

FILED
06-15-2023
CIRCUIT COURT
DANE COUNTY, WI
2022CV002446

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 10

DANE COUNTY

RISE, INC.

JASON RIVERA,

Plaintiffs,

v.

WISCONSIN ELECTIONS COMMISSION,

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

TARA McMENAMIN,
in her official capacity as City Clerk for the
City of Racine, Wisconsin,

CELESTINE JEFFREYS,
in her official capacity as City Clerk for the
City of Green Bay, Wisconsin,

Defendants,

WISCONSIN STATE LEGISLATURE,

Intervenor.

Declaratory Judgment
Case No. 2022CV2446
Case Code: 30701

Hon. Ryan D. Nilsestuen

**PLAINTIFFS' BRIEF IN OPPOSITION TO INTERVENOR THE
WISCONSIN STATE LEGISLATURE'S MOTION TO DISMISS THE FIRST
AMENDED COMPLAINT**

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INTRODUCTION

Wisconsin election statutes require that absentee ballots be witnessed and that the witness's "address" be included on the ballot certificate. But they do not specify a precise form the address must take. In the 2022 general election, some municipalities read into the statutes a requirement that was not there and deemed witness addresses insufficient for failing to include three specific components—a street number, street name, and municipality—even if the information provided on the absentee ballot certificate was enough to locate the witness. Some municipalities required even more. These requirements risked disenfranchising voters who did everything the law asked of them. Plaintiffs brought this suit to ensure that does not happen again.

Intervenor's motion to dismiss is based entirely on an untenably narrow definition of "address" as always requiring three specific components—street number, street name, and municipality. But the election statutes' text includes no such definition: it requires a witness "address," but not in any particular form. The straightforward conclusion is that no particular form is mandatory, as long as the information provided indicates a place an election official could communicate with the witness. Intervenor's proffered interpretation, in contrast, reads into the election statutes a requirement for a particular format of witness address that simply is not there.

Intervenor's proposed definition finds no support in the statutory text or plain meaning, and it would render surplus other parts of the election statutes that do require particular forms of address, such as the definition of a "*complete residential* address" for purposes of the identification requirement for military ballots. Intervenor's definition is also contrary to the fundamental rule that the election statutes be interpreted to give effect to the will of the voters, "notwithstanding informality or failure to fully comply with some of [the election statutes'] provisions." Wis. Stat. § 5.01(1). Intervenor's approach would require clerks to reject absentee ballots where a voter witnesses her husband's ballot and for her address writes "ditto" after her husband has already

provided a complete residential address, or where a student witness writes his student address, which includes the dormitory name and number, but not a street number or name.

Because Intervenor's motion to dismiss is based on an unsupported, untenably narrow definition of "address" that appears nowhere in the relevant statutes, the Court should deny the motion to dismiss.

BACKGROUND

This case concerns three provisions of the Wisconsin elections statutes: Sections 6.87(2), 6.87(9), and 6.87(6d). Section 6.87(2) prescribes the form of the absentee ballot certificate and requires that it include a witness attestation and fields for the witness's name, "address," and signature. Section 6.87(9) provides that "[i]f a municipal clerk receives an absentee ballot with an improperly completed certificate . . . the clerk may return the ballot to the elector" with an opportunity to cure, time permitting. And Section 6.87(6d) provides that "[i]f a certificate is missing the address of a witness, the ballot may not be counted." Together, these provisions constitute the "Witness Address Requirement." Wisconsin law does not define "address" for purposes of any of these three provisions.

The most recent of the provisions, Section 6.87(6d), was enacted in 2016. Seeking to better understand the new law, many clerks reached out to WEC with questions. Dkt. 160, Am. Compl. ¶ 37. In response, WEC promulgated guidance concerning how clerks should implement the Witness Address Requirement (the "2016 Guidance"). In consultation with the Wisconsin Department of Justice, WEC concluded that clerks were not required to reject absentee ballots merely because the witness attestation was missing one or more components of a three-part address (street number, street name, municipality). *Id.* Instead, "if the information could be reasonably ascertained by the official," WEC instructed the clerks that they could "add the municipality name to a witness certificate." *Id.* While the 2016 Guidance expressed WEC's understanding that "a

complete address” meant “a street number, street name and name of municipality,” local officials were nonetheless free to “take corrective actions in an attempt to remedy a witness address error” to the extent any of these elements were missing. *Id.* (emphasis added). The 2016 Guidance instructed clerks to contact the voter only if they could not ascertain the missing components of the witness address from the information provided. *Id.*

The 2016 Guidance remained in place for six years until the Waukesha County Circuit Court held it unlawful last year. On September 7, 2022, the Republican Party of Waukesha and three individual Republican voters obtained an order enjoining enforcement of the 2016 Guidance. *Id.* ¶ 39. The order focused on the portion of the guidance that permitted local election officials to fill in missing information on a witness attestation. *Id.* The Court held that clerks lacked the authority to “modify or add information to incomplete absentee ballot certifications.” *Id.* The Court did not, however, opine on the proper definition of “address.” *Id.* ¶ 40 (“I have done nothing and I’m not asked to interpret what is a missing address or what is an incomplete address and I’ve not decided, no one has asked me to decide what happens to absentee ballots that have an incomplete witness address.”).

After the Waukesha County Circuit Court’s order, WEC issued a clerk communication concerning the status of the Witness Address Requirement. The communication explained that the Waukesha Court had enjoined the 2016 Guidance. *Id.* ¶ 41. The communication stated that the court “had not overturned the existing WEC definition of address contained in the now-invalidated memoranda—namely, street number, street name, and name of municipality,” but it did not note that the 2016 Guidance had given that definition for a “complete address,” not an “address” generally. *Id.*

The Waukesha Court’s order, together with the ensuing WEC guidance, led to widespread confusion among clerks concerning what was required for an address to satisfy the Witness Address Requirement. Green Bay, for example, initially announced it would require a five-component address (street number, street name, municipality, zip code, state), but then stated it would accept a four-component address, requiring *either* a state or zip code along with street number, street name, and municipality. *Id.* ¶ 42. Madison, on the other hand, ultimately interpreted “address” to mean street number, street name, and at least one of either municipality or zip code. *Id.* ¶ 44. Racine, for its part, required street number, street name, and municipality, and did not accept zip codes as a proxy for municipality. In each of these cities, whenever a witness-attestation did not include an “address,” as that specific city defined it, the ballot was returned to the voter for correction. *Id.* ¶¶ 44–46.

Absentee voting data from past elections establishes that divergent definitions of “address” may lead to disenfranchisement. In fall 2021, the Legislative Audit Bureau (“LAB”) released a report concerning election administration in the 2020 election. *Id.* ¶ 43. This report showed that, out of a random sample of 14,710 absentee ballot certificates across 29 municipalities, 6.9 percent had a partial witness address. *Id.* This data suggests that a substantial portion of voters risk having their ballots rejected under one or another city’s definition of “address.”¹

¹ Intervenor complains that the LAB study defined addresses as incomplete if they did not have a state and zip code, and therefore treated some addresses as incomplete even though they would meet the Legislature’s proposed three-component definition. Intervenor’s Br. in Supp. of Mot. to Dismiss at 12–13, Doc. No. 183. But the study nevertheless shows that many witnesses provided less than the complete, traditional mailing address that would be printed on an envelope for delivery by the postal service, and Intervenor offers no reason to conclude that the primary problem with the addresses was that they lacked a zip code or state. At the motion to dismiss stage, Plaintiffs are entitled to “all reasonable inferences that may be drawn from” their allegations “in favor of stating a claim,” *H.A. Friend & Co. v. Pro. Stationery, Inc.*, 2006 WI App 141, ¶ 8, 294 Wis. 2d 754, 720 N.W.2d 96, and the LAB study supports the reasonable inference that a substantial

Seeking to prevent further confusion and disenfranchisement, Plaintiffs filed this action on September 27, 2022. Plaintiffs filed their governing Amended Complaint on March 24, 2023. Doc. No. 160. They seek declaratory and injunctive relief, clarifying the meaning of address under Sections 6.87(2) and (9) and requiring WEC to inform municipal and county clerks of the Court's interpretation. Intervenor the Wisconsin State Legislature has moved to dismiss for failure to state a claim. Dkt. 183, Legislature's Br. in Supp. of Mot. to Dismiss.

LEGAL STANDARD

A motion to dismiss for failure to state a claim tests the legal sufficiency of a complaint. *Evans v. Cameron*, 121 Wis. 2d 421, 426, 360 N.W.2d 25, 28 (1985). A claim will be dismissed only if "it is quite clear that under no conditions can the plaintiff recover." *State ex rel. Adell v. Smith*, 2001 WI App 168, ¶ 5, 247 Wis. 2d 260, 265, 633 N.W.2d 231, 234. The Court must "construe the facts set forth in the complaint and all reasonable inferences that may be drawn from those facts in favor of stating a claim." *H.A. Friend & Co. v. Pro. Stationery, Inc.*, 2006 WI App 141, ¶ 8, 294 Wis. 2d 754, 761, 720 N.W.2d 96, 99.

ARGUMENT

I. Section 6.87 does not require a particular form of "address."

Section 6.87 requires that a witness's "address" be included on absentee ballot certificates, but it does not specify what form that address may take. The natural conclusion is that, by its plain text, Section 6.87 does not require any particular form: any effective indication of where the witness may be communicated with suffices. Intervenor asks the Court to turn this pragmatic requirement into a technical trap for unwary voters, disenfranchising them even if they give

number of witnesses provide addresses that do not include all of the components that Intervenor argues should be required.

election officials all the information needed to locate a witness. The statutory text, purpose, and context all require the Court to reject that argument.

A. The ordinary meaning of “address” encompasses any information allowing a witness to be found.

Section 6.87’s failure to define “address” or to specify any particular required form of “address” means that under the statute’s plain text, any information falling within that term’s ordinary meaning suffices. “When interpreting statutes, [courts] start with the text.” *Clean Wis., Inc. v. Wis. Dep’t of Nat. Res.*, 2021 WI 72, ¶ 10, 398 Wis. 2d 433, 961 N.W.2d 611. An undefined term like “address” must be given its “common, ordinary, and accepted meaning.” *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis. 633, 681 N.W.2d 110. And as Justice Hagedorn has explained, “[a]lthough Wis. Stat. § 6.87(6d) requires an address, § 6.87(2) and (6d) are silent on precisely what makes an address sufficient.” *Trump v. Biden*, 2020 WI 91, ¶ 49, 394 Wis. 2d 629, 951 N.W.2d 568 (Hagedorn, J., concurring).

The plain meaning of “address,” used as a noun, includes “a place where a person or organization may be communicated with.” *Address*, Merriam-Webster, <https://merriam-webster.com/dictionary/address> (last updated June 11, 2023). That is an unmistakably functional definition—it does not require any specific information, so long as what is provided suffices to locate the person in question. Intervenor’s preferred definition from the *Oxford English Dictionary* is similar, defining “address” as “[t]he particulars of the place where a person lives or an organization is situated . . . these particulars considered as a location where a person or organization can be contacted by post.” *Address*, Oxford English Dictionary, <https://www.oed.com/view/Entry/2208> (last modified Dec. 2022). To be sure, that definition specifies that “address” in this sense “typically consist[s] of a number, street name, the name of a town or district, and often a postal code.” *Id.* (emphasis added). But the very statement that an

“address” *typically* consists of those components necessarily acknowledges that they are not always essential, and that it is possible to provide an “address” meeting that definition that does not include them all.

Common sense confirms that it is sometimes possible to provide an “address” without specifying a street number, street name, and municipality. Consider the following examples, each of which unambiguously conveys both the “place where a person . . . may be communicated with” and “the particulars of the place where a person lives” without including all three components that Intervenor says are always required:

- A witness who is the voter’s spouse or family member lists an address of “same,” “see above,” “ditto,” or an equivalent, and the voter’s complete address is just above where the witness has signed.
- A resident of a senior apartment identifies his address by his room number at Attic Angels or Capitol Lakes, without providing a street address.
- A university student lists the name and room number of her residence hall, but no street name or number because that is how mail is processed on her campus.
- A witness omits a street number because none has been assigned (e.g., after new construction), and instead uses coordinates or landmarks.
- A witness omits a municipality because she resides in one of the several counties that use street addresses providing precise geographic coordinates instead of traditional street numbers—e.g., W182-S8200 Racine Ave., in Muskego—and knows that those coordinates inherently convey municipality.
- A witness omits a municipality because her address is on a street that is immediately familiar to nearly all residents of the municipality (for example, Mifflin Street in Madison, or Como Road in Como).
- A witness omits a municipality, but the street name is unique to a single Wisconsin municipality (for example, Moen Valley Road in Black Earth, Mc Bride Road in Maple Bluff, or Darn Republican Street in Chetek).

Intervenor provides no argument for why each of these examples does not constitute an “address” under the term’s plain meaning, even under Intervenor’s preferred dictionary definition.

Intervenor instead asks the Court to read into the Witness Address Requirement a demand that

simply is not there: that the witness’s “address” be provided in a single, very specific form. But the text of the Witness Address Requirement and the plain meaning of the word “address” provide no basis for requiring voters to provide their address in one specific way. And the Court has “no power to insert what the legislature chose to omit.” *Wis. Dep’t of Workforce Dev. v. Wis. Lab. & Indus. Rev. Comm’n*, 2017 WI App 68, ¶ 23, 378 Wis. 2d 226, 903 N.W.2d 303.

The Court could stop here. The ordinary meaning of “address” encompasses any information that specifies where a voter may be found and provides no support for Intervenor’s argument that three specific components are required. And “[i]f the meaning of the statute is plain, [courts] ordinarily stop the inquiry.” *Kalal*, 2004 WI 58, ¶ 45 (quoting *State v. Delaney*, 2003 WI 9, ¶ 13, 259 Wis. 2d 77, 658 N.W.2d 416). But if there is any doubt, the Witness Address Requirement’s purpose and the statutory context confirm what the statute’s plain text already shows.

B. The Witness Address Requirement’s purpose supports a functional definition.

Plaintiffs’ proposed definition is consistent not only with the Witness Address Requirement’s text, but also with its purpose. “A statute’s purpose or scope may be readily apparent from its plain language or its relationship to surrounding or closely-related statutes—that is, from its context or the structure of the statute as a coherent whole.” *Kalal*, 2004 WI 58, ¶ 49. Here, the “coherent whole” establishes that the Witness Address Requirement exists to help clerks identify and contact witnesses. Under Section 6.87, an absentee ballot is witnessed as follows: the voter (i) exhibits the ballot “unmarked to the witness,” then (ii) “mark[s] the ballot and enclose[s] and seal[s] the same” in the certificate envelope in the presence of the witness. Wis. Stat. §§ 6.87(2), (4). The witness then certifies that the voter completed those steps properly, and that the witness is an adult U.S. citizen, is not a candidate for office, and did not solicit or advise the voter for or against any candidate or measure. Wis. Stat. §§ 6.87(2), (4).

The straightforward inference from this context is that the Witness Address Requirement exists to further the same purpose as the certification it immediately follows—namely, to ensure that the ballot was voted (i) by the voter, not another person, (ii) in a lawful manner, and (iii) without coercion or undue influence by the witness or anyone else. Requiring the witness’s address gives clerks a way to contact the witness if any of these three requirements becomes the subject of dispute. As long as sufficient information is provided for the witness to be located, that purpose is fully served. Requiring witnesses always to provide a street number, street name, and municipality, even if they have already provided unambiguous information about where they may be found, would do nothing to advance the statutory purpose.

C. Closely related statutes support Plaintiffs’ interpretation.

The text of related statutes further confirms Plaintiffs’ reading, demonstrating that where the Legislature wants to require a particular form of address, it has said so expressly rather than relying on the word “address” alone. This is telling: as the Court of Appeals recently instructed in another case interpreting Wisconsin election statutes, “[w]here the legislature uses similar but different terms in a statute, particularly within the same section, we may presume it intended the terms to have different meanings.” *State ex rel. Zignego v. WEC*, 2020 WI App 17, ¶ 64, 391 Wis. 2d 441, 941 N.W.2d 284 (quoting *State ex rel. DNR v. Wis. Ct. of Appeals*, 2018 WI 25, ¶ 28, 380 Wis. 2d 354, 909 N.W.2d 114), *aff’d as modified*, 2021 WI 32, 396 Wis. 2d 391, 957 N.W.2d 208; *see also State v. Schmidt*, 2021 WI 65, ¶ 57, 397 Wis. 2d 758, 960 N.W.2d 888 (“The Presumption of Consistent Usage canon of construction . . . in part dictates that ‘a material variation in terms suggests a variation in meaning.’” (emphasis added) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170 (2012))).

Start with Section 6.34, which sets out the requirements for proof of residence by military voters. Unlike Section 6.87’s Witness Address Requirement, Section 6.34(3)(b) requires that

documents include a “*complete residential address*,” which it expressly defines as “a numbered street address, if any, and the name of a municipality.” (Emphasis added.) If, as Intervenor argues, “address” necessarily included all those components on its own, then the word “complete” and the express requirement of a numbered street address and municipality name would be surplusage. Yet “[s]tatutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage.” *Kalal*, 2004 WI 58, ¶ 46. Further, Section 6.34(3)(b)’s interjection of the qualifier “*if any*” after “numbered street address,” suggests that *even* a “complete” address so defined will sometimes lack one or two components, because sometimes no “numbered street address” will exist. Thus, if Intervenor’s interpretation were correct, “address” would impose an even stricter set of requirements than “complete residential address.” This cannot be correct.

In contrast, Plaintiffs’ construction of the Witness Address Requirement harmonizes Section 6.87 with Section 6.34. Under Plaintiffs’ reading, Section 6.34’s expressly defined “complete residential address” requires a three-part address (with an exception where a numbered street address is not available), whereas Section 6.87’s “address” (unadorned by “complete”) requires only sufficient information to determine where a witness can be communicated with. *Cf. Trump*, 2020 WI 91, ¶ 49 (Hagedorn, J., concurring) (noting the “stark contrast” between Sections 6.87 and 6.34(3)(b)). This gives each of the terms used by the election statutes independent force. Intervenor’s interpretation, on the other hand, would land the Court in an interpretive rut: “complete residential address” and “address” would have identical definitions, despite (i) the obvious difference in terminology; and (ii) the former having a specified definition and the latter having none.

Similarly, Section 6.87(2)’s requirements for absentee voters’ *own* address information supports Plaintiffs’ interpretation. That provision delineates the specific components required for

the voter's own address: "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) (alterations in original). But the statute provides no similar delineation for the witness's address. Here, too, adopting Intervenor's proposed definition would mean treating unlike terms alike.

D. Plaintiffs' interpretation promotes voter enfranchisement and avoids absurd results.

Adopting Intervenor's restrictive definition of address would also violate Section 5.01(1)'s mandate that the election statutes be construed to "give effect to the will of the electors . . . notwithstanding informality or failure to fully comply with some of [the elections statutes'] provisions." Plaintiffs' definition achieves that goal, while Intervenor's would disenfranchise voters who provided sufficient information to locate their witness but did so in a form other than Intervenor's preferred three-component approach.

Intervenor argues that Section 5.01(1) is inapplicable because matters relating to the absentee ballot process require a strict rule of construction under Section 6.84(2). MTD at 10–11. But Section 6.84(2)'s narrow interpretive carveout does not apply here. That section provides that "notwithstanding [Section 5.01(1)]," Sections 6.86, 6.87(3)–(7), and 9.01(1)(b)(2) and (4) must "be construed as mandatory." None of those provisions is in dispute here. Section 6.87(6d)—the only of the above provisions remotely implicated by this litigation—concerns only the remedy for a missing address, not the initial requirement of an address. That requirement exists under Section 6.87(2), which falls under Section 5.01(1)'s pro-voter rule. Section 6.84(2) therefore expressly removes the underlying requirement for a witness address from the exceptions to Section 5.01(1)'s mandate to construe the election statutes to further voter intent.

Were Section 6.84(2) as broad as Intervenor says, it would be constitutionally suspect. According to Intervenor, Section 6.84 mandates that ballots not be counted even when cast by qualified voters and when enough information is provided to locate the witness, if there is a wholly technical issue like the lack of a municipality name. But the Wisconsin Constitution guarantees the right to vote as a fundamental right—indeed, as the right which “lies at the very basis of our Democracy.” *State ex rel. Frederick v. Zimmerman*, 254 Wis. 600, 613, 37 N.W.2d 473 (1949). “Strict scrutiny is applied to statutes that restrict a fundamental right.” *Mayo v. Wis. Injured Patients & Fams. Comp. Fund*, 2018 WI 78, ¶ 28, 383 Wis. 2d 1, 914 N.W.2d 678. Accordingly, if Intervenor were correct that Section 6.84 mandates rejecting, rather than counting, the votes of otherwise-qualified electors just because their witness certificates have nonmaterial technical defects, Section 6.84 would likely fail constitutional muster. Fortunately, the Court can avoid this constitutional quagmire by interpreting Section 6.84 and Section 5.01 according to their plain meaning, as described above.

II. Plaintiffs’ interpretation is administrable.

Intervenor’s argument that a functional definition of address is unadministrable ignores that applying it in practice would be very similar to—but even easier than—the approach that WEC recommended from 2016 to 2022. Under WEC’s 2016 Guidance, if a voter provided less than their witness’s street number, street name, and municipality, clerks were required to determine whether they could “discern any missing information from outside sources.” Am. Compl. ¶ 37. Thus, in practice, clerks had to assess whether the information provided on the certificate, along with other available information, was sufficient to allow the clerk to identify the witness’s complete, three component address. That is exactly the functional determination that Plaintiffs allege the statute requires. Thus, while Intervenor asserts that the 2016 Guidance does not “endorse[] or apply” Plaintiffs’ proposed definition, it identifies no instances in which a ballot would be rejected under

Plaintiffs' standard but not the 2016 Guidance, or vice versa. The same is not true for Intervenor's proposed definition. There are a number of cases in which clerks would have counted a ballot under the 2016 Guidance, but would be unable to do so under the Intervenor's definition:

- 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.

In each instance, the ballot would count under Plaintiffs' definition and would count under the 2016 Guidance, but would not count under Intervenor's definition.

The 2016 Guidance was in place for every statewide election from October 2016 to August 2022. Dkt. 160, Am. Compl. ¶ 37. Nowhere in the complaint did Plaintiffs allege that clerks ran into serious issues applying that guidance, and Plaintiffs are aware of no evidence that they did. Moreover, any discussion of administrability concerns is premature. Whether Plaintiffs' definition is administrable is, at most, a question of fact, which is not addressed at the motion-to-dismiss stage. *See Kaloti Enters., Inc. v. Kellogg Sales Co.*, 2005 WI 111, ¶ 11, 283 Wis. 2d 555, 699 N.W.2d 205 ("When testing the legal sufficiency of a claim, all facts alleged in the complaint, as well as all reasonable inferences from those facts, are accepted as true.").

CONCLUSION

This Court should deny Intervenor the Wisconsin State Legislature's Motion to Dismiss Plaintiffs' Amended Complaint.

Electronically signed by Diane M. Welsh

Diane M. Welsh, SBN 1030940

PINES BACH LLP

122 W. Washington Ave, Suite 900

Madison, WI 53703

Telephone: (608) 251-0101

Facsimile: (608) 251-2883

dwelsh@pinesbach.com

David R. Fox*

Spencer W. Klein*

Samuel T. Ward-Packard, SBN 1128890

ELIAS LAW GROUP LLP

250 Massachusetts Ave. NW, Suite 400

Washington, D.C. 20001

Telephone: (202) 968-4652

dfox@elias.law

sklein@elias.law

swardpackard@elias.law

Makeba Rutahindurwa*

ELIAS LAW GROUP LLP

1700 Seventh Avenue, Suite 2100

Seattle, Washington 98101

Telephone: (202) 968-4599

mrutahindurwa@elias.law

*Attorneys for Plaintiffs Rise, Inc. and
Jason Rivera*

*Admitted *pro hac vice*

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