STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 12

PRIORITIES USA, WISCONSIN ALLIANCE FOR RETIRED AMERICANS, *and* WILLIAM FRANKS, JR.,

Plaintiffs,

Case No. 2023CV1900

v.

WISCONSIN ELECTIONS COMMISSION,

Defendant.

PROPOSED-INTERVENOR DEFENDANT THE WISCONSIN STATE LEGISLATURE'S MEMORANDUM IN SUPPORT OF ITS PROPOSED MOTION TO DISMISS

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INTRODUCTION

Plaintiffs ask this Court to invalidate as unconstitutional several of Wisconsin's absentee-voting laws, based upon a theory that has no grounding in our State's Constitution, precedent, or history. As a threshold matter, the Wisconsin Constitution does not provide—and has never provided—a right to vote absentee, so Plaintiffs' lawsuit fails for that reason alone. Further, even if this Court were to hold that Wisconsin has a constitutional right to vote absentee never before noticed by anyone in our State's 175-year history, Plaintiffs' facial/hybrid challenges still fail because Plaintiffs do not plausibly plead that the challenged provisions burden all voters, as Plaintiffs would need to show to prevail in their lawsuit. Finally, granting Plaintiffs' requested relief would violate Article I, Section IV of the United States Constitution, under the standard articulated in *Moore v. Harper*, 143 S. Ct. 2065 (2023). Indeed, Plaintiffs' utterly meritless lawsuit is precisely the type that the U.S. Supreme Court envisioned when it expounded the narrow but critical rule in *Moore*.

This Court should dismiss this lawsuit.

STATEMENT

A. The Legislature Has Used Its Constitutional Authority To Enact Various Procedures That Govern Voting In Wisconsin, Including Procedures Governing The Privilege Of Absentee Voting

1. Article III of the Wisconsin Constitution provides for the right to vote, Wis. Const. art. III, § 1, but does not provide a right to vote absentee, *id.* § 2. Instead, the Wisconsin State Legislature ("Legislature") has the constitutional authority to enact laws governing voting, including laws that "[p]rovid[e] for absentee voting." *Id.*

Consistent with its constitutional authority, the Legislature has enacted "lots of rules that make voting easier." *Luft v. Evers*, 963 F.3d 665, 672 (7th Cir. 2020). To begin, "[r]egistering to vote is easy in Wisconsin," *Frank v. Walker*, 768 F.3d 744, 748 & n.2 (7th Cir. 2014), as Wisconsin law sets out straightforward eligibility requirements and flexible registration procedures. Subject to limited exceptions, a person qualifies to vote in Wisconsin if he or she is a U.S. citizen, is at least 18 years old on the day of the election, and has resided at his or her current address at least 28 consecutive days before the election. Wis. Stat. § 6.02(1); Wis. Const. art. III, § 1. Wisconsin law provides many ways to register to vote, including on election day. Wis. Stat. §§ 6.30, 6.33–.34, 6.55.

Casting a ballot on Election Day is "easy in Wisconsin." *Frank*, 768 F.3d at 748. Wisconsin law ensures that voters have time off work to go to the polls on Election Day and prohibits employers from penalizing employees for any absences. Wis. Stat § 6.76. Wisconsin polls have fixed voting hours set by statute and are open from 7 a.m. until 8 p.m. on Election Day, *id.* § 6.78(1m), a thirteen-hour window. Any voter who is already in line when the polls close is entitled to cast a ballot. *Id.* § 6.78(4). Wisconsin law also provides for curbside voting on Election Day. *Id.* § 6.82(1). Disabled voters may also request assistance inside the polling place, *id.* § 6.82(2), and have the option of voting via paper ballot in municipalities that use voting machines, *id.* § 6.82(3), or requesting "a specific type of accommodation [to] facilitate his or her voting," *id.* § 5.36.

2. Wisconsin offered only limited absentee voting in its early history. Wisconsin first offered absentee voting during the Civil War, 1862 Wis. Act. 11 (Special Sess.),[1] when the Legislature adopted a law "allowing the qualified electors of this state, who should be acting as volunteer soldiers in the service of the United States, to vote at the general fall elections," while also specifically regulating "the mode in which such votes should be taken, returned and canvassed, and that they might be given at whatever places such soldiers should be located at the time, whether within or without this state," *State ex rel. Chandler v. Main*, 16 Wis. 398, 411 (1863); 1862 Wis. Act. 11 (Special Sess.). Following the Civil War, voting in Wisconsin was primarily conducted at the polls on Election Day, with certain exceptions for disabled voters. *See, e.g.*, 1893 Wis. Act. 288, § 47 (allowing disabled voters to cast ballots from outside the polling place).[2]

Wisconsin enacted its first comprehensive absentee-voting regime in 1915. 1915 Wis. Act. 461;[3] *see Teigen v. WEC*, 2022 WI 64, ¶ 174, 403 Wis. 2d 607, 976 N.W.2d 519 (Hagedorn, J., concurring). This initial absentee-voting scheme offered Wisconsinites expanded opportunities for absentee voting, while also incorporating extensive safeguards to protect against fraud. The new regime provided any elector who would be "absent from the county in which he is a qualified elector on the day of holding any general, special, primary, county, city, village or town election" the

[1] Available at https://docs.legis.wisconsin.gov/1862/related/acts/62ssact011.pdf.

[2] Available at https://docs.legis.wisconsin.gov/1893/related/acts/288.pdf.

[3] Available at https://docs.legis.wisconsin.gov/1915/related/acts/461.pdf.

opportunity to cast an absentee ballot. 1915 Wis. Act. 461, § 44m—1. The law required the voter to request an absentee ballot, *id.* § 44m—2, swear an affidavit before "an officer authorized by law to administer oaths," *id.* §§ 44m—5–6, and return the completed ballot and affidavit "by registered mail, postage prepaid," or "in person" to "the officer issuing the ballot," *id.* § 44m—6. The law also provided penalties for voters who failed to return their absentee ballots or submitted fraudulent affidavits, as well as penalties for officials who refused to accept absentee ballots. *Id.* § 44m—14.

In 1986, Wisconsinites ratified a constitutional amendment expressly acknowledging the Legislature's authority to enact laws "[p]roviding for absentee voting." Wis. Const. art. III, § 2. This was the first time the Wisconsin Constitution mentioned absentee voting, as the Legislature previously operated under the Constitution's general grant of lawmaking authority to regulate elections in the State. *Chandler*, 16 Wis. at 414–15. In April 1986—the same month that the new amendment was ratified—the Legislature overhauled the State's absentee voting scheme to clarify the requirements and streamline the process. 1985 Wis. Act. 304.[4] Among the new provisions, the Legislature created Wis. Stat. § 6.84, a general provision directing the policy goals and interpretation of absentee-voting laws in the State, which remains unchanged to this day. *Compare* Wis. Stat. § 6.84 *with* 1985 Wis. Act. 304, § 68n. The revisions also removed the onerous affidavit requirement,

[4] Available at https://docs.legis.wisconsin.gov/1985/related/acts/304.pdf.

allowing voters to instead "make and subscribe to the certification" on their absentee ballots "before 2 witnesses." 1985 Wis. Act. 304, § 73.

As this history shows, the Wisconsin has made exercising the privilege of absentee voting continuously easier, from its inception to today. For instance, although absentee voting in Wisconsin used to be available only for "those who, because of sickness, physical disability, or religious reasons, [could not] appear at the polling place in their precincts and to those who expect[ed] to be absent from their places of residence on the day of an election," *Sommerfeld v. Bd. of Canvassers*, 269 Wis. 299, 302 (1955), the Legislature has since expanded the absentee voting regime to all qualified voters, *see* 1999 Wis. Act 182, § 90m;[5] Wis. Stat. § 6.85 (2000),[6] as amended by 2011 Wis. Act 23, § 55.[7]

Today, the Legislature has enacted a comprehensive statutory scheme that enables all Wisconsinites to exercise the "privilege" of voting absentee if they so choose, in one of the most generous, no-excuse-needed absentee voting regimes in the Nation. Wis. Stat. § 6.84. If a qualified, registered voter in Wisconsin is "for any reason . . . unable or unwilling to appear at the polling place in his or her ward or election district," *id.* § 6.85(1), the voter may request an absentee ballot through numerous different methods, *id.* § 6.86(1)(a)(1)–(6). A voter can pick up absentee ballots in person or receive one via mail, with email and fax options available in select

[5] Available at https://docs.legis.wisconsin.gov/1999/related/acts/182.

[6] Available at https://docs.legis.wisconsin.gov/1999/statutes/statutes/6/85.

[7] Available at https://docs.legis.wisconsin.gov/2011/related/acts/23.

circumstances. *Id.*; *id.* § 6.86(ac). Absentee voters can cast absentee ballots in person up to two weeks before Election Day during designated "early voting" times at the municipal clerk's office or another site designated by the clerk. Wis. Stat. § 6.855. Absentee voters may also cast absentee ballots by delivering them to the municipal clerk's office or designated polling place before or on Election Day. Wis. Stat. § 6.87(4)(b)(1), (5). Finally, all voters have the option of casting an absentee ballot by mail before Election Day. *Id.* § 6.87(4)(b)(1). Wisconsin offers additional options for obtaining and casting absentee ballots to voters who are living overseas, *id.* § 6.87(3)(d), in the military, *id.*; *id.* § 6.865, nursing or retirement home residents, *id.* § 6.875, or indefinitely confined, *id.* § 6.86(2)(a).

2. Three absentee-voting procedures are at issue in the present case.

a. *The Witness Requirement.* Like several other states,[8] Wisconsin requires absentee ballots to be witnessed. Under Section 6.87, an absentee voter must mark and fold the voter's absentee ballot in the presence of an adult witness and then place it within the official absentee-ballot envelope. Wis. Stat. § 6.87(4)(b)(1); *see id.* § 6.875. The witness must then provide his or her "[a]ddress" on the absentee-ballot envelope certificate. *Id.* § 6.87(2). "If a certificate is missing the address of a witness, the [absentee] ballot may not be counted." *Id.* § 6.87(6d).

2. *The Drop Box Prohibition.* Under Section 6.87, absentee ballots must "be mailed by the elector, or delivered in person, to the municipal clerk issuing the ballot

[8] This statutory requirement is consistent with the laws of several other states. *See, e.g.*, Ala. Code § 17-11-9; Alaska Stat. § 15.20.203; La. Rev. Stat. § 18:1306; Minn. Stat. Ann. § 203B.07; N.C. Gen. Stat. Ann. § 163-231; S.C. Code Ann. § 7-15-220.

or ballots." Wis. Stat. § 6.87(4)(b)1. The short-lived practice of using absentee-ballot "drop boxes" in Wisconsin arose during the COVID-19 pandemic, and purported to permit individuals to drop off both their own absentee ballots and those of other voters at "unstaffed" drop box locations, later to be collected by municipal clerks. *Teigen*, 2022 WI 64, ¶¶ 6–8. The Supreme Court in *Teigen*, 2022 WI 64, concluded that the Legislature's "'carefully regulated' procedures for absentee voting do not permit voting via ballot drop boxes," citing Section 6.87(4)(b)1. *Id.* ¶¶ 72–73. Absentee voters must either "mail[ ]" or personally "deliver[ ]" their absentee ballots to the municipal clerk to have their vote counted. Wis. Stat. § 6.87(4)(b)1; *Teigen*, 2022 WI 64, ¶ 87.

3. *The Cure Deadline.* Wisconsin law provides a statutory deadline for the receipt of absentee ballots by municipal clerks, and absentee ballots received after this time may not be counted. Wis. Stat. § 6.87(6). This operates as the deadline for absentee voters to cure any errors in their absentee-ballot certificates. Specifically, Section 6.87(6) requires an absentee voter to return the voter's ballot "so it is delivered to the polling place no later than 8 p.m. on election day." *Id.* § 6.87(6).[9] "Any ballot not mailed or delivered as provided in this subsection may not be counted." *Id.* Municipal clerks who encounter an improperly completed absentee

[9] Other States enforce a similar cure deadline. *See, e.g.*, Iowa Code § 53.18(2) (voter may cure defective absentee ballot affidavit before polls close on election day); Ky. Rev. Stat. Ann. § 117.087(c)(5) (voter may cure defective absentee ballot before polls close on election day); Mont. Code Ann. § 13-13-245 (voter may cure defective absentee ballot before 8 p.m. on election day); Vt. Stat. Ann. tit. 17, § 2547 (voter may cure defective absentee ballot before polls close on election day).

ballot certificate may "return" that ballot "to the elector . . . whenever time permits the elector to correct the defect and return the ballot." *Id.* § 6.87(9).

B. Plaintiffs File This Action, Claiming That Certain Of Wisconsin's Absentee-Voting Procedures Are Unconstitutional

On July 20, 2023, Plaintiffs Priorities USA, the Wisconsin Alliance for Retired Americans, and William Franks, Jr. (collectively, "Plaintiffs") initiated this action against WEC, challenging several of Wisconsin's statutory absentee-voting procedures as unconstitutional. Plaintiffs assert four declaratory judgment claims in their Complaint. First, Plaintiffs allege that the statutory provision requiring absentee voters to obtain a witness, Wis. Stat. § 6.87(4)(b)1, is facially unconstitutional under Article III of the Wisconsin Constitution because it "severely burdens the[ ] fundamental right to vote" and ask this Court to issue a declaratory judgment to that effect. Compl. ¶¶ 75–82. Second, Plaintiffs ask this Court to declare that the Supreme Court's holding in *Teigen*—that Wis. Stat. § 6.87(4)(b)1 precludes the use of absentee ballot drop boxes—renders Section 6.87(4)(b)1 unconstitutional. Compl. ¶¶ 83–95. Third, Plaintiffs request a declaration that the statutory deadline for an absentee voter to correct an improperly completed absentee-ballot certificate envelope to have the voter's vote counted, Wis. Stat. § 6.87(4)(b)1, likewise violates Article III. Compl. ¶¶ 97–106. Fourth, Plaintiffs ask for a declaratory judgment that Section 6.84, which reaffirms the constitutional right to vote in Wisconsin while clarifying that voting absentee is a "privilege," Wis. Stat. § 6.84(1), contravenes the Constitution. Compl. ¶¶ 107–112. For their first three counts, Plaintiffs seek an additional declaration that certain documents issued by the

Wisconsin Elections Commission are invalid to the extent they "embod[y]" and "implement[ ]" these statutory provisions. Compl. ¶¶ 75, 84, 98; *id.* at 28–29.

There are two sets of proposed intervenors: the Republican National Committee, Republican Party of Wisconsin, Republican Party of Rock County, and Republican Party of Walworth County, who assert that their private interest in fair and efficient elections entitles them to intervene in this action, Dkt.27, and the Legislature, which has invoked its statutory right to intervene "at any time" in any lawsuit where a party challenges "the constitutionality of a statute, facially or as applied," Wis. Stat. § 803.09(2m), as well as its right to intervene under Wis. Stat. § 803.09(1), and a request for permissive intervention under Wis. Stat. § 803.09(2). Dkt.41 at 6–7 (quoting Wis. Stat. § 803.09(2m)); *see id.* at 7–15.

LEGAL STANDARD

A motion to dismiss "tests the legal sufficiency of the complaint." *State ex rel. Zecchino v. Dane Cnty.*, 2018 WI App 19, ¶ 8, 380 Wis. 2d 453, 909 N.W.2d 203 (citation omitted). Dismissal is appropriate where a pleading "[f]ail[s] to state a claim upon which relief can be granted," Wis. Stat. § 802.06(2)(a)(6), or where the complaint does not "state[ ] a valid legal claim against the challenged laws," *Serv. Emps. Int'l Union, Loc. 1 ("SEIU") v. Vos*, 2020 WI 67, ¶¶ 7, 9, 393 Wis. 2d 38, 946 N.W.2d 35 (holding that motion to dismiss facial constitutional challenges for failure to state a claim should have been granted); *see also Zecchino*, 2018 WI App 19, ¶¶ 9–14 (holding that the plaintiff's complaint failed to state an open-meetings-law violation claim as a matter of law). To resolve a motion to dismiss, the Court must "interpret[ ]" the

contested "constitutional and statutory provisions" purportedly underlying the plaintiff's claims. *League of Women Voters of Wis. v. Evers*, 2019 WI 75, ¶ 13, 387 Wis. 2d 511, 929 N.W.2d 209. When a court decides that the plaintiff's preferred interpretation of the law underlying its claim is incorrect, that is, when the Court concludes that, as a matter of law, plaintiff has not stated any claim for relief, the Court must grant the motion to dismiss. *Id.* ¶¶ 13, 42 (ordering dismissal of complaint at motion-to-dismiss stage when Court held that plaintiffs' "interpretation of constitutional and statutory provisions" did not support claim for relief).

In ruling upon a motion to dismiss, a court must accept the complaint's factual allegations as true and construe "all reasonable inferences that may be drawn from those facts in favor of stating a claim." *Notz v. Everett Smith Grp., Ltd.*, 2009 WI 30, ¶ 15, 316 Wis. 2d 640, 764 N.W.2d 904 (citation omitted); *see* Wis. Stat. § 802.06(2)(a); *Keller v. Welles Dep't Store of Racine*, 88 Wis. 2d 24, 29, 276 N.W.2d 319 (Ct. App. 1979) ("The underlying facts alleged are taken as true, and only the legal premises derived therefrom are challenged."). A court does not accept "legal conclusions" or "unreasonable inferences" as true. *Morgan v. Pa. Gen. Ins. Co.*, 87 Wis. 2d 723, 731, 275 N.W.2d 660 (1979). Courts regularly grant motions to dismiss when "it appears quite certain that no relief can be granted under any set of facts the plaintiffs might prove in support of their allegations." *Notz*, 2009 WI 30, ¶ 15 (citation omitted).

Parties may bring three "type[s]" of challenges to the constitutionality of a statute: a facial challenge (that is, a challenge to a law "in [its] entirety, rather than as applied to a given party or set of circumstances"), a hybrid challenge (that is, a

facial challenge to a category of applications of a statute), or an as-applied challenge (that is, a challenge to the constitutionality of a statute as applied to specific facts). *SEIU*, 2020 WI 67, ¶¶ 4, 36–37, 45; *Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, ¶ 29, 376 Wis. 2d 147, 897 N.W.2d 384. In a facial challenge, "the challenging party claims that the law is unconstitutional on its face—that is, it operates unconstitutionally in all applications." *SEIU*, 2020 WI 67, ¶ 38. Courts will reject a facial challenge if the court can identify *any* "constitutional applications of the[ ] [challenged] laws." *Id.* ¶ 72. In a hybrid challenge—a facial challenge against categories of applications of a statute—the challenger "must meet the standard for a facial challenge" as to the challenged category of application. *Gabler*, 2017 WI 67, ¶ 29. That is, the challenger must "demonstrate that the disputed portions of [the statute] cannot be constitutionally enforced" within the identified category "under any circumstances." *Id.* (citation omitted). Finally, in an as-applied challenge to application of a statute, the challenger must demonstrate the statute's unconstitutionality as applied to a "specific application" of the statute to the particular facts identified by the challenger. *SEIU*, 2020 WI 67, ¶ 37.

Where, as here, a plaintiff brings a facial or hybrid challenge to one or more statutes, a motion to dismiss for failure to state a claim is an appropriate vehicle to "test[ ] the legal sufficiency" of the plaintiff's constitutional claims. *Data Key Partners v. Permira Advisors LLC*, 2014 WI 86, ¶ 19, 356 Wis. 2d 665, 849 N.W.2d 693 (citation omitted). In *SEIU*, for instance, the Wisconsin Supreme Court considered a motion to dismiss several claims attacking the facial constitutionality of a series of statutory

provisions. 2020 WI 67, ¶¶ 3–4, 7. The Court concluded, as a matter of law, that the challenged provisions had at least some constitutional applications, requiring dismissal of several of plaintiffs' facial claims. *See id.* ¶¶ 10–13. Thus, consistent with *SEIU*, a defendant may bring a motion to dismiss where the complaint does not "state[ ] a valid legal claim against the challenged laws," even when the pleading's factual allegations are taken as true. *Id.* ¶ 7.

ARGUMENT

I. This Court Should Dismiss Plaintiffs' Complaint In Full As None Of The Challenged Absentee-Voting Laws Burden The Right To Vote

A. There Is No Right To Vote Absentee In Wisconsin, Which Alone Defeats All Of Plaintiffs' Constitutional Claims

Plaintiffs' claims all fail because the Wisconsin Constitution contains no right to vote absentee, *see* Wis. Const. art. III, so the challenged statutory provisions—each of which regulates only the privilege of absentee voting in Wisconsin, or simply recognize that absentee voting is a privilege—do not burden the constitutional right to vote. For that reason alone, this Court should dismiss this lawsuit in whole.

1. In construing constitutional provisions, the goal is "to promote the objects for which they were framed and adopted." *State v. Cole*, 2003 WI 112, ¶ 10, 264 Wis. 2d 520, 665 N.W.2d 328 (citation omitted). In doing so, courts look to "three primary sources in determining the meaning of a constitutional provision: the plain meaning, the constitutional debates and practices of the time, and the earliest interpretations of the provision by the legislature, as manifested through the first legislative action

following adoption." *Appling v. Walker*, 2014 WI 96, ¶ 19, 358 Wis. 2d 132, 853 N.W.2d 888 (citation omitted).

As a matter of constitutional text, *id.*, the Wisconsin Constitution guarantees the right to vote, Wis. Const. art. III, § 1, but it does not guarantee a right to vote absentee, *id.* § 2. The Constitution simply provides that the Legislature "may," but need not, regulate elections by "[p]roviding for absentee voting." *Id.* Thus, determining the substance of the State's absentee-voting laws is a legislative policy-making function. *See, e.g.*, *League of Women Voters of Wis. Educ. Network, Inc. v. Walker*, 2014 WI 97, ¶¶ 19–21, 357 Wis. 2d 360, 851 N.W.2d 302; *State ex rel. La Follette v. Kohler*, 200 Wis. 518, 548, 228 N.W. 895 (1930) ("[T]he power to prescribe the manner of conducting elections is clearly within the province of the Legislature."); *State ex rel. McGrael v. Phelps*, 144 Wis. 1, 17–18, 128 N.W. 1041 (1910) (recognizing that regulating the right to vote is a proper "field of legislative activity").

The historical practices before the adoption of the current Article III, Section 2 of the Wisconsin Constitution confirm that absentee voting is not a constitutional right in Wisconsin. *Appling*, 2014 WI 96, ¶ 19. The People voted to adopt the current version of Article III, Section 2 of the Wisconsin Constitution in April 1986. *See* 1985 J.R. 14. Before that, the Legislature maintained extensive authority to regulate absentee voting, through its general authority "in the regulation of [the State's] own affairs." *Chandler*, 16 Wis. at 412. Pursuant to its general lawmaking authority, the Legislature adopted multiple absentee-voting laws, first enabling soldiers to vote by mail during the Civil War, 1862 Wis. Act. 11 (Special Sess.); *see Chandler*, 16 Wis.

at 411, and subsequently enacting the first comprehensive absentee-voting scheme in 1915, 1915 Wis. Act. 461; *see Teigen*, 2022 WI 64, ¶ 174 (Hagedorn, J., concurring), which scheme required an affidavit sworn before "an officer authorized by law to administer oaths" and included harsh penalties for noncompliant absentee voters, including confinement in the county jail, 1915 Wis. Act. 461, § 44m—5–6.

The Wisconsin Supreme Court consistently upheld the Legislature's authority to regulate absentee voting, including upholding the (often extremely) limited absentee voting provisions contained in the early laws. In addressing the absentee voting law during the Civil War, the Wisconsin Supreme Court concluded that the Legislature had the constitutional authority to permit "the qualified electors of this state, who should be acting as volunteer soldiers in the service of the United States, to vote at the general fall elections," while specifying exactly "the mode in which such votes should be taken, returned and canvassed, and that they might be given at whatever places such soldiers should be located at the time, whether within or without this state." *Chandler*, 16 Wis. at 411, 422. Because there was no explicit "prohibition upon legislative action" in this arena, the Wisconsin Supreme Court concluded that the Legislature maintained the authority to regulate absentee voting—including by limiting it only to soldiers outside of the State's borders—even though the Legislature had never previously seen fit to allow the practice. *Id.* at 415, 417–19. After the Legislature adopted more expansive absentee voting laws, the Wisconsin Supreme Court continually held that the Legislature maintained the "constitutional power to say how, when, and where [a] ballot shall be cast." *State ex*

rel. Frederick v. Zimmerman, 254 Wis. 600, 613, 37 N.W.2d 473 (1949); *Gradinjan v. Boho (In re Chairman in Town of Worcester)*, 29 Wis. 2d 674, 684–85, 139 N.W.2d 557 (1966) (citation omitted). For instance, in *Gradinjan*, the Wisconsin Supreme Court upheld as constitutional the Legislature's policy of differentiating between in-person and absentee voting requirements, concluding that the Legislature could reasonably "determine that fraud and violation of the sanctity of the ballot could much more readily be perpetrated by use of an absentee ballot than under the safeguards provided at a regular polling place." 29 Wis. 2d at 684–85. Thus, the Wisconsin courts have long reaffirmed the core understanding that the Legislature's policy judgments regarding absentee voting are immune to judicial critique under Article III, unless those judgments "destroy or impair the right to vote" because there maintains "a legitimate field of legislative activity in the nature of regulation," such that "reasonable" regulations pertaining "to conservation, prevention of abuse, and promotion of efficiency," are affirmed if "[t]heir aim is to protect lawful government, not to needlessly harass or disfranchise any one." *League of Women Voters of Wis.*, 2014 WI 97, ¶¶ 19–21, 50 (citations omitted).

Finally, the "earliest interpretations of the provision by the legislature, as manifested through the first legislative action following adoption," *Appling*, 2014 WI 96, ¶ 19 (citation omitted), further confirm this understanding, whether considered from the time of Wisconsin's original founding or when Article III, Section 2 was recently adopted.

Looking first to the State's founding, only 14 years after the constitutional convention to adopt the first constitution for Wisconsin in 1848, *State v. Williams*, 2012 WI 59, ¶ 33, 341 Wis. 2d 191, 814 N.W.2d 460, the Legislature enacted legislation allowing, but extensively regulating, absentee voting for volunteer soldiers serving outside of the State, 1862 Wis. Act. 11 (Special Sess.); *see Chandler*, 16 Wis. at 411. The Supreme Court upheld this law as "being within the scope of the legislative power," noting that this was the first law in Wisconsin regarding absentee voting after the adoption of the Constitution. *Chandler*, 16 Wis. at 414–15, 418.

The same is true for the period after the adoption of the current Article III, Section 2, in 1986. Nearly contemporaneously with the adoption of the current Article III, Section 2 of the Wisconsin Constitution, the Legislature enacted 1985 Wis. Act 304, amending and creating numerous provisions of the election law. Among those provisions was 1985 Wis. Act 304, § 68n, creating Wis. Stat. § 6.84's declaration of the Legislature's policy regarding absentee voting, noting that "voting by absentee ballot is a privilege exercised wholly outside the traditional safeguards of the polling place" and so "must be carefully regulated to prevent the potential for fraud or abuse; to prevent overzealous solicitation of absent electors who may prefer not to participate in an election; to prevent undue influence on an absent elector to vote for or against a candidate or referendum; or other similar abuses," and that the various provisions relating to absentee voting, including those in Wis. Stat. § 6.87 "shall be construed as mandatory." 1985 Wis. Act 304, § 68n (codified at Wis. Stat. § 6.84).

Moreover, the same Act made minor revisions to, but did not repeal, the witness requirement. *Id.* § 73.

2. Here, Plaintiffs' lawsuit asks this Court to invalidate several of the State's absentee-voting laws as unconstitutional, but these provisions do not, as a matter of law, impose any facial burden on the *constitutional right to vote*, as there is no constitutional right to vote absentee in Wisconsin. As explained immediately above, the constitutional text, historical understanding, and contemporaneous legislative action confirm that the Legislature maintains the authority to regulate absentee voting, which is not a constitutional right in our State. *See supra* pp.12–17.

The challenged absentee-voting provisions do not burden anyone's right to vote, as Wisconsinites have several constitutionally sufficient paths to exercise the franchise without any resort to absentee voting. Wisconsin's voters may vote in many different ways, including by voting in person, Wis. Stat. §§ 6.77–.78, voting early at the municipal clerk's office, *id.* § 6.855, voting curbside on election day, *id.* § 6.82(1), and voting absentee, *id.* § 6.87. *See supra* p.2. "Wisconsin has lots of rules that . . . make voting easier than do the rules of many other states." *Luft*, 963 F.3d at 672.

None of Plaintiffs' four Counts challenging Wisconsin's absentee-voting election laws can possibly show a violation of their constitutional right to vote, because each challenged provision relates only to absentee voting, which Plaintiffs have no constitutional right to. Count One challenges Wis. Stat. § 6.87(4)(b)1's witness-certification requirement, which applies only to voters who vote absentee, requiring that they vote in front of a witness who then certifies to the same. Compl.

¶¶ 70–82. Count Two contends that the drop box prohibition found in Wis. Stat. § 6.87(4)(b)1, as interpreted by the Wisconsin Supreme Court, *Teigen*, 2022 WI 64, ¶¶ 55–72, which mandates that voters return absentee ballots to their local clerk either by mail or by personally delivering them to the office, precluding the use of drop boxes, is unconstitutional. Compl. ¶¶ 83–96. Count Three challenges Wis. Stat. § 6.87(6)'s requirement that absentee ballots be received by the local clerk by 8:00 p.m. on election day, including ballots that need to be cured, which requirement specifically applies only to absentee ballots. Compl. ¶¶ 97–106. And finally, Count Four seeks a declaration that Wis. Stat. § 6.84, which explains the Legislature's policy that "voting by absentee ballot is a privilege exercised wholly outside the traditional safeguards of the polling place" and so "must be carefully regulated to prevent the potential for fraud or abuse," *id.*, is unconstitutional, Compl. ¶¶ 107–12. All of these statutory provisions relate *only* to absentee voting and nowhere discuss the various other generous avenues for voting all Wisconsinites maintain to cast their ballot, and so Plaintiffs cannot claim that the challenged provisions unduly burden their right to vote. *Milwaukee Branch of NAACP v. Walker*, 2014 WI 98, ¶¶ 29, 46, 357 Wis. 2d 469, 851 N.W.2d 262; *Luft*, 963 F.3d at 672.

Finally, it is worth noting that if each of Wisconsin's many easy options for voting were not reasonably available to a specific voter, that individual could obtain as-applied relief on the basis that Wisconsin law burdens their right to vote. *See SEIU*, 2020 WI 67, ¶ 37; *accord Frank v. Walker* ("*Frank II*"), 819 F.3d 384, 386 (7th Cir. 2016). Although such a situation appears impossible ever to occur given how

"eas[y]" it is to vote in Wisconsin, *Luft*, 963 F.3d at 672, such a plaintiff could apply to a court for a narrow constitutional remedy if such a case arose, *see SEIU*, 2020 WI 67, ¶ 37; *see also Frank II*, 819 F.3d at 386–87.

B. Even Were This Court To Conclude That There Is A Right To Vote Absentee, Plaintiffs' Lawsuit Fails Because They Do Not Even Attempt To Plead Allegations Of A Sufficient Burden On Their Voting Rights To Satisfy Their Facial Challenge

Even if this Court somehow determines for the first time in our State's history that Wisconsinites have a constitutional right to vote absentee, *but see supra* Part I.A, this Court should dismiss Counts One through Three of Plaintiffs' Complaint for the additional reason that their allegations do not come close to meeting the high bar necessary for entitlement to the extraordinary relief of facial invalidation. The vast majority of voters (if not all voters) are easily capable of voting absentee while complying with the challenged absentee-voting laws, meaning that the challenged provisions would not impair or deprive voters of the ability to vote absentee, even assuming that voters had a constitutional right to vote using this method.

1. As noted above, facial challenges to statutory provisions are disfavored and can succeed only where there is "no set of circumstances [ ] under which [the statute] would be valid." *League of Women Voters of Wis.*, 2014 WI 97, ¶ 15 (citation omitted). In reviewing election regulations under a facial challenge, "courts generally defer to legislative judgments" and "employ a presumption of constitutionality." *Id.* ¶¶ 47, 55 (assuming without deciding that "reasonableness functions as an independent limit on election regulation"); *see also State ex rel. Small v. Bosacki*, 154 Wis. 475, 478–79, 143 N.W. 175 (1913) (the Legislature may "prescribe reasonable rules and regulations

for the exercise of the elective franchise" without "infring[ing] upon [any] constitutional rights"); *State ex rel. Runge v. Anderson*, 100 Wis. 523, 533, 76 N.W. 482 (1898) ("so far as legislative regulations are reasonable and bear on all persons equally so far as practicable in view of the constitutional end sought, they cannot be rightfully said to contravene any constitutional right"). Consistent with that understanding, the Wisconsin Supreme Court has repeatedly recognized the State's legitimate and compelling interest in protecting the integrity of elections, both generally, and of absentee voting, in particular. *Gradinjan*, 29 Wis. 2d at 684–85; *see also League of Women Voters of Wis.*, 2014 WI 97, ¶ 51.

The Wisconsin Supreme Court in *SEIU* provided further clarity on the showing that a plaintiff must make to succeed on facial constitutional claims, as opposed to an as-applied challenge. *See* 2020 WI 67, ¶¶ 37–42. There, the plaintiffs raised a facial constitutional challenge to a series of statutory provisions. *See id.* ¶¶ 50–54. The Court detailed the distinction between facial and as-applied challenges: whereas in an as-applied challenge, a court will "consider[ ] the facts of the particular case in front of it to determine whether the challenging party has shown that the constitution was actually violated by the way the law was applied in that situation," *id.* ¶ 37, in a facial challenge (as well as in "hybrid" challenges to a category of applications of a statute, *Gabler*, 2017 WI 67, ¶ 29) the court must determine that the challenged law "cannot be enforced 'under any circumstances,'" *SEIU*, 2020 WI 67, ¶ 38 (citation omitted). In other words, with a facial challenge, the plaintiff must demonstrate that "all applications of the law," rather than just one "specific application," are

"unconstitutional." *Id.* ¶ 48. Applying this framework, the Court upheld the constitutionality of various statutes. *Id.* ¶¶ 10–13, 71–72, 77, 83, 86.

2. Here, Plaintiffs' allegations do not even attempt to explain why any of the challenged provisions of Wisconsin election law would impermissibly burden all Wisconsinites' right to vote absentee, assuming such a right existed, nor could they, given the minor, if any, burdens these provisions impose on voters. In particular, Plaintiffs broadly challenge three statutory provisions that Plaintiffs claim "burden the right to vote by making it more difficult for voters to cast an absentee ballot," as well as the entire "statutory doctrine" that has allegedly "shielded" these statutory provisions "from legal scrutiny." Compl. ¶ 2. And they ask this Court to invalidate these statutes as they apply to all "hundreds of thousands of Wisconsin voters," including, but not limited to, "the elderly, people with disabilities, and other individuals who vote absentee." Compl. ¶ 23. Thus, Plaintiffs' claims amount to facial or, at a minimum, hybrid, challenges to multiple statutory provisions, for which they need to prove that the challenged law "cannot be enforced 'under any circumstances.'" *SEIU*, 2020 WI 67, ¶ 38 (citation omitted). Plaintiffs cannot meet this high burden on any of their claims.[10]

a. *The Witness-Certification Requirement.* Plaintiffs do not plead that the witness-certification requirement is facially unconstitutional, even assuming that

[10] The Legislature strongly believes that each of the challenged provisions is wholly reasonable, including to protect against voter fraud and to set reasonable ground rules for elections. Given the motion-to-dismiss posture, however, the Legislature limits its arguments here to Plaintiffs' failure to allege plausibly a sufficiently broad-based burden on the claimed right to vote absentee to support their facial/hybrid claims.

there is a constitutional right to absentee voting. The witness-certification statute provides that "an elector voting absentee, other than a military elector or an overseas elector, shall make and subscribe to the certification before one witness who is an adult U.S. citizen," by "mark[ing] the ballot" in the witness's presence, Wis. Stat. § 6.87(4)(b)1, after which the witness must then provide his or her "[a]ddress" on the absentee-ballot envelope certificate, *id.* § 6.87(2). This requires any elector to fill out his or her ballot in the presence of any other adult citizen, and then to get that adult-citizen witness to place their name and address on the completed ballot before it is returned to the polling place. *Id.* § 6.87(2), (4)(b)1. Although Plaintiffs assert that the witness-certification requirement "is facially unconstitutional under Article III of the Wisconsin Constitution," Compl. ¶ 75, Plaintiffs only claim that this requirement burdens "*[m]any* Wisconsin voters who rely on absentee ballots to vindicate their right to vote" because they "live alone or do not have an eligible witness in their household," Compl. ¶ 76. While the Legislature strongly believes that this provision does not burden any voters, this allegation is that the provision burdens only *some* absentee voters, defeating Plaintiffs' facial challenge. *SEIU*, 2020 WI 67, ¶ 38. Put another way, even if this Court concludes that Plaintiffs have plausibly pleaded that some voters might face some burden on their claimed right to vote absentee from this provision, their facial challenge fails. *Id.*

b. *The Drop Box Prohibition.* No better is Plaintiffs' challenge to the prohibition on absentee ballot drop boxes. Section 6.87(4)(b)1 requires that after an elector completes an absentee ballot and has it certified by a witness, the elector must either

"mail" the absentee ballot, or "deliver[it] in person, to the municipal clerk issuing the ballot or ballots," Wis. Stat. § 6.87(4)(b)1, which the Wisconsin Supreme Court has interpreted as prohibiting the use of drop boxes, *Teigen*, 2022 WI 64, ¶¶ 55–72. This merely requires that an elector who votes absentee either (1) utilize the traditional mail processes which all or nearly all Wisconsinites use on a daily basis, or (2) travel to their local municipal clerk's office to drop off their completed ballot. Plaintiffs raise a hybrid challenge to this provision to the extent it does not permit the use of drop boxes, Compl. ¶ 84, but given that even Plaintiffs acknowledge that voters can "guarantee timely delivery" by "mail[ing] the ballot far in advance of election day," Compl. ¶ 87, they necessarily concede that some voters could easily vote early and not be burdened, destroying their hybrid challenge to this provision, *SEIU*, 2020 WI 67, ¶ 38. And even if *some* rare voters might have a hard time getting to their mailbox or traveling to their local clerk's office, for individualized reasons specific to those voters, that still would not come even close to the proof required for Plaintiffs' hybrid challenge to Section 6.87(4)(b)1. *See SEIU*, 2020 WI 67, ¶ 38.

c. *The Cure Deadline.* The deadline to cure any deficiencies in an absentee ballot is similarly constitutional against Plaintiffs' facial challenge, even assuming there is a constitutional right to absentee voting, as Plaintiffs fail to show that it "cannot be enforced 'under any circumstances.'" *SEIU*, 2020 WI 67, ¶ 38 (citation omitted). This requirement merely states that (1) the polling place must receive absentee ballots "no later than 8 p.m. on election day," (2) any ballots that were "not mailed or delivered as provided in this subsection may not be counted," Wis. Stat.

§ 6.87(6), and (3) any deficient absentee ballot may only be cured if "time permits the elector to correct the defect and return the ballot" by the 8 p.m. election-day deadline, *id.* § 6.87(9). These provisions do not impose any burdens on any absentee voters, who all maintain a significant window of time to send their absentee ballots to their municipal clerks, such that there is also a sufficient period to cure any absentee-ballot errors before Election Day, meaning no absentee voters are actually burdened by this requirement. At an absolute minimum, at least some absentee voters can easily return their ballots sufficiently ahead of Election Day, guaranteeing their ability to cure any hypothetical defect under this statute before the cure deadline, thereby defeating Plaintiffs' "facial[ ]" challenge to Wis. Stat. § 6.87(6). Compl. ¶ 98; *SEIU*, 2020 WI 67, ¶ 38

II. Count Four Should Be Dismissed For The Independent Reason That Plaintiffs Lack Standing To Assert It

This Court should dismiss Count Four of Plaintiffs' Complaint, which challenges the Legislature's policy statement that absentee voting "must be carefully regulated," Wis. Stat. § 6.84, for the independent reason that Plaintiffs have not alleged that they have been harmed in any way by Section 6.84 and thus do not have standing to challenge that statutory provision.

A. To have standing, plaintiffs must "possess some personal stake in the case," *Teigen*, 2022 WI 64, ¶ 17, and be "directly affected by the issues in controversy," *State v. Popenhagen*, 2008 WI 55, ¶ 24, 309 Wis. 2d 601, 749 N.W.2d 611 (citation omitted). Put another way, a plaintiff must "allege[ ] a personal stake in the outcome of the controversy as to give rise to that adverseness necessary to sharpen the presentation

of issues," and, as a practical matter, protect courts from "devot[ing] time or resources to adjudicating disputes only to conclude a party is not entitled to any relief." *Teigen*, 2022 WI 64, ¶¶ 17–18 (citation omitted). Where a party cannot meet this requirement as to any given claim, that claim should be dismissed. *See, e.g.*, *Friends of Black River Forest v. Kohler Co.*, 2022 WI 52, ¶¶ 1–3, 402 Wis. 2d 587, 977 N.W.2d 342 (affirming grant of a motion to dismiss for lack of standing).

B. Plaintiffs lack standing to assert Count Four, as they have failed to "allege[ ] a personal stake in the outcome of the controversy as to give rise to that adverseness necessary to sharpen the presentation of issues." *Teigen*, 2022 WI 64, ¶ 17 (citation omitted).

Section 6.84 imposes no harms or burden on Plaintiffs, meaning that Plaintiffs have no "personal stake" in this provision's constitutionality. *See id.* That provision is, by its own terms, merely a statement of "[l]egislative policy." Wis. Stat. § 6.84(1). Section 6.84 is not an absentee-voting regulation; rather, it merely explains the Legislature's policy judgment—the same judgment found in the Wisconsin Constitution itself, *see supra* p.13—that "voting by absentee ballot is a privilege exercised wholly outside the traditional safeguards of the polling place," which requires "careful[ ] regulat[ion] to prevent the potential for fraud or abuse," Wis. Stat. § 6.84(1), and so the Legislature declared that all "matters relating to the absentee ballot process . . . shall be construed as mandatory," *id.* § 6.84(2). The Legislature's acknowledgment here that absentee voting is a "privilege," *id.* § 6.84(1), in turn, parrots the explicit constitutional declaration that the Legislature "*may*" enact laws

"[p]roviding for absentee voting," Wis. Const. art. III, § 2(3) (emphasis added). Section 6.84 does not itself impose any requirements or burdens on Plaintiffs, meaning that Plaintiffs have no standing to challenge this provision.

Plaintiffs do not allege any specific "right" of theirs that Section 6.84 stands to violate, *see* Wis. Stat. § 806.04(1), which failure is fatal to their claim, *Popenhagen*, 2008 WI 55, ¶ 24; *Teigen*, 2022 WI 64, ¶ 18. Rather than assert factual allegations plausibly suggesting that Plaintiffs are or will be "directly affected" by Section 6.84, as necessary to establish standing, *see Popenhagen*, 2008 WI 55, ¶ 24 (citation omitted), Plaintiffs claim that Section 6.84 "violates the Wisconsin Constitution," Compl. ¶ 112. Plaintiffs do not have a "personal stake" in this abstract question of constitutional law. *Popenhagen*, 2008 WI 55, ¶ 24 (citation omitted). Simply put, to the extent Plaintiffs could be harmed by an election law, it must be through affirmative provisions of the election law that actually regulate election processes, like those Plaintiffs challenge in Counts One through Three.

In any event, Plaintiffs' attack on Section 6.84 in Count Four rests on an incorrect interpretation of Section 6.84 as "establish[ing] absentee votes as being less worthy of protection than in-person ballots cast on election day." Compl. ¶ 108. Section 6.84 does no such thing. By its plain terms, Section 6.84 acknowledges that absentee voting should be subject to *greater* protections than in-person voting, given that it occurs "outside the traditional safeguards of the polling place." Wis. Stat. § 6.84(1); *see Crawford*, 553 U.S. at 191 (acknowledging the legitimacy of a state's interest in "deterring and detecting voter fraud" and "safeguarding voter confidence").

Section 6.84 does not, as Plaintiffs allege, establish absentee ballots as "less valuable and worthy of protection" than in-person ballots, Compl. ¶ 108, and, instead, merely states the Legislature's policy determinations regarding the additional protections necessary to ensure election integrity in the absentee-voting context.

III. A Ruling For Plaintiffs On Any Of Their Claims Would Violate Article I, Section 4 Of The United States Constitution

A. The Elections Clause in Article I, Section 4 of the U.S. Constitution authorizes state legislatures to create rules to govern federal elections. U.S. Const. art. I, § 4, cl. 1. The Elections Clause provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof," giving Congress an oversight role and the power to "at any time by Law make or alter such Regulations." *Id.* Just as Article I of the U.S. Constitution created and defined Congress, *see id.* art. I, § 1, state legislatures are "creatures of the State Constitutions, and cannot be greater than their creators," *Moore*, 143 S. Ct. at 2083–84 (quoting 2 Records of the Federal Convention of 1787, at 88 (M. Farrand ed. 1911)). When a state legislature exercises "its constitutional power" under the Elections Clause, it is "act[ing] both as a lawmaking body created and bound by its state constitution, and as the entity assigned particular authority by the Federal Constitution." *Id.* at 2084.

Because challenges to a State's election laws under a state constitution can implicate the State's legislative authority under the federal constitution, the state courts deciding such claims cannot "read [those] law[s] in such a manner as" would "intrude" on or "arrogate . . . the power vested in state legislatures" by the U.S.

Constitution's Elections Clause. *Id.* at 2088–90. Although state courts may "apply state constitutional restraints when legislatures act under the power conferred upon them by the Elections Clause," *id.* at 2089, they may not read state law in such a manner as would "unconstitutionally intrude upon the role specifically reserved to state legislatures by Article I, Section 4, of the Federal Constitution," *id.* at 2090. Put another way, a court violates the U.S. Constitution if, in interpreting state law, it effectively takes for itself the state legislature's authority to "prescribe[ ]" the "Times, Places and Manner" of federal elections. *Id.*; U.S. Const. art. I, § 4, cl. 1.

The U.S. Supreme Court's recent decision in *Moore* is the key, modern precedent. There, the Court addressed the effect of federal constitutional restraints on "state court interpretations of state law in cases implicating the Elections Clause" in a challenge to the North Carolina Supreme Court's conclusion that the state legislature's redistricting map violated North Carolina's Constitution. *Moore*, 143 S. Ct. at 2074, 2089–90. In upholding the North Carolina Supreme Court's decision, the Court recognized the "general rule" that federal courts "accept[ ] state court interpretations of state law," and held that the "Elections Clause does not exempt state legislatures from the ordinary constraints imposed by state law." *Id.* at 2088. Still, "state courts do not have free rein." *Id.* More specifically, the Court explained that in certain rare cases, "state courts might read state law in such a manner as to circumvent federal constitutional provisions," including the Elections Clause. *Id.* Accordingly, the Court emphasized that "state courts may not transgress the ordinary

bounds of judicial review such that they arrogate to themselves the power vested in state legislatures to regulate federal elections." *Id.* at 2089.

B. Here, invalidating the challenged provisions under the Wisconsin Constitution would "transgress the ordinary bounds of judicial review," *id.*, allowing courts to supplant the Legislature's role in regulating the "Times, Places and Manner" of federal elections, U.S. Const. art. I, § 4, cl. 1. Plaintiffs' theory is so far out of step with Wisconsin's Constitution, precedent, and history that judicially adopting it would create exactly the sort of rare, outlier case that *Moore* contemplated when it held that judicial intervention on legislative election rules that govern federal elections can violate the Elections Clause. *See Moore*, 143 S. Ct. at 2088–89.

In Wisconsin, both the state and federal constitutions impose a duty on the Legislature to enact the State's election laws, Wis. Const. art. III, § 2; U.S. Const. art. I, § 4, cl. 1, and the State's election code reflects the Legislature's fulfillment of that "two-fold" constitutional duty, *see Moore*, 143 S. Ct. at 2084. The Legislature is the policymaking body for the State, and the courts "are not permitted to second-guess the policy choices the legislature made." *Kohn v. Darlington Cmty. Schs.*, 2005 WI 99, ¶ 43, 283 Wis. 2d 1, 698 N.W.2d 794. As such, the Legislature has exercised its policymaking judgment in enacting the State's absentee voting laws and determined that "voting by absentee ballot is a privilege exercised wholly outside the traditional safeguards of the polling place" that "must be carefully regulated to prevent the potential for fraud or abuse; to prevent overzealous solicitation of absent electors who may prefer not to participate in an election; to prevent undue influence

on an absent elector to vote for or against a candidate or to cast a particular vote in a referendum; or other similar abuses." Wis. Stat. § 6.84(1); *Lee v. Paulson*, 2001 WI App 19, ¶ 7, 241 Wis. 2d 38, 623 N.W.2d 577 (recognizing the "guarded attitude with which the legislature views [absentee voting]"). To further these policy goals, the Legislature provided that laws "relating to the absentee ballot process" "shall be construed as mandatory." Wis. Stat. § 6.84(2). The Legislature's reasoned absentee-voting "policy choices," *Kohn*, 2005 WI 99, ¶ 43, are consistent with longstanding precedent. Indeed, the Wisconsin Constitution and Wisconsin caselaw are clear that the constitutional right to vote in Wisconsin does not include a right to vote absentee. Wis. Const. art. III, §§ 1–2; *Teigen*, 2022 WI 64, ¶ 71; *Jefferson v. Dane County*, 2020 WI 90, ¶ 16, 394 Wis. 2d 602, 951 N.W.2d 556; *Lee*, 2001 WI App 19, ¶ 7.

Plaintiffs' Complaint asks this Court to, in effect, recognize a right to absentee voting despite the plain terms of the Wisconsin Constitution and thereby hamstring the Legislature's ability to regulate the absentee voting process, including for federal elections—the precise situation that the U.S. Supreme Court in *Moore* admonished against. *Moore*, 143 S. Ct. at 2088–90. Plaintiffs' unprecedented rewriting of the Wisconsin Constitution would, as applied to federal elections, "intrude upon the role specifically reserved to state legislatures" by the Elections Clause. *Id.* at 2090. Each of the challenged provisions implicates the Legislature's federal-constitutional authority because they regulate the "'Times, Places and Manner' of federal elections." *Id.* at 2074, 2090 (quoting U.S. Const. art. I, § 4, cl. 1). The Legislature's policy statement governs the statutory scheme for absentee voting, including the times,

places, and manner in which absentee ballots may be cast. Wis. Stat. § 6.84; *see supra* pp.5–6, 25–26. The absentee-ballot witness requirement is one aspect of the Legislature's chosen manner in which voters may cast an absentee ballot. Wis. Stat. § 6.87(4)(b)(1); *see supra* pp.6, 21–22. The drop box prohibition limits the places where voters may cast absentee ballots. Wis. Stat. § 6.87(4)(b)(1); *see supra* pp.6–7, 22–23. And the cure deadline represents the outer limit of the time period in which a voter may correct an absentee ballot error. Wis. Stat. § 6.87(6); *see supra* pp.7–8, 23–24. The Legislature enacted each provision "in accordance with" Wisconsin law, using "the method which the State has prescribed for legislative enactments." *Moore*, 143 S. Ct. at 2082 (citation omitted). And each of the provisions furthers the Legislature's policy goals, consistent with its role under state law. Wis. Const. art. III, § 1; *Kohn*, 2005 WI 99, ¶ 43.

Plaintiffs' claims ask this Court to override the Legislature's lawful exercise of its "two-fold" constitutional authority to make laws regulating elections in the State, unsupported by any constitutional text or prior Wisconsin precedent, thereby seeking to "distort[ ]" Wisconsin law in contravention of the federal Constitution. *Moore*, 143 S. Ct. at 2084, 2089 (citation omitted); *see* Compl. ¶¶ 75–82, 83–95, 97–106; 107–112. Plaintiffs' egregiously "distorted" reading of Article III of the Wisconsin Constitution would greatly diminish the Legislature's ability to define the times, places, and manner of all absentee voting, including for federal elections. *Moore*, 143 S. Ct. at 2083–84, 2087–90 (citation omitted). The "ordinary bounds of judicial review" do not allow a state court to "distort[ ]" state law "beyond what a fair reading require[s]"

in "cases implicating the Elections Clause," *id.* at 2089 (citation omitted), but that is precisely what Plaintiffs seek here.

CONCLUSION

This Court should grant the Legislature's Motion To Dismiss.

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Respectfully submitted,

Electronically signed by Misha Tseytlin

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