STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

RISE, INC. & JASON RIVERA,

Plaintiffs-Respondents,

WISCONSIN ELECTIONS COMMISSION, et al.,

Defendants,

v.

WISCONSIN STATE LEGISLATURE,

Intervenor-Appellant.

Appeal No. 2024AP165

Circuit Court Case No. 2022CV2446

PLAINTIFFS-RESPONDENTS' RESPONSE IN OPPOSITION TO INTERVENOR-APPELLANT'S MOTION FOR STAY PENDING APPEAL

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

PINES BACH LLP
Diane M. Welsh,
State Bar No. 1030940
122 W. Washington Ave, Suite 900
Madison, WI 53703
Telephone: (608) 251-0101
Facsimile: (608) 251-2883
dwelsh@pinesbach.com

*Admitted *pro hac vice* by the circuit court

Attorneys for Plaintiffs-Respondents

ELIAS LAW GROUP LLP
David R. Fox*
Samuel T. Ward-Packard,
State Bar No. 1128890
250 Mass. Ave NW, Suite 400
Washington, D.C. 20001
Telephone: (202) 968-4652
dfox@elias.law
swardpackard@elias.law

Makeba Rutahindurwa*
1700 Seventh Ave, Suite 2100
Seattle, Washington 98101
Telephone: (206) 968-4599
mrutahindurwa@elias.law

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

Wisconsin law requires that an absentee ballot be witnessed, and further requires that the witness list their "address" on the absentee ballot certificate. Wis. Stat. § 6.87(2), (4)(b)1., (6d) (the "witness-address requirement"). But the statute does not define the term "address," says nothing about what form the "address" must take, and does not require that the address include any particular components. Courts have a "duty to respect not only what [the legislature] wrote but, as importantly, what it didn't write." *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1900 (2019) (plurality op.). The Circuit Court followed this fundamental judicial precept in holding that the statute does not require any particular form of address: any form will do, so long as it suffices to indicate "a location where the witness may be communicated with"—the relevant plain meaning of the word "address."

Applying this straightforward, plain-language construction, the Circuit Court declared that no particular form of witness address is required, enjoined Wisconsin Elections Commission guidance suggesting that local officials should require one specific form of address, and enjoined the defendant municipal clerks from treating a witness address as inadequate merely because it is not in the clerk's or Commission's preferred form. The Legislature moved for a stay pending appeal. Although the Legislature's case for a stay rested largely on its argument that the Court's order is inadministrable, the Commission and clerks—who, unlike the Legislature, actually administer Wisconsin's elections—did not join the Legislature's motion or file their own motions for a stay. The Circuit Court denied the Legislature's motion after carefully assessing each of the four required factors. *See Waity v. LeMahieu*, 2022 WI 6, ¶ 49, 400 Wis. 2d 356, 969 N.W.2d 263.

This Court reviews the Circuit Court's denial of a stay for an erroneous exercise of discretion. The Circuit Court properly exercised its discretion here, and the Court should affirm. The Legislature is unlikely to succeed on appeal because its construction of the statute is not reconcilable with the text, context, and purpose of the witness-address requirement. The equities also weigh against a stay. The

Circuit Court's order provides a uniform, statewide judicial construction of the witness-address requirement, replacing what the record shows to be a *status quo* rife with inconsistent local standards. The Legislature is not injured by the immediate enforcement of a court order that eliminates an unnecessary, inconsistently applied requirement and replaces it with a reasonable construction of the statute's plain text. By contrast, Plaintiffs and Wisconsin voters would be irreparably harmed by the enforcement pending appeal of an arbitrary requirement that a ballot be counted only if the witness address on the certificate takes a particular form that the statute nowhere specifies. And amid all the Legislature's bluster, one omission stands out: the Legislature *nowhere* argues that the Circuit Court's construction of "address" will deprive election officials of any information they actually need to conduct elections.

The Court should deny the motion to stay.

STATEMENT OF THE CASE

I. Statutory Framework

Wis. Stat. § 6.87 sets out Wisconsin's procedures for voting by absentee ballot. It requires that an absentee ballot be provided to the voter along with an envelope with a printed certificate on one side. Wis. Stat. § 6.87(2). Among other things, this certificate must bear a witness attestation, followed by fields for the witness's printed name, "address," and signature. Wis. Stat. § 6.87(2). When executing the absentee ballot certificate, the witness must provide their address in the given field. Wis. Stat. § 6.87(2), (4)(b)1. The statute does not define the term "address." *See* Wis. Stat. § 6.87; App. 32 (R.233 at 6).[1]

During the absentee voting period, when a municipal clerk receives an

[1] In this brief, "App." refers to the Legislature's Appendix to Intervenor-Appellant's Motion for Stay Pending Appeal; "Supp. App." refers to Plaintiffs-Respondents' Supplemental Appendix to Response in Opposition to Intervenor-Appellant's Motion for Stay Pending Appeal; and "R." refers to the Circuit Court record.

"absentee ballot with an improperly completed certificate," "the clerk may return the ballot to the elector . . . whenever time permits the elector to correct the defect and return the ballot within the period authorized [by statute]." Wis. Stat. § 6.87(9). Municipal clerks are thus the officials who determine whether any given absentee ballot will be included in the election day absentee-ballot count without further action by the voter or will instead be returned to the voter for correction.

On election day, elections inspectors process and count the absentee ballots. Wis. Stat. § 6.88(3). If an absentee ballot certificate "is missing the address of a witness, the ballot may not be counted." Wis. Stat. § 6.87(6d). Municipal clerks are charged with training and supervising the elections inspectors in their jurisdictions. Wis. Stat. § 7.15(1)(e); *see also* Wis. Stat. § 7.30.[2]

II. Factual Background

The witness-address requirement was enacted in 1965. App. 30 (R.233 at 4); *see also* 1965 Act 666 at 1244–45. But it and other absentee ballot procedures were treated as directory rather than mandatory for at least the next several decades. *See Sommerfeld v. Bd. of Canvassers of City of St. Francis*, 269 Wis. 299, 303 69 N.W.2d 235, 238 (1955), *superseded by statute as recognized in Teigen v. Wis. Elections Comm'n*, 2022 WI 64, ¶ 80, 403 Wis. 2d 607, 976 N.W.2d 519 (plurality op.). The record contains no indication that a single absentee ballot was disqualified based on an inadequate witness address between 1965 and 2016. Then, in March 2016, Section 6.87 was revised to add a new subsection (6d) providing that "[i]f a certificate is missing the address of a witness, the ballot may not be counted." 2015 Act 261 § 78.

---

[2] A municipality may elect to establish a "municipal board of absentee ballot canvassers" to count absentee ballots in lieu of having its elections inspectors perform that duty. Wis. Stat. §§ 7.52(1)(a); 7.53(2m). For purposes of this case, absentee balloting procedures do not materially differ in municipalities that make such a designation. *Compare* Wis. Stat. § 6.88 (default procedures for inspectors), *with* Wis. Stat. § 7.52 (alternative procedures for boards of canvassers).

In October 2016, in advance of the first general election under the revised statute, the Commission issued guidance advising municipal clerks about how to apply it. The guidance instructed that "a *complete* address contains a street number, street name and name of municipality." App. 308 (R.4 at 5) (emphasis altered). But the guidance did not instruct clerks to invalidate ballots merely because a "complete address" was not provided. To the contrary, the guidance required clerks to cure incomplete addresses themselves by looking up missing witness-address information and adding it to the ballot certificate. *Id.* The 2016 guidance indicated that "[i]f clerks are reasonably able to discern any missing information from outside sources," they should "mak[e] that correction directly to the absentee certificate envelope." *Id.* The Commission summarized its guidance to be "that municipal clerks shall do all that they can reasonably do to obtain any missing part of the witness address." App. 309 (R.4 at 6). Wisconsin elections from 2016 through the August 2022 primary election were administered in accordance with that 2016 guidance.

On September 7, 2022, the Republican Party of Waukesha County and three individual Republican voters obtained an order from the Waukesha County Circuit Court enjoining the 2016 guidance. App. 302–04 (R.38 at 105–07); *White v. Wis. Elections Comm'n*, No. 22CV1008 (Cir. Ct. Waukesha Cnty. 2022). The Waukesha court concluded that the guidance was contrary to law because it required local officials to fill in missing address information on absentee ballot certificates. App. 303 (R.38 at 106). The Waukesha court held that local elections officials lacked "the duty or ability to modify or add information to incomplete absentee ballot certifications." *Id.* But nothing in that decision settled the definition of a witness's "address" for purposes of Section 6.87, as this Court previously recognized. *See Rise, Inc. v. Wis. Elections Comm'n*, 2023 WI App 44, ¶¶ 8, 22–23, 995 N.W.2d 500.

On September 14, 2022, the Commission issued a clerk communication announcing that the Waukesha court had enjoined the 2016 WEC guidance as

invalid and contrary to law. App. 299–300 (R.38 at 88–89). That communication informed clerks that the Waukesha court "had not overturned the existing WEC definition of address contained in the now-invalidated memoranda" which required three components—"namely, street number, street name, and name of municipality." App. 299 (R.38 at 88). But the communication did not provide any statutory justification for that definition and did not resolve whether alternative forms that similarly provided adequate information to locate a witness were acceptable and if not, why not. Clerks were therefore left to guess for themselves whether, for example, a zip code was an adequate substitute for a municipality name, or how to handle university residence halls, or witnesses who write "same" because they live with the voter.

On October 14, 2022, Plaintiffs had an experienced elections research team survey over twenty of Wisconsin's largest municipalities about their approaches to witness addresses after *White*. Supp. App. 118–21 (R.91); *see also* Supp. App. 122–55 (R.88). Clerks offices' in those municipalities reported several very different approaches to absentee ballot witness addresses. Fifteen of twenty-one municipalities surveyed—among them Milwaukee, Appleton, and Janesville—reported that they were requiring a *five*-component witness address (street number, street name, municipality, state, zip). Supp. App. 119–20 (R.91 ¶ 9). Two other municipalities, Ashland and Fond du Lac, indicated that they were urging, but not requiring, absentee voters to have their witnesses list those five components out of an abundance of caution. Supp. App. 120 (R.91 ¶ 10). Only four municipalities of the twenty-one surveyed indicated that they were applying the three-component standard propounded in the September 14 Clerk Communication. Supp. App. 120 (R.91 ¶ 11). Contemporary press coverage and sworn statements from municipal and county clerks further confirmed that municipalities were neither taking consistent approaches to witness addresses nor defaulting to the Commission and Legislature's three-component definition. App. 218–19 (R.104 at 5–6).

III. Procedural History

A. Parties

Plaintiffs in this action are Rise, Inc., and Mr. Jason Rivera. Rise is a student-led 501(c)(4) nonprofit organization that runs advocacy and voter mobilization programs in Wisconsin and around the country. Supp. App. 156–57 (R.211 ¶¶ 2–5). Rise's mission is to empower college students to advocate for free public higher education and to end homelessness, housing insecurity, and food insecurity among college students. Supp. App. 156–57 (R.211 ¶ 2). Rise's efforts to empower and mobilize students as participants in the political process are critical to its mission because building political power within the student population is a necessary condition to achieving Rise's policy goals. Supp. App. 157 (R.211 ¶ 3). In 2020, Rise helped nearly 12,000 Wisconsin voters make a plan to vote. Supp. App. 158 (R.211 ¶ 7). Of these, 3,887 voted by mail. Supp. App. 158 (R.211 ¶ 8). In 2022, Rise helped just under 8,000 voters make plans to vote in municipalities around the state, including Madison, Racine, and Green Bay. Supp. App. 158 (R.211 ¶ 7). Rise brought this lawsuit because student voters Rise aims to mobilize are particularly likely to return absentee ballot certificates bearing witness addresses that do not satisfy the contrived, rigid definition of witness "address" endorsed by the Commission and the Legislature. Supp. App. 159–60 (R.211 ¶¶ 11–14)

Mr. Rivera is a qualified Wisconsin voter currently registered in Dane County. Supp. App. 162 (R.212 ¶ 5). Mr. Rivera has voted by absentee ballot in the past and plans to continue doing so in the future. Supp. App. 162 (R.212 ¶ 6).

Plaintiffs' original Complaint, filed on September 27, 2022, named the Wisconsin Elections Commission and City of Madison Clerk Maribeth Witzel-Behl as Defendants. App. 311 (R.3 at 1). The Legislature intervened as a defendant

shortly after the action was filed. Supp. App. 165–66 (R.71).[3] After the November 2022 election, Plaintiffs filed a First Amended Complaint, adding City of Racine Clerk Tara McMenamin and City of Green Bay Clerk Celestine Jeffreys as Defendants.

B. 2022 Emergency Litigation

Plaintiffs moved for a temporary injunction on September 28, 2022. App. 305–07 (R.5). The Circuit Court (Judge Colás) denied that motion on October 7, 2022, after finding that temporary injunction was "unnecessary to preserve the status quo." App. 227–28 (R.79). The Circuit Court did not address Plaintiffs' likelihood of success on the merits, nor did the Court define "address." *Id.* Plaintiffs renewed their request for a temporary injunction on October 25, 2022, citing the rapidly accumulating evidence that, with just weeks remaining before the election, Wisconsin lacked a uniform, statewide standard for witness addresses. App. 211–13 (R.103); App. 214–17 (R.104 at 1–4). The Circuit Court denied the motion, finding that the "status quo with respect to the definition of 'address,' is the same as it has been for 56 years": "Local clerks apply their understanding of the term 'address' to absentee ballot certifications, relying on non-binding advice from state elections authorities and, at least in some cases, advice from their municipal attorneys." App. 209 (R.129 at 3). Accordingly, although it acknowledged the evidence that "there is variation in how clerks interpret the term," the Circuit Court again held that a temporary injunction was not necessary to preserve the status quo. *Id.*

---

[3] The plaintiffs in the *White* case, in which the Waukesha County Circuit Court had enjoined the 2016 guidance, also sought to intervene but their motion was denied, Supp. App. 167–168 (R.100), and this Court affirmed that denial, *Rise, Inc.*, 2023 WI App 44, ¶ 55.

C. First Amended Complaint, Answers, and Consolidation

Plaintiffs filed the operative First Amended Complaint on February 15, 2023. App. 147–72 (R.160). Plaintiffs pleaded two claims. Count I sought a declaratory judgment under the Uniform Declaratory Judgments Act, Wis. Stat. § 806.04(2), that: (i) a witness "address" for the purposes of Wis. Stat. § 6.87(2) is "a place where the witness may be communicated with" and; (ii) an otherwise-valid absentee ballot certificate from which a local clerk can reasonably discern where the witness may be communicated with is properly completed for purposes of Wis. Stat. § 6.87(9). App. 168–69 (R.160 ¶ 72). Count II sought a declaratory judgment, pursuant to Wis. Stat. § 227.40, that the Commission's September 14, 2022, Clerk Communication was invalid insofar as it adopted the three-component definition of witness address rather than the proper statutory definition set out in Count I. App. 170 (R.160 ¶ 82).

The First Amended Complaint also incorporated extensive allegations about how different sorts of witness addresses had been handled during the November 2022 election. *See* App. 150–71 (R.160 ¶¶ 1–10, 41–46). In particular, the First Amended Complaint alleged that each of the three named Clerk Defendants applied a different standard to witness addresses. Discovery on that allegation proved unnecessary—each Clerk Defendant admitted the allegations in their respective Answers:

- The Madison Clerk admitted that she interpreted witness "address," for purposes of Wis. Stat. § 6.87, to mean street number, street name, and at least one of either municipality or zip code, and returned absentee ballots with certificates not satisfying that definition to voters for correction. *See* Supp. App. 175 (R.178 ¶ 44); App. 162–63 (R.160 ¶ 44).
- The Racine Clerk admitted that she interpreted witness "address," for purposes of Wis. Stat. § 6.87, to mean street number, street name, and municipality, and returned absentee ballots with certificates not satisfying that definition to voters for correction. *See* Supp. App. 186 (R.177 ¶ 45); App. 162–63 (R.160 ¶ 45).

- The Green Bay Clerk admitted that she interpreted witness "address," for purposes of Wis. Stat. § 6.87, to mean street number, street name, municipality, and at least one of either state or zip code, and returned absentee ballots with certificates not satisfying that definition to voters for correction. *See* Supp. App. 200 (R.179 ¶ 46); App. 162–63 (R.160 ¶ 46)

These admissions render it a matter of undisputed fact, for purposes of this appeal, that absentee ballots were treated differently in different Wisconsin municipalities during the November 2022 election.

The Legislature moved to dismiss the First Amended Complaint, but the Court denied the motion. Supp. App. 205–07 (R.202). This case was subsequently consolidated for trial with *League of Women Voters of Wisconsin v. Wisconsin Elections Commission*, No. 22CV2472. Supp. App. 208–11 (R.203).

D. Summary Judgment Litigation and Decision

Plaintiffs moved for summary judgment on both counts, App. 102–22 (Doc 213), and the Commission and Legislature cross-moved, Supp. App. 212–41 (R.222); App. 53–83 (R.224). After briefing, the Circuit Court (Judge Nilsestuen) issued a decision granting summary judgment to Plaintiffs and holding that "address," for purposes of Section 6.87's witness requirement, means "a place where the witness can be communicated with." App. 27–33 (R.233).

The Circuit Court's decision rested on four points. First, the Circuit Court agreed with Plaintiffs that the Commission and Legislature's three-component standard would impose an unjustifiable atextual limit on permissible witness addresses. App. 29 (R.233 at 3). The Circuit Court emphasized that the Legislature's own preferred dictionary definition supported Plaintiffs argument, because even that definition did not treat the Legislature's three preferred components as mandatory. *Id.* Second, the Circuit Court reasoned that the statutes consistently are more specific when they intend to require specific address components—as in Wis. Stat. § 6.34(3)(b)—or a specific type of address. App. 29–30 (R.233 at 3–4). Third, the

Circuit Court concluded that Plaintiffs' definition was administrable, because it just asks clerks to decide "whether they can locate the person based on the provided information." App. 31 (R.233 at 5). And fourth, the Circuit Court held that Plaintiffs' definition, unlike the Legislature's, would avoid a violation of the Civil Rights Act's Materiality Provision. App. 32 (R.233 at 6).[4]

The Circuit Court called a hearing to determine the precise scope of the remedy, and Plaintiffs submitted a proposed order. App. 21–23 (R.238). In brief, that order:

- Declares that "witness address" means "a place where the witness may be communicated with" and does not require any particular components. App. 21 (R.238 at 1).
- Declares that the witness-address requirement is satisfied, and the ballot certificate is not improperly completed, so long as the ballot certificate "contains sufficient information to allow a reasonable person in the community to identify a location where the witness may be communicated with." *Id.*
- Orders the Commission to revise or rescind the September 2022 Clerk Communication's three-component definition, to inform local elections officials of the Circuit Court's ruling, and to refrain from issuing inconsistent guidance going forward. App. 22 (R.238 at 2).
- Orders the Clerk Defendants to comply with the Circuit Court's declarations in applying the witness-address requirement. App. 23 (R.238 at 3).

Notably, although counsel for all defendants were present at the remedial hearing,

[4] In a decision issued on the same day in *League of Women Voters*, the Circuit Court granted summary judgment to plaintiff the League on a Materiality Clause claim as to four specific categories of absentee ballots. *See* App. 24–26 (resulting final order).

only the Legislature objected to the form of the order. *See* Supp. App. 96–97 (R.257 at 30–31). The Legislature's main objection was to the "reasonable person" standard for the requirement's application, which it criticized as "inadministrable." Supp. App. 92 (R.257 at 26). Yet the Legislature also conceded that the "reasonable person" standard was an "objective standard," and struggled to identify any real-world categories of certificates that would be difficult to evaluate under the standard. *Id*. The Circuit Court noted, in response, that "a couple of outlier scenarios" were likely inevitable in the context of election administration and did not constitute an administrability problem. Supp. App. 110 (R.257 at 44). The Court entered Plaintiffs' proposed order at the conclusion of the hearing. App. 21–23 (R.238).

E. Motion for Stay Pending Appeal

The Legislature moved for a stay pending appeal. App. 2–20 (R.245). After briefing and a hearing, the Circuit Court denied the stay. App. 1 (R.252). In its ruling from the bench, the Circuit Court applied the *Waity* standard. Supp. App. 45 (R.255 at 36). As to the first factor, whether the Legislature had made a "strong showing that it is likely to succeed on appeal," the Circuit Court emphasized that it could not simply rely on its "own legal reasoning" and had to "consider the standard of review and the possibility that appellate courts" might disagree with its analysis. Supp. App. 46–48 (R.255 at 37–39). The Circuit Court concluded that the Legislature had not made a strong showing of likely success even accepting those guidelines. Supp. App. 48–51 (R.255 at 39–42). In particular, the Circuit Court emphasized that the Legislature had not identified any statutes that supported its three-component definition, distinguishing *Waity*'s facts, where several statutes supporting the stay movant's position had been cited. Supp. App. 49 (R.255 at 40). The Circuit Court also noted that Justice Hagedorn appeared to have reached the same conclusion as it had about the "stark contrast" between Section 6.87's use of "address" and Section 6.34's standard for a "complete residential address." Supp. App. 49 (R.255 at 40) (quoting *Trump v. Biden*, 2020 WI 91, ¶ 49 (Hagedorn, J., concurring)). And the

Circuit Court noted that many of the Legislature's arguments for a stay asked it to redo its previous legal analysis, which *Waity* does not require. Supp. App. 50 (R.255 at 41).

Turning to the balance of harms, the Circuit Court considered whether the Legislature had shown that it would "suffer irreparable injury absent a stay." Supp. App. 51 (R.255 at 42). The Circuit Court first noted that unlike the Legislature, the Commission was not moving for a stay, and questioned how the Legislature could assert an injury when the arm of the state charged with "executing and enforcing the elections statutes" was not asserting any such injury. Supp. App. 52 (R.255 at 43). The Circuit Court also emphasized that it was not enjoining a statute—an action it agreed might be understood to injure the Legislature—but instead was construing an undefined statute to ensure a "consistent statewide definition" of witness address. Supp. App. 53 (R.255 at 44). And the Circuit Court reasoned that the Commission could quickly resolve any confusion by issuing clerk communications, something it does "on a regular basis." Supp. App. 53 (R.255 at 44). The Circuit Court thus found that the Legislature had not shown that it would suffer an irreparable harm absent a stay.

By contrast, the Circuit Court found that Plaintiffs had shown that a stay would cause them irreparable injury. The Circuit Court agreed with Plaintiffs that Wisconsin had no uniform statewide standard for witness addresses. Supp. App. 54 (R.255 at 45). And the Circuit Court credited Plaintiffs' argument—which went uncontested in the summary judgment briefing—that the lack of a statewide standard is disrupting Rise's GOTV programming and is causing it to divert scare resources to address the inconsistent requirements for witness addresses across different municipalities. Supp. App. 54 (R.255 at 45).

For similar reasons, the Circuit Court found that a stay would harm the public interest. Supp. App. 55 (R.255 at 46). It noted that the Legislature's "briefing and arguments" had focused on "outlier examples," and found the numbers of affected ballots in the categories the Legislature was concerned about "aren't significant"

Supp. App. 55 (R.255 at 46). The Circuit Court also found that from the perspective of voters, nothing would change, so voter confusion was very unlikely. Supp. App. 55–56 (R.255 at 46–47). And the Circuit Court found that the public had a strong interest in having a single consistent standard applied to ballots, and in having the right to vote protected from disenfranchisement "for insignificant or trivial reasons." Supp. App. 56 (R.255 at 47). Having found that all four factors weighed against a stay, the Circuit Court denied the motion. Supp. App. 57 (R.255 at 48). The Circuit Court also indicated that even if it had found the Legislature's showing of likely success on appeal to be stronger, it would have considered it to be outweighed by the equities. Supp. App. 57 (R.255 at 48).[5]

Four days after the stay hearing, the Legislature moved this Court for a stay pending appeal and requested a decision within 72 hours. The Court construed the scheduling request as a motion for an *ex parte* stay, denied that motion as unjustified on the facts, and indicated that it would leave the Circuit Court's order in effect through the February 20 spring primary election.

F. Commission's Steps to Comply

On February 9, the Commission issued several communications to clerks about the Circuit Court's decisions in this case and *League*. The Commission alerted clerks that the Circuit Court had declared that a witness address means "a place where the witness may be communicated with" and that "Wis. Stat. § 6.87's requirement that the witness's address be included on the absentee ballot certificate does not require that any particular components or information be included" so long as there is "sufficient information to allow a reasonable person in the community to identify a location where the witness may be communicated with." Supp. App. 243–244. The Commission further explained that the Circuit Court had declared that an absentee ballot certificate is not "improperly completed" under Wis. Stat. § 6.87(9),

[5] The Circuit Court also denied the Legislature's motion to stay the *League* order pending appeal. Supp. App. 64 (R.255 at 55).

and local elections officials should not reject, return for cure, or refuse to count an absentee ballot based on a witness's address, as 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. Supp. App. 244.

The Commission also informed clerks that it was enjoined from promulgating rules, guidance or any other documents inconsistent with the Circuit Court's order but that it was not required to modify the text of the absentee ballot certificate envelopes based on the decision. *Id.* The Commission attached to its communication the Circuit Court's final declaratory judgment and permanent injunction order. Supp. App. 245–47.

In addition to the February 9 Clerk Communication, the Commission issued a Q&A document, intended to offer "a practical guide to understanding" the communications issued with respect to absentee ballot witness addresses. Supp. App. 248–49. In that document, the Commission noted that "by definition," what information is sufficient for a reasonable person in the community to identify a location where the witness can be communicated with will be "community specific." Supp. App. 249. And it specified certain forms of addresses that must be deemed sufficient under the separate injunction in *League*. *Id*.

Finally, the Commission revised the September 14, 2022, Clerk Communication to remove the three-component definition of witness address. In its place, the revised Communication instructs that clerks should "refer to the Commission's memoranda concerning *League of Women Voters of Wisconsin v. WEC, et al.* and *Rise, Inc., et al. v. WEC et al.* issued on February 9, 2024" for information related to the witness-address requirement. Supp. App. 250.

STANDARD OF REVIEW

An appellate court reviews the circuit court's denial of a motion for relief pending appeal "under the erroneous exercise of discretion standard." *Waity v. LeMahieu*, 2022 WI 6, ¶ 50, 400 Wis. 2d 356, 969 N.W.2d 263. "A discretionary determination will be sustained where it is demonstrably made and based upon the

facts appearing in the record and in reliance on the appropriate and applicable law." *Sunnyside Feed Co. v. City of Portage*, 222 Wis. 2d 461, 468, 588 N.W.2d 278 (Ct. App. 1998). In applying that standard, the reviewing court "does not conduct the analysis anew." *Doe 1 v. Madison Metro. Sch. Dist.*, 2022 WI 65, ¶ 31, 403 Wis. 2d 369, 976 N.W.2d 584. Rather, "it looks for a reasonable basis to sustain a circuit court's discretionary decision." *Id.*

ARGUMENT

The Court's February 9 Order directed Plaintiffs to answer four specific questions. Plaintiffs first provide those answers, then turn to the remainder of the *Waity* analysis.

I. Answers to the Court's Questions

Court's Question 1: Is it your position that the meaning of "address" in §6.87(2) is ambiguous with respect to the issue of whether it requires particular components, such as street number, street, and municipality, or instead does not require any such components?

Answer: No. Plaintiffs' position is that Section 6.87(2) *unambiguously does not require* that a witness address take any particular form or include any particular components. Courts have a "duty to respect not only what [the legislature] wrote but, as importantly, what it didn't write." *Warren*, 139 S. Ct. at 1900. And Section 6.87(2) does not require any one form or type of address. It leaves the form of the address up to the witness.

Plaintiffs fully canvass the relevant textual and other evidence below, *infra* Part II, but the statute's unambiguous failure to require any particular form of address is best illustrated by contrasting the witness-address requirement with other uses of the term "address" in Wisconsin's elections statutes. Where a legislature "knows how to say something but chooses not to, its silence is controlling." *Delgado v. U.S. Att'y Gen.*, 487 F.3d 855, 862 (11th Cir. 2007) (quoting *CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1226 (11th Cir. 2001)). And "[w]here the legislature uses similar but different terms in a statute, particularly within the same section, we may presume it intended the terms to have different meanings."

State ex rel. Zignego v. Wis. Elections Comm'n, 2020 WI App 17, ¶ 64, 391 Wis. 2d 441, 941 N.W.2d 284 (quoting *State ex rel. Dep't of Nat. Res. v. Wis. Ct. of Appeals*, 2018 WI 25, ¶ 28, 380 Wis. 2d 354, 909 N.W.2d 114 ("DNR")), *aff'd as modified*, 2021 WI 32, 396 Wis. 2d 391, 957 N.W.2d 208. This rule reflects the sound idea that a "material variation in terms suggests a variation in meaning." *State v. Schmidt*, 2021 WI 65, ¶ 57, 397 Wis. 2d 758, 960 N.W.2d 888 (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170 (2012)).

Here, Section 6.87(2) does not require any particular form of witness address, instead requiring only an "address." This puts it in stark contrast with other election laws which expressly specify a particular type or form of address. In particular:

- Section 6.87(2) requires that absentee *voters'* own addresses be included in the following form: "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) (as in original).
- Section 6.87(2) requires that a clerk's address printed on certificate envelopes be the "*post-office address* of the clerk." *Id.* (emphasis added).
- Section 6.34(3)(b)(2) requires that proof-of-residency documents for military voters include a "complete residential address, including a numbered street address, if any, and the name of a municipality." Wis. Stat. § 6.34(3)(b)(2).
- Section 6.15(2)(a) requires that new residents who wish to vote a presidential ballot swear that their prior "legal residence was in the ... (town) (village) (city) of ..., state of ..., residing at ... (street address);" and that they are currently "residing at ... (street address), in the [... ward of the ... aldermanic district of] the (town) (village) (city) of ..., county of ..." Wis. Stat. § 6.15(2)(a) (as in original).

- Section 8.10(2) requires that nomination papers list the candidate's "street address" and "mailing address." Wis. Stat. § 8.10(2)(b), (c).

Thus, if Wisconsin's lawmakers had intended to require a particular type of witness address, or one that included particular components, the statute would surely say so—just as many other election statutes that require an address do. "A short sentence would have done the trick," and "[t]he silence . . . is strident." Scalia & Garner, *supra*, at 182 (quoting *Comm'r of Internal Revenue v. Beck's Est.*, 129 F.2d 243, 245 (2d Cir. 1942)). To require that a witness address take a particular form, as the challenged guidance did, is therefore not merely to construe an ambiguous statute but to impose a requirement that the statute simply does not impose.

Court's Question 2: Are you able to cite any case law or persuasive authority interpreting the term "address" in any Wisconsin statute in a manner similar to the circuit court's definition?

Answer: In the Circuit Court, neither party cited or relied on any decisions interpreting the term "address" in other Wisconsin statutes. Plaintiffs are not aware of any other Wisconsin statute that uses the unadorned term "address" in a similar context including, in particular, in a statute where it is surrounded by many other provisions that expressly require a particular type or form of address. Plaintiffs are therefore unaware of any directly analogous decisions from Wisconsin courts.

Plaintiffs do, however, note that in *State v. Dinkins*, 2010 WI App 163, ¶ 5, 330 Wis.2d 591, 794 N.W.2d 236, *aff'd*, 2012 WI 24, 339 Wis. 2d 78, 801 N.W.2d 787, the Court of Appeals and the Supreme Court addressed a statutory requirement that convicted sex offenders provide "the address at which" they would "be residing" after release from prison. In support of a conviction of a homeless individual under the statute for failing to provide his "address," the State argued that the "natural and ordinary" meaning of "address" was "'the designation of a place . . . where a person or organization may be found or communicated with,'" "'[a] description of the location of a person. . . . [t]he location at which a particular organization or person may be found or reached,'" or "'the particulars of the place

where someone lives.'" Supp. App. 278–79 (Br. of Pl.-Resp. at 13–14, *State v. Dinkins*, No. 2009AP1643-CR, 2009 WL 3760374 (Wis. Ct. App. Oct. 29, 2009)) (quoting various dictionaries). This Court assumed without deciding that "address" held that meaning. *Dinkins*, 2010 WI App 163, ¶¶ 17–18. And although the Supreme Court affirmed under a different rationale and without reaching the meaning of "address," a two-justice dissent would have held that even a homeless individual could comply with the requirement to provide his "address" with "a specific description of the place or places which he will be spending his days and nights upon his release from prison"—something that would be adequate only under a functional definition of "address" akin to the one the Circuit Court adopted here. *Dinkins*, 2012 WI 24, ¶ 114 (Ziegler, J., dissenting).

Court's Question 3: Is the circuit court's definition of "address" limited to residences of witnesses, as opposed to non-residential locations where the witnesses may be communicated with?

Answer: No. Nothing in the statute requires the witness to provide a *residential* address. Section 6.87(2) requires only the witness's "address." A business address is, as a matter of plain meaning, an address. As the other statutory provisions quoted in the response to the Court's first question show, when Wisconsin's lawmakers want to require a residential address, they do so expressly—by writing a statute that refers to the voter's residence or a "residential address." Moreover, allowing witnesses to provide business addresses makes sense because municipal employees often act as witnesses for voters who complete their absentee ballots at the clerk's office.[6] There is no statutory or other reason to require such employees to provide their home addresses.

Thus, because the statute does not require the witness's residential address, the Circuit Court's order does not require a residential address either.

---

[6] *See, e.g.*, City of Madison, *In-Person Absentee Voting Hours and Locations*, https://www.cityofmadison.com/clerk/elections-voting/voting/vote-absentee/in-person-absentee-voting-hours-and-locations (last accessed Feb. 12, 2024).

Court's Question 4: Do the word "address" and the phrase "information to allow a reasonable person in the community to identify a location where the witness may be communicated with" have the same meaning?

Answer: Not exactly. Only a portion of the quoted phrase has the same meaning as the word "address." Specifically, "a location where the witness may be communicated with" is functionally equivalent to the word "address" as it is defined by Merriam-Webster: "a place where a person or organization may be communicated with."[7] And, as the Circuit Court's order makes clear, it is this portion of the phrase that defines the term "address." App. 21 (R.238 at 1).

The remainder of the phrase quoted by the Court's question—"information to allow a reasonable person in the community to identify"—merely provides an objective standard for evaluating whether an absentee ballot certificate includes a witness "address" in compliance with Section 6.87. In particular, the "reasonable person in the community" standard dictates how local officials should *apply* the statutory requirement that the witness provide an "address." It makes clear that information constituting the witness's "address" must be present on the face of the certificate itself in a form that is objectively sufficient to designate the required place to someone familiar with the relevant community. The purpose of that phrase is to reflect the statute's demand that the certificate *itself* include the witness's address; the fact that a clerk might subjectively know where a witness lives—for instance, because they know the witness personally—would not suffice under the statute's plain text. The "reasonable person" standard therefore does not change the plain meaning of the word "address"; it simply provides an objective lens for assessing whether the requirement is met.

II. The Circuit Court properly applied *Waity* to deny a stay pending appeal.

The Circuit Court did not erroneously exercise its discretion in denying the motion for a stay pending appeal, and this Court should not disturb its decision. The

[7] https://merriam-webster.com/dictionary/address (last updated June 11, 2023).

Circuit Court applied the correct legal standard, carefully assessing and balancing each of the *Waity* factors in detail. Under that standard, the Circuit Court correctly found that the Legislature is unlikely to succeed on appeal because the Legislature's statutory interpretation finds no support in the text or context of the statute, but seeks instead to read into the statute a requirement—an address in a very particular form—that indisputably is not there. The Circuit Court also properly found that the equities strongly weigh against a stay.

A. The Circuit Court applied the correct legal standard.

The Circuit Court carefully applied the standard the Supreme Court set out in *Waity* to govern stays pending appeal. That case requires courts to consider and balance four factors in determining whether to stay an order pending appeal:

> (1) whether the movant makes a strong showing that it is likely to succeed on the merits of the appeal;
>
> (2) whether the movant shows that, unless a stay is granted, it will suffer irreparable injury;
>
> (3) whether the movant shows that a stay will cause no substantial harm to other interested parties; and
>
> (4) whether the movant shows that a stay will cause no harm to the public interest.

Waity, 2022 WI 6, ¶ 49. *Waity* also establishes two further guidelines courts must follow in analyzing the likelihood of success on appeal. First, "a circuit court cannot simply input its own judgment on the merits of the case and conclude that a stay is not warranted." *Id.* ¶ 52. And second, "circuit courts must consider the standard of review, along with the possibility that appellate courts may reasonably disagree with its legal analysis." *Id.* ¶ 53.

The Legislature suggests at several points in its brief that the Circuit Court applied an "incorrect legal standard" and therefore "erred as a matter of law." *E.g.*, Mem. 27. But the Circuit Court considered each of the four *Waity* factors, and with respect to each factor, it considered all information relevant to that factor. It

therefore neither disregarded nor failed to consider some essential component of the required standard. *Waity*, 2022 WI 6, ¶¶ 50, 53. The Legislature just disagrees with the Circuit Court's conclusion—a matter of discretion, not legal error. *Id.* ¶ 50.

B. The Circuit Court properly held that the Legislature had not made a strong showing of likely success on appeal.

As the Circuit Court rightly concluded, the Legislature is not likely to succeed in this appeal. Although this Court will review the Circuit Court's decision and order *de novo*, it is not likely to reverse, because the Circuit Court got the merits right. And the Circuit Court did not abuse its discretion in assessing this factor—it applied the correct legal standard, from *Waity*, to reach a reasonable assessment of the Legislature's likelihood of success on appeal.

At the outset, the Legislature is mistaken to argue that "[t]he 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." Mem. 29. *Waity* says no such thing. Rather, *Waity* says only that a circuit court "must *consider* the standard of review, along with the possibility that appellate courts may reasonably disagree with its legal analysis." 2022 WI 6, ¶ 53 (emphasis added). The Circuit Court here did just that, expressly considering both the standard of review and the possibility that a reviewing court would disagree. Supp. App. 48–50 (R. 255 at 39–42). The Circuit Court then appropriately discounted that possibility based on the weakness of the Legislature's arguments. Courts must be able to do that, or else a litigant could invariably obtain a stay pending appeal based on entirely meritless statutory arguments.[8] And nothing in *Waity* forecloses the Circuit Court's approach—to the contrary, *Waity reaffirms* that the stay movant must make a "strong showing" of likely success. *Waity*, 2022 WI 6, ¶ 49.

---

[8] For instance, if the Legislature's argument were that a witness must provide the GPS coordinates of their residence to satisfy the witness-address requirement, that statutory argument would be reviewed *de novo*. Yet it would have no chance of success on appeal.

The strength of the Legislature's arguments is therefore central to the likelihood-of-success analysis. And the Circuit Court reasonably held that the Legislature's arguments are weak and unlikely to succeed. Text, context, statutory purpose, and related statutes all support the Circuit Court's functional definition of "address" as "a location where the witness may be communicated with," rather than a particular set of components. Thus, while a three-, four- or five-component mailing address certainly suffices, alternatives like "same as voter," or a student's residence hall name, room number, and university, also constitute "addresses" for purposes of the statute.

Text. In construing a statute, courts "begin[] with the language of the statute." *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis. 633, 681 N.W.2d 110 (quoting *Seider v. O'Connell,* 2000 WI 76, ¶ 43, 236 Wis. 2d 211, 612 N.W.2d 659). Here, the pivotal feature of that language is that it just requires an "address." It does not, by its plain text, require any specific *sort* of address—a residential address, mailing address, or postal address, for instance. Nor does it, by its plain text, require any specific *form* of address—that is, any specific combination of the various smaller bits of information, like municipality or zip code, that may together constitute an address. As one Justice of the Wisconsin Supreme Court has put it: "Although Wis. Stat. § 6.87(6d) requires an address, § 6.87(2) and (6d) are silent on precisely what makes an address sufficient." *Trump v. Biden*, 2020 WI 91, ¶ 49, 394 Wis. 2d 629, 951 N.W.2d 568 (Hagedorn, J., concurring).

An undefined term such as "address" must be given its "common, ordinary, and accepted meaning." *Kalal*, 2004 WI 58, ¶ 45. Dictionaries are often helpful in determining the ordinary meaning of undefined terms. *See id.* ¶ 54. Here, the first entry in Merriam-Webster—the preeminent dictionary of American English—defines "address," when used as a noun, as "a place where a person or organization

may be communicated with." *Address*, Merriam-Webster.[9] This definition is an unmistakably functional one—rather than describing the concept as a composite of specific components, it encompasses the many possible forms an address may take by focusing on the concept's essential purpose: to identify where the addressee may be communicated with. For that reason, the Merriam-Webster definition closely matches the plain text of Section 6.87 which—like the definition—does not indicate that an "address" must comprise any particular formal components.

That plain meaning definition also comports with the commonsense principle that a witness may convey an "address" without listing any specific address components. Consider a few examples:

- A witness who is the voter's spouse or family member lists an address of "same," "same as voter," or "see above," and the voter's complete address appears just above where the witness has signed.
- A student witness lists an address of "123 Liz Waters, UW-Madison," because that is how mail is processed on her campus.
- A witness in a community known locally by a colloquial name lists that colloquial name in lieu of the municipality's legal name—for example, a witness in Como, Wisconsin, lists Como, rather than "the Town of Geneva," as the municipality. *See* Supp. App. 77 (R.257 at 11).
- A witness who resides in the country lists a zip code or county in lieu of a municipality.

As a matter of "ordinary . . . meaning," each of these witnesses has conveyed a perfectly valid address. *Kalal*, 2004 WI 58, ¶ 45. The Circuit Court's definition rightly ensures that they will be treated as such.

The Legislature responds by relying on a different dictionary definition. *See*

[9] https://merriam-webster.com/dictionary/address (last updated June 11, 2023).

Mem. 30–31. But that definition does nothing to support the Legislature's argument:

> The particulars of the place where a person lives or an organization is situated, typically consisting of a number, street name, the name of a town or district, and often a postal code; these particulars considered as a location where a person or organization can be contacted by post.

Address, Oxford English Dictionary.[10] In fact, the Legislature's preferred definition undermines its own argument in at least four ways.

First, the entry's frontline definitional clause—"the particulars of the place where a person lives"—supports the Circuit Court's functional approach to determining whether something is an "address," not the Legislature's component-based approach. After all, many different combinations of particulars may suffice to convey "where a person lives" (or, for that matter, "where a person may be communicated with"). The particulars "Room 123, Liz Waters Residence Hall, University of Wisconsin," for instance, certainly convey a place of residence, yet without including *any* of the three components that the Legislature would make mandatory.

Second, the exemplifying clause the Legislature wants the Court to focus on—"typically consisting of a number, street name, the name of a town or district, and often a postal code"—further undermines the Legislature's case. The adverb "typically" indicates that the items in the list that follow are *not* always required. Nor could they be. Even the Legislature admits that a "town" is not required, because Wisconsin's municipal types include cities and villages as well as towns. *See* Wis. Stat. ch. 60 (towns); ch. 61 (villages); ch. 62 (cities). And the entry's alternative of a "district" as a typical address component creates even more problems, because a "district" is a category of administrative division in England with no exact American equivalent. It perhaps most resembles a county, but the

[10] https://www.oed.com/dictionary/address_n (subscription required) (last updated Sept. 2023).

Legislature's three-component definition requires a municipality, not a county.[11]

Finally, as the Circuit Court emphasized in particular, the Legislature excludes zip codes from its definition of address, yet its preferred dictionary says a "postal code" is "often" part of an address. At the point at which the Legislature is saying that "typical" address components are always required but components that are "often" part of an address do not suffice, it has plainly burrowed too deep into the dictionary.[12]

Context. "Context is important to meaning," so "statutory language is interpreted in the context in which it is used." *Kalal*, 2004 WI 58, ¶ 46. Here, the statutory context further supports the Circuit Court's definition. In particular, the witness-address requirement's remedial provision, Wis. Stat. § 6.87(6d), provides that if an absentee ballot certificate "is *missing* the address of a witness, the ballot may not be counted." That provision's use of the term "missing," rather than, for example, "incomplete," supports the Circuit Court's functional definition of address. Under the Legislature's three-component definition of "address," an address may be missing (where the field is blank) or not missing (where all three components are provided), but it may also be *partial*—where, for example, the witness provides street name and number but not municipality. And subsection (6d) is silent as to what to do about "partial" or "incomplete" addresses. The Legislature seems to assume that "partial" addresses count as "missing" addresses under subsection (6d), but the statute does not say that. The Legislature's definition thus

---

[11] While England also has counties, they are ceremonial and have been superseded by districts for administrative purposes. *See Districts of England*, Wikipedia, https://en.wikipedia.org/wiki/Districts_of_England (last accessed Feb. 13, 2024).

[12] The Legislature also invokes the U.S.P.S. standard for a "full address." Mem. 31. But it cites no authority for the odd idea that a federal agency's internal standard for a "full address" would control the meaning of the unadorned term "address" in a Wisconsin statute. Nor does its citation establish that the Postal Service will not *deliver* absent a "full address."

leads straight to a second interpretive quagmire.

By contrast, the Circuit Court's functional definition of "address" avoids the quagmire and harmonizes the subsection (6d) remedial provision with the witness-address requirement as a whole. Insofar as "witness address" means "a location where the witness may be communicated with," rather than any specific components, whether an address is "missing" becomes a straightforward, binary determination. When the information on the certificate suffices objectively to convey where the witness may be communicated with, the address is not "missing." Where the certificate does not sufficiently convey such a location, the address is "missing." The immediate statutory context thus supports the Circuit Court's holding.

The Legislature's argument from context, Mem. 31–32, boils down to a citation to Section 6.84. That statute expresses a "policy" that "voting by absentee ballot is a privilege exercised wholly outside the traditional safeguards of the polling place." Wis. Stat. § 6.84(1). It then separately requires that several statutory provisions "shall be construed as mandatory" meaning ballots "cast in contravention of the procedures specified in those provisions may not be counted." Wis. Stat. § 6.84(2). As relevant here, Section 6.84(2) covers subsection (6d), the Section 6.87 remedial provision just discussed, so that section must be "strictly construed" to prohibit counting of any ballot whose certificate is "missing" a witness address. The problem for the Legislature is that the question of what constitutes an "address" necessarily precedes the question whether a certificate is *missing* an address—as just explained. And nothing in Section 6.84(2) sheds light on the meaning of "address."

Purpose. Purpose is "perfectly relevant to a plain-meaning interpretation" so long as that purpose is "ascertainable from the text and structure of the statute itself." *Kalal*, 2004 WI 58, ¶ 48. Here, the Circuit Court's functional definition of "witness address" suits the statutory purpose just as well as it suits the statute's plain text and context. The witness's role, under Section 6.87, is to observe the voter voting the

absentee ballot and then to attest, on the certificate, that the proper voting procedures were followed and the other requirements were met. Wis. Stat. § 6.87(4)(b)1. For the local officials who process absentee ballots, having the witness's address on the ballot certificate ensures—at least in theory—that they will be able to reach the witness if a question arises about whether the voting procedure was properly executed. For instance, if an allegation is made that the voter was subject to undue influence at the time they marked the ballot, the witness could in theory be located and asked about the allegation. (In practice, nothing in the record suggests that this ever happens, or that the witness's address is used for anything at all.)

The Circuit Court's functional definition of witness address furthers that purpose. If the certificate contains sufficient information to allow a reasonable person to identify a place where the witness may be communicated with, then, *ipso facto*, the certificate allows local officials to communicate with the witness if they need to do so. From a municipal clerk's perspective, it makes no difference whether the witness lists a zip code in lieu of a municipality or lists a residence hall name and room number in lieu of a street name and street number—the clerk still has enough information to communicate with the witness, so the purpose is fulfilled.

The Legislature's brief discussion of purpose gestures vaguely at concerns about "fraud," Mem. 32, but provides no reason to think the Circuit Court's functional definition of witness address allows any more fraud than a strict three-component definition would.

Related statutes. Statutory language is interpreted "in relation to the language of surrounding or closely-related statutes." *Kalal*, 2004 WI 58, ¶ 46. As explained above in response to the Court's first question, the different ways related election statutes handle the term "address" confirm that the Circuit Court was right to adopt a functional definition of "address" under Section 6.87, because when lawmakers intend to demand a particular type or form of address, the statutes do so expressly. *Supra* Part I.

The Legislature has no adequate response to these related statutes. It

illogically contends that they support a three-component definition, on the ground that some of them expressly require some or all of the three components that the Legislature contends Section 6.87(2)'s unadorned reference to a witness's "address" implicitly requires. Mem. 33–34. But well-established rules demand the opposite reading: "[w]here the legislature uses similar but different terms in a statute, particularly within the same section, we may presume it intended the terms to have different meanings," *Zignego*, 2020 WI App 17, ¶ 64 (quoting *DNR*, 2018 WI 25, ¶ 28), and statutory language must be "read where possible to give reasonable effect to every word, in order to avoid surplusage." *Kalal*, 2004 WI 58, ¶ 46.

Compliance with federal law. "State law should be construed, whenever possible, to be in harmony with federal law, so as to avoid having the state law invalidated by federal preemption." *Marbry v. Superior Ct.*, 185 Cal. App. 4th 208, 231 (Cal. Ct. App. 2010); *see also Martin ex rel. Hoff v. City of Rochester*, 642 N.W.2d 1, 18 (Minn. 2002) (similar); *State v. Mooney*, 98 P.3d 420, 425 (Utah 2004) (similar). Here, as the Circuit Court emphasized, App. 32 (R.233 at 6), its functional definition of "witness address" helps to avoid a plain violation of federal law.

The Civil Rights Act's Materiality Provision, prohibits the "den[ial of] the right of any individual to vote . . . because of an error or omission on any record or paper relating to any . . . act requisite to voting . . . [that] is not material in determining whether such individual is qualified under State law to vote in such election." 52 U.S.C. § 10101(a)(2)(B). In other words, the Materiality Provision protects voters against ballot rejection because of technical noncompliance with a requirement that is immaterial to qualifications.

It is highly debatable whether any part of a *witness's* address is ever material to whether the *voter* is qualified to vote under state law. *Cf. Liebert v. Wis. Elections Comm'n*, No. 23-cv-672, 2024 WL 181494 (W.D. Wis. Jan. 17, 2024) (recently filed federal-court lawsuit challenging the entire witness requirement under the Materiality Provision). But, at a minimum, there can be no dispute that a missing component of the witness's address is not material when the ballot certificate

otherwise adequately conveys a location where the witness may be communicated with. For instance, when a certificate includes street name, street number, and zip code, municipality is plainly immaterial—the three provided components convey municipality. So too when the witness lists an address of "same as voter." And indeed, the Circuit Court, in the consolidated *League of Women Voters* case, held that the Materiality Provision applies to those two categories of ballots and two others. App. 24–26.[13]

History. The Legislature's "history" point is a series of non sequiturs. The Legislature claims that both it and the Commission have "consistently understood" Section 6.87 to require a three-component address. Mem. 35–36. But the Legislature's own account of the legislative history reveals that the statutory term "address," for purposes of the witness requirement, has been undefined since the Johnson Administration. Mem. 36 (citing 1965 Act 666). The Legislature's understanding of the term as entailing three components is a litigation decision made in September 2022, not a longstanding background fact of Wisconsin law. As for the Commission, it first opined on the contents of an "address" just seven years ago, in late 2016. *Supra* Background, Part II. And the effect of its 2016 guidance was that ballots with certificates listing addresses like "same as voter" or a university residence hall room *were accepted and counted*—clerks were directed to "do all that they can reasonably do to obtain any missing part of the witness address," and were authorized to add missing information to ballot certificates themselves. And even if the Legislature had history on its side, it would not overbear all the above analysis. "Where statutory language is unambiguous, there is no need to consult extrinsic sources of interpretation," including history. *Kalal*, 2004 WI 58, ¶ 46.

Administrability. The Legislature turns last to something it calls "administrability." Mem. 36–37. But the statute as the Circuit Court construed it is

[13] That order is now on appeal to District I, which has declined to stay the order pending appeal.

perfectly administrable. Whether information on the certificate sufficiently conveys "a location where the witness may be communicated with" is, in nearly all cases, a simple inquiry. The Legislature's brief to this Court identifies not a single circumstance in which it would be difficult to answer that question, Mem. 42–43, and it has struggled to identify any such circumstance throughout this litigation, *see, e.g.,* Supp. App. 92 (R.257 at 26); App. 81 (R.224 at 29).

The Legislature focuses its arguments not on the Circuit Court's construction of "address" but instead on the "reasonable person in the community" standard the Circuit Court adopted for the statute's application. But that standard was added to Plaintiffs' proposed order to address concerns raised by the Commission that defining "witness address" to mean "place where the witness may be communicated with" might lead some clerks to use entirely subjective personal knowledge in assessing witness addresses. *See* Supp. App. 233–35 (R.222 at 22–25). For instance, a clerk might recognize the witness's name and accept a certificate with a blank witness-address field, because the clerk knows "a location where the witness may be communicated with" from the name alone. Plaintiffs do not contend that reliance on such subjective knowledge is permitted; the statute requires an "address" to be conveyed *by the certificate itself*. Accordingly, Plaintiffs added the "reasonable person" language—a standard universally understood to require an objective inquiry—to the proposed order to alleviate concerns about subjective application. The addition of "in the community" ensures that local officials will not treat widespread public knowledge—such as the colloquial name of a community or a residence hall name—as subjective.

Finally, the Legislature's argument that its three-component standard "ensures uniformity in the way these ballots are treated on a statewide basis," Mem. 37, is unsupported by any record evidence. Even under the Commission's September 2022 guidance, the three municipal clerk defendants each applied a different standard to witness addresses. *Supra* Background, Part III.A. And the Commission's position in the consolidated *League* case appended a variety of

exceptions and complications to the supposedly uniform three-component standard. *See* Supp. App. 315–16. The requirement, the Commission said, was not literally to list the three components, but rather to include "*information from which local officials can determine* a street number, street name, and municipality for the witness." Supp. App. 316 (emphasis added). Thus, the Commission explained, "[b]allots including a street number and street name, but no municipality" are acceptable if, and only if, "the witness' street number and street name are the same as the voter's," and ballots with "a notation indicating that the witness' address is the same as the voter's, such as 'same,' 'ditto,' or an arrow pointing to the voter section" also suffice. Supp. App. 317–18. It is far from obvious that municipal clerks can apply the Commission's test more uniformly than the Circuit Court's, and nothing in the record suggests that is the case.

C. The Circuit Court properly balanced the harms and assessed the public interest.

The Circuit Court's assessment of the equities is owed considerable deference, *Waity*, 2022 WI 6, ¶ 50, and none of the Legislature's arguments overcome that deference. Nor does the Legislature ever address, let alone refute, the Circuit Court's discretionary determination, in balancing the four *Waity* factors, that the equities would warrant denying a stay even if the Legislature were likely to succeed on appeal. *See* Supp. App. 57 (R.255 at 48).

1. A stay will not cause the Legislature irreparable harm.

The Circuit Court appropriately found that the Legislature would not be irreparable harmed by denial of a stay. *See Waity*, 2022 WI 6, ¶ 49. The Circuit Court emphasized three considerations in its oral ruling. First, its order merely construed an undefined term in a statute, rather than enjoining the statute. Supp. App. 53 (R.255 at 44). Second, although the Legislature asserted that denial of a stay would disrupt the Commission's and municipal clerks' work and therefore cause confusion, those parties did not join the stay motion. Supp. App. 52 (R.255 at 43). And third, any confusion could be resolved by clerk communications, and

would certainly not be worse than the confusion under the status quo. Supp. App. 53 (R. 255 at 44). On this point, Plaintiffs argued, and the Circuit Court found, that a stay would frustrate, not further, the orderly administration of elections because it would allow municipal clerks to continue applying local, idiosyncratic definitions of the term "witness address." Supp. App. 7 (R.250 at 3); Supp. App. 54 (R.255 at 45).

On appeal, the Legislature first asserts that it represents the State and will be harmed in that capacity by the confusion and inconsistent application of the witness-address requirement that will follow from its concerns about administrability. Mem. 44–46. Even assuming that the Legislature represents the State in an appeal to which the Commission is a party and is represented by the Department of Justice, *but see* Wis. Stat. § 165.25(1), this argument fails for the same reasons the equivalent merits argument fails. For one thing, the Legislature identifies not a single plausible instance of a real-world administrability problem. The one concrete example it points to is university residence halls, Mem. 45—but this does not help its argument: there is *no question* that an address of the form "Room 123, Liz Waters Hall, UW-Madison" unambiguously conveys "a location where the witness may be communicated with" to a reasonable person in the Madison community. Why the Legislature thinks otherwise it does not explain. More broadly, the Legislature persists in ignoring the Circuit Court's finding that confusion and inconsistency, rather than consistent application of the three-component definition, was the relevant *status quo*. *See supra* Part II.B. Nor does the Legislature explain why *voters* will be confused. As the Circuit Court expressly found, voters will "see no change" from the order—the only difference will be that fewer have their ballots rejected or disqualified. Supp. App. 55 (R.255 at 46).

The Legislature next suggests that it is "unclear" how many clerks will comply with the Circuit Court's declaratory judgment. Mem. 45. This phrasing is telling—the Legislature is well-aware that Wisconsin's local elections officials consistently comply with the judiciary's construction of statutory terms, whether

they are formally bound to do so or not. In any case, the Legislature's decision to appeal moots its own argument: whether or not the Circuit Court's declaratory judgment will be followed statewide, *this Court's affirmance of that judgment would be*. The Legislature cannot seriously suggest that local officials would ignore the Circuit Court's order if this Court declined to stay it and indicated that it is likely to affirm on the merits. When courts speak, clerks listen.

The Legislature also asserts it will suffer irreparable harm absent an immediate stay because the Commission may issue and then revoke guidance if the Legislature prevails on appeal. Mem. 46. But now that the Commission has complied with the Circuit Court's order, this argument—if anything—cuts the other way.

The Legislature next argues that the Circuit Court committed "legal error" by giving weight to the Commission's and Clerk Defendants' decision not to join the stay motion. Mem. 47. But the Circuit Court was addressing the Legislature's argument that denial of a stay would disrupt the Commission's and municipal clerks' work, and with respect to that argument, the Commission's and clerks' decision not to seek a stay was undeniably relevant. The Legislature's argument that *Bostelmann* forecloses the Circuit Court's consideration of the Commission's non-position is wrong. Mem. 47–48. Neither the Wisconsin Supreme Court nor the Seventh Circuit foreclosed a court from considering, as part of its overall analysis of irreparable harm, the parties' arguments—or lack thereof—in order to ascertain the reality of the injuries implicated by a stay motion. *See Democratic Nat'l Comm. v. Bostelmann*, 2020 WI 80, ¶ 13, 394 Wis. 2d 33, 949 N.W.2d 423; *Democratic Nat'l Comm. v. Bostelmann*, 977 F.3d 639, 641 (7th Cir. 2020) (per curiam); *see also Bostelmann*, 977 F.3d at 647 (Rovner, J., dissenting) (giving weight to the Commission's decision not to seek a stay).

Finally, the Legislature asserts that the Circuit Court erred under *Waity* by failing to assume that the Legislature would prevail on appeal. Mem. 49. But the transcript shows otherwise. Supp. App. 51–54 (R.255 at 42–45). The Circuit Court

considered explicitly whether the Legislature would "suffer irreparable injury *absent a stay*." Supp. App. 51 (R.255 at 42) (emphasis added). And it weighed the likely effects if the Commission had to "issue a subsequent communication saying that a stay has been granted." Supp. App. 54 (R.255 at 45).

2. A stay will cause Plaintiffs and Wisconsin voters irreparable harm.

The Circuit Court also correctly found that a stay would inflict grave harm on Plaintiffs and voters across Wisconsin. Supp. App. 54–55 (R.255 at 45–46). Following *Waity*'s instruction to analyze this factor by presuming that the nonmovant will prevail on appeal, 2022 WI 6, ¶ 58, the Circuit Court found that granting a stay would cause eligible voters to be disenfranchised due to "trivial errors and technicalities." Supp. App. 54 (R.255 at 45). The Circuit Court also found that Plaintiff Rise would be forced to continue diverting resources to encourage in-person voting, so as to minimize the risk that its target voters are disenfranchised by shifting local standards. *Id*.

None of the Legislature's arguments to the contrary rebut these findings. The Legislature first asserts that the Commission's updated absentee ballot certificate and instructions will prevent witnesses from listing addresses that do not comply with the three-component definition. Mem. 51. But the Legislature has no answer for voters whose addresses do not neatly fit its definition—such as university students who are commanded by campus mail policies to list residence hall name and room number as the first line of their address. *See* App. 166 (R.160 ¶ 61) (quoting the UW-Madison sample student address, which begins "6206 Withey, Ogg Hall"). Moreover, the Commission's own usability testing for the new certificate and instructions establishes that not all witnesses will fill out the "simple form," Mem. 51, in the way the Legislature predicts—one participant in that testing

listed a witness address of "same as above." Supp. App. 340.[14]

The Legislature also downplays the number of affected voters. Mem. 53–54. But the Legislature has not built a record to support such arguments, choosing instead to litigate this case on the facts as Plaintiffs have alleged them. Indeed, the Legislature makes the absurd suggestion that the Court should draw inferences from the limited discovery pursued in the separate *League* case. Mem. 54. But the uncontested record in *this* case establishes that clerks in three of Wisconsin's largest cities are all applying different and inconsistent standards to witness addresses. *Supra* Background, Part III.C. Because that uncontested record is entirely consistent with the Circuit Court's findings, those findings cannot constitute an erroneous exercise of discretion. *Sunnyside Feed Co.*, 222 Wis. 2d at 468. Moreover, even a small number of disenfranchised voters is too many—every vote counts.

By the same token, it is far too late for the Legislature to contest whether Rise is diverting resources or redirecting its GOTV efforts, Mem. 52—thoroughly substantiated allegations that the Legislature has never contested before this appeal, *see* Supp. App. 324 (R.228 at 3) (noting that no party disputed any of Plaintiffs' factual allegations underpinning their standing). Rise has consistently emphasized that, absent a uniform standard for witness addresses, it will either have to abandon absentee voting as a GOTV tool or expend considerable resources to determine what information constitutes a sufficient witness address in each target municipality, then tailor its training and materials accordingly. *Supra* Background, Part III.A.; *see also* Supp. App. 159–60 (R.211 ¶¶ 12–14). The Legislature suggests that all Plaintiffs

[14] The Commission's adoption of the new certificate and instructions post-dates Plaintiffs' motion and the Legislature's cross-motion for summary judgment in this case. The Court may, however, take judicial notice of the Commission's materials evaluating usability. *See* Wis. Stat. § 902.01(3)–(4), (6); *Sisson v. Hansen Storage Co.*, 2008 WI App 111, ¶¶10–11, 313 Wis. 2d 411, 756 N.W.2d 667 (confirming that an appellate court "may take judicial notice of matters of record in government files").

need to do is "inform voters to follow the three-component definition." Mem. 52. But the record refutes that suggestion. *See, e.g.,* Supp. App. 54–55 (R.255 at 45–46) ("I agree with the Plaintiffs that it is not easy to comply with a law that, currently, is inconsistently applied by 1,800 election clerks.").

Finally, District I's decision not to stay the injunction in *League* does not change the stay analysis here. The Circuit Court's order in this case applies to a broader set of absentee ballot certificates than just the four specific categories addressed by the *League* injunction, including university residence halls, the most important category for Plaintiffs. *See* Supp App. 65 (R.255 at 56) (Circuit Court's finding that "the *Rise* relief . . . encompasses a category of voters which are not addressed in the *League of Women Voters* case"). Thus, even with the *League* order in place, Plaintiffs would be substantially harmed by a stay of the order in this case. Moreover, this Court cannot predict whether the *League* injunction will stay in place until this appeal is resolved.

3. A stay will harm the public interest.

The Circuit Court correctly found that a stay was not in the public interest. Supp. App. 55 (R.255 at 46). As the Legislature admits, the public benefits from consistency and clarity in the enforcement of Wisconsin's election laws. Mem. 56. Only denying a stay will ensure that such clarity and consistency will be the status quo during the pendency of the appeal; granting a stay would reinstate the chaos of 2022, not the Legislature's three-component definition. *See* Supp App. 56 (R.255 at 47) ("Further, the status quo prior to my order was confusion and uneven application of the law[.]"). Moreover, as the Circuit Court emphasized, nothing about the order will change things from a voter's perspective: Voters will "receive the same absentee ballot" with "the same witness certification on it." Supp. App. 55–56 (R.255 at 46–47).

The Legislature rehashes all the same arguments it made with respect to the second *Waity* factor, Mem. 56–57, so Plaintiffs incorporate their responses, *supra* Part II.C.1. Plaintiffs emphasize, in particular, that the Circuit Court found that

public has an incredibly strong interest in preserving the constitutional right to vote—"one of our most important rights." Supp. App. 56 (R.255 at 47). Because the Legislature's three-component standard would deprive voters of that right without basis in law, its arguments should be rejected and a stay should be denied.

CONCLUSION

For the foregoing reasons, the Court should deny the Legislature's motion for a stay pending appeal.

Dated: February 13, 2024

By: *Electronically signed by Diane M. Welsh*
Diane M. Welsh,
State Bar No. 1030940
PINES BACH LLP
122 W. Washington Ave,
Suite 900
Madison, WI 53703
Telephone: (608) 251-0101
Facsimile: (608) 251-2883
dwelsh@pinesbach.com

Respectfully submitted,

David R. Fox*
Samuel T. Ward-Packard,
State Bar No. 1128890
ELIAS LAW GROUP LLP
250 Massachusetts Ave NW,
Suite 400
Washington, D.C. 20001
Telephone: (202) 968-4652
dfox@elias.law
swardpackard@elias.law

Makeba Rutahindurwa*
ELIAS LAW GROUP LLP
1700 Seventh Ave, Suite 2100
Seattle, Washington 98101
Telephone: (206) 968-4599
mrutahindurwa@elias.law

*Admitted *pro hac vice* by the circuit court

Attorneys for Plaintiffs-Respondents