

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 4

MARGARET HONIG, *et al.*,

Plaintiffs,

v.

Case No. 2026CV1463
Case Codes: 30952
30701

WISCONSIN ELECTIONS COMMISSION, *et al.*,

Defendants.

**REPLY BRIEF IN SUPPORT OF PLAINTIFFS'
MOTION FOR JUDGMENT ON THE PLEADINGS**

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INTRODUCTION

WEC acknowledged that “the ballots appear to have been timely returned by the voters, and the error in timely delivering them to the polling places was solely due to actions of the clerk’s authorized representatives.” (Dkt. 9 at 26) And WEC admits that the Honigs “validly cast absentee ballots in Wisconsin’s spring election, held on April 7, 2026.” (Dkt. 46, ¶1) There is no dispute: Plaintiffs Margaret and Robert Honig did everything right. But Defendants (and Proposed Intervenors) argue the law requires disenfranchising innocent Wisconsin voters like the Honigs for the errors of election officials. They are wrong, many times over.

Wisconsin’s right-to-vote jurisprudence is crystal clear: “voters should not be deprived of their constitutional right to vote simply because election officials have failed to perform their duties.” *Roth v. Lafarge Sch. Dist. Bd. of Canvassers*, 2004 WI 6, ¶21, 268 Wis. 2d 335, 677 N.W.2d 599.¹ The contrary position advanced by WEC—

¹ WEC claims “Plaintiffs offer no case law support for [this] rule of law.” (Dkt. 62 at 30) It is unclear how WEC justifies this proposition. Although the clearest recent recitation of this principle is found in *Roth*, many other cases (as cited in Plaintiffs’ opening brief, Dkt. 49 at 13–19) reinforce it:

[T]he question is, whether such official nonfeasance and malfeasance of the inspectors of election can operate to disfranchise legal voters without notice and without fault ... It would be a fraud on the constitution to hold the [voters] disenfranchised without notice or fault. They went to the election clothed with a constitutional right of which no statute could strip them, without some voluntary failure on their own part.

State ex rel. Wood v. Baker, 38 Wis. 71, 84, 89 (1875).

If the ... regulations ... prescribed by law ... deprive a fully qualified elector 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, they are destructive of his constitutional right, and make the law itself as void.

Dells v. Kennedy, 49 Wis. 555, 558, 6 N.W. 246 (1880).

We can conceive of no principle which permits the disfranchisement of innocent voters for the mistake, or even the willful misconduct, of election officers

State ex rel. Dithmar v. Bunnell, 131 Wis. 198, 206, 110 N.W. 177 (1907) (quoting *People ex rel. Hirsh v. Wood*, 42 N.E. 536, 537 (N.Y. 1895)).

the agency charged with upholding Wisconsin’s elections laws—is alarming. And doubly so because, earlier this year, WEC confirmed in the Dane County Circuit Court that it **knows** Plaintiffs are right: “Once an elector has complied with the statutory process, whether absentee or in-person, she has a constitutional right to have her vote counted.” (Dkt. 47 at 4)²

Those who go to ... vote ... have been guilty of no negligence or breach of duty, and their right thereafter to vote ... cannot be limited on account of the negligence or default of others.

State ex rel. McGraef v. Phelps, 144 Wis. 1, 43–44, 128 N.W. 1041 (1910).

“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.”

State ex. rel. Graves v. Wiegand, 212 Wis. 286, 294, 249 N.W. 537 (1933) (quoting *Symmonds v. Barnett*, 182 Wis. 114, 127, 195 N.W. 707 (1923)).

Was the ballot which lacked the signature of one of the ballot clerks, cast by an absent voter and properly counted ...? [T]hat particular ballot was cast by an absent voter and, under the law of *State ex rel. Symmonds v. Barnett*, 182 Wis. 114, 195 N.W. 707, it was properly counted.

In re Burke, 229 Wis. 545, 555, 282 N.W. 598, 602 (1938).

Clearly no voter could be punished ... for he would have no means of knowing [that an election official had erred and thus failed to satisfy the relevant election statute]. The voter would not knowingly be doing wrong. And not to count his vote for no fault of his own would deprive him of his constitutional right to vote.

Ollman v. Kowalewski, 238 Wis. 574, 578 (1941).

[A]bsentee voters came to the city clerk’s office and relied upon the procedures employed by the city clerk’s staff [R]egularity ... attends the execution of an absentee ballot in the city clerk’s office which would readily lead the voter to assume that his vote is being properly cast.

Schmidt v. City of W. Bend Bd. of Canvassers, 18 Wis. 2d 316, 324, 118 N.W.2d 154 (1962).

If the record ... indicated the slightest evidence of any fraud, connivance or attempted undue influence, we would ... [declare] the absentee voters’ ballots invalid. However, we are not inclined to disenfranchise these voters who [satisfied] the statutory requirements.

Lanser v. Koconis, 62 Wis. 2d 86, 93, 214 N.W.2d 425 (1974).

[A]ll voters ... are prejudiced if the ballots ... are invalidated. Voters were encouraged to utilize the events, and 17,000 voters did so in reliance on representations that the process ... complied with the law. Striking these ballots would disenfranchise voters who did nothing wrong when they dropped off their ballot where their local election officials told them they could.

Trump v. Biden, 2020 WI 91, ¶27, 394 Wis. 2d 629, 951 N.W.2d 568.

² Docket entry 47 is an amicus brief WEC filed in *Ayodabo v. City of Madison*, No. 25CV3082 (Dane Cnty. Cir. Ct.). Plaintiffs referenced this brief during the May 14, 2026 hearing in this matter (Dkt. 37 at 27:20–29:1) and subsequently filed it on the record (Dkt. 47).

As the Honigs’ circumstances reveal, WEC’s newfound misapplication of law carries profound consequences for voters. Any Wisconsinite who chooses to vote by absentee ballot is now at risk. Given the stakes, this Court should act promptly. As the Honigs, and all Wisconsin voters, prepare to vote in the November 3 general election, they deserve the protection of a declaration from this Court confirming that Wisconsin’s election statutes cannot disenfranchise innocent voters for election officials’ errors.

ARGUMENT

I. This Court may uphold the right to vote; WEC’s and Proposed Intervenor’s technical objections are too little or too late.

a. Plaintiffs are not required to pursue relief through WEC when relief is sought against WEC. Plaintiffs served the Legislature months ago.

WEC begins its response on the wrong foot. It claims that Plaintiffs are forbidden from declaratory relief because Wis. Stat. § 5.06(8) provides the exclusive remedy and because the summons and complaint were not served in accordance with Wis. Stat. § 806.04(11). Wrong and wrong. Section “5.06 does not require voters to complain to [WEC] when they believe WEC has violated the law.” *Teigen v. WEC*, 2022 WI 64, ¶¶47–49, 403 Wis. 2d 607, 976 N.W.2d 519 (lead op.), *overruled on other grounds by Priorities USA v. WEC*, 2024 WI 32, 412 Wis. 2d 594, 8 N.W.3d 429; *accord Teigen*, 2022 WI 64, ¶¶168–69 (Hagedorn, J., concurring). Between the above-cited paragraphs from the lead opinion and the concurring paragraphs from Justice Hagedorn, *Teigen* obviated Wis. Stat. § 5.06 review for claims against WEC.

WEC’s reliance on *Kuechmann v. School District of La Crosse*, 170 Wis. 2d 218, 224, 487 N.W.2d 639 (Ct. App. 1992), further illustrates its error. As WEC admitted

earlier this year, “*Kuechmann* simply held that the plaintiffs needed to wait until [WEC] completed the administrative process before they filed suit.” (Dkt. 47 at 7) Here, WEC both initiated and completed the § 5.06 process on April 30, 2026, and Plaintiffs filed suit the following week. (Dkt. 9 at 18, 22) As a result, “Plaintiffs were not required to file an administrative complaint under Wis. Stat. § 5.06(1) because the Commission commenced an investigation on its own motion under Wis. Stat. § 5.06(4), and its final decision concluded that investigation.” (Dkt. 47 at 8) Moreover, after WEC completed the § 5.06 process, Plaintiffs had no way of appealing WEC’s underlying order. Only an “election official or complainant who is aggrieved by an order” may appeal to the circuit court. Wis. Stat. § 5.06(8). Plaintiffs are neither.

Finally, in accord with Wis. Stat. § 806.04(11), Plaintiffs served both the Attorney General and statutorily required legislative leaders months ago. (*See* Dkt. 16) So, WEC’s procedural arguments here lack merit and cannot foreclose this Court from issuing a declaratory judgment in Plaintiffs’ favor.

b. Plaintiffs’ categorical challenge may be resolved by this Court; Proposed Intervenor forfeited any objection.

Proposed Intervenor’s response focuses on the misguided notion that Plaintiffs’ constitutional challenge is unrecognized under Wisconsin law. (Dkt. 61 at 11–14) This is untrue. Plaintiffs allege a “categorical” or “hybrid” challenge. (Dkt. 9 at 16–18) Within the relevant ‘category,’ Plaintiffs must demonstrate “the statute could not be constitutionally enforced under any circumstances.” *Kaul v. Wis. State Leg.*, 2025 WI 23, ¶15, 416 Wis. 2d 322, 21 N.W.3d 513. Here, the issue is whether Wis. Stat. § 6.84(2) or § 6.87(6) can be applied to disenfranchise voters who, like the Honigs,

have done everything right but find themselves out of statutory compliance due solely to errors by election officials. Notably, neither WEC nor Proposed Intervenor have identified any situation where such a disenfranchisement is valid under the Wisconsin Constitution.

Proposed Intervenor also insist the dispute ended when the Court ordered temporary relief on May 14, 2026, such that “there is no continuing wrong.” (Dkt. 61 at 15, 17) But this is incorrect. Seven weeks before a major election, WEC insists it has authority, and maybe even an obligation, to disenfranchise innocent voters solely due to the errors of election officials. (See Dkt. 62) Certainly, prospective relief is appropriate—indeed, necessary. It is similarly untrue, as Proposed Intervenor assert, that the facts do not suffice for this Court to adjudicate the merits of the dispute. (Dkt. 61 at 16) The parties all stipulate that the opposite is true. “There are no disputed issues of fact, and the parties agree that the legal issues can be determined.” (Dkt. 44 at 1)

II. WEC is bound by Supreme Court of Wisconsin precedents.

WEC’s framing of this dispute (whether the “Commission has the power to unilaterally declare a law unconstitutional” (Dkt. 62 at 19)) is disingenuous. WEC was never obligated to **declare** anything; all it had to do was follow the Wisconsin Constitution and respect Plaintiffs’ right to vote. Instead, WEC, on its own motion, wrongfully disenfranchised the Honigs based solely on the errors of election officials. As this Court recognized, doing so violated the law. (Dkt. 35; Dkt. 37 at 36:20–40:21)

WEC admits it does not have “discretion to ignore court precedent.” (Dkt. 62 at 6) Indeed, it must follow the Wisconsin Constitution as construed by binding

precedent. But it clearly contravened Supreme Court of Wisconsin precedents in *Wood, Dells, Dithmar, Phelps, Symmonds, Graves, Burke, Ollman, Schmidt, Lanser, Roth*, and *Trump*. WEC attempts to resolve this contradiction by claiming it never considered the constitutional implications of disenfranchising the Honigs in the first place: “The Commission did not analyze the constitutional question in its order because that was beyond the scope of its power.” (Dkt. 62 at 19) But that is not true; the constitutional question was central to WEC’s analysis of whether it should order disenfranchisement. Commissioner Mark Thomsen—the lone WEC commissioner to vote against disenfranchising the Honigs—was unequivocal that he voted ‘no’ ***because of*** the order’s constitutional infirmity:

[W]e took an oath to the Constitution ... And so my starting point is, as a commissioner, what are my obligations in terms of evaluating the law in light of the Constitution and doing what I think is right? ... I grabbed the [Wisconsin] Supreme Court decision in the *Milwaukee Branch of NAACP vs. Walker*, 2014 WI 98 at ¶23, it talks about foundational principles ... “Without question the right to vote is a fundamental right, and in many respects, it is protective of other rights. As Justice Brennan explained so long ago, ‘the right to vote is a fundamental political right because it is preservative of all other rights.’” We have the ability to count these 23 votes. There is no question that the electors did everything right and the clerk screwed up. ... I don’t think we should send it back and change the canvass. I think that decision is consistent with a read of the statute to give it a constitutional gloss, because I do not believe the intent of the legislature was to disenfranchise voters that follow the law. ... I’m going to vote against this motion, as [written], for those reasons among others ...

WEC Meeting, Apr. 30, 2026, at 20:16–24:34, video available at <https://vimeo.com/showcase/11083613?video=1188256499>. Had WEC followed Commissioner Thomsen’s lead, there would be no need for this action.

WEC's argument here is not only false, but also ludicrous. WEC cannot choose to "not analyze the [Constitution]." (Dkt. 62 at 19) The Wisconsin "Constitution is the supreme law of the state." *Gibson Auto Co. v. Finnegan*, 217 Wis. 401, 406, 259 N.W. 420 (1935). It cannot be ignored. This is especially true of WEC Commissioners and the WEC Administrator, all of whom are required to swear an oath to "support the constitution of the United States and the constitution of the state of Wisconsin." Wis. Stat. § 15.06(8); *id.* § 19.01(1), (1m). Perhaps WEC's abdication of constitutional issues is appropriate when there is no binding authority on point. But the Supreme Court of Wisconsin **has** considered whether mandatory election statutes (like Wis. Stat. §§ 6.87(6) and 6.84(2)) may constitutionally disenfranchise innocent voters, like the Honigs, for the errors of election officials. (Dkt. 49 at 13–19; *see also* note 1, *supra*) Those precedents are straightforward and easy to apply: "[a]s 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." *Symmonds*, 182 Wis. at 127. At bottom, mandatory election statutes may not disenfranchise innocent voters due solely to the errors of election officials, and WEC may not disregard those precedents.

III. The automatic disenfranchisement language in Wis. Stat. §§ 6.84(2) and 6.87(6) severely burdens—indeed, extinguishes altogether—the right to vote, contrary to the Wisconsin Constitution.

WEC's *Anderson/Burdick* argument is hard to parse. It erroneously presupposes that Plaintiffs allege that Wis. Stat. §§ 6.84(2) and 6.87(6) impose unconstitutional burdens on voters merely because they are "ballot deadline statutes" (Dkt. 62 at 21) and wrongly assumes that the right to vote is equally protected by the

state and federal constitutions (*id.* at 21, 25–26). WEC is wrong on both accounts. No matter the analytical framework, the result is the same: the Wisconsin Constitution forbids the disenfranchisement of innocent voters for the errors of election officials.

a. Plaintiffs do not dispute whether the Legislature can require voters to return absentee ballots by 8:00 PM on Election Day. The unconstitutional burden arises elsewhere, from the deprivation of Plaintiffs’ right to vote due solely to errors by election officials.

The gravamen of this dispute is Plaintiffs’ wrongful disenfranchisement for errors attributable solely to election officials. WEC’s contrary contention—that the dispute here involves the deadline by which a voter must return their absentee ballot—is a distraction. Plaintiffs’ obligations to timely return their absentee ballots are not before this Court at all. WEC’s underlying order confirmed that “the ballots appear to have been timely returned by the voters.” (Dkt. 9 at 26) Both the current and former WEC Chairs recognized the same during the relevant hearing:

This is not a situation where the ballots arrived at 7:45 on Election Day. Here, there was an epic failure to transport ballots, **ballots that were received the day before the election** to the polling places by 8:00 PM on Election Day. **To be clear, the fault does not lie with the voters.**

WEC Meeting, Apr. 30, 2026, *supra*, at 18:37–57 (Don Millis) (emphases added).

[S]o what we have is a statute that says that... “[t]he ballot shall be returned so it is delivered to the polling place no later than 8:00 PM on election day.” So far, so good. **The voter definitely did that.**

Id. at 26:58–27:57 (Ann Jacobs) (emphasis added). (*See also* Dkt. 46, ¶1) This dispute has **nothing** to do with a voter’s burden to timely return absentee ballots; here, the voters’ ballots **were** timely returned.

Under an *Anderson/Burdick* analysis, a reviewing court must first consider “the character and magnitude of the asserted injury to the rights protected.”

Milwaukee Branch of NAACP v. Walker, 2014 WI 98, ¶39, 357 Wis. 2d 469, 851 N.W.2d 262. Here, the asserted injury is disenfranchisement, the complete deprivation of Plaintiffs’ fundamental right to vote. Under the text of Wis. Stat. §§ 6.84(2) and 6.87(6), when a municipal clerk fails to deliver an absentee ballot that the voter timely returned, the voter is disenfranchised through no fault of their own. This is far more than a “burden” upon Plaintiffs’ right to vote—it is the plenary denial of it. Unsurprisingly, WEC identifies no case suggesting that disenfranchisement is minimally burdensome.

The only Wisconsin case WEC relies upon is *Milwaukee Branch of NAACP*.³ (Dkt. 62 at 23–24) There, the Court addressed whether two burdens resulting from a “voter ID” provision—“the time and inconvenience of ... secur[ing] ... identification cards” and “payments for transportation ... and documents [necessary to secure] ... photo identification cards,” 2014 WI 98, ¶40—violated the right to vote. But the voter ID statute did not impose a disenfranchisement provision on innocent voters. So, the burdens in *Milwaukee Branch of NAACP* pale in comparison to the unblinking disenfranchisement WEC foisted upon the Honigs here.

WEC’s federal cases are irrelevant for the same reason. In both *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802, 804–05 (1969), and *Tully v. Okeson*, 977 F.3d 608, 616 (7th Cir. 2020), the plaintiffs brought a constitutional

³ This is the same case that Commissioner Thomsen quoted at the relevant WEC hearing. WEC also cites two cases for the uncontroversial proposition that the Legislature has the capacity to pass voting statutes, *State ex rel. Runge v. Anderson*, 100 Wis. 523, 76 N.W. 482 (1898) and *State ex rel. Frederick v. Zimmerman*, 254 Wis. 600, 613–14, 37 N.W. 2d 473 (1949). Neither is cited to analyze if Wis. Stat. §§ 6.84(2) and 6.87(6) may disenfranchise innocent voters for the errors of election officials.

challenge against a state's failure to provide absentee voting to all qualified voters. But neither addressed automatic disenfranchisement. WEC's reliance upon *Luft v. Evers*, 963 F.3d 665, 671–72 (7th Cir. 2020), and *Common Cause v. Thomsen*, 574 F. Supp. 3d 634, 636 (W.D. Wis. 2021), is flawed for the same reason. These cases are all about the deadlines for **voters** to return their ballots. But again, Plaintiffs here satisfied all such obligations. None of these cases address whether a statute could, consistent with the Wisconsin Constitution, reflexively disenfranchise a voter who did everything right, based solely on the error of an election official.

The cases WEC relies upon from other states are similarly irrelevant. In *Alliance for Retired Americans v. Secretary of State*, the Supreme Court of Maine considered a statute that reads: "... to be valid, an absentee ballot must be delivered to the municipal clerk at any time before the polls closed." 240 A.3d 45, 51 (Me. 2020). Nothing in that case considered whether a statute may, in compliance with the fundamental right to vote, disenfranchise innocent voters. Unlike here, the Maine voters' failure to comply with the statute was presumed. The *Alliance* plaintiffs argued that voters who did not timely return their absentee ballots should nevertheless have their votes counted. But that is not at issue here; the Honigs, indisputably, timely returned their absentee ballots.

The same logical defect disrupts WEC's reliance upon *League of Women Voters of Michigan v. Secretary of State*, 959 N.W.2d 1 (Mich. 2020). Like in Maine, Michigan state law requires that an absentee "ballot must reach the clerk ... before the close of the polls on election day" and provides that "ballot[s] received ... after the close of the

polls on election day will not be counted.” Mich. Comp. Laws § 168.764a. Unlike Wis. Stat. §§ 6.84(2) and 6.87(6), this Michigan provision does not disenfranchise innocent voters for errors by election officials. So, nowhere in *League of Women Voters of Michigan* did the Supreme Court of Michigan consider if doing so violates the right to vote. Like *Alliance*, this case has no relevance here.

b. Innocent absentee voters may not be disenfranchised for the errors of election officials merely because they could instead vote on Election Day. Any federal authority suggesting otherwise fails to address Wisconsin’s broader protection of the right to vote.

WEC advances the false presumption that the Wisconsin Constitution affords no greater protections to absentee voters than its federal counterpart. (Dkt. 62 at 23, 25–26) Once again, WEC is misapplying fundamental voting rights law.

First, *Anderson/Burdick* is not the only way a Wisconsin court may measure whether an election statute complies with our state constitution. On the same day the Supreme Court of Wisconsin decided *Milwaukee Branch*, it also issued *League of Women Voters of Wisconsin Education Network, Inc. v. Walker*, 2014 WI 97, 357 Wis. 2d 360, 851 N.W.2d 302. The latter case acknowledged that Wisconsin has historically applied a much simpler “reasonableness” test to determine the constitutionality of election statutes. *Id.*, ¶47. “The power of the Legislature to adopt reasonable regulation of the exercise of the right of suffrage is not questioned, but all regulations of the elective franchise ... must be reasonable.” *Phelps*, 144 Wis. at 35. To be reasonable, “election laws must not destroy or impair the right to vote.” *League of Women Voters*, 2014 WI 97, ¶50; accord, e.g., *State ex rel. Frederick v. Zimmerman*, 254 Wis. 600, 613, 37 N.W.2d 473 (1949); *State ex rel. Ekern v. Dammann*, 215 Wis.

394, 400, 254 N.W. 759, 761 (1934). So, statutorily destroying the right to vote in Wisconsin is *per se* unreasonable, and therefore unconstitutional.

Yet, WEC understands Wis. Stat. §§ 6.84(2) and 6.87(6) to destroy the Honigs' right to vote. The Honigs did everything right and validly cast their absentee ballots. WEC has conclusively admitted so. (Dkt. 46, ¶1) Yet, WEC used these statutes to disenfranchise innocent voters—to deprive them of the right to vote—based solely on errors by election officials. This is unreasonable, and therefore unconstitutional under Wisconsin law.

Second, WEC is wrong to imply that the right to vote is not unconstitutionally infringed upon so long as absentee voters may vote on election day. Federal courts evince some skepticism that absentee ballot regulations can violate the federal right to vote while voters maintain the ability to cast a ballot on election day. *McDonald*, 394 U.S. at 804–05; *Tully*, 977 F.3d at 611. But the right to vote under the Wisconsin Constitution functions differently. Here, it is much stronger, rooted in broad protections throughout the Wisconsin Constitution:

[T]he right to vote is ... guaranteed by the declaration of rights and by section 1, art. 3, of the Constitution... It is guaranteed both by the Bill of Rights, and ... 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, ... and the equality clauses,—constitute inhibitions of legislative interference by implication, and with quite as much efficiency as would express limitations... .

Phelps, 144 Wis. at 14–15. Wisconsin voters enjoy these protections whether they vote absentee or in person. WEC itself recently rejected the notion that absentee voters are somehow second class, merely because they return their ballots before election

day. “[A]n elector [has the] right to have her cast ballot counted once she has cast it. Once an elector has complied with the statutory process, whether absentee or in-person, she has a constitutional right to have her vote counted.” (Dkt. 47 at 4)

In harmony with WEC’s prior positions (as documented in Dkt. 47), Wisconsin courts have repeatedly held that the right to vote protects absentee voters, even if they could have voted on election day. *Symmonds* is perhaps the first example. *Symmonds* considered whether to count the votes of a group of innocent absentee voters whose election officials failed to satisfy the language of two mandatory election statutes. The Supreme Court of Wisconsin refused to effectuate the mandatory statutes, and gave no weight to the fact that absentee voters are still able to get to the polls on election day:

[A] voter is not to be [disenfranchised] through the failure of election officers to perform their duty, where the elector himself is not delinquent... To so apply the statute would be to disfranchise a qualified voter through the negligence of the election officers... ‘Their constitutional right cannot be baffled by latent official failure or defect.’

Id. *Symmonds* is not alone. The ability to vote on election day played no part in subsequent decisions to count absentee votes notwithstanding election officials’ disregard for mandatory statutes. *In re Burke*, 229 Wis. 545, 555, 282 N.W. 598 (1938) (applying *Symmonds*); *Pet. of Anderson*, 12 Wis. 2d 530, 535–36, 107 N.W. 496 (1961).⁴

⁴ WEC’s argument presumes absentee voters knowingly assume the risk of disenfranchisement and can avoid this risk by voting on election day. Yet not every absentee voter may vote in person, whether due to disability or service outside of the state or country, etc. And once the Legislature has chosen to authorize absentee voting for all, it cannot treat that option as a second-class right. Neither Article III nor Wisconsin’s guarantees of equal protection and due process will tolerate such discrimination.

c. WEC's effort to distinguish controlling precedent is wholly unpersuasive.

WEC bizarrely argues that the controlling precedents of *Wood*, *Symmonds*, *Dithmar*, and *Ollman* are distinguishable because in those cases “voters had no knowledge of, and thus no opportunity to avoid, election officials’ malfeasance or failures to act.” (Dkt. 62 at 30) Of course, the Honigs never—at least not until well after the election (Dkt. 9, ¶35; Dkt. 46, ¶15)—had notice that their municipal clerk failed to deliver their ballots for counting by 8:00 PM on Election Day. As a purely theoretical matter, it is difficult to see how anyone could **ever** be on notice of such an error with enough time to correct it. The error itself cannot occur until **after** the 8:00 PM deadline has elapsed. So, even if the Honigs had been given actual notice at the precise moment the clerk’s error materialized, there would be no opportunity to take corrective action. If anything, this portion of WEC’s brief merely confirms that Plaintiffs are correct about the law. These cases establish that innocent voters like the Honigs cannot be disenfranchised solely on the basis of errors by election officials.

Likewise, WEC's other "distinctions" border on the absurd. The plain language of *Roth*,⁵ *Trump*,⁶ *Dells*,⁷ *Phelps*,⁸ and *Graves*⁹ resolves that Plaintiffs cannot be disenfranchised solely on the basis of errors by election officials. Ignoring this consistent body of precedent, WEC baselessly insists that each of these cases must be confined to its specific facts. (Dkt. 62 at 34–36) WEC's refusal to engage with precedent resolves against its interest; famously, lower courts may not ignore any language from the Supreme Court of Wisconsin. *Zarder v. Humana Ins. Co.*, 2010 WI 35, ¶58, 324 Wis. 2d 325, 782 N.W.2d 682. And the overwhelming weight of Wisconsin precedent speaks clearly: in Wisconsin, the right to vote is unconstitutionally infringed upon any time voters are disenfranchised solely on the basis of errors by election officials.

Finally, WEC simply misreads *Petition of Anderson*. At issue there, a facially mandatory statute authorized a municipal clerk to endorse and distribute absentee ballots to voters only in response to requests "not less than 3 days prior to an election." 12 Wis. 2d at 532. But (among other things) the clerk wrongly provided ballots to

⁵ "[V]oters should not be deprived of their constitutional right to vote simply because election officials have failed to perform their duties." *Roth*, 2004 WI 6, ¶21.

⁶ Striking these ballots would disenfranchise voters who did nothing wrong when they dropped off their ballot where their local election officials told them they could." *Trump*, 2020 WI 91, ¶27.

⁷ "If the ... regulations ... prescribed by law ... deprive a fully qualified elector his right to vote at an election, without his fault and against his will ... they are destructive of his constitutional right, and make the law itself as void." *Dells*, 49 Wis. at 558.

⁸ "Those who go to ... vote ... have been guilty of no negligence or breach of duty, and their right thereafter to vote ... cannot be limited on account of the negligence or default of others." *Phelps*, 144 Wis. at 43–44.

⁹ "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." *Graves*, 212 Wis. at 294 (quoting *Symmonds*, 182 Wis. at 127).

voters who placed requests for absentee ballots just 2 days and 1 day before the election. *See id.* Although fault lay **both** with the clerk and the voters, the Supreme Court of Wisconsin nevertheless counted the ballots. *Id.* at 536. So, *Petition of Anderson* stands for a proposition slightly beyond that which Plaintiffs (who are indisputably faultless here) rely upon in this lawsuit. It thus goes further than Plaintiffs need, and it does not provide any support for WEC.

IV. The Legislature cannot usurp disenfranchisement power simply by disclaiming Wis. Stat. § 5.01’s application to absentee voters.

Both WEC and Proposed Intervenor overstate the relevance of Wis. Stat. § 6.84(2)’s marginalization of Wis. Stat. § 5.01(1). Under the latter provision, Wisconsin’s elections statutes are generally “construed to give effect to the will of the electors ... notwithstanding informality or failure to fully comply with some of their provisions.” Wis. Stat. § 5.01(1). The Legislature disclaimed this provision for certain absentee voting statutes: “Notwithstanding s. 5.01(1) ... [b]allots cast in contravention of [certain absentee voting] provisions may not be counted. Ballots counted in contravention [of those provisions] ... may not be included in the certified results of any election.” Wis. Stat. § 6.84(2). Through subsection 6.84(2), the Legislature claims authority to disenfranchise absentee voters. Both WEC and Proposed Intervenor believe the Legislature may do so because it has disclaimed the “will of the electors” language found in Wis. Stat. § 5.01. (Dkt. 61 at 22–23; Dkt. 62 at 11–13) They are mistaken.

The limitation on the Legislature’s ability to disenfranchise voters is a function of the right to vote under the Wisconsin Constitution, **not** the statutory language in

Wis. Stat. § 5.01(1). *Phelps* rejected the notion that the right to vote was a “mere privilege.” *Phelps*, 144 Wis. at 14–16. In so doing, it determined that the elective franchise cannot be easily extinguished by the Legislature. *Phelps* was clear about this: “we ... [place] the right of suffrage upon the high plane of removal from the field of mere legislative impairment.” *Id.* It then categorically forbade statutory language that would foreclose qualified voters from exercising their right to vote. “[Statutes] must not have for their purpose **directly or indirectly** to deny or abridge the constitutional right of citizens to vote ... if they do they must be declared void.” *Id.* at 35–36 (quotation marks and citation omitted) (emphasis added). As the law stands, the right to vote “may not **under our Constitution** and laws be destroyed or even unreasonably restricted.” *State ex rel. Barber v. Cir. Ct. for Marathon Cnty.*, 178 Wis. 468, 473, 190 N.W. 563, 565 (1922) (emphasis added).

“Directly or indirectly,” WEC weaponized the language in Wis. Stat. §§ 6.84(2) and 6.87(6) to wrongly disenfranchise the Honigs. *Phelps* confirms that, under the Wisconsin Constitution, the Legislature never had the authority to pass a statute that would disenfranchise the Honigs, or any other voters, in the circumstances here. Under *Phelps* and its progeny, neither Wis. Stat. § 5.01(1)’s “will of the electors” language nor Wis. Stat. § 6.84(2)’s “notwithstanding s. 5.01(1)” proviso is relevant to whether the deprivation at hand was legal. This matter begins and ends with the Wisconsin Constitution, which clearly protects the Honigs and forecloses the Legislature’s effort to negate their right to vote on the basis advanced here. Such is the fundamental nature of the franchise in Wisconsin.

This is not to say that the Legislature has no authority to regulate elections. As *Phelps* also instructs, the Legislature does have such power—within limits. The power to disenfranchise voters is not one the Legislature has ever enjoyed. Lest the *right* to vote be relegated into a mere *privilege*, this Court should recognize that, under our state constitution and a long tapestry of precedent, Wis. Stat. §§ 6.84(2) and 6.87(6) cannot disenfranchise the Honigs solely for errors by election officials.

V. *Boehm* is irrelevant, and the pending petition for review portends no additional relevance to this dispute.

Finally, there is no reason to stay this matter pending final resolution in *Democratic National Committee v. Boehm*, 2026 WI App 44, --- Wis. 2d ---, --- N.W.3d ---. The pending petition for review in *Boehm* identifies two potential issues for further consideration by the Supreme Court of Wisconsin:

Do state courts have the authority to grant election participants' requests to extend polling hours to avoid infringing on Wisconsin's right to vote?

Did the [RNC] timely challenge the Circuit Court's order extending polling hours?

Pet. Expedited Rev., *Democratic Nat'l Comm. v. Boehm*, No. 24AP2484 (Wis., filed Aug. 10, 2026). Neither the extension of polling hours nor the timeliness of a challenge to a circuit court order is at issue here. So, regardless of whether the petition for review is granted or denied, *Boehm* will not aid adjudication here.

More to the point, nothing in the Court of Appeals' decision in *Boehm* nor the pending petition for review illuminates whether the Wisconsin Constitution would ever authorize a Wisconsin voter's disenfranchisement based solely on the errors of an election official. WEC's and Proposed Intervenor's selective quoting from *Boehm*

(Dkt. 61 at 12, 15, 16; Dkt. 62 at 10, 13) does not strengthen their arguments here, either. They imply that *Boehm* has resolved that Wis. Stat. § 6.87(6)’s mandatory disenfranchisement language is constitutional. Wrong. *Boehm* merely confirms that which Plaintiffs freely admit: “the legislature wrote that even if the clerk, through no fault of the elector, fails to deliver the electors vote to the elector’s polling place before 8:00 p.m. on election day, the ‘ballot may not be counted.’” *Boehm*, 2026 WI App 44, ¶48. Indeed, this *is* what the Legislature wrote. But whether it infringes upon the right to vote under the Wisconsin Constitution is a separate question—one not addressed in *Boehm* or the pending petition for review. Delay here will only further jeopardize Wisconsin voters. This Court should rule at the upcoming hearing.

CONCLUSION

The Wisconsin Constitution guards the fundamental right to vote. For this reason, and for those stated above, Plaintiffs respectfully request that this Court:

1. Declare that Wisconsin election statutes, Wis. Stat. §§ 6.84(2) and 6.87(6) included, cannot be interpreted or applied to disenfranchise voters solely due to errors by election officials;
2. Declare that WEC’s Decision and Order is an unconstitutional invasion of Plaintiffs’ right to vote;
3. Enjoin WEC from further disseminating its Decision and Order, from taking any further action in accordance with its unlawful statutory interpretation, and to distribute to all municipal and county clerks a notice of this Court’s declaration and its reasoning; and
4. Enter final judgment in Plaintiffs’ favor.

Dated: September 14, 2026

Respectfully submitted,

Electronically signed by Scott B. Thompson

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