STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

PRECIOUS AYODABO, et al.,

Plaintiffs,

v. **Case No. 2025CV003082**

CITY OF MADISON, et al.,

Defendants.

NON-PARTY *AMICUS CURIAE* BRIEF OF GOVERNOR TONY EVERS

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INTRODUCTION

Governor Tony Evers submits this non-party *amicus curiae* brief to emphasize that all Wisconsin voters—whether voting absentee or in-person on election day—have a constitutional right to vote. If a voter follows all of the rules when casting a ballot, their vote must count and their constitutional right to vote must be respected. One Defendant, however, has argued that absentee voting is a mere "privilege"—not a constitutional right—and therefore that this case should be dismissed. Witzel-Behl Br. at 1, Dkt. No. 51.

This court should reject that argument for two reasons. First, case law makes clear that the constitutional right to vote extends to all voters regardless of the way they cast their ballots. Absentee voters are not second-class voters. Second, Defendant's argument wrongly relies on a policy statement within the statute regarding absentee voting. But as case law makes clear, no statute can override a constitutional right in the way Defendant suggests.

Governor Evers takes no position on any other dispute at issue in this case, including whether Defendants[1] have committed a violation of this constitutional right or whether money damages would be an appropriate remedy.

[1] While there are multiple defendants in this case, this brief adresses only one issue raised by one defendant, Maribeth Witzel-Behl. Accordingly, it refers only to that defendant for the remainder of the brief.

ARGUMENT

I. Wisconsin voters have a constitutional right to vote no matter how they choose to exercise it.

The people of Wisconsin have a constitutional right to vote. "[N]o right is more jealously guarded and protected by the departments of government under our constitutions, federal and state, than is the right of suffrage." *State ex rel. Frederick v. Zimmerman*, 254 Wis. 600, 613, 37 N.W.2d 473 (1949). This right is so fundamental because it is the "principal means by which the consent of the governed, the abiding principal of our form of government, is obtained." *McNally v. Tollander*, 100 Wis. 2d 490, 501, 302 N.W.2d 440 (1981). Because the right to vote is so "central to our system of government," the Supreme Court "has consistently sought to protect its free exercise." *Id*. at 502.

In Wisconsin, we are proud of our democracy. We have one of the highest voter turnout rates in the nation. *See Wisconsin's Election Landscape*, MIT Election Data & Science Lab, https://electionlab.mit.edu/landscapes/wisconsin (last visited Jan. 20, 2026) ("Wisconsin's turnout levels remain among the highest of all states"). We have an election system that is centered on our communities, with more than 1,800 local, municipal clerks running free, fair, and secure elections. *Id*. Wisconsinites' right to vote is "even stronger" than the federal right to vote "because in addition to the equal protection and due process protections . . . the franchise for Wisconsin voters is expressly declared in Article III, Section 1" of the state constitution. *Milwaukee Branch of NAACP v. Walker*, 2014 WI 98, ¶ 62 n.14, 357 Wis. 2d 469, 851 N.W.2d 262. The right to vote is secured in several constitutional provisions: Article I, Section 1; Article III, Section 1, "and by the fundamentally declared purpose of government." *State ex rel. McGrael v. Phelps*, 144 Wis. 1, 128 N.W. 1041, 1046 (1910).

However, Defendant Maribeth Witzel-Behl argues absentee voters are not exercising a constitutional right. Her motion to dismiss relies on Wis. Stat. § 6.84(1), which is a statement of "Legislative Policy" adopted in 1985. The policy statement begins, appropriately, with the recognition that "voting is a constitutional right, the vigorous exercise of which should be strongly encouraged." Wis. Stat. § 6.84(1). It then notes that voting via an absentee ballot is a "privilege" that "must be carefully regulated." *Id.* Defendant Witzel-Behl concludes that because the availability (or not) of an absentee ballot is a privilege, then the voters who use them have no constitutional right to have them counted. Witzel-Behl Br. at 6-7, Dkt. No. 51.

Defendant misunderstands a policy statement which simply addresses whether the process of voting by absentee ballots can be carefully regulated. Of course, the absentee ballot voting process can be regulated—and it is. But Wis. Stat. § 6.84(1) does not mean that voters who follow all the rules for using an absentee ballot are second-class voters who unknowingly enter a zone where their constitutional rights are suspended.

Our Supreme Court's recent decision in *Priorities USA v. Wis. Elections Comm'n*, 2024 WI 32, 412 Wis. 2d 594, 8 N.W.3d 429, makes this point clear. There, the court explained the limited significance of Wis. Stat. § 6.84(1): it is "merely a declaration of legislative policy setting forth that 'absentee balloting must be carefully regulated.'" *Id*. ¶ 32. The court had previously read Wis. Stat. § 6.84(1) as "mandat[ing] a 'skeptical' view of absentee voting." *Id*. ¶ 43 (quoting *Teigen v. Wis. Elections Comm'n*, 2022 WI 64, ¶ 53, 403 Wis. 2d 607, 976 N.W.2d 519, *overruled by Priorities USA*, 412 Wis. 2d 594). That skepticism had then been brought to bear by the *Teigen* Court on a statutory provision dealing with the return of absentee ballots. *See Teigen*, 403 Wis. 2d at 645–55. But this skeptical view of absentee voting was later rejected in *Priorities*. The use of Wis. Stat. § 6.84(1) to generate an improper "gloss" over all absentee voting "allowed

policy concerns to alter the lens through which [the *Teigen* court] viewed the statutory language." *Priorities USA*, 412 Wis. 2d 594, ¶¶ 44, 46. In other words, Defendant Witzel-Behl's motion is premised on an unjustifiably overbroad reading of a policy statement that has never been held to have any bearing on voters' constitutional rights. Using Wis. Stat. § 6.84(1) as an analytical framework for statutory interpretation has been rejected as "unsound in principle" by our Supreme Court. *Id*. ¶ 46. It follows that it must be similarly rejected as an analytical framework for the state Constitution as is discussed further in Section II.

Longstanding judicial precedents protect absentee voters' rights. Take, for instance, *State v. Barnett*, 182 Wis. 114, 195 N.W. 707 (1923). There, several absentee ballots did not have the required "signature or autograph initials" (or "indorsement") of election officials. *Id*., 195 N.W. at 713–14. Ballots without election officials' initials—which the officials apply when they receive the completed ballot—should not have been counted under existing Wisconsin law. *Id*. But the court reasoned that while an in-person voter can examine the ballot "and see that it is properly indorsed by the ballot clerks," absentee voters who send back their voted ballots do not. *Id*. at 714. Absentee voters are "not present to see that the duty [to indorse] is performed" and the indorsement "is not within [the voters'] power to demand or compel." *Id*. To apply this law to absentee voters, then, "would be to disfranchise a qualified voter through the negligence of the election officers." *Id*. at 713. The remedy was to not apply the law to absentee voters "[i]n order that the *constitutional right of the voter shall not be abridged*." *Id*. at 714 (emphasis added).

Consider too *Sommerfeld v. Board of Canvassers of the City of St. Francis*, 269 Wis. 299, 69 N.W.2d 235 (1955), which also acknowledged the constitutional right for absentee voters. There, several absentee ballots were challenged because a third party delivered them to the municipal clerk, though the law required voters to mail them or deliver them in person. *Id*. at

301.[2] The court affirmed that those ballots counted. Wisconsin law cannot be "meant to disenfranchise" by providing "sick or physically disabled" voters "a condition that they could not possibly perform," the court reasoned. *Id*. at 303. And in *Lanser v. Koconis*, 62 Wis. 2d 86, 214 N.W.2d 425 (1974), our Supreme Court again recognized the constitutional right to vote for absentee voters. At issue were absentee ballots that a special courier delivered to a nursing home for resident voters to fill out, rather than the clerk mailing the ballots as state law required. The court recognized the legislature's ability to regulate absentee voting but held "we are not inclined to disenfranchise these voters who acted in conformance with the statutory requirements." *Id*. at 93. Those ballots counted—and those voters' constitutional rights were vindicated.

If there was any doubt that absentee voters are exercising a constitutional right to vote, Wisconsin's "long history" respecting the will of the voter should extinguish any questions. *Trump v. Biden*, 2020 WI 91, ¶ 38, 394 Wis. 2d 629, 951 N.W.2d 568 (Hagedorn, J., concurring) (citing *Roth v. Lafarge Sch. Dist. Bd. of Canvassers*, 2004 WI 6, ¶ 19, 268 Wis. 2d 335, 677 N.W.2d 599). This tradition is even enshrined in statute: the state's election laws "shall be construed to give effect to the will of the electors," Wis. Stat. § 5.01(1), "notwithstanding technical noncompliance," *Trump*, 394 Wis. 2d 629, ¶ 38 (Hagedorn, J., concurring). And so, our courts have "consistently placed a premium on giving effect to the will of the voter." *Roth*, 268 Wis. 2d 335, ¶ 26; *Ollmann v. Kowalewski*, 238 Wis. 574, 300 N.W. 183, 185–86 (1941) (explaining the "will of the electors" provision is consistent with the "constitutional right

[2] The *Teigen* majority questioned *Sommerfeld*'s authority in noting it pre-dated the passage of Wis. Stat. § 6.84. *Teigen*, 403 Wis. 2d 607, ¶ 80 ("The adoption of § 6.84 renders Sommerfeld a nullity."). However, *Teigen*'s interpretation of Wis. Stat. § 6.84 was overruled and "no longer possesse[s] any precedential value." *Blum v. 1st Auto & Cas. Ins. Co.*, 2010 WI 78, ¶ 46, 326 Wis. 2d 729, 786 N.W.2d 78. In any event, as explained below, a statute cannot override a constitutional right.

to vote"); *Stahovic v. Rajchel*, 122 Wis. 2d 370, 376, 380, 363 N.W.2d 243 (Ct. App. 1984) (detailing the "the fundamental principle that, in construing election laws, the will of the electorate is to be furthered" and courts should "avoid[] thwarting the will of the electors").

Embracing Defendant's argument would lead to absurd results. The will of voters who chose to use legally available absentee ballots could be ignored for a myriad of reasons and all without recourse. A drop box full of ballots could be damaged by fire or rain, but there would be no obligation to send them duplicate ballots so the votes could be counted. *See generally* Wis. Stat. § 5.85 (detailing ballot duplication procedures for in-person ballots). A set of absentee ballots could misplaced, and no one would need to look for them. A clerk could intentionally omit from the official ballot their required initials under Wis. Stat. § 6.87(1) for all voters from a disfavored precinct, and nothing could be done.

Denying absentee voters a core constitutional right, as Defendant proposes, would affect millions of people who chose to use absentee ballots for a myriad of reasons. Some absentee voters have disabilities, are in the military, or live overseas. They include caregivers, parents of school-age children, the elderly, and hardworking Wisconsinites whose work shifts make voting on Election Day a severe burden. In 2025's Spring Election, for example, more than 363,000 in-person absentee ballots and 330,000 absentee mail ballots were cast, exceeding 30% of the 2.3 million total ballots cast in that election.[3] In the 2024 general election, more than 1.54 million absentee ballots were cast, including both in-person and by-mail absentee ballots, or roughly 45% of the more than 3.4 million total ballots cast.[4] The constitutional right to vote would mean

[3] Wis. Elections Comm'n, 2025 Spring Election Statistics Report (Oct. 2, 2025), https://elections.wi.gov/resources/statistics/2025-spring-election-voting-and-registration-statistics-report.

[4] Wis. Elections Comm'n, 2024 General Election Statistics Report (June 2, 2025), https://elections.wi.gov/resources/statistics/2024-general-election-voting-and-registration-

little if close to half of all voters in Wisconsin were deprived of it because they chose to legally cast an absentee ballot.

II. Wisconsin statutes cannot override constitutional rights.

No statute—much less one that is a statement of "Legislative Policy"—can override a well-established constitutional right. Our Supreme Court has said this essential idea "may be said without citation of authority." *Kayden Indus., Inc. v. Murphy*, 34 Wis. 2d 718, 733, 150 N.W.2d 447 (1967). Nevertheless, it has made clear: the Wisconsin constitution "is of the highest dignity and prevails over legislative acts and court rule to the contrary." *Id*. '"[W]here there is a conflict between an act of the legislature and the constitution of the state, the statute must yield to the extent of the repugnancy, but no further.'" *State ex rel. LaFollette v. Bd. of Sup'rs of Milwaukee Cnty.*, 109 Wis. 2d 621, 629, 327 N.W.2d 161 (Ct. App. 1982) (quoting *Marsh v. Buck*, 313 U.S. 406, 408 n.3 (1941)); *State v. Cole*, 2003 WI 112, ¶ 14, 264 Wis. 2d 520, 665 N.W.2d 328.

This proposition is even more self-evident when the right to vote is at issue. The right to vote is a "sacred" one "of the highest character," which sits on "the high plane of *removal from the field of mere legislative material impairment*." *Phelps*, 128 N.W. at 1046 (emphasis added). The recognition that state laws cannot impair the constitutional right to vote is more than 150 years old. *State ex rel. Wood v. Baker*, 38 Wis. 71, 86 (1875) ("Statutes cannot impair the right, though they may regulate its exercise. Every statute regulating it must be consistent with the constitutionally qualified voter's right of suffrage when he claims his right at an election."). And it has been consistently recognized for generations since. *See, e.g.*, *League of Women Voters of Wis. Educ. Network, Inc. v. Walker*, 2014 WI 97, ¶ 50, 357 Wis. 2d 360, 851 N.W.2d 302

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statistics-report. The sum of absentee ballots includes both non-UOCAVA absentee ballots and those military and overseas ballots sent under UOCAVA.

("[E]lection laws must not destroy or impair the right to vote"); *Zimmerman*, 254 Wis. at 613 ("It is true that the right of a qualified elector to cast his ballot for the person of his choice cannot be destroyed or substantially impaired."); *Barnett*, 195 N.W. at 714 (holding that statutory requirement did not apply to absentee voters "[i]n order that the constitutional right of the voter shall not be abridged"). Thus, while Wis. Stat. § 6.84(1) "declar[es] . . . legislative policy," it does not, cannot, and should not override the constitutional right that absentee voters have. *Priorities USA*, 412 Wis. 2d 594, ¶ 32.

CONCLUSION

The constitutional right to vote attaches to all voters, including absentee voters, through their entire voting process. Defendant Witzel-Behl's reliance on Wis. Stat. § 6.84(1) is misplaced as clarified by our Supreme Court in *Priorities USA v. Wisconsin Elections Commission*.

Respectfully submitted this 23rd day of January 2026.

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