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No. 2024AP164

PRIORITIES USA;
WISCONSIN ALLIANCE FOR RETIRED AMERICANS;
AND WILLIAM FRANKS, JR., PLAINTIFF-APPELLANTS,

GOVERNOR TONY EVERS, INTERVENOR-APPELLANT,

V.

WISCONSIN ELECTIONS COMMISSION,
DEFENDANT-RESPONDENT,

WISCONSIN STATE LEGISLATURE,
INTERVENOR-RESPONDENT.

BRIEF OF AMICI CURIAE DISABILITY RIGHTS WISCONSIN, THE
LEAGUE OF WOMEN VOTERS OF WISCONSIN, AND WISCONSIN
FAITH VOICES FOR JUSTICE

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INTERESTS OF AMICI CURIAE

Amici are Wisconsin nonprofit organizations and members of the Wisconsin Voting Rights Coalition, who work individually and collectively to encourage civic engagement and provide nonpartisan information about elections and voting, including absentee voting. They invest time and resources in educating their members or the public about elections and how and when to cast a ballot. Amici were intervenors-defendants-appellants in *Teigen v. Wisconsin Elections Commission*, *Teigen v. Wisconsin Elections Comm'n*, 2022 WI 64, 403 Wis. 2d 607, 976 N.W.2d 519.

Disability Rights Wisconsin's ("DRW") mission is to address the issues facing, and to ensure the rights of, all people with disabilities in the state. DRW is designated by the Governor to act as the congressionally mandated protection and advocacy agency for Wisconsin citizens with mental illness, developmental disabilities and other physical impairments, pursuant to Wis. Stat. § 51.62, 29 U.S.C. § 794e, 42 U.S.C. § 15041 et. seq., and 42 U.S.C. § 10801 et. seq. DRW has direct experience working to ensure that people with disabilities' voting rights are protected. This includes advocacy to ensure that people with disabilities have equal access to the polls, education of people with disabilities, service providers, and families on voting laws; working with

election officials on the state and local levels on access to the polls for people with disabilities and working one-one-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.

The League of Women Voters of Wisconsin's ("LWVWI") mission is to empower voters and defend democracy. To that end, LWVWI promotes political responsibility through informed and active participation in government. LWVWI began as an organization focused on the needs of women voters, but has evolved into an organization concerned with educating, advocating for, and empowering all Wisconsinites. LWVWI works with and through 22 local Leagues around Wisconsin to expand informed, active participation in state and local government, giving a voice to all Wisconsinites.

Wisconsin Faith Voices for Justice ("WFVJ") is a coalition of clergy, religious leaders, and people of faith from many faith traditions across the state of Wisconsin. WFVJ educates its members and their communities about important issues in Wisconsin, including civic engagement, because their faith traditions teach a shared duty to see to the needs of all people and work toward a more equitable society.

INTRODUCTION

The right to vote is enshrined in our constitution. Members of this Court have described it as “a sacred right of the highest character,” “fundamental,” and “preservative of all rights.” *League of Women Voters of Wis. Educ. Network, Inc. v. Walker*, 2014 WI 97, ¶72, 357 Wis. 2d 360, 851 N.W.2d 302 (Abrahamson, C.J., dissenting) (citing *State v. Phelps*, 144 Wis. 1, 15, 128 N.W. 1041 (1910)); *Jefferson v. Dane Cnty.*, 2020 WI 90, ¶51, 394 Wis. 2d 602, 951 N.W.2d 556 (Bradley, A.W., concurring in part); Order, *O’Bright v. Lynch*, No. 2020AP1761-OA, ¶¶1–2, 11 (Roggensack, C.J., concurring). Expressing this right is “the hard work of democracy.” *Teigen v. Wisconsin Elections Comm’n*, 2022 WI 64, ¶151, 403 Wis. 2d 607, 976 N.W.2d 519 (Hagedorn, J., concurring). Amici write to describe 1) how drop boxes ameliorate inequality within Wisconsin’s voting system, and 2) why, following *Teigen*, this Court should hesitate to apply Wis. Stat. § 6.84 to Wisconsin’s election laws.

I. Absentee-ballot drop boxes are helpful tools in reducing disparate access to the franchise.

Absentee-ballot drop boxes provided Wisconsinites with a safe, secure, and effective method of ballot return. During the 2020 presidential election, widespread drop box use was associated with extraordinary electoral participation by Wisconsin voters. More than

three million Wisconsinites—over seventy percent of the electorate—voted in the November 2020 general election.¹ And voting by absentee ballot doubled in popularity, growing to 59.7% of all votes cast in the 2020 general election, up from 27.3% in 2016.² While COVID-19 undoubtedly affected those numbers, absentee voting in Wisconsin has long been,³ and continues to be, an important way individuals exercise their right to vote.

While drop boxes increase access to the franchise generally, they also provide some relief to inequalities within our state's voting scheme.

Voters with disabilities offer one example. Whether a voter accesses the franchise through in-person or absentee voting is often a matter of choice. *See* Wis. Stat. § 6.85. But not always. Over 80,000 Wisconsinites are enrolled in community-based (i.e., at home, or otherwise not in institutions) care programs.⁴ These care programs only

¹ Craig Gilbert, *Here's What was Behind Wisconsin's Record-breaking 2020 Turnout—and What it Means for the War Over Voting Rules*, *Milwaukee Journal Sentinel*, (March 12, 2021), available at <https://www.jsonline.com/story/news/politics/analysis/2021/03/12/wisconsin-had-record-breaking-2020-voter-turnout-heres-what-happened/4664099001/>.

² Wisconsin Elections Commission, *November 3, 2020 Election Data Report* (Feb. 3, 2021), available at <https://www.wispolitics.com/wp-content/uploads/2021/01/D.-November-2020-Election-Data-Report-Updated.pdf>.

³ Wisconsin adopted a form of absentee voting during the Civil War, and “led the way” in ensuring that soldiers could vote while battling to end slavery. Becca Damante, *President Trump Ignores the Long History of Absentee Ballots*, Constitutional Accountability Center (June 11, 2020), <https://www.theusconstitution.org/blog/president-trump-ignores-the-long-history-of-absentee-ballots/>; *State ex rel. Chandler v. Main*, 16 Wis. 398 (1863).

⁴ *Our Voices, Our Votes*, Disability Rights Wisconsin (April 2022), available at <https://disabilityrightswi.org/wp-content/uploads/2022/04/Our-Voices-Our-Votes-4-2022.pdf>

permit those who require nursing-home level of care, or greater, to enroll. For these individuals with serious disabilities, it is often difficult (and sometimes impossible) to cast ballots at a polling place on election day. See *Carey v. Wisconsin Elections Comm'n*, 624 F. Supp. 3d 1020, 1025 (W.D. Wis. 2022) (discussing the physical limitations of four such voters, and how those limitations implicate their capacity to vote in person). So, to access the right to vote at all, these voters must vote absentee. As a result, these voters have significantly fewer options to cast their ballot, because they cannot return their ballot to the clerk's office or vote there on election day. By enabling more robust access to ballot return through drop boxes, Wisconsin previously eased the burden on voters with disabilities that resulted from this inherent inequality. See generally *Our Voices, Our Votes*, Disability Rights Wisconsin (April 2022), available at <https://disabilityrightswi.org/wp-content/uploads/2022/04/Our-Voices-Our-Votes-4-2022.pdf>.

Voters of color are another example. In 2015, a federal court ruled that limiting municipalities to one alternate location for absentee ballot collection was unconstitutional and violated the Voting Rights Act. *One Wisconsin Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 963 (W.D. Wis. 2016) *aff'd in part, vacated in part, rev'd in part sub nom. Luft v. Evers*, 963 F.3d 665 (7th Cir. 2020). That court relied on the clearly

disproportionate result created by the previous rule, Wis. Stat. § 6.855 (2013-14): “In 2014, the number of adults per municipality in Wisconsin ranged from 33 to 433,496 ... The state’s one-location rule ignores the obvious logistical difference between forcing a few dozen voters to use a single location and forcing a few hundred thousand voters to use a single location.” *Id.* at 934. And the burden of this “obvious logistical difference” was disproportionately foisted upon Wisconsin’s voters of color, the largest share of which reside in Wisconsin’s larger municipalities. *Id.* at 958–60. Although the Legislature eventually repealed this “one-location rule,” voters in Racine County (one of Wisconsin’s most diverse) are now facing the renewed prospect of this discriminatory rule, largely reimposed by a recent court order. See *Brown v. Wisconsin Elections Comm’n*, No. 2022CV1324 (Wis. Cir. Ct. Racine Cnty. Jan. 10, 2024), *bypass granted*, No. 2024AP232 (May 3, 2024). So here too, drop boxes could provide some relief by providing voters of color with more robust access to absentee-ballot return.

Wisconsin’s geographic diversity also places obstacles upon rural voters that are not encountered by those in larger municipalities. For example, our state’s “rural counties have about one voting place every 34 miles. But voters in suburban parts of the state have a polling location

every 13 square miles.”⁵ Put simply, these Wisconsinites must travel further to cast their ballots than other voters in the state. Secure ballot drop boxes once afforded municipalities another tool to reduce this inherent disparity.

II. The application of Wis. Stat. § 6.84 in *Teigen* delivered a discriminatory result. For this (and other) reason(s), this statute merits skepticism.

Teigen’s approach to voters with disabilities required additional litigation to guarantee their right to vote. This Court should consider both the lessons learned from *Teigen* and the more fundamental issues which triggered them when considering the question presented in this case.

In addition to prohibiting secure ballot drop boxes, *Teigen* established a blanket rule prohibiting all voters from having third-parties return their absentee ballots to the clerk’s office.⁶ *Teigen* 2022 WI 64 ¶¶4, 73, 74; *Carey* 624 F. Supp. 3d 1028. Indeed, *Teigen* demanded a voter’s “bodily presence” at the clerk’s office to return an absentee ballot. *Id.* ¶74; *see also Id.* ¶¶178-179 (Hagedorn, J., *concurring*). Yet doing so plainly ignored what was always clear: voters with disabilities often

⁵ Erin Gottsacker, *What changing election regulations mean for Wisconsin’s rural voters*, WXPB (July 11, 2022) available at <https://www.wxpr.org/election/2022-07-11/what-changing-election-regulations-mean-for-wisconsins-rural-voters>.

⁶ Also known as ballot-return assistance.

require ballot-return assistance to access the franchise at all. *Id.* ¶237 (Bradley, J. A.W., dissenting). The result was stark. “The Wisconsin Supreme Court [had] authoritatively interpreted § 6.87(4)(b)1 as prohibiting voters from giving their ballot to a third party, and the court identified no exceptions for disabled voters.” *Carey*, 624 F. Supp. 3d 1028.

With no options left, a group of voters were forced to litigate their basic right to vote during an election.⁷ Less than sixty days after *Teigen*’s publication, *Carey* held *Teigen*’s construction of Wis. Stat. § 6.87(4)(b) 1 to be pre-empted by federal law:

The court concludes that the VRA preempts § 6.87(4)(b) 1 because it is impossible to comply with both laws. As discussed above, Wisconsin state courts have construed § 6.87(4)(b) 1 as prohibiting voters from obtaining assistance in returning their absentee ballot. For the reasons explained below, that prohibition contradicts the VRA.

624 F. Supp. 3d 1032. The harm *Teigen* imposed on voters who rely on absentee voting was thus ameliorated, but only in part.

For voters with disabilities, *Teigen* placed a false imprimatur of legality on a discriminatory statutory scheme rooted in Wis. Stat. § 6.84. Under Wis. Stat. § 6.84 the Legislature expressed an intention to prejudice absentee-ballot voters.⁸ The statute makes this disparate

⁷ Wisconsin’s partisan primary for statewide office was held on August 9, 2022; one month after *Teigen*’s publication, and weeks before *Carey*’s. Municipal clerks started sending absentee ballots 47 days before election day. Wis. Stat. § 7.15(1)(cm).

⁸ The provision reads, in key part, “The legislature finds that voting is a constitutional right, the vigorous exercise of which should be strongly encouraged. In contrast, voting by absentee

treatment operational in Wis. Stat. § 6.84 (2). Under this provision, “matters relating to the absentee ballot process...shall be construed as mandatory” and ballots “cast in contravention” of that process “may not be counted.” Wis. Stat. § 6.84(2); *compare* Wis. Stat. § 5.01(1) (“Except as otherwise provided...[Wisconsin’s election statutes] shall ... give effect to the will of the electors...notwithstanding informality or failure to fully comply with some of their provisions.”). *Teigen* explicitly relied on Wis. Stat. § 6.84. 2022 WI 64 ¶¶53, 54, 62, 80.

Given that the statute explicitly differentiates how categories of voters exercise their rights, this Court should exercise caution in applying Wis. Stats. §§ 6.84 (1–2) to the issue of drop boxes.⁹ The statute creates an arrangement whereby voters with disabilities (and others) who may only vote absentee, must endure more scrutiny than voters who are capable of voting at a polling location. But Wisconsin’s constitution has been understood to demand equality for perhaps 175 years. The first clause declares: “All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness.” Wis. Cons. art. I, § 1. “The theory of our

ballot is a privilege exercised wholly outside the traditional safeguards of the polling place [and] must be carefully regulated to prevent the potential for fraud or abuse.” Wis. Stat. § 6.84 (1).

⁹ If it upholds them at all.

government is, that socially and politically, all are equal.” *Knowlton v. Bd. of Sup'rs of Rock Cty.*, 9 Wis. 410, 411 (1859). “Equality of rights and privileges is the underlying purpose to be accomplished by our constitutional system of government.” *State ex rel. Milwaukee Sales & Inv. Co. v. R.R. Comm'n of Wis.*, 174 Wis. 458, 183 N.W. 687, 689 (1921). And ours is unique. The Wisconsin Constitution affords “greater protections for individual liberties...than the federal constitution.” *Matter of Adoption of M.M.C.*, 2024 WI 18, ¶ 53 (Dallet, J., concurring). Yet, Wis. Stat. § 6.84 suggests that voters with disabilities and others who must exercise the franchise through absentee voting are simply left with a “privilege” while those who can make it to the polls enjoy a “right.” This differentiation is out of step with our form of government.

Beyond its application to those who require an absentee ballot, Wis. Stat. § 6.84 also stands apart from the Wisconsin Constitution’s guarantee of the right to vote, which is another reason this Court should be skeptical of its application in this case. “[D]emocracy goes forward by great leaps and bounds, supported by the franchises of a free people.” *State v. Kohler*, 200 Wis. 518, 228 N.W. 895, 913 (1930). As this Court recognized, our state constitution enshrines the right to vote repeatedly, throughout its text:

[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; and the express and implied inhibitions of class legislation, as well. Such declared purpose and the declaration of rights, so far as they go, and the equality clauses,—constitute inhibitions of legislative interference by implication, and with quite as much efficiency as would express limitations, as this court has often held.

Phelps, 144 Wis. 1, 128 N.W. 1041, 1046 (1910). This Court has historically been skeptical of Legislative interference on the franchise, placing “the right of suffrage upon the high plane of removal from the field of mere legislative material impairment.” *Id.* 144 Wis. 1, 128 N.W. 1041, 1046 (1910). Indeed, “[i]t 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).

In *State ex rel. Ekern v. Dammann*, this Court held that, under our state constitution, statutes which “regulate the manner of voting are restrictions upon the constitutional right of voters.” *State ex rel. Ekern v. Dammann*, 215 Wis. 394, 254 N.W. 759, 763 (1934). Furthermore, it expressly positioned the Legislature downstream from this most sacred right: “[t]he legislature is not the source of the right; it is merely the source of the restriction, if it imposes one.” *Id.* And there are limits on such restrictions.

This Court has repeatedly rejected the notion that voting can be considered a privilege under our state constitution. **“It has an element other than that of mere privilege.”** *Phelps*, 144 Wis. 1, 128 N.W. 1041, 1046 (1910) (emphasis added). “[The right to vote] is commonly referred to as a sacred right of the highest character and then again, at times, as a mere privilege, a something of such inferior nature that it may be made ‘the foot–ball of party politics.’ **We subscribe to the former view.**” *Id.* (emphasis added); *Dammann*, 215 Wis. 394, 254 N.W. 759, 761–62 (1934).

It is noteworthy that these opinions came decades *after* this Court first affirmed absentee voting’s constitutionality in Wisconsin. *State ex rel. Chandler v. Main*, 16 Wis. 398 (1863). In harmony with *Phelps* and *Dammann*, *Main* never diminished absentee voting as somehow less shielded by government intrusion than voting in person at a polling place. In fact, the language from *Main* implies that this Court holds absentee voting to be well within the right to vote, as protected by our state constitution:

[W]hatever else may be said upon the subject, this at least is true, that history has furnished no better example illustrating the capacity of the people for self government, than that furnished under this law, of the citizen soldiers pausing amid the horrors of war to discharge their duties as the primary legislators of the republic, and to guard by an intelligent use of their ballots, to be forwarded to their

homes, the welfare of their country, and those principles of civil liberty for which they are ready at any moment to lay down their lives upon the field of battle.

Id., 16 Wis. 398, 423 (1863).

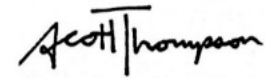
This jurisprudence reveals: 1) our state constitution exalts the right to vote; 2) all related legislation upon the “manner” of voting restricts that right; and 3) the right to vote cannot, in Wisconsin, be construed as a privilege¹⁰. Nevertheless, under Wis. Stat. § 6.84, the Legislature plucked one “manner” of voting (absentee voting) from the right to vote and tossed it into a specifically proscribed category: the privilege to vote. This simply cannot be. The right to vote is paramount under our constitution and cannot be shrunk into the “privilege to vote” to fit the whims of the Legislature. As such, to the extent this Court construes Wis. Stat. § 6.84, it should do so with skepticism.

¹⁰ There are a line of cases to the contrary, beginning with *Clapp v. Joint School District No. 1 of Villages of Hammond & Roberts*, 21 Wis. 2d 473, 481, 124 N.W.2d 678 (1963), which say that absentee voting is a privilege. But there was trouble with *Clapp* from the start. *Clapp* relied exclusively on *Sommerfeld v. Board of Canvassers* 269 Wis. 299, 69 N.W.2d 235 (1955) in opining absentee voting is a privilege. But the *Sommerfeld* majority said no such thing, and instead only acknowledged that “in some states absentee voting is held to be a privilege...[i]n other states such laws are given a liberal construction.” 269 Wis. 301-02, 69 N.W.2d 237 (1955). It was the non-binding *Sommerfeld* dissent that stated “[a]bsentee voting is a privilege.” *Id.* at 302 (Gehl J., *dissenting*). Other precedent (*Main, Phelps, Damann, and Circuit Court for Marathon County*) rejects the notion that voting can be a privilege. *Clapp* also cites *Petition of Anderson*, 12 Wis. 2d 530, 107 N.W.2d 496 (1961) in its discussion of absentee voting. But *Petition of Anderson* supports Amici’s position by acknowledging that absentee voters would be “deprived of their right to vote” if their ballots were disregarded for mere technical violations. *Id.* at 534. This is what Wis. Stat. § 6.84 does, by demanding exactly such a deprivation to the right to vote. *Clapp*’s hasty proclamation should not overwhelm the clear weight of contrary authority.

CONCLUSION

Secure ballot drop boxes provided expanded access to the franchise for Wisconsin voters. As this Court reconsiders the question, it should not default to accepting Wis. Stat. § 6.84's diminution of the right to vote.

Respectfully submitted this 3rd day of May, 2024.



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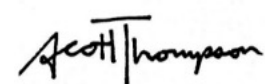
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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19 (7)(d), (8)(b), (bm), and (c) for a brief produced with proportional serif font. The length of this brief is 2,958 words.

Dated May 3, 2024.



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