



**Table of Contents**

**TABLE OF CONTENTS** ..... 2

**INTRODUCTION**..... 3

**BACKGROUND** ..... 5

    A. WEC’s 2016 guidance was enacted to ensure that absentee ballots are properly counted and has been used in every election for the last six years. .... 5

    B. The Waukesha County Circuit Court’s September 7, 2022 Order enjoined the 2016 guidance, and WEC has not clarified the definition of address in the weeks since. .... 6

**LEGAL STANDARD** ..... 7

**ARGUMENT**..... 8

**I. Plaintiffs are likely to succeed on the merits of their claims.**..... 8

        A. Rise has standing to seek declaratory and injunctive relief. .... 9

        B. Mr. Rivera also has standing. .... 11

        C. The definition of “address” in the Witness Address Requirement is ambiguous, but cannot mean “complete address.” ..... 12

        D. This Court should interpret the address requirement to require only sufficient information to determine where the witness “may be communicated with.” ..... 14

        E. Rejecting absentee ballots because the witness address is incomplete would raise serious concerns under the federal Civil Rights Act’s materiality provision. .... 16

**II. Plaintiffs will suffer irreparable injury without a temporary injunction.** ..... 19

**III. Plaintiffs have no adequate remedy at law.** ..... 21

**IV. A temporary injunction is required to preserve the status quo.**..... 21

**V. The equities favor granting Plaintiffs’ requested relief.**..... 22

**CONCLUSION** ..... 23

## INTRODUCTION

This motion seeks a temporary injunction to prevent the wrongful disenfranchisement of thousands of Wisconsinites. Rise, Inc. and Mr. Jason Rivera (“Plaintiffs”) move the court to reinstate a reasonable interpretation of Wisconsin election law that has prevailed for the last six years. Wisconsin election law requires that absentee ballots be witnessed, and that the witness provide an “address”—a term undefined in the statute (the “Witness Address Requirement”). Since 2016, the Wisconsin Elections Commission (“WEC”) has instructed local election officials that an absentee ballot certification containing sufficient information to enable an official to reasonably discern the witness’s address requires no further action from the voter to be counted. At least twelve state elections have been held with that guidance in place without incident, including the recent August 2022 primary.

Now, however, this guidance has been upended, threatening to disenfranchise untold numbers of lawful Wisconsin voters for immaterial omissions, as local election officials attempt to apply the Witness Address Requirement with no clear guidance as to what it requires. This uncertainty is the result of a September 7, 2022 order from the Waukesha County Circuit Court (the “Waukesha court”) in which it enjoined the 2016 guidance as a result of litigation brought by the Republican Party of Waukesha County and three individual Republican voters. The Waukesha court was clear that it invalidated the guidance not because it disagreed with WEC’s interpretation of “address” (it was explicit that it had not been asked to and made no findings on that question), but because it found that WEC’s assertion in the 2016 guidance that local election officials could permissibly alter absentee ballot certifications was not permitted by Wisconsin law.

As a result of the Waukesha court’s injunction, however, WEC has withdrawn the 2016 guidance in full—indeed, it no longer can be found on WEC’s website at all. And local election

officials across the state now have no clear guidance as to what components of a witness's address are required on an absentee ballot certificate. Plaintiffs filed this action to ensure that voters are not unlawfully disenfranchised by local clerks misconstruing Wisconsin's Witness Address Requirement. Plaintiffs seek a temporary injunction to ensure that local clerks have clear, uniform guidance as to how to implement the law in the upcoming election, protecting voters from disparate treatment that could very well be the difference between their ballot being counted or being flagged for rejection. Specifically, Plaintiffs ask this Court to declare that (1) the Witness Address Requirement is satisfied so long as an absentee ballot certification accompanying an otherwise-lawful ballot contains sufficient information to reasonably discern the location where the witness may be communicated with, and (2) any ballot meeting this standard must be counted without any further action from the voter. Plaintiffs further ask the Court to enter an injunction directing WEC to instruct municipal and county clerks that they must count otherwise lawful absentee ballots if the witness address on such ballots includes sufficient information from which the clerk can reasonably discern where the clerk may communicate with the witness. This interpretation follows from Wisconsin rules of statutory interpretation and the dictionary definition of "address," is consistent with the interpretation underpinning the portion of the 2016 guidance that the Waukesha court expressly left undisturbed in its September 7 decision, and is needed to ensure that Wisconsin election law is not applied by clerks in a manner that would violate federal law. The requirements for a temporary injunction are met, and the Court should issue an injunction to ensure voters are not wrongfully disenfranchised in the upcoming election.

## BACKGROUND

### A. **WEC's 2016 guidance was enacted to ensure that absentee ballots are properly counted and has been used in every election for the last six years.**

Wisconsin election law requires that absentee ballots be witnessed and that the envelope containing the ballot include a certificate with space for a witness to provide her “address,” an undefined term. *See* Wis. Stat. § 6.87(2). In 2015, the Legislature amended the election law to instruct that “[i]f a certificate is missing the address of a witness, the ballot may not be counted.” Wis. Stat. § 6.87(6d). Prior to the 2016 general election, WEC received “many calls from clerks asking how the new statutory requirement should be interpreted.” Affidavit of Diane Welsh (“Welsh Aff.”) Ex. 1, *Absentee Witness Address Corrections*, WEC, <https://elections.wi.gov/absentee-witness-address-corrections> (archived Aug. 3, 2022).<sup>1</sup> In consultation with the Wisconsin Department of Justice, WEC reviewed the statute and determined two things: (1) a “complete” witness address includes a street number, street name, and municipality; and (2) the statute does not require the rejection of an absentee ballot if the certificate does not include every piece of a “complete” witness address. *Id.* Rather, as the Department of Justice advised, “a reasonable, defensible interpretation of the law would be to allow [] local election officials to add the municipality name to a witness certificate if the information could be reasonably ascertained by the official.” *Id.*

Consistent with these determinations, WEC unanimously issued guidance in October 2016 (the “2016 guidance”) directing local election officials to “take corrective actions in an attempt to remedy a witness address error,” while also clarifying that if these officials were “reasonably able

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<sup>1</sup> This webpage has been removed as a consequence of the Waukesha court’s injunction, but an archived version of the webpage as it appeared on August 3, 2022 has been filed as Exhibit 1 to the Welsh Affidavit.

to discern any missing information from outside sources, [they were] not required to contact the voter before making that correction directly to the absentee certificate envelope.” Welsh Aff. Ex. 2, *Amended: Missing or Insufficient Witness Address on Absentee Certificate Envelopes*, WEC (Oct. 18, 2016). In other words, the 2016 guidance instructed clerks that where an absentee ballot certification contained information sufficient for the clerk to reasonably discern the witness’s complete address, they could make that correction and count the ballot without any further action from the voter. This rule has applied in every election since, including the August 2022 primary.

**B. The Waukesha County Circuit Court’s September 7, 2022 Order enjoined the 2016 guidance, and WEC has not clarified the definition of address in the weeks since.**

On September 7, 2022, Judge Michael Aprahamian of the Waukesha County Circuit Court enjoined WEC’s use of the 2016 guidance. Welsh Aff. Ex. 3, *White v. WEC*, No. 2022-CV-1008, unpub. order (Dkt. 167) (Sept. 7, 2022). The Waukesha court also enjoined WEC from “advising, guiding, instructing, publishing or otherwise communicating information to Wisconsin municipal clerks and local elections officials that clerks or local election officials have the duty or ability to modify or add information to incomplete absentee ballot certifications.” *Id.* ¶8. But the Waukesha court expressly left open the question of what constitutes an adequate address for the purposes of Wis. Stat. § 6.87(2). Welsh Aff. Ex. 4, *White v. WEC*, Tr. of Arg. of Temp. Inj. at 48:20-49:1 (Sept. 7, 2022) (“No one is asking me to determine what can be counted or not be counted. . . . That’s not part of any of the requested relief”). The Waukesha court reiterated this point at a subsequent stay hearing, emphasizing again that its September 7 order did not (and did not intend to) define “address” for the purposes of the Witness Address Requirement. Welsh Aff. Ex. 5, *White v. WEC*, No. 2022-CV-1008, Tr. of Mot. To Stay Hr’g at 46:24-47:6 (Sept. 13, 2022) (“I made no decision regarding what constitutes an address. I have not done anything to overturn what WEC may define as an address. I have done nothing and I’m not asked to interpret what is a missing

address or what is an incomplete address and I've not decided, no one has asked me to decide what happens to absentee ballots that have an incomplete witness address. That's not at issue before me.”).

Nevertheless, the September 7 order resulted in WEC's withdrawal of the 2016 guidance in its entirety, and the practical effect has been to leave the state's more than 1,800 local election officials without clear or uniform guidance as to how to apply the Witness Address Requirement or determine whether it has been satisfied when reviewing ballot envelopes. On September 14, WEC sent out an informal communication advising clerks that the Waukesha court's ruling did not overturn WEC's existing definition of address—“namely, street number, street name, and name of municipality.” But, in the same communication, WEC expressly acknowledged that its definition of address was contained only in “now-invalidated memoranda.” *Temp. Inj. on WEC Guidance re Missing Absentee Witness Address (White v. WEC, 22-CV-1008)*, WEC (Sept. 14, 2022), <https://elections.wi.gov/memo/temporary-injunction-wec-guidance-re-missing-absentee-witness-address-white-v-wisconsin>. WEC has issued no other post-injunction guidance regarding the definition of address.

### LEGAL STANDARD

A circuit court may issue a temporary injunction pursuant to Wis. Stat. § 813.02(1) if the movant satisfies four criteria: “(1) the movant is likely to suffer irreparable harm if a temporary injunction is not issued; (2) the movant has no other adequate remedy at law; (3) a temporary injunction is necessary to preserve the status quo; and (4) the movant has a reasonable probability of success on the merits.” *Milwaukee Deputy Sheriffs' Ass'n v. Milwaukee County*, 2016 WI App 56, ¶20, 370 Wis. 2d 644, 883 N.W.2d 154 (citing *Werner v. A.L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520–21, 259 N.W.2d 310, 313-14 (1977)). The court must also determine that “on

balance equity favors issuing the injunction.” *Carlin Lake Ass’n, Inc. v. Carlin Club Props., LLC*, 2019 WI App 24, ¶44, 387 Wis. 2d 640, 929 N.W.2d 228.

## ARGUMENT

Plaintiffs satisfy each of the elements required for a temporary injunction and the equities similarly weigh in favor of granting Plaintiffs’ requested relief. Both Plaintiffs have standing to bring this suit and are likely to succeed on the merits of their claims. Plaintiffs will suffer irreparable injury without a temporary injunction and their injury cannot be compensated by damages, making a temporary injunction the only available form of redress. A temporary injunction is also necessary to preserve voters’ long-held understanding of the steps they must take to ensure that their absentee ballots are counted. Finally, equitable considerations favor granting the relief Plaintiffs seek because of the very real risk of Wisconsin voters being unlawfully disenfranchised if an injunction does not issue. For these reasons, this Court should grant Plaintiffs’ motion and issue the requested temporary injunction.

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

Plaintiffs are likely to succeed on the merits. As a threshold matter, both Rise and Mr. Rivera have standing to seek the relief requested in the Complaint. Absent immediate relief, Rise will be forced to divert critical resources and will suffer harm to its organizational mission. And as a Wisconsin voter, Mr. Rivera has standing to litigate the proper application of state law to absentee ballots in the state by WEC.

Further, Plaintiffs are likely to prevail with respect to the proper interpretation of “address.” Given the ambiguity of “address” as it appears in the Witness Address Requirement and Wisconsin principles of statutory interpretation, the Court must look to the word’s dictionary definition—“a place where a person may be communicated with,” *Address*, Merriam-Webster, [www.merriam-](http://www.merriam-)



webster.com/dictionary/address (last visited Sept. 27, 2022)—and instruct clerks that, so long as the certification provides enough information to reasonably discern where a witness may be communicated with, an absentee ballot certificate is properly completed and the ballot must be counted. This interpretation is not only the correct reading based on the text and applicable canons, but also necessary to keep Wisconsin election law in compliance with federal law.

**A. Rise has standing to seek declaratory and injunctive relief.**

Rise has standing to seek the relief requested in the Complaint. Standing in Wisconsin is “limited only by prudential considerations” and the standard is “quite liberal.” *Teigen v. WEC*, 2022 WI 64, ¶16, 403 Wis. 2d 607, 976 N.W.2d 519. The pivotal prudential question is whether a plaintiff has a “stake in the case” that will generate “sufficient adversity.” *Id.* ¶17. In declaratory-judgment actions brought under Wis. Stat. § 806.04, this means a plaintiff must identify some “legally protectable interest in the controversy.” *Voters with Facts v. City of Eau Claire*, 2017 WI App 35, ¶15, 376 Wis. 2d 479, 899 N.W.2d 706. A “risk for pecuniary loss” is one such interest. *Lake Country Racquet & Athletic Club, Inc. v. Vill. of Hartland*, 2002 WI App 301, ¶19, 259 Wis. 2d 107, 655 N.W.2d 189.

Insofar as a party has standing, its eligibility for declaratory and injunctive relief follows. Relief under the Uniform Declaratory Judgments Act is available to anyone “whose rights, status or other legal relations are affected by a statute.” Wis. Stat. § 806.04(2). And a party showing entitlement to declaratory relief is entitled to any “necessary or proper” further relief, Wis. Stat. § 806.04(8), including appropriate injunctive relief, *Town of Blooming Grove v. City of Madison*,

275 Wis. 328, 336, 81 N.W.2d 713, 717 (1957) (“Injunctive relief may be granted in aid of a declaratory judgment, where necessary or proper to make the judgment effective.”).

Rise satisfies these liberal standing requirements. Rise’s “stake” in the proper construction of Sections 6.87(2) and (9) arises from its activities and mission in Wisconsin, which are directly impacted by those statutory provisions. As part of its efforts to empower and mobilize students, Rise is conducting ongoing get-out-the-vote efforts around the state. Affidavit of Maxwell Lubin (“Lubin Aff.”) ¶6. It has helped nearly 4,000 Wisconsin students make a plan to vote this year and aims to increase that number as the election approaches. *Id.* Rise therefore has at least two interests sufficient to create standing: (1) an organizational interest in ensuring that the ballots of the voters it has encouraged to vote are counted; and (2) a pecuniary interest in deploying its paid organizing fellows and funds effectively in the coming weeks. Both interests will be threatened if Sections 6.87(2) and (9) are misconstrued by local election officials to reject absentee ballots on dubious technical grounds. Some Rise voters may be disenfranchised, others may be discouraged from voting, and Rise will need to divert its resources to limit the damage. *Id.* ¶¶9–11.

Rise will, for example, need to shift its focus to encouraging voters to vote in-person, and it will also need to spend time and money shifting the materials and information it provides to voters regarding Wisconsin’s witness address requirement. *Id.* ¶¶9–11. Wisconsin courts have long assumed that advocacy organizations like Rise have standing to litigate election laws under the Declaratory Judgments Act based on similar resource-allocation concerns. *See, e.g., Milwaukee Branch of NAACP v. Walker*, 2014 WI 98, ¶11, 357 Wis. 2d 469, 851 N.W.2d 262 (“Voces alleges that ‘Act 23 will force Voces to divert substantial resources away from traditional voter registration and voter turnout efforts in order to educate and assist voters in procuring Act 23–acceptable photo ID.’”).

**B. Mr. Rivera also has standing.**

Mr. Rivera has standing separately and independently from Rise. *Teigen* set out two approaches to voter standing, one in the lead opinion for three members of the Court and the other in Justice Hagedorn's concurrence. *See* 2022 WI 64, ¶¶14–36 (lead opinion); *id.* ¶¶158–167 (Hagedorn, J., concurring). Mr. Rivera has standing under either approach.

Under the lead opinion's approach, a voter seeking to litigate Wisconsin election laws must show two things: (1) "injury in fact" and (2) that state law "protects, recognizes, or regulates the asserted interest" or right. *Id.* ¶20 (quoting *Friends of Black River Forest v. Kohler Co.*, 2022 WI 52, ¶25, 402 Wis. 2d 587, 977 N.W.2d 587). The lead opinion established that administration of elections "in a manner other than that required by law" is an injury in fact to all voters. *Id.* ¶¶21–22 (citing Wis. Stat. § 6.84(1)). ("If the right to vote is to have any meaning at all, elections must be conducted according to law."). As for the "second standing prong," it held that Wisconsin state law unquestionably recognizes and seeks to protect "Wisconsin voters' right to vote." *Id.* ¶29. Under the lead opinion's approach, then, any voter alleging that an election is being administered unlawfully has standing—full stop. *See id.* ¶167 (Hagedorn, J., concurring) (explaining that the lead opinion "suggests it creates broad voter standing against any election official or WEC by any elector for nearly any purported violation of any election law"); *id.* ¶212 (Ann Walsh Bradley, J., dissenting) (explaining that the lead opinion "delineates no bounds whatsoever on who may challenge election laws.").

Justice Hagedorn, for his part, took a narrower approach to the first prong of the inquiry, requiring a more specific showing of actionable injury than voters' mere status as voters. He found such an injury under Wis. Stat. § 5.06 which, in his view, gave Wisconsin voters a right to "have local election officials comply with the law." *Id.* ¶166 (Hagedorn, J., concurring). And he saw the

alleged violation of that right as actionable under Wis. Stat. § 227.40(1), which governs actions for “declaratory judgment as to the validity of [a] rule or guidance document.” *Id.*

Mr. Rivera is a registered Wisconsin voter who plans to vote by absentee ballot in the general election and is concerned that state law will not be properly applied to such ballots. Affidavit of Jason Rivera (“Rivera Aff.”) ¶¶5, 8–9. He faces precisely the same injury—unlawful election administration practices—and has the same protected interest—the right to vote—as the *Teigen* plaintiffs. *See* 2022 WI 64 ¶¶21, 29. He is even suing the same defendant (WEC). He thus has standing under the lead opinion’s approach. Mr. Rivera also satisfies Justice Hagedorn’s stricter approach. Like the *Teigen* plaintiffs, he has the right under Wis. Stat. § 5.06 to have local election officials comply with the law (even if—like the plaintiffs in *Teigen*—he is not proceeding under that statute). Here, that right is actionable under Wis. Stat. § 806.04.

**C. The definition of “address” in the Witness Address Requirement is ambiguous, but cannot mean “complete address.”**

The first step in statutory interpretation is to look to the text. *See Clean Wis., Inc. v. Wis. Dep’t of Nat. Res.*, 2021 WI 72, ¶10, 398 Wis. 2d 433, 961 N.W.2d 611, 615 (“When interpreting statutes, we start with the text, and if its meaning is plain on its face, we stop there.”). The text of Wis. Stat. § 6.87(2) indicates a witness completes a certification on a voter’s absentee ballot envelope by, among other things, listing her “address,” but does not define that term. Wis. Stat. § 6.87(9) identifies certain steps clerks may take upon receiving an absentee ballot “with an improperly completed certificate or with no certificate.” Wis. Stat. § 6.87(9). But the Legislature left undefined the components of a witness’s “address” that are needed for the certificate to be properly completed within the meaning of Section 6.87(9). *See id.*; *see also Trump v. Biden*, 2020 WI 91, ¶49, 394 Wis. 2d 629, 951 N.W.2d 568 (Hagedorn, J., concurring) (noting that § 6.87 is

“silent on precisely what makes an address sufficient.”); Wis. Stat. § 5.02 (Election Code’s list of definitions, which does not include “address”).

The Court thus cannot stop at the plain text to derive the meaning of the term “address.” Importantly, however, the text of the statute *does* make clear that the term “address” for a witness certificate cannot mean “complete address.” This is because several other parts of the Election Code specifically explain which components of an address are required—either by delineating those components or asking for a “complete residential address.” *See, e.g.*, Wis. Stat. § 6.87(2) (requiring that a voter state “I am a resident of the [. . . ward of the] (town)(village) of . . . , or of the . . . aldermanic district in the city of . . . , residing at . . .\* in said city, the county of . . . , state of Wisconsin.”) (alterations in original); Wis. Stat. § 6.34(3)(b)(2) (voter identification must include “[a] current and complete residential address, including a numbered street address, if any, and the name of a municipality”); Wis. Stat. § 6.18 (former Wisconsin resident seeking presidential absentee ballot must specify “[p]resent address,” including “[c]ity” and “[s]tate”); Wis. Stat. § 8.15(5)(b) (candidate seeking ballot access “shall include his or her mailing address” on nomination papers).

As the Court of Appeals recently instructed in another case interpreting the Election Code, “[w]here the legislature uses similar but different terms in a statute, particularly within the same section, we may presume it intended the terms to have different meanings.” *State ex rel. Zignego v. WEC*, 2020 WI App 17, ¶64, 391 Wis. 2d 441, 941 N.W.2d 284 (quoting *State ex rel. DNR v. Wis. Ct. of Appeals*, 2018 WI 25, ¶28, 380 Wis. 2d 354, 909 N.W.2d 114), *aff’d as modified*, 2021 WI 32, 396 Wis. 2d 391, 957 N.W.2d 208; *see also State v. Schmidt*, 2021 WI 65, ¶57, 397 Wis. 2d 758, 960 N.W.2d 888 (“The Presumption of Consistent Usage canon of construction . . . in part dictates that ‘a material variation in terms suggests a variation in meaning.’”) (emphasis added)

(quoting Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 170 (2012)); accord *Estate of Miller v. Storey*, 2017 WI 99, ¶35 n.14, 378 Wis. 2d 358, 903 N.W.2d 759. So too here; the lack of a clear definition for the “address” required from absentee-ballot witnesses under Section 6.87, combined with the fact that the term is specifically defined in different parts of the Election Code, renders “address” in the Witness Address Requirement ambiguous (albeit plainly not a stand-in for “complete address”) and in need of this Court’s interpretation.<sup>2</sup>

**D. This Court should interpret the address requirement to require only sufficient information to determine where the witness “may be communicated with.”**

Given the ambiguity of “address” in the Witness Address Requirement and the fact that its plain meaning cannot be “complete address,” the Court should define “address” according to that term’s ordinary usage. See *Garcia v. Mazda Motor of Am., Inc.*, 2004 WI 93, ¶14, 273 Wis. 2d 612, 682 N.W.2d 365 (“[I]f a word is not defined in a statute, [courts] look next to recognized dictionary definitions to determine the common and ordinary meaning of a word.”). Merriam-Webster defines the word “address” as “a place where a person or organization may be communicated with.” *Address*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/address> (last visited Sept. 27, 2022). This definition is appropriate here and, combined with the Election Code’s explicit requirement that ambiguities be construed in favor of the voter, requires clerks to count any ballot where they can reasonably discern the place where the witness may be communicated with. See Wis. Stat. § 5.01(1) (stating that most portions of the Elections

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<sup>2</sup> The related canon of avoiding surplusage would yield a similar result. See *Zignego*, 2020 WI App 17, ¶66 (discussing the canon). Reading Section 6.87(2)’s reference to witness “address” to mean “complete address” would render the use of similar terms elsewhere in the Election Code surplusage. See, e.g., Wis. Stat. § 6.34(3)(b)(2) (voter identification must include “[a] current and complete residential address, including a numbered street address, if any, and the name of a municipality”). This, too, would violate Wisconsin rules of statutory interpretation.

Code, including Wis. Stat. § 6.87(2) and Wis. Stat. § 6.87(9), must be “construed to give effect to the will of the electors, if that can be ascertained from the proceedings, notwithstanding informality or failure to fully comply with some of [the Elections Code’s] provisions.”).

This interpretation is also supported by Wis. Stat. § 6.87(6d), which (as noted) prompted the issuance of the 2016 guidance and requires that “[i]f a certificate is *missing* the address of a witness, the ballot may not be counted.” (emphasis added). Under this statute, an absentee ballot should be rejected only if the witness address is *absent* from the ballot, not merely if the address does not include certain pieces. So long as a ballot provides information sufficient for a clerk to reasonably discern the place where the witness may be communicated with, an address plainly is not missing. That conclusion is underscored by the fact that the Election Code admonishes that § 6.87(6d)—unlike many other provisions of the Code—must be strictly construed. *See* Wis. Stat. § 6.84(2).

The Department of Justice and WEC reached a similar conclusion when the addition of Wis. Stat. § 6.87(6d) prompted the issuance of the 2016 guidance, although they allowed clerks to add pieces in a manner the Waukesha court found problematic. But the functional result of the 2016 guidance which the Waukesha court did not disturb—that a ballot requires no further action from the voter and must be counted if a clerk can reasonably discern where the witness may be communicated with—is supported as a matter of statutory interpretation. That DOJ and WEC previously arrived at the same place regarding the ultimate question of when Wisconsin law requires the rejection of a ballot as it relates to the Witness Address Requirement further bolsters the conclusion that Plaintiffs are likely to succeed on the merits.

Each of these sources—the plain meaning of “address,” its statutory context, common usage, the Election Code’s presumption in favor of a voters’ intent, other statutes concerning

witness addresses, and prior guidance from the Department of Justice and WEC—makes clear that where an otherwise lawful ballot contains a witness certificate with sufficient information to reasonably discern the place where the witness may be communicated with, that ballot must be counted. Partial addresses that do just that would satisfy Wis. Stat. § 6.87(2), and a certificate with sufficient information that a clerk can reasonably discern where a witness may be communicated with is properly completed for the purposes of Section 6.87(9).

**E. Rejecting absentee ballots because the witness address is incomplete would raise serious concerns under the federal Civil Rights Act’s materiality provision.**

Plaintiffs’ interpretation of the Witness Address Requirement is also necessary to ensure that Wisconsin election law does not violate federal law. Section 101 of the Civil Rights Act provides that

[n]o person acting under color of law shall . . . deny the right of any individual to vote in any election because of 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) (emphasis added). This so-called “materiality provision” was “created to ensure qualified voters were not disenfranchised by meaningless requirements that prevented eligible voters from casting their ballots but had nothing to do with determining one’s qualifications to vote.” *Migliori v. Cohen*, 36 F.4th 153, 164 (3d Cir. 2022).

As one federal court has explained, there are two types of nonmaterial omissions under this provision: “1) failure to provide information, such as race or social security number, that is not directly relevant to the question of eligibility; and 2) failure to follow needlessly technical instructions, such as the color of ink to use in filling out the form.” *Diaz v. Cobb*, 435 F. Supp. 2d 1206, 1213 (S.D. Fla. 2006); *see also, e.g., Migliori*, 36 F.4th at 156–57 (concluding that “a date on the outside of a mail-in ballot, required under state law,” is “immaterial to a voter’s



qualifications and eligibility”), *pet. for cert. filed, Ritter v. Migliori*, No. 22-30 (U.S. July 7, 2022); *Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1309 (N.D. Ga. 2018) (holding the requirement of the elector’s date of birth on absentee ballot materials to be immaterial); *Wash. Ass’n of Churches v. Reed*, 492 F. Supp. 2d 1264, 1270 (W.D. Wash. 2006) (holding that the required disclosure of social security numbers was not “material” because it did not change eligibility to vote); *cf. Diaz*, 435 F. Supp. 2d at 1213 (holding questions regarding mental capacity and felony convictions to be material because both were related to qualifications for voting).

A complete witness address is not required to be qualified to vote in Wisconsin. The phrase “qualified under State law to vote” refers to a state’s statutory or constitutional requirements for voting. *See Reed*, 492 F. Supp. 2d at 1270 (looking to the state constitution’s voter-eligibility requirements). Under Wisconsin law, a person is eligible to vote if they are (1) a U.S. citizen, (2) age 18 or older, and (3) “a resident of an election district in this state.” Wis. Const. art. III, § 1; *see also* Wis. Stat. § 6.02. A person is eligible to vote absentee if they are (1) unable or unwilling to appear at their polling place for any reason or (2) an otherwise qualified elector who has moved within the state to a different ward or municipality later than 28 days prior to an election. Wis. Stat. § 6.85. An absentee voter must complete a certificate attesting to their eligibility to vote absentee under § 6.85 before a witness who is an adult U.S. citizen and who is not a candidate on the ballot. *Id.* Wis. Stat. § 6.87(4)(b)(1).

Because the complete address of the witness who certifies a voter’s absentee ballot is irrelevant to these requirements, it is a nonmaterial requirement. Any interpretation of Wisconsin law requiring a complete witness address to count an absentee ballot would thus be preempted by federal law. *See Town of Delafield v. Cent. Transp. Kriewaldt*, 2020 WI 61, ¶5, 392 Wis. 2d 427,

944 N.W.2d 819 (explaining that, under Supremacy Clause of U.S. Constitution, “state law that conflicts with federal law is without effect; it is preempted” (cleaned up)).<sup>3</sup>

Requiring a complete witness address also cannot be justified by a state interest in fraud prevention. To begin, a purported interest in fraud prevention does not render a requirement “material” under the materiality provision. *See Migliori*, 36 F.4th at 163 (“Fraud deterrence and prevention are at best tangentially related to determining whether someone is qualified to vote.”); *Schwier v. Cox*, 412 F. Supp. 2d 1266, 1276 (N.D. Ga. 2005) (finding that role of mandatory disclosure of social security number in preventing fraud did not render requirement material), *aff’d*, 439 F.3d 1285 (11th Cir. 2006); *Reed*, 492 F. Supp. 2d at 1270 (similar). Even if it did, it is unclear how a *complete* (as opposed to *partial*) witness address would materially advance anti-fraud objectives. *See Fla. State Conf. of NAACP v. Browning*, 522 F.3d 1153, 1174 (11th Cir. 2008) (suggesting that “materiality” requires at least “minimal relevance,” if not “outcome-determinative” effect). Indeed, the only conceivable purpose served by the witness-address requirement—identifying the witness—is vindicated by simply requiring information sufficient to reasonably discern where a voter can be communicated with.

In short, an interpretation of Wisconsin law requiring local election officials to reject an absentee ballot because it has a partial witness address would run afoul of federal law because a complete witness address is not material to establishing a Wisconsin voter’s eligibility to vote

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<sup>3</sup> Although the Election Code distinguishes generally between in-person and absentee voting, *see* Wis. Stat. § 6.84(1), there can be little doubt that absentee ballots and their accompanying envelopes and certificates—as “record[s] or paper[s] relating to [an] . . . act requisite to voting,” 52 U.S.C. § 10101(a)(2)(B)—qualify for the materiality provision’s protections, *see, e.g., Democratic Cong. Campaign Comm. v. Kosinski*, No. 22-CV-1029, 2022 WL 2712882, at \*21 (S.D.N.Y. July 13, 2022) (noting that “courts have deemed the Materiality Provision to be applicable to errors such as missing handwritten dates on absentee ballot envelopes” and citing *Migliori*, 36 F.4th at 163–64).

absentee. This provides further support for interpreting the Witness Address Requirement to require only information sufficient to reasonably discern where a voter may be communicated with. That Plaintiffs' interpretation keeps Wisconsin election law in accord with federal law further demonstrates Plaintiffs' likelihood of success on the merits.

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

A temporary injunction is necessary because, without immediate relief, Plaintiffs are at risk of suffering irreparable injury. *See Werner v. A. L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520, 259 N.W.2d 310, 314 (1977) (requirement of "irreparable injury" is met by showing that without a temporary injunction, the permanent injunction sought would be "rendered futile").

For its part, Rise identifies two irreparable injuries: (1) rejection of the ballots of its target voters and (2) misallocation of its limited resources. Rise has devoted considerable resources to its get-out-the-vote efforts in Wisconsin. Its staff and volunteers have identified thousands of young voters around the state and helped those voters make plans to vote in the general election. Lubin Aff. ¶6. Rise's records indicate that more than 1,400 of those voters have voted by absentee ballot in a past election. *Id.* ¶7. Many will do so again this cycle. *Id.* ¶9.

Rise now faces a grave risk that many of its target voters will have their absentee ballots rejected, undermining its long-planned GOTV efforts. Wisconsin's statutory deadline to begin distributing absentee ballots has come and gone. *See* Wis. Stat. § 7.15(1)(cm). Many of Rise's voters will return general-election ballots in the coming days; some may have done so already. Without further action by Rise, those voters will rely on Rise's pre-September 7 understanding of the address requirements for absentee ballot witnessing. Clerks who interpret "address" to require, for instance, a zip code are thus likely to reject the ballots of some of Rise's target voters under Wis. Stat. §§ 6.87(2), (9). A post-election permanent injunction entered after such ballots already

have been rejected will come too late to prevent the harm. *See Martin*, 347 F. Supp. 3d at 1310 (“[I]t is axiomatic that there is no post hoc remedy for a violation of the right to vote.”). Only a temporary injunction will stave off irreparable injury to those voters and, by extension, to Rise.

Rise’s efforts to help its target voters navigate the current state of uncertainty will also result in misallocation of resources and pecuniary harm. Rise has limited funds and staff time, and the election is just six weeks away. Absent a temporary injunction to preserve the status quo, Rise must take immediate steps to redirect funds and its organizing fellows’ time toward providing supplemental instruction to absentee voters who may already be voting. *Lubin Aff.* ¶¶10–11. Those funds and staff hours will not be recoverable once expended. A temporary injunction is necessary to settle Rise’s short-term expectations.

Mr. Rivera also faces potential irreparable injury as a registered voter intending to vote absentee in the November election. *Rivera Aff.* ¶¶5–6. Mr. Rivera will suffer irreparable injury if Wisconsin elections are not administered in a fair manner because absentee votes are wrongfully rejected. A temporary injunction is the only remedy available to protect Mr. Rivera from this grave harm.

More generally—but no less importantly—only a temporary injunction can ensure that a large number of Wisconsin voters are not unlawfully disenfranchised as a result of incorrect and inconsistent interpretation of Wisconsin law by local election officials across the state. Evidence from the previous general election suggests that many Wisconsin voters will include only some components of a complete witness address on the absentee ballot certificate. Last fall the Legislative Audit Bureau released Report 21-19 on Elections Administration, which included a review of a random sample of 14,710 absentee ballot certificates cast from 29 municipalities in the November 2020 general election. *See State of Wis. Legis. Audit Bureau, Elections Admin.*, Rep.

21-19 at 42 (Oct. 2021), available at <https://legis.wisconsin.gov/lab/media/3288/21-19full.pdf>. This review showed that 1,022 certificates (6.9 percent) in 28 municipalities had partial witness addresses, while only 15 certificates (0.1 percent) in 10 municipalities were missing a witness address in its entirety. *Id.* at 42-43. The review further showed that 799 certificates (5.4 percent) did not include a zip code and 364 certificates (2.5 percent) did not include a state. *Id.* at 42. Without guidance providing clerks with a straightforward definition of witness address, a significant percentage of absentee voters in Wisconsin face the risk of wrongful disenfranchisement.

### **III. Plaintiffs have no adequate remedy at law.**

An injury has no adequate remedy at law if it “cannot be compensated by damages.” *Kohlbeck v. Reliance Const. Co.*, 2002 WI App 142, ¶ 13, 256 Wis. 2d 235, 246, 647 N.W.2d 277. Here, Rise’s injuries include frustration of its goals related to the upcoming general election, disqualification of its target voters’ ballots, and diversion of its institutional resources. Mr. Rivera faces harm to his rights as a Wisconsin voter should the upcoming election be administered unfairly. Such injuries cannot be redressed by money damages after the election is over.

### **IV. A temporary injunction is required to preserve the status quo.**

A temporary injunction is also needed to preserve voters’ long-held understanding of the steps they must take to ensure that their absentee ballots are counted. In every Wisconsin election from October 2016 through this year’s August 9 partisan primary, absentee voters had every reason to think that their ballots would be counted so long as the witness certificate contained address information sufficient to convey where the witness may be communicated with. That understanding should be preserved. The Waukesha court’s September 7 decision changed only the law governing the behavior of Wisconsin election officials, not voters or witnesses. It did not

purport to alter the underlying definition of “address.” Welsh Aff. Ex. 3 ¶¶6–9; Welsh Aff. Ex. 4 at 48:20-49:1. Voters do not yet have reason to doubt that the commonsense construction of that term adopted in the 2016 guidance has changed.

Without a temporary injunction, though, voters’ settled understanding of the term “address” is in jeopardy. Local election officials may soon fill the void left by WEC’s inaction by requiring a complete address. As a consequence, voters who cast absentee ballots in the August 9 primary may have their ballots rejected in November even though their witness certificates contain the same information in both elections. A temporary injunction is necessary and appropriate to prevent this result.

**V. The equities favor granting Plaintiffs’ requested relief.**

Finally, equitable considerations weigh strongly in favor of granting the declaratory and injunctive relief Plaintiffs seek. Voters have relied on WEC’s 2016 guidance for six years, including in the recent August 2022 primary, and WEC’s 2016 guidance reflects a reasonable interpretation of the Witness Address Requirement consistent with Wisconsin principles of statutory interpretation. Absent this Court’s intervention, voters who properly submitted their absentee ballots risk having those ballots rejected not because of any material question regarding their eligibility, but instead due to a trivial omission such as a missing zip code. This unwarranted disenfranchisement of lawful voters is an injury without redress, as “there is no post hoc remedy for a violation of the right to vote.” *Martin*, 347 F. Supp. 3d at 1310.

Rather than permit untold numbers of Wisconsinites to suffer the irreparable harm of unjustified disenfranchisement, this Court should protect the right to vote against distortions of the law. The Court can do so by issuing an order declaring that the Witness Address Requirement requires that otherwise lawful absentee ballots must be counted if the witness address includes

sufficient information from which the clerk can reasonably discern where the witness may be communicated with, and by issuing a temporary injunction directing WEC to provide local election officials with that interpretation. The equities strongly favor such a result.

### CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that this Court declare that under Wis. Stat. §§ 6.87(2) and 6.87(9), (1) an “address” on a witness certificate requires only the information necessary to reasonably discern the location where the witness may be communicated with; and (2) an absentee ballot containing such a witness address is not “improperly completed” under Wis. Stat. § 6.87(9) and must be counted if it is otherwise lawful. Plaintiffs further request that the Court issue a temporary injunction requiring WEC to instruct municipal and county clerks accordingly.

DATED this 28th day of September, 2022.

Respectfully submitted,

Electronically signed by Diane M. Welsh

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