IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

RALPH RUFFOLO and
MARY RUFFOLO,

Plaintiffs,

Case No. 23-CV-0635

v.

WISCONSIN DEPARTMENT
OF NATURAL RESOURCES,

ADAM PAYNE, *in his official capacity as secretary of the Wisconsin Department of Natural Resources*,

and

JOSH KAUL, *in his official capacity as attorney general of Wisconsin*,

Defendants.

PLAINTIFFS' SUR-REPLY BRIEF OPPOSING DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

The Defendants fell into a trap of their own making. This Court should not allow the Defendants to back out of that trap by raising arguments in their reply brief that directly contradict their principal brief.

Plaintiffs Ralph and Mary Ruffolo (collectively, the Ruffolos) file this sur-reply brief to address a narrow but important issue: whether this Court should remand this case to state court.

In the brief supporting their motion to dismiss, the Defendants (collectively, the DNR) argued that this case should be "dismissed" for lack of federal jurisdiction—specifically, lack of ripeness and sovereign immunity. The Ruffolos filed a response brief, pointing out that the correct remedy for a lack of jurisdiction is to remand this case to the state court from which it was removed. Now, in its reply brief, the DNR tries to walk back its jurisdictional arguments by recasting them as non-jurisdictional.

The DNR's about-face fails. The DNR's cursory arguments supporting federal jurisdiction are waived because they were first raised in a reply brief. And its attempt to "clarify" the arguments that it made in its principal brief is unconvincing. The DNR is bound by the arguments against federal jurisdiction that it made in its principal brief.

In any event, the DNR has the burden of proving federal jurisdiction, and its effort in its reply brief falls far short. In its reply brief, the DNR still argues lack of ripeness and still asserts sovereign immunity, despite claiming that those arguments do not implicate federal jurisdiction. That two-faced reply brief is insufficient to meet the DNR's burden of establishing federal jurisdiction.

The Court should thus remand this entire case to state court.[1]

[1] As the Ruffolos explained in other briefs, the untimeliness of the DNR's notice of removal provides an independent ground for remanding this case. (Dkt. 7:2–8.) If the Court does not remand this entire case, then it should remand the Ruffolos' state-law claims and stay their federal claims. (Dkt. 7:8–12.) If the Court resolves the Ruffolos' federal claims instead of staying them, then it should remand their state-law claims. (Dkt. 8:13–16.)

ARGUMENT

I. The Court should remand this entire case to state court because the DNR's ripeness argument disavowed federal subject-matter jurisdiction.

A. The DNR argued against federal jurisdiction in its principal brief, so it cannot advance the opposite position in its reply brief.

"[A]rguments raised for the first time in a reply brief are waived." *Thorncreek Apartments III, LLC v. Mick*, 886 F.3d 626, 636 (7th Cir. 2018) (citation omitted).

In its reply brief, the DNR argues for the first time that this case is ripe under Article III of the U.S. Constitution. Not only is that argument new, but it directly contradicts the argument that the DNR made in its principal brief. This Court should conclude that the DNR has waived its argument supporting federal jurisdiction. The DNR tries to avoid that waiver by mischaracterizing what it argued in its principal brief. This Court should not allow it.

As the DNR recognized in its principal brief supporting its motion to dismiss, "Article III of the Constitution limits federal courts' jurisdiction to 'cases' and 'controversies.'" (Dkt. 3:36 (citing *Amling v. Harrow Indus. LLC*, 943 F.3d 373, 377 (7th Cir. 2019)). "One component of the case-or-controversy requirement is ripeness." (Dkt. 3:36 (citing *Amling*, 943 F.3d at 377).) The Ruffolos agree. (Dkt. 8:5–6.)

In its principal brief, the DNR argued that "the Ruffolos' claims" are "not ripe. . . . Lack of ripeness requires dismissal." (Dkt. 3:8.) The DNR repeatedly advanced that position. The DNR argued, for example, "The Ruffolos' claims must be dismissed because they are not ripe for adjudication." (Dkt. 3:35.) It reiterated, "Because any controversy between the parties is hypothetical, this case should be dismissed as unripe." (Dkt. 3:36.)

The DNR made clear that its ripeness argument was both jurisdictional and prudential. After recognizing that ripeness is an Article III jurisdictional prerequisite (Dkt. 3:36 & n.7), the DNR stated that "[r]ipeness also includes prudential considerations" (Dkt. 3:37). Explaining the concept of prudential ripeness, the DNR

stated that a federal court may decline to exercise jurisdiction "even where a 'case or controversy' exists." (Dkt. 3:37.)

The DNR argued that this case is unripe both jurisdictionally and prudentially. The DNR began its jurisdictional argument by asserting that "[t]here is no live controversy between the Ruffolos and the [DNR], its Secretary, or the Attorney General." (Dkt. 3:38.) The DNR then spent multiple pages arguing this case is unripe under Article III. (Dkt. 3:38–40.) The DNR then alternatively argued that this case is unripe on prudential grounds even if there is Article III jurisdiction. It began this argument by stating, "Alternatively, even if the Court were to conclude that a 'case or controversy' exists, prudential considerations merit forbearance." (Dkt. 3:40.) The DNR then spent about one and a half pages arguing that this case is prudentially unripe. (Dkt. 3:40–41.) The DNR summed up its view that this case must be dismissed under either ripeness ground: "Whether for lack of a live, legal dispute between the parties, or their failure to exhaust, this Court should dismiss the Ruffolos' claims as unripe." (Dkt. 3:41.)

As the Ruffolos explained in their response brief, however, a lack of Article III ripeness requires this case to be remanded to state court. Dismissal is not the proper remedy for a lack of federal subject-matter jurisdiction. (Dkt. 8:5–9.)

Now the DNR tries to undo its Article III ripeness argument. The DNR now asserts for the first time that the Ruffolos' facial claims "are ripe and within this Court's jurisdiction" and that the Ruffolos' "non-facial challenges" also support Article III jurisdiction. (Dkt. 17:7, 9.) The DNR asserts that its "opening brief should not be read to argue otherwise." (Dkt. 17:8.)

But, as just explained, the DNR clearly argued in its principal brief that this case lacks Article III ripeness. The DNR's attempt to "read" its principal brief differently is misleading at best.

Tellingly, the DNR states that it "dedicated *nearly half* of [its] ripeness argument to principles of administrative exhaustion and prudential (*rather than jurisdictional*) ripeness." (Dkt. 17:8 (emphases added).) That statement contains a huge implicit concession: the DNR spent more than half of its ripeness argument

asserting a lack of jurisdiction. This implicit concession is correct and totally inconsistent with the DNR's attempt to "read" its principal brief as not asserting a lack of jurisdiction.

It is "too little and too late" for the DNR to change its position in its reply brief. *See Anvar v. Dwyer*, 82 F.4th 1, 9 (1st Cir. 2023) (applying the rule that "arguments appearing for the first time in an appellant's reply brief are deemed waived"). The DNR's attempt to support federal jurisdiction in a reply brief, after arguing *against* federal jurisdiction in its principal brief, "is a highly problematic strategy" because "arguments raised for the first time in a reply brief are waived." *Wonsey v. City of Chicago*, 940 F.3d 394, 398 (7th Cir. 2019). This Court has applied that waiver rule to arguments supporting jurisdiction that were first raised in a reply brief. *See, e.g.*, *Stewart v. Wang*, No. 20-CV-179-JDP, 2023 WL 2302065, at *4 (W.D. Wis. Mar. 1, 2023). That waiver rule applies to arguments in a party's reply brief that contradict the position the party took in its initial brief. *See, e.g.*, *Eagle Supply & Mfg., L.P. v. Bechtel Jacobs Co., LLC*, 868 F.3d 423, 429 n.1 (6th Cir. 2017); *Goldberg v. 401 N. Wabash Venture LLC*, No. 09-C-6455, 2013 WL 5376556, at *6 n.1 (N.D. Ill. Sept. 25, 2013). This Court thus limits its consideration to the arguments raised in the parties' principal briefs. *See, e.g.*, *Reilly v. Century Fence Co.*, 527 F. Supp. 3d 1003, 1007 (W.D. Wis. 2021).

Applying that waiver rule here, this Court should consider the DNR's argument that this case is *unripe* under Article III and the Ruffolos' argument that this case must be remanded to state court. (*See* Dkt. 3:36–40; 8:5–9.) The Court should not consider the DNR's opposite argument in reply, *i.e.*, that this case is *ripe* under Article III.

B. The DNR's attempt to disavow its earlier ripeness argument is unconvincing.

In reply, the DNR argues that this case is ripe for Article III jurisdictional purposes even though the DNR has not taken statutory-enforcement action against the Ruffolos. (Dkt. 17:7, 9.) But the DNR took the opposite view in its principal brief. (Dkt. 3:37–40.) For example, while addressing jurisdictional ripeness, the DNR

argued that "[c]hallenges involving possible future application of statutes are commonly rejected as unripe." (Dkt. 3:37.) While arguing *against* Article III ripeness, the DNR stated that it "*could* bring an enforcement action requiring the Ruffolos to meet their obligations under the Spills Law. . . . These types of 'uncertain or contingent' events do not present a justiciable controversy." (Dkt. 3:39.) The DNR thus concluded its jurisdictional argument by stating that "[b]ecause the Ruffolos cannot point to any real, direct injury likely to result from enforcement of the Spills Law, their claims are unripe and this case must be dismissed." (Dkt. 3:40.) The DNR then shifted to "[a]lternatively" arguing this case is not prudentially ripe. (Dkt. 3:40.)

Because the DNR argued in its principal brief that the lack of enforcement rendered this case unripe under Article III, it cannot advance the opposition position for the first time in reply.

C. Whether this case is ripe under state law is immaterial here.

The DNR notes that the Ruffolos have argued in *state court* that this case is ripe. (Dkt. 17:11, 14.) Without citing any legal authority, the DNR asserts that "[t]he Ruffolos cannot have it both ways, embracing ripeness when it suits them and disavowing it to avoid this Court's jurisdiction." (Dkt. 17:12.)

The DNR is wrong in multiple respects. For starters, a claim can be ripe under Wisconsin law even if it is unripe under Article III. *Smith v. Wisconsin Dep't of Agric., Trade & Consumer Prot.*, 23 F.3d 1134, 1142 (7th Cir. 1994). Also, the Ruffolos are not "disavowing" ripeness under Article III. (Dkt. 17:12.) They take no position on whether this case is ripe under Article III. (Dkt. 8:7 n.3.) In a removal case, a plaintiff "does not have to take a position" on whether Article III jurisdiction exists; instead, the defendant has the burden of establishing federal jurisdiction. *Barnes v. ARYZTA, LLC*, 288 F. Supp. 3d 834, 839 (N.D. Ill. 2017). The Ruffolos have simply argued that this case must be remanded because the DNR has failed to meet that burden by arguing *against* federal jurisdiction. (Dkt. 8:5–9.)

Likewise, the DNR is wrong to assert that the Ruffolos "urge" this Court to grant them summary judgment. (Dkt. 17:11–12 & n.2.) The Ruffolos' position should

be obvious because they filed a motion to remand this entire case to state court, and they advanced that argument in multiple briefs. (Dkt. 6; 7; 8:5–10.) The Ruffolos' request for summary judgment was clearly an alternative to their main request for a remand to state court. (*See, e.g.*, Dkt. 8:4–5, 16, 27, 43–44, 48.) The Ruffolos have made clear their view that "this Court should remand this entire case to state court. The Court should not address the merits of the Ruffolos' claims." (Dkt. 8:16.) Because the DNR devoted almost 30 pages to the merits of the Ruffolos' claims (Dkt. 3:42–79), it cannot fault the Ruffolos for arguing the merits of their claims in the alternative to their request for a remand. After all, "[f]ailure to respond to an argument . . . results in waiver." *Bonte v. U.S. Bank, N.A.*, 624 F.3d 461, 466 (7th Cir. 2010). The Ruffolos are not trying to "have it both ways" by responding to the DNR's arguments on the merits.

Rather, the DNR is trying to "have it both ways." (Dkt. 17:12.) The DNR asserted federal jurisdiction in its notice of removal. (Dkt. 1:3.) Then, one week later, the DNR argued a lack of federal jurisdiction by maintaining that this case is unripe under Article III. (Dkt. 3:36–40.) But now, the DNR is taking the opposite view in its reply brief. (Dkt. 17:7–25.) What's more, even in reply, the DNR still seems to argue that this case is unripe—just on prudential rather than jurisdictional grounds. (Dkt. 17:7–25.) The DNR now seems to be arguing that this case is unripe enough to justify dismissal but *not* unripe enough to require a remand to state court. (Dkt. 17:7–25.) That litigation strategy is the epitome of trying to have it both ways.[2]

[2] When a case is dismissed on prudential-ripeness grounds, it is dismissed *without* prejudice. *See, e.g.*, *Foster v. Cantil-Sakauye*, 744 F. App'x 469, 469 (9th Cir. 2018); *Simmonds v. I.N.S.*, 326 F.3d 351, 361 (2d Cir. 2003); *Firstmerit Bank, N.A. v. BMO Harris Bank*, No. 15-CV-9238, 2016 WL 2622326, at *5 (N.D. Ill. May 9, 2016); *see also Constr. & Gen. Laborers' Union No. 330 v. Town of Grand Chute*, 915 F.3d 1120, 1121 (7th Cir. 2019) (dismissing a claim "without prejudice" because it was "not ripe"). And when a federal case is dismissed without prejudice, the plaintiff may refile it in state court. *See, e.g.*, *LaBuhn v. Bulkmatic Transp. Co.*, 865 F.2d 119, 121 (7th Cir. 1988); *Sneed v. Rybicki*, 146 F.3d 478, 482 (7th Cir. 1998). As with Article III ripeness, the Ruffolos take no position on whether this case satisfies federal prudential-ripeness requirements. (*See* Dkt. 8:7 n.3.) The Ruffolos instead maintain that this Court should remand this case to state court.

D. The DNR has not adequately distinguished the case law on which the Ruffolos relied in arguing for a remand.

The DNR tries but fails to distinguish *Barnes*, 288 F. Supp. 3d 834; *Collier v. SP Plus Corporation*, 889 F.3d 894 (7th Cir. 2018) (per curiam); and *Mocek v. Allsaints USA Limited*, 220 F. Supp. 3d 910 (N.D. Ill. 2016). The DNR argues that "[f]irst and most importantly, none of those cases involved a facial, constitutional challenge to a statute like Ruffolos' claim here. This alone conclusively distinguishes those cases." (Dkt. 17:12–13.) But the DNR does not explain why it thinks this distinction matters. "[P]erfunctory and undeveloped arguments, as well as arguments that are unsupported by pertinent authority, are waived." *White v. United States*, 8 F.4th 547, 552 (7th Cir. 2021).

In *Barnes*, *Mocek*, and *Collier*, the case had to be remanded to state court because the defendant had moved to dismiss on jurisdictional grounds and thus failed to meet its burden of establishing federal jurisdiction. (Dkt. 8:6–7.) The same is true here. (Dkt. 8:7–9.)

The DNR also argues that "those cases involved fundamental jurisdictional defects rather than prudential considerations like ripeness." (Dkt. 17:13.) But a lack of Article III ripeness is a jurisdictional defect. *See, e.g.*, *Smith*, 23 F.3d at 1142. The parties seem to agree on that point. (Dkt. 3:36; 8:5–6.) Crucially, the DNR argued in its principal brief that this case is unripe under Article III, and it has waived the contrary argument in its reply brief. *See supra* § I.A.

A similar situation arose in *Barnes*, where the defendant removed the case to federal court, moved to dismiss on jurisdictional grounds, and then withdrew its Article III jurisdictional argument "in a ploy to avoid being forced out of federal court." *Barnes*, 288 F. Supp. 3d at 839. That strategic change of heart was not enough to keep that case in federal court. The DNR's change of heart is not enough here, either.

Finally, the DNR suggests that it could remove this case to federal court a second time if it were remanded to state court on ripeness grounds. (Dkt. 17:13–14.) That argument against a remand is baseless on several fronts. First, "the Supreme

Court has squarely rejected the argument that there is an implicit 'futility exception' hidden behind the plain meaning of [the remand requirement in 28 U.S.C.] § 1447(c)." *Smith*, 23 F.3d at 1139 (citing *International Primate Protection League v. Administrators of Tulane Educational Fund*, 500 U.S. 72 (1991)). Second, even if there were a futility exception, a remand would not be futile because the Ruffolos could amend their complaint to remove their federal claims, thus preventing a second removal to federal court. Third, the DNR's futility argument seemingly hinges on the fact that the Ruffolos have argued in *state court* that this case is ripe under *state law*. (*See* Dkt. 17:14.) The Ruffolos have already refuted that reasoning. *See supra* § I.C.

* * *

In sum, this Court should hold the DNR to the argument that it made in its principal brief supporting its motion to dismiss: that this case is unripe under Article III. The DNR's contrary argument in its reply brief is waived. Because the DNR has thus failed to establish federal jurisdiction, this case should be remanded to state court.

II. The Court should remand this entire case because the DNR asserted sovereign immunity under the U.S. Constitution.

The DNR's 180-degree turn in reply is not limited to ripeness; the DNR is also disavowing the Eleventh Amendment immunity argument that it raised in its principal brief. "[A]rguments raised for the first time in a reply brief are waived." *Thorncreek Apartments*, 886 F.3d at 636. Because the DNR asserted Eleventh Amendment immunity in its principal brief, it waived its new argument *against* such immunity.

The DNR argued in the principal brief supporting its motion to dismiss: "Sovereign immunity bars all of [the Ruffolos'] claims, including their federal claims, which do not come within the narrow exception under *Ex parte Young*."[3] (Dkt. 3:22.) The DNR made clear that its immunity arguments relied on both Wisconsin law and the Eleventh Amendment to the U.S. Constitution. Citing "Article IV, § 27 of the

[3] *See Ex parte Young*, 209 U.S. 123 (1908).

Wisconsin Constitution," the DNR discussed the doctrine of sovereign immunity under Wisconsin law. (Dkt. 3:24.) The DNR then argued at length that sovereign immunity under the Wisconsin Constitution bars the Ruffolos' state-law and federal claims. (Dkt. 3:25–31.) Relying on the Eleventh Amendment, the DNR next argued that "[t]he Ruffolos' federal claims also are barred by sovereign immunity." (Dkt. 3:31.) Specifically, the DNR argued that "the Ruffolos' federal constitutional claims are barred because they fail to come within *Ex parte Young*'s narrow exception for prospective suits against state officials." (Dkt. 3:23.) The DNR spent several pages advancing that view. (Dkt. 3:31–35.) Importantly, the *Ex parte Young* doctrine is an exception to Eleventh Amendment immunity. *Council 31 of the Am. Fed'n of State, Cnty. & Mun. Emps., AFL-CIO v. Quinn*, 680 F.3d 875, 881–82 (7th Cir. 2012).

The DNR also specifically argued that it had *not* waived its Eleventh Amendment immunity by removing this case to federal court. According to the DNR's principal brief: "On removal to federal court, *Lapides v. Board of Regents of University System of Georgia*, 555 U.S. 613, 619 (2002) 'ruled that "a State's voluntary appearance in federal court amount[s] to a waiver of its Eleventh Amendment immunity."' *Tyler v. Wick*, 680 F. App'x 484, 486 (7th Cir. 2017)." (Dkt. 3:31.) The DNR continued, "*Lapides*, however, 'applies only to state-law claims for which the State has waived its immunity in state court.'" (Dkt. 3:31–32 (quoting *Tyler*, 680 F. App'x at 486).) According to the DNR, "even after *Lapides*, the Ruffolos' state-law claims are barred." (Dkt. 3:32.) "On removal of federal-law, official-capacity claims like [the Ruffolos'] constitutional challenges to the Spills Law here, the question is whether the official would be entitled to sovereign immunity for those claims if asserted in state court." (Dkt. 3:32.) "Thus, on removal of federal-law official-capacity claims for prospective relief, the question is whether federal law somehow authorizes the suit against the state official, such as under the limited exception to state sovereign immunity recognized in *Ex parte Young*." (Dkt. 3:33.) The DNR then spent several pages arguing that the *Ex parte Young* exception to Eleventh Amendment immunity does not apply here. (Dkt. 3:33–35.) The DNR thus argued that the Ruffolos' "complaint should be dismissed on these threshold grounds." (Dkt. 3:35.)

In the Ruffolos' response brief, they explained that a remand to state court (rather than dismissal) was the correct remedy due to the DNR's assertion of Eleventh Amendment immunity. (Dkt. 8:9–10.)

Presumably to avoid a remand, the DNR now asserts that it never relied on the Eleventh Amendment. According to the DNR's reply brief, the DNR's immunity defense was "based exclusively on state-law sovereign immunity." (Dkt. 17:15.) The DNR asserts that it "did not invoke Eleventh Amendment immunity as a bar to this suit" because "a State's voluntary appearance in federal court amount[s] to a waiver of its Eleventh Amendment immunity." (Dkt. 17:15 (second quotation from *Tyler*, 680 F. App'x at 486).)

The DNR is misrepresenting what it argued in its principal brief. In its principal brief, the DNR argued that this quotation from *Tyler* did *not* apply here because this waiver rule "applies only to state-law claims for which the State has waived its immunity in state court." (Dkt. 3:31–32 (quoting *Tyler*, 680 F. App'x at 486).) The DNR argued that this waiver rule hinged on the *Ex parte Young* doctrine, which the DNR maintained did not allow the Ruffolos to pursue their federal constitutional claims. (Dkt. 3:33–35.) Again, *Ex parte Young* is an exception to Eleventh Amendment immunity; even the case law that the DNR cited acknowledges this point. (*See* Dkt. 3:33.) *See, e.g.*, *Omosegbon v. Wells*, 335 F.3d 668, 673 (7th Cir. 2003) (noting "*Ex parte Young*" is an "exception to the Eleventh Amendment"); *see also Sherwood v. Marchiori*, 76 F.4th 688, 693 (7th Cir. 2023) (same).

To summarize, the DNR argued in its principal brief that it did *not* waive its Eleventh Amendment immunity by removing this case to federal court, because the Ruffolos' claims did not fall within the *Ex parte Young* exception to Eleventh Amendment immunity. (Dkt. 3:31–35.) But in reply, the DNR takes the opposite view by claiming that it never asserted Eleventh Amendment immunity and that the notice of removal waived such immunity. (Dkt. 17:15.) Because "arguments raised for the first time in a reply brief are waived," *Thorncreek Apartments*, 886 F.3d at 636 (citation omitted), the DNR is barred from now arguing that it waived its Eleventh Amendment immunity.

The DNR makes two other, related arguments that warrant only a short refutation. First, the DNR argues that in a removal case, a federal court may resolve a state-law defense of sovereign immunity. (Dkt. 17:16.) That observation is irrelevant here because, as the Ruffolos have explained, a federal court should remand such a defense to state court if the federal court remands a plaintiff's claims. (Dkt. 8:10 (citing *Gossmeyer v. McDonald*, 128 F.3d 481, 488–89 (7th Cir. 1997); *Smith*, 23 F.3d at 1139).)

Second, the DNR claims that "dismissal based on the Eleventh Amendment is without prejudice." (Dkt. 17:17 (citing *McHugh v. Ill. Dep't of Transp.*, 55 F.4th 529, 533 (7th Cir. 2022)).) But *McHugh* was not a removal case, so the court there did not state what the remedy should be in a removal case that is barred by the Eleventh Amendment. As the Ruffolos have explained, the Seventh Circuit has held that a claim barred by the Eleventh Amendment must be remanded to the state court from which the case was removed. (Dkt. 8:9–10 (citing *Smith*, 23 F.3d at 1140).)

In sum, because the DNR asserted Eleventh Amendment immunity in its principal brief, this Court should remand this case to state court. (Dkt. 8:9–10.) This Court should not consider the DNR's contrary argument, first raised in reply, that Eleventh Amendment immunity does not apply here. The DNR is bound by the arguments that it raised in its principal brief, and those arguments require this case to be remanded to state court.[4]

[4] Although this Court should remand the DNR's state-law immunity defense along with the rest of this case (Dkt. 8:10; 18:13), the Ruffolos note that the DNR's reply brief misstates Wisconsin law on sovereign immunity. According to the DNR, "a plaintiff must allege that the individual officer has effectively gone rogue by stepping out of his or her official role and taking actions not even arguably authorized by law—not simply by taking common administrative action with which the challenger disagrees." (Dkt. 17:25.) But one of the cases cited by the DNR correctly states the test: "to the extent that the officer's mistakes amount to the misconstruction or the misapplication of a statute, he is exceeding his authority as much as if he were operating under an unconstitutional statute." *Lister v. Bd. of Regents of Univ. Wisconsin Sys.*, 72 Wis. 2d 282, 304, 240 N.W.2d 610 (1976) (quoting *Wisconsin Fertilizer Ass'n v. Karns*, 39 Wis. 2d 95, 101, 158 N.W.2d 294 (1968)). More succinctly worded, a state official "acts outside his authority when he misconstrues or misapplies a statute." *Karns*, 39 Wis. 2d at 103. Sovereign immunity under Wisconsin law thus does not apply if a plaintiff "allege[s] the [defendant state official] is misconstruing and misapplying the statute." *Id.* at 104. Here, the Ruffolos are alleging that the Defendants are acting outside

CONCLUSION

This Court should remand this entire case to the Jefferson County Circuit Court.

Dated this 17th day of November 2023.

Respectfully submitted,

Electronically signed by
s/ Scott E. Rosenow

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their authority by misconstruing or misapplying Wis. Stat. § 292.11(3). (*See, e.g.*, Dkt. 1-1:853, 855, 863–66, 873–74; 8:27.) The Ruffolos' statutory claims thus easily fall within the declaratory-judgment exception to Wisconsin's doctrine of sovereign immunity. If the DNR were correct that the Ruffolos may seek judicial review only if and when the DNR issues a final decision, then their ability to seek review "would be solely in the discretion of the officer who is being challenged for acting outside his authority. Certainly the legislature did not contemplate such a result." *Karns*, 39 Wis. 2d at 107.