STATE OF WISCONSIN
COURT OF APPEALS, DISTRICT IV
APPEAL NO. 2022 AP _____

NANCY KORMANIK,

Plaintiff-Respondent,

vs.

WISCONSIN ELECTIONS COMMISSION,

Defendant,

DEMOCRATIC NATIONAL COMMITTEE,

Intervenor-Defendant-Petitioner, and

RISE, INC.,

Intervenor-Defendant.

On Appeal from the Circuit Court for
Waukesha County Case No. 2022CV001395
The Honorable Brad Schimel, Presiding

PETITION AND SUPPORTING MEMORANDUM
FOR LEAVE TO APPEAL FROM TEMPORARY INJUNCTION ORDER
NOT APPEALABLE AS OF RIGHT
AND
EMERGENCY REQUEST FOR STAY OF TEMPORARY INJUNCTION
PENDING DISPOSITION OF PETITION

***EX PARTE* CONSIDERATION REQUESTED FOR EMERGENCY**
REQUEST FOR STAY OF TEMPORARY INJUNCTION

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INTRODUCTION

Intervenor-Defendant-Petitioner Democratic National Committee ("DNC"), by its undersigned counsel, respectfully petitions for leave to appeal a Temporary Injunction signed by Waukesha County Circuit Judge Brad D. Schimel earlier today requiring the Defendant Wisconsin Elections Commission ("WEC") to "withdraw," **by 7 p.m., Monday, October 10, 2022**, a guidance document governing important aspects of the absentee-voting process that is already underway in the runup to the November 8 federal and state general election. *See* Temporary Injunction, App. 112.[1] Specifically challenged here, the guidance addresses the procedure by which a municipal clerk or local election official may return a completed and submitted absentee ballot to an elector, and the procedures by which a municipal clerk or local election official may "spoil" an absentee ballot at an elector's request. The challenged guidance was issued by WEC on August 1, 2022—over nine weeks ago—and is materially identical to guidance WEC has provided for at least the last seven statewide elections in Wisconsin over the past two years, and apparently much further back.[2]

Yet Respondent waited until *after* absentee ballots and instructions had been distributed and *after* absentee balloting was already underway before filing her belated challenge to WEC's longstanding guidance. As of this past Monday,

[1] Citations to "App." are to the Appendix that accompanies this Petition.

[2] DNC has only analyzed relevant Commission guidance over the past two years, since September 2020. According to the October 4, 2022 Affidavit of WEC Administrator Meagan Wolfe, the WEC's challenged guidance on spoiling ballots dates back to 2014, meaning that the challenged guidance has been in place for at least eight years and dozens of statewide elections. *See* App. 109.

October 3, over 350,000 sets of absentee ballots and instructions already had been created and nearly 65,000 voted absentee ballots already had been returned to local clerks. App. 108-109. Yet, in the face of plain and unambiguous decisions by this Court and the Supreme Court of Wisconsin, the Circuit Court in this case has now **ordered that WEC's long-standing guidance be "withdrawn" by 7 p.m. Monday without any stay (however brief) pending an opportunity to seek leave to appeal.**

Specifically, in the *Teigen v. WEC* drop-box litigation earlier this year, another Waukesha County Circuit Judge enjoined long-standing WEC guidance about the use of drop boxes on January 13 and ordered that it be withdrawn promptly even though absentee voting for the February 15 spring election was already underway. This Court stayed the injunction, and the Wisconsin Supreme Court upheld the stay, because absentee voting was already well underway; the injunction "create[ed] a high risk of inconsistent or incomplete guidance to voters"; and "the risk of confusion—and possible disenfranchisement—[was] compelling." *Teigen v. Wisconsin Elections Commission*, L.C. No. 2021-CV-958 (Ct. App. Dist. II/IV Jan. 24, 2022) (granting stay), *emergency motion to vacate stay denied*, No. 2022AP91 (Jan. 28, 2022). The *Teigen* stay decisions appear at App. 025-034 ("Teigen Court of Appeals stay order") and App. 036-040 ("Teigen Supreme Court stay order"). Simply put, courts "should not muddy the waters during an ongoing election." App. 039 (Hagedorn, J., concurring).

The *Teigen* stay decisions apply with even greater force and urgency to the

current election. The *Teigen* stay issues involved a low-turnout February primary election. This case, on the other hand, involves the November general election for critical federal and state elections (including for the U.S. Senate, U.S. House, Governor, other state executive offices, and the Wisconsin Legislature). Turnout is much larger, and the risks of confusion and error are much greater now than last February. Moreover, absentee voting is much further along in this election than it was in *Teigen*, further increasing the harm of changing absentee voting procedures mid-election.

This Court should therefore enter an immediate stay of the Circuit Court's Temporary Injunction ordering WEC to "withdraw" its guidance **by 7 p.m. Monday**, so that this Court has time to request and consider responses from the other parties below and to make a considered decision whether to grant leave to appeal from today's Temporary Injunction order (and to extend the stay pending appeal, if leave to appeal is granted). DNC's counsel are notifying all counsel of record of this request for temporary relief pending disposition of the petition. Wis. Stat. §§ 808.03, 808.07(2). **DNC respectfully requests that, if necessary, this Court grant an *ex parte* stay of the Temporary Injunction until at least early next week so that this Court can give this petition and stay request appropriate consideration.**

BACKGROUND

This petition for leave to appeal arises from a Temporary Injunction issued today by Judge Brad D. Schimel of the Circuit Court for Waukesha County that

enjoins two-year-old guidance from the WEC and changes the procedures for absentee voting in Wisconsin's November 8, 2022 general election even though absentee voting has been underway since September 22 and more than 64,000 Wisconsinites have already submitted their completed absentee ballots.[3] App. 108-109. Because of the Circuit Court's order changing the two-year status quo and altering voting procedures *in the middle of the election*, the tens of thousands of Wisconsinites who will vote absentee over the next four weeks will do so under different procedures and standards than did the 64,000-plus who have already submitted their absentee ballots.

Interlocutory appeal is necessary to prevent irreparable injury to Petitioner and the public. As discussed in the Introduction above, this Court and the Supreme Court recognized the harm caused by altering voting processes while voting was underway earlier this year in staying a Circuit Court injunction of WEC guidance relating to absentee voting through the use of drop boxes while the absentee voting process was already underway for the February 2022 election. *See Teigen* stay decisions discussed above and reprinted in App. 025-040.

The potential harm is all the more severe and compelling here than in *Teigen* because the absentee voting process is much farther along, turnout will be much greater in this election than in the February local primary elections, and the strain of sudden court-ordered changes on election administrators will be all the greater.

[3] At the time this brief was drafted, the transcript of the October 5th, 2022 hearing was not available to DNC, such that discussion of the Court's ruling is based upon the notes and memories of counsel.

The absentee voting process in the November general election began on September 22, which was the deadline for municipal clerks to send absentee ballots to all voters with valid requests for absentee ballots on file. As of October 3, clerks had created 356,227 absentee ballots, and the United States Postal Service reported that 301,442 of those ballots had either been delivered to voters or were about to be delivered. Also as of October 3, voters had returned 64,325 completed absentee ballots to clerks. App. 109.

Voters completed all of these 64,000-plus submitted absentee ballots while guidance from the WEC was in effect that, among other things, allowed voters to request that clerks spoil their completed, submitted ballots so that they could correct errors or change their voting choices by submitting new absentee ballots or voting in person by the statutorily prescribed deadlines. App. 012-015. These procedures have been in place at least since October 2020 and in at least all of Wisconsin's past seven statewide elections. The procedures, which voters and municipal clerks have relied upon, are fully consistent with Wisconsin's election laws and have protected Wisconsinites from being disenfranchised because of mere ministerial errors and have ensured that their votes reflect their true intent.

Because of the Circuit Court's Temporary Injunction, the tens of thousands of Wisconsinites who will vote absentee over the next four weeks will not have the options created by these procedures available to them, merely because they will vote later than the 64,000-plus who voted before them. In addition to violating basic requirements of the Equal Protection Clauses in the U.S. and Wisconsin

Constitutions, the court-mandated use of these inconsistent procedures will create precisely the type of voter confusion and uncertainty in the administration of the general election that led to the stay orders by this Court and the Wisconsin Supreme Court in *Teigen*.

The significant timing problem with the Circuit Court's order is one of Respondent's own making. Although the WEC guidance at issue has been in place for more than two years, Respondent did not file her complaint in the underlying case until September 23, 2022, after the absentee voting process had begun. It has long been the law in Wisconsin that "[a] party who delays in making a claim may lose his or her right to assert that claim based on the equitable doctrine of laches." *Dickau v. Dickau*, 2012 WI App 111, ¶ 9, 344 Wis. 2d 308, 824 N.W.2d 142. The doctrine applies with particular force in election-related matters, where states have a compelling interest in establishing procedures that voters and clerks can understand and rely upon before an election begins and certainly where, as here, an election is already underway. *Trump v. Biden*, 2020 WI 91, ¶ 10, 394 Wis. 2d 629, 951 N.W.2d 568, *cert denied*, 141 S. Ct. 1387 (2021). All the elements of laches are satisfied here: Respondent had actual or constructive knowledge of the challenged WEC guidance and voting procedures for more than two years; Petitioner had no knowledge that Respondent would bring her claims; and, as discussed, there would be material prejudice if Respondent's request for relief, embodied in the Circuit Court's Temporary Injunction, were allowed and implemented.

That material prejudice, as discussed, would include the application of substantially different absentee voting procedures to voters based only on the serendipity of when they chose to vote. But the Wisconsin Supreme Court has emphasized that "[t]he concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications." *State ex rel. Sonneborn v. Sylvester*, 26 Wis. 2d 43, 54, 132 N.W.2d 249, 254 (1965). Based on the same principle, the Equal Protection Clause in the U.S. Constitution forbids Wisconsin from, "by later arbitrary and disparate treatment, valu[ing] one person's vote over that of another," *Bush v. Gore*, 531 U.S. 98, 104-05 (2000) (per curiam), which would be the precise result of changing absentee voting procedures mid-election.

STATEMENT OF ISSUES

1. Whether the Circuit Court abused its discretion in issuing the October 7, 2022 Temporary Injunction ordering WEC to "withdraw" the challenged guidance even though absentee voting is already underway, in violation of the *Teigen* stay orders issued by this Court and the Supreme Court of Wisconsin.

2. Whether Respondent's action is barred by the equitable doctrine of laches.

3. Whether WEC's challenged guidance faithfully implements the governing provisions of Wisconsin's statutory election code.

STANDARD OF REVIEW

This Court grants interlocutory review under Wis. Stat. § 808.03(2) when an immediate appeal will "(a) Materially advance the termination of the litigation or clarify further proceedings in the litigation; (b) Protect the petitioner from substantial or irreparable injury; or (c) Clarify an issue of general importance in the administration of justice." Wis. Stat. § 808.03(2). A petitioner "must demonstrate that the issue raised meets *one* of the criteria" in § 808.03(2) and show "a substantial likelihood that this court will reverse the trial court's nonfinal order." *Cascade Mtn., Inc. v. Capitol Indem. Corp.*, 212 Wis. 2d 265, 268 n.2, 569 N.W.2d 45 (Ct. App. 1997) (emphasis added).

Although the grant of a temporary injunction lies within the discretion of the trial court, *Milwaukee Deputy Sheriffs' Ass'n v. Milwaukee County*, 2016 WI App 56, ¶ 20, 370 Wis. 2d 644, 883 N.W.2d 154, a circuit court abuses its discretion in granting such an injunction "when the circuit court: (1) fails to consider and make a record of the factors relevant to its determination; (2) considers clearly irrelevant or improper factors; . . . (3) clearly gives too much weight to one factor," or "[4] made an error of law." *Sch. Dist. of Slinger v. Wisconsin Interscholastic Athletic Ass'n*, 210 Wis. 2d 365, 370, 563 N.W.2d 585, 588 (Ct. App. 1997) (citing *Best Disposal Sys. v. Milwaukee Metro. Sewerage Dist.*, 128 Wis. 2d 537, 540, 386 N.W.2d 504, 505 (Ct.App.1986)). Questions of law, including matters of statutory interpretation, are reviewed de novo. See *Covelli v. Covelli*, 2006 WI App 121, ¶

13, 293 Wis. 2d 707, 718 N.W.2d 260; *Wis. Indus. Energy Group v. Pub. Serv. Comm'n of Wis.*, 2012 WI 89, ¶ 14, 342 Wis. 2d 576, 819 N.W.2d 240.

STATEMENT OF FACTS

On October 5, 2022, following a hearing on Respondent's Motion for a Temporary Restraining Order and Temporary Injunction, the Circuit Court granted a Temporary Injunction, making oral findings that Respondent had satisfied the criteria for such relief. At the conclusion of the hearing, Petitioner DNC and the other defendants moved for a stay of the ruling, which the Circuit Court denied in an oral ruling. Today, on October 7, the Circuit Court entered a written order containing the terms of the Temporary Injunction. Among other requirements, the written order prohibits the WEC "from publicly displaying, applying, or disseminating certain published guidance, including its August 1, 2022 memorandum titled 'Spoiling Absentee Guidance for the 2022 Partisan Primary'" and its 'August 2, 2022 publication titled 'Rules about Spoiling Your Ballot.'" App. 112.

In granting the Temporary Injunction, the Circuit Court made multiple errors. It gave no effect to this Court's and the Supreme Court's rulings in *Teigen* that prohibit court-ordered withdrawal of WEC guidance in the middle of an election; misapplied Wisconsin jurisprudence on laches; failed even to address that, in violation of the Equal Protection Clauses in the U.S. and Wisconsin Constitutions, changing the absentee voting procedures during the election will create inconsistent procedures and rights for voters depending solely on when they submit their

absentee ballots; and improperly found that the "status quo" is what existed before the WEC published its guidance in October 2020.

First, in response to *Teigen*, the Circuit Court dismissed the relevance of the rulings summarized above that prohibited withdrawing WEC guidance mid-election on the basis that *Teigen* involved drop boxes and this case involves something different—whether clerks can spoil absentee ballots at a voter's request and provide a replacement ballot. This factual distinction misses the point, which is that under *Teigen*, any mid-election withdrawal of WEC guidance that voters and clerks are relying upon is impermissible because it will cause confusion and disruption and potentially undermine public confidence in the outcome of the election. It does not matter whether the WEC guidance addresses drop boxes or spoiling absentee ballots. What does matter is that in this case, withdrawing WEC guidance on how to vote while absentee voting is happening will have the same deleterious effects that led to the *Teigen* rulings.

Second, in addressing laches and Respondent's two-year-plus delay in bringing her action after the general election had started, the Circuit Court found that Respondent should not be found to have had notice of the WEC's guidance. He reasoned that the average voter does not pay any attention to the WEC's guidance, and that Respondent therefore could not have been on notice until the WEC published a press release relating to the guidance on August 2, 2022. This finding not only ignores that the same procedures had been used for all seven of Wisconsin's most recent statewide elections, but also that the laches doctrine imputes

constructive knowledge to parties where the information at issue is readily available. *See, e.g.*, *Biden*, 2020 WI 91, ¶ 13 ("[U]nreasonable delay in laches is based not on what litigants know, but what they might have known with the exercise of reasonable diligence."); *State ex rel. Wren v. Richardson*, 2019 WI 110 ¶ 20, 936 Wis.2d 516, 936 N.W.2d 587, *cert. denied sub nom. Wis. ex rel. Wren v. Richardson*, 140 S. Ct. 2831 (2020) ("Where the question of laches is in issue, the plaintiff is chargeable with such knowledge as he might have obtained upon inquiry, provided the facts already known by him were such as to put a man of ordinary prudence upon inquiry.") (quoting *Melms v. Pabst Brewing Co.*, 93 Wis. 153, 174, 66 N.W. 518 (1896)).

Here, the WEC's guidance on absentee voting procedures had been published on its website beginning in at least October 2020 and was easily accessible by Respondent. (As discussed in n.2 *supra*, WEC Administrator Wolfe has testified by affidavit that the challenged WEC guidance is consistent with the guidance dating back to 2014.) Under the Circuit Court's ruling, a voter could ignore voting guidance and procedures that have been in place for years, suddenly pay attention, and then bring a lawsuit to disrupt an ongoing election. That result contravenes basic laches principles and is incompatible with the rulings in *Teigen*.

Third, in addressing the DNC's Equal Protection claim, the Circuit Court stated there could not be an Equal Protection violation because Wis. Stat. § 6.86(5) gives absentee voters the opportunity to obtain replacement ballots for absentee ballots that are spoiled or damaged, which puts them on equal footing with in-person

voters. But Respondent's Equal Protection claim is not based on that scenario. Instead, as discussed, it is based on the indisputable fact that withdrawing the WEC's guidance during the election will result in different procedures and standards for absentee voters who submit their ballots after the Temporary Injunction takes effect. The Circuit Court did not address how subjecting one class of voters to different procedures and standards could comply with Equal Protection and "[t]he concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications." *State ex rel. Sonneborn*, 26 Wis. 2d at 54.

Finally, addressing the principle that a temporary injunction is only appropriate if necessary to preserve the status quo, the Circuit Court found that the status quo is not the WEC's guidance and the seven statewide elections that have relied on that guidance over the past two years. Instead, the Circuit Court ruled that the status quo is the statutory scheme that governs absentee voting and concluded that enjoining the WEC guidance would preserve that status quo. But it defies common sense to deem the status quo as not being the standards and procedures that voters and clerks have relied on for the past two years and that 64,000-plus voters have known about and already relied upon in submitting their completed ballots in this very election.

ARGUMENT

Interlocutory appeal is warranted because immediate review is necessary to prevent irreparable harm to Petitioner and the public and because this Court is substantially likely to reverse the Circuit Court's grant of its Temporary Injunction.

I. INTERLOCUTORY REVIEW WILL PROTECT PETITIONER AND THE PUBLIC FROM IRREPARABLE INJURY

The Circuit Court's Temporary Injunction exposes Petitioner and the public to irreparable harm because it changes voting rules while an election is already underway and violates the Equal Protection Clauses of the U.S. and Wisconsin Constitutions.

First, the Temporary Injunction threatens to inject chaos and confusion into the November election and to thereby reduce voter confidence. In the election context, courts routinely deny untimely requests for injunctive relief because of the prejudice that doing so would cause. Such claims may be too late even when brought *before* the election, when they are made too close in time to the start of voting. *See, e.g.*, *Hawkins v. Wisconsin Elections Commission*, 2020 WI 75, 393 Wis.2d 629, 948 N.W.2d 877; *see also Democratic Nat'l Comm. v. Bostelmann*, 977 F.3d 639, 642 (7th Cir. 2020), *rev'd in part sub nom. Democratic Nat'l Comm. v. Republican Nat'l Comm.*, 141 S. Ct. 28, 589 U.S. ___ (2020) (per curiam); *Fulani v. Hogsett*, 917 F.2d 1028, 1031 (7th Cir. 1990). As the Seventh Circuit explained in *Fulani*, "[i]n the context of elections … any claim against a state electoral procedure must be expressed expeditiously." 917 F.2d at 1031. That is because, "[a]s time passes,

the state's interest in proceeding with the election increases in importance as resources are committed and irrevocable decisions are made." *Id.*; *see also Clark v. Reddick*, 791 N.W.2d 292, 294-96 (Minn. 2010) (declining to hear ballot challenge when petitioner delayed filing until 15 days before absentee ballots were to be made available); *Knox v. Milwaukee Cnty. Bd. of Election Comm'rs*, 581 F. Supp. 399, 402 (E.D. Wis. 1984) (denying temporary injunction where complaint was filed seven weeks before election).

In *Hawkins*, the Wisconsin Supreme Court considered a petition filed by members of the Green Party nearly three months before the 2020 general election. The Court concluded there was insufficient time to grant "any form of relief that would be feasible," and that granting relief would "completely upset[] the election," causing "confusion and disarray" and "undermin[ing] confidence in the general election results." *Hawkins*, 2020 WI 75, ¶¶ 9-10. Accordingly, the Court denied the petition. *Id.* The Court's ruling in *Hawkins* was not the first occasion the Court denied a petition because it lacked sufficient time to complete its review and award any effective relief. *See Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶¶ 17, 21, 249 Wis. 2d 706, 639 N.W.2d 537 (declining to hear the petitioner's redistricting claims three and a half months before an election because doing so "would have serious practical and political ramifications for the people of this state and their elected officials").

Here, Respondent's timing was even worse: Respondent sought, and the Circuit Court granted, a Temporary Injunction changing the procedures for absentee

voting *once voting was already underway*. Absent immediate review, the Temporary Injunction will create voter confusion, election disarray, and loss of public confidence an order of magnitude greater than the pre-election change sought in *Hawkins*. As discussed above, the stay decisions by the Wisconsin Court of Appeals and Supreme Court of Wisconsin in the *Teigen* drop-box litigation earlier this year are squarely on point and compel rejecting Respondent's request relief. As in *Teigen*, absentee ballots already have been distributed, instructions already have been widely publicized, and voting already is underway in the manner prescribed by WEC's guidance. In such circumstances, court-ordered "[w]ithdrawal of existing guidance while an election is underway" is improper because it is "likely to result in voter confusion," "uncertainty in the administration of the election," and "substantial harm to the defendants and the public interest." *Teigen* Supreme Court stay order, App. 038.

Second, the Temporary Injunction irreparably harms Petitioner and the public because it violates the Equal Protection Clauses of the United States and Wisconsin Constitutions and subjects Wisconsinites to disparate treatment based solely on when they decided to request and submit their absentee ballots. *See Shipley v. Chi. Bd. of Election Comm'rs*, 947 F.3d 1056, 1061 (7th Cir. 2020) (citing *Burdick v. Takushi*, 504 U.S. 428, 433 (1992)). Respondent's request would result in one set of procedures applying to absentee voters who have already cast their ballots, and another that would apply to the tens of thousands of Wisconsinites who likely will vote absentee over the next several weeks. In addition, it would create a

distinction between in-person and absentee voters, granting only the former the ability to spoil their ballots.

Such a result is impermissible under Wisconsin law. *Milwaukee Branch of NAACP v. Walker*, 2014 WI 98, ¶ 62 n.14, 357 Wis. 2d 469, 851 N.W.2d 262 ("Wisconsin's protection of the right to vote is even stronger [than the protections of federal law] because in addition to the equal protection and due process protections of Article I, Section 1 of the Wisconsin Constitution, the franchise for Wisconsin voters is expressly declared in Article III, Section 1 of the Wisconsin Constitution."); *Ollmann v. Kowalewski*, 238 Wis. 574, 300 N.W. 183, 185 (1941) ("Voting is a constitutional right … and any statute that denies a qualified elector the right to vote is unconstitutional and void."). There is no repair for that harm, since an election conducted in violation of state law cannot be undone. *See Biden*, 2020 WI 91, ¶ 1.

Respondent's request to treat one group of Wisconsin voters differently from others while an election is ongoing lacks any rational (let alone compelling) reason and would violate the equal protection rights of the tens of thousands of voters who will be voting absentee between now and Election Day. *See* U.S. Const. amend. XIV, § 1; Wis. Const. art. I, § 1; *Bush v. Gore*, 531 U.S. at 104 (the "fundamental nature" of the right to vote means "equal weight accorded to each vote and the equal dignity owed to each voter"); *accord Shipley*, 947 F.3d at 1061 (citing *Burdick*, 504 U.S. at 433). Because the Temporary Injunction results in constitutional violations, it subjects Wisconsin voters to irreparable harm. *See Mitchell v. Cuomo*, 748 F.2d

804, 806 (2d Cir. 1984) ("When an alleged deprivation of an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.") (quoting 11 C. Wright & A. Miller, *Federal Practice and Procedure*, § 2948, at 440 (1973)); *City of Greensboro v. Guilford Cnty. Bd. of Elections*, 120 F. Supp. 3d 479, 490 (M.D.N.C. 2015) (finding irreparable harm absent court action if plaintiffs were "deprived of their equal protection rights" during an election cycle).

II. THERE IS A SUBSTANTIAL LIKELIHOOD THAT THIS COURT WILL REVERSE THE CIRCUIT COURT'S ENTRY OF THE TEMPORARY INJUNCTION

A petitioner must show "a substantial likelihood that this court will reverse the trial court's nonfinal order." *Cascade Mtn., Inc. v. Capitol Indem. Corp.*, 212 Wis. 2d 265, 268 n.2, 569 N.W.2d 45 (Ct. App. 1997). And, as questions of law, including matters of statutory interpretation, are reviewed *de novo*, there is a substantial likelihood that this court will reverse the trial court's nonfinal order. *Covelli*, 2006 WI App 121, ¶ 13.

A. Respondent's claim is untimely

First, Respondent's claim is untimely, and in the election context, courts routinely deny untimely requests for injunctive relief because of the prejudice that doing so would cause. *See supra* Part **Error! Reference source not found.**.

Here, the Circuit Court has gone a drastic step beyond the circumstances faced by the Supreme Court in *Hawkins* by changing procedures for absentee voting once such voting is already underway. If not enjoined, the lower court's order will

create voter confusion, election disarray, and loss of public confidence an order of magnitude greater than the pre-election change sought in *Hawkins*. As discussed above, the stay decisions by the Wisconsin Court of Appeals and Supreme Court of Wisconsin in the *Teigen* drop-box litigation earlier this year are squarely on point and compel denial of Respondent's motion here.

B. Laches bars Respondent's claim

A related but separate ground for overturning the lower court's order is the equitable doctrine of laches, which "is founded on the notion that equity aids the vigilant, and not those who sleep on their rights to the detriment of the opposing party." *State ex rel. Wren*, 2019 WI 110, ¶ 14 (citations omitted). As discussed, these principles have particular force in election-related matters, where diligence and promptness are required.

Under Wisconsin law, laches has three elements: (1) the party asserting a claim unreasonably delayed in doing so; (2) a second party lacked knowledge that the first party would raise that claim; and (3) the delay prejudiced the second party. *Wis. Small Bus. United, Inc. v. Brennan*, 2020 WI 69, ¶ 12, 393 Wis. 2d 308, 946 N.W.2d 101. All three elements are satisfied here, barring Respondent's claims.

First, because the WEC has published the challenged absentee voting procedures at least since September 2020, Respondent has had actual or constructive knowledge of them for a minimum of two years. While the lower court reasoned that the average voter does not pay any attention to the WEC's guidance, and that Respondent therefore could not have been on notice until the WEC published a press

release relating to the guidance on August 2, 2022, as discussed above, this finding not only ignores that the same procedures had been used for all seven of Wisconsin's most recent statewide elections, but also that the laches doctrine imputes constructive knowledge to parties where the information at issue is readily available. *Biden*, 2020 WI 91, ¶ 13; *State ex rel. Wren*, 2019 WI 110, ¶ 20. There was nothing to prevent Respondent from bringing her claims during this period. Instead, she waited while Wisconsin voters relied upon the WEC's published absentee voting procedures in casting their absentee ballots, as directed by election officials. Respondent offers no explanation for her delay and her decision to wait until after the election started to request that this Court undermine the voters' reliance by overthrowing procedures and protocols that have been in effect for at least two years and seven elections. This is a textbook example of unreasonable delay.

Second, the requirement that another party was unaware Respondent would raise her claim is also satisfied. The WEC and Intervenor-Defendants had no way to anticipate Respondent's misguided effort to change absentee voting procedures that have been publicized for multiple election cycles and years. Respondent provides no evidence that Petitioners had such knowledge and, indeed, it would be absurd to claim that Petitioners should have anticipated Respondent would lie in wait for more than two years and then suddenly reveal herself in the middle of an election to disrupt ongoing absentee voting that is well underway.

Third, the final requirement of laches—prejudice—is also satisfied here. "What amounts to prejudice … depends upon the facts and circumstances of each

case, but it is generally held to be anything that places the party in a less favorable position." *Brennan*, 2020 WI 69, ¶ 19 (quoting *Wren*, 2019 WI 110, ¶ 32). Respondent's delay in asserting her claim will be highly prejudicial to Defendants, many thousands of Wisconsin voters, and nearly two thousand municipal clerks who have been relying on the election practices belatedly challenged here. *See also Teigen* Supreme Court stay order, App. 038 (judicially compelled "[w]ithdrawal of existing [WEC] guidance while an election is underway" would likely case "substantial harm" to voters and the public interest).

In *Brennan*, by comparison, the Wisconsin Supreme Court denied a request to overturn a budget enactment on which Wisconsinites had relied. That enactment, the Court explained, gave rise to "substantial reliance interests on behalf of both public and private parties across the state." 2020 WI 69, ¶ 27 (emphasis added). The Court declined to disturb such reliance interests based on claims not "brought in a timely manner." *Id*. ¶ 31. Here, voters and election clerks have "substantial reliance interests" in the longstanding voting procedures that are under challenge. Because these reliance interests arise in the context of an ongoing election, they are at least as compelling as those the Court found dispositive in *Brennan*.

Accordingly, the laches doctrine requires rejecting Respondent's untimely claim and request for relief.

C. Respondent's requested change in absentee voting procedures would violate the Equal Protection Clauses of the U.S. and Wisconsin Constitutions

As discussed above, because the lower court's order would result in applying different, inconsistent standards to voters based solely on when they decided to request and submit their absentee ballots, it would violate the Equal Protection Clauses of the U.S. and Wisconsin Constitutions. *See supra* Part **Error! Reference source not found.**; *Shipley*, 947 F.3d at 1061; *Milwaukee Branch of NAACP*, 2014 WI 98, ¶ 62 n.14; *Ollmann*, 300 N.W. at 185.

Treating one group of Wisconsin voters differently from others while an election is ongoing lacks any rational (let alone compelling) reason and would violate the equal protection rights of the tens of thousands of voters who will be voting absentee between now and Election Day. See U.S. Const. amend. XIV, § 1; Wis. Const. art. I, § 1; *Bush v. Gore*, 531 U.S. at 104 (the "fundamental nature" of the right to vote means "equal weight accorded to each vote and the equal dignity owed to each voter"); *accord Shipley*, 947 F.3d at 1061. The Equal Protection Clause forbids Wisconsin from engaging in "arbitrary and disparate treatment, [by] valu[ing] one person's vote over that of another." *Bush*, 531 U.S. at 104-05; *see also Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 665 (1966) ("[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause."); *State ex rel. Sonneborn*, 26 Wis. 2d at 54. This prohibition against disparate treatment of voters extends, under the Equal Protection Clause, to the procedures and methods through which citizens cast their votes. *See*

League of Women Voters of Ohio v. Brunner, 548 F.3d 463, 478 (6th Cir. 2008) (denying motion to dismiss on equal protection grounds based on allegations that voting machines were not distributed proportionately, under-trained poll workers misdirected voters, and provisional ballots were not utilized properly); *Common Cause S. Christian Leadership Conference of Greater L.A. v. Jones*, 213 F.Supp.2d 1106, 1108-10 (C.D. Cal. 2001) (holding defendants were not entitled to judgment on the pleadings where plaintiffs alleged that some counties adopted more reliable voting procedures than others in violation of equal protection); *Ury v. Santee*, 303 F. Supp. 119, 126 (N.D. Ill. 1969) (finding failure to provide substantially equal voting facilities violated equal protection).

Respondent has articulated no rational or non-arbitrary reason to impose the disparate treatment of absentee voters that would result from her claim. Her claim does not survive scrutiny under the U.S. or Wisconsin Constitutions.

D. The WEC guidance that the order enjoins is consistent with governing Wisconsin election statutes

The WEC's August guidance does not contravene Wis. Stat. §§ 6.84, 6.86(5), or 6.86(6), as the Circuit Court found. Rather, the guidance is consistent with settled law and common sense. The order enjoins the dissemination or publication of information: (i) that a municipal clerk or local election official may return a previously completed and submitted absentee ballot to an elector, except as otherwise provided in Wis. Stat. §6.87(9); or (ii) that a municipal clerk or local election official is authorized to spoil an absentee ballot on behalf of an elector.

The Circuit Court found that a municipal clerk may not return a previously completed and submitted absentee ballot to an elector except as otherwise provided in Wis. Stat. §6.87(9). But the lower court's position that Section 6.86(6) places exclusive bounds on whether, how, and when a ballot can be spoiled or returned to an elector is incongruous with the statute itself. *Teigen*, 2022 WI 64, ¶ 63 (cleaned up, citation omitted). ("[T]he legislature does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions[.]") (citation omitted).

As to the second clause, that Section 6.86(5) disallows clerks or officials from spoiling an absentee ballot on behalf of an elector, Section 6.86(5) contains no such language and no such exclusion. Rather, it reads: "Whenever an elector returns a spoiled or damaged absentee ballot to the municipal clerk […] the clerk shall issue a new ballot to the elector or elector's agent, and shall destroy the spoiled or damaged ballot." Wis. Stat. § 6.86(5). The Circuit Court's construction creates an exclusion out of thin air, introducing a mandate wholly absent from the plain language or reasonable construction of the statute. And courts "may not rewrite statutes; [they] must simply interpret them as they are written." *United Am., LLC v. Wis. Dep't of Transp*., 2020 WI App 24, ¶ 16, 392 Wis.2d 335, 944 N.W.2d 38. The lower court effectively concluded that the legislature "hid an elephant in a mousehole[,]" by "read[ing] into the statutes a monumentally different voting mechanism not specified by the legislature." *Teigen*, WI 64, ¶ 63. It would be extraordinary for the legislature, by use of the word "whenever," to transmogrify a statute that specifies how a clerk should respond to the return of a spoiled ballot in

a particular situation into one which suddenly prescribes the entirety of procedures and eligible actors involved in ballot spoliation. Even more so when such an interpretation both ignores a slew of other statutes related to spoiled ballots and requires the reader to imagine the word "only" appears in the statute, as Respondent suggests. A critical fact that Respondent ignores is that under the WEC's guidance, it is the voters—not the election clerks—who have control over whether an absentee ballot is spoiled. The August guidance provides that absentee "voters can request to have their returned absentee ballot spoiled." App. 012. Under the guidance, without such a request from the voter, an absentee ballot cannot be spoiled. Thus, there is no basis for Respondent's apparent contention that the guidance opens the door to rogue clerks spoiling ballots when that is not the intent of the voter.

The Circuit Court's Order is also inconsistent with other election statutes. This is because Wis. Stat. § 6.80(2)(c) allows that: "[a]ny elector who, by accident or mistake, spoils or erroneously prepares a ballot may receive another, by returning the defective ballot, but not to exceed 3 ballots in all." In addition, Wis. Stat. § 5.91(16), which sets requirements for ballots, voting devices, automatic tabulating equipment, or related equipment and materials, requires that any such system must: "provide[] an elector with the opportunity to change his or her votes and to correct any error or to obtain a replacement for a spoiled ballot prior to casting his or her ballot." As a result, the WEC's guidance is consistent with these portions of the election code that provide voters an opportunity to correct mistakes or erroneously prepared ballots. "When reasonably possible, we read statutes in harmony, and a

harmonious reading is quite reasonable in this case." *Teigen* 2022 WI 64, ¶ 50 (citations omitted). Of course, the election code does not create dual classes of voters—one with an ability to correct mistakes and one without. And it is not the case that Section 6.80(2)(c) and Section 5.91(16) apply only to non-absentee voters—such a structure would create a disfavored class of voters in violation of the Wisconsin and federal Equal Protection Clauses as set forth above.

III. THIS COURT SHOULD STAY THE TEMPORARY INJUNCTION

For the sake of completeness, we address here the four factors an appellate court must consider when reviewing a request to stay an order pending appeal: "(1) whether the movant makes a strong showing that it is likely to succeed on the merits of the appeal; (2) whether the movant shows that, unless a stay is granted, it will suffer irreparable injury; (3) whether the movant shows that no substantial harm will come to other interested parties; and (4) whether the movant shows that a stay will do no harm to the public interest." *Waity v. LeMahieu*, 2022 WI 6, ¶ 49, 400 Wis. 2d 356, 969 N.W.2d 263. These factors are not prerequisites but rather "interrelated considerations that must be balanced together." *Id.* (quotation marks and citation omitted). Temporary injunctions are appropriate when necessary to preserve the status quo. *Id.*

The Circuit Court declined to enter a stay pending appeal. This Court reviews a trial court's decision on a stay for "an erroneous exercise of discretion." *Id.* at ¶ 49. An appellate court will sustain a discretionary act if it concludes the trial court (1) examined the relevant facts; (2) applied a proper standard of law; and (3) using

a demonstrated rational process, reached a conclusion that a reasonable judge could reach. *State v. Gudenschwager*, 191 Wis.2d 431, 440, 529 N.W.2d 225 (1995).

This Court should stay the circuit court's rulings for the following reasons.

First, as explained above, Petitioner has made a strong showing that it is likely to succeed on the merits of the appeal. *See supra* Part II.

Moreover, the Circuit Court dismissed Petitioner's likelihood of success on the merits, asserting that the court's statutory construction was straightforward and correct. But denigrating Petitioner's likelihood of achieving reversal in a case like this one, where appellate review will be conducted *de novo*, is an error of law. This is contrary to the Wisconsin Supreme Court's recent stay jurisprudence *See Waity*, 2022 WI 6, ¶ 53 ("When reviewing the likelihood of success on appeal, circuit courts must consider the standard of review, along with the possibility that appellate courts may reasonably disagree with its legal analysis. For questions of statutory interpretation, as are presented in this case, appellate courts consider the issues de novo."). Here, as in *Waity* and the recent decisions on which it relied, the Circuit Court paid no heed to the appellate standard of review. That is itself an erroneous exercise of discretion.

The Circuit Court here made the identical mistake called out in *Waity*; in denying Petitioner's motion for a stay, it focused on the harms to Respondent were the injunction stayed, rather than consider the harms Petitioner and the public at large would face in the absence of a stay during the appeal in the event that Petitioner is ultimately successful in having the injunction vacated on appeal. *Id.* at ¶ 58. As

in *Waity*, here "the circuit court never considered whether the harms could be undone or unwound by an appellate court at the end of the appeal." *Id.* at 11. Given that the harms here involve the injection of chaos and uncertainty into the November election, resulting in diminished confidence in Wisconsin's elections and violating Wisconsinites' right to equal protection under the law, which may be irrevocably complete by the time the appeal in this case is adjudicated, there is no way that harms to Petitioner or the public at large "could be undone or unwound" by this Court or any other at the end of the appeal. Thus, when this Court properly "consider[s] the potential harms that accompany the decision to grant or deny the Petitioner's motion for a stay pending appeal in this case, … the balance tips in favor of granting the stay." *Id.*

The remaining *Waity* factors also favor a stay. The possibility of a stay imposing harm on Respondent is almost non-existent. Respondent introduced no evidence of any fraud or vote dilution caused by the WEC ballot spoiling guidance. Simply put, there is no conceivable harm to Respondent, much less one that could outweigh the harm imposed on Wisconsinites who could be wrongfully precluded from voting by the circuit court's erroneous construction of the law.

Finally, the public interest strongly favors entrance of a stay. Wisconsin law and public policy endorse participation in our elections. *See, e.g.*, Wis. Stat. § 6.84(1) ("[V]oting is a constitutional right, the vigorous exercise of which should be strongly encouraged"). There is no public interest in potentially disenfranchising eligible voters, applying different procedures to voters based solely

on when and how they vote, creating confusion for voters and election officials concerning which procedures apply, and undermining public confidence in the general election. In sum, all four *Waity* factors, properly applied, favor entrance of a stay in this matter. Appellant's request for a stay should be granted.

CONCLUSION

For the reasons set forth above, this Court should (a) *promptly* grant Petitioner's emergency request for a stay of the Temporary Injunction pending disposition of the Petition for Leave to Appeal From Temporary Injunction Order Not Appealable as of Right; and (b) grant the Petition for Leave to Appeal.

Dated: October 7, 2022

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CERTIFICATION

I hereby certify that this petition conforms to the rules contained in WIS. STAT. Section 809.50(1) and is produced with a proportional serif font. The length of this petition and supporting memorandum is 7,176 words.

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CERTIFICATE OF SERVICE

I certify that on this 7th day of October 2022, I caused a copy of this brief to be served upon counsel for each of the parties via the appellate court's electronic filing system.

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