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INTEREST OF THE UNITED STATES

The United States respectfully submits this Statement of Interest pursuant to 28 U.S.C. § 517, which authorizes the Attorney General “to attend to the interests of the United States in a suit pending in . . . a court of a State.”¹ This case presents an important question regarding the interpretation of Section 101 the Civil Rights Act of 1964, 52 U.S.C. § 10101(a) (Section 101). Congress has vested the Attorney General with authority to enforce Section 101 on behalf of the United States. *See* 52 U.S.C. § 10101(c). Accordingly, the United States has a substantial interest in ensuring proper interpretation of Section 101.

Because Plaintiff’s claims for declaratory and injunctive relief may require the Court to apply Section 101 to Wisconsin state law, the United States submits this Statement of Interest for the limited purpose of assisting the Court’s analysis by describing the appropriate construction of Section 101. The United States expresses no view on the merits of any claim or any other legal or factual dispute between the parties.

INTRODUCTION

Section 101 of the Civil Rights Act prohibits any official acting under color of state law from denying any individual the right to vote because of an “error or omission” on any record or paper related to “any act . . . requisite to voting” that 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). Often called the “Materiality Provision,” this statute bars any denial of an individual’s right to vote based on errors or omissions in responding to demands for information on papers or records, where that information is not material to determining whether the voter is

¹ This Statement of Interest is also filed pursuant to SCR 20:5.5(d)(2) of the Wisconsin Rules of Professional Conduct.

eligible to vote under state law. The Materiality Provision provides a simple and effective limitation that preserves the right to vote against unwarranted denials on merely technical grounds.

PROCEDURAL BACKGROUND

By statute, Wisconsin requires that all absentee ballots be accompanied by a certificate executed by both the voter and an adult, U.S.-citizen witness. *See* Wis. Stat. § 6.87(2), (4).² Under a Wisconsin statutory provision enacted in March 2016, “[i]f a certificate is missing the address of a witness, the ballot may not be counted.” Wis. Stat. § 6.87(6d); 2015 Wis. Act 261 (2016). No Wisconsin statutory provision defines the minimum address information sufficient to comply with this provision. *See Trump v. Biden*, 394 Wis. 2d 629, 642 (2020); *see also id.* at 653 (Hagedorn, J., concurring).

Following enactment of Wis. Stat. § 6.87(6d), the Wisconsin Elections Commission (WEC) issued guidance to municipal clerks interpreting this witness-address requirement. As amended on October 18, 2016, that guidance provided that WEC “has set a policy that a complete address contains a *street number, street name and name of municipality.*” *See* Memorandum from Michael Haas, Interim Elections Administrator, and Diane Lowe, Lead Elections Specialist to Wisconsin Municipal Clerks and the Milwaukee City Elections Commission and Wisconsin County Clerks and the Milwaukee County Elections Commission, Wisconsin Elections Commission, *Amended: Missing or Insufficient Witness Address on Absentee Certificate Envelopes* (Oct. 18, 2016) (emphasis in original). The guidance further

² The witness citizenship requirement does not apply to military or overseas electors. *See* Wis. Stat. § 6.87(4)(b).

directed clerks that they “*must* take corrective actions in an attempt to remedy a witness address error.” *Id.* (emphasis in original).

On September 7, 2022, the Waukesha County Circuit Court granted a temporary injunction requiring WEC to rescind its guidance that clerks may add or correct missing witness address information on absentee ballot certification as contrary to Wisconsin law. *See* Temporary Inj., *White v. Wisconsin Elections Commission*, No. 22CV1008, Doc. No. 167, at ¶¶ 1, 5-6 (Waukesha Cnty. Sept. 7, 2022). WEC did so on September 13, 2022.³ The Waukesha County Circuit Court’s judgment became final on October 3, 2022. *See* Order Granting Final J. to Pls. and Intervenor Pl. the Wis. State Legislature, *White v. Wisconsin Elections Commission*, No. 22CV1008, Doc. No. 188 (Waukesha Cnty. Oct. 3, 2022).

Plaintiff League of Women Voters of Wisconsin filed this action on September 30, 2022, following the Waukesha County Circuit Court’s entry of its temporary injunction. *See* Compl., Doc. No. 2.⁴ Among other relief, the First Amended Complaint seeks a declaratory judgment

³ The parties appear to dispute whether this rescission also rescinded WEC’s definition of address contained in the October 18, 2016 guidance. *Compare* First Am. Compl. ¶ 13 *with* Def.-Int. Wisconsin Legislature’s Answer, Doc. No. 21, at ¶ 13. The United States takes no position on this question, and no position on the effect on this litigation, if any, of WEC’s September 14, 2022 memorandum to clerks regarding the *White* litigation. *See* Memorandum from Wisconsin Elections Commission to Wisconsin Municipal Clerks, Wisconsin County Clerks, City of Milwaukee Election Commission, and Milwaukee County Election Commission, *Temporary Injunction on WEC Guidance re Missing Absentee Witness Address* (*White v. Wisconsin Elections Commission*, 22-CV-1008) (Sept. 14, 2022) (noting “the Court clarified that it had not ruled on what constitutes a witness address or a missing witness address, and it had not overturned the existing WEC definition of address contained in the now-invalidated memoranda—namely, *street number, street name, and name of municipality.*”).

⁴ A separate suit against WEC concerning the construction of Wis. Stat. § 6.87(6d) was filed by Plaintiff Rise, Inc. and an individual voter on September 27, 2022. *See* Compl., *Rise, Inc. v. Wisconsin Elections Commission*, No. 22CV2446, Doc. No. 1 (Dane Cnty. Sept. 27, 2022). The *Rise* plaintiffs did not raise claims arising under or turning on a construction of Section 101, but alleged that an interpretation of Wisconsin law contrary to its proposed construction would “risk violating [the Materiality] provision of the Civil Rights Act” because complete address information is “irrelevant to voter eligibility in Wisconsin.” *Id.* ¶ 53; *see also* ¶¶ 41, 52, 59. On

finding that Wis. Stat. § 6.87(6d) violates the 1964 Civil Rights Act, 52 U.S.C. § 10101(a)(2)(B), as applied to Wisconsin absentee voters who cast or will return absentee ballots with certificates upon which the witness has recorded their street number, street address, and municipality but has omitted one or more address components outside of those three components of WEC's existing definition of 'address' for purposes of Wis. Stat. § 6.87(6d).

First Am. Compl., Doc. No. 10, at 26-27. The Complaint further seeks a declaration that Wis. Stat. § 6.87(6d) violates Section 101 "as applied to ballots with certificates from household member witnesses who record the same street number and street name as the voter but do not duplicate the municipality, and ballots with certain notations—such as 'SAME,' ditto marks, or arrows pointing up to the voter's information." *Id.* at 27. And the Complaint seeks "temporary and permanent injunctions" barring WEC, Wisconsin's municipal and county clerks, and the Milwaukee City and County Election Commissions from rejecting ballots on grounds that violate Section 101 as construed in the requested declaratory judgment.

On October 4, 2022, Plaintiff League of Women Voters of Wisconsin moved for emergency declaratory relief and a temporary injunction, seeking relief on its Section 101 claim (among other claims). *See* Mem. in Supp. of Pl.'s Mot. for Emergency Declaratory Relief & Temporary Inj., Doc. No. 16.

STATUTORY BACKGROUND

Section 101 of the Civil Rights Act of 1964, as amended, prohibits persons acting under color of law from "deny[ing] the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act

October 7, 2022, the *Rise* Court denied a temporary injunction based on its finding that WEC's guidance "contained in the October 18, 2016 [WEC] memorandum and the September 14, 2022 memorandum" defining "address" to include street number, street name, and municipality "is the status quo and that the requested temporary relief is unnecessary to preserve the status quo." Order Denying Temporary Inj., *Rise, Inc. v. Wisconsin Elections Commission*, No. 22CV2446, Doc. No. 79 (Dane Cnty. Oct. 7, 2022).

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). As used in Section 101, “the word ‘vote’ includes all action necessary to make a vote effective including, but not limited to, registration or other action required by State law prerequisite to voting, casting a ballot, and having such ballot counted and included in the appropriate totals of votes cast.” *Id.* § 10101(e); *see also id.* § 10101(a)(3)(A). This provision was “necessary to sweep away such tactics as disqualifying an applicant who failed to list the exact number of months and days in his age.” *Condon v. Reno*, 913 F. Supp. 946, 950 (D.S.C. 1995); *see also, e.g., United States v. Crawford*, 229 F. Supp. 898, 901-02 (W.D. La. 1964), *rev’d on other grounds sub nom. United States v. Clement*, 358 F.2d 89 (5th Cir. 1966). In short, Congress enacted the Materiality Provision to prohibit election officials from using election papers as tests for voters, rather than as a mechanism to gather information necessary to assess voters’ qualifications. *See Schwier v. Cox*, 340 F.3d 1284, 1294 (11th Cir. 2003) (explaining that Congress sought “to address the practice of requiring unnecessary information for voter registration with the intent that such requirements would increase the number of errors or omissions on the application forms, thus providing an excuse to disqualify potential voters”); *see also United States v. Cartwright*, 230 F. Supp. 873, 876 (M.D. Ala. 1964) (finding an application form to be “a strict examination or test” when registration is denied “because of technical and inconsequential errors and omissions”).

ARGUMENT

I. Section 101 Requires Courts to Compare the Grounds for Rejection of a Paper or Record Requisite to Voting with State Law Voter Qualification Requirements to Determine Whether an Error or Omission Is Material.

Congress enacted Section 101 to “provide specific protections to the right to vote.” H.R. Rep. No. 914, 88th Cong., 1st Sess. 19 (1963) (1963 House Report); *see* Civil Rights Act of 1964, Pub. L. No. 88-352, § 101, 78 Stat. 241-242. In passing Section 101, Congress intended to redress practices requiring voters to provide more information on voting-related papers than was actually necessary to demonstrate a voter’s qualifications; such practices tended to provide inappropriate excuses to “disqualify potential voters” who were in fact fully qualified to vote. *Schwier*, 340 F.3d at 1294.

Straightforward in its command and targeted in its scope, the Materiality Provision prohibits state officials from denying any individual the right to vote based on an “error or omission” on a record or paper that relates to any “act requisite to voting,” where that error or omission is not material to determining “whether such individual is qualified under State law to vote in such election.” 52 U.S.C. § 10101(a)(2)(B). Congress directed that the term “vote” be construed broadly to include without limitation all actions prerequisite to voting under state law, the actual casting of the ballot, and having a ballot counted. 52 U.S.C. § 10101(e); *id.* § 10101(a)(3)(A) (applying subsection (e)’s definition to subsection (a)). Absentee ballot certifications, which must be completed by Wisconsin voters in order to “hav[e] such ballot counted,”⁵ 52 U.S.C. § 10101(e), are a “paper or record” related to an “act requisite to voting,” 52 U.S.C. § 10101(a)(2)(B), and thus are covered by Section 101. *Cf. Migliori v. Cohen*, 36

⁵ *See* Wis. Stat. § 6.87(6d) (providing absentee ballots missing a witness address on the certificate “may not be counted.”).

F.4th 153, 156-57 (3d Cir. 2022) (applying Materiality Provision to declaration on Pennsylvania absentee ballot envelopes), *vacated as moot sub nom. Ritter v. Migliori*, No. 22-30, --- S. Ct. ---, 2022 WL 6571686 (Oct. 11, 2022) (mem.).⁶

To determine whether an error or omission is material, the information required must be compared to state law qualifications to vote. *See Migliori*, 36 F.4th at 162-63 (3d Cir. 2022) (to determine whether rejecting absentee ballots based on missing dates violates Section 101, “we must ask whether this requirement is material in determining whether such individual is qualified to vote under Pennsylvania law”); *La Unión del Pueblo Entero v. Abbott*, No. 21-cv-844, 2022 WL 1651215, at *20-21 (W.D. Tex. May 24, 2022); *Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1308-09 (N.D. Ga. 2018); *Wash. Ass’n of Churches v. Reed*, 492 F. Supp. 2d 1264, 1270 (W.D. Wash. 2006); *see also Diaz v. Cobb*, 435 F. Supp. 2d 1206, 1213 (S.D. Fla. 2006) (describing as not material “failure to provide information, such as race or social security number, that is not directly relevant to the question of eligibility,” and “failure to follow needlessly technical instructions.”). Applying Section 101 therefore requires comparing the information called for by the absentee ballot certification with the relevant state’s qualifications to vote. In Wisconsin,

⁶ Defendant-Intervenor suggests the Materiality Provision is limited to papers or records related to registration. *See Int.-Defendant the Wis. State Legislature’s Br. in Opp.*, at 18-19. But the only way to arrive at this interpretation of Section 101 is to ignore that Section 101 applies to “any application, registration, or other act requisite to voting.” 52 U.S.C. § 10101(a)(2)(B). Defendant-Intervenor’s interpretation would read “application” and “other act requisite to voting” out of the statute. Particularly in light of the statutory definition of “vote” encompassing “all action necessary to make a vote effective,” 52 U.S.C. § 10101(e), an absentee ballot application must fall within Section 101’s substantive reach. Courts have regularly applied Section 101 to absentee ballot materials. *See, e.g., Migliori*, 36 F.4th at 156-57; *La Unión del Pueblo Entero v. Abbott*, No. 5:21-cv-844, 2022 WL 1651215, at *22-23 (W.D. Tex. May 24, 2022); *League of Women Voters of Ark. v. Thurston*, No. 5:20-cv-5174, 2021 WL 5312640, at *4 (W.D. Ark. Nov. 15, 2021); *Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1308-09 (N.D. Ga. 2018).

individuals are qualified to vote if they are (a) U.S. citizens that are (b) 18 years of age or older and (c) have resided in an election district or ward for 28 consecutive days before an election.

*See Wis. Stat. § 6.02.*⁷

The United States takes no position on the extent to which a missing witness address may violate Section 101, nor on what specific pieces of witness address information are material to determining a voter's qualification to vote. And the United States assumes, as Plaintiff does, that a witness address in some form may be material to determining a voter's qualification to vote under State law. Accordingly, if the Court reaches Plaintiff's claim turning on Section 101, it would require the Court to consider what portion of a witness's address is material to determining a Wisconsin voter's qualification to vote – and whether any pieces of address information, if erroneously written or omitted, would not be material to making that determination. If this Court concludes that some portion of a witness address is not material to determining a voter's qualification to vote under Wisconsin law, rejection of absentee ballots based on such errors or omissions would implicate Section 101.⁸

Section 101's unconditional terms admit of no balancing tests or trade-offs. It safeguards the right to vote against rejections of papers or records based on errors that are not material to

⁷ Wisconsin also disqualifies individuals who (1) are “incapable of understanding the objective of the elective process or . . . under guardianship,” (2) have been convicted of “treason, felony, or bribery” unless their right to vote has been restored, or (3) have become interested via a “bet or wager” hinging on an election's result. Wis. Stat. § 6.03(1)-(2). These qualifications may also factor into the Section 101 analysis.

⁸ Because the Plaintiff has assumed for the purposes of this litigation that a witness certification may be generally material, the Court may also find it appropriate to consider whether and to what extent the witness's address information is material to the *witness's qualification to serve as a witness* under Wisconsin law. Wisconsin law establishes three qualifications for a witness: they must be over age 18, a U.S. citizen, and not a candidate for office. *See Wis. Stat. § 6.87(4)(b)*. Military and overseas voters are exempted from the requirement that a witness be a U.S. citizen. *See id.*

determining voter qualifications, regardless of any other purported rationale for eliciting the information at issue. Indeed, requiring voters to provide exact information that is not in fact material to their qualifications, and which merely serves to confirm their already-known identity, would invite precisely the type of harm Congress enacted Section 101 to prevent: “the practice of requiring unnecessary information for voter registration with the intent that such requirements would increase the number of errors or omissions on the application forms, thus providing an excuse to disqualify potential voters.” *Schwier*, 340 F.3d at 1294. Once a voter’s identity is determined, stacking additional requirements that could also tie to their “identity” is not material to determining that voter’s qualifications and compounds the chance for error.

Courts have thus found various sorts of information—such as a driver’s license number matching state records, *Wash. Ass’n of Churches*, 492 F. Supp. 2d at 1266, 1270, a full social security number, *Schwier*, 439 F.3d at 1286, or a birth year on an absentee ballot envelope, *Crittenden*, 347 F. Supp. 3d at 1308-09—not to be material to determining a voter’s qualifications, even though this information could conceivably confirm a voter’s “identity.” See also *La Unión del Pueblo Entero*, 2022 WL 1651215, at *21 (allegations that ID number information required from voters “has no material relation to determining whether an individual is either a qualified voter or entitled to vote by mail under” state law, and is “unnecessary and therefore not material to determining an individual’s qualification vote” under state law, stated claim under Section 101).⁹

⁹ Defendant-Intervenor suggests that applying Section 101 to all “ballot-validity rules” could result in virtually all such rules being invalidated, including “laws regulating where and when elections are to occur.” Def-Int. Opp. at 19. Not so. Laws regulating where and when elections occur, like most election rules, do not require voters to enter information on a paper or record. Section 101’s application only to errors or omissions on papers or records, and not to any other type of election regulation, ensures the broader application imagined by Defendant-Intervenor will not come to pass.

II. Section 101 Applies to Absentee Ballot Certifications.

While Section 101 on its face applies to absentee ballot certifications, several additional principles may be germane here.

First, Section 101 applies to papers or records related to absentee voting. It is irrelevant whether state law calls absentee voting is a “right,” or whether it is a voter’s only means to vote. *See* Wis. Stat. § 6.84(1). “Section 101 . . . does not only apply when a voter is absolutely prohibited from voting.” *La Unión del Pueblo Entero*, 2022 WL 1651215, at *21. “Vote” as used in Section 101 is defined broadly as “all action necessary to make a vote effective.” 52 U.S.C. § 10101(e). Because inclusion of a witness address is necessary to make an absentee vote effective, *see* Wis. Stat. § 6.87(6d), rejection of an absentee ballot based on errors or omissions in the witness’s address that are not material to determining a voter’s qualification to vote are encompassed within Section 101’s prohibition, *see La Unión del Pueblo Entero*, 2022 WL 1651215, at *21 (conducting similar analysis of Texas’s vote-by-mail requirements). Having created absentee balloting procedures, Wisconsin must operate them in accord with federal law and may not disenfranchise voters who rely on them. *Cf. Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 665 (1966) (“[O]nce the franchise is granted to the electorate, . . . the right of suffrage ‘is subject to the imposition of state standards which are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed.’”); *Self Advoc. Sols. N.D. v. Jaeger*, 464 F. Supp. 3d 1039, 1052 (D.N.D. 2020) (“[A] state that creates a system for absentee voting must administer it in accordance with the Constitution.”) (internal quotation marks omitted); *Martin v. Kemp*, 341 F. Supp. 3d 1326, 1338 (N.D. Ga. 2018); *Zessar v. Helander*, No. 05-cv-1917, 2006 WL 642646, at *6 (N.D. Ill. Mar. 13, 2006), *judgment entered*, 2007 WL 1703915, *judgment vacated as moot sub nom.*

Zessar v. Keith, 536 F.3d 788 (7th Cir. 2008); *Raetzel v. Parks/Bellefont Absentee Election Bd.*, 762 F. Supp. 1354, 1358 (D. Ariz. 1990).

Second, that affected voters can potentially “cure” the errors or omissions that caused their disenfranchisement is of no import. “Section 101 provides that state actors may not deny the right to vote based on errors or omissions that are not material; it does not say that state actors may initially deny the right to vote based on errors or omissions that are not material as long as they institute cure processes.” *La Unión del Pueblo Entero*, 2022 WL 1651215, at *21; *see also Kemp*, 341 F. Supp. 3d at 1339 (finding in-person cure “illusory, particularly for the category of voters who cannot vote in person due to physical infirmity”); *cf. Obama for America v. Husted*, 697 F.3d 423, 431 (6th Cir. 2012) (finding equal protection violation where plaintiffs presented evidence that elimination of early voting days would preclude voters from voting). In enacting Section 101, Congress prohibited any “*person* acting under color of law” from denying “any individual” the right to vote based on an error or omission that is not material, 52 U.S.C. § 10101(a)(2) (emphasis added). The statute therefore operates to restrain a state official at the moment they would deny the right to vote, regardless of a State’s overall construction of their system of voting.

In any event, even if some form of cure could conceivably be adequate, Wisconsin law on its face makes the opportunity to cure absentee ballots lacking witness addresses only permissive for municipal clerks, not mandatory. *See Wis. Stat. § 6.87(9)* (providing clerks “may” return such ballots). And even where clerks attempt to do so, cure is available only to voters who can receive and return rejected absentee ballots by mail prior to the close of the polls on election day. *See Wis. Stat. § 6.87(9)* (“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 [before 8 p.m. on Election Day].”) (emphasis added). For voters whose ballots are not returned or who are not afforded time to cure, rejection of their absentee ballot will constitute a complete denial of the right to vote.

Third, Section 101 does not permit the circular logic that all information that state law requires on a paper or record is necessarily material to determining a voter’s qualifications to vote by virtue of its enactment into state law, regardless of whether the required information is related to the generally applicable qualifications to vote under state law. Any construction of Section 101 that exempted from the Materiality Provision’s reach all state prerequisites or design choices related to papers or records that are necessary to cast an effective ballot would invite the precise harms the statute was designed to prevent: introduction of complex and needless requirements on papers and records that increase the chances that election materials are rejected despite a voter having established that they are qualified to vote. *See generally supra* Part I. It would also undermine the will of Congress in enacting Section 101 by hollowing out the statute’s guarantee, permitting a state to disenfranchise voters based on errors or omissions in voting-related papers or records by merely writing their intent to do so into statute. Whether these requirements are introduced at the whim of individual officials or by design at the municipal, county, or state level is a distinction without a difference for a voter whose election materials are rejected. It is also irrelevant under Section 101’s plain text, which does not distinguish between state actors enforcing state law and ones venturing beyond it. Accordingly, Section 101 requires that the error or omission at issue be compared to the *qualifications* to exercise the franchise that a state imposes equally on all voters.

Finally, in its opposition to preliminary relief in *Rise, Inc. v. Wisconsin Elections Commission*, the Wisconsin Legislature argued that complying with Section 101 in its acceptance or rejection of absentee ballots would “be unconstitutional under the U.S. Constitution’s anti-commandeering doctrine.” Proposed-Intervenor Def. the Wis. State Legislature’s Br. in Opp. to Pls.’ Mot. for a Temporary Inj., *Rise, Inc. v. Wisconsin Elections Commission*, No. 22CV2446, at 18 (Dane Cnty. Oct. 3, 2022) (hereinafter “*Rise, Inc. Legislature Opp.*”). This argument misconstrues both the anti-commandeering doctrine and Section 101. The anti-commandeering doctrine prohibits the federal government from “compel[ling] the States to enact or administer a federal regulatory program.” *New York v. United States*, 505 U.S. 144, 188 (1992). It is not a freestanding bulwark against any obligation of the states to comply with federal “law,” as the Legislature appeared to suggest. *Rise, Inc. Legislature Opp.* at 18. The application of Section 101 in these circumstances is much simpler and more straightforward: where “compliance with both state and federal law is impossible,” federal law “must prevail.” *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 377 (2015) (internal quotation marks omitted); see also *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372 (2000) (“[S]tate law is naturally preempted to the extent of any conflict with a federal statute.”).

CONCLUSION

The United States respectfully submits the foregoing to assist the Court in evaluation of Plaintiff's claim turning on application of Section 101.

Date: October 14, 2022

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