2d 517, 960 N.W.2d 350 (quotation excluded). Because “election administration” and “conduct of elections” were specifically excluded from Wis. Stat. § 5.06(3), and because this complaint is about “election administration” and the “conduct of elections,” the 10-day deadline does not apply.

Ultimately, the hallmark of timeliness under § 5.06(3) is prejudice to another party. “A complaint under this section shall be filed promptly so as not to prejudice the rights of any other party.” Here, Thornapple has nothing to say. It never alleges that the date of filing somehow compromised Thornapple’s ability to defend against, or otherwise investigate the allegations of, the pending complaint. That should resolve the inquiry: the timing of the Complaint did not prejudice any party; it was timely and should proceed accordingly.

## **II. The clerk is the proper defendant.**

All Wis. Stat. § 5.06 complaints must be filed against an election official. The pending complaint is no exception, and it was filed against the Clerk for the Town of

Thornapple. Pinnow was named in her official capacity as Clerk such that, if Thornapple hires a new clerk, that person can and would be substituted as a matter of law. And Thornapple never denies that Pinnow is the clerk. Whomever holds the office, that person is vested with the authority to conduct the Thornapple's elections. "Each municipal clerk has charge and supervision of elections and registration in the municipality." Wis. Stat. § 7.15(1). This authority includes equipping Thornapple's polling places and providing for the purchase and maintenance of election equipment. Wis. Stat. § 7.15(1)(a)-(b). It also includes making the effort to comply with requests for accommodations made by voters with disabilities. Wis. Stat. § 7.15 (14). State law places the Clerk squarely at the center of this dispute. The clerk is the proper defendant. And through her silence, Pinnow does not deny that she holds these official responsibilities.

### **III. Thornapple broke the law governing the abandonment of a pre-existing electronic voting system.**

Municipal administration of electronic voting systems is governed by statute. *See* Wis. Stat. § 5.40. The adoption and abandonment of such systems are governed by separate provisions. *See* Wis. Stats. §§ 5.40(1), (5m). This case is about the latter. Thornapple abandoned its electronic voting system without paying heed to the dictates of Wis. Stat. § 5.40(5m). Yet its clerk conducted, and is conducting, elections without using that electronic voting system.

Thornapple's defense to this misconduct confuses adoption with abandonment. It is easy to see why. Communities of fewer than 7,500 *may* adopt electronic voting systems (whereas all others *must* adopt them). Wis. Stat. § 5.40(1). But this small-

town exception is conspicuously absent from the abandonment statute. Wis. Stat. § 5.40(5m). Indeed, (5m) goes so far as to specifically exclude (1), and its associated small-town exception, in its very first word. “*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.” (emphasis added). So, Thornapple had the choice to adopt an electronic voting system in the first instance; but having adopted an electronic voting system, to abandon it Thornapple *must* seek and receive that authority from this Commission.

Reading the statute as a whole—rather than taking § 5.40(1) in isolation and out of context—reinforces this conclusion. If Thornapple were right, language creating a small-town exception would have to be read into (5m). There is nothing in (5m) that would otherwise exclude Thornapple. But reading language into a statute in this fashion is forbidden. Adjudicators cannot read words into statutes that the Legislature did not see fit to include. *See, e.g., Jefferson v. Dane Cnty.*, 2020 WI 90, ¶35, 394 Wis. 2d 602, 951 N.W.2d 556. Moreover, Thornapple’s reading threatens to render the statute absurd, suggesting that, even after expending state and federal funds on electronic voting machines, a municipality can capriciously mothball those machines, rendering the expenditure of taxpayer money a waste. Thus, the Legislature’s inclusion of the small-town exception in (1), and its corresponding exclusion from (5m) should resolve the question. Thornapple properly exercised its authority to adopt an electronic voting system. But to properly abandon it,

Thornapple must first petition for, and subsequently receive, permission from this Commission.

Thornapple's other statutory construction arguments also fail. The distinction between "any" and "every" that Thornapple seizes upon does not prove anything. The distinction does not mean that small municipalities can hopscotch arbitrarily between using and not using their electronic voting machines. It simply provides that larger municipalities were required to begin using such machines for the first election after the statute became effective, whereas smaller municipalities (without the immediate requirement to start using such machines) had flexibility to begin doing so, if they so chose, at *any* election after the statute's adoption. Thornapple similarly overreads the distinction between "shall" and "may"; the issue here is again permissive *as to timing* for a small municipality to adopt such machines. That permissibility does not extend beyond adoption and allow small municipalities to willy-nilly abandon machines they adopted and spent taxpayer funds to obtain.

It also appears that Thornapple is confused about the significance of "notwithstanding." Thornapple reads "[n]otwithstanding sub. (1)" to exclude small municipalities from (5m) entirely. But this is not what "notwithstanding" means, nor how it operates in this statute. To the contrary, "notwithstanding" confirms that the abandonment provision from (5m) applies broadly, regardless of the language of the earlier subsection. That is, "[n]otwithstanding sub. (1)," any municipality using such machines and wishing to stop doing so has a process to follow, and that process is petitioning WEC for permission.

The Supreme Court of Wisconsin already resolved any ambiguity in “notwithstanding” in *Adams v. State Livestock Facilities Siting Review Board*, 2012 WI 85, ¶¶39–44, 342 Wis. 2d 444, 820 N.W.2d 404. *Adams* considered Wis. Stat. § 93.90(3), concerning the siting process for livestock facilities. It reads:

*Notwithstanding* ss. 33.455, 59.03(2)(a), 59.69, 60.10(2)(i), 60.61, 60.62, 61.34(1), 61.35, 62.11(5), 62.23, 66.0415, 92.07(2), 92.11, and 92.15(3)(a), a political subdivision may not disapprove or prohibit a livestock facility siting or expansion...

Wis. Stat. § 93.90(3) (emphasis added). The statutes listed after ‘notwithstanding’ granted political subdivisions authority to disapprove or prohibit livestock siting or expansion. But the second half of § 93.90(3) removes that authority. Contrary to Thornapple’s position here, *Adams* determined that “notwithstanding” operated “to expressly withdraw[], with limited exceptions, the power formerly reserved to political subdivisions” under the statutes it lists after “notwithstanding.” *Id.*, ¶46. In other words, the Legislature used “notwithstanding” to clarify that those other statutes were not to be harmonized with § 93.90(3). The same is true here. The language from § 5.40(5m) contains no small-town exception. And *notwithstanding* the small-town exception in § 5.40(1), no such exception should be read in to (5m).

**IV. Thornapple’s polling places are not accessible to all individuals with disabilities.**

In its response, Thornapple never argues that its polling places are accessible to individuals with disabilities. It never argues that it ever complied with Wis. Stat.

§ 5.25(4)(a).<sup>2</sup> Rather than demonstrate how its voting system treats voters with disabilities with equality and respect, Thornapple boldly argues that it has no voting system (as that term is understood in Wisconsin law) to equally administer in the first place. The statute reads:

Each polling place shall be accessible to all individuals with disabilities. The commission shall ensure that the *voting system* used at each polling place will permit all individuals with disabilities to vote without the need for assistance and with the same degree of privacy that is accorded to nondisabled electors voting at the same polling place.

Wis. Stat. § 5.25(4)(a) (emphasis added). Thornapple’s logic, too clever by half, relies on the absence of “paper ballots” from the statutory definition of voting system, § 5.02(24w)(a). But this provision broadly captures every type of voting system no matter their sophistication. It refers to “[t]he total combination of mechanical, electromechanical, or electronic equipment,” etc. *Id.* And Counsel for Thornapple confirmed, during a hearing on the matter, that even with Thornapple’s (unauthorized) hand counting process, “[a]t some point a machine is being involved with the process.” (Ex. 1 at 10:25-11:9.) This should resolve the matter. Thornapple has a voting system, with mechanical components. It may not discriminate against voters with disabilities, and must comply with § 5.25(4)(a).

## V. Conclusion

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<sup>2</sup> Perhaps, this is not surprising. One week after Thornapple filed its response in this matter, a federal court determined that Thornapple violated federal law “by failing to provide a voting system equipped for individuals with disabilities at each polling place” in the two preceding elections.” *United States of America v. Town of Thornapple et al.*, No. 24-CV-JDP (W.D. Wis. Oct. 4, 2024) (order granting preliminary injunction).



For the foregoing reasons, and for those in the operative complaint, this Commission should grant Complainant's requested relief.

Respectfully submitted:

Electronically signed by:  
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Scott B. Thompson, SBN 1098161  
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(608)-285-2485

**As to the facts above:**

I declare under penalty of false swearing under the law of Wisconsin that the foregoing is true and correct.

Signed on the 16th day of October, 2018, at Thornapple, Wisconsin  
Erin Webster  
Electronically Signed By: /s/Erin Webster

**Ex. 1**

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,  
Plaintiff,

-vs-

Case No. 24-CV-664-JDP

TOWN OF THORNAPPLE, WISCONSIN,  
ET AL.,

Madison, Wisconsin  
September 27, 2024  
11:04 a.m.

Defendants.

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STENOGRAPHIC TRANSCRIPT OF EVIDENTIARY HEARING  
HELD BEFORE CHIEF U.S. DISTRICT JUDGE JAMES D. PETERSON

APPEARANCES:

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## APPEARANCES (Continued):

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14 (Proceedings called to order at 11:04 a.m.)

15 THE CLERK: Case No. 24-CV-664-JDP, the *United States*  
 16 *of America v. Town of Thornapple, Wisconsin, et al.*, is called  
 17 for an evidentiary hearing.

18 May we have the appearances, please.

19 MR. DELLHEIM: Good morning, Your Honor. Richard  
 20 Dellheim for the United States.

21 THE COURT: Good morning.

22 Who else is with you there?

23 MS. TURNER: Margaret Turner also for the United  
 24 States.

25 MS. OSWALD: Barbara Oswald with the U.S. Attorney's

1 very specific to you. It means a voting machine that tabulates  
2 the ballots; is that correct?

3 MR. LAWSON: When I'm saying "machine," I'm trying to  
4 track mechanical, electromechanical, electronic equipment. That  
5 could be in the casting of the ballot. It could be a computer  
6 where you put your ballot. It could be just a simple apparatus  
7 like where I do. I drop my paper ballot into a counter. It  
8 could be what I used to do when I lived in New York was this  
9 big, huge apparatus where I had to pull a mechanical lever after  
10 flipping switches.

11 THE COURT: The definition obviously doesn't require a  
12 computer because it says a combination of mechanical,  
13 electromechanical, or electronic equipment. So you could have  
14 no electronic equipment whatsoever and you still have a voting  
15 system.

16 MR. LAWSON: That's what I experienced when I was in  
17 New York with the big -- you flip various levers, and then you  
18 pull the machine. It's a mechanical apparatus. Our position is  
19 that Thornapple has nothing that falls within any of these  
20 definitions. It's pure hand.

21 THE COURT: Do they have a box where the ballots go?

22 MR. LAWSON: Yes.

23 THE COURT: Is it locked?

24 MR. LAWSON: I don't know.

25 THE COURT: It doesn't seem to me that the definition

1 here requires any particular level of sophistication of the  
2 mechanical devices. Why wouldn't a locked ballot box count as a  
3 mechanical system?

4 MR. LAWSON: I would -- I would think if that  
5 qualified, then -- you know, obviously you have to print the  
6 ballots. You have to use a pencil to mark them. At some point  
7 a machine is being involved in the process. The term, if it  
8 would include a lock, would be -- if "mechanical" included lock,  
9 it would be so broad as to include things -- almost anything --

10 THE COURT: I guess that's my --

11 MR. LAWSON: -- so that would be the --

12 THE COURT: That's my point, that it seems to me that  
13 "voting system" is defined here in a very broad way so that it  
14 does, in fact, cover the method that communities might use to  
15 vote, even if it's a paper ballot and a voting booth.

16 MR. LAWSON: Well, I would also submit that when you  
17 look at it in the context of what they're talking about, of  
18 mechanical, electromechanical, and electronic equipment, that I  
19 think the electromechanical and electronic equipment involves  
20 some type of, you know, process that the voter would be engaging  
21 with in some capacity, whether it's putting the ballot in the  
22 counting machine or flipping the switches when you're actually  
23 casting the ballot.

24 Also, if you -- you know, if there is ambiguity in the term  
25 of "mechanical" and we want to go back and look at the history