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IN THE SUPREME COURT OF WISCONSIN
No. 2023-AP-36

Wisconsin Voter Alliance and
Ron Heuer,

Petitioners-Appellants,

v.

Kristina Secord,

Respondent-Respondent-Petitioner.

**BRIEF OF *AMICI CURIAE* DISABILITY RIGHTS
WISCONSIN AND THE GREATER WISCONSIN
AGENCY ON AGING RESOURCES, INC.**

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INTERESTS OF AMICUS CURIAE

Disability Rights Wisconsin (“DRW”) is a nonprofit organization organized and located in Wisconsin. DRW’s mission is to address the issues facing, and to advance the dignity, equality, and self-determination of, people with disabilities in Wisconsin. DRW is designated, under federal and state law, as the protection and advocacy system for Wisconsin citizens with mental illness, developmental disabilities, and other physical impairments. *See* Wis. Stat. § 51.62; 29 U.S.C. § 794e; 42 U.S.C. §§ 15041 *et. seq.*; 42 U.S.C. §§ 10801 *et. seq.*

DRW advocates for voting rights in Wisconsin. This includes ensuring that people with disabilities have equal access to the polls; public education about voting rights; and working one-on-one with clients to resolve individual problems with the voting process. DRW educates its constituents and the public about voting issues and regularly engages in policy and legal advocacy to advance civil rights and election access for people with disabilities.

DRW has also engaged in other litigation to protect voting rights, including *City of Green Bay v. Bostelmann*, No. 20-cv-479, 2020 WL 1492975 (E.D. Wis. Mar. 27, 2020); *Democratic Nat’l Committee v. Bostelmann*, 488 F. Supp. 3d 776 (W.D. Wis. Sep. 21, 2020), *stay denied*, 976 F.3d 764 (7th Cir. Sept. 27, 2020), *question certified on reconsideration*, 973 F.3d 764 (7th Cir. Sept. 29, 2020), *certified question answered*, 2020 WI 80, 394 Wis. 2d 33, 949 N.W.2d 423, *stay granted after certified answer*, 977 F.3d 639 (7th Cir. Oct. 8, 2020), *motion to vacate denied*, 141 S. Ct. 644 (U.S. Oct. 26, 2020); *Jefferson v. Dane Cnty.*, 2020 WI 90, 394 Wis. 2d 602, 951 N.W.2d 556; *Fabick v. Wisconsin Elections Comm’n*, 2022 WI 88, __ Wis. 2d __, 989 N.W.2d 764 (Table);

Teigen v. Wisconsin Elections Comm'n, 2022 WI 64, 403 Wis. 2d 607, 976 N.W.2d 519, *reconsideration denied* 2022 WI 104; *Archambault v. Wisconsin Elections Comm'n*, Waukesha Cnty. Cir. Ct. No. 2021CV1620 (filed Nov. 9, 2021).

The Greater Wisconsin Agency on Aging Resources, Inc. (“GWAAR”) is a nonprofit agency organized and located in Wisconsin. GWAAR’s mission is to support lead aging agencies and to “promote, protect, and enhance the well-being of older people in Wisconsin.” As part of that mission, GWAAR advocates on behalf of, and seeks to protect, the right to vote of every eligible older adult and adult with disabilities, including by supporting: increased funding for specialized transportation programs for voting related activities; increased funding for the Wisconsin Elections Commission’s Polling Place Accessibility Audits; enhanced election inspector/special voting deputy training; expanding access to photo ID; and improving access to secure, equitable, and private absentee voting.

Among its many other programs, GWAAR operates the Wisconsin Guardianship Support Center (“GSC”) which provides neutral information and assistance regarding adult guardianship, protective placement, advance directives, and supportive decision-making. GSC is a leading expert on Wisconsin’s guardianship law and how it impacts the right to vote.

DRW co-leads and GWAAR is a member of the Wisconsin Disability Vote Coalition (“DVC”), a non-partisan effort to help ensure full participation in the entire electoral process of Wisconsin voters with disabilities, including registering to vote, casting a vote, and accessing polling places. With a membership of more than 40 community agency

partners, self-advocates, and other community members, DVC conducts outreach and education across Wisconsin, including on guardianship and voting rights. DRW also implemented a limited-term Voting Rights & Guardianship Project in 2022-2023 which resulted in the development, in consultation with GSC, of resources for attorneys, guardians, individuals under guardianship, and the public.

INTRODUCTION

Wisconsin law recognizes the right to vote of every United States citizen over the age of 18. Wis. Const. art. III, § 1. This Court held, “[T]he right to vote is ... guaranteed by the declaration of rights and by section 1, art. 3, of the Constitution. It has an element other than that of mere privilege. It is guaranteed both by the Bill of Rights, and the exclusive instrument of voting power contained in section 1, art. 3, of the Constitution, and by the fundamentally declared purpose of government.” *State v. Phelps*, 144 Wis. 1, 15, 128 N.W. 1041 (1910). The right to vote “is a right which has been most jealously guarded and may not under our Constitution and laws be destroyed or even unreasonably restricted.” *State v. Cir. Ct. for Marathon Cnty.*, 178 Wis. 468, 190 N.W. 563, 565 (1922). Older Wisconsinites and Wisconsinites with disabilities enjoy this right on an equal basis with any other Wisconsin voter. Wis. Const. art. I, § 1. Recently, however, the rights of older Wisconsinites and Wisconsinites living in residential care facilities have been the subject of alarming and deeply misinformed claims by political candidates, individuals purporting to work on behalf of the people of the State of Wisconsin, and activists like Wisconsin Voter Alliance and their

attorneys.¹ But for the limited circumstances in which a person's right to vote is removed by a court upon a specific finding under Chapter 54, *see* Wis. Stat. § 6.03(1)(a),² neither the Constitution nor any Wisconsin law distinguishes, nor could distinguish, the right to vote of older voters or voters with disabilities from any other.

Amici DRW and GWAAR advocate for and work on behalf of Wisconsinites with disabilities, including with respect to the right to vote implicated in this case and the rights afforded by Wisconsin's guardianship laws, including the right to confidentiality. This brief discusses Wisconsin's limited guardianship laws and how they interact with 1) the right to vote, 2) the existing safeguards to prevent voting by individuals whose rights have been removed, and 3) other policy fixes to improve the process without the invasion of privacy urged by the Wisconsin Voter Alliance and Mr. Heuer (collectively, "WVA"). This Court should reject WVA's attempts to circumvent the clear protections of Wisconsin law.

¹ *See e.g.* Anya Van Wagtenonk, *Senate candidate Eric Hovde says most nursing homes not 'at a point to vote,'* WPR (Apr. 10, 2024), <https://www.wpr.org/news/senate-candidate-eric-hovde-nursing-home-voters>; Scott Bauer, *Republican Wisconsin Senate candidate says he doesn't oppose elderly people voting,* AP (Apr. 20, 2024) (noting Mr. Hovde relied on discredited reports of 100% turnout in certain facilities); Matt Mencarini, *'Blurring of lines': Private lawyer plays starring role in taxpayer-funded election probe,* Wisconsin Watch (Apr. 28, 2022), https://madison.com/news/local/govt-and-politics/blurring-of-lines-private-lawyer-plays-starring-role-in-taxpayer-funded-election-probe/article_e7739a9a-c47f-559d-a456-1c41203a2704.html.

² The statutes also provide for a procedure by which a court may remove the right to vote, even if a guardian is not appointed, based on a finding that an individual does not "understand the objective of the elective process" without a guardianship. Wis. Stat. § 54.25(2)(c)1.g.

ARGUMENT

WVA's arguments, and the decision of the court below, rest on fundamental misconceptions about Wisconsin's guardianship laws.

I. Individuals under guardianship retain their right to vote unless a court specifically rescinds the right based on a clear and convincing showing.

The Wisconsin Constitution guarantees “[a]ll people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed.” Wis. Const. art. I, § 1. Consistent with this fundamental promise, nearly twenty years ago, Wisconsin shifted guardianship law away from a default that removed all rights in favor of limited guardianship, in which an individual under guardianship³ retains all rights not expressly removed or modified by court order. Wis. Stat. § 54.18(1). Prior versions of the statute presumed that all rights would be removed unless a court specifically retained certain rights for the individual. Jane E. Raymond, *Landmark Guardianship and Adult Protective Services Reforms Signed into Law*, Wisconsin Lawyer (Aug. 2006); *see also* Wis. Stat. § 880.33(3) (2005-06).

The law seeks to protect the rights of the individual. A petitioner must petition the Court to remove the right to vote, and the Court must then make a specific determination that the individual lacks the evaluative capacity to exercise the right to vote. To make that decision, the circuit court must determine whether the individual “understand[s] the

³ The statutes refer to this individual as a “ward.” Wis. Stat. § 54.01(37).

objective of the elective process.” Wis. Stat. §§ 6.03(1)(a), 54.25(2)(c)1.g. The decision to remove the right must be based on clear and convincing evidence that the individual lacks the evaluative capacity to exercise the right to vote, or the right is retained. Wis. Stat. §§ 54.25(2)(c)2, 54.44(2). The court must also consider the recommendations of a guardian ad litem (“GAL”), who advocates for the best interests of the individual. Wis. Stat. § 54.40(3), (4)(f). In short, since 2006, an individual’s right to vote is not automatically rescinded when a guardian is appointed; rather, the right is removed only after a court specifically evaluates the individual’s capacity and makes the requisite finding based on clear and convincing evidence.

II. Guardianship proceedings are confidential.

In any guardianship proceeding, confidentiality is mandated by the plain text of the statutes and is central to those statutes’ purpose. Wis. Stat. § 54.75. While it has long been the case that guardianship records are confidential, the Legislature strengthened this protection when it updated the statutes in 2006 Wisconsin Act 387. *Compare* Wis. Stat. § 880.33(2)(e) (2003–04) (“Every hearing on a petition under s. 880.07 (1m) shall be open, unless the proposed ward or his or her attorney acting with the proposed ward's consent moves that it be closed.”) *with* Wis. Stat. § 54.44.(5) (“Every hearing under this chapter shall be closed, unless the proposed ward or ward or his or her attorney acting with the proposed ward’s or ward’s consent or the attorney for a foreign ward moves that it be open.”). As both the *Reynolds* court and Judge Neubauer’s dissent acknowledge, if a record is statutorily exempt from disclosure, the analysis ends. Wis. Stat. § 19.35(1)(a); *Wisconsin Voter Alliance v. Reynolds*, 2023 WI App 66, ¶¶20, 22, 34, 410 Wis. 2d 335, 1

N.W.3d 748; *Wisconsin Voter Alliance v. Secord*, 2024 WI App 6, ¶¶79, 83, 3 N.W.3d 513 (table) (unpublished) (Neubauer, J., dissenting).

Here, the Legislature clearly intended that these records be kept confidential, and for good reason. The mere fact that an individual is the subject of a petition under Chapter 54, or is under guardianship, may lead to improper and incorrect assumptions about that person, including their capacity to exercise their rights, even where the law recognizes that individuals retain any rights not removed. This is, unfortunately, true for many individuals with disabilities. The confidentiality of guardianship proceedings helps address this concern.

Confidentiality also mitigates the risk that individuals under guardianship may be vulnerable to exploitation. Guardianship proceedings involve inherently sensitive information, including medical and financial information, derived from an inherently sensitive population of Wisconsinites (those who may be subject to guardianship). Further, confidentiality mitigates a possible chilling effect that might otherwise cause someone not to petition for guardianship, even where it is warranted, for fear of the (unfortunate, but real) stigma towards the individual who may be placed under guardianship.

The existing exceptions to confidentiality only underscore the importance of the rule. For example, only the individual subject to the petition, or their attorney acting with their consent, may move for a hearing under Chapter 54 to be open to the public. Wis. Stat. § 54.44(5). Individuals who seek information regarding a guardianship must demonstrate a “need,” and are limited only to disclosure as to whether a person has been found incompetent and the name and contact

information of the guardian. Wis. Stat. § 54.75.⁴ Reflecting the real dangers of misuse of personal information, the general rule that guardianship information should be kept confidential is so broad as to include *even the fact* that an individual is under guardianship. *Id.* The decision of the court of appeals, however, upends this rule

III. Wisconsin law already contains safeguards to avoid ineligible voting, which do not require self-appointed watchdogs.

By ensuring that individuals under guardianship are apprised of the nature of the proceeding, including whether the right to vote has been removed, as well as requiring circuit courts to inform appropriate election officials when an individual's right to vote is rescinded, Wisconsin's guardianship law already addresses WVA's purported concern about ineligible voting.⁵

First, various steps in the process seek to ensure that the individual and the guardian are aware of the status of the right to vote, including by specifying the "specific rights" that may be removed, personal service, and the right to have counsel and be present at the hearing. Wis. Stat. §§ 54.34(1)(m), 54.38(2), 54.42(1), (5)–(6), 54.44(4)(a); *Racine Cty. v. P.B.*, 2022 WI App 62, 405 Wis. 2d 383, 983 N.W.2d 721. The circuit court also

⁴ While WVA relies on this statute, it is plainly inapplicable as WVA is seeking information beyond the scope of what may be disclosed. WVA is looking for specific information about individuals beyond whether they are under guardianship or the identity of their guardian, particularly whether their right to vote has been removed. *Reynolds*, 2023 WI App 66, ¶3.

⁵ These purported concerns are misplaced. WVA suggests that the fact that "only" a limited subset of individuals under guardianship were found in the WisVote database is somehow evidence that WEC (or others) are not performing their statutory duty. (WVA Br. 13.) But WisVote only contains information about individuals who have registered to vote. Wis. Stat. § 6.36(1)(a)1. It would not include, for example, a minor under guardianship, or an individual who never registered.

appoints a GAL who advocates for the individual's best interest and whose duties include explaining the petition and hearing procedure. Wis. Stat. § 54.40(4)(a). If guardianship is ordered and the right to vote removed, the Court makes a specific finding on form GN-3170⁶ which is distributed to, among others, the individual's attorney and the GAL. In short, both the guardian and the individual, throughout the proceedings, are informed of the status of the individual's right to vote. Intentionally voting when not qualified to do so is a crime. Wis. Stat. § 12.13(1)(a); 12.13(3)(g).⁷

Second, the law mandates that election officials be notified when a voter's right to vote is rescinded. State law specifies that a court's determination "shall be communicated in writing by the clerk of court to the election official or agency charged under s. 6.48, 6.92, 6.925, 6.93, or 7.52(5) with the responsibility for determining challenges to registration and voting that may be directed against that elector." Wis. Stat. § 54.25(2)(c)1.g.⁸ The majority opinion below incorrectly states that this information is "published to the world," but, in fact, the clerk of court follows a specific statutory procedure. *Compare* 2024 WI App 6, ¶17 with Wis. Stat. § 54.25(2)(c)1.g.

⁶ <https://www.wicourts.gov/formdisplay/GN-3170.pdf?formNumber=GN-3170&formType=Form&formatId=2&language=en>

⁷ The Wisconsin Voter Registration form requires the voter to attest that they are qualified. WEC, *Wisconsin Voter Registration Application EL-131* (Rev. 2019), https://elections.wi.gov/sites/default/files/legacy/2020-06/El-131%2520Voter%2520Registration%2520App_Fillable-%2520%2528REV%25202020-06%2529_0.pdf.

⁸ The majority opinion below inaccurately states that this information is required to be reported to the Wisconsin Elections Commission. 2024 WI App 6, ¶17. The proper official or agency is the municipal clerk or their designee, who have the authority to hear challenges and change a voter's status to ineligible. *See* Wis. Stat. §§ 6.48, 6.92, 6.925, 6.93, 7.52, 6.36(b)1.b.

The statutes proscribe a procedure by which a court determines, then communicates to election officials, when a person's right to vote is removed. No part of that statutory procedure suggests a role for self-appointed "watchdogs" to do the work that has been entrusted to the individual, their guardian, the court, and the clerks to perform.

Third, challenge procedures do not automatically entitle WVA or anyone else to these records. The law provides for challenging registration and voting because the voter is allegedly incapable of understanding the objective of the elective process and is thereby ineligible to vote. *See* Wis. Stat. §§ 6.48(3), 6.925, 6.93, 6.935; Wis. Adm. Code. EL § 9.02. Nothing about those provisions suggests that challengers are privileged to learn otherwise confidential information, and none reference accessing records protected by Wis. Stat. § 54.75. Rather, challengers are expected to make challenges based on personal knowledge. Wis. Admin. Code EL § 9.02. A considerable amount of voter registration information is publicly available, but it does not necessarily follow that information that may be relevant to a voter's qualifications, including citizenship status, how long they have lived at their address,⁹ whether they have made a wager on the outcome of the election, and their age, a public record. *See* Wis. Stat. § 6.36(1)(b)1. Certain information, like dates of birth, are not publicly accessible, even though they could be relevant to voting eligibility. Wis. Stat. § 6.36(1)(b)1.a. WVA's contention, and the court of appeals' conclusion, that the ability to challenge somehow entitles them to information to which they concede

⁹ Certain public records may indicate when properties are bought and sold but would not reflect where a person actually resides. *See* Wis. Stat. § 6.10(1).

they are otherwise not entitled is contrary to the way these laws generally work.

The majority opinion below misapplies this rule, claiming that the right to confidentiality in guardianship proceedings is modified by the “right not only to vote but to have only eligible votes considered in any election.” 2024 WI App 6, ¶15. The opinion cites no binding or persuasive precedent for this proposition, only Justice Grassl Bradley’s dissent in *State ex rel. Zignego v. Wisconsin Elections Commission*, 2021 WI 32, 396 Wis. 2d 391, 957 N.W.2d 208. But a dissent is not law, and there is no such right.¹⁰ And to the extent such a right might be held to exist, it is already contemplated and protected by the notice procedures under Wis. Stat. § 54.25(2)(c)1.g.

Individuals under guardianship do have a clear right to have records pertaining to that determination kept confidential. Wis. Stat. § 54.75. Unless and until it is removed through an appropriate procedure, those individuals have the same right to vote as any other Wisconsin citizen. Wis. Const. art. III, § 1. Despite WVA’s assertions, the right to public records under Wis. Stat. § 19.35 does not apply to records, like the Notice of Voting Eligibility (“NVE”) forms, exempted by statute. Wis. Stat. §§ 19.35(1)(b); 54.75. Neither the open records law nor Wisconsin election law envisions or permits the type of free-floating access WVA claims to otherwise private and sensitive information, let alone a “clear

¹⁰ Even if it did exist, such a right could not apply to an organization like Wisconsin Voter Alliance, which cannot vote. Whether it could apply to an individual, like Mr. Heuer, would seem to depend on a number of factors, including whether he voted in the same election and for the same office. In a separate appeal pending before the court of appeals, a party seeks to clarify whether any voter has standing to challenge voting procedures based solely on a “vote pollution” theory, which this Court has not adopted. *Kormanik v. Wisconsin Elections Comm’n*, No. 2024AP408 (filed Mar. 5, 2024).

legal right” to access it, such that a writ of mandamus would be appropriate. *Reynolds*, 2023 WI App 66, ¶20.

IV. Improvements in voter eligibility reporting should come through policy changes.

To the extent there remains an issue with the procedure created by Wis. Stat. § 54.25, the answer is legislative, not empowering would-be challengers by improperly making that which is private a matter of public record.

2023 Assembly Bill 572 (“AB 572”), included language that would have changed the way by which a court communicates its determination, and would have required the circuit court to notify WEC, by email, of the determination that an individual is not eligible to vote. WEC, in turn, would then have been required to change the voter’s status to ineligible within three business days. The same procedure would apply to a restoration of the right. The bill also required WEC to inform the voter when their right has been restored, and that they are required to complete a new registration. 2023 Wis. AB 572.

GWAAR¹¹ and DRW¹² supported the sections of AB 572 that would have provided additional notification and clarification around this procedure. It is particularly critical to ensure that restoration is promptly and effectively communicated to both the relevant elections

¹¹ GWAAR, *Written testimony regarding AB 572* (Oct. 31, 2023), https://lobbying.wi.gov/Data/PositionFileUploads/11012023_084229_Assembly-Campaigns-Elections-Committee_Testimony-AB%20572_JZander-GWAAR_Oct-31-2023.pdf.

¹² DRW, *Written testimony regarding AB 572* (Oct. 31, 2023), https://lobbying.wi.gov/Data/PositionFileUploads/11142023_020713_2023%20AB572%20testimony.pdf.

officials and the voter, and the registration list updated, so no one loses their constitutional right to vote.

However, the helpful language in AB 572 was accompanied by other parts of the bill that would have degraded the rights of residents of qualified retirement homes and residential care facilities to vote privately and without undue interference. Governor Evers vetoed the bill because of these additional intrusive measures.¹³

While administrative fixes may make the existing process work better, the additional communications required by AB 572 would have dramatically improved on the current statutes, particularly by requiring that the individual voter receive notice if their right to vote had been removed or reinstated. To the extent that WVA is concerned about proper eligibility notification, it should work with the Legislature to support common-sense reforms that would improve communications whenever an individual's right to vote is either removed or restored, and thereby protect every individual's sacred and fundamental right to vote, as guaranteed by the Wisconsin Constitution.

CONCLUSION

For the foregoing reasons, this Court should reverse the unpublished decision of the Court of Appeals.

¹³ Governor Evers, *Letter to the Wisconsin Assembly* (Mar. 21, 2024), https://content.govdelivery.com/attachments/WIGOV/2024/03/21/file_attachments/2821423/Signed%20Veto%20Message%20-%20AB%20572.pdf.

Respectfully submitted this 23rd day of May, 2024.

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CERTIFICATION REGARDING FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8) (b), (bm), and (c) for a brief. The length of this brief is 2,976 words.

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