

state laws, so the Legislature is plainly entitled to rely upon the State's interests in seeking a stay of a judicial order enjoining state law.

The Circuit Court was also wrong to suggest that the supposedly limited nature of its injunction order eliminates any harm to the State and the Legislature. Enjoining state law prior to appellate review always results in "substantial and irreparable harm of the first magnitude" to the State, no matter how narrow the injunction. App.298; *accord Abbott*, 138 S. Ct. at 2324 n.17 (2018) ("[T]he inability to enforce its duly enacted plans clearly inflicts irreparable harm on the State[.]"); *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers); *Veasey v. Abbott*, 870 F.3d 387, 391 (5th Cir. 2017) ("When a statute is enjoined, the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws.").

The Circuit Court's heavy reliance on the fact that WEC itself did not move for a stay was legal error. The Circuit Court did not cite any authority recognizing this as a factor in the irreparable harm analysis, and the *Bostelmann* proceedings refute the relevance of this consideration. In *Bostelmann*, WEC's

leadership, in their official capacities, was also named defendants in a suit challenging certain of the State's election laws, and the Legislature was an intervenor. *See Dem. Nat'l Comm. v. Bostelmann*, 977 F.3d 639, 641–42 (7th Cir. 2020) (per curiam). When the U.S. District Court for the Western District of Wisconsin issued an order granting partial relief to the plaintiff, the Legislature—but not WEC, through its leadership—appealed and was the only party speaking on behalf of the State that sought a stay from the Seventh Circuit pending appeal, citing the irreparable harms associated with changing election rules so close to an election. *See id.* After initially denying the Legislature's motion, the Seventh Circuit subsequently certified to the Wisconsin Supreme Court the question of whether the Legislature had the statutory authority to represent the State's interests in litigation challenging the validity of state law. *Id.* at 641. The Wisconsin Supreme Court answered that question affirmatively, so the Seventh Circuit considered the Legislature's merits arguments, reversed its prior position, and granted the stay, *id.* at 641, with the U.S. Supreme Court later declining to overturn that decision, *Dem. Nat'l Comm. v. Wis. State Legislature*, 141 S.

Ct. 28 (2020) (mem.). And notably, neither the U.S. Court of Appeals for the Seventh Circuit in granting the stay nor the U.S. Supreme Court in denying the motion to vacate that stay discounted the Legislature's harm showing merely because WEC (through its leadership) chose not to file its own stay motion. *See Dem. Nat'l Comm.*, 977 F.3d at 641–43; *see generally Dem. Nat'l Comm.*, 141 S. Ct. 28.

Finally, while the Circuit Court assumes away the harms that the State and the Legislature will suffer absent a stay by stating that the State does not have an interest in the enforcement of a state statute preempted by federal law, this issue goes to the merits of this case and not to the harm the State will sustain without a stay. For purposes of conducting the harm analysis, the Circuit Court had to assume that that the Legislature would prevail on appeal, and address its asserted harms from that perspective. *See Waity*, 2022 WI 6, ¶ 57. The harms that the State and the Legislature will suffer while the Legislature's appeal is pending before this Court are substantial, *see supra* pp.55–56, and the Circuit Court erred in declining to consider them.

C. Plaintiff Will Not Be Harmed By A Stay

1. In balancing the equities, the Court must also assess whether “the non-movant will experience” “substantial harm” if a stay is granted “but the non-movant is ultimately successful” on appeal. *Waity*, 2022 WI 6, ¶¶ 49, 58 (citation omitted). Only the harm the non-movant might experience during “the period of time that the case is on appeal” is relevant, and not “any harm that could occur in the future.” *Id.* ¶ 58; compare *Nken*, 556 U.S. at 426.

2. A stay pending appeal will not harm Plaintiff. *Waity*, 2022 WI 6, ¶¶ 49, 58. For one thing, Plaintiff’s members can easily comply with Wisconsin’s absentee voting laws, including Section 6.87’s witness-address requirement, with little effort. App.339. Properly completing the witness certification is especially straightforward now that WEC has updated the Standard Absentee Ballot Certificate to clarify, with specificity, what information is required. App.106. And should a voter wish to avoid the witness requirement all together, he or she can simply vote in person on Election Day. In other words, a stay pending appeal will simply maintain the status quo, such that Plaintiff will not suffer any harm if the injunction is stayed during this appeal. *Waity*, 2022 WI 6, ¶¶ 49, 58.

The evidence that Plaintiff submitted in this case of absentee ballots being rejected for witness-address errors was extremely limited, and does not show that Plaintiff or the State's electors will suffer any substantial harm if a stay is granted. Plaintiff only identified sixty-seven instances during the November 2022 general election in which absentee ballots were rejected for witness-address errors. App.477–80. And some of those errors, as Plaintiff itself admits, resulted from municipal clerks demanding *more* information than WEC's current guidance (which, as the Legislature has explained in the *Rise* matter, embodies the correct interpretation of Section 6.87's witness-address requirement) expressly requires—such as a zip code or state name, in addition to a street number, name, and city. App.494–95. It is also unclear how the Circuit Court could even enjoin the enforcement of Section 6.87's witness-address provision as preempted by federal law to instances where that same Court concluded that the provision does not even apply under the Circuit Court's reading of that provision in *Rise*. In any event, the Circuit Court failed to make any findings at all as to whether this small number of voters would be able to cure any witness-address error in sufficient time

for their ballots to be counted. This limited evidence of rejected absentee ballots cannot outweigh the substantial harm that the Legislature and the State will suffer if this Court does not stay the Circuit Court's orders.

3. The Circuit Court's conclusion that Plaintiff's members and other voters risk disenfranchisement if a stay is entered does not affect the analysis, where the Circuit Court itself recognized that the number of voters that might have their ballots rejected for a witness-address deficiency would be minimal. February 2, 2024 Oral Decision, *supra*, at 56:56–57:03, 57:42–57:50, 58:30–58:41, 58:49–58:55. The Circuit Court did not, moreover, make any findings at all as to whether this small number of voters would be able to cure any witness-address deficiency in sufficient time for their ballots to be counted. Accordingly, Plaintiff's assertion of absentee-voter disenfranchisement cannot outweigh the substantial harm that the Legislature and the State will suffer absent a stay of the Circuit Court's orders pending appeal.

Second, the Circuit Court relied upon Plaintiff's assertion that it would be harmed by having to expend resources educating voters as to the three-component definition of a witness's

“address,” but such harm is decidedly minimal, especially when considered against the substantial harm that the State will suffer absent a stay. *See supra* pp.55–56. If Plaintiff chooses to undertake educational initiatives on this subject, all it need do is inform absentee voters and absentee witnesses to conform with the status quo and follow the three-component definition of a witness “address” set forth in WEC’s current guidance on this subject, pending the outcome of the Legislature’s appeal. The Circuit Court erred in concluding that this harm—which is at most minimal—outweighs the several harms that the State and the Legislature will sustain if the Circuit Court’s orders are not stayed pending this Court’s review.

D. A Stay Pending Appeal Will Not Harm, But Rather Will Benefit, The Public Interest

1. The public interest lies in favor of a stay. The Wisconsin Supreme Court has made it clear that “[t]he 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.” App.299. The U.S. Supreme Court has reached the same conclusion. *Abbott*, 138 S. Ct. at 2324 & n.17. Here, the public’s interest in the continued

enforcement of Section 6.87(6d)—which represents a legislative policy decision about the need to deter the potential for voter fraud, *see Koschkee v. Taylor*, 2019 WI 76, ¶ 11, 387 Wis. 2d 552, 929 N.W.2d 600; Wis. Stat. § 6.84(1)—weighs in favor of a stay pending this Court’s review. *Waity*, 2022 WI 6, ¶ 60. Additionally, the public would benefit from a stay because a stay will prevent the confusion among voters and clerks that will likely result if WEC is forced to issue new guidance in less than one week, only to have to rescind that new guidance and reinstate old guidance in the event the Legislature is successful on appeal—all before the February 20, 2024 primary election, which is less than three weeks away. *See, e.g., Republican Nat’l Comm. v. Dem. Nat’l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam) (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam)).

2. The Circuit Court commits the same errors in concluding that a stay pending appeal is contrary to the public interest as it does in assessing the harms to the Legislature and the State, *see supra* pp.55–56, and so its analysis on this prong should be rejected for the same reasons. And to the extent the Circuit Court suggests that its order advances the public interest by preserving

constitutional rights, that is incorrect, as there is no right to vote absentee in Wisconsin. Wis. Const. art. III, § 2; see *Teigen*, 2022 WI 64, ¶ 52 n.25 (“Establishing rules governing the casting of ballots outside of election day rests solely within the power of the people’s representatives because such regulations affect only the privilege of absentee voting and not the right to vote itself.”).

CONCLUSION

This Court should grant this Emergency Motion For Stay Pending Appeal.

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Respectfully submitted,

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