

STATE OF WISCONSIN : CIRCUIT COURT : DANE COUNTY
BRANCH 4

MARGARET HONIG
and ROBERT HONIG,

Plaintiffs,

v.

Case No. 26-CV-1463

WISCONSIN ELECTIONS COMMISSION, *et al.*

Defendants,

and

BILLIE L. JOHNSON
and KENDALL E. POST,

Intervenor-Defendants.

**[PROPOSED] ANSWER AND AFFIRMATIVE DEFENSES IN INTERVENTION OF
BILLIE L. JOHNSON AND KENDALL E. POST**

Intervenor-Defendants BILLIE L. JOHNSON and KENDALL E. POST (collectively, "Intervenors"), by and through undersigned counsel, hereby answer the Complaint of Plaintiffs MARGARET HONIG and ROBERT HONIG as follows. Except as expressly admitted herein, Intervenors deny *all* allegations of the Complaint, including all prayers for relief.

INTRODUCTION

1. **Admit** that Plaintiffs *claim* to have cast absentee ballots in the April 7, 2026 Spring Election. Intervenors lack knowledge or sufficient information to admit or deny whether Plaintiffs actually cast valid ballots according to the law and, if so, whether those specific ballots

are identifiable and traceable through the canvass process, and on that basis **deny** the remaining implications of this paragraph.

2. **Admit** that the City of Madison received and initially counted certain absentee ballots that arrived after the mandatory 8 p.m. deadline. Intervenors lack knowledge or information sufficient to admit or deny whether Plaintiffs actually cast valid ballots according to the law and, if so, whether Plaintiffs' ballots and votes remain separately identifiable following the City's drawdown procedure, and on that basis **deny** the remaining implications of this paragraph.

3. **Admit** that WEC, by a 5-1 bipartisan vote on April 30, 2026, issued a decision and ordered City and County Election Officials to "conform their conduct to" Wis. Stat. § 6.87(6) and directed City Election Officials to remove "the 23 unlawfully counted absentee ballots" and adjust the returns accordingly. Intervenors **deny** that WEC's order directed the exclusion of Plaintiffs' specifically identifiable ballots, as Plaintiffs have not established—and the Complaint does not allege—that their specific physical ballots are among those confirmed to have been removed from the certified count following the City's drawdown. Intervenors **deny** all remaining allegations of this paragraph.

4. **Deny.** The Wisconsin Constitution does not prohibit enforcement of a mandatory ballot delivery deadline lawfully enacted by the Legislature. The case Plaintiffs cite, *Ollmann v. Kowalewski*, is inapplicable, does not stand for the broad proposition asserted and was decided before the Legislature enacted Wis. Stat. § 6.84(2) in 1985 to declare § 6.87(6) mandatory.

5. **Admit** that the state canvass deadline is May 15, 2026, pursuant to Wis. Stat. § 7.70(3)(a). **Deny** that this deadline justifies the extraordinary relief sought and certainly does not justify overriding mandatory statutory requirements.

6. **Deny** that Plaintiffs are entitled to a *writ of mandamus*, declaratory relief, injunctive relief, or any other relief sought in the Complaint. Mandamus cannot compel an act the law expressly forbids.

PARTIES

7. Intervenors lack knowledge or information sufficient to admit or deny the allegations of paragraph 7 and therefore **deny** the same.

8. Intervenors lack knowledge or information sufficient to admit or deny the allegations of paragraph 8 and therefore **deny** the same.

9. **Admit.**

10. **Admit.**

11. **Admit.**

12. **Admit.**

JURISDICTION AND VENUE

13. **Admit** that this Court generally has subject matter jurisdiction over civil matters arising within Dane County, Wisconsin. **Deny** that this matter is properly brought before this Court and **deny** that Plaintiffs state a claim upon which relief may be granted. Further affirmatively assert that the Court should dismiss Plaintiffs' Complaint pursuant to all the below affirmative defenses.

14. **Admit** that Defendants and Intervenors have a local presence or status. **Deny** that this matter is properly brought before this Court and **deny** that Plaintiffs state a claim upon which relief may be granted. Further affirmatively assert that the Court should dismiss Plaintiffs' Complaint pursuant to all the below affirmative defenses.

15. **Admit** that all other defects aside, venue would be proper in Dane County. **Deny** the remaining implications of this paragraph.

FACTS

16. **Admit** that Wis. Stat. § 6.88(3) generally provides, in relevant part, as set forth in this Paragraph. Affirmatively assert that Wisconsin election law contains many other requirements before absentee ballots may be counted.

17. **Admit** that Wis. Stat. § 6.88(1)-(2) generally provides, in relevant part, as set forth in paragraph 17. Intervenors lack sufficient knowledge or information to determine whether municipal clerks complied with these requirements for all absentee ballots returned or for the ballots at issue in this matter and therefore **deny**.

18. **Admit** that Wis. Stat. § 6.88(1)-(2) generally provides, in relevant part, as set forth in paragraph 18. Intervenors lack sufficient knowledge or information to determine whether municipal clerks complied with these requirements for all absentee ballots returned or for the ballots at issue in this matter and therefore **deny**.

19. **Admit** that Wis. Stat. § 6.88(3) generally provides, in relevant part, as set forth in paragraph 19. Intervenors lack sufficient knowledge or information to determine whether municipal clerks complied with these requirements for all absentee ballots returned or for the ballots at issue in this matter and therefore **deny**.

20. **Admit.**

21. Intervenors lack knowledge or information sufficient to admit or deny the remaining allegations and, on that basis, **deny** all allegations in paragraph 21.

22. Intervenors lack knowledge or information sufficient to admit or deny whether Plaintiffs properly requested, completed, and returned their absentee ballots and therefore **deny** all allegations in paragraph 22.

23. Intervenors lack knowledge or information sufficient to admit or deny and therefore **deny** all allegations in paragraph 23.

24. Intervenors lack knowledge or information sufficient to admit or deny and therefore **deny** all allegations in paragraph 24.

25. Intervenors lack knowledge or information sufficient to admit or deny and therefore **deny** all allegations in paragraph 25. Intervenors affirmatively assert that Wisconsin statutory law requires ballots to be delivered to the appropriate polling places by 8 p.m. on election day. Wis. Stat. § 6.87(6).

26. **Admit** upon information and belief that on April 7, 2026, the City of Madison Clerk's Office delivered certain absentee ballots to polling places after 8 p.m., in violation of Wis. Stat. § 6.87(6), and that election inspectors unlawfully counted those ballots. Intervenors lack knowledge or information sufficient to admit or deny the remaining specific factual allegations and therefore **deny**.

27. **Admit** upon information and belief that in the Spring Election the City of Madison canvass and the Dane County canvass included the unlawfully counted ballots referred to in paragraph 26. Intervenors lack knowledge or information sufficient to admit or deny the remaining specific factual allegations and therefore **deny**.

28. **Admit** upon information and belief that, upon learning that the City of Madison may have unlawfully counted late-arriving absentee ballots, WEC properly discharged its

statutory duty and opened an investigation. Intervenors lack knowledge or information sufficient to admit or deny the remaining specific factual allegations and therefore **deny**.

29. **Admit** upon information and belief that 23 absentee ballots were not delivered by the 8 p.m. deadline as required by Wis. Stat. § 6.87(6). Intervenors lack knowledge or information sufficient to admit or deny the remaining specific factual allegations and therefore **deny**.

30. **Admit** that *absentee* voters do not personally deliver their own ballots to polling locations on election day—after all, they have elected the privilege of voting by absentee ballot. *See* Wis. Stat. § 6.84(1). **Deny** the implication that this is relevant or has any effect on the mandatory delivery deadline contained in Wis. Stat. § 6.87(6). The Legislature knew absentee voters would not be delivering their own ballots to polling locations when it enacted the deadline and when clarifying its mandatory application.

31. **Admit** that *absentee* voters do not maintain “control over” their own ballots after they are returned. **Deny** the implication that this is relevant or has any effect on the mandatory delivery deadline contained in Wis. Stat. § 6.87(6). The Legislature knew absentee voters would not continue to have control over their ballots after they are returned. This is exactly why the Legislature explained that “voting by absentee ballot must be carefully regulated” and expressly added that the 8 p.m. delivery deadline “shall be construed as mandatory.” Wis. Stat. §§ 6.84(1)-(2).

32. **Admit** that on April 30, 2026, WEC, by a 5-1 bipartisan vote, issued a decision and ordered City and County Election Officials to "conform their conduct to" Wis. Stat. § 6.87(6) and directed City Election Officials to remove "the 23 unlawfully counted absentee

ballots" and adjust the returns accordingly. Intervenors **deny** anything to the contrary. ("WEC's Order").

33. **Admit** that WEC's Order required that the 23 late-delivered ballots not be counted in the Spring Election, pursuant to Wis. Stat. §§ 6.84(2) and 6.87(6). **Deny** any implication that WEC's Order was improper, it was legally required. Intervenors affirmatively assert upon information and belief that Plaintiffs' specific physical ballots cannot be identified, segregated, or traced through the canvass process and therefore it was not possible to confirm that Plaintiffs' specific ballots would "not be counted."

34. **Admit** on information and belief that local officials took steps to comply with WEC's Order, including reconvening canvass boards. Intervenors affirmatively assert, upon information and belief, that because election inspectors failed to separately identify and segregate almost all of the late-arriving absentee ballots as instructed, the City of Madison had to employ a drawdown procedure: removing ballots by random selection from the general ballot pool rather than by specific identification allowing for removal of the unlawfully counted absentee ballots.

35. Intervenors lack knowledge or information sufficient to admit or deny the specific contents of any letters sent to Plaintiffs and therefore **deny**. Intervenors note that administrative notice of WEC's Order is not equivalent to proof that Plaintiffs' specific physical ballots are among those confirmed removed from the count. In fact, Intervenors affirmatively assert that it is much more likely than not that Plaintiffs' ballots were *not* removed from the count and therefore Plaintiffs' ballots were likely included in the revised election returns.

36. **Deny** and affirmatively assert upon information and belief that the Dane County Board of Canvassers has filed an administrative agency review of WEC's Order pursuant to Wis.

Stat. § 5.06(8) which is pending in Dane County Circuit Court as Case Number 2026CV001455. In fact, as explained in Intervenor's affirmative defenses below, this is the exclusive remedy to challenge WEC's Order and Plaintiffs' claims are thus barred, requiring dismissal of the Complaint.

37. **Deny.** WEC's order was lawfully required by Wis. Stat. §§ 6.84(2) and 6.87(6). Statute mandates that absentee ballots arriving at polling locations after 8 p.m. "may not be counted." *Id.* Intervenor further **deny** that Plaintiffs have established that their specific votes are among those removed, as distinct from votes of other Madison voters not party to this action.

38. **Admit** that Wis. Stat. § 6.87(6) provides, in relevant part, as quoted in paragraph 38. Intervenor affirmatively assert that the statute means precisely what it says and was confirmed as mandatory by the Legislature.

39. **Admit** that Wis. Stat. § 6.84(2) provides, in relevant part, as quoted in paragraph 39. Intervenor affirmatively assert that this provision mandates exclusion of the 23 late-arriving ballots.

40. **Deny.** WEC's order is consistent with the Wisconsin Constitution and applicable law. The "line of binding precedent" Plaintiffs invoke does not survive and cannot overcome the Legislature's 1985 enactment of Wis. Stat. § 6.84(2). The cases cited are either pre-1985, inapplicable to Wis. Stat. § 6.87(6), or both.

CLAIMS FOR RELIEF

First Claim for Relief: Writ of Mandamus

41. Intervenor incorporate their responses to all preceding paragraphs.

42. The allegations of paragraph 42 state legal conclusions to which no response is required; to the extent a response is required, **deny** that Plaintiffs are entitled to a writ of mandamus and that the cited authorities support the relief sought.

43. The allegations of paragraph 43 state legal conclusions to which no response is required; to the extent a response is required, **deny** that Plaintiffs are entitled to a writ of mandamus and that the cited authorities support the relief sought.

Paragraphs 44 through 65. **Deny** all allegations in paragraphs 44 through 65; **admit** statutory text to the extent quoted. Affirmatively assert that while Plaintiffs invoke the general right to vote, the same cases cited and over a century of longstanding Wisconsin precedent establish that this right is fully compatible with, in fact requires, mandatory legislative regulation of how voting is conducted and that “[t]o do so infringes upon no constitutional rights.” *State ex rel. Small v. Bosacki*, 154 Wis. 475, 478-79, 143 N.W. 175 (1913). In *Phelps*, the very case relied upon by Plaintiffs, the Supreme Court made it clear that the right to vote is “subject to regulation like all other rights,” *State ex rel. McGrauel v. Phelps*, 144 Wis. 1, 128 N.W. 1041, 1046 (1910), and another case cited in the Complaint goes even further expressly stating that the Legislature “has the constitutional power to say how, when and where [a qualified elector’s] ballot shall be cast.” *State ex rel. Frederick v. Zimmerman*, 254 Wis. 600, 37 N.W.2d 473, 480 (1949). Intervenors further specifically deny that Plaintiffs’ injury is redressable by the relief sought and deny that Plaintiffs have established their specific ballots are among those confirmed removed from the certified count.

Second Claim for Relief: Declaratory Judgment and Injunctive Relief

66. Intervenors incorporate their responses to all preceding paragraphs.

Paragraphs 67 through 73: **Deny** all allegations in paragraphs 67 through 73; **admit** statutory text to the extent quoted. WEC has not adopted an incorrect interpretation of Wisconsin election law; it has executed upon its duty to enforce the law as written. The Wisconsin Constitution does not prohibit enforcement of mandatory ballot delivery deadlines enacted by the Legislature, see responses to paragraphs 44 through 65. Wis. Stat. §§ 6.84(2) and 6.87(6) are constitutionally valid legislative regulations of the right to vote.

AFFIRMATIVE DEFENSES

Without taking on the burden of proof on any issue for which such burden properly rests with Plaintiffs, Intervenor hereby give notice that the following matters likely bar some or all of Plaintiffs' Complaint and/or requests for relief:

1. **Exclusive Remedy: Administrative Agency Review Under Wis. Stat. § 5.06 and Ch. 227.**

Plaintiffs' challenge to WEC's Order is barred because Wis. Stat. § 5.06 prescribes the sole and exclusive procedure for reviewing WEC determinations of this kind. WEC issued its order under § 5.06(6); judicial review must therefore proceed under § 5.06(8), which channels review into a Chapter 227 administrative agency appeal. "No room exists for an argument that the remedy of judicial review afforded under [Wis. Stat. §] 5.06 . . . is inadequate." *Kuechmann v. School Dist. of La Crosse*, 170 Wis. 2d 218, 224, 487 N.W.2d 639, 641 (Ct. App. 1992) (holding that the exclusive remedy for review of an order pursuant to Wis. Stat. § 5.06 is an administrative agency review under § 5.06(8)). "[T]he circuit court cannot employ some other method of review, such as an independent action for declaratory relief, prohibition or injunction." *Id.* at 224–25 (emphasis added). The Court of Appeals recently affirmed this rule in *Bernegger v. Winkelhorst*, No. 2023AP1889, unpublished slip op. at 4 (Wis. Ct. App. Oct. 16,

2024): “an independent action for prohibition (or mandamus) cannot be used in lieu of the statutory procedure outlined in Wis. Stat. § 5.06.”

Plaintiffs have neither pursued nor invoked that statutorily mandated path, and their mandamus action must be dismissed for that reason alone. Adding to the requirement that this Court dismiss this action, upon information and belief, the Dane County Board of Canvassers has filed under this exclusive remedy seeking administrative agency review of WEC’s Order. *See* Dane County Circuit Court as Case Number 2026CV001455.

2. Failure to State a Claim: No Clear Legal Right, No Clear Legal Duty, and Express Statutory Prohibition.

Plaintiffs’ Complaint fails to state a claim upon which relief can be granted. A writ of mandamus requires both a clear legal right in the petitioner and a positive, plain legal duty in the respondent. *State ex rel. Kurkierewicz v. Cannon*, 42 Wis. 2d 368, 376, 166 N.W.2d 255, 258-59 (1969). Plaintiffs can establish neither. The Legislature has declared that absentee ballots not delivered to the polling place by 8 p.m. on election day “may not be counted” and “may not be included in the certified result of any election,” and that this provision “shall be construed as mandatory.” Wis. Stat. §§ 6.84(2) and 6.87(6). No clear legal right exists to count unlawfully delivered ballots, and WEC has no duty—let alone a clear one—to certify results in defiance of an express legislative prohibition.

3. Lack of Standing: Injury Not Traceable and Not Redressable.

Plaintiffs lack standing because their alleged injury is neither traceable to the conduct challenged nor redressable by the relief sought. Almost all of the late-arriving ballots were *not* segregated for individual identification and therefore other ballots were removed by random drawdown from the general ballot pool. Plaintiffs do not—and cannot—allege whether their specific ballots are among the three identified or among the twenty randomly drawn. Reinstating

the original canvass totals would not restore Plaintiffs' votes; it would restore an undifferentiated aggregate that may include timely ballots cast by non-parties. Courts of equity do not grant speculative relief that fails to redress the named plaintiffs' specific injuries and that risks displacing the lawful votes of absent voters.

4. **Mandamus is not appropriate: WEC Complied with, and Was Compelled By, a Clear, Unambiguous and Mandatory Statute.**

WEC's Order was issued pursuant to its authority under Wis. Stat. § 5.06(6) and compelled by the commands of Wis. Stat. §§ 6.84(2) and 6.87(6). WEC exercised no impermissible discretion; it followed the Legislature's unambiguous and mandatory directive. As WEC's own decision—attached to the Complaint—acknowledges, the Commission was bound by the plain statutory text, however sympathetic the circumstances of affected voters might be.

PRAYER FOR RELIEF

WHEREFORE, Intervenors Billie L. Johnson and Kendall E. Post respectfully request that this Court:

- A. Deny Plaintiffs' request for a writ of mandamus in its entirety;
- B. Deny Plaintiffs' requests for declaratory judgment and injunctive relief;
- C. Dismiss the Complaint with prejudice;
- D. Enter judgment in favor of Defendants and Intervenors; and
- E. Grant such other and further relief as this Court deems just and proper.

Respectfully submitted this 11th day of May 2026.

NJB LAW & CONSULTING LLC

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