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STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY
BRANCH 8

CONCERNED VETERANS OF
WAUKESHA COUNTY, et al.,

Plaintiffs,

v.

Case No. 22-CV-1603

WISCONSIN ELECTIONS COMMISSION,

Defendant,

and

UNION VETERANS COUNCIL, et al.,

Intervenors.

DEFENDANT'S BRIEF IN SUPPORT OF MOTION TO DISMISS

INTRODUCTION

Plaintiffs' chapter 227 declaratory judgment action challenging certain guidance documents issued by Defendant Wisconsin Elections Commission (the "Commission") is based on fundamental inaccuracies about Wisconsin's election administration system and fails as a matter of law. The allegations in Plaintiffs' complaint do not establish any invalidity in the guidance documents that could provide grounds for invalidating them under Wis. Stat. § 227.40. This action should be dismissed because Plaintiffs have failed to state a claim for relief under Wis. Stat. § 227.40.

STATEMENT OF THE CASE

I. Complaint.

Plaintiffs bring an action for declaratory judgment, pursuant to Wis. Stat. § 227.40(1), as to the validity of two administrative guidance documents. (Dkt. 2 (Petition for Declaratory Judgment under Wisconsin Statutes § 227.40 and Injunction) (hereinafter, “Compl.”).)¹ Wisconsin Stat. § 227.40(1) provides that “the exclusive means of judicial review of the validity of a rule or guidance document shall be an action for declaratory judgment as to the validity of the rule or guidance document,” and “[t]he court shall render a declaratory judgment in the action only when it appears from the complaint and the supporting evidence that the rule or guidance document or its threatened application interferes with or impairs, or threatens to interfere with or impair, the legal rights and privileges of the plaintiff.”

Plaintiffs include three individuals and one organization, Concerned Veterans of Waukesha County. (Compl. ¶¶ 1–4.) Each individual plaintiff is identified as a “Wisconsin elector and taxpayer.” (*Id.* ¶¶ 1–2.) Concerned Veterans of Waukesha County is an association of “Wisconsin veterans, electors and taxpayers.” (*Id.* ¶ 3.)

¹ Plaintiffs erroneously identify their filing as a petition for declaratory judgment under Wis. Stat. § 227.40 rather than a civil complaint. *See* Wis. Stat. § 227.40(1).

Plaintiffs' central allegation is that two guidance documents issued to municipal clerks by the Commission—the *Military and Overseas Voting Manual* and the *Military and Overseas Voting Cheat Sheet* (hereinafter, the “guidance documents”)—are invalid because they violate Wis. Stat. § 6.22(6). (*Id.* ¶¶ 6, 18–20, 23.) That statute requires each “municipal clerk” to “keep an up-to-date list of all eligible military electors who reside in the municipality” and to “distribute one copy of the list to the each polling place in the municipality for use on election day.” Wis. Stat. § 6.22(6). Plaintiffs assert that the guidance documents violate this statute because neither guidance document contains any reference to municipal clerks' obligations regarding military elector lists under Wis. Stat. § 6.22(6) nor “require[s]” that a military elector list be used by clerks. (Compl. ¶¶ 20–21, 23.)

Further, Plaintiffs allege that the guidance documents have “caused” municipal clerks to “not have” up-to-date military elector lists as required by Wis. Stat. § 6.22(6); and that municipal clerks' failure to have the military elector lists “has created a vulnerability in Wisconsin's military absentee ballot process: essentially, any person can apply for a military elector absentee ballot and have it sent to any address.” (*Id.* ¶¶ 26–27.)

II. Legal background.

Plaintiffs' complaint begins with numerous legal assumptions about the powers and duties of local election officials and the Commission, the scope and

purpose of the “military elector list” statute, Wis. Stat. § 6.22(6), and military absentee voting. (See, e.g., *id.* ¶¶ 10, 14, 16, 27, 36, 40, 44.) It is thus appropriate to initially review the legal framework relevant to Plaintiffs’ claims.

A. Wisconsin has a decentralized system in which local election officials are primarily responsible for administering elections. Commission guidance is non-binding and does not have the force or effect of law.

Wisconsin is a unique state in that it has a “highly decentralized system for election administration.” *State ex rel. Zignego v. Wis. Elections Comm’n*, 2021 WI 32, ¶ 13, 396 Wis. 2d 391, 957 N.W.2d 208 (citing *Jefferson v. Dane Cnty.*, 2020 WI 90, ¶ 24 n.5, 394 Wis. 2d 602, 951 N.W.2d 556). “Rather than a top-down arrangement with a central state entity or official controlling local actors,” Wisconsin “places significant responsibility on a small army of local election officials” who function as partners in administering elections. *Id.* “Municipal clerks are the officials primarily responsible for election administration in Wisconsin,” with “a vast array of duties and responsibilities consistent with their primary role.” *Id.* ¶ 15.

While giving primary responsibility for election administration to local officials, Wisconsin also “gives some power to its state election agency (the Commission).” *Id.* ¶ 13. The “Commission has general responsibility for administering [Wis. Stat.] chapters five through ten and 12, the power to

investigate and prosecute violations of election laws, the duty and power to issue guidance and formal advisory opinions, and the charge to conduct voter education programs.” *Id.* ¶ 18 (citing Wis. Stat. § 5.05(1), (2m), (2w), (5t), (6a), (12)); *see also* Wis. Stat. §§ 7.08(3), (11) (requiring Commission to prepare and publish an election manual and to assign staff to respond to inquiries from local election officials), 7.31(5), and 7.315(1)–(2) (requiring Commission to prescribe and conduct training programs for municipal clerks and election inspectors).

In addition to its enumerated statutory responsibilities, the Commission is “responsible for [issuing] guidance in the administration and enforcement” of Wisconsin’s election laws, *Jefferson*, 394 Wis. 2d 602, ¶ 24. Guidance documents

are not law, they do not have the force or effect of law, and they provide no authority for implementing or enforcing standards or conditions. They simply “explain” statutes and rules, or they “provide guidance or advice” about how the executive branch is “likely to apply” a statute or rule. They impose no obligations, set no standards, and bind no one. They are communications about the law—they are not the law itself.

Serv. Emps. Int’l Union, Loc. 1 v. Vos (“*SEIU*”), 2020 WI 67, ¶ 102, 393 Wis. 2d 38, 946 N.W.2d 35; *see also* Wis. Stat. § 227.112(3). The power to create and issue guidance documents is an inherent power of the executive branch and does not require a specific delegation of power from the Legislature. *Id.* ¶¶ 100–05.

B. Military absentee voting.

In general, any qualified elector, other than a military elector,² must register to vote before voting in any election in this state.³ Wis. Stat. § 6.27. “Military electors,” however, “are not required to register as a prerequisite to voting in any election.” Wis. Stat. § 6.22(3). Because of this difference, municipal clerks receive voter information about non-military and military voters in different ways.

For non-military voters, registration requires completing and submitting a registration form in person at the office of the municipal clerk, by mail, or electronically. Wis. Stat. § 6.30. Information to be submitted includes the elector’s name, address, identification, and proof of residence. Wis. Stat. §§ 6.33–6.34. Clerks enter registration information into a statewide electronic voter database, from which the Commission compiles and maintains an official registration list that contain numerous categories of information about each registered elector, including name, address, date of birth, ward or aldermanic

² A “[m]ilitary elector” is a member of the U.S. Army, Navy, Air Force, Marine Corps, Coast Guard, Merchant Marine of the United States, Peace Corps, the commissioned corps of the Federal Public Health Service, the commissioned corps of the National Oceanic and Atmospheric Administration, civilian employees of the United States and civilians officially attached to a uniformed service who are serving outside the United States, and any spouse and dependents of the above who are residing with or accompanying them. Wis. Stat. § 6.22(1)(b)–(c).

³ An exception exists for certain new or former residents who may vote in presidential elections without first being registered in Wisconsin. *See* Wis. Stat. §§ 6.15, 6.18, 6.27.

district, in-person polling location, and many other items. Wis. Stat. § 6.36(1)(a). The registration list is available to municipal clerks and local election officials for election use. *See* Wis. Stat. §§ 6.36, 6.45(1).

For military electors, in contrast, no voter registration process is required. The municipal clerk therefore generally does not receive voter information regarding a military elector until the military elector applies for an absentee ballot—although a military voter may register like a non-military elector and may vote in person on election day, as well.

Any qualified elector—including a military elector—who for any reason is unable or unwilling to vote in-person on election day may instead vote by absentee ballot. Wis. Stat. § 6.85. An absentee ballot request from a registered elector must include the elector's name, residential address, mailing address (if different), and proof of identification, where necessary. *See* Wisconsin Elections Commission, *Election Administration Manual* (Sept. 2022), at 88, <https://elections.wi.gov/media/16921/download>; *see also* Wis. Stat. § 6.869 (authorizing the Commission to prescribe uniform instructions for absentee electors, including methods for requesting an absentee ballot).

A military elector can apply for an absentee ballot by the same methods generally available to other absentee voters, including “by means of electronic mail or facsimile transmission in the manner prescribed in s. 6.86(1)(ac).” Wis. Stat. § 6.22(2)(e). A military elector also may apply for an absentee ballot

using the federal post card application.⁴ *See* Wis. Stat. § 6.22(2)(c). Upon receipt of a valid and timely absentee ballot request from a military elector, the municipal clerk shall send or transmit the ballot to the elector as soon as it is available. Wis. Stat. § 6.22(2)(e), (4)(a)–(b).

Because a military elector is not required to register prior to voting, when such an elector requests an absentee ballot for the first time, the municipal clerk's existing voter records may not yet contain information about that elector. Accordingly, the Legislature has directed municipal clerks to keep an up-to date list of all eligible military electors who reside in the municipality in the format prescribed by the Commission. Wis. Stat. § 6.22(6). This list shall contain:

- The name of each military elector;
- The elector's latest-known military residence and military mailing address;
- Indication whether the military elector is one who falls under the definition in Wis. Stat. § 6.34(1)—*i.e.*, who is absent from their usual voting residence due to service or duty—and who thus is entitled to receive an absentee ballot via email or fax; and

⁴ The Federal Post Card Application is distributed by the U.S. Department of Defense Federal Voting Assistance Program for use by absentee voters covered by the Uniformed and Overseas Citizens Absentee Voting Act. *See* <https://www.fvap.gov>. The Federal Post Card Application is a combination voter registration form and absentee ballot request, and it is required to be accepted in Wisconsin if the voter has provided all required information on the form. *See* Wis. Stat. § 6.24(4).

- Indication whether the elector has certified on his or her ballot application an alternate address to be used if the elector's ballot is returned to the clerk as undeliverable.

Id. The military elector list is to be kept current through all possible means, and each municipal clerk shall take reasonable care to avoid duplicating names or listing anyone who is not eligible to vote. *Id.* The clerk shall distribute a copy of the list to each polling place in the municipality for use on election day. *Id.*

Except as provided in Wis. Stat. § 6.25,⁵ military absentee ballots are to be marked, returned, deposited, and recorded in the same manner as other absentee ballots. Wis. Stat. § 6.22(5). Like any other absentee ballot, a military absentee ballot must include certification under Wis. Stat. § 6.87(2) by the elector and by an adult witness, and additionally must include a statement of the military elector's birth date. Wis. Stat. § 6.22(2)(b), (5).

Military absentee ballots, like other absentee ballots, are returned to the municipal clerk's office once completed. Wis. Stat. § 6.87(4)(b)1. From there, the absentee ballots are delivered to the polling place at which the elector would vote if he or she were voting in-person. Wis. Stat. § 6.88(1)–(3). On election day, the absentee ballots are counted by poll workers at the polling

⁵ In lieu of an official state absentee ballot, a qualified military elector also may use a federal write-in absentee ballot under 42 U.S.C. § 1973ff-2. Wis. Stat. § 6.25(1).

places. Wis. Stat. § 6.88(3). An absentee ballot may not be counted if the ballot certificate is not properly completed. Wis. Stat. § 6.88(3)(b). Additionally, when the absentee ballots are being counted, any ballot—including military absentee ballots—may be challenged for cause under the same procedures and standards that apply to other challenges. Wis. Stat. § 6.93.⁶

ARGUMENT

When reviewing a motion to dismiss, the court must accept the complaint's factual allegations as true, taking "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). The court need not, however, 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). "Plaintiffs must allege facts that, if true, plausibly suggest a violation of applicable law." *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶ 21, 356 Wis. 2d 665, 849 N.W.2d 693.

⁶ Further, if there is a recount after votes have been counted, additional procedures exist for reviewing the validity of absentee ballots, including opportunities for objections and offers of evidence. *See* Wis. Stat. § 9.01(1)(b), (5). Following the completion of the recount, appeal to circuit court is available. Wis. Stat. § 9.01(6)–(8).

Here, Plaintiffs have brought a Wis. Stat. § 227.40 declaratory judgment action to challenge the validity of certain Commission guidance documents, arguing that they are unlawful because they violate Wis. Stat. § 6.22(6). The allegations in Plaintiffs complaint, however, even if taken as true, do not establish any invalidity in the guidance documents that could provide grounds for invalidating them under Wis. Stat. § 227.40. This action should be dismissed because Plaintiffs have failed to state a claim upon which relief can be granted. *See* Wis. Stat. § 802.06(2)(a)6.

Plaintiffs are not entitled to declaratory relief invalidating the challenged guidance documents under Wis. Stat. § 227.40 for three reasons.

First, under Wis. Stat. § 227.40, a court can invalidate a guidance document only if it is unlawful, and Plaintiffs have identified nothing unlawful in the guidance documents at issue here. Plaintiffs try to frame their claim as a claim that the Commission has unlawfully *failed* to issue guidance construing the requirements imposed on municipal clerks by Wis. Stat. § 6.22(6), but such a claim is not actionable under Wis. Stat. § 227.40.

Second, in the alternative, even if Plaintiffs could advance a claim based on the *absence* of guidance construing Wis. Stat. § 6.22(6), any such claim

would fail as a matter of law because the Commission has no legal duty to issue the type of guidance demanded by Plaintiffs.⁷

Third, Plaintiffs' allegations about the impact of the guidance documents on election integrity provide no basis for invalidating those documents both because those allegations do not establish any illegality in the documents that could support a claim under Wis. Stat. § 227.40 and because the allegations themselves are factually and legally unfounded.

I. Plaintiffs have identified nothing in the challenged guidance documents that violates Wis. Stat. § 6.22(6).

Plaintiffs purport to seek relief under Wis. Stat. § 227.40. In a proceeding for review of a guidance document under that statute, “the court shall declare the . . . guidance document invalid if it finds that it violates constitutional provisions or exceeds the statutory authority of the

⁷ Under Wis. Stat. § 6.22(6), the Commission is charged with prescribing the format for military elector lists. Consistent with that statutory responsibility, the Commission takes the position that the existing procedures it has prescribed for recording and maintaining military elector information in the statewide WisVote database satisfy the military elector list requirements of Wis. Stat. § 6.22(6). For purposes of the present motion to dismiss, however, the Court must accept Plaintiffs' allegations that at least some municipal clerks are not maintaining the required military elector lists, and that the Commission has not supplied clerks with guidance about how to comply with Wis. Stat. § 6.22(6). The present motion to dismiss contends that, even if those allegations are assumed to be true, Plaintiffs' claim nonetheless fails as a matter of law and should be dismissed. If the Court denies this motion to dismiss, the Commission intends to create a factual record refuting Plaintiffs' allegations.

agency.” Wis. Stat. § 227.40(4)(a).⁸ Here, Plaintiffs contend that the challenged guidance documents exceed the Commission’s statutory authority by contravening Wis. Stat. § 6.22(6), but that contention is plainly incorrect.

Wisconsin Stat. § 6.22(6) directs municipal clerks to maintain up-to-date military elector lists for their respective municipalities in a format prescribed by the Commission. Plaintiffs assert that the challenged guidance documents violate that statute because, they allege, those documents do not enumerate municipal clerks’ statutory obligations regarding military elector lists under Wis. Stat. § 6.22(6) or specifically require that a military elector list be used by clerks. (Compl. ¶¶ 20–21, 23.)⁹ Plaintiffs have identified nothing in the Commission’s guidance, however, that is inconsistent with Wis. Stat. § 6.22(6).

The guidance documents at issue here summarize and describe other portions of Wis. Stat. § 6.22 and related statutes that govern the requesting, sending, and returning of military and overseas ballots, but they do not

⁸ The court also may declare a rule or guidance document invalid if it “was promulgated or adopted without compliance with statutory rule-making or adoption procedures.” Wis. Stat. § 227.40(4)(a). Plaintiffs here have not alleged that the challenged guidance documents were adopted in a procedurally unlawful manner. Moreover, the Supreme Court has invalidated statutory adoption procedures for guidance documents as unconstitutional. *See SEIU*, 393 Wis. 2d 38, ¶¶ 105–08.

⁹ The challenged guidance documents contain numerous references to the procedures clerks are to follow in recording and maintaining military elector information in WisVote. (*See, e.g.*, Compl. Ex. A:6, 8, 12–13, 16–18, 23; Ex. B:42.) Plaintiffs disregard or try to minimize these parts of the guidance documents. (*See, e.g.*, Compl. ¶¶ 22, 24.)

enumerate the specific military elector list requirements of Wis. Stat. § 6.22(6). Plaintiffs complain that the guidance documents contravene that provision because they do not themselves “require” municipal clerks to do what the statute already expressly requires them to do. But, a guidance document that simply fails to repeat a statutory provision does not thereby violate that provision.

Plaintiffs allege that there is no existing Commission guidance construing Wis. Stat. § 6.22(6). They thus try to frame their claim as a claim that the Commission has exceeded its statutory authority by *failing* to issue guidance that discusses the requirements imposed on municipal clerks by Wis. Stat. § 6.22(6). Such a claim, however, is not actionable under Wis. Stat. § 227.40 because a court’s authority under that statute is limited to reviewing the validity of an existing guidance document in the same fashion as it may review the validity of an administrative rule. *See SEIU*, 393 Wis. 2d 38, ¶ 111. Because Plaintiffs have identified nothing unlawful in the existing guidance documents they challenge, there is nothing in that guidance for this Court to invalidate under Wis. Stat. § 227.40, and Plaintiffs’ claim that the guidance exceeds the Commission’s statutory authority thus fails as a matter of law.

II. The Commission has no legal duty to issue the type of guidance demanded by Plaintiffs.

Alternatively, even if Plaintiffs could advance a claim based on the *absence* of guidance construing Wis. Stat. § 6.22(6), any such claim would fail on its merits because the Commission has no legal duty to issue the type of guidance that Plaintiffs demand.

First, as a statutory matter, the Commission is not required to issue guidance on every provision in Wisconsin's election statutes, nor is it required to reference military elector lists in guidance documents pertaining to related but different subjects. The statutes prescribing the Commission's powers and duties generally *empower* the Commission to issue advisory opinions, publish election manuals, respond to inquiries from local election officials and conduct education programs for voters and election officials, but except where expressly specified, those statutes do not *require* the Commission to issue guidance on particular subjects. *See generally* Wis. Stat. §§ 5.05, 7.08(3), (11), 7.31(5), 7.315(1)–(2). Here, Plaintiffs have not cited any statute that specifically directs the Commission to issue the type of guidance documents they are demanding. The Commission thus has not exceeded its statutory authority simply because it has issued guidance documents that discuss some of the statutory provisions related to absentee voting by military electors, without enumerating the specific requirements of Wis. Stat. § 6.22(6).

Second, within Wisconsin's decentralized system of election administration, "[m]unicipal clerks are the officials primarily responsible for election administration." *Zignego*, 396 Wis. 2d 391, ¶ 15. There is thus no legal support for Plaintiffs' apparent belief that municipal clerks are not required to carry out their responsibilities under Wis. Stat. § 6.22(6) unless the Commission has issued guidance directing them to do so. To the contrary, municipal clerks have an independent duty to follow and implement Wisconsin's election laws.

Plaintiffs assert, to the contrary, that municipal clerks are not supposed to interpret Wisconsin's election laws for themselves, but instead must rely on interpretations supplied by the Commission. (Compl. ¶ 16; *see also id.* ¶ 14 (county clerks).) That assertion is contrary to elementary constitutional principles. Government officials charged with executing a law—which includes local election officials—must of necessity first judge for themselves the meaning of the law and what it requires. *SEIU*, 393 Wis. 2d 38, ¶ 96. The authority of executive officials thus “encompasses determining what the law requires as well as applying it (preferably in that order).” *Id.* ¶ 99; *see also State v. Whitman*, 196 Wis. 472, 497, 220 N.W. 929 (1928) (“Every executive officer in the execution of the law must of necessity interpret it in order to find out what it is he is required to do.”).

Accordingly, the election-related duties of Wisconsin's municipal clerks require them to exercise their own judgment and discretion in interpreting and applying statutory provisions. *See, e.g.*, Wis. Stat. § 7.15(1)(e)–(h) (requiring municipal clerks, *inter alia*, to train subordinate election officials in their duties; discharge election officials for improper conduct or willful neglect of duties; report suspected election frauds, irregularities, or violations to the district attorney; and review, examine, and certify the sufficiency and validity of petitions and nomination papers). Municipal clerks likewise must exercise their judgment and discretion in interpreting and applying the military elector list provisions of Wis. Stat. § 6.22(6).

Therefore, contrary to Plaintiffs' suggestions, the legal effect of Wis. Stat. § 6.22(6) does not depend on the existence of Commission guidance enumerating the requirements of that statute. If Plaintiffs believe that some municipal clerks are not complying with the requirements of Wis. Stat. § 6.22(6), they may file a complaint against any such clerk with the Commission pursuant to Wis. Stat. § 5.06. But any alleged errors by municipal clerks do not give rise to a cause of action against the Commission for having failed to issue guidance prohibiting those errors.

III. Plaintiffs' allegations about election integrity provide no basis for invalidating the guidance documents.

Finally, Plaintiffs allege that, because the challenged guidance documents do not repeat the requirements in Wis. Stat. § 6.22(6) for up-to-date military elector lists, those documents have thereby “caused the municipal clerks to not have” such lists; and that municipal clerks’ alleged failure to have the military elector lists “has created a vulnerability in Wisconsin’s military absentee ballot process: essentially, any person can apply for a military elector absentee ballot and have it sent to any address.” (Compl. ¶¶ 26–27.) As previously noted, the Commission contends that the existing procedures it has prescribed for recording and maintaining military elector information in WisVote satisfy Wis. Stat. § 6.22(6). But even if Plaintiffs’ contrary allegations are assumed to be true for purposes of the present motion, they do not establish any invalidity in the guidance documents that could provide grounds for invalidating them under Wis. Stat. § 227.40. More fundamentally, however, the inferences about election integrity that Plaintiffs draw from their allegations are factually and legally unfounded.

First, contrary to Plaintiffs’ contention, the Commission’s guidance documents could not have “caused” municipal clerks to “not have” up-to-date military elector lists as required by Wis. Stat. § 6.22(6). (*Id.* ¶ 26.) The Commission’s guidance documents are, by definition, not binding and cannot

compel any action or inaction on the part of municipal clerks. Wis. Stat. § 227.112(3) (“A guidance document does not have the force of law and does not provide the authority for implementing or enforcing a standard [or] requirement . . .”). Moreover, there is nothing in the guidance documents that prevents clerks from complying with Wis. Stat. § 6.22(6); rather, those guidance documents simply do not enumerate specific responsibilities of clerks under that provision.

Second, contrary to Plaintiffs’ erroneous suggestions, the reasonable inference from the language of Wis. Stat. § 6.22(6) is that the military elector lists are not intended to function as safeguards against fraudulent absentee ballot applications, but rather are meant to facilitate the voting rights of military electors by ensuring that clerks have complete and up-to-date contact information for all individuals who have self-certified that they qualify as military electors.

There are other statutory safeguards against fraudulent military absentee voting. Like any other absentee ballot, a military absentee ballot must include certification under Wis. Stat. § 6.87(2) by the elector and by an adult witness, and additionally must include a statement of the military elector’s birth date. Wis. Stat. § 6.22(2)(b), (5). Because of these certification requirements, if someone fraudulently applied for and received an absentee ballot on behalf of an imaginary military voter, in order to vote that ballot, the

person perpetrating the fraud would also have to fraudulently sign the certificate on behalf of the imaginary voter and provide a fraudulent witness certification, fraudulent witness signature, and fraudulent witness address. *See* Wis. Stat. § 6.87(2). Such conduct would violate criminal election fraud prohibitions. *See* Wis. Stat. § 12.13(1)(a), (b), (d), (3)(i).

Third, to the extent that such fraudulent conduct is possible (albeit plainly illegal) under Wisconsin's election statutes, that possibility is not the result of any failure to keep military elector lists under Wis. Stat. § 6.22(6).

In Wisconsin, a military elector does not have to be registered to vote as a prerequisite to voting. Wis. Stat. § 6.22(3). This means that when an unregistered military elector requests an absentee ballot for the first time, the municipal clerk's records do not yet contain any voter information about that elector. Any existing military elector list thus would not contain information about such a new military voter, and therefore also would not prevent a bad actor from fraudulently requesting and receiving an absentee ballot on behalf of an imaginary military elector.

It follows that Plaintiffs are clearly wrong when they assert that the recent alleged illegal actions of former Milwaukee Elections Commission Deputy Director Kimberly Zapata would have been prevented if the municipal clerks of South Milwaukee, Menomonee Falls, and Shorewood had possessed

complete, accurate, and up-to-date military elector lists. (*See* Compl. ¶¶ 36, 40, 44.) To the contrary, even if those clerks maintained the type of separate military elector lists demanded by Plaintiffs, they would simply have assumed that Zapata's imaginary military electors were new voters who did not yet appear on their existing lists, issued the requested absentee ballots, and then added the applicants' information to the existing lists.¹⁰

If the criminal-law safeguards against the type of election fraud allegedly committed by Zapata are insufficient, as Plaintiffs suggest, that is not due to the Commission's guidance documents, or even due to any alleged failure by clerks to keep military elector lists. Rather, it is a policy matter that may be properly addressed by the Legislature. Such policy arguments provide no grounds for invalidating a guidance document under Wis. Stat. § 227.40, and Plaintiffs have thus failed to state a claim for such relief.

¹⁰ Similarly, even if clerks record and maintain military elector information integrated in WisVote, as prescribed by the Commission, that information will not include first-time applicants who have not previously self-identified as qualified to receive a military absentee ballot.

CONCLUSION

For all of the foregoing reasons, the Commission respectfully asks the Court to grant its motion and dismiss this case.

Dated this 19th day of December 2022.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed Defendant's Brief in Support of Motion to Dismiss with the clerk of court using the Wisconsin Circuit Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 19th day of December 2022.

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