STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 6

LEAGUE OF WOMEN VOTERS
OF WISCONSIN,

Plaintiff,

v.

Case No. 2022CV2472
Code: 30701

WISCONSIN ELECTIONS COMMISSION,

Declaratory Judgment

Defendant.

**RESPONSE OF LEAGUE OF WOMEN VOTERS OF WISCONSIN TO SUA SPONTE REVIEW FOR POSSIBLE CONSOLIDATION**



Plaintiff League of Women Voters of Wisconsin ("the League") submits this response to the Court's notice of *sua sponte* review for consolidation of this case with *Rise, Inc. v. Wisconsin Elections Commission*, No. 22CV2246 (Dane Cnty. Cir. Ct.), under Wis. Stat. § 805.05(1)(b). As explained below, the League opposes consolidation at this point as unwarranted, untimely, and unduly prejudicial.

**RELEVANT STATUTORY AUTHORITY**

Wisconsin law authorizes consolidation of "actions which might have been brought as a single action under s. 803.04 [that] are pending before different courts." Wis. Stat. § 805.05(1)(b). Such consolidation may follow an on-the-record "conference involving both judges and all counsel," and requires "the joint written order of the transferring court and the court to which the action is transferred." *Id.* For its part, the relevant provision in Wis. Stat. § 803.04 provides that multiple parties "may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the

alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action." Wis. Stat. § 803.04(1).

## ARGUMENT

The League opposes consolidation at this point as unwarranted, untimely, and unduly prejudicial.

### I. Consolidation of these cases is unwarranted.

Consolidation of these cases is unwarranted: they address distinct issues; they are brought on behalf of separate plaintiffs; and they neither "aris[e] out of the same transaction, occurrence, or series of transactions or occurrences" nor include "any question of law or fact common to all" parties. Wis. Stat. § 803.04(1).



#### A. *League* presents for adjudication distinct legal issues not before the Court in *Rise*, and the legal issues before the Court in *Rise* are not before the Court in *League*.

*Rise* focuses on one narrow question: What constitutes an address for purposes of a witness certification under Wis. Stat. § 6.87(2)? As Judge Colás noted in denying the *Rise* plaintiffs' moton for temporary injunction, this question has been answered by the Wisconsin Elections Commission ("WEC") in current guidance and communications to local election officials. *Rise, Inc. v. Wis. Elections Comm'n*, No. 22CV2246 (Dane Cnty. Cir. Cct. 7, 2022). The Legislature agrees with WEC. Only the *Rise* plaintiffs continue to advocate for a less stringent definition of "address." *Id.* (Pl.'s Br. in Support of Summ. J., Oct. 17, 2022) Not only has the League not sought to get involved in *Rise*, it has explicitly ***disclaimed*** any interest in the issue presented by that case (Dkt. 10, First Am. Compl., at 3 n.3), and it does not dispute

WEC's definition of "address" (Dkt. 46, Pl. Reply Br., at 2 n.2). There is no adversity between the League and WEC (or the Legislature) on the specific issue to be adjudicated, and that question is not before the Court in *League*.

By contrast, the *League* case focuses on wholly different legal questions, statutory provisions, and bodies of law: What does it mean for an address to be "missing" under Wis. Stat. § 6.87(6d)? Is Wis. Stat. § 6.87(6d) preempted by the federal Civil Rights Act of 1964's materiality provision such that ballots with immaterial witness-address defects or omissions must be counted? And does procedural due process under the Fourteenth Amendment require municipal clerks to notify voters if the certifications accompanying their absentee ballots are deficient in a way that will lead to those ballots not being counted? WEC guidance does not address any of the League's questions, all of which arose for the first time as a consequence of the judgment in *White v. Wisconsin Elections Commission*, No. 22CV1008 (Waukesha Cnty. Cir. Ct.) (Order Oct. 3, 2022). The League's claims involve not only questions of Wisconsin statutory interpretation, but also substantial questions of federal statutory and constitutional law. While the League has asserted federal claims for relief, the *Rise* plaintiffs have not.



The relevant circuit courts understand that just because claims in two separate lawsuits involve related statutes, they are not necessarily part of the same action such that they should be adjudicated together. Judge Aprahamian recognized that when he made crystal clear in *White* that he was not deciding the legal issue that the *Rise* plaintiffs put before Judge Colás. *White*, No. 22CV1008 (Waukesha Cnty. Cir.

Ct.) (Oct. 3, 2022 Order Granting Final Judgment at 3 ("Nothing herein is intended, nor shall be construed, to enjoin WEC from issuing or distributing its guidance regarding the definition of 'address' as used in Wis. Stat. § 6.87[.]")); *see also White*, No. 22CV1008 (Waukesha Cnty. Cir. Ct.) (Sept. 13, 2022 Hr'g Tr. at 51:19-52:2, 53:6-11) (Second Lenz Aff., ¶2, Ex. 1). And, just as clearly, Judge Colás recognized that the issues before him did not merit transfer of *Rise* to Waukesha County to be adjudicated with the *White* case. *Rise, Inc.*, No. 22CV2446 (docket entry accompanying October 17, 2022 scheduling conference). The same is equally true here. The respective plaintiffs in the *Rise* and *League* cases presented discrete legal claims, which should be adjudicated separately.

One may also glean that the legal issues in the two cases are distinct by considering whether the outcome of each case would impact the issues in the other case. Issuing declaratory relief fixing the definition of "address" would not resolve the question of whether and when a witness's address is "missing" on an absentee-ballot certification. Were Judge Colás to rule against the *Rise* plaintiffs and determine that WEC's definition of "address" is correct, that ruling would have no bearing on the issues before the Court in *League*. Similarly, regardless of whether Judge Trammell were to rule for or against the League with respect to when a witness's address is "missing" on an absentee-ballot certification, that would not determine how Judge Colás rules on the definition of "address" in *Rise*. Furthermore, a ruling in the *Rise* plaintiffs' favor would not resolve the League's federal Civil Rights Act and due process claims. The League's federal challenges seek declaratory and injunctive relief

to preclude the rejection of three specifically defined categories of ballots and to ensure notice to all absentee voters with potentially dispositive witness-address defects. The issue of notice to voters is not raised at all in *Rise*.

### B. *League* and *Rise* involve different parties, none of whom have sought to become involved in each other's disputes.

These two cases also do not share an identity of parties. The actions of various parties across each of the relevant cases highlight this fact, and its importance. The *White* plaintiffs have sought to intervene in *Rise* and tried to consolidate *Rise* into the *White* litigation, while they have made no effort on either front in *League*. The Legislature and WEC are both parties in both cases, but neither has moved to consolidate.[1] The City of Madison Clerk is a defendant in *Rise* but has made no effort to intervene in *League*. The U.S. Department of Justice filed a statement of interest in *League* to elucidate its views on the materiality provision of the Civil Rights Act of 1964, but saw no need to do so in *Rise*, where there are no federal claims. All of this makes perfect sense—while both cases implicate subsections of Wis. Stat. § 6.87, they involve completely different subsections, terms, claims, and prayers for relief.



### C. *League* and *Rise* do not arise out of the same transaction, occurrence, or series of transactions or occurrences; nor do they include any question of law or fact common to all parties.

Wisconsin does not have much precedent on consolidation, but two cases decided within a matter of months by our Supreme Court encapsulate why the *Rise*

[1] WEC raised the prospect of consolidation in a letter to Judge Colás filed on October 6, 2022, and mentioned it again at after oral argument on October 7, 2022, but has not filed a motion to effectuate consolidation and never raised the issue with Judge Trammell.

and *League* matters should not be consolidated.[2] In *Winnek v. Moore*, the Supreme Court affirmed the trial court's decision to consolidate two contract cases because both "grew out of the same transactions and depended upon substantially the same evidence." 164 Wis. 53, 54, 159 N.W. 558 (1916). Just months earlier, however, in *Charles A. Stickney Co. v. Lynch*, the same court rejected the notion that two cases should have been consolidated, recognizing that "they were brought by different parties and related, in some respects, to essentially different controversies." 163 Wis. at 357. *Rise* and *League* address "essentially different controversies." *Id.* They are like the actions addressed in *Charles A. Stickney Co.*, not like those in *Winnek*. It follows that consolidation is not appropriate here. These cases involve different controversies among different parties, which can (and should) be resolved independent of each other.



## II. Consolidation of *League* and *Rise* would be untimely.

Consideration of the timing of adjudication of the different issues presented by *League* and *Rise* also weighs heavily against consolidation. After the *Rise* and *League* cases were filed in close succession, their procedural paths diverged. Judge Colás

[2] Both cases were decided under Section 2610 of the 1915 Wisconsin Statutes. *See Charles A. Stickney Co. v. Lynch*, 163 Wis. 353, 357, 158 N.W. 85 (1916). That provision was similar in many respects to Wisconsin's current consolidation statute, though, unlike the current provision, it contained an express instruction from the Legislature that the rule should be "liberally construed in order that, so far as practicable, all closely related contentions may be disposed of in one action, even though in the strict sense there by two controversies, provided the contentions relate to the same general subject and separate actions would subject either of the parties to the danger of double liability or serious hardship." This statutory history is revealing in two respects. For one, the Legislature has seen fit to remove the instruction on liberal construction, and that decision should be respected. *See, e.g.*, *Knoke v. City of Monroe*, 2021 WI App 6, ¶25, 395 Wis. 2d 551, 953 N.W.2d 889 (citing *Lang v. Lang*, 161 Wis. 2d 210, 220, 467 N.W.2d 772 (1991), for "presumption that the legislature intends to change the law when it amends a statute"). For another, even under the broader languge of the prior statute, consolidation would be improper here, as no party is subject to "double liability or serious hardship."

heard and denied the *Rise* plaintiffs' request for a temporary injunction nearly two weeks ago, and the *Rise* plaintiffs have now filed a motion for expedited summary judgment proceedings along with supporting materials. On October 17, Judge Colás held a status conference, and a scheduling order setting forth next steps in *Rise* is forthcoming.

The *League* case, by contrast, had a two-hour temporary injunction hearing, and Judge Trammell suggested a plan to rule by this Friday. Were these cases to be consolidated, they would proceed before Judge Colás because *Rise* was filed first. Dane Cnty. Local R. 312. But because *League* focuses on issues distinct from the one raised in *Rise*, consolidation would necessitate Judge Colás familiarizing himself with more than 140 pages of briefing on state- and federal-law claims distinct from those in *Rise*, and then likely holding another hearing on the League's pending motion for a temporary injunction. As a practical matter, that would undermine the timeliness of the League's temporary injunction motion. In addition, whatever scheduling has occurred in *Rise* will necessarily be upended by the inclusion of the League as a new party in that action.



## III. Consolidation would prejudice the League and all Wisconsin voters.

The League, and all Wisconsin voters, would be prejudiced by consolidation. As noted above, consolidating these cases would require extending and likely re-running the proceedings on the League's pending motion for temporary injunction. With the election now less than three weeks away, and with clarity and relief on the League's claims sorely needed, the concomitant delay would not serve the interests

of any party or the public. Indeed, such a delay would be prejudicial to the League and almost certainly result in the disenfranchisement of some Wisconsin voters.

Even if the Court did, after a short delay, ultimately grant the League's requested relief, that delay would disenfranchise Wisconsin voters. Absentee ballots are currently being returned to voters in contravention of federal requirements and state guidance. (*E.g.*, Dkt. 17, McMenamin Aff., ¶2; Dkt. 35, Woodall-Vogg Aff., ¶2) The closer the election gets before a temporary injunction issues, the greater the chances that local election officials will have unnecessarily returned to voters absentee ballots that were eligible to be counted under state and federal law, some of which will never be re-submitted to clerks in time to be counted. Wis. Stat. §§ 6.87(6), 6.87(9). Further, the longer the delay in ruling on the League's motion for temporary injunction, the shorter the pre-election period clerks will have to contact voters to notify them that they are at risk of disenfranchisement due to a missing witness-address defect on their absentee-ballot certifications; and therefore those voters will have less time to correct such an error or omission.



In addition to the strong public interest, the parties would also be prejudiced by consolidation. *City of Madison v. Wis. Emp. Rel. Comm'n*, 2000 WI 39, ¶11 n.11, 234 Wis. 2d 550, 610 N.W.2d 94 (recognizing, in the context of intervention, the interest of litigants in the prompt adjudication of their rights); *see also Hedtcke v. Sentry Ins. Co.*, 109 Wis.2d 461, 479, 326 N.W.2d 727 (1982). Various parties in each case, including the City of Madison Clerk, who has considerable responsibilities in the lead-up to the November 8 election, and the *White* plaintiffs, would have to

review, consider, and respond to pleadings and attend hearings in matters in which they would not otherwise be a party. This is necessarily true because Wisconsin law "contemplates only one action and one set of pleadings after consolidation" of two separately filed lawsuits. *Seventeen Seventy-Six Peachtree Corp. v. Miller*, 41 Wis. 2d 410, 414, 164 N.W.2d 278 (1969); *accord State ex rel. DNR v. Wis. Ct. of Appeals, Dist. IV*, 2018 WI 25, ¶35, 380 Wis. 2d 354, 909 N.W.2d 114.

Finally, the League respectfully submits that consolidation would frustrate, rather than further, judicial economy. Because the issues in each case are so different, and each has been subject to considerable briefing and hearing already, consolidation will require a single judge to become acquainted with a completely separate set of arguments in a very compressed time frame. Consolidation may also frustrate appellate review, given the divergent postures of the two cases and the possibility of concurrent final and non-final orders.[3]



The prejudice that will flow from consolidation, amplified by the disparate procedural postures of the the two cases, weighs heavily against consolidation here.

## CONCLUSION

Consolidation is discretionary, as underscored by the repeated use of "may" in Wis. Stat. § 805.05(1)(b). For all of the reasons stated above, this Court should not consolidate this case with *Rise, Inc. v. Wisconsin Elections Commission*, No. 22CV2246 (Dane Cnty. Cir. Ct.).

[3] Depending on the breakdown of any final and non-final orders, this situation may not be addressed by Wis. Stat. § 809.10(4), which addresses only "prior nonfinal judgments, orders and rulings adverse to the appellant …" Wis. Stat. § 809.10(4).

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Respectfully submitted,

By: */s/Daniel S. Lenz*
Daniel S. Lenz, SBN 1082058
Elizabeth M. Pierson, SBN 1115866
LAW FORWARD
222 W. Washington Ave., Ste. 250
Madison, WI 53703-0326
dlenz@lawforward.org
epierson@lawforward.org
608.556.9120

Jon Sherman (admitted *pro hac vice*)
D.C. Bar No. 998271
FAIR ELECTIONS CENTER
1825 K St. NW, Suite 450
Washington, DC 20006
jsherman@fairelectionscenter.org
Phone: (202) 331-0114

Jeffrey A. Mandell, SBN 1100406
Douglas M. Poland, SBN 1055189
STAFFORD ROSENBAUM LLP
222 West Washington Ave., Suite 900
Post Office Box 1784
Madison, Wisconsin 53701-1784
jmandell@staffordlaw.com
dpoland@staffordlaw.com
608.256.0226