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 et al.,

Defendants.

PLAINTIFF'S BRIEF IN OPPOSITION TO WEC'S MOTION TO RECONSIDER AND CONSOLIDATE DANE COUNTY CASES NOS. 22-CV-2472 AND 22-CV-2446

INTRODUCTION

Eight months and three statewide elections have passed since these cases were filed. At this late hour, with a Motion for Summary Judgment pending in one case and a Motion to Dismiss pending in the other, and without regard for the differences between the matters, Defendant Wisconsin Elections Commission and the WEC Commissioners[1] (collectively, "Defendants" or "WEC") request that these respective Courts reconsider their order denying this precise procedure.

Because these matters involve distinct questions and bodies of law, and because it would be procedurally disruptive, wasting judicial resources and prejudicing the parties, Plaintiff League of Women Voters respectfully requests that WEC's Motion to Reconsider and Consolidate be denied.

[1] The Commissioners include Don M. Millis, Robert F. Spindell, Jr., Marge Bostelmann, Ann S. Jacobs, Mark L. Thomsen, and Joseph J. Czarnezki.

BACKGROUND

The League agrees with and incorporates WEC's Factual and Procedural Background. (*League* case, dkt. 120, Exh. B, 2–8.) Additional relevant procedural facts are included in the Argument section, *infra*.

LEGAL STANDARD

"When actions which might have been brought as a single action under s. 803.04 are pending before different courts, any such action may be transferred upon motion of any party or of the court to another court where the related action is pending." Wis. Stat. § 805.05(1)(b). The consolidation statute authorizes the Court to "make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay." *Id.* Wisconsin statute § 803.04 governs permissive joinder of parties. Two cases may be joined or consolidated under these statutes if they "aris[e] out of the same transaction, occurrence, or series of transactions or occurrences" and if the cases concern a "question of law or fact" common to all plaintiffs or defendants. Wis. Stat. § 803.04(1).

Wisconsin's consolidation rules closely resemble Federal Rule of Civil Procedure 42(a), which provides:

> If actions before the court involve a common question of law or fact, the court may:
>
> (1) join for hearing or trial any or all matters at issue in the actions;
> (2) consolidate the actions; or
> (3) issue any other orders to avoid unnecessary cost or delay.

Fed. R. Civ. P. 42(a). In both state and federal courts, consolidation is contemplated in large part as a tool to avoid unnecessary costs or delay. Whether to consolidate cases is a matter within "the sound discretion of the trial court[.]" *Fire Ins. Exch. v. Basten*, 202 Wis. 2d 74, 95, 549 N.W.2d 690 (1996).

Plaintiffs have a fundamental interest in obtaining prompt adjudication of their claims. This is implicit in the consolidation statute's recognition of the importance of avoiding unnecessary costs and delay. This principle has also been recognized in the context of motions to intervene, which may not be granted if they will "unduly delay or prejudice the adjudication of the rights of the original parties." *City of Madison v. Wisconsin Emp. Rels. Comm'n*, 2000 WI 39, ¶11, 234 Wis. 2d 550, 610 N.W.2d 94. Courts also recognize plaintiffs as "masters of the complaint" for purposes of determining where their claims will be heard. *See, e.g.*, *Caterpillar Inc. v. Williams,* 482 U.S. 386, 395 (1987); *Garbie v. DaimlerChrysler Corp.*, 211 F.3d 407, 410 (7th Cir. 2000); *Daniel v. Armslist, LLC,* 2019 WI 47, ¶89, 386 Wis. 2d 449, 926 N.W.2d 710 (A.W. Bradley, J., dissenting).

Wisconsin law also recognizes that consolidation is sometimes contrary to the interests of judicial economy, and efficiency may favor separate trials. *See* Wis. Stat. § 805.05(2) ("The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition or economy, or pursuant to s. 803.04 (2) (b), may order a separate trial of any claim […] always preserving inviolate the right of trial in the mode to which the parties are entitled."); *see also Keplin v. Hardware Mut. Cas. Co.*, 24 Wis. 2d 319, 327, 129 N.W.2d 321 (1964) ("if such issues are

too diversive so as to be confusing to the case as a whole or the presence of an issue would prejudice a party not involved, the cases should not be consolidated.").

ARGUMENT

Consolidating these two cases is both substantively and procedurally inappropriate, and consolidation would unduly prejudice the League. The motion should be denied.

I. *Rise* and *League* address different questions of law and are not appropriate for consolidation.

Two Wisconsin Supreme Court cases exemplify why the *Rise, Inc. v. Wisconsin Elections Commission* ("*Rise*") and *League of Women Voteres of Wisconsin v. Wisconsin Elections Commission* ("*League*") should not be consolidated. 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. 353, 357, 158 N.W. 85*; see also Basten*, 202 Wis. 2d at 95 (consolidation appropriate when cases will amount to "duplicate proceedings growing out of the same transaction and involving similar issues."). Consolidation is appropriate where, for example, an insurer has filed a declaratory judgment action to determine coverage and their insured is a defendant in a parallel injury suit, *see id.*, or where multiple actions are filed by heirs against the administrator of the same estate. *Biron v. Edwards*, 77 Wis.

477, 46 N.W. 813, 814 (1890). However, consolidation for trial of different issues is not appropriate. *Cover v. Chicago Eye Shield Co.*, 136 F.2d 374, 376 (7th Cir. 1943) ("To say that such separate trials of different issues shall all be considered as one trial, as suggested by appellant, would certainly do violence to the rights of the several claimants involved, as well as the defendant.").

The League has never contested that both its case and *Rise* involve unresolved issues regarding the absentee ballot certificate witness certification that emerged following the Waukesha County Circuit Court's decision in *White v. Wisconsin Elections Commission*, 22-CV-1008, Dkt. 188, (Waukesha Cnty. Cir. Ct., Oct. 3, 2022). (*See League* case, dkt. 2, Compl., ¶1 ("A recent temporary injunction issued in Waukesha County Circuit Court threatens to unlawfully disenfranchise Wisconsin voters.").) But the overlap ends there. *League* and *Rise* raise different, independent questions of law about that requirement based on separate bodies of law and implicating different parties. Therefore, consolidation is not appropriate.

A. The questions raised by League *and the relief requested are different from those in* Rise.

The questions posed by the two cases are distinct, which is sufficient reason to deny consolidation. *Cf. Schmidt v. Riess*, 186 Wis. 574, 203 N.W. 362, 365 (1925) (consolidation for trial appropriate where facts and proof required were "identical"); *Department of Workforce Dev. v. Labor and Industry Rev. Comm'n*, 2016 WI App 21, ¶31 n.23, 367 Wis. 2d 609, 877 N.W.2d 620 (common question of law is a "prerequisite" to consolidation).

1. *Rise* presents for the Court's determination two legal questions not presented in *League*, involves WEC guidance not implicated by *League,* and seeks relief not requested in *League*.

There are at least three aspects of the legal questions presented for the Court's resolution in *Rise* not present in *League*, each of which weighs against consolidation.

First, as has been true throughout the lifespan of both cases, *Rise* presents for the Court's determination how the term "address" in Wis. Stat. § 6.87 should be interpreted in the absence of any statutory definition. As the *Rise* plaintiffs explained in their First Amended Complaint: "This case concerns two issues: the proper definition of witness 'address' for purposes of Wis. Stat. § 6.87; and, relatedly, the circumstances in which a clerk may return the ballot to the voter for correction due to a witness-address issue rendering the absentee ballot certificate 'improperly completed' for purposes of Wis. Stat. § 6.87(9)." (*Rise* case, dkt. 160, ¶3.) The League has long disclaimed any position on the question of how to interpret the term "address," and it is not presented for the Court's determination in its lawsuit. (*League* case, dkt. 94, Second Am. Compl., ¶10 n.3; dkt. 58, Pl.'s Resp. to *Sua Sponte* Rev. for Possible Consol., p. 2 ("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, and it does not dispute WEC's definition of 'address'") (emphasis original) (citations omitted).)

Second, the questions presented in *Rise* implicate, and challenge, specific WEC guidance. (*Rise* case, dkt. 160, First Am. Compl., ¶¶9–10, 73–82 (challenging WEC guidance defining "address").) The League presents no such challenge.

Third, *Rise* seeks relief in the form of a declaratory judgment establishing its preferred definition of "address" under Wis. Stat. § 6.87(2) and declaring absentee

ballot certificate envelopes that satisfy that definition to be properly completed; as well as a declaratory judgment invalidating WEC's September 14 communication to clerks. (*Rise* case, dkt. 160 at 25.) The League does not seek that relief.

2. In contrast to *Rise's* focus solely on Wisconsin law and election procedure, *League* seeks a judicial determination of a disputed question of federal law under the Civil Rights Act of 1964.

The League's case, following the Court's decision on the Legislature's Motion to Dismiss (*League* case, dkt. 107, March 14, 2023 Dec. & Order), is narrowly focused on a different question than *Rise*: whether, under the 1964 Civil Rights Act's Materiality Provision, 52 U.S.C. § 10101(a)(2)(B), eligible absentee voters in Wisconsin—and only those falling within four specific subcategories—are entitled to have their ballot counted, notwithstanding immaterial errors or omissions made in a witness's address on the absentee ballot certificate. (*League* case, dkt. 114, Mem. of Law in Supp. of SJ, p. 1.) The League specifically seeks a declaration that four types of errors or omissions are not material to a determination of the voter's qualifications and, therefore, cannot result in the rejection of that voter's ballot. (*Id.* at 9–11.) Wisconsin's witness address requirement in Wis. Stat. § 6.87(6d) is preempted where it conflicts with the Civil Rights Act. *See Carey v. Wisconsin Elections Comm'n*, 624 F. Supp. 3d 1020, 1032 (W.D. Wis. 2022) ("The effect of the Supremacy Clause is that state laws that are contrary to or interfere with federal law are preempted and therefore unenforceable." (citing *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 604 (1991))). This federal preemption question, which contains four discrete subparts given the

four categories of absentee ballots, must be answered, independent of and notwithstanding the resolution of the issues in the *Rise* case, to vindicate the *federal* rights of the League, its members, and Wisconsin voters. The League's sole remaining claim requires the Court to analyze, under the plain meaning of the *federal* statute, what of the witness address requirement is or is not material under *federal* law. (*Id.* at 21–37; *League* case dkt. 94, Second Am. Compl., ¶¶64–74.) These federal questions are not at issue in *Rise*.

And as noted above, the parties raise different questions and request different relief, further underscoring the inappropriateness of consolidation. In contrast to the declaratory judgment of Wisconsin law Rise seeks, the League seeks a declaratory judgment that Wis. Stat. § 6.87(6d) violates the Materiality Provision of the 1964 Civil Rights Act as applied to four specific categories of Wisconsin absentee voters who cast or will return absentee ballots with certificates filled out in certain, enumerated ways, and that the applicable federal law preempts the conflicting Wisconsin law, displacing it and rendering it inapplicable in certain circumstances. (*League* case, dkt. 94 at 28)

These issues, presenting *different* legal questions for judicial resolution and implicating *different* remedies, have always been and remain distinct. The Courts were right to deny consolidation last year, and reconsideration of that decision at this late juncture is unwarranted and would prejudice the League.

3. *League* and *Rise* implicate separate bodies of law.

Because they implicate different issues under state and federal law, resolution of the legal issues presented in *Rise* and *League* require the respective judges presiding over each case to analyze separate and unrelated bodies of law. *Rise* involves Wisconsin state-law issues of statutory interpretation, which the Court presiding in that case must resolve with reference to Wisconsin's canons of statutory interpretation. *See e.g. State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110; *but see* Daniel R. Suhr, *Interpreting Wisconsin Statutes*, 100 Marq. L. Rev. 969, 970 (2017) ("[A]s *Kalal* set forth a broad new standard, it left many methodological questions to be decided in subsequent cases, such as what tools are available to determine statutory meaning, when a statute is ambiguous, and what tools are appropriate to resolve that ambiguity."). Some of those questions are uncertain or unsettled. *Id.* at 988 ("But the effort to supplant or undermine *Kalal* has taken on renewed vigor in the last few years.").

While issues surrounding Wisconsin statutory interpretation were relevant prior to the Court's March 14, 2023 decision in the *League* case, they have no bearing on the League's only current claim under the Materiality Provision. In contrast to the solely *state-law* legal issues presented for determination in *Rise*, the Court in the League's case must apply *federal* law to resolve the sole remaining claim. *Shaw v. Leatherberry*, 2005 WI 163, ¶31, 286 Wis. 2d 380, 706 N.W.2d 299 (citing *Felder v. Casey,* 487 U.S. 131, 151 (1988)); *see also Lindas v. Cady*, 150 Wis. 2d 421, 441 N.W.2d 705 (1989) ("State judges, like federal judges, are bound by the supremacy clause

to apply federal law in state courts."). To that end, the League's brief in support of its pending Motion for Summary Judgment is grounded in federal law concerning the 1964 Civil Rights Act provision at issue, including cases explaining: (1) an absentee ballot certificate is a "record or relating to [an] . . . act requisite to voting;" (2) "Qualified under State law," as used in the Materiality Provision, means eligible to vote under state law; (3) the meaning of "material"; and (4) the application of these principles to specific types of information a witness might provide. (*League* case, dkt. 114, Mem. of Law in Supp. of SJ, p. 14–35.) To make its arguments, the League discusses persuasive federal cases like *La Union del Pueblo Entero v. Abbott*, 604 F. Supp. 3d 512 (W.D. Tex. 2022) and *Martin v. Crittenden*, 347 F. Supp. 3d 1302 (N.D. Ga. 2018). (*League* case, dkt. 114, Mem. of Law in Supp. of SJ, p. 22–23.) It also addresses the legislative history of the Materiality Provision with citations to the Congressional Record. (*Id.* at 26–28.) None of this law or history has any bearing on the issues presented in *Rise*, and the Court presiding over that case need not review, analyze, or resolve any of those *federal-law* issues or their components. Similarly, this Court need not review, analyze, or resolve any of the *Wisconsin state-law* issues presented to the *Rise* Court.

In short, while both cases relate to Wisconsin's absentee ballot certificate envelope and the witness address requirement, *League* and *Rise* involve separate issues of state and federal law that should be determined independently.

B. Developments since the previous decision caution against consolidation.

Developments in the respective cases since the Courts' previous decision denying consolidation (*League* case, dkt. 64) make consolidation even less appropriate than it would have been last year.

First, the League no longer has an active *state-law* claim regarding the meaning of "missing" in Wis. Stat. § 6.87(6d). That claim has been dismissed, so any amendment by the *Rise* plaintiffs that now touches on the meaning of that statute results in no overlap between the cases. And, as discussed *supra*, the current lack of any questions of state-law statutory interpretation in the *League* case results in a complete separation in the respective bodies of law implicated in each case.

Second, similarly, the League, with the consent of the Defendants and the Legislature, dismissed without prejudice its claim related to Wis. Stat. § 6.87(9) and whether the Due Process Clause of the Fourteenth Amendment requires WEC to instruct municipal clerks to provide notice to voters prior to rejecting ballots due to witness address defects or omissions. (*League* case, dkt. 94, Second Am. Comp., ¶¶75–81; dkt. 110, Stipulation; dkt. 111, Order.) This issue remains part of *Rise*. (*Rise* case, dkt. 160, First Am. Compl., ¶3. (discussing "circumstances in which a clerk may return the ballot to the voter for correction due to a witness-address issue rendering the absentee ballot certificate 'improperly completed' for purposes of Wis. Stat. § 6.87(9)").)

Third, *Rise*, particularly *after* the March 2023 amendment of the complaint, now involves multiple defendants and units of government who are not named in the

League's case: the city clerks for the cities of Madison, Racine, and Green Bay. (*Id.*, ¶9); *Charles A. Stickney Co.*, 158 N.W. at 87 ("The actions could not have been joined in the first instance, as they were brought by different parties and related, in some respects, to essentially different controversies."). Consequently, the parties in the two cases are different, other than WEC, which is, of course, a defendant in *every* election or voting-related lawsuit in Wisconsin, and the Legislature, which successfully sought to be part of both cases (and has not joined WEC's instant motion).

Fourth and finally, the procedural developments since the initial order rejecting consolidation only make consolidation more inappropriate. These two cases have taken very different tracks, and any attempt to consolidate their disparate procedural postures at such a late juncture in *League* would result in undue delay and consequent prejudice to the League—the very concerns that Wisconsin's consolidation statute seeks to avoid. Wis. Stat. § 805.05(1)(b); *Aug. Schmidt Co. v. Hardware Dealers Mut. Fire Ins. Co.*, 26 Wis. 2d 517, 523, 133 N.W.2d 352 (1965) (courts have discretion to grant consolidation "when no prejudice will result from trying the several cases together.").

II. Because the two cases are in different procedural postures, consolidation would cause prejudicial delay in the adjudication of the League's claims.

Even if the Court were to identify a legal basis that would allow consolidation, it should exercise its discretion to deny WEC's motion because of the very different procedural postures of the two cases. The League's case is so much farther along the litigation timeline *Rise* that consolidation would unduly prejudice the League. Even

though *Rise* has been pending since last year and was amended back in March of this year, and even though it agreed to a summary judgment briefing timeline in *League* that ended in September, WEC now proposes to consolidate these cases and delay adjudication of summary judgment in the League's case until such time as Rise's claims have been decided on the merits. In contrast to the League's case, *Rise* is in the early stages with the Legislature's Motion to Dismiss its First Amended Complaint still pending.[2] Once the Court issues that decision, assuming Rise's case survives, the parties may need to conduct discovery and the Court will need to set a briefing schedule for summary judgment. Once briefing is complete, the Court will need to reach a decision on summary judgment in *Rise*, assuming there are no material issues of fact. Under WEC's proposal, *only then* would the Court turn to the League's pending Motion for Summary Judgment. There is no way to know exactly how long this will take, but the whole process will likely delay the ultimate adjudication of the League's sole remaining federal claim by several months at a minimum, likely into 2024.

By contrast, the League's case has arrived at the summary judgment stage after multiple rounds of adversarial briefing and amended complaints. The League has already filed its Motion for Summary Judgment and supporting brief and several hundred pages of affidavits and evidence. The League filed its original Summons and

[2] Pursuant to Wis. Stat. § 802.06(1)(b), this motion has resulted in an automatic stay in the *Rise* case. Should WEC's motion be granted, the League expects that any such stay would not apply to its claims, as the motion to consolidate is for purpose of trial only. However, this additional procedural hurdle underscores the potential for undue delay and hardship to the League, which has already experienced such a stay during the pendency of earlier motions to dismiss.

Complaint on September 30, 2022 (*League* case, dkt. 2), and promptly followed it with an Amended Complaint on October 3 (*League* case, dkt. 10) and Motion for Temporary Injunction on October 4 (*League* case, dkt. 15.) The Court heard oral argument on October 14, and issued an oral ruling denying the League's motion on October 26, in large part based on how soon before the November 2022 general election the requested ruling would have been issued. (*League* case, dkt. entry, Oct. 26, 2022.) The League filed a petition for leave to appeal this denial on October 28, which the Court of Appeals denied on November 1. (*League* case, dkt. 68, 71.) During this period, the Court also considered whether to consolidate this case with *Rise* and granted intervention to the Legislature. (*League* case, dkt. 55, Rev. for *Sua Sponte* Order for Consol.; dkt. 34, Order Granting Int.) On November 11, the Legislature filed a Motion to Dismiss Count 1. (*League* case, dkt. 73.) Then, on December 5, WEC filed a Motion for Judgment on the Pleadings on Counts I and III. (*League* case, dkt. 79.) On December 19, the League filed a stipulation in which all parties agreed the League could file a Second Amended Complaint by January 3, 2023, which would moot WEC's motion but not the Legislature's. (*League* case, dkt. 83.) On December 23, 2022, the League filed its Second Amended Complaint. (*League* case, dkt. 94.) Briefing continued on the Legislature's motion, and the Court held a hearing on January 24, 2023 (*League* case, dkt. Entry, Jan. 24, 2023). On February 8, WEC filed its Answer and Defenses to the Second Amended Complaint. (*League* case, dkt. 105.) On March 14, 2023, the Court dismissed Count One of the Second Amended Complaint. (Dkt. 107.) On March

23, the Legislature filed its own Answer. (*League* case, dkt. 109.) The League conducted discovery over several months, including requests for production of documents and requests for admission. (*League* case, dkt. 115, Lenz. Aff. Ex. 4, Def. Resp. to Pl.'s First Set of Req. for Prod. of Doc. and Int.; dkt. 116, Lenz Aff. Ex. 29, Def. Resp. to Pl.'s First Set of Req. for Adm. and Int.) On June 1, 2023, the parties filed a joint stipulation with the Court proposing a summary judgment briefing schedule that would have all briefing completed by September 1 (*League* case, dkt. 110), which the Court adopted (*League* case, dkt. 111.)

Before the Court's August 3 order, Defendants' responsive briefs and cross-motions for Summary Judgment were due on August 4, with the League's Reply and cross-response due August 18. Now the case is delayed until the consolidation motion is decided. Rather than *avoid* unnecessary delay in the cases, *see* Wis. Stat. § 805.05(1)(b), WEC's motion to consolidate threatens to impose an unnecessary—and prejudicial—delay on adjudication of the League's claims.

Courts often cite differences in procedural posture as grounds for denying motions to consolidate cases. *See, e.g.*, *Habitat Educ. Ctr., Inc. v. Kimbell*, 250 F.R.D. 390, 395 (E.D. Wis. 2008) ("Further, the cases are in slightly different procedural postures, and consolidation might delay the projects that are farthest along and might unnecessarily delay an appeal in a particular case"); *Prudential Ins. Co. of Am. v. Marine Nat. Exch. Bank*, 55 F.R.D. 436, 437–38 (E.D. Wis. 1972) (Defendant's motion to consolidate on eve of trial in one case denied because of delay it would cause to case ready for disposition); *see also Tupitza v. Tupitza*, 251 Wis. 257, 263, 29

N.W.2d 54 (1947) (trial court did not err in denying consolidation in part because "the procedure applicable on the trials and subsequent proceedings therein [were] so different"); *Van Patten v. Wright*, No. 07-C-0026, 2009 WL 1886010, at *1 (E.D. Wis. June 30, 2009) ("I denied the earlier motion to consolidate because the case pending before Judge Callahan contains additional claims, both cases have additional defendants, and the cases were at different stages procedurally.").

Moreover, in each of the four cases above, there was no exigent, external need for speedy adjudication—but here there is. Wisconsin's spring primary election is on February 20, 2024, and the presidential preference primary election follows quickly on April 2, 2024. The League's claims must be resolved in time for clerks to receive the instructions they need to administer those early 2024 elections in compliance with federal law. In each pending case, appellate review is likely. Furthermore, because the League raises a federal claim, there is even the possibility of U.S. Supreme Court review; there is no possibility of this in *Rise*. If the League is required to wait for *Rise*'s resolution on the merits, it will be hard-pressed to obtain relief in time for 2024 elections.

Legal challenges that impact election administration should, if possible, be resolved well in advance of an election, though this precautionary principle is not monolithic or one-size-fits-all. The League has prosecuted its case with this general principle in mind. "Parties bringing election-related claims have a special duty to bring their claims in a timely manner. Unreasonable delay in the election context poses a

particular danger—not just to municipalities, candidates, and voters, but to the entire administration of justice." *Trump v. Biden*, 2020 WI 91, ¶30, 394 Wis. 2d 629, 951 N.W.2d 568; *see also Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006).[3] Here, the League has made every effort to obtain relief well in advance of upcoming elections, particularly in light of the fact that this Court denied the League's temporary injunction motion last year in large part due to the risks the Court identified with issuing injunctive relief against an election law in the weeks before an election. (*League* case, Oct. 16, 2022 Tr., 13:8–16[4] ("I also believe that the fact that the election is all but two weeks away lends some credence to the argument raised by WEC and the Legislature that any decision issued by this Court granting the temporary injunction would frustrate the electoral process by causing confusion.").) Granting WEC's motion and freezing summary judgment briefing in the League's case—likely for a period of at least several months pending the resolution of the claims in *Rise*—would be contrary to the clear directives of the Supreme Courts of both Wisconsin and the United States and is against the public interest in well-run elections. *See Purcell*, 549 U.S. at 4; *Milwaukee Branch of NAACP v. Walker*, 2014 WI 98, ¶73, 357 Wis. 2d 469, 504, 851 N.W.2d

[3] There is also specific precedent for declining to delay adjudicating a federal claim until related state claims have been decided. See *Trump v. Wisconsin Elections Comm'n*, 506 F. Supp. 3d 620, 636 (E.D. Wis.), *aff'd*, 983 F.3d 919 (7th Cir. 2020) ("While there is parallel litigation pending in the state court, that litigation does not address the federal constitutional issue that is the center of plaintiff's case. Given the importance of the federal issue and the limited timeline available, it would be inappropriate to wait for the conclusion of the state court case."). Of course, the parties here do not face the same exceptional time pressure that courts faced in December 2020 when former President Trump was trying to overturn Wisconsin's election results. However, delaying adjudication of the League's federal law claims is all but certain to create time pressure down the line, and is simply unnecessary.

[4] A copy of the relevant pages of this transcript are attached as Exhibit 2 to the Affidavit of Daniel S. Lenz, filed herewith.

262, 279 ("It should be beyond question that the State has a significant and compelling interest in protecting the integrity and reliability of the electoral process, as well as promoting the public's confidence in elections.").

WEC stipulated to the briefing schedule on the League's motion for summary judgment in June, more than two months after Rise had filed its First Amended Complaint. WEC knew then what claims were at issue in each case but did not suggest revisiting the Courts' decision to keep them separate. The eleventh-hour nature of this motion undercuts WEC's arguments about the necessity of consolidation and significantly increases the threatened prejudice to the League. Given the time imposed by the above-cited decisions of the Supreme Courts of both Wisconsin and the United States, time matters for vindicating Wisconsin voters' federal rights.

Related to the timing issue is the fact, discussed at greater length above, *see supra* at 4–10, that these two cases involve completely different claims and legal questions, and that the League's case has different defendants than Rise's case. Accordingly, the idea that combining the cases would streamline proceedings for both suits is highly dubious. *See, e.g., Van Patten,* 2009 WL 1886010, at *2 (declining to consolidate cases even when both were at summary judgment stage, because of differences in claims and defendants).

Respectfully, the Courts should deny WEC's eleventh-hour Motion to Reconsider and Consolidate. In the alternative, if the Court decides to consolidate the two cases for trial, the League respectfully requests that the Court reject WEC's proposal

to delay adjudication of the League's summary judgment motion, for the reasons discussed in this brief.

CONCLUSION

For the foregoing reasons, Plaintiff League of Women Voters of Wisconsin respectfully requests that the Courts deny the Motion to Reconsider and Consolidate.

Dated: August 11, 2023

By: *Electronically signed by Daniel S. Lenz*
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