

FILED
10-08-2024
Anna Maria Hodges
Clerk of Circuit Court
2024CV007822

WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY
BRANCH 7

DENNIS EUCKE,
JUSTIN GAVERY, and
JOE NOLAN

Plaintiffs,

v.

Case No. 24CV7822
Code: 30952

WISCONSIN ELECTIONS COMMISSION, and
CITY OF MILWAUKEE ELECTION COMMISSION.

Defendants.

PROPOSED BRIEF OF *AMICI CURIAE*
IN OPPOSITION TO PLAINTIFFS' REQUESTED RELIEF

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii

INTRODUCTION..... 1

STATEMENT OF INTEREST..... 2

ARGUMENT..... 4

 I. THE COURT SHOULD DENY THE RELIEF SOUGHT BECAUSE IT IS
 UNSUPPORTED BY WELL-PLEADED FACT ALLEGATIONS OR BY
 ANY SUBSTANTIVE LAW..... 4

 II. LARGE-SCALE LIST-MAINTENANCE PROGRAMS BASED ON
 DATABASE COMPARISONS ARE INHERENTLY UNRELIABLE AND
 DISFAVORED, ESPECIALLY SO CLOSE TO AN ELECTION..... 10

 III. PLAINTIFFS’ REQUESTED DECLARATORY, INJUNCTIVE, AND
 MANDAMUS RELIEF THREATENS CONFUSION AND DISRUPTION
 AFTER VOTING HAS BEGUN. 13

CONCLUSION 16

TABLE OF AUTHORITIES

Cases

<i>Arcia v. Fla. Sec’y of State</i> , 772 F.3d 1335 (11th Cir. 2014)	10, 12
<i>Cattau v. Nat’l Ins. Servs. of Wis., Inc.</i> , 2019 WI 46, 386 Wis. 2d 515, 926 N.W.2d 756	6, 9
<i>Clarke v. Wis. Elections Comm’n</i> , 2023 WI 79, 410 Wis. 2d 1, 998 N.W.2d 370	3
<i>Data Key Partners v. Permira Advisers LLC</i> , 2014 WI 86, 56 Wis. 2d 665, 849 N.W.2d 693	9
<i>Hawkins v. Wis. Elections Comm’n</i> , 2020 WI 75, 393 Wis. 2d 629, 948 N.W.2d 877	13, 14
<i>Johnson v. Wis. Elections Comm’n</i> , 2022 WI 19, 401 Wis. 2d 198, 972 N.W.2d 559	3
<i>League of Women Voters of Wis. v. Millis</i> , 21-cv-00805-jdp (W.D. Wis.).....	3
<i>League of Women Voters of Wis. v. Wis. Elections Comm’n</i> , No. 24AP166 (Wis. Ct. App. Dist. I).....	3
<i>Majority Forward v. Ben Hill Cnty. Bd. of Elections</i> , 512 F. Supp. 3d 1354 (M.D. Ga. 2021).....	11
<i>Merrill v. Milligan</i> , 142 S. Ct. 879 (2022).....	13
<i>Ollmann v. Kowalewski</i> , 238 Wis. 574, 300 N.W. 183 (1941).....	15
<i>Priorities USA v. Wis. Elections Comm’n</i> , 2024 WI 32, 412 Wis. 2d 594, 8 N.W.3d 429	3
<i>Priorities USA v. Wis. Elections Comm’n</i> , 2024 WI 32, 412 Wis. 2d 594, 8 N.W.3d 42.....	3

<i>State ex rel. McGrael v. Phelps,</i> 144 Wis. 1, 128 N.W. 1041 (1910)	14
<i>State ex rel. Wood v. Baker,</i> 38 Wis. 71 (1875).....	15
<i>State v. Barnett,</i> 182 Wis. 114, 195 N.W. 707 (1923)	15
<i>State v. Cir. Ct. for Marathon Cnty.,</i> 178 Wis. 468, 190 N.W. 563 (1922)	14
<i>State ex rel. Zignengo v. Wis. Elections Comm'n,</i> 2020 WI App 17, 391 Wis. 2d 441, 941 N.W.2d 284.....	6
<i>State ex rel. Zignengo v. Wis. Elections Comm'n,</i> 2021 WI 32, 396 Wis. 2d 391, 957 N.W.2d 208	6, 7
<i>Strid v. Converse,</i> 111 Wis. 2d 418, 331 N.W.2d 350 (1983).....	6
<i>Teigen v. Wis. Elections Comm'n,</i> No. 22AP91, unpublished order (Wis. Ct. App. , Jan. 24, 2022)	3
<i>Tex. League of United Latin Am. Citizens v. Whitley,</i> No. SA-19-CA-074-FB, 2019 WL 7938511 (W.D. Tex. Feb. 27, 2019).....	16
Statutes	
52 U.S.C. § 20507(c)(2)	12
Wis. Stat. § 6.10(1)	9
Wis. Stat. § 6.17(7)	6
Wis. Stat. § 6.18(5)	6
Wis. Stat. § 6.47(2)	15
Wis. Stat. § 6.50(2)(c)	6
Wis. Stat. § 6.50(3)	6, 7, 8

Other Authorities

Wis. Election Comm’n, *October 7-13 Daily Absentee Ballot Reports – November 5, 2024 General Election* (Oct. 7, 2024), <https://elections.wi.gov/resources/statistics/october-7-13-daily-absentee-ballot-reports-november-5-2024-general-election> 5

Dep’t of Justice, *Voter Registration List Maintenance: Guidance Under Section 8 of the National Voter Registration Act, 52 U.S.C. § 20507* (Sept. 2024), <https://www.justice.gov/crt/media/1366561/dl>..... 12

USPS, *CASS Technical Guide 2011–2019 Cycle*, https://postalpro.usps.com/mnt/glusterfs/2021-06/CASSTECH_N.pdf (last visited Oct. 8, 2024) 8

INTRODUCTION

With voting underway in the presidential election, Plaintiffs request an extraordinary remedy: an order (or, in the alternative, a writ) compelling the Wisconsin Elections Commission (WEC) and the City of Milwaukee Election Commission (MEC) to mail notices of registration abnormalities to 150,000 Wisconsin voters. Plaintiffs go on, if these voters (unrepresented before this Court) do not respond within thirty days, the requested relief must also compel Defendants to change their registration statuses to “ineligible.” All of this, Plaintiffs say, must be done in the less-than-a-month period remaining before Election Day. The requested relief is impossible to fulfill at this late stage, and even trying to do so would contravene settled principles of both state and federal law. *Amici*, the League of Women Voters of Wisconsin and the Wisconsin State Conference of the NAACP, submit this brief to emphasize three main points.

First, Plaintiffs provide no plausible factual basis for the relief sought here. They appear to have used a database-matching program to identify tens of thousands of voters they deem suspicious, but they allege no specific facts to support that this program, or the data that it uses, is reliable to the degree required by Wisconsin election law. Nor do Plaintiffs plead any legitimate evidentiary basis for the extraordinary relief they seek. Of the allegedly 150,000 ineligible voters referenced in their Complaint, Plaintiffs identify only a few thousand as having “moved”; nonetheless, as to all 150,000 voters against whom Plaintiffs seek sweeping relief—the mailing of notices threatening deactivation of their voter registration status—

doing so is appropriate only when a clerk (or, as relevant here, a municipal election commission) receives individualized, reliable information that a voter no longer resides in the municipality. The record does not suggest, much less demonstrate, the use of sufficiently reliable information here.

Second, the sort of data matching that Plaintiffs have undertaken is inherently unreliable. Federal courts have acknowledged the risk of inaccuracies in large-scale, systemic list maintenance programs based upon lists generated from database comparisons. If this risk materializes, each and every resulting inaccuracy could infringe on a Wisconsinite's constitutionally guaranteed right to vote. These risks are exacerbated as we get closer and closer to Election Day, which counsels against granting the relief Plaintiffs seek.

Third, having failed to identify any clearcut entitlement to the relief they seek, Plaintiffs can make out no plausible claim for declaratory or injunctive relief. Nor can Plaintiffs maintain their freestanding request for mandamus relief. Indeed, Plaintiffs' extraordinary request for relief at the eleventh hour has the potential to sow confusion in and cause massive disruption to the State's election system.

STATEMENT OF INTEREST

The League of Women Voters of Wisconsin (LWVWI) was founded in 1920 by the suffragists who fought to win the right to vote for women through the Nineteenth Amendment. LWVWI is an affiliate of The League of Women Voters of the United States, which has 750 state and local Leagues in all 50 states, the District of

Columbia, Puerto Rico, and the Virgin Islands. LWVWI works to expand informed, active participation in state and local government, giving a voice to all Wisconsinites.

LWVWI engages in litigation, as a party, to protect the proper administration of Wisconsin's voter rolls. *See, e.g., League of Women Voters of Wis. v. Millis*, 21-cv-00805-jdp (W.D. Wis.). As both a party, and as an amicus, LWVWI regularly fights to protect democracy and voting rights in high-profile, election administration cases. *See, e.g., Priorities USA v. Wis. Elections Comm'n*, 2024 WI 32, 412 Wis. 2d 594, 8 N.W.3d 429; *Teigen v. Wis. Elections Comm'n*, overruled in part by *Priorities USA v. Wis. Elections Comm'n*, 2024 WI 32, 412 Wis. 2d 594, 8 N.W.3d 429; *Johnson v. Wis. Elections Comm'n*, 2022 WI 19, ¶1, 401 Wis. 2d 198, 972 N.W.2d 559, overruled in part by *Clarke v. Wis. Elections Comm'n*, 2023 WI 79, ¶1, 410 Wis. 2d 1, 998 N.W.2d 370; *League of Women Voters of Wis. v. Wis. Elections Comm'n*, No. 22CV2472, Dkt. 161, Declaratory Judgment and Permanent Injunction (Dane Cnty. Cir. Ct. Jan. 30, 2024), *appeal pending*, No. 24AP166 (Wis. Ct. App. Dist. I).

The Wisconsin State Conference of the NAACP (Wisconsin NAACP) was founded in 1909 in response to the ongoing violence and injustice against African Americans across the nation. Wisconsin NAACP is a unit of the National NAACP, the oldest and one of the largest, most significant organizations promoting and protecting the civil rights of African Americans and other racial and ethnic minorities. Wisconsin NAACP is a non-partisan, interracial, nonprofit membership organization with a mission to ensure the political, educational, social, and economic equality of all citizens by removing the barriers of racial discrimination in all aspects of life.

Currently, Wisconsin NAACP has a statewide membership base of at least 1,500 active members and at least 12,500 inactive members. The organization's membership is inclusive of all individuals and includes people from different racial and ethnic backgrounds. The Milwaukee Branch has at least 750 members, and its membership is predominantly Black people and other people of color.

The Wisconsin NAACP is committed to protecting the right to vote of all voters. Ahead of the 2024 General Election, local branches of Wisconsin NAACP, including the Milwaukee Branch, have been educating voters by sharing educational pamphlets and other materials and producing media content about voter registration and the importance voting in our democracy to encourage voters to get out the vote. The organization's media ads are targeted in the Madison and Milwaukee areas. Wisconsin NAACP is planning a robust election protection and poll monitoring program for the General Election. Many of the local branches have partnered with transportation companies to help give free rides to the polls to those voters who face transportation barriers.

ARGUMENT

I. THE COURT SHOULD DENY THE RELIEF SOUGHT BECAUSE IT IS UNSUPPORTED BY WELL-PLEADED FACT ALLEGATIONS OR BY ANY SUBSTANTIVE LAW.

The basic premise of the Complaint is that Wisconsin's voter rolls are supposedly rife with ineligible voters—"almost 150,000" Wisconsinites each of whose registration is "invalid[] because the voter in question permanently moved out of State and is no longer a citizen of Wisconsin." (Dkt. 3, ¶1.) Identifying a litany of

vague and speculative harms to Wisconsin residents flowing from these “anomalous registrations,” i.e., “identity theft,” casting an “illegal ballot,” the Complaint seeks a court order compelling MEC and WEC to mail all 150,000 individuals notices, and if those individuals fail to respond within thirty days, change their registration statuses to “ineligible.” (*Id.*, ¶4.) All of this, the Complaint alleges, must be completed before Election Day, a mere twenty-eight days from the date of this filing. (*Id.* at p. 17; *see also id.*, ¶¶4, 52–53, 60, 68–69.) If granted, Plaintiffs’ requested relief will send tens of thousands of voters down a path of confusion whereby, when they arrive to vote on Election Day, they learn for the first time that they have been deactivated from the voter roll through no fault of their own.¹ Moreover, this is certain to create an administrative nightmare for election officials, first as Defendants scramble to fulfill the herculean task of sending thousands of notices, waiting for responses, and scrubbing the voter roll on top of their necessary work preparing for a massive, high-interest election. And second, as election inspectors face confused, incredulous voters whose registrations have been deactivated and who must then unexpectedly gather the necessary paperwork and invest the required time to re-register at their polling place. (*Id.* ¶¶22–27.)

¹ This is to say nothing of absentee voters, whose registrations Plaintiffs also seek to jeopardize, even though nearly 37,000 absentee ballots have already been mailed in the City of Milwaukee, and over 8,000 were already returned. *See* Wis. Election Comm’n, *October 7-13 Daily Absentee Ballot Reports – November 5, 2024 General Election*, <https://elections.wi.gov/resources/statistics/october-7-13-daily-absentee-ballot-reports-november-5-2024-general-election> (Oct. 7, 2024) (Row number 1015 of the published attachment, “Municipal Absentee Counts as of October 7, 2024” provides the City of Milwaukee’s absentee count.)

Plaintiffs seek remedies that are practicably unavailable in the weeks leading up to the election. Yet the barebones factual allegations of Plaintiffs' Complaint would not sustain the requested relief under any timeline whatsoever. *Cattau v. Nat'l Ins. Servs. of Wis., Inc.*, 2019 WI 46, ¶6, 386 Wis. 2d 515, 926 N.W.2d 756 (per curiam) (quoting *Strid v. Converse*, 111 Wis. 2d 418, 423, 331 N.W.2d 350 (1983) ("It is the sufficiency of the facts alleged that control the determination of whether a claim for relief is properly plead."). Wisconsin law authorizes a local election official to mail the kinds of notices requested here only "upon receipt of *reliable information* that a registered elector has changed his or her residence to a location outside of the municipality." Wis. Stat. § 6.50(3) (emphasis added). This requirement is nothing new; reliability has been a hallmark of this provision for nearly 100 years. Since the Legislature first instructed municipal clerks to review the status of registered voters who appear to have moved their residence, the statute always required that action be taken only upon "reliable information." *E.g.*, Wis. Stat. §§ 6.17(7), 6.18(5) (1927); *id.* § 6.50(2)(c) (1967). Yet, Plaintiffs provide no such "reliable information" here.

Binding precedent confirms both the primacy of the "reliable information" requirement under § 6.50(3) and the Complaint's failure to satisfy it. The plaintiffs in *State ex rel. Zignengo v. Wisconsin Elections Commission* sought similar relief under § 6.50(3), requesting that hundreds of thousands of voters be found "ineligible" for having allegedly moved out of their municipalities. 2020 WI App 17, ¶¶6–17, 391 Wis. 2d 441, 941 N.W.2d 284, *aff'd as modified in other respects*, 2021 WI 32, 396 Wis. 2d 391, 957 N.W.2d 208. The Court of Appeals held that Wisconsin law requires the

“determination of reliability of information, and any possible change of voter registration status to ineligible, be made voter-by-voter and not as a group,” because the statute refers to “elector” in the singular, not plural. *Id.*, ¶99. So, Section 6.50(3) does not authorize the relief Plaintiffs seek— “groups” cannot be moved from eligible to ineligible status on the voter roll because “information regarding hundreds of thousands of [voters]” is not reliable for individual voters. *Id.*, ¶¶98–99. That logic controls here. The allegation that hundreds of thousands of registrations are invalid is not based on individualized assessments, and therefore is not “reliable information” upon which the Milwaukee Election Commission—or this Court—may lawfully rely.

There is more. The pending Complaint rests on dubious information generated after “271,962 active registrations were run through an automated system” that “discovered a number of issues.” (Dkt. 3, ¶¶23–24.) Those issues, according to Plaintiffs, were submitted through the Postal Service’s “CASS evaluation system” and that “CASS evaluation was run against several deeper-leveled databases.” (*Id.*, ¶¶24–25.) Plaintiffs make no attempt to demonstrate the accuracy of their data—including by explaining who analyzed the lists, which lists were analyzed, what systems or processes were used, when the underlying data was collected, or specifically what errors these analyses allegedly identified. Having identified no factual basis to support the extraordinary relief they are requesting Plaintiffs may not obtain the disruptive “remedy” they seek.

The 150,000 voters who, according to Plaintiffs, moved out of their municipalities appear to have been identified through a matching process that

compares the County’s registration list with data against USPS’s Coding Accuracy Support System (CASS) and other unnamed “deeper-leveled” databases. (Dkt. 3, ¶¶23–25.) CASS itself is not even a database; rather, it is a program that cleans up addresses—by, for example, converting “ST.” to “Street” in accordance with USPS’s standard format. *See USPS, CASS Technical Guide 2011–2019 Cycle.*² And Plaintiffs never identify what these “deeper-level” databases are, much less how they work or other details vital to assessing the accuracy of their outputs. Thus, Plaintiffs’ allegation that the voter roll has 150,000 invalid registrations remains unsupported by any underlying facts; it therefore cannot be considered reliable within the meaning of Wis. Stat. § 6.50(3).

Further, a vast majority of the 150,000 supposedly anomalous registrations at issue here have nothing to do with a voter’s moving out of the municipality, which is the only reason that would trigger the notice mailing requirement in Wis. Stat. § 6.50(3). (Dkt. 3, ¶¶32(a)–(f).) Plaintiffs’ categories of complaints about the addresses at issue include a litany of so-called “anomalies”: registrations tied to commercial addresses, incomplete addresses, doors inaccessible to USPS, and others that do not provide a basis for MEC to send notice in the first place. (*See id.*) Section 6.50(3) requires the mailing of notices—the core of Plaintiffs’ requested relief—*only* upon MEC’s “receipt of reliable information that a registered elector *has changed his or her residence to a location outside of the municipality.*” Wis. Stat. § 6.50(3) (emphasis

² Available at https://postalpro.usps.com/mnt/glusterfs/2021-06/CASSTECH_N.pdf (last visited Oct. 8, 2024).

added). Yet, Plaintiffs' "anomalies" are not *reliable* such that anyone could conclude these voters have left the City of Milwaukee. As to the voters whose addresses are referenced in paragraph 32 of Plaintiff's Complaint, the requested relief finds no support in Wisconsin substantive law (and as such cannot be granted). *See, e.g., Cattau*, 2019 WI 46, ¶6 (quoting *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶31, 56 Wis. 2d 665, 849 N.W.2d 693) ("The sufficiency of a complaint depends on substantive law that underlies the claim made because it is the substantive law that drives what facts must be pled."). The 2,250 voters identified by Plaintiffs as ineligible because they are registered at a "commercial" address (Dkt. 3, ¶32(a)), may be lawfully registered because residency for the purposes of voting is not determined by the nature of their accommodation, which may include a shelter, a nursing home, a college campus, or another non-traditional residence. *See Wis. Stat. § 6.10(1)* ("The residence of a person is the place where the person's habitation is fixed, without any present intent to move, and to which, when absent, the person intends to return."). To take another example, the "32 active voter registrations tied to addresses where the door was not accessible to USPS" (Dkt. 3, ¶32(c)), assumes that having a mailbox at the front door is a voter-eligibility requirement. That is not the law in Wisconsin.

Ultimately, the allegations in Plaintiffs' Complaint do not substantiate cognizable claims under Wisconsin law. The information Plaintiffs provided on the record to date is not reliable, fails to meet Wisconsin's most rudimentary pleading standards, much less justify Plaintiffs' requests for extraordinary relief that is

practicably unavailable. The Complaint does not merit the emergency relief Plaintiffs seek.

II. LARGE-SCALE LIST-MAINTENANCE PROGRAMS BASED ON DATABASE COMPARISONS ARE INHERENTLY UNRELIABLE AND DISFAVORED, ESPECIALLY SO CLOSE TO AN ELECTION.

Systematic list maintenance on residency or citizenship grounds on the eve of an election presents an acute risk of inaccuracies, confusion, and even disenfranchisement of eligible voters. Federal courts throughout the country have recognized as much. The Eleventh Circuit in *Arcia v. Florida Secretary of State*, considering database matching in the context of identifying noncitizens, acknowledged that this type of matching itself was unreliable—“the process of matching voters across various databases creates a foreseeable risk of false positives and mismatches based on user errors, problems with the data-matching process, flaws in the underlying databases.” 772 F.3d 1335, 1342 (11th Cir. 2014). The inherent errors in these types of purges also became apparent in 2019, when the Secretary of State of Texas initiated a systematic removal of 98,000 voter registrants alleged as non-citizens based on citizenship information received from the Texas Department of Public Safety. A court adjudicating a challenge to that purge found that the Secretary had “created [a] mess.” *Tex. League of United Latin Am. Citizens v. Whitley*, No. SA-19-CA-074-FB, 2019 WL 7938511 at *2 (W.D. Tex. Feb. 27, 2019). The court reached this conclusion, and expressed it in such frank terms, because the evidence showed that the vast majority of the thousands of registrants identified as non-citizens were in fact eligible voters. *See id.*

Another federal court, this one in Georgia, ruled that residency challenges based specifically on database comparison were unreliable because the method of comparing the State's voter list against the U.S. Postal Service's National Change of Address database was prone to error. *Majority Forward v. Ben Hill Cnty. Bd. of Elections*, 512 F. Supp. 3d 1354, 1369–70 (M.D. Ga. 2021). For example, one voter had submitted a change-in-address form to the Postal Service so that packages could be delivered to their temporary address out of state—and not because the voter had abandoned their Georgia residence. *Id.* at 1363. Another voter had submitted a change-in-address form because they were attending college in a different state but intended to return to the address in their voter file after college. *Id.* at 1364. A third voter had submitted a change-of-address form because they received military orders to move out of the country temporarily. *Id.* at 1365. Other voters found themselves in similar situations. *Id.* at 1365–67. Thus, despite being listed in this USPS database, *none* of these voters' registrations were invalid. *See id.* And although these voters could vote provisionally even after being purged from the rolls, the court found that the added burdens were sufficient to preclude the purge from proceeding. *Id.* at 1371–72.

With this year's general election less than four weeks away, that logic applies here with added force. This Court need not decide whether Plaintiffs' method of identifying voters is reliable or not, because the proximity of the election and the difficulties MEC and WEC will face in verifying the accuracy of Plaintiffs' list in this short period of time provide independent bases for rejecting Plaintiffs' sweeping (and

unsubstantiated) requests. Congress—recognizing the perils of conducting the sort of large-scale systemic list maintenance on residency grounds—has expressly prohibited most states³ from undertaking such action within 90-days of a federal election. 52 U.S.C. § 20507(c)(2) (“Any program the purpose of which is to systematically remove the names of ineligible voters from the list of eligible voters” on the basis of residency changes cannot be conducted within 90 days of a primary, general, or runoff election for federal office); *accord, e.g., Arcia v. Fla. Sec’y of State*, 772 F.3d at 1345–46.

The hazards that are otherwise avoided by the 90-day restriction—prejudice to voters and burdens on election officials—are the same whether the systematic list maintenance is initiated by the election board, an individual’s request, or order of a court. The federal Department of Justice’s recent guidance expressly clarifies that the 90-day “deadline also applies to list maintenance programs based on third-party challenges derived from any large, computerized data-matching process.” Dep’t of Justice, *Voter Registration List Maintenance: Guidance Under Section 8 of the National Voter Registration Act, 52 U.S.C. § 20507* (Sept. 2024) [hereinafter “DOJ Guidance”].⁴

Although Wisconsin is not subject to the 90-day provision due to its same-day voter registration program, the concerns underlying its enactment are nevertheless present here, especially when considered alongside the broad protections the

³ Wisconsin is one of six states exempt from this express restriction. But the underlying rationale remains valid, and this Court should heed it here.

⁴ Available at <https://www.justice.gov/crt/media/1366561/dl> (last visited Oct. 7, 2024).

Wisconsin Constitution provides to the right to vote (see *infra*). Again, this cautions strongly against Plaintiffs' requested relief.

III. PLAINTIFFS' REQUESTED DECLARATORY, INJUNCTIVE, AND MANDAMUS RELIEF THREATENS CONFUSION AND DISRUPTION AFTER VOTING HAS BEGUN.

The declaratory, injunctive, and mandamus relief Plaintiffs demand (after voting has begun, and less than 28 days before Election Day) portends extreme disruption to Wisconsin's election system. A plaintiff seeking this kind of extraordinary remedy from a federal court must have an entitlement that is "entirely clearcut." *Merrill v. Milligan*, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring). And for this reason, federal courts take into account the burden on voters, candidates, and administrators. *E.g., id.* at 881–82 (Kavanaugh, J., concurring) (plaintiffs must establish that requested election-eve "changes are feasible without significant cost, confusion, or hardship").

The Wisconsin Supreme Court has articulated a similar rule in denying relief where plaintiffs have delayed seeking relief until granting their requests would interfere with an approaching election. *Hawkins v. Wis. Elections Comm'n*, 2020 WI 75, ¶5, 393 Wis. 2d 629, 948 N.W.2d 877 (per curiam) (declining to exercise jurisdiction where it was "too late" for court "to grant [] any form of relief that would be feasible and that would not cause confusion and undue damage to both the Wisconsin electors who want to vote and the other candidates in all of the various races on the general election ballot"); accord *Teigen v. Wis. Elections Comm'n*, No. 22AP91, unpublished order granting emergency stay, *6–8 (Wis. Ct. App., Jan. 24,

2022), *mot. to vacate stay denied*, unpublished order at *3 (Wis. Jan. 28, 2022). As Justice Hagedorn wrote, “this court should not muddy the waters during an ongoing election.” *Teigen*, No. 22AP91, unpublished order at *4 (Wis. Jan. 28, 2022) (Hagedorn, J., concurring) (citing *Hawkins*, 2020 WI 75, ¶5). Plaintiffs’ indolence in waiting to raise their sweeping claims about Wisconsin elections until so close to the election is yet another reason why, even if they had come within spitting distance of having show reliable information, they would not be entitled to equitable relief at this juncture.

Here, where Plaintiffs seek this Court’s “intervention” into the 2024 election, the potential burdens—a massive new mandate that Defendants identify mail notices voters *en masse* after the registration deadline causing inordinate confusion and chaos to the administration of the election—would be extreme. But the consequences for the voters, who will bear the cost of every inaccurate “ineligible” registration determination, would be unconstitutional.

The right to vote is broadly and repeatedly protected by the Wisconsin Constitution. As our Supreme Court has explained, that right is “guaranteed by the declaration of rights and by section 1, art. 3, of the Constitution. It has an element other than that of mere privilege.” *State ex rel. McGrael v. Phelps*, 144 Wis. 1, 128 N.W. 1041, 1046 (1910). The framers of the Wisconsin Constitution “[placed] the right of suffrage upon the high plane of removal from the field of mere legislative material impairment.” *Id.* It “may not under our Constitution and laws be destroyed or even unreasonably restricted.” *State v. Cir. Ct. for Marathon Cnty.*, 178 Wis. 468, 190 N.W.

563, 565 (1922). For this reason, the Wisconsin Supreme Court has repeatedly determined that official negligence in the care of voter rolls cannot suffice to invalidate an otherwise-qualified Wisconsin voter's ballot. A voter's "constitutional right cannot be baffled by latent official failure or defect." *State v. Barnett*, 182 Wis. 114, 133, 195 N.W. 707, 713 (1923) (quoting *State ex rel. Wood v. Baker*, 38 Wis. 71, 89 (1875)); see also *Ollmann v. Kowalewski*, 238 Wis. 574, 300 N.W. 183, 185 (1941).

But at least the voters in *Kowalewski*, *Barnett*, and *Baker* all enjoyed the opportunity to vote in the first place, and thus had the ability to object, and preserve their right to vote through litigation. None of the 150,000 voters whose registrations are at risk here have been joined to or given notice of this litigation. So, when those Wisconsinites arrive at their polling locations only to first learn that their registrations were improperly switched to "inactive" status, they may not have time to assemble the paperwork necessary for them to return to the polls to register and cast a ballot. This is particularly true for victims of domestic abuse, sexual assault, or stalking, whose confidential registrations require significant, additional material. See Wis. Stat. § 6.47(2) (requiring a timely protective order, an affidavit dated within 30 days of the registration request, and a statement from the authorized agent of a shelter). Such voters would be entirely disenfranchised, without any chance to exercise their fundamental right to vote in a historic presidential election, all because of the half-baked data analysis underlying Plaintiffs' Complaint. The Wisconsin Constitution does not countenance such a result, and neither should this Court.

CONCLUSION

For the reasons set forth herein, Plaintiffs' Complaint lacks a basis for the extraordinary and sweeping election-eve relief sought. This relief should be denied if the Complaint is not dismissed outright.

Dated this 8th day of October.

Respectfully submitted:

Electronically signed by:

Scott B. Thompson

Scott B. Thompson, SBN 1098161

Jeffrey A. Mandell, SBN 1100406

LAW FORWARD

222 W. Washington St., Suite 250

Madison, WI 53703

(608)-285-2485

Ezra D. Rosenberg*

Pooja Chaudhuri*

Heather Szilagyi*

LAWYERS' COMMITTEE FOR CIVIL

RIGHTS UNDER LAW

1500 K Street, NW, Suite 900

Washington, DC 20005

(202)-662-860

**Pro Hac Vice motion forthcoming*

Counsel for proposed amici curiae