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Dated: July 20, 2023

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COMPLAINT

COME NOW Plaintiffs PRIORITIES USA, WISCONSIN ALLIANCE FOR RETIRED AMERICANS, and WILLIAM FRANKS, JR., by and through their undersigned counsel, and hereby assert a complaint for declaratory relief pursuant to Wisconsin Statutes §§ 806.04 and 227.40 against Defendant WISCONSIN ELECTIONS COMMISSION (“WEC”) and allege and petition this Court as follows:

INTRODUCTION

1. The Wisconsin Constitution guarantees the right to vote as a fundamental right that is inherent and foundational to free government. *See* Wis. Const. art. I, §§ 1, 4, 22; art. III, §§ 1, 2. “The right of a qualified elector to cast a ballot for the election of a public officer, which shall be free and equal, is one of the most important of the rights guaranteed to him by the constitution.” *State ex rel. Frederick v. Zimmerman*, 254 Wis. 600, 613, 37 N.W.2d 473 (1949). For more than a century, Wisconsin constitutional law has protected voting as a “sacred right of the highest character,” with “a dignity not less than any other of many fundamental rights.” *State v. Phelps*, 144 Wis. 1, 128 N.W. 1041, 1046 (1910). Voting “lies at the very basis of our Democracy,” as “one of the inherent rights which can be surrendered only by the people and subjected to limitation only by the fundamental law,” and “no right is more jealously guarded.” *Frederick*, 254 Wis. at 613. It is “remove[d] from the field of mere legislative material impairment.” *Phelps*, 128 N.W. at 1046.

2. This case brings a state constitutional challenge to three rules that burden the right to vote by making it more difficult for voters to cast an absentee ballot and to the statutory doctrine that has shielded the rules from legal scrutiny for far too long.

3. 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.’” *Id.* To the

contrary, election legislation is subject to enhanced prohibitions on “class legislation,” to “[t]he recognized existence and inviolability of inherent rights,” to “[t]he constitutionally declared purposes of government,” and to “[t]he express guaranty of the right to vote,” all in addition to the requirement—applicable to all legislation—that “[t]he regulation must be reasonable.” *Frederick*, 254 Wis. at 613–14.

4. 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.

5. Many Wisconsin voters rely on casting an absentee ballot to vindicate their right to vote. Over the past fifteen years, more than 4.6 million absentee ballots have been cast in federal elections in Wisconsin—one out of every five ballots cast across eight elections. Absentee voting is particularly popular in presidential election cycles (such as the upcoming 2024 elections), comprising one out of every three ballots cast in 2016 and 2020. Absentee voting also is important for people who have trouble making it to the polls on election day, such as older voters, voters with limited mobility, and those with strict work schedules or childcare obligations.

6. Despite the long pedigrees of both absentee voting and constitutionally protected voting rights in Wisconsin, the legislature has improperly erected multiple barriers to absentee voting that make it unnecessarily difficult for many Wisconsin electors to cast ballots and that

disenfranchise many qualified voters based on mere technical violations of unnecessary rules. This case challenges three such rules and the statutory doctrine underpinning them.

PARTIES

7. Plaintiff Priorities USA (“Priorities”) is a nonprofit corporation organized under Section 501(c)(4) of the Internal Revenue Code. Priorities is a vote-centric progressive advocacy and service organization. Its mission is to build a permanent infrastructure to engage Americans by persuading, registering, and mobilizing citizens around issues and elections that affect their lives. In furtherance of this purpose, Priorities works to help educate, mobilize, register, and turn out voters across the country. And absentee voting is a critical pillar of these efforts. In advance of the 2024 elections, Priorities expects to make \$75 million in contributions and expenditures to educate, register, mobilize, and turn out voters in upcoming state and federal elections around the country, including in Wisconsin.

8. The challenged restrictions directly harm Priorities by frustrating its mission of, and efforts aimed at, engaging voters in the political process by making it more difficult to vote absentee and thus to turn out voters in Wisconsin. These restrictions will require Priorities to expend additional resources to educate absentee voters about the remaining avenues to cast a ballot and to assist voters in overcoming the barriers created by WEC guidance.

9. Plaintiff Wisconsin Alliance for Retired Americans (the “Alliance”) is a nonprofit, social welfare organization, organized under Section 501(c)(4) of the Internal Revenue Code, serving and representing over 15,000 members in the State of Wisconsin, including in Dane County. The Alliance is a chartered state affiliate of the Alliance for Retired Americans, which is one of the country’s leading grassroots senior organizations and engages in important political efforts to protect and preserve programs vital to the health and economic security of older Americans.

10. The Alliance's membership is composed of retirees, most of whom are over the age of 65, from public and private sector unions; community organizations; and individual activists. Many of the Alliance's members rely on absentee ballots to vote. For some of the Alliance's older members or those with disabilities, voting absentee is the only form of voting that is reasonably available to them. The challenged restrictions burden these members' right to vote by making it more difficult for their votes to be cast and counted.

11. The Alliance's mission is to ensure social and economic justice and to protect the civil rights of retirees after a lifetime of work. The challenged restrictions threaten the Alliance's efforts to ensure its members have adequate access to the franchise and make it harder for the Alliance's members to vote. The restrictions also force the Alliance to divert its limited resources toward helping its members overcome hurdles to voting absentee.

12. Plaintiff William Franks, Jr. is a board member of the Alliance and a member of the American Federation of Teachers. He resides at 5578 Huntingwood Way, Waunakee, WI 53597, in Dane County.

13. Mr. Franks is a registered Wisconsin voter. He voted in the November 2022 general election and in many previous elections by absentee ballot and intends to vote absentee in future elections.

14. Mr. Franks believes that absentee voting is an important avenue for the exercise of the fundamental right to vote and that voters should not be forced to overcome unnecessary obstacles in order to cast an absentee ballot and have that ballot counted. He also believes that Wisconsin's elections should be administered under the proper construction of the state's election laws, as framed by the Wisconsin Constitution and its commitment to democratic and free government. Without a judicial declaration enforcing the Wisconsin Constitution, and invalidating

interpretive guidance that contradict its principles, these objectives will not be served, and Mr. Franks will question whether the results of future elections properly reflect the voters' will.

15. Defendant Wisconsin Elections Commission (“WEC”) is a governmental agency responsible for “the administration of [Chapters] 5 to 10 and 12 [of the Wisconsin Statutes] and other laws relating to elections and election campaigns, other than laws relating to campaign financing.” Wis. Stat. § 5.05(1). WEC is tasked with providing local election officials with education, training, and support in administering Wisconsin’s elections. WEC is located at 201 West Washington Ave., Second Floor, Madison, WI 53707.

JURISDICTION AND VENUE

16. This Court has jurisdiction over the subject matter of this dispute under Wis. Stat. §§ 753.03, 806.04, and 227.40.

17. Wis. Stat. § 753.03 creates circuit court subject matter jurisdiction over all civil matters in this state.

18. Wis. Stat. § 806.04, the Uniform Declaratory Judgments Act, specifically grants this Court jurisdiction to declare rights, status, and other legal relations between parties.

19. Wis. Stat. § 227.40 specifically grants this Court jurisdiction to declare the validity or invalidity of a rule or guidance document.

20. Venue is proper in this court under Wis. Stat. §§ 801.50(3)(b) and 227.40(1).

21. Venue is proper in Dane County under Wis. Stat. § 227.40(1) because William Franks, Jr. resides in Waunakee, WI, in Dane County and because Priorities, which does not have its principal place of business in Wisconsin, challenges WEC guidance prepared and issued at WEC’s office in Madison, WI, in Dane County.

BACKGROUND

22. Absentee voting is a critical component of Wisconsin elections. In the 2018 midterm general election, 575,000 Wisconsin voters used absentee ballots. Driven in large part by the COVID-19 pandemic, absentee voting surged in the November 2020 general election, with more than 2 million Wisconsinites successfully casting absentee ballots. Interest in absentee voting remains high; in the November 2022 general election, nearly 760,000 Wisconsinites voted using absentee ballots, an almost 25 percent increase from pre-pandemic levels.

23. 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 Wisconsin Legislature has erected unjustifiable barriers to the franchise for the elderly, people with disabilities, and other individuals who vote absentee.

24. Defendant WEC is a statewide agency responsible for administering election and voting laws on a statewide basis, including by providing guidance regarding the interpretation and implementation of the law. In this role, WEC has promulgated guidance on absentee voting. *See* “Uniform Instructions for Wisconsin Absentee Voters,” Form EL-128, Wisconsin Elections Commission (revised Feb. 1, 2022), <https://elections.wi.gov/wec-form/uniform-absentee-ballot-instructions> (“Uniform Instructions”).

25. WEC has also issued an Election Administration Manual, which serves as a “knowledge base for the array of duties required of municipal clerks,” who are encouraged “to reference this manual frequently and to make use of the other resources cited throughout the manual.” “Election Administration Manual,” Wisconsin Elections Commission (Sept. 14, 2022), <https://elections.wi.gov/resources/manuals/election-administration-manual> (“Manual”).

26. WEC’s guidance instructs elections officials how to comply with requirements established by state law—including specifically, with respect to absentee voting, Chapter 6, Subchapter IV. Wis. Stat. §§ 6.85–6.89—and by the Wisconsin Supreme Court. Some of these requirements, however, cannot be squared with Wisconsin’s constitutional commitment to the right to vote.

27. **Absentee Ballot Witness Requirement.** The Election Administration Manual explains that absentee ballots must be “witnessed by an adult U.S. Citizen, and mailed or delivered in person to the municipal clerk.” Manual at 98. Guidance provided in the Uniform Instructions similarly provides that an absentee voter “must vote . . . in the presence of an adult witness.” Uniform Instructions at 1.

28. The Election Administration Manual relies on Wis. Stat. § 6.87(4)(b)1 for this requirement. That subsection provides, in pertinent part: “[A]n elector voting absentee . . . shall make and subscribe to the certification before one witness who is an adult U.S. citizen. . . . The absent elector, in the presence of the witness, shall mark the ballot in a manner that will not disclose how the elector’s vote is cast. The elector shall then, still in the presence of the witness, fold the ballots so each is separate and so that the elector conceals the markings thereon and deposit them in the proper envelope.”

29. The Witness Requirement is extremely burdensome for many voters. More than 600,000 Wisconsin voters—including members of the Alliance—do not have anyone in their household who can act as a witness. *See Democratic Nat’l Comm. v. Bostelmann*, 488 F. Supp. 3d 776, 793 (W.D. Wis. 2020).¹ Many of these individuals also have limited mobility or health

¹ *Bostelmann* included a *federal* constitutional challenge to the witness requirement brought by one of the parties to this case; it did not include the state-law challenge Plaintiffs bring here, which

conditions that make it difficult to find a trusted third party who is willing and available to witness and certify an absentee ballot.

30. In 2020, in the context of the COVID-19 pandemic, WEC issued guidance with purported “solutions” that are impractical for many voters, such as “driv[ing] to a meet up spot to observe/witness through . . . vehicle windows,” fulfilling the requirement “via video chat like Skype or Facetime with the ballot left outside of the door or in a mailbox for the witness to sign and provide their address,” or asking a delivery person to witness the ballot. These solutions remain extremely burdensome, and they also eliminate any conceivable benefit from the requirement.

31. The waning of the public health emergency caused by COVID-19 has not eliminated the burdens that the Witness Requirement imposes. It remains the case that hundreds of thousands of Wisconsin voters do not have anyone in their household who can witness their ballots, and the Witness Requirement makes it significantly harder for these voters to vote.

32. Moreover, should there be *any* error on the ballot certificate—including errors that have nothing to do with the witness—WEC advises that the voter can cure their ballot only with the participation of the original witness. *See* Manual at 99. This requirement makes curing the ballot much more difficult, and may make it effectively impossible if the witness is not someone that the voter knows.

33. In addition to burdening the right to vote, the Witness Requirement also threatens the right to a secret ballot under Article III, Section 3 of the Wisconsin Constitution. As a practical matter, it may be difficult for many voters to mark their ballot in such a manner that a witness can

was beyond the federal courts’ jurisdiction. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984). The federal court in *Bostelmann* denied a preliminary injunction against the enforcement of the Witness Requirement, and the case was ultimately dismissed without prejudice after the 2020 election.

certify that the voter has marked their ballot but cannot determine *how* the voter has marked their ballot—especially when the witness is someone previously unknown to the voter such as the “grocery or food delivery persons” suggested by WEC.

34. There are other, far less burdensome ways of ensuring that the voter who completed an absentee ballot is the same voter who requested and was issued the ballot. There is no witness or notary requirement for absentee ballots in 36 states and the District of Columbia. Those jurisdictions use a variety of less burdensome alternative methods to authenticate absentee ballots, and there is no evidence of any meaningful problems with voter fraud in those jurisdictions.

35. **Drop Box Prohibition.** Section 6.87 provides that an envelope containing a voter’s absentee ballot “shall be mailed by the elector, or delivered in person, to the municipal clerk issuing the ballot or ballots.” Wis. Stat. § 6.87(4)(b)1.

36. In 2020, WEC promulgated guidance encouraging municipal clerks to use ballot drop boxes to make it easier for voters to return their absentee ballots. As explained by WEC: “A drop box is a secure, locked structure operated by local election officials. Voters may deposit their ballot in a drop box at any time after they receive it in the mail up to the time of the last ballot collection [on] Election Day. Ballot drop boxes can be staffed or unstaffed, temporary or permanent.” *Teigen v. Wisconsin Elections Comm’n*, 2022 WI 64, ¶ 1, 403 Wis. 2d 607, 976 N.W.2d 519 (Grassl Bradley, J., plurality opinion).

37. Drop boxes immediately became one of the most popular methods for returning absentee ballots. In 2020, thousands of voters used hundreds of drop boxes without incident. These drop boxes were located in a variety of official municipal locations throughout Wisconsin.

38. As Justice Kavanaugh recognized, “secure absentee ballot drop boxes” contributed to making “[r]eturning an absentee ballot in Wisconsin . . . easy.” *Democratic Nat’l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 36 (2020) (Kavanaugh, J., concurring). Not anymore.

39. In 2022, the Wisconsin Supreme Court concluded that this guidance authorizing drop boxes violated Wis. Stat. § 6.87(4)(b)1. *Teigen*, 2022 WI 64, ¶ 72 (Grassl Bradley, J., plurality opinion); *id.* at ¶ 204 (Hagedorn, J., concurring). Over a vigorous dissent, the majority interpreted the statutory phrase “to the municipal clerk” to preclude WEC from authorizing voters to deliver absentee ballots to clerks via drop boxes. *Id.* at ¶¶ 62–63 (Grassl Bradley, J., lead opinion).

40. Since *Teigen*, current WEC guidance provides that an absentee voter may *only* return their ballot via mail, return their ballot to their “municipal clerk’s office,” or return their ballot to their “polling place or central count location.” Uniform Instructions. WEC’s guidance therefore prohibits municipal clerks from accepting absentee ballots at drop boxes (the “Drop Box Prohibition”).

41. Drop boxes are a secure, accessible, and efficient method of delivering absentee ballots to the municipal clerk. Drop boxes are critical for voters—including the Alliance’s members and constituents—who are unable to vote in person because of disability, scheduling conflicts, lack of transportation, or other hardship.

42. Wisconsin law requires absentee ballots to be delivered by election day. Wis. Stat. § 6.86(3)(c). Drop boxes therefore are especially important to voters who are concerned about the ability of the U.S. Postal Service to ensure timely delivery.

43. As the U.S. Postal Service has acknowledged, mail ballot delivery times can vary widely, and delays in delivery can result in ballots arriving after statutory deadlines. A voter who

timely completes their absentee ballot and places it in the mail therefore cannot guarantee that their vote will be received by the statutory deadline.

44. Election mail delay is well documented in Wisconsin. In the 2018 midterm elections, one of the five lowest-performing processing and delivery centers in the entire nation was the facility located in Eau Claire, Wisconsin, with nearly 14% of election and political mail delivered later than expected.

45. Ballot delivery problems persisted in 2020. For example, during the April primary, three tubs of absentee ballots were discovered at the Milwaukee processing and delivery center after polls closed; the post office failed to deliver ballots requested on March 22 and March 23; and nearly 400 voted ballots did not receive postmarks or were not legibly marked by the post office.

46. Indeed, but for the intervention of the federal courts, the U.S. Postal Service's failure to timely deliver mail ballots would have invalidated the ballots of approximately 80,000 lawful voters in the spring 2020 primary election. *See Bostelmann*, 488 F. Supp. 3d at 790–91.

47. It is no answer to say that voters should return their absentee ballots early. Many voters do not decide which candidates they will support until shortly before election day. And particularly in primary elections, returning a ballot early may mean a wasted vote as candidates often drop out of the race shortly before election day. In Wisconsin's August 2022 primary, for example, at least four candidates dropped out of the race after absentee ballots had been printed and mailed, and many ballots had already been returned.

48. Drop boxes allow absentee voters to return their ballots through a convenient, safe, and reliable method that ensures that they will be returned on time. The court-imposed prohibition on drop boxes, by contrast, has contributed to voter disenfranchisement.

49. For example, in the 2022 general election, when drop boxes were prohibited, more than 1,600 absentee ballots were returned after election day; a similar number of ballots were returned late in the 2018 general election, before WEC encouraged the use of drop boxes. That is more than double the amount—and several times the proportion—of late ballots received during the 2020 general election, when ballot drop boxes were widely available. Despite nearly thrice as many absentee votes being cast, only 689 absentee ballots were returned after election day in 2020.

50. Contrary to some claims, there is no evidence that secure drop boxes facilitate voter fraud. Instead, the evidence demonstrates that secure drop boxes helped ensure that thousands of lawful voters were able to participate in the election without having to worry about the U.S. Postal Service’s ability to deliver their ballot in time to be counted.

51. **Election-Day Cure Deadline.** Wisconsin law requires absentee voters to submit, with an absentee ballot, a signed certificate attesting that the voter is eligible to vote and that the voter marked the ballot in the presence of a witness, who also must sign the certificate. Wis. Stat. § 6.87(2). “The ballot shall be returned so it is delivered to the polling place no later than 8 p.m. on election day. . . . Any ballot not mailed or delivered as provided in this subsection may not be counted.” Wis. Stat. § 6.87(6).

52. If there is an error in the certificate required by Wis. Stat. § 6.87(2), the municipal clerk “should contact the voter, if possible.” Manual at 99; Wis. Stat. § 6.87(9) (“[T]he clerk may return the ballot to the elector . . . whenever time permits the elector to correct the defect and return the ballot.”). The voter then “has the option to correct the absentee certificate envelope in the clerk’s office, by mail, or at the polling place / central count location on Election Day.” Manual at 99.

53. To correct a defective absentee certificate envelope, the voter “must personally deliver a corrected envelope by 8 p.m. on Election Day to their polling place or central count” (the “Election-Day Cure Deadline”). *Id.*; Wis. Stat. § 6.87(6), (9). Per WEC guidance, “the original witness must accompany them to the polling place or central count location.” Manual at 99.

54. Because of the 8 p.m. Election Day deadline, voters who return their ballots on or close to Election Day are deprived of the cure opportunities that are extended to other absentee voters. Wis. Stat. § 6.87(9) only permits municipal clerks to return absentee ballots with defective certificates to voters where “time permits” the voter to correct the error before 8 p.m. on Election Day. Where time does not permit, however, any voter who returns an absentee ballot with a technical, but curable, certificate defect is deprived of the franchise.

55. In many cases, the inability to return an absentee ballot in time to permit a cure before 8 p.m. on election day may be due to no fault of the voter. In the lead up to the 2020 election, there was significant litigation across the country—including here in Wisconsin—addressing the U.S. Postal Service’s failure to deliver absentee ballots by the date specified by state statutes. Even without these delays, it would be almost impossible for voters to be assured that their ballots will be delivered sufficiently in advance of election day such that “time permits” them to take advantage of the statutory cure procedure. As a result, an absentee voter may be deprived of the ability to remedy a curable defect in the ballot certificate due to unanticipated mail delivery delays entirely outside the voter’s control.

56. The required presence (or, at the least, participation) of the original witness also may make it difficult or impossible for a voter to cure by 8 p.m. on election day. Even if the witness is personally known to the voter, it may take hours or days for the voter to contact the witness and secure their assistance. Where the voter does not personally know the witness—for example, if the

voter has followed WEC’s suggestion of asking a food delivery person to witness their ballot—it will take even longer.

57. In contrast, WEC guidance on provisional voting permits a voter to “provide the required information to the municipal clerk by 4:00 p.m. the Friday after the election.” There is no practical reason why the Cure Deadline for absentee ballots should be shorter than the deadline for provisional ballots.

58. **Interpretive Statute.** Wis. Stat. § 6.84 declares legislative policy distinguishing between the right to vote, which it recognizes as “a constitutional right, the vigorous exercise of which should be strongly encouraged,” and voting absentee, which it identifies as “a privilege exercised wholly outside the traditional safeguards of the polling place.” It further designates certain requirements (including the Witness Requirement) as strictly mandatory, abrogating the requirement that election laws “shall be construed to give effect to the will of the electors.” Wis. Stat. § 5.01(1).

59. The Wisconsin Constitution protects the right to vote and specifies that the legislature may authorize absentee voting. It does not, however, permit the legislature to treat absentee votes as less valuable than votes cast in person.

60. For more than 150 years, Wisconsin has recognized that some voters are unable to cast an in-person ballot on election day and authorized such voters to vote absentee. For these voters—including some members of the Alliance—the right to an absentee ballot *is* the right to vote. The State has extended the ability to vote absentee beyond those strictly unable to vote by in-person ballot on election day to those who choose not to, but the principle remains that when those voters cast absentee ballots, they are exercising their fundamental right to vote.

LEGAL PRINCIPLES

61. “Nothing 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 the essential component to the structure of government in Wisconsin and “lies at the very basis of our Democracy.” *Frederick*, 254 Wis. at 613.

62. “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) (emphasis added).

63. Unsurprisingly, the quintessential nature of the right to vote is evident throughout the Wisconsin Constitution. First and foremost, the Constitution explicitly guarantees the right to vote to “[e]very United States citizen age 18 or older,” Wis. Const. art. III, § 1, and it provides that “members of the assembly shall be chosen . . . by the qualified electors,” art. IV, § 4, and the “governor and lieutenant governor shall be elected by the qualified electors of the state,” art. V, § 3. The Constitution further guarantees “inherent rights . . . secure[d] . . . [by] governments . . . deriving their just powers from the consent of the governed.” Wis. Const. 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,” art. I, § 4, specifically a “free government,” art. I, § 22. And it specifically provides for absentee voting. Wis. Const. art. III, § 2. *See also Teigen*, 2022 WI 64, ¶ 22 (Grassl Bradley, J., plurality opinion) (contrasting “Wisconsin elected officials deriv[ing] their just powers

from the consent of the governed” with “tyrants . . . claim[ing] electoral victory via elections” where voters “possess only a hollow right” to vote (internal quotations omitted)).

64. The right to vote is *the* fundamental right under the Wisconsin Constitution. The Wisconsin Supreme Court has recognized that state actions that severely burden fundamental rights, including the right to vote, must be subjected to strict scrutiny. *See Mayo v. Wis. Injured Patients & Fams. Comp. Fund*, 2018 WI 78, ¶ 28, 383 Wis. 2d 1, 914 N.W.2d 678; *Milwaukee Branch of NAACP v. Walker*, 2014 WI 98, ¶ 22, 357 Wis. 2d 469, 851 N.W.2d 262.

65. Thus, this Court must apply strict scrutiny to resolve whether WEC’s guidance on absentee voting, authorized by and interpreting Wisconsin statutory law, violates the fundamental right to vote guaranteed by the Wisconsin Constitution. *Mayo*, 2018 WI 78, ¶ 28 (citing *League of Women Voters of Wis. Educ. Network, Inc. v. Walker*, 2014 WI 97, ¶¶ 139–40, 357 Wis. 2d 360, 851 N.W.2d 302 (Abrahamson, C.J., dissenting) (concluding that the right to vote is fundamental)).

66. To survive strict scrutiny, state action (including the guidance at issue here) must be narrowly tailored to furthering a compelling state interest. *Mayo*, 2018 WI 78, ¶ 28.

67. Wisconsin courts recognize that “[a] compelling interest encompasses ‘only those interests of the highest order’” *State v. Miller*, 196 Wis. 2d 238, 249, 538 N.W.2d 573 (Ct. App. 1995) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972)). “A compelling interest is not just a general interest in the subject matter but the need to apply the regulation without exception to attain the purposes and objectives of the legislation.” *State v. Yoder*, 49 Wis. 2d 430, 438 (1971), *aff’d sub. nom. Wisconsin v. Yoder*, 406 U.S. 205 (1972).

68. Furthermore, “[a] regulation must further the identified state interest that motivated the regulation not merely in theory, but in fact.” *Planned Parenthood of the Heartland v. Reynolds ex rel. State*, 915 N.W.2d 206, 239–40 (Iowa 2018), *overruled on other grounds* 975 N.W.2d 710

(Iowa 2022); *see also State v. Arctic Village Council*, 495 P.3d 313, 324–25 (Alaska 2021) (recognizing that absentee ballot witness requirement was not “effective tool for detecting voter fraud”).

69. To satisfy the narrow tailoring component of strict scrutiny, a law “must be the least restrictive means of achieving” an identified compelling state interest. *State v. Oatman*, 2015 WI App 76, ¶ 12, 365 Wis. 2d 242, 871 N.W.2d 513 (quoting *McCullen v. Coakley*, 573 U.S. 464, 478 (2014)).

FIRST CLAIM FOR RELIEF
Declaratory Judgment under Wis. Stat. §§ 806.04, 227.40
(Absentee Ballot Witness Requirement)

70. The preceding paragraphs are incorporated by reference herein.

71. Wis. Stat. § 806.04(2) provides that any person “whose rights, status or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status or other legal relations thereunder.”

72. Wis. Stat. § 227.40(1) further provides that “the exclusive means of judicial review of the validity of a rule or guidance document shall be an action for declaratory judgment as to the validity of the rule or guidance document.” A “guidance document” means, among other things, any “communication issued by an agency” that “[e]xplains the agency’s implementation of a statute or rule enforced or administered by the agency,” or “[p]rovides guidance or advice with respect to how the agency is likely to apply a statute or rule enforced or administered by the agency, if that guidance or advice is likely to apply to a class of persons similarly affected.” Wis. Stat. § 227.01(3m).

73. A rule or guidance document that violates constitutional provisions must be declared invalid. Wis. Stat. § 227.40(4)(a); *see also Wisconsin Realtors Ass'n v. Pub. Serv. Comm'n of Wisconsin*, 2015 WI 63, ¶ 47, 363 Wis. 2d 430, 867 N.W.2d 364.

74. The Uniform Instructions and the Election Administration Manual constitute “guidance document[s]” within the meaning of Wis. Stat. § 227.01(3m).

75. The Witness Requirement in Wis. Stat. § 6.87(4)(b)1, which is embodied and implemented in the Uniform Instructions and the Election Administration Manual, is facially unconstitutional under Article III of the Wisconsin Constitution.

76. Many Wisconsin voters who rely on absentee ballots to vindicate their right to vote live alone or do not have an eligible witness in their household. Moreover, WEC itself has proposed procedures for complying with the Witness Requirement that would put an absentee voter at heightened risk of having their vote revealed. For example, a voter who slides their ballot under the door to a stranger might end up with a signed witness certification—but also might end up having their ballot revealed or stolen.

77. By requiring absentee voters to vote in the presence of a witness, the Witness Requirement severely burdens their fundamental right to vote, including the right to vote by secret ballot.

78. The Witness Requirement is neither necessary to serving a compelling state interest nor narrowly tailored toward furthering that compelling interest. *Mayo*, 2018 WI 78, ¶ 28.

79. WEC may assert that the purpose of the Witness Requirement is to deter fraud. *See, e.g., Democratic Nat'l Comm. v. Bostelmann*, 451 F. Supp. 3d 952, 978–79 (W.D. Wis. 2020). But there is no evidence that the Requirement actually advances that interest.

80. WEC's suggestions for how persons living alone could satisfy the Witness Requirement at the height of the COVID-19 pandemic in 2020 illustrate how unnecessary the Witness Requirement is. WEC cannot explain how a requirement that can be satisfied by having a delivery person watch through the window while someone marks a ballot could possibly deter fraud. There is no requirement that the voter be known to the witness or that the witness do anything whatsoever to verify the identity of the person marking the ballot; should someone wish to engage in absentee ballot fraud (which all evidence shows is a vanishingly rare phenomenon), they could simply deceive the witness as to their true identity—or even fill out the witness certification themselves.

81. WEC similarly cannot explain how the Witness Requirement is necessary. Wisconsin already employs multiple other methods to deter absentee voter fraud, including absentee ballot application identification, Wis. Stat. § 6.86(1)(ac), (ar), (c), registration requirements, Wis. Stat. § 6.86(1)(a), (2m)(a), and certificate requirements, Wis. Stat. § 6.87(2), as well as various criminal penalties for election fraud, Wis. Stat. §§ 12.13, 12.60. There is no evidence the Witness Requirement bolsters these methods, let alone is required to fill gaps left by them.

82. The Witness Requirement is not necessary and narrowly tailored to achieve any state interest, let alone a compelling one, but instead serves only as an unjustifiable barrier to the exercise of the franchise. The Court should therefore declare that the Witness Requirement is facially unconstitutional under Article III of the Wisconsin Constitution.

SECOND CLAIM FOR RELIEF
Declaratory Judgment under Wis. Stat. §§ 806.04, 227.40
(Drop Box Prohibition)

83. The preceding paragraphs are incorporated by reference herein.

84. To the extent that Wis. Stat. § 6.87(4)(b)1, the Uniform Instructions, and the Election Administration Manual now prohibit the use of ballot drop boxes, they impermissibly burden the right to vote and are therefore facially unconstitutional under Article III, Sections 1 and 2 of the Wisconsin Constitution.

85. By restricting Wisconsin voters' options for returning their absentee ballots and having those ballots properly counted, the Drop Box Prohibition severely burdens the right to vote. Without the opportunity to drop off their absentee ballots at drop boxes, voters must instead rely on the U.S. Postal Service—and its unsecured mailboxes—to deliver their absentee ballot and simply hope that the ballot arrives by election day.

86. The delivery of mail by the U.S. Postal Service is entirely outside the control of voters. And, the Postal Service has experienced significant delays in recent years. Notably, the Postal Service even settled litigation stemming from delays in delivery of ballots. *See* Stipulation & Consent Order, *Democratic Party of Va. v. Veal*, No. 3:21-cv-671-MHL (E.D. Va. Oct. 28, 2021), ECF No. 27; *NAACP v. U.S. Postal Serv.*, No. 20-cv-2295 (EGS), 2020 WL 6469845 (D.D.C. Nov. 1, 2020) (ordering USPS to take steps to ensure the timely delivery of mail-in ballots).

87. In practice, the only way to guarantee timely delivery is to mail the ballot far in advance of election day, effectively moving up the deadline for returning absentee ballots by several days. And even if the ballot does arrive on time, voters who vote using the mail are less likely to have time to avail themselves of the statutory cure procedure should their ballot certificate be defective.

88. Because of the severe burden it places on the right to vote, the Drop Box Prohibition is subject to strict scrutiny, meaning it must be necessary to serving a compelling state interest, and must be narrowly tailored toward furthering that compelling interest. *Mayo*, 2018 WI 78, ¶ 28.

89. The Drop Box Prohibition is not necessary to achieve any state interest, let alone a compelling one. There is not—and has never been—any evidence that the use of secure drop boxes facilitates fraud. Thousands of Wisconsin voters voted using drop boxes in 2020 without incident. Neither the plaintiffs in *Teigen*, nor the court, pointed to anything other than a highly speculative risk of drop box tampering.

90. Even if a hypothetical risk of fraud could suffice to establish the requisite compelling interest, the Drop Box Prohibition is far from narrowly tailored. Any hypothetical risk of drop box tampering could be addressed, as it has been in other states, through video monitoring and placing drop boxes in secure locations in or near government offices. And WEC's pre-*Teigen* guidance permitting drop boxes included security suggestions. Madison, for example, placed drop boxes near fire stations and other secure municipal locations.

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

92. Consequently, Wis. Stat. § 6.87(4)(b)1 as interpreted by *Teigen*, violates the Wisconsin Constitution.

93. The Wisconsin Supreme Court in *Teigen* did not address these constitutional arguments. It relied entirely on a statutory analysis of § 6.87(4)(b)1 to conclude that Wisconsin law does not allow municipal clerks to accept absentee ballots through secure drop boxes.

94. Given the impermissible burden imposed on the right to vote imposed by *Teigen*'s interpretation of § 6.87(4)(b)1, the lack of any state interest justifying the Drop Box Prohibition, and the lack of narrow tailoring, *Teigen* was incorrectly decided. The *Teigen* court failed to consider the constitutional implications of its impermissibly narrow construction of § 6.87(4)(b)1, overlooking its obligation to “avoid interpreting a statute in such a way that would render it unconstitutional when a reasonable interpretation exists that would render the legislation constitutional.” *Am. Family Mut. Ins. Co. v. Wis. Dep’t of Revenue*, 222 Wis. 2d 650, 667, 586 N.W.2d 650 (1998).

95. The Court should therefore declare that § 6.87(4)(b)1, to the extent it prohibits the use of drop boxes, is unconstitutional under Article III, Sections 1 and 2 of the Wisconsin Constitution.

96. In the alternative, the Wisconsin Supreme Court should revisit its decision in *Teigen* and confirm that § 6.87(4)(b)1 allows the use of drop boxes consistent with the statutory text and constitutional principles.

THIRD CLAIM FOR RELIEF
Declaratory Judgment under Wis. Stat. §§ 806.04, 227.40
(Election-Day Cure Deadline)

97. The preceding paragraphs are incorporated by reference herein.

98. The 8 p.m. Election-Day Cure Deadline in Wis. Stat. § 6.87(6), which is embodied and implemented in the Uniform Instructions and the Election Administration Manual, is facially unconstitutional under Article III, Sections 1 and 2 of the Wisconsin Constitution.

99. Voters who properly returned absentee ballots close to election day but who are required to correct and return their certificate envelope as a result of a defect will have no opportunity to correct their envelope in time for it to be received and counted, especially if they relied on a witness who is not readily available.

100. By denying these voters a reasonable opportunity to cure such defects and have their ballots counted, the Election-Day Cure Deadline imposes a severe burden on the fundamental right to vote.

101. The Election-Day Cure Deadline is neither necessary to serving a compelling state interest nor narrowly tailored toward furthering that compelling interest. *Mayo*, 2018 WI 78, ¶ 28.

102. Federal courts have concluded that the relevant federal statutes require only that an election is “consummated” on election day. *Foster v. Love*, 522 U.S. 67, 71 (1997) (holding that “combined actions of voters and officials meant to make a final selection of an officeholder” cannot be consummated *before* election day); *see also Millsaps v. Thompson*, 259 F.3d 535, 546 (6th Cir. 2001); *Voting Integrity Project v. Keisling*, 259 F.3d 1169, 1175 (9th Cir. 2001); *Voting Integrity Project v. Bomer*, 199 F.3d 773, 777 (5th Cir. 2000). Furthermore, these courts did not hold that federal statutes required all “combined actions of voters and officials meant to make a final selection of an officeholder” take place *on* election day. *See Millsaps*, 259 F.3d at 546–47.

103. WEC cannot explain how a requirement that effectively requires a voter to return their absentee ballot several days before the statutory return deadline, in order to ensure they have an opportunity to correct defects if necessary, could possibly ensure timely conclusion of the selection of an officeholder.

104. WEC similarly cannot explain how the Election-Day Cure Deadline is necessary. In fact, it is commonplace that “official action to confirm or verify the results of the election

extends well beyond federal election day.” *Millsaps*, 259 F.3d at 546 n.5. Election officials must, for example, count, certify, and publicly announce the results. *Id.* at 546; *see also Bush v. Gore*, 531 U.S. 98, 116 (2000) (Rehnquist, C.J., Scalia & Thomas, J.J., concurring) (cataloguing administrative actions occurring in Florida after election day to conclude the election process).

105. At the same time, the Election-Day Cure Deadline is not narrowly tailored. Providing a reasonable amount of time between the deadline for returning absentee ballots and the deadline for returning for correcting defects would both ensure that voters have opportunity to correct defects and that election officials are able to timely count ballots and verify election results, without sacrificing voters’ fundamental right to vote at the altar of day-of election results. Such a “system does not foster either of the primary evils identified by Congress as reasons for passing the federal statutes: ‘distortion of the voting process threatened when the results of an early federal election in one State can influence later voting in other States, and . . . the burden on citizens forced to turn out on two different election days to make final selections of federal officers in presidential election years.’” *Bomer*, 199 F.3d at 777 (quoting *Foster*, 522 U.S. at 73).

106. The Election-Day Cure Deadline is not necessary to achieve any state interest, let alone a compelling one. And it is far from narrowly tailored. Instead, it serves only to erect an unnecessary and unjustifiable barrier to the exercise of the franchise. The Court should therefore declare that the current deadline to correct absentee voting defects by mail is unconstitutional under Article III, Sections 1 and 2 of the Wisconsin Constitution.

FOURTH CLAIM FOR RELIEF
Declaratory Judgment under Wis. Stat. § 806.04
(Wis. Stat. § 6.84)

107. The preceding paragraphs are incorporated by reference herein.

108. Wis. Stat. § 6.84 seeks to establish absentee votes as being less valuable and worthy of protection than in-person ballots cast on election day.

109. The Wisconsin Constitution protects the right to vote and authorizes the legislature to “[p]rovid[e] for absentee voting,” Wis. Const. art. III, § 2.

110. Absentee voting is a method of exercising the right to vote—as is voting in person on election day. Nothing in the text of the Wisconsin Constitution permits the legislature to treat absentee voting as deserving of less protection than any other method of voting.

111. The Supreme Court observed in *Teigen*: “Legislative Policy Directs Us to Take a Skeptical View of Absentee Voting.” 2022 WI 64, ¶¶ 52–53 (Grassl Bradley, J., lead opinion). Unfortunately, the Supreme Court failed to recognize that the Constitution does not allow the legislature to impose such a skeptical view of a widely-used method of voting.

112. The Court should therefore declare that Wis. Stat. § 6.84 violates the Wisconsin Constitution by impermissibly differentiating between votes cast in person and votes cast by absentee ballot in a manner which unnecessarily risks disenfranchising absentee voters.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request the following relief:

1. A declaratory judgment that:
 - a. The Uniform Instructions for Wisconsin Absentee Voters (Form EL-128) and the Election Administration Manual are invalid to the extent that they impose a witness requirement for absentee ballots;
 - b. The Uniform Instructions for Wisconsin Absentee Voters (Form EL-128) and the Election Administration Manual are invalid to the extent they prohibit the use of drop boxes for the return of absentee ballots;
 - c. The Uniform Instructions for Wisconsin Absentee Voters (Form EL-128) and the Election Administration Manual are invalid to the extent they require a voter

to correct defects on their absentee ballot certificate by 8 p.m. on election day;
and

- d. The underlying statutory provisions violate the Wisconsin Constitution.
2. A declaratory judgment that Wis. Stat. § 6.84 violates the Wisconsin Constitution; and
3. Such other relief as the Court deems appropriate.

Dated: July 20, 2023

Electronically signed by Diane M. Welsh

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*Application for admission *pro hac vice*
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