

FILED
08-07-2026
CIRCUIT COURT
DANE COUNTY, WI
2025CV001438

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 12

DANE COUNTY

UNITED WISCONSIN, et al.,

Plaintiffs,

v.

Case No. 2025CV1438

Code: 30701

Declaratory Judgment

WISCONSIN ELECTIONS COMMISSION,

Defendant.

**PLAINTIFFS' REPLY TO DEFENDANT'S RESPONSE TO PLAINTIFFS'
PROPOSED FINDINGS OF UNDISPUTED MATERIAL FACTS**

1. Plaintiff United Wisconsin is a nascent political party that seeks to represent centrist voters by advocating for the rule of law, public education, conservation of Wisconsin's natural resources, and small businesses. (Andrews Decl., ¶5, Schultz Decl., ¶4, and Mahoney Decl., ¶4)

Defendant's Response No. 1: Undisputed.

Plaintiffs' Reply No. 1: Undisputed.

2. United Wisconsin has all the ingredients necessary to sustain its growth as a political party except for one: it cannot nominate its preferred candidates or any candidates who have a chance at winning elections. (Andrews Decl., ¶9; see also id., ¶10)

Defendant's Response No. 2: Objection. The cited material lacks a sufficient foundation for the proposition asserted. Subject to and not waiving this objection, the proposed fact is disputed. Defendant's experts opine as follows: "Ultimately, fusion voting should not be expected to lead to more representative candidates. It is not likely to allow a third party candidate to successfully contest general elections. It is not likely to incentivize the creation of centrist parties. It is not likely to send meaningful signals to voters. It is not likely to provide useful information from vote shares. It is not likely to lead to more moderate candidates winning partisan primaries. It offers the illusion of greater choice while leaving the binary reality of the two-party system intact." (Lodahl Decl. Ex. A:45 ("Atkinson-Tahk Report").) This dispute is immaterial, however, and does not prevent the Court from entering summary judgment in favor of Defendant.

Plaintiffs' Reply No. 2: Defendant fails to dispute the proposed fact. The proposed fact relies on Plaintiff Andrews' testimony as to her personal experience working in politics and founding United Wisconsin. The proposed fact does not predict the effect of relegalizing fusion voting in Wisconsin; it merely illustrates the effect of the fusion ban on United Wisconsin's nominations. Defendant's proffered quotation from its experts' report does not genuinely dispute Plaintiff Andrews' statement that United Wisconsin currently cannot nominate its preferred candidates. Plaintiffs refer the Court to Daniel Cantor's declaration (Dkt. 29 at 3–4, 7 (Cantor Decl., ¶¶12–16, 27–28)), for further support of this proposed fact.

3. Fusion voting would allow United Wisconsin to nominate viable candidates on the ballot. (See Andrews Decl., ¶9)

Defendant's Response No. 3: Objection. The cited evidentiary material does not support the proposed fact; therefore, the Court should not consider it. Subject to and not waiving this objection, and if the proposed fact were supported by evidence such that the Court could consider it, Defendant would dispute the proposed fact. (*See* Response to Proposed Fact No. 2.) This dispute is immaterial, however, and would not prevent the Court from entering summary judgment in favor of Defendant.

Plaintiffs' Reply No. 3: Defendant fails to dispute the proposed fact. Plaintiff Andrews' statement that United Wisconsin would be able to grow into a successful political party if only it could nominate its preferred candidate—a candidate already nominated by one of the major political parties and therefore having a reasonable chance at winning an election—supports the proposed fact, because in nearly all major elections, only major party candidates are viable candidates. Plaintiffs refer the Court to Plaintiff Andrews' declaration (Dkt. 30 at 2–3 (Andrews Decl., ¶¶10–14)), for further support of this proposed fact.

4. Plaintiff Kris Andrews is the Executive Director of United Wisconsin. (Andrews Decl., ¶6)

Defendant's Response No. 4: Undisputed.

Plaintiffs' Reply No. 4: Undisputed.

5. Plaintiffs Dale Schultz and Dave Mahoney co-founded United Wisconsin. (Schultz Decl., ¶4; Mahoney Decl., ¶4)

Defendant's Response No. 5: Undisputed.

Plaintiffs' Reply No. 5: Undisputed.

6. Andrews has worked in Wisconsin politics for over 40 years. (Andrews Decl., ¶1) During her career, Andrews has observed the parties grow more polarized and less representative of the electorate. (Id., ¶2)

Defendant's Response No. 6: The first sentence of this proposed fact is undisputed. Defendant objects to the remainder of the proposed fact because the evidentiary material does not support it; therefore, the Court should not consider it.

Plaintiffs' Reply No. 6: Defendant fails to dispute the proposed fact. The second sentence of this proposed fact relies on Plaintiff Andrews' testimony as to her personal experience working in politics. Plaintiffs refer the Court to Daniel Cantor's declaration (Dkt. 29 at 3–5 (Cantor Decl., ¶¶12, 14, 21), and Dr. Drutman's report (Dkt. 28 at 5–20 (Drutman rep. at 3–17)), for further support of this proposed fact.

7. Andrews no longer identifies with either of the major political parties, nor does she find that either political party addresses the issues that matter to her—public education, ethics and transparency in government, rule of law, and conservation of natural resources. (Andrews Decl., ¶3)

Defendant's Response No. 7: Undisputed.

Plaintiffs' Reply No. 7: Undisputed.

8. Plaintiffs David Deininger and Lee Rasch are individual Wisconsin voters who feel unrepresented by both the Democratic and Republican Parties. (Deininger Decl., ¶3; Rasch Decl., ¶¶3–5)

Defendant's Response No. 8: Undisputed.

Plaintiffs' Reply No. 8: Undisputed.

9. Fusion nominations are cross-nominations between parties. Fusion voting is the practice of allowing candidates to accept nominations from, and then be listed on the ballot under, more than one political party. (Burden Decl., Exh. A [hereinafter "Burden rep."] at 1; Drutman Decl., Exh. A [hereinafter "Drutman rep."] at 1)

Defendant's Response No. 9: The first sentence of this proposed fact is undisputed. The second sentence is disputed in part. The description of being "listed on the ballot under, more than

one political party” refers only to disaggregated fusion voting, but aggregated fusion voting is another way to display fusion nominations. (Atkinson-Tahk Report 5–6.) With aggregated fusion, the candidate name would be listed once on the ballot, along with a listing of the candidate’s nominating parties. (*Id.*) This dispute is immaterial, however, and does not prevent the Court from entering summary judgment in favor of Defendant. Defendant does not dispute that fusion voting is a system in which multiple parties may nominate the same candidate and these multiple nominations are reflected on the ballot. (*See id.* at 5.)

Plaintiffs’ Reply No. 9: Defendant fails to dispute the proposed fact. In their Complaint and throughout this litigation, Plaintiffs have defined “fusion voting” as “the practice of allowing candidates to accept nominations from, and then be listed on the ballot under, more than one political party,” that is, as disaggregated fusion. Defendant disputes Plaintiffs’ Proposed Fact Number 9 to the extent that “aggregated fusion voting” may differ from this definition. Plaintiffs refer to “disaggregated fusion voting” and “fusion voting” interchangeably, and where Plaintiffs do not refer to “disaggregated” fusion voting as defined above, they use the term “aggregated fusion voting” as defined in Defendant’s Response. Plaintiffs refer the Court to the reports of Dr. Drutman (Dkt. 28 at 51 n.53 (Drutman rebuttal at 21 n.53)) and Dr. Burden (Dkt. 26 at 5–8 (Burden rep. at 2–5)) for further support of this proposed fact.

10. Fusion voting is currently permitted in New York, Connecticut, and Mississippi. (Burden Decl., Exh. B [hereinafter “Burden rebuttal”] at 7; Drutman rep. at 1)

Defendant’s Response No. 10: Disputed. This proposed fact omits Oregon and Vermont, which allow aggregated fusion voting. (Atkinson-Tahk Report 13.) This dispute is immaterial, however, and does not prevent the Court from entering summary judgment in favor of Defendant.

Plaintiffs’ Reply No. 10: Undisputed. Plaintiffs incorporate their reply in support of Proposed Fact Number 9.

11. A fledgling political party must demonstrate a substantial level of public support before the state will grant it ballot access. (Declaration of Daniel Cantor [hereinafter “Cantor Decl.”], ¶27)

Defendant’s Response No. 11: Objection. The cited material lacks a sufficient foundation for the proposition asserted. The proposed fact is also vague because it does not define “ballot access,” a concept that may differ from state to state. Subject to and not waiving these objections, the proposed fact is undisputed.

Plaintiffs' Reply No. 11: Defendant fails to dispute this proposed fact. The Court should overrule Defendant's foundation objection, as the cited declaration lays the appropriate foundation for the testimony. In particular, the proposed fact is supported by Daniel Cantor's declaration (Dkt. 29 at 1–2 (Cantor Decl., ¶¶2–6)), based on Mr. Cantor's years of experience in party politics and establishing new political parties.

12. Once a minor political party has ballot access, it will generally create a “screening committee” to review the records of and hold interviews with prospective nominees of the two major parties. (Cantor Decl., ¶28)

Defendant's Response No. 12: Objection. The cited material lacks a sufficient foundation for the proposition asserted. The proposed fact is also vague because it does not define “ballot access,” a concept that may differ from state to state. Subject to and not waiving these objections, the proposed fact is undisputed.

Plaintiffs' Reply No. 12: Defendant fails to dispute this proposed fact. The Court should overrule Defendant's foundation objection, as the cited declaration lays the appropriate foundation for the testimony. In particular, the proposed fact is supported by Daniel Cantor's declaration (Dkt. 29 at 1–2 (Cantor Decl., ¶¶2–6)), based on Mr. Cantor's years of experience in party politics and establishing new political parties.

13. The screening committee assists the minor party in determining which (if any) of the major party nominees it wishes to cross-nominate, at which point the minor party needs to collect nominating signatures to nominate that candidate for placement on the minor-party's ballot line. (Cantor Decl., ¶29)

Defendant's Response No. 13: Objection. The cited material lacks a sufficient foundation for the proposition asserted. Subject to and not waiving this objection, the proposed fact is disputed. The proposed fact assumes that all minor parties would engage in cross-nomination as a matter of course, an assumption that is not supported by the cited evidentiary material. Some prominent minor parties like the Green Party oppose fusion voting. (Atkinson-Tahk Report 16.) This dispute is immaterial, however, and does not prevent the Court from entering summary judgment in favor of Defendant.

Plaintiffs' Reply No. 13: Defendant fails to dispute the proposed fact. As with Proposed Fact Number 12, this proposed fact relies on Daniel Cantor's assertion that minor parties “typically” conduct a process like the one he describes. (Cantor Decl., ¶28 (Dkt. 29 at 7 (“Fusion parties typically follow a conventional playbook ... ”))) Plaintiffs acknowledge that minor parties do not

always engage in cross-nomination, hence the proposed fact including the terms “if any.”

14. If the minor party’s nominating paperwork is approved by the relevant election authorities, and the candidate accepts the minor-party’s nomination, the candidate is then listed on the minor party’s ballot line, as well as on the ballot line of the major party that has also nominated the candidate. (Cantor Decl., ¶¶30–32)

Defendant’s Response No. 14: Objection. The cited material lacks a sufficient foundation for the proposition asserted. Subject to and not waiving this objection, the proposed fact is disputed. The description of being “listed on the minor party’s ballot line, as well as on the ballot line of the major party that has also nominated the candidate” refers only to disaggregated fusion voting, but aggregated fusion voting is another way to display fusion nominations. (Atkinson-Tahk Report 5–6.) For example, Oregon and Vermont allow aggregated fusion voting. (*Id.* at 13.) This dispute is immaterial, however, and does not prevent the Court from entering summary judgment in favor of Defendant.

Plaintiffs’ Reply No. 14: Defendant fails to dispute the proposed fact. Plaintiffs reiterate and incorporate their reply in support of Proposed Fact Number 9. Plaintiffs acknowledge that aggregated fusion voting does not involve multiple, independent party lines on the ballot, but that is not relevant because this case does not involve aggregated fusion. The Court should overrule Defendant’s foundation objection, as the cited declaration lays the appropriate foundation for the testimony. In particular, the proposed fact is supported by the testimony of Daniel Cantor based on his years of experience in party politics and establishing new parties. (Dkt. 29 at 1–2 (Cantor Decl., ¶¶2–6))

15. The votes are counted and reported for each ballot line separately, and then the total votes for each candidate are aggregated to determine the winner of the election. (Cantor Decl., ¶¶32, 35–37)

Defendant’s Response No. 15: Objection. The cited material lacks a sufficient foundation for the proposition asserted. Subject to and not waiving this objection, the proposed fact is disputed. The proposed fact assumes multiple ballot lines for each candidate and thus refers only to disaggregated fusion voting. Aggregated fusion voting is another way to display fusion nominations. (Atkinson-Tahk Report 5–6.) Further, to the extent that this proposed fact implicitly assumes that this is how fusion voting would proceed in Wisconsin if its anti-fusion statutes are invalidated, Defendant disputes the assumption: existing law does not specify whether Wisconsin ballots should use an aggregated or disaggregated arrangement, and moreover, Wisconsin’s existing election technology may not be compatible with fusion voting. (Kehoe Decl. ¶¶ 4, 6, 29–

31.) These disputes are immaterial, however, and do not prevent the Court from entering summary judgment in favor of Defendant.

Plaintiffs' Reply No. 15: Defendant fails to dispute the proposed fact. Plaintiffs reiterate and incorporate their reply in support of Proposed Fact Number 9. Plaintiffs acknowledge that aggregated fusion voting typically does not involve counting or reporting votes under each cross-nominated party line separately, but that is not relevant because this case does not involve aggregated fusion.

The Court should overrule Defendant's foundation objection, as the cited declaration lays the appropriate foundation for the testimony. In particular, the proposed fact is supported by the testimony of Daniel Cantor based on his years of experience in party politics and establishing new parties. (Dkt. 29 at 1–2 (Cantor Decl., ¶¶2–6))

Defendant's dispute as to Wisconsin's existing election technology being compatible with fusion voting is immaterial to this proposed fact, which merely offers an illustration of how fusion voting works.

16. By engaging in fusion, the minor party builds political power and influence; this is true in circumstances where the candidate's winning margin is attributable to the minor party's ballot line and also in circumstances where the minor party's ballot line delivers fewer votes than the margin of victory. (Cantor Decl., ¶¶35–36)

Defendant's Response No. 16: Objection. The cited evidentiary material does not support the proposed fact; therefore, the Court should not consider this proposed fact.

Subject to and not waiving this objection, and if the proposed fact were supported by evidence such that the Court could consider it, Defendant would dispute the proposed fact. Defendant's experts explain:

For example, if a candidate wins by 1,000 votes and received 5,000 votes on a minor party line, advocates claim the minor party "provided the margin of victory." This reasoning is fundamentally flawed because it confuses *where* a vote was recorded with *why* it was cast. Election returns tell us which line a voter selected, but they cannot tell us what that voter would have done in a world without fusion.

....

Because we cannot observe the alternative reality where fusion was not used, we cannot measure the "causal effect" of the minor party line. Treating every vote on a fusion line as a vote 'delivered' by that party, and assuming the candidate

would have lost those votes otherwise, is a logical error that misjudges the influence of minor parties.

(Atkinson-Tahk Report 40.) This dispute is immaterial, however, and does not prevent this Court from entering summary judgment in favor of Defendant.

Plaintiffs’ Reply No. 16: Undisputed in part and disputed in part. The excerpted material does not support the dispute. Defendant’s purported dispute is limited to the causal relationship between votes cast on the minor party line and the margin of victory in a given election. Defendant does not articulate a dispute beyond the causal aspect of this proposed fact. The Court should deem at least the rest of the proposed fact—namely, that minor parties are able to build political power and influence when they cross-nominate candidates both in elections where the votes cast on their ballot line are greater than the margin of victory and in elections where the votes cast on their ballot line are fewer than the margin of victory—admitted.

The disputed portion of this proposed fact—the causal element—is immaterial for purposes of summary judgment. But even if it were material, Plaintiffs have adduced evidence that the availability of fusion affects voter behavior by allowing voters to support a minor party without risking the “spoiler” effect, creating incentives and thereby encouraging votes on the minor party’s ballot line and increasing that party’s political power and influence. In fact, Plaintiffs aver to their willingness to vote for candidates on a third-party line specifically in uncontested affidavits. (*See also* Dkt. 28 at 28 (Drutman rep. at 25); Dkt. 28 at 43, 52–54 (Drutman rebuttal at 13, 22–24); Dkt. 29 at 2–4, 6, 10 (Cantor Decl., ¶¶9, 12–13, 16, 23, 37); Dkt. 30 at 2–3 (Andrews Decl., ¶¶6, 14))

17. Cross-party coalition-building has a long history in Wisconsin politics, from the time of statehood. (Disch Decl., Exh. A [hereinafter “Disch rep.”] at 1; accord Disch Decl., Exh. B [hereinafter “Disch rebuttal”] at 3)

Defendant’s Response No. 17: Undisputed for purposes of summary judgment.

Plaintiffs’ Reply No. 17: Undisputed.

18. “[C]ross-party coalition building” in all its forms, including electoral fusion, “was a defining practice of Wisconsin politics from [the state’s] beginnings.” (Disch rep. at 9; see also Disch rep. at 1, 4, 8–9, 15, 19–30, 34)

Defendant's Response No. 18: Objection. The proposed fact is vague because “electoral fusion” is not defined. Subject to and not waiving this objection, to the extent that the term “electoral fusion” means or includes “fusion voting,” the proposed fact is disputed. Fusion voting didn’t occur until the introduction of the Australian ballot. (Atkinson-Tahk Report 56–57.) This dispute is immaterial, however, and does not prevent the Court from entering summary judgment in favor of Defendant. To the extent that the term “electoral fusion” means “fusion nominations” only (*see* definition in Proposed Fact No. 9), the proposed fact is undisputed.

Plaintiffs’ Reply No. 18: Defendant fails to dispute the proposed fact. Plaintiffs’ expert Professor Disch demonstrates that fusion voting occurred in Wisconsin from the earliest years of statehood. (Dkt. 27 at 14 (Disch rep. at 11)) Defendant’s experts do not challenge that history; in fact, they praise Professor Disch’s work. (Dkt. 25 at 94 (Atkinson-Tahk rep. at 55)) Further, notwithstanding Defendant’s preference for the term “fusion nominations” over the term “fusion voting,” Plaintiffs use the term “fusion voting” as defined in their Complaint: “multiple parties [being able to] nominate the same candidate for a public office.” (Dkt. 2 at 5 (Compl., ¶3))

19. Fusion nominations were common in the final third of the 19th Century, typically involving cooperation between a minor party and a major party but occasionally involving cooperation between the major parties. (Disch rep. at 6 (quoting Howard A. Scarrow, Duverger’s Law, Fusion, and the Decline of American “Third” Parties, 39 W. Pol. Q. 634, 634 (Dec. 1986)))

Defendant's Response No. 19: Undisputed.

Plaintiffs’ Reply No. 19: Undisputed.

20. The 19th Century in Wisconsin “was a period of fierce partisanship, during which many voters were unwilling to ally themselves even symbolically with another party by voting on its ballot line.” (Disch rebuttal at 17 (internal quotation marks omitted))

Defendant's Response No. 20: Undisputed.

Plaintiffs’ Reply No. 20: Undisputed.

21. Fusion was a core practice for labor-related movements and more reform-minded political groups like the Reform Party, the Greenback Party, the Labor Party, and the People’s Party. (Disch rep. at 22–30)

Defendant's Response No. 21: Objection. The proposed fact is vague because it doesn’t define the term “[f]usion.” Subject to and not waiving that objection, to the extent the term “[f]usion” means “fusion nominations,” no dispute. To the extent the term “[f]usion” means or

includes “fusion voting,” Defendant disputes, because fusion voting didn’t occur until the introduction of the Australian ballot. (Atkinson-Tahk Report 56–57.) This dispute is immaterial, however, and does not prevent the Court from entering summary judgment in favor of Defendant.

Plaintiffs’ Reply No. 21: Defendant fails to dispute the proposed fact. As to Defendant’s vagueness objection, Plaintiffs use the term “fusion candidacies” to mean campaigns involving fusion nominations. Further, however irrelevant, Defendant’s dispute that “fusion voting didn’t occur until the introduction of the Australian ballot” is not supported by the evidence. Professor Disch demonstrates that fusion voting, as defined in Plaintiffs’ Complaint, occurred in Wisconsin from the earliest years of statehood. (Dkt. 27 at 14 (Disch rep. at 11); Dkt. 2 at 5 (Compl., ¶3))

22. Wisconsin elections included fusion candidacies in at least 1850, 1851, 1853, 1873, 1878, 1886, 1887, 1894, 1895, and 1896.

Defendant’s Response No. 22: Objection. The proposed fact is vague because it doesn’t define “fusion candidacies.” Subject to and not waiving that objection, to the extent that “fusion candidacies” means “fusion nominations,” no dispute. To the extent that “fusion candidacies” means candidates elected via “fusion voting,” Defendant disputes, because fusion voting didn’t occur until the introduction of the Australian ballot. (Atkinson-Tahk Report 56–57.) This dispute is immaterial, however, and does not prevent the Court from entering summary judgment in favor of Defendant.

Plaintiffs’ Reply No. 22: Defendant fails to dispute the proposed fact. As to Defendant’s vagueness objection, Plaintiffs use the term “fusion candidacies” to mean campaigns involving fusion nominations. Further, however irrelevant, Defendant’s dispute that “fusion voting didn’t occur until the introduction of the Australian ballot” is not supported by the evidence. Professor Disch demonstrates that fusion voting, as defined in Plaintiffs’ Complaint, occurred in Wisconsin from the earliest years of statehood. (Dkt. 27 at 14 (Disch rep. at 11); Dkt. 2 at 5 (Compl., ¶3))

23. The tradition would have continued but for the Wisconsin Legislature adopting a bill in 1897 to remove the nation’s only express statutory provision protecting fusion and replace it with a fusion ban. (Disch rep. at 30–31; Disch rebuttal at 23–26)

Defendant’s Response No. 23: Objection. The cited evidentiary material does not support the proposed fact; therefore, the court should not consider it.

Subject to and not waiving this objection, and if the proposed fact were supported by evidence such that the Court could consider it, Defendant would dispute the proposed fact. The assertion that “[t]he tradition would have continued” but for the 1897 legislation is a historical counterfactual that would be impossible to reconstruct with certainty, even if Plaintiffs’ experts had tried. As Defendant’s experts explain: “[T]hird-party fragility was a recurrent feature of American politics even in institutional environments highly favorable to party-printed tickets and informal fusion. . . . [T]he limited durability of minor parties cannot be attributed to anti-fusion ballot rules that did not yet exist. If minor parties struggled to maintain organization and identity without such rules, then later difficulties cannot simply be treated as ‘effects’ of the rules.” (Atkinson-Tahk Report 57.) This dispute is immaterial, however, and would not prevent the Court from entering summary judgment in favor of Defendant.

Plaintiffs’ Reply No. 23: Defendant fails to dispute the proposed fact. Defendant’s experts fail to provide evidence that genuinely disputes Professor Disch’s conclusion. Rather, Defendant suggests that minor parties of the time were of “limited durability,” and therefore the fusion tradition may not have continued, notwithstanding Professor Disch’s determination that fusion voting enabled frequent creation and dissolution of dynamic, responsive, but often short-lived parties and coalitions. (Dkt. 27 at 50–51 (Disch rebuttal at 5–6); Dkt. 27 at 11–33 (Disch rep. at 8–30)) In other words, the critical question is not whether the specific parties active in 1897 would have perpetuated, but whether other parties would have continued to crop up and compete. More importantly, Defendant does not articulate a dispute as to the assertion that fusion nominations would likely have continued to appear absent the ban. Nonetheless, any such dispute of Proposed Fact Number 23 would be immaterial.

24. Smaller political parties in 19th-Century America frequently arose and fell as part of an extra-constitutional structure where larger and smaller parties sometimes collaborated, helping “to prevent plurality rule, promoting majority rule, and protecting the minority’s access to power.” (Disch rebuttal at 6 (quoting PETER H. ARGERSINGER, *THE LIMITS OF AGRARIAN RADICALISM: WESTERN POPULISM AND AMERICAN POLITICS*, 161 (1995)); see also *id.* at 17–19)

Defendant’s Response No. 24: Undisputed.

Plaintiffs’ Reply No. 24: Undisputed.

25. In 19th-Century Wisconsin, fusion allowed Democrats to stay competitive with the Republican Party and allowed influence for minor and newer parties, even as the Republicans controlled Wisconsin state government for most of the nineteenth century. (Disch rebuttal at 22)

Defendant's Response No. 25: Objection. The proposed fact is vague because it doesn't define "fusion." Even the cited material notes that the term "fusion" encompasses a "range of meanings," and the definition may differ depending on the context. (Doc. 27:9 (Disch Report 6).) Defendant further objects to this proposed fact because the cited evidentiary material does not support it; therefore, the Court should not consider it.

Plaintiffs' Reply No. 25: Defendant fails to dispute the proposed fact, so the Court should deem the proposed fact admitted. Plaintiffs clarify that the term "fusion" means "fusion voting" as defined above. (See also Dkt. 2 at 5 (Compl., ¶3))

26. When they did not use fusion, Wisconsin's minor parties and the Democratic Party won very few elections in the state between 1856 and 1895. (Disch rep. at 22) When these parties succeeded electorally in Wisconsin, they generally did so through electoral fusion. (Id. at 23–30)

Defendant's Response No. 26: Objection. The proposed fact is vague because the terms "fusion" and "electoral fusion" are not defined. Even the cited material notes that the term "fusion" encompasses a "range of meanings," and the definition may differ depending on the context. (Doc. 27:9 (Disch Report 6).) Defendant further objects to this proposed fact because the cited evidentiary material does not support it; therefore, the Court should not consider it.

Plaintiffs' Reply No. 26: Defendant fails to dispute the proposed fact. As to Defendant's vagueness objection, Plaintiffs offer that both the terms "fusion" and "electoral fusion" mean "fusion" as defined in Plaintiffs' Proposed Fact Number 9. Defendant does not dispute any of the cited evidence that this proposed fact summarizes, nor does Defendant point to any evidence to the contrary, while Professor Disch's report details this proposed fact extensively. (See, e.g., Dkt. 27 at 25 (Disch rep. at 22 ("Between 1856 and 1895, Republicans won all but two of twenty Wisconsin gubernatorial elections.")); Dkt. 27 at 27, 29, 32 (Disch rep. at 24, 26, 29) (detailing the few examples, all reliant on fusion nominations, of non-Republican electoral victories))

27. Fusion became an increasingly popular tool for minor parties and Democratic candidates, including in William R. Taylor's gubernatorial victory in Wisconsin in 1873. (Disch rep at 6)

Defendant's Response No. 27: Objection. The proposed fact is vague because the term "[f]usion" is not defined. Even the cited material notes that the term "fusion" encompasses a "range of meanings," and the definition may differ depending on the time period referenced. (Doc. 27:9 (Disch Report 6).) Subject to and not waiving that objection, to the extent that the term "[f]usion" means "fusion nominations," no dispute. To the extent that the term "[f]usion" means or includes

“fusion voting,” Defendant disputes, because fusion voting didn’t occur until the introduction of the Australian ballot. (Atkinson-Tahk Report 56–57.) This dispute is immaterial, however, and does not prevent the Court from entering summary judgment in favor of Defendant.

Plaintiffs’ Reply No. 27: Defendant fails to dispute the proposed fact. As to Defendant’s vagueness objection, Plaintiffs use the term “fusion” here to mean “fusion voting,” as defined in Plaintiffs’ Complaint. Further, Defendant’s dispute that “fusion voting didn’t occur until the introduction of the Australian ballot” is not supported by the evidence. Professor Disch demonstrates that fusion voting, as defined in Plaintiffs’ Complaint, occurred in Wisconsin from the earliest years of statehood. (Dkt. 27 at 14 (Disch rep. at 11); Dkt. 2 at 5 (Compl., ¶3))

28. While the Republican Party was founded in Wisconsin through the merger of multiple abolitionist parties into one party, it relied on electoral fusion far less frequently. (Disch rep. at 19–28)

Defendant’s Response No. 28: Objection. The proposed fact is vague because the term “electoral fusion” is not defined. Subject to and not waiving that objection, to the extent that the term “electoral fusion” means “fusion nominations,” no dispute. To the extent that the term “electoral fusion” means or includes “fusion voting,” Defendant disputes, because fusion voting didn’t occur until the introduction of the Australian ballot. (Atkinson-Tahk Report 56–57.) This dispute is immaterial, however, and does not prevent the Court from entering summary judgment in favor of Defendant.

Plaintiffs’ Reply No. 28: Defendant fails to dispute the proposed fact. As to Defendant’s vagueness objection, Plaintiffs use the term “electoral fusion” here to mean “fusion voting,” as defined in Plaintiffs’ Complaint. Defendant’s dispute that “fusion voting didn’t occur until the introduction of the Australian ballot” is not supported by the evidence. Professor Disch demonstrates that fusion voting, as defined in Plaintiffs’ Complaint, occurred in Wisconsin from the earliest years of statehood. (Dkt. 27 at 14 (Disch rep. at 11); Dkt. 2 at 5 (Compl., ¶3))

29. On rare occasions when Wisconsin Republicans utilized fusion, they typically fused with Democrats to block minor, newer parties from gaining power. (Disch rep. at 26–27)

Defendant’s Response No. 29: Objection. The proposed fact is vague because the term “fusion” is not defined. Even the cited material notes that the term “fusion” encompasses a “range of meanings,” and the definition may differ depending on the time period referenced. (Doc. 27:9 (Disch Report 6).) Subject to and not waiving that objection, to the extent that the term “fusion”

means “fusion nominations,” no dispute. To the extent that the term “fusion” means or includes “fusion voting,” Defendant disputes, because fusion voting didn’t occur until the introduction of the Australian ballot. (Atkinson-Tahk Report 56–57.) This dispute is immaterial, however, and does not prevent the Court from entering summary judgment in favor of Defendant.

Plaintiffs’ Reply No. 29: Defendant fails to dispute the proposed fact. As to Defendant’s vagueness objection, Plaintiffs use the term “fusion” here to mean “fusion voting,” as defined in Plaintiffs’ Complaint. Defendant’s dispute that “fusion voting didn’t occur until the introduction of the Australian ballot” is not supported by the evidence. Professor Disch demonstrates that fusion voting, as defined in Plaintiffs’ Complaint, occurred in Wisconsin from the earliest years of statehood. (Dkt. 27 at 14 (Disch rep. at 11); Dkt. 2 at 5 (Compl., ¶(3))

30. Wisconsin Republicans adopted an Australian-style statewide ballot law in 1889; nothing in that law precluded continued use of fusion voting. (Disch rebuttal at 23–25)

Defendant’s Response No. 30: As to the first clause, Defendant objects in part. Defendant does not dispute that the Wisconsin Legislature adopted an Australian-style statewide ballot law in 1889. Defendant objects to the implication that “Wisconsin Republicans” were the sole members of the Legislature to have voted for this legislation because it is unsupported by the cited evidence; therefore, the Court should not consider it. The bill was “adopted” by the Wisconsin Legislature, which was composed of both Republicans and Democrats, and the cited material provides no evidence of the vote breakdown.

As to the second clause, Defendant disputes the assertion that use of fusion voting “continued” after the 1889 law, because fusion voting didn’t exist prior to the introduction of the Australian ballot in the 1889 law. (Atkinson-Tahk Report 56–57.) This dispute is immaterial, however, and does not prevent the Court from entering summary judgment in favor of Defendant.

Plaintiffs’ Reply No. 30: Defendant fails to put this fact in dispute. Plaintiffs do not state that this legislation passed with only Republican votes but merely that a Republican-dominated legislature adopted the Australian-style statewide ballot law in 1889. (As a matter of fact, Republican members held more than 70% of the seats in each chamber. See *Biographical Sketches*, WIS. BLUE BOOK 493–500 (Senate), 501–22 (Assembly) (1889).) Any dispute beyond that, including as to whether any non-Republican legislators voted in favor of that law, is immaterial for purposes of summary judgment.

Further, even if Defendant disagrees with use of the term “fusion voting” to describe pre-1889 fusion practices, there is no dispute that fusion

nominations continued through and after 1889. Thus, any dispute is immaterial.

31. In 1891, when Democrats gained temporary control of the Wisconsin Legislature, they amended the 1889 Australian-ballot law to explicitly protect fusion. (Disch rebuttal at 23) This was the only pro-fusion amendment adopted by any state during the Australian-style reforms. (*Id.*)

Defendant's Response No. 31: As to the first sentence, Defendant does not dispute that the Wisconsin Legislature amended the 1889 Australian-ballot law in 1891 to “protect fusion,” subject to the following objection. Defendant objects to the implication that “Democrats” were the sole members of the Legislature to have voted for this legislation is unsupported because it is unsupported by the cited evidence; therefore, the Court should not consider it. The legislation was enacted by the Wisconsin Legislature, which was composed of both Republicans and Democrats, and the cited material provides no evidence of the vote breakdown.

Plaintiffs' Reply No. 31: Defendant fails to put this fact in dispute. The “vote breakdown” of the Legislature is immaterial as to this proposed fact. (As a matter of fact, during this legislative session, Democratic members held clear majorities of the seats in each chamber. See *Biographical Sketches*, WIS. BLUE BOOK 585 (Senate), 606 (Assembly) (1891).)

32. The fusion ban, codified at 1897 Wis. Laws, ch. 348, exists today as Wis. Stat. §§ 8.03(1) and 8.15(7). Today's § 8.03(1) employs language that largely mirrors the 1897 law.

Defendant's Response No. 32: Undisputed.

Plaintiffs' Reply No. 32: Undisputed.

33. The fusion ban was enacted in a highly partisan environment, targeted at suppressing the electoral effectiveness of political opponents and their coalition partners. (Disch rep. at 30–34; Disch rebuttal at 21)

Defendant's Response No. 33: Objection. The cited evidentiary material does not support the proposed fact; therefore, the Court should not consider it.

Subject to and not waiving this objection, and if the proposed fact were supported by evidence such that the Court could consider it, Defendant would dispute it. Defendant's experts explain: “The evidence Dr. Disch cites is at least as consistent with non-partisan or mixed motives—concerns about ballot design, electoral integrity, and the perceived legitimacy of ‘combination tickets’—as with an intent to impair challenger parties.” (Atkinson-Tahk Report 55.)

This dispute is immaterial, however, and would not prevent the Court from entering summary judgment in favor of Defendant.

Plaintiffs' Reply No. 33: Defendant fails to put this fact in dispute. Professor Disch's expert reports provide detailed evidence in support of this proposed fact (*see* Dkt. 27 at 37 (Disch rep. at 34); Dkt. 27 at 68–70 (Disch rebuttal at 23–25)), while Defendant's experts merely state an opposite conclusion without any evidentiary support. Such a conclusory statement does not constitute a genuine dispute of fact.

34. Prior to the enactment of the fusion ban, Wisconsin was the only state in the country that had a statute expressly protecting fusion voting on the state-run, Australian-style ballot. (Disch rebuttal at 24–25)

Defendant's Response No. 34: Undisputed.

Plaintiffs' Reply No. 34: Undisputed.

35. The legislation protecting fusion (passed by Democrats in 1891, *see* PFOF ¶31, *supra*) was specifically repealed by Republicans. (Disch rep. at 25–26)

Defendant's Response No. 35: Objection. The cited evidentiary material does not support the proposed fact; therefore, the Court should not consider it.

Subject to and not waiving this objection, and if the proposed fact were supported by evidence such that the Court could consider it, Defendant would dispute the proposed fact. The implication that “Democrats” were the sole members of the Legislature to have voted for the “legislation protecting fusion” is unsupported by the cited evidence. The bill was passed by the Wisconsin Legislature, which was composed of both Republicans and Democrats, and Professor Disch provides no evidence of the vote breakdown. Similarly, although Republicans controlled the Legislature when the fusion ban was enacted, Professor Disch states that the bill “passed without opposition”—presumably meaning that no Democrats voted against it. (Doc. 27:37 (Disch Report 34).) It is therefore incorrect to characterize the repeal measure as solely by “Republicans.” Again, the legislation was passed by the Wisconsin Legislature, which was composed of both Republicans and Democrats. Even if Plaintiffs had supported this proposed fact with evidence, the dispute is immaterial and would not prevent the Court from entering summary judgment in favor of Defendant.

Plaintiffs' Reply No. 35: Defendant fails to dispute this proposed fact. Plaintiffs acknowledge that their citation to the “Disch report at 25–26” in Proposed Fact Number 35 was in error and should read “Disch rebuttal at 25–

26.” Nonetheless, a Republican-controlled legislature repealed the earlier fusion-protective legislation passed by a Democratic-controlled legislature. (Dkt. 27 at 68, 70–71 (Disch rebuttal report at 23, 25–26)) The “vote breakdown” of the Legislature is immaterial as to this proposed fact.

36. The Republican-controlled legislature banned fusion without hearings, floor debate, or evidence, through an obscure provision in a lengthy bill passed at the end of a legislative session. (Disch rep. at 30–34)

Defendant’s Response No. 36: Objection. The cited evidentiary material does not support the proposed fact; therefore, the Court should not consider it. The claim that the referenced legislation passed “without hearings, floor debate, or evidence” is unsupported by the cited evidence. Professor Disch acknowledges that “Wisconsin’s Legislative Reference Bureau does not maintain drafting files (the official administrative records of the bill drafting process) for bills passed prior to the 1927 legislative session.” (Doc. 27:35 (Disch Report 32).) She never claims that there were no hearings on the bill nor that the Legislature considered no evidence; she opines only that the bill passed “probably without a floor debate.” (Doc. 27:37 (Disch Report 34).) Moreover, the characterizations “obscure” and “lengthy” are not facts. Even if Plaintiffs had supported this proposed fact with evidence, the dispute is immaterial and would not prevent the Court from entering summary judgment in favor of Defendant.

Plaintiffs’ Reply No. 36: Defendant fails to dispute the proposed fact. Professor Disch concludes, based on historical and academic research and the available evidence, that “[t]he ban, adopted as one provision within a larger amendment to the state’s election administration statute as an add-on, passed without opposition or even a floor debate. Many newspapers at the time expressed surprise that such a consequential provision would pass without fanfare.” (Dkt. 27 at 8 (Disch rep. at 5))

37. A fusion ban became possible once states implemented Australian electoral reform, but Australian electoral reform does not require the prohibition of fusion. (Disch rebuttal at 15 (The fusion ban “became possible as state legislatures implemented Australian electoral reform but was not practically necessary to accomplish that task.”))

Defendant’s Response No. 37: Undisputed.

Plaintiffs’ Reply No. 37: Undisputed.

38. In the years immediately preceding Wisconsin’s fusion ban, Republicans in Oregon and South Dakota saw significant Republican electoral victories after passing fusion bans in their states. (Disch rebuttal at 15, 19–22) It was during those same years that Wisconsin Republicans

briefly lost control of state government and Democrats passed the nation's only statutory protection for fusion voting; once Republicans regained control, they banned fusion voting. (Disch rep. at 29–30; Disch rebuttal at 25)

Defendant's Response No. 38: Defendant objects and disputes in part. The implication that “Democrats” were the sole members of the Wisconsin Legislature to have voted for the “statutory protection for fusion voting” is unsupported by the cited evidence; therefore, the Court should not consider it. The bill was passed by the Wisconsin Legislature, which was composed of both Republicans and Democrats, and Professor Disch provides no evidence of the vote breakdown. Similarly, although Republicans controlled the Legislature when the fusion ban was enacted, Professor Disch states that the bill “passed without opposition”—presumably meaning that no Democrats voted against it. (Doc. 27:37 (Disch Report 34).) It is therefore incorrect to characterize the measure as solely enacted by Wisconsin Republicans. Again, the legislation was passed by the Wisconsin Legislature, which was composed of both Republicans and Democrats. Even if Plaintiffs had supported this proposed fact with evidence, the dispute is immaterial and would not prevent the Court from entering summary judgment in favor of Defendant.

The remainder of the proposed fact is undisputed.

Plaintiffs' Reply No. 38: Undisputed. The “vote breakdown” of the Legislature is immaterial as to this proposed fact, but Plaintiffs note that this proposed fact merely refers to the Legislature's majority-holding party of the time. Notably, the 1897 Legislature that passed Wisconsin's fusion ban was “dominate[d]” by Republicans, who held 91 seats in the Assembly and 29 in the Senate; the Democrats were such a tiny faction as to be irrelevant. (Dkt. 27 at 33 (Disch rep. at 29))

39. In 1897, Republican-run legislatures enacted anti-fusion laws in neighboring Illinois and Iowa, as well as North Dakota, Pennsylvania, Wyoming, and Indiana. (Disch rebuttal at 21 n.142)

Defendant's Response No. 39: Undisputed.

Plaintiffs' Reply No. 39: Undisputed.

40. Wisconsin's fusion ban was signed by a Republican governor, following passage through a state legislature where Republicans held near-total control, holding 91 out of 100 Assembly seats and 29 out of 33 Senate seats. (Disch rep. at 30) The ban consisted of a single substantive sentence hidden in a lengthy piece of otherwise-mundane election administration legislation. (Id. at 30–31, 33)

Defendant's Response No. 40: Objection. The words “hidden” and “otherwise-mundane” are characterizations, not facts supported by evidence. Otherwise, this proposed finding is undisputed.

Plaintiffs' Reply No. 40: Undisputed.

41. At least two newspapers explicitly noted that the fusion ban's effects would be felt by Democrats and their minor party allies. (Disch rep. at 32, 34)

Defendant's Response No. 41: Undisputed.

Plaintiffs' Reply No. 41: Undisputed.

42. Republicans in the Wisconsin Legislature claimed in public to have no knowledge of the fusion ban they had just passed. (Disch rep. at 32)

Defendant's Response No. 42: Objection. The cited evidentiary material does not support the proposed fact; therefore, the Court should not consider it. The cited evidence shows only that one legislator—Senator Roehr—expressed no knowledge of the fusion provision. (Doc. 27:35 (Disch Report 32).) Other Republican legislators had instead “profess[ed] to be ignorant as to the manner in which such a law was enacted” (*id.*); ignorance of the “manner” of enacting a law isn't the same as ignorance of that law's contents. Even if Plaintiffs had supported this proposed fact with evidence, the dispute is immaterial and would not prevent the Court from entering summary judgment in favor of Defendant.

Plaintiffs' Reply No. 42: Defendant fails to put this fact in dispute; a sitting legislator claiming ignorance of the “manner in which such a law was enacted” shortly after enacting a law does indicate ignorance of that provision. Senator Roehr was also not a backbench member of the Legislature but the “chairman of the committee reporting the bill.” (Dkt. 27 at 35 (Disch rep. at 32) (emphasis in original)) Regardless, any such dispute is immaterial for purposes of summary judgment.

43. “[N]either the leaders and members of third parties nor their major-party counterparts imagined that Australian-style electoral reform could be used to eliminate fusion.” (Disch rebuttal at 15)

Defendant's Response No. 43: Dispute. The cited material lacks a sufficient foundation for the proposition asserted. The proposed finding also mischaracterizes the Australian ballot, which was not “used to eliminate fusion” but rather created the conditions in which a fusion ban became possible, as Plaintiffs recognize in Proposed Fact No. 37. Even if Plaintiffs had properly

supported this proposed fact with evidence, the dispute is immaterial, and does not prevent the Court from entering summary judgment in favor of Defendant.

Plaintiffs’ Reply No. 43: Defendant fails to put this fact in dispute. Defendant’s distinction between being “used to eliminate fusion” and “creat[ing] the conditions in which a fusion ban became possible” does not meaningfully change the proposed fact—that “neither the leaders and members of third parties nor their major-party counterparts imagined that Australian-style electoral reform” *would* lead to or enable a ban on fusion voting. This is further buttressed by the fact, appearing on the same cited page of Professor Disch’s rebuttal report, that no state adopted a fusion ban as part of legislation initially adopting Australian-style ballot reform. (Dkt. 27 at 60 (Disch rebuttal at 15))

44. The practice of fusion was indispensable to non-major parties’ viability. (Disch rep. at 4–6; Disch rebuttal at 6, 17–19; see also Drutman rep. at 22–25)

Defendant’s Response No. 44: Objection. The cited evidentiary material does not support the proposed fact; therefore, the Court should not consider it. Defendant further objects because the proposed fact is vague because it does not define the term “fusion” and seems to conflate the multiple distinct senses of “fusion” addressed in the proposed findings above: “fusion nominations” (Proposed Fact No. 9, 19); “fusion voting” (Proposed Fact No. 9); and “cross-party coalition-building” (Proposed Fact No. 17–18). It is therefore impossible to conclude which of these three senses of “fusion,” if any, were “indispensable to non-major parties’ viability,” as the proposed fact asserts. This also confuses correlation with causation—at most, the evidence shows that minor parties did not win without “fusion,” not that they could not win without “fusion.” And as to fusion voting in particular, Defendant disputes since, as their experts explain, “[g]iven the massive structural changes accompanying the introduction of the Australian ballot—specifically the shift from privately distributed party tickets to a state-administered secret ballot, and the sudden imposition of novel regulations regarding ballot access and layout—it is unclear what valid inferences about . . . fusion voting can be drawn from such a small sample of elections that occurred more than a century ago.” (Atkinson-Tahk Report 50.) Even if Plaintiffs had supported this proposed fact with evidence, it is immaterial and would not prevent this Court from entering summary judgment in favor of Defendant.

Plaintiffs’ Reply No. 44: Defendant fails to put this fact in dispute. Professor Disch provides academic research and a thorough historical analysis that supports this fact, whereas Defendant’s experts (who are not historians) simply throw up their hands and suggest that pre-Australian ballot elections cannot be analyzed. Defendant suggests that there is no evidence that minor parties “could not win without ‘fusion,’” despite the cited evidence that, when

fusion was legal, minor parties had power and support (see Dkt. 27 at 7–9 (Disch rep. at 4–6); Dkt. 27 at 51, 62–64 (Disch rebuttal at 6, 17–19)), and the cited evidence that, with fusion banned, minor party activity is “extremely limited.” (Dkt. 28 at 28–29 (Drutman rep. at 24–25))

45. Democrats and their allies generally could not win elections in Wisconsin without fusion, while Republicans usually could and did. (Disch rep. at 22–28, 34; Disch rebuttal at 18)

Defendant’s Response No. 45: Objection. The cited evidentiary material does not support the proposed fact; therefore, the Court should not consider it. Defendant further objects because the proposed fact is vague because it does not define the term “fusion” and seems to conflate the multiple distinct senses of “fusion” addressed in the proposed facts above: “fusion nominations” (Proposed Fact No. 9, 19); “fusion voting” (Proposed Fact No. 9); and “cross-party coalition-building” (Proposed Fact No. 17–18). It is therefore impossible to conclude which of these three senses of “fusion,” if any, are the ones “without” which Democrats and their allies “generally could not win.” This also confuses correlation with causation—at most, the evidence shows that Democrats did not win without “fusion,” not that they could not win without “fusion.” Even if Plaintiffs had supported this proposed fact with evidence, it is immaterial and would not prevent this Court from entering summary judgment in favor of Defendant.

Subject to and not waiving this objection, if the proposed fact were supported by evidence such that the Court could consider it, as to fusion voting in particular, Defendant would dispute the proposed fact. As Defendant’s experts explain, “[g]iven the massive structural changes accompanying the introduction of the Australian ballot—specifically the shift from privately distributed party tickets to a state-administered secret ballot, and the sudden imposition of novel regulations regarding ballot access and layout—it is unclear what valid inferences about . . . fusion voting can be drawn from such a small sample of elections that occurred more than a century ago.” (Atkinson-Tahk Report 50.) Moreover, Defendant’s experts explain that “third-party fragility was a recurrent feature of American politics even in institutional environments highly favorable to party-printed tickets and informal fusion,” which “means that the limited durability of minor parties cannot be attributed to anti-fusion ballot rules that did not yet exist.” (*Id.* at 57.) This dispute is immaterial, however, and does not prevent this Court from entering summary judgment in favor of Defendant.

Plaintiffs Reply No. 45: Defendant fails to put this fact in dispute. Professor Disch provides academic research and a thorough historical analysis that supports this fact, whereas Defendant’s experts simply state that they can’t be sure. Further, Defendant suggests that minor parties of the time were of “limited durability,” and therefore the decline of minor-party activity in Wisconsin cannot be attributed to the fusion ban, notwithstanding Professor Disch’s determination that fusion voting enabled frequent creation and

dissolution of dynamic, responsive, but often short-lived parties and coalitions. (See Dkt. 27 at 50–51 (Disch rebuttal at 5–6); see also Dkt. 28 at 43 (Drutman rebuttal at 13)) Further, this proposed fact refers to the Democratic Party, not third parties; Defendant’s dispute as to third parties is not responsive to the proposed fact.

46. The practical effect of the ban was to shut Democrats out of power. (Disch rep. at 30–34)

Defendant’s Response No. 46: Objection. The cited evidentiary material does not support the proposed fact; therefore, the Court should not consider it. Subject to and not waiving this objection, and if the proposed fact were supported by evidence such that the Court could consider it, Defendant would dispute the proposed fact. Defendant’s experts explain: “Given the massive structural changes accompanying the introduction of the Australian ballot—specifically the shift from privately distributed party tickets to a state-administered secret ballot, and the sudden imposition of novel regulations regarding ballot access and layout—it is unclear what valid inferences about . . . fusion voting can be drawn from such a small sample of elections that occurred more than a century ago.” (Atkinson-Tahk Report 50.) Moreover, “[c]orrelation, however, is not causation. Attributing Republican dominance in this primarily to a ballot-format rule, rather than unrelated political forces, requires much more than temporal coincidence. And there are ample grounds for believing that the Republican Party’s dominance in this era was driven by other factors.” (*Id.* at 61.) Even if Plaintiffs had supported this fact with evidence and there was a dispute, it would not prevent the Court from entering summary judgment in favor of Defendant.

Plaintiffs Reply No. 46: Defendant fails to put this fact in dispute. Plaintiffs do not claim that the ban on fusion voting was the *only* reason for the Democrats’ loss in power in Wisconsin but, as Professor Disch demonstrates in the cited pages, Democrats posed a threat to Republicans and won (or came closer to winning) elections only when they engaged in fusion nominations. Once that tool was removed, they were effectively shut out of power in Wisconsin, as were minor parties who fused with them. (See also Dkt. 28 at 43 (Drutman rebuttal at 13))

47. Fusion enabled parties to translate support into electoral influence and signal coalition strength to voters without forcing them to vote for a different party that they do not favor. (Disch rebuttal at 6, 17–19; Drutman rebuttal at 2–4, 18–19, 22)

Defendant’s Response No. 47: Objection. This proposed fact is vague because it does not define the term “[f]usion” and seems to conflate the multiple distinct senses of “[f]usion” addressed in the proposed findings above: “fusion nominations” (Proposed Finding No. 9, 19); “fusion voting” (Proposed Finding No. 9); and “cross-party coalition-building” (Proposed Finding

No. 17–18). Moreover, to the extent the proposed finding relates to fusion voting, the cited evidentiary material does not support it; therefore, the Court should not consider it. Defendant’s experts explain:

For example, if a candidate wins by 1,000 votes and received 5,000 votes on a minor party line, advocates claim the minor party “provided the margin of victory.” This reasoning is fundamentally flawed because it confuses *where* a vote was recorded with *why* it was cast. Election returns tell us which line a voter selected, but they cannot tell us what that voter would have done in a world without fusion.

....

Because we cannot observe the alternative reality where fusion was not used, we cannot measure the “causal effect” of the minor party line. Treating every vote on a fusion line as a vote “delivered” by that party, and assuming the candidate would have lost those votes otherwise, is a logical error that misjudges the influence of minor parties.

(Atkinson-Tahk Report 40.) In any event, anti-fusion voting laws do not “force” people to vote for anyone. Even if Plaintiffs had supported this fact with evidence and there was a dispute, it would not prevent the Court from entering summary judgment in favor of Defendant.

Plaintiffs’ Reply No. 47: Defendant articulates no dispute of this proposed fact, so the Court should deem this proposed fact admitted. As to Defendant’s vagueness objection, Plaintiffs use the term “fusion” here to mean “fusion voting,” as defined in their Complaint. Further, as Professor Disch describes and demonstrates at length,

The 19th Century was a period of fierce partisanship, during which many voters were “unwilling to ally themselves even symbolically with another party” by voting on its ballot line. These included third-party voters who voted for neither major party, as well as “disaffected Republicans who never considered voting directly for the Democracy [Democratic Party] they hated.” Fusion nominations, with both parties enjoying independent ballot lines, kept both groups in the voting electorate because it permitted them “to register their discontent effectively without directly supporting a party that represented negative reference groups and rarely offered acceptable policy alternatives.”

(Dkt. 27 at 62 (Disch rebuttal at 17) (internal footnotes omitted))

48. Fusion functioned as a stabilizing, majority-producing practice embedded in Wisconsin's political tradition. (Disch rep. 4, 8–9; Disch rebuttal at 6, 17–19)

Defendant's Response No. 48: Objection. This proposed fact is vague because it does not define the term “[f]usion” and seems to conflate the multiple distinct senses of “[f]usion” addressed in the proposed findings above: “fusion nominations” (Proposed Finding No. 9, 19); “fusion voting” (Proposed Finding No. 9); and “cross-party coalition-building” (Proposed Finding No. 17–18). Defendant further objects because the cited evidence doesn't support this proposed finding. Nowhere in the cited sections of Professor Disch's report does she mention “stability,” and she only once quotes another scholar who stated that the “electorate of multiple parties . . . promot[ed] majority rule.” (Doc. 27:51 (Disch Rebuttal Report 6).)

Subject to and not waiving these objections, if the proposed fact were supported by evidence such that the Court could consider it, and to the extent this proposed fact is referencing fusion voting, Defendant would dispute it. Fusion voting was available in Wisconsin only between 1891 and 1897, and so it is inaccurate to characterize this specific form of fusion as “embedded in Wisconsin's political tradition.” Defendants' experts explain: “Given the massive structural changes accompanying the introduction of the Australian ballot—specifically the shift from privately distributed party tickets to a state-administered secret ballot, and the sudden imposition of novel regulations regarding ballot access and layout—it is unclear what valid inferences about . . . fusion voting can be drawn from such a small sample of elections that occurred more than a century ago.” (Atkinson-Tahk Report 50.) Even if Plaintiffs had supported this fact with evidence and there was a dispute, it would not prevent this Court from entering summary judgment in favor of Defendant.

Plaintiffs' Reply No. 48: Defendant fails to dispute the proposed fact. As Professor Disch demonstrates at length, fusion voting, as defined in Plaintiffs' Complaint, occurred in Wisconsin from the earliest years of statehood. (See, e.g., Dkt. 27 at 14 (Disch rep. at 11)) As to Defendant's vagueness objection, Plaintiffs offer that “fusion” in this proposed fact means “fusion voting,” as defined in Plaintiffs' Complaint.

Further, while Defendant's experts may be unsure what “inferences about . . . fusion voting can be drawn” from historical examples, Professor Disch supports her conclusion with scholarly research and that of recognized experts in the field. (Dkt. 27 at 51 (Disch rebuttal at 6 n.27 (citing Argersinger)); accord Dkt. 81 (historians' amicus brief)) Defendant's objection that the cited evidence doesn't support the proposed fact should be overruled.

49. At the time of the ban's enactment, "fusion nominations were robustly practiced, especially in Milwaukee, the epicenter of multi-party politics and labor party organizing in Wisconsin." (Disch rep. at 34)

Defendant's Response No. 49: Undisputed.

Plaintiffs' Reply No. 49: Undisputed.

50. The "Republican Party had the most to fear from fusion, and Republican legislators banned [it] in Wisconsin, without explanation or public debate." (Disch rep. at 34)

Defendant's Response No. 50: Objection. The cited evidentiary material does not support the proposed fact; therefore, the Court should not consider it.

Subject to and not waiving this objection, and if the proposed fact were supported by evidence such that the Court could consider it, Defendant would dispute the proposed fact. Although Republicans controlled the Legislature when the fusion ban was enacted, Professor Disch states that the bill "passed without opposition"—presumably meaning that no Democrats voted against it. (Doc. 27:37 (Disch Report 34).) It is therefore incorrect to characterize fusion voting as "banned" solely by "Republican legislators." Moreover, Professor Disch again acknowledges that "Wisconsin's Legislative Reference Bureau does not maintain drafting files (the official administrative records of the bill drafting process) for bills passed prior to the 1927 legislative session" (Doc. 27:35 (Disch Report 32)), and she states only that the ban passed "probably without a floor debate" (Doc. 27:37 (Disch Report 34)). Even if Plaintiffs had supported this fact with evidence, it is immaterial and would not prevent this Court from entering summary judgment in favor of Defendant.

Plaintiffs' Reply No. 50: Defendant fails to dispute the proposed fact. Professor Disch concludes, based on historical and academic research and the available evidence, that "[t]he ban, adopted as one provision within a larger amendment to the state's election administration statute as an add-on, passed without opposition or even a floor debate. Many newspapers at the time expressed surprise that such a consequential provision would pass without fanfare." (Dkt. 27 at 8 (Disch rep. at 5)) As further support, Professor Disch compares the debate and media attention proposed legislation banning fusion voting received in other states to the lack thereof in Wisconsin. (Dkt. 27 at 37 (Disch rep. at 34))

51. Republicans maintained power in Wisconsin for decades after the passage of the fusion ban. Republicans did not lose a gubernatorial election or control of the State Assembly until 1933. (Disch rep. at 34)

Defendant's Response No. 51: Undisputed.

Plaintiffs' Reply No. 51: Undisputed.

52. The fusion ban targets the tools that enable a minor political party to exist and function meaningfully. (Drutman rep. at 23–25; Andrews Decl., ¶¶9–11, 14; Mahoney Decl., ¶¶9–13; Schultz Decl., ¶¶9–13)

Defendant's Response No. 52: Objection. The cited evidentiary material does not support the proposed fact; therefore, the Court should not consider it.

Subject to and not waiving this objection, and if the proposed fact were supported by evidence such that the Court could consider it, Defendant would dispute the proposed fact. Most importantly, anti-fusion laws do not “directly preclude[] minor political parties from developing and organizing.” *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 361 (1997). Moreover, the Andrews, Mahoney, and Schultz declarations are from fact witnesses who speculate about the reasons why they are having trouble growing a brand-new third party. They blame their difficulties solely on anti-fusion laws, even though other structural factors surely contribute (leaving aside the attractiveness or lack thereof of United Wisconsin's political message). Additionally, “as Dr. Drutman himself concedes, minor parties struggle to survive in single-member, winner-take-all districts.” (Atkinson-Tahk Report 53; *see also* Doc. 28:28 (Drutman Report 25) (“Wisconsin uses winner-take-all majoritarian elections, which are hostile to third-party candidates.”).) And history shows that “third-party fragility was a recurrent feature of American politics even in institutional environments highly favorable to party-printed tickets and informal fusion.” (Atkinson-Tahk Report 57.) Even if Plaintiffs had supported this fact with evidence and there was a dispute, it would not prevent this Court from entering summary judgment in favor of Defendant.

Plaintiffs' Reply No. 52: Defendant fails to dispute the proposed fact. The ban on fusion voting prohibits political organizations (like United Wisconsin) from banding together with similarly minded voters (like moderate voters who often associate with either of the major parties) and other parties (like either of the major parties or other minor parties) to advance shared candidates (cross-nominees). It is not contrary to the proposed fact that there may also be other reforms in addition to fusion voting that could lend support to minor parties. Defendant's citation to *Timmons* does not meaningfully respond to this point. Further, Plaintiffs Andrews, Mahoney, and Schultz testify in support of this fact based on their personal experiences working in politics, which is a proper basis for opinion testimony. (Dkt. 30 at 2–3 (Andrews Decl. ¶¶9–11, 14); Dkt. 32 at 2 (Mahoney Decl. ¶¶9–13); Dkt. 34 at 2 (Schultz Decl., ¶¶9–13)) Their experiences are buttressed by the historical record, which shows that Wisconsin had robust third parties, with some

measurable success, prior to the fusion ban. (See Dkt. 27 at 13–32 (Disch rep. at 10–29)) The Court should deem this proposed fact admitted.

53. The fusion ban imposes a sweeping and outcome-determinative restraint on the only historically effective mechanism for minor-party participation. (Drutman rep. at 23–25; Disch rep. at 34)

Defendant’s Response No. 53: Objection. The cited evidentiary material does not support the proposed fact; therefore, the Court should not consider it.

Subject to and not waiving this objection, and if the proposed fact were supported by evidence such that the Court could consider it, Defendant would dispute the proposed fact. As their experts explain:

Even before the Australian ballot—when fusion ballots as such were not at issue—minor parties frequently proved fragile. . . .

This pattern is important for two reasons. It demonstrates that third-party fragility was a recurrent feature of American politics even in institutional environments highly favorable to party-printed tickets and informal fusion. And it means that the limited durability of minor parties cannot be attributed to anti-fusion ballot rules that did not yet exist. If minor parties struggled to maintain organization and identity without such rules, then later difficulties cannot simply be treated as “effects” of the rules

(Atkinson-Tahk Report 57.)

Plaintiffs’ Reply No. 53: Defendant fails to dispute the proposed fact. Defendant fails to provide evidence that genuinely disputes Professor Disch’s conclusion. Rather, Defendant’s experts claim that minor parties of the time were of “limited durability,” and therefore the fusion tradition may not have continued, notwithstanding Professor Disch’s determination that fusion voting enabled frequent but healthy creation and dissolution of dynamic, responsive, but often short-lived parties and coalitions. (Dkt. 27 at 50–51 (Disch rebuttal at 5–6)) In other words, the critical question is not whether the parties active in 1897 would have thrived, gained power, or even perpetuated, but whether other parties would have continued to crop up and compete. Moreover, Defendant does not dispute that minor-party activity has declined substantially since the ban on fusion voting. (Dkt. 29 at 2–3 (Cantor Decl., ¶¶9–10))

54. The fusion ban prohibits a political organization from banding together with like-minded voters and other parties to advance shared candidates and policy goals. (Drutman rep. at 18–20, 22–25; Cantor Decl., ¶8)

Defendant’s Response No. 54: Objection. The cited evidentiary material does not support the proposed fact; therefore, the Court should not consider it.

Subject to and not waiving this objection, and if the proposed fact were supported by evidence such that the Court could consider it, Defendant would dispute the proposed fact. Wisconsin’s anti-fusion laws prohibit listing two party nominations for one candidate on the state-printed ballot; they do not “prohibit[] a political organization from banding together with like-minded voters and other parties to advance shared candidates and policy goals.” *See Timmons*, 520 U.S. at 363 (even under anti-fusion laws, “part[ies] retain[] great latitude in [their] ability to communicate ideas to voters and candidates through [their] participation in the campaign, and party members may campaign for, endorse, and vote for their preferred candidate”). The cited evidence asserts, at most, only that anti-fusion laws make it more difficult for third-parties to succeed electorally—not that it “prohibits” any political organizing activity.

Plaintiffs’ Reply No. 54: Defendant fails to dispute the proposed fact. The ban on fusion voting prohibits political organizations (like United Wisconsin) from banding together with like-minded voters (like moderate voters who often associate with either of the major parties) and other parties (like either of the major parties or other minor parties) to advance shared candidates (cross-nominees). Defendant’s citation to *Timmons* does not meaningfully respond to this point or foreclose conclusions based on the different factual record in this case. The Court should deem this proposed fact admitted.

55. Fusion historically operated in Wisconsin without generating voter confusion (Disch rebuttal at 27) and continues to function in other jurisdictions without fueling outbreaks of voter misunderstanding. (Drutman rebuttal at 3–7)

Defendant’s Response No. 55: Objection. The cited evidentiary material does not support the proposed fact; therefore, the Court should not consider it.

Subject to and not waiving this objection, and if the proposed fact were supported by evidence such that the Court could consider it, Defendant would dispute the proposed fact. It is unclear exactly what historical evidence Professor Disch refers to when she says that Wisconsin voters “had not been confused by cross-nominations,” an assertion that doesn’t even relate to the specific practice of fusion voting anyway. (Doc. 27:72 (Disch Rebuttal Report 27).) There is also no way Professor Disch could support such a categorical statement about the total lack of voter

confusion over a century ago—the absence of evidence is not evidence of absence. The same is true of Drutman. He critiques the evidence of confusion that Defendant’s experts offer, but he does not identify any affirmative evidence of a lack of voter confusion. (Doc. 28:33–37 (Drutman Rebuttal Report 3–7).) As to the modern era, Defendant would also dispute. Defendant’s experts discuss why fusion voting may cause confusion (Atkinson-Tahk Report 30, 33, 36, 46, 54, 64–65) and identify evidence of confusion in New York’s use of fusion voting and in voter surveys (*id.* at 19–21, 40–41, 65).

Even if Plaintiffs had supported this proposed fact with evidence, this dispute is immaterial because the relevant questions pertaining to voter confusion are (1) whether avoiding voter confusion is a legitimate state interest; and (2) whether Wisconsin’s anti-fusion statutes are rationally connected to that interest. A dispute over the extent of voter confusion simply underscores that anti-fusion statutes are rationally connected to this state interest. Moreover, the Court need not consider facts related to voter confusion if it relies instead on the other legitimate state interests described by Defendant.

Plaintiffs Reply No. 55: Defendant fails to dispute the proposed fact. While Defendant’s experts cite contemporary survey evidence, they do so inaccurately. (See Dkt. 26 at 27 (Burden rebuttal at 12)) As the historical evidence cited in the proposed fact details, fusion voting was ubiquitous in early Wisconsin politics. Professor Disch’s research, relying both on historical sources and other scholars’ research and analysis, finding no evidence of significant voter confusion, supports the conclusion that fusion voting historically did not cause voter confusion. (Dkt. 27 at 72 (Disch rebuttal at 27)) Defendant’s experts make no effort to suggest, much less support with historical evidence, a contrary notion.

56. Peer-reviewed studies demonstrate that voters can understand ballots reflecting cross-nominations and that such ballots can be designed to clearly communicate the relevant information. (Burden rep. at 7–11; Burden rebuttal at 2–5, 7)

Defendant’s Response No. 56: Disputed but immaterial. Professor Burden concedes that “[a]ll changes in election laws and election administration have the potential to confuse voters” (Doc. 26:10 (Burden Report 7)) and that “some voters might be surprised or even confused to see a candidate listed twice for an office,” (Doc. 26:19 (Burden Rebuttal Report 4)). Defendant’s experts explain further:

Dr. Burden argues that “confusion among voters about fusion candidacies is likely to be modest, to reduce over time with repeated use, and not to be consequential for generating voter error.” This conclusion rests primarily on the Loepp and Melusky study, which found that experimental subjects who marked

fusion ballots reported similar levels of ease and clarity as those who marked non-fusion ballots.

This evidence addresses one type of confusion: confusion about how to mark the ballot correctly. But it largely overlooks a more significant concern: confusion about the minor parties themselves.

(Atkinson-Tahk Report 64 (footnotes omitted).)

This dispute is immaterial for purposes of summary judgment because the relevant questions pertaining to voter confusion are (1) whether avoiding fusion confusion is a legitimate state interest; and (2) whether Wisconsin's anti-fusion statutes are rationally connected to that interest. A dispute over the extent of voter confusion simply underscores that anti-fusion statutes are rationally connected to this state interest. Moreover, the Court need not consider facts related to voter confusion if it relies instead on the other legitimate state interests described by Defendant.

Plaintiffs' Reply No. 56: Defendant fails to dispute the proposed fact. As Dr. Burden demonstrates, "any voter confusion due to the reintroduction of fusion would likely be modest." (Dkt. 26 at 17 (Burden rebuttal at 2)) Dr. Burden does not, as Defendant's experts state, rely primarily on the Loepp and Melusky study. (Dkt. 26 at 23 (Burden rebuttal at 8) (analyzing comparative effect on voter confusion for changes that enhance versus restrict voter choice, supported by the empirically studied "cost of voting" theory); Dkt. 26 at 24 (Burden rebuttal at 9) (discussing the difference between short-term and long-term changes to voting); Dkt. 26 at 25 (Burden rebuttal at 10) (discussing the failsafe built into voting that would correct many, if not most, instances of the only error voters could feasibly make due to reimplementing fusion); Dkt. 28 at 25 (Drutman rep. at 22); Dkt. 28 at 33–37 (Drutman rebuttal at 3–7))

Defendant's lack of meaningful evidence that voter confusion will result in Wisconsin if fusion is reimplemented undermines its argument that the ban on fusion voting serves any legitimate state interest. A possibility of near-zero voter confusion does not amount to or even justify a (purported) state interest.

57. Modern election administration used in Wisconsin already accommodates complex ballots, multiple candidates, and numerous party designations. (Burden rep. at 7–11; Burden rebuttal at 2–5)

Defendant's Response No. 57: Undisputed, subject to the clarification that Wisconsin's existing election technology may not be compatible with fusion voting. (Kehoe Decl. ¶¶ 4, 29–31.)

Plaintiffs' Reply No. 57: As Dr. Burden demonstrates, all the machines on Wisconsin's list of approved election machines are compatible with fusion voting and are used in the states in which fusion voting is legal. (Dkt. 26 at 10–14 (Burden rep. at 7–11 (listing the specific models of voting machines that are approved for use in Wisconsin and noting “all of the voting equipment currently approved and in use in the state of Wisconsin is also approved and in use in Connecticut, New York, or both”)); *accord* McDonell Decl., ¶10)) The Kehoe declaration's statement that “Wisconsin's existing election technology *may* not be compatible with fusion voting” (emphasis added) does not materially dispute that.

58. Fusion is administered successfully in other states through existing regulatory and management tools. (Burden rep. at 7)

Defendant's Response No. 58: Objection. The proposed fact is vague because it is unclear what Plaintiffs mean by “administered successfully” and “regulatory and management tools;” the cited evidence addresses only voting equipment and voter confusion. (Doc. 26:10 (Burden Report 7).) Defendant further objects because the cited evidentiary material does not support the proposed fact; therefore, the Court should not consider it.

Plaintiffs' Reply No. 58: Defendant fails to dispute the proposed fact. As Dr. Burden explains, all the machines on Wisconsin's list of approved election machines are compatible with fusion voting and are used in the states in which fusion voting is legal. (Dkt. 26 at 10–14 (Burden rep. at 7–11 (listing the specific models of voting machines that are approved for use in Wisconsin and noting that “all of the voting equipment currently approved and in use in the state of Wisconsin is also approved and in use in Connecticut, New York, or both”)); *accord* McDonell Decl., ¶10))

59. Wisconsin already employs detailed ballot-design and election-administration rules capable of addressing any election-administration concerns raised in the context of fusion voting. (Disch rebuttal at 27; Burden rep. at 7–10; Burden rebuttal at 4, 7, 11)

Defendant's Response No. 59: Disputed but immaterial. Multiple regulatory gaps would result from the invalidation of Wisconsin's anti-fusion statutes. (Kehoe Decl. ¶¶ 4–24.) Existing law does not resolve those issues, and it is unclear whether the Commission has the authority to resolve them without legislation. (*Id.*) Additionally, Wisconsin's voting equipment and technology

may be incompatible with fusion voting. (*Id.* ¶¶ 29–31.) The Commission has certified voting equipment from five different vendors, and none of it has been tested or certified to account for fusion voting. (*Id.* ¶ 29.)

This dispute is immaterial, however, and does not prevent this Court from entering summary judgment in favor of Defendant.

Plaintiffs’ Reply No. 59: Defendant fails to dispute the proposed fact. Even if there were “regulatory gaps” created by reimplementing fusion voting through this case, such “gaps” are not new to the election code, as evidenced by the volume of election-related litigation Wisconsin has seen in recent years. For that reason, WEC has authority under Wis. Stat. ch. 5 to promulgate rules or issue guidance accordingly. *See also Clarke v. WEC*, 2023 WI 79, ¶¶56, 77, 410 Wis. 2d 1, 998 N.W.2d 370 (provisions “of the Wisconsin Constitution mean what they say,” and “it is necessary to enjoin” unconstitutional laws to avoid use in “all future elections”; while “hopeful” that the Legislature will address the problem, “should that fail to happen, this court is prepared to” adopt remedy). Moreover, as Dane County Clerk Scott McDonell testifies, “this concern is overstated. Wisconsin’s existing statutory and regulatory election law framework is full of gaps, none of which foreclose us holding free, full, and fair elections.” (McDonell Decl., ¶9)

60. Voters in other jurisdictions, though unfamiliar with fusion, do not have difficulty with ballots featuring cross-nominations. (Burden rep. at 7–11; Burden rebuttal at 2–5; Drutman rebuttal at 3–7)

Defendant’s Response No. 60: Objection. The cited evidentiary material does not support the proposed fact; therefore, the Court should not consider it. The evidence Professor Burden cites, even if taken at face value, does not support such a categorical statement about the total lack of voter confusion. (Doc. 26:10–14 (Burden Report 7–11); Doc. 26:17–20 (Burden Rebuttal Report 2–5).) As for Drutman, he critiques the evidence of confusion that Defendant’s experts offer, but he does not identify any affirmative evidence of a lack of voter confusion. (Doc. 28:33–37 (Drutman Rebuttal Report 3–7).)

Subject to and not waiving this objection, and if the proposed fact were supported by evidence such that the Court could consider it, Defendant would dispute the proposed fact. Professor Burden concedes that “[a]ll changes in election laws and election administration have the potential to confuse voters” (Doc. 26:10 (Burden Report 7)) and that “some voters might be surprised or even confused to see a candidate listed twice for an office,” (Doc. 26:19 (Burden Rebuttal Report 4)). Defendants’ experts explain further:

Dr. Burden argues that “confusion among voters about fusion candidacies is likely to be modest, to reduce over time with repeated use, and not to be consequential for generating voter error.” This conclusion rests primarily on the Loepp and Melusky study, which found that experimental subjects who marked fusion ballots reported similar levels of ease and clarity as those who marked non-fusion ballots.

This evidence addresses one type of confusion: confusion about how to mark the ballot correctly. But it largely overlooks a more significant concern: confusion about the minor parties themselves.

(Atkinson-Tahk Report 64 (footnotes omitted).)

This dispute is immaterial for purposes of summary judgment because the relevant questions pertaining to voter confusion are (1) whether avoiding fusion confusion is a legitimate state interest; and (2) whether Wisconsin’s anti-fusion statutes are rationally connected to that interest. A dispute over the extent of voter confusion simply underscores that anti-fusion statutes are rationally connected to this state interest. Moreover, the Court need not consider facts related to voter confusion if it relies instead on the other legitimate state interests described by Defendant.

Plaintiffs’ Reply No. 60: Defendant fails to dispute the proposed fact. As Dr. Burden demonstrates, “any voter confusion due to the reintroduction of fusion would likely be modest.” (Dkt. 26 at 17 (Burden rebuttal at 2)) Dr. Burden does not, as Defendant’s experts state, rely primarily on the Loepp and Melusky study. (See Dkt. 26 at 11 (Burden rep. at 8) (analyzing comparative effect on voter confusion for changes that enhance versus restrict voter choice, supported by the empirically studied “cost of voting” theory); Dkt. 26 at 12 (Burden rep. at 9) (discussing the difference between short-term and long-term changes to voting); Dkt. 26 at 13 (Burden rep. at 10) (discussing the failsafe built into voting that would correct many, if not most, instances of the only error voters could feasibly make due to reimplementing fusion))

Defendant fails to describe what “confusion about minor parties themselves” means, but presumably Defendant means to reference its experts’ discussion of “billboard” and “sham” parties and “sore loser” candidates. As Dr. Burden points out, Defendant’s experts rely on the sporadic occurrence of these phenomena New York elections without observing that they haven’t arisen meaningfully in other states that allow fusion, and without considering significant cultural and demographic differences between New York and Wisconsin. (Dkt. 26 at 27 (Burden rebuttal at 12)) And Dr. Drutman further explains the relative insignificance of these issues. (See Dkt. 28 at 23–27

(Drutman rep. at 20–24); Dkt. 28 at 35–37, 41–42 (Drutman rebuttal at 5–7, 11–12))

Defendant’s lack of meaningful evidence that voter confusion will result in Wisconsin if fusion is reimplemented undermines its argument that the ban on fusion voting serves any legitimate state interest.

61. The marginal administrative burdens associated with fusion are readily manageable through existing regulatory tools, including ballot formatting and labeling requirements. (Burden rep. at 7–11; Burden rebuttal at 2–5)

Defendant’s Response No. 61: Disputed but immaterial. Multiple regulatory gaps would result from the invalidation of Wisconsin’s anti-fusion statutes. (Kehoe Decl. ¶¶ 4–24.) Existing law does not resolve those issues, and it is unclear whether the Commission has the authority to resolve them without legislation. (*Id.*) Additionally, Wisconsin’s voting equipment and technology may be incompatible with fusion voting. (*Id.* ¶¶ 29–31.) The Commission has certified voting equipment from five different vendors, and none of it has been tested or certified to account for fusion voting. (*Id.* ¶ 29.)

This dispute is immaterial, however, and does not prevent this Court from entering summary judgment in favor of Defendant.

Plaintiffs’ Reply No. 61: Defendant fails to dispute the proposed fact. Plaintiffs reiterate and incorporate herein their replies to Proposed Facts Numbers 57–59.

62. There is no evidence that striking down the fusion ban would lead to more “sham” or “sore loser” candidates. (Burden rebuttal at 11)

Defendant’s Response No. 62: Disputed but immaterial. Defendants’ experts discuss evidence of “sham” parties and “sore losers” under New York’s fusion voting system. (Atkinson-Tahk Report 18–21, 35.)

This dispute is immaterial for purposes of summary judgment because the relevant questions pertaining to sham parties and sore loser candidates are (1) whether avoiding these issues is a legitimate state interest; and (2) whether Wisconsin’s anti-fusion statutes are rationally connected to those interests. A dispute over the extent of the problem of sham parties and sore loser candidates simply underscores that anti-fusion statutes are rationally connected to these state interests. Moreover, the Court need not consider facts related to sham parties and sore loser candidates if it relies instead on the other legitimate state interests described by Defendant.

Plaintiffs' Reply No. 62: Defendant fails to dispute the proposed fact as to what is likely to happen in Wisconsin. Defendant's experts opine based on limited occurrences in New York. Dr. Burden addresses that argument in his rebuttal report. (Dkt. 26 at 24–28 (Burden rebuttal at 9–13))

63. The fusion ban is a structural classification that artificially protects the duopoly parties and cements their status in perpetuity. (Drutman rep. at 2, 5–9, 12–17, 23–25; Cantor Decl., ¶13)

Defendant's Response No. 63: Objection. The cited evidentiary material does not support the proposed fact; therefore, the Court should not consider it. Most of the cited evidence generally discusses polarization in the United States' political system. (Doc. 28:5, 8–12, 15–20 (Drutman Report 2, 5–9, 12–17).) To the extent Drutman identifies a culprit, he also cites the advantages of a “proportional representation” system over “two-party majoritarian systems” (Doc. 28:5 (Drutman Report 2)), the fact that the United States uses “winner-take-all majoritarian elections” (Doc. 28:28 (Drutman Report 25)), and “fundamental changes in the party system, geographic realignment, the nationalization of American politics, and intensely close competition for control of government” (*id.*), all of which are separate from anti-fusion voting laws. The other cited portion of Drutman's report discuss historical evidence from a period before the Australian ballot was introduced, during which fusion voting in its modern form didn't exist. (Doc. 28:26–27 (Drutman Report 23–24).) At most, Drutman asserts that fusion voting “offers a realistic and practical mechanism for addressing these challenges” (Doc. 28:28 (Drutman Report 25)), which doesn't support the proposition that anti-fusion laws themselves “cement[]” the two-party system “in perpetuity.”

Subject to and not waiving this objection, and if the proposed fact were supported by evidence such that the Court could consider it, Defendant would dispute the proposed fact. Defendant's experts disagree with Drutman's analysis of the effect of anti-fusion voting laws. (Atkinson-Tahk Report 47–55.) This dispute is immaterial, however, and does not prevent this Court from entering summary judgment in favor of Defendant.

Plaintiffs' Reply No. 63: Defendant fails to dispute the proposed fact and articulates no dispute at all as to Daniel Cantor's testimony supporting the proposed fact. (Dkt. 29 at 4 (Cantor Decl., ¶13)) The Court should deem the proposed fact admitted.

64. Without fusion, minor parties are relegated for perpetuity to a spoiler role, whereby any electoral effort they make is not only futile in advancing their own candidate and platform, but also seriously risks helping their least-favored major-party candidate win the race and get to govern. (Drutman rep. at 25; Drutman rebuttal at 10, 13, 22, 24; Cantor Decl., ¶9; *see also* Andrews Decl., ¶6)

Defendant's Response No. 64: Objection; Plaintiffs do not define the term “fusion,” which can mean several different things. Assuming they mean “fusion voting,” the proposed fact is disputed but immaterial. In addition to the response above to Proposed Fact No. 63, Defendant's experts explain why fusion voting is unlikely to generate centrist third parties and does not avoid the spoiler effect. (Atkinson-Tahk Report 38–45.) This dispute does not prevent this Court from entering summary judgment in favor of Defendant.

Plaintiffs' Reply No. 64: Defendant fails to dispute the proposed fact. Plaintiffs incorporate herein their reply in support of Proposed Fact Number 63. Further, Defendant's experts do not adequately support their claim that “fusion voting is unlikely to generate centrist third and parties and does not avoid the spoiler effect.” (See Dkt. 28 at 32–35 (Drutman rebuttal at 2–5))

65. Parties' inability to nominate the preferred candidate *does* preclude minor parties from developing and organizing, because voters have no incentive to associate with them. (Cantor Decl., ¶¶13, 23)

Defendant's Response No. 65: Objection. The cited evidentiary material does not support the proposed fact; therefore, the Court should not consider it. Anti-fusion laws do not always mean parties are unable to “nominate [their] preferred candidate;” that is true only when their “preferred candidate” has already been nominated by another party. Moreover, the cited declarant never says that anti-fusion laws “preclude minor parties from developing and organizing;” instead, he says there is “little hope for impactful, effective third-party activity in states that do not permit fusion voting” (Doc. 29:4 (Cantor Decl. ¶ 13)) and that new parties require “rules that allow . . . [them] to nominate *viable* candidates for office” (Doc. 29:6 (Cantor Decl. ¶ 23)). The “rules” Cantor references might also include “winner-take-all majoritarian elections,” which Drutman recognizes are “hostile to third-party candidates.” (Doc. 28:28 (Drutman Report 25).) This proposed finding also does not account for the Green Party, for example, which has a national presence despite the ubiquity of anti-fusion voting laws nationwide. (Atkinson-Tahk Report 41.) Even if Plaintiffs had supported this fact with evidence, it would not prevent this Court from entering summary judgment in favor of Defendant.

Plaintiffs' Reply No. 65: Defendant fails to dispute the proposed fact. Defendant seems to agree that minor parties have “little hope for impactful, effective third-party activity in states that do not permit fusion voting.” As stated in the cited evidentiary material, parties need “rules that allow a new party to nominate *viable* candidates for office.” (Dkt. 29 at 6 (Cantor Decl., ¶23) (emphasis in original))

Plaintiffs have adduced evidence that the availability of fusion affects voter behavior by allowing voters to support a minor party without risking the “spoiler” effect, creating incentives and thereby encouraging votes on the

minor party's ballot line and increasing that party's political power and influence. In fact, Plaintiffs aver, in uncontested testimony, to their willingness to vote for candidates on a third-party line specifically. (Dkt. 31 at 1 (Deininger Decl., ¶4); Dkt. 33 at 1 (Rasch Decl., ¶4)); *see also* Dkt. 28 at 28 (Drutman rep. at 25); Dkt. 28 at 43, 52–55 (Drutman rebuttal at 13, 22–25); Dkt. 29 at 2–4, 6, 10 (Cantor Decl., ¶¶9, 12–13, 16, 23, 37); Dkt. 30 at 2–3 (Andrews Decl., ¶¶6, 14))

66. Absent fusion, minor parties today are virtually irrelevant in elections. (Cantor Decl., ¶23; Drutman rep. at 24–25)

Defendant's Response No. 66: Objection. The cited evidentiary material does not support the proposed fact; therefore, the Court should not consider it. The cited declaration only discusses the difficulty “for a new party to get off the ground,” and the cited problems are not all derived from anti-fusion laws. (Doc. 29:6 (Cantor Decl. ¶ 23).) Again, this proposed finding ignores nationwide third parties like the Green Party. (Atkinson-Tahk Report 41.) As for Drutman's report, he says “third party activity in Wisconsin is extremely limited” not due to anti-fusion laws, but rather “because, like all U.S. States, Wisconsin uses winner-take-all majoritarian elections, which are hostile to third-party candidates.” (Doc. 28:28 (Drutman Report 25).) And none of the cited evidence uses the characterization “virtually irrelevant.” Even if Plaintiffs had supported this fact with evidence, it would not prevent this Court from entering summary judgment in favor of Defendant.

Plaintiffs' Reply No. 66: Defendant fails to dispute the proposed fact. Defendant disputes that the “cited problems are not all derived from anti-fusion laws,” which is immaterial to the proposed fact.

Further, the Green Party is not a counterexample in Defendant's favor. Whatever its goals, the Green Party has never won a statewide election or a legislative election in Wisconsin, has not won a statewide election anywhere in the U.S. since 2002, and it has never won a U.S. Senate or House election. It holds no seats in any state legislature at present. *See* Green Party, GPUS Elections Database, available at <https://greenpartyus.org/>; *see also* Per Urlaub, *Why Is the U.S. Green Party So Irrelevant?*, NEW REPUBLIC (Oct. 19, 2016), available at <https://newrepublic.com/article/137924/us-green-party-irrelevant>; Calder McHugh, *'It Smells Like a Rat': The Nasty Feud That Could Flip Wisconsin*, POLITICO (Oct. 3, 2024), available at <https://www.politico.com/news/magazine/2024/10/03/wisconsin-green-party-00180283>. (All URLs last visited Aug. 6, 2026.)

67. America and Wisconsin face a problem termed the “two-party doom loop”: in our two-party system, “as the parties move further apart from each other, they engage in more

aggressive hardball tactics and rhetoric. These aggressive hardball tactics and rhetoric further push them away from each other.” (Drutman rep. at 5) This is not a problem that self-corrects; instead, it escalates. (*Id.* at 15)

Defendant’s Response No. 67: Undisputed for purposes of summary judgment.

Plaintiffs’ Reply No. 67: Undisputed.

68. Today, large numbers of Wisconsinites indicate that the two-party duopoly leaves them feeling unrepresented. (Marquette Univ. Law School, “Party ID lean,” in *Marquette Law School Supreme Court Poll October 15–22, 2025*, available at <https://law.marquette.edu/poll/wp-content/uploads/2025/10/MLSP86ToplinesRV.html#party-id-lean>; *see also, e.g.*, Andrews Decl., ¶11; Schultz Decl., ¶¶5, 9; Mahoney Decl., ¶¶5, 9; Deininger Decl., ¶¶3–4; Rasch Decl., ¶¶3–5)

Defendant’s Response No. 68: Undisputed for purposes of summary judgment.

Plaintiffs’ Reply No. 68: Undisputed.

69. The “two-party doom loop” reduces our political system’s stability. (Drutman rep. at 2, 5–9, 12–17)

Defendant’s Response No. 69: Disputed but immaterial. Defendant’s experts explain:

Dr. Drutman relies heavily on the concept of “political stability” without ever defining what he means.

. . . Dr. Drutman, however, implicitly redefines “stability” to mean “moderation” or a lack of “polarization.” He seems to argue that the current system is “unstable” simply because it is polarized.

This is a conceptual error. “Stability” and “polarization” are not the same thing. A political system can be deeply polarized (with fierce disagreement between parties) yet structurally stable (enduring over time without collapse).

(Atkinson-Tahk Report 50 (footnote omitted).) This dispute is immaterial, however, and does not prevent this Court from entering summary judgment in favor of Defendant.

Plaintiffs’ Reply No. 69: Defendant misunderstands Dr. Drutman’s reports; as his rebuttal report explains, “[a] polarized system can be stable—if there is a moderating mechanism preventing either pole from gaining unchecked power.” (Dkt. 28 at 44 (Drutman rebuttal at 14)) Further, “[t]he

danger is not polarization alone but the self-reinforcing feedback loop that emerges when two parties view each other as existential threats. Parties diverge; stakes increase. Higher stakes intensify animosity. Animosity erodes democratic norms.” (*Id.* (internal citations omitted)) Defendant fails to dispute the proposed fact.

70. America’s two-party system has grown less stable since the mid-1990s. (Drutman rep. at 17)

Defendant’s Response No. 70: For the same reasons provided in response to Proposed Fact No. 69, disputed but immaterial.

Plaintiffs’ Reply No. 70: Plaintiffs reiterate and incorporate herein their reply in support of Proposed Fact Number 69. Further, Defendant’s dispute to Proposed Fact Number 69 does not materially respond to this proposed fact. The Court should deem this proposed fact admitted.

Dated: August 7, 2026.

Respectfully submitted,

Electronically signed by Kacy C. Gurewitz

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