Commission Defendants and the Legislature suggested in motion-to-dismiss briefing that the term "statements," as used in the witness certification, refers only to the voter's confirmation that they "exhibited the enclosed ballot unmarked to the witness," and marked and sealed the ballot "in the presence of no other person." *See, e.g.*, ECF No. 20 at 13–14; ECF No. 49 at 24–25. But nothing in the statutory language supports this litigation-driven limitation on the scope of the witness certification. To the contrary, the witness must separately attest that "the voting procedure was executed as there stated"—and that clause would be redundant and unnecessary if the witness certification only addressed the voter's attestation to procedural compliance. Wisconsin courts, like federal courts, "read statutes to avoid surplusage" and "assume that the legislature used all the words in a statute for a reason." *State v. Matasek*, 2014 WI 27, ¶ 18, 353 Wis. 2d 601, 846 N.W.2d 811; *see also, e.g.*, *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (explaining that courts should be "reluctant to treat statutory terms as surplusage in any setting"). Applying those principles here, Section 6.87's witness requirement is an explicit and unambiguous requirement to prove qualifications by a witness's voucher.

Commission Defendants' arguments in ongoing state-court litigation confirm that they consider the witness requirement to be a voucher of qualifications—at least, when it suits them to so argue. In *League*, the Commission's position in the trial court litigation was that the witness-address requirement did not violate the Materiality Provision because the witness attests to voter qualifications:

> 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*.

A159 (Exhibit L1, Combined Br. of Defs. in Opp. to Pls.' Mot. for Summ. J. & ISO Defs.' Cross-Mot. for Summ. J. at 16, *League*, No. 22-CV-2472 (Cir. Ct. Dane Cnty. Sept. 21, 2023), Doc. 137) (emphasis added). Insofar as the witness's attestation is material to qualifications, it follows

directly that the witness requirement is a voucher of qualifications. A witness's attestation cannot be material to substantive qualifications if the witness attests only to procedural compliance.

Neither *People First of Alabama v. Merrill*, 467 F. Supp. 3d 1179, (N.D. Ala. 2020), nor *Thomas v. Andino*, 613 F. Supp. 3d 926, 961 (D.S.C. 2020), compels a different conclusion. *People First* rejected a Section 201 challenge to Alabama's requirement that "an absentee voter 'have a notary public (or other officer authorized to acknowledge oaths) or two witnesses witness his or her signature to the [absentee voting] affidavit.'" 467 F. Supp. 3d at 1224 (quoting Ala. Code § 17-11-9) (alteration in original). But the Alabama statute at issue required the notary or witnesses to certify only that "the affiant is known (or made known) to me to be the identical party he or she claims to be." Ala. Code § 17-11-7. That requirement to confirm identity is a far cry from the witness requirement's express instruction that the witness must attest to the truth of the voter's "above statements," including the voter's own attestation about qualifications. And *Thomas* is even less apposite—the statute at issue there did not require the witness to *attest* to anything at all, just to "witness the oath taken by the voter." 613 F. Supp. 3d at 961; *see* S.C. Code § 7-15-380. These nonbinding, out-of-circuit authorities shed no light on Wisconsin's dissimilar statutory scheme.

C. The witness requirement may be satisfied only by a member of a class—an adult U.S. citizen.

The witness requirement is a voucher by "members of [a] class" because only adult U.S. citizens can execute the certification. *See* 52 U.S.C. § 10501(b). The VRA does not define the term "class," so the Court should "look to the plain and ordinary meaning of the term" and may "look to dictionary definitions." *United States v. Johnson*, 47 F.4th 535, 543 (7th Cir. 2022). In this case, the relevant definition of "class" is "a group, set, or kind sharing common attributes." *Class*, Merriam–Webster, https://www.merriam-webster.com/dictionary/class (last updated Feb. 11, 2024); *see also, e.g.*, *Class*, Black's Law Dictionary (11th ed. 2019) ("A group of people, things, qualities, or activities that have common characteristics or attributes.").

To satisfy the witness requirement, the witness generally must be "an adult U.S. citizen" (but "need not be a U.S. citizen" in the rare case when the voter is a military or overseas elector). Wis. Stat. § 6.87(2), (4)(b)1; *see also* Wis. Stat. § 6.24(1) (defining "overseas elector"). Both "U.S. citizens" and "adults" are classes, as is the joint category of "adult U.S. citizens." U.S. citizens share the attribute of full political membership in the American polity, adults share the attribute of having obtained the age of majority, and adult U.S. citizens share both those attributes. It makes no difference that the class in question is broad; a broad class is still a class—and in this case, it excludes Plaintiff Haas's fiancé, for one, from serving as a witness. That Wisconsin lifts one of the class requirements (U.S. citizenship) for individuals serving as witnesses for voters in the military or who reside overseas, *see* Wis. Stat. § 6.87(4)(b)1, simply confirms that the statute identifies classes of witnesses.[1]

Because the witness requirement violates the Vouching Rule, Plaintiffs are entitled to summary judgment.

II. The witness requirement violates the Materiality Provision of the Civil Rights Act.

If the witness rule is construed not to violate the Vouching Rule, then it necessarily violates the Materiality Provision, which states:

> 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.

[1] Again, *Thomas* is not to the contrary. Although *Thomas* held the "class" element not to be satisfied in a Vouching Rule case, when *Thomas* was decided the South Carolina statute did not limit who could be a witness in any way. That statute, S.C. Code § 7-15-380, was amended to require that the witness be "at least eighteen years of age" only in 2022—two years *after* the *Thomas* decision. *See* Act. 150, S. 108, § 6, 2022 Gen. Assemb., 124th Sess. (S.C. 2022) (eff. July 1, 2022).

52 U.S.C. § 10101(a)(2)(B). A claim under the Materiality Provision has four elements.[2] *First*, the election regulation at issue must result in the "den[ial of] the right of any individual to vote." *Id. Second*, that denial must be caused by "an error or omission." *Id. Third*, the error or omission must occur on "any record or paper relating to any application, registration, or other act requisite to voting." *Id. Fourth*, that "error or omission" must not be "material in determining whether such individual is qualified under State law to vote in such election." *Id. League* precludes re-litigation of the first three elements, and, in any event, Plaintiffs' claim satisfies all four elements.

A. The Court should apply issue preclusion to the first three Materiality Provision elements.

In its January 17, 2024, order on Defendants' motions to dismiss, the Court directed the parties to address "whether principles of issue or claim preclusion will affect this case once judgment is entered in *League of Women Voters*." ECF No. 56 at 15. Judgment in that case has since been entered against Commission Defendants and the Legislature (which, as here, intervened to oppose relief). A221–23 (Exhibit L4, *League*, No. 22-CV-2472 (Cir. Ct. Dane Cnty. Jan. 30, 2024), Dkt. 161 ("*League* Order") at 1–3). In an order entered on January 30, the Dane County Circuit Court declared that:

> [T]he Materiality Provision prohibits rejecting absentee ballots based upon one of the following errors or omissions: (1) witness certifications containing the witness's street number, street name, 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 not the municipality or state name.

[2] The Materiality Provision is sometimes framed as a three-element claim, where the second and third elements of the four-element analysis are merged. *See, e.g., La Unión del Pueblo Entero v. Abbott*, No. 5:21-CV-0844-XR, --- F. Supp. 3d -----, 2023 WL 8263348, at *8 (W.D. Tex. Nov. 29, 2023) (outlining three elements of Materiality Provision claims); *see also* ECF No. 42 at 17; ECF No. 52 at 10.

A221–22 (*League* Order at 1–2); *see also* A215 (Exhibit L3, *League*, No. 22-CV-2472 (Cir. Ct. Dane Cnty. Jan. 2, 2024), Dkt. 157 ("*League* Decision") at 4). In reaching that result, the court applied the same four-element approach to Materiality Provision claims that this Court outlined in its order on the motions to dismiss. Specifically, the Dane County Circuit Court considered whether the witness-address requirement entailed "(1) a denial of the right to vote (2) because of an error or omission (3) on any 'record or paper related to . . . an act requisite to voting' (4) that is not material in determining whether the voter is qualified to vote." A215 (*League* Decision at 4) (quoting 52 U.S.C. § 10101(e)); *see also* ECF No. 56 at 5 (identifying the same four elements for a Materiality Provision claim).[3]

The preclusive effect of a state-court judgment is a question of state law. *Creation Supply, Inc. v. Selective Ins. Co. of Se.*, 51 F.4th 759, 763 (7th Cir. 2022); *see also Jensen v. Foley*, 295 F.3d 745, 748 (7th Cir. 2002) ("Federal courts must give state court judgments the same preclusive effect as would a court in the rendering state."). Under Wisconsin law, offensive issue preclusion "applies when two criteria are met." *Rinaldi v. Wisconsin*, No. 19-CV-3-JDP, 2019 WL 3802465, at *5 (W.D. Wis. Aug. 13, 2019). First, "the question of fact or law that is sought to be precluded actually must have been litigated in a previous action and [have been] necessary to the judgment." *Id.* (quoting *Mrozek v. Intra Fin. Corp.*, 2005 WI 73, ¶ 17, 281 Wis. 2d 448, 699 N.W.2d 54). Second, the Court must "determine whether it is fundamentally fair to employ issue preclusion

[3] In further response to the Court's instruction to address claim preclusion as well as issue preclusion, ECF No. 56 at 15, Plaintiffs note that the judgment in *League* has no claim-preclusive effect on this action. First, the claims are not identical. The claim in *League* is a challenge to the witness-*address* requirement; here, by contrast, Plaintiffs' Materiality Provision claim challenges the witness requirement *as a whole*. Second, claim preclusion requires "mutuality," *Coleman v. Lab. & Indus. Rev. Comm'n of Wis.*, 860 F.3d 461, 469 (7th Cir. 2017), and none of the Plaintiffs in this action are parties in *League.* And third, "claim preclusion applies *defensively*; it is invoked by a defendant who seeks to prevent a plaintiff from asserting a claim that the plaintiff has previously litigated and lost." *Robbins v. Med-1 Sols., LLC*, 13 F.4th 652, 657 (7th Cir. 2021) (internal quotation marks omitted). Having lost in *League*, neither Commission Defendants nor the Legislature may rely on the judgment in that case as "a shield" here. *Id.*

given the circumstances of the particular case at hand." *Id.* (quoting *Mrozek*, 2005 WI 73, ¶ 17). Issue preclusion, moreover, "does not require identity of the parties." *Robbins v. Med-1 Sols., LLC*, 13 F.4th 652, 657 (7th Cir. 2021); *see also Coleman v. Lab. & Indus. Rev. Comm'n of Wis.*, 860 F.3d 461, 469 (7th Cir. 2017) (recognizing "the requirement of mutuality has been abandoned" for issue preclusion).[4]

Applying those criteria, the Dane County Circuit Court's decision in *League* should be given issue-preclusive effect in this case. Specifically, the Court should preclude Commission Defendants and the Legislature from contesting whether the witness requirement results in (i) denial of the right to vote (ii) because of an error or omission on a record or paper (iii) related to an act requisite to voting.

First, those three "question[s] . . . of law" were "actually . . . litigated" in *League* and were "necessary to the judgment" in that case. *Rinaldi*, 2019 WL 3802465, at *5. Regarding the first element, denial of the right to vote, the Dane County Circuit Court expressly rejected the Legislature's argument—also made here—that the witness requirement "doesn't deny the right to vote because Wisconsin offers numerous ways to vote." A218 (*League* Decision at 7); *see also* A192–97 (Exhibit L2, Intervenor-Def. the Wis. State Leg.'s Combined Br. ISO Mot. for Summ. J. & Resp. Opposing Pl.'s Mot. for Summ. J. at 19–24, *League*, No. 22-CV-2472 (Cir. Ct. Dane Cnty. Sept. 21, 2023), Dkt. 138). The court also noted that the Legislature's citations in support of

[4] While one Wisconsin Court of Appeals decision cautions against "broad application" of issue preclusion against state agencies, *Gould v. Dep't of Health & Soc. Servs.*, 216 Wis. 2d 356, 370, 576 N.W.2d 292, 298 (Wis. Ct. App. 1998); *see also Teriaca v. Milwaukee Emps.' Ret. Sys.*, 2003 WI App 145, ¶ 15, 265 Wis. 2d 829, 667 N.W.2d 791 (extending *Gould*'s reasoning to pension boards), that decision expressly leaves open the possibility that issue preclusion may apply against a state agency in appropriate circumstances, *Gould*, 216 Wis. 2d at 370, 576 N.W. 292 ("We need not decide whether there are any circumstances that might justify applying the doctrine against a state agency and, if so, what they are[.]"). This case presents such circumstances. Here, unlike in *Gould*, the Legislature has already decided "whether to appeal" the case that will have preclusive effect (*League*), so applying issue preclusion would not punish the state for deciding not to appeal on cost-benefit grounds. *Id.* at 369; *see id.* at 365.

that argument were to "cases that concern 52 U.S.C. § 10301," not the Materiality Provision. A218 (*League* Decision at 7). As to the second element, the error-or-omission requirement, the court held that Wisconsin's witness requirement punishes an error or omission on a record or paper—namely, the absentee ballot certificate. *Id.* at 4. As to the third element, the requisite-to-voting requirement, the court held that because state law "requires a witness address in order for the absentee ballot to be cast and counted," completing the witness certification is "an 'action necessary' to vote." *Id.* at 4–5. Again, the court rejected the same arguments the Legislature has made here. *Compare id.* at 7, *with* A196–97 (Ex. L2 at 23–24). Thus, all three issues were actually litigated in *League*. And the court's disposition of these three issues was necessary to the judgment because the court had to find all four Materiality Provision elements satisfied before declaring a violation. *See* A215–16 (*League* Decision at 4–5).[5]

It makes no difference that *League* concerned only the witness-address requirement, while this action challenges the witness requirement in its entirety. The witness-address requirement is part of the witness certification. Thus, insofar as the witness-address requirement results in denial of the right to vote because of an error or omission on a record or paper related to an act requisite to voting, it follows that the witness requirement, as a whole, does the same. Of note, Plaintiffs do not contend that the Court should apply issue preclusion as to the Materiality Provision's fourth element, whether the error or omission is material to the voter's qualifications. *But see infra* Section II.B.3. *League* concerned only errors or omissions related to witness addresses, while this

[5] Applying federal issue-preclusion law rather than Wisconsin law would not materially change the analysis. Under federal law, courts consider whether "1) the issue sought to be precluded must be the same as that involved in the prior action, 2) the issue must have been actually litigated, 3) the determination of the issue must have been essential to the final judgment, and 4) the party against whom estoppel is invoked must be fully represented in the prior action." *People Who Care v. Rockford Bd. of Educ.*, 68 F.3d 172, 178 (7th Cir. 1995). As just shown, the *League* litigation met the first three federal requirements. And the Legislature was "fully represented" in *League* by the same counsel who represent it here.

action concerns witness-related errors or omissions of all sorts. Accordingly, Plaintiffs recognize that the parties in *League* did not "actually litigate" the full scope of possible qualifications to which the witness requirement might be material.

Second, applying issue preclusion here would not violate fundamental fairness. *See Rinaldi*, 2019 WL 3802465, at *5. Wisconsin courts consider five factors to assess fundamental fairness:

> (1) Was appellate review of the prior judgment available?
>
> (2) Is the question a legal question involving a distinct claim from the prior proceeding, or has the law shifted since the prior proceeding?
>
> (3) Are there significant differences between the quality or extensiveness of the proceedings in the two courts?
>
> (4) Did the party seeking preclusion have a lower burden of persuasion in the first action than in the second?
>
> (5) Would public policy or the individual circumstances make it fundamentally unfair to apply issue preclusion?

Gallo v. Harris, No. 19-CV-591-JDP, 2020 WL 2473671, at *3 (W.D. Wis. May 13, 2020) (citing *Estate of Rille v. Physicians Ins. Co.*, 2007 WI 36, ¶ 60, 300 Wis. 2d 1, 728 N.W.2d 693). None of these factors weighs against preclusion here. Appellate review of the *League* judgment is available; indeed, the Legislature has already noticed an appeal and "[t]he pendency of an appeal doesn't suspend the preclusive effect of the judgment being appealed." *DeGuelle v. Camilli*, 724 F.3d 933, 935 (7th Cir. 2013). The *League* Order issued just two weeks ago, also concerns a Materiality Provision claim, and the law governing such claims has not shifted in the interim. The proceedings in the Dane County Circuit Court were extensive and of high quality; all parties were represented by experienced election-law attorneys and the court thoroughly analyzed the relevant

issues. The plaintiff bore the burden of proof, just as in this case. And no public policy or individual circumstance militates against issue preclusion.[6]

B. The witness requirement satisfies all four elements of the Materiality Provision.

If this Court does not apply issue preclusion, an independent analysis confirms that the witness requirement satisfies each of the four elements required to prove a violation of the Materiality Provision.

1. Rejection of a voter's ballot for noncompliance with the witness requirement denies the right to vote.

When a Wisconsin voter's absentee ballot is not counted because of noncompliance with the witness requirement, that result constitutes denial of the right to vote for purposes of the Materiality Provision. 52 U.S.C. § 10101(a)(2)(B). The relevant provision of the Civil Rights Act expressly defines the word "vote" to include "all action[s] necessary to make a vote effective including . . . having [a] ballot counted and included in the appropriate totals of votes cast." 52 U.S.C. § 10101(e); *see id.* § 10101(a)(3)(A) (incorporating this definition for purposes of the Materiality Provision's use of the term "vote"). And the Supreme Court has long confirmed that the constitutional right to vote includes "the right to have one's vote counted." *Reynolds v. Sims*, 377 U.S. 533, 554 (1964); *see also id.* at 563 n.40; *United States v. Classic*, 313 U.S. 299, 318 (1941) (explaining that right to vote includes both "right to cast a ballot" and to "have it counted"). An otherwise valid absentee ballot that does not comply with the witness requirement is

[6] Again, the analysis under federal law would not materially differ. In place of Wisconsin's fundamental fairness factors, federal courts consider whether the plaintiff "could easily have joined in the earlier action" and whether "the application of offensive estoppel would be unfair." *Parklane Hosiery, Inc. v. Shore*, 439 U.S. 322, 331 (1979). Plaintiffs could not easily have joined the *League* litigation. They challenge the witness requirement as a whole and also assert a second, separate federal claim; thus, even if they had been aware of *League* when it was initiated in 2022 and had timely moved for intervention, the existing parties likely would have resisted the proposed expansion of that litigation. And no other facts render application of issue preclusion unfair.

disqualified, Wis. Stat. § 6.88(3)(b); *see also* PFOF ¶¶ 10–12, and so is not "counted and included in the appropriate totals of votes cast," 52 U.S.C. § 10101(e). Consequently, a voter's failure to comply with the witness requirement results in denial of the right to vote in violation of the Materiality Provision.

Numerous other federal courts have concluded that the Materiality Provision prohibits enforcement of state laws, like Wisconsin's witness requirement, that require election officials to reject absentee ballots because of immaterial paperwork errors or omissions made in the process of submitting them. *See, e.g.*, *Migliori v. Cohen*, 36 F.4th 153, 164 (3d Cir.) (concluding that rejecting mail ballots due to omission of date on outer envelope "violate[s] the Materiality Provision by denying [v]oters their right to vote"), *vacated as moot sub nom. Ritter v. Migliori*, 143 S. Ct. 297 (2022);[7] *Abbott*, 2023 WL 8263348, at *22–23 (holding that ID "number-matching provisions of S.B. 1 require election officials to deny the [Materiality Provision]'s broadly defined right to vote"), *stayed pending appeal sub nom. United States v. Paxton*, No. 23-50885 (5th Cir. Dec. 15, 2023) (per curiam); *Pa. State Conf. of NAACP v. Schmidt*, No. 1:22-CV-00339, 2023 WL 8091601, at *30–31 (W.D. Pa. Nov. 21, 2023) (holding that "immaterial error or omission of a date [on mail ballot outer envelope] resulted in rejection of ballots and disenfranchised the

[7] The reasoning of an opinion vacated on non-merits grounds, like *Migliori*, remains persuasive both in the Third Circuit and here, where it is directly on point. *See Real Alts., Inc. v. Sec'y Dep't of Health & Hum. Servs.*, 867 F.3d 338, 356 n.18 (3d Cir. 2017); *see also Christianson v. Colt Indus. Operating Corp.*, 870 F.2d 1292, 1298 (7th Cir. 1989) (recognizing as persuasive a decision vacated on other grounds). *Migliori* itself has been considered persuasive in multiple federal court decisions despite its vacatur. *See, e.g.*, *Vote.Org v. Callanen*, 89 F.4th 459, 476–77, 479–80 & n.7 (5th Cir. 2023); *Abbott*, 2023 WL 8263348, at *8 n.12; *Schmidt*, 2023 WL 8091601, at *25–27; *Eakin v. Adams Cnty. Bd. of Elections*, No. 1:22-CV-340, 2023 WL 3903112, at *4 (W.D. Pa. June 8, 2023). Meanwhile, the dissent by Justice Alito, joined by Justice Thomas and Gorsuch, from denial of an application to stay while the petition for certiorari was still pending is neither determinative nor persuasive here. And Justice Alito conceded that his opinion was "based on the review that [he] ha[d] been able to conduct in the time allowed" and he did not "rule out the possibility that" his "current view" would prove "unfounded" after full briefing, which never occurred given the vacatur. *See Ritter v. Migliori*, 142 S. Ct. 1824, 1824 (2022) (Alito, J., dissenting).

Plaintiffs" in violation of Materiality Provision); *In re Ga. Senate Bill 202*, No. 1:21-CV-01259, 2023 WL 5334582, at *7–11 (N.D. Ga. Aug. 18, 2023) (holding that invalidating ballots for failure to write birthdate on absentee ballot outer envelope denies right to vote in violation of Materiality Provision); *Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1308–09 (N.D. Ga. 2018) (concluding that rejection of absentee ballots "on the basis of a birth year error or omission" on envelope violates Materiality Provision). Similarly, when an absentee ballot is rejected in Wisconsin because it has a noncompliant witness certificate, that rejection denies the right to vote in violation of the Materiality Provision.

The fact that the witness requirement implicates absentee voting does not obviate this analysis because nothing in the Materiality Provision's text limits its application to in-person voting. And Section 202 of the Voting Rights Act, as explained above, creates a federal statutory right for any qualified voter who "may be absent from their election district" on election day to vote absentee for president and vice president. 52 U.S.C. § 10502(d); *supra* Section I.A. Once a voter invokes their right to vote by absentee ballot, any rejection of that ballot necessarily denies that right.

2. Noncompliance with the witness requirement is an "error or omission" on a "paper" relating to "an act requisite to voting."

The witness requirement's satisfaction of the Materiality Provision's second and third elements is established by "the straightforward application of legal terms with plain and settled meanings." *See Bostock v. Clayton County*, 590 U.S. 644, 663 (2020). The Commission prescribes a uniform certificate, and municipalities include that certificate with absentee ballots. PFOF ¶¶ 1–2, 9. A witness certificate deemed noncompliant with the witness requirement necessarily suffers "an error," whereas a wholly missing or incomplete witness certificate presents an "omission." 52 U.S.C. § 10101(a)(2)(B). The ballot envelope on which the certificate appears is undoubtedly a "paper." *Id.* And proper completion of the witness certificate is an "act requisite to voting." *Id.*;

see also Migliori, 36 F.4th at 162 n.56 ("find[ing] that the mail-in ballot squarely constitutes a paper relating to an act for voting"); *see supra* Section II.B.1.[8]

3. The information that must be included on the witness certificate "is not material in determining whether such individual is qualified under State law to vote."

If compliance with the witness requirement does not require a witness to vouch for the voter's qualifications, *but see supra* Part I, then it is necessarily immaterial in "determining whether [an] individual is qualified under State law to vote." 52 U.S.C. § 10101(a)(2)(B). The Civil Rights Act provides that "qualified under State law" in this context "shall mean qualified according to the laws, customs, or usages of the State." 52 U.S.C. § 10101(e). And Wisconsin law provides that "[e]very U.S. citizen age 18 or older who has resided in an election district or ward for 28 consecutive days before any election where the citizen offers to vote is an eligible elector," and that "[a]ny U.S. citizen age 18 or older who moves within this state later than 28 days before an election shall vote at his or her previous ward or election district if the person is otherwise qualified." Wis. Stat. § 6.02; *see* Wis. Const., art. III, § 1; *see also* Wis. Stat. § 6.15 (allowing new residents with less than 28 days' residency to vote for president and vice president only). If the witness is not confirming the voter's statements about their own qualifications, then the witness certificate does not provide information relevant to determining the voter's citizenship status, age, or residency. Thus, procedural compliance with the witness requirement would be entirely

[8] It makes no difference that compliance with the witness requirement takes place after the registration process. The Materiality Provision's terms—encompassing "*any* record or paper relating to *any* application, registration, *or other act requisite to voting*," 52 U.S.C. § 10101(a)(2)(B) (emphasis added)—explicitly contemplate a broad range of records and papers *in addition to* registration forms. *See Common Cause v. Thomsen*, 574 F. Supp. 3d 634, 636 (W.D. Wis. 2021) (Peterson, J.) ("text of § 10101(a)(2)(B) isn't limited to . . . voter registration"); *Abbott*, 2023 WL 8263348, at *18–19 (similar).

irrelevant, and therefore immaterial, to determining whether an absentee voter is qualified to vote under Wisconsin law.[9]

Immaterial requirements cannot be transformed into "material" ones merely because they are imposed by state law. The Fifth Circuit recently rejected the notion that "States may circumvent the Materiality Provision by defining all manner of requirements, no matter how trivial, as being a qualification to vote and therefore 'material.'" *Vote.org*, 89 F.4th at 487; *see also Abbott*, 2023 WL 8263348, *14 (rejecting same "tautological[]" argument and recognizing that such "logic would erase the Materiality [Rule] from existence, by defining *whatever* requirements might be imposed by state law in order to vote, no matter how trivial," as material in determining voter qualifications). A state's codification of a voting requirement does not automatically neuter application of the Materiality Provision; to the contrary, "[t]he Materiality [Rule] is a standard that a State's [voting requirements] must satisfy." *Vote.org*, 89 F.4th at 487; *cf. Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 17 (2013) (distinguishing between setting qualifications and obtaining information necessary to confirm those qualifications). Interpreting the Materiality Provision in any other way would shield the same immaterial requirements that Congress sought to abolish. For example, in the 1960s, the Louisiana Constitution required voters to provide their age, not only in years but also in months and days, in order to register to vote. *See* Commission on Civil Rights, Voting: 1961 Commission on Civil Rights Report, Book 1 at 56.[10] The Civil Rights Act was enacted in direct response to this context of disenfranchisement. *Id.* Permitting states to circumvent the Materiality Provision by codifying requirements like these "not only would defy common sense, but also would defeat Congress' stated objective." *Quarles v. United States*, 139

[9] Both Commission Defendants and the Legislature appear to concede as much in prior briefing in this case. *See, e.g.*, ECF No. 20 at 14–15; ECF No. 49 at 32–33; ECF No. 44 at 3–8; ECF No. 53 at 8, 11–12.

[10] Available at https://perma.cc/CC7B-T888.

S. Ct. 1872, 1879 (2019). Courts "should not lightly conclude that Congress enacted a self-defeating statute." *Id.*

III. The Court should not stay its decision once dispositive motions are fully briefed.

A. The proceedings in *Priorities USA* do not warrant a stay of this Court's decision.

In *Priorities USA*, plaintiffs challenge several absentee voting procedures, including the witness requirement, as incompatible with the Wisconsin Constitution's voting rights guarantees. A74–82 (Exhibit K1, Summons and Compl. ¶¶ 71–112, *Priorities USA*, No. 23-CV-1900 (Cir. Ct. Dane Cnty. July 20, 2023), Doc. 2). While this Court noted that "*Priorities USA* could resolve or simplify plaintiffs' claims under the Voting Rights Act," ECF No. 56 at 13, subsequent events have rendered such guidance increasingly unlikely. On January 24, 2024, the Dane County Circuit Court granted defendants' motion to dismiss because "the allegations in the complaint, if proven, would not meet the high hurdle for a facial challenge" under Wisconsin constitutional law because some voters might not be burdened by the challenged provisions. A86 (Exhibit K2, Decision and Order on Motions to Dismiss at 2, *Priorities USA*, No. 23-CV-1900 (Cir. Ct. Dane Cnty. Jan. 24, 2024), Doc. 100). As relevant here, the state court did not address the scope or meaning of the witness requirement, including whether the witness vouches for the voter's qualifications.

The issues noticed for appeal confirm that such guidance is highly unlikely to be forthcoming. The plaintiffs have filed a bypass petition with the Wisconsin Supreme Court, which outlines the three issues presented for that court's review:

> (1) Whether laws that burden the right to vote, including by burdening absentee voting, are subject to strict scrutiny just like laws burdening other fundamental rights, such that the State must prove that the burden they impose is narrowly tailored to serve a compelling state interest. . . .
>
> (2) Whether a voting law is immune from facial challenge where it imposes some unjustifiable burden on all voters it regulates, but some voters are more burdened than others. . . .

> (3) Whether to overrule the Court's holding in *Teigen v. Wisconsin Elections Commission*, 2022 WI 64, 403 Wis. 2d 607, 976 N.W.2d 519, that Wis. Stat. § 6.87 precludes the use of secure drop boxes for the return of absentee ballots to municipal clerks.

A125 (Exhibit K4, Petition to Bypass at 4, *Priorities USA*, No. 24-AP-164 (Wis. Feb. 9, 2024)). None of these questions will require the state supreme court to parse the meaning of the witness requirement. If the bypass petition is denied, similar issues will be considered by the state court of appeals.[11] Either way, state-court adjudication of pleading requirements and constitutional standards will not assist with the narrow dispute here over the proper construction of the witness requirement and federal statutes. *See* A99 (Exhibit K3, Docketing Statement at 2, *Priorities USA*, No. 23-CV-1900 (Cir. Ct. Dane Cnty. Feb. 1, 2024), Doc. 108). Because *Priorities USA* is not likely to resolve the claims here, this Court should adjudicate the merits to ensure timely resolution in advance of the 2024 elections. *Cf. Democratic Nat'l Comm. v. Bostelmann*, 451 F. Supp. 3d 952, 969 (W.D. Wis. 2020) (recognizing that infringement of the right to vote inflict irreparable harm); *Wis. Term Limits v. League of Wis. Muns.*, 880 F. Supp. 1256, 1266 (E.D. Wis. 1994) ("[E]ach election is unique and cannot be replicated.").

[11] These issues are: "(1) Does prohibiting an absentee ballot from being cast unless a witness has certified the voting procedure and provided their address, under Wis. Stat. secs. 6.87(2), (6d), violate the fundamental right to vote under the Wisconsin Constitution? (2) Does the prohibition on the use of drop boxes to accept returned absentee ballots, as previously articulated by the Wisconsin Supreme Court, violate the fundamental right to vote under the Wisconsin Constitution? (3) Is the proper construction of the statutes governing the return of absentee ballots one that prohibits drop boxes, as the Wisconsin Supreme Court has previously held? (4) Does the requirement that any alleged errors on the absentee ballot envelope be cured by the close of polls on election day, in contrast to the deadline for provisional ballots, violate the fundamental right to vote under the Wisconsin Constitution? (5) Does the strict compliance rule for absentee voting, set forth in Wis. Stat. sec. 6.84, violate the fundamental right to vote under the Wisconsin Constitution? (6) In order to pursue a facial constitutional challenge against requirements which burden voting, must Plaintiffs demonstrate a sufficiently serious burden imposed on all voters, rather than solely on voters affected by the challenged requirement?" A99 (Ex. K3 at 2).

B. The proceedings in *League of Women Voters* do not warrant a stay of this Court's decision.

The Court directed the parties to address whether the proceedings in *League of Women Voters* warrant a stay of decision. ECF No. 56 at 15. They do not. As explained above in Section II.A, the circuit court's decision in *League* provides grounds to apply issue preclusion against Commission Defendants and the Legislature on three of the four Materiality Provision elements. As to the fourth element, whether the witness requirement is material to a voter's qualifications, *League* has not answered and will not answer that question. The purpose and effects of the witness's attestation are not at issue in *League*, which concerns only the witness-*address* requirement. A212–14 (*League* Decision at 1–3). Accordingly, the *League* appeal is unlikely to provide this Court with more guidance about the proper interpretation of Wisconsin law such that a stay would be appropriate.

The Court also directed the parties to address "how confusion can be avoided or minimized in the event that this court reaches a different conclusion than the state court" in *League*. ECF No. 56 at 15. The best way to avoid confusion is to apply issue preclusion to the three overlapping elements of the Materiality Provision claims in the two cases. *See supra* Section II.A. As to the fourth element, whether the Court rules for or against Plaintiffs, its ruling will not cause confusion. If the Court rules that the entire witness requirement is immaterial, that decision will plainly be consistent with *League*'s holding that certain witness-address components are immaterial. And if the Court rules that the requirement, as a whole, is material, that ruling would not present any conflict with *League*'s holding, which is limited to specific categories of information that appear in the witness certificate. In any case, Wisconsin's elections officials have extensive experience complying with court orders, and the Commission routinely issues detailed clerk communications

to apprise local officials of legal developments.[12] There is no reason to expect that elections officials will have trouble navigating this Court's and the state court's distinct rulings about the witness requirement.

CONCLUSION

For the reasons set forth above, the Court should grant summary judgment for Plaintiffs.

Respectfully submitted this 16th day of February, 2024.

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[12] *See* Wis. Elections Comm'n, Clerk Communications, https://elections.wi.gov/clerks/clerk-communication (last visited Feb. 16, 2024).

CERTIFICATE OF SERVICE

The undersigned hereby certifies that all counsel of record who are deemed to have consented to electronic service are being served this 16th day of February, 2024, with a copy of this document via the Court's CM/ECF system.

/s/ Uzoma N. Nkwonta
Uzoma N. Nkwonta