StaffordRosenbaum LLP
Attorneys

Jeffrey A. Mandell

222 West Washington Avenue, Suite 900
P.O. Box 1784
Madison, WI 53701-1784
JMandell@staffordlaw.com
608.210.6303

February 1, 2024

The Honorable Ryan D. Nilsestuen
Dane County Circuit Court
Branch 10
215 S Hamilton St, Room 5015
Madison, WI 53703-3289

Re: *League of Women Voters of Wisconsin v. Wisconsin Elections Commission*
Case No. 2022CV2472

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Dear Judge Nilsestuen:

Please accept this letter brief on behalf of plaintiff League of Women Voters of Wisconsin ("LWVWI") in opposition to the intervenor-defendant Wisconsin Legislature's motion to stay the Court's permanent injunction pending appeal.

1. **The Court should continue distinguishing between *LWVWI v. WEC* and *Rise, Inc. v. WEC* for purposes of stay proceedings.**

At the outset, we want to emphasize the distinction between the *LWVWI* case and the *Rise, Inc.* case. As you know, the cases were filed separately, raise distinct claims and legal theories, were resolved in different decisions based on different rationales under federal law and state law, respectively, and resulted in separate final orders. Though the Legislature asks this Court to stay both orders pending appeal, it is essential to keep the two orders distinct and consider the question of staying each order on its own merits.

2. **The Legislature applies the incorrect legal standard in its memorandum in support of a stay. Whether the Court should stay the final order and judgment of LWVWI's federal claim is a question of federal law.**

One key reason for considering each order in isolation is that the legal standards governing the stay analyses for the two orders are meaningfully distinct. As the Court is aware, LWVWI has argued that federal standards for permanent injunctions apply in its case because the relief afforded vindicates the protections of the Materiality Provision of the federal Civil Rights Act, 52 U.S.C. § 10101. (*See* Dkt. 114 at 37; *see also* Hr'g, Jan. 30,

Madison Office
222 West Washington Avenue
P.O. Box 1784
Madison, Wisconsin
53701-1784
608.256.0226
888.655.4752
Fax 608.259.2600
www.staffordlaw.com

Milwaukee Office
1200 North Mayfair Road
Suite 430
Milwaukee, Wisconsin
53226-3282
414.982.2850
888.655.4752
Fax 414.982.2889
www.staffordlaw.com

2024.) Neither the WEC Defendants nor the Legislature contested this (*see generally* Dkts. 137, 138), and the Court applied the federal standards in explaining its decision to enter LWVWI's requested declaratory judgment and permanent injunction. As a result, WEC and the Legislature have both forfeited any arguments against applying the federal standard. *See, e.g.*, *Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (failure to refute an argument constitutes a concession).

The Legislature's reliance on *Waity v. LeMahieu*, 2022 WI 6, ¶49, 400 Wis. 2d 356, 969 N.W.2d 263, upon which it bases its entire motion, is therefore misplaced. The federal standards apply equally to the merits and to this Court's consideration of the Legislature's motion for stay. The federal injunction standards apply, instead of Wisconsin state-law standards, "[b]ecause the equitable factors are part of the substantive inquiry into whether relief should be granted." (Dkt. 114 at 37) "[T]he 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, ¶30, 286 Wis. 2d 380, 706 N.W.2d 299 (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 state court." *Id*. (emphasis added). Accordingly, where the rule in question is substantive, not procedural, the federal rule trumps the state law analogue.

Just as the equitable factors for issuing an injunction are substantive, not procedural, the factors governing the issuance of a stay are substantive too. The Legislature's motion to stay the permanent injunction in *LWVWI* implicates LWVWI's substantial rights. If a stay is in place, LWVWI and its members will be unable to vindicate their rights under the Materiality Provision during the February 20 election and will consequently risk disenfranchisement. Therefore, it is federal law on stays pending appeal, rather than Wisconsin law on the same issue, that applies to the final order in the *LWVWI* case. *See Felder*, 487 U.S. at 147 (noting that although "States retain the authority to prescribe the rules and procedures governing suits in their courts . . . , [t]hat authority does not extend so far as to permit States to place conditions on the vindication of a federal right").

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3. The Legislature cannot meet the federal-law test that governs its motion.

A court considering a stay pending appeal of an order implicating federal rights considers four factors:

> (1) whether the stay applicant has made a strong showing that [it] is likely to succeed on the merits;
>
> (2) whether the applicant will be irreparably injured absent a stay;

(3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and

(4) where the public interest lies.

Nken v. Holder, 556 U.S. 418, 426 (2009). This federal test is similar but not identical to the one under state law. *Compare State v. Gudenschawager*, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995) (per curiam).[1] But, significantly, the glosses on the state test upon which the Legislature relies so heavily do not apply when this Court applies the federal test.

a. The Legislature cannot establish a likelihood of success on the merits.

As a threshold matter, while the first stay factor under the state-law test has been understood to be satisfied where the appeal will entail *de novo* review, *see Waity*, 2022 WI 6, ¶53, such an approach is directly contrary to federal law. As the U.S. Supreme Court has explained, "a reviewing court may not resolve a conflict between considered review and effective relief by reflexively holding a final order in abeyance pending review." *Nken*, 556 U.S. at 427. To the contrary, litigants and the public alike, "while entitled to both careful review and a meaningful decision, are also generally entitled to the prompt execution of orders." *Id.* The Legislature insists that because the appellate courts will review these questions *de novo*, this Court must assume that the Legislature has a likelihood of success on appeal. (*See* Dkt. 169 at 3.) That argument is incompatible with the federal standard.

For much the same reason, the Legislature's argument that this Court's decision represents an "expansive interpretation" of the Materiality Provision is plainly wrong. While there has been no prior Materiality Provision challenge precisely focused on a witness-address requirement for absentee voting, that fact only underscores how unlikely the Legislature is to succeed on the merits. As noted in *LWVWI*'s initial summary judgment brief, "[a]lmost all challenges brought under the Materiality Provision relate to purported errors or omissions in the *voter's* information on a record or paper." (Dkt. 154 (emphasis original)) The fact that this challenge is related to the information of a *witness* makes it even more likely that the Court's conclusion that these four discrete categories of errors or omissions

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[1] Under state law, a stay is appropriate "where the moving party: (1) makes a strong showing that it is likely to succeed on the merits of the appeal; (2) shows that, unless a stay is granted, it will suffer irreparable injury; (3) shows that no substantial harm will come to other interested parties; and(4) shows that a stay will do no harm to the public interest." *Gudenschawager*, 191 Wis. 2d at 440. "These factors are not prerequisites but rather are interrelated considerations that must be balanced together." *Id.* The *Waity* decision that the Legislature cites adopts these same interrelated factors. 2022 WI 6, ¶49. Should this Court disagree with LWVWI and apply the state-law standard for stays pending appeal, it should nonetheless deny the stay because the Legislature cannot meet any of the relevant criteria.

in the *witness's* address are immaterial to determining the *voter's* qualifications will be upheld on appeal.

Both of the Legislature's first two merits arguments essentially reduce to the contention that 52 U.S.C. § 10101(a)(2)(B) is categorically inapplicable to absentee voting, which this Court and many others have rightly rejected as contrary to the Materiality Provision's plain text. (Dkt. 169 at 4-7) Next, the Legislature asserts that the witness-address requirement is *on its face* material to determining voter qualifications (*id*. at 4-5, 8), but LWVWI has not argued otherwise in this case. Once again, the Legislature ignores the as-applied nature of LWVWI's suit, notwithstanding this Court's clear finding that this is not a facial challenge. (*Id*. at 8; Dkt. 157 at 8 ("The Intervenor's parade of horribles treats the Plaintiff's claim as a facial challenge to the Witness Address Requirement, which is not before the Court.")) The Legislature has failed to raise, and thus has waived, any argument that the four specific categories of errors or omissions actually at issue in *LWVWI v. WEC* are, in fact, material.

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Finally, contrary to the Legislature's assertions, the Court's decision is neither "expansive" nor revolutionary. (Dkt. 169 at 5, 9) This Court's decision that rejecting absentee ballots bearing certain, limited errors or omissions in the witness-address field violates the Materiality Provision is entirely consistent with prior court decisions. *See, e.g.*, *La Union del Pueblo Entero v. Abbott*, No. 5:21-CV-0844-XR, 2023 WL 8263348, at *14 (W.D. Tex. Nov. 29, 2023) (voter's ability to provide an ID number not material to their eligibility to vote) [attached as Exhibit A]; *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"); *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). The Legislature appears to acknowledge as much, listing various cases applying the Materiality Provision to absentee voting requirements in a footnote. (Leg. Br. at 7-8 n.2) Moreover, the United States Department of Justice filed a Statement of Interest, emphasizing the importance and general applicability of the Materiality Provision to absentee-voting procedures under state law. (Dkt. 56) Given the overwhelming weight of authority supporting this Court's ruling, there is no basis to think that the Legislature "is likely to succeed on the merits." *Nken*, 556 U.S. at 426.

b. The Legislature will suffer no injury absent a stay.

The second prong also strongly favors denying the stay request. Here, as above, the Legislature's heavy reliance on Wisconsin Supreme Court observations is inapposite. The Legislature quotes the proposition that "the harm that stems from refusing to stay an injunction against the enforcement of a law passed by the Legislature and signed by the Governor, regardless of the nature of the challenge to the law, is an irreparable harm of the first magnitude." (Dkt. 169 at 13 (quoting *SEIU, Local 1 v. Vos*, No. 2019AP 622, Order at *8 (Wis. June 11, 2019)) [attached as Exhibit B); *accord League of Women Voters v.*

Evers, No. 2019AP559, Order at *8 (Wis. Apr. 30, 2019) (same) [attached as Exhibit C]. But this theory does not hold when applying the federal stay factors. For one thing, it conflicts with federal law, which rejects the notion that a stay is *ever* "a matter of right, even if irreparable injury might otherwise result to the appellant." *Nken*, 556 U.S. at 427 (quoting *Virginian R. Co. v. United States,* 272 U.S. 658, 672 (1926)). For another, the Wisconsin Supreme Court's observation regarding Wisconsin law cannot govern challenges—like this one—that turn on a conflict *between* state and federal law. Giving dispositive weight to the purported harm to the Legislature would upend the Supremacy Clause of the U.S. Constitution and necessarily impose a parallel harm on Congress, which itself enacted the Materiality Provision in 1964 and has at least an equal interest in having its statute followed in this instance. (Dkt. 56)

Looking at the issue fresh, without the presumption applied by the Wisconsin Supreme Court, makes clear that the Legislature cannot show any irreparable injury absent a stay. Indeed, if this Court's injunction remains in effect, the only consequence is that, in the four limited circumstances it addresses, the Materiality Provision that has governed nationwide for nearly 60 years will apply to absentee ballots in Wisconsin. The witness-address requirement will continue to be enforced even if LWVWI's injunction is affirmed on appeal. The sole impact is that enforcement of the state law requirement has been harmonized with federal law. Further, the Legislature has never presented any argument or evidence addressing whether these four categories of errors or omissions are material or that enjoining any of these four categories would specifically cause harm. (*See generally* Dkts. 138, 153) The permanent injunction issued by this Court is limited in scope to four, narrowly tailored categories , each of which addresses a specific type of error or omission that has no effect on election officials' ability to identify and confirm the address of a witness and thus has no impact on the State's anti-fraud interests. (Dkt. 114 at 24-37) That is hardly an irreparable harm.

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The Legislature reframes any alleged harm as a harm to the "sovereign interest" of the state. That, again, fundamentally misses the point of the Materiality Provision and the U.S. Constitution's Supremacy Clause. The Materiality Provision sets limits on that precise type of voting requirement to ensure that no one is denied the right to vote for reasons wholly unrelated to determining their eligibility. 52 U.S.C. § 10101(e). And the Supremacy Clause ensures that the Materiality Provision's protections preempt contrary state law.[2] *See Carey v. Wis. Elections Comm'n*, 624 F. Supp. 3d 1020, 1032 (W.D. Wis. 2022) ("The effect of the Supremacy Clause is that state laws that are contrary to or interfere with federal law are preempted and therefore unenforceable."). The Legislature, however, would turn the

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[2] For the same reason, the Legislature's repeated argument that state law entirely determines what is "material" for purposes of the Provision must fail. (Dkt. 169 at 8) This logic would "erase the Materiality Provision from existence." *La Union del Pueblo Entero*, 2023 WL 8263348, *14 (internal citations omitted). The Court's decision on this matter is entirely consistent with other case law on the matter and, therefore, likely to be upheld on appeal. *See id.* (collecting cases).

Supremacy Clause on its head, and require this Court to elevate its purported interest in having the laws enforced in the way it sees fit over the protections Congress provided to voters nationwide.

The Legislature will suffer no injury from the permanent injunction in this case.

c. LWVWI, its members, and the public will all suffer an injury should this Court enter a stay.

By contrast, LWVWI and the voters on whose behalf it is litigating will be substantially injured if the order is stayed. The evidence in this case has shown that some Wisconsin voters have had their ballots discounted for reasons that are not material to their qualifications as voters. (Dkt. 114 at 9-12, 24-37) That is an irreparable injury suffered by *every one* of those voters.

Since LWVWI filed this case and sought preliminary injunctive relief, Wisconsin has held four statewide elections, all of which apparently involved election administrators applying Wisconsin law in ways that violate the Materiality Provision. The circuit court declined to adjudicate the Materiality Provision issue at the temporary injunction hearing before the November 2022 general election, and Wisconsin voters have been waiting for relief ever since. Wisconsin will hold four statewide elections this year, the first of which is in less than three weeks. Any reasonable balance of the harms to voters on the one hand and the Legislature on the other will strongly favor the voters. For these same reasons, the final prong—the public interest—also militates against staying this Court's injunction.

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The Legislature's claim that there will be massive voter and clerk confusion absent a stay is nonsensical. The Court's injunction is narrowly tailored to address WEC and election officials. Nothing about this injunctive relief would confuse absentee voters, who will continue to receive instructions from WEC pursuant to Wis. Stat. § 6.869, none of which was challenged or modified by the Court's decision or order. Voters will continue to receive the same instructions and the same absentee-ballot-certificate envelope. Far from creating confusion, the Court's order (and any subsequent guidance from WEC) can only help resolve the current confusion over what ballots must be rejected under state and federal law and thereby guarantee uniform treatment across the state. (*See* Dkt. 114 at 9-12; Dkt. 137 at 7)

Moreover, the Legislature's contention that this will disrupt "longstanding" WEC guidance (Dkt. 169 at 3, 15) misstates the facts. WEC's current guidance dates back only to 2022. WEC *had* longstanding guidance that generally resolved any Materiality Provision concerns, but the Commission was required to rescind that guidance following the circuit court's judgment in *White v. WEC*, which the Legislature sought. (Dkt. 137 at 6) The Legislature now seeks to weaponize the confusion that *it* caused in an effort to stay a decision which would provide clarification to the clerks and avoid unlawful

disenfranchisement. Similarly, the Legislature boldly points to this Court's contemporaneous order in *Rise, Inc.* as another reason why a stay might not be harmful (Dkt. 169 at 13), even as it actively seeks to stay that order as well, and even as it has already appealed both orders.[3]

4. The Court should deny the Legislature's request for an administrative stay.

Finally, the Court should deny the Legislature's alternative request for an administrative stay. The Legislature cites no authority in support of its request, but its argument is nonetheless misplaced for many of the same reasons described above. The Court's tailored injunction can only resolve, not exacerbate, the confusion and disenfranchisement the Legislature has caused. Ensuring that accurate information is timely disseminated to the clerks in advance of the upcoming election to avoid any violation of the Materiality Provision is crucial for protecting voters' rights.

* * *

In conclusion, the applicable test here is the one prescribed by federal law. And no prong of that test—much less the overall balance of them—favors issuance of a stay. Accordingly, this Court should deny the Legislature's motion for a stay pending appeal.

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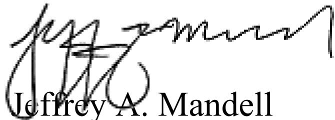
Respectfully submitted,

STAFFORD ROSENBAUM LLP



Jeffrey A. Mandell

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Enclosures

[3] That the Legislature raises a mirror-image argument in its brief in support of its motion to stay the permanent injunction in *Rise, Inc. v. WEC*, Case No. 2022CV2446, renders both versions a bit disingenuous.

EXHIBIT A

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2023 WL 8263348
Only the Westlaw citation is currently available.
United States District Court, W.D.
Texas, San Antonio Division.

LA UNIÓN DEL PUEBLO ENTERO, et al., Plaintiffs,
v.
Gregory W. ABBOTT, et al., Defendants.

5:21-CV-0844-XR [Consolidated Cases]
|
Signed November 29, 2023

Synopsis

Background: Voter-advocacy groups and the United States brought actions, which were then consolidated, against Texas Governor and other state and county officials, alleging that various provisions in a Texas law adding to state's mail-in voting process a requirement for the matching of identification (ID) numbers violated the United States Constitution and federal civil-rights statutes, including the Civil Rights Act of 1964's (CRA) so-called materiality provision, which bars a state from denying the right to vote based on an error or omission in voting-related documentation if the error is not material to determining whether the voter is qualified under state law to vote, and seeking declaratory and injunctive relief. Groups affiliated with the Republican Party were permitted by the United States Court of Appeals for the Fifth Circuit, 29 F.4th 299, to intervene as defendants. After the District Court, Xavier Rodriguez, J., 604 F. Supp. 3d 512, denied defendants' motion to dismiss the United States' claims and, 618 F. Supp. 3d 388, denied defendants' motion to dismiss voter-advocacy groups' claims, plaintiffs moved for summary judgment on their claims under the CRA's materiality provision, and Republican Party intervenor-defendants cross-moved for summary judgment on those claims.

Holdings: The District Court, Xavier Rodriguez, J., held that:

[1] at least one of voter-advocacy groups had Article III standing;

[2] voter-advocacy groups were procedurally barred from establishing that certain Texas election laws that were not challenged in groups' complaint were invalid under the CRA's materiality provision;

[3] Texas election laws that merely addressed procedures for collecting, tracking, and correcting identification numbers, but did not require rejecting ballots or ballot applications, did not violate CRA's materiality provision;

[4] Texas election laws requiring voters applying to vote by, or voting by, mail to supply an ID number matching the number in their voter-registration record violated the CRA's materiality provision;

[5] availability under Texas law, to a voter whose mail-in ballot or application for such a ballot was rejected, of in-person voting or procedures to cure the rejection did not negate Texas election laws' violation of the CRA's materiality provision;

[6] plaintiffs were entitled to a permanent injunction barring enforcement of Texas election laws requiring voters applying to vote by, or voting by, mail to supply an ID number matching the number in their voter-registration record; and

[7] the *Purcell* principle, which provides that federal courts generally should not alter state election laws in the period close to an election, did not weigh against granting a permanent injunction.

United States' motion granted; voter-advocacy groups' motion granted in part and denied in part.

West Headnotes (56)

[1] **Election Law** Voting procedures

Unlike many other statutes creating causes of action in the voting-rights context, the Civil Rights Act of 1964's (CRA) so-called materiality provision, which bars a state from denying the right to vote based on an error or omission in voting-related documentation if the error is not material to determining whether the voter is qualified under state law to vote, is not a burden-interest balancing statute; violations of the materiality provision are prohibited no matter their policy aim. 52 U.S.C.A. § 10101(a)(2)(B).

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[2] **Election Law** 🔑 Voting procedures

A state's interest in deterring and preventing voter fraud must yield to a qualified voter's right, under the Civil Rights Act of 1964's (CRA) so-called materiality provision, which bars a state from denying the right to vote based on an error or omission in voting-related documentation if the error is not material to determining whether the voter is qualified under state law to vote, to have their ballot counted despite immaterial paperwork errors. 52 U.S.C.A. § 10101(a)(2)(B).

[3] **Election Law** 🔑 Power to Restrict or Extend Suffrage

It is a basic truth that even one disenfranchised voter is too many.

[4] **Civil Rights** 🔑 Rights Protected

A plaintiff proceeding under § 1983 to remedy an alleged violation of federal law need only show that the federal law includes a private right; after that, § 1983 presumptively supplies a remedy. 42 U.S.C.A. § 1983.

[5] **Civil Rights** 🔑 Availability, Adequacy, Exclusivity, and Exhaustion of Other Remedies

Section 1983 can play its textually prescribed role as a vehicle for enforcing federal rights, even alongside a detailed enforcement regime that also protects those interests, so long as § 1983 enforcement is not incompatible with Congress's handiwork. 42 U.S.C.A. § 1983.

[6] **Federal Civil Procedure** 🔑 In general; injury or interest

Federal Civil Procedure 🔑 Causation; redressability

A plaintiff invoking a federal court's jurisdiction must establish Article III standing by satisfying three irreducible requirements: the plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendants, and (3) that is likely to be redressed by a favorable judicial decision. U.S. Const. art. 3, § 2, cl. 1.

[7] **Federal Civil Procedure** 🔑 In general; injury or interest

The elements of Article III standing are not mere pleading requirements but rather an indispensable part of the plaintiff's case; thus, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation. U.S. Const. art. 3, § 2, cl. 1.

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[8] **Summary Judgment** 🔑 Favoring nonmovant; disfavoring movant

Summary Judgment 🔑 Burden of Proof

To establish Article III standing on summary judgment, a plaintiff must set forth by affidavit or other evidence specific facts, which for purposes of the summary judgment motion will be taken to be true, showing an injury resulting from the defendant's conduct. U.S. Const. art. 3, § 2, cl. 1; Fed. R. Civ. P. 56(e).

[9] **Injunction** 🔑 Persons entitled to apply; standing

Where multiple plaintiffs seek injunctive relief, only one needs to establish Article III standing for each claim asserted. U.S. Const. art. 3, § 2, cl. 1.

[10] **Declaratory Judgment** 🔑 Proper Parties

Plaintiffs seeking injunctive and declaratory relief can satisfy the redressability requirement for Article III standing only by demonstrating continuing injury or threatened future injury for the self-evident reason that injunctive and declaratory relief cannot conceivably remedy any past wrong. U.S. Const. art. 3, § 2, cl. 1.

[11] **Federal Civil Procedure** In general; injury or interest

For a threatened future injury to constitute an injury in fact, as required for Article III standing, it must be (1) potentially suffered by the plaintiff, not someone else, (2) concrete and particularized, not abstract, and (3) actual or imminent, not conjectural or hypothetical. U.S. Const. art. 3, § 2, cl. 1.

[12] **Federal Civil Procedure** In general; injury or interest

For a threatened future injury to satisfy the imminence requirement for Article III standing, there must be at least a substantial risk that the injury will occur. U.S. Const. art. 3, § 2, cl. 1.

[13] **Federal Civil Procedure** In general; injury or interest

The injury alleged as an Article III injury-in-fact need not be substantial; it need not measure more than an identifiable trifle. U.S. Const. art. 3, § 2, cl. 1.

[14] **Federal Civil Procedure** In general; injury or interest

The injury-in-fact requirement for Article III standing is qualitative, not quantitative, in nature. U.S. Const. art. 3, § 2, cl. 1.

[15] **Associations** Suits on organization's own behalf; organizational standing in general

Associations Suits on Behalf of Members; Associational or Representative Standing

Juridical entities may establish Article III standing under an associational or organizational theory of standing. U.S. Const. art. 3, § 2, cl. 1.

[16] **Associations** Suits on Behalf of Members; Associational or Representative Standing

Associational standing is a three-part test: (1) the association's members would independently meet the Article III standing requirements; (2) the interests the association seeks to protect are germane to the purpose of the organization; and (3) neither the claim asserted, nor the relief requested, requires participation of individual members. U.S. Const. art. 3, § 2, cl. 1.

[17] **Associations** Suits on organization's own behalf; organizational standing in general

Organizational standing under Article III does not depend on the standing of the organization's members; the organization can establish standing in its own name if it meets the same standing test that applies to individuals. U.S. Const. art. 3, § 2, cl. 1.

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[18] **Associations** Injury or interest in general

An organization, like any other party, can satisfy the injury-in-fact requirement for Article III standing by demonstrating financial harm. U.S. Const. art. 3, § 2, cl. 1.

[19] **Associations** Injury or interest in general

An organization can establish a likely future injury, as required for organizational standing under Article III, if it intends to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute. U.S. Const. art. 3, § 2, cl. 1.

[20] **Associations** Injury or interest in general

An organization can demonstrate the requisite injury for organizational standing under Article III with evidence that its ability to pursue its mission is perceptibly impaired because it has diverted significant resources to counteract the defendant's conduct. U.S. Const. art. 3, § 2, cl. 1.

[21] **Associations** Injury or interest in general

An organization does not automatically suffer a cognizable injury in fact, as required for organizational standing under Article III, by diverting resources in response to a defendant's conduct; rather, the Article III injury comes when that diversion of resources concretely and perceptibly impairs the organization's ability to carry out its purpose. U.S. Const. art. 3, § 2, cl. 1.

[22] **Associations** Injury or interest in general

It is the perceptible impairment to an organization's ability to carry out its mission caused by a defendant's conduct, not the drain on the organization's resources caused by that conduct, that is the concrete and demonstrable injury for organizational standing under Article III. U.S. Const. art. 3, § 2, cl. 1.

[23] **Associations** Elections and voting rights

Declaratory Judgment Subjects of relief in general

At least one voter-advocacy group among groups that brought action challenging, as violating the Civil Rights Act of 1964 (CRA), Texas law adding to state's mail-in voting process a requirement for the matching of identification numbers had associational standing under Article III to seek declaratory and injunctive relief, where that group's individual members would have independent standing to challenge the number-matching provisions under CRA section barring a state from denying the right to vote based on an error or omission in voting-related documentation if the error is not material to determining whether the voter is qualified under state law to vote, the interests that the group sought to protect were germane to its mission, and suit did not require participation of group's members. U.S. Const. art. 3, § 2, cl. 1; 52 U.S.C.A. § 10101(a)(2)(B).

[24] **Associations** Indicia of membership; organizations without members

For purposes of organizational standing under Article III, when an organization has identified members and represents them in good faith, further scrutiny into how the organization operates is not required. U.S. Const. art. 3, § 2, cl. 1.

[25] **Associations** Participation of members; necessity of individualized proof

The prong of the test for associational standing under Article III that asks whether the claim asserted or the relief requested requires participation of individual members focuses on matters of administrative convenience and efficiency and is solely prudential. U.S. Const. art. 3, § 2, cl. 1.

[26] **Election Law** Judicial Review or Intervention

Voter-advocacy groups failed in their operative complaint to raise any challenges to certain sections of Texas law adding to state's mail-in voting process a requirement for the matching of identification numbers, and groups were thus procedurally barred from establishing that those sections were invalid for allegedly violating section of the Civil Rights Act of 1964 (CRA), its so-called materiality provision, barring a state from denying the right to vote based on an error or omission in voting-related documentation if the error is not material to determining whether the voter is qualified under state law to vote. 52 U.S.C.A. § 10101(a)(2)(B); Tex. Elec. Code Ann. §§ 86.002(g), (h), (i), 87.041(b), (d-1), (e), 87.0411.

[27] **Election Law** Identification of voters

Certain provisions in Texas law adding to state's mail-in voting process requirements for the matching of identification numbers did not violate section of the Civil Rights Act of 1964 (CRA), its so-called materiality provision, barring a state from denying the right to vote based on an error or omission in voting-related documentation if the error is not material to determining whether the voter is qualified under state law to vote, because the provisions at issue

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did not require the rejection, on any basis, of mail-in ballots or of applications for mail-in ballots, but instead merely addressed procedures for collecting, tracking, and correcting the relevant identification numbers. 52 U.S.C.A. § 10101(a)(2)(B); Tex. Elec. Code Ann. §§ 84.002(a)(1-a), 84.011(a), (a)(3-a), 86.002(g), 86.015(c)(4), 87.0411, 87.0271.

[28] **Election Law** Identification of voters

Identification (ID) number associated with a voter's registration record was not material to voter qualifications for purposes of the Civil Rights Act of 1964's (CRA) so-called materiality provision, which bars a state from denying the right to vote based on an error or omission in voting-related documentation if the error is not material to determining whether the voter is qualified under state law to vote, and Texas law requiring voters applying to vote by, or voting by, mail to supply an ID number matching that in their voter-registration record thus violated the CRA's materiality provision, even though federal law required state to provide voters with unique identifiers, where a voter's ID number did not offer any information about substantive eligibility to vote under state law. 52 U.S.C.A. §§ 10101(a)(2)(B), 20901 et seq.

[29] **Election Law** Voting procedures

To determine whether an error or omission on a "record or paper relating to any application, registration, or other act requisite to voting" is material to determining whether a voter is qualified under state law to vote in an election, as the error or omission must be for it to be an acceptable basis, under the Civil Rights Act of 1964, for denying the voter the right to vote, the information required must be compared to state-law qualifications to vote. 52 U.S.C.A. § 10101(a)(2)(B).

[30] **Election Law** Voting procedures

State-law "qualifications" to vote, for purposes of section of the Civil Rights Act of 1964 barring a state from denying the right to vote based on an error or omission in voting-related documentation if the error is not material to determining whether the voter is qualified under state law to vote, are substantive and are distinct from rules governing the conduct of elections, including the manner of determining qualifications. 52 U.S.C.A. § 10101(a)(2)(B).

[31] **Election Law** Identification of voters

Duplicative requirement that a voter who successfully obtained a mail ballot by providing, with their ballot application, an identification (ID) number matching the number in their voter-registration record must, to have the mail-in ballot counted, again supply a matching ID number on the ballot's carrier envelope violated the Civil Rights Act of 1964's (CRA) so-called materiality provision, which bars a state from denying the right to vote based on an error or omission in voting-related documentation if the error is not material to determining whether the voter is qualified under state law to vote, even if requiring an ID number on a ballot application were permissible, since voter's possession of a ballot showed that the voter had already been identified and found qualified to vote. 52 U.S.C.A. § 10101(a)(2)(B).

[32] **Election Law** Identification of voters

Section of the Civil Rights Act of 1964 barring a state from denying the right to vote based on an error or omission in voting-related documentation if the error is not material to determining whether the voter is qualified under state law to vote does not permit state actors to require voters to recite redundant information that confirms a known identity, even as a prophylactic against voter impersonation. 52 U.S.C.A. § 10101(a)(2)(B).

[33] **Election Law** Identification of voters

Provisions in Texas election code governing procedures for requesting and casting a mail-in ballot, and requiring voters applying to vote by,

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or voting by, mail to supply an identification (ID) number matching that in their voter-registration record, were sufficiently related to voting to come within the Civil Rights Act of 1964's (CRA) so-called materiality provision, which bars a state from denying the right to vote based on an error or omission in voting-related documentation if the error is not material to determining whether the voter is qualified under state law to vote; CRA's materiality provision protected a voter's right to cast a ballot and have it counted, and phrase "other act requisite to voting" in CRA encompassed completion of ballot applications and carrier envelopes. 52 U.S.C.A. § 10101(a)(2)(B); Tex. Elec. Code Ann. §§ 86.001(f), (f-1), (f-2), 87.041(b), (d-1), (e).

[34] **Election Law** Voting procedures

Section of the Civil Rights Act of 1964 barring a state from denying the right to vote based on an error or omission in voting-related documentation if the error is not material to determining whether the voter is qualified under state law to vote prohibits the denial of the right to vote in a single election just as thoroughly as it prohibits the wholesale refusal to register a voter. 52 U.S.C.A. § 10101(a)(2)(B).

[35] **Statutes** In general; factors considered

Statutes General and specific terms and provisions; ejusdem generis

Canons of statutory construction such as ejusdem generis are applied only to resolve ambiguity, not create it.

[36] **Statutes** Words of number or amount

Congress's use of the phrase "any other" when introducing a broadening provision is expansive language that offers no indication whatever that Congress intended a limiting construction of the general phrase constrained by more-specific preceding examples.

[37] **Statutes** Exceptions, Limitations, and Conditions

In interpreting statutes, courts do not woodenly apply limiting principles every time Congress includes a specific example along with a general phrase.

[38] **Statutes** Departing from or varying language of statute

Judges are not free to overlook plain statutory commands on the strength of nothing more than suppositions about intentions or guesswork about expectations.

[39] **Constitutional Law** Fifteenth Amendment

When legislating pursuant to its Fifteenth Amendment powers, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting. U.S. Const. Amend. 15.

[40] **Statutes** Absent terms; silence; omissions

In general, courts should not construe statutes based on what Congress failed to say in legislative history.

[41] **Election Law** Voting procedures

Denial of the statutory right to vote, in violation of section of the Civil Rights Act of 1964 barring a state from denying the right to vote based on an error or omission in voting-related documentation if the error is not material to determining whether the voter is qualified under state law to vote, is complete when a particular application or carrier envelope for a mail-in ballot is rejected; the opportunity to cure the rejection, to submit another application, or to cancel the mail-in ballot does not negate the denial of the statutory right to vote. 52 U.S.C.A. § 10101(a)(2).

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[42] **Election Law** Voting procedures

Section of the Civil Rights Act of 1964 barring a state from denying the right to vote based on an error or omission in voting-related documentation if the error is not material to determining whether the voter is qualified under state law to vote requires paperwork with an immaterial error or omission to be accepted, not rejected with an invitation to try again. 52 U.S.C.A. § 10101(a)(2).

[43] **Election Law** Voting procedures
Election Law Identification of voters

Availability under Texas law of in-person voting to a voter whose mail-in ballot, or application for a mail-in ballot, was rejected for failing to comply with provisions in Texas election code governing procedures for requesting and casting a mail-in ballot, and requiring voters applying to vote by, or voting by, mail to supply an identification (ID) number matching that in their voter-registration record, did not negate Texas election code's denial of the statutory right to vote in violation of the Civil Rights Act of 1964's (CRA) so-called materiality provision, which bars a state from denying the right to vote based on an error or omission in voting-related documentation if the error is not material to determining whether the voter is qualified under state law to vote. 52 U.S.C.A. § 10101(a)(2)(B); Tex. Elec. Code Ann. §§ 86.001(f), (f-1), (f-2), 87.041(b), (d-1), (e).

[44] **Election Law** Voting procedures
Election Law Identification of voters

Availability under Texas law of procedures for a voter to cure state's rejection of voter's mail-in ballot, or application for such a ballot, for failing to comply with Texas election laws governing mail-in voting procedures and requiring voters applying to vote by, or voting by, mail to supply an identification (ID) number matching that in their voter-registration record did not negate Texas election code's denial of the statutory right to vote in violation of the Civil Rights Act of 1964's (CRA) so-called materiality provision, which bars a state from denying the right to vote based on an error or omission in voting-related documentation if the error is not material to determining whether the voter is qualified under state law to vote, since the initial rejection itself was unlawful. 52 U.S.C.A. § 10101(a)(2)(B); Tex. Elec. Code Ann. §§ 86.001(f), (f-1), (f-2), 87.041(b), (d-1), (e).

[45] **Election Law** Voting procedures
Election Law Identification of voters

Assuming that availability under Texas law of procedures for a voter to cure state's rejection of voter's mail-in ballot, or application for such a ballot, for failing to comply with Texas election laws governing mail-in voting procedures and requiring voters to supply an identification (ID) number matching that in their voter-registration record were legally relevant to whether those Texas election laws violated the Civil Rights Act of 1964's (CRA) so-called materiality provision, which bars a state from denying the right to vote based on an error or omission in voting-related documentation if the error is not material to determining whether the voter is qualified under state law to vote, some voters could not use cure procedures, so they did not save Texas laws from violating CRA. 52 U.S.C.A. § 10101(a)(2)(B); Tex. Elec. Code Ann. §§ 86.001(f), (f-1), (f-2), 87.041(b), (d-1), (e).

[46] **Election Law** Voting procedures

The Civil Rights Act of 1964's (CRA) so-called materiality provision, which bars a state from denying the right to vote based on an error or omission in voting-related documentation if the error is not material to determining whether the voter is qualified under state law to vote, applies to all state laws, including neutral and evenly applied laws; there is no requirement, for a state law to violate the CRA's materiality provision, that the law be discriminatory. 52 U.S.C.A. § 10101(a)(2)(B).

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[47] **Statutes** Statute as a Whole; Relation of Parts to Whole and to One Another

In pari materia is a tool of statutory construction used to resolve textual ambiguities, not a basis for creating them.

[48] **Statutes** In pari materia

Even where two provisions were both parts of a comprehensive federal legislative effort and enacted by the same legislative body at the same time, one provision cannot be leveraged through the in pari materia canon to introduce an exception to the coverage of the other where none is apparent.

[49] **Statutes** Express mention and implied exclusion; expressio unius est exclusio alterius

When Congress includes particular language in one section of a statute but omits it in another section of the same statute, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.

[50] **Injunction** Grounds in general; multiple factors

A party seeking a permanent injunction must prove: (1) that it has succeeded on the merits; (2) that a failure to grant the injunction will result in irreparable injury; (3) that said injury outweighs any damage that the injunction will cause the opposing party; and (4) that the injunction will not disserve the public interest.

[51] **Injunction** Conduct of elections

Voter-advocacy groups and United States were entitled to a permanent injunction barring enforcement of Texas election laws governing procedures for requesting and casting a mail-in ballot, and requiring voters applying to vote by, or voting by, mail to supply an identification (ID) number matching that in their voter-registration record, where Texas laws violated the Civil Rights Act of 1964's (CRA) so-called materiality provision, which bars a state from denying the right to vote based on an error or omission in voting-related documentation if the error is not material to determining whether the voter is qualified under state law to vote, denying injunction would irreparably injure Texas voters, voters' injury outweighed Texas's injury, and an injunction would serve the public interest. 52 U.S.C.A. § 10101(a)(2)(B); Tex. Elec. Code Ann. §§ 86.001(f), (f-1), (f-2), 87.041(b), (d-1), (e).

[52] **Injunction** Elections, Voting, and Political Rights

The denial of the opportunity to cast a vote that a person may otherwise be entitled to cast—even once—is an irreparable harm for purposes of injunctive relief.

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[53] **Election Law** Nature and source of right

No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, the country's residents must live; other rights, even the most basic, are illusory if the right to vote is undermined.

[54] **Election Law** Scope of Inquiry and Powers of Court or Board

Even recognizing the importance of the fundamental right to vote, in an election-related case, a court must weigh any protective action against the potential for confusion and disruption of the election administration under the *Purcell* principle, which provides that, as a general rule, federal courts should not alter state election laws in the period close to an election.

[55] **Injunction** Conduct of elections

The logic of the *Purcell* principle, which provides that federal courts generally should not alter state election laws in the period close to an election, extends only to injunctions that

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affect the mechanics and procedures of the act of voting.

[56] **Injunction** Conduct of elections

The *Purcell* principle, which provides that federal courts generally should not alter state election laws in the period close to an election, did not weigh against granting a permanent injunction barring enforcement of Texas election laws, which violated the Civil Rights Act of 1964, requiring voters applying to vote by, or voting by, mail to supply an identification (ID) number matching that in their voter-registration record; the injunction was not likely to lead to the kind of voter confusion envisioned by *Purcell* because it would not affect procedures for voting by mail from a voter's perspective and would not affect the forms or deadlines that voters had been using to apply for and vote by mail since passage of challenged Texas laws. 52 U.S.C.A. § 10101(a)(2)(B); Tex. Elec. Code Ann. §§ 86.001(f), (f-1), (f-2), 87.041(b), (d-1), (e).

West Codenotes

Held Invalid

Tex. Elec. Code Ann. §§ 86.001(f), (f-1), (f-2), 87.041(b), (d-1), (e).

Attorneys and Law Firms

Leah J. Tulin, Brennan Center for Justice at NYU School of Law, Washington, DC, Nina Perales, Fatima L. Menendez, Julia Renee Longoria, Kenneth Parreno, MALDEF [Mexican American Legal Defense & Educational Fund], San Antonio, TX, Elizabeth Yvonne Ryan, Weil, Gotshal & Manges LLP, Dallas, TX, Jason S. Kanterman, Rebecca L. Martin, Kevin Zhen, Michael C. Keats, Fried, Frank, Harris, Shriver, & Jacobson LLP, New York, NY, Patrick A. Berry, Sean Morales-Doyle, Brennan Center for Justice at NYU School of Law, New York, NY, for Plaintiff La Union Del Pueblo Entero.

Aaron J. Curtis, Weil, Gotshal & Manges, LLP, New York, NY, Sean Morales-Doyle, Andrew B. Garber, Eliza Sweren-Becker, Pro Hac Vice, Jasleen K. Singh, Pro Hac Vice, Patrick A. Berry, Robyn Sanders, Pro Hac Vice, Brennan Center for Justice at NYU School of Law, New York, NY, Megan Cloud, Elizabeth Yvonne Ryan, Madeleine Hall Carpenter, Matthew Berde, Pro Hac Vice, Weil, Gotshal & Manges LLP, Dallas, TX, Julia Renee Longoria, Mexican American Legal Defense and Educational Fund, San Antonio, TX, Leah J. Tulin, Brennan Center for Justice at NYU School of Law, Washington, DC, Paul R. Genender, Paul Hastings LLP, Houston, TX, for Plaintiffs Friendship-West Baptist Church, Texas Impact, James Lewin.

Nina Perales, Fatima L. Menendez, Julia Renee Longoria, Kenneth Parreno, MALDEF [Mexican American Legal Defense & Educational Fund], San Antonio, TX, Jason S. Kanterman, Rebecca L. Martin, Kevin Zhen, Michael C. Keats, Fried, Frank, Harris, Shriver, & Jacobson LLP, New York, NY, Patrick A. Berry, Sean Morales-Doyle, Brennan Center for Justice at NYU School of Law, New York, NY, Leah J. Tulin, Brennan Center for Justice at NYU School of Law, Washington, DC, for Plaintiffs Southwest Voter Registration Education Project, Mexican American Bar Association of Texas, Texas Hispanics Organized for Political Education, JOLT Action, William C. Velasquez Institute, Fiel Houston, Inc.

Amira Marcella Mattar, Pro Hac Vice, Ben Clements, Courtney M. Hostetler, John Bonifaz, Ronald A. Fein, Free Speech for People, Newton, MA, Danielle V. Ahlrich, Reed Smith LLP, Austin, TX, Laura E. Rosenbaum, Stoel Rives LLP, Portland, OR, Victor Genecin, NAACP Legal Defense & Educational Fund, Inc., New York, NY, Wendy J. Olson, Elijah M. Watkins, Mark L. Bieter, Stoel Rives LLP, Boise, ID, Bradley R. Prowant, Stoel Rives LLP, Minneapolis, MN, Jennifer A. Holmes, NAACP Legal Defense & Educational Fund, Inc., Washington, DC, Sean Michael Lyons, Lyons & Lyons, PC, San Antonio, TX, for Plaintiffs Mi Familia Vota, Marlon Lopez, Paul Rutledge.

Amira Marcella Mattar, Pro Hac Vice, Ben Clements, Courtney M. Hostetler, John Bonifaz, Ronald A. Fein, Free Speech for People, Newton, MA, Laura E. Rosenbaum, Stoel Rives LLP, Portland, OR, Victor Genecin, NAACP Legal Defense & Educational Fund, Inc., New York, NY, Wendy J. Olson, Elijah M. Watkins, Mark L. Bieter, Stoel Rives LLP, Boise, ID, Bradley R. Prowant, Stoel Rives LLP, Minneapolis, MN, Jennifer A. Holmes, NAACP Legal Defense & Educational Fund, Inc., Washington, DC, Sean Michael Lyons, Lyons & Lyons, PC, San Antonio, TX, for Plaintiff Marla Lopez.

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Christopher D. Hilton, Amy Snow Hilton, J. Aaron Barnes, Patrick K. Sweeten, Ryan G. Kercher, Jameson C. Joyce, Ethan Quinn Szumanski, Monroe David Bryant, Jr., William D. Wassdorf, Office of the Attorney General, General Litigation Division, Austin, TX, Eric A. Hudson, Terrazas, PLLC, Austin, TX, Johnathan Stone, Kathleen Hunker, William Thomas Thompson, Lehotsky Keller Cohn LLP, Austin, TX, for Defendants Gregory W. Abbott, Warren K. Paxton.

Eric A. Hudson, Terrazas, PLLC, Austin, TX, Patrick K. Sweeten, Office of the Attorney General of Texas, Austin, TX, for Defendant Jose A. Esparza.

Chad Ennis, Texas Secretary of State, Austin, TX, Robert E. Henneke, Texas Public Policy Foundation, Austin, TX, for Defendant Lupe C. Torres.

Beatriz Mejia, Caroline A. Lebel, Pro Hac Vice, David Louk, Kathleen Hartnett, Kelsey Spector, Sharon Song, Cooley LLP, San Francisco, CA, Christine Sun, States United Democracy Center, San Francisco, CA, Germaine Maria Habell, Cooley LLP, Los Angeles, CA, Jo Anne Anne Bernal, John Edward Untereker, El Paso County Attorney's Office, El Paso, TX, Orion Armon, Cooley LLP, Denver, CO, Ranjana Natarajan, States United Democracy Center, Austin, TX, Marina Eisner, States United Democracy Center, Washington, DC, Robert Cotter, States United Democracy Center, Chicago, IL, for Defendant Lisa Wise.

E. Stewart Crosland, Pro Hac Vice, John M. Gore, Stephen J. Kenny, Pro Hac Vice, Charles E.T. Roberts, Jones Day, Washington, DC, for Defendants Harris County Republican Party, Dallas County Republican Party, National Republican Senatorial Committee, National Republican Congressional Committee.

Eric J.R. Nichols, Karson Karl Thompson, Victoria A. Giese, Cory Ren Liu, Butler Snow LLP, Austin, TX, for Defendant Kim Ogg.

Larry L. Roberson, Robert William Piatt, III, Lisa V. Cubriel, Bexar County District Attorney's Office, Civil Division, San Antonio, TX, for Defendant Joe Gonzales.

Anthony J. Nelson, Amy Stoeckl Ybarra, Travis County Attorney's Office, Austin, TX, for Defendants Jose Garza, Dyana Limon-Mercado.

Barbara S. Nicholas, Assistant District Attorney, Dallas, TX, Ben L. Stool, Criminal District Attorney's Office of Dallas County, T, Dallas, TX, for Defendant John Creuzot.

Jacqueline Lysette Villarreal, Michael J. Garza, Hidalgo County District Attorney Office, Civil Litigation, Edinburg, TX, for Defendant Ricardo Rodriguez, Jr.

Ian Russell Kaplan, El Paso County Attorney's Office, El Paso, TX, Rogelio C. Rodriguez, Law Firm, El Paso, TX, for Defendant Yvonne Rosales.

Anthony J. Nelson, Travis County Attorney's Office, Austin, TX, for Defendant Rebecca Guerrero.

Sameer Singh Birring, Tiffany Sue Bingham, Harris County Attorney's Office, Houston, TX, for Defendant Teneshia Hudspeth.

Donna Garcia Davidson, Austin, TX, Chase Martin, Attorney at Law, Naples, FL, Stewart Whitson, Naples, FL, for Amicus Foundation for Government Accountability.

Veronica Smith Moye, Gibson, Dunn & Crutcher LLP, Dallas, TX, for Amicus Young Black Lawyers' Organizing Coalition.

Eric Wang, Pro Hac Vice, The Gober Group, Arlington, VA, for Amicus Lawyers Democracy Fund.

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MEMORANDUM OPINION[1]

XAVIER RODRIGUEZ, UNITED STATES DISTRICT JUDGE

***1** On this date, the Court considered the motions for summary judgment as to the Section 101 Materiality Provision claims filed by the United States (ECF No. 609), the OCA Plaintiffs (ECF No. 611), and the Intervenor-Defendants (ECF No. 608), and the responses and replies thereto. After careful consideration, the Court issues the following order.

BACKGROUND

On September 7, 2021, Texas Governor Greg Abbott signed into law the Election Protection and Integrity Act of 2021, an omnibus election law commonly referred to as S.B. 1. *See* Election Integrity Protection Act of 2021, S.B. 1, 87th Leg.,

2d Spec. Sess. (2021). In the weeks that followed, numerous private plaintiffs, including OCA-Greater Houston, League of Women Voters of Texas, and REVUP-Texas (collectively, the "OCA Plaintiffs"), and the United States filed suit, challenging various provisions of S.B. 1 under the United States Constitution and federal civil rights statutes.[2]

The United States and the OCA Plaintiffs (collectively, "Plaintiffs") allege that various provisions of S.B. 1 adding an identification ("ID") number-matching requirement to Texas's mail-in voting process violate Section 1971 of the Civil Rights Act of 1964 ("CRA"), now codified under 52 U.S.C. § 10101(a)(2) ("Section 101"). *See* ECF No. 200 at 45–46; ECF No. 131 at 16–17.[3] The "Materiality Provision" of Section 101 states:

> (2) 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). The CRA defines the term "vote" broadly: it includes "all action necessary to make a vote effective including, but not limited to ... casting a ballot, and having such ballot counted and included in the appropriate totals of votes cast." *Id.* §§ 10101(a)(3)(A), 10101(e). Section 101, therefore, prohibits state actors from denying a person's right to make their vote effective based on an error or omission that is not material to determining whether they are qualified to vote under state law.

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The OCA Plaintiffs attack the number-matching framework as a whole,[4] while the United States merely challenges the provisions requiring election officials to reject applications to vote by mail and mail-in ballots bearing ID numbers that do not match voter registration records—Sections 5.07 and 5.13 of S.B. 1. *See* ECF No. 200 at 45–46; ECF No. 131 at 16–17. Plaintiffs seek injunctions barring enforcement of the provisions they challenge and a declaration that the challenged provisions violate the Materiality Provision. *See id.*

I. Voter Qualifications and Registration Records

***2** S.B. 1 did not change voter eligibility requirements in Texas. Texas law defines a "qualified voter" as an individual who is 18 years of age or older, is a United States citizen, is a resident of the state of Texas, has not been adjudged mentally incompetent, has not been convicted of a felony (unless they have completed their term of sentence or received a pardon), and is registered to vote. Tex. Elec. Code ("TEC") § 11.002(a); *see also* Tex. Const. art. VI, § 2(a).

The official Texas voter registration form prepared by the Texas Secretary of State ("SOS") enumerates all of these qualifications and asks applicants to confirm their eligibility as to each of them.[5] *See* ECF No. 609-3 at 108 (Texas Voter Registration Application). An applicant must affirm, by checking the applicable boxes on the form, that she is a U.S. citizen and will be 18 years of age by the date of the next election. *See id.* The applicant must also provide her date of birth, residential address, and sign and date a statement, under penalty of perjury, affirming that she is a resident of the county identified on the form, is a U.S. citizen, and satisfies the requirements related to felony convictions and mental incompetence. *See id.* The form also requires the applicant to provide (1) a Texas Driver's License or Personal Identification number ("DPS number"), (2) "if no [DPS number]," the last four digits of her Social Security Number ("SSN4"), or (3) a statement that she has not been issued either identification number.[6] *See id.*

Texas did not require voter-registration applicants to provide an ID number until January 1, 2004, in compliance with the Help America Vote Act ("HAVA"), 52 U.S.C. § 20901 *et seq. See* ECF No. 609-1 (DOJ's Statement of Uncontested Facts ("SUF")) ¶ 11; TEC § 13.002(c)(8)(A); 52 U.S.C. § 21083(d) (requiring states to comply with relevant HAVA requirements by January 1, 2004). Congress enacted HAVA in the wake of the November 2000 presidential election and its attendant controversies. One of HAVA's main goals was to "modernize and improve registration nationwide" by "[r]equiring states to develop statewide databases" to track voter registration. H.R. REP. 107-329(I), 2001 WL 1579545, at *35–36.

Under HAVA, states were directed to establish "a single, uniform, official, centralized, interactive computerized statewide voter registration list ... contain[ing] the name and registration information of every legally registered voter in the State and assign[ing] a unique identifier to each legally registered voter in the State." *See* 52 U.S.C. § 21083(a)(1)(A). HAVA also imposed additional ID number requirements on *new* voter registration applications. Specifically, HAVA provides that applicants must provide a current and valid driver's license number or, if they have not been issued such a

number, their SSN4, which the state must then compare with the SSA database or DOL database. *See* 52 U.S.C. § 21083(a)(5)(A)(i). Applicants who indicate that they have neither a driver's license number nor an SSN4 must be assigned a unique identification number on the state's computerized database, which will "serve to identify the applicant for voter registration purposes." *See id.* § 21083(a)(5)(A)(ii).

***3** Texas's statewide voter registration database, maintained by the Texas SOS, is known as the Texas Election Administration Management ("TEAM") system. SUF ¶ 81. TEAM should contain only one record for each registered voter in Texas. SUF ¶ 128. Each record is assigned a Voter Unique Identification Number ("VUID"), which may itself be associated with up to two other ID numbers. *Id.* Specifically, each VUID may be associated with (1) one number issued by the Texas Department of Public Safety ("DPS") on a driver's license, personal identification card, or election identification certificate (collectively, a "DPS number"), (2) one SSN4, (3) both a DPS number and an SSN4, or (4) neither number. *See* SUF ¶¶ 129–30.

II. Voting-by-Mail in Texas Generally

Texas authorizes several categories of voters to vote by mail. These include voters who are 65 years of age or older, disabled voters who cannot vote in person on Election Day "without the likelihood of needing personal assistance or injuring [their] health," voters absent from their home counties for the entire in-person voting period, and voters who expect to give birth near Election Day. SUF ¶ 17; TEC §§ 82.001–004, .007–.008.

A qualified voter seeking to obtain a mail ballot must first submit a signed application for a ballot by mail ("ABBM") to their county's early voting clerk. TEC §§ 84.001, 84.007. The ABBM includes "the applicant's name and the address at which the applicant is registered to vote," information demonstrating the voter's eligibility for a mail ballot, "an indication of each election for which the applicant is applying for a ballot," and a mailing address, if different from the address of registration. *See* TEC § 84.002.

If the early voting clerk determines that the application does not "fully comply with the applicable requirements," the clerk is generally required to mail the applicant a new application with a written notice that identifies the defects in the application and explains to the applicant how the defects may be corrected. *Id.* § 86.008. Upon receiving a timely and non-defective ABBM, the clerk sends the voter an official ballot by mail ("BBM"), a ballot envelope in which to place the ballot, and an official carrier envelope in which to place the ballot envelope. *Id.* §§ 86.001–002, .012–.013.

To vote by mail, a voter must then (1) place his BBM in the official ballot envelope, (2) seal the ballot envelope, (3) place the ballot envelope in the official carrier envelope, (4) seal the carrier envelope, (5) sign the certificate on the carrier envelope, and (6) return the ballot materials to the early voting clerk, either by mail or common or contract carrier or in-person on election day, with an acceptable form of photo identification. *Id.* § 86.005–.06, .013.[7]

In every election, each county in Texas convenes an Early Voting Ballot Board ("EVBB"), which opens the carrier envelopes and determines whether to accept individual BBMs based on, *e.g.*, whether the voter's ABBM stated a legal ground for voting by mail and whether the signature on the carrier envelope matches the signature on the ABBM.[8] *Id.* § 87.041(b). An optional Signature Verification Committee ("SVC") may also be appointed to carry out the same functions. *Id.* §§ 87.027(a), (i).

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***4** At the direction of the Texas Legislature, the SOS has developed an online tool for tracking ABBMs and mail ballots, which "must ... for each carrier envelope, record or assign a serially numbered and sequentially issued barcode or tracking number that is unique to each envelope." *See id.* § 86.015(c)(2) (the "Ballot Tracker"). Accordingly, carrier envelopes now bear a unique number that links them to an associated voter and their ABBM. Counties are responsible for entering the information used to track ABBMs and mail ballots into the Ballot Tracker.

III. S.B. 1's Identification-Number Requirements

S.B. 1's number-matching framework, codified in Sections 5.02, 5.03, 5.07, 5.08, 5.10, 5.12, 5.13, and 5.14 of S.B. 1, superimposes a new requirement on the mail-in voting process, at both the application and voting stages. To have their ballots counted under S.B. 1, Texans voting absentee must write an ID number that matches an ID number in TEAM on both their ABBM and BBM materials.

At the application stage, Section 5.02 requires voters to write one of three pieces of information on their ABBM:

(1) the applicant's DPS number;

(2) if the applicant "has not been issued" a DPS number, his or her SSN4; or

(3) if the applicant lacks both a DPS ID number and an SSN4, a statement to that effect.

TEC § 84.002(a)(1-a). An applicant is permitted to use an expired DPS ID number, if the number is otherwise valid, for purposes of fulfilling these requirements. *Id.* § 84.002(b-1). To implement this new requirement, Section 5.03 of S.B. 1 directs the SOS to create a space for this information on its "officially prescribed" ABBM. TEC § 84.011(a), (a)(3-a); *see id.* § 31.002.

At the voting stage, Section 5.08 further requires that the carrier envelope in which the ballot envelope is mailed include a space, hidden from view when sealed, for the voter to enter the same identification number information required under Section 5.02. TEC § 86.002(g).

Under Sections 5.07 and 5.13 of S.B. 1, an ABBM or mail ballot must be rejected if the voter fails to provide a DPS number or SSN4 that identifies "the same voter identified on the applicant's application for voter registration." *See* TEC § 86.001(f) (codifying Section 5.07, which provides that early voting clerks "shall reject" mail ballot applications that do not include a matching ID number); TEC § 87.041(b)(8) (codifying Section 5.13, which establishes that a mail ballot "may be accepted only if" it includes a matching ID number).

Finally, S.B. 1 establishes notice-and-cure procedures for ABBMs and mail ballots that are rejected based on the number-matching requirements. Section 5.10 requires the SOS Ballot Tracker to "allow a voter to add or correct information" on her ABBM or carrier envelope as required by S.B. 1's matching-number requirement. TEC § 86.015(c)(4). Sections 5.12 and 5.14 amend the responsibilities of the EVBB (and any SVC, if appointed), to include notifying the voter of any carrier envelope flagged for rejection for a variety of reasons, including pursuant to S.B. 1's number-matching requirement. *See* TEC §§ 87.0411; 87.0271.[9]

IV. Implementation of S.B. 1's Number-Matching Requirements

***5** To implement S.B. 1's number-matching requirement at the application stage, the SOS prepared an official ABBM with the following instructions:

> YOU MUST PROVIDE ONE of the following numbers ... Texas Driver's License, Texas Personal Identification Number or Election Identification Certificate Number issued by the Department of Public Safety (NOT your voter registration VUID#) ... If you do not have a Texas Driver's License, Texas Personal Identification Number or a Texas Election Identification Certificate Number, give the last 4 digits of your Social Security Number[.]

SUF ¶ 92; *see also* TEC § 84.011(a), (a)(3-a) (codifying Section 5.03's requirement that the SOS create a space for this information on its "officially prescribed" ABBM.).

To implement S.B. 1's requirements at the voting stage, the SOS prepared a carrier envelope with identical instructions under the flap of the envelope. SUF ¶ 93; TEC § 86.002(g). (codifying Section 5.08's requirement that the carrier envelope in which the ballot envelope is mailed include a space, hidden from view when sealed, for the voter to enter the same identification number information required under Section 5.02).

Following S.B. 1's effective date, the SOS identified that incomplete records in the TEAM system could interfere with the ability of many qualified voters to cast a mail ballot that would be counted under the new requirements. SUF ¶ 131. As of January 3, 2023, nearly 190,000 Texas voters who have been issued DPS identification still lacked a DPS number in TEAM records, and more than 90,000 Texas registered voters had neither a DPS number nor a SSN4 affiliated with their voter registration record. SUF ¶¶ 140–41. In addition, roughly 2.4 million Texas voters have only one of their multiple DPS numbers in TEAM. SUF ¶ 142. The TEAM database also contains tens of thousands of errors, including over 60,000 DPS numbers inconsistent with DPS records and nearly 45,000 SSN4s inconsistencies between TEAM and DPS databases. SUF ¶¶ 143–44. In light of these inadequacies, both the SOS and county officials have directed duly registered and qualified Texas voters whose registration records are incomplete or erroneous for S.B. 1 purposes to submit new voter registration applications. SUF ¶ 105.

TEAM lacks records adequate to determine the number of ABBMs rejected statewide on account of S.B. 1. SUF ¶¶ 149, 151. Although the parties disagree about the precise number of ABBMs and mail ballots that have been rejected (and cured) since S.B. 1's effective date, it is undisputed that the total is in the thousands. *See, e.g.*, ECF No. 646 (State Opp. to OCA MSJ) (asserting that "nearly half of the 11,430 voters whose records indicated an initial rejection on SB 1 grounds

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were able to cure or vote in-person"). Data produced by Bexar County and Harris County alone document over 3,000 ABBM rejections in the November 2022 General Election for failure to meet S.B. 1 requirements, only about 1,200 of which were successfully cured. SUF ¶ 152(b)-(c). In the March 2022 primary election, more than 25,000 ballots were rejected statewide based on a mismatched or missing DPS numbers or SSN4s. SUF ¶¶ 153–54. In the November 2022 general election, S.B. 1 required officials across Texas to reject more than 11,000 mail ballots. SUF ¶ 161.

***6** The individual experiences of voters and county officials illustrate S.B. 1's widespread effects. For example, in the 2022 primary election, Ms. Pam Gaskin, a 75-year-old voter who had been registered to vote in Fort Bend County for over 40 years, had her ABBM rejected after she followed the form's instructions and submitted her Texas Driver License number, which she later learned was not in the voter registration database. SUF ¶¶ 180–81. And in the general election, Mr. Roberto Benavides, a 76-year-old voter in Travis County, attempted to respond to a notice of mail ballot rejection, but his efforts to cure were unsuccessful and his vote went uncounted. SUF ¶¶ 182–85. Local election officials eventually informed Mr. Benavides that the Texas Driver License number in his voter registration record contained a typo. SUF ¶ 184. County election officials reported voter confusion and frustration, including cases of voters discarding carrier envelopes that election officials had returned due to a failure to meet S.B. 1 requirements rather than taking additional steps to overcome the ballot rejection. SUF ¶¶ 99, 186.

In response to the pervasive confusion and rejection of ABBMs and mail ballots, election officials took action to mitigate S.B. 1's impact on voters. SUF ¶ 122. For example, although S.B. 1's text establishes a hierarchy of identification —with voters who have a DPS number being required to provide that number and only voters who lack a DPS number being permitted to provide a SSN4, *see* TEC §§ 84.002(a)(1-a), 86.002(g); SUF ¶¶ 32, 50—officials have accepted a SSN4 from voters with a DPS number on file. SUF ¶ 96. Similarly, state officials have recommended that voters provide both a DPS number and SSN4, and some counties have added inserts to mail voting materials with similar guidance. SUF ¶¶ 97, 123.

Election officials confirmed that the DPS numbers and SSN4s required by S.B. 1 are not used to ensure that voters are qualified to vote or to cast a mail ballot under Texas law, to identify voters, or to flag potential fraud. Keith Ingram, then serving as Director of the Elections Division of the SOS, acknowledged in a 2022 deposition that "individual eligibility criteria ha[ve] nothing to [d]o with the number." SUF ¶ 15. Nor do election officials ordinarily use these numbers to look up voter records, and the SOS does not instruct them to do so. SUF ¶¶ 118–20. Rather, election officials look up voters using other information on mail ballot materials—such as the voter's name, date of birth, and address—just as they did before S.B. 1. SUF ¶ 120. Election officials must also verify a voter's identity using the signature by which the voter attests to identity and eligibility, just as they did before S.B. 1. TEC § 87.041(b)(2); SUF ¶ 65. Further, the SOS and county officials do not consider a DPS number or SSN4 mismatch or omission to be evidence of fraud. SUF ¶¶ 187–91. And because matching a DPS number or SSN4 against incomplete and erroneous voter registration records fails to identify some voters accurately, S.B. 1 requires election officials to reject mail ballot materials from voters who provided accurate information. SUF ¶¶ 34–36, 51, 92–94, 100–103, 131, 134–37, 139–46, 180–85.

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V. Procedural History

Plaintiffs allege that S.B. 1's number-matching provisions violate Section 101 of the CRA because they require the rejection of vote-by-mail applications and mail ballot carrier envelopes based on errors or omissions that are not material to determining whether a person is qualified to vote under Texas law.

In November 2021, the United States filed an amended complaint, its operative pleading, against Texas and its Secretary of State ("SOS") in his official capacity, alleging that Sections 5.07 and 5.13 of S.B. 1 violate Section 101 of the CRA. ECF No. 131. Texas and the SOS filed a motion to dismiss claims of the United States in December 2021, *see* ECF No. 145, which the Court denied in all respects in May 2022. *La Union del Pueblo Entero v. Abbott ("LUPE (USA)")*, 604 F. Supp. 3d 512, 517 (W.D. Tex. 2022).

The OCA Plaintiffs filed their Second Amended Complaint in January 2022, asserting eight claims, including their Section 101 claim, against the Texas SOS and the Texas Attorney General (together with Texas and the SOS, the "State Defendants"), in their official capacities, and several county officials in Travis County and Harris County.[10] ECF No. 200. The State Defendants moved to dismiss the OCA Plaintiffs' claims in February 2022. ECF No. 240. In August

2022, the Court entered an order, which, in relevant part, denied the State Defendants' motion with respect to the OCA Plaintiffs' claim under Section 101 of the CRA. *La Union del Pueblo Entero v. Abbott ("LUPE (OCA)")*, 618 F. Supp. 3d 388, 398 (W.D. Tex. 2022).

***7** The OCA Plaintiffs and the United States both moved for summary judgment as to their Section 101 claims. *See* ECF No. 609 (DOJ MSJ); ECF No. 611 (OCA MSJ). Plaintiffs' motions are opposed by both the State Defendants and the Intervenor-Defendants—the Harris County Republican Party, the Dallas County Republican Party, the Republican National Committee, the National Republican Senatorial Committee, and the National Republican Congressional Committee (collectively, the "Committees" or the "Intervenor-Defendants"). *See* ECF No. 645 (State Opp. to DOJ MSJ); ECF No. 646 (State Opp. to OCA MSJ); ECF No. 634 (GOP Opp. to DOJ MSJ); ECF No. 635 (GOP Opp. to OCA MSJ). The Intervenor-Defendants also independently filed a cross-motion for partial summary judgment, asserting that the Section 101 claims brought by the United States and the OCA Plaintiffs fail as a matter of law.[11] *See* ECF No. 608 (GOP MSJ) at 13–23.

In August 2023, in advance of the bench trial of this case scheduled for September 2023, the Court entered a summary ruling on the parties' motions for summary judgment as to Plaintiffs' Section 101 claims. *See* ECF No. 724. For the reasons stated in the Court's summary ruling and set out more fully in this memorandum opinion, the Court granted the United States' motion for summary judgment (ECF No. 609) in full and granted the OCA Plaintiffs' motion for summary judgment (ECF No. 611) with respect to their challenge to Section 5.07 of S.B. 1 only.

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LEGAL STANDARD

The Court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. To establish that there is no genuine issue as to any material fact, the movant must either submit evidence that negates the existence of some material element of the non-moving party's claim or defense, or, if the crucial issue is one for which the nonmoving party will bear the burden of proof at trial, merely point out that the evidence in the record is insufficient to support an essential element of the nonmovant's claim or defense. *Little v. Liquid Air Corp.*, 952 F.2d 841, 847 (5th Cir. 1992), *on reh'g en* banc, 37 F.3d 1069 (5th Cir. 1994) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)).

Once the movant carries its initial burden, the burden shifts to the nonmovant to show that summary judgment is inappropriate. *See Fields v. City of S. Hous.*, 922 F.2d 1183, 1187 (5th Cir. 1991). Any "[u]nsubstantiated assertions, improbable inferences, and unsupported speculation are not sufficient to defeat a motion for summary judgment," *Brown v. City of Houston*, 337 F.3d 539, 541 (5th Cir. 2003), and neither will "only a scintilla of evidence" meet the nonmovant's burden. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc). Rather, the nonmovant must "set forth specific facts showing the existence of a 'genuine' issue concerning every essential component of its case." *Morris v. Covan World Wide Moving, Inc.*, 144 F.3d 377, 380 (5th Cir. 1998). The Court will not assume "in the absence of any proof ... that the nonmoving party could or would prove the necessary facts" and will grant summary judgment "in any case where critical evidence is so weak or tenuous on an essential fact that it could not support a judgment in favor of the nonmovant." *Little*, 37 F.3d at 1075.

***8** For a court to conclude that there are no genuine issues of material fact, the court must be satisfied that no reasonable trier of fact could have found for the nonmovant, or, in other words, that the evidence favoring the nonmovant is insufficient to enable a reasonable jury to return a verdict for the nonmovant. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). In making this determination, the court should review all the evidence in the record, giving credence to the evidence favoring the nonmovant as well as the "evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that evidence comes from disinterested witnesses." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). The Court "may not make credibility determinations or weigh the evidence" in ruling on a motion for summary judgment, *id.* at 150, 120 S.Ct. 2097, and must review all facts in the light most favorable to the nonmoving party. *First Colony Life Ins. Co. v. Sanford*, 555 F.3d 177, 181 (5th Cir. 2009).

DISCUSSION

To violate Section 101, a state law must (1) deny the right of any individual to "vote" in an election (as defined), (2) based

on an "error or omission" on a "record or paper relating to any application, registration, or other act requisite to voting," (3) that is not "material in determining whether" that "individual is qualified under State law to vote in such election." 52 U.S.C. § 10101(a)(2)(B); *see also* *Migliori v. Cohen*, 36 F.4th 153, 162 & n.56 (3d Cir. 2022) (Section 101 violated when error or omission not material to state-law voter qualifications used as basis not to count mail ballot), *judgment vacated sub nom.* *Ritter v. Migliori*, ––– U.S. ––––, 143 S. Ct. 297, 214 L.Ed.2d 129 (2022);[12] *see also* *Pa. State Conf. of the NAACP v. Schmidt*, No. 1:22-cv-339, 2023 WL 3902954, at *5–7 (W.D. Pa. June 8, 2023) (rejecting nearly identical arguments by Intervenor-Defendants).

Because there is significant overlap among the parties' motions and accompanying responses, the Court will address their arguments bearing on Sections 5.07 and 5.13 of S.B. 1 and the proper scope of the Materiality Provision collectively. Before turning to the primary question presented in the parties' motions—the materiality of the number-matching requirement to voter qualifications—the Court will briefly address the relevance of certain summary judgment evidence and several issues specific to the OCA Plaintiffs.

I. Evidence of the Intent and Impact of the Number-Matching Requirements

[1] As a preliminary matter, the Court observes that parties on both sides of this dispute have devoted dozens of pages of briefing to legislative intent and estimates of the past and future impact of the number-matching requirement on voters in Texas. To the extent that this evidence bears on the wisdom of the number-matching provisions, it is entirely irrelevant to the Court's analysis of Plaintiffs' Section 101 claims on the merits.[13] Unlike many other causes of action in the voting-rights context, the Materiality Provision is not a burden-interest balancing statute. Materiality Provision violations are prohibited no matter their policy aim.

***9** **[2]** For their part, the State Defendants and, to a lesser extent the Intervenor-Defendants, repeatedly direct the Court's attention to the purported purpose of the number-matching requirement—to prevent voter fraud. *See, e.g.*, ECF No. 646 at 4–13, 24–25, 27, 37. While Texas undoubtedly has an interest in deterring and preventing voter fraud, that interest must yield to a qualified voter's right, under Section 101 of the CRA, to have their ballot counted despite immaterial paperwork errors. *See* *Schwier v. Cox* (*Schwier II*), 412 F. Supp. 2d 1266, 1276 (N.D. Ga. 2005) (rejecting contention that any information that "could help to prevent voter fraud" is material), *aff'd*, 439 F.3d 1285 (11th Cir. 2006) (adopting district court's reasoning); *Migliori*, 36 F.4th at 163 ("[W]hatever sort of fraud deterrence or prevention [a] requirement may serve," it is irrelevant under Materiality Provision if it is not material to determining voter qualifications); *Wash. Ass'n of Churches v. Reed*, 492 F. Supp. 2d 1264, 1266, 1270 (W.D. Wash. 2006) (rejecting state's argument that number-matching voter registration scheme would help prevent voter fraud).

Likewise, all of the parties address the substantial measures that elections officials have taken to reduce S.B. 1's impact on voters, the adequacy (or inadequacy) of S.B. 1's cure provisions, and the relative rejection rates before and after S.B. 1's enactment and officials' various mitigation efforts. *See* ECF No. 609 at 10 (noting that S.B. 1 "continues to disenfranchise Texas voters at historic rates" and that the post-cure rejection rate of 2.7% in the November 2022 general election was "nearly three times the national average and well above historical rejection rates in Texas"); ECF No. 611 at 20–25 (identifying "massive increases in the number of rejected ABBMs and mail ballots" in elections after S.B. 1 and observing that, due to deficiencies in the cure process and "most voters whose ABBMs or ballots were rejected [based on S.B. 1] were not able to cure the issue and cast an effective vote"). The State Defendants assert that the Materiality Provision cannot demand "perfection," because "all systems are prone to some error." ECF No. 645 at 18. But this case has nothing to do with election officials' inadvertent rejection of ABBMs and mail ballots; Sections 5.07 and 5.13 of S.B. 1 *require* election officials to reject voting materials for failure to satisfy the number-matching provisions. The Defendant-Intervenors similarly insist that the Court should uphold the number-matching requirements because "the sky is not falling in Texas." ECF No. 634 at 25. But that is not the standard for relief under Section 101.

[3] The magnitude of S.B. 1's impact is simply not relevant to the question of whether the number-matching provisions require election officials to disenfranchise voters for errors that are immaterial to their eligibility. The Materiality Provision does not demand that Plaintiffs satisfy a balancing test or demonstrate some threshold number of votes denied. *See* 52 U.S.C. § 10101(a)(2)(B). It is a "basic truth that even one disenfranchised voter—let alone several thousand—is too many." *See, e.g.*, *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 244 (4th Cir. 2014); *see also* *Migliori*, 36 F.4th at 158, 162–64 (finding Materiality Provision

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violation where 257 of about 22,000 ballots rejected). The Court thus reserves any questions as to the burdens that S.B. 1's number matching requirements have imposed on voters and the likelihood of future harm to its analysis of Plaintiffs' claim for injunctive relief.

Nor will the Court consider the wisdom of any voting practices beyond the purview of this litigation, or the theoretical application of the Materiality Provision to those practices. Both the State Defendants and Defendant-Intervenors suggest that granting Plaintiffs' requested relief would have catastrophic consequences on voting in Texas and across the nation, enumerating a whole host of voting regulations that, in their view, would be "on the chopping block." *See, e.g.*, ECF No. 635 at 16 (addressing prohibitions on overvoting and signature requirements); ECF No. 645 at 7 (addressing ID requirements and signature-comparison procedures in other states). Although there are reasons to doubt that the Materiality Provision would invalidate the regulations cited in Defendants' briefing,[14] the mere existence of other voting requirements in Texas and elsewhere is simply irrelevant. Those requirements are not currently before the Court and have not, to the Court's knowledge, survived a Section 101 challenge in any forum with the authority to bind this Court.

II. The OCA Plaintiffs' Standing and Challenges to §§ 5.02, 5.03, 5.08, 5.10, 5.12–5.14

***10** Before it can reach the merits of the OCA Plaintiffs' motion for partial summary judgment, the Court must be assured of its subject matter jurisdiction over their claims, including their standing to challenge S.B. 1's number-matching requirements.

A. The OCA Plaintiffs have standing to challenge the ID-matching requirements

[4] **[5]** The State Defendants do not meaningfully challenge the Article III standing of any of the OCA Plaintiffs, and largely recycle arguments from their motion to dismiss that have already been rejected. *See* ECF No. 646 at 51–55; ECF No. 448 at 49–50.[15] Indeed, in their response to the OCA Plaintiffs' motion for partial summary judgment, the State Defendants assert a single sentence that OCA Plaintiffs have not established associational standing "because there is a triable question of fact regarding their injury for many of the reasons described in State Defendant's motion to dismiss." ECF No. 646 at 55. As the OCA Plaintiffs point out, however, this argument ignores the factual evidence demonstrating associational standing raised in their motion and fails to satisfy the State Defendants' burden on summary judgment. *See* ECF No. 665 at 41 n.54. Nonetheless, given the OCA Plaintiffs' burden on summary judgment and the Court's duty to review its subject-matter jurisdiction, the Court will address the evidence offered in support of the OCA Plaintiffs' standing to challenge S.B. 1's number-matching provisions.

1. Legal Standard

[6] It is well settled that a plaintiff invoking a federal court's jurisdiction must establish standing by satisfying three irreducible requirements. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). "The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant[s], and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338, 136 S.Ct. 1540, 194 L.Ed.2d 635 (2016).

[7] **[8]** **[9]** The elements of standing are "not mere pleading requirements but rather an indispensable part of the plaintiff's case." *Lujan*, 504 U.S. at 561, 112 S.Ct. 2130. Thus, "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Id.* On summary judgment, the plaintiff "must 'set forth' by affidavit or other evidence 'specific facts' " showing an injury resulting from the defendant's conduct, "which for purposes of the summary judgment motion will be taken to be true." *Id.* (quoting Fed. R. Civ. P. 56(e)). Where multiple plaintiffs seek injunctive relief, only one needs to establish standing for each claim asserted. *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006).

***11** **[10]** "[P]laintiffs seeking injunctive and declaratory relief can satisfy the redressability requirement only by demonstrating a continuing injury or threatened future injury" for the self-evident reason that "injunctive and declaratory relief 'cannot conceivably remedy any past wrong.' " *Stringer v. Whitley*, 942 F.3d 715, 720 (5th Cir. 2019) (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 108, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998)).

[11] **[12]** **[13]** **[14]** To constitute an injury in fact, a threatened future injury must be (1) potentially suffered by the

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plaintiff, not someone else; (2) "concrete and particularized," not abstract; and (3) "actual or imminent, not 'conjectural' or 'hypothetical.' " *Id.* at 720–21 (citations omitted). The injury must be "imminent ... to ensure that the alleged injury is not too speculative for Article III purposes." *Id.* at 721 (quoting *Lujan*, 504 U.S. at 564 n.2, 112 S.Ct. 2130). For a threatened future injury to satisfy the imminence requirement, there must be at least a "substantial risk" that the injury will occur. *Stringer*, 942 F.3d at 721 (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014)). Nonetheless, "[t]he injury alleged as an Article III injury-in-fact need not be substantial; it need not measure more than an identifiable trifle." *OCA-Greater Houston v. Texas*, 867 F.3d 604, 612 (5th Cir. 2017) (quotations omitted). "This is because the injury in fact requirement under Article III is qualitative, not quantitative, in nature." *Id.* (quotations omitted).

[15] Juridical entities may establish standing under an associational or organizational theory of standing. *Id.* at 610.

[16] "Associational standing is a three-part test: (1) the association's members would independently meet the Article III standing requirements; (2) the interests the association seeks to protect are germane to the purpose of the organization; and (3) neither the claim asserted, nor the relief requested requires participation of individual members." *Texas v. Nuclear Regul. Comm'n*, 78 F.4th 827, 836–37 (5th Cir. 2023).

[17] **[18]** **[19]** "By contrast, 'organizational standing' does not depend on the standing of the organization's members. The organization can establish standing in its own name if it 'meets the same standing test that applies to individuals.' " *OCA-Greater Hous.*, 867 F.3d at 610 (citations omitted) (quoting *Ass'n of Cmty. Orgs. for Reform Now v. Fowler*, 178 F.3d 350, 356 (5th Cir. 1999)). For example, an organization, like any other party, can satisfy the injury-in-fact requirement by demonstrating financial harm. *See, e.g., Lion Health Servs., Inc. v. Sebelius*, 635 F.3d 693 (5th Cir. 2011) (hospice care provider had standing to challenge federal regulation governing calculation of annual Medicare hospice provider cap by demonstrating financial harm it suffered through use of the regulation). An organization can likewise establish a likely future injury if it intends "to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute." *Babbitt v. Farm Workers*, 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979).[16]

***12** **[20]** **[21]** **[22]** An organization can also demonstrate the requisite injury with evidence that its "ability to pursue its mission is 'perceptibly impaired' because it has 'diverted significant resources to counteract the defendant's conduct[.]' " *Tenth St. Residential Ass'n v. City of Dallas*, 968 F.3d 492, 500 (5th Cir. 2020) (quoting *N.A.A.C.P. v. City of Kyle*, 626 F.3d 233, 238 (5th Cir. 2010)). But "an organization does not automatically suffer a cognizable injury in fact by diverting resources in response to a defendant's conduct." *El Paso Cnty. v. Trump*, 982 F.3d 332, 343 (5th Cir. 2020). "Rather, the Article III injury comes when that diversion of resources concretely and 'perceptibly impairs' the organization's ability to carry out its purpose. Put differently, the 'perceptible impairment' to an organization's ability to carry out its mission, not the 'drain on the organization's resources,' is the 'concrete and demonstrable injury' for organizational standing." *La. Fair Hous. Action Ctr., Inc. v. Azalea Garden Props., L.L.C.*, 82 F.4th 345, 353 (5th Cir. 2023) (citations and alteration marks omitted) (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982)).

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2. Analysis

[23] Based on the summary judgment record, the Court concludes that at least one of the OCA Plaintiffs, REV-UP, has established associational standing.[17]

[24] With respect to associational standing, it is undisputed that REV-UP is a membership organization and that it has members in Texas who vote by mail. *see* ECF No. 611 at 41.[18] It is also undisputed that REV-UP members had their ABBMs and/or mail ballots rejected based on S.B. 1's number matching requirement and are at risk of having their voting materials rejected again on the same basis in future elections. *See id.* at 44–45 (describing Teri Saltzman a legally blind voter in Travis County whose March 2022 ABBM and mail ballot and November 2022 mail ballot were rejected based on the number-matching requirement). REV-UP has also presented undisputed evidence that its members have been deterred from voting by mail out of fear that their ABBMs or mail ballots will be rejected due to S.B. 1's matching-number requirement. *See id.* at 44–45. These are sufficient injuries to confer Article III standing. *See, e.g., Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1351–52 (11th Cir. 2009) ("Requiring a registered voter either to produce photo identification to vote in person or to cast an absentee or provisional ballot is an injury

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sufficient for standing," as is requiring a registered voter to obtain a photo identification, irrespective of how easy it may be to comply with that requirement); *Stringer v. Hughs*, Nos. SA-20-CV-46-OG, SA-16-CV-257-OG, 2020 WL 6875182, at *9 (W.D. Tex. Aug. 28, 2020) (violation of federal statutory right to simultaneously apply for voter registration and driver's license constituted injury "regardless of whether the individual plaintiffs have been registered to vote by alternative means").

Thus, these individual members would have independent standing to challenge the number-matching provisions under Section 101 because they have suffered an injury-in-fact; the harm they have suffered is fairly traceable to the number-matching provisions of S.B. 1 requiring the rejection of certain voting materials; and the injunctive relief requested by the OCA Plaintiffs—barring enforcement of the number-matching requirements—would redress their harm. *Spokeo*, 578 U.S. at 338, 136 S.Ct. 1540 (2016).

***13** With respect to the second element of associational standing, the interests REV-UP seeks to protect by challenging S.B. 1's number matching requirements are undoubtedly germane to its mission "to empower persons with disabilities through voter registration and assistance, issue advocacy, mobilization, and organizing." ECF No. 611 at 41; *see La Union del Pueblo Entero v. Abbott ("LUPE")*, 614 F. Supp. 3d 509, 526 (W.D. Tex. 2022).

[25] Finally, REV-UP's claims do not require the participation of its members. This "prong of the associational standing test" focuses on "matters of administrative convenience and efficiency," *Food & Com. Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 557, 116 S.Ct. 1529, 134 L.Ed.2d 758 (1996), and is "solely prudential," *Ass'n of Am. Physicians & Surgeons, Inc. v. Tex. Med. Bd.*, 627 F.3d 547, 550 (5th Cir. 2010). The OCA Plaintiffs' claims "can be proven by evidence from representative injured members, without a fact-intensive-individual inquiry," *Tex. Med. Bd.*, 627 F.3d at 552, and there is no question that it is "more administratively convenient and efficient to assert such a challenge in a representative capacity." *LUPE*, 614 F. Supp. 3d at 527.

The Court concludes that the OCA Plaintiffs have met their initial burden on summary judgment with respect to REV-UP's associational standing to assert its Section 101 claim on behalf of its members. Thus, Defendants must either set forth facts to create a material issue or specifically demonstrate why, under the undisputed material facts, the OCA Plaintiffs are not entitled to summary judgment; they cannot simply assert that an issue remains. *Celotex*, 477 U.S. at 322, 106 S.Ct. 2548 (1986) (Rule 56(e) of the Federal Rules of Civil Procedure "requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial" (cleaned up)). That burden is not discharged by "mere allegations or denials." *Id.* at 322 n.3, 106 S.Ct. 2548; Fed. R. Civ. P. 56(e). Defendants have failed to discharge their burden.

Accordingly, the Court concludes that there is no genuine dispute of material fact as to the OCA Plaintiffs' standing to challenge S.B. 1's number-matching framework under the Materiality Provision, and turns to the merits of the OCA Plaintiffs' claims.

B. Challenges to §§ 5.02, 5.03, 5.08, 5.10, and 5.12–5.14

Although the OCA Plaintiffs have standing to challenge the number-matching framework generally, their motion for partial summary judgment as to their Section 101 claim must be denied to the extent that it challenges Sections 5.02, 5.03, 5.08, 5.10, 5.12, 5.13, and 5.14 of S.B. 1, for both procedural and substantive reasons.

[26] Procedurally, the OCA Plaintiffs failed to raise any challenges to Sections 5.08, 5.13, and 5.14 in their Second Amended Complaint. *See* ECF No. 200 ¶ 646. *See Solferini as Tr. of Corradi S.p.A. v. Corradi USA, Inc.*, No. 20-40645, 2021 WL 3619905, at *2 (5th Cir. Aug. 13, 2021) (determining that a movant was precluded from raising a claim at the summary judgment stage when he failed to plead that claim in his complaint).

[27] Regardless of any procedural error, the OCA Plaintiffs' challenges to Sections 5.02, 5.03, 5.08, 5.10, 5.12, and 5.14 of S.B. 1 fail on the merits because none of those provisions require that mail-in ballot applications or mail-in ballots be rejected on any basis. Rather, those provisions merely address the procedures for collecting, tracking, and correcting the relevant identification numbers. *See* TEC §§ 84.002(a)(1-a), 84.011(a), (a)(3-a), 86.002(g), 86.015(c)(4), 87.0411, 87.0271. The Materiality Provision only prohibits actions that "*deny* the right of any individual to vote in any election because of an error or omission on any record or paper[.]" 52 U.S.C. § 10101(a)(2)(B) (emphasis added). It does not, as the State Defendants correctly point out, prevent Texas

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from otherwise prescribing the form of ballot materials or collecting and reviewing information that may be immaterial to voter eligibility. *See* ECF No. 646 at 47. Indeed, the OCA Plaintiff's Second Amended Complaint explicitly concedes that "the State may legally request this information from voters (for example, as an optional data point that would prevent the need for a signature review)." ECF No. 200 at 45.

***14** The OCA Plaintiffs nonetheless seek to enjoin these provisions because, even if they do not require election officials to reject any voting materials, they "contribute to the implementation and enforcement of SB 1's matching-number requirement." ECF No. 665 at 37. But these provisions cannot violate the materiality provision because they do not require the rejection of any voting materials. To extent that the OCA Plaintiffs challenge those provisions as unduly burdensome and confusing to voters, the Court does not dispute that being deterred from voting by mail is a harm, or even a legally cognizable harm, but because "deterrence" does not constitute a "denial" based on an "error or omission," the Materiality Provision is simply not the appropriate vehicle for such a claim.

III. Plaintiffs' Challenges to Sections 5.07 and 5.13

A. Whether the ID numbers in TEAM are material to voter qualifications

[28] The Court must determine at the outset whether a voter's ability to provide the ID number associated with her voter registration record is material to her qualification to vote in a given election. It is not.

The State Defendants tautologically argue that "Texas law deems [ID] numbers material; therefore, they are material." ECF No. 646 at 30–33. As the OCA Plaintiffs point out, "[t]his logic would erase the Materiality Provision from existence, by defining *whatever* requirements might be imposed by state law in order to vote, no matter how trivial, as being 'material in determining whether such individual is qualified under State law to vote in such election.' " ECF No. 665 at 24 (citing 52 U.S.C. § 10101(a)(2)(B) and *United States v. Mississippi*, 380 U.S. 128, 137–38, 85 S.Ct. 808, 13 L.Ed.2d 717 (1965) (phrase "otherwise qualified by law" in Section 10101(a)(1) cannot include invalid statutes; Congress "obviously" meant "qualifications required of all voters by valid state or federal laws")).

[29] **[30]** To determine whether an error or omission is material, the information required must be compared to state-law qualifications to vote. *See Migliori*, 36 F.4th at 162; *Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1308–09 (N.D. Ga. 2018). Qualifications are substantive voter attributes. *See, e.g., Lassiter v. Northampton Cnty. Bd. of Elections*, 360 U.S. 45, 51, 79 S.Ct. 985, 3 L.Ed.2d 1072 (1959) (residence, age, criminal record); TEC § 11.002(a) (age, citizenship, mental capacity, criminal record, residence, and prior registration). They are distinct from rules governing the conduct of elections, including the manner of determining qualifications. *See Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 13–17, 133 S.Ct. 2247, 186 L.Ed.2d 239 (2013); *see also Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 666, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966) (distinguishing qualifications and compliance with poll tax).

It is self-evident that a voter's ID number is not material to her eligibility to vote under Texas law. Indeed, by itself, a voter's DPS number or SSN4 cannot offer any information about a voter's substantive eligibility to vote—or even to vote by mail—in the state of Texas because those numbers are static. For example, a person's SSN4 does not change when he turns 18, registers to vote, moves into or out of the state of Texas, is convicted of a felony or judged mentally incompetent, or even dies, even though all of those factors bear on his eligibility to vote in Texas. Nor does a person's SSN4 change when she turns 65, becomes disabled, changes her travel plans, or suffers a miscarriage, even though all of those factors could impact her eligibility to vote by mail in Texas.

Further, the text of S.B. 1 itself acknowledges that even *possession* of a DPS number or SSN4 is immaterial to voter eligibility by permitting applicants and voters to represent on their ABBMs and BBMs that they have "not been issued [such] a number." *See* S.B. 1 §§ 5.02, 5.08; TEC § 84.002(a)(1-a). The presumably tiny fraction of Texas residents who fall into this category are not disqualified from voting on this basis. Nor are the over 90,000 voters registered in Texas who, regardless of whether they have been issued a DPS number or SSN4, have neither ID number associated with their TEAM record. *See* SUF ¶¶ 140–41. Those voters presumably have neither ID number associated with their TEAM record because they registered to vote before 2004, when Texas began requiring a DPS number or SSN4 on its voter registration form in compliance with HAVA.[19]

***15** Not even HAVA's ID number requirement renders the relevant DPS numbers or SSN4s "material" to voter qualifications.[20] To begin, HAVA did not direct states to purge all existing voters from state rolls and force them to re-register

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in accordance with the new federal requirements.[21] Indeed, HAVA does not even require states to *implement* a registration process. *See* 52 U.S.C. § 21083(a)(1)(B) (exempting states without voter registration requirements from HAVA's ID number and database provisions).[22] And, as with S.B. 1, HAVA does not prohibit individuals who do not possess a state ID number or SSN4 from registering to vote, but rather directs states to assign those voters unique identification numbers. As a result, even following HAVA, thousands of qualified voters have neither a DPS number nor an SSN4 associated with their TEAM record. SUF ¶ 141 (indicating that, as of January 2023, over 90,000 Texas registered voters had neither a DPS number nor a SSN4 affiliated with their voter registration record). Thus, having a DPS number or SSN4 associated with one's registration record cannot be material to voter *eligibility.*

For the argument that HAVA renders ID numbers *per se* material to voter eligibility, the State Defendants rely on the majority opinion in *Florida State Conf. of N.A.A.C.P. v. Browning*, which concluded:

> The fact that HAVA section 303(a) requires states to obtain the applicant's identification numbers before accepting a registration application and also to "determine whether the information provided ... is sufficient to meet [that] requirement[ ]" indicates that Congress deemed the identification numbers material to determining eligibility to register and to vote.

522 F.3d 1153, 1174 (11th Cir. 2008). The Court is neither bound nor persuaded by this reasoning, which is undermined by the text of HAVA itself.

As the concurrence in *Browning* and at least one other court have pointed out, HAVA does not require states to verify the accuracy of an applicant's identifying number before registration:

> If a state is not required to verify an applicant's identifying number, then HAVA does not automatically make such information material because an individual in a state without a matching scheme could provide her driver's license or social security number and even though she may have transposed two numbers of her application, that immaterial error would not prevent her from voting in that state. Furthermore, the information cannot be *per se* material because HAVA provides for the assignment of a unique identifying number, which does not have to be matched, for those individuals who do not have a driver's license or social security number.

Browning, 522 F.3d at 1183 n.17 (Barkett, J., dissenting in part); *see also Wash. Ass'n of Churches*, 492 F. Supp. 2d at 1268–69 ("It is clear from the language of the statute and by looking at legislative history that HAVA's matching requirement was intended as an administrative safeguard for 'storing and managing the official list of registered voters,' and not as a restriction on voter eligibility. This is evidenced by the requirement that a person who has no driver's license or social security number be given a unique identifying number, but not be matched, prior to registering to vote.") (citations omitted). Texas's failure to verify the validity of the ID numbers provided on voters' original registration forms is manifest in the thousands of errors in TEAM. As a matter of common sense, a qualified voter's ability to correctly guess the incorrect DPS number associated with her voter registration record in TEAM cannot be material to her eligibility to vote.

***16** Whatever the force of the *Browning* panel's decision with respect to the materiality of providing (or being assigned) an ID number upon registration, that is not what is at issue in this case. Voters who seek to vote by mail in Texas have already complied with HAVA and the Texas Election Code when they registered to vote. SB 1's matching-number requirement superfluously duplicates HAVA's registration-stage requirement to *provide* an ID number at *both* the ABBM and mail ballot stages, and it then *also* requires the number to match the voter's file in the TEAM database, which is riddled with errors.

The State Defendants assert that the ID number requirement is material to voter eligibility because it confirms the identity of the voter and that the person casting the ballot is in fact the registered voter.[23] ECF No. 645 at 15–22. Here again, the State Defendants have confused voters' substantive qualifications with the methodology for identifying voters in order to administer an election. *See* 52 U.S.C. §§ 20504(c)(2)(B)(ii), 20508(b)(1) (distinguishing between information necessary "to enable the appropriate State election official to assess the eligibility of the applicant" and information needed "to administer voter registration"); *see also* Tex. Const. art. 6, § 2(a) (defining "qualified voter"), and "The Times, Places and Manner of holding Elections," U.S. Const. art. I, § 4 cl. 1; *see also* Tex. Const. art. 3, § 27 (permitting regulation of elections by law).

***17** As a practical matter, the undisputed evidence confirms that election officials do *not* use the ID numbers on ABBMs and BBMs to confirm voters' identities but to reject their

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voting materials. While he was serving as the Director of the Elections Division of the Texas SOS, Keith Ingram acknowledged that "individual eligibility criteria ha[ve] nothing to [d]o with the number."[24] SUF ¶ 15. The Travis County Clerk further testified that Travis County is "able to associate [an ABBM] applicant with their voter even in the absence" of an identification number, because they "have to look up [the voter's] file to see if [the voter] ha[s] a number in the first place." *See* ECF No. 611-1, Ex. 18, Charlie Johson Dep. at 28:19–29:2. This is logical—to compare the DPS number or SSN4 on mail ballot materials with a voter's registration record, as S.B. 1 requires, officials must have already discerned the identity of the voter "identified on the applicant's application for voter registration" or "the voter's application for voter registration."[25] TEC §§ 86.001(f), 87.041(b)(8); SUF ¶¶ 119–20.

[31] Similarly, even if the Court were to conclude that S.B. 1's matching-number requirement does not violate Section 101 at the ABBM stage, the duplicative requirement that a voter who has successfully obtained a mail ballot by matching the ID number on their ABBM to their voter file must do so *again* on the carrier envelope to have their vote counted would still be unlawful. After all, the provision of the ballot itself indicates that the voter has already been identified and found qualified by an election official. *See* *Martin*, 347 F. Supp. 3d. at 1309 (enjoining requirement that voters hand-write their birth year on absentee ballot because "the qualifications of the absentee voters" were "not at issue because [county] elections officials have already confirmed such voters' eligibility through the absentee ballot application process"); *League of Women Voters of Ark. v. Thurston*, No. 5:20-CV-05174, 2021 WL 5312640, at *4 (W.D. Ark. Nov. 15, 2021) (state law requiring absentee voters to submit duplicative information at mail-ballot stage, after voters had already correctly provided the information at the application stage, under threat of being disenfranchised on the basis of a mismatch or omission, gave rise to a materiality violation).

***18** **[32]** Once election officials have determined an applicant or voter's identity, additional requirements that confirm identity are not material to determining whether the applicant or voter is qualified to vote or vote by mail and compounds the chance for error and disenfranchisement. *See* *Schwier v. Cox (Schwier I)*, 340 F.3d 1284, 1294 (11th Cir. 2003). Section 101 does not permit state actors to require voters to recite redundant information that confirms a known identity, even as a prophylactic against voter impersonation. *See* *Schwier II*, 412 F. Supp. 2d at 1276 (rejecting contention that any information that "could help to prevent voter fraud" is material to qualifications). Thus, courts have found a wide range of information—such as a driver's license number matching state records, *Wash. Ass'n of Churches*, 492 F. Supp. 2d at 1266, 1270; a social security number, *Schwier v. Cox* (*Schwier III*), 439 F.3d 1285, 1286 (11th Cir. 2006) (mem. op.); or a birth year on an absentee ballot envelope, *Martin*, 347 F. Supp. 3d at 1308–09—not to be material to determining a voter's qualifications, even though this information could conceivably confirm a voter's identity.

Thus, the Court concludes as a matter of law that a voter's ability to provide the ID number associated with her voter registration record on TEAM is not material to her voter qualifications under Texas law.

B. Whether Section 101's protections extend to S.B. 1's mail-in voting process

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The State Defendants and Intervenor-Defendants maintain that Sections 5.07 and 5.13 do not even *implicate* the Materiality Provision because they govern the procedures for requesting and casting a mail-in ballot rather than voter registration. *See* ECF No. 608 at 13–23; ECF No. 634 at 15–18; ECF No. 635 at 13–17; ECF No. 645 at 11–12 (incorporating by reference the arguments in Intervenor-Defendant's MSJ); ECF No. 646 at 29–30 (same). The Materiality Provision, they argue, prohibits states from refusing to register voters *during the voter-registration process* based on violations of rules that seek information immaterial to assessing state-law voter qualifications.

Here, Defendants seek to reassert an argument already rejected in the Court's order denying the State Defendants' motion to dismiss the United States' materiality claim:

> [T]he preparation and submission of an application to vote by mail, as well as the preparation and submission of a mail ballot carrier envelope, are actions that voters must take in order to make their votes effective. Section 101, as a result, does not only apply when a voter is absolutely prohibited from voting. It also reaches the actions contemplated under sections 5.07 and 5.13.

LUPE (USA), 604 F. Supp. 3d at 541.

Intervenor-Defendants nonetheless argue that their construction is supported by the canon of *ejusdem generis*, which provides that "where general words follow an enumeration of specific items, the general words are read as applying only to other items akin to those specifically

enumerated." *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 588, 100 S.Ct. 1889, 64 L.Ed.2d 525 (1980). Intervenor-Defendants contend that the terms "application" and "registration" relate to an initial qualification determination, and that the term "other act requisite to voting" must "therefore refer[ ] only to the functional equivalents of 'application' and 'registration'—i.e., the initial processes to assess voter qualifications." ECF No. 608 at 20. Not so.

[33] The CRA's capacious definition of "vote" easily dispenses with the Intervenor-Defendants' position that "all evidence indicates ... that Congress was concerned with registration when it passed the materiality provision, not other stages of the electoral process." ECF No. 663 at 19. If Section 101 was intended only to protect qualified voters' right to *register* and be added to the voter rolls and not their right to actually cast a ballot and have it counted, Congress could have said so. It did just the opposite: the statute protects an individual's right to *vote*, broadly defined to include "*all action necessary* to make a vote effective including, ... casting a ballot, and having such ballot counted and included in the appropriate totals of votes." 52 U.S.C. §§ 10101(a)(2)(B), (a)(3)(A) (emphasis added).

***19** **[34]** The text of the Materiality Provision further confirms that the "right to vote" is evaluated on an election-by-election basis. It protects a qualified individual's right to vote "*in any election*" regardless of paperwork errors that are immaterial to their qualification to vote "*in such election.*" 52 U.S.C. § 10101(a)(2)(B) (emphasis added). In other words, denying the statutory right to vote based on an error or omission that disqualifies a voter from only a *single* election violates Section 101. This language cannot reasonably be interpreted to mean Congress forbade denying the right to vote only for errors that affect whether the voter is qualified "to register," or to vote "in elections generally." Section 101 prohibits denial of the right to vote in a single election just as thoroughly as it prohibits wholesale refusal to register a voter. *Cf. Migliori*, 36 F.4th at 163 ("[M]ateriality is limited to errors or omissions determining qualification 'to vote in *such* election,' not future elections.").

[35] **[36]** **[37]** More importantly, canons of construction such as *ejusdem generis* are applied only to resolve ambiguity, not create it. *See Harrison*, 446 U.S. at 588, 100 S.Ct. 1889 (citing *United States v. Powell*, 423 U.S. 87, 91, 96 S.Ct. 316, 46 L.Ed.2d 228 (1975)). Congress's use of the phrase "any other" when introducing a broadening provision is "expansive language" that "offers no indication whatever that Congress intended [a] limiting construction" of the general phrase constrained by more specific preceding examples. *Harrison*, 446 U.S. at 589, 100 S.Ct. 1889.[26] And the Supreme Court has counseled that courts should not "woodenly apply limiting principles every time Congress includes a specific example along with a general phrase," In any event, we do not woodenly apply limiting principles every time Congress includes a specific example along with a general phrase. *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 227, 128 S.Ct. 831, 169 L.Ed.2d 680 (2008). The Court does not find any uncertainty in the phrase "other act requisite to voting" and concludes that the phrase encompasses the completion of both ABBMs and the carrier envelopes. An ABBM is an "application" "requisite to voting" for most individuals who seek to cast a mail ballot. *See* TEC § 84.001(a); SUF ¶ 36. Similarly, preparation of a carrier envelope[27] is "an act requisite to voting" for individuals who cast a mail ballot. *See* TEC §§ 86.005(c), 86.006, 101.057, 101.107; SUF ¶¶ 48, 63, 70.

In support of their position that the Materiality Provision should be limited to the registration stage, the Intervenor-Defendants rely on statements in two non-binding, non-precedential opinions. *See, e.g.*, ECF No. 608 at 17 (citing *Ritter*, 142 S. Ct. at 1825 (Alito, J., dissenting from the denial of the application for stay) and *Vote.org v. Callanen*, 39 F.4th 297 (5th Cir. 2022) (stay opinion)). The motions panel in *Vote.org* suggested in a footnote that "[a] plausible argument can be made that [Section 101] is tied to only voter registration specifically and not to all acts that constitute casting a ballot." 39 F.4th at 305 n.6. The panel relied on reasoning in Justice Alito's reasoning in dissent, that even after qualifying and registering, a voter who "does not follow the rules" may be unable to cast a vote for "any number of reasons":

> ***20** A voter may go to the polling place on the wrong day or after the polls have closed. A voter may go to the wrong polling place and may not have time to reach the right place before it is too late. A voter who casts a mail-in ballot may send it to the wrong address.

Ritter, 142 S. Ct. at 1825 (Alto, J., dissenting). Thus, the panel reasoned, "[i]t cannot be that any requirement that may prohibit an individual from voting if the individual fails to comply denies the right of that individual to vote under" the Materiality Provision. (5th Cir. 2022). And that is literally correct: only refusals to count a voter's ballot for *immaterial errors on voting-related paperwork* are actionable under the statute's plain terms.

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It is not clear to the Court how any of the errors cited by the motions panel—going to the wrong polling place, sending a ballot to the wrong address, or failing to cast an in-person or mail ballot by the relevant deadline—constitutes an "error or omission" on "any paper or record" that would fall within the scope of the Materiality Provision. *See Democratic Cong. Campaign Comm. v. Kosinski*, 614 F. Supp. 3d 20, 55 (S.D.N.Y. 2022) (distinguishing between errors regarding a voter's assigned polling place and errors "on any record or paper"); *Friedman v. Snipes*, 345 F. Supp. 2d 1356, 1372–73 (S.D. Fla. 2004) (declining to issue an injunction under Section 101 requiring counting of absentee ballots received after a deadline, noting that this was not an error or omission "on any record or paper"). fMore importantly, none of those provisions are at issue in this litigation.

Finally, at odds with the plain text, Intervenor-Defendants insist that the Materiality Provision must be limited to voter registration to avoid constitutional problems, because Congress sought with the Materiality Provision to prevent "racially discriminatory practices in *voter registration.*" ECF No. 608 at 15–16; *see also id.* at 7–8. In enacting Section 101, Congress considered "the practice of requiring unnecessary information for voter registration"—such as listing the registrant's "exact number of months and days in his age"—"with the intent that such requirements would increase the number of errors or omissions on the application forms, thus providing an excuse to disqualify potential voters." ECF No. 608 at 14 (citing *Schwier I*, 340 F.3d at 1294). "Such trivial information served no purpose other than as a means of inducing voter-generated errors that could be used to justify rejecting applicants." *Browning*, 522 F.3d at 1173; *see* H.R. Rep. No. 88-914, pt. 2, at 5 (1963) ("[R]egistrars [would] overlook minor misspelling errors or mistakes in age or length of residence of white applicants, while rejecting" an African-American's application "for the same or more trivial reasons."). The Intervenor-Defendants' argument—that Section 101 is limited to voter registration because Congress considered discrimination in the registration process—fails, for at least two reasons.

[38] First, because the language of the Materiality Provisions is unambiguous, neither the canon of constitutional avoidance nor legislative history can defeat the text. *See United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 494, 121 S.Ct. 1711, 149 L.Ed.2d 722 (2001) ("[T]he canon of constitutional avoidance has no application in the absence of statutory ambiguity."); *Bostock v. Clayton Cnty., Ga.*, ––– U.S. ––––, 140 S. Ct. 1731, 1750, 207 L.Ed.2d 218 (2020) ("[L]egislative history can never defeat unambiguous statutory text[.]"). Even assuming that Congress intended to limit the Materiality Provision to errors and omissions at the registration stage, the text simply does not permit that construction. The Supreme Court has counseled that, "[w]hen the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit." *Bostock*, 140 S. Ct. at 1737; *see also id.* ("Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result.... But the limits of the drafters' imagination supply no reason to ignore the law's demands.").[28] "Ours is a society of written laws. Judges are not free to overlook plain statutory commands on the strength of nothing more than suppositions about intentions or guesswork about expectations." *Id.* at 1754.

***21 [39]** Second, in addition to its power to regulate federal elections under the Elections Clause, U.S. Const. art. I, § 4, the Reconstruction Amendments authorize Congress to enact prophylactic legislation to protect the right to vote in particular, as the Supreme Court has repeatedly confirmed. *E.g.*, *City of Boerne v. Flores*, 521 U.S. 507, 518, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997) (noting the validity of Congress's "suspension of literacy tests and similar voting requirements" as well as "other measures protecting voting rights" and collecting cases). When legislating pursuant to its Fifteenth Amendment powers, "Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting." *South Carolina v. Katzenbach*, 383 U.S. 301, 324, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966).

[40] While Congress surely intended to prevent abuses in the voter registration process, *see, e.g., Schwier I*, 340 F.3d at 1294, nothing in Section 101's statutory language nor its legislative purpose indicates that Congress chose to *allow* them at other stages in the process between voter registration and completing all legal requirements requisite to voting an effective ballot.[29] Indeed, a rule protecting voter *registration* only, but allowing registered voters to still be denied an *effective* vote based on irrelevant paperwork errors, would not have accomplished Congress' broader, well-documented aim of eradicating all manner of arbitrary and discriminatory denials of the right to vote. *E.g.*, H.R. Rep. No. 88-914 (1963), *reprinted at* 1964 U.S.C.C.A.N. 2391, 2394, 2485–87, 2491. Thus, Congress used expansive language in crafting a prophylactic rule that protects "the right of any individual to vote in any election" and that extends to "all action necessary

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to make a vote effective." 52 U.S.C. §§ 10101(a)(2)(B) & (e). The broad definition of the "right to vote" further undermines Intervenor-Defendants' position. It would not make sense for Congress to capaciously define the right to vote to include all actions necessary to render a vote effective but limit the application of the statute's protections to the initial act of *registering* to vote.

The "rational means" of combatting racial discrimination in voting is not limited to solving a problem—disenfranchisement based on immaterial errors on voting paperwork—on a form-by-form basis. Indeed, Congress's enactment of a broader rule is entirely rational: after identifying a record of a problem at the registration stage, Congress was not limited to crafting a solution with an obvious loophole allowing officials to use forms at later stages in the same way, and for the same purpose. *See Katzenbach*, 383 U.S. at 309, 86 S.Ct. 803 (describing "voluminous legislative history" addressing "unremitting and ingenious defiance of the Constitution"); *Browning*, 522 F.3d at 1173 ("[W]e recognize that Congress in combating specific evils might choose a broader remedy .... The text of the [Materiality Provision], and not the historically motivating examples of intentional and overt racial discrimination, is thus the appropriate starting point of inquiry in discerning congressional intent."). To the extent that the Intervenor-Defendants seek to challenge the wisdom of the Materiality Provision's expansive reach as a policy matter, "[that] is an argument to be addressed to Congress, not to this Court." *Harrison*, 446 U.S. at 593, 100 S.Ct. 1889.

***22** In short, the Court concludes that completing an ABBM is an "application" "requisite to voting" for most individuals who seek to cast a mail ballot. *See* TEC § 84.001(a); SUF ¶ 36. Similarly, preparation of a carrier envelope is "an act requisite to voting" for most individuals who cast a mail ballot. *See* TEC §§ 86.005(c), 86.006, 101.057, 101.107; SUF ¶¶ 48, 63, 70. Thus, the Materiality Provision reaches Sections 5.07 and 5.13 of S.B. 1 because failure to satisfy the number-matching requirements constitutes an "error or omission" on an ABBM or carrier envelope—a "record or paper"—relating to a voter's application to vote by mail or mail-in ballot—an "application, registration, or other act requisite to voting" under Section 101.

C. Whether Sections 5.07 and 5.13 result in a denial of the right to vote in an election

[41] Denial of the statutory right to vote under Section 101 is complete when a particular application or carrier envelope is rejected; an opportunity to cure the rejection, submit another application, or cancel a mail ballot does not negate the denial of the statutory right to vote. *See La Unión del Pueblo Entero*, 604 F. Supp. 3d at 541; *see also Vote.org v. Ga. State Election Bd.*, No. 1:22-cv-1734, ––– F.Supp.3d ––––, ––––, 2023 WL 2432011, at *7 (N.D. Ga. Mar. 9, 2023) (rejecting the "argument that the opportunity to cure an error rehabilitates any potential violation"); *Sixth Dist. of Afr. Methodist Episcopal Church v. Kemp*, 574 F. Supp. 3d 1260, 1282 (N.D. Ga. 2021) (same).

Recycling arguments that were already rejected at the motion-to-dismiss stage, the State Defendants and Intervenor-Defendants insist that Sections 5.07 and 5.13 do not violate the Materiality Provision because they do not deny the right to vote. *See* ECF No. 608 at 16–18, ECF No. 634 at 9–15, ECF No. 635 at 7–13, ECF No. 663 at 8–11, ECF No. 645 at 22–26, ECF No. 646 at 41–50.

[42] Defendants reassert that the opportunity to cure a rejection or vote in person after a rejection satisfies their obligation not to deny the statutory right to vote protected by Section 101. *See* ECF No. 646 at 20–23, 41–47; ECF No. 634 at 9–10. But the Court has already recognized that cure procedures do not absolve an initial violation. *See LUPE (USA)*, 604 F. Supp. 3d at 541. Indeed, the efficacy of any cure procedure is irrelevant to the question under the Materiality Provision, which is violated whenever an ABBM or mail ballot is rejected based on an immaterial error or omission. Section 101 requires paperwork with an immaterial error or omission to be accepted, not rejected with an invitation to try again. If a qualified voter fails to cure an immaterial error or omission on her voting materials, she is unable to cast a ballot and have her vote counted—she was denied the right to vote in that election based on the error or omission.

[43] Nor does the availability of in-person voting negate S.B. 1's denial of the statutory right to vote for failure to satisfy the number-matching requirements. Section 101 protects against rejection of mail voting materials. *See LUPE (USA)*, 604 F. Supp. 3d at 541 n.20; *see also Migliori*, 36 F.4th at 156–57. This is because Section 101 applies to "any individual" participating in "any election" and to "any record or paper" relating to "any application, registration, or act requisite to voting." 52 U.S.C. § 10101(a)(2)(B) (emphasis added); *see also, e.g., United States v. Gonzales*, 520 U.S. 1, 5, 117 S.Ct. 1032, 137 L.Ed.2d 132 (1997) (explaining that "the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind' " (quoting Webster's

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Third New International Dictionary 97 (1976))). Having made mail ballot voting available, Texas is not permitted to refuse to count mail ballots solely because of an insignificant paperwork error. *See In re Georgia Senate Bill 202*, No. 1:21-CV-01259-JPB, 2023 WL 5334582, at *10 (N.D. Ga. Aug. 18, 2023) ("The text of the Materiality Provision does not distinguish between ... 'an act requisite to voting *absentee*' and 'an act requisite to voting *in person.*' Instead, the statute prohibits the denial of the right to vote.").

***23** **[44]** **[45]** S.B. 1 provides that mail ballot materials must be rejected if the materials lack an ID number matching voter registration records, preventing an applicant from casting a mail ballot or have that ballot counted. *See* TEC §§ 86.001(f), 87.041(b)(8); SUF ¶¶ 32–35, 50–51, 63. The existence of additional, more onerous procedures that voters could use to try to overcome the rejection does not negate the original denial. Section 101's plain text does not permit election officials to reject mail ballot materials based on errors or omissions not material to voter qualifications *unless and until* voters successfully provide the requested information or the State fixes its own database errors or omissions. *See* 52 U.S.C. § 10101(a)(2)(B); *LUPE (USA)*, 604 F. Supp. 3d at 541. Ultimately, even with a cure process, the fact remains that S.B. 1 requires rejection of mail ballot materials if a voter does not submit an identification number that matches voter registration records. *See* TEC §§ 86.001(f), 87.041(b)(8); SUF ¶¶ 37, 39, 61, 63, 67–68. That rejection denies the statutory right to vote.[30]

The number-matching provisions of S.B. 1 require election officials to deny the CRA's broadly defined right to vote based on errors or omissions on ABBM's and carrier envelopes that are not material to voter qualifications under Texas law. In short, it is difficult to imagine a clearer violation of the Materiality Provision than S.B. 1's number-matching requirement. Nonetheless, in an effort to narrow the scope of the Materiality Provision, the State Defendants and Intervenor-Defendants advance a number of unpersuasive interpretations of the text, which the Court will briefly address.

D. Defendants' wholly unpersuasive interpretations of the Materiality Provision

1. The Materiality Provision reaches "neutral, evenly applied" state law.

[46] The State Defendants contend that the Materiality Provision does not apply to non-discriminatory, "neutrally applied" state laws such as Sections 5.07 and 5.13. ECF No. 645 at 9–11; ECF No. 646 at 27–29. Here, State Defendants rely on language from another provision of Section 101, arguing that, "[l]ooking at 10101(a)(2) as a whole ... it *becomes apparent* that the Materiality Provision functions as a safeguard against the discriminatory application of state voter qualification and registration rules." ECF No. 645 at 9. It is far from "apparent" that the Materiality Provision applies only to discriminatory applications of state voting rules. Indeed, the exception that the State Defendants ask the Court to recognize, which appears nowhere on the face of Section 101's text, would swallow the rule set forth in the Materiality Provision.

***24** In its entirety, Section 10101(a)(2) provides:

> No person acting under color of law shall –
>
> (A) in determining whether any individual is qualified under State law or laws to vote in any election, apply any standard, practice, or procedure ***different from*** the standards, practices, or procedures applied under such law or laws to other individuals within the same county, parish, or similar political subdivision which have been found by State officials to be qualified to vote;
>
> (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; or
>
> (C) employ any literacy test as a qualification for voting in any election unless (i) such test is administered to each individual and is conducted wholly in writing, and (ii) a certified copy of the test and of the answers given by the individual is furnished to him within twenty-five days of the submission of his request made within the period of time during which records and papers are required to be retained ....

52 U.S.C. § 10101(a)(2).

[47] **[48]** The State Defendants argue that, because they serve a common function, common tools of statutory construction require the three provisions of section 10101(a)(2) to be read *in pari materia.*[31] ECF No. 645 at 9. As Plaintiffs point out, however, *in pari materia* is a tool used to

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resolve textual ambiguities, not a basis for creating them. ECF No. 670 at 7 (citing *Erlenbaugh v. United States*, 409 U.S. 239, 245, 93 S.Ct. 477, 34 L.Ed.2d 446 (1972)). Indeed, even where two provisions were "both parts of a comprehensive federal legislative effort" and "enacted by the same legislative body at the same time," one provision cannot be leveraged through the *in pari materia* canon "to introduce an exception to the coverage of the [other] where none is now apparent." *Erlenbaugh*, 409 U.S. at 244–45, 93 S.Ct. 477.

While Subsection (A) and the Materiality Provision may have been enacted to address a common problem, one should not limit the other where they "play different roles in achieving these broad, common goals." *Id.* Indeed, as a matter of common sense, it is simply incorrect to assume that tools directed at the same goal must operate by the same means. Umbrellas, goloshes, and raincoats, for example, all work toward the same purpose—protection from the elements—but function in completely different ways. To suggest that, because an umbrella works by "opening," we should likewise "open" our boots and coats in the face of a storm would be nonsensical and even—with respect to the raincoats—counterproductive.

***25** By selectively applying language in Subsection (A) to other provisions, State Defendants would restrict all three subsections of 52 U.S.C. § 10101(a)(2) to accomplish only the purpose of Subsection (A), rendering the other provisions fully redundant. *Compare* 52 U.S.C. § 10101(a)(2)(A) (preventing an official from applying "any standard, practice, or procedure different from the standards, practices, or procedures applied under such law or laws to other individuals") with ECF No. 645 at 10 (suggesting the Materiality Provision is applicable only to "prevent individuals acting under color of law from applying state laws relating to voting differently with respect to some citizens than to others so as to deny or abridge the right of all citizens to vote" (emphasis in original)).

[49] The State Defendants' interpretation would violate the "obligation to give effect to every provision of [a] statute." *Carcieri v. Salazar*, 555 U.S. 379, 395, 129 S.Ct. 1058, 172 L.Ed.2d 791 (2009). Congress's choice not to include the same disparate treatment requirement of Subsection (A) when drafting the Materiality Provision must be given effect because "when Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452, 122 S.Ct. 941, 151 L.Ed.2d 908 (2002) (citation and internal quotation marks omitted); *Migliori*, 36 F.4th at 162 n.56 (the Materiality Provision "does not mention racial discrimination" and "we cannot find that Congress intended to limit this statute to either instances of racial discrimination or registration").

While the provisions of Section 101 fall well within the scope of Congress's broad legislative power under the Reconstruction Amendments, *Katzenbach*, 383 U.S. at 324, 86 S.Ct. 803, it is worth remembering that, in enacting the CRA, Congress also relied on its authority under the Elections Clause. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, § 101, 74 Stat. 241, 241 (1964) (applying Section 101 only to federal elections); Voting Rights Act of 1965, Pub. L. No. 89–110, § 15(a), 79 Stat. 437, 445 (1965) (expanding Section 101 to cover state and local elections). Thus, regardless of any racial considerations, Congress had the power to require that votes in federal elections be counted despite immaterial paperwork errors, so long as those errors had nothing to do with voters' qualifications under state law. "[B]y tying the federal franchise to the state franchise instead of simply placing it within the unfettered discretion of state legislatures, the Framers avoided 'render[ing] too dependent on the State governments that branch of the federal government which ought to be dependent on the people alone.' " *Inter Tribal Council of Ariz.*, 570 U.S. at 17, 133 S.Ct. 2247 (quoting The Federalist No. 52, at 326 (J. Madison)); *see also id.* (overturning, as inconsistent with the NVRA, an Arizona law requiring voter-registration officials to "reject" any application for registration, including a federal form, not accompanied by documentary evidence of citizenship). In other words, it is entirely possible that Congress sought to vindicate the federal franchise generally by preventing state officials from rejecting voting materials for minor paperwork errors, regardless of the racial impact of the officials' conduct.

2. The Materiality Provision applies *because* S.B. 1's requirements are immaterial

The Intervenor-Defendants admit what the State Defendants will not: that a DPS number or SSN4 appearing in state databases is not material to voter qualifications. ECF No. 634 at 15; ECF No. 608 at 20 ("[T]he United States ... may point out that the personal identification numbers on an application or mail ballot are 'not material' to determining an individual's qualifications to vote. That is entirely correct." (internal

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citations omitted)). That should end the inquiry. Nonetheless, the Intervenor-Defendants suggest, contrary to both the text and purpose of the Materiality Provision, that that the number-matching provisions of S.B. 1 fall outside of Section 101's purview *because* DPS numbers and SSN4s are *not* used to determine voter qualifications. In other words, the Intervenor-Defendants assert that Section 101 applies only where the error or omission *is* material to a voter's qualifications under state law. "It is because sections 5.02 [sic] and 5.08 [sic] do not regulate voter qualification determinations that they fall *outside* the materiality provision." ECF No. 634 at 21.

***26** A judge in the Northern District to Georgia recently rejected the same argument:

> Contrary to Responding Defendants' position, the fact that the outer envelope is not used to determine voter qualifications merely reinforces the immateriality of the Birthdate Requirement. It has never been the law that the Materiality Provision only applies to that initial determination of whether a voter is qualified to vote. Moreover, interpreting the Materiality Provision in the manner Responding Defendants suggest would essentially render the provision meaningless. In other words, a state could impose immaterial voting requirements yet escape liability each time by arguing that the very immateriality of the requirement takes it outside the statute's reach.

In re Georgia Senate Bill 202, 2023 WL 5334582, at *10. The Court agrees.

The Republican Committees suggest that, following successful registration, states and election officials are free to intentionally reject ballots cast by eligible voters for any reason whatsoever, so long as it does not disqualify the voter from attempting to vote in future elections. The interpretation does violence not only to the clear text of the Materiality Provision but to the civil rights of every qualified voter in the State of Texas and to the fundamental premise of our democracy.

IV. Plaintiffs are entitled to permanent injunctive relief

[50] A party seeking a permanent injunction must prove: (1) that it has succeeded on the merits; (2) that a failure to grant the injunction will result in irreparable injury; (3) that said injury outweighs any damage that the injunction will cause the opposing party; and (4) that the injunction will not disserve the public interest. *Valentine v. Collier*, 993 F.3d 270, 280 (5th Cir. 2021). The Court addresses each factor in turn.

[51] First, for the reasons set forth in this order, the Court concludes that Sections 5.07 and 5.13 of S.B. 1 violate the Materiality Provision. Plaintiffs have thus succeeded on the merits of their challenge to Sections 5.07 and 5.13 of S.B. 1 under Section 101 of the Civil Rights of 1964, 52 U.S.C. § 10101(a)(2)(B).

[52] Second, the Court concludes that failure to grant the requested injunction will result in irreparable injury to voters in Texas. "The denial of the opportunity to cast a vote that a person may otherwise be entitled to cast—even once—is an irreparable harm." *Jones v. Governor of Fla.*, 950 F.3d 795, 828 (11th Cir. 2020). "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); *see also Purcell v. Gonzalez*, 549 U.S. 1, 7, 127 S.Ct. 5, 166 L.Ed.2d 1 (2006) (recognizing the "strong interest in exercising the fundamental political right to vote") (citing *Dunn v. Blumstein*, 405 U.S. 330, 336, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972)). Given the text of Sections 5.07 and 5.13 (mandating the rejection of mail ballot materials for immaterial paperwork errors and omissions), the thousands of ABBMs and mails ballots that have been rejected thus far, and the persistent ID errors in the TEAM records, the Court concludes that, without the requested injunctive relief, future denials of ABBMs and mail-in ballots in violation of the Materiality Provision are not only likely but certain.

***27** **[53]** Third, the injury to Plaintiffs and voters in Texas outweighs any damage the injunction will cause to the State Defendants and election officials. The injury to Plaintiffs and voters in Texas is great: "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964). On the other hand, enjoining the rejection of otherwise valid voting materials would impose at most a *de minimis* burden on the State Defendants and election officials. The State Defendants can comply with this Order through minor modifications to their election administration practices. Any injunction would not direct the State Defendants to change the *process* for applying to vote by mail or the deadline or eligibility requirements for doing so. Texas election officials could continue to use the form ABBM and carrier envelopes prescribed by the SOS in administering elections, and could even follow the same cure process outlined under Texas law (in an effort to correct

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outstanding TEAM errors). Rather, the injunction would merely require officials to accept otherwise valid ABBMs and mail ballots that failed to satisfy S.B. 1's number matching requirements.

Finally, it is clear to the Court that the injunction would not disserve the public interest, and, to the contrary, will serve the public interest by protecting individuals' fundamental right to vote. *See Dunn*, 405 U.S. at 336, 92 S.Ct. 995 (stating that protecting the right to vote is of particular public importance because it is "preservative of all rights.") (citing *Reynolds v. Sims*, 377 U.S. 533, 562, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964)); *see also Wash. Ass'n of Churches*, 492 F. Supp. 2d at 1271 ("Given Washington's most recent governor's election, where the winner was decided by just hundreds of votes, the Court finds that the public interest weighs strongly in favor of letting every eligible resident of Washington register and cast a vote."). Moreover, it is the public policy of the State of Texas to construe any constitutional or statutory provision which restricts the right to vote liberally: "[a]ll statutes tending to limit the citizen in his exercise of this right should be liberally construed in [the voter's] favor." *Owens v. State*, 64 Tex. 500, 502 (1885).

[54] Even recognizing the importance of the fundamental right to vote, a court must weigh any protective action against the potential for confusion and disruption of the election administration under the "*Purcell* principle." *See Benisek v. Lamone*, ––– U.S. ––––, 138 S. Ct. 1942, 1945, 201 L.Ed.2d 398 (2018). The *Purcell* principle provides that, as a general rule, federal courts "should not alter state election laws in the period close to an election." *Democratic Nat'l Comm. v. Wis. State Legislature*, ––– U.S. ––––, 141 S. Ct. 28, 208 L.Ed.2d 247 (2020) (Kavanaugh, J., concurring) (upholding Seventh Circuit's stay of injunction entered six weeks before the general election). In *Purcell*, the Supreme Court reversed a lower court's order enjoining the implementation of a proposition, passed by ballot initiative two years earlier, that required voters to present identification when they voted on election day. Reversing the lower court, the Court emphasized that the injunction was likely to cause judicially-created voter confusion in the face of an imminent election. *Purcell*, 549 U.S. at 2, 6, 127 S.Ct. 5.

[55] The Supreme Court has recognized that "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Purcell*, 549 U.S. at 4–5, 127 S.Ct. 5. The *Purcell* principle's logic extends only to injunctions that affect the mechanics and procedures of the act of voting. *See, e.g., Republican Nat'l Comm. v. Democratic Nat'l Comm. ("RNC v. DNC")*, ––– U.S. ––––, 140 S. Ct. 1205, 1207, 206 L.Ed.2d 452 (2020) (extension of absentee ballot deadline); *Mi Familia Vota v. Abbott*, 834 F. App'x 860, 863 (5th Cir. 2020) (mask mandate exemption for voters); *Tex. Alliance for Retired Ams. v. Hughs*, 976 F.3d 564, 566–67 (5th Cir. 2020) (new ballot type eliminating straight-ticket voting); *Democratic Nat'l Comm. v. Wis. State Leg.*, 141 S. Ct. at 31 (extension of absentee ballot deadline).

***28** **[56]** Plaintiffs' requested injunction does not affect the procedures for voting by mail from a voter's perspective. Enjoining election officials from rejecting ballot materials will not affect the forms or deadlines that voters have used to apply for and vote by mail since 2022. Accordingly, it is unlikely that the proposed preliminary injunction would lead to the kind of voter confusion envisioned by *Purcell.* To be sure, at least some voters might be confused by the fact that ABBMs and carrier envelopes continue to solicit ID numbers despite a court order enjoining the ID-number requirement. But unlike confusion about other voting procedures, such as deadlines, polling locations, and S.B. 1's number-matching requirement itself, this "confusion" about the applicability of the ID-number requirements would not disenfranchise anyone—voters will be able to apply for and cast mail-in ballots regardless of their ability to provide a matching ID number. Thus, any voter's potential, subjective confusion is clearly outweighed by the irreparable harm that other voters will suffer absent injunctive relief.

Likewise, the time considerations set forth in *Purcell* are inapplicable here, given that the November 2023 general election has already occurred and the 2024 primaries are months away The Supreme Court has upheld stays of injunctions entered days, weeks, and months before primary or general elections. *See Wis. State Legislature*, 141 S. Ct. at 28; *Raysor v. DeSantis*, ––– U.S. ––––, 140 S. Ct. 2600, 207 L.Ed.2d 1120 (2020) (upholding Eleventh Circuit's stay of injunction entered three months before primary election); *RNC v. DNC*, 140 S. Ct. at 1208 (staying preliminary injunction entered five days before primary election); *Veasey v. Perry*, 574 U.S. 951, 135 S.Ct. 9, 190 L.Ed.2d 283 (2014) (upholding stay of injunction entered 24 days before general election day).

Therefore, Plaintiffs' request for injunctive relief is granted.

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CONCLUSION

For the reasons stated herein, the United States' motion for summary judgment (ECF No. 609) is **GRANTED**. The OCA Plaintiffs' motion for summary judgment (ECF No. 611) is **GRANTED IN PART** and **DENIED IN PART**. The motion is granted with respect to the OCA Plaintiffs' challenge to Section 5.07 and 5.13 of S.B. 1 and denied in all other respects.

The Court concludes as a matter of law that Sections 5.07 and 5.13 of Senate Bill 1, codified in Sections 86.001(f) and 87.041(b)(8) of the Texas Election Code, require officials to reject mail ballot applications and mail ballots based on errors or omissions on a record or paper relating to an act requisite to voting that is not material in determining whether voters are qualified under Texas law to vote or to cast a mail ballot. Such rejections deny the statutory right to vote protected by Section 101 of the Civil Rights Act of 1964, 52 U.S.C. § 10101(a)(2)(B).

The Court therefore **DECLARES** that Section 5.07 and Section 5.13 of Senate Bill 1 violate Section 101 of the Civil Rights Act of 1964, 52 U.S.C. § 10101(a)(2)(B).

The Court also finds that a permanent injunction of Sections 5.07 and 5.13 of Senate Bill 1 is warranted.

It is therefore **ORDERED** that the State Defendants, the Harris County Elections Administrator, and the Travis County Clerk, their agents and successors in office, and all persons acting in concert with them are **PERMANENTLY ENJOINED** from enforcing the requirements of Section 5.07 and 5.13 of Senate Bill 1 that violate Section 101 of the Civil Rights Act of 1964, 52 U.S.C. § 10101(a)(2)(B).

The Court finally orders that OCA Plaintiffs are entitled to recover their reasonable attorney's fees and expenses, subject to a reduction in recovery for hours expended on these unsuccessful claims unless the district court finds a "common core of facts" or "related legal theories." *Fessler v. Porcelana Corona De Mexico, S.A. DE C.V.*, 23 F.4th 408, 417 (5th Cir. 2022) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 434–35, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983)).

The United States, the OCA Plaintiffs, and the State Defendants, are hereby **ORDERED** to meet and confer concerning an appropriate remedial plan and, **by no later than December 15, 2023**, to file a proposed order or a joint advisory indicating points of disagreement.

*29 It is so **ORDERED**.

All Citations

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Footnotes

1 This memorandum opinion supplements the Court's earlier summary ruling on these motions issued in August 2023. *See* ECF No. 724.

2 For the purposes of judicial economy, the Court consolidated these cases under the above-captioned lead case. *See* ECF No. 31 (consolidating *OCA-Greater Houston v. Esparza*, No. 1:21-CV-780-XR (W.D. Tex. 2021); *Houston Justice v. Abbott*, No. 5:21-CV-848-XR (W.D. Tex. 2021); *LULAC Texas v. Esparza*, No. 1:21-CV-786-XR (W.D. Tex. 2021); and *Mi Familia Vota v. Abbott*, No. 5:21-CV-920-XR (W.D. Tex. 2021) under *La Unión del Pueblo Entero v. Abbott*, No. 5:21-CV-844-XR (W.D. Tex. 2021)); *United States v. Texas*, No. 5:21-CV-1085-XR (W.D. Tex. Nov. 4, 2021), ECF No. 13.

3 When citing to the parties' filings, the Court refers to ECF pagination, which may not reflect the pages numbers of the underlying documents.

4 In their motion, the OCA Plaintiffs state that they seek to challenge Sections 5.02, 5.03, 5.07, 5.08, 5.10, 5.12, 5.13, and 5.14 of S.B. 1 and have voluntarily withdrawn their challenge to Section 5.06. ECF No. 611 at 8 n.1. Although it will not meaningfully affect the disposition of the Section 101 claims, the Court observes that the Second Amended Complaint does not appear to include any references to Sections 5.08, 5.13, or 5.14 of S.B. 1.

5 An applicant can submit a registration application in order to register to voter for the first time or to inform the registrar of a change of address or other information. *See* ECF No. 609-3 at 108.

6 The form also contains spaces for "optional" information, including the applicant's gender and telephone number. *See* ECF No. 609-3 at 108.

7 Military voters, military family members, and overseas citizens may also use a Federal Post Card Application to apply for a mail ballot and a Texas-issued signature sheet to accompany a mail ballot in lieu of a carrier envelope, both of which must comply with SB1's requirements. *See* TEC §§ 101.052(e), 101.057, 101.107; SUF ¶¶ 27, 48–49.

8 The voter's ABBM and carrier envelope signatures may also be compared with other signatures on file with the county clerk or voter registrar. TEC §§ 87.027(i), 87.041(e).

9 When initially enacted, Sections 5.12 and 5.14 instructed the SVC and EVBB, respectively, to determine within two business days of identifying a defect whether it would be possible for the voter to correct the defect and return the carrier envelope before polls closed on election day. If so, the SVC and EVBB had the option of returning the carrier envelope to the voter by mail or to the early-voting clerk, who could contact the voter directly. If not, Sections 5.12 and 5.14 authorized the SVC and EVBB to contact voters by telephone or e-mail and inform them of their options to either cancel their mail-in ballot and vote in person or to correct the carrier envelope in person at the early voting clerk's office within six days after the election. The Legislature has since enacted a provision, effective September 1, 2023, allowing the SVC and EVBB to mail back a corrective action form to the voter as opposed to the carrier envelope. Tex. S.B. 1599, 88th Legis., R.S., § 8, sec. 87.0271(b), 2023 Tex. Gen. Laws.

10 The OCA Plaintiffs have also sued, in their official capacities, Travis County Clerk, Travis County District Attorney, Harris County Elections Administrator, and Harris County District Attorney. ECF No. 200 ¶¶ 48–51.

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11 The Committees first sought to intervene in this action in October 2021. ECF No. 57. The Court denied their motion, concluding that the Committees had not established a legally protectable interest at stake in this litigation or that the State Defendants' representation of their purported interests would be inadequate. *See* ECF No. 122 at 2–7. The Fifth Circuit reversed the Court's order concluding that the Committees' interest in S.B. 1's provisions concerning party-appointed poll watchers—an interest raised for the first time on appeal—warranted intervention. *La Union del Pueblo Entero v. Abbott*, 29 F.4th 299, 306 (5th Cir. 2022). In accordance with the Fifth Circuit's mandate, in May 2022, the Court granted the Committees' renewed motion to intervene. *See* Text Orders dated May 13, 2022 and May 18, 2022. It is not clear to the Court that the Committees' interest in the provisions applicable to *partisan* poll watchers establishes a commensurate interest in vote-by-mail procedures. Nonetheless, given that the State Defendants incorporate many of the Committees' arguments by reference in their responses to Plaintiffs' motions, the Court considers the Intervenor-Defendants' motion and briefing. The Intervenor-Defendants' briefing appears to universally misidentify S.B. 1's provisions requiring that ABBMs and BBMs be rejected for failure to satisfy the number-matching requirement as Sections 5.02 and 5.08. *See* ECF Nos. 608, 634, 635, 663. The Court construes the Intervenor-Defendants' arguments to apply to the correct provisions —Sections 5.07 and 5.13.

12 In *Migliori*, a unanimous Third Circuit panel affirmed the application of the Materiality Provision in the mail ballot context and held that voters who had omitted an immaterial date on mail-ballot related paperwork must have their votes counted. 36 F.4th at 156–57. The candidate seeking to prevent qualified voters' votes from being counted sought a stay in the U.S. Supreme Court, which rejected the stay application over the dissent of three justices, in effect allowing the contested votes to be counted. *Ritter v. Migliori*, ––– U.S. ––––, 142 S. Ct. 1824, 213 L.Ed.2d 1034 (Mem) (2022). The Supreme Court vacated *Migliori* after the underlying dispute became moot. *See Ritter v. Migliori*, 143 S. Ct. 297 (citing *United States v. Munsingwear, Inc.*, 340 U.S. 36, 71 S.Ct. 104, 95 L.Ed. 36 (1950)). Despite this vacatur, the substantive analysis in *Migliori* remains convincing. *See Gutierrez v. Saenz*, 565 F. Supp. 3d 892, 903–04 (S.D. Tex. 2021); *see also, e.g., United States v. Ambriz*, 727 F.3d 378, 384 n.8 (5th Cir. 2013) (relying on "a case that was vacated for other reasons"); *Free Speech Coal., Inc. v. Att'y Gen. United States*, 974 F.3d 408, 427 (3d Cir. 2020) (relying on vacated opinion whose "prior analysis continues to resonate").

13 Defendants lodge a number of objections in response to the Statement of Uncontested Facts attached to the United States' motion for summary judgment. *See* ECF No. 634 at 22–25 (GOP Opp. to DOJ MSJ); ECF No. 645-1 (State Response to SUF). Many of these "objections" constitute legal arguments in the guise of a factual dispute. *See, e.g.*, 645-1 ¶ 105 (asserting that voters must provide a matching ID number in order to be "qualified" to vote by mail). Others, as discussed herein are simply irrelevant because they bear on disputes about the magnitude of harm caused by S.B.

1's number-matching requirements. *See, e.g.*, ECF No. 634 at 23–25. Others still object to statements in the SUF without proffering any contradictory evidence. *See* ECF No. 645-1 ¶ 104 (objecting to the use of the word "directed" to the extent that it implies the SOS's advisories or guidance have the force and effect of law or are in any way authoritative or binding); *id.* ¶¶ 119–20 (objecting to testimony by county election officials because the United States did not elicit testimony from officials in every county in Texas, without identifying any contrary testimony from any other election officials). Defendants' subjective disagreement with Plaintiffs' characterization of the evidence—or the SOS's guidance—does not create a genuine dispute of fact. Finally, while the State Defendants contend that the SUF is "incomplete," the addition of redundant or minimally relevant materials do not establish genuine issues for trial. *See, e.g.*, ECF No. 645-1 ¶¶ 7, 11–12, 21–22, 26–27, 31, 35–37, 41, 49, 58, 62–63, 67.

To the extent that the Court order does not rely on the United States' statements of fact, Defendants' objections are moot. To the extent that this order does rely on Plaintiffs' factual assertions, Defendants' objections are overruled because they have failed to "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). In short, none of the "factual disputes" identified in Defendants' briefing fail in turn to articulate disputes based on actual evidence that could "affect the outcome of the action" under the appropriate legal standard. *Wiley v. State Farm Fire & Cas. Co.*, 585 F.3d 206, 210 (5th Cir. 2009).

14 *See, e.g.*, ECF No. 637 at 30 (arguing that the Materiality Provision would not apply to prohibitions on overvoting ballot —marking it for too many candidates—because the voter's ballot would still be counted in that election, even though her ballot in that particular contest would be treated as unmarked, since election officials would be unable to determine the voter's preference).

15 The Court declines the State Defendants' and Intervenor-Defendants' invitations, to reverse its conclusion that the OCA Plaintiffs can challenge the number-matching provisions directly under both the private right of action created by Section 101 and 42 U.S.C. § 1983. *See* ECF No. 646 at 51–56, ECF No. 608 at 14 n.2 (suggesting that only the Attorney General has a right to sue under Section 101); *LUPE (OCA)*, 618 F. Supp. 3d at 434 ("[C]aselaw clearly establishes that organizations, like the OCA-GH Plaintiffs, have historically been able to enforce [Section 101].").A plaintiff proceeding under § 1983 need only show that the federal law includes a private right; after that, § 1983 presumptively supplies a remedy. *See, e.g., Gonzaga Univ. v. Doe*, 536 U.S. 273, 284–85, 122 S.Ct. 2268, 153 L.Ed.2d 309 (2002). Indeed, the Supreme Court recently confirmed that the presumption cannot be rebutted merely by pointing to a parallel government enforcement scheme that allows suits by the Attorney General. Rather, "§ 1983 can play its textually prescribed role as a vehicle for enforcing [federal] rights, even alongside a detailed enforcement regime that also protects those interests, so long as § 1983 enforcement is not 'incompatible' with Congress's handiwork." *Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 599 U.S. 166, 189, 143 S.Ct. 1444, 216 L.Ed.2d 183 (2023).

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16 *See also Dep't of Tex., Veterans of Foreign Wars of U.S. v. Tex. Lottery Comm'n*, 760 F.3d 427, 439 (5th Cir. 2014) (charitable organizations had standing to challenge statute prohibiting their use of bingo proceeds for political advocacy as an unconstitutional burden on their political speech); *S. Christian Leadership Conf. v. Sup. Ct. of State of La.*, 252 F.3d 781, 878–788 (5th Cir. 2001) (concluding that "at least some" of the plaintiffs—law students and faculty and community and student organizations—had standing to challenge a Louisiana Supreme Court rule restricting representation by student-practitioners because "[t]he operations of law-school clinics were directly regulated" and "[s]everal of the client organizations would be unable to obtain representation by the clinics"); *cf. Lujan*, 504 U.S. at 561–62, 112 S.Ct. 2130 ("When the suit is one challenging the legality of government action or inaction" and "the plaintiff is himself an object of the action (or forgone action) at issue[,] ... there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it.").

17 Although only one of the OCA Plaintiffs must establish standing to assert a claim under Section 101, *see Rumsfeld*, 547 U.S. at 47, 52 n.2, 126 S.Ct. 1297, it appears more likely than not that OCA-Greater Houston and LWVTX have standing on the same bases, *see* ECF No. 611 at 32–37 (LWVTX); *id.* at 38–41 (OCA-Greater Houston).

18 As the Supreme Court recently clarified, the burden of establishing the requirement for "an organization has identified members and represents them in good faith, our cases do not require further scrutiny into how the organization operates."

Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 201, 143 S.Ct. 2141, 216 L.Ed.2d 857 (2023).

19 Given the number of errors in the TEAM database, a voter's ability to correctly guess the incorrectly recorded version of their ID number could hardly be considered material to either their eligibility to vote or their identity.

20 HAVA's ID requirements apply "notwithstanding any other provision of law," which avoids any potential conflict with Section 101. *Id.* § 21083(a)(5)(A)(i); *see also Fla. State Conf. of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1174, (11th Cir. 2008); 52 U.S.C. § 21145(a) (omitting the Civil Rights Act of 1964 from list of laws not to be superseded by HAVA).

21 Such a requirement would almost certainly violate the constitution. *See, e.g., Beare v. Smith*, 321 F. Supp. 1100, 1103 (S.D. Tex. 1971) (concluding that Texas's annual voter registration requirement amounted to an unconstitutional poll tax in violation of the Equal Protection Clause of the Fourteenth Amendment).

22 *See also Browning*, 522 F.3d at 1183 n.17 (Barkett, J., dissenting in part) ("The [ID number] information also cannot be *per se* material if a state such as North Dakota is allowed to hold federal elections without any registration requirements.").

23 The State Defendants suggest that S.B. 1's number-matching requirement constitutes a "decision to bring mail-in voting into conformity with requirements already employed for in-person voting: that voters offer proof of identification by means of a government issued ID." ECF No. 645 at 5. S.B. 1, they argue, "requires voters to provide a number that identifies them in a similar way a photo ID would identify them if they appeared in person because it is unique to them, and that for reasons unrelated to voting is unlikely in anyone else's possession." *Id.* at 17. The comparison to in-person voter ID requirements is inapt.

Under Texas law, voters who cast a ballot in person can provide one of seven forms of photo ID. TEC § 63.0101(a) (enumerating the following acceptable forms of photo IDs: a U.S. military ID card, a U.S. passport book or card, a U.S. citizenship certificate, and a driver's license, personal ID card, election ID certificate, or handgun license issued by the Texas DPS). A voter can provide an expired photo ID, so long as it has not been expired for over four years. *Id.* In addition, a voter who does not possess and cannot reasonably obtain an acceptable photo ID can still cast a ballot by filling out a declaration at the polls and providing one of seven alternative supporting forms of ID. *See id.* § 63.0101(b) (voter may alternatively provide a current utility bill, bank statement, government check, paycheck, birth certificate, or any other government document showing the voter's name and address).

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Any of these forms of identification will suffice for in-person voters, regardless of the specific ID number associated with their TEAM records. S.B. 1, on the other hand, requires absentee voters to recall and produce the very same identification number(s) they provided on a registration form months or years earlier—assuming that the numbers were correctly recorded in TEAM. S.B. 1 not only permits voters to provide expired DPS numbers but *requires* voters to provide an expired DPS number whenever their TEAM record contains an expired number. *Cf.* SUF ¶ 142 (noting that roughly 2.4 million Texas voters have only one of their multiple DPS numbers in TEAM).

Thus, the proper analogy in the in-person voting context would be requiring in-person voters to search their closets, filing cabinets, and couch cushions for the long-expired, possibly misplaced, photo ID that happened to be in their possession when they registered to vote (perhaps decades earlier) or else be turned away at the polls.

24 In *Migliori*, the Third Circuit considered a similar statement from the Pennsylvania Deputy Secretary for Elections & Commissions that the date on the carrier envelope "[was] not used 'to determine the eligibility' (i.e., qualifications) of a voter." *Migliori*, 36 F.4th at 164. "This, without more," the panel concluded, "slams the door shut on any argument that this date is material." *Id.*

25 The State Defendants insist that the ID numbers could be used to distinguish between two individuals with similar names and personal information, such as a "junior" and "senior" living in the same household. *See* ECF No. 645 at 17–18. But Plaintiffs do not dispute that the ID numbers can be *useful* in affirmatively identifying voters. *See* ECF No. 200 at 45 (conceding that "the State may legally request this information from voters (for example, as an optional data point that would prevent the need for a signature review)"). Rather, they challenge S.B. 1's ability to accurately and reliably exclude voters as unqualified for failing to satisfy the ID-matching requirement. Furthermore, even after S.B. 1, election officials

continued to rely on other, publicly available information (also provided on the ABBM) to confirm voters' identities. For example, Mr. Ingram testified that, under S.B. 1, a county clerk can provide a voter with her ID number on file so long as the voter validates their identity by providing "information that would be in their voter record," like "name, date of birth, [and] address," all of which were required on ABBMs before S.B. 1. ECF No. 611-1 at 435–36 (Ex. 20, Ingram Dep. at 104:21–105:10). Likewise, an Election Advisory from the SOS instructs county officials to "confirm the voter's identity using publicly available information" in carrying out the cure processes, *i.e.*, without the use of ID numbers, *id.* at 1155 (Ex. 70, Election Advisory No. 2022-08). In short, the State Defendants' assertion that DPS numbers and SSN4s *could* be used to help confirm a voter's identity does not create a genuine dispute of fact as to whether the ID numbers are required to confirm a voter's eligibility.

26 In *Harrison*, the Supreme Court declined to apply a narrowing construction to § 307(b)(1) of the Environmental Protection Act, providing for direct review by a federal court of appeals of administrative actions under several specifically enumerated provisions of the Act and of "any other final action" of the Administrator. 446 U.S. at 587–92, 100 S.Ct. 1889. The Court declined to apply the canon of *ejusdem generis* because there was "no uncertainty in the meaning of the phrase, 'any other final action'."

> When Congress amended the provision in 1977, it expanded its ambit to include not simply "other final action," but rather "any other final action." This expansive language offers no indication whatever that Congress intended the limiting construction of § 307(b)(1) that the respondents now urge. Accordingly, we think it inappropriate to apply the rule of ejusdem generis in construing § 307(b)(1). Rather, we agree with the petitioners that the phrase, "any other final action," in the absence of legislative history to the contrary, must be construed to mean exactly what it says, namely, any other final action.

Id. at 588–89, 100 S.Ct. 1889.

27 Or, with respect to military and overseas voters, a signature sheet.

28 Likewise, with respect to the CRA's expansive definition of "voting," the Supreme Court has explained that, "[w]hen a statute includes an explicit definition of a term, [courts] must follow that definition, even if it varies from a term's ordinary meaning." *Van Buren v. United States*, ––– U.S. ––––, 141 S. Ct. 1648, 1657, 210 L.Ed.2d 26 (2021) (quoting *Tanzin v. Tanvir*, ––– U.S. ––––, 141 S. Ct. 486, 490, 208 L.Ed.2d 295 (2020)) (internal quotation marks omitted).

29 In general, courts should not construe statutes based on what Congress failed to say in legislative history. *See* *Harrison*, 446 U.S. at 591–92, 100 S.Ct. 1889 ("The respondents also rely on what the Committee and the Congress did *not* say about the 1977 amendments to § 307(b)(1).... [But] it would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute. In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark.").

30 Even assuming that the Court considered the cure procedures to be legally relevant—and it does not—cure procedures under S.B. 1 do not protect the franchise because some voters cannot effectively use them to ensure their application is accepted and their valid ballot is counted. *Cf.* *Democratic Exec. Comm. of Fla. v. Detzner*, 347 F. Supp. 3d 1017, 1030–31 (N.D. Fla. 2018) (finding cure provisions inadequate to resolve due process concerns when "the opportunity to cure has proven illusory"); *Martin v. Kemp*, 341 F. Supp. 3d 1326, 1339 (N.D. Ga. 2018) (same). For example, to access the online Ballot Tracker, a voter is required by statute to enter their name, SSN4, DPS ID number, and registration address. *See* TEC § 86.015(b). This log-in process compares the information entered by the voter against the TEAM database. Accordingly, if a voter is missing either a DPS ID number or SSN4 in TEAM, or if TEAM has incorrect information for either of those numbers, the voter simply cannot log in to the tracker. The online Ballot by Mail Tracker is therefore only able to cure an SB 1-related defect in scenarios where the voter (1) is in possession of a number in their TEAM record, but did not include a number on their ABBM or carrier envelope; or (2) made a transcription error on their ABBM or carrier envelope.

31 The State Defendants rely on *Broyles v. Texas*, 618 F. Supp. 2d 661, 697 (S.D. Tex. 2009), for the proposition that "only racially motivated deprivations of rights are actionable" under the Materiality Provision. ECF No. 646 at 29. But *Broyles* mistakenly cited *Kirksey* v. *City of Jackson*, 663 F.2d 659 (5th Cir. 1981)—which involved claims under Section 2 of the Voting Rights Act—for its conclusion that 42 U.S.C. § 1971 (now 52 U.S.C. § 10101) requires a showing of

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racial discrimination. *See* *Broyles*, 618 F. Supp. 2d at 697; *Kirksey*, 663 F.2d at 664–665; *see also* *Vote.org v. Callanen*, No. SA-21-CV-00649-JKP-HJB, 2021 WL 5987152, at *3 (W.D. Tex. Dec. 17, 2021) (rejecting argument that Materiality Provision claims require showing of racial discrimination and noting that *Broyles* mistakenly invoked *Kirksey* in stating otherwise).

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EXHIBIT B

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OFFICE OF THE CLERK

Supreme Court of Wisconsin

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WI 53701-1688

TELEPHONE (608) 266-1880
FACSIMILE (608) 267-0640
Web Site: www.wicourts.gov

June 11, 2019

To:

Hon. Frank D. Remington
Circuit Court Judge, Br. 8
215 S. Hamilton St., Rm. 4103
Madison, WI 53703

Carlo Esqueda
Clerk of Circuit Court
215 S. Hamilton St., Rm. 1000
Madison, WI 53703

Thomas C. Bellavia
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Colin Thomas Roth
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Timothy E. Hawks/ Barbara Z. Quindel
Richard Saks
Hawks Quindel, S.C.
P.O. Box 442
Milwaukee, WI 53201-0442

*Address list continues on Page 13

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You are hereby notified that the Court has entered the following order:

No. 2019AP622 SEIU, Local 1 v. Vos L.C.#2019CV302

Pending before this court is a motion by the defendants-appellants, Robin Vos, Roger Roth, Scott Fitzgerald, and Jim Steineke, all in their official capacities as leaders of the Wisconsin Assembly and Wisconsin Senate[1] (the Legislative Defendants), for temporary relief pending appeal in this matter.

In an order entered March 26, 2019, the Dane County Circuit Court granted in part the motion of the plaintiffs-respondents, Service Employees International Union, Local I, et al. (the plaintiffs), for a temporary injunction and enjoined the enforcement of certain provisions in 2017 Wisconsin Act 369 (Act 369), which the Wisconsin Legislature had passed during an

[1] Robin Vos is the Speaker of the Assembly. Roger Roth is the President of the Senate. Scott Fitzgerald is the Majority Leader of the Senate. Jim Steineke is the Majority Leader of the Assembly.

"extraordinary session"[2] in December 2018 and which had subsequently been signed into law by then Governor Scott Walker. Specifically, the circuit court temporarily enjoined the defendants from enforcing the following provisions of Act 369:

- Section 26, which provides that in order for the Attorney General to compromise or discontinue a civil action brought on behalf of the state or a state officer, department, board, or commission, the Attorney General must obtain the consent of a house of the Legislature that has intervened in the action or, if no house of the Legislature has intervened, from the Legislature's Joint Committee on Finance;

- Section 30, which provides that, with respect to civil actions against the state or a state department, officer, employee, or agent in which the plaintiff seeks injunctive relief or a consent decree, in order for the Attorney General to compromise or settle the action, the Attorney General must obtain the consent of a house of the Legislature that has intervened in the action or, if no house of the Legislature has intervened, from the Legislature's Joint Committee on Finance;

- Section 64, which provides that the Legislature's Joint Committee for the Review of Administrative Rules (JCRAR) may suspend an administrative rule multiple times; and

- Sections 31, 33, 38, 65-71, and 104-105, which (1) define a new category of administrative materials as "guidance documents;"[3] (2) require existing and new guidance documents to go through a notice and comment period, which must be certified by the secretary or head of the respective administrative department or agency;[4] (3) require that each guidance document must identify the applicable

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[2] We use the term "extraordinary session" to describe what the Legislature did in December 2018 when it conducted floor debate and votes because that has been the term used by the parties in their filings.

[3] Section 31 of Act 369 defines "guidance document" as "any formal or official document or communication issued by an agency, including a manual, handbook, directive, or informational bulletin, that does any of the following:

1. Explains the agency's implementation of a statute or rule enforced or administered by the agency, including the current or proposed operating procedure of the agency.
2. Provides guidance or advice with respect to how the agency is likely to apply a statute or rule enforced or administered by the agency, if that guidance or advice is likely to apply to a class of persons similarly situated."

[4] Any guidance document that an administrative department or agency wishes to adopt after July 1, 2019 (the first day of the seventh month after the effective date of Act 369), must go

> provision of federal or state law that supports the statement or interpretation of law in the guidance document; (4) require that each guidance document must not contain any standard, requirement, or threshold that is not explicitly required or permitted by a lawfully promulgated statute or rule; and (5) authorize judicial review proceedings to challenge the validity of guidance documents.[5]

In the same order, the circuit court also denied the Legislative Defendants' motion for a stay of the injunction pending the completion of appellate review. The circuit court's discussion of the motion for a stay was contained in a single footnote, which stated as follows (except for the deletion of a parenthetical aside):

> [2]To obtain a stay pending appeal, the legislative defendants must demonstrate the inverse of all the factors that plaintiffs must demonstrate for injunctive relief. *See State v. Scott*, 2018 WI 74, ¶46, 382 Wis. 2d 476, 914 N.W.2d 141 ("a stay pending appeal is appropriate where the moving party: (1) makes a strong showing it is likely to succeed on the merits of the appeal; (2) shows that, unless a stay is granted, it will suffer irreparable injury; (3) shows that no substantial harm will come to other interested parties; and (4) shows that a stay will do no harm to the public interest.").[[6]]

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through the notice and comment period and must be certified as such before it may be adopted by the department or agency. Act 369, § 38. For all guidance documents that are in existence prior to July 1, 2019, if the guidance document has not gone through the notice and comment period and has not been certified as such prior to July 1, 2019, the guidance document is considered rescinded. Id.

[5] The circuit court found that the plaintiffs had not met their burden for obtaining a temporary injunction and therefore refused to enjoin the enforcement of a number of provisions in both Act 369 and 2017 Wisconsin Act 370 (Act 370). Those sections, which have remained in effect, include provisions relating to (1) the ability of the houses of the Legislature to intervene in civil actions (Act 369 §§ 3, 5, 28, 29, 97, 98, and 99), (2) the designation of enterprise zones (Act 369 § 87), and (3) requests to the federal government for waivers on pilot programs and demonstration projects and for reallocation of public and local assistance funds (Act 370 §§ 10-11). In addition, the plaintiffs withdrew their motion for a temporary injunction with respect to several other provisions of Act 369: section 35 (prohibiting administrative agencies from seeking deference for their interpretations of law in lawsuits), section 16 (relating to changes in security at the state capitol), and section 72 (requiring notice of the outcome of a challenge to the validity of an administrative rule be given to the Legislative Reference Bureau). These statutory provisions also have remained in effect.

[6] These factors were adopted by this court in State v. Gudenschwager, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995) (citing Leggett v. Leggett, 134 Wis. 2d 384, 385, 396 N.W.2d 787

> The court has concluded that plaintiffs are likely to succeed on the merits on some of their claims. And during oral arguments, the legislative defendants could not identify any harm that would result if the court were to decline to issue a stay in this case. Accordingly, to the extent this court balances the interests of the parties for and against the stay, the balance overwhelmingly tips in favor of not granting one. Therefore, the court denies the legislative defendants' motion to stay this ruling pending appeal . . . ."

The Legislative Defendants subsequently appealed as of right from the circuit court's order granting the temporary injunction. See Wis. Stat. § 813.025(3). By order dated April 19, 2019, this court assumed jurisdiction over the appeal on its own motion, pursuant to Wis. Const. Art. VII, § 3(3), Wis. Stat. § 808.05(3), and Wis. Stat. § (Rule) 809.61.

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While the appeal was pending in the court of appeals, the Legislative Defendants filed a motion for temporary relief (a stay) pending appeal, along with a memorandum in support of the motion. See Wis. Stat. § 808.07(2). In the motion, the Legislative Defendants seek a stay of the entirety of the circuit court's injunction while their appeal is pending.

When this court assumed jurisdiction over this appeal, it acquired jurisdiction over all motions that were pending in the appeal, including the Legislative Defendants' motion for temporary relief pending appeal. The court's April 19, 2019 order, therefore, advised the parties that it would decide that motion based on the documents that had been filed in the court of appeals. On April 30, 2019, however, this court issued an order in League of Women Voters of Wisconsin v. Evers, Case No. 2019AP559, an appeal relating to the constitutionality of the three acts passed during the December 2018 "extraordinary session." In the April 30, 2019 order, this court granted the Wisconsin Legislature's motion for temporary relief pending appeal. Accordingly, by order dated May 7, 2019, this court allowed the parties to file supplemental memoranda concerning the motion for temporary relief pending appeal in this matter, including the effect, if any, of this court's April 30, 2019 order in Case No. 2019AP559 on the motion.

Wisconsin Statute § (Rule) 808.07(2) authorizes both a circuit court and an appellate court to grant a number of forms of temporary relief while an appeal is pending, including (1) staying execution or enforcement of a judgment or order; (2) suspending, modifying, restoring, or granting an injunction; or (3) issuing any other order appropriate to preserve the "existing state of affairs or the effectiveness of the judgment subsequently to be entered."

Where a litigant asks an appellate court to grant it temporary relief pending appeal and the litigant has sought such relief unsuccessfully in the circuit court, the motion addressed to the appellate court is not considered in a vacuum. The appellate court's review is conducted by

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(Ct. App. 1986)). Indeed the Scott decision cited Gudenschwager as authority for those factors. We therefore will refer to these factors in this order as the "Gudenschwager factors."

reviewing initially the circuit court's decision to grant or deny such relief under an erroneous exercise of discretion standard. Gudenschwager, 191 Wis. 2d at 440. "An appellate court will sustain a discretionary act if it finds that the trial court (1) examined the relevant facts, (2) applied a proper standard of law, and (3) using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." Id. at 440 (citing Loy v. Bunderson, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982)).

Having reviewed the circuit court's decision on the Legislative Defendant's motion for a stay pending appeal, we conclude that the circuit court erroneously exercised its discretion because it made errors of law. It set forth the proper factors relevant to such motions, but it failed to follow the proper rules for applying them.

The circuit court's legal errors appear to arise, in part, from its erroneous belief that the factors for deciding whether to grant a stay pending appeal are simply the inverse of the factors for granting a temporary injunction. Those analyses, while similar, have important differences with respect both to the likelihood of success and consideration of irreparable injuries, which we will explain below.

In order to obtain a temporary injunction, a moving party, usually the plaintiff, must first demonstrate that it has a reasonable likelihood of success on the merits of its claim. In other words, it must demonstrate that it is reasonably likely to obtain the relief it seeks at the conclusion of the case. See Werner v. A.L. Grootemaat & Sons, Inc., 80 Wis. 2d 513, 520, 259 N.W.2d 310 (1977) ("A temporary injunction is not to be issued unless the movant has shown a reasonable probability of ultimate success on the merits."). On the other hand, where a party against whom a temporary injunction has been entered seeks a stay of that injunction pending appeal (in either the circuit court or an appellate court), the appellant must make a "strong showing" that it is likely to succeed on its appeal of the temporary injunction. We have explained, however, that this "strong showing" is met when the circuit court has enjoined a statute based on its conclusion that the statute is unconstitutional. See Gudenschwager, 191 Wis. 2d at 441. The plaintiff's likelihood of success on the ultimate merits of his/her claim is not necessarily the inverse of the appellant's likelihood of success on appeal of a temporary injunction. In other words, the likelihood of success calculus in these two analyses is not a zero sum game. If a plaintiff has a likelihood of success on the merits of its claims, that fact does not necessarily mean that the defendant against whom a temporary injunction has been entered lacks a likelihood of success on an appeal of the temporary injunction. If the opposite were true, then no stay of a temporary injunction pending appeal would ever be entered because a circuit court must always find a reasonable likelihood of ultimate success on the merits by the party seeking an injunction in order to issue the temporary injunction in the first place.

The circuit court in this case, however, erred as a matter of law because it relied on this improper conflation of the two analyses. When it was supposed to be analyzing the Legislative Defendants' likelihood of success on an appeal of its injunction, it did not conduct that analysis but again pointed to the fact that it had already found that the plaintiffs had a likelihood of

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success on the merits of some of their claims. This was the wrong analysis for deciding the motion for a stay and caused it to issue a legally flawed decision, as discussed below.

Moreover, the circuit court also fell victim to the same legal error that occurred in League of Women Voters of Wisconsin. It failed to take into account that its decision to issue a temporary injunction was based on legal determinations regarding novel questions involving the separation of powers doctrine that will be subject to de novo review on appeal. It failed to consider that its conclusions regarding the scope of the separation of powers doctrine will be the first word, not the last word, on those legal questions. It simply reasoned that since it had determined those legal questions in favor of the plaintiffs initially, the Legislative Defendants had to have no likelihood of success on appeal.

Second, the circuit court failed to properly consider irreparable injuries. Instead, it once more pointed to its consideration of harms in deciding the plaintiffs' motion for a temporary injunction. The analysis of harms for a temporary injunction, however, is not the same as that which must occur when deciding a motion for a stay of a temporary injunction, nor is one simply the inverse of the other. Again, if those analyses were simply inverses of each other, then no stay of a temporary injunction would ever be issued. In order to grant a temporary injunction, a circuit court must conclude that the irreparable injuries that result from not granting the temporary injunction tip in favor of the party seeking the injunction. That conclusion must be reached before any stay is ever sought or analyzed. If a circuit court merely conducted the same analysis of harms in deciding the stay, of course it would reach the same conclusion.

There is, however, a critical distinction between the two analyses, one which the circuit court in this case ignored. When deciding a motion for a temporary injunction, a circuit court analyzes whether the party moving for an injunction has shown that it will suffer irreparable harm in the absence of a temporary injunction and that it lacks an adequate remedy at law. Werner, 80 Wis. 2d at 520. The circuit court also compares that showing of irreparable harm with the competing irreparable harm that the party or parties who oppose the injunction and the public will suffer if a temporary injunction is issued. See Pure Milk Products Co-op v. National Farmers Organization, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979) (in context of reviewing grant of permanent injunction, "competing interests must be reconciled and the plaintiff must satisfy the trial court that on balance equity favors issuing the injunction"); see also Werner, 80 Wis. 2d at 520 (consideration of irreparable harm and lack of adequate legal remedy is required for both temporary and permanent injunctions).

On the other hand, in the context of a subsequent motion to stay an injunction, the court must weigh the irreparable harm that the movant for a stay would face in the absence of a stay during the appeal in the event that the movant is ultimately successful in having the injunction vacated on appeal versus the irreparable harm that the party who prevailed at the circuit court would suffer without the injunction during the appeal in the event the party who prevailed at the circuit court was successful in having the temporary injunction affirmed at the end of the appeal. Gudenschwager, 191 Wis. 2d at 441-44. In other words, the analysis for a stay motion adds to the mix the ability of the respective harms to be undone or unwound by the appellate court at the

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end of the appeal. Therefore, consideration of the likelihood that each side's harms can be mitigated or remedied upon conclusion of the appeal if the result on appeal is in favor of that side is a necessary consideration.

It is the presence of this added element that requires circuit courts to conduct two separate harms analyses—one analysis of the factors for determining whether to grant a temporary injunction in the first instance and, if a temporary injunction is entered and a stay is sought, a second analysis of the factors for determining whether to stay that injunction while it is being reviewed on appeal. The circuit court in this instance, however, never conducted this second analysis and never considered the ability or likelihood that either side's harms could be remedied or mitigated in the event that side prevailed on appeal. It simply relied on the analysis it had used for deciding to grant the temporary injunction. That was an error of law that rendered its ultimate decision an erroneous exercise of discretion.

Having determined that the circuit court's decision was legally erroneous, we turn to the proper application of the Gudenschwager analysis.

When we address the first factor of the likelihood of success on appeal where a statute has been enjoined, our prior decisions require us to take into account the presumption of constitutionality that attaches to regularly enacted statutes.[7] Unlike the situation in League of Women Voters of Wisconsin, the plaintiffs in this case do not allege that either Act 369 or Act 370 was invalidly enacted into law. Therefore, the presumption of constitutionality clearly should be applied in this case. Further, as both the Governor and the Attorney General concede, the presumption of constitutionality, by itself, is sufficient to satisfy the first Gudenschwager factor of a "strong showing" of a likelihood of success on appeal in the context of a motion for temporary relief pending appeal. See Gudenschwager, 191 Wis. 2d at 441 ("Since regularly enacted statutes are presumed to be constitutional, see Chicago & N.W.R. Co. v. LaFollette, 27 Wis. 2d 505, 520-21, 135 N.W.2d 269 (1965), we conclude that, for purposes of deciding whether or not to grant a stay pending appeal, the State has made a strong showing that it is likely to succeed on the merits of its appeal of Judge Wolfe's finding that chapter 980 is unconstitutional."). Consequently, as we did in Gudenschwager, we conclude that the first factor weighs in favor of granting a stay of an injunction against the enforcement of a statute. Id.

Turning to consideration of irreparable harms, we acknowledge that in most cases there will be some harm to both sides, especially when the stay motion is directed toward an injunction against the enforcement of a statute that is presumed to be constitutional. That does not mean, however, that the totality of the harms on each side of the issue will be of equal severity and magnitude, nor that they will be equal in terms of the ability and likelihood that the harms can be remedied or mitigated by the ultimate decision on appeal.

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[7] The circuit court failed to consider the presumption of constitutionality in its footnote denying the Legislative Defendants' motion for a stay pending appeal. This was yet another error of law that rendered its decision an erroneous exercise of discretion.

As we stated in our April 30, 2019 order in League of Women Voters of Wisconsin, the Legislature (here represented by the Legislative Defendants) and the public suffer a substantial and irreparable harm of the first magnitude when a statute enacted by the people's elected representatives is declared unenforceable and enjoined before any appellate review can occur. Moreover, there are specific irreparable harms that stem from the nature of the acts that would be enjoined under the circuit court's order. Sections 26 and 30 of Act 369 grant to the Legislature the right to consent or not to consent before the Attorney General (1) settles or discontinues a civil action in which the state (or a subdivision or representative thereof) is a plaintiff (plaintiff-side action) or (2) compromises or settles a civil action against the state (or a subdivision or representative thereof) in which an injunction or consent decree is sought (defendant-side action). If the temporary injunction is not stayed while this appeal is pending, the Legislature will be prevented from exercising those rights of review and consent. For example, it will be unable to review instances where the Attorney General confesses the invalidity (constitutional or otherwise) of a statute passed by the Legislature. Moreover, this harm likely will not be able to be remedied or mitigated if the Legislative Defendants prevail in this appeal. A settlement of a plaintiff-side case or the entry of a final injunction or consent decree in a defendant-side case will almost certainly result in the entry of a final judgment or order in that litigation. It will be extremely difficult, if not impossible, to undo those final judgments or orders, especially where the civil action was pending in a federal court.[8]

Moreover, this is not a speculative injury. The Attorney General has admitted that once the circuit courts in League of Women Voters of Wisconsin and this case enjoined the enforcement of sections 26 and 30 of Act 369, the Department of Justice (DOJ) proceeded to settle several cases since it no longer needed to obtain legislative consent. Aff. of Charlotte Gibson ¶21. Some, if not all, of these cases appear to have been pending in federal court since they were identified as "multi-state" consumer cases. If the Legislative Defendants ultimately prevail on appeal, this court will not be able to direct the federal courts to vacate or reopen the judgments in those cases. The right of the Legislature to review and consent to those settlements will be gone forever.[9]

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[8] The majority of the civil cases in which the Wisconsin Department of Justice is involved occur in federal court. Aff. of Charlotte Gibson ¶5.

[9] In its footnote, the circuit court stated that during oral argument on the motion for temporary injunction, the Legislative Defendants "could not identify any harm that would result if the court were to decline to issue a stay in this case." As shown in the text above, that is not fully accurate if the circuit court really meant that the Legislative Defendants had identified no harm at all. The Legislative Defendants did identify the harms that would result from the Legislature's inability to enforce the enjoined sections of Act 369. If the circuit court meant that the Legislative Defendants had been unable to identify particular case settlements or particular administrative regulations or particular guidance documents to which the Legislature would object in the absence of a temporary injunction, that is not surprising since neither the Legislative Defendants nor their counsel had access to the relevant information about what case settlements or administrative regulations would occur during the pendency of this appeal. Further, the case

The same types of irreparable injury will occur with respect to the Legislature's ability to suspend administrative rules and to ensure that administrative guidance documents comport with the statutes that govern the promulgating agency. Because these provisions relate to state agencies, however, we acknowledge that there is a somewhat greater possibility that a final decision on appeal could remedy or mitigate the harm that stems from the injunction.

However, the plaintiffs, the Governor, and the Attorney General identify the general harm that may occur if statutory provisions that are ultimately found to be unconstitutional are enforced while the appeal is pending. The Attorney General also alleges that sections 26 and 30 of Act 369 make it more difficult and time-consuming for the DOJ to settle cases. He particularly focuses on the impact of the legislative consent requirement on settlement negotiations, noting that in some instances opposing parties make settlement offers contingent upon DOJ acceptance within a certain time period and that the Legislature and the DOJ had not agreed upon a procedure for obtaining legislative consent before the injunctions were entered. Indeed, he contends that some settlement opportunities may be missed because the DOJ may not be able to obtain legislative consent within the time set by the opposing party.

Even accepting, arguendo, that some settlement opportunities during the pendency of this appeal may be missed because the DOJ may not be able to obtain legislative consent within the time frame specified in a settlement offer, that does not necessarily mean that the state has lost the ability to obtain a similar settlement or final litigated result. An opposing party that wishes to settle may be willing to extend the time period for settlement or to renew its settlement offer (or to make a similar new offer) later in the case that will provide the same or similar benefits to the state. To say that the state will lose out forever on the benefits it could obtain in a particular settlement offer that could not be accepted within the time period specified in the offer is speculative.

Finally, we consider the potential harm to the public. As the Attorney General notes, staying the injunction may delay the settlement or resolution of some plaintiff-side consumer cases where settlement funds are distributed to individual members of the public. It must be remembered, however, that this delay, if it occurs, would be temporary because the stay of the injunction under consideration would apply only while this appeal is pending. On the other hand, however, as noted above, the public as a whole suffers irreparable injury of the first magnitude where a statute enacted by its elected representatives is declared unenforceable and enjoined before any appellate review can occur.

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law does not require that level of specificity. For example, in Gudenschwager, this court concluded that the state would be irreparably harmed because Gudenschwager's release would create a risk of him committing new sexual offenses. The court did not require the state to identify what specific crimes Gudenschwager would commit against which individuals on what specific dates. 191 Wis. 2d at 442 ("The harm identified by the State is that there is a substantial likelihood that Gudenschwager will commit further acts of sexual violence if he were to be released under the conditions set by Judge Wolfe.").

Having considered the nature and magnitude of the irreparable harms and the likelihood that those harms cannot be remedied or mitigated at the conclusion of the appeal, we conclude that a stay of the temporary injunction should be granted in this case, with one exception.

The exception to the stay relates to guidance documents that were in existence as of March 26, 2019, when the circuit court order enjoining section 38 of Act 369 was entered. Under section 38 of Act 369, if an existing guidance document has not been certified as having gone through the new notice and public comment procedure, the guidance document will be considered rescinded as of July 1, 2019. Those guidance documents, which assist members of the public in dealing with their state government, will no longer be available. The agencies subject to this requirement, however, have been under the impression that they would not have to meet the July 1, 2019 deadline because the guidance document provisions in Act 369 have been subject to a circuit court temporary injunction for more than two months (since March 26, 2019). If this court were now to stay that part of the circuit court's injunction, the agencies would have insufficient time to complete the notice and comment procedure for all of their existing guidance documents. The inability of the agencies at this point to complete that process would create harm to the general public because the existing guidance documents on which members of the public rely to interact with state government agencies will no longer be available as of July 1, 2019. That harm to the public affects our decision with respect to guidance documents that were in existence when the circuit court enjoined section 38 of Act 369. We therefore determine that, given the effect of the circuit court's temporary injunction on the notice and comment process for those guidance documents and the impact that the rescission of those documents would have on the public, the better course is to allow the temporary injunction to remain in effect solely with respect to the provision in section 38 of Act 369 that requires the rescission of guidance documents in existence on March 26, 2019 that are not certified as having gone through the notice and public comment process by July 1, 2019. See Wis. Stat. § 227.112(7)(a). Our decision does not affect section 38 in regard to guidance documents that were created after the circuit court injunction was entered.

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IT IS ORDERED that the motion of defendants-appellants Robin Vos, Roger Roth, Scott Fitzgerald, and Jim Steineke for temporary relief pending appeal is granted in part as follows. The temporary injunction issued by the Dane County Circuit Court on March 26, 2019, is stayed pending the final resolution of the appeal in this matter, with the sole exception that the temporary injunction is not stayed and therefore remains in effect with respect to the provision in section 38 of Act 369 that requires the rescission of guidance documents that were in existence as of March 26, 2019. See Wis. Stat. § 227.112(7)(a).[10]

[10] When an appellate court determines that a circuit court erroneously exercised its discretion in failing to grant a stay pending appeal at the same time that the temporary injunction was issued, it should craft its relief to return the parties to the positions they were in immediately prior to the entry of the circuit court's injunction to the extent practicable. The court notes that the Attorney General has acknowledged that the Department of Justice settled or discontinued some cases without obtaining legislative consent while the injunctions in League of Women

¶1 REBECCA FRANK DALLET, J. *(Concurring in part, dissenting in part).* I agree with the majority order that the temporary injunction remains in effect with respect to the provision in section 38 of 2017 Wisconsin Act 369 (Act 369) that requires the rescission of guidance documents. I also agree that the temporary injunction be stayed with respect to section 64 of Act 369, which provides that the Legislature's Joint Committee for the Review of Administrative Rules may suspend an administrative rule multiple times. I disagree, however, with the decision to stay the temporary injunction to the extent it enjoins enforcement of sections 26 and 30 of Act 369.[11] For that reason, I respectfully dissent.

¶2 The majority order alters the applicable standard of review, erroneous exercise of discretion, with respect to the first Gudenschwager factor, likelihood of success. See State v. Gudenschwager, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995). The majority order appears to alter substantive law when it asserts that because the decision to issue a temporary injunction "was based on legal determinations regarding novel questions," it would be subject to de novo review on appeal. Under current law however, a de novo review is part and parcel of the erroneous exercise of discretion standard. See LeMere v. LeMere, 2003 WI 67, ¶14, 262 Wis. 2d 426, 663 N.W.2d 789 (setting forth that this court decides de novo "'any questions of law which may arise during our review of an exercise of discretion'") (quoted source omitted). However, I will not dwell on the first Gudenschwager factor as the Attorney General and the Governor concede that this factor weighs in favor of the Legislative Defendants. Accepting this concession, I focus instead on the other three Gudenschwager factors as applied to sections 26 and 30.[12] As emphasized by this court in Gudenschwager, 191 Wis. 2d at 440, "[t]hese factors are not prerequisites but rather are interrelated considerations that must be balanced together."

¶3 In its written decision, the circuit court observed that during oral argument the Legislative Defendants "could not identify any harm that would result if the court were to decline to issue a stay in this case." In their brief to the circuit court, the Legislative Defendants pointed only generally to chaos resulting from not knowing which cases, if any, the Attorney General would defend. I agree with the Governor that counsel for the Legislative Defendants, the movant, "made virtually no effort to persuade the court that the final three Gudenschwager factors, having to do with irreparable and other harm, were in their favor." In contrast, Service

Voters of Wisconsin and this case were in effect. The court will not attempt to undo those settlements or discontinuances because it does not appear that it would be practicable to do so.

[11] Sections 26 and 30 took away the Attorney General's power to settle or discontinue a civil action where the State is a plaintiff and the power to compromise or settle a civil action against the State in which an injunction or consent decree is sought. This power was given to a house of the Legislature, or the Legislature's Joint Committee on Finance.

[12] Pursuant to the other three factors, the moving party must: "(2) show[] that, unless a stay is granted, it will suffer irreparable injury; (3) show[s] that no substantial harm will come to other interested parties; and (4) show[] that a stay will do no harm to the public interest." State v. Gudenschwager, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995).

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Employees International Union, Local I, et al. (the plaintiffs), the Governor, and the Attorney General provided numerous affidavits detailing specific harm resulting from the challenged statutory provisions. The circuit court applied the proper standard and determined that the Legislative Defendants made no showing on three of the four Gudenschwager factors. There is no basis for this court to declare that no reasonable judge could reach the conclusion of the circuit court. See State v. Jeske, 197 Wis. 2d 905, 913, 541 N.W.2d 225 (Ct. App. 1995) (concluding that a circuit court's decision should be upheld "unless it can be said that no reasonable judge, acting on the same facts and underlying law, could reach the same conclusion.") This court's inquiry should end there.

¶4 Even when this court considers the briefs that were submitted to this court subsequent to the circuit court's decision, the Legislative Defendants still do not demonstrate proof of harm if the injunction is not stayed that outweighs the harm to the plaintiffs, the Governor, and the Attorney General if the stay is granted. The majority order focuses on abstract harm to the Legislative Defendants and the public when a law enacted by the Legislature and signed by the Governor is enjoined. This abstract harm to the Legislative Defendants is offset by the alleged abstract harm to the Governor and Attorney General of having their executive powers usurped.

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¶5 The Attorney General, however, provides specific examples of concrete harm to its office and the public that would result from the litigation procedure controls in sections 26 and 30 going into effect, including harm that occurred before entry of the injunction. A critical part of the Attorney General's responsibility in litigation is a determination of the terms on which to compromise, settle, or dismiss a case. The Attorney General alleges that the litigation control provisions in sections 26 and 30 prevent it from maintaining necessary confidentiality in settlement negotiations and to timely meet deadlines for settlement offers since no process of legislative approval has been established. The Attorney General details specific examples of harm resulting from missed settlement deadlines and breached confidentiality.[13] The Attorney General further describes how taxpayers would be harmed by continuing to defend the State of Wisconsin in suits that the Department of Justice believes, in its professional judgment, should be terminated.

¶6 The majority order inflates the corresponding abstract harm the Legislative Defendants would suffer from an inability to exercise their newly conferred power to review and consent to settlement negotiations. Any abstract harm conferred upon the Legislative Defendants from the temporary injunction enjoining the enforcement of the litigation control provisions is outweighed by concrete, irreparable harm to the Attorney General and the citizens of the State of Wisconsin, and therefore the temporary injunction should remain in effect as to sections 26 and 30 of Act 369.

[13] The majority order simply speculates that opposing parties "may be willing to extend the time period for settlement or to renew its settlement offer . . . later in the case." However, individuals entitled to compensation may never attain another settlement and, at a minimum, will have any recovery delayed in the process without the ability to obtain interest.

¶7 For the reasons stated above, I respectfully concur in part and dissent in part.

¶8 I am authorized to state that Justices SHIRLEY S. ABRAHAMSON and ANN WALSH BRADLEY join this concurrence/dissent.

Sheila T. Reiff
Clerk of Supreme Court

*Address list continued:

Jeremy P. Levinson/ Stacie H. Rosenzweig
Halling & Cayo, S.C.
320 E. Buffalo St., Ste. 700
Milwaukee, WI 53202

Eric M. McLeod
Husch Blackwell LLP
P.O. Box 1379
Madison, WI 53701-1379

Lisa M. Lawless
Husch Blackwell, LLP
555 E. Wells St., Ste. 1900
Milwaukee, WI 53202-3819

Lester A. Pines/ Tamara Packard
Beauregard W. Patterson/ Christa Westerberg
Pines Bach LLP
122 W. Washington Ave., Ste. 900
Madison, WI 53703-2718

Daniel Townsend/ Matthew Wessler
Gupta Wessler PLLC
1900 L Street NW, Ste. 312
Washington, DC 20036

Misha Tseytlin
Troutman Sanders LLP
1 N. Wacker Dr., Ste. 2905
Chicago, IL 60606-2882

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EXHIBIT C

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OFFICE OF THE CLERK

Supreme Court of Wisconsin

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WI 53701-1688

TELEPHONE (608) 266-1880
FACSIMILE (608) 267-0640
Web Site: www.wicourts.gov

April 30, 2019

To:

Hon. Richard G. Niess
Circuit Court Judge Br. 9
215 S. Hamilton St., Rm. 5109
Madison, WI 53703

Carlo Esqueda
Clerk of Circuit Court
215 S. Hamilton St., Rm. 1000
Madison, WI 53703

Deana K. El-Mallawany/ Jessica Marsden
Benjamin Berwick/ Kristy Parker
Protect Democracy
2020 Pennsylvania Ave. N.W., #163
Washington, DC 20006-1811

Lawrence S. Robbins
Carolyn Forstein/ Wendy Liu
Robbins Russell
2000 K. Street N.W., 4th Fl.
Washington, DC 20006

Jeffrey A. Mandell/ Kurt Simatic
Stafford Rosenbaum LLP
P.O. Box 1784
Madison, WI 53701-1784

*Address list continues on Page 13

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You are hereby notified that the Court has entered the following order:

No. 2019AP559 The League of Women Voters v. Tony Evers L.C.#2019CV84

Pending before this court is a motion by the intervening defendant-appellant, Wisconsin Legislature (the Legislature), for temporary relief pending appeal in this matter.

In an order dated March 21, 2019, the Dane County circuit court granted the motion of the plaintiffs-respondents, The League of Women Voters, et al. (the plaintiffs), for an injunction and enjoined the enforcement of three Acts[1] that the Legislature had passed during an

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[1] The three acts passed during the December 2018 "extraordinary session" and subsequently signed by the Governor were 2017 Wisconsin Act 368, 2017 Wisconsin Act 369, and 2017 Wisconsin Act 370. This order will refer to them collectively as "the three Acts."

"extraordinary session"[2] in December 2018. The circuit court's order also enjoined the enforcement of the Senate confirmations of 82 appointees during the December 2018 "extraordinary session" and "vacated" those appointments. In the same order, the circuit court also denied the Legislature's motion for a stay of the injunction pending the completion of appellate review that is authorized as a matter of right pursuant to Wis. Stat. § 813.025(3).

The Legislature initiated the present appeal on March 22, 2019, in the court of appeals. At the same time, the Legislature filed a motion in the court of appeals for "an emergency stay," asking that court to grant it, first, an immediate administrative (ex parte) stay, and second, following the receipt of responses from the other parties, a stay pending the entirety of the appeal. It is clear from the motion that the Legislature was seeking an order from the court of appeals that would have stayed the effect of the circuit court's injunction with respect to both enjoining the three Acts and "vacating" the appointments of 82 individuals whose appointments by Governor Walker had been confirmed by the Senate during the December 2018 "extraordinary session." In other words, with respect to the appointments, the Legislature asked the court of appeals to stay the effect of the circuit court's injunction, thereby returning those individuals to their respective positions during the pendency of this appeal.

Within a few hours after the filing of the Legislature's motion for an emergency stay, the defendant-respondent, Governor Tony Evers, the plaintiffs, and the Wisconsin Department of Justice (DOJ) had asked the court of appeals to establish a briefing schedule that would allow them to file responses before the court of appeals considered issuing any stay. Later in the afternoon on March 22, 2019, the court of appeals issued an order that, inter alia, directed the parties other than the Legislature to file responses to the Legislature's motion by 4:00 p.m. on Monday, March 25, 2019.

Within a short time after the court of appeals issued that order, the Governor had a letter hand-delivered to the Chief Clerk of the Wisconsin Senate. The letter consisted of the following single sentence and a list of the 82 individuals whose appointments had been confirmed by the Senate during the December 2018 "extraordinary session": "In light of yesterday's ruling in League of Women Voters v. Knudson, et al., Dane County Case No. 19CV84,[3] this letter is to remove the following appointments from consideration for confirmation by the Wisconsin Senate: . . . ."

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[2] We use the term "extraordinary session" to describe what the Legislature did in December 2018 when it convened itself to conduct floor debate and votes because that is the term used by the parties in their filings.

[3] This was the short caption and case number for this matter when it was in the circuit court. Defendant Dean Knudson was subsequently dismissed from the lawsuit. Thus, the short caption has changed on appeal to The League of Women Voters v. Tony Evers, and it has been assigned appellate case number 2019AP559.

On March 27, 2019, following receipt of the responses to the Legislature's motion and a reply memorandum filed by the Legislature, the court of appeals granted the Legislature's motion for temporary relief pending appeal. It first addressed two preliminary matters. It noted that some parties had conflated the plaintiffs' likelihood of success in the action with the Legislature's likelihood of success on the appeal challenging the injunction. It clarified that its focus at this point was on the latter and not on the merits of whether the circuit court had properly granted an injunction. Second, it further stated that in deciding the Legislature's stay motion, its task was to weigh the harms that might result from denying a stay pending appeal in the event that the injunction was ultimately reversed against the harms that might result from imposing a stay if the injunction was ultimately affirmed. That task did not include weighing the harms or benefits that allegedly flowed from the three Acts.

The court of appeals then turned to reviewing the circuit court's application of the factors for considering temporary relief pending appeal that were set forth in State v. Gudenschwager, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995) (citing Leggett v. Leggett, 134 Wis. 2d 384, 385, 396 N.W.2d 787 (Ct. App. 1986)).[4] With respect to the first factor of the Legislature's likelihood of success on appeal of the injunction, the court of appeals did not decide whether the presumption of constitutionality which usually attaches to regularly enacted statutes should impact its consideration of that factor. It determined that it did not need to do so because the issue presented in the appeal, whether the Legislature had validly convened in December 2018, was a legal question of first impression that would be subject to de novo review on appeal. The court of appeals indicated that the circuit court had erred by failing to take these considerations into account when it concluded that the Legislature had no likelihood of success on the merits. With respect to the second factor, whether there would be irreparable injury if no stay pending appeal were granted, the court of appeals stated that the circuit court again had erred in evaluating the alleged irreparable injury by holding a view that there was no chance its legal conclusion would be overturned and by failing to consider the harm that could result from enjoining acts and confirmations of appointments that may ultimately be found valid (which would then require undoing acts done in reliance on the injunction in the intervening period). Noting that not all of the alleged harms were significant, the court of appeals did find significant the harm that the people of the state would suffer from having statutes enacted by their elected representatives declared unenforceable. Ultimately, the court of appeals concluded that when the balancing test was properly performed, the first two Gudenschwager factors weighed in favor of granting the stay and those factors outweighed any potential harm under the third and fourth factors. The court of appeals therefore ordered "that the temporary injunction issued by the circuit court on March 21, 2019, is hereby stayed pending the Legislature's appeal."

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[4] A stay or other temporary relief pending appeal is appropriate where the moving party:
(1) makes a strong showing that it is likely to succeed on the merits of the appeal;
(2) shows that, unless a stay is granted, it will suffer irreparable injury;
(3) shows that no substantial harm will come to other interested parties; and
(4) shows that a stay will do no harm to the public interest.

The parties, however, continued to dispute the effect of the "stay" granted by the court of appeals, especially with respect to the status of the 82 appointees. The Legislature took the position that the "stay" restored those appointees to the positions they had held prior to the circuit court's injunction. Governor Evers took the position that the court of appeals' stay was prospective only and that his letter had withdrawn those appointments at a time while the injunction was in effect so those appointees no longer had any claim to their positions. The Governor advised the various state agencies, commissions, boards, etc. that those appointees should not be allowed to return to their positions or have access to the physical offices some of them had occupied prior to the injunction.[5]

The Legislature therefore filed a new motion with the court of appeals, asking that court to "enforce" its March 27, 2019 "stay." In an order dated April 9, 2019, the court of appeals denied the Legislature's motion. It noted that its March 27, 2019 order had been silent as to the status of the appointees and that it had not expressly ordered the Governor to allow them to continue in their positions. The court of appeals stated that it had been the circuit court's action in denying the stay, not the Governor's subsequent action in withdrawing the nominations, that had been the subject of its review. From that premise, it concluded that the only way its March 27, 2019 order could have restored the appointees to their positions would have been by operation of law as an automatic effect of the stay. It then pointed to the general rule of law that a stay "operates upon the judicial proceeding itself . . . by halting or postponing some portion of the proceeding, or by temporarily divesting an order of enforceability." Niken v. Holder, 556 U.S. 418, 428 (2009). It further stated that it was not aware of any legal authority for the proposition that an action taken while an injunction was in effect is invalidated by an appellate court's subsequent stay. In other words, it believed that its March 27, 2019 order could have only prospective effect and could not affect the Governor's ability to withdraw the nominations pursuant to the circuit court's injunction while that injunction was still in effect. On the other hand, however, the court of appeals acknowledged that an appellate court reviewing the merits of the injunction would still have the power to determine that the Governor's withdrawal of the nominations had been void if it ultimately concluded that those nominations had been validly confirmed during the December 2018 "extraordinary session."

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On April 10, 2019, the Legislature filed in this court a document entitled "Emergency Petition for Original Action, Supervisory Writ, Writ of Mandamus, and/or Immediate Temporary Relief of Intervening Defendant-Appellant-Petitioner Wisconsin Legislature." The document was filed bearing the case caption and case number for the above-referenced appeal.

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[5] Governor Evers has reappointed a majority of the 82 appointees to the positions to which they had been appointed by Governor Walker. He has not, however, reappointed the appointees to certain significant positions, including positions on the Public Service Commission (PSC), the Labor and Industry Review Commission (LIRC), and the University of Wisconsin Board of Regents.

By order dated April 11, 2019, this court separated the two portions of the Legislature's April 10, 2019 filing. The petition for original action and for a supervisory writ or writ of mandamus was assigned to a new case, Wisconsin Legislature v. Evers, No. 2019AP673-OA. That petition was subsequently denied by this court's April 17, 2019 order. The portion of the April 10, 2019 filing that sought immediate temporary relief was treated as a motion to this court in this appeal.[6] The court's April 11, 2019 order directed the other parties to the appeal to file responses to the Legislature's motion by 3:00 p.m. on Monday, April 15, 2019. On that date the court received responses from the plaintiffs and from Governor Evers. In addition, the court granted the motion of Wisconsin Manufacturers and Commerce (WMC) for leave to file a non-party brief amicus curiae in support of the Legislature's motion and accepted for filing WMC's accompanying non-party brief. The court has now considered the Legislature's motion for immediate temporary relief pending appeal, the responses to that motion, and the non-party brief in support of that motion.

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The Legislature's motion for temporary relief asks this court to "order immediate reinstatement of the appointees." It argues that the uncertain status of the appointees is creating an ongoing and intolerable harm to its interest and to the public interest because the boards and commissions to which the Governor has refused to reappoint the prior appointees, including the PSC, the LIRC, and the Board of Regents, are being hindered in performing their duties. It also points to the impact that the injunction and the Governor's withdrawal of the nominations is having on the individual appointees and their assistants, who have had their salaries and benefits terminated. In addition, the Legislature asserts that if the Governor were to appoint new individuals to those positions, there would be more confusion because two people would be claiming to be the true appointee and because the court of appeals acknowledged that the original appointees may ultimately be restored after a review of the merits of the injunction. Further, the Legislature argues that it was the circuit court's injunction, not the Governor's subsequent letter to the Chief Clerk of the Senate, which had vacated the 82 appointments. The Legislature contends that since the injunction has now been stayed by the court of appeals' March 27, 2019 order, those 82 appointees are now able once more to enforce the statutory rights to their appointed positions that they gained when their nominations were confirmed by the Senate during the December 2018 "extraordinary session." It asks this court to recognize the statutory rights the appointees regained after the March 27, 2019 court of appeals' order.

In response, Governor Evers asserts that the legislature is creating a false picture of an emergency or of chaos surrounding the various boards and commissions and that there is no need for this court to grant any immediate temporary relief. For example, he relies on an affidavit from the chairperson of the PSC to the effect that this litigation and the loss of one of its three members has not hindered the PSC's ability to complete its work, pointing to an April 11, 2019 meeting of the two remaining members, at which the PSC had decided 31 agenda items. The

[6] At the time of the Legislature's April 10, 2019 filing, this appeal was still pending in the court of appeals, but a petition for bypass of the appeal to this court had been filed in this court. On April 15, 2019, this court granted the petition for bypass and assumed jurisdiction over the appeal.

Governor also argues that the court of appeals properly exercised its discretion when it denied the Legislature's motion to enforce its stay. If this court would decide to review the matter anew, the Governor contends that this court should reach the same conclusion as the court of appeals that he was permitted to withdraw the nominations when the injunction was in effect prior to the March 27, 2019 stay order.

Although the Legislature has not specifically cited Wis. Stat. § (Rule) 808.07(2), it is clear that its various motions for temporary relief pending appeal have been brought pursuant to that rule.[7] Wisconsin Statute § (Rule) 808.07(2) authorizes both a circuit court and an appellate court to grant a number of forms of temporary relief while an appeal is pending, including (1) staying execution or enforcement of a judgment or order; (2) suspending, modifying, restoring, or granting an injunction; or (3) issuing any other order appropriate to preserve the "existing state of affairs or the effectiveness of the judgment subsequently to be entered."

Where a litigant asks an appellate court to grant it temporary relief pending appeal and the litigant has sought such relief unsuccessfully in the circuit court, the motion addressed to the appellate court is not considered in a vacuum. The appellate court's review is conducted by reviewing the circuit court's decision to grant or deny such relief under an erroneous exercise of discretion standard. Gudenschwager, 191 Wis. 2d at 439. Our decision in Gudenschwager also makes clear that where a motion for relief pending appeal is directed to this court after the movant has unsuccessfully sought such relief in both the circuit court and the court of appeals, this court reviews the circuit court's exercise of discretion, not the court of appeals' exercise of discretion. 191 Wis. 2d at 444 ("Consequently, we find that [the circuit court's] decision to release Gudenschwager pending appeal amounted to an erroneous exercise of discretion."). This is the only logical way to proceed. Otherwise, this court would be reviewing the court of appeals' discretionary decision, which in turn was reviewing the circuit court's exercise of discretion.

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"An appellate court will sustain a discretionary act if it finds that the trial court (1) examined the relevant facts, (2) applied a proper standard of law, and (3) using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." Gudenschwager, 191 Wis. 2d at 440 (citing Loy v. Bunderson, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982)). Our review of the circuit court's order in this case denying the Legislature's request for a stay of the injunction leads us to conclude, as did the court of appeals, that the circuit court erroneously

[7] The dissent criticizes the court for relying on Wis. Stat. § (Rule) 808.07, implying that the court is creating some new standard or basis for relief. To the contrary, the court is simply using the procedure and standards that this court has established, by rule and by case law, as the rules of decision for motions for temporary relief pending appeal. The dissent does not dispute that the Legislature's motion is clearly one for temporary relief pending appeal. Indeed, the court of appeals also relied on Rule 808.07 when it granted a stay pending appeal in its March 27, 2019 order in this case. Further, while it criticizes the court for relying on the court's long-established procedure and standards, the dissent tellingly offers no other basis on which to decide the current motion.

exercised its discretion. Although the circuit court referenced the four factors set forth in Gudenschwager, it made errors of law in the manner in which it applied them.

The four factors are set forth in footnote 2 above. It should be noted that those four items are interrelated factors to be considered; they are not separate prerequisites. Gudenschwager, 191 Wis. 2d at 440. Thus, having more of one of the factors may excuse less of another. Id.

The first factor to be considered is that the movant must make a "strong showing" that it is likely to prevail on the merits of the appeal. This "strong showing," however, is inversely proportional to the amount of irreparable injury that the moving party (and the public) will suffer in the absence of temporary relief pending appeal. The movant is obligated to show at least "more than the mere 'possibility'" of success on the merits. Id. at 441.

The circuit court did not, however, consider whether, even if it had reached an opposite conclusion in deciding to grant the injunction, the Legislature had nonetheless shown more than the "mere possibility" of succeeding on an appeal of its ruling. The circuit court simply determined that because it had found the plaintiffs' interpretation of the constitution and statutes to be more compelling, that determination meant that the Legislature had "no likelihood of success on the merits." As noted by the court of appeals, the circuit court never recognized that success on the merits in this case turned on questions of law that would be reviewed de novo by the appellate courts. The circuit court did not acknowledge that its determination was the first word, not the last word, on the interpretation of the relevant constitutional provisions and statutes.[8]

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Our review of the Legislature's motion and the arguments it made below leads us to conclude that it has set forth an argument that has "more than the mere 'possibility'" of prevailing. The circuit court concluded that under Article IV, § 11 and Wis. Stat. § 13.02, the Legislature may meet only during "regular sessions" that commence in January of each year and "special sessions" called by the Governor. The Legislature points out, however, that under Wis.

[8] The dissent claims that the court is substantively changing the law to say that the presence of a de novo standard of appellate review satisfies the first Gudenschwager factor of likelihood of success on appeal. The court is merely saying that where an appeal will rest on review of a legal question, to which a de novo standard of appellate review will apply, it is an error of law for a circuit court to proclaim that because it has decided the legal issue against the appellant in granting an injunction, the appellant must therefore have "no likelihood of success on the merits" on appeal. The standard of appellate review can greatly affect an appellant's chance of success in the appellate court. An appellant facing a clearly erroneous or erroneous exercise of discretion standard of appellate review will have a much more difficult burden than one facing a de novo standard of review. Consequently, when the circuit court ignored the impact of the standard of appellate review and refused to analyze whether the appellant will have more than the mere possibility of convincing an appellate court, taking a fresh look at the legal question, to reach the opposite conclusion, it failed to properly apply the law, thereby erroneously exercising its discretion.

Stat. § 13.02(2), the "regular session" is to commence on the first Tuesday after January 8th "unless otherwise provided under sub. (3)." Subsection (3) of the statute provides that the joint committee on legislative organization shall meet and develop a work schedule for the session. The Legislature further notes that since the late 1960s or early 1970s, in each biennium, both houses have passed a joint resolution providing that the Legislature's "session" will extend from the beginning of the biennium until the end of the biennium, with certain periods of time prescheduled for floor sessions and other periods prescheduled for committee work, with the ability to convert committee work periods into floor periods. Such a joint resolution was in effect when the Legislature called itself into a floor period (or "extraordinary session") in December 2018. Moreover, the Legislature questions whether the circuit court had the authority to inquire into the manner in which the Legislature called itself into a floor period. See State ex rel. Ozanne v. Fitzgerald, 2011 WI 43, ¶15, 334 Wis. 2d 70, 798 N.W.2d 436.

As we are only at the early stage of this appeal and in the context of a motion for temporary relief pending appeal, we express no position as to whether or not any of the Legislature's arguments will ultimately prevail. That is not the focus of this analysis. We cannot say, however, that the Legislature's arguments have "no likelihood of success on the merits," as the circuit court did.

We further agree with the court of appeals that the circuit court's consideration of the irreparable harms that would flow from denying relief pending appeal was erroneously premised on the circuit court's determination that the challenged Acts and confirmations would ultimately be found to be invalid. As the court of appeals properly noted, there is a substantial harm to the Legislature and to the public where statutes enacted by the people's elected representatives are declared unenforceable and enjoined before any appellate review can occur. Indeed, the harm that stems from refusing to stay an injunction against the enforcement of a law passed by the Legislature and signed by the Governor, regardless of the nature of the challenge to the law, is an irreparable harm of the first magnitude.

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In addition, and of equal importance, the circuit court completely ignored the harms that would result from refusing to stay its order "vacat[ing]" the appointments, even temporarily. First, in the absence of a stay and in the event of an ultimate determination that the Legislature was validly convened, the 82 appointees will have been harmed by having been removed, even temporarily, from exercising the powers of their positions. Likewise, the boards and commissions to which those individuals were appointed will have been harmed by the failure to receive the votes and input of those individuals. Finally, the public will also have suffered irreparable harm if individuals who have been confirmed to appointed positions are removed from those positions without a final determination on whether their confirmations were valid.

The circuit court also failed to take into account that its injunction had not just enjoined the appointees from exercising the powers of their respective positions; it had vacated their appointments. Denying a stay, therefore, not only kept those appointees from exercising their respective powers for a period of time while the injunction was reviewed on appeal, it provided a potential basis for the Governor to withdraw those nominations permanently, as his March 22,

2019 letter purported to do. The circuit court's refusal to grant a stay of its injunction, therefore, also gave rise to the potential confusion that would ensue if the Governor nominated new individuals to the positions at issue, thereby creating a situation where two people would both claim a right to the same position.

On the other hand, staying the injunction would not have created irreparable harm, at least as to the appointees. The circuit court's injunction was based on its determination that the December 2018 confirmations of the 82 individuals were invalid because the Legislature was not properly convened. Even if the circuit court's view is ultimately determined to be the correct one, invalidating the December 2018 confirmations would not mean that those individuals lacked authority to serve. When the Governor nominates someone to serve in the types of positions at issue, that nominee serves in an acting capacity until the Senate confirms them or rejects their confirmation. If the December 2018 confirmations would ultimately be found to be invalid, those individuals could have continued to serve in an acting capacity just as they had done prior to the December 2018 confirmation vote. In other words, the invalidity of the December 2018 confirmation vote would not render the initial appointments of those 82 individuals void ab initio. The invalidity of the December 2018 confirmation vote would only return those individuals to the status of a yet-to-be-confirmed nominee serving in an acting capacity. Only by "vacat[ing]" the appointments and then refusing to stay that order did the circuit court purport to remove those individuals from their positions, even temporarily.

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We therefore conclude that the balance of the four Gudenschwager factors weighs in favor of granting temporary relief until this court can complete its work on the appeal.

The question that remains is what the nature of that temporary relief should be. To answer this question, it is important to remember what this court is reviewing. We are reviewing the circuit court's decision not to grant a stay at the time that it entered its injunction. It is at this point that we depart from the court of appeals' apparent belief that its authority to issue relief pending appeal was limited to staying the circuit court's injunction and that such a stay was prospective only. As noted above, Rule 808.07 gives an appellate court a much broader range of tools to craft relief that is needed to preserve the status quo and to ensure the efficacy of any final appellate decision. Moreover, if the determination is made by the appellate court that the circuit court erred in failing to grant a stay at the same time that the injunction was issued, then the appellate court should craft its relief to return the parties to the positions they were in immediately prior to the entry of the circuit court's injunction to the extent practicable.

Indeed, that is what Rule 808.07(2)(a)3. contemplates when it authorizes an appellate court to "[m]ake any order appropriate to preserve the existing state of affairs . . . ." The "existing state of affairs" referenced in the rule, at least under these circumstances, has to mean the state of affairs in effect prior to the circuit court's injunction. If it did not mean this, but rather meant only the state of affairs as of the moment of the appellate stay, then the appellate court would be powerless to undo any acts taken by the parties before the appellate court could act on a request for a stay. This would lead to an absurd result. It would encourage litigants to move for injunctions in a circuit court, and when they obtained such an injunction, to rush

around taking all sorts of actions before the appellate court could even consider whether to issue a stay or other temporary relief--actions that the appellate court would then be unable to undo. That is antithetical to the orderly administration of justice and therefore cannot be what the rule intends. On the other hand, there are practical limits to what actions an appellate court can undo in order to return the parties to the prior state of affairs.

The state of affairs that was existing immediately prior to the entry of the circuit court's injunction in this case was that the three Acts were in effect and the 82 appointees were performing the duties of their respective positions. We therefore tailor the relief we grant to restore that state of affairs to the extent practicable. This requires two separate forms of relief. First, we continue the court of appeals' stay of the circuit court's injunction against the enforcement of the three Acts and the enforcement of the confirmations of the 82 appointees for the duration of this appeal. Second, we grant an injunction returning the 82 appointees to the respective positions to which they were appointed immediately and for the duration of this appeal. Because the circuit court should have entered a stay of its injunction at the time it was entered, and in order to ensure the effectiveness of our order returning the 82 appointees to their positions, we order that the Governor's March 22, 2019 letter withdrawing the appointments was without legal effect and will remain so for the duration of this appeal. The 82 appointees shall immediately be allowed to perform the duties of their respective positions in the same manner as they were performing those duties prior to March 21, 2019.

IT IS ORDERED that the motion of the Intervening Defendant-Appellant, Wisconsin Legislature, for temporary relief pending appeal is granted in part, as set forth below; and

IT IS FURTHER ORDERED that the court of appeals' March 27, 2019 stay of the portion of the Dane County circuit court's March 21, 2019 order in Dane County Case No. 19CV84 that enjoined enforcement of any provision of 2017 Wisconsin Act 368, 2017 Wisconsin Act 369, and 2017 Wisconsin Act 370 shall remain in effect pending this court's final decision in this case; and

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IT IS FURTHER ORDERED that the court of appeals' March 27, 2019 stay of the portions of the Dane County circuit court's March 21, 2019 order in Dane County Case No. 19CV84 that enjoined the defendants from enforcing the December 2018 confirmations of the 82 nominees/appointees to the various state authorities, boards, councils, and commissions and that "temporarily vacated" those appointments shall remain in effect pending this court's final decision in this case; and

IT IS FURTHER ORDERED that the 82 nominees/appointees are hereby restored, as of the date of this order, to the positions to which they were appointed, and they may exercise all of the rights and duties of those positions as they did prior to the Dane County circuit court's March 21, 2019 injunction and order, pending this court's final decision in this case. The letter of March 22, 2019, from Governor Evers to Jeff Renk, Chief Clerk of the Wisconsin Senate, was of no legal effect and will remain so for the duration of this appeal.

ANN WALSH BRADLEY, J. (*dissenting*). Relying on an argument not advanced by any party, the majority reinstates 82 gubernatorial appointees. The danger of a court reaching out and relying on a statute not cited by the parties is twofold. First, it blindsides the parties and deprives them of notice and the opportunity to be heard. Second, the court does not have the benefit of making sure that its newly advanced theory has been tested by an adversary briefing process, thereby increasing the chance of inadvertently or sub silentio substantively changing the law. Indeed, it appears that the majority has changed the substantive law here.

Although the majority acknowledges that the Legislature has not cited Wis. Stat. § (Rule) 808.07(2), it still relies upon that rule in crafting the relief it affords. The Legislature's kitchen sink motion for relief sought a supervisory writ, writ of mandamus, unspecified "immediate temporary relief," and even an original action. Yet, a remedy pursuant to § 808.07(2) was not among the types of relief sought. Nevertheless, the majority "corrects" this deficiency in the Legislature's motion by finding relief under a stone that the Legislature did not lift. Such a practice blindsides the parties and fails to provide notice and an opportunity to be heard on the basis the court finds dispositive. See Springer v. Nohl Elec. Prods. Corp., 2018 WI 48, ¶¶50-51, 381 Wis. 2d 438, 912 N.W.2d 1 (Abrahamson, J., dissenting).

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Without the benefit of briefing on the subject of § 808.07(2), it appears that the majority substantively alters existing law. The majority's initial substantive error lies in its treatment of the first Gudenschwager factor, likelihood of success on the merits of the appeal. See State v. Gudenschwager, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995). In the majority's view, the circuit court erroneously exercised its discretion because "the circuit court never recognized that success on the merits in this case turned on questions of law that would be reviewed de novo by the appellate courts." It further opines that "[t]he circuit court did not acknowledge that its determination was the first word, not the last word, on the interpretation of the relevant constitutional provisions and statutes." As a result, the majority appears to alter the substantive law, asserting that—as a matter of law—there exists more than a "mere possibility" that the Legislature will prevail on the merits.[9]

Reliance on the appellate standard of review is puzzling, given that de novo review does not make the merits of a party's arguments any stronger. Nevertheless, the majority appears to view de novo review as tantamount to meeting the "mere possibility" standard. Does this mean that even when a circuit court determines a law to be unconstitutional beyond a reasonable doubt that it must deem the first Gudenschwager factor satisfied simply because an appellate court will

[9] Yet another example of an inadvertent or sub silentio change in the substantive law lies in footnote 8 of the majority order, where it states: "An appellant facing a clearly erroneous or erroneous exercise of discretion standard of appellate review will have a much more difficult burden than one facing a de novo standard of review." Under current law, a de novo review is part and parcel of the erroneous exercise of discretion standard. See LeMere v. LeMere, 2003 WI 67, ¶14, 262 Wis. 2d 426, 663 N.W.2d 789 (setting forth that we decide de novo "any questions of law which may arise during our review of an exercise of discretion . . . .").

owe its determination no deference? Under the majority's analysis, it appears that the answer is yes.

The majority's second substantive error lies in its one-sided presentation of the irreparable harm that would be suffered absent a stay. It places an inordinate amount of weight on the harm that results from enjoining an enacted law while completely ignoring the harm that comes from leaving a potentially unconstitutional law in place.

The majority claims that "there is a substantial harm to the Legislature and to the public where statutes enacted by the people's elected representatives are declared unenforceable and enjoined before any appellate review can occur." Without citation to authority, it asserts that "the harm that stems from refusing to stay an injunction against the enforcement of a law passed by the Legislature and signed by the Governor, regardless of the nature of the challenge to the law, is an irreparable harm of the first magnitude."

But what about the harm that results from a potentially unconstitutional law remaining in effect? The harm wrought by subjecting the people of Wisconsin to potentially unconstitutional "laws" should be, but apparently is not, worthy of the court's consideration. Indeed, the circuit court here determined that the laws at issue are unconstitutional beyond a reasonable doubt. The enforcement of a law that a circuit court determines is unconstitutional beyond a reasonable doubt would also appear to irreparably harm the public interest, yet the majority says nary a word about it.

For the reasons stated above, I respectfully dissent.

I am authorized to state that Justices SHIRLEY S. ABRAHAMSON and REBECCA FRANK DALLET join this dissent.

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Sheila T. Reiff
Clerk of Supreme Court

*Address list continued:

Lester A. Pines/ Tamara Packard
Beauregard W. Patterson/ Aaron Dumas
Pines Bach LLP
122 W. Washington Ave., Ste. 900
Madison, WI 53703-2718

Misha Tseytlin
Troutman Sanders LLP
1 N. Wacker Dr., Ste. 2905
Chicago, IL 60606-2882

Eric A. Baker/ Barry J. Blonien
Boardman & Clark LLP
P.O. Box 927
Madison, WI 53701-0927

Patrick O. Patterson
Law Office of Patrick O. Patterson, S.C.
7481 N. Beach Dr.
Milwaukee, WI 53217-3663

Colin Thomas Roth
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Corydon James Fish/ Lane E.B. Ruhland
Wisconsin Manufacturers & Commerce
501 E. Washington Ave.
Madison, WI 53703-2914

Delanie Breuer
Wisconsin Paper Council
10 E. Doty St., Ste. 445
Madison, WI 53703

Thomas C. Bellavia
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

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