No. 2024AP165

In the Wisconsin Court of Appeals

DISTRICT IV

RISE, INC., *and* JASON RIVERA,
PLAINTIFFS-RESPONDENTS,
v.
WISCONSIN ELECTIONS COMMISSION; MARIBETH WITZEL-BEHL, CITY CLERK FOR THE CITY OF MADISON, WISCONSIN; TARA MCMENAMIN, CITY CLERK FOR THE CITY OF RACINE, WISCONSIN; *and* CELESTINE JEFFREYS, CITY CLERK FOR THE CITY OF GREEN BAY, WISCONSIN,
DEFENDANTS,

WISCONSIN STATE LEGISLATURE,
INTERVENOR-APPELLANT.

On Appeal From The Dane County Circuit Court,
The Honorable Ryan D. Nilsestuen, Presiding
Case No. 2022CV2446

REPLY BRIEF OF INTERVENOR-APPELLANT THE WISCONSIN STATE LEGISLATURE

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INTRODUCTION

As the Legislature explained in its Opening Brief, nothing in Wis. Stat. § 6.87's text supports the Circuit Court's attempt to rewrite the statutory term "address" as requiring the three Clerk Defendants to determine (somehow) whether each absentee-ballot witness has provided "sufficient information" to allow a "reasonable person in the community" to locate that witness. Plaintiffs' Response Brief does not meaningfully grapple with their obligation to defend the Circuit Court order that they asked for and obtained, spending much of their Response Brief running away from the Circuit Court's controlling "reasonable person in the community" standard and attacking the Legislature's alternative definition of "address." Since Plaintiffs cannot seriously defend the Circuit Court's actual order on review, this Court should reverse.

ARGUMENT

I. Plaintiffs Cannot Defend The Circuit Court's Incorrect And Unadministrable Definition Of "Address" Under Wis. Stat. § 6.87

A. As the Legislature explained, the Circuit Court's interpretation of "address" violates principles of statutory interpretation and is unadministrable. Br.26–38. The Circuit Court erroneously relied on a single entry from the Merriam-Webster Dictionary to support its reading, but such reliance is unjustified because that definition does not support an atextual "reasonable person in the community" standard, conflicts with multiple dictionary definitions, and is not supported by caselaw or any other statutory authority. *Id.* The statutory context, too, belies the Circuit Court's interpretation, as other language in

related statutes uses the word "address" in relation to particular pieces of information. Br.28–32. Finally, the Circuit Court's definition is entirely unadministrable. Br.32–35.

B. Plaintiffs spend most of their brief running away from the Circuit Court's definition of "address," seeking to defend only the "place where the witness may be communicated with" aspect of the Circuit Court's definition as supposedly "functional." *See* Resp.19–32. But the Circuit Court itself understood that it makes no sense to require the three Clerk Defendants to determine whether an absentee-ballot witness has provided "a place where the witness may be communicated with" without explaining *how* clerks are supposed to perform this "function" in the real world. The Circuit Court attempted to solve this problem by telling these clerks that the way they must figure out where the witness "may be communicated with" is for the clerk to decide whether a "reasonable person in the community" would be able to find the witness' location from the information provided. But, of course, none of this has any basis in the statutory text or context, Br.26–32, and is entirely unadministrable, Br.32–35.

Plaintiffs' effort to explain how clerks are supposed to apply the Circuit Court's controlling "reasonable person in the community" standard, Resp.32–35, fails. Their argument that persons often have general duties to act in a "reasonable" manner, *see* Resp.33, is a *non sequitur*. The duty that society sometimes imposes on individuals to act reasonably provides no insight at all into what geographic knowledge a "reasonable person in the community" should possess for purposes of applying the Circuit

Court's reading of "address," let alone how the three Clerk Defendants—and any other clerk that chooses to follow the Circuit Court's definition[1]—are supposed to determine if they have more or less geographic knowledge than a "reasonable person" in their community when dealing with specific witness location information.

C. Having no serious defense of the Circuit Court's controlling "reasonable person in the community" test, Plaintiffs spend the rest of their defense of the Circuit Court's order focusing only on the "a place where the witness may be communicated with" aspect of the Circuit Court's definition. But that portion of the Circuit Court's definition has no administrable content without telling clerks how they are supposed to decide whether the information provided is sufficient to identify "a place where the witness may be communicated with" (which is why the Circuit Court, at Plaintiffs' urging, imposed the "reasonable person in the community" test). Even putting aside this fatal defect in Plaintiffs' attempt to focus only on half of the Circuit Court's definition of "address," their arguments fail.

Plaintiffs argue that "address" means a "place where the witness may be communicated with" because Section 6.87 does not require any specific "form" of "address." Resp.20 (emphasis omitted). But, with all respect, that is not the "common, ordinary,

[1] Plaintiffs at points equivocate on whether they believe that the Circuit Court's order is binding on clerks statewide, *see* Resp.30–31, but ultimately cannot dispute that the Circuit Court's order binds only the three Clerk Defendants in this case, and not the rest of the State's numerous nonparty clerks, *see* Br.20–21.

and accepted meaning," *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis.2d 633, 681 N.W.2d 110, of "address," especially when used in the context of a form that someone must complete. In ordinary usage, if a form asks someone to provide their address—be it on an absentee-ballot witness certificate or a credit card application—it would be decidedly *uncommon* to respond "the three houses around the corner from the Culverts on Mineral Point Road" or to just provide the name of a student residence hall, *see* Br.33–35, even though that type of information may allow at least some people to determine "where the witness may be communicated with."

And while Plaintiffs follow the Circuit Court in relying upon one Merriam-Webster Dictionary definition, they overlook that other entries from Merriam-Webster show that "address" is not commonly understood as having such an indeterminate reach as the Circuit Court adopted here. For instance, Merriam-Webster's first entry *also* refers to the "directions for delivery on the outside of . . . a letter," *Address*, Merriam-Webster Online (Definition 1(b)),[2] and "the designation of place of delivery" on a "business letter," *Address*, Merriam-Webster Online, *supra* (Definition 1(c))—both of which require markedly more specific information than the Circuit Court's definition of "address."

Plaintiffs argue that an absentee-ballot witness "address" does not require any specific components because other statutory provisions do expressly require such components—for example, by

[2] Available at https://www.merriam-webster.com/dictionary/address (all websites last visited May 5, 2024).

requiring that an absentee voter indicate specific address components in his voter attestation, and that a clerk's "post-office address" be listed on the absentee-ballot envelope. Resp.25 (citing Wis. Stat. § 6.87(2)). But Section 6.87(2) must be read as a "coherent whole," *Kalal*, 2004 WI 58, ¶ 49, and there is no reason to believe the Legislature intended "address" to have any different meaning when used in relation to absentee-ballot witnesses than it did in relation to absentee voters or municipal clerks, in other sections of the same statute. Relatedly, Plaintiffs claim that Wis. Stat. § 6.34(3)(b)2's definition of a "*complete* residential address" as "a numbered street address, if any, and the name of a municipality" supports their position, Resp.25 (emphasis added), but there is again no basis to conclude that this definition reflects the Legislature's intention to allow *incomplete* addresses to suffice under Section 6.87(2). And while Plaintiffs identify Wis. Stat. §§ 6.15(2)(a) and 8.10(2) as other "related statutes" that require specific address components, in contrast to Section 6.87(2)'s silence, Resp.25, these statutes—like Section 6.34(3)(b)2 and other provisions of Section 6.87(2)—all collectively demonstrate that when the word "address" is used in the context of Wisconsin's election laws, *Kalal*, 2004 WI 58, ¶ 49, that term calls for more specificity than what the Circuit Court's definition requires.

Plaintiffs' reliance on Justice Hagedorn's concurrence in *Trump v. Biden*, 2020 WI 91, 394 Wis. 2d 629, 951 N.W.2d 568; Resp.26, is unavailing. Plaintiffs claim that Justice Hagedorn "expresses uncertainty about what forms of address are adequate but does not suggest that the 'silent' statute somehow requires just

one, very specific form." Resp.26. But Plaintiffs mischaracterize Justice Hagedorn's position. Noting that Section 6.87 does not define "what makes a[ ] [witness'] address sufficient," Justice Hagedorn queried whether it would require a "municipality," the "state," or the "[z]ip code"—suggesting that *some degree of specificity* is required to satisfy Section 6.87's address requirement. *See Trump*, 2020 WI 91, ¶ 49 (Hagedorn, J., concurring). The Circuit Court's amorphous standard does not come close to providing the specificity Justice Hagedorn sought.

Plaintiffs argue that "the Circuit Court's functional definition . . . furthers the putative statutory purpose," Resp.27, but that overlooks Section 6.84(1)'s clear pronouncement that absentee voting laws must be strictly construed so as to "prevent the potential for fraud or abuse" that inherently accompanies the "privilege" of absentee voting, Wis. Stat. § 6.84(1). Adopting an amorphous standard for witness addresses that clerks cannot possibly apply evenhandedly on a statewide basis, *see* Br.32–35, defeats that statutory purpose.

Contrary to Plaintiffs' assertions, Resp.28–29, history does not support their position. Plaintiffs argue that the term "address" has been "undefined since the Johnson Administration," Resp.28, and the Wisconsin Election Commission's ("WEC") 2016 Guidance permitted ballots bearing witness addresses such as "same as voter" to be counted because clerks were authorized to unilaterally alter such ballots to make them compliant with the statute, Resp.29. But Plaintiffs point to no historical evidence of anything like the Circuit Court's standard ever having been applied to the

meaning of "address" in the history of the absentee voting regime. To the contrary, absentee voting statutes have called for "an address" since the 1960s, and Plaintiffs cite no example of any clerk adopting anything like the Circuit Court's definition in that long history. *See* Br.43–45. Plaintiffs also fail to acknowledge that the Waukesha County Circuit Court enjoined as unlawful WEC's 2016 Guidance purporting to authorize clerks to make unilateral alterations to witness certificates. *See* Order, *White v. WEC*, No.2022CV1008 (Sept. 7, 2022). The aspect of that Guidance adopting a three-part definition of "address," by contrast, was not enjoined. *Id.* So even if WEC temporarily—and *unlawfully*—interpreted "same as voter" to satisfy Section 6.87(2), WEC clearly interpreted "address" differently than the Circuit Court below.[3]

II. Plaintiffs Have Not Rebutted The Legislature's Proposed Definition Of Address, But The Court Need Not Reach That Issue In Order To Vacate The Circuit Court's Judgment Below

A. While this Court need not adopt a definition of "address" to resolve this case, Br.46, the Legislature submits that, as used in the context of Section 6.87(2)'s witness-address requirement, "address" is best read to mean a street number, street name, and name of municipality, just as WEC concluded in 2016. Br.39–46. This definition is consistent with the commonly understood

[3] Plaintiffs suggest that the Legislature's explanation of why it was improper for the Circuit Court to rely on the federal Materiality Provision to support its definition of "address" is irrelevant, Resp.28, while recognizing that the Circuit Court accepted Plaintiffs' reading of Section 6.87(2) in part to purportedly reconcile Section 6.87 with this separate federal law, *see* Br.35–38. Plaintiffs offer no response to the Legislature's argument that the Materiality Provision does not support the Circuit Court's holding.

meaning of "address," Br.39–42, and supported by related language in other statutes, which require these three component parts when calling for an "address," Br.42–43 (citing Wis. Stat. §§ 6.87(2), 6.34(3)(b)2). This three-part definition also accords with WEC's historical understanding of the term. Br.43–45. Finally, unlike the Circuit Court's definition, this three-part definition is administrable because it calls for the rejection or acceptance of absentee ballots on the basis of objective, easily identifiable criteria without calling for subjective determinations of a clerk's knowledge or reasonableness. Br.45–46.

B. Plaintiffs argue that this Court must adopt a definition of witness "address" in this case, claiming that "[t]he proper definition of 'witness address' is a question *requiring* judicial settlement." Resp.31 (emphasis added). But as Plaintiffs themselves recognize, "address" in this context "has been undefined since the Johnson Administration," Resp.28, and as the parties "invoking the judicial process," Plaintiffs must convince this Court that returning to the status quo in the event of reversal is somehow improper, *see, e.g.*, *Richards v. First Union Secs., Inc.*, 2006 WI 55, ¶ 17, 290 Wis. 2d 620, 714 N.W.2d 913. While Plaintiffs suggest that restoring the status quo would cause "uncertainty and insecurity" because the Clerk Defendants took different approaches to witness "addresses," Resp.32, clerks have determined whether an absentee ballot contains a sufficient address for over fifty years without anyone raising any concerns until very recently, Br.10–11, 17. And, of course, it is trivially easy for an absentee voter to ensure a witness provides the basic

information required for the ballot to pass muster under Section 6.87(6d) under any approach, given that the absentee-ballot witness certificate now provides clear instructions for the witness to follow and expressly instructs the witness to write his or her address in the form of a street number, street name, and city in a box titled "Witness Address (Number, Street Name, City)." Br.14; R.246 at 5.

But even if the Court believes it is necessary to adopt an interpretation of "address," Plaintiffs fail to rebut the Legislature's argument that the plain meaning of "address" for purposes of Section 6.87 means a street number, street name, and name of municipality. Plaintiffs argue that it is possible to convey the "particulars of the place where a person lives," Resp.22 (citing *Address*, Oxford English Dictionary[4]), without these three components, but the "particulars of where a person lives" are most commonly understood as including, at minimum, a street number, street name, and municipality, *see Kalal*, 2004 WI 58, ¶ 45; Br.39–42. While Plaintiffs suggest these three components "are not always required," Resp.22, the fact that these elements are "typically" part of an "address" merely shows that "address" is "ordinar[ily]" and "common[ly]" understood as containing these three components, *Kalal*, 2004 WI 58, ¶¶ 45–49 & n.8.

Plaintiffs argue that the three-part definition of "address" fails to account for Section 6.87(6d)'s requirement that a ballot be rejected only if an address is "missing," not just "incomplete" or

[4] Available at https://www.oed.com/dictionary/address_n?tl=true (subscription required).

"partial." Resp.23. But "missing" means "not present" or "not to be found," *Missing*, Oxford English Dictionary,[5] so a witness address is "*missing*," not just incomplete, if any of these three component parts is "not present," *id.* And, in any event, this case has never involved the meaning of "missing," and to interpret that term at this juncture would be improper. *See Gibson v. Overnite Transp. Co.*, 2003 WI App 210, ¶ 9, 267 Wis. 2d 429, 671 N.W.2d 388.

Plaintiffs criticize the Legislature's invocation of Section 6.84 to support its position, calling it "irrelevant to the central question in this case." Resp.24. But Section 6.84 governs the "[c]onstruction" of Wisconsin's absentee voting statutes and requires that certain provisions—including Section 6.87(6d)—be "construed as mandatory." Wis. Stat. § 6.84(2). Thus, Section 6.84 provides the context in which Section 6.87's reference to "address" must be understood, and Section 6.84 evidences the Legislature's intent to "carefully regulate" the absentee voting process "to prevent the potential for fraud or abuse," Wis. Stat. § 6.84(1), by, among other things, ensuring that an absentee-ballot envelope reveal precisely where an absentee-ballot witness can be located, should the need arise, Wis. Stat. § 6.87.

Plaintiffs claim that the Legislature's argument that Section 6.87(2) requires an absentee witness to provide the same pieces of information that it requires of an absentee voter him or herself is "baffling" because a voter must provide a "ward or aldermanic

[5] Available at https://www.oed.com/dictionary/missing_adj?tl=true (subscription required).

district" and "county" in addition to street number, street name, and municipality. Br.26–27. But the Legislature cited Section 6.87(2)'s requirements for an absentee *voter* as evidence that an "address" is commonly understood as requiring at least certain particular components, rather than the amorphous standard the Circuit Court adopted here. Br.42–43. And while Plaintiffs also claim that the Legislature failed to identify other related statutes that support the three-component definition, Resp.27–28, that is false. In its Opening Brief, the Legislature explained that multiple related statutes—Section 6.87(2), Section 6.34(3)(b)2, Section 8.10, and Section 8.28, Br.29–30, 42–43—all call for particular components and therefore confirm that an "address," as that term in most commonly understood in this context, *Kalal*, 2004 WI 58, ¶ 45, requires three component parts.

Plaintiffs argue that the three-component definition "is a litigation decision made in September 2022," Resp.28–29, but WEC interpreted the term "address" to require a street number, street name, and name of municipality since at least October 2016, Br.13 (citing R.38 at 50). Further, absentee voting in Wisconsin has *always* included some type of address requirement calling for specific component parts—for both the absentee voter, who originally had to provide a "street and number" and "city," 1915 Wis. Act 461 §§ 44m-3, and the witnessing official, who had to provide a "post-office address," *id.* § 44m-5—thereby demonstrating that the common meaning of "address," when viewed through this historical lens, has always required, at

minimum, the constitutive components the Legislature advocates for here, *see* Br.43–45.

Finally, Plaintiffs criticize the Legislature's administrability arguments, arguing that the three-component definition will not necessarily ensure that the address provided is "where the witness may be reliably communicated with," and that "nothing stops a witness . . . from providing a three-component address for a business, a friend's home, or the local Walmart." Resp.30. But such complications are not exclusive to a three-part definition of "address." Plaintiffs fail to dispute—and thereby implicitly concede—that interpreting "address" as requiring the three constitutive component parts would produce a simple and easily administrable rule that could be applied uniformly across the State without asking 1,800 municipal clerks to make individual, subjective determinations about their own knowledge and the relative knowledge of members of the community. Br.45–46.

CONCLUSION

This Court should reverse the Circuit Court's grant of summary judgment to Plaintiffs and remand for entry of summary judgment in the Legislature's favor.

Dated: May 6, 2024

Respectfully submitted,

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CERTIFICATION BY ATTORNEY

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm) and (c) for a brief. The length of this brief is 2961 words.

Dated: May 6, 2024

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