

RISE, INC., *and* JASON RIVERA,

*Plaintiffs,*

*v.*

Case No. 2022CV2446

WISCONSIN ELECTIONS COMMISSION,  
*and* MARIBETH WITZEL-BEHL, *in her*  
*official capacity as City Clerk for the*  
*City of Madison, Wisconsin,*

*Defendants.*

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**PROPOSED-INTERVENOR DEFENDANT THE WISCONSIN STATE  
LEGISLATURE'S NOTICE OF MOTION AND MOTION TO INTERVENE**

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TO: Rise, Inc.  
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Los Angeles, CA 90026

Jason Rivera  
108 N. Bedford St.  
Madison, WI 53703

Wisconsin Elections Commission  
201 West Washington Ave., Second Floor  
Madison, WI 53707

Maribeth Witzel-Behl  
210 Martin Luther King Jr. Blvd., Room 103  
Madison, WI 53703

PLEASE TAKE NOTICE that Proposed-Intervenor Defendant the Wisconsin State Legislature ("Legislature"), by its undersigned attorneys at Troutman Pepper

Hamilton Sanders LLP, hereby moves the Court for leave to intervene as Defendant in order to assert the claims and defenses set forth in its Answer of Proposed-Intervenor Defendant. Proposed-Intervenor Defendant moves to intervene both as of right under Wis. Stat. § 803.09(2m), and Wis. Stat § 803.09(1), as well as permissively under Wis. Stat. § 803.09(2).

The grounds for this Motion are as follows and as explained in more detail in the Legislature’s accompanying Memorandum:

1. The Legislature is entitled to intervene as a matter of right under Wis. Stat. § 803.09(2m), which grants the Legislature the right to intervene when a party “challenges the construction or validity” of a state law, because this case requires the Court to interpret Wis. Stat. §§ 6.87(2), (6d), and (9), among other statutes.

2. The Legislature is entitled to intervene as a matter of right under Wis. Stat. § 803.09(1), because the Legislature has filed a timely motion seeking to protect its interests in the enforcement of state statutes, the integrity and efficacy of its own powers, the integrity of upcoming elections, and the integrity of judgments it has secured, which interests are unique to the Legislature and are directly threatened by Plaintiffs’ Complaint.

3. Alternatively, this Court should grant the Legislature permissive intervention under Wis. Stat. § 803.09(2), because the Legislature shares Defendants’ defense to Plaintiffs’ Complaint—a defense that directly implicates the Legislature’s unique interests—and because the Legislature’s timely involvement would not prejudice the existing parties.

PLEASE TAKE FURTHER NOTICE that Proposed-Intervenor Defendant has, consistent with the requirements of Wis. Stat. § 803.09(3), simultaneously filed with this Motion, (1) a Memorandum In Support Of Motion To Intervene, (2) a proposed Order Granting Motion To Intervene, (3) a proposed Answer, (4) a proposed Brief In Opposition To Plaintiffs' Motion For A Temporary Injunction, (5) a proposed Order Denying Plaintiffs' Motion For A Temporary Injunction, and (6) an Affidavit Of Kevin M. LeRoy.

PLEASE TAKE FURTHER NOTICE that Proposed-Intervenor Defendant requests that this Court hear this Motion with its already scheduled hearing, Dkts.9–10, on Plaintiffs' Motion For Temporary Injunction on October 7, 2022, at 10:30AM, at 7th Floor, Courtroom 7A – Branch 10, 215 S Hamilton Street, Madison WI 53703-3285.

PLEASE TAKE FURTHER NOTICE Proposed-Intervenor Defendant requests to be heard on Plaintiff's Motion For Temporary Injunction at this Court's already scheduled hearing on that Motion through undersigned counsel.

Dated: October 3, 2022

Respectfully submitted,

*Electronically signed by Kevin M. LeRoy*

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**PROPOSED-INTERVENOR DEFENDANT THE WISCONSIN  
STATE LEGISLATURE'S MEMORANDUM IN SUPPORT OF  
ITS MOTION TO INTERVENE**

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## INTRODUCTION

With this action, Plaintiffs seek to upend the longstanding and correct interpretation of an absentee-ballot witness “address” under Wis. Stat. § 6.87(2), while Wisconsin is in the middle of an election and weeks into the absentee-ballot voting procedure. Specifically, rather than straightforwardly interpreting a witness “address” to mean the witness’s street number, street name and name of municipality—as the Wisconsin Elections Commission (“WEC”) has properly understood this term in extant guidance, consistent with Section 6.87(2)’s text and context—Plaintiffs would have this Court redefine an address as any “sufficient information [for a clerk] to determine where the witness ‘may be communicated with.’” That atextual definition is an entirely unadministrable standard, and would lead both to disuniformity in application and confusion, all the while undermining the Legislature’s interests in the continued and faithful enforcement of Section 6.87, which is an essential election-integrity measure.

This Court should allow the Legislature to intervene as a Defendant in this matter, for three independent reasons. First, the Legislature has a sovereign interest in defending state election laws against Plaintiffs’ unlawful attempt to redefine “address” within the meaning of the state election laws—an interest codified in Wis. Stat. § 803.09(2m), which grants the Legislature the right to intervene when a party “challenges the construction or validity” of a state law. *Democratic Nat’l Comm. v. Bostelmann*, 2020 WI 80, ¶ 8, 394 Wis. 2d 33, 949 N.W.2d 423 (quoting Wis. Stat. § 803.09(2m)). Second, the Legislature is also entitled to intervene as a matter of

right under Wis. Stat. § 803.09(1), because the Legislature has filed a timely motion seeking to protect its interests in the enforcement of its statutes, the integrity and efficacy of its own powers, and the integrity of upcoming elections, which interests are unique to the Legislature and directly threatened by Plaintiffs' Complaint. Finally, if this Court were to disagree that the Legislature may intervene as of right under the two bases just discussed, the Court should grant the Legislature permissive intervention under Wis. Stat. § 803.09(2) because the Legislature shares Defendants' defense to Plaintiffs' Complaint—a defense that directly implicates the same unique interests described above—and because the Legislature's timely involvement would not prejudice the existing parties at all.

Finally, the Legislature requests that this Court hear this Motion at its already scheduled hearing on Plaintiffs' Motion For Temporary Injunction on October 7, 2022, Dkts.9–10, while also allowing the Legislature to be heard on Plaintiffs' Motion For Temporary Injunction through undersigned counsel at that hearing.

#### STATEMENT<sup>1</sup>

**A. In 2016, WEC Issues Guidance Explaining The Necessary Components Of An Absentee-Ballot Witness's "Address" Under Wis. Stat. § 6.87**

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

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<sup>1</sup> To avoid duplicative briefing, the Legislature recites the same Statement in its simultaneously filed Brief In Opposition To Plaintiffs' Motion For A Temporary Injunction and its Memorandum In Support Of Its Motion To Intervene.

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 absentee-ballot envelope. *Id.* § 6.87(4)(b)(1); *see id.* § 6.875. Under Section 6.87(2), a witness must then provide his or her “[a]ddress” on the certificate of the absentee-ballot envelope. *Id.* § 6.87(2). “If a certificate is missing the address of a witness, the [absentee] ballot may not be counted.” *Id.* § 6.87(6d). While Section 6.87(2) does not specifically define a witness “address,” another election-law statute, Wis. Stat. § 6.34, explains that an address for voter-identification purposes “includ[es] a numbered street address, if any, and the name of a municipality.” Wis. Stat. § 6.34(3)(b)(2). Further, Section 6.87(2) instructs the absentee voter himself or herself to provide substantially the same address details on the absentee-voter’s certificate: “I am a resident of the [... ward of the] (town) (village) of ....., or of the .... aldermanic district in the city of ....., residing at ....\* in said city, the county of ....., state of Wisconsin.” Wis. Stat. § 6.87(2) (all ellipses and brackets in original).

During the Fall 2016 election cycle, WEC issued guidance entitled “Missing or Insufficient Witness Address on Absentee Certificate Envelopes,” which, as relevant here, properly explains the components of a valid witness address under Section 6.87(2). Affidavit of Diane M. Welsh (“Welsh Aff.”), Dkt.4, Ex.2 at 1 (“2016 Guidance”). WEC based its guidance on a considered recommendation from its staff. “[T]aking a common sense approach” that adhered to “the Legislative directive and purpose,” WEC staff determined that a witness address should “contain at a minimum, a street number, street name and name of municipality,” to be considered

“sufficient” under Section 6.87. Affidavit of Kevin M. LeRoy (“LeRoy Aff.”), Ex.2 at 4–5. Thus, WEC staff struck a balance: rejecting “the strictest approach” (which would require witnesses to supply “street number, street name, apartment or unit number, municipality, state, and zip code”) as well as a much more minimal approach (“just a street number and street name”). *Id.*, Ex.2 at 4. WEC adopted its staff recommendation at its October 14, 2016 meeting, *id.*, Ex.3 at 7–8, explaining in its 2016 Guidance that, per Section 6.87(2), a witness address must include “a street number, street name and municipality,”—the “minimum pieces of information required” to identify and validate a witness address, Welsh Aff., Ex.1 at 1; *see id.*, Ex.2 at 1.

The 2016 Guidance also purported to require Wisconsin’s county and municipal clerks to alter unilaterally the address information on absentee ballots, purporting to create a non-statutory addition to Wisconsin’s absentee-ballot statutes. Under the 2016 Guidance, WEC claimed that “clerks *must* take corrective actions in an attempt to remedy a witness address error,” Welsh Aff., Ex.2 at 1 (emphasis added), requiring clerks to alter physically the ballot and then “initial[ ] next to the information that was added,” *id.*, Ex.2 at 2. Thus, this portion of the 2016 Guidance was mandatory and binding on all clerks. *See id.* The 2016 Guidance further provided that clerks have the option to “contact voters and notify them of the address omission,” although “contacting the voter is only required if clerks cannot remedy the address insufficiency from extrinsic sources.” *Id.*, Ex.2 at 1.

The Legislature has sought to codify more explicitly the required components of an absentee-witness address, while also agreeing with WEC's explanation of the meaning of "address." Specifically, in 2021, the Legislature voted for 2021 Senate Bill 935, which would have amended Section 6.87 to list the required components of a witness address as: "[t]he witness's house or apartment number"; "[t]he witness's street name"; and "[t]he witness's municipality." S.B. 935 § 3, 2021 Leg. That understanding of a witness "address" aligns with WEC's 2016 Guidance, which, in turn, properly explains Section 6.87(2). *Compare id., with Welsh Aff., Ex.1 at 1.* While the State Senate and State Assembly both voted for this bill, Governor Evers vetoed it in April 2022. *See Wis. St. Leg. 2021–2022, S.B. 935.*<sup>2</sup>

On January 10, 2022, the Legislature's Joint Committee for Review of Administrative Rules ("JCRAR") acted under its statutory power, *see Wis. Stat. § 13.56*, 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 Guidance] and promulgate it as an emergency rule or cease issuing such guidance to clerks." *LeRoy Aff., Ex.4.* In response, WEC promulgated its 2016 Guidance as a formal rule, filing Emergency Rule 2209 with the Legislative Reference Bureau on July 18, 2022. *See Wis. Elections Comm'n, Statement of Scope: Emergency Rule Relating To Correction Of Absentee Ballot Certificate Envelopes (Feb. 3, 2022);*<sup>3</sup>

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<sup>2</sup> Available at <https://docs.legis.wisconsin.gov/2021/proposals/reg/sen/bill/sb935> (all websites last visited Oct. 3, 2022).

<sup>3</sup> Available at [https://docs.legis.wisconsin.gov/code/register/2022/794a1/register/ss/ss\\_009\\_22/ss\\_009\\_22](https://docs.legis.wisconsin.gov/code/register/2022/794a1/register/ss/ss_009_22/ss_009_22).

Wis. Elections Comm’n, Emergency Rule 2209 (July 18, 2022).<sup>4</sup> On July 20, 2022, JCRAR voted to suspend the portion of Emergency Rule 2209 that empowered clerks to modify witness addresses, determining that this directive “conflicts with state law and fails to comply with legislative intent.” JCRAR, Record of Committee Proceedings (July 20, 2022).<sup>5</sup> As JCRAR focused its veto on WEC’s purported creation of an avenue for clerks to “correct[ ] . . . absentee ballot certificate envelopes,”*id.*, this JCRAR veto did not suspend WEC’s guidance properly explaining its view that a witness address under Section 6.87(2) is “a street number, street name and municipality.” Welsh Aff., Ex.1 at 1. After JCRAR suspended the Rule, WEC issued a statement explaining that the 2016 Guidance still applied to clerks correcting absentee-ballot certificate envelopes. Wis. Elections Comm’n, *Statement Regarding JCRAR Emergency Rule Suspension* (July 25, 2022).<sup>6</sup>

**B. The Waukesha County Circuit Court Enjoins WEC’s Direction That Clerks Correct Absentee Ballot Certificates, While Making Clear That Its Order Does Not Impact WEC’s Definition Of Address**

In July 2022, a group of Wisconsin voters and the Republican Party of Waukesha County sued WEC in Waukesha County Circuit Court, explaining WEC’s 2016 Guidance’s requirement that clerks correct absentee-ballot certificates was

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<sup>4</sup> Available at [https://docs.legis.wisconsin.gov/code/register/2022/799a3/register/emr/emr2209\\_rule\\_text/emr2209\\_rule\\_text](https://docs.legis.wisconsin.gov/code/register/2022/799a3/register/emr/emr2209_rule_text/emr2209_rule_text).

<sup>5</sup> 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](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).

<sup>6</sup> Available at <https://elections.wi.gov/news/statement-regarding-jcrar-emergency-rule-suspension>.

unlawful. LeRoy Aff., Ex.1 at 10. The Legislature intervened as a plaintiff—unopposed, at least as to permissive intervention—on August 11, 2022, *id.*, and then asserted related claims of its own, *id.*, Ex.7 at 13–16. The plaintiffs and the Legislature then moved for temporary injunctions against WEC’s enforcement of the 2016 Guidance in August 2022. *Id.*, Ex.1 at 10; *see id.*, Exs.5–6.

On September 7, 2022, the Circuit Court issued the requested temporary injunction, explaining in an oral decision that the Legislature (and, as relevant, plaintiffs) were entitled to an injunction against the 2016 Guidance’s binding requirement that all clerks alter unilaterally the address information on absentee ballots. LeRoy Aff., Ex.1 at 25. The Circuit Court made clear that its order does *not* affect WEC’s longstanding definition of an address. *Id.* at 51–53. WEC thus may continue to rely on that definition and instruct clerks accordingly for the upcoming 2022 general election. *See id.* Indeed, the Waukesha County Circuit Court expressly confirmed in its October 3, 2022 final judgment issuing its permanent injunction that “[n]othing herein is intended, nor shall be construed, to enjoin WEC from issuing or distributing *its* guidance regarding the definition of ‘address’ as used in Wis. Stat. § 6.87.” *Id.* at 3 (emphasis added).

On September 14, 2022—and in response to the Circuit Court’s decision—WEC issued another guidance to all Wisconsin clerks, reiterating the 2016 Guidance’s understanding of a witness “address” under Section 6.87(2) and clarifying that this understanding was still in force. Wis. Elections Comm’n, Temp. Inj. on WEC Guidance re: Missing Absentee Witness Address (*White v. WEC*, 22-CV-1008) (Sept.

14, 2022) (“WEC September 2022 Guidance”).<sup>7</sup> In particular, WEC explained that the Circuit Court “had not overturned the existing WEC definition of address contained in the now-invalidated memoranda.” *Id.* This Guidance then expressly reiterated that definition of a witness “address” for the benefit of all clerks: “namely, *street number, street name, and name of municipality.*” *Id.* (emphasis added).

**C. Plaintiffs File This Action, Incorrectly Claiming That WEC’s Guidance On An Absentee-Ballot Witness “Address” Is No Longer In Force**

On September 27, 2022, Plaintiffs Rise, Inc. and Jason Rivera filed suit against WEC and Maribeth Witzel-Behl, the clerk for the City of Madison—who, as a “local election official[ ]” with “significant responsibility” from the State, is an agent of the State for these purposes, *State ex rel. Zignego v. Wis. Elections Comm’n*, 2021 WI 32, ¶ 13, 396 Wis. 2d 391, 957 N.W.2d 208; *accord Jefferson v. Dane County*, 2020 WI 90, ¶ 24 n.5, 394 Wis. 2d 602, 951 N.W.2d 556—asserting two claims for declaratory and injunctive relief. Dkt.3 (“Compl.”). Overall, Plaintiffs allege that WEC’s guidance explaining what constitutes a valid absentee-ballot witness “address” under Section 6.87(2) is no longer in force. Compl. ¶ 36. So, as their first claim, Plaintiffs seek a declaratory judgment that “a witness address is sufficient under [Wis. Stat. § 6.87] if a local clerk can reasonably discern the location where a witness may be communicated with,” such that ballots with such information will not be considered “improperly completed” under the statute. Compl. ¶¶ 54–60. For their second claim,

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<sup>7</sup> Available at <https://elections.wi.gov/memo/temporary-injunction-wec-guidance-re-missing-absentee-witness-address-white-v-wisconsin> (guidance letter reproduced at LeRoy Aff. Ex.8).

Plaintiffs ask this Court to “issue a permanent injunction requiring that WEC inform municipal and county clerks . . . that the requirement for a witness address under Wis. Stat. § 6.87(2) is satisfied by a ballot certificate that includes sufficient information from which the clerk can reasonably discern the place where the witness may be communicated with.” Compl. ¶¶ 61–64. Plaintiffs further ask this Court to “require that WEC direct municipal and county clerks that an otherwise lawful ballot” that satisfies their broad definition of a sufficient witness address “is not ‘improperly completed’ under Wis. Stat. § 6.87(9).” Compl. ¶ 64. Plaintiffs moved for a temporary injunction on September 28, 2022. Dkt.8.

#### STATEMENT OF INTEREST

The Legislature comprises the State Assembly and the State Senate. *See* Wis. Const. art. IV, § 1. Wisconsin law recognizes that the Legislature, as the body “vested” with the “legislative power,” *id.*, has an interest in defending in court the State’s own sovereign interest in its law. *Bostelmann*, 2020 WI 80, ¶¶ 8, 13. Specifically, Section 803.09(2m) of the Wisconsin Statutes states that “[w]hen a party to an action [ ] in state or federal court . . . otherwise challenges the construction or validity of a statute, as part of a claim or affirmative defense . . . the legislature may intervene as set forth under [Section] 13.365.” Section 13.365(3), in turn, provides that “[t]he joint committee on legislative organization may intervene at any time in the action on behalf of the legislature” and authorizes the hiring of counsel other than the Attorney General. Wis. Stat. § 13.365(3). Thus, “Wisconsin has adopted a public policy that gives the Legislature a set of litigation interests,” *Bostelmann*, 2020 WI

80, ¶ 8, including when—as is the case here, *infra* pp. 10–11—a party “otherwise challenges the construction or validity of a statute, as part of a claim or affirmative defense,” *Bostelmann*, 2020 WI 80, ¶ 8 (quoting Wis. Stat. § 803.09(2m)).

The Legislature has also organized itself into various committees, one of which is JCRAR. Wis. Stat. Ann. § 13.56; *accord League of Women Voters of Wis. (“LWV”) v. Evers*, 2019 WI 75, ¶ 28, 387 Wis. 2d 511, 929 N.W.2d 209 (explaining that the Legislature has the power to conduct its own internal affairs and procedures). As noted, under Wisconsin law, JCRAR has the power to “suspend any rule” from an administrative agency, Wis. Stat. § 227.26(2)(d), if JCRAR determines that the rule “fail[s] to comply with legislative intent” or was promulgated in “[a]n absence of statutory authority,” among other reasons, *id.* § 227.19(4)(d); *Martinez v. Dep’t of Indus., Lab. & Hum. Rels.*, 165 Wis. 2d 687, 701, 478 N.W.2d 582 (1992) (recognizing “legislative accountability over rule-making”). That express statutory power is implicated here, *infra* p. 15; and when the Legislature intervenes in court, it also speaks on behalf of its committees, including JCRAR, and their interests. *See* Wis. Stat. §§ 13.56(2), 803.09(2m).

## ARGUMENT

### **I. The Legislature Is Entitled To Intervene As Of Right Under Section 803.09(2m) Because Plaintiffs’ Challenge Involves The Construction Of Wis. Stat. § 6.87**

The Legislature may intervene as of right in any action “at any time” when that action “otherwise challenges the construction or validity” of a state law “as part of a claim or affirmative defense.” Wis. Stat. § 803.09(2m); *see also id.* § 13.365. Based

on the plain language in Section 803.09(2m), “Wisconsin has adopted a public policy that gives the Legislature . . . litigation interests” that justify intervention when “a party . . . otherwise challenges the construction or validity of a statute, as part of a claim or affirmative defense.” *Bostelmann*, 2020 WI 80, ¶ 8 (quoting Wis. Stat. § 803.09(2m)). Thus, in such cases, “the Legislature” has “a statutory right to participate as a party, with all the rights and privileges of any other party.” *Id.* ¶ 13.

Here, the Legislature is entitled to intervene as of right under Section 803.09(2m). On September 27, 2022, Plaintiffs filed their Complaint, Compl. ¶¶ 54–64, asking this Court to redefine the meaning of a witness “address” under the State’s election laws governing requirements for absentee ballots, *see* Wis. Stat. §§ 6.87(2), (6d), (9). Thus, Plaintiffs’ claim involves the “construction” of those state laws in order for Plaintiffs to prevail. That is, the Court must interpret and apply Sections 6.87(2), 6.87(6d), and 6.87(9)—and any other absentee-voting laws within Chapter 6 implicated here—to determine whether and when the witness-address requirement is met and adjudicate Plaintiffs’ claims. Therefore, this Court should grant the Legislature’s Motion To Intervene for this reason alone.

## **II. Alternatively, The Legislature Is Entitled To Intervention As A Matter Of Right Under Section 803.09(1)**

The Legislature also is entitled to intervene in this action as of right under Section 803.09(1). “A movant must meet four requirements to intervene as a matter of right: (1) the motion to intervene must be timely; (2) the movant must claim an interest in the subject of the action; (3) ‘the disposition of the action may as a practical matter impair or impede the movant’s ability to protect that interest;’ and (4) the

existing parties do not adequately represent the movant's interest." *City of Madison v. Wis. Emp't Relations Comm'n*, 2000 WI 39, ¶ 11, 234 Wis. 2d 550, 610 N.W.2d 94 (citations omitted); accord *Armada Broad., Inc. v. Stirn*, 183 Wis. 2d 463, 471, 516 N.W.2d 357, 360 (1994); see also Wis. Stat. § 803.09(1).

The Legislature satisfies all four requirements of Section 803.09(1); therefore, this Court should grant its Motion To Intervene.

1. *The Legislature's Motion is Timely.* When considering whether a motion to intervene is timely, "courts in Wisconsin have looked at a number of factors, including: (1) when the proposed intervenor discovered his or her interest was at risk; (2) how far litigation has proceeded; and (3) the extent to which the other parties would be prejudiced by the addition of a new party," *Roth v. La Farge Sch. Dist. Bd. of Canvassers*, 2001 WI App. 221, ¶ 17, 247 Wis. 2d 708, 634 N.W.2d 882, which includes considerations of whether the intervenor could simply "initiate[ ] a separate [ ] action," *State ex rel. Bilder v. Twp. of Delavan*, 112 Wis. 2d 539, 550, 334 N.W.2d 252 (1983). However, "[t]he critical factor is whether in view of all the circumstances the proposed intervenor acted promptly." *Id.* at 550. Here, the Legislature's Motion is plainly timely. See *Roth*, 2001 WI App. 221, ¶ 17. The Legislature filed this Motion promptly in the early stages of litigation after it "discovered [its] interest was at risk." *Id.* Specifically, the Legislature filed this Motion a mere six days after Plaintiffs filed their Complaint on September 27, 2022, Dkt.3, and before Defendants have answered or otherwise responded. Moreover, neither Plaintiffs nor Defendants will suffer any "prejudice[ ] by the addition of" the Legislature to this action at this exceedingly early

stage in the litigation, before Defendants have fully prepared even their responsive pleadings. *Roth*, 2001 WI App. 221, ¶ 17.

2. *The Legislature Has A Substantial Interest In The Subject Matter Of This Action.* To satisfy the interest element of Section 803.09(1), the proposed intervenor must have an “interest of such direct and immediate character that the intervenor will either gain or lose by the direct operation of the judgment.” *City of Madison*, 2000 WI 39, ¶ 11 n.9 (citation omitted). This inquiry follows a “pragmatic approach,” *Armada*, 183 Wis. 2d at 474, which looks to “the facts and circumstances of the particular case,” in light of the liberal “policies underlying the intervention statute”—namely “the speedy and economical resolution of controversies” by joining interested parties in a single suit, with due regard that the “original parties . . . should be allowed to conduct and conclude their own lawsuit,” *Bilder*, 112 Wis. 2d at 548 (citations omitted). The “interest test” is “*primarily* a practical guide to disposing of lawsuits by involving *as many apparently concerned persons as is compatible with efficiency and due process.*” *Id.* at 548–49 (emphases added; citations omitted).

Here, the Legislature has a direct, substantial interest in the subject of this action for four independent reasons. First, Wisconsin has the sovereign and “legitimate interest in the continued enforcement of [its] statutes,” *Berger v. N. Carolina State Conf. of the NAACP*, 142 S. Ct. 2191, 2201 (2022) (brackets altered; citations omitted), and Sections 13.365 and 803.09(2m) demonstrate the State’s sovereign choice to allow the Legislature to assert this interest in court, Wis. Stat. §§ 13.365, 803.09(2m); *Bostelmann*, 2020 WI 80, ¶¶ 8, 13. Second, the Legislature

has an interest in the integrity and efficacy of its own powers, *Wis. Legislature v. Palm*, 2020 WI 42, ¶ 13, 391 Wis. 2d 497, 942 N.W.2d 900, including JCRAR’s power to “suspend any [administrative] rule” for specified reasons, Wis. Stat. §§ 227.26(2)(d), 227.19(4)(d); *Martinez*, 165 Wis. 2d at 701 (“legislative accountability over rule-making”), and its power over rulemaking, *Palm*, 2020 WI 42, ¶ 13. Third, the Legislature has a special interest in ensuring the integrity of the elections in Wisconsin through the faithful enforcement of its election-integrity statutes. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 196 (2008) (controlling plurality of Stevens, J.); *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989). Finally, the Legislature has an interest in the integrity of the injunction it obtained from the Waukesha County Circuit Court in *White v. WEC. LeRoy Aff.*, Exs.1, 10.

This case implicates each of these legislative interests. First, as explained above, because the Court must interpret and apply Sections 6.87(2), 6.87(6d), and 6.87(9)—and any other relevant election laws—to adjudicate Plaintiffs’ claims regarding the witness address requirement, *supra* p. 11–12, the Legislature has an interest in the proper enforcement of those election laws. Second, Plaintiffs’ requested relief, if granted by this Court, would undermine JCRAR’s veto of WEC’s Emergency Rule 2209 and impinge upon JCRAR’s rule-suspension power, by once again giving clerks non-statutory discretion to accept absentee ballots with deficient witness addresses, despite Section 6.87(6d). Such relief would sanction the same power that JCRAR struck down under its statutory authority and, thus, would necessarily frustrate the Legislature’s decision to vest JCRAR with rule-suspension

power, undermine 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. Third, Plaintiffs' claims would undermine Section 6.87(2) by imposing their own amorphous and subjective definition of an "address," even though Section 6.87(2)'s witness-address requirements are part of the Legislature's election-integrity measures for absentee voting. *See* Wis. Stat. § 6.84(1); *accord Eu*, 489 U.S. at 231; *Crawford*, 553 U.S. at 196. Finally, through filing this action, Plaintiffs seek to leverage the injunction secured by the Legislature in *White v. WEC* to embolden clerks to ignore Section 6.87(2)'s witness-address requirement, thereby frustrating the Legislature's interest in that hard-fought injunction.

3. *The Disposition of This Lawsuit May Impair the Legislature's Interest.* The third element under Section 803.09(1) considers whether the Court's "disposition of the action may as a practical matter impair or impede the [Legislature's] ability to protect [its] interest[s]," *City of Madison*, 2000 WI 39, ¶ 11 (internal citation omitted), which element is easily met here.

If this Court grants Plaintiffs' request to adopt its broad definition of "address" under the state election statutes, this will impede all of the Legislature's interests noted above. By allowing Plaintiffs to disregard the clear directives of Sections 6.87(2), (6d) and 6.87(9)—as well as WEC's 2016 Guidance that still remains in place with respect to the definition of "address"—a ruling from this Court in Plaintiffs' favor would undermine the Legislature's interests in the robust enforcement of the State's election laws. Such a ruling would also undermine JCRAR's rule-suspension power

and, with it, the Legislature's ability to protect such power, by once again empowering clerks with non-statutory authority to accept absentee ballots with deficient witness addresses, despite JCRAR's veto of WEC's Emergency Rule. Further, by emptying Section 6.87(2)'s witness-address requirement of any real meaning by adopting a definition of an "address" that is wholly amorphous and subjective, an order in favor of Plaintiffs here would undermine the Legislature's interests in election integrity. See Wis. Stat. § 6.84(1); accord *Eu*, 489 U.S. at 231; *Crawford*, 553 U.S. at 196.

4. *No Other Party Adequately Represents the Legislature's Interests.* Section 803.09(1)'s final prong is whether any existing parties "adequately represent the [Legislature's] interest[s]." *City of Madison*, 2000 WI 39, ¶ 11 (citation omitted). This adequacy requirement imposes a "minimal" burden on the proposed intervenor to "show[] that the representation of [its] interest 'may be' inadequate." *Wolff v. Town of Jamestown*, 229 Wis. 2d 738, 747, 601 N.W.2d 301 (Ct. App. 1999) (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)). For example, courts examine whether the proposed intervenor would "gain or lose" in the same manner as another party, or whether it would "protect a right that would not otherwise be protected." *Helgeland v. Wis. Muns.*, 2008 WI 9, ¶ 45, 307 Wis. 2d 1, 745 N.W.2d 1 (citation omitted). Further, even if the proposed intervenor seeks the same outcome as an existing plaintiff in the litigation, the intervenor will still satisfy the adequacy inquiry if it is "in a better position . . . to provide full ventilation of the legal and factual context." *Wolff*, 229 Wis. 2d at 748 (citation omitted).

Here, the Legislature satisfies the “minimal” burden of “show[ing] that the representation of [its] interest ‘may be’ inadequate,” unless intervention is granted. *Id.* at 747. The Legislature has unique sovereign interests at issue in this lawsuit, *supra* pp. 12–13, that none of the existing parties share, meaning that these parties cannot possibly represent the Legislature’s interests, *Helgeland*, 2008 WI 9, ¶ 45. Plaintiffs are adverse to the Legislature, as the Legislature is challenging Plaintiffs’ incorrect construction of state law—definition of “address” under the state election statutes. Therefore, Plaintiffs cannot adequately represent the Legislature’s interests. *Id.* Nor can Defendants—WEC and Ms. Maribeth Witzel-Behl, both agents of the State when enforcing state election law—share the Legislature’s sovereign interests in the construction of state law and JCRAR’s powers. Because these interests are unique to the Legislature—and, indeed, lie within the Legislature’s core powers, *e.g.*, *Palm*, 2020 WI 42, ¶ 13—only the Legislature can adequately raise and assert these Legislature-specific arguments and interests here. Thus, while both the Legislature and Defendants disagree with Plaintiffs’ definition and interpretation of “address” under the state election statutes, Defendants cannot adequately represent the Legislature’s sovereign interests in this case. *See Berger*, 142 S. Ct. at 2203–04; *accord Helgeland*, 2008 WI 9, ¶ 45 (“protect a right that would not otherwise be protected”).

### **III. At Minimum, This Court Should Grant The Legislature Permissive Intervention Under Section 803.09(2)**

In the event the Court declines to grant intervention as a matter of right, it should, at a minimum, exercise its discretion to grant the Legislature permissive

intervention. Section 803.09(2) governs permissive intervention and provides, as relevant here, that “[u]pon timely motion anyone may be permitted to intervene in an action when a movant’s claim or defense and the main action have a question of law or fact in common.” Wis. Stat. § 803.09(2). And “[i]n exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties,” *id.*, by, for example, “making the lawsuit complex or unending.” *C.L. v. Edson*, 140 Wis. 2d 168, 177, 409 N.W.2d 417 (Ct. App. 1987). A proposed intervenor need only be “a proper party” to obtain permissive intervention; it need not “be necessary to the adjudication of the action.” *City of Madison*, 2000 WI 39, ¶ 11 n.11.

The Legislature satisfies Section 803.09(2)’s two threshold requirements. First, the Legislature’s “defense” in this case is “in common” with the “main action,” Wis. Stat. § 803.09(2), since, like Defendants, the Legislature asserts the defense that the 2016 Guidance as it pertains to the definition of “address” remains in place and is not displaced by the Waukesha County Circuit Court’s decision in *White v. WEC*. Second, the Legislature’s Motion is “timely,” Wis. Stat. § 803.09(2), as it was filed in the early stages of litigation—a mere six days after Plaintiffs filed their Complaint, and before WEC has filed any responsive pleading here, *supra* pp. 11–12.

In addition to these two threshold requirements, all other appropriate permissive-intervention factors favor the Legislature’s involvement here.

The Legislature has significant and direct interests that are implicated in this case, as discussed above. First, the Legislature has a sovereign interest in the

enforcement of its statutes. *Bostelmann*, 2020 WI 80, ¶¶ 8, 13; *Eu*, 489 U.S. at 231. That interest is implicated here because the subject matter of this lawsuit calls upon the Court to interpret, and apply, Wisconsin’s election laws. The Legislature also has an interest in protecting JCRAR’s rule-suspension power. Moreover, the Legislature has a special interest in ensuring the faithful enforcement of the state election-integrity statutes that are designed to protect the integrity of the elections in Wisconsin. *Crawford*, 553 U.S. at 196 (controlling plurality of Stevens, J.); *Eu*, 489 U.S. at 231.

The Legislature’s involvement “will [not] unduly delay or prejudice the adjudication of the rights of the original parties,” Wis. Stat. § 803.09(2), but will instead directly further Section 803.09’s “primar[y]” concern with “disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process,” *Bilder*, 112 Wis. 2d at 548–49 (citations omitted); see Gabrielle B. Adams, et al., *Wisconsin Civil Procedure Before Trial* § 4.56 (6th ed. 2018). Granting intervention to the Legislature would *avoid* prejudice to Plaintiffs here, as it would promote a “speedy and economical resolution,” *Helgeland*, 2008 WI 9, ¶ 40 (citation omitted), of the correct interpretation of “address” under the state election statutes, and allow the Court to reach a “final decision on a key issue” in a single lawsuit, *Bilder*, 112 Wis. 2d at 550. Finally, the Legislature’s involvement in this matter would not “mak[e] the lawsuit complex or unending,” as the Legislature’s defense relates to the same defense of Defendants here. *Edson*, 140 Wis. 2d at 177. In short, the Legislature is raising the same defense as Defendants, while asserting

additional theories in support of that defense based upon the Legislature's unique interests that are not represented by the existing parties.

### CONCLUSION

This Court should grant the Legislature's Motion To Intervene.

Dated: October 3, 2022

Respectfully submitted,

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