No.2024AP165

In the Wisconsin Court of Appeals

DISTRICT IV

RISE, INC., *and* JASON RIVERA,
PLAINTIFFS-RESPONDENTS,
v.
WISCONSIN ELECTIONS COMMISSION, MARIBETH WITZEL-BEHL, CITY CLERK FOR THE CITY OF MADISON, WISCONSIN; TARA MCMENAMIN, CITY CLERK FOR CITY OF RACINE, WISCONSIN; *and* CELESTINE JEFFREYS, CITY CLERK FOR THE CITY OF GREEN BAY, WISCONSIN,
DEFENDANTS,

WISCONSIN STATE LEGISLATURE,
INTERVENOR-APPELLANT

On Appeal From The Dane County Circuit Court,
The Honorable Ryan D. Nilsestuen, Presiding
Case No. 2022CV2446

APPENDIX TO INTERVENOR-APPELLANT'S REPLY IN SUPPORT OF EMERGENCY MOTION FOR STAY PENDING APPEAL

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LEAGUE OF WOMEN VOTERS
OF WISCONSIN,

Plaintiff,

Case No. 2022CV2472

v.

WISCONSIN ELECTIONS COMMISSION, et al.,

Defendants.

INTERVENOR DEFENDANT THE WISCONSIN STATE LEGISLATURE'S BRIEF IN SUPPORT OF MOTION FOR STAY PENDING APPEAL

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INTRODUCTION

In this Court's January 2, 2024, summary-judgment order, this Court held that the Materiality Provision of the federal Civil Rights Act of 1964 preempts Wisconsin's absentee-ballot witness requirement as to four specific categories of absentee ballots. Dkt.157. Then, in this Court's January 30, 2024, injunction order, the Court enjoined Defendant the Wisconsin Elections Commission ("WEC") to inform election officials statewide that they may not reject the four categories of absentee ballots that fail to comply with the State's absentee-ballot witness requirement, and also to issue new "guidance on [the] implementation" of this Court's order. Dkt.161 at 2.

This Court should stay its January 2 and January 30 orders pending the appeal of Intervenor-Defendant the Wisconsin State Legislature ("the Legislature") of those orders, as the Legislature satisfies the stay-pending-appeal standard set out by the Wisconsin Supreme Court in *Waity v. LeMahieu*, 2022 WI 6, 400 Wis. 2d 356, 969 N.W.2d 263. To begin, the Legislature has a strong likelihood of success on appeal as a matter of law under *Waity*, including because this Court's orders address a novel question of law that is subject to de novo review on appeal. Further, the balance of the equities weighs decisively in favor of a stay pending appeal: the State and the Legislature suffer irreparable harm any time a state statute is enjoined; this Court's orders will cause confusion among clerks and the public alike, especially from WEC having to rescind longstanding guidance and replace it with new guidance, which new guidance itself may be quickly rescinded if the Legislature prevails on appeal here;

and Plaintiffs would suffer no harm, given how straightforward it is to comply with the absentee-ballot witness requirement.

Finally, and at a minimum, this Court should grant a limited administrative stay while the Legislature moves the Court of Appeals for a stay pending appeal and during the Court of Appeals' consideration of that motion, given the potential for needless confusion for municipal clerks and voters throughout the State, especially in light of the already underway February 20, 2024, Spring Primary Election.

STANDARD OF REVIEW

Section 808.07 of the Wisconsin Statutes authorizes "a trial court [to] . . . [s]tay execution or enforcement of a judgment or order" during "the pendency of an appeal" of that order. Wis. Stat. § 808.07(2)(a); *see id.* § (Rule) 809.12. When deciding a motion to stay an order pending appeal, the Court must consider whether the moving party: (1) "makes a strong showing that it is likely to succeed on the merits of the appeal"; (2) "shows that, unless a stay is granted, it will suffer irreparable injury" during the pendency of the appeal; (3) "shows that no substantial harm will come to other interested parties" during the pendency of the appeal; and (4) "shows that a stay will do no harm to the public interest." *Waity*, 2022 WI 6, ¶ 49. These four factors "are not prerequisites but rather are interrelated considerations that must be balanced together." *Id.* (citation omitted).

ARGUMENT

I. The Legislature Has A High Likelihood Of Success On Appeal

A. To assess whether a party has a high likelihood of success on appeal, the Court must follow the analytical approach that the Wisconsin Supreme Court articulated in *Waity*. That approach forbids a court from "input[ting] its own judgment on the merits of the case and conclud[ing] that a stay is not warranted," because the dispositive question at the stay-pending-appeal stage is "whether the movant made a strong showing of success *on appeal*." *Waity*, 2022 WI 6, ¶ 52. The trial court must therefore "consider the standard of review, along with the possibility that appellate courts may reasonably disagree with its legal analysis." *Id.* ¶ 53. The court may not "merely repeat and reapply legal conclusions already made." *Id.* ¶ 52. Further, when a case involves issues that an appellate court will review de novo—such as novel questions of statutory interpretation—the circuit court must "consider[ ] how other reasonable jurists on appeal may . . . interpret[ ] the relevant law and whether they may . . . come to a different conclusion." *Id.* ¶ 53. Such considerations, alone, establish that a strong likelihood of success on appeal exists. *See id.* ¶¶ 51–53.

B. Here, the Legislature has satisfied the likelihood-of-success-on-appeal factor because "reasonable judges on appeal could easily . . . disagree[ ] with," *id.* ¶ 53, this Court's conclusion in its January 2, 2024 summary-judgment decision that the Materiality Provision preempts Wisconsin's absentee-ballot witness requirement as applied to the four specific categories, *see* Dkt.157; Dkt.161 at 2.

1. The Materiality Provision applies only to laws that: (1) deny an individual "the right to vote (2) because of an error or omission (3) on any 'record or paper relating to . . . an act requisite to voting' (4) that is not material in determining whether the voter is qualified to vote." Dkt.157 at 4 (citing 52 U.S.C. § 10101(e)).[1] Here, as the Legislature explained, the Materiality Provision does not apply to Wis. Stat. § 6.87(6d) or preempt its enforcement as to certain categories of absentee ballots with insufficient witness addresses, for multiple independently sufficient reasons. Dkt.138. First, because Section 6.87(6d) applies only *after* Wisconsin law has deemed an absentee voter "qualified to vote" in connection with her absentee ballot request, this state statute does not fall within the Materiality Provision's scope. Dkt.138 at 11–19 (citing, *inter alia*, *Schwier v. Cox*, 340 F.3d 1284 (11th Cir. 2003); *Ritter v. Migliori*, 142 S. Ct. 1824, 1825–26 (2022) (Alito, J., dissenting from denial of stay); and *Friedman v. Snipes*, 345 F. Supp. 2d 1356, 1370 (S.D. Fla. 2004)). Second, the Materiality Provision also does not apply to Section 6.87(6d) because that Section does not "deny" anyone "the right to vote," given that a voter may cast her ballot in person on Election Day without having to satisfy Section 6.87(6d). Dkt.138 at 19–24 (citing, *inter alia*, *Tully v. Okeson*, 977 F.3d 608, 613 (7th Cir. 2020); and *Vote.Org v. Callanen*, 39 F.4th 297, 306 (5th Cir. 2022)). Third, even if Section 6.87(6d) did fall within the Materiality Provision's scope, the absentee-ballot witness requirement complies with the Materiality Provision because it is "material" to determining a

[1] The Materiality Provision also requires that the challenged conduct be performed by a "person acting under color of law," 52 U.S.C. § 10101, but that element is not disputed here.

voter's qualifications to vote under state law. Dkt.138 at 24–29 (citing, *inter alia*, *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191 (2008); *Teigen v. Wis. Elections Comm'n*, 2022 WI 64, ¶ 71, 403 Wis. 2d 607, 976 N.W.2d 519; and *Common Cause v. Thomsen*, 574 F. Supp. 3d 634, 636 (W.D. Wis. 2021)). Finally, any contrary interpretation would destroy the State's responsibility for, and interest in, election administration under Article I, Section 4, of the U.S. Constitution. Dkt.138 at 14–15.

2. The Legislature understands that this Court disagreed with its arguments on these fronts in its January 2, 2024, summary-judgment order and its January 30, 2024, injunction order; however, the Legislature respectfully submits that reasonable jurists may disagree with this Court's conclusions, demonstrating that the Legislature has a strong likelihood of success on appeal.

First, the Court concluded that Section 6.87(6d) falls within the Materiality Provision's scope because it relates to whether a voter is "qualified to vote" under Wisconsin law. Dkt.157 at 5. But that is a novel question of statutory interpretation, subject to de novo review, upon which reasonable jurists could disagree, which alone establishes the Legislature's likelihood of success on appeal. *Waity*, 2022 WI 6, ¶¶ 51–53; *see* Dkt.157 at 2 ("State law does not define 'address' or specify the minimum address information necessary to comply with this provision."). In any event, the Court's conclusion was, with respect, incorrect and did not address some of the Legislature's key arguments. For example, the Court did not fully address the Legislature's point that the Materiality Provision requires the challenged law to be material to the voter's qualification *under state law*, Dkt.138 at 11–15, 25 (citing

Ritter, 142 S. Ct. at 1825–26 (Alito, J., dissenting from denial of stay); and *Common Cause*, 574 F. Supp. 3d at 636)), or that the witness requirement is material to whether a voter is who she says she is—an essential component of a voter's qualifications to vote by absentee ballot *under Wisconsin law*. Dkt.138 at 26.

Second, the Court concluded that Section 6.87(6d) falls within the Materiality Provision's scope because the rejection of an absentee ballot for non-compliance effectively "den[ies]" an absentee voter the right to vote, and because compliance with the absentee-ballot witness requirement is an "action necessary" to have an absentee ballot counted and therefore constitutes an act "requisite to voting." Dkt.157 at 4–5, 7–8. These too are novel question of statutory interpretation, reviewable on a de novo basis, upon which reasonable appellate judges may disagree, thereby supporting the Legislature's likelihood of success on appeal. *Waity*, 2022 WI 6, ¶¶ 51–53; Dkt.157 at 2 ("State law does not define 'address' or specify the minimum address information necessary to comply with this provision.").

Additionally, the Court's analysis of these issues was, with all respect, mistaken. Dkt.157 at 4–5, 7–8. For one thing, the Court hypothesized that the Legislature's position would permit a state law to require voters to guess "the name and favorite color of the poll worker who handed them their ballot," Dkt.157 at 7, but that sort of provision would be unlawful in many other respects, including by being entirely arbitrary in violation of the Fourteenth Amendment's Due Process Clause, among many other state and federal constitutional provisions. *See* U.S. Const. amend. XIV, § 1. In any event, the Court's statement is not an accurate

characterization of the Legislature's argument. That hypothetical involves a limitation on the *right* to vote in-person on Election Day, rather than, as here, on the *privilege* of voting by alternative means, such as by absentee ballot. Wis. Stat. § 6.84(1). Further, and contrary to the Court's conclusion, the plain statutory language and Wisconsin Supreme Court precedent establish that absentee voting is a privilege, not a right, and the availability of alternative means of casting a ballot strongly support the Legislature's conclusion that enforcing the absentee-ballot witness requirement does not "deny" any voter the right to vote in any way. Dkt.138 at 19–24 (citing, *inter alia*, *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2333, 2338 (2021); *Lee v. Paulson*, 2001 WI App 19, ¶ 7, 241, Wis. 2d 38, 623 N.W.2d 577; *Vote.Org*, 39 F.4th at 305–06; and *Tully*, 977 F.3d at 613). The Court also did not address the textual point that, because Wisconsin law offers another way to cast a vote without complying with Section 6.87, absentee ballots are only related, but not "requisite" to, the act of voting. Dkt.138 at 23–24. In other words, and as the Legislature explained, compliance with Section 6.87 is never *necessary* to exercise one's right to vote. *Id.* Moreover, appellate judges may be less persuaded by the nonbinding cases in other jurisdictions that this Court relied upon, given that those cases involved different voting laws administered by other States. Dkt.157 at 4–5 (citing various non-binding cases).[2]

[2] *See, e.g.*, *La Unión del Pueblo Entero v. Abbott*, 604 F. Supp. 3d 512, 541 (W.D. Tex. 2022) (concerning Texas law that required rejection of certain vote-by-mail applications); *Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1308–09 (N.D. Ga. 2018) (concerning Georgia law requiring rejection of absentee ballots that do not include birth year); *League of Women*

Third, the Court held that the absentee-ballot witness requirement is "not material to whether a voter is qualified" because it "says nothing about the voter's citizenship, age or residency," nor "about whether the voter has been disenfranchised." Dkt.157 at 5. This too involves a novel question of statutory interpretation, reviewed de novo, which independently supports the Legislature's likelihood of success on appeal here. *Waity*, 2022 WI 6, ¶ 53. And, here too, the Court's analysis did not address some of the Legislature's key points. For example, the Court did not address that the Materiality Provision requires the challenged law to be material to the voter's qualification under *state law*. Dkt.138 at 13–14, 25 (citing *Ritter*, 142 S. Ct. at 1825–26 (Alito, J., dissenting from denial of stay); and *Common Cause*, 574 F. Supp. 3d at 636)), or that, under Wisconsin law, the witness requirement is "material" to whether a voter is who she says she is—an essential component of a voter's qualifications to vote by absentee ballot, Dkt.138 at 26. Thus, although this Court held that Section 6.87(6d) is a voter-qualification provision that denies certain voters the right to vote—which the Legislature respectfully asserts is incorrect, *supra* pp.6–7—the Legislature is still likely to prevail on appeal because Section 6.87(6d)'s witness-requirement is "material" under any understanding of materiality that could survive constitutional scrutiny and respect the State's important interest in combatting election fraud.

Voters of Ark. v. Thurston, No. 5:20-cv-5174, 2021 WL 5312640, at *3–4 (W.D. Ark. Nov. 15, 2021) (denying motion to dismiss without determining whether Arkansas law requiring rejection of absentee ballots for failure to provide certain identifying information, where a voter must submit that same information in other parts of the voting process, violated Materiality Provision).

Finally, the Court held that adopting an expansive interpretation of the Materiality Provision would not impermissibly infringe the State's election-administration authority. Dkt.157 at 8. Resolving this issue requires consideration of novel questions of statutory and constitutional interpretation reviewed de novo on appeal, which alone demonstrates the Legislature's likelihood of success on appeal. *Waity*, 2022 WI 6, ¶ 53. Further, the Court's expansive interpretation of the Materiality Provision would frustrate the State's constitutional authority over election administration by authorizing voters to ignore *any* reasonable ballot requirements that have some connection to a "record or paper," forcing the State to litigate, on an ad hoc basis, whether any ballot error is "material." Dkt.153 at 7–8. The Court also rejected the Legislature's concerns about the impact of applying the Materiality Provision to Section 6.87(6d) by explaining that this is merely an "as-applied challenge" to "four discrete categories" of ballot errors, but that statement overlooks the fact that the decision announces a broad, generally applicable rule as to the scope of the Materiality Provision, and that scope would conflict with the State's constitutional authority over elections. Dkt.157 at 8; Dkt.138 at 14–15.

II. The Equitable Considerations Weigh Heavily In Favor Of A Stay Pending Appeal

A. The remaining stay-pending-appeal factors—namely, the risk of irreparable harm to the movant, the potential harm to the nonmovant, and the balance of the equities—require the Court to consider and balance the harms that could result from either granting or denying the stay pending appeal to the parties and to the public. *Waity*, 2022 WI 6, ¶¶ 57–60. The court must examine whether denying the stay will

cause the movant to "suffer irreparable injury" that "can[not] be undone" if the moving party prevails on appeal and "the circuit court's decision is reversed." *Id.* ¶¶ 49, 57. Harm that cannot be "mitigated or remedied upon conclusion of the appeal . . . must weigh in favor of the movant." *Id.* ¶ 57 (citation omitted). Next, the court must assess whether "the non-movant will experience" "substantial harm" if the court grants the stay "but the non-movant is ultimately successful" on appeal. *Id.* ¶¶ 49, 58 (citation omitted). Only the harm the non-movant might experience during "the period of time that the case is on appeal"—rather than "any harm that could occur in the future"—is relevant to this analysis. *Id.* ¶ 58. Finally, for the "harm to the public interest" element, the public interest is always served by the enforcement of duly enacted laws, including while a case is on appeal. *Id.* ¶¶ 49, 60.

B. Here, the balance of equities overwhelmingly supports a stay.

Denial of a stay pending appeal will cause irreparable harm to the State, whose interests the Legislature represents here, *Democratic Nat'l Comm. v. Bostelmann*, 2020 WI 80, ¶ 8, 394 Wis. 2d 33, 949 N.W.2d 423, and to the Legislature's own particular interests, *Waity*, 2022 WI 6, ¶¶ 49, 57. An injunction against state law irreparably harms the State, which has a sovereign interest in the faithful enforcement of state statutes as written, *see Bostelmann*, 2020 WI 80, ¶ 8—and where that injunction targets election-related laws, it further harms the Legislature's and the State's particular interests in the integrity and "orderly administration" of elections in Wisconsin, *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 196 (2008). Indeed, as the Wisconsin Supreme Court has recognized, the State and the

Legislature necessarily "suffer a substantial and irreparable harm of the first magnitude when a statute . . . is declared unenforceable and enjoined before any appellate review can occur." Dkt.22 at 98 (Order at 8, *Serv. Emps. Int'l Union, Loc. 1 v. Vos*, 2020 WI 67, 393 Wis. 2d 38, 946 N.W.2d 35 (No.2019AP622) ("*SEIU* Order")). Here, this Court has enjoined the operation of Section 6.87(6d)'s witness-address requirement as to certain categories of witness certifications. Dkt.157 at 4, 8. That constitutes irreparable harm to the Legislature. *Bostelmann*, 2020 WI 80, ¶ 8; *SEIU* Order at 8. Further, the harm is especially severe here because the enjoined law is an election statute that the Legislature put in place to ensure the integrity and "orderly administration" of Wisconsin's elections. *Crawford*, 553 U.S. at 196.

In the absence of a stay pending appeal, WEC must "disseminate to all county clerks" new guidance prohibiting the rejection of absentee ballots that contain one of the four types of errors or omissions at issue in this case by February 9, 2024. Dkt.161 at 2. But if the Legislature is successful in having the injunction reversed on appeal, that new guidance will no longer be applicable, and WEC may well have to scramble to reverse that guidance and issue new guidance all before the primary election on February 20, 2024—which is *less than three weeks away*. *See* Deadlines for the February 20, 2024 Spring Primary Election, MyVote Wis.[3] Specifically, before this Court's injunction, WEC and the Legislature always understood Section 6.87 to require the witness to write her street name, street number, and name of

[3] Available at https://myvote.wi.gov/en-us/Voter-Deadlines (all websites last visited Jan. 31, 2024).

municipality on the absentee-ballot witness certificate, with the failure to include one of these elements requiring rejection of that absentee ballot unless cured. Dkt.138 at 4–7 (citing Dkt.22 at 106–07). Accordingly, WEC has issued guidance to that effect, instructing clerks to reject absentee ballots with an absentee-ballot witness certificate that is missing one of these requirements. Dkt.138 at 4–7 (citing Dkt.22 at 88–89, 106–07). Now, after this Court's injunction, WEC must effectively rescind that guidance and "disseminate" new "guidance" instructing clerks *not* to reject absentee ballots with otherwise state-law-deficient witness certificates falling into the specific categories listed in the Court's injunction, even though the next election is less than three weeks away. Dkt.161 at 2; *see* Wis. Elections Comm'n, *Calendar*.[4]

A stay pending appeal will also benefit the public interest. *Waity*, 2022 WI 6, ¶¶ 49, 60. As the Wisconsin Supreme Court has recognized, "the public as a whole suffers irreparable injury of the first magnitude where a statute enacted by its elected representatives is declared unenforceable and enjoined before any appellate review can occur." *SEIU* Order at 9. Here, the public has an interest in the continued enforcement of Section 6.87(6d)—which law reflects the democratically-elected Legislature's policy determination that this is necessary to deter the potential for voter fraud, *Koschkee v. Taylor*, 2019 WI 76, ¶ 11, 387 Wis. 2d 552, 929 N.W.2d 600; *see* Wis. Stat. § 6.84(1)—until the appellate courts have the opportunity to conduct their review. Moreover, allowing the injunction to take effect now, on the eve of the

[4] Available at https://elections.wi.gov/calendar (listing 2024 Spring Primary as occurring on Tuesday, February 20, 2024).

primary election on February 20, will result in voter and clerk confusion, especially given the injunction's requirement that WEC effectively rescind its longstanding guidance on absentee-ballot-witness certificates and replace it with new guidance, which is a separate irreparable harm. *See, e.g.*, *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam) (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam)). As discussed above, *supra* pp.11–12, even if the Legislature prevails on appeal, changing the rules for absentee voting now and the resulting confusion to voters will result in harm that cannot be undone.

Plaintiffs, for their part, will suffer no harm from a stay pending appeal here. *Waity*, 2022 WI 6, ¶¶ 49, 58. Complying with Wisconsin's absentee voting laws is straightforward, including Section 6.87's witness-address requirement. Dkt.42 at 29. All that an absentee voter must do to comply with Section 6.87 is ensure that the witness completes the witness certificate, writing the witness's street number, street name, and the name of the municipality where the witness resides. Wis. Stat. § 6.87(6d). Complying with this requirement is especially straightforward now, as WEC has clarified the required witness-address components on its updated Standard Absentee Ballot Certificate. Fourth LeRoy Affidavit, Ex.1 at 1 (Wis. Elections Comm'n, Standard Absentee Ballot Certificate, Form EL-122 (Aug. 2023)). And if the Court does not stay pending appeal its injunction in *Rise, Inc. v. Wisconsin Elections Commission* ("*Rise*"), No.2022CV2446 (Dane Cnty. Cir. Ct.), a witness need only provide "sufficient information [on the certificate] to allow a reasonable person in the community to identify a location where the witness may be communicated with" for

a clerk to accept the absentee ballot, even if the witness does not include her street number, street name, and the name of the municipality on the certificate, *Rise*, No.2022CV2446, Dkt.238 at 1–2. Finally, should a voter desire to avoid having to comply with that law, she can easily avoid the absentee-ballot witness requirement altogether by voting in person on Election Day. Because a stay will simply maintain the status quo, Plaintiffs will not suffer any harm if the status quo is maintained during the pendency of these appeals. *Waity*, 2022 WI 6, ¶¶ 49, 58.

III. At The Very Minimum, This Court Should Grant A Limited, Administrative Stay Pending The Legislature's Filing Of A Motion For Stay Pending Appeal With The Court Of Appeals And The Court Of Appeals' Consideration Of That Motion

Should the Court decline to grant the Legislature a stay pending appeal, it should, at a minimum, grant a limited administrative stay while the Legislature moves the Court of Appeals for a stay pending appeal and during the Court of Appeals' consideration of that motion. That is, an administrative stay is essential here in light of the potential for inconsistence guidance from WEC, which will cause needless confusion for municipal clerks and voters throughout the State, *see* Dkt.161 at 2; *see supra* pp.11–13, as well the very real need for clerks across the State to administer the State's election law in the middle of the ongoing 2024 Spring Primary.

CONCLUSION

This Court should grant the Legislature's Motion For Stay Pending Appeal.

Dated: January 31, 2024

Respectfully submitted,

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FILED
03-14-2023
CIRCUIT COURT
DANE COUNTY, WI
2022CV002472

BY THE COURT:

DATE SIGNED: March 14, 2023

Electronically signed by Honorable Nia Trammell
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT BRANCH 6 DANE COUNTY

LEAGUE OF WOMAN VOTERS OF WISCONSIN,

Plaintiff,

vs. Case No. 22CV2472

WISCONSIN ELECTIONS COMMISSION ET AL,

Defendants.

DECISION AND ORDER ON MOTION TO DISMISS

Section 6.87(6d) of the Wisconsin statutes states that an absentee ballot may not be counted if it is "missing" a witness' address on the absentee ballot certificate. The term "missing" is undefined by the statute. No Wisconsin court has passed on the issue of how the term "missing" should be construed under the statute. Plaintiff, the League of Women Voters of Wisconsin (the "League") filed this lawsuit seeking clarity on this issue. In Count One of its Second Amended Complaint, the League seeks a declaration that the term missing as used in § 6.87(6d), means completely blank. It seeks a declaration that, with respect to witness addresses, an absentee ballot may only be rejected where the address is completely blank. The League further seeks an injunction requiring the Wisconsin Elections Commission (the "WEC") to

instruct municipal clerks, county clerks, and boards of elections that they shall not exclude from counting or return absentee ballots under §§ 6.87(6d) and 6.87(9) unless the witness address field is completely blank.

Presently before the Court is the Intervenor Defendant's, Wisconsin State Legislature's (the "Legislature") Motion to Dismiss Count One of the Second Amended Complaint. Having considered the parties' briefs and the arguments at the hearing on January 24, 2023, the Court issues the following Decision and Order:

BACKGROUND AND FACTUAL ALLEGATIONS

For the sole purpose of deciding the present motion, the Court recites the following facts and background information from the Second Amended Complaint, as modified by the Court. The Court accepts as true the facts alleged therein.[1]

1. The WEC is an administrative body created under the laws of Wisconsin that administers and enforces Wisconsin election laws and is comprised of six appointed members. (Dkt. 94, ¶¶ 26, 28). The WEC has "the responsibility for the administration of chs. 5 to 10 and 12 [of the Wisconsin statutes] and other laws relating to elections and election campaigns[.]" Wis. Stat. § 5.05(1). (Dkt. 94, ¶ 27).

2. Defendants Don Millis, Julie M. Glancey, Mark L. Thomsen, Ann S. Jacobs, Marge Bostelmann, and Robert F. Spindell, Jr. are members of the WEC. (Dkt. 94, ¶ 29).

3. Defendant Meagan Wolfe is the Administrator of the WEC. (Dkt. 94, ¶ 30).

4. The League is dedicated to encouraging its members and the people of Wisconsin to exercise their right to vote as protected by the U.S. Constitution, the Voting Rights Act, and

[1] Legal conclusions were recited in the Second Amended Complaint and are helpful for understanding the parties' arguments, but the Court need not accept them as true. *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶18, 356 Wis. 2d 665, 849 N.W.2d 693.

the Civil Rights Act of 1964. (Dkt. 94, ¶ 21). It seeks to maximize eligible voter participation through its voter registration, education, and outreach efforts and to encourage civic engagement through registration and voting. *Id.*

5. In Wisconsin, registered voters may apply for and obtain absentee ballots through various means. (Dkt. 94, ¶ 32, citing Wis. Stat. §§ 6.855, 6.86(2m)(a), 6.22(4), 6.24(4), 6.25(1)(c), 6.86(3), 6.875(6) and 6.86(1)(ac)).

6. Voters may return absentee ballots and cast their vote by either (1) mailing the absentee ballots to the municipal clerk's office or dropping them off in person; (2) appearing in person to vote before election day at the office of the municipal clerk or designated alternate sites, in which case the ballots are not processed and counted until election day; (3) mailing their absentee ballots to the municipal clerk's office by no later than 8:00 p.m. on election day; or (4) returning their absentee ballot to the municipal clerk's office by election day, which then requires the clerk to bring the ballot to the voter's polling place by 8:00 p.m. (Dkt. 94, ¶ 33, citing Wis. Stat. §§ 6.87, 6.855, 6.87, 6.88. and 6.87(6)).

7. Wisconsin requires all absentee ballots to be witnessed by an adult U.S. citizen, who need not be a Wisconsin resident. (Dkt. 94, ¶ 36, citing Wis. Stat. § 6.87(4)(b)(1)).

8. In 2016, the Legislature passed, and the Governor signed 2015 Wisconsin Act 261, which included a requirement that an absentee voter's witness must fill in their address on the ballot's certificate envelope for the ballot to be counted. (Dkt. 94, ¶ 34). Codified as § 6.87(6d), Stats., this requirement reads as follows: "[i]f a certificate is missing the address of a witness, the ballot may not be counted." *Id;* Wis. Stat. § 6.87(6d).

9. Absentee ballot certificates include a voter certification and a witness certification section, which the voter and witness must sign under penalty of perjury. (Dkt. 94, ¶ 37).

10. The witness address field on the absentee ballot certificate is labeled with the following: "Address of Witness(s) – street number or fire number and street, or rural route and box number, municipality, state and zip code." The Inspectors' Statement, Form EL-104, contains a code for each potential reason for rejecting an absentee ballot, and includes the code "RWA" to describe the incident -"There is no address of a witness." There is no code for missing or partial voter addresses. (Dkt. 94, ¶ 38).

11. The WEC Election Day Manual notes that an absentee ballot certificate envelope must contain the witness' address for the ballot to be counted. There is no instruction to clerks, election inspectors, or canvassers to verify or do anything else with the witness' address. As long as an address is present, the ballot is counted. (Dkt. 94, ¶ 39).

12. The term "missing" is undefined in § 6.87(6d). (Dkt. 94, ¶ 35). Neither Chapter 6 of the Wisconsin statutes (Electors) nor Chapter 5 of the statutes (Elections – General Provisions; Ballots and Voting Systems) defines the term "missing." *Id;* Wis. Stat. chs. 5-6. No definition of the term "missing" is included under Chapter 990 of the Wisconsin statutes (Construction of Statutes). *Id;* Wis. Stat. § 990.01.

13. The League has been involved in the issue of witness addresses on absentee ballot certificates since 2016 and has advocated for a policy on curing technical, immaterial omissions or defects in the witness certificate. (Dkt. 94, ¶ 23).

14. In 2016, the WEC adopted a definition of "address" for implementation of § 6.87(6d) that included three components: street number, street name, and municipality name. WEC also initially advised that "in addition to returning the absentee ballot to the voter to correct the error, a clerk could correct missing information if they received consent from the voter to do so." (Dkt. 94, ¶ 40).

15. At a WEC meeting on October 14, 2016, the WEC passed a motion that reaffirmed the WEC's three-component definition of the term "address." (Dkt. 94, ¶ 41). The WEC also modified an "October 4, 2016 staff policy" to permit "adding a municipality to the witness certificate if the address is reasonably ascertainable from other information on the absentee ballot envelope, or other reliable extrinsic sources that are available" without first obtaining voter consent and required that any additions to the witness address field should be initialed by the clerk. *Id.*

16. The WEC issued an updated guidance memorandum on October 18, 2016 ("AMENDED: Missing or Insufficient Witness Address on Absentee Ballot Certificate Envelopes"), which defined "a complete address" as containing "a street number, street name and name of municipality." The guidance instructed clerks to try to cure problems with the witness address, either by correcting the ballot themselves or contacting the voter. (Dkt. 94, ¶ 42).

17. The October 18, 2016 memorandum provided that clerks may contact voters to address missing certificate information and then place the clerk's initial next to the information provided by the voter. (Dkt. 94, ¶ 43).

18. The October 18, 2016 memorandum remained the most current WEC guidance available on this issue through the 2016, 2017, 2018, and 2019 elections. (Dkt. 94, ¶ 44, citing *Trump v. Biden*, 2020 WI 91, ¶18, 394 Wis. 2d 629, 951 N.W.2d 568.)

19. The WEC issued related guidance prior to the 2020 general election: "Please note that the clerk should attempt to resolve any missing witness address information prior to Election Day if possible, and this can be done through reliable information (personal knowledge, voter registration information, through a phone call with the voter or witness). The witness does not

need to appear to add a missing address." WEC also re-sent its October 18, 2016 memorandum. (Dkt. 94, ¶ 45).

20. On January 10, 2022, the Wisconsin Legislature's Joint Committee for the Review of Administrative Rules (the "JCRAR") directed the WEC to either "cease issuance" of the October 18, 2016 guidance on correcting absentee witness certificates or promulgate an emergency rule. (Dkt. 94, ¶ 46).

21. The WEC promulgated an emergency rule, EmR2209, which was substantively identical to WEC's cure guidance in the October 18, 2016 memorandum and became effective on July 11, 2022. (Dkt. 94, ¶ 47).

22. On July 20, 2022, the JCRAR voted to suspend EmR2209 pursuant to Wis. Stat. § 227.26(2)(d). (Dkt. 94, ¶ 48).

23. On September 7, 2022, the Waukesha County Circuit Court granted a temporary injunction in *White v. Wisconsin Elections Commission*, 22-CV-1008, Dkt. 167 (Sept. 7, 2022), invalidating the WEC's guidance on curing witness address problems on absentee ballot certificates. (Dkt. 94, ¶ 5). The *White* court barred the WEC from the following:

> ¶6. WEC is prohibited and enjoined from publicly displaying or disseminating the AMENDED: Missing or Insufficient Witness Address on Absentee Certificate Envelopes (Oct. 18, 2016), marked as Exhibit 2 to the Complaint, the October 19, 2020, memorandum entitled "Spoiling Absentee Ballot Guidance," marked as Exhibit 3 to the Complaint, or any prior or subsequent version of that substantive guidance relating to missing or adding information to absentee ballot witness certifications in any form.
>
> ¶7. WEC is prohibited and enjoined from advising, guiding, instructing, publishing, or otherwise communicating information to Wisconsin municipal clerks and local elections officials that is contrary to Wis. Stat. [§] 6.87, which provides that if a municipal clerk receives an absentee ballot with an improperly completed certificate or with no certificate, the clerk may return the ballot to the elector, inside the sealed envelope when an envelope is received, together with a new envelope if necessary, whenever time permits the elector to correct the defect and return the ballot by the applicable deadline.

> ¶8. WEC is prohibited and enjoined from advising, guiding, instructing, publishing or otherwise communicating information to Wisconsin municipal clerks and local elections officials that clerks or local election officials have the duty or ability to modify or add information to incomplete absentee ballot certifications.
>
> ¶9. WEC is ordered and required by September 14, 2022, to notify all municipal clerks and local election officials previously receiving the guidance mentioned in paragraph 6 above that this Court has declared that guidance invalid and contrary to law.

(Dkt. 94, ¶¶ 5, 49).

24. At a September 13, 2022 hearing on a motion to stay, the *White* court stated the temporary injunction was not intended to have any effect on existing WEC guidance as to the definition of an "address." (Dkt. 94, ¶ 53).

25. On September 13, 2022, the WEC withdrew its October 2016 memorandum outlining the cure guidance. *Id.*

26. On October 3, 2022, the *White* court granted a final judgment to the plaintiffs and made permanent the injunction preventing the WEC from issuing guidance or otherwise instructing clerks to cure defects in witness addresses on absentee ballot certificates. (Dkt. 94, ¶¶ 6, 50, citing *White v. Wisconsin Elections Commission*, 22-CV-1008, Dkt. 188 (Oct. 3, 2022)).

27. The League believes, that "some municipal clerks are not adhering to WEC's longstanding definition of an "address" as comprised of three components—a street number, a street name, and a municipality name—such that ballots missing the state name and/or the zip code from the witness address will be rejected." (Dkt. 94, ¶13).

APPLICABLE LEGAL STANDARD

Whether a complaint states a claim upon which relief can be granted is a question of law. *John Doe 67C v. Archdiocese of Milwaukee*, 2005 WI 123, ¶19, 284 Wis. 2d 307, 700 N.W.2d 180. Generally, pleadings only require a short, plain statement of the claim that

identifies a transaction or occurrence that led to the claim, and if true, entitles the pleader to relief. Wis. Stat. § 802.02(1)(a). "A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint." *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶19, 356 Wis. 2d 665, 849 N.W.2d 693. All facts plead and reasonable inferences that may be drawn therefrom are accepted as true for testing the sufficiency. *Id.* The Court does not add facts in evaluating the sufficiency of the complaint and does not accept as true the legal conclusions raised in the complaint. *Id.*, ¶18. The complaint's sufficiency rests on the substantive law underlying the claim. *Id.* ¶31. The facts themselves must "reveal an apparent right to recover under any legal theory" to be sufficient as a cause of action. *Cattau v. Nat'l Ins. Servs. Of Wis., Inc.*, 2019 WI 49, ¶4, 386 Wis. 2d 515, 926 N.W.2d 756.

ANALYSIS

A. Declaratory Relief.

1. *A justiciable controversy must exist for the Court to entertain an action for declaratory judgment.*

Wisconsin's Uniform Declaratory Judgments Act (the "Act") provides that "[a]ny person … whose rights, status or other legal relations are affected by a statute" may bring a claim for declaratory judgment. Wis. Stat. § 806.04(2). As relevant here, the Act states that an affected person "may have determined any question of construction … arising under the … statute … and obtain a declaration of rights, status or other legal relations thereunder." *Id.* Because "the purpose of the Act is to allow courts to anticipate and resolve identifiable, certain disputes between adverse parties," a "justiciable controversy" must exist before the court may exercise jurisdiction over a claim. *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶¶28-29, 309 Wis. 2d 365, 749 N.W.2d 211. A justiciable controversy exists when:

> (1) A controversy in which a claim of right is asserted against one who has an interest in contesting it.
>
> (2) The controversy must be between persons whose interests are adverse.
>
> (3) The party seeking declaratory relief must have a legal interest in the controversy –that is to say, a legally protectible interest.
>
> (4) The issue involved in the controversy must be ripe for judicial determination.

Id., ¶29. A claim is justiciable "[i]f all four factors are satisfied" which then makes it appropriate for the court's review. *Id.* The Act provides a vehicle 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." Wis. Stat. § 806.04(12).

The League initiated the instant action in part to seek a declaratory judgment as to the meaning of the term "missing" in § 6.87(6d). (Dkt. 94, Count One of Second Amended Complaint). Count One of the Second Amended Complaint incorporates by reference the Complaint's factual allegations and states in relevant part:

> 58. Wis. Stat. § 6.87(6d) permits a municipal clerk or board of election commissioners to exclude an absentee ballot from counting only when the address is "missing": "If a certificate is missing the address of a witness, the ballot may not be counted." Wis. Stat. § 6.87(6d).
>
> 59. "Missing" is not a defined term in Wisconsin statutes governing elections. *Trump v.* Biden, 2020 WI 91, ¶49, 394 Wis. 2d 629, 951 N.W.2d 568 (Hagedorn, J., concurring).
>
> 60. WEC guidance has never expressly defined the term "missing."
>
> 61. A plain-text reading of "missing" indicates that a ballot should not be counted only if the address is completely absent. *See Missing*, MERRIAM-WEBSTER DICTIONARY ….
>
> 62. The common-sense, plain-language definition of "missing" to mean circumstances in which the address field is left completely blank—*i.e.* in which the witness provides no address information at all—avoids or narrows the federal issues discussed in Counts 2 and 3 ….
>
> 63. Therefore, Plaintiffs are entitled to a judgment pursuant to Wis. Stat. § 806.04 declaring that an absentee ballot may be found to have a "missing" witness address and thereby excluded from counting under Wis. Stat. § 6.87(6d) only if there is no witness address information contained on the absentee ballot certificate.

(Dkt. 94, ¶ 58-63). The League further asks the Court to require the WEC to instruct Wisconsin's municipal clerks, county clerks, and boards of elections that they shall not exclude from counting or return any ballot pursuant to §§ 6.87(6d) and 6.87(9) unless the witness address field is completely blank.

2. *No justiciable controversy exists as to Count One because there are no allegations that the WEC has taken any action that has caused harm or will cause imminent harm.*

In seeking dismissal, the Legislature argues that Count One of the Second Amended Complaint does not claim that the WEC has taken any action or is likely to take any action challenged by the League. (Dkt. 74, p. 8). In distilling Count One, the Legislature contends that the request for declaratory judgment is predicated solely on Wisconsin's lack of guidance as to when a witness' address is considered missing for purposes of rejecting an absentee ballot under § 6.87(6d) after *White* barred the WEC's cure guidance. *Id.* It further maintains that because Wisconsin's system for election administration is highly decentralized, any claim that the term "missing" in § 6.87(6d) is being incorrectly interpreted must be raised against clerks misapplying the law. *Id.* at 9.

The Legislature finds support for its position in *Wisconsin Pharmaceutical Ass'n., v. Lee*, 264 Wis. 325, 58 N.W.2d 700 (1953). In that case, an association of pharmacists sued the Wisconsin State Board of Pharmacy and its members seeking a declaration on the interpretation of § 151.07, Stats., or the Dangerous Drug Law. *Wisconsin Pharmaceutical Ass'n., v. Lee*, 264 Wis. 325, 328, 58 N.W.2d 700 (1953). The Association's complaint alleged that it reported 18 alleged violations of the Dangerous Drug Law to the Board. *Id.* at 327. Before acting on the alleged violations, the Board requested an opinion from the attorney general. *Id.* The attorney general concluded that the statute permitted a physician to, orally or by memorandum, delegate

some drug dispensing activities to an unqualified person without the physician's personal and immediate supervision. *Id.* The Association disagreed with the attorney general's opinion. *Id.*

The Board had taken no regulatory enforcement action and did not threaten the same against the plaintiff, but the Association sought a declaration that the Dangerous Drug Law precluded unqualified employees of physicians from preparing and dispensing drugs. *Id.* at 328. The court concluded that a justiciable controversy did not exist and "[a]t most there is a difference of opinion between the plaintiffs and the defendants concerning the violation of a penal statute by persons not parties to this action." *Id.* at 329. For that matter, the court stated that the Board's and the attorney general's opinion was not conclusive as to whether the statute had been violated. *Id.* at 30. The court found that while the Board is charged with investigating and prosecuting under the law, it was not required to do so where it opines that no violation has occurred. *Id.* at 330. Concluding that the real controversy was between the physicians and their employees, the court found that the Association's claim against the Board was not "against one who has an interest in contesting it," or a "controversy between persons whose interests are adverse." *Id.* at 330.

Some decades later, the Court of Appeals relied on *Wisconsin Pharmaceutical Ass'n.,* to find that no justiciable controversy existed in *Wis. Educ. Ass'n Council PAC v. Wis. State Elections Bd., PAC,* 2000 WI App 89, ¶¶ 12, 17, 23, 234 Wis. 2d 349, 610 N.W.2d 108. The *Wis. Educ. Ass'n Council* case concerned the transfer of campaign contributions under § 11.26(8). The lawsuit spawned from two republican legislators transferring between $100 and $6000 to local county parties from their personal committees. *Id.,* ¶2. The Democratic Party of Wisconsin's chairman complained to the Wisconsin Elections Board that the transfers violated a $6000 contribution limit fixed under § 11.26(8)(b). *Id.* The Wisconsin Education Association

Council Political Action Committee ("WEAC PAC") then filed suit seeking a declaration that interpreted the statute, and to enjoin the Republican Party of Wisconsin and its affiliates from violating § 11.26(8). *Id.* This lawsuit was dismissed after the court refused to grant a temporary restraining order. *Id.*, ¶3. The Board subsequently dismissed the Democratic Party's complaint and WEAC PAC then requested a formal opinion interpreting the scope of the restrictions under § 11.26(8). *Id.*, ¶¶4-5. The Board ultimately chose not to issue a formal opinion. *Id.*, ¶5.

In its lawsuit against the Board, WEAC PAC sought a declaration on the limitations of § 11.26(8) and an injunction prohibiting the Board from interpreting or applying that statute in a manner inconsistent with the declaratory judgment. *Id.*, ¶6. The court noted that the substance of WEAC PAC's dispute was (1) to learn the meaning of 11.26(8) and (2) the right to make contributions consistent with 11.26(8). *Id.*, ¶13. As for the second claim, the court noted that there was no dispute because the Board did not oppose WEAC PAC's right to make contributions consistent with the statute. *Id.* However, as to the first claim (whether WEAC PAC may learn the meaning of the statute by way of a declaratory judgment action), the court stated that this was not the issue that mattered. *Id.* The court noted that:

> WEAC-PAC seems to argue that the Board's refusal to issue a formal opinion interpreting the statute, coupled with its opposition to the granting of declaratory relief in this action, establishes the necessary adversity between WEAC-PAC and the Board to create a justiciable controversy over the meaning of WIS. STAT. § 11.26(8). But, a dispute over the Board's failure to issue an opinion, or over whether declaratory relief is merited on the present facts, is not a proxy for a dispute over the meaning of the statute which WEAC-PAC wants the court to interpret.

Id., ¶12. As with *Wisconsin Pharmaceutical Ass'n.*, the court repeated that there was merely a difference in opinion between WEAC PAC and the Board and that the real controversy was between the plaintiff and the Republicans making the contribution fund transfers. *Id.*, ¶19.

In sum, the League argues that since the *White* case, there is a vacuum as to the definition of "missing" under § 6.87(6d). It highlights that the WEC has had an ongoing definition of the term "address," which is squarely at odds with what the League believes constitutes a "missing" address, for purposes of rejecting absentee ballots under § 6.87(6d). Undeniably, the WEC has endorsed a definition of "address" that requires three components: a street number, a street name and, a municipality. The League proffers that by adopting this definition of "address," the WEC is tacitly rejecting a construction of § 6.87(6d) that would limit a "missing" address to those instances where a witness leaves the address field completely blank on the witness certificate portion of an absentee ballot. To the League, this definitional disagreement alone is sufficient to obtain declaratory relief on the meaning of "missing" under § 6.87(6d). But if this was not enough, the League also asserts that because the WEC is inextricably connected to how absentee ballots are processed and is charged with enforcing the elections statutes, the agency is uniquely a proper party to defend the claim for declaratory relief.

The matter before the Court is of great significance to the League and its members, given its mission to safeguard the right to vote and ensure that citizens' votes count. As laudable as that goal may be, the Second Amended Complaint suffers a defect in that it fails to articulate any conduct taken by the WEC that creates adversity or controversy between the parties; it seemingly relies on the inherent power of parties to obtain declaratory relief as the basis for the claim.

Each of the League's claims is addressed in turn. First, the League faults the WEC for adopting a definition for the term "address." There is nothing unlawful about this, and any disagreement with guidance issued on the definition of "address" may be challenged under § 227.40, Stats.

Second, the League contends that the WEC ceased providing guidance for curing problems in the witness address field on absentee ballot certificates after the *White* court enjoined the practice. There is nothing unlawful about this. It was court mandated.

Third, the League maintains that declaratory relief is proper because there is no definition for the term "missing" under § 6.87(6d) and the WEC's definition of "address" is at odds with the League's position on how a "missing" address should be defined under § 6.87(6d). This definitional difference alone, however, does not raise a justiciable controversy as keenly illustrated in *Wisconsin Pharmaceutical Ass'n.,* and *Wis. Educ. Ass'n Council PAC.*

Fourth, although the Second Amended Complaint points to the potential that some municipal clerks may misapply § 6.87(6d), no claims are made that the WEC has taken any action or conduct that would result in harm or imminent harm. There are some references to the WEC's responsibilities under Wisconsin's elections code in the Second Amended Complaint. It is in its brief that the League articulates how some of those responsibilities may intersect with the application of § 6.87(6d). The League's brief asserts that the WEC is authorized under § 5.06 to enforce provisions of the elections law and to prosecute complaints under § 5.06(1)(c)-(d). It then argues that because the WEC disagrees with the plain-text reading of § 6.87(6d), it is clear that the WEC will enforce § 6.87(6d) by attributing a different meaning to the term "missing". The League's brief also claims that under § 7.70, the WEC is responsible for canvassing functions and must include votes cast under § 6.87(6d) as part of votes counted in the canvass; consequently, the League states that because this is a function that the WEC has carried out in the past and is certain to take in the future, a declaration construing § 6.87(6d) is appropriate. The League's brief then argues that the WEC has failed in its charge under § 5.05(1), (7), (12),

and § 7.08(3) to issue guidance on the meaning of the term "missing" under § 6.87(6d).[2] However, as the Legislature aptly noted in its brief, the League failed to initially tie any of its arguments about how the WEC will carry out its election-related duties to the Second Amended Complaint. Ultimately, the sufficiency of the facts alleged in the complaint controls the outcome of a motion to dismiss. *Strid v. Converse*, 111 Wis. 2d 418, 423, 331 N.W.2d 350 (1983). The Court is bound by what has been alleged in the Second Amended Complaint. The Second Amended Complaint alleges that some municipal clerks may misinterpret § 6.87(6d) as to when an address is considered "missing;" it does not allege that the WEC has taken any action which violates the League's interpretation of § 6.87(6d) or that it will likely take such action.[3]

The state law cases cited by the League which involved declaratory judgment actions against the state or state actors are not persuasive here. The Court does not disagree with the League that the Act affords parties the ability to secure prospective relief. In addition to that, there must be some allegation that the defendant's conduct has resulted in harm or will result in imminent harm. For instance, *Koschkee v. Evers* raised allegations that the Superintendent of the Department of Public Instructions refused to submit proposed rules to the Department of

[2] It is worth commenting that none of these statutes would compel the WEC to promulgate guidance on the meaning of the word "missing" as used in § 6.87(6d). Absent such a mandate by law, the WEC has done nothing unlawful by not issuing guidance on the meaning of the term missing under § 6.87(6d). *Wis. Educ. Ass'n Council*, 2000 WI App 89, ¶12, 234 Wis. 2d 349, 610 N.W.2d 108 ("[an agency's] failure to issue an opinion" that "interpret[s] [a] statute," is not a basis to obtain declaratory relief).

[3] The Legislature illuminated the omission by noting for instance that the Second Amended Complaint makes no claim that any elector has brought any complaint to the WEC about misapplication of § 6.87(6d) and there is no claim that the WEC will err in carrying out its election based duties under § 7.70 based on its understanding of the claims under Count One. During oral argument, the League highlighted paragraphs 15, 35, 36, 39, 53, 58, and 60 of the Second Amended Complaint as the facts best illustrating the "vacuum" left as to the definition of missing since the *White* injunction. While these paragraphs may demonstrate that a vacuum exists, they contain no specific factual allegations regarding the purported justiciable case or controversy at issue or the allegedly unlawful conduct of the WEC. The threadbare recitation of facts against the WEC is insufficient to support a claim for declaratory relief against the WEC.

Administration under the REINS Act (2017 Wis. Act 57). *Koschkee v. Evers*, 2018 WI 82, ¶3, 382 Wis. 2d 666, 913 N.W.2d 878. In *Teague*, the plaintiff alleged that the agency's refusal to correct "Criminal History Search" records, which suggested that he had a criminal history when he did not, violated § 19.70, Stats., and his due process rights. *Id.*, ¶¶1, 12-15. In all of those cases, the plaintiff articulated a specific wrong committed by the agency or state actor, hence a justiciable controversy was discernibly present. That is not the case here.

The League also cites *Milwaukee Dist. Council 48 v. Milwaukee Cty*., 2001 WI 65, 244 Wis. 2d 333, 627 N.W.2d 866, which the Court finds factually dissimilar. There, the plaintiffs sued Milwaukee County preemptively challenging the construction of eligibility standards for pension benefits. The county ordinance conferred to employees a property interest in a deferred vested pension upon 10 years of service unless the employee is terminated for "fault or delinquency." *Milwaukee Dist. Council 48 v. Milwaukee Cty*., 2001 WI 65, ¶¶ 9-11, 244 Wis. 2d 333, 627 N.W.2d 866. The county ordinance also provided 46 grounds for when an employee could be terminated for "cause". *Id.*, ¶¶ 12-18. The county ordinance did not address whether the grounds for a "cause" termination or any other grounds would amount to "fault or delinquency" for purposes of denying vested pension benefits.

The plaintiffs argued that "the county was wrongfully construing the pension ordinance and the labor agreement to mean that if an employee is terminated for 'cause' after ten years of service, the employee is disqualified for a deferred vested pension." *Id.*, ¶20. As such, the plaintiffs filed suit urging that the statute required a due process hearing before the county could deny vested benefits, even if an employee was terminated for cause. *Id.*, ¶¶20-25. Among other things, the complaint alleged that "[w]ithin the past three years, several members of the Bargaining Unit represented by Plaintiff, have been terminated for an alleged `just cause' after

10 years of service and have been denied pension benefits by said defendants." *Id.*, ¶21. A controversy existed in *Milwaukee Dist. Council 48* over the "due process afforded to test whether the county has presented the proper grounds and taken the necessary steps to deny a vested employee a pension" and the court concluded that the matter was ripe for adjudication. *Id.*, ¶¶43, 45–46.

Unlike this case, the *Milwaukee Dist. Council 48* plaintiffs' complaint sufficiently alleged the harm or imminent harm ascribed to the defendant and asserted that the county had previously denied pension benefits to employees terminated for just cause. The League's Second Amended Complaint stands in stark contrast. Count One fails the justiciability test.

The League inserted an argument that the Court's October 26, 2022 denial of its temporary injunction and basis for doing so effectively prevents the League or any similarly situated parties from obtaining prospective declaratory relief on the construction of § 6.87(6d). The Court denied the temporary injunction because the election was two weeks away and concluded that the status quo would be altered by the Court construing the term "missing" under § 6.87(6d). (Dkt. 72). The League's argument may have had more appeal or given the Court pause but for the League's acknowledgment that there is at least one municipal clerk who has issued a memorandum disagreeing with the League's desired construction of § 6.87(6d). (Dkt. 98 at p. 7). This belies the League's argument and underscores the Legislature's position that the League "hand-picked a litigation adversary" which was the "most convenient" rather than "sue… any actual clerk who has disagreed with its interpretation of Section 6.87." (Dkt. 100 at p. 2).

At oral argument, the League also championed the federal court's decision in *Carey v. Wis. Elections Comm'n.*, No. 22-cv-402-jdp, unpublished slip op., (W.D. Wis., August 30,

2022), noting that it addressed the very nature of the wrong that needs to be addressed here.[4] The Court agrees with the League that there are strong parallels between *Carey* and this case. Carey is of no precedential value for the Court though. It may be viewed as persuasive authority, but the Court affords it less weight in the face of other available state authority and given that the construction of § 6.87(6d) is a local matter.

B. Injunctive Relief.

As noted, the Second Amended Complaint also seeks injunctive relief. The Legislature argues that the League's claim for injunctive relief fails because § 227.112, Stats., prohibits the Court from directing the WEC to "instruct" clerks on the meaning of the term "missing," in § 6.87(6d). (Dkt. 74, at p. 7). It contends that although the WEC is charged with issuing guidance on how the election code is administered and enforced, such guidance does not have the force of law and is not authority for implementing or enforcing requirements under the code. *Id.* (citing

[4]*Carey* involved a claim for declaratory and injunctive relief over the treatment of disabled persons under § 6.87(4)(b)1, Stats. Before the *Carey* dispute arose, the Wisconsin Supreme Court in *Teigen v. Wis. Elections Comm'n,* 2022 WI 64, 403 Wis. 2d 607, 976 N.W.2d 519, concluded that § 6.87(4)(b)1 mandated that voters with disabilities return their absentee ballot by mail, or in person on their own. The *Teigen* court declined to decide whether disabled voters were entitled to help when submitting their ballot by mail. Some days after the *Teigen* decision, when questioned about "what she would tell voters to reduce confusion over who can physically place ballots in mailboxes, [WEC's] administrator … said that voters should ask their local clerks for guidance but added that 'right now, the voter is the one required to mail the ballot." *Carey v. Wis. Elections Comm'n*., No. 22-cv-402-jdp, at 6, unpublished slip op., (W.D. Wis., August 30, 2022).

The *Carey* plaintiffs sued in federal court seeking declaratory and injunction relief. They sought a finding that § 6.87(4)(b)1 prohibited voters, including disabled voters, from relying on others to return their absentee ballot in contravention of the Voting Rights Act ("VRA"). The WEC agreed during litigation that the plaintiffs were entitled to assistance. However, the federal court noted that the "statements and memos from defendants since *Teigen* was issued are either inconsistent with their litigation position or simply punt the question to more than 1,800 municipal clerks." *Id.*, at 1-2. The court stated that "[i]f defendants cannot or will not give plaintiffs assurances that their right to vote will be protected, this court must do so." *Id*. at 2. After finding that § 6.87(4)(b)1 was preempted by the VRA to the extent it prohibits assistance to disabled voters needing to return ballots, the court concluded that the plaintiffs were entitled to declaratory and injunctive relief. *Id*. at 22.

Jefferson v. Dane County, 2020 WI 90, ¶ 24, 394 Wis. 2d 602, 951 N.W.2d 556.) Conversely, the League maintains that the Court has the authority to order injunctive relief to effectuate declaratory judgment and that under § 5.05(5t), Stats., the WEC has a statutory duty to issue guidance even if there is no injunction issued by the Court. (Dkt. 98, at p. 13).

The Court has concluded that the League is not entitled to the declaratory relief it seeks in Count One. Section 5.05(5t) does not provide the League an independent ground to obtain injunctive relief against the WEC. This provision of the elections law at most may require written guidance from the WEC after a binding court order has been issued. Section 5.05(5t) does not supplant the justiciability standard required in the first instance to have gotten the League the binding court order it sought on the construction of § 6.87(6d). There is no basis for the Court to grant injunctive relief under Count One.

C. Relief Against the Legislature.

The League posits that even if Count One cannot proceed against the WEC, it may still obtain declaratory relief against the Legislature. The Court disagrees.

First, the League must traverse and overcome the Legislature's sovereign immunity. Article IV, sec. 27 of the Wisconsin Constitution states that "[t]he legislature shall direct by law in what manner and in what courts suits may be brought against the state." Wis. Const. art. IV, § 27. "The legislature has the exclusive right to consent to a suit against the state," and such consent to suit "must be clear and express." *State v. P.G. Miron Construction Co.*, 181 Wis. 2d 1045, 1052-1053, 512 N.W.2d 499 (1994).

Generally speaking, the Declaratory Judgment Act "does not make any provision for a suit against the state, and … as a result, declaratory judgments against the state are barred by principles of sovereign immunity." *Lister v. Board of Regents*, 72 Wis. 2d 282, 302-303, 240

N.W.2d 610 (1976)(referencing predecessor statute, Wis. Stat. § 269.56). Our courts recognize that "the declaratory judgment procedure is particularly well-suited (in cases where such relief is otherwise appropriate) for resolving controversies as to the constitutionality or proper construction and application of statutory provisions." *Id.* at 303. As noted in *Lister*, courts must engage "in a fiction that allows such actions to be brought against the officer or agency charged with administering the statute on the theory that a suit against a state officer or agency is not a suit against the state when it is based on the premise that the officer or agency is acting outside the bounds of his or its constitutional or jurisdictional authority." *Id*. (emphasis added). None of this applies here in the case of the Legislature. The League's claim against the Legislature would rest only on the disagreement over the League's interpretation of § 6.87(6d) versus the Legislature's. But the Legislature has not authorized suits to proceed against the state merely over disagreements on the construction of a statute.

The League contends that the Legislature has waived immunity –it cannot voluntarily enter in this action and then take the anomalous position that the Court lacks jurisdiction over it. It is well-settled that the court has no personal jurisdiction over the State if the legislature does not clearly and expressly waive sovereign immunity. *Id.* at 291, 240 N.W.2d 610. Such waiver of sovereign immunity must be unequivocal –it cannot occur constructively or impliedly. The Court declines to decide the issue of waiver, however, because a claim for relief against the Legislature must be stated in the complaint for the Court to even entertain granting such relief. see e.g. *Miller v. Zoning Bd. of Appeals of Vill. of Lyndon Station*, 2022 WI App 51, ¶ 14 n.8, 404 Wis. 2d 539, 980 N.W.2d 295 (noting that the intervenors in an appeal of a zoning board decision are not properly characterized as defendants since the plaintiff had not filed any legal claim against them). Since the Legislature's intervention in this action, the League has not

amended its complaint to add any claim for relief against the Legislature. It is not just enough that the Legislature intervened. The absence of any claims against the Legislature precludes declaratory relief against it.

For all the foregoing reasons, the Court concludes that Count One of the Seconded Amended Complaint fails to state a claim upon which relief can be granted. Count One is properly dismissed.

ORDER

The Legislature's Motion to Dismiss Count One is granted. Count One of the Second Amended Complaint is hereby dismissed from the action.

CERTIFICATION

I hereby certify that filed with this brief is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 20th day of February, 2024.

Electronically signed by Misha Tseytlin
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