

**WISCONSIN CIRCUIT COURT
WAUKESHA COUNTY**

<p>Concerned Veterans of Waukesha County c/o Ken Marek 745 E. Imperial Dr. Hartland WI 53029</p> <p>Ken Marek 745 E. Imperial Dr. Hartland WI 53029</p> <p>Tom Gudex 7051 Parkview Ave. Lannon WI 53046</p> <p>Janel Brandtjen N52 W16632 Oak Ridge Trail Menomonee Falls, WI 53051,</p> <p style="text-align: center;">Plaintiffs</p> <p style="text-align: center;">v.</p> <p>Wisconsin Election Commission 212 Washington Avenue, Third Floor P.O. Box 7984 Madison WI 53707-7984</p> <p style="text-align: center;">Defendant</p>	<p>Case Code: Case Type:</p> <p>Case No. _____</p>
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**PLAINTIFFS' MEMORANDUM OF LAW
IN SUPPORT OF TRO/TI MOTION**

The Plaintiffs file this memorandum in support of their pre-election motion for a temporary restraining order and temporary injunction enjoining WEC's guidance to county

clerks and municipal clerks on military absentee ballots in WEC’s Military and Overseas Voting Manual (Feb. 2022) and in its Military and Overseas Voting Cheat Sheet (Rev. 2020-10) in conflict with Wisconsin Statutes 6.22(6) and declaring that the military elector absentee ballots be sequestered prior to the November 8, 2022 election so that Wisconsin Statutes 6.22(6) verification can be completed before they are counted.

STATEMENT OF FACTS

The Plaintiffs’ concern in this case is that WEC’s guidance to the county clerks and municipal clerks does not comply with Wis. Stat. § 6.22(6) which requires a “military elector list,” which is up-to-date, complete, verified, current, accurate and distributed to each polling place. Wis. Stat. § 6.22(5). The military elector list is used to ensure that military elector absentee ballots are not sent to non-qualified voters. Wis. Stat. § 6.22(6).

Wisconsin has a decentralized election system. *Jefferson v. Dane Cnty.*, 951 N.W.2d 556, 563 n. 5 (Wis. 2020). The legislature has delegated to the WEC the responsibilities of, among others, administering, enforcing and promulgating rules relating to the election laws. *Id.*; Brandtjen Aff. at ¶ 8. Therefore, WEC has the responsibility for guidance in the administration and enforcement of Wisconsin's election laws, not the county clerks, not the municipal clerks. *Jefferson*, 951 N.W.2d at 563. Brandtjen Aff. at ¶ 9.

Accordingly, “county clerks are not to interpret Wisconsin's election laws and make declarations based on those interpretations;” *Jefferson*, 951 N.W.2d at 563, instead, the county clerks rely on WEC’s guidance. *Id.* See, generally Wis. Stat. § 5.05; Brandtjen Aff. at ¶ 10. County clerks have different responsibilities such as (1) providing election supplies and ballots, (2) preparing ballots, (3) adhering to the election time schedule, (4) resolving doubts

that relate to election notices, (5) certifying candidates for municipal judges, (6) assisting the WEC in conducting the WEC's voter education, (7) maintaining toll-free telephone lines to exchange voting information, (8) training election officials, and (9) reporting information to the WEC. *Jefferson*, 951 N.W.2d at 563; Wis. Stat. §§ 7.10(1)–(10); *Brandtjen Aff.* at ¶ 11.

Similarly, municipal clerks are not to interpret Wisconsin's election laws and make declarations based on those interpretations; instead the municipal clerks rely on WEC's guidance. *See, generally* Wis. Stat. § 5.05. *Brandtjen Aff.* at ¶ 12. Municipal clerks have different responsibilities such as (1) supervise registration and elections; (2) equip polling places; (3) provide for the purchase and maintenance of election equipment; (4) prepare ballots for municipal elections, and distribute ballots and provide other supplies for conducting all elections; (5) prepare official absentee ballots for delivery to electors requesting them; (6) send an official absentee ballot to each elector who has requested a ballot by mail, and to each military elector and overseas elector; (7) prepare the necessary notices and publications in connection with the conduct of elections or registrations; (8) train election officials in their duties; (9) discharge election officials for improper conduct or willful neglect of duties; (10) report suspected election frauds, irregularities, or violations of which the clerk has knowledge to the district attorney for the county where the suspected activity occurs and to the commission; (11) review, examine and certify the sufficiency and validity of petitions and nomination papers; (12) direct how and when to destroy the contents of the blank ballot boxes and unused election materials; (13) send, when required, an absentee ballot to each elector and send or transmit an absentee ballot to each military elector and each overseas elector; (14) reassign inspectors appointed to serve at one polling

place to another polling place within the municipality whenever necessary to assure adequate staffing at all polling places. Wis. Stat. §§ 7.15 (1)(a–k). Brandtjen Aff. at ¶ 13.

WEC’s guidance to county clerks and municipal clerks on military absentee ballots in WEC’s Military and Overseas Voting Manual (Feb. 2022) and in its Military and Overseas Voting Cheat Sheet (Rev. 2020-10) does not comply with Wisconsin Statutes 6.22(6).

Brandtjen Aff. at ¶ 14. Wisconsin Statutes 6.22(6) requires a “military elector list,” which is up-to-date, complete, verified, current, accurate and distributed:

- Up-to-date--“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.”
- Complete-- “The list shall contain the name, latest-known military residence and military mailing address of each military elector.”
- Verified--“The list shall indicate whether each elector whose name appears on the list is a military elector, as defined in s. 6.34 (1)...”
- Current--“The list shall be kept current through all possible means.”
- Accurate--“Each clerk shall exercise reasonable care to avoid ... listing anyone who is not eligible to vote.”
- Distributed--“Each clerk shall distribute one copy of the list to the each polling place in the municipality for use on election day.”

Wis. Stat. § 6.22(6). Brandtjen Aff. at ¶ 17.

Yet, the Wisconsin Election Commission’s guidance to clerks on military absentee ballots in WEC’s Military and Overseas Voting Manual (Feb. 2022) (MOVVM), Brandtjen Aff. Exhibit A, does not require an up-to-date, complete, verified, current, accurate and distributed military elector list. Brandtjen Aff. at ¶ 18. In fact, it doesn’t mention “military elector list”—and doesn’t require that a military elector list be applied either. Brandtjen Aff. at ¶ 19. Instead, WEC provides guidance without it:

Military Voters

Military voters do not need to register but can do so if they choose. They do not need to provide proof of residence if they do register. They can register using the following methods:

- FPCA
- EL-131
- Online at MyVote.wi.gov

Registration deadlines:

- Online or By Mail - form must be postmarked/completed by the third Wednesday before the election. Wis. Stat. §6.28(1).
- In person at the clerk's office – by 5p.m. CST on the Friday preceding the election. Wis. Stat. §6.29(2).
- At their polling place on Election Day.

Clerks must still obtain sufficient information to enter a military elector into WisVote, such as their name, address, and date of birth. Wis. Stat. §6.22(3). If an unregistered military member uses a Federal Post Card Application (FPCA) to request their absentee ballot, they are effectively registering to vote but are still not required to provide proof of residence. If a military voter retires or wishes to change their status to a regular voter, they must register as a regular voter and provide a proof of residence document.

MOVM at 5-6. *See, also*, MOVM at 7. Brandtjen Aff. at ¶20.

WEC's Military and Overseas Voting Cheat Sheet (08-2022) (Cheat Sheet), Brandtjen Aff. Exhibit B, fares no better at complying with Wisconsin Statutes § 6.22(6). The Cheat Sheet doesn't mention "military elector list"—and doesn't require that a military elector list be applied either. Brandtjen Aff. at ¶ 21.

To be sure, WEC's guidance in the MOVM requires that "Clerks must still obtain sufficient information to enter a military elector into WisVote, such as their name, address, and date of birth." MOVM at 6. Brandtjen Aff. at ¶ 22. But, this statement is a far cry from satisfying the Wisconsin Statutes § 6.22(6) requirement for an up-to-date, complete, verified, current, accurate and distributed military elector list. Brandtjen Aff. at ¶ 23.

Under Wisconsin’s decentralized election system, WEC’s legally unauthorized guidance in the MOVIM and Cheat Sheet have caused the municipal clerks to not have up-to-date, complete, verified, current, accurate and distributed military elector list—required by Wisconsin Statutes § 6.22(6). Brandtjen Aff. at ¶ 24. Not having the legally-required lists has created a vulnerability in Wisconsin’s military absentee ballot process: essentially, any person can apply for a military elector absentee ballot and have it sent to any address. *Id.* at ¶ 25. This vulnerability has been exposed by recent actions undertaken by now former Milwaukee Elections Commissioner Deputy Director Kimberly Zapata. *Id.* at ¶ 26.

Zapata publicly admitted on November 3, 2022, that she visited the state’s MyVote Wisconsin website and ordered military elector absentee ballots in the names of Holly A. Brandtjen, Holly Adams and Holly Jones by entering information for them. *Id.* at ¶ 27. Zapata admitted that she had the ballot papers delivered to Janel Brandtjen’s residence. *Id.* at ¶ 28. The absentee ballots were delivered to Brandtjen’s residence. *Id.* at ¶ 29. It is important to follow the path of these three military elector absentee ballots requested by Zapata to understand the importance of the military elector absentee ballot list to ensuring absentee ballots are only sent to qualified voters. *Id.* at ¶ 30.

First, on or about October 25, 2022, the Clerk of South Milwaukee, sent a military absentee ballot purportedly requested by “Holly A. Brandtjen,” of 722 Oak St., South Milwaukee, voter identification number 701923081 to Plaintiff Janel Brandtjen’s residence at N52 W16632 Oak Ridge Trail, Menomonee Falls, WI 53051. *Id.* at ¶ 31. On October 27, 2022, Janel Brandtjen received the absentee ballot at her residence. Brandtjen Aff. at ¶ 32. But, Janel Brandtjen is not qualified to cast the military absentee ballot of Holly

Brandtjen. *Id.* at ¶ 33. This election illegality would not have occurred if the Clerk of South Milwaukee had an up-to-date, complete, verified, current, accurate and distributed military elector list. *Id.* at ¶ 34.

Second, on or about October 25, 2022, the Clerk of Menomonee Falls, sent a military absentee ballot purportedly requested by “Holly Adams” to Brandtjen’s residence at N52 W16632 Oak Ridge Trail, Menomonee Falls, WI 53051. *Id.* at ¶ 35. On October 27, 2022, Brandtjen received the absentee ballot at her residence. Brandtjen Aff. at ¶ 36. But, Brandtjen is not qualified to cast the absentee ballot of Holly Adams. *Id.* at ¶ 37. This election illegality would not have occurred if the Clerk of Menomonee Falls had an up-to-date, complete, verified, current, accurate and distributed military elector list. *Id.* at ¶ 38.

Third, on or about October 25, 2022, the Defendant, Village Clerk of Shorewood, sent a military absentee ballot purportedly requested by “Holly Jones” to Brandtjen’s residence at N52 W16632 Oak Ridge Trail, Menomonee Falls, WI 53051. *Id.* at ¶ 39. On October 27, 2022, Brandtjen received the absentee ballot at her residence. *Id.* at ¶ 40. But, Brandtjen is not qualified to cast the absentee ballot of Holly Jones. *Id.* at ¶ 41. This election illegality would not have occurred if the Clerk of Shorewood had an up-to-date, complete, verified, current, accurate and distributed military elector list. *Id.* at ¶ 42.

WEC’s guidance fails to comply with the legal requirements under Wisconsin Statutes § 6.22(6) for an up-to-date, complete, verified, current, accurate and distributed military elector list. *Id.* at ¶ 43. The recent actions of now former Milwaukee Elections Commissioner Deputy Director Kimberly Zapata have exposed the vulnerability statewide. *Id.* at ¶ 44.

ARGUMENT

The Court should issue a temporary restraining order and temporary injunction under the facts and circumstances of this case.

I. The legal standards for temporary restraining orders and temporary injunctions apply.

A temporary injunction is a pre-trial order requiring a party to refrain from performing an act during an action pending a final decision on the merits. Wis. Stat. § 813.02(1). A temporary injunction is available when it appears the moving party is entitled to a judgment but a threatened act before a final judgment on the merits would injure the moving party and render any judgment ineffectual. Wis. Stat. § 813.02(1)(a). Courts will issue temporary injunctions only if the moving party shows:

- A reasonable probability of success on the merits.
- That it has no adequate remedy at law.
- That it would suffer irreparable harm in the absence of an injunction.
- That an injunction is necessary to preserve the status quo.

Werner v. A.L. Grootemaat & Sons, Inc., 259 N.W.2d 310, 313–14 (Wis. 1977).

A temporary restraining order (TRO) is available whenever a motion for temporary injunction is pending and is effective only until the court can rule on a motion for temporary injunction. Wis. Stat. § 813.05(1). A temporary restraining order (TRO) is a short-lived emergency order requiring a party to refrain from performing a particular act pending the outcome of a motion for temporary injunction. A TRO maintains the status quo until the court rules on the motion for temporary injunction. Wis. Stat. § 813.02(1).

II. A reasonable probability of success on the merits exists.

The first factor of whether a reasonable probability of success exists on the merits is satisfied. *See Gabl on behalf of Zingsheim v. Aurora Health Care, Inc.*, 977 N.W.2d 756, 768 (Wis. Ct. App. 2022), *citing Milwaukee Deputy Sheriffs' Ass'n*, 883 N.W.2d 154, 161 (Wis. Ct. App. 2016). A complaint stating at least one viable legal claim is required as an underlying basis for an injunction. *School Dist. of Slinger v. Wis. Interscholastic Athletic Ass'n*, 563 N.W.2d 585, 589 (Wis. Ct. App. 1997). In other words, there must be a viable or protectable legal claim (or right) upon which plaintiff would have a reasonable probability of success. A request for a temporary injunction is not a claim in and of itself, but a vehicle to prevent harm while litigation is pending on the underlying claim(s). A temporary injunction is available

[w]hen it appears from a party's pleading that the party is entitled to judgment and any part thereof consists in restraining some act, the commission or continuance of which during the litigation would injure the party, or when during the litigation it shall appear that a party is doing or threatens or is about to do, or is procuring or suffering some act to be done in violation of the rights of another party and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act.

Wis Stat. § 813.02(1)(a) (emphasis added).

The Plaintiffs have a reasonable probability of success on the merits on their claim that WEC's guidance to county clerks and municipal clerks on military absentee ballots in WEC's Military and Overseas Voting Manual (Feb. 2022) and in its Military and Overseas Voting Cheat Sheet (Rev. 2020-10) does not comply with Wis. Stat. § 6.22(6). *Brandtjen Aff.* at ¶ 14. In other words, WEC's guidance in these documents is legally unauthorized—beyond the scope of WEC's powers.

As a preliminary matter, Wis. Stat. § 227.40 authorizes the court to declare a state agency guidance document invalid if it find that it violates constitutional provisions or exceeds the statutory authority of the agency:

(4) (a) In any proceeding pursuant to this section for judicial review of a rule or guidance document, the court shall declare the rule or guidance document invalid if it finds that it violates constitutional provisions or exceeds the statutory authority of the agency or was promulgated or adopted without compliance with statutory rule-making or adoption procedures.

This petition is brought under Wis. Stat. § 227.40.

As to the specific claim, it is based on Wisconsin Statutes 6.22(6) requiring a “military elector list,” which is up-to-date, complete, verified, current, accurate and distributed:

- Up-to-date--“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.”
- Complete-- “The list shall contain the name, latest-known military residence and military mailing address of each military elector.”
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To be sure, WEC's guidance in the MOVM requires that "Clerks must still obtain sufficient information to enter a military elector into WisVote, such as their name, address, and date of birth." MOVM at 6. Brandtjen Aff. at ¶ 22. But, this statement is a far cry from satisfying the Wisconsin Statutes § 6.22(6) requirement for an up-to-date, complete, verified, current, accurate and distributed military elector list. Brandtjen Aff. at ¶ 23.

Under Wisconsin’s decentralized election system, WEC’s legally unauthorized guidance in the MOVIM and Cheat Sheet have caused the municipal clerks to not have up-to-date, complete, verified, current, accurate and distributed military elector list—required by Wisconsin Statutes § 6.22(6). Brandtjen Aff. at ¶ 24. Not having the legally-required lists has created a vulnerability in Wisconsin’s military absentee ballot process: essentially, any person can apply for a military elector absentee ballot and have it sent to any address. *Id.* at ¶ 25. This vulnerability has been exposed by recent actions undertaken by now former Milwaukee Elections Commissioner Deputy Director Kimberly Zapata. *Id.* at ¶ 26.

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Third, on or about October 25, 2022, the Defendant, Village Clerk of Shorewood, sent a military absentee ballot purportedly requested by “Holly Jones” to Brandtjen’s residence at N52 W16632 Oak Ridge Trail, Menomonee Falls, WI 53051. *Id.* at ¶ 39. On October 27, 2022, Brandtjen received the absentee ballot at her residence. *Id.* at ¶ 40. But, Brandtjen is not qualified to cast the absentee ballot of Holly Jones. *Id.* at ¶ 41. This election illegality would not have occurred if the Clerk of Shorewood had an up-to-date, complete, verified, current, accurate and distributed military elector list. *Id.* at ¶ 42.

Additionally, private investigator Heather Honey submitted a public records request to Karen Stritchko, the Deputy City Clerk of the City of South Milwaukee. Heather Honey Aff. Included was a request for an electronic copy of the records of all UOCAVA eligible voters by precinct as of July 1, 2022. *Id.* In response to the request, the Deputy City Clerk of South Milwaukee informed Honey that the Clerk of South Milwaukee does not have

access to a list of UOCAVA voters. *Id.* She said that the information was only available from the Wisconsin Elections Commission. *Id.*

Consequently, WEC's guidance fails to comply with the legal requirements under Wisconsin Statutes § 6.22(6) for an up-to-date, complete, verified, current, accurate and distributed military elector list. *Id.* at ¶ 43. The recent actions of now former Milwaukee Elections Commissioner Deputy Director Kimberly Zapata have exposed the vulnerability statewide. *Id.* at ¶ 44. WEC's provision of legally unauthorized guidance regarding the legally-required security check of Wisconsin Statutes § 6.22(6) has demonstrably resulted in an absentee ballot process so deficient that it allows the unrestricted manufacture of fake ballots. If WEC's guidance complied with Wisconsin Statutes § 6.22(6), these vulnerabilities would not exist.

For these reasons, and based on these facts and circumstances, the Plaintiffs have satisfied the requirement of showing of probability of success on the merits.

III. The Plaintiffs have no adequate remedy at law to prevent the counting of unlawfully cast military ballots—if any.

The second factor of whether an adequate remedy at law exists is satisfied. Generally, “irreparable injury” means an injury that, without a stay, will harm the movant in a way that “is not adequately compensable in damages” and for which there is not an “adequate remedy at law.” *See Allen v. Wis. Pub. Serv. Corp.*, 694 N.W.2d 420, 429 (Wis. Ct. App. 2005). “The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against” a claim that an injury is irreparable. *Sampson v. Murray*, 415 U.S. 61, 90 (1974) (quoted source omitted); see also *Brock*

v. Milwaukee Cnty. Pers. Rev. Bd., No. 97-0234, unpublished op., 1998 WL 261627, at *3 (Wis. Ct. App. May 26, 1998).

In this case, the temporary injunction remedy sought is to prevent any military elector absentee ballots cast by non-qualified persons casting military elector absentee ballots, if any, from being counted. The Plaintiffs want to ensure that any close election result is not determined by non-qualified people voting military elector absentee ballots. By sequestering the military absentee ballots for election official verification, the military absentee ballots by qualified voters will be counted. The military absentee ballots cast by non-qualified voters will not be counted. So, no qualified voter will be disenfranchised. But, the military elector absentee ballots cast by non-qualified voters will not be counted.

Here, there is no possibility of an adequate remedy at law to protect the election's integrity of the November 8, 2022 election. Once a non-qualified person's military elector absentee ballot is counted, the action is complete and irrevocable. If an election margin is narrow, then these unlawfully cast military elector absentee ballots may exceed the victory margin. Further, there is no possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation. The damage will already be done. A narrow election result will be exceeded by the number of unlawfully cast military absentee ballots.

IV. An irreparable harm will result in the absence of an injunction because unlawfully cast military absentee ballots, if any, may be counted.

The third factor of irreparable harm exists is satisfied. To obtain temporary injunctive relief, a moving party must show he is likely to suffer irreparable harm if a temporary

injunction is not issued. *See Milwaukee Deputy Sheriffs' Ass'n*, 883 N.W.2d at 161; *Gabl*, 977 N.W.2d at 776.

In this case, the temporary injunction remedy sought is to prevent any military elector absentee ballots cast by non-qualified persons casting military elector absentee ballots, if any, from being counted. The Plaintiffs want to ensure that any close election result is not determined by non-qualified people voting military elector absentee ballots. By sequestering the military absentee ballots for election official verification, the military absentee ballots by qualified voters will be counted. The military absentee ballots cast by non-qualified voters will not be counted. So, no qualified voter will be disenfranchised. But, the military elector absentee ballots cast by non-qualified voters will not be counted.

Here, irreparable harm will occur if the temporary injunctive relief is not granted because, without the temporary injunctive relief, non-qualified persons' military elector absentee ballots would be counted. Counting unlawfully cast ballots reduces the credibility of a narrow election result. If an election margin is narrow, then these unlawfully cast military elector absentee ballots may exceed the victory margin—casting definitive doubt on the close election result. Once the unlawfully cast military elector absentee ballots are counted, the damage will already be done—irreparable injury. And, the fact will be established that the narrow election result was exceeded by the number of unlawfully cast military absentee ballots—a terrible result for credibility of Wisconsin's elections.

V. An injunction is necessary to preserve the status quo so that unlawfully cast military absentee ballots, if any, are not counted before verification.

The fourth factor of preservation of the status quo is satisfied. The last factor pertains to maintaining the status quo between the parties until the litigation ends. *Milwaukee*

Deputy Sheriffs' Ass'n, 883 N.W.2d at 161. Usually, “[t]he purpose of a temporary injunction or restraining order is to maintain the status quo and not to change the position of the parties or compel the doing of acts which constitute all or part of the ultimate relief sought.” 8 Jay E. Grenig, *Wis. Pleading and Prac. Forms* § 71:31 (5th ed. 2021); *see also Codept, Inc. v. More-Way N. Corp.*, 127 N.W.2d 29, 34 (Wis. 1964); *Gabl*, 977 N.W.2d at 777–78.

In this case, the status quo is preserved because the temporary injunction sought is to ensure the election integrity of the November 8, 2022 elections. Election integrity’s status quo is preserved by ensuring only military electors cast military elector absentee ballots in the November 8, 2022 election. By sequestering and verifying the military elector absentee ballots, election integrity is preserved—the status quo is preserved—without directing WEC how to change its guidance on military elector lists and the military elector absentee ballot process to legally comply with Wisconsin law. The purpose of the narrow temporary injunction is to get through the November 8, 2022 without any counting of unlawfully cast military elector absentee ballots. The effect of the narrow temporary injunction is to essentially preserve the status quo so that WEC can change its guidance before the 2023 elections to comply with Wisconsin law.

VI. The low administrative costs of sequestering the military elector absentee ballots were already anticipated in the enactment of Wisconsin Statutes 6.22(6).

The administrative costs of sequestering the military elector absentee ballots are low. In 2016 and 2020, the number of military absentee ballots were fewer than 10,000 statewide. *Ron Heuer Aff.*; *Heather Honey Aff.* And, any costs associated with comparing the military

elector absentee ballots with the legally-required military elector list required by Wisconsin Statutes 6.22(6) were already incorporated in the enactment of Wisconsin Statutes 6.22(6).

CONCLUSION

The Court should issue the temporary restraining order and temporary injunction enjoining WEC's guidance to county clerks and municipal clerks on military absentee ballots in WEC's Military and Overseas Voting Manual (Feb. 2022) and in its Military and Overseas Voting Cheat Sheet (Rev. 2020-10) in conflict with Wisconsin Statutes 6.22(6) and declaring that the military elector absentee ballots be sequestered prior to the November 8, 2022 election so that Wisconsin Statutes 6.22(6) verification can be completed before they are counted.

Dated November 4, 2022

/s/Erick G. Kaardal

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