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## **INTRODUCTION**

Plaintiffs’ new request is unprecedented: a declaration that any Wisconsin election law is unconstitutional as applied to any set of facts in which an election official may err. That request runs headlong into longstanding doctrine governing both constitutional challenges and declaratory judgments. Each independently forbids it.

This Court already gave Plaintiffs everything they asked for, on the narrow, unique facts they put before it. *See* Background, *infra*. At the May 14 hearing, Plaintiffs told the Court that “this is not a facial challenge” and that “at the end of the day, we’re only asking for relief about these particular individuals.” (Dkt. 37 at 20:18–19, 30:24–25.)<sup>1</sup> The Court took them at their word, ruled that evening, and Plaintiffs’ ballots were counted. That is how an as-applied challenge is supposed to work, and Plaintiffs won it here.

Three months later, they ask for the broad, unworkable relief Intervenor warned was always the real objective: a declaration that “Wisconsin election statutes cannot be interpreted or applied to disenfranchise voters due to errors by election officials,” circulated with its “reasoning” to every municipal and county clerk in Wisconsin. (Dkt. 49 at 23.) The request names no statute, defines no “error,” allocates no fault between voter and official, and sets no time limit. By its terms, it reaches every election statute, on facts that appear nowhere in the pleadings—providing election officials with a broad option to ignore election statutes and count ballots that the legislature commanded may not be counted.

Wisconsin law does not recognize that form of relief. A constitutional challenge is either facial (an attack on an entire identified enactment) or as applied, which is confined to the

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<sup>1</sup> Hereinafter, “Tr.” refers to the Transcript of the hearing in this case held on May 14, 2026, as well as the page number before the colon and the applicable lines after the colon. “Dkt.” refers to the document number in the Court’s record for this case.

challenger’s own circumstances and decided on “the facts of the particular case in front of us, ‘not hypothetical facts in other situations.’” *Mayo v. Wis. Injured Patients & Families Comp. Fund*, 2018 WI 78, ¶24, 383 Wis. 2d 1, 914 N.W.2d 678 (citation omitted). Plaintiffs disclaimed the first and already prevailed on the second. What remains is neither: a request for a freestanding rule of decision for controversies that do not yet exist, asserted by no one, on a record this case will never make. *See Wash. State Grange v. Wash. State Repub. Party*, 552 U.S. 442, 450–51, 128 S. Ct. 1184 (2008) (courts should not “formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied”) (citing *Ashwander v. TVA*, 297 U.S. 288, 346–47, 56 S. Ct. 466 (Brandeis, J., concurring)).

The Declaratory Judgments Act independently authorizes a court to refuse a judgment that “would not terminate the uncertainty or controversy giving rise to the proceeding.” Wis. Stat. § 806.04(6). The declaration Plaintiffs propose would not settle anything and is a recipe for statewide chaos this Court should not create.

Intervenors do not ask this Court to disturb its May 14 order or to revisit the 23 ballots. They ask only that the Court decline to convert a resolved, unique dispute into an amorphous statewide rule of election administration that the legislature never enacted, that no evidentiary record supports, and that thousands of election officials could never consistently apply.

The Court should deny Plaintiffs’ motion and dismiss the remaining claim.

## **BACKGROUND**

### ***A. The specific and unique facts in this case—23 ballots, just minutes late.***

Section 6.87(6), Wis. Stat., provides that an absentee “ballot shall be returned so it is delivered to the polling place no later than 8 p.m. on election day,” directs the municipal clerk to “cause the ballot to be delivered to the polling place serving the elector’s residence before 8

p.m.,” and provides that “[a]ny ballot not mailed or delivered as provided in this subsection may not be counted.” Section 6.84(2) makes those provisions “mandatory” and confirms that ballots cast in contravention of specific requirements, including §§ 6.87(3) to (7), “may not be counted.”

In the April 7 Spring Election, 23 absentee ballots were delivered by a City of Madison courier just minutes late. (Dkt. 9 ¶¶29, 32 & Exh. A at 24–26; Dkt. 46 ¶¶11, 13.) Based on the unambiguous directive of §§ 6.84(2) and 6.87(6), on April 30, the Wisconsin Elections Commission (the “Commission”) issued a decision and order directing the municipal and county boards of canvassers to reconvene and correct their decisions to count the late-arriving ballots. (Dkt. 9 ¶32 & Exh. A at 20–26; Dkt. 46 ¶13.) Only 3 of the late-arriving ballots could be individually identified and removed from the count; the remaining 20 were excluded through a random drawdown. (Dkt. 31 at 1.)

Those were the facts before this Court: 23 identified ballots, held in the Clerk’s custody before election day, yet somehow not delivered to the polling place until after the polls had closed on election day, in one municipality, in one election, affecting the outcome of no race. (Dkt. 10 ¶8(a)–(d); Dkt. 12 at 4; Dkt. 13 at 4.)

***B. This Court granted Plaintiffs complete relief on those facts.***

Plaintiffs filed suit on May 6, 2026, and moved immediately for emergent relief. (Dkt. 9, 10.) At the May 14 hearing, Plaintiffs repeatedly confined the request to those facts and those voters: “To be totally clear, we’d be fine if the Order said, ‘Under the facts as alleged in this Complaint . . .’” and clarified that “[a]t the end of the day, we’re only asking for relief about these particular individuals.” (Tr. at 26:23–25, 30:24–25.)

The Court granted that narrow as-applied relief the same evening, ordering that the first canvassed results be accepted and the second disregarded, that those results “shall be considered

the final canvassed results by all election officials and voter participation shall be entered for all 23 individuals,” and that Defendants “refrain from any dissemination of, or further action in accordance with,” the Commission’s April 30 order. (Dkt. 35 ¶¶1–3.)

***C. Plaintiffs now seek unprecedented and unnecessary expansive relief.***

On August 4, 2026, after the parties agreed there are no disputed facts as to the 23 late-arriving ballots, Plaintiffs moved for judgment on the pleadings under Wis. Stat. § 802.06(3). (Dkt. 48.) Their brief asks the Court to:

1. Declare that Wisconsin election statutes cannot be interpreted or applied to disenfranchise voters due to errors by election officials;
2. Declare that WEC’s Decision and Order is an unconstitutional invasion of Plaintiffs’ right to vote;
3. Enjoin WEC from further disseminating its Decision and Order, from taking any further action in accordance with its unlawful statutory interpretation, and to distribute to all municipal and county clerks a notice of this Court’s declaration and its reasoning.

(Dkt. 49 at 23.)

None of this is tied to the case before the Court. The first request names no statute, election, or voter, and is not limited to Wis. Stat. § 6.87(6), absentee ballots, late delivery, or the 23 ballots already counted. The second would declare any Wisconsin election statute unconstitutional wherever an official commits an undefined “error,” with no allocation of fault and no time limit. And the third would convert that declaration into a statewide rule of decision, circulated to every clerk for use in canvasses and recounts not yet disputed, on records that will never exist in this case. Plaintiffs seek relief that operates on every election official in Wisconsin, not relief limited to their own facts.

## **LEGAL STANDARDS**

Judgment on the pleadings under Wis. Stat. § 802.06(3) is “essentially a summary judgment decision without affidavits,” confined to the complaint and answer, and proper only where no genuine issue of material fact exists. *Southport Commons, LLC v. Wis. Dep’t of Transp.*, 2021 WI 52, ¶18, 397 Wis. 2d 362, 960 N.W.2d 17 (citing *McNally v. Capital Cartage, Inc.*, 2018 WI 46 ¶23, 381 Wis. 2d 349, 912 N.W.2d 35); *see also Wagner v. Allen Media Broad.*, 2024 WI App 9, ¶18, 410 Wis. 2d 666, 3 N.W.3d 758 (citations omitted).

Two other principles govern the motion. First, declaratory relief requires a justiciable controversy ripe for determination. *Loy v. Bunderson*, 107 Wis. 2d 400, 410, 320 N.W.2d 175 (1982) (citing Borchard, *Declaratory Judgments*, pp. 26–57). Granting or denying declaratory relief “falls within the discretion of the circuit court,” which the legislature codified by authorizing courts to refuse a judgment that “would not terminate the uncertainty or controversy giving rise to the proceeding.” *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶¶28–29, 35, 309 Wis. 2d 365, 749 N.W.2d 211 (citing *Loy*, 107 Wis. 2d at 409–10); Wis. Stat. § 806.04(6). A complaint may be dismissed on that basis even if it otherwise states a claim. *See Am. Med. Servs., Inc. v. Mut. Fed. Sav. & Loan Ass’n*, 52 Wis. 2d 198, 203–04, 188 N.W.2d 529 (1971) (citations omitted). Second, because judgment on the pleadings is summary judgment without affidavits, Wis. Stat. § 802.08(6)’s reciprocal-judgment principle allows the Court to award judgment to the non-moving party, and “[d]ismissal is proper when for a valid reason the merits are not reached and the suit should not be entertained.” *Kenosha v. Unified Sch. Dist.*, 55 Wis. 2d 642, 650, 201 N.W.2d 66 (1972).

The Court should dismiss the remaining claim and close the case.

## **ARGUMENT**

### **I. PLAINTIFFS' REQUEST IS NEITHER A COGNIZABLE CONSTITUTIONAL CHALLENGE NOR A PERMISSIBLE DECLARATORY JUDGMENT.**

#### ***A. Plaintiffs' justiciable claims are resolved.***

Two of Plaintiffs' three new requests have already been resolved. Request No. 3's prohibitory component—enjoining the Commission from disseminating or further acting on the April 30 order—duplicates the Court's May 14 order, which has been in effect for more than three months. Request No. 2, a declaration directed at the Commission's April 30 order as it affected *these* Plaintiffs, is the only request tethered to the facts pleaded, and Plaintiffs have again already obtained complete relief: their ballots were counted.

What remains is the request that required Intervenor's involvement: an extraordinarily broad declaration that speaks to "Wisconsin election statutes" *generally* and to "errors by election officials" *generally*, and the mandatory dissemination of such a broad undefined declaration to every municipal and county clerk throughout Wisconsin. (Dkt. 49 at 23.) Those requests are the subject of this brief (hereinafter, "Plaintiffs' Request").

#### ***B. There are two kinds of constitutional challenge; Plaintiffs' Request is neither.***

A constitutional challenge to a statute is either facial or as applied. *Mayo*, 2018 WI 78, ¶24 (citing *League of Women Voters of Wis. Educ. Network, Inc. v. Walker*, 2014 WI 97, ¶13, 357 Wis. 2d 360, 851 N.W.2d 302). A facial challenge attacks an identified enactment and, if successful, renders it unenforceable "under any circumstances." *Id.* An as-applied challenge asks whether the statute is unconstitutional as applied to the challenger's own circumstances, and the resulting holding is confined to "the facts of the particular case . . . 'not hypothetical facts in other situations.'" *Id.* (quoting *State v. Wood*, 2010 WI 17, ¶13, 323 Wis. 2d 321, 780 N.W.2d

63). Plaintiffs’ Request fits neither category and asks this Court to rule on “hypothetical facts in other situations;” exactly what the Supreme Court already held improper in *State v. Wood*. *Id.*

*It is not a facial challenge.* A facial challenge requires both an actual statute to test and a holding that it is unconstitutional under all circumstances. Plaintiffs’ request is not limited to a specific statute—not Wis. Stat. § 6.87(6), not Wis. Stat. § 6.84(2), not any specific provision at all. It speaks of “Wisconsin election statutes” generally, plural and unbounded. No court can hold “Wisconsin election statutes” unconstitutional prospectively under potential future facts.

*It is not an appropriate as applied challenge.* An as-applied holding is limited to a party’s facts. Plaintiffs expressly disclaim that limitation by demanding statewide dissemination of the declaration “and its reasoning” for the guidance of every clerk in Wisconsin. What Plaintiffs seek is a freestanding rule of decision, announced in the abstract, to govern future controversies between parties not before the Court on facts not before the Court. That is the definition of an advisory opinion.

The Wisconsin Department of Justice (“WisDOJ”) identified this defect at the outset. On May 14, 2026, WisDOJ explained that Plaintiffs “could have sought relatively modest relief from the Court—an order that *the Court* determines that Wis. Stat. § 6.87(6) was unconstitutional in this particular application, and so this Court orders that the drawdown be reversed,” but instead “seek something far more sweeping and law-changing . . .” (Dkt. 31 at 2 (emphasis in original).) That observation was correct then and is more forceful now as Plaintiffs have already obtained full relief.

***C. Both doctrines foreclose Plaintiffs’ Request.***

An as-applied constitutional challenge is decided on “the facts of the particular case in front of [the court], not hypothetical facts in other situations,” and the challenger must show,

beyond a reasonable doubt, that constitutional rights were “actually violated.” *Mayo*, 2018 WI 78, ¶¶24, 56–58 (citations omitted). The United States Supreme Court applies the same rule in the election context: a constitutional theory resting on a contested factual premise “must await an as-applied challenge” tested against an evidentiary record. *Wash. State Grange*, 552 U.S. 442, 457–458; *see also Zemel v. Rusk*, 381 U.S. 1, 20, 85 S. Ct. 1271 (1965) (requiring the avoidance of advisory opinions and that adjudication “must await a concrete fact situation”); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937) (relief must be specific to a “real and substantial controversy” not “an opinion advising what the law would be upon a hypothetical state of facts”). Here, the relief sought applies to unknown (rather than just hypothetical) facts.

Like the U.S. Supreme Court, Wisconsin also requires facts “sufficiently developed to allow a conclusive adjudication” for any declaratory judgment. *Olson*, 2008 WI 51, ¶43 (citations omitted); and courts should not issue advisory opinions or declarations that rest on “hypothetical states of fact,” *Miller Brands-Milwaukee, Inc. v. Case*, 162 Wis. 2d 684, 696–97, 470 N.W.2d 290 (1991) (quoting *Waukesha Mem’l Hosp., Inc. v. Baird*, 45 Wis. 2d 629, 643, 173 N.W.2d 700 (1970)). Sister-state authority agrees—as it must, since Wis. Stat. § 806.04(15) directs that Wisconsin’s Act be construed “to make uniform the law of those states which enact it”: a court cannot make an as-applied determination of unconstitutionality “when there has been no evidentiary hearing and no findings of fact,” *People v. Harris*, 2018 IL 121932, ¶39 (citation omitted); *accord Harrold v. Collier*, 2005-Ohio-5334, ¶38 (requiring a “presently existing set of facts”); *Patterson v. Planned Parenthood of Houston & Se. Tex., Inc.*, 971 S.W.2d 439, 442 (Tex. 1998) (no relief on facts “contingent or remote”). A “declaratory judgment must not be employed to determine rights in anticipation of events which may never occur or for consideration of moot cases or as a medium for the rendition of an advisory opinion which may

prove to be purely academic.” *Gulnac v. S. Butler Cty. Sch. Dist.*, 526 Pa. 483, 488, 587 A.2d 699 (1992) (citations omitted). What Plaintiffs seek are all prohibited in *Gulnac*: an anticipatory declaration for hypothetical events, in a case rendered moot, amounting to an advisory opinion.

Both doctrines require denial of Plaintiffs’ Request, and there is no middle ground: Narrow the Request to what is before the Court—23 ballots excluded in April under § 6.87(6)—and the as-applied posture holds. But the statewide declaration and the clerk-notice command disappear with it, and the Court has already granted that relief in full. Keep the statewide, statute-wide sweep, and Plaintiffs are asking the Court to rule on statutes, election officials, and voters not before it, on facts that do not exist. Call it a facial challenge instead, and Plaintiffs must show the statute cannot be enforced under any circumstances—a burden they have never carried and disclaimed on the record. (Tr. at 20:18–19.)

Narrow it, broaden it, or relabel it: Plaintiffs’ Request fails the same way every time, and it fails without this Court ever reaching the Constitution.

## **II. THE COURT SHOULD DECLINE TO ENTER THE REQUESTED RELIEF AND DISMISS THE REMAINING CLAIM.**

Even apart from the categorical defects above, the Court can, and should, resolve this motion without reaching any constitutional question. *See Labor & Farm Party v. Elections Bd.*, 117 Wis. 2d 351, 354, 344 N.W.2d 177 (1984) (courts should “not normally decide constitutional questions if the case can be resolved on other grounds”) (citing *Kollasch v. Adamany*, 104 Wis. 2d 553, 561, 313 N.W.2d 47 (1981)); *see also State ex rel. Oitzinger v. City of Marinette*, 2025 WI App 19, ¶76, 415 Wis. 2d 635, 19 N.W.3d 663 (courts “decide cases on the narrowest possible grounds” (quoting *State v. Castillo*, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997))). At least five independent grounds support denial of Plaintiffs’ Request and support dismissal.

***A. Plaintiffs' Request does not terminate any controversy; it creates new ones.***

The “controversy giving rise to th[is] proceeding,” Wis. Stat. § 806.04(6), was whether 23 identified absentee ballots cast in the April 7 Spring Election would be counted. That controversy was terminated on May 14, 2026.

Plaintiffs' remaining claim would not terminate any uncertainty. It would manufacture uncertainty on a statewide and statute-wide scale. Thousands of municipal clerks and 72 county clerks, plus thousands more election workers, together with the Commission, would have to decide more questions than answers, in real time and with no rulebook: what counts as an “error”; whose error counts; how fault is allocated when both an official and a voter contribute to noncompliance; whether a third party's fault (the postal service or a private carrier) counts as well; how long after election day the rule keeps operating; and who makes that call.

WisDOJ raised this concern from the outset, at the May 14 hearing:

As one example, what if errors are discovered after election results have already been certified? What is the time limit after which the remedy they seek is not “mandatory”? How should the Commission, clerks, and other election officials determine whether an election official was “at fault” for a ballot's noncompliance with a statutory procedure? Does the rule extend to the fault of other third parties, like the postal system or private mail delivery companies?

(Dkt. 31 at 2.)

Plaintiffs have had sixteen weeks and a lengthy brief to answer these questions. They have answered none of them and no court can answer them, on one set of pleadings, for every election official in Wisconsin. That is the function of legislation, not a declaratory judgment.

Section 806.04(6) exists precisely for this situation. It is not a technicality; it is the legislature's instruction that declaratory relief is available to end disputes, not to create new ones. Because the declaration Plaintiffs propose “would not terminate the uncertainty or controversy giving rise to the proceeding,” the Court should refuse to enter it. *Id.* And because that

conclusion appears “on the face of the complaint,” the claim may be dismissed without further proceedings. *Am. Med. Servs.*, 52 Wis. 2d 198, 202.

***B. Plaintiffs’ remaining claim is no longer ripe.***

Plaintiffs devote a single sentence to ripeness, asserting that the facts “have been sufficiently developed” because the material facts are admitted. (Dkt. 49 at 11–12.) Plaintiffs conflate two different questions: whether *Plaintiffs’ own facts* are developed and whether *the facts underlying the rule they ask for* are developed. Only the second matters to the relief sought, and those future facts are not merely undeveloped; they are unknown.

A declaratory judgment claim may be ripe without an actual injury, but “the facts [must] be sufficiently developed to allow a conclusive adjudication,” so that courts avoid “entangling themselves in abstract disagreements.” *Olson*, 2008 WI 51, ¶43 (citations omitted). “The facts on which the court is asked to make a judgment should not be contingent or uncertain.” *Id.*

The pleadings develop one unique fact pattern upon which this Court has already ruled and granted relief. Every other application of Plaintiffs’ Request rests on facts that are not merely undeveloped but unknown and unknowable on this record. What the declaration would mean for a ballot found the next morning, or a week later; for a ballot delayed jointly by a voter’s late mailing and a clerk’s slow processing; for a delay caused by the postal service or a private carrier; for an error discovered after reported results or even certification—none is presented or considered. Those are the contingent and uncertain facts *Olson* forbids a court to adjudicate.

***C. Judgment on the pleadings is the wrong vehicle for the relief sought.***

Plaintiffs’ own authorities show the limits of its motion. Judgment on the pleadings “is ordinarily confined to the complaint and answer,” *Wagner*, 2024 WI App 9, ¶18 (citations

omitted), and is “essentially a summary judgment decision without affidavits and other supporting documents,” *Southport*, 2021 WI 52, ¶18 (citing *McNally*, 2018 WI 46, ¶23).

A two-document record was found to support a judgment limited to 23 ballots and specific facts. It cannot support a statewide rule of decision governing every future combination of official and voter conduct across every municipality in Wisconsin. Plaintiffs’ choice of judgment on the pleadings is itself a measure of how narrow this record is.

Plaintiffs also overstate the parties’ stipulation. They quote Dkt. 44 for the proposition that “[a]ll parties agree that the Court can and should reach the merits of this dispute.” (Dkt. 49 at 10.) The letter says that “the parties agree that the legal issues can be determined by the court on summary judgment.” (Dkt. 44 at 1.) An agreement that a legal question may be decided is not consent to the scope of the now-requested relief.

***D. Plaintiffs’ interest was entirely remedial and fully satisfied.***

“Declaratory judgment provides prospective rather than remedial relief.” *PRN Assocs. LLC v. DOA*, 2009 WI 53, ¶53, 317 Wis. 2d 656, 766 N.W.2d 559. Plaintiffs’ remedy was obtained in full.

Equitable relief “must be in response to the invasion of legally protected rights,” and “may provide complete justice *only where there is a wrong*.” *Democratic Nat’l Comm. v. Boehm*, 2026 WI App 44, ¶62 (publication ordered; review pending) (quoting *Breier v. E.C.*, 130 Wis. 2d 376, 389, 387 N.W.2d 72 (1986)) (emphasis in original). Plaintiffs’ ballots were counted. There is no continuing wrong, no irreparable harm, and an adequate remedy at law was already provided.

Plaintiffs may respond that the issue is capable of repetition yet evading review. That doctrine, where it applies, excuses mootness so that a court may review a specific question. It

does not authorize relief broader than the controversy that gave rise to the case, and it does not supply the developed factual record that a statewide rule of decision would require.

***E. The new relief sought operates on thousands of non-parties.***

Section 806.04(11) provides that “no declaration may prejudice the right of persons not parties to the proceeding.” Intervenor acknowledges that *Helgeland v. Wisconsin Municipalities*, 2008 WI 9, ¶85, 307 Wis. 2d 1, 745 N.W.2d 1, holds that sub. (11) does not require joining all affected by a challenged statute; a contrary rule would make the declaratory remedy worthless.

But this case is different in kind. Plaintiffs do not merely ask for a declaration about a statute’s validity. They ask for a mandatory injunction whose operative mechanism is to direct the Commission to transmit the Court’s declaration “and its reasoning” to thousands of municipal clerks and 72 county clerks, none of whom is before the Court, so that those officials will conform their conduct to it. That is relief designed to bind non-parties in fact, even if it does not bind them in name.

Nor is the legislature before the Court. *See* Wis. Stat. § 803.09(2m). Plaintiffs ask this Court to declare that an unspecified body of legislative enactments may not be applied as written, without notice to the branch that enacted them of what statutes are challenged.

**III. PLAINTIFFS CANNOT CARRY THEIR CONSTITUTIONAL BURDEN.**

A party challenging a statute’s constitutionality must establish invalidity “beyond a reasonable doubt”; every legislative act is presumed constitutional, and “every presumption must be indulged to uphold the law if at all possible.” *Norquist v. Zeuske*, 211 Wis. 2d 241, 250, 564 N.W.2d 748 (1997) (citations omitted). The specific statute must “clearly contravene[]” the Constitution. *State v. Cole*, 2003 WI 112, ¶18, 264 Wis. 2d 520, 665 N.W.2d 328 (quotation omitted).

Plaintiffs’ brief never states this standard, never invokes it, and never attempts to satisfy it. That omission is not an oversight; it is structural. A beyond-a-reasonable-doubt showing requires a statute to examine and an application to test. Plaintiffs have supplied neither. They cannot prove, beyond a reasonable doubt, that unnamed statutes are unconstitutional in undescribed applications on facts that were never pled.

#### **IV. IF THE COURT REACHES THE MERITS, PLAINTIFFS ARE NOT ENTITLED TO JUDGMENT.**

Plaintiffs rest on two flawed premises: that old cases control and that no recent authority says otherwise. Both are wrong. The only recent appellate decision construing Wis. Stat. § 6.87(6) says the opposite, and Plaintiffs’ old cases involved different defects under a displaced statutory structure.

##### ***A. Plaintiffs ignore recent precedents requiring deference to the legislature.***

Plaintiffs’ entire case-law argument skips over the framework our Supreme Court most recently set out for claims like theirs—and the breadth of what Plaintiffs now seek makes that framework more damaging to their position, not less. *League of Women Voters of Wis. Educ. Network, Inc. v. Walker* holds that legislation impairing or destroying the right to vote receives no deference and is void regardless of the state’s interest, but legislation that merely regulates how the franchise is exercised need only be “reasonable,” with deference given to “legislative discretion.” 2014 WI 97, ¶¶154–55 (citations omitted). *Walker* upheld a single discrete regulation—a photo ID requirement—against a facial challenge. Plaintiffs no longer challenge one regulation as applied to 23 ballots and an 8:00 p.m. deadline; they ask this Court to declare that the legislature’s authority to regulate elections generally cannot survive whenever any official, anywhere, errs. If *Walker* commands deference to a single reasonable regulation, it commands deference to the entire regulatory scheme Plaintiffs now attack—the more sweeping

the challenge, the more obviously it targets regulation itself rather than any specific impairment of the right to vote.

Persuasive federal authority confirms the point on this exact deadline. In *Democratic Nat'l Comm. v. Wis. State Legis.*, Justice Kavanaugh rejected the identical “disenfranchisement” theory Plaintiffs press here, explaining that “reasonable election deadlines do not ‘disenfranchise’ anyone under any legitimate understanding of that term,” and that the only relevant question is “whether the deadline is reasonable under the circumstances.” 592 U.S. 1039, 1050, 1055, 141 S. Ct. 28 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay). Wisconsin’s Court of Appeals reaffirmed as much for this very statute weeks before Plaintiffs filed this motion. *Boehm*, 2026 WI App 44, ¶48. Construing the very subsection at issue here, the court wrote:

Other election statutes further make clear that, other than where a specific exception is provided, such as for persons already in line to vote at 8:00 p.m., the ability to cast a ballot in a given election lawfully ends at 8:00 p.m. on election day. Related to absentee voting, for example, WIS. STAT. § 6.87(6) states: . . . “*Any ballot not mailed or delivered as provided in this subsection may not be counted.*” . . . So, the legislature wrote that even if the clerk, through no fault of the elector, fails to deliver the elector’s vote to the elector’s polling place before 8:00 p.m. on election day, the ballot “may not be counted.”

*Id.* (emphases in original).

That is the precise proposition Plaintiffs contend no statute may constitutionally embody, stated by the Court of Appeals in a recent decision recommended for publication.

This is also not dictum just because *Boehm*’s holding concerned polling hours under Wis. Stat. § 6.78. *Boehm* considered construction of the operative statute, examined as part of the 8:00 p.m. statutory scheme, and even if only persuasive, it is new appellate analysis on point.

The concurrence Plaintiffs may invoke asserting that “these statutes must be flexible—when their application would infringe on electors’ right to vote,” *id.*, ¶88 (Neubauer, J.,

concurring), does not help them. The concurrence emphasized a fact-specific, evidence-based inquiry incongruous with Plaintiffs’ Request and reaffirmed that “legislation on the subject of elections is within the constitutional power of the Legislature so long as it merely regulates the exercise of the elective franchise, and does not deny the franchise itself either directly or by rendering its exercise so difficult and inconvenient as to amount to a denial.” *Id.*, ¶81 (quoting *State ex rel. Van Alstine v. Frear*, 142 Wis. 320, 341, 125 N.W. 961 (1910)).

Plaintiffs cite no authority—recent or otherwise—that supports a request this broad.

***B. Plaintiffs’ case law analysis does not establish the rule they claim.***

Plaintiffs assert that “at least twelve cases . . . over 150 years of precedent” establish that the Wisconsin Constitution bars any mandatory statute requiring disenfranchisement for official error. (Dkt. 49 at 13–14.) Plaintiffs use a string citation because an actual review of the cases exposes that none supports their remaining claim.

Start with *Trump v. Biden*, which Plaintiffs cite in their string and again for the claim that this principle “ensure[d] hundreds of thousands of absentee votes were counted in the 2020 presidential election.” (Dkt. 49 at 14, 18 n.14.) The cited paragraph is a laches holding, not a constitutional one: it appears in the majority’s prejudice analysis (the third element of laches) and resolves a single category of challenged ballots collected at two City of Madison events, counted because voters “were encouraged to utilize the events” and did so “in reliance on representations that the process they were using complied with the law.” *Trump v. Biden*, 2020 WI 91, ¶27. Justice Hagedorn explained separately in *Trump v. Biden* that § 6.84(2) “tells us that, to the extent an absentee ballot does not comply with certain statutory requirements, it may not be counted.” *Id.* ¶39 (Hagedorn, J., concurring). Even Plaintiffs’ “fraud on the constitution” and “monstrous” language, drawn from *Wood*, cuts against them here: Justice Hagedorn quoted

that very passage to make the point that a noncompliant absentee ballot “may not be counted” under Wis. Stat. § 6.84(2). *Id.*, ¶39, n.3. Plaintiffs’ strongest rhetoric thus comes from an opinion that, on the operative modern statute, cuts against them.

*Roth* fails for a related reason. It concerned deciphering voter intent on a marked ballot, not the statutory requirements for a valid absentee ballot: the Court held that a ballot bearing “a qualifying mark in a qualifying place” under Wis. Stat. § 7.50(2)(c) should be counted “to give effect to the will of the voter.” *Roth v. LaFarge School District Board of Canvassers*, 2004 WI 6, ¶¶26–27, 268 Wis. 2d 335, 677 N.W.2d 599. That holding, and its survey of the older cases, rests on Wis. Stat. § 5.01(1)’s command to honor “the intent of the voter,” *id.* ¶¶17–27, which is the very canon § 6.84(2) excludes, “notwithstanding s. 5.01 (1),” for the absentee requirements it lists and not § 7.50(2)(c). *See also Trump*, 2020 WI 91, ¶¶38–39 (Hagedorn, J., concurring) (drawing the important distinction); *Lee v. Paulson (In re Ballot Recount)*, 2001 WI App 19, ¶7, 241 Wis. 2d 38, 623 N.W.2d 577 (“Section 6.84(2)’s strict construction requirement applicable to statutes relating to the absentee ballot process, is consistent with the guarded attitude with which the legislature views that process.”).

The remaining cases—*Wood v. Baker*, *Dells*, *Symmonds*, *Phelps*, *Dithmar*, *Graves*, *Anderson*, *Schmidt*, and *Ollmann*<sup>2</sup>—share two features, and both are absent here. None involved any provision now expressly enumerated by Wis. Stat. § 6.84(2) as mandatory *notwithstanding* § 5.01(1), and in each the ballot itself was present and countable, with a single non-fatal defect—a marking, an endorsement, a registration list, a candidate’s placement on the ballot. In contrast, the legislature directed in § 6.84(1) that voting by absentee ballot must be carefully regulated and specifically enumerated certain requirements in § 6.84(2) as mandatory. The statutes impacted

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<sup>2</sup> See Dkt. 49 at pp. 13-14 for Plaintiffs’ citations.

by Plaintiffs' Request are wide-reaching and include all requirements enumerated in § 6.84(2) as well as an undefined number of others.

Plaintiffs' own authority confirms as much. *Ahlgrimm* did not merely define the line between mandatory and directory provisions—it enforced a mandatory election-timing rule against a blameless filer, keeping a candidate off the ballot for filing with the county clerk rather than the Elections Board. *State ex rel. Ahlgrimm v. State Elections Bd.*, 82 Wis. 2d 585, 263 N.W.2d 152 (1978). A mandatory command does not fall merely because its application is unwelcome to a sympathetic party.

*Lanser* and *Hayden* add nothing more. Plaintiffs insist it is “simply not true” that these cases can be distinguished. (Dkt. 49 at 22.) But, again, neither court construed Wis. Stat. § 6.84(2) because both predate it: *Lanser v. Koconis*, 62 Wis. 2d 86, 214 N.W.2d 425 (1974), and *In re Hayden*, 105 Wis. 2d 468 (Ct. App. 1981), were decided well before the legislature enacted § 6.84(2) in 1985. *See* Wis. Stat. § 6.84 (History: 1985 a. 304; 1987 a. 391). Moreover, the cases distinguish themselves: *Lanser* and *Hayden* expressly relied upon § 5.01's will-of-the-voter mandate, which is the exact statutory provision that the legislature expressly carved out in § 6.84(2). *Lanser*, 62 Wis. 2d 86, 94 (holding that “the mandate of sec. 5.01, Stats., requires the conclusion that these absentee voters' ballots be counted.”); *Hayden*, 105 Wis. 2d 468, 478 (following *Lanser*'s directive that § 5.01 required the counting of the ballots). Plaintiffs' fallback, that § 6.87(6) was already facially mandatory before 1985 (Dkt. 49 at 20), does not account for the § 5.01 carve-out and would only concede the statute's mandatory character and moves the entire dispute to the constitutional plane, where the beyond-a-reasonable-doubt burden per Part III applies, and where Plaintiffs have not attempted to carry it.

**C. *Gonfiantini* cuts against Plaintiffs.**

Plaintiffs cite *Gonfiantini v. Rock County Board of Canvassers*, 2025 WI App 26, 416 Wis. 2d 118, 20 N.W.3d 773 for the claim that “*Gradinjan*’s precedential value is significantly in doubt following *Gonfiantini*.” (Dkt. 49 at 14 n.2 (citing ¶42).) This is not correct. Instead, *Gonfiantini* rejected reliance on Wis. Stat. § 6.84 because the endorsement requirement in § 6.87(1) is “not among the mandatory provisions listed in § 6.84(2)” —so “§ 6.84 actually undermines” the argument that relies on it. *Id.* ¶30. Section 6.87(6) is different: it is on that list, along with the other statutes Plaintiffs’ Request implicates. Nor did *Gonfiantini* cast any doubt on *Gradinjan*’s constitutional holding; it held that the statutory text *Gradinjan* construed was repealed. *Id.* ¶¶41–43. And far from supporting Plaintiffs, *Gonfiantini* cites the governing methodology directly from *Gradinjan*: “disputes over whether a ballot should be counted are resolved by interpreting the pertinent statutory language.” *Id.* ¶43 (citing *Gradinjan v. Boho*, 29 Wis. 2d 674, 682-83, 139 N.W.2d 557 (1966)). Plaintiffs’ brief proposes a freestanding constitutional override that never engages that text—precisely the gap WisDOJ identified at the outset: “Plaintiffs are asking us all to ignore the pla[i]n language of 6.87(6). They haven’t made any statutory argument.” (Tr. at 29:13–15.)

**V. THE REMAINING CLAIM SHOULD BE DISMISSED.**

Declaratory judgment is Plaintiffs’ “only remaining claim.” (Dkt. 49 at 10.) Their *mandamus* claim was satisfied by the May 14 order. Nothing else is pending.

This Court may enter judgment against the moving party. Because judgment on the pleadings is “essentially a summary judgment decision without affidavits,” *Southport*, 2021 WI 52, ¶18, the reciprocal-judgment principle of Wis. Stat. § 802.08(6) applies: judgment “may be awarded to such party even though the party has not moved therefor.” A declaratory judgment

claim should be dismissed where it would not terminate the controversy, *Am. Med. Servs.*, 52 Wis. 2d 198, 202, or where “for a valid reason the merits are not reached and the suit should not be entertained.” *Kenosha*, 55 Wis. 2d 642, 650.

Both conditions are met. The controversy that gave rise to this proceeding is resolved; the declaration Plaintiffs seek would not end any remaining uncertainty but would generate it statewide, on facts that are contingent and unknown, through relief that is neither facial nor as-applied and cannot be administered by the officials charged with applying it.

The Court should deny the motion, dismiss the remaining claim, and close the case.

### **CONCLUSION**

For the foregoing reasons, Intervenor respectfully request that the Court:

1. DENY Plaintiffs’ motion for judgment on the pleadings (Dkt. 48) in its entirety;
2. DECLINE, in the exercise of its discretion under Wis. Stat. § 806.04(6), to enter the declaration requested in paragraph 1 of Plaintiffs’ prayer;
3. DENY the requested injunction, including the command that the Commission distribute notice to all municipal and county clerks;
4. DISMISS Plaintiffs’ only remaining claim for relief; and
5. ENTER JUDGMENT closing this case.

Dated this 4th day of September 2026.

**CHALMERS, ADAMS, BACKER & WALLEN, LLC**

By: Electronically signed by Nicholas J. Boerke

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