STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY
BRANCH 9

MICHAEL WHITE, EVA WHITE, EDWARD WINIECKE, *and* REPUBLICAN PARTY OF WAUKESHA COUNTY,

Plaintiffs,

WISCONSIN STATE LEGISLATURE,

Intervenor-Plaintiff,

v.

Case No. 2022CV1008

WISCONSIN ELECTIONS COMMISSION,

Defendant,

WAUKESHA COUNTY DEMOCRATIC PARTY AND LEAGUE OF WOMEN VOTERS OF WISCONSIN,

Intervenor-Defendants.

PLAINTIFF-INTERVENOR THE WISCONSIN STATE LEGISLATURE'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S AND INTERVENOR-DEFENDANTS' MOTION FOR A STAY

KEVIN M. LEROY
State Bar No. 1105053
EMILY A. O'BRIEN
State Bar No. 1115609
TROUTMAN PEPPER
HAMILTON SANDERS LLP
227 W. Monroe, Suite 3900
Chicago, Illinois 60606
(312) 759-1938 (KL)
(312) 759-5939 (EO)
(312) 759-1939 (fax)
kevin.leroy@troutman.com
emily.obrien@troutman.com

MISHA TSEYTLIN
State Bar No. 1102199
Counsel of Record
TROUTMAN PEPPER
HAMILTON SANDERS LLP
227 W. Monroe, Suite 3900
Chicago, Illinois 60606
(608) 999-1240 (MT)
(312) 759-1939 (fax)
misha.tseytlin@troutman.com

Attorneys for the Wisconsin State Legislature

TABLE OF CONTENTS

INTRODUCTION

In its stay motion, Intervenor-Defendant Waukesha County Democratic Party ("WCDP") fails to carry its burden for obtaining a stay pending appeal under *Waity v. LeMahieu*, 2022 WI 6, ¶ 49, 400 Wis. 2d 356, 969 N.W.2d 263. As to likelihood of success on the merits, WCDP does not even attempt to address this Court's well-considered reasons why Plaintiffs and the Legislature are likely to prevail. On the equities, WCDP and its supporting parties seek to confuse the issue, claiming that this Court disabled the Wisconsin Elections Commission ("WEC") from explaining to voters what constitutes a sufficient "address" on a witness certificate. But, of course, this Court's order says nothing about that issue, and it does not purport to displace WEC's separate guidance that a witness address must include the bare minimum of the street number, street name, and name of the municipality. Instead, the temporary injunction here focuses on ending WEC's unlawful practice of requiring election clerks to fix unilaterally or otherwise supplement witness certificates. And WCDP does not have any meaningful response to the harms flowing from a stay pending appeal, including nullifying the Legislature's duty, "pursuant to its constitutional grant of legislative power, to maintain some legislative accountability over rule-making." *Martinez v. Dep't of Indus., Lab. & Hum. Rels.*, 165 Wis. 2d 687, 701, 478 N.W.2d 582 (1992).

ARGUMENT

I. The Supreme Court's Decision In *Waity* Articulates How This Court Must Analyze An Application For A Stay Pending Appeal

"[A] trial court . . . may . . . [s]tay execution or enforcement of a judgment or order" during "the pendency of an appeal" of that order. Wis. Stat. § 808.07(2)(a); *see* Wis. Stat. § (Rule) 809.12. When deciding a motion to stay an order pending appeal, a court must consider whether the moving party: (1) "makes a strong showing that it is likely to succeed on the merits of the appeal"; (2) "shows that, unless a stay is granted, it will suffer irreparable injury" during the pendency of the appeal; (3) "shows that no substantive harm will come to other interested parties" during the pendency of the appeal; and (4) "shows that a stay will do no harm to the public interest." *Waity*, 2022 WI 6, ¶ 49. These factors "are not prerequisites but rather are interrelated considerations that must be balanced together." *Id.* (citation omitted). If a circuit court has "appl[ied] an incorrect legal standard" to adjudicate a request for a stay pending appeal, it has "erroneously exercised its discretion" as a matter of law. *Id.* ¶ 50. In *Waity*, the Supreme Court articulated the analytical approach that courts must take when assessing a motion for stay pending appeal, providing "[f]urther explanation" on the proper standard to "ensure the standard for stays pending appeal is correctly followed in the future." *Id.* ¶ 3; *see also id.* ¶¶ 48–49.

The *Waity* standard for stays acknowledges that when "reasonable jurists on appeal may [ ] interpret[ ] the relevant law" and "come to a different conclusion," that creates a presumption of a movant's likelihood of success on appeal. *Id.* ¶ 53. *Waity* makes clear that "a circuit court cannot simply input its own judgment on the merits

of the case and conclude that a stay is not warranted," *id.* ¶ 52, but instead "must consider the standard of review, along with the possibility that appellate courts may reasonably disagree with its legal analysis," *id.* ¶ 53. But *Waity* still requires a circuit court to undertake a fresh "consideration" of "whether the *movant* made a *strong* showing of success *on appeal*," which consideration does not "simply repeat" the argument and conclusions below. *Id.* ¶¶ 49, 51–52 (first two emphases added). This means that a circuit court must look to the movant's particular arguments on the merits in the movant's stay motion, in determining how much weight to give its initial presumption. *See id.* Thus, a movant whose appeal will be subject to de novo review will satisfy the likelihood-of-success-pending-appeal element, but the *degree* to which the movant satisfies this element—and the *weight* a circuit court should give to this consideration in the stay analysis, within *Waity*'s sliding-scale balancing test—will differ based upon the strength of the movant's merits showing. *See id.* ¶¶ 53–54.

On the equitable factors relevant to the stay determination, *Waity* requires a circuit court to perform a "comparison" of the harms resulting from an interim stay and the harms caused by denial of a stay. *Id.* ¶ 58. First, a circuit court "must consider whether the harm can be undone if, on appeal," the movant prevails and "the circuit court's decision is reversed." *Id.* ¶ 57. A court must then "consider the extent of harm the non-movant will experience if a stay is entered, but the non-movant is ultimately successful in having the . . . injunction affirmed and reinstated." *Id.* ¶ 58 (citation omitted; omission in original). A circuit court must consider the degree to which the harm may be "mitigated or remedied upon conclusion of the appeal,"

focusing on the "period of time that the case is on appeal" and not more broadly on "[all] harm that could occur in the future." *Id.* ¶¶ 57–58 (citation omitted). When the grant or absence of a stay threatens irreparable injury, the court should give considerable weight to the possibility of permanent harm. *See id.* And as to the public-interest factor, *Waity* emphasized that a circuit court must consider "the public interest served" in the continued applicability of duly enacted laws. *Id.* ¶ 60.

II. WCDP And Its Supporting Parties Fail To Satisfy The *Waity* Standard For A Stay Pending Appeal

A. While This Court Must Presume That WCDP Has A Likelihood Of Success On Appeal Under *Waity*, WCDP's Failure To Respond To This Court's Reasoning Militates Against A Stay

Under *Waity*, WCDP enjoys a presumption that it is likely to succeed on appeal because of the de novo standard of review that will apply on appeal, 2022 WI 6, ¶¶ 51–53, *see supra* Part I, but that presumption is at its lowest ebb here because WCDP does not offer this Court any reasons in its stay motion why this Court's well-considered merits conclusion was incorrect.

In issuing its temporary injunction, this Court offered two independent, powerful reasons why Plaintiffs and the Legislature are likely to prevail in this case. This Court first explained that "the plain language" of Wis. Stat. 6.87 "does not authorize election officials to correct, modify, alter or add to an absentee ballot certification," laying out its reasoning over the course of several pages of transcript. Tr. of Sept. 7, 2022 Oral Decision On Temp.-Injunction Mots. ("Tr.") 16:24–19:18. Second, this Court provided an independent basis for finding WEC's actions unlawful, "[i]n addition to the plain language of the pertinent statutes." Tr. 19:19–20.

Specifically, WEC's actions "def[y] the Joint Committee [for Review of Administrative Rules ('JCRAR')]'s oversight authority, in violation of the law and core separation of powers principles, and result[ ] in an unlawful attempt to circumvent the [JCRAR] rejection of the substantively identical Emergency Rule 2209." Tr. 19:25–20:5. This Court then cited supporting precedent and directly engaged with and rebutted WEC's arguments below. Tr. 20:6–20.

WCDP's motion for a stay does not engage with this Court's reasoning on the merits, thereby undermining its case for a stay under *Waity*. Dkt.171, ¶¶ 20–24 (WCDP motion); *accord* Dkt.172 (Intervenor-Defendant League of Women Voters Of Wisconsin's ("LWV") notice of joinder in WCDP's motion); Dkt.174 (same, as to WEC). As to this Court's holding under Wis. Stat. § 6.87's text, WCDP's motion does not explain what fault WCDP finds in this Court's careful textual analysis. *See* Dkt.171, ¶ 24. And WCDP makes *no* mention of the alternative basis for this Court's holding—that WEC violated the mandatory JCRAR process for reviewing rules—and thus provides no basis for concluding that WCDP, as the "movant," has "made a strong showing of success on appeal." *Waity*, 2022 WI 6, ¶ 52 (emphasis omitted).

WCDP's inadequate effort falls dramatically short of what *Waity* requires, as illustrated by a survey of circuit-court stay motions that the Wisconsin Supreme Court has reviewed and held that the circuit courts should have granted. To take just two examples, in *Waity*, the movants methodically countered each merits basis for the circuit court's challenged ruling in their Motion for Stay Pending Appeal. Affidavit Of Kevin M. LeRoy ("LeRoy Aff.") Ex. 1 (Defs.' Mem. in Supp. of Emergency

Mot. for Stay Pend. Appeal at 2–8, *Waity v. Vos*, No. 2021CV000802 (Dane Cty. Cir. Ct. Apr. 30, 2021)). Then, the Wisconsin Supreme Court held that the movants had "set forth arguments that have more than the mere possibility of success on the merits," while substantively engaging with and rebutting the circuit court's merits reasoning. LeRoy Aff. Ex. 2 (Order Granting Stay Pending Appeal at 9, *Waity v. LeMahieu*, No. 2021AP802 (Wis. July 15, 2021) (citations omitted)). In *League of Women Voters*, the movant similarly presented fulsome merits arguments to the circuit court in support of its motion for a stay pending appeal. LeRoy Aff. Ex. 3 (Intervening Def.-Appellant Wis. Legis.'s Mem. in Supp. of Emergency Mot. to Stay the Temp. Inj. and for Leave to Appeal at 12–22, *League of Women Voters of Wis. v. Evers*, No. 2019CV000084 (Dane Cnty. Cir. Ct. Mar. 22, 2019)). As in *Waity*, the Wisconsin Supreme Court then explained that the movant's "arguments below lead[ ] [the Court] to conclude that [the movant] has set forth an argument that has more than a mere possibility of prevailing," while again confronting and rebutting the circuit court's contrary reasoning on the merits. LeRoy Aff. Ex. 4 (Order Granting Stay Pending Appeal at 7, *League of Women Voters v. Evers*, No.2019AP559 (Wis. Apr. 30, 2019)).

B. WCDP And Its Supporting Parties Have Not Demonstrated That Either They Or The Public Would Suffer Meaningful Harm Absent A Stay

WCDP and the public would suffer no meaningful harm from this Court declining to stay its temporary injunction pending appeal because this Court's order focuses narrowly on stopping WEC from mandating that clerks engage in a specific, unlawful practice. In particular, this Court's injunction prohibits WEC from "publicly

displaying or disseminating" or "advising, guiding, instructing, publishing, or otherwise communicating information to Wisconsin municipal clerks and local elections officials" about the 2016 Mandate "that is contrary to Wis. Stat. § 6.87." Dkt.167 at 2–3. Thus, this Court's injunction prohibits WEC from ordering clerks to add "missing or add[itional] information to absentee ballot witness certifications in any form," including missing witness-address information on those certificates. Dkt.167 at 2. The Order does not prohibit WEC from retaining its relevant advice regarding what constitutes a sufficient witness address under Wis. Stat. § 6.87. *See id.* In fact, WEC appears to have currently in place separate guidance regarding what elements make up a sufficient witness certificate address under Section 6.87—requiring only the street number, street name, and name of municipality, WEC, *Mem. re Absentee Certificate Envelopes: Missing or Insufficient Witness Address*, at 5 (Oct. 14, 2016)*—which guidance this Court's temporary injunction does not address, *see* Dkt.167 at 2–3. The injunction also does not impede WEC's authority to oversee the fairness and integrity of the electoral process, including by reviewing challenges to the sufficiency of nomination papers, Wis. Admin. Code EL § 2.07; testing the sufficiency and approving the use of electronic voting systems, *id.* §§ 7.02, 7.03; certifying municipal clerks and election inspectors, *id.* §§ 11.01, 12.03; and adjudicating challenges concerning election violations, *id.* § 20.02–20.10.

* Available at https://elections.wi.gov/media/11813/download (all websites last visited Sept. 12, 2022).

WCDP is confused as to the effect of this Court's temporary injunction, contending that the injunction prohibits WEC from issuing guidance "specif[ying] the circumstances under which a witness address is 'missing' such that 'the ballot may not be counted,'" thereby "creat[ing] a vacuum[ ] in which each . . . municipal clerk[ ] will be left to their own devices." Dkt.171, ¶¶ 30, 35; *accord* Dkt.172 (LWV joinder); Dkt.174 (WEC joinder). That is simply not true. This Court's injunction prohibits WEC from "publicly displaying and disseminating" or "advising, guiding, instructing, publishing, or otherwise communicating information to Wisconsin municipal clerks and local elections officials" about the 2016 Mandate "that is contrary to Wis. Stat. § 6.87." Tr. 25:8–26:19. That mandate, in turn, deals with the issue of clerks unilaterally "insert[ing] address information in the witness certification on an absentee ballot." Tr. 19:12–14. This Court's injunction does not enjoin WEC from retaining and disseminating widely its apparently currently in-place guidance regarding what elements make up a witness certificate address. *See* WEC, *Mem. re Absentee Certificate Envelopes: Missing or Insufficient Witness Address*, at 5, *supra*. Thus, this Court's temporary injunction does not require that any particular ballot not be counted. *Contra* Dkt.171, ¶¶ 30–32; Dkt.172, ¶¶ 7–8 (LWV joinder, articulating same argument). And if the certificate is "missing" an address, the injunction merely repeats Section 6.87's instruction that "the clerk may return the ballot to the elector . . . whenever time permits the elector to correct the defect and return the ballot by the applicable deadline." Dkt.167, ¶ 7.

Relatedly, this Court's injunction does not place an "unfair[ ]" burden on Wisconsin voters, as WCDP claims. Dkt.171, ¶ 32. A State's election regime may, and "invariably" will, "impose some burden upon individual voters," *Luft v. Evers*, 963 F.3d 665, 671–72 (7th Cir. 2020) (citation omitted), and any burden on voting from this Court's injunction—which simply enforces Section 6.87's plain terms—is entirely insignificant. This is because, under Wisconsin law, absentee voting is a privilege, not a right, Wis. Stat. § 6.84(1); *Teigen v. Wis. Elections Comm'n*, 2022 WI 64, ¶ 71, 976 N.W.2d 519, and this Court's enforcement of Section 6.87 has no impact on voters' ability to vote in person on Election Day or even to use a municipal clerk as a witness when delivering their absentee ballots in person, *see* Wis. Stat. § 6.87(8). Further, for those voters who wish to deliver their absentee ballots via mail, all that this Court's enforcement of Section 6.87 requires is for the absentee voter to select a witness who will fully complete the absentee-ballot certificate himself or herself, rather than rely on clerks to fill in the details for them. And even if there are witness-certificate errors on an absentee ballot, this Court's injunction leaves in force the statutory remedial provision for "clerk[s] [to] return the ballot to the elector . . . whenever time permits the elector to correct the defect and return the ballot by the applicable deadline." Dkt.167, ¶ 7. So, while WCDP is correct that voters may "bear[ ] the consequences" for certification errors made by their witnesses, Dkt.171, ¶ 32, those "consequences" amount to only an insubstantial burden, given voters' robust ability to mitigate them under existing Wisconsin law.

Finally, while the Legislature has no basis to dispute WCDP's and LWV's claims that they will expend some resources "educating its members and supporters" about absentee-voting procedures, now that WEC is no longer permitted to require clerks to correct absentee-witness addresses themselves, *see* Dkt.171, ¶¶ 28, 33; Dkt.172, ¶¶ 9–10, these parties overstate those harms. At most, WCDP and LWV might wish to re-emphasize the apparently legal requirements for a completed absentee ballot witness certificate address, which will not require substantial expenditures by WCDP or LWV.

C. Staying The Injunction Will Impose Serious Harm Upon The Legislature And The Public

1. A stay of this Court's temporary injunction pending appeal will impose serious, irreparable harm on the Legislature. In particular, WEC's continued enforcement of the 2016 Mandate will substantially and irreparably harm the Legislature during the stay period by: (1) nullifying state election laws; (2) circumventing the Legislature's duty to oversee agency action; and (3) undermining Wisconsin's election laws.

First, WEC's conduct will continue effectively to nullify Section 6.87's absentee-ballot-correction requirements for the duration of the appeal process. The Legislature always suffers "a substantial and irreparable harm of the first magnitude" when administrative agencies purport to nullify the Legislature's laws, *see* Tseytlin Aff., Dkt.47, Ex. 2 at 9 (Order, *SEIU v. Vos*, No.2019AP622 (June 11, 2019) ("*SEIU* Stay Order")); *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018), which harm is all the more acute where, as here, the law that the agency purports to nullify

is a grant of power to the Legislature, *see SEIU v. Vos*, 2020 WI 67, ¶ 119, 393 Wis. 2d 38, 946 N.W.2d 35. Here, allowing the 2016 Mandate to remain in effect would nullify the exclusive requirements for the correction and treatment of deficient absentee ballots set forth in Section 6.87, and so inflicts *per se* irreparable harm to the Legislature. *SEIU* Stay Order at 9; *Abbott*, 138 S. Ct. at 2324 n.17.

Second, WEC's conduct will continue to undermine JCRAR's authority and threaten vital procedural safeguards designed to protect the separation of powers "inherent in the Wisconsin Constitution." *Wis. Legislature v. Palm*, 2020 WI 42, ¶ 13, 391 Wis. 2d 497, 942 N.W.2d 900. By flouting JCRAR's conclusion that Emergency Rule 2209 was unlawful and re-imposing the *exact same requirements* under the guise of the 2016 Mandate, WEC defied both the mandatory statutory rulemaking process and the Legislature's constitutional power to provide "legislative accountability over rule-making," *Martinez*, 165 Wis. 2d at 701, which power is reflected in the statutes creating JCRAR and authorizing it to review and temporarily suspend agency rules post-promulgation, Wis. Stat. §§ 13.56, 227.19, 227.24, 227.26; *see also Martinez*, 165 Wis. 2d at 702; *SEIU*, 2020 WI 67, ¶ 12. A stay of this Court's temporary injunction pending appeal would cause the Legislature irreparable harm by preventing JCRAR from ensuring that WEC's policies are consistent with Wisconsin's elections statutes for the duration of the appeal process, impinging upon the Legislature's constitutional authority to keep in check unbridled agency action, consistent with the separation of powers. *Martinez*, 165 Wis. 2d at 701.

Finally, given the Legislature's "compelling interest in preserving the integrity of its election process," *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989), a stay would impose a grave harm on the Legislature by allowing WEC to continue to contravene Wisconsin's election laws. The elections laws are the province of the Legislature, not of agencies, *see League of Women Voters of Wis. Educ. Network, Inc. v. Walker*, 2014 WI 97, ¶ 24, 357 Wis. 2d 360, 851 N.W.2d 302, yet WEC has continually substituted its own judgment for that of the Legislature by instructing clerks to manually and unlawfully correct absentee-ballot certificates.

2. For many of the same reasons, the public interest strongly favors a denial of stay. WEC's nullification of both Wisconsin election laws and JCRAR's authority substantially harms the public interest, since "[t]here is always a public interest in prompt execution of [valid laws]." *Nken v. Holder*, 556 U.S. 418, 436 (2009); *SEIU* Stay Order at 9. The public maintains a particularly strong "interest in preserving the integrity of [the] election process," *Eu*, 489 U.S. at 231; *see also Milwaukee Branch of NAACP v. Walker*, 2014 WI 98, ¶ 73, 357 Wis. 2d 469, 851 N.W.2d 262, as well as maintaining confidence in election results, *id.*, ¶ 72. In light of the approaching November election and the overwhelming importance of ensuring fair and free elections in Wisconsin, the public will undoubtedly suffer irreparable harm unless WEC is immediately enjoined from instructing clerks to continue the unlawful practice of correcting absentee-ballot information under the 2016 Mandate.

Because the 2016 Mandate nullifies longstanding election laws—which laws are designed to safeguard the integrity of the electoral process and the franchise of

all Wisconsin voters—timely relief in this case is essential, given the necessity of ensuring ballot-correction procedures are lawful before absentee voters begin returning ballots to municipal clerks as early as September 22, 2022. *See* Wis. Stat. § 7.15(1)(cm); Wis. Const. art. XIII, § 1. Delayed enforcement of this Court's temporary injunction can do nothing to "undo[ ]" the multitude of harms that will result from WEC's continued enforcement of its 2016 Mandate, *Waity* , 2022 WI 6, ¶ 57, including during the 2022 general election.

3. WCDP argues that it is not necessary for the injunction to take immediate effect because "Wisconsin holds multiple elections every calendar year" and the Legislature could benefit from the injunction in the future. Dkt.171, ¶ 39. This argument does not change the fact that the Legislature, the Plaintiffs, and the public would suffer irreparable harm in the impending election, while the public would be deprived of the statutory safeguards against vote dilution established by Wis. Stat. § 6.87 during the 2022 election. And the Legislature did not "delay" in bringing suit, as WCDP erroneously contends. Dkt.171, ¶¶ 40, 42. On the contrary, the Legislature exhausted the statutory tools available to it—the JCRAR rule-review process—in an attempt to avoid the need for court intervention. Once WEC made clear that it intended to violate JCRAR's veto of its substantively identical Emergency Rule 2209, the Legislature swiftly sought this Court's assistance.

WCDP suggests that "the only comprehensible articulation of the status quo" is the 2016 Mandate, and a stay of the Court's temporary injunction would "avoid any chance of voter whiplash." Dkt.171, ¶¶ 45, 47. However, the temporary injunction

did not change the absentee-ballot instructions that the public received. Rather, Wisconsin law has consistently instructed Wisconsin voters that they must complete their ballots in their entirety before those ballots will be counted. The only inconsistency arose from the 2016 Mandate, which instructed clerks who allegedly knew witnesses to give special treatment to those ballots.

WCDP suggests that "due process" requires that "election procedures must not be changed to the detriment of voters who reasonably rely on the previously established procedures." Dkt.171, ¶¶ 48–49. WCDP fails to establish any detriment to voters. As discussed above, absentee voting is a "privilege," not a right, Wis. Stat. § 6.84(1), and this Court's enforcement of Section 6.87 has no effect on voters' ability to use the other established voting procedures of voting in person on Election Day or using a municipal clerk as a witness when delivering their absentee ballots in person, *see* Wis. Stat. § 6.87(8). Moreover, the Court's injunction does not impact WEC's apparently in place guidance regarding the necessary elements for a sufficient witness address, and it requires clerks to provide remedial opportunities to voters consistent with Wis. Stat. § 6.87. *See supra* pp.7–9. Finally, the concrete harms to due process from WEC's harm to the separation of powers and defiance of JCRAR oversight outweigh the hypothetical and de minimis "detriment" that WCDP claims.

CONCLUSION

This Court should deny WCDP's, LWV's, and WEC's motions to stay pending appeal the Court's Order granting a temporary injunction.

Dated: September 12, 2022

Respectfully Submitted,

Electronically signed by Misha Tseytlin

MISHA TSEYTLIN
State Bar No. 1102199
Counsel of Record
KEVIN M. LEROY
State Bar No. 1105053
EMILY A. O'BRIEN
State Bar No. 1115609
TROUTMAN PEPPER
HAMILTON SANDERS LLP
227 W. Monroe, Suite 3900
Chicago, Illinois 60606
(608) 999-1240 (MT)
(312) 759-1938 (KL)
(312) 759-5939 (EO)
(312) 759-1939 (fax)
misha.tseytlin@troutman.com
kevin.leroy@troutman.com
emily.obrien@troutman.com