STATE OF WISCONSIN CIRCUIT COURT BRANCH 10 DANE COUNTY

RISE, INC. and JASON RIVERA,

Plaintiffs,

v.

WISCONSIN ELECTIONS COMMISSION and MARIBETH WITZEL-BEHL,

Defendants,

WISCONSIN STATE LEGISLATURE,

Intervenor Defendant,

MICHAEL WHITE and EVA WHITE,

Proposed Intervenor Defendants.

Case No. 2022-CV-002446
Case Code: 30701
Declaratory Judgment

[PROPOSED] INTERVENOR DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR EXPEDITED BRIEFING

Consistent with the Court's permission for Movant-Intervenors Michael and Eva White to participate in argument this morning on Plaintiffs' Motion for Expedited Briefing and Decision on Plaintiffs' Motion for Summary Judgment, Movant Intervenors respectfully submit this opposition to that motion.

Plaintiffs' request for summary judgment on a highly expedited schedule is an improper second effort at their already-denied temporary injunction motion. Plaintiffs could seek reconsideration of that motion or appeal it, but they have done neither. And it is procedurally improper for Plaintiffs to attempt to use an expedited summary judgment proceeding to obtain the same relief the Court denied them in its October 7 Order Denying Temporary Injunction. It is worth emphasizing that Plaintiffs attempted to submit an affidavit of a clerk at the hearing on their

motion for temporary injunction, and the Court rejected that effort because it would have unfairly prejudiced the other parties by evading Plaintiffs' obligation to present such evidence with their motion. Plaintiffs' current motion undoubtedly seeks to sidestep that defect by packaging their new (and thus even less timely) affidavits in a highly expedited motion for summary judgment. It is a naked attempt to relitigate their failed motion for a temporary injunction and should be rejected out of hand.

Plaintiffs' motion to expedite should be denied for several additional reasons.

1. Plaintiffs suggested (at the conference this morning) that their affidavits demonstrate that the status quo is "chaos" with regard to WEC's longstanding three-component definition of address. But Plaintiffs have submitted nothing but hearsay evidence of one of Wisconsin's 72 county clerks, *see* Aff. of Scott McDonnell, and an unscientific survey composed of vague hearsay evidence of conversations that Plaintiffs' representatives allegedly had with unidentified employees of unidentified rank and authority in municipal clerk's offices of 21 of Wisconsin's 1,851 municipalities, *see* Aff. of Delia Goldin. Even aside from the reliability and admissibility problems with Plaintiffs' hearsay evidence, their affidavits prove nothing. The McDonnell affidavit is particularly meaningless. As the county clerk, he can presumably clear up any supposed confusion that exists among municipal clerks within his jurisdiction. In any event, in sum total, the affidavits convey, at most, information regarding processes and procedures within approximately 1% of the municipal clerk's offices across the State. And it is far from clear that the methodology used to select that 1% was even remotely sound.

2. Moreover, as both WEC and the Legislature noted at this morning's conference, Plaintiffs' motion to expedite deprives all other parties of the opportunity to develop counter evidence that would disprove their theory. And there is not nearly sufficient time to develop

detailed evidence of statewide application of the definition of address before Election Day, which is rapidly approaching. Plaintiffs claimed at this morning's status conference that any discovery into this "new evidence" would be unnecessary since they do not rely upon this new evidence for purposes of summary-judgment. But their summary judgment brief itself directly contradicts that claim, as it relies on this very evidence in support of the claim for declaratory relief. *See* Pls. Br. in Support of Summary Judgment at 15-16. As indicated above, these affidavits introduce disputed issues of material fact that preclude summary judgment. The obvious impropriety of resolving this matter on such a highly expedited motion for summary judgment underscores that Plaintiffs seek a redo of their temporary injunction motion. Accordingly, there is no basis for expediting Plaintiffs' summary judgment motion to afford them a second chance to obtain the relief the Court already denied them in its October 7 Order Denying Temporary Injunction.

3. Regardless, as several parties noted this morning, changing the election rules this late in the game contravenes Supreme Court guidance. Even if the current rules are undesirable in Plaintiffs' eyes, what matters is that the rules are *set* and the election is underway. Here, clerks throughout the state are already processing ballots according to the status quo. *See* Wis. Stat. 6.87(9). Plaintiffs ask this Court to upend that state of affairs, courting predictably disastrous results. The Supreme Court has "repeatedly emphasized" that courts should not issue injunctions "changing the election rules" determining which ballots may be counted "so close to the election date." *Republican Nat'l Comm. V. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020). That is because late orders changing such rules inherently produce "judicially created confusion." *Id.* (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006)). Plaintiffs' requested relief would alter which ballots may be returned to the voter and which are deemed sufficient to be counted as submitted, but "it is too late to grant [Plaintiffs] any form of relief that would be feasible and that would not

cause confusion." *Hawkins v. Wis. Elections Comm'n*, 2020 WI 75, ¶ 5, 393 Wis. 2d 629, 948 N.W.2d 877. Under Plaintiffs' rushed schedule, the Court would issue a ruling at the earliest on October 28, 2022—eleven days before the election. Even if the Court were inclined to expedite Plaintiffs' motion for summary judgment, precedent (and prudence) require waiting until after Election Day.

4. Plaintiffs' motion to expedite, if granted, would create additional problems. If this Court were to adopt Plaintiffs' open-ended, anything-goes definition of "address," the Court would be imposing a brand-new rule on ballots returned on the eve of the election, causing—not abating—confusion throughout the state. WEC's three-part definition of "address" has been in place since 2016. As counsel noted at this morning's conference, more than 150,000 absentee ballots have already been returned, *see* Ex. A, Aff. of Sara Meyers, and tens of thousands more will have cast absentee ballots by the October 28 date on which Plaintiffs seek a ruling. Plaintiffs' request would subject ballots cast after October 28 to different rules governing their sufficiency. The Court should not invite that avoidable disaster.

5. Finally, Plaintiffs' motion to expedite is futile because, as the Legislature's counsel explained at this morning's hearing, the Legislature intends to timely move to dismiss Plaintiffs' Complaint in full, which will trigger the "stay[]" of "all discovery and other proceedings" under Wis. Stat. § 802.06(1)(b).

* * *

Plaintiffs are wrong on the facts and wrong on the law. The status quo is the same as it was on October 7: "[T]he definition of an absentee ballot witness 'address' contained in the October 18, 2016 Wisconsin Elections Commission memorandum and the September 14, 2022 memorandum to clerks from the Elections Commission, namely that an address is sufficient if it

contains a street number, street name and name of municipality, is the status quo." Doc. 79. And Plaintiffs have put forward no reliable (or admissible) evidence of any confusion, much less widespread statewide confusion over the meaning of WEC's longstanding definition of "address." Even if they had, the *Purcell* principle does not have an exception for relief that favors Plaintiffs. In any event, Plaintiffs' request to expedite is an improper attempt to circumvent this Court's order denying their request for pre-election relief. It invites confusion and error on the basis of an undeveloped record. The Court should thus deny the motion.

Dated: October 17, 2022

Respectfully submitted,

Electronically signed by Bryant M. Dorsey
Kurt A. Goehre, State Bar Number: 1068003
Bryant M. Dorsey, State Bar Number: 1089949
CONWAY, OLEJNICZAK & JERRY, S.C.
231 S. Adams Street/PO Box 23200
Green Bay, WI 54305-3200
(920) 437-0476
KAG@lcojlaw.com
BMD@lcojlaw.com

Thomas R. McCarthy*
Conor D. Woodfin*
CONSOVOY MCCARTHY PLLC
1600 Wilson Boulevard, Suite 700
Arlington, VA 22209
(703) 243-9423
tom@consovoymccarthy.com
conor@consovoymccarthy.com

Attorneys for Intervenor Defendants

*Admitted *pro hac vice*