STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY

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

Plaintiffs,

v.

WISCONSIN ELECTIONS COMMISSION,

Defendant.

Case No.: 22-CV-1008

Case Code No.: 30701

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PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

The Wisconsin Elections Commission ("WEC"), Defendant, along with the Waukesha County Democratic Party ("WCDP") and the League of Women Voters of Wisconsin ("LWVWI") (collectively, "Intervenors"), offer four unpersuasive arguments against the declaratory and injunctive relief Plaintiffs seek in this case against WEC guidance that instructs local officials to fill in, entirely on their own, missing information on the witness certifications that by law must accompany absentee ballots in Wisconsin. First, they contend that no law prohibits such unilateral action by municipal clerks or election officials. But that argument gets the inquiry backwards—no law *authorizes* the guidance, so it is unlawful—and it is wrong in any event. The Wisconsin Legislature has required by statute that only the witness, not a non-witness official, may fill out that information, Wis. Stat. § 6.87(4)(b)1, so the guidance violates State law. Second, they say that WEC's guidance is harmless. But WEC's guidance is perceived as authoritative throughout the state and promotes vote dilution by encouraging the counting of otherwise invalid ballots.

Third, they speculate that a failure to violate Wisconsin law would violate federal law, including possibly the United States Constitution. In addition to being speculative, procedurally improper, and dependent on development beyond the scope of this case, this argument is also simply wrong. And fourth, they contend that WEC's guidance represents the "status quo." But the status quo is the State law that WEC's guidance flouts.

First, WEC and Intervenors take the untenable position that, although Wisconsin law does not authorize municipal clerks or election officials to add witness address information to an absentee ballot certification, WEC's guidance is lawful because it is not specifically prohibited. WEC is mistaken. WEC only has the authority granted to it by the Legislature, and the Legislature has not granted WEC the authority to create new or change existing aspects of election-related laws. Simply because WEC believes that Wisconsin statutes do not address a given topic or action, does not mean WEC has the authority to create a new procedure in the absentee ballot voting process—something that surely would violate the separation of powers.

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In any event, the assertion that the statutes do not prohibit municipal clerks or election officials from adding witness address information to the absentee ballot certification is both wrong and misleading. Wisconsin statutes require that an absentee ballot voted by an elector be witnessed by another and that "one" witness must sign a certification to that effect, and that same witness must provide his or her address. Wis. Stat. § 6.87(4)(b)1 (the absent elector shall mark the ballot, fold the ballot, deposit the ballot in the envelope, and execute his or her certification all in the "presence" of that "one witness"); § 6.87(2) (the same "witness shall execute" the certification, which includes the witness's "[p]rinted name" and "[a]ddress"). Indeed, the foregoing is certified to by that witness under penalty of perjury. *Id.*

As such, Wisconsin law leaves no room for anyone but the original witness to provide his or her address, and any other interpretation would render the witness address requirement in the witness certification meaningless. If a clerk or election official, who is not the original witness to the certification, could simply insert address information into the witness certification, then the elector would have no duty to provide that information at all. It appears that WEC used to share the same understanding given that the certification that WEC created, and revised in 2020, explicitly instructs electors to "[h]ave your witness sign and write their address below." (Doc. No. 11, Ex. C at 36). Further, any other interpretation introduces increased risk of fraud and error into an already fraught absentee balloting process. This is why the Legislature clarified that "[i]f a certificate is missing the address of a witness, the ballot may not be counted." Wis. Stat. § 6.87(6d). These statutes, including the witness certification requirement, are unquestionably mandatory. Wis. Stat. § 6.84(2).

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The wrongfulness of the argument put forth by WEC and supporting Intervenors is further revealed by the exclusive remedy Wisconsin has provided for an "improperly completed [absentee ballot] certification." Under Wisconsin law, rather than subject the ballot to invalidation under Section 6.87(6d), a municipal clerk "may return the ballot to the elector . . . to correct the defect and return the ballot." Wis. Stat. § 6.87(9). WEC argues that the use of "may" in this statute somehow opens the floodgates to all other conceivable methods to correct missing witness address information—in addition to any other defect in the witness or elector certifications to an absentee ballot. But the word "may" in this context demonstrates that the clerk is authorized to take one remedy, but not required to take any. It does not mean that the clerk may supplement the authorized remedy with other remedies of its own choosing that are not grounded in statutory text.

WEC and Intervenors also attempt to distract the Court by arguing that the term "address" must be defined, and Intervenors argue that the equitable doctrine of laches bars the complaint. Again, they are wrong. Under any reasonable definition of "address," Wisconsin law prohibits municipal clerks from supplying missing information and, in any event, does not authorize the WEC guidance. Furthermore, the doctrine of laches is inapplicable. Unlike the cases relied on by Intervenors, Plaintiffs promptly filed this action prior to the August 9, 2022 primary election and the November 8, 2022 general election and, as such, there is no evidence of delay or prejudice.

Second, the argument that no irreparable harm will result without a temporary injunction is mystifying. WEC concedes that municipal clerks have been relying on and will continue to rely on its guidance. (Doc. No. 95 at 21 ("clerks and other local election officials have followed the Commission guidance in the administration of elections"); Doc No. 118, WEC Answer ¶ 16 (admitting that some clerks followed its guidance, while others did not). Thus, there is no doubt that irreparable harm has and will continue to occur. For the agency charged with administering our election laws to suggest that its guidance, which is contrary to Wisconsin election statutes, will not result in harm to future elections and to Plaintiffs—who recently voted absentee by mail and plan to do so again in November (Doc. Nos. 2 ¶¶ 2-4, 10, 11)—is astounding.

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Third, WEC's and the Intervenors' assertion that a temporary injunction will alter the status quo ignores the relationship between existing election laws and WEC's guidance. The status quo is the law passed by the Legislature. Wisconsin's election laws have been in effect long before WEC's guidance, which is intended to serve merely as an aid in administering and enforcing those laws. Wis. Stat. § 227.112(3) (guidance is "nothing but the written manifestations of the executive branch's thought processes"); *Service Employees International Union, Local 1 v. Vos (SEIU)*, 2020 WI 67, ¶ 122, 393 Wis. 2d 38, 946 N.W.2d 35 (Kelly, J., majority op.). If WEC could

insulate itself from injunctions merely by pointing to its guidance as the status quo, litigants would never be able to secure preliminary relief against its conduct. The law does not support such lawlessness.

Lastly, Intervenors argue the requested injunctive relief will violate federal law and the Constitution. The federal statute invoked by Intervenors governs voter registration, not ballot processing. If it did govern ballot processing, Wisconsin law would satisfy it. And in any event, if federal law did preempt Wisconsin law, the remedy could never be for municipal clerks to take unauthorized action to bring ballots into compliance with the preempted Wisconsin law.

I. MUNICIPAL CLERKS AND ELECTION OFFICIALS CANNOT ADD WITNESS ADDRESS INFORMATION ON AN ABSENTEE BALLOT CERTIFICATE RETURNED BY AN ELECTOR.

Wisconsin law provides that an absent elector must mark and mail the ballot "in the presence of the witness." Wis. Stat. § 6.87(4)(b)1. The absent elector must also "make and subscribe to the certification" before the "one witness," who must execute a "certificate" that attests to compliance with several procedural safeguards. Wis. Stat. § 6.87(2). The witness must then print his or her name and address and sign the certificate. *Id.* As shown by structure of the statute (and basic logic), the printed name, address, and signature all underwrite the validity of the certification. *See id.* Wisconsin law further provides that "voting by absentee ballot must be carefully regulated to prevent the potential for fraud or abuse" and that the procedures set forth in Wis. Stat. §§ 6.86, and 6.87 (3) to (7) "shall be construed as mandatory," and any ballot cast in contravention of those provisions may not be counted. Wis. Stat. § 6.84(1), (2). This is a "strict construction requirement, applicable to statutes relating to the absentee ballot process" and "is consistent with the guarded attitude with which the legislature views that process." *Lee v. Paulson*, 2001 WI App 19, ¶¶ 7-8, 241 Wis. 2d 38, 623 N.W.2d 577.

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These strict requirements serve important legislative goals. "Voting is a constitutional right, the exercise of which is 'strongly encouraged,' . . . [but] 'voting by absentee ballot is a privilege exercised wholly outside the traditional safeguards of the polling place.'" *Jefferson v. Dane Cnty.*, 2020 WI 90, ¶ 16, 394 Wis. 2d 602, 951 N.W.2d 556 (quoting Wis. Stat. § 6.84(1)). As a result of being beyond the traditional safeguards of the polling place, voting by absentee ballot has always presented an increased risk of illegalities. As noted in the bipartisan Carter-Baker Report, "[a]bsentee ballots remain the largest source of potential voter fraud" and citizens who vote in places other than their established polling place are, among other things, "more susceptible to pressure, overt and subtle, or to intimidation." COMM'N ON FED. ELECTION REFORM, Building Confidence in U.S. Elections, Report of the Commission on Federal Election Reform at p. 46 (Sept. 2005) (Co-Chair President Jimmy Carter and Co-Chair James Baker, III) (Goehre 2nd Aff. Ex. M).

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WEC's guidance—which it reaffirmed and republished after legislative admonishment just a few short weeks ago—informing municipal clerks that they may add missing witness address information to the witness certification to an absentee ballot (Doc. No. 11 at 37-42, collectively referred to as "WEC guidance") disregards Wisconsin law and policy of "carefully regulat[ing]" the absentee ballot voting process. They implement procedures that are not authorized by, and explicitly contradict, duly enacted legislation governing absentee ballots. *See* Wis. Stat. § 6.87.

A. Wisconsin Law Requires That Absentee Ballots Be Witnessed and That the Witness Provide His or Her Address.

The Legislature expressly required that absentee ballots be witnessed and the witness provide his or her address. As provided in § 6.87, the absent elector must mark the ballot "in the presence of the witness" and, while "still in the presence of the witness," fold the ballot and deposit it in the absentee ballot envelope. Wis. Stat. § 6.87(4)(b)1. The absent elector must also "make

and subscribe to the certification" before the "one witness." *Id*. Likewise, "the witness shall execute" a "certificate" that attests, among other things: that the witness is "an adult U.S. citizen;" that the witness is not "a candidate for any office on the enclosed ballot (except in the case of an incumbent municipal clerk);" that the witness "did not solicit or advise" how the absent elector should vote; and that the absent elector followed the lawful voting procedure and that the absent elector's certification is true. Wis. Stat. § 6.87(2). The witness must then print his or her name and address and sign the certificate. *Id*.

The structure of the statute makes it abundantly clear that the address requirement is of a single piece with the requirement that the witness print his or her name and sign. The text of § 6.87(2) is as follows:

> The witness shall execute the following:
>
> > I, the undersigned witness, subject to the penalties of s. 12.60 (1) (b), Wis. Stats., for false statements, certify that I am an adult U.S. citizen** and that the above statements are true and the voting procedure was executed as there stated. I am not a candidate for any office on the enclosed ballot (except in the case of an incumbent municipal clerk). I did not solicit or advise the elector to vote for or against any candidate or measure.
> >
> > ....(Printed name)
> > ....(Address)
> > Signed ....

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A certification that does not have a printed name, an address, or a signature is not "executed." And the statute is clear that "[t]he witness" is the only person who can execute the certification. These procedures make it unquestionably clear that there can be only "one witness" to an absentee ballot, and it is that "witness" who must insert and certify his or her address information. Wis. Stat. § 6.87(4)(b)(1). *State ex rel. Zignego v. Wisconsin Elections Comm'n*, 2021 WI 32, ¶ 12, 396 Wis. 2d 391, 399, 957 N.W.2d 208, 212 ("When interpreting statutes, we focus primarily on the language of the statute, looking as well to its statutory context and

structure.")*; State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 663, 681 N.W.2d 110, 124 ("Statutory language is given its common, ordinary, and accepted meaning"). In fact, the requirement is so important that the Legislature found it necessary to reiterate that "[i]f a certificate is missing the address of a witness, the ballot may not be counted." Wis. Stat. § 6.87(6d). *See* Wis. Stat. § 6.84(2) (providing that § 6.87(4)(b)1 and (6d) are "mandatory").

If a municipal clerk could unilaterally add witness address information to the witness certification, as WEC suggests, it would essentially render meaningless the requirement that the "one witness" sign the certification and insert his or her address. But that interpretation would violate the surplusage canon of statutory interpretation. That canon requires that, "[i]f possible, every word and every provision is to be given effect." Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 174 (2012); *see also Kalal*, 2004 WI 58, ¶ 46. After all, it would be peculiar for the Wisconsin Legislature to provide such a detailed and meticulous witness certification procedure—and for non-compliant ballots to be rejected—if it could all be magically cured by a municipal clerk.

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In any event, WEC claims authority to instruct municipal clerks that they may mark documentation accompanying ballots without any input from the voter or his or her witness. But WEC never explains the source of any such authority. As a pure creature of statute, WEC lacks authority to act beyond that given to it by the Legislature. Wis. Stat. §§ 5.05(1), 5.025, 15.01(2), 15.01(9), and 15.61. In other words, WEC only has "those powers . . . expressly conferred . . . by the statutes under which [it] operate[s]." *Koschkee v. Taylor*, 2019 WI 76, ¶ 14, 387 Wis. 2d 552, 929 N.W.2d 600; *Schmidt v. Department of Resource Development*, 39 Wis. 2d 46, 56-57, 158 N.W.2d 306, 312 (1968). No statute—and certainly none to which anybody has pointed this

Court—grants WEC authority to instruct anybody to make any marks on the documentation submitted by a voter without voter or witness input.

Specifically, WEC is only authorized to administer and enforce chapters 5-10 and 12 of the Wisconsin Statutes, as expressly set forth by the Legislature, but has no authority to promulgate new election-related laws—particularly when WEC contends that the statutes are silent on the issue. Wis. §§ 5.05(1), (2w). *See State ex rel. Zignego v. Wisconsin Elections Comm'n*, 2021 WI 32, ¶¶ 18, 39 n.17, 396 Wis. 2d 391, 402, 411, 957 N.W.2d 208, 213, 217 (noting the "limited" duties and powers of WEC). The Wisconsin Constitution provides that the "legislative power shall be vested in a senate and assembly," Wis. Const. Art. IV, § 1, and expressly confirms that the Legislature may enact laws concerning "suffrage" and "[p]roviding for absentee voting." Wis. Const. Art. III, § 2. *See, e.g., League of Women Voters of Wisconsin Educ. Network, Inc. v. Walker*, 2013 WI App 77, ¶ 72, 348 Wis. 2d 714, 750, 834 N.W.2d 393, 411, *aff'd*, 2014 WI 97, ¶ 72, 357 Wis. 2d 360, 851 N.W.2d 302 (The right of citizens to vote "'is a right . . . subject to *reasonable* regulation by the legislature.'"). Neither WEC nor Intervenors address this foundational impediment to their arguments.

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There is simply no provision in the statutes that allows a municipal clerk or election official to add address information to the witness certificate. *Cf. Jefferson*, 2020 WI 90, ¶ 24 (noting county clerks were not to "interpret Wisconsin's election laws and make declarations based on those interpretations" because that was "[n]owhere in the[] duties" assigned by the Legislature). In fact, the only statutory evidence is to the contrary. Per legislative instruction, the municipal clerk, faced with the possibility of having to invalidate a ballot due to missing address information, can send the ballot back to the voter for correction. Wis. Stat. § 6.87(9). In other words, the

municipal clerk is empowered to contact the voter for his or her input, not to correct the situation on their own.

In short, the requirement in the statute that only the witness complete the witness certification and provide his or her address information excludes the potential for anyone other than the witness to insert or add an address. *FAS, LLC v. Town of Bass Lake*, 2007 WI 73, ¶ 27, 301 Wis. 2d 321, 341, 733 N.W.2d 287, 297 ("the express mention of one matter excludes other similar matters [that are] not mentioned") (citation omitted).

B. Under Wisconsin Law, the Only Available Option to Correct Missing Witness Address Information Is for the Clerk to Contact the Absent Elector.

The Legislature has provided the only option to remedy an absentee ballot without the necessary witness address information: "If a municipal clerk receives an absentee ballot with an improperly completed certificate or with no certificate, the clerk may return the ballot to the elector…." Wis. Stat. § 6.87(9).

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WEC contends that the use of "may" in § 6.87(9) allows for other ways to correct a defective witness certification. WEC's interpretation of the statutory language is unreasonable. First, it would render the witness certification requirement meaningless because a witness would no longer have to provide the requested information. Second, it would contradict the mandatory and stringent procedural requirements attached to absentee voting—requirements that must be strictly complied with in order to "prevent the potential for fraud or abuse" in absentee ballot voting. Wis. Stat. § 6.84(1). Third, and contrary to WEC's position, the obvious interpretation of § 6.87(9) is that a municipal clerk, although not required to do so, may return the absentee ballot to the voter, when time permits, if it is missing witness address information. The only thing "permissive" is whether the clerk decides to do so or not. Simply because the Legislature opted not to mandate that clerks attempt to correct a deficient certification on an absentee ballot does not

change the fact that the only option available to clerks under such circumstances is set forth in § 6.87(9).[1]

C. The Court Does Not Need to Determine the Definition of "Address" Used in Wisconsin Election Law.

WEC and Intervenors argue that the Court may not issue an injunction in this matter unless the word "address" is defined. This is a red herring. Plaintiffs' claim does not concern what is or is not considered a complete address. The issue is whether a municipal clerk or election official may unilaterally insert witness address information to the witness certification of an absentee ballot voted by an elector. Indeed, WEC instructs municipal clerks that they "must take corrective action" when the witness address certification is missing the witness address and that "clerks are not required to contact the voter before making that correction directly to the absentee certificate envelope." (Doc. No. 11 at 44). WEC's guidance itself is silent as to the amount of missing address information that may be supplied. The only issue here is whether the clerk may insert address information into the witness certification without contacting the voter. Nothing requested by the Plaintiffs hinges on what may or may not constitute a complete address, and this Court need not make that determination.

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It is, however, interesting to note that this newfound position that an address need not include a street number, street name, municipality, state, or zip code appears to be a position concocted for litigation. Form EL-122, including the witness certification created and recently revised by WEC, instructs that the "witness sign and write their address below," and then provides

[1] Even if the Court were inclined to find some other remedy, that remedy would have to be anchored in the statutory remedy set forth in Wis. Stats. § 6.87(9). *Kalal*, 2004 WI 58, ¶ 44 ("It is, of course, a solemn obligation of the judiciary to faithfully give effect to the laws enacted by the legislature" and "[j]udicial deference to the policy choices enacted into law by the legislature requires that statutory interpretation focus primarily on the language of the statute.") Accordingly, any remedy must involve at least the voter or the witness. There is no authority to exclude the voter and witness entirely from any such process.

a space for the "[a]ddress of witness." (Doc. No. 11, at 36, Goehre Aff. Ex. C). And this same form states that the witness must provide the "house number and street name or fire number and street name, city, state and zip code" or "[i]f your rural address does not include a house number/fire number and street name, provide rural route number and box number, city, state and zip code." *Id.* Even WEC's improper guidance provides that an address means the "street number, street name, and name of municipality." (Doc. No. 11 at 37). WEC's suggestion that an address is not required or must be defined contradicts its own prior statements and publications on that issue. In any event, even if WEC could define "address," that would not give them any authority to authorize clerks to supply missing information short of that definition.

D. JCRAR Has Rejected WEC's Guidance.

WEC does not attempt to address the fact that the Wisconsin Legislature's Joint Committee for Review of Administrative Rules ("JCRAR") rejected WEC's attempt to codify its prior incorrect guidance and suspended the proposed emergency rule on July 20, 2022 and, in doing so, JCRAR determined that Wisconsin law does not authorize the municipal clerk to add or change any information on the witness certification portion of the absentee ballot envelope under any circumstances. (Doc. No. 11 at 43-47). In particular, JCRAR rejected the proposed rule because it fails to comply with legislative intent and conflicts with state law. Wis. Stat. § 227.19(4)(d). JCRAR's rejection of WEC's rule incorporating WEC's guidance is instructive on the issue, and WEC does not have the authority to ignore the Legislature's determination, which is exactly what WEC did by stating that its prior guidance was still in place immediately after JCRAR informed WEC that the guidance was contrary to law. WEC does not have the authority to circumvent the Legislature's determination by continuing to promote its guidance, and its implicit assertions to the contrary should be rejected. *See Martinez v. Dep't of Indus., Lab. & Hum. Rels.*, 165 Wis. 2d

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687, 698–99, 478 N.W.2d 582, 586 (1992) (agency who instructs others "to ignore JCRAR's changes, . . . exceeded its powers" since, as a "creature" of the Legislature, an agency "cannot, at any time, possess powers superior to it.").

E. The Requested Relief Will Not Violate Federal Law or the Constitution.

Intervenors argue that the relief sought by Plaintiffs will violate 52 U.S.C. § 10101(a)(2)(B), as well as the First and the Fourteenth Amendments to the U.S. Constitution. Intervenors' arguments are misplaced and wrong.

Intervenors may not defend WEC's guidance based on federal laws not raised as claims or defenses in this Court by WEC. Whatever those federal laws have to say about Wisconsin's ballot requirements is inapposite to this case because WEC does not argue that federal law preempts Wisconsin law, but instead argues, incorrectly (but as it must), that its guidance fully complies with Wisconsin law. *See* Doc. No. 95, WEC Br. at 6. WEC's guidance does not treat Wisconsin law as void, but rather arrogates to municipal clerks additional powers not conferred by statute. *See id.* If federal law rendered Wisconsin law void, on its face or as applied to certain circumstances, then municipal clerks could ignore—or be compelled by legal process to ignore—the Wisconsin law and count the offending ballots. But nothing about federal law requires or allows—or could require or allow—municipal clerks to take *other* steps, including steps to bring ballots into compliance with Wisconsin law. In fact, if federal law required municipal clerks to take any such steps, especially ones as detailed as those imposed in WEC's guidance, it would violate the anti-commandeering doctrine. Because the Constitution "withhold[s] from Congress the power to issue orders directly to the States," *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1475 (2018), the remedy for a violation of § 10101(a)(2)(B) would be to count the

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offending ballots—not to require or enable government officials to take curative steps that violate state law. (Goehre 2nd Aff. Ex. N).

There is simply no argument that any federal law—statutory or constitutional—has any relevance to this case. Federal law cannot *compel* WEC to instruct municipal clerks to alter documentation submitted with ballots, which would violate the anti-commandeering principle. Such alterations are also not necessary to avoid any possible conflict with federal law, as that would be accomplished—if required (and it's not)—by municipal clerks simply counting ballots that lack the required information. Thus, contention that Federal law made WEC do it is not a defense to this action. Additionally, Federal law cannot *allow* WEC to so instruct municipal clerks. The limits of WEC's authority are established in State law. It literally has no power to act beyond those limits. So the suggestion that Federal law *empowered* WEC to so instruct the clerks is also unavailable as a defense to this action.

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To see this even more clearly, imagine WEC had issued guidance that complied with Wisconsin law and Intervenors sought an injunction against its enforcement, in some or all of its applications, as violations of federal statutory or constitutional law. In theory, this Court could grant an injunction against that enforcement. And as a result, certain ballots that might have been excluded would be counted. But this Court could not enjoin municipal clerks to supply missing address information. *See Dalton v. Meister*, 84 Wis. 2d 303, 312, 267 N.W.2d 326, 331 (1978) ("[I]t is uniformly agreed that a court may not punish by contempt persons who violate an injunction by independent conduct and whose rights have not been adjudicated."). The relief intervenors seek here is nothing less than an injunction that is beyond the Court's power.

In any event, Wisconsin's ballot requirements do not violate 52 U.S.C. § 10101(a)(2)(B). That statute provides that "[n]o person acting under color of law shall …

> deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election.

Its requirements are not even applicable to ballot-validity measures like the ones at issue in this case. And even if they were applicable, they would be satisfied.

First and foremost, § 10101(a)(2)(B) does not affect state laws that govern the process of casting or processing mail-in ballots, because laws that regulate the casting of mail-in ballots do not deem a voter not "qualified under State law to vote" and do not "deny the right of any individual to vote." §10101(a)(2)(B). States determine whether voters are qualified through the process of registration, not while reviewing witness certifications. And the failure to follow basic ballot-casting rules "constitutes the forfeiture of the right to vote, not the denial of that right." *See Ritter v. Migliori*, 142 S.Ct. 1824, 2022 WL 2070669, at *2 (June 9, 2022)(Alito, J., dissent) (Goehre 2nd Aff. Ex. O); *see also Rosario v. Rockefeller*, 410 U.S. 752, 758 (1973) (explaining that voters who "chose not to" follow the State's election deadline were not "disenfranchise[d]" by the State) (Goehre 2nd Aff. Ex. P). The Intervenors' approach to the statute would subject an enormous range of laws to a strange and incongruous test. *See, e.g.*, *Vote.Org v. Callanen*, 39 F.4th 297, 306 (5th Cir. 2022) (the materiality statute does not apply to all "requirement[s] that may prohibit an individual from voting if the individual fails to comply") (Goehre 2nd Aff. Ex. Q).

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Nor do laws governing how a mail-in absentee ballot must be cast regulate an "act requisite to voting." §10101(a)(2)(B). The materiality statute defines "vote" to include "all action necessary to make a vote effective including … casting a ballot, and having such ballot counted." §10101(e). So completing the witness certifications *is* "voting" because it is "necessary to make a vote effective." But it would be strained and awkward to describe the act of voting as "requisite to the act of voting." Until recently, *no* case in *any* jurisdiction suggested that the materiality statute

governs "the counting of ballots by individuals *already deemed qualified to vote*." *Friedman v. Snipes*, 345 F. Supp. 2d 1356, 1371 (S.D. Fla. 2004) (Goehre 2nd Aff. Ex. R).

Even if § 10101(a)(2)(B) were relevant to this case and its requirements were applicable to Wisconsin's ballot laws, those laws would satisfy the requirements. Wisconsin has determined that the absentee ballot voting process, including the requirement of having a witness who certifies to the voting process set forth therein, and includes his or her address, is mandatory for the ballot to count. Accordingly, such errors or omissions to the witness certification are material. *Common Cause v. Thomsen*, 574 F. Supp. 3d 634, 636 (W.D. Wis. 2021) (rejecting challenge to student identification requirements for purposes of submitting a ballot because statutes made clear the requirements were material, even though not constitutional or substantive requirements) (Goehre 2nd Aff. Ex. S). *See also Democratic National Committee et al., v. Marge Bostelmann, et al.*, No. 20-1538, 2020 WL 3619499, at *2 (7th Cir. Apr. 3, 2020) (Goehre 2nd Aff. Ex. T) (Courts must give "adequate consideration to the state's interest," as it relates to the witness requirements applicable to absentee ballots, including "[c]onfidence in the integrity of our electoral processes" and "the state's substantial interest in combatting voter fraud.")

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In *Common Cause*, the plaintiff alleged that Wisconsin's requirements that a student identification card include an issuance date, an expiration date not more than two years after the issuance date, and a signature, violated 52 U.S.C. § 10101(a)(2)(B) and the Constitution. *Common Cause v. Thomsen*, 574 F. Supp. 3d 634, 636 (W.D. Wis. 2021). The plaintiff asserted that these voter identification requirements were not material to determining whether the individual is qualified to vote since it had nothing to do with being a citizen, a resident of Wisconsin, or at least 18 years of age, or any other substantive qualification. *Id.* The court rejected that notion and explained that "qualified," as used in § 10101(a)(2)(B), "is not limited to these substantive

qualifications" even though the requirements for student IDs including certain information are not uniformly imposed on other voters:

> In this case, the information at issue is required by state law. Common Cause Wisconsin cites no authority for the view that information on an ID that is required by state law to vote isn't material to a voter's eligibility unless every form of voter ID requires the same information. If that were the case, it would invalidate most if not all of the voter ID requirements because each ID includes different information.

Id.

Here, Wisconsin requires that an absentee ballot contain a witness certification to be completed by the "one witness," and that the witness sign and provide his or her address. Wis. Stat. § 6.87(4)(b)1. If the witness's address is missing, the ballot will not be counted. Wis. Stat. § 6.87(6d). Wisconsin is therefore clear that such requirements are material. So if they were subject to § 10101(a)(2)(B), they would satisfy it.

As to the constitutional arguments, *Common Cause* similarly disposed of the plaintiff's challenge based on the First and Fourteenth Amendments. The court first explained that "[e]ven if the state doesn't provide a reason, the court may not invalidate a statute if 'there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Id.* Applying the rational basis standard, the court concluded that "it is not irrational to believe that a signature could be used to help resolve any questions about identity that might arise after election." *Id.* For example, a witness certification including the witness's address could certainly help resolve material questions about the identity of the elector who voted, helping to "discourag[e] and prosecut[e] fraud and misrepresentation." *Howlette v. City of Richmond, Va.*, 485 F. Supp. 17, 23 (E.D. Va.), *aff'd,* 580 F.2d 704 (4th Cir. 1978) (Goehre 2nd Aff. Ex. U).

That makes sense. "Casting a vote, whether by following the directions for using a voting machine or completing a paper ballot, requires compliance with certain rules." *Brnovich v. DNC,*

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141 S. Ct. 2321, 2338 (2021) (Goehre 2nd Aff. Ex. V). The Constitution gives state legislatures ample authority to enact those rules. *See* Art. I, § 4, cl. 1; amend. X. And those rules are particularly important for mail-in voting, which takes place outside the presence of election officials and presents a heightened risk of fraud. *Brnovich*, 141 S. Ct. at 2348; *Bostelmann*, 2020 WL 3619499, at *2. Hence why laws requiring mail-in voters to follow certain rules—sign and date a declaration, use a sealed secrecy envelope, find a witness, follow deadlines, and more—are ubiquitous. *Republican Party of Penn. v. Degraffenreid*, 141 S. Ct. 732, 736 (2021) (Thomas, J., dissent) (Goehre 2nd Aff. Ex. W). These workaday rules serve state interests that are "strong and entirely legitimate." *Brnovich*, 141 S. Ct. at 2340. They are routinely upheld.

Finally, voting by absentee ballot is a privilege, but it is not a right. Wis. Stat. § 6.84(1). By extending the privilege of absentee voting to Wisconsin voters, the State did not convey an additional right to vote. *See Tully v. Okeson*, 977 F.3d 608, 613 (7th Cir. 2020), *cert. denied*, 141 S. Ct. 2798, 210 L. Ed. 2d 930 (2021) (Goehre 2nd Aff. Ex. X) (absentee voting laws do not impact the "ability to exercise the fundamental right to vote.") As such, the fact that Wisconsin "accommodates some voters by permitting (not requiring) the casting of absentee . . . ballots, is an indulgence—not a constitutional imperative that falls short of what is required." *Crawford v. Marion Cty Election Bd.*, 553 U.S. 181, 209, 192–97, 128 S.Ct. 1610 (Scalia, J., concurring) (Goehre 2nd Aff. Ex. Y).

Wisconsin statutes also make clear that the statutory requirements governing the privilege to vote absentee are material and must be completely satisfied or ballots may not be counted. Wis. Stat. § 6.84(2). The witness certification requirements, Wis. Stat. § 6.87(4)(b)1, and the prohibition on counting any absentee ballot that is missing the witness address, set forth in Wis. Stat. § 6.87(6d), are mandatory. Such "mandatory" election requirements "must be strictly adhered

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to" and "strictly observed." *Teigen v. Wisconsin Elections Comm'n*, 2022 WI 64, ¶ 53, 976 N.W.2d 519, 539; *State ex rel. Ahlgrimm v. State Elections Bd.*, 82 Wis. 2d 585, 592–93, 263 N.W.2d 152 (1978). These are not "technical" or immaterial requirements, as Intervenors contend. Rather, the Legislature has made it abundantly clear that it is a material and mandatory requirement to the absentee voting process and, if the witness address is missing, the ballot will not be counted. That process, which is "carefully regulated" by the Legislature, is intended to "prevent the potential for fraud or abuse . . . or similar abuses." Wis. Stat. § 6.84(1).

II. LACHES IS INAPPLICABLE.

Intervenors also argue that laches bars the Plaintiffs' Complaint, relying on *Trump v. Biden* in their endeavor to dispose of this case. But, unlike the circumstances in *Trump v. Biden*, there is no evidence that Plaintiffs sat on their rights as it relates to the WEC guidance that will result in the illegal administration of the 2022 August primary and upcoming November election. Indeed, Plaintiffs acted proactively, before the elections, to file their Complaint and seek injunctive relief. This is entirely contrary to *Trump v. Biden*, which premised its application of laches because the former President did not assert his challenges prior to the election, but rather, only did so after the election concluded. *Trump v. Biden*, 2020 WI 91, ¶¶ 11-12, 394 Wis. 2d 629, 637, 951 N.W.2d 568, 572, *cert. denied*, 141 S. Ct. 1387, 209 L. Ed. 2d 128 (2021). In particular, the Supreme Court explained that it would "not allow persons to gamble on the outcome of an election contest and then challenge it when dissatisfied with the results, especially when the same challenge could have been made before the public is put through the time and expense of the entire election process." *Id.* ¶ 11 (quoting 29 C.J.S. Elections § 459 (2020)). Laches has no application here because Plaintiffs appropriately asserted their challenges before the August and November elections, and there is no delay. Issuing the injunction here is appropriate, regardless of the fact that WEC's

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guidance was not enjoined for the prior August primary election. *See also* Order, *Teigen v. WEC*, No. 2022AP91 (Supreme Ct. Wis. Feb. 11, 2022) (Goehre 2nd Aff. Ex. Z) (in denying the request to stay an injunction against use of absentee ballot drop boxes, the Supreme Court allowed WEC's guidance to remain for the primary on February 15, 2022, but enjoined it for the April 5, 2022 election).

Furthermore, WEC's guidance was at issue in mid-July when JCRAR reviewed and rejected WEC's proposed emergency rule incorporating its prior guidance. Indeed, immediately after the Legislature's rejection, WEC reaffirmed that its guidance was still in effect despite the Legislature's express rejection of it as being contrary to law, which put the guidance squarely at issue in the upcoming elections.

Lastly, applying the doctrine of laches is particularly inappropriate in matters of public interest. *Carlson v. Oconto Cty. Bd. of Canvassers*, 2001 WI App 20, 240 Wis. 2d 438, 443-44, 623 N.W.2d 195, 197-98 (citing *State ex rel. Pelishek v. Washburn*, 223 Wis. 595, 600, 270 N.W. 541 (1936)) (the public policy of the election statutes is that substantial violations of the election law should operate to vacate an election); *McNally v. Tollander*, 100 Wis. 2d 490, 507 (1981) (after forty percent of the electorate were issued the wrong ballot by their clerks, the Court found "the processes of the law [were] so infected as to require nullification of the election"). Based on the clear public and legislative interest in absentee ballot voting procedures, as set forth in Wis. Stat. § 6.84 (1), laches is inapplicable for this reason as well.

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III. IRREPARABLE HARM WILL RESULT WITHOUT AN INJUNCTION.

Plaintiffs have demonstrated WEC's guidance is contrary to law and, if such guidance remains in place as Wisconsin voters get ready to cast absentee ballots or head to the polls for the November 8, 2022 statewide election, it will result in irreparable harm. (Doc. No. 12 at 12-13).

One example of harm that Plaintiffs demonstrated is that, if the guidance, policies, and practices persist for another election, it would lead to the unequal administration of Wisconsin's election system, and Plaintiffs' votes will be diluted by votes that the Legislature has explicitly instructed should not count. Indeed, WEC's answer to the complaint confirms this harmful outcome. (Doc No. 118, WEC Answer ¶ 16) (admitting that some clerks followed its guidance while others did not). "Electoral outcomes obtained by unlawful procedures corrupt the institution of voting, degrading the very foundation of free government," and unlawful votes "pollute" lawful votes, "which in turn pollutes the integrity of the results." *Teigen v. Wisconsin Elections Comm'n*, 2022 WI 64, ¶ 25, 976 N.W.2d 519. There is no rectifying that, and as a consequence, there is no means to rectify an unlawfully diluted or polluted vote. This is irreparable harm. *State ex rel. Dep't of Nat. Res. v. Wisconsin Ct. of Appeals, Dist. IV*, 2018 WI 25, ¶ 47, 380 Wis. 2d 354, 909 N.W.2d 114 ("It is nearly tautological to observe that losing a statutorily-granted right is a harm. Losing the right with no means to recover it makes the harm irreparable."); *Pure Milk Prod. Co-op v. Nat. Farmers Org.*, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979) (an "injury is irreparable" where it is "not adequately compensable in damages").

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WEC argues that there is no evidence that Plaintiffs will vote in November and, therefore, there will be no harm. First, as noted above, the Court is within its power to consider the harm to all voters that will result if erroneous guidance remains in place for an upcoming election. It is well documented that municipal clerks rely on and implement WEC guidance. *Teigen*, 2022 WI 64, ¶ 166, (Hagedorn, J., concurring) ("many local election officials . . . are likely to rely on and implement [WEC's] erroneous advice"). Additionally, WEC has conceded that clerks have used, and continue to use, its 2016 guidance in upcoming elections (Doc. No. 11 at 45; Doc. No. 95 at 2; Doc. No. 118 ¶ 16), which will unquestionably impair the administration and integrity of our

elections if it is not enjoined. Second, the Plaintiffs have indicated that they intend to vote in the upcoming election, and that they did in fact vote in the August primary by absentee ballot submitted by mail. (Doc Nos. 2 ¶¶ 2-4, 10, 11). To the extent there was any doubt in that regard, Plaintiffs confirm that they will vote in November, by absentee ballot submitted by mail, utilizing a properly completed witness certification. (M. White 2nd Aff. ¶¶ 3-5; E. White 2nd Aff. ¶¶ 3-5).

WEC also argues that such harm is "too speculative." To the contrary, issuing an injunction to halt erroneous guidance that violates election laws to avoid voter harm is not only proper, it is required. Order, *Jefferson v. Dane Cnty.*, No. 2020AP557-OA (Supreme Ct. Wis. Mar. 31, 2020) (Goehre 2nd Aff. Ex. AA). In *Jefferson*, the petitioners sought leave to commence an original action against Dane County and its County Clerk, and they requested temporary injunctive relief ordering that the respondents remove their guidance indicating that voters could declare themselves indefinitely confined due to illness solely because of the Safer at Home Order. *Id* at 1-2. The injunction was sought just weeks before the April election and presidential primary. In issuing the injunction, the Court noted that the unlawful advice would harm voters since they "may be misled to exercise their right to vote in ways that are inconsistent with" the law. *Id*. at 3. *See also* (Doc. No. 47 at Order, *SEIU v. Vos*, No.2019AP622 (June 11, 2019)) (the "Legislature . . . and public suffer a substantial and irreparable harm" when agencies undo the Legislature's laws). The same will result here if an injunction is not issued. *Joint Sch. Dist. No. 1, City of Wisconsin Rapids v. Wisconsin Rapids Educ. Ass'n*, 70 Wis. 2d 292, 310–11, 234 N.W.2d 289, 300 (1975) (an "unlawful activity may be enjoined in the absence of an express showing of irreparable damage" since the unlawful activity reflects a "legislative . . . determination that such activity will cause irreparable harm to the public").

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IV. WISCONSIN ELECTION LAW, NOT WEC GUIDANCE, REFLECTS THE STATUS QUO, AND UPHOLDING THE STATUS QUO PROTECTS THE PUBLIC INTEREST.

WEC takes the position that the status quo is WEC's guidance, regardless of whether it is contrary to law or not. In doing so, it asks the Court to deny the requested injunction and allow WEC to enforce its unlawful guidance during the November election.[2] Contrary to WEC's assertion, the status quo is the statute—not the guidance that violates the statute, regardless of how long the violation has occurred. *Westinghouse Elec. Corp. v. Free Sewing Mach. Co.*, 256 F.2d 806, 808 (7th Cir. 1958) ("The status quo is the last uncontested status which preceded the pending controversy.") (Doc. No. 11, Ex. J). *See Wisconsin Rapids*, 70 Wis. 2d at 310–11 (an activity declared unlawful "reflects a legislative . . . determination that it would result in harm which cannot be countenanced by the public" and "therefore may be enjoined").

If WEC could insulate itself from injunctions by unilaterally issuing guidance on the eve of elections, then it would become a law unto itself. But that is the opposite of how the equitable analysis is supposed to work. Instead, the law, as enacted by the Legislature, constitutes the status quo and the guidance in conflict with that law contravenes the status quo. WEC's position flouts the bedrock rule that "[i]f an act of one party alters the relationship between that party and another, and the latter contests the action, the status quo cannot be the relationship as it exists after the action." 43A C.J.S. Injunctions § 27 (Goehre 2nd Aff. Ex. DD). It also ignores the rule that the status quo "must be lawful" and "thus cannot be a state of affairs that contravenes the law." *Id.* Any other approach would mean that, every year, WEC could rewrite the election code as the

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[2] Curiously, Intervenors fail to acknowledge that the portions of Wis. Stat. § 6.87(4)(b)1 and (6d), relating to witness certifications to an absentee ballot and that an absentee ballot must not be counted if it is missing witness address information, were enacted prior to WEC's guidance and it is WEC who attempted to change that status quo through its improper guidance.

elections approach, and then prevent any timely judicial relief by insisting that its new diktats suddenly became the "status quo."

In the election context especially, courts routinely reject attempts to treat as the status quo anything other than the law as enacted by state legislatures. *See, e.g.*, *Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring) (noting strong interest in preventing changes to "a state's election law in the period close to an election," and calling it "absurd" and "not the law" that a "late-breaking" non-legislative change to a "state election law" would itself be entitled to deference) (Goehre 2nd Aff. Ex. BB).

Moreover, voters would undoubtedly benefit from an order enjoining WEC's guidance for the upcoming November 2022 election, since voters maintain a substantial interest in preserving the integrity of the election process and maintaining confidence in the outcome of elections. As recently stated by the Wisconsin Supreme Court:

> Elections are one of the most important features of our Republic, and upholding the rules and procedures prescribed for elections, according to the laws enacted by the Legislature, reinforces the sanctity of the rule of law and reassures all Americans of the integrity of our elections.

Teigen, 2022 WI 64, ¶ 21. *See EU v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989) (there is a "compelling interest in preserving the integrity of [a State's] electoral process") (Goehre 2nd Aff. Ex. CC); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 197 (2008) ("public confidence in the integrity of the electoral process has independent significance") (Goehre 2nd Aff. Ex. Y); *Milwaukee Branch of NAACP v. Walker*, 2014 WI 98, ¶¶ 72-73, 357 Wis. 2d 469, 851 N.W.2d 262 (there is a "significant and compelling interest in protecting the integrity and reliability of the electoral process, as well as promoting the public's confidence in elections").

As such, the public interest would be further served here by an injunction ensuring that WEC abide by the procedures established by the Legislature. Without an injunction, voters will

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be exposed to the risk of elections conducted outside of the law as well as irreparable harm to their right to an undiluted or unpolluted vote. WEC has clearly demonstrated, through its actions and statements, that unless it is enjoined, it will continue to provide, and municipal clerks will continue to follow, unlawful guidance that will harm Wisconsin voters and seriously impair the integrity of our elections. Preventing non-uniform, disparate election policies and practice by municipal clerks and local election officials is of paramount importance to the public's interest in having elections that are administered properly and in accordance with the law.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court issue a temporary restraining order and permanent injunction against WEC's use, dissemination, publication, or application of WEC's guidance relating to missing or adding information to absentee ballot witness certifications.

Dated this 30th day of August, 2022.

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