No. 2024AP166

In the Wisconsin Court of Appeals

DISTRICT I

LEAGUE OF WOMEN VOTERS OF WISCONSIN,
PLAINTIFF-APPELLANT-CROSS-RESPONDENT,
v.
WISCONSIN ELECTIONS COMMISSION, DON MILLIS, JULIE M. GLANCEY, ROBERT F. SPINDELL, JR., MARK L. THOMSEN, ANN S. JACOBS, MARGE BOSTELMANN, AND MEAGAN WOLFE,
DEFENDANTS-RESPONDENTS,

WISCONSIN STATE LEGISLATURE,
INTERVENOR-RESPONDENT-CROSS-APPELLANT.

On Appeal From The Dane County Circuit Court,
The Honorable Ryan D. Nilsestuen, Presiding
Case No. 2022CV2472

INTERVENOR-RESPONDENT-CROSS-APPELLANT'S EMERGENCY MOTION FOR STAY PENDING APPEAL

KEVIN M. LEROY
State Bar No. 1105053
EMILY A. O'BRIEN
State Bar No. 1115609
TROUTMAN PEPPER HAMILTON SANDERS LLP
227 W. Monroe Street,
Suite 3900
Chicago, Illinois 60606

MISHA TSEYTLIN
Counsel of Record
State Bar No. 1102199
TROUTMAN PEPPER HAMILTON SANDERS LLP
227 W. Monroe Street, Suite 3900
Chicago, Illinois 60606
(608) 999-1240 (MT)
(312) 759-1939 (fax)
misha.tseytlin@troutman.com

Attorneys for Intervenor-Respondent-Cross-Appellant

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INTRODUCTION

Wisconsin law required absentee-ballot witnesses to provide their address on the ballot's certificate envelope, while providing that ballots with certificates that are "missing" a witness address "may not be counted." Wis. Stat. § 6.87(6d). Based upon a novel, expansive interpretation of the Materiality Provision of the Civil Rights Act of 1964, the Circuit Court invalidated the application of this witness-address requirement in four specific circumstances, without holding that the requirement even applies to those circumstances (and, indeed, adopting a reading of the requirement in *Rise Inc., et al. v. WEC*, Case No.2022CV2446 (Dane Cnty. Cir. Ct.) that would mean that the requirement would not appear to apply to those four circumstances).

A stay of the Circuit Court's orders pending Intervenor-Defendant the Wisconsin State Legislature's (the "Legislature") appeal is both necessary and amply justified, as the Legislature meets each of the stay factors. First, the Legislature has a strong chance of success on appeal, including because the Circuit Court issued a legally erroneous, unprecedented ruling that, if logically followed to its natural conclusion, would invalidate a series of commonplace voting rules and regulations. Second, the balance of

the equities firmly favors a stay pending appeal, as the State and the Legislature suffer irreparable harm whenever a court enjoins a state statute in any respect. Further, there is very limited evidence of any absentee ballots being improperly rejected in the four circumstances the Circuit Court's injunction addresses, reducing any equitable considerations in favor of denying a stay.

The Legislature thus respectfully requests that this Court issue a stay pending appeal by no later than February 9, 2024, the date on which the Circuit Court has ordered Defendant Wisconsin Election Commission ("WEC") to disseminate to all clerks a copy of the Circuit Court's injunction and guidance on its implementation. The Legislature acted with the fastest dispatch in filing this Motion, filing two business day after the Circuit Court's February 2, 2024 stay hearing and oral decision denying relief. To avoid the unlawful and harmful consequences of the Circuit Court's orders, an expedited stay, *see* Wis. Stat. § (Rule) 809.82(2)(a), from this Court is essential. And while the Legislature believes that the injunction in this case is less problematic than the injunction entered in *Rise*, a related case before District IV (given the grave unadministrability concerns

that the *Rise* injunction raises), the injunction here is still unlawful and inequitable and should be stayed by this Court pending appeal.

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

STATEMENT OF THE CASE

A. Legal Background[1]

1. The Wisconsin Constitution guarantees the right to vote, Wis. Const. art. III, § 1, while providing that "[l]aws *may* be enacted . . . [p]roviding for absentee voting," *id.* § 2 (emphasis added). Absentee voting is a "privilege" under Wisconsin law. Wis. Stat. § 6.84(1); *Teigen v. WEC*, 2022 WI 64, ¶ 52 n.25, 403 Wis. 2d 607, 976 N.W.2d 519. Because this "privilege [is] exercised wholly outside the traditional safeguards of the polling place," Wisconsin law requires absentee-voting procedures to "be carefully regulated to prevent the potential for fraud or abuse." Wis. Stat. § 6.84(1). To that end, Wis. Stat. § 6.84(2) requires that "matters relating to the absentee ballot process" must be "construed as mandatory,"

[1] Because both this case and *Rise* involve the same statute, and to avoid duplicative briefing, this Emergency Motion and the Legislature's contemporaneously filed Emergency Motion For Stay Pending Appeal in *Rise* have a significant overlap as to the Legal Background section.

and that any ballot "cast in contravention" of the State's absentee-voting provisions "may not be counted." *Id.* § 6.84(2).

Pursuant to its constitutional authority to enact general laws, including those "[p]roviding for absentee voting," Wis. Const. art. III, § 2, the Legislature has enacted several absentee-voting laws since the State's founding. The Legislature originally permitted absentee voting only for soldiers during the Civil War, *see* 1862 Wis. Act 11 (Special Sess.),[2] and then later enacted the State's first comprehensive absentee-voting regime in 1915, *see* 1915 Wis. Act 461;[3] *Teigen*, 2022 WI 64, ¶ 174 (Hagedorn, J., concurring). While the 1915 law expanded absentee-voting opportunities, it also contained extensive provisions aimed at preventing fraud or abuse. For example, to request an absentee ballot, a qualified elector was required to swear an affidavit before a designated official and then return it with the properly completed ballot to "the officer issuing the ballot," and failure to comply with the relevant provision subjected both the elector and the official to penalties. 1915 Wis. Act 461, § 44m—1–2, 5–6, 14.

[2] Available at https://docs.legis.wisconsin.gov/1862/related/acts/62ssact011.pdf (all websites last visited Feb. 5, 2024).

[3] Available at https://docs.legis.wisconsin.gov/1915/related/acts/461.pdf.

This scheme generally governed absentee voting in Wisconsin until 1966, when the Legislature replaced the 1915 regime's burdensome affidavit provisions with a simplified witness requirement allowing absentee voters to "make and subscribe to the certification" on their absentee ballots "before 2 witnesses." 1965 Wis. Act 666, § 1 (creating Wis. Stat. § 6.87).[4] In 1986, Wisconsinites ratified a constitutional amendment enshrining the Legislature's authority to enact laws "[p]roviding for absentee voting." Wis. Const. art. III, § 2. That same year, the Legislature reformed the absentee-voting scheme, simplifying the absentee-voting process and clarifying its requirements. *See* 1985 Wis. Act 304.[5] As part of this legislative overhaul, the Legislature enacted Wis. Stat. § 6.84 to elucidate the State's policy goals and the proper interpretation of laws governing the "privilege" of absentee-voting.

Wisconsin's comprehensive absentee-voting regime is one of the most generous in the Nation, allowing any qualified, registered voter to exercise the "privilege" of voting absentee "for any reason"

[4] Available at https://docs.legis.wisconsin.gov/1965/related/acts/666.pdf.

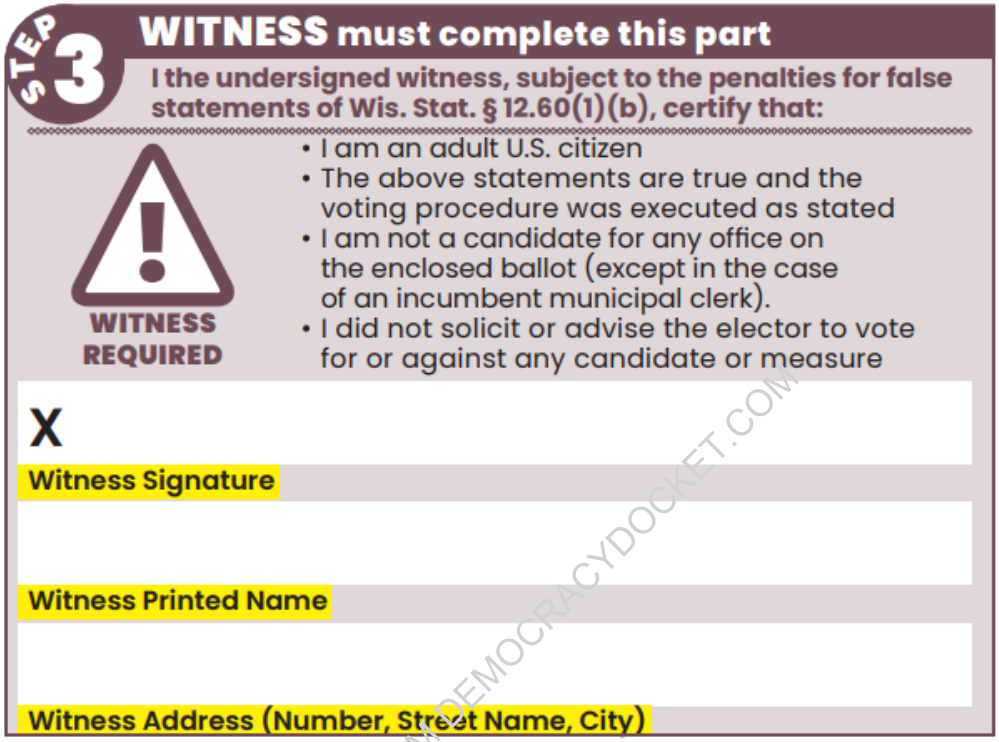
[5] Available at https://docs.legis.wisconsin.gov/1985/related/acts/304.pdf.

if the voter is "unable or unwilling to appear at the polling place in his or her ward or election district." Wis. Stat. §§ 6.84, 6.85(1). Wisconsin law further provides numerous different methods to request an absentee ballot, *id.* § 6.86(1)(a)1–6, to obtain a requested absentee ballot, *id.* § 6.86(ac), and to cast an absentee ballot, *id*. §§ 6.855, 6.87(4)(b)1, (b)5.

Section 6.87 contains the current procedural requirements governing the completion and counting of absentee ballots in Wisconsin, including, as relevant here, the absentee-ballot witness requirement. Pursuant to that requirement, the absentee voter must mark the absentee ballot in the presence of one adult witness before folding and placing the ballot in an official absentee-ballot envelope. *Id*. § 6.87(4)(b)1; *see also id.* § 6.875(6)(c)1. The witness must then write his or her "[a]ddress" on the witness certificate, which is printed on the absentee-ballot envelope. *Id.* § 6.87(2). This witness-address attestation is required for the ballot to be cast successfully: "[i]f a certificate is missing the address of a witness, the [absentee] ballot may not be counted." *Id.* § 6.87(6d).

Below is an image of WEC's revised absentee ballot witness certificate, which includes clear instructions for witnesses to

provide their signature, printed name, and their address, consisting of a street number, street name, and city:



App.106.

If a municipal clerk "receives an absentee ballot with an improperly completed certificate or with no certificate," then the witness "may return the ballot to the elector" so long as "time permits the elector to correct the defect and return the ballot within the period authorized under sub. (6)." Wis. Stat. § 6.87(9). Voters are also able to monitor the status of their submitted ballots through the online "Track My Ballot" tool, which shows them when

the clerk "receive[s]" "returned ballot[s]" and alerts them to any "problem[s]" with their ballots. App.830.

WEC has correctly interpreted the meaning of "address' in Section 6.87's witness-address requirement through guidance issued in October 2016. In that guidance, WEC properly defined witness "address," Wis. Stat. § 6.87(6d), explaining to clerks that "a complete [absentee-witness] address contains a *street number, street name, and name of municipality*." App.865 ("2016 Guidance") (emphasis added). That 2016 Guidance further directed clerks to "take corrective actions in an attempt to remedy a witness address error" and allowed the clerks to make corrections "directly to the absentee certificate envelope" without needing "to contact the voter" in cases where the clerk was "reasonably able to discern any missing information from outside sources." App.865.

On September 7, 2022, the Waukesha County Circuit Court enjoined this latter part of the 2016 Guidance, *see* App.256–86. (Order, *White v. WEC*, 2022CV1008 (Waukesha Cnty. Cir. Ct. Sept. 7, 2022)), holding that clerks had no "duty or ability to modify or add information to incomplete absentee ballot certifications,"

App.281. This ruling did not, however, implicate the 2016 Guidance's interpretation of a witness's "address," nor did the court otherwise rule on when a ballot certificate is defective. *See* App.305–07.

Shortly after the Waukesha County Circuit Court's September 2022 ruling, WEC issued new guidance to clerks to reaffirm its view of the three-part definition of "address," explaining that the *White* court "had not overturned the existing WEC definition of address contained in the now-invalidated memoranda—namely, *street number, street name, and name of municipality*." *See* App.288–89. Although the September 2022 Guidance did not "discuss whether a zip code is an adequate substitute for a municipality name," App.114, and absentee ballots previously included a space to input zip code information, App.834, WEC recently revised the absentee-ballot form to clarify its view that witnesses need only provide their "Number, Street Name, [and] City" in the witness certificate, App.106. WEC's current Uniform Instructions for Wisconsin Absentee Voters likewise makes clear that additional components (like a zip code) are not required because an absentee ballot "will not be counted" only if

the witness fails to provide one or more of the three required components—"street number, street name, city." App.834; *see* Wis. Stat. § 6.869.

Many municipal clerks and absentee voters used WEC's new guidance and the Uniform Instructions for Wisconsin Absentee Voters for the first time in the November 2022 general election, with very few complications. Plaintiffs have only identified sixty-seven instances in which ballots were rejected for witness-address issues. App.477–79. Many of these instances involve the actions of non-party clerks, including municipal clerks in Appleton, Eau Claire, Waukesha, Oshkosh, and Janesville. App.477–79; App.510–738. Far from demonstrating a wide-reaching, statewide problem with WEC's interpretation of "address," the evidence indicates that, to the extent ballots are being inconsistently rejected in certain, isolated situations and by certain clerks—many of whom are not parties to this action—in a handful of counties, those inconsistencies are the result of actions by local clerks, not by WEC's guidance about the address requirement or the necessary components thereof (and, indeed, often contrary to WEC's guidance).

2. Section 10101(a)(2)(B) of Title 52 of the U.S. Code, known as the "Materiality Provision," prohibits States from denying any otherwise qualified individual the right to vote based on an "error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election." 52 U.S.C. § 10101(a)(2)(B). Congress enacted the Materiality Provision as part of the Civil Rights Act of 1964 to assist in its efforts "[t]o enforce the constitutional right to vote." Pub. L. 88-352, 78 Stat. 241, 241 (1964) (codified as amended at 52 U.S.C. § 10101(a)(2)(B)). The Materiality Provision specifically targeted the then-commonplace "practice of requiring unnecessary information for voter registration with the intent that such requirements would increase the number of errors or omissions on the application forms, thus providing an excuse to disqualify potential voters," which practice included "tactic[s]" such as "disqualify[ing] an applicant who failed to list the exact number of months and day in his age." *Schwier v. Cox*, 340 F.3d 1284, 1294

(11th Cir. 2003) (citing *Condon v. Reno*, 913 F.Supp. 946, 949–50 (D.S.C. 1995)).

Plaintiffs challenging the actions of state officials under this provision must prove the following five elements in order to prevail on a Materiality Provision claim: (1) the challenged conduct must be performed by a person who is "acting under color of law"; (2) it must have the effect of "deny[ing]" a person "the right . . . to vote"; (3) the denial must be attributable to "an error or omission on [a] record or paper"; (4) the "record or paper" must be "relat[ed] to [an] application, registration, or other act requisite to voting"; and (5) the "error or omission" must not be "material in determining whether such individual is qualified under State law to vote in such election." 52 U.S.C. § 10101(a)(2)(B). A related provision, 52 U.S.C. § 10101(e), defines the phrase "qualified under State law" for purposes of the Materiality Provision as "qualified according to the laws, customs, or usages of the State." *Id.* § 10101(e). So, once a voter satisfies a State's eligibility criteria and voter registration requirements, that voter is "qualified under State law" to vote in that State. *Id.*; *see id.* § 10101(a)(2)(B). Per its plain text, the Materiality Provision does not reach a State's election rules or

actions beyond the voter-qualification stage, *see id.* § 10101(a)(2)(B), which plain-text understanding harmonizes the Materiality Provision's prohibition on immaterial qualification and registration barriers for eligible voters with the well-recognized role of the States in election administration, *see, e.g.*, *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) ("[It is] clear that States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder." (citation omitted)), *see also Smiley v. Holm*, 285 U.S. 355, 369 (1932); *Ohio v. Hildebrant*, 241 U.S. 565, 567 (1916); *McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 810–11 (1969).

B. Litigation Background

On October 3, 2022, Plaintiff filed its three-count First Amended Complaint against WEC, App.174–203, alleging that (1) the term "missing" under Section 6.87(6d) entails an address field on the witness certificate that is "completely absent" or "completely blank" (with Plaintiff seeking a declaratory judgment to that effect), App.193–95; App.426–27; (2) WEC's failure to provide guidance instructing clerks to count ballots with "missing" address components under Section 6.87(6d) violates

Section 10101(a)(2)(B) of the Civil Rights Act of 1964, 52 U.S.C. § 10101(a)(2)(B), App.195–98; App.427–30; and (3) Section 6.87(9) violates the U.S. Constitution's Due Process Clause because it does not require clerks who reject ballots with witness-address omissions or errors under Section 6.87(6d) to notify voters or return the defective ballots, App.198–200; App.430–33.

On October 4, 2022, Plaintiff moved for a temporary injunction on its claims, asking the Circuit Court to recognize its proposed definition of "missing" under Section 6.87(6d), enjoin WEC "from rejecting absentee ballots with certificates that bear partial witness address information," and require WEC to issue new guidance instructing clerks to notify voters of witness-ballot errors or omissions, among other relief. App.206–08. On October 7, 2022, the Legislature intervened, App.308, and filed an opposition to Plaintiff's motion shortly thereafter, App.311–51. The Court denied Plaintiff's temporary injunction, *see* App.352, 387–402, finding that the status quo was the plain text of the statute, which did not define the term "missing," and WEC's 2016 guidance, which "has been instructing clerks all along to inform

voters that their ballots would not be counted with an incomplete witness address," App.398.

Plaintiff petitioned the Court of Appeals for leave to appeal the Circuit Court's denial of emergency injunctive relief, App.353–84, which petition the Court of Appeals denied on the grounds that Plaintiff "fail[ed] to satisfy the criteria for permissive appeal," App.386.

Plaintiff then filed its Second Amended Complaint, adding WEC's Commissioners and Administrator as additional Defendants and asserting the same three claims. App.406–36. On March 14, 2023, the Circuit Court granted the Legislature's Motion To Dismiss Count I, *see* App.407–10, 426–27, reasoning that no justiciable controversy existed, App.446–57, because Plaintiff failed to show that "WEC has taken any action that has caused harm or will cause imminent harm," App.446. The Circuit Court reviewed the "state law cases cited by the League which involved declaratory judgment actions against the state or state actors," and found that "[i]n all of those cases, the plaintiff articulated a specific wrong committed by the agency or state actor." App.451–52. However, due to Plaintiff's failure to allege

such a harm, the Circuit Court concluded the justiciability standard was not met, as required for declaratory and injunctive relief under Wisconsin law. App.453–55. On June 13, 2023, the Court accepted the parties' stipulation to dismiss Count III pursuant to Wis. Stat. § 805.04(1). App.458–60.

On July 31, 2023, WEC moved the Circuit Court to consolidate this case with *Rise*, solely for the purposes of trial under Wis. Stat. § 803.04, *see* App.739–45, 746–66, which Plaintiff opposed, *see* App.777. The Circuit Court granted WEC's motion for consolidation for trial on August 22, 2023, and reassigned the case to Judge Nilsestuen, the same judge handling the *Rise* matter. App.780–81. In that case, the Circuit Court interpreted the meaning of the term "address" for purposes of Wis. Stat. § 6.87's witness-address requirement, holding that an "address" is any "place where the witness may be communicated with." App.136.

On January 2, 2024, the Circuit Court granted Plaintiff's motion for summary judgment and denied WEC and the Legislature's cross motions for summary judgment. App.72–79. The Circuit Court concluded that Wis. Stat. § 6.87(6d) falls within the Materiality Provision's scope and held that the federal statute

preempts Wisconsin's absentee-ballot witness requirement where there are "trivial mistakes" in a witness's address. App.76 ("[A]n absentee ballot cannot be rejected for trivial defects, such as a missing ZIP code for the witness's address."). The Circuit Court first reasoned that Wis. Stat. § 6.87(6d) falls within Section 10101(a)(2)(B)'s scope because it relates to whether a voter is "qualified to vote" under Wisconsin law. App.76. Further, the Court concluded that rejecting a ballot for non-compliance with Section 6.87(6d) effectively "den[ies]" an absentee voter the right to vote, App.75, and that compliance with Section 6.87(6d)'s absentee-ballot witness requirement constitutes an "action necessary" to have an absentee ballot counted and thus constitutes an act "requisite to voting," App.75–76, 78–79. The Circuit Court held that Section 6.87(6d)'s witness-address requirement is not "material to whether a voter is qualified," because it does not bear on the specific constitutional requirements governing voter qualifications. App.76 (citing Wis. Const. art III, § 1). Thus, the Court concluded that "rejecting ballots for trivial mistakes in the Witness Address requirement directly violates the federal Civil Rights Act of 1964." App.76.

The Circuit Court then stated that the Materiality Provision "prohibits rejecting [absentee] ballots in the four limited categories identified by the Plaintiff," given that "this is an as-applied challenge" that focused on these categories only. App.79. Those "four discrete categories of errors or omissions," App.79, are: (1) witness certifications containing the witness's street number, street name, and municipality, but not other address information, (2) witness certifications by a member of the voter's household who lists a street number and street name but omits other information, (3) witness certifications using terms like "same" or "ditto" or other means to convey that the witness's address is the same as the voter's, and (4) witness certifications with a street number, street name, and zip code, but no municipality, App.81.

Although the Circuit Court applied its understanding of the Materiality Provision to these four categories, the Circuit Court never discussed in its orders in this Case whether Section 6.87(6d) would actually require the rejection of any ballot in each of these categories for failure to include a witness's "address." *See generally* App.79. Nor is it self-evident that Section 6.87(6d) would require such a rejection. As to the first category—"witness

certifications containing the witness's street name, street number, and municipality, but not other address information such as state name or zip code" (category 1)—the Legislature, WEC, and Plaintiffs all agreed that Section 6.87(6d) *does not* require the rejection of such a ballot, because all agree that a zip code is not a required element of a witness's "address." *Supra* pp.16–17. As for the other three categories of ballots, these witness addresses would appear not to violate Section 6.87's witness-address requirement as (erroneously) interpreted by the Circuit Courtin *Rise*—namely, that the witness's address need only reveal the "place where the witness can be communicated with." App.130. That standard would appear to be satisfied by a witness certificate submitted by a member of the voter's household listing a street number and name, but no municipality (category 2); those in which a witness uses terms to convey that their address is the same as the voter's (category 3); and those in which a witness provides a street number, name, and zip code but no municipality (category 4).

On January 30, 2024, the Circuit Court issued a declaratory judgment and permanent injunction declaring that the Materiality Provision applies to Section 6.87 and prohibits clerks from

rejecting the four categories of absentee ballots listed above. App.81. The Circuit Court further ordered WEC to both inform election officials statewide that they may not reject these four categories of absentee ballots and issue new "guidance on [the] implementation" of the Circuit Court's order. App.80–81.

The next day, on January 31, 2024, the Legislature moved the Circuit Court for a stay pending appeal, arguing that it satisfied all four elements for a stay, as articulated in *Waity v. LeMahieu*, 2022 WI 6, 400 Wis. 2d 356, 969 N.W.2d 263. App.83–84. First, the Legislature submitted that it has a strong likelihood of success on appeal because Plaintiff's claim raises a novel question of statutory interpretation and reasonable jurists may disagree with the Circuit Court's conclusions. App.89–95. Then, the Legislature argued that the equitable considerations likewise weighed heavily in favor of a stay, asserting that while the State's and the Legislature's interests would be irreparably harmed without a stay, Plaintiff would suffer no harm and the public interest would be served if a stay were issued, as it would simply maintain the status quo during the pendency of the appeals process. App.95–100.

In an oral decision on February 2, 2024, the Circuit Court denied the Legislature's request for a stay pending appeal. *See* February 2, 2024 Oral Decision at 1:02:41–1:02:56 (transcripts forthcoming).[6] As an initial matter, the Circuit Court held that it was applying the federal stay standard, as articulated by the U.S. Supreme Court in *Nken v. Holder*, 556 U.S. 418 (2009). *Id.* at 53:53–55:05. But the Circuit Court noted that the federal factors—that is, (1) the movant's likelihood of success on the merits; (2) whether the movant will suffer irreparable harm absent a stay; (3) whether a stay will substantially harm nonmoving parties; and (4) what outcome best serves the public interest, 556 U.S. at 426—are "very similar" to the Wisconsin Supreme Court's articulation of the stay factors in *Waity*. February 2, 2024 Oral Decision, *supra*, at 43:43–55:05.

On the likelihood-of-success-on-the-merits factor, the Circuit Court concluded that the Legislature had not made a strong showing of success on appeal. *Id.* at 55:05–55:10. The Court noted that it was not considering the standard of review that this Court

[6] Available at https://wiseye.org/2024/02/02/dane-county-circuit-court-rise-inc-et-al-vs-wisconsin-elections-commission-et-al-3/.

would apply, as *Waity* requires, but stated that even if the court did consider this Court's de novo review, this factor would still weigh against the Legislature. *Id.* at 55:10–55:37. The Court then stated that nothing in the Legislature's stay briefing showed the Circuit Court's analysis was "highly flawed." *Id.* at 57:23–57:41.

On the remaining three equitable factors, the Circuit Court held that each factor weighed against granting a stay pending appeal. *Id.* at 57:58–1:04:55. First, the Court determined the Legislature would not suffer harm as a result of the injunction, dismissing the Legislature's argument that the injunction frustrated the operation of a duly enacted state law. *Id.* at 57:58–1:01:06. The Court also pointed out that the "executive branch officials charged with overseeing Wisconsin elections" did not oppose the court's order or express support for the Legislature's requested stay. *Id.* at 1:00:11–1:00:29. Next, the Court held that Plaintiff and other voters would suffer "substantial injury" if a stay is granted, noting that they would be harmed by the "otherwise valid ballots rejected for trivial reasons." *Id.* at 1:01:08–1:01:44. Finally, the Court determined that "there is a strong public interest in ensuring that otherwise eligible absentee ballots are

not rejected for trivial reasons," noting that the court's injunction "will avoid unlawful disenfranchisement of voters whose witnesses make trivial mistakes." *Id.* at 1:01:51–1:02:28. The Court also noted that a stay would frustrate the prompt execution of a judicial order. *Id.* at 1:02:28–1:02:39.

ARGUMENT

I. *Waity* Provides The Standard For A Stay Pending Appeal

A. Wis. Stat. § (Rule) 808.07(2) allows this Court to "[s]uspend . . . an injunction" pending appeal. Wis. Stat. § (Rule) 808.07(2). In deciding whether to stay an injunction pending appeal, a reviewing court must consider whether the movant (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," (3) "shows that no substantial harm will come to other interested parties," and (4) "shows that a stay will do no harm to the public interest." *Waity*, 2022 WI 6, ¶ 49. These factors "are not prerequisites but rather are interrelated considerations that must be balanced together." *Id.* (citation omitted). When a party asks an appellate court for a stay pending appeal after a circuit court has denied the same request,

the appellate court must consider whether the circuit court "examined the relevant facts, applied a proper standard of law, and using a demonstrative rational process, reached a conclusion that a reasonable judge could reach." *Id.* ¶ 50 (citation omitted). When a circuit court has "appl[ied] an incorrect legal standard" to the analysis, it has "erroneously exercised its discretion" as a matter of law. *Id.*

Here, the Circuit Court erroneously exercised its discretion in applying the *Waity* standard to deny the Legislature's stay-pending-appeal request, and therefore erred as a matter of law. *See id.* The Legislature articulates these errors below in relation to each of the four *Waity* factors—while also explaining why the Legislature is entitled to a stay pending appeal—so as not to provide duplicative briefing on closely related arguments.

B. *Waity* applied to a question of state law the *same* four-part test for stays pending appeal that the U.S. Supreme Court announced as a matter of federal law in *Nken*. *Compare Waity*, 2022 WI 6, ¶ 49, *with Nken*, 556 U.S. at 425–26. While *Waity* emphasizes certain considerations in the stay-pending-appeal analysis, none of those emphases are contrary to what the U.S.

Supreme Court has said about the *Nken* stay-pending-appeal test. Indeed, federal Courts of Appeals have applied their own glosses on *Nken* as well, and the federal district courts within those circuits are bound to follow those glossed *Nken* standards—just as lower courts in Wisconsin are bound to follow *Waity*. *See, e.g.*, *Citigroup Glob. Markets, Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 37 & n.7 (2d Cir. 2010) (applying a "serious questions" standard for the likelihood-of-success-on-the-merits factor in context of a preliminary-injunction motion and holding that "this circuit's 'serious questions' standard does not conflict with . . . *Nken*"); *Leiva-Perez v. Holder*, 640 F.3d 962, 967 (9th Cir. 2011) (requiring a stay petitioner to show either "a probability of success on the merits" or that "serious legal questions are raised" and concluding that this is consistent with *Nken*). Further, Plaintiff itself applied Wisconsin's injunction-pending-appeal standard as to its federal law claim in its prior interlocutory appeal in this case. App.379. Accordingly, it does not "defeat" any "federal right" for a Wisconsin state court to apply *Waity*'s four-part test when determining whether to stay an injunction based on a federal claim pending appeal, which is the

legal standard for determining whether a state court must displace a state rule in the adjudication of a federal claim. *See Brown v. W. Ry. Co. of Ala.,* 338 U.S. 294, 296 (1949); *Davis v. Wechsler*, 263 U.S. 22, 24 (1923).

The cases that Plaintiff relied upon below to claim that *Waity* did not conform with the federal stay-pending-appeal standard are inapposite. App.1–7. *Shaw v. Leatherberry*, 2005 WI 163, 286 Wis. 2d 380, 706 N.W.2d 299, concerned a dispute about which standard of proof is required for a plaintiff's excessive-force claim asserted in state court under 42 U.S.C. § 1983—the lower preponderance-of-the-evidence standard, as used in federal court, or the higher clear-and-convincing-evidence standard, which had been used in Wisconsin state courts. *Id.* ¶ 18. Applying the higher standard, the state law burden of proof would frustrate the federal right at issue there, as it would require the plaintiff to make a higher showing to vindicate his federal right in state court than he would in federal court. *Id.*; *Brown,* 338 U.S. at 296; *Davis*, 263 U.S. at 24. Here, in contrast, *Waity* does not ratchet up the standard announced in *Nken*, even as it emphasizes certain considerations in the analysis. *Felder v. Casey*, 487 U.S. 131

(1988), in turn, considered whether a state law notice-of-claim requirement could apply to a plaintiff before filing a 42 U.S.C. § 1983 suit in state court. *Id.* at 134. This too clearly frustrates the vindication of federal rights in state court, as it requires an additional showing for plaintiffs asserting federal rights in state court than in federal court, *id.* at 138—again, unlike the situation here.

C. Here, the Circuit Court refused to apply the *Waity* standard, which alone constitutes an erroneous exercise of discretion. So, because the Circuit Court did not apply the correct standard for assessing the Legislature's stay request—that is, the standard set forth by the Wisconsin Supreme Court in *Waity*—its decision is not entitled to any deference in this Court. *See Waity*, 2022 WI 6, ¶ 50. And under *Waity*, the Legislature is entitled to a stay pending appeal, as explained below. *See infra* Part.II. In any event, and for the same reasons as explained below, the Legislature is entitled to a stay pending appeal under the U.S. Supreme Court's *Nken* decision too without considering *Waity*'s gloss, regardless of whether *Waity* applies.

II. The Legislature Is Entitled To A Stay Pending Appeal

A. The Legislature Has A High Likelihood Of Success On Appeal

1. In analyzing the likelihood of success factor, a reviewing court may not "simply input its own judgment on the merits of the case and conclude that a stay is not warranted." *Waity*, 2022 WI 6, ¶¶ 52–53. Rather, the court "must consider the standard of review, along with the possibility that appellate courts may reasonably disagree with its legal analysis." *Id.* By default, when an issue on appeal requires de novo review—for example, cases involving novel legal questions of statutory interpretation—the reviewing court must consider that "reasonable jurists on appeal may [ ] interpret[ ] the relevant law" and "come to a different conclusion." *Id.* This consideration alone supports a movant's strong likelihood of success on appeal. *See id.* ¶¶ 51–53. Even if this Court concludes that *Waity* does not apply, *but see supra* Part.I, the federal stay standard likewise requires the Court to consider "whether the stay applicant has made a strong showing that he is likely to succeed on the merits." *Nken*, 556 U.S. at 426.

2. The Legislature is likely to succeed on the merits of its appeal. Whether Section 6.87(6d) violates the Materiality

Provision is a novel issue of statutory interpretation that this Court will review de novo. *Waity*, 2022 WI 6, ¶ 53. As discussed below, the Legislature is correct on its multiple arguments that Section 6.87(6d) does not violate the Materiality Provision, so it has a likelihood of success even if this Court agrees with the Circuit Court that *Waity* does not apply. As explained, *supra* pp.37–45, the Materiality Provision applies to laws that (1) "deny the right of any individual to vote in any election" (2) "because of an error or omission" (3) "on any record or paper relating to" (4) an "act requisite to voting," (5) "if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election." 52 U.S.C. § 10101(a)(2)(B). Section 6.87(6d) falls outside the Materiality Provision's scope because the absentee-ballot witness requirement does not affect any voter-qualification determinations, *infra* pp.37–44, and because it does not operate to "deny" anyone the right to vote, which are independently fatal to Plaintiff's claim, *infra* pp.44–45. And even if it *did* apply outside of the voter-registration context, Section 6.87(6d) would not violate the Materiality Provision because its requirement is "material" under

any interpretation of the term that could withstand constitutional scrutiny. *Infra* pp.46–48. Notably, the Legislature need only show a likelihood of success on *one* of these merits arguments in order to satisfy the likelihood-of-success-on-appeal factor here.

a. As an initial matter, Section 6.87 falls outside the scope of the Materiality Provision because it does not relate to whether a person is "qualified . . . to vote"—an essential element of a Materiality Provision claim. 52 U.S.C. § 10101(a)(2)(B); App.799–807. The Materiality Provision applies only where an error or omission is "material in determining whether such individual is *qualified under State law to vote in such election*." 52 U.S.C. § 10101(a)(2)(B) (emphasis added). "[Q]ualified under State law" is defined by statute as "qualified according to the laws, customs, or usages of the State." *Id.* § 10101(e). A voter's "qualif[ications]," as the term is used in the statute, relate to those state laws that determine eligibility criteria and voter registration requirements. The text compels the conclusion that once a voter satisfies those state law qualification requirements, that voter is "qualified under State law" to vote in that State. *Id.*; *see id.* § 10101(a)(2)(B). The

Materiality Provision thus only applies to laws or conduct that relate to a voter's ability to qualify and register to vote.

Interpreting the Materiality Provision in this way is necessary to respect the States' broad constitutional authority over election administration, which involves the "reasonable regulation[ ] of parties, elections, and ballots to reduce election- and campaign-related disorder." *Timmons,* 520 U.S. at 358 (citations omitted); *see Moore v. Harper*, 143 S. Ct. 2065, 2085 (2023) ("Elections are complex affairs, demanding rules that dictate everything from the date on which voters will go to the polls to the dimensions and font of individual ballots"). Because this broad constitutional authority means that federal law should not be interpreted to displace state election laws—including absentee ballot rules like Section 6.87(6d)—lightly, *Timmons*, 520 U.S. at 358; *Smiley*, 285 U.S. at 369; *Hildebrant*, 241 U.S. at 567; *McDonald*, 394 U.S. at 810–11, courts have taken a measured approach when interpreting the Materiality Provision. *See, e.g.*, *Thrasher v. Ill. Republican Party*, No.4:12-cv-4071-SLD-JAG, 2013 WL 442832, at *3 (C.D. Ill. Feb. 5, 2013); *Friedman v. Snipes*, 345 F. Supp. 2d 1356, 1370–71 (S.D. Fla. 2004); *McKay v. Altobello*,

No.CIV.A. 96-3458, 1996 WL 635987, at *1 (E.D. La. Oct. 31, 1996).

For example, in *Schwier v. Cox*, 340 F.3d 1284, the Eleventh Circuit considered whether a state procedure requiring voters to disclose their social security numbers violated the Materiality Provision. Analyzing the purpose and scope of the Materiality Provision, the court concluded that it "was intended to address the practice of requiring unnecessary information *for voter registration* with the intent that such requirements would increase the number of errors or omissions on the application forms, thus providing an excuse to disqualify potential voters," such as prior tactics that required applicants to "list the exact number of months and days in his age" in order to register to vote. *Id.* at 1294, 1297 (emphasis added and citation omitted). The court then remanded the matter for consideration of whether the Georgia requirement was "*material*" to determining whether a person is *qualified* to vote under Georgia law. *Id.* at 1297 (emphasis in original).

Similarly, in *Ritter v. Migliori*, 142 S. Ct. 1824 (2022), Justice Alito, joined by Justices Thomas and Gorsuch, explained why the Materiality Provision does not extend outside the voter-

qualification context. *Id.* at 1825–26 (Alito, J., dissenting from denial of stay). In that case, the Third Circuit had held that a Pennsylvania rule requiring mail-in ballots to include a handwritten date with the voter declaration signature violated the Materiality Provision—a decision that the U.S. Supreme Court later vacated as moot. *Migliori v. Cohen*, 36 F.4th 153, 164 (3d Cir. 2022), *cert. granted, judgment vacated sub nom. Ritter v. Migliori*, 143 S. Ct. 297 (2022). In dissenting from a denial of a stay in that case, the dissenting Justices explained that the Materiality Provision "appl[ies] only to errors or omissions that are not material to the question whether a person is qualified to vote." *Ritter*, 142 S. Ct. at 1826 (Alito, J., dissenting from denial of stay). Technical ballot requirements such as that at issue in *Migliori* have nothing to do with the "requirements that must be met in order to establish eligibility to vote," and thus are not within the Materiality Provision's scope. *Id.* at 1825.

A contrary conclusion that permits the Materiality Provision to apply outside of the voter registration context risks invalidating a wide range of state laws enacted pursuant to States' constitutional authority over election administration. *See supra*

pp.41–43; *Timmons,* 520 U.S. at 358. But courts must avoid interpretating federal statutes in a manner that "engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question." *Gomez v. United States*, 490 U.S. 858, 864 (1989). Indeed, "Congress exercises its conferred powers subject to the limitations contained in the Constitution," *New York v. United States*, 505 U.S. 144, 156 (1992), which grants to "the States a broad power to . . . control . . . the election process for state offices," *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986) (quoting U.S. Const. art. I, § 4, cl. 1). Applying the Materiality Provision to all state election-administration rules would accordingly "upset the usual constitutional balance of federal and state powers," *Gregory v. Ashcroft*, 501 U.S. 452, 460–61 (1991), and render the Materiality Provision unconstitutional to the extent it would subject most of the States' election-administration laws to a federal court's scrutiny on the basis of "materiality" alone. *See infra* pp.42–44.

Applying the Materiality Provision to state laws unrelated to voter qualification, such as Section 6.87(6d), would allow voters to bring a Materiality Provision challenge anytime a ballot is

rejected for noncompliance with reasonable ballot requirements that have any connection to a voting "record or paper." *See* 52 U.S.C. § 10101(a)(2)(A). For example, a voter who "refuses to give his or her name and address" to poll workers on Election Day, as required by Wisconsin law, could sue the State when he is "not [ ] permitted to vote." *See* Wis. Stat. §§ 6.79(2), (3). The same would be true for an absentee voter who refuses to sign for himself the absentee-ballot envelope (a "paper"), despite the capability to do so, once his ballot is rejected for this reason. *Id.* § 6.87(2); *see* Wis. Stat. § 6.87(5); *Ritter*, 142 S. Ct. at 1826 (Alito, J., dissenting from the denial of the application for stay) (addressing hypothetical of "a voter [who] did not personally sign his or her ballot but instead instructed another person to complete the ballot and sign it [for him or her]"). And the same holds for an absentee voter who delivers her ballot (a "paper") late to the polling place for same-day-absentee voting. Wis. Stat. §§ 6.87(4), (6); *Ritter*, 142 S. Ct. at 1825 (Alito, J., dissenting from the denial of the application for stay) ("A voter may go to the polling place on the wrong day or after the polls have closed[.]").

Here, the Materiality Provision does not apply to Section 6.87 because Section 6.87(6d) does not relate to whether an absentee voter may "*register* to vote." *See Snipes*, 345 F. Supp. 2d at 1371. Wisconsin law provides that a voter—whether absentee or otherwise—is qualified if the voter is a U.S. citizen; is at least 18 years old; and satisfies certain residency, lack-of-felony-conviction, and competency requirements. Wis. Stat. §§ 6.02(1), 6.03(1); Wis. Const. art. III, § 1. But Section 6.87(6d) relates "to the counting of ballots by individuals *already deemed qualified to vote*," *Snipes*, 345 F. Supp. 2d at 1371, and therefore applies *only* when a voter has *already successfully obtained* permission to vote by absentee ballot, *see* Wis. Stat. § 6.87(6d) ("If a certificate is missing the address of a witness, *the ballot may not be counted*." (emphasis added)). Because a voter wishing to vote by absentee ballot must satisfy the same eligibility and registration requirements as all other Wisconsin voters before receiving an absentee ballot, *supra* p.37–38, Section 6.87(6d) does not impose any requirements—at all—on the prior voter-qualification determinations. Therefore, this requirement does not fall within the Materiality Provision's scope.

b. Section 6.87's limitation on absentee voting also falls outside the scope of the Materiality Provision because it does not "deny" any voter the right to vote—another essential element of the claim. 52 U.S.C. § 10101(a)(2)(B); App.75–76.

The Materiality Provision only applies the state laws or action that "deprive" the voter "of the right to vote." *Vote.Org v. Callanen,* 39 F.4th 297, 305–06 (5th Cir. 2022). While the right to vote is a constitutional guarantee, Wisconsin law regards the right to vote *absentee* as a privilege that must be "carefully regulated to prevent the potential for fraud and abuse." Wis. Stat. § 6.84(1); *see Tully v. Okeson*, 977 F.3d 608, 611 (7th Cir. 2020); *Lee v. Paulson*, 2001 WI App 19, ¶ 7, 241 Wis. 2d 38, 623 N.W.2d 577; *see also McDonald*, 394 U.S. at 807, 810–11; *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 n.6 (1969); *see also Hill v. Stone*, 421 U.S. 289, 300 n.9 (1975); *Goosby v. Osser*, 409 U.S. 512, 520–21 (1973); *Bullock v. Carter*, 405 U.S. 134, 143 (1972); *Common Cause Ind. v. Lawson*, 977 F.3d 663, 664 (7th Cir. 2020); *Tex. Dem. Party v. Abbott*, 978 F.3d 168, 185 (5th Cir. 2020); *Mays v. LaRose*, 951 F.3d 775, 792 (6th Cir. 2020); *see also Org. for Black Struggle v. Ashcroft*, 978 F.3d 603, 607 (8th Cir. 2020). Accordingly,

limitations on the privilege of absentee voting cannot "deny" any voter their right to vote, as that term is used in the Materiality Provision.

Here, Section 6.87(6d) does not deny anyone their constitutional "right . . . to vote," 52 U.S.C. § 10101(a)(2)(B), because it is a narrow limitation that applies *only* to the privilege of absentee voting. A voter can avoid complying with the absentee-ballot witness requirement by exercising the constitutionally guaranteed right to vote in person on Election Day.[7]

c. Even if the Materiality Provision did apply outside the context of voter-qualification determinations, *contra* pp.37–44, and did deny some absentee voters the right to vote, *contra* pp.45–45, Section 6.87(6d) would not violate that provision because the absentee-ballot witness requirement is "material" under any

[7] Further, a voter who wishes to vote by absentee ballot can make sure that the voter's ballot is counted by complying with the simple absentee voting rules, including the witness-signature requirement, Wis. Stat. § 6.87(6d), and can "cure" any errors in his ballot where "time permits" cure before the ballot deadline, Wis. Stat. 6.87(9). The State has endeavored to ensure that absentee voters are aware of these obligations, by, for example, requiring clerks to send absentee ballots "no later than the 47th day before" a general election, Wis. Stat § 7.15(1)(cm); *see, e.g.,* App.840–41, and allowing absentee voters to track their ballot status online via WEC's "Track My Ballot" tool, *see supra* p.15; *see* App.830.

understanding of that term that can survive constitutional scrutiny. *See* App.812–17.

The term "material"—which is not defined in the statute itself—is commonly understood to mean "[o]f such a nature that knowledge of the item would affect a person's decision-making," "significant," or "essential." *Material*, Black's Law Dictionary (11th ed. 2019); *see also Material*, Oxford English Dictionary Online (2023) ("Of serious or substantial import; significant, important, of consequence[;] [p]ertinent, relevant; essential.").[8] Materiality does not exist in a vacuum—rather, the Materiality Provision applies only to voting requirements that are not "material in determining whether such individual is qualified under State law to vote in such election." 52 U.S.C. § 10101(a)(2)(B). In other words, the Materiality Provision only prohibits the use of voting requirements that are "material to deciding "whether an individual may vote *under Wisconsin law*." *Common Cause v. Thomsen*, 574 F. Supp. 3d 634, 636 (W.D. Wis. 2021) (emphasis added).

[8] Available at https://www.oed.com/dictionary/material_adj?tab=meaning_and_use#37801431 (subscription required).

The absentee-ballot witness requirement does not run afoul of the Materiality Provision because that requirement is "material" to "whether an individual may vote" by absentee ballot "under Wisconsin law." *Id.* Wisconsin law is clear: "The statutory requirements governing absentee voting must be completely satisfied or ballots may not be counted." *Teigen*, 2022 WI 64, ¶ 53 (citing Wis. Stat. § 6.84(2)). As one of those statutory requirements, the absentee-ballot witness requirement reflects the Legislature's policy goal of "prevent[ing] the potential for fraud or abuse," while affording voters the "privilege of voting by absentee ballot." Wis. Stat. § 6.84(1); *accord Lee,* 2001 WI App 19, ¶ 7; *Brnovich v. Dem. Nat'l Comm.*, 141 S. Ct. 2321, 2347–48 (2021). Indeed, the State has an obvious interest in "deterring and detecting voter fraud," *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191 (2008), including the risk of fraud threatened by absentee voting, including the "overzealous solicitation of absent electors" and the "undue influence on an absent elector to vote for or against a candidate or to cast a particular vote." Wis. Stat. § 6.84(1). Against this backdrop, the absentee-ballot witness requirement makes sense because it ensures that election officials

are able to confirm, by contacting the witness, that the absentee voter is who he claims to be, in the event any issues with his identity or ballot arise. In other words, the requirement functions as a method of ensuring that the absentee voter is actually the individual who completed the ballot, making the witness certification, including the address component, obviously "material" to a voter's qualifications *to vote absentee*. 52 U.S.C. § 10101(a)(2)(B); *Material*, Black's Law Dictionary; *Material*, Oxford English Dictionary Online. Thus, even if the Materiality Provision applied to qualifications for *absentee* voting, the witness-address requirement survives judicial scrutiny here.

3. The Circuit Court's conclusion that the "reasonable judges" of this Court could not "easily . . . disagree" with the Circuit Court on the merits of whether Section 6.87(6d) violates the Materiality Provision is wrong. *Waity*, 2022 WI 6, ¶ 53.

First, the Circuit Court erred as a matter of law in failing to apply the Supreme Court's *Waity* decision when analyzing the Legislature's likelihood of success on appeal. As explained above, *Waity* governs the stay analysis here. *Supra* Part.I. *Waity*, in turn, requires that a court consider "the standard of review, along

with the possibility that appellate courts may reasonably disagree with its legal analysis." 2022 WI 6, ¶ 53.[9] When properly applied, that standard supports granting a stay here, where the question of whether Section 6.87(6d) violates the Materiality Provision has yet to be addressed by the Wisconsin Supreme Court or this Court and will be reviewed de novo.

Second, the Circuit Court held that the Materiality Provision applies to Section 6.87(6d) because the absentee-ballot witness

[9] Although the Circuit Court suggested that the standard of review would not matter in any event given the "multitude of rulings by other courts" that have supposedly reached a similar conclusion, February 2, 2024 Oral Decision, *supra*, at 55:38–55:48, the Circuit Court ignored that three Justices of the U.S. Supreme Court have reached the opposite conclusion, determining that the Materiality Provision does not extend outside the voter-qualification context. *Ritter*, 142 S. Ct. at 1825–26 (Alito, J., dissenting from denial of stay). Similarly, the Circuit Court also failed to acknowledge contrary precedent in the Eleventh Circuit, which court concluded that the Materiality Provision "was intended to address the practice of requiring unnecessary information *for voter registration* with the intent that such requirements would increase the number of errors or omissions on the application forms, thus providing an excuse to disqualify potential voters," such as prior tactics that required applicants to "list the exact number of months and days in his age" in order to register to vote. *Schwier*, 340 F.3d at 1294, 1297 (emphasis added and citation omitted). And the Circuit Court's reliance on various federal district court decisions as support for applying the Materiality Provision outside of the voter-registration context is likewise in error, App.78, as these decisions did not analyze the text of the statute to determine whether it was permissible for courts to extend Section 10101(a)(2)(B) that far, *see La Unión del Pueblo Entero v. Abbott*, 604 F. Supp. 3d 512, 540–543 (W.D. Tex. 2022); *Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1308–09 (N.D. Ga. 2018); *League of Women Voters of Ark. v. Thurston*, No.5:20-cv-05174, 2021 WL 5312640, at *4 (W.D. Ark. Nov. 15, 2021). Again, this reasoned disagreement supports awarding a stay here, including because the Legislature only needs to demonstrate a likelihood of success on *one* of its merits arguments in order to satisfy this factor.

requirement relates to whether a voter is "qualified to vote" under Wisconsin law. App.76. As an initial matter, that conclusion rests on a novel question of statutory interpretation that this Court must review de novo, which alone establishes the Legislature's likelihood of success on appeal under *Waity*. 2022 WI 6, ¶¶ 51–53. And even beyond the standard of review, the Circuit Court's conclusion was erroneous and failed to address some of the Legislature's key arguments. For example, the Circuit Court did not address that—as the Legislature explained—the Materiality Provision requires the challenged law to be material to the voter's qualification *under state law*. App.799–803, 813 (citing *Ritter*, 142 S. Ct. at 1825–26 (Alito, J., dissenting from denial of stay); *Common Cause*, 574 F. Supp. 3d at 636)).

Third, the Circuit Court found that Section 6.87(6d) falls within the Materiality Provision's scope because the rejection of an absentee ballot for non-compliance operates to "deny" an absentee voter the right to vote. App.73. The Circuit Court further concluded that compliance with the absentee-ballot witness requirement is an "act requisite to voting" because it is an "action necessary" to have an absentee ballot counted. App.75–76, 78–79.

Again, that these are novel questions of statutory interpretation subject to de novo review independently counsels in favor of a stay here. *Waity*, 2022 WI 6, ¶¶ 51–53; App.73.

The Circuit Court also incorrectly analyzed these issues. App.75–76, 78–79. The Circuit Court hypothesized that the Legislature's interpretation would permit a law that required voters to guess "the name and favorite color of the poll worker who handed them their ballot," App.78, but that hypothetical is absurd and irrelevant, including because such an arbitrary law would obviously violate the Fourteenth Amendment's Due Process Clause as well as other state and federal constitutional provisions. *See* U.S. Const. amend. XIV, § 1. That hypothetical also distorts the Legislature's argument because it involves a limitation on the *right* to vote in-person on Election Day, rather than on the *privilege* of voting by absentee ballot. Wis. Stat. § 6.84(1).

Fourth, the Circuit Court concluded that the absentee-ballot witness requirement is "not material to whether a voter is qualified" because it "says nothing about the voter's citizenship, age or residency," nor "about whether the voter has been disenfranchised." App.76. Like the other pertinent issues in this

appeal, this conclusion rests on novel questions of statutory interpretation, reviewable de novo by this Court, which counsels in favor of a stay here. *Waity*, 2022 WI 6, ¶ 53. And in any event, the Circuit Court's analysis was incorrect, and it did not address some of the Legislature's key points. For example, the Circuit Court did not consider that the Materiality Provision, by its own terms, requires the challenged law to be material to the voter's "qualification under *State law*," 52 U.S.C. 10101(a)(2)(B) (emphasis added), or that, under Wisconsin law, the witness requirement is "material" to an absentee voter's qualification *to vote by absentee ballot*, specifically, because the requirement effectively provides election clerks with a method of confirming that the a voter is who she says she is—an essential component of a voter's qualifications to vote by absentee ballot, App.813–14. Therefore, even if this Court were to disagree with the Legislature's likelihood of success on appeal as to the scope of the Materiality Provision, *see supra* pp.36–48, the Legislature is nevertheless likely to prevail on this independent basis because Section 6.87(6d) is "material" to the state law qualifications for absentee voters.

Finally, the Circuit Court rejected the Legislature's concern that an expansive interpretation of the Materiality Provision would undermine the State's constitutional election-administration authority. App.79. Again, this raises a de novo question of statutory interpretation that compels the conclusion that a stay is warranted here. *Waity*, 2022 WI 6, ¶ 53. And contrary to this conclusion, the Circuit Court's interpretation of the Materiality Provision would significantly frustrate the State's obligation, as set forth in Article I, section 4, of the U.S. Constitution, to regulate the conduct and administration of elections within state borders. U.S. Const. art I, § 4. Specifically, applying the Materiality Provision in this broad manner would permit voters to ignore any and all reasonable ballot requirements related to a "record or paper" and force the State to litigate whether the particular requirement is "material" under federal law. App.851–52. And while the Circuit Court explained that this case is merely an "as-applied challenge" to "four discrete categories" of ballot errors, that fails to consider that the decision announces a broad, generally applicable rule that squarely

conflicts with the State's constitutional authority over elections. App.79; App.802–03.

B. The Legislature And The State Will Suffer Irreparable Harm Absent A Stay

1. A court reviewing a stay pending appeal motion must also consider the risk of irreparable harm to the movant, the potential harm to the nonmovant, and the balance of the equities that could result from either granting or denying the stay pending appeal. *See Waity*, 2022 WI 6, ¶¶ 57–60. When addressing the risk of irreparable harm to the movant, the court must examine whether denying the stay will cause the movant to "suffer irreparable injury" that "can[not] be undone" if the moving party prevails on appeal and "the circuit court's decision is reversed." *Id.* ¶¶ 49, 57. Harm that cannot be "mitigated or remedied upon conclusion of the appeal . . . must weigh in favor of the movant." *Id.* ¶ 57 (citation omitted). Even without applying *Waity*, the federal stay standard requires this approach on this factor, directing courts to consider "whether the applicant will be irreparably injured absent a stay." *Nken*, 556 U.S. at 426; *see also Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Common Cause Ind. v. Lawson*, 978 F.3d 1036, 1039 (7th Cir. 2020).

2. Here, the Legislature and the State—whose interests the Legislature represents in this case, *Dem. Nat'l Comm. v. Bostelmann*, 2020 WI 80, ¶ 8, 394 Wis. 2d 33, 949 N.W.2d 423—will suffer irreparable harm in the event this Court denies a stay pending appeal, *Waity*, 2022 WI 6, ¶¶ 49, 57. The Legislature has a sovereign interest in the validity and continued enforcement of its duly enacted statutes, which interest is direct harmed by an injunction of such laws. *See Bostelmann*, 2020 WI 80, ¶ 8. Therefore, as the Wisconsin Supreme Court recognized, the State and the Legislature necessarily "suffer a substantial and irreparable harm of the first magnitude when a statute . . . is declared unenforceable and enjoined before any appellate review can occur." App.298; *see also Abbott v. Perez*, 138 S. Ct. 2305, 2324 & n.17 (2018). That harm is magnified when an injunction halts the enforcement of an election law because the State has an undeniably important interest in the integrity and "orderly administration" of elections in Wisconsin. *Crawford*, 553 U.S. at 196; *see also Abbott*, 138 S. Ct. at 2324 & n.17.

Enforcement of the Circuit Court's injunction of Section 6.87(6d)'s witness-address requirement as to certain

categories of witness certifications, App.75, 79, constitutes irreparable harm to the Legislature's and the State's general interest in enforcing duly enacted state laws. *Bostelmann*, 2020 WI 80, ¶ 8; App.298. Further, the Circuit Court's injunction here involves an election-related law enacted in the course of the Legislature's constitutional responsibility to regulate election administration in Wisconsin and in a specific effort to protect the integrity and "orderly administration" of state elections. *Crawford*, 553 U.S. at 196.

3. The Circuit Court erred in analyzing the harms that the Legislature and the State will suffer absent a stay.

The Circuit Court was wrong to conclude that the Legislature cannot assert harms on behalf of the State. The Wisconsin Supreme Court rejected this precise contention in *Bostelmann*. *See generally* 2020 WI 80. In considering the Legislature's intervention authority, the *Bostelmann* Court held that "the Legislature has the authority to represent the State of Wisconsin's interests in the validity of state laws under § 803.09(2m)." *Id.* ¶ 1; *see also id.* ¶ 10. State law authorizes the Legislature to represent the State's interests in the validity of

state laws, so the Legislature is plainly entitled to rely upon the State's interests in seeking a stay of a judicial order enjoining state law.

The Circuit Court was also wrong to suggest that the supposedly limited nature of its injunction order eliminates any harm to the State and the Legislature. Enjoining state law prior to appellate review always results in "substantial and irreparable harm of the first magnitude" to the State, no matter how narrow the injunction. App.298; *accord Abbott*, 138 S. Ct. at 2324 n.17 (2018) ("[T]he inability to enforce its duly enacted plans clearly inflicts irreparable harm on the State[.]"); *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers); *Veasey v. Abbott*, 870 F.3d 387, 391 (5th Cir. 2017) ("When a statute is enjoined, the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws.").

The Circuit Court's heavy reliance on the fact that WEC itself did not move for a stay was legal error. The Circuit Court did not cite any authority recognizing this as a factor in the irreparable harm analysis, and the *Bostelmann* proceedings refute the relevance of this consideration. In *Bostelmann*, WEC's

leadership, in their official capacities, was also named defendants in a suit challenging certain of the State's election laws, and the Legislature was an intervenor. *See Dem. Nat'l Comm. v. Bostelmann*, 977 F.3d 639, 641–42 (7th Cir. 2020) (per curiam). When the U.S. District Court for the Western District of Wisconsin issued an order granting partial relief to the plaintiff, the Legislature—but not WEC, through its leadership—appealed and was the only party speaking on behalf of the State that sought a stay from the Seventh Circuit pending appeal, citing the irreparable harms associated with changing election rules so close to an election. *See id.* After initially denying the Legislature's motion, the Seventh Circuit subsequently certified to the Wisconsin Supreme Court the question of whether the Legislature had the statutory authority to represent the State's interests in litigation challenging the validity of state law. *Id.* at 641. The Wisconsin Supreme Court answered that question affirmatively, so the Seventh Circuit considered the Legislature's merits arguments, reversed its prior position, and granted the stay, *id.* at 641, with the U.S. Supreme Court later declining to overturn that decision, *Dem. Nat'l Comm. v. Wis. State Legislature*, 141 S.

Ct. 28 (2020) (mem.). And notably, neither the U.S. Court of Appeals for the Seventh Circuit in granting the stay nor the U.S. Supreme Court in denying the motion to vacate that stay discounted the Legislature's harm showing merely because WEC (through its leadership) chose not to file its own stay motion. *See Dem. Nat'l Comm.*, 977 F.3d at 641–43; *see generally Dem. Nat'l Comm.*, 141 S. Ct. 28.

Finally, while the Circuit Court assumes away the harms that the State and the Legislature will suffer absent a stay by stating that the State does not have an interest in the enforcement of a state statute preempted by federal law, this issue goes to the merits of this case and not to the harm the State will sustain without a stay. For purposes of conducting the harm analysis, the Circuit Court had to assume that that the Legislature would prevail on appeal, and address its asserted harms from that perspective. *See Waity*, 2022 WI 6, ¶ 57. The harms that the State and the Legislature will suffer while the Legislature's appeal is pending before this Court are substantial, *see supra* pp.55–56, and the Circuit Court erred in declining to consider them.

C. Plaintiff Will Not Be Harmed By A Stay

1. In balancing the equities, the Court must also assess whether "the non-movant will experience" "substantial harm" if a stay is granted "but the non-movant is ultimately successful" on appeal. *Waity*, 2022 WI 6, ¶¶ 49, 58 (citation omitted). Only the harm the non-movant might experience during "the period of time that the case is on appeal" is relevant, and not "any harm that could occur in the future." *Id.* ¶ 58; *compare Nken*, 556 U.S. at 426.

2. A stay pending appeal will not harm Plaintiff. *Waity*, 2022 WI 6, ¶¶ 49, 58. For one thing, Plaintiff's members can easily comply with Wisconsin's absentee voting laws, including Section 6.87's witness-address requirement, with little effort. App.339. Properly completing the witness certification is especially straightforward now that WEC has updated the Standard Absentee Ballot Certificate to clarify, with specificity, what information is required. App.106. And should a voter wish to avoid the witness requirement all together, he or she can simply vote in person on Election Day. In other words, a stay pending appeal will simply maintain the status quo, such that Plaintiff will not suffer any harm if the injunction is stayed during this appeal. *Waity*, 2022 WI 6, ¶¶ 49, 58.

The evidence that Plaintiff submitted in this case of absentee ballots being rejected for witness-address errors was extremely limited, and does not show that Plaintiff or the State's electors will suffer any substantial harm if a stay is granted. Plaintiff only identified sixty-seven instances during the November 2022 general election in which absentee ballots were rejected for witness-address errors. App.477–80. And some of those errors, as Plaintiff itself admits, resulted from municipal clerks demanding *more* information than WEC's current guidance (which, as the Legislature has explained in the *Rise* matter, embodies the correct interpretation of Section 6.87's witness-address requirement) expressly requires—such as a zip code or state name, in addition to a street number, name, and city. App.494–95. It is also unclear how the Circuit Court could even enjoin the enforcement of Section 6.87's witness-address provision as preempted by federal law to instances where that same Court concluded that the provision does not even apply under the Circuit Court's reading of that provision in *Rise*. In any event, the Circuit Court failed to make any findings at all as to whether this small number of voters would be able to cure any witness-address error in sufficient time

for their ballots to be counted. This limited evidence of rejected absentee ballots cannot outweigh the substantial harm that the Legislature and the State will suffer if this Court does not stay the Circuit Court's orders.

3. The Circuit Court's conclusion that Plaintiff's members and other voters risk disenfranchisement if a stay is entered does not affect the analysis, where the Circuit Court itself recognized that the number of voters that might have their ballots rejected for a witness-address deficiency would be minimal. February 2, 2024 Oral Decision, *supra*, at 56:56–57:03, 57:42–57:50, 58:30–58:41, 58:49–58:55. The Circuit Court did not, moreover, make any findings at all as to whether this small number of voters would be able to cure any witness-address deficiency in sufficient time for their ballots to be counted. Accordingly, Plaintiff's assertion of absentee-voter disenfranchisement cannot outweigh the substantial harm that the Legislature and the State will suffer absent a stay of the Circuit Court's orders pending appeal.

Second, the Circuit Court relied upon Plaintiff's assertion that it would be harmed by having to expend resources educating voters as to the three-component definition of a witness's

"address," but such harm is decidedly minimal, especially when considered against the substantial harm that the State will suffer absent a stay. *See supra* pp.55–56. If Plaintiff chooses to undertake educational initiatives on this subject, all it need do is inform absentee voters and absentee witnesses to conform with the status quo and follow the three-component definition of a witness "address" set forth in WEC's current guidance on this subject, pending the outcome of the Legislature's appeal. The Circuit Court erred in concluding that this harm—which is at most minimal—outweighs the several harms that the State and the Legislature will sustain if the Circuit Court's orders are not stayed pending this Court's review.

D. A Stay Pending Appeal Will Not Harm, But Rather Will Benefit, The Public Interest

1. The public interest lies in favor of a stay. The Wisconsin Supreme Court has made it clear that "[t]he public as a whole suffers irreparable injury of the first magnitude where a statute enacted by its elected representatives is declared unenforceable and enjoined before any appellate review can occur." App.299. The U.S. Supreme Court has reached the same conclusion. *Abbott*, 138 S. Ct. at 2324 & n.17. Here, the public's interest in the continued

enforcement of Section 6.87(6d)—which represents a legislative policy decision about the need to deter the potential for voter fraud, *see Koschkee v. Taylor*, 2019 WI 76, ¶ 11, 387 Wis. 2d 552, 929 N.W.2d 600; Wis. Stat. § 6.84(1)—weighs in favor of a stay pending this Court's review. *Waity*, 2022 WI 6, ¶ 60. Additionally, the public would benefit from a stay because a stay will prevent the confusion among voters and clerks that will likely result if WEC is forced to issue new guidance in less than one week, only to have to rescind that new guidance and reinstate old guidance in the event the Legislature is successful on appeal—all before the February 20, 2024 primary election, which is less than three weeks away. *See, e.g.*, *Republican Nat'l Comm. v. Dem. Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam) (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam)).

2. The Circuit Court commits the same errors in concluding that a stay pending appeal is contrary to the public interest as it does in assessing the harms to the Legislature and the State, *see supra* pp.55–56, and so its analysis on this prong should be rejected for the same reasons. And to the extent the Circuit Court suggests that its order advances the public interest by preserving

constitutional rights, that is incorrect, as there is no right to vote absentee in Wisconsin. Wis. Const. art. III, § 2; *see Teigen*, 2022 WI 64, ¶ 52 n.25 ("Establishing rules governing the casting of ballots outside of election day rests solely within the power of the people's representatives because such regulations affect only the privilege of absentee voting and not the right to vote itself.").

CONCLUSION

This Court should grant this Emergency Motion For Stay Pending Appeal.

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Respectfully submitted,

Electronically signed by Misha Tseytlin
MISHA TSEYTLIN
Counsel of Record
State Bar No. 1102199
KEVIN M. LEROY
State Bar No. 1105053
Emily A. O'Brien
State Bar No. 1115609
TROUTMAN PEPPER
HAMILTON SANDERS LLP
227 W. Monroe Street, Suite 3900
Chicago, Illinois 60606
(608) 999-1240 (MT)
(312) 759-1938 (KL)
(312) 759-1939 (EO)
(312) 759-1939 (fax)
misha.tseytlin@troutman.com
kevin.leroy@troutman.com
emily.obrien@troutman.com

Attorneys for Intervenor-Respondent-Cross-Appellant