

RISE, INC., *and* JASON RIVERA,

Plaintiffs,

v.

Case No. 2022CV2446

WISCONSIN ELECTIONS COMMISSION,
and MARIBETH WITZEL-BEHL, *in her*
official capacity as City Clerk for the
City of Madison, Wisconsin,

Defendants.

**PROPOSED-INTERVENOR DEFENDANT THE WISCONSIN STATE
LEGISLATURE'S BRIEF IN OPPOSITION TO PLAINTIFFS'
MOTION FOR A TEMPORARY INJUNCTION**

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INTRODUCTION

Plaintiffs challenge the Wisconsin Elections Commission's ("WEC") longstanding interpretation of what constitutes a witness "address" for absentee-ballot certificate envelopes under Wis. Stat. § 6.87(2)—"*street number, street name and name of municipality*"—even though Wisconsin is *weeks* into the absentee-ballot voting for the Fall 2022 Election. In place of the straightforward, longstanding definition of a witness "address" under Section 6.87(2), Plaintiffs would substitute an atextual, vague definition: "sufficient information [for a clerk] to determine where the witness 'may be communicated with.'" That standard is unadministrable and would lead to disuniformity in application by Wisconsin's over 1,800 election officials and to voter confusion, in the middle of this ongoing election. Notably, WEC expressly reiterated its longstanding interpretation of a witness "address" under Section 6.87(2)—an interpretation that faithfully follows Section 6.87(2)'s plain text and statutory context—in guidance issued to all clerks *just this past month*, which guidance Plaintiffs would have this Court contradict, causing confusion statewide.

Plaintiffs fail to satisfy any of the required elements for temporary-injunctive relief. They have no likelihood of success on the merits of their claims. The plain text and statutory context, as well as the proper understanding of both the Wisconsin State Legislature ("Legislature") and WEC, all show that an "address" under Section 6.87(2) is a witness's street number, street name, and name of municipality. Further, Plaintiffs have not shown that they will suffer irreparable harm without a temporary injunction. It is trivially easy for any absentee-ballot witness to fill-in his

or her street number, street name, and name of municipality on an absentee-ballot certificate; thus, there is no risk of voter confusion or the erroneous rejection of absentee ballots. Plaintiffs' atextual redefinition of "address" would only aggravate their claimed concerns of voter confusion and erroneous rejection of absentee ballots. The balance of the equities also cuts entirely against Plaintiffs. Plaintiffs inexplicably delayed bringing this lawsuit until *after* absentee ballots have already gone out and are beginning to be returned. And if Plaintiffs had legitimate concerns about the definition of an "address" under Section 6.87(2) after the Waukesha County Circuit Court's order in *White v. WEC*, they could have raised this lawsuit weeks ago in that Court, considering that their counsel here was also involved in that case. Finally, considerations of the status quo weigh heavily against Plaintiffs, as they seek to disrupt WEC's longstanding understanding of a witness "address," adopted in October 2016, which understanding follows the text and context of Section 6.87(2).

This Court should deny Plaintiffs' Motion For A Temporary Injunction. Alternatively, if this Court does grant a temporary injunction, the Legislature respectfully requests an immediate stay of that order pending appeal, under *Waity v. LeMahieu*, 2022 WI 6, 400 Wis. 2d 356, 969 N.W.2d 263.

STATEMENT¹

A. In 2016, WEC Issues Guidance Explaining The Necessary Components Of An Absentee-Ballot Witness's "Address" Under Wis. Stat. § 6.87

Section 6.87 of the Wisconsin Statutes outlines the procedures and requirements for completing and counting absentee ballots in Wisconsin. Wis. Stat. § 6.87. Unless an absentee voter is in the military, is overseas, or resides at certain residential care facilities, Section 6.87 requires the absentee voter to mark and fold the absentee ballot in the presence of a witness and then place it within the official absentee-ballot envelope. *Id.* § 6.87(4)(b)(1); *see id.* § 6.87(5). Under Section 6.87(2), a witness must then provide his or her "[a]ddress" on the certificate of the absentee-ballot envelope. *Id.* § 6.87(2). "If a certificate is missing the address of a witness, the [absentee] ballot may not be counted." *Id.* § 6.87(6d). While Section 6.87(2) does not specifically define a witness "address," another election-law statute, Wis. Stat. § 6.34, explains that an address for voter-identification purposes "includ[es] a numbered street address, if any, and the name of a municipality." Wis. Stat. § 6.34(3)(b)(2). Further, Section 6.87(2) instructs the absentee voter himself or herself to provide substantially the same address details on the absentee-voter's certificate: "I am a resident of the [... ward of the] (town) (village) of ..., or of the ... aldermanic district in the city of ..., residing at ...* in said city, the county of ..., state of Wisconsin." Wis. Stat. § 6.87(2) (all ellipses and brackets in original).

¹ To avoid duplicative briefing, the Legislature recites the same Statement in its simultaneously filed Brief In Opposition To Plaintiffs' Motion For A Temporary Injunction and its Memorandum In Support Of Its Motion To Intervene.

During the Fall 2016 election cycle, WEC issued guidance entitled “Missing or Insufficient Witness Address on Absentee Certificate Envelopes,” which, as relevant here, properly explains the components of a valid witness address under Section 6.87(2). Affidavit of Diane M. Welsh (“Welsh Aff.”), Dkt.4, Ex.2 at 1 (“2016 Guidance”). WEC based its guidance on a considered recommendation from its staff. “[T]aking a common sense approach” that adhered to “the Legislative directive and purpose,” WEC staff determined that a witness address should “contain at a minimum, a street number, street name and name of municipality,” to be considered “sufficient” under Section 6.87. Affidavit of Kevin M. LeRoy (“LeRoy Aff.”), Ex.2 at 4–5. Thus, WEC staff struck a balance: rejecting “the strictest approach” (which would require witnesses to supply “street number, street name, apartment or unit number, municipality, state, and zip code”) as well as a much more minimal approach (“just a street number and street name”). LeRoy Aff., Ex.2 at 4. WEC adopted its staff recommendation at its October 14, 2016, meeting, LeRoy Aff., Ex.3 at 7–8, explaining in its 2016 Guidance that, per Section 6.87(2), a witness address must include “a street number, street name and municipality,”—the “minimum pieces of information required” to identify and validate a witness address, Welsh Aff., Ex.1 at 1; *see id.*, Ex.2 at 1.

The 2016 Guidance also purported to require Wisconsin’s county and municipal clerks to alter unilaterally the address information on absentee ballots, purporting to create a non-statutory addition to Wisconsin’s absentee-ballot statutes. Under the 2016 Guidance, WEC claimed that “clerks *must* take corrective actions in

an attempt to remedy a witness address error,” Welsh Aff., Ex.2 at 1 (emphasis added), requiring clerks to alter physically the ballot and then “initial[] next to the information that was added,” *id.*, Ex.2 at 2. Thus, this portion of the guidance was mandatory and binding on all clerks. *See id.* The 2016 Guidance further provided that clerks have the option to “contact voters and notify them of the address omission,” although “contacting the voter is only required if clerks cannot remedy the address insufficiency from extrinsic sources.” *Id.*, Ex.2 at 1.

The Legislature has also sought to codify more explicitly the required components of an absentee-witness address, while also agreeing with WEC’s explanation of the meaning of “address.” Specifically, in 2021, the Legislature voted for 2021 Senate Bill 935, which would have amended Section 6.87 to list the required components of a witness address as: “[t]he witness’s house or apartment number”; “[t]he witness’s street name”; and “[t]he witness’s municipality.” S.B. 935 § 3, 2021 Leg. That understanding of a witness “address” aligns with WEC’s 2016 Guidance, which, in turn, properly explains Section 6.87(2). *Compare id., with* Welsh Aff., Ex.1 at 1. While the State Senate and State Assembly both voted for this bill, Governor Evers vetoed it in April 2022. *See* Wis. St. Leg. 2021–2022, S.B. 935.²

On January 10, 2022, the Legislature’s Joint Committee for Review of Administrative Rules (“JCRAR”) acted under its statutory power, *see* Wis. Stat. § 13.56, to require WEC “to show statutory authority for its guidance regarding

² Available at <https://docs.legis.wisconsin.gov/2021/proposals/reg/sen/bill/sb935> (all websites last visited October 2, 2022).

completeness of addresses and correction of errors and omissions on absentee ballots [i.e., the 2016 Guidance] and promulgate it as an emergency rule or cease issuing such guidance to clerks.” LeRoy Aff., Ex.4. In response, WEC promulgated its 2016 Guidance as a formal rule, filing Emergency Rule 2209 with the Legislative Reference Bureau on July 18, 2022. *See* Wis. Elections Comm’n, Statement of Scope: Emergency Rule Relating To Correction Of Absentee Ballot Certificate Envelopes (Feb. 3, 2022);³ Wis. Elections Comm’n, Emergency Rule 2209 (July 18, 2022).⁴ On July 20, 2022, JCRAR voted to suspend the portion of Emergency Rule 2209 that empowered clerks to modify witness addresses, determining that this directive “conflicts with state law and fails to comply with legislative intent.” JCRAR, Record of Committee Proceedings (July 20, 2022).⁵ As JCRAR focused its veto on WEC’s purported creation of an avenue for clerks to “correct[] . . . absentee ballot certificate envelopes,” JCRAR, Record of Committee Proceedings. *supra*, this JCRAR veto did not suspend WEC’s guidance properly explaining its view that a witness address under Section 6.87(2) is “a street number, street name and municipality.” Welsh Aff., Ex.1 at 1. After JCRAR suspended the Rule, WEC issued a statement explaining that the 2016 Guidance still

³ Available at https://docs.legis.wisconsin.gov/code/register/2022/794a1/register/ss/ss_009_22/ss_009_22.

⁴ Available at https://docs.legis.wisconsin.gov/code/register/2022/799a3/register/emr/emr2209_rule_text/emr2209_rule_text.

⁵ Available at https://docs.legis.wisconsin.gov/code/register/2022/799b/register/actions_by_jcrar/actions_taken_by_jcrar_on_july_20_2022_emr2209/actions_taken_by_jcrar_on_july_20_2022_emr2209.

applied to clerks correcting absentee-ballot certificate envelopes. Wis. Elections Comm'n, *Statement Regarding JCRAR Emergency Rule Suspension* (July 25, 2022).⁶

B. The Waukesha County Circuit Court Enjoins WEC's Direction That Clerks Correct Absentee Ballot Certificates, While Making Clear That Its Order Does Not Impact WEC's Definition Of Address

In July 2022, a group of Wisconsin voters and the Republican Party of Waukesha County sued WEC in Waukesha County Circuit Court, explaining WEC's 2016 Guidance's requirement that clerks correct absentee-ballot certificates was unlawful. LeRoy Aff., Ex.1 at 10. The Legislature intervened as a plaintiff—unopposed, at least as to permissive intervention—on August 11, 2022, LeRoy Aff., Ex.1 at 10, and then asserted related claims of its own, LeRoy Aff. Ex.7 at 13–16. The plaintiffs and the Legislature then moved for temporary injunctions against WEC's enforcement of the 2016 Guidance in August 2022. LeRoy Aff., Ex.1 at 10; *see* LeRoy Aff., Exs.5–6.

On September 7, 2022, the Circuit Court issued the requested temporary injunction, explaining in an oral decision that the Legislature (and, as relevant, plaintiffs) were entitled to an injunction against the 2016 Guidance's binding requirement that all clerks alter unilaterally the address information on absentee ballots. LeRoy Aff., Ex.1 at 25. The Circuit Court made clear that its order does *not* affect WEC's longstanding definition of an address. *Id.* at 51–53. WEC thus may continue to rely on that definition and instruct clerks accordingly for the upcoming

⁶ Available at <https://elections.wi.gov/news/statement-regarding-jcrar-emergency-rule-suspension>.

2022 general election. *See id.* Indeed, the Waukesha County Circuit Court expressly confirmed in its October 3, 2022 final judgment issuing its permanent injunction that “[n]othing herein is intended, nor shall be construed, to enjoin WEC from issuing or distributing *its* guidance regarding the definition of “address” as used in Wis. Stat. § 6.87.” LeRoy Aff., Ex.10 at 3 (emphasis added).

On September 14, 2022—and in response to the Circuit Court’s decision—WEC issued another guidance to all Wisconsin clerks, reiterating the 2016 Guidance’s understanding of a witness “address” under Section 6.87(2) and clarifying that this understanding was still in force. Wis. Elections Comm’n, Temp. Inj. on WEC Guidance re: Missing Absentee Witness Address (*White v. WEC*, 22-CV-1008) (Sept. 14, 2022) (“WEC September 2022 Guidance”).⁷ In particular, WEC explained that the Circuit Court “had not overturned the existing WEC definition of address contained in the now-invalidated memoranda.” *Id.* This Guidance then expressly reiterated that definition of a witness “address” for the benefit of all clerks: “namely, *street number, street name, and name of municipality.*” *Id.* (emphasis added).

C. Plaintiffs File This Action, Incorrectly Claiming That WEC’s Guidance On An Absentee-Ballot Witness “Address” Is No Longer In Force

On September 27, 2022, Plaintiffs Rise, Inc. and Jason Rivera filed suit against WEC and Maribeth Witzel-Behl, the clerk for the City of Madison—who, as a “local election official[]” with “significant responsibility” from the State, is an agent of the

⁷ Available at <https://elections.wi.gov/memo/temporary-injunction-wec-guidance-re-missing-absentee-witness-address-white-v-wisconsin> (guidance letter reproduced at LeRoy Aff. Ex.8).

State for these purposes, *State ex rel. Zignego v. Wis. Elections Comm'n*, 2021 WI 32, ¶ 13, 396 Wis. 2d 391, 957 N.W.2d 208; accord *Jefferson v. Dane County*, 2020 WI 90, ¶ 24 n.5, 394 Wis. 2d 602, 951 N.W.2d 556—asserting two claims for declaratory and injunctive relief. Dkt.3 (“Compl.”). Overall, Plaintiffs allege that WEC’s guidance explaining what constitutes a valid absentee-ballot witness “address” under Section 6.87(2) is no longer in force. Compl. ¶ 36. So, as their first claim, Plaintiffs seek a declaratory judgment that “a witness address is sufficient under [Wis. Stat. § 6.87] if a local clerk can reasonably discern the location where a witness may be communicated with,” such that ballots with such information will not be considered “improperly completed” under the statute. Compl. ¶¶ 54–60. For their second claim, Plaintiffs ask this Court to “issue a permanent injunction requiring that WEC inform municipal and county clerks . . . that the requirement for a witness address under Wis. Stat. § 6.87(2) is satisfied by a ballot certificate that includes sufficient information from which the clerk can reasonably discern the place where the witness may be communicated with.” Compl. ¶¶ 61–64. Plaintiffs further ask this Court to “require that WEC direct municipal and county clerks that an otherwise lawful ballot” that satisfies their broad definition of a sufficient witness address “is not ‘improperly completed’ under Wis. Stat. § 6.87(9).” Compl. ¶ 64. Plaintiffs moved for a temporary injunction on September 28, 2022. Dkt.8.

LEGAL STANDARD

To obtain temporary-injunctive relief from this Court, Plaintiffs must make four showings: (1) a reasonable probability of success on the merits of their claims;

(2) the absence of adequate remedy at law; (3) they will suffer irreparable harm without temporary-injunctive relief; and (4) the equities, on balance, favor temporary-injunctive relief. *See Serv. Emps. Int’l Union, Local 1 v. Vos* (“SEIU”), 2020 WI 67, ¶ 93, 393 Wis. 2d 38, 946 N.W.2d 35; *Pure Milk Prods. Co-op v. Nat’l Farmers Org.*, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979); *Werner v. A. L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520, 259 N.W.2d 310 (1977); *see also* Wis. Stat. § 813.02(1)(a). “At times,” this Court may also consider whether an injunction is necessary “to preserve the status quo.” *Waity*, 2022 WI 6, ¶ 49.

ARGUMENT

I. This Court Should Deny Plaintiffs’ Motion For A Temporary Injunction

A. Plaintiffs Have No Likelihood Of Success On The Merits

1. This Court must interpret statutes according to the text of the “[s]tatutory language.” *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. “Statutory language is given its common, ordinary, and accepted meaning,” unless the statute makes clear that a technical or special meaning applies. *Id.* As statutory interpretation requires “the ascertainment of meaning, not a search for ambiguity,” *id.* ¶ 47 (citations omitted), the Court must also consider “the context in which [statutory language] is used” when interpreting a statute, *id.* ¶ 46. Further, and relatedly, the Court must read statutory language “in relation to the language of surrounding or closely-related statutes.” *Id.* Finally, while this Court should not “defer[]” to administrative agencies’ interpretations of a statute, it may give respectful consideration to such interpretations in light of an

agency's expertise. *Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 2018 WI 75, ¶ 3, 382 Wis. 2d 496, 914 N.W.2d 21.

2. Here, Plaintiffs have no likelihood of success, *SEIU*, 2020 WI 67, ¶ 93, on their declaratory and injunctive-relief claims, which claims are premised on the erroneous assumption that Wisconsin law has not properly defined a witness "address" under Wis. Stat. § 6.87(2), *see* Dkt.3 ¶¶ 54–64.

Under Section 6.87(2), a witness must provide his or her "[a]ddress" on the certificate of the absentee-ballot envelope, Wis. Stat. § 6.87(2), with Section 6.87(6d) then providing that, "[i]f a certificate is missing the address of a witness, the [absentee] ballot may not be counted," *id.* § 6.87(6d). The proper interpretation of Section 6.87(2)'s witness "address" provision is that it comprises a witness's street number, street name, and name of municipality, such that the failure to include any of those three pieces of information on a witness certificate is a failure to provide an "address." While Section 6.87(2) does not define a witness "address," the "common, ordinary, and accepted meaning" of this term, *Kalal*, 2004 WI 58, ¶ 45, is "[t]he particulars of the place where a person lives . . . , typically consisting of *a number, street name, the name of a town or district*," "Address," Oxford English Dictionary Online (September 2022) (emphasis added).⁸ These "particulars" are what are "considered" the "location where a person . . . can be contacted by post." *Id.* And while an "address" may "often" include "a postal code," that is not a strict or universal component of an "address," under the ordinary meaning of this term. *See id.*

⁸ Accessed at www.oed.com/view/Entry/2208.

The statutory “context” of Section 6.87(2) strongly supports the plain-text understanding that a witness “address” under Section 6.87(2) refers to the witness’s street number, street name, and name of municipality. *Kalal*, 2004 WI 58, ¶ 46. Section 6.34 explains that, for voter-identification purposes, an address “includ[es] a numbered street address, if any, and the name of a municipality.” Wis. Stat. § 6.34(3)(b)(2). Further, Section 6.87(2) itself instructs the absentee voter to provide substantially the same details of his or her own address on the absentee-voter’s certificate: “I am a resident of the [... ward of the] (town) (village) of, or of the aldermanic district in the city of, residing at* in said city, the county of, state of Wisconsin.” Wis. Stat. § 6.87(2) (all ellipses and brackets in original). As these three provisions are all election-law statutes related to addresses of individuals, they are “closely-related statutes” that this Court must interpret together. *Kalal*, 2004 WI 58, ¶ 46. So, given this powerful statutory context, it would make sense to read Section 6.87(2)’s witness-address requirement to likewise require the vital information of the witness’s street number, street name, and name of municipality.

Further, while this Court may not *defer* to WEC’s or the Legislature’s interpretations of a statute, *Tetra Tech*, 2018 WI 75, ¶ 3, it is notable that both WEC and the Legislature understand a witness “address” in Section 6.87(2) to mean the witness’s street number, street name, and name of municipality.

As for WEC, it has understood that a witness “address” under Section 6.87(2) means the witness’s “*street number, street name, and name of municipality.*” WEC September 2022 Guidance, *supra*; see Dkt.4, Ex.2 at 1. WEC first issued guidance

properly explaining this interpretation in October 2016, Dkt.4, Ex.2 at 1, and then expressly reaffirmed this correct understanding in guidance issued to all clerks on September 14, 2022—reiterating to all clerks that a witness “address” is a “*street number, street name, and name of municipality,*” WEC September 2022 Guidance, *supra*. Although the Waukesha County Circuit Court enjoined WEC’s 2016 Guidance as to its purporting to require clerks to correct absentee-ballot-certificate envelopes, the Circuit Court “clarified that it had not ruled on what constitutes a witness address” and “had not overturned the existing WEC definition of address contained in the [2016 Guidance]”—as the WEC September 2022 Guidance itself states. *Id.* Indeed, the Circuit Court’s final judgment issuing its permanent injunction expressly states that “[n]othing herein is intended, nor shall be construed, to enjoin WEC from issuing or distributing *its* guidance regarding the definition of “address” as used in Wis. Stat. § 6.87.” LeRoy Aff., Ex.10 at 3 (emphasis added).

The Legislature’s understanding is in accord. Specifically, when the JCRAR considered WEC’s Emergency Rule 2209, which WEC had submitted to the Legislature in advance of promulgating its 2016 Guidance as a rule, it vetoed that Rule only as to “the [mandatory] correction of absentee ballot certificate envelopes,” stating that this “conflict[ed] with state law and fail[ed] to comply with legislative intent.” JCRAR, Record of Committee Proceedings (July 20, 2022).⁹ Thus, JCRAR did *not* disapprove of WEC’s interpretation of a witness “address” under

⁹ Available at https://docs.legis.wisconsin.gov/code/register/2022/799b/register/actions_by_jcrar/actions_taken_by_jcrar_on_july_20_2022_emr2209/actions_taken_by_jcrar_on_july_20_2022_emr2209.

Section 6.87(2), as explained in the 2016 Guidance. The Legislature expressed this same understanding of a witness “address” in 2021 Senate Bill 935—ultimately vetoed by Governor Evers—which, in context, defined an address as “[t]he witness’s house or apartment number”; “[t]he witness’s street name”; and “[t]he witness’s municipality.” S.B. 935 § 3, 2021 Leg.

3. Plaintiffs’ arguments about the meaning of a witness “address” under Section 6.87(2)—which arguments provide the essential foundation for both of their claims here, *see* Dkt.3 ¶¶ 54–64—all fail.

First, Plaintiffs’ claim is that a witness “address” under Section 6.87(2) means only “sufficient information [for a clerk] to determine where the witness ‘may be communicated with,’” Dkt.8 at 14, but Plaintiffs have made up this definition out of whole cloth. The plain meaning of an “address” in Section 6.87(2) refers to the specific details of where an individual lives, *supra* p. 10, and both the statutory context and the understanding of WEC and the Legislature make clear that those details are the witness’s street number, street name, and name of municipality, *supra* pp. 11–12. Nothing in Section 6.87, in Chapter 6, or in any other part of Wisconsin law even suggests that an “address” in Section 6.87(2) means Plaintiffs’ vague definition of “where the witness ‘may be communicated with.’” Dkt.8 at 14.

Plaintiffs’ invented definition of an “address” would also be unadministrable and compel an intolerable lack of “perfect equality” among absentee voters. *State v. Buer*, 174 Wis. 120, 182 N.W. 855, 857 (1921). Plaintiffs do not even attempt to define what type of information is “sufficient” for a clerk to determine where the witness

may be communicated with. Nor do Plaintiffs explain how much of that undefined information is needed—or even what it means for a clerk to “communicate” with a witness. Consider just some of the unanswered, and unanswerable, questions that Plaintiffs’ proposed definition raises: Would a mere description of where the witness lives be sufficient? What about a statement that the witness lives near a particular intersection or landmark? And so on. And as nothing in Wisconsin law offers any guidance to implement Plaintiffs’ made-up definition, it will be impossible for Wisconsin’s over 1,800 election officials to administer Plaintiffs’ rule, let alone in a manner that ensures “perfect equality” across the State. *Id.*

Finally, while Plaintiffs claim that their definition of a witness “address” is compelled by Wis. Stat. § 5.01(1)’s “explicit requirement that ambiguities be construed in favor of the voter,” Dkt.8 at 14, that is clearly wrong. Even if there were an unresolvable ambiguity as to the meaning of “address” in Section 6.87(2), *but see supra* pp. 10–12, Section 5.01(1)’s interpretative rule does not apply here. Instead, Wis. Stat. § 6.84(2) imposes its own strict rule of construction in this case, as this is a “matter[] relating to the absentee ballot process” involving Section 6.87(6d). Wis. Stat. § 6.84(2). So, under Section 6.84(2)’s rule, the statutory provisions at issue here “shall be construed as mandatory”—“*[n]otwithstanding s. 5.01(1).*” *Id.* (emphasis added). Only WEC’s and the Legislature’s understanding of a witness “address” under Section 6.87(2) complies with Section 6.84(2)’s strict interpretative rule.

Second, Plaintiffs turn the role of statutory context on its head. They recognize that, similar to Section 6.87(2)’s reference of a witness “address,” Section 6.34 defines

an “address” for voter-identification purposes, while Section 6.87(2) also defines an “address” for the absentee voter himself of herself. Dkt.8 at 13. But rather than conclude that a witness “address” under Section 6.87(2) must comprise components *similar to* these other “closely-related statutes,” *Kalal*, 2004 WI 58, ¶ 46, Plaintiffs claim these three statutes *cannot* share a similar definition, Dkt.8 at 13–14—even as they are all election-related statutes pertaining to addresses. That is not how statutory interpretation works. *See Kalal*, 2004 WI 58, ¶ 46.

Third, Plaintiffs’ argument based on Section 6.87(6d)—which provides that, “[i]f a certificate is missing the address of a witness, the ballot may not be counted,” Wis. Stat. § 6.87(6d)—is risible. Plaintiffs claim that an address could not be considered “missing” or “absent” under Section 6.87(6d) if the witness certificate “provides information sufficient for a clerk to reasonably discern the place where the witness may be communicated with.” Dkt.8 at 15. Thus, Plaintiffs assert—in *ipse dixit* fashion—that Section 6.87(6d) also supports their definition of a witness “address” under Section 6.87(2). But this reading of Section 6.87(6d) just assumes the correctness of Plaintiffs’ definition. All that said, the Legislature’s interpretation of a witness “address” under Section 6.87(2) does easily fit with Section 6.87(6d)’s rule. If a witness certificate is “missing” one of the three constitutive elements of an “address”—street number, street name, or name of municipality—then the address itself is “missing” from the certificate, per Section 6.87(6d)’s rule, under any ordinary understanding of the term “missing.” *See Kalal*, 2004 WI 58, ¶ 45.

Fourth, Plaintiffs’ argument that WEC’s 2016 Guidance also supports their definition of a witness “address” under Section 6.87(2) rests on revisionist history. Plaintiffs claim, incredibly, that WEC concluded in its 2016 Guidance that “a ballot requires no further action from the voter and must be counted if a clerk can reasonably discern *where the witness may be communicated with.*” Dkt.8 at 15 (emphasis added). WEC’s 2016 Guidance does not endorse the amorphous may-be-communicated-with standard that Plaintiffs have invented for purposes of this case. Rather, as stated above, WEC’s 2016 Guidance properly explains that “address” under Section 6.87(2) has a specific meaning: “a complete address [under Section 6.87(2)] contains a *street number, street name and name of municipality.*” Dkt.4, Ex.2 at 1. The reasoning from the memo of WEC staff, which led to WEC adopting the 2016 Guidance, further undermines Plaintiffs’ claim that this guidance somehow incorporates their preferred definition of “address.” *Supra* pp. 11–12. In that memo, WEC staff defined a witness “address” based on *specific* components—not based on the amorphous standard from Plaintiffs—explaining that a witness address must “contain at a minimum, a street number, street name and name of municipality” to be considered “sufficient” under Section 6.87. LeRoy Aff., Ex.2 at 4–5. That was a “common sense approach” providing the “minimum pieces of information required” to identify and validate a witness address. *Id.*, Ex.1 at 1; *see id.*, Ex.2 at 1. Finally, even the portion of the 2016 Guidance that the Waukesha County Circuit Court ultimately enjoined focused upon this explicit definition, providing that “clerks *must* take corrective actions . . . to remedy a witness address error” by adding missing

information to the certificate themselves, “[i]f clerks are reasonably able to discern *any missing information* from outside sources.” Dkt.4, Ex.2 at 1 (emphasis added). That “missing information” could only possibly be a missing “*street number, street name [or] name of municipality.*” Dkt.4, Ex.2 at 1.

Finally, Plaintiffs wrongly suggest that any definition of “address” other than their own would violate the Federal Civil Rights Act, 52 U.S.C. § 10101(a)(2)(B). Dkt.8 at 16–19. Plaintiffs’ attorneys made this same argument to the Circuit Court in *White v. WEC*, but the Circuit Court properly gave this meritless argument no weight. LeRoy Aff., Ex.1 at 20–21. Nothing in 52 U.S.C. § 10101(a)(2)(B)—which merely prohibits denying an individual the right to vote based on an “error or omission,” as long as the error or omission is not “material in determining whether such individual is qualified under State law to vote in such election”—demands any specific definition of “address.” To the contrary, interpreting 52 U.S.C. § 10101(a)(2)(B) to force WEC to adopt Plaintiffs’ proposed definition would be unconstitutional under the U.S. Constitution’s anti-commandeering doctrine, which bars the Federal Government from “compel[ling] the States to . . . administer” federal law. *New York v. United States*, 505 U.S. 144, 188 (1992). Regardless, there is no conflict between 52 U.S.C. § 10101(a)(2)(B) and Section 6.87. To “prevent the potential for fraud or abuse,” Wisconsin law requires voters wishing to exercise the “privilege of voting by absentee ballot,” Wis. Stat. § 6.84(1), to comply with certain provisions of Section 6.87, *see id.* § 6.84(2). Thus, the requirement that all absentee ballots include a properly completed witness certificate, *see* Wis. Stat. § 6.87(6d), (9),

is a specific qualification under Wisconsin law applying to all absentee voters, thus meeting 52 U.S.C. § 10101(a)(2)(B)'s materiality requirement. All that said, if Plaintiffs believed that they had a claim that Section 6.87(2) or WEC's 2016 Guidance violated federal law, then they should have brought such a federal claim.

Plaintiffs' key cited authority, *Migliori v. Cohen*, 36 F.4th 153 (3d Cir. 2022)—a Pennsylvania-related decision resting largely on concessions made by the defendants in that case, *see id.* at 165–66 (Matey, J., concurring in judgment)—is entirely distinguishable, Dkt.8 at 16–18, assuming this out-of-state case has any relevance. *Migliori* invalidated the practice of rejecting absentee ballots that did not include a handwritten date next to the voter declaration signature under 52 U.S.C. § 10101(a)(2)(B). *Migliori*, 36 F.4th at 162–64. The Third Circuit noted that this requirement was not “material” to voter qualifications under Pennsylvania law because only ballots with missing dates were not counted, whereas “ballots that were received with an erroneous date were counted.” *Id.* at 163. Here, in contrast, providing an accurate witness certificate is both itself a qualification to vote absentee under Wisconsin law and relevant to confirm other qualifications for absentee voters. It is thus “material” under § 10101(a)(2)(B), even under the *Migliori* approach.

B. Plaintiffs Have Not Shown That They Will Suffer Irreparable Harm Absent Temporary-Injunctive Relief

Plaintiffs have also failed to show that they will suffer irreparable harm unless the Court grants them a temporary injunction. *SEIU*, 2020 WI 67, ¶ 93. Plaintiffs will suffer no harm without temporary-injunctive relief here, since it is trivially easy for any witness to fill in the necessary components of his or her address under Section

6.87(2)—street number, street name, and municipality—as properly explained by WEC in its 2016 Guidance, which is still in force. *Supra* pp. 11–12. Any absentee-ballot witness will, of course, already know these three pieces of information for himself or herself, so as to satisfy fully Section 6.87(2)’s address requirement. The ease with which witnesses may supply those three pieces of information explains why Plaintiffs try to place the focus on the omission of zip codes, *see* Dkt.8 at 19, 21, 22—although zip codes are not required under WEC’s operative guidance, *supra* pp. 11–12.

Plaintiffs have failed to put forward any evidence to disturb that commonsense conclusion. Plaintiffs rely on a recent study by the State Legislative Audit Bureau here, but that is misplaced. Dkt.8 at 20–21 (citing State of Wis. Legis. Audit Bureau, Elections Admin., Rep. 21-19 at 42–43 (Oct. 2021) (hereinafter “LAB Report”)¹⁰). The Audit Bureau’s study showed that, in a random sample of absentee ballots cast in the November 2020 general election, 1,022 absentee-ballot certificates contained partial witness addresses. LAB Report at 42. While this study explains that these addresses “did not have one or more components of a witness address, such as a street name, municipality, *state*, and *zip code*,” *id.* (emphasis added), it did not identify what percentage of the 1,022 certificates were missing which address component, *see id.* That destroys Plaintiffs’ claims of injury, given that the Audit Bureau’s study considered address fields that are *not* elements of a witness “address” under WEC’s and the Legislature’s definition of that term in Section 6.87(2). *Supra* pp. 11–13.

¹⁰ Available at <https://legis.wisconsin.gov/lab/media/3288/21-19full.pdf>.

Specifically, the Audit Bureau’s study considered missing zip codes and missing States, LAB Report at 42, while the operative definition includes only street number, street name, and municipality, *supra* pp. 11–12.

Plaintiffs’ requested “fix”—a court order defining witness “address” under Section 6.87(2) as requiring “only sufficient information to determine where the witness ‘may be communicated with,’” Dkt.8 at 14 (emphasis omitted)—would not alleviate their alleged problems of voter confusion and erroneously rejected absentee ballots, Dkt.8 at 19–20. To the contrary, this Court issuing such an order would increase the confusion of voters, while giving no guidance to clerks. Given the vague and subjective nature of Plaintiffs’ proposed definition of “address,” no absentee voter could be sure that his or her local elections clerk would accept the address that their witness submits and so count their vote. And in light of this test’s highly subjective nature, the over 1,800 election clerks will interpret and apply Plaintiffs’ may-be-communicated-with standard quite differently, likely leading to more erroneous rejections of absentee ballots than under WEC’s objective rule.

Finally, Plaintiffs are incorrect that WEC’s current, prevailing definition of a witness “address” under Section 6.87(2) causes voter confusion in any respect. Dkt.8 at 19–20. The commonly accepted and used definition of a witness “address” under Section 6.87(2) has always been the witness’s street number, street name, and name of municipality, and WEC’s 2016 Guidance is in accord. *See supra* pp. 11–12. Further, as explained above, WEC’s interpretation of a witness “address” under Section 6.87(2) is consistent both with the statutory text and the required statutory

context, *see supra* pp. 10–11, thereby serving as a reliable guide for all Wisconsinites, *accord State v. Neumann*, 2013 WI 58, ¶ 50 n.29, 348 Wis. 2d 455, 832 N.W.2d 560 (“[E]very person is expected to know the law.”).

While Plaintiffs suggest that the Waukesha County Circuit Court invalidated and/or WEC rescinded the definition of an “address” in the 2016 Guidance, Dkt.8 at 6–7, that is demonstrably false. WEC issued guidance to all Wisconsin clerks in September explaining that the 2016 Guidance’s definition of an “address” remains in full force, given that the Waukesha County Circuit Court had “clarified that it had not ruled on what constitutes a witness address” or “overturned the existing WEC definition of address contained in the [2016 Guidance].” *See* WEC September 2022 Guidance, *supra*. That September 2022 Guidance then expressly reiterated that definition of a witness “address” for the benefit of all clerks: “namely, *street number, street name, and name of municipality.*” *See* WEC September 2022 Guidance, *supra*. Finally, the Waukesha County Circuit Court expressly confirmed in its October 3, 2022 final judgment issuing its permanent injunction that “[n]othing herein is intended, nor shall be construed, to enjoin WEC from issuing or distributing *its* guidance regarding the definition of “address” as used in Wis. Stat. § 6.87.” *LeRoy Aff.*, Ex.10 at 3 (emphasis added).

C. The Balance Of The Equities And Considerations Of The Status Quo Strongly Favor Denial Of Any Temporary-Injunctive Relief

Finally, the balance of the equities and any considerations of the status quo weigh decisively against temporary-injunctive relief here. *SEIU*, 2020 WI 67, ¶ 93; *Pure Milk*, 90 Wis. 2d at 800.

To begin, Plaintiffs are too late with their lawsuit to obtain the election-related relief that they seek. The Wisconsin Supreme Court has disapproved of eleventh-hour challenges to absentee ballots, explaining that “the time to challenge election policies . . . is not after all ballots have been cast.” *Trump v. Biden*, 2020 WI 91, ¶ 22, 394 Wis. 2d 629, 951 N.W.2d 568, *cert. denied*, 141 S. Ct. 1387 (2021). So, once voters have started to cast ballots in a given election, the courts should not alter the rules of that election. *See id.* To challenge election policies after voters have already cast their votes “is beyond unfair” because it “would violate every notion of equity that undergirds our electoral system.” *Trump*, 2020 WI 91, ¶ 25. This conclusion follows from the well-established principle from *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam). Under that principle, courts “should ordinarily not alter the election rules on the eve of an election,” so as to avoid “judicially created confusion.” *Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam). Yet, Plaintiffs have filed this lawsuit challenging the procedures for completing absentee ballots ***after absentee ballots have already gone out and are beginning to be returned.*** *See* Wis. Stat. §§ 6.86(7), 7.15(1)(cm); MyVote Wisconsin, *Deadlines*;¹¹ Wis. Elections Comm’n, *Voting By Mail*.¹² Accordingly, were this Court to grant any temporary-injunctive relief, as Plaintiffs request, there would be no way

¹¹ Available at <https://myvote.wi.gov/en-us/Voter-Deadlines>.

¹² Available at <https://elections.wi.gov/voters/voting-mail#230548828-671723725> (under “When will I get my absentee ballot?” tab).

to avoid grave, “judicially created confusion” for Wisconsin voters and clerks alike, in violation of the *Purcell* principle. *Republican Nat’l Comm.*, 140 S. Ct. at 1207.

Granting Plaintiffs’ requested relief would also disserve the public interest because their definition of a witness “address” under Section 6.87(2) is unadministrable. Plaintiffs have not even attempted: to define what type of information is “sufficient” for a clerk to figure out where the witness may be communicated with; to explain how much of that undefined information is needed; or even to define what it means for a clerk to “communicate” with a witness; and so on. Thus, under Plaintiffs’ approach, the over 1,800 clerks across the State would be left asking, for example, whether a mere description of where the witness lives would be sufficient; or whether a statement that the witness lives near a particular intersection or landmark suffices; or even whether a witness could request that the clerk call or email him or her for more specific details. With no guidance in Wisconsin law on these impossible questions—and no help from Plaintiffs either—there is no way for Wisconsin’s clerks to administer Plaintiffs’ rule across the State, to say nothing of doing so in a uniform manner. *See supra* pp. 19–20.

Plaintiffs’ lawsuit in this Court is also blatant forum shopping, which is a practice that is against the public interest. *Accord Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997). Plaintiffs claim to take issue with the recent injunction issued by the Waukesha County Circuit Court in *White v. WEC*, suggesting—falsely—that it rescinded WEC’s definition of an “address” in the 2016 Guidance. *Supra* pp. 7, 11–12. But if Plaintiffs had legitimate concerns with the Waukesha County Circuit

Court's decision in *White v. WEC*, then they should have brought this lawsuit in that court. Instead, Plaintiffs brought their claims to this Court, hoping for a more favorable result in this forum. Such obvious forum shopping is deeply insulting to the Circuit Courts of this State, and thus contrary to the public interest.

Granting the request temporary injunction would harm the People and the Legislature in multiple other respects. First, the People and the Legislature have a sovereign interest in the enforcement of its statutes as written, *Democratic Nat'l Comm. v. Bostelmann*, 2020 WI 80, ¶¶ 8, 13, 394 Wis. 2d 33, 949 N.W.2d 423; *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989), that is implicated here because adjudicating this lawsuit requires the Court to interpret and apply Wisconsin's election laws. Moreover, the People and the Legislature have a special interest in ensuring the faithful enforcement of statutes that are designed to protect the integrity of the elections in Wisconsin, *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 196 (2008); *Eu*, 489 U.S. at 231, which Plaintiffs' lawsuit undermines for the reasons described above, *see supra* pp. 9–15.

Finally, considerations of the status quo disfavor any temporary injunction relief. Section 6.87(2) and WEC's longstanding guidance on the elements of a witness address under that statute are the status quo. *See* WEC September 2022 Guidance, *supra*. That very same guidance remains in force today, with WEC redistributing it to clerks just this month. *Id.* The Legislature, for its part, supports the continued operation of this guidance here, which is the very definition of maintaining the status quo. Plaintiffs, in contrast, would have this Court upend the status quo by imposing

the wholly new, unadministrable definition of witness “address” that they have just created for purposes of this case—right in the middle of an election. That cannot preserve the status quo here, under any understanding of that term.

II. If This Court Issues A Temporary Injunction To Plaintiffs, It Should Immediately Stay Its Order Pending Appeal

The Legislature strongly believes that Plaintiffs failed to demonstrate that they are entitled to any temporary-injunctive relief from this Court. *See supra* Part I. But if this Court disagrees and does enter a temporary-injunction order, then the Legislature respectfully requests that this Court immediately stay that order while the Legislature pursues an emergency appeal.

A. Section 808.07 of the Wisconsin Statutes provides that “a trial court . . . may . . . [s]tay execution or enforcement of a judgment or order” during “the pendency of an appeal” of that order. Wis. Stat. § 808.07(2)(a); *see* Wis. Stat. § (Rule) 809.12. When reviewing a request to stay an order pending appeal, the Court must consider whether the moving party: (1) “makes a strong showing that it is likely to succeed on the merits of the appeal”; (2) “shows that, unless a stay is granted, it will suffer irreparable injury” during the pendency of the appeal; (3) “shows that no substantial harm will come to other interested parties” during the pendency of the appeal; and (4) “shows that a stay will do no harm to the public interest.” *Waity*, 2022 WI 6, ¶ 49. These four factors “are not prerequisites but rather are interrelated considerations that must be balanced together.” *Id.* (citation omitted).

The Wisconsin Supreme Court’s recent decision in *Waity* explains the proper analytical approach for a court’s assessment of likelihood of success on appeal, in

particular, given that this factor places the court in a somewhat unusual posture, as the court has by definition already ruled against the stay-movant on the merits. As *Waity* explains, the court cannot “simply input its own judgment on the merits of the case and conclude that a stay is not warranted,” because the salient issue is “whether the movant made a strong showing of success *on appeal*.” *Id.* ¶ 52. For this reason, the court “must consider the standard of review, along with the possibility that appellate courts may reasonably disagree with its legal analysis.” *Id.* ¶ 53. When the appellate courts will review the issues de novo, or when they have not previously examined the legal questions in the appeal, then the circuit court must strongly “consider[] how other reasonable jurists on appeal” might “interpret[] the relevant law” and if those jurists might “come to a different conclusion.” *Id.* Moreover, the presence of these considerations, standing alone, establishes the stay-movant’s strong likelihood of success on appeal. *See id.* ¶¶ 51–53.

B. If this Court enters a temporary injunction here, it should immediately stay that injunction pending appeal, as the Legislature would satisfy all four stay-pending-appeal factors.

First, the Legislature would have a strong likelihood of success on the merits, given that its appeal would present novel questions of law reviewed de novo on appeal. *Id.* ¶¶ 49, 53. No appellate court in the State has authoritatively defined what a witness “address” is under Section 6.87(2), *accord Trump*, 2020 WI 91, ¶¶ 47–52 (Hagedorn, J., concurring), thus this would present a novel question for the appellate courts, *see Waity*, 2022 WI 6, ¶¶ 51–53. Further, as a question of statutory

interpretation, the appellate courts would review this Court's interpretation of a witness "address" under Section 6.87(2) de novo. *See id.* For these reasons, the Legislature would have a strong likelihood of prevailing on appeal, *id.*, even were this Court to rule against the Legislature's powerful merits arguments, *see supra* Part I.A, by issuing a temporary injunction to Plaintiffs.

Second, the Legislature would suffer irreparable harm during the pendency of the appeal, in the absence of a stay. *Waity*, 2022 WI 6, ¶ 49. Section 6.87(2) and 6.87(6d) are part of the Legislature's crucial efforts to protect the integrity and reliability of the absentee-voting regime—a regime that "must be carefully regulated to prevent the potential for fraud or abuse" because it operates "wholly outside the traditional safeguards of the polling place." Wis. Stat. § 6.84(1). So, given these statutes' connection to "protecting the integrity and reliability of the electoral process," the Legislature unquestionably has a "compelling interest" in these statutes' robust operation. *Milwaukee Branch of NAACP v. Walker*, 2014 WI 98, ¶ 73, 357 Wis. 2d 469, 851 N.W.2d 262 (citing *Crawford*, 553 U.S. at 196); *accord Eu*, 489 U.S. at 231. Yet, if this Court orders any relief on Plaintiffs' claims here, this would undermine Sections 6.87(2) and 6.87(6d) by replacing the straightforward and sensible interpretation of a witness "address" adopted by the Legislature and WEC with Plaintiffs' vague and confusing definition. That undermining of duly enacted statutes imposes "substantial and irreparable harm of the first magnitude" on the Legislature, *LeRoy Aff. Ex.9* at 8—a harm made all the more acute given the election-integrity implications in this case, *Walker*, 2014 WI 98, ¶ 73.

Importantly, the “harms to the Legislature and the public “can[not] be undone if, on appeal,” a temporary injunction from this Court “is reversed.” *Waity*, 2022 WI 6, ¶ 57. If this Court enters an order adopting Plaintiffs’ amorphous and subjective definition of a witness “address,” then clerks across the State would immediately implement that definition as they review the absentee ballots ***that are already being returned to their offices***. *Supra* pp. 21–22. Thus, in the absence of a stay of any order from this Court, clerks across the State would accept absentee ballots with witness addresses that comply with Plaintiffs’ open-ended definition—but not with Section 6.87(2) and WEC’s 2016 Guidance—while any appeal from the Legislature is pending. There would be no way to identify those illegal absentee ballots once accepted by the clerks, even if the Legislature were to prevail on any appeal, and thus no way to vindicate Section 6.87(2) as to those ballots. *See Waity*, 2022 WI 6, ¶ 57.

Third, no substantive harm would come to Plaintiffs if this Court stayed any temporary-injunction order during the pendency of the appeal. *Id.* ¶ 49. As explained above, it is trivially easy for any absentee-ballot witness to comply with Section 6.87(2)’s address requirement, as confirmed by WEC’s extant 2016 Guidance, by listing their street number, street name, and municipality. *Supra* pp. 11–12. Further, under Section 6.87(9)’s remedial procedure, absentee voters whose ballots nevertheless do not contain a sufficient witness address may have those ballots returned to them by the clerk, if time permits. Wis. Stat. § 6.87(9). So, if this Court were to stay any temporary injunction pending appeal here, all absentee voters in Wisconsin would still easily be able to comply with Sections 6.87(2) and 6.87(6d) and

vote absentee and, even if unsuccessful, utilize Section 6.87(9)'s remedial provision if time permits, during the pendency of any appeal in this case.

Finally, a stay pending appeal would protect the public interest, while a denial of a stay would harm the public interest. *Waity*, 2022 WI 6, ¶ 49. As explained above, Plaintiffs' preferred definition of a witness "address" under Section 6.87(2) would cause voter confusion, in the middle of an ongoing election. *Supra* pp. 19–20, 21–22. And separately, this Court refusing to stay any injunction it may issue would undermine Sections 6.87(2) and 6.87(6d) while any appeal is pending, thus inflicting the same "substantial and irreparable harm of the first magnitude" on the public as on the Legislature, as discussed above. *LeRoy Aff. Ex.9* at 8.

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CONCLUSION

This Court should deny Plaintiffs' Motion For A Temporary Injunction.

Dated: October 3, 2022

Respectfully submitted,

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