

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 6

LEAGUE OF WOMEN VOTERS
OF WISCONSIN,

Plaintiff,

v.

Case No. 2022cv2472

Code: 30701

Declaratory Judgment

WISCONSIN ELECTIONS COMMISSION et al.,

Defendants.

**PLAINTIFF'S NOTICE OF MOTION AND
MOTION FOR SUMMARY JUDGMENT**

NOTICE

TO: **ALL PARTIES**

PLEASE TAKE NOTICE that Plaintiff the League of Women Voters of Wisconsin ("LWVWI or the "League") will appear before the Honorable Nia Trammell, Branch 6, in her usual courtroom located at the Dane County Courthouse, 215 South Hamilton Street, Madison, Wisconsin 53703, at such date and time as shall be set by the Court, and shall then and there present the following Motion for Summary Judgment.

MOTION

1. The League seeks declaratory relief and a permanent injunction pursuant to 42 U.S.C. § 1983 and the 1964 Civil Rights Act's Materiality Provision, 52 U.S.C. § 10101(a)(2)(B) ("the Materiality Provision"), to ensure that eligible

absentee voters in Wisconsin will have their ballot counted notwithstanding any immaterial errors or omissions made in a witness's address on the absentee ballot certificate.

2. Contrary to longstanding practice over the past six years, following a decision last year by the Circuit Court for Waukesha County, Wisconsin's election officials have now been forbidden from curing errors in witness addresses on absentee ballot certificates. Ballots that are "missing" such addresses may not be counted under Wis. Stat. § 6.87(6d), but there is no definition or guidance on what it means for an address to be "missing."

3. Consequently, Wisconsin's municipal clerks are now required to reject absentee ballots for trivial, inconsequential omissions or errors in the witness address field on absentee ballot certificates.

4. Even if ballots with certain partial witness address information or certain notations in the witness address field are deemed "missing" under Wis. Stat. § 6.87(6d), they must nevertheless be counted despite such immaterial omissions under the 1964 Civil Rights Act's materiality provision, specifically 52 U.S.C. 10101(a)(2)(B).

5. The League seeks permanent declaratory and injunctive relief under federal law, finding Wis. Stat. § 6.87(6d) is preempted by the 1964 Civil Rights Act when there is an immaterial omission or error in the address provided by a witness on an absentee ballot certificate and protecting absentee voters' right to vote.

6. The League's arguments are laid out in full in the memorandum of law and affidavits accompanying this motion.

WHEREFORE, for the reasons stated above and in the accompanying Memorandum of Law and supporting affidavits, the League seeks summary judgment pursuant to Wis. Stat. § 802.08 as follows:

- (a) A declaratory judgment 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), and 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, ballots with certain notations—such as "SAME," ditto marks, or arrows pointing up to the voter's information, and ballots with certificates in which witnesses recorded their street number, street name, and zip code, but omitted their municipality names;
- (b) Temporary and permanent injunctions barring Defendant Wisconsin Elections Commission, Defendants Don Millis, Joseph J. Czarnecki, Robert F. Spindell, Jr., Mark Thomsen, Ann S. Jacobs and Marge

Bostelmann, in their official capacity as members of the Wisconsin Elections Commission, and Defendant Meagan Wolfe, in her official capacity as Administrator of the Wisconsin Elections Commission, and their respective agents, officers, employees, successors, and all persons acting in concert with the Wisconsin Elections Commission, including but not limited to Wisconsin's municipal and county clerks, the Milwaukee County Election Commission and the Milwaukee City Election Commission, from rejecting such ballots as described in subsection (a);

- (c) Temporary and permanent injunctions requiring Defendants to issue updated guidance or instructions to Wisconsin's municipal and county clerks, the Milwaukee County Election Commission and the Milwaukee City Election Commission, advising them not to reject such ballots as described in subsection (a);
- (d) An order awarding Plaintiff their costs, disbursements, and reasonable attorneys' fees incurred in bringing this action pursuant to 42 U.S.C. § 1988; and;
- (e) Such other or further relief as this Court deems just and proper.

DATED: July 7, 2023

Respectfully submitted,

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**MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

Plaintiff League of Women Voters of Wisconsin (“Plaintiff,” “LWVWI,” or “the League”) seeks declaratory relief and a permanent injunction pursuant to 42 U.S.C. § 1983 and the 1964 Civil Rights Act’s Materiality Provision, 52 U.S.C. § 10101(a)(2)(B) (“the Materiality Provision”), to ensure that eligible absentee voters in Wisconsin will have their ballot counted, notwithstanding any immaterial errors or omissions made in a witness’s address on the absentee ballot certificate.

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 Defendant Wisconsin Elections Commission (“WEC”) and the WEC Commissioners¹ (collectively, “Defendants”) to cure immaterial omissions or errors in witness addresses on absentee ballot certificate envelopes. With that guidance in place, absentee ballots were not rejected for technical defects in the witness address field because municipal clerks² would fill in any omitted information that could be readily ascertained. However, last September, WEC was forced to withdraw that guidance after the Waukesha County Circuit Court enjoined it.

Consequently, Wisconsin’s municipal clerks are now required to reject absentee ballots for trivial, inconsequential omissions or errors in the witness address

¹ The Commissioners include Don M. Millis, Robert F. Spindell, Jr., Marge Bostelmann, Ann S. Jacobs, Mark L. Thomsen, and Joseph J. Czarnezki. (PPUF, ¶10.)

² This brief refers to municipal clerks and boards of election commissioners collectively as “clerks” or “municipal clerks.” See Wis. Stat. § 7.21 (1).

field on absentee ballot certificates. In every subsequent election, Wisconsin voters have been disenfranchised merely because their witness omitted their state name or zip code or signaled that their address mirrored the voter's address. The voting rights of the League's members, as well as the voters the League serves and educates, have been threatened by this newly strict interpretation of Section 6.87(6d).

Disenfranchising the League's members and other Wisconsin voters because of trivial errors or omissions that have no bearing on officials' ability to determine whether a voter is qualified to vote violates the Materiality Provision. Where a witness address contains sufficient information for a clerk to identify the witness's address, requiring extraneous details is neither important nor necessary to determining a voter's qualifications. Such immaterial omissions or errors in the witness's address are not made by the voter; nor do they even concern the voter's information. Requiring technical perfection on records or papers that are part of the voting process is clearly prohibited by federal law. 52 U.S.C. § 10101(a)(2)(B).

The League respectfully moves for summary judgment on Count Two of its Second Amended Complaint and requests declaratory and permanent injunctive relief pursuant to the Civil Rights Act of 1964 to shield four categories of absentee ballots from unlawful rejection based on immaterial errors or omissions in the witness address field.

STATEMENT OF FACTS³

I. Background

A. Absentee Voting in Wisconsin

Wisconsin law provides a “comprehensive” system by which any elector may request, receive, vote, and return an absentee ballot. (Plaintiff’s Proposed Undisputed Facts in Support of Its Motion for Summary Judgment (“PPUF”), ¶12); *see generally* Wis. Stat. ch. 6, subch. IV. Registered voters in Wisconsin apply for and obtain absentee ballots in a variety of ways. (PPUF, ¶13); *see* Wis. Stat. §§ 6.855, 6.86, 6.22, 6.24, 6.25, 6.875.

The absentee ballot certificate contains both a voter certification and a witness certification, which the voter and witness must sign under penalty of perjury.⁴ (PPUF, ¶14.) All absentee ballots must be witnessed by an adult U.S. citizen. Wis. Stat. § 6.87(4)(b)1.⁵ (PPUF, ¶15.) The witness affirms the following statement:

I, the undersigned witness, subject to the penalties of s. 12.60(1)(b), Wis. Stats., for false statements, certify that I am an adult U.S. citizen** and that the above statements are true and the voting procedure was executed as there stated. I am not a candidate for any office on the enclosed ballot (except in the case of an incumbent municipal clerk). I did not solicit or advise the elector to vote for or against any candidate or measure.

³ In accordance with the Court’s order, Plaintiff has contemporaneously filed a statement of Proposed Undisputed Facts in Support of its Motion for Summary Judgment. (Dkt. 111.) Plaintiff summarizes the key undisputed facts here for the Court’s convenience. All facts summarized here are set forth in full in Plaintiff’s separate statement of facts.

⁴ WEC, Form EL-122, Standard Absentee Ballot Certificate, *available at* <https://elections.wi.gov/media/11405/download>. Making false statements to election officials “for the purpose of obtaining or voting an absentee ballot” is a separate crime under Wisconsin law. Wis. Stat. § 12.13(3)(i).

⁵ *Id.*

The witness then signs the certification. (PPUF, ¶16); Wis. Stat. § 6.87(2). The statute also provides that: “If a certificate is missing the address of a witness, the ballot may not be counted.” (PPUF, ¶17); Wis. Stat. § 6.87(6d).

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.”⁶ (PPUF, ¶18.) The Inspectors’ Statement, Form EL-104, contains a code for each potential reason for rejecting an absentee ballot. (PPUF, ¶19.) That list contains the code “RWA” to describe the basis for rejection (“There is *no address* of a witness”), but there is no code for missing or partial *voter* addresses.⁷ (PPUF, ¶20.) The voter’s address is usually affixed by means of a printed label. (PPUF, ¶21; Affidavit of Maribeth Witzel-Behl (“Witzel-Behl Aff.”), ¶2.)

The Election Day Manual also notes that an absentee ballot certificate envelope must contain the witness’s address for the ballot to be counted.⁸ (PPUF, ¶22.) There is no instruction to clerks, election inspectors, or canvassers to verify or do anything else with the witness’s address. (PPUF, ¶23.) As long as an address is present, the ballot is counted.

⁶ WEC, Form EL-122, Standard Absentee Ballot Certificate, *available at* <https://elections.wi.gov/media/11405/download>.

⁷ See WEC, Form EL-104, Inspectors’ Statement, *available at* <https://elections.wi.gov/media/12465/download> (emphasis added).

⁸ WEC, Election Day Manual, p. 91, *available at* <https://elections.wi.gov/resources/manuals/election-day-manual>.

B. 2015 Wisconsin Act 261 and Previous WEC Guidance

In 2016, 2015 Wisconsin Act 261 (“Act 261”) became law. (PPUF, ¶24.) Act 261 included a provision requiring an absentee voter’s witness to fill in their address on the ballot’s certificate envelope: “If a certificate is missing the address of a witness, the ballot may not be counted.” (PPUF, ¶25); 2015 Wis. Act 261, § 78; Wis. Stat. § 6.87(6d).

At its October 14, 2016 meeting, WEC unanimously passed a motion that (a) reaffirmed WEC’s three-component definition of “address” as street number, street name, and municipality name; (b) modified previous guidance to permit “adding a municipality to the witness certificate if the address is reasonably ascertainable from other information on the absentee ballot envelope, or other reliable extrinsic sources that are available” without first obtaining voter consent; and (c) required that any additions to the witness address field should be initialed by the clerk.⁹ (PPUF, ¶26.) WEC issued updated guidance reflecting these instructions on October 18, 2016. The guidance directed clerks to try to cure problems with the witness address, either by correcting the ballot themselves or contacting the voter.¹⁰ (PPUF, ¶27.)

The October 18, 2016 Memorandum remained the most current WEC guidance available on this issue through the 2016, 2017, 2018, and 2019 elections. (PPUF, ¶28);

⁹ WEC, “Open Session Minutes,” (Oct. 14, 2016), *available at* <https://elections.wi.gov/media/11815/download>.

¹⁰ (Dkt. 95, Ex. 1, WEC, “AMENDED: Missing or Insufficient Witness Address on Absentee Ballot Certificate Envelopes,” (Oct. 18, 2016); Dkt. 105, Def. Ans. to Sec. Am. Compl., ¶42; Dkt. 109, Leg. Ans. to Sec. Am. Compl., ¶42.)

see *Trump v. Biden*, 2020 WI 91, ¶18, 394 Wis. 2d 629, 951 N.W.2d 568. WEC issued related guidance in the run-up to the November 2020 general election.¹¹ (PPUF, ¶29.)

C. The 2022 Challenge to WEC Guidance

In July 2022, several individuals and the Republican Party of Waukesha County filed suit under Wis. Stat. § 227.40(1). (PPUF, ¶31.) The Legislature intervened as a plaintiff. (*Id.*) The Court granted Plaintiffs and the Legislature a temporary injunction. (PPUF, ¶31); *White v. Wis. Elec. Comm'n* (see 22-CV-1008, Dkt. 167, Sept. 7, 2022). *Id.* ¶¶6–9. WEC subsequently rescinded its October 2016 memoranda.¹² (PPUF, ¶32.)

On October 3, 2022, the Court granted final judgment to the plaintiffs in *White* and made permanent the injunction preventing WEC from issuing guidance or otherwise instructing clerks to cure defects in witness addresses on absentee ballot certificates. (PPUF, ¶33); *White v. Wis. Elec. Comm'n*, 22-CV-1008, Dkt. 188, (Waukesha Cnty. Cir. Ct., Oct. 3, 2022). The Court expressly declined to address the federal law arguments raised by the League and other parties regarding whether a ballot omitting certain witness address information must nevertheless be counted under the 1964 Civil Rights Act. (PPUF, ¶34); *White v. Wis. Elec. Comm'n*, 22-CV-1008, Dec. Tr. at 20:21–21:13 (Waukesha Cnty. Cir. Ct., Sep. 7, 2022).¹³ Furthermore,

¹¹ (Dkt. 96, Ex. 2, WEC, “Spoiling Absentee Ballot Guidance,” (Oct. 19, 2020); Dkt. 105, Def. Ans. to Sec. Am. Compl., ¶45; Dkt. 109, Leg. Ans. to Sec. Am. Compl., ¶45.)

¹² WEC, Temporary Injunction on WEC Guidance re Missing Absentee Witness Address (*White v. Wis. Elec. Comm'n*, 22-CV-1008), (Sept. 13, 2022), available at <https://elections.wi.gov/media/16801/download>.

¹³ (Dkt. 19, Affidavit of Daniel S. Lenz, ¶3, Ex. 2.)

at the September 13 hearing on the stay motion, the Court stated in no uncertain terms that it did not intend for the temporary injunction to have any effect on existing WEC guidance as to the definition of an “address.” (PPUF, ¶35); *White v. Wis. Elec. Comm’n*, 22-CV-1008, Dec. Tr. At 46:24–47:6 (Waukesha Cnty. Cir. Ct., Sep. 13, 2022).¹⁴

1. Clerk Instructions

The November 2022 General Election was the first election held in Wisconsin in which (1) Wis. Stat. § 6.87(6d) applied and (2) there was no WEC guidance on how clerks were to handle absentee ballot witness certifications. Unsurprisingly, there was confusion and variation among clerks regarding how to handle this issue. The Green Bay City Clerk’s office required witness addresses to include the state and zip code, even though WEC’s definition excluded those components: “To respond to this change in the law, the Clerk’s office will mail back certificates that lack a voter signature, witness signature and/or a complete witness address including house number, street name, city, state and zip code.”¹⁵ (PPUF, ¶36.) Similarly, the stated policy of the Racine City Clerk’s office was to return ballots to voters if the witness address lacked a state name or zip code: “For any omission in the witness address field on an absentee ballot certificate envelope, even if it is just the state name or the zip code, a member of my staff returns the ballot . . . to the voter.” (PPUF, ¶37; Affidavit of Tara McMenamain (“McMenamin Aff.”) ¶2) The City of Oshkosh planned

¹⁴ (Dkt. 19, Affidavit of Daniel S. Lenz, ¶4, Ex. 3.)

¹⁵ City of Green Bay Clerk, Press Release: “A Change in the Absentee Ballot Curing Process” (Sept. 26, 2022), available at <https://greenbaywi.gov/CivicAlerts.aspx?AID=465>.

to require zip codes. (PPUF, ¶38; Affidavit of Daniel Lenz (“Lenz Aff.”) ¶6, Ex. 2, p. 6, Oshkosh Policy.)

Other clerks adopted a more functional approach. Janesville’s city clerk, for example, instructed that witness addresses should be “sufficient in a manner that without doing any other research, we could reasonably locate the address of the witness using just the information they provide on the envelope.” (PPUF, ¶39; Lenz Aff. ¶7, Ex. 3, p. 5., Lorena Stottler Sept. 29, 2022 email.) That office further stated that, so long as “the street is the same as the voter address,” the witness address is complete and not “missing” under Section 6.87(6d), even if it lacks “the city, state and/or zip.” (*Id.*, pp. 5–6.) Canvassers were required to count these types of ballots. (*Id.*)

During the course of this litigation, WEC has come around to the latter approach. (PPUF, ¶¶40–42; *see, e.g.*, Lenz Aff. ¶29, Ex. 25, Defendants’ Responses to Plaintiff’s First Set of Requests for Admission and Interrogatories to Defendants (“Defendants’ RFA Responses”), at 9 (Response to RFA No. 13) (“A witness’s omission of the name of their municipality from the witness certification on an Absentee Ballot Certificate Envelope does not cause the witness’s address to be ‘missing’ under Wis. Stat. § 6.87(6d), if it is possible to determine the name of a municipality for the witness from other information contained on the face of the absentee ballot certificate.”); *id.* at 7, (Response to RFA No. 10) (explaining that a witness’s address is complete “if the witness address field includes information from which it is possible to determine a street number, street name, and name of municipality for the

witness”).) However, WEC has not conveyed this guidance to municipal clerks, for instance, as a means to stay in compliance with the 1964 Civil Rights Act’s Materiality Provision. (PPUF, ¶43.) To date, WEC has failed to provide municipal clerks with any guidance on how to reconcile enforcement of Section 6.87(6d) with that federal law.

2. Information from the November 2022 Election

Actual practice demonstrates that clerks were applying varying interpretations of Wis. Stat. § 6.87(6d). According to information municipal clerks provided to WEC, in the November 2022 General Election, 2,239 absentee ballots were rejected and coded on the inspector’s statement as “certification insufficient.” (PPUF, ¶44; Lenz. Aff. ¶9, Ex. 5, Attachment A to Defendants’ Responses to Plaintiff’s First Set of Requests for Production of Documents and Interrogatories (excerpted).)¹⁶ Other sources confirm that election officials throughout Wisconsin rejected and did not count absentee ballots accompanied by the omissions or errors at issue in Count Two of the Second Amended Complaint. The League’s Materiality Provision claim focuses on four categories of witness address omissions and/or errors:

- a. *Witness certifications containing the witness’s street name, street number, and municipality, but no other address information such as state name or*

¹⁶ WEC notes in its response to the League’s interrogatory that the data it produced is based on information manually entered into the WisVote system by local election officials and therefore may be under-inclusive or contain errors. (PPUF, ¶45; Lenz Aff. ¶8, Ex. 4, Defendants’ Responses to Plaintiff’s First Set of Requests for Production of Documents and Interrogatories, pp. 3–5.) WEC also noted that WisVote data does not specify the reason why an absentee ballot may have been rejected beyond the fact that the witness certification was insufficient—which could mean a lack of address information or another problem, such as a missing signature. (*Id.*)

zip code: The City of Green Bay rejected at least three such ballots (Ryan Grusnick, Jelaine Martin, and Sandra Spencer) (PPUF, ¶46; Lenz Aff. ¶10, Ex. 6, pp. 4, 6, 8; ¶12, Ex. 8, pp. 2-4), as did the City of Appleton (Emily Bierman, Mary Jill Marshall, George Kloes) (PPUF, ¶46; Lenz Aff. ¶13, Ex. 9, p. 3; ¶15, Ex. 11, pp. 2–4.) The City of Racine rejected at least one (Jo Knudsen). (PPUF, ¶46; Lenz Aff. ¶16, Ex. 12, p. 8; ¶18, Ex. 14, p. 2.)

b. *Witness certifications in which household member witnesses record the same street number and street name as the voter but omit other address information like municipality names:* In the November 2022 General Election, the Cities of Appleton, Eau Claire, Waukesha, Oshkosh, and Racine all rejected ballots accompanied by this type of certification. (PPUF, ¶47; Lenz Aff. ¶13, Ex. 9, p. 3; ¶15, Ex. 11, pp. 5–9; ¶19, Ex. 15, p. 3; ¶21, Ex. 17; ¶22, Ex. 18, p. 3; ¶24, Ex. 20, pp. 2–3; ¶25, Ex. 21, p. 2; ¶26, Ex. 22; ¶28, Ex. 24, pp. 2–19; ¶16, Ex. 12, pp. 5–8; ¶18, Ex. 14, p. 3–19); *see infra* at 32–33 (listing forty-three voters.) The League also identified eight absentee voters in Racine whose ballots cast in the November 2022 general election were rejected, despite their witnesses including the same street number, street name, *and* zip code as the voter: Cindi Lou Brown, Carolyn Bonds, Debra D. Newman, Wilbert K. Bell, Katrina Bell, Sandra Trott, Peg S. Rousar-Thompson, and Stephen J. Jackson. (PPUF, ¶51; Lenz Aff. ¶16, Ex. 12, pp. 5–8; ¶18, Ex. 14, pp. 20–27.) Claire Woodall-Vogg, the Executive Director of the City of Milwaukee Elections Commission, estimated that the

city receives “hundreds” of such certifications during each election. (PPUF, ¶48; Dkt. 35, Affidavit of Claire Woodall-Vogg (“Woodall-Vogg Aff.”) ¶4.)

c. Witness certifications bearing notations like “SAME,” ditto marks, and/or arrows conveying that the witness was indicating that their address is identical to that of the voter: The City of Oshkosh rejected one such ballot—Snighda Trafder’s—in which the witness wrote “Same as voter’s address” in the space designated for their address. (PPUF, ¶49; Lenz Aff. ¶25, Ex. 21, p. 3; ¶26, Ex. 22, p. 10; ¶28, Ex. 24, p. 20.) The City of Milwaukee Election Commission’s Executive Director has also affirmed that it receives absentee ballots with this type of notation recorded in the witness certification. (PPUF, ¶50; dkt. 35, Woodall-Vogg Aff. ¶4.)

d. Witness certifications in which witnesses recorded their street number, street name, and zip code, but omitted their municipality names: Eight absentee voters in Racine (Cindi Lou Brown, Carolyn Bonds, Debra Newman, Wilbert K. Bell, Katrina Bell, Sandra Trott, Peg Rousar-Thompson, and Stephen Jackson) had their ballots rejected in the November 2022 general election, despite their witnesses including a street number, street name, and zip code. (PPUF, ¶51; Lenz Aff. ¶16, Ex. 12, pp. 5–8; ¶18, Ex. 14, pp. 20–27.)

This information confirms that these types of absentee ballots, which would have been readily cured and counted prior to *White v. WEC*, are now being rejected, and the voters who cast them are left disenfranchised. (PPUF, ¶52.) Additionally,

these votes are not included in the statewide election results WEC certifies. (PPUF, ¶54): Wis. Stat. § 7.70.

STANDARD OF REVIEW

I. Application of Federal Law

Wisconsin state courts have jurisdiction to adjudicate actions based upon 42 U.S.C. § 1983. *Terry v. Kolski*, 2005 WI 163, ¶16, 78 Wis.2d 475, 479, 254 N.W.2d 704 (1977). When reviewing the merits of a federal claim, such as Plaintiff's § 1983 claim, Wisconsin courts apply federal law. *See e.g., Lindas v. Cady*, 150 Wis. 2d 421, 441 N.W.2d 705 (1989) ("State judges, like federal judges, are bound by the supremacy clause to apply federal law in state courts."). Both the Wisconsin Supreme Court and the U.S. Supreme Court "recognize[] that [j]ust as federal courts are constitutionally obligated to apply state law to state claims, so too the Supremacy Clause imposes on state courts a constitutional duty to proceed in such manner that all the substantial rights of the parties under controlling federal law [are] protected." *Shaw v. Leatherberry*, 2005 WI 163, ¶31, 286 Wis. 2d 380, 706 N.W.2d 299 (quotation marks and citations omitted) (citing *Felder v. Casey*, 487 U.S. 131, 151 (1988)). In *Shaw*, the Supreme Court of Wisconsin decided that "[i]nasmuch as the burden of proof is *substantive*, . . . under the Supremacy Clause, the lower federal burden of proof applies in § 1983 excessive force cases in state court." *Id.* (emphasis added). Accordingly, where the rule in question is substantive, not procedural, the federal rule trumps the state law analogue. Wisconsin courts may apply state procedural rules to a plaintiff's federal claim, but per *Shaw*, when a rule determines substantive

rights and obligations, federal law preempts state law. *Felder v. Casey*, 139 Wis.2d 614, 627, 408 N.W.2d 19, 25 (1987), *point affirmed in* 487 U.S. 131, 138 (1988) (“States may establish the rules of procedure governing litigation in their own courts. By the same token, however, where state courts entertain a federally created cause of action, the federal right cannot be defeated by the forms of local practice.” (quotation marks and citation omitted)); *Duello v. Bd. Of Regents of Univ. of Wisconsin Sys.*, 220 Wis. 2d 554, 569–70, 583 N.W.2d 863 (Ct. App. 1998).

II. Standards for Summary Judgment

Summary judgment is appropriate when there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. *Brey v. State Farm Mut. Auto. Ins. Co.*, 2022 WI 7, ¶8, 400 Wis. 2d 417, 970 N.W.2d 1; *Talley v. Mustafa Mustafa*, 2018 WI 47, ¶12, 381 Wis. 2d 393, 911 N.W.2d 55. A movant is entitled to summary judgment where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Wis. Stat. § 802.08 “A factual dispute is genuine if a reasonable jury could return a verdict in favor of the nonmoving party and the dispute is material if it could affect the outcome of the trial under the applicable legal standards.” *Murphy v. Columbus McKinnon Corp.*, 2021 WI App 61, ¶13, 399 Wis. 2d 18, 963 N.W.2d 837 (internal quotations omitted). The party opposing the motion may not rest on the allegations of their pleading but must establish a triable issue of material fact. *Deegan v. Jefferson County*, 188 Wis. 2d 544, 561, 525 N.W.2d 149 (Wis. App. 1994).

ARGUMENT

I. **Technical witness address defects on an absentee ballot certificate envelope are exactly the type of immaterial errors or omissions that fall squarely within the Civil Rights Act's prohibition.**

The Civil Rights Act of 1964 prohibits denying an individual the right to vote because of errors or omissions that are not material to ascertaining their qualifications to vote. The Materiality Provision states that:

No person acting under color of law shall . . . deny 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 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). Congress enacted this provision to protect voters from disenfranchisement due to technical defects that have no material effect on officials' ability to determine whether an individual is qualified to vote. The Materiality Provision is a *per se* prohibition against this type of disenfranchisement, and as the U.S. Department of Justice noted in its Statement of Interest, the provision does not create a balancing test. (Dkt. 53, Statement of Interest of the United States, at 10 (noting the Materiality Provision's "unconditional terms admit of no balancing tests or trade-offs").)

A. **An absentee ballot certificate envelope is a "record or paper relating to [an] . . . act requisite to voting."**

The Materiality Provision's prohibition is both narrow and expansive. It provides that:

No person acting under color of law shall-- . . . (B) deny **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 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) (emphases added). This subsection is therefore tightly focused just on “error[s] or omission[s] on any record or paper” but broadly prohibits “deny[ing] the right of any individual to vote” for immaterial omissions or errors “relating to any . . . act requisite to voting.” *Id.* According to its plain terms, this statutory provision’s coverage is manifestly **not** confined to voter registration rules, procedures, and practices.

Under Section 10101, “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.” 52 U.S.C. § 10101(e); *id.* § 10101(e)(3)(A) (applying subsection (e)’s definition to subsection (a)) (emphases added); *La Union del Pueblo Entero v. Abbott*, 604 F. Supp. 3d 512, 540 (W.D. Tex. 2022) (“The [Civil Rights Act] . . . defines the term ‘vote’ broadly: it includes all action necessary to make a vote effective.”). Therefore, an absentee ballot certificate envelope, which must be completed by an absentee voter and their witness in order to “hav[e] such ballot counted,” 52 U.S.C. § 10101(e), is a “record or paper relating to” an “act requisite to voting,” 52 U.S.C. § 10101(a)(2)(B) and falls within the protection of the Materiality Provision.

Courts have routinely applied this provision to records or papers relating to requesting and casting absentee ballots. *See, e.g., La Unión del Pueblo Entero*, 604 F.

Supp. 3d at 541 (finding the Materiality Provision applies to “the preparation and submission of an application to vote by mail, as well as the preparation and submission of a mail ballot carrier envelope”); *Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1308–09 (N.D. Ga. 2018) (holding Materiality Provision forbids rejecting a ballot because a voter incorrectly recorded or omitted their birth year on an “absentee ballot envelope”); *League of Women Voters of Ark. v. Thurston*, No. 5:20-cv-5174, 2021 WL 5312640, at *3–4 (W.D. Ark. Nov. 15, 2021) (applying Materiality Provision to absentee ballot request forms and return envelope certificates). By its express terms, the Materiality Provision protects the individual right “to vote in any election,” notwithstanding an immaterial error or omission on an absentee ballot certificate envelope.

B. “[Q]ualified under State law” in the Materiality Provision means eligible to vote under state law, not that all technical voting requirements have been satisfied.

Under the Materiality Provision, a ballot may only be rejected for consequential defects, *i.e.* when the defect is material to determining the voter’s qualifications to vote under state law. Section 10101(e) provides that the words “qualified under State law” mean “qualified according to the laws, customs, or usages of the State.” 52 U.S.C. § 10101(e).

To be qualified to vote under the Wisconsin Constitution and Wisconsin statutes, a person must be a “U.S. citizen age 18 or older,” Wis. Stat. § 6.02(1), have “resided in an election district or ward for 28 consecutive days before any election where the citizen offers to vote,” *id.*, and not be disenfranchised due to a felony

conviction, or adjudicated incompetent to vote. Wis. Stat. § 6.03 (1);¹⁷ *see also* WIS. CONST. art. III, § 1 (“Every United States citizen age 18 or older who is a resident of an election district in this state is a qualified elector of that district.”). Therefore, in Wisconsin, an error or omission on an absentee ballot certificate envelope is a valid reason to reject the ballot under the Civil Rights Act *only* if the erroneous or omitted information is important or more or less necessary to, influential over, or goes to the merits of determining whether an individual is a U.S. citizen and at least 18 years old, satisfies the Wisconsin residence requirements, or is disqualified by reason of a felony conviction or an incompetence adjudication. *See, e.g., Martin*, 347 F. Supp. 3d at 1308–09 (comparing requirement to record correct year of birth on absentee ballot envelope against voting eligibility criteria and finding requirement immaterial “to determining a voter’s eligibility”).

By contrast, compliance with all voting requirements beyond the voting eligibility criteria, such as requirements to date an absentee ballot return envelope or have a witness record their address on the certificate envelope, is not contemplated by the phrase “qualified under State law.” To interpret the phrase “qualified under State law” to include compliance with all voting requirements would render the Materiality Provision meaningless. If *all* registration and voting laws are “voting qualifications,” then *any* failures to comply with said laws are *per se* material to determining a voter’s qualifications. Such reasoning is circular—omitted information

¹⁷ Wis. Stat. § 6.02 is titled “Qualifications, general,” and Wis. Stat. § 6.03 is titled “Disqualification of electors.”

would be material to determining a voter's qualifications simply because state law requires that information.¹⁸

C. To be “material,” an error or omission must be important or more or less necessary to determining whether a voter is qualified to vote under state law.

The 1964 Civil Rights Act does not define the term “material.” Therefore, this Court must construe this term according to its “ordinary, contemporary, common meaning.” *United States v. Melvin*, 948 F.3d 848, 852 (7th Cir. 2020).¹⁹ To find the contemporary meaning of “material,” the Court must examine what the word “meant when the statute was enacted, often by referencing contemporary dictionaries.” *Id.* If the plain meaning of the statute's words at the time of enactment yields an unambiguous meaning, the inquiry ends there. *Id.*

¹⁸ A refrain in Defendants' responses to Plaintiff's First Set of Requests for Admission and Interrogatories is that “[t]he factors governing whether an absentee voter is ‘Qualified Under Wisconsin Law’ to vote in an election, as defined in Definition No. 6 of Plaintiff's First Set of Requests for Admission, do not include the presence or omission of witness address information on the absentee voter's Absentee Ballot Certificate Envelope.” (PPUF, ¶56; see, e.g., Lenz Aff. ¶29, Ex. 25, Defendants' RFA Responses, at 6–7 (Response to RFA No. 9).) But Defendants notably do not take the position that “qualified under State law” *should* be defined to embrace all voting requirements, including Wis. Stat. § 6.87(6d)'s witness address requirement. Nor could it, as such an interpretation of the Materiality Provision would render it a nullity. As the U.S. Department of Justice wrote in its Statement of Interest in this case, the Materiality Provision “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.” (Dkt. 53 at 14.) Accordingly, Defendants' purported qualification is without merit and should be disregarded.

¹⁹ Federal law governs any interpretation of the substantive rule of decision here under the 1964 Civil Rights Act. *Shaw v. Leatherberry*, 2005 WI 163, ¶31, 286 Wis. 2d 380, 706 N.W.2d 299.

When Congress enacted the Civil Rights Act of 1964, “material” was defined as “[i]mportant; more or less necessary; having influence or effect; going to the merits; having to do with matter, as distinguished from form.” Black’s Law Dictionary Revised 4th Ed., 1128 (1968);²⁰ Black’s Law Dictionary 4th Ed., 1128 (1951) (same).²¹ With this contemporary understanding of the meaning of “material,” it is plain that the Materiality Provision unambiguously holds that an omission or error is material only when it is *important* or *more or less necessary* to,²² *has influence* over, or *goes to the merits* of determining whether an individual is qualified under state law to vote in an election. Because the meaning of “material” is plain, the inquiry could end there.

The legislative history reinforces this unambiguous meaning of the statute and further illuminates the types of errors or omissions that are “not material” to determining a voter’s qualifications under Wisconsin law. One summary of the statute, prepared for an April 9, 1964 hearing in the U.S. Senate, explained that “[o]fficials cannot reject an application for voting registration for reasons, such as trivial mistakes or omissions on application forms . . .” 110 CONG. REC. 7,480 (1964). In order to justify a rejection, the omitted or erroneously recorded information must be important or go to the merits of determining whether a person is eligible to vote

²⁰ Accessible at

<http://heimatundrecht.de/sites/default/files/dokumente/Black%27sLaw4th.pdf>

²¹ Accessible at

<https://archive.org/details/blackslawdiction00blac/page/n5/mode/2up?ref=ol&view=theater&q=material>

²² “More or less” necessary can alternately be defined as “substantially” necessary; “more or less” meaning substantially. Black’s Law Dictionary Revised 4th Ed., 1161 (1968); Black’s Law Dictionary 4th Ed., 1161 (1951) (same).

under state law. During a February 3, 1964 hearing, supporters in the U.S. House of Representatives stated that erroneously recording an address on a voter registration application is one type of immaterial error that cannot be used to deny the right to vote under the Materiality Provision. 110 CONG. REC. 1,691 (1964) (“Let us say as an example there is a lawsuit filed, and it is said, ‘He denied me the right to vote because when he asked me where I lived I said 1854 West 10th Street, and it turned out I lived at 1809 West 10th Street’ . . . In other words, if you ask a picayune question or use some kind of an excuse that is not material to determine whether or not he is qualified to vote, that is an immaterial question and hence the judge is authorized to say, ‘Now, Mr. Registrar, you have not the right to disqualify this man on that alone.’”); *see also* 110 CONG. REC. 6,741 (1964) (describing a voter’s “fail[ure] to sign the application form” as a “highly technical and immaterial error[]”).

Congress understood omissions or errors to be immaterial when the required voting eligibility information was readily ascertainable from other portions of the record or paper at issue. For example, supporters in the Senate understood the Materiality Provision to prevent rejecting a voter’s registration application “because [the voter] did not state the specific year she became a resident of [her county]” when it was “perfectly clear from the four corners of the application that she had been a resident for many years in excess of the statutory requirement” to vote in the county. 110 CONG. REC. 6,741 (1964); *see also* 110 CONG. REC. 6,715 (1964) (in the context of discussing “totally immaterial errors and omissions,” citing examples of registration applicants who were rejected for “fail[ing] to fill in a blank calling for ‘residence’

although the applicant answered other portions of the form calling for his address and length of residence,” “failure to state her date of birth in one question although she stated responsively in another question that she had been a resident of [the county] since 1899”). Rejecting ballots due to deviations from technical requirements that have no functional impact on officials’ ability to verify the voter’s qualifications is the core of what Congress prohibited when it enacted 52 U.S.C. § 10101(a)(2)(B).

Congress was aware that some ballots would fail to comply with every technical instruction, and the Materiality Provision safeguards such ballots where that deviation has no material effect on determining the voter’s qualifications. Section 10101(a)(2)(B) is, therefore, functional in its approach. The plain meaning of the phrase “not material” is that the erroneously recorded or omitted information is *functionally* neither “[i]mportant” nor “more or less necessary” to determining whether an individual is eligible to vote. Black’s Law Dictionary Revised 4th Ed., 1128 (1968); Black’s Law Dictionary 4th Ed., 1128 (1951). As confirmed by the legislative history, denying the right to vote based on immaterial witness address omissions or errors is exactly the type of practice Congress intended to outlaw.

II. Rejecting an absentee ballot under Wis. Stat. § 6.87(6d) because the voter’s witness made an immaterial error or omission in recording their address violates the Materiality Provision of the 1964 Civil Rights Act.

Requiring an absentee voter’s witness to supply additional address information beyond what is required to identify and locate that witness is neither important nor more or less necessary to determining a voter’s qualifications to vote. It amounts to what Congress sought to prevent with the Materiality Provision—the “practice of

requiring unnecessary information . . . with the intent that such requirements would increase the number of errors or omissions . . . , thus providing an excuse to disqualify potential voters.” *Schwier v. Cox*, 340 F.3d 1284, 1294 (11th Cir. 2003).

Wisconsin law currently requires that a voter’s ballot be rejected if the voter’s witness makes an inconsequential omission or error in recording their address on an absentee ballot certificate envelope. The WEC’s previous guidance was rescinded, and now clerks are no longer permitted to remedy trivial witness address defects. Consequently, Wisconsin voters are subject to disenfranchisement because of a witness’s immaterial omission or error.²³ Indeed, Wisconsin voters have been disenfranchised, as ballots have been rejected due to immaterial errors or omissions in the witness address field in municipalities such as Oshkosh, Green Bay, and Racine. (PPUF, ¶¶46–47, 49, 51; Lenz Aff. ¶25, Ex. 21, p. 3; ¶26, Ex. 22; ¶28, Ex. 24, pp. 2–20; ¶10, Ex. 6, pp. 4, 6, 8; ¶12, Ex. 8, pp. 2-4; ¶16, Ex. 12, pp. 5–8; ¶18, Ex. 14, pp. 3–19.) Accordingly, with respect to the four categories of omissions or errors outlined below, Wis. Stat. § 6.87(6d) conflicts with and is preempted by the federal Materiality Provision. *See Carey v. Wisconsin Elections Comm’n*, 624 F. Supp. 3d 1020, 1032 (W.D. Wis. 2022) (“The effect of the Supremacy Clause is that state laws

²³ When a witness certification is deemed invalid, it may be too late for the voter to vote in person, Wis. Stat. § 6.86(6), or to spoil the rejected ballot and obtain a new one, *id.* § 6.86(5). Moreover, a purely discretionary “cure” procedure, such as Wis. Stat. § 6.87(9), under which the clerk simply sends the ballot back to the voter, would not excuse rejecting a ballot in violation of the Materiality Provision. *See La Union del Pueblo Entero*, 604 F. Supp. 3d at 541 (applying Materiality Provision to absentee-ballot application requirements) (“[Section 10101(a)(2)(B)] 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.”).

that are contrary to or interfere with federal law are preempted and therefore unenforceable.”).

Numerous courts have held that purely technical defects pertaining to a voter’s information on ballot return envelope certificates are immaterial and that the Civil Rights Act prohibits rejection of a ballot because of such errors. For example, in *Martin*, a federal district court held that the Materiality Provision prohibited the rejection of ballots because a voter failed to write their birth year or recorded an incorrect birth year on the ballot return envelope. 347 F. Supp. 3d at 1308–09. Other courts have held that the Materiality Provision forbids election officials from rejecting ballots when voters omit their Social Security Numbers. *Schwier v. Cox*, 412 F. Supp. 2d 1266, 1276 (N.D. Ga. 2005), *aff’d* 439 F.3d 1285 (11th Cir. 2006); *Washington Ass’n of Churches v. Reed*, 492 F. Supp. 2d 1264, 1270–71 (W.D. Wash. 2006). If even those defects in the voter’s own personal information are immaterial to the voter’s qualifications, an inconsequential error in a *witness’s* address—one that does not prevent a clerk from ascertaining the correct address—cannot rise to the level of an error or omission that is material to the voter’s qualifications.

Accordingly, this case is unlike any other Materiality Provision case in that the omitted information at issue here concerns *only* a third-party witness, *not* the voter. Plaintiff’s counsel has not located any Section 10101(a)(2)(B) case in which the erroneous or omitted information in question pertains to a third party. Right from the start, it is dubious that missing witness address information is “material.” At best, a witness address on an absentee ballot certificate envelope provides a way to

contact the witness and confirm what that witness has certified regarding the voter's identity and qualifications.²⁴ This is in addition to the contact information that the clerk (or another election official) has for the voter, whom the clerk may also contact. This makes the connection between a witness address and the voter's qualifications all the more tenuous and, therefore, make omissions or errors by the witness even more likely to be immaterial than an error or omission by the voter.²⁵

The League has identified four types of absentee ballot witness address omissions or errors that are immaterial to determining an individual's qualifications to vote, pursuant to 52 U.S.C. § 10101(a)(2)(B). In each of these four scenarios described below, a municipal clerk can ascertain the address of a witness notwithstanding the identified immaterial omission or error.

A. The omission of any witness address information beyond the three components itemized in WEC's existing definition of a witness address is not material to determining a person's qualifications to vote.

WEC has defined "address" under Wis. Stat. § 6.87(6d) to include a street number, street name, and municipality. According to Defendants themselves, "WEC

²⁴ It is far from evident that Wisconsin's witness address requirement serves even this minor function. So long as a witness's address is present, the certificate envelope may be opened and the ballot counted. WEC, Election Day Manual, at 92–95, available at <https://elections.wi.gov/resources/manuals/election-day-manual>. There is no instruction telling clerks to verify the witness address or use it any other way.

²⁵ Plaintiff has not argued that the witness address requirement in Wis. Stat. § 6.87(6d), is immaterial on its face. Instead, Plaintiff submits that the Materiality Provision is violated as applied to the rejection of the four identified categories of absentee ballots with specific witness address errors or omissions. However, last year, the Legislature notably conceded that Wis. Stat. § 6.87(6d) has nothing to do with whether a voter is qualified under Wisconsin law to vote. (Dkt. 42, at 18 (“[L]aws that regulate the casting of mail-in ballots—like Section 6.87(6d)—do not relate to whether a voter is ‘qualified under State law to vote’ under Section 10101(a)(2)(B).”))

has set a policy advising local election officials that a complete address contains three elements: a street number, street name, and name of municipality.” (PPUF, ¶41; Lenz Aff. ¶29, Ex. 25, Defendants’ RFA Responses, at 2 (Response to RFA No. 1); *see also* Defendants’ RFA Responses, at 8 (Response to RFA No. 12) (“WEC has defined ‘address’ to include street number, street name, and name of municipality, according to the September 14, 2022 WEC Communication.”).) The Legislature endorsed this definition as “a common sense approach” that strikes “a reasonable balance.” (Dkt. 42, Leg.’s Mem. in Opp. to P’s Mtn. for Temp. Inj., at 3.)

Given the “reasonable” nature of this definition of a witness address, the omission of the witness’s state name, zip code, or any other address information beyond the three components itemized in WEC’s existing definition is “not material in determining whether [the voter] is qualified under State law to vote” 52 U.S.C. § 10101(a)(2)(B). Defendants and the Legislature do not appear to dispute this part of Count Two of Plaintiff’s Second Amended Complaint but have not settled this part of Count Two; nor has WEC issued guidance instructing clerks that such omissions are immaterial and cannot serve as the basis for rejecting the ballot. WEC, for its part, admitted (with irrelevant qualifications, *see supra* at 17 n.17) that “a witness’s omission of any information other than street number, street name, and name of municipality from the witness certification on an Absentee Ballot Certificate Envelope, is not Material in determining whether the absentee voter is Qualified Under Wisconsin Law to vote in such election.” (PPUF, ¶42; Lenz Aff. ¶29, Ex. 25, Defendants’ RFA Responses, at 6 (Response to RFA No. 9).) And the Legislature told

this Court last year that Wisconsin state law requires no more than these three address components, as WEC's "address" definition is "still in force," and that any rejection of ballots containing all three of those elements would be unlawful. (Dkt. 42, at 23.) Though it did not concede a Section 10101(a)(2)(B) violation, the Legislature merely argued that "[t]his category of absentee ballots is not part of this case." (*Id.*)

However, this category remains part of this case because the record demonstrates that WEC's refusal or failure to issue guidance on this question resulted in the rejection of absentee ballots cast in the November 2022 general election. Ballots accompanied by certificates that omitted the witness's state name, zip code, and any other address components beyond the three required by WEC's definition were rejected last year. Even based on a sample of just ten of Wisconsin's approximately 1,850 municipalities, the following Wisconsin voters had their ballots rejected last year due to such immaterial omissions: Emily Bierman (Appleton); Mary Jill Marshall (Appleton); George E. Kloes (Appleton) (PPUF, ¶46; Lenz Aff. ¶13, Ex. 9, p. 3; ¶15, Ex. 11, pp. 2-4); Ryan Grusnick (Green Bay), Jelaine Martin (Green Bay), Sandra Spencer (Green Bay) (PPUF, ¶46; Lenz Aff. ¶10, Ex. 6, pp. 4, 6, 8; ¶12, Ex. 8, pp. 2-4); and Jo Knudsen (Racine) (PPUF, ¶46; Lenz Aff. ¶16, Ex. 12, p. 8; ¶18, Ex. 14, p. 2.). Shortly before the November 2022 election, the Green Bay City Clerk's office issued a notice requiring that absentee ballots lacking this immaterial information be returned to the voter instead of being approved for counting: "[T]he Clerk's office will mail back certificates that lack a . . . complete witness address including house

number, street name, city, state and zip code.”²⁶ (PPUF, ¶36.) Similarly, in the run-up to the November 2022 general election, the Racine City Clerk’s office intended to reject ballots and return them to voters if the witness address lacked a state name or zip code: “For any omission in the witness address field on an absentee ballot certificate envelope, even if it is just the state name or the zip code, a member of my staff returns the ballot . . . to the voter.” (PPUF, ¶37; *McMenamin Aff.* ¶2.) It is quite common for an absentee voter’s witness to only record their street number, street name, and municipality. In Madison, the clerk has noted that voters turn in “numerous absentee ballots accompanied by witness certifications in which the witness has written their street name, street number, and municipality but has not included a state or zip code.” (PPUF, ¶57; *Witzel-Behl Aff.* ¶3.) Given the legal vacuum created by *White v. WEC* and WEC’s ongoing refusal or failure to issue guidance on how to comply with both the Materiality Provision and Wis. Stat. § 6.87(6d), it is highly likely that many more municipal clerks adopted similar policies, and that statewide the number of eligible individuals denied the right to vote due to immaterial omissions was even more significant.²⁷

²⁶ City of Green Bay Clerk, Press Release: “A Change in the Absentee Ballot Curing Process” (Sept. 26, 2022), available at <https://greenbaywi.gov/CivicAlerts.aspx?AID=465>. A ballot returned to a voter will not be counted unless it is returned, again, to the clerk before 8:00 pm on Election Day. Wis. Stat. § 6.87(6). Any time the ballot is returned to the voter, there is a risk of erroneous disenfranchisement. The voter may not get the ballot in time to send it back, they may be absent from that address, or may believe they have simply been sent a second ballot in error.

²⁷ Unless permanently enjoined, the policy of rejecting ballots that lack a witness’s state name and/or zip code will result in further disenfranchisement. For example, in 2021, the Legislative Audit Bureau reviewed a random sample of 14,710 certificates from ballots cast in the November 2020 election and found that:

Rejecting and refusing to count these Category 1 absentee ballots violates 52 U.S.C. § 10101(a)(2)(B) because the omission of state names, zip codes, or any other address information beyond what is required by WEC’s three-component definition of “address” is neither important nor more or less necessary to determining whether an individual is eligible to vote under Wisconsin law. Even assuming for argument’s sake that Wisconsin officials might need to be able to contact the absentee voter’s witness to confirm the absentee voter’s identity or qualifications, clerks, canvassers, election inspectors, and law enforcement will be able to readily identify a witness based on their street number, street name, and municipality name, *even if* the state name and zip code are omitted. Additionally, these officials can always contact the voter—who is required by statute to complete their absentee ballot in the presence of their witness—to obtain additional information about their witness. *See* Wis. Stat. § 6.87(4)(b)1.

Finally, throughout this litigation, Defendants WEC and the Commissioners have tried to disclaim any responsibility for the disposition of absentee ballots with purported witness address deficiencies, but federal courts have rejected the notion

1,022 certificates (6.9 percent) in 28 municipalities had partial witness addresses because they did not have one or more components of a witness address, such as a street name, municipality, state, and zip code, including 799 certificates (5.4 percent) that did not have a zip code and 364 certificates (2.5 percent) that did not have a state[.]

Wisconsin Legislative Audit Bureau, Report 21-19 “Elections Administration” (Oct. 2021), at 42–43.²⁷ Even if one focuses just on the 799 certificates without zip codes (5.4 percent), this category of omission alone would result in an extremely large population of unlawfully disenfranchised voters.

that WEC may avoid liability by simply refusing to engage in a live dispute over the application of federal law. In *Carey*, following the Supreme Court of Wisconsin's ruling "prohibiting voters from giving their ballot to a third party," the federal district court considered a claim seeking declaratory and injunctive relief under Section 208 of the Voting Rights Act, 52 U.S.C. § 10508, which mandates assistance for covered voters. 624 F. Supp. 3d at 1028. WEC attempted to deflect responsibility onto the state's 1,850 municipal clerks, but the court firmly rejected this gambit, noting "the commission plays an important role in enforcing election laws," and that the law does not require plaintiffs to sue individual municipal clerks. *Id.* at 1029.

The U.S. district court explained why WEC's speak-no-evil defense is meritless: A "refusal to provide guidance can't be relied on to show the absence of a dispute." *Id.* at 1030; *id.* ("[D]efendants have refused to issue any official guidance that would preclude enforcement . . . against plaintiffs."). Ducking a federal law question in its administrative guidance and submitting briefs signaling general agreement with a plaintiff's legal positions do not negate justiciability or adversity. The federal court noted that "numerous courts have held that a litigation position doesn't eliminate a threat of enforcement because a litigation position isn't binding, and the relevant parties could change their mind on a whim." *Id.* (collecting cases). As in this case, WEC had refused to commit to a clear and unqualified interpretation of federal law in either its guidance or briefs:

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 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.

Even if the court were to assume that defendants won't enforce the law against plaintiffs, there would still be a reasonable possibility that a municipal clerk could reject a ballot under those circumstances. . . . *A potential rejection of a ballot by a clerk is fairly traceable to defendants because defendants have refused to provide clerks the guidance that defendants are required under state law to provide.* See, e.g., Wis. Stat. § 5.05(5t) (requiring the commission to provide “updated guidance or formal advisory opinions” within two months of a binding court decision); Wis. Stat. § 6.869 (requiring the commission “to prescribe uniform instructions for municipalities to provide to absentee electors”).

Id. at 1031 (emphasis added).

Defendants cannot avoid liability by disavowing responsibility for reviewing absentee ballots' compliance with Wisconsin law and for deciding whether to count them. (PPUF, ¶43; Lenz Aff. ¶29, Ex. 25, Defendants' RFA Responses, at 6–13 (Responses to RFA Nos. 9–21) (“Whether a particular absentee ballot certificate is ‘missing the address of a witness,’ within the meaning of Wis. Stat. § 6.87(6d), is determined, in the first instance, by local election officials, not by WEC.”).) One thousand eight hundred and fifty municipal clerks, many from small towns and villages, are not individually and separately responsible for interpreting federal law and applying it to Wisconsin law. Defendants may oppose or settle Plaintiff's Materiality Provision claim, but *Carey* makes plain that they may not avoid liability by simply disowning this live legal dispute and refusing to issue guidance reconciling Wis. Stat. § 6.87(6d) and the 1964 Civil Rights Act.

B. The omission of a witness's municipality is not material to determining a voter's qualifications, where the witness has provided a street number and street name that match the voter's street number and street name.

Members of the same household often witness each other's absentee ballots. (PPUF, ¶48; dkt. 35, Woodall-Vogg Aff. ¶4.) These witnesses frequently omit their municipality name when writing their address on the certificate envelope. (See e.g. PPUF, ¶48; Witzel-Behl Aff. ¶4 (“[F]or each election, Madison receives numerous ballots accompanied by witness certifications in which household member witnesses record the same street number and street name as the voter, but omit all other address components.”)²⁸ In the specific scenario when a witness's street number and street name match the voter's street number and street name, the witness's omission of their municipality is neither important nor more or less necessary to determining a person's qualifications to vote under Wis. Stat. §§ 6.02, 6.03. The municipality name is already reflected on the absentee ballot certificate in the voter's address, which is typically on an affixed label in the voter certification box, not written in by the voter. (See, e.g., PPUF, ¶21; Witzel-Behl Aff. ¶2.) Rejecting the ballot merely for a purely technical and inconsequential failure to duplicate the municipality name in the witness certification violates the Materiality Provision.

At a minimum, the following Wisconsin voters had their ballots rejected in last year's general election, even though their same-household witnesses recorded the

²⁸ See also Patrick Marley, *Absentee Ballots At Risk of Being Tossed*, MILWAUKEE JOURNAL-SENTINEL (Oct. 7, 2016), available at <https://www.jsonline.com/story/news/politics/elections/2016/10/07/absentee-ballots-risk-being-tossed/91728826/>.

same street number and street name as them: Bradley Shiazoo Lor (Appleton); Daniel J. Laux (Appleton); Michael C. Schmidt (Appleton); Joseph E. Marx (Appleton); Lloyd E. Learman (Appleton) (PPUF, ¶47; Lenz Aff. ¶13, Ex. 9, p. 3; ¶15, Ex. 11, pp. 5–9); Ashley Ann Loney (Eau Claire) (PPUF, ¶47; Lenz Aff. ¶19, Ex. 15, p. 3; ¶21, Ex. 17); Tracy Ann Reed (Waukesha); Madoona Tawabuddin (Waukesha) (PPUF ¶47; Lenz Aff. ¶22, Ex. 18, p. 3; ¶24, Ex. 20, pp. 2–3); William R. Salm (Oshkosh); Brielle Elizabeth Meisel (Oshkosh); Khempet Thao (Oshkosh); Richard Malchow (Oshkosh); Marlene M. Malchow (Oshkosh); Joanne M. Fenrich (Oshkosh); Timothy L. Fahley (Oshkosh); Paul J. Fennel (Oshkosh); Haley M. Fullerton (Oshkosh); Arlene C. Schmuhl (Oshkosh); Shirley A. Gafner (Oshkosh); Emily S. Boettcher (Oshkosh); Betty J. Grenfell (Oshkosh); Jade M. Baker (Oshkosh); Soloman S. Brooks (Oshkosh); Elizabeth J. Spanbauer (Oshkosh); Stacy L. Fox (Oshkosh); Joan G. Nimke (Oshkosh) (PPUF, ¶47; Lenz Aff. ¶25, Ex. 21, p. 2; ¶26, Ex. 22; ¶28, Ex. 24, pp. 2–19); Jovani Yata (Racine); Josephine Garcia (Racine); Christine M. Gradymler (Racine); Alesandra Selena Leal (Racine); Andrew J. Miller (Racine); Tammy A. Porasik (Racine); Joanne M. Finn (Racine); Natasha Marie Robles (Racine); Vincente H. Compos (Racine); Roberto S. Aquino (Racine); Rosa L. Aquino (Racine); Gloria Coronado (Racine); Mary K. Overstreet (Racine); Cathy A. Middleton (Racine); Kathylon L. Parker (Racine); Nicholas Allen Lawson (Racine); and Dana Michelle Kjell (Racine). (PPUF, ¶47; Lenz Aff. ¶16, Ex. 12, pp. 5–8; ¶18, Ex. 14, p. 3–19.) Additionally, the League has identified eight absentee voters in Racine whose ballots cast in the November 2022 general election were rejected, despite their witnesses

including the same street number, street name, *and* zip code as the voter: Cindi Lou Brown, Carolyn Bonds, Debra D. Newman, Wilbert K. Bell, Katrina Bell, Sandra Trott, Peg S. Rousar-Thompson, and Stephen J. Jackson. (PPUF, ¶51; Lenz Aff. ¶16, Ex. 12, pp. 5–8; ¶18, Ex. 14, pp. 20–27.)

WEC has admitted (with irrelevant qualifications, *see supra* 17 at n.17) that rejecting such absentee ballots would violate the Materiality Provision. (PPUF, ¶55; Lenz Aff. ¶29, Ex. 25, Defendants' RFA Responses, at 8 (Response for RFA 11); Dkt. 45, at 14–16, Def. Resp. Br. Opp. P's Mtn. for Em. Dec. Rel. and Temp. Inj.) Specifically, WEC stated that “[a] witness’s omission of the name of their municipality from the witness certification on an Absentee Ballot Certificate Envelope does not cause the witness’s address to be ‘missing’ under Wis. Stat. § 6.87(6d) if it is possible to determine the name of the witness’s municipality from other information on the face of the absentee ballot certificate.” (PPUF, ¶40; Lenz Aff. ¶29, Ex. 25, Defendants' RFA Responses, at 9 (Response for RFA 13).) However, WEC has not issued guidance instructing municipal clerks to count ballots in this category to avoid a violation of federal law. Absent WEC guidance to the contrary, clerks are rejecting ballots for a technical lack of the witness’s municipality, even where the witness clearly resides at the same address as the voter and the municipality is listed above in the voter certification. Until Defendants issue a directive shielding these ballots from rejection, they stand in violation of 52 U.S.C. § 10101(a)(2)(B). *See supra* at 29–31 (discussing *Carey v. Wisconsin Elections Commission*).

C. Notations in place of a witness address indicating the witness has the same address as the voter, even if construed as errors, are not material to determining a person's qualifications to vote.

The Materiality Provision forbids rejecting absentee ballots that bear certain notations including but not limited to “SAME,” ditto marks, and/or arrows pointing up to the voter's address, which clearly convey that the witness was indicating their address is identical to the voter's address. Even with the limited discovery in this action, Plaintiff has unearthed one such ballot that was rejected on this basis. Oshkosh voter Snigdha Trafder had her ballot rejected after the witness wrote “same as voter's address.” (PPUF, ¶49; Lenz Aff. ¶25, Ex. 21, p. 2; ¶26, Ex. 22, p. 10; ¶28, Ex. 24, p. 20.) And Milwaukee has also received absentee ballots with this type of notation recorded in the witness certification, confirming it is a common practice. (PPUF, ¶50; dkt. 35, Woodall-Vogg Aff. ¶4.)

This is not an omission of the witness's address at all—it communicates the same information, as though the witness re-wrote the voter's address. Defendants have admitted that such notations do not indicate that the witness address is “missing” within the meaning of Wis. Stat. § 6.87(6d). (PPUF, ¶59; Lenz Aff. ¶29, Ex. 25, Defendants' RFA Responses, at 10–12 (Responses for RFA Nos. 18–21).) But even if such a statement is considered an omission or error, that defect is not material to determining the voter's qualifications to vote under Wisconsin law. A witness who uses a notation to indicate they live at the same address as the voter instead of writing out the same address as the voter might have deviated from the technical instructions, but that does not go to the merits or have any material effect on any

official's evaluation of the individual's qualifications to vote or on corroboration of their qualifications by identifying and locating the witness. Enforcing Wis. Stat. § 6.87(6d) in such a hyper-formalistic manner in this context would serve no purpose other than disenfranchisement by technicality.

Again, WEC admitted (with irrelevant qualifications, *see supra* 17 at n.17) that rejecting such absentee ballots with clear notations that the witness's address is the same as the voter's address would violate the Materiality Provision. (Lenz Aff. ¶29, Ex. 25, Defendants' RFA Responses, at 9–10 (Responses for RFA Nos. 14–17).) Until WEC issues a directive shielding these ballots from rejection, the rejection of absentee ballots bearing these types of purported errors in the witness's address will continue in violation of 52 U.S.C. § 10101(a)(2)(B).

D. The omission of a witness's municipality is not material to determining a person's qualifications to vote, where the witness has provided their street number, street name, and zip code.

Finally, the Materiality Provision forbids rejecting an absentee ballot where the witness recorded their street number, street name, and zip code but not their municipality's name. The League has identified eight absentee voters in Racine, Wisconsin whose ballots cast in the November 2022 general election were rejected, despite their witnesses including a street number, street name, and zip code: Cindi Lou Brown, Carolyn Bonds, Debra D. Newman, Wilbert K. Bell, Katrina Bell, Sandra Trott, Peg S. Rousar-Thompson, and Stephen J. Jackson. (PPUF, ¶51; Lenz Aff. ¶16, Ex. 12, pp. 5–8; ¶18, Ex. 14, pp. 20–27.)

A municipal clerk can readily identify a witness's municipality using a witness's street number, street name, and zip code. The omission of a municipality name carries no risk that the clerk's office will be unable to locate the witness if needed to determine a person's qualifications to vote. Therefore, providing a street number, street name, and zip code but omitting a municipality does not constitute a material omission because, once the clerk has this combination of address information, the missing municipality and state names are no longer important or more or less necessary to determining the individual's qualifications to vote. In this final category, the absentee ballot certificate envelopes bear a combination of witness address information that definitively communicates the witness's address and, therefore, the Materiality Provision forbids the rejection of a ballot with such an inconsequential omission. This view accords with WEC's functional definition of "address":

Under WEC's definition of a complete address, an absentee ballot certificate contains a witness address if the witness address field includes information from which it is possible to determine a street number, street name, and name of municipality for the witness, without modifying or adding to the information contained on the face of the absentee ballot certificate as it was received by the municipal clerk from the elector.

(PPUF, ¶40; Lenz Aff. ¶29, Ex. 25, Defendants' RFA Responses, at 7 (Response to RFA No. 10).)

In sum, no Wisconsin voter may be denied their right to vote based on the immaterial omissions and errors described above. Based on the foregoing reasons, Plaintiff respectfully requests that this Court grant summary judgment in its favor

and enter declaratory and injunctive relief pursuant to the Civil Rights Act of 1964 to shield these four categories of absentee ballots from unlawful rejection.

III. The Court should grant the League declaratory and injunctive relief.

The Court may grant a permanent injunction when a plaintiff has demonstrated: “(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.” *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156–57 (2010) (citation and quotation marks omitted). Because the equitable factors are part of the substantive inquiry into whether relief should be granted, federal law, not Wisconsin law, applies. *Shaw*, 2005 WI 163, ¶31 (“[i]nasmuch as the [rule] is substantive,” federal law governs).

A. An injunction is necessary to avoid irreparable harm.

A permanent injunction is necessary to prevent disenfranchisement of the Wisconsin voters served by the League and the League’s members. The League is a community-based organization with approximately 2,800 members, and their right to vote is at stake in this case. (PPUF, ¶6; dkt. 18, Affidavit of Debra Cronmiller (“Cronmiller Aff.”) ¶¶3–4.)

The violation of the right to vote in any given election is an irreparable harm. “Courts routinely deem restrictions on fundamental voting rights irreparable injury.” *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014)

(collecting cases); *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) (“A restriction on the fundamental right to vote . . . constitutes irreparable injury.”). Furthermore, the ongoing violation of federal statutory guarantees protecting the right to vote also constitutes an irreparable injury. *See Common Cause Ind. v. Lawson*, 327 F. Supp. 3d 1139, 1155 (S.D. Ind. 2018) (finding irreparable injury due to violation of National Voter Registration Act (“NVRA”)) (“As has been held by numerous other courts, the Court determines that a violation of the right to vote is presumptively an irreparable harm.”), *aff’d*, 937 F.3d 944 (7th Cir. 2019); *League of Women Voters of United States v. Newby*, 838 F.3d 1, 9 (D.C. Cir. 2016) (violation of NVRA requirements threatened irreparable injury to organization); *Carey*, 624 F. Supp. 3d at 1034 (in case brought under Voting Rights Act, noting “plaintiffs risk losing their right to vote, which qualifies as an irreparable harm”).

The same principle has been articulated in the context of constitutional protections for the right to vote. *See Ezell v. City of Chicago*, 651 F.3d 684, 699 (7th Cir. 2011) (recognizing that once a constitutional violation has been demonstrated, no further showing of irreparable injury is necessary); *Preston v. Thompson*, 589 F.2d 300, 303 n.3 (7th Cir. 1978) (“The existence of a continuing constitutional violation constitutes proof of an irreparable harm.”). This applies with equal force here in the context of federal statutory rights protecting the right to vote.

B. Traditional legal remedies cannot adequately protect Plaintiffs’ rights.

There is no adequate remedy at law for Wisconsin voters who are denied the right to vote due to an immaterial omission or error in the witness address field. If

Plaintiff is denied injunctive relief, its members and the other Wisconsin voters it serves will face unlawful disenfranchisement. Once an election “comes and goes, there can be no do-over and no redress.” *League of Women Voters of N.C.*, 769 F.3d at 247; *see also Common Cause Ind.*, 327 F. Supp. 3d at 1153–54 (finding “no adequate remedy at law” when an individual’s right to vote is violated, because “an individual cannot vote after an election has passed”). Likewise, monetary damages cannot compensate for irreparable harm—the right to vote is priceless. *See Common Cause Ind.*, 327 F. Supp. 3d at 1154; *Democratic Nat’l Comm. v. Bostelmann*, 451 F. Supp. 3d 952, 969 (W.D. Wis. 2020) (“[I]nfringement on a citizens’ [sic] constitutional right to vote cannot be redressed by money damages, and therefore traditional legal remedies [are] inadequate[.]” (citing *Christian Legal Soc’y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006))).

C. The balance of equities and the public interest favor the League’s and Wisconsin voters’ interests in vindicating the rights guaranteed by the 1964 Civil Rights Act.

Finally, the Court should exercise its discretion to grant Plaintiff’s motion because doing so will serve the public interest. *Monsanto Co.*, 561 U.S. at 130. Injunctions to vindicate federal statutory rights are in the public interest, and Defendant’s interests are—at best—secondary. *See, e.g., Common Cause Indiana v. Lawson*, 937 F.3d 944, 949 (7th Cir. 2019) (affirming preliminary injunction, noting “the public interest favors compliance with the [National Voter Registration Act]”); *Carey*, 624 F. Supp. 3d at 1034 (in case brought under Voting Rights Act, finding that

“the public interest is served by helping to ensure that eligible citizens are able to exercise their right to vote”).

Furthermore, the right to vote is “preservative of all rights.” *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 667 (1966). The public therefore has a “strong interest in the fundamental political right to vote.” *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). That public interest is “best served by favoring enfranchisement and ensuring that qualified voters’ exercise of their right to vote is successful.” *Hunter v. Hamilton Cty. Bd. of Elections*, 635 F.3d 219, 244 (6th Cir. 2011); *see also Am. Council of Blind of Ind. v. Ind. Election Comm’n*, 2022 WL 702257, at *10 (S.D. Ind. Mar. 9, 2022) (“[T]he Court finds that the public interest would be served by prohibiting discrimination in voting.”). In sum, “[t]he public interest . . . favors permitting as many qualified voters to vote as possible.” *Obama for Am.*, 697 F.3d at 437. Granting Plaintiff’s motion will serve the public interest in the vindication of federal statutory rights and the lawful administration of elections.

CONCLUSION

For the foregoing reasons, Plaintiff League of Women Voters of Wisconsin respectfully requests that the Court grant summary judgment in its favor.

DATED: July 7, 2023

Respectfully submitted,

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