STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 10

LEAGUE OF WOMEN VOTERS
OF WISCONSIN,

Plaintiff,

Case No. 2022CV2472

v.

WISCONSIN ELECTIONS COMMISSION, et al.,

Defendants.

INTERVENOR DEFENDANT THE WISCONSIN STATE LEGISLATURE'S BRIEF IN SUPPORT OF MOTION FOR STAY PENDING APPEAL

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INTRODUCTION

In this Court's January 2, 2024, summary-judgment order, this Court held that the Materiality Provision of the federal Civil Rights Act of 1964 preempts Wisconsin's absentee-ballot witness requirement as to four specific categories of absentee ballots. Dkt.157. Then, in this Court's January 30, 2024, injunction order, the Court enjoined Defendant the Wisconsin Elections Commission ("WEC") to inform election officials statewide that they may not reject the four categories of absentee ballots that fail to comply with the State's absentee-ballot witness requirement, and also to issue new "guidance on [the] implementation" of this Court's order. Dkt.161 at 2.

This Court should stay its January 2 and January 30 orders pending the appeal of Intervenor-Defendant the Wisconsin State Legislature ("the Legislature") of those orders, as the Legislature satisfies the stay-pending-appeal standard set out by the Wisconsin Supreme Court in *Waity v. LeMahieu*, 2022 WI 6, 400 Wis. 2d 356, 969 N.W.2d 263. To begin, the Legislature has a strong likelihood of success on appeal as a matter of law under *Waity*, including because this Court's orders address a novel question of law that is subject to de novo review on appeal. Further, the balance of the equities weighs decisively in favor of a stay pending appeal: the State and the Legislature suffer irreparable harm any time a state statute is enjoined; this Court's orders will cause confusion among clerks and the public alike, especially from WEC having to rescind longstanding guidance and replace it with new guidance, which new guidance itself may be quickly rescinded if the Legislature prevails on appeal here;

and Plaintiffs would suffer no harm, given how straightforward it is to comply with the absentee-ballot witness requirement.

Finally, and at a minimum, this Court should grant a limited administrative stay while the Legislature moves the Court of Appeals for a stay pending appeal and during the Court of Appeals' consideration of that motion, given the potential for needless confusion for municipal clerks and voters throughout the State, especially in light of the already underway February 20, 2024, Spring Primary Election.

STANDARD OF REVIEW

Section 808.07 of the Wisconsin Statutes authorizes "a trial court [to] . . . [s]tay execution or enforcement of a judgment or order" during "the pendency of an appeal" of that order. Wis. Stat. § 808.07(2)(a); *see id.* § (Rule) 809.12. When deciding a motion to stay an order pending appeal, the Court must consider whether the moving party: (1) "makes a strong showing that it is likely to succeed on the merits of the appeal"; (2) "shows that, unless a stay is granted, it will suffer irreparable injury" during the pendency of the appeal; (3) "shows that no substantial harm will come to other interested parties" during the pendency of the appeal; and (4) "shows that a stay will do no harm to the public interest." *Waity*, 2022 WI 6, ¶ 49. These four factors "are not prerequisites but rather are interrelated considerations that must be balanced together." *Id.* (citation omitted).

ARGUMENT

I. The Legislature Has A High Likelihood Of Success On Appeal

A. To assess whether a party has a high likelihood of success on appeal, the Court must follow the analytical approach that the Wisconsin Supreme Court articulated in *Waity*. That approach forbids a court from "input[ting] its own judgment on the merits of the case and conclud[ing] that a stay is not warranted," because the dispositive question at the stay-pending-appeal stage is "whether the movant made a strong showing of success *on appeal*." *Waity*, 2022 WI 6, ¶ 52. The trial court must therefore "consider the standard of review, along with the possibility that appellate courts may reasonably disagree with its legal analysis." *Id.* ¶ 53. The court may not "merely repeat and reapply legal conclusions already made." *Id.* ¶ 52. Further, when a case involves issues that an appellate court will review de novo—such as novel questions of statutory interpretation—the circuit court must "consider[ ] how other reasonable jurists on appeal may . . . interpret[ ] the relevant law and whether they may . . . come to a different conclusion." *Id.* ¶ 53. Such considerations, alone, establish that a strong likelihood of success on appeal exists. *See id.* ¶¶ 51–53.

B. Here, the Legislature has satisfied the likelihood-of-success-on-appeal factor because "reasonable judges on appeal could easily . . . disagree[ ] with," *id.* ¶ 53, this Court's conclusion in its January 2, 2024 summary-judgment decision that the Materiality Provision preempts Wisconsin's absentee-ballot witness requirement as applied to the four specific categories, *see* Dkt.157; Dkt.161 at 2.

1. The Materiality Provision applies only to laws that: (1) deny an individual "the right to vote (2) because of an error or omission (3) on any 'record or paper relating to . . . an act requisite to voting' (4) that is not material in determining whether the voter is qualified to vote." Dkt.157 at 4 (citing 52 U.S.C. § 10101(e)).[1] Here, as the Legislature explained, the Materiality Provision does not apply to Wis. Stat. § 6.87(6d) or preempt its enforcement as to certain categories of absentee ballots with insufficient witness addresses, for multiple independently sufficient reasons. Dkt.138. First, because Section 6.87(6d) applies only *after* Wisconsin law has deemed an absentee voter "qualified to vote" in connection with her absentee ballot request, this state statute does not fall within the Materiality Provision's scope. Dkt.138 at 11–19 (citing, *inter alia*, *Schwier v. Cox*, 340 F.3d 1284 (11th Cir. 2003); *Ritter v. Migliori*, 142 S. Ct. 1824, 1825–26 (2022) (Alito, J., dissenting from denial of stay); and *Friedman v. Snipes*, 345 F. Supp. 2d 1356, 1370 (S.D. Fla. 2004)). Second, the Materiality Provision also does not apply to Section 6.87(6d) because that Section does not "deny" anyone "the right to vote," given that a voter may cast her ballot in person on Election Day without having to satisfy Section 6.87(6d). Dkt.138 at 19–24 (citing, *inter alia*, *Tully v. Okeson*, 977 F.3d 608, 613 (7th Cir. 2020); and *Vote.Org v. Callanen*, 39 F.4th 297, 306 (5th Cir. 2022)). Third, even if Section 6.87(6d) did fall within the Materiality Provision's scope, the absentee-ballot witness requirement complies with the Materiality Provision because it is "material" to determining a

[1] The Materiality Provision also requires that the challenged conduct be performed by a "person acting under color of law," 52 U.S.C. § 10101, but that element is not disputed here.

voter's qualifications to vote under state law. Dkt.138 at 24–29 (citing, *inter alia*, *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191 (2008); *Teigen v. Wis. Elections Comm'n*, 2022 WI 64, ¶ 71, 403 Wis. 2d 607, 976 N.W.2d 519; and *Common Cause v. Thomsen*, 574 F. Supp. 3d 634, 636 (W.D. Wis. 2021)). Finally, any contrary interpretation would destroy the State's responsibility for, and interest in, election administration under Article I, Section 4, of the U.S. Constitution. Dkt.138 at 14–15.

2. The Legislature understands that this Court disagreed with its arguments on these fronts in its January 2, 2024, summary-judgment order and its January 30, 2024, injunction order; however, the Legislature respectfully submits that reasonable jurists may disagree with this Court's conclusions, demonstrating that the Legislature has a strong likelihood of success on appeal.

First, the Court concluded that Section 6.87(6d) falls within the Materiality Provision's scope because it relates to whether a voter is "qualified to vote" under Wisconsin law. Dkt.157 at 5. But that is a novel question of statutory interpretation, subject to de novo review, upon which reasonable jurists could disagree, which alone establishes the Legislature's likelihood of success on appeal. *Waity*, 2022 WI 6, ¶¶ 51–53; *see* Dkt.157 at 2 ("State law does not define 'address' or specify the minimum address information necessary to comply with this provision."). In any event, the Court's conclusion was, with respect, incorrect and did not address some of the Legislature's key arguments. For example, the Court did not fully address the Legislature's point that the Materiality Provision requires the challenged law to be material to the voter's qualification *under state law*, Dkt.138 at 11–15, 25 (citing

Ritter, 142 S. Ct. at 1825–26 (Alito, J., dissenting from denial of stay); and *Common Cause*, 574 F. Supp. 3d at 636)), or that the witness requirement is material to whether a voter is who she says she is—an essential component of a voter's qualifications to vote by absentee ballot *under Wisconsin law*. Dkt.138 at 26.

Second, the Court concluded that Section 6.87(6d) falls within the Materiality Provision's scope because the rejection of an absentee ballot for non-compliance effectively "den[ies]" an absentee voter the right to vote, and because compliance with the absentee-ballot witness requirement is an "action necessary" to have an absentee ballot counted and therefore constitutes an act "requisite to voting." Dkt.157 at 4–5, 7–8. These too are novel question of statutory interpretation, reviewable on a de novo basis, upon which reasonable appellate judges may disagree, thereby supporting the Legislature's likelihood of success on appeal. *Waity*, 2022 WI 6, ¶¶ 51–53; Dkt.157 at 2 ("State law does not define 'address' or specify the minimum address information necessary to comply with this provision.").

Additionally, the Court's analysis of these issues was, with all respect, mistaken. Dkt.157 at 4–5, 7–8. For one thing, the Court hypothesized that the Legislature's position would permit a state law to require voters to guess "the name and favorite color of the poll worker who handed them their ballot," Dkt.157 at 7, but that sort of provision would be unlawful in many other respects, including by being entirely arbitrary in violation of the Fourteenth Amendment's Due Process Clause, among many other state and federal constitutional provisions. *See* U.S. Const. amend. XIV, § 1. In any event, the Court's statement is not an accurate

characterization of the Legislature's argument. That hypothetical involves a limitation on the *right* to vote in-person on Election Day, rather than, as here, on the *privilege* of voting by alternative means, such as by absentee ballot. Wis. Stat. § 6.84(1). Further, and contrary to the Court's conclusion, the plain statutory language and Wisconsin Supreme Court precedent establish that absentee voting is a privilege, not a right, and the availability of alternative means of casting a ballot strongly support the Legislature's conclusion that enforcing the absentee-ballot witness requirement does not "deny" any voter the right to vote in any way. Dkt.138 at 19–24 (citing, *inter alia*, *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2333, 2338 (2021); *Lee v. Paulson*, 2001 WI App 19, ¶ 7, 241, Wis. 2d 38, 623 N.W.2d 577; *Vote.Org*, 39 F.4th at 305–06; and *Tully*, 977 F.3d at 613). The Court also did not address the textual point that, because Wisconsin law offers another way to cast a vote without complying with Section 6.87, absentee ballots are only related, but not "requisite" to, the act of voting. Dkt.138 at 23–24. In other words, and as the Legislature explained, compliance with Section 6.87 is never *necessary* to exercise one's right to vote. *Id.* Moreover, appellate judges may be less persuaded by the nonbinding cases in other jurisdictions that this Court relied upon, given that those cases involved different voting laws administered by other States. Dkt.157 at 4–5 (citing various non-binding cases).[2]

[2] *See, e.g.*, *La Unión del Pueblo Entero v. Abbott*, 604 F. Supp. 3d 512, 541 (W.D. Tex. 2022) (concerning Texas law that required rejection of certain vote-by-mail applications); *Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1308–09 (N.D. Ga. 2018) (concerning Georgia law requiring rejection of absentee ballots that do not include birth year); *League of Women*

Third, the Court held that the absentee-ballot witness requirement is "not material to whether a voter is qualified" because it "says nothing about the voter's citizenship, age or residency," nor "about whether the voter has been disenfranchised." Dkt.157 at 5. This too involves a novel question of statutory interpretation, reviewed de novo, which independently supports the Legislature's likelihood of success on appeal here. *Waity*, 2022 WI 6, ¶ 53. And, here too, the Court's analysis did not address some of the Legislature's key points. For example, the Court did not address that the Materiality Provision requires the challenged law to be material to the voter's qualification under *state law*, Dkt.138 at 13–14, 25 (citing *Ritter*, 142 S. Ct. at 1825–26 (Alito, J., dissenting from denial of stay); and *Common Cause*, 574 F. Supp. 3d at 636)), or that, under Wisconsin law, the witness requirement is "material" to whether a voter is who she says she is—an essential component of a voter's qualifications to vote by absentee ballot, Dkt.138 at 26. Thus, although this Court held that Section 6.87(6d) is a voter-qualification provision that denies certain voters the right to vote—which the Legislature respectfully asserts is incorrect, *supra* pp.6–7—the Legislature is still likely to prevail on appeal because Section 6.87(6d)'s witness-requirement is "material" under any understanding of materiality that could survive constitutional scrutiny and respect the State's important interest in combatting election fraud.

Voters of Ark. v. Thurston, No. 5:20-cv-5174, 2021 WL 5312640, at *3–4 (W.D. Ark. Nov. 15, 2021) (denying motion to dismiss without determining whether Arkansas law requiring rejection of absentee ballots for failure to provide certain identifying information, where a voter must submit that same information in other parts of the voting process, violated Materiality Provision).

Finally, the Court held that adopting an expansive interpretation of the Materiality Provision would not impermissibly infringe the State's election-administration authority. Dkt.157 at 8. Resolving this issue requires consideration of novel questions of statutory and constitutional interpretation reviewed de novo on appeal, which alone demonstrates the Legislature's likelihood of success on appeal. *Waity*, 2022 WI 6, ¶ 53. Further, the Court's expansive interpretation of the Materiality Provision would frustrate the State's constitutional authority over election administration by authorizing voters to ignore *any* reasonable ballot requirements that have some connection to a "record or paper," forcing the State to litigate, on an ad hoc basis, whether any ballot error is "material." Dkt.153 at 7–8. The Court also rejected the Legislature's concerns about the impact of applying the Materiality Provision to Section 6.87(6d) by explaining that this is merely an "as-applied challenge" to "four discrete categories" of ballot errors, but that statement overlooks the fact that the decision announces a broad, generally applicable rule as to the scope of the Materiality Provision, and that scope would conflict with the State's constitutional authority over elections. Dkt.157 at 8; Dkt.138 at 14–15.

II. The Equitable Considerations Weigh Heavily In Favor Of A Stay Pending Appeal

A. The remaining stay-pending-appeal factors—namely, the risk of irreparable harm to the movant, the potential harm to the nonmovant, and the balance of the equities—require the Court to consider and balance the harms that could result from either granting or denying the stay pending appeal to the parties and to the public. *Waity*, 2022 WI 6, ¶¶ 57–60. The court must examine whether denying the stay will

cause the movant to "suffer irreparable injury" that "can[not] be undone" if the moving party prevails on appeal and "the circuit court's decision is reversed." *Id.* ¶¶ 49, 57. Harm that cannot be "mitigated or remedied upon conclusion of the appeal . . . must weigh in favor of the movant." *Id.* ¶ 57 (citation omitted). Next, the court must assess whether "the non-movant will experience" "substantial harm" if the court grants the stay "but the non-movant is ultimately successful" on appeal. *Id.* ¶¶ 49, 58 (citation omitted). Only the harm the non-movant might experience during "the period of time that the case is on appeal"—rather than "any harm that could occur in the future"—is relevant to this analysis. *Id.* ¶ 58. Finally, for the "harm to the public interest" element, the public interest is always served by the enforcement of duly enacted laws, including while a case is on appeal. *Id.* ¶¶ 49, 60.

B. Here, the balance of equities overwhelmingly supports a stay.

Denial of a stay pending appeal will cause irreparable harm to the State, whose interests the Legislature represents here, *Democratic Nat'l Comm. v. Bostelmann*, 2020 WI 80, ¶ 8, 394 Wis. 2d 33, 949 N.W.2d 423, and to the Legislature's own particular interests, *Waity*, 2022 WI 6, ¶¶ 49, 57. An injunction against state law irreparably harms the State, which has a sovereign interest in the faithful enforcement of state statutes as written, *see Bostelmann*, 2020 WI 80, ¶ 8—and where that injunction targets election-related laws, it further harms the Legislature's and the State's particular interests in the integrity and "orderly administration" of elections in Wisconsin, *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 196 (2008). Indeed, as the Wisconsin Supreme Court has recognized, the State and the

Legislature necessarily "suffer a substantial and irreparable harm of the first magnitude when a statute . . . is declared unenforceable and enjoined before any appellate review can occur." Dkt.22 at 98 (Order at 8, *Serv. Emps. Int'l Union, Loc. 1 v. Vos*, 2020 WI 67, 393 Wis. 2d 38, 946 N.W.2d 35 (No.2019AP622) ("*SEIU* Order")). Here, this Court has enjoined the operation of Section 6.87(6d)'s witness-address requirement as to certain categories of witness certifications. Dkt.157 at 4, 8. That constitutes irreparable harm to the Legislature. *Bostelmann*, 2020 WI 80, ¶ 8; *SEIU* Order at 8. Further, the harm is especially severe here because the enjoined law is an election statute that the Legislature put in place to ensure the integrity and "orderly administration" of Wisconsin's elections. *Crawford*, 553 U.S. at 196.

In the absence of a stay pending appeal, WEC must "disseminate to all county clerks" new guidance prohibiting the rejection of absentee ballots that contain one of the four types of errors or omissions at issue in this case by February 9, 2024. Dkt.161 at 2. But if the Legislature is successful in having the injunction reversed on appeal, that new guidance will no longer be applicable, and WEC may well have to scramble to reverse that guidance and issue new guidance all before the primary election on February 20, 2024—which is *less than three weeks away*. *See* Deadlines for the February 20, 2024 Spring Primary Election, MyVote Wis.[3] Specifically, before this Court's injunction, WEC and the Legislature always understood Section 6.87 to require the witness to write her street name, street number, and name of

[3] Available at https://myvote.wi.gov/en-us/Voter-Deadlines (all websites last visited Jan. 31, 2024).

municipality on the absentee-ballot witness certificate, with the failure to include one of these elements requiring rejection of that absentee ballot unless cured. Dkt.138 at 4–7 (citing Dkt.22 at 106–07). Accordingly, WEC has issued guidance to that effect, instructing clerks to reject absentee ballots with an absentee-ballot witness certificate that is missing one of these requirements. Dkt.138 at 4–7 (citing Dkt.22 at 88–89, 106–07). Now, after this Court's injunction, WEC must effectively rescind that guidance and "disseminate" new "guidance" instructing clerks *not* to reject absentee ballots with otherwise state-law-deficient witness certificates falling into the specific categories listed in the Court's injunction, even though the next election is less than three weeks away. Dkt.161 at 2; *see* Wis. Elections Comm'n, *Calendar*.[4]

A stay pending appeal will also benefit the public interest. *Waity*, 2022 WI 6, ¶¶ 49, 60. As the Wisconsin Supreme Court has recognized, "the public as a whole suffers irreparable injury of the first magnitude where a statute enacted by its elected representatives is declared unenforceable and enjoined before any appellate review can occur." *SEIU* Order at 9. Here, the public has an interest in the continued enforcement of Section 6.87(6d)—which law reflects the democratically-elected Legislature's policy determination that this is necessary to deter the potential for voter fraud, *Koschkee v. Taylor*, 2019 WI 76, ¶ 11, 387 Wis. 2d 552, 929 N.W.2d 600; *see* Wis. Stat. § 6.84(1)—until the appellate courts have the opportunity to conduct their review. Moreover, allowing the injunction to take effect now, on the eve of the

[4] Available at https://elections.wi.gov/calendar (listing 2024 Spring Primary as occurring on Tuesday, February 20, 2024).

primary election on February 20, will result in voter and clerk confusion, especially given the injunction's requirement that WEC effectively rescind its longstanding guidance on absentee-ballot-witness certificates and replace it with new guidance, which is a separate irreparable harm. *See, e.g.*, *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam) (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam)). As discussed above, *supra* pp.11–12, even if the Legislature prevails on appeal, changing the rules for absentee voting now and the resulting confusion to voters will result in harm that cannot be undone.

Plaintiffs, for their part, will suffer no harm from a stay pending appeal here. *Waity*, 2022 WI 6, ¶¶ 49, 58. Complying with Wisconsin's absentee voting laws is straightforward, including Section 6.87's witness-address requirement. Dkt.42 at 29. All that an absentee voter must do to comply with Section 6.87 is ensure that the witness completes the witness certificate, writing the witness's street number, street name, and the name of the municipality where the witness resides. Wis. Stat. § 6.87(6d). Complying with this requirement is especially straightforward now, as WEC has clarified the required witness-address components on its updated Standard Absentee Ballot Certificate. Fourth LeRoy Affidavit, Ex.1 at 1 (Wis. Elections Comm'n, Standard Absentee Ballot Certificate, Form EL-122 (Aug. 2023)). And if the Court does not stay pending appeal its injunction in *Rise, Inc. v. Wisconsin Elections Commission* ("*Rise*"), No.2022CV2446 (Dane Cnty. Cir. Ct.), a witness need only provide "sufficient information [on the certificate] to allow a reasonable person in the community to identify a location where the witness may be communicated with" for

a clerk to accept the absentee ballot, even if the witness does not include her street number, street name, and the name of the municipality on the certificate, *Rise*, No.2022CV2446, Dkt.238 at 1–2. Finally, should a voter desire to avoid having to comply with that law, she can easily avoid the absentee-ballot witness requirement altogether by voting in person on Election Day. Because a stay will simply maintain the status quo, Plaintiffs will not suffer any harm if the status quo is maintained during the pendency of these appeals. *Waity*, 2022 WI 6, ¶¶ 49, 58.

III. At The Very Minimum, This Court Should Grant A Limited, Administrative Stay Pending The Legislature's Filing Of A Motion For Stay Pending Appeal With The Court Of Appeals And The Court Of Appeals' Consideration Of That Motion

Should the Court decline to grant the Legislature a stay pending appeal, it should, at a minimum, grant a limited administrative stay while the Legislature moves the Court of Appeals for a stay pending appeal and during the Court of Appeals' consideration of that motion. That is, an administrative stay is essential here in light of the potential for inconsistence guidance from WEC, which will cause needless confusion for municipal clerks and voters throughout the State, *see* Dkt.161 at 2; *see supra* pp.11–13, as well the very real need for clerks across the State to administer the State's election law in the middle of the ongoing 2024 Spring Primary.

CONCLUSION

This Court should grant the Legislature's Motion For Stay Pending Appeal.

Dated: January 31, 2024

Respectfully submitted,

Electronically signed by Misha Tseytlin

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