Supreme Court of Wisconsin

No. 2024AP164

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

v.

THE WISCONSIN ELECTIONS COMMISSION,
DEFENDANT-APPELLEE-RESPONDENT,

THE WISCONSIN STATE LEGISLATURE,
INTERVENOR-DEFENDANT-APPELLEE-RESPONDENT.

PETITION TO BYPASS

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INTRODUCTION

This appeal presents critical questions about the constitutional and statutory frameworks governing absentee voting that only this Court can resolve. Petitioners challenge three arbitrary and unnecessary procedural requirements—and a corresponding statutory mandate—that make it unreasonably difficult for absentee voters to cast ballots that will be counted: the requirement that the ballot be marked in the presence of a witness, who must sign and write their address on the ballot certificate (the "Witness Requirement"); the requirement that ballots be returned only by mail or directly in-person to a clerk, and not to a secure drop box (the "Drop Box Prohibition"); the requirement that any defect with the ballot certificate be cured by 8:00 p.m. on election day, even though in-person provisional ballots may be cured days later (the "Election-Day Cure Deadline"); and the provision in Section 6.84 of the Wisconsin Statutes that even harmless failures to comply with the aforementioned requirements results in disenfranchisement (together, the "Challenged Restrictions").

The Court should grant this Petition now, well in advance of the 2024 general election and before briefs are filed in the Court of Appeals. The nature of the issues presented means that the arguments appropriate in the Court of Appeals would be profoundly different from the arguments that will appropriately be made here. And the fast-approaching November general election requires a definitive resolution of the issues this case presents as soon as possible.

This should have been an easy case. This Court held more than a century ago that the Wisconsin Constitution imbues the right to vote with a "dignity not less than any other of many fundamental rights," and "'vindicates' it 'as vigorously as it does

any right of any kind which men may have or enjoy.'" *State v. Phelps*, 144 Wis. 1, 128 N.W. 1041, 1046 (1910). In doing so, the Court expressly rejected the view that voting is "a mere privilege, a something of such inferior nature that it may be made 'the football of party politics.'" *Id.* It instead "plac[ed] the right of suffrage upon the high plane of removal from the field of mere legislative material impairment." *Id.*

Under this fundamental-rights approach, the Challenged Restrictions are obviously invalid. State actions that burden fundamental rights are subject to strict scrutiny under the Wisconsin Constitution. *Mayo v. Wis. Injured Patients & Fams. Comp. Fund*, 2018 WI 78, ¶ 28, 383 Wis. 2d 1, 914 N.W.2d 678. For good reason, neither the Wisconsin Elections Commission nor the Legislative Intervenors argued below that the Challenged Restrictions could survive such scrutiny. Petitioners allege—and will prove if the case proceeds—that the Challenged Restrictions accomplish nothing and therefore are not necessary to serve any compelling government interest. App. 35–43, ¶¶ 70–112.

Unfortunately, several of the Court's more recent decisions have strayed from the Court's early clarity on the constitutional significance of voting. In *Milwaukee Branch of NAACP v. Walker*, 2014 WI 98, 357 Wis. 2d 469, 851 N.W.2d 262, the Court applied rational basis review to a voter identification law despite clear evidence that it imposed serious burdens on many would-be voters. In *League of Women Voters of Wis. v. Walker*, 2014 WI 97, 357 Wis. 2d 360, 851 N.W.2d 302, the Court refused to even consider whether the asserted benefits of that same voter identification law could possibly justify its burdens, and instead upheld the law based essentially on the Legislature's say so. And in *Teigen v. Wisconsin Elections Commission*, 2022 WI 64, ¶ 52 n.25, 403 Wis.

2d 607, 976 N.W.2d 519, the Court suggested that absentee voting is entirely unprotected by the Wisconsin Constitution because it is only a "privilege" that somehow may be regulated without affecting "the right to vote itself." *Teigen* then strained to hold that Wisconsin statutes preclude the use of drop boxes to return ballots, when in fact they say nothing of the sort. Wis. Stat. § 6.87(4)(b)1.

Although none of these decisions purported to overrule *Phelps* or its progeny, each is entirely incompatible with the Court's longstanding treatment of voting as a fundamental right with a "dignity not less than any other of many fundamental rights." *Phelps*, 128 N.W. at 1046. The Court would not treat any other fundamental right with such disdain. The result is an unjustified inconsistency in the Court's precedent that only this Court can resolve.

The Court should therefore grant the Petition and set an expedited briefing and argument schedule.

STATEMENT OF ISSUES PRESENTED

The issues presented for review are:

(1) Whether laws that burden the right to vote, including by burdening absentee voting, are subject to strict scrutiny just like laws burdening other fundamental rights, such that the State must prove that the burden they impose is narrowly tailored to serve a compelling state interest.

Petitioners preserved this argument below, App. 64–75, but the circuit court did not expressly reach it. It is directly intertwined with the second issue presented, because it affects the extent of the burden that must be alleged to support a facial challenge to a voting law.

(2) Whether a voting law is immune from facial challenge where it imposes some unjustifiable burden on all voters it regulates, but some voters are more burdened than others.

The circuit court held that Petitioners could not bring a facial challenge to the Challenged Restrictions, reasoning that some voters could minimize the burden imposed by each of the Challenged Restrictions by either complying with it or voting in some other way. App. 6–10.

(3) Whether to overrule the Court's holding in *Teigen v. Wisconsin Elections Commission*, 2022 WI 64, 403 Wis. 2d 607, 976 N.W.2d 519, that Wis. Stat. § 6.87 precludes the use of secure drop boxes for the return of absentee ballots to municipal clerks.

The circuit court held that "[e]ven if [it] agree[d] that *Teigen* was incorrectly decided, [it] must follow the *Teigen* precedent and [] leave any revisiting of that decision to the Wisconsin Supreme Court." App. 11.

STATEMENT OF THE CASE

Petitioners Priorities USA, the Wisconsin Alliance for Retired Americans, and William Franks, Jr. filed this lawsuit on July 20, 2023, to challenge four unnecessary and burdensome requirements that Wisconsin absentee voters face: (1) the requirement that an absentee ballot be marked in the presence of a witness, who must sign and write their address on the ballot certificate; (2) the requirement imposed by this Court in *Teigen* that absentee ballots be returned only by mail or directly in-person to a clerk, and not to a secure drop box; (3) the requirement that any defect with the ballot certificate be cured by 8:00 p.m. on election day, even though in-person provisional ballots may be cured days later; and (4) Wisconsin Statutes § 6.84, which requires that even harmless failures to comply with the these requirements result in disenfranchisement. Petitioners assert that these Challenged Restrictions infringe upon the fundamental right to vote in violation of the Wisconsin Constitution. *See generally* Dkt. 2, App. 16–44.

Petitioners brought suit in the Dane County Circuit Court against the Wisconsin Elections Commission, the agency responsible for promulgating guidance implementing the Challenged Restrictions. The Legislature subsequently intervened as a defendant under Section 803.09(2m). Both defendants filed separate motions to dismiss Petitioners' claims.

On January 24, 2024, the circuit court issued its Decision and Order on Motions to Dismiss. The court held that Petitioners' claims were justiciable, and it rejected the Legislature's argument that the constitutional right to vote is not implicated by the Challenged Restrictions because they regulate only absentee voting. App. 5–6. But it granted the motions to dismiss as to

Petitioners' "facial constitutional challenges." App. 6–10. The circuit court held that "facial challenge[s] require[] the Plaintiffs to show that the challenged provisions impose a burden on *all voters*, not just absentee voters." App. 7 (emphasis added). And it concluded for that reason that Petitioners had not adequately alleged that the Challenged Restrictions are "unconstitutional in every single application." App. 10. The court further noted that "[e]ven if [it] agree[d]" with Petitioners "that *Teigen* was incorrectly decided, [it] must follow the *Teigen* precedent and . . . leave any revisiting of that decision to the Wisconsin Supreme Court." App. 11.[1]

Upon the entry of final judgment, Dkt. 103, App. 13, Petitioners timely appealed, Dkt. 104, App. 139–40. This petition for bypass follows.

STATEMENT OF REASONS TO GRANT THE PETITION

Bypass is appropriate because this case presents "real and significant question[s] of . . . state constitutional law," Wis. Stat. § 809.62(1r)(a), regarding the level of scrutiny applicable to constitutional challenges to laws that burden the right to vote. These questions are "likely to recur unless resolved," *id.* § 809.62(1r)(c), because the Court's precedent addressing them is fundamentally inconsistent. And the issues' importance means that the Court will likely "choose to consider [them] regardless of

[1] The circuit court denied the motions to dismiss as to Petitioners' "hybrid constitutional challenge" to the witness requirement as applied to "absentee voters who do not live with another person who could serve as their witness," as well as the corresponding "hybrid challenge" to Section 6.84, whose "direction to not count ballots would conflict with a finding that the witness provision . . . is unconstitutional. . . ." App. 10–11. Petitioners subsequently voluntarily dismissed that claim, Dkt. 102, App. 138, and the court entered final judgment, Dkt. 103, App. 13.

how the Court of Appeals might decide," and that "there is a clear need to hasten the ultimate appellate decision" to resolve the applicable standards sufficiently in advance of the 2024 general election. Wisconsin Supreme Court Internal Operating Procedures ("Internal Operating Procedures") at 8.

The Court should therefore grant bypass. And it should do so now, before briefs are filed in the Court of Appeals, because the fast-approaching November election requires expedited review, and the arguments appropriate in the Court of Appeals would be profoundly different from the arguments that will appropriately be made here.

I. This case presents the significant question of whether voting rights are constitutionally protected in the same manner as other fundamental rights.

This case requires the determination of a significant question of state constitutional law: Whether voting rights are equal to other fundamental rights under the Wisconsin Constitution, as the Court has long held, or whether they are subject to lesser constitutional protections, as some of the Court's more recent decisions suggest. The Court should grant bypass and hold that laws burdening the right to vote are subject to strict scrutiny and that such laws are facially invalid if their burdens are unjustified as to all burdened voters.

A. Laws that burden the right to vote should be subject to strict scrutiny.

This Court has long recognized that the Wisconsin Constitution protects the right to vote as a "sacred right of the highest character," with "a dignity not less than any other of many fundamental rights," *State v. Phelps*, 144 Wis. 1, 128 N.W. 1041,

1046 (1910). The Court has described this right "which shall be free and equal, [a]s one of the most important of the rights guaranteed to [Wisconsinites] by the constitution." *State ex rel. Frederick v. Zimmerman*, 254 Wis. 600, 613, 37 N.W.2d 473 (1949).

The fundamental nature of the right to vote is evident throughout the Wisconsin Constitution.[2] The Wisconsin Constitution explicitly guarantees the right to vote to "*[e]very* United States citizen age 18 or older," Wis. Const. art. III, § 1 (emphasis added). The Constitution further guarantees "inherent rights . . . secure[d] . . . [by] governments . . . deriving their just powers from the consent of the governed." *Id.* art. I, § 1. It ensures "[t]he right of the people peaceably to assemble, to consult for the common good, and to petition the government," *Id.* art. I, § 4—specifically, a "free government," *Id.* art. I, § 22. In fact, "[n]othing can be clearer under [Wisconsin's] Constitution and laws than that the right of a citizen to vote is a fundamental, inherent right." *State v. Cir. Ct. for Marathon Cnty.*, 178 Wis. 468, 190 N.W. 563, 565 (1922).

The right to vote is therefore undeniably fundamental. This Court has unwaveringly subjected state actions burdening other fundamental rights to strict scrutiny under the Wisconsin Constitution. *See, e.g.*, *Mayo v. Wis. Injured Patients & Fams. Comp. Fund*, 2018 WI 78, ¶ 28, 383 Wis. 2d 1, 914 N.W.2d 678;

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[2] "At the Wisconsin Constitutional Convention of 1846, the Judiciary Committee reported that judges as well as legislatures and executives should be selected in accordance with an axiom of government in this country, that the people are the source of all political power, and to them should their officers and rulers be responsible for the faithful discharge of their respective duties." Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 Mich. L. Rev. 859, 885–86 (2021) (internal quotation marks omitted).

Matter of Visitation of A. A. L., 2019 WI 57, ¶ 45, 387 Wis. 2d 1, 927 N.W.2d 486; *In re Zachary B.*, 2004 WI 48, ¶¶ 17, 19, 23–25, 271 Wis. 2d 51, 678 N.W.2d 831. The fundamental right to vote is no less deserving of protection. But this Court's decisions in *Milwaukee Branch of NAACP v. Walker*, 2014 WI 98, 357 Wis. 2d 469, 851 N.W.2d 262, and *League of Women Voters of Wis. v. Walker*, 2014 WI 97, 357 Wis. 2d 360, 851 N.W.2d 302, which were announced on the same day and purportedly set out the standards for Wisconsin courts testing the constitutionality of election-related regulations, betrayed this foundational precept.

Milwaukee Branch and *League of Women Voters* are internally inconsistent and doctrinally unsound, and the approach they endorse breaks from decades of this Court's precedent uniformly applying heightened scrutiny to restrictions on fundamental rights. *Milwaukee Branch* held that challenged regulations trigger strict scrutiny only when they impose *severe* "burden[s] on electors' right to vote." 2014 WI 98, ¶ 22. And instead of evaluating the burdens and state justification for the same voter identification law, *League* upheld the law on the "presumption of constitutionality." 2014 WI 97, ¶¶ 16–17. As Chief Justice Abrahamson recognized in dissent, these decisions "fail[ed] to rely on Wisconsin cases that have over the years interpreted and applied the voting provisions of the Wisconsin Constitution," *League*, 2014 WI 97, ¶ 127 (Abrahamson, C.J., dissenting), and "ignore[d] the uniqueness of Wisconsin's constitutional provision on voting rights and Wisconsin's unique jurisprudence protecting the right to vote under its own constitution," *id.* ¶ 128. Instead, they applied "multiple contradicting standards of review" that "[m]ake it impossible to evaluate how or why the court reache[d] its decision" that voting rights need not be protected in the same manner as other fundamental rights. *Id.* ¶¶ 125–26.

No reported decision by this Court or the Court of Appeals has relied on *Milwaukee Branch* since it was decided, and its precise contours remain unclear. This uncertainty hanging over such a foundational and fundamental constitutional right necessitates further clarity from this Court. The correct standard should be simple and straightforward: Election regulations that infringe upon the fundamental right to vote, like infringements on all other fundamental rights, are subject to strict or heightened scrutiny under the Wisconsin Constitution.

Such rigorous constitutional scrutiny of restrictions on voting would be nothing new. As early as 1880, the Supreme Court recognized that if voting regulations in practice "deprive a fully qualified elector of his right to vote at an election, without his fault and against his will, and require of him what is impracticable or impossible, and make his right to vote depend upon a condition which he is unable to perform," then "they are as destructive of his constitutional right, and make the law itself as void, as if it directly and arbitrarily dis[en]franchised him . . . ." *Dells v. Kennedy*, 49 Wis. 555, 6 N.W. 246, 247 (1880); *see also State ex rel. Knowlton v. Williams*, 5 Wis. 308, 316 (1856) ("An act of the legislature which deprives a person of the right to vote, although he has every qualification which the constitution makes necessary, cannot be sustained."). Procedures that impose unnecessary barriers to the franchise must therefore be subject to the most exacting review by the courts.

Further, the right to vote should be protected through heightened review regardless of the manner in which it is exercised. Absentee voting has long been an important part of Wisconsin elections. As far back as the Civil War, Wisconsinites have been able to exercise the right to vote by casting an absentee

ballot; indeed, Wisconsin was one of the few states to uphold absentee voting for Union soldiers fighting in that war. *See* 6 Op. Att'y Gen. 744. Wisconsin voters have long been able to cast an absentee ballot if they could not vote in person due to illness, disability, or absence, Act of July 5, 1917, ch. 570, Laws of Wis., and no-excuse absentee voting has been available for more than two decades, Wis. Stat. § 6.85. Accordingly, millions of absentee ballots have been cast in federal elections in Wisconsin in recent years, comprising one out of every three ballots cast in 2016 and 2020.

But for the hundreds of thousands of Wisconsin voters who rely on absentee ballots, voting is treated not as a right but as a privilege. Under the guise of an untenable distinction between the "right" to vote and the "privilege" of absentee voting, the Legislature has erected unjustifiable barriers to the franchise for the elderly, people with disabilities, and other individuals who vote absentee. *See* Wis. Stat. § 6.87. These barriers make it unnecessarily difficult for many Wisconsin electors to cast ballots and disenfranchise many qualified voters based on mere technical violations of unnecessary rules. Wisconsin law long ago rejected the argument that voting is "a mere privilege, a something of such inferior nature that it may be made 'the foot-ball of party politics,'" *Phelps*, 128 N.W. at 1046, and that should be true regardless of the means by which a ballot is cast.

Unfortunately, a footnote in this Court's opinion in *Teigen* seems to endorse the idea that absentee voting is a mere privilege as a matter of Wisconsin constitutional law, potentially precluding *any* constitutional challenge to even the most arbitrary restrictions on absentee voting. *See Teigen*, 2022 WI 64, ¶ 52 n.25 ("Establishing rules governing the casting of ballots outside of

election day rests solely within the power of the people's representatives because such regulations affect only the privilege of absentee voting and not the right to vote itself."). This statement was entirely gratuitous to the Court's holding, which addressed only the *statutory* question of the proper interpretation of Section 6.87(4)(b)(1), which authorizes voters to return their ballots by "mail[], or deliver[y] in person, to the municipal clerk," as prohibiting the use of drop boxes. *Teigen*, 2022 WI 64, ¶¶ 4, 55. No one argued in *Teigen*, and this Court did not otherwise address, whether a prohibition on the use of drop boxes is consistent with the Wisconsin Constitution.

The statement is therefore dictum. But this Court has held that "the court of appeals may not dismiss a statement from an opinion by this court by concluding that it is dictum," *Zarder v. Humana Ins. Co.*, 2010 WI 35, ¶ 58, 324 Wis.2d 325, 785 N.W.2d 682. Although the circuit court here rejected the Legislature's argument that "the challenged provisions are completely immune from review for constitutionality," App. 5, the Legislature is certain to renew the argument on appeal. This Court alone is not bound by its own dicta, *see Wis. Just. Initiative, Inc. v. Wis. Elections Comm'n*, 2023 WI 38, ¶ 148, 407 Wis.2d 87, 990 N.W.2d 122 (Hagedorn, J., concurring), and it should clarify that voting is a fundamental right, not a mere privilege, no matter what procedures voters use to cast their ballots. Until the Court does so, *Teigen* footnote 52 will hang like the sword of Damocles over all constitutional challenges to absentee voting rules in the lower courts.

Clarity is therefore badly needed. The Court should grant bypass and hold that the Wisconsin Constitution protects the fundamental right to vote with the same ferocity with which it

protects other fundamental constitutional rights, and regardless of the manner in which a particular ballot is cast. Otherwise, eligible voters facing burdens on their voting rights will be unable to vindicate this fundamental constitutional right, particularly if they vote absentee. And until the issues raised by this case are resolved, thousands of Wisconsinites will face irreversible disenfranchisement for technical noncompliance with the Challenged Restrictions. *See Wis. Term Limits v. League of Wis. Muns.*, 880 F. Supp. 1256, 1266 (E.D. Wis. 1994) (recognizing "that each election is unique and cannot be replicated"); *see also infra* Part III.

B. Laws burdening the right to vote should be facially invalid if their burdens are unjustified as to all burdened voters.

The circuit court did not directly reach the standard of review governing Petitioners' claims because it ran aground on a shoal further offshore: it held that Petitioners could not bring a facial challenge at all because they did not allege that "all voters, not just absentee voters" are burdened by the Challenged Restrictions. App. 7. That holding flowed directly from the substantive legal standards applied in this Court's fractured decisions in *Milwaukee Branch* and *League*. The result would be different under a legal framework that properly protects voting as a fundamental constitutional right.

In *League*, the Court held that to bring a facial challenge to a voting law, "the challenger must show that the law cannot be enforced under any circumstances." *League*, 2014 WI 97, ¶ 13 (quoting *State v. Wood*, 2010 WI 17, ¶ 13, 323 Wis.2d 312, 780 N.W.2d 63 (cleaned up)). That is the test the circuit court said it applied here. App. 6–7. But whether that test is met necessarily

depends on the underlying constitutional standard, which is what determines the "circumstances" under which the law can and cannot be enforced. If laws burdening voting rights are subject to strict scrutiny, then there will be fewer circumstances under which they may constitutionally be enforced, and therefore a broader role for facial challenges.

The allegations in this case illustrate the point. Petitioners alleged that all of the Challenged Restrictions are facially unconstitutional because they impose unjustifiable burdens on all voters to whom they apply:

- The Witness Requirement imposes some burden on all Wisconsin voters who vote absentee, by requiring that they find someone to witness their ballot, and that burden is in all instances unjustified as a matter of strict scrutiny because it is not necessary to serve any compelling state interest. Election officials do nothing with the information except verify its presence, and it cannot possibly prevent fraud. App. 36–37, ¶¶ 78–81.

- The Drop Box Prohibition imposes some burden on all Wisconsin voters who would otherwise use a drop box by making it harder for them to return their ballot, and that burden is unjustified as a matter of strict scrutiny because drop boxes are at least as secure, and more reliable and administrable, than mail. App. 39, ¶¶ 89–91.

- The Election-Day Cure Deadline imposes some burden on all Wisconsin voters who must cure their ballot, by requiring them to do so urgently by election day, and that burden is unjustified as a matter of strict scrutiny because Wisconsin

already allows provisional ballots to be cured later. App. 41–42, ¶¶ 103–05.

- Section 6.84's rule requiring disenfranchisement for minor deviations from absentee voting rules, including the other three Challenged Restrictions, burdens every voter it disenfranchises, for no adequate reason. App. 42–43, ¶¶ 108–11.

In sum, the fact that none of the Challenged Restrictions is necessary to serve any compelling government interest necessarily means that they may not be constitutionally applied to anyone, and thus that they are facially unconstitutional. *See Tashjian v. Republican Party. of Conn.*, 479 U.S. 208, 217–22 (1986) (holding statute unconstitutional where it imposed some burden and furthered only insubstantial state interests).

Review of the circuit court's order that Petitioners did not adequately allege a facial challenge to the Challenged Restrictions therefore directly implicates the applicable standard of review. If, as Petitioners argue, all burdens on the right to vote are subject to strict scrutiny, then—taking Petitioners' allegations as true, as the Court must at the motion to dismiss stage—it will follow that the Challenged Restrictions are facially invalid. And it will make no difference that, as the circuit court emphasized, some voters are more burdened than others. App. 9–10.

The fact the circuit court's decision did not expressly address the standard of review is therefore no reason for the Court to deny bypass, because the governing standard of review was nevertheless an essential part of the circuit court's holding.

II. This Court should overrule *Teigen*.

The Court should also grant bypass to reconsider its statutory holding in *Teigen* that Section 6.87(4)(b)(1) prohibits the use of secure drop boxes to return absentee ballots. The Court should reach this holding as a matter of statutory construction because Section 6.87(4)(b)(1) does not prohibit the use of drop boxes. If the Court does so, it will not need to reach the state constitutional question posed by *Teigen*'s statutory interpretation.

This Court has recognized that where "cogent, substantial, and proper reasons exist," it has a duty "to correct . . . a prior ruling." *McGovern v. Kraus*, 200 Wis. 64, 227 N.W. 300, 305 (1929). "Prior rulings construing or giving a certain effect to a statute were similarly overruled . . . when it became evident on a subsequent appeal that, by reason of other provisions or crucial matters not presented or considered theretofore, the prior ruling was clearly wrong." *State v. Hackbarth*, 228 Wis. 108, 279 N.W. 687, 691 (1938). This is exactly such a case.

The fractured majority in *Teigen* misread the relevant statutory language in Section 6.87(4)(b)(1). Section 6.87 authorizes voters to "mail[] or deliver[] in person, *to the municipal clerk*." Wis. Stat. § 6.87(4)(b)(1) (emphasis added). "It does not say 'municipal clerk's *office*.'" *Teigen*, 2022 WI 64, ¶ 219 (Walsh Bradley, J., dissenting, joined by Dallet and Karofsky, J.J.) (emphasis added). "This is important because elsewhere the Wisconsin Statutes are replete with references to the 'office of the municipal clerk.'" *Id.* at ¶ 220; *see also id.* at ¶¶ 223–24 (applying presumption of consistent usage). As the *Teigen* dissent correctly noted, the "municipal clerk's office" is a location, whereas the "municipal clerk" is a person. *Id.* at ¶¶ 221–22.

There is thus a good argument that Section 6.87 is unambiguous in *authorizing* drop boxes. At the least, however, it is ambiguous as to whether it allows drop boxes. And that ambiguity should be resolved with the recognition that the construction of the statute implicates the fundamental right to vote. *Id.* at ¶¶ 205–06. "Where there is serious doubt of constitutionality," this Court "must look to see whether there is a construction of the statute which is reasonably possible which will avoid the constitutional question." *Baird v. La Follette*, 72 Wis.2d 1, 5, 239 N.W.2d 536 (1976); *see also Fleming v. Amateur Athletic Union of U.S., Inc.*, 2023 WI 40, ¶ 76, 407 Wis. 2d 273, 990 N.W.2d 244 (Karofsky, J., dissenting, joined by Walsh Bradley and Dallet, J.J.) ("When faced with an ambiguous statute where one reading of the statute raises serious constitutional questions, [the] court has long favored the reading of the statute that avoids constitutional issues." (citing *Baird*, 72 Wis.2d at 5)).

Teigen was therefore wrong to hold that Section 6.87(4)(b)(1) prohibits the return of ballots via drop boxes. The Court should grant bypass and reverse it.

III. The upcoming 2024 elections justify speedy resolution of the issues presented.

The Court should grant bypass now, before briefing in the Court of Appeals, and expedite this case to allow definitive resolutions of the issues presented in this case well in advance of the 2024 general election. Certainty as to election-related rules and requirements—for voters, candidates, advocacy groups, and election officials—is of paramount importance, especially as an election approaches.

The Court should grant this Petition now, notwithstanding its usual policy of rejecting bypass petitions filed before briefing is complete. That policy is not required by any statute or rule. *See* Wis. Stat. § 809.60(1)(a) (requiring only that the petition be filed "no later than 14 days following the filing of the respondent's brief," and not addressing the earliest date for filing). And in other urgent election-related cases, the Court has not hesitated to grant bypass before briefing was complete in the Court of Appeals. *See* Order, *Teigen v. Wis. Elections Comm'n*, No. 2022AP91 (Wis. Jan. 28, 2022).

Absent swift resolution of the issues presented in this case, Petitioners (along with all Wisconsin voters, civic organizations, and municipal and state election officials) will enter the 2024 general election season facing uncertainty over the rights of absentee voters. Awaiting briefing in the Court of Appeals—not to mention Court of Appeals review—might preclude real relief and threatens to permanently deny Wisconsin voters their fundamental right to vote in the 2024 elections.

If Petitioners are unable to pursue timely relief—relief which only this Court is positioned to provide—they and all Wisconsinites will continue to be subject to the witness requirement, drop-box prohibition, election-day cure deadline, and Section 6.84's harsh mandate. As a result, Wisconsin voters who are unable to cast absentee ballots and have those ballots counted successfully will be *irreparably* deprived of their right to vote in the 2024 elections. *See Wis. Term Limits*, 880 F. Supp. at 1266 (recognizing "that each election is unique and cannot be replicated"). Only this Court can prevent this outcome.

CONCLUSION

The Court should grant the petition for bypass now and order an expedited briefing schedule to resolve this case well in advance of the November election.

Dated: February 9, 2024. Respectfully submitted,

Electronically signed by David R. Fox

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CERTIFICATIONS

I hereby certify that this petition conforms to the rules contained in Sections 809.19(8)(b), (8)(bm), (8g); 809.62(2), (4); and 809.81 of the Wisconsin Statutes. I further certify that this petition has been produced with a proportional serif font. The length of this petition is 4,986 words, exclusive of the appendix.

Dated: February 9, 2024.

Respectfully submitted,
Electronically signed by David R. Fox