

STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY
BRANCH 9

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

Plaintiffs,

Case No. 2022CV1008

v.

WISCONSIN ELECTIONS COMMISSION,

Defendant.

**PROPOSED INTERVENOR THE WISCONSIN STATE LEGISLATURE'S
MEMORANDUM IN SUPPORT OF ITS MOTION FOR A TEMPORARY
INJUNCTION OR, ALTERNATIVELY, FOR A WRIT OF MANDAMUS**

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

*Attorneys for the Wisconsin State
Legislature*

TABLE OF CONTENTS

INTRODUCTION	1
STATEMENT	2
A. WEC Issues The 2016 Witness Certificate Alteration Mandate	2
B. JCRAR Orders WEC To Promulgate A Rule To Codify The 2016 Witness Certificate Alteration Mandate, And Then JCRAR Strikes Down WEC's Rule.....	5
C. WEC Remarkably Declares That The 2016 Witness Certificate Alteration Mandate Is Still In Force	8
ARGUMENT	9
I. The Legislature Is Entitled To A Temporary Injunction Requiring Defendants To Comply With State Law	9
A. JCRAR Is Extremely Likely To Succeed On The Merits Of Its Claims, For Three Independently Sufficient Reasons	10
1. The 2016 Witness Certificate Alteration Mandate Is Unlawful Because Clerks Lack The Authority To Amend Absentee Ballots	10
2. The 2016 Witness Certificate Alteration Mandate Is Also Unlawful Because JCRAR Vetoed Emergency Rule 2209.....	13
3. The 2016 Witness Certificate Alteration Mandate Is Also Unlawful Because It Is A Rule Issued Without Following Rule Promulgation Procedures.....	16
B. WEC's Conduct Imposes Irreparable Harm On The Legislature, For Which There Is No Remedy At All.....	20
C. WEC Would Suffer No Harm From A Temporary Injunction	23
D. An Injunction Would Serve The Public's Interest.....	23
II. Alternatively, JCRAR Is Entitled To A Writ Of Mandamus.....	24
CONCLUSION.....	25

INTRODUCTION

In 2016, the Wisconsin Elections Commission (“WEC”) issued what it called a “guidance” document (hereinafter “2016 Witness Certificate Alteration Mandate” or “2016 Mandate”), which mandated that all county and municipal clerks unilaterally correct missing or insufficient witness addresses on absentee ballots, in violation of Wisconsin law. In 2022, the Legislature’s Joint Committee for Review of Administrative Rules (“JCRAR”) exercised its statutory authority to order WEC to promulgate a formal rule codifying the 2016 Mandate and then vetoed the near verbatim formal rule (“Emergency Rule 2209”) as unlawful. Remarkably, WEC then continued its unlawful conduct, advising all county and municipal clerks that this 2016 Witness Certificate Alteration Mandate remained in effect even after JCRAR’s veto of its proposed formal rule. Meanwhile, in Spring of 2022, the Legislature adopted a solution to the issue of insufficient or missing witness address information by passing a bill that made it easier for voters to address any such errors, but the Governor vetoed that bill for political reasons. The Legislature now moves for a temporary injunction or, in the alternative, a writ of mandamus, barring WEC’s continuation of the unlawful 2016 Mandate.

A temporary injunction is plainly warranted. The Legislature is extremely likely to succeed on the merits of its challenge to the 2016 Witness Certificate Alteration Mandate for multiple reasons, including because (1) the 2016 Mandate is inconsistent with election statutes, (2) its continued application unlawfully attempts to circumvent JCRAR’s veto of the substantively identical Emergency Rule 2209, and

(3) WEC unlawfully issued the 2016 Mandate without following mandatory rule promulgation procedures. Further, WEC's unlawful conduct in mandating an ultra vires ballot-witness-information-correction procedure on all county and municipal clerks imposes grave harms against the Legislature and the public interest by nullifying state election laws and infringing on the separation of powers.

The Legislature respectfully submits that timely relief is essential, given the necessity of ensuring ballot-correction procedures are lawful before absentee voters begin returning ballots to municipal clerks on September 22, 2022. *See* Wis. Stat. § 7.15(cm); Wis. Const. art. XIII, § 1. Further, no chance of voter or clerk confusion would arise from such immediate relief, as the August 9 primary election is now over. The Legislature also requests that this Court align the schedule for responsive briefing to this Motion with the motion-for-temporary-injunction briefing schedule the parties have stipulated to, such that all pending motions can be decided together.

STATEMENT¹

A. WEC Issues The 2016 Witness Certificate Alteration Mandate

Section 6.87 of the Wisconsin Statutes outlines the procedures and requirements for completing and counting absentee ballots in Wisconsin. Wis. Stat. § 6.87. Unless an absentee voter is in the military, is overseas, or resides at certain residential care facilities, Section 6.87 requires the absentee voter to mark and fold the absentee ballot in the presence of a witness and then place it within the official

¹ To avoid duplicative briefing, the Legislature recites the same Statement in its simultaneously filed Memorandum In Support Of Its Motion For A Temporary Injunction and its Memorandum In Support Of Its Motion To Intervene.

absentee-ballot envelope. *Id.* § 6.87(4)(b)(1); *see id.* § 6.875. Section 6.87 further provides that the witness must sign the absentee-ballot certificate printed on the absentee-ballot envelope, while also, generally, writing the witness’s address on the certificate. *Id.* § 6.87(2). Section 6.87 then provides that “[i]f a certificate is missing the address of a witness, the ballot may not be counted.” *Id.* § 6.87(6d) (emphasis added). Section 6.87 contains a remedial provision related to the certificate on the absentee-ballot envelope: *if a clerk “receives an absentee ballot with an improperly completed certificate or with no certificate, the clerk may return the ballot to the elector,” but only if “time permits the elector to correct the defect and return the ballot within the period authorized under sub. (6).”* *Id.* § 6.87(9) (emphasis added).

During the Fall 2016 election cycle, WEC issued the 2016 Witness Certificate Alteration Mandate, which requires that Wisconsin’s county and municipal clerks alter unilaterally the information on absentee ballots, purporting to create a non-statutory addition to Sections 6.87(6d) and (9). Dated October 18, 2016, and entitled “Missing or Insufficient Witness Address on Absentee Certificate Envelopes,” the 2016 Mandate creates an alternative procedure for “remedy[ing]” any “witness address error[s]” on the certificates of submitted absentee ballots. Wis. Elections Comm’n, *Amended: Missing or Insufficient Witness Address on Absentee Certificate Envelopes* (Oct. 18, 2016).² Specifically, under the 2016 Mandate, “clerks *must* take corrective actions in an attempt to remedy a witness address error.” *Id.* (emphasis

² Available at <https://elections.wi.gov/memo/amended-missing-or-insufficient-witness-address-absentee-certificate-envelopes> (all websites last visited on August 10, 2022).

added). The 2016 Mandate states that “clerks are not required to contact the voter before making that correction directly to the absentee certificate envelope” if the clerks “are reasonably able to discern any missing information from outside sources.” *Id.* While clerks have the option to “contact voters and notify them of the address omission,” “contacting the voter is only required if clerks cannot remedy the address insufficiency from extrinsic sources.” *Id.* The 2016 Mandate contains a non-exhaustive list of ways a clerk may “reasonably . . . obtain any missing part of the witness address,” including, among others, that the clerk may supply such information him- or herself where “[t]he clerk has personal knowledge of the witness and knows his/or [sic] her address.” *Id.* The 2016 Mandate *requires* clerks to amend absentee-ballot certificates to supplement witness identification information. *Id.*

The 2016 Mandate also details the specific steps that clerks must take when supplementing witness information, requiring clerks to alter physically the ballot and then “initial[] next to the information that was added.” *Id.* And while WEC acknowledges “the concern some clerks have expressed about altering information on the certificate envelope, especially in the case of a recount,” the 2016 Mandate provides that “in order to promote uniformity in the treatment of absentee ballots statewide,” all “clerks must attempt to obtain any information that is missing from the witness address and document any addition by including their initials.” *Id.*

The Legislature is aware that absentee witnesses sometimes make errors, and has sought to make it easier for voters themselves to cure this problem, but Governor Evers thwarted the Legislature’s efforts. In 2021, the Legislature voted for 2021

Senate Bill 935, which would have required a clerk who “receives an absentee ballot with an improperly completed certificate or with no certificate,” to “post a notification of the defect on the elector’s voter information page on the Internet site that is used by electors for original registration,” thereby notifying the elector of the need for additional action. S.B. 935 § 4, 2021 Leg. The Act also would have allowed clerks to “attempt to notify the elector of the defect by other means.” *Id.* Critically, both methods assist the voters themselves, not election clerks, to address any witness errors. The State Senate and State Assembly both voted for this bill, but Governor Evers vetoed it in April 2022. *See* Wis. St. Leg. 2021–2022, S.B. 935.³

B. JCRAR Orders WEC To Promulgate A Rule To Codify The 2016 Witness Certificate Alteration Mandate, And Then JCRAR Strikes Down WEC’s Rule

JCRAR is a bipartisan standing committee empowered by statute to review rules promulgated by state agencies. Wis. Stat. § 13.56; *see* Wis. Stat. §§ 227.19, 227.24, 227.26. JCRAR may both order state agencies to promulgate claimed guidance or policy statements as formal rules and, if JCRAR chooses, suspend agency rules after a post-promulgation review. Wis. Stat. §§ 227.19(4)(d), 227.26(2)(b), (d). That is, if JCRAR determines that “a statement of policy or an interpretation of a statute meets the definition of a rule, it may direct the agency to promulgate the statement or interpretation as an emergency rule under s. 227.24(1)(a) within 30 days.” Wis. Stat. § 227.26(2)(b). And JCRAR “may suspend any rule by a majority vote of a quorum of the committee,” after a public hearing, *id.* § 227.26(2)(d), if JCRAR

³ Available at <https://docs.legis.wisconsin.gov/2021/proposals/reg/sen/bill/sb935>.

determines that an agency rule “fail[s] to comply with legislative intent” or was promulgated without “statutory authority,” among other reasons, *id.* § 227.19(4)(d).

On January 10, 2022, JCRAR acted under its clear statutory power to require WEC “to show statutory authority for its guidance regarding completeness of addresses and correction of errors and omissions on absentee ballots [i.e., the 2016 Mandate] and promulgate it as an emergency rule or cease issuing such guidance to clerks.” Ex. 1 at 1 to Affidavit of Misha Tseytlin (“Tseytlin Aff.”) (JCRAR Notification Letter to WEC, (Jan. 10, 2022) (hereinafter “JCRAR Notification Letter”)). JCRAR also notified WEC in its Notification Letter that WEC could not advance an emergency rule or direct this action by clerks unless the agency could show statutory authority to do so. *Id.* at 2.

After receiving the JCRAR Notification Letter, WEC scrapped its prior plans to draft a scope statement on the 2016 Mandate’s promulgation *and* “on the best alternative to existing guidance,” i.e., the 2016 Mandate itself, and instead proceeded only on promulgation of the 2016 Mandate. *See* Wis. Elections Comm’n, Statement of Scope: Emergency Rule Relating To Correction of Absentee Ballot Certificate Envelopes (Feb. 3, 2022) (hereinafter “WEC Scope Statement” or “Scope Statement”);⁴ *see generally* Wis. Stat. § 227.135 (scope statements are a necessary preliminary step in the rule-promulgation process). On February 3, 2022, WEC published this Scope Statement after securing the Governor’s approval, with the Commission formally

⁴ Available at https://docs.legis.wisconsin.gov/code/register/2022/794a1/register/ss/ss_009_22/ss_009_22.

adopting the statement at its March 9, 2022, meeting. Wis. Elections Comm’n, Emergency Rule 2209 (July 18, 2022) (hereinafter “Rule” or “Emergency Rule 2209”).⁵ WEC’s Scope Statement notes its intent to “codify longstanding guidance” about missing or insufficient witness addresses “into a formal rule.” WEC Scope Statement, *supra*. Thus, exactly as in the 2016 Mandate, the Scope Statement explains that, under the proposed rule, “clerks must take corrective actions to remedy a witness address error,” and “[i]f clerks are able to discern any missing information from outside sources, clerks are not required to contact the voter before making that correction directly to the absentee certificate envelope.” *Id.*; *see* 2016 Mandate, *supra*. In support, WEC claimed it had authority to enact the 2016 Mandate as a formal rule based upon Wis. Stat. §§ 5.05(1), 6.869, 7.08(3), and 227.11(2)(a). WEC Scope Statement, *supra*; *but see infra* Part I.A.1.

On July 18, WEC filed Emergency Rule 2209 with the Legislative Reference Bureau. Emergency Rule 2209, *supra*. Mirroring the 2016 Mandate, the Rule required clerks to unilaterally amend witness information on absentee-ballot certificates. *Compare* Emergency Rule 2209, *supra*, *with* 2016 Mandate, *supra*.

On July 20, 2022, JCRAR held a public hearing on Emergency Rule 2209, and then JCRAR voted to suspend the Rule “on the grounds that the rule conflicts with state law and fails to comply with legislative intent.” JCRAR, Record of Committee

⁵ Available at https://docs.legis.wisconsin.gov/code/register/2022/799a3/register/emr/emr2209_rule_text/emr2209_rule_text.

Proceedings (July 20, 2022).⁶ WEC “exceeded the provisions of state law and acted in violation of the limited delegation of authority granted to it by the legislature” by “improperly authoriz[ing] municipal clerks” to correct ballot information “without the knowledge of the voter or the voter’s witness.” Sen. Steve Nass, Press Release, JCRAR Suspends WEC Emergency Rule on Absentee Ballot Certification Curing (July 20, 2022) (hereinafter “Sen. Nass Press Release”).⁷ The Emergency Rule unlawfully “mandates municipal clerks to take certain actions in processing the incomplete absentee ballot certifications directly in conflict with the optional language in state law.” *Id.* “[S]tate law makes clear that if an absentee ballot certification is missing elements, it can only be corrected by the voter or the voter’s witness . . . The WEC emergency rule was an attempt to circumvent state law.” *Id.*

C. WEC Remarkably Declares That The 2016 Witness Certificate Alteration Mandate Is Still In Force

Following JCRAR’s vote to suspend the Rule, WEC issued a statement on its public website, communicating its position that the 2016 Witness Certificate Alteration Mandate remains in force. Wis. Elections Comm’n, *Statement Regarding JCRAR Emergency Rule Suspension* (July 25, 2022).⁸ WEC claimed that because its

⁶ Available at https://docs.legis.wisconsin.gov/code/register/2022/799b/register/actions_by_jcrar/actions_taken_by_jcrar_on_july_20_2022_emr2209/actions_taken_by_jcrar_on_july_20_2022_emr2209.

⁷ Available at <https://legis.wisconsin.gov/senate/11/nass/news/press-releases/jcrar-suspends-wec-emergency-rule-on-absentee-ballot-certification-curing/>.

⁸ Available at <https://elections.wi.gov/news/statement-regarding-jcrar-emergency-rule-suspension>.

“Commissioners have not yet authorized retracting the Commission’s separate 2016 Guidance on Absentee Ballot Certificate Correction, upon which the 2022 emergency rule was based,” the 2016 Mandate “continues to remain intact, as it has since 2016.” *Id.* WEC justified this conclusion by explaining that “actions of the Commission require a two-thirds vote of Commission members” under Wisconsin law, and its members “have not yet met to discuss the recent [JCRAR] vote . . . suspending the WEC’s 2022 emergency rule.” *Id.* WEC also expressed that while the “Commissioners *may* meet to discuss the JCRAR’s vote or to take further action on the Commission’s 2016 guidance,” “[a]s with any decision, Wisconsin’s local clerks, along with their legal counsel, can consider the recent legislative committee activity as they plan for upcoming elections.” *Id.* (emphasis added).

ARGUMENT

I. The Legislature Is Entitled To A Temporary Injunction Requiring Defendants To Comply With State Law

While the Wisconsin Supreme Court has phrased the factors for awarding equitable relief in various different ways over the years, most recently, the Court articulated four “interrelated” traditional factors that courts must consider when deciding whether to issue equitable relief: (1) movant’s likelihood of success; (2) irreparable harm to movant in the absence of a temporary injunction; (3) whether there will be harm to the opposing party; and (4) whether the public interest favors

relief. *Waity v. LeMahieu*, 2022 WI 6, ¶ 49, 400 Wis. 2d 356, 969 N.W.2d 263.⁹ The Legislature has made each of these showings.

A. JCRAR Is Extremely Likely To Succeed On The Merits Of Its Claims, For Three Independently Sufficient Reasons

1. The 2016 Witness Certificate Alteration Mandate Is Unlawful Because Clerks Lack The Authority To Amend Absentee Ballots

a. Wisconsin courts have a “solemn obligation” to “faithfully give effect to the laws enacted by the legislature, and to do so requires a determination of statutory meaning.” *Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. When a court interprets statutes, it must “begin[] with the language of the statute.” *Id.* ¶ 45 (citation omitted). A court must generally give statutory language its “common, ordinary, and accepted meaning”—and if that meaning is “plain,” the inquiry often stops there. *Id.* Because statutory interpretation involves “the ascertainment of meaning, not a search for ambiguity,” courts must also consider the context in which the language is used, must “avoid absurd or unreasonable results,” and may consult statutory history. *Id.* ¶¶ 46–48 (citations omitted); *Richards v. Badger Mut. Ins. Co.*, 2008 WI 52, ¶ 22, 309 Wis. 2d 541, 749 N.W.2d 581; *State v. Cox*, 2018 WI 67, ¶ 10, 382 Wis. 2d 338, 913 N.W.2d 780. Finally, where a statute specifically addresses an issue, the statute controls. *See State v. Fitzgerald*, 2019 WI 69, ¶ 30, 387 Wis. 2d 384, 929 N.W.2d 165.

⁹ The Court also added that, “[a]t times, this court has also noted that [t]emporary injunctions are to be issued only when necessary to preserve the status quo.” *Waity*, 2022 WI 6, ¶ 49 (citation omitted). The Legislature respectfully submits that the status quo should be considered from the statutory status quo, not from WEC’s unlawful recent practices.

Agencies are “creations of the legislature” and “can exercise only those powers granted by the legislature.” *Martinez v. Dep’t of Indus., Lab. & Hum. Rels.*, 165 Wis. 2d 687, 478 N.W.2d 582 (1992); *accord Teigen v. Wis. Elections Comm’n*, 2022 WI 64, ¶ 52, 976 N.W.2d 519 (“WEC must follow Wisconsin statutes.”). As “legislative creation[s],” agencies have “no inherent constitutional authority to make rules” or take other action—and without clear statutory authorization, they cannot promulgate rules or guidance with the force of law. *Martinez*, 165 Wis. 2d at 698.

b. Section 6.87’s mandatory procedures for correcting witness information on absentee ballots could not be more “plain,” *Kalal*, 2004 WI 58, ¶ 45, and both the 2016 Mandate and Emergency Rule 2209 direct clerks to violate those procedures, contrary to law. Section 6.87 gives clerks two options when they encounter ballots with errors or omissions in the witness information on the absentee-ballot certificate. First, Section 6.87(9) states that “the clerk may return the ballot to the elector, inside the sealed envelope when an envelope is received, together with a new envelope if necessary.” Wis. Stat. § 6.87(9). Clerks may only utilize this sole remedial approach “whenever time permits the elector to correct the defect and return the ballot within the period authorized.” *Id.* Second, if there is insufficient time for a voter to “correct the defect and return the ballot,” *id.*, then Section 6.87 requires clerks to reject the ballot, because “[i]f a certificate is missing the address of a witness, the ballot may not be counted.” *Id.* § 6.87(6d). The practice that the 2016 Mandate and Emergency Rule 2209 require directs clerks to take actions other than those provided in Section 6.87, and so is unlawful. No law allows clerks to amend absentee-ballot

certificates for voters instead of allowing voters to make any corrections themselves. *See Teigen*, 2022 WI 64, ¶¶ 54, 58. The 2016 Mandate and Emergency Rule 2209 unlawfully require clerks to “take corrective actions to remedy a witness address error,” and allowing alterations of ballot information without voter involvement or consent. *See WEC Scope Statement, supra; see also 2016 Mandate, supra.*

Because the practice underlying the WEC-imposed requirements is contrary to law, these unlawful requirements are void in all their forms, regardless of the vehicle WEC utilizes to impose them—including the 2016 Mandate and the now-suspended Emergency Rule 2209. “WEC must follow Wisconsin statutes,” *Teigen*, 2022 WI 64, ¶ 52, and cannot supplement statutory language to create authority where none exists, *Martinez*, 165 Wis. 2d at 697; *Teigen*, 2022 WI 64, ¶ 54.

c. None of the provisions that WEC cited in its Scope Statement empower WEC to allow Wisconsin clerks to take the illegal actions that the 2016 Mandate and Emergency Rule 2209 seek to require. *See WEC Scope Statement, supra.* First, under Section 5.05(1), WEC may “[p]romulgate rules under ch. 227 applicable to all jurisdictions for the purpose of interpreting or implementing the laws regulating the conduct of elections or election campaigns,” but the Legislature’s commands in Subsections 6.87(6d) and (9) control over Section 5.05(1)’s general grant of authority. *See id.; E.g., Martineau v. State Conservation Comm’n*, 46 Wis. 2d 443, 449, 175 N.W.2d 206 (1970); *see also* Wis. Stat. § 227.10(2m). Second, Section 6.869 requires WEC to “prescribe uniform instructions for municipalities to provide to absentee electors,” which instructions must “include information concerning the procedure for

correcting errors in marking a ballot and obtaining a replacement for a spoiled ballot,” Wis. Stat. § 6.869, but this provision cuts against WEC because WEC is giving *illegal* instructions. Third, WEC’s reliance on Section 7.08(3) is illogical, as that provision only describes WEC’s responsibility for “[p]repar[ing] and publish[ing]” “an election manual written so as to be easily understood by the general public explaining the duties of the election officials.” *Id.* § 7.08(3). Fourth, Section 227.11(2)(a) does not support WEC, as that Section only allows agencies to promulgate rules, and “a rule is not valid if the rule exceeds the bounds of correct interpretation” of a statute. *Id.* § 227.11(2)(a). Here, WEC’s 2016 Mandate directly contradicts the plain language of Section 6.87, *Kalal*, 2004 WI 58, ¶¶ 45–46; *supra* pp. 11–12, and so is invalid under Section 227.11(2)(a).

2. The 2016 Witness Certificate Alteration Mandate Is Also Unlawful Because JCRAR Vetoed Emergency Rule 2209

a. Section 227.26(2) authorizes JCRAR to review rules promulgated by agencies and temporarily suspend those rules if, after a public hearing, JCRAR determines that the rule implicates one of the considerations enumerated in Section 227.19(4)(d). Wis. Stat. § 227.26(2); *see also Martinez*, 165 Wis. 2d at 701. As relevant, JCRAR may suspend a rule promulgated in the absence of statutory authority, which fails to comply with legislative intent, or which conflicts with state law. Wis. Stat. § 227.19(4)(d). This JCRAR-suspension-power statute reflects the constitutional principle that, “[a]s a matter of public policy, it is incumbent on the legislature, pursuant to its constitutional grant of legislative power, to maintain some legislative accountability over rule-making.” *Martinez*, 165 Wis. 2d at 701.

An agency may not circumvent JCRAR's rule-suspension authority by enforcing the substance of a suspended rule under the guise of a claimed guidance document. Agencies are legislative creations, vested *solely* with the powers delegated to them by the Legislature. *Martinez*, 165 Wis. 2d at 697. As a result, agencies “cannot, at any time, possess powers superior to” the Legislature itself. *Milwaukee v. Railroad Comm’n*, 182 Wis. 498, 501, 196 N.W. 853 (1924). Thus, when JCRAR exercises its statutory rule-suspension power and commands an agency to cease the underlying action or practice, and the agency continues to engage in the underlying action or practice under the façade of nonbinding guidance, the agency violates the law. *See Martinez*, 165 Wis. 2d at 698. Indeed, in *Martinez*—where the Department of Industry, Labor, and Human Relations disagreed with JCRAR's rejection of a new rule and “notified Wisconsin employers that they should ignore the changes made by JCRAR,” *id.* at 692–93—the Supreme Court explained that an agency “does not have the authority to declare JCRAR's rule changes void,” *id.* at 698–99; *accord Teigen*, 2022 WI 64, ¶ 52, as WEC did here. Any other interpretation impermissibly renders the rule-suspension power superfluous. *Kalal*, 2004 WI 58, ¶ 46.

b. WEC's continued enforcement of the 2016 Witness Certificate Alteration Mandate defies JCRAR's oversight authority, in violation of the law and core separation-of-powers principles. JCRAR declared the 2016 Mandate a rule on January 10, 2022, and ordered WEC to promulgate it as an emergency rule pursuant to Wis. Stat. § 227.26(2)(b). JCRAR Notification Letter, *supra*. WEC promulgated Emergency Rule 2209 on July 18, 2022, which Rule mirrors the instructions

contained in the 2016 Mandate. Emergency Rule 2209, *supra*. Following a public hearing on July 20, 2022, JCRAR exercised its authority under Section 227.26(2)(d) and suspended the Rule codifying the 2016 Mandate. JCRAR, Record of Committee Proceedings, *supra*. Despite JCRAR’s suspension, WEC announced, on July 25, 2022, that the 2016 Witness Certificate Alteration Mandate—a mandate *substantively identical* to Emergency Rule 2209—“remain[s] intact.” WEC, Statement Regarding JCRAR Emergency Rule Suspension (July 25, 2022).¹⁰

WEC’s conduct is clearly unlawful. JCRAR suspended Emergency Rule 2209 based on JCRAR’s conclusion that the Rule’s manual-correction practice “conflicts with state law and fails to comply with legislative intent.” JCRAR, Record of Committee Proceedings, *supra*. Yet the 2016 Witness Certificate Alteration Mandate requires clerks to engage in that *exact same practice*, so the 2016 Mandate also necessarily “conflicts with state law and fails to comply with legislative intent.” *Id.* In other words, because both Emergency Rule 2209 and the 2016 Mandate require clerks to correct deficient absentee ballots, both actions conflict with “current state law[, which] makes clear that if an absentee ballot certification is missing elements, it can only be corrected by the voter or the voter’s witness.” *See* Sen. Nass Press Release, *supra*. Allowing WEC to re-implement the 2016 Mandate would allow the agency to completely ignore JCRAR’s rejection of the manual-absentee-ballot-correction procedures. That result is clearly absurd, *see Kalal*, 2004 WI 58, ¶ 46, as

¹⁰ Available at <https://elections.wi.gov/news/statement-regarding-jcrar-emergency-rule-suspension>.

it would frustrate the Legislature's decision to vest JCRAR with rule-suspension power, negate the Legislature's ability to provide a check on unbridled agency action, and threaten the separation of powers, *see, e.g., Martinez*, 165 Wis. 2d at 698.

Nor does it matter that WEC claimed the 2016 Mandate must continue because its members had “not yet met to discuss” JCRAR's rejection of Emergency Rule 2209, and any action retracting the 2016 Mandate would “require a two-thirds vote of Commission members.” Wis. Elections Comm'n, *Statement Regarding JCRAR Emergency Rule Suspension, supra*. By law, WEC's internal operating procedures necessarily cede to statutory requirements as the Legislature has constitutional authority to “place limitations and conditions on an agency's exercise of rulemaking authority, including establishing the procedures by which agencies may promulgate rules,” including the requirements of Chapter 227. *Koschkee v. Taylor*, 2019 WI 76, ¶¶ 20–21, 387 Wis. 2d 552, 929 N.W.2d 600.

3. The 2016 Witness Certificate Alteration Mandate Is Also Unlawful Because It Is A Rule Issued Without Following Rule Promulgation Procedures

a. Chapter 227 sets forth specific processes and requirements that govern agencies' exercise of delegated rulemaking duties. *See Wis. Realtors Ass'n v. Pub. Serv. Comm'n*, 2015 WI 63, ¶¶ 97–98, 363 Wis. 2d 430, 867 N.W.2d 364. Under Chapter 227, a “rule” is “a regulation, standard, statement of policy, or general order of general application that has the force of law” from an agency that “implement[s], interpret[s], or make[s] specific legislation enforced or administered by the agency.” Wis. Stat. § 227.01(13). Chapter 227 also provides for “emergency rule[s]” and

establishes specific procedures that the agency must follow for their promulgation. Wis. Stat. § 227.24(1). Those procedures include submission and publication of a scope statement before promulgation, Wis. Stat. § 227.24(1)(e), and then submission of the emergency rule to JCRAR for post-promulgation review, Wis. Stat. § 227.26(2)(d); *see also id.* § 227.19(4)(d)(1), (3), (6). If an agency promulgates a “rule” without complying with Chapter 227’s requirements, then that rule “is unenforceable” and invalid. *Wis. Legis. v. Palm*, 2020 WI 42, ¶ 58, 391 Wis. 2d 497, 942 N.W.2d 900. These statutory rule-making procedures offer vital procedural safeguards against an agency’s imposition of “arbitrary, unreasonable or oppressive” policy choices. *Id.* ¶ 34 (citation omitted).

The Supreme Court has articulated a five-part test for determining whether an agency’s “order” or “guidance” is a “rule” under Section 227.24(1). *Id.* ¶ 22. First, the order must be “a regulation, standard, statement of policy or general order,” *id.* (citation omitted), all of which include formal “agency action[s].” *Id.* ¶ 23 (citation omitted). Second, the order must be “of general application.” *Id.* ¶ 22 (citation omitted). This element “focus[es] . . . on the people who [are] regulated by the order . . . not on the type of factual circumstances that led to the [agency’s] order.” *Id.* (citation omitted). An order satisfies this element if “the class of people regulated . . . is described in general terms and new members can be added to the class,” *id.* (citation omitted), but not if the order applies only “to a specifically named person or to a group of specifically named persons,” *id.* ¶ 17 (citation omitted). Third and fourth, the order must “hav[e] the effect of law” and be “issued by an agency.” *Id.* ¶ 22 (citing *Citizens*

for Sensible Zoning, Inc. v. Dep't of Nat. Res., Columbia Cnty., 90 Wis. 2d 804, 814–16, 280 N.W.2d 702 (1979)). An order has “the effect of law” when “sanctions can result as a violation” or “where the interest of individuals in a class can be legally affected through enforcement of the agency action,” *Cholvin v. Wis. Dep't of Health & Fam. Servs.*, 2008 WI App 127, ¶ 26, 313 Wis. 2d 749, 758 N.W.2d 118. And it is “issued by an agency” when the promulgating entity is a state agency, *see Citizens for Sensible Zoning*, 90 Wis. 2d at 816. Fifth, and finally, the order must “implement, interpret or make specific legislation enforced or administered by such agency.” *Palm*, 2020 WI 42, ¶ 22 (citation omitted). An order qualifies under this element if it embodies the “subjective judgment” of the agency, imposing the agency’s own policy decisions as opposed to the Legislature’s “mature consideration,” as expressed in the statute. *Id.* ¶ 28 (citations omitted).

And a so-called “guidance” satisfying the test for whether agency action is a rule is void for failure to comply with all applicable rulemaking procedures, such as notice and comment. *See id.* ¶¶ 15, 21–22.

b. The 2016 Witness Certificate Alteration Mandate is an unlawfully promulgated rule, as it satisfies all five elements of the Supreme Court test for a rule.

First, the 2016 Mandate is a formal “agency action,” issued by WEC. *Wis. Elections Comm’n, Amended: Missing or Insufficient Witness Address on Absentee Certificate Envelopes, supra.* The 2016 Mandate, issued by the WEC Administrator on official WEC letterhead, explicitly requires that all “clerks” must “do all that they

can reasonably do to obtain any missing part of the witness address,” *id.*, and thus it is, at an absolute minimum, a “statement of policy” by WEC, *Palm*, 2020 WI 42, ¶ 22.

Second, the 2016 Mandate is “of general application,” *id.* ¶ 17, because it purports to control clerks’ conduct on a statewide basis, Wis. Elections Comm’n, *Amended: Missing or Insufficient Witness Address on Absentee Certificate Envelopes, supra*. The 2016 Mandate applies to *all* municipal and county clerks, and to all absentee ballots (and so all absentee voters), *id.*, so it clearly “describe[s] in general terms” the class of persons regulated, and “new members could be added to the class” if, for example, a new clerk is elected/appointed or an elector decides to vote absentee in upcoming elections, *Palm*, 2020 WI 42, ¶¶ 22, 23.

Third and fourth, the 2016 Mandate has “the effect of law” and was “issued by an agency.” *Id.* ¶ 22. The 2016 Mandate requires clerks to “take corrective actions in an attempt to remedy a witness address error.” Wis. Elections Comm’n, *Amended: Missing or Insufficient Witness Address on Absentee Certificate Envelopes, supra*. It provides that clerks “*shall* assist in rehabilitating” deficient absentee ballots, and states that they “*must* attempt to obtain any information that is missing from the witness address.” *Id.* (emphases added). The 2016 Mandate thus imposes mandatory requirements that WEC invented, and implicates the “interest[s]” of all voters as “a class” through the enforcement of agency action, by contradicting the Legislature’s election-security statutes for absentee ballots. *Cholvin*, 2008 WI App 127, ¶¶ 26, 29. Further, WEC is “an agency” that issued the 2016 Mandate. *Palm*, 2020 WI 42, ¶ 22.

Finally, the 2016 Mandate “implement[s], interpret[s] or make[s] specific legislation enforced or administered” by WEC, rather than simply enforcing statutes within that agency’s purview. *Id.* (citation omitted). WEC issued the 2016 Mandate to control municipal clerks’ interpretation of Section 6.87(6d). Section 6.87(6d) does not require or even suggest that clerks manually correct deficient ballot certificates. Thus, the 2016 Witness Certificate Alteration Mandate’s manual-correction requirements are entirely a product of WEC’s “subjective judgment,” rather than the Legislature’s “mature” judgment. *Palm*, 2020 WI 42, ¶¶ 27–28.

Even though the 2016 Mandate is clearly a “rule” under Section 227.24(1), WEC never formally promulgated it in compliance with all Chapter 227 requirements, and so it “is unenforceable” and invalid. *Palm*, 2020 WI 42, ¶ 58. WEC neither prepared a scope statement before issuing the 2016 Mandate nor “h[e]ld a preliminary public hearing and comment period” on the scope statement, as Section 227.136 requires. *See* Wis. Stat. § 227.136(1). And WEC never prepared a scope statement, submitted the 2016 Mandate for the Governor’s approval, or held a post-promulgation public hearing. *See id.* § 227.19(2), (4). Instead, WEC ignored all of the mandatory rule-making procedures and imposed the 2016 Mandate on municipal clerks under the guise of a guidance document.

B. WEC’s Conduct Imposes Irreparable Harm On The Legislature, For Which There Is No Remedy At All

WEC’s continuing enforcement of the 2016 Mandate is irreparably harming the Legislature by (1) nullifying state law; (2) circumventing the Legislature’s duty

to oversee agency action; and (3) undermining Wisconsin's election laws, and no remedy at law (such as money damages) can alleviate these harms.

By contravening Section 6.87's absentee-ballot-correction requirements, WEC's conduct effectively nullifies portions of that statute. The Legislature suffers "substantial and irreparable harm of the first magnitude" when agencies purport to nullify the Legislature's laws. *See* Tseytlin Aff. Ex. 2 at 8 (Order, *SEIU v. Vos*, No.2019AP622 (June 11, 2019) ("*SEIU* Stay Order")); *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018). That harm is more acute where, as here, the law the agency purports to nullify is a grant of power to the Legislature. *See SEIU, Local 1 v. Vos*, 2020 WI 67, ¶ 119, 393 Wis. 2d 38, 946 N.W.2d 35. Here, WEC's claim that the 2016 Mandate remains in effect, despite the suspension of Emergency Rule 2209, nullifies Sections 6.87's exclusive requirements for the correction and treatment of deficient absentee ballots, *supra* pp. 10–12, and so inflicts *per se* irreparable harm to the Legislature, *SEIU* Stay Order at 8; *Abbott*, 138 S. Ct. at 2324 n.17.

WEC's conduct also threatens vital procedural safeguards designed to protect the separation of powers "inherent in the Wisconsin Constitution." *Palm*, 2020 WI 42, ¶ 13. Rather than accept JCRAR's conclusion that Emergency Rule 2209's mandatory-correction requirements were unlawful as required by Wisconsin law and the Constitution, WEC re-imposed those *exact same requirements* under the guise of the 2016 Mandate. In doing so, 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. WEC's action deprived JCRAR of its statutory power to suspend agency rules, and so undermines JCRAR's authority on an ongoing basis. Absent a temporary injunction, not only will JCRAR be prevented from ensuring that WEC's policies are consistent with Wisconsin's elections statutes, but WEC's actions will impinge upon the Legislature's authority to rein in unbridled agency action, as envisioned by Wisconsin's constitutional design.

And given that the "State indisputably has a compelling interest in preserving the integrity of its election process," *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989), the Legislature would suffer an especially grave injury in the absence of an injunction in this case. Sections 6.87(6d) and (9) are products of the Legislature's desire to stave off the "serious problem" of "[v]oting fraud," which is exasperated by "absentee voting," *Griffin v. Roupas*, 385 F.3d 1128, 1130–31 (7th Cir. 2004), given that "voting by mail makes vote fraud much easier," *Nader v. Keith*, 385 F.3d 729, 734 (7th Cir. 2004). Recognizing the importance of ensuring access to the ballot box, the Legislature recently attempted to amend these statutes to make it *easier* for voters themselves to address absentee ballot certificate deficiencies while also protecting against potential fraud. *See* Wis. St. Legs. 2021–2022, Senate Bill 935. Despite the Legislature's efforts, Governor Evers vetoed the bill earlier this year. *Id.* Nevertheless, the elections laws themselves are the province of the Legislature, not of agencies. Thus, WEC has no authority to substitute its own

judgment for that of the Legislature and to instruct clerks to manually correct absentee ballot certificates in defiance of Wisconsin law.

C. WEC Would Suffer No Harm From A Temporary Injunction

WEC will not suffer any harm if an injunction issues. *Waity*, 2022 WI 6, ¶ 49. A temporary injunction blocking the 2016 Witness Certificate Alteration Mandate would merely require WEC to comply with the State's existing election laws. The injunction would in no way impede WEC's authority to oversee the fairness and integrity of the electoral process, in compliance with state law, 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.

D. An Injunction Would Serve The Public's Interest

The public interest strongly favors temporary injunctive relief here. WEC's announcement that the 2016 Mandate remains in effect nullifies long-standing election laws concerning absentee ballot correction, which laws are designed to safeguard the integrity of the electoral process and the franchise of all Wisconsin voters. Wis. Stat. § 6.87(6d), (9). Relatedly, WEC's conduct effectively nullifies JCRAR's authority, under Section 227.26(2)(b), to temporarily suspend agency rules. Such nullification, of course, always 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. Therefore, the public would clearly benefit from

an order enjoining WEC from blatantly defying JCRAR's suspension of Emergency Rule 2209 by instructing clerks to continue the unlawful practice of correcting absentee ballot information under the 2016 Mandate, particularly in light of the overwhelming importance of ensuring fair and free elections in the state of Wisconsin.

The public would also benefit from this Court granting immediate relief for the 2022 November election. The public maintains a strong "interest in preserving the integrity of its 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, *Walker*, 2014 WI 98, ¶ 72. Allowing WEC to continue to flout election laws with its openly unlawful 2016 Mandate harms the public interests applicable to electoral processes. Thus, the public interest further supports immediate relief now, in time for the 2022 general election.

II. Alternatively, JCRAR Is Entitled To A Writ Of Mandamus

Mandamus is "a remedy that can be used to compel a public officer to perform a duty of his office presently due to be performed." *Voces De La Frontera, Inc. v. Clarke*, 2017 WI 16, ¶ 11, 373 Wis. 2d 348, 891 N.W.2d 803 (citation omitted). This Court may issue a writ of mandamus when a plaintiff shows: (1) that it possesses a "clear legal right"; (2) that a state actor has violated a "positive and plain duty" under the law; (3) that this violation causes "substantial damages"; and (4) that "no other adequate remedy at law" exists. *See id.* (citations omitted); *see generally* Wis. Stat. §§ 783.01 *et seq.*, 801.02(5). The elements of mandamus relief largely overlap with those of temporary-injunctive relief. *Compare Voces*, 2017 WI 16, ¶ 11, *with Pure*

Milk Prods. Co-op v. Nat'l Farmers Org., 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979). Thus, JCRAR is alternatively entitled to a writ of mandamus, ordering WEC and Wisconsin clerks to perform their duties under the plain terms of Chapter 6, for much the same reasons that they are entitled to temporary-injunctive relief. *Supra* Part I.

JCRAR is entitled to mandamus relief with respect to WEC's continuing enforcement of the 2016 Mandate's unlawful witness-certificate-correction requirements. JCRAR has a "clear legal right" to temporarily suspend rules under Section 227.26. *See Voces*, 2017 WI 16, ¶ 11; *supra* Part I.A.2. By enforcing the 2016 Mandate despite directly contrary Wisconsin law and JCRAR's suspension of the substantively identical Emergency Rule 2209, WEC is violating its "positive and plain" duty to respect the Legislature's general authority to oversee agency rule-making and JCRAR's specific authority to veto agency rules. *See Voces*, 2017 WI 16, ¶ 11; *supra* Part I.A. In doing so, WEC has frustrated the Legislature's constitutional obligation to provide a check against agency action and threatened the lawful administration of free and fair elections in the State of Wisconsin. *See Voces*, 2017 WI 16, ¶ 11; *supra* Part I.B. WEC's conduct has therefore caused, and continues to cause, "substantial damages" to both the Legislature and the public, for which no legal remedy exists. *See Voces*, 2017 WI 16, ¶ 11; *supra* Part I.B–C.

CONCLUSION

This Court should grant the Legislature a temporary injunction or, alternatively, a writ of mandamus.

Dated: August 11, 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

RETRIEVED FROM DEMOCRACYDOCKET.COM