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**COURT OF APPEALS**

**STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT IV**

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NANCY KORMANIK,

Plaintiff-Appellee.

vs.

Appeal No.  
22AP

WISCONSIN ELECTIONS  
COMMISSION,

Circuit Court Case No.  
2022-CV-1395

Defendants-Respondents

and

RISE, INC.,

Intervenor-Defendant-Petitioner.

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**PETITION AND SUPPORTING MEMORANDUM FOR LEAVE  
TO APPEAL FROM TEMPORARY INJUNCTION ORDER NOT  
APPEALABLE AS OF RIGHT**

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## PETITION AND VENUE REQUEST

Intervenor-Defendant Rise, Inc. petitions the Court under Wis. Stat. § 809.50 for leave to appeal a non-final order entered on October 7, 2022, by the circuit court for Waukesha County, the Honorable Brad Schimel presiding. A copy of the order is attached. App. 20.

This petition is made to the Court of Appeals, District IV, under Wis. Stat. § 752.21(2). Plaintiff Nancy Kormanik “designated” Waukesha County as the circuit court venue under Wis. Stat. § 801.50(3)(a). App. 4. Intervenor-Defendant Rise therefore “select[s]” this Court to hear this appeal. Wis. Stat. § 752.21(2).

Rise respectfully requests that this Court decide this petition on an expedited basis and as soon as practicable. Rise petitions for interlocutory review of an extraordinary temporary injunction order that has enjoined absentee ballot guidance issued by the Wisconsin Elections Commission (“WEC”) in the middle of the absentee voting period. The temporary injunction order requires, among other things, that WEC withdraw critical guidance **by 7 p.m. on Monday, October 10, 2022**. This Court’s immediate review is therefore necessary to avoid

severe prejudice to Rise and Wisconsin voters. Rise separately seeks an emergency stay of the circuit court's temporary injunction order.<sup>1</sup>

### **ISSUE PRESENTED**

Rise petitions this Court to review an order entered by the Waukesha County Circuit Court issued a temporary injunction that enjoins WEC's longstanding policy pertaining to spoiling absentee ballots.

Absentee voting is underway in Wisconsin. As of the time of this filing, more than 300,000 Wisconsin voters have received absentee ballots and nearly 65,000 of those ballots have been returned. Absentee voting is proceeding according to guidance that WEC asserts has been in place since at least 2014. WEC republished that guidance on at least three subsequent occasions, including in October 2020 and twice in August 2022. This guidance provides that a voter who returns an absentee ballot may spoil their ballot until the Thursday prior to Election Day, and either receive a new absentee ballot or vote a new one.

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<sup>1</sup> Rise further joins the Petition for Leave to Appeal and Emergency Request for Stay of Temporary Injunction Pending Disposition of Petition filed earlier today by Intervenor-Defendant-Petitioner Democratic National Committee, Case No. 22AP1720.

Plaintiff has voted absentee for years, including in the 2022 primary election. But she waited to bring this challenge to Wisconsin's absentee ballot guidance until after absentee voting for the 2022 general election had already begun. And, contrary to settled law most recently set out in *Teigen v. Wisconsin Elections Commission*, L.C. No. 2021-CV-958 (Ct. App. Dist. II/IV Jan. 24, 2022) and the Wisconsin Supreme Court's decision in *Hawkins v. Wisconsin Elections Commission*, 2020 WI 75, 393 Wis.2d 629, 948 N.W.2d 877, the circuit court granted Plaintiff's requested temporary injunction ordering WEC to withdraw its longstanding guidance. Rise seeks expedited interlocutory review of the circuit court's temporary injunction order.

#### STATEMENT OF FACTS

**I. Wisconsin has allowed voters to spoil previously completed absentee ballots since at least 2014.**

Since at least 2014, voters in Wisconsin have been permitted to spoil a previously completed and submitted absentee ballot. App. 042. A voter may spoil their absentee ballot for any number of reasons: The voter might inadvertently vote for too many candidates. The absentee ballot could become damaged. Or the voter could change their mind about who to vote for. So long as the voter requests that their ballot be spoiled prior to the Thursday before Election Day—and the municipal

clerk determines that the person requesting a new ballot is the person to whom the original ballot was provided—the voter may request a new absentee ballot or vote in person. App. 12-14.

The Wisconsin Government Accountability Board issued this guidance in 2014.<sup>2</sup> App. 42. WEC has reiterated this policy to both municipal clerks and the public on at least three subsequent occasions: On October 29, 2020, WEC issued a memorandum titled “Spoiling Absentee Guidance” to municipal clerks and local election officials in Wisconsin. App. 18. On August 1, 2022, WEC issued a materially identical memorandum titled “Spoiling Absentee Guidance for the 2022 Partisan Primary” to these same officials. App. 12. And on August 2, 2022, WEC issued a press release to the general public with this same guidance titled “Rules about ‘Spoiling’ Your Ballot.” App. 16.

**II. Plaintiff delayed bringing this action to enjoin Wisconsin’s longstanding absentee ballot guidance until after absentee voting for the 2022 general election had begun.**

As set forth above, the policy Plaintiff challenges has been in place for most of the past decade—if not longer. Plaintiff has voted

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<sup>2</sup> The Wisconsin Government Accountability Board was the state agency responsible for administering and enforcing Wisconsin’s election laws until it was abolished and replaced by WEC in 2016.

absentee according to this guidance on several occasions. Yet she waited to challenge the guidance until after absentee voting for the 2022 general election had already begun.<sup>3</sup> By the time Plaintiff filed her suit, municipal clerks had already sent out 244,779 absentee ballots to electors, and within days (by October 3), electors had already returned 64,325 absentee ballots to municipal clerks. App. 42.

The circuit court granted Plaintiff's motion for a temporary injunction on October 7, 2022. That temporary injunction order states, among other things, that, effective 7:00 p.m. on Monday, October 10, WEC:

- (1) is enjoined from “advising, guiding, instructing, publishing, or otherwise communicating information related to spoiling absentee ballots and/or returning absentee ballots to electors that contravenes Wis. Stat. §§ 6.84, 6.86(1)(ar), 6.86(5) and 6.86(6), except as otherwise provided in Wis. Stat. § 6.87(9).”
- (2) is enjoined from displaying its August 1, 2022 memorandum titled “Spoiling Absentee Guidance for the 2022 Partisan Primary,” its August 2, 2022 publication titled “Rules about ‘Spoiling’ Your Ballot,” or “any other publication that communicates information contrary to Wis. Stat. §§ 6.86(5) and 6.86(6), including prohibiting the dissemination or publication of the following information: (i) that a municipal

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<sup>3</sup> Clerks were required to send absentee ballots to all electors with valid requests on file by no later than September 22, 2022. *See* Wis. Stat. § 7.10(3), 7.15(1)(c), (cm). Clerks must send absentee ballots to all military and overseas voters by no later than September 24, 2022. *See* 52 U.S.C. § 20302(a)(8).



clerk or local election official may return a previously completed and submitted absentee ballot to an elector, except as otherwise provided in Wis. Stat. §6.87(9); or (ii) that a municipal clerk or local election official is authorized to spoil an absentee ballot on behalf of an elector.”

- (3) “shall notify all Wisconsin municipal clerks and local election officials that the August 1st Published Memorandum and August 2nd Published Memorandum have been withdrawn.”

App. 20-21.

### **III. Petitioner Rise, Inc. successfully intervened below to defend its interests in mobilizing college students.**

Petitioner Rise, Inc. successfully moved to intervene in Plaintiff’s suit on September 29. Rise is a student-led nonprofit organization that seeks to empower college students to advocate for policies that broaden access to higher education. The success of this mission hinges on Rise’s ability to build political power among college students. Rise has therefore conducted an extensive get-out-the-vote campaign in Wisconsin, where it employs a state director, two deputy directors, and sixteen paid organizing fellows. These staffers have engaged approximately 15,000 voters this election cycle by helping them formulate a plan to vote. College students rely on absentee voting at a higher rate than the general population because many of them reside on college campuses but are lawfully registered to vote at their parents’ addresses throughout the state. Like all citizens voting for the first

time, college students are more likely to commit errors in preparing their ballots. Rise's efforts to educate these voters about Wisconsin's absentee ballot requirements are therefore critical to its mission, and Rise formulated these efforts that Wisconsin's longstanding and unchallenged absentee ballot guidance would remain in effect for the 2022 general election.

### ARGUMENT

This Court has discretion under Wis. Stat. § 808.03(2) to review non-final orders if the interlocutory appeal will either "(a) Materially advance the termination of the litigation or clarify further proceedings in the litigation; (b) Protect the petitioner from substantial or irreparable injury; or (c) Clarify an issue of general importance in the administration of justice." All three factors are present here.

This Court should also consider whether the petitioner demonstrates likely circuit court error. Where the circuit court has likely erred, interlocutory review will expedite and clarify the proceedings. *Leavitt v. Beverly Enters.*, 2010 WI 71, para. 43, 326 Wis. 2d 421, 784 N.W.2d 683 (citing Michael S. Heffernan, *Appellate Practice and Procedure in Wisconsin*, § 9.4 (4th ed. 2006)). This factor, too, weighs in favor of review.

**IV. Rise's petition for leave to appeal satisfies Wis. Stat. § 808.03(2).**

Rise's petition for leave to appeal satisfies the criteria under Wis. Stat. § 808.03(2) for three reasons, any one of which provides a sufficient basis for this Court to grant interlocutory review.

*First*, this Court's review is necessary to protect Rise and Wisconsin voters from substantial and irreparable injury. At least 64,325 Wisconsin voters have returned their completed absentee ballots to clerks in reliance on Wisconsin's longstanding policy of allowing them to spoil those ballots until the Thursday prior to Election Day. App. 42. The circuit court's temporary injunction irreparably injures these voters by suddenly changing Wisconsin's rules for spoiling previously returned absentee ballots after these voters have returned them. In doing so, it deprives these voters of the opportunity to return their ballots according to the policy now mandated by the circuit court. Even if the circuit court's ruling on the merits were correct—and it is not, *see infra* pp. 14-15, the timing of the injunction deprives Wisconsin voters of the opportunity to cast their ballots with the same understanding now afforded to the remaining 250,000 Wisconsin voters who have yet to return their absentee ballots. The practical result is that Wisconsin's 1800-plus local election officials will apply inconsistent standards—and

thus that some Wisconsin voters will have their votes arbitrarily rejected—in a manner that is squarely at odds with basic principles of equal protection. *See Bush v. Gore*, 531 U.S. 98, 104-05 (2000).

Absent immediate appellate review, Rise will also face substantial and irreparable. Rise's mission is to empower college students by ensuring that they can effectively participate in the political process. *See supra* pp. 6-7. Rise has furthered this mission by spearheading a substantial get-out-the-vote campaign in Wisconsin that has already engaged approximately 15,000 voters by helping them formulate a plan and understand the legal requirements to cast a ballot. *Id.* Many of these voters rely on absentee voting because they live on campus but are lawfully registered to vote at their parents' addresses throughout the state. And as a group consisting of a disproportionately high number of first-time voters, these voters are more likely to make mistakes and be confused and deterred by sudden changes to voting requirements. *See supra* pp. 6-7. By granting injunctive relief so late in the election process—and changing the state of play just weeks after many voters cast ballots under the prior status quo in the August primary—the circuit court's order disrupts the settled expectations upon

which Rise has formulated its efforts to engage and educate voters to further its core mission.

*Second*, this Court's intervention is necessary to clarify an issue of general importance in the administration of justice. It is settled law in Wisconsin and nationwide that courts must refrain from granting injunctive relief in the period close to an election if the plaintiff has "unduly delayed in seeking redress" from the challenged election policy. *Hawkins v. WEC*, 2020 WI 75, ¶5 n.1, 393 Wis. 2d 629, 632, 948 N.W. 2d 877, 879; *see Merrill v. Milligan*, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring) (Plaintiff must establish that she "has not unduly delayed in bringing the complaint to court"). That is precisely this case. Plaintiff delayed until after absentee voting for the 2022 general election had begun to challenge an absentee ballot policy that had been in place for nearly a decade. She has never provided any explanation for her delay, which is particularly notable given her own admission that she has voted absentee repeatedly in the past including during the 2022 partisan primary election in which WEC most recently reiterated the guidance she now challenges. App. 03-04. This Court should review the temporary injunction order to clarify that a voter seeking to challenge election guidance must do so *promptly*, so as to

avoid needless “disruption and . . . unanticipated and unfair consequences for candidates, political parties, voters, among others.” *Milligan*, 142 S. Ct. at 881 (Kavanaugh, J., concurring).

*Third*, this Court’s review will materially advance the termination of the litigation. For the reasons discussed above, Wisconsin voters, campaigns, and advocacy groups like Rise have a clear interest in obtaining resolution of this litigation as expeditiously as possible, which will clarify the rules governing the absentee voting period that is already underway. This Court can expedite that resolution by granting interlocutory review and clarify that injunctive relief cannot issue given Plaintiff’s extremely prejudicial delay in bringing this action.

**V. Rise will likely succeed on the merits of this appeal.**

This Court should also grant review because Petitioner is likely to succeed in showing that the circuit court abused its discretion in granting a temporary injunction.

The circuit court abused its discretion in granting a temporary injunction ordering WEC to withdraw guidance in the middle of an election. It is “a bedrock tenet of election law” that “[w]hen an election is close at hand, the rules of the road must be clear and settled.” *Milligan*, 142 S. Ct. at 881 (Kavanaugh, J. concurring). This Court

stayed an injunction for this very reason in *Teigen v. Wisconsin Elections Commission*, L.C. No. 2021-CV-958 (Ct. App. Dist. II/IV Jan. 24, 2022). The circuit court granted an injunction against WEC's guidance relating to ballot drop boxes on January 13, 2022, even though the absentee voting process for the February 15 election had begun. This Court stayed that injunction, explaining that more than 8,000 absentee ballots had "already been mailed to electors with instructions that are consistent with the Commission's guidance," and as such "[t]he potential for voter confusion and uncertainty in administration" is both "apparent" and "compelling." App. 28-29. The Wisconsin Supreme Court upheld the stay, explaining that "[w]ithdrawal of existing guidance while an election is underway is likely to result in voter confusion and uncertainty in the administration of the election." App. 36; *see also Hawkins v. Wis. Elections Comm'n*, 2021 WI 75, ¶¶ 5, 393 Wis. 2d 629, 948 N.W.2d 877 ("the 2020 fall general election has essentially begun," and therefore "it is too late to grant petitioners any form of relief that would be feasible and that would not cause confusion and undue damage

to both the Wisconsin electors who want to vote and the other candidates in all of the various races.

The potential for confusion here is exponentially greater than in *Teigen*. For one thing, WEC asserted below that as of October 3, 2022, more than 301,442 absentee ballots have been mailed to electors and 64,325 ballots have been returned. App. 42. For another, the temporary injunction enjoys WEC's August 2022 guidance in its *entirety* and is not limited to those aspects of the guidance that Plaintiff claims is unlawful. By enjoining that guidance in its entirety, the temporary injunction creates a serious risk of confusion among voters that other non-controversial components of the challenged guidance are now unlawful. *See, e.g.*, App. 13-14 (clarifying that a voter who received an absentee ballot but did not return it can vote in person on election day).

Rise will likely prevail on the merits for the additional reason that the circuit court's injunction radically alters the status quo. "The function of a temporary injunction is to maintain the status quo, not to change the position of the parties or compel the doing of acts which constitute all or part of the ultimate relief sought." *Codept, Inc. v. More-Way N. Corp.*, 232 Wis. 2d 165, 173 127 N.W.2d 29 (1964). The status quo is WEC's guidance allowing Wisconsin voters to spoil absentee



ballots up and until certain deadlines provided under state law— guidance that WEC asserts has been in place since 2014. *See supra* pp.##. By ordering WEC to withdraw that guidance, the circuit court has disrupted the status quo and compelled WEC to take steps that amount to part of the ultimate relief sought in this case.

The circuit court, moreover, granted temporary injunctive relief despite Plaintiff's failure to show irreparable harm. The guidance Plaintiff challenges has been in place since 2014, yet Plaintiff has not identified *a single instance* of identify theft or voter fraud resulting from that guidance. As this Court explained when it stayed a similar temporary injunction in *Teigen*, this failure to do so is fatal to request to disrupt a statewide election that is already underway. *See* App. 31 (“[T]he more concrete harms of voter confusion and administrative difficulty are not countered by the assertion of any similarly concrete harms that may occur with the guidance that has already been in place during recent elections. So far as is shown to us in this litigation, earlier use of that guidance has not produced evidence of specific harms.”).

Plaintiff's contention that WEC's guidance is unlawful is also flat wrong. Plaintiff asserts that Wisconsin law prohibits a voter from spoiling a ballot after it has already been received by the clerk, relying

on the language of Wis. Stat. § 6.86(6), which provides that “if an elector mails or personally delivers an absentee ballot to the municipal clerk, the municipal clerk shall not return the ballot to the elector. App. 95. But Section 6.86(6) itself contains an exception that allows clerks to return absentee ballots under the circumstances described in WEC’s guidance. See Wis. Stat. § 6.86(6) (“*Except as authorized in sub. (5) and s. 6.87 (9), if an elector mails or personally delivers an absentee ballot to the municipal clerk, the municipal clerk shall not return the ballot to the elector.*”). And under subsection 5, “[w]henver an elector returns a spoiled or damaged absentee ballot to the municipal clerk . . . and the clerk believes that the ballot was issued to or on behalf of the elector whose returning it, the clerk shall issue a new ballot to the elector. . . . Any request for a replacement ballot under this subsection *must be made within the applicable time limits under subs. (1) and (3) (c).*” Wis. Stat. § 6.86(5) (emphasis added). This exception clearly provides that a voter can spoil their ballot after returning it—i.e., by the Thursday prior to

Election Day as provided under subsections (1) and (3) (c). *See Wis. Stat. § 6.86(1)(b).*

### CONCLUSION

For the foregoing reasons, Rise respectfully requests that the Court grant this petition for interlocutory review.

Dated: October 7, 2022

By: *Electronically signed by:*

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### CERTIFICATION

I hereby certify that this petition confirms to the rules contained in WIS. STAT. Section 809.50(1) and is produced with proportional serif font. The length of this petition and supporting memorandum is 3,514 words.

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NANCY KORMANIK,

Plaintiff-Respondent,

vs.

Appeal No.  
2022-AP-

WISCONSIN ELECTIONS  
COMMISSION,

Circuit Court Case No.  
2022-CV-1395

Defendant,

RISE, INC.,

Intervenor-Defendant-  
Petitioner,

DEMOCRATIC NATIONAL  
COMMITTEE,

Intervenor-Defendant-  
Petitioner.

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**BRIEF IN SUPPORT OF EMERGENCY REQUEST FOR STAY  
OF TEMPORARY INJUNCTION PENDING DISPOSITION OF  
PETITION**

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On Appeal from the Circuit Court for  
Waukesha County Case No. 2022CV001395  
The Honorable Brad Schimel, Presiding

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Intervenor-Defendant Rise, Inc., by its attorneys, submits this brief in support of its motion for a stay pending appeal of the circuit court's October 7, 2022 Order, App. 20.

## I. INTRODUCTION

Intervenor-Defendant-Petitioner Rise, Inc. ("Rise"), by its undersigned counsel, respectfully seeks an emergency stay of the Temporary Injunction entered by Waukesha County Circuit Judge Brad D. Schimel earlier today ordering Defendant Wisconsin Elections Commission ("WEC") to "withdraw," by 7 p.m., Monday, October 10, 2022, a guidance document governing important aspects of the absentee-voting process that is already underway in the run-up to the November 8 federal and state general election. *See* App. 20-22. The guidance addresses the procedure by which a municipal clerk or local election official may return a completed and submitted absentee ballot to an elector, and the procedures by which a municipal clerk or local election official may "spoil" an absentee ballot at an elector's request. The challenged guidance was issued by WEC on August 1 and 2, 2022—over nine weeks ago—and is materially identical to guidance WEC has provided for at least the last seven statewide elections in Wisconsin over the past two years, and apparently much longer.

Rise respectfully asks the Court to immediately stay the circuit court's Temporary Injunction ordering WEC to "withdraw" its guidance by 7 p.m. Monday, so that this Court has time to request and consider responses from the other parties below and to make a considered decision whether to grant parties leave to appeal from today's Temporary Injunction order (and to extend the stay pending appeal, if leave to appeal is granted). Rise's counsel is notifying all counsel of record of this request for temporary relief pending disposition of the petition. Wis. Stat. §§ 808.03, 808.07(2). Rise respectfully requests that, if necessary, this Court grant an *ex parte* stay of the Temporary Injunction until at least early next week so that this Court can give this petition and stay request appropriate consideration.

## II. BACKGROUND

Wisconsin law provides that “if an elector mails or personally delivers an absentee ballot to the municipal clerk,” the clerk may “not return the ballot to the elector” “[e]xcept as authorized in sub. (5) and 6.87(9).” Wis. Stat. § 6.86(6) (emphasis added). Section 6.86(5) requires clerks to issue a new ballot to an elector “[w]henever an elector returns a spoiled or damaged absentee ballot to the municipal clerk,” so long as any request for a replacement ballot is made “within the applicable time limits under subs. (1) and (3)(c).”<sup>1</sup> *Id.* § 6.86(5). Section 6.87(9), in turn, provides that “[if] a municipal clerk receives an absentee ballot with an improperly completed certificate or with no certificate, the clerk may return the ballot to the elector . . . whenever time permits the elector to correct the defect and return the ballot.”

Consistent with those statutory directives, for at least the last seven statewide elections, WEC has issued guidance (the “Absentee Ballot Guidance”) setting forth the process and rules by which voters can “spoil” absentee ballots. The most recent Absentee Ballot Guidance providing these rules and processes was issued by WEC more than two months ago on August 1, 2022. Compl., Exh. A; Wis. Elections Comm’n, *Spoiling Absentee Guidance for the 2022 Partisan Primary* (Aug. 1, 2022), available at <https://elections.wi.gov/memo/spoiling-absentee-guidance-2022-partisan-primary>; Compl. Exh. B; Wis. Elections Comm’n, *Rules about ‘Spoiling’ Your Ballot* (Aug. 2, 2022), available at <https://elections.wi.gov/news/rules-about-spoiling-your-ballot-0>. The Absentee Ballot Guidance governed the partisan primary that took place in August and is materially identical to the WEC guidance that governed the November 2020 general election and

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<sup>1</sup> Those time limits provide that mailed requests for a new ballot must be received “no later than 5 p.m. on the 5th day immediately preceding the election,” while in-person requests must be made “no earlier than 14 days preceding the election and no later than the Sunday preceding the election.” Wis. Stat. § 6.86(1)(b).

every state election that has been held since then. *See* Wis. Elections Comm'n, *Rules about 'Spoiling' Your Ballot* (Oct. 29, 2020).<sup>2</sup>

The Absentee Ballot Guidance provides, among other things:

- A voter who returned an absentee ballot may request in writing or in-person that their returned absentee ballot be spoiled so they can either (i) vote a new one, or (ii) vote on election day.
- A voter cannot appear at the polls on election day and spoil their absentee ballot at that time.
- A voter who mailed an absentee ballot to the clerk cannot vote at the polls on election day if the voter has not spoiled their ballot by the applicable deadline, even if the clerk has not received the ballot.
- A voter who received an absentee ballot but did not return the ballot can vote in person.
- A voter can spoil their election day ballot in person at the polls.

*See Rules about 'Spoiling Your Ballot' at 1–2, Compl. Exh. B, pp. 1–2; Spoiling Absentee Guidance for the 2022 Partisan Primary at 1–2, Compl. Exh. A, pp. 1–2.*

Absentee voting for the 2022 general election is now well underway. Clerks were required to send absentee ballots by September 22 to all electors with valid requests on file, *see* Wis. Stat. §§ 7.10(3), 7.15(1)(c), (cm), and by September 24 to all military and overseas voters with valid requests on file, 52 U.S.C. § 20302(a)(8). As of Monday, October 3, over 350,000 absentee ballots had been created and almost 65,000 absentee ballots had been returned to election clerks. App. 40-43.

Nearly two months after WEC issued the most recent Absentee Ballot Guidance—and after the absentee voting process had already begun—Plaintiff filed this suit. Plaintiff seeks to drastically limit the ability of Wisconsin voters to cure defects in their absentee ballots or

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<sup>2</sup> Available at <https://elections.wi.gov/news/rules-about-spoiling-your-ballot>.

accompanying certifications. The crux of her complaint is an allegation that WEC's guidance—which voters have relied on, in some form, since at least the 2020 general election, including in the most recent 2022 primary election held in August—is inconsistent with several provisions of Wisconsin law. Specifically, Plaintiff alleges that the guidance impermissibly allows municipal clerks to (1) return a ballot to a voter in some circumstances, and (2) spoil a ballot upon the voter's request. Compl. ¶¶15, 16. Plaintiff further sought a temporary injunction to enjoin the Absentee Ballot Guidance and to require WEC to “promptly” issue so-called “corrected guidance” setting new rules for absentee voting, including that (1) a clerk is prohibited from returning a previously completed and submitted absentee ballot to a voter; (2) a clerk has no power to “spoil” a voter's previously submitted absentee ballot; and (3) in order to spoil an absentee ballot, a voter must spoil the ballot before requesting a new absentee ballot. App. 45.

Rise, Inc. promptly filed a motion to intervene on September 29. The Court granted that motion on October 7. App. 20.

The Court granted Plaintiff's motion for a temporary injunction on October 7. *Id.* Specifically, the Court entered an injunction stating, among other things, that WEC:

- (1) is enjoined from “advising, guiding, instructing, publishing, or otherwise communicating information related to spoiling absentee ballots and/or returning absentee ballots to electors that contravenes Wis. Stat. §§ 6.84, 6.86(1)(ar), 6.86(5) and 6.86(6), except as otherwise provided in Wis. Stat. § 6.87(9).”
- (2) is enjoined from displaying its August 1, 2022 memorandum titled “Spoiling Absentee Guidance for the 2022 Partisan Primary,” its August 2, 2022 publication titled “Rules about ‘Spoiling’ Your Ballot,” or “any other publication that communicates information contrary to Wis. Stat. §§ 6.86(5) and 6.86(6), including prohibiting the dissemination or publication of the following information: (i) that a municipal clerk or local election official may return a previously completed and submitted absentee ballot to an elector, except as otherwise provided in Wis. Stat. §6.87(9); or (ii) that a municipal clerk or local election official is authorized to spoil an absentee ballot on behalf of an elector.”

- (3) “shall notify all Wisconsin municipal clerks and local election officials that the August 1st Published Memorandum and August 2nd Published Memorandum have been withdrawn.”

App. 20-22. The Court ordered WEC to comply with these directives by 7 p.m. on Monday, October 10. The Court entered that order even though absentee balloting had, at that point, been underway in Wisconsin for 15 days and counting. Rise immediately filed an appeal on October 7, and now moves this Court for an immediate stay of the Order pending appeal.

### III. LEGAL STANDARD

A stay during “the pendency of an appeal” is appropriate where 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” while the appeal is pending; (3) “shows that no substantial harm will come to other interested parties” while the appeal is pending; and (4) “shows that a stay will do no harm to the public interest.” *Waity v. LeMahieu*, 2022 WI 6, ¶6, 400 Wis. 2d 356, 969 N.W.2d 263. These four considerations are not indispensable elements, but rather “interrelated considerations that must be balanced together.” *Id.*

### IV. ARGUMENT

The Court should stay the trial court’s October 7 Order pending appeal for at least the following four reasons. *First*, if a stay is not granted, Rise will have to take immediate steps to educate its target voters about the new processes, and will therefore be irreparably harmed. The resources expended in that effort will not be recoverable even if Rise prevails on appeal. Voters, too, will suffer irreparable harm, as some will be rendered unable to have their absentee ballots cured. *Second*, a stay, which will only return the parties to the status quo, will cause no substantial harm to Plaintiff, WEC, or Intervenor-Defendants the DNC—who filed an appeal and emergency stay earlier today. Plaintiff has yet to make any showing that the pre-Order cure processes are contributing to fraud, confusion, or any other concrete injury to Wisconsin’s election system, never

mind to Plaintiff herself. *Third*, Rise is likely to succeed on the merits of an appeal, because Wisconsin law clearly supports WEC's soon-to-be invalidated Absentee Ballot Guidance. *Fourth*, it is in the public interest not to change ballot-cure rules mid-stream by court order, then to change them again days or weeks later if the appellate courts take a different view of the merits. The best course of action is to maintain the pre-Order status quo by granting a stay.

**A. Rise—and Wisconsin voters—will suffer irreparable harm absent a stay.**

A stay is necessary to prevent irreparable injury to Rise, and to Wisconsin voters writ large. Because many of Rise's target voters plan to vote absentee, Rise will need to take immediate action in response to the Court's Order. First, it will need to suddenly divert significant resources to voter reeducation, to update any voters who—by choice or necessity—still plan to vote absentee. Second, it will need to divert significant resources toward encouraging voters to vote in-person on election day, to minimize the risk that any of its target voters casts an absentee ballot in a way that is no longer curable under the court's Order. These injuries cannot be redressed post-appeal because Rise has limited time remaining to achieve its organizational goals—every day brings the election closer. Nor can Rise recoup its limited resources that will be unnecessarily expended in the event a stay is not issued.

A stay is also necessary to prevent irreparable injury to Wisconsin voters. By definition, the Court's order will make it impossible for some absentee voters to cure their ballots—that is the whole point of Plaintiff's lawsuit. If Rise prevails on appeal, those voters will have been disenfranchised in violation of Wisconsin law. And “[i]t is axiomatic that there is no post hoc remedy for a violation of the right to vote.” *Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1310 (N.D. Ga. 2018).

Both these harms justify a stay pending appeal.

**B. Neither Plaintiff nor any other interested party will be harmed by a stay.**

Plaintiff has yet to establish that she is being harmed by WEC's guidance at all, never mind that she will be harmed by a brief delay in its invalidation. The only supposed harm Plaintiff cites—"potential disenfranchisement by identity theft and voter fraud," App. 56—remains both speculative and unsubstantiated. Materially identical guidance governed both the November 2020 general election and the August 2022 partisan primary—and every election in between. Yet Plaintiff still has not identified a single instance of identity theft or voter fraud that resulted from that guidance—not in her complaint, not in her motion or brief, and not at the hearing. Nor has the Court made any factual findings that such fraud is occurring. It therefore is impossible to say that Plaintiff needs relief now to avoid irreparable injury. This should have been dispositive.

Underscoring this point, Plaintiff tarried significantly in bringing her lawsuit. WEC issued the challenged guidance on August 1 and 2, 2022, in advance of the partisan primary held that month. This guidance was nothing new; rather, it was materially identical to that WEC issued in advance of the 2020 election, and which has governed every election since. Plaintiff did not challenge the guidance in 2020. She did not challenge the guidance when WEC re-issued it in advance of the August primary. Instead, she waited until after absentee voting for the November election had already begun to come to the Court and ask for extraordinary preliminary relief. While the Court has elected to look past this delay, at a minimum it means Plaintiff cannot credibly claim a need for immediate relief. If things were as urgent as Plaintiff says, her lawsuit would have been brought and resolved months or years ago. As it was not, the Court should stay its order to give the appellate courts time to weigh in.

No other interested party will be harmed by a stay. The other parties before the Court all agree that a stay is appropriate.

**C. Rise is likely to succeed on the merits of its appeal.**

Rise is likely to succeed in showing that the circuit court abused its discretion in issuing a temporary injunction, and incorporates by reference the arguments in its Petition for Leave to Appeal, filed concurrently with this motion.

**D. A stay is in the public interest.**

A stay would benefit both local election officials and, by extension, Wisconsin voters. Absent a stay, widespread confusion among election officials about how to participate in and administer an absentee voting process that has already begun is certain. Local officials have already started conducting absentee voting using the now-enjoined processes. Clerks used the same processes to administer the recent primary election and used similar processes during past election cycles. Reliance, in short, could not be higher.

Against that backdrop, the Court's Order amounts to a sea-change in Wisconsin election law, revoking guidance that has been in effect for years. And because Wisconsin election administration is decentralized—overseen by more than 1800 municipalities and their local officials—application of this Court's order is certain to be inconsistent. Wisconsin's election officials simply are not equipped to learn about, analyze, and apply a sweeping judicial intervention overnight, while already busy running an ongoing election. The likely result of the Court's Order, absent a stay, is inconsistent and confusing cure processes around the state over the coming weeks. And municipalities will be forced to commit scarce resources and municipal attorney time to time-sensitive analysis of this Court's order, any subsequent WEC action in compliance, and Rise's likelihood of success on appeal.

All this will harm voters as well as officials. Voters rely on the existence of settled, publicly disseminated processes this far into the election cycle. Many have already made plans to vote. Most no doubt assumed the accuracy of then-lawful information at the time they made those plans.



Few voters monitor the news for late-breaking judicial interventions in election administration. Absent a stay, absentee voters are likely to be disenfranchised—a result that is decidedly not in the public interest.

## V. CONCLUSION

For the foregoing reasons, Rise respectfully moves the Court to grant a stay of the circuit court's entire October 7, 2022 Order pending appeal.

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By: Electronically signed by Diane M. Welsh

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