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CIRCUIT COURT  
DANE COUNTY, WI  
2022CV002446

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY  
BRANCH 10

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RISE, INC., et al.,

Plaintiffs,

v.

Case No. 22-CV-2446

WISCONSIN ELECTIONS  
COMMISSION, et al.,

Defendants,

and

WISCONSIN STATE LEGISLATURE,

Intervenor-Defendant.

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**DEFENDANT WISCONSIN ELECTIONS COMMISSION'S BRIEF IN  
OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

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## INTRODUCTION

Plaintiffs Rise Inc. and Jason Rivera seek summary judgment on two claims for relief, but only one claim against the Wisconsin Elections Commission (the “Commission”): a Wis. Stat. § 227.40 declaratory judgment claim to invalidate the Commission’s September 14, 2022, guidance document interpreting the witness “address” requirement in Wis. Stat. § 6.87. (Doc. 160 ¶¶ 73–82; 210.) Plaintiffs contend that the guidance is invalid because the Commission’s statutory interpretation of “address”—street name, street number, and municipality—is incorrect. Particularly, Plaintiffs argue that when the Legislature used the word “address” in Wis. Stat. § 6.87, it intended the word to mean something looser: a “place where the witness may be communicated with.” (Doc. 213:10–17.)

Commission’s guidance interpreting witness “address” in Wis. Stat. § 6.87(2) is a proper statutory construction, while the Plaintiffs’ proposed alternative interpretation is plainly not. It finds no support in the statute’s text, context, or purpose, and further, it is so vague and subjective that its implementation would risk unconstitutional arbitrary and disparate treatment of voters. Plaintiffs’ motion for summary judgment should be denied, and judgment should instead be entered in favor of the Commission.

## RESPONSE TO PLAINTIFFS' STATEMENT OF UNDISPUTED FACTS

Plaintiffs' "Statement of Undisputed Facts" in support of summary judgment contains more than facts. (Doc. 213:4–9.) Section I. is a recitation of relevant law, the second paragraph of section II. is a recitation of the proceedings and outcome in *White v. WEC*, Case No. 22-CV-1008 (Waukesha Cnty.), and the second paragraphs of sections IV. and V. are all procedural history.

The remaining parts and paragraphs, however, include material facts that the Commission does not dispute. The Commission agrees with Plaintiffs' assertion that there are no genuine issues as to any material facts, and the Court may issue summary judgment under Wis. Stat. § 802.08. (Doc. 213:20.)

### LEGAL STANDARD

Summary judgment is appropriate when there is no genuine dispute of material fact, and the moving party is entitled to judgment as a matter of law. *Water Well Sols. Serv. Grp., Inc. v. Consol. Ins. Co.*, 2016 WI 54, ¶ 11, 369 Wis. 2d 607, 881 N.W.2d 285 (citing Wis. Stat. § 802.08(2) (2013–14)). When there are no genuine disputes as to any material facts, the court may grant summary judgment to the non-moving party. *See* Wis. Stat. § 802.08(6).

## ARGUMENT

Plaintiffs' Wis. Stat. § 227.40 declaratory judgment claim to invalidate the Commission's September 14, 2022, guidance interpreting the witness "address" requirement should be rejected. The Commission's three-component interpretation of "address" is a proper statutory construction, supported by the statutory text, context, and purpose. Plaintiffs' alternative interpretation, a subjective "place where the witness may be communicated with" (Doc. 213:12), standard, finds no such statutory support. Not only that, but the standard is so vague that it would be impossible for Wisconsin's 1,800+ municipal clerks to uniformly administer it, risking unconstitutional arbitrary and disparate treatment of voters.

Because there are no genuine disputes of material fact, and because the Commission's guidance is not invalid as a matter of law, summary judgment should be entered in favor of the Commission.

### **I. The Commission's guidance interpreting witness "address" in Wis. Stat. § 6.87(2) is a proper statutory construction.**

Plaintiffs' Wis. Stat. § 227.40 claim argues that the Commission's September 14 clerk communication is invalid because it incorrectly construes the meaning of "address" in Wis. Stat. § 6.87(2). (Doc. 160 ¶ 82.) Plaintiffs' claim fails—and judgment should be entered against them—because the Commission's three-component interpretation of "address" is a proper

statutory construction. Plaintiffs' offered interpretation of "address," on the other hand, is not.

Statutory interpretation begins with the language of the statute. *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. Statutory language "is given its common, ordinary, and accepted meaning," unless the statute makes clear that a special or technical meaning applies. *Id.* Further, "[c]ontext is important to meaning." *Id.* ¶ 46. "Therefore, statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Id.* The statute's "purpose" is also a relevant consideration, so long as it is "ascertainable from the text and structure of the statute itself." *Id.* ¶ 48.

Here, the statutory text, context, and purpose all lead to the conclusion that the Commission's three-component interpretation of "address" in Wis. Stat. § 6.87(2) is the most reasonable interpretation. There is simply no statutory support for Plaintiffs' contention that "address" means enough "information sufficient to identify a place where the witness may be communicated with." (Doc. 213:12.) Moreover, the Commission's interpretation of "address" does not raise constitutional problems, while Plaintiffs' interpretation does.

**A. The Commission’s interpretation of “address” is consistent with the text’s common, ordinary, and accepted meaning; Plaintiffs’ interpretation is not.**

To begin, the “common, ordinary, and accepted meaning” of “address” is the particular components of where a person resides. *Kalal*, 271 Wis. 2d 633, ¶ 45. Consider how an average person would answer the question: “What is your address?” Common sense dictates that this person would most likely respond with their mailing address or some combination of the components thereof, not with a subjective description of any place where he or she may be communicated with (*e.g.*, “The blue house with tall trees near the fire station.”). Plaintiffs’ proffered interpretation of “address” in Wis. Stat. § 6.87(2) is simply not consistent with the word’s common, ordinary, and accepted meaning.

Courts sometimes refer to dictionaries for guidance on a word’s common meaning. However, “[m]any words have multiple dictionary definitions;” therefore, “the applicable definition depends upon the context in which the word is used.” *Kalal*, 271 Wis. 2d 633, ¶ 49. Indeed, that is the case here: both Plaintiffs’ interpretation and the Commission’s interpretation of “address” can find some degree of dictionary support. *Compare Address*, Oxford English Dictionary, <https://www.oed.com/view/Entry/2208> (subscription required). (defining “address” as “[t]he particulars of the place where a person lives . . . , typically consisting of a number, street name, the name of a



town or district”), *with Address*, Merriam-Webster, <https://merriam-webster.com/dictionary/address> (defining “address” as “a place where a person or organization may be communicated with”).<sup>1</sup> That is why dictionary definitions alone cannot suffice, and the Court must also consider the context in which the word “address” is used to decipher its plain meaning.

**B. The Commission’s component-based interpretation of “address” is contextually supported by comparison to closely-related statutes, while Plaintiffs’ interpretation finds no such support.**

The Commission’s three-component interpretation of witness “address” in Wis. Stat. § 6.87(2) is contextually supported by comparable language in closely-related statutes. Statutes in the same chapter “contain[ing] the same subject matter . . . must be considered in *pari materia* and construed together.” *James v. Heinrich*, 2021 WI 58, ¶ 19, 397 Wis. 2d 517, 960 N.W.2d 350 (alteration in original) (citation omitted). Here, the word “address” appears many times in Wis. Stat. ch. 6, and all such references plainly contemplate a meaning associated with the particular components of where the person resides—not just “any information that specifies where a [person] may be communicated with.” (Doc. 213:15.) And Wis. Stat. § 6.34(3)(b)2. expressly says

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<sup>1</sup> The Legislature has previously pointed out, however, that “the full definition of ‘address’ contained in Merriam-Webster’s Definition” actually undercuts Plaintiffs’ position and shows that this dictionary, too, primarily defines the term as referring to the particulars or where a person may be contacted by post. (Doc. 191:4–5.)

that a “complete residential address” includes a numbered street address and name of municipality—suggesting that “address” in Wis. Stat. § 6.87(2) contains the same three components.

**1. The word “address,” as it is used throughout the chapter, connotes a definite list of components indicating location of residence.**

The Commission’s component-based interpretation of “address” in Wis. Stat. § 6.87(2) is supported by comparison to other uses of the word “address” throughout the same statutory chapter. Again and again, these statutes use the word “address” to refer to a particular set of components indicating where a person resides. Plaintiffs’ interpretation of “address” in Wis. Stat. § 6.87(2), in contrast, finds no support in the surrounding statutes: there are no instances where the word “address” may be reasonably interpreted to mean “any information” sufficient to identify “a place” where a person may be communicated with.<sup>2</sup> (Doc. 213:12, 15.)

For example, Wis. Stat. § 6.15 allows individuals who have recently moved to the state to vote in a presidential election, provided that they satisfy all other eligibility requirements. To qualify, these individuals must submit an

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<sup>2</sup> Indeed, Plaintiffs’ proffered meaning of “address” in Wis. Stat. § 6.87(2) is so broad that it does not even require the witness to provide information relating to his or her *residence*. Information about the witness’s workplace, gym, or preferred grocery store could also suffice, as each of these locations, too, are “a place” where the witness may be communicated with. (Doc. 213:12.)

application to the municipal clerk of the municipality in which they reside. Wis. Stat. § 6.15(2)(a). This application must include a “cancellation card” that may be forwarded to the proper official of the applicant’s prior residence. *Id.* § 6.15(2)(b)–(c). The form of the cancellation card, as set out in the statute, indicates that the applicant’s previous “address” is communicated through specific components: “[s]treet,” “[t]own, village, city,” “[s]tate,” and “[z]ip.” *Id.* § 6.15(2)(b).

There are also multiple examples of the word “address” being used to indicate the particular set of components that allow a person to be reached by mail. *See generally* USPS, *Mailing Standards of the United States Postal Service Domestic Mail Manual*, 602 Addressing, <https://pe.usps.com/text/dmm300/602.htm#ep1085515> (explaining the required components of a mailing address). For example, Wis. Stat. § 6.48 allows any registered elector to challenge the registration of another registered elector by submitting an affidavit to the municipal clerk or board of election commissioners. Wis. Stat. § 6.48(1)(a). The clerk or director, upon receipt of the affidavit, shall mail a notification to the challenged elector at his or her registered “address.” *Id.*; *see also* Wis. Stat. § 6.87(3)(b) (“Whenever possible, the municipal clerk shall notify an elector if his or her [absentee] ballot cannot be mailed or transmitted to the *address* directed by the elector.”).

Plaintiffs' broad, functional interpretation of "address," in contrast, bears no relationship to the statutory text or context. And there is no basis, as a matter of statutory interpretation, for "address" in Wis. Stat. § 6.87(2) to be interpreted in a vastly different manner than all other references to "address" throughout the same chapter.

**2. The three-component definition of "address" in Wis. Stat. § 6.34 provides strong support for the Commission's three-component definition of "address" in Wis. Stat. § 6.87.**

Wisconsin Stat. § 6.34 is a particularly illustrative example. Section 6.34 provides a list of documentation that may be used to establish an elector's proof of residence. Specifically, the statute says that an identifying document must contain a "current and complete residential *address*, including a *numbered street address, if any, and the name of a municipality.*" Wis. Stat. § 6.34(3)(b)2. This statute thus demonstrates that "address" means the particular components of where a person resides—including street number, street name, and municipality—and provides strong support for the Commission's identical interpretation of "address" in Wis. Stat. § 6.87(2).

Plaintiffs suggest that this example cuts the other way based on the "if any" qualifier and the word "complete," which they say would make a numbered street address and municipality surplusage. (Doc. 213:16–17.) Neither argument assists them.

As to “if any,” that qualifier is simply an acknowledgement that some electors lack a numbered street address, such as someone experiencing homelessness at the time of an election.<sup>3</sup> It does not mean that “address” in Wis. Stat. § 6.87(2) should be interpreted as not requiring a numbered street address for those who have one, or as not requiring any specific components at all.

As to the word “complete,” that term does not render the express requirement of a numbered street address and municipality surplusage. The “surplusage” canon of statutory construction provides only that “[s]tatutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage.” *James*, 397 Wis. 2d 517, ¶ 21 (quoting *Kalal*, 271 Wis. 2d 633, ¶ 46). But here, the word “complete” and the clause “including a numbered street address, if any, and the name of a municipality” can both be read as adding value: “complete” tells the reader that an identifying document—such as a bank statement or paycheck—showing an *incomplete* address will not suffice to constitute proof of residence, and the clause makes clear what a “complete residential address” includes. Wis. Stat. § 6.34(3)(b)2.

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<sup>3</sup> In such cases, a homeless individual may designate a certain fixed location as his or her residence—such as “a homeless shelter, a park bench, or other location where . . . [he or she] may spend time or return to on a regular basis”—and to use a letter from a shelter or other service organization as proof of residence to register to vote. See Wis. Elections Comm’n, *HOMELESS VOTERS*, <https://elections.wi.gov/sites/default/files/legacy/2020-09/Homeless%2520Voters-%2520WI%2520Voter%2520Guide%25202020.pdf>.

Even if there were surplusage in Wis. Stat. § 6.34(3)(b), it certainly does not follow, as Plaintiffs suggest, that the lack of surplusage in Wis. Stat. § 6.87(2) causes “address” there to mean something different altogether. This would run contrary to the “Presumption of Consistent Usage” canon, which provides that “a word or phrase is presumed to bear the same meaning throughout a text.” *Estate of Miller v. Storey*, 2017 WI 99, ¶ 35, 378 Wis. 2d 358, 903 N.W.2d 759. The clause in Wis. Stat. § 6.34(3)(b)2. makes clear that “address” includes “a numbered street address, if any, and the name of a municipality,” and under the presumption of consistent usage, “address” in Wis. Stat. § 6.87(2) should be interpreted the same.

In sum, the Commission’s three-component interpretation of “address” in Wis. Stat. § 6.87(2) finds ample contextual support in closely-related statutes.

**C. The purpose of the witness address requirement in Wis. Stat. § 6.87(2)—to allow the witness to be located if needed—shows that the Commission’s three-component definition of “address” is the most reasonable interpretation.**

The Commission agrees that the purpose of the witness address requirement in Wis. Stat. § 6.87(2) is to allow a clerk to contact the witness if needed to verify any of the matters attested to on the absentee ballot certificate. (Doc. 213:15–16.) But that does not mean that “address” must be interpreted in the broadest possible way, such as Plaintiffs’ subjective “only

enough information to convey a location where the witness may be communicated with” standard. (Doc. 213:10.)

To the contrary, and as explained above in sections I.A. and I.B. *supra*, the statutory text and context demonstrate that the word “address” in Wis. Stat. § 6.87(2) connotes a definite list of components. While “address” sometimes requires three components (*see, e.g.*, Wis. Stat. § 6.34(3)(b)) and sometimes more than three components (*see, e.g.*, Wis. Stat. § 6.15(2)(b)), a three-component interpretation of “address” in Wis. Stat. § 6.87(2) is most consistent with the statute’s purpose. That is, a numbered street address and municipality is all that is required to allow a clerk to locate a witness. The additional components of state and zip code are not required because, unlike with some of the other uses of “address” referenced above, there is no requirement that the address be sufficient for mailing purposes.

The Commission’s three-component interpretation of “address” in Wis. Stat. § 6.87(2) is the most reasonable interpretation of that statute. Plaintiffs have not demonstrated that the Commission’s “address” guidance is contrary to statute and thus their Wis. Stat. § 227.40 claim fails. Judgment should be entered against Plaintiffs and in favor of the Commission.

**D. The Commission's interpretation of "address" does not raise constitutional problems.**

Plaintiffs argue that the Commission's three-component interpretation of "address" in Wis. Stat. § 6.87(2) would cause constitutional problems that must be avoided, if possible, by rejecting the Commission's statutory interpretation. Plaintiffs are incorrect.

According to Plaintiffs, any requirement that an absentee ballot certificate include a street number, street name, and municipality for the witness would violate the fundamental right to vote under the Wisconsin Constitution by disenfranchising absentee voters whose ballots do not include those address components, but do include other location information sufficient to find the witness. (Doc. 213:17-19.) Contrary to Plaintiffs' suggestion, however, the Commission's interpretation is plainly constitutional.

To start, Plaintiffs identify the wrong level of constitutional review. They argue that strict scrutiny would automatically apply to a three-component witness address requirement because such a requirement allegedly restricts a fundamental right. (Doc. 213:19.) The U.S. Supreme Court recognizes, however, that "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730 (1974). All such regulations "will invariably impose some



burden upon individual voters,” but “to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently.” *Burdick v. Takushi*, 504 U.S. 428, 433 (1992).

Rather than tie the hands of the states in that way, courts instead vary the degree of constitutional scrutiny depending on the severity of any burden the challenged law may impose on the overall opportunity to vote. See *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997). Under what is commonly called the *Anderson/Burdick* test, a court weighs “the character and magnitude of the asserted injury” against “the precise interests” the state is seeking to serve. *Burdick*, 504 U.S. at 434 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). A regulation deserves strict scrutiny only when it places “severe burdens on plaintiffs’ rights.” *Timmons*, 520 U.S. at 358. When the burden is not severe, the review is “less exacting” and a “State’s ‘important regulatory interests’ will usually be enough to justify ‘reasonable, nondiscriminatory restrictions.’” *Id.* (quoting *Burdick*, 504 U.S. at 434; *Anderson*, 460 U.S. at 788).

Wisconsin state courts, similarly, have long recognized, and continue to recognize that the right to vote is properly subject to reasonable regulation. In *State ex rel. Runge v. Anderson*, 100 Wis. 523, 76 N.W. 482 (1898), for example,

the court described how reasonable regulations further the exercise of the franchise:

Manifestly, the right to vote, the secrecy of the vote, and the purity of elections, all essential to the success of our form of government, cannot be secured without legislative regulations. Such regulations, within reasonable limits, strengthen and make effective the constitutional guaranties instead of impairing or destroying them. Some interference with freedom of action is permissible and necessarily incident to the power to regulate at all, as some interference with personal liberty is necessary and incident to government; and so far as legislative regulations are reasonable and bear on all persons equally so far as practicable in view of the constitutional end sought, they cannot be rightfully said to contravene any constitutional right.

*Id.* at 533–34.

Most recently, in considering a state constitutional challenge to Wisconsin’s voter ID law, the Wisconsin Supreme Court followed the federal courts’ lead and held that a voter regulation is subject to strict scrutiny if it creates a severe burden on the right to vote, but that it is otherwise presumed valid and subject to rational basis review. *Milwaukee Branch of NAACP v. Walker*, 2014 WI 98, ¶¶ 22, 40, 357 Wis. 2d 469, 851 N.W.2d 262 (referencing *Anderson* and *Burdick*).

In deciding whether a regulatory burden on voting is severe enough to warrant strict scrutiny, the question is whether the burden “may be overcome with some reasonable effort.” *Democratic Nat’l Comm. v. Bostelmann*, 451 F. Supp. 3d 952, 979 (W.D. Wis. 2020), *rev’d in part on other grounds*, 2020 WL 3619499 (7th Cir. Apr. 3, 2020). The Wisconsin Supreme

Court, for example, held that the time, inconvenience, and cost imposed by Wisconsin's voter ID requirement were not severe because they were "in many respects no more of an imposition than is casting an in-person ballot on election day." *Milwaukee Branch of NAACP*, 357 Wis. 2d 469, ¶¶ 71, 77. And the U.S. Supreme Court, applying an *Anderson/Burdick* analysis, has likewise concluded that Indiana's similar voter ID requirement "surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 198 (2008).

The requirement that an absentee ballot certificate include a street number, street name, and municipality for the witness plainly does not severely burden the ability to vote. It is commonplace for at least that much address information to be required on a multitude of governmental and business forms, and the burden of supplying such limited items of information on an absentee ballot certificate is substantially less than the burdens of other requirements that are clearly constitutional, such as registering to vote, voting in person on election day, or the voter ID requirements that were upheld in *Milwaukee Branch of NAACP* and *Crawford*. Therefore, under either *Anderson/Burdick* or *Milwaukee Branch of NAACP*, the three-component address requirement would be subject to rational basis review.

Moreover, the requirement would easily survive that level of scrutiny because it is rationally related to three legitimate state interests.

First, it rationally relates to the legitimate state interest in protecting the integrity of absentee voting. The U.S. Supreme Court has recognized that “States certainly have an interest in protecting the integrity, fairness, and efficiency of their ballots and election processes as means for electing public officials.” *Timmons*, 520 U.S. at 364. The Wisconsin Supreme Court has likewise acknowledged “a significant and compelling interest in protecting the integrity and reliability of the electoral process, as well as promoting the public’s confidence in elections.” *Milwaukee Branch of NAACP*, 357 Wis. 2d 469, ¶ 73. And the Wisconsin Legislature has specifically identified the prevention of fraud and undue influence as important state interests in regulating absentee voting. Wis. Stat. § 6.84(1).

The three-component witness address requirement rationally relates to the above interest because it provides enough information to reliably locate the witness if a question arises about the validity of the ballot, without requiring additional information, such as state and zip code, which could provide potential pitfalls for individual voters without adding significant additional value toward the overall goal of protecting election integrity. Such a common-sense balancing of the systemic interest in the fairness of the voting

system with the important interests in disqualifying as few votes as possible is entirely rational.

Second, the three-component witness address requirement rationally relates to the legitimate state interest in promoting uniformity, which in turn facilitates the fair and orderly administration of elections. *See Crawford*, 553 U.S. at 196 (recognizing that interest); *Storer*, 415 U.S. at 730 (recognizing the necessity of order, rather than chaos, in regulating elections). Under the Commission's statutory interpretation, all election officials should apply a uniform, bright-line definition of witness address that will promote clarity for voters, create the appearance and reality of fair and equitable treatment of different voters, and facilitate principled review of any complaints alleging error by an election official.

Third, states have a recognized interest in the administrative efficiency of the election system. *See Timmons*, 520 U.S. at 364 (recognizing state interest in protecting the efficiency of election processes); *Burdick*, 504 U.S. at 433 (recognizing state interest in “assur[ing] that elections are operated equitably and efficiently”); *Ariz. Democratic Party v. Hobbs*, 976 F.3d 1081, 1085–86 (9th Cir. 2020) (recognizing interest in efficiently verifying and counting votes and avoiding administrative costs). The bright-line, three-component definition of witness address promotes administrative efficiency by enabling local election officials—charged with processing

thousands of absentee ballots in a limited time—to quickly and effectively determine the adequacy of a witness address without having to devote limited resources to engaging in (and possibly reviewing) a ballot-by-ballot assessment of a potentially open-ended universe of diverse descriptions of a witness' location.

In short, the Commission's three-component definition of a witness address gives rise to no constitutional difficulties because it does not severely burden the right to vote and is rationally related to the state's legitimate interests in election integrity, electoral uniformity, and administrative efficiency.

**E. Plaintiffs' proposed definition of "address" is subjective and cannot be uniformly administered, and Plaintiffs have not established that any clerk has applied that definition in previous elections.**

Plaintiffs contend that their amorphous, functional definition of a witness address is "readily administrable" (Doc. 213:19), but that plainly is not so.

Plaintiffs' definition would require local election officials to devote their limited resources to an administratively burdensome review of the witness location information on each individual ballot certificate. That location information would not have to supply any defined factors or particular categories of data, but rather could include a potentially open-ended universe

of diverse descriptions of various locations. Literally any verbal description of a unique location could satisfy Plaintiffs' definition, making it necessary for busy local officials to carefully examine and evaluate each such description.

In addition, those officials would not be called upon simply to compare the location information on the certificate to some definite standard, but rather to the officials' own judgment as to what information would be sufficient for the purpose of contacting the witness. Presumably, where the judgments of different individual officials—such as the election inspectors canvassing ballots—are uncertain or in disagreement, they would have to discuss the reasons underlying their respective judgments, which would create still more administrative burden. And the same kinds of uncertainties and concomitant administrative burdens would be compounded in the event of any administrative or judicial review of the actions of local officials under Plaintiffs' vague standard. Far from being administrable, Plaintiffs' functional definition would introduce chaos, rather than order into the democratic process. *Compare Storer*, 415 U.S. at 730 (recognizing necessity of order, rather than chaos, in regulating elections).

Unable to give their shapeless definition any actual substantive content, Plaintiffs instead suggest that it must be administrable because, they assert, clerks throughout the state successfully applied it from 2016 until September 2022. (Doc. 213:19.) The latter assertion, however, is factually false. It is

undisputed that, since 2016, the Commission has advised election officials throughout the state to use its three-component definition of a witness address. The plaintiff in *League of Women Voters of Wisconsin v. WEC*, Case No. 22-CV-2472 (Dane Cnty.), has submitted evidence that some municipal clerks have not followed the Commission's guidance and have rejected absentee ballots that should not be rejected under the Commission's statutory interpretation, but there is no evidence that any of those clerks, or any other Wisconsin election officials, have administered any elections under Plaintiffs' vague, functional interpretation.

Based on Plaintiffs' reference to the date of September 2022, it appears they are suggesting that clerks used a functional definition of witness address until the September 7, 2022, order of the Waukesha County Circuit Court in *White v. WEC*, Case No. 22-CV-1008. Any such suggestion, however, is erroneous. *White* held that Wisconsin's election statutes do not permit *local election officials to add or correct* missing witness address information on absentee ballot certificates. (See Doc. 4:7–9.) However, the *White* court expressly did not reach the issue of what information *witnesses themselves* must include in a witness address, but rather left unaffected the Commission's three-component definition of an address. (*League* Doc. 22:107.) Some clerks may have changed how they administer the witness address requirement since *White*, but neither that decision nor any other evidence supports Plaintiffs'



erroneous suggestion that, from 2016 to 2022, clerks accepted as a witness address any information that somehow “conveys where the witness may be communicated with.” (Doc. 213:19.)

**II. Plaintiffs’ proposed definition of “address” would lead to potentially unconstitutional arbitrary and disparate treatment of voters.**

Although the Commission’s uniform, three-component definition of a witness address does not give rise to constitutional problems, the same cannot be said about Plaintiffs’ proposed functional definition. Plaintiffs’ definition is so vague, and subject to such varying interpretations, that its adoption would give rise to grave concerns of unconstitutionally arbitrary and disparate treatment of different voters.

In *Bush v. Gore*, 531 U.S. 98, 110 (2000), the U.S. Supreme Court terminated manual recounts in the 2000 presidential election in Florida due to the inconsistent standards various election officials throughout the state were applying. The Court held that equal protection principles prohibit “arbitrary and disparate treatment” of various voters participating in an election. *Id.* at 104–05. Seven Justices agreed that there were “constitutional problems with the recount.” *Id.* at 111.

Florida law required election officials to count votes based on the intent of the voter. *Id.* at 105–06. The Court held that the wide range of different ways

in which election officials throughout the state had interpreted and applied that standard violated equal-protection requirements by allowing identically marked ballots to be treated differently. *Id.* at 106, 109. The Court explained that “the standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another.” *Id.* at 106. Due to the “absence of specific standards” and “uniform rules” to determine voter intent, the recount did “not satisfy the minimum requirement for nonarbitrary treatment of voters.” *Id.* at 105–06.

The uniformity principle established in *Bush* thus generally prohibits election officials from applying to various voters in an election different standards—or substantially different interpretations of a vague or general standard—that would lead to substantial disparities in the counting of similarly marked ballots.<sup>4</sup> Although the U.S. Supreme Court cautioned that the precedential effect of *Bush* might be limited by its unusual facts, lower courts have applied it in a variety of cases concerning the conduct of

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<sup>4</sup> This differs from the *Anderson-Burdick* standard, which asks whether an election-related rule—even if facially uniform—unduly burdens the right to vote.

elections. *See Democratic Nat'l Comm. v. Bostelmann*, 488 F. Supp. 3d 776, 815 (W.D. Wis. 2020), *stay denied*, 976 F.3d 764 (7th Cir. 2020), and *reconsideration and stay granted*, 977 F.3d 639 (7th Cir. 2020).<sup>5</sup> The Wisconsin Supreme Court has not specifically decided a case based on *Bush*, but following the 2020 election, it did indicate that *Bush* might apply to alleged violations of Wisconsin's statutory requirements for absentee witness certifications. *See Trump v. Biden*, 2020 WI 91, ¶ 31 n.12, 394 Wis. 2d 629, 951 N.W.2d 568.

Here, Plaintiffs' proposed functional definition of a witness address is constitutionally problematic under the equal protection principles of *Bush*. Under Plaintiffs' proposal, each municipal clerk receiving absentee ballots and each local election inspector participating in later counting (or recounting) those ballots would have to determine for himself or herself whether any witness location information on the certificate—whatever form that information might take—should be deemed sufficient to locate and contact the witness. Different officials would be left entirely free to have different views of

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<sup>5</sup> *See also, e.g., Ohio ex rel. Skaggs v. Brunner*, 588 F. Supp. 2d 819, 826 (S.D. Ohio 2008) (finding a substantial equal protection issue where provisional ballots that lacked the voter's name were counted in some counties and rejected in others); *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219, 235 (6th Cir. 2011) (holding that, when deciding whether to count provisional ballots, election officials must use consistent, "specific standards" and "apply similar treatment to equivalent ballots"); *Pierce v. Allegheny Cnty. Bd. of Elections*, 324 F. Supp. 2d 684, 705–06 (W.D. Pa. 2003) (holding that plaintiffs were likely to prevail on an equal protection claim where challenged state law allowed officials in different counties to adopt different rules governing the return of completed absentee ballots by third parties).

what is “sufficient,” based on their own familiarity with the locations in question, their own sense of how much effort should be required to locate a witness, or other variables. As in *Bush*, there would be nothing to prevent absentee ballots with identically marked certificates from being counted in some instances and rejected in others—not only in different municipalities, but even from one team of ballot counters to another within a single jurisdiction.

If anything, Plaintiffs’ functional definition of witness address is even more arbitrary than was the voter intent standard in *Bush* because the range of possible ways a voter might mark a ballot to indicate their vote is inherently more limited than is the indeterminate range of possible verbal descriptions of a witness’ location.

Plaintiffs’ functional definition should be rejected in order to avoid these potentially serious constitutional problems. See *Milwaukee Branch of NAACP*, 357 Wis. 2d 469, ¶ 64.

**III. The Commission is entitled to judgment on Plaintiffs’ Wis. Stat. § 227.40 claim.**

Plaintiffs’ claim against the Commission seeks declaratory relief under Wis. Stat. § 227.40(1), which is “the exclusive means of judicial review of the validity of a rule or guidance document.” Under that statute, “the court shall declare the . . . guidance document invalid if it finds that it

violates constitutional provisions or exceeds the statutory authority of the agency.” Wis. Stat. § 227.40(4)(a).<sup>6</sup> Here, Plaintiffs contend that the challenged guidance interpreting “address” in Wis. Stat. § 6.87 exceeds the Commission’s statutory authority by contravening the statute’s plain meaning but, for all of the reasons outlined above, that contention is incorrect. The Commission’s three-component interpretation of “address” is a proper statutory construction and the most reasonable interpretation in light of the statute’s purpose. The guidance document therefore does not exceed the Commission’s statutory authority, and it is not invalid under Wis. Stat. § 227.40.

With no genuine disputes of material fact, and because the Commission’s guidance is not invalid as a matter of law, summary judgment should be entered in favor of the Commission.

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<sup>6</sup> The court also may declare a rule or guidance document invalid if it “was promulgated or adopted without compliance with statutory rule-making or adoption procedures.” Wis. Stat. § 227.40(4)(a). Plaintiffs here have not alleged that the challenged guidance documents were adopted in a procedurally unlawful manner.

## CONCLUSION

For the reasons discussed herein, the Commission respectfully asks the Court to deny Plaintiffs' motion for summary judgment and enter summary judgment in the Commission's favor.

Dated this 23rd day of October 2023.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed Defendant Wisconsin Elections Commission's Brief in Opposition to Plaintiffs' Motion for Summary Judgment with the clerk of court using the Wisconsin Circuit Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 23rd day of October 2023.

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