

STATE OF WISCONSIN

CIRCUIT COURT
 BRANCH 12

DANE COUNTY

PRIORITIES USA,

WISCONSIN ALLIANCE FOR RETIRED
 AMERICANS,

and

WILLIAM FRANKS, JR.,

Plaintiffs,

v.

WISCONSIN ELECTIONS
 COMMISSION,

Defendant,

WISCONSIN STATE LEGISLATURE,

Intervenor-Defendant.

Declaratory Judgment
 Case Code: 30701
 Case No. 2023-CV-1900

Hon. Ann Peacock

**PLAINTIFFS' RESPONSE BRIEF IN OPPOSITION TO DEFENDANT
 WEC'S AND INTERVENOR-DEFENDANT LEGISLATURE'S
 MOTIONS TO DISMISS**

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INTRODUCTION

For more than a century, Wisconsin courts have recognized that the right to vote is “a sacred right of the highest character,” with “a dignity not less than any other of many fundamental rights.” *State v. Phelps*, 144 Wis. 1, 128 N.W. 1041, 1046 (1910). But as a growing share of Wisconsin voters have voted absentee in recent elections, they have faced a gauntlet of arbitrary and unnecessary procedural requirements standing between them and their sacred right to vote. This lawsuit challenges three of those requirements: the requirement that the ballot be marked in the presence of a witness, who must sign and write their address on the ballot certificate (the “Witness Requirement”); the requirement that ballots be returned only by mail or directly in-person to a clerk, and not to a secure drop box (the “Drop Box Prohibition”); and the requirement that any defect with the ballot certificate be cured by 8:00 p.m. on election day, even though in-person provisional ballots may be cured days later (the “Election-Day Cure Deadline”) (together, the “Challenged Restrictions”). Defendant the Wisconsin Elections Commission (“WEC”) and Intervenor-Defendant the Wisconsin State Legislature (“Legislative Intervenors”) separately move to dismiss, arguing that the Challenged Restrictions are constitutional because they do not impermissibly burden the right to vote.

The motions to dismiss should be denied. Plaintiffs have sufficiently alleged that each of the Challenged Restrictions imposes a substantial barrier to Wisconsin citizens’ exercise of their right to vote and that they are not justified by compelling state interests. The Witness Requirement makes it unjustifiably harder for every Wisconsin absentee voter to cast a valid ballot. The Drop Box Prohibition forces many Wisconsin voters to return their absentee ballots by mail, inevitably causing some to be delayed and discarded rather than counted. And the Election-Day Cure Deadline prevents voters who could otherwise have fixed problems with their ballots from doing so. Moreover, each of these restrictions makes the harm from the others worse. The need to find a

witness means it takes many voters longer to complete their ballots, raising the risk of mail delays and reducing the time for cure. Problems with witness addresses and signatures are one of the most common reasons that ballots require cure—without the witness requirement, far fewer ballots would require cure at all. And the delay between mailing and receipt of ballots returned by mail leaves less time for cure than for ballots returned by drop box. Moreover, the harm from each of the Challenged Restrictions is worsened by Section 6.84 of the Wisconsin Statutes, which provides that even harmless failures to comply with the Challenged Restrictions will cause disenfranchisement.

None of the Challenged Restrictions—nor Section 6.84—is justified by any legitimate, much less compelling, state interest. Election officials do not use the witness information for anything, and a criminal planning to forge a ballot could just as easily forge the witness information too. Drop boxes are more secure and more reliable than the mail, and caused no problems when they were used. There is no reason that absentee ballots need to be cured before provisional ballots. Nor is there reason to believe that the consequently rejected ballots are anything other than the personally voted ballots of eligible Wisconsin voters. And even if subject to a less demanding level of scrutiny, neither the Challenged Restrictions nor Section 6.84 can survive.

The motions to dismiss should be denied.

BACKGROUND

Absentee voting has been a crucial feature of Wisconsin elections since the Civil War. *See* 6 Op. Att’y Gen. 744; *see also* Act of July 5, 1917, ch. 570, Laws of Wis. It has become increasingly popular in recent years. In 2018, 575,000 Wisconsin voters used absentee ballots. Compl. (Dkt. 2, at ¶ 22.) In 2020, that number increased to more than 2 million. *Id.* And it has remained high even as the health emergency waned and voter participation dropped off in the 2022

midterm elections—nearly 760,000 Wisconsinites used absentee ballots in that election, an almost 25 percent increase from pre-pandemic levels. *Id.*

WEC, as the agency responsible for administering Wisconsin’s absentee voting laws, has promulgated guidance implementing three restrictions that severely burden the voting rights of the millions of Wisconsin voters who have used absentee ballots in the last several elections: (1) a requirement that absentee ballots must be witnessed; (2) the elimination of drop boxes as an acceptable means for returning absentee ballots; and (3) a requirement that defective absentee ballots be corrected by 8:00 p.m. on Election Day. That guidance appears in WEC’s Uniform Instructions for Wisconsin Absentee Voters (“Form EL-128”) (Dkt. 2 at ¶ 24), as well as in WEC’s Election Administration Manual, which serves as a “knowledge base for the array of duties required of municipal clerks” in Wisconsin elections. (Dkt. 2 at ¶ 25.)

The Witness Requirement

The Election Administration Manual requires that each absentee ballot must be “witnessed by an adult U.S. Citizen.” (Dkt. 2 at ¶ 27.) Guidance provided on Form EL-128 similarly requires that an absentee voter “must vote . . . in the presence of an adult witness.” *Id.* WEC derives that requirement from Section 6.87, which provides that an elector voting absentee “shall make and subscribe to the certification before one witness who is an adult U.S. citizen. . . . The absent elector, in the presence of the witness, shall mark the ballot in a manner that will not disclose how the elector’s vote is cast. The elector shall then, still in the presence of the witness, fold the ballots so each is separate and so that the elector conceals the markings thereon and deposit them in the proper envelope.” Wis. Stat. § 6.87(4)(b)1. This requirement imposes a significant obstacle to absentee voting for the hundreds of thousands of Wisconsin voters who do not have anyone in their household who can witness their ballots.

In 2020, the COVID-19 pandemic exacerbated and laid bare the substantial burdens this unnecessary requirement imposes, by making it harder and more dangerous for voters who do not live with another adult citizen to comply. To address those burdens, WEC issued guidance with purported “solutions” that eliminate any conceivable benefit from the requirement yet remain impractical for many voters, such as asking a delivery person to witness the ballot, “driv[ing] to a meet up spot to observe/witness through . . . vehicle windows,” or fulfilling the requirement “via video chat like Skype or Facetime with the ballot left outside of the door or in a mailbox for the witness to sign and provide their address.” (Dkt. 2 at ¶ 30.) These “solutions” are as impractical now as they were then. And the waning of the COVID-19 public health emergency has not eliminated the Witness Requirement’s burdens, particularly for voters who do not live with another adult citizen.

The Drop Box Prohibition

Wisconsin law provides that an envelope containing a voter’s absentee ballot “shall be mailed by the elector, or delivered in person, to the municipal clerk issuing the ballot or ballots.” Wis Stat. § 6.87(4)(b)1. In 2020, WEC promulgated guidance allowing voters to deliver their ballots to the municipal clerk using ballot drop boxes. (Dkt. 2 at ¶ 36.) As WEC explained:

A drop box is a secure, locked structure operated by local election officials. Voters may deposit their ballot in a drop box at any time after they receive it in the mail up to the time of the last ballot collection [on] Election Day. Ballot drop boxes can be staffed or unstaffed, temporary or permanent.

(Dkt. 2 at ¶ 36 (quoting *Teigen v. Wis. Elections Comm’n*, 2022 WI 64, ¶ 1, 403 Wis. 2d 607, 976, N.W.2d 519 (Grassl Bradley, J., plurality opinion))). Drop boxes were very popular, and thousands of people used them without incident in 2020. (Dkt. 2 at ¶ 37.)

In 2022, however, the Wisconsin Supreme Court interpreted Section 6.87(4)(b)1 to prohibit the use of drop boxes as a manner of delivering an absentee ballot to the municipal clerk. *Teigen*,

2022 WI 64, ¶ 55. Current WEC guidance reflects this interpretation of Section 6.87(4)(b)1, providing that absentee voters must return their ballots via mail, to the “municipal clerk’s office,” or to their “polling place or central count location.” (Dkt. 2 at ¶ 40.)

The Election-Day Cure Deadline

Wisconsin law allows voters to cure non-material defects on absentee ballot certificates, such as problems with the voter’s or witness’s signature, or the witness’s address. Wis. Stat. § 6.87(9) (“[T]he clerk may return the ballot to the elector . . . whenever time permits the elector to correct the defect and return the ballot.”). The voter “has the option to correct the absentee certificate envelope in the clerk’s office, by mail, or at the polling place / central count location on Election Day.” (Dkt. 2 at ¶ 52.) To correct a defective absentee certificate envelope, the voter “must personally deliver a corrected envelope by 8:00 p.m. on Election Day to their polling place or central count.” *Id.* ¶ 53; Wis. Stat. § 6.87(6), (9).

That requirement stands in stark contrast to the cure deadline for provisional ballots. In Wisconsin, voters who are unable to provide proof of identification at the polls may vote using a provisional ballot. (Dkt. 2 at ¶ 57.) For such a ballot to be counted, the voter must “provide the required information to the municipal clerk by 4:00 p.m. the Friday after the election.” *Id.*

Section 6.84

Section 6.84 of the Wisconsin Statutes states that as a matter of legislative policy “voting by absentee ballot is a privilege . . . that must be carefully regulated,” and establishes that “with respect to matters relating to the absentee ballot process, §§ 6.86, 6.87(3) to (7), and 9.01(1)(b)2. And 4. Shall be construed as mandatory.” Wis. Stat. § 6.84. It further states that “[b]allots cast in contravention of the procedures specified in those provisions may not be counted.” Wis. Stat. § 6.84(2). The specified provisions include those establishing each of the Challenged Restrictions.

See Wis. Stat. § 6.87(4)(b)1 (Witness Requirement and Drop Box Prohibition); Wis. Stat. § 6.87(6) (Election-Day Cure Deadline). Section 6.84 therefore specifically disfavors absentee voters and provides that, unlike other voters, they will be held to a strict compliance standard such that even harmless failures to comply with the Challenged Restrictions and other requirements will cause disenfranchisement.

LEGAL STANDARD

“A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint.” *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶ 19, 356 Wis. 2d 665, 849 N.W.2d 693. To survive a motion to dismiss, “a complaint must plead facts which[,] if true, would entitle the plaintiff to relief.” *Id.* ¶ 21. The Court must “accept as true all facts pled and the reasonable inferences therefrom” and determine whether those facts and inferences support a claim under the substantive law. *Voters with Facts v. City of Eau Claire*, 2018 WI 63, ¶ 27, 382 Wis. 2d 1, 913 N.W.2d 131.

ARGUMENT

Under the facts as alleged in the Complaint, the Challenged Restrictions are unconstitutional. The Wisconsin Constitution strongly protects the fundamental right to vote, which includes absentee voting. Plaintiffs properly bring both facial and hybrid challenges, because the Challenged Restrictions burden all voters to whom they apply. Plaintiffs’ allegations show that the Challenged Restrictions severely burden a fundamental right, so they are subject to strict scrutiny, which they cannot survive. And federal law does not preclude the ordinary judicial review of state election laws that Plaintiffs seek here.

The motions to dismiss should therefore be denied.

I. The Wisconsin Constitution’s protections of the right to vote extend to absentee voting.

The Wisconsin Constitution guarantees the right to vote as a fundamental right inherent and foundational to free government. *See* Wis. Const. art. I, §§ 1, 4, 22; art. III, §§ 1, 2. The “right of a qualified elector to cast a ballot for the election of a public officer, which shall be free and equal, is one of the most important of the rights guaranteed to him by the constitution.” *State ex rel. Frederick v. Zimmerman*, 254 Wis. 600, 613, 37 N.W.2d 473 (1949). For more than a century, Wisconsin constitutional law has protected voting as a “sacred right of the highest character,” with “a dignity not less than any other of many fundamental rights.” *Phelps*, 128 N.W. at 1046.

Voting “lies at the very basis of our Democracy,” as “one of the inherent rights which can be surrendered only by the people and subjected to limitation only by the fundamental law,” and “no right is more jealously guarded.” *Frederick*, 254 Wis. at 613. It is “remove[d] from the field of mere legislative material impairment.” *Phelps*, 128 N.W. at 1046. As early as 1880, the Wisconsin Supreme Court recognized that if voting regulations in practice “deprive a fully qualified elector of his right to vote at an election, without his fault and against his will, and require of him what is impracticable or impossible, and make his right to vote depend upon a condition which he is unable to perform,” then “they are as destructive of his constitutional right, and make the law itself as void, as if it directly and arbitrarily disenfranchised him” *Dells v. Kennedy*, 49 Wis. 555, 558, 6 N.W. 246, 247 (1880); *see also State ex rel. Knowlton v. Williams*, 5 Wis. 308 (1856) (“An act of the legislature which deprives a person of the right to vote, although he has every qualification which the constitution makes necessary, cannot be sustained.”). Procedures that impose substantial and unnecessary barriers to the franchise are therefore unconstitutional under longstanding Wisconsin constitutional law.

This strong constitutional protection of the right to vote necessarily includes absentee voting. Absentee voting has been a crucial feature of Wisconsin elections since the Civil War. *See* 6 Op. Att’y Gen. 744; *see also* Act of July 5, 1917, ch. 570, Laws of Wis. For more than two decades, absentee voting has been available to “any otherwise qualified elector who for any reason is unable or unwilling to appear” at his or her polling place on election day. Wis. Stat. § 6.85. More than two million Wisconsinites voted absentee in the November 2020 general election, and nearly 760,000 Wisconsinites voted absentee in the November 2022 general election. (Dkt. 2 at ¶ 22.)

The Legislative Intervenors argue that these millions of Wisconsin voters were merely exercising a “privilege” of voting absentee that is shorn of any constitutional protection. (Dkt. 60 at 12–19.) Nonsense. The text and structure of the Wisconsin Constitution confirm that the constitutional right to vote encompasses *all* forms of voting, including absentee voting. Article III of the Wisconsin Constitution (“Suffrage”) consecrates the right to vote. Section 1 guarantees the right to vote to “[e]very United States citizen age 18 or older.” Wis. Const. art. III, § 1. Section 3 guarantees that “[a]ll votes shall be by secret ballot.” Wis. Const. art. III, § 3. And Section 2 guarantees the “[i]mplementation” of the right to vote, through laws “[d]efining residency,” Wis. Const. art. III, § 2(1), “[p]roviding for registration of electors,” art. III, § 2(2), and, notably, “[p]roviding for absentee voting,” art. III, § 2(3). Thus, “Article III, Section 2 of the Wisconsin Constitution addresses implementation of voting rights through legislation.” *League of Women Voters of Wis. Educ. Network, Inc. v. Walker*, 2014 WI 97, ¶ 18, 357 Wis. 2d 360, 851 N.W.2d 302 (emphasis added).

Section 2’s authorization of legislation regarding certain voting-related topics does not suggest that those topics are somehow separate from the right to vote and therefore exempt from constitutional scrutiny. Article III, § 2’s authorization of laws “[p]roviding for absentee voting,”

is exactly parallel to its authorization of laws “[d]efining residency” and “[p]roviding for registration of electors.” Wis. Const. art. III, § 2(1), (2), (3). Under the Legislative Intervenors’ reasoning, residency requirements and voter registration regulations, too, would be immune from constitutional challenge. The Wisconsin Supreme Court has rejected that approach, holding that election laws related to registration “must not destroy or impair the right to vote.” *League of Women Voters of Wis. Educ. Network*, 2014 WI 97, ¶ 50. The same reasoning applies to regulations of absentee voting.

Relying on outdated precedent, the Legislative Intervenors ask the Court to set aside the text of the Constitution and look to intent and historical practice instead. (Dkt. 60 at 12–13 (citing *State v. Cole*, 2003 WI 112, ¶ 10, 264 Wis. 2d 520, 665 N.W.2d 328).) But as the Wisconsin Supreme Court has since clarified, it is “[t]he text of the constitution [that] reflects the policy choices of the people, and . . . [i]t is th[is] enacted law, not the unenacted intent, that is binding on the public.” *Serv. Emps. Int’l Union, Loc. 1 v. Vos*, 2020 WI 67, ¶ 28, 393 Wis. 2d 38, 946 N.W.2d 35 (“*SEIU*”) (citation and internal quotation marks omitted). The text and structure of the Constitution unambiguously establish a fundamental right to vote and provide for absentee voting as one means of exercising that right. There is no basis for looking to extrinsic interpretative sources like historical practice to question what the Constitution unambiguously provides. *See id.*

Finally, although the question is one of Wisconsin constitutional law, federal courts overwhelmingly agree that restrictions of absentee voting are subject to the same constitutional standards as other restrictions on voting rights—they are not exempt from judicial scrutiny. WEC cites *McDonald v. Chicago Board of Election Commissioners*, 394 U.S. 802 (1969), to reach the opposite conclusion (*see* Dkt. 65 at 7), but *McDonald* is neither binding nor persuasive here. First and foremost, *McDonald* predates *Anderson*, *Burdick*, *Crawford*, and their progeny—all

subsequent U.S. Supreme Court cases that reject a litmus-test approach when evaluating burdens on the right to vote. *See Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *Burdick v. Takushi*, 504 U.S. 428, 434–35 (1992); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 189–91 (2008). Many federal courts of appeals have recognized that *McDonald* does not stand for the proposition that restrictions on absentee voting are insulated from constitutional scrutiny.¹ And the U.S. Supreme Court has since made clear that “the Court’s disposition of the claims in *McDonald* rested on failure of proof.” *O’Brien v. Skinner*, 414 U.S. 524, 529 (1974). When plaintiffs presented evidence of a burden on their right to vote in a later case challenging an absentee voting restriction, the Court held the restriction unconstitutional. *See id.* at 530. Plaintiffs here have adequately alleged burdens on the right to vote that render the Challenged Restrictions unconstitutional under the Wisconsin Constitution.

II. Plaintiffs appropriately bring facial and hybrid challenges.

Contrary to Legislative Intervenors’ arguments, Plaintiffs appropriately bring both facial and hybrid challenges to the Challenged Restrictions, because under the facts as Plaintiffs allege them the Challenged Restrictions may not constitutionally be enforced against anyone. Each of the Challenged Restrictions imposes a burden on *every* Wisconsin absentee voter—that is, on every person to whom the Restrictions apply. Every Wisconsinite who votes absentee must complete

¹ *See, e.g., Price v. N.Y. State Bd. of Elections*, 540 F.3d 101, 108–09 & n.9 (2d Cir. 2008); *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 193 (5th Cir. 2020) (“the Supreme Court interpreted a post-*McDonald* limitation on absentee voting as potentially violative of equal protection even though, like the statute in *McDonald*, it left open other options for voting” (citing *Am. Party of Tex. v. White*, 415 U.S. 767, 794–95 (1974))); *Ohio State Conf. of N.A.A.C.P. v. Husted*, 768 F.3d 524, 540 (6th Cir. 2014), *vacated on other grounds* 2014 WL 10384647 (6th Cir. Oct. 1, 2014) (“In *McDonald*, the Supreme Court did not apply rational basis review to the challenged Illinois statute allowing only certain categories of voters to receive absentee ballots solely because absentee ballots were at issue.”).

their ballot in the presence of a witness, must drop off that ballot somewhere other than a secure and accessible drop box, and must ensure that ballot is perfectly completed before the Election Day cure deadline. Plaintiffs contend that these burdens are never constitutionally justified, for any voter, and therefore properly challenge them on their face. *Cf. Green Party of Tenn. v. Hargett*, 791 F.3d 684, 692 (6th Cir. 2015) (recognizing that, where challenged requirements already apply only to group for which challenge was brought, “plaintiffs have in effect asserted a facial challenge”).

Legislative Intervenors’ contrary argument ignores the allegations in the Complaint. Plaintiffs do indeed “plead that the witness-certification requirement is facially unconstitutional.” (Dkt. 60 at 21.) The Complaint alleges that the Witness Requirement is unnecessary and does not advance any state interest, that it risks revealing a voter’s votes in violation of the right to the secret ballot, and that it makes it harder for all voters to cure their ballots. (Dkt. 2 at ¶¶ 32–34, 79–82.) Those arguments are true for every voter, supporting a facial challenge. The Complaint also alleges that the Witness Requirement particularly burdens the hundreds of thousands of Wisconsin voters without anyone in their household to witness their ballot. (Dkt. 2 at ¶ 29.) The Legislative Intervenors do not deny that this allegation adequately supports at least a hybrid challenge to the Witness Requirement on behalf of those hundreds of thousands of voters, and they cite nothing suggesting that any distinction between a facial and hybrid claim may be policed via a motion to dismiss rather than at the remedial stage.

Plaintiffs’ other challenges—to the Drop Box Prohibition, the Cure Deadline, and Section 6.84—rely entirely on burdens imposed on all absentee voters, so the Legislative Intervenors’ argument about facial challenges has no bearing on them. The Complaint alleges that the Drop Box Prohibition burdens all absentee voters alike by requiring them to rely on the U.S. Postal

Service and risk a late delivery. (Dkt. 2 at ¶¶ 85–87.) Similarly, the Complaint alleges that the Election Day Cure Deadline makes it harder for every absentee voter to cure any defect with their ballot and therefore effectively requires every absentee voter to return their ballot early. (Dkt. 2 at ¶¶ 99, 103.) And it alleges that Section 6.84 unconstitutionally degrades the voting rights of all absentee voters by increasing the risk of disenfranchisement. (Dkt. 2 at ¶ 112.) Each of those claims applies to all absentee voters alike and is therefore properly brought as a facial challenge.

III. The Challenged Restrictions and Section 6.84 are unconstitutional.

A. The Challenged Restrictions and Section 6.84 must withstand strict scrutiny.

The Challenged Restrictions and Section 6.84 are subject to, and cannot survive, strict scrutiny. Under Wisconsin Supreme Court precedent, if “a voter regulation creates a severe burden on electors’ right to vote, [courts] will apply strict scrutiny. . . and conclude that it is constitutional only if it is narrowly drawn to satisfy a compelling state interest.” *Milwaukee Branch of NAACP v. Walker*, 2014 WI 98, ¶ 22, 236 Wis. 2d 86, 613 N.W.2d 90. Longstanding Wisconsin constitutional law demands such a strict test, by recognizing that the right to vote is a “sacred right of the highest character,” with “a dignity not less than any other of many fundamental rights,” and that voting rights are therefore “remove[d] from the field of mere legislative material impairment.” *Phelps*, 128 N.W. at 1046; *see also Frederick*, 254 Wis. at 613 (the right to vote is “one of the most important of the rights guaranteed . . . by the constitution”). State actions burdening other fundamental rights are subject to strict scrutiny under the Wisconsin Constitution. *See, e.g., Mayo v. Wis. Injured Patients & Fams. Comp. Fund*, 2018 WI 78, ¶ 28, 383 Wis. 2d 1, 914 N.W.2d 678; *Matter of Visitation of A. A. L.*, 2019 WI 57, ¶ 45, 387 Wis. 2d 1, 927 N.W.2d 486; *In re Zachary B.*, 2004 WI 48, ¶¶ 17, 19, 23–25, 271 Wis. 2d 51, 678 N.W.2d 831. There is no basis for treating voting rights any differently.

Rigorous constitutional scrutiny of restrictions on voting is nothing new. Even before the development of the formal strict scrutiny test, Wisconsin cases had long held that state action abridging the constitutional right to vote is void. *See Dells v. Kennedy*, 49 Wis. at 558; *see also State ex rel. Knowlton v. Williams*, 5 Wis. 308 (1856).

1. The Witness Requirement

Plaintiffs have sufficiently alleged that the Witness Requirement imposes a severe burden on the right to vote and therefore must be subject to strict scrutiny under any applicable framework. More than 600,000 Wisconsin voters do not have anyone in their household who can act as a witness for their absentee ballot. *See Democratic Nat'l Comm. v. Bostelmann*, 488 F. Supp. 3d 776, 793 (W.D. Wis. 2020). Those individuals often have limited mobility or other health conditions that make it difficult to find a trusted third party who is willing and available to witness and certify an absentee ballot. (Dkt. 2 at ¶ 29); *cf. State v. Arctic Vill. Council*, 495 P.3d 313, 324–25 (Alaska 2021) (concluding that voters facing serious health risks were severely burdened by witness requirement during the COVID-19 pandemic). Consequently, a voter who lives alone must somehow find someone they trust or entrust a random third party. By forcing voters to go out of their way to find a witness, the Witness Requirement effectively undermines the very purpose of absentee voting. *See Wis. Stat. § 6.85* (permitting any “qualified elector who *for any reason is unable or unwilling to appear*” to exercise their right to vote (emphasis added)).

The purported “alternative suggestions” offered by WEC in *DNC v. Bostelmann* are wholly inadequate. *Democratic Nat'l Comm. v. Bostelmann*, Nos. 20-1538 & 20-1546, 20-1539 & 20-1545, 2020 WL 3619499, *2 (7th Cir. Apr. 3, 2020); (Dkt. 65 at 14.) Those “solutions” included “driv[ing] to a meet up spot to observe/witness through . . . vehicle windows,” fulfilling the requirement “via video chat like Skype or Facetime with the ballot left outside of the door or in a mailbox for the witness to sign and provide their address,” or asking a delivery person to witness

the ballot. (*See* Dkt. 2 at ¶ 30.) For many voters, these solutions are simply impractical. And, as explained further below, they demonstrate the irrationality of the Witness Requirement itself.

The Witness Requirement also threatens the right to a secret ballot. WEC fails to explain how a voter may mark a ballot in such a way that a witness can ascertain that the voter has marked the ballot but cannot see who the voter has voted for. They do not explain what it means to “mark the ballot in the presence of the witness in a way that will not reveal her vote.” (Dkt. 65 at 14.) That concept is inherently self-contradictory. Nor does WEC explain what purpose the Witness Requirement serves if the ballot must be marked in such a manner.

2. Drop Box Prohibition

The Drop Box Prohibition similarly imposes a severe burden on the right to vote and therefore must survive strict scrutiny even under the *Milwaukee Branch* framework. It cannot and therefore must be struck down.

Drop boxes were widely used in 2020 without incident, allowing thousands of voters to deposit their absentee ballots on time safely and conveniently, without relying on the U.S. Postal Service. And data from recent elections suggests that drop boxes dramatically reduced the incidence of late-returned ballots in 2020. In 2022, when drop boxes were prohibited, more than 1,600 absentee ballots were returned after election day. (Dkt. 2 at ¶ 49.) A similar number of ballots were returned late in the 2018 general election, before WEC’s guidance encouraging the use of drop boxes. *Id.* That is more than double the amount—and several times the proportion—of late ballots received during the 2020 general election, when ballot drop boxes were widely available. Despite nearly three times as many absentee votes being cast, only 689 absentee ballots were returned after election day in 2020. *Id.* As Justice Kavanaugh recognized in 2020, “secure absentee ballot drop box[es]” contributed to making “[r]eturning an absentee ballot in Wisconsin

... easy.” *Democratic Nat’l Comm. v. Wis. State Legis.*, 141 S. Ct. 28, 36 (2020) (Kavanaugh, J., concurring).

With drop boxes now prohibited, an absentee voter may now have their valid absentee ballot rejected due to unanticipated mail delivery delays entirely outside the voter’s control. The U.S. Postal Service has acknowledged that mail ballot delivery times can vary widely and delays in delivery can result in ballots arriving after statutory deadlines. (Dkt. 2 at ¶ 43.) A voter who timely completes an absentee ballot and places it in the mail therefore cannot guarantee that the ballot will be received by the statutory deadline. Election mail delay is well documented in Wisconsin. In the 2018 midterm elections, one of the five lowest-performing processing and delivery centers in the entire nation was the facility located in Eau Claire, Wisconsin, with nearly 14% of election and political mail delivered later than expected. (Dkt. 2 at ¶ 44.) Ballot delivery problems persisted in 2020. For example, during the April 2020 primary election, three tubs of absentee ballots were discovered at the Milwaukee processing and delivery center after polls closed; the post office failed to deliver ballots requested on March 22 and March 23; and nearly 400 voted ballots did not receive postmarks or were not legibly marked by the post office. (Dkt. 2 at ¶ 45.) But for the intervention of the federal courts, the U.S. Postal Service’s failure to timely deliver mail ballots would have invalidated the ballots of approximately 80,000 lawful voters in the spring 2020 primary election. *See Bostelmann*, 488 F. Supp. 3d at 790–91.

The Drop Box Prohibition means voters who are understandably concerned that relying on the postal service to timely deliver their ballots could cause rejection must personally travel to either a clerk’s office location or an early voting site—both of which are only open during business hours, when many voters are working. Voters with disabilities, those who lack easy access to reliable personal transportation or have less economic resources, or those with conflicting work or

caregiver responsibilities in particular may find this exceedingly difficult to do. This requirement imposes a severe and impermissible cost of voting on absentee voters.

WEC's only response to these allegations is that voters have *other* available methods of voting—such as voting in person and voting by mail. (Dkt. 65 at 19.) Although those might be viable options for some voters, for others—including many of the Alliance's elderly and disabled members—they are simply not sufficient. And the argument further ignores both the substantial issues voters have encountered with timely mail delivery in recent years, and that voting in person may be difficult for many for the same reasons that traveling to return their ballot may be difficult.

WEC misstates the allegations of the Complaint when it argues that Plaintiffs' "real complaint is not that their ballots won't be delivered, but that they need to deposit their ballot further in advance." (Dkt. 65 at 20.) As alleged in the Complaint, the problem is that there is no way for a voter to know *how far* in advance they must deposit their absentee ballot in the mail to ensure that it will be delivered by the statutory deadline. Mail delays, in addition to being pervasive, are highly variable and unpredictable. Voters are left to make their best guess as to the effective deadline for depositing their absentee ballots in the mail.

Finally, WEC's reliance on federal case law sheds little light on the correct analysis under the *Wisconsin* Constitution. As explained above, Wisconsin law subjects burdens on the fundamental right to vote to strict scrutiny. And the Wisconsin Constitution does not distinguish between in-person and absentee voting.

3. Election-Day Cure Deadline

Like the Witness Requirement and the Drop Box Prohibition, the Election Day Cure deadline imposes a severe burden on the fundamental right to vote and serves no rational, let alone compelling, purpose.

Because of the 8:00 p.m. Election Day cure deadline, voters whose ballots are received on or close to Election Day are deprived of the cure opportunities that are extended to other absentee voters. As a result of this deadline, voters may be disenfranchised due to minor deficiencies in their ballot certificates that they could otherwise have cured. Moreover, as explained above, U.S. Postal Service delays frequently result in absentee ballots being delivered long after they would normally be expected. To ensure that their absentee ballots arrive not just in time to be counted, but with *enough* time to ensure that they may take advantage of the cure procedure, voters must mail their ballots far in advance of election day.

It is no answer to say that voters should return their absentee ballots early. Absentee voters already encounter compressed timelines, as absentee ballots sent to voters through the mail are often delayed. (Dkt. 2 at ¶¶ 42–46.) And many voters do not decide which candidates they will support until shortly before election day. And particularly in primary elections, returning a ballot early may mean a wasted vote as candidates often drop out of the race shortly before election day. In Wisconsin’s August 2022 primary, for example, at least four candidates dropped out of the race after absentee ballots had been printed and mailed, and many ballots had already been returned. (Dkt. 2 at ¶ 47.) Providing a reasonable amount of time between the deadline for returning absentee ballots and the deadline for correcting defects would both ensure that voters have opportunity to correct defects and that election officials are able to timely count ballots and verify results, without sacrificing voters’ fundamental right to vote.

In an attempt to argue that the burdens imposed by the Election-Day Cure Deadline are minimal, WEC cites to *Arizona Democratic Party v. Hobbs*, 976 F.3d 1081 (9th Cir. 2020), as a case that “examined an election-day cure deadline nearly identical to Wisconsin’s.” (Dkt. 65 at 24.) That deadline was not identical, however, because under the scheme at issue in *Arizona*

Democratic Party voters could cure *mismatched* signatures within five days after Election Day; it was only missing signatures that were subject to the earlier election-day deadline. *Ariz. Democratic Party*, 976 F.3d at 1085–86 (“whereas the failure to sign one’s ballot is entirely within the voter’s control, voters are not readily able to protect themselves against the prospect that a polling official might subjectively find a ballot signature not to match a registration signature”). In Wisconsin, however, *any* defect is subject to the strict Election-Day Cure Deadline. For example, if a voter’s witness fails to provide their address, that absentee ballot could be rejected for a reason entirely beyond the voter’s control and without any opportunity to cure. And *New Georgia Project v. Raffensperger*, 976 F.3d 1278, 1281 (11th Cir. 2020), involved a ballot receipt deadline—not a cure deadline at all.

4. Section 6.84

Section 6.84’s strict-compliance rule for absentee voting substantially burdens the right to vote by disenfranchising voters based on minor, harmless failures to comply with the procedural requirements for absentee voting. Wis. Stat. § 6.84(2). Section 6.84’s sanction is as harsh as it gets—complete disenfranchisement of the voters to whom it applies. The problem is not merely that absentee voters are treated differently from other voters (Dkt 65 at 33)—it is that they are disenfranchised based on minor irregularities. Such disenfranchisement is undeniably a substantial burden on the right to vote.

B. The Challenged Restrictions and Section 6.84 fail strict scrutiny because they are not necessary or narrowly tailored to furthering compelling state interests.

Because each of the Challenged Restrictions and Section 6.84 severely burden the fundamental right to vote, they are subject to strict scrutiny even under the *Milwaukee Branch* approach advocated by WEC, so they can be upheld only if they are narrowly tailored to achieve

a compelling state interest. WEC does not even attempt to defend the Challenged Restrictions and Section 6.84 under this standard.

1. The Witness Requirement

The Witness Requirement is neither necessary nor narrowly tailored to furthering any compelling state interest. Any state interest in detecting fraud, deterring fraud, or protecting voter confidence is furthered only “in the abstract” by the witness requirement. *Arctic Vill. Council*, 495 P.3d at 325 (concluding that “given the lack of evidence that the requirement is effective in detecting fraud — and the other protections in place (such as signing under penalty of perjury) to guard the integrity of the process . . . the witness requirement is not closely enough related to the State’s interest in promoting public confidence in elections to justify the burden it places on voters”). There is no evidence that absentee voters are engaging in any type of fraudulent conduct, that the presence of a witness in any way deters or prevents such conduct, or even that the Witness Requirement promotes public confidence in elections. A criminal desiring to submit fraudulent absentee ballots could falsify the witness certification as easily as the voter’s signature.

The purported “alternatives” cited by WEC in the earlier *Bostelmann* litigation demonstrate why the Witness Requirement is such a bad fit for its purported goals. For example, there is no way for a witness who observes a ballot being marked through video chat to be certain that it is the same ballot that is later “left outside of the door or in a mailbox.” (Dkt. 2 at ¶ 30.) And the statute does nothing to ensure that a potential witness—who may be somebody completely unknown to the voter such as a delivery driver—can ascertain the identity of the voter filling out the ballot.

The Witness Requirement is therefore entirely unnecessary. There is no witness or notary requirement for absentee ballots in 36 states and the District of Columbia. *See, e.g.*, Del. Code Ann. tit. 15, §§ 5505(b)(4), 5514; Kan. Stat. Ann. § 25-1136(b); Neb. Rev. Stat. § 32-947; N.M.

Stat. Ann. §§ 1-6-8, 1-6-14; Vt. Stat. Ann. tit. 17, §§ 2542, 2546, 2547. Nor is there any evidence of any meaningful problems with fraudulent or unauthorized absentee ballots in those jurisdictions. *See, e.g.*, Ga. Code Ann. §§ 21-2-384, 251-2-386(a)(1); 25 Pa. Cons. Stat. §§ 3146.4, 3146.6(a), 3146.8; Wyo. Stat. Ann. §§ 22-9-111, 22-9-121.

2. The Drop Box Prohibition

The statutory prohibition on drop boxes in Section 6.87 as interpreted by the Supreme Court in *Teigen*, and as implemented by the Drop Box Prohibition, cannot withstand strict scrutiny. It is not necessary, nor narrowly tailored, to furthering a compelling state interest. WEC argues that the Drop Box Prohibition “could relate” to (1) “the state’s interest in promoting election security,” and (2) “the state’s interest in promoting uniformity.” (Dkt. 65 at 21–22.) Both arguments are misplaced.

As to the first asserted interest, there is no evidence that drop boxes facilitate election misconduct, nor that prohibiting them deters such misconduct or enhances election security. *see Teigen*, 2022 WI 64, ¶ 244 (Walsh Bradley, J., dissenting) (“There is no evidence at all in this record that the use of drop boxes fosters voter fraud of any kind.”). Even if the hypothetical threat of voter fraud could suffice to establish the requisite compelling interest, the Drop Box Prohibition is far from narrowly tailored. Any hypothetical risk of drop box tampering could be addressed, as it has been in other states, through less restrictive means, such as video monitoring and ensuring the drop boxes are placed in secure locations.² And WEC’s pre-*Teigen* guidance permitting drop

² *See, e.g.*, 10 Ill. Stat. § 5/19-6 (drop boxes must be secured by locks that may be opened only by election personnel and ballots shall be collected every day); Iowa Code § 53.17 (drop boxes must be monitored by recorded video surveillance, securely fastened to an immovable object or surface, and be emptied at least four times per day); Ky. Rev. Stat. § 117.086 (drop boxes must be secured to ensure immobility and under video surveillance); 21-A Me. Rev. Stat. § 752-B (drop box must

boxes included security suggestions. Madison, for example, placed drop boxes near fire stations and other secure municipal locations. Indeed, drop boxes are generally *more* secure than U.S. Postal Service mailboxes, which are not monitored and are placed in various locations across Wisconsin's cities, towns, and municipalities. There is no basis for assuming that ballots delivered through the U.S. Postal Service are any more secure, or less likely to be tampered with, than those delivered to municipal clerks through drop boxes.

As to the State's purported interest in "promoting uniformity," that some local election officials may decide to make drop boxes more available than others is not a sound basis for prohibiting drop boxes altogether. And WEC could mitigate the potential for statewide variation by issuing guidance to local election officials, as it does in countless other areas.

3. The Election-Day Cure Deadline

The Election-Day Cure Deadline is neither necessary nor narrowly tailored to furthering a compelling state interest. WEC first asserts that the Deadline furthers Wisconsin's interest in "counting the votes, and announcing the results, as soon as possible after the polls close." (Dkt. 65 at 26 (quotation omitted).) Second, WEC suggests the Deadline furthers the State's "interest in averting administrative costs associated with elections." *Id.* Neither assertion holds water.

Plaintiffs are not arguing that there should not be *any* deadline at all, but rather that the existing deadline imposes an impermissible and unjustified burden on voters given the existing voting framework in Wisconsin. It is commonplace that "official action to confirm or verify the

be bolted to the ground and regularly monitored); Md. Code, Election Law, §§ 1-101, 2-304, 2-305 (security cameras, periodic in-person visits, and emptied at least once per day); Mich. Comp. Laws Ann. § 168.761d (video monitoring); Minn. Stat. § 203B.082 (continual recording); N.J. Stat. § 19:63-16.1 (video recording); N.M. Stat. 1978 § 1-6-9 (video surveillance); 17 Vt. Stat. § 2543 (video surveillance).

results of the election extends well beyond federal election day.” *Millsaps v. Thompson*, 259 F.3d 535, 546 n.5 (6th Cir. 2001). Election officials must, for example, count, certify, and publicly announce the results. *Id.* at 546; *see also Bush v. Gore*, 531 U.S. 98, 116 (2000) (Rehnquist, C.J., Scalia & Thomas, J.J., concurring) (cataloguing administrative actions occurring in Florida after election day to conclude the election process). Of course, elections officials must at some point be able to certify final election results. Even if this interest were considered *compelling*, the current deadline is unnecessary and not narrowly tailored to furthering it. WEC guidance on provisional voting permits a voter to “provide the required information to the municipal clerk by 4:00 p.m. the Friday after the election.” (Dkt. 2 at ¶ 57.) This means that, even with all absentee mail ballots received by the Election-Day Cure Deadline, election officials cannot and will not certify final election results until later. There is no practical reason why the Election-Day Cure Deadline for absentee ballots should be shorter than the deadline for provisional ballots.

As for administrative costs, courts have repeatedly held that mere administrative burdens cannot alone justify burdening the fundamental right to vote.³ WEC relies on *Arizona Democratic Party* but the state defendants in *Arizona Democratic Party* provided actual *evidence* of meaningful increased costs. *See Ariz. Democratic Party*, 976 F.3d at 1085. Here, any such costs

³ *See, e.g., Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 218 (1986) (“the possibility of future increases in the cost of administering the election system is not a sufficient basis here”); *Fish v. Kobach*, 840 F.3d 710, 755 (10th Cir. 2016) (“There is no contest between the mass denial of a fundamental constitutional right and the modest administrative burdens to be borne by [the Secretary of State’s] office and other state and local offices involved in elections.”); *United States v. Georgia*, 892 F. Supp. 2d 1367, 1377 (N.D. Ga. 2018) (finding that administrative, time, and financial burdens on the State are “minor when balanced against the right to vote, a right that is essential to an effective democracy”); *Ga. State Conf. of the NAACP v. Fayette Cnty. Bd. of Comm’rs*, 118 F. Supp. 3d 1338, 1348 (N.D. Ga. 2015) (granting injunction under Section 2 of Voting Rights Act, even though county board of commissioners face administrative burdens from injunction, because “the harm [plaintiffs] would suffer by way of vote dilution outweighs the harm to the [board]”).

should be minimal because Wisconsin voters are *already* permitted to cure provisional ballots by 4:00 p.m. the Friday after the election. (Dkt. 2 at ¶ 57.) To the extent that expanding that cure deadline to include absentee ballots “may impose some additional costs on the state, [] this is the price imposed by the” Wisconsin Constitution. *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 595 (6th Cir. 2006).

4. Section 6.84

Section 6.84, too, fails strict scrutiny because there is no compelling interest in disenfranchising voters based on harmless, technical failures to comply with absentee voting procedures, including the Challenged Restrictions. Precisely because the Challenged Restrictions are (as just explained) unnecessary, the disenfranchisement that Section 6.84 imposes is a grotesquely disproportionate consequence for noncompliance. Plaintiffs therefore state a claim that Section 6.84 is unconstitutional for the same reason that they state a claim that the Challenged Restrictions are unconstitutional.

C. **There is no rational basis to justify the Challenged Restrictions or Section 6.84.**

Each of the Challenged Restrictions and Section 6.84 furthermore fail to survive even rational basis review. Under rational basis scrutiny, “[t]he basic test is . . . whether there exists any reasonable basis to justify” the Challenged Restrictions. *Mayo*, 2018 WI 78, ¶ 29 (quoting *Bostco LLC v. Milw. Metro. Sewerage Dist.*, 2013 WI 78, ¶ 76, 350 Wis. 2d 554, 835 N.W.2d 160). *Cf. In re Commitment of Alger*, 2015 WI 3, ¶ 39, 360 Wis. 2d 193, 858 N.W.2d 346 (stating that only where challenged rule “neither implicates a fundamental right nor discriminates against a suspect class, we apply rational basis review rather than strict scrutiny to the legislation”).

Recognizing the irrationality of the Challenged Restrictions and Section 6.84 is not a matter of “reweigh[ing] the policy choices of the” WEC or the Wisconsin Legislature. *Mayo*, 2018 WI

78, ¶ 40. Instead, it merely requires acknowledging that—given the lack of evidence of any necessity—requiring voters to have their absentee ballots witnessed, prohibiting voters from returning absentee ballots via drop boxes, and requiring voters to correct any defects on their absentee ballots by 8:00 p.m. on election day “bear[] no rational relationship to a legitimate government interest,” whether that is protecting the integrity of and promoting public confidence in elections, preventing voter fraud, or completing the canvass and certification of an election. *Id.* The Challenged Restrictions and Section 6.84 do nothing in the service of these state interests, and thus they are not “reasonable means of furthering” such interests, *Milwaukee Branch*, 2014 WI 98, ¶ 76.

IV. Plaintiffs have standing to bring Count IV.

Contrary to Defendants and Legislative Intervenors’ arguments, Plaintiffs’ challenge to Section 6.84 is justiciable. “A controversy is justiciable when: (1) a right is asserted against [a defendant] who has an interest in contesting it; (2) the controversy is between persons whose interests are adverse; (3) the plaintiff has a legally protectable interest in the controversy; and (4) the controversy is ripe for judicial determination.” *Papa v. Wis. Dep’t of Health Servs.*, 2020 WI 66, ¶ 29, 393 Wis. 2d 1, 946 N.W.2d 17 (internal quotations and citation omitted). And the merits of a claim do not affect its justiciability. *Tooley v. O’Connell*, 77 Wis. 2d 422, 434–35, 253 N.W.2d 335 (1977) (“The merits of plaintiffs’ cause of action do not determine its justiciability.”).

WEC and Legislative Intervenors only dispute the third factor (Dkt. 60 at 24; Dkt. 65 at 28–29), “a requirement often voiced in terms of standing.” *Fabick v. Evers*, 2021 WI 28, ¶ 11, 396 Wis. 2d 231, 956 N.W.2d 856. “[S]tanding in Wisconsin is not a matter of jurisdiction, but of sound judicial policy.” *Friends of the Black River Forest v. Kohler Co.*, 2022 WI 52, ¶ 17, 402 Wis. 2d 587, 977 N.W.2d 342 (quoting *McConkey v. Van Hollen*, 2010 WI 57, ¶ 15). Organizations like Plaintiffs Priorities USA and the Wisconsin Alliance for Retired Americans (“WIARA”) “may

have standing to bring suit on either [their] own behalf ('organizational standing') or on the behalf of one or more of [their] members ('associational standing')." *Munger v. Seehafer*, 372 Wis.2d 749, 890 N.W.2d 22, 42 (Wis. Ct. App. 2016).

Plaintiffs have standing to challenge Section 6.84 because it makes each of the Challenged Restrictions worse, by establishing that votes cast in harmless noncompliance with those Restrictions will not be counted. Wis. Stat. § 6.84(2); *see also Jefferson v. Dane Cnty.*, 2020 WI 90, ¶ 16, 394 Wis. 2d 602, 951 N.W.2d 556 ("its exercise requires strict compliance"). "[B]ecause compliance with the absentee ballot process is mandatory, [noncompliant absentee voters'] ballot would not count." *Id.* ¶ 26; *see also Trump v. Biden*, 2020 WI 91, ¶ 39, 394 Wis. 2d 629, 951 N.W.2d 568 (Hagedorn, J., concurring) ("[T]o the extent an absentee ballot does not comply with certain statutory requirements, it may not be counted."). Sections 6.84(1) and 6.84(2) cannot be read separately from each other. *See Teigen*, 2022 WI 64, ¶¶ 53–54; *Lee v. Paulson*, 2001 WI App 19, ¶ 7, 241 Wis. 2d 38, 623 N.W.2d 577. Section 6.84 therefore makes absentee voting both more difficult and riskier, because any harmless deviation from required procedures, including the Challenged Provisions, may lead to disenfranchisement. No one disputes that Plaintiffs have standing to bring suit against the Challenged Restrictions; their standing to challenge Section 6.84 flows from the same injury.

First, the Challenged Restrictions directly injure Plaintiffs by making it harder to vote in Wisconsin, making it more likely that votes will not be counted, and requiring Priorities USA and WIARA to divert resources from other urgent needs toward voter education efforts to help their constituents successfully navigate a needlessly difficult process. Plaintiff William Franks, Jr. is a long-time absentee voter, and the Challenged Restrictions make it harder for him to cast his ballot and ensure that it is timely received and counted by election officials. Plaintiff Priorities USA has

associational standing on behalf of its constituents—progressive voters—who vote absentee and are therefore injured by the Challenged Restrictions. Plaintiff WIARA also has associational standing on behalf of its over 15,000 members in Wisconsin, including Mr. Franks, many of whom vote absentee and are similarly injured by the Challenged Restrictions. And both Priorities USA and WIARA have organizational standing because they must divert significant staff and financial resources to ensure that their constituents and members are able to vote absentee in spite of the Challenged Restrictions. These diversions include initiatives and programming aimed at educating voters on the requirements of the Challenged Restrictions, resources to connect absentee voters with eligible ballot witnesses, disseminating information on where voters may return absentee ballots, and communications campaigns aimed at ensuring voters return their absentee ballots in time to provide an opportunity to cure defects and ensuring voters complete their absentee ballots without defects.

Second, those injuries are to voting rights and to expression that furthers voting rights, which Wisconsin law recognizes and protects. *See State v. Stevenson*, 2000 WI 71, ¶ 12, 236 Wis. 2d 86, 613 N.W.2d 90 (recognizing that generalized “chilling effect” of unconstitutional statute satisfies standing requirement). “Without question, the right to vote is a fundamental right” under the Wisconsin Constitution. *Milwaukee Branch*, 2014 WI 98, ¶ 23; *see also State v. Cir. Ct. for Marathon Cnty.*, 178 Wis. 468, 190 N.W. 563, 565 (1922) (“Nothing can be clearer under [Wisconsin’s] Constitution and laws than that the right of a citizen to vote is a fundamental, inherent right.”). Voters therefore have standing to challenge government acts impairing their voting rights. *See Teigen*, 2022 WI 64, ¶ 29 (lead opinion); *see also id.* ¶ 166 (Hagedorn, J., concurring). And the injuries to Plaintiffs’ voting rights and related expression are to rights that

are protected and recognized by Wisconsin law, satisfying the second prong of the standing requirement.

Thus, because Plaintiffs have standing to bring suit against the Challenged Provisions, they have standing to seek relief against Section 6.84 as well, which makes compliance with the Challenged Procedures mandatory.

V. *Moore v. Harper* preserves this Court’s power to review the constitutionality of election rules.

Finally, Legislative Intervenors argue that allowing Plaintiffs’ claims would violate the Elections Clause of the United States Constitution. (Dkt. 60, at 27–32.) The U.S. Supreme Court’s recent decision in *Moore v. Harper* says precisely the opposite: it confirms that “[s]tate courts retain the authority to apply state constitutional restraints when legislatures act under the power conferred upon them by the Elections Clause.” 143 S. Ct. 2065, 2090 (2023). Plaintiffs’ claims in this case call for nothing more than that. Plaintiffs certainly are not asking this Court or any court to “exceed the bounds of ordinary judicial review,” *id.*, and Legislative Intervenors offer no basis for concluding that any court would do so. A long line of Wisconsin precedent recognizes that the right to vote is fundamental and “remove[d] from the field of mere legislative material impairment.” *Phelps*, 128 N.W. at 1046. The Wisconsin courts are entitled—indeed, duty bound—to adjudicate Plaintiffs’ claims that the Challenged Restrictions are unconstitutional under that precedent.

CONCLUSION

For the reasons set forth above, the Court should deny both WEC’s and the Legislative Intervenors’ motions to dismiss.

DATED this 29th day of September, 2023.

Respectfully submitted,

Electronically signed by Diane M. Welsh

Diane M. Welsh, SBN 1030940

PINES BACH LLP

122 W. Washington Ave., Suite 900

Madison, WI 53703

Telephone: (608) 310-3319

Facsimile: (608) 251-2883

dwelsh@pinesbach.com

David R. Fox*

Justin Baxenberg*

Richard A. Medina*

Omeed Alerasool*

ELIAS LAW GROUP LLP

250 Massachusetts Ave. NW, Suite 400

Washington, DC 20001

Telephone: (202) 986-4490

Facsimile: (202) 986-4498

dfox@elias.law

jbaxenberg@elias.law

rmedina@elias.law

oalerasool@elias.law

Attorneys for Plaintiffs

*Admitted *pro hac vice*

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