STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

NANCY KORMANIK,

Plaintiff-Respondent,

vs.

WISCONSIN ELECTIONS COMMISSION,

Defendant,

DEMOCRATIC NATIONAL COMMITTEE,

Intervenor-Petitioner,

RISE, INC.,

Intervenor-Petitioner.

Appeal Nos.
22AP001720 LV &
22AP001727 LV

Circuit Court Case No.
2022-CV-1395

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF RISE, INC.'S PETITION FOR LEAVE TO APPEAL AND MOTION FOR STAY

PINES BACH LLP
Diane M. Welsh, SBN 1030940
122 W. Washington Ave, Suite 900
Madison, WI 53703

Telephone: (608) 251-0101
Facsimile: (608) 251-2883
dwelsh@pinesbach.com

ELIAS LAW GROUP LLP
Graham W. White*
Richard A. Medina*
Samuel T. Ward-Packard, SBN 1128890
10 G Street NE, Suite 600
Washington, D.C. 20002
Telephone: (202) 968-4652
gwhite@elias.law
rmedina@elias.law
swardpackard@elias.law

ALI & LOCKWOOD LLP
Kathryn Ali*
Elizabeth Lockwood*
ALI & LOCKWOOD LLP
300 New Jersey Avenue NW, Suite 900
Washington, D.C. 20001
Telephone: (202) 651-2475
katie.ali@alilockwood.com
liz.lockwood@alilockwood.com

Attorneys for Intervenor-Petitioner Rise, Inc.

*Motion for admission *pro hac vice* granted by the circuit court.

TABLE OF CONTENTS

INTRODUCTION

On October 10, the Court directed the parties to submit any additional materials regarding Intervenor-Defendant-Petitioner Rise, Inc.'s ("Rise") pending petition for leave to appeal and motion for stay by 12:00 p.m. on October 12, and to otherwise update the Court on the status of relevant transcripts. The October 5, 2022 Waukesha County Circuit Court hearing transcript was provided to the parties on Sunday, October 9—after Rise filed its petition and stay motion. The transcript is included in Petitioner Rise's amended appendix, filed concurrently with this memorandum. Review of that transcript underscores the numerous ways the circuit court abused its discretion in issuing a temporary injunction that upends the status quo in the midst of an ongoing election based on a misinterpretation of Wisconsin law, and without making the predicate findings necessary to justify this extraordinary relief. Rise accordingly submits this supplemental brief to highlight why this Court's immediate review is necessary, and why the stay should be extended.

ARGUMENT

The October 5, 2022 hearing transcript bolsters Rise's pending petition for interlocutory appeal and motion for a stay, highlighting at least five ways that the circuit court abused its discretion. *First*, the transcript establishes that Respondent unduly delayed in bringing her lawsuit even on the facts as the

circuit court found them. *Second*, the transcript evinces no finding of irreparable harm or even a plausible basis for such a finding. *Third*, the court's interpretation of the "status quo" for the purposes of issuing a temporary injunction was incorrect as a matter of law. *Fourth*, the transcript confirms that the circuit court's temporary injunction order went well beyond the scope of its own legal conclusions. And *fifth*, the court failed to conduct a proper analysis of Defendants' and Defendant-Intervenors' motion for stay. Each of these errors independently merits review and reversal.

I. The circuit court's factual findings show that Respondent unduly delayed in bringing this lawsuit.

The circuit court made a factual finding that the key event putting voters and officials on notice of the challenged guidance was WEC's August 2, 2022 press release. Transcript; App. 176. As a threshold matter, the idea that a policy on the books since 2014 became public knowledge only by virtue of a 2022 press release is highly suspect. But even accepting that finding, Respondent inexplicably delayed in bringing this action for nearly two months—until after the August election had ended and the November election began. As the circuit court repeatedly observed, absentee voting was already underway when Respondent filed suit. *E.g.*, Transcript; App. 178. Respondent has never explained her delay. *See, e.g.*, Rise Opposition to TI; App. 080. And because the Wisconsin Supreme Court has repeatedly (and recently)

admonished that mid-election emergency relief is not available to plaintiffs who "unduly delay[] in seeking redress"—*see* Int.-Pet. Rise, Inc. Pet. for Leave to Appeal at 13, Case No. 2022 AP1727 LV (Oct. 10, 2022) (citing *Hawkins v. WEC*, 2020 WI 75, ¶5 n.1, 393 Wis. 2d 629, 632, 948 N.W. 2d 877, 879)—the circuit court's decision to grant a temporary injunction in spite of Respondent's delay was an abuse of discretion.

II. The transcript shows that the circuit court lacked any basis to find irreparable injury.

The transcript also highlights that there was no foundation for the circuit court's conclusion that Respondent faced irreparable harm. The sole basis of that finding was Respondent's vague, unsubstantiated allegation that her vote might be "diluted" by "fraud." Transcript; App. 178, 185-86. But Respondent presented no evidence from which the court could conclude that *the challenged guidance* would contribute to fraud, or that "electors are at risk of having their vote changed by someone else"—the only harm Respondent ever alleged. *See* Plntf Brief ISO TI; App. 050. All of this provides a second, independent ground to hold that the circuit court's order was an abuse of discretion—among other things, a circuit court's factual findings must be supported by facts in the record to warrant the extraordinary relief of a mid-election injunction. The order here was not.

III. The circuit court analyzed the incorrect status quo.

The circuit court issued its temporary injunction after finding that "the status quo is our statutory scheme created by the legislature." Transcript; App. 188. That is wrong as a matter of law. The status quo is "the last uncontested status which preceded the pending controversy." *Westinghouse Elec. Corp. v. Free Sewing Mach. Co.*, 256 F.2d 806, 808 (7th Cir. 1958). Respondent challenged guidance issued by WEC in August 2022 and sought an injunction to return to the status quo "that existed before WEC" issued that guidance. Plnt Brief ISO TI; App. 058. But as the court itself recognized, this August 2022 guidance merely reiterated guidance that WEC had issued for years. App. 188; *see also* Rise Brief in Opposition to TI; App. 069-070 (discussing WEC's preceding and consistent guidance).

This longstanding WEC guidance was, therefore, the "last uncontested status which preceded the pending controversy," and should have been the baseline the circuit court used in assessing whether a temporary injunction was appropriate. And given that it is blackletter law that a temporary injunction may be issued "only when necessary to *preserve* the status quo," *Werner v. A.L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520 259 N.W.2d 310, 314 (1977) (emphasis added), the circuit court's issuance of a temporary injunction that radically altered the status quo was a clear abuse of discretion. *See, e.g.*, *Codept, Inc. v. More-Way N.*

Corp., 23 Wis. 2d 165, 173, 127 N.W.2d 29 (1964) ("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."); *Pure Milk Prods. Co-op. v. Nat'l Farmers Org.*, 64 Wis. 2d 241, 251, 219 N.W.2d 564, 570 (1974) (similar).

IV. The circuit court's temporary injunction order is overly broad and exceeds the scope of the court's findings and legal conclusions.

The hearing transcript demonstrates that the circuit court further abused its discretion by issuing a temporary injunction that reaches considerably further than the court's own findings and legal conclusions permit. This is so in at least four ways.

First, the court expressly acknowledged "that parts of the guidance are lawful." Transcript: App. 198-200. Yet the court's injunction requires WEC to withdraw it in full. As counsel for WEC explained, a blanket injunction like this makes it "very difficult for the commission to understand . . . what it can and cannot do" and chills any effort by WEC to issue amended guidance that "could be subject to contempt." Transcript; App. 200.

Second, the court acknowledged (correctly) that Wisconsin law provides no basis for distinguishing among the reasons a voter may spoil her ballot. Transcript; App. 176 ("The various briefs opposed to the injunction are correct when they assert that there is not a limitation on the reason for a voter spoiling their ballot.").

Yet the court disregarded that critical finding and enjoined even the portions of the WEC guidance that make clear that a voter may spoil her ballot because she changes her mind about whom to vote for. Order for TI (Oct. 7, 2022); App. 021.

Third, the circuit court's conclusion about *when* a voter may spoil a ballot or request that it be spoiled were too conclusory to support the injunction. The court concluded that the "statutes are specific about when and by whom an absentee ballot may be spoiled," and that "only the elector may spoil it and *they must do it either before it's submitted or as they are returning it*." Transcript; App. 184 (emphasis added). But the court did not cite any statute or other authority to support that crucial finding. Nor could it have—no such statute exists in the Elections Code. The circuit court therefore lacked any basis to enjoin WEC guidance related to the timing of spoiling requests.

Finally, the circuit court concluded that the term "damaged" in Wis. Stat. § 6.86(5) refers to instances when the ballot is "damaged in the mail" en route to the clerk.[1] Yet in the very same

[1] Transcript; App. 179 ("Putting in both words suggests that damaged could be that something got damaged in the mail, that it's bent or torn, you name it, or something obscure, it got wet. Spoiled implies more that the elector made a mistake and they want to spoil their ballot and do it again. So I don't think the fact that the legislature uses both of those words means that they intended from the language of the statute that voters could later on after they submit their ballot contact the clerk and say get rid of that one and send me a new one.").

discussion, the court also suggested that Wis. Stat. § 6.86(5) does not permit voters to replace a ballot that was damaged—unbeknownst to them—in such a way.[2] And the court's injunction forces WEC to withdraw lawful guidance that permits voters to correct a damaged ballot after it has been received by the clerk. *See* App. 021 (requiring WEC guidance be withdrawn); App. 016 (specifying that a voter may be issued a new ballot after correcting a "damaged ballot"). That remedy is neither logically consistent with the court's own reasoning nor warranted on any other ground.

V. The court failed to conduct a *de novo* analysis of the motions to stay.

The transcript also shows that the court's analysis of Defendants' and Defendant-Intervenors' motion to stay was "flawed" because it "simply input its own judgment on the merits of the case" to conclude "that a stay is not warranted." *Waity v. LeMahieu*, 2022 WI 6, ¶ 52, 400 Wis. 2d 356, 389, 969 N.W.2d 263, 279 (granting a stay pending appeal on this basis and emphasizing that "[t]he relevant inquiry is whether the movant made a strong showing of success *on appeal*") (emphasis added). *Waity* demands that courts consider four factors that "are not prerequisites but

[2] Transcript; App. 181 ("If we have a process that voters can, after submitting [a ballot] to the clerk, say hang on a second, send me a new one and get rid of that old one, now the clerks have to locate the originally cast one, take steps to destroy it and send out a new one. I can't help but believe if the legislature intended to put that burden on the clerks, that they would have said so in the statutes.").

rather are interrelated considerations that must be balanced together." *Id.*, 2022 WI 6, ¶ 49 (quotation omitted). This includes not only whether the movant is "likely to succeed on the merits of the appeal," but also whether the movant is likely to suffer irreparable injury absent a stay, "shows that no substantial harm will come to other interested parties," and "shows that a stay will do no harm to the public interest." *Id.*

Here, the circuit court ignored that clear directive and considered just one factor—likelihood of success on the merits—without balancing it against any of the others. Transcript; App. 213-14. And, even worse, in considering that factor, the circuit court failed to "consider the standard of review, along with the possibility that appellate courts may reasonably disagree with its legal analysis." *Waity*, 2022 WI 6, ¶ 53. "For questions of statutory interpretation, as are presented in this case, appellate courts consider the issues de novo." *Id.* As in *Waity*, had the circuit court "considered how other reasonable jurists on appeal may have interpreted the relevant law," "its stay analysis would have been different." *Id. See also id.* ¶ 52 ("[W]henever a party is seeking a stay, there has already been a determination at the trial level adverse to the moving party. If the circuit court were asked to merely repeat and reapply legal conclusions already made, the first factor would rarely if ever side in favor of the movant.").

For all of the reasons stated in Rise's motion for stay, Int.-Pet. Rise, Inc. Brief ISO Stay, Case No. 2022 AP1727 LV (Oct. 10, 2022), a stay continues to be warranted while this appeal is pending.

CONCLUSION

For the foregoing reasons, Rise respectfully requests that the Court grant the petition for interlocutory review and extend the stay currently in place pending disposition of that review and any resulting appeal.

Dated: October 12, 2022

Respectfully submitted,

By: *Electronically signed by Diane M. Welsh*

Diane M. Welsh, SBN 1030940
PINES BACH LLP
122 W. Washington Ave, Suite 900
Madison, WI 53703
Telephone: (608) 251-0101
Facsimile: (608) 251-2883
dwelsh@pinesbach.com

Graham W. White*
Richard A. Medina*
Samuel T. Ward-Packard, SBN 1128890
ELIAS LAW GROUP LLP
10 G Street NE, Suite 600
Washington, D.C. 20002
Telephone: (202) 968-4652
gwhite@elias.law
rmedina@elias.law
swardpackard@elias.law

Kathryn Ali*
Elizabeth Lockwood*
ALI & LOCKWOOD LLP
300 New Jersey Avenue NW, Suite 900
Washington, D.C. 20001
Telephone: (202) 651-2475

katie.ali@alilockwood.com
liz.lockwood@alilockwood.com

Attorneys for Intervenor-Petitioner Rise, Inc.

**Motion for Admission Pro Hac Vice granted in the circuit court.*

CERTIFICATION

I hereby certify that this Supplemental Memorandum confirms to the rules contained in WIS. STAT. Section 809.19(8) and is produced with proportional serif font. The length of this supporting memorandum is 1,839 words.

Dated: October 12, 2022

Respectfully submitted,

By: *Electronically signed by Diane M. Welsh*

Diane M. Welsh, SBN 1030940
PINES BACH LLP
122 W. Washington Ave, Suite 900
Madison, WI 53703
Telephone: (608) 251-0101
Facsimile: (608) 251-2883
dwelsh@pinesbach.com

Graham W. White*
Richard A. Medina*
Samuel T. Ward-Packard, SBN 1128890
ELIAS LAW GROUP LLP
10 G Street NE, Suite 600
Washington, D.C. 20002
Telephone: (202) 968-4652
gwhite@elias.law
rmedina@elias.law
swardpackard@elias.law

Kathryn Ali*
Elizabeth Lockwood*
ALI & LOCKWOOD LLP
300 New Jersey Avenue NW, Suite 900
Washington, D.C. 20001
Telephone: (202) 651-2475
katie.ali@alilockwood.com
liz.lockwood@alilockwood.com

Attorneys for Intervenor-Petitioner Rise, Inc.

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