

No. 2024AP165

In the Wisconsin Court of Appeals

DISTRICT IV

RISE, INC., *and* JASON RIVERA,
PLAINTIFFS-RESPONDENTS,

v.

WISCONSIN ELECTIONS COMMISSION, MARIBETH WITZEL-
BEHL, CITY CLERK FOR THE CITY OF MADISON,
WISCONSIN; TARA McMENAMIN, CITY CLERK FOR CITY OF
RACINE, WISCONSIN; *and* CELESTINE JEFFREYS, CITY
CLERK FOR THE CITY OF GREEN BAY, WISCONSIN,
DEFENDANTS,

WISCONSIN STATE LEGISLATURE,
INTERVENOR-APPELLANT.

On Appeal From The Dane County Circuit Court,
The Honorable Ryan D. Nilsestuen, Presiding
Case No. 2022CV2446

**INTERVENOR-APPELLANT'S EMERGENCY
MOTION FOR STAY PENDING APPEAL**

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INTRODUCTION

The Wisconsin State Legislature (the “Legislature”) seeks a stay of the Circuit Court’s January 30, 2024 injunction order (“Order”), pending the Legislature’s appeal. In that Order, the Circuit Court ordered three clerks to accept witness certifications if the witness provides on the “address” line “sufficient information to allow a reasonable person in the community to identify a location where the witness may be communicated with.” The Circuit Court also required Defendant Wisconsin Elections Commission (“WEC”) to “rescind” its longstanding guidance on the meaning of Wis. Stat. § 6.87’s witness-address requirement as the witness’s street name, number, and municipality, and “advise” all clerks of the Circuit Court’s new interpretation. Notably, the vast majority of these clerks are not before the Circuit Court and thus cannot be bound by the Circuit Court’s reading of “address,” whether that reading is forwarded to them by WEC or not.

This Court should stay the Order pending appeal, as the Legislature has met the stay-pending-appeal standard set forth in *Waity v. LeMahieu*, 2022 WI 6, 400 Wis. 2d 356, 969 N.W.2d 263. The Legislature has a strong likelihood of success on appeal as a matter of law under *Waity*, given that the Circuit Court’s Order

addresses a novel question of statutory interpretation subject to de novo review on appeal and upon which reasonable jurists could disagree. The standard that the Circuit Court adopted has, moreover, no basis in Wisconsin law and will be unadministrable, as the three defendant clerks and any clerk that chooses to follow the Circuit Court's new reading will need to determine whether his or her own knowledge is that of a "reasonable" person in the community—something that no clerk in Wisconsin has, to the Legislature's knowledge, ever had to do in any context. The balance of the equities also weighs firmly in favor of a stay. The State, the Legislature, and the public will suffer irreparable harm absent a stay, as the Circuit Court's Order will cause substantial confusion among clerks and the public alike from having to implement this new, unadministrable definition, while any absentee-ballot witness can easily comply with the status quo by simply following WEC's extant form.

Further, if the Court of Appeals (either District I or District II) denies the Legislature's stay motion in *League of Women Voters v. WEC*, No.2022CV2472 (Dane Cnty. Cir. Ct.) ("*LWV*"), the

propriety of staying the Circuit Court’s injunction in this case would be even more clear, as explained below.

This Court should grant the Legislature’s Motion For Stay Pending Appeal. **The Legislature respectfully requests that this Court issue a stay pending appeal by no later than February 9, 2024**—the day that the Circuit Court has ordered WEC to comply with the Order by either rescinding its current guidance on witness certifications or revising and reissuing that guidance—to avoid further confusion prior to the upcoming February 20, 2024 Spring Primary Election.¹

STATEMENT OF THE CASE

A. Legal Background²

The Wisconsin Constitution guarantees the right to vote, Wis. Const. art. III, § 1, while providing that “[l]aws *may* be

¹ The Legislature filed this Motion just two business days after the Circuit Court’s February 2, 2024 stay hearing and oral decision denying the Legislature’s stay motion before that court, which motion the Legislature was required to file pursuant to Wis. Stat. § (Rule) 809.12, and did not file yesterday only because it was attempting (unsuccessfully) to get the reporter to produce the transcript of the stay hearing where the Circuit Court articulated its reasoning for denying a stay pending appeal.

² Because both this case and *LWV* involve the same statute, and to avoid duplicative briefing, this Emergency Motion and the Legislature’s contemporaneously filed Emergency Motion For Stay Pending Appeal in *LWV* have a significant overlap as to the Legal Background section.

enacted . . . [p]roviding for absentee voting,” *id.* § 2 (emphasis added). Absentee voting is a “privilege” under Wisconsin law. Wis. Stat. § 6.84(1); *Teigen v. WEC*, 2022 WI 64, ¶ 52 n.25, 403 Wis. 2d 607, 976 N.W.2d 519. Because this “privilege [is] exercised wholly outside the traditional safeguards of the polling place,” Wisconsin law requires absentee-voting procedures to “be carefully regulated to prevent the potential for fraud or abuse.” Wis. Stat. § 6.84(1). To that end, Wis. Stat. § 6.84(2) requires that “matters relating to the absentee ballot process” must be “construed as mandatory,” and that any ballot “cast in contravention” of the State’s absentee-voting provisions “may not be counted.” *Id.* § 6.84(2).

Pursuant to its constitutional authority to enact general laws, including those “[p]roviding for absentee voting,” Wis. Const. art. III, § 2, the Legislature has enacted several absentee-voting laws since the State’s founding. The Legislature originally permitted absentee voting only for soldiers during the Civil War, *see* 1862 Wis. Act 11 (Special Sess.),³ and then later enacted the State’s first comprehensive absentee-voting regime in 1915, *see*

³ Available at <https://docs.legis.wisconsin.gov/1862/related/acts/62ssact011.pdf> (all websites last visited Feb. 5, 2024).

1915 Wis. Act 461;⁴ *Teigen*, 2022 WI 64, ¶ 174 (Hagedorn, J., concurring). While the 1915 law expanded absentee-voting opportunities, it also contained extensive provisions aimed at preventing fraud or abuse. For example, to request an absentee ballot, a qualified elector was required to swear an affidavit before a designated official and then return it with the properly completed ballot to “the officer issuing the ballot,” and failure to comply with the relevant provision subjected both the elector and the official to penalties. 1915 Wis. Act 461, § 44m—1–2, 5–6, 14.

This scheme generally governed absentee voting in Wisconsin until 1966, when the Legislature replaced the 1915 regime’s burdensome affidavit provisions with a simplified witness requirement allowing absentee voters to “make and subscribe to the certification” on their absentee ballots “before 2 witnesses.” 1965 Wis. Act 666, § 1 (creating Wis. Stat. § 6.87).⁵ In 1986, Wisconsinites ratified a constitutional amendment enshrining the Legislature’s authority to enact laws “[p]roviding for absentee voting.” Wis. Const. art. III, § 2. That same year, the Legislature

⁴ Available at <https://docs.legis.wisconsin.gov/1915/related/acts/461.pdf>.

⁵ Available at <https://docs.legis.wisconsin.gov/1965/related/acts/666.pdf>.

reformed the absentee-voting scheme, simplifying the absentee-voting process and clarifying its requirements. *See* 1985 Wis. Act 304.⁶ As part of this legislative overhaul, the Legislature enacted Wis. Stat. § 6.84 to elucidate the State’s policy goals and the proper interpretation of laws governing the “privilege” of absentee-voting.

Wisconsin’s comprehensive absentee-voting regime is one of the most generous in the Nation, allowing any qualified, registered voter to exercise the “privilege” of voting absentee “for any reason” if the voter is “unable or unwilling to appear at the polling place in his or her ward or election district.” Wis. Stat. §§ 6.84, 6.85(1). Wisconsin law further provides numerous different methods to request an absentee ballot, *id.* § 6.86(1)(a)1–6, to obtain a requested absentee ballot, *id.* § 6.86(ac), and to cast an absentee ballot, *id.* §§ 6.855, 6.87(4)(b)1, (b)5.

Section 6.87 contains the current procedural requirements governing the completion and counting of absentee ballots in Wisconsin, including, as relevant here, the absentee-ballot witness requirement. Pursuant to that requirement, the absentee voter


⁶ Available at <https://docs.legis.wisconsin.gov/1985/related/acts/304.pdf>.

must mark the absentee ballot in the presence of one adult witness before folding and placing the ballot in an official absentee-ballot envelope. *Id.* § 6.87(4)(b)1; *see also id.* § 6.875(6)(c)1. The witness must then write his or her “[a]ddress” on the witness certificate, which is printed on the absentee-ballot envelope. *Id.* § 6.87(2). This witness-address attestation is required for the ballot to be cast successfully: “[i]f a certificate is missing the address of a witness, the [absentee] ballot may not be counted.” *Id.* § 6.87(6d).

Below is an image of WEC’s revised absentee ballot witness certificate, which includes clear instructions for witnesses to provide their signature, printed name, and their address, consisting of a street number, street name, and city:

STEP 3 WITNESS must complete this part

I the undersigned witness, subject to the penalties for false statements of Wis. Stat. § 12.60(1)(b), certify that:



**WITNESS
REQUIRED**

- I am an adult U.S. citizen
- The above statements are true and the voting procedure was executed as stated
- I am not a candidate for any office on the enclosed ballot (except in the case of an incumbent municipal clerk).
- I did not solicit or advise the elector to vote for or against any candidate or measure

X

Witness Signature

Witness Printed Name

Witness Address (Number, Street Name, City)

App.40.

If a municipal clerk “receives an absentee ballot with an improperly completed certificate or with no certificate,” then the witness “may return the ballot to the elector” so long as “time permits the elector to correct the defect and return the ballot within the period authorized under sub. (6).” Wis. Stat. § 6.87(9). Voters are also able to monitor the status of their submitted ballots through the online “Track My Ballot” tool, which shows them when the clerk “receive[s]” “returned ballot[s]” and alerts them to any “problem[s]” with their ballots. App.88–90.

WEC has correctly interpreted the meaning of “address” in Section 6.87’s witness-address requirement through guidance issued in October 2016. In that guidance, WEC properly defined witness “address,” Wis. Stat. § 6.87(6d), explaining to clerks that “a complete [absentee-witness] address contains a *street number, street name, and name of municipality,*” App.308 (“2016 Guidance”) (emphasis added). That 2016 Guidance further directed clerks to “take corrective actions in an attempt to remedy a witness address error” and allowed the clerks to make corrections “directly to the absentee certificate envelope” without needing “to contact the voter” in cases where the clerk was “reasonably able to discern any missing information from outside sources.” App.308.

On September 7, 2022, the Waukesha County Circuit Court enjoined this latter part of the 2016 Guidance, *see* App.267–96, holding that clerks had no “duty or ability to modify or add information to incomplete absentee ballot certifications.” App.292. This ruling did not, however, implicate the 2016 Guidance’s interpretation of a witness’s “address,” nor did the court otherwise rule on when a ballot certificate is defective. *See* App.302–04.

Shortly after the Waukesha County Circuit Court's September 2022 ruling, WEC issued new guidance to clerks to reaffirm its view of the three-part definition of "address," explaining that the *White* 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.*" See App.299–300. Although the September 2022 Guidance did not "discuss whether a zip code is an adequate substitute for a municipality name," App.108, and absentee ballots previously included a space to input zip code information, App.92, WEC recently revised the absentee-ballot form to clarify its view that witnesses need only provide their "Number, Street Name, [and] City" in the witness certificate, App.94. WEC's current Uniform Instructions for Wisconsin Absentee Voters likewise makes clear that additional components (like a zip code) are not required because an absentee ballot "will not be counted" only if the witness fails to provide one or more of the three required components—"street number, street name, city." App.97; see Wis. Stat. § 6.869.

Many municipal clerks and absentee voters used WEC's new guidance and the Uniform Instructions for Wisconsin Absentee Voters for the first time in the November 2022 general election, with very few complications. Plaintiffs have only identified 67 instances in which ballots were rejected for witness-address issues. App.110 (citing App.333–561). Many of these instances involve the actions of non-party clerks, including municipal clerks in Appleton, Eau Claire, Waukesha, Oshkosh, and Janesville. App.110 (citing App.333–561). Far from demonstrating a wide-reaching, statewide problem with WEC's interpretation of "address," the evidence indicates that, to the extent ballots are being inconsistently rejected in certain, isolated situations and by certain clerks—many of whom are not parties to this action—in a handful of counties, those inconsistencies are the result of action by local clerks, not by WEC's guidance about the address requirement or the necessary components thereof (and, indeed, often contrary to WEC's guidance). Given that many of these clerks previously failed to comply with WEC's nonbinding guidance and many are not named as Defendants here, there is no reason to believe that these clerks will change their approaches

now because, again, the Circuit Court's Order does not bind them.
See infra p.45.

B. Litigation Background

1. Plaintiffs File Their Initial Complaint, Lose Two Preliminary Injunction Motions

Plaintiffs Rise, Inc. and Jason Rivera filed their initial complaint on September 27, 2022, naming only WEC and one municipal clerk, Clerk Maribeth Witzel-Behl, in her official capacity as City Clerk for the City of Madison. App.310. Plaintiffs alleged that the injunction issued in *White*, 2022CV1008 (Sept. 7, 2022), “thrust” Wisconsin’s absentee-voting system “suddenly into a state of disarray,” such that municipal clerks thereafter lacked guidance on what constituted a legally sufficient address for absentee ballot purposes, App.314. They requested that the Circuit Court issue an order judicially defining “address” as “a place where a witness may be communicated with” and instructing clerks not to deem an address “improperly completed” under the absentee-ballot statute “if a local clerk can reasonably discern the location where a witness may be communicated with.” App.329–30.

Over the course of the Circuit Court proceedings in this case, Plaintiffs moved for a temporary injunction twice, App.305–06; App.211–12, and twice the Circuit Court denied their motions, App.227; App.207–09. On October 7, 2022, the Circuit Court denied Plaintiffs’ first injunction motion, holding that such relief was “unnecessary to preserve the status quo”—defined as “the definition of an absentee ballot witness ‘address’ contained in the October 18, 2016 [WEC] memorandum and the September 14, 2022 memorandum to clerks from [WEC], namely that an address is sufficient if it contains a street number, street name and name of municipality.” App.227. After Plaintiffs moved for a temporary injunction again, App.211–12, citing “new evidence” that some clerks, including at least 12 non-party clerks, were using different interpretations of Section 6.87(2)’s witness-address requirement than that provided in the 2016 Guidance and September 2022 Guidance, App.215–16, the Circuit Court denied the motion, again pointing to the status quo and reasoning that Wisconsin has administered its elections successfully and without a “legally binding definition of the witness address” for “the past 56 years,” App.208–09. The Circuit Court was unswayed by Plaintiffs’

purported “new evidence,” and explained that such allegations “do[] not change the status quo, which is that the law has always left room for local clerks to interpret and apply the term to the ballot envelope before them.” App.209.

During these proceedings, the Circuit Court procedurally consolidated a companion case for purposes of trial only, *League of Women Voters of Wisconsin v. WEC*, 2022CV2472 (Dane Cnty. Cir. Ct. Mar. 14, 2023) (“*LWV*”), which case also involved a dispute over the meaning of Section 6.87’s witness-address requirement. App.126–146. There, the plaintiff asserted that the Materiality Provision of the federal Civil Rights Act of 1964, 52 U.S.C. § 10101(a)(2)(B) precluded the application of Section 6.87(6d)’s witness-address requirement to multiple categories of absentee ballots. App.198–200. The *LWV* plaintiff also sought a declaratory judgment defining the word “missing” under Section 6.87(6d)—rather than “address”—but, like Plaintiffs’ original Complaint here, the *LWV* plaintiff did not identify any legally cognizable relief as to WEC, failing to allege that WEC itself had acted or was likely to act unlawfully. App.133–43. The Circuit Court thus dismissed the *LWV* plaintiff’s request for declaratory relief and its

“missing” statutory interpretation claim in *LVW* prior to consolidation, agreeing with the Legislature’s argument that “the League ‘hand-picked a litigation adversary’ which was the ‘most convenient’ rather than ‘sue . . . any actual clerk who has disagreed with its interpretation of Section 6.87,” leaving only the plaintiff’s challenge to the legality of Section 6.87(6d) under federal law. App.116–18, 120, 142.

On March 24, 2023, Plaintiffs here filed an Amended Complaint, adding two individual county clerks—Clerk Tara McMenammin, in her official capacity as City Clerk for the City of Racine, and Clerk Celestine Jeffreys, in her official capacity as City Clerk for the City of Green Bay—as defendants, while asserting the same argument now in two claims, first against the clerks and then against WEC. App.168–70.

2. The Parties Move For Summary Judgment, And The Circuit Court Adopts Plaintiffs’ Definition Of “Address”

On January 2, 2024, the Circuit Court granted Plaintiffs’ motion for summary judgment and denied WEC’s and the Legislature’s cross motions for summary judgment, App.27–33, holding that the term “address” as used in Wis. Stat. § 6.87 means “a place where a person or organization may be communicated

with,” App.29, 32. The Circuit Court’s decision did not enjoin WEC or the named clerks from taking any action, nor did it order any party to do anything. *See* App.32.

The Circuit Court then entered a separate declaratory judgment and permanent injunction on January 30, 2024. App.21–23. There, the Circuit Court ordered that Section 6.87’s witness-address requirement “does not require that any particular components or information be included” by the witness, so long as “the face of the certificate contains sufficient information to allow a reasonable person in the community to identify a location where the witness may be communicated with.” App.21. This new and amorphous “reasonable person” standard—which was not the standard put forth in the now-rescinded portion of WEC’s 2016 Guidance on correcting “address” errors and was not even the standard requested by Plaintiffs in their pleading, App.329–30—is now the mandatory interpretation of Section 6.87’s witness-address requirement as to the three defendant clerks.

The Circuit Court further ordered WEC to “rescind” *or* “revise and reissue” its guidance defining the term “address” to mean a witness’s street number, street name, and municipality,

and notify municipal clerks of “their obligation not to reject, return for cure, or refuse to count any absentee ballot based on a witness’s address,” if that address complies with the Circuit Court’s “address” definition. App.22–23. As such, the Circuit Court did not direct WEC to provide updated guidance to clerks but instead gave WEC the option of simply rescinding the 2016 Guidance without issuing any new guidance. App.22–23. Moreover, the Circuit Court did not purport to, nor could it, bind these non-party clerks to the Circuit Court’s understanding of Section 6.87(6d), so even if WEC chose the option of “revis[ing] and reissu[ing]” its guidance on the meaning of “address” in that provision, the non-party clerks would not be bound by it. App.22–23.

Also on January 30, 2024, the Circuit Court issued a separate injunction in *LWV*, No.2022CV2472, enjoining the application of the witness-address requirement statewide as to four categories of absentee ballot witnesses. App.24–26.⁷ The court ordered that “no absentee ballot may be rejected” if the

⁷ The statewide scope of the Circuit Court’s *LWV* injunction is permissible because federal law permits a plaintiff to sue a statewide officer to block state law, on a statewide basis, on the grounds that the state law is preempted by federal law or violates the U.S. Constitution. *Ex Parte Young*, 209 U.S. 123, 159–60 (1908).

witness-address certificate “meet[s] any of the following four sets of criteria”: (1) “The witness’s street number, street name, and municipality are present, but there is neither a state name nor a ZIP code provided,” (2) “The witness’s street number, street name, and ZIP code are present, but there is neither a municipality nor a state name provided,” (3) “The witness’s street number and street name are present and match the street number and street name of the voter, but no other address information is provided,” or (4) “The witness certification indicates that the witness address is the same as the voter’s address with any or any combination of the following words: ‘same,’ ‘same address,’ ‘same as voter,’ ‘same as above,’ ‘see above,’ ‘ditto,’ or by using quotation marks and/or an arrow or line pointing to or from the voter address.” App.25.

3. The Legislature Moves For A Stay Pending Appeal, Which The Circuit Court Denies

The Legislature then promptly filed a motion for stay pending appeal, arguing that the four factors articulated by the Supreme Court in *Waity*, 2022 WI 6, all supported staying the Circuit Court’s injunction for the pendency of this appeal. *See* App.6–19. First, the Legislature explained that it has a high likelihood of success on appeal because this case raises novel

“questions of statutory interpretation” that “reasonable judges on appeal could easily . . . disagree[]” over. App.6–14 (citing *Waity*, 2022 WI 6, ¶ 53). Next, the Legislature argued that it would suffer irreparable harm in the absence of a stay because the Circuit Court’s definition of “address” and associated injunction impose an unadministrable standard that will severely damage and frustrate “the State’s and the Legislature’s interest in ensuring the integrity and ‘orderly administration’ of elections, App.14–15 (citing *Waity*, 2022 WI 6, ¶¶ 49, 57, and *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 196 (2008)). On the third factor—harm to the nonmovant if a stay issues—staying the Circuit Court’s order would cause no harm to Plaintiffs because a stay would simply preserve the status quo, as the Circuit Court had previously twice held in denying Plaintiffs’ two temporary injunction motions. App.18 (citing *Waity*, 2022 WI 6, ¶¶ 49, 58). Here, the Legislature also pointed out that the injunction issued in *LVW*, No.2022CV2472, App.24–26, appears to cover all of the absentee ballots that Plaintiffs here were concerned about, App.18–19. Finally, the Legislature explained that the public interest would

be served by a stay. App.17–18 (citing *Waity*, 2022 WI 6, ¶¶ 49, 60).

The Circuit Court denied the Legislature’s stay motion on February 2, 2024. In orally explaining its reasoning, the Circuit Court held that the Legislature had not established a strong likelihood of success on appeal because the Legislature failed to identify anything that “sows serious doubt” about the validity of the Circuit Court’s decision on the merits. February 2, 2024 Oral Decision at 41:00–45:15 (transcripts forthcoming).⁸ The Circuit Court simply determined that its analysis of the legal issue in this case was more accurate than that of the circuit court in *Waity*, and therefore *Waity*’s presumption that a movant demonstrates a likelihood of success by showing a novel legal issue upon which reasonable jurists might disagree, *see infra* pp.27–29, did not apply, February 2, 2024 Oral Decision, *supra*, at 42:28–46:02. Next, the Circuit Court stated it had “a hard time seeing how the Legislature as a[n] institution suffers” any injury as a result of the injunction, giving significant weight to WEC’s “nonposition” on the

⁸ Available at <https://wiseye.org/2024/02/02/dane-county-circuit-court-rise-inc-et-al-vs-wisconsin-elections-commission-et-al-3/>.

stay motion. *Id.* at 46:02–50:00. On the harm to the nonmovant if a stay issues, the Circuit Court determined that a stay would “substantially harm” Plaintiffs because they would need to educate absentee witnesses to include their street number, street name, and city on the witness certificate (which information is already plainly requested on the witness certificate itself, *see supra* pp.12–13). *Id.* at 50:00–51:03. Finally, the Circuit Court held that a stay would likewise harm the public interest because it would harm the constitutional right to vote, whereas voters will see “no change” resulting from the Circuit Court’s injunction as it only affects WEC’s communications to clerks. *Id.* at 51:03–53:48.

ARGUMENT

I. The Legislature Is Entitled To A Stay Pending Appeal

This Court has the authority to “[s]uspend . . . an injunction” “[d]uring the pendency of an appeal” under Wis. Stat. § (Rule) 808.07(2). To determine whether such relief is appropriate, courts consider four factors—namely, whether the movant: (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,” (3) “shows that no substantial harm will come to other interested parties,” and (4) “shows that a stay will

do no harm to the public interest.” *Waity*, 2022 WI 6, ¶ 49. These factors “are not prerequisites” but are instead “interrelated considerations that must be balanced together.” *Id.* (citation omitted). When a party asks an appellate court for a stay pending appeal after the circuit court denies such a request, the appellate court must consider whether the circuit court “examined the relevant facts, applied a proper standard of law, and using a demonstrative rational process, reached a conclusion that a reasonable judge could reach.” *Id.* ¶ 50 (citations omitted). If the circuit court “appl[ies] an incorrect legal standard” to adjudicate a request for a stay pending appeal, it “erroneously exercise[s] its discretion” as a matter of law. *Id.*

The Circuit Court here erroneously exercised its discretion in applying the *Waity* standard to deny the Legislature’s request for a stay pending appeal, and thus erred as a matter of law. *Id.* The Legislature describes these errors immediately below in relation to each of the four *Waity* factors—while also explaining why the Legislature is entitled to a stay pending appeal—so as not to provide duplicative briefing on closely related arguments.

A. The Legislature Has A High Likelihood Of Success On The Merits

1. To determine a stay movant's likelihood of success on the merits, a court must, under *Waity*, "consider the standard of review, along with the possibility that appellate courts may reasonably disagree with its legal analysis," rather than "simply input its own judgment on the merits of the case and conclude that a stay is not warranted." *Id.* ¶¶ 52–53. *Waity* clarified that when a case involves issues that an appellate court reviews de novo, courts assessing stay motions must consider that "reasonable jurists on appeal may . . . interpret[] the relevant law and . . . come to a different conclusion," such that the presence of such issues alone supports a movant's strong likelihood of success on appeal. *See id.* ¶¶ 51–53.

2. The Legislature is likely to succeed on the merits of its appeal under the standard set forth in *Waity*. The legal issue here—the meaning of the term "address" for purposes of Section 6.87's witness-address requirement—is a novel question of statutory interpretation that this Court will review de novo. *See id.* ¶ 53. Neither the Supreme Court nor this Court "has previously interpreted," *id.*, "address" for purposes of

Section 6.87's witness-address requirement, *see Trump v. Biden*, 2020 WI 91, ¶¶ 17–18, 394 Wis. 2d 629, 951 N.W.2d 568; *id.* ¶¶ 47–49 (Hagedorn, J., concurring). Further, the Circuit Court itself stated that a “reasonable jurist might disagree with [its] analysis” of this novel legal issue. February 2, 2024 Oral Decision, *supra*, at 44:45–48; *see Waity*, 2022 WI 6, ¶ 53. The novelty of the legal issue and the de novo standard of review alone establish that the Legislature has a strong likelihood of success on appeal. *Waity*, 2022 WI 6, ¶ 53.

3. Even putting the *Waity* presumption aside, the Legislature is likely to prevail on the merits of its appeal, as its position regarding the proper interpretation of Section 6.87's witness-address requirement is legally correct.

Wisconsin courts have a “solemn obligation” to “faithfully give effect to the laws enacted by the legislature,” by making a “determination of statutory meaning.” *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. To determine a statute's meaning, the court must “begin[] with the language of the statute,” giving that language its “common, ordinary, and accepted meaning,” unless a different

technical or special meaning clearly applies. *Id.* ¶ 45. Relevant to this interpretive analysis is “the context in which [statutory language] is used,” and the relationship between the statutory language and that of “surrounding or closely-related statutes.” *Id.* ¶ 46. Finally, the court construes a statute in a manner that “avoid[s]” “unreasonable results,” *id.*, and may reference statutory history to inform its interpretation, *id.* ¶ 48 (citations omitted); *Richards v. Badger Mut. Ins. Co.*, 2008 WI 52, ¶ 22, 309 Wis. 2d 541, 749 N.W.2d 581; *State v. Cox*, 2018 WI 67, ¶ 10, 382 Wis. 2d 338, 913 N.W.2d 780.

Section 6.87(2)’s plain text, context, purpose, history, and administrability concerns compel the conclusion that a witness’ “address” must include three components: a street name, street number, and name of municipality, which is different than the Circuit Court’s interpretation.

a. Text. Although Section 6.87 does not define “address,” the best reading of the term is that a witness’s street number, street name, and name of municipality, just as WEC has previously provided. The term’s “common, ordinary, and accepted meaning,” *Kalal*, 2004 WI 58, ¶ 45, is “[t]he particulars of the place where a

person lives . . . , typically consisting of *a number, street name, the name of a town or district,*” *Address*, Oxford English Dictionary Online (emphasis added).⁹ These “particular[]” details comprise what is typically “considered” the “location where a person . . . can be contacted by post.” *Id.* While an address may be understood to include other details, including a zip code, those details are not always included in an address, as the term is commonly understood. *See id.* For example, for purposes of the United States Postal Service, a “full address” must contain the addressee’s “name,” “street address,” and “city or town name,” but a “postal code” need only be provided “if known.” App.100–01. Because an address, as that term is commonly understood, requires these three basic pieces of information, an address is incomplete when one of them is missing. Wis. Stat. § 6.87(6d), (9).

b. Context and Purpose. The statutory context and purpose for which Section 6.87(2) was enacted support WEC’s interpretation of “address.” *Kalal*, 2004 WI 58, ¶ 46. For one thing, interpreting “address” as requiring three components accords with the statute’s “manifest . . . purpose,” *State v. Dinkins*,

⁹ Accessed at www.oed.com/view/Entry/2208 (subscription required).

2010 WI App. 163, ¶ 12, 330 Wis. 2d 591, 794 N.W.2d 236 (citation omitted), of “prevent[ing] the potential for fraud or abuse” that inherently accompanies the “privilege” of absentee voting, Wis. Stat. § 6.84(1). Additionally, and in part because the Legislature has a “guarded attitude” with respect to that privilege, the absentee-voting laws must be “strictly construed.” *Lee v. Paulson*, 2001 WI App. 19, ¶ 7, 241 Wis.2d 38, 623 N.W.2d 577 (citing Wis. Stat. § 6.84(2)). Requiring a witness address to include a street number, street name, and name of municipality serves the State’s interest in preventing such “fraud” and “abuse,” Wis. Stat. § 6.84(1), because it ensures that an election official has the means to locate an absentee-ballot witness and confirm the identity of the absentee-voter, if questions about the ballot arise. Therefore, the only way to “strict[ly] constru[e],” Wis. Stat. § 6.84, “address” is as requiring all three mandatory elements.

The statutory “context,” *Kalal*, 2004 WI 58, ¶ 46, in which “address” must be interpreted is in accord. For example, other language in Section 6.87(2) itself demands that the absentee voter certify, on his ballot envelope, that “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) (all ellipses and brackets in original). Thus, Section 6.87(2) requires an absentee voter to provide the same three pieces of information the Legislature believes should be required of a ballot witness, under a strict interpretation of the term “address.” Moreover, a voter who wishes to vote by absentee ballot must first successfully register to vote, *id.* § 6.20—a process that requires the voter to verify his identity by providing “proof of residence.” *Id.* § 6.34(3)(b)(2). “[T]o be considered proof of residence,” the voter must produce documents that contain an “address, including a numbered street address, if any, and the name of a municipality.” *Id.* These provisions—all of which regulate the absentee-voting process—are “closely-related” and therefore must be interpreted “as a coherent whole.” *Kalal*, 2004 WI 58, ¶¶ 46, 49. Doing so compels the conclusion that, under Section 6.87(2), a witness’s address must contain the same three pieces of information as a voter’s own address and proof of residence.

The “language” used in other “closely-related statutes” is in accord. *Id.* For instance, Wis. Stat. § 6.15(2)(a) requires new

residents who wish to vote in presidential elections to submit to the local municipal clerk an affidavit demonstrating their “(town) (village) [or] (city)” name and “street address.” Wis. Stat. § 6.15(2)(a). And Wis. Stat. §§ 8.10 and 8.28 require candidates for political office to submit “nomination papers” that detail the candidate’s “address” to ensure compliance with the relevant “residency qualifications.” *Id.* §§ 8.10, 8.28. Current nomination papers for partisan office include “street, fire, or rural route number,” a “name of street or road,” and a “name of municipality.” See EL-168 Nomination Paper for Partisan Office (2016).¹⁰ The individual responsible for circulating a candidate’s nomination papers must also certify his “address,” which must “[i]nclude number, street, and municipality.” *Id.*

c. History. The history of Wisconsin’s absentee-voting laws “confirm[s]” WEC’s understanding of Section 6.87 as requiring a three-component witness-address. See *Kalal*, 2004 WI 58, ¶ 51; see also *Teigen*, 2022 WI 64, ¶ 178 (Hagedorn, J., concurring). Voting absentee is a privilege, not a right, in Wisconsin, see Wis. Const. art. III, § 2, which privilege the State “carefully regulate[s]” with

¹⁰ Available at <https://elections.wi.gov/media/14106/download>.

its absentee-voting laws. Wis. Stat. § 6.84(1). When the State first enacted a comprehensive absentee-voting scheme in 1915, it required absentee voters to request an absentee ballot, 1915 Wis. Act 461, § 44m—2, swear an affidavit before a qualified officer, *id.* §§ 44m—5–6, and return both the completed ballot and affidavit to the officer issuing the ballot, *id.* § 44m—6. The State required the absentee voter’s affidavit to contain his or her “address,” including the “[s]treet and number” and “city.” *Id.* §§ 44m—3, 5. Notably, the law required the absentee voter to mark the ballot only “in the presence of” the official, who was in turn required to enclose the ballot in an envelope bearing his own “post-office address.” *Id.* § 44m—5. Both the absentee voter and official faced harsh penalties if they failed to comply with these requirements. *Id.* §§ 44m—5–6.

Since then, the Legislature has reformed Wisconsin’s absentee voting regime, while retaining the traditional emphasis on ensuring absentee ballots are properly witnessed. In its 1966 revision to the absentee voting laws, the Legislature allowed certain qualified absentee electors to forego the affidavit requirement by instead “mak[ing] and subscrib[ing] to the

certification before 2 witnesses,” 1965 Wis. Act 666, § 1, which alternative witnessing provision required both witnesses to execute a witness certification and provide their names and addresses, *see id.* If an absentee voter used this alternative to cast his or her ballot and the “certification” on the ballot was “found to be insufficient,” the law mandated that “the vote shall not be accepted or counted.” *Id.* (creating Wis. Stat. § 6.88). The Legislature later expanded absentee voting to all otherwise qualified electors and reduced the number of required witnesses to one, but it has maintained the requirement that an absentee voter’s witness must provide his or her “address” on the certification. *See* 1999 Wis. Act 182 §§ 90m, 95p. As a result, Wisconsin’s current absentee voting regime still requires absentee ballots to be certified by one witness who provides an “address,” Wis. Stat. § 6.87(2), which provision WEC, the Legislature, and state officials alike have consistently understood to require absentee voter witnesses to include a street number, street name, and municipality name on a witness certification, *supra* pp.13–16.

d. Administrability. Finally, interpreting “address” under Section 6.87(2) as requiring a street number, street name, and

name of municipality provides a straightforward and workable rule. *See Kalal*, 2004 WI 58, ¶ 46. Wisconsin has over 1,800 municipal clerks, and requiring them to accept or reject absentee ballots based on whether or not three objective criteria are satisfied ensures uniformity in the way these ballots are treated on a statewide basis. In other words, the tri-part definition of “address” allows clerks to determine easily whether a ballot is complete without implicating any subjective determinations that will result if clerks have to determine what information a “reasonable person in the community” would find sufficient to “identify a location where the witness may be communicated with,” as necessary under the Circuit Court’s interpretation of Section 6.87. App.23. This three-component definition therefore provides the uniformity necessary to ensure that each absentee ballot is treated in a consistent and equal manner, without the risk that individual clerks will apply disparate, locally contrived, or context-based standards.

3. The Circuit Court’s decision to deny a stay of its orders pending the Legislature’s appeal was incorrect.

First, the Circuit Court committed clear legal error—which constitutes an erroneous exercise of the Circuit Court’s discretion as a matter of law under *Waity*, 2022 WI 6, ¶ 50—by pointing to the claimed strength of its own reasoning to hold that its ruling on the meaning of a witness’s “address” for purposes of Section 6.87 was unlikely to be reversed on appeal, rather than considering the novelty of this question and the de novo standard of review. See February 2, 2024 Oral Decision, *supra*, at 44:06–46:00. Although the Circuit Court recited *Waity*’s standard for assessing a stay movant’s likelihood of success on appeal, the Circuit Court’s reason for holding against the Legislature on this prong was that it found its own reasoning more compelling than that of the circuit court in *Waity* in terms of the authority supporting the stay movant’s merits position in that case. *Id.* But every circuit court—including the circuit court in *Waity*—will presumably believe that its own decision is well-supported by all of the relevant authorities, so the Circuit Court’s approach here effectively deletes the *Waity* presumption. That is why *Waity* requires courts to examine the novelty of the legal issue at stake as well as the standard of review on appeal. See 2022 WI ¶¶ 52–53. In failing to apply the *Waity*

standard regarding a movant’s likelihood of success, the Circuit Court “erroneously exercised its discretion.” *Id.* ¶ 50. Again, that this appeal involves a novel issue of statutory interpretation—reviewed de novo and upon which reasonable jurists could disagree—alone demonstrates that the Legislature has a strong likelihood of succeeding in its appeal. *See supra* pp.28–29.

Second, the Circuit Court’s analysis of the Legislature’s reliance on the Oxford English Dictionary’s definition of “address,” and that Court’s ultimate conclusion that the Oxford English Dictionary does not inform the statutory meaning of a witness’s “address,” was incorrect. App.29. The Circuit Court misconstrued the Legislature as “argu[ing] that the items the Oxford English Dictionary says are ‘typically’ part of an address,” that is, a number, street name, and the name of a town or district, “are universal components, but the items the dictionary says are ‘often’ part of an address”—*e.g.*, a postal code—“are not.” App.29. The Legislature did not make that argument. App.66–68; App.46–48. The Legislature instead argued that the Oxford English Dictionary’s “typical[]” components of an “address,” *Address*, Oxford English Dictionary Online, *supra*, offer the “ordinary” and

“common” meaning of that word as used in Section 6.87, *Kalal*, 2004 WI 58, ¶¶ 45–49 & n.8 (emphases added), whereas components that are merely “often” part of an address fall outside the ordinary meaning of this term, App.66–68; App.46–48. This conclusion also follows from the ordinary meaning of the word “typical,” which refers to what is “[o]f the nature of” or “emblematic” of a thing, *Typical*, Oxford English Dictionary Online (July 2023)¹¹, and the word “often,” which means only “[m]any times” or “on numerous occasions,” *Often*, Oxford English Dictionary Online (Dec. 2023).¹²

Although the Circuit Court criticized the Legislature’s reliance on the Oxford English Dictionary’s definition of “address” because this dictionary provides other definitions of that term, App.29–30, the ordinary-meaning inquiry usually requires courts to select the *best* meaning of a statutory term from among multiple potential meanings—including by relying on other considerations like statutory context and purpose, as well as history, *Kalal*, 2004

¹¹ Available at <https://doi.org/10.1093/OED/8072365958> (subscription required).

¹² Available at <https://doi.org/10.1093/OED/7210545543> (subscription required).

WI 58, ¶ 49 (“Many words have multiple dictionary definitions; the applicable definition depends upon the context in which the word is used.”). Thus, these alternative definitions do not alone undermine the Legislature’s argument. And, of course, Plaintiffs’ preferred dictionary definition from Merriam Webster also provides alternative definitions, *see Address*, Merriam-Webster Online (“directions for delivery on the outside of an object (such as a letter or package”),¹³ which fact the Circuit Court ignored entirely in adopting that definition, *see App.29–30*.

Third, reasonable jurists could also disagree with the Circuit Court’s discussion of context. App.29–30. Chapter 6 of the Wisconsin Statutes uses the term “address” in multiple provisions and in different iterations, including Wis. Stat. § 6.34(3)(b)(2)’s use of “complete residential address, including a numbered street address, if any, and the name of a municipality.” The statutory context of Subsection 6.34(3)(b)(2), among other sources of statutory context, powerfully supports the Legislature, as it shows that Chapter 6 defines the term address with reference to *particular* pieces of information—such as a street name, street

¹³ Available at <https://www.merriam-webster.com/dictionary/address>.

number, and name of a municipality. Wis. Stat. § 6.34(3)(b)(2); App.66–69; App.49. Section 6.87’s reference to a witness’s “address” similarly refers to those particulars. App.65; App.44–45.

Finally, the Circuit Court’s interpretation of Section 6.87’s witness-address requirement is unadministrable—even more unadministrable, in fact, than the amorphous standard that Plaintiffs proposed in their Complaint. The Circuit Court’s Order declares that Section 6.87’s witness-address requirement “does not require” a witness to provide any “particular components” of his or her address, but only “sufficient information to allow a reasonable person in the community to identify a location where the witness may be communicated with.” App.21. The Circuit Court makes no attempt to explain how this standard could work in real life. To determine whether witness addresses are sufficient, the three defendant clerks and any other of the State’s over 1,800 clerks, App.245, that decides to follow the Circuit Court’s new reading will need to consider whether they possess more or less knowledge than “a reasonable person in the community,” App.21. If a clerk decides that he or she is more knowledgeable than “a reasonable person in the community,” App.21, that clerk must somehow disregard his

or her own personal knowledge to evaluate these witness-address certificates. And if the clerk instead determines that he or she is *less* knowledgeable than “a reasonable person in the community,” App.21, the clerk must somehow acquire the requisite reasonable-person knowledge to assess witness-address certificates. And so on.

B. The State And The Legislature Will Suffer Irreparable Harm Absent A Stay

1. In addition to a movant’s likelihood of success on appeal, the stay-pending-appeal analysis requires this Court to consider the risk of irreparable harm to the movant in the absence of a stay. *Waity*, 2022 WI 6, ¶ 49. This analysis involves considering 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.

2. Here, the significant and irreparable harm that the Legislature and the State will suffer if the Circuit Court’s Order is not stayed pending appeal supports granting relief.

The denial of a stay pending appeal will harm both the Legislature, *Waity*, 2022 WI 6, ¶¶ 49, 57, and the State, whose interests the Legislature represents in this case, *Dem. Nat’l Comm. v. Bostelmann*, 2020 WI 80, ¶ 8, 394 Wis. 2d 33, 949 N.W.2d 423, by imposing a novel, unadministrable “reasonable person in the community” standard on the three named clerks and then confusingly requiring WEC to notify all other clerks about the Circuit Court’s view—which those clerks can accept or not—in the middle of an ongoing election, *see* App.21–23; *State ex rel. Zignego v. WEC*, 2021 WI 32, ¶ 13, 396 Wis. 2d 391, 957 N.W.2d 208 (noting Wisconsin’s “highly decentralized system for election administration”); Wis. Stat. § 227.112(3) (WEC’s guidance “does not have the force of law”).

The unadministrability of the Circuit Court’s Order highlights the irreparable harm that the Legislature and the State will suffer in the absence of a stay. The Circuit Court’s Order would require the three defendant clerks to accept and count absentee ballots, the witness certification on which contains “sufficient information to allow a reasonable person in the community to identify a location where the witness may be

communicated with.” App.21. But, as explained above, *see supra* pp.41–42, that is an amorphous inquiry that no clerk in this State, to the Legislature’s knowledge, has ever been asked to perform before in any context, and which is bound to result in inconsistent treatment of absentee ballots during the upcoming Spring Primary Election. App.245. How is an individual clerk to figure out if he or she has more or less knowledge regarding the information provided on a witness certificate than a reasonable person in his or her community? For example, if an absentee-ballot witness merely provides his or her dormitory building in lieu of a street number, name, and city, how should a clerk decide whether a “reasonable person in the community” would be familiar with that building? The Circuit Court’s Order offers no objective method for clerks to carry this out. Further, the number of clerks that will comply with the Circuit Court’s Order is unclear, as only the three defendant clerks are bound by the Order. *See Dalton v. Meister*, 84 Wis. 2d 303, 311, 267 N.W.2d 326 (1978); *In re Zur Ruhe Cemetery*, 193 Wis. 108, 213 N.W. 657, 658 (1927); *see also Zignego*, 2021 WI 32, ¶ 13; Wis. Stat. § 227.112(3). Absent a stay, the confusion and inconsistent applications that the Circuit Court’s

order will engender throughout the State during the upcoming election will be irreparable.

The Legislature and the State will suffer further irreparable harm in the absence of a stay pending appeal. As explained above, *supra* pp.13–16, the Legislature and WEC have historically understood “address” to require a street number, street name, and name of municipality, and that the failure to include one of those components requires the rejection of such ballot absent cure. WEC has issued guidance to that effect. *Supra* pp.13–15. Now, just three weeks before the February 20, 2024 Spring Primary Election, the Circuit Court’s order enjoins WEC from interpreting “address” in that straightforward manner and requires WEC to “rescind” its previous guidance regarding that definition of an “address,” and “promptly advise . . . election officials of this Court’s Order.” App.22. But if the Legislature succeeds on appeal, and the injunction is reversed, any new guidance that WEC issues will be inapplicable, and WEC will need to reverse course in advance of the fast-approaching primary election, which is *less than three weeks away*. See Deadlines for the February 20, 2024 Spring

Primary Election, MyVote Wis.¹⁴ The situation will be all the more confusing because the vast majority of the State's clerks are not bound by the Circuit Court's Order—just as clerks were not bound by WEC's prior guidance—and only the three defendant clerks will be bound. *See supra* p.45.

3. The Circuit Court's heavy reliance on the fact that WEC itself did not move for a stay was an erroneous exercise of the Circuit Court's discretion, and thus legal error. *See Waity*, 2022 WI 6, ¶ 50. The Circuit Court did not cite any authority recognizing this as a factor in the irreparable harm analysis, and the proceedings in *Bostelmann* refute the relevance of this consideration. In that case, WEC's leadership, in their official capacities, were also named defendants in a suit challenging certain of the State's absentee voting provisions, and the Legislature had intervened to defend those provisions. *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—

¹⁴ Available at <https://myvote.wi.gov/en-us/Voter-Deadlines>.

appealed and sought a stay from the Seventh Circuit pending appeal. *See id.* The Seventh Circuit 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 and granted the stay. *Id.* The U.S. Supreme Court declined to overturn that decision. *Dem. Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28 (2020) (mem.). 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 gave any weight whatsoever to WEC (through its leadership) choosing not to file its own stay motion. *See Bostelmann*, 977 F.3d at 641–43; *Dem. Nat'l Comm.*, 141 S. Ct. 28.

Further, the Circuit Court made another *Waity* error here, beyond the one it made on the likelihood of success on appeal analysis discussed above. The Circuit Court analyzed the harms to the Legislature and the State by assuming that its interpretation of Section 6.87 would survive the Legislature's

appeal. But under *Waity*, a court must analyze potential harm to the movant by assuming that the movant will prevail on appeal. 2022 WI 6, ¶ 57. So, the Circuit Court had to assume that Section 6.87 would be administered pursuant to the Circuit Court’s injunction, and then assume that the statute would go back to being administered in the same way that it has been administered for the past several years once the Legislature prevails on appeal. Then, the Circuit Court was required to analyze the harms stemming from that. The Circuit Court did not even address this essential component of the harms analysis.

Finally, the Circuit Court concluded that the confusion that will result from its new interpretation of Section 6.87’s witness-address requirement will be resolved by WEC issuing a communication to clerks regarding the Circuit Court’s orders, but that too is wrong. WEC’s efforts to notify clerks of the Circuit Court’s new interpretation of Section 6.87 will not resolve the administrability issues inherent in the Circuit Court’s definition of a witness’s “address,” as the Circuit Court did not explain how clerks should determine whether a witness has provided “sufficient information to allow a reasonable person in the

community to identify a location where the witness may be communicated with.” App.22. As explained above, this new standard cannot be administered objectively or coherently. *See supra* pp.41–45.

C. Plaintiffs Will Suffer No Substantial Harm From A Stay Pending Appeal

1. With respect to the third stay factor, this Court considers whether “the non-movant will experience” “substantial harm” if the court grants the stay “but the non-movant is ultimately successful” on appeal. *Waity*, 2022 WI 6, ¶ 58. The movant’s burden to show that the plaintiff will suffer no substantial harm from a stay relates *only* to the “period of time that the case is on appeal” and not to *all* harms “that could occur in the future.” *Id.* Further, a court’s evaluation of harms to other parties must consider those harms in “comparison” to the harms caused by denial of a stay. *Id.*

2. Here, Plaintiffs will not be harmed by the grant of a stay pending appeal. *Id.* ¶¶ 49, 58. Complying with Section 6.87’s witness-address requirement requires—as it has since the statute’s enactment—that a witness include a street number, street name, and name of municipality on the witness certificate.

App.308; Wis. Stat. § 6.87(6d). WEC recently made this even more clear by updating the Standard Absentee Ballot Certificate to ask expressly absentee witnesses to provide this specific information:

STEP 3 WITNESS must complete this part

I the undersigned witness, subject to the penalties for false statements of Wis. Stat. § 12.60(1)(b), certify that:

- I am an adult U.S. citizen
- The above statements are true and the voting procedure was executed as stated
- I am not a candidate for any office on the enclosed ballot (except in the case of an incumbent municipal clerk).
- I did not solicit or advise the elector to vote for or against any candidate or measure

WITNESS REQUIRED

X

Witness Signature

Witness Printed Name

Witness Address (Number, Street Name, City)

App.40. Citizens can fairly be expected to fill out properly such a simple form, and—so far as the record here is concerned—only a handful of absentee witnesses have ever failed to supply their street numbers, names, and cities. *See supra* p.15. Alternatively, if a voter does not wish to comply with the witness-address requirement, the voter can vote in person on Election Day. *See* App.18. A stay of the Circuit Court’s injunction will do no more than preserve the status quo that has been in place since at

least 2016, so Plaintiffs will suffer no harm as a result of a stay pending appeal here. *Waity*, 2022 WI 6, ¶¶ 49, 58. Further, to the extent that nonparty clerks applied Section 6.87's witness-address requirement inconsistently in past elections, nothing in the Circuit Court's Order or WEC sending out that Order can lawfully change that. *See supra* pp.45.

3. The Circuit Court's contrary conclusion that Plaintiffs will suffer harm from a stay pending appeal is wrong.

First, the Circuit Court cited Plaintiffs' contention that they 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 harm to the State. *See supra* pp.43–46. All Plaintiffs need do, if they choose to undertake educational initiatives on this subject, is inform voters to follow the three-component definition already embodied in WEC's guidance on the witness-address requirement and made plain on the State's Standard Absentee Ballot Certificate. It is unclear, moreover, how Plaintiffs would spend less money on their education efforts absent a stay, since only three of the State's clerks are bound by the Circuit Court's

Order, and the record demonstrates that non-party clerks have previously chosen not to follow WEC's guidance regarding Section 6.87's witness-address requirement. *See supra* pp.15, 45.

Second, the Circuit Court concluded that Plaintiffs' harms consisted of clerks' inconsistent application of the witness-address requirement—despite the clear three-part definition set forth in WEC's guidance—and that the Circuit Court's injunction, including the rescission of WEC's guidance and WEC's issuance of new guidance, would solve this inconsistent-application problem. But under the Circuit Court's Order, and as explained above, *see supra* pp.41–45, there is no coherent method for clerks who choose to follow WEC's new guidance to determine the information a “reasonable person in the community” would need to satisfy Section 6.87's witness-address requirement. The definition of “address” adopted by the Circuit Court lends itself only to inconsistent applications, rather than alleviating such consistency issues. *Supra* pp.41–45. And, as noted above, non-party clerks cannot be bound by the Circuit Court's definition of “address” in any event. *See supra* p.45.

The Circuit Court also referenced concerns of disenfranchisement of voters, but any purported disenfranchisement concerns do not weigh against issuing stay relief here. The Circuit Court itself recognized that the number of voters that might have their ballots rejected for a witness-address deficiency would be small. February 2, 2024 Oral Decision, *supra*, at 51:10–51:28. The evidence in *LWV*—and referenced in the *Rise* Plaintiffs’ briefing below—confirms that fact. In *LWV*, the plaintiff only identified 67 instances during the November 2022 general election in which absentee ballots were rejected for witness address errors. App.110 (citing App.333–561). And some of those errors, the *LWV* plaintiff admits, resulted from clerks demanding *more* information than WEC’s guidance expressly requires—such as a zip code or state name, in addition to a street number, street name, and municipality. App.110 (citing App.333–561). The Circuit Court did not make any findings at all as to whether the remain small number of voters would be able to cure any witness-address deficiency in sufficient time for their ballots to be counted.

Finally, at the very minimum, a stay is particularly warranted if the Court allows the Circuit Court’s injunction in

LWV to stand pending appeal. In that case, the Circuit Court held that the rejection of absentee ballots that contain four specific types of witness-address errors or omissions violates the Civil Rights Act of 1964's Materiality Provision. App.24–26. The Circuit Court also issued an order that, among other things, enjoined WEC from rejecting ballots that contained any of those discrete errors, App.24–26, and that order is binding statewide because it is permissible for a plaintiff to sue a statewide officer to block state law, on a *statewide* basis, on the grounds that the state law is preempted by federal law or violates the U.S. Constitution. *Ex Parte Young*, 209 U.S. at 159–60. As was made clear during the January 30, 2024 hearing on the scope of the injunction, *see* App.34–35, the *LWV* injunction applies to, and prevents the rejection of, the vast majority of the absentee ballots that the *Rise* Plaintiffs are concerned about, *compare, e.g.*, App.32 (noting that the Circuit Court's definition of "address" would prohibit rejection of an absentee ballot with a witness address listing "same address as voter"), *with* App.24–26 (enjoining the rejection of a ballot where the witness address reads "same as voter"). And for any categories of witness certificates not covered

by the *LWV* injunction—such as witness certificates that merely list a witness’s dormitory building, rather than a street number, name, and city, which is the only example that Plaintiffs’ counsel invoked when confronted with this issue—the injunction in this case does not clarify how a clerk should handle such certificates, including because it is unclear whether such certificates would satisfy the Circuit Court’s amorphous “reasonable person in the community” standard. *See supra* pp.41–45.

D. A Stay Pending Appeal Is In The Public Interest

1. This Court must consider whether a stay pending appeal is in the public interest. *Waity*, 2022 WI 6, ¶ 49. The public benefits from consistency and clarity in the enforcement of the State’s election laws. *See Republican Nat’l Comm. v. Dem. Nat’l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam); *State v. Brechler*, 185 Wis. 599, 202 N.W. 144, 148 (1925).

2. For all the same reasons that the Legislature and State will suffer harm absent a stay, the public will benefit from a stay pending appeal. *Waity*, 2022 WI 6, ¶¶ 49, 60. As set forth above, unless this Court stays the Circuit Court’s injunction pending the outcome of this appeal, WEC will be forced to rescind its longstanding guidance on absentee-ballots, *see supra* pp.45–46,

only to reverse course if the Legislature is successful before this Court. That about-face is a recipe for confusion among election clerks and the voting public, in the middle of an ongoing election. *See, e.g., Republican Nat'l Comm.*, 140 S. Ct. at 1207 (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam)). Further, the new definition of a witness “address” that WEC will disseminate to clerks per the Circuit Court’s Order will be unadministrable for both the three defendant clerks that are bound by that Order and any other clerk that chooses to follow it. *See supra* pp.41–45. This substantial harm to the voting process cannot be undone after ballots are cast.

3. The Circuit Court’s errors in concluding that a stay pending appeal is contrary to the public interest are the same as its errors in assessing the harms to the Legislature and the State, *see supra* pp.47–49, and the Circuit Court’s analysis on this prong should thus be rejected for the same reasons.

CONCLUSION

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

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Respectfully submitted,

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