



May 13, 2024

Via Electronic Submission

Attorney General Joshua L. Kaul
Wisconsin Department of Justice
P.O. Box 7857
Madison, Wis. 53707-7857

Re: Request for Legal Opinion: Interpreting Article III, § 7(2) of the Wisconsin Constitution

Dear Attorney General Kaul,

Thank you for your consideration of this comment regarding the Dane County Corporation Counsel's request for a formal opinion interpreting Article III, § 7(2) of the Wisconsin Constitution.

Law Forward is a nonprofit law firm and advocacy organization dedicated to preserving fundamental democratic principles, reviving Wisconsin's traditional commitment to open government, and promoting a progressive vision for the future.

Common Cause Wisconsin is a nonpartisan, nonprofit citizen's lobby organization working to create open, honest, and accountable government that serves the public interest; promote equal rights, opportunity, and representation for all; and empower all people to make their voices heard in the political process.

Wisconsin Faith Voices for Justice is a statewide, nonpartisan, interfaith education and advocacy organization. We connect and empower faith communities and individuals to work for the common good and a life of dignity for everyone. We advocate for change so that all individuals and families can thrive socially, prosper economically, and participate fully in civil society. We intentionally build bridges across faith communities and draw on the collective wisdom, courage, and strength of our various faith traditions.

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Leaders Igniting Transformation (LIT) is a Black and Brown-led independent nonprofit. Founded in 2017, LIT organizes young people to build independent political power for social, racial, and economic justice. We engage in values-based issues and electoral organizing, direct action, public policy advocacy, and leadership development.

The Wisconsin Democracy Campaign (“WDC”) is a nonpartisan and nonprofit public-interest watchdog group. WDC is working for a real democracy that allows the common good to prevail over narrow interests. Its work includes defending against anti-voter legislation, identifying and advocating against efforts to restrict access to voting and to suppress the right to vote, and championing efforts to make Wisconsin a national leader in election security, accuracy, and accessibility.

The ACLU of Wisconsin Foundation is a nonprofit, nonpartisan, private organization, dedicated to defending the civil rights and liberties of all Wisconsinites.

The Wisconsin Fair Maps Coalition includes nonpartisan, c(3) pro-democracy organizations working for a permanent independent, nonpartisan redistricting process, a fair and accountable judiciary, and equal access to the ballot for all in Wisconsin.

All Voting is Local (All Voting) is a 501(c)(3), nonpartisan, multi-state organization that fights against state and local voting policies that silence Americans’ voices, particularly for Black, Brown, Native American, and other historically marginalized communities—not just in election years but every year.

Fair Elections Center is a national, nonpartisan voting rights and elections reform 501(c)(3) organization based in Washington, D.C.

The undersigned agree with Dane County Corporation Counsel that interpreting Article III, § 7(2) raises novel issues of statewide importance and warrants guidance to assist election officials, voters, and other interested parties in the crucial work of maintaining Wisconsin’s commitment to free, safe, and secure elections. We explain why this provision must be read consistent with other guarantees of the Wisconsin Constitution, particularly its fundamental commitment to democratic values, the right to vote, and the right to participate in representative government. Wisconsin law already comprehensively governs who may administer an election. The new amendment should not be read to substantively alter these rules to impede the right to vote, or chill individuals or advocacy organizations from exercising their rights.

I. The Right to Vote.

The right to vote is enshrined in the Wisconsin Constitution, and this new amendment should be read consistent with that guarantee. An interpretation of Article III, § 7(2) that interferes with the work of election administrators and the rights of civil society could create conditions where voters

face barriers to exercising this fundamental right, and this must be avoided. Members of our Supreme Court have recently described the right to vote as “a sacred right of the highest character,” “fundamental,” and “preservative of all rights.” *League of Women Voters of Wis. Educ. Network, Inc. v. Walker*, 2014 WI 97, ¶72, 357 Wis. 2d 360, 851 N.W.2d 302 (Abrahamson, C.J., dissenting) (citing *State v. Phelps*, 144 Wis. 1, 15, 128 N.W. 1041 (1910)); *Jefferson v. Dane Cnty.*, 2020 WI 90, ¶51, 394 Wis. 2d 602, 951 N.W.2d 556 (Bradley, A.W., concurring in part); Order, *O’Bright v. Lynch*, No. 2020AP1761-OA, ¶¶1–2, 11 (Roggensack, C.J., concurring). Expressing this right is “the hard work of democracy.” *Teigen v. Wisconsin Elections Comm’n*, 2022 WI 64, ¶151, 403 Wis. 2d 607, 976 N.W.2d 519 (Hagedorn, J., concurring).

Our state constitution enshrines the right to vote repeatedly:

[T]he right to vote is... guaranteed by the declaration of rights and by section 1, art. 3, of the Constitution. It has an element other than that of mere privilege. It is guaranteed both by

the Bill of Rights, and the exclusive instrument of voting power contained in section 1, art. 3, of the Constitution, and by the fundamentally declared purpose of government; and the express and implied inhibitions of class legislation, as well. Such declared purpose and the declaration of rights, so far as they go, and the equality clauses,—constitute inhibitions of legislative interference by implication, and with quite as much efficiency as would express limitations, as this court has often held.

Phelps, 128 N.W. at 1046. The right to vote “is a right which has been most jealously guarded and may not under our Constitution and laws be destroyed or even unreasonably restricted.” *State v. Cir. Ct. for Marathon Cnty.*, 178 Wis. 468, 190 N.W. 563, 565 (1922).

The fundamental right to vote is not merely an individual liberty, but a core tenet in the concept of self-governance at the heart of our constitution. The first section of our Constitution holds, “All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; *to secure these rights, governments are instituted, deriving their just powers from the consent of the governed.*” Wis. Const. art. I, § 1 (emphasis added). As our Supreme Court described over 90 years ago: “[D]emocracy goes forward by great leaps and bounds, supported by the franchises of a free people.” *Kohler*, 200 Wis. 518, 228 N.W. 895, 913 (1930).

As legal scholars Miriam Seifter and Jessica Bulman-Pozen have explained, the Constitution’s commitment to democratic self-governance is inherent in its basic structure: “All state constitutions include not only the right to vote but also additional protections to safeguard popular participation in and control over elections. For instance, they guarantee rights to free, fair, and secure elections, rights against interference in voting, and more. Together these clauses undergird a powerful state constitutional commitment to democracy.”¹ As the same scholars described: “In guaranteeing a right to vote, requiring popular election of numerous government actors, limiting

¹ Jessica Bulman-Pozen & Miriam Seifter, *State Constitutional Rights and Democratic Proportionality*, 123 Colum. L. Rev. 1855, 1916 (Nov. 2023).

terms of office, and parsing responsibilities among government actors, these constitutions place the people themselves above government.”²

The ability of the people to do the “hard work of democracy” depends in no small part on the ability of election officials, from the Wisconsin Elections Commission to the “small army of local election officials” who are charged with carrying out much of the work of administering elections in our state. *State ex rel. Zignego v. Wisconsin Elections Comm’n*, 2021 WI 32, ¶13, 396 Wis. 2d 391, 957 N.W.2d 208. With vanishingly few exceptions, those officials perform their work diligently, assiduously, and in accordance with law. But they do not, and cannot, do it alone. In order to administer elections in Wisconsin, clerks necessarily work with any number of technical experts, attorneys, and others who assist election officials in performing their duties. As Dane County’s request reveals, however, an expansive reading of Article III, § 7(2)—one that would have the effect of either (1) limiting the definition of who is an election official or (2) broadening the definition of what is an election “task” beyond those duties specifically described in Chapters 5 through 12 of the statutes—would interfere with the ability of officials to administer free and fair elections,³ and thereby damage the rights of all voters to successfully participate in our democracy and the “collective interest in accurate, well-run elections.”⁴ Such an overbroad reading of Article III, § 7(2) would be contrary to the basic interpretive requirement that the Constitution should be read in harmony with itself. *See Lumsden v. Cross*, 10 Wis. 282, 287–88 (1860) (“It is our duty to give such a construction to the constitution as will make it consistent with itself, and will harmonize and give effect to all its various provisions.”). Any court, agency, or official interpreting this provision should be mindful of this potential conflict and read the provision in such a way as to ensure the right to vote by ensuring that officials are able to continue successfully running Wisconsin’s elections and, in so doing, safeguard and promote the fundamental right to vote and democratic governance the Wisconsin Constitution guarantees.

II. The Right to Organize and Petition

Deeply entwined with the right to vote are the rights to speak, assemble, and petition the government; Article III, § 7(2) should not be read to limit these bedrock rights. Wisconsin’s Constitution guarantees that “every person may freely speak, write and publish his sentiments on all subjects” and that “no laws shall be passed to restrain or abridge the liberty of speech or of the

² Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 Mich. L. Rev. 859, 880 (2021)

³ In public reporting around this amendment, clerks have expressed this concern. For example, prior to passage, Oconomowoc City Clerk Diane Coenen said, “We’re trying to do our job. We’re trying to facilitate an election securely, fairly and accurately ... Our goal is to make sure that every person who wants to vote and is eligible to vote gets to vote. And then we have all this back and forth, back and forth. It’s very concerning and disheartening.” Alexander Shur and Jack Kelly, *Wisconsin ballot questions on election administration are too vague, officials say*, Wisconsin Watch (Mar. 29, 2024), <https://wisconsinwatch.org/2024/03/wisconsin-election-ballot-amendments-constitution-voting-clerks/>.

⁴ Bulman-Pozen & Seifter, *supra* note 1, at 1916.

press.” Wis. Const. art. I, § 3. It also guarantees that “[t]he right of the people peaceably to assemble, to consult for the common good, and to petition the government, or any department thereof, shall never be abridged.” *Id.*, § 4. Together, these clauses define Wisconsinites’ free-speech and association rights and “without any doubt, [] clearly prohibit[] the state from acting to restrain or abridge the liberty of speech.” *Jacobs v. Major*, 139 Wis. 2d 492, 504, 407 N.W.2d 832 (1987). The rights to assemble and petition preexist both the Wisconsin and U.S. Constitutions, and are “inherent right[s] of the citizen under all free governments.” *In re Stolen*, 193 Wis. 602, 216 N.W. 127, 128 (1927).

Individuals and groups throughout the state, including the undersigned, regularly exercise their rights to assemble and petition around elections. This work includes, but is not limited to:

- Providing rides to the polls on election day;
- Providing voter education;
- Operating telephone and text help lines to provide nonpartisan, accurate information about voting laws and procedures;
- Assisting voters with disabilities in exercising their right to vote; and
- When needed, helping to recruit pollworkers to ensure that polling locations and central counts are sufficiently staffed to meet voters’ needs.

As Dane County’s request ably demonstrates, the text of Article III, § 7(2), properly read, should not affect the right of anyone to engage in this type of core, protected political activity. Even proponents of the amendment denied it should have this type of effect.⁵ We encourage you to issue guidance that ensures that Article III, § 7(2) does not impair, and will not be read to infringe upon, the rights of all Wisconsinites to do the critical work of our democracy.

It is deeply unfortunate that the Legislature has continued to propose vague and confusingly worded amendments to the fundamental charter of our state government, and then to leave it to private litigants, government officials, state agencies, the courts, and others to pick up the pieces. We appreciate your office’s prompt consideration of this request for additional guidance.

Sincerely,

Daniel S. Lenz
Staff Counsel, Law Forward

⁵ Andrew Bahl, *Wisconsin constitutional amendments pass, but questions remain*, Cap Times (Apr. 2, 2024), https://captimes.com/news/elections/wisconsin-constitutional-amendments-pass-but-questions-remain/article_9ceeda9a-f12c-11ee-8d68-cbded6faf1c7.html (citing a representative of the Wisconsin Institute for Law and Liberty, which supported the amendment, who indicated that common, election-related activities would still be allowed and that “And we won’t see things like, you know, poll workers, the League of Women Voters, for example, being banned from participating in the process as they do now.”).

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Jay Heck

Executive Director,

Common Cause Wisconsin

Rabbi Bonnie Margulis

Executive Director,

Wisconsin Faith Voices for Justice

Jon Sherman

Litigation Director,

Fair Elections Center

Nick Ramos

Executive Director,

Wisconsin Democracy Campaign

Dr. Melinda Q. Brennan

Executive Director,

American Civil Liberties Union of Wisconsin
Foundation

Iuscely Flores

Co-organizing Director,

Wisconsin Fair Maps Coalition

Sam Liebert

Wisconsin State Director,

All Voting is Local

Amanda Avalos

Co-Executive Director,

Leaders Igniting for Transformation