

**FILED**  
**09-16-2024**  
**CIRCUIT COURT**  
**DANE COUNTY, WI**  
**2023CV000279**

**BY THE COURT:**

**DATE SIGNED: September 16, 2024**

Electronically signed by Rhonda L. Lanford  
Circuit Court Judge

THIS IS A FINAL ORDER FOR THE PURPOSE OF APPEAL.

STATE OF WISCONSIN

CIRCUIT COURT  
BRANCH 16

DANE COUNTY

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 ON MOTIONS FOR SUMMARY JUDGMENT**

**INTRODUCTION**

This case challenges the process by which two referenda – a constitutional amendment and an advisory referendum – reached the 2023 Spring Election ballot. Plaintiffs EXPO Wisconsin, Inc. and WISDOM, Inc. (“Plaintiffs”), a pair of advocacy

organizations, claim that the Wisconsin Elections Commission (“WEC”) issued a memorandum containing the certified referendum questions to the county clerks and Milwaukee County Board of Elections (“MCBEC”) two days after the 70-day statutory deadline in Wis. Stat. § 8.37 (2021-22).<sup>1</sup> The result of missing this statutory deadline, Plaintiffs claim, is that the memorandum is invalid, and should not have been included on the ballot. It would follow that the election results with respect to the referenda are invalid. Plaintiffs now move for summary judgment on this claim, asking for declaratory and injunctive relief invalidating the election’s results.

Defendant WEC responds that (1) Plaintiffs do not have standing to bring their claim and that (2) their interpretation of Wis. Stat. § 8.37 is incorrect. Specifically, WEC argues that the 70-day deadline in Wis. Stat. § 8.37 applies to the transmission of the referenda from the Legislature to WEC, which happened 75 days before the 2023 Spring Election, not from WEC to the county clerks and MCBEC as Plaintiffs claim. WEC also argues that (3) the statute is directive so that WEC substantially complied under either interpretation of the statute. WEC requests that summary judgment be granted in its favor.

The Wisconsin State Legislature (“Legislature”) intervened as an additional Defendant and also moves for summary judgment in its favor, arguing that (1) Plaintiffs do not have standing; (2) Wis. Stat. § 8.37 is a non-reviewable legislative rule of proceeding; (3) the Legislature complied with the statute because their transmission of the referenda 75 days before the Spring Election did not violate 70-day deadline in Wis. Stat.

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<sup>1</sup> All subsequent references to the Wisconsin Statutes are to the 2021-22 version.

§ 8.37; (4) even under the Plaintiffs' interpretation of Wis. Stat. § 8.37, the Legislature substantially complied by transmitting the referenda to WEC in time to meet the deadline; and(5) Plaintiffs are not entitled to invalidate the referenda.

For the following reasons, Plaintiffs' motion for summary judgment is DENIED. WEC's motion for summary judgment is GRANTED. The Legislature's motion for summary judgment is DENIED as moot.

### FACTUAL BACKGROUND

The Wisconsin Constitution outlines the procedure for adding an amendment. Wis. Const. art XII, § 1. 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." *Id.* 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.

Wis. Const. art. XII, § 1 (emphasis added).

Wisconsin Statutes § 8.37 governs the filing of referenda. The statute directs that proposed constitutional amendments, ballot measures or questions, and petitions for such be filed with the “official or agency responsible for preparing the ballots for the election.”

Wis. Stat. § 8.37 (2021-22). The statute also requires that this filing occur no later than 70 days before the election at which the filed amendment, measure, or question will appear on the ballot. *Id.* The statute further states that in the case of measures or questions filed with a school district clerk, the clerk shall transmit the measure or question to the clerks of counties with territory in the school district before the end of the next business day. *Id.* In full, Wisconsin Statute § 8.37 reads:

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.

Wis. Stat. § 8.37 (emphasis added).

In this case, unless otherwise noted, the parties do not dispute the facts. Two consecutive Legislatures passed the “Bail Amendment,” with final passage on January 19,

2023, as Enrolled Joint Resolution 2. Dkt. 116 at 10, *see* S.J. Res. 2, 2023-24 Wis. Leg., Reg. Sess. This resolution provided that two questions be submitted to the voters. Dkt. 116 at 10. On the same day, the Legislature also passed the welfare advisory referendum resolution, the “Welfare Referendum,” as Enrolled Joint Resolution 4. Dkt. 116 at 11, *see* S.J. Res. 4, 2023-24 Wis. Leg., Reg. Sess. Also on January 19, 2023, the Legislature filed both resolutions with WEC—75 days before the 2023 Spring Election on April 4. Dkt. 118 at 12.

On January 26, WEC issued a memorandum<sup>2</sup> to the county clerks and MCBEC. Dkt. 118 at 13. This memorandum was transmitted with two attached documents: a “Certification of Referendum Question” instructing that the referendum questions “shall be submitted to the voters at the Spring Election ... on April 4, 2023,” (dkt. 116 at 12), and a “Type A Notice of Referendum Election,” which is a sample for county clerks and MCBEC to use when publishing the election notice in newspapers as required on March 7, 2023. Dkt. 118 at 13. This memorandum also contained an “Appendix A” which sought to address inquiries into whether the referenda complied with the 70-day deadline in Wis. Stat. § 8.37. Dkt. 116 at 13. WEC issued this memorandum 68 days before the 2023 Spring Election on April 4. *Id.* at 5. There is no evidence in the record that this timeline had any adverse consequences on election administration or on preparing the ballots for the Spring Election. Dkt. 123 at 37.

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<sup>2</sup> Available at <https://elections.wi.gov/memo/certification-referendum-question-and-type-notice-referendum-april-4-2023-spring-election>.

Plaintiffs are two organizations that campaigned against the proposed constitutional amendment. Dkt. 116 at 13. WISDOM, Inc. also campaigned against the advisory referendum. *Id.* at 14. Both organizations prioritized these campaigns at the expense of other work and diverted resources to these campaigns. Dkt. 124 at 14, 17. In addition, EXPO Wisconsin, Inc. serves about 225 formerly incarcerated people who could not vote in the 2023 Spring Election but who had their voting rights restored before the next statewide election in April 2024. *Id.* at 17.

Plaintiffs originally moved for a temporary injunction on February 20, 2023, which this Court denied. Dkt. 116 at 9. Plaintiffs then filed a Motion for Summary Judgment on March 5, 2024, asking for declaratory judgment stating (1) WEC's memo and accompanying documents conveying the ballot questions to the county clerks were invalid; (2) the referenda therefore did not qualify for inclusion on the Spring 2023 ballot; and (3) the election results with respect to the referenda are invalid. Dkt. 116 at 9-10.

WEC, in its Brief in Opposition to Plaintiffs' Motion for Summary Judgment filed on April 3, 2024, requests that summary judgment be entered in its favor, and Plaintiffs' claims be dismissed, because: (1) Plaintiffs lack standing; (2) Plaintiffs' reading of Wis. Stat. § 8.37 is incorrect as a matter of law; and (3) alternatively, if Plaintiff's reading is correct, Wis. Stat. § 8.37 is only a directory, not mandatory statute. Dkt. 123 at 4.

The Legislature also filed for Summary Judgment on March 5, 2024, requesting that all Plaintiffs' claims be dismissed for five reasons: (1) Plaintiffs lack standing; (2) Wis. Stat. § 8.37 is a legislative rule of proceeding, the Legislature's interpretation of which the Court may not review under Wisconsin law; (3) if Wis. Stat. § 8.37 is

reviewable, the Legislature complied with Wis. Stat. § 8.37 by timely submitting the resolutions to WEC; (4) alternatively, if Plaintiff's reading of Wis. Stat. § 8.37 is correct, the Legislature nevertheless substantially complied with the statute; and (5), even if Plaintiffs' claim argument succeeds, Plaintiffs are not entitled to the remedy of invalidating the referenda. Dkt. 118 at 5-6.

### STANDARD OF REVIEW

Trial courts follow a standard methodology when faced with a motion for summary judgment, which first requires it to determine if a claim for relief has been stated. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 314-315, 401 N.W.2d 816 (1987). If one has been stated, "the inquiry then shifts to whether any factual issues exist." *Id.* at 315. A party may be entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Wis. Stat. § 802.08(2). "If it shall appear to the court that the party against whom a motion for summary judgment is asserted is entitled to a summary judgment, the summary judgment may be awarded to such party even though the party has not moved therefor." Wis. Stat. § 802.08(6).

The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. *Baxter v. Wisconsin Dep't of Natural Resources*, 165 Wis. 2d 298, 312, 477 N.W.2d 648 (Ct. App. 1991). A factual issue is "genuine" if the evidence is such that a reasonable jury could return a verdict in favor of the nonmoving party. *Id.* Material facts are those that are of

consequence to the merits of the litigation. *In Interest of Michael R.B.*, 175 Wis. 2d 713, 724, 499 N.W.2d 641, 646 (1993).

If the moving party has made a prima facie case for summary judgment, an examination is then made of the opposing party's affidavit and other proof to determine whether there exist disputed material facts, or undisputed material facts from which reasonable alternative inferences may be drawn, sufficient to entitle the opposing party to a trial. *Lambrecht v. Est. of Kaczmarczyk*, 2001 WI 25, ¶ 22, 241 Wis. 2d 804, 623 N.W.2d 751. The opponent of a summary judgment motion may not rest on mere denials, but must counter with evidentiary submissions of his or her own demonstrating that there is a dispute. *Dawson v. Goldammer*, 2006 WI App 158, ¶¶ 30-31, 295 Wis. 2d 728, 722 N.W.2d 106.

Importantly, there is no right to summary judgment disposition; rather, it rests within the trial court's discretionary power to so grant. *Zimmer v. Daun*, 40 Wis. 2d 627, 631, 162 N.W.2d 626 (1968).

## ANALYSIS

First, the Court will address the argument by both WEC and the Legislature that Plaintiffs lack standing. Second, the Court will address the Legislature's argument that Wis. Stat. § 8.37 is a rule of legislative proceeding, the Legislature's interpretation of which the Court may not review. Third, the Court will turn to the merits, considering Plaintiffs' argument that Wis. Stat. § 8.37 is mandatory and the argument by both WEC and the Legislature that the statute is directory. The Court will then consider the argument by both

WEC and the Legislature that, if Wis. Stat. § 8.37 is directory, they substantially complied with it even under Plaintiffs' interpretation of the statute. Finally, the Court will address the remaining arguments, including the Legislature's argument that Plaintiffs are not entitled to the requested remedy and all parties' discussions of the proper interpretation of Wis. Stat. § 8.37.

## I. STANDING

Both WEC and the Legislature argue that Plaintiffs do not have standing to bring this claim. Whether a party has standing is a question of law. *Wisconsin Legislature v. Palm*, 2020 WI 42, ¶ 12, 391 Wis. 2d 497, 942 N.W.2d 900. Generally, “standing depends on (1) whether the party whose standing is challenged has a personal interest 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 v. Bishop's Grove Condo. Ass'n, Inc.*, 2011 WI 36, ¶ 40, 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.

In Wisconsin, judicial policy calls for standing to be liberally construed. *City of Mayville v. Dept of Admin.*, 2021 WI 57, ¶ 18, 397 Wis. 2d 496, 960 N.W.2d 416. Judicial policy favors carefully developed and zealously argued issues. *McConkey v. Van Hollen*, 2010 WI 57, ¶ 16, 326 Wis. 2d 1, 783 N.W.2d 855. “Wisconsin courts evaluate standing

as a matter of judicial policy rather than as a jurisdictional prerequisite.” *Palm*, 2020 WI 42 at ¶ 12. “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*, 2011 WI 36 at ¶ 55. “An organization has standing to sue in its own name if it alleges facts sufficient to show that a member of the organization would have had standing to bring the action in its own name.” *Munger v. Seehafer*, 2016 WI App 89, ¶ 49, 372 Wis. 2d 749, 890 N.W.2d 22 (quotation omitted).

Turning to the first element of the test articulated in *Foley-Ciccantelli*, Plaintiffs have a personal interest in the controversy. Both Plaintiffs campaigned against passage of the constitutional amendment. Dkt. 116 at 13. WISDOM, Inc. also opposed the advisory referendum question. *Id.* at 14. EXPO has an additional interest because it serves harmed individuals: about 225 people who had their voting rights restored between April 4, 2023, and next statewide election in April 2024. Dkt. 124 at 23. Turning to the context of elections, an individual voter has an interest in ensuring that constitutional amendments are validly submitted to the people. *McConkey* 2010 WI 5 at, ¶ 17. This is an application of the principle demonstrated in Wis. Stat. § 5.06 that voters have a legal right to have election officials follow the law. *Teigen v. WEC*, 2022 WI 64, ¶ 164, 403 Wis. 2d 607, 976 N.W.2d 519 (Hagedorn, J., concurring).

Regarding the second element of the *Foley-Ciccantelli* test, Plaintiffs’ interests have been adversely affected. If the referenda had been held in April 2024, Plaintiffs would have had an additional year to campaign. Dkt. 116 at 14. In the time that they campaigned before

the 2023 Spring Election, Plaintiffs diverted resources from their other advocacy campaigns. Dkt. 124 at 14, 17. Federal courts have found that an advocacy organization's diversion of resources in response to election laws is an injury that supports standing for that organization's challenges to those election laws. *Common Cause Indiana v. Lawson*, 937 F.3d 944, 952-53; *Common Cause v. Thomsen*, 574 F. Supp. 3d 634, 636. In addition, the individuals served by EXPO who had their voting rights restored between April 4, 2023, and next statewide election in April 2024 were harmed by being unable to vote on the referenda. Dkt. 124 at 23.

Finally, Plaintiffs satisfy the third element, which asks whether judicial policy calls for protecting Plaintiffs' interests. Specifically, judicial policy calls for protecting the principles of valid submission of constitutional amendments and having election officials follow the law. *See McConkey*, 2010 WI 57 at ¶ 17, *Teigen*, 2022 WI 64 at ¶ 64. Plaintiffs' injured interests make them zealous advocates for these principles in this case. Dkt. 116 at 9. As such, Plaintiffs EXPO and WISDOM have standing to bring this action.

## II. REVIEWABILITY

The Legislature argues that its interpretation of Wis. Stat. § 8.37 and the filing of the referenda under that interpretation are not reviewable by the Court because the statute is a legislative rule of proceeding. "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." *State ex rel. La Follette v. Stitt*, 114 Wis.

2d 358, 364-65, 338 N.W.2d 684 (1983). “[C]ourts 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.” *Id.* at 365. For example, “[h]ow the Legislature meets, when it meets, and what descriptive titles the Legislature assigns to those meetings or their operating procedures constitute parts of the legislative process with which the judicial branch ‘has no jurisdiction or right to interfere.’” *League of Women Voters of Wisconsin v. Evers*, 2019 WI 75, ¶ 37, 387 Wis. 2d 511, 929 N.W.2d 209 (quoting *State ex rel. Ozanne v Fitzgerald*, 2011 WI 43, ¶ 8, 334 Wis. 2d 70, 798 N.W.2d 436). However, “[w]hen the legislative process has been completed, a court may then in a proper case consider whether the power of the legislature has been constitutionally exercised....” *Id.* at ¶ 36 (quotation omitted).

The prohibition on judicial review applies only to purely internal legislative processes, as a review of these cases makes clear. In *Stitt*, the Supreme Court of Wisconsin declined to rule on whether the Legislature enacted an act under a valid procedure, when it failed to refer the act to certain committee as required by statute. 114 Wis. 2d at 363. In *Ozanne*, the Court declined to review whether the Legislature gave proper notice of a meeting of the joint committee on conference under the Open Meetings Law. 2011 WI 43 at ¶ 13. In *League of Women Voters*, the Court reviewed the Legislature’s work schedule in question “for the limited purpose of ensuring the Legislature’s compliance with the constitution’s directives...” and, once satisfied, “proceed[ed] no further.” 2019 WI 75 at ¶ 39.

In this case, Wis. Stat. § 8.37 is not a purely internal legislative process. It involves transmission of information to external entities, namely “the official or agency responsible for preparing the ballots for the election.” Wis. Stat. § 8.37. The statute also mentions filing of petitions with such an entity and the process for transmission of proposed measure language between school district clerks and county clerks. *Id.* Further, the plain language of the statute does not provide a basis for treating some of the entities involved differently from others or for extending to all the entities potentially involved – such as local entities submitting referenda. *See State ex rel Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. Finally, holding otherwise would interpret this exception too broadly; separation of powers does not shield from judicial review the Legislature’s interpretation of every procedural statute that involves the Legislature. *See Milwaukee J. Sentinel v. Wisconsin Dep’t of Admin.*, 2009 WI 79, ¶ 19, 319 Wis. 2d 439, 768 N.W.2d 700 (for example, “even if [a] statute might otherwise be characterized as a legislative rule of proceeding, we may interpret the statute and apply it to the legislative action to determine whether that action complies with the relevant constitutional mandates.”)

Therefore, the Legislature’s interpretation of Wis. Stat. § 8.37 and the filing of the referenda under that interpretation are reviewable by this Court.

### **III. A. STATUTORY INTERPRETATION**

Plaintiffs claim that Wis. Stat. § 8.37 is mandatory which would mean that the potential two-day delay, as a violation of the statute, could void WEC’s memorandum –

and potentially the referenda. *See Gradinjan v. Boho*, 29 Wis. 2d 674, 681, 139 N.W.2d 557 (1966). WEC and the Legislature contend that Wis. Stat. § 8.37 is directory, so the potential two-day would not necessarily void the memorandum as long as it was merely a technical violation and still substantially complied with the statute. *See Matter of Hayden*, 105 Wis. 2d 468, 483, 313 N.W.2d 869 (Ct. App. 1981).

To determine whether a statute is mandatory or directory, several factors must be considered: “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.” *Midwest Mut. Ins. Co. v. Nicolazzi*, 138 Wis. 2d 192, 198, 405 N.W.2d 732 (Ct. App. 1987). “Where the language is clear and unambiguous, a mandatory construction is more likely.” *Id.* When the statute contains a penalty for failure to observe it, the statute is generally mandatory but “[i]f a statute is remedial in nature, it is more apt to be construed as a directory statute.” *Id.* at 199. When a statute’s instructions are for a public officer to follow, the statute is more likely to be directory; if its instructions are for a private person, the statute is more likely to be mandatory. *Id.* at 199-200. This same distinction applies when a statute prescribes the doing of an act within a certain time. *Id.* at 200.

This question is crucial because in the context of election law, “[a]n 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.” *Gradinjan*, 29 Wis. 2d at 681. Wisconsin election statutes are typically construed “as directory rather than mandatory so as to preserve the will of the elector.” *Id.* at 682, *see* Wis. Stat. § 5.01(1). By the same logic,

election statutes are construed as mandatory only if “a noncompliance with their terms is expressly declared to be fatal, or will change or render doubtful the result.” *Id.* at 681. For example, an election statute may “merely provide[] 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.” *Id.* When such a directory statute is violated, substantial compliance is sufficient. *Hayden*, 105 Wis. 2d at 483.

However, an election statute may be mandatory when it expressly declares it or when courts have interpreted it to be mandatory based on the *Nicolazzi* factors. Those pertaining to absentee ballots are mandatory because they expressly declare it. *See* Wis. Stat. § 6.84(2). (“Notwithstanding s. 5.01 (1), with respect to matters relating to the absentee ballot process, ss. 6.86, 6.87 (3) to (7) and 9.01 (1) (b) 2. and 4. shall be construed as mandatory.”) Wisconsin courts have also treated candidate filing deadlines as mandatory because they pertain to private individuals and have a built-in penalty: the potential candidate’s name not appearing on the ballot. *State ex rel. Ahlgrimm v. State Elections Bd.*, 82 Wis. 2d 585, 592, 263 N.W.2d 152 (1978).

Considering these factors, the Court finds Wis. Stat. § 8.37 is directory. It is an election statute that falls within the broad rule of Wis. Stat. § 5.01(1) that Wisconsin election statutes are generally directory. It is not one of the excepted statutes in Wis. Stat. § 6.84(2) that are declared to be mandatory.

While Wis. Stat. § 8.37 involves a filing deadline, it can be distinguished from the mandatory candidate filing deadline courts have interpreted is imposed by Wis. Stat. § 8.15(1) in two ways. First, Wis. Stat. § 8.15(1) instructs incumbents and candidates – acting

as private people – to meet certain deadlines. Wis. Stat. § 8.15(1). (“If an incumbent fails to file nomination papers and a declaration of candidacy by 5 p.m. on June 1 preceding the partisan primary, all candidates for the office held by the incumbent, other than the incumbent, may file nomination papers no later than 72 hours after the latest time prescribed in this subsection.”) In contrast, Wis. Stat. § 8.37 “provides the mode and manner of intragovernmental filing of referenda.” Dkt. 123 at 33, *see* Wis. Stat. § 8.37. (“[A]ll proposed constitutional amendments and any other measure or question that is to be submitted to a vote of the people, [...] 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.”) This parallels one of the factors used to distinguish mandatory and directory statutes: instructions for a public officer are more likely directory, but those for a private person are more likely mandatory. *Nicolazzi*, 138 Wis. 2d at 199-200.

Second, Wis. Stat. § 8.37 can be distinguished from a candidate filing deadline because it contains no consequence for non-compliance. While Wis. Stat. § 8.15(1) contains language explicitly limiting appearance on the ballot to those candidates who filed before the deadline (“Only those candidates for whom nomination papers containing the necessary signatures acquired within the allotted time and filed before the deadline may have their names appear on the official partisan primary ballot.”), Wis. Stat. § 8.37 contains no similar language stating, hypothetically, that proposed referenda which fail to meet the 70-day deadline cannot appear on the ballot. This also parallels one of the factors used to

distinguish mandatory and directory statutes: when a statute contains a penalty for failure to observe it, the statute is more likely to be mandatory. *Nicolazzi*, 138 Wis. 2d at 199.

Plaintiffs argue that because Wis. Stat. § 8.37 is mandated by Article XII, sec. 1 of the Wisconsin Constitution, the Legislature is bound to strictly observe it. Dkt. 116 at 31. The two cases Plaintiffs cite illustrate the explicit constitutional commands in Article XII, sec. 1 of the Wisconsin Constitution that amendments must be submitted separately, *State v. Timme*, 54 Wis. 318, 11 N.W. 785, 790 (1882), and that the Legislature must vote on proposed amendments by “yeas and nays” in each house. *State ex rel. Owen v. Donald*, 160 Wis. 21, 151 N.W. 331, 342 (1915). But, while Wis. Stat. § 8.37 provides a procedure as mandated by the Wisconsin Constitution (“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”), the specific 70-day deadline is not explicitly commanded as part of the constitutionally mandated process. Wis. Const. art. XII, § 1. As such, a strict-construction rule for constitutional mandates does not apply here.

Together, the statutory language and structure indicate that Wis. Stat. § 8.37 is directory.

### **III. B. SUBSTANTIAL COMPLIANCE**

Once the Court has determined that Wis. Stat. § 8.37 is directory, it must review whether the potential two-day delay nonetheless constituted substantial compliance. The doctrine of substantial compliance means “actual compliance in respect to the substance essential to every reasonable objective of the statute” *Nicolazzi*, 138 Wis. 2d at 200. With

substantial compliance, a directory statute has requirements which may be technically violated even while complying with the substance of the statute. *Id.*

The broad rule in Wis. Stat. § 5.01(1) explicitly instructs that, even when there are technical violations, the will of the voters is vital to the substance of the election statutes. (“Except as otherwise provided, chs. 5 to 12 shall be construed to give effect to the will of the electors, if that can be ascertained from the proceedings, notwithstanding informality or failure to fully comply with some of their provisions.”) Wis. Stat. § 5.01(1), *see, e.g. Trump v. Biden*, 2020 WI 91, ¶ 38, 394 Wis. 2d 629, 951 N.W.2d 568 (Hagedorn, J., concurring). As such, when a directory election statute is technically violated, “[a]bsent connivance, fraud or undue influence,” substantial compliance is sufficient. *Hayden*, 105 Wis. 2d at 483. As long as the technical violations did not “impeach” the “integrity” of the election such that the will of the electors could not be ascertained, then substantial compliance occurred. *Id.* at 484.

In this case, there is no evidence that the potential two-day delay undermined any potential reasonable objectives of Wis. Stat. § 8.37 or the integrity of the election. Among the objectives of Wis. Stat. § 8.37 that the parties mentioned were to govern the transmission of proposed referenda to WEC (Dkt. 118 at 36-37), and to give additional time for one or more tasks: to certify and order the referendum questions (Dkt. 123 at 26-27), to publish the applicable notice of referenda (Dkt. 123 at 31), or to prepare separate and distribute ballots for referenda, dkt. 116 at 22. The Court notes that it would be reasonable to assume that another possible objective may be to fix a minimum time

between transmission of a referendum and its appearance on the ballot so as to give interested parties sufficient time to campaign for or against it.

However, looking at all of these objectives and the undisputed facts presented by the parties, there is no evidence in the record that there was any problem with WEC's certification and ordering of the referenda, with WEC's publication of the various notices, or with the work of MCBEC and county clerks to print and distribute the ballots. Dkt. 123 at 37. The potential two-day delay had no substantial effect on the campaigning. Dkt. 118 at 17, 20; Dkt. 124 at 8-10. Specifically, a representative for EXPO testified that "every day that we have the opportunity [to advocate against the Resolutions] is vital" but that "the harm in this case was that EXPO lost an entire year of opportunity for advocacy." Dkt. 124 at 8. Similarly, a representative for WISDOM testified that "[t]he fact that they sent it over late didn't harm us. The fact that it wound up on the ballot is what harmed us." Dkt. 124 at 10. The transmission of the referenda to WEC and WEC's memorandum to the county clerks and MCBEC substantially complied with every reasonable objective of Wis. Stat. § 8.37.

Turning to Wis. Stat. § 5.01(1)'s instruction to give effect to the will of the voters, here the will of the voters can be ascertained from the election results of the referenda. Dkt. 118 at 16. There is no claim of "connivance, fraud or undue influence" in the process of transmitting the referenda. *Hayden*, 105 Wis. 2d at 483. The potential two-day delay did not interfere with the process to such an extent that the election's "integrity" was "impeached," *id.* at 484, so there is no reason to not believe the results of the election. This also indicates that the potential two-day delay constituted substantial compliance.

Because there was substantial compliance with Wis. Stat. § 8.37, WEC's second ground for summary judgment and the Legislature's fifth ground for summary judgment succeed. The Plaintiffs' first claim, that WEC's memo and accompanying documents conveying the ballot questions to the county clerks were invalid, fails because this substantial compliance is sufficient to fulfill the statute's reasonable objectives. This results in the denial of Plaintiffs' other dependent claims.

The Legislature's fifth claim, that Plaintiffs are not entitled to the remedy of invalidating the referenda, is moot because Plaintiffs will not receive any remedy. This decision does not reach WEC's second argument or the Legislature's third argument regarding whether the deadline in Wis. Stat. § 8.37 concerns transmission from the Legislature to WEC or from WEC to MCBEC and the county clerks. Deciding which step in the transmission of referenda Wis. Stat. § 8.37's 70-day deadline applies to is unnecessary in this case because, even if Plaintiffs' interpretation of the statute is correct, WEC only missed the deadline by two days and this technical violation is still substantial compliance with the statute, as discussed above.

### **ORDER**

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

- Plaintiffs' motion for summary judgment is DENIED,
- Defendant's motion for summary judgment is GRANTED, and
- Defendant Intervenor's motion for summary judgment is DENIED as moot.