

**FILED**  
**04-24-2024**  
**CLERK OF WISCONSIN**  
**COURT OF APPEALS**

**STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT IV**

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RISE, INC. & JASON RIVERA,

Plaintiffs-Respondents,

WISCONSIN ELECTIONS  
COMMISSION, et al.,

Defendants,

v.

Appeal No.  
2024AP165

Circuit Court Case No.  
2022CV2446

WISCONSIN STATE LEGISLATURE,

Intervenor-Appellant.

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**PLAINTIFFS-RESPONDENTS' SUPPLEMENTAL APPENDIX**

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On Appeal from the  
Circuit Court for Dane County  
Case No. 2022CV2446

The Honorable Ryan D. Nilsestuen, Presiding

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# Wisconsin Elections Commission

201 West Washington Avenue | Second Floor | P.O. Box 7984 | Madison, WI 53707-7984  
(608) 266-8005 | elections@wi.gov | elections.wi.gov

**DATE:** February 9, 2024

**TO:** Wisconsin Municipal Clerks  
City of Milwaukee Election Commission  
Wisconsin County Clerks  
Milwaukee County Election Commission

**FROM:** Wisconsin Elections Commission

**SUBJECT:** Permanent Injunction on WEC concerning Absentee Voter Witness Address Information in *Rise, Inc., et al. v. WEC et al.* (2022-CV-002446)

On January 30, 2024, the Honorable Judge Ryan D. Nilsestuen of the Dane County Circuit Court issued a Permanent Injunction in the above-referenced case relating to what witness address information must be included on an absentee ballot certificate. This memo discusses the case as well as the Commission's reissued memorandum concerning the Permanent Injunction in *White et al. v. WEC* (2022-CV-001008). The decision and the reissued memorandum are attached to this memorandum. The Commission is also sending a Q&A document related to this memo.

1. Reissued Memorandum Concerning *White et al. v. WEC*

Pursuant to the Permanent Injunction in *Rise, Inc., et al. v. WEC et al.* of January 30, 2024, this communication is hereby issued to give notice that the WEC memorandum of September 14, 2022, contained a definition of a witness address that is invalid and contrary to law. That memorandum has therefore been revised and reissued. Specifically, the Commission's prior definition of a witness address has been withdrawn and replaced with the standards explained in this memorandum and attached permanent injunction. **Please refer to the reissued memorandum, also dated February 9, 2024, concerning *White et al. v. WEC* and continue to follow the Commission's guidance contained in that document.**

2. Concerning the Permanent Injunction for *Rise, Inc., et al. v. WEC et al.*

The Dane County Circuit Court declared that:

[W]ith respect to a witness's address on an absentee ballot certificate, the term 'address' in Wis. Stat. § 6.87(2) and (6d) means 'a place where the witness may be communicated with.'

The Dane County Circuit Court further declared that:

Wis. Stat. § 6.87's requirement that the witness's address be included on the absentee ballot certificate does not require that any particular components or information be included, but only

*Wisconsin Elections Commissioners*

Don M. Millis, chair | Marge Bostelmann | Ann S. Jacobs | Carrie Riepl | Robert Spindell | Mark L. Thomsen

Administrator  
Meagan Wolfe

Supp. App. 003

that the face of the certificate contains sufficient information to allow a reasonable person in the community to identify a location where the witness may be communicated with.

The Dane County Circuit Court declared that, “an absentee ballot certificate is not ‘improperly completed’ under Wis. Stat. § 6.87(9), based on a witness address,” and that, “Wis. Stat. § 6.87 does not authorize the rejection of, return for cure of, or refusal to count an absentee ballot based on a witness’s address,” as long as “the face of the certificate contains sufficient information to allow a reasonable person in the community to identify a location where the witness may be communicated with.”

The Commission is enjoined “from promulgating rules, guidance documents, or other materials inconsistent with this Order, or from otherwise taking any action inconsistent with” the decision. However, the Court did not require the Commission to modify the text of any absentee ballot certificate envelope as long as it advises Wisconsin election officials of the Court’s Order and advises Wisconsin election officials that they have an:

obligation not to reject, return for cure, or refuse to count any absentee ballot based on a witness’s address if the face of the certificate contains sufficient information to allow a reasonable person in the community to identify a location where the witness may be communicated with.

This memorandum, the attached Permanent Injunction, and related Q&A document constitute the Wisconsin Elections Commission’s advisement to Wisconsin’s election officials of their obligations as stated by the Court.

Please review this notice, the attached Permanent Injunction, and the Q&A document with your municipal attorney to determine if any changes to your procedures are required.

Please contact the WEC Help Desk at [elections@wi.gov](mailto:elections@wi.gov) or at 608-261-2028 with any questions. Thank you for your prompt attention to this matter. This memorandum was reviewed and approved by the six members of the Wisconsin Elections Commission at their February 8, 2024, public meeting.

**FILED**  
**01-30-2024**  
**CIRCUIT COURT**  
**DANE COUNTY, WI**  
**2022CV002446**

**BY THE COURT:**

**DATE SIGNED: January 30, 2024**

Electronically signed by Ryan D. Nilsestuen  
Circuit Court Judge

STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

BRANCH 10

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RISE, INC. AND JASON RIVERA,  
Plaintiffs

Declaratory Judgment and Permanent  
Injunction

vs.

WISCONSIN ELECTIONS  
COMMISSION et al.,  
Defendants

Case No. 2022CV2446

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For the reasons stated on the record and given in the Court’s January 2, 2024, Decision and Order (Dkt. 223), the Court hereby:

1. **DECLARES** that, with respect to a witness’s address on an absentee ballot certificate, the term “address” in Wis. Stat. § 6.87(2) and (6d) means “a place where the witness may be communicated with”;
2. **DECLARES** that Wis. Stat. § 6.87’s requirement that the witness’s address be included on the absentee ballot certificate does not require that any particular components or information be included, but only that the face of the certificate contains sufficient information to allow a reasonable person in the community to identify a location where the witness may be communicated with;

3. **DECLARES** that an absentee ballot certificate is not “improperly completed” under Wis. Stat. § 6.87(9), based on a witness’s address, so long as the face of the certificate contains sufficient information to allow a reasonable person in the community to identify a location where the witness may be communicated with;
4. **DECLARES** that Wis. Stat. § 6.87 does not authorize the rejection of, return for cure of, or refusal to count an absentee ballot based on a witness’s address, if the face of the certificate contains sufficient information to allow a reasonable person in the community to identify a location where the witness may be communicated with;
5. **DECLARES** that the Wisconsin Elections Commission’s September 14, 2022, Memorandum entitled “Temporary Injunction on WEC Guidance re Missing Absentee Witness Address,” Dkt. 38 Ex. 8, is invalid and contrary to law to the extent that it adopts a different definition of “address” for purposes of the witness address requirement than the definition adopted in this Order;
6. **ORDERS** Defendant the Wisconsin Elections Commission, by February 9, 2024, to rescind the Memorandum entitled “Temporary Injunction on WEC Guidance re Missing Absentee Witness Address,” Dkt. 38 Ex. 8, or to revise and reissue the memorandum consistent with this Order;
7. **ORDERS** Defendant the Wisconsin Elections Commission, by February 9, 2024, to promptly advise all municipal and county election officials of this Court’s Order;
8. **ENJOINS** Defendant the Wisconsin Elections Commission from promulgating rules, guidance documents, or other materials inconsistent with this Order, or from otherwise taking any action inconsistent with this Order; and

9. **ENJOINS** Defendants Maribeth Witzel-Behl, Tara McMenamin, and Celestine Jeffreys from rejecting or returning for cure any absentee ballot based on a witness's address, if the face of the certificate contains sufficient information to allow a reasonable person in the community to identify a location where the witness may be communicated with.
10. Provided, however, that nothing in this Order shall require Defendant the Wisconsin Elections Commission to modify the printed text of the absentee ballot certificate as the Wisconsin Elections Commission approved it at its December 19, 2023, meeting, so long as Defendant the Wisconsin Elections Commission advises municipal and county election officials of this Court's Order and of their obligation not to reject, return for cure, or refuse to count any absentee ballot based on a witness's address, if the face of the certificate contains sufficient information to allow a reasonable person in the community to identify a location where the witness may be communicated with.

**This order is final for purposes of appeal.**



# Wisconsin Elections Commission

201 West Washington Avenue | Second Floor | P.O. Box 7984 | Madison, WI 53707-7984  
(608) 266-8005 | elections@wi.gov | elections.wi.gov

**DATE:** February 9, 2024

**TO:** Wisconsin Municipal Clerks  
City of Milwaukee Election Commission  
Wisconsin County Clerks  
Milwaukee County Election Commission

**FROM:** Wisconsin Elections Commission

**SUBJECT:** Q&A Concerning Witness Address Information Related to *Rise, Inc., et al. v. WEC et al.*, (2022-CV-002446), *League of Women Voters of Wisconsin v. WEC, et al.*, (2022-CV-002472), and *White et al. v. Wisconsin Elections Commission*, (2022-CV-001008)

This memo is intended to answer basic questions that may arise following the Commission's three clerk communications concerning the above-referenced cases relating to absentee ballot witness addresses. This Q&A document does not alter the meaning of those communications and is intended as a practical guide to understanding them.

Question 1: Can an election official modify or add information to absentee ballot witness certifications?

Answer 1: No. Election officials cannot modify or add information to absentee ballot witness certifications.

Question 2: What does "address" mean as used in Wis. Stat. § 6.87(2) and (6d)?

Answer 2: It means "a place where the witness may be communicated with."

Question 3: What information is required for a sufficient witness address?

Answer 3: No particular components or information are required, but **an absentee ballot cannot be rejected or returned to a voter for correction under Wis. Stat. § 6.87(9) as long as the face of the certificate contains sufficient information to allow a reasonable person in the community to identify a location where the witness may be communicated with.** This does not prevent returning an absentee ballot to a voter or rejecting an absentee ballot after 8 p.m. on Election Day if this standard cannot be met or if there is a separate issue, such as a missing witness signature or missing voter signature.

*Wisconsin Elections Commissioners*

Don M. Millis, chair | Marge Bostelmann | Ann S. Jacobs | Carrie Riepl | Robert Spindell | Mark L. Thomsen

Administrator  
Meagan Wolfe

Supp. App. 008



Question 4: What information is enough for a reasonable person in the community to identify a location where the witness can be communicated with?

Answer 4: The Commission cannot provide a complete answer to this question since, by definition, it is community specific. However, it can state that in the four scenarios below, the witness address must be considered sufficient. A witness address is sufficient if:

- a. The witness's street number, street name, and municipality are present, but there is neither a state name nor a ZIP code provided;
- b. The witness's street number, street name, and ZIP code are present, but there is neither a municipality nor a state name provided;
- c. The witness's street number and street name are present and match the street number and street name of the voter, but no other address information is provided; or
- d. The witness certification indicates that the witness address is the same as the voter's address with any or any combination of the following words: "same," "same address," "same as voter," "same as above," "see above," "ditto," or by using quotation marks and/or an arrow or line pointing to or from the voter address.

Question 5: If one of these four scenarios is not present, should the absentee ballot be rejected?

Answer 5: Not on that basis. **If an election official determines that one of the four scenarios above is present, the witness address is sufficient, and no further determination is needed. If one of these scenarios is not present, an election official must apply the standard in Answer 3, which is to look to the face of the certificate for information that would allow a reasonable person in the community to identify a location where the witness may be communicated with. If the information can be found on the face of the certificate, it is sufficient.**

Please contact the WEC Help Desk at [elections@wi.gov](mailto:elections@wi.gov) or at (608) 261-2028 with any questions. This memorandum was reviewed and approved by the six members of the Wisconsin Elections Commission at their February 8, 2024, public meeting.



# Wisconsin Elections Commission

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**DATE:** February 9, 2024

**TO:** Wisconsin Municipal Clerks  
City of Milwaukee Election Commission  
Wisconsin County Clerks  
Milwaukee County Election Commission

**FROM:** Wisconsin Elections Commission

**SUBJECT:** **AMENDED February 8, 2024:** Permanent Injunction on WEC Guidance re: Missing Absentee Witness Address in *White et al. v. Wisconsin Elections Commission* (2022-CV-001008)

On October 3, 2022, the Honorable Judge Michael J. Aprahamian of the Waukesha County Circuit Court issued a Permanent Injunction declaring two memoranda issued by the Wisconsin Elections Commission (WEC) invalid and contrary to law. The Permanent Injunction, attached to this memorandum, prohibits the WEC from disseminating or displaying the following memoranda:

- 1) The October 18, 2016, memorandum entitled, “AMENDED: Missing or Insufficient Witness Address on Certificate Envelopes”
- 2) The October 19, 2020, memorandum entitled, “Spoiling Absentee Ballot Guidance”

The Court further prohibited WEC from providing any advice or guidance that municipal clerks or other local election officials have the duty or ability to modify or add information to absentee ballot certifications. The Court additionally prohibited WEC from giving any advice or guidance contrary to the provision in Wis. Stat. § 6.87 that, if a municipal clerk receives an absentee ballot with an improperly completed certificate or with no certificate, the clerk may return the ballot to the elector, inside the sealed envelope when an envelope is received, together with a new envelope if necessary, whenever time permits for the elector to correct the defect and return the ballot by the applicable deadline. *See*, Wis. Stat. § 6.87(9).

Pursuant to the Permanent Injunction of October 3, 2022, this communication is hereby issued to give notice that the WEC memoranda of October 18, 2016, and October 19, 2020, have been declared invalid and contrary to law and have been withdrawn. The Court stated that the Permanent Injunction is not “intended, nor shall be construed, to enjoin WEC from issuing or distributing its guidance regarding the definition of ‘address’ as used in Wis. Stat. § 6.87.” **With respect to witness address content, please refer to the Commission’s memoranda concerning *League of Women Voters of Wisconsin v. WEC, et al.* and *Rise, Inc., et al. v. WEC et al.* issued on February 9, 2024.**

Please review this notice and the attached Permanent Injunction with your municipal attorney to determine if any changes to your procedures are required.

*Wisconsin Elections Commissioners*

Don M. Millis, chair | Marge Bostelmann | Ann S. Jacobs | Carrie Riepl | Robert Spindell | Mark L. Thomsen

Administrator  
Meagan Wolfe

Supp. App. 010

Please contact the WEC Help Desk at elections@wi.gov or at 608-261-2028 with any questions. Thank you for your prompt attention to this matter. This memorandum was reviewed and approved by the six members of the Wisconsin Elections Commission at their February 8, 2024, public meeting.

RETRIEVED FROM DEMOCRACYDOCKET.COM

FILED  
10-03-2022  
Clerk of Circuit Court  
Waukesha County  
2022CV001008

DATE SIGNED: October 3, 2022

Electronically signed by Michael J. Aprahamian  
Circuit Court Judge

STATE OF WISCONSIN      CIRCUIT COURT      WAUKESHA COUNTY  
BRANCH 9

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MICHAEL WHITE, EVA WHITE, EDWARD  
WINIECKE, *and* REPUBLICAN PARTY OF  
WAUKESHA COUNTY,

*Plaintiffs,*

Case No. 2022CV1008

THE WISCONSIN STATE LEGISLATURE,

*Intervenor-Plaintiff,*

v.

WISCONSIN ELECTIONS COMMISSION,

*Defendant,*

WAUKESHA COUNTY DEMOCRATIC PARTY,  
*and* LEAGUE OF WOMEN VOTERS OF  
WISCONSIN,

*Intervenor-Defendants.*

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**ORDER GRANTING FINAL JUDGMENT TO PLAINTIFFS AND INTERVENOR  
PLAINTIFF THE WISCONSIN STATE LEGISLATURE**

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After considering the parties' briefing, arguments, and all other record evidence presented in this case, it is hereby **ORDERED** that Plaintiffs and Intervenor Plaintiff are entitled to final judgment on their claims for declaratory and permanent-injunctive relief, *see* Wis. Stat. § 806.01(1)(c);

Defendant the Wisconsin Election Commission (“WEC”) is **PERMANENTLY PROHIBITED** and **ENJOINED** from publicly displaying or disseminating any document, communication, guidance, or memoranda that municipal clerks or election officials can add information to absentee ballot witness certifications in any form including, but not limited to, the October 18, 2016, memorandum entitled “AMENDED: Missing or Insufficient Witness Address on Absentee Certificate Envelopes,” and the memorandum dated October 19, 2020, entitled “Spoiling Absentee Ballot Guidance”;

WEC is **PERMANENTLY PROHIBITED** and **ENJOINED** from advising, guiding, instructing, publishing, or otherwise communicating information to Wisconsin municipal clerks and local elections officials that is contrary to Wis. Stat. § 6.87(9), which provides that if a municipal clerk receives an absentee ballot with an improperly completed certificate or with no certificate, the clerk may return the ballot to the elector, inside the sealed envelope when an envelope is received, together with a new envelope if necessary, whenever time permits the elector to correct the defect and return the ballot by the applicable deadline;

WEC is **PERMANENTLY PROHIBITED** and **ENJOINED** from advising, guiding, instructing, publishing, or otherwise communicating information to Wisconsin municipal clerks and local elections officials that clerks or local election officials have the duty or ability to modify or add information to incomplete absentee ballot certifications;

The Court's final judgment applies to portions of the WEC memoranda of October 18, 2016 and October 19, 2020, now withdrawn, and any other memoranda, communication, guidance, or publication of WEC that contains or indicates that municipal clerks or local election officials can modify or add information to absentee ballot certifications;

Nothing herein is intended, nor shall be construed, to enjoin WEC from issuing or distributing its guidance regarding the definition of "address" as used in Wis. Stat. § 6.87;

Thus, the Court now enters final judgment in favor of Plaintiffs and Intervenor-Plaintiff, consistent with the above. This final judgment resolves all claims pending in this case, and is final for purposes of appeal.

**SO ORDERED.**

FILED  
01-02-2024  
CIRCUIT COURT  
DANE COUNTY, WI  
2022CV002472

BY THE COURT:

DATE SIGNED: January 2, 2024

Electronically signed by Ryan D. Nilsestuen  
Circuit Court Judge

STATE OF WISCONSIN

CIRCUIT COURT  
BRANCH 10

DANE COUNTY

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League of Women Voters of Wisconsin,  
Plaintiff

vs.

Wisconsin Elections Commission et al.,  
Defendants

Decision and Order on  
Summary Judgment

Case No. 2022CV2472

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### INTRODUCTION

The right to vote is a fundamental political right because it helps preserve all other rights. *Yick Wo V. Hopkins*, 118 U.S. 356, 370 (1886). All qualified voters have a constitutionally protected right to vote in state and federal elections. *Reynolds v. Sims*, 377 U.S. 533, 554, 84 S. Ct. 1362, 1378 (1964). In order to protect this fundamental right, the Civil Rights Act of 1964 was enacted which, among other protections, prohibits denying a person the right to vote based on incorrect or missing information on voting paperwork when the information is not needed to determine whether the person is qualified to vote. Some municipal clerks in Wisconsin are rejecting otherwise valid absentee ballots due to incorrect or missing address information for witnesses, such as a missing ZIP code or using colloquial or shorthand terms (*e.g.*, “same”). This case asks the Court to determine whether rejecting these ballots violates federal law. It does.

Before the Court are cross motions for summary judgment. For the reasons stated below, the Court is granting the plaintiff League of Women Voters of Wisconsin’s (“Plaintiff”) motion for summary judgment, denying the defendant Wisconsin Elections Commission (“Defendant” or “WEC”) cross-motion for summary judgment, and denying the intervenor Wisconsin State Legislature’s (“Intervenor” or “Legislature”) cross motion for summary judgment.

## BACKGROUND AND FINDINGS OF FACT

Section 6.87 of the Wisconsin Statutes provides for absentee voting procedures. Among other requirements, an elector completing an absentee ballot must do so in front of a witness. Wis. Stat. § 6.87(4)(b)1. The witness must then complete and sign a written verification. Wis. Stat. § 6.87(2), (4)(b)1. An absentee ballot may not be counted if the certification is missing the witness's "address." Wis. Stat. § 6.87(6d). These related provisions are called the "Witness Address Requirement." State law does not define "address" or specify the minimum address information necessary to comply with this provision.<sup>1</sup> See *Trump v. Biden*, 394 Wis. 2d 629, 642 (2020); see also *id.* at 653 (Hagedorn, J., concurring).

In October 2016, the WEC issued guidance to municipal clerks on the Witness Address Requirement. The guidance defined "address" as consisting of a street number, street name, and municipality. The guidance also directed clerks to add a municipality to the witness certificate if it could be reasonably ascertained from other information or other reliable extrinsic sources. Finally, the guidance directed clerks to cure immaterial errors either by correcting the ballot themselves or contacting the voter. All was fine and well for 31 elections. See Wisconsin Elections Commission, *Election Results Archive*, <https://elections.wi.gov/elections/election-results/results-all> (Listing all elections between 2016 and September 2022) (Last viewed Dec. 19, 2023).

This guidance was struck down, in part, six years later. Specifically, on September 7, 2022, the Waukesha County Circuit Court, through a temporary injunction, prohibited the WEC from issuing guidance to local election clerks on how to cure errors in witness addresses, such as missing ZIP codes. *White v. Wis. Elec. Comm'n*, 22-CV-1008 (Waukesha Cnty. Cir. Ct., Sep. 7, 2022). The court issued its final judgment on October 3, 2022.

This is important because the WEC's guidance ensured that absentee ballots were not rejected for mere technical defects in a witness's address. Without this guidance, municipal clerks throughout Wisconsin are interpreting the Witness Address Requirement differently, with some clerks discarding otherwise valid ballots due to irrelevant and trivial errors, such as a missing ZIP code. In Green Bay and Racine, for example, clerks require a witness address to contain both the state and ZIP code. It is unclear why both a state and a ZIP code are needed to comply with the Witness Address Requirement. In the November 2022 general election, 2,239 absentee ballots were rejected due to insufficient certifications. While there is a range of reasons why a certification may be insufficient, some ballots were rejected for very specific, technical reasons, such as:

- Appleton, Green Bay, and Racine each rejected absentee ballots because the witness address did not contain a ZIP code or municipality;
- Appleton, Eau Claire, Oshkosh, Racine, and Waukesha each rejected absentee ballots because the witness, who lived at the same house as the voter, included the same street number and street name as the voter, but omitted other address information, such as a ZIP code or municipality;
- Oshkosh rejected a ballot because the witness wrote "same as voter's address"; and

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<sup>1</sup> This is the question being asked in *Rise, Inc. v. Wisconsin Elections Commission*, 22-CV-2446 (Dane Cnty. Cir. Ct., Jan. 02, 2024). Because of the overlapping nature of this case and that case, the Court granted the WEC's motion to consolidate the cases for the purposes of a trial. Doc. 127.



- Racine rejected numerous ballots because the witnesses included their street number, street name, and ZIP code, but not a municipality.

## LEGAL STANDARD

### I. Summary judgment methodology

The methodology for summary judgment is well-established. The court first examines the pleadings to determine whether claims have been stated and a material factual issue is presented. *Preloznick v. City of Madison*, 113 Wis.2d 112, 116, 334 N.W.2d 580 (Ct. App. 1983). If so, the court then examines the moving party's submissions to determine whether they establish a prima facie case for summary judgment. *Id.* If the moving party has done so, the court then examines the opposing party's affidavits to determine whether a genuine issue exists as to any material fact. *Id.* Summary judgment may be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Wis. Stat. § 802.08(2). The purpose of summary judgment procedure is to determine the existence of genuine factual disputes in order to avoid trials where there is nothing to try. *Yahnke v. Carson*, 2000 WI 74, ¶ 10, 236 Wis. 2d 257, 264.

### II. Section 101 of the Civil Rights Act of 1964

Wisconsin courts have jurisdiction to hear and adjudicate federal claims under 42 USC § 1983. *Terry v. Kolski*, 2005 WI 163, ¶16, 78 Wis.2d 475, 479 (1977). While a state court may apply state procedural rules to a federal claim, the Supremacy Clause provides that federal law preempts state law when a rule determines substantive rights and obligations. *Duello v. Bd. Of Regents of Univ. of Wisconsin Sys.*, 220 Wis. 2d 554, 569–70, 583 N.W.2d 863 (Ct. App. 1998).

The Civil Rights Act of 1964 prohibits denying an individual the right to vote due to errors or omissions that are immaterial to determining whether the individual is qualified to vote:

No person acting under color of law shall-- deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election.

52 U.S.C.A. § 10101. This is called the "Materiality Provision," which provides that it is illegal for state actors – such as election clerks – to deny voters their right to vote based on errors or omissions that are immaterial to their statutory qualifications to vote. The word "vote" includes all action necessary to make a vote effective, such as registration or requesting a ballot. 52 U.S.C. §§ 10101(a)(2)(B), (a)(3)(A), and (e).<sup>2</sup> To determine whether an error is "material," the information

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<sup>2</sup> The Materiality Provision serves an important purpose. It was enacted to "sweep away such tactics as disqualifying an applicant who failed to list the exact number of months and days in his age." *Condon v. Reno*, 913 F. Supp. 946, 950 (D.S.C. 1995). Such tactics were designed to suppress the right to vote, especially people of color. See, e.g., *South*

being required must be compared to state qualifications to vote. *See, e.g., Fla. State Conf. of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1173 (11th Cir. 2008).

## DISCUSSION

The Plaintiff asks me to declare that the Materiality Provision prohibits rejecting absentee ballots with one of the following errors or omissions: (1) witness certifications containing the witness's street name, street number, and municipality, but not other address information such as state name or ZIP code; (2) witness certifications by a member of the voter's household who lists a street number and street name, but omits other information, such as a municipality; (3) witness certifications using terms like "same" or "ditto" or other means to convey that their address is the same as the voter; and (4) witness certifications with a street number, street name, and ZIP code, but no municipality.

The material facts in this case are not in dispute. *Compare* Doc. 113 with Docs. 136, 141, and Doc. 140 with Doc 150.<sup>3</sup> Rather, this case involves interpreting how federal law (i.e., the Materiality Provision) applies to state law and practice. Because no party alleges summary judgment should be denied due to a dispute of material fact, the Court will proceed to determining whether one of the moving parties – either the Plaintiff or the Legislature – is entitled to judgment as a matter of law.

### I. The Materiality Provision applies to the Witness Address Requirement.

To state a claim under the Materiality Provision, a plaintiff must allege: (1) a denial of the right to vote (2) because of an error or omission (3) on any "record or paper relating to...an act requisite to voting" (4) that is not material in determining whether the voter is qualified to vote. 52 USC § 10101(e). The Eleventh Circuit stated that this test turns on whether, "accepting the error *as true and correct*, the information contained in the error is material to determining the eligibility of the applicant." *Fla. State Conf. of N.A.A.C.P. v. Browning*, 522 F.3d at 1175 (Emphasis original).

As noted above, absentee ballots have been rejected for each of the categories identified by the Plaintiff. Specifically, the Plaintiff has identified numerous voters in multiple jurisdictions whose right to vote was denied when their absentee ballot was rejected due to an error or omission with the witness address. As such, the first two elements of stating a claim are met.

The Witness Address Requirement is also a "record or paper relating to...an act requisite to voting." Federal law broadly defines "to vote" to include "all action necessary to make a vote effective, including, but not limited to, registration or other action required by State law prerequisite to voting, casting a ballot, and having such ballot counted..." 52 USC § 10101(e). State law requires a witness address in order for the absentee ballot to be cast and counted. Wis.

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*Carolina v. Katzenbach*, 383 U.S. 301, 86 S. Ct. 803, 15 L. Ed. 2d 769 (1966); *United States v. Cartwright*, 230 F. Supp. 873 (M.D. Ala. 1964); *United States v. Wilder*, 222 F. Supp. 749 (W.D. La. 1963).

<sup>3</sup> The vast majority of the proposed facts submitted by the parties are legal conclusions, a few of which are not supported by the cited case law or statutes. *See e.g.*, Doc. 140 at ¶ 17. Counsel for the Intervenor is reminded of its duty of candor towards the Court.

Stat. § 6.87(6d). As such, it is an “action necessary” to vote. This is a similar conclusion reached by other courts who have found that the Materiality Provision applies to absentee ballots and certifications. *See e.g., La Unión del Pueblo Entero v. Abbott*, 604 F. Supp. 3d 512, 541 (W.D. Tex. 2022); *Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1308–09 (N.D. Ga. 2018); *League of Women Voters of Ark. v. Thurston*, No. 5:20-cv-5174, 2021 WL 5312640, at \*3–4 (W.D. Ark. Nov. 15, 2021).

Finally, the Witness Address Requirement is not material to whether a voter is qualified. Under the Wisconsin Constitution and statutes, a person is qualified to vote if they: are a U.S. citizen age 18 or older; have resided in an election district or ward for 28 consecutive days before any election where the citizen offers to vote; and are not disenfranchised due to a felony conviction or adjudicated incompetent to vote. Wis. Const. art. III, § 1; Wis. Stat. §§ 6.02(1) and 6.03(1). As such, an absentee ballot could be permissibly rejected under the Materiality Provision if, for example, the voter failed to sign the certification required under Wis. Stat. § 6.87(2) which addresses residency and eligibility. By contrast, and as should be clear by now, an absentee ballot cannot be rejected for trivial defects, such as a missing ZIP code for the witness’s address. After all, a witness’s address says nothing about the voter’s citizenship, age, or residency. Nor does it say anything about whether the voter has been disenfranchised due to a felony conviction or adjudicated incompetent to vote. The address is simply not material to determining the eligibility of a voter. As such, rejecting ballots for trivial mistakes in the Witness Address requirement directly violates the federal Civil Rights Act of 1964.

The United States, in its statement of interest, accurately and concisely demonstrates why the Materiality Provision prohibits this practice:

Because inclusion of a witness address is necessary to make an absentee vote effective...rejection of an absentee ballot based on errors or omissions in the witness’s address that are not material to determining a voter’s qualification to vote are encompassed within Section 101’s prohibition, *see La Unión del Pueblo Entero*, 2022 WL 1651215, at \*21 (conducting similar analysis of Texas’s vote-by-mail requirements). Having created absentee balloting procedures, Wisconsin must operate them in accord with federal law and may not disenfranchise voters who rely on them. *Cf. Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 665 (1966) (“[O]nce the franchise is granted to the electorate... the right of suffrage ‘is subject to the imposition of state standards which are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed.’”); *Self Advoc. Sols. N.D. v. Jaeger*, 464 F. Supp. 3d 1039, 1052 (D.N.D. 2020) (“[A] state that creates a system for absentee voting must administer it in accordance with the Constitution.”) (internal quotation marks omitted); *Martin v. Kemp*, 341 F. Supp. 3d 1326, 1338 (N.D. Ga. 2018); *Zessar v. Helander*, No. 05-cv-1917, 2006 WL 642646, at \*6 (N.D. Ill. Mar. 13, 2006), judgment entered, 2007 WL 1703915, judgment vacated as moot sub nom. *Zessar v. Keith*, 536 F.3d 788 (7th Cir. 2008); *Raetzl v. Parks/Bellefont Absentee Election Bd.*, 762 F. Supp. 1354, 1358 (D. Ariz. 1990).

Doc. 56: 10.

## II. The arguments to the contrary are unpersuasive.

### a. The claims are justiciable.

The Defendant and the Intervenor argue that the Materiality Provision claim is non-justiciable. The justiciability of a federal claim must be determined by federal law, not state law. *Shaw v. Leatherberry*, 2005 WI 163, ¶ 31, 286 Wis. 2d 380. Federal law provides that a claim for declaratory judgment are justiciable if “the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.” *MedImmune*, 549 U.S. at 127, 127 S.Ct. 764, quoting *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273, 61 S.Ct. 510, 85 L.Ed. 826 (1941). “Injury need not be certain. Any pre-enforcement suit entails some element of chance.” *Brandt v. Vill. of Winnetka, Ill.*, 612 F.3d 647, 650 (7th Cir. 2010). A trial court has discretion in deciding actions for declaratory relief so long as it applies the proper standard of law and uses a rational process. *Wisconsin Educ. Ass'n Council v. Wisconsin State Elections Bd.*, 2000 WI App 89, ¶ 9, 234 Wis. 2d 349, 356, 610 N.W.2d 108, 112.

The Defendant’s arguments on justiciability boil down to an assertion that, because the WEC itself does not directly accept or deny ballots, there can be no injury. The Defendant’s finger-pointing to other “responsible” parties is addressed in depth below. However, regarding justiciability alone, the WEC’s statutory responsibility to administer the State’s elections and provide guidance to local authorities demonstrates their direct adverse relationship to the plaintiffs and their stated injury. *See, e.g., Democratic Nat’l Comm. v. Bostelmann*, 488 F. Supp. 3d 776, 796 (W.D. Wis. 2020) (finding that the adverse parties’ injuries, ostensibly caused by local authorities, had a direct connection to the WEC sufficient for standing due to the Commission’s responsibilities to those local authorities).

Though the Defendant argues justiciability and its status as a supposedly improper defendant as separate threads, the Court views these as inherently tied together. Its argument against justiciability relies on the Court finding that they were not the party to cause an injury, and therefore some other more proper defendant must exist if an injury is identifiable. The WEC argues that it is not a proper defendant because it is not directly responsible for municipal clerks rejecting absentee ballots due to immaterial errors or omissions in the Witness Address Requirement. Yet this argument ignores the WEC’s administrative and enforcement authority under Wisconsin law, which makes it a proper defendant:

The court isn’t persuaded that the commission is an improper party simply because its involvement in the enforcement process comes later. “Injury need not be certain. Any pre-enforcement suit entails some element of chance.” For example, plaintiffs asserting a pre-enforcement challenge to a criminal statute may sue the state attorney general to enjoin enforcement, even though police officers are making the initial arrest decisions. The commission is in a similar position to a prosecutor, something it has implicitly acknowledged in previous lawsuits by failing to object on justiciability grounds, even when the lawsuit also involved state laws would be enforced in the first instance by clerks. If the court were to accept defendants’ argument, it would mean that any plaintiffs seeking statewide relief on a challenge to voting requirements would have to sue more than 1,800

municipal clerks. That isn't feasible, and it isn't what the law requires.

*Carey v. Wisconsin Elections Comm'n*, 624 F. Supp. 3d 1020, 1029 (W.D. Wis. 2022)(Internal citations omitted).

**b. The Intervenor turns the Materiality Provision on its head.**

The Intervenor takes the curious position that the Materiality Provision is limited to papers or records related to registration, arguing the Witness Address Requirement “does not relate to whether a voter is ‘qualified under State law to vote’ under [the Materiality Provision], given that the witness-address requirement applies only to absentee voters who are permitted to request an absentee ballot and so are already deemed qualified to vote.” Doc. 138 at 1. But that argument ignores the plain language of the Civil Rights Act, which makes it clear that it applies to an “application” to vote and any “other act requisite to voting.” Because completing an absentee ballot certification – including the witness address – is “requisite” to having an absentee ballot counted, it squarely falls within the confines of the Materiality Provision. This is the same conclusion reached by numerous other courts. *See, e.g., Vote.org v. Georgia State Election Bd.*, No. 1:22-CV-01734-JPB, 2023 WL 2432011, at \*7 (N.D. Ga. Mar. 9, 2023); *La Unión del Pueblo Entero v. Abbott*, No. 5:21-cv-844, 2022 WL 1651215, at \*22-23 (W.D. Tex. May 24, 2022); *League of Women Voters of Ark. v. Thurston*, No. 5:20-cv-5174, 2021 WL 5312640, at \*4 (W.D. Ark. Nov. 15, 2021); *Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1308-09 (N.D. Ga. 2018). As succinctly stated recently in *Penn State*, the purpose of the Materiality Provision “would be lost if after qualifying to vote, a voter’s ballot would not be counted by reason of obstacles that the statute was enacted to prohibit in the first place.” *Pennsylvania State Conf. of NAACP v. Schmidt*, No. 1:22-CV-00339, 2023 WL 8091601, at \*31 (W.D. Pa. Nov. 21, 2023). As such, the Materiality Provision applies throughout the entire process, from registering to vote to casting and counting a ballot.

**c. Insignificant errors or omissions in witness addresses can – and have – deprived qualified voters of their right to vote.**

The Intervenor also argues that the Witness Address Requirement doesn’t deny the right to vote because Wisconsin offers numerous ways to vote. This argument is unpersuasive and relies largely on cases that concern 52 U.S.C. § 10301, as opposed to the Materiality Provision in § 10101. The undisputed record shows that voters have been deprived of their vote due to insignificant errors and omissions in the Witness Address Requirement, not through the types of restrictions on absentee voting procedure imposed in the cases the Intervenor relies upon, such as criminalizing third-party absentee ballot drop-offs or implementing an age requirement for absentee voting. The case at hand concerns voters who are ostensibly allowed to vote absentee, but are being deprived of that right due to immaterial errors of the type explicitly outlined in 52 U.S.C. § 10101.

To argue otherwise would be akin to saying that a requirement that voters at polling stations must write down the name and favorite color of the poll worker who handed them their ballot is not a violation of the Voting Rights Act because they could always elect to vote by mail. The Intervenor in effect argues that states that offer multiple avenues for voting are allowed to circumvent the Materiality Provision. This assertion is unfounded and unsupported. Further, multiple courts have



held that that the Materiality Provision applies to absentee voting despite other methods of voting being available. *See e.g., Pennsylvania State Conference of NAACP, et al. v. Schmidt et al.; Sixth Dist. of Afr. Methodist Episcopal Church v. Kemp*, 574 F. Supp. 3d 1260 (N.D. Ga. 2021); *Mi Familia Vota v. Fontes*, No. CV-22-00509-PHX-SRB, 2023 WL 8181307 (D. Ariz. Sept. 14, 2023). As stated above, having created absentee balloting procedures, Wisconsin must operate them in accordance with federal law and may not disenfranchise voters who rely on them. After all, a voter whose ballot is rejected due to a missing ZIP code might not know their vote has been rejected until *after* the polls close. (While Wisconsin law permits clerks to contact voters to cure absentee ballots with improper certification, this is a discretionary – not mandatory – act. Wis. Stat. § 6.87(9)).

**d. Applying the Materiality Provision to the Witness Address Requirement will not cause the sky to fall.**

The Intervenor finally argues that applying the Materiality Provision to the Witness Address Requirement will “unconstitutionally destroy state election-administration authority” and prevent “Wisconsin (or any State) from holding fair and orderly elections under its own state law.” The Intervenor posits that if the Materiality Provision applies to the Witness Address Requirement, then a voter could refuse to give their name and address to poll workers or show up to the polls after 8:00 pm on Election Day. This argument ignores the plain language of the Materiality Provision, which applies to a “record or paper” related to voting. If a voter arrived late to the polls or refused to give her name to a poll worker, it wouldn’t implicate the Materiality Provision because neither action involves a “record or paper.” Further, this is an as-applied challenge, focusing on four discrete categories of errors or omissions which have resulted in rejected ballots. The Intervenor’s parade of horrors treats the Plaintiff’s claim as a facial challenge to the Witness Address Requirement, which is not before the Court.

**CONCLUSION**

Having created absentee ballot voting procedures, Wisconsin must administer them in conformance with federal law, including the Materiality Provision. That provision prohibits rejecting ballots in the four limited categories identified by the Plaintiff. Therefore, the Plaintiff is entitled to summary judgment in its favor.

**ORDER**

**IT IS ORDERED:**

- (1) The Plaintiff’s motion for summary judgment on Count II of its Second Amended Complaint is **GRANTED**.
- (2) The Defendant Wisconsin Election Commission’s (WEC) cross motion for summary judgment is **DENIED**.
- (3) The Intervenor Legislature’s cross motion for summary judgment is **DENIED**.
- (4) The Court will schedule oral arguments on the requested injunctive relief.

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY  
BRANCH 10

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LEAGUE OF WOMEN  
VOTERS OF WISCONSIN,

Plaintiff,

v.

Case No. 22-CV-2472

WISCONSIN ELECTIONS  
COMMISSION, et al.,

Defendants,

and

WISCONSIN STATE  
LEGISLATURE,

Intervenor.

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**COMBINED BRIEF OF DEFENDANTS IN OPPOSITION TO  
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT  
AND IN SUPPORT OF DEFENDANTS' CROSS-MOTION  
FOR SUMMARY JUDGMENT**

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**INTRODUCTION**

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

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

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

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

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

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



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

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

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

### **LEGAL AND FACTUAL BACKGROUND**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### III. Procedural history of the present case.

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

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

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

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

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

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

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

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

(*League* Doc. 114:11.)

### STANDARD OF REVIEW

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

### ARGUMENT

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

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

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

*Id.*

A controversy is justiciable when four factors are present:

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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<sup>1</sup> The Commission conveyed guidance to the clerks after the *White* injunction. In a September 14, 2022, memorandum, the Commission notified local election officials that an October 18, 2016, memorandum and an October 19, 2020, memorandum were declared invalid and contrary to law by the *White* court. But that same memorandum also stated that the *White* court “clarified that it had not ruled on what constitutes a witness address or a missing witness address, and it had not overturned the existing WEC definition of address contained in the now-invalidated memoranda—*name, street number, street name, and name of municipality.*” (*League* Doc. 22:88 (emphasis in original).)

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

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

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

No person acting under color of law shall . . . deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any . . . act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election.

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

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

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

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

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

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

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

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

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

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

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



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

\* \* \*

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

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

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

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

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

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

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

## CONCLUSION

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

Dated this 21st day of September 2023.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

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

Dated this 21st day of September 2023.

Electronically signed by:

Thomas C. Bellavia  
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# Wisconsin Elections Commission

Special Meeting

Tuesday, December 19, 2023

11:00 A.M.

## OPEN AND CLOSED SESSION AGENDA

- A. Call to Order**
- B. Administrator's Report of Appropriate Meeting Notice**
- C. Approval of Previous Meeting Minutes**
  - 1. November 2, 2023** 1
- D. Discussion and Appointment of Commission Secretary**
- E. Discussion, Review, and Possible Action Pertaining to Ballot Templates for Spring 2024 Primary and Election, and Communication of Preliminary Ballot Order to County Clerks** 13
- F. Discussion, Review, and Possible Action Pertaining to the Uniform Instructions for Wisconsin Absentee Voters** 17
- G. Discussion, Review, and Possible Action Pertaining to the Election Administration, Election Day, Caucus, and SVD Manuals for County and Municipal Clerks** 27
- H. Review and Potential Action on the Election Observer Draft Administrative Rule** 38
- I. Consideration and Possible Action Pertaining to the Waiver of the Delegation of Authority and Commission Determinations on Wis. Stat. § 5.06 Complaints** 77
  - 1. Matt Roeser v. Celestine Jeffreys (EL 22-37)**
  - 2. Eugene Wojciechowski v. Rebecca Grill (EL 22-58)**
  - 3. Dawn M. Martin v. Rebecca Grill (EL 23-38)**

- J. Commission Consideration and Possible Action on Existing Ballot Return Guidance Document**
- K. Commission Discussion and Possible Action on Administrative Rules**
  - 1. Declaration of Candidacy Challenges (ss 089-23 and 090-23)**
  - 2. Nomination Paper Challenges (ss 091-233 and 092-23)**
  - 3. Mandatory Use of Uniform Instructions for Absentee Voting (ss 093-23 and 094-23)**
- L. Closed Session**
  - 1. Advisory Opinion Consideration and Potential Action**
  - 2. Wis. Stat. § 5.05 Complaints**
  - 3. Litigation Update and Consideration of Potential Litigation**
  - 4. Closed Session Minutes Approval**
- M. Adjourn**



# Wisconsin Elections Commission

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**DATE:** For the December 19, 2023, Commission Meeting

**TO:** Members, Wisconsin Elections Commission

**FROM:** Meagan Wolfe  
Administrator

Prepared and Presented by:  
WEC Staff

**SUBJECT:** Revised Uniform Instructions for Consideration and Approval

## 1. Background

At its November 2, 2023, meeting the Wisconsin Elections Commission (“the Commission”) directed staff to complete usability testing and development of final revised Uniform Instructions for Commission review at the December 19 meeting. The final draft version of the revised Uniform Instructions is attached to these materials as Appendix F.1., F.2., and F.3.

## 2. Usability Testing

In general, feedback on the design from municipal and county clerks has been uniformly positive. Recent usability testing with voters likewise produced positive feedback. Commission staff conducted usability testing over a six-week period employing two techniques: (1) in-person assessments at various locations around the state; and (2) remote assessments conducted through the mail with volunteer voters. Staff designed testing protocols to evaluate the effectiveness of the new design and to identify any potential sources of voter confusion not previously noted.

### General Feedback.

Overall feedback was universally positive, with many voters commenting on a favorable font size, the amount of text on the page, and the overall layout. The design was repeatedly described as “easy to read” and several voters lauded the use of “plain language” on the form. Voters familiar with the previous version of the instructions were especially complimentary, with all concluding the new version was a significant improvement. One woman remarked that the revised instructions were, “Just so much better; they’re wonderful.”

*Wisconsin Elections Commissioners*

Don M. Millis, chair | Marge Bostelmann | Ann S. Jacobs | Carrie Riepl | Robert Spindell | Mark L. Thomsen



There were no negative comments on the overall design; however, one voter felt the instructions should explain if the certificate envelope may be filled out in pen or pencil.

Page 1 (Steps) Feedback.

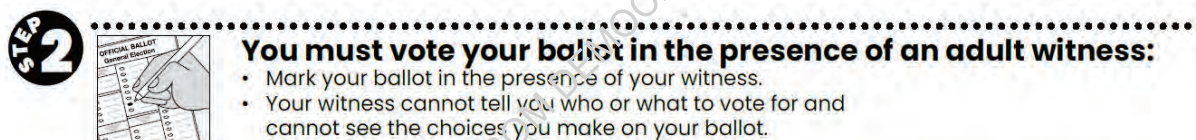
While the step-by-step instructions on page one were generally well received, there were some elements that caused concern for voters.

Several voters felt that the cautionary language in Step 1 was intimidating. Step 1 reads as follows:



The voters voicing this concern said that the warning felt “heavy-handed” and perhaps should be moved to the back page or omitted entirely. However, another voter specifically highlighted the cautionary language as a positive element, noting that, “it gets your attention,” and helped make clear the importance of the instructions. Because of the conflicting feedback on this item, staff elected not to propose any changes to the section.

Step 2, regarding witness requirements, produced the largest volume of feedback. Step 2 reads as follows:



<b>Who can be a witness?</b> <ul style="list-style-type: none"><li><input checked="" type="checkbox"/> A witness must a U.S. Citizen who is at least 18 years old.</li><li><input checked="" type="checkbox"/> For military or overseas voters, your witness must be at least 18 years old but is not required to be a U.S. Citizen.</li><li><input checked="" type="checkbox"/> A witness can be a friend, spouse, family member, neighbor, etc.</li></ul>	<b>Who cannot be a witness?</b> <ul style="list-style-type: none"><li><input checked="" type="checkbox"/> A candidate on the ballot for this election.</li></ul>
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**If you're having trouble finding a witness or have questions about the witness requirement, please contact your municipal clerk.**

A handful of voters felt that Step 2 was too lengthy and suggested moving much of the language to the back page of instructions. At least two voters asked about a “witness date” and felt the instructions should clarify whether the witness must record a date. One voter felt that the light gray box made the text harder to read. However, staff also received feedback that “Step 2 is clear,” and that, “Witness instructions are good and clear.”

Steps 3, 4, and 5 received only positive feedback.

Finally, three voters expressed concerns about Step 6, which describes the ballot return process. Two voters felt the Step 6 section was too text heavy and found the number of options “confusing.” One voter wanted to know what qualified as a disability and felt that the instructions should contain a list of qualifying medical conditions. One voter felt the instructions should say something about drop boxes.

Step 6 appears as shown below.

**STEP 6** .....  
**Return your ballot.**

Unless you are a voter with a disability, you must personally return your own ballot and it must be received in time to be delivered to your polling place **no later than 8:00 p.m. on Election Day.**

- Mail it back. Allow at least **one week** for mail.
- Drop it off at your municipal clerk’s office.
- Drop it off at your polling place or central count location.
- Voters with disabilities have the right to assistance in returning an absentee ballot. The voter’s assistant can be anyone who is not the voter’s employer, an agent of the employer, a representative of their labor union, or a candidate on the ballot.
- **Absentee ballots may not be returned by email or fax.**

Staff did not prepare any revisions for the Commission, however there is one additional exception that the Commission may wish to consider in the Step 6 instructions.

Under Wis. Stat. § 6.86(3), hospitalized voters may also have an agent return their ballot. This section also references “physical disability” as the reason for assistance.<sup>1</sup> Thus, the proposed language in Step 6 may suffice as-is since disabilities are already referenced. In the alternative, the Commission may wish to specifically highlight hospitalized voters in the instructions. For example, the fourth bullet above could be modified to begin: “Voters with disabilities, to include hospitalized voters, have the right to assistance in returning an absentee ballot.”

#### Page 2 (Instructions) Feedback.

Page 2 instructions received only positive feedback. Voters felt the instructions were clear, concise, and “to the point.”

#### Mailing Tests

Testing conducted through the mail mirrored the in-person testing results. Voters in eight jurisdictions volunteered to receive, complete, and return test ballots using the draft instructions. Feedback from voters was similar to in-person feedback, and the section producing the most concern in live testing – Step 2 – also produced the most difficulty in mail testing.

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<sup>1</sup> See, e.g., Wis. Stat. § 6.86(3)(a)1, which states in part, that any elector signing a ballot application on a hospitalized elector's behalf shall attest to a statement that the application is made on request and by authorization of the hospitalized elector, “*who is unable to sign the application due to physical disability.*” (emphasis added).

Two participating voters failed to correctly follow the instructions. One voter failed to have a witness sign the certificate envelope. A second voter in a different jurisdiction returned a certificate envelope with a witness address that said, “same as above.”

Staff have not prepared any alternatives based on these results; however, the Commission may wish to examine the language in Step 2 more closely based on this voter feedback. For example, Step 2 could be re-phrased to explicitly emphasize the importance of obtaining a witness *signature*, in addition to having a witness present.

### **3. Proposed Motion**

The Wisconsin Elections Commission approves and prescribes the Revised Uniform Instructions, as shown in Appendix F.1, F.2, and F.3, for all future elections. Staff are directed to update all Commission resources with this guidance and to notify clerks of this change.

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