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Waukesha County
2022CV001603

STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY
BRANCH 8

CONCERNED VETERANS OF WAUKESHA COUNTY, et al.,

Plaintiffs,

v.

WISCONSIN ELECTIONS COMMISSION,

Defendant.

Case No. 2022CV1603
Case Code: 30701
Declaratory Judgment

Judge Michael P. Maxwell

MEMORANDUM IN SUPPORT OF UNION VETERANS COUNCIL AND CAPTAIN TIMOTHY McDONALD'S MOTION TO INTERVENE

INTRODUCTION

Proposed Intervenors-Defendants Union Veterans Council ("Union Veterans") and Captain Timothy McDonald ("Captain McDonald") submit this memorandum in support of their motion to intervene in this proceeding under Wis. Stat. § 803.09(1)–(2). Plaintiffs seek—in a case filed with just one business day to go before election day—to segregate thousands of military electors' ballots and to invalidate longstanding WEC guidance that makes military absentee voting in Wisconsin simple and efficient. Both Proposed Intervenors have a significant interest in opposing Plaintiffs' late-breaking, ill-conceived quest to disenfranchise Wisconsin service members who voted absentee in reliance on settled WEC guidance.

Proposed Intervenor Union Veterans is an organization that supports veterans across the country—including those who vote in Wisconsin—who are now union members. Union Veterans is committed to furthering the political engagement of both active-duty and retired service members in Wisconsin and beyond—particularly active-duty service members, who face barriers

to asserting their own rights. Captain McDonald is a captain in the United States Merchant Marine who often votes under Wisconsin's military-elector absentee voting law while deployed. Plaintiffs' requested relief will harm both Union Veterans and Captain McDonald.

For these reasons and those set forth below, Proposed Intervenors are entitled to intervene in this case as a matter of right under Wis. Stat. § 803.09(1). Such intervention is needed to protect their substantial and distinct legal interests, which will otherwise be inadequately represented in this litigation. Wisconsin courts routinely find such interests sufficient for intervention as of right, including in similar election-administration cases.

In the alternative, the Court should allow Union Veterans and McDonald to permissively intervene pursuant to Wis. Stat. § 803.09(2). As required by Wis. Stat. § 803.09(3), a responsive pleading setting forth the defenses for which intervention is sought accompanies Proposed Intervenors' motion. *See* Ex. 1 to this motion.

BACKGROUND

I. Statutory Framework

Wisconsin's Election Code creates a set of special procedures for absentee voting by "military electors." Wis. Stat. § 6.22(1). "Military electors" are those serving in the uniformed services—the army, navy, air force, marine corps, coast guard, health services commissioned corps, and NOAA commissioned corps—as well as merchant marine members, "[c]ivilian employees of the United States and civilians officially attached to a uniformed service who are serving outside the United States," peace corps volunteers, and "[s]pouses and dependents of those listed in the above categories residing with or accompanying them." Wis. Stat. § 6.22(1)(b)–(c). Unlike other Wisconsin voters, military electors are not required to register to vote before requesting an absentee ballot. Wis. Stat. §§ 6.22(3), 6.27. Nor are they required to maintain a

current Wisconsin residence, because they may vote based on their "residence prior to becoming a military elector." Wis. Stat. § 6.22(2)(a).

II. Plaintiffs' Lawsuit

This case concerns Section 6.22(6), which is not a requirement for voters, but instead is an ancillary recordkeeping provision requiring that 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). The statute instructs clerks to keep the list "current through all possible means" and to "exercise reasonable care to avoid duplication of names or listing anyone who is not eligible to vote." *Id.* And it provides that each clerk "shall distribute one copy of the list to the [*sic*] each polling place in the municipality for use on election day." *Id.*

Plaintiffs filed this lawsuit at the end of the day on Friday, November 4—with just one business day to go before election day.

Plaintiffs allege that two WEC guidance documents fail to comply with Section 6.22(6): the "Military and Overseas Voting Manual" (the "Military Manual"),[1] which WEC issued on February 4, 2022, and a "Military & Overseas Cheat Sheet for Clerks" (the "Military Cheat Sheet"),[2] which WEC issued on August 15, 2022. Plaintiffs complain that neither guidance document discusses Section 6.22(6)'s list requirement, and they blame that omission for three invalid military ballots that municipal clerks issued in response to a since-fired election worker's fraudulent requests. None of those ballots were voted. Plaintiffs nevertheless ask the Court to order that *all* military ballots be "sequestered" until after election day and be further verified before they are counted.

[1] Available at https://elections.wi.gov/resources/manuals/military-and-overseas-voter-manual.
[2] Available at https://elections.wi.gov/resources/quick-reference-topics/military-overseas-cheat-sheet-clerks.

III. Proposed Intervenors

Union Veterans Council is a 501(c)(5) labor organization and a constituency organization of the AFL-CIO. Affidavit of William Attig ("Attig Aff.") at ¶3. The AFL-CIO formed the Council in 2009 to serve as "a force multiplier for union veterans and all working families in their fight for economic freedom and security." Union Veterans Council, *UVC Charts their Future to "Always Be There For the Fight!"* (Mar. 16, 2022).[3] Union Veterans' membership includes veterans in unions around the country, including 13,700 in Wisconsin. Attig Aff. at ¶4 Its organizing strategy depends, in significant part, on engaging and mobilizing retired and active-duty service members to "hold private enterprise and elected officials accountable for their words and actions." Union Veterans Council, About Us (last accessed Nov. 6, 2022).[4] Union Veterans' mission is to "fight every day for those who have fought for us." *Id.* Active-duty service members often face practical and legal barriers to asserting their own rights, and Union Veterans is dedicated to ensuring that those rights are protected, just as other veterans did for Union Veterans' members when they were in active service. Attig Aff. at ¶6.

Captain Timothy McDonald is a resident of Wisconsin, a Wisconsin voter, and a captain in the United States Merchant Marine. Affidavit of Timothy McDonald ("McDonald Aff.") at ¶¶2–3. Captain McDonald graduated from the United States Merchant Marine Academy in Kings Point, New York in 2010. McDonald Aff. at ¶5. Captain McDonald has been sailing for the Merchant Marine ever since, and he now serves as a captain on vessels that lay fiber-optic and marine cable along the sea floor. McDonald Aff. at ¶6. He most recently voted as a military absentee voter in the August 2022 primary and has voted absentee in eight of the last ten elections. McDonald Aff. at ¶7. Because his duties entail frequent deployments either to the coasts or overseas, and because

[3] Available at https://unionveterans.org/news/uvc-charts-their-future-always-be-there-fight.
[4] Available at https://unionveterans.org/about-us.

Captain McDonald is often at sea for as long as two months at a time, Wisconsin's military-elector absentee law is critical to his democratic participation. McDonald Aff. at ¶¶7–8. He is concerned that Plaintiffs' requested relief will interfere with his ability to cast military absentee ballots, because it aims to invalidate the WEC guidance on which he relies. McDonald Aff. at ¶11. Captain McDonald also believes that all military electors' votes cast in the impending election should be counted without delay or ballot sequestration—he objects to the idea of depriving military voters of the very freedoms they work each day to make possible. McDonald Aff. at ¶¶11–12.

LEGAL STANDARD

To intervene as of right, a proposed intervenor must satisfy four criteria specified in Wis. Stat. § 803.09(1):

(A) the motion to intervene must be timely;

(B) the proposed intervenors must claim an interest sufficiently related to the subject of the action;

(C) they must show that the disposition of the action may, as a practical matter, impair or impede its ability to protect that interest; and

(D) they must demonstrate that the existing parties do not adequately represent its interest.

Helgeland v. Wis. Muns., 2008 WI 9, ¶38, 307 Wis. 2d 1, 745 N.W.2d 1. If these elements are satisfied, the Court must grant intervention. *Armada Broad., Inc. v. Stirn*, 183 Wis. 2d 463, 471, 516 N.W.2d 357 (1994) ("If [movant] meets each of the requirements [in Wis. Stat. § 803.09], we must allow him to intervene.").

In addition, the Court has discretion to grant permissive intervention "[u]pon timely motion" if "a movant's claim or defense and the main action have a question of law or fact in common." Wis. Stat. § 803.09(2).

ARGUMENT

I. Union Voters and McDonald are both entitled to intervene as a matter of right.

Both Proposed Intervenors satisfy the requirements to intervene as of right: (1) their motion is timely; (2) both have significant interests at stake; (3) disposition of the case could impair those interests; and (4) neither Plaintiffs nor WEC adequately represents those interests.

A. Proposed Intervenors' motion is timely.

The first requirement—that Proposed Intervenors' motion be timely—is easily satisfied here. Though "[t]here is no precise formula to determine whether a motion to intervene is timely," *State ex rel. Bilder v. Township of Delavan*, 112 Wis. 2d 539, 550, 334 N.W.2d 252 (1983), courts consider two factors. The "critical factor" is whether the proposed intervenor acted promptly, which includes "when the proposed intervenor discovered its interest was at risk and how far litigation has proceeded." *Olivarez v. Unitrin Prop. & Cas. Ins. Co.*, 2006 WI App 189, ¶15, 296 Wis. 2d 337, 723 N.W.2d 131; *Roth v. La Farge Sch. Dist. Bd. of Canvassers*, 2001 WI App 221, ¶¶16–17, 247 Wis. 2d 708, 634 N.W.2d 882. The second factor is whether intervention would prejudice the original parties to the suit. *Bilder*, 112 Wis. 2d at 550.

Plaintiffs filed their complaint at the end of the day on Friday, November 4. WEC has not yet filed a responsive pleading or responded to Plaintiff's Motion for a Temporary Injunction. Proposed Intervenors are filing a Proposed Answer and Proposed Brief in Opposition to a Temporary Injunction concurrently with their Motion to Intervene—on the very day the Court docketed the lawsuit. *See* Ex. 1, 2. And counsel to Proposed Intervenors are prepared to appear at any hearing the Court chooses to set and to comply with any briefing order established by the Court. Thus, their intervention will entail no prejudice or delay for either party or for the Court. *See Bilder*, 112 Wis. 2d at 550–51. The motion to intervene thus readily satisfies the timeliness

requirement. *See Roth*, 2001 WI App 221, ¶¶17–18 (holding that intervention was timely where a party sought to intervene two weeks after the complaint was filed but before the defendants filed an answer).

B. Proposed Intervenors have several interests closely related to the subject of the action.

Proposed Intervenors also clear the second requirement, as each has a significant interest in this litigation. Courts interpret the interest requirement of Wis. Stat. § 803.09(1) "with the same flexibility that [they] bring to the statute as a whole." *Helgeland*, 2008 WI 9, ¶44. Intervention should be granted if the intervenor's "interest is 'of such direct and immediate character that the intervenor will either gain or lose by the direct operation of the judgment.'" *Id.* ¶45 (quoting *City of Madison v. Wis. Emp. Rels. Comm'n*, 2000 WI 39, ¶11 n.9, 234 Wis. 2d 550, 610 N.W.2d 94). Proposed Intervenors' interests easily satisfy that standard.

First, Union Veterans has a strong organizational interest in protecting the voting rights of current service members, which this lawsuit threatens. Protecting those rights is the only way for service members to have a say in their governments and communities. Attig Aff. at ¶6 But as Union Veterans' members know from their own service, there are practical and legal barriers that make it exceedingly difficult for active service members to protect their own rights. Veterans therefore have a long-standing practice of standing up to protect active service members' interests, and Union Veterans is devoted to doing the same. Attig Aff. at ¶6. Union Veterans' membership also includes Wisconsin voters and Wisconsin poll workers, all of whom have a strong interest in ensuring that Wisconsin's election proceeds smoothly and according to law. Attig Aff. at ¶7; *see Teigen v. Wis. Elections Comm'n*, 2022 WI 64, ¶16, 403 Wis. 2d 607, 976 N.W.2d 519.

Second, Captain McDonald has at least two interests that are "sufficiently related" to the subject of this lawsuit to merit intervention: a direct personal interest in whether, when, and how

military electors' votes are counted; and an interest by virtue of his status as a Wisconsin voter in the lawful administration of Wisconsin elections. *Teigen*, 2022 WI 64, ¶16, 403 Wis. 2d at 607, 976 N.W.2d at 519. Captain McDonald has voted by military absentee ballot in most recent elections—eight of the last ten, including the August partisan primary, McDonald Aff. at ¶7—and plans to do so again in future elections, McDonald Aff. at ¶9. Because of his service in the Merchant Marine and his long deployments installing deep-sea cable—deployments that last, in McDonald's words, until his ship runs "out of cable or out of food"—military absentee balloting is often his only option for voting. McDonald Aff. at ¶6.

McDonald also has a general interest as a Wisconsin voter under *Teigen*, 2022 WI 64, in the proper construction and application of the Elections Code, and in opposing Plaintiffs' unlawful effort to sequester and re-examine ballots contrary to the provisions of the Code. The lead opinion in *Teigen* established that the casting of ballots "in a manner other than that required by law" is an injury in fact to all voters. *Id.* ¶¶21–22 ("If the right to vote is to have any meaning at all, elections must be conducted according to law."); *see also id.* ¶166 (Hagedorn, J., concurring) (also holding plaintiffs had standing). Because Plaintiffs seek to compel election officials to count ballots only after sequestration and additional verification—steps not provided for in the Election Code—McDonald faces precisely the same injury—unlawful voting processes—as the *Teigen* plaintiffs. *See id.* ¶¶21, 29. He will also face that injury if military absentee ballots are segregated based on a misapplication of the relevant statutes. Captain McDonald therefore has two distinct interests sufficient to warrant intervention as of right.

C. A ruling in Plaintiffs' favor would impair Proposed Intervenors' ability to protect their interests.

Union Veterans and McDonald also satisfy their minimal burden to show that this case may impair their ability to protect their interests. The Wisconsin Supreme Court treats this

requirement as flexible, with two considerations guiding the analysis: (1) whether "an adverse holding in the action would apply to the movant's particular circumstances" and (2) whether "the action into which the movant seeks to intervene will result in a novel holding of law." *Helgeland*, 2008 WI 9, ¶¶80–81. Both factors favor intervention here.

First, an adverse ruling would directly and seriously impair each of Proposed Intervenors' interests. Union Veterans' goal of protecting service members and facilitating their political engagement will be undermined if this lawsuit makes military absentee voting more difficult. For his part, Captain McDonald will face new uncertainty about how and when to cast the military absentee ballots on which he relies and may even have future ballots rejected if new restrictions on military absentee balloting are imposed by the Court. He also cannot protect his interest, under *Teigen*, in seeing that the election laws are properly applied unless he is a participant in the course of litigation.

Second, intervention is warranted because Plaintiffs' suit raises an issue of first impression in Wisconsin—whether WEC's guidance relating to military electors is consistent with Wisconsin state law—and will necessarily result in a "novel holding of law." *Helgeland*, 2008 WI 9, ¶81. This litigation therefore threatens Proposed Intervenors' interests not only in this election, but many to come.

D. No other party adequately represents Proposed Intervenors' interests.

As to the final requirement, no other party can be expected to represent Union Veterans' or McDonald's interests. The burden to satisfy this factor is "minimal." *Armada Broad.*, 183 Wis. 2d at 476 (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)). Because the course of litigation is difficult to predict, the relevant question is whether representation "*may* be" inadequate, not whether it *will* be inadequate. *See Wolff v. Town of Jamestown*, 229 Wis. 2d 738,

747, 601 N.W. 2d 301 (Ct. App. 1999). When there is a realistic possibility that the existing parties might inadequately represent the proposed intervenor's interests, "all reasonable doubts are to be resolved in favor of allowing the movant to intervene and be heard on [its] own behalf." 1 Jean W. Di Motto, *Wisconsin Civil Procedure Before Trial* § 4.61, at 41 (2d ed. 2002) (citing *Chiles v. Thornburgh*, 865 F.2d 1197, 1214 (11th Cir. 1989)).

That is the situation here. Even if WEC (the defendant in this action) ultimately shares Proposed Intervenors' "mutually desired outcome" in preserving its military-elector guidance, *Wolff*, 229 Wis. 2d at 748, both Proposed Intervenors have "special, personal [and] unique interest[s]" that are distinct from WEC's interests, *Helgeland*, 2008 WI 9, ¶116. And government entities cannot be expected to litigate "with the vehemence of someone who is directly affected" by the litigation's outcome. *Armada Broad.*, 183 Wis. 2d at 476. Injunctive or declaratory relief delaying or preventing the counting of military votes would directly harm Captain McDonald's democratic participation and Union Veterans' mission in a way that is distinct from any effect on WEC. WEC's interests in this litigation are defined by its statutory duties to conduct elections and to administer Wisconsin's election laws. Those are different interests from the interests of voters and organizations that work affirmatively with voters to help enfranchise them. Indeed, this Court has recently and repeatedly granted intervention to voting organizations in challenges to election procedures brought against WEC. *See, State ex rel. Kormanik v. Brash*, 2022 WI 67 ¶3 (recognizing that circuit court granted motions to intervene). This suit is no different. Proposed Intervenors cannot rely on WEC or anyone else in the litigation to protect their distinct interests, and so are entitled to intervene as of right.

II. Alternatively, Proposed Intervenors should be granted permissive intervention.

Even if this Court were to find Union Veterans and Captain McDonald ineligible for intervention as of right, both Proposed Intervenors are entitled to permissive intervention under Wis. Stat. § 803.09(2). This Court has broad discretion to permit a party to intervene where the "movant's claim or defense and the main action have a question of law or fact in common," intervention will not "unduly delay or prejudice the adjudication of the rights of the original parties," and the motion is timely. Wis. Stat. § 803.09(2); *see also Helgeland*, 2008 WI 9, ¶120.

Proposed Intervenors easily satisfy these criteria. The motion to intervene is timely and, given that this litigation is in its infancy, intervention will cause no undue delay or prejudice. Proposed Intervenors raise common questions of law and fact, including the core issue of whether, when, and under what conditions military votes should be counted under Wisconsin law. And they are prepared to proceed in accordance with any schedule this Court sets, ensuring that their intervention assists in this Court's efficient resolution of this case.

CONCLUSION

For the reasons stated above, the Court should grant Proposed Intervenors' motion to intervene as a matter of right. In the alternative, the Court should exercise its discretion to grant permissive intervention.

DATED this 7th day of November, 2022.

Electronically signed by Diane M. Welsh

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**Motion for admission *pro hac vice* forthcoming

STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY
BRANCH 8

CONCERNED VETERANS OF WAUKESHA COUNTY, et al., Plaintiffs, v. WISCONSIN ELECTIONS COMMISSION, Defendant.	Case No. 2022CV1603 Case Code: 30701 Declaratory Judgment Judge Michael P. Maxwell

[PROPOSED] ANSWER BY INTERVENORS-DEFENDANTS UNION VETERANS COUNCIL AND TIMOTHY MCDONALD

Intervenors-Defendants Union Veterans Council and Captain Timothy McDonald, by and through their attorneys, submit the following answer to Plaintiffs' Complaint.

Plaintiff

1. Intervenors-Defendants lack sufficient knowledge form a belief as to the truth of the allegations in this paragraph and therefore deny them.

2. Intervenors-Defendants lack sufficient knowledge form a belief as to the truth of the allegations in this paragraph and therefore deny them.

3. Intervenors-Defendants lack sufficient knowledge form a belief as to the truth of the allegations in this paragraph and therefore deny them.

4. Intervenors-Defendants lack sufficient knowledge form a belief as to the truth of the allegations in this paragraph and therefore deny them.

Defendant

5. Admit.

EXHIBIT
1

Jurisdiction

6. This paragraph contains legal conclusions to which no response is required; to the extent a response is required the allegations are denied.

7. This paragraph contains legal conclusions to which no response is required; to the extent a response is required, the allegations are denied.

8. This paragraph contains legal conclusions to which no response is required; to the extent a response is required the allegations are denied.

Claim

9. Intervenors-Defendants admit that this paragraph describes Plaintiffs' claims but denies that those claims are legally valid or factually supported.

10. Deny.

11. This paragraph is too vague to permit Intervenors-Defendants to admit or deny it; to the extent a response is required, the allegations are denied.

12. This paragraph contains legal conclusions to which no response is required; to the extent a response is required the allegations are denied.

13. This paragraph contains legal conclusions to which no response is required; to the extent a response is required the allegations are denied.

14. This paragraph contains legal conclusions to which no response is required; to the extent a response is required the allegations are denied.

15. This paragraph contains legal conclusions to which no response is required; to the extent a response is required the allegations are denied.

16. This paragraph contains legal conclusions to which no response is required; to the extent a response is required the allegations are denied.

17. This paragraph contains legal conclusions to which no response is required; to the extent a response is required the allegations are denied.

18. This paragraph contains legal conclusions to which no response is required; to the extent a response is required the allegations are denied.

19. Intervenors-Defendants admit that this paragraph quotes from portions of the cited statute, which speaks for itself. The remainder of this paragraph contains legal conclusions to which no response is required; to the extent a response is required the allegations are denied.

20. This paragraph contains legal conclusions to which no response is required; to the extent a response is required the allegations are denied.

21. Intervenors-Defendants admit that the cited guidance document does not mention the phrase "military elector list." The remainder of this paragraph contains legal conclusions to which no response is required; to the extent a response is required the allegations are denied.

22. Intervenors-Defendants admit that this paragraph quotes from portions of the cited guidance document, which speaks for itself.

23. Intervenors-Defendants admit that the cited guidance document does not mention the phrase "military elector list." The remainder of this paragraph contains legal conclusions to which no response is required; to the extent a response is required the allegations are denied.

24. Intervenors-Defendants admit that this paragraph quotes from portions of the cited guidance document, which speaks for itself. The remainder of this paragraph contains legal conclusions to which no response is required; to the extent a response is required the allegations are denied.

25. This paragraph contains legal conclusions to which no response is required; to the extent a response is required the allegations are denied.

26. Deny.

27. Deny.

28. Deny.

29. Intervenors-Defendants lack sufficient knowledge to form a belief as to the truth of the allegations in this paragraph and therefore deny them.

30. Intervenors-Defendants lack sufficient knowledge to form a belief as to the truth of the allegations in this paragraph and therefore deny them.

31. Intervenors-Defendants lack sufficient knowledge to form a belief as to the truth of the allegations in this paragraph and therefore deny them.

32. Deny.

33. Intervenors-Defendants lack sufficient knowledge to form a belief as to the truth of the allegations in this paragraph and therefore deny them.

34. Intervenors-Defendants lack sufficient knowledge to form a belief as to the truth of the allegations in this paragraph and therefore deny them.

35. Intervenors-Defendants lack sufficient knowledge to form a belief as to the truth of the allegations in this paragraph and therefore deny them.

36. Deny.

37. Intervenors-Defendants lack sufficient knowledge to form a belief as to the truth of the allegations in this paragraph and therefore deny them.

38. Intervenors-Defendants lack sufficient knowledge to form a belief as to the truth of the allegations in this paragraph and therefore deny them.

39. Intervenors-Defendants lack sufficient knowledge to form a belief as to the truth of the allegations in this paragraph and therefore deny them.

40. Deny.

41. Intervenors-Defendants lack sufficient knowledge to form a belief as to the truth of the allegations in this paragraph and therefore deny them.

42. Intervenors-Defendants lack sufficient knowledge to form a belief as to the truth of the allegations in this paragraph and therefore deny them.

43. Intervenors-Defendants lack sufficient knowledge to form a belief as to the truth of the allegations in this paragraph and therefore deny them.

44. Deny.

45. This paragraph contains legal conclusions to which no response is required; to the extent a response is required the allegations are denied.

46. Deny.

47. This paragraph contains legal conclusions to which no response is required; to the extent a response is required the allegations are denied.

48. This paragraph contains legal conclusions to which no response is required; to the extent a response is required the allegations are denied.

49. Deny.

50. Deny.

Prayer for relief

Intervenors-Defendants deny that Plaintiffs are entitled to any relief.

AFFIRMATIVE DEFENSES

Intervenors-Defendants assert the following affirmative defenses without accepting any burdens regarding them:

1. Plaintiffs lack standing to assert their claim.

2. Plaintiffs' complaint fails, in whole or in part, to state a claim upon which relief can be granted.

3. Plaintiffs' claim is barred by laches.

4. Plaintiffs' claim is barred by unclean hands.

Intervenors-Defendants reserve the right to assert any further defenses that may become evident during the pendency of this matter.

INTERVENORS-DEFENDANTS' REQUEST FOR RELIEF

Having answered Plaintiffs' complaint, Intervenors-Defendants request that the Court:

1. Deny Plaintiffs any relief;

2. Dismiss Plaintiff's complaint with prejudice; and

3. Grant such other further relief as the Court deems just and proper.

DATED this 7th day of November, 2022.

Respectfully submitted,

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*Admitted *pro hac vice*
** Motion for admission *pro hac vice* forthcoming

STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY
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CONCERNED VETERANS OF WAUKESHA COUNTY, et al., Plaintiffs, v. WISCONSIN ELECTIONS COMMISSION, Defendant.	Case No. 2022CV1603 Case Code: 30701 Declaratory Judgment Judge Michael P. Maxwell

PROPOSED INTERVENORS UNION VETERANS COUNCIL AND CAPTAIN TIMOTHY MCDONALD'S OPPOSITION TO PLAINTIFFS' TRO/TI MOTION

INTRODUCTION

In a motion filed with just one business day to go before election day, Plaintiffs ask the Court to call into question whether military voters in Wisconsin will have their votes counted, demanding that this Court order Defendant Wisconsin Elections Commission ("WEC") to sequester all ballots cast by military voters until they can be further examined. Even setting aside the extraordinary nature of the relief Plaintiffs seek—relief that could disenfranchise Wisconsin's military servicemembers, who cast their ballots in good faith reliance on established procedures—Plaintiffs do not carry their burden to demonstrate that a temporary injunction is warranted, and their motion should be denied.

First, Plaintiffs are unlikely to succeed on the merits. As a threshold matter, their claims are barred by laches; by Plaintiffs' own admission, the WEC guidance they challenge was published months ago, yet they waited until the literal eve of election day to sue. If Plaintiffs

EXHIBIT 2

thought some adjustment to Wisconsin's election procedures was needed, it was incumbent upon them to seek that change promptly to avoid prejudicing WEC, municipal clerks, and Wisconsin voters. This alone should be dispositive. But Plaintiffs also sued the wrong defendant, demanding an injunction against WEC when both the alleged legal violation and the relief that Plaintiffs seek are the responsibility of local officials who are not parties here. And Plaintiffs have not shown any legal violation in the first place—much less one bearing any relationship to the specter of fraudulent ballots that they raise. Plaintiffs rely on an ancillary recordkeeping provision that is not part of the statutory process for sending or verifying military absentee ballots, and even then do not present any evidence that any municipal clerk has violated that provision. Moreover, the relief Plaintiffs seek is disproportionate to any alleged violation of the provision, which bears no causal relationship to the issuance of the ballots that Plaintiffs seek to sequester. Finally, Plaintiffs lack standing to raise their declaratory judgment challenge.

Second, Plaintiffs do not show any threat of irreparable harm. Their concerns about fraudulent military ballots are speculative; the entire basis of their Motion is three invalid ballots that were requested by a since-fired election worker, promptly detected, and never voted. And the relief they seek would severely harm others, including Intervenors-Defendants, by threatening to throw out votes lawfully cast by members of the military in accordance with state law.

Finally, Plaintiffs' Motion would upend rather than preserve the status quo, which alone requires this Court to deny their Motion.

For all three reasons, the Court should deny Plaintiffs' Motion.

BACKGROUND

Wisconsin's Election Code creates a set of special procedures for absentee voting by "military electors." Wis. Stat. § 6.22(1). "Military electors" are those serving in the uniformed services—the army, navy, air force, marine corps, coast guard, health services commissioned

corps, and NOAA commissioned corps—as well as merchant marine members, "[c]ivilian employees of the United States and civilians officially attached to a uniformed service who are serving outside the United States," peace corps volunteers, and "[s]pouses and dependents of those listed in the above categories residing with or accompanying them." Wis. Stat. §§ 6.22(1)(b)–(c). Unlike other Wisconsin voters, military electors are not required to register to vote before requesting an absentee ballot. Wis. Stat. §§ 6.22(3), 6.27. Nor are they required to maintain a current Wisconsin residence, because they may vote based on their "residence prior to becoming a military elector." Wis. Stat. § 6.22(2)(a).

This case concerns Section 6.22(6), an ancillary recordkeeping provision requiring that 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). The statute instructs clerks to keep the list "current through all possible means" and to "exercise reasonable care to avoid duplication of names or listing anyone who is not eligible to vote." *Id.* And it provides that each clerk "shall distribute one copy of the list to the [*sic*] each polling place in the municipality for use on election day." *Id.*

The duty to administer these procedures is divided among several actors. "Unlike many places around the country, Wisconsin 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. "Rather than a top-down arrangement with a central state entity or official controlling local actors, Wisconsin gives some power to its state election agency (the Commission) and places significant responsibility on a small army of local election officials." *Id.* As relates to Wis. Stat. § 6.22(6), WEC has "the duty and power to issue guidance and formal advisory opinions," *Zignego*, 2021 WI 32, ¶18, but municipal clerks are the officials charged with actually

applying the statute, Wis. Stat. § 6.22(6); *see Zignego*, 2021 WI 32, ¶15 ("Our election laws give municipal clerks a vast array of duties and responsibilities consistent with their primary role in running Wisconsin elections.").

Plaintiffs filed this lawsuit at the end of the day on Friday, November 4, leaving just one business day to go before election day. Plaintiffs allege that WEC has violated Section 6.22(6) by issuing two guidance documents for municipal clerks: the "Military and Overseas Voting Manual" (the "Military Manual"),[1] which WEC issued on February 4, 2022, and a "Military & Overseas Cheat Sheet for Clerks" (the "Military Cheat Sheet"),[2] which WEC issued on August 15, 2022. Plaintiffs complain that neither guidance document discusses Section 6.22(6)'s list requirement, and they blame that omission for three invalid military ballots that municipal clerks issued in response to a since-fired election worker's fraudulent requests, none of which were voted. Based on this isolated misconduct—which was detected and addressed—Plaintiffs ask the Court to order that *all* military ballots be "sequestered" until after Election Day and further verified before they are counted.

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)). "[I]njunctive relief is addressed to the sound discretion of the trial court;

[1] Available at https://elections.wi.gov/resources/manuals/military-and-overseas-voter-manual.
[2] Available at https://elections.wi.gov/resources/quick-reference-topics/military-overseas-cheat-sheet-clerks.

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)).

ARGUMENT

The Court should deny the Motion because Plaintiffs are unlikely to succeed on the merits, do not face irreparable harm, and seek an injunction that would improperly alter, rather than preserve, the status quo.

I. Plaintiffs are unlikely to succeed on the merits.

Plaintiffs are unlikely to succeed on the merits because they waited unreasonably long before suing, cannot show that WEC violated Wis. Stat. § 6.22(6), do not have statutory standing, and offer no evidence that any fraudulent ballot has been voted.

A. Plaintiffs' claims are barred by laches.

Plaintiffs are barred by laches from pursuing the relief they seek. "A party who delays in making a claim may lose his or her right to assert that claim based on the equitable doctrine of laches." *Dickau v. Dickau*, 2012 WI App 111, ¶9, 344 Wis. 2d 308, 824 N.W.2d 142. "Laches is founded on the notion that equity aids the vigilant, and not those who sleep on their rights to the detriment of the opposing party." *State ex rel. Wren v. Richardson*, 2019 WI 110, ¶14, 389 Wis. 2d 516, 936 N.W.2d 587 (citations and internal quotation marks omitted), *cert. denied sub nom. Wis. ex rel. Wren v. Richardson*, 140 S. Ct. 2831 (June 1, 2020).

Those principles are especially relevant in election-related matters, where diligence and promptness are required. As the Wisconsin Supreme Court has explained, "it would be unfair both to Wisconsin voters and to the other candidates on the general election ballot to interfere in an election that, for all intents and purposes, has already begun." *Hawkins v. Wis. Elections Comm'n*, 393 Wis.2d 629, 635, 948 N.W.2d 877, 880 (2020). And that is so "[e]ven if [the court] would ultimately determine that the . . . claims are meritorious." *Id.* The Seventh Circuit similarly explained in *Fulani v. Hogsett*, 917 F.2d 1028 (7th Cir. 1990), that "[a]s time passes, the state's interest in proceeding with the election increases in importance as resources are committed and irrevocable decisions are made." *Id.* at 1031; *see also Purcell v. Gonzalez*, 549 U.S. 1 (2006); *Clark v. Reddick*, 791 N.W.2d 292, 294–96 (Minn. 2010) (declining to hear ballot challenge when petitioner delayed filing until 15 days before absentee ballots were to be made available); *Knox v. Milwaukee Cnty. Bd. of Elections Comm'rs*, 581 F. Supp. 399, 402 (E.D. Wis. 1984) (denying preliminary injunction where complaint was filed seven weeks before election).

Under Wisconsin law, laches has three elements: (1) the party asserting a claim unreasonably delayed in doing so; (2) a second party lacked knowledge that the first party would raise that claim; and (3) the delay prejudiced the second party. *See Wis. Small Bus. United, Inc. v. Brennan*, 2020 WI 69, ¶ 12, 393 Wis. 2d 308, 946 N.W.2d 101. All three elements are satisfied here, barring Plaintiffs' claims.

First, Plaintiffs unreasonably delayed in bringing their claim before this Court. Plaintiffs concede that the WEC guidance they now challenge was published in February 2022 and August 2022—months before Plaintiffs filed their suit, and months before the general election. Mot. at 4. Moreover, Plaintiff Brandtjen attested that she received absentee ballots in the names of Holly A. Brandtjen, Holly Adams, and Holly Jones—the ballots that supposedly "exposed" the alleged

"vulnerability" Plaintiffs now raise—on October 27, 2022. *Id*. at 6-7. Plaintiffs do not explain why they waited until the eve of the election to file when the event that prompted the suit happened more than a week earlier.

Second, neither WEC nor Intervenors-Defendants could have anticipated that Plaintiffs would pursue this misguided effort to put military ballots at risk, especially when those ballots—for the most part—have already been requested and are on their way to clerk's offices, if not already returned.

Finally, Plaintiffs' delay in asserting their groundless claim will be enormously prejudicial to WEC, Intervenors-Defendants, and many military voters in Wisconsin who relied upon the absentee voting process Plaintiffs belatedly challenge. Putting military ballots at risk of not being counted after they have been cast—and without time for military electors to vote by other means—would violate the constitutional rights of the very Wisconsinites who are bravely protecting the rest of ours through their service.

Precisely for this reason, the Wisconsin Supreme Court (and other courts in this state and around the country) routinely denies requests for injunctive relief in the election context on the basis of delay, even when the request is asserted well before the election. *See, e.g.*, *Hawkins*, 2020 WI 75 ¶¶ 9-10, 393 Wis. 2d at 629, 948 N.W.2d at 877 (denying injunctive relief sought nearly *three months* before the 2020 general election on the basis that there was insufficient time to grant "any form of relief that would be feasible," and that granting relief would "completely upset[] the election," causing "confusion and disarray" and "undermin[ing] confidence in the general election results"); *see also Democratic Nat'l Comm.* v. *Bostelmann*, 977 F.3d 639, 642 (7th Cir. 2020) (six weeks before the election); *Fulani*, 917 F.2d at 1031 (three weeks before the election). Faithful application of these precedents mandates denial of Plaintiffs' eleventh hour motion. Entertaining

Plaintiffs' request to call into question the integrity of military ballots the day before the general election—an extraordinary request in its own right—would create far more confusion, disarray, and loss of confidence in the results than was at issue in *Hawkins*, *Democratic National Committee*, or *Fulani*.

B. Plaintiffs cannot show that Defendant WEC violated Wis. Stat. § 6.22(6).

Plaintiffs' Motion is premised on their allegations that WEC has violated Wis. Stat. § 6.22(6), which requires municipal clerks to maintain a "military elector list" and distribute it to polling places. But WEC is neither responsible for maintaining the Section 6.22(6) list nor responsible for counting ballots, and thus cannot be ordered to sequester them. Plaintiffs thus have sued the wrong defendant. In any event, Section 6.22(6)'s "military elector list" plays no role in processing or verifying requests for military absentee ballots and therefore has nothing to do with the alleged problem that Plaintiffs claim their lawsuit is meant to address. Nor do Plaintiffs offer even a shred of evidence that municipal clerks are in fact violating Section 6.22(6). Finally, even if Plaintiffs' claims were otherwise viable—and they are not—the relief they seek (sequestering all military ballots) is neither available nor appropriate.

1. Plaintiffs have sued the wrong defendant because Defendant WEC neither maintains the § 6.22(6) list nor counts ballots and thus cannot sequester them.

Plaintiffs' core complaint is that municipal clerks have supposedly failed to maintain the "military elector lists" that Wis. Stat. § 6.22(6) requires them to maintain. But Plaintiffs have not sued any municipal clerk; they sued only WEC. Nothing in the statute requires WEC to maintain a "military elector list." Wis. Stat. § 6.22(6). And Plaintiffs do not explain how WEC is responsible for municipal clerks' alleged failure to maintain such lists, which Section 6.22(6) independently requires them to maintain.

The same is true for the relief Plaintiffs seek—an order sequestering military absentee ballots until they can be further examined. WEC does not receive or count voted absentee ballots, hence it cannot be ordered to sequester them and could not possibly comply with an order to do so. Rather, absentee ballots are collected and counted at the local level, by local inspectors or boards of canvassers. *See* Wis. Stat. §§ 6.88, 7.52. Any order from this Court requiring WEC to sequester military absentee ballots rather than counting them would therefore be a nullity, because that is not an activity that WEC engages in. And the Court cannot enjoin local inspectors and boards of canvassers because they are not parties to this case. *See Dalton v. Meister*, 84 Wis. 2d 303, 311, 267 N.W.2d 326, 311 (1978) ("Injunctions operate in personam and will not issue against one who is beyond the court's jurisdiction.").

2. The "military elector list" plays no role in the sending or acceptance of military absentee ballots.

Plaintiffs also are unlikely to succeed because their Motion is predicated on the false assumption that the "military elector list" required by Wis. Stat. § 6.22(6) influences how municipal clerks receive and process requests for military absentee ballots, such that maintenance of the list would somehow prevent fraudulent ballot requests. *E.g.*, Mot. at 6. This is wrong. Section 6.22(6) requires municipal clerks to "keep an up-to-date list of all eligible military electors who reside in the municipality," but only for one specific purpose: so that it can "distribute one copy of the list to each polling place in the municipality for use on election day." Wis. Stat. § 6.22(6). Nothing in the statute requires municipal clerks or WEC to make any use of the "military elector list" in processing requests for military absentee ballots.

To the contrary, different subsections of Section 6.22—subsections (2), (4) and (5)—address how municipal clerks must handle requests for military ballots. Those provisions say nothing about consulting the "military elector list" as part of that process. Wis. Stat. §§ 6.22(2),

(4), (5). That makes sense. Wisconsin law explicitly provides that "[m]ilitary electors are not required to register as a prerequisite to voting in any election"—a provision impossible to square with a requirement that military voters be listed on the "military elector list" before they may be sent a ballot. Wis. Stat. § 6.22(3). Moreover, Section 6.22(2)(c) provides that military electors may apply for absentee ballots using the "federal postcard registration and absentee ballot request form," so long as the municipal clerk is able to determine from the form "[t]hat the applicant is qualified to vote in the ward or election district where he or she seeks to vote" and "[t]hat the applicant qualifies to receive an absentee ballot under this section." Wis. Stat. § 6.22(2)(c).

Plaintiffs' Motion would add an additional requirement, not present in the statute—that the voter be listed on the "military elector list." And that nonexistent requirement is integral to Plaintiffs' Motion, because it is the only thing linking their legal claim to the harm they invoke: the mailing of invalid absentee ballots. Because there is no requirement that municipal clerks consult the "military elector list" before sending a military ballot to a military elector, Plaintiffs' claims are based on a false premise, their requested relief would not redress their alleged harm, and they accordingly cannot succeed on the merits of their claims.

3. Plaintiffs have no evidence that municipal clerks are failing to maintain "military elector lists" or otherwise violating § 6.22(6).

Plaintiffs' Motion also fails because Plaintiffs offer no evidence that municipal clerks are violating Section 6.22(6) in the first place. Plaintiffs assume that municipal clerks are not following Section 6.22(6) because two WEC guidance documents do not mention a "military elector list." But this does not show that municipal clerks are not complying with the statute.

The only other "evidence" Plaintiffs cite as suggesting that municipal clerks are not generating and maintaining military elector lists under Wis. Stat. § 6.22(6) is a public records response in which the City of South Milwaukee stated that it did not have a list of "all UOCAVA

eligible voters by precinct." Mot. at 13. But "UOCAVA eligible voters" are distinct from "military electors" under Wisconsin law: "UOCAVA voters" include all Americans living overseas, while "military electors" are a narrower group that includes only those who are in the military, employed by the federal government, or married to or a dependent of someone who is. *Compare* Wis. Stat. § 6.22(b), *with* 52 U.S.C. § 20302(a)(1). South Milwaukee's lack of a list of "UOCAVA eligible voters" therefore says nothing about whether South Milwaukee maintains a "military elector list" under Section 6.22(6). And because the military elector lists play no role in the processing and sending of military absentee ballots, which are governed by Wis. Stat. § 6.22(2), (4), and (5), Plaintiffs' assertion that fraudulent requests by a since-fired election worker led to the mailing of three invalid military absentee ballots to one of the Plaintiffs simply does not show that clerks have not prepared military elector lists according to their statutory duties.

C. Sequestration of military ballots is a grossly disproportionate and inappropriate remedy in the absence of any evidence that any fraudulent military ballots have been voted.

Even if Plaintiffs could show a violation of Section 6.22(6)—which they have not done—the Court should still deny Plaintiffs' Motion because the relief they seek is entirely untethered from and disproportionate to any such violation. "The mere fact that a defendant has committed an illegal act does not justify an injunction, under penalty of contempt, which enjoins it from all unlawful practices which the court has neither 'found to have been pursued nor persuasively to be related to proven unlawful conduct.'" *Pure Milk Prod. Co-op. v. Nat'l Farmers Org.*, 90 Wis. 2d 781, 803, 280 N.W.2d 691, 701 (1979) (quoting *Labor Bd. v. Express Pub. Co.*, 312 U.S. 426, 433 (1941)).

Plaintiffs ask the Court to require all military absentee ballots in the State of Wisconsin to be sequestered and verified before they are counted. But they do not support this extraordinary request with any evidence that even a single invalid military absentee ballot has been voted. They

instead point to three invalid military ballots that were sent to one of the Plaintiffs after a now-fired elections employee submitted fraudulent requests for them. But none of those ballots were voted, and Plaintiffs offer no evidence that any other fraudulent requests were made. It would be inappropriate to order WEC to sequester and call into question ballots cast by all military voters in Wisconsin based on the existence of three fraudulent ballot requests by a single former elections employee that were promptly detected, which did not lead to the submission of any invalid completed ballots, and which have no causal connection to the alleged violation of § 6.22(6). *See Pure Mil Prod. Co-op.*, 90 Wis. 2d at 803, 280 N.W.2d at 701.

D. Plaintiffs lack standing to maintain their declaratory judgment action.

Plaintiffs also lack standing to pursue their declaratory judgment action. To obtain a declaratory judgment, Plaintiffs must demonstrate the existence of the "conditions precedent to the proper maintenance of a declaratory judgment action," including that they have a "legally protectible interest," i.e., standing. *Tooley v. O'Connell*, 77 Wis. 2d 422, 433-34, 253 N.W.2d 335, 340 (1977); *see also* Wis. Stat. § 227.40(1) ("The 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."). Although Wisconsin's standing requirements are prudential in nature, courts have adopted a two-pronged test for standing under chapter 227 of the Wisconsin statutes: "(1) Does the challenged action cause the petitioner injury in fact? and (2) is the interest allegedly injured arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question?" *Teigen v. Wis. Elections Comm'n*, 2022 WI 64, ¶ 19, 403 Wis. 2d 607, 625, 976 N.W.2d 519, 528 (quoting *Wisconsin's Env't Decade, Inc. v. Pub. Serv. Comm'n of Wis.*, 69 Wis. 2d 1, 10, 230 N.W.2d 243 (1975)). Plaintiffs here meet neither prong.

First, the challenged WEC guidance does not cause Plaintiffs an injury in fact. As explained above, *see supra* Section I.B.2, it has no bearing on processing or verifying requests for military absentee ballots, let alone counting such ballots. Accordingly, even if the guidance were inconsistent with Wisconsin law, it does not affect Plaintiffs' voting rights. And there is no evidence of "unlawful votes" being cast as a result of the challenged guidance. *See supra* Section I.B.3. This case therefore is distinguishable from *Teigen*, where "[t]he record indicate[d] . . . thousands of votes ha[d] been cast via [an] unlawful method, thereby directly harming [plaintiff] Wisconsin voters." 2022 WI 64, ¶24; *id.* ¶25 ("Unlawful votes . . . pollute [lawful votes], which in turn pollutes the integrity of the results.").[3]

Second, the statute in question—Wis. Stat. § 6.22(6)—is not aimed at protecting Plaintiffs' right to vote. Rather, it is an administrative provision that details the format in which municipal clerks should keep a list of eligible military electors. *See supra* Section I.B. The statute here is thus wholly distinct from that at issue in *Teigen*—Wis. Stat. § 6.84(1)—which "recognizes and seeks to protect [plaintiff] Wisconsin voters' right to vote." 2022 WI 64, ¶¶28-29 (cleaned up); *see also* Wis. Stat. § 6.84(1) (expressly stating that "voting is a constitutional right" and that "voting by absentee ballot is a privilege exercised wholly outside the traditional safeguards of the polling place").

Plaintiffs also assert taxpayer standing, but for such standing to exist "it must be alleged that the complaining taxpayer and taxpayers as a class have sustained, or will sustain, some pecuniary loss." *Fabick v. Evers*, 2021 WI 28 ¶11, 396 Wis. 2d 231, 956 N.W.2d 856 (quoting

[3] As six of seven Wisconsin Supreme Court justices agreed in *Teigen*, any argument that Wis. Stat. § 5.06 gives Plaintiffs a statutory right that is threatened by unlawful WEC guidance is misplaced. *See* 2022 WI 64, ¶¶32–35 (plurality opinion) (explaining that Wis. Stat. § 5.06 "can't" confer standing on Wisconsin voters where, as here, that statute "sets forth specific procedures that were never invoked."); *see id.* ¶¶210–215 (dissent) (finding no legal right to support standing).

S.D. Realty Co. v. Sewerage Comm'n of the City of Milwaukee, 15 Wis. 2d 15, 21, 112 N.W.2d 177 (1961)). Here, Plaintiffs have not even alleged—much less demonstrated—that the challenged conduct has caused any additional expenditure of taxpayer funds or causes them any pecuniary loss.

Plaintiffs therefore lack standing to pursue a declaratory judgment in this case, and they are unlikely to succeed on the merits of their claims for this additional reason.

II. Plaintiffs have not shown they face irreparable harm.

Plaintiffs also fail to carry their burden to demonstrate that they are likely to suffer irreparable harm if a temporary injunction is not issued. The supposed harm Plaintiffs cite—that "non-qualified persons' military elector absentee ballots would be counted" and "cast[] definitive doubt on [a] close election result," Mot. at 16—is both speculative and completely unsubstantiated. Identical guidance governed the August 2022 partisan primary. Yet Plaintiffs do not identify a single instance of a confirmed (or even alleged) non-qualified military elector absentee ballot being counted due to that guidance. Moreover, the only supposed evidence of wrongdoing Plaintiffs cite in their Motion was done by a since-fired election worker and did not result in any non-qualified military elector absentee ballots being voted, let alone counted. *Id.* at 6–7. On the other side of the coin, the harm that would result from Plaintiffs' proposed injunction—confusion among military voters and election officials about whether their votes will be counted and how to participate in and administer an absentee voting process that has already begun—is certain and concrete. That such confusion will result in the disenfranchisement of lawful Wisconsin voters is also likely. This is the very definition of irreparable harm; "[i]t is axiomatic that there is no post hoc remedy for a violation of the right to vote." *Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1310 (N.D. Ga. 2018).

Plaintiffs' lack of irreparable harm alone mandates denial of Plaintiffs' Motion. *See Werner*, 80 Wis. 2d at 520 (movant must satisfy each of the four temporary injunction criteria to win relief).

III. Plaintiffs' Motion seeks to alter rather than preserve the status quo.

Plaintiffs' Motion should also be denied because it would radically alter the status quo. "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." *Codept, Inc. v. More-Way N. Corp.*, 23 Wis. 2d 165, 173, 127 N.W.2d 29 (1964); *see also Pure Milk Prods. Coop. v. Nat'l Farmers Org.*, 64 Wis. 2d 241, 251, 219 N.W.2d 564, 570 (1974). Here, Plaintiffs' Motion seeks to do both and should be denied on that basis alone.

"The status quo is the last uncontested status which preceded the pending controversy." *Westinghouse Elec. Corp. v. Free Sewing Mach. Co.*, 256 F.2d 806, 808 (7th Cir. 1958). Here, Plaintiffs claim that sequestering military election absentee ballots would preserve the status quo because its purpose is "to ensure the election integrity of the November 8, 2022 elections." Mot. at 17. But the *purpose* of the injunction is completely inapposite to the question of whether the status quo is preserved. Here, the status quo is processing all military election absentee ballots on schedule, as planned—and as happened during the recent August 2022 primary. Plaintiffs' requested relief, on the other hand, would fundamentally alter Wisconsin's settled and lawful procedures for processing military elector absentee ballots—on the eve of the election, no less. This is an inappropriate use of a temporary injunction. *See Werner*, 80 Wis. 2d at 520; *Codept*, 23 Wis. 2d at 173; *Mogen David Wine Corp. v. Borenstein*, 267 Wis. 503, 509, 66 N.W.2d 157, 160 (1954) (denial of temporary injunction proper where requested relief would have upset the status quo). And it would lead to different procedures being applied in the general election and the primary, even though they constitute a single, integral election under Wisconsin law. *See State ex*

rel. La Follette v. Democratic Party of U.S., 93 Wis. 2d 473, 517, 287 N.W.2d 519 (1980), *rev'd on other grounds sub nom. Democratic Party of U. S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981); *State v. Kohler*, 200 Wis. 518, 228 N.W. 895, 910 (1930).

Furthermore, Plaintiffs seek extraordinary and affirmative relief—the sequestration of all military elector absentee ballots—that is contrary to Wisconsin's longstanding rule that temporary injunctions may not "compel[] the performance of some affirmative action." *Carpenter Baking Co. v. Bakery Sales Drivers Local Union*, 237 Wis. 24, 31, 296 N.W. 118, 122 (1941). Plaintiffs' Motion therefore must be denied because it requests the Court to compel "acts which constitute all or part of the ultimate relief sought." *Codept, Inc.*, 23 Wis. 2d at 173. To find otherwise would be a plain abuse of discretion. *See, e.g., Sch. Dist. of Slinger v. Wis. Interscholastic Athletic Ass'n*, 210 Wis. 2d 365, 374, 563 N.W.2d 585, 589 (Ct. App. 1997) (finding circuit court abused discretion by issuing temporary injunction that "provide[d] the desired result" sought in the complaint).

CONCLUSION

For the reasons stated above, the Court should deny Plaintiffs' Motion for a Restraining Order.

DATED this 7th day of November, 2022.

Electronically signed by Diane M. Welsh

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*Admitted *pro hac vice*
**Motion for admission *pro hac vice* forthcoming