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**CIRCUIT COURT**  
**DANE COUNTY, WI**  
**2022CV002446**

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December 15, 2022

**VIA ELECTRONIC FILING ONLY**

The Honorable Juan B. Colás  
Dane County Courthouse  
Branch 10 - Room 7103  
215 S. Hamilton St.  
Madison, WI 53703

Re: Rise, Inc. *et al.* v. Wisconsin Elections Commission, *et al.*  
Dane Co. Case No. 2022CV2446

Dear Judge Colás,

Pursuant to the Court's request at the December 1, 2022 scheduling conference, Plaintiffs Rise, Inc. and Jason Rivera ("Plaintiffs") submit this short brief addressing whether this case may proceed in this Court notwithstanding Michael and Eva White's pending appeal of the denial of their motion to intervene. *See* No. 2022AP1838.

For the reasons set forth below, Wis. Stat. § 808.075(3)<sup>1</sup> does not prohibit this Court from continuing to act here.

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<sup>1</sup> Wis. Stat. § 808.075(3) provides: "In a case not appealed under [Wis. Stat. §] 809.30, the circuit court retains the power to act on all issues until the record has been transmitted to the court of appeals. Thereafter, the circuit court may act only as provided in subs. (1) and (4)."

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## I. Background

Plaintiffs filed this case against the Wisconsin Elections Commission and Madison City Clerk Maribeth Witzel-Behl on September 27, 2022, seeking a declaratory judgment and injunctive relief to settle the meaning of the term “address” as it is used in Wis. Stat. §§ 6.87(2), (6d), and (9). Dkt. 3. Those provisions together make up Wisconsin’s witness-address requirement for absentee ballot certificates. Aiming to settle the matter for purposes of the 2022 general election, Plaintiffs moved on September 28 for a temporary injunction defining “witness address” as “place where the witness can be communicated with.” Dkt. 5, 8.

Before the Court had acted on that temporary injunction motion, two voters (Michael and Eva White) moved to intervene as defendants. Dkt. 43. The Whites were plaintiffs in a separate action, *White v. WEC*, that reached final judgment on October 3. Order Granting Final J. to Pls., *White v. WEC*, No. 2022CV1008 (Cir. Ct. Waukesha County Oct. 3, 2022), Dkt 188. The Whites asserted that Plaintiffs’ lawsuit was an attempt to “collaterally attack” that final judgment. Dkt. 43 at 1.<sup>2</sup>

The Court denied the Whites’ motion to intervene on October 20. Dkt. 100. The Court explained that Defendants and Intervenor-Defendant the Wisconsin Legislature adequately represented the Whites’ “broad, non-specific interests.” *Id.* at 2.<sup>3</sup> And the Court disagreed with the Whites’ characterization of this case as a “collateral attack” on the judgment issued in *White*, explaining that “the relief sought in this action, a definition of ‘address,’” was not inconsistent with the final judgment in that case. *Id.* Indeed, the Waukesha Circuit Court itself emphasized that it was not reaching that question in its ruling. *See* Dkt. 4 at 7–9.

The Court denied Plaintiffs’ motion for a temporary injunction and several subsequent motions seeking to obtain expedited resolution of this question in advance of the November 8 election. *See* Dkt. 79, 102, 129. This included Plaintiffs’ motion for expedited consideration of summary judgment on their declaratory judgment claim. *See* Dkt. 85.

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<sup>2</sup> The Whites also moved – prematurely – either to dismiss this case or to transfer it to Waukesha County Circuit Court for consolidation. Dkt. 61, 62, 63, 65, 66. Those motions were mooted when the Court denied the Whites’ motion to intervene. *See* Dkt. 100.

<sup>3</sup> The Court had previously allowed the Legislature to intervene as a Defendant on October 6. Dkt. 71.

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Two motions are currently pending before the Court: (i) the Legislatures' motion to dismiss and (ii) Plaintiffs' motion for summary judgment. As noted at the December 1 status conference, Plaintiffs plan to file an amended complaint, *see* Wis. Stat. § 802.09 (permitting amendment as of right within six months of service of complaint), which will moot both motions.

Separately pending on appeal is the Court's earlier denial of the Whites' intervention in this matter. The Whites filed a notice of appeal of the Court's order denying their intervention on October 27, Dkt. 114, and the record was transmitted to the Court of Appeals on November 16, Dkt. 141. At a status conference on December 1, this Court ordered the parties to brief whether the November 16 transmission of the record to the Court of Appeals in the Whites' appeal of the denial of their intervention prohibits this Court from taking any further action under Wis. Stat. § 808.075(3).

## II. Analysis

Wis. Stat. § 808.075(3) does not prohibit this Court from continuing to act in this case. The Whites' motion to intervene initiated a special proceeding. It is that special proceeding—not this underlying action—which is pending before the Court of Appeals. Accordingly, Wis. Stat. § 808.075(3) does not apply, let alone prohibit the main action's continuing before this Court. Further, although no controlling authority directly addresses whether Section 808.075(3) permits a circuit court to act during the appeal of an order denying intervention, at least one Wisconsin Supreme Court case indicates otherwise. And prohibiting a circuit court from proceeding whenever a putative intervenor appeals a denial of intervention would be profoundly disruptive to the efficient operation of the courts.

Most fundamentally, the main action in this case is not pending before the Court of Appeals at all, thus Wis. Stat. § 808.075(3) does not apply. Wisconsin law distinguishes between "actions" and "special proceedings." Wis. Stat. § 801.01. "A motion to intervene is a form of special proceeding." *Grand View Windows, Inc. v. Brandt*, 2013 WI App 95, ¶42, 349 Wis. 2d 759, 837 N.W.2d 611. As a consequence, an order denying intervention is a final order in a special proceeding; it "determines and disposes finally of the proceeding . . . [and] precludes any further steps therein." *State v. Lamping*, 36 Wis. 2d 328, 337, 153 N.W.2d 23, 28 (1967). The Whites' appeal is thus properly classified as an appeal from a final order in a special proceeding about intervention, not from an order in the main

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action. In other words, this “case” — *i.e.*, the main action — has not been “appealed,” hence Wis. Stat. § 808.075(3) is not implicated at all.<sup>4</sup>

The procedural mechanism by which the Whites appealed underscores the conclusion that the Court’s order denying intervention was an order in a special proceeding. The Whites appealed as of right under Wis. Stat. § 808.03(1). Appeal as of right is permitted only from a “final judgment or final order... that disposes of the entire matter in litigation as to one or more of the parties, whether rendered in an action or a special proceeding.” Wis. Stat. § 808.03(1). The order denying the Whites’ motion to intervene was not a final order in the main action — it did not “dispose of the entire matter in litigation as to one or more of the parties” because the Whites were never parties, just proposed intervenors. Accordingly, that the Whites took their appeal as of right under Section 808.03(1) — rather than by permission under Section 808.03(2) — further confirms that this Court’s order was an order in a special proceeding, and that Wis. Stat. § 808.075(3) does not apply to the main action.

Further, to the extent that precedent sheds any light on the effect of Wis. Stat. § 808.075(3) when a putative intervenor appeals the denial of a motion to intervene, it does not support prohibiting this Court from taking further action in this case. For starters, undersigned counsel has been unable to find any case directly addressing the issue at hand, which itself is telling. Section 808.075 (or its materially equivalent predecessor) has been on the books since at least 1988. *See* Sup. Ct. Order, 146 Wis. 2d xiii (1988). If an appeal from denial of a motion to intervene prohibited a circuit court from continuing to act in the main litigation, surely a court would have said so by now.

Insofar as any appellate authority is illuminating, it suggests Section 808.075(3) does not apply here. Most pertinent is *Armada Broadcasting, Inc. v. Stirn*, 183 Wis. 2d 463, 516 N.W.2d 357 (1994). There, Armada brought a mandamus action seeking to compel release of public records related to sexual harassment allegations involving a teacher. *Id.* at 468. The teacher moved to intervene, and the circuit court denied the motion and ordered the release of the records. *Id.* at 469–70. The teacher then appealed and *moved* the

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<sup>4</sup> For a detailed discussion of the action–special proceeding distinction in Wisconsin law and its effect on two-track cases like this one, see Michael S. Heffernan, *Appellate Practice and Procedure in Wisconsin* § 4.10 (“Attorneys should be aware... that special proceedings often arise in the context of an ongoing action and an order terminating a special proceeding must be separately appealed. Special proceedings are related to or connected with the underlying proceeding but present a ‘separate and distinct’ issue.”).

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court of appeals “for stay of further proceedings pending appeal,” which the court granted. *Id.* at 470. Had Section 808.075(3) automatically prohibited the circuit court from taking further action, a motion for a stay pending appeal would not have been necessary. Yet neither the Supreme Court, *id.*, nor the court of appeals, 177 Wis. 2d 272, 275–76 (1993), ever suggested as much. So, while *Armada Broadcasting* does not expressly reject the application of Wis. Stat. § 808.075(3) here, it is difficult to reconcile with that result.

Finally, the efficient operation of the courts would be severely disrupted if a circuit court were prohibited from taking further action whenever a putative intervenor appealed. If that were the rule, anyone wishing to delay a case’s resolution—regardless of whether they had standing or a plausible basis for intervention—would need only to file cursory intervention papers, wait for the circuit court to deny intervention, then file a notice of appeal and wait for the transmittal of the record on appeal. Because even a routine affirmance on appeal can take months to issue, such maneuvers could utterly derail time-sensitive cases. That cannot be the law.

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Plaintiffs contend for the foregoing reasons that Wis. Stat. 808.075(3) does not apply and that this Court may continue to act on all issues in this case.

Sincerely,



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