STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY
BRANCH 9

Michael White, Eva White, Edward Winiecke, and Republican Party of Waukesha County,

Plaintiffs,

v.

Wisconsin Elections Commission,

Defendant.

Case No. 2022CV001008
Case Code: 30701
Hon. Michael Aprahamian

PROPOSED INTERVENOR-DEFENDANT WAUKESHA COUNTY DEMOCRATIC PARTY'S COMBINED OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION AND PROPOSED INTERVENOR THE WISCONSIN STATE LEGISLATURE'S MOTION FOR A TEMPORARY RESTRAINING ORDER OR, ALTERNATIVELY, FOR A WRIT OF MANDAMUS

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Proposed Intervenor-Defendant Waukesha County Democratic Party, by its attorneys, submits this brief in opposition to the motion for temporary restraining order and preliminary injunction filed by Plaintiffs Michael White, Eva White, Edward Winiecke, and Republican Party of Waukesha County, and the motion for a temporary restraining order or, alternatively, for a writ of mandamus filed by Proposed Intervenor the Wisconsin State Legislature (the "Legislature").

I. INTRODUCTION

In October 2016, the Wisconsin Elections Commission ("WEC")—in consultation with the Wisconsin Department of Justice—issued guidance to guarantee that the witness-address requirement for absentee ballots contained in Wis. Stat. § 6.87(6d) would be uniformly applied across the state. The 2016 guidance has been implemented ever since, ensuring that absentee ballots are properly counted consistent with the requirements of the Election Code, Wis. Stat. §§ 5.01–12.60, and the right to vote constitutionally guaranteed to all eligible Wisconsin electors.

Now, just weeks before the start of absentee voting for the November general election, Plaintiffs and the Legislature seek to upend the 2016 guidance. Their requests for extraordinary preliminary relief come not only after six years of consistent and successful implementation of the 2016 guidance, but after voters cast ballots under this guidance during the August primary election. That Plaintiffs and the Legislature seek to inject confusion and uncertainty in the middle of the election is particularly inexcusable given that this issue came as no surprise: The contours of the witness-address requirement were hotly contested in the aftermath of the 2020 election and have been the subject of official deliberation and public discourse ever since. The Legislature not only *can* address any statutory uncertainty through the legislative process, it *must*; simply put, it should not be permitted to call on this Court to address an issue that it has the responsibility to resolve itself. And neither the Legislature nor Plaintiffs should be allowed to risk confusion and

disenfranchisement for Wisconsin voters in the middle of an election when they could have—and should have—brought their claims sooner.

It is enough that the equities foreclose the relief that Plaintiffs and the Legislature seek, but their claims also fail on the merits. Through legalistic sleight of hand, they focus their attention on one issue (WEC's authority to purportedly violate the plain text of the Election Code) while wholly ignoring an essential predicate consideration: what the law actually requires for witness addresses. Ultimately, because the statutory text of § 6.87 is ambiguous as to what constitutes an "address"—and *un*ambiguous as to mandating that a ballot be discounted only if the address is "missing"—the 2016 guidance is consistent with the Election Code and should be retained to ensure that implementation of the witness-address requirement does not violate federal law. Neither the actions of the Joint Committee for Review of Administrative Rules ("JCRAR") nor any other state law changes this result. For these reasons and those below, the pending motions for preliminary relief should be denied.

II. BACKGROUND

A. The 2016 guidance was enacted to ensure that absentee ballots are properly counted in compliance with the Election Code.

In 2015, the Legislature amended § 6.87 to instruct that "[i]f a certificate is missing the address of a witness, the ballot may not be counted." Wis. Stat. § 6.87(6d). Prior to the 2016 general election, WEC received "many calls from clerks asking how the new statutory requirement should be interpreted." *Absentee Witness Address Corrections*, WEC, https://elections.wi.gov/absentee-witness-address-corrections (last visited Aug. 22, 2022). WEC reviewed the statute in consultation with the Wisconsin Department of Justice[1] and determined two things: (1) a

[1] At that time, the Department of Justice was led by Republican Attorney General Brad Schimel. *See* Letter from Attorney Kilpatrick to Court in re: Wis. Stat. § 757.19 (Dkt. No. 18).

"complete" witness address includes a street number, street name, and municipality; and (2) the statute does *not* require the rejection of an absentee ballot if the certificate does not include every piece of a "complete" witness address. *Id.* Rather, the "Department of Justice advised that a reasonable, defensible interpretation of the law would be to allow [] local election officials to add the municipality name to a witness certificate if the information could be reasonably ascertained by the official." *Id.*

Consistent with the Department of Justice's advice, WEC unanimously issued the 2016 guidance on October 18, 2016, and the guidance has been utilized in every election since. The 2016 guidance directs local election officials to "take corrective actions in an attempt to remedy a witness address error" and that, if they "are reasonably able to discern any missing information from outside sources, [they] are not required to contact the voter before making that correction directly to the absentee certificate envelope." Aff. of Kurt A. Goehre in Supp. of Pls.' Mot. for TRO & Prelim. Inj. ("Goehre Aff.") Ex. D, at 1 (Dkt. No. 11).

B. When adjudicating a challenge to the witness-address requirement following the 2020 election, a majority of the Justices on the Wisconsin Supreme Court indicated that the 2016 guidance was a reasonable interpretation of the Election Code.

The specific requirements for the witness certificate on an absentee-ballot envelope—and the 2016 guidance in particular—were contested following the 2020 election, with former President Donald Trump and his campaign arguing "that municipal officials improperly added witness information on absentee ballot certifications, and that these ballots [were] therefore invalid." *Trump v. Biden*, 2020 WI 91, ¶2, 394 Wis. 2d 629, 951 N.W.2d 568. Although the *Trump* Court had no need to define the precise parameters of the witness-address requirement—it concluded instead that the doctrine of laches barred the Trump campaign's claims, which "could have been raised long before the election," *id.* ¶32—its decision and the separate opinions of the Justices are nonetheless instructive. Then-Chief Justice Roggensack, in a dissenting opinion joined

by two other Justices, concluded that the 2016 guidance ran afoul of the Election Code. *See id.* ¶¶75–86 (Roggensack, C.J., dissenting). Two Justices, by contrast, agreed that "Wisconsin voters complied with the election rulebook" and that "[n]o penalties were committed." *Id.* ¶34 (Dallet and Karofsky, JJ., concurring). And Justice Hagedorn, joined by Justice Walsh Bradley, noted the ambiguity in § 6.87 (6d)'s address requirement:

> Although Wis. Stat. § 6.87(6d) requires an address, § 6.87(2) and (6d) are silent on precisely what makes an address sufficient. This is in stark contrast to other provisions of the election statutes that are more specific. For example, Wis. Stat. § 6.34(3)(b)2. requires an identifying document to contain "[a] current and complete residential address, including a numbered street address, if any, and the name of the municipality" for the document to be considered proof of residence. Similarly, Wis. Stat. § 6.18 requires former residents to swear or affirm their Wisconsin address as follows: "formerly residing at . . . in the . . . ward . . . aldermanic district (city, town, village) of . . . County of . . . ." While the world has surely faced more pressing questions, the contours of what makes an address an address has real impact. Would a street address be enough, but no municipality? Is the state necessary? Zip code too? Does it matter if the witness uses their mailing address and not the residential address (which can be different)?

Id. ¶49 (Hagedorn, J., concurring) (alterations in original) (footnote omitted). Justice Hagedorn concluded that "if the witness provided only part of the address—for example, a street address and municipality, but no state name or zip code—it is at least arguable that this would satisfy § 6.87 (6d)'s address requirement," and that, "to the extent clerks completed addresses that were already sufficient under the statute, I am not aware of any authority that would allow such votes to be struck." *Id.* ¶50 (Hagedorn, J., concurring). Ultimately, only three of the seven Justices on the Wisconsin Supreme Court wrote or joined opinions concluding that the 2016 guidance was unlawful. By contrast, four Justices wrote or joined opinions suggesting that WEC's guidance constituted at least a reasonable interpretation of the witness-address requirement.

C. The 2016 guidance remains in effect after JCRAR voted to suspend proposed Emergency Rule 2209, and the primary election has already been conducted under the 2016 guidance.

On January 10, 2022, JCRAR voted "to require [WEC] to show statutory authority for its guidance regarding completeness of addresses and correction of errors and omissions on absentee ballots and promulgate it as an emergency rule." Aff. of Misha Tseytlin Ex. 1, at 1 (Dkt. No. 47); *see also* Wis. Stat. § 227.26(2)(b). WEC complied with this directive, voting 4-2 at its March 9, 2022, meeting to approve the final scope statement and instruct staff to complete the rule-promulgation process for Emergency Rule 2209, which went into effect in July 2022. *See Open Meeting Minutes*, WEC 5 (March 9, 2022), https://elections.wi.gov/event/wisconsin-elections-commission-march-meeting; Goehre Aff. Ex. F (Dkt. No. 11). On July 20, JCRAR held a public hearing at which it voted to suspend Emergency Rule 2209 "on the grounds that," in its view, "the rule conflicts with state law and fails to comply with legislative intent." *Record of Committee Proceedings*, JCRAR 2 (July 20, 2022), https://docs.legis.wisconsin.gov/code/register/2022/799B/register/actions_by_jcrar/actions_taken_by_jcrar_on_july_20_2022_emr2209/actions_taken_by_jcrar_on_july_20_2022_emr2209. JCRAR offered no amendments to the rule. *See id.*[2]

Following JCRAR's meeting, on July 21, 2022, WEC issued a statement regarding JCRAR's suspension of Emergency Rule 2209. *See Statement Regarding JCRAR Emergency Rule Suspension*, WEC (July 21, 2022), https://elections.wi.gov/media/15681/download. Consistent with Wisconsin law, WEC stated that it had not "authorized retracting [its] separate 2016 Guidance on Absentee Ballot Certificate Correction, upon which the 2022 emergency rule was based,"

[2] Although Plaintiffs repeatedly reference JCRAR's actions and conclusions, *see, e.g.*, Pls.' Br. in Supp. of Mot. for TRO & Prelim. Inj. 6, 10 (Dkt. No. 12), the source for these assertions is not an official document or statement from JCRAR, but rather a press release issued by JCRAR's co-chair that seemingly reflects solely his own views, *see* Goehre Aff. Ex. G (Dkt. No. 11).

explained that any such retraction would require a two-thirds vote of its members, and concluded that, without such a vote, the 2016 guidance "continues to remain intact." *Id.*; *see also* Wis. Stat. § 5.05(1e) ("Any action by [WEC] . . . requires the affirmative vote of at least two-thirds of the members."). At its meeting on August 3, WEC entertained a motion "[t]o drop guidance pertaining to absentee ballot certificate correction and all that entails from the WEC website and issue a notice to clerks informing them of the action," but the motion failed on a 3-3 vote. *Open Session Minutes*, WEC 2 (Aug. 3, 2022), https://elections.wi.gov/media/16026/download.

Plaintiffs initiated this lawsuit on July 12, 2022, and filed their pending motion for preliminary relief on August 2—just one week before Wisconsin's primary election. On August 9, Wisconsin held its statewide primary, conducted under the longstanding 2016 guidance. The Legislature's request for a temporary injunction followed on August 11.

III. LEGAL STANDARD

A circuit court may issue a temporary injunction only if the movant establishes four criteria: "(1) the movant is likely to suffer irreparable harm if a temporary injunction is not issued; (2) the movant has no other adequate remedy at law; (3) a temporary injunction is necessary to preserve the status quo; and (4) the movant has a reasonable probability of success on the merits." *Milwaukee Deputy Sheriffs' Ass'n v. Milwaukee County*, 2016 WI App 56, ¶20, 370 Wis. 2d 644, 883 N.W.2d 154 (citing *Werner v. A.L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520–21, 259 N.W.2d 310 (1977)). "[U]sually '[t]he purpose of a temporary injunction or restraining order is to maintain the status quo and not to change the position of the parties or compel the doing of acts which constitute all or part of the ultimate relief sought.'" *Gahl ex rel. Zingsheim v. Aurora Health Care, Inc.*, 2022 WI App 29, ¶60, ___ Wis. 2d ___, 977 N.W.2d 756 (second alteration in original) (quoting 8 Jay E. Grenig, *Wisconsin Pleading and Practice* § 71:31 (5th ed. 2021)). "[I]njunctive relief is addressed to the sound discretion of the trial court; competing interests must be reconciled

and the *plaintiff must satisfy* the trial court that on balance equity favors issuing the injunction." *Carlin Lake Ass'n v. Carlin Club Props., LLC*, 2019 WI App 24, ¶44, 387 Wis. 2d 640, 929 N.W.2d 228 (quoting *Columbia County v. Bylewski*, 94 Wis. 2d 153, 163, 288 N.W.2d 129 (1980)). "This burden reflects that 'injunctions are not to be issued lightly but only to restrain an act that is clearly contrary to equity and good conscience.'" *Id*. (quoting *Bartell Broads., Inc. v. Milwaukee Broad. Co.*, 13 Wis. 2d 165, 171, 108 N.W.2d 129 (1961)).

IV. ARGUMENT

Both Plaintiffs and the Legislature face a high burden to justify the extraordinary relief they request, and they fail to meet it at every turn. Neither explains—or even so much as addresses—what the statute on which they place such heavy reliance *actually says*, and an analysis of § 6.87 (6d)'s language within the larger context of the Election Code demonstrates its ambiguity. Given this uncertainty, the 2016 guidance should not be disturbed, a conclusion buttressed by the fact that this interpretation of the statute is necessary to avoid preemption by federal law. JCRAR's disagreement with that interpretation lacks any legal force. Plaintiffs and the Legislature thus cannot demonstrate a likelihood of success on the merits.

But success on the merits tells only part of this story, as Plaintiffs and the Legislature seek improper preliminary relief. They ask this Court to issue a temporary injunction that both grants all of the relief they request in this litigation and radically alters the status quo. And by seeking at this late hour to invalidate the 2016 guidance—which was vetted by the Department of Justice and has been in effect for six years and used in nearly 20 statewide elections—they ask this Court to risk confusion and disenfranchisement without explaining (let alone justifying) their delay. This unwarranted upheaval, contrary to both the appropriate scope of temporary injunctions and the equitable considerations that the Court must consider, further compels denial of both motions.

A. Plaintiffs are unlikely to succeed on the merits.

Both Plaintiffs and the Legislature conspicuously dodge a critical predicate issue when arguing about the lawfulness of the 2016 guidance: To borrow a phrase from Justice Hagedorn's *Trump* concurrence, "what makes an address an address"? 2020 WI 91, ¶49 (Hagedorn, J., concurring). Section 6.87 is ambiguous on this point, and the 2016 guidance is a reasonable, lawful interpretation of that statute—one that further ensures that the Election Code complies with federal statutory requirements. The Legislature casts JCRAR's disagreement with WEC (and, it would seem, with the Department of Justice) as an insurmountable impediment to continued implementation of the 2016 guidance, but JCRAR's actions have no legal effect on the guidance at issue here. For these reasons, Plaintiffs and the Legislature cannot show a "reasonable probability of success on the merits," *Milwaukee Deputy Sheriffs' Ass'n*, 2016 WI App 56, ¶20, and their motions for preliminary relief should be denied.[3]

[3] Plaintiffs rely on federal caselaw for the proposition that "the 'threshold is low' at this stage" and that "it is enough that [their] chances are better than negligible," suggesting that the Seventh Circuit "appl[ied] *Wisconsin* law" when announcing this standard. Pls.' Br. in Supp. of Mot. for TRO & Prelim. Inj. 9 (Dkt. No. 12) (emphasis added) (quoting *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 387 (7th Cir. 1984)). But the appropriate factors to consider in granting preliminary relief is a procedural concern, and therefore federal courts do *not* apply state law. *See, e.g.*, *Certified Restoration Dry Cleaning Network, LLC v. Tenke Corp.*, 511 F.3d 535, 541 (6th Cir. 2007). *Roland Machinery* thus does not displace the proper standard under Wisconsin law: "The writ (temporary injunction) is to a great extent a preventative remedy; and where the parties are in dispute concerning their legal rights, it will not ordinarily be granted *until the right is established*[.]" *Werner*, 80 Wis. 2d at 520 n.5 (emphasis added) (quoting *Akin v. Kewaskum Cmty. Schs. Joint Sch. Dist. No. 2*, 64 Wis. 2d 154, 159–60, 218 N.W.2d 494 (1974)). At any rate, the Seventh Circuit itself later clarified that "a mere possibility of success is not enough" to justify preliminary relief; instead, "an applicant for preliminary relief bears [the] significant burden" of making a "'*strong*' showing" of likely success on the merits. *Ill. Republican Party v. Pritzker*, 973 F.3d 760, 762–63 (7th Cir. 2020) (emphasis added).

1. The 2016 guidance is consistent with the witness-address requirement.

Inherent in both Plaintiffs' and the Legislature's motions is the assumption that a witness address that must be completed by a local official under the 2016 guidance (which is to say, an address for which "at least one component [is] missing; usually the municipality," Goehre Aff. Ex. D, at 1 (Dkt. No. 11)) necessarily renders its accompanying absentee ballot ineligible to be counted. But neither Plaintiffs nor the Legislature addresses a critical threshold issue: whether an *incomplete* (as opposed to *missing*) address is indeed fatally insufficient under state law. Because the Election Code's witness-address requirement leaves "address" undefined—despite providing differing, more precise definitions of "address" in other provisions—and specifies that only absentee ballots with "missing" addresses cannot be counted, the 2016 guidance is consistent with Wisconsin law.

Under the Election Code, an absentee ballot must be witnessed, and if the absentee-ballot envelope's "certificate is missing the address of [the] witness, the ballot may not be counted." Wis. Stat. § 6.87 (6d). Section 6.87 provides no other guidance as to what specifically a witness address requires. *See Trump*, 2020 WI 91, ¶49 (Hagedorn, J., concurring) ("Although Wis. Stat. § 6.87(6d) requires an address, § 6.87(2) and (6d) are silent on precisely what makes an address sufficient."); *see also* Wis. Stat. § 5.02 (Election Code's list of definitions, which does not include "address"). This vagueness stands in contrast not only to the information § 6.87 requires from absentee voters—"I am a resident of the [. . . ward of the] (town)(village) of . . . , or of the . . . aldermanic district in the city of . . . , residing at . . .* in said city, the county of . . . , state of Wisconsin," Wis. Stat. § 6.87(2) (alterations in original)—but also to the use of the term "address" elsewhere in the Election Code, *see, e.g.*, *id.* § 6.34(3)(b)(2) (voter identification must include "[a] current and complete residential address, including a numbered street address, if any, and the name of a municipality"); *id.* § 6.18 (former Wisconsin resident seeking presidential absentee ballot must

specify "[p]resent address," including "[c]ity" and "[s]tate"); *id.* § 8.15(5)(b) (candidate seeking ballot access "shall include his or her mailing address" on nomination papers).

The lack of a clear definition for the "address" required from absentee-ballot witnesses under § 6.87(6d), combined with the fact that the term is used to require different information in different parts of the Election Code, renders the precise contours of the witness-address requirement ambiguous. As the Wisconsin Supreme Court has explained, "the Presumption of Consistent Usage canon of construction . . . in part dictates that '*a material variation in terms suggests a variation in meaning*.'" *State v. Schmidt*, 2021 WI 65, ¶57, 397 Wis. 2d 758, 960 N.W.2d 888 (emphasis added) (quoting Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 170 (2012)); *accord Estate of Miller v. Storey*, 2017 WI 99, ¶35 n.14, 378 Wis. 2d 358, 903 N.W.2d 759. Notably, this canon was recently applied in the context of the Election Code; in concluding that two differently phrased terms in the election laws should in turn be interpreted differently, the Court of Appeals emphasized that "[w]here the legislature uses similar but different terms in a statute, particularly within the same section, we may presume it intended the terms to have different meanings." *State ex rel. Zignego v. WEC*, 2020 WI App 17, ¶64, 391 Wis. 2d 441, 941 N.W.2d 284 (quoting *State ex rel. DNR v. Wis. Ct. of Appeals*, 2018 WI 25, ¶28, 380 Wis. 2d 354, 909 N.W.2d 114), *aff'd as modified*, 2021 WI 32, 396 Wis. 2d 391, 957 N.W.2d 208. A witness's address under § 6.87(6d) should therefore be interpreted as something less exacting that the full mailing address prescribed elsewhere in the Election Code. *See Trump*, 2020 WI 91, ¶50 (Hagedorn, J., concurring) ("[I]f the witness provided only part of

the address—for example, a street address and municipality, but no state name or zip code—it is at least arguable that this would satisfy § 6.87(6d)'s address requirement.").[4]

Moreover, subsection (6d) provides that an absentee "ballot may not be counted" if its "certificate is *missing* the address of a witness." Wis. Stat. § 6.87 (6d) (emphasis added). Accordingly, an absentee ballot should be rejected under the statute only if the witness address is *absent* from the ballot, *see, e.g.*, *Missing*, Merriam-Webster, https://www.merriam-webster.com/dictionary/missing (last visited Aug. 22, 2022), not if the address is merely *incomplete*. The specific use of the term "missing" should not be glossed over: The Election Code itself admonishes that § 6.87(6d) is among the select provisions that should be strictly construed. *See* Wis. Stat. § 6.84(2). Accordingly, the 2016 guidance—which allows the processing of absentee ballots only if a "*component* of the address [is] missing," Goehre Aff. Ex. D, at 1 (Dkt. No. 11) (emphasis added), not the *entire* address—is consistent with the requirements of § 6.87(6d).

While both Plaintiffs and the Legislature tout the importance of proper statutory interpretation*, see, e.g.*, Pls.' Br. in Supp. of Mot. for TRO & Prelim. Inj. ("Pls.' Br.") 9–10 (Dkt. No. 12); Proposed Intervenor Wis. State Legislature's Mem. in Supp. of Its Mot. for Temporary

[4] The related canon of avoiding surplusage would yield a similar result. *See Zignego*, 2020 WI App 17, ¶66 (discussing canon). Reading § 6.87(6d)'s reference to "address" as mandating, for example, a city name, county name, and zip code would render superfluous the language elsewhere in the Election Code specifying those particular requirements. The Wisconsin Supreme Court has further explained that, "[w]ithout some indication to the contrary, general words (like all words, general or not) are to be accorded their full and fair scope. *They are not to be arbitrarily limited*. This is the general-terms canon." *Benson v. City of Madison*, 2017 WI 65, ¶25, 376 Wis. 2d 35, 897 N.W.2d 16 (emphasis added) (quoting Scalia & Garner, *supra*, at 101); *see also, e.g.*, *State v. Kozel*, 2017 WI 3, ¶39, 373 Wis. 2d 1, 889 N.W.2d 423 ("We will not read into the statute a limitation the plain language does not evidence." (quoting *County of Dane v. LIRC*, 2009 WI 9, ¶33, 315 Wis. 2d 293, 759 N.W.2d 571)). An address is "a place where a person or organization may be communicated with," *Address*, Merriam-Webster, https://www.merriam-webster.com/dictionary/address (last visited Aug. 22, 2022), which does not necessarily encompass the battery of requirements specified elsewhere in the Election Code (and that Plaintiffs and the Legislature would apparently have this Court read into § 6.87(6d)).

Inj. or, Alternatively, for Writ of Mandamus ("Legislature's Mem.") 10–11 (Dkt. No. 46), neither considers the specific text of § 6.87 nor reaches the correct result: The precise contours of a witness's "address" is undefined, and an absentee ballot must be rejected only if the address is *missing*, not merely incomplete. Given these conclusions, the 2016 guidance—blessed at different times by both the Wisconsin Department of Justice and a majority of the Justices on the Wisconsin Supreme Court, *see supra* at 2–4—is consistent with the Election Code.

2. The 2016 guidance reconciles Wisconsin law with federal requirements.

In addition to being consistent with the plain text of § 6.87 (6d), the 2016 guidance ensures compliance with federal law. Under Plaintiffs' conception of the witness-address requirement, anything less than a complete address renders an absentee ballot "defective—and therefore invalid." Pls.' Br. 10 (Dkt. No. 12); *see also* Legislature's Mem. 1 (Dkt. No. 46) (suggesting that 2016 guidance allows election officials to "correct *missing or insufficient* witness addresses on absentee ballots" (emphasis added)). This distortion of § 6.87, however, runs afoul of not only the plain statutory text, but also the federal Civil Rights Act's materiality provision, which prohibits states from denying the franchise to eligible voters based on immaterial technical requirements.

Section 101 of the Civil Rights Act provides that

> [n]o person acting under color of law shall . . . deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission *is not material in determining whether such individual is qualified under State law to vote in such election*.

52 U.S.C. § 10101(a)(2) (emphasis added). As one federal court has explained, there are two types of nonmaterial omissions under this provision: "1) failure to provide information, such as race or social security number, that is not directly relevant to the question of eligibility; and 2) failure to follow needlessly technical instructions, such as the color of ink to use in filling out the form." *Diaz v. Cobb*, 435 F. Supp. 2d 1206, 1213 (S.D. Fla. 2006); *see also, e.g.*, *Migliori v. Cohen*, 36

F.4th 153, 156–57 (3d Cir. 2022) (concluding that "a date on the outside of a mail-in ballot, required under state law," is "immaterial to a voter's qualifications and eligibility"), *petition for cert. filed*, No. 22-30 (U.S. July 11, 2022); *Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1309 (N.D. Ga. 2018) (finding requirement of elector's date of birth on absentee ballot nonmaterial); *Wash. Ass'n of Churches v. Reed*, 492 F. Supp. 2d 1264, 1270 (W.D. Wash. 2006) (required disclosure of social security number was not "material" because it did not establish requirements for eligibility to vote); *cf. Diaz*, 435 F. Supp. 2d at 1213 (question regarding mental capacity and felony conviction were material because both were qualifications for voting). Both categories of requirements are unlawful because "[t]hat provision was created to ensure qualified voters were not disenfranchised by meaningless requirements that prevented eligible voters from casting their ballots but had nothing to do with determining one's qualifications to vote." *Migliori*, 36 F.4th at 164.

The phrase "qualified under State law to vote" refers to a state's statutory or constitutional requirements for voting. *See Reed*, 492 F. Supp. 2d at 1270 (looking to state constitution's voter-eligibility requirements). Under Wisconsin law, a person is eligible to vote if they are (1) a U.S. citizen, (2) age 18 or older, and (3) "a resident of an election district in this state." Wis. Const. art. III, § 1; *see also* Wis. Stat. § 6.02. A person is eligible to vote absentee if they are (1) unable or unwilling to appear at their polling place for any reason or (2) an otherwise qualified elector who has moved within the state to a different ward or municipality later than 28 days prior to an election. Wis. Stat. § 6.85. An absentee voter must complete a certificate attesting to their eligibility to vote absentee under § 6.85 before a witness who is an adult U.S. citizen and who is not a candidate on the ballot. *Id.* § 6.87(4)(b)(1). Significantly, the complete address of the witness who certifies a voter's absentee ballot is irrelevant to each of these requirements. Accordingly, the

witness's address is nonmaterial—and it follows that rejecting an otherwise-eligible voter's absentee ballot because of a purportedly incomplete witness address would violate the materiality provision. Were the Court to adopt Plaintiffs' and the Legislature's interpretation of § 6.87(6d), the witness-address requirement would therefore be preempted by federal law. *See Town of Delafield v. Cent. Transp. Kriewaldt*, 2020 WI 61, ¶5, 392 Wis. 2d 427, 944 N.W.2d 819 (explaining that, under Supremacy Clause of U.S. Constitution, "state law that conflicts with federal law is without effect; it is preempted" (cleaned up)).[5]

To the extent Plaintiffs or the Legislature contends that a complete witness address is material because it is required to combat "an increased risk of voter fraud and abuse with respect to absentee balloting," Pls.' Br. 11 (Dkt. No. 12); *see also* Legislature's Mem. 22 (Dkt. No. 46), this argument is unpersuasive. To begin, a purported interest in fraud prevention does not render a requirement "material" under the materiality provision. *See Migliori*, 36 F.4th at 163 ("Fraud deterrence and prevention are at best tangentially related to determining whether someone is qualified to vote."); *Schwier v. Cox*, 412 F. Supp. 2d 1266, 1276 (N.D. Ga. 2005) (finding that role of mandatory disclosure of social security number in preventing fraud did not render requirement material), *aff'd*, 439 F.3d 1285 (11th Cir. 2006); *Reed*, 492 F. Supp. 2d at 1270 (similar). Even if it did, neither Plaintiffs nor the Legislature provides any indication as to how a *complete* (as opposed to *partial*) witness address would materially advance that objective. *See Fla. State Conf.*

[5] Although the Election Code distinguishes generally between in-person and absentee voting, *see* Wis. Stat. § 6.84(1), there can be little doubt that absentee ballots and their accompanying envelopes and certificates—as "record[s] or paper[s] relating to [an] . . . act requisite to voting, 52 U.S.C. § 10101(a)(2)(B)—qualify for the materiality provision's protections, *see, e.g.*, *Democratic Cong. Campaign Comm. v. Kosinski*, No. 22-CV-1029 (RA), 2022 WL 2712882, at *21 (S.D.N.Y. July 13, 2022) (noting that "courts have deemed the Materiality Provision to be applicable to errors such as missing handwritten dates on absentee ballot envelopes" (citing *Migliori*, 36 F.4th at 163–64)).

of NAACP v. Browning, 522 F.3d 1153, 1174 (11th Cir. 2008) (suggesting that "materiality" requires at least "minimal relevance," if not "outcome-determinative" effect). Indeed, the only conceivable purpose served by the witness-address requirement—identifying the witness—is vindicated by the 2016 guidance, which provides that local official may cure a ballot without contacting a voter *only if* they "are reasonably able to discern any missing information from outside sources." Goehre Aff. Ex. D, at 1 (Dkt. No. 11).

In short, rejecting an absentee ballot based on an incomplete witness address—a necessary predicate to Plaintiffs' and the Legislature's position that the 2016 guidance serves to remedy otherwise-defective absentee ballots—would run afoul of federal law, since a complete witness address is not material to establishing a Wisconsin voter's eligibility to vote absentee. This provides further support for the 2016 guidance, and another reason to reject the requests for preliminary relief.

3. JCRAR's disagreement does not change this analysis or prohibit WEC from continuing to follow the 2016 guidance.

In casting JCRAR's rejection of Emergency Rule 2209 as an absolute bar to further implementation of the 2016 guidance, the Legislature's motion overlooks yet another critical threshold question: What is the status quo in the absence of Emergency Rule 2209? The Legislature fails to address this question because it does not like the answer: The 2016 guidance remains in effect until (1) WEC itself retracts it, (2) the Legislature enacts a law overturning it, or (3) a court overrules it. None of these actions has occurred, and so the 2016 guidance remains in effect.

First, contrary to the Legislature's suggestion, the 2016 guidance was issued pursuant to powers vested in WEC and is not an unlawfully promulgated rule. Under Wis. Stat. § 5.05(6a), WEC may issue formal or informal opinions, and it acted in accordance with that authority when it unanimously directed that the 2016 guidance be issued to clerks at its meeting of October 14,

2016. *See Open Session Minutes*, WEC 7–8 (Oct. 14, 2016), https://elections.wi.gov/media/11815/download; *see also Trump v. WEC*, 506 F. Supp. 3d 620, 638 (E.D. Wis.) (rejecting challenges to WEC's interpretation of Election Code, including witness-address requirement, because "[t]hese issues are ones the Wisconsin Legislature has expressly entrusted to the WEC" through § 5.05 and WEC was thus "acting pursuant to the legislature's express directives"), *aff'd*, 983 F.3d 919 (7th Cir. 2020). The 2016 guidance furthered both WEC's general responsibility under § 5.05(1) to oversee the administration of the Election Code and its specific responsibility under § 6.869 to "prescribe uniform instructions for municipalities to provide to absentee electors," including "information concerning the procedure for correcting errors in marking a ballot and obtaining a replacement for a spoiled ballot."

The 2016 guidance is also exclusively directed to the local election officials charged with examining absentee ballots. Wisconsin Stat. § 227.01(13) specifically states that the term "rule" "does not include, and [§] 227.10 does not apply to, any action or inaction of an agency" that is "directed to a specifically named person or to a group of specifically named persons that does not constitute a general class." The 2016 guidance is specifically directed to a limited class of defined persons described in specific terms—Wisconsin's municipal and county clerks—and new members cannot be added to that class. *See Wis. Legislature v. Palm*, 2020 WI 42, ¶21, 391 Wis. 2d 497, 942 N.W.2d 900 ("[W]hen the class of people regulated by an order 'is described in general terms and new members can be added to the class,' the order is of general application and is a rule." (quoting *Citizens for Sensible Zoning, Inc. v. DNR*, 90 Wis. 2d 804, 816, 280 N.W.2d 702 (1979))). The Legislature tries to muddy this distinction by claiming that the election of new clerks means new members can be added to the class, but by the same token those individuals who are no longer clerks are removed. In other words, the 2016 guidance applies to a defined and specific

set of officeholders at any one time—individuals who hold the title of municipal or county clerk—and that class cannot be expanded, even if the names of the people holding those titles occasionally change. The 2016 guidance thus falls under an enumerated exception and is not a rule.

JCRAR's authority over rules does not extend to WEC guidance. The statutory authority on which JCRAR relied in suspending Emergency Rule 2209—and to which the Legislature now clings—is explicitly limited to JCRAR's authority to suspend *rules*. *See* Wis. Stat. § 227.26(2)(d); Legislature's Mem. 13–20 (Dkt. No. 46). While JCRAR may request that an agency proffer guidance as an emergency rule, *see* Wis. Stat. § 227.26(2)(b), it lacks authority to issue or suspend agency guidance that clearly falls outside of the statutory definition of a rule, *see SEIU, Loc. 1 v. Vos*, 2020 WI 67, ¶119, 393 Wis. 2d 38, 946 N.W.2d 35 (holding that statutes requiring administrative agencies to identify existing law that supported contents of guidance documents and submit guidance documents to legislative reference bureau violated separation of powers and were facially unconstitutional). The power to adjudicate disputes over whether given "guidance" needs to be a "rule" lies with the courts, which is why the Legislature seeks an injunction here. This makes the present case distinguishable from *Martinez v. DILHR*—on which the Legislature relies extensively in its motion—where JCRAR offered amendments to a rule and an administrative agency exceeded its authority by explicitly directing the entities it controlled to ignore JCRAR's amendments. *See* 165 Wis. 2d 687, 698, 478 N.W.2d 582 (1992). There was no dispute in *Martinez* over whether the rule at issue needed to be a rule and therefore fell within JCRAR's authority. Here, by contrast, JCRAR's general view that the 2016 guidance exceeds the bounds of the Election Code has no legally binding effect and is entitled to no deference.[6]

[6] The lack of any "clear legal right" that flows from JCRAR's actions, *Voces de la Frontera, Inc. v. Clarke*, 2017 WI 16, ¶11, 373 Wis. 2d 348, 891 N.W.2d 803 (cleaned up), further explains why

WEC appropriately considered and rejected the suggestion that it retract the 2016 guidance following JCRAR's suspension of Emergency Rule 2209. As WEC explained following the suspension, any action by WEC requires a two-thirds vote of its members under § 5.05(1e), and a motion to retract the 2016 guidance failed following a 3-3 vote at WEC's meeting of August 3, 2022. *See supra* at 5–6. This two-thirds requirement is not simply an "internal operating procedure" of WEC that can be disregarded, Legislature's Mem. 16 (Dkt. No. 46); it is a statutory requirement, imposed by the Legislature, for WEC to take any official action. The 2016 guidance, unanimously adopted, is the last official action of WEC concerning this issue—and, accordingly, remains in effect.

Second, while the Legislature seeks extraordinary relief from this Court, it has taken no legislative action to clarify § 6.87 (6d)'s ambiguity or otherwise nullify the 2016 guidance. Wisconsin Stat. § 227.26(2)(f) provides that, following the suspension of a rule, "[JCRAR] shall, within 30 days after the suspension, meet and take executive action regarding the introduction, in each house of the legislature, of a bill to support the suspension." To date, it does not appear JCRAR has taken any action in support of such a bill. JCRAR's justification might be that the Legislature is out of session, but the Legislature possesses the power to call itself into session whenever it deems appropriate, so it could act on any such proposal expeditiously. *See League of Women Voters of Wis. v. Evers*, 2019 WI 75, ¶42, 387 Wis. 2d 511, 929 N.W.2d 209. Any such effort, of course, runs the risk of a gubernatorial veto. So, instead, the Legislature seeks to intervene in this lawsuit and asks the Court to provide the relief it cannot or will not achieve through the

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the Legislature's alternative request for a writ of mandamus must also be denied, *see* Legislature's Mem. 24–25 (Dkt. No. 46).

legislative process. The Legislature's continued inaction leaves the WEC's duly enacted guidance as the only legally significant interpretation of § 6.87(6d) currently in effect.[7]

Third, and finally, no court has held that the 2016 guidance runs afoul of the Election Code. To the contrary, the separate opinions offered by the Justices of the Wisconsin Supreme Court in *Trump* indicate that at least four Justices agree that the 2016 guidance is lawful. *See supra* at 3–4; *see also Trump*, 506 F. Supp. 3d at 628, 639 (rejecting challenge to 2016 guidance because "plaintiff has not shown a significant departure from the Wisconsin Legislature's chosen election scheme").

* * *

Ultimately, with the 2022 election well underway, there must be *some* guidance to ensure that municipal clerks handle the witness-address requirement uniformly. WEC is the agency that the Legislature tasked with offering that guidance, and it has provided an interpretation of the witness-address requirement that is consistent with both the Election Code and federal law. Absent further legislative or judicial action, JCRAR's belated opinion of that guidance offers at best one

[7] The Legislature suggests that Governor Tony Evers "thwarted" its efforts to improve the cure process for absentee-ballot certificates by vetoing Senate Bill 935 earlier this year. Legislature's Mem. 4–5 (Dkt. No. 46). But it fails to mention that Governor Evers vetoed the bill—which would have "disallow[ed] clerks from curing errors on an absentee ballot"—in part because this process would have been insufficient. *Letter from Governor Tony Evers to the Senate*, Office of Governor 1 (Apr. 8, 2022), https://content.govdelivery.com/attachments/WIGOV/2022/04/08/file_attachments/2126962/Signed%20Veto%20Message%20-%20SB%20935.pdf. Specifically, he explained that

> [w]hile it may be practical for a clerk to call a small number of voters who have made an error, it is unrealistic for clerks to call large numbers of voters to warn them that their ballot is being discarded if they do not correct it. . . . Furthermore, by only requiring voters to be warned via a website that their vote will not be counted, this bill disadvantages populations throughout the state that may have difficulty using or accessing the Internet.

Id. at 2.

legislative committee's (unfounded) disagreement with the 2016 guidance. That guidance, endorsed by the Wisconsin Department of Justice, is consistent with state and federal law, and JCRAR lacks the authority to compel WEC to rescind it. The Court should accordingly deny the motions for a temporary injunction.

B. Plaintiffs and the Legislature seek an inappropriate temporary injunction.

While a reasonable probability of success on the merits is the sine qua non of a temporary injunction, the posture and equities of this case independently warrant denial of preliminary relief. Plaintiffs and the Legislature cannot seek all of their requested relief through a temporary injunction, and they must demonstrate that "a temporary injunction is necessary to preserve the status quo." *Zingsheim*, 2022 WI App 29, ¶28. Neither Plaintiffs nor the Legislature can meet these requirements; they instead seek to stretch the extraordinary—and limited—remedy of a temporary injunction far beyond its proper scope.

1. Plaintiffs and the Legislature seek a temporary injunction that would grant all of their requested relief, contrary to bedrock principles of Wisconsin law.

Plaintiffs' and the Legislature's requests for a temporary injunction are inappropriate because they seek relief that is indistinguishable from the ultimate relief requested. *Compare, e.g.*, Compl. 14 (Dkt. No. 2) (seeking "[a] permanent injunction requiring that WEC cease and desist in offering incorrect guidance concerning [the witness-address requirement]"), *with* Pls.' Br. 14 (Dkt. No. 12) (requesting that "this Court issue a temporary restraining order and permanent injunction against WEC's use, dissemination, publication, or application of the [2016 guidance] relating to missing or adding information to absentee ballot witness certifications"). Granting a temporary injunction that provides a party all of the relief requested constitutes an abuse of discretion. *See, e.g.*, *Sch. Dist. v. Wis. Interscholastic Athletic Ass'n*, 210 Wis. 2d 365, 367, 563 N.W.2d 585 (Ct. App. 1997); *see also Codept, Inc. v. More-Way N. Corp.*, 23 Wis. 2d 165, 173,

127 N.W.2d 29 (1964) ("The function of a temporary injunction is to maintain the *status quo*, not to change the position of the parties or compel the doing of acts *which constitute all or part of the ultimate relief sought*." (second emphasis added)). As the Court of Appeals recently explained when reversing a grant of a temporary injunction in *Zingsheim*, "[t]he court's order clearly exceeded the limited purpose of a mandatory injunction because it changed the position of the parties and compelled the acts which constituted all or part of the ultimate relief sought." 2022 WI App 29, ¶61. Such would be the unacceptable result here if the pending motions were granted.

2. A temporary injunction would radically alter the status quo.

Fundamentally, Plaintiffs and the Legislature seek a temporary injunction that would abruptly change longstanding WEC guidance in the weeks directly preceding the general election, asking this Court to alter the status quo in a manner directly contrary to the limited instances in which a temporary injunction is appropriate.

"[T]he purpose of a temporary injunction or restraining order is to maintain the status quo and not to change the position of the parties[.]" *Zingsheim*, 2022 WI App 29, ¶60 (quoting Grenig, *supra*, § 71:31); *see also Pure Milk Prods. Coop. v. Nat'l Farmers Org.*, 64 Wis. 2d 241, 251, 219 N.W.2d 564 (1974) ("[I]njunctions are not to be issued lightly, but only where necessary to preserve the status quo of the parties and where there is irreparable injury." (footnote omitted)). Neither Plaintiffs nor the Legislature disputes that the 2016 guidance has been in place for every election over the past six years, including the primary held two weeks ago. But the Legislature nevertheless "submits that the status quo should be considered from the statutory status quo, not from WEC's unlawful recent practices." Legislature's Mem. 10 n.9 (Dkt. No. 46). Even if the 2016 guidance were unlawful—and it is not, *see supra* at 8–20—the Legislature cannot wave away six years of consistent implementation and consequent reliance by urging a status quo that simply does not exist. *See SCFC, Inc. v. Visa USA, Inc.*, 936 F.2d 1096, 1100 (10th Cir. 1991) ("The status quo

is not defined by the parties[’] existing *legal rights*; it is defined by the *reality* of the existing status and relationships between the parties, regardless of whether the existing status and relationships may ultimately be found to be in accord or not in accord with the parties’ legal rights.”). The status quo in this case *is the 2016 guidance*; six years of application have seen to that.

That Plaintiffs and the Legislature seek to upend the status quo between the primary and general elections renders their requests for relief all the more inappropriate. The Legislature suggests that “no chance of voter or clerk confusion would arise” because “the August 9 primary election is now over,” Legislature’s Mem. 2 (Dkt. No. 46), but this has it backward: The risk of confusion and disenfranchisement is *greater* because Plaintiffs and the Legislature seek to change the rules and upend expectations in the middle of an election. As the Wisconsin Supreme Court has explained, a primary election “is a part of the election” that will conclude in November. *State v. Kohler*, 200 Wis. 518, 559, 228 N.W. 895 (1930); *see also State ex rel. La Follette v. Democratic Party of U.S. of Am.*, 93 Wis. 2d 473, 517, 287 N.W.2d 519 (1980) (noting “[t]he critical nexus between the primary and the general election”), *rev’d on other grounds*, 450 U.S. 107 (1981). And as the U.S. Supreme Court has observed, “[c]ourt orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls.” *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006) (per curiam); *see also, e.g.*, *Common Cause Ind. v. Lawson*, 978 F.3d 1036, 1043 (7th Cir. 2020) (per curiam) (citing *Purcell* and staying injunction issued close to election where “plaintiff brought the *Purcell* rule upon itself by waiting more than a year to bring this lawsuit”). Here, not only has the 2016 guidance been in effect for six years, but Wisconsin voters cast their ballots in the primary election under this guidance mere weeks ago. This is a textbook example of a case where a last-minute change in an election rule poses the unacceptable risk of voter confusion—and the even greater risk of disenfranchisement.

In short, a temporary injunction is not the proper vehicle for the radical alteration to the status quo that Plaintiffs and the Legislature seek. This alone compels rejection of their requests for preliminary relief.

C. The equities militate against a temporary injunction.

Finally, Plaintiffs and the Legislature fail to meet their burden of establishing that the balance of equities warrants a temporary injunction in this case. Instead, equitable principles urge *against* preliminary relief because (1) the pending motions are inexcusably delayed and (2) the public interest requires ensuring that Wisconsin voters are not improperly disenfranchised.

1. Plaintiffs and the Legislature inexcusably delayed in seeking relief.

Plaintiffs and the Legislature have had six years to challenge the 2016 guidance. Instead, Plaintiffs chose to initiate this lawsuit just one month before the primary election and then waited another three weeks before moving for expedited relief, while the Legislature's request for preliminary relief was filed *after* the use of the 2016 guidance during the August primary election. Neither provides any explanation for this unjustified delay.

In declining to address the merits of, among other claims, a challenge to the 2016 guidance, the *Trump* Court admonished the former president's campaign for similar delay tactics, stating:

> Interpreting complicated election statutes in days is not consistent with best judicial practices. These issues could have been brought weeks, months, or even years earlier. The resulting emergency we are asked to unravel is one of the Campaign's own making.
>
> The claims here are not of improper electoral activity. Rather, they are technical issues that arise in the administration of every election.

2020 WI 91, ¶¶30–31 (footnote omitted). Here, Plaintiffs and the Legislature have had nearly two years since the *Trump* decision to bring a lawsuit challenging the 2016 guidance, and nothing prevented them from doing so. Instead, they waited—and now ask the Court to interpret an ambiguous statute in the middle of an election on a preliminary posture, requesting a hasty change

of the rules between the primary and general elections. *See* Legislature's Mem. 2 (Dkt. No. 46) ("**The Legislature respectfully submits that timely relief is essential**[.]"). Their inexplicable delay would warrant denial of the requested relief in any circumstance—as courts have noted, "[l]ack of diligence, standing alone, may . . . preclude the granting of preliminary injunctive relief, because it goes primarily to the issue of irreparable harm," *Majorica, S.A. v. R.H. Macy & Co.*, 762 F.2d 7, 8 (2d Cir. 1985) (per curiam)—but this equitable consideration is particularly important when the extraordinary relief sought risks voter confusion and disenfranchisement during an election, *see, e.g.*, *Hawkins v. WEC*, 2020 WI 75, ¶5, 393 Wis. 2d 629, 948 N.W.2d 877 (declining grant of original action where "the petitioners delayed in seeking relief in a situation with very short deadlines"); *Knox v. Milwaukee Cnty. Bd. of Elections Comm'rs*, 581 F. Supp. 399, 404 (E.D. Wis. 1984) (denying injunctive relief because challenge, "made some . . . 22 months after the adoption of the final plan, is inexcusably delayed"); *cf. Trump v. WEC*, 983 F.3d 919, 926 (7th Cir. 2020) ("The President had a full opportunity before the election to press the very challenges to Wisconsin law underlying his present claims. Having foregone that opportunity, he cannot now—after the election results have been certified as final—seek to bring those challenges.").[8]

2. The public interest does not favor injunctive relief.

Finally, Plaintiffs and the Legislature ask this Court to upend longstanding guidance grounded in protecting the right to vote, a request squarely at odds with the public interest. Were Plaintiffs and the Legislature to succeed, voters who properly submitted their absentee ballots could have those ballots rejected not because of any material question regarding their eligibility,

[8] This equitable hurdle is especially pronounced for the Legislature, which could have amended § 6.87 (6d) to more clearly define the ambiguous term "address" (or otherwise legislatively responded to the 2016 guidance) at any point over the last six years. *See supra* at 18–19.

but instead due to an omission as trivial as a missing municipality name or zip code in the address of their ballot witness. Any finding of irreparable harm for Plaintiffs and the Legislature must be considered in light of their failure to diligently pursue relief. *See Ty, Inc. v. Jones Grp., Inc.*, 237 F.3d 891, 903 (7th Cir. 2001) ("Delay in pursuing a preliminary injunction may raise questions regarding the plaintiff's claim that he or she will face irreparable harm if a preliminary injunction is not entered."). By contrast, there can be no question that the unwarranted disenfranchisement of lawful voters is an injury without redress: "It is axiomatic that there is no post hoc remedy for a violation of the right to vote." *Martin*, 347 F. Supp. 3d at 1310. Rather than countenance a temporary injunction that could result in scores of Wisconsinites suffering the irreparable harm of unjustified disenfranchisement, this Court should instead continue to preserve the franchise against unnecessary attacks based on trivial technicalities and distortions of the law.

V. CONCLUSION

Plaintiffs and the Legislature are a day late and a dollar short. Even though the guidance they now challenge was developed with the input and approval of the Wisconsin Department of Justice and has been in effect for six years, they waited until this year's election was in full swing to seek a temporary injunction—inexcusably introducing the risk of confusion and disenfranchisement ahead of the November general election. The equities alone militate against a temporary injunction, but their requested relief is also without merit: The 2016 guidance is consistent with Wisconsin law and necessary to ensure compliance with the federal Civil Rights Act. Having failed to establish the elements required for a temporary injunction, neither Plaintiffs nor the Legislature is entitled to preliminary relief, and their motions should be denied.

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