FILED
06-03-2024
CLERK OF WISCONSIN
SUPREME COURT

IN THE SUPREME COURT OF WISCONSIN
No. 2024AP232

KENNETH BROWN,
Plaintiff-Respondent-Cross-Appellant,

V.

WISCONSIN ELECTIONS COMMISSION,
Defendant-Co-Appellant-Cross-Respondent,

TARA MCMENAMIN
Defendant-Appellant-Cross-Respondent,

WISCONSIN ALLIANCE FOR RETIRED AMERICANS,
DEMOCRATIC NATIONAL COMMITTEE, AND
BLACK LEADERS ORGANIZING FOR COMMUNITIES,
Intervenors-Co-Appellants-Cross-Respondent.

On Appeal From The Racine County Circuit Court,
The Honorable Eugene A. Gasiorkewicz, Presiding

INTERVENOR-CO-APPELLANT-CROSS-RESPONDENT BLACK LEADERS ORGANIZING FOR COMMUNITIES' OPENING BRIEF

Scott B. Thompson SBN 1098161
T.R. Edwards SBN 119447
Law Forward, Inc.
222 West Washington Avenue, Suite 250
Madison, WI 53703
sbthompson@lawforward.org
tedwards@lawforward.org
608.535.9808
Counsel for Black Leaders Organizing for Communities

TABLE OF CONTENTS

ISSUES PRESENTED 8

STATUTORY PROVISIONS IMPLICATED 9

STATEMENT ON ORAL ARGUMENT AND PUBLICATION 11

STATEMENT OF THE CASE 12

STANDARDS OF REVIEW 13

I. Review of an Agency Determination 13

II. Statutory Interpretation 13

ARGUMENT 15

I. Introduction 15

II. Respondent's preferred construction of "advantage to any political party" is untethered to the text, context, and practical realities that flow from Wis. Stat. § 6.855. 17

a. Background of Wis. Stat. § 6.855(1). 17

b. There is no textual basis for Respondent's preferred construction of "advantage to any political party." 19

c. Brown's standard is inconsistent with the historical context of Wis. Stat. § 6.855(1) and would lead to absurd and likely unconstitutional results. 21

III. Wisconsin Stat. § 6.84 does not preclude the City of Racine's Mobile Elections Unit (MEU). 24

a. The circuit court's construction of Wis. Stat. § 6.855 relies upon an atextual inflation of Wis. Stat. § 6.84. It should be rejected. 25

IV. The Wisconsin Constitution prohibits Wis. Stat. § 6.84. 26

a. The Wisconsin Constitution forbids the diminishment of the right to vote into a privilege. Because this is what Wis. Stat. § 6.84 demands, it is unconstitutional. 27

i. The right to vote is preeminent, and it is exercised when Wisconsinites vote by absentee ballot. 27

ii. The right to vote cannot be denigrated into a "mere privilege." Because this is precisely what Wis. Stat. § 6.84 does, it is unconstitutional. 30

b. The history of absentee ballot laws in Wisconsin has produced some authority in tension with BLOC's position here. Any such tension is overwhelmed by the weight of authority and the state constitution. 34

i. Historical Wisconsin caselaw describing absentee voting as a privilege is not inconsistent with BLOC's position here, which acknowledges that absentee ballots themselves are not guaranteed by the Wisconsin Constitution. 34

ii. Gradinjan v. Boho, which disenfranchised absentee voters for minor statutory deviations, is at odds with the clear weight of authority. 37

V. Conclusion 40

TABLE OF AUTHORITIES

Cases

C. Coakley Relocation Sys., Inc. v. City of Milwaukee,
2008 WI 68, 310 Wis. 2d 456, 750 N.W.2d 900 14

Carey v. Wisconsin Elections Comm'n,
624 F. Supp. 3d 1020 (W.D. Wis. 2022) 27

Clapp v. Joint School District No. 1 of Villages of Hammond & Roberts,
21 Wis. 2d 473, 124 N.W.2d 678 (1963) 34, 35, 36

Clarke v. Wisconsin Elections Comm'n,
2023 WI 79, 410 Wis. 2d 1, 998 N.W.2d 370 20

Clean Wisconsin, Inc. v. Wisconsin Dep't of Nat. Res.,
2021 WI 71, 398 Wis. 2d 386, 961 N.W.2d 346 13

County of Dane v. LIRC,
2009 WI 9, 315 Wis. 2d 293, 759 N.W.2d 571 14

Cree, Inc. v. Lab. & Indus. Rev. Comm'n,
2022 WI 15, 400 Wis. 2d 827, 970 N.W.2d 837 13

Dawson v. Town of Jackson,
2011 WI 77, 336 Wis. 2d 318, 801 N.W.2d 316 14

DOC v. Schwarz,
2005 WI 34, 279 Wis. 2d 223, 693 N.W.2d 703 14

Gradinjan v. Boho,
29 Wis. 2d 674, 139 N.W.2d 557 (1966) 37, 38, 39, 40

In re Burke,
229 Wis. 545, 282 N.W. 598 (1938) 29, 39

Jefferson v. Dane Cnty.,
2020 WI 90, 394 Wis. 2d. 602, 951 N.W.2d 556 ..... 13, 14, 28, 36

Johnson v. Wisconsin Elections Comm'n,
2021 WI 87, 399 Wis. 2d 623 20

Knowlton v. Bd. of Sup'rs of Rock Cty.,
9 Wis. 410 (1859) 24

Lanser v. Koconis,
62 Wis. 2d 86, 214 N.W.2d 425 (1974) 30

League of Women Voters of Wis. Educ. Network, Inc. v. Walker,
2014 WI 97, 357 Wis. 2d 360, 851 N.W.2d 302 28

League of Women Voters of Wisconsin Educ. Network, Inc. v. Walker,
2014 WI 97 31

Luft v. Evers,
963 F.3d 665 (7th Cir. 2020) 17, 18

Matter of Adoption of M.M.C.,
2024 WI 18 24

McGrael v. Phelps,
144 Wis. 1, 128 N.W. 1041 (1910) 30, 31, 33

McNally v. Tollander,
100 Wis. 2d 490, 302 N.W.2d 440 (1981) 28

Ollmann v. Kowalewski,
238 Wis. 574, 300 N.W. 183 (1941) 33, 37, 38, 39

One Wisconsin Inst., Inc. v. Thomsen,
198 F. Supp. 3d 896 (W.D. Wis. 2016) .....*passim*

Petition of Anderson,
12 Wis. 2d 530, 107 N.W.2d 496 (1961) 30, 35

Roth v. Lafarge School Dist. Bd. Of Canvassers,
2004 WI 6, 268 Wis. 2d 335, 677 N.W.2d 599 ..... 29, 39

Sommerfeld v. Board of Canvassers,
269 Wis. 299, 69 N.W.2d 235 (1955) 35

Southwest Airlines Co. v. Dep't of Revenue,
2021 WI 54, 397 Wis. 2d 431, 60 N.W.2d 384 ..... 13, 19

State ex rel. Ekern, et al. v. Dammann,
215 Wis. 394, 254 N.W. 759 (1934) 26, 31

State ex rel. Frederick v. Zimmerman,
254 Wis. 600, 37 N.W.2d 473 (1949) 34

State ex rel. Kalal v. Cir. Ct. for Dane Cnty.,
2004 WI 58, 271 Wis. 2d 633, 681 N.W.2d 110 13

State ex rel. McGrael v. Phelps,
144 Wis. 1, 128 N.W. 1041 (1910) 28

State ex rel. Milwaukee Sales & Inv. Co. v. R.R. Comm'n of Wis.,
174 Wis. 458, 183 N.W. 687 (1921) 24

State ex rel. Wood v. Baker,
38 Wis. 71 (1875) 33, 38, 39

State v. Barnett,
182 Wis. 114, 195 N.W. 707 (1923) 29, 32, 33, 39

State v. Cir. Ct. for Marathon Cnty.,
178 Wis. 468, 190 N.W. 563 (1922) 28

State v. Kohler,
200 Wis. 518, 228 N.W. 895 (1930) 29, 31

Teigen v. Wisconsin Elections Comm'n,
2022 WI 64, 403 Wis. 2d 607, 976 N.W.2d 519 ..... 25, 28, 36

Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue,
2018 WI 75, 382 Wis. 2d 496, 914 N.W.2d 21 13

Trump v. Biden, 2020 WI 91, 394 Wis. 2d 629, 951 N.W.2d 568 .... 30, 36

Statutes and Constitutional Provisions

Wis. Cons. art. I, § 1 23

Wis. Stat. § (Rule) 809.22 11

Wis. Stat. § (Rule) 809.23 11

Wis. Stat. § 5.01 25

Wis. Stat. § 5.06 ..... 13, 19, 20

Wis. Stat. § 6.22 27

Wis. Stat. § 6.23 27

Wis. Stat. § 6.24 27

Wis. Stat. § 6.33 20

Wis. Stat. § 6.41 33

Wis. Stat. § 6.84 .....*passim*

Wis. Stat. § 6.855 .....*passim*

Wis. Stat. § 6.86 18

Wis. Stat. § 7.20 22

Wis. Stat. § 11.57 ..... 29, 30

Wis. Stat. § 11.62 32

Other Authorities

2017 Wis. Act 369 ..... 18, 19

ISSUES PRESENTED

Consistent with this Court's order, Black Leaders Organizing for Communities' (BLOC) appeal concerns the following issues, originally set forth in its Petition for Bypass:

I. Whether the circuit court improperly construed "advantage to any political party" under Wis. Stat. § 6.855(1).
   a. Answer below: No.
   b. Our answer: Yes.

II. Whether the Circuit Court improperly applied Wis. Stat. § 6.84 to prohibit the City of Racine's Mobile Elections Unit (MEU) under Wis. Stat. § 6.855.
   a. Answer below: No.
   b. Our answer: Yes.

STATUTORY PROVISIONS IMPLICATED

Wis. Stat. § 6.84 Construction.

(1) LEGISLATIVE POLICY. The legislature finds that voting is a constitutional right, the vigorous exercise of which should be strongly encouraged. In contrast, voting by absentee ballot is a privilege exercised wholly outside the traditional safeguards of the polling place. The legislature finds that the privilege of voting by absentee ballot must be carefully regulated to prevent the potential for fraud or abuse; to prevent overzealous solicitation of absent electors who may prefer not to participate in an election; to prevent undue influence on an absent elector to vote for or against a candidate or to cast a particular vote in a referendum; or other similar abuses.

(2) INTERPRETATION. Notwithstanding s. 5.01 (1), with respect to matters relating to the absentee ballot process, ss. 6.86, 6.87 (3) to (7) and 9.01 (1) (b) 2. and 4. shall be construed as mandatory. Ballots cast in contravention of the procedures specified in those provisions may not be counted. Ballots counted in contravention of the procedures specified in those provisions may not be included in the certified result of any election.

Wis. Stat. § 6.855 Alternate absentee ballot site.

(1) The governing body of a municipality may elect to designate a site other than the office of the municipal clerk or board of election commissioners as the location from which electors of the municipality may request and vote absentee ballots and to which voted absentee ballots shall be returned by electors for any election. The designated site shall be located as near as practicable to the office of the municipal clerk or board of election commissioners and no site may be designated that affords an advantage to any political party. An election by a governing body to designate an alternate site under this section shall be made no fewer than 14 days prior to the time that absentee ballots are available for the primary under s. 7.15 (1) (cm), if a primary is scheduled to be held, or at least 14 days

prior to the time that absentee ballots are available for the election under s. 7.15 (1) (cm), if a primary is not scheduled to be held, and shall remain in effect until at least the day after the election. If the governing body of a municipality makes an election under this section, no function related to voting and return of absentee ballots that is to be conducted at the alternate site may be conducted in the office of the municipal clerk or board of election commissioners.

(2) The municipal clerk or board of election commissioners shall prominently display a notice of the designation of the alternate site selected under sub. (1) in the office of the municipal clerk or board of election commissioners beginning on the date that the site is designated under sub. (1) and continuing through the period that absentee ballots are available for the election and for any primary under s. 7.15 (1) (cm). If the municipal clerk or board of election commissioners maintains a website on the Internet, the clerk or board of election commissioners shall post a notice of the designation of the alternate site selected under sub. (1) on the website during the same period that notice is displayed in the office of the clerk or board of election commissioners.

(3) An alternate site under sub. (1) shall be staffed by the municipal clerk or the executive director of the board of election commissioners, or employees of the clerk or the board of election commissioners.

(4) An alternate site under sub. (1) shall be accessible to all individuals with disabilities.

(5) A governing body may designate more than one alternate site under sub. (1).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is warranted in this matter under the standards in Wis. Stat. § (Rule) 809.22. Pursuant to this Court's order, unless otherwise ordered, the Court will hear oral argument during the fall of 2024.

Publication is proper under the standards in Wis. Stat. § (Rule) 809.23(1) because the issues raised here are of statewide import related to absentee voting, a cornerstone of Wisconsin elections.

STATEMENT OF THE CASE

In light of this Court's order encouraging the Bypass Petitioners to avoid repetition, BLOC joins the Statement of the Case submitted by the Wisconsin Elections Commission and incorporates it by reference herein.

STANDARDS OF REVIEW

I. Review of an Agency Determination

At the center of this case is the Wisconsin Elections Commission's (WEC) decision to deny relief to Brown in response to a Wis. Stat. § 5.06 complaint. This Court will "review the decision of the agency, not the circuit court." *Clean Wisconsin, Inc. v. Wisconsin Dep't of Nat. Res.*, 2021 WI 71, ¶14, 398 Wis. 2d 386, 961 N.W.2d 346. Review of agency determinations is "generally [done] in accordance with chapter 227 of our statutes." *Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 2018 WI 75, ¶11, 382 Wis. 2d 496, 914 N.W.2d 21. And for an administrative agency's conclusions of law, the standard of review is de novo. *Id.* at ¶84.

II. Statutory Interpretation

This case involves questions of statutory interpretation regarding Wis. Stat. § 6.855 as well as its relationship to Wis. Stat. § 6.84. "Statutory interpretation is a matter of law which we review de novo, giving no deference to the agency's legal conclusions." *Cree, Inc. v. Lab. & Indus. Rev. Comm'n*, 2022 WI 15, ¶13, 400 Wis. 2d 827, 970 N.W.2d 837. "The purpose of statutory interpretation and application is to apply the meaning of the words the legislature chose." *Jefferson v. Dane Cnty.*, 2020 WI 90, ¶21, 394 Wis. 2d. 602, 951 N.W.2d 556 (citing *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶44, 271 Wis. 2d 633, 681 N.W.2d 110). "If the meaning of the statute is plain, we need not inquire further." *Southwest Airlines Co. v. Dep't of Revenue*, 2021 WI 54, ¶22, 397 Wis. 2d 431, 960 N.W.2d 384. "Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." *Id.* (citing *Kalal*, 2004 WI 58, ¶¶45-46). "Context

is important," such that statutory language is interpreted "not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Kalal*, 2004 WI 58, ¶46 (internal citations omitted). The Court "will not add words into a statute that the legislature did not see fit to employ." *Jefferson*, 2020 WI 90, ¶25 (citing *Dawson v. Town of Jackson*, 2011 WI 77, ¶42, 336 Wis. 2d 318, 801 N.W.2d 316); *see also, e.g.*, *County of Dane v. LIRC*, 2009 WI 9, ¶33, 315 Wis. 2d 293, 759 N.W.2d 571; *C. Coakley Relocation Sys., Inc. v. City of Milwaukee*, 2008 WI 68, ¶24 & n.10, 310 Wis. 2d 456, 750 N.W.2d 900. This accords with "the maxim[] of statutory construction [] that courts should not add words to a statute to give it a certain meaning." *DOC v. Schwarz*, 2005 WI 34, ¶20, 279 Wis. 2d 223, 693 N.W.2d 703 (internal quotation marks and citations omitted).

ARGUMENT

I. Introduction

The Wisconsin Constitution affords broad protections to the right to vote. All Wisconsin voters enjoy these protections, including those who choose to vote by absentee ballot. This case is about whether, going forward, Wisconsin's absentee voters will be able to access the franchise to the degree they are entitled under the law.

Alternate in-person absentee voting sites ("alternate sites" or "IPAV sites") provide voters with convenient locations to return absentee ballots. *See generally* Wis. Stat. § 6.855. Municipalities designate alternate sites as described under § 6.855. This case concerns the method municipalities use to decide the location of these alternate sites. It involves both the construction of § 6.855 as well as its application to the City of Racine's IPAV program.

Under Wis. Stat. § 6.855(1), "no [alternate] site may be designated that affords an advantage to any political party." How should this language be understood? Plaintiff-Respondent-Cross-Appellant Kenneth Brown's interpretation (which the circuit court adopted) is unworkable. For Brown, "an advantage to any political party" can be avoided only if voters in the immediate vicinity of an alternate site cast their ballots *exactly* as those voters who live in the immediate vicinity of the municipal clerk's office. As he put it, "the goal is…the *same* political makeup." (emphasis in original). But this construction is at odds with the text of the statute, its context, equal protection guarantees, and the sensible deployment of alternate sites throughout Wisconsin. For these reasons, Brown's construction must be rejected in favor of a functional standard.

The second issue concerns a vehicle. Racine deployed a van, referred to as the "Mobile Elections Unit" ("MEU"), to and from its alternate sites to assist in absentee ballot collection. The circuit court found that Wis. Stat. § 6.855 forbids the MEU. To reach this holding, the circuit court construed Wis. Stat. § 6.855's language as mandatory because Wis. Stat. § 6.84 instructs that "voting by absentee ballot is a privilege" and "ballots cast in contravention" of Wisconsin's absentee ballot statutes "may not be counted." It was through this lens that the circuit court reasoned § 6.855's silence on MEUs must be understood as a prohibition upon them.

This was an improper application of Wis. Stat. § 6.84. The text of Wis. Stat. § 6.84 narrows its application to only a few absentee voting statutes, and Wis. Stat. § 6.855 is not one of them. Moreover, under this Court's precedent, legislative silence on matters related to voting cannot be understood as a de facto prohibition against anything that is not specifically authorized. If anything, such silence is understood as a reservation of power to the voters. As a result, Wis. Stat. § 6.84 does not apply to Wis. Stat. § 6.855. And even if it applied, Wis. Stat. § 6.855 does not prohibit the MEU or any other unenumerated activities.

Finally, there is *no* proper way to apply § 6.84, because it amounts to an unconstitutional infringement on the right to vote. This Court has repeatedly recognized that in Wisconsin 1) the right to vote is not a privilege, and 2) the right to vote is exercised when voters cast absentee ballots. So, under the Wisconsin Constitution the Legislature cannot reduce the right to vote into a privilege. Yet, for those Wisconsinites who vote with absentee ballots, this is exactly what Wis. Stat. § 6.84

proclaims and attempts to carry out. As a result, Wis. Stat. § 6.84 is unconstitutional, and cannot apply.

For these reasons, set forth in full below, this Court should reverse the decision of the circuit court and affirm the decision of the Wisconsin Elections Commission, to reject the original complaint.

II. Respondent's preferred construction of "advantage to any political party" is untethered to the text, context, and practical realities that flow from Wis. Stat. § 6.855.

The construction of "advantage to any political party" Brown advanced, and the circuit court endorsed, should be rejected. The plain text of Wis. Stat. § 6.855, its context in the larger absentee balloting scheme, and the absurd results Brown's construction would precipitate all weigh in favor of a more practical understanding of this language.

a. Background of Wis. Stat. § 6.855(1).

Wisconsin Stat. § 6.855 prescribes how municipalities designate IPAV sites. To understand how this provision applies today, it is necessary to first consider its circuitous history.

When enacted, Wis. Stat. § 6.855 limited municipalities to *one* alternate site. *See* Wis. Stat. § 6.855 (2013-14). "The designated site shall be located as near as practicable to the office of the municipal clerk or board of election commissioners and no site may be designated that affords an advantage to any political party." *Id*. This was sometimes known as the one-location rule.

In 2015, the federal District Court for the Western District of Wisconsin ruled that the one-location rule 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). In his

holding, Judge Peterson relied on the clearly disparate result that Wis. Stat. § 6.855 (2013-14) created: "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. So, the court enjoined the one-location rule, root and branch: "Wisconsin's statutes establishing a one-location rule, Wis. Stat. § 6.855–.86, violate the First and Fourteenth Amendments and § 2 of the Voting Rights Act." *Id*. at 963. "[T]he court will permanently enjoin the invalid provisions." *Id*.

Before *One Wisconsin* reached the Seventh Circuit Court of Appeals, the Wisconsin Legislature amended Wis. Stat. § 6.855 to eliminate the one-location rule. Under 2017 Wis. Act 369, a fifth and final subsection was appended to Wis. Stat. § 6.855, explicitly authorizing a municipality to "designate more than one alternate site." But the fix was clumsy. The act did not remove the language within § 6.855(1) that gave rise to the one-location rule. Nevertheless, the Seventh Circuit subsequently recognized that Act 369 dissolved it. In no uncertain terms the court explained, "*[t]he one-location rule is gone*, and its replacement is not substantially similar to the old one." *Luft v. Evers*, 963 F.3d 665, 674 (7th Cir. 2020) (emphasis added).[1] Thus, although 2017 Wis. Act 369

[1] As a result, that court remanded that aspect of the case to the district court with instructions to dismiss it as moot. *Luft*, 963 F.3d at 674.

did not remove the words which created the one-location rule, this history demonstrates its implied repeal.

These jurisprudential and legislative considerations should weigh on how this Court construes Wis. Stat. § 6.855."[C]ontext is important." *Southwest Airlines Co*., 2021 WI 54, ¶22. And the context from *One Wisconsin* and 2017 Wis. Act 369 renders a limiting principle: Wis. Stat. § 6.855(1) must not be construed to limit the availability of alternate sites and thereby level disparate impacts against Wisconsin's voters of color who exercise the right to vote through absentee ballots.

b. There is no textual basis for Respondent's preferred construction of "advantage to any political party."

The circuit court accepted Brown's argument that the location of Racine's alternate sites afforded an advantage to a political party. If upheld, Brown's application of Wis. Stat. § 6.855 would distort and inflate the "political party" language the beyond recognition.

Brown developed his own evidentiary framework to claim a violation of the "political party" language from Wis. Stat. § 6.855. And he purports to meet his own standard through the submission of a report alongside his Wis. Stat. § 5.06 complaint. According to Brown, to establish a violation of Wis. Stat. § 6.855, one must only do the following: First, claim "the political makeup of the ward where the Clerk's office is located as a baseline." (R. 86 at 13.) According to Brown, the "political makeup" consists of the "top-of-the-ticket" results from prior elections. (R. 56 at 45.) Next, compare the "political makeup" of that "baseline" ward to the remaining wards in the municipality. Then, identify those wards with zero deviation in "political makeup" from the baseline ward. Those wards are the only wards that may host alternate sites under Brown's standard. (R. 86 at 13; R. 59 at 40 ("the goal is… a ward that

has the *same* political makeup as the one in which the clerk's office is located.") (emphasis in original)).

None of this comes from the statute. Nothing in Wis. Stat. § 6.855 mentions a baseline or makes even a passing reference to the "political makeup" of the area near surrounding a municipal clerk's office.[2] Put simply, none of this is law. The genesis of Brown's standard is an exercise in circular reasoning. His "advantage to any political party" standard appears to be derived from the same "research" Brown used to support his Wis. Stat. § 5.06 complaint. (R. 56 at 48, 49.) This material was compiled by two individuals (an intern and a political scientist) who work with Brown's lawyers. (*Id.* at 50.) Yet their purported understanding of Wisconsin law is not binding, nor does it merit elevation into the statute books. Because this standard is of Brown's own invention and is otherwise untethered to the text, it should not be embraced by this Court.

WEC's refusal to find a violation based solely upon Respondent's "research" and invented standard was appropriate. In dismissing this allegation from the underlying Wis. Stat. § 5.06 complaint, WEC rejected the notion that Respondent's "proof" sufficed to demonstrate Racine's IPAV sites contravened the relevant language from Wis. Stat. § 6.855. WEC acknowledged that Wis. Stat. § 6.855 limits, in some ways, municipalities' ability to designate IPAV sites, but correctly determined that Brown's method of establishing a violation was not tethered to the statute: "This is not to say that the Commission may never be presented

[2] Any alleged "political makeup" reflected by vote totals is either beside the point entirely, or not necessarily indicative of an advantage to "any political party." "Wisconsin does not have party registration, so voters never formally disclose their party membership at any point in the electoral process." *See Johnson v. Wisconsin Elections Comm'n*, 2021 WI 87, ¶43, 399 Wis. 2d 623, 651, *overruled by Clarke v. Wisconsin Elections Comm'n*, 2023 WI 79, ¶43, 410 Wis. 2d 1, 998 N.W.2d 370; *see also* Wis. Stat. § 6.33.

with a justiciable claim under Wisconsin Statute that compels it to examine political inequity in electoral processes, but this is not that complaint." (R. 59 at 56.) Lest Wis. Stat. § 6.855 fall out of line with its jurisprudential and legislative evolution, the statute should be construed in line with WEC's application below.

c. Brown's standard is inconsistent with the historical context of Wis. Stat. § 6.855(1) and would lead to absurd and likely unconstitutional results.

Brown's standard is inconsistent with the history of Wis. Stat. § 6.855(1), absurd, and likely unconstitutional. Under Brown's standard, a municipality may only satisfy the relevant part of Wis. Stat. § 6.855 if the voting population of the wards hosting alternate sites carry the *exact same* "partisan[3] breakdown" as the voting population which resides within the ward hosting its municipal clerk's office. This construction is a thinly veiled effort to confine the IPAV sites to the ward hosting the clerk's office and nowhere else. Brown is not hiding from this. He argued to the circuit court that if IPAV sites are "placed 'as near as practicable to the office of the municipal clerk'—*which will be within the same ward—then the political makeup of the surrounding area will remain unchanged*." (R. 59 at 40 (emphasis added).) Although this might not be the one-location rule, it could be called the "few-locations rule."

Limiting IPAV sites in this fashion—to the narrow footprint occupied by the ward hosting clerk offices—drags Wis. Stat. § 6.855 closer to its discriminatory past. One basis for *One Wisconsin*'s injunction against Wis. Stat. § 6.855 (2013-14) was that a limitation on the number

[3] Again, the premise of this argument is belied by Wisconsin practice: there is no party registration for voters, so precisely who is and who is not formally affiliated with any one party is impossible to discern from public information.

of alternate sites disadvantaged voters of color in Wisconsin's larger municipalities. *One Wisconsin Inst.*, 198 F. Supp. 3d at 931-32. That same disadvantage would befall the same voters under Brown's few-locations rule.

Consider Wisconsin's largest municipality, the City of Milwaukee. In the 2022 general election vote for Governor, the ward in which Milwaukee's Board of Election Commissioners is located—Ward 141[4]—saw 394 votes cast for the Democratic candidate, Tony Evers, and 294 votes cast for Republican candidate, Tim Michels.[5] How many of Milwaukee's 354 wards had the same partisan makeup? Zero.[6] So, under Respondent's few-locations rule Ward 141 is the *only* ward which may host an alternate site. Incredibly, the same is true for Wisconsin's 20

[4] The City of Milwaukee is the only municipality in Wisconsin that maintains its own Board of Election Commissioners, rather than a municipal clerk. *See* Wis. Stat. § 7.20(1). It is located within City Hall at 200 E. Wells St. Room 501, Milwaukee, WI 53202. *See* Elections Commission, City of Milwaukee https://city.milwaukee.gov/election. The City of Milwaukee provides its ward maps on the website which helps Milwaukeeans learn how to run for public office. *See* District Maps, City of Milwaukee https://city.milwaukee.gov/election/HowtoRunforPublicOffice/District-Maps. A link on that page, labeled "Go to Ward Maps" produces a 352-page pdf document; page 140 of the pdf provides the map to Ward 141, within the boundaries of that ward lies 200 E. Wells St., the Milwaukee Elections Commission. The link to that pdf is reproduced here, for the Court's convenience: https://drive.google.com/file/d/1zp1X9G1fgRZCfWczZpp0xZ6QO4A3m7lF/view.

[5] A statewide, ward-by-ward voting breakdown is published by the Wisconsin Elections Commission. *See Election Results*, Wisconsin Elections Commission https://elections.wi.gov/elections/election-results#accordion-5601. The ward-by-ward report for the 2022 election for governor is published as an excel spreadsheet and can be downloaded under the drop-down menu labeled "2022 General Election Results." *Ward by Ward Report_Governor.xlsx* available at https://elections.wi.gov/sites/default/files/documents/Ward%20by%20Ward%20Report_Governor_0.xlsx The ward totals for Milwaukee Ward 141 is available in the second sheet of that spreadsheet, titled "Ward by Ward Report" at row 1966.

[6] *Id.*, Ward by Ward Report, rows 1826-2177.

largest municipalities[7] (and likely follows in the vast majority of the remainder).

Confining Milwaukee's IPAV program to Ward 141 would discriminate against voters of color, contrary to *One Wisconsin* and the historical progression of Wis. Stat. § 6.855. Approximately 91% of the residents of Milwaukee zip code 53206 are Black while 2% are white.[8] The demographics of zip code 53202, where Ward 141 is located, are largely reversed. Just 8% of its residents are Black, and 76% are white.[9] Under Brown's few-locations rule, Wis. Stat. § 6.855 would authorize IPAV sites *only* in the whiter zip code, forcing the residents of the predominantly black zip code to travel further to return their ballots. So not only would the few-locations rule trigger the "obvious logistical difference[s]" associated with forcing a few hundred thousand voters to use a [few] location[s]," but also it would disadvantage voters of color by foreclosing majority-minority wards from hosting alternate sites.

One Wisconsin demonstrates how Brown's construction contravenes federal law; and for similar reasons, it likely violates the Wisconsin Constitution. "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

---

[7] *See Id.,* Ward by Ward Report, rows 534-687 (Madison), rows 162-220 (Green Bay), rows 1322-1394 (Kenosha), rows 2684-2732 (Racine), rows 284-291, 2402-2444, 3607-3608 (Appleton), rows 3464-3515 (Waukesha), rows 339-342, 898-966 (Eau Claire), rows 3620-3658 (Oshkosh), rows 2839-2875 (Janesville), rows 2235-2260 (West Allis), rows 1428-1455 (La Crosse), rows 3090-3112 (Sheboygan), rows 2203-2234 (Wauwatosa), rows 1008-1029 (Fond du Lac), rows 3402-3423 (Brookfield), rows 3436-2456 (New Berlin), rows 1650-1674 (Wausau), rows 3358-3383 (Menomonee Falls), rows 1800-1825 (Greenfield).

[8] *See* Census Reporter, 53206 https://censusreporter.org/profiles/86000US53206-53206/

[9] *See* Census Reporter, 53202 https://censusreporter.org/profiles/86000US53202-53202/

of our 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). So, if the federal constitution prohibits the discrimination inherent in the one-location rule, Respondent's few-locations rule must also fall under Wisconsin's more-rigorous equal protections.

III. Wisconsin Stat. § 6.84 does not preclude the City of Racine's Mobile Elections Unit (MEU).

Nothing in Wis. Stat. § 6.84 prevents Racine from operating its MEU. No party specifically[10] encouraged the circuit court to apply § 6.84 (which directs that certain statutes are mandatory rather than directory) to Wis. Stat. § 6.855. Nevertheless, the circuit court explicitly relied on Wis. Stat. § 6.84 to condemn Racine's use of an MEU. (R. 99 at 17 ("This Court reads Wis. Stat. § 6.855 with Wis. Stat. § 6.84.").) But Wis. Stat. § 6.84 does not, and cannot, preclude conduct that is not specifically authorized in statute. What is more, Wis. Stat. § 6.855 is not subject to mandatory construction at all. Properly considered, the MEU is consistent with Wis. Stat. 6.855 and the absentee voting requirements of Wisconsin.

[10] Brown encouraged a mandatory application of Wis. Stat. § 6.855, without specific reference to Wis. Stat. § 6.84. (*Compare* R. 86 at 1 ("The question is simply whether the procedures the Clerk used complied with the language of the statute.")) *with* Wis. Stat. § 5.01 ("[I]nformality or failure to fully comply" is not fatal.).

a. The circuit court's construction of Wis. Stat. § 6.855 relies upon an atextual inflation of Wis. Stat. § 6.84. It should be rejected.

On their face, the mandatory construction provisions of Wis. Stat. § 6.84 do not apply to Wis. Stat. § 6.855. Wisconsin Stat. § 6.84 purports to diminish flexibility for voters who cast an absentee ballot, but it applies to a specific set of absentee ballot statutes only—and Wis. Stat. § 6.855 is not one of them. The statute applies to "matters relating to the absentee ballot process, ss. 6.86, 6.87 (3) to (7) and 9.01 (1) (b) 2. and 4." Wis. Stat. § 6.84(2). There is no mention of § 6.855. This ends the inquiry—Wis. Stat. § 6.84 does not apply. *See* Wis. Stat. § 5.01 ("[C]hs. 5 to 12 shall be construed to give effect to the will of the electors, if that can be ascertained from the proceedings, notwithstanding informality or failure to fully comply with some of their provisions.") Here, the "informality or failure to comply with some… provisions" of chs. 5 to 12 is not fatal, and the MEU is thus in accord with our election statutes. Wis. Stat. § 5.01.

The result would be the same even if Wis. Stat. § 6.84 were to apply to § 6.855. Brown may argue that § 6.84's reference to "matters relating to the absentee process" expands its reach to include § 6.855, a position that may find some support in *Teigen*. *Teigen v. Wisconsin Elections Comm'n*, 2022 WI 64, ¶¶52-63, 403 Wis. 2d 607, 976 N.W.2d 519. But this does not change the text of § 6.84(2), which still requires "contravention" of an absentee ballot provision for it to apply at all. And neither Brown nor the circuit court identified any provision which is "contravened" by the MEU.

Instead of "contravention" the circuit court's construction improperly focused on authorization: "Nowhere can this Court find or

has been provided any authority allowing the use of a van or vehicle as an alternate absentee voting vehicle. Interpretation of the election statutes and specifically Wis. Stat. § 6.855 to allow them is a bridge too far." (internal quotations omitted) (R. 99 at 16-17.) But relying on the absence of statutory authority to limit voting in any way is prohibited:

> [S]ince the right of the voters so to express themselves is a constitutional right that may be regulated but not destroyed by the Legislature, a failure on the part of the Legislature to restrict results not in the absence of power on the part of the voters to express themselves in this manner, but in an absence of restriction upon the power.

State ex rel. Ekern, et al. v. Dammann, 215 Wis. 394, 254 N.W. 759, 761-62 (1934).

Brown may quibble with *Dammann* based on the misguided notion that individuals who choose to vote absentee are exercising a privilege rather than a constitutional right. That argument is a red herring: all statutes which "regulate the manner of voting are restrictions upon the constitutional right of voters." *Id.* at 763.[11]

Neither the plain language of Wis. Stat. § 6.84 nor this Court's unanimous *Dammann* opinion permit the absence of specific authority to operate as a de facto prohibition. As a result, without any identifiable statutory prohibition against the MEU, it is proper under Wisconsin's election laws.

IV. The Wisconsin Constitution prohibits Wis. Stat. § 6.84.

Wis. Stat. § 6.84 should not be applied to construe any statute because it violates the constitutional right to vote and is therefore invalid. The role of Wis. Stat. § 6.84 permeates through both questions presented in this case. The circuit court relied on Wis. Stat. § 6.84 in

[11] A full discussion of the constitutional infirmity of Wis. Stat. § 6.84 is found in Section III, *infra.*

construing § 6.855 and in applying § 6.855 to Racine's IPAV program. (R. 99 at 7, 15-17.) But Wis. Stat. § 6.84 purports to diminish the right to vote into a mere privilege. The Wisconsin Constitution, as construed by this Court, forbids such a diminution. No matter the context, § 6.84 cannot apply.

a. The Wisconsin Constitution forbids the diminishment of the right to vote into a privilege. Because this is what Wis. Stat. § 6.84 demands, it is unconstitutional.

This Court has long disfavored legislative action invading upon the right to vote. This disfavor includes a clear boundary: the Wisconsin Constitution does not countenance the diminution of the right to vote into a "mere privilege." Yet, this is exactly what Wis. Stat. § 6.84(1) expresses and what § 6.84(2) carries out. Although absentee ballots themselves are not guaranteed[12] under the constitution, Wisconsinites are nevertheless exercising their *right* to vote whenever, and however, they cast their ballots. Absentee ballots included. And any regulation which withers the franchise into a privilege cannot be squared with the state constitution. Because this is precisely what Wis. Stat. § 6.84 accomplishes for voters who choose to vote via absentee ballot, it is unconstitutional.

i. The right to vote is preeminent, and it is exercised when Wisconsinites vote by absentee ballot.

The right to vote is broadly, and repeatedly, protected throughout the Wisconsin Constitution:

[12] There are categories of voters who can *only* exercise their right to vote via absentee ballot. This includes certain voters with disabilities, as well as voters who will not be in Wisconsin on election day because they are located overseas and/or are a member of the armed forces. *See Carey v. Wisconsin Elections Comm'n*, 624 F. Supp. 3d 1020, 1027 (W.D. Wis. 2022); *see also* Wis. Stat. §§ 6.22–6.24.

> [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.

State ex rel. McGrael v. Phelps, 144 Wis. 1, 128 N.W. 1041, 1046 (1910). In guarding it this broadly, the framers of the Wisconsin Constitution "[placed] the right of suffrage upon the high plane of removal from the field of mere legislative material impairment." *Id.* It "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).

This Court has not wavered from *Phelps* and its sweeping declarations. "Because the right to vote is so central to our system of government, this Court has consistently sought to protect its free exercise." *McNally v. Tollander*, 100 Wis. 2d 490, 502, 302 N.W.2d 440 (1981). Echoing that sentiment, members of this Court have described the right to vote 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 *Phelps*, 144 Wis. at 15); *Jefferson*, 2020 WI 90, ¶51 (Bradley, A.W., concurring in part); Order, *O'Bright v. Lynch*, No. 2020AP1761-OA, ¶¶1–2, 11 (Oct. 29, 2020) (Roggensack, C.J., concurring). Exercising this right is "the hard work of democracy." *Teigen*, 2022 WI 64, ¶151 (Hagedorn, J., concurring). And our system of government depends on that hard work. "[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).

These declarations should apply with equal force here because the right to vote is at stake when Wisconsinites vote by absentee ballot. That the right to vote pervades absentee voting is nothing new. Repeatedly, this Court has confirmed that tossing absentee ballots for minor deviations from related statutes infringes upon Wisconsinites' right to vote. These cases hold that—notwithstanding Wis. Stat. § 6.84—voters are exercising the right to vote, not the privilege to vote, when voting by absentee ballot.

Perhaps the first case to acknowledge the inherent position of the right to vote within the absentee voting process was *State v. Barnett*, wherein this Court considered rejecting absentee ballots which failed to comply with the voter registration statutes. Holding that the votes would be counted, this Court confirmed that to hold otherwise would "deprive the otherwise qualified voter of his constitutional right of suffrage." 182 Wis. 114, 195 N.W. 707, 711 (1923). This Court applied the rule from *Barnett* in *In re Burke*, and counted absentee ballots which did not bare the statutorily required signature of a ballot clerk. *In re Burke*, 229 Wis. 545, 282 N.W. 598, 602 (1938). More recently, also applying *Barnett*, this Court in *Roth v. Lafarge School Dist. Bd. Of Canvassers* reaffirmed its basic holding: "We noted that to disqualify the [absentee] ballots would deprive the voters of their constitutional rights." 2004 WI 6, ¶21, 268 Wis. 2d 335, 677 N.W.2d 599.

Barnett and its progeny do not stand alone. In *Petition of Anderson*, this Court considered whether to reject three absentee ballots for failing to comply with the relevant absentee ballot statute, Wis. Stat. § 11.57

(1959-60).[13] 12 Wis. 2d 530, 534, 107 N.W.2d 496 (1961). Before determining that the votes would be counted, this Court explained that rejecting these absentee ballots would deprive the relevant voters "of their right to vote." *Id.*; *see also Lanser v. Koconis,* 62 Wis. 2d 86, 93, 214 N.W.2d 425 (1974) ("[W]e are not inclined to disenfranchise these voters").

And of course, in *Trump v. Biden*, this Court considered whether to invalidate hundreds of thousands of absentee ballots for alleged inconsistencies with absentee voting statutes. There, this Court correctly identified that throwing out these absentee ballots would deprive Wisconsinites of their *right* to vote: "Striking these ballots would disenfranchise[14] voters." 2020 WI 91, ¶27, 394 Wis. 2d 629, 951 N.W.2d 568.

Together, these cases render an inescapable conclusion: the right to vote is carried out by those who vote by absentee ballot.

ii. The right to vote cannot be denigrated into a "mere privilege." Because this is precisely what Wis. Stat. § 6.84 does, it is unconstitutional.

Although the Legislature may regulate the right to vote, that authority does not include reducing the right to vote, as guaranteed by the Wisconsin constitution, into a mere privilege. This question was authoritatively resolved over 100 years ago in *Phelps*. "[I]n *McGrael v. Phelps,* 144 Wis. 1, 128 N.W. 1041 (1910), we concluded that voting was

[13] The opinion is ambiguous as to the year of the particular provision, but based upon the date of the publication, it appears that Wis. Stat. § 11.57 (1959-60) was at issue.
[14] "In the election context, 'disenfranchise' means to deny a voter the right to vote." *Trump v. Biden*, 2020 WI 91, ¶145 (R. Bradley, J., dissenting).

a right, not a privilege." *League of Women Voters of Wisconsin Educ. Network, Inc. v. Walker*, 2014 WI 97, ¶19.

In *Phelps*, this Court took care to stake out the state constitutional guardrails protecting the right to vote: "In a logical treatment of such major proposition the nature of the right involved may well be considered. Without adequate understanding thereof one can hardly discover and appreciate its constitutional safeguards." 128 N.W. at 1045. In no uncertain terms, the majority went on to reject the notion that the right to vote can be considered a privilege. "*It has an element other than that of mere privilege.*" *Phelps*, 128 N.W. at 1046 (emphasis added); *restated in State v. Kohler*, 228 N.W. at 905. "[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). The right to vote is no mere privilege—it is "a sacred right of the highest character." *Id.*; *see also Dammann*, 254 N.W. at 761–62; *State v. Cir. Ct. for Marathon Cnty.*, 190 N.W. at 565.

The Legislature cannot pass a statute to extinguish a constitutional right. Nevertheless, Wis. Stat. § 6.84(1) purports to do just that. Whether such a proclamation can be squared with our constitution is an easy question. Given that the right to vote is exercised when Wisconsinites vote absentee and given that the right to vote cannot be diminished into the privilege to vote, Wis. Stat. § 6.84(1) must be superseded by the broad protections the Wisconsin Constitution provides for the right to vote. Wis. Stat. § 6.84 (1) is unconstitutional.

The Legislature's unconstitutional "privilege" decree under Wis. Stat. § 6.84(1) is carried out under (2). For similar reasons, this second subsection cannot be squared with the right to vote.

As an initial matter, the two should be understood as inseverable—they must fall together. Whether the Legislature is proclaiming to diminish a right (Wis. Stat. § 6.84(1)) or effectuating that proclamation (Wis. Stat. § 6.84(2)), it does not disturb the essential formula: the Wisconsin Constitution does not countenance a transformation of the right to vote into a privilege. It follows that if Wis. Stat. § 6.84(1) is unconstitutional (it is), then Wis. Stat. § 6.84(2) is also unconstitutional. Regardless, subsection (2)'s unlimited and exacting encumbrances on the right to vote are independently unconstitutional.

This Court's precedent in *Barnett* confirms this. In *Barnett* this Court counted absentee votes cast in contravention of two different mandatory voting provisions. Both are examined here.

First, registration lists. The relator alleged that 64 absentee voters cast their ballots illegally because their names did not appear on the relevant registration lists. *Barnett*, 195 N.W. at 711. At the time, it was settled law that Wisconsin's voter registration laws "are mandatory; and that one whose name is not on the registration list should not be permitted to vote." *Id.* at 712. Yet this Court held that the 64 votes must be counted. In construing the law to permit the votes, the Court recognized that requiring disenfranchisement in that instance would "place our registration regulations perilously near the border line of unconstitutionality." *Id.*

Second, clerk indorsement. Under Wis. Stat. § 11.62 (1921-23), clerks processing absentee ballots were required to "indorse[] the ballot

in like manner as other ballots [were] required to be" and then deposit that ballot into the requisite ballot box. A related statute, Wis. Stat. § 6.41 (1921-23) required that "any ballot which is not indorsed…shall be void, not counted, and be treated and preserved as a defective ballot." Again, this Court refused to effectuate statutorily prescribed disenfranchisement on constitutional grounds. "Their constitutional right cannot be baffled by latent official failure or defect." *Barnett*, 195 N.W. at 713 (1923) (quoting *State ex rel. Wood v. Baker*, 38 Wis. 71, 89 (1875)).

This Court went further in *Ollmann v. Kowalewski*, 238 Wis. 574, 300 N.W. 183, 185 (1941). Like *Barnett*, *Ollman* considered the same statutory demand that a ballot missing a clerk's signature be "void, not counted, and be treated and preserved as a defective ballot." *Id*. at 185. This Court unanimously held:

> Any statute that purported to authorize refusal to count ballots cast under the instant circumstance would be unconstitutional. A statute purporting so to operate would be void, rather than the ballots. And the ballots not being void, should be counted notwithstanding the statute. Voting is a constitutional right. Art III, § 1, Const., and any statute that denies a qualified elector the right to vote is unconstitutional and void.

Id. 185.

Wis. Stat. § 6.84(2) cannot withstand the weight of contrary constitutional authority. *Phelps* and its progeny recognize that the right to vote is not a privilege in Wisconsin. At the same time, *Barnett* and related cases hold that the right to vote is exercised by those who vote by absentee ballot. And in those same cases, this Court found it unconstitutional for the Legislature to disenfranchise absentee voters who did not meet draconian standards for statutory compliance. It follows that our Constitution does not permit Wis. Stat. § 6.84(2). To

require that Wisconsin's absentee voters follow every jot and tittle of our labyrinthine absentee ballot provisions is inconsistent with the Wisconsin Constitution and its protections for the right to vote.

"If citizens are deprived of [the] right [to vote], which lies at the very basis of our Democracy, we will soon cease to be a Democracy." *State ex rel. Frederick v. Zimmerman,* 254 Wis. 600, 613, 37 N.W.2d 473, 480 (1949). Wis. Stat. § 6.84 is unconstitutional and therefore null and void, and the circuit court's reliance on that statute was therefore misplaced.

b. <u>The history of absentee ballot laws in Wisconsin has produced some authority in tension with BLOC's position here. Any such tension is overwhelmed by the weight of authority and the state constitution.</u>

Any contrary authority must yield to the Constitution and the mountain of precedent that confirms the sanctity of the right to vote. For nearly 150 years this Court has been construing Wisconsin's election laws. The results are not perfectly uniform. Nevertheless, this Court has repeatedly stepped in to uphold Wisconsinites' right to vote in the face of mandatory legislative language to the contrary. Carefully considered, the notion that Wis. Stat. § 6.84 is unconstitutional is in harmony with the relevant jurisprudence.

i. Historical Wisconsin caselaw describing absentee voting as a privilege is not inconsistent with BLOC's position here, which acknowledges that absentee ballots themselves are not guaranteed by the Wisconsin Constitution.

In response, Brown may direct this Court to a line of cases, 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

reflexively concede that absentee voting is a privilege. There are good reasons to view these opinions narrowly and skeptically.

First, 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 that 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. 299, 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). The *Sommerfeld* majority, on the other hand, acknowledged that those states which strictly construe absentee voting stop short of such a harsh construction that disenfranchisement would result. "Apparently even in those states which have adopted a rule of strict construction they state that a substantial compliance therewith is all that is required." *Id.* at 303.

Clapp also cites *Petition of Anderson*, 12 Wis. 2d 530, 107 N.W.2d 496 (1961) while discussing absentee voting. But *Petition of Anderson* supports BLOC's position. It acknowledges that absentee voters would be "deprived of their right to vote" if their ballots were disregarded for mere technical violations. *Id.* at 534. And this is precisely what Wis. Stat. § 6.84 does, by requiring such a deprivation.

Even *Clapp* is not even wholly out of step with BLOC's argument. Again, BLOC acknowledges that absentee ballots themselves are not constitutionally protected. The taproot of BLOC's position is that whenever someone is voting, no matter the method, they are exercising their right to vote. This premise is undisturbed by *Clapp*.

At issue in *Clapp* were the results of a June 1962 school district referendum. The plaintiffs claimed the election was void because of a laundry list of election law violations, including that "no provision was made for absentee voting." *Clapp*, 21 Wis. 2d at 479. This is an important distinction: *Clapp*'s focus was on the behavior of the clerks who failed to provide voters with the option to vote absentee. So, whether voters who cast absentee ballots remain protected by the right to vote was not at issue. *Id*. at 481 ("We do not have a case of a resident demanding an absentee ballot for himself and being refused by the school district clerk."). *Clapp* is thus most fairly read to apply to the provision of absentee ballots (which is not constitutionally protected), but not to voters who exercise the franchise via absentee ballot (who still enjoy the right to vote under the Wisconsin Constitution).

Beyond *Clapp*, members of this Court have relied upon Wis. Stat. § 6.84 as the basis to identify absentee voters as exercising a privilege, as opposed to a right. *See Teigen* 2022 WI 64 (passim)[15]; *Jefferson*, 2020 WI 90, ¶16. Yet these cases said nothing of Wis. Stat. § 6.84's constitutionality—that issue was simply not before the Court. Their value is limited to a simple restatement of the language provided by the legislature under Wis. Stat. § 6.84, not whether that language is constitutional.

[15] In tension with some majority paragraphs of *Teigen's* lead opinion, one concurrence argued that this Court's *Trump v. Biden* decision already resolved that, notwithstanding Wis. Stat. § 6.84, "equity" and the Court's desire to avoid "unfair[ness]" overwhelm any legislative obligations for strict compliance with the text of our absentee balloting statutes. *Teigen*, 2022 WI 64, ¶¶118, 124-126 (R. Bradley, J., concurring).

ii. Gradinjan v. Boho, which disenfranchised absentee voters for minor statutory deviations, is at odds with the clear weight of authority.

Brown may also point this Court to *Gradinjan v. Boho*, 29 Wis. 2d 674, 139 N.W.2d 557 (1966). There, this Court considered a statute which, "by explicit and clear language provided that an absentee ballot not containing the name or initials of the issuing municipal clerk shall not be counted." *Id*. at 683. The ballots at issue contained no such name or initials. The *Gradinjan* appellant argued that such a statute would be unconstitutional should it disenfranchise a voter. *Gradinjan* nevertheless held that "the legislature could, upon reasonable grounds, require that absentee ballots must be authenticated by the municipal clerk and that a ballot without such authentication could not be counted in calculating the result of a public election." *Id.* at 563. This holding is tenuous for several reasons and should not be relied upon in the face of this Court's historic commitment to the right to vote.

The *Grandnjan* Court failed to adequately account for significant authority to the contrary. Although it lists seven different cases seemingly in opposition to its ultimate holding, *Id*. at 682, *Gradinjan* only seriously engages with one: *Ollmann*.[16] *Id.* at 683 (discussing *Ollmann v. Kowalewski*, 238 Wis. 574, 300 N.W. 183 (1941)). *Ollman* could not be clearer about the constitutional defect accompanying mandatory voting laws that demand disenfranchisement:

> Any statute that purported to authorize refusal to count ballots cast under the instant circumstance would be unconstitutional. A statute purporting so to operate would be void, rather than the ballots. And the ballots not being void, should be counted notwithstanding the statute. Voting is a constitutional right. Art III, § 1, Const., and any statute that

[16] *Grandinjan* does references a second case, *Petition of Anderson*, but does not distinguish its holding so much as it acknowledges legislative changes that followed its publication.

> denies a qualified elector the right to vote is unconstitutional and void. It is true that section 6.41, Stats. is plainly enough mandatory in its terms, and if literally applied would invalidate the 305 votes. But if construing it as mandatory will make it unconstitutional, it must be held to be directory only in order to save the statute, and that is how we must construe it. A ballot legally cast cannot be rejected if it expresses the will of the voter.

Ollmann 300 N.W. at 185. *Gradinjan* purports to distinguish this broad pronouncement in five short sentences:

> *Ollmann* must be distinguished on two grounds. In *Ollmann* the voter received a ballot with initials marked upon it at a regular polling place. In this instance at the times the voter received the ballot and cast his vote the ballot did not have any authenticating name or initial on it. Further, the ballots in question here are absentee ballots. Clearly, the legislature could determine that fraud and violation of the sanctity of the ballot could much more readily be perpetrated by use of an absentee ballot than under the safeguards provided at a regular polling place.

29 Wis. 2d at 684. Both of these points from *Gradinjan* merit skepticism. *First*, the mode by which the clerk failed to comply with the statute was of no obvious consequence in *Ollman*. The most important question was who bore responsibility for the statutory violation—it was the clerk's fault, not the voter's. "[N]ot to count his vote for no fault of his own would deprive him of his constitutional right to vote." *Ollmann*, 300 N.W. at 185. This proposition was nothing new; indeed, it has been a general principle of Wisconsin law since shortly after the civil war. In *Baker* this Court refused to construe the state's voter registration laws to demand disenfranchisement when a voter's name was left off the registration roll through no fault of his own:

> And if failure or error in duty of the inspectors, of which voters have no notice in fact, could operate directly or indirectly to disfanchise [*sic*] voters at the election, we should encounter…difficulty in sustaining the statute under the constitution.
> …
>
> Surely it would be a strange attempt to protect the elective franchise and preserve the purity of elections, to put it in the power of inspectors

> of election, by careless accident or corrupt design, to disfranchise constitutional voters. That, we take it, would be the actual effect of avoiding elections where the inspectors use defective or irregular registers at the election, as official and valid; so entrapping voters into dispensing with proof of their right, required and authorized only when their names are not registered at the election. We cannot think that such is a necessary or admissible construction of the statute.

Baker, 38 Wis. at 87–88. *Baker* is far from alone. "As a general rule a voter is not to be deprived of his constitutional right of suffrage through the failure of election officers to perform their duty, where the elector himself is not delinquent in the duty which the law imposes upon him." *See Barnett*, 195 N.W. at 712; *see also In re Burke*, 282 N.W. at 602; *Roth v. Lafarge Sch. Dist. Bd. of Canvassers,* 2004 WI 6, ¶26 (collecting cases). *Gradinjan*'s failure to engage substantively on this issue is significant and suggests it should be confined to its narrow facts.

Second, the fact that *Ollman* did not involve absentee ballots is beside the point. The issue in *Ollman* had already been construed in the absentee ballot context twice, in *Barnett* and *In re Burke*. *Barnett* refused to disenfranchise absentee voters, notwithstanding clear mandatory construction language to the contrary. *Barnett*, 195 N.W. at 712 (1923). This Court in *Ollman* specifically cited *Barnett*. 300 N.W. at 185 (1941). *Gradinjan* made no mention of *Barnett*. Yet *Gradinjan*'s silence on *Burke* is slightly more egregious because *In re Burke* seems to dispositively resolve the question in the other direction. *In re Burke* considered the same signature requirement at issue in *Gradinjan* and in *Ollman*. Yet unlike *Ollman*, the absentee ballots in *In re Burke* ballots had no clerk signature. Still, *Burke* applied *Barnett*, finding that such absentee ballots must be counted. *Burke*, 282 N.W. at 602. It is unclear how *Burke* can be harmonized with *Gradinjan*, if at all.

Ultimately, *Gradinjan* stands on shaky grounds. Lest it confuse the clear weight of authority to the contrary, it should be confined to its specific facts.

Wis. Stat. § 6.84 violates the right to vote. Any tension that exists between this conclusion and prior authority is overwhelmed by the Wisconsin Constitution's broad protection of the right to vote, and this Court's jurisprudence upholding those protections.

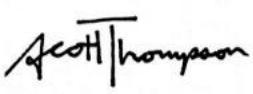
V. Conclusion

Absentee voting is a cornerstone of the voting system in Wisconsin. The WEC was correct to reject Brown's contorted understanding of "advantage to any political party" as well as his allegation that Racine's MEU violated Wis. Stat. § 6.855. Any construction of Wis. Stat. § 6.855 should pay no mind to § 6.84, which does not apply to § 6.855 and is otherwise unconstitutional.

The decision of the circuit court should, accordingly, be reversed and WEC's decision should be affirmed.

Dated: June 3, 2024

Respectfully submitted,



Electronically Signed By: Scott B. Thompson
Scott B. Thompson SBN 1098161
T.R. Edwards SBN 119447
Law Forward, Inc.
222 West Washington Avenue, Suite 250
Madison, WI 53703-0326
sbthompson@lawforward.org
tedwards@lawforward.org
608.535.9808

Counsel for Black Leaders Organizing For Communities

CERTIFICATION OF COMPLIANCE WITH WIS. STAT. § 809.19(8g)(a)

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief, as well as this Court's Order regarding page length. The length of this brief is 9,088 words.

Dated this 3rd day of June, 2024.

Electronically Signed By: Scott B. Thompson

Scott B. Thompson SBN 1098161
Law Forward, Inc.
222 West Washington Avenue, Suite 250
Madison, WI 53703-0326
sbthompson@lawforward.org
608.535.9808

Counsel for Black Leaders Organizing For Communities