

FILED  
09-27-2022  
CIRCUIT COURT  
DANE COUNTY, WI  
2022CV002446  
Honorable Juan B Colas  
Branch 10

STATE OF WISCONSIN	CIRCUIT COURT BRANCH	DANE COUNTY
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RISE, INC.

*and*

JASON RIVERA,

Plaintiffs,

v.

WISCONSIN ELECTIONS COMMISSION,

*and*

MARIBETH WITZEL-BEHL, in her official  
capacity as City Clerk for the City of Madison,  
Wisconsin

Defendants.

Declaratory Judgment  
Case No. 22-CV-  
Case Code: 30701

### AFFIDAVIT OF DIANE M. WELSH

STATE OF WISCONSIN     )  
  ) ss  
DANE COUNTY             )

I, Diane M. Welsh, being first duly sworn on oath, depose and state as follows:

1. I am one of the attorneys representing Plaintiffs Rise, Inc. and Mr. Jason Rivera in the captioned action. I make this Affidavit on personal knowledge of the facts and circumstances set forth herein.

2. A true and correct copy of the webpage *Absentee Witness Address Corrections*, WEC, <https://elections.wi.gov/absentee-witness-address-corrections>, as it appeared and was archived on August 3, 2022, is attached hereto as **Exhibit 1**.

3. A true and correct copy of *Amended: Missing or Insufficient Witness Address on Absentee Certificate Envelopes*, WEC (Oct. 18, 2016), is attached hereto as **Exhibit 2**.

4. A true and correct copy of *White v. Wis. Elections Comm'n*, No. 2022-CV-1008, unpub. order (Dkt. 167) (Sept. 7, 2022), is attached hereto as **Exhibit 3**.

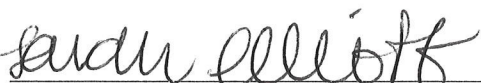
5. A true and correct copy of *White v. Wis. Elections Comm'n*, No. 2022-CV-1008, Tr. of Arg. of Temp. Inj. (Sept. 7, 2022), is attached hereto as **Exhibit 4**.

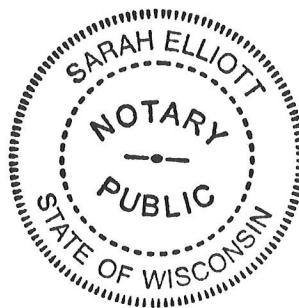
6. A true and correct copy of *White v. Wis. Elections Comm'n*, No. 2022-CV-1008, Tr. of Mot. to Stay Hr'g (Sept. 13, 2022), is attached hereto as **Exhibit 5**.

Dated this 27th day of September, 2022.

  
Diane M. Welsh, SBN 1030940

SUBSCRIBED and SWORN to before  
me this 27<sup>th</sup> day of September, 2022.

  
Notary Public, State of Wisconsin  
My commission expires June 3<sup>rd</sup>, 2024.



The Wayback Machine - <https://web.archive.org/web/20220803191715/https://elections.wi.gov/absentee-...>

**WISCONSIN ELECTIONS  
COMMISSION**

**EXHIBIT  
1**

## Absentee Witness Address Corrections

- In 2015 Wisconsin Act 261 created Wis. Stat. § 6.87(6d). This statute required an absentee witness address be present on the certificate envelope in order for the ballot to be counted.
- October 4, 2016, Wisconsin Elections Commission ("Commission") staff issued initial guidance based on many calls from clerks asking how the new statutory requirement should be interpreted due to a concern that many absentee ballots cast in the November 2016 General/Presidential Election would be rejected for lacking a complete witness address. The initial guidance from the Commission staff outlined that a street number, street name and municipality name were the minimum pieces of information required for the witness address to be complete, and also that in addition to returning the absentee ballot to the voter to correct the error, a clerk could correct missing information if they received consent from the voter to do so.
- The Wisconsin Department of Justice advised that a reasonable, defensible interpretation of the law would be to allow a local election officials to add the municipality name to a witness certificate if the information could be reasonably ascertained by the official. Prior consent of the voter or witness would not be required, although contacting the voter or witness, if possible, to obtain the information could be helpful.
- During its October 14, 2016 meeting, the Commission unanimously passed motions directing staff to issue updated guidance that clerks:
  1. must add the name of the municipality of the witness if they are reasonably able to ascertain it from other information on the envelope, or other reliable extrinsic sources
  2. the witness address must include a street number, street name and municipality
  3. the clerk does not have to obtain consent from the voter prior to adding it to the envelope
  4. if any addition is made by the clerk, should initial it.
- Based on the Commission's motions, staff issued guidance on October 17, 2016 (amended by the October 4, 2020 guidance) in the form of a clerk communication found here: <https://elections.wi.gov/memo/amended-missing-or-insufficient-witness-address-absentee-certificate-envelopes>
- This guidance has been in place since October 2016, covering all elections subsequent to that

date.

- The issue of correcting missing witness address information was raised in the recount litigation after the November 2020 Election: *Trump v. Biden*, 2020 WI 91, 394 Wis. 2d 629, 951 N.W.2d 568.
  - The majority determined that Wis. Stat. § 6.87(6d) does not say which portion of the address the witness must provide. Furthermore, the guidance that the Commission created has been followed statewide since October 2016, including in the 2016 Presidential Election. The majority concluded that striking the ballots exclusively in Milwaukee and Dane counties, years after this guidance has been issued and relied on, was unreasonable and prejudicial.
  - The concurrence stated that it is clear that Wis. Stat. § 6.87(6d) would prohibit counting a ballot if the entire address is absent from the certification. However, if the witness provided only part of the address, it is not clear which parts of the address satisfy the statutory directive (i.e., street address, state name, zip code, etc.). The WEC, other election officials, the Legislature, and others may wish to examine witness address information being added to a certificate as a valid administrative concern and may also wish to examine if the requirements of the applicable statute and measures involving the guidance and practice of these practices are currently sufficient to avoid future problems.

- 📄 **Memo Re: Absentee Witness Address**
- 📄 **Supreme Court Decision (Trump v. Biden recount)**
- 📄 **10.18.2022 Guidance-insufficient witness address-AMENDED**
- 📄 **10-14-2016 Elections Commission Open Session Minutes**
- 📄 **10.14.16 Absentee Certificate Envelopes Memo**
- 📄 **10.14.2016 AMENDED Memo Absentee Certificate Address**

# WISCONSIN ELECTIONS COMMISSION

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MARK L. THOMSEN, CHAIR

## MEMORANDUM

**DATE:** October 18, 2016

**TO:** Wisconsin Municipal Clerks and the Milwaukee City Elections Commission  
Wisconsin County Clerks and the Milwaukee County Elections Commission

**FROM:** Michael Haas, Interim Elections Administrator  
Diane Lowe, Lead Elections Specialist

**SUBJECT:** **AMENDED:** Missing or Insufficient Witness Address on Absentee Certificate Envelopes

**PLEASE NOTE:** The previous guidance on this topic, which was issued on October 4, 2016, has been modified by the WEC and is replaced with the guidance below.

One of the components of 2015 Wisconsin Act 261 is the requirement for an absentee ballot witness to provide their address when signing the absentee certificate envelope.

**SECTION 78. 6.87 (6d)** of the statutes is created to read:

**6.87 (6d)** If a certificate is missing the address of a witness, the ballot may not be counted.

In implementing this requirement, the first question that comes to mind is “What constitutes an address?” The Wisconsin Elections Commission (WEC) has set a policy that a complete address contains a *street number, street name and name of municipality*. But in many cases, at least one component of the address could be missing; usually the municipality.

The purpose of this memorandum is to offer guidance to assist you in addressing this issue. The WEC has determined that clerks **must** take corrective actions in an attempt to remedy a witness address error. If clerks are reasonably able to discern any missing information from outside sources, clerks are not required to contact the voter before making that correction directly to the absentee certificate envelope.

Clerks may contact voters and notify them of the address omission and the effect if the deficiency is not remedied but contacting the voter is only required if clerks cannot remedy the address insufficiency from extrinsic sources. When contacting a voter, you should advise that their ballot will not be counted with an incomplete address so that they can take action and also prevent a similar issue in the future. Clerks shall offer suggestions for correcting the certificate envelope to ensure the voter’s absentee ballot will not be rejected.

**EXHIBIT**

**2**

AMENDED: Missing/Insufficient Witness Address on Absentee Certificate Envelopes

October 18, 2016

Page 2

Clerks shall assist in rehabilitating an absentee certificate that does not contain the street number and street name (or P.O. Box) and the municipality of the witness address. If a clerk adds information to an absentee certificate, either based on contact with the voter or based on other sources, clerks shall indicate such assistance was provided by initialing next to the information that was added on the absentee certificate. The Commission recognized the concern some clerks have expressed about altering information on the certificate envelope, especially in the case of a recount. On balance, in order to promote uniformity in the treatment of absentee ballots statewide, the Commission determined that clerks must attempt to obtain any information that is missing from the witness address and document any addition by including their initials.

In short, the Commission's guidance is that municipal clerks shall do all that they can reasonably do to obtain any missing part of the witness address. Those steps may include one or more of the following options:

1. The clerk is able to reasonably discern the missing address or address component by information appearing on the envelope or from some other source, such as:
  - The voter has provided his or her complete address and the clerk has personal knowledge that the witness resides at the same address as the voter.
  - The clerk has personal knowledge of the witness and knows his/or her address.
  - The voter's complete address appears on the address label, and the witness indicates the same street address as the voter.
  - The clerk is able to utilize lists or databases at his or her disposal to determine the witness's address.
2. The voter or witness may wish to appear in person to add the missing information, or provide the address information by phone, fax, email or mail. The voter may provide the address separately as an alternative to returning the certificate envelope and having the voter mail it back again as outlined below.
3. The voter may request that the clerk return the certificate envelope so the voter can personally add the witness address.
  - Be sure to include a self-addressed stamped envelope in which the voter may return the certificate envelope containing the ballot. The post office does not approve of placing another stamp over a cancelled stamp. Contact your postmaster or a Mail Piece Design Analyst before attempting to re-stamp or re-meter the certificate envelope. Also, note that the U.S. Postal Service is advising that voters mail absentee ballots at least one week before Election Day to accommodate new delivery standards. We suggest advising the voter of the importance of timely mailing if the voter wishes to have the certificate envelope mailed back to them.
4. The voter may wish to spoil the original ballot and vote a new one.

If the request to spoil the ballot is within the proper time frame, the clerk mails a second ballot and new certificate envelope to the voter. (See procedure for *Spoiling and Replacement Ballots*, beginning on page 109 of Election Administration Manual.)

I hope this guidance is helpful as you continue to issue and receive absentee ballots. Thank you for your efforts to assist voters in completing the absentee certificate sufficiently so their votes may be counted.

If you have questions, please contact the Elections Help Desk at 608-261-2028 or [elections@wi.gov](mailto:elections@wi.gov).

STATE OF WISCONSIN

CIRCUIT COURT

WAUKESHA COUNTY

FILED

SEP 07 2022

CIRCUIT COURT  
WAUKESHA COUNTY, WIS.

MICHAEL WHITE, ET AL.,

Plaintiffs,

-vs-

Case: 22CV1008

WISCONSIN ELECTIONS COMMISSION,

Defendant.

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TEMPORARY INJUNCTION

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¶1. Plaintiffs filed this lawsuit against the Wisconsin Elections Commission (“WEC”) on July 12, 2022, seeking declaratory and injunctive relief. Plaintiffs alleged that WEC has issued and continues to provide guidance and information inconsistent with the express requirements of Wisconsin law through guidance contained in an October 18, 2016, memorandum entitled AMENDED: Missing or Insufficient Witness Address on Absentee Certificate Envelopes, in a memorandum dated October 19, 2020, entitled “Spoiling Absentee Ballot Guidance,” and other statements relating to missing or insufficient witness addresses on absentee certificate envelopes.

¶2. Plaintiffs moved for a TRO and Temporary Injunction on August 2, 2022. Plaintiffs requested temporary injunctive relief requiring WEC to cease and desist from offering



incorrect guidance, and directing WEC to issue corrected guidance to clerks and local election officials.

¶3. On or about August 11, 2022, the Wisconsin Legislature moved to intervene in the case and simultaneously filed its complaint and motion for temporary injunction or alternatively, a writ of mandamus. The declaratory and injunctive relief the Legislature seeks tracks the relief requested by the Plaintiffs.

¶4. The Court granted the Legislature's motion to intervene, as well as those filed by the League of Women Voters of Wisconsin and the Waukesha County Democratic Party.

¶5. Having considered the submissions, briefs, and arguments of the parties and intervening parties, and for the reasons stated on the record during the September 7, 2022, hearing on the motions for temporary injunctive relief, the Court GRANTS the motions for temporary injunctive relief. IT IS ORDERED THAT:

¶6. WEC is prohibited and enjoined from publicly displaying or disseminating the AMENDED: Missing or Insufficient Witness Address on Absentee Certificate Envelopes (Oct. 18, 2016), marked as Exhibit 2 to the Complaint, the October 19, 2020, memorandum entitled "Spoiling Absentee Ballot Guidance," marked as Exhibit 3 to the Complaint, or any prior or subsequent version of that substantive guidance relating to missing or adding information to absentee ballot witness certifications in any form.

¶7. WEC is prohibited and enjoined from advising, guiding, instructing, publishing, or otherwise communicating information to Wisconsin municipal clerks and local elections officials that is contrary to Wis. Stat. § 6.87, which provides that if a municipal clerk receives an absentee ballot with an improperly completed certificate or with no certificate, the clerk may return the ballot to the elector, inside the sealed envelope when an envelope is received, together



with a new envelope if necessary, whenever time permits the elector to correct the defect and return the ballot by the applicable deadline.

¶8. WEC is prohibited and enjoined from advising, guiding, instructing, publishing or otherwise communicating information to Wisconsin municipal clerks and local elections officials that clerks or local election officials have the duty or ability to modify or add information to incomplete absentee ballot certifications.

¶9. WEC is ordered and required by September 14, 2022, to notify all municipal clerks and local election officials previously receiving the guidance mentioned in paragraph 6 above that this Court has declared that guidance invalid and contrary to law.

Dated this 7<sup>th</sup> day of September, 2022.

BY THE COURT:

/s/ Michael J. Aprahamian

Circuit Court Judge

1           STATE OF WISCONSIN           CIRCUIT COURT           WAUKESHA COUNTY

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2           MICHAEL WHITE, et al.,

3                           Plaintiffs,

4                           -vs-

Case No. 22-CV-1008

5           WISCONSIN ELECTIONS COMMISSION,

6                           Defendant.

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7           September 7, 2022

Honorable Michael J. Aprahamian  
Circuit Court Judge, presiding

8                           ARGUMENT OF TEMPORARY INJUNCTION

9           A P P E A R A N C E S:

10                   R. GEORGE BURNETT and KURT GOEHRE, Attorneys at Law,  
11                   appeared on behalf of the Plaintiffs.

12                   THOMAS BELLAVIA and LYNN LODAHL, Assistant Attorney  
13                   Generals, appeared on behalf of the Wisconsin Elections  
14                   Commission.

15                   MISHA TSEYTLIN, Attorney at Law, appeared on behalf  
16                   of the Wisconsin Legislature.

17                   JEFFREY MANDELL and JOHN GEISE, Attorneys at Law,  
18                   appeared on behalf of the Waukesha County Democratic  
19                   Party.

20                   DANIEL LENZ and JOHN SHERMAN, Attorneys at Law,  
21                   appeared on behalf of the Wisconsin League of Women  
22                   Voters.

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5           Lori Schiek

6           Official Court Reporter

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1 EXCERPT OF PROCEEDINGS

2 THE COURT: Michael White et al versus  
3 Wisconsin Elections Commission, et al. Case 22-CV-1008.  
4 Can I have the appearances, please.

5 MR. BURNETT: Yes, Your Honor. George Burnett  
6 and Kurt Goehre for the Plaintiffs.

7 MR. BELLAVIA: For the Defendant, Wisconsin  
8 Elections Commission, Assistant Attorneys General Thomas  
9 Bellavia and Lynn Lodahl.

10 MR. TSEYTLIN: For intervenor Wisconsin  
11 Legislature Misha Tseytlin.

12 MR. MANDELL: For intervenor Wisconsin  
13 Democratic Party of Waukesha County, Jeff Mandell and  
14 John Geise.

15 MR. LENZ: For intervenor defendant League of  
16 Women Voters of Wisconsin, Attorney Daniel Lenz of Law  
17 Forward and John Sherman.

18 THE COURT: Well, good afternoon to all of you.  
19 I think you got in the seating chart okay so we know  
20 where everybody is and I think you did relate to my clerk  
21 and court reporter who going to be making argument so I  
22 think I have that as well.

23 I want to cover a couple of preliminary  
24 things first to make sure we're all on the same page.  
25 There were a number of intervenors that moved to

1 intervene and I think we, I granted that most of them  
2 were unopposed. If they said they were opposed, I  
3 granted the request impermissive. I think you had an  
4 order that approved all of their intervention.

5 There were a flurry of pro hac vice orders  
6 that may have come in. I think I signed them all. Are  
7 there any outstanding that I need to address now before  
8 somebody gets in trouble before arguing without a pro hac  
9 vice? Hearing nothing. I think we're good there.

10 There was a bunch of submissions already  
11 and I read everything. That's a lot of materials. I did  
12 read everything. Are we taking any evidence today? Was  
13 there contemplation of any evidence today?

14 MR. BURNETT: Not on the Plaintiffs' part, Your  
15 Honor.

16 MR. BELLAVIA: No, Your Honor.

17 MR. MANDELL: No

18 MR. TSEYTLIN: Not on the Legislature's part.

19 MR. LENZ: No.

20 THE COURT: I didn't think so but I wanted to  
21 just make sure we're set. So with that I have read  
22 everything but I do appreciate argument. So with that  
23 let me hear from Mr. Burnett.

24 MR. BURNETT: Thank you, Your Honor. I'm going  
25 to try to condense this rather complicated set of briefs

1           into some, some basic points.

2                   THE COURT: Hang on a second. I appreciate you  
3 standing up. Stay seated because it's easier there is  
4 microphone there, right there.

5                   MR. BURNETT: Got it.

6                   THE COURT: It will help me. I've been to 20  
7 concerts already this year. My hearing is not the best.  
8 I want to make sure I hear everybody. So stay seated. I  
9 appreciate you standing up but sitting is better.

10                  MR. BURNETT: Very good. I think, Your Honor,  
11 that this case really rises and falls on this Court's  
12 construction of Section 6.87 of the statutes. That's  
13 well developed in the briefs but if boiled down it comes  
14 down to two alternatives. Alternative number one is the  
15 alternative advanced by the Plaintiffs.

16                   A clerk faced with an absentee ballot that  
17 has an address or of a witness that is either incomplete  
18 or missing has two options under this statute. The clerk  
19 can do nothing guided by the press of business and other  
20 considerations or the clerk can send the ballot back to  
21 the voter to rectify the problem.

22                   According to WEC and the intervenors, the  
23 clerk has multiple options. One option the clerk may not  
24 do according to WEC's guidance is nothing. According to  
25 the guidance the clerk must do something.

1           The clerk may send the ballot back to the  
2           voter or the clerk may conduct their own investigation or  
3           rely on their own experience in order to rectify the  
4           problems.

5           So the question for the Court is what does  
6           the statute say. Well, the statute says four things.  
7           Number one, an address is required. 6.87(2) gives a  
8           sample of the certification that the witness must sign  
9           and swear to and in that certification it expressly calls  
10          for an address.

11          There is no debate that an address is  
12          required nor should there be any debate that WEC  
13          understands what an address is. Certainly it understood  
14          what an address was when it developed the absentee ballot  
15          application and certification form, EL-122, it's called,  
16          and it appears in the record as Document 11 Page 36.

17          That particular certification directs the  
18          witness to provide a house number, a street name or fire  
19          number, a city, state, zip code and it gives additional  
20          instructions in the event they're rural and don't have a  
21          specific house number. So WEC understands what an  
22          address is.

23          The third thing the statute contains in  
24          (6d) is a directive that if there is an address missing  
25          on the certificate, the ballot may not be counted.



1                   And then lastly what the statute contains  
2                   in 6.87(9) is a directive to the clerk that if they  
3                   receive an absentee ballot with an improperly completed  
4                   certificate or no certificate, the clerk may return the  
5                   ballot to the elector inside a sealed envelope and  
6                   onward.

7                   So the statute contains four things. What  
8                   is absent is in the statute is any directive or any  
9                   suggestion that the clerk may fix the problem on their  
10                  own, that they may supplement or add information to the  
11                  ballot. That they may consult other sources or that they  
12                  may or that they must respond. These are things that  
13                  WEC's guidance has concocted. They've added words to the  
14                  statute.

15                 Administrative agencies are confined by  
16                 statutes as are Courts. Neither Courts nor  
17                 administrative agencies may add words to statutes that  
18                 the legislature didn't incorporate. There is -- At the  
19                 center of this case, there is one question that needs to  
20                 be answered. If the legislature intended clerks to have  
21                 many options, like those that WEC has suggested, why did  
22                 it mention only one.

23                 Turning to the question of what the remedy  
24                 is, because this is a motion for a preliminary  
25                 injunction, WEC argues that even if its interpretation is

1 wrong, this Court should do nothing. And it provides a  
2 number of reasons and I'll address a few.

3 First of all, it says well, laches stops  
4 the Court from proceeding. Aside from the fact that  
5 we're facing a new election, which this guidance will be  
6 very important and prominent for, WEC says too much time  
7 has passed for the Court to intervene and they cite the  
8 Trump v. Biden decision, although I believe they misapply  
9 it.

10 In Trump v. Biden laches was applied  
11 because the former President waited until the results of  
12 the election were in and then challenged procedures that  
13 were susceptible to challenge before voting began. And  
14 the Court said taking a wait and see approach is  
15 impermissible when it comes to elections.

16 Here the Plaintiffs have not taken a wait  
17 and see approach. The legislature has informed WEC that  
18 its guidance in the form of an emergency rule, which has  
19 been discussed at length in briefing, was wrong and  
20 inappropriate and the Plaintiffs have sued before a  
21 ballot has been cast or an absentee ballot has been  
22 distributed. So laches doesn't apply for those two  
23 reasons.

24 Laches is not a statute of repose. It is  
25 designed to stop plaintiffs who sleep on their rights

1 from belatedly entering court and that doesn't apply  
2 here.

3 The second thing that is raised is  
4 standing and that question, that objection is answered in  
5 the Teigen case where four justices concluded that voters  
6 had the authority to challenge WEC issued memorandum that  
7 inaccurately related the law. Now, there was a  
8 disagreement among the four justices. Three justices  
9 relied on normal general standing principles while  
10 Justice Hagedorn found standing in, I believe, it was  
11 Section 506 and Section 227.40 of the statutes.

12 But the important point is that four  
13 justices, a majority of the Court, concluded voters have  
14 standing to challenge memorandum or counsel or guidance  
15 issued by WEC that violates the statutes.

16 There are various arguments that an  
17 injunction is inappropriate here because the harm is not  
18 sufficiently irreparable, it changes the status quo. The  
19 equities don't counsel in favor of that. That's all  
20 addressed in briefing and I'm not going to belabor it  
21 here other than to note that if in WEC's guidance is  
22 wrong it is not something that is not something that this  
23 Court can endorse by doing nothing. If this Court  
24 believes that WEC misinterpret 6.87, the obligation is to  
25 do something and the only recourse is to issue an

1           injunction directing WEC to change the guidance,  
2           correcting the misimpression that has been communicated  
3           to 1,850 or so municipal clerks and to refrain from  
4           issuing other things that would disagree or contradict  
5           the Court's ruling if the Court accepts our  
6           interpretation of the statute.

7                     An injunction is also appropriate for a  
8           very practical reason. The current state of affairs is  
9           that clerks are poised, if they so choose, to correct  
10          information in just the way the legislature has  
11          counseled. If the ballot -- if a ballot is missing a  
12          witness's address, all the clerk needs to do is send it  
13          back to the voter with a brief note or instruction, you  
14          need to fix this. However, if the Court does nothing, if  
15          the Court issues no injunction and the guidance remains  
16          in place, there is going to be a plethora of ballots that  
17          are potentially invalid that will only lead to further  
18          litigation. It will only lead to ballot challenges and  
19          it will expose a number of voters to votes that may be  
20          not counted.

21                    The practical, the sensible thing to do is  
22          to compel WEC to issue guidance that actually  
23          corroborates what the legislature as determined. An  
24          injunction is also appropriate here because WEC has had  
25          every opportunity to correct the guidance it issued when

1 the Legislative Joint Committee so instructed it that its  
2 interpretation of the law was wrong.

3 Instead, WEC doubled down. They issued  
4 public statements that said no, we are not wrong. They  
5 told clerks even if the emergency rule is not valid,  
6 follow the guidance that said essentially the same thing.  
7 The Martinez v. DIHLR case, which is cited in the briefs,  
8 has said that that course of action exceeds the agency's  
9 authority. In Martinez to my memory, DIHLR refused to  
10 follow a directive from the Joint Committee and  
11 instructed employers differently and the Supreme Court  
12 determined that that was well beyond the agency's  
13 authority.

14 There is also a long line of cases that  
15 indicates that voting rights are so important that voting  
16 procedures are so important, the violation is irreparable  
17 harm and that's cited in the briefing as well.

18 With regard to the last point and that's  
19 that somehow or another if the Court does something it  
20 violates the Voting Rights Act three things are  
21 important. Number one, the Voting Rights Act Section  
22 10101 deals with qualifications to vote. And the voter  
23 qualifies by registering meeting the statutory  
24 requirements. There is nothing in that act that requires  
25 a clerk to correct a mistake on a ballot.

1                   So for those reasons we'd ask the Court to  
2                   grant the injunction as requested and we would rely on  
3                   our brief for further argument.

4                   THE COURT: All right. I'm going to turn to  
5                   Mr. Tseytlin. As well I told my clerk and court reporter  
6                   we're going to do an N. So we're going up here and back  
7                   down and back and up and brief rebuttal. So with that,  
8                   Mr. Tseytlin, go ahead.

9                   MR. TSEYTLIN: Thank you, Your Honor. I'm  
10                  going to try not to duplicate too many of my friends'  
11                  eloquent remarks. I'm going to focus on the  
12                  legislature's core interest here which is the  
13                  institutional interest the legislature as the body that  
14                  passes the election laws of Wisconsin and also the body  
15                  that under the Supreme Court decision of Martinez has the  
16                  statutory and constitutional authority to oversee  
17                  agencies making rules.

18                  And on the first issue that my friend  
19                  discussed in detail in regard to the substance of the  
20                  2016 mandate, because it is a mandate, it's not just a  
21                  guidance, regardless of what WEC labels it, the defense  
22                  of WEC is kind of the defense of well meaning bureaucrats  
23                  who have no statutory authority which is the statute  
24                  doesn't give me that power, but it doesn't prohibit me  
25                  from doing so I can just the good.

1                   That is not the way that agency authority  
2                   works in the State of Wisconsin. Agencies like WEC are  
3                   mere creatures of the legislature. We created them and  
4                   they only have the powers we gave them. Since they  
5                   cannot point to anything that allows them to issue so  
6                   called guidance that mandates that clerks correct or take  
7                   any steps other than mail them back or not counting  
8                   absentee ballots missing an address on the certificate,  
9                   the statutory issue is with respect easy, if WEC wants  
10                  more statutory power, if the municipal clerks wants more  
11                  statutory powers, they have to come to the legislature.  
12                  They can't just say it's not prohibited, therefore we can  
13                  do it which is an entire line of argument. But there are  
14                  actually two independent, other independent reasons why  
15                  the 2016 mandate is unlawful.

16                  First, it violates the JCRAR veto which it  
17                  was upheld as constitutional in the Martinez decision  
18                  unanimously by our State Supreme Court.

19                  Now, there is actually two provisions of  
20                  the JCRAR approval process that are relevant here.  
21                  First, 227.26(2)(b) which allows the JCRAR to determine  
22                  that a statement of policy, the agency is actually a  
23                  rule. And when the JCRAR determines that in its sole  
24                  discretion it can direct mandatorily its creature, the  
25                  agency here WEC, to promulgate that claimed guidance as



1 an emergency rule. That, all of that happened here. In  
2 January of this year the JCRAR determined that the 2016  
3 mandate was in fact a rule. It then directed WEC to  
4 issue it as an emergency rule. WEC did so.

5 Then there is the other half of what JCRAR  
6 can do and it completes the picture of why that first  
7 makes sense. And this is 227.26(2)(d) which is it can  
8 veto that forced rule, forced by JCRAR's determination  
9 after a public hearing and a couple of bases in the  
10 statute on which it can do that.

11 That's exactly what happened here. JCRAR  
12 issued its proposed scope statement, WEC issued its  
13 proposed scope statement, it's actual scope statement  
14 then issued emergency rule 2209. JCRAR then convened the  
15 meeting that has to under the statute two days later  
16 reviewed it reviewed the emergency rule and vetoed it.

17 Under the statute and under the Supreme  
18 Court decision of Martinez that should have been the end  
19 of the ball game. WEC its legislature creator it was  
20 forced to promulgate the 2016 mandate as a rule. It did  
21 so, we vetoed it. It, that should have been the end.  
22 What they did is remarkable. They said this whole two  
23 step process that's laid out in the statute you made us  
24 promulgate it as an emergency rule and then you vetoed  
25 it, all of that is irrelevant.

1                   What we can do is just go back to the  
2                   world that was as if WEC had not been forced by JCRAR to  
3                   promulgate the 2016 mandate as a rule and then vetoed it.  
4                   If you want to strike it down you have to go to Court.  
5                   What JCRAR did is irrelevant. Well, that renders the  
6                   entire two step process meaningless.

7                   If we -- if we -- when we make the  
8                   determination that they need to that WEC or an agency  
9                   needs to promulgate what it claims to be a document as a  
10                  rule and then we veto it, it has to have some meaning and  
11                  the meaning is clear which is that WEC or any agency  
12                  can't go back to doing the same thing, they can't go back  
13                  to business as usual again. Again, WEC or any agency is  
14                  the creature of the legislature and when the legislature  
15                  follows the statutes to make clear that what the agency  
16                  claims is a guidance which is actually a rule and then  
17                  vetoes that rule, that's the end of the ball game and  
18                  that's an independent separate reason why this Court  
19                  should enjoin the enforcement of the 2016 mandate.

20                  And then the final, the final reason that  
21                  this Court should enjoin the enforcement of the 2016  
22                  mandate is in fact that mandate was a rule. The Supreme  
23                  Court in the Palm decision, most famously rearticulated  
24                  and implied the five step test for a rule. And all five  
25                  of those steps are plainly satisfied with the 2016

1 mandate.

2 Step one is a full description of the  
3 action. What's this? You see it on the WEC letterhead.  
4 Two, does it have the effective law that was issued by  
5 the agency. Well, of course, it was. You've got word  
6 shall must throughout the mandate. That is under  
7 Wisconsin Supreme Court black letter law when you have  
8 words like shall or must that's mandatory, that's not  
9 suggestive language. That is mandatory language. Is it  
10 a general application? Yes, of course, it is. It covers  
11 all municipal election clerks throughout the state. New  
12 clerks could leave, new clerks could be appointed.  
13 That's the definition of general application.

14 My friend's suggestion that general  
15 application has to apply to literally every single person  
16 or agency in Wisconsin, I mean that would basically make  
17 nothing a rule because except maybe the Palm rule where  
18 you know where we have a shut down for the whole state.  
19 No other regulation either you have a large class where  
20 people can accidentally leave in regard to clerks that is  
21 of general application. In fact, I would say -- I would  
22 say as a footnote on those last two points.

23 If they are correct that the 2016 mandate  
24 was not a rule because it literally didn't apply to all  
25 people or anything like that, then WEC couldn't have even

1 issued the emergency rule that it did because that also  
2 only applied to municipal clerks and of course WEC  
3 couldn't issue any rules period applied to any municipal  
4 clerks because that wouldn't apply to all citizens who  
5 are not themselves clerks. So it doesn't make sense.

6 And then the final of the five part test  
7 is that it implements, interprets or makes specific  
8 legislation enforced or administered. That's exactly  
9 what happened here. We have here an interpretation of  
10 the statutes and then my friends didn't even contest that  
11 fifth element is satisfied.

12 So for all those reasons the 2016 mandate  
13 was always the rule and it had to be promulgated  
14 consistent with rule making procedure which it never was  
15 so whatever an issue from the beginning in the same way  
16 that the executive order in Palm was ordered.

17 And then finally turning to the equities.  
18 And here I'm going to focus on the legislature equities.  
19 As I see my friends, from WEC's argument here, their  
20 entire argument of why we don't have standing or we have  
21 suffered irreparable harm is entirely carnic of their  
22 merits side.

23 At Pages 17 to 18 of their submission late  
24 last week in opposition to our filing they say well  
25 legislature hasn't suffered institutional harm because in

1 fact we're complying with the statutes and the  
2 legislature hasn't suffered institutional harm because we  
3 are in fact complying with the JCRAR process.

4 Well, then we just have a duplication if  
5 Your Honor agrees with us on any of our three affirmative  
6 arguments of why we should prevail on the merits, then  
7 WEC has effectively conceded that we have standing and we  
8 have irreparable harm. If Your Honor disagrees with us  
9 and says they are correct on the meaning of the statutes,  
10 the meaning of the JCRAR process, then we have no  
11 likelihood of success and then if we wouldn't suffer any  
12 harm. So then I think they have effectively conceded  
13 this really boils down to the merits of our three  
14 arguments.

15 And then finally on this Federal issue  
16 that some of my friends have raised.

17 THE COURT: You have lots of friends. You're a  
18 very popular guy.

19 MR. TSEYTLIN: They're my friends. I work with  
20 these folks all the time. That they have raised is  
21 actually four separate reasons why this Court should not  
22 be troubled by any Federal issues.

23 First, under the well established Henry  
24 Doctrine, an administrative law. An agency decision  
25 cannot be held or upheld on a ground that the agency

1           itself didn't rely upon. WEC did not rely upon any  
2           Federal law in issuing the 2016 mandate. In fact not  
3           even in the briefs in this case. So under the Henry  
4           Doctrine is the whole Federal law issue needs to be set  
5           to the side.

6                       Second, nothing in the Federal statute  
7           that they cite actually requires or even suggests that  
8           WEC can issue or should issue or must issue any sort of  
9           mandate to clerks. So whatever concerns they have under  
10          the Federal statute has nothing to do with WEC.

11                     Third, if somehow the Federal statute did  
12          direct WEC to do a bunch of stuff or directed clerks to  
13          do a bunch stuff which it clearly doesn't, that that  
14          statute would be obviously unconstitutional under the  
15          Anti-Commandeering Doctrine that says that the Federal  
16          government can't force states, including state agencies  
17          to administer law.

18                     And finally the statute itself just  
19          doesn't apply here. Here we have a privilege of voting  
20          absentee. We have certain requirements to exercise that  
21          privilege. Nothing in this statute creates the  
22          revolutionary principle that states can't have certain  
23          requirements on absentee voters that don't go to voter  
24          qualification. And for all of those reasons I would urge  
25          Your Honor to issue the temporary injunction or if Your

1 Honor agrees with us that the issue is so clear, consider  
2 issuing a mandamus as a final judgment this morning, this  
3 afternoon.

4 THE COURT: Thank you. Mr. Bellavia.

5 MR. BELLAVIA: Thank you, Your Honor. I don't  
6 want to repeat the contents of our briefs. I think the  
7 briefing has been very thorough so I might touch on and  
8 respond to some of the points that have already been made  
9 here today and I wanted to discuss a few things that I  
10 think came up in reply briefs that we haven't, that the  
11 Commission has not yet really spoken on.

12 We argued, I'm starting on the probability  
13 of success on the merits and what the statutory  
14 interpretation issue first. The question is whether the  
15 election statutes prohibit clerks from adding witness  
16 address information to an absentee ballot certificates  
17 and the Commission argued, made an argument about the  
18 meaning of the terms address and missing in subsection  
19 6.87(6d) which is the statute that says that a ballot  
20 shall not be counted if the witness address is missing.  
21 And those terms aren't defined in the statute but then  
22 when you get down to the question of the clerks filling  
23 in information, is ambiguous as to whether they're  
24 filling in address information that is completely missing  
25 or their supplementing address information that's there



1 by, for example, adding a zip code, something I think a  
2 lot of clerks we found did in the 2020 election. They  
3 just added a zip code.

4 I think the address was already there  
5 before the zip code was added so those ballots were  
6 countable in any event. So to the extent that the  
7 Plaintiffs' entire theory of harm on which they base  
8 their standing and their request for preliminary  
9 injunctive relief is premised on the idea that some  
10 ballots that due to this guidance from the Commission,  
11 some ballots are being counted that should not be counted  
12 under (6d) and I don't think that one can draw that  
13 conclusion at all given this, given the kinds of  
14 possibilities that I just outlined and in fact Justice  
15 Hagedorn in his concurrence in the Trump v. Biden case,  
16 that's cited in the briefs, Paragraphs 49 and 50 of his  
17 concurrence, he found the exact same thing and he  
18 basically went through the same logical analysis that I  
19 just set out for you. He probably did it more clearly  
20 than I have done and concluded that there is no authority  
21 in the statutes that would allow a vote to be struck if  
22 it contains sufficient address information but that  
23 address information had also been supplemented by the  
24 clerk writing something additional.

25 Now, the Plaintiffs have in their reply

1       brief, they say this is all a red herring. That's not  
2       our issue at all. We don't care about the definition of  
3       address. We don't care about the definition of missing.  
4       All we care about is that there is nothing in the  
5       statutes that says clerks can write in the -- in the  
6       witness certificate portion of the ballot.

7               The problem there is it necessarily  
8       follows that they're saying that if the clerk does write  
9       in there, does write something in there, that therefore  
10      the ballot becomes uncountable. That's the whole premise  
11      of their having standing is that votes are being  
12      improperly counted. But if the clerk just writes in the  
13      address it does not at all lead to the conclusion that  
14      votes are being improperly counted so we think it's  
15      really not a red herring issue at all and as I said  
16      Justice Hagedorn seems to think it was quite an important  
17      issue.

18             As to the merits of this, the argument  
19      that since the statutes don't say anywhere explicitly  
20      that clerks can fill in deficient or missing address  
21      information, therefore, the power doesn't exist because  
22      agencies only have the power they're given, I think  
23      that's, that argument is an exaggeration, it's an  
24      overstatement.

25             Obviously, when officials are charged with

1       executing a statute, they always have to interpret its  
2       meaning and apply it to various factual circumstances  
3       that come before them. That's their job as the executive  
4       branch of the government. Statutes obviously cannot and  
5       do not spell out in detail every particular action that  
6       an executive branch official or employee has to perform  
7       in order to implement a statute and part of the  
8       constitutional power the executive branch includes the  
9       power to interpret what the statute means and then to  
10      decide how that statute should be implemented in  
11      accordance with that interpretation.

12               There is nothing wrong with the executive  
13      interpreting statutes, it's part of the function of the  
14      executive branch to do it for the purpose of facilitating  
15      their execution of the statute.

16               In the case of the Elections Commission,  
17      they're charged with providing interpretive guidance to  
18      all the local election officials throughout the state.  
19      So that's what they have done here. They've taken  
20      statutes that speak in general terms and they've  
21      confronted this problem of what to do if there is witness  
22      address information that is missing or incomplete and  
23      they've made the rather, you know, we're primarily  
24      concerned I think about making sure that there would be  
25      treatment of these kinds of ballot envelopes that was as

1 uniform as possible throughout the state.

2 So there is a need for clear guidance. I  
3 think that's why they spoke with the kind of directive  
4 language that they did was to encourage that all clerks  
5 should take steps that they can take to try to correct  
6 the ballots for any voter whose ballot seems to have a  
7 facial deficiency on the envelope so as not to get into a  
8 situation where there is selection going on and some  
9 clerks are helping voters more than others or picking and  
10 choosing which voters to help which is obviously not a  
11 good thing.

12 So they've authorized, they gave a whole  
13 menu of options in the guidance of things that things  
14 that clerks could do. One of them was that if the  
15 clerk --

16 THE COURT: Well, that's Mr. Burnett's point,  
17 right. They have a whole menu, whereas the statute only  
18 gave one option.

19 MR. BELLAVIA: That's true.

20 THE COURT: Two options. Do nothing and then  
21 one option here's how you do it and that ensures the  
22 uniformity that you say.

23 MR. BELLAVIA: I understand that. I think  
24 we've made some of our arguments about that point in the  
25 brief as to whether, that we don't think that necessarily

1 excludes any other option. Obviously the Plaintiffs, the  
2 Plaintiffs disagree.

3 I would point out to the Court that I  
4 think that all of the options that are in that guidance,  
5 except for the one that involves the clerks writing in  
6 information, actually all fall within 6.87(9) that the  
7 Plaintiffs rely on.

8 That provision says that the clerk can  
9 return the ballot to the voter. It doesn't say anything  
10 more about how that can be interpreted, how it can be  
11 returned to the voter. So the, in briefing, you know, in  
12 the rush and hustle and bustle of briefing it is usually  
13 portrayed as it simply means that the clerk can put the  
14 ballot back in the mail to the voter and then the voter  
15 can make the correction and mail it back to the clerk.  
16 Obviously a very time-consuming process especially with  
17 the, you know, the slowing down of the postal service and  
18 contemporary times.

19 I don't think that that provision itself  
20 has to be read that way at all. In fact, it's a routine  
21 practice throughout the state for clerks can contact the  
22 -- can contact the voter in other ways like by telephone  
23 and say do you want to come down-- there is information  
24 missing from your ballot envelope. Can you -- would you  
25 like to come down and correct it.

1 I think that's what some of those other  
2 menu options are different are various flavors of that  
3 way in which -- in which the ballot can be returned to  
4 the -- to the voter not by mailing it.

5 THE COURT: How is the voter going to correct  
6 it at that point other than taking it back to the  
7 witness?

8 MR. BELLAVIA: Well, the voter --

9 THE COURT: Are you saying the witness, the  
10 voter's add information for the witness's certification?  
11 Can they do that? It doesn't seem like they could do  
12 that.

13 MR. BELLAVIA: Well, I think that's a fair  
14 question. That goes to the point of whether everything  
15 that's, whether, for instance, the way the statute is  
16 structured 6.87(2) it says the witness shall execute the  
17 following. Then there is some certification language. I  
18 certify these various things about the voter, the voter's  
19 a citizen, et cetera and then there is some lines  
20 underneath. It says printed name, address, signature.

21 Now, clearly the witness has to sign for  
22 the certification to be valid. That's the standard  
23 meaning in Blacks Law Dictionary of execute, is to  
24 validate a legal document by one's -- by one's signature.

25 The Plaintiffs argue that only the witness

1 can print in, can print their own name and only the  
2 witness can write in their address. I don't think that  
3 necessarily follows from the structure of that, of that  
4 statute at all because I think that they derive that from  
5 the witness shall execute the following and then -- and  
6 then all those things are under there. But I don't think  
7 that follows given the meaning of -- given the meaning of  
8 execute.

9 I think execute means certify the  
10 certification language by signing. But -- but even if  
11 the -- but even if the witness -- I'm losing my --

12 THE COURT: Even if the witness.

13 MR. BELLAVIA: Can you repeat?

14 THE COURT: No, I think you addressed it.

15 MR. BELLAVIA: Okay. Okay. Let me pick up my  
16 train of thought.

17 THE COURT: Sure.

18 MR. BELLAVIA: So I was making a point that we  
19 don't think there is anything unusual or improper about  
20 giving guidance to fill in these kinds of practical  
21 implementation gaps in a statute and as I was saying, I  
22 don't think that, oh, I don't think that (9) excludes the  
23 other, the other forms of ballot curing that are  
24 discussed in the guidance and I don't think that the  
25 Plaintiffs, the Plaintiffs can in rebuttal, they can



1 clarify their own position but I don't think they  
2 actually challenged anything. Maybe the use of shall but  
3 other than the use of shall in the guidance, I don't  
4 think they challenged the other forms of ballot curing,  
5 only that the clerks can't write in.

6 So one of the things that, that we would  
7 ask as sort of an alternative argument is if the Court  
8 does decide to issue a temporary injunction, that it  
9 craft its relief in such a way that it only invalidates  
10 the portions of the guidance that, that the Court finds  
11 are likely to be found unlawful here and that have been  
12 challenged by the Plaintiffs, primarily, the clerks  
13 writing it in themselves because I think the guidance  
14 regarding the other options on the menu of options are  
15 all valuable, that's still valuable guidance to the  
16 clerks and I think that as I said it all falls within the  
17 scope of (9) I think so it could be -- it could be upheld  
18 even within the Plaintiffs' -- even within the  
19 Plaintiffs' framework.

20 Then the second issue on the likelihood of  
21 success on the merits, I'm going to talk about is whether  
22 the 2016 guidance is an unpromulgated rule and the  
23 Commission's primary argument here is that it's not a  
24 rule because it does not have the force of law. That's  
25 the argument that we have primarily relied on.

1           The Plaintiffs are relying on the, largely  
2           on the Palm decision in which an agency, emergency order  
3           was invalidated as an unpromulgated rule. But the issue  
4           that was involved in Palm was whether the agency order  
5           was a statement of policy in general application. It was  
6           not whether the agency order had the force of law. In  
7           fact, the parties didn't dispute that that order did have  
8           the force of law. So the question was whether it was  
9           sufficiently general, sufficiently general application.

10           THE COURT: What does that mean to have the  
11           force of law? Mr. Tseytlin is saying must and should and  
12           all these mandatory strictures within the 2016 memorandum  
13           that it sounds like it's law, they're not required to do  
14           it. But are you saying it's something more than, there  
15           has to be some sanction available or something else, a  
16           consequence.

17           MR. BELLAVIA: I don't know that there is a  
18           single -- that there is a single factor that is  
19           necessarily conclusive. But we rely primarily on Justice  
20           Hagedorn's concurring opinion in Teigen in the recent  
21           Teigen decision where he talked about this issue at  
22           length.

23           The three other justices who voted to  
24           invalidate the -- to invalidate the guidance that was at  
25           issue in that case did not reach the question of whether

1           it was an unpromulgated rule because they invalidated it  
2           for substantive reasons. But Justice Hagedorn did  
3           address it and concluded it was not an unpromulgated rule  
4           and he talked about this mandatory language issue even  
5           though the guidance in Teigen didn't have that mandatory  
6           language and he acknowledged that there are cases that  
7           give weight to mandatory language and say that when an  
8           agency is speaking with mandatory language it is more  
9           likely to be trying to speak and intending to speak with  
10          the force of law.

11                       But Justice Hagedorn really said that  
12          there was a more fundamental question that should be  
13          asked. This is in Paragraph 194 of his, of his opinion.  
14          All this discussion is around between 193 and 200 of his  
15          opinion. There is a more fundamental question should be  
16          asked is whether the guidance is binding and enforceable  
17          and how has the agency actually applied or threatened to  
18          apply this guidance in practice. There is nothing in the  
19          guidance at issue in this case other than the use of  
20          shall that there is nothing there about enforcement.

21                       There are no threats made to clerks and  
22          there is no history of any attempt to enforce this as if  
23          it were a, as if it were a binding rule. In fact, there  
24          is language at the beginning of the guidance that  
25          suggests that, you know, this is advisory guidance for --

1           for you folks on this, on this important issue suggesting  
2           that it is not, that it's not meant to be binding and  
3           enforceable.

4                       So the word shall can sometimes be  
5           advisory rather than -- rather than mandatory. Typically  
6           when it is considered to be advisory rather than  
7           mandatory it is precisely about whatever it is that the  
8           shall is pointing to is not actually being required of  
9           consequences if you don't do it and that's the case here.

10                      There are no consequences for clerks who  
11           actually don't follow the Commission's guidance. The  
12           Commission has never tried to impose consequences and so  
13           we think that is why it does not have the force of law  
14           and I would point out that if one looks at the votes in  
15           Teigen necessarily for, other than Justice Hagedorn  
16           specifically said he didn't think that it was, that --  
17           that the WEC guidance had the force of law, the other  
18           three justices would have upheld the guidance.

19                      So they obviously didn't think it was an  
20           unpromulgated rule. So four held in that case that the  
21           Commission's guidance was not an unpromulgated rule and I  
22           think Justice Hagedorn's reasoning is -- is pretty  
23           persuasive on that and applicable here while  
24           acknowledging there is mandatory language here that  
25           wasn't present there.

1                   The third issue on the merits is this  
2                   JCRAR suspension issue. This is one that I think we very  
3                   thoroughly, very thoroughly briefed so as I was listening  
4                   to my friend Mr. Tseytlin speak about this, I was tempted  
5                   to repeat the arguments that are in the brief but I don't  
6                   really think it's necessary to repeat them in any detail.

7                   I guess the fundamental things I would say  
8                   about this are that the legislature does not have the  
9                   power to authorize a legislative committee to directly  
10                  tell executive branch agencies how to interpret and  
11                  implement the law. If there was -- if instead of this  
12                  weird two step veto process that the legislature has been  
13                  arguing here, if instead of that they just did it  
14                  straight forwardly and what if the legislature just  
15                  promulgated a rule that says if -- if the joint committee  
16                  for review of administrative rules think that any agency  
17                  policy is contrary to statute they can direct the agency  
18                  to stop implementing that policy, that would be an  
19                  unconstitutional law. That's a legislative -- that's a  
20                  legislative veto. It's not -- it's not permissible under  
21                  the separation of powers.

22                  The legislature has the power to stop an  
23                  agency from implementing the policy by change, by  
24                  enacting a new law that changes the law, if it's being  
25                  interpreted in a way the legislature doesn't agree with

1           they can create new statutory language that does not  
2           permit the interpretation or the agency's interpretation  
3           and implementation of the law can be challenged in the  
4           courts and the court can declare what the law is and  
5           decide and the Court has the power to direct the agency  
6           to change its interpretation of the law following  
7           adjudication of the issue in the Court.

8                       So you can, either the legislature can  
9           either change the law or somebody can sue the Commission  
10          arguing that the guidance is invalid just as the  
11          Plaintiffs here have done. But what they can't do is  
12          just, JCRAR just can't declare a law to be invalid nor  
13          can they simply declare, I'm sorry, declare guidance to  
14          be invalid nor can they simply declare guidance to be an  
15          unpromulgated rule in a legally binding, illegally  
16          binding way.

17                      What Section 227.24(2)(b) provides is that  
18          if JCRAR makes its own determination that they think that  
19          the guidance meets the statutory definition of a rule,  
20          they can direct the agency to promulgate that guidance as  
21          an administrative rule, as an emergency rule.

22                      Now, in this case they did that.  
23          Commission complied and then they exercised their other  
24          power to suspend the emergency rule that they had just  
25          ordered the Commission to create. You put those two

1 things together, it's doing exactly what I just said you  
2 can't do under the separation of powers.

3 First they say this is a rule so you must  
4 promulgate it and then after you promulgate it, it's  
5 contrary to statute so it's invalid. By two steps  
6 they've gotten where they can't ordinarily go under  
7 standard separation of powers, separation of powers  
8 principles. It's very peculiar if you think about it  
9 that the -- that the Joint Committee for Review of  
10 Administrative Rules would direct an agency to create a  
11 rule that they know to be unlawful and contrary to  
12 statutes. We're talking about the legislature -- they're  
13 telling the agency to create a rule only so they can  
14 suspend that rule.

15 I would point out that the legislature  
16 uses the term, uses the term veto and that JCRAR veto.  
17 It's not really a veto of the rule. It's a power to  
18 suspend the rule for a limited period of time during  
19 which they are requirements for submitting bills that  
20 would permanently make, that would permanently supersede  
21 the suspended rule and if those bills don't eventually  
22 get passed within a time frame that's set out in great  
23 detail and hard difficult detail in the statute, if the  
24 bills don't get passed in a timely way, then eventually  
25 the rule can go back into effect. But that's not really

1 an issue in this case just that the use of the word veto  
2 is not correct.

3 I did want to respond to the arguments  
4 that have been made about the Martinez case because I  
5 think there is an important factual distinction that the  
6 Plaintiffs and the legislature have left out. What  
7 happened in Martinez is that DIHLR had promulgated an  
8 administrative rule. There was no question of whether  
9 the policy that was embodied in that rule was supposed to  
10 be embodied in the rule. It was and it had been.

11 So the question of unpromulgated rule  
12 needing to be promulgated that was wasn't the issue at  
13 all. DIHLR had promulgated a rule. JCRAR then acted  
14 under 227.24 and they suspend it but they did not suspend  
15 the entire rule. They suspended portions of the rule  
16 leaving other portions in effect thereby changing the  
17 rule's meaning, kind of like line item veto that can  
18 change the meaning of a statute by eliminating certain  
19 parts of it.

20 Now, if you ask me, I don't think there is  
21 anything in 227.24 that allows that but neither the  
22 parties nor the Court seem concerned about whether that  
23 was a statutorily authorized thing for JCRAR to do and  
24 they did it and for our purposes they acted lawfully and  
25 they suspended part of the rule. So they left a modified



1 rule in effect.

2 That rule has the force of law because  
3 administrative rules have the force of the law. That  
4 rule continued to be binding on the entire world  
5 including DIHLR after JCRAR had modified it. DIHLR  
6 concluded that they thought this whole process is  
7 unconstitutional under separation of powers springs of  
8 bolts JCRAR shouldn't have the power to suspend rules or  
9 parts of rules at all.

10 And they then directed the parties that  
11 were subject to the rule in question to ignore JCRAR's  
12 version of the law, of the rule and to just follow the  
13 previous unmodified DIHLR version of the rule. That was  
14 unlawful and the courts, you know, the courts rightly  
15 found it was unlawful. It was unlawful because there was  
16 a rule in effect and the agency was saying don't follow  
17 that rule. That's not what happened here.

18 What happened here is that JCRAR suspended  
19 the emergency rule in its entirety. That emergency rule  
20 simply codified what was in the guidance. They suspended  
21 in its entirety. At that point there is no rule in  
22 effect. There is now no -- there isn't any binding  
23 provision of law just before the rule existed, yeah,  
24 before the emergency rule was promulgated. The guidance  
25 existed and everyone was functioning, was functioning

1 under the guidance. Parties that thought that that  
2 guidance was unlawful contrary to statute could have  
3 brought an action like this one under 227.40 simply to  
4 challenge the correctness of the guidance but it would  
5 either be and then a Court would decide whether it was or  
6 wasn't consistent with the statute. Nothing to do with  
7 all of this unpromulgated rule stuff.

8 So I really think that, that Martinez is  
9 distinguishable on that basis and that the Commission  
10 here did not at all do what DIHLR had done in the  
11 Martinez case.

12 On irreparable harm, just a couple of  
13 points. The Plaintiffs claim that harm through  
14 partially, they claim harm through dilution of their  
15 votes, but we believe that there is no factual record  
16 before the Court sufficient to establish any likelihood  
17 of that type of harm arising. The Commission's guidance  
18 actually makes unlawful -- I'm sorry. There is no  
19 evidence that the Commission's guidance makes unlawful  
20 voting more likely.

21 To the contrary, it's more probable that  
22 an envelope on which the clerk has added some witness  
23 address information contains a valid ballot than that it  
24 contains an invalid ballot given just the fact that there  
25 are a heck of a lot of valid ballots than invalid ballots

1           that would be found in any sampling of ballots that one  
2           took. Fraudulent ballot, voter fraud is relatively rare,  
3           thankfully. It's very rare and while it does occur and  
4           it's important, more likely than not the ballot inside  
5           that envelope is --

6                   THE COURT: You're bringing up these points  
7           about a valid ballot and a fraudulent ballot. They're  
8           just telling me to apply the law that says if the  
9           certification is not on there or it's missing, it can't  
10          be counted. Whether there is some evil attempt behind it  
11          or whether somebody just for whatever reason didn't  
12          include the address or the certification.

13                  MR. BELLAVIA: Well, if the address --

14                  THE COURT: If it's not on there and it's  
15          missing the law says the ballot may not be counted and  
16          you're drawing is such well, it should be counted because  
17          it's a valid ballot. It wasn't an attempt to defraud  
18          anybody and therefore those should be counted. But  
19          you're making some presumptions here that are contrary to  
20          the law I think.

21                  MR. BELLAVIA: I'm not trying to convey to the  
22          Court that I think that if the witness address is missing  
23          that the ballot should be counted contrary to that  
24          statutory provision.

25                  THE COURT: Okay.

1                   MR. BELLAVIA: Our position there is that it  
2                   may be, I would argue that if there is partial address  
3                   information that is there, then there is a question to be  
4                   resolved, whether by a Court or by the election  
5                   inspectors in the course of a challenge process or  
6                   something, there is a question there to be resolved as to  
7                   whether the address is missing or not within the meaning  
8                   of that, within the meaning of that statute. And that if  
9                   the clerks have written, if there is partial information  
10                  there and the clerks have supplemented it with additional  
11                  information in their effort to help the ballot to be  
12                  counted, that even if the Court were to conclude that  
13                  they're not authorized to do that, which we don't think  
14                  the Court should reach that conclusion, but even if the  
15                  Court did reach that conclusion, the fact that the clerk  
16                  did that does not itself invalidate the ballot because  
17                  (6d) doesn't say anything about that. It simply says if  
18                  the address is missing.

19                  So if there was enough address information  
20                  there and the clerk supplemented it, then that wouldn't  
21                  invalidate the ballot. I do not mean to suggest that  
22                  now, there is sometimes circumstances where often the  
23                  witness will be the spouse of the voter and they live in  
24                  the same, they live at the same address and they have the  
25                  same name. And so there is always a sticker that

1           actually is provided by the clerk, right, that has the  
2           name and address of the voter and then there is the  
3           voter's certification where they certify yeah that's me  
4           and they sign that they followed the rules and then  
5           sometimes the witness will just put in their name after  
6           the witness certification and not repeat the address  
7           because it's already -- because it's already elsewhere on  
8           the envelope.

9                       Technically, since there is an address  
10          line there so technically they didn't -- they didn't fill  
11          in that form that they had been directed to fill in that  
12          line but I think the address information is not missing  
13          if one can determine from the information that's within  
14          the face of the ballot that this is the spouse of the  
15          person, they live at the same address. That that's --  
16          that that's their address. I don't think the address is  
17          missing. I think that inspectors or a Court considering  
18          that ballot envelope could say that it could be counted  
19          under (6d).

20                      So I think there are a lot of these kinds  
21          of different scenarios that make this question of  
22          counting or not counting ballots not quite as  
23          transparently obvious as it can be, as it can appear at  
24          first sight.

25                      The other theory of irreparable harm that

1 the Plaintiffs and the legislature emphasizes kind of  
2 this per se irreparable harm due to simply a failure by  
3 the Commission to follow the law.

4 Simply because the guidance is alleged to  
5 be contrary to statute, that if it is contrary to  
6 statute, then it's per se irreparable harm because the  
7 entire public is automatically harmed if the law is not  
8 properly interpreted and implemented. And to support  
9 this theory they rely largely on some of the recent stay  
10 pending appeals orders that have come from the Supreme  
11 Court particularly in the SCIU case which is also in some  
12 other cases and in those cases those cases that involved  
13 trial Court orders that invalidated, facially invalidated  
14 and enjoined an enforcement of the statute. And the  
15 Supreme Court concluded that in that circumstance where a  
16 statute is invalidated and enjoined the will of the  
17 legislature in enacting that statute has necessarily been  
18 nullified and that is per se irreparable harm to the  
19 public sufficient to stay the lower court's order while  
20 the merits of the validity of the statute are fully  
21 adjudicated in the appeal. That's not what's going on  
22 here.

23 Nobody has invalidated any statute here.  
24 The Commission has no authority to invalidate a statute.  
25 The Commission has interpreted a statute and they have

1 issued guidance that -- that articulates their  
2 interpretation of the statute. As I said earlier, that's  
3 what the executive branch, one of the things that the  
4 executive branch is supposed to do and is allowed to do.

5 When the executive branch interprets and  
6 applies a statute that even if they're wrong that doesn't  
7 nullify the statute. That's constitutional government in  
8 accordance with the separation of powers.

9 There are methods for responding if you  
10 think that the agency's interpretation is wrong that I  
11 outlined before. Sue the agency and challenge their  
12 interpretation and the Court is empowered to direct them  
13 to change their interpretation or change the law so as to  
14 supersede the interpretation. But simply because the  
15 executive branch is interpreting the law in the way that  
16 the Plaintiffs and the legislature disagree with, that  
17 does not provide -- that does not constitute irreparable  
18 harm in anything like the sense that was issued in that  
19 SCIU stay decision where a statute had been completely  
20 invalidated so it counted be enforced at all.

21 Commission is enforcing the statutes  
22 through its guidance not saying that they can't be  
23 enforced at all. They disagree with the interpretation  
24 and how it's being enforced and that's a separate --  
25 that's a separate question. But I don't think there is

1 per se irreparable harm just because they disagree with  
2 an interpretation of the meaning of the statute.

3 I think I have one more point and then I  
4 will be finished. Let's see. Yeah. The last point I  
5 wanted to make just in conclusion was a second kind of in  
6 the alternative argument related to the remedy that any  
7 remedy that the Court might afford here that in addition  
8 we, I asked you earlier that if you grant the preliminary  
9 injunction that you only invalidate the witness writing  
10 in, I meaning the clerk writing on the ballot on the  
11 envelope portion of the guidance and not the entire  
12 guidance. And I would also add if there is any  
13 preliminary declaratory relief from the Court saying that  
14 clerks are not allowed to write in information, that the  
15 Court also include in its declaration an indication that  
16 ballots are not automatically invalidated just because  
17 the clerk has written something on the ballot because  
18 there is no statutory support for that.

19 It would cause confusion and lead to  
20 ballots being, some ballots being invalidated even though  
21 there was address information on the ballot. It simply  
22 had been supplemented by the clerk.

23 So it would be good if any declaratory --  
24 if any declaratory relief was clear on that point to  
25 avoid that kind of potential confusion. So with that I



1 will stop. Thank you.

2 THE COURT: All right. Thank you. Who is  
3 going --

4 MR. GEISE: John Geise for Waukesha County  
5 Democratic Party. I wanted to --

6 THE COURT: Maybe the pull microphone a little  
7 closer. That's that thing right there.

8 MR. GEISE: Yeah. Gotcha. Is that better?

9 THE COURT: Yeah.

10 MR. GEISE: Great. I wanted to touch on a few  
11 things that have been discussed and then turn to a couple  
12 other pieces.

13 So first the legislature has maintained  
14 here that JCRAR's suspension of the rule also invalidated  
15 the guidance and that's contrary to what legislature  
16 counsel said at the JCRAR hearing. We can provide the  
17 time stamp for you but at the JCRAR July 20, 2022  
18 hearing, legislative counsel stated that the law  
19 following JCRAR's suspension would return to the status  
20 it was prior to the agency's promulgation of the  
21 emergency rule. And we agree with that.

22 We think that once JCRAR suspended it, it  
23 would return to the agency's guidance and I would submit  
24 that the legislature taking a contrary position here is a  
25 position that's recently developed for litigation based

1 on that.

2 Second, I wanted to just add another  
3 reason that the guidance isn't a rule. And that's  
4 Wisconsin Statute 227.01(13) specifically states the term  
5 rule does not include any action or inaction that is  
6 directed to a specifically named person or group of  
7 specifically named persons that do not constitute a  
8 general class.

9 And in Palm the Supreme Court clarified  
10 that that means that if it's described in general terms  
11 and new members can be added to the class, then it is a  
12 rule. Well, here it's not anything directed at a general  
13 class that people can be added to. It's directed to a  
14 very specific class. This regulation is directed to  
15 Wisconsin municipal and county clerks.

16 And the legislature submits that people  
17 can be added to that because clerks change, people come  
18 and go but that's a little misleading. Obviously if  
19 someone is elected clerk, someone else leaves that  
20 position but the number of people subject to the rule are  
21 always the same and it is people who hold the title or  
22 sorry, not rule, guidance, people who hold the title  
23 county and municipal clerk. So based purely on one of  
24 the exceptions to a rule this is not a rule.

25 THE COURT: Mr. Tseytlin is going to say then

1 WEC will never issue any rule because they're only  
2 applied to those same municipal clerks the actions they  
3 take. He did say that. So they can issue no rules?  
4 Anything they do can never be a rule?

5 MR. GEISE: Well, I think that they could. I  
6 mean I think that they could expand beyond those  
7 individuals and then it would be a rule but I would also  
8 submit that we would go back to WEC's guidance. There  
9 are five requirements and at least it does meet two of  
10 them, in addition to the fact that it does have the force  
11 of law under that one.

12 I would like to turn to and before I go  
13 into the crux of this, I also wanted to address a  
14 question you asked about the statute providing two  
15 options under 6.87(9). That is only related, that --  
16 there are two points I would make on that.

17 First, you only get to 6.87(9) it says  
18 it's the options for an improperly completed certificate.  
19 You only get there if the word improperly means that  
20 having some portion of having an incomplete address is an  
21 improperly completed certificate. The statute doesn't  
22 say that, we wouldn't submit, we would submit that  
23 Justice Hagedorn in Trump v. Biden made this point too.  
24 We would submit it's not clear that having a portion of  
25 the address makes a certificate improperly completed.

1                   And second, 6.87(9) is subject to Section  
2                   5.01 when you interpret it as opposed to and I will get  
3                   into the legislature and the Plaintiffs make a lot about  
4                   how these provisions are mandatory.

5                   That's only true for (6d). The mandatory  
6                   provisions here under 6.842 are Sections three through  
7                   seven of 6.87. So yes it is true that it is mandatory  
8                   that if the address is missing, the ballot cannot be  
9                   counted. But once we get outside of that when we're  
10                  talking about 6.87(2) saying only the witness can execute  
11                  the certification, when we're talking about 6.87(9)  
12                  improperly completed certificate then we are into Section  
13                  5.01. And Section 5.01 is very clear. It says that  
14                  those provisions should be construed to give effect to  
15                  the will of the electors notwithstanding failure to fully  
16                  comply with some of their provisions. And the Wisconsin  
17                  Supreme Court in Roth, which is 2004 WI 6 Paragraph 26  
18                  made it very clear that cases construing this statute  
19                  evidence a premium on giving effects to the will of the  
20                  voter.

21                  So I would submit improperly completed  
22                  certificate isn't really clear and we're in a world where  
23                  we're talking about that. Where we're meant to focus on  
24                  giving effect to the will of the voter despite perhaps  
25                  not having a perfectly completed address.

1                   And I would like to turn now to just focus  
2                   a little on what Plaintiffs and the legislature are  
3                   asking you to do here. Because I would submit it's truly  
4                   extraordinary. They seek to not just have you overturn  
5                   WEC's guidance but they ask you to offer a radical  
6                   interpretation of Wisconsin law that's sure to  
7                   disenfranchise voters and they've requested that on an  
8                   emergency basis in the midst of an election.

9                   It's an interpretation of law that's  
10                  contrary to the unanimous WEC that passed it. It's  
11                  contrary to the Wisconsin DOJ's advice to WEC in 2016  
12                  which was the genesis of that guidance and it's contrary  
13                  to the interpretation that was offered by four of the  
14                  seven justices of the Wisconsin Supreme Court in Trump v.  
15                  Biden because essentially what they're asking you to do  
16                  is you need to not only overturn WEC's guidance but you  
17                  also need to determine that an absentee ballot with an  
18                  incomplete address cannot be counted and the problem  
19                  they --

20                 THE COURT: No one is asking me to determine  
21                 what can be counted or not be counted. They're just  
22                 asking me to determine whether the advice, guidance,  
23                 mandate whatever you want to call it from WEC is valid  
24                 and contrary to law. So they're not asking whether I  
25                 count anything. No one is making a determination on any

1 of that. That's not part of any of the requested relief.

2 MR. GEISE: Well, Your Honor, they have  
3 submitted that the guidance is contrary to the law  
4 because it allows an incomplete address to be counted and  
5 what I would say is that all that we have in the statute  
6 right now is a missing address cannot be counted. And  
7 there is nothing to tell clerks or to tell anyone what  
8 happens with an incomplete address and WEC's guidance is  
9 specifically developed to fill that void and to provide  
10 uniformity.

11 So Plaintiffs and the legislature can say  
12 yes, we just want you to overturn the guidance say it's  
13 contrary, that's all. But in saying it's contrary, you  
14 would be saying that an incomplete address cannot be  
15 counted necessarily first and second, I think you would  
16 have to, and second if you didn't, then you'd sort of you  
17 would leave a gap that is contrary to the very uniformity  
18 they claim to want because without the guidance, (6d)  
19 says if it's missing an address, it should not be  
20 counted.

21 I don't think anyone here is actually  
22 really disputing that but what if someone wrote their  
23 street name and not the municipality. What if someone  
24 wrote the municipality and not the city. What if they  
25 didn't write the zip code. There is nothing in the

1 statute that speaks to that. And that's precisely, those  
2 kinds of gaps are precisely what WEC's role is to fill  
3 and that's what they did and they did it in a reasonable  
4 way that again four of the seven justices of the  
5 Wisconsin Supreme Court has said is reasonable. The DOJ  
6 said is reasonable and that the unanimous WEC said is  
7 reasonable.

8 And the reason it's reasonable I think is  
9 because again what we have is (6d). If a certificate is  
10 missing the address of a witness, the ballot may not be  
11 counted. But it doesn't say anything about incomplete  
12 address. And in fact, the words address and missing in  
13 that statute really doom the argument that it means  
14 incomplete addresses can't be counted and support the  
15 guidance and I would like to sort of talk about why and I  
16 think the first place you have to look is the word  
17 address.

18 Now, Plaintiffs' counsel stated that the  
19 WEC understands what an address is based on some WEC  
20 guidance and other submissions and I think WEC's policy  
21 on an address doesn't change what the pure language of  
22 the statute is or how they interpret the statute in that  
23 context and in 6.87(d) it says address, it doesn't say  
24 complete address. And it leaves the word undefined.  
25 Justice Hagedorn acknowledged it explicitly in Trump v.

1        Biden when he said that, you know, if clerks completed  
2        addresses that were already sufficient under the statute,  
3        I'm not aware of any authority that would allow such  
4        votes to be struck, right. And the reason the word  
5        address is so important there is because when the  
6        legislature wants the word address in the election code  
7        to mean specific information, it says that. And it did  
8        that, it's done that in at least three places of the  
9        election code.

10                    In 6.87(2) itself it requires the  
11        voter to add ward number or aldermanic along with their  
12        street address, city and county. It doesn't provide  
13        those same things when it's talking about the witness  
14        address. In 6.34(3)(b)(2) when it's talking about a  
15        voter identification, it actually uses the term complete  
16        residential address which would suggest that just the  
17        word address by itself doesn't mean complete residential  
18        address because those words would be mere surplusage.  
19        And it says that including a number street address if  
20        anything and the name of the municipality.

21                    And then in Section 6.18 it states a  
22        former Wisconsin resident seeking a Presidential absentee  
23        ballot must provide a present address including city and  
24        state.

25                    And the reason why that's important is



1 because the legislature didn't say any of that here. It  
2 said the word address. And in the absence of a  
3 definition and given the precise definitions elsewhere,  
4 you have to ask what controls. And we would submit there  
5 are three rules of statutory interpretation that show  
6 that address in the context of the statute can't mean  
7 complete address.

8 First, and again Plaintiffs' counsel  
9 mentioned this, this principle, the Wisconsin Supreme  
10 Court has emphasized that or I'm sorry, the Wisconsin  
11 Supreme Court has emphasized that where the legislature  
12 uses similar but different terms in the statute,  
13 particularly within the same section, we presume it  
14 intended those terms to have different meanings and that  
15 was in Eggo. That's 2020 WI App. 17 Paragraph 64.

16 The legislature specifically noted  
17 repeatedly within the election code even in some of the  
18 same sections we're talking about, when they wanted an  
19 address to include certain information and that means it  
20 can be assumed it didn't specify that and it didn't mean  
21 that regarding witness address.

22 And second in cases likes Benson the  
23 Wisconsin Supreme Court has emphasized that Wisconsin  
24 follows the general terms Cannon which means that a word  
25 should be given it's full and fair scope and not

1 arbitrarily limited.

2 If you look at the word address in a  
3 dictionary it means simply a place where a person or an  
4 organization may be communicated. It doesn't include  
5 such a place has to be defined by its street number, its  
6 municipality or its zip code.

7 And finally where the word address to  
8 always mean complete address, the legislature would have  
9 no need to define the contours elsewhere in the election  
10 code, as I've already said or for example 6.34 to use the  
11 specifically the term address because the word address  
12 would mean that. So clearly it has to, it clearly does  
13 not mean complete address in this statute or the  
14 legislature would have to tell you otherwise where it  
15 does.

16 And that's why the word address can't mean  
17 complete address. But the second word that's really  
18 important in (6d) is the word missing. And I think if  
19 you look at Plaintiffs' brief at Page 11 it's fairly  
20 telling that Plaintiffs say that the statute means  
21 ballots can't be counted where the envelope is missing  
22 the witness's address or is incomplete. But that's one  
23 of the places in their brief where they're not quoting  
24 the statute. Their just extrapolating. And that's  
25 important because the statute doesn't say that.

1                   It says you shouldn't count envelopes with  
2                   a missing address. And the point meaning missing, of  
3                   missing is synonymous with absent not incomplete. And so  
4                   Plaintiffs have talked about not adding words into the  
5                   statute and things like that and I agree but if a statute  
6                   meant a ballot should not be completed not be counted  
7                   with a missing or incomplete address it would say that.  
8                   And adding the words or incomplete into the statute  
9                   violates the admonition Plaintiffs' counsel pointed out  
10                  from cases like Jefferson v. Dane County to not add words  
11                  into a statute the legislature itself didn't see fit to  
12                  employ.

13                  And I would also point out again that it  
14                  is important that (6d) is the one mandatory provision  
15                  we're talking about here. Because 6.84(2) tells us that  
16                  (6d) falls within the range that should be read as  
17                  mandatory and strictly construed but that's strictly  
18                  construed both such that ballots should be, should not be  
19                  counted if they violate those provisions but also that  
20                  the language has to be very tightly construed and the  
21                  words have to mean what they say.

22                  And sections outside that range are  
23                  treated very differently and so Plaintiffs and the  
24                  legislature have talked about 6.87(2) for the witness has  
25                  to execute the statute and 6.87(9) for an improperly

1 completed certificate which I've already touched on and  
2 again those fall under 5.01 which have to be construed to  
3 give effect of the will of the electors notwithstanding  
4 informality or the failure to fully comply with some of  
5 their provisions.

6 And so if you take a broad view of what  
7 we're talking about here, the only provision of law we're  
8 dealing with that has to be strictly construed tells us  
9 that if the address field is left fully blank, a ballot  
10 can't be counted. And no one, I don't think anyone  
11 before you, is disputing that. But an incomplete address  
12 is wholly outside that provision and the other provisions  
13 that Plaintiffs and the legislature try to bootstrap in  
14 to make an incomplete address somehow fit in there, are  
15 specifically provisions that have to be read to give  
16 effect to the will of the elector.

17 And basically I think it's fair to say  
18 when and I would submit that the Wisconsin DOJ's guidance  
19 that WEC has followed and that the Wisconsin Supreme  
20 Court adopted, basically says when reading the statutory  
21 guidance as a whole, an address may not be perfect to be  
22 valid, it merely needs to have enough information to be  
23 able to identify where the witness lives. That's giving  
24 effect and that's precisely what the reasonably discerned  
25 language of the guidance does.

1                   And given that, I just would submit the  
2                   reading by Plaintiffs and the legislature simply can't be  
3                   right. And there is one other reason before I would like  
4                   to turn to the equities but on the merits there is one  
5                   other reason why their guidance can't be right. And  
6                   they, beyond violating the rules of interpretation, their  
7                   reading would open the statute up to Federal preemption.  
8                   The Federal civil rights act materiality provision  
9                   prohibits states from denying the franchise eligible  
10                  voters based on immaterial technical requirements and a  
11                  witness's complete address is not material to determining  
12                  whether such an individual is qualified under state law  
13                  to vote in the election.

14                 Under Wisconsin law and that's Article 3  
15                 Section 1 of the Wisconsin Constitution, there are really  
16                 three requirements to be qualified to vote in Wisconsin.  
17                 You have to be a US citizen, you have to be 18 and older,  
18                 you have to be a resident of the election district in the  
19                 state. The complete address is not necessary to release  
20                 any of those requirements and so Federal law would  
21                 prohibit the rejection of and otherwise eligible absentee  
22                 ballot because merely because the address is incomplete  
23                 and any other interpretation would render that section in  
24                 direct conflict with Federal law and preempt it. And I  
25                 would note that actually 6.84(2) and 5.01 in the

1 interplay between them, seem to consider and account for  
2 Federal law by strictly limiting the provisions of the  
3 absentee voting code that are construed as mandatory.

4 There is a reason why Section 6.84(2) is  
5 written to have very limited and specific provisions of  
6 the absentee code that are mandatory whereas in all other  
7 instances Section 5.01 tells you that minor errors have  
8 to be tolerated to give effect to the will of the voter  
9 and that's because it keeps Wisconsin in part it's at  
10 least because to me it seems it keeps Wisconsin law in  
11 compliance with the materiality provision.

12 And on this point and on the Federal point  
13 I really, I would submit that Plaintiffs and  
14 legislature's arguments at least in their briefing, here  
15 they've offered some different arguments, I would say in  
16 their briefing, that their principal argument against  
17 this is that a witness address is required under state  
18 law so it's material to determining qualifications.

19 But if that were the standard, that would  
20 swallow the entire rule, right. I mean the Third Circuit  
21 recently said in McLaury v. Towering (phonetic) that the  
22 materiality provision was created to ensure qualified  
23 voters were not disenfranchised by meaningless  
24 requirements that prevented eligible voters from casting  
25 their ballots but had nothing to do with determining

1           one's qualifications to vote. And I would submit if you  
2           rejected ballots based on a lack of a complete address  
3           you would be falling into, falling directly into what  
4           Federal law prohibits.

5                       And so on the merits in considering all of  
6           those factors, Plaintiffs and the legislature have  
7           offered you a problematic interpretation of the statute  
8           that raises Federal issues while DOJ's reasonable  
9           interpretation of the statute has been relied on by WEC  
10          for the last six years, complies with how you're supposed  
11         to interpret Wisconsin statutes and with Federal law.  
12         And WEC unanimously adopted this interpretation based on  
13         the DOJ telling it it was reasonable and four of the  
14         seven justices of the Wisconsin Supreme Court agree it's  
15         reasonable. It's reasonable, it's in line with how you  
16         should read the statute under 5.01 and 6.84 and it keeps  
17         Wisconsin law from running afoul in Federal law and we do  
18         submit that that dooms Plaintiffs' and the legislature's  
19         likelihood of success on the merits.

20                      But likelihood of success on the merits is  
21         only one requirement for the extraordinary relief of a  
22         temporary injunction and so now I would like to turn to  
23         the equities very briefly.

24                      I think it's really important to take a  
25         step back here and look at where we are in the election

1 cycle.

2 We're in the midst of the election. The  
3 Wisconsin Supreme Court has explained that a general  
4 election and it's primary share a critical nexus and that  
5 the primary is part of the election. And so Plaintiffs  
6 and the legislature really are asking you to make a  
7 fundamental change to the rules while the election is  
8 happening.

9 THE COURT: Did it happen in Teigen? The  
10 ballot boxes, didn't that happen in Teigen? The primary,  
11 the primary had the ballot boxes and the other one the  
12 general election didn't?

13 MR. GEISE: Was it Teigen? I would have to  
14 check.

15 MR. MANDELL: Your Honor, may I address that  
16 briefly?

17 MR. BELLAVIA: Which was before the August  
18 primary.

19 THE COURT: Go ahead.

20 MR. MANDELL: Your Honor, the difference in  
21 Teigen were that the rules were changed, the drop boxes  
22 were closed but any voter attempting to return a ballot  
23 to the drop box would know that they would get there,  
24 they couldn't use it and there would be instructions on  
25 the drop box on how to use the ballot. Here by contrast



1 votes who have submitted a ballot, first of all voter can  
2 request an absentee ballots for both the primary and the  
3 general election at the same time. So a voter who has  
4 requested an absentee ballot for both the primary and the  
5 general, would then return their primary ballot followed  
6 up on MyVote to make sure it was counted, could do the  
7 exact same thing when their general election ballot comes  
8 in the mail and that ballot might not be counted because  
9 of the change in the rules.

10 It's a completely different situation  
11 because the voter doesn't have the same kind of  
12 necessary, doesn't automatically have the kind of notice  
13 they had when they would have gone to a drop box and it  
14 would be -- and the drop box was closed.

15 MR. GEISE: And I would submit that that is a  
16 huge voter confusion problem and it would lead to a host  
17 of administrative issues for clerks and for organizations  
18 like the Waukesha County Democratic party who try and  
19 help people navigate these rules to vote. And there is a  
20 reason that timing is important.

21 I will acknowledge, you know, I'm an  
22 elections lawyer. Sometimes in elections that kind of  
23 timing is unavoidable but it was entirely avoidable here.  
24 WEC's guidance has been on the books since 2016. And  
25 this very issue was discussed at length by the Supreme

1 Court in Trump v. Biden in 2020. Plaintiffs and the  
2 legislature have had six years to either challenge this  
3 issue in Court or in the legislature's case, to address  
4 it through legislation. And they've had two years since  
5 the ruling in Trump highlighted this issue in detail.

6 So it is simply too late to come now and  
7 ask for a temporary injunction to implement this change  
8 while an election is happening.

9 And if you look at their briefs and what  
10 they have said here today, neither one of them really  
11 offers a meaningful excuse for that delay. Plaintiffs  
12 have submitted that they're on time because unlike in  
13 Trump they did not wait until after the election and in  
14 their briefing they pointed out they filed their  
15 temporary injunction a week before the primary. But I  
16 think that argument is insufficient for at least three  
17 reasons.

18 First, they filed their temporary  
19 injunction three weeks after initiating this case and  
20 they took no action to get a ruling before the primary  
21 election and in fact agreed to a briefing schedule that  
22 would make sure that their motion was heard after the  
23 primary. And second to a point my co-counsel has raised,  
24 in Wisconsin absentee ballots are mailed out six weeks  
25 before the election. So even when they first filed

1 ballots had already gone out to all of the voters. And  
2 third, I would just submit that waiting until the eve of  
3 an election when you had six years just isn't appropriate  
4 where the equities are concerned regardless of that  
5 timing.

6 So just because this challenge came before  
7 the election, doesn't make it timely. And I would point  
8 Your Honor to the Wisconsin Supreme Court case in Hawkins  
9 v. Wisconsin Elections Commission which is 2020 WI 75.  
10 Rejecting an attempt to put candidates on the ballot  
11 between a primary and a general because the relief would  
12 cause voter confusion and undue damage.

13 And Plaintiffs' relief here again would do  
14 just that and the reason Hawkins is important because the  
15 Wisconsin Supreme Court made the determination and issued  
16 the ruling that that was too late on September 14th of  
17 2020. So given that it is currently September 7th, I  
18 think we're well within when the Wisconsin Supreme Court  
19 has said it's too late for these kind of changes that  
20 will inevitably lead to voter confusion.

21 And I would say the legislature has even  
22 less of an excuse for its delay because at any point it  
23 could pass legislation to fix this and it could have done  
24 that at any point over the last six years and the fact  
25 that it's been unsuccessful getting legislation through

1 the political process doesn't mean it gets to challenge  
2 the guidance and a temporary injunction in the middle of  
3 an election. And if you look at the legislature's  
4 explanation for why they're late here, I would submit it  
5 muddies the facts a little when arguing that their --  
6 there was -- their challenge was timely. Because the  
7 legislature's claim is that it brought this action as  
8 soon as WEC violated JCRAR's suspension of the emergency  
9 rule in July. But as I've noted, that's contrary to what  
10 legislative counsel said at the JCRAR emergency hearing  
11 which was that they understood it precisely the way that  
12 WEC did and that WEC issued the statement afterwards  
13 which merely stated that under Section 505 WEC can only  
14 take action with two-thirds of the committee. They  
15 hadn't taken any action. So the guidance remained in  
16 effect.

17 So the idea that somehow WEC flouted  
18 JCRAR's ruling and that led the legislature to file this  
19 action based on legislative counsel's determination and  
20 based on the, you know, the facts, just simply is not  
21 accurate. And I would also point out that JCRAR didn't  
22 request that the WEC make its guidance a rule until  
23 January, 2022. So it already waited nearly six years  
24 after the guidance was passed. And that WEC voted at its  
25 March 9th meeting to approve its scope statement and

1 instructed staff to complete the rule making process  
2 which was again four months before the legislature sought  
3 to join this action and seek a temporary injunction. I  
4 think all of those dates are important because I think  
5 the legislature pointing to WEC simply issuing a  
6 statement reiterating Wisconsin law in July and that  
7 spurring their involvement is a little misleading.

8 And I would just close that in addition to  
9 being too late, this is also, when we're looking at the  
10 other temporary injunction factors, it's also an  
11 inappropriate request for a temporary injunction given  
12 that it would radically alter the status quo and  
13 Plaintiffs and the legislature argue that the status quo  
14 is what prevailed before the purportedly unlawful  
15 guidance but I don't think that can be right because that  
16 first assumes their likelihood of success on the merits  
17 and second that would readout the status quo requirement  
18 entirely I think you know for example I've had logic.  
19 There was a law that had been on the books since 1927  
20 that I challenged here, asked for a temporary injunction  
21 and to tell you it didn't change the status quo because  
22 of we looked at the status quo of what was happening in  
23 1926. And that simply can't be right. And it's also  
24 contrary to what the courts have said in Gall v. Aurora  
25 Healthcare which is 2022 Wis.App 29 at Paragraph 61.

1                   The Court of Appeals told us in its  
2                   extensive discussion of the status quo that we look at  
3                   the status quo before the litigation. And here the last  
4                   six years show that the status quo is following what's in  
5                   WEC's guidance.

6                   so this is a request for an injunction to  
7                   radically alter that status quo and I submit based on the  
8                   requirements that is inappropriate for this type of  
9                   relief.

10                  And so just to conclude, Your Honor, we  
11                  would submit that it's too late for the radical relief  
12                  the plaintiffs and the legislature request and that WEC's  
13                  guidance is a reasonable interpretation in line with  
14                  Wisconsin statutory interpretation and necessary to keep  
15                  Wisconsin law in compliance with Federal law. And so  
16                  accordingly we'd ask that you deny the motions here.

17                  THE COURT: Thank you. Yes, sir, Mr. Sherman.

18                  MR. SHERMAN: Thank you, Your Honor. I would  
19                  like to make a few threshold points first before turning  
20                  to the Federal law, thank you, and respond to a few of  
21                  the arguments that have been made you by Plaintiffs and  
22                  the legislature.

23                  First, State courts cannot issue  
24                  injunctions that contravene Federal law. Plaintiffs and  
25                  the legislature have sought to recharacterize our

1 argument as the Federal law that we cited justifies what  
2 WEC did. That's not our argument. Our argument is that  
3 Federal law sets limitations on what this Court can order  
4 in response to the motion for temporary injunction.

5 In addition to the cases we cited in our  
6 brief, we would also point the Court to State ex rel  
7 Zimmerman 249 Wis. 237. It's a case from 1946 case.

8 In this case the petitioner sought to  
9 throw out the ballots, primary votes for Joseph MacCarthy  
10 who was at the time a sitting judge. There was a  
11 Wisconsin State law that barred a sitting judge from  
12 running for another office but the Supreme Court of  
13 Wisconsin interpreted Federal law to mean it was a  
14 ceiling and not a floor and that the State legislature  
15 could not add to those Federal requirements for running  
16 for the US Senate and rejected the petition on that  
17 basis.

18 So clearly this is case law that is still  
19 valid and is precedent for the proposition that an  
20 injunction or any relief that's issued both by State  
21 Court needs to contend with Federal law limitations and  
22 that's what really we have sought to do in intervening  
23 here to set forth and articulate what are the Federal law  
24 constraints on both the US constitution and Federal  
25 statutes.

1                   The legislature, I believe Plaintiffs and  
2                   the legislature both refer to chicanery. Chicanery is  
3                   not, not to the contrary. It doesn't relieve this Court  
4                   of its obligation to issue an order that stays within the  
5                   confines set by Federal law. The legislature has also  
6                   referenced the Anti-Commandeering Doctrine with respect I  
7                   think this argument is very very off base. Prince v.  
8                   United States and York v. United States both of those  
9                   Supreme Court decisions concern Federal laws, Federal  
10                  statutes that constricted state local officials into some  
11                  kind of Federal administrative schemes such as the Brady  
12                  Bills gun background checks, I believe it's Prince the  
13                  nuclear waste regulation.

14                 The doctrine is not applicable here  
15                 because there is nothing, there is no commandeering where  
16                 a State Court issues an order requiring, you know, State  
17                 officials or local officials to stay within the bounds  
18                 set by the Federal law to comply with Federal law. If a  
19                 Federal Court or State Court orders state and local  
20                 officials to comply with Federal law, that's not  
21                 commandeering, that's just constitutional litigation  
22                 number one. Practical. I wanted to make a couple of  
23                 just practical points before I turn to the Federal law  
24                 arguments here.

25                 It's practical and actual points here. I



1 think it's important just to step back and note what's at  
2 stake here and note what the scope of the issue is some  
3 of the numbers.

4 I think it's remarkable just to see or  
5 witness the parties duking this out because they have no  
6 idea what the impact of what they argue here today. They  
7 have no idea whose ox will be gored based on what they  
8 argue in this courtroom. The Republican Party and the  
9 legislature and others have noted after, during the 2000  
10 -- run up to the 2016 general election and immediately  
11 after in 2017 were nowhere to be found on this.

12 It defies credulity that they weren't  
13 paying attention to this rule change but they didn't  
14 complain in 2016 or 2017 the first election in which this  
15 cure policy was applied.

16 Just to define some of the scope of this  
17 issue, some of the scope of this problem this is really  
18 tens of thousands of ballots, tens of thousands of voters  
19 who will be caught up in this issue if the cure policy is  
20 enjoined.

21 In the last Presidential election, the  
22 margin of victory was roughly 20,000 votes. We've cited  
23 in one of the letters from the League of Women Voters  
24 that went to JCRAR that was also cited in the letter to  
25 WEC, it's part of our intervention papers in this case,

1 we cited the legislature audit bureau 50 published a  
2 report last year that reports number 21-19 it's called  
3 Elections Administration, came out in October of last  
4 year and they actually had some numbers, some data on  
5 what the scope of this issue is.

6 They took a random sample of about 14,710  
7 ballots and found that roughly one in 14 of them, or  
8 seven percent had incomplete witness addresses. Very  
9 very few. Only 15 out of those 14,710 ballots I believe  
10 had no witness address whatsoever.

11 So really the lion's share of this issue  
12 is about incomplete witness addresses. And their data  
13 further showed that most of the incomplete witness  
14 addresses are just missing a zip code or a state name.  
15 They didn't actually note how many are missing a  
16 municipality name but 700 or so, I have the numbers but  
17 700 or so of the 1,020 ballots with incomplete witness  
18 addresses were missing a zip code and roughly 364 were  
19 also missing the Wisconsin, the name, state name.

20 So if absentee voting returns to  
21 pre-pandemic levels which is roughly four to eight  
22 percent or if it stays somewhat higher you know not quite  
23 what it was in 2020 but something like 20 percent of the  
24 electorate which is roughly 3.3, 3.4 million votes by  
25 mail, we're talking about anywhere from 10,000 to 48,000

1 votes in Wisconsin with incomplete witness addresses that  
2 need to be dealt with in some fashion and as counsel for  
3 the Waukesha County Dem's pointed out, there really is no  
4 instruction on the matter. It's a law in the state  
5 statute. It doesn't say anything about how to address  
6 that and that's what the, what WEC is attempting to do to  
7 cure the policy.

8 The league has intervened here because  
9 it's not as concerned with the oxen that may be gored or  
10 not but we're worried that voters are being gored by,  
11 would be gored in the absence of this policy and that's,  
12 we've intervened to indicate all voters' Federal rights  
13 under both the U.S. Constitution and under the Civil  
14 Rights Act.

15 Another practical just consideration or  
16 practical point the witness address has a requirement, it  
17 isn't very functional as a security measure. Election  
18 inspectors and canvassers are only looking to see that  
19 there is a witness signature and there is a witness  
20 address. They don't do anything with either of those.  
21 Once they note that the certification has a witness  
22 signature and a witness address, they remove the ballot.  
23 They note that this voter has voted but that ballot is  
24 fed into a machine.

25 MR. TSEYTLIN: Your Honor, I must object. You

1           said there was not going to be any evidence taken. I  
2           didn't see any of this in any of the submissions. This  
3           is testimony that could not be subjected to any.

4           THE COURT: I'm not sure. I'll give you an  
5           opportunity to tell me a little bit about this but let's  
6           move on. This isn't the part of the record. Is just you  
7           telling me probably, generally what you think happens.

8           MR. SHERMAN: Could I respond, Your Honor, just  
9           to the objection?

10          THE COURT: Sure but I already ruled on but go  
11          ahead.

12          MR. SHERMAN: If I could just respond briefly.  
13          The election day manual has all of this in it and Your  
14          Honor I assume could take judicial notice of that and  
15          review it. This is all contained in the election day  
16          manual.

17                 So just to note that both in and this is  
18          just in further response to arguments that were made, we  
19          don't get an opportunity to respond to further oral  
20          argument so Your Honor could consult the election day  
21          manual or take judicial notice it.

22                 The ballot is removed from the absentee  
23          certified envelope, fed into the machine and that's the  
24          end of it. Only in a challenge or recount scenario and  
25          we did note this response explicitly in our brief that's

1 the only circumstance where a witness address could come  
2 into play.

3 But with respect to the universe of mail  
4 in absentee ballots, generally what we're all arguing  
5 about here today is a requirement that really isn't, no  
6 election official is really doing anything with.

7 In a very very small number of  
8 circumstances it comes into play in a challenge or a  
9 recount scenario and there is, and if we want to talk  
10 about the record, there is no evidence of its use in the  
11 record. No one has cited to any evidence and it is the  
12 Plaintiffs' and the legislature's burden here. They've  
13 not cite to any evidence that the witness address  
14 requirement is actually being used.

15 This does have relevance, you know, for  
16 the Federal law arguments but I just wanted to emphasize  
17 that because the standard right now is not your ballot  
18 counts if we can identify the witness. The standard is  
19 the ballot counts if there is a witness signature and a  
20 witness address in the certification but we don't do  
21 anything with either of those.

22 Given the sole purpose of 6.87(6d) is  
23 witness identification, it only makes sense to have a  
24 functional approach and allow a witness signature to  
25 suffice for the requirements in those circumstances and

1           then only if there is the challenge of a witness  
2           identification be necessary and the voter can be  
3           contacted to that end. Failing that, if those options  
4           aren't on the table, something like the cure guidance is  
5           what's necessary to fill in the gap and to comply with  
6           Federal law and that's what I'll turn to now.

7                       I won't rehash everything that counsel for  
8           Waukesha County Dem's talked about with respect to the  
9           Civil Rights Act but I do want to make a few points about  
10          this. The materiality requirement in the Civil Rights  
11          Act is directly implicated by the relief that Plaintiffs  
12          and the legislature seek here. And if the Court issues  
13          the requested injunction it will put Wisconsin election  
14          law and procedures in violation of that Federal law.

15                     Under that requirement, any aspect of the  
16          voting process that makes a vote effective is subject to  
17          the materiality requirement and the words qualified under  
18          state law go only to the express qualifications set by  
19          the state and as noted by other counsel for the Waukesha  
20          County Dem's, Wisconsin Stat. 6.02 sets the  
21          qualifications. Article 3, Section 1 of the Wisconsin  
22          Constitution, excuse me, sets the qualifications and  
23          there are disqualifications set as well in Wisconsin  
24          Stat. 6.03 that go to felons, disenfranchisement, but by  
25          contrast the Wisconsin Statutes at play in this

1           litigation never refer to the witness address or anything  
2           we've been talking about here with respect to the  
3           absentee ballot certificate envelope. They're never  
4           called for qualification. So we are talking about  
5           whether or not the witness address, let me just move  
6           slightly so I feel like counsel for WEC is blocking the  
7           view.

8                       THE COURT: I can see.

9                       MR. SHERMAN: Okay. So what we're talking  
10           about here is the relevance and the materiality of the  
11           witness address requirement as to those voting  
12           eligibility criteria to vote in Wisconsin by any method.

13                      Plaintiffs and the legislature have  
14           presented somewhat contradictory arguments on this but  
15           there, I take their main argument to be that every  
16           procedural requirement in Wisconsin election law is per  
17           se material even if there is no nexus with those voting  
18           eligibility criteria but that just can't be because under  
19           that argument, every single procedural technical  
20           requirement would be material, per se, material and it  
21           would render the Federal materiality requirement a  
22           nullity by simply saying, you know, with a circular  
23           reasoning that it's material because it's material.

24                      The only way something is material is if  
25           it goes to the voting eligibility criteria. If it has

1           some role in determining whether the voter's qualified  
2           under state law to vote. That's the phrase.

3                   Ultimately, the witness address is not  
4           material to determining the voter's qualifications for a  
5           handful of reasons. One, to state the obvious the  
6           witness's address is not information about the voter.  
7           It's also not reasonably calculated to, it's not  
8           information that you can just plug into a database and  
9           yield information about the voter.

10                   The witness address it's just not  
11          dispositive of directly bearing on the voter itself and  
12          there are many cases decided under the materiality  
13          requirement but they all -- they all involve, I believe,  
14          every single one of them information about the voter.  
15          Not so here. This is quite a different case. This is  
16          information about the witness not the voter.

17                   The witness address, of course, is  
18          information about a witness but the only function it  
19          serves is to identify the witness and the only way that  
20          can be relevant and material to the question of the  
21          voter's qualifications is if you -- if you need to  
22          identify them and speak to and contact the witness to  
23          corroborate. It's an antifraud measure in that sense but  
24          it's not directly information about the voter. And as  
25          I've noted before, it's an antifraud measure that no one



1 seems to be using in Wisconsin and it also predates all  
2 of the other antifraud measures that the legislature has  
3 enacted over the last ten years, before antifraud  
4 measures. A Wisconsin voter goes through the following.  
5 Registers to vote and submits documentary proof of  
6 residence as part of that process. The only across the  
7 board documentary proof of residence requirement in the  
8 country. Arizona may be second but that's caught up in  
9 litigation. A straight voter ID requirement that applies  
10 not just to in-person voting as it does in many states by  
11 absentee vote and an absentee ballot is mailed to the  
12 address identified by the voter which is a further check  
13 on the process.

14 So what -- what then I've been trying to  
15 figure out, what is the nature of the Plaintiffs' and  
16 legislature's complaint about identifying the witness  
17 through other means. These other means that have been  
18 identified and enumerated in the cure guidance.

19 You know, whether it's a database search  
20 or voter contact, all of those complaints are based in  
21 state law and they have to yield. They have to then  
22 they're superceded by the Federal law requirement here in  
23 the Civil Rights Act.

24 I did want to note, too, that it's not  
25 just the scenario that counsel for WEC talked about where

1       it might be a spouse, you know, who omits their witness  
2       address. There could be a person who like puts ditto  
3       marks, who writes same. Who includes street name and  
4       street address but omits the municipality name thinking  
5       the rest of the balance of the address is clear because  
6       it matches what's above.

7               All of these are scenarios that trigger or  
8       in the absence of the cure guidance, will trigger Federal  
9       law and, you know, trigger the Federal law requirements  
10      such as materiality and the Civil Rights Act. And so all  
11      of those need to be addressed.

12             I think if the Court, I'm not going to die  
13      on this hill of arguing that the, you know, Section 101  
14      the materiality provision in the Federal law rendered  
15      6.87(6d) per se on its face invalid, we do believe that,  
16      but in the alternative if Your Honor is not inclined to  
17      think that the witness address is immaterial on its face,  
18      then I think what's triggered is a need to disaggregate  
19      the witness address into its different components and  
20      into these different scenarios and create rules and sub  
21      rules that will account for and take into account the  
22      Federal law, the materiality requirement. Otherwise an  
23      injunction that just disposes of the cure guidance is  
24      just teeing up new and potentially confusing litigation,  
25      right next, right in the course of the an ongoing

1 election on the Federal law claims so that's why we've  
2 intervened to tee these up now and of course the Court  
3 has concurrent jurisdiction over Federal law issues and  
4 can address those in the course of these proceedings.

5 I wanted to say one other point about the  
6 cure guidance. The injunction, you know. The League is  
7 not, you know, here to necessarily argue that every  
8 single phrase or every single provision of the cure  
9 guidance needs to be upheld. What the Federal Civil  
10 Rights Act requires is that the ballot be counted and not  
11 be rejected for an immaterial technical omission, but if  
12 what Plaintiffs and the legislature are really up in arms  
13 about is the fact that clerks are filling in information  
14 and completing that address, that part of the guidance  
15 could be enjoined as long as what's upheld and what's  
16 sustained as part of the order is that the ballot be  
17 counted and that's to protect Wisconsin election law and  
18 procedures from running afoul of the Civil Rights Act.

19 So the cure policy can be upheld to the  
20 extent that it protects voters rights under Federal law  
21 but the ballots can be counted without being cured, cured  
22 quote unquote per se. You know, the face that's just to  
23 say the face of the absentee ballot certificate envelope  
24 doesn't need to be completed by the clerk in order for  
25 the ballot to be counted. That requirement in 6.87(6d)

1 can yield, must yield to the Federal law requirements.

2 There are a variety of permutations some  
3 of which we have already discussed but as I said before  
4 most of the actual yield rules incomplete witness  
5 addresses are incomplete because there is an omitted  
6 state name or an omitted zip code. That's the evidence  
7 from the legislature audit bureau's analysis from last  
8 year. And disposing of those, just dealing with just  
9 those two categories, would deal with the lion's share of  
10 what ballots that are in dispute.

11 Municipality name. I assume they didn't  
12 discuss in the LAD report but I assume that's next. That  
13 most people leave off the municipality name but I think  
14 that's clear in context. I think those three, omitting  
15 any of those three components of a witness address  
16 together or any of them singularly, we submit that's  
17 immaterial to the voter's qualifications and any order I  
18 think that's issued in this case could potentially keep  
19 Wisconsin election law and procedures on the right side  
20 of the Federal law requirements by addressing those three  
21 components of the witness address. Municipality name,  
22 zip code and state name.

23 Just a few other points on this before  
24 turning to the other Federal law arguments here. I do  
25 think, you know, in reviewing an incomplete witness

1 address practically speaking, municipal clerks are able  
2 and law enforcement if they're involved in an  
3 investigation, are able to deduce who that witness is and  
4 identify that witness even if there is an incomplete  
5 address. There would only be so many people with the  
6 specific name living at a specific address even if the  
7 municipality name is omitted. And they will be able to  
8 identify which specific person served as a witness for  
9 the voter.

10 In that circumstance, voter contact can be  
11 useful. But it's not necessary if they can identify the  
12 witness based on the database search which is, you know,  
13 has been done for six years without anyone raising the  
14 issue.

15 Just briefly because I know I said I would  
16 come back to it. The LAD report said that 799  
17 certificates did not have a zip code and 364 certificates  
18 did not have a state name. They did not highlight how  
19 many of the certificates were missing a municipality  
20 name, I just assume that because they didn't note it,  
21 it's less than 364 but it wasn't noted in the report. 15  
22 certificates in ten municipalities did not have a witness  
23 address in its entirety. So comparatively it's a very  
24 small number which falls squarely within the 6.87(6d)  
25 language.

1 I wanted to just note again I think I  
2 noted this but in any order that this Court were to issue  
3 I think that it could carve out certain categories to  
4 keep Wisconsin law and election procedures in compliance  
5 with the Federal law and to my mind it has to do so in  
6 order to comply with the Civil Rights Act to designate  
7 the, in (6d) and say which of these scenarios would trip  
8 the materiality.

9 Turning to the other arguments that we've  
10 raised under the constitution, similarly, Plaintiffs and  
11 the legislature's argument and requested relief would put  
12 Wisconsin election law and procedures in violation of the  
13 First and Fourteenth Amendments under the Anderson Voting  
14 Test that's been outlined by the U.S. Supreme Court. The  
15 burden in this case is most severe possibilities a full  
16 rejection of a vote, it's denial of the fundamental right  
17 to vote. It's not, you know, as in some other cases just  
18 do you have to go get an ID, do you have to present proof  
19 of residence. This is just full out rejection of the  
20 ballot.

21 The State's interests, Plaintiffs, you  
22 know, have not really established how the witness address  
23 practically functionally furthers a compelling statement.  
24 I noted there seems to be no evidence of usage of the  
25 witness address in the record. And, you know, on the

1           other hand, on the other side of the scale, we have the  
2           rejection of tens of thousands of votes in Wisconsin.

3                       So we would submit, the League would  
4           submit that this and I've noted too that Wisconsin has  
5           all these additional purported voting integrity voting  
6           security measures from proof of residence, nations only  
7           across the board proof of documents, voter ID is  
8           submitted at the time of the absentee ballot application  
9           or along with the absentee ballot if they didn't do it  
10          previously.

11                      So it has all of these measures in place  
12          and I think that's relevant to this analysis as well.  
13          Under this balancing test, it seems clear to us that  
14          denial of tens of thousands of ballots is not justified  
15          by an omitted zip code, omitted state name, an omitted  
16          municipality name. And other scenarios where the witness  
17          indicates same or ditto.

18                      There are a variety of, you know, common  
19          scenarios here which this Court could address in its  
20          order which would reconcile what the Plaintiffs are  
21          asking, reconciling any interpretation of 6.87(6d) with  
22          the Federal law requirement.

23                      The other option too is to give WEC an  
24          opportunity to craft new guidance within parameters set  
25          by this Court. We obviously don't have a lot of time

1 here based on when the Plaintiffs and legislature decided  
2 to file this lawsuit. But if the Court were inclined to  
3 think that the current guidance runs afoul of state law,  
4 WEC could be given another opportunity to craft guidance  
5 that deals with all these rules and Your Honor could deal  
6 with them. This Court could deal with them in its order  
7 or could give WEC another opportunity to craft guidance  
8 that in the Court's view better reconciled state law and  
9 Federal law.

10 I won't rehash the obvious usage. We  
11 cited that we think that case is extremely instructive  
12 here. The panel you know made clear that perfection is  
13 not a reasonable or valid goal for election law, voting  
14 law requirement. It took a very functional approach to  
15 absentee voting and the requirements for it for  
16 perfection sake wasn't the litmus test. The  
17 constitutional framework was very functional. If the  
18 information that's recorded in the witness address, in  
19 the witness certification is sufficient and sufficiency  
20 was the litmus test, if it's sufficient to identify the  
21 witness, it serves its purpose and if it does not meet  
22 it, to result in the quote unquote heavy handed measure  
23 of rejecting the ballot.

24 Lastly, I do want to note as well the due  
25 process implications of what Plaintiffs and the



1 legislature are asking this Court to do. And with  
2 respect to their counsel I don't think what they've  
3 argued and repeatedly citing in 6.87(9) is a serious  
4 attempt to deal with those serious due process concerns.

5 Just to read the statute in part really  
6 quickly it says if a municipal clerk receives an absentee  
7 ballot with an improperly completed certificate or with  
8 no certificate, the clerk may return the ballot to the  
9 elector. Both in the Plaintiffs and the legislature's  
10 reply briefs, they conceded explicitly that this, the may  
11 in this statute, means that the clerk can choose whether  
12 or not to return the ballot to the voter. They can  
13 decide to submit it, you know, to seal it back up, send  
14 it back to the voter or they can hold it for rejection.  
15 So the fate of that voter's ballot rests  
16 in the hands of clerk who on a whim can decide to send it  
17 back for a cure of that witness certification or to just  
18 hold it and reject it.

19 We would submit that that simply is not  
20 adequate notice. It doesn't comply with due process for  
21 one. It's not uniform. And I would underscore that the  
22 Plaintiffs and the legislature who have raised concerns  
23 about uniformity and other aspects of this litigation  
24 with cure guidance have not said anything about the  
25 obvious non-uniformity created by 6.87(9). The

1 preexisting state of affairs prior to this cure guidance  
2 was you could send it back or not. And it could just be  
3 rejected. And in the absence of this guidance, this cure  
4 guidance, that is going to create non-uniformity across  
5 voters because this is just purely discretionary.

6 The other problem with this concerns the  
7 balance of the language where it says together with the  
8 new envelope, if necessary, quote, whenever time permits  
9 the elector to correct the defect and return the ballot  
10 within the period under (6d).

11 So again non-uniformity is purely a gut  
12 call on the clerk's part, clerk staff, as to whether  
13 there is enough time to get the ballot back to the voter  
14 and for the ballot to be returned from the voter back to  
15 -- back to the clerk's office. Even the form EL-122, the  
16 absentee ballot certificate envelope that we've been  
17 discussing, Section 5 says mail back your ballot. Allow  
18 four to five days for delivery to insure your ballot is  
19 received by election day. Ballots received after  
20 election day will not be counted.

21 So we're talking about a minimum of ten  
22 days but of course we have all seen through the news and  
23 other sources you know other things that USPS that has  
24 put out there have been significant delays of ballots  
25 being delivered to voters and ballots being delivered,

1           being mailed back from voters to clerk's offices.

2                       So mail no longer constitutes a viable way  
3           to provide adequate notice to a voter. The legislature  
4           seemed to understand that themselves by proposing an SB  
5           935 that there would be notice put up online. That in  
6           and of itself wouldn't be sufficient for all voters but  
7           it just goes to show that even the legislature seems to  
8           understand that it is not adequate to rely on the mail  
9           for providing adequate notice and an adequate opportunity  
10          to cure a quote unquote defective ballot to meet those  
11          Federal due process requirements.

12                      I would also note that the Supreme Court  
13          of Wisconsin, Wisconsin recent decision in Teigen which  
14          largely struck down the use of drop boxes throughout the  
15          state has only made voters throughout Wisconsin more  
16          reliant on the mail not less.

17                      With that I just conclude by saying we do  
18          think the League submits that the requested relief in  
19          this case would put -- would put Wisconsin election law  
20          and procedures in violation of the U.S. Constitution and  
21          the Civil Rights Act.

22                      This Court does have the power and indeed  
23          the obligation under Wisconsin state law to address those  
24          Federal arguments now in these proceedings. That's  
25          certainly the most efficient way to deal with them. And

1 it can deal with them in a variety of ways. It can  
2 create rules to reconcile Federal law into state law  
3 here. It could also give WEC another opportunity to  
4 craft guidance if that is the way the Court, Your Honor,  
5 is leaning. And with that I will stop.

6 THE COURT: All right. I'll give you a very  
7 short rebuttal, like two minutes each because I need to  
8 use the restroom, I am sure some of you do too. My  
9 clerk, my court reporter needs a 15 minute break.  
10 Because I did a bad job of telling her about JCRAR and  
11 all of that stuff ahead of time so she is probably  
12 wondering what is going on. So she needs a break but I  
13 I'll give you rebuttal two minutes each. And then I'll  
14 take a 15 minute break and I'll come back, okay.

15 MR. BURNETT: Thank you. The pressure is on.

16 THE COURT: I told you I had to go to the  
17 bathroom, didn't I?

18 MR. BURNETT: Yeah. I understand. There is no  
19 answer to that basic question I asked. If the  
20 legislature intended the clerks to have all these options  
21 why didn't it say so.

22 The idea that this isn't a mandatory  
23 guidance is refuted in the guidance itself. If you look  
24 at the guidance, it says the clerk must and it highlights  
25 the word must. So it's clear to municipal clerks reading

1           this that this is something they should do. You were  
2           absolutely right the Teigen case distinguished between  
3           primaries and general elections. That's found at  
4           Document 139, Page 3.

5                       There is no evidence that voters are going  
6           to be confused by any of this. The ballot envelope gives  
7           them very clear direction as to how to fill it out. How  
8           their witness should fill it out and it indicates  
9           precisely the information the witness needs. We were  
10          told that there is confusion about geez, what is a  
11          complete address.

12                      Well, if you look at the WEC policy we're  
13          involved with here, it defines a complete address as a  
14          street number, a street name and name and municipality.  
15          This isn't a case about counting votes. This is a case  
16          about stopping the issuance of guidance that violates  
17          Wisconsin law. The whole idea that Federal law is  
18          somehow or another violated because these requirements  
19          deal, don't deal with qualifications to vote was rejected  
20          by Judge Peterson in the Common Cause decision found at  
21          Document 132, Page 6. Thank you.

22                      THE COURT: Thank you.

23                      MR. TSEYTLIN: I'll scrap most of what I was  
24          going to say and I'll try to submit a couple of brief  
25          points.

1                   The issue here as Your Honor properly  
2 articulated is whether WEC can mandate clerks to take  
3 extra steps that are not provided in the statute when  
4 confronted with missing witness addresses. This case  
5 does not call on this Court to define what a missing  
6 witness address is. It does not call upon this Court to  
7 issue novel and I would say revolutionary decisions under  
8 Federal law which I think if taken seriously would lead  
9 to the conclusion that all rules for absentee voting in  
10 Wisconsin are preempted because of course in Wisconsin  
11 all otherwise eligible voters can vote absentee.

12                   So if what my friends are arguing any rule  
13 above that are preempted by Federal law, then gee under  
14 their theory which no Court has adopted or even suggested  
15 all those rules by in Wisconsin are preempted that is  
16 obviously not correct and in any event not presented by  
17 this case.

18                   I do want to focus on just this argument  
19 about the JCRAR veto because it is one of the things in  
20 this case that goes beyond the dispute here. What we  
21 heard from WEC's counsel here, my friend, is that they  
22 don't really have a textural argument in the statute of  
23 why they can ignore what JCRAR did. They're basically  
24 saying that the JCRAR regime is unconstitutional. The  
25 JCRAR regime was upheld as constitutional unanimously by

1 the Wisconsin Supreme Court in the Martinez decision. So  
2 they, you know, I'll give DOJ credit. They argued in  
3 Martinez. All of the same arguments they're raising  
4 here. That the JCRAR regime was unconstitutional a very  
5 eloquent brief submitted by the DOJ. They lost seven to  
6 zero at the State Supreme Court.

7 They're welcome to go off in this case and  
8 I'm sure this case will go up and ask the State Supreme  
9 Court to overturn Martinez. But as long as Martinez is  
10 the law, the JCRAR process is mandatory and binding.  
11 When JCRAR says you're claiming this for guidance but we  
12 think this is a rule. We're directing you that's the  
13 term in the statute to issue it as a rule and then that  
14 happens the JCRAR thereafter suspends that and it can be  
15 now multiple suspensions that was upheld in the SCIU  
16 case. That's the end of the ball game and that is  
17 sufficient to hold that this whole enterprise here is  
18 illegal. There is no possible argument that following  
19 state rule making procedures is, violating state rule  
20 making procedures, is mandated by Federal law that  
21 somehow this involves defining what address means. That  
22 is a very clean easy way to determine that the 2016  
23 mandate is illegal under the JCRAR regime. There is no  
24 textural argument to the contrary and any contrary  
25 constitutional arguments have been rejected in the

1           Martinez decision by the State Supreme Court.

2                           THE COURT: All right. Let's take 15  
3 minutes. Let's come back at five to. Okay. So 3:55.

4   (Recess taken.)

5   (Proceedings concluded.)

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I, Lori Schiek, do hereby certify that I am an Official Court Reporter assigned to report the proceedings herein in Waukesha County, Waukesha, Wisconsin; that the foregoing 92 pages are a true and correct transcript of my stenographic notes taken in the proceedings held on September 7, 2022, and reduced to typewritten form.

Dated this 22nd day of September, 2022.

Lori Schiek  
Lori Schiek,  
Official Court Reporter

1           STATE OF WISCONSIN           CIRCUIT COURT           WAUKESHA COUNTY

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2           MICHAEL WHITE, et al.,

3                           Plaintiffs,

4                           -vs-

Case No. 22-CV-1008

5           WISCONSIN ELECTIONS COMMISSION,

6                           Defendant.

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7           September 13, 2022

Honorable Michael J. Aprahamian  
Circuit Court Judge, presiding

8                           MOTION TO STAY HEARING

9           A P P E A R A N C E S:

10                   KURT GOEHRE, Attorney at Law, appeared by Zoom on  
11                   behalf of the Plaintiffs.

12                   LYNN LODAHL and STEVEN KILPATRICK, Attorneys at Law,  
13                   appeared by Zoom on behalf of the Wisconsin Elections  
14                   Commission.

15                   JEFFREY MANDELL and JOHN GEISE, Attorneys at Law,  
16                   appeared by Zoom on behalf of the Waukesha County  
17                   Democratic Party.

18                   MISHA TSEYTLIN, Attorney at Law, appeared by Zoom on  
19                   behalf of the Wisconsin Legislature.

20                   DANIEL LENZ, JOHN SHERMAN, and ELIZABETH PIERSON,  
21                   Attorneys at Law, appeared by Zoom on behalf of the  
22                   League of Women Voters of Wisconsin.

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5           Lori Schiek

6           Official Court Reporter

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1 TRANSCRIPT OF PROCEEDINGS

2 THE COURT: Michael White et al. Versus  
3 Wisconsin Elections Commission. 22-CV-1008.

4 I'm going to ask for the appearances, I'll  
5 call out the party and if the lead attorney who is going  
6 to be making the argument could just make the appearance  
7 for him or herself and then any other attorneys appearing  
8 for that party as well that would be appreciated. So for  
9 the Plaintiffs.

10 MR. GOEHRE: Attorney Kurt Goehre.

11 THE COURT: For WEC.

12 MR. KILPATRICK: Assistant Attorney General  
13 Steven Kilpatrick and with me is Assistant Attorney  
14 General Lynn Lodaal.

15 THE COURT: For the Waukesha County Democratic  
16 Party.

17 MR. MANDELL: Jeff Mandell with Stafford  
18 Rosenbaum. With me on the Zoom is John Geise from the  
19 Alliance Law Group.

20 THE COURT: For the league of Women Voters of  
21 Wisconsin.

22 MR. LENZ: Dan Lenz. With me on the Zoom are  
23 Attorneys John Sherman and Elizabeth Pierson. With us on  
24 the Zoom as well is Deborah Cronmiller the executive  
25 director of the League.

1                   THE COURT: And for the Wisconsin State  
2                   Legislature.

3                   MR. TSEYTLIN: Misha Tseytlin.

4                   THE COURT: All right. Good morning to all.  
5                   We also have some people, well, one reporter now. One  
6                   just left here in the courtroom. The courtroom is open.  
7                   We are broadcasting this on the screen as well.

8                   Somebody else is in the waiting room. I'm  
9                   going to let them in.

10                  We're here on a motion to stay enforcement  
11                  of the temporary injunction that was issued last week.  
12                  At the end of that hearing there was an oral motion to  
13                  stay the injunction. I requested that it be put in  
14                  writing so that we could address it more fulsomely and  
15                  there could be a response and we scheduled this hearing  
16                  for today.

17                  I did see that the Waukesha County  
18                  Democratic Party did file that motion and supporting  
19                  memorandum and then the League of Women Voters of  
20                  Wisconsin joined in it as did WEC. There was also  
21                  opposition filed by the Plaintiffs as well as the  
22                  Wisconsin State Legislature.

23                  With that, Mr. Lenz, I'm sorry,  
24                  Mr. Mandell, why don't you go ahead and make your  
25                  argument and I'll ask then Mr. Lenz and Mr. Kilpatrick

1           for their's.

2                       MR. MANDELL: Thank you, Your Honor. The Court  
3           should stay its order. There are four factors to  
4           consider under Waity which is the Supreme Court's  
5           decision earlier this year and conveniently all of the  
6           parties here agree on what those factors are.

7                       The first is whether the movant makes a  
8           strong showing that it is likely to succeed on the merits  
9           of the appeal. As the legislature acknowledges on Page 4  
10          of its brief the fact that a de novo standard of review  
11          will apply on appeal here presumptively satisfies this  
12          standard.

13                      Plaintiffs don't acknowledge this. They  
14          make the precise error that is criticized in the Waity  
15          decision asserting that we have no likelihood of success  
16          on appeal because we lost in this Court. That's at Page  
17          2 of their brief. That is not an accurate statement of  
18          Wisconsin law.

19                      The legislature, despite recognizing the  
20          presumption, says that we still don't satisfy the  
21          standard because the presumption is at its lowest here  
22          and we failed to rebut this Court's rationale in granting  
23          the injunction. Respectfully this is incorrect.

24                      We do have sufficient arguments that show  
25          we have a likelihood that another Court looking at this

1           anew under a de novo standard will see things  
2           differently.

3                       With respect to the construction of  
4           Wisconsin Statute Section 6.87(2) and (9), our view is  
5           consistent with that that four justices of the Wisconsin  
6           Supreme Court took in Trump v. Biden 2020 WI 91. That  
7           alone suggests that there is a significant possibility  
8           that our view will prevail.

9                       Additionally, this Court's interpretation  
10          of those provisions erroneously ignores the statutory and  
11          precedential mandate to construe these provisions as  
12          directory and quote give effect to the will of the voter,  
13          which is in Wisconsin Statute 5.01(1).

14                      The Court as it geared up to announce its  
15          understanding of these provisions, cited Wisconsin  
16          Statute Section 6.84(2) which is about mandatory  
17          provisions. But that provision actually favors our  
18          position because it makes clear that neither (2) nor (9)  
19          of Wisconsin 6.87 is a mandatory provision.

20                      On Page 12 of the partial transcript that  
21          has been provided of the Court's order, the Court  
22          referenced 6.84(2) even though as the Court went through  
23          its order, it offered no construction of any mandatory  
24          provision in the Wisconsin code.

25                      On Page 18 of that transcript the Court

1 read Section 6.87(9) as mandatory. The Plaintiffs in  
2 their brief in response to our motion make the same error  
3 on Page 3. They don't cite statute nor do they cite  
4 precedent. Instead they cite the lead opinion from the  
5 Supreme Court in Teigen. But it is important to note  
6 that the provision, the piece of Teigen that they cite  
7 does not have the support of four justices. It is not  
8 the law and it lacks the force of law. It is,  
9 therefore -- - the Teigen pieces that have been cited,  
10 whether by Plaintiffs, by the legislature or by this  
11 Court, are all unilluminated and unhelpful because every  
12 single citation to Teigen that is before this Court, both  
13 the two in this Court's order, the two in the Plaintiffs'  
14 brief and the one in the legislature's brief, every  
15 single one of them is to a paragraph that lacks the force  
16 of law and does not have four votes. It is not a  
17 statement of the majority of the Court.

18 Turning to the legislature's  
19 administrative law argument and why we have a likelihood  
20 of success there. The legislature continues to distort  
21 the procedural history here to try to make this case fit  
22 into the box of the Martinez precedent. But it doesn't  
23 fit. The Elections Commission took no official action --

24 THE COURT: Hang on. Somebody was talking and  
25 I just muted them. Again, if you are not an attorney and



1 not currently making an argument, I want you to mute.

2 Sorry about that, Mr. Mandell. Go ahead.

3 MR. MANDELL: No problem, Your Honor. This  
4 case does not fit the Martinez precedent. The Elections  
5 Commission took no official action following the JCRAR  
6 vote in July. It did not readopt the guidance or  
7 otherwise defy the legislature and to say otherwise  
8 ignores the record.

9 JCRAR used its statutory authority to  
10 require rule making. Unhappy with the emergency rule it  
11 then suspended the emergency rule but there is no basis  
12 to pretend that that process undoes the Election  
13 Commission's unanimous vote six years ago to adopt the  
14 guidance. To say so ignores this record, ignores the  
15 statutory scheme and undermines Justice Kelly's opinion  
16 in SCIU which is premised on the difference in kind as  
17 well as in statute between rules and guidance.

18 On both counts the statutory piece and the  
19 administrative law piece our arguments are more than  
20 sufficient that an Appellate Court might see things  
21 differently than this Court has.

22 Lastly, on this point the legislature  
23 suggests that somehow our motion is insufficient because  
24 we did not restate those arguments in full in our motion  
25 to stay. That suggestion is factious. Most motions for

1 stays as we tried in this Court are made orally and they  
2 rely entirely on the incorporation of the merits argument  
3 that had been presented on the substance. Just like the  
4 Plaintiffs' brief in opposition incorporates their  
5 arguments on substance, so too our motion does and there  
6 is no need for us to bury the Court in paper by filling  
7 our motion with arguments already made. The Court is  
8 well aware of those arguments. So we satisfy the first  
9 prong here both under the presumption in Waity and on the  
10 merits of the arguments itself.

11 The second prong is whether the movant  
12 shows that absent a stay it will suffer irreparable  
13 injury. This factor is relevant to a stay but not to a  
14 temporary injunction so it's a particularly important  
15 factor for consideration here and the Supreme Court has  
16 been clear that if a movant seeking a stay shows  
17 irreparable harm, "that fact must weigh in favor of the  
18 movant." That's in Paragraph 57 of the Waity decision.

19 In other words, if we can show irreparable  
20 harm the stay really should issue. The existence of  
21 irreparable harm to the movants here is indisputable.  
22 There are three different kinds of irreparable harm.

23 First, some or all of the Waukesha County  
24 Democratic Party's members will suffer  
25 disenfranchisement. That is the irreparable harm as we

1       quoted in our brief. The Wisconsin Supreme Court has  
2       said nothing can be clearer under our constitution in  
3       rights than the right of the citizen to vote is a  
4       fundamental inherent right. The Court has also said that  
5       no right is the more zealously guarded and protected by  
6       the departments of government under our constitutions,  
7       Federal and State, than the right of suffrage. And as we  
8       quoted, there is, as we pointed out, there is no possible  
9       remedy that compensates an eligible voter who is deprived  
10      of their right to vote. That voter has lost something  
11      completely immeasurable and as we quoted it is axiomatic  
12      that there is no possible remedy for a violation of that  
13      right.

14               But you don't need to rely solely on that  
15      arbitrary irreparable harm. There is also harm in the  
16      diversion of the Waukesha County Democratic Party  
17      resources in the home stretch of the campaign. The  
18      legislature says on Page 10 of their brief that this is  
19      overstated and that quote, at most the Waukesha County  
20      Democratic Party might wish to reemphasize the apparent  
21      legal arguments for a completed absentee ballot witness  
22      certificate address which will not require substantial  
23      expenditures.

24               This argument is entirely speculative and  
25      oversimplified. The reality of the task before the

1       Waukesha County Democratic Party in the face of this  
2       Court's order is that we must reeducate voters who have  
3       been conditioned over six years in the past 12 elections  
4       that specific voting behavior is sufficient. That is --  
5       - that kind of reeducation is no simple task. Especially  
6       in the home stretch of a campaign when there is so much  
7       other noise around the election and absent a stay, this  
8       Court places the Waukesha County Democratic Party in the  
9       nearly impossible position of having to accomplish this  
10      feat in remarkably little time.

11               The election is only eight weeks from  
12      today. And voters can begin casting absentee ballots  
13      next week.

14               Third, irreparable harm has already been  
15      recognized by this Court in the form of likely  
16      inconsistent election administration across the state.  
17      That's at Page 24, lines 19 to 22 of the partial  
18      transcript. The Court recognized this as irreparable  
19      harm in speaking of irreparable harms to the Republican  
20      Party of Waukesha County. It can't then reverse course  
21      and deny that the same harm, the flip side of the coin,  
22      applies and irreparably harms the Waukesha County  
23      Democratic Party. Allowing the injunction to take place  
24      shortly before the election exacerbates the problem  
25      rather than mitigates is.

1                   In other words, sure there are two sides  
2                   of this coin and sure, each side, each party faces some  
3                   kind of harm here. But if you think about the nature of  
4                   the harm that the Court is worried about, the harm is  
5                   worse if the injunction goes into effect immediately than  
6                   if the injunction is stayed.

7                   The fact is the injunction invalidates  
8                   Elections Commission guidance that has existed since  
9                   shortly after the adoption of the current statutory  
10                  scheme, right. Wisconsin Statute 6.87(6d) was created by  
11                  2015 Wisconsin Act 261. That change had the Elections  
12                  Commission, election administrators and Courts think  
13                  about Wisconsin Statute 6.87 and to take away the  
14                  guidance that has synthesized and helped guide the  
15                  application of that statute since its current form will  
16                  create a vacuum in which municipal clerks and other  
17                  election officials lack a consistent interpretation of  
18                  Wisconsin law.

19                  The legislature denies this. The  
20                  legislature says that the Elections Commission has  
21                  binding guidance on what constitutes an address. But a  
22                  Page 7 of their brief and there is a footnote with a  
23                  citation and they return to that citation several times  
24                  later in their brief. This is mistaken.

25                  The source that the legislature cites is

1 not a rule, it is not even Elections Commissions  
2 guidance. It is simply a staff memo written to  
3 commissioners to help them decide whether they should  
4 adopt the guidance that is challenged here. It has no  
5 binding effect. It was never sent to clerks. And the  
6 minutes of the meeting at which the Elections Commission  
7 discussed this memo made clear that the memo was not  
8 adopted. Both the portions the commissioners agreed with  
9 and those they disagreed with informed the guidance that  
10 the legislature has successfully urged this Court to  
11 invalidate.

12 The legislature cannot in some post hoc  
13 effort to minimize the irreparable harm to the movants  
14 here, pick and choose which part of the guidance they now  
15 belatedly want to keep after urging successfully this  
16 Court to strike the guidance down in full. All of these  
17 are bases that show that there is irreparable harm to the  
18 movants if the injunction is not stayed.

19 The third factor is whether the movant  
20 shows that no substantial harm will come to other  
21 interested parties. As we pointed out in our brief, this  
22 isn't really about the idea that no substantial harm will  
23 come to interested parties it's about comparing the harms  
24 that will befall competing parties that's made clear in  
25 Paragraph 58 of the Wisconsin Supreme Court Waity

1 decision and here if the Court compares those harms, the  
2 harms to the Plaintiffs and the legislature simply do not  
3 outweigh the harms the Waukesha County Democratic Party  
4 or the other movants. But start with the vote dilution  
5 which is the harm about, on which the Plaintiffs rest  
6 their case. Each of their votes under their theory is  
7 diluted if at all because this is entirely speculative to  
8 only a miniscule extent.

9 The Legislative Audit Bureau report which  
10 the Court can take judicial notice, suggests that from  
11 the sample that the Legislative Audit Bureau reviewed  
12 merely was 0.1 percent of absentee ballots had missing  
13 witness addresses. I mean it's 0.1 percent should not  
14 have been counted. That means that Plaintiffs votes are  
15 barely diluted at all. 0.1 percent is not a margin that  
16 changes the outcome of a state-wide election.

17 This is analogous as we say in our papers  
18 to the Supreme Court's analysis of the taxpayer harms at  
19 issue in Waity.

20 The Supreme Court said well, yes, there  
21 are taxpayer harms but individual taxpayers can't claim  
22 those whole harms. They can only claim their pro rata  
23 share of those harms.

24 The same thing is true of vote dilution.  
25 Even if, and again this is purely speculative and there

1 is no evidence in the record that these ballots would be  
2 accepted but even if some infinitum number of ballots  
3 that are completely missing witness addresses are  
4 accepted, the pro rata dilution that that effectuates to  
5 Plaintiffs is too small to be measured in any serious  
6 way.

7 Plaintiffs also make a strange analogy of  
8 vote dilution to improper venue but that is completely  
9 unhelpful. So that harm cannot outweigh the harm to the  
10 Waukesha County Democratic Party of the movants. The  
11 legislature's harm for its part is about having to  
12 continue and that's their word on Page 10 of their brief  
13 facing the harm of unlawful guidance.

14 The record shows that that harm is  
15 overstated. Were this existential the legislature would  
16 not have sat on its rights for more than five years and  
17 nine elections before exercising its oversight authority  
18 nor would it have waited nearly six years and 12  
19 elections before coming to court.

20 The record, what's true here, is that the  
21 legislature changed its mind and the legislature is  
22 allowed to change its mind. I don't object to the  
23 legislature changing its mind. But if you go back and  
24 you look at those 2016 minutes I referenced before where  
25 the Elections Commission considered the staff memo



1 recommending the guidance that's at issue here, the  
2 motion to adopt that guidance was made by then  
3 Commissioner and now Commissioned Chair Millus. The  
4 second that motion was made by then Commissioner King.  
5 These are the Republican legislature leaders appointees  
6 to the commission at that time. This is the reason that  
7 JCRAR didn't challenge this until now is that they  
8 favored this at the time. In fact, Mr. Millus in the  
9 minutes, Commissioner Millus's complaint about the staff  
10 memo was that it said that clerks may correct missing  
11 information and he wanted it to say that they must, which  
12 is the exact crux of the legislature's complaint now that  
13 is most effective to them about the, about the guidance.  
14 Again, none of this is wrong.

15 The legislature is entitled to change its  
16 mind. JCRAR is entitled to have a different view of the  
17 law now than it had then but it undermines the  
18 seriousness of the harm when they were willing to allow  
19 if not actively support this policy for years and years  
20 and elections and elections to say now oh, it has to  
21 disappear this moment right on the eve of this coming  
22 election. It's just not credible.

23 And so whether you consider it through  
24 vote dilution or you consider the administrative law  
25 issue, the harms to Plaintiffs and the legislature simply

1 cannot outweigh the harms of the Waukesha County  
2 Democratic Party much less the other movants.

3 The fourth and final factor under Waity is  
4 whether the movant shows that a harm will not damage the  
5 public interests. It shows that a stay will not damage  
6 the public interests.

7 Both sides here claim that the public  
8 interests favors their position. And everyone agrees  
9 that the public has interests in full, fair, free  
10 elections where all eligible voters get to participate.  
11 So what is the Court to do. Well, two things.

12 First, because all of the other factors  
13 favor the stay, if there is a tie here or even if it  
14 slightly favored the Plaintiffs and the legislature, the  
15 stay should still issue. But second, the Court should  
16 look at this, recognize that there are public, that the  
17 public interests plays both ways and do everything it can  
18 to avoid the possibility of voter whiplash. Avoiding  
19 that, that kind of whiplash, necessitates a stay here.

20 Because, if the Court allows the  
21 injunction to go into effect, when there is a reasonable  
22 likelihood an Appellate Court will see things  
23 differently, then the law will keep flip flopping back  
24 and forth.

25 Whereas, if the Court stays its order and

1 allows the Appellate Court to do its job and conduct its  
2 own analysis, even if there can be no more than one  
3 change in the law. If the higher Court agrees with us,  
4 the law remains consistent. If the higher Court agrees  
5 with this Court and with the Plaintiffs and the  
6 legislature, there is only one change.

7 Additionally, I have to note that the  
8 Court's ruling included observations about the public  
9 interests and public harms. They are not supported by  
10 the record and are not proper consideration. On Page 20  
11 of the Court says, "It is of little wonder that  
12 proponents from all corners of the political spectrum are  
13 critical, cynical and suspicious of how elections are  
14 managed and overseen when three unelected bureaucrats can  
15 defy the legislature and decline to suspend guidance that  
16 the Joint Committee under its oversight authority has  
17 determined violates Wisconsin law."

18 There is no record of evidence in this  
19 case that individuals in desperate political beliefs are  
20 critical, cynical or suspicious about how elections are  
21 managed and overseen in this state. There is no record  
22 of evidence that any unelected bureaucrats, presumably  
23 the Court was referring to some members of the Elections  
24 Commission, have defied the legislature nor is there any  
25 record of evidence of the intent of such actors.

1                   And JCRAR, the Joint Committee to which  
2                   the Court referred, has oversight authority, we all agree  
3                   about that, but under Bedrocks Separation of Powers and  
4                   Principles that oversight authority does not include  
5                   making a definitive determination of whether a guidance  
6                   document violates state law.

7                   As Chief Justice Marshall taught us 220  
8                   years ago, it is emphatically the province and duty of  
9                   the judicial department to say what the law is. Of  
10                  course, JCRAR can express its concern that a guidance  
11                  document is inconsistent with the law. And, yes, JCRAR  
12                  has express authority to suspend a rule if it believes  
13                  that rule is inconsistent with the law. But JCRAR cannot  
14                  and did not make a definitive ruling that a guidance  
15                  document is -- it violates a statute. That is something  
16                  only Courts can do.

17                  Secondly, the Court said quote on Page 24,  
18                  "Simply because three commissioners refuse to accede to  
19                  the Joint Committee's determination and are determined to  
20                  keep the guidance in place, does not mean that this Court  
21                  owes any deference to them or to the guidance, or that  
22                  the guidance should remain in place," before going on.

23                  Once again there is no record evidence of  
24                  the commissioners' intent and once again JCRAR cannot  
25                  make the definitive determination of the guidance

1           lawfulness. Those are not -- those statements are not  
2           supported in the record. They are not proper  
3           considerations when thinking about harm to the public  
4           interests under the fourth factor of the Waity standard.

5                     Balancing all of these factors and all the  
6           parties agree that the factors are not prerequisites as  
7           the Court said in Waity but are a dynamic system to get  
8           considered together strongly favors the entrance of a  
9           stay.

10                    There are briefly, Your Honor, two  
11           additional considerations outside of the Waity test that  
12           favor a stay. First is that the Waity Court in Paragraph  
13           49 said that a stay is often important to preserve the  
14           status quo. Was quoting the Werner decision at 80 Wis.2d  
15           520. The purposes of vindicating the status quo is to  
16           minimize reversals in law if the Court of Appeals  
17           disagrees with the Circuit Court's ruling. I addressed  
18           that earlier as part of the public harm. But given that  
19           the past 12 state-wide elections, including one just a  
20           month ago, have been administered under the -- under the  
21           guidance at issue here, given that the Appellate Court  
22           applying de novo review very well may interpret the  
23           relevant statute different than this Court does and would  
24           have good reason to do so as I outlined before and given  
25           that the Waukesha County Democratic Party and other

1 movants will suffer significant irreparable harm if the  
2 temporary injunction goes into effect, the only  
3 comprehensive articulation of the status quo is that the  
4 same election administration principle that is  
5 consistently applied in every election for the past six  
6 years should continue to apply this fall until an  
7 Appellate Court can review this Court's work.

8 The Court said and the legislature and the  
9 Plaintiffs have argued, that the status quo should be the  
10 statutory regime but as I noted earlier that statutory  
11 regime was barely in effect for any time at all prior to  
12 the guidance. There is no status quo to point to of the  
13 statutory regime governing elections in Wisconsin without  
14 the guidance. And so that really is not a logical or  
15 supportable way to think about the status quo.

16 Lastly, there are fundamental principles  
17 of due process under Federal and State constitutional  
18 guarantees that favor a stay here.

19 As we outlined in our papers, election  
20 procedures must not be changed to the detriment of voters  
21 who have reasonably relied on the previously established  
22 procedures. Certainly those procedures should not be  
23 changed in such a way to upset reasonable reliance on the  
24 eve of an election.

25 That principle applies with particular

1 force here as we discussed at last week's hearing because  
2 some voters requested their absentee ballots for the  
3 August primary and the November general election at the  
4 same time and they could have had their votes counted in  
5 the August primary and yet once the injunction takes  
6 effect they could cast a ballot with the same information  
7 on the envelope for the November election and have their  
8 vote not counted. That is a huge harm to their reliance  
9 interests and a violation of due process. These  
10 additional considerations on top of the clear analysis of  
11 the Waity factors counts in favor of a stay. Thank you,  
12 Your Honor.

13 THE COURT: Thank you, Mr. Mandell. Mr. Lenz.  
14 Any additional argument?

15 MR. LENZ: Thank you, Your Honor. Very  
16 briefly, Your Honor. As we did in our papers we join  
17 with the Waukesha County Democratic Party as to the  
18 factors outlined under the Waity test particularly the  
19 first, third and fourth factor.

20 We wrote separately and I'll briefly  
21 address the additional harm that we visited upon the  
22 League and its members as under that test and how that  
23 also requires the Court to enter a stay.

24 Specifically the League has two interests  
25 that will be irreparably harm absent a stay in this case

1 and I'll break it down into two buckets. The first is  
2 harm to its membership. As we outlined in the record and  
3 the affidavit of filed Newcomer (phonetic) the League  
4 represents approximately 2,000 members across the state  
5 many of whom who vote by absentee ballot. The League is  
6 active in helping its members and the general populus in  
7 completing the absentee ballot process successfully and  
8 making sure their voice is heard.

9 Absent a stay in this matter that interest  
10 will be harmed because those voters may not have their  
11 ballot counted even though as Mr. Mandell outlined, they  
12 have done so consistently over the past six years in the  
13 exact same way including in the August election. That  
14 is, for the reasons Mr. Mandell stated, as it pertains to  
15 the Waukesha County Democratic Party membership, an  
16 irreparable harm per se that cannot be repaired in the  
17 future nor is there any remedy of law.

18 The other interests that the League has  
19 that would be irreparably harmed absent a stay, is its  
20 organizational interests and there are a couple of  
21 separate organizational interests here. The first, is  
22 the past interest that the League has demonstrated over  
23 time in advocating for and supporting the existing  
24 guidance. As we outlined in our intervention papers the  
25 League is active in this area since the enactment of Wis.



1 Stat. 6.87(6d) and the initial guidance when it was  
2 created in October of 2016.

3 The League has continued to be active in  
4 this phase up through this case as well as proceeding  
5 before JCRAR in 2022. Furthermore, the League as a  
6 central function of the League, is providing information  
7 both to its members and to other voters across the state  
8 on a nonpartisan basis regardless of candidate,  
9 regardless of partisan affiliation and that -- and the  
10 League spent considerable time and resources on providing  
11 that information to voters. That interest will also be  
12 harmed absent a stay.

13 The Plaintiffs in their response to our  
14 papers don't address the League's interest at all. The  
15 legislature does briefly indicating that we somehow  
16 overstated this but the opposite is true. The  
17 significant harm that would be visited upon the League is  
18 not simply that's going to have to change its guidance,  
19 it's the risk of I believe Mr. Mandell called it whiplash  
20 of inconsistent guidance if we have differing opinions by  
21 different Courts over time.

22 The League will be faced with the  
23 impossible situation of repeatedly revising guidance  
24 creating a great deal of confusion as well as an  
25 unnecessary expenditure of time and funds. That also

1 can't be repaired because there are only eight weeks left  
2 before the election. That type of inconsistent  
3 information can't simply just be cleaned up or remediated  
4 later in law. And then so those are the League interests  
5 at issue here. We otherwise join with the Dem's.

6 I do have one request for clarification  
7 that's arisen in the responses from the Plaintiffs and  
8 the legislature and that Mr. Mandell touched on which is  
9 the effect of the Court's injunction on existing WEC  
10 guidance and information about the definition of address.

11 We agree to some extent with the  
12 legislature that WEC has provided information as to what  
13 it considers guidance or, I'm sorry, what it considers an  
14 address that was reduced in the October 16, 2018 guidance  
15 that this Court has now enjoined. As a matter of  
16 clarification, it may help remediate some of these  
17 problems, I think it would be helpful if the Court could  
18 clarify whether it was enjoining that portion of the  
19 guidance that defined address and or whether it will, it  
20 considers any further WEC guidance or any past WEC  
21 guidance information that helps provide definition of  
22 address that is otherwise not contained in the statute to  
23 municipal clerks and voters so they know what that would  
24 mean.

25 THE COURT: All right. Thank you, Mr. Lenz.

1 Mr. Kilpatrick.

2 MR. KILPATRICK: Thank you, Your Honor. I will  
3 try to be brief. On behalf of the Commission I just want  
4 to reiterate the Commission has been delegated the  
5 responsibilities of the administration Chapters 5, 10 and  
6 12 of the statutes. That means that the Commission is  
7 responsible for providing guidance to local election  
8 officials and the public concerning the administration,  
9 enforcement of Wisconsin's election laws.

10 Wisconsin Elections Commission also has  
11 advisory responsibilities that include explaining the  
12 election laws and promoting uniform procedures, insures  
13 that clerks and other officials are made aware of the  
14 integrity and importance of the vote of each citizen and  
15 for those reasons we believe that the stated public  
16 interests in a fair and uniform administration of  
17 elections are also the interests to the Commission as a  
18 defendant in this case, and, therefore, irreparable harm  
19 to voters in the general public described in the movant's  
20 motion that the Commission joined is applicable to the  
21 Commission.

22 Also I want to point out that contrary to  
23 what the legislature said in its brief, there is no stand  
24 alone guidance right now issued by the Commission that  
25 addresses what the content of a witness address is. What

1 the Court did in issuing an injunction preventing the  
2 Commission from advising clerks about the contents of the  
3 October 18, 2016 and later 2020 guidance, is preventing  
4 the Commission from advising about the content of a  
5 witness address as well as what clerks should do with  
6 regards to adding missing address information.

7 The Commission passed this guidance, the  
8 memorandum as a package, and now there is nothing for the  
9 clerks to be guided by and that results in uncertainty as  
10 to what a complete address is and increases the risk that  
11 some ballots will not be counted without the fault of the  
12 elector.

13 To close again, the guidance has been in  
14 place since before the November 2016 election and it  
15 should not be changed right before the November 2022  
16 election.

17 And finally I agree with Mr. Lenz, if the  
18 Court is willing to explain the temporary injunction and  
19 particularly with regard to whether the Commission can  
20 issue further guidance regarding the content of the  
21 witness address if the, if the injunction is interpreted  
22 that way by the Court. Thank you, Your Honor.

23 THE COURT: Thank you. Mr. Goehre.

24 MR. GOEHRE: Thank you, Your Honor. As counsel  
25 has indicated it appears that all the parties agree that

1 the Waity factors are really what is at issue here this  
2 morning and Plaintiffs' position is clear. We believe  
3 that the intervenors and the Commission have not made a  
4 strong showing that they're likely to succeed on the  
5 merits on the appeal. As this Court has already found  
6 and as an Appellate Court will likely find in our belief  
7 is that the Plaintiffs as well as the legislature are the  
8 ones that are likely to succeed on the merits not the  
9 Commission, not the intervenors.

10 I want to address the arguments by counsel  
11 concerning 6.84 and the suggestion that none of the  
12 provisions that are the subject of this Court's order  
13 touched any of the mandatory sections addressed in  
14 6.84(2). Well that's simply not the case.

15 One of the sections at issue that was  
16 raised in our motion and certainly was argued quite  
17 extensively last week was 6.87(4)(b1). That's the same  
18 provision that was at issue in the Teigen case. And what  
19 that statute says is that an absentee balloted voted by  
20 an elector must be witnessed by another and that quote  
21 one witness must sign a certification to that effect and  
22 that same witness must provide his or her address which  
23 is set forth in 6.87(2) in the form that's provided under  
24 that statute including that the witness must print their  
25 name, print their address and sign that certification.

1                   So that's all set forth in 6.87(4)(b1)  
2                   which is expressly included in the mandatory provision  
3                   that's set forth in 6.84(2). Likewise, 6.87(6d) also has  
4                   a mandatory provision under 6.84(2) which indicates that  
5                   if the certificate is missing the address of a witness  
6                   the ballot may not be counted.

7                   There is no dispute that that section,  
8                   which is at issue here, is a mandatory provision and by  
9                   the way which hasn't been mentioned yet this morning the  
10                  certificate that that one witness must sign including the  
11                  address, is signed under penalties of false statements  
12                  under Chapter 12.

13                  So the suggestion that this order and the  
14                  motion requesting a preliminary injunction do not touch  
15                  on any of the mandatory provisions as set forth in  
16                  Section 6.84 is simply inaccurate. And what we know from  
17                  the Teigen decision is that these absentee ballot  
18                  requirements at issue have to be strictly adhered to and  
19                  strictly observed to prevent the potential for fraud and  
20                  abuse. That's clear. That's also set forth in 6.84(1).

21                  What we haven't heard yet this morning nor  
22                  last week is any authority under Wisconsin law that even  
23                  suggests that clerks may add information to a witness  
24                  certification on an absentee ballot. The argument that  
25                  was raised this morning in relation to four justices on

1 the Wisconsin Supreme Court supporting the interpretation  
2 of the Commission and intervenors in the Trump v. Biden  
3 case is simply inaccurate. That case, of course, was  
4 decided on the Act Doctrine of Laches and they didn't  
5 address or reach the issue of whether the clerk can add  
6 address information to a witness certification on an  
7 absentee ballot that's otherwise missing address  
8 information.

9 In fact, the concurrence by Justice  
10 Hagedorn expressly states that there is no authority to  
11 prohibit clerks from adding information to, "addresses  
12 that were already sufficient." So that section that's  
13 relied upon by intervenors is premised on an already  
14 sufficient address in a witness absentee ballot  
15 certification. Clearly, that's inapplicable to the  
16 issues in this case. Here the Commission has instructed  
17 clerks to add address information to the witness  
18 certification when the address is missing which is  
19 clearly not authorized by law.

20 For that reason we believe that the  
21 Commission and the intervenor defendants have not made a  
22 strong showing that they're likely to succeed on the  
23 merits of an appeal and simply suggesting that there is a  
24 possibility of success does not meet the standard in  
25 Waity.

1                   We've also incorporated in our brief our  
2                   prior arguments which for sake of brevity I will not get  
3                   into unless the Court has questions on that.

4                   The second factor here is whether the  
5                   intervenors and the Commission have not shown that they  
6                   will suffer irreparable injury without the stay.  
7                   Certainly we believe they will have not shown that they  
8                   will show irreparable injury with the stay. Again the  
9                   injunction ordered was consistent with 6.87 and the  
10                  Wisconsin Statutes. The injunction ordered is consistent  
11                  not only with that statute but it's also consistent with  
12                  the information that the Commission actually provides  
13                  voters on their absentee ballot certification form. This  
14                  is EL form 122 which is the certification form at issue  
15                  in this case and that's the certification form that each  
16                  voter reviews and provides the instructions on how to  
17                  complete the certification, both for the voter and the  
18                  witness and what we know on that form that WEC, that the  
19                  Commissioner created, again it's very clear and indicates  
20                  that the witness has to provide an address and it also  
21                  provides instruction on what to include in that address  
22                  which, of course, is not an issue in this case on this  
23                  motion for preliminary injunction. But the suggestion  
24                  that voters are somehow going to be confused about what  
25                  to do when faced with completing the certification flies



1 in the face of the instructions that the Commission  
2 actually is the voters and the witnesses.

3 In fact, last week during argument counsel  
4 for the intervenors referenced the Election Day Manual  
5 which is a document that's provided to municipal clerks  
6 across the state. And that manual which is provided on  
7 the Commission's website and updated as recently as  
8 September, 2020, actually provides that clerks, that on  
9 Page 99 of 101, it instructs clerks that the  
10 certification can be corrected if the voter appears to  
11 correct the certificate and instructs the clerks that the  
12 original, this is quote, the original witness must be  
13 present.

14 So this is the Election Day Manual that  
15 the Commission is sending out to clerks which directly is  
16 directly contrary to the 2016 guidance that the  
17 Commission has thoroughly refused to forgo and yet they  
18 claim that somehow voters are going to be confused or  
19 clerks are going to be confused. The only confusion that  
20 is going to arise here arises from the 2016 guidance and  
21 the later 2020 guidance that suggests or actually  
22 instructs clerks that they have to add witness address  
23 information if the address is missing from the  
24 certificate. That is clearly contrary to law. It's  
25 contrary to what the instruction provides at EL 122 and

1           it's contrary to the Election Day Manual and this gets  
2           into what the actual harm is.

3                       And clearly the harm here is to the  
4           Plaintiffs and the legislature in the unequal  
5           administration of the election laws. Clearly the  
6           guidance at issue in this case on one hand contrary to  
7           Wisconsin law, instructs clerks to add missing  
8           information yet WEC or the Commission is also providing  
9           guidance that instructs clerks that they have to go  
10          through the voter and that the witness must be present.

11                      So we've got conflicting manuals here  
12          provided by the Commission which goes to the issue of the  
13          unequal administration of our election laws which clearly  
14          the Plaintiffs have an interest in insuring that our  
15          election laws are administered fairly and equally across  
16          this state. We know that the Commission has argued this  
17          is. This is undisputed that the Commission agrees that  
18          clerks across the state are going to rely on the 2016  
19          guidance at issue here. It's no doubt that there is  
20          going to be the unequal administration of the law and as  
21          the Teigen decision indicated, electoral outcomes  
22          obtained by unlawful procedures trump the institutional  
23          voting degrading the very foundation of pregovernment and  
24          unlawful votes pollute lawful votes. That's exactly what  
25          we have here.

1                   So the harm here runs against the  
2           Plaintiffs not against the Commission, not against the  
3           intervenors and the suggestion that the intervenors are  
4           going to have to undertake some efforts to update  
5           materials, are going to have to incur expenses for voter  
6           outreach to provide new information there is simply no  
7           admissible evidence in the record that I'm aware of that  
8           indicates that that needs to take place but furthermore,  
9           the intervenors have certainly suggested that they do  
10          that as a matter of course. That's part of their  
11          routine, regular functions as organizations in relation  
12          to updating members on current aspects of election laws.

13                   So there is no indication that this order  
14          is going to work any additional harm in that respect.

15                   And the last factor here we believe the  
16          intervenors and the Commission cannot show that a stay  
17          will do no harm to the public interests. The public  
18          certainly has an interest in our election laws being  
19          administered in the manner that is consistent with the  
20          laws passed by the legislature as I mentioned. The  
21          public has an interest in the equal administration of our  
22          election laws. Again citing the recent Teigen decision,  
23          elections are one of the most important features of our  
24          public and upholding the rules and procedures described  
25          for the elections according to the laws enacted by the

1 legislature reenforces the sanctity of a rule of law and  
2 reassures all Americans of integrity of our elections.

3 That's at the core of this case and that's  
4 at the core of the order issued by this Court last week.  
5 A stay would allow the Commission to continue to serving  
6 promoting guidance that is contrary to clear and binding  
7 legislation, informs clerks and local election officials  
8 that they may add information to absentee ballot witness  
9 certifications. Certainly there is no authority under  
10 Wisconsin law, we haven't heard any arguments to suggest  
11 that this morning. This would only cause greater  
12 confusion amongst municipal clerks and risk the erosion  
13 of trust in the administration of our elections. As such  
14 a stay would do significant harm to public interests and  
15 Plaintiffs respectfully request that the Court deny the  
16 intervenors' and the Commissions' motions. Thank you,  
17 Your Honor.

18 THE COURT: Thank you, Mr. Goehre.  
19 Mr. Tseytlin.

20 MR. TSEYTLIN: Thank you, Your Honor. So just  
21 a little bit of background on Waity. The legislature has  
22 painful experiences over three cases League of Women  
23 Voters, SCIU and Waity where Circuit Courts issue  
24 injunctions against legislative actions. And then when  
25 we submitted written fulsome stay motions, the Circuit

1 Courts just said well, you know, you already lost for the  
2 same reasons you lost. You're not going to get, you're  
3 not going to get a stay. We got -- we finally got this  
4 issue on the merits, the stay issue into the Supreme  
5 Court in Waity and the Supreme Court articulated how  
6 Circuit Courts should address this tricky issue where the  
7 Circuit Court has ruled against the party say, I think  
8 you're going to lose but then is asked to stay. And what  
9 the Supreme Court did say is that consistent with the  
10 legislature has argued through these three cases is that  
11 the Circuit Court cannot do what the Circuit Court had  
12 done in Waity, SCIU and League of Women Voters and say  
13 because you lost at the temporary injunction stage,  
14 therefore, you have no likelihood of success.

15 So when you have an issue like this where  
16 it is a question of de novo review on appeal, the Court  
17 just must to stay in compliance with Waity acknowledge  
18 that my friend Mr. Mandell has a likelihood of success on  
19 the merits. It just has to say that. If it does not  
20 that, that is in clear violation of Waity. Having said  
21 that Waity also makes clear that even though the  
22 Plaintiffs in a de novo case have overcome that first  
23 threshold, that you can overcome a little bit just from  
24 the presumption of from the de novo review or you can  
25 overcome it a lot. And what Waity and those prior cases

1           that were unpublished from the Wisconsin Supreme Court  
2           make clear is that in the stay motion there has to be an  
3           articulation of what exactly the Circuit Court did wrong.  
4           And in fact, you know, I heard Mr. Mandell say well, stay  
5           motions are done orally, and this kind of thing. Well,  
6           that is exactly one of the problems that Waity was trying  
7           to fix that, that because in order to seek a stay from an  
8           Appellate Court, you first seek a stay from the Circuit  
9           Court. You shouldn't have the quickie process where the  
10          counsel just makes an oral motion saying can you please  
11          just stay this decision for the reasons that were put in  
12          the brief.

13                       What you actually want to do you want to  
14          have fulsome written presentation which then can be met  
15          in adversarial written presentations on the other side  
16          explaining by the part of the lawsuit before the Circuit  
17          Court why there is in fact a likelihood of success on  
18          appeal and then the party that won can rebut those  
19          arguments.

20                       So we have here unfortunately is by Mr.  
21          Mandell and those supporting him, presented no rationale  
22          whatsoever to this Court as to what was done wrong on the  
23          merits. And we had some backbone today by Mr. Mandell in  
24          his oral presentation but I would respectfully submit  
25          that is far too late for I think with regards to the

1           likelihood of success in order to stay consistent with  
2           what the Supreme Court said in Waity is this Court must  
3           acknowledge that Mr. Mandell and WEC and the League of  
4           Women Voters have a likelihood of success on the merits  
5           on appeal but that is at his lower status part of the  
6           sliding scale because they failed to present in their  
7           stay motion any substantive argument as to what this  
8           Court did wrong and it must be insufficient to cross  
9           reference the arguments that you made before because the  
10          whole point that Waity is making likelihood of success is  
11          that the Circuit Court can't cross reference what it said  
12          before in TI and Circuit Courts can't do that, then there  
13          needs to be a real engagement, certainly the party can't.

14                 Now, if this Court were to consider  
15          the belated presentation by Mr. Mandell today which  
16          respectfully should have been in his stay motion if it  
17          was going to be considered as part of the stay  
18          proceedings under Waity he made this reference to the  
19          four justices in Trump v. Biden. This is confusing two  
20          issues. One is, what is a sufficient address and two,  
21          what is a clerk supposed to do if the address is in fact  
22          insufficient.

23                 What this Court's injunction does and what  
24          the mandate, the 2016 mandate was about, is only about  
25          that second question. Was, can the clerks fix what is in

1 fact an insufficient address or does it have to fall  
2 under the statutory procedure. This Court correctly  
3 determined it has to follow the statutory procedure.

4 THE COURT: Hang on a second, Mr. Tseytlin. I  
5 need to interject. You start picking up speed and it  
6 gets -- you go very fast and the way you're facing right  
7 now your name is covering your mouth so my court reporter  
8 doesn't even have the advantage of reading your lips. So  
9 I'm just going to ask you to go a little slower, okay.

10 MR. TSEYTLIN: Okay. I apologize, Your Honor.

11 THE COURT: Okay.

12 MR. TSEYTLIN: What I was saying there is that  
13 Mr. Mandell in referencing the Trump v. Biden decision  
14 and Justice Hagedorn's concurrence, is mixing up two  
15 issues. What is a sufficient address and what is the  
16 clerk to do if the address is in fact insufficient.

17 This case and this lawsuit and this  
18 Court's injunction only deals with that second question  
19 which is if the address is insufficient can the clerks do  
20 what the 2016 mandate required which is fix that  
21 insufficiency or does the clerk need to follow what the  
22 statute says.

23 This Court held and contrary to the  
24 mandate, that the statutes control. The question of what  
25 is a sufficient address has not been challenged here and



1 I was very surprised to hear my friends casting doubt on  
2 the staff memo that was adopted by WEC which was not  
3 challenged in this case as what is a sufficient address.  
4 And I would ask the Court to look at footnote two of Page  
5 9 of WEC's brief on the TI that's available at Docket 95.

6 There WEC specifically references the  
7 staff memorandum that says that a sufficient address is  
8 the street number name and municipality and that WEC  
9 specifically says that in adopting this memo in 2016 and  
10 it says that nobody challenged it. Nobody disputes that  
11 but we dispute it in this case that the staff memo  
12 provides street number, street name number, municipality.  
13 Nobody disputes that that wasn't challenged.

14 So that staff memo which was adopted by  
15 WEC remains and issues if anyone disagrees with that they  
16 think that's too stringent, they think you know just the  
17 street name would be sufficient or thinks it is not  
18 sufficient to have the zip code too, that is not part of  
19 this case. So it's important that the Court not allow my  
20 friend to confuse this issue.

21 Now, with regard to the separate basis on  
22 which this Court ruled, which have remarkably left really  
23 out of my friend's submission on the stay, there was a  
24 clear violation of the JCRAR procedure. I still haven't  
25 heard any explanation from my friends why their

1 understanding of the JCRAR statutory procedure would not  
2 render the entire procedure pointless. Why give JCRAR  
3 the specific statutory authority to say that a particular  
4 claim document is in fact a rule and then allow them to  
5 suspend that rule. Why do that if the guidance document  
6 could just be put into, back into effect immediately upon  
7 the JCRAR's engagement through that two step. That would  
8 defeat the statutory regime, that would be contrary to  
9 statutory test and that could not possibly be the law.

10 Moving on to Mr. Mandell's discussions of  
11 irreparable harms. There is absolutely no reason to  
12 think there would be any disenfranchisement here  
13 whatsoever. The requirement to put an address is plain  
14 on the forms and this issue has now been elevated to  
15 greater public focus. It is simply fanciful to think  
16 that any number of voters and their witnesses are not  
17 going to do the basics of putting the street numbers name  
18 and municipality on these forms. And that goes to the  
19 next harm that Mr. Mandell invokes which is educating  
20 voters.

21 Of course the Waukesha Democratic Party  
22 and the League of Women Voters are reaching out to  
23 voters, to say hey you can vote absentee. The only  
24 additional burden here is in that communication to say oh  
25 by the way, make sure you got an address in your witness

1 certificate.

2 You know, with all respect, it is a great  
3 exaggeration to say that that adding that little caveat  
4 is somehow a meaningful burden.

5 Now, in terms of the harms to us and their  
6 continued assertion that somehow JCRAR comes too late.  
7 Our JCRAR what, this is the first time we have invoked  
8 our statutory authority. JCRAR is differently composed  
9 than it was before. The legislature is differently  
10 composed, the voters have different concerns. This by  
11 allowing this unlawful 2016 mandate to stand, this would  
12 be a direct insult and flouting to the legislature's  
13 institutional authority and responsibility to oversee  
14 agencies and this is a harm that is new. It is a harm  
15 that just arose this summer when we invoked the JCRAR  
16 process so that we wouldn't have to go to the Courts and  
17 then remarkably WEC told us to basically pound sand.  
18 That just occurred. We brought this lawsuit as soon as  
19 it was possible to address that and ask this Court to  
20 address it prospectively so you wouldn't have the problem  
21 that happened in Trump v. Biden. Thank you, Your Honor.

22 THE COURT: All right. Mr. Mandell, I'll give  
23 you two minutes. I wasn't going to give you any but you  
24 looked like you were reaching over to unmute button like  
25 you wanted to say something. Go ahead.

1                   MR. MANDELL: Thank you, Your Honor. In  
2                   response to the Plaintiffs, the issue, there is a little  
3                   bit of goal post moving here. I never said that the  
4                   statutory provisions that the Court construed don't touch  
5                   mandatory provisions. I said they aren't mandatory  
6                   provisions. Of course, the entire statutory scheme, all  
7                   of the provisions interact with each other. But the  
8                   provisions that are at issue in this case, the provisions  
9                   that this Court interpreted, are not mandatory and the  
10                  fact that they interact with mandatory provisions doesn't  
11                  make them so.

12                 In response to Mr. Tseytlin's last point,  
13                 I just want to note that it is the legislature's own  
14                 internal lawyers at the legislature counsel who say that  
15                 the guidance document automatically goes back into effect  
16                 when the rule is suspended. This is not the WEC didn't  
17                 do anything. The WEC didn't revote to make the rule or  
18                 the guidance document. This is simply how it works.

19                 The legislature's own lawyers believe that  
20                 and have stated that in public hearings and told the  
21                 committee that. For Mr. Tseytlin to say oh how could we  
22                 possibly have known this was going to be the outcome and  
23                 we have to rush to court simply isn't true. He is right.  
24                 The JCRAR waited to bring this case. JCRAR now sees it  
25                 differently, as he just said. The committee is

1 different, the circumstances are different. All of those  
2 things are fine but none of them support his claim of  
3 irreparable harm that would defeat a stay. Thank you,  
4 Your Honor.

5 THE COURT: Thank you.

6 MR. MANDELL: Oh and one more thing. I just  
7 want to note. Plaintiffs continue to -- to --to quote to  
8 this Court from the Teigen decision and again even after  
9 we discussed it this morning, every single paragraph that  
10 Plaintiffs' counsel quotes does not have the force of  
11 law. These are paragraphs that are essentially a  
12 concurring opinion and it is clear on the front page of  
13 the opinion which paragraphs have the force of law and  
14 which do not and counsel continues to urge this Court to  
15 follow its binding precedent language that is not  
16 precedential. Thank you.

17 THE COURT: Thank you. First off, I want to  
18 thank you for your briefs and your excellent advocacy on  
19 behalf of your clients on a very short turn around time.

20 I have reviewed the submissions. There is  
21 agreement regarding the standard I need to apply which is  
22 always nice to see. And it's the Waity case. So a trial  
23 Court may stay execution or enforcement of a judgment or  
24 order during the pendency of an appeal. That's under  
25 Wisconsin Stat. Section 808.07(2)(a). And the Court must

1 consider whether the moving part one, makes a strong  
2 showing that it is likely to succeed on the merits of the  
3 appeal. Two, shows that unless the stay is granted it  
4 will suffer irreparable injury during the pendency of the  
5 appeal. Three, shows that no substantive harm will come  
6 to other interested parties during the pendency of the  
7 appeal. And four, shows that the stay will do no harm to  
8 the public interests. That's Waity at Paragraph 49.

9 These factors are not prerequisites or  
10 rather are interrelated considerations that must be  
11 balanced together. The Waity standard for stays  
12 acknowledges that when reasonable juris on appeals may  
13 interpret relevant law and come to a different conclusion  
14 that creates a presumption of the movant's likelihood of  
15 success on appeal.

16 On the equitable factors relevant to the  
17 stay determination, Waity requires a Circuit Court to  
18 perform a comparison of the harms resulting from an  
19 interim stay and the harms caused by denial of the stay.  
20 And as to the public interests factor Waity emphasizes a  
21 Circuit Court must consider the public interests served  
22 and the continued applicability of duly enacted laws.

23 I have reviewed the submissions and I'm  
24 particularly persuaded by the legislature's opposition to  
25 the request for a stay. I do find that the Waukesha

1 County Democratic Party as well as the joining parties in  
2 that motion enjoy the presumption that it is likely to  
3 succeed on appeal because of the de novo standard review  
4 that will apply on appeal. However, I don't believe that  
5 it is a strong showing of success on appeal. I am  
6 considering the arguments from Mr. Mandell not agreeing  
7 with Mr. Tseytlin that their too late, they somehow  
8 dropped the ball and not referring to the arguments that  
9 were previously submitted or that refreshing them here  
10 and adding to them here somehow prevents my  
11 consideration.

12 I am considering them, however, for the  
13 reasons that I outlined previously. I do believe it's  
14 not a strong showing of success and I do believe that the  
15 Plaintiffs and the legislature have a much stronger  
16 showing.

17 With respect to irreparable harm, there is  
18 a number of arguments that were raised by, I'll call them  
19 the movants here for the stay and they relate to  
20 disenfranchisement, this reeducation and institutional  
21 harms and reliance but I think again, and I mentioned  
22 this in my original injunction, I think they're missing  
23 what the issue is in this case and they're kind of  
24 strongman arguments. I made no decision regarding what  
25 constitutes an address. I have not done anything to

1           overturn what WEC may define as an address. I have done  
2           nothing and I'm not asked to interpret what is a missing  
3           address or what is an incomplete address and I've not  
4           decided, no one has asked me to decide what happens to  
5           absentee ballots that have an incomplete witness address.  
6           That's not at issue before me.

7                       The only issue before me was the guidance  
8           that related to directing clerks to add information to  
9           absentee certifications. That was the issue. So there  
10          is nothing about the decision that disenfranchises  
11          voters. It relates strictly to the guidance instructing  
12          clerks and local election officials to add to the  
13          absentee certification specifically as it relates to an  
14          address.

15                   This issue about resources. I don't state  
16          it, maybe state is as Mr. Tseytlin did, that this is an  
17          additional education and resources are going to be  
18          allocated to adding the address for absentee voters  
19          saying and instructing them you need to make sure you  
20          have a complete address. I would frankly think that that  
21          was being done already and it defies credulity to think  
22          that they never said that before and now they're going to  
23          have to change gears and instead that because that was  
24          always the requirement and the form itself on the  
25          certification said this is what constitutes an address.



1           So there is no change in that regard and this goes to the  
2           whole whiplash argument that there is somehow a change  
3           with the voters. I don't believe there is a change with  
4           the voters. The voters were told what is required on the  
5           form and the guidance that is being provided is not  
6           guidance provided to voters. It's guidance provided to  
7           the clerks and local election officials and what they are  
8           to do when faced with potentially incomplete addresses on  
9           absentee certifications. And I don't think that whiplash  
10          argument holds any sway.

11                   I do believe in comparing the harms and I  
12          do find there is irreparable harm in granting the stay to  
13          the legislature and the Plaintiffs for the reasons I  
14          outlined in my decision, that in comparing the harms it  
15          clearly favored denying the motion for a stay and  
16          irreparable harm to the legislature in particular  
17          outweighs any irreparable harm alleged by the movants for  
18          the stay here.

19                   And then considering the public interests.  
20          I have considered it previously in granting the  
21          injunction but I considered it again and I do believe for  
22          the reasons I stated previously, that the injunction is  
23          appropriate and staying it would not be in the public  
24          interests. I agree full, fair and free elections are  
25          paramount. But they need to be according to law and the

1 law has always been that the addressed need to be on  
2 these certifications and I find that the guidance that  
3 was provided is contrary to that law and, therefore, the  
4 public interests weighs in favor of the injunction and  
5 against the stay.

6 And for all those reasons as well as the  
7 reasons outlined in more specifically in the  
8 legislature's brief, I am denying the motion for a stay.

9 I would ask Mr. Goehre to prepare an order  
10 denying the stay. I'm not going to be the final word on  
11 this. Mr. Mandell, any thought about ways to facilitate  
12 this being reviewed promptly so if you are entitled to  
13 relief you get the relief.

14 This is a temporary order. This could  
15 mean an interlocutory appeal. Have you discussed on your  
16 side or even the Plaintiffs or legislature about a way to  
17 make sure that you can proceed to get some relief if  
18 you're entitled to some.

19 MR. MANDELL: Your Honor, we haven't had those  
20 discussions across parties but I would ask on that note  
21 your order is denominated as a temporary injunction which  
22 is what the Plaintiffs asked for but when I look at the  
23 order and I look at the prayer for relief in the  
24 complaint of the Plaintiffs and in the intervening  
25 complaint of the legislature, I don't see anything that

1 remains undone. I would ask the Court to denominate this  
2 as a final order so that it is immediately appealable.

3 THE COURT: Let me hear from, hang on, let me  
4 hear from Mr. Goehre first.

5 MR. GOEHRE: Thank you, Your Honor. I would  
6 like an opportunity to talk with my clients about that  
7 proposal before I respond on the record. Definitively, I  
8 can do that today and get back to Attorney Mandell.

9 THE COURT: Mr. Tseytlin, were you going to add  
10 anything or do you want the similar type of courtesy?

11 MR. TSEYTLIN: Pending further discussions I am  
12 inclined to support Mr. Mandell's request.

13 THE COURT: All right. Why don't you have  
14 those discussions. If there is a stipulation, given the  
15 fact that the evidence isn't going to change, the  
16 arguments aren't going to change and in all respects this  
17 would be a final judgment or summary judgment in that  
18 regard and if you want to stipulate to that and that can  
19 be included in the order denying the stay and you can  
20 prepare that paperwork, I will look for it and sign off  
21 on it promptly. If there is some other route you want to  
22 proceed then, Mr. Mandell, if there no agreement as to  
23 that I'll look for that paperwork as well.

24 MR. MANDELL: Thank you, Your Honor. I just  
25 want to note for the record I have not discussed this

1 with counsel for WEC or the intervenors either so  
2 obviously when we have conversations later this afternoon  
3 with Mr. Tseytlin and Mr. Goehre about any stipulations,  
4 their views will be relevant as well.

5 THE COURT: Fair enough. Anything else from  
6 your end, Mr. Mandell?

7 MR. MANDELL: Nothing else from my end, Your  
8 Honor.

9 THE COURT: Mr. Lenz?

10 MR. LENZ: Yes, Your Honor, very briefly. I  
11 would like to renew our request particularly in light of  
12 the Court's order just now to maybe modify the written  
13 injunction as it pertains to the WEC's definition of  
14 address.

15 We agree with the legislature that the  
16 memorandum was adopted but it was adopted into the  
17 October 2016 guidance that's now been enjoined. That's  
18 the only guidance that went to the clerks that contains  
19 that definition. I believe the Court just clarified,  
20 although I respectfully disagree with the order, it  
21 didn't intend to touch WEC's definition of address. I  
22 think that --

23 THE COURT: That is true. That is true. I was  
24 not enjoining the definition of address. It was only the  
25 instruction to the clerks on what they should do when

1           faced with a purportedly incomplete certification  
2           address.

3                   MR. LENZ: I appreciate that but my concern and  
4           WEC may want to have a view on this as well that the  
5           injunction as written would prevent WEC from reissuing  
6           the contents of that guidance as it pertains just to the  
7           definition of address. So we were just requesting a  
8           clarification from the Court on that.

9                   THE COURT: All right. I thought I gave it but  
10          Mr. Kilpatrick you want to weigh in?

11                   MR. KILPATRICK: Yes, Your Honor. Thank you.  
12          Yes. If the Court is willing to clarify what the  
13          Commission could do, obviously the Commission does not  
14          want to be in violation of an injunction. As I said  
15          before, it is our position that the memo that the  
16          legislature referenced is not a guidance document, it was  
17          not issued to the clerks, it was internal. So in our  
18          view there is nothing guiding the clerks right now and so  
19          the withdrawal of the October 18, 2016 memo withdraws  
20          also the definition of address.

21                   So if it could be made clear that the  
22          Commission is permitted to issue further guidance that  
23          only governs the contents of a witness address, that  
24          would be appreciated.

25                   THE COURT: Why don't you include that in your

1 discussions with counsel relative to whether this is  
2 going to be a final order or not, and if you can agree  
3 upon language that you would propose in amending the  
4 temporary injunction or what will become a final  
5 injunction, if there is agreement, I'll review that and  
6 make sure it comports with my decision. But I thought I  
7 was very clear. I was not touching the definition of  
8 address, what is missing, what is incomplete in my  
9 injunction but you may be right the way it was phrased in  
10 there may provide some confusion to the commissioners and  
11 we can perhaps deal with that promptly. Anything else?

12 MR. KILPATRICK: Thank you, Your Honor.

13 THE COURT: Anything else from your end,  
14 Mr. Kilpatrick?

15 MR. KILPATRICK: No, Your Honor.

16 THE COURT: Mr. Goehre?

17 MR. GOEHRE: No, Your Honor.

18 THE COURT: Mr. Tseytlin?

19 MR. TSEYTLIN: No, Your Honor.

20 THE COURT: All right. Everyone have a good  
21 day.

22 (Proceedings concluded.)  
23  
24  
25

[illegible]

I, Lori Schiek, do hereby certify that I am an Official Court Reporter assigned to report the proceedings herein in Waukesha County, Waukesha, Wisconsin; that the foregoing 54 pages are a true and correct transcript of my stenographic notes taken in the proceedings held on September 13, 2022, and reduced to typewritten form.

Dated this 25th day of September, 2022.

Lori Schiek  
Lori Schiek,  
Official Court Reporter