STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Case Nos. 22-AP-636, 22-AP-1030, 22-AP-1290, 22-AP-1423

AMERICAN OVERSIGHT,

Petitioner-Respondent,

v.

ASSEMBLY OFFICE OF SPECIAL COUNSEL,

Respondent-Appellant,

ROBIN VOS, EDWARD BLAZEL AND WISCONSIN STATE ASSEMBLY,

Respondents.

Dane County Circuit Court Case No. 21-CV-3007,
the Hon. Frank D. Remington, Presiding

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ISSUES PRESENTED

OSC's statement of the issues contains inappropriate argument and misrepresents the facts and applicable law. A more neutral and accurate phrasing of the issues is as follows:[1]

1. Did the circuit court have jurisdiction over the merits of the Open Records Law claims?

   Circuit Court Answer: Yes.

   How This Court Should Answer: Yes.

2. Did the circuit court correctly determine that OSC must disclose documents subject to the Open Records Law?

   Circuit Court Answer: Yes.

   How This Court Should Answer: Yes.

3. Did the circuit court act within its discretion in determining that OSC was in contempt for failing to produce all of the documents subject to a prior court order?

   Circuit Court Answer: Yes.

   How This Court Should Answer: Yes.

4. Did the circuit court act within its discretion to manage its case calendar in denying OSC's same-day motion to continue a contempt hearing?

   Circuit Court Answer: Yes.

   How This Court Should Answer: Yes.

[1] American Oversight separates OSC's arguments regarding jurisdiction and the applicability of the Open Records Law into two issues, as the legal questions and remedies attached to each issue differ.

5. Did the circuit court act within its discretion in declining to recuse when it determined it was not biased?
   Circuit Court Answer: Yes.
   How This Court Should Answer: Yes.
6. Did the circuit court act within its discretion in revoking the pro hac vice admissions of OSC's out-of-state attorneys based on their conduct during the proceedings?
   Circuit Court Answer: Yes.
   How This Court Should Answer: American Oversight does not take a position because this issue does not impact the merits of its claims.
7. Did the circuit court act within its discretion in finding it could sanction OSC's attorneys based on their conduct during the proceedings?
   Circuit Court Answer: Yes.
   How This Court Should Answer: American Oversight does not take a position because this issue does not impact the merits of its claims.

STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION

American Oversight does not believe oral argument is necessary because the briefs "fully present and meet the issues on appeal." Wis. Stat. § 809.22(2)(b). Indeed, given the extraordinary length of the briefs, they "fully develop the theories and legal authorities" such that "oral argument would be of such marginal value that it does not justify the additional expenditure of court time or cost to the litigant." *Id.* Moreover, as demonstrated below, OSC presents arguments that are "plainly contrary to relevant legal authority that appear to be sound and are not significantly challenged" and that are "on their face without merit." Wis. Stat. § 809.22(2)(a)(1), (2).

American Oversight agrees, however, that publication is warranted. Although this case should be decided "on the basis of controlling precedent," and should "involve no more than the application of well-settled rules of law to a recurring fact situation," Wis. Stat. § 809.23(1)(b)(1), (3), it will "[d]ecide[] a case of substantial and continuing public interest," Wis. Stat. § 809.23(1)(a)(5). The public interest in government transparency remains paramount, as does the public interest in the question of whether agencies of the government are bound by the rule of law. That reason alone is sufficient to warrant publication.

STATEMENT OF THE CASE

OSC's summary of the case contains significant omissions. It glosses over portions of the proceedings below that do not further OSC's arguments and ignores important context that would aid this Court in reviewing the issues on appeal under the appropriate standards. As such, American Oversight provides the following complete statement of the case.

I. NATURE OF THE CASE

This is a case to enforce the Open Records Law, Wis. Stat. §§ 19.31 *et seq.* It stems from the Office of Special Counsel's refusal to search for and disclose records responsive to open records requests submitted by American Oversight. The case later developed issues regarding contempt and recusal.

II. FACTUAL AND PROCEDURAL HISTORY

A. American Oversight's records requests and initial judicial proceedings.

On November 3, 2020, Wisconsin held a general election, in which over 3.2 million Wisconsinites cast ballots. In May 2021, despite overwhelming evidence that Wisconsin's 2020 election results were sound, Assembly Speaker Robin Vos announced that the Assembly planned to hire a team to investigate the election. In June 2021, the Assembly retained Michael Gableman to supervise the investigation at a cost of $11,000 per month, R-App. 304 (R. 36 at 3), and in August 2021, Mr. Gableman was appointed "special counsel to oversee an Office of Special Counsel." R-App. 292–301 (R. 103); *see also* R-App. 308–311 (R. 108).

During the first few months of its investigation, the Office of Special Counsel claimed to have "collected and reviewed thousands of

governmental and other documents" and "interviewed numerous witnesses." R. 135 at 7. American Oversight, a nonpartisan, nonprofit organization dedicated to ensuring government transparency at all levels, requested a significant number of those and related records from OSC under the Open Records Law.

In particular, on September 15, 2021, American Oversight requested from OSC contracts, invoices, plans, scope of work statements, and other documents related to the organization and structure of, and payment for, the investigation; interim or final reports, analyses, or work product prepared by Mr. Gableman or other contractors in the course of conducting the investigation; communications between Mr. Gableman and others working on the election investigation; and calendars for the investigators. *See* R. 8; R. 15; R. 17. On October 15, 2021, American Oversight also requested from OSC correspondence between OSC investigators and specified recipients. *See* R. 19. American Oversight sent follow-up requests to OSC on October 26, 2021, seeking substantively the same categories of records as the first requests, but for the time period from September 15, 2021, through the date of the search. *See* R. 21; R. 23; R. 25. American Oversight also requested OSC records from the Assembly, Speaker Vos, and Assembly Chief Clerk Edward Blazel (the three together, the "Legislative Respondents").

On December 4, 2021, nearly three months after its first request, American Oversight received an email from Zakory Niemierowicz, writing on behalf of OSC. The email, which was addressed to American Oversight and at least one additional addressee not associated with American Oversight, stated in full:

> Good afternoon,
>
> Attached are the open records for the Office of Special Counsel up until December 1st, 2021. Some documents that contain strategic information to our investigation will continue to be help [sic] until the conclusion of our investigation. If you have any questions or concerns please feel free to contact our office at coms@wispecialcounsel.org
>
> Very Respectfully,
> Zakory Niemierowicz
> WI Special Counsel

Supp-App. 5 (R. 27 at 1). The email included links to three PDFs totaling 114 pages. *See id.*; *see also* R. 28–32.

It was apparent that the 114-page production omitted records responsive to American Oversight's requests. For example, although OSC employed at least ten individuals in addition to Mr. Gableman, the production included almost no records reflecting communications between Mr. Gableman and those individuals. The production also included only minimal documents regarding the wide range of "evidence" OSC allegedly had obtained and only minimal documentation of the activities of OSC described in a report Mr. Gableman submitted to the Assembly Committee on Campaigns and Elections on Nov. 10, 2021. *See* R. 135 at 7. On December 9, 2021, American Oversight informed OSC by letter of these deficiencies and explained that withholding records because they "contain strategic information" is not a specific or valid justification for denying a records request under Wisconsin law. *See* R. 6. OSC did not respond to American Oversight's letter.

On December 20, 2021, American Oversight filed a Summons and Petition for Writ of Mandamus in Dane County Circuit Court. The Petition claimed OSC improperly denied American Oversight's records requests and improperly withheld responsive records in violation of the Open Records Law. R. 5. American Oversight asked the circuit court to compel

OSC to produce the improperly withheld records; to award American Oversight attorneys' fees and costs; and to award punitive damages. American Oversight brought similar claims against the Legislative Respondents. American Oversight also applied for an Alternative Writ to obtain immediate relief. R. 11. On December 21, 2021, the circuit court (Remington, J.) granted the Alternative Writ and ordered OSC either to immediately release the withheld records or to show cause that the records should not be released at a hearing scheduled for January 21, 2022. R-App. 5–6 (R. 42).

On January 18, 2022—three days before the show cause hearing and twenty-eight days after it was scheduled—OSC moved to continue the hearing, arguing that it was not served properly and that OSC's counsel was busy with other cases. R. 80. The circuit court denied the motion the next day. R. 82. The court reasoned that the Open Records Law requires prompt judicial attention to alleged violations; OSC's motion was untimely; the Legislative Respondents sought no continuance; and OSC did not properly raise the issue of service to the court. *See id.* The court permitted OSC's counsel to appear and argue by Zoom. R. 85.

On January 20, 2022, OSC moved to dismiss or quash the Petition. R. 98; R. 99. OSC argued that the circuit court lacked personal jurisdiction over OSC because it was not properly served. OSC also argued, for the first time, that the withheld records were exempt from disclosure under numerous theories, and that American Oversight improperly sought a declaratory judgment, a remedy not provided for in the Open Records Law. *See* R. 99.

OSC further asserted that the disclosure of 114 pages of records to American Oversight was "done in error" based on "erroneous advi[c]e"

OSC received from "separate counsel." *Id.* at 7. In arguing that no documents should have been produced, OSC relied heavily on Mr. Gableman's alleged status as an independent contractor and on a confidentiality provision in one of the contracts purportedly signed by Mr. Gableman and Speaker Vos. *See id.*

B. The January 21, 2022, show cause hearing.

The circuit court held the show cause hearing as scheduled on January 21, 2022. At the hearing, the court asked Attorney Bopp, counsel for OSC, whether Mr. Gableman had a current contract with Speaker Vos or the Assembly. Supp-App. 31:17–18 (R. 148 at 26). Attorney Bopp responded: "We understand him to have that," but conceded "the details honestly escape me." Supp-App. 31:19-21 (R. 148 at 26). Attorney Bopp could not locate the "executed contract continuing Mr. Gableman's appointment," but agreed to "obtain it from the Office of Special Counsel" and file it by the following Monday. Supp-App. 32:14–20 (R. 148 at 27). Later during the hearing, Attorney Bopp stated that in fact "[t]here may not be" "any document that relates to a possible extension of the contract." Supp-App. 54:19–21 (R. 148 at 49). Following the January 21 hearing, OSC filed a copy of an August 2021 amendment to Mr. Gableman's contract, which did not include a term beyond December 31, 2021. *See* R-App. 308–311 (R. 108).

Attorney Bopp reiterated OSC's position in its motion to quash and argued that the records responsive to American Oversight's requests should not be disclosed because the Open Records Law "doesn't apply to an investigation instituted by the legislature pursuant to their legislative authority," that the source of this authority was "in the constitution of Wisconsin," and that the Assembly required OSC to keep its records

confidential. Supp-App. 43:19–44:1 (R. 148 at 38–39); *see also* R. 99 at 8–14. After Attorney Bopp could point to no language to support this argument other than a contract between Speaker Vos and Mr. Gableman (which, as explained above, Attorney Bopp could not demonstrate was currently in effect), the court characterized Attorney Bopp's argument as "a misstatement and an exaggeration," and rejected it. Supp-App. 60:8–24 (R. 148 at 55).

The court noted that "answering th[e] question" of whether the presumption of disclosure under the Open Records Law is rebutted "usually requires preliminary in-camera inspection of the record by the Court." Supp-App. 58:2–7 (R. 148 at 53). It ordered that the records be filed with the court for in camera review by January 31, 2022. Supp-App. 47:25–48:3 (R. 148 at 42–43). The court rejected OSC's argument that the court should not even inspect the records in camera to determine whether they were exempt from disclosure. Regarding OSC's argument that the records at issue were automatically exempt from disclosure because they were part of an investigative file, the court observed that, according to a Court of Appeals opinion, "[a] prosecutor cannot shield documents subject to the Open Records Law by simply placing them in a prosecutorial file. It is in the nature of the documents, not their location, which determines their status under" the Open Records Law. Supp-App. 52:4–11 (R. 148 at 47).

The court also rejected OSC's argument that American Oversight requested a remedy—declaratory judgment—not provided for in the Open Records Law. The court observed that American Oversight did not in fact seek a declaratory judgment. Supp-App. 59:22–25 (R. 148 at 54); *see also* R. 5 at 17–21. The court ordered OSC to produce the records for in camera inspection in ten days' time, Supp-App. 45:24-46:2 (R. 148 at 40–41), and

scheduled a hearing for March 8, Supp-App. 79:12–13 (R. 148 at 74); *see also* R-App. 8–10 (R. 110) ("January 25 Order").

The court also addressed OSC's argument that OSC was not properly served because the individual who accepted service was not authorized to do so. The court scheduled a hearing at which Mr. Gableman, who had submitted an affidavit in support of OSC's position, and the individual who accepted service could testify so that the court could make a factual finding on that question. Supp-App. 14:7–18:3 (R. 148 at 9–13). The court stated, "If I conclude then that there's no personal jurisdiction, . . . I'll vacate the order requiring . . . production for in-camera review." Supp-App. 65:18–22 (R. 148 at 60). On January 26, 2022, counsel for OSC filed a letter to the court accepting service on behalf of OSC and requesting that the hearing on personal jurisdiction be removed from the court's calendar. R. 116.

C. OSC's repeated efforts to evade in camera review and disclosure of its records.

On January 27, 2022, OSC moved the circuit court to postpone its in camera review until after briefing was complete, citing a purported fear of criminal penalties under Wis. Stat. § 12.13 were OSC to produce the records to the court.[2] R. 118. The court denied OSC's motion the following day, noting that Section 12.13 applies to the Wisconsin Elections Commission, not OSC. R. 119 at 2–3. The court also observed that OSC "simply rehashe[d]" the arguments the court already rejected, and "d[id] not explain why an act demanded by the Order of the Court would or

[2] By OSC's argument, its December 2021 production would have already exposed it to criminal penalties. OSC did not attempt to reconcile its previous position with the position in its motion for reconsideration. *See* R. 118.

even could be criminally prosecuted." *Id.* at 3. The court cited an opinion of the Attorney General, Wis. Op. Att'y Gen. OAG-7-09 (2009), in which "[e]very one of OSC's latest arguments interpreting Wis. Stat. § 12.13(5) was carefully considered and soundly rejected." R. 119 at 3–4.

On January 31, 2022, the circuit court filed a letter permitting OSC to submit for in camera review hard copies of the responsive records it had withheld, after counsel for OSC had trouble e-filing them. R-App. 213 (R. 121). The court stated: "If I determine, after applying the [applicable] balancing test, some records should be released, I will then file those in the court record. Records that I determine should remain sealed will either be returned or preserved, but will not be part of the public file." *Id.*

On February 17, 2022, OSC moved the circuit court to permit it to argue *ex parte* that the records should be exempt from disclosure. R. 153. OSC claimed that *ex parte* argument was necessary to protect the confidentiality of records and because the court could not conduct a competent review of the records without "context" provided *ex parte* by OSC. *Id.* at 6. OSC also requested a 30-day stay of any order to disclose records. *Id.* at 7. American Oversight opposed this motion. *See* R. 155.

On February 24, 2022, American Oversight learned of a website, wielectionreview.org, where OSC had posted more than 2,700 pages of documents related to its investigation—at the same time that OSC maintained that all of its records were exempt from disclosure and that any disclosure of its records would significantly compromise its investigation. *See* R. 160 ¶ 3. American Oversight informed the circuit court of this website on February 28, 2022. R. 159.

D. The circuit court's March 2, 2022, decision and order.

On March 2, 2022, the circuit court issued a decision and order resolving numerous pending motions. R-App. 12–63 (R. 165). The court denied OSC's motion for *ex parte* argument, noting that OSC "cite[d] [no] authority in support of [its] argument nor any standard by which the argument should be evaluated." R-App. 20 (R. 165 at 9).

The court summarized the records it had reviewed in camera. The records included: "printed emails . . . [that] reflect the sort of mundane correspondence one would expect from any office." R-App. 47 (R. 165 at 36). An example was a brief exchange in which an interview was scheduled for "this evening when I am done with work." R-App. 48 (R. 165 at 37). Some of the withheld records were public records including "a notice of hearing" for a Dane County case, "a declaration filed in a Georgia federal district court," and "other, seemingly random court filings." R-App. 48–49 (R. 165 at 37–38). Other withheld records included OSC letters responding to various records requests; a published press release; contracts or contract offers; resumes and employment applications; "fifteen, one-sentence-long election complaints," such as "[d]eceased friend received two postcards stating thank you for voting," R-App. 51 (R. 165 at 40); a media and open records policy; written remarks; copies of public laws; "memos drafted by Wisconsin's Legislative Reference Bureau,"; and an article from the 2004 edition of Wisconsin Interest," R-App. 55 (R. 165 at 44).

Finding no reason for nondisclosure of the records it had reviewed in camera, the court ordered release of all responsive records to American Oversight. The court held that OSC had improperly denied American Oversight's requests and delayed disclosure of its records in violation of

the Open Records Law. R-App. 13 (R. 165 at 2). The court also held that OSC failed to fulfill its statutory obligation to "initially tell the requester all of their reasons for nondisclosure in order to 'provide a basis for review in the event of court action.'" R-App. 23 (R. 165 at 12) (citation omitted). In these circumstances, "'the writ of mandamus compelling disclosure must issue.'" R-App. 24 (R. 165 at 13) (citation omitted).

In requiring release of the withheld records, the court further held that the Assembly neither suspended the Open Records Law nor required OSC to keep all of its records confidential; no statute prevented disclosure of OSC's records; there were no common law reasons for nondisclosure; and public policy counseled disclosure. R-App. 27–39 (R. 165 at 16-28). The court held that American Oversight prevailed in substantial part against OSC, the Assembly, and Speaker Vos and was therefore entitled to reasonable attorney's fees under the Open Records Law. R-App. 62 (R. 165 at 51). The court imposed $1,000 in punitive damages on OSC and on the Assembly and Speaker Vos.[3] *Id.* The orders were stayed until after the court resolved OSC's pending motion for a stay. R-App. 63 (R. 165 at 52); *see also* R. 152; R. 153.

E. The March 8, 2022, hearing on OSC's motion to stay disclosure of records.

The court held a hearing on OSC's motion to stay the disclosure order on March 8, 2022. *See* Supp-App. 92–185 (R. 182). During the hearing, the court reiterated that OSC failed to establish that Mr. Gableman had

[3] In its Petition, American Oversight requested punitive damages, which a court may award in Open Records cases where it finds that an authority has arbitrarily or capriciously denied or delayed response to a records request. Wis. Stat. § 19.37(3). *See* R. 5 at 21. The circuit court's award of punitive damages after making the requisite finding was therefore not *sua sponte*, as OSC incorrectly contends. *See* OSC Br. at 31.

signed a current contract with Speaker Vos, despite the fact that there had "been plenty of occasion for him to make an affidavit or testimony to that fact." Supp-App. 117:23–24 (R. 182 at 26). The court also stated: "I have looked at every piece of paper frontwards and backwards, from top to bottom and bottom to top, and I can not find a single document in this record that if released would undermine Mr. Gableman's investigation." Supp-App. 145:7–11 (R. 182 at 54). Attorney Bopp responded: "And I know that . . . your intent is not to undermine the investigation. Your intent is to comply with the law, . . . as you see it." Supp-App. 153:4–6 (R. 182 at 62). The court denied OSC's motion to stay the disclosure order, R-App. 65–79 (R. 177), and unsealed records it had reviewed in camera that same day, *see* R. 142–47; R. 149; R. 161–64. The records totaled 761 pages.

F. American Oversight's review of OSC's records and OSC's non-compliance with the January 25 Order.

American Oversight reviewed the records promptly after they were made available on the docket. It was apparent that the 761-page production did not encompass all records responsive to American Oversight's requests. *See* Supp-App. 186–90 (R. 199); *see generally* R. 142–47; R. 149; R. 161–64. For instance, responsive records explicitly referenced in the produced documents were missing. Emails that referenced attachments were produced, but not the attachments themselves. Some records referenced work product related to subpoenas, reports, and other matters that was nowhere to be found in the production.

Additionally, OSC appeared not to have disclosed entire categories of records American Oversight requested. For example, no contracts for any OSC staff other than Mr. Gableman were disclosed. Nor did the production include any text messages, despite evidence that OSC staff communicated with each other through text messages. It also appeared

that the emails of only four of OSC's staff of ten were searched. In a letter dated March 25, 2022, American Oversight informed OSC of these deficiencies and requested the missing records. Supp-App. 186–90 (R. 199).

OSC responded to American Oversight's letter on April 8, 2022. Supp-App. 191–98 (R. 200). OSC denied failing to comply with the January 25 Order to disclose all records responsive to American Oversight's requests. OSC stated that its failure to disclose email attachments was inadvertent, but it admitted that it deleted the digital copies of the responsive electronic records before disclosure "as a matter of routine procedure." Supp-App. 192 (R. 200 at 2). OSC attached to its letter copies of attachments of which it had found printed versions. *See* Supp-App. 193 (R. 200 at 3). OSC stated that other categories of records identified by American Oversight as missing from the production simply did not exist. Supp-App. 193–94 (R. 200 at 3–4). OSC also asserted that it had lawfully deleted records prior to receiving American Oversight's requests, Supp-App. 194 (R. 200 at 4), and that it was exempt from compliance with Wisconsin's Public Records Retention Laws, including Wis. Stat. § 16.61(4), Supp-App. 194–95 (R. 200 at 4–5).[4]

G. American Oversight's *prima facie* case of contempt, OSC's failure to rebut, and related proceedings.

On April 20, 2022, after receiving OSC's letter, American Oversight moved the circuit court to reopen and modify its March 8 order to, among other things, (1) require OSC to renew its search for responsive records and (2) hold OSC in contempt for failure to comply with the January 25

[4] OSC's duty to comply with the Public Records Retention Laws is the subject of a separate, ongoing lawsuit in Dane County Circuit Court, No. 22-cv-1583.

Order. R. 194; R. 196.[5] American Oversight also moved the court for a temporary injunction requiring OSC to preserve public records in compliance with the Public Records Retention Laws. R. 195; R. 197. On April 21, 2022, the court issued an order preventing OSC from destroying any record that might be responsive to any of American Oversight's requests. R. 201.

The circuit court held a scheduling conference on April 26, 2022. *See* Supp-App. 199–227 (R. 223). At the conference, the court concluded that American Oversight made a *prima facie* showing of contempt by pointing to OSC's letter in which its statements demonstrated that it failed to disclose all records responsive to American Oversight's requests. Supp-App. 206:23–207:7 (R. 223 at 8–9). During the hearing, Attorney Bopp continually spoke over the court and did not stop speaking despite the court repeatedly requesting that he pause. *See* Supp-App. 215:2–8 (R. 223 at 17).[6] In response, the court temporarily muted Attorney Bopp's microphone to "maintain some decorum and control over this hearing," and asked him not to "speak over the top of me." Supp-App. 215:9–11 (R. 223 at 17).

OSC opposed American Oversight's motions requesting orders of contempt and for a temporary injunction requiring it to refrain from deleting records. *See* R. 225; R. 226.

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[5] As discussed more fully on pages 75–77 below, American Oversight's motion asked the circuit court to initiate contempt proceedings and hold OSC in contempt. The court therefore did not *sua sponte* convert American Oversight's motion into one of contempt, as OSC wrongly contends. *See* OSC Br. at 27.

[6] *See also* https://wiseye.org/2022/04/26/dane-county-circuit-court-scheduling-hearing-american-oversight-vs-assembly-office-of-special-counsel-et-al/ at 20:00–21:20 (last visited Mar. 28, 2023).

The court scheduled a hearing on the motions for June 10, 2022, and ordered OSC to designate any witnesses by May 10, 2022. *See* R. 209; Supp-App. 221:12–224:3 (R. 223 at 23–26)

OSC filed its witness list on May 10, 2022, designating OSC staff member Mr. Niemierowicz as its sole witness. *See* R. 224. American Oversight noticed Mr. Niemierowicz's deposition on May 12, 2022. R. 300 ¶ 3. In briefing filed on May 27, 2022, American Oversight expressed its intent to seek Mr. Gableman's testimony if Mr. Niemierowicz could not provide sufficient answers regarding OSC's intent to comply with the January 25 Order. *See* R. 253 at 4 n.3.

The deposition of Mr. Niemierowicz was originally scheduled for June 1, 2022, but the day before, counsel for OSC stated that the deposition could not proceed on June 1 due to illness, and the deposition was rescheduled to June 6. R. 300 ¶ 4.

In light of this delay, American Oversight obtained a subpoena on June 1 requiring Mr. Gableman to give testimony at the hearing on June 10, *see* R. 256; the subpoena was served on Mr. Gableman on June 5, after OSC's counsel did not respond to a request to accept service. R. 300 ¶ 5.

Mr. Niemierowicz's deposition testimony on June 6, 2022, confirmed the need for Mr. Gableman to testify. Mr. Niemierowicz's testimony indicated that he took direction from Mr. Gableman, who had ultimate authority over OSC's records. *See, e.g.*, Supp-App. 331 at 191:8–192:2 (R. 317 at 49). OSC nevertheless moved to quash the subpoena for Mr. Gableman's testimony. R. 255. American Oversight opposed the motion to quash, arguing that it had not needed to name Mr. Gableman as a witness according to the Court's order; that he could be considered a rebuttal witness in response to Mr. Niemierowicz's testimony; and that Mr.

Gableman's testimony was necessary to support American Oversight's motion to modify. *See generally* R. 299.

The circuit court held a hearing on OSC's motion to quash the subpoena on June 8, 2022. *See* Supp-App. 228–82 (R. 314). The court denied OSC's motion to quash because the subpoena was timely served; American Oversight had foreshadowed the potential need for Mr. Gableman's testimony so the subpoena came as no surprise; the subpoena was not prejudicial to either OSC or Mr. Gableman; Mr. Gableman was the undisputed custodian of OSC's records at the times of American Oversight's requests and OSC's response; Mr. Niemierowicz's testimony was insufficient to answer the question of whether OSC was in contempt of court; and Mr. Gableman had the requisite knowledge to answer that question. Supp-App. 269:5–272:8 (R. 314 at 42–45). The circuit court also confirmed that it intended the May 10 deadline to notice witnesses to apply only to OSC, and that "there can be rebuttal witnesses designated at a late date if the need requires after a party takes a deposition." Supp-App. 269:13–19 (R. 314 at 42).

At the hearing, counsel for OSC also conceded that OSC "did not comply with the [c]ourt's January order at the time the documents were first produced." Supp-App. 244:7–11 (R. 314 at 17).

It also became apparent during the June 8 hearing that a conflict of interest might have emerged between OSC and Mr. Niemierowicz. Counsel for OSC agreed with the court that OSC was "putting the responsibility for the question [of violation of the court's order] directly on Mr. Niemierowicz's shoulders." Supp-App. 273:20–25 (R. 314 at 46). Because the interests of Mr. Niemierowicz and OSC may have diverged, and "[u]nderstanding that one remedial sanction [for contempt] can be

incarceration," the court "wonder[ed] whether Mr. Niemierowicz has been apprised of the possibility that he may need to seek independent legal counsel." Supp-App. 274:4–12 (R. 314 at 47).

The court emphasized that it was "not suggesting there's a conflict of interest" or "that anyone has done anything wrong or that anyone has failed to do anything." Supp-App. 274:13 (R. 314 at 47), Supp-App. 275:14–15 (R. 314 at 48). The court explained that its comments stemmed from the fact that contempt, unlike most other orders that may issue in a civil case, could theoretically result in incarceration. Thus, an abundance of caution was warranted, even if the possibility of incarceration being imposed as a sanction was remote:

> I am saying that I also proceed very carefully and extremely cautiously when the question before the Court [is] contempt, and where one of the sanctions that could be imposed is confinement in the Dane County Jail. I just raise the issue because I don't believe anyone is deserving – certainly not Mr. Niemierowicz's interest by having this occur to him spontaneously on Friday's hearing.
>
> I don't know that it's been discussed. It might not have occurred, but I do think a discussion may be warranted[.]

Supp-App. 274:14–22 (R. 314 at 47). The court reiterated that its comments were aimed at its belief that it "would be appropriate to have a discussion over whether a potential conflict exists [and] [i]f so, whether there's a knowing and written waiver or other discussion." Supp-App. 275:10–13 (R. 314 at 48); *see also id.* at 17–20. After Attorney Dean stated that incarceration for contempt "would be incomprehensibly disproportionate," the court remarked:

> Well, you may entirely be correct; but my experience, Mr. Dean, in this serious matter is to afford all the individuals who play a role in a disobedience to the Court advance notice of the possibilities that could occur so they can prepare accordingly. . . . I do believe it's a discussion that should be had so we don't have a problem on Friday if it were to come at that late date.

Supp-App. 275:21–276:14 (R. 314 at 48–49).

H. The June 10, 2022, contempt hearing.

On June 10, 2022, the circuit court held a hearing on American Oversight's motion for contempt. *See* Supp-App. 389-440 (R. 322); Supp-App. 441–44 (R. 325). At the hearing, counsel for OSC informed the court and American Oversight that Mr. Niemierowicz had obtained separate counsel and decided not to appear at the hearing, "in light of the Court's comments" on June 8 regarding a potential conflict of interest between Mr. Niemierowicz and OSC. Supp-App. 392:9–10, 19–20 (R. 322 at 4). OSC orally requested an adjournment of at least 90 days. Supp-App. 393:14–15 (R. 322 at 5). Counsel for OSC also stated that Mr. Gableman was "in the process of attempting to locate someone to represent him" and did not want to testify. Supp-App. 393:12–14 (R. 322 at 5). The court denied the request to adjourn the hearing because it was untimely; "[n]one of the things that [the court] said to Mr. Niemierowicz should have been a surprise to him"; "the public . . . ha[s] the right to see records"; and the court already denied OSC's motion to quash the subpoena of Mr. Gableman's testimony. Supp-App. 403:23–405:2 (R. 322 at 15–17).

Shortly after Mr. Gableman took the stand, he began speaking about unrelated matters, including an issue in a separate case and the manner in which he was served the subpoena, even though there was no question pending and these statements were unrelated to any question asked. *See* Supp-App. 421:11–422:5 (R. 322 at 33–34). Mr. Gableman accused the circuit court judge of "abandon[ing] his role as a neutral magistrate and . . . acting as an advocate." Supp-App. 420:21–23 (R. 322 at 33). Although Mr. Gableman said he made these statements "on the advice of my counsel,"

id., he asserted shortly thereafter that he had no counsel, Supp-App. 423:1–4 (R. 322 at 35).

The court reminded Mr. Gableman of the behavior expected of a witness in the courtroom. Supp-App. 422:18–24 (R. 322 at 34). Mr. Gableman responded with such exclamations as "You want to put me in jail, Judge Remington? I'm not gonna be railroaded," Supp-App. 423:17–19 (R. 322 at 35), and repeatedly interrupted the court. Mr. Gableman then refused to answer any further questions. Supp-App. 424:1–425:2 (R. 322 at 36–37).[7]

Then, during a recess in the hearing, Mr. Gableman made disrespectful comments about the court and misogynistic comments about counsel for American Oversight that were captured by the court reporter:

> MR. GABLEMAN: This is his -- you know, this is his time to shine.
> MR. STADLER: Yeah.
> MR. GABLEMAN: You know, this is his -- -- what passes for success for him.
> MR. STADLER: He --
> (Audio cuts out.)
> MR. GABLEMAN: Finally, somebody's -- you know what? I enjoyed it when people interrupted me, because I don't need people to tell me how right I am. I need – I need them to tell me when I'm wrong or if I'm wrong.
> MR. STADLER: Let me figure out how to get around it.
> MR. GABLEMAN: But -- but that's where his advocacy comes in. He's not interested in right or wrong.
> MR. STADLER: He's Westerberg with a beard.
> MR. GABLEMAN: Yes. You work as --
> *That's what you were saying, right, Ms. Westerberg?*
> *Oh, yes.*
> *Why don't you come right up to the bench, Ms. Westerberg? Why -- why don't you come back into my chambers so you can dictate what --*
> (Mr. Stadler taps the microphone.)

[7] Mr. Gableman's tone and demeanor is apparent in the videorecording of the hearing. *See* https://wiseye.org/2022/06/10/dane-county-circuit-court-oral-argument-american-oversight-vs-assembly-office-of-special-counsel-et-al-2/ at 44:35–49:05 (last visited Mar. 28, 2023).

> MR. GABLEMAN: I know. I don't care. It's the truth. When I had a courtroom, I never acted like that. Jesus. I -- I hope I never made a litigant feel like he has. I hope. I hope I never did. I don't believe I did. I tried. I tried to be fair. Not like this.

Supp-App. 442:2–443:5 (R. 325 at 2–3).[8]

I. The June 15 Contempt Order and subsequent proceedings.

On June 15, 2022, the circuit court issued a decision and order holding OSC in contempt for failing to comply with its January 25 Order. R-App. 83–107 (R. 327). The court found that American Oversight made a *prima facie* showing of contempt, which OSC failed to rebut at the hearing. R-App. 84 (R. 327 at 2). The court imposed remedial sanctions of $2,000 per day until OSC purged the contempt conditions, which included submitting a sworn affidavit showing, to a reasonable degree of certainty, that Mr. Gableman searched for and produced records responsive to American Oversight's requests; made reasonable efforts to search for lost or deleted records; and provided a description of all withheld records. R-App. 107 (R. 327 at 25). The order also summarized Mr. Gableman's behavior at the June 10 hearing and concluded that he violated numerous rules of professional responsibility. R-App. 100–07 (R. 327 at 18-25); *see also* R-App. 105 & n.12 (R. 327 at 23) (noting the recent assassination of Hon. John Roemer "by a person he had sentenced" and that "[l]awyers who appear in court should help protect the court system even if they have a problem

[8] There has been some dispute regarding the recess exchange, the audio for which is available at https://www.jsonline.com/story/news/politics/2022/06/15/gablemans-misogynistic-comments-should-penalized-judge-says/7635525001/ (last visited Mar. 28, 2023). On June 14, 2022, after learning of public reports regarding the recess exchange, Attorney Stadler, counsel for the Legislative Respondents, denied that it was he who called the court "Westerberg with a beard," and denied "hear[ing] those words," Supp-App. 446 (R. 326 at 2). Attorney Stadler referred to the comment as "unprofessional," and stated he was "completely offended that anyone would attribute such a comment to [him]." *Id.*

with the judge"). The court instructed the Dane County Clerk of Courts to forward the decision and hearing transcripts to the Wisconsin Office of Lawyer Regulation. R-App. 107 (R. 327 at 25).

On June 17, 2022, OSC moved to stay imposition of the contempt sanctions pending appeal. R. 330. American Oversight opposed this motion. R. 372. On June 21, 2022, the circuit court noticed a hearing on OSC's motion to take place on July 13, 2022. R. 337. On June 28, 2022, OSC filed a letter requesting the July 13 hearing be continued and attaching an affidavit of Mr. Gableman that OSC argued satisfied the purge conditions. R. 349; R. 350. American Oversight opposed OSC's request, stating that OSC did not adequately address the purge conditions in the court's order. *See* R. 352.

On July 1, 2022, OSC filed a motion once again seeking to continue the July 13 hearing, in part due to counsel's unavailability, and again arguing that Mr. Gableman's affidavit purged the contempt conditions. R. 358. On July 5, 2022, the court rescheduled the hearing, at which the parties would also be heard on whether OSC had purged the contempt conditions, to July 21, 2022. R. 361.

On July 15, 2022, OSC moved for Judge Remington to recuse himself. R. 376; R. 377. The primary basis of the motion was the court's comments during the June 8 hearing regarding a potential conflict of interest between Mr. Niemierowicz and OSC, which OSC characterized as a "threat." *See* R. 377 at 1. OSC also pointed to the court's denial of OSC's same-day motion to continue the contempt hearing, and the court's finding that OSC was in contempt after OSC admittedly "offer[ed] no testimony," as evidence of the court's actual or apparent bias. *Id.* The recusal motion further relied on OSC's position that "the events of June 8-

10 were merely the coup de grâce in a series of events" that OSC claimed demonstrated Judge Remington's bias. *Id.* at 2.

On July 18, 2022, the court denied OSC's motion for recusal, observing that "OSC does nothing more than summarize the hearings and decisions which have resulted, for the most part, in adverse rulings." R-App. 112 (R. 379 at 4). The court further explained: "I have determined that I can and have been acting in an impartial manner in this case. I will continue to do so in the future." R-App. 110 (R. 379 at 2); *see also* R-App. 112–13 (R. 379 at 4–5).

After denying OSC's seventh motion for a continuance, the circuit court held the hearing, as rescheduled, on July 21, 2022, and permitted OSC's counsel, Attorney Bopp, to appear by telephone. *See* R. 385; Supp-App. 447–90 (R. 389). During the hearing Attorney Bopp characterized the court's previous statements regarding a potential conflict of interest between OSC and Mr. Niemierowicz as a "threat" and talked over the court. Supp-App. 478:17–24 (R. 389 at 32). Attorney Bopp also objected to the court's having rescheduled the hearing on OSC's motion to stay. Supp-App. 484:9–19 (R. 389 at 38). The court explained that it was "acting pursuant to the discretion to control the mode, operation and scheduling of the Court's calendar," and noted that the hearing had been rescheduled at the request of OSC due to its counsel's unavailability. Supp-App. 485:3–23 (R. 389 at 39).

On August 5, 2022, OSC filed a supplemental affidavit of Mr. Gableman regarding OSC's search for and production of records. R. 409.

On August 16, 2022, the court held a hearing on whether OSC had purged its contempt. *See* R. 438. At the hearing, Attorney Bopp represented

that OSC had "put on the internet every single document that they have." R. 438 at 10:23–25.

The circuit court issued three decisions on August 17, 2022. First, it issued a decision and order concluding OSC had purged its contempt, finding that the supplemental affidavit of Mr. Gableman showed to a "reasonable degree of certainty" that OSC had complied with the January 25 Order. R-App. 207 (R. 424 at 2). Second, the court issued a decision and order denying OSC's motion to stay imposition of sanctions as moot. R-App. 210–11 (R. 425). Third, the court issued a supplement to its July 18, 2022, decision denying OSC's motion for recusal. R-App. 115–204 (R. 423). The supplement set out a detailed factual and procedural history of the case, R-App. 117–94 (R. 423 at 3–80), and reaffirmed and expounded upon the court's prior decision not to recuse, R-App. 195–200 (R. 423 at 81-86). The supplement also revoked the pro hac vice admission of five out-of-state attorneys for OSC, citing the "phony legal principles" and "invented facts" in their briefing, lack of candor to the tribunal, and disrespectful courtroom behavior. R-App. 200–04 (R. 423 at 86–90).[9]

[9] OSC asserts that the circuit court revoked OSC attorneys' pro hac vice admissions "principally for filing the Recusal Motion." OSC Br. at 36. The portion of the supplemental decision on recusal that OSC cites—R-App. 200–04 (R. 423 at 86–90)—does not support this contention. The circuit court made clear in its decision that OSC's attorneys' sanctionable conduct included filing a brief that "applie[d] phony legal principles to invented facts," R-App. 200 (R. 423 at 86), and the recusal brief was "consistent with earlier briefing and oral argument," all of which "demonstrate[d] unwillingness to abide [by] the rules of professional conduct." R-App. 201 (R. 423 at 87). This was just one of multiple factors the court considered, including the lawyers' "demonstrated unwillingness to abide by the rules of decorum." *Id.*

OSC appealed several of the circuit court's orders in piecemeal fashion; the appeals were consolidated in this proceeding. *See* Court Order of Sept. 1, 2022; Court Order of Dec. 14, 2022.[10]

[10] OSC has also appealed the circuit court's rulings on attorneys' fees and costs. That appeal, Appeal No. 22-AP-1516, is proceeding separately and is in abeyance pending resolution of this appeal. *See* Court Order of Dec. 14, 2022.

ARGUMENT

The Wisconsin Open Records Law, Wis. Stat. § 19.31 *et seq.*, was created "[i]n recognition of the fact that a representative government is dependent upon an informed electorate." Accordingly, it is "the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them." *Id.* The Supreme Court has endorsed this approach. It has explained that, "[i]f Wisconsin were not known as the Dairy State it could be known, and rightfully so, as the Sunshine State. All branches of Wisconsin government have, over many years, kept a strong commitment to transparent government." *Schill v. Wis. Rapids Sch. Dist.*, 2010 WI 86, ¶ 1, 327 Wis. 2d 572, 786 N.W.2d 177.

Applying these well-established principles, the circuit court determined that the Office of Special Counsel—by its own account an "authority" under the Open Records Law, Wis. Stat. § 19.32(1)—must produce documents upon public request. Despite the fact that OSC has by this time either produced, or pledged to publish on its readily accessible website, every single document in its possession, OSC argues to this Court that this constitutes the "exceptional case" in which the public should be denied access to its records. *See* Wis. Stat. § 19.31. OSC's explanations lack merit.

OSC also argues that the circuit court abused its discretion in declining to grant a same-day motion for a continuance and in holding OSC in contempt for failing to produce the documents the court had ordered OSC to produce. OSC further argues the court erroneously failed to recuse after issuing decisions unfavorable to OSC. These complaints go to the heart of the circuit court's discretion to manage its docket and its

courtroom, and OSC provides no basis to overturn the circuit court's sound exercises of that discretion.

Finally, OSC's attorneys raise, in their own name, several arguments related to their own conduct. Questions regarding OSC's attorneys' conduct, professional choices, and reputations do not in any way impact the merits of this case. American Oversight does not take a position on those issues.

I. THE CIRCUIT COURT HAD JURISDICTION OVER AMERICAN OVERSIGHT'S CLAIMS.

OSC contends that the circuit court lacked jurisdiction over this matter. *See* OSC Br. at 38–40. In doing so, OSC ignores both the broad subject matter jurisdiction afforded to circuit courts in Wisconsin and the court's jurisdiction to assess violations of the law.

A. Circuit courts always have subject matter jurisdiction.

The circuit court properly noted that it had subject matter jurisdiction because, as the Wisconsin Supreme Court has observed, "a circuit court is never without" it. *Vill. of Trempealeau v. Mikrut*, 2004 WI 79, ¶ 1, 273 Wis. 2d 76, 681 N.W.2d 190; *see also* Wis. Const. art. VII, § 8; R-App. 23 (R. 165 at 12). Ignoring that precept, OSC now argues that the circuit court lacked subject matter jurisdiction to consider American Oversight's claims.[11] The question of whether a court had subject matter

[11] OSC complains only that the circuit court "lacked jurisdiction," and fails to specify whether it refers to personal or subject matter jurisdiction. OSC Br. at 38. American Oversight infers OSC is arguing the latter, given OSC's focus on separation of powers rather than service. To the extent OSC did intend to sweep personal jurisdiction into its brief here, OSC has waived that argument, having failed to develop it in any meaningful way. *See Indus. Risk Insurers v. Am. Eng'g Testing, Inc.*, 2009 WI App 62, ¶ 25, 318 Wis. 2d 148, 769 N.W.2d 82 ("Arguments unsupported by legal authority will not be considered . . . ."). Moreover, as the circuit court noted, by accepting service of the Summons and Petition, OSC mooted any such argument. *See* R-App. 23 (R. 165 at 12); *see also Lees v. Dep't of Indus., Labor & Human Rels.*, 49 Wis. 2d 491, 500, 182 N.W.2d 245 (1971)

jurisdiction is a matter of law that is subject to de novo review. *See Van Deurzen v. Yamaha Motor Corp. USA*, 2004 WI App 194, ¶ 9, 276 Wis. 2d 815, 688 N.W.2d 777.

The established principle that circuit courts are never without subject matter jurisdiction is, by itself, sufficient to resolve this issue. The Supreme Court of Wisconsin recognized as much in a previous Open Records case in which a labor union contended that the courts lacked jurisdiction to review whether the legislature's ratification of a collective bargaining agreement that purported to exempt certain employment records from disclosure was sufficient to alter the Open Records Law. *Milw. J. Sentinel v. Dep't of Admin.*, 2009 WI 79, ¶ 3, 319 Wis. 2d 439, 768 N.W.2d 700. The Court rejected the challenge to subject matter jurisdiction and held that it "ha[s] jurisdiction to interpret the Wisconsin Constitution and the Wisconsin Statutes." *Id.* ¶ 20; *see also Teague v. Schimel*, 2017 WI 56, ¶ 72 & n.35, 375 Wis. 2d 458, 896 N.W.2d 286 (noting courts cannot "abjure [thei]r core judicial function" by permitting the legislature to "'weigh and consider'" an individual injury against "'the need for public access to this information'") (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.")).[12]

(explaining that filing an answer (as OSC did, R. 140) is sufficient to waive personal jurisdiction objections).

[12] If this Court were to construe OSC's argument as one challenging the circuit court's competency, it would fare no better. "[C]hallenges to the circuit court's competency are waived if not raised in the circuit court." *Mikrut*, 273 Wis. 2d 76, ¶ 30. Although OSC did include a single sentence in its answer disputing subject matter jurisdiction, R. 140 at 8, and a single line disputing subject matter jurisdiction in its amended motion to dismiss/quash, R. 105, OSC failed to develop that argument, never framed it in terms of competency, and did not raise it at all, in either flavor, in the briefing leading up to the rulings OSC now challenges, *see* R. 99. OSC has therefore waived any ability to raise

B. The separation of powers does not prevent the courts from evaluating violations of the law.

The separation of powers arguments raised by OSC do not change the result here. OSC suggests that for the judiciary to pass judgment on OSC's actions would interfere with the operations of a co-equal branch. Specifically, OSC claims that the circuit court "interfere[d] in its investigations." OSC Br. at 38. But the question this case poses—"has the public officer performed a duty required of him by law?"—"is always judicial, never political." *State v. Houser*, 122 Wis. 534, 100 N.W. 964, 983 (1904) (Winslow, J., concurring).

Beyond that, in this instance, far from "second guess[ing] the Assembly," OSC Br. at 38, the court gave effect to the legislative branch's considered judgment. The Open Records Law is itself an exercise of legislative authority meriting respect from the judicial branch. The legislature has decided to subject itself to the Open Records Law's requirements by defining "authority" to include "the assembly or senate," as well as other public officers and bodies. Wis. Stat. § 19.32(1); *see also* Wis. Stat. § 19.37(1) (authorizing mandamus suits against an "authority"). Hence, numerous cases have been filed against legislators, legislative staff, and the assembly or senate, and adjudicated by the courts with no concerns about jurisdiction. This is true even where the defendant is conducting arguably "legislative" activities, such as communicating with constituents, *John K. MacIver Inst. for Pub. Pol'y, Inc. v. Erpenbach*, 2014 WI App 49, 354 Wis. 2d 61, 848 N.W.2d 862, considering changes to laws governing state waters, *Lueders v. Krug*, 2019 WI App 36, 388 Wis. 2d 147,

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competency now. OSC has also failed to proffer any "extraordinary circumstances" that would permit this Court to disregard its waiver. *Id.*

931 N.W.2d 898, or most recently, investigating misconduct by legislators, *Wis. State Journal v. Blazel*, No. 21AP1196, 2023 WL 2416209, unpublished slip op. (Ct. App. Mar. 9, 2023) (recommended for publication).[13]

Moreover, the Assembly is properly understood to be legislating (or contracting) with the knowledge of the law as it exists. *See Wis. Carry, Inc. v. City of Madison*, 2017 WI 19, ¶ 62, 373 Wis. 2d 543, 892 N.W.2d 233. Thus, absent a clear legislative directive to the contrary, courts presume the extant law applies. *See Czapinski v. St. Francis Hosp., Inc.*, 2000 WI 80, ¶ 22, 236 Wis. 2d 316, 613 N.W.2d 120 ("[A] statute's construction will stand unless the legislature explicitly changes the law."). The Assembly (with the Governor) could have enacted an exception to the Open Records Law, exempting OSC from compliance. *See, e.g.*, Wis. Stat. § 19.36(13) (exempting personal financial information from disclosure). It did not do that, and the appropriate result as a matter of separation of powers is to enforce that decision.

No contract between the Speaker and a private entity, even if valid, can trump that statutory choice. Indeed, the Wisconsin Supreme Court has explicitly rejected similar arguments in the past. *See Milw. J. Sentinel*, 319 Wis. 2d 439, ¶ 41 (concluding that collective bargaining agreement ratified by the legislature was insufficient to amend the Open Records Law). OSC asserts that "the issue was not whether the Assembly/OSC violated the Public Records Law, but whether the Assembly/OSC's manner of conducting its investigation violated the Constitution," and posits that

[13] Because the publication decision for this case is still pending, American Oversight includes a copy of the decision in its Supplemental Appendix at Supp-App. 500. It is also available at https://www.wicourts.gov/ca/opinion/DisplayDocument.pdf?content=pdf&seqNo=631101.

courts can intervene only if there is a constitutional violation. OSC Br. at 39. OSC relies on *State* ex rel. *LaFollette v. Stitt*, 114 Wis. 2d 358, 365, 338 N.W.2d 684 (1983), to support its assertion, but that ruling directed the courts to "inquire into whether the legislature has complied with legislatively prescribed formalities in enacting a statute." *Id.* at 364. In other words, the Supreme Court declined to review only the procedural validity of the enactment of a statute—the core legislative function—but did not suggest that substantive compliance with a statute is an issue beyond the ken of the courts.

Another case on which OSC relies, *State* ex rel. *Ozanne v. Fitzgerald*, 2011 WI 43, 334 Wis. 2d 70, 798 N.W.2d 436, is similarly limited to precluding review of the procedure by which a statute was adopted. The Court declined to review claims that a statutory "Act is invalid because the legislature did not follow certain notice provisions of the Open Meetings Law" for a joint committee on conference. *Id.* ¶ 13. Quoting *Stitt*, the *Ozanne* Court explained that "'this court will not determine whether internal operating rules or procedural statutes have been complied with by the legislature in the course of its enactments.'" *Id.* (quoting *Stitt*, 114 Wis. 2d at 364).

Thus, neither *Stitt* nor *Ozanne* precludes review of substantive legal compliance with a statute passed by the legislature itself (and which the legislature chose to apply to itself). Indeed, the *Stitt* Court distinguished its holding from that in *State* ex rel. *Lynch v. Conta*, 71 Wis. 2d 662, 239 N.W.2d 313 (1976), which addressed "whether certain legislators had violated the open meeting law and whether they could be subject to forfeitures for such violations." *Stitt*, 114 Wis. 2d at 369. As the *Lynch* Court explained, there was no separation of powers reason to abstain from ruling because that

"case did not present the question of the *voidability of legislative actions* taken in violation of the open meeting law." *Id.* (emphasis added). The same distinction applies here.

The other cases on which OSC relies are similarly inapposite. OSC cites *League of Women Voters of Wis. v. Evers*, 2019 WI 75, 387 Wis. 2d 511, 929 N.W.2d 209, but there, petitioners argued that legislation passed during an extraordinary session must be struck down because the procedure of the extraordinary session itself was unconstitutional. As OSC notes, the Supreme Court concluded that "[t]he *process* by which laws are enacted . . . falls beyond the power of judicial review" and so "the judicial power cannot . . . supervise the making of laws." OSC Br. at 38–39 (emphasis added) (quoting *League of Women Voters*, 387 Wis. 2d 511, ¶¶ 35–36). No one here is asking the judicial branch to "enjoin the legislative process," or supervise how laws are made, *League of Women Voters*, 387 Wis. 2d 511, ¶ 36; American Oversight seeks only enforcement of the laws validly passed by the legislature itself.

Perhaps recognizing that OSC's authorities apply only to challenges to the process of legislative enactment—not to OSC's refusal to comply with the Open Records Law—OSC argues broadly that courts "lack all constitutional prerogative to evaluate the manner, process, or scope of the Assembly's investigation." OSC Br. at 39. OSC relies on *In re Falvey*, 7 Wis. 630 (1858), for that sweeping proposition. That case explains that "[t]he policy, the expediency of exercising the power, and the manner of conducting the investigation, rests . . . entirely in the sound discretion of the legislature," which "has the power of choosing how the investigation shall be had; whether by a committee of one house, or by a committee of each house, acting separately, or by committees acting jointly." *Id.* at 638.

As this passage makes clear, the *Falvey* Court was addressing whether the legislature had the constitutional authority to conduct certain investigations and—finding it had—what limits pertained to that authority. *Id.* at 634–38.

The *Falvey* Court's holding is inapplicable to the matter before this Court. The fact that the Assembly may determine how to investigate something—through a joint committee of legislators, as in *Falvey*, or by creating an Office of Special Counsel, as here—has nothing to do with whether the Open Records Law applies to the records received and created during the course of that investigation.

OSC's complaint that, by finding OSC in violation of the Open Records Law for failing to release certain records subject to that law and requested by American Oversight, the circuit court somehow "second guess[ed] the Assembly in determining how to conduct its investigation, including its confidential treatment of investigation documents," OSC Br. at 38, thus rings hollow. OSC fails to demonstrate how the production of documents would in any way affect the Assembly's "determin[ation of] how to conduct its investigation," *id.*, particularly in light of the fact that those documents were made and remain public, without any stated impact on the investigation. American Oversight does not contest the manner by which the Assembly determined to investigate (i.e., through OSC). American Oversight does not complain about—and the circuit court did not address—OSC's selection of witnesses, its timetable, its staffing, whom it subpoenaed, what kinds of reports it drafted, or the scope or subject of the investigation. American Oversight simply requested that—*following* the decisions OSC has made on those questions—OSC produce its records in compliance with the State's policy of sunshine and good governance, as

embodied in the Open Records Law. To the extent OSC believed that any particular request for a particular document would interfere with its investigation, it retained every right to raise that concern as part of the public-interest balancing test exemption from disclosure. As detailed below, OSC did not do so, and could not have succeeded even if it had.

II. THE CIRCUIT COURT CORRECTLY DETERMINED THAT OSC WAS IN VIOLATION OF THE OPEN RECORDS LAW.

Consistent with the statutory language and the Open Records Law's presumption in favor of public access, the circuit court correctly determined that OSC violated the law by failing to provide American Oversight with records it requested, and that no exceptions to disclosure applied.

A. This Court reviews questions of law de novo and findings of fact for clear error.

"The interpretation of the public record statutes and their application to undisputed facts are questions of law that we review independently, while benefitting from the circuit court's analysis." *J. Sentinel, Inc. v. Milw. Cnty. Sheriff's Off.*, 2022 WI App 44, ¶ 10, 404 Wis. 2d 328, 979 N.W.2d 609 (citation omitted). Where there are mixed questions of fact and law, the court of appeals "will uphold the court's findings of fact unless they are clearly erroneous, but review the application of the law to those facts de novo." *Klismet's 3 Squares Inc. v. Navistar, Inc.*, 2016 WI App 42, ¶ 10, 370 Wis. 2d 54, 881 N.W.2d 783.

B. OSC's failure to disclose records violated the Open Records Law.

It is "the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them," and so

the Open Records Law "shall be construed in every instance with a presumption of complete public access, consistent with the conduct of government business." Wis. Stat. § 19.31. Accordingly, "[t]he denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied." *Id.* The Supreme Court has "recognized this provision as one of the strongest declarations of policy to be found in the Wisconsin Statutes." *Milw. J. Sentinel*, 319 Wis. 2d 439, ¶ 52 (citation omitted).

Consistent with that policy, the text of the Open Records Law authorizes broad access to government documents. Under the statutory scheme, "any requester has a right to inspect any record." Wis. Stat. § 19.35(1)(a). "Records" include "any material on which written, drawn, [or] printed" information or data is recorded, "that has been created or is being kept by an authority"; an "authority," in turn, includes a "state or local office," and any of various state and local agencies, commissions, and other bodies (including the Assembly), that has custody of a record. Wis. Stat. § 19.32(1), (2). OSC has admitted that it is an "authority" under the Open Records Law. R. 140 at 2; *see also* Supp-App. 194 (R. 200 at 4). Because OSC is an authority, and there is no dispute that American Oversight requested the records at issue, OSC was required to disclose those records.

"Wisconsin law does recognize three types of exceptions to this general policy of open access: (1) statutory exceptions; (2) common law exceptions; and (3) public policy exceptions." *Democratic Party of Wis. v. Wis. Dep't of Just.*, 2016 WI 100, ¶ 10, 372 Wis. 2d 460, 888 N.W.2d 584. These exceptions, however, "should be recognized for what they are, instances in derogation of the general legislative intent, and should,

therefore, be narrowly construed; and unless the exception is explicit and unequivocal, it will not be held to be an exception." *Hathaway v. Joint Sch. Dist. No. 1, City of Green Bay*, 116 Wis. 2d 388, 397, 342 N.W.2d 682 (1984).

The circuit court here evaluated American Oversight's requests and properly determined that OSC, an authority, failed to respond to those requests in compliance with the law. R-App. 21–22 (R. 165 at 10–11). The court also determined, as further explained below, that no exceptions to disclosure existed. The court's holding that OSC violated the Open Records Law was therefore proper.

C. No exceptions to disclosure applied.

OSC argues that statutory, common law, and public policy exceptions (plus a constitutional claim, for good measure) exempted its records from disclosure under the Open Records Law. OSC is incorrect; its arguments cannot overcome the text of the statute and the broad presumption in favor of disclosure. *See Hathaway*, 116 Wis. 2d at 397; Wis. Stat. § 19.31.

1. The Constitution does not exempt OSC's records from disclosure under the Open Records Law.

OSC begins by arguing that the Assembly exempted OSC's records from disclosure under the Open Records Law pursuant to its constitutional power to investigate. For the most part, OSC simply reprises its jurisdictional arguments, which remain incorrect for the reasons stated above. *See supra* Argument Section I. OSC's additional arguments also fail.

First, OSC contends that—through a confidentiality provision in a contract between Speaker Vos and Mr. Gableman on behalf of his consulting firm, Consultare—the Assembly was exercising its constitutional power to conduct legislative investigations, and that

legislative investigations are limited only by the Constitution and the Assembly itself. OSC Br. at 48. But none of the cases it cites supports that proposition. For instance, OSC takes *State* ex rel. *McCormack v. Foley*, 18 Wis. 2d 274, 118 N.W.2d 211 (1962), entirely out of context. That case addressed the question of whether a certain statute—a legislative enactment—violated the Constitution, and it noted in dicta that the Wisconsin legislature (unlike the federal Congress) had the authority to legislate on any subject (rather than being limited to enumerated topics). *Id.* at 276–77. That general statement does not assist OSC, especially as in this case the only legislative enactment, the Open Records Law, requires disclosure on its own terms. Moreover, at least one commentator has since stated that due to the many limitations the Constitution places on the Legislature, it "has significantly less than plenary power." Jack Stark, *The Wisconsin State Constitution* 88 (Oxford Univ. Press 2011).

The other cases OSC cites establishing the legislative power to investigate are immaterial, as that power is not in dispute here. *See* OSC Br. at 47. As explained above, *see supra* pages 45–46, *Falvey*'s statement that the legislature may choose the "manner" in which it investigates is unrelated to the issue here. The *Falvey* Court was addressing how the legislature might choose to compose an investigative body (by joint or separate committees of the houses), not whether the investigative body remained bound by the law. And *Goldman v. Olson*, 286 F. Supp. 35 (W.D. Wis. 1968) (cited in OSC Br. at 47–48), is a non-binding federal court case that OSC cites only for the proposition that the legislature can investigate any subject matter. OSC Br. at 47. American Oversight does not dispute that elections are a proper *subject* of Assembly investigation; it merely contends that the Open Records Law applies to OSC and its records.

The relevant question is not whether OSC can investigate, but whether the plain terms of the law the Assembly, Senate, and Governor enacted apply here. None of OSC's cases stand for the proposition that a contractor conducting an investigation for an office of the Assembly can ignore all laws.[14] Nor has the Assembly itself taken the position in this, or related, litigation that the confidentiality provision in this contract overrides the Open Records Law.

In fact, OSC's position has explicitly been rejected by the Wisconsin Supreme Court, when it held that confidentiality provisions in a collective bargaining agreement ratified by an act of the legislature did not modify the Open Records Law. *Milw. J. Sentinel*, 319 Wis. 2d 439. As the Court said:

> In light of the[] express statutory policies [in Wis. Stat. § 19.31], we cannot accept WSEU's argument that parties may, through the collective bargaining process, contract away the public's rights under Wis. Stat. § 19.35(1)(a). To hold otherwise would be contrary to the public interest, and would have the potential to eviscerate the Public Records Law through private agreements.

Id. ¶ 53. Where even a vote of both houses of the legislature (without ratification by the Governor) is insufficient to modify the Open Records Law, surely a contract signed by a single legislator, or resolutions passed by only one house of the legislature, cannot have this effect.

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[14] OSC's conduct demonstrates that it did not see itself as bound by a confidentiality provision that overrides the Open Records Law. OSC produced to American Oversight and another requester 114 pages of records on December 4, 2022. *See* Supp-App. 5 (R. 27); *see also* R. 28–32. It was only more than a month later—and in the context of the defense of this case—that OSC labeled that production an "error." R. 99 at 7. OSC also made public on its website numerous investigatory records at the same time that it was arguing that it could not disclose any records in response to American Oversight's open records requests. *See* R. 160 ¶ 3; *see also* R. 159.

Second, OSC argues that "OSC was bound to comply with the Assembly's confidentiality requirements." OSC Br. at 50. Even assuming that is true, OSC does not escape its obligations under the Open Records Law. The contract requires Consultare—Mr. Gableman's consulting firm—to "[k]eep all information/findings related to the services rendered under this agreement confidential, except when working with Integrity Investigators and such designee(s) of the Assembly whom the Speaker shall from time to time identify in writing to the Consultant for such purposes." R-App. 303 (R. 36 at 1). The question of what "keep . . . confidential" means under this contract is therefore a matter of contractual interpretation.

OSC simply assumes, without citation, that the confidentiality provision "necessarily includes via [sic] public records requests." OSC Br. at 41. But the Wisconsin Supreme Court has made clear that "[c]ontracts . . . incorporate the law extant at the time of execution." *Brenner v. Amerisure Mutual Ins. Co.*, 2017 WI 38, ¶ 39, 374 Wis. 2d 578, 893 N.W.2d 193; *see also Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, ¶ 60, 295 Wis. 2d 1, 719 N.W.2d 408. Thus, the contract's confidentiality provision must be read to incorporate the Open Records Law—not nullify its application to OSC's records.[15] In any event, as *Milwaukee Journal Sentinel* establishes, the legislature cannot contract away the public's right to know under the Open Records Law.

[15] It is worth clarifying the limits of the arguments before this Court. This case does not present the question of whether the legislative branch and other entities can be made exempt from the Open Records Law. Had the legislative branch passed a bill revising the Open Records Law such that it would not apply to OSC or any Special Counsel hired by the Assembly, and that bill were signed into law by the Governor, this would be a different case. But that is not what happened.

Third, OSC disputes the circuit court's conclusion that OSC did not demonstrate it was bound by any contractual provision mandating confidentiality at the time of the court's January 25 Order. Specifically, the circuit court noted that the original contract had expired at the time of its decision, and it found that OSC had not demonstrated that the First Amendment to the contract (which OSC purported would extend the term indefinitely) had been validly accepted by Special Counsel Michael Gableman. *See* R-App. 29–32 (R. 165 at 18–21).

The Court need not reach this question, because as explained above, no contract could, even if in effect, have exempted OSC from the Open Records Law. Even so, and as OSC acknowledges, the question of whether the First Amendment had been accepted was "a simple factual question." OSC Br. at 42. This court "will not reverse" the circuit court's factual finding that the First Amendment to the contract did not demonstrate acceptance "unless the finding is clearly erroneous." *Noll v. Dimiceli's, Inc.*, 115 Wis. 2d 641, 643, 340 N.W.2d 575 (Ct. App. 1983). The circuit court did not clearly err in determining that the First Amendment had not been accepted, and OSC had thus failed to demonstrate it was bound by a contractual confidentiality provision.

In this regard, the circuit court correctly noted that Mr. Gableman's "signature" on the First Amendment comprised only "/s/." The court expressed surprise that a Wisconsin attorney would use that notation to sign an important document. R-App. 31 (R. 165 at 20). And there was a sound basis for this view: the record before the circuit court showed that Mr. Gableman had signed other documents—including the original

contract—with his full signature.[16] *See* R-App. 31–32 (R. 165 at 20-21). OSC is correct that, under Wisconsin law, a symbol *can* be used to accept a contract. But that sidesteps the question: the court was not holding that "/s/" could *not* be used to sign, but rather was expressing skepticism—based on the evidence before it—that Mr. Gableman *would* have signed in that manner.

OSC fails to identify any other evidence from which the circuit court could have found the amendment had been accepted. Indeed, the circuit court highlighted that there had "been plenty of occasion for [Mr. Gableman] to make an affidavit or testimony to that fact," but that Mr. Gableman had declined to do so. Supp-App. 117:20–24 (R. 182 at 26).[17] Instead, to support its argument that the First Amendment was in effect, OSC cites an *absence* of information (the fact that the Assembly did not allege the contract was void) and information presented to the circuit court *after* its decision on the motion to dismiss. *See* OSC Br. at 43 (citing a March 8, 2022 hearing, although the relevant decision issued on March 2). The evidence before the circuit court at the time it issued its decision, however, does not support a finding that it clearly erred in concluding that, in the absence of any other evidence of Mr. Gableman's acceptance of the

[16] OSC argues that "a difference in signature alone cannot negate the acceptance of the contract," because Mr. "Gableman's signature varies on almost every document signed." OSC Br. at 44. A suggestion that slight variations in the penmanship of a signature are equivalent to the difference between any signature and hand-written "/s/" is grasping at straws.

[17] Indeed, counsel for OSC told the circuit court on January 20, 2022: "I'm reminded that under Wisconsin law contracts can be extended by the conduct of the parties. And whether there is a finding addendum or not or the special counsel and the legislature is relying upon that law, I don't know. And so I will, of course, produce, as you requested, any document that relates to a possible extension of the contract. There may not be any . . . ." Supp-App. 54:14–21 (R. 148 at 49). OSC did not subsequently produce any such document to support the possibility of extension.

amendment, OSC had failed to demonstrate the existence of any enforceable contract. R-App. 32 (R. 165 at 21).

2. No statute exempts OSC's records from disclosure under the Open Records Law.

OSC also argues that Wis. Stat. § 12.13(5)(a) exempts the requested records from disclosure. It does not.

Section 12.13(5)(a) provides:

> Except as specifically authorized by law . . . , no investigator, prosecutor, employee of an investigator or prosecutor, or member or employee of the commission may disclose information related to an investigation or prosecution under chs. 5 to 10 or 12, or any other law specified in s. 978.05 (1) or (2) or provide access to any record of the investigator, prosecutor, or the commission that is not subject to access under s. 5.05(5s) to any person other than an employee or agency of the prosecutor or investigator or a member, employee, or agent of the commission prior to presenting the information or record in a court of law.

This excerpt is from the statutory chapter on "prohibited election practices" and the "commission" referenced is the Wisconsin Elections Commission. *See* Wis. Stat. § 12.01(2). The circuit court therefore properly held that this provision applies only to the investigators and prosecutors of that Commission—not to OSC. Thus, § 12.13(5)(a) does not provide a "clear statutory exception" to disclosure. *J. Times v. Police & Fire Comm'rs Bd.*, 2015 WI 56, ¶ 67, 362 Wis. 2d 577, 866 N.W.2d 563 (quotation omitted).

The circuit court's decision on this point accords with the well-reasoned opinion of the Wisconsin Attorney General. Although "[o]pinions of the attorney general are not binding as precedent, . . . they may be persuasive as to the meaning of statutes." *State v. Beaver Dam Area Dev. Corp.*, 2008 WI 90, ¶ 37, 312 Wis. 2d 84, 752 N.W.2d 295 (citation omitted). And because "[t]he legislature has expressly charged the state attorney general with interpreting the open meetings and public records statutes, . . . the interpretation advanced by the attorney general is of

particular importance here." *Id.*; *see also Schill*, 327 Wis. 2d 572, ¶ 106 ("The opinions and writings of the attorney general have special significance in interpreting the Public Records Law . . . .).

The Attorney General concluded that "Wis. Stat. § 12.13(5) does not apply to district attorneys or law enforcement agencies, but only to the [Government Accountability Board, the predecessor of the Wisconsin Elections Commission], its employees and agents, and to the investigators and prosecutors retained by the GAB, and the assistants to those persons." Wis. Op. Att'y Gen. OAG-7-09, ¶ 2 (2009). In reaching that conclusion, the Attorney General began by acknowledging the appropriate canons of statutory construction, including the principle that "statutory exemption[s] to the public records law . . . must be narrowly construed." *Id.* ¶ 6 (citing *Chvala v. Bubolz*, 204 Wis. 2d 82, 88, 552 N.W.2d 892 (Ct. App. 1996)). Applying those principles, the Attorney General analyzed the specific part of the statutory text that outlines who, precisely, is prohibited from disclosing information: an "investigator, prosecutor, employee of an investigator or prosecutor, or member or employee of the [commission]."[18]

There is no dispute that "commission" modifies "member or employee" in the last clause of the text. The question, then, is whether "commission" also modifies "investigator, prosecutor," and "employee" thereof. *Id.* ¶¶ 10–11. The Attorney General correctly explained that "the rules of statutory construction command [him] to consider the full text and structure of Wis. Stat. § 12.13(5) and closely related statutes" in answering that question. *Id.* ¶ 12. As the Supreme Court has emphasized, "statutory

[18] The version of the statute the Attorney General analyzed used the word "board," as the Government Accountability Board had not been replaced by the Wisconsin Elections Commission at that time. That change has no bearing on the relevant statutory analysis.

language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *State* ex rel. *Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110.

Accordingly, the Attorney General noted that Wis. Stat. § 12.13 was enacted as "part of a comprehensive reform to the administration of the state's elections, ethics, and lobbying laws." OAG-7-09, ¶ 13. This reform package "created for the first time GAB-investigators and GAB-prosecutors," but "left undisturbed the collective investigative and prosecutorial authority of state and local law enforcement and prosecutors." *Id.* ¶ 15.

Bearing this context in mind, the Attorney General set forth four main reasons for concluding that Section 12.13(5) should be construed narrowly. First, the Attorney General explained that applying the statute to district attorneys and law enforcement outside of the GAB "would deprive separate clauses of meaning and render portions of the statute superfluous." *Id.* ¶ 16. As the Attorney General noted, Section 12.13(5)(b)(2) excludes from the statutory prohibition any "[c]ommunications made by an investigator, prosecutor, employee of an investigator or prosecutor, or member or employee of the commission . . . with a local, state, or federal law enforcement or prosecutorial authority." If "investigator" and "prosecutor" included local and state law enforcement and prosecutors, then the distinction in subsection (b)(2) would make no sense. To avoid this superfluity, the statute is best interpreted to understand "investigator" and "prosecutor" to include only those working for the Commission.

Second, the Attorney General relied on Section 12.13(5)'s cross-reference to Wis. Stat. § 5.05(5s). As the Supreme Court has explained, when one statute cross-references another, "we construe the two statutes together." *State v. Le*, 184 Wis. 2d 860, 865, 517 N.W.2d 144 (1994). Section 5.05(5s) provides certain exceptions to the Open Records Law for "[r]ecords obtained or prepared *by the commission* in connection with an investigation." (emphasis added). Section 12.13(5)'s incorporation of Section 5.05(5s) strengthens the conclusion that both statutes address disclosures only by the Wisconsin Elections Commission prosecutors and investigators. OAG-7-09, ¶ 20.

Third, the Attorney General considered how the legislative purpose of permitting the disclosure of certain information would play out under a contrary reading. The Attorney General explained that "[t]he intent of Wis. Stat. § 12.13(5)(a) and its cross-reference to Wis. Stat. § 5.05(5s) is clear: certain records demonstrating the government's final decisions to investigate or prosecute should be accessible to the public." *Id.* ¶ 25. A broad reading of Wis. Stat. § 12.13(5) would defeat this purpose. *Id.* For example, under Wis. Stat. § 5.05(5s), records obtained or prepared by the Commission that contain findings that "a complaint does not raise a reasonable suspicion that a violation of the law has occurred," or that, "following an investigation, . . . no probable cause exists to believe that a violation of the law has occurred," remain subject to disclosure under the Open Records Law. Wis. Stat. § 5.05(5s)(e)(3), (4). It would be absurd if, under OSC's proposed reading, the Commission were permitted—and indeed required—to disclose such information, but ordinary district attorneys would be prohibited from doing so, even if they wanted to disclose, for instance, a decision not to charge.

Fourth, the Attorney General applied the general principle that exceptions to the Open Records Law must be narrowly construed: "'unless the exception is explicit and unequivocal, it will not be held to be an exception.'" OAG-7-09, ¶ 32 (quoting *Hathaway*, 116 Wis. 2d at 397). For all of the reasons discussed, the fact that the terms "prosecutor" and "investigator" can "have a broad connotation when taken out of context" does not provide an "explicit and unequivocal" exemption when considered within the text and structure of Wis. Stat. § 12.13(5). *Id.* ¶ 33. Otherwise, under OSC's reading, any agency of government could purport to review elections and exempt records from disclosure simply by titling its employees "investigators."

OSC's contrary arguments are unavailing. OSC focuses primarily on the last-antecedent rule, a grammatical canon of construction suggesting that a modifying clause (here, "of the commission") modifies only the last antecedent. *See Service Inv. Co. v. Dorst*, 232 Wis. 574, 288 N.W. 169, 170 (1939). But the Supreme Court has long taken the view that the last-antecedent rule "is not always applicable and may be easily rebutted where other circumstances so indicate." *Id.* (noting that some subject matters may require different construction). The sound arguments set forth by the Attorney General, and especially the narrow construction of exceptions to the Open Records Law directed by Wis. Stat. § 19.31 (not to mention the linguistic problems that would result from OSC's reading), are precisely the sort of "other circumstances" indicating that the typical last-antecedent construction is incorrect here. OSC thus misstates the law when it says that the last-antecedent discussion ends the analysis, OSC Br.

at 55–56; as the *Dorst* Court made clear, it is only one consideration.[19] *See also Stoker v. Milw. Cnty.*, 2014 WI 130, ¶ 24, 359 Wis. 2d 347, 857 N.W.2d 102 ("The principle of interpreting statutes to avoid unreasonable or absurd results is more compelling in this instance than the rule of the last antecedent.").

OSC next argues that the statutory phrase "record of the investigator, prosecutor, or the commission" makes sense only if the investigators and prosecutors are outside the commission. OSC Br. at 56. In the same vein, it contends that the terms "investigator" and "prosecutor" must be surplusage if they are limited to Commission members and employees, who are also listed in the statute. OSC Br. at 58. That too is wrong: in this context, it is reasonable to clarify that investigators and prosecutors may share otherwise confidential documents with other Commission employees. Moreover, the possible surplusage OSC identifies would need to be weighed against the obvious surplusage the Attorney General identified—which OSC fails to address—and against all of the other considerations to which the Attorney General pointed.

As to legislative intent, OSC simply says that purpose is manifest from the text of the statute—as OSC interprets it. OSC Br. at 57–58. But that is circular reasoning, and it fails to address the purpose and text of the Open Records Law as a whole, which does not support OSC's interpretation, and indeed utterly fails to engage with the Supreme Court's edict that exemptions to the Open Records Law must be both clearly articulated and narrowly construed. *See supra* pages 48–49. Nor does OSC

[19] Although OSC also presents a "syntax" argument, OSC Br. at 57, this simply reprises its last-antecedent argument and fails for the same reasons.

address the broader context of Wis. Stat. § 12.13(5), or the statute that it cross-references.

Rather than engage with these points from the Attorney General's opinion, OSC asks this Court to ignore it. OSC Br. at 59–60. OSC believes that because the Attorney General's opinion pre-dates the creation of OSC, it could not possibly have foreseen how these issues would affect that body—and would have concluded differently had it been aware of the impact of its opinion. But the 2009 Attorney General's opinion concluded that the provision applied only to those connected to the Wisconsin Elections Commission, and although the Legislature subsequently amended the statute to substitute the Commission for the Board, it has refrained from making any substantive changes. This suggests it agreed with the Attorney General's interpretation. *See Schill*, 327 Wis. 2d 572, ¶ 126 ("[A] statutory interpretation by the attorney general is accorded even greater weight, and is regarded as presumptively correct, when the legislature later amends the statute but makes no changes in response to the attorney general's opinion." (internal quotation marks and citation omitted)).

3. The common law does not exempt OSC's records from disclosure under the Open Records Law.

OSC next claims a common law basis for withholding its records. *See* OSC Br. at 51–53. OSC cites to authorities—most pre-dating the modern Open Records Law[20]—that set forth the principle, derived from common law, that investigatory records from prosecutorial investigations, fire marshal investigations, and John Doe proceedings may be withheld consistent with the Open Records Law. But OSC cites no case that

[20] The current Open Records Law took effect on January 1, 1983.

recognizes an investigatory exception outside of the law enforcement or executive branch context at all and ignores that investigations in civil contexts such as public employment tend to be governed by statute. *See*, *e.g.*, Wis. Stat. §§ 19.356(2)(a)(1), 19.36(10)(b). As the circuit court correctly assessed, OSC's argument suffers from the lack of a limiting principle, R-App. 38 (R. 165 at 27) as it would permit the legislature to thwart the Open Records Law by conducting its business through secret and advisory investigations on any topic it may choose. OSC's argument also violates the principle that exceptions to disclosure must "be narrowly construed," and fails to persuade that the investigatory exception, such as it is, "is explicit and unequivocal." *Hathaway*, 116 Wis. 2d at 397.

In the absence of applicable case law, OSC turns to rhetoric. OSC argues that immunity from the Open Records Law is "even more compelling" for OSC "than for the investigation of an individual suspected of a crime" because "[n]othing is more fundamental to ordered society than lawful elections deserving of public trust and confidence." OSC Br. at 52. It does not follow, however, that this public interest necessitates secrecy: indeed, OSC makes a powerful point for the public's interest in *disclosure* of documents relating to the integrity of elections and related investigations.

OSC intimates—but does not squarely argue—that its investigation included a criminal law component. *See id.* But none of the sources to which it cites—the Assembly's authorizing resolution, or the two ballots—refer to criminal prosecution at all. *See id.* (citing R-App. 276–77 (R. 101); R-App. 283–91 (R. 102); R-App. 293–301 (R. 103)). OSC's function is not even quasi-prosecutorial in the manner of the examples to which it turns. District attorneys, fire marshals, and judges acting as one-person grand

juries in John Doe proceedings are all aimed at uncovering who bears responsibility for an identified wrong, and developing information to determine whether they should face further consequences. OSC's charge—to assess whether there *was* any wrong in the first place, and to write a public report of its assessment—is a different animal. Indeed, it must be: the legislature—from which OSC derives—has "authority to make laws, but not to enforce them." *See Koschkee v. Taylor*, 2019 WI 76, ¶ 11, 387 Wis. 2d 552, 929 N.W.2d 600.

As a last effort, OSC argues that it would be reasonable to find a partial application of the common law exemption, only for the pendency of the investigation. OSC Br. at 52 ("[d]isclosure following completion of an investigation is . . . perfectly consistent with established law"). OSC is flatly wrong. "[T]he language and the public policy of the open records and open meetings laws require *timely* access to the affairs of government." *State* ex rel. *Auchinleck v. Town of LaGrange*, 200 Wis. 2d 585, 597, 547 N.W.2d 587 (1996) (emphasis added). When an authority receives an Open Records request, its "statutory choices" are "comply or deny." *WTMJ, Inc. v. Sullivan*, 204 Wis. 2d 452, 457, 555 N.W.2d 140 (Ct. App. 1996), *abrogated on other grounds by Friends of Frame Park, U.A. v. City of Waukesha*, 2022 WI 57, 403 Wis. 2d 1, 976 N.W.2d 263. Delaying release until some unspecified time in the future, including "when an investigation is completed," is not an option. *Id*. (rejecting Department of Corrections argument that it had not denied request when it said records would be made available when a criminal investigation was complete).

> Were we to accept the State's argument, government could effectively avoid the requirements of the open records law by merely stating that records would be supplied eventually. This is contrary to the policy set out in § 19.35(4), Stats., which requires that upon request, an authority shall fill or deny the request "as soon as practicable and without delay."

Id.

The two cases OSC cites do not help its cause. *Breier* is the seminal case rejecting secret arrests in Wisconsin. It evaluated a law enforcement agency's attempt to conceal arrest information under the balancing test—*not* a common law prosecutorial exception. *Newspapers, Inc. v. Breier,* 89 Wis. 2d 417, 428, 279 N.W.2d 179 (1979). In correctly rejecting this attempt, the court said "it is offensive to any system of ordered liberty to permit the government to keep secret its reason for depriving an individual of liberty." *Id*. at 438. The second case arose from a request for records in a district attorney's files that was denied based on features unique to that office, such as "broad prosecutorial discretion." *State* ex rel. *Richards v. Foust*, 165 Wis. 2d 429, 434, 477 N.W.2d 608 (1991) (citing *State v. Karpinski*, 92 Wis. 2d 599, 285 N.W.2d 729 (1979)). It held that even closed investigations were off-limits to the public. *Foust*'s statement that a final report could later be disclosed was a quote from a 1929 fire marshal case. *Id*. at 435 (*quoting State* ex rel. *Spencer v. Freedy*, 198 Wis. 388, 223 N.W. 861 (1929)).

To the extent OSC is arguing that a prosecutorial discretion-type common law exception to disclosure should apply to it, allowing OSC to withhold all but a pat report of its final conclusions, that is incorrect. The rule of *Auchenlick* and *WTMJ*, not *Foust*, applies to OSC. In a matter of such paramount public interest—as OSC recognizes—the public has a strong interest in access to the information necessary to evaluate the methods of OSC's investigations to ascertain for itself whether they were sufficiently thorough and unbiased. If OSC argued there was a compelling need for secrecy as to a particular document, that question would have fallen under the public-interest balancing test exception, not the common law

exception. But, as explained below, OSC did not try to make such an argument at the relevant time, and it does not do so now.[21]

4. The public interest weighs in favor of disclosure of OSC records.

OSC argues that the public interest balancing test weighs in its favor. But because OSC fails to meet a threshold requirement, this Court need not even consider this argument (which would fail, in any event).

a. OSC has waived its balancing test arguments because its denial was not sufficiently specific.

If no statutory or common law exemption to disclosure applies, a custodian conducts a balancing test to "'weigh the competing interests involved and determine whether permitting inspection would result in harm to the public interest which outweighs the legislative policy recognizing the public interest in allowing inspection.'" *John K. MacIver Inst. for Pub. Pol'y*, 354 Wis. 2d 61, ¶ 13 (quoting *Osborn v. Bd. of Regents of the Univ. of Wis.*, 2002 WI 83, ¶ 15, 254 Wis. 2d 266, 647 N.W.2d 158). "The balance is accomplished through a case-by-case analysis." *Madison Tchrs., Inc. v. Scott*, 2018 WI 11, ¶ 19, 379 Wis. 2d 439, 906 N.W.2d 436.

As the Supreme Court has long held, "there is an absolute right to inspect a public document in the absence of specifically stated sufficient reasons to the contrary." *Breier*, 89 Wis. 2d at 427 (internal quotation marks and citation omitted). This rule applies in balancing test cases, and "provides a means of restraining custodians from arbitrarily denying

[21] The holes in OSC's argument are all the more apparent in this posture, now that OSC has (so it says) disclosed all of its records. No record, to American Oversight's knowledge, reflects any evidence used in charging criminal activities, and OSC has not pointed to any specific documents, or categories thereof, whose disclosure prejudiced OSC's investigation in any way. *See infra* Argument Section II.C.4.b.

access to public records without weighing whether the harm to the public interest from inspection outweighs the public interest in inspection." *Mayfair Chrysler-Plymouth, Inc. v. Baldarotta*, 162 Wis. 2d 142, 160, 469 N.W.2d 638 (1991). Moreover, "specific policy reasons are necessary to provide the requester with sufficient notice of the grounds for denial to enable him to prepare a challenge to the withholding." *Id.*

As a result, where the custodial officer fails at the time of denial "to state with specificity his reasons for withholding public records," it is "impossible for the courts to make the contemplated review" of whether "the inspection of the documents would cause harm to the public interest that would outweigh the presumptive benefit to be derived from granting inspection." *Beckon v. Emery*, 36 Wis. 2d 510, 518, 153 N.W.2d 501 (1967). And "[i]t is not the trial court's or [appellate] court's role to hypothesize reasons or to consider reasons for not allowing inspection which were not asserted by the custodian." *Breier*, 89 Wis. 2d at 427.

Here, as in *Beckon*, OSC failed at the time of its denial to "state with specificity [its] reasons for withholding public records," and thus as in *Beckon*, it is "impossible for the courts to make the contemplated review." *Id.* The response "did not describe the records that were responsive to the requests and then apply the balancing test to each record individually to explain why it was not disclosed." *Blazel*, 2023 WL 2416209, slip op. ¶ 60 (rejecting custodian's denial) (citing *Milw. J. Sentinel*, 319 Wis. 2d 439, ¶¶ 55–56).

OSC's denial of the requested records comprised one sentence: "Some documents that contain strategic information to our investigation will continue to be help [sic] until the conclusion of our investigation." *See* R-App. 15 (R. 165 at 4). This is not an explanation or reason so much as it is

a statement of intent. The most charitable reading one could give this sentence is that OSC determined that "some" of the withheld documents "contain strategic information." But there is no description of the withheld documents and the type of strategic information the documents contain, discussion of how disclosure of any of the withheld documents would impair OSC, and why OSC concluded that any such harm would outweigh the presumptive public interest in disclosure. On that thin record, it is "impossible for the courts to make the contemplated review." *Beckon*, 36 Wis. 2d at 518. And any additional analysis offered by counsel once litigation has commenced simply comes too late: otherwise, custodians would have no incentive to apply a meaningful balancing test at the time of denial.[22]

OSC's stated rationale for denial of disclosure is indistinguishable from the statements in *Beckon* that the documents at issue were "confidential" and that it was "contrary to the public interest" for them to be disclosed. *Id.* OSC's explanation is likewise no more specific than the insufficient denial in *State* ex rel. *Blum v. Bd. of Educ., Sch. Dist. of Johnson Creek*, 209 Wis. 2d 377, 565 N.W.2d 140 (Ct. App. 1997), which "referred only to the administrative burden in complying with the request, and to the immateriality and incompleteness of the records." *Id.* at 386. And OSC's denial stands in stark contrast to those that *have* been found sufficiently specific, such as "detailed written denials" outlining nine separate public policy considerations, including privacy interests, effective

[22] In its briefing, OSC argues that it "listed two specific policy reasons, integrity of an 'investigation' and, even more specifically, 'strategic information.'" OSC Br. at 63. This is disingenuous. OSC's denial e-mail does not use the word "integrity" at all, but merely refers to "strategic information to our investigation." R-App. 15 (R. 165 at 4). OSC's belated attempt to add a gloss suggests an awareness that the denial e-mail was not sufficiently specific on its face.

law enforcement, and the safety of law enforcement officers, *see Vill. of Butler v. Cohen*, 163 Wis. 2d 819, 828 & n.3, 472 N.W.2d 579 (Ct. App. 1991), or an explanation that a "request was being denied because a pledge of confidentiality had been given to an informant who provided information to the" agency, *Mayfair*, 162 Wis. 2d at 161.

OSC relies primarily on the denial statement in *Journal/Sentinel, Inc. v. Aagerup*, 145 Wis. 2d 818, 823, 429 N.W.2d 772 (Ct. App. 1988), in which "the custodian stated that the autopsy [at issue] was part of a law enforcement detection effort." But there the custodian had "pointed to a particular statutorily-recognized public policy reason for confidentiality: crime detection" and, moreover, withheld a particular autopsy report "on the grounds that it was implicated in the crime detection effort of this particular case." *Id.* at 823–24. The reader is able to understand that the autopsy had some relevance to understanding the cause of death—and the particular perpetrator—and that revealing more could impair the prosecution's ability to locate and prosecute a suspect for committing a specific crime. In other words, it was possible for the court to undertake a meaningful review. Here, in contrast, "strategic information" tells the reader nothing. Because, at the time it partially denied American Oversight's requests, OSC failed to provide a basis for withholding with any specificity, the Court's inquiry can, and should, end here.

b. OSC's balancing test argument fails on its merits.

Even if this Court were to consider OSC's belated balancing test explanation, however, OSC fails to meet its burden to show that "inspection would cause harm to the public interest which outweighs the presumptive public interest in allowing inspection." *Breier*, 89 Wis. 2d at 428. The public interest in the probity of Wisconsin's elections and the

transparency of its government is undoubtedly a paramount one. The public has a significant interest in any assessment thereof, including an interest in assessing the quality of OSC's investigation, the reliability and veracity of its results, and the choices that were and were not made by those investigators. Only in sunshine can the public appropriately contextualize OSC's findings.

Against that compelling interest, and the strong foundational interest in transparency more generally, Wis. Stat. § 19.31, OSC set only "strategic information." It failed to address what sort of strategic information it had in mind, and how disclosure of that information would harm the public interest. In other words, it "failed to demonstrate a 'fact-intensive inquiry' of the specific circumstances and concerns." *Blazel*, 2023 WL 2416209, slip op. ¶ 66. This cannot carry the day. OSC "did not provide policy reasons for the denial that were specific to each document," but rather spoke to "denial of release of the whole package." *Id.* ¶ 60. The Court of Appeals has made clear that "[s]pecific reasons why each document warrant confidentiality are necessary." *Id.* (internal quotation marks and citation omitted).

OSC's minimal proffer collapses completely when considered in the context of the actual documents it was trying to protect. The circuit court detailed the various documents that OSC sought to withhold from disclosure. *See* R-App. 47–55 (R. 165 at 36–44); *supra* page 24. These included publicly available court records; public records requests and responses; résumés of those seeking employment with OSC; "mundane" office correspondence about work schedules and the procurement of office supplies; public relations remarks; OSC's interim report, which had already been released to the public; statutes; and complaints about film

stars and other celebrities. *Id.* It would defy reason to determine that disclosing an e-mail about the purchase of staplers or reams of paper would jeopardize OSC's "strategy." And indeed, OSC has not pointed to any prejudice it—or the public interest—has suffered since those documents actually were disclosed and made publicly available on OSC's website or by American Oversight.

Perhaps recognizing this problem, OSC tries to cloak itself in vague language about the importance of confidentiality in criminal investigations generally. *See* OSC Br. at 61–62. But this is not a criminal investigation, and the Court of Appeals has also made clear that a "'blanket rule' is not a proper application of the balancing test." *Blazel*, 2023 WL 2416209, slip op. ¶ 62; *see also Wis. Newspress, Inc. v. Sch. Dist. of Sheboygan Falls*, 199 Wis. 2d 768, 780, 546 N.W.2d 143 (1996) ("[T]he balancing test must be applied in every case in order to determine whether a particular record should be released, and there are no blanket exceptions other than those provided by common law or statute."). OSC relies primarily on the warning in *Foust* against the disclosure of a district attorney's files—because "[t]he file may contain historical data leading up to the prosecution which may be in the form of anonymous statements, informants' statements, or neighborhood investigations at the scene of the crime—all of which are to be protected if continuing cooperation of the populace in criminal investigations is to be expected." 165 Wis. 2d at 435. There is a gulf between the specific prosecutorial file of a district attorney who is concerned with protecting actual witnesses in a criminal case and the non-prosecutorial investigation OSC is empowered to undertake. Nor has OSC provided any explanation as to why the documents at issue here are akin to the highly sensitive documents to which it seeks to analogize. On the contrary, the circuit court

reviewed the documents and concluded that they were not sensitive at all. *See* R-App. 47–56 (165 at 36–45).

Even if cases concerning traditional prosecutorial functions applied to OSC, they would not garner the result OSC seeks. OSC argues that "it is *only* the custodian who understands the documents, not a viewer who may consider the documents random and insignificant (even a judge)." OSC Br. at 62. Under this "test," courts simply must take the custodian's word for it that the custodian's strategic considerations reflected in documents describing, for instance, options for the purchase of credenzas and lateral filing cabinets, or the custodian's possession of documents already publicly available (like statutes and court records), outweigh the presumption of disclosure—and those courts lack competency to find otherwise. OSC's "test" contradicts the entire premise of in camera review, a key judicial tool in Open Records Law cases. *See State* ex rel. *Youmans v. Owens*, 28 Wis. 2d 672, 682, 137 N.W.2d 470 (1965) ("If the person seeking inspection thereafter institutes court action to compel inspection and the officer depends upon the grounds stated in his refusal, the proper procedure is for the trial judge to examine *in camera* the record or document sought to be inspected."). This is not a test at all, and it cannot comport with the Open Records Law.

Indeed, cases in which Wisconsin courts have agreed with decisions to withhold prosecutorial documents are illustrative.[23] In *Mayfair*, 162 Wis. 2d at 162, for example, the Court confirmed, through an in camera review of withheld documents, that the release thereof would in fact divulge the

[23] Unable to point to relevant case law in Wisconsin, OSC relies primarily on a decades-old federal case that concerns the scope of the attorney work-product privilege. *See* OSC Br. at 61 (citing *Shelton v. Am. Motors Corp.*, 805 F.2d 1323, 1329 (8th Cir. 1986)). Needless to say, it is neither binding nor apposite.

name of a confidential informant. Similarly, in *Aagerup*, 145 Wis. 2d at 825, the court of appeals found no error in withholding an autopsy report where "testimony of experienced law enforcement and medical personnel" indicated that the autopsy could be used to locate and prosecute the decedent's killer. These specific, discrete rationales for withholding documents stand in stark contrast to the "just trust me" argument that the public interest would be harmed by, *e.g.*, the disclosure of a copy of an *already published* OSC interim report. If, as OSC suggests, we are simply unable to see the danger here because we are not OSC, then it stands to reason that any member of the public would likewise find such "insight" into OSC's "strategy" too opaque to be genuinely compromising.

If the Court reaches the balancing test at all, it should affirm the circuit court's application of it.

D. The remedy OSC seeks is not warranted by its arguments on appeal.

Finally, OSC is wrong on the question of remedy. OSC argues that, if this Court agrees OSC's records were exempt from the Open Records Law, it "should vacate the circuit court's Mandamus Order, R. 165, R-App. 11, including the punitive damage award, since none of these arguments were arbitrary and capricious, and the Order Denying Stay, R. 177, R-App. 54, Judgment, R. 497, F-App. 319, Contempt Order, R. 327, R-App. 82, and Purge Order, R. 424:3, R-App. 208 ($24,000 sanction)." OSC Br. at 66. This does not follow. Should OSC prevail on this argument, it would be appropriate to vacate the order mandating production—for all the good it would do OSC, having already produced those documents—and the $1,000 ordered in punitive damages.

As to the stay order, however, the question is clearly moot, and OSC has failed to develop any arguments specific to the question of a stay or

any prejudice it suffered from not receiving one. And the contempt and purge orders have nothing to do with the question of whether OSC's records were exempt from disclosure under the Open Records Law, and everything to do with whether OSC comported with the circuit court's order to produce records for in camera review. As explained below, it did not.

III. THE CIRCUIT COURT PROPERLY EXERCISED ITS DISCRETION IN HOLDING OSC IN CONTEMPT OF COURT.

Following notice and a hearing, the circuit court held OSC was in contempt of court for willfully failing to comply with the January 25 Order to produce for in camera review records responsive to American Oversight's requests. *See* R-App. 83–107 (R. 327). This conclusion finds ample support in the record. OSC argues the circuit court erroneously exercised its discretion for numerous reasons, but most of these amount to complaints about the circuit court's case management decisions, some of which OSC has waived. Few of these arguments even reference case law. None of these arguments comes close to establishing that the circuit court erroneously exercised its discretion in managing the contempt proceedings or in holding OSC in contempt.

A. A finding of contempt will not be reversed on review absent plain mistake or erroneous exercise of discretion.

A party that intentionally fails to comply with a court order is in contempt of court. *See* Wis. Stat. § 785.01(1)(b). A failure to comply with an order that is achieved through a "volitional act done by one who knows or should reasonably be aware that his conduct is wrongful" meets the intentionality requirement. *Currie v. Schwalbach*, 132 Wis. 2d 29, 39, 390 N.W.2d 575 (Ct. App. 1986), *aff'd*, 139 Wis. 2d 544, 407 N.W.2d 862 (1987).

A court may infer intentionality from the evidence. *See id.* After a party makes out a *prima facie* case for contempt, the alleged contemnor "bear[s] the burden of demonstrating that their conduct was not contemptuous." *Noack v. Noack*, 149 Wis. 2d 567, 575, 439 N.W.2d 600 (Ct. App. 1989). If the contemnor does not meet this burden, a court "may impose a remedial or punitive sanction for contempt of court." Wis. Stat. § 785.02.

"The question of whether or not a defendant's act is a contempt of court is one which the trial court has far better opportunity to determine than a reviewing court," and "an appellate court will not reverse except in a plain instance of mistake or abuse of discretion." *Currie*, 132 Wis. 2d at 36 (citing *In re Adam's Rib, Inc.*, 39 Wis. 2d 741, 746, 159 N.W.2d 643 (1968)).[24] A trial court's findings of fact "will not be upset on appeal unless they are contrary to the great weight and clear preponder[a]nce of the evidence and it is not necessary the evidence in support of the findings constitutes the great weight or clear preponderance of the evidence. Nor is it sufficient that there is evidence to support a contrary finding." *In re Adam's Rib*, 39 Wis. 2d at 746–47.

B. The circuit court did not erroneously exercise its discretion in holding OSC in contempt of court.

The circuit court did not erroneously exercise its discretion in concluding that OSC willfully failed to comply with the January 25 Order. The record evidence supports the circuit court's conclusion that American Oversight established a *prima facie* case of contempt when it showed that "OSC failed to produce records it was ordered to produce." R-App. 84

[24] The term "abuse of discretion" was replaced in 1992 with the term "erroneous exercise of discretion," though the substance of the terms is the same. *See State v. Plymesser*, 172 Wis. 2d 583, 585–86 n.1, 493 N.W.2d 367 (1992).

(R. 327 at 2). In short, after OSC represented to have produced all documents responsive to American Oversight's requests, American Oversight ascertained that OSC had not in fact done so. *See* R. 196 at 4; Supp-App. 187–88 (R. 199 at 2–3). OSC then conceded it had not produced all responsive records, *see* Supp-App. 193 (R. 200 at 3), and conceded that American Oversight had established a *prima facie* case of contempt. *See* R-App. 89 (R. 327 at 7); Supp-App. 241:6–14 (R. 314 at 14); OSC Br. at 70 n.31.

OSC now also admits that it failed to meet its burden at the contempt hearing to put forth evidence that it was not in contempt. *See, e.g.*, OSC Br. at 66 (conceding OSC did not "present a defense"); Supp-App. 395:11–12 (R. 322 at 7) (conceding OSC's counsel was "not presenting a case in chief on behalf of respondent"). The circuit court was therefore well within its discretion to conclude OSC was in contempt of court. *See In re Adam's Rib*, 39 Wis. 2d at 747–48 (trial court did not erroneously exercise its discretion in holding party in contempt where the contemnor "offered nothing other than his own denial to show he did not have possession of" records he had been ordered to produce).

C. OSC's numerous attacks on the circuit court's discretion fail.

OSC submits a litany of complaints focusing not on the substance of the circuit court's decision, but rather on the court's management of the contempt proceedings. None of OSC's arguments has merit or defeats the circuit court's contempt finding.

1. The circuit court properly considered American Oversight's request by motion to hold OSC in contempt as a motion for contempt.

On April 20, 2022, American Oversight filed a motion that, among other things: requested the circuit court "consider whether contempt is appropriate"; requested "a contempt order or increased punitive damages

against OSC for its careless and incomplete response to the Court's January 25, 2022, order"; argued that "[t]he Court Should Grant Additional Relief, Including Punitive Damages and Contempt"; and stated that, "because [the] OSC directly violated a Court order made on January 25, the Court should also consider whether to modify its final judgment to include contempt findings." R. 196 at 8, 11, 12–13. The circuit court properly interpreted this filing as a motion for contempt.

OSC now argues that the circuit court "inappropriate[ly]" converted American Oversight's motion into a motion for contempt. OSC Br. at 68. OSC cites no case law to support its puzzling argument that the circuit court's treatment of American Oversight's filing as a motion for contempt was improper. *See id.* at 68.

Even were it not obvious on the face of the filings that American Oversight requested the court hold OSC in contempt, the circuit court acted well within its discretion to interpret American Oversight's motion as a request to hold OSC in contempt and otherwise address American Oversight's concerns. "Every court has inherent power, exercisable in its sound discretion, consistent within the Constitution and statutes, to control disposition of causes on its docket with economy of time and effort." *Larry v. Harris*, 2008 WI 81, ¶ 23, 311 Wis. 2d 326, 752 N.W.2d 279. During a status conference held on April 26, 2022, the court characterized American Oversight's motion as "a motion to reopen or a motion for contempt," and concluded that briefing the motion and holding an evidentiary hearing would be the most efficient way to proceed. *See* Supp-App. 202:11–12 (R. 223 at 4); *see also* Supp-App. 206:17–21, 208:10–209:1 (R. 223 at 8, 10–11). OSC voiced no objection at that time to the court's characterization of the motion as one for contempt, *see* Supp-App. 202:11–

12 (R. 223 at 4) nor did it object to the setting of a briefing schedule and hearing, *see* Supp-App. 208:10–209:1 (R. 223 at 10–11). Indeed, counsel for OSC referred to American Oversight's motion as one for "contempt" during the status conference. Supp-App. 218:13 (R. 223 at 20). And OSC styled its opposition brief as a "Response in Opposition to Motion to Modify and for Contempt." R. 225. In light of the discussion held with the parties regarding American Oversight's motion, the circuit court properly exercised its discretion to set a briefing schedule on contempt and hold a hearing upon American Oversight's motion.

As these facts establish, OSC had ample notice of the charge of contempt and sufficient opportunity to present a defense to that charge. In fact, OSC did defend against that charge. *See* R. 225; R. 259; R. 261–98; *see generally* Supp-App. 385–440 (R. 322). Nothing more is required for a court to impose sanctions on a contemnor. *See Joint Sch. Dist. No. 1, City of Wis. Rapids v. Wis. Rapids Educ. Ass'n*, 70 Wis. 2d 292, 317, 234 N.W.2d 289 (1975).

2. OSC waived any argument that American Oversight failed to establish a *prima facie* case of contempt.

OSC's argument here that American Oversight failed to establish a *prima facie* case of contempt, *see* OSC Br. at 69–70, is a new one. OSC conceded in the circuit court that American Oversight established a *prima facie* case of contempt, *see supra* page 75, and OSC admits elsewhere in its briefing on appeal that it made this concession. *See* OSC Br. at 70 n.31. OSC has therefore waived, repeatedly, any argument that American Oversight failed to establish a *prima facie* case of contempt. *See State v. Caban*, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997); *Lord v. Hubbell, Inc.*, 210 Wis. 2d 150, 154, 563 N.W.2d 913 (Ct. App. 1997).

3. The record supports the circuit court's finding that OSC had not remedied its contempt of court by June 15, 2022, the date the court issued the contempt order.

OSC contends that it was not in contempt of court on June 15, 2022, the date of the court's contempt order, because it would *later* establish to a reasonable degree of certainty that it had produced all responsive documents in its possession as of that date. *See* OSC Br. at 70. But whether OSC subsequently carried its burden is immaterial to the legal inquiry that was before the circuit court at the time of the relevant hearing.

In this regard, OSC apparently misunderstands the nature of the contempt order and the purge conditions. In holding OSC in contempt of court on June 15 for failing to comply with the January 25 Order, the court did not find that responsive but unproduced records remained in OSC's possession. Rather, the court held that as of the June 10 hearing, OSC had failed to meet its burden to demonstrate that its conduct was not contemptuous.

The court cited in its decision ample evidence supporting the *prima facie* case that OSC had failed to produce records that the January 25 Order required OSC to produce. *See* R-App. 89–94 (R. 327 at 7-12). Even though the circuit court subsequently found OSC established to a reasonable degree of certainty that it had previously produced all responsive records, OSC did not make that showing as of the June 10 hearing or the June 15, 2022, contempt order. Indeed, as of the date of the court's decision, the evidence showed that OSC's prior assertion that it had produced all responsive records was incorrect, *see, e.g.*, Supp-App. 191–98 (R. 200), and that it produced additional records only after American Oversight ascertained and informed OSC that they were missing. Lacking in the evidence was any showing by OSC that it had in fact searched for and

disclosed all responsive records; in other words, based on the record before the court on June 10, there could have remained undisclosed responsive records that remained hidden due to OSC's failure to search. The court properly inferred from the evidence that OSC willfully violated the January 25 Order. *See In re Adam's Rib*, 39 Wis. 2d at 747–48 (court properly held party in contempt where contemnor's delivery of only a subset but clearly not all records required to be produced was "conclusive of the fact that he had possession of those that he delivered and would be the proper basis for an inference that he had or should know the whereabouts of the remainder").

4. The circuit court properly relied on evidence that OSC had not complied with the January 25 Order.

OSC takes issue with numerous pieces of evidence the circuit court considered in determining whether OSC was in contempt of court. *See* OSC Br. at 75–79. These arguments do not, either alone or in totality, meet the exacting standard for showing the circuit court erroneously exercised its discretion.

a. The circuit court properly allowed American Oversight to present additional evidence at the June 10, 2022 hearing.

The circuit court properly permitted American Oversight to present further evidence of OSC's contempt during the June 10, 2022, evidentiary hearing. As an initial matter, the evidence American Oversight presented at the hearing was more than just "rebuttal" evidence. OSC Br. at 75. As the court explained on the record, the purpose of the evidentiary hearing was to search for truth. Supp-App. 405:11–17 (R. 322 at 17). The court observed that the evidence American Oversight intended to submit was relevant to the question the court needed to answer: "whether the Office of

Special Counsel intentionally violated the Court's order." Supp-App. 405:19–21 (R. 322 at 17). Additionally, American Oversight had a valid subpoena for Mr. Gableman's testimony on June 10 that OSC did not succeed in quashing. Nor did OSC renew its motion to quash or ask the court to reconsider its order denying the motion to quash on June 10. OSC's argument, like many others, boils down to a complaint about how the circuit court managed its docket, which the court has "broad discretion" to do, "[c]onsistent with its inherent and statutory powers." *Kirk v. Credit Acceptance Corp.*, 2013 WI App 32, ¶ 56, 346 Wis. 2d 635 N.W.2d 522.

Even if the evidence American Oversight presented during the evidentiary hearing were characterized as "rebuttal" evidence, the circuit court also did not erroneously exercise its discretion in permitting it. As OSC correctly observes, a plaintiff's rebuttal is limited to "matters raised by any adverse party in argument." Wis. Stat. § 805.10; *see also* OSC Br. at 75. Additionally, "[w]aiver of argument by either party shall not preclude the adverse party from making any argument which the adverse party would otherwise have been entitled to make." Wis. Stat. § 805.10. Although OSC declined to present any evidence at the June 10 hearing (contrary to its prior claim that it would present evidence, R. 255), it argued in briefing filed after American Oversight established a *prima facie* case of contempt that it was not in contempt, *see generally* R. 225; it submitted an affidavit and exhibits to support its denial of contempt, *see* R. 259; R. 261–98; Supp-App. 231:7–235:24 (R. 314 at 4–8); and it did not abandon that position at the hearing. The court therefore properly exercised its discretion to permit American Oversight to present the evidence it did at the hearing.

b. The circuit court properly accepted into evidence an exhibit that showed noncompliance.

Second, OSC contends that the circuit court erroneously relied on an exhibit entered into evidence during the June 10 hearing. *See generally* Supp-App. 336–84 (R. 321); *see also* OSC Br. at 76. The document includes a collection of citizens' "reports" of election fraud submitted through www.wifraud.com, a website maintained by OSC, between September 2021 and February 2022. *See, e.g.*, Supp-App. 382 (R. 321 at 47) ("I believe my vote was changed and here is why. Before the election my spam was full of Republican e-mailed for donations. Then after the vote my spam was full of Democrats e-mailed for donations to Biden and Stacey Abrams asking for donations to Democrats and not one for Republican candidates. That's how I know it was changed."); Supp-App. 336 (R. 321 at 1) (heading of cover letter enclosing document sent by Michael Gableman includes www.wifraud.com email address).

Although these reports were clearly responsive to American Oversight's September and October 2021 records requests—as well as four other requests American Oversight had submitted to OSC by that time—OSC did not disclose the document to American Oversight until May 27, 2022. *See* Supp-App. 427:1–428:2 (R. 322 at 39–40); Supp-App. 336 (R. 321 at 1) (cover letter enclosing document dated May 27, 2022). That OSC produced records it should have produced months earlier—and did so only after American Oversight told OSC that they remained undisclosed—strongly suggested there could have been other undisclosed responsive records in OSC's possession that American Oversight could not ascertain. *See In re Adam's Rib*, 39 Wis. 2d at 747–48. It was thus neither plain mistake

nor erroneous exercise of discretion for the court to interpret this exhibit as tending to show OSC's contempt. *See* R-App. 93–94 (R. 327 at 11–12).[25]

OSC represented to the court on June 28, 2022—18 days after the evidentiary hearing and 13 days after the court issued its decision and order holding OSC in contempt—that OSC was not in possession of this document until May 23, 2022. *See* R. 350 ¶ 29. But this is misleading; although OSC had custody of most of these complaints since before the January 25 Order, *see generally* Wis. Stat. § 19.35 (requesters are entitled to records in the custody of authorities), OSC apparently chose not to search for them until nearly four months after that date and well after it had represented to the court that it had already searched for and produced all responsive records. And even if it were credible that OSC did not have custody of documents maintained on its own website—which OSC does not even argue, *see* OSC Br. at 76 (arguing OSC did not have "possession" of the document until May 23, 2022 but not arguing OSC did not have custody of the document until May 23, 2022)—OSC could have shared this information during the June 10 hearing. The circuit court did not erroneously exercise its discretion in relying in part on Supp-App. 336–84 (R. 321) as evidence OSC failed to comply with the January 25 Order.

c. The court properly relied on the deposition of Zakory Niemierowicz.

Next, the circuit court properly relied in part on statements made under oath on June 6, 2022, by Zakory Niemierowicz, OSC's office administrator, chief of staff, and sometime co-custodian of records, *see*

[25] For the same reason, OSC's argument that the circuit court "erroneously used OSC's voluntary remedy"—producing records only after American Oversight discovered they were missing—"as evidence," OSC Br. at 74–75, is meritless.

Supp-App. 286 at 10:21–22 (R. 317 at 10); OSC Br. at 71, as evidence that OSC was in contempt of court. Wis. Stat. § 804.07(1)(b) provides that "[t]he deposition of . . . anyone who at the time of taking the deposition was an . . . employee . . . of a . . . governmental agency which is a party may be used by an adverse party for any purpose." The court was permitted to consider statements recorded in Mr. Niemierowicz's deposition transcript—filed on June 9, 2022, *see* Supp-App. 283–335 (R. 317)—pursuant to that statute.

The court properly considered certain of Mr. Niemierowicz's statements under oath to suggest OSC was not in compliance with the January 25 Order. For example, as the court noted, Mr. Niemierowicz referred to a "classified person" working for OSC, yet this person was not reflected in any documents. *See* R-App. 93 (R. 327 at 11). Indeed, Mr. Niemierowicz admitted it was "possible" that this person's contract with OSC was deleted. Supp-App. 303 at 80:8–14 (R. 317 at 80). Mr. Niemierowicz also stated that he did not recall how Mr. Gableman searched for responsive records, Supp-App. 316 at 130:7–11 (R. 317 at 130), that Mr. Niemierowicz did not have authority to require OSC staff to comply with open records requests, Supp-App. 331 at 191:14–24 (R. 317 at 191), and that he understood from "[t]he Wisconsin open records statutes" that he could lawfully "delete any messages on [the encrypted message service] Signal because they're deleted before they can be requested," Supp-App. 319 at 142:12–17 (R. 317 at 142), reflecting what can at best be described as an incomplete understanding of the Open Records Laws. Indeed, while American Oversight's records requests were pending—which they were during much of the relevant time period—auto-deleting records risks violating the retention provision in the Open Records Law,

s*ee* Wis. Stat. § 19.35(5) ("No authority may destroy any record at any time after the receipt of a request for inspection or copying of the record . . . until after the request is granted or until at least 60 days after the date that the request is denied . . . ."), in addition to the Public Records Retention Laws, *see, e.g.*, Wis. Stat. § 16.61.

American Oversight addresses OSC's other arguments regarding Mr. Niemierowicz (OSC Br. at 71–73) below, *see infra* Argument Section IV.

d. The circuit court properly drew an adverse inference from Mr. Gableman's conduct at the hearing.

Further, it was not an erroneous use of discretion for the circuit court to draw an adverse inference from Mr. Gableman's refusal to testify. *See* OSC Br. at 78; R-App. 94 (R. 327 at 12). After American Oversight called Mr. Gableman to the witness stand during the June 10 hearing, he invoked "the right to silence guaranteed to me under the United States Constitution, . . . the State of Wisconsin constitution and all cases interpreting the same." Supp-App. 424:24–435:2 (R. 322 at 36–37). "[I]n a civil case as distinguished from a criminal case, an inference of guilt or against the interest of the witness may be drawn from his invoking the fifth amendment." *Grognet v. Fox Valley Trucking Serv.*, 45 Wis. 2d 235, 239, 172 N.W.2d 812 (1969). Indeed, "since only one inference can be drawn logically in such a case, the court may as a matter of law draw such inference." *Id.*

OSC now argues that Mr. Gableman did not invoke any right under the Fifth Amendment, "but simply his need for representation," OSC Br. at 78. The record, however, clearly shows that Mr. Gableman invoked the right to remain silent, which is synonymous with the rights guaranteed by the Fifth Amendment, *see, e.g.*, *Miranda v. Arizona*, 384 U.S. 436, 440 (1966);

State v. Markwardt, 2007 WI App 242, ¶¶ 23–28, 306 Wis. 2d 420, 742 N.W.2d 546. Mr. Gableman also appeared to agree with the court's question whether he was invoking his Fifth Amendment right to remain silent. *See* Supp-App. 424:8–435:2 (R. 322 at 36–37).

5. The purge conditions were proper.

OSC contends that the conditions the circuit court imposed to purge its contempt were improper. OSC Br. at 79–80. This contention, too, is incorrect. "Satisfaction of [a] purge condition must be within the power of the contemnor . . . and, the purge conditions must reasonably relate to the cause or nature of the contempt." *In re Marriage of Larsen*, 159 Wis. 2d 672, 676, 465 N.W.2d 225 (Ct. App. 1990), *aff'd*, 165 Wis. 2d 679, 478 N.W.2d 18 (1992). The purge conditions here—which required an affidavit from Mr. Gableman showing compliance with the January 25 Order, to a reasonable degree of certainty, R-App. 105 (R. 327 at 23), satisfied both these requirements and consequently were within the circuit court's discretion.

OSC certainly had the power to supply an affidavit from Mr. Gableman, the Special Counsel and head of OSC, as well as the custodian of its records. The circuit court directed OSC to produce an affidavit by Mr. Gableman in his capacity as Special Counsel, not as "an individual" as OSC now argues. *See* OSC Br. at 80. Moreover, submitting an affidavit by Mr. Gableman was incontestably within OSC's power because it in fact did so, twice. *See* R. 350; R. 409. And on August 18, 2022, the court issued an order that OSC had purged its contempt of court as of June 28, 2022, the date OSC supplied the court with Mr. Gableman's first affidavit. *See* R-App. 206–08 (R. 424).

The purge conditions also related to the nature of OSC's contempt. OSC was in contempt of court for willfully failing to search for and

disclose documents responsive to American Oversight's records requests. According to Mr. Niemierowicz, Mr. Gableman and not Mr. Niemierowicz had the authority to direct OSC personnel to respond to open records requests. *See supra* page 83. Moreover, Mr. Gableman is the only person who was a custodian of records for most of the relevant time periods; Mr. Niemierowicz was not designated "co-custodian" alongside Mr. Gableman until May 11, 2022, well after the Open Records requests at issue in this matter. Supp-App. 313 at 119:2–120:1 (R. 317 at 31). The purge conditions required Mr. Gableman to attest, to a reasonable degree of certainty, that OSC's records were properly searched for and disclosed.

Nor was it necessary for the purge conditions to identify a particular record that OSC needed to produce, as OSC argues. *See* OSC Br. at 80. It is unclear from OSC's brief what purpose this would serve, or even how the circuit court would have been able to identify any additional responsive records OSC had in its custody but had not yet produced. In any case, this argument again reflects OSC's apparent failure to understand the purpose of the purge conditions. They were intended to set forth how OSC could purge its contempt of the January 25 Order: by showing to a reasonable degree of certainty compliance with that order to search for responsive records, and to produce any records found.

For the same reason, the circuit court's imposition of $24,000 in sanctions to be paid to the court for OSC's contempt was not an abuse of discretion. *See* OSC Br. at 81. Again, the relevant question was not when all responsive documents were ultimately produced, but rather when OSC had purged the contempt conditions, which required it to provide evidence that it had adequately searched for and disclosed all responsive records. OSC chose to provide sufficient evidence it had complied with the

January 25 Order five months after the order was issued, three months after American Oversight identified significant deficiencies with OSC's production in response to the January 25 order, 18 days after the evidentiary hearing at which it had the opportunity to submit evidence that it was not in contempt of the January 25 Order, and 14 days after the court held it was in contempt. The court imposed a statutorily permissible dollar amount of sanctions for the time period during which OSC had been held in contempt but had not yet purged the contempt. *See* R-App. 208 (R. 424 at 3). The only party responsible for OSC's failure to present evidence, before June 27, 2022, that its conduct was not contemptuous is OSC.

IV. THE CIRCUIT COURT PROPERLY EXERCISED ITS DISCRETION TO DENY OSC'S SAME-DAY MOTION TO CONTINUE THE CONTEMPT HEARING.

On June 10, 2022, after the contempt hearing had begun, counsel for OSC made a verbal motion to continue that hearing for "at least 90 days" in light of Mr. Niemierowicz's decision to retain separate counsel and not appear, and Mr. Gableman's decision to begin searching for separate counsel. Supp-App. 392:9–393:23 (R. 322 at 4–5). OSC appears to argue that the circuit court's denial of this same-day motion for a continuance denied it due process. OSC Br. at 82. It did not.

A. Deciding a motion for a continuance is discretionary.

"[A] motion for a continuance to obtain the attendance of witnesses is addressed to the discretion of the trial court," and "the exercise of that discretion will not be disturbed upon appeal except where it is clearly shown that there has been an abuse of discretion." *Bowie v. State*, 85 Wis. 2d 549, 556, 271 N.W.2d 110 (1978). "[I]t is not every denial of a request for more time that violates due process even if the party fails to offer evidence

or is compelled to defend without counsel." *Ungar v. Sarafite*, 376 U.S. 575, 589, (1964). "A circuit court properly exercises its discretion if it 'employs a logical rationale based on the appropriate legal principles and facts of record.'" *Vill. of Shorewood v. Steinberg*, 174 Wis. 2d 191, 204, 496 N.W.2d 57 (1993) (citation omitted).

B. The circuit court properly denied OSC's motion for a continuance.

As an initial matter, in repeatedly asserting that Judge Remington threatened that Mr. Niemierowicz risked being "'jailed spontaneously'" at the June 10 hearing, OSC Br. at 83; *see also id.* at 33, 72, 102 n.49, 128, OSC reads the court's statements out of context. In discussing the apparent conflict of interest between Mr. Niemierowicz and OSC, Judge Remington stated: "I also proceed very carefully and extremely cautiously when the question before the Court the [sic] contempt, and where one of the sanctions that could be imposed is confinement in the Dane County Jail. I just raise the issue because I don't believe anyone is deserving -- certainly not Mr. Niemierowicz's interest by having this occur to him spontaneously on Friday's hearing." Supp-App. 247:14–20 (R. 314 at 47). OSC stretches credulity in assuming that, by "this occur," Judge Remington meant Mr. Niemierowicz being jailed. Rather—taken in context—the better understanding is that it would not be in anyone's interest for Mr. Niemierowicz to belatedly realize the potential consequences prescribed by law and whether he wished to consult with unconflicted counsel. OSC's efforts to construe this line from the hearing as a threat cannot be squared with a judge's ethical obligation to notify an individual that his interests might not be adequately protected by his lawyers.

As to the legal question, the circuit court did not erroneously exercise its discretion in denying OSC's same-day motion to continue the

contempt hearing. *See Bowie*, 85 Wis. 2d at 557 (court did not abuse its discretion in denying continuance of criminal trial at which a witness for the defense did not appear). The court heard argument on the motion from all parties. *See* Supp-App. 392:9–403:19 (R. 322 at 4–15). The court then denied the motion for a continuance for several reasons. The court's reasons for denying the motion were sound and supported by the record.

First, the motion was untimely. Supp-App. 403:23–24 (R. 322 at 15). OSC waited until the parties, counsel (some of whom had traveled from out of state), and the judge had all gathered in the courtroom before making its motion. Supp-App. 394:2–6 (R. 322 at 6). Second, the court reiterated that "the public has a right to know" and "see records" of OSC. Supp-App. 404:7–8 (R. 322 at 16) (citing Chapter 19 of the Wisconsin code). At the time of the hearing, it had been nearly nine months since American Oversight had submitted its first records request to OSC. Third, American Oversight had subpoenaed Mr. Gableman's testimony, and he was present in the courtroom and able to testify. Supp-App. 404:19–23 (R. 322 at 16). OSC had previously moved to quash the subpoena for Mr. Gableman's testimony; the court denied that motion on the record on June 8, 2022. Supp-App. 269:5 (R. 314 at 42). And this was OSC's fourth request for a continuance in 2022. *See* R. 80; R. 118; R. 156.

The court also rejected OSC's argument that Mr. Niemierowicz's refusal to voluntarily appear at the hearing (there is no evidence that he had been subpoenaed) was somehow the fault of the court when it had reminded OSC's counsel of their ethical duties after an apparent conflict of interest between Mr. Niemierowicz and OSC emerged. Supp-App. 403:24–404:5 (R. 322 at 15–16). By June 8, 2022, Mr. Niemierowicz had been deposed, OSC had named Mr. Niemierowicz as its sole witness on the

issue of whether it was in contempt of court, and, as the court noted, counsel for OSC was "putting the responsibility for the question now before the court [whether OSC was in contempt for violating the January 25 Order] directly on Mr. Niemierowicz's shoulders," Supp-App. 273:20–25 (R. 314 at 46). The court therefore reasonably perceived a potential divergence of interests between OSC and Mr. Niemierowicz, who were both represented by the same counsel, and accurately noted the range of possible legal consequences that could be imposed on Mr. Niemierowicz as a result of OSC's apparent strategy.

OSC's counsel had an ethical duty to consider potential conflicts of interest between their clients and advise them of all the potential consequences and their right to obtain independent counsel if warranted. *See* SCR 20:1.7. It is apparent from OSC's counsel's reactions to the court's reminder that they likely had not had such a conversation with Mr. Niemierowicz. To blame the court for Mr. Niemierowicz's refusal to appear based on the court reminding OSC of ethical obligations it had as yet failed to satisfy and the actual range of legal consequences at stake for the witness is absurd. The circuit court was clear that although the court was raising the question to ensure that it was considered, the court did not believe that counsel had made any misstep, nor did the court intend to suggest there was in fact a conflict of interest. Supp-App. 274:13, 275:14–15 (R. 314 at 47, 48). The court's decision to deny the continuance—a matter soundly within its discretion—is all the more reasonable when considered in this context.[26]

[26] It is also not clear that Mr. Niemierowicz ever did obtain independent legal counsel. Although he apparently retained Kevin Scott, at the time of the hearing Attorney Scott was included on OSC's website as a member of its "investigative team" as "Attorney and Lead Counsel," and Attorney Scott also appeared for Mr. Gableman in his capacity

OSC identifies no rule that prohibits a court from reminding attorneys of their ethical duties; indeed, such reminders should be encouraged. Nor does OSC propose any line this Court could draw to inform a circuit court which ethical obligations it may permissibly remind attorneys of or when a simple and accurate statement of the law would amount to an erroneous exercise of discretion.

Finally, OSC inflates the importance of Mr. Niemierowicz to the issue of contempt, and therefore the importance of obtaining a continuance of the contempt hearing. Mr. Niemierowicz is a 2021 college graduate whose initial position with OSC was "office administrator." Supp-App. 286 at 10:4–5, 10:6–11:6 (R. 317 at 4). He was later named "chief of staff," but his duties remained the same, including "buying supplies, setting up technology, shopping for office equipment . . . [and] doing reimbursement plans with the clerk's office." *Id*. at 11:12–12:4. Mr. Gableman was the sole records custodian for most of OSC's early existence, and Mr. Niemierowicz was not named co-custodian until May 11, 2022. Supp-App. 313 at 119:2–120:1 (R. 317 at 31). Even after being named co-custodian, "ultimately decisions [were] up to [Mr. Gableman] on how to respond" to open records requests. *Id*. at 120:5–12.

Mr. Gableman's ultimate responsibility is also clear from the manner in which OSC responded to open records requests. Mr. Gableman trained Mr. Niemierowicz on responding to open records requests, Supp-App. 290 at 26:17–22 (R. 317 at 8), and immediately sat down with Mr. Niemierowicz to go through requests OSC received and identify potentially responsive records, Supp-App. 292 at 36:9–24 (R. 317 at 10); Supp-App. 294 at 44:12–20

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as special counsel in a separate circuit court case. Neither counsel for OSC nor Attorney Scott mentioned these facts at the June 10 hearing.

(R. 317 at 12). Mr. Gableman decided which records to withhold in response to American Oversight's requests, Supp-App. 297 at 53:15–19 (R. 317 at 15); provided Mr. Niemierowicz with search techniques Supp-App. 299–300 at 64:19–65:6 (R. 317 at 17–18); shared a work email address with Mr. Niemierowicz, Supp-App. 310 at 105:21–106:5 (R. 317 at 28); and otherwise "worked very closely" with him, Supp-App. 311 at 111:11 (R. 317 at 29). In light of these and other facts known to the circuit court at the time of the motion for a continuance, it was reasonable for the circuit court to not only raise conflict of interest issues for Mr. Niemierowicz's benefit (and certainly not as a "threat"), but also to deny the motion for a continuance and proceed with Mr. Gableman's testimony, while reserving the question of whether Mr. Niemierowicz's testimony was necessary after Mr. Gableman had been examined. Supp-App. 404:1–402:5 (R. 322 at 16–17). The circuit court did not erroneously exercise its discretion in denying OSC's motion for a continuance.[27]

V. THE CIRCUIT COURT CORRECTLY UNDERSTOOD THE LAW AND DID NOT ERR IN DECLINING TO RECUSE.

The Wisconsin Supreme Court has made clear that, in reviewing a circuit judge's decision not to recuse on impartiality grounds, the appellate court should determine only whether or not that circuit judge actually undertook an inquiry to subjectively determine bias. The record shows that Judge Remington did conduct such an inquiry and produced two

[27] For the same reason, OSC's argument that the circuit court's June 8 statements regarding a potential conflict of interest between Mr. Niemierowicz and OSC was the causal factor for OSC's failure to present any evidence at all at the June 10 hearing, *see* OSC Br. at 71–73, is meritless.

opinions totaling nearly 100 pages evidencing the thoroughness of that inquiry. This Court need look no further to affirm.

Perhaps recognizing that the subjective standard of review mandated by the Supreme Court presents an insurmountable bar for its arguments, OSC contends that this Court should instead apply two alternative approaches to its review—both of which the Supreme Court has expressly rejected. This Court should decline OSC's invitation to disregard binding precedent.

A. A judge must subjectively and solely determine whether he or she lacks impartiality.

1. The Court of Appeals is limited to reviewing whether the circuit judge considered and made a subjective determination of impartiality under Wis. Stat. § 757.19(2)(g).

Wis. Stat. § 757.19(2) governs when judges in Wisconsin are statutorily disqualified from participating in a case. The provision states that judges "shall disqualify" themselves when one of seven defined circumstances occurs:

> (a) When a judge is related to any party or counsel thereto or their spouses within the 3rd degree of kinship.
> (b) When a judge is a party or a material witness, except that a judge need not disqualify himself or herself if the judge determines that any pleading purporting to make him or her a party is false, sham or frivolous.
> (c) When a judge previously acted as counsel to any party in the same action or proceeding.
> (d) When a judge prepared as counsel any legal instrument or paper whose validity or construction is at issue.
> (e) When a judge of an appellate court previously handled the action or proceeding while judge of an inferior court.
> (f) When a judge has a significant financial or personal interest in the outcome of the matter. Such interest does not occur solely by the judge being a member of a political or taxing body that is a party.
> (g) When a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner.

Id. The first six grounds (subparts (a) through (f)) occur when a specified qualifying condition is met objectively, "that is, without recourse to the judge's state of mind." *State v. American TV & Appliance of Madison, Inc.*, 151 Wis. 2d 175, 181–82, 443 N.W. 2d 662 (1989). But, as OSC acknowledges, those first six grounds are not at issue here. *See generally* OSC Br. at 86–90; *see also, e.g.*, R. 377 at 2.

Accordingly, the only relevant provision is subpart (g). And, as OSC concedes, that provision is analyzed differently. *See* OSC Br. at 86. The Wisconsin Supreme Court has held that, unlike the other statutory grounds for recusal, the conditions of subpart (g) may be evaluated only by the *judge himself*: "[T]he basis for disqualification [under subpart (g)] is a subjective one." *American TV*, 151 Wis. 2d at 183. Subpart (g) thus "concerns not what exists in the external world subject to objective determination, but what exists in the judge's mind." *Id.*

Under *American TV*, a judge considering his or her own disqualification under subpart (g) must "make[] a determination [whether], in fact or appearance, he or she cannot act in an impartial manner." *Id.* (emphasis added). Under this test, it does not matter whether "one other than the judge objectively believes there is an appearance that the judge is unable to act in an impartial manner." *Id.* Nor does it matter whether "the judge's impartiality can reasonably be questioned by someone other than the judge." *Id.* (internal quotation marks omitted). This test is applied by the judge alone.

Under the *American TV* test, a reviewing court is "limited to establishing whether the judge made a determination requiring disqualification." *Id.* at 186; *see also, e.g.*, *State v. Pinno*, 2014 WI 74, ¶ 93, 356 Wis. 2d 106, 850 N.W. 2d 207 ("Judge Nuss determined that he was not

biased; therefore, he complied with Wis. Stat. § 757.19(2)(g).”). In other words, the only task for the reviewing court is to “objectively decide if the judge went through the required exercise of making a subjective determination.” *State v. Harrell*, 199 Wis. 2d 654, 664, 546 N.W.2d 115 (1996).

There is no one way for a judge to make a bias determination. Reviewing courts have been satisfied, for example, by a judge’s statement that he has considered the issue of bias. *E.g.*, *Pinno*, 356 Wis. 2d 106, ¶ 93 (finding a judge’s explanation that he acts impartially to be sufficient for a determination); *State v. Rochelt*, 165 Wis. 2d 373, 379, 477 N.W.2d 659 (Ct. App. 1991) (“The trial judge’s declaration that he was not biased satisfies the subjective test.”). Such explicit statements, however, are not required; Wisconsin courts have found that the subjective test is met even when the judge never directly stated she had considered the issue. *See State v. Carprue*, 2004 WI 111, ¶ 62, 274 Wis. 2d 656, 683 N.W.2d 31 (“By instructing the jury that it was to disregard any impression that it might have regarding whether she believed the defendant was guilty or not guilty, we can infer that Judge Schellinger did consider the matter of bias.”); *see also State v. Marhal*, 172 Wis. 2d 491, 506, 493 N.W.2d 758 (Ct. App. 1992) (finding subjective test was met where it was “clear from the record that the trial judge never doubted that she was impartial nor believed that her unequivocal response to the juror’s comments would give anyone reason to doubt her impartiality”).

OSC refuses to acknowledge that the *American TV* test is as straightforward as the Supreme Court and Courts of Appeals indicate. Instead, OSC attempts to graft additional requirements onto the subjective standard. For example, OSC’s brief indicates that a judge must explicitly

consider whether his actions create the appearance of impartiality under "the totality of the circumstances." OSC Br. at 88. OSC also argues that a "true 'determination'" is required, one that "properly analyz[es] the true facts and allegations of the case and appl[ies] controlling law that explicitly defines 'actual bias.'" OSC. Br. at 90.[28] But these additional requirements find no support in the case law. OSC thus attempts, in so many ways, to transmute the bias test from a decidedly subjective one to an objective one, which it is not.[29]

Moreover, OSC points to no case in which a reviewing court deemed a judge's consideration of his partiality insufficient because the judge did not explicitly elaborate on the method by which he made the determination. Nor does OSC point to any case in which a majority of a reviewing court deemed a judge's determination insufficient because he did not sufficiently consider certain "facts and allegations." Indeed, in the *only* case OSC cites in which a reviewing court held a lower court judge's subjective determination to be lacking, that judge had expressly

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[28] OSC's amorphous "true determination" requirement supposedly is rooted in the definition of "determination" in Black's Law Dictionary. *See* OSC. Br. at 90 & n.42. But "deciding something officially" does not bear resemblance to OSC's demand for an extensive explanation containing specific statements regarding specific criteria not described in the statute. *See id.*

[29] OSC also argues that a reviewing court must be able to reject a judge's subjective determination that he is unbiased when the evidence of bias is strong enough. OSC Br. at 89–90. This is just another way of trying to re-insert an objective standard into Wis. Stat. § 757.19(2)(g). If evidence suggesting bias could invalidate a judge's subjective determination that he was not biased, there would be no point in differentiating between a subjective and objective standard in the first place.

Moreover, Wis. Stat. § 757.19(2) defines six other circumstances in in which bias, objectively, may be present. As the Wisconsin Supreme Court has explained, "[i]f the general prohibition in (2)(g) were read so broadly [as to require a judge to recuse in all situations where objective bias may exist], the six specific situations enumerated in the statute would become superfluous." *Harrell*, 199 Wis. 2d at 664–65.

outsourced the appearance-of-bias determination to another judge. *See State v. Carviou*, 154 Wis. 2d 641, 643, 454 N.W.2d 562 (Ct. App. 1990).

OSC's argument relies instead on strained and unpersuasive interpretations of the case law. Citing *Rochelt*, 165 Wis. 2d 373, OSC argues that a judge's declaration that he was unbiased was sufficient under the subjective standard only because the reviewing court had separately evaluated whether there was an appearance of bias when analyzing due process claims. *See* OSC. Br. at 89. But *Rochelt* does not link these two analyses, as OSC suggests. *See* 165 Wis. 2d at 379 ("The trial judge's declaration that he was not biased satisfies the subjective test. The objective test remains for us to apply."). Nor does OSC point to any other authority for this interpretation. *See* OSC Br. at 89. And to the extent there ever was any doubt about *Rochelt*, the Wisconsin Supreme Court provided clarity in *Pinno,* 356 Wis. 2d 106. *Pinno* directly cites *Rochelt* in reiterating the requirements of the subjective *American TV* test, without any qualification or need for additional analysis. *See id.* ¶ 84. This Court should reject OSC's attempts to stretch *Rochelt* beyond its reasonable bounds.

OSC also misreads *Carviou*, 154 Wis. 2d 641. OSC claims that *Carviou* requires judges to make a special demonstration as to the appearance of partiality. *See* OSC. Br. at 89. But *Carviou* does not require a judge's determination to take a certain form; instead, it simply clarifies that the judge to whom the recusal motion is addressed cannot delegate a bias determination. *See* 154 Wis. 2d at 643, 647. In short, *Carviou* reinforces the longstanding principle that it is the *presiding judge* who determines whether he cannot act in an impartial manner.

Finally, OSC claims that subpart (g)'s plain meaning requires a judge to explicitly address both appearance of partiality and actual bias.

OSC Br. at 89. But the statute does no such thing; rather, it requires that *if* a judge determines there is an issue of impartiality or the appearance of impartiality then the judge must recuse. *See* Wis. Stat. § 757.19(2)(g). None of the cases OSC cites, OSC Br. at 89, supports the idea that anything more than a consideration of the issue of partiality is required. *See American TV*, 151 Wis. 2d at 188 ("He states in his letter that he had determined that he could act fairly and impartially; the facts do not suggest he made a determination that there was an appearance that he could not do so."); *Storms v. Action Wis. Inc.*, 2008 WI 110, ¶ 25, 314 Wis. 2d 510, 754 N.W.2d 480 (finding sufficient a Justice's letter to the parties stating that campaign contributions would not influence his judgment). There is no basis for the "magic words" requirement OSC seeks to impose: this Court need determine only whether or not Judge Remington made a determination as to partiality. In any event, this distinction is immaterial here, where the circuit judge did in fact consider—and reject—the question of whether he appeared biased. *See infra* Argument Section V.B.

As an alternative to expanding the requirements of the subjective test, OSC also argues that this Court should apply another test that OSC finds more favorable. *See* OSC Br. at 86–87. But this Court has no power to overturn Wisconsin Supreme Court precedent and re-instate the objective test. *State* ex rel. *McCaffrey v. Shanks*, 124 Wis. 2d 216, 221, 369 N.W.2d 743 (Ct. App. 1985) ("We are bound by the precedents established by the supreme court of this state, even if we disagree with a particular precedent.") (citing *State v. Lossman*, 118 Wis. 2d 526, 533, 348 N.W.2d 159 (1984)). That should be the end of the Court's inquiry on this issue.

2. The Wisconsin Code of Judicial Conduct does not provide a basis upon which to overturn a judge's decision not to recuse.

OSC also claims that a Wisconsin appellate court can review a judge's failure to recuse based on Wisconsin's Code of Judicial Conduct (the "Judicial Code"), specifically under SCR 60.04(4). OSC Br. at 86 & n.36. But the Supreme Court has already made clear that the Judicial Code "governs the ethical conduct of judges; it has no effect on their legal qualification or disqualification to act and a judge may be disciplined for conduct that would not have required disqualification under sec. 757.19." *American TV*, 151 Wis. 2d at 185; *see also Carviou*, 154 Wis. 2d at 644 ("Our supreme court has decided that even when a judge commits ethical violations by presiding over a case, his actions do not constitute grounds for recusal." (citing *American TV*, 151 Wis. 2d 175)). This should settle the matter.

American Oversight nevertheless addresses, for the sake of completeness, OSC's unavailing arguments to the contrary. First, OSC points to Chief Justice Abrahamson's concurrence in *Harrell*, arguing for the applicability of the Judicial Code to review of a recusal determination. OSC Br. at 91. But (as OSC itself recognizes) the majority of the Court rejected that argument and this Court does not have the discretion to ignore a binding majority opinion in favor of one justice's concurrence. And the concurrence itself explicitly confirms that *Harrell* (and *American TV*) stand for the proposition that the Judicial Code is *not* a basis to review a judge's decision on recusal. *See Harrell*, 199 Wis. 2d at 665–69 (Abrahamson, C.J., concurring).

Second, OSC claims that the Wisconsin Supreme Court in *Pinno*, 356 Wis. 2d 106, "came to the opposite conclusion" from *American TV*

regarding whether the Judicial Code was applicable to legal questions of recusal. *See* OSC Br. at 91. OSC misreads this case. Although *Pinno* mentioned that the presiding circuit judge had not faced a situation that would have required him to recuse under the Judicial Code, the Court did not say that violation of the Judicial Code would have *mandated* recusal. 356 Wis. 2d 106, ¶¶ 95–96. Indeed, an unpublished opinion of this Court has already rejected the argument that *Pinno* changed the "well-established legal framework" for analyzing recusal. *In re Sydney E.J.*, 2014 WI App 120, ¶ 12, 2014 WL 5343813 (unpublished opinion cited only for persuasive authority) ("Nowhere in *Pinno* did our supreme court state that it was changing the framework for appellate review of judicial recusal claims, and we are bound by our prior decisions." (internal citation omitted)).[30]

Third, recognizing that constitutional due process does not apply to the government, OSC raises the possibility that a doctrine at common law, the "fair trial" doctrine, justifies applying an objective standard based upon the Judicial Code here. OSC Br. at 91–92. Again, OSC does not point to any binding Wisconsin precedent to support the application of this doctrine in this context, and this Court may not deviate from the current precedent. Arguments to change the law are for the Supreme Court only.

Finally, despite arguing that "*Pinno* confirms Judicial Code applicability," OSC itself cannot explain *how* the Judicial Code should inform this supposed common law right, admitting it is "unclear." OSC Br. at 93. There is no basis (and no need) for this Court to consider this unfounded and undeveloped common law theory. *See Rock Lake Ests. Unit*

[30] A copy of this opinion is included in the Supplemental Appendix at Supp-App. 491 pursuant to Wis. Stat. § 809.23(3)(c).

Owners Ass'n, Inc. v. Twp. of Lake Mills, 195 Wis. 2d, 369, 536 N.W.2d 415 (Ct. App. 1995) (declining to consider argument because it was "undeveloped").

OSC's attempt to persuade this Court to invent a new legal standard or contravene binding case law should be rejected, and only underscores how OSC cannot meet the actual test, as explained next.

B. This Court should uphold the circuit court's subjective recusal determination as sufficient under Wis. Stat. § 757.19(2)(g).

Judge Remington's recusal determination meets and exceeds Wis. Stat. § 757.19(2)(g)'s requirement that he make a subjective determination regarding bias—which, as discussed, is the only test accepted under Wisconsin precedent.

Judge Remington twice addressed OSC's motion for recusal. On July 18, 2022, Judge Remington issued a five-page decision in which he assessed OSC's arguments that he should recuse himself. In this decision, he stated the following:

> OSC does not meet its burden to prove bias, or the appearance of bias, or any of the statutory factors for disqualification. I have reviewed OSC's brief and the parts of the record cited therein. *I have determined that I can and have been acting in an impartial manner in this case.* I will continue to do so in the future.

R-App. 109–10 (R. 379 at 1–2) (emphasis added); *see also id.* at 111–12. On August 17, 2022, Judge Remington issued a ninety-page supplement to his July 18 decision. In that decision, he addressed OSC's numerous accusations that he demonstrated bias, *see* R-App. 119–94 (R. 423 at 5–80), and concluded that the evidence was insufficient, *id.* at 194. He again stated that he "considered OSC's arguments and determined [he] may act in an impartial manner." *Id.* at 199. Judge Remington went further still: although he explained it was unnecessary under Wisconsin law, he also

evaluated objective reasons for his recusal, and stated that "based on [his] examination of OSC's arguments . . . I find absolutely no such evidence" demonstrating unfair bias. *Id.* at 199–200.

In short, there can be no dispute that Judge Remington considered the issue of his own partiality: he correctly noted the legal standard to evaluate bias, evaluated OSC's allegations, responded to them, and repeatedly stated his determination that he could be impartial and would be impartial in the remaining aspects of the case. This is all that is required under Wisconsin law, and indeed far more than the determinations courts have found sufficient. *See supra* Argument Section V.A.

OSC claims that Judge Remington "neglected to subjectively determine whether he created an impermissible appearance of bias." OSC Br. at 94. But OSC does not develop this critique beyond a limited footnote. *Id.* at 94 & n.45. In any event, OSC's argument that Judge Remington did not consider the issue of an appearance of bias is plainly inaccurate; it is clear on the face of both of Judge Remington's decisions that he considered *all* of OSC's arguments related to his bias and rejected them. *See* R-App. 109–10 (R. 379 at 1–2) (July 18 decision); *see also id.* 199–200 (August 17 order).

Bizarrely, OSC accuses Judge Remington of wrongdoing for evaluating OSC's own arguments, suggesting that Judge Remington's determination that those arguments were insufficient somehow renders his decision improperly "adversarial." *See* OSC Br. at 94 & n.45. This argument is both factually inaccurate and ill-considered. As explained above, Judge Remington repeatedly conveyed his subjective assessment of the issue. Taking OSC's argument to its logical conclusion, it asks this Court to set up a catch-22: if a judge's rejection of a party's arguments that

the judge is biased cannot be used to demonstrate a judge's impartiality, then it is nearly impossible for a judge to avoid recusal once it is raised. Judge Remington has fulfilled his obligation under the subjective test, and there is nothing further this Court need analyze.

C. OSC's recusal motion improperly seeks a second bite at the apple.

Even if this Court were to disagree—and there is no basis on which to do so—the remedy OSC seeks is excessive. OSC claims that upon a finding that Judge Remington should have recused, this Court should "vacate the circuit court's Mandamus Order, punitive damage award, contempt finding, purge conditions, and sanctions, and, if any issues remain, remand to a different judge." OSC Br. at 85; *see also id.* at 95 (asking for remand to a different judge if any issues remain), 118–19 (arguing to vacate past decisions in this case). In essence, OSC seeks a second bite at the apple of the merits of its case in the trial court. OSC offers no explanation or authority for why this extraordinary relief is warranted here. In the only case OSC cites in which a reviewing Court found the subjective test under Wis. Stat. § 757.19(2)(g) had not been met, the remedy was remand to the presiding judge to make the appropriate subjective determination. *See Carviou*, 154 Wis. 2d at 643. OSC argues that remand to Judge Remington is not appropriate in this case *only because* of the objective analysis OSC urges this Court to undertake in contravention of controlling Wisconsin law. *See* OSC Br. at 94–95 ("unlike *Carviou* . . . , here it is unnecessary to remand the case for this determination, as this Court should find that he was required to recuse *because of non-permitted actual bias or the appearance thereof*" (emphasis added)).

OSC relies on cases that invalidated prior decisions on the basis of due process (which the state is not constitutionally entitled to), which

would not justify the same result in this context. *See Miller v. Carroll*, 2020 WI 56, 392 Wis. 2d 49, 944 N.W.2d 542. OSC points to no authority stating that a failure to make the proper determination under Wis. Stat. § 757.19(2)(g) would invalidate all previous decisions in that case and American Oversight is aware of none.

D. The circuit court's behavior was not out of the ordinary and was fully appropriate under the circumstances.

OSC spills significant ink arguing that various events in the procedural history of this case demonstrate that Judge Remington displayed bias. *See* OSC Br. at 94–119. These arguments, however, are rooted entirely in the amorphous and unsupported standards OSC pushes this Court to adopt in contravention of binding precedent. These arguments also gratuitously and disrespectfully disparage the circuit court, despite warnings against such rhetoric from this Court. *See Auto-Chlor System of the Mid-South LLC v. Ehlert*, 2021 WI App 67, ¶ 26, 2021 WL 3412916 (unpublished opinion cited only for persuasive authority).[31] For the reasons explained above, the Court should disregard OSC's laundry list of supposed evidence of bias because it is outside the only applicable appellate standard of review.[32]

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[31] A copy of this opinion is included in the Supplemental Appendix at Supp-App. 569 pursuant to Wis. Stat. § 809.23(3)(c).

[32] Were an objective standard ever to become relevant, American Oversight vigorously contests the notion that Judge Remington was biased in any way, or that his actions give rise to an appearance of bias. Even putting aside that OSC's bias claims are rife with misstatements and omissions, OSC's allegations amount to nothing more than disagreements with the circuit court's substantive and case management decisions or reactions to OSC's argument and conduct. As the U.S. Supreme Court has explained, "[j]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion" nor do "judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily . . . support a bias or partiality challenge." *Lietky v. United* States, 510 U.S. 540, 555 (1994); *see also Disciplinary Proceedings Against Nora*, 2018 WI 23, ¶ 35, 380 Wis. 2d 311, 909 N.W.2d

While this Court cannot make its own bias determination, American Oversight nevertheless believes several responses to OSC's factual allegations against Judge Remington are warranted. OSC's accusations of bias are, fundamentally, challenges to the substantive decisions in this case and include significant mischaracterizations of the record and Judge Remington's handling of the proceedings.[33] Thus, to ensure this Court has appropriate context for the merits decisions discussed in the sections above, American Oversight provides the following clarifications regarding the most egregious of the misstatements of the record in OSC's recusal arguments.

First, OSC entirely omits key background for the circuit court proceedings about which OSC complains. As one example, OSC complains at length about the June 10, 2022, contempt hearing, singling out the circuit court's supposedly "harsh treatment" of Mr. Gableman. *See* OSC Br. at 101. But OSC entirely omits from its extensive submission to this Court the most unusual feature of those proceedings: Mr. Gableman's conduct on the witness stand and in the courtroom. *Compare* Supp-App. 420:12–425:5 (R. 322 at 32–37); Supp-App. 441–44 (R. 325), *with* R-App. 254–74 (citing

155 ("[C]ritical statements based on a judicial officer's consideration of a litigant's arguments or evidence and the officer's experience with a litigant during a proceeding . . . are usually not sufficient to demonstrate bias" (citing *Lietky*, 510 U.S. at 555)).

[33] OSC's accusation, for instance, that "Judge Remington frequently misstated evidence to the detriment of OSC," OSC Br. at 110, is unsubstantiated. To take just one example, OSC criticizes Judge Remington for "yet another transformation by ellipses" supposedly to "tarnish OSC and its attorneys" when he stated in his recusal opinion that OSC "delayed filing . . . per local rules" without noting that OSC had stated it delayed filing "due to unavailability of AO counsel on the 1/17/22 holiday to discuss resolution per local rules." OSC Br. at 112. OSC fails to acknowledge that Judge Remington's key point was that "OSC does not explain what 'local rule' it believes *required* it to delay filing its motion," R-App. 124 (R. 423 at 10) (emphasis added); *see also* R. 377 at 5 (not identifying an applicable local rule).

portions of R. 322 but not including those pages). OSC does not even attempt to argue that Judge Remington's characterization of that conduct was inaccurate or undeserving of "harsh treatment," *see* OSC Br. at 101–02; *see also id.* at 102 & n.49. Indeed, the Legislative Respondents' counsel described Mr. Gableman's conduct as "unprofessional," Supp-App. 446 (R. 326 at 2), and, if anything, Judge Remington showed remarkable restraint in addressing it.[34]

Similarly, OSC argues that Judge Remington "stonewalled OSC efforts to make its record." OSC Br. at 113. But OSC does not argue that it was prejudiced in any of the examples it cites. OSC also does not explain how any of the cited examples, which frequently involved OSC's attorney talking over the court and attempting to revisit issues that had already been discussed and decided, reflect anything other than the court exercising its inherent power to control the proceedings before it. *See City of Sun Prairie v. Davis*, 226 Wis. 2d 738, 749–50, 595 N.W.2d 635 (1999) (courts have inherent authority to "ensur[e] that the court functions efficiently and effectively to provide the fair administration of justice"); *Latham v. Casey & King Corp.*, 23 Wis. 2d 311, 314, 127 N.W.2d 225 (1964) ("The general control of the judicial business before it is essential to the court if it is to function.").

[34] Judge Remington ultimately concluded that Mr. Gableman's breaches of standards of professional conduct warranted referral to the Wisconsin Supreme Court's Office of Lawyer Regulation. *See* R-App. 100–07 (R. 327 at 18–25). OSC attempts to dissociate itself from Mr. Gableman's conduct by claiming that "OSC's attorneys here only represent OSC, not Gableman in his personal capacity, and OSC expresses no view on the merits of this referral." OSC Br. at 102 & n.49. OSC cannot simultaneously argue that the court's treatment of Mr. Gableman was "harsh" and take no position on the conduct leading to that supposed "treatment."

Second, OSC accuses Judge Remington of engaging in improper "predeterminations" of legal issues, but OSC does not even accurately describe the determinations about which it complains. For instance, OSC suggests that Judge Remington predetermined the "merits of the writ" at the January 21, 2022, hearing, OSC Br. at 95, but the only issue Judge Remington decided at that hearing was whether to conduct in camera review—*not* the merits of OSC's motion, as OSC says.[35] Moreover, OSC had *already* briefed its motion to quash by the hearing, R. 99; the record demonstrates Judge Remington was significantly familiar with OSC's arguments, *see generally, e.g.*, Supp-App. 6–91 (R. 148); and OSC omits that Judge Remington repeatedly stated that he was offering preliminary views on the merits only, *see* Supp-App. 45:8–11 (R. 148 at 40) ("[R]ather than give my answers to these questions without the benefit of further argument and consideration, I'd like to set a briefing schedule to do that . . . ."), Supp-App. 61:14–15 (R. 148 at 56) (describing "the preliminary review of your arguments"), Supp-App. 80:23–24 (R. 148 at 75) ("And I will have the benefit of those briefs to see whether I stay with my preliminary thoughts . . . ."). Likewise, OSC takes issue with Judge Remington "issu[ing] [his] final order on the merits before the scheduled oral argument on the merits." OSC Br. at 96. Even if this were a valid complaint—which it is not, as the issues had been fully briefed—OSC omits that Judge Remington expressly stayed his order pending oral argument on OSC's motion for a stay pending appeal, thus affording OSC

[35] As Judge Remington explained, the presumption under the Open Records Law is in favor of access, Wis. Stat. § 19.31; in camera review is a typical procedure for assessing withholding claims, *Youmans*, 28 Wis. 2d at 682; and the Open Records Law requires prompt resolution to afford access "without delay," Wis. Stat. § 19.35(4). *See* Supp-App. 57:22–58:13 (R. 148 at 52–53).

an opportunity to again raise its merits objections in that context. R-App. 63 (R. 165 at 52).

As another example, OSC's argument that Judge Remington "gave [American Oversight] a roadmap for making a contempt motion" during the March 8, 2022 hearing, OSC Br. at 98, is based on nothing more than Judge Remington's acknowledgement that American Oversight might seek a contempt ruling *if it uncovers evidence of noncompliance with the court's order*. After American Oversight made this suggestion, *see* Supp-App. 132:3–19 (R. 182 at 41), Judge Remington said nothing about whether he believed there was such noncompliance.[36] *See* Supp-App. 165:25–166:2 (R. 182 at 74–75) ("Now *if* American Oversight can demonstrate by other sources that there were documents that should have been produced . . . ." (emphasis added)).

Third, OSC's accusation that Judge Remington had a "motive" for his supposed mistreatment of OSC—the motive being that he found "everything about OSC to be repugnant"—OSC Br. at 101, is baseless. OSC's only support for this accusation is that Judge Remington made comments supposedly "irrelevant to his rulings" that "roundly condemned the work of OSC," saying, for example, it "accomplished nothing." *Id.* According to OSC, "the public records case before the circuit court did not concern what OSC accomplished." *Id.* That is not correct.

[36] After American Oversight's counsel raised the "outstanding issue [] that there are several indications that the [OSC]'s production of 700 pages to this Court is not complete" and cited concerns with the court's description of the documents produced for in camera review, Supp-App. 132:3–19 (R. 182 at 41), Judge Remington stated: "These issues will have to wait another day . . . I have no motion before the Court alleging the inadequacy of the production. Obviously, you wouldn't be able to do that until you see what, in fact, has been produced." Supp-App. 132:20–24 (R. 182 at 41). In context, Judge Remington's subsequent comments, about which OSC complains, are plainly in reaction to the argument raised by American Oversight's counsel earlier in the hearing.

This case was about American Oversight's requests for public records; after Judge Remington ordered release of the requested records, the contempt phase addressed whether OSC had in fact complied with that order—that is, whether it could show it had produced all responsive records. Whether OSC "accomplished" certain tasks—and whether documents had been created regarding those tasks—was important to evaluating whether responsive documents ever existed (or continued to exist) such that they could be produced in response to the court's order. As such, Judge Remington's comments regarding OSC's "work" spoke directly to the claims before him in this case.

OSC goes as far as to suggest that Judge Remington's decisions were animated by a desire to create negative publicity for OSC. It argues that "a reasonable observer could conclude . . . that he had a publicity-generating goal to undermine public support for OSC." OSC Br. at 103–04. This argument, which impugns the integrity of a judge, has no support in the record, and OSC offers none.[37] Indeed, OSC's own counsel has previously disclaimed this argument. During the March 8 hearing, counsel for OSC stated to Judge Remington, unprompted: "I know that -- that your intent is not to undermine the investigation. Your intent is to comply with the law, and -- as you see it." Supp-App. 153:4–6 (R. 182 at 6).

[37] In making its arguments to this Court, OSC continues to make the type of speculative accusations regarding the court's motives that this Court has previously admonished. *See Auto-Chlor*, 2021 WL 3412916, ¶ 26 ("Before concluding, we admonish Auto-Chlor's counsel for making repeated unprofessional and disrespectful comments about the circuit court that have no support in the record . . . Zealous advocacy is not furthered by gratuitous, disrespectful comments from counsel. Counsel are obligated to make supported challenges to circuit court actions or decisions that could have legal merit; counsel are also obligated to avoid making pointless and ad hominem attacks of this kind.").

Fourth, OSC's claims that "Judge Remington used demeaning language," OSC Br. at 116, are vastly overstated. The language OSC cites consists of basic statements regarding key merits issues in this case, and factual statements regarding OSC's and its attorneys' conduct and arguments. For example, OSC takes issue with Judge Remington's statement: "Nothing in these particular records bespeaks any investigation at all, let alone one demanding strategic secrecy." *Id.* at 117. The notion that this statement is somehow demeaning in an open records case in which a defendant has claimed it may withhold particular records because they supposedly contain "strategic information to our investigation," R. 5 ¶ 45, represents a misunderstanding of both this case and the word "demean."

Similarly, OSC's labeling of Judge Remington's statements regarding OSC's investigation as "shocking in their intemperance and even vitriol," OSC Br. at 101, is facially inaccurate. *See* OSC Br. at 101 (citing as evidence of bias Judge Remington's statements that there was no evidence OSC created "weekly progress reports," that OSC "generated no measurable data," "generated no reports," and obtained "no relief"), 101–02 (citing Judge Remington's description of Mr. Gableman's behavior and conduct during testimony and throughout the case), 102–03 (citing various of Judge Remington's descriptions of OSC's arguments for which OSC attorneys' pro hac vice credentials were revoked). At most, OSC complains about what it sees as Judge Remington's "critical statements based on [his] consideration of [OSC's] arguments or evidence and [his] experience with [OSC and its representatives] during [the] proceeding[s]." *Disciplinary Proceedings Against Nora*, 2018 WI 23, ¶ 35. Such statements do not indicate bias, let alone come anywhere close to "shocking." *See id.*

Fifth, OSC asserts that Judge Remington "aided AO in . . . inappropriate ways." OSC Br. at 106. But OSC fails to cite a single example that supports this conclusion.[38] For instance, OSC says that Judge Remington "provided detailed step-by-step instructions to AO for how to effectuate service." Not only is that a mischaracterization of the facts surrounding the service issue but it also ignores the court's authority to ensure efficient and effective case management. *See City of Sun Prairie*, 226 Wis. 2d at 749–50. Indeed, OSC conceded jurisdiction without raising any objection to the method of resolution of the service issue. *See* R. 116.

OSC goes on to argue that there was a "wink-and-nod" exchange in which Judge Remington "advised [American Oversight] on how to proceed with its case," instructing counsel that it "can figure out what your next move is" before stating his desire to "limit the contested issues." OSC Br. at 107. Nothing in OSC's cited exchange advises American Oversight *to do anything* at all, let alone suggests "acts of guidance." OSC's arguments repeat the same demeaning suggestion that Mr. Gableman made at the June 10, 2022, hearing: as the court recounted it, that American Oversight's counsel "is not capable of litigating without the help of the judge." R-App. 103 (R. 327 at 21).

OSC takes particular issue with Judge Remington allowing American Oversight to name Mr. Gableman as a witness despite,

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[38] Instead, OSC resorts to its own subjective interpretation of video of hearings. *See* OSC Br. at 10607, 114–16 (citing January 21, 2022 and April 26, 2022 video recordings at https://wiseye.org/2022/01/21/dane-county-circuit-court-american-oversight-vs-assembly-office-of-special-counsel-et-al/?startStreamAt=986; https://wiseye.org/2022/04/26/dane-county-circuit-court-scheduling-hearing-american-oversight-vs-assembly-office-of-special-counsel-et-al/?startStreamAt=1194). Should the Court consider OSC's cited video evidence, American Oversight is confident it will find OSC's characterizations to be unsupported.

according to OSC, American Oversight not submitting a witness list with his name. OSC Br. at 109. But OSC once again misstates the relevant history. OSC says that "the circuit court had ordered that the parties" submit witness lists by May 10. *Id.* That basic statement is misleading, as the record demonstrates that it was clear the deadline applied to OSC, not to American Oversight. Supp-App. 221:12–224:3 (R. 223 at 23–26). While Judge Remington later acknowledged that his form written order referred to "lists," plural, he expressly stated that "[t]he context of the order for disclosure of witnesses was my intent to apply to the Office of Special Counsel," based on the shifting burdens of proof at issue in contempt proceedings. Supp-App. 254:4–23 (R. 223 at 27). OSC's implication, that Judge Remington ignored OSC's arguments without reason, is simply not supported in the record.

VI. AMERICAN OVERSIGHT DOES NOT TAKE A POSITION ON OSC'S ATTORNEYS' PRO HAC VICE REVOCATIONS BECAUSE THEY DO NOT IMPACT THE MERITS OF THIS CASE.

As discussed throughout American Oversight's brief, the record reflects how OSC's litigation strategies compounded the longevity and complexity of this case, ultimately at the expense of the Wisconsin taxpayer. Notwithstanding these observations, American Oversight's focus remains on the merits of its open records claims. Whether OSC's out-of-state attorneys' pro hac vice admissions were properly revoked has no bearing on any of American Oversight's claims in this case, and OSC does not argue otherwise. *See* OSC Br. at 119 (asking this Court only to vacate the revocation order and reinstate the BLF Attorneys' pro hac vice

admissions); *id.* at 135 (same).[39] As such, American Oversight does not take a position on this issue in this appeal.[40]

VII. AMERICAN OVERSIGHT DOES NOT TAKE A POSITION ON WHETHER OSC'S ATTORNEYS ENGAGED IN SANCTIONABLE CONDUCT BECAUSE THAT ISSUE DOES NOT IMPACT THE MERITS OF THIS CASE.

OSC argues that Judge Remington erroneously determined he "could sanction OSC and each of its seven lawyers" based on their conduct before the court. OSC Br. at 136 (quoting R-App. 202 (R. 423 at 88)). OSC acknowledges that Judge Remington did not in fact sanction OSC's attorneys, but nevertheless asks this Court to "vacate the circuit court's finding of sanctionable conduct." *Id.* at 136–37; *see also* R-App. 202–04 (R. 423 at 88–90). Judge Remington's observation that he "could" sanction OSC's attorneys does not affect the merits of this case and, as with the pro hac vice issue, OSC does not argue otherwise. *See id.* at 137. As such, American Oversight does not take a position on this issue in this appeal.

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[39] This is in contrast to OSC's position regarding recusal, which asks this Court to vacate a slew of merits rulings. *See supra* Argument Section V.

[40] In taking no position on the merits of OSC's out-of-state attorneys' pro hac vice admissions, American Oversight does not concede any factual or legal assertions made by OSC in furtherance of its argument on that issue. American Oversight also does not concede that the issue was not mooted by this Court's grant of the out-of-state attorneys' pro hac vice motions in this appeal, 8/26/2022 Court Order, 2022AP1290; *see also* 9/1/2022 Court Order, 2022AP1423, which grant "*shall continue* though *subsequent* appellate *or circuit court actions* or proceedings in the same matter." SCR 10.03(4) (emphases added). *See Matter of Commitment of J.W.K.*, 2019 WI 54, ¶ 11, 386 Wis. 2d 672, 927 N.W.2d 509 ("An issue is moot when its resolution will have no practical effect on the underlying controversy." (internal quotes omitted)).

American Oversight similarly makes no concessions with respect to OSC's arguments regarding "sanctionable conduct." *See infra* Argument Section VII.

CONCLUSION

For the reasons articulated above, American Oversight respectfully requests that the Court affirm the circuit court in full.

Respectfully submitted this 30th day of March, 2023.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font, and conforms with the Court's September 1, 2022 order with respect to the word limit for this brief. The length of the brief is 30,207 words.

Dated this 30th day of March, 2023.

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