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WISCONSIN COURT OF APPEALS
DISTRICT I
No. 2024AP166

LEAGUE OF WOMEN VOTERS OF WISCONSIN,

Plaintiff-Appellant-Cross-Respondent,

v.

WISCONSIN ELECTIONS COMMISSION, DON MILLIS,
JULIE M. GLANCEY, ROBERT F. SPINDELL, JR.,
MARK L. THOMSEN, ANN S. JACOBS,
MARGE BOSTELMANN AND MEAGAN WOLFE,

Defendants-Respondents,

WISCONSIN STATE LEGISLATURE,

Intervenor-Respondent-Cross-Appellant.

Appeal from the Circuit Court for Dane County
The Honorable Ryan D. Nilsestuen and
the Honorable Nia Trammell, Presiding
Circuit Court Case No. 2022-CV-2472

OPENING BRIEF OF PLAINTIFF-APPELLANT-CROSS-RESPONDENT
LEAGUE OF WOMEN VOTERS OF WISCONSIN

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STATEMENT OF THE ISSUES

1. A claim under Wisconsin's Uniform Declaratory Judgments Act, Wis. Stat. § 806.04, is justiciable when: (1) a controversy exists where a claim of right is asserted against one who has an interest in contesting it; (2) the controversy is between persons whose interests are adverse; (3) the party seeking declaratory relief has a legally protectable interest; and (4) the issue involved in the controversy is ripe for judicial determination. In Count I of its Second Amended Complaint, the League of Women Voters of Wisconsin alleged that the Wisconsin Elections Commission failed to perform its statutory duty to issue guidance over the meaning of the term "missing" in Wis. Stat. § 6.87(6d) and sought a circuit court declaration of that term. The Wisconsin Elections Commission has an interest in contesting and did, in fact, contest the League's claim. No party has disputed the League's interest in the declaration it seeks nor the ripeness of its claim. Did Count I of the League's Second Amended Complaint state a claim for relief?

Answered by the circuit court: No.

2. Wisconsin law regarding witness certificates for absentee ballots requires that "[i]f a certificate is missing the address of a witness, the ballot may not be counted." Wis. Stat. § 6.87(6d). "Missing" is not a defined term in the statutes. Should that term be given its plain text meaning such that a ballot should not be rejected if there is any component part or indicia of the witness's address?

Answered by the circuit court: Not answered.

STATEMENT ON ORAL ARGUMENT & PUBLICATION

Oral argument is warranted under the standards in Wis. Stat. § (Rule) 809.22. Publication is warranted under Wis. Stat. § (Rule) 809.23(1)(a) because this case (1) will clarify an existing rule of law and (2) will decide an issue of substantial and continuing public interest, specifically the rules applicable to the absentee ballot witness address requirement.

INTRODUCTION

Pursuant to Wis. Stat. § 6.87(6d), a clerk may reject an absentee ballot only if the address required for the witness certification is “missing.” For approximately six years, municipal clerks and their staffs relied on guidance from the Wisconsin Elections Commission (“WEC”), the WEC Commissioners, and the WEC Administrator (collectively, “Defendants”) to cure omissions or errors in witness addresses on absentee ballot certificate envelopes. With that guidance in place, absentee ballots were not rejected, and voters were not disenfranchised, for partial witness addresses because municipal clerks¹ would fill in any omitted information that could be readily ascertained. However, in September 2022, WEC was forced to withdraw that guidance after the Waukesha County Circuit Court enjoined it.

The League of Women Voters of Wisconsin brought suit immediately after that ruling seeking, *inter alia*, a declaratory judgment that “missing” in Wis. Stat. § 6.87(6d) meant precisely what it said, and that an absentee ballot should be rejected only when a witness certification fails to contain any component part or indicia of the witness’s address, not just when it is partial or incomplete. Shortly after intervening, the Legislature moved to dismiss Count I of the League’s complaint regarding the meaning of the term “missing,” arguing that the claims in nonjusticiable. In March 2023, the Court granted the motion. This Court should reverse that ruling: the League’s state law claim is plainly justiciable under Wisconsin caselaw.

First, the League’s claim for a declaratory judgment is justiciable. The League brought suit against WEC over the meaning of “missing,” a claim that WEC, as the agency that administers and enforces Wisconsin’s election law, including Wis. Stat. § 6.87(6d), has an interest in contesting and did, in fact, contest. Furthermore, WEC’s position was adverse to the League’s, the League has a legally

¹ This brief refers to municipal clerks and boards of election commissioners collectively as “clerks” or “municipal clerks.” See Wis. Stat. § 7.21(1).

protected interest in protecting the right to vote of its members and all eligible Wisconsinites, and the issue was ripe for determination.

Second, because the League's claim for declaratory judgment was justiciable, so too was its claim for related injunctive relief.

Third and finally, the League's plain-text definition of "missing" in the statute is the only permissible construction. Given the imminence of the 2024 elections, this Court should protect the rights of Wisconsin voters to have their absentee ballots counted in accordance with the statutes.

The League's Second Amended Complaint ("SAC") stated a claim for relief. "Missing," as used in Wis. Stat. § 6.87(6d), does not mean "partial" or "incomplete," and the circuit court committed reversible error by dismissing as nonjusticiable the League's state law claim in Count I of its complaint regarding the meaning of "missing" in Wis. Stat. § 6.87(6d).

STATEMENT OF THE CASE

This appeal involves the proper construction and application of Wisconsin law on voting via absentee ballot. Various relevant aspects of Wisconsin's absentee ballot voting system, including the requirement that a voter have a witness who must, in addition to signing a certification, provide an address, are discussed below.

A. Absentee voting in Wisconsin.

Wisconsin law permits any voter—termed "elector" in the statutes—to request and return an absentee ballot in accordance with certain procedures. Wis. Stat. § 6.85(1), (3); *see generally* Wis. Stat. ch. 6, subch. IV. Wisconsin has one of the oldest absentee voting systems, dating back to the Civil War.² Registered voters in Wisconsin apply for and obtain absentee ballots in a variety of ways:

- by mail-in application or electronic application;

² Wisconsin adopted a form of absentee voting during the Civil War, and "led the way" in ensuring that soldiers could vote while battling to end slavery. Becca Damante, *President Trump Ignores the Long History of Absentee Ballots*, Constitutional Accountability Center (June 11, 2020), <https://www.theconstitution.org/blog/president-trump-ignores-the-long-history-of-absentee-ballots/>.

- by requesting one in person at the municipal clerk’s office or at an alternate site under Wis. Stat. § 6.855;
- by signing a statement and filing a request to receive absentee ballots under Wis. Stat. §§ 6.86(2), 6.86(2m)(a) (indefinitely confined voters), 6.22(4), 6.24(4), or 6.25(1)(c) (military and overseas voters);
- by agent as provided in Wis. Stat. § 6.86(3) (hospitalized voters);
- by delivering an application to a special voting deputy under Wis. Stat. § 6.875(6) (voters in retirement homes and residential care facilities); and
- by electronic mail or fax as provided in Wis. Stat. § 6.86(1)(ac).

Absentee voters who receive their ballot by mail or electronically may return their marked absentee ballot by mailing it to their municipal clerk’s office or dropping it off in person at the clerk’s office. Wis. Stat. § 6.87; *see also* Wisconsin Elections Commission, Form EL-128, Uniform Instructions for Wisconsin Absentee Voters.³ Voters with disabilities are entitled to receive assistance in this process. *Carey v. Wis. Elections Comm’n*, 624 F. Supp.3d 1020, 1033 (W.D. Wis. 2022). In-person absentee voters receive and mark their ballots before Election Day at the office of the municipal clerk or designated alternate sites but their ballots are not processed and counted until Election Day. Wis. Stat. §§ 6.855, 6.87, 6.88. Absentee ballots returned by mail or dropped off at the municipal clerk’s office must be received by the clerk no later than 8:00 p.m. on Election Day. Wis. Stat. § 6.87(6).

All absentee ballots must be witnessed by an adult U.S. citizen but that individual need not be a Wisconsin resident. Wis. Stat. § 6.87(4)(b)(1). The witness requirement and, therefore, the witness address requirement, apply to all absentee voters. *Id.* The absentee ballot certificate and application (sometimes referred to as the “return envelope” or “certificate envelope”) contains both a voter certification and a witness certification, which the voter and witness must sign under penalty of

³ Available at <https://elections.wi.gov/media/13783/download> (last visited May 30, 2024).

perjury. The voter's address is typically (but not always) affixed by means of a printed label that the clerk has placed on the certificate envelope, so no absentee ballot is likely to be rejected for a missing or partial voter address. (R. 94 at 17; App. 053.)

The witness address field 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. That list contains the code "RWA" to describe the incident—"There is *no address* of a witness"—but there is no code for a missing or partial *voter* address. *See* Wisconsin Elections Commission, Form EL-104, Inspectors' Statement, *available at* <https://elections.wi.gov/media/12465/download> (last visited May 15, 2024) (emphasis added).

B. 2015 Wisconsin Act 261 and WEC guidance.

In 2016, the Wisconsin State Legislature passed, and the Governor signed, 2015 Wisconsin Act 261 ("Act 261"), which, in addition to authorizing the creation of an online voter registration system, included a provision requiring an absentee voter's witness to fill in their address on the certificate envelope: "If a certificate is missing the address of a witness, the ballot may not be counted." Wis. Stat. § 6.87(6d). Of central importance to the League's claim in Count I of the SAC, Wis. Stat. § 6.87 does not define the term "missing"; nor is that term defined in the Wisconsin Election Code's definitional section or in general definitions found in the Wisconsin State Statutes. *See* Wis. Stat. §§ 5.02, 990.01.

For several years, WEC guidance protected voters from disenfranchisement resulting from Wis. Stat. § 6.87(6d). (R. 94 at 13; App. 049.) Shortly after Wis. Stat. § 6.87(6d) was enacted, WEC adopted a definition of "address" for purposes of implementing the statute, which included three components: street number, street

name, and municipality name.⁴ (*Id.* at 18.) WEC also 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.”⁵ (*Id.*) At its October 14, 2016 meeting, WEC unanimously passed a motion that (a) reaffirmed WEC’s three-component definition of “address”; (b) modified “the 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 certificate envelope, or other reliable extrinsic sources that are available” without first obtaining voter consent; and (c) required that any additions to the witness address field should be initialed by the clerk.⁶ (*Id.* at 18–19.)

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.”⁷ (*Id.* at 18.) The guidance instructed clerks to try to cure problems with the witness address either by correcting the ballot themselves or contacting the voter. The October 18, 2016 Memorandum provided that clerks may contact voters to address missing certificate information and indicate such assistance by initialing next to the information provided on the certificate. (*Id.*)

This memorandum remained the most current WEC guidance available on this issue for elections from 2016 through 2019. (*Id.*); *see Trump v. Biden*, 2020 WI 91, ¶18, 394 Wis. 2d 629, 951 N.W.2d 568 (“The process of handling missing witness information is not new; election officials followed guidance that WEC

⁴ The League did not dispute this definition of address below because its claim does not turn on that definition. It includes this information only as background.

⁵ Wisconsin Elections Commission, *Absentee Witness Address Corrections Webpage*, (no longer available via WEC website due to *White v. WEC* injunction).

⁶ Wisconsin Elections Commission, “Open Session Minutes,” (Oct. 14, 2016), *available at* <https://elections.wi.gov/media/11815/download> (last visited May 14, 2024).

⁷ Wisconsin Elections Commission, “AMENDED: Missing or Insufficient Witness Address on Absentee Ballot Certificate Envelopes,” (Oct. 18, 2016) (R. 95.)

created, approved, and disseminated to counties in October 2016. It has been relied on in 11 statewide elections since, including in the 2016 presidential election when President Trump was victorious in Wisconsin.”). WEC issued related guidance in the run-up 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.”⁸ (R. 94 at 20; App. 056.)

C. Challenges to WEC guidance.

Although WEC’s guidance had been in place for years, it came under attack in the lead-up to the 2022 election cycle, giving rise to this litigation. On January 10, 2022, the Legislature’s Joint Committee for the Review of Administrative Rules (“JCRAR”), purportedly acting pursuant to Wis. Stat. § 227.26(2)(b), directed WEC to either “cease issuance” of the October 18, 2016 guidance on correcting absentee witness certificates⁹ or promulgate an emergency rule. (*Id.*) Shortly thereafter, 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. (*Id.*) On July 20, 2022, JCRAR voted to suspend EmR2209 pursuant to Wis. Stat. § 227.26(2)(d). (R. 94 at 21; App. 057.)

Additionally, on July 12, 2022, several individuals and the Republican Party of Waukesha County filed suit under Wis. Stat. § 227.40(1) in *White v. Wisconsin Elections Commission*, challenging WEC’s October 18, 2016 guidance and seeking to enjoin its use. The Legislature intervened as a plaintiff and sought a temporary injunction or mandamus. The circuit court for Waukesha County, the Honorable

⁸ Wisconsin Elections Commission, “Spoiling Absentee Ballot Guidance,” (Oct. 19, 2020) (R. 96.)

⁹ JCRAR actually directed WEC to cease issuance of “guidance relating to completeness of addresses and correction of errors and omissions on absentee ballots.” *Letter from JCRAR to WEC*, (Jan. 10, 2022), available at <https://elections.wi.gov/media/13655/download> (pp. 10–11) (emphasis added). However, the address is written on the certificate and the witness is not to view the ballot itself. Wis. Const. art. III, § 3.

Michael J. Aprahamian presiding, issued a temporary injunction, barring WEC from disseminating, publishing, or advising clerks on this cure guidance:

¶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.

(R. 19 at 4-6.) Less than a week later, on September 13, 2022, WEC withdrew its October 2016 memoranda outlining that cure guidance.¹⁰

On October 3, 2022, the *White* court granted final judgment to the plaintiffs and made permanent the injunction preventing WEC from issuing guidance or otherwise instructing clerks to cure defects in witness addresses on absentee ballot certificates. (*Id.* at 95-97.) In issuing its injunctions in *White*, the circuit court confined its rulings to the disputed questions concerning whether clerks, under Wisconsin law, may fill in witness address information on an absentee ballot

¹⁰ Wisconsin Elections Commission, *Temporary Injunction on WEC Guidance re Missing Absentee Witness Address (White v. Wisconsin Elections Commission, 22-CV-1008)*, (Sept. 13, 2022), available at <https://elections.wi.gov/media/16801/download> (last visited May 21, 2024).

certificate envelope. The circuit court expressly declined to address the federal law arguments raised in that action, stating:

As noted, the issue before the Court is not whether a specific address on a certification is incomplete or missing or even whether ballots with missing addresses on certifications should be counted. Federal law may very well speak to those issues. But nothing under Federal law requires or allows municipal clerks to take actions, like modifying or altering an absentee ballot certification, to bring the ballots in compliance with Wisconsin law. The remedy under Federal law, if one lies, would be to count the allegedly defective ballots.

(*Id.* at 28.) At the September 13 hearing on the motion to stay, the circuit court clarified that it did not intend for the temporary injunction to have any effect on existing WEC guidance as to the definition of an “address.” (*Id.* at 86-87; 90-92.)

The November 2022 General Election was the first election held in Wisconsin in which Wis. Stat. § 6.87(6d) applied without any published WEC guidance on how clerks were to handle absentee ballot witness certifications. Unsurprisingly, there was confusion and variation among the approximately 1,850 municipal clerks statewide regarding how to handle this issue. As the circuit court in this matter stated:

Without this guidance, municipal clerks throughout Wisconsin are interpreting the Witness Address Requirement differently, with some clerks discarding otherwise valid ballots due to irrelevant and trivial errors, such as a missing ZIP code. In Green Bay and Racine, for example, clerks require a witness address to contain both the state and ZIP code. It is unclear why both a state and a ZIP code are needed to comply with the Witness Address Requirement. In the November 2022 general election, 2,239 absentee ballots were rejected due to insufficient certifications.

(R. 157 at 2; App. 009.)

D. Proceedings in the circuit court.

Almost immediately after the *White* court issued the temporary injunction (and before the final judgment), the League filed the action below, seeking to avoid unlawful voter disenfranchisement. (R. 2.) Days later, the League filed an amended complaint. (R. 10.) Both the original and amended complaints alleged three claims. First, the League asserted a claim under Wis. Stat. § 806.04, seeking declaratory relief that an absentee ballot may only be found to have a “missing” witness address

and thereby excluded from counting under Wis. Stat. § 6.87(6d) if there is no witness address information contained on the absentee ballot certificate, and injunctive relief pursuant to Wis. Stat. §§ 813.01-.02 requiring WEC to instruct Wisconsin's municipal clerks, county clerks, and boards of elections that they shall neither exclude from counting nor return any ballot pursuant to Wis. Stat. §§ 6.87(6d), 6.87(9) unless the witness address field is completely devoid of any address information. Second, the League brought a claim under 52 U.S.C. § 10101(a)(2)(B) (the 1964 Civil Rights Act's "Materiality Provision") seeking declaratory and injunctive relief that ballots accompanied by witness certifications containing certain immaterial omissions or errors must be counted. Third and finally, the League asserted a claim under the Due Process Clause of the Fourteenth Amendment seeking declaratory and injunctive relief requiring clerks to give voters notice and an opportunity to cure before rejecting a ballot based on a witness address defect or omission. The Wisconsin State Legislature intervened as a defendant. (R. 7-8.) The League moved for a temporary injunction before the 2022 General Election, which the Legislature and WEC opposed. (R. 42, 45) The circuit court denied the motion (R. 66.) and this Court denied the League's request for leave to appeal.

On November 11, 2022, the Legislature moved to dismiss Count I of the League's complaint—its state law claim¹¹ regarding the meaning of "missing." Neither WEC, its commissioners, nor its administrator joined the Legislature's motion. The Dane County Circuit Court, the Honorable Nia Trammell presiding, received briefing and heard oral argument and, on March 14, 2023, granted the Legislature's motion and dismissed Count I as nonjusticiable. (R. 107; App. 016-36.)

¹¹ The Legislature moved to dismiss Count I of the First Amended Complaint. While the motion was pending, the League filed the SAC. By agreement of the parties, the Legislature's motion regarding Count I applied to the SAC without the need to refile. (R. 83.)

The League subsequently moved for summary judgment on its remaining claim under the Materiality Provision.¹² The circuit court, the Honorable Ryan Nilsestuen presiding, granted that motion on January 2, 2024 (R. 157; App. 008-015) and, on January 30, 2024, issued a declaratory judgment and permanent injunction requiring WEC to issue guidance to clerks to avoid the rejection of absentee ballots with respect to four categories of witness address errors or omissions. (R. 161; App. 005-07.)

Following the circuit court's judgment, the League filed this appeal. The Legislature then cross-appealed. The Legislature also filed an emergency motion for stay, which this Court denied on February 8, 2024.

E. Rise, Inc. v. Wisconsin Elections Commission

Contemporaneous with this case, a separate set of plaintiffs sought separate relief regarding a different part of Wis. Stat. § 6.87(6d), specifically the meaning of “address” for purposes of the witness address certification. On August 23, 2023, the circuit court consolidated this case with *Rise, Inc. v. Wisconsin Elections Commission* for trial. (R. 127.) The circuit court issued an opinion and order on summary judgment on January 2, 2024 (App. 074-80.) and, on January 30, a declaratory judgment that “address” in Wis. Stat. §§ 6.87(2) and 6.87(6d) means “a place where the witness may be communicated with” and related permanent injunctive relief. (See App. 071-73.) The Legislature appealed, and the case is pending before the Court of Appeals, District IV. *Rise v. Wis. Elections Comm'n*, Case No. 22AP165 (filed Jan. 30, 2024).

ARGUMENT

The circuit court committed reversible error by dismissing as nonjusticiable the League's state law claim in Count I of its complaint regarding the meaning of “missing” in Wis. Stat. § 6.87(6d). That claim easily satisfies the justiciability requirement of Wisconsin law for declaratory judgment actions, and the League is

¹² By stipulation of the parties, the League dismissed its Due Process Clause claim. (R. 110.)

entitled to a declaration that the plain text of Wis. Stat. § 6.87(6d) should be read to mean what it says—an address is “missing” when the witness certification fails to contain any component part or indicia of the witness’s address, not just when it is partial or incomplete.

I. Legal Standard.

“Whether a complaint states a claim upon which relief can be granted is a question of law for our independent review.” *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶17, 356 Wis. 2d 665, 849 N.W.2d 693 (internal citation omitted). While this court may consider the determination of the circuit court, it owes it no deference. *Watts v. Watts*, 2005 WI 61, ¶14, 381 Wis. 2d 39, 697 N.W.2d 61. This Court accepts as true the factual allegations in the complaint and “the reasonable inferences therefrom.” *Data Key Partners*, 2014 WI 86, ¶¶18–19. “Plaintiffs must allege facts that, if true, plausibly suggest a violation of applicable law.” *Id.*, ¶21. A motion to dismiss for failure to state a claim should only be granted when “it appears certain that *no* relief can be granted under any set of facts that a plaintiff can prove in support of his or her allegations.” *Peterson v. Volkswagen of Am., Inc.*, 2005 WI 61, ¶16, 281 Wis. 2d 39, 697 N.W.2d 61 (emphasis added) (cleaned up).¹³ “[C]ourts are to liberally construe a complaint and should deny a motion to dismiss when the facts alleged, if proven true, would constitute a cause of action.” *Id.* (cleaned up). The Supreme Court has also held that determinations as to whether a claim is justiciable are to be reviewed *de novo*. *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶32, 309 Wis. 2d 365, 749 N.W.2d 211.

So long as the claim is justiciable, an action for declaratory judgment may be maintained. *Miller Brands–Milwaukee, Inc. v. Case*, 162 Wis. 2d 684, 694, 470 N.W.2d 290 (1991). A claim under Wis. Stat. § 806.04 is justiciable when four factors are met: “(1) A controversy in which a claim of right is asserted against one

¹³ This brief uses the signal “cleaned up” when internal quotation marks, ellipses, and other metadata have been omitted from a quotation to improve its readability without altering its meaning. See Jack Metzler, *Cleaning Up Quotations*, 18 J. App. Prac. & Process 143 (2017), available at: <https://lawrepository.ualr.edu/appellatepracticeprocess/vol18/iss2/3>.

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 protectable interest. (4) The issue involved in the controversy must be ripe for judicial determination.” *Olson*, 2008 WI 51, ¶29.

II. The League’s claim for declaratory relief regarding the meaning of “missing” is justiciable.

Count I of the SAC properly alleged a claim under Wis. Stat. § 806.04 against WEC, its commissioners, and its administrator, as the enforcing agency for Wisconsin’s election laws, over its misinterpretation of Wis. Stat. § 6.87(6d).

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

The declaratory judgment statute is appropriately used to seek prospective relief requiring agencies to accord with the law. In *Koschkee v. Evers*, a group of petitioners brought an original action, seeking a declaratory judgment (and a related injunction) requiring the Superintendent of Public Instruction to comply with the

REINS Act procedures regarding administrative rules. 2018 WI 82, ¶3, 382 Wis. 2d 666, 913 N.W.2d 878; *see also Teague v. Schimel*, 2017 WI 56, ¶¶34–35, 81, 375 Wis. 2d 458, 896 N.W.2d 286 (“The DOJ’s Criminal History Search reports violate Mr. Teague’s rights, and he is to be afforded prospective relief sufficient to protect those rights.”).

Here, the SAC met the four requirements for justiciability under *Olson*: (1) The League asserted a claim of right against an entity which had an interest in contesting it; (2) the controversy was between parties with adverse interests; (3) the League had a legally protectable interest in the controversy; and (4) the issue involved in the controversy was ripe for determination. 2008 WI 51, ¶29.

A. *The League asserted a claim of right against a party who has an interest in contesting it.*

The League brought suit against WEC over the meaning of Wis. Stat. § 6.87(6d), which WEC has an interest in contesting and did, in fact, contest below. WEC is the agency charged with administering and enforcing Wisconsin’s election laws. (R. 94, ¶¶26–28; App. 050.) No party to this action has contested the League’s interest in protecting the right to vote of its members and all eligible Wisconsinites, or the League’s particular interest in legal issues that impact the casting and counting of absentee ballots. (*See id.*, ¶¶2, 10, 15, 20–25.) The circuit court, however, incorrectly concluded that the SAC did not sufficiently allege “conduct taken by the WEC that creates adversity or controversy between the parties.” (R. 107 at 13; App. 028.) This conclusion misapprehends the nature of the complaint. At its core, the League’s claim challenges how WEC is performing this duty. As the SAC alleged, and as WEC conceded, WEC has issued no guidance over the meaning of “missing” in Wis. Stat. § 6.87(6d), either before or after the *White* judgment. (R. 94, ¶7, App. 042; R. 45 at 11.) Various aspects of how WEC has administered elections since the *White* injunction make clear that it contests the League’s state law claim.

First, WEC’s post-*White* guidance continues to suggest that absentee ballots accompanied by partial witness addresses—*i.e.* certifications that contain one or more component parts or indicia of an address such that address information is not “missing”—are not sufficient for the ballot to be counted. While WEC has not issued guidance on the meaning of “missing,” its post-*White* guidance emphasized WEC’s view of what was *required* for an address: “*street number, street name, and name of municipality.*”¹⁴ This guidance was in place at the time of, and referenced in, the SAC. (R. 94, ¶49 n.14; App. 057.) Following the circuit court’s injunctions in this case and *Rise*, WEC updated its guidance.¹⁵ In light of *Rise*, WEC’s guidance now states that “an absentee ballot cannot be rejected or returned to a voter for correction under Wis. Stat. § 6.87(9) as long as the face of the certificate contains sufficient information to allow a reasonable person in the community to identify a location where the witness may be communicated with.”¹⁶ While these guidance documents partially revolve around the question of what constitutes an “address”—which is not at issue in this case—the inescapable implication of that guidance is that only having *part* of that address can be grounds for rejecting a ballot—which would of course be inconsistent with a plain-text reading of “missing.” In addition to the guidance it *has* issued, WEC’s continued failure to issue guidance on the meaning of “missing” when ballots are being rejected is a separate wrongdoing that requires redress.

¹⁴ Wisconsin Elections Commission, Temporary Injunction on WEC Guidance re Missing Absentee Witness Address (*White v. Wisconsin Elections Commission*, 22-CV-1008), (Sept. 13, 2022), available at <https://elections.wi.gov/media/16801/download> (last visited May 16, 2024).

¹⁵ Wisconsin Elections Commission, *AMENDED February 8, 2024: Permanent Injunction on WEC Guidance re: Missing Absentee Witness Address in White et al. v. Wisconsin Elections Commission* (2022-CV-001008) (Feb. 9, 2024), https://elections.wi.gov/sites/default/files/documents/Revised%20and%20Reissued%20Communication%20in%20White%20v.%20WEC_2.9.24.pdf (last visited May 16, 2024).

¹⁶ Wisconsin Elections Commission, *Q&A Concerning Witness Address Information Related to Rise, Inc., et al. v. WEC et al.*, (2022- CV-002446), *League of Women Voters of Wisconsin v. WEC, et al.*, (2022-CV-002472), and *White et al. v. Wisconsin Elections Commission*, (2022-CV-001008) (Feb. 9, 2024), https://elections.wi.gov/sites/default/files/documents/Absentee%20Ballot%20Witness%20Address%20Q%26A_2.9.24.pdf (last visited May 16, 2024).

That was also the conclusion of the United States District Court for the Western District of Wisconsin in *Carey*, 624 F. Supp. 3d 1020.¹⁷ In *Carey*, a group of voters with disabilities brought suit following the Wisconsin Supreme Court's decision in *Teigen v. Wisconsin Elections Commission*, 2022 WI 64, 403 Wis. 2d 607, 976 N.W.2d 519, *reconsideration denied*, 2022 WI 104, seeking to affirm their rights under the federal Voting Rights Act ("VRA") to receive assistance in returning absentee ballots. *Id.* at 1024. In analyzing whether the plaintiffs had standing, the *Carey* court considered whether they were threatened with an imminent injury *and* whether WEC itself would cause those injuries. *Id.* at 1027, 1029. WEC argued (1) that it was municipal clerks, not WEC, that actually administered the law at issue, and (2) that WEC had taken no steps demonstrating that it would take adverse actions against the plaintiffs for using ballot return assistance. *Id.* at 1029. The court rejected both contentions. As to the first issue, it stated: "The court isn't persuaded that the commission is an improper party simply because its involvement in the enforcement process comes later." *Id.* On the second issue, the court specifically pointed to the *lack* of any WEC guidance or information that conformed to the plaintiffs' view of the law. *Id.* at 1030 ("[T]he memo does nothing to disavow the view that the law prohibits disabled voters from receiving assistance The August 3 memo doesn't provide any more clarity."). And *unlike* in this case, WEC claimed, at least in litigation, to agree with the plaintiffs' position regarding the VRA. The *Carey* court nonetheless found standing, specifically holding:

[D]efendants have refused to issue any official guidance that would preclude enforcement of § 6.87(4)(b)1 against plaintiffs. Even in their brief, defendants don't commit to enforcing or interpreting state and federal law in a way that would allow plaintiffs third-party assistance. If defendants wished to resolve their dispute with plaintiffs, they could have issued official guidance explaining that disabled

¹⁷ The circuit court declined to follow the logic of *Carey* because it was non-precedential and, the court said, there was available state authority and the construction of Wis. Stat. § 6.87(6d) is a state-law matter. (R. 107 at 18; App. 033.) As the circuit court noted, however, there are "strong parallels" between *Carey* and this case. (*Id.*) Wisconsin courts, however, frequently look to federal cases as persuasive authority on issues of justiciability. See *Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n, Inc.*, 2011 WI 36, ¶46, 333 Wis. 2d 402, 797 N.W.2d 789.

voters are entitled to assistance in returning their absentee ballots. But defendants have refused to do that, so a controversy between plaintiffs and defendants still exists.

Id. at 1031.

Finally, the *Carey* court noted WEC's role in providing guidance that would avoid unlawful disenfranchisement by clerks. *Id.* Here, WEC's lack of action in light of its duties to administer Wisconsin's election laws threatens the League's interest in avoiding unlawful disenfranchisement.¹⁸ The case for justiciability in this case is even stronger than in *Carey*, in light of Wis. Stat. § 806.04's explicit purpose of affording relief from uncertainty and the fact that WEC actively opposed the relief sought.

Second, another part of WEC's duties to "administer and enforce" Wisconsin's election laws is its duty to ascertain accurate election results. Wisconsin uses a cascading process for reporting and canvassing results. Municipalities must begin canvassing results no later than the Monday after Election Day and must complete the process no later than 4:00 p.m. that day. Wis. Stat. §§ 7.53(1)(a), 7.53(2)(d), 7.51(5)(b). County boards of canvass must complete the county-wide canvass and deliver their statements to WEC within 14 days of Election Day. Wis. Stat. § 7.60(5). WEC then performs the statewide canvass. Specifically, WEC records and preserves the results from the counties and collects any delinquent or erroneous results. Wis. Stat. § 7.70(1). WEC's Chair, or their designee, then canvasses the returns for various offices. Wis. Stat. § 7.70(3). WEC records the statements from the statewide canvass and transmits certificates of elections. Wis. Stat. § 7.70(5).

To perform their canvassing functions, WEC and its Chair necessarily determine for themselves that the various reported results are correct and

¹⁸ The same is true of the League's federal law claim under the Materiality Act, and the same justiciability arguments apply there. Just as WEC had a duty to administer and enforce Wis. Stat. § 6.87 in accordance with the VRA, so too must it enforce Wis. Stat. § 6.87(6d) in accordance with the Civil Rights Act.

appropriate under law, as the result of the canvass is a certification of the number of legal votes cast, which also determines the results that WEC records and transmits. *State ex rel. Swenson v. Norton*, 46 Wis. 332, 1 N.W. 22, 28–29 (1879) (certification is *prima facie* evidence of lawful votes) (internal citations omitted). As the League pled, the uncertainty after *White* “holds the fate of numerous Wisconsin voters.” (R. 94, ¶8; App. 042.) Unfortunately, further proceedings in this case bore this out. As the circuit court stated in its summary judgment decision, “[i]n the November 2022 general election, 2,239 absentee ballots were rejected due to insufficient certifications.” (R. 157 at 2; App. 009.) In its summary judgment filings, the League demonstrated that some of those ballots were rejected because they bore partial witness addresses by providing relevant examples. Had WEC properly construed “missing” in its efforts to administer and enforce Wis. Stat. §§ 6.87(6d) and 7.70, it would have been obliged to include those votes in the count. Instead, WEC’s failure to do so meant those voters were disenfranchised, which was the precise outcome the League sought to prevent with its unsuccessful temporary injunction motion.¹⁹

Third, the cases on which the circuit court (and the Legislature) relied are inapposite. The circuit court relied on *Wisconsin Pharmaceutical Association v. Lee*, 264 Wis. 325, 58 N.W.2d 700 (1953). In that case, an association of pharmacists and an individual pharmacist sued the State Board of Pharmacy for declining to prosecute what the pharmacists believed were violations of the “Dangerous Drug Law.” *Id.* at 325–327. The Supreme Court held the case was not justiciable because: “At most there is a difference of opinion” between the plaintiffs and the board

¹⁹ Because the circuit court’s decision on the motion to dismiss preceded summary judgment proceedings, the circuit court did not know this fact when it dismissed Count I. The development of a record during litigation is a feature, not a bug, of Wisconsin’s notice pleading system and is why courts can, *sua sponte*, amend pleadings to conform to evidence. *See* Wis. Stat. § 802.09(2); *see also* Wis. Stat. § 802.02(6) (“All pleadings shall be so construed as to do substantial justice.”). The circuit court nonetheless criticized the SAC for its “threadbare recitation of facts against the WEC.” (R. 107 at 15; App. 030.) Notice pleading does not require the type of exhaustive recitation that the circuit court demanded, which would have necessarily involved restating even more legal conclusions regarding WEC’s duties. Rather, the SAC recites the factual history leading up to and following the *White* decision, and imminent problems the League anticipated which, unfortunately, came to pass.

concerning whether a violation had occurred, and that the defendants were otherwise not required to prosecute. *Id.* at 329–330. That is not the case here. The League alleges, and the law provides, that WEC administers and enforces Wis. Stat. § 6.87(6d). For the reasons described, WEC *itself* has failed to do so in accordance with the proper construction of that statute. The effect of that failure may be that municipal clerks are also improperly enforcing Wis. Stat. § 6.87(6d), but that does not prohibit the League from seeking statewide relief from WEC where the allegations in the complaint, the reasonable inferences therefrom, and the law all provide that WEC administers that statute.

B. WEC is adverse to the League.

WEC is not only *interested* in contesting the League’s definition, but it *has* contested it.²⁰ In WEC’s response to the League’s motion for a temporary injunction, it argued that the League “has no probability of success on the merits of its Wis. Stat. § 6.87(6d) ‘missing’ address claim.” (R. 45 at 12.) WEC continued to argue that “Plaintiff’s proposed definition of ‘missing’ in Wis. Stat. § 6.87(6d) would produce unreasonable results” and should therefore be rejected. (*Id.*) While WEC’s arguments are misplaced and, in any event, insufficient to overcome the plain text of the statute, it is nonetheless clear that WEC is sufficiently adverse to the League’s position to make the claim justiciable. WEC similarly denied the League’s allegations in Count I of the SAC. (*See* R. 94, ¶¶61, App. 060-61; R. 105, ¶¶61 (“As to the allegations in paragraph 61 of the complaint, they are legal conclusions to which no response is required. To the extent a response is required, Defendants DENY.”).) Not only is WEC the proper defendant because it is administering and enforcing Wis. Stat. § 6.87(6d) improperly, but it also took an adverse position to the League (as did the Legislature), providing the circuit court with the opportunity to provide a “conclusive adjudication.” *Milwaukee Dist.*

²⁰ Although these are two separate factors under *Olson*, many courts, including the circuit court in this case, have combined them for purposes of the justiciability analysis. *See, e.g., Wis. Educ. Ass’n Council*, 2000 WI App 89, ¶¶10, 14, 234 Wis. 2d 349, 610 N.W.2d 108; (R. 107 at 13; App. 028.)

Council 48 v. Milwaukee Cnty., 2001 WI 65, ¶¶20, 244 Wis. 2d 333, 627 N.W.2d 866.

WEC's adverse conduct and position distinguish this case from *Wisconsin Education Association Council v. Wisconsin State Elections Board*, 2000 WI App 89, 234 Wis. 2d 349, 610 N.W.2d 108. In *Wisconsin Education Association Council*, the defendant denied that it necessarily opposed the plaintiff's construction of the statute at issue, asserting it had only declined to issue an opinion. *Id.*, ¶¶7, 14. That is not true here, where WEC has opposed the League's construction of Wis. Stat. § 6.87(6d) and, more importantly, has taken various actions in its election administration duties that evince its opposition to the League's position.

C. *The League has a legally protected interest in protecting the right to vote of its members and all eligible Wisconsinites.*

No party contested the League's interest in protecting its members, and all eligible voters in Wisconsin, from disenfranchisement. As the SAC explained, the League has a longstanding interest in voting rights generally. (*See R.* 94, ¶¶20–22.) This includes advocacy around this issue of the witness address requirement dating back to WEC's original 2016 guidance. (*Id.*, ¶¶23–25.)

Wisconsin and federal law protect the right to vote. *Gill v. Whitford*, 585 U.S. 48, 65 (2018) (quoting *Reynolds v. Sims*, 377 U.S. 533, 561 (1964) (noting right to vote is “individual and personal”); *see also Luft v. Evers*, 963 F.3d 665, 669 (7th Cir. 2020) (“[T]he right to vote is personal.”); *State v. Phelps*, 144 Wis. 1, 15, 128 N.W. 1041 (1910); *State v. Cir. Ct. for Marathon Cnty.*, 178 Wis. 468, 190 N.W. 563, 565 (1922) (noting right to vote “is a right which has been most jealously guarded and may not under our Constitution and laws be destroyed or even unreasonably restricted”). The League clearly meets this element of the *Olson* test.

D. *The League's state law claim is ripe for determination.*

The League's claim regarding the meaning of “missing” in Wis. Stat. § 6.87(6d) is ripe, if not overdue, for determination. Critically, Wis. Stat. § 806.04 does not require past unlawful conduct. The statute allows “controversies of a

justiciable nature to be brought before the courts for settlement and determination prior to the time that a wrong has been threatened or committed.” *Olson*, 2008 WI 51, ¶28. “[A] plaintiff seeking declaratory judgment need not actually suffer an injury before availing himself of the Act. What is required is that the facts be sufficiently developed to allow a conclusive adjudication.” *Id.*, ¶43; *see also State ex rel. Lynch v. Conta*, 71 Wis. 2d 662, 674, 239 N.W.2d 313 (1976) (“Potential defendants may seek a construction of a statute or a test of its constitutional validity without subjecting themselves to forfeitures or prosecution.”). Neither the circuit court nor Legislature disputed that Count I of the SAC was ripe. The lawsuit was filed immediately after the temporary injunction in *White* was issued and reflected the imminent threat (later realized) that absentee ballots accompanied by partial witness addresses would not be counted in WEC’s certification of the results. With elections around the corner again in 2024 and 2025, that threat remains very real.

The Wisconsin Supreme Court held a similarly situated case, *Milwaukee District Council 48 v. Milwaukee County*, was justiciable. In that case, a union and an individual sued for declaratory relief, claiming that the county was incorrectly construing a pension ordinance. 2001 WI 65, ¶20. The Court held “[t]he controversy is ripe because the union seeks a declaration of law concerning the procedural due process available to an employee to contest termination of employment and loss of pension when the determination of one may lead automatically to the determination of the other.” *Id.*, ¶43. In its reasoning, the Court specifically noted that this was the point of the declaratory judgment statute—“to gain ‘relief from uncertainty and insecurity with respect to rights, status and other legal relations.’” *Id.*, ¶45 (citing Wis. Stat. § 806.04(12)). The circuit court in this case distinguished *Milwaukee Council*, stating that the plaintiffs in that case had “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.” (R. 107 at 17; App. 032.) This distinction is both legally and factually incorrect. Legally, a plaintiff in a declaratory judgment action need not allege past harm to pursue their claim. *Olson*,

2008 WI 51, ¶43. Factually, the League both alleged and subsequently proved that voters were—and continue to be—threatened with disenfranchisement when they return absentee ballots accompanied by partial, but not “missing,” witness addresses on the absentee ballot certificate. (R. 94, ¶¶1–2, 61–63; App. 041, 061.)

This case underscores why pre-enforcement relief is, and must be, available for election-related claims under Wis. Stat. § 806.04. Absent this type of review, the League, its members, and Wisconsin voters (and candidates) must wait until after elections to bring piecemeal challenges to various municipal clerk actions. This type of uncertainty heading into any election does a profound disservice to the voters. *See Trump*, 2020 WI 91, ¶22 (“The time to challenge election policies such as these is not after all ballots have been cast and the votes tallied.”).

Therefore, Count I of the SAC is justiciable under each of the factors described by the Supreme Court in *Olson* and therefore states a claim upon which relief may be granted. *Miller Brands–Milwaukee, Inc. v. Case*, 162 Wis. 2d at 694.

III. The League’s claim for injunctive relief is likewise justiciable.

The circuit court was incorrect in finding that the League’s claim for injunctive relief was nonjusticiable. The circuit court’s finding on this point relied entirely on its previous finding that the League’s claim for declaratory relief was nonjusticiable. (R. 107 at 18–19; App. 033–34.) For the reasons stated in Section II, *supra*, that conclusion was mistaken. Because Count I states a claim upon which relief can be granted, the circuit court erred in dismissing the League’s parallel request for injunctive relief. WEC has a plain statutory duty that would require it to issue such information even in the absence of such an injunction:

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

Wis. Stat. § 5.05(5t). Moreover, the circuit court also has the authority to order injunctive relief necessary to effectuate a declaratory judgment, including by

requiring WEC to inform clerks of the court's judgment. *Town of Blooming Grove v. City of Madison*, 275 Wis. 328, 336, 81 N.W.2d 713 (1957) (“Injunctive relief may be granted in aid of a declaratory judgment, where necessary or proper to make the judgment effective.” (internal citation omitted)). Both state and federal courts, including the circuit court in this case, have issued such injunctions requiring WEC to instruct, inform, or guide clerks as to the effect of declaratory judgments. For example:

- R. 99 at 7 (*Teigen* court ordering that WEC “shall withdraw the Memos and issue a statement to clerks notifying them that WEC’s interpretation of Wis. Stat. §§ 6.87 and 6.855 in the Memos has been declared invalid by this Court, as described above”);
- R. 19 at 4-6 (*White* court ordering that WEC “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”);
- R. 99 at 13-14 (*Carey* court ordering that WEC must “provide written instructions to all Wisconsin municipal clerks that the Voting Rights Act requires that any Wisconsin voters who require assistance with mailing or delivering their absentee ballots to the municipal clerk because of a disability must be permitted to receive such assistance by a person of the voter’s choice...”);
- R. 161; App. 006 (the circuit court ordering that the WEC Defendants “must disseminate to all county clerks, all municipal clerks...a copy of this Order and guidance on its implementation such that no absentee ballot may be rejected based upon witness certifications bearing witness-address information meeting any of the following four sets of criteria.”); and

- App. 071-73 (*Rise* court ordering WEC “by February 9, 2024, to promptly advise all municipal and county election officials of this Court’s Order”).

There is nothing unusual or improper about a court issuing injunctive relief to effectuate a declaratory judgment.

IV. “Missing” as used in Wis. Stat. § 6.87(6d) means exactly what it says.

A plain-text reading of “missing” indicates that a ballot should be rejected only if the witness certification fails to contain any component part or indicia of the witness’s address, not just when it is partial or incomplete. This common sense statutory interpretation has practical benefits for election administration and will allow this Court to adhere to the principle of constitutional avoidance.

A. *Given the ongoing need for guidance, this Court should address the merits of the League’s state law claim.*

This Court should take up this merits question because the 2024 elections are rapidly approaching and clerks across the state need to know how to process absentee ballots with variations in how the witness address appears. Although the circuit court below did not reach the merits, remanding the question would cause unacceptable delay in an election year, and since it is a purely legal question certain to be appealed again, this Court would derive no benefit from the development of a record in the circuit court.

The nature of the question raised in Count I makes it appropriate for this Court to resolve the merits without remanding the case. Count I raises a strictly legal question—how to construe “missing” in Wis. Stat. § 6.87(6d). This Court resolves such questions *de novo*. *City of Sheboygan v. Flores*, 229 Wis. 2d 242, 246, 598 N.W.2d 307 (Ct. App. 1999). This Court has previously held that it may resolve legal questions even in circumstances in which the circuit court did not address the merits. *See Holsum Foods Div. of Harvest States Cooperatives v. Home Ins. Co.*, 162 Wis. 2d 563, 567 n.1, 469 N.W.2d 918 (Ct. App. 1991). In *Holsum Foods*, the circuit court denied summary judgment regarding insurance coverage after

determining it needed more information regarding other possible causes of damage. *Id.* This Court reversed and reached the question of law, finding there were no disputed facts and it was appropriate to resolve the legal question. *Id.* The U.S. Court of Appeals for the Seventh Circuit has taken a similar approach. *Aviles v. Cornell Forge Co.*, 183 F.3d 598, 605 n.2 (7th Cir. 1999) (“[W]e decline to remand for consideration of a fully briefed summary judgment motion. We are conducting de novo review, and the court ruled on a purely legal issue. In the interests of judicial economy, we will address that legal issue now.”) The same is true here—the League’s request for a declaratory judgment regarding the plain meaning of “missing” does not turn on any disputed facts and there are no determinations by the circuit court on which this Court need rely. This Court can, and should, reach the merits of the League’s state law claim. *See also In re Rule’s Est.*, 3 Wis. 2d 301, 304, 88 N.W.2d 734 (1958).

B. “Missing” in Wis. Stat. § 6.87(6d) means what it says.

“Missing” means “absent (not present²¹)” *not* “partial” or “incomplete.” *See Missing*, Merriam-Webster Dictionary (2016 ed.); *see also Missing*, Shorter Oxford English Dictionary (6th ed. 2007) (“Not present, not to be found; absent, lost”); *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110 (“[W]e have repeatedly held that statutory interpretation begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.” (cleaned up)). Any other reading of this term would require election officials or this Court to redefine “missing” in the statute to mean something else, like “incomplete,” “partial,” or “erroneous,” or to rewrite the statute to include these other terms in a disjunctive series. Similarly, any use of “missing” to encompass situations in which a particular data point (*i.e.* state name or zip code) is missing would require the Court to rewrite the term “address” in Wis. Stat. §§

²¹ *See Absent*, Merriam-Webster Dictionary (2016 ed.) (defining “absent” as “1: not present 2: lacking 3: inattentive”); *see also Absent*, Shorter Oxford English Dictionary (6th ed. 2007) (“1 Away; not present 2 Not existing; lacking”).

6.87(2) and 6.87 (6d) as “an address *containing the following specific components*” or as the standard statutory language “complete address.” *May v. Tri-Cnty. Trails Comm’n*, 220 Wis. 2d 729, 737, 583 N.W.2d 878 (Ct. App. 1998) (“[W]e are not free to rewrite the statute.”); *La Crosse Lutheran Hosp. v. La Crosse Cnty.*, 133 Wis. 2d 335, 338, 395 N.W.2d 612 (Ct. App. 1986).

Where the Legislature has sought to define “address” to include specific components or to require a “*complete address*,” it has done so explicitly, including in other provisions of Wis. Stat. ch. 6. *See, e.g.*, Wis. Stat. § 6.34 (3)(b)(2) (proof of residence requirement for voter registration) (“A current and *complete* residential address, including a numbered street address, if any, and the name of a municipality.” (emphasis added)); Wis. Stat. § 185.05 (1)(k) (“The complete address, including street number, city, town or village, county and zip code of its principal office . . .”); Wis. Stat. § 601.715(2)(a)3. (“The complete address of the registered agent, as changed.”).

But the Legislature chose to use a different word here—“missing”—and this Court must give effect to the statutory language. *See Gister v. Am. Family Mut. Ins. Co.*, 2012 WI 86, ¶33, 342 Wis. 2d 496, 818 N.W.2d 880 (“Where the legislature uses similar but different terms in a statute, particularly within the same section, we may presume it intended the terms to have different meanings.” (cleaned up)); *In re Incorporation of Portion of Town of Sheboygan*, 2001 WI App 279, ¶9, 248 Wis. 2d 904, 637 N.W.2d 770 (“It is presumed that the legislature is cognizant of what language to include or omit when it enacts laws.”). Wisconsin Stat. § 6.87(6d)’s use of “missing” is also consistent with the very few other uses of the term in Wisconsin election laws, which signal absence, not incompleteness. *See, e.g.*, Wis. Stat. § 6.80(2)(d) (“If the initials are missing, the inspectors shall supply the missing initials.”).

Concrete examples help demonstrate why this reading of “missing” is compelled by the plain language of Wis. Stat. § 6.87(6d). If a witness records their street name and street address, but omits their municipality, it is not logical,

reasonable, or consistent with the dictionary definition of “missing” to say that the witness’s address is “missing.” Additionally, if a witness uses the word “SAME” or ditto marks to indicate clearly that they live in the same household as the voter, the address, once again, is not “missing,” as the circuit court held; it is simply not duplicated in the witness certification. This is enough to end the inquiry. The Legislature chose to use “missing” and the meaning of that term, both in its plain language and as used elsewhere, is clear.

Reading “missing” literally—to mean that a ballot should be rejected only if the witness certification fails to contain any component part or indicia of the witness’s address, not just when it is partial or incomplete—would also keep Wis. Stat. § 6.87(6d) in accord with another crucial statutory provision: “Except as otherwise provided, chs. 5 to 12 shall be construed to give effect to the will of the electors, if that can be ascertained from the proceedings, notwithstanding informality or failure to fully comply with some of their provisions.” Wis. Stat. § 5.01(1). The clear legislative intent to reject ballots *only* when a witness address is “missing” comports with Wis. Stat. § 5.01(1) and the legislative policy of the election code. *Trump*, 2020 WI 91, ¶38 (“[W]e have a long history of construing [chapters 5 through 12] to give effect to the ascertainable will of the voter . . .”).

Wisconsin Stat. § 6.84 is a partial exception to the rule set forth in Wis. Stat. § 5.01(1) and demands mandatory compliance with certain procedures for voting via absentee ballot, including Wis. Stat. § 6.87(6d). Wis. Stat. § 6.84(2). However, there is no conflict between reading the requirement of Wis. Stat. § 6.87(6d) as mandatory and reading the word “missing” literally to give effect to the will of the electors. To the contrary, it is the *only way* to fulfill the requirement of Wis. Stat. § 6.84(2) and make sure the statute is followed. If one takes the requirements of Wis. Stat. § 6.84 seriously, it must mean that the listed statutes, like Wis. Stat. § 6.87(6d), are to be read carefully and precisely. “[Wisconsin Stat. § 6.84(2)] tells us that, to the extent an absentee ballot does not comply with certain statutory requirements, it may not be counted.” *Trump*, 2020 WI 91, ¶39. The “certain statutory requirement”

of Wis. Stat. § 6.87(6d) is that the witness address not be “missing.” Only in that narrow circumstance where the witness certification fails to contain any component part or indicia of the witness’s address may the ballot not be counted.

This plain-text reading of “missing” has the practical benefit of providing useful information to clerks across Wisconsin about how to administer the witness address requirement. It provides the clerks and poll workers with a clear definition of when a ballot is to be counted (when there is at least *some* address information on the certification, or indicia of the same) and when it is not to be counted (when any and all address information is absent). In Wisconsin’s decentralized system of election administration, such an objective ruling will also ensure uniformity in how Wisconsin’s approximately 1,850 clerks process absentee ballots.

Adopting the common-sense, plain-language definition of “missing” to mean circumstances in which the address field is left completely devoid of any component part or indicia of the witness’s address should avoid conflicts with both federal law—*i.e.*, preemption—and with related state court decisions. If an address is “missing” only when the witness provides no component part or indicia of the witness’s address at all, this may eliminate or narrow the risk that Wisconsin election law and practices run afoul of and are preempted by the Civil Rights Act of 1964.

Wisconsin courts strongly prefer to avoid unnecessarily addressing constitutional issues. See *Kenosha Cnty. Dep’t of Human Servs. v. Jodie W.*, 2006 WI 93, ¶20, 293 Wis. 2d 530, 716 N.W.2d 845 (“Where the constitutionality of a statute is at issue, courts attempt to avoid an interpretation that creates constitutional infirmities.” (cleaned up)). To that end, if there is a construction of a statute that avoids a constitutional issue, a court should adopt it. *Lab. & Farm Party v. Elections Bd.*, 117 Wis. 2d 351, 354, 344 N.W.2d 177 (1984); *Baird v. La Follette*, 72 Wis. 1, 5, 239 N.W.2d 536 (1976) (same). The Materiality Provision of the 1964 Civil Rights Act prohibits clerks from denying an individual the right to vote “because of an error or omission on any record or paper relating to any application, registration,

or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election.” 52 U.S.C. § 10101(a)(2)(B). The circuit court already ruled that ballots reflecting any of four categories of errors or omissions in the witness address field must be counted to comply with the Materiality Provision. That ruling, although it has added clarity for clerks, was limited in its application. A ruling under state law that “missing” means “missing” will allow clerks to confidently and uniformly address a much broader set of witness address issues, which could also potentially implicate and resolve potential conflicts with the Materiality Provision.

Finally, such a ruling would not conflict with the Dane County Circuit Court’s ruling in *Rise v. Wisconsin Elections Commission* that an “address” as used in Wis. Stat. §§ 6.87(2) and 6.87(6d) means “a place where the witness may be communicated with.” (App. 071-73) The *Rise* decision has been appealed, so in the event that it is overturned, clerks and voters alike will benefit even more from clarity on the meaning of “missing.”

CONCLUSION

For the reasons stated, this Court should reverse the decision of the circuit court.

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Respectfully submitted,

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CERTIFICATION REGARDING FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8) (b), (bm), and (c) for a brief. The length of this brief is 10,225 words.

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