

RISE, INC., *and* JASON RIVERA,

*Plaintiffs,*

*v.*

Case No. 2022CV2446

WISCONSIN ELECTIONS COMMISSION,  
*and* MARIBETH WITZEL-BEHL, *in her*  
*official capacity as City Clerk for the*  
*City of Madison, Wisconsin,*

*Defendants.*

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**INTERVENOR DEFENDANT THE WISCONSIN STATE  
LEGISLATURE'S BRIEF IN SUPPORT OF MOTION TO DISMISS**

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## INTRODUCTION

Plaintiffs brought this lawsuit because they were concerned that some municipal and county clerks throughout Wisconsin will unlawfully reject certain absentee ballots, in violation of Wis. Stat. § 6.87. But rather than sue the clerks they think will break the law, Plaintiffs instead sued the Wisconsin Elections Commission (“WEC”) and a single municipal clerk, without so much as suggesting that either WEC or that particular clerk will engage in that allegedly illegal conduct. This Court should dismiss Plaintiffs’ claims against WEC because Plaintiffs’ requested relief—an order *requiring* WEC to issue guidance conforming with their desired interpretation of Wis. Stat. § 6.87—is unavailable under Wisconsin law. And as for the single municipal clerk that Plaintiffs sued—Clerk Witzel-Behl—the Complaint fails to assert *any* substantive allegations concerning her or her staff, let alone facts plausibly suggesting that she would disagree with Plaintiffs’ interpretation of Section 6.87 or apply Wisconsin’s absentee-voting laws in a manner inconsistent with Plaintiffs’ position. Because Plaintiffs fail to allege that Clerk Witzel-Behl is an adverse party, their declaratory-judgment claim against her must also be dismissed.

## STATEMENT

### A. Legal Background

Section 6.87 of the Wisconsin Statutes governs the process for completing and counting absentee ballots in Wisconsin. Subject to exceptions not relevant here, Section 6.87 requires an absentee voter to mark and fold his or her absentee ballot in the presence of a witness and then place it inside the official absentee-ballot envelope.

*Id.* § 6.87(4)(b)(1); *see id.* § 6.875. The witness must (among other things) write his or her “[a]ddress” on the certificate printed on the absentee-ballot envelope. *Id.* § 6.87(2). “If a certificate is missing the address of a witness, the [absentee] ballot may not be counted.” *Id.* § 6.87(6d). Finally, a clerk who “receives an absentee ballot with an improperly completed certificate or with no certificate . . . may return the ballot to the elector . . . whenever time permits the elector to correct the defect and return the ballot within the period authorized under sub. (6).” *Id.* § 6.87(9).

Although Section 6.87 does not expressly define the term “address,” its plain text and the required statutory context demonstrate that a witness “address” means a street number, street name, and the name of municipality. *See State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. WEC set forth this same definition of a witness address in its 2016 guidance on missing or insufficient absentee-witness addresses, explaining that “a complete address contains a street number, street name, and name of municipality.” Dkt.4 at 5 (“2016 Guidance”). And while the Waukesha County Circuit Court enjoined the 2016 Guidance in *White v. WEC*, 2022CV001008, to the extent it required clerks to unilaterally alter witness certificates, that court did *not* invalidate the 2016 Guidance’s interpretation of “address,” as the court’s final judgment expressly states. Dkt.38 at 107. Following the *White* injunction, and in an abundance of caution, WEC reaffirmed the 2016 Guidance’s interpretation of the term “address” in additional guidance issued to all clerks in September 2022, again specifically explaining that the *White* court “had not overturned the existing WEC definition of address contained

in the now-invalidated memoranda—namely, *street number, street name, and name of municipality.*” Dkt.38 at 88 (“September 2022 Guidance”). The Legislature also understands “address” under Section 6.87(2) to mean a street number, street name, and municipality, expressing its understanding both in proposed legislation, *see* S.B. 935 § 3, 2021 Leg., and via its partial veto of WEC’s 2016 Guidance, JCRAR, Record of Committee Proceedings (July 20, 2022).<sup>1</sup>

## **B. Litigation Background**

Plaintiffs Rise, Inc. and Jason Rivera filed their lawsuit against WEC and Clerk Maribeth Witzel-Behl, in her official capacity as the clerk for the City of Madison, on September 27, 2022, seeking both declaratory and injunctive relief. Dkt.3 at 4. Taking the facts alleged in the Complaint as true for purposes of this Motion To Dismiss, *Notz v. Everett Smith Grp., Ltd.*, 2009 WI 30, ¶ 15, 316 Wis. 2d 640, 764 N.W.2d 904, Plaintiffs claim that Wisconsin law does not define the term “address” under Section 6.87(2), and that this lack of definition causes confusion for clerks across the State, who are accordingly likely to reject absentee ballots that contain legally sufficient witness addresses, Dkt.3 ¶¶ 2, 8, 10–12, 19, 36–38, 56–57 (alleging that clerks “lack guidance” concerning this requirement). Plaintiffs allege that this confusion persists despite acknowledging that WEC defined “address” in its 2016 Guidance and reaffirmed that definition in its September 2022 Guidance, issued

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<sup>1</sup> Available at [https://docs.legis.wisconsin.gov/code/register/2022/799b/register/actions\\_by\\_jcrar/actions\\_taken\\_by\\_jcrar\\_on\\_july\\_20\\_2022\\_emr2209](https://docs.legis.wisconsin.gov/code/register/2022/799b/register/actions_by_jcrar/actions_taken_by_jcrar_on_july_20_2022_emr2209) (last visited Nov. 10, 2022).

after the Waukesha County Circuit Court enjoined a *different* part of the 2016 Guidance without altering that definition of “address.” Dkt.3 ¶¶ 35–36.

While Plaintiffs named Clerk Witzel-Behl as a Defendant along with WEC, the Complaint contains no substantive allegations against her. *See generally* Dkt.3 ¶¶ 1–64. The Complaint makes only two allegations regarding Clerk Witzel-Behl: it alleges that she is “responsible for the administration of elections in the City of Madison, where Mr. Rivera resides,” Dkt.3 ¶ 24, and it alleges that she is the City Clerk for the City of Madison, which makes this Court a proper venue, Dkt.3 ¶ 28.

The Complaint asserts two claims, based on the allegations recited above.

First—against both WEC and Clerk Witzel-Behl—Plaintiffs seek a declaratory judgment from this Court that, under Section 6.87(2), an “address” is “a place where a witness may be communicated with” and that an address must not be deemed “improperly completed” under the absentee-ballot statute “if a local clerk can reasonably discern the location where a witness may be communicated with.” Dkt.3 ¶ 60. Without such a declaration, Plaintiffs allege, absentee voters risk having their absentee ballots unlawfully rejected by clerks across the State. Dkt.3 ¶¶ 56–57.

Second—against WEC only—Plaintiffs seek a permanent injunction “requiring that WEC inform municipal and county clerks of the Court’s interpretation that the requirement for a witness address under Wis. Stat. § 6.87(2) is satisfied by a ballot certificate that includes sufficient information from which the clerk can reasonably discern the place where the witness may be communicated with,” Dkt.3 ¶ 64, and “that WEC direct municipal and county clerks that an otherwise lawful ballot” that

satisfies Plaintiffs’ proposed definition of “address” “is not ‘improperly completed’ under Wis. Stat. § 6.87(9),” Dkt.3 ¶ 64. That is, Plaintiffs request an order from this Court “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 witness may be communicated with.” Dkt.3 at 21.

Plaintiffs moved for a temporary injunction, which this Court denied on October 7, 2022. Dkt.79. This Court held that temporary-injunctive relief was “unnecessary to preserve the status quo,” which this Court properly defined as “the definition of an absentee ballot witness ‘address’ contained in the October 18, 2016 [WEC] memorandum and the September 14, 2022 memorandum to clerks from [WEC], namely that an address is sufficient if it contains a street number, street name and name of municipality.” Dkt.79 at 1. Plaintiffs then filed a Motion For Summary Judgment and a Motion For An Expedited Briefing Schedule, which this Court denied on October 21, 2022. Dkt.102.<sup>2</sup>

On October 25, 2022, Plaintiffs moved for a second temporary injunction, in light of alleged “new evidence” that certain clerks are applying Section 6.87(2)’s witness-address requirement disparately. Dkts.103, 104. This Court denied again,

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<sup>2</sup> In its order, the Court explained that WEC and Clerk Witzel-Behl had until November 11, 2022, to submit answers or motions to dismiss, Dkt.102 at 1–2, and the Legislature submits this Motion prior to that deadline, *see League of Women Voters of Wisconsin v. Evers*, 2019 WI 75, ¶¶ 2, 11, 387 Wis. 2d 511, 929 N.W.2d 209 (ordering the grant of the Legislature’s motion to dismiss, in a case where the Legislature was also an intervenor and had filed a proposed answer with its motion to intervene).

explaining that elections in Wisconsin have been carried out in the absence of a “legally binding definition of the witness address” for “the past 56 years.” Dkt.129 at 3. In response to Plaintiffs’ “new evidence” justification for that motion, this Court explained that such allegations “do[ ] not change the status quo, which is that the law has always left room for local clerks to interpret and apply the term to the ballot envelope before them.” Dkt.129 at 3.

### ARGUMENT

When ruling on a motion to dismiss, the Court must accept the complaint’s factual allegations as true, taking “all reasonable inferences that may be drawn from those facts in favor of stating a claim.” *Notz*, 2009 WI 30, ¶ 15; *see* Wis. Stat. § 802.06(2)(a). The Court need not, however, accept “legal conclusions” or “unreasonable inferences” as true. *Morgan v. Pa. Gen. Ins. Co.*, 87 Wis. 2d 723, 731, 275 N.W.2d 660 (1979). The Court must grant a motion to dismiss if “it appears quite certain that no relief can be granted under any set of facts the plaintiffs might prove in support of their allegations.” *Notz*, 2009 WI 30, ¶ 15. As explained below, this Court should dismiss the Complaint as to Clerk Witzel-Behl because she is not adverse to Plaintiffs in any way, as a declaratory-judgment claim requires, and as to WEC because the particular relief that Plaintiffs seek—an order compelling WEC to issue binding guidance to clerks—is not legally cognizable.

#### **I. The Court Should Dismiss Plaintiffs’ Declaratory-Judgment Claim Against Clerk Witzel-Behl Because She Is Not Adverse To Plaintiffs**

A. To bring a declaratory-judgment action, a plaintiff must demonstrate that the controversy is “between persons whose interests are adverse.” *Olson v. Town of*

*Cottage Grove*, 2008 WI 51, ¶ 29, 309 Wis. 2d 365, 749 N.W.2d 211; see Wis. Stat. § 806.04. Absent adversity between the parties, a claim for declaratory relief is not “properly before the court.” *Olson*, 2008 WI 51, ¶ 28. So, where the interests of a plaintiff and defendant are not adverse, the court must dismiss the claims against that defendant and, if no other legally cognizable claims are present, the defendant herself. See *Wis. Educ. Ass’n Council (WEAC) v. Wis. State Elections Bd.*, 2000 WI App 89, ¶¶ 12, 17, 23, 234 Wis. 2d 349, 610 N.W.2d 108. Finally, the plaintiff bears the burden of “demonstrat[ing]” that adversity exists. *Olson*, 2008 WI 51, ¶ 28.

For parties’ interests to be adverse, the parties must actually be in “dispute[ ]” over the claim, *WEAC*, 2000 WI App 89, ¶ 11, such that they are “contesting” the substantive issues that the plaintiff has presented to the court, *id.* ¶ 16. So, if a declaratory-judgment claim seeks the judicial construction of a statute, that claim is not justiciable unless the plaintiff shows that the defendant actually “dispute[s] . . . the meaning of the statute which [the plaintiff] wants the court to interpret.” *Id.* ¶ 12; accord *Tooley v. O’Connell*, 77 Wis. 2d 422, 437, 253 N.W.2d 335 (1977) (finding adversity where plaintiff alleged a “statutory scheme” was unconstitutional and government defendant had “a statutory duty” to enforce that scheme).

*WEAC* is particularly instructive here. There, a political-action committee sued the Wisconsin Board of Elections, seeking a declaration regarding the proper interpretation of a campaign-finance statute that it believed the Board had failed to properly enforce. 2000 WI App 89, ¶¶ 3, 6. The Court of Appeals ordered dismissal of the plaintiff’s claims, holding that there was a lack of adversity between the

parties. *Id.* ¶¶ 21, 23–24. Specifically, the Court of Appeals concluded that the parties were not adverse with respect to the meaning of the campaign-finance statute at the heart of plaintiff’s claim because no facts showed that the Board “ha[d] any interest in contesting [plaintiff’s] proffered interpretation,” including because the Board had previously refused to issue its own formal opinion on the relevant statute’s meaning. *Id.* ¶ 16.

B. Here, this Court should dismiss the declaratory-judgment claim against Clerk Witzel-Behl—and, accordingly, Clerk Witzel-Behl herself—since the Complaint contains no allegations plausibly suggesting that Clerk Witzel-Behl’s “interests are adverse” to Plaintiffs’ on this claim. *Olson*, 2008 WI 51, ¶ 29; *WEAC*, 2000 WI App 89, ¶¶ 16, 24. Plaintiffs allege that “address” under Section 6.87(2) is undefined in Wisconsin law, Dkt.3 ¶ 9, and they seek a declaratory judgment against Clerk Witzel-Behl that an “address” under this statute means their proffered definition, Dkt.3 ¶ 13. Yet, *nowhere* does the Complaint allege that Clerk Witzel-Behl “dispute[s] . . . the meaning of the statute” that Plaintiffs want this Court to adopt. *WEAC*, 2000 WI App 89, ¶ 12. That is, the Complaint fails to allege that Clerk Witzel-Behl will refuse to accept absentee ballots with witness certificates that—per Plaintiffs’ preferred definition of “address”—contain enough witness address information to “reasonably discern where the witness may be communicated with.” Dkt.3 ¶ 58. Highlighting

the lack of adversity here, the Complaint makes *no substantive allegations against Clerk Witzel-Behl in any respect*.<sup>3</sup> See generally Dkt.3 ¶¶ 24, 29.

Finally, in subsequent briefing in this case, Plaintiffs have implicitly conceded that their interests are not adverse to Clerk Witzel-Behl's. *Contra Olson*, 2008 WI 51, ¶ 29. Specifically, in their brief in support of their Motion For Summary Judgment, Plaintiffs claimed that their declaratory-judgment claim was justiciable because their "interests are adverse to WEC's and the Legislature's." Dkt.87 at 9 (emphasis added). Notably, Plaintiffs did *not* assert in that brief that their interests were adverse to those of Clerk Witzel-Behl, which is consistent with the complete lack of supporting allegations against Clerk Witzel-Behl in the Complaint.

## **II. The Court Should Dismiss Plaintiffs' Claims Against WEC Because Those Claims Seek Only Legally Unrecognized Relief**

A. As stated above, to survive a motion to dismiss for failure to state a claim, a complaint must show that the plaintiff is legally entitled to the relief sought against the defendant "under any set of facts the plaintiff[ ] might prove in support of [its] allegations." *Notz*, 2009 WI 30, ¶ 15. Thus, if a plaintiff is not legally entitled to any of the relief that it seeks against the defendant, the Court must dismiss the plaintiff's complaint for failure to state a claim. *Id.* Further, "a dispute over [an agency's]

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<sup>3</sup> To the extent Plaintiffs offer evidence suggesting that their interests *may* be adverse to those of certain other clerks, see, e.g., Dkt.94 at 2–3, then the "real controversy," *WEAC*, 2000 WI App 89, ¶ 19, is between Plaintiffs and those clerks—not Clerk Witzel-Behl, see *Thorsland v. Wolter*, 2016 WI App 88, ¶ 13, 372 Wis. 2d 459, 888 N.W.2d 247 (suggesting that the Court may consider evidence outside the pleadings when ruling on a jurisdictional motion).

failure to issue an opinion” that “interpret[s] [a] statute,” without anything more, is not a basis to obtain legal relief under Wisconsin law. *WEAC*, 2000 WI App 89, ¶ 12.

B. Plaintiffs brought their declaratory and injunctive-relief claims against WEC, requesting that this Court declare the proper definition of a witness “address” under Section 6.87(2) and enjoin WEC to mandate that clerks across the State implement that definition. Dkt.3 ¶¶ 54–64. Yet, nowhere in the Complaint do Plaintiffs claim that any guidance issued by WEC is contrary to Wisconsin law, or even that any specific action from WEC is unlawful. *See generally* Dkt.3. Rather, Plaintiffs allege only that WEC’s 2016 Guidance and September 2022 Guidance cause “confusion” among the clerks, *see e.g.*, Dkt.3 ¶¶ 11–12, 30–36, given the Waukesha County Circuit Court’s enjoining of the 2016 Guidance as to its separate requirement that clerks unilaterally amend witness certifications, Dkt.3 ¶ 32. Thus, Plaintiffs claim that WEC must remedy this supposed “lack [of] guidance,” Dkt.3 ¶ 8; *see also id.* ¶¶ 2, 10–12, 19, 36, 56–57, by issuing additional guidance to “direct . . . clerks” on the meaning of “address,” Dkt.3 ¶¶ 61–64.

Plaintiffs’ claims against WEC do not seek any lawfully recognized relief under Wisconsin law. Wisconsin’s election law does not allow Plaintiffs to use WEC—whom, again, is not alleged to have taken any unlawful action—as a cat’s paw to enforce Plaintiffs’ preferred definition of “address” among the clerks, thus remedying an alleged “lack [of] guidance” here. Dkt.3 ¶ 8; *see also id.* ¶¶ 2, 10–12, 19, 36, 56–57. Rather, Wisconsin has created “a highly decentralized system for election administration,” *State ex rel. Zignego v. WEC*, 2021 WI 32, ¶ 13, 396 Wis. 2d 391, 957

N.W.2d 208; *Jefferson v. Dane County*, 2020 WI 90, ¶ 24 n.5, 394 Wis. 2d 602, 951 N.W.2d 556, with local clerks, not WEC, bearing the responsibility for implementing the State’s election laws—including Section 6.87(2)’s witness-address requirement, *see, e.g.*, Wis. Stat. §§ 6.87(4)(b)(1), 6.87(2). Plaintiffs must sue local clerks, not WEC, if they wish to obtain a judgment enforcing their understanding of Section 6.87(2)’s witness-address requirement—although, as explained above, those clerks must be adverse to Plaintiffs on this statutory-interpretation issue. *Supra* Part I.

The Wisconsin statute governing an agency’s adoption of guidance documents, Wis. Stat. § 227.112, also prohibits this Court from issuing an order directing WEC to instruct clerks that they must count absentee ballots that contain “sufficient information from which the clerk can reasonably discern where the witness may be communicated with,” as Plaintiffs have requested. Dkt.3 at 21. While WEC is “responsible for [issuing] *guidance* in the administration and enforcement” of Wisconsin’s election laws, *Jefferson*, 2020 WI 90, ¶ 24 (emphasis added), WEC’s guidance “does *not* have the force of law and does *not* provide the authority for implementing or enforcing a standard [or] requirement,” Wis. Stat. § 227.112(3) (emphases added). Thus, Plaintiffs cannot obtain an injunction from this Court that orders WEC to issue *binding guidance*—something that is foreign under Wisconsin law—to “direct . . . clerks” on the meaning of “address.” Dkt.3 ¶¶ 61–64. Further, and relatedly, Plaintiffs’ “dispute over [WEC’s] failure to issue an opinion” that “interpret[s]” Section 6.87(2) in the manner that they prefer does not by itself allow Plaintiffs to obtain any relief under Wisconsin law. *WEAC*, 2000 WI App 89, ¶ 12.

At prior stages of these proceedings, Plaintiffs erroneously likened this case to others in which plaintiffs sought declaratory relief against WEC. Dkt.125 at 5–6. However, in those cases and others where such relief was granted, parties challenged *specific* WEC actions or guidance, often under Wis. Stat. § 227.40, which provides the “exclusive means” to challenge agency guidance. Plaintiffs have not done so here. For example, in *Teigen v. WEC*, 2022 WI 64, 403 Wis. 2d 607, 976 N.W.2d 519, the plaintiffs sought a declaration that WEC’s guidance documents authorizing clerks to establish absentee-ballot drop boxes and allowing voters’ agents to return ballots to those drop boxes were unlawful. *Id.* ¶¶ 6–9. As that declaratory-judgment claim challenged a WEC action—the issuance of specific guidance—as unlawful, it presented a justiciable controversy for the Supreme Court, which ultimately held that the guidance was unlawful. *Id.* ¶ 55. Similarly, in *White*, the Legislature challenged WEC’s 2016 Guidance to the extent that it purported to require clerks to unilaterally alter deficient witness certificates. *See* Dkt.38, Ex.7 at 12–13. That challenge also presented a justiciable controversy, as it challenged specific WEC action, allowing the Waukesha County Circuit Court to declare that such guidance was unlawful as to the challenged portion. *See* Dkt.38, Ex.1. Even in *Zignego*, 2021 WI 32, upon which Plaintiffs rely, Dkt.125 at 5, the plaintiffs specifically challenged WEC’s failure to comply with a statute that required a voter’s registration status to “be changed when officials receive reliable information that the elector moved out of their municipality.” 2021 WI 32, ¶ 1. Here, in contrast, Plaintiffs have *not* challenged any guidance issued by WEC—or any other specific conduct from WEC at all. Instead, their Complaint

rests on allegations that clerks “*lack* guidance” from WEC. Dkt.3 ¶ 8 (emphasis added); *see also* Dkt.3 ¶¶ 2, 10–12, 19, 36, 56–57. Wisconsin law does not authorize any relief for such claims; thus, this Court must dismiss them. *Notz*, 2009 WI 30, ¶ 15.

## CONCLUSION

This Court should grant the Legislature’s Motion To Dismiss.

Dated: November 11, 2022

Respectfully submitted,

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