

LEAGUE OF WOMEN
VOTERS OF WISCONSIN,

Plaintiff,

v.

Case No. 22-CV-2472

WISCONSIN ELECTIONS
COMMISSION, et al.,

Defendants,

and

WISCONSIN STATE
LEGISLATURE,

Intervenor.

**DEFENDANTS' CROSS-MOTION IN SUPPORT OF SUMMARY
JUDGMENT**

PLEASE TAKE NOTICE that pursuant to Wis. Stat. § 802.08, Defendants Wisconsin Elections Commission, and its Administrator and the individual members of the Commission in their official capacities, (collectively, "Defendants"), by undersigned counsel, move the Court for summary judgment. As the basis for this motion, Defendants incorporate by reference their combined brief in support of their motion for summary judgment and in

opposition to Plaintiff's motion for summary judgment, along with all supporting affidavits and exhibits. Based on the undisputed facts and legal arguments set forth therein, Defendants are entitled to judgment as a matter of law on all claims.

Dated this 21st day of September 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this *Defendants' Cross-Motion In Support of Summary Judgment* with the clerk of court using the Wisconsin Circuit Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 21st day of September 2023.

Electronically signed by:

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THOMAS C. BELLAVIA
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WISCONSIN ELECTIONS
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**COMBINED BRIEF OF DEFENDANTS IN OPPOSITION TO
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
AND IN SUPPORT OF DEFENDANTS' CROSS-MOTION
FOR SUMMARY JUDGMENT**

INTRODUCTION

Wisconsin law requires that all absentee ballots be accompanied by a certificate executed by both the voter and a witness. The required witness certification must include the witness's address, and the ballot cannot be counted if that address is missing. The statutes do not specify what address information must be included, but the Wisconsin Elections Commission has

issued guidance defining a complete witness address as including the witness' street number, street name, and municipality.

The League of Women Voters of Wisconsin has brought suit under 42 U.S.C. § 1983, based on a provision in the federal Civil Rights Act, against the Commission, its members, and its administrator (collectively, "Defendants"), to address concerns that some local election officials are rejecting certain absentee ballots on the ground that ballot certificates lack one of three types of immaterial witness address information. None of those local officials are named as defendants. The League has moved for summary judgment on its claim, and Defendants have filed a cross-motion for summary judgment in their favor.

Summary judgment should be denied to the League, and granted in favor of Defendants, for three reasons.

First, the League presents a non-justiciable controversy. None of Defendants participated in the conduct the League alleges, and an injunction against Defendants would not enjoin any entity that reviews or rejects absentee ballots. And Defendants' reading of the relevant state law on witness addresses, Wis. Stat. § 6.87(2), is consistent with the League's position.

Second, the League fails to state a claim under 42 U.S.C. § 1983. Section 1983 creates no duty of rescue and holds officials liable only for their own

conduct. Here, the League seeks to hold Defendants liable for the acts of others—some local clerks—that Defendants do not supervise or control.

Third, were this Court to reach the merits, Defendants are complying with federal law because the three categories of ballots at issue would satisfy Defendants' interpretation of Wis. Stat. §6.87(2) and thus not be rejected to begin with. As interpreted by the Commission, Wis. Stat. § 6.87(2) seeks only information material to a voter's qualification and is thus consistent with federal law.

The League also raises a new, fourth type of ballot certificate omission, and this Court should not consider that unpled claim here.

LEGAL AND FACTUAL BACKGROUND

The League's claim arises out of concerns about the potential rejection of absentee ballots by local election officials on the grounds that the ballot envelope certificates lack one of three types of witness address information.

I. Wisconsin's absentee ballot procedure requires witnesses to provide their address.

Under Wisconsin's election statutes, any otherwise qualified voter who for any reason is unable or unwilling to vote in person at his or her polling place on election day may vote absentee. Wis. Stat. § 6.85(1). Registered voters wishing to vote absentee must submit a written absentee ballot request to the municipal clerk. Wis. Stat. § 6.86(1)(a)–(ac). The clerk prepares and sends an

official absentee ballot to that individual voter at the address that the voter has provided. Wis. Stat. §§ 6.86(7), 6.87(3)(a), 7.15(1)(cm). Accompanying the absentee ballot is an absentee ballot certificate envelope in which the completed ballot will later be returned to the clerk. *See* Wis. Stat. § 6.87(2). The voter's address is usually recorded on the certificate envelope by a pre-printed label affixed to the certificate by the municipal clerk. (*League* Doc. 113 ¶ 21; 117 ¶ 2.)

The absentee voter completes the ballot in the presence of a witness who is an adult U.S. citizen. Wis. Stat. § 6.87(4)(b)1. The voter marks the ballot in a manner that does not disclose the contents of the vote. *Id.* Then, still in the presence of the witness, the voter folds the ballot and places it into the certificate envelope. *Id.*

The exterior of the envelope includes a certificate, to be executed by both the voter and the witness. *See* Wis. Stat. § 6.87(2), (4)(b)1.

The voter certifies his or her residence, eligibility to vote, and various other items of information. Wis. Stat. § 6.87(2). The voter must complete and sign the certificate in the presence of the witness. Wis. Stat. § 6.87(4)(b)1. The voter must certify "that I exhibited the enclosed ballot unmarked to the witness, that I then in (his) (her) presence and in the presence of no other person marked the ballot and enclosed and sealed the same in this envelope in such a manner that no one but myself and any person rendering assistance

under s. 6.87 (5), Wis. Stats., if I requested assistance, could know how I voted.”
Wis. Stat. § 6.87(2).

The witness then executes and signs the certificate, certifying, *inter alia*, that the statements made in the voter’s certification are true and that “the voting procedure was executed as there stated.” Wis. Stat. § 6.87(2). The certificate must include the witness’ address: “[i]f a certificate is missing the address of a witness, the ballot may not be counted.” *Id.*

The certificate envelope is then sealed and returned to the municipal clerk. Wis. Stat. § 6.87(4)(b)1.

II. Interpretations of the meaning of the witness address requirement.

The statutes do not specify the information that the witness address must include. Following the 2016 enactment of Wis. Stat. § 6.87(6d), the Commission issued guidance to municipal clerks interpreting the witness address requirement. As amended on October 18, 2016, that guidance provided that the Commission “has set a policy that a complete address contains a street number, street name and name of municipality.” (*League* Doc. 26:2.)

As originally issued, the 2016 guidance offered not only guidance about what constitutes a complete address, but also advised clerks to take corrective actions in an attempt to remedy a witness address error. (*League* Doc. 26:2–3.). Options for corrective actions included making corrections to a

witness address directly on the certificate envelope, so long as the clerk was “reasonably able to discern” “from outside sources” the content of “any missing information.” (*League* Doc. 26:2.)

The Commission’s 2016 guidance remained in effect during elections conducted in Wisconsin from 2016 to 2022. (*See League* Doc. 113 ¶¶ 28–31.)

The present case grew out of a partial challenge to the 2016 guidance in Waukesha County Circuit Court, *White v. Wisconsin Elections Commission*, No. 22-CV-1008 (Waukesha Cnty. Cir. Ct.) (*See Rise* Doc. 4:7–9.) The *White* court held that Wisconsin’s election statutes do not permit local election officials to add or correct missing witness address information on absentee ballot certificates. (*See Rise* Doc. 4:7–9.) However, the *White* court expressly did not reach the guidance’s three-component definition of “address.” Accordingly, the court’s final, permanent injunction order, issued on October 3, 2022, stated that it “applies to portions” of the Commission’s guidance “that contain[] or indicate[] that municipal clerks or local election officials can modify or add information to absentee ballot certifications.” (*League* Doc. 22:107.) The order further specified: “Nothing herein is intended, nor shall be construed, to enjoin WEC from issuing or distributing its guidance regarding the definition of ‘address’ as used in Wis. Stat. § 6.87.” (*League* Doc. 22:107.)

Since the *White* decision, some local officials have rejected ballots featuring the witness address types described in the League’s Amended Complaint: a certificate with a witness address that includes the three elements but no zip code or state; a witness address that omits the municipality but includes a street address matching the voter’s; or a witness address field that refers to the voter’s address information with a marking like “ditto,” “same,” or an arrow. (*League* Doc. 113 ¶¶ 36–39, 44–51.)

III. Procedural history of the present case.

The League filed the present case on September 30, 2022, and subsequently filed two amended complaints. (*League* Doc. 2; 10; 94.) Under the Second Amended Complaint, which is the operative pleading, the named defendants include the Commission, its individual members, and its administrator. (*See League* Doc. 94.) The Wisconsin State Legislature has been granted leave to participate as an intervening defendant. (*League* Doc. 34.)

The Second Amended Complaint included three claims for declaratory and injunctive relief. Two of the claims have been dismissed and are not before the Court (*League* Doc. 111): a claim seeking relief on the state-law meaning of “missing” in Wis. Stat. § 6.87(6d); and a claim alleging that the procedure for curing a deficient witness address under Wis. Stat. § 6.87(9) violates due process under the federal constitution. (*See League* Doc. 94 ¶¶ 56–63, 75–81, Prayer for Relief ¶¶ (a)–(b) and (e)–(f).)

The only claim remaining seeks a declaration that the Voting Materiality Provision of the federal Civil Rights Act of 1964, 52 U.S.C. § 10101(a)(2)(B), prohibits Wisconsin election officials from rejecting absentee ballots in three categories on the ground that any such ballot is “missing” a witness address under Wis. Stat. § 6.87(6d) (*League* Doc. 94 ¶¶ 64–74, Prayer for Relief ¶ (c).):

1. Ballots with a certificate on which the witness address field includes a street name, street number, and municipality, but omits additional information, such as state or zip code (*League* Doc. 94 ¶ 69);
2. Ballots with a certificate on which the witness address field includes a street number and street name, but omits the municipality; however, the witness’ street number and street name are the same as the voter’s, and the municipality is also included for the voter (*League* Doc. 94 ¶ 70); and
3. Ballots with a certificate on which the witness address field does not include a street number, street name, or municipality, but does include a notation indicating that the witness’ address is the same as the voter’s (*League* Doc. 94 ¶ 71.)

The Second Amended Complaint seeks an injunction barring Defendants, their agents, and all persons acting in concert with them from rejecting absentee ballots in the identified categories. (*League* Doc. 94, Prayer for Relief ¶ (d).)

The League has moved for summary judgment on that claim. (*League* Doc. 112–14.) In addition, the League’s motion requests summary judgment on

a fourth type of claim that was not pleaded in the Second Amended Complaint, but instead introduced for the first time in its summary judgment brief:

4. Ballots with a certificate on which the witness address field includes a street number, street name, and zip code, but omits the name of the municipality.

(*League* Doc. 114:11.)

STANDARD OF REVIEW

The League has correctly stated the legal standards for summary judgment and for deciding a federal preemption claim.

ARGUMENT

This Court should deny the League's motion for summary judgment and grant summary judgment to Defendants, for three reasons. First, the League presents a non-justiciable controversy because the injuries it alleges are not caused by Defendants and not curable by them: they stem from acts by local election officials, unnamed in this suit. Second, the League fails to state a claim under 42 U.S.C. § 1983 because Defendants have no affirmative duty to force local election officials to do what the League desires. Third, even if the League stated a claim, Wis. Stat. § 6.87(2) complies with federal law when the state statute is read consistently with the Commission's longstanding guidance.

I. The League’s claim under the federal materiality provision does not present a justiciable controversy.

As a threshold matter, the League’s claim for declaratory and injunctive relief under the federal materiality provision fails because it does not present a justiciable controversy between the parties. A court must be presented with a justiciable controversy before it may exercise its jurisdiction over a claim for declaratory judgment. *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶ 28, 309 Wis. 2d 365, 749 N.W.2d 211. This is because the purpose of Wisconsin’s Uniform Declaratory Judgments Act, Wis. Stat. § 806.04, “is to allow courts to anticipate and resolve identifiable, certain disputes between adverse parties.”

Id.

A controversy is justiciable when four factors are present:

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

Id. (citing *Loy v. Bunderson*, 107 Wis. 2d 400, 410, 320 N.W.2d 175 (1982)).

This is consistent with the underlying philosophy of the Act, which is “to enable controversies of a justiciable nature to be brought before the courts for

settlement and determination prior to the time that a wrong has been threatened or committed.” *Lister v. Bd. of Regents of Univ. Wis. Sys.*, 72 Wis. 2d 282, 307, 240 N.W.2d 610 (1976).

The League’s claim here relates to the legality of rejecting certain categories of absentee ballots by local election officials. The only defendants in this action, however, are the Commission, its members, and its administrator, and the League has not alleged that any of them has taken an action that has caused or will cause any local officials to reject any absentee ballots based on an insufficient witness address. It is undisputed that the Commission has not issued guidance to local election officials on when an absentee ballot must be rejected under Wis. Stat. § 6.87(6d), and the Commission’s guidance on the elements of an address is consistent with the League’s own position.

Instead, the League’s request for relief against Defendants is based on the fact that the Commission has not issued the guidance the League wants. But an agency’s failure to issue a particular opinion does not create the kind of concrete adversity of interests necessary to give rise to a justiciable controversy. *See Wis. Educ. Ass’n Council PAC v. Wis. State Elections Bd.*, 2000 WI App 89, ¶ 12, 234 Wis. 2d 349, 610 N.W.2d 108. While the League may have established the existence of such adverse interests between itself and those local officials whom it has identified as rejecting ballots in the subject

categories, it has not established such adversity between itself and Defendants.

In addition, there also is no adversity here on the pertinent legal issues. The League's claim under the federal materiality provision does not challenge the Commission's three-component definition of a witness address, but rather accepts that definition and builds upon it. For purposes of the claim before the Court, therefore, there is no adversity between the parties as to that definition.

The League's claim presents no justiciable controversy and thus fails as a matter of law.

II. The League fails to state a claim against the Defendants under 42 U.S.C. § 1983.

Summary judgment should also be granted to Defendants because the League fails to state a claim under federal law. The League's right of action for a "Materiality Claim" lies under 42 U.S.C. § 1983. That section does not render officials responsible for the mistakes of others or impose an affirmative duty to correct other officials' constitutional violations.

In *Burks v. Raemisch*, the U.S. Court of Appeals for the Seventh Circuit made clear that officials are not responsible for other officials' constitutional mistakes: "Section 1983 does not establish a system of vicarious responsibility." *Burks v. Raemisch*, 555 F.3d 592, 593 (7th Cir. 2009). The court emphasized that "[p]ublic officials do not have a free-floating obligation to put

things to rights.” *Id.* at 595. The court concluded: “public employees are responsible for their own misdeeds but not for anyone else’s. Section 1983 establishes a species of tort liability, and one distinctive feature of this nation’s tort law is that there is no general duty of rescue.” *Id.* at 596 (citing *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189 (1989)).

Here, the League has presented evidence that certain municipal clerks applied Wis. Stat. § 6.87(6d) and (2) in the last statewide election in ways that it alleges disenfranchise its members. Such alleged injuries resulted from actions taken by government officials who are *not* any of the defendants in this case. Section 1983 does not hold Defendants here—the individual Commissioners and Administrator Wolfe—liable for the acts of those municipal clerks. That is particularly true because the clerks do not work for the Commission: “Unlike many places around the country, Wisconsin has a highly decentralized system for election administration.” *State ex rel. Zignego v. WEC*, 2021 WI 32, ¶ 13, 396 Wis. 2d 391, 957 N.W.2d 208. “Wisconsin gives some power to its state election agency (the Commission) *and places significant responsibility on a small army of local election officials.*” *Id.* (emphasis added) (referencing Wisconsin’s 1,850 municipal clerks and 72 county clerks). The League does not allege that the Commissioners or Administrator Wolfe even knew what was happening, much less supervised any of the clerks who rejected a ballot.

The League argues that the Commissioners have an affirmative duty to issue guidance to municipal clerks that mirrors the League’s litigation position. (Dkt. 114:15–16.) But the League points to *no* source of a duty on the Commissioners’ (or the Commission’s) part to issue guidance to municipal clerks in the first instance,¹ much less the specific guidance the League seeks. In effect, the League demands that the defendants jump in to fix the asserted errors of others, but “[p]ublic officials do not have a free-floating obligation to put things to rights.” *Burks*, 555 F.3d at 595.

The named defendants here, the individual Commissioners and Administrator, are not liable under section 1983 for a violation of the League’s members’ federal statutory rights under 52 U.S.C. § 10101(a)(2)(B). The League fails to state a claim, and summary judgment should be granted in Defendants’ favor.

¹ The Commission conveyed guidance to the clerks after the *White* injunction. In a September 14, 2022, memorandum, the Commission notified local election officials that an October 18, 2016, memorandum and an October 19, 2020, memorandum were declared invalid and contrary to law by the *White* court. But that same memorandum also stated that the *White* 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—*name, street number, street name, and name of municipality.*” (*League* Doc. 22:88 (emphasis in original).)

III. Alternatively, Defendants’ guidance about the three components of a witness address complies with the federal materiality provision.

For the reasons discussed in Sections I and II, above, the Court should deny the League’s request for summary judgment and grant Defendants’ motion for summary judgment. In the alternative, if the Court does reach the merits of that claim, then it should conclude that Defendants’ interpretation of Wis. Stat. § 6.87(2) does not violate the materiality provision because the three-component definition seeks only information material to the voter’s qualification to vote under state law.

First, Defendants agree that an interpretation of the witness address requirement seeking *immaterial* information would violate the materiality provision. The federal statute at issue here provides:

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 . . . act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election.

52 U.S.C. § 10101(a)(2)(B). The word “vote,” as used in that provision, “includes all action necessary to make a vote effective including . . . having such ballot counted and included in the appropriate totals of votes cast.” 52 U.S.C. § 10101(e); *see also* 52 U.S.C. § 10101(a)(3)(A).

Requirements for the witness address field that are immaterial to the voter’s qualification to vote would violate federal law. When a local election

official rejects an absentee ballot because the certificate is not properly completed, that ballot is not counted. *See* Wis. Stat. § 6.87(6d). That official thus has prevented the absentee voter from casting an effective vote and has done so because of an error or omission on the certificate, which is a paper relating to an act requisite to voting. The rejection of that ballot thus is permissible under the federal materiality provision only if the reason for the rejection is material to determining whether that voter is “qualified under state law to vote in such election.” 52 U.S.C. § 10101(a)(2)(B).

Wisconsin’s requirements to have a witness for the casting of an absentee ballot, Wis. Stat. § 6.87(4)(b)1., and to have that witness provide an address, Wis. Stat. § 6.87(2), both are material to determining whether the absentee voter in question is qualified to cast that absentee ballot in that election. The first component requires a witness to certify (a) the identity of the voter—*i.e.* that the person casting the ballot is, in fact, the voter to whom the ballot was issued; and (b) that the ballot was completed secretly, in such a way that no other person could see how the voter had voted, except a person who was lawfully assisting the voter pursuant to Wis. Stat. § 6.87(5). *See* Wis. Stat. § 6.87(2). The second component facilitates the witness requirement by enabling election officials to locate and contact the witness, should the need arise.

Both the League and the United States, which filed a statement of interest in this case, do not dispute that requiring a witness address in some form may be material to determining a voter's qualification to vote under state law. (Doc. 53:10; 114:31 n.25.)

The question is what information is "material." In Defendants' view, as long as the certificate, on its face, includes information from which local election officials can determine a street number, street name, and municipality for the witness, the purpose of the witness address requirement is accomplished. The Commission's view of section 6.87(2) does not violate federal law.

The Commission believes that the omissions described in the Second Amended Complaint's three categories would not run afoul of Wis. Stat. § 6.87(2) and should not be reasons to reject a ballot under state law. In each category, it is possible to ascertain the three categories of information from the face of the certificate. If section 6.87(2) is properly applied to these categories, the ballots should not be rejected under state law, and so no violation of the materiality provision could possibly arise. The Commission cannot have violated federal law where its position is that these categories of ballots should be accepted.

For completeness, the Commission also notes that to the extent these omissions were a local election official's reason to reject a ballot, such rejections would violate the materiality provision.

Ballots where the witness address field contains a street name, street number, and municipality, but omits the state or zip code (*League Doc. 94 ¶ 69*), lack only information unnecessary to the purposes of the witness address requirement. Rejecting those ballots would thus violate the federal materiality provision.

Ballots including a street number and street name, but no municipality, but where the witness' street number and street name are the same as the voter's (*League Doc. 94 ¶ 70*), show that the voter and witness live in the same household. Here, too, the witness' street number, street name, and municipality all are present on the face of the certificate in a way that suffices to accomplish the purpose of the witness address requirement. Rejecting those ballots because the voter does not repeat the municipality's name would require immaterial information and violate the federal materiality provision.

Ballots not including a street number, street name, or municipality in the witness address field, but including a notation indicating that the witness' address is the same as the voter's, such as "same," "ditto," or an arrow pointing to the voter section (*League Doc. 94 ¶ 71*), also clearly communicate the witness' street number, street name, and municipality to local election officials.

Again, rejecting such a ballot because the three components are not separately listed in the witness address field would violate the federal materiality requirement.

* * *

If the Court decides to reach the merits of the League's claim, it should conclude that, for the three categories identified in the Second Amended Complaint, Defendants' interpretation of Wis. Stat. § 6.87(2) is consistent with the federal materiality requirement. Rejecting an absentee ballot featuring any of the three categories of the Second Amended Complaint would violate the materiality provision, but it would also be inconsistent with state law.

IV. The League's newly asserted challenge to the rejection of absentee ballots in a fourth, unpleaded category is not properly before the Court.

In its summary judgment brief, the League argues that the federal materiality provision is violated by the rejection of absentee ballots in a fourth category that was not pleaded in the Second Amended Complaint. In this new category of ballots, the witness address field contains a street number, street name, and zip code for the witness, but does not include the municipality. (*See League Doc. 114:11, 32–33.*)

This ballot category differs from the other three challenged categories because certificate in those categories all contain the three address components in the Commission's definition of a witness address, whereas certificates in this

new, fourth category include only two of those three components (*i.e.* street number and name), but no municipality. The League argues that the inclusion of a zip code is functionally equivalent on the theory it would enable election officials to identify and locate the witness (*League* Doc. 114:35–37), although it presents no evidence of whether this would always be the case.

The League’s functional equivalence argument goes beyond the scope of the claim pleaded in the Second Amended Complaint and presents a different legal issue. It departs from a requirement that the certificate convey the witness’s street number, street name, and municipality to advance a functional equivalence test, one that looks for any information that might enable an election official to locate the witness. This Court should not permit the League to seek summary judgment on this unpled, different claim.

Further, this request for a functional test, one that would require clerks to look for any information that would make it possible to locate a witness, is the claim presented by the *Rise* Plaintiffs. Even aside from a need for the League to amend its pleading to add this new claim, any consideration of arguments about its fourth category should not be taken up in the context of the current summary judgment motion, but instead deferred and taken up in coordination with the parallel issues in *Rise*.

CONCLUSION

For the reasons discussed herein, Defendants respectfully ask the Court to deny the League's motion for summary judgment and to enter summary judgment in Defendants' favor pursuant to Wis. Stat. § 802.08(6).

Dated this 21st day of September 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this *Combined Brief of Defendants' In Opposition to Plaintiff's Motion for Summary Judgment and In Support of Defendants' Cross-Motion for Summary Judgment* with the clerk of court using the Wisconsin Circuit Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 21st day of September 2023.

Electronically signed by:

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