

Defendants Wisconsin Elections Commission (“WEC”) and the individual WEC Commissioners¹ (collectively, “Defendants”) filed their reply in support of their Motion for Summary Judgment. By leave of this Court, Plaintiff League of Women Voters of Wisconsin (“the League” or “Plaintiff”) submits this sur-reply in response to Defendants’ argument regarding Count Two’s application to a fourth category of absentee ballots that must be rejected under Defendants’ interpretation of Wis. Stat. § 6.87(d)—specifically, those containing the witness’s street number, street name, and zip code, but lacking the witness’s municipality.

I. Defendants’ state-law statutory interpretation is no defense to the League’s Materiality Provision claim.

Defendants’ argument in response to this fourth category is almost entirely premised on their interpretation of a Wisconsin statute. They do not engage with 52 U.S.C. § 10101(a)(2)(B) (“the Materiality Provision”) or any of the cases construing it; nor do they dispute the League’s reading of the Materiality Provision or the dictionary definitions of “material.” See *Minett v. Overwachter*, 433 F. Supp. 3d 1084, 1091 (W.D. Wis. 2020) (“[B]ecause [nonmovant] does not respond to [movant]’s arguments . . . I will assume that he has abandoned that aspect of his claim.”). Instead, Defendants simply contend that the League construes the *Wisconsin* statute incorrectly. This is not a defense to the League’s federal claim.

¹ On October 18, 2023, Carrie Riepl succeeded Joseph J. Czarnecki as a member of the WEC and is automatically substituted as a party. Wis. Stat. § 803.10(a).

State statutory construction has limited relevance to the adjudication of the League’s federal Materiality Provision claim.² Crucially, Defendants do not argue that Wis. Stat. § 6.87(d) can be construed to *avoid* the alleged federal-law violation. *See, e.g., Three Affiliated Tribes of Fort Berthold Rsrv. v. Wold Eng’g, P.C.*, 467 U.S. 138, 152 (1984) (“[A] state court may construe state law narrowly to avoid a perceived conflict with federal statutory or constitutional requirements.”); *Servotronics, Inc. v. Rolls-Royce PLC*, 975 F.3d 689, 695 (7th Cir. 2020) (“When a statute is susceptible of two interpretations, one that creates a conflict with another statute and another that avoids it, we have an obligation to avoid the conflict if such a construction is possible and reasonable.” (cleaned up)). Instead, Defendants’ interpretation of Wis. Stat. § 6.87(d) runs directly into the League’s claimed violation of the Materiality Provision as to this fourth category of absentee ballots. Defendants contend that “address” in Wis. Stat. § 6.87(d) requires all three components—street number, street name, and municipality—and thus requires the rejection of an absentee ballot that includes only street number, street name, and zip code. Instead of avoiding the question of whether Wis. Stat. § 6.87(d) conflicts with and is preempted by 52 U.S.C. § 10101(a)(2)(B) with as applied to this fourth category of absentee ballots, Defendants’ statutory construction compels this Court to resolve it.

And yet, Defendants do not engage with the merits of the federal-law issue raised by the League’s claim under the Materiality Provision—not its plain text, its legislative history, or the cases construing it. Instead, they posit that a “functional

² The Court previously dismissed Count One, the League’s state-law claim seeking a construction of the term “missing” in Wis. Stat. § 6.87(d).

definition” is *per se* inappropriate and argue against such a construction of Wis. Stat. § 6.87(d) based on *Wisconsin* case law. (Dkt. 152 at 9.)

This argument fails for two reasons. *First*, Wisconsin law on statutory interpretation is no defense to this federal claim: Defendants’ proffered construction of Wis. Stat. § 6.87(d) does not moot the League’s Civil Rights Act claim, but rather creates the legal issue that, in part, this case seeks to resolve—whether four specific categories of absentee ballots with witness addresses that do not meet the Defendants’ strict definition of “address” must nevertheless be counted pursuant to federal law.

Second, during this litigation, Defendants endorsed a functional interpretation of Wis. Stat. § 6.87(d). In Defendants’ Response to Plaintiff’s Request for Admission Number 1, they wrote:

[I]t follows from WEC’s definition of a complete address that 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. It follows logically that a certificate is missing the address of a witness, *if it is not possible to determine those three address components from the information contained on the face of the absentee ballot certificate*.

(Dkt. 116 at 71, Lenz Aff. July 7, 2023, Ex. 25 (emphases added)) Accordingly, even taking Defendants’ (irrelevant) state-statutory-construction argument at face value, they have already conceded that Wis. Stat. § 6.87(d) should be interpreted in a functional manner. Instead of rebutting the League’s argument that there is no material, functional, or outcome-determinative difference between this fourth

category of absentee ballots (which bear street numbers, street names, and zip codes) and those ballots that bear each of the three components in the WEC’s “address” definition, Defendants now seek to retract their own functional construction of the state statute at issue.

II. Absentee ballots in the League’s fourth category cannot be rejected.

Defendants have implicitly conceded that ballots in the fourth category are “functionally equivalent” to absentee ballots that satisfy WEC’s three-component definition of “address” in two ways. (Dkt. 152 at 9.)

First, they make no argument that the omission of a municipality is material to determining a voter’s qualifications in this fourth category’s circumstances. (Dkt. 152 at 8–11) Such an argument would fail. In combination with witnesses’ street numbers and street names, zip codes enable election officials or law enforcement to discern the municipality omitted from the absentee ballot certificate envelope. Election officials also have the voter’s full name and full address, including their municipality, and the witness’s name.³ Wis. Stat §§ 6.27, 6.30(5), 6.33(1), 6.34. Accordingly, Defendants’ functional definition of Wis. Stat. § 6.87(d) only demonstrates that the omission of the municipality’s name under these circumstances *is not material* to determining a voter’s qualifications. 52 U.S.C. § 10101(a)(2)(B).

³ See EL-122, Standard Absentee Ballot Certificate (Rev. 2023-08), <https://lawforwardmadison.sharepoint.com/:x:/r/sites/LawForwardInc/Shared%20Documents/Clark%20et%20al%20v.%20WEC%20et%20al/Pleadings%20-%20Drafts/2023.10.23%20notes%20on%20Caperton%20citations%20since%202019.xlsx?d=wc3d18fefb18f4dbf85096ca08bdd349a&csf=1&web=1&e=odL3uW>.

Second, Defendants concede that municipal clerks will be able to use the zip code to ascertain the witness's municipality. This concession is implicit in their argument that municipal clerks' offices will face an undue burden by doing "a case-by-case assessment" of absentee ballot certificate envelopes. (Dkt. 152 at 11.) Furthermore, the administrative burden is not a consideration in claims under the Materiality Provision. As the U.S. Department of Justice noted in its Statement of Interest in this case, the Materiality Provision's

unconditional terms admit of no balancing tests or trade-offs. It safeguards the right to vote against rejections of papers or records based on errors that are not material to determining voter qualifications, regardless of any other purported rationale for eliciting the information at issue.

(Dkt. 53 at 10-11.) In short, an omitted municipality on this type of absentee ballot certification is the precise type of immaterial omission that the Materiality Provision seeks to guard against.

Further, it bears reiterating that the heart of this dispute concerns the *witness's* address, not the voter's address. Almost all challenges brought under the Materiality Provision relate to purported errors or omissions in the *voter's* information on a record or paper.⁴ That is not the case here, where the witness's

⁴ *League of Women Voters of Arkansas v. Thurston*, No. 5:20-CV-05174, 2023 WL 6446015, at *17 (W.D. Ark. Sept. 29, 2023) (concerning requirement that voters record name, address, and date of birth multiple times during voting process); *Pennsylvania State Conf. of NAACP v. Schmidt*, No. 1:22-CV-339, 2023 WL 3902954, at *1, 7 (W.D. Pa. June 8, 2023) (concerning requirement that voter record date on absentee ballot's return envelope); *La Union del Pueblo Entero v. Abbott*, 604 F. Supp. 3d 512, 540-41 (W.D. Tex. 2022) (concerning requirement that voter "provide a driver's license, election identification certificate, or personal identification card number on both their application to vote by mail and their mail ballot carrier envelope" or alternative such as last four of Social Security Number); *Chapman v. Berks Cnty. Bd. of Elections*, No. 355 M.D. 2022, 2022 WL 4100998, at *30 (Pa. Commw. Ct. Aug. 19, 2022) (concerning requirement that voter write date on declaration for

address information has an attenuated relationship to the voter's qualifications. This weighs in favor of finding that the omission of a witness's municipality is not material to determining a voter's qualifications when the witness did provide their zip code. As a practical, functional matter, should the need arise, election officials or law enforcement can track down the witness based on their street number, street name, and zip code.

CONCLUSION

For the foregoing reasons, Plaintiff League of Women Voters of Wisconsin respectfully requests that this Court grant summary judgment in its favor on Count Two of its Second Amended Complaint, as to the fourth category of absentee ballots,

return envelope of mail-ballot); *McCormick for U.S. Senate v. Chapman*, No. 286 M.D. 2022, 2022 WL 2900112, at *1, 10 (Pa. Commw. Ct. June 2, 2022) (concerning failure to handwrite date on mailing envelope of absentee ballot); *Vote.Org v. Callanen*, 39 F.4th 297, 302 (5th Cir. 2022) (concerning requirement for voter's wet signature); *Democratic Party of Virginia v. Brink*, 599 F. Supp. 3d 346, 356 (E.D. Va. 2022) (concerning requirement for voter to record full social security number in order to register to vote); *Sixth Dist. of Afr. Methodist Episcopal Church v. Kemp*, 574 F. Supp. 3d 1260, 1281-82 (N.D. Ga. 2021) (concerning requirement for voter to provide date of birth on absentee ballot applications and returned absentee ballots); *Org. for Black Struggle v. Ashcroft*, 493 F. Supp. 3d 790, 803 (W.D. Mo. 2020) (concerning requirements that mail-in voters provide name, address of registration, mailing address, reason for requesting, and signature); *Common Cause v. Thomsen*, 574 F. Supp. 3d 634, 636 (W.D. Wis. 2021) (concerning requirement that voter's identification contain signature, issuance date, and expiration date); *Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1304 (N.D. Ga. 2018) (concerning requirement that voter provide correct birth year on absentee ballot certificate envelope); *Fla. State Conf. of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1156-57 (11th Cir. 2008) (concerning requirement voter registration applicant record driver's license or Social Security number on application); *Schwier v. Cox*, 412 F. Supp. 2d 1266, 1276 (N.D. Ga. 2005), *aff'd*, 439 F.3d 1285, 1286 (11th Cir. 2006) (concerning requirement to record social security numbers on voter registration forms); *Gonzalez v. State of Arizona*, No. CV 06-1268-PHX, 2006 WL 3627297, at *1 (D. Ariz. Sept. 11, 2006) (concerning requirements that voter provide proof of citizenship and photo identification); *Diaz v. Cobb*, 435 F. Supp. 2d 1206, 1211-12 (S.D. Fla. 2006) (concerning voter registration applicant's failure to check boxes affirming no disqualification due to felony conviction or mental incapacity); *Common Cause/Georgia League of Women Voters of Georgia, Inc. v. Billups*, 439 F. Supp. 2d 1294, 1355 (N.D. Ga. 2006) (concerning voter identification requirements for in-person and absentee voters); *Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 839 (S.D. Ind. 2006) (concerning photo ID requirement for in-person voters); *Washington Ass'n of Churches v. Reed*, 492 F. Supp. 2d 1264, 1266, 1270 (W.D. Wash. 2006) (requiring matching to either Social Security Administration database or driver's license database before allowing person to register to vote).

and deny Defendants' and Intervenor-Defendants' cross-motions for summary judgment.

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Respectfully submitted,

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