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CIRCUIT COURT
DANE COUNTY, WI
2022CV002446

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February 1, 2024

VIA EFILING

Hon. Ryan D. Nilsestuen
Dane County Circuit Court, Branch 10
215 S. Hamilton St.,
Madison, WI 53703

Re: ***Rise, Inc. et al. v. Wisconsin Elections Commission, et al.*, No. 2022-CV-2446**
Response in Opposition to Motion for Stay Pending Appeal

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Dear Judge Nilsestuen:

Consistent with the Court's instruction that the parties provide letter briefs addressing whether to stay the January 30 order, Doc. 238, pending appeal, Plaintiffs Rise, Inc. and Jason Rivera write to oppose Intervenor-Defendant the Wisconsin State Legislature's application for such a stay.

I. Legal Standard

In ruling on Intervenor's motion, the Court must balance four considerations:

(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 no substantial harm will come to other interested parties; and
(4) whether the movant shows that a stay will do no harm to the public interest.

Waity v. LeMahieu, 2022 WI 6, ¶ 49, 400 Wis. 2d 356, 969 N.W.2d 263.

Whether to grant a stay pending appeal is a discretionary decision reviewed with considerable deference. *State v. Gudenschwager*, 191 Wis. 2d 431, 439–40, 529 N.W.2d 225 (1995) (per curiam). So long as the Court uses "a rational process" to reach "a decision that a reasonable judge could make," any reviewing court must affirm. *Weber v. White*, 2004 WI 63, ¶ 40, 272 Wis. 2d 121, 681 N.W.2d 137; *see also Waity*, 2002 WI 6, ¶ 85 (Dallet, J., dissenting).

Intervenor's motion satisfies none of the four *Waity* factors.

I. Intervenor has not made a "strong showing" of likely success on appeal.

Intervenor is not likely to succeed on appeal because this is a statutory interpretation case and Intervenor's argument is irreconcilable with the plain text of the relevant statute. The statute merely requires an "address," without requiring that it take any particular form. Wis. Stat. § 6.87(2).

In arguing otherwise, Intervenor relies primarily on a single dictionary definition. But as the Court rightly observed, the definition in question undermines Intervenor's argument by providing only that an "address" "typically" consists of particular components, and not that it must do so. Doc. 233 at 3. Intervenor now burrows further into the dictionary in an attempt to distinguish "typical" address components from components that are "often" part of an address. But that exercise does not alter the fundamental fact that the statute requires only an "address," not a "typical address" or an address that takes any particular form.

The Court also rightly held that other statutes support the Court's reasoning. Wis. Stat. § 6.34(b)(2), for one, defines a "complete residential address" to include "a numbered street address, if any, and the name of the municipality." The contrast between that statute and Wis. Stat. § 6.87 shows that Wisconsin's lawmakers use more specific terms when they intend to require an address in a particular form. Indeed, one Supreme Court justice has already noted the "stark contrast" between section 6.87 and "other provisions of the election statutes that are more specific," including section 6.34. *Trump v. Biden*, 2020 WI 91, ¶ 49, 394 Wis.2d 629, 951 N.W.2d 568 (Hagedorn, J., concurring). Intervenor's sole answer to this point is to argue that the obvious surplusage its reading would create in Section 6.87 poses no problem because the Court's decision construing "address" adopts "an 'unusual meaning' of the statutory term." Doc. 245 at 8. But it does no such thing—the adopted construction is the first definition of the term in the most prominent dictionary of American English.

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Moreover, as the Court also already held, Intervenor's definition would create more problems than it solves, because it would run afoul of federal law. Doc. 233 at 6. Intervenor claims that Plaintiffs "did not make" this argument and so faults the Court for crediting it. Doc. 245 at 10. But Plaintiffs *did* make the argument, explaining in their opening brief on summary judgment that state law should be construed to avoid federal preemption. Doc. 213 at 17 n.4.[1] And although Intervenor gestures at vague administrability concerns, Intervenor still has not identified any category of actually existing ballots that cannot easily be assessed under the Court's construction of "address."

[1] By the same logic, Intervenor is wrong to suggest that denial of a stay in *League* would render a stay appropriate here. The proper statutory definition of "address" is a question that precedes the Materiality Provision analysis—a state-law requirement does not conflict with federal law if state law does not actually require the thing federal law prohibits. And the definition of "address" declared in this case applies to all absentee ballot certificates, not just the four categories that are the subject of the order in *League*.

Finally, Intervenor makes the peculiar decision to continue pressing on *State v. Buer*, 174 Wis. 120, 182 N.W. 855 (1921). As the Court quite rightly noted, *Buer* dismissed a state-constitutional challenge to a statute—it did not and could not have announced a new, statewide "perfect equality" constraint on elections statutes because it ruled *against* the party seeking to enjoin the statute at issue. *Id.* at 857. Intervenor, moreover, misrepresents Plaintiffs' analysis of *Buer*. *Compare* Doc. 245 at 9–10 (claiming that Plaintiffs did not argue that their definition of "address" complies with *Buer*), *with* Doc. 228 at 9 n.5 (explaining that to the extent *Buer* applies, it is satisfied for all the same reasons that *Bush v. Gore* is satisfied).

Thus, although reviewing courts will consider the construction of the witness address requirement *de novo*, Intervenor has not made the "strong showing" of likely success that would be required to justify a stay. *Waity*, 2022 WI 6, ¶ 49. Nothing Intervenor identifies in its stay motion creates significant doubt about the soundness of the Court's January 2 decision. Rather, Intervenor just repeats failed arguments and mischaracterizes the record. Such a meager showing is not likely to convince "other reasonable jurists" to "come to a different conclusion." *Waity*, 2022 WI 6, ¶ 53.

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II. The equities foreclose a stay.

The remaining three *Waity* considerations also foreclose a stay here.

First, Intervenor has not shown irreparable injury in the absence of a stay. Intervenor's argument ignores that the Court's order does nothing more than enforce the statute as written. Thus, the Court has not "replaced Section 6.87's" requirements with something new, Doc. 245 at 12, but merely construed the statute's requirements and ordered the Commission and Clerk Defendants to comply with the statute as construed. The three-component definition that Intervenor criticizes the Court for setting aside appears nowhere in the statute: it comes instead from the Commission's guidance and Intervenor's briefs. Nor has the three-component definition "prevailed since this statute's enactment," Doc. 245 at 12—as the Court found in 2022, "[f]or the past 56 years Wisconsin elections have been conducted, and absentee ballots counted, apparently without a legally binding definition of the witness address," Doc. 129 at 3. In the resulting vacuum, municipal clerks have adopted their own idiosyncratic definitions of the term; the three Clerk Defendants in this action, for instance, admitted to employing three different and inconsistent definitions. Doc. 177, ¶ 45; Doc. 178, ¶ 44; Doc. 179, ¶ 46; *see also* Doc. 160, ¶¶ 44–46; Doc. 213 at 6–7 & n.1. A stay will therefore frustrate, not further, the "orderly administration of elections," Doc. 245 at 12, by perpetuating the same inconsistencies that plagued the November 2022 election.

In any event, Intervenor is wrong to claim that it represents "the State" for purposes of the appeal. Doc. 245 at 12. The Attorney General and Department of Justice represent the State in "all actions and proceedings, civil or criminal, in the court of appeals and the supreme court," Wis. Stat. § 165.25(1), and the Department of Justice has not moved for a stay pending appeal in this matter even though it is present in the matter as counsel to the Commission, the relevant arm of the State, and even though it is the Commission and the municipal clerks—not Intervenor—who are directly affected by the Court's order. The fact that the Commission and the Clerk

Defendants—who actually administer the statute—do not seek a stay suggests that Intervenor's concerns are illusory.

Second, a stay will inflict grave harm on other interested parties—Plaintiffs and voters across Wisconsin—because it will cause future elections to be conducted either in the absence of adequate guidance about the meaning of "address" or under a standard that is more demanding than the statute itself. Either way, voters will be disenfranchised as a result.

Plaintiffs first initiated this action in September 2022, seeking relief in advance of the then-impending general election. Plaintiffs warned that, in the absence of judicial guidance construing Wis. Stat. § 6.87's witness requirement, clerks would apply different and inconsistent definitions of the term "address." In a good-faith effort to stave off that grave harm, Plaintiffs filed two separate motions for temporary injunction and a motion for expedited summary judgment. Docs. 5, 85, 103. Plaintiffs even requested that, insofar as the Court was inclined to adopt Intervenor's three-component definition, it do so promptly—to ensure that a consistent standard for witness addresses of some sort applied statewide during the November 2022 election. Doc. 125 at 10. But Intervenor thwarted all these efforts, urging the Court not to reach the merits until the election had passed. *See, e.g.*, Doc. 115.

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Plaintiffs' warnings about the serious consequences of delay proved correct. In the November 2022 election and other statewide elections since then, ballots that would have been accepted and counted in Madison were rejected in Racine; ballots that would have been accepted and counted in Racine and Madison were rejected in Green Bay. Doc. 213 at 6–7. Similar inconsistencies plagued the treatment of absentee ballots in municipalities all across the state. *Id.* at 7 n.1.

Granting a stay would likely allow those inconsistencies to persist through the entire 2024 election cycle. Intervenor seeks a stay "until resolution of Intervenor Defendant's appeal from this case to the Court of Appeals and, if applicable, the Supreme Court." Doc. 247 at 1. Appeal to the Court of Appeals often consumes over a year, and appeal to the Supreme Court will take longer still.[2] Accordingly, a stay will likely extend Intervenor's successful stall tactics through a second federal election cycle.

A stay would therefore cause substantial harm to Plaintiff Rise. Rise has explained that Wisconsin's lack of a single coherent standard for witness addresses has compelled it to shift resources away from absentee voting in its get-out-the-vote programming. Doc. 213 at 10; Doc. 211, ¶¶ 11–14 Although absentee voting is a popular and convenient method of voting for the student voters it aims to organize, Rise cannot risk having its target voters' ballots disqualified because of varied and inconsistent local standards for witness addresses. Doc. 211, ¶¶ 13–14.

[2] This case will be reviewed by a three-judge panel in District IV. The average time from notice of appeal to decision in such appeals is 388 days. Wis. Court Sys., Court of Appeals Annual Report 3 (2022), https://www.wicourts.gov/ca/DisplayDocument.pdf?content=pdf&seqNo=679537.

Contrary to Intervenor's naked assertion, it is not "easy to comply," Doc. 245 at 15, with a law that may be applied differently in each of the cities in which Rise conducts programming. A stay will leave Rise with no choice but to continue eschewing absentee voting for a second full election cycle. The resulting "substantial harm" to Rise's resources and programming requires denying the motion. *Waity*, 2022 WI 6, ¶ 49.

Finally, as to the public interest, the status quo is not, as Intervenor assumes without any justification, consistent statewide application of its three-component definition. To the contrary, the status quo is "voter and clerk confusion," Doc. 245 at 14, because the Commission's guidance endorsing the three-component definition (i) is not binding on clerks and (ii) is so plainly atextual that many clerks are not following it. In fact, this Court found during the 2022 temporary injunction litigation that the "status quo" is that Wisconsin does not have a single uniform standard for witness addresses. Doc. 129 at 3 ("For the past 56 years Wisconsin elections have been conducted, and absentee ballots counted, apparently without a legally binding definition of the witness address. Since then, until the present, clerks have been legally free to interpret the term.").

Because the status quo comprises inconsistent local standards that are perpetuating voter and clerk confusion, Intervenor's argument that "a stay will simply maintain the status quo," Doc. 245 at 15, is a reason to deny the motion. ***Only immediate application of the Court's order will ensure that all absentee ballots statewide are assessed using a single, uniform standard during the impending spring primary and subsequent elections.*** A stay, by contrast, will further perpetuate the prevailing confusion and inconsistency. The resulting "harm to the public interest" suffices by itself to warrant denying the motion. *Waity*, 2022 WI 6, ¶ 49.

Thus, the equities favor denial of a stay.

III. An administrative stay is inappropriate.

In the alternative, Intervenor requests an administrative stay. But an administrative stay is no more justified than a stay pending appeal. Intervenor again assumes that clerks are uniformly applying the three-component definition to absentee ballot certificates. They are not, so a stay will not avoid "confusion for municipal clerks and voters," Doc. 245 at 16, during the spring primary. Such confusion is the status quo, and only giving the Court's January 30 order immediate effect will do anything to resolve it.

Respectfully submitted,

/s/ David Fox
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Counsel to Plaintiffs

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