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CIRCUIT COURT
DANE COUNTY, WI
2022CV002446

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 10

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-2446
Case Code: 30701
Hon. Juan Colás

**PLAINTIFFS' REPLY BRIEF IN IN SUPPORT OF
MOTION FOR A TEMPORARY INJUNCTION**

INTRODUCTION

Every statewide election in Wisconsin since 2016—including the August 2022 primary—has proceeded according to guidance issued by the Wisconsin Elections Commission (“WEC”) instructing local election officials that an absentee ballot certification containing sufficient information to enable an official to reasonably discern the witness’s complete address requires no further action from the voter to be counted. In September, the use of the guidance document which provided this information was enjoined by the Waukesha County Circuit Court—although the Court did not find that WEC’s interpretation was inconsistent with Wisconsin Statutes. WEC subsequently withdrew the guidance document in full. The result? Wisconsin’s 1,800-plus clerks and election officials are left without clear or uniform guidance as to how to apply the law as it pertains to witness addresses on absentee ballots. That is why Plaintiffs filed this suit and their temporary injunction motion: to prevent mass confusion on the eve of an election, and to ensure

that local officials apply the law consistently, protecting voters from disparate treatment that could mean the difference between their ballot being counted or rejected. In other words, Plaintiffs' goal is simply to maintain the status quo—ensuring that absentee ballots that are cast consistent with WEC's correct interpretation of the statutory address requirement are counted.

The Legislature's primary argument in opposing Plaintiffs' motion is that the definition of "address" contained in the guidance at issue is "still in force," so there is no need for the Court to weigh in.¹ But WEC's definition of "address" applicable to absentee ballot witness certificates appeared *only* in its now-invalidated memoranda, which can no longer be found anywhere on WEC's website. And while the Legislature urges the Court to adopt a definition of "address" found in separate provisions of the Election Code, this argument turns the usual principles of statutory interpretation on their head. Further, even if this Court were to adopt the Legislature's definition, it would require—at a minimum—this Court to direct WEC to issue clear and uniform guidance to that effect.

Because Wis. Stat. § 6.87(2) does not define the term "address" as it pertains to witness certifications on absentee ballots (unlike several other provisions of the Election Code, which specifically delineate which components of an address are required in other contexts), that term is ambiguous. Plaintiffs thus offer the dictionary definition of that term—where the witness may be communicated with—and a standard for determining whether a witness's "address" is present—whether the election official can reasonably discern where the witness may be communicated with. This standard is both faithful to Wis. Stat. § 5.01(1)'s interpretive guidance and consistent with the 2016 guidance (and thus the standard clerks have applied during the last twelve elections).

¹ As of the time of filing this brief, neither of the Defendants have filed a brief regarding Plaintiffs' Motion for a Temporary Injunction. If either Defendant files a brief, Plaintiffs may seek leave of the Court to file a supplemental reply brief.

Plaintiffs therefore are likely to succeed on the merits.

Plaintiffs also satisfy the remaining criteria for a temporary injunction. Absent an injunction, they face irreparable harm. This includes, among other things, disenfranchisement of lawful Wisconsin voters due to the lack of clear guidance. For similar reasons, Plaintiffs have no adequate remedy at law. Finally, Plaintiffs' proposed relief is meant to preserve the status quo; all they seek is to ensure that the upcoming election proceeds in the same manner as the last twelve.

ARGUMENT

I. Plaintiffs are likely to succeed on the merits of their claims.

Plaintiffs are likely to succeed on the merits of their claim that the term "address" in Wis. Stat. § 6.87(2) is ambiguous, and that the fairest reading consistent with Wisconsin principles of statutory interpretation is that a witness's "address" is present when an official can reasonably discern where the witness may be communicated with. The Legislature's arguments only confirm that clerks presently have no clear guidance on the meaning of address, and that "*complete* address" (which is not the term at issue here) means street name, street number, and municipality.

A. There currently is no operative guidance on the meaning of "address."

Section 6.87 of the Election Code does not define the term "address." Accordingly, WEC— together with the Wisconsin Department of Justice—determined that (i) a "complete" address includes a street number, street name, and municipality; and (ii) an absentee ballot need not be rejected if the certificate does not include every piece of a "complete" witness address. Pls. Brf.; Doc 8 at 5. WEC subsequently issued unanimous guidance in October 2016 (the "2016 guidance") instructing that where an absentee ballot certification contained enough information for a clerk to reasonably discern a witness's complete address, the clerk could make that correction and count the ballot without further action from the voter. Doc.4, Exh. 1.

The crux of the Legislature's brief is that this 2016 guidance remains in effect. *See* Leg.

Opp.; Doc. 40 at 8, 12–13. This ignores several critical facts. First, after the Waukesha court’s order, WEC explained that its guidance documents had been enjoined, called them “invalidated,” and stated they had “been withdrawn.” Wis. Elections Comm’n, *Temp. Inj. on WEC Guidance re Missing Absentee Witness Address (White v. WEC, 22-CV-1008)* (Sept. 14, 2022).² Second, WEC has pulled the guidance at issue from its website; clerks can no longer view those memoranda. *See* Pls. Brf.; Doc. 8 at 3. Third, the September 14 communication is not “a guidance,” as the Legislature suggests. Leg. Opp.; Doc. 40 at 8. A guidance document is a “formal or official document or communication issued by an agency” that “[e]xplains the agency’s implementation of a statute or rule enforced or administered by the agency.” Wis. Stat. § 227.01(3m)(b). The September 14th communication does no such thing, nor was it issued using the procedures required to make guidance binding. *See id.* § 227.112. Finally, on September 19, WEC revised its Election Manual—which, along with *properly* promulgated rules and guidance documents, is the primary mechanism for WEC to set out “the duties of... election officials,” Wis. Stat. § 7.08(3)—to remove all “references to the clerk’s ability to add missing witness address information on the absentee certificate.” Wis. Elections Comm’n, *Election Administration Manual* (Sept. 19, 2022).³ The Manual’s only instruction about witness addresses now reads: “The witness must include their address.” *Id.* at 98.

B. The Legislature conflates “address” with “complete address.”

The Legislature’s attempt to argue that “address” as used in Section 6.87(2) is unambiguous because “*complete* address” is defined elsewhere in the Election Code, Leg. Opp.; Doc. 40 at 11–12, contravenes ordinary principles of statutory interpretation. Plaintiffs do not

² Available at <https://elections.wi.gov/memo/temporary-injunction-wec-guidance-re-missing-absentee-witness-address-white-v-wisconsin>.

³ Available at <https://elections.wi.gov/resources/manuals/election-administration-manual>.

dispute that, if Section 6.87(2) required a witness to include a “complete address,” the witnesses would need to include street name, street address, and municipality. But Section 6.87(2) does not say that. It requires only an “address.” *See* Pls. Brf.; Doc. 8 at 13. And “[w]here the legislature uses similar but different terms in a statute, particularly within the same section, [courts] presume it intended the terms to have different meanings.” *State ex rel. Zignego v. WEC*, 2020 WI App 17, ¶64, 391 Wis. 2d 441, 941 N.W.2d 284 (quotation omitted); *see also* Pls. Brf.; Doc. 8 at 13–14. Further, the Legislature relies on Wis. Stat. §§ 6.34(3)(b)(2) and § 6.87(2) to argue that “address” means street name, street address, and municipality. Leg. Opp.; Doc. 40 at 12–13. But section 6.34(3)(b)(2) uses the phrase “complete residential address” to refer to street number, street name, and municipality. And Section 6.87(2) delineates the specific components of an address a voter needs to provide item-by-item. Neither provision would so read if “address” unambiguously meant street number, street name, and municipality, as the Legislature’s own citation to *State ex rel. Kalal v. Cir. Ct. for Dane County*, 2004 WI 58, ¶46, 271 Wis. 2d 633, 663, 681 N.W.2d 110, 124, explains. *See id.* (“Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage.”). If “address” had the Legislature’s meaning, much of Sections 6.34(3)(b)(2) and 6.87(2) would be surplusage.

The same conflation of “address” with “complete address” plagues the Legislature’s attempt to rely on WEC’s 2016 guidance, Leg. Opp.; Doc. 40 at 12–13, 17, which states that “a *complete address* contains a street number, street name and name of municipality.” Doc. 4, Exh. 2 at 1 (emphasis added). However, WEC understood Section 6.87(2)’s reference to “address” to require something less for ballots to be counted—the guidance allowed clerks to append address information if they were reasonably able to discern that information. *Id.* The Legislature points to WEC’s October 2016 staff memo to argue against this conclusion but omits that WEC later

modified that policy in the 2016 guidance, apparently because it believed a voter need not include all three elements to satisfy the “address” requirement and have a ballot counted. *See* Doc. 38, Exh. 3 at 7 (“The Commission directs staff to modify the October 4, 2016 staff policy” to provide that clerks “may add the municipality to the witness certificate if they are able to reasonably ascertain the information from other information on the envelope, or other reliable extrinsic sources.”). WEC’s 2016 guidance therefore defines only “complete address,” and suggests something less satisfies the statute’s “address” requirements.

Finally, the Legislature cannot point to its own vetoed bill to rehabilitate its definition of “address.” Leg. Opp.; Doc. 40 13–14. A definition vetoed by the Governor is not the law and does not control. *See* Wis. Const. art. V, § 10. If anything, the Legislature’s recent, failed attempt to enact its preferred definition of “address” implies the definition in the statute remains up for debate—if it were unambiguous, the Legislature would have had no need to act.

C. This Court should give “address” in Section 6.87(2) its ordinary definition.

Because “address” is an ambiguous term, it should be given its ordinary definition. *See Garcia v. Mazda Motor of Am., Inc.*, 2004 WI 93, ¶14, 273 Wis. 2d 612, 682 N.W.2d 365. Here, that means “a place where the witness may be communicated with.” *Address*, Merriam-Webster.⁴ This construction also has the benefit of being consistent with the statute’s overall purpose, which is “to give effect to the will of the electors . . . notwithstanding informality or failure to fully comply with some of [the Code’s] provisions.” Wis. Stat. § 5.01(1).

⁴ The Legislature claims Plaintiffs made this definition “out of whole cloth,” Leg. Opp.; Doc. 40 at 14, yet then offers a competing definition from a different dictionary, *id.* at 11 (quoting the Oxford English Dictionary). Plaintiffs’ proposed definition simply follows instruction from the Wisconsin Supreme Court that “if a word is not defined in a statute, [courts] look next to recognized dictionary definitions to determine the common and ordinary meaning of a word.” *Garcia*, 2004 WI 93, ¶ 14.

The Legislature first responds that Section 5.01 does not apply because this suit “relat[es] to the absentee ballot process,” requiring interpretation under Wis. Stat. § 6.84(2)’s rule of strict construction. This overlooks the express limits of that statute, which applies only to Sections 6.86, 6.87(3)–(7), and 9.01(1). *See id.* § 6.84(2). Neither Section 6.87(2) nor Section 6.87(9), the relevant provisions here, is on that list. Section 6.87(6d) is, but it is purely remedial, providing in whole: “If a certificate is missing the address of a witness, the ballot may not be counted.” All that follows from its inclusion in Section 6.84(2) is that, *given a definition of address*, a ballot missing a witness address may not be counted. Thus, Section 5.01(1)’s requirement that ambiguities be construed in favor of the voter applies to the antecedent question: the definition of address.

The Legislature next contends that Plaintiffs’ proposed standard is “unadministrable.” Leg. Opp.; Doc. 40 at 14–15, 24. But this ignores that what Plaintiffs propose is that WEC instruct clerks to proceed as they have for the last six years, with the only difference being that clerks not modify the information written on the absentee ballot certificate. Under the 2016 guidance, if a clerk was “reasonably able to discern” all three components of a witness’s “complete address,” she could fill those in and count the ballot without notifying the voter. Doc. 4, Exh. 2 at 1. The Legislature does not explain how clerks were able to administer that standard for years without incident, yet would be unable to administer the standard that Plaintiffs propose—which is functionally the same as directing them to determine whether the address information provided is sufficient to enable election officials to communicate with the witness (should they ever need to). And nothing Plaintiffs propose would stop WEC from issuing guidance laying out specific steps clerks must take to discern where a witness may be communicated with (as WEC did in the 2016 guidance).

Finally, the Legislature turns, somewhat confoundingly, to the federal anti-commandeering

doctrine. This appears to be in rebuttal to Plaintiffs' argument that defining "address" to require more than is required to reasonably discern where a person can be communicated with risks running afoul of the Federal Civil Rights Act's Materiality Provision. The Legislature counters that Plaintiffs may not invoke the Materiality Provision because that would violate the anti-commandeering doctrine. Leg. Opp.; Doc. 40 at 18. That doctrine prohibits the federal government from commandeering state government officials. *New York v. United States*, 505 U.S. 144 (1992). But it is not "commandeering" when a state law is preempted by, or violates, federal law. *Id.* at 187; U.S. Const., art. VI, ¶ 2. With that point clarified, Plaintiffs' argument is straightforward. The Wisconsin officials who enacted the witness address requirement were no doubt aware of the Civil Rights Act of 1964. It would be strange if Wisconsin lawmakers had knowingly adopted a witness address requirement that violated or was preempted by its Materiality Provision. Thus, to the extent "address" is ambiguous, federal law provides another reason to adopt Plaintiffs' construction.

The Legislature argues that the witness address requirement is material, but this is circular, boiling down to a contention that *any* procedural voter-qualification requirement is "material." Leg. Opp.; Doc. 40 at 18–19. If that were the standard, the Materiality Provision would be a dead letter.

II. Plaintiffs will suffer irreparable injury without a temporary injunction.

Plaintiffs also have shown that they will suffer irreparable harm without a temporary injunction. Pls. Brf.; Doc. 8 at 19–21. The Legislature claims that "it is trivially easy for any witness to fill in the necessary components of his or her address," and thus that Plaintiffs will suffer no harm without temporary-injunctive relief. Leg. Opp.; Doc. 40 at 19–20. But this ignores the practical reality that many electors are likely to return certificates with witness-address information that makes clear where the witness can be contacted without actually amounting to an "address."

For example, a witness who resides with the voter might write “same” or “see above” on the address line of the certificate. This is not mere conjecture; the data shows that many Wisconsin voters will return absentee ballots that contain partial witness addresses. Pls. Brf.; Doc. 8 at 20–21. All Plaintiffs seek is to preserve a six-year-old status quo: votes count unless the witness’s address is truly not discernable. Absent clear guidance along these lines, Plaintiffs will suffer irreparable harm.

III. The balance of the equities supports a temporary injunction.

For similar reasons, the balance of the equities tips decidedly in Plaintiffs’ favor. The Legislature claims that Plaintiffs’ requested relief will disrupt enforcement of Wisconsin election law and upend the status quo. Leg. Opp.; Doc. 40 at 25–26. In fact, the opposite is true: all Plaintiffs seek is to ensure that clerks proceed and votes are counted the same way as they did and were in the August 2022 primary and every election before it during the last six years.

Plaintiffs also did not unduly delay in bringing this suit. The very case the Legislature cites on this point, *Trump v. Biden*, 2020 WI 91, 394 Wis. 2d 629, 951 N.W.2d 568, explained that as of 2020, WEC’s process for dealing with missing witness information had “been relied on in 11 statewide elections,” *id.* ¶18. Plaintiffs filed this lawsuit just two weeks after WEC’s September 14 communication confirmed that Wisconsin’s 1800-plus local election officials no longer had consistent or uniform guidance. And no absentee ballots have been counted yet. Wis. Stat. § 6.88.

The Legislature’s accusations of forum shopping also ring hollow. Plaintiff Rivera resides in and intends to vote absentee in Dane County, while Plaintiff Rise employs organizers at the University of Wisconsin-Madison. Defendant WEC is headquartered in Dane County, and Defendant Witzel-Behl is the Madison City Clerk. Defendants were sued in their home forum by Plaintiffs whose interests are most tangible in the same forum. Nor does the Waukesha court have

any special claim on the issues in dispute—it expressly declined to construe “address,” and has now entered a final judgment again explaining that its injunction does not consider the question Plaintiffs present here. *See* Order at 3, *White v. Wis. Elections Comm’n*, 2022-CV-001008 (Wis. Cir. Ct. Oct. 3, 2022), Doc. 188. There is no better forum than Dane County for this litigation.

CONCLUSION

The Court should grant the motion for a temporary injunction and deny an immediate stay.

DATED this 6th day of October, 2022.

Respectfully submitted,

Electronically signed by Diane M. Welsh

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