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Waukesha County
2022CV001603

STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY
BRANCH 8

CONCERNED VETERANS OF
WAUKESHA COUNTY,
KEN MAREK,
TOM GUDEX, and
JANEL BRANDTJEN,

Plaintiffs,

v.

WISCONSIN ELECTIONS COMMISSION,

Defendant,

UNION VETERANS COUNCIL,
CAPTAIN TIMOTHY McDONALD,

Intervenor-Defendants.

Case No. 2022CV1603
Case Code: 30701
Declaratory Judgment

Judge Michael P. Maxwell

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REPLY IN SUPPORT OF INTERVENOR-DEFENDANTS UNION VETERANS COUNCIL AND CAPTAIN TIMOTHY McDONALD'S MOTION TO DISMISS

INTRODUCTION

Months after bringing their election-eve lawsuit, Plaintiffs concede that its entire premise is false. They want the Wisconsin Election Commission ("WEC") to issue guidance mandating the use of "military elector lists" to prevent fraudulent military votes. But they now admit that any military voter who requests a ballot must be sent one whether the voter is on a military elector list or not. *See* Dkt. 56, Plaintiffs' Br. at 12 ("[I]f a military elector is not registered, § 6.22(3) makes certain he or she is not deprived of an opportunity to vote."); *id.* at 14 ("If the military elector is not on the military elector list, then § 6.22(3) is applicable."); Wis. Stat. § 6.22(3), (6). Guidance

about military elector lists therefore cannot prevent fraudulent military votes, because even under the guidance Plaintiffs seek, military ballots would still be sent to requestors who are not on such a list.

This reality leaves Plaintiffs without standing. Their alleged "injury" was an increased risk of fraudulent military absentee votes. A lack of guidance about military elector lists, however, cannot have caused that injury because military elector lists cannot prevent the issuance of military ballots. Plaintiffs' statutory arguments for standing also fail. On the merits, Plaintiffs have no cause of action, they did not exhaust their administrative remedies, and their claims fail as a matter of law.

Intervenors therefore respectfully request that the Court dismiss Plaintiffs' complaint.

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ARGUMENT

I. Plaintiffs lack standing.

Plaintiffs assert standing under three statutes: Sections 227.40(1),[1] 6.84(1), and 5.06. None confers standing here. And Plaintiffs expressly abandon their taxpayer-standing theory. Dkt. 56 at 5 n.1. The Court should therefore dismiss their claims for lack of standing.

A. Wis. Stat. § 227.40(1)

Plaintiffs lack standing under Section 227.40(1) because they do not show "an injury in fact" that is "a direct result of the agency action" they challenge. *Teigen v. Wis. Elections Comm'n*, 2022 WI 64, ¶ 20 (lead op.); *see Friends of Black River Forest v. Kohler Co.*, 2022 WI 52, ¶¶ 12–31. Rather, Plaintiffs' response brief now confirms that Plaintiffs' alleged injury—a concern about election integrity—cannot possibly be the direct result of the lack of agency guidance that

[1] Plaintiffs cite "Wisconsin Statutes § 277.40(1)." Because no such provision exists, Intervenors assume Plaintiffs mean Section 227.40(1).

Plaintiffs challenge. That is because the guidance that Plaintiffs say is required would not prevent the election vulnerability that Plaintiffs say they have identified.

The central contention in Plaintiffs' complaint and eleventh-hour TRO motion was that election officials' alleged failure to maintain a "military elector list" had "created a vulnerability in Wisconsin's military absentee ballot process: essentially, any person can apply for a military ballot and have it sent to any address." Dkt. 3, TRO Mot. at 6. But Plaintiffs now admit that even if military elector lists were used as they demand, election officials would still have to send military ballots to voters who request them, whether or not those voters were on a military elector list. In particular, Plaintiffs concede that if a requestor "is not on the military elector list, then [Section] 6.22(3) is applicable," meaning that the clerk must still "provide the elector [the] opportunity" to cast a military ballot. Dkt. 56 at 13–15. This follows directly from Section 6.22(3), which provides that "[m]ilitary electors are not required to register as a prerequisite to voting in any election." To require voters to be listed on a military elector list before requesting a military ballot would require them to register in violation of this provision.

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Because Plaintiffs admit that military ballots must be sent even to electors who are not already on a military elector list, any lack of guidance about military elector lists could not possibly be the cause of the asserted "vulnerability" that underlies Plaintiffs' claims—that "any person can apply for a military ballot and have it sent to any address." Dkt. 3 at 6. Take the three ballots that were sent to Plaintiff Brandtjen after a request by a since-fired Milwaukee election official. *See* Dkt. 2, Compl. ¶¶ 27–44. Those ballots would still have been sent under Plaintiffs' own approach. Local election officials receiving the requests would have checked the military elector list, found that the electors in question were not listed, but then sent the ballots anyway under Section 6.22(3). *See* Dkt. 56 at 14–15.

The lack of guidance therefore does not change who gets military ballots, so it makes no difference to "the integrity of election outcomes." Dkt. 56 at 10. Unlike in *Teigen*, there can no longer be any argument here that the challenged conduct "pollutes the integrity of the results" of elections. 2022 WI 64, ¶ 25. Even on Plaintiffs' account, the military elector lists simply have no effect on what ballots are sent and counted. As a result, Plaintiffs' alleged injury is not the direct result of the challenged agency action, so Plaintiffs lack standing under Section 227.40.

Plaintiffs have no answer to this problem. They ignore *Teigen*'s requirement that they show "injuries that are a direct result of the agency action" to have standing to sue under chapter 227. 2022 WI 64, ¶ 20 (quoting *Black River Forest*, 2022 WI 52, ¶ 21). They instead argue that they have *stated a claim* under Section 227.40. Dkt. 56 at 5–7. But Plaintiffs need *both* standing *and* a cause of action—the two are separate requirements. *See State v. Deetz*, 66 Wis. 2d 1, 13, 224 N.W.2d 407 (1974); *Pagoudis v. Keidl*, 2021 WI App 56, ¶ 13.

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B. Wis. Stat. § 6.84(1)

Plaintiffs also rely on Section 6.84(1), a legislative policy statement that creates no substantive rights, and which Plaintiffs mention for the first time in their response brief. Section 6.84(1) says nothing about conferring standing to sue. The next subsection requires that three election-law provisions "be construed as mandatory" (Sections 6.86, 6.87(3) to (7), and 9.01(1)(b)2. and 4.), and provides that "[b]allots cast in contravention of the procedures specified in those provisions may not be counted." Wis. Stat. § 6.84(2). But Plaintiffs do not allege a violation of any of those provisions.

Plaintiffs suggest that *Teigen* declared that Section 6.84(1) creates generalized election-integrity standing for all voters. Dkt. 56 at 8 (citing *Teigen*, 2022 WI 64, ¶¶ 21, 23 (lead op.)). But in *Teigen*, the plaintiffs alleged that the challenged conduct was leading to the counting of unlawful votes. *Teigen*, 2022 WI 64, ¶ 25. Here, in contrast, the relief Plaintiffs seek would not affect who

receives a military ballot or the counting of unlawful votes. *Supra* Part I.A. Regardless, the portion of the *Teigen* opinion which Plaintiffs cite is not precedential because it did not garner support from a majority of the Court. *Teigen,* 2022 WI 64, ¶ 167 (Hagedorn, J., concurring in part) (calling this part of the lead opinion's analysis "unpersuasive" and pointing out that it did not "garner the support of four members of [the Supreme Court]").

C. Wis. Stat. § 5.06

Finally, Plaintiffs cite Section 5.06, which imposes an administrative prerequisite to suits challenging actions taken by local elections officials. This statute does not create standing. Indeed, as explained below, the statute provides a separate reason to dismiss this action. Justice Hagedorn's contrary conclusion in *Teigen*, 2022 WI 64, ¶ 164 (Hagedorn, J., concurring in part), was rejected by all six other justices, *see id.* ¶¶ 32–34 (lead op.); *id.* ¶¶ 210–15 (Walsh Bradley, J., dissenting).[2] This Court should not adopt this flawed argument.

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II. Plaintiffs lack a valid cause of action.

In addition to lacking standing, Plaintiffs lack a valid cause of action. Neither of the two statutes on which Plaintiffs rely—Sections 227.40 and 5.06—creates a claim here. Plaintiffs' lack of a valid cause of action provides an independent basis to dismiss this case. *See DSG Evergreen Fam., L.P. v. Town of Perry*, 2020 WI 23, ¶¶ 48–49.

A. Wis. Stat. § 227.40

Section 227.40 does not provide Plaintiffs with a cause of action because it does not authorize the Court to do what Plaintiffs request—to review a *lack* of guidance. Section 227.40 authorizes "judicial review of the validity *of a rule or guidance document*." And it allows a court

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[2] Justice Hagedorn limited his standing analysis under Section 5.06 "only to challenges under Wis. Stat. § 227.40(1) to WEC rules and guidance documents when that guidance threatens to cause local election officials to behave illegally—a legal right protected by § 5.06." *Teigen*, 2022 WI 64, ¶ 167 n.8. Because there is no valid § 227.40(1) challenge to a WEC rule or guidance document here, *see infra* Part II, even Justice Hagedorn's reasoning does not save Plaintiffs' action.

to declare a rule or guidance document "invalid" only where it "[1] violates constitutional provisions or [2] exceeds the statutory authority of the agency or [3] was promulgated or adopted without compliance with statutory rule-making or adoption procedures." Wis. Stat. § 227.40(4); *see also Debeck v. Wis. Dep't of Nat. Res.*, 172 Wis. 2d 382, 385, 493 N.W.2d 234 (Ct. App. 1992). Plaintiffs ask the Court to do something else entirely—to "correct" WEC's "omissions" by ordering new guidance on a subject that WEC's existing guidance does not address. Dkt. 56 at 11, 16. The Court correctly recognized at the temporary injunction hearing that it can do no such thing. *See* Dkt. 55, Decl. at 6 ("[M]y reading of 227.40 doesn't allow me to add. It only allows me to take away or to decline guidance that's faulty.").

Plaintiffs now criticize the Court's conclusion, but their grounds for doing so are flawed. *See* Dkt. 56 at 15–16. First, nothing in *SEIU v. Vos*, 2020 WI 67, supports Plaintiffs' arguments. The paragraph they quote simply establishes that guidance documents are "reviewable by the courts in the same fashion as administrative rules." 2020 WI 67, ¶ 111. But Section 227.40 does not authorize court-ordered rulemaking any more than court-ordered issuance of guidance documents. Second, Plaintiffs' contention that existing guidance is invalid because it has unlawful omissions leads nowhere. *See* Dkt. 56 at 11–12. Plaintiffs do not ask the Court to declare invalid the *existing* WEC military elector guidance. *See* Dkt. 2 at 10. Doing so would not redress Plaintiffs' alleged injury and would only deprive municipal clerks of guidance that correctly articulates state law about other military elector issues unrelated to the Section 6.22(6) list requirement. And Plaintiffs do not argue that WEC's existing guidance "exceeds [its] statutory authority," Wis. Stat. § 227.40(4); they assert only that WEC "*has* the inherent authority to create and issue guidance documents," which is undisputed, Dkt. 56 at 12 (emphasis added).

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Plaintiffs' argument, based solely on the *New Oxford American Dictionary* definition of "validity," that the Court must order new guidance because WEC's "lack of guidance [about military elector lists] reflects unsound reasoning," is beside the point. *See* Dkt. 56 at 6. Alleged "unsound reasoning" is not a basis for the Court to invalidate guidance—only a violation of the constitution, a lack of statutory authority, or a failure to follow mandatory procedures justifies such relief. *See* Wis. Stat. § 227.40(4)(a). And whether Plaintiffs agree with WEC's existing guidance or not, the relief they seek is the issuance of additional guidance, and Section 227.40 provides them with no cause of action that could lead to that relief.

B. Wis. Stat. § 5.06

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Section 5.06 also provides no applicable cause of action for the unrebutted reasons Intervenors set out in their opening brief: it does not authorize a claim against WEC, the sole defendant here. Dkt. 50 at 9–10. Plaintiffs try to argue that Section 5.06's exhaustion rule does not *bar* this action, Dkt. 56 at 10–11, but they never explain how that statute can be read to *authorize* the action. It cannot, because the statute only provides for a circuit court action *after* a complaint has been addressed by WEC—not in the absence of any WEC complaint. Wis. Stat. § 5.06(2), (8).

III. Plaintiffs' claims are barred by their failure to exhaust administrative remedies.

Plaintiffs' claims are also barred by their failure to exhaust the administrative remedy required by Section 5.06. Section 5.06 provides that no elector "may commence an action or proceeding to test the validity of any decision, action or failure to act on the part of any election official" unless they first file an administrative complaint with WEC. Wis. Stat. § 5.06(2). Plaintiffs concede that they did not exhaust that remedy but argue that they were not required to do so. That is incorrect.

Contrary to Plaintiffs' argument, *Teigen* did not create an exception to the Section 5.06 regime whenever a plaintiff sues WEC. Rather, in *Teigen*, three Justices concluded that the

plaintiffs did not need to file a Section 5.06 complaint before suing WEC because the relief those plaintiffs sought was *unavailable* under Section 5.06. 2022 WI 64, ¶¶ 44–51 (lead op.). In doing so, the *Teigen* lead opinion was merely following a long line of cases in which courts "have been willing to assume jurisdiction of a case, notwithstanding a party's failure to exhaust administrative remedies, where the court finds that the reasons supporting the exhaustion rule are lacking." *Nodell Inv. Corp. v. City of Glendale,* 78 Wis. 2d 416, 425–26, 254 N.W.2d 310 (1977) (explaining that exhaustion was not required where an administrative action "would not have afforded the party adequate relief" because the agency had no authority to grant the relief requested). Here, in contrast, requiring exhaustion would make perfect sense. Plaintiffs seek to force WEC to require local officials to comply with the law—precisely the kind of relief that Section 5.06(1)'s administrative process contemplates. *See id.* at 426–28 (holding that the plaintiffs were precluded from judicial relief because they failed to exhaust an administrative remedy before an agency that "does have the power . . . to afford relief to the [plaintiffs]"); *see also* Dkt. 50 at 10–11.

Plaintiffs are also wrong that WEC "has conceded primary jurisdiction" such that exhaustion is not required. Dkt. 56 at 11. The existence of an administrative complaint made to WEC on the same issue instructs *against* the application of the primary jurisdiction doctrine, which applies only "where there has been a total absence of any formal proceedings before the agency." *Nodell Inv. Corp.*, 78 Wis. 2d at 428 n.13 (distinguishing "exhaustion" and "primary jurisdiction"). And far from "conced[ing] to this Court's primary jurisdiction," Dkt. 56 at 5, WEC's letter in response to the complaint simply acknowledges that it does not want to get ahead of the Court's determination of the issues in this case—including whether the Court has jurisdiction at all. *See* Dkt. 55, Decl. at 3. If the Court dismisses this case, as it should, WEC can proceed to hear the complaint.

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Finally, even if the primary jurisdiction doctrine were properly in play, "the better course" is for a court to defer to the agency when, like here, "the issue involves factual or specialized questions that fit squarely within the very area for which the agency was created." *Wis. Prop. Tax Consultants, Inc. v. Wis. Dep't of Revenue*, 2022 WI 51, ¶ 6, 402 Wis. 2d 653, 659, 976 N.W.2d 482, 485 (quotations omitted); *see also* Wis. Stat. § 5.06(9) (requiring the Court to "accord[] due weight to the experience, technical competence and specialized knowledge of the commission"). As the papers filed with this Court thus far make clear, there are myriad factual issues to resolve, including whether each of Wisconsin's thousand-plus municipal clerks are properly maintaining and disseminating the military elector information that the statutes require. And the relationship between the military elector lists and the rest of the military elector scheme is a technical one that WEC is best equipped to address itself.

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IV. Plaintiffs' claims fail as a matter of law.

Finally, Plaintiffs' claims fail because their requested relief under Section 6.22 is facially inconsistent with that section's language. Section 6.22(6) does not require WEC to issue guidance to municipal clerks directing them to keep military elector lists and telling them how to use them. Section 6.22(6) provides simply: "Each municipal clerk shall 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) (emphasis added). It goes on to set forth what information "[t]he list shall contain," require that it be "kept current by all possible means," mandates that municipal clerks use reasonable care to deduplicate it and remove ineligible voters, and require that clerks distribute it to polling places "for use on election day." *Id.* As this text makes clear, the extent of WEC's duty under Section 6.22(6) is to prescribe a *format* for military elector lists, nothing more. The remaining duties regarding military elector lists are placed directly on municipal clerks alone.

Nothing in the statute obligates WEC to issue a guidance document regarding the *creation and use* of military elector lists, which is what Plaintiffs seek.

CONCLUSION

For the reasons stated in this reply and in Intervenors' motion, this Court should dismiss Plaintiffs' complaint in its entirety.

DATED this 15th day of March, 2023.

Electronically signed by Diane M. Welsh
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