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10-27-2022  
CIRCUIT COURT  
DANE COUNTY, WI  
2022CV002446

STATE OF WISCONSIN      CIRCUIT COURT      DANE COUNTY  
  BRANCH 10

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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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**INTERVENOR DEFENDANT THE WISCONSIN STATE LEGISLATURE'S BRIEF  
IN OPPOSITION TO PLAINTIFFS' SECOND MOTION FOR TEMPORARY  
INJUNCTION**

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Plaintiffs' second temporary injunction motion seeks two alternative forms of relief: (1) an order interpreting "address" under Wis. Stat. § 6.87(2) as "a place where the witness can be communicated with" and compelling WEC to instruct clerks that absentee ballot certificates satisfying that standard are valid, Dkt.104 at 12–13; or, alternatively, (2) an order interpreting "address" as "street number, street name, and municipality" and compelling WEC to instruct clerks that ballots conforming with *that* definition are valid. Dkt.104 at 13. The first request is identical to the one this

Court already rejected, Dkts.5 at 1–2; 79 at 1, and is thus a nonstarter. As to the second request, while it is not problematic from the point of equitable considerations and the status quo, Plaintiffs have sought this relief against the wrong parties.

On Plaintiffs’ first request—that this Court issue an order interpreting “address” under Section 6.87(2) as “a place where the witness can be communicated with” and compelling WEC to instruct clerks that absentee ballot certificates satisfying that standard are valid, Dkt.104 at 12–13—this Court has already rejected this request, correctly holding that the relevant status quo is “the definition of an absentee ballot witness “address” contained in [WEC’s 2016 and 2022 guidance], namely that an address is sufficient if it contains a street number, street name and name of municipality.” Dkt.79 at 1. This Court should also deny this regurgitation of Plaintiffs’ prior temporary injunction request for the additional reasons that the Legislature already explained in detail in its briefing on Plaintiffs’ prior motion for a temporary injunction and at the temporary injunction hearing, including because Plaintiffs are wrong about the meaning of “address” under Section 6.87(2). *See* Dkt.40 at 10–26; Mot. Hr’g Tr. (Oct. 7, 2022) (“Tr.”).

Developments that have taken place since this Court’s rejection of Plaintiffs’ prior motion for a temporary injunction only further defeat Plaintiffs’ second request. Clerks having to implement a new, judicially-created, and unadministrable definition of “address” now—*when far more absentee ballots have been returned than was even the case at the time of Plaintiffs’ first motion*—would violate the binding principle that courts should “not alter the election rules on the eve of an election,” so as to avoid

“judicially created confusion.” *Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam); *Trump v. Biden*, 2020 WI 91, ¶ 22, 394 Wis. 2d 629, 951 N.W.2d 568, *cert. denied*, 141 S. Ct. 1387 (2021); *see* Wis. Stat. §§ 6.86(7), 7.15(1)(cm); Dkt.76 at 9 (WEC reporting that, even as of October 6, 2022, clerks had distributed 308,495 absentee ballots and 89,604 absentee ballots had been returned). Granting a temporary injunction that imposes Plaintiffs’ first request is guaranteed to “create[ ] confusion,” *Republican Nat’l Comm.*, 140 S. Ct. at 1207, given that, *inter alia*, Plaintiffs’ definition in that first request provides *no* guidance as to what type of information is “sufficient” for a clerk to determine where a witness may be communicated with or even what it means to “communicate” with a witness.

Plaintiffs’ mostly inadmissible hearsay evidence, *see* Wis. Stat. § 908.02, that a couple of clerks are misapplying the statutorily *correct* definition that this Court properly held is the status quo, Dkts.104 at 2–6, 9–10; 79 at 1, does not change the equitable analysis. In essence, Plaintiffs ask this Court to use the claimed fact that some limited number of clerks are apparently disregarding WEC’s guidance as a justification for causing chaos by forcing all clerks to adopt Plaintiffs’ atextual, unadministrable approach to re-defining “address.” The premise of Plaintiffs’ decision to sue WEC as the lead defendant here is that clerks generally choose to follow WEC’s guidance on the meaning of Wisconsin election laws, including on the meaning of “address.” Thus, the status quo remains the definition of “address” that WEC has promulgated to clerks as recently as September 14, 2022—“street number,

street name, and municipality”—even if a couple of clerks are apparently choosing to reject WEC’s guidance for their own, incorrect approaches. *See* Dkt.40 at 10–22.

Thus, to the extent that Plaintiffs now claim that their concern is not with the actions of WEC (or Maribeth Witzel-Behl), but that certain other clerks are requiring that witnesses include more than the three statutorily necessary elements of “address,” they have sued the wrong parties. The Legislature respectfully submits that if Plaintiffs wish to ensure that these certain clerks are not rejecting legally sufficient ballots by requiring more than the street number, street name, and municipality, the proper defendants are those specific clerks. This is the point that the Legislature made at the temporary injunction hearing, Tr. 37:25–38:10, and Plaintiffs’ continued refusal to sue the correct parties undermines the goals that Plaintiffs claim they are seeking in this lawsuit.

Turning to Plaintiffs’ alternative requested relief—an order interpreting “address” as “street number, street name, and municipality” and compelling WEC to instruct clerks that ballots conforming with *that* definition are valid, Dkt.104 at 13—this relief would not harm the status quo, but is nevertheless improper. As a threshold matter, because the underlying definition in this requested relief mirrors the statutorily correct and status quo definition of “address,” the Legislature would have no status-quo-based or other equitable concerns with this Court issuing such relief. But this relief would nevertheless be improper. WEC has already issued guidance to clerks articulating this very definition of address on September 14, 2022, and Plaintiffs cite no authority that would permit this Court to require WEC to re-

issue the same guidance or to use WEC as a cat's paw to force clerks that have rejected WEC's guidance to comply with that guidance's correct understanding of "address." Wisconsin has "a highly decentralized system for election administration," *State ex rel. Zignego v. WEC*, 2021 WI 32, ¶ 13, 396 Wis. 2d 391, 957 N.W.2d 208; *Jefferson v. Dane Cnty.*, 2020 WI 90, ¶ 24 n.5, 394 Wis. 2d 602, 951 N.W.2d 556, with clerks bearing the responsibility for implementing election laws, including Section 6.87, *see, e.g.*, Wis. Stat. §§ 6.87(4)(b)(1), 6.87(2). And while WEC is "responsible for [issuing] *guidance* in the administration and enforcement" of Wisconsin's election laws, *Jefferson*, 2020 WI 90, ¶ 24 (emphasis added), WEC's guidance by definition "does *not* have the force of law and does *not* provide the authority for implementing or enforcing a standard [or] requirement," Wis Stat. § 227.112 (emphases added).

### CONCLUSION

This Court should deny Plaintiffs' Second Motion For A Temporary Injunction.

Dated: October 27, 2022

Respectfully submitted,

*Electronically signed by Kevin M. LeRoy*

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