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 REPLY IN SUPPORT OF EMERGENCY MOTION FOR STAY PENDING APPEAL

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INTRODUCTION

Plaintiffs ask this Court to keep in place during this appeal a requirement that three clerks must implement an unprecedented, unadministrable re-definition of an absentee-ballot witness' "address." While Plaintiffs cannot rebut the Legislature's powerful showing on any of the stay-pending-appeal factors, the Legislature wishes to highlight, in particular, Plaintiffs' failure to defend their core argument below that the Circuit Court's injunction would create an administrable statewide standard. Plaintiffs now concede by silence that the injunction binds only the three Clerk Defendants here and could not possibly bind all nonparty clerks statewide. Further, the injunction would not even consistently apply as to those three Clerk Defendants for the only category of witness-address errors that Plaintiffs are now concerned about, given the injunction in *LWV v. WEC*, No.22CV2472 (Dane Cnty. Cir. Ct. Jan. 30, 2024), App.24–26: a witness-address based upon a student's residence hall. As Plaintiffs admitted below, whether the name of a residence hall would suffice under the "reasonable person" approach to "address" depends upon whether it is "a large, public building" that is "familiar with the community." Yet, there is no way for a clerk to

decide that objectively, including because—to borrow the Circuit Court's own words—many reasonable people in the community will not "know any of the dorms" in their communities, "despite living [in those communities] for a long time." Supp.App.75.

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

ARGUMENT

I. The Legislature Is Entitled To A Stay Pending Appeal, Under The *Waity v. LeMahieu* Standard

A. The Legislature Established Its High Likelihood Of Success On Appeal

1. As the Legislature explained, it has a substantial likelihood of success on this appeal. Mot.28–43. This case presents a novel question of statutory interpretation about the meaning of "address" for the purpose of Section 6.87's witness address requirement, which alone is sufficient to demonstrate that the Legislature is likely to succeed on appeal under *Waity*. Mot.28–29 (citing *Waity v. LeMahieu*, 2022 WI 6, ¶¶ 51–53, 400 Wis. 2d 356, 969 N.W.2d 263). The Circuit Court, with respect, failed to apply this *Waity* presumption correctly. Mot.38–39. *Indeed, the Circuit Court explicitly acknowledged that "a reasonable juris[t] might disagree with [its] analysis,"* yet the Circuit Court still concluded

that the Legislature failed to establish its likelihood of success on the merits. Supp.App.49–50 (emphasis added); *accord* Supp.App.60 (making similar observation in *LWV* that, "as [the Court] mentioned with *Rise* . . . people can make reasonable arguments one way or another on most of these [merits] issues"). And even without *Waity*, the Legislature's merits arguments on their own terms establish that the Legislature is likely to prevail here, including because the Circuit Court adopted an amorphous definition of the term "address" in Section 6.87 that has no basis in Wisconsin law and that cannot be administered fairly. Mot.29–37.

2. This Court's February 9, 2024 Order, directing Plaintiffs to answer four specific questions in their Response to the Legislature's Motion underscores the Legislature's likelihood of success. Order, *Rise v. WEC*, No.2024AP165 (Wis. Ct. App. Feb. 9, 2024) (hereinafter "February 9 Order").

As for the Court's first question—whether Plaintiffs' position is that "address" is "ambiguous with respect to whether it requires particular components, or instead does not require any such components," February 9 Order at 2—Plaintiffs answered, "No,"

explaining their view that Section 6.87 "unambiguously does *not* require that a witness address take *any* particular form or include *any* particular components," Resp.20–23 (emphases altered). Even putting aside the implausibility of Plaintiffs' response here, it is difficult to imagine a less workable rule than one requiring no particular form or components.

With respect to the Court's second question—asking Plaintiffs to identify any Wisconsin authority that has adopted the Circuit Court's definition of an "address," February 9 Order at 2—Plaintiffs can provide no source. The *only* authority that Plaintiffs have attempted to put forward is *State v. Dinkins*, 2010 WI App 163, 330 Wis. 2d 591, 794 N.W.2d 236, *aff'd on other grounds*, 2012 WI 24, 339 Wis. 2d 78, 801 N.W.2d 787, Resp.22–23, but that case is not helpful. *Dinkins* involved a statute requiring convicted sex offenders to report, ten days prior to their release from prison, the "address at which the person is or will be residing." *Id.* ¶ 13 (citing Wis. Stat. § 301.45). In reversing the defendant's conviction for violating that statute, this Court focused on the meaning of the word "reside"—not "address"—concluding that, when a sex offender does not know where he will "reside" following his release,

he cannot be "convicted of failing to comply with the address reporting requirement." *Id.* ¶ 24.

For the Court's third question—whether the Circuit Court's "definition of 'address' [is] limited to residences of witnesses, as opposed to non-residential locations where the witnesses may be communicated with," February 9 Order at 3—Plaintiffs again show the unadministrability of their rule, Resp.23. In Plaintiffs' view, Section 6.87 does not require "a *residential* address," and any non-residential address of a witness, such as a business address, would suffice. *See* Resp.23. Taking Plaintiffs' amorphous rule to its logical conclusion, the address of *any* place where a witness may ever be communicated with, however fleetingly, would satisfy Section 6.87. Contrast this with the Legislature's (and WEC's) longstanding rule: an "address" comprises "[t]he particulars of *where a person lives*," *Address*, Oxford English Dictionary Online (Dec. 2023) (emphasis added),[1] meaning that the witness must provide the street number, street name, and name of municipality of where she lives, which could be a residential location or—if the

[1] Accessed at https://www.oed.com/dictionary/address_n (subscription required) (all websites last visited Feb. 20, 2024).

witness is living at a non-residential address, such as, for example, in a homeless shelter—a non-residential location.

Finally, this Court's fourth question asked whether "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." February 9 Order at 3. As the Legislature explains more fully below, *infra* pp.19–20, Plaintiffs retreat from the "reasonable person in the community standard" that the Circuit Court adopted at Plaintiffs' urging, perhaps in recognition of the unadministrability concerns. Resp.24. But Plaintiffs defended this standard below as "dictated pretty directly by the statutory framework that the Court applied in its January 2nd decision," Supp.App.74–75, and asked the Circuit Court to make this standard the centerpiece of their injunction.

3. Plaintiffs' assertion that "the Circuit Court carefully applied the standard the Supreme Court set out in *Waity*" is wrong. Resp.26–27; *contra* 2022 WI 6, ¶¶ 51–53; Supp.App.40–42. *Waity* held that when an appeal raises a novel question of statutory interpretation that is subject to de novo review, that alone

normally establishes the movant's likelihood of success on appeal for the purposes of a stay. Mot.28; *Waity*, 2022 WI 6, ¶¶ 51–53. This does not mean that "a litigant could invariably obtain a stay pending appeal" by raising a novel question of statutory interpretation, Resp.26, as the movant must still satisfy the three other *Waity* factors to merit a stay, *Waity*, 2022 WI 6, ¶ 49. And while the Legislature does not argue that an obviously wrong statutory-interpretation argument would suffice (after all, *Waity* did not deal with such a weak statutory argument), *see* Resp.26, this case does not even arguably implicate that situation, given that *the Circuit Court admitted that "a reasonable juris[t] might disagree with [its] analysis" on the merits*, Supp.App.49–50 (emphasis added); *accord* Supp.App.60.

4. Plaintiffs' various merits only show that reasonable jurists may disagree on appeal, Resp.27–36, such that the Legislature has a high likelihood of success on the merits here under *Waity*.

a. Text. In purportedly analyzing the statutory text, Plaintiffs merely offer their preferred Merriam-Webster dictionary definition of "address," claiming that it is better than the Legislature's definition derived from the Oxford English

Dictionary. Resp.27–30. As an initial matter, while Plaintiffs assert—without citation—that Merriam-Webster is the "preeminent dictionary of American English," Resp.27–28, it is "[t]he Oxford English Dictionary (OED) [that] is widely accepted as the most complete record of the English language ever assembled," *Oxford English Dictionary*, Harvard Library;[2] *About the OED*, Oxford English Dictionary Online ("The *Oxford English Dictionary* (*OED*) is widely regarded as the accepted authority on the English language.").[3]

Plaintiffs claim that the OED's definition of "address" does not call into doubt the Circuit Court's injunction, but that is incorrect. Resp.27–29. To begin, the OED's component-part definition, *not* Merriam-Webster's "functional" definition, represents the most "common, ordinary, and accepted meaning" of the term, which must guide a reviewing court's statutory analysis. *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. Further, that the OED definition lists "towns or districts," rather than a municipality, as "typical[ ]"

[2] Available at https://library.harvard.edu/services-tools/oxford-english-dictionary.

[3] Available at https://www.oed.com/information/about-the-oed/.

address components does not undermine its applicability here, Resp.29, because a "municipality" is "[a] town, city, or district having local self-government," *Municipality*, Oxford English Dictionary Online.[4] Finally, the distinction between components that are "typical[ ]"—like a street number, street name, and name of a town or district—and those that are merely "often" included—like a postal code—is important because it shows that only the "typical[ ]" components at issue here reflect what is "ordinar[ily]" and "common[ly]" understood as an "address," which is the primary goal of statutory interpretation. *Kalal*, 2004 WI 58, ¶ 45.

Plaintiffs' own preferred dictionary, for its part, undermines Plaintiffs' arguments. Resp.27–29. Plaintiffs have identified no dictionary definition that supports the Circuit Court's "reasonable person in the community" standard. February 9 Order at 3. Further, Plaintiffs' preferred dictionary includes definitions for "address" that, like the OED, call for particularized components, which components constitute the ordinary meaning of "address" as commonly understood. *Address,* Merriam-Webster Online (2024)

[4] Accessed at https://www.oed.com/dictionary/municipality_n (subscription required).

("directions for delivery on the outside of an object (such as a letter or package)").[5]

Plaintiffs' four hypothetical circumstances where information could "convey an 'address' without listing" specific components, Resp.28, do not support their position. Indeed, whether the addresses in Plaintiffs' hypotheticals are "sufficient" would necessarily depend on the subjective knowledge of the municipal clerk reviewing the absentee ballot, informed by that clerk's subjective view of a typical community member's level of familiarity with the community, its landmarks, and its institutions—an imprecise meta-inquiry that necessarily requires the clerk to disregard his or her own knowledge and instead take action based on conjecture about what others might know.

Plaintiffs' reliance on Justice Hagedorn's concurrence in *Trump v. Biden*, 2020 WI 91, 394 Wis. 2d 629, 951 N.W.2d 568, Resp.16, 27, is misplaced. As Justice Hagedorn noted, Section 6.87, unlike other provisions in Chapter 6, is "silent on precisely what makes a[ ] [witness] address sufficient." *Trump*, 2020 WI 91, ¶ 49 (Hagedorn, J., concurring). Thus, Justice

[5] Available at https://www.merriam-webster.com/dictionary/address.

Hagedorn concluded that Section 6.87 does not explicitly define "the contours of what makes a[ ] [witness'] address." *Id.* For example, Justice Hagedorn was uncertain whether a witness' address had to include a "municipality," the "state," or the "[z]ip code." *Id.* Yet, this discussion from Justice Hagedorn supports the Legislature's and WEC's three-component definition of a witness' address, not Plaintiffs' amorphous standard. That is because, while recognizing that Section 6.87 does not statutorily define a witness' "address," Justice Hagedorn accepted as a fundamental premise that an address comprises *particular components*—such as a "street address," "municipality," "state," or "[z]ip code"—without ever suggesting that an amorphous standard like the Circuit Court's would suffice. *See id.*

b. Context. Plaintiffs' discussion of the statutory context also fails to support their arguments.

Plaintiffs argue that Section 6.87(6d)'s requirement that a ballot be rejected if it is "missing" an address, rather than if an address is "incomplete," supports their construction, Resp.30–31, but the Circuit Court did not consider this issue in its analysis, nor did Plaintiffs even present it below, *see generally* App.27–33, 114–

119. Rather, the plaintiff in *LWV* had presented this "missing" argument as its first count in its operative complaint, which count the Circuit Court ultimately dismissed on justiciability grounds. Reply.App.26–27. That Plaintiffs must offer a new, additional argument to support the decision below necessarily demonstrates that the Legislature has a likelihood of success on appeal under *Waity*. 2022 WI 6, ¶ 49. And, in any event, this argument is wrong. If a witness address does not include one or more of the three component parts, the address—which is commonly understood as the combination of these three constitutive components—is "not present" or "not to be found," and is therefore "missing," *Missing*, Oxford English Dictionary Online,[6] as the Legislature explained in detail in *LWV* before the Circuit Court dismissed that claim.

c. *Purpose*. Plaintiffs do not meaningfully engage with the Legislature's argument that Section 6.87(2) provides the statutory purpose necessary to understand the meaning of "address" as used in Section 6.87(6d). Resp.31–32. Wisconsin's absentee ballot laws

[6] Accessed at https://www.oed.com/dictionary/missing_adj (subscription required).

are designed to "prevent the potential for fraud or abuse" inherent in the absentee voting system. Wis. Stat. § 6.84(1). Requiring a witness to include a street number, street name, and name of municipality ensures that election officials with be able to locate the witness in a consistent manner. Indeed, Plaintiffs' own argument on this point recognizes that locating a witness to ask about allegations of fraud or undue influence is the express purpose of the witness address requirement. Resp.32.

The Circuit Court's amorphous "reasonable person" standard does not further this express statutory purpose. Resp.32. Nothing about the "reasonable person" standard guarantees that anyone outside of the reviewing clerk would know where, or how, to contact a witness who lists an address that satisfies that standard. For example, it is possible that reasonable people from outside the relevant community may need to contact a witness to further the statutory purpose of preventing voter fraud by, for example, adjudicating a challenge to a ballot. *See* Wis. Stat. § 6.93 ("The vote of any absent elector may be challenged for cause and the inspectors of election shall have all the power and authority given them to hear and determine the legality of the ballot the

same as if the ballot had been voted in person."); *id.* § 6.925 ("*Any elector* may challenge for cause any person offering to vote whom the elector knows or suspects is not a qualified elector." (emphasis added.)). In such circumstances, the "reasonable person in the community standard" could well be insufficient.

d. Related Statutes. Plaintiffs' discussion of other statutes related to Section 6.87 likewise fails.

Chapter 6 of the Wisconsin Statutes contains several references to an "address," and, in each case, the term refers to specific component parts. For example, Section 6.34 lists a "complete residential address" as "including a numbered street address, if any, and the name of a municipality," Wis. Stat. § 6.34(3)(b)(2), which supports the conclusion that the term "address" in Section 6.87 likewise refers to particular address components, *Kalal*, 2004 WI 58, ¶ 46. Similarly, Section 6.87(2)'s requirement that an absentee voter certify his residence by providing a street number, street name, and name of municipality provides further evidence that related statutes are in accord with the Legislature's definition here. *See* Wis. Stat. § 6.87(2).

Contrary to Plaintiffs' assertion, Resp.32–33, the Legislature's definition does not create intolerable surplusage, as some statutory provisions have different requirements by which an address' sufficiency is determined, *see* Wis. Stat. § 6.34 (calling for a "*complete* residential address" (emphasis added)). And even if the Legislature's definition of a witness' "address" in Section 6.87 did result in some surplusage, "the canon against surplusage is not absolute." *Milwaukee Dist. Council 48 v. Milwaukee County.*, 2019 WI 24, ¶ 17 n.10, 385 Wis. 2d 748, 924 N.W.2d 153 (citing Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 176–77 (2012)).

e. Compliance With Federal Law. Plaintiffs argue that the Circuit Court's "functional definition of 'witness address' helps to avoid a plain violation of federal law," but they did not adequately preserve that argument below, App.120 n.4, so the Circuit Court should not have opined on it, App.13–14 (citing *Serv. Emps. Int'l Union, Loc. 1 v. Vos* ("*SEIU*"), 2020 WI 67, ¶ 24 & n.9, 393 Wis. 2d 38, 946 N.W.2d 35). In any event, this argument is wrong for the reasons that the Legislature presented in *LWV*—namely, that the Materiality Provision does not apply to Section 6.87's regulation of

the privilege of absentee voting, but even if it did, Section 6.87's witness-address requirement is plainly "material." *See* Reply.App.5–11. Finally, Plaintiffs' invocation of the Materiality Provision as support further shows that, at the very least, Plaintiffs are not entitled to an injunction while the *LWV* injunction (which District I refused to stay pending appeal, *see* Copy of Order Denying Motion for Relief in 2024AP166 (Feb. 9, 2024)), is in place because the *LWV* injunction remedies Plaintiffs' concerns, as the Legislature explains below, *infra* pp.35–36.

f. Statutory History. Plaintiffs admit that WEC promulgated the three-component definition of "address" in September 2016—"seven years ago." Resp.34 (emphasis added). That definition is consistent with the ordinary understanding of the term, *supra* pp.10–12, which term has been in the Wisconsin Statutes for decades, App.69–71, as Plaintiffs themselves recognize, Resp.34 (citing 1965 Wis. Act 666). Plaintiffs' amorphous definition is a sharp break from this history, and they cannot point to any historical source ever adopting the novel definition that they have put forward here for the purposes of the case. *Supra* pp.7–8.

g. Administrability. Plaintiffs fail to grapple with the significant administrability issues posed by the "reasonable person" standard that the Circuit Court imposed. Resp.35. Plaintiffs assert—almost apologetically—that they incorporated the "reasonable person in the community" standard in their proposed order to mitigate WEC's concerns about clerks needing to use "subjective personal knowledge in assessing witness addresses." Resp.35. But Plaintiffs have offered nothing to show that clerks will be able to administer the amorphous "reasonable person" standard, and therefore this standard does nothing to assuage WEC's concerns. In any event, the Circuit Court's injunction is in dispute here, and that Plaintiffs now appear remorseful about suggesting the "reasonable person" standard only further shows why a stay pending appeal is needed.

Plaintiffs' own statements during the Circuit Court's injunction hearing demonstrate the significant administrability problems that accompany the reasonable person standard. During the hearing, the Circuit Court questioned how the standard would apply to "[s]omebody [who] puts down one of the residential halls [in Madison]," such as "Anderson." Supp.App.75. The Circuit

Court then stated that, "despite living here for a long time," he doesn't "know any of the dorms," because he "didn't go to undergrad here," but that he thought "Anderson might be one." Supp.App.75. In response, Plaintiffs' counsel asserted that, "generally speaking, our position on named buildings is that it's going to depend on what the building is," and "in th[e] specific case of a university residence hall"—such as "Anderson Hall, Room 201"—"generally speaking," that will "satisf[y] the statutory requirement to provide an address," as it is "generally a large, public building" that "a reasonable person, familiar with the community . . . can be expected to be familiar with." Supp.App.76; *see also* Supp.App.83 ("with named buildings . . . its going to depend, to some extent, on how significant the building is in the community"). So, even for buildings like residence halls—which is the *only* example Plaintiffs can point to that concerns them still, in light of the *LWV* injunction—Plaintiffs' definition apparently requires clerks to consider whether the building is sufficiently large and sufficiently familiar to the community to satisfy Plaintiffs' definition. And, notably, "Anderson" does not appear to

be a residence hall in the University of Wisconsin-Madison. *See Residence Halls*, University of Wisconsin-Madison.[7]

WEC's guidance issued in response to the Circuit Court's injunction highlights the unadministrability of the new standard. Supp.App.243–44; Supp.App.248–51. In that guidance, WEC merely reiterated what the Circuit Court provided in its injunction order, stating that the order at a minimum prohibits the rejection of the four types of absentee ballots at issue in the related *LWV* injunction—which addressed specific categories of ballot errors, the treatment of which can be easily and uniformly administered. Supp.App.249. WEC's guidance concludes by simply directing clerks to consider whether they need to update their ballot-review procedures and to speak with legal counsel if necessary. Supp.App.250.

[7] Available at https://www.housing.wisc.edu/undergraduate/residence-halls/. Although Anderson is not a residence hall at the University of Wisconsin-Madison, this Court may take judicial notice of the fact that the Arthur Andersen Center is a center at the University's business school and there is an Anderson Auditorium at nearby-Edgewood College. *See* Wis. Stat. § 902.01; *Sisson v. Hansen Storage Co.*, 2008 WI App 111, ¶ 11, 313 Wis. 2d 411, 756 N.W.2d 667. Thus, the Circuit Court's reference to "Anderson" clearly demonstrates the substantial perils associated with the reasonable person in the community standard.

Finally, Plaintiffs argue that the record undermines the Legislature's claim that its three-component definition of a witness' "address" ensures uniform, statewide treatment, but this is unpersuasive. Resp.35–36. The record here shows that at least some of the three Clerk Defendants did not properly apply the three-component definition of "address," as WEC's then-operative guidance required—sometimes improperly rejecting ballots for failure to include additional discrete components, such as zip codes. App.109–10.

B. The State And Legislature Itself Will Suffer Irreparable Harm Without A Stay

1. Both the Legislature and the State, whose interests the Legislature represents here, will suffer irreparable harm absent a stay. Mot.43–50. The Circuit Court's injunction adopts a novel, unadministrable definition of a witness's "address" under Section 6.87, while compelling WEC to inform all clerks about the Circuit Court's view, which guidance the clerks may choose to follow or not. Mot.44–45. Clerks have no way to apply this amorphous definition in any objective matter, thus resulting in inconsistent treatment of absentee ballots. Mot.45–46.

2. Plaintiffs' counterarguments on the irreparable-harm-to-the-movant factor are incorrect.

First, Plaintiffs question the Legislature's authority to rely upon the State's interests in this case, Resp.37, but their concerns are unfounded. The Wisconsin Supreme Court expressly held in *Democratic National Committee v. Bostelmann,* 2020 WI 80, 394 Wis. 2d 33, 949 N.W.2d 423, that "the Legislature has the authority to represent the State of Wisconsin's interest in . . . state laws under § 803.09(2m)," *id.* ¶ 1; *accord SEIU*, 2020 WI 67, ¶¶ 50–73 (holding that Section 803.09(2m) is facially constitutional).[8] The Legislature has this authority, moreover, even when it has appealed in a case where the Department of Justice has also appeared to represent an executive-branch defendant. *Contra* Resp.37. That is just what happened in *Bostelmann* itself. Plaintiffs' citation of Wis. Stat. § 165.25(1) does not somehow change this straightforward holding in *Bostelmann*.

[8] *Bostelmann* considered the Legislature's statutory authority to represent the State's interest in the "validity of a state statute" under Section 803.09(2m). Wis. Stat. § 803.09(2m); *Bostelmann*, 2020 WI 80, ¶ 14. This case involves the Legislature's authority to represent the State's interest in "the construction . . . of a statute" under Section 803.09(2m). Wis. Stat. § 803.09(2m); *see Bostelmann*, 2020 WI 80, ¶ 12 (approvingly referencing "the interests statutorily granted to the Legislature under § 803.09(2m)").

Resp.37. Section 165.25(1) statutorily empowers the Attorney General—whose powers and duties are solely "prescribed by law," Wis. Const. art. VI, § 3; *State v. City of Oak Creek*, 2000 WI 9, ¶¶ 21, 24, 232 Wis. 2d 612, 605 N.W.2d 526—to represent the State on appeal, Wis. Stat. § 165.25(1). As *Bostelmann* explains, "[a]longside that section's grant of authority to the Attorney General and [the Department of Justice] are multiple references to the power of the Legislature to intervene under Wis. Stat. § 803.09(2m)." 2020 WI 80, ¶ 12. So, "[w]hen it comes to the interests statutorily granted to the Legislature under § 803.09(2m), the [statutory] authority given to the [the Department of Justice] to defend those interests is not exclusive." *Id.*

Second, Plaintiffs' argument that the Legislature has not identified any "real-world administrability problem[s]" with the Circuit Court's adoption of the "reasonable person in the community" standard for a witness's address, Resp.35, 37, is simply false. The Legislature carefully explained throughout its Motion that the Circuit Court's amorphous standard could not be consistently applied by clerks, including because it requires clerks

to somehow determine whether they know more or less than a reasonable person in their community. Mot.7, 42–43, 44–46.

Plaintiffs criticize the Legislature's invocation of witnesses in university housing as an example of the administrability problem, Resp.37 (discussing Mot.45), but that backfires badly. Plaintiffs' own colloquy with the Circuit Court over the application of the "reasonable person in the community" standard to absentee-ballot witnesses living in university housing demonstrates the hopeless unadministrability of this standard. *Supra* pp.20–21. As Plaintiffs explained at that hearing, whether an address like "Anderson Hall, Room 201"—which, again, appears not to be an actual residence hall—satisfies Plaintiffs' standard depends upon whether the building is "a large, public building" that is "familiar [to] the community." Supp.App.76; *see also* Supp.App.83; *supra* pp.20–21. Yet, there is no objective way for clerks to determine this under the "reasonable person" standard. For example, as the Circuit Court itself stated, the Court did not "know any of the dorms" at the University of Wisconsin-Madison "despite living [in Madison] for a long time," because he "didn't go to undergrad here." Supp.App.75. And likely even more confounding questions arise

for other kinds of large, even less familiar residential structures in a community, such as senior living facilities, apartment complexes, townhome subdivisions, and the like.

Third, Plaintiffs contend that this Court should consider the Legislature's irreparable harms from the supposed "status quo" of "confusion and inconsistency" in the application of the witness-address requirement prior to this case. Resp.37. But Plaintiffs only submitted evidence of the Clerk Defendants applying the witness-address requirement, App.109–10, 121, and the disparity among these three Clerks was over the particular address components that they required witnesses to include, App.109–10; Supp.App.175, 186, 200. Plaintiffs submitted no evidence of any clerk adopting anything like the amorphous definition of a witness "address" that the Circuit Court adopted here.

Fourth, Plaintiffs argue that the Legislature will not suffer harm from the inconsistent application of the Circuit Court's "reasonable person in the community" standard for a witness' address because, in their view, the 1,800 clerks across the State will inevitably apply the Circuit Court's standard voluntarily—at least if this Court "declined to stay it and indicated that it is likely

to affirm on the merits." Resp.35, 37–38. This argument is wrong and misunderstands the required stay-pending-appeal analysis.

Crucially, and as an initial matter, *Plaintiffs do not contest that the injunction only binds the three Clerk Defendants, and that WEC's newly issued guidance has no binding effect on the overwhelming majority of the clerks.* Resp.37–38; *see* Mot.21–22; Wis. Stat. § 227.112(3); *Jefferson v. Dane County*, 2020 WI 90, ¶ 24 n.5, 394 Wis. 2d 602, 951 N.W.2d 556. Thus, Plaintiffs have conceded away any plausible claim that the injunction creates "a uniform, statewide judicial construction of the witness-address requirement." Resp.6–7; *see* Resp.37–38.

Further, even if every single clerk in Wisconsin voluntarily decided to adopt this new approach, the administrability problems inherent in the application of such an amorphous standard guarantee that it would result in inconsistent treatment of absentee ballots across the state. *See supra* pp. 19–22, 25–26.

Those points aside, this Court's irreparable-harm analysis does *not* depend on whether "it is likely to affirm on the merits," thus "the Legislature's decision to appeal" the merits decision here could not possibly "moot[ ] its own argument" on the irreparable-

harm element for a stay-pending appeal. Resp.37–38. As *Waity* held, the irreparable-harm element requires this Court to *assume* that the Legislature is likely to succeed on the merits and then, from that assumption, consider whether the Legislature will suffer irreparable harm during the pendency of the appeal *if it ultimately prevails*. 2022 WI 6, ¶ 57.

Plaintiffs claim that the Circuit Court did properly analyze the irreparable-harm-to-the-movant factor by first assuming that the Legislature would prevail on appeal and then considering the Legislature's asserted harms, but this is incorrect. Resp.38–39. While the Circuit Court stated that it was considering whether the Legislature will "suffer irreparable injury absent a stay," as *Waity* requires, Resp.38–39 (quoting Supp.App.51); *Waity*, 2022 WI 6, ¶¶ 54–57, the substance of its analysis was legally flawed. Specifically, the Circuit Court's irreparable-harm-to-the-movant analysis considered whether the Legislature would suffer harm if, after WEC complied with the Circuit Court's injunction by rescinding its longstanding definition of a witness' "address" and issuing new guidance to clerks informing them of the Circuit Court's new definition, WEC had "to issue a subsequent

communication *saying a stay has been granted*." Supp.App.53–54 (emphasis added); *see* Resp.38–39. However, *Waity* required the Circuit Court to consider the Legislature's harm absent a stay if the Legislature were to prevail on the merits *after its appeal before this Court*. 2022 WI 6, ¶¶ 54–57. That required the Circuit Court to consider the Legislature's harm from WEC administering Section 6.87 according to the Circuit Court's injunction, this Court then overturning that injunction on the merits after its full review, and WEC consequently returning to administer Section 6.87 in the same way that it has been administered for the past several years prior to the Circuit Court's injunction. The Circuit Court nowhere conducted that required analysis, *see generally* Supp.App.51–54, which is a legal error under *Waity*.

Finally, Plaintiffs argue, without any legal support, that the Circuit Court correctly weighed WEC's decision not to join the Legislature's appeal and stay motions, Resp.38, but that argument is unsupported. In *Bostlemann*, WEC's decision not to join the Legislature's motion for a stay pending appeal of a district court order extending certain registration and absentee voting deadlines had no bearing on the analytical framework the Seventh Circuit

used in addressing that motion. *Democratic Nat'l Comm. v. Bostelmann*, 977 F.3d 639, 641–43 (7th Cir. 2020); *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28 (2020).

C. The Legislature Showed That Plaintiffs Will Suffer No Harm Absent A Stay Pending Appeal

1. Plaintiffs, in contrast, will not suffer harm if this Court were to stay the Circuit Court's injunction pending appeal, as the Legislature explained. Mot.50–56 (citing *Waity,* 2022 WI 6, ¶ 58). All that a witness must do to comply with the witness-address requirement is write her street number, street name, and name of municipality on the witness certificate—a simple, minimally burdensome requirement that any citizen can be expected to complete. Mot.50–51. WEC recently made this witness-address requirement even easier to satisfy with its updated Standard Absentee Ballot Certificate, which certificate expressly directs the witness to provide these three pieces of information. Mot.51 (reproducing App.40).[9] The Circuit Court, for its part, erred in

[9] The Legislature submitted WEC's updated Standard Absentee Ballot Certificate, under affidavit, as part of its stay-pending-appeal motion in the Circuit Court below, thus it is part of the record under review here. App.37, 40–41; *compare* Resp.40 n.14 (noting that the Commission adopted the updated Standard Absentee Ballot Certificate after the parties filed their summary-judgment motions).

concluding that Plaintiffs would suffer harm from a stay: whatever resource expenditures Plaintiffs will incur for its voter-education efforts are decidedly minimal—and it is unclear how a stay would actually affect Plaintiffs' efforts, in any event. Mot.52–53. The Circuit Court's order does not save Plaintiffs from the harm of inconsistent application of the witness-address requirement, as the Circuit Court's own definition of "address" cannot be applied consistently, and nonparty clerks are not bound by that definition. Mot.53. And any concerns of disenfranchisement referenced by the Circuit Court do not weigh against a stay, Mot.54—especially given the Circuit Court's companion *LWV* injunction, Mot.54–56, which injunction District I has now declined to stay pending appeal.

2. Plaintiffs' assertions regarding their supposed harms are wrong.

Plaintiffs do not meaningfully confront the Legislature's argument that complying with the witness-address requirement, as it has been consistently understood by WEC and the Legislature, is straightforward. *See* Resp.39–40. Plaintiffs claim that university students, in particular, may have difficulty listing

their street number, street name, and name of municipality on a witness-address certificate because their dorm-room number and residence-hall name may also make up their university-housing address. Resp.39 (citing App.166). But Plaintiffs failed to provide any *factual*, *record* support for this claim, instead relying solely on the allegations in their own operative Complaint, Resp.39, and "[c]ommon sense," *see* App.115. This Court should thus disregard this argument out of hand. Wis. Stat. § 802.08(3); *Tews v. NHI, LLC*, 2010 WI 137, ¶ 82, 330 Wis. 2d 389, 793 N.W.2d 860 ("[T]he complaint is not evidentiary." (citation omitted)). And Plaintiffs' only "citation" for this proposition—paragraph 61 of their operative Complaint—shows that a student's university-housing address *does* include a street number, street name, and name of municipality, App.166, undercutting their argument entirely.

Plaintiffs only other response is that *one* anonymous individual improperly completed WEC's updated Standard Absentee Ballot Certificate by writing "same as above," instead of his actual address. Resp.39–40 (citing Supp.App.340). That one unknown person—a person who Plaintiffs do not even claim to be affiliated with or represent—had difficulty completing the updated

witness certificate cannot possibly establish Plaintiffs' own "substantial harm" from a stay, under *Waity*. 2022 WI 6, ¶ 58.

Plaintiffs claim that the Legislature "downplays the number of affected voters." Resp.40. But the Circuit Court itself recognized that its decision was "very limited," affecting only "a subset" of the limited number of votes rejected "due to an insufficient certification," Supp.App.55, and the evidence in *LWV* demonstrated that only 67 ballots were rejected for witness-address errors, with no finding of how many of these errors were cured, Mot.54. While Plaintiffs criticize the Legislature's invocation of this record evidence in the companion *LWV* case, Resp.40, Plaintiffs invoked the "[s]ummary judgment evidence adduced in the now-consolidated case, *League of Women Voters*" for support below. App.110, thus they cannot object to consideration of that evidence, *see Mrozek v. Intra Fin. Corp.*, 2005 WI 73, ¶ 22, 281 Wis. 2d 448, 699 N.W.2d 54 (judicial estoppel).

Plaintiffs defend the Circuit Court's conclusion that Plaintiffs will suffer a resource-diversion harm because "it is not easy to comply with a law that, currently, is inconsistently applied by 1,800 election clerks." Resp.41 (quoting Supp.App.54–55). Yet,

that conclusion rests on two fatal errors, to which Plaintiffs have no adequate response. First, the Circuit Court legally erred in believing that its order would apply to all clerks statewide, rather than just the three Clerk Defendants before it, as Plaintiffs now concede by silence. Wis. Stat. § 227.112(3); *Jefferson*, 2020 WI 90, ¶ 24 n.5; App.109–121; Supp.App.175, 186, 200. And, second, the Circuit Court also legally erred by concluding that its amorphous definition of a witness' "address" would be applied by clerks consistently, so as to reduce Plaintiffs' alleged resource-diversion harm, *supra* pp.19–22, 25–26.

Finally, Plaintiffs claim that the injunction in *LWV*—which District I has now declined to stay pending appeal—should not change the stay-pending-appeal calculus here, but that is unpersuasive. A circuit court considering whether to grant an injunction—and, accordingly, a court considering whether to stay such an injunction pending appeal—must "weigh *any* applicable equitable considerations." *Forest County v. Goode*, 219 Wis. 2d 654, 684, 579 N.W.2d 715 (1998) (providing "list" of such considerations that is not "exhaustive," but "illustrat[ive]"). Here, the presence of the *LWV* injunction is an applicable equitable

consideration, *see id.,* because that injunction addresses all of Plaintiffs' genuine concerns, Mot.55–56. Plaintiffs complain that "this Court cannot predict whether the *League* injunction will stay in place until this appeal is resolved," Resp.41, but District I has already declined to stay the *LWV* injunction pending appeal, Order, *League of Women Voters of Wis v. WEC*, No.2024AP166 (Wis. Ct. App. Feb. 8, 2024). And while Plaintiffs point out that the *LWV* injunction does not cover students who list their "university residence hall[ ]" as their witness address, Resp.41, the Circuit Court's injunction does not actually resolve that claimed issue, *supra* pp.31–32.

D. A Stay Pending Appeal Is In The Public Interest

1. Finally, the Legislature explained that a stay pending appeal here is in the public interest. Mot.56–57 (citing *Waity,* 2022 WI 6, ¶¶ 49, 60). The public will suffer in the absence of a stay pending appeal for the same reasons that the Legislature and the State will suffer irreparable harm in the absence of such a stay. Mot.56–57. The Circuit Court's injunction requires WEC to rescind its longstanding guidance on the interpretation of a witness' "address" and replace it with guidance adopting the Circuit Court's amorphous, unadministrable standard. Mot.56–

57. Then, if the Legislature prevails on appeal here, WEC will have to reverse course and reinstitute its longstanding definition. That is a textbook example of the "judicially created confusion" that comes from injunctions of election laws in the midst of ongoing elections, compelling a stay pending appeal to protect the public interest. *Republican Nat'l Comm. v. Democratic Nat'l Comm.,* 140 S. Ct. 1205, 1207 (2020) (citing *Purcell v. Gonzalez,* 549 U.S. 1 (2006) (per curiam)).

2. Plaintiffs' arguments on the public-interest factor largely incorporate their arguments on the harm-to-the-movant factor, Resp.41–42, and so fail for the same reasons, *supra* Part II. Beyond this, Plaintiffs invoke the public's "incredibly strong interest in preserving the constitutional right to vote" to challenge a stay pending appeal here, Resp.42, but that invocation is decidedly misplaced in this case. The Circuit Court's injunction below deals only with one component of Wisconsin's absentee-voting regime, App.21–23, and the Wisconsin Constitution, the Wisconsin Statutes, the Wisconsin Supreme Court, and various federal courts—including the U.S. Supreme Court—all unequivocally establish that absentee voting is *not* part of the

fundamental right to vote.[10] Thus, staying the Circuit Court's injunction below does not in any way affect "the constitutional right to vote." *Contra* Resp.41–42. In any event, it is also notable here that the witness-address requirement—the only provision affected by the Circuit Court's injunction below—is exceedingly straightforward, while the absentee-voting regime more broadly incorporates a cure provision that may be used to correct witness-address errors. *Compare* Wis. Stat. § 6.87(2), (6d); *with id.* § 6.87(9). The scope of the injunction is fatal to Plaintiffs' argument here because, as discussed above, *supra* pp.35–36, it does not even resolve the only practical problem that Plaintiffs can invoke now, in light of the relief issued in *LWV*—students who list their "university residence hall[ ]" as their witness address, Resp.41.

[10] *McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 807–08 (1969); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 n.6 (1969); *Hill v. Stone*, 421 U.S. 289, 300 n.9 (1975); *Goosby v. Osser*, 409 U.S. 512, 521–22 (1973); *Bullock v. Carter*, 405 U.S. 134, 143 (1972); *Common Cause Ind. v. Lawson*, 977 F.3d 663, 664 (7th Cir. 2020); *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 185 (5th Cir. 2020); *Mays v. LaRose*, 951 F.3d 775, 792 (6th Cir. 2020); *Org. for Black Struggle v. Ashcroft*, 978 F.3d 603, 607 (8th Cir. 2020); *Tully v. Okeson,* 977 F.3d 608, 613 (7th Cir. 2020); *Teigen v. Wis. Elections Comm'n*, 2022 WI 64, ¶ 71, 403 Wis. 2d 607, 976 N.W.2d 519.

CONCLUSION

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

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Respectfully submitted,

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