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CIRCUIT COURT
DANE COUNTY, WI
2022CV002472

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 6

LEAGUE OF WOMEN VOTERS
OF WISCONSIN,

Plaintiff,

v.

Case No. 2022cv2472
Code: 30701
Declaratory Judgment

WISCONSIN ELECTIONS COMMISSION, DON MILLIS, JULIE M. GLANCEY, ROBERT F. SPINDELL, JR., MARK L. THOMSEN, ANN S. JACOBS, MARGE BOSTELMANN, in their official capacity as members of the Wisconsin Elections Commission, MEAGAN WOLFE, in her official capacity as the Administrator of the Wisconsin Elections Commission,

Defendants,

THE WISCONSIN LEGISLATURE,

Intervenor-Defendant.

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PLAINTIFF'S BRIEF IN OPPOSITION TO LEGISLATURE'S MOTION TO DISMISS COUNT I OF PLAINTIFF'S SECOND AMENDED COMPLAINT

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INTRODUCTION

The League of Women Voters of Wisconsin seeks a declaratory judgment in Count I of its Second Amended Complaint[1] that "missing," as used in Wis. Stat. § 6.87(6d), means exactly what the plain text says, such that otherwise lawful absentee ballots cannot be excluded from election results unless the space for the witness address on the ballot is left entirely blank. Count I presents an issue of first impression, as neither the courts nor the Wisconsin Elections Commission ("WEC" or "the Commission") has provided any interpretation of what constitutes a "missing" witness address on an absentee ballot.

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The Legislature moves to dismiss the League's declaratory judgment claim in Count I, arguing under Wis. Stat. § 802.06(2)(6) that it fails to state a claim because the League is not entitled to any declaratory or injunctive relief from the Commission. The Court should deny the Legislature's motion because it fails to carry its heavy burden of establishing that "it appears certain that *no* relief can be granted under any set of facts that [the League] can prove in support of [its] allegations." *Peterson v. Volkswagen of Am., Inc.*, 2005 WI 61, ¶16, 281 Wis. 2d 39, 697 N.W.2d 61 (emphasis

[1] The Legislature filed the instant motion and its brief in support on November 11, 2022 (dkt. 73, 74) against Count I of the League's First Amended Complaint (dkt. 10). The League filed its Second Amended Complaint on December 23, 2022. (Dkt. 94.) This latest amendment added the individual Commissioners as additional defendants. By stipulation of the parties (dkt. 83), incorporated and adopted by this Court on January 4, 2023 (dkt. 97), the Legislature's Motion to Dismiss Count I was deemed to apply to Count I of the Second Amended Complaint.

added) (cleaned up).[2] Generally, the Legislature's arguments conflate the two *separate* aspects of relief the League seeks, lumping into a single section arguments that fail to establish why the League is not entitled to at least *one* of the remedies it seeks in Count I, a declaratory judgment *or* an injunction. Moreover, the Legislature weaves into its argument irrelevant legal principles that it has not raised as legal grounds for dismissal. As the League demonstrates below, however, when each type of relief it seeks is analyzed separately, controlling Wisconsin law makes clear that the League can obtain both types of relief it seeks.

First, Wisconsin's Uniform Declaratory Judgments Act envisions just the type of declaratory relief Count I seeks: "Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." Wis. Stat. § 806.04(1). Moreover, WEC is a proper defendant for this claim. WEC is the sole actor with "the responsibility for the administration of chs. 5 to 10 and 12 and other laws relating to elections and election campaigns, other than laws relating to campaign financing." Wis. Stat. § 5.05(1). In carrying out this responsibility, WEC periodically issues guidance pursuant to Wis. Stat. §§ 227.01(3m) and 227.112. *See Teigen v. Wis. Elections Comm'n*, 2022 WI 64, ¶¶190, 196–97, 403 Wis. 2d 607, 987 N.W.2d 519 (Hagedorn, J., concurring). It also performs other statewide functions, including issuing additional guidance (or a for-

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[2] This brief uses the signal "cleaned up" when internal quotation marks, ellipses, and other metadata have been omitted from a quotation to improve its readability without altering its meaning. *See* Jack Metzler, *Cleaning Up Quotations*, 18 J. App. Prac. & Process 143 (2017), available at: https://lawrepository.ualr.edu/appellatepracticeprocess/vol18/iss2/3.

mal opinion) following a binding court order, and recording, canvassing (by the chairperson or their designee), and transmitting election results. Wis. Stat. §§ 5.05(5t), 7.70. For all of these reasons, WEC and the Commissioners would be properly subject to the declaratory relief requested in Count I.

Second, Count I properly states a claim for injunctive relief against WEC, including a requirement that WEC inform clerks of any determination by this Court as to the proper interpretation of section 6.87(6d). Indeed, the statutes require WEC to issue updated guidance of the type contemplated in the Second Amended Complaint following a binding court order. Wis. Stat. § 5.05(5t).[3] And courts routinely require the Commission to inform clerks of their determinations.

Third and finally, because the Legislature has now intervened as a defendant and, in so doing, averred that it has independent and "unique" "interests in the enforcement of its statutes, the integrity and efficacy of its own powers, and the integrity of upcoming elections" (dkt. 8, Leg. Br. in Supp. of Mot. to Interv. at 4), the request for declaratory relief included in Count I may proceed against the Legislature even if one or more counts against the Commission and Commissioners were to be dismissed. The Legislature has not explained why this Court should dismiss Count I as applied to itself. The Legislature's Motion to Dismiss Count I should, therefore, be denied.

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[3] That statute provides: "Within 2 months following the publication of a decision of a state or federal court that is binding on the commission and this state, the commission shall issue updated guidance or formal advisory opinions, commence the rule-making procedure to revise administrative rules promulgated by the commission, or request an opinion from the attorney general on the applicability of the court decision."

LEGAL STANDARD—MOTION TO DISMISS

Courts "will not grant a motion to dismiss [for failure to state a claim] unless it appears certain that no relief can be granted under any set of facts that a plaintiff can prove in support of his or her allegations." *Peterson*, 2005 WI 61, ¶16 (cleaned up). "As such, courts are to liberally construe a complaint and should deny a motion to dismiss when the facts alleged, if proven true, would constitute a cause of action." *Id*. (cleaned up). A motion to dismiss under Wis. Stat. § 802.06(2)(a)6. "usually will be granted only when it is quite clear that under no conditions can the plaintiff recover." *Wilson v. Cont'l Ins. Cos.*, 87 Wis. 2d 310, 317, 274 N.W.2d 679 (1979) (cleaned up) (interpreting Wis. Stat. § 802.06(2)(a)6. as previously codified at Wis. Stat. § 802.06(2)(f) (1979–80)).

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ARGUMENT

The Legislature's premise[4] is that the League cannot lawfully seek the relief requested in its state-law claim against WEC and, therefore, Count I must be dismissed. (Dkt. 74 at 6.) Because WEC is properly subject to the relief requested, and because the Legislature has also intervened as an adverse defendant, this is wrong. Accordingly, the Court should deny the Legislature's motion to dismiss.

[4] The Legislature's brief also contains a recitation of its atextual arguments on the merits regarding the definition of "missing" as "Legal Background." (Dkt. 10, Br. in Supp. of Mot. to Dismiss, pp. 3–5.) Those arguments are not the basis of the instant motion, so a response is unnecessary. To the extent that a response is required, the League incorporates its arguments in support of its Motion for Emergency Declaratory Relief and Temporary Injunction. (Dkt. 16 at 7–12; dkt. 46 at 1–4.)

I. Count I properly states a claim under the Wisconsin Uniform Declaratory Judgments Act because the League can obtain declaratory relief from WEC.

WEC, as the agency that administers and enforces Wisconsin's election law (except for laws relating to campaign finance), is subject to the relief requested in Count I for at least three reasons related to its statutory functions. Because dismissal is only appropriate when "*no* relief" may be granted and because clearly *at least* declaratory relief is appropriate, the motion should be denied.

a. Wisconsin's Uniform Declaratory Judgments Act authorizes the declaratory relief requested in Count I.

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Wisconsin law empowers courts "to declare rights, status, and other legal relations whether or not further relief is or could be claimed." Wis. Stat. § 806.04(1). The Legislature has determined that Wis. Stat. 806.04 should be read broadly, "as to effectuate its general purpose to make uniform the law of those states which enact it …" *Id.* §§ 806.04(12), (15). "[I]ts purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered." *Id.* § 806.04(12). "The underlying philosophy of the Uniform Declaratory Judgments Act is to enable controversies of a justiciable nature to be brought before the courts for settlement and determination prior to the time that a wrong has been threatened or committed." *Lister v. Bd. of Regents of Univ. of Wis. Sys.,* 72 Wis. 2d 282, 307, 240 N.W.2d 610 (1976). The statute is particularly well-suited to construing terms in statutes and, indeed, includes a specific procedure parties must follow (as the League did here) when the construction of a statute is at issue. *Id.* § 806.04(11). The Wisconsin Supreme Court has long held that

so long as the claim is justiciable,[5] an action for declaratory judgment may be maintained. *Miller Brands–Milwaukee, Inc. v. Case,* 162 Wis. 2d 684, 694, 470 N.W.2d 290 (1991).

The declaratory judgment statute is appropriately used to seek prospective relief requiring agencies to accord with the law. *See, e.g.*, *Koschkee v. Evers*, 2018 WI 82, ¶3, 382 Wis. 2d 666, 913 N.W.2d 878 ("In this original action, petitioners seek a declaratory judgment that Superintendent of Public Instruction Tony Evers (Evers) and the Department of Public Instruction (DPI) must comply with the REINS Act, 2017 Wis. Act 57."); *Teague v. Schimel*, 2017 WI 56, ¶¶34–35, 375 Wis. 2d 458, 896 N.W.2d 286. Indeed, the League can seek prospective declaratory and injunctive relief regarding Wis. Stat. 6.87(6d) *only* from WEC, not the municipal clerks. This Court's October 26, 2022 ruling denying the League's temporary injunction motion on the grounds that the election was under way and the *status quo* could not be altered during an ongoing election means that the League or other similarly situated plaintiffs could never obtain declaratory and injunctive relief against municipal clerks for their interpretations and actions regarding witness addresses under Wis.

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[5] Although the Legislature's brief twice uses the term "justiciable controversy" in discussing recent opinions of the Wisconsin Supreme Court, it neither presents nor develops any argument that the type of adversity required for a complaint to present a justiciable controversy is absent here. The Legislature therefore waives any such argument. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992) ("We may decline to review issues inadequately briefed" and "Arguments unsupported by references to legal authority will not be considered.") (citations omitted); *State v. Gulrud*, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987) (undeveloped arguments deemed waived). Moreover, it is barred from presenting that argument in reply. *See State v. Reese*, 2014 WI App 27, ¶14 n.2, 353 Wis. 2d 266, 844 N.W.2d 396 (arguments raised for the first time in reply brief forfeited).

Stat. 6.87(6d) during an ongoing election. However, with rare exceptions (*see, e.g.,* LWVWI Br. in Supp. of MTI, dkt. 16 at 16, citing Green Bay memorandum), municipal clerks usually do not issue guidance documents or interpretations of Wisconsin election laws; typically, only WEC performs these functions. Even while it has chosen a decentralized election administration system, the Wisconsin Legislature has created WEC as a centralized authority for interpreting and issuing guidance on the state's election laws. Accordingly, there would never be an occasion to sue municipal clerks in advance of an election to challenge their interpretation and application of Wis. Stat. § 6.87(6d) that the League believed violated the plain text of that provision.

The Legislature understands all of this, and that is why it seeks to deflect responsibility to the clerks and restrict the League to as-applied challenges—because the prospect of such challenges is illusory. Therefore, if the League's request for prospective declaratory and injunctive relief in Count I were not viable, the state-law questions raised in Count I would evade judicial review, except in the exceedingly rare circumstance of a municipality publicly announcing its interpretation and implementation of Wis. Stat. § 6.87(6d) in advance of an election. In addition, the notion that Wisconsin's decentralized election system requires suing nearly two thousand municipal clerks individually in their own separate cases is ludicrous and infeasible. Even if it were feasible, bringing all these actions as as-applied challenges against municipal clerks would clog and burden the court system and, at best, each would result only in relief against one individual municipal clerk, leaving 1,849 clerks with the discretion to comply or not with the court order binding upon a different clerk.

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The Legislature's argument is therefore incorrect, and the motion should therefore be denied. Furthermore, because a declaratory judgment on Count I would bind WEC in at least three ways, the League' claim must stand.

b. WEC's enforcement authority would be affected by a declaratory judgment in this case.

As part of its general duties to administer Wisconsin's election laws, WEC enforces Wis. Stat. § 6.87(6d). Pursuant to Wis. Stat. § 5.06(1):

> Whenever any elector of a jurisdiction or district served by an election official believes that a decision or action of the official or the failure of the official to act with respect to any matter concerning … election administration or conduct of elections is contrary to law … the elector may file a written sworn complaint with the commission requesting that the official be required to conform his or her conduct to the law, be restrained from taking any action inconsistent with the law …

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Following receipt of a section 5.06 complaint, or on its own motion, WEC may investigate and determine whether such a violation occurred, as well as, "summarily decide the matter before it and, by order, require any election official to conform his or her conduct to the law, restrain an official from taking any action inconsistent with the law or require an official to correct any action or decision inconsistent with the law." *Id.* §§ 5.06(2), (6). And WEC does, in fact, decide such complaints and, when appropriate, issue orders to local election officials. *See, e.g.*, *Weidner et al. v. Coolidge*, No. EL 22-24 (Wis. Elec. Comm'n Sept. 30, 2022)[6].

While Wis. Stat. § 5.06 is the most relevant statutory provision for present purposes, WEC has additional enforcement authority. The Commission also receives

[6] Available at https://elections.wi.gov/resources/complaints/el-22-24-weidner-et-al-v-coolidge.

and processes complaints against anyone accused of committing a crime related to elections. *See* Wis. Stat. § 5.05(2m). It is statutorily empowered to prosecute alleged civil violations of election laws and sue for injunctive relief. *Id.* §§ 5.05(1)(c)–(d). The League's requested declaratory relief would control how any complaint WEC heard or brought would interpret Wis. Stat. § 6.87(6d) and the term "missing" in that statutory provision. For example, an elector in a jurisdiction whose vote was not counted in the most recent election because the certificate included a partial witness address may complain, and WEC would have to adjudicate that complaint based on the declaratory judgment's interpretation of the meaning of Wis. Stat. § 6.87(6d).

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WEC, for its part, has made clear in this case that it disagrees with the League's plain-text reading of Wis. Stat. § 6.87(6d). (*See* Dkt. 45, WEC Br. in Opp. to TI at 12–13.) Absent the League's requested relief, it is therefore clear that WEC will enforce Wis. Stat. § 6.87(6d) by assigning a different meaning to the term "missing" than that sought by the League, to the detriment of the League, its members, and the voters it serves. It follows that WEC is a proper defendant against which the League may obtain the declaratory relief it seeks. Seeking declaratory and injunctive relief against enforcing entities is the basic way entities seek prospective relief, which the Legislature well knows. *See Planned Parenthood v. Kaul*, 942 F.3d 793, 796 (7th Cir. 2019) (Legislature moved to intervene in lawsuit in which Planned Parenthood of Wisconsin sued the Wisconsin Attorney General, along with other state officials, to enjoin abortion restrictions); *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923) ("If a case for preventive relief be presented, the court enjoins, in effect, not the execution

of the statute, but the acts of the official, the statute notwithstanding."). Because WEC enforces Wis. Stat. § 6.87, Count I states a claim for relief.

c. WEC's role in determining election results would be affected by a declaratory judgment in this case.

WEC also plays a critical role in the process of ascertaining election results that would be affected by a declaratory judgment in the League's favor. Wisconsin uses a cascading process for reporting and canvassing results. Municipalities must begin canvassing results no later than the Monday after election day and must complete the process no later than 4:00 p.m. that day. Wis. Stat. §§ 7.53(1)(a), 7.53(2)(d), 7.51(5)(b). County boards of canvass must complete the county-wide canvass and deliver their statements to WEC within 14 days of the election. Wis. Stat. § 7.60(5). WEC then performs the state canvass. Specifically, the Commission records and preserves the results from the counties and collects any delinquent or erroneous results. Wis. Stat. § 7.70(1). The Chair of the Commission, or their designee, then canvasses the returns for various offices. Wis. Stat. § 7.70(3). WEC records the statements from the statewide canvass and transmits certificates of elections. Wis. Stat. § 7.70(5).

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To perform their canvassing functions, WEC and its Chair necessarily determine for themselves that the various reported results are correct and appropriate under law, as the result of the canvass is a certification of the number of legal votes cast, which also determines the results that WEC records and transmits. *State ex rel. Swenson v. Norton*, 46 Wis. 332, 1 N.W. 22, 28–29 (1879) (certification is *prima facie* evidence of lawful votes) (internal citations omitted). The relief requested in Count I bears directly on this function, as it would require WEC to include those votes cast in

compliance with Wis. Stat. § 6.87(6d) to be counted in the canvass. To comply with a judgment, WEC would need to inform municipal and county clerks, who also play roles in this process, as Wis. Stat. § 5.05(5t) requires the Commission to do. Because this is an action that WEC has taken in the past and is certain to take in the future, and because that would be affected by a declaratory judgment properly construing Wis. Stat. § 6.87(6d), the League's Count I must stand. This is the precise function of a claim for declaratory relief: "to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations." Wis. Stat. § 806.04(12). Understanding the meaning of Wis. Stat. § 6.87(6d) would remove any uncertainty as to how absentee ballots were to be counted and thereby ensure that WEC ascertained election results pursuant to law. This is independently sufficient relief for Count I to proceed.

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d. WEC has the statewide responsibility for the uniform administration of elections and is, therefore, properly subject to the relief requested in this action.

WEC has general authority to administer Wisconsin elections. Wis. Stat. § 5.05(1). More precisely, WEC prescribes many of the statewide procedures for election administration, including how absentee-ballot certifications are handled. For example, the Commission promulgates rules and issues guidance applicable statewide. Wis. Stat. §§ 5.05(1)(f), 227.01(3m)(a); *Teigen*, 2022 WI 64, ¶196 (Hagedorn, J., concurring). Pursuant to statute, WEC provides uniform instructions for municipalities to provide to absentee electors, including information regarding requirements of photo identification. Wis. Stat. § 6.869. It prepares and publishes election manuals,

trains election officials, and conducts voter education. Wis. Stat. §§ 7.08(3), 5.05(7), 5.05(12). Each of these functions is part of WEC's duties to administer Wisconsin elections and would be controlled by the declaratory relief sought in the Complaint. Moreover, the Second Amended Complaint alleges that, in the absence of the requested relief, the Commission has failed to perform any of these functions as required by Wisconsin law. Having failed to issue guidance[7] on the meaning of "missing" within Wis. Stat. § 6.87(6d), declaratory relief in advance of further elections is necessary to clarify WEC's obligations in enforcing Wisconsin election law and the rights of absentee voters whom the League serves.

For all of these reasons, Count I properly requests a declaratory judgment as it will bind WEC in its actions and ensure the uniform administration of Wis. Stat. § 6.87(6d) throughout Wisconsin. The Legislature's motion, therefore, should be denied.

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II. Count I properly states a claim for injunctive relief because the League may obtain an injunction against WEC.

The Legislature myopically relies on a single element of requested relief and only one of WEC's many functions—issuing guidance—as the basis for its argument that Count I should be dismissed because the League cannot obtain *injunctive* relief against WEC. (Dkt. 74 at 6–8.) For the reasons stated in Section I, *supra*, the League properly seeks *declaratory* relief against WEC, and the motion should be denied on

[7] Alternatively, the guidance that the Commission *has* issued—its September 14, 2022 guidance to clerks after the *White* injunction including the definition of address implies that anything short of that definition (street number, street name, and name of municipality) is insufficient for purposes of Wis. Stat. § 6.87(6d). (Dkt. 94, Second Amend. Compl., ¶49, n.14.)

that basis alone. The Legislature is also incorrect, however, that one specific element of injunctive relief sought—that WEC instruct clerks regarding any declaratory judgment—is unavailable.

To the contrary, WEC has a plain statutory duty that would require it to issue such information even if this Court were not to issue such an injunction:

> Within 2 months following the publication of a decision of a state or federal court that is binding on the commission and this state, the commission shall issue updated guidance or formal advisory opinions, commence the rule-making procedure to revise administrative rules promulgated by the commission, or request an opinion from the attorney general on the applicability of the court decision.

Wis. Stat. § 5.05(5t). Of course, this Court also has the authority to order injunctive relief necessary to effectuate a declaratory judgment, including by requiring WEC to inform clerks of the court's judgment. *Town of Blooming Grove v. City of Madison*, 275 Wis. 328, 336, 81 N.W.2d 713 ("Injunctive relief may be granted in aid of a declaratory judgment, where necessary or proper to make the judgment effective.") (internal citation omitted). And both state and federal courts have issued such injunctions requiring WEC to instruct, inform, or guide clerks as to the effect of declaratory judgments. *See Teigen v. Wis. Elections Comm'n*, 21-CV-958, dkt. 142 (Waukesha Cnty. Cir. Ct., Jan. 20, 2022) ("[T]he Wisconsin Elections Commission shall withdraw the Memos and issue a statement to clerks notifying them that WEC's interpretation of Wis. Stat. §§ 6.87 and 6.855 in the Memos has been declared invalid by this Court, as described above."); *White v. Wis. Elections Comm'n*, 22-CV-1008, dkt. 167 (Waukesha Cnty. Cir. Ct., Sept. 7, 2022) ("WEC is ordered and required by September 14, 2022, to notify all municipal clerks and local election officials previously receiving

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the guidance mentioned in paragraph 6 above that this Court has declared that guidance invalid and contrary to law."); *Carey v. Wis. Elections Comm'n*, 22-cv-402-jdp, dkt. 40 (W.D. Wis. Aug. 31, 2022) ("Defendants may have until September 9, 2022, to provide written instructions to all Wisconsin municipal clerks that the Voting Rights Act requires that any Wisconsin voters who require assistance with mailing or delivering their absentee ballots to the municipal clerk because of a disability must be permitted to receive such assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union.").

The Legislature's reliance on Wis. Stat. § 227.112(3) is unavailing. While it is true that guidance documents on their own do not have the force of law pursuant to that statute, this Court's judgments certainly do. Wis. Stat. § 806.04. An injunction to require WEC to issue guidance informing clerks of a court's judgment is not only commonplace, it is a statutory requirement, which helps effectuate judicial clarifications as to the meaning of the law—precisely what the League seeks here.

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Therefore, the Legislature's motion should be denied.

III. Count I also survives the Legislature's motion to dismiss because, even if the League could not obtain the relief it seeks in Count I against WEC, it may obtain that declaratory relief against the Legislature.

Even assuming Count I did not state a claim for relief against the Commission, it may proceed against the Legislature. While the Legislature argues (incorrectly) that WEC is not a proper defendant for Count I, its motion does not address its own intervention, which precludes dismissal. The Legislature's motion and brief make no

mention of its own role in this litigation, nor any argument that Count I cannot proceed against it.

Wisconsin Education Association Council v. Wisconsin State Elections Board, 2000 WI App 89, 234 Wis. 2d 349, 610 N.W.2d 108, belies the argument for which the Legislature cites it as support. (Dkt. 74, p. 6.) In that case, the trial court had entered declaratory judgment against the Elections Board (a predecessor agency to WEC). *Id.*, ¶7. The court of appeals reversed the judgment and remanded for dismissal, finding that there was no justiciable controversy between the parties. Specifically, the court held that, because the Elections Board had no cognizable interest[8] in contesting the plaintiff's proffered definition of a statute, the parties' positions were not sufficiently adverse for adjudication. *Id.*, ¶¶15–22.

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In this case, by contrast, the Legislature does not seek dismissal based on the lack of a justiciable controversy; such an argument appears nowhere in its motion or brief. (*See supra* n.5) But even if it did, such an argument would be to no avail. In support of its own intervention as a party, the Legislature claimed several cognizable interests of the kind that the Elections Board lacked in *Wisconsin Education Association Council*. Specifically, the Legislature has pleaded that it "has an interest in defending in court the State's own sovereign interest in its law[,]" that it "has 'a statutory right to participate as a party, with all the rights and privileges of any other party[,]'" and

[8] As noted in Section I above, unlike in *Wisconsin Education Association Council*, WEC contests the League's plain-text reading of Wis. Stat. § 6.87(6d). (Dkt. 45, WEC Br. in Opp. to TI, pp. 12–13); *cf. Wis. Educ. Ass'n Council*, 2000 WI App. 89, ¶7 ("The court noted that 'the Board did not offer any argument or analysis' regarding the interpretation of WIS. STAT. § 11.26(8), and that the Board had made it known that it did not necessarily disagree with WEAC-PAC's suggested construction of the statute.").

that it had a "direct, substantial interest in the subject of this action" that would be impeded by a judgment in the League's favor. (Dkt. 8 at 9, 11, 13–15.) Having invoked these interests, the Legislature cannot now rely on *Wisconsin Education Association Council* to assert that this case suffers from a lack of adversity. And it especially cannot do so when its motion to dismiss is not even based on an alleged lack of a justiciable controversy.

Moreover, the Legislature's argument is fundamentally at odds with the nature of intervention in Wisconsin. Once a person or entity intervenes in litigation, the court affords that intervenor the same status as the original parties to the suit. *Zellner v. Herrick*, 2009 WI 80, ¶22, 319 Wis. 2d 532, 770 N.W.2d 305 (citing *Kohler Co. v. Sogen Int'l Fund*, 2000 WI App 60, ¶11, 233 Wis. 2d 592, 608 N.W.2d 746). In *Kohler Co.*, the court of appeals adopted the federal rule that, "[t]he intervenor renders itself 'vulnerable' to complete adjudication by the federal court of the issues in litigation between the intervenor and the adverse party.'" 2000 WI App 60, ¶12 (quoting *Schneider v. Dumbarton Developers, Inc.*, 767 F.2d 1007, 1017 (D.C. Cir. 1985)). The Supreme Court cited the *Kohler Co.* case approvingly in *Zellner*. The Legislature was not required to intervene here, but having done so, it is subject to adjudication of the League's requests for declaratory and injunctive relief. Such is the "price paid for intervention." *Id.* ¶15 (cleaned up).

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This rule furthers a central goal of intervention: "the speedy and economical resolution of controversies." *Armada Broad., Inc. v. Stirn*, 183 Wis. 2d 463, 472, 516 N.W.2d 357 (1994). Were the League to seek relief against various municipalities

pursuant to Count I, as the Legislature suggests, the Legislature's interests would remain constant, and presumably it would intervene anew in each suit, with nothing gained by the procedural mechanics but significant duplication of effort and a waste of judicial time and resources. The Legislature has repeatedly intervened in various lawsuits against WEC to assert its interpretations of state and federal law. *See, e.g.*, *Dem. Nat'l Comm. v. Bostelmann*, 20-CV-249, dkt. 20–21 (W.D. Wis., March 20, 2020); *Swenson v. Bostelmann*, 20-CV-459, dkt. 25–26 (W.D. Wis., June 8, 2020); *White v. Wis. Elections Comm'n*, 22-CV-1008, dkt. 41, 45 (Waukesha Cnty. Cir. Ct., Aug. 11, 2022); *Rise, Inc. v. Wis. Elections Comm'n*, 22-CV-2446, dkt. 35–36 (Dane Cnty. Cir. Ct., Oct. 3, 2022). Having chosen to intervene here, the Legislature should not be permitted to avoid adjudication of the very issue in which it has claimed an interest as the basis for its intervention. For these additional reasons, the motion should be denied.

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CONCLUSION

For the reasons stated herein, Plaintiff League of Women Voters of Wisconsin respectfully requests that the Court DENY the Legislature's motion to dismiss Count I of the League's complaint.

Respectfully submitted this 10th day of January, 2023,

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