

Pursuant to the Court's June 13, 2023 Order (dkt. 111), Plaintiff League of Women Voters of Wisconsin ("League") responds as follows to Intervenor Defendant the Wisconsin State Legislature's ("Legislature") proposed undisputed findings of fact:

1. Wisconsin offers multiple ways for voters to cast their votes. A voter may cast a ballot in person at his or her assigned polling place on Election Day, Wis. Stat. §§ 6.77–78. A voter may vote in person up to two weeks before Election Day during designated "early voting" times at the municipal clerk's office or another site designated by the clerk. *Id.* § 6.855. A voter may also cast an absentee ballot by delivering it to the municipal clerk's office before or on Election Day. *Id.* § 6.87(4)(b)(1), (5). Finally, a voter may cast an absentee ballot by mail before Election Day. *Id.* § 6.87(4)(b)(1).

Response: The League affirmatively states that the statutes referenced in this proposed undisputed finding of fact speak for themselves and disputes the Legislature's proposed finding to the extent it is inconsistent with those statutes.

2. Wisconsin offers additional options for obtaining and casting ballots to voters who are living overseas, *id.* § 6.87(3)(d), in the military, *id.* § 6.865, nursing or retirement home residents, *id.* § 6.875, disabled, *id.* §§ 5.36, 6.82, or indefinitely confined, *id.* § 6.86(2)(a).

Response: The League affirmatively states that the statutes referenced in this proposed undisputed finding of fact speak for themselves and disputes the Legislature's proposed finding to the extent it is inconsistent with those statutes.

3. Wisconsin law recognizes that while "voting is a constitutional right," absentee voting is "a privilege exercised wholly outside the traditional safeguards of the polling place." *Id.* § 6.84(1).

Response: The League affirmatively states that the statute referenced in this proposed undisputed finding of fact speaks for itself and disputes the Legislature's proposed finding to the extent it is inconsistent with that statute.

4. Wisconsin law sets out straightforward requirements that must be met to establish a person's eligibility to vote. To qualify to vote in Wisconsin, a person must be a U.S. citizen, be at least 18 years old on the day of the election, and have resided at his or her current address at least 28 consecutive days before the election to be qualified to vote in that election. *Id.* § 6.02(1). A person who has been convicted of a felony and has not completed the terms of the sentence, has placed a bet or wager on the outcome of the election, or has been adjudicated incompetent to vote by a court is disqualified from voting. *Id.* § 6.03.

Response: The League affirmatively states that the statutes referenced in this proposed undisputed finding of fact speak for themselves and disputes the Legislature's proposed finding to the extent it is inconsistent with those statutes. Although the Legislature's proposed finding is not one of fact, the League disputes the Legislature's characterization that all such requirements are "straightforward." *See, e.g.,* Wis. Stat. §§ 6.10–6.20.

5. Wisconsin law provides multiple ways to register to vote, *id.* § 6.30 (allowing in-person, mail, and electronic registration), and allows multiple forms of proof to confirming eligibility, *id.* §§ 6.33–.34.

Response: The League affirmatively states that the statutes referenced in this proposed undisputed finding of fact speak for themselves and disputes the Legislature's proposed finding to the extent it is inconsistent with those statutes.

6. There is no requirement that voters register in advance of an election, as Wisconsin allows voters to register at their polling place immediately before casting a ballot. *Id.* § 6.55.

Response: The League affirmatively states that the statute referenced in this proposed undisputed finding of fact speaks for itself and disputes the Legislature's proposed finding to the extent it is inconsistent with that statute. Although the Legislature's proposed finding is not one of fact, the League further disputes the

Legislature’s implication that this option is available to all voters. Many voters rely on absentee voting for reasons of disability. *See Carey v. Wis. Elections Comm’n*, 624 F. Supp. 3d 1020, 1024 (W.D. Wis. 2022); Wis. Stat. § 6.86(2)(a), 6.875. Others may require absentee ballots because they are away from their polling place. Wis. Stat. §§ 6.87(3)(a) (elector may direct absentee ballot to be sent to another address), 6.24 (federal overseas voting). For those voters and others, same-day registration at a polling place is not an option.

7. Before a clerk or responsible official can issue an absentee ballot, the voter must first satisfy all eligibility and registration requirements. To cast an absentee ballot in Wisconsin, a person must be a “qualified elector,” *id.* § 6.85, who is already “registered to vote,” *id.* § 6.86.

Response: The League affirmatively states that the statutes referenced in this proposed undisputed finding of fact speak for themselves and disputes the Legislature’s proposed finding to the extent it is inconsistent with those statutes.

8. If a qualified, registered voter in Wisconsin is “for any reason . . . unable or unwilling to appear at the polling place in his or her ward or election district,” *id.* § 6.85(1), he or she may request an absentee ballot through no less than six different methods, *id.* § 6.86(1)(a)(1)–(6).

Response: The League affirmatively states that the statutes referenced in this proposed undisputed finding of fact speak for themselves and disputes the Legislature’s proposed finding to the extent it is inconsistent with those statutes. Although the Legislature’s proposed finding is not one of fact, the League further disputes the Legislature’s implication that all of these options are available to all voters. For reasons of disability or absence, for example, a voter may not be able to request an absentee ballot in person at the office of the municipal clerk or at an

alternate site under Wis. Stat. § 6.855. Wis. Stat. § 6.86(1)(a)1. And various methods of requesting absentee ballots are limited to specific classes of voters. Wis. Stat. §§ 6.86(1)(a)4. (applicable to hospitalized electors), 6.86(1)(a)5 (applicable to voters living in certain residential care facilities and retirement homes).

9. Voters can pick up absentee ballots in person or receive them via mail, with email and fax options available in select circumstances. *Id.*

Response: The League affirmatively states that the statutes referenced in this proposed undisputed finding of fact speak for themselves and disputes the Legislature's proposed finding to the extent it is inconsistent with those statutes. Although the Legislature's proposed finding is not one of fact, the League further disputes the Legislature's implication that all of these options are available to all voters. For reasons of disability or absence, for example, a voter may not be able to pick an absentee ballot in person at the office of the municipal clerk or at an alternate site under Wis. Stat. § 6.855. Wis. Stat. § 6.86(1)(a)1. And facsimile and email transmission is limited, by statute, to military and overseas voters. Wis. Stat. § 6.87(3)(d).

10. There are no supplemental eligibility or registration requirements for absentee voters. *See generally id.* §§ 6.84–.89.

Response: The League affirmatively states that the statutes referenced in this proposed undisputed finding of fact speak for themselves and disputes the Legislature's proposed finding to the extent it is inconsistent with those statutes.

11. Section 6.87 governs the absentee-balloting process in Wisconsin. *Id.* § 6.87.

Response: Disputed to the extent that the Legislature implies that Section 6.87 is the *only* statute that governs the absentee-balloting process. Wis. Stat. § 6.87 is titled “Absent voting procedure.” However, many state and federal laws, along with certain decisions delegated to municipalities and municipal clerks “govern” the absentee ballot process in Wisconsin. The examples are too numerous to list exhaustively, but include: Wis. Stat. §§ 5.54, 5.81 (certain requirements for absentee ballots), 6.85 (definition of an absent elector), 6.855 (alternate absentee ballot site), 6.86 (methods for obtaining an absentee ballot), 6.875 (absentee voting in certain residential care facilities and retirement homes), 6.88 (voting and recording the absentee ballot), 7.15 (municipal clerk to prepare absentee ballots) 7.52 (central count processing), 52 U.S.C. § 20301 *et seq.* (voting by absent uniformed services voters and overseas voters in federal elections), and 52 U.S.C. § 10101(a)(2)(B) (no person may be denied the right to vote due to any immaterial “error or omission on any *record or paper* relating to any application, registration, or other act requisite to voting.”) (emphasis added).

12. Subject to certain exceptions not relevant here, the statute requires an absentee voter to mark the ballot in the presence of a witness and place it inside the official absentee-ballot envelope. *Id.* § 6.87(4)(b)(1); *see id.* § 6.875. Section 6.87(2) provides that the witness must then write the witness’s own “[a]ddress” on the certificate printed on the absentee-ballot envelope. *Id.* § 6.87(2).

Response: The League affirmatively states that the statutes referenced in this proposed undisputed finding of fact speak for themselves and disputes the Legislature’s proposed finding to the extent it is inconsistent with those statutes.

13. “If a certificate is missing the address of a witness, the [absentee] ballot may not be counted.” *Id.* § 6.87(6d).

Response: The League affirmatively states that the statute quoted in this proposed undisputed finding of fact speaks for itself and disputes the Legislature’s proposed finding to the extent it is inconsistent with that statute.

14. A clerk who “receives an absentee ballot with an improperly completed certificate or with no certificate . . . may return the ballot to the elector . . . whenever time permits the elector to correct the defect and return the ballot within the period authorized under sub. (6).” *Id.* § 6.87(9).

Response: The League affirmatively states that the statute quoted in this proposed undisputed finding of fact speaks for itself and disputes the Legislature’s proposed finding to the extent it is inconsistent with that statute.

15. In addition to this cure provision, Wisconsin law requires “uniform instructions” for absentee electors which must include information on “the procedure for correcting errors in marking a ballot and obtaining a replacement for a spoiled ballot.” *Id.* § 6.869.

Response: Disputed in part. Wis. Stat. § 6.87(9) is not a cure provision; nor is it a requirement imposed on municipal clerks. Rather, Wis. Stat. § 6.87(9) makes it optional for clerks to return absentee ballots accompanied by insufficient certifications, and leaves it to the clerk to determine whether and when to return such ballots to voters. Wis. Stat. § 6.87(9). Otherwise, the League affirmatively states that the statute quoted in this proposed undisputed finding of fact speaks for itself and disputes the Legislature’s proposed finding to the extent it is inconsistent with that statute.

16. Absentee voters also have the option of tracking their ballots online via WEC’s “Track My Ballot” tool, which shows when “returned ballot[s] [are] received”

by the clerk and alerts voters to any “problem[s].” Third Affidavit of Kevin M. LeRoy (“Third LeRoy Aff.”), Ex.1 at 1.

Response: Disputed in part. Many absentee voters have the option of tracking their ballots via MyVote. However, WEC’s systems rely on information provided by local election officials and therefore, as noted by WEC, may be under-inclusive or contain errors. (Dkt. 136, Def. Resp. to Pl. Prop. Findings of Undisputed Fact, ¶45.) Furthermore, 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. (Dkt. 115, Lenz Aff. ¶8, Ex. 4, Defendants’ Responses to Plaintiff’s First Set of Requests for Production of Documents and Interrogatories, pp. 3–5.)

17. While Section 6.87(2) does not define “address” in the context of the witness address requirement, the plain text of the statute and the surrounding statutory context demonstrate that a witness’s “address” comprises a street number, street name, and the name of municipality. *See State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110.

Response: Disputed. This proposed undisputed finding of fact is a legal conclusion, and not supported by the citation provided. Otherwise, the League affirmatively states that the judicial opinion cited in this proposed undisputed finding of fact speaks for itself and disputes the Legislature’s proposed finding to the extent it is inconsistent with that opinion and other applicable law.

18. Section 6.87(2) requires the absentee voter to provide substantially the same address details on his or her certificate: “I am a resident of the [... ward of the](town) (village) of ..., or of the ... aldermanic district in the city of ..., residing at ...* in said city, the county of ..., state of Wisconsin.” Wis. Stat. § 6.87(2) (all ellipses and brackets in original).

Response: Disputed in part. This proposed undisputed finding of fact's reference to "substantially the same address details" constitutes a legal conclusion. Otherwise, the League affirmatively states that the statute quoted in this proposed undisputed finding of fact speaks for itself and disputes the Legislature's proposed finding to the extent it is inconsistent with that statute.

19. Moreover, another election-law statute, Section 6.34, explains that an address for voter-identification purposes "includ[es] a numbered street address, if any, and the name of a municipality." *Id.* § 6.34(3)(b)(2).

Response: Disputed in part. This proposed undisputed finding of fact constitutes a legal conclusion. Otherwise, the League affirmatively states that the statute quoted in this proposed undisputed finding of fact speaks for itself and disputes the Legislature's proposed finding to the extent it is inconsistent with that statute.

20. If a witness does not provide one of the three constitutive elements of an address on the witness certification, then the witness's address is "missing." *Id.* § 6.87(6d); Dkt.42 at 14.

Response: Disputed. This proposed undisputed finding of fact constitutes a legal conclusion, and is not supported by the citation provided. As argued extensively in briefing in this case, the League disputes the Legislature's interpretation of "missing" in the context of Wis. Stat. § 6.87(6d). (*See generally*, Dkt. 16, Pl. Br. in Supp. of Mtn. for Temp. Inj., pp. 7–12.)

21. In 2016, WEC relied on this definition of a witness address when issuing certain guidance, which guidance properly states the components of a valid witness address under Section 6.87(2), Dkt.26 at 2–3 ("2016 Guidance"), explaining that "a complete address contains a street number, street name, and name of municipality," Dkt.26 at 2 ("2016 Guidance") (emphasis omitted).

Response: Disputed. The 2016 Guidance does not establish what, if anything, WEC relied upon in establishing this definition of “address.” Rather, the 2016 Guidance states: “The Wisconsin Elections Commission (WEC) has set a policy that a complete address contains a street number, street name and name of municipality.” (Dkt. 26, p. 2.) Additionally, the assertion that the 2016 Guidance “properly states the components of a valid witness address under Section 6.87(2)” constitutes a legal conclusion, not a proposed finding of fact. Otherwise, the League affirmatively states that the 2016 Guidance speaks for itself and disputes the Legislature’s proposed finding to the extent it is inconsistent with the Guidance.

22. WEC based its 2016 Guidance on a recommendation from WEC’s staff, who used “a common sense approach” that adhered to “the Legislative directive and purpose” to determine that a witness address should “contain at a minimum, a street number, street name and name of municipality” to be “sufficient” under Section 6.87. Dkt.22 at 41–42 (Affidavit of Kevin M. LeRoy (“LeRoy Aff.”), Ex.2 at 4–5). This approach reflected a balance between “the strictest approach,” which would require witnesses to supply “street number, street name, apartment or unit number, municipality, state, and zip code,” and requiring “just a street number and street name,” which would not be sufficient information for clerks to contact a voter in many cases. *Id.* at 41 (LeRoy Aff., Ex.2 at 4).

Response: Disputed in part. The 2016 Guidance does not establish what, if anything, WEC relied upon in establishing this definition of “address.” Additionally, the assertion that the 2016 Guidance “adhered to ‘the Legislative directive and purpose’ to determine that a witness address should ‘contain at a minimum, a street number, street name and name of municipality’ to be ‘sufficient’ under Section 6.87” constitutes a legal conclusion, not a proposed finding of fact. Further, the assertion that “requiring ‘just a street number and street name’ . . . would not be sufficient

information for clerks to contact a voter in many cases” is unsubstantiated and neither supported by the record evidence in this case nor established by WEC’s Staff Memo prepared for the Wisconsin Elections Commission’s October 14, 2016 Meeting, which the Legislature cites. Otherwise, the League affirmatively states that the memorandum referenced in this proposed finding of undisputed fact speaks for itself and disputes the Legislature’s proposed finding to the extent it is inconsistent with the Guidance.

23. While the Waukesha County Circuit Court enjoined the portion of the 2016 Guidance in *White v. WEC*, 2022CV001008, that court did not invalidate the 2016 Guidance’s interpretation of “address.” *Id.* at 107 (LeRoy Aff., Ex.10 at 3). Rather, the court struck down only the portion of the guidance that purported to require clerks to unilaterally alter witness certificates. *Id.* at 106–07 (LeRoy Aff., Ex.10 at 2–3).

Response: The League affirmatively states that the order cited in this proposed undisputed finding of fact speaks for itself and disputes the Legislature’s proposed finding to the extent it is inconsistent with that order.

24. WEC then reaffirmed this interpretation of “address” in additional guidance issued to all clerks on September 14, 2022, again specifically emphasizing that the *White* court “had not overturned the existing WEC definition of address contained in the now invalidated memoranda—namely, street number, street name, and name of municipality.” *Id.* at 88–89 (LeRoy Aff., Ex.8 at 1–2).

Response: The League affirmatively states that the communication cited in this proposed undisputed finding of fact speaks for itself and disputes the Legislature’s proposed finding to the extent it is inconsistent with that guidance.

25. Accordingly, the current Uniform Instructions for Wisconsin Absentee Voters specify these three address components—“street number, street name, city”—that the witness must provide. Third LeRoy Aff., Ex.2 at 1 (“Uniform Instructions”); *see* Wis. Stat. § 6.869. The Uniform Instructions emphasize that providing these

witness address components is critical to ensuring that the absentee ballot will be counted:

To make sure your ballot is counted, double check the following before you return it:

...

- **Witness Signature and Address:** your witness must sign and provide their full address (street number, street name, city) in the Certification of Witness section.

...

If any of the required information above is missing, your ballot **will not be counted**.

Third LeRoy Aff., Ex.2 at 1 (emphasis in original). Although the witness address field on absentee ballots previously included boxes for both state and zip code information, Third LeRoy Aff., Ex.3 at 1, WEC recently updated the absentee-ballot form to clarify that witnesses need only provide their “Number, Street Name, [and] City” in the witness certificate, Third LeRoy Aff., Ex.6 at 1. Moreover, the Uniform Instructions make clear that an absentee ballot “will not be counted” only if the witness does not provide the minimum required address information—namely, the witness’s “street number, street name, [and] city.” Third LeRoy Aff., Ex.2 at 1.

Response: Disputed in part. The currently operative Uniform Instructions for Wisconsin Absentee Voters lacks any statement that “an absentee ballot ‘will not be counted’ *only* if the witness does not provide the minimum required address information.” (Emphasis added). Instead, it states that an absentee ballot lacking those three address components (street number, street name, city) “will not be counted.” Otherwise, the League affirmatively states that the guidance documents and forms cited in this proposed undisputed finding of fact speak for themselves and disputes the Legislature’s proposed finding to the extent it is inconsistent with those guidance documents and forms.

DATED: October 5, 2023

Respectfully submitted,

By: Electronically signed by Daniel S. Lenz

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