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CLERK OF WISCONSIN
SUPREME COURT

In the Supreme Court of Wisconsin

Appeal No. 2024-AP-2484

DEMOCRATIC NATIONAL COMMITTEE,

Petitioner-Respondent-Petitioner,

v.

HEATHER BOEHM, Clerk of the City of Whitewater,

Respondent,

REPUBLICAN NATIONAL COMMITTEE,

Intervenor-Appellant.

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ON APPEAL FROM AN ORDER DATED NOVEMBER 5, 2024, ENTERED IN WALWORTH COUNTY CIRCUIT COURT, THE HONORABLE DAVID M. REDDY, PRESIDING

AMICUS CURIAE BRIEF OF SCOTT MCDONELL, DANE COUNTY CLERK

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INTRODUCTION

Wisconsin circuit courts have historically exercised equitable authority to extend polling hours in exigent circumstances. In 2018, the Wisconsin Elections Commission (WEC) provided guidance to local election officials that stated, "Wisconsin courts have regularly determined that they also have inherent[1] jurisdiction and authority to issue such orders [to extend polling hours][2]." The Court of Appeals opinion casts doubt upon that guidance. This court should affirm that state courts have this equitable authority.

The Court of Appeals made the following statements regarding the circuit courts authority to consider extending voting hours:

> For the reasons explained in this decision, the court did not have authority to extend voting hours, whether the extension was ordered before or after the polls closed. *Democratic National Committee v. Boehm,* 2026 WI App 44 ¶ 4, n. 4
>
> Whether a circuit court has the authority to reopen a polling place or otherwise extend voting past the 8:00 p.m. statutory closing time, **and if so,** under what circumstances it can exercise that authority, is of the utmost importance to election integrity and the public confidence in election results. *Id*, ¶ 9 (emphasis added) See also ¶¶ 14 and 30 making virtually the identical statement.
>
> The underlying question here is whether the circuit court had the lawful authority in the first instance to reopen the polling places and extend voting hours past 8:00 p.m." *Id.*, ¶ 44

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[1]In retrospect equitable authority may have been a more precise term than inherent authority. The Court of Appeals went to great lengths to explain why the circuit court did not have inherent authority in this case. However, this court has explained that "equitable authority is a variant of the inherent authority doctrine." *Breier v. E.C.*, 130 Wis. 2d 376, 388, 387 N.W.2d 72 (1986)

[2]https://elections.wi.gov/sites/default/files/legacy/memo/20/clerk_comm_re_voting_hours_extension_10_12_18_pdf_49772.pdf

> By creating a statewide poll closing time of 8:00 p.m., the legislature clearly chose finality, equality, uniformity, and certainty over leeway subject to political gamesmanship and the views or leanings of a single judge in one county, which may differ from those of other judges in other counties. *Id*., ¶ 49
>
> Unless a federal court orders that a particular elector or electors be permitted to vote after that closing time, an elector may only cast a ballot after 8:00 p.m. if the elector is already in line when the polls close at 8:00 p.m." *Id*., ¶ 52
>
> Referring to WEC's October 12, 2018 memorandum: "To the extent the memorandum conflicts with our decision herein, such guidance is simply in error, and future WEC memorandums will no doubt be corrected to reflect this decision." *Id*., ¶ 71
>
> The circuit court here had no authority to usurp the legislature's provision that polls close at 8:00 p.m. all across the state and for every election…" *Id*., ¶ 75

The Court of Appeals determined that the facts did not support the circuit court's Order extending voting hours. *Id.*, ¶¶ 63-69. It could have stopped there. Rather, the court engaged in an extensive discussion as to whether the circuit court had authority to consider extending voting.

As the Court of Appeals predicted, WEC approved new guidance on October 15, 2026.[3] That guidance now says:

> *DNC v. Boehm* did not completely close the door on state circuit court extensions of voting at polling places. The *Boehm* decision was clear that such state court authority could not be derived from §6.96 or inherent authority, but appeared to leave the door open to whether sufficient extraordinary circumstances would still justify equitable relief.

[3] https://elections.wi.gov/sites/default/files/documents/Clerk%20Communication%20-%20Polling%20Place%20Extensions.pdf

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While this *amicus* curiae believes that is what the law should be, it is not at all clear that's what the Court of Appeal's meant.

WEC suggests a state court retains equitable jurisdiction to extend polling hours in exigent circumstances. However, a circuit judge may interpret the Court of Appeals decision differently. Judge Neubauer found it necessary to clarify the majority opinion:

> I read the majority's decision (and my concurrence) to be limited to the facts of this case. In other circumstances, however, the polling hours statutes cannot be applied to violate the constitutional right to vote set forth in WIS. CONST. art. III, § 1(2): these statutes must be flexible – when their application would infringe on electors' right to vote.

Id., ¶ 88 (Neubauer, P.J. concurring).

It has been the long-standing practice in Wisconsin that state court' have equitable authority to extend voting hours in exigent circumstances. This Court should affirm that practice and clear up any doubt raised by the Court of Appeals decision.

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ARGUMENT

I. IN EXTRAORDINARY CIRCUMSTANCES THE POLL CLOSING HOURS ESTABLISHED BY WIS. STAT § 6.78(1m) MUST YIELD TO THE ELECTORS' CONSTITUTIONAL RIGHT TO VOTE.

The constitutional right to vote must prevail when infringed by the statutory requirement that polls must close at 8:00 p.m. Wisconsin electors have a constitutional right to vote guaranteed by Art. III, Sec. 1 of the Wisconsin Constitution. The legislature may regulate voting, but a statute cannot impair the

right to vote. *State ex rel. Wood v. Baker*, 38 Wis. 71, 86 (1875); *League of Women Voters of Wis. Educ. Network, Inc.,* 2014 WI 97, ¶ 50.

Wisconsin Stat. § 6.78(1m) states that on election day the polls shall be open from 7 a.m. to 8 p.m. The statutes do not grant local election officials' authority to extend voting hours. But circumstances that preclude access to the polling place during those hours can infringe on an elector's right to vote. Prior to this case, Wisconsin circuit courts have found that exigent circumstances warranted extension of polling hours to protect the right to vote. *Boehm*, 2026 WI App 44 ¶¶ 90, 91 (Neubauer, P.J. concurring).

In extraordinary and exigent circumstances, the specific voting hours of Wis. Stat. § 6.78(1m) must be subordinated if it is shown that the 8:00 p.m. closing time infringes on the elector's constitutional right to vote.

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II. WISCONSIN CIRCUIT COURTS HAVE PLENARY AUTHORITY TO PROTECT ELECTORS' CONSTITUTIONAL RIGHT TO VOTE.

Wisconsin circuit courts have broad plenary authority to redress wrongs and vindicate constitutional rights. Judge Neubauer's concurrence correctly states that "[i]n instances involving extraordinary or exigent circumstances…our state courts properly can and have exercised equitable authority to extend voting hours to protect electors' constitutional right to vote." *Boehm*, 2026 WI App 44, ¶ 90 (Neubauer, P.J. concurring).

Article VII, Section 8 of the Wisconsin Constitution expressly states that, "Except as otherwise provided by law, the circuit court shall have original

jurisdiction in all matters civil and criminal within this state…"[4] This court has recognized that "this grant of jurisdiction is extremely broad." *Matter of Guardianship of Eberhardy*, 102 Wis. 2d 539, 548, 307 N.W.2d 881 (1981). There the court recognized the broad scope of the circuit court's authority:

> The scope of this general grant of authority was said in *Putnam v. Sweet*, 2 Pin. 302, and also in *Att'y Gen. v. Railroad Cos*., 35 Wis. 531, to include greater power than was probably ever before, in a free government, delegated to any one tribunal, the united powers of the English king's bench, common pleas, exchequer, and chancery.

Id., at 548-549, (quoting *State ex rel. Attorney General v. Portage City Water Co.*, 107 Wis. 441, 447, 83 N.W. 697 (1900)); (Also citing, State *ex rel. Pierce v. Kundert*, 4 Wis. 2d 392, 394, 90 N.W.2d 628 (1958)). Wisconsin circuit courts are constitutional courts of plenary jurisdiction, and "do not depend solely upon statute for their powers." *Id*., at 549 (quoting *Stevenson v. Milwaukee County*, 140 Wis. 14, 17, 121 N.W. 654 (1907)).

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In *Eberhardy*, the circuit court was asked to approve sterilization of a person adjudicated incompetent. The circuit court concluded that it did not have authority to approve the operation because there was no statutory authority. The court of appeals affirmed. *Id*., at 548. This court reversed, and held:

> This view of jurisdiction, founded solely upon statutory authorization, is too narrow and does not comport with the precedents of this court. We conclude that, under the Constitution of the State of Wisconsin, the circuit court had the jurisdiction to approve the proposed tubal

[4]Wisconsin Const. Art. I, Section 9 also provides that, "Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws."

> ligation; and, additionally, we conclude that the statutes acknowledge the plenary jurisdiction of Wisconsin's circuit courts.

Id.

Relying on *Eberhardy* and its reliance on Art. VII, Sec. 8 of the Wisconsin Constitution, this court held that in Wisconsin, "no circuit court is without subject matter jurisdiction to entertain actions of any nature whatsoever." *Village of Trempealeau v. Mikrut*, 2004 WI 79, ¶ 8, 273 Wis. 2d 76, 681 N.W.2d 190 (citing *Mueller v. Brunn*, 105 Wis. 2d 171, 176, 313 N.W.2d 790 (1982)). Because the jurisdiction and power of the circuit court is conferred by the Constitution, "the subject matter jurisdiction of the circuit courts cannot be curtailed by state statute." *Id*.

A circuit court has equitable authority to fashion a remedy "in situations in which there is no explicit statutory authority or in which the available legal remedy is inadequate to do complete justice." *Breier,* 130 Wis. 2d at 387. In exercising equitable jurisdiction, circuit courts in Wisconsin are "given a broad authorization to make the injured parties whole." *State v. Excel Management Services, Inc.*, 111 Wis. 2d 479, 490, 331 N.W.2d 312 (1983). The court further held that "[o]nce a court of equity obtains jurisdiction over a matter, it will exercise its jurisdictions in an effort to do complete justice between the parties to the action." *Id*., at 491 (citing *Fullerton Lumber Co. v. Torborg*, 274 Wis. 478, 485, 80 N.W.2d 461 (1957); *Tri-State Home Improvement Co. v. Mansavage*, 77 Wis. 2d 648, 660, 253 N.W.2d 474

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(1977)). See also, *City of Eau Claire v. Booth*, 2016 WI 65, ¶ 7, 370 Wis. 2d 595, 882 N.W.2d 738.

A court may only exercise equitable jurisdiction in response to legally protected rights. *Breier*, 130 Wis. 2d at 389. As previously stated, circuit courts have exercised equitable authority to extend voting hours in exigent circumstances. In April 2024, the Dane County Circuit Court ordered that a polling place at UW-Madison Memorial Union be kept open until 9:30 p.m. That order was based upon evidence that for a 90-minute period on election day some voters were turned away from the polling place by facility staff who incorrectly advised that voting was not taking place at that location. *In re Petition of Mary Beth Witzel-Behl*, No. 2024CV976 (Dane County Cir. Ct. April 2, 2024). Most recently, during the 2025 Spring Election, the Marathon County Circuit Court issued an Order extending polling hours for one hour. There the electronic polling books lost functionality for three hours resulting in long lines. *Marathon County Clerk v. Village of Kronenwetter*, No. 2025CV216 (Marathon Cty. Cir. Ct. April 1, 2025).

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Wisconsin has a well-recognized constitutional right to vote. Interference with access to the polling place can infringe on the right to vote. If a court determines that exigent circumstances exist, Wisconsin courts have equitable authority to extend voting hours to protect electors' constitutional right to vote. When exercising its equitable authority, a circuit court has broad discretion to fashion a remedy. This court applies a "highly deferential" erroneous exercise of discretion standard when a circuit court exercises its equitable jurisdiction. *Price*

Corp. v. Vandenberg, 2016 WI 49, ¶ 16, 369 Wis. 2d 387, 882 N.W.2d 371; *Nationstar Mortgage LLC v. Stafsholt*, 2018 WI 21, ¶ 23, 380 Wis. 2d 284, 908 N.W.2d 784.

III. WISCONSIN STAT. § 6.96 DOES NOT PRECLUDE THE CIRCUIT COURT FROM EXTENDING VOTING HOURS IN EXIGENT CIRCIMSTANCES.

Wisconsin Stat. § 6.96 does not impair a state courts authority to extend voting hours. The Court of Appeals misinterprets § 6.96 to conclude that state courts do not have such authority. The court incorrectly concluded that since the legislature did not expressly mention state courts, they are not authorized to extend polling hours. This court should reverse the decision of the Court of Appeals and hold that § 6.96 does not limit the authority of state courts.

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The Court of Appeals attempts to rely upon the negative implication canon of statutory interpretation, otherwise known as *expressio unius est exclusio alterius,* without mentioning it. Under that canon "the express mention of one matter excludes other similar matters [that are] not mentioned." *Matter of Adoption of M.M.C.*, 2024 WI 18, ¶ 3, 411 Wis. 2d 389, 5 N.W.3d 238 (citing *James v. Heinrich*, 2021 WI 58, ¶ 18, 397 Wis. 2d 517, 960 N.W.2d 350; *FAS, LLC v. Town of Bass Lake*, 2007 WI 73, ¶ 27, 301 Wis. 2d 321, 733 N.W.2d 287; and Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 107(2012)). This court has recognized that before the rule is applied, there must be some evidence the legislature intended it to apply. *Wisconsin Citizens Concerned for Cranes and*

Doves v. Wisconsin Department of Natural Resources, 2004 WI 40, ¶ 17, n. 11, 270 Wis. 2d 318, 677 N.W.2d 612 (citing *Pritchard v. Madison Metro. School Dist.*, 2001 WI App 62, ¶ 13, 242 Wis. 2d 301, 625 N.W.2d 613.)

Scalia & Garner's treatise, which this Court has relied upon multiple times, is instructive. They state that the doctrine can only be applied when "the thing specified can reasonably be thought to be an expression of *all* that shares in the grant or prohibition involved." Scalia & Garner, p. 107 (quoted by Justice Grassl Bradley's dissent in *Matter of N.A.L.*, 2026 WI 16, 420 Wis. 2d 221, 34 N.W.3d 765 (Grassl Bradley, J. dissenting). They state that, "[v]irtually all the authorities who discuss the negative-implication canon emphasize that it must be applied with great caution, since its application depends so much on context." *Id.*

There is no evidence that the legislature intended for Wis. Stat. § 6.96 to divest state courts of equitable authority to extend voting hours. To the contrary, context indicates that the legislature had no such intent. Therefore, the negative implication canon does not apply.

Section 6.96 was enacted as part of 2002 Wis. Act 265. It establishes a procedure for marking ballots if voting hours are extended by a federal court order, and states:

> **Voting procedure for electors voting pursuant to federal court order.** Whenever any elector is allowed to vote at a polling place pursuant to a federal court order after the closing time provided under s. 6.78, the inspectors shall, before giving the elector a ballot, write on the back of the ballot the notation "s. 6.96". If voting machines are used in the municipality where the elector is voting, the elector's vote may be received only upon an absentee ballot furnished by the

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> municipal clerk which shall have the notation "s. 6.96" written on the back of the ballot by the inspectors before the ballot is given to the elector. When receiving the elector's ballot, the inspectors shall provide the elector with the written voting information prescribed by the commission under s. 7.08(8). The inspectors shall indicate on the list the fact that the elector is voting pursuant to a federal court order. The inspectors shall then deposit the ballot. The ballot shall be counted under s. 5.85 or 7.51 unless the order is vacated. If the order is vacated after the ballot is counted, the appropriate board or boards of canvassers or the chairperson of the commission or his or her designee shall reopen the canvass to discount any ballots that were counted pursuant to the vacated order and adjust the statements, certifications, and determinations accordingly.

The purpose of 2002 Act 265 was to get federal funding under the Help America Vote Act of 2002 (HAVA), H.R. 3295. A Legislative Reference Bureau Drafter's Note dated November 26, 2002 stated that Act 265 "attempts to implement mandates imposed upon this state under the Help America Vote Act and enable receipt of federal aid by this state under the Act." *DNC v. Boehm*, 2026 WI App 44, ¶ 50, n. 9.

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The sole purpose of § 6.96 is to establish a procedure for marking provisional ballots that are cast pursuant to a federal court order. This is expressly required by § 302(c) of HAVA. There is nothing in the plain language of § 6.96 that indicates an intent by the legislature to divest state courts of equitable jurisdiction to extend voting hours. It does not even purport to convey jurisdiction on federal courts, as the legislature has no such power. Therefore, it cannot reasonably be construed as an expression of *all* that shares in the grant or prohibition involved, because there is none. The legislature clearly did not intend to divest a state court of its equitable jurisdiction.

Even if § 6.96 had expressed a legislative intent to divest state courts of equitable jurisdiction, that is not within the legislature's purview. As discussed *infra*, Art. VII, Sec. 8 of the Wisconsin Constitution grants Wisconsin circuit courts broad equitable authorization to redress wrongs. *Eberhardy*, 102 Wis. 2d 539, 548. "Because this power is granted to circuit courts by our constitution, it cannot be 'curtailed by state statute.'" *City of Eau Claire v. Booth*, 2016 WI 65, ¶ 7, 370 Wis. 2d 595, 882 N.W.2d 738 (citing *Village of Trempealeau v. Mikrut*, 2004 WI 79, 273 Wis. 2d 76, 681 N.W.2d 190.) See also, *State v. Excel Management Services*, *Inc.*, 111 Wis. 2d 479, 490, 331 N.W.2d 312(1983). Therefore, § 6.96 cannot deprive state courts of their equitable jurisdiction.

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CONCLUSION

Wisconsin circuit courts have equitable authority to extend voting hours if extraordinary circumstances infringe upon the right to vote. The Court of Appeals decision casts doubt on that authority and has caused confusion for local election officials. This court should clarify that circuit courts have such equitable authority and broad discretion to determine when relief is warranted.

Dated this 27th day of October, 2026.

DANE COUNTY CORPORATION COUNSEL

ELECTRONICALLY SIGNED BY:
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CERTIFICATION REGARDING FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in sec. 809.19 (8)(b), (bm), & (c)3 for a brief. The length of this brief is 2,996 words.

Dated this 27th day of October, 2026.

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