STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 10

RISE, INC.

and

JASON RIVERA,

Plaintiffs,

v.

WISCONSIN ELECTIONS COMMISSION,

and

MARIBETH WITZEL-BEHL, in her official capacity as City Clerk for the City of Madison, Wisconsin,

Defendants

and

WISCONSIN STATE LEGISLATURE

Intervenor-Defendant.

Declaratory Judgment
Case No. 22-CV-2446
Case Code: 30701
Honorable Juan B. Colás

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF THEIR SECOND MOTION FOR A TEMPORARY INJUNCTION

INTRODUCTION

Notably absent from the briefs in opposition to Plaintiffs' second motion for a temporary injunction is any dispute about whether clerks across Wisconsin are applying varying interpretations of what constitutes an absentee ballot witness "address." Rather, WEC and the Legislature try to move the goalposts, throwing up illusory concerns about the scope of the relief Plaintiffs request, the admissibility of Plaintiffs' evidence, the relevant status quo, and whether relief against WEC is appropriate this close to an election.

Each of these arguments is a smokescreen aimed at masking the troubling reality that, absent immediate action by this Court before election night, Wisconsin voters will be disenfranchised because Wisconsin municipalities have been left to decide for themselves the necessary components of a witness "address" (and have in fact reached wildly different answers to that question). Whatever this Court thinks the statewide pre-litigation status quo was, it has the ability, authority, and duty to act to ensure for purposes of the general election that clerks across the state apply a uniform definition of "address" and that ballots are not treated differently simply by virtue of where they happen to be returned. The Court should grant Plaintiffs' motion.

ARGUMENT

Plaintiffs satisfy the by now familiar standard for a temporary injunction: "(1) [they are] likely to suffer irreparable harm if a temporary injunction is not issued; (2) [they have] no other adequate remedy at law; (3) a temporary injunction is necessary to preserve the status quo; and (4) [they have] a reasonable probability of success on the merits." *Milwaukee Deputy Sheriffs' Ass'n v. Milwaukee Cnty.*, 2016 WI App 56, ¶20, 370 Wis. 2d 644, 883 N.W.2d 154. Neither WEC nor the Legislature responds to Plaintiffs' arguments on irreparable harm and adequate remedy other than by reference to briefing that predates the new evidence that is the entire basis for this motion. Their arguments on probability of success essentially boil down the claim that this Court already

considered and rejected Plaintiffs' arguments on the merits. That is incorrect—this Court has never ruled on the merits—and Plaintiffs' merits arguments more than suffice for a temporary injunction. *See* Dkt. 104 at 1–4, 7–8. That leaves the status quo, which is where WEC and the Legislature spend the bulk of their opposition briefs—specifically on what the appropriate baseline is against which to measure relief. But, as Plaintiffs explained in their opening brief, this question goes only to *what* relief the Court should craft; it has no bearing on *whether* temporary injunctive relief should issue. No one disputes that without temporary injunctive relief now, identical ballots will be accepted by some clerks and rejected by others on election night, for no reason other than the location where they happen to be returned. That result cannot stand.

I. Plaintiffs present a straightforward question of statutory interpretation and request appropriate relief that this Court has authority to grant.

First things first: there can be no serious dispute that this Court has authority to grant the relief Plaintiffs seek, or that such relief would be meaningful. WEC and the Legislature both try to muddy the waters by complicating the straightforward statutory interpretation question Plaintiffs raise and the simple relief Plaintiffs seek (as WEC does) and raising questions about this Court's discretion to grant it (as the Legislature does). Both arguments are meritless.

A. Plaintiffs' request is simple.

Plaintiffs ask this Court to define witness "address" in Wis. Stat. 6.87(2) and, based on that definition, to direct WEC to instruct local elections officials—as it routinely does on myriad issues relating to election administration in the state—how absentee ballots should be processed and counted. WEC spends nearly a quarter of its brief explaining the different officials and steps involved in absentee ballot processing and counting. None of this matters and the Court can sidestep it entirely for the simple reason that every step in the process WEC describes flows from

the term "address" in Wis. Stat. 6.87(2). *See* WEC Opp. 5–10. If anything, WEC's arguments underscore how critical it is to get immediate clarity on the meaning of that term.

Consider the steps WEC describes. First, a municipal clerk who receives an absentee ballot has statutory discretion to return that ballot to a voter for correction *only if* that ballot contains "an improperly completed certificate or [] no certificate." Wis. Stat. § 6.87(9); *see* WEC. Opp. 6-8. This discretion is not triggered if an absentee ballot contains a properly completed certificate. What are the elements of a properly completed certificate? Wis. Stat. § 6.87(2) provides that answer, and one of the elements is a witness "address." All Plaintiffs ask here is for a ruling defining "address" so that clerks can determine when an absentee ballot certificate satisfies that definition and consequently cannot be returned to a voter under the discretion afforded by Wis. Stat. 6.87(9).

Second, WEC details the processes for counting an absentee ballot, but those processes—including whether Wis. Stat. § 6.87(6d) applies—again hinge on the definition of "address" in Wis. Stat. 6.87(2). WEC. Opp. 8–10, 20–21. Absentee ballot counting is conducted either by the election inspectors at a polling place, or by the municipal board of absentee ballot canvassers. In either instance, the local election official charged with reviewing the ballot must determine whether the absentee ballot "certification has been properly executed," Wis. Stat. § 6.88(3)(a) (for election inspectors at polling places) or whether "the [absentee ballot] certification has been properly executed," Wis. Stat. § 7.52(3)(a) (for municipal boards of absentee ballot canvassers). Whether the statutory standard is met in either instance hinges on the requirements of Wis. Stat. § 6.87, which, in turn, hinges on the meaning of "address" in Section 6.87(2). In other words, if

at any point in this process the local election official has determined that the witness address is valid, the ballot counts, and nothing further is required.[1]

B. This Court can grant Plaintiffs' requested relief.

The Legislature agrees that equitable principles do not stand in the way of this Court adopting Plaintiffs' proposed alternative three-component definition of address for purposes of this temporary injunction. Leg. Opp. at 2, 4. But such relief is "nevertheless improper," the Legislature contends, because WEC has "already issued guidance to clerks articulating" the three-part definition of address. *Id.* at 5. This is wrong. Plaintiffs have not sought reissuance of any WEC guidance. Plaintiffs instead seek an interpretation of Wisconsin law coupled with an instruction to WEC to inform local officials of the interpretation. That is structurally equivalent to the relief another circuit court issued in *White, et al. v. WEC, et al.*, No. 2022-CV-001008 (Cir. Ct. Waukesha Cnty.) just weeks ago. *See White*, Dkt. 167, at ¶9. Notably, the Legislature never contested the Waukesha court's authority to issue this identical form of relief in *White.*

Nor does the Legislature's argument that Plaintiffs could instead have sued every delinquent clerk individually make the relief Plaintiffs seek in this lawsuit or this motion somehow improper. *See* Leg. Opp. at 4. WEC is a defendant in this action. And "WEC's role as the centralized election body" in Wisconsin "means the buck stops there." *State ex rel. Zignego v. Wisconsin Elections Comm'n*, 2021 WI 32, ¶60, 396 Wis. 2d 391, 423, 957 N.W.2d 208, 223–24 (Bradley, J., dissenting). WEC "may direct municipal clerks to implement a court order pertaining to the state's election procedures." *Frank v. Walker*, 196 F. Supp. 3d 893, 918 (E.D. Wis. 2016). Here, Plaintiffs seek less than that, asking only that WEC be directed to inform municipal clerks

[1] This also dooms WEC's arguments regarding Wis. Stat. § 6.87(6d), which provides that "[i]f a certificate is missing the address of a witness, the ballot may not be counted." *See* WEC Opp. at 20–21. Because the definition of address is an antecedent question to anything in Section 6.87(6d)'s scope, any issues regarding its application must flow from the definition of "address."

of a court order authoritatively interpreting "address" under Wis. Stat. § 6.87(2) for purposes of the general election. That is precisely the remedy granted in *White*. *See White*, Dkt. 167 at ¶9 (temporary injunction commanding WEC to "notify all municipal clerks and local election officials previously receiving the guidance" of the court's order). And this relief would be meaningful, as it is likely that clerks will follow this interpretation to the letter.

C. *Hawkins and Purcell* favor rather than forbid an injunction here.

WEC and the Legislature's fallback argument is that this Court should refrain from issuing an injunction because the election is approaching. *See* WEC Opp. at 13–14; Leg. Opp. at 2–3. But this is precisely why the Court *must* act. Under *Purcell v. Gonzalez*—the fountainhead case on this issue—courts generally ought not to change election rules just prior to an election because "[c]ourt orders affecting elections" can "result in voter confusion." 549 U.S. 1, 4–5 (2006). Here, however, there is already mass confusion among local election officials, and among voters who are getting inconsistent and ever-changing information from those officials (in addition to having their ballots rejected at abnormally high rates). Dkt. 104 at 4–7; *see* Dkt. 88. For this reason, the danger the *Purcell* court warned of is simply not present here. In fact, the opposite is true: *only* a temporary injunction that articulates a single standard for officials to employ statewide can stop the currently prevailing confusion from spilling over into election day. This conclusion is underscored by the fact that all Plaintiffs seek is to restore the absentee ballot witness certificate process to what it was during the August 2022 primary and every other election during the past six years.

The cases WEC and the Legislature cite are thus inapposite. In *Hawkins*, the Court concluded that it was too late to grant any relief where the petitioners unreasonably delayed in seeking relief in a situation with short deadlines and an upcoming election *and* where the relief required the ordering and reprinting of ballots where many ballots had already been mailed out to voters. *Hawkins v. Wisconsin Elections Comm'n*, 2020 WI 75, ¶9, 393 Wis. 2d 629, 948 N.W.2d

877. Here, no absentee ballots have been counted. Wis. Stat. § 6.88. And Plaintiffs' foremost concern is that when they are counted, that process is orderly and lawful.

As for *RNC v. DNC*, the U.S. Supreme Court there reversed a district court's unilateral decision to "change[] the election rules" five days before a scheduled election by allowing absentee ballots postmarked after the election to still be counted despite that having never before been the case. 140 S. Ct. 1205, 1206 (2020) (*per curiam*). Here, Plaintiffs ask the Court to do the opposite by preserving longstanding election practices to prevent disenfranchisement.

II. This Court's immediate action is needed.

A. Evidence establishes widespread inconsistencies in clerk practices on the ground.

As Plaintiffs have described in detail, new evidence demonstrates that clerks across the state are applying different interpretations of what constitutes a witness "address." *See* Dkt. 104 at 4–7. Defendants never dispute that ultimate factual claim. Instead, they argue that Plaintiffs' evidence is inadmissible hearsay, or that it at most shows "a few clerks" are not following WEC's guidance. *See* Leg. Opp. at 3–4; WEC Opp. at 2, 14–19. They are wrong on both counts.

First, much of the evidence Plaintiffs cite is not hearsay—it comes from local officials describing their first-hand knowledge of local practices. Dkt. 89; Dkt. 94; Dkt 120. In any case, eight federal courts of appeals—including the Seventh Circuit—recognize that courts are free to consider hearsay evidence in considering preliminary injunctions. *See G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709, 725 (4th Cir. 2016), *vacated and remanded on other grounds*, 137 S. Ct. 1239 (2017) (collecting cases); *see also Ty, Inc. v. GMA Accessories, Inc.*, 132 F.3d 1167, 1171 (7th Cir. 1997) (Posner, C.J.). Defendants cite no contrary authority.

Second, the Legislature is wrong that the problem is limited to "a few clerks," and that the Court therefore need not act. Leg. Opp. at 3. Among other evidence, a survey of twenty-one

municipalities found that *fifteen* reported using a five-component address definition. Dkt. 91; *see also* Dkt. 104 at 5–6. Even if Plaintiffs somehow managed to identify through their survey the *only* clerks (out of the state's 1800-plus local election officials) that are not following WEC guidance—a dubious proposition—that is still fifteen too many. The Legislature cites no authority permitting courts to ignore inconsistent election practices just because the inconsistency is limited. Nor could it. *See supra* p. 4. And a few clerks can be responsible for many voters: Among the fifteen municipalities that reported applying a five-component definition are six of the ten largest cities in the state (Milwaukee, Green Bay, Racine, Appleton, Waukesha, and Janesville), with an aggregate population of nearly a million people.

B. Only Plaintiffs' definition of "witness address" preserves the status quo that existed from October 2016 to September 2022.

Having established that there is a widespread problem on the ground, the question next becomes whether temporary injunctive relief is appropriate. WEC and the Legislature's primary response is that the status quo is WEC's three-component definition, and that this precludes the Court from acting. They are once again wrong on both counts.

The appropriate baseline for this motion is the "status quo pendente lite" (*i.e.*, pending the litigation). *Werner v. A. L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520, 259 N.W.2d 310, 314 (1977). Here, that status quo is a longstanding regime—which governed every statewide election from October 2016 through the August 2022 primary—under which local elections officials would have accepted and then counted the following absentee ballots, among many others:

- A ballot witnessed by a student who listed her address as Room 210, Waters Residence Hall, rather than 1200 Observatory Drive.
- A ballot witnessed by the voter's husband, where the witness listed his address as "same" or "see above."
- A ballot witnessed by a retirement community resident who listed her address as Capitol Lakes Room 23.

For the last six years, ballots like these were sufficient because, under the guidance WEC withdrew just six weeks ago, the witness provided information that allowed local officials to discern where the witness could be communicated with. *See* Dkt. 4 at 5. The same would be true under Plaintiffs' definition. Under WEC and the Legislature's three-component definition of "address," by contrast, *none* of these voters' ballots would be accepted, never mind counted on election night.[2] Accordingly, Plaintiffs' definition is the only one that preserves the status quo.

WEC and the Legislature both misunderstand the role of recent evidence in the above analysis. WEC says that "the Commission's guidance is and has always been just that—guidance." WEC Opp. at 15. So, according to WEC, "variations in clerks' application of the witness address requirement" are just irrelevant to the status quo—only the words in the guidance matter. *Id.* at 17. Contradicting WEC, the Legislature says that the "premise" of this whole case is that "clerks generally choose to follow WEC's guidance," so whatever definition WEC most recently "promulgated to clerks" is the status quo. Leg. Opp. at 3.

WEC's rejoinder is wrong because it ignores the practical realities of Wisconsin elections and WEC's role in shaping those realities. Local officials look to two sources, above all, to understand the Elections Code: the courts and WEC. Here, the evidence is overwhelming that local officials are not applying the three-component definition that WEC calls its status quo guidance (perhaps because WEC in fact revoked its relevant guidance in September and replaced it with a

[2] This is particularly problematic given that many of the absentee voters at issue may have voted under the prior guidance just several months ago in the August primary. Under Wisconsin law, a general election and its affiliated primary are united in a "critical nexus." *State ex rel. La Follette v. Democratic Party of U. S.*, 93 Wis. 2d 473, 517, 287 N.W.2d 519 (1980), *rev'd sub nom. on other grounds, Democratic Party of U. S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981). As our Supreme Court has explained, "the primary is a part of the election." *State v. Kohler*, 200 Wis. 518, 228 N.W. 895, 910 (1930); *see also State ex rel. Wettengel v. Zimmerman*, 249 Wis. 237, 243, 24 N.W.2d 504 (1946) ("There can be no doubt that under the laws … of Wisconsin the primary election … is an integral part of the election process.").

confusing, contradictory "clerk communication"). Thus, it is entirely appropriate for a court to step in, identify the last *coherent statewide* status quo, and issue an injunction restoring that status quo pending the outcome of this litigation. And as the Legislature correctly observes—despite WEC's suggestions to the contrary—local officials do "generally choose to follow WEC's guidance." Leg. Opp. at 3. That many are not doing that only shows that officials are confused as to whether there is operative guidance and, if so, what it mandates—i.e., what is sufficient to satisfy the witness address requirement. But where, as here, it is clear that many officials are not applying WEC's three-component definition, that definition cannot be construed as the baseline "status quo."

But even if the Court agrees with WEC and the Legislature about which status quo to use as the baseline, Plaintiffs' requested temporary injunction would still be appropriate. Under Wisconsin law, a temporary injunction may not be denied on the basis that it would alter the pre-litigation status quo if temporary injunctive relief is necessary to address unlawful agency or other official action. *Serv. Emps. Int'l Union, Loc. 1 v. Vos*, 2020 WI 67, ¶67, 393 Wis. 2d 38, 78, 946 N.W.2d 35, 55. As our Supreme Court explained just two years ago:

> If we concluded that the movant would not suffer irreparable harm, would that make it acceptable for the executive to enforce an unconstitutional law? If there were an alternative legal remedy, would we tell the circuit court that the continued application of an unconstitutional law is legally warranted? If the status quo would not change without a temporary injunction, would that mean the unconstitutional law could remain in effect? Obviously not.

Id.; *cf. Tetra Tech EC, Inc. v. Wis. Dep't of Rev.*, 2018 WI 75, ¶¶83–84, 382 Wis. 2d 496, 564, 914 N.W.2d 21, 54. In other words, if the pre-litigation status quo meant that local officials were violating Wisconsin law and unlawfully disenfranchising Wisconsin voters, they should not be permitted to keep doing so simply because righting the ship would alter the (unlawful) status quo.

C. Even if the status quo is WEC's definition, a temporary injunction is still needed.

Even if the Court maintains its earlier conclusion that the status quo is WEC's three-component definition, its action is still needed to ensure consistent application of that definition. A status quo is not "preserved" when many clerks across the state—who collectively are responsible for processing and counting hundreds of thousands if not millions of ballots—are not following it. A temporary injunction decisively interpreting "address" as WEC proposes for purposes of the general election and requiring WEC to inform local officials of the court's order would substantially mitigate the irreparable harm.

Despite having argued earlier in this litigation that its three-component definition was the status quo, Dkt. 76 at 11–12, WEC now claims that a court order adopting that definition would *change* the status quo because it would prevent clerks from rejecting ballots with certificates that lack zip code or state. WEC Opp. at 18. Indeed, it would—that is the point. WEC's objection seems to be that it has not previously told clerks they cannot reject ballots on that basis. *Id.* at 19. That is demonstrably false. WEC's 2016 guidance said that "a *complete* address contains a street number, street name and name of municipality," that "clerks *must* take corrective actions in an attempt to remedy a witness address error," and that if clerks were "reasonably able to discern any missing information from outside sources," the certificate should be corrected and the ballot accepted. Dkt. 4 at 5 (emphasis added). No plausible reading of those instructions permitted clerks to reject ballots missing zip code or state.

CONCLUSION

The Court should grant the motion for a temporary injunction to preserve whatever it determines to be the last statewide status quo. Plaintiffs also respectfully submit that this motion can be decided on the papers.

DATED this 28th day of October, 2022.

Respectfully submitted,

Electronically signed by Leslie A. Freehill

Diane M. Welsh, SBN 1030940
Leslie A. Freehill, SBN 1095620
PINES BACH LLP
122 W. Washington Ave, Suite 900
Madison, WI 53703
Telephone: (608) 251-0101
Facsimile: (608) 251-2883
dwelsh@pinesbach.com
lfreehill@pinesbach.com

John M. Geise*
Spencer Klein*
Samuel T. Ward-Packard, SBN 1128890
ELIAS LAW GROUP LLP
10 G Street NE, Suite 600
Washington, D.C. 20002
Telephone: (202) 968-4652
jgeise@elias.law
sklein@elias.law
swardpackard@elias.law

Makeba Rutahindurwa*
ELIAS LAW GROUP LLP
1700 Seventh Avenue, Suite 2100
Seattle, Washington 98101
Telephone: (206) 968-4599
mrutahindurwa@elias.law

Kathryn Ali*
Elizabeth Lockwood*
ALI & LOCKWOOD LLP
300 New Jersey Ave NW, Suite 900
Washington, DC 20001
Telephone: (202) 651-2475
katie.ali@alilockwood.com
liz.lockwood@alilockwood.com

Attorneys for Plaintiff

*Admitted *pro hac vice*.