UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

SUSAN LIEBERT; ANNA HAAS; ANNA POI; *and* ANASTASIA FERIN KNIGHT,

Plaintiffs,

v.

WISCONSIN ELECTIONS COMMISSION; DON M. MILLIS, ROBERT F. SPINDELL, MARGE BOSTELMANN, ANN S. JACOBS, MARK L. THOMSEN, *and* JOSEPH J. CZARNEZKI, *in their official capacities as commissioners of the Wisconsin Elections Commission*; Meagan Wolfe, *in her official capacity as administrator of the Wisconsin Elections Commission*; MICHELLE LUEDTKE, *in her official capacity as city clerk for the City of Brookfield*; MARIBETH WITZEL-BEHL, *in her official capacity as city clerk for the City of Madison*; *and* LORENA RAE STOTTLER, *in her official capacity as city clerk for the City of Janesville*,

Defendants.

Case No. 3:23-cv-00672-jdp

THE WISCONSIN STATE LEGISLATURE'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, TO STAY

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INTRODUCTION

As the Seventh Circuit has explained, registering to vote and voting in Wisconsin is "easy." *Frank v. Walker*, 768 F.3d 744, 748 & n.2 (7th Cir. 2014); *Luft v. Evers*, 963 F.3d 665, 672 (7th Cir. 2020). Wisconsin law provides a *right* to vote in person on Election Day, while offering a broadly permissive *privilege* of absentee voting through one of the most accommodating absentee voting regime in the Nation. Plaintiffs ask this Court to strike down one of the key safeguards that Wisconsin law places on the privilege of absentee voting—the requirement that an absentee voter cast her absentee ballot in the presence of a qualified witness—asserting that this requirement conflicts with the Voting Rights Act of 1965 or, in the alternative, the Materiality Provision of the Civil Rights Act of 1964. But both Plaintiffs' Voting Rights Act claim (Count I) and their Materiality Provision claim (Count II) fail as a matter of law, for multiple independently sufficient reasons. Thus, this Court should grant summary judgment to Intervenor-Defendant the Wisconsin State Legislature ("Legislature") as to all of Plaintiffs' claims.

Plaintiffs' Count I—their claim that Wisconsin's absentee-ballot witness requirement is an improper "test or device" that denies citizens the "right to vote" under Section 10501(b) of the Voting Rights Act, 52 U.S.C. § 10501(b)—fails for three independently sufficient reasons. First, the requirement is not a "prerequisite" to exercising the "right to vote," *id.* § 10501(b), because absentee voting itself in Wisconsin law is a *privilege* offered to Wisconsin citizens, not part of the *right* to vote itself. Second, even if the requirement were a prerequisite to voting, it is not a "test

or device" under Section 10501(b) because it does not require verification of the absentee voter's qualifications to vote. Finally, the requirement does not mandate the absentee voter to prove his qualifications to "registered voters or members of any other class" within the meaning of Section 10501(b), *id.* § 10501(b), as any adult U.S. citizen may serve as an absentee voter's witness.

Plaintiffs' Count II—their claim that the absentee-ballot witness requirement violates the Materiality Provision of the Civil Rights Act, Section 10101(a)(2)(B), 52 U.S.C. § 10101(a)(2)(B)—likewise fails for three, independently sufficient reasons. To begin, the Materiality Provision precludes only certain state laws that bear on whether an individual is "qualified . . . to vote," *id.*, yet the absentee-ballot witness requirement simply does not fall within that category. Further, failure to follow the absentee-ballot witness requirement does not deny Wisconsin voters the *right* to vote, so as to trigger the Materiality Provision, *id.* § 10101(a)(2)(B), because, as noted already, absentee voting in Wisconsin is merely a privilege under state law. Finally, even if this Court were to conclude that the requirement did fall within the Materiality Provision's scope, the absentee-ballot witness requirement is "material" to determining whether an individual may vote under Wisconsin law.

Alternatively, if this Court is not inclined to grant summary judgment to the Legislature, this Court should continue to stay its decision on this case pending the resolution of *Priorities USA v. Wisconsin Elections Commission* by the Wisconsin appellate courts and the resolution of *League of Women Voters of Wisconsin. v. Wisconsin Elections Commission* by the Wisconsin appellate courts. Resolution of

those cases could simplify the issues here, and a stay would not cause prejudice to any party before the Court.

STATEMENT

A. Wisconsin's Voting Laws, Including Its Absentee-Ballot Witness Requirement, Make Voter Registration And Voting Easier

Wisconsin has "lots of rules that make voting easier" in the State, from the registration process to the actual casting of a ballot. *Luft*, 963 F.3d at 672; *Frank*, 768 F.3d at 748 & n.2.

"Registering to vote is easy in Wisconsin." *Frank*, 768 F.3d at 748 & n.2. Any competent adult U.S. citizen without a felony conviction and who has resided at her current address for at least 28 consecutive days prior to the election is qualified to vote in Wisconsin. Wis. Stat. §§ 6.02(1), 6.03(1); Wis. Const. art. III, § 1; PFOF ¶ 3. Qualified voters may register to vote in several ways: in person before Election Day; by mail; by online application; or at their polling place on Election Day. Wis. Stat. §§ 6.30, 6.33–.34, 6.55; PFOF ¶ 4.

Casting a ballot is similarly easy in Wisconsin. *See Luft*, 963 F.3d at 672; *accord Frank*, 768 F.3d at 748. Registered voters may choose to cast their ballots in-person on Election Day at polling places any time from 7 a.m. until 8 p.m., and they are entitled to cast their ballots as long as they are in line when the polls close. Wis. Stat. § 6.78(1m), (4); PFOF ¶¶ 6–7. Alternatively, voters may utilize curbside voting on Election Day, where local clerks offer this statutorily permissible option. Wis. Stat. § 6.82(1); PFOF ¶ 8. Wisconsinites are also entitled to take time off from work to vote, and employers may not penalize their employees for doing so. Wis. Stat.

§ 6.76; PFOF ¶ 9. For disabled voters, Wisconsin law allows them to request assistance in casting their ballots at polling places, to use paper ballots at municipal polling places using electronic voting machines, or to request other accommodations that help them exercise their right to vote. *See* Wis. Stat. §§ 6.82(2)–(3), 5.36; PFOF ¶ 10.

Wisconsin has also long provided a generous absentee voting regime for qualified, registered voters who are "unable or unwilling to appear at the polling place in [their] ward or election district[s]." Wis. Stat. § 6.85(1); *see* 1999 Wis. Act 182, §§ 90m, 95p (creating Wisconsin's current absentee-voting regime, requiring the absentee voter to vote in the presence of one witness, in 2000);[1] 1965 Wis. Act 666, § 1 (creating Wis. Stat. § 6.87 in 1966 and imposing a "2 witnesses" requirement);[2] PFOF ¶ 11. Today, this regime permits voters to exercise the "privilege" of absentee voting, Wis. Stat. § 6.84(1), in numerous, convenient ways, PFOF ¶ 12. Voters may request absentee ballots in person, by mail, Wis. Stat. § 6.86(1)(a)(1)–(6); PFOF ¶ 13, or—in certain circumstances (such as military voters, those living overseas, or nursing home residents)—by email or fax, Wis. Stat. §§ 6.865, 6.86(ac), 6.86(2)(a), 6.87(3)(d), 6.875; PFOF ¶ 13. "[T]he privilege of voting by absentee ballot must be carefully regulated to prevent," among other risks, "overzealous solicitation of absent electors"; "undue influence on an absent elector to vote" in a particular manner; and other "similar abuses," like ballot-harvesting schemes. Wis. Stat. § 6.84(1).

[1] Available at https://docs.legis.wisconsin.gov/1999/related/acts/182.pdf (all websites last visited Feb. 15–16, 2024).

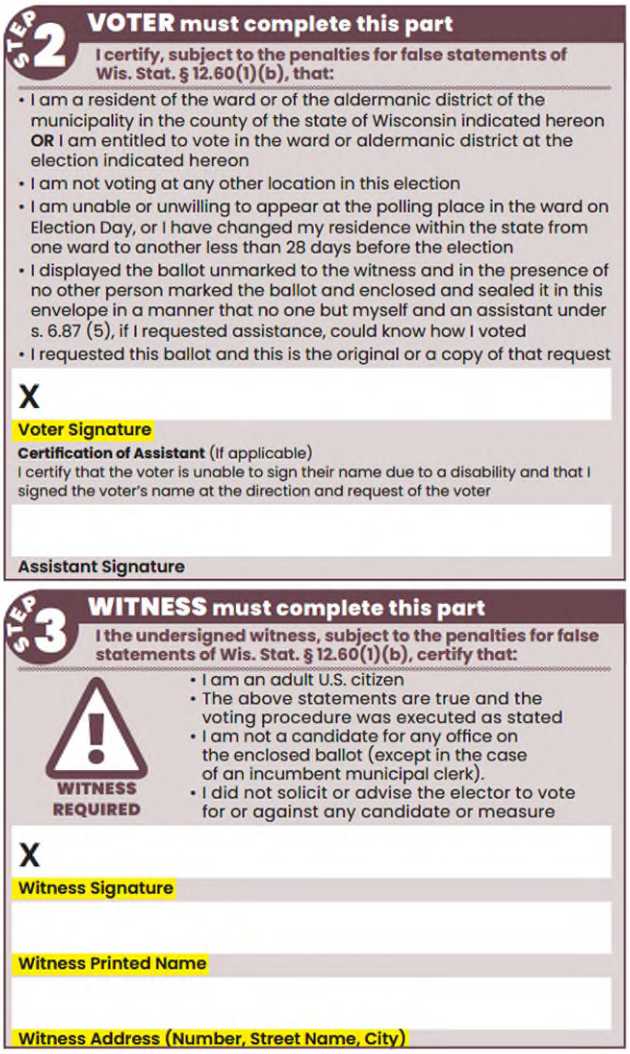
[2] Available at https://docs.legis.wisconsin.gov/1965/related/acts/666.pdf.

Studies show that "[a]bsentee ballots [are] the largest source of potential voter fraud," as the landmark Carter-Baker Commission on Federal Election Reform concluded. PFOF ¶ 14 (citing Ex. A to Decl. of Kevin M. LeRoy ("LeRoy Decl."), Carter-Baker Comm'n on Fed. Elections Reform, *Building Confidence in U.S. Elections* 46 (2005) (citing *Balancing Access and Integrity: The Report of the Century Foundation Working Group on State Implementation of Election Reform* at 67–69 (N.Y., Century Foundation Press, 2005)). "Absentee balloting is vulnerable to abuse in several ways." PFOF ¶ 15 (citing Ex. A to LeRoy Decl. at 46). "Blank ballots mailed to the wrong address or to large residential buildings might get intercepted," and "[c]itizens who vote at home, at nursing homes, at the workplace, or in church are more susceptible to pressure, overt and subtle, or to intimidation." PFOF ¶ 16 (citing Ex. A to LeRoy Decl. at 46). "Vote buying schemes are far more difficult to detect when citizens vote by mail." PFOF ¶ 17 (citing Ex. A to LeRoy Decl. at 46). Accordingly, in Wisconsin, "[w]hile the legislature has recognized absentee voting has many benefits for voters, the legislature has also enacted safeguards designed to minimize the possibility of fraud." *Teigen v. Wis. Elections Comm'n*, 976 N.W.2d 519, 543 (Wis. 2022); *see also Jefferson v. Dane Cnty.,* 951 N.W.2d 556, 561 (Wis. 2020); *Lee v. Paulson,* 623 N.W.2d 577, 579 (Wis. Ct. App. 2000).

In Wisconsin, and like many other States, absentee voters must fill out their ballots in the presence of a witness. Wis. Stat. § 6.87(2), (4)(b)1; PFOF ¶¶ 19–20.[3]

[3] *See, e.g.*, Ala. Code § 17-11-9; Alaska Stat. § 15.20.203; La. Rev. Stat. § 18:1306; Minn. Stat. § 203B.07; N.C. Gen. Stat. § 163-231; S.C. Code §§ 7-15-380, 7-15-220.

Under the current version of Wis. Stat. § 6.87, absentee voters must mark and fold their ballots before a witness who is an adult U.S. citizen and then place the ballot in the official absentee-ballot envelope. Wis. Stat. § 6.87(2), (4)(b)1; PFOF ¶ 21. The absentee voter and witness must then complete certain attestations on the printed certificate provided with each absentee ballot envelope. Specifically, the voter certifies that she is "a resident" of a particular political subdivision, that she is "entitled to vote" in that subdivision, that she is "not voting at any other location," and that she "exhibited the enclosed ballot unmarked to the witness" before marking the ballot "in [the witness's] presence and in the presence of no other person." Wis. Stat. § 6.87(2); PFOF ¶ 23. After observing the absentee-voting process, the witness "certif[ies] that [he or she is] an adult U.S. citizen and that the above statements are true and the voting procedure was executed as there stated," and then signs the certification. Wis. Stat. § 6.87(2); PFOF ¶ 24. These certifications are printed on the back of the ballot envelope sent to each absentee voter, as reproduced immediately below:



STEP 2 **VOTER must complete this part**

I certify, subject to the penalties for false statements of Wis. Stat. § 12.60(1)(b), that:

- I am a resident of the ward or of the aldermanic district of the municipality in the county of the state of Wisconsin indicated hereon **OR** I am entitled to vote in the ward or aldermanic district at the election indicated hereon
- I am not voting at any other location in this election
- I am unable or unwilling to appear at the polling place in the ward on Election Day, or I have changed my residence within the state from one ward to another less than 28 days before the election
- I displayed the ballot unmarked to the witness and in the presence of no other person marked the ballot and enclosed and sealed it in this envelope in a manner that no one but myself and an assistant under s. 6.87 (5), if I requested assistance, could know how I voted
- I requested this ballot and this is the original or a copy of that request

X

Voter Signature

Certification of Assistant (If applicable)
I certify that the voter is unable to sign their name due to a disability and that I signed the voter's name at the direction and request of the voter

Assistant Signature

STEP 3 **WITNESS must complete this part**

I the undersigned witness, subject to the penalties for false statements of Wis. Stat. § 12.60(1)(b), certify that:

WITNESS REQUIRED

- I am an adult U.S. citizen
- The above statements are true and the voting procedure was executed as stated
- I am not a candidate for any office on the enclosed ballot (except in the case of an incumbent municipal clerk).
- I did not solicit or advise the elector to vote for or against any candidate or measure

X

Witness Signature

Witness Printed Name

Witness Address (Number, Street Name, City)

PFOF ¶ 25 (citing Ex. B to LeRoy Decl., *Official Absentee Ballot Application/Certification*, WEC[4]).

The Wisconsin Elections Commission ("WEC") issues uniform instructions for absentee voters, which instructions currently provide, in relevant part, that the absentee voter must: "[m]ark [the] ballot in the presence of [the] witness"; "[r]efold

[4] Available at https://elections.wi.gov/wec-form/official-absentee-ballot-application certification.

[the] voted ballot and place it inside of the return envelope"; "[s]eal the envelope in the presence of [the] witness"; "[f]ill out the required sections of the absentee return envelope"; and "[r]eturn [the] ballot." PFOF ¶ 26 (citing Ex. C to LeRoy Decl., *Uniform Instructions for Wisconsin Absentee Voters*, WEC[5]). The instructions also recommend that the voters mail back the ballot "at least one week" before Election Day. PFOF ¶ 27 (citing Ex. C to LeRoy Decl.).

Finally, WEC provides a ballot tracking service to all absentee voters. PFOF ¶ 28 (citing Ex. D to LeRoy Decl., *Track My Ballot*, WEC[6]). The "Track My Ballot" tool allows voters to check the status of their ballot by simply providing their names and dates of birth. PFOF ¶ 29 (citing Ex. D to LeRoy Decl.). The tracker allows them to see if their ballots have been received and if there are any errors that will need to be cured in order to have their ballots counted. PFOF ¶ 30 (citing Ex. D to LeRoy Decl.). The website also allows voters to request an entirely new ballot if they are concerned their ballot has been lost or may not make it to its destination by Election Day. PFOF ¶ 31 (citing Ex. D to LeRoy Decl.).

B. Pending Parallel State-Court Cases—Including One Filed By Plaintiffs' Counsel—Challenge The Absentee-Ballot Witness Requirement On State Constitutional Grounds, And The Witness Address Requirement Under The Materiality Provision

The Wisconsin state appellate courts are currently considering multiple state-court parallel cases to the pending federal case here.

[5] Available at https://elections.wi.gov/wec-form/uniform-absentee-ballot-instructions.

[6] Available at https://myvote.wi.gov/en-us/Track-My-Ballot.

First, before filing the Complaint here, counsel for Plaintiffs' in this case filed a four-count complaint in the Circuit Court for Dane County, Wisconsin, on behalf of plaintiff Priorities USA, among others, against the WEC, challenging the same absentee-ballot witness requirement at issue here under the Wisconsin Constitution. PFOF ¶ 36 (citing Ex. E to LeRoy Decl., Dkt.2, *Priorities USA, et al. v. Wisconsin Elections Commission*, No. 2023CV001900 (Wis. Cir. Ct., Dane Cnty. July 20, 2023) ("*Priorities USA*")). The Legislature successful intervened in those proceedings as a Defendant. PFOF ¶ 37 (citing Ex. F to LeRoy Decl., Dkt.73, *Priorities USA* (Sept. 11, 2023)). The Circuit Court recently granted a motion to dismiss in *Priorities USA*, dismissing the plaintiffs' facial constitutional challenge to Wis. Stat. § 6.87(4)(b)1 (among other statutes), PFOF ¶ 38 (citing Ex. G to LeRoy Decl., Dkt.100, *Priorities USA* (Jan. 24, 2024)), and then accepted the plaintiffs notice of voluntary dismissal of their more limited, "hybrid" constitutional claim against the witness requirement, PFOF ¶ 39 (citing Ex. H to LeRoy Decl., Dkt.103, *Priorities USA* (Jan. 29, 2024)). The *Priorities USA* plaintiffs appealed the Dane County circuit court's final judgment to the Wisconsin Court of Appeals. PFOF ¶ 40 (noting appeal docketed as *Priorities USA v. Wisconsin Elections Commission*, No. 2024AP164 (Wis. Ct. App.)), and then petitioned the Wisconsin Supreme Court to bypass the Court of Appeals in light of the approaching November 2024 General Election, PFOF ¶ 41 (citing Ex. I to LeRoy Decl., Petition to Bypass, *Priorities USA v. WEC*, No. 2024AP164 (Feb. 9, 2024)).

Second, a separate state case challenges the absentee-ballot witness requirement as preempted by federal law. PFOF ¶ 42 (citing Ex. J to LeRoy Decl.,

Dkt.94, *League of Women Voters of Wis. v. WEC*, No. 2022CV2472 (Wis. Cir. Ct., Dane Cnty. Dec. 23, 2022) ("*LWV*")). Specifically, in *LWV*, the plaintiffs argued that denial of the right to vote due to "omission of certain witness address components would violate" Section 10101(a)(2)(B) of the Civil Rights Act, specifically challenging "the prohibition on denying a vote based on an immaterial omission or error." PFOF ¶ 43 (citing Ex. J to LeRoy Decl.) Section 10101(a)(2)(B), known as the Materiality Provision, is one of the same federal statutes invoked by Plaintiffs here. *Infra* pp.28–37. The Circuit Court allowed the Legislature to intervene in the proceedings. PFOF ¶ 44 (citing Ex. K to LeRoy Decl., Dkt.34, *LWV* (Oct. 7, 2022)). The Circuit Court entered summary judgment in the *LWV* plaintiffs' favor, finding that the Materiality Provision applies to the witness address requirement and that the witness' address is not "material to whether a voter is qualified." PFOF ¶ 45 (Ex. L to LeRoy Decl., Dkt.157 at 5, *LWV* (Jan. 2, 2024)). Following that decision, the Dane County Circuit Court entered judgment as to the Materiality Provision claim and issued an injunction providing that "no absentee ballot may be rejected" with "witness certifications" falling into the following four categories: (a) "[t]he witness's street number, street name, and municipality are present, but there is neither a state name nor a ZIP code provided"; (b) "[t]he witness's street number, street name, and ZIP code as present, but there is neither a municipality nor a state name provided"; (c) "[t]he 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"; and (d) "[t]he witness certification indicates that the witness address is the same as

the voter's address" with use of specified language or other markings. PFOF ¶ 46 (Ex. M to LeRoy Decl., Dkt.161, *LWV* (Jan. 30, 2024)). Both plaintiffs and the Legislature appealed, and the Court of Appeals has consolidated those cases. PFOF ¶ 47 (noting appeals docketed as *LWV v. Wisconsin Elections Commission*, No. 2024AP166 (Wis. Ct. App.). The Dane County Circuit Court and the Wisconsin Court of Appeals recently denied a request from the Legislature to stay the Dane County Circuit Court's injunction pending appeal, PFOF ¶ 48, and merits briefing on the Legislature's appeal has yet to commence, PFOF ¶ 49 (citing *LWV*, No. 2024AP166 (Wis. Ct. App.).

Third, another case filed in Wisconsin's Dane County Circuit Court seeks an order judicially defining a witness's "address" for purposes of the absentee-ballot witness address requirement. PFOF ¶ 50 (citing Ex. O to LeRoy Decl, Dkt.160, *Rise v. Wisconsin Elections Comm'n*, No. 2022CV2446 (Wis. Cir. Ct., Dane Cnty. Mar. 24, 2023) (*"Rise"*)). Again, the Legislature moved to intervene, and the Dane County Circuit Court granted the motion. PFOF ¶ 51 (citing Ex. P to LeRoy Decl, Dkt.71, *Rise* (Oct. 6, 2022)). The Dane County Circuit Court recently granted the *Rise* plaintiffs' motion for summary judgment, holding that the term "address" as used in Wis. Stat. § 6.87 means "a place where a person or organization may be communicated with." PFOF ¶ 52 (citing Ex. Q to LeRoy Decl., Dkt.233, *Rise* (Jan. 2, 2024).[7] Following that decision, the Dane County Circuit Court then issued an

[7] On August 23, 2023, the Circuit Court procedurally consolidated *Rise* with *LWV* as companion cases for purposes of trial. PFOF ¶ 53 (citing Ex. R to LeRoy Decl., Dkt.203, *Rise* (Aug. 23, 2023)).

injunction ordering that clerks may not "reject[ ] or return[ ] 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." PFOF ¶ 54 (citing Ex. S to LeRoy Decl., Dkt.238, *Rise* (Jan. 30, 2024)). The Dane County Circuit Court further ordered WEC to "rescind" or "revise and reissue" its guidance defining the term "address" and to notify municipal clerks of "their obligation not to reject, return for cure, or refuse to count any absentee ballot based on a witness's address," if that address complies with the Circuit Court's "address" definition. PFOF ¶ 55 (citing Ex. S to LeRoy Decl.). The Legislature appealed to the Wisconsin Court of Appeals, PFOF ¶ 56 (noting appeals docketed as *Rise v. Wisconsin State Legislature*, No. 2024AP165 (Wis. Ct. App.)), where it is currently seeking a stay of the Dane County Circuit Court's decision pending appeal, PFOF ¶ 57 (citing Ex. T to LeRoy Decl., *Rise*, Intervenor-Appellant's Emergency Mot. for Stay Pending Appeal, No. 2024AP165 (Feb. 6, 2024)).

Following the Dane County Circuit Court's decisions in *LWV* and *Rise*, WEC issued a series of new guidance documents to municipal and county clerks throughout Wisconsin informing them of the *LWV* and *Rise* courts' decisions and providing guidance on implementing those decisions for the upcoming elections in the State. PFOF ¶ 58 (citing Ex. U to LeRoy Decl., *LWV* Clerk Communication (Feb. 9, 2024); Ex. V to LeRoy Decl., *Rise* Clerk Communication (Feb. 9, 2024)).

C. Plaintiffs Bring This Action, Alleging That Wisconsin's Absentee-Ballot Witness Requirement Violates Federal Law, And The Legislature Successfully Intervenes As A Defendant

1. On October 2, 2023, Plaintiffs filed a two-count Complaint against WEC, its six commissioners, its administrator, and three individual municipal clerks for the cities of Brookfield, Madison, and Janesville, challenging Wisconsin's absentee-ballot witness requirement under federal law. *See generally* Dkt.1. WEC is the state agency with the responsibility for administering Wisconsin's elections laws, *see* Wis. Stat. § 5.05(1), while city clerks in Wisconsin are the local-government officials charged with supporting municipal governments' administrative functions, including by managing election procedures in their respective jurisdictions, *see id.* §§ 5.02(10), 5.84, 5.89, 5.72, 6.87, 7.41.

Plaintiffs' Complaint challenges the absentee-ballot witness requirement in its entirety, claiming that Section 6.87 either violates the Voting Rights Act of 1965 or, alternatively, is unlawful under the 1964 Civil Rights Act's Materiality Provision. Dkt.1 ¶¶ 50–61. Plaintiffs bring Count I under Section 201 of the VRA, which provides, in relevant part, that "[n]o citizen shall be denied . . . the right to vote" "because of his failure to comply with any test or device," including a "requirement that . . . as a prerequisite for voting," the voter must "prove his qualifications by the voucher of registered voters or members of any other class." 52 U.S.C. § 10501. According to Plaintiffs, Section 6.87's absentee-ballot witness requirement constitutes an unlawful voucher requirement under Section 201 of the Voting Rights Act because it prohibits election officials from counting absentee ballots unless the witness first certified that the voter's qualifications to participate in the election "are

true." Dkt.1 ¶ 53. In Count II, Plaintiffs assert an alternative claim against Section 6.87 under the Civil Rights Act's Materiality Provision. *Id.* ¶ 58. The Materiality Provision prohibits, as relevant here, the States from denying "any individual" the right "to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election." 52 U.S.C. § 10101(a)(2)(B). If the Court determines that the Section 6.87's absentee-ballot witness requirement does not violate the Voting Rights Act (per their Count I), Plaintiffs contend that the requirement must then "not [be] material in determining whether [an] individual is qualified under State law to vote," meaning that it cannot lawfully serve as the basis for disqualifying an absentee voter or rejecting his or her ballot under the Materiality Provision. Dkt.1 ¶¶ 59, 61.

2. On October 30, 2023, the Legislature moved to intervene as a Defendant here on behalf of the State, seeking to protect the State's unique, sovereign interests in the continued validity of Wisconsin law and to defend the exercise of its own constitutional powers, including to "[p]rovid[e] for absentee voting." Dkt.29 at 2 (citing Wis. Const. art. III, § 2). This Court granted the Legislature's motion on December 5, 2023, noting the "the significant differences between the legislature's and other defendants' arguments." Dkt.47 at 5.

D. The Legislature Moves To Dismiss Or Stay, And This Court Denies That Motion Without Prejudice, While Granting A Partial Stay

Contemporaneously with its motion to intervene, the Legislature filed a proposed motion to dismiss or stay adjudication of this case, which proposed motion the Court accepted for filing after the Court granted the Legislature's request to intervene. *See generally* Dkt.49. The Legislature explained that the Court should abstain from hearing this case or stay it pending the Wisconsin state courts' resolution of *Priorities USA* and *LWV*, given that they both involve challenges to Wisconsin's absentee-ballot witness requirement. *Id.* at 12–17. But if the Court did reach the merits of Plaintiffs' claims here, the Legislature argued that both claims should be dismissed under Federal Rule of Civil Procedure 12(b)(6). *Id.* at 17–40. Count I should be dismissed because the absentee-ballot witness requirement is not a "prerequisite" to voting under Section 201, does not relate to a voter's "qualifications" to vote, and does not require the "voucher" of any members of a class. *Id.* at 17–26. And Count II should be dismissed because either the absentee-ballot witness requirement falls outside the scope of Section 10101(a)(2)(B) or because it constitutes a permissible "material" qualification to vote under Wisconsin law. *Id.* at 26–40.

On January 17, 2024, this Court issued a decision denying the Legislature's motion to dismiss "without prejudice to defendants' renewing their arguments in a motion for summary judgment," Dkt.56 at 2, while also "conclud[ing] that a partial stay is appropriate on both of plaintiffs' claims," *id.* at 11–12, so the Court could "reserve a ruling on the merits . . . while related cases are pending in state court," *id.*

at 2. As the Court explained, "*Priorities USA* could resolve or simplify plaintiffs' claim under the [VRA]." *Id.* at 13. This is because the case "will likely require the Wisconsin courts to construe § 6.87 and to resolve the dispute regarding the scope of what the witness must certify," thus "[i]f the state court sides with defendants on that issue, plaintiffs' claim under the [VRA] fails." *Id.* at 12. And the Court recognized that the recent summary-judgment decision in *LWV* "potentially complicates the decision in this case" because "there is significant overlap in the arguments raised by the parties in both cases, and the state court's interpretation of the Materiality Rule has implications beyond the issue of the witness's address." *Id.* at 14–15. But due to "the time-sensitive nature" of the claims presented, the Court decided to "allow the parties to continue litigating," including by filing summary judgment motions under current deadlines. *Id.* at 13.[8]

The Court's January 17 Order directed the parties to discuss three particular issues in their summary-judgment briefing: (1) "whether principles of issue or claim preclusion will affect" this Court's decision regarding the Civil Rights Act Materiality Provision claim "once judgment is entered in [*LWV*]"; (2) "if neither issue nor claim preclusion applies, whether this court should stay resolution of the Civil Rights Act claim pending resolution of [*LWV*] or the 2024 election, and, if so, what authority

[8] This Court also granted WEC's request to be dismissed from the case on sovereign-immunity grounds, finding that Plaintiffs had "not even attempt[ed]" to show abrogation of sovereign immunity. *Id.* at 7. The Court found that the "[i]ndividual state officials are not entitled to sovereign immunity when a plaintiff seeks prospective relief for ongoing violations of federal law." *Id.* at 8 (citing *McDonough Assocs., Inc. v. Grunloh*, 722 F.3d 1043, 1049 (7th Cir. 2013)). Thus, the Court declined to dismiss them from the case. *Id.* at 10.

supports such a stay"; and (3) "if the court were to decide the Civil Rights Act claim, how confusion can be avoided or minimized in the event that this court reaches a different conclusion than the state court in [*LWV*]." *Id.* at 15.

Finally, the 2024 election cycle in Wisconsin is fast-approaching. On April, 2, 2024, Wisconsin will hold a Presidential Preference Primary as well as a Spring General Election. *See* PFOF ¶ 32 (citing Ex. W to LeRoy Decl., *Wisconsin Elections Commission 2024 Calendar of Election Events*, WEC.[9]). Then, on August 13, 2024, Wisconsin will hold a Fall Primary. PFOF ¶ 33. Finally, on November 5, 2024, the State will hold the Fall General Election. PFOF ¶ 34.

STANDARD OF REVIEW

This Court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "Material facts" are those that "might affect the outcome of the suit," and a dispute is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. "[T]he plain language of Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "In such a situation, there can be 'no

[9] Available at https://elections.wi.gov/resources/quick-reference-topics/2023-2024-calendar-election-events.

genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.* at 322–23. The moving party is thus "entitled to a judgment as a matter of law." *Id.* at 323.

ARGUMENT

I. The Legislature Is Entitled To Summary Judgment In Its Favor On Count I Under Section 201 Of The Voting Rights Act Of 1965

Section 201 of the Voting Rights Act of 1965, codified at 52 U.S.C. § 10501, provides that "[n]o citizen shall be denied, because of his failure to comply with any test or device, the right to vote in any Federal, State, or local election conducted in any State or political subdivision of a State." 52 U.S.C. § 10501(a). As relevant here, the Voting Rights Act defines "test or device" to include "any requirement that a person as a prerequisite for voting or registration for voting . . . (4) prove his qualifications by the voucher of registered voters or members of any other class." *Id.* § 10501(b). A "test or device" may also include, "any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, [or] (3) possess good moral character." *Id.* Under the Voting Rights Act, any "test or device" of the nature described in Section 10501(b) is per se prohibited. *See Briscoe v. Bell*, 432 U.S. 404, 410 n.9 (1977) ("The Act suspends the operation of all 'tests or devices[.]'"); *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 338 n.6 (2000) (the Voting Rights Act now "bars certain types of voting tests and devices altogether").

Here, while Plaintiffs assert in Count I that the absentee-ballot witness requirement is an improper "test or device" requiring a person to, "as a prerequisite for voting," "prove his [or her] qualifications by the voucher of . . . [a] member[of a] class," and thus prohibited by Section 201 of the Voting Rights Act, Compl. ¶ 53 (quoting 52 U.S.C. § 10501(b)), that claim fails for three independently sufficient reasons (and there are no material disputes of fact). First, because Wisconsin's absentee-ballot witness requirement is not a "prerequisite for voting," that requirement does not fall within Section 10501's scope. *Infra* Part I.A. Second, Wisconsin's absentee-ballot witness requirement does not require absentee voters to "prove [their] qualifications," requiring only that the witness certify that the absentee voter followed all required procedures—a protection against, for example, one person illegally voting multiple absentee ballots on behalf of others. *Infra* Part I.B. Finally, Wisconsin's absentee-ballot witness requirement does not require an absentee voter to secure the "voucher of registered voters or members of any other class" in violation of Subsection 10501(b)(4), as a multitude of individuals may serve as a witness. *Infra* Part I.C.

A. The Absentee-Ballot Witness Requirement Is Not A Prerequisite To Voting

1. Under a plain-language reading of Section 10501, *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997), Section 10501 applies only to state laws that impose a "requirement" that must be completed "as a prerequisite" to "voting or registration for voting." 52 U.S.C. § 10501(b); *Greater Birmingham Ministries v. Sec'y of State for State of Ala.*, 992 F.3d 1299, 1335 (11th Cir. 2021). A "prerequisite" is "[s]omething

that is necessary before something else can . . . be done." Prerequisite, *Black's Law Dictionary* (11th ed. 2019). Thus, courts have interpreted Section 10501(b) as "bar[ring] a State from denying the right to vote in any federal, state, or local election because of 'any test or device,'" *Oregon v. Mitchell*, 400 U.S. 112, 144–45 (1970) (plurality opinion) (citing Section 201(b) of the Voting Rights Act, codified at Section 10501), and "prohibiting the denial of the right to vote in any election for failure to pass a [covered] test," *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2331 (2021); *accord NAACP v. New York*, 413 U.S. 345, 350–51 (1973) (discussing similar language now found in 52 U.S.C. § 10303(c) and explaining that it "prohibit[s] the use of tests or devices . . . when the effect is to deprive a citizen of his right to vote"). Notably, Section 10501's focus is on the "*right* to vote," 52 U.S.C. § 10501(b) (emphasis added), as opposed to every method of voting that a State may offer as a privilege to its citizens. Thus, Section 10501 prohibits a State from "conditioning *the right to vote*" on a voter satisfying a prohibited test or device. *Puerto Rican Org. for Pol. Action v. Kusper*, 490 F.2d 575, 579 (7th Cir. 1973) (emphasis added).

Greater Birmingham Ministries, 992 F.3d 1299, is a helpful example. There, the Eleventh Circuit held that an Alabama voter identification law did not violate Section 10501 where the law provided voters with multiple options to verify their identity and proceed to cast a vote. *Id.* at 1335–36. The challenged law provided that if an individual could not verify his identity with a photo ID at the polling place on Election Day, he could still cast a ballot by having his identity and eligibility to vote affirmed by two election officials. *Id.* at 1334–35. The Eleventh Circuit rejected the

plaintiffs' claim that the law violated Section 10501, finding that "no one in Alabama [was] 'required' to rely on the" challenged provision, as other "options" were available to individuals hoping to cast a vote. *Id.* at 1335–36. Voters could vote with a readily obtainable photo ID or, as the statute further provided, cast a provisional ballot and then obtain the required ID and present it to the clerk's office sometime after Election Day, if they did not wish to utilize the election official verification option. *Id.*

2. Wisconsin's absentee-ballot witness requirement in Section 6.87 is not a "requirement" imposed on Wisconsin voters as a "prerequisite," 52 U.S.C. § 10501(b), for exercising their "right to vote," *id.* § 10501(a). Wisconsin law makes absentee voting a "*privilege*," which is separate from the "*right*" to vote in person, Wis. Stat. § 6.84(1) (emphases added); *Teigen*, 976 N.W.2d at 543, thus Section 6.87 does not work as a "prerequisite for voting," 52 U.S.C. § 10501(b), as it does not affect "the right to vote," 52 U.S.C. § 10501(a). Voters who do not wish to comply with the absentee-ballot witness requirement to use the privilege of absentee voting may exercise their right to vote in person on Election Day. *See supra* pp.3–4 (discussing voting options). Exercising the right to vote in person is "easy in Wisconsin." *See Luft*, 963 F.3d at 672; *accord Frank*, 768 F.3d at 748. Voters may appear at the polling place any time between 7 a.m. and 8 p.m., *supra* pp.3–4, can utilize curbside voting options where available, *supra* pp. 3–4, and may request assistance and accommodations when needed, *supra* pp. 3–4. Wisconsin law also prohibits employers from penalizing employees for taking time off to vote. *Supra* pp. 3–4. So, just like voters in *Greater Birmingham Ministries*, Wisconsin voters are not

"'required' to rely on" Section 6.87's absentee-ballot witness requirement to vote. 992 F.3d at 1335–36. And because Wisconsin's absentee voting rules—including the absentee-ballot witness requirement—do not "deny[ ] the right to vote," *Oregon,* 400 U.S. at 144–45 & n.9, they do not violate Section 10501 by operating as a "prerequisite" to voting, 52 U.S.C. § 10501(b).

B. The Absentee-Ballot Witness Requirement Does Not Require Absentee Voters To Prove Their Qualifications

1. To violate Section 10501, a law must not act as a "prerequisite" to voting, *and* it must also fit within the description of "test or device" as defined by the Voting Rights Act. 52 U.S.C. § 10501(b). As noted above, Section 10501(b) describes four different types of "test[s] or device[s]," including, as relevant here, a requirement that a voter "prove his qualifications by the voucher of registered voters or members of any other class." *Id.* The plain language reading of this provision, *Robinson*, 519 U.S. at 340, is that required certifications do not violate Section 10501 if they do not require a voter to prove his voting eligibility. *See Thomas v. Andino,* 613 F. Supp. 3d 926, 961 (D.S.C. 2020); *People First of Ala. v. Merrill,* 467 F. Supp. 3d 1179, 1225 (N.D. Ala. 2020) (preliminary-injunction posture); *Howlette v. City of Richmond,* 485 F. Supp. 17, 23–24 (E.D. Va. 1978), *aff'd per curiam,* 580 F.2d 704 (4th Cir. 1978).

The district court decisions in *Merrill* and *Thomas* are instructive. In *Merrill*, the Northern District of Alabama considered an Alabama voting provision that required a witness to vouch as to the identity of the absentee voter, concluding that the requirement did not violate Section 10501(b)(4) because it did not ask the witness to vouch for the absentee voter's qualifications to vote. 467 F. Supp. 3d at 1225.

Similarly, in *Thomas*, the District Court for South Carolina considered an absentee-ballot witness law that only required the witness to "confirm that the voter complete[d] the voter's oath and sign[ed] the document." 613 F. Supp. 3d at 961. That law was not a prohibited "test or device" under Section 10501(b)(4), the court concluded, because it did not require the witness to "confirm that the voter [was] registered to vote or 'qualified' in any way." *Id.* As *Thomas* further explained, South Carolina absentee voter rules required voters to register and thus "prove [their] qualifications" to receive an absentee ballot, meaning that they proved their qualifications long before they would need to comply with the witness requirement. *Id.* "There would be no need to, and the Witness Requirement d[id] not, require the witness, who may or may not know the voter, to sign upon the witness line for purposes of verifying that the voter [was] registered or 'qualified' to vote." *Id.* at 962.

2. Wisconsin's absentee-ballot witness requirement does not require a witness to verify the absentee voter's qualifications, and, thus, does not violate Section 10501, *See Greater Birmingham Ministries,* 992 F.3d at 1335–36; *Thomas,* 613 F. Supp. 3d at 961; *Merrill,* 467 F. Supp. 3d at 1225; *Howlette,* 485 F. Supp. at 23–24.

Section 6.87 provides specific procedures that an absentee voter must follow to cast her vote, as well as the text of the voter and witness' certifications. Wis. Stat. § 6.87. These required procedures include the absentee voter showing the unmarked absentee ballot to the witness, marking the absentee ballot "in a manner that will not disclose how [his] vote is cast," and placing the completed absentee ballot in the "proper envelope." *Id.* § 6.87(4)(b)(1). The absentee voter must also herself certify

that she is a resident of the locality in which she is casting an absentee vote, that she is not going to vote "at any other location" in the relevant election, and that she is either "unable or unwilling to appear at the polling place . . . on election day" or that she has relocated to another locality "later than 28 days before" the present election. *Id.* § 6.87(2). The absentee voter must further certify that she followed these prescribed procedures in Section 6.87. *Id.* The witness then certifies that the absentee-voter indeed followed Section 6.87's required procedures. Section 6.87 instructs the witness to certify that "the above statements are true and the voting procedure was executed as there stated." *Id.*; *see supra* p.7 (reproducing absentee-ballot certifications, including the witness certification).

In this way, the witness certification provides a safeguard to "potential voter fraud" inherent in absentee voting. *See* PFOF ¶¶ 14–17 (citing Ex. A to LeRoy Decl., at 46). Specifically, the witness certifies that the absentee voter freely executed a single unmarked ballot, Wis. Stat. § 6.87(2), (4)(b)(1), as opposed to, for example, the absentee voter fraudulently completing several ballots or completing a ballot under pressure from another person, *see* PFOF ¶ 16 (citing Ex. A to LeRoy Decl., at 46). Those kinds of notorious voter-fraud issues can plague absentee voting, *see* PFOF ¶ 14–17 (citing Ex. A to LeRoy Decl., at 46), without proper safeguards like Wisconsin's absentee-ballot witness requirement, *see* Wis. Stat. § 6.87(4).

Read in context, *see State ex rel. Kalal v. Cir. Ct. for Dane Cnty.,* 681 N.W.2d 110, 124 (Wis. 2004), Section 6.87's witness certification provision requires that the witness certify only that the absentee voter completed the procedures required by

Section 6.87—that is, that the absentee voter marked a single, unmarked ballot—not that the witness must vouch for the absentee voter's qualification to vote. To begin, Section 6.87 states that the witness must certify that "the above statements are true"; it does not require the witness to certify that "*all* the above statements are true." Wis. Stat. § 6.87(2). Further, reading Section 6.87 to require the witness to verify a voter's qualifications to vote would be "absurd" and "unreasonable." *Kalal*, 681 N.W.2d at 124. A witness generally cannot even verify the voter's eligibility to vote: most witnesses would not have the resources to confirm whether the voter is properly registered, maintains a certain residence, or does not intend to vote at another locality. *See* Wis. Stat. §§ 6.30, 6.33–34, 6.55 (establishing qualifications to vote); *Kalal*, 681 N.W.2d at 124. A witness can only certify to those facts that the witness can observe; namely, that the absentee voter voted on behalf of *herself*, while showing the witness the unmarked ballot, marking the ballot, and placing it in the required envelope. *See Kalal*, 681 N.W.2d at 124. Wisconsin law leaves all verification duties to the municipal clerks and poll workers with the information and resources to confirm a voter's qualifications. Wis. Stat. §§ 6.32, 6.79(2); *see Kalal*, 681 N.W.2d at 124. Finally, there is simply no need for the witness to verify the voter's eligibility. *See Kalal*, 681 N.W.2d at 124. As in *Thomas*, 613 F. Supp. 3d at 961, a Wisconsin voter many only obtain an absentee ballot *after* he has shown his eligibility by completing the voter registration process with the clerk, Wis. Stat. §§ 6.20, 6.85, 6.86.

The Legislature's interpretation of Section 6.87(2) is also consistent with the statutory purpose of absentee ballot rules like the witness requirement, *see* Wis. Stat.

§ 6.84, which is to "deter[ ] and detect[ ] voter fraud," *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191 (2008); *accord League of Women Voters of Wis. Educ. Network, Inc. v. Walker*, 851 N.W.2d 302, 314 (Wis. 2014). As noted above, when the witness certifies that the absentee voter completed a single unmarked ballot in the presence of no one else, Wis. Stat. § 6.87(2), (4)(b)(1), the witness helps guard against the notorious types of fraud and abuse inherent in absentee voting, *see* PFOF ¶ 14–17 (citing Ex. A to LeRoy Decl., at 46). As the Carter-Baker Commission has found, "[a]bsentee ballots remain the largest source of potential voter fraud," as "[b]lank ballots mailed to the wrong address or to large residential buildings might get intercepted," or citizens who vote at places like "nursing homes," "the workplace" or "church" may be pressured to vote in a certain manner. *Id.* Wisconsin law recognizes these concerns: as the Legislature has instructed, "the privilege of voting by absentee ballot must be carefully regulated to prevent," among other risks, "overzealous solicitation of absent electors"; "undue influence on an absent elector to vote" in a particular manner; and other "similar abuses," like ballot-harvesting schemes. Wis. Stat. § 6.84(1). A witness requirement ensures that the person completing and submitting the absentee ballot is voting on his own behalf, *see* Wis. Stat. § 6.84(1); *Crawford*, 553 U.S. at 191; *Walker*, 851 N.W.2d at 314, and not, for example, completing multiple ballots or being forced to vote in a certain way by another. Thus, it makes sense to interpret the witness requirement as a means of confirming only that the absentee voter followed the statutorily prescribed procedures—not a means of confirming that the absentee voter is qualified to vote.

Finally, the statutorily mandated instructions promulgated by WEC are also in accord with this interpretation of Section 6.87(2). The instructions provide, in relevant part, that the absentee voter must: "[m]ark [the] ballot in the presence of [the] witness"; "[r]efold [the] voted ballot and place it inside of the return envelope"; "[s]eal the envelope in the presence of [the] witness"; "[f]ill out the required sections of the absentee return envelope"; and "[r]eturn [the] ballot." PFOF ¶ 26 (citing Ex. C to LeRoy Decl.). The instructions do not require the voter to produce an ID, provide the witness with his address, or share any other information or documentation that would allow the witness to confirm eligibility. *Id.*

C. The Absentee-Ballot Witness Requirement Does Not Require Voters To Prove Their Qualifications To A Member Of Any Class

Even if this Court were to interpret the absentee-ballot witness requirement as requiring a witness to verify the absentee voter's qualifications, *contra* Parts I.A–B, Section 6.87's absentee-ballot witness requirement does not violate Section 10501(b)(4) for the additional reason that Section 6.87 does not require that the verification come from a "member[ ]" of a certain "class." 52 U.S.C. § 10501(b)(4).

1. Section 10501(b)(4)'s prohibition on verification by "members of any other class" targets the "inherently discriminatory voucher" practices used in certain States, *Greater Birmingham Ministries*, 992 F.3d at 1336, which discriminatory practices provide essential historical context for interpreting the plain terms of this statute. As the court explained in *Davis v. Gallinghouse,* 246 F. Supp. 208 (E.D. La. 1965), "Congress undoubtedly meant" Subsection 10501(b)(4)'s ban to "hit at the requirement in some states that identity be proven by the voucher of two registered

voters," which, in light of the fact that "all or a large majority of the registered voters are white, minimizes the possibility" of a person of color registering. *Id.* at 217; *accord United States v. Logue*, 344 F.2d 290, 292 (5th Cir. 1965).

2. Section 6.87, which allows all "adult U.S. citizens" to witness an absentee ballot, Wis. Stat. § 6.87(4)(b)1, does not violate Section 10501(b)(4). It is not the sort of "inherently discriminatory voucher" that Section 10501(b)(4) targets. *Greater Birmingham Ministries*, 992 F.3d at 1336; *see Davis,* 246 F. Supp. at 217. Instead, Section 6.87 "allows for a myriad of competent individuals to witness the oath whether the witness themselves are registered to vote or not." *Thomas*, 613 F. Supp. 3d at 962. Congress' design in enacting Section 10501(b)(4)—targeting "inherently discriminatory voucher" practices, *Greater Birmingham Ministries*, 992 F.3d at 1336—does not prohibit a State from requiring any adult U.S. citizen to witness an absentee voter's vote. Were it otherwise, States could not use any witness requirement to further their legitimate anti-fraud concerns with absentee voting, Wis. Stat. § 6.84(1)—for example, a young child cannot grasp the meaning of the witness certification or the significance of the required attestations. Yet, Congress did not draft Section 10501(b)(4) to prevent States from employing such basic measures to ensure voters follow proper procedures. So, because Section 6.87's absentee-ballot witness requirement does not require the voucher of a witness from a particular "class," it does not violate Section 10501(b)(4).

II. The Court Should Grant Summary Judgment In Favor Of The Legislature On Count II, Under 52 U.S.C. § 10101(a)(2)(B), The Materiality Provision Of The Civil Rights Act Of 1964

The Legislature is also entitled to summary judgment on Plaintiffs' Count II, which alleges that the absentee-ballot witness requirement violates Section 10101(a)(2)(B) of the Civil Rights Act of 1964.

Section 10101(a)(2)(B), the Materiality Provision, prohibits any State from denying an individual the right to vote based on an "error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election." 52 U.S.C. § 10101(a)(2)(B). Thus, a claim for violation of Section 10101(a)(2)(B) has five elements: (1) the challenged conduct must be performed by a person who is "acting under color of law," *id.* § 10101(a)(2); (2) it must have the effect of "deny[ing]" a person "the right . . . to vote"; (3) the denial must be attributable to "an error or omission on [a] record or paper"; (4) the "record or paper" must be "relat[ed] to [an] application, registration, or other act requisite to voting"; and (5) the "error or omission" must not be "material in determining whether such individual is qualified under State law to vote in such election," *id.* § 10101(a)(2)(B).

Plaintiffs cannot satisfy three of these elements. First, the absentee-ballot witness requirement does not affect "whether [an] individual is qualified under State law to vote" and therefore falls outside Section 10101(a)(2)(B)'s scope. *Infra* Part II.A. Second, the absentee-ballot witness requirement does not, as Section 10101(a)(2)(B) requires, "deny" a person "the right . . . to vote." *Infra* Part II.B. And third, even if

the absentee-ballot witness requirement did fall within Section 10101(a)(2)(B)'s scope, which it does not, it is a "material" requirement, such that Section 6.87 is unaffected by Section 10101(a)(2)(B)'s prohibition. *Infra* Part II.C.

A. The Absentee-Ballot Witness Requirement Does Not Affect Voter-Qualification Determinations, So Section 10101(a)(2)(B) Does Not Apply

1. The scope of Section 10101(a)(2)(B) is narrow. As noted immediately above, to fall under Section 10101(a)(2)(B)'s prohibition, the relevant state law must restrict whether an individual is "qualified . . . to vote." 52 U.S.C. § 10101(a)(2)(B). The term "vote," as defined by the Civil Rights Act is broad: "Vote" encompasses a range of activities, including "all action necessary to make a vote effective," such as, among other things "casting a ballot" and "having such ballot counted." *Id.* § 10101(e). However, Section 10101(a)(2)(B) does not regulate all laws affecting "voting"—Congress added specific qualifiers, restricting Section 10101(a)(2)(B)'s reach to those laws affecting whether an individual is "qualified" to vote and prohibiting certain acts or rules "relating to any application, registration, or other act requisite to voting." *Id.* § 10101(a)(2)(B). "Qualified under State law" is defined by the Civil Rights Act as "qualified according to the laws, customs, or usages of the State." *Id.* § 10101(e). Thus, under its plain language of the Civil Rights Act, *Robinson*, 519 U.S. at 340, Section 10101(a)(2)(B) regulates laws affecting an individual's ability to qualify for and register to vote; it does not reach States' election rules and actions unrelated to voter qualification.

In *Ritter v. Migliori*, 142 S. Ct. 1824 (2022), Justice Alito joined by Justices Thomas and Gorsuch, explained that Section 10101(a)(2)(B) "applies only to errors or

omissions that are not material to the question whether a person is qualified to vote." *Id.* at 1826 (Alito, J., dissenting from the denial of a stay) (explaining why the Third Circuit's interpretation of Section 10101(a)(2)(B) was "very likely incorrect"). Technical ballot requirements, like a law requiring a mail-in ballot envelope to include a handwritten date, are unrelated to the "requirements that must be met in order to establish eligibility to vote," because "the failure to follow" rules for voting "constitutes the forfeiture of the right to vote, not the denial of that right," and the requirements for qualifying to vote are simply different from the requirements for casting a ballot. *Id.* at 1825.

Several courts interpreting Section 10101(a)(2)(B) have similarly confined the statute's reach to those laws and rules affecting individuals' ability to register to vote. *See, e.g.*, *Thrasher v. Ill. Republican Party,* No.4:12-cv-4071-SLD-JAG, 2013 WL 442832, at *3 (C.D. Ill. Feb. 5, 2013); *Friedman v. Snipes*, 345 F. Supp. 2d 1356, 1370–71 (S.D. Fla. 2004); *McKay v. Altobello,* No.CIV.A. 96-3458, 1996 WL 635987, at *1 (E.D. La. Oct. 31, 1996). For example, the Eleventh Circuit held that the Materiality Provision "was intended to address the practice of requiring unnecessary information for *voter registration* with the intent that such requirements would increase the number of errors or omissions on the application forms, thus providing an excuse to disqualify potential voters." *Schwier v. Cox*, 340 F.3d 1284, 1294 (11th Cir. 2003) (emphasis added) (citing *Condon v. Reno*, 913 F. Supp. 946, 949–50 (D.S.C. 1995)). The Eleventh Circuit then provided an example of the type of requirement that would "increase the number of errors or omission on the application forms," describing a law

that required a potential voter to "list the exact number of months and days in his age" on a registration form. *Id.* (citation omitted). The Eleventh Circuit held that a Georgia law requiring a potential voter to provide his social security number was a closer call warranting a remand to the district court to determine whether providing a social security number was "material" to whether a person is qualified to vote. *Id.* at 1297. In *Snipes*, the Southern District of Florida likewise held that Section 10101(a)(2)(B) applies only to laws affecting voter qualification, explaining "[n]othing in [its] review of the case law in [its own] jurisdiction or in other jurisdictions indicates that [Section 10101(a)(2)(B)] was intended to apply to the counting of ballots by individuals *already deemed qualified to vote*." 345 F. Supp. 2d at 1371.

This tailored scope of the Materiality Provision is also consistent with the traditional role of States in election administration under the Constitution. States have "well-established and long-held . . . powers to determine the conditions under which the right of suffrage may be exercised." *id.*, at 1370 (citation omitted). "Elections are complex affairs, demanding rules that dictate everything from the date on which voters will go to the polls to the dimensions and font of individual ballots." *Moore v. Harper*, 600 U.S. 1, 29 (2023). "States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots" in order "to reduce election- and campaign-related disorder." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (citation omitted).

Indeed, were this Court to find that Section 10101(a)(2)(B) reaches voter rules beyond those related to voter registration and qualification, that would call into

question the validity of basic state laws regulating election administration, creating significant constitutional concerns for the Materiality Provision. The U.S. Constitution provides that the administration of federal elections is a responsibility shared by the States and the federal government. U.S. Const. art. I, § 4, cl. 1. "[T]he Constitution grants to the States a broad power to prescribe the 'Times, Places and Manner of holding Elections for Senators and Representatives,'" *Tashjian v. Republican Party of Conn.,* 479 U.S. 208, 217 (1986) (emphasis added) (quoting U.S. Const. art. I, § 4, cl. 1), and "[c]asting a vote, whether by following the directions for using a voting machine or completing a paper ballot, requires compliance with certain rules," *Brnovich,* 141 S. Ct. at 2338. Allowing Section 10101(a)(2)(B) to invalidate banal laws regulating when and where elections are to occur would violate the principle that Congress does not preempt state law without a "clear and manifest purpose," *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 485 (1996), and "would upset the usual constitutional balance of federal and state powers," *Gregory v. Ashcroft,* 501 U.S. 452, 460 (1991); *see also Gomez v. United States,* 490 U.S. 858, 864 (1989) ("It is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question.").

Finally, expanding the scope of Section 10101(a)(2)(B) would also be unworkable. If Section 10101(a)(2)(B) applied to election administration, rather than just the registration process, a voter could presumably sue a State anytime she is not permitted to vote. For example, a voter who "refuses to give his or her name and

address" to poll workers on Election Day, as required by Wisconsin law, could sue the State when he is "not [ ] permitted to vote." *See* Wis. Stat. §§ 6.79(3). The same would be true for an absentee voter who refuses to sign for himself the absentee-ballot envelope (a "paper"), despite the capability to do so, once his ballot is rejected for this reason. *Id.* § 6.87(2); *see id.* § 6.87(5); *Ritter*, 142 S. Ct. at 1826 (Alito, J., dissenting from the denial of the application for stay) (addressing hypothetical of "a voter [who] did not personally sign his or her ballot but instead instructed another person to complete the ballot and sign it [for him or her]"). And the same holds for an absentee voter who delivers her ballot (a "paper") late to the polling place for same-day-absentee voting. Wis. Stat. §§ 6.87(4), (6); *Ritter*, 142 S. Ct. at 1825 (Alito, J., dissenting from the denial of the application for stay) ("A voter may go to the polling place on the wrong day or after the polls have closed."). States would face a heavy burden if any of these voters filed a Civil Rights Act challenge: to prevail in the face of a Section 10101(a)(2)(B) challenge, the State would need to show that each rejection met the precondition that the "error or omission" was "material" to determining whether the individual was qualified to vote. 52 U.S.C. § 10101(a)(2)(B). Under this sort of regime, a State would be significantly constrained in exercising its core authority to "devis[e] a set of rules under which everyone who takes reasonable steps to cast an effective ballot can do so." *Common Cause Ind. v. Lawson,* 977 F.3d 663, 665 (7th Cir. 2020).

2. Here, the absentee-ballot witness requirement does not bear on whether a voter is "qualified . . . to vote," and, therefore, Section 10101(a)(2)(B) does not apply.

Whether someone can secure a witness does not determine whether the absentee voter meets the qualifications for registration under Wisconsin law. It does not determine whether he is a U.S. citizen, is 18 years of age, or meets the applicable residency and competency requirements. Wis. Stat. §§ 6.02(1), 6.03(1); Wis. Const. art. III, § 1. Indeed, to even obtain an absentee ballot, a voter must already be registered to vote. Wis. Stat. §§ 6.86(1), 6.87(2), (4)(b)(1). Thus, the absentee-ballot witness requirement relates only "to the counting of ballots by individuals *already deemed qualified to vote*." *Snipes*, 345 F. Supp. 2d at 1371. So, because the absentee-ballot witness requirement is not implicated until after all voter-qualification determinations have been made, it falls outside Section 10101(a)(2)(B).

B. The Absentee-Ballot Witness Requirement Does Not "Deny" Absentee Voters "The Right To Vote" And Thus Does Not Meet Another Key Requirement Of Section 10101(a)(2)(B)

Section 10101(a)(2)(B) is inapplicable here for the additional reason that the Wisconsin's absentee-ballot witness requirement does not "deny [absentee voters] the right . . . to vote," 52 U.S.C. § 10101(a)(2)(B); *see Vote.Org v. Callanen,* 39 F.4th 297, 306 (5th Cir. 2022), providing an independently sufficient reason to grant summary judgment to the Legislature on Count II.

1. For Section 10101(a)(2)(B) to apply to a challenged state law, that state law act must implicate "the right . . . to vote." 52 U.S.C. § 10101(a)(2)(B). The Supreme Court has consistently held that the constitutional right to vote does *not* include the right to vote absentee, *see McDonald v. Bd. of Election Comm'rs of Chi.,* 394 U.S. 802, 807–08 (1969); *Kramer v. Union Free Sch. Dist. No. 15,* 395 U.S. 621, 626 n.6 (1969); *see also Hill v. Stone,* 421 U.S. 289, 300 n.9 (1975); *Goosby v. Osser,* 409 U.S. 512,

521–22 (1973); *Bullock v. Carter,* 405 U.S. 134, 143 (1972)—a holding applied by other federal courts of appeals, *see, e.g., Lawson,* 977 F.3d at 664; *Tex. Democratic Party v. Abbott,* 978 F.3d 168, 185 (5th Cir. 2020); *Mays v. LaRose,* 951 F.3d 775, 792 (6th Cir. 2020); *see also Org. for Black Struggle v. Ashcroft,* 978 F.3d 603, 607 (8th Cir. 2020). In line with this precedent, the Seventh Circuit held in a preliminary injunction posture that an absentee voting law was unlikely to fall within Section 10101(a)(2)(B)'s reach because "[t]he fundamental right to vote means the ability to cast a ballot, but not the right to do so in a voter's preferred manner, such as by mail." *Tully v. Okeson,* 977 F.3d 608, 613 (7th Cir. 2020); *see also Vote.org*, 39 F.4th at 306.

2. Here, the absentee-ballot witness requirement does not deny Wisconsin voters the right to vote. To begin, and as explained in detail above, absentee voting in Wisconsin is a "privilege," not a right, under state law, Wis. Stat. § 6.84; *Teigen*, 976 N.W.2d at 543; *see supra* pp.21–22, and neither the text of the Civil Rights Act nor the Constitution place absentee voting within the protected right to vote, *see* 52 U.S.C. § 10101(a)(2)(B); *McDonald*, 394 U.S. at 807–08; *Kramer*, 395 U.S. at 626 n.6; *see also Hill*, 421 U.S. at 300 n.9; *Goosby*, 409 U.S. at 521–22; *Bullock*, 405 U.S. at 143. Thus, the absentee-ballot witness requirement—which applies only to the privilege of absentee voting—does not deprive anyone in Wisconsin of "the right . . . to vote." 52 U.S.C. § 10101(a)(2)(B). Instead, all qualified voters in Wisconsin may freely exercise their right to robust, in-person voting without complying with the absentee-ballot witness requirement in any way. Wis. Stat. §§ 6.76–.78, 6.80; *see infra* Part I.A; *Vote.org*, 39 F.4th at 306. And, moreover, exercising that right to in-

person voting is easy in Wisconsin. *See Luft*, 963 F.3d at 672; *accord Frank*, 768 F.3d at 748.

Further, while not legally relevant here, it is nevertheless notable that even if a voter decides he does want to vote absentee, the absentee-ballot witness requirement is not burdensome, which also undermines Plaintiffs' arguments that the rule denies them the "right . . . to vote in any election." 52 U.S.C. § 10101(a)(2)(B). Section 6.87 provides clear, straightforward procedures for ballot execution, but if an absentee voter does make an error in following Section 6.87's instructions, the law provides him the opportunity to "cure" such mistake. Wis. Stat. § 6.87(9); *Vote.Org.*, 39 F.4th at 305–06. Specifically, clerks may return improperly completed ballots to the absentee voters, Wis. Stat. § 6.87(9), and voters have plenty of time to complete their ballots and make any necessary corrections, *see* § 7.15(1)(cm) (clerks to send absentee ballots "no later than the 47th day before each partisan primary and general election and no later than the 21st day before each other primary and election"). Further, WEC's uniform instructions recommend that voters mail back their ballots "at least one week" before Election Day. PFOF ¶ 27 (citing Ex. C to LeRoy Decl.). And, once the absentee ballots are mailed, voters can track their ballots online and monitor for any needed corrections or lost ballot issues. PFOF ¶¶ 28–31 (citing Ex. D to LeRoy Decl.). Thus, voters can "plan[ ] ahead and tak[e] advantage of the opportunities allowed by state law" to ensure their compliance with all requirements and leave time to correct any errors. *Democratic Nat'l Comm. v. Bostelmann,* 977

F.3d 639, 642 (7th Cir. 2020); *Lawson,* 977 F.3d at 665 (noting that voters "who act at the last minute assume risks"); *Vote.org*, 39 F.4th at 306.

C. If Section 10101(a)(2)(B) Applied Here, It Would Satisfy That Provision Because The Absentee-Ballot Witness Requirement Is "Material"

Finally, even if this Court were to find that the absentee-ballot witness requirement falls within Section 10101(a)(2)(B)'s scope and denies the right to vote, *but see supra* Parts II.A–B, the Legislature is entitled to summary judgment on Count II for the alternative reason that the absentee-ballot witness requirement is "material" under any reasonable interpretation of Section 10101(a)(2)(B).

1. For Section 10101(a)(2)(B) to invalidate a state law, the law must prescribe a voting requirement that 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 term "material," although left undefined by statute, means to be "[o]f such a nature that knowledge of the item would affect a person's decision-making." *Material,* Black's Law Dictionary (11th ed. 2019). To be material is to be "significant," "essential," *id.*, or "[o]f serious or substantial import," *Material*, Oxford English Dictionary Online (2023).[10] Here, a challenged law must prescribe a voting requirement that is not "significant" or of "substantial import" "to a determination whether an individual may vote under Wisconsin law." *Common Cause v. Thomsen*, 574 F. Supp. 3d 634, 640 (W.D. Wis. 2021). And, as this Court explained in *Common*

[10] Available at https://www.oed.com/dictionary/material_adj?tab=meaning_and_use#37801431 (last visited Feb. 16, 2024) (subscription required).

Cause, the phrase "qualified under State law" may refer to all state laws that bear on the ability of an individual to cast a vote, not just those "substantive qualifications" such as a voters age, citizenship, and residency. *Id.* at 639–40. So, in *Common Cause*, this Court considered a challenge to Wisconsin's voter identification law requiring that an ID show certain types of information and found that required information on an ID was "material to a determination whether an individual may vote under Wisconsin law." *Id.* at 640. Similarly, the Fifth Circuit found that Texas' wet signature requirement was a "material requirement" and part of an individual's qualifications to vote. *Vote.Org v. Callanen*, 89 F.4th 459, 489 (5th Cir. 2023).

Further, the purpose of Section 10101(a)(2)(B), as explained by its proponents, is to ensure "the qualifications established by the State [are] applied with an even hand and nondiscriminatory." 110 Cong. Rec. 1695 (1964). The idea is that when a State enacts its rules governing how and whether individuals may cast a vote, those rules should not deny the ability to vote based on arbitrary or discriminatory factors like "race, color, previous condition of servitude, or sex." *Id.* at 1696. The rules must play a "significant," "serious," or "substantial" role in the voting process. *Material,* Black's Law Dictionary; *Material,* Oxford English Dictionary Online, *supra.*

2. If the Court were to (mis)interpret Section 10101(a)(2)(B) as covering absentee-voting rules like the absentee-ballot witness requirement, *but see supra* Parts II.A, B,[11] the Legislature would still be entitled to summary judgment because

[11] As explained above, *supra* p.25, absentee voters have to prove their qualifications to vote through the voter registration process before they may receive an absentee ballot and then comply with the absentee-ballot witness requirement. Section 6.87 only impacts "the

the absentee-ballot witness requirement plays a material—*i.e.*, "significant," "serious," and "substantial," *Material,* Black's Law Dictionary; *Material,* Oxford English Dictionary Online, *supra*—role in the absentee-voting process. Under Wisconsin law, "[t]he statutory requirements governing absentee voting must be completely satisfied or ballots may not be counted." *Teigen*, 976 N.W.2d at 539 (citing Wis. Stat. § 6.84(2)). If Section 10101(a)(2)(B) applies to these provisions, then they too are "material to a determination whether an individual may vote under Wisconsin law," no less than other voter-qualification requirements. *Common Cause*, 574 F. Supp. 3d at 640. Here, an absentee voter may not vote without a witness under Wisconsin law, *Teigen,* 976 N.W.2d at 539 (citing Wis. Stat. § 6.84(2)), just as Wisconsinites may not vote without proper identification, *Common Cause*, 574 F. Supp. 3d at 639–40, or just as Texas voters may not vote without a wet signature on their applications, *Vote.org*, 89 F.4th at 489.

Further, the absentee-ballot witness requirement is not a discriminatory or arbitrary requirement like those Congress meant to prohibit. *See* 110 Cong. Rec. 1695 (1964). It plays an essential role in "prevent[ing] the potential for fraud [and] abuse," while still affording voters the "privilege of voting by absentee ballot." Wis. Stat. § 6.84(1); *accord Lee,* 623 N.W.2d at 579; *Brnovich,* 141 S. Ct. at 2348; *Eu v. S.F. Cnty. Democratic Cent. Comm.,* 489 U.S. 214, 231 (1989). By requiring voters to cast

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counting of ballots by individuals *already deemed qualified to vote*," *Snipes*, 345 F. Supp. 2d at 1371. The absentee-ballot witness requirement, therefore, does not determine *whether* a citizen is allowed to vote. Instead, it protects the voting process by ensuring that an absentee voter completes his own ballot.

their absentee ballots in the presence of a witness, Wisconsin protects its important interest in "deterring and detecting voter fraud," *Crawford*, 553 U.S. at 191, including the varieties of voter fraud inherent in absentee voting such as "overzealous solicitation of absent electors" and "undue influence" on absentee voters, Wis. Stat. § 6.84(1). For example, an individual may be less willing to execute illegally another's absentee ballot or multiple ballots, *see* PFOF ¶ 16 (citing Ex. A to LeRoy Decl., at 46), if the individual must cast those illicitly obtained ballots in front of a witness, who election officials may contact to verify that the absentee-ballot procedures were observed. The procedure-verification role of the witness also furthers Wisconsin's anti-voter fraud objective by ensuring that the ballot process is completed in the statutorily prescribed manner.

To the extent there is any ambiguity in the meaning of "material," this Court should adopt the Legislature's understanding of the statute due to constitutional concerns: if Section 10101(a)(2)(B) is read to prohibit basic election laws like the absentee-ballot witness requirement, the Civil Rights Act would effectively revoke constitutionally established state authority to enact and enforce election laws. The "Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections." *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 217 (2009) (citation omitted). In particular, the Constitution "reserves to the States the power to set voter qualifications in state and local elections, except to the limited extent that the people through constitutional amendments have specifically narrowed the powers of the States," *Oregon,* 400 U.S.

at 125 (plurality opinion), and thereby established "state control over the election process for state offices," *Tashjian,* 479 U.S. at 217.

If the Materiality Provision is interpreted to prevent States from applying basic election-integrity laws relating to absentee voting, the Materiality Provision would be unconstitutional, or at least constitutionally suspect, as a grave congressional intrusion into state authority to administer state and local elections. *Holder,* 557 U.S. at 217; *Oregon,* 400 U.S. at 125 (plurality opinion); *Tashjian,* 479 U.S. at 217. This Court should approach any such interpretation with great caution under the constitutional-avoidance canon. *See Gray-Bey v. United States,* 201 F.3d 866, 869 (7th Cir. 2000) ("[C]ourts must if they can interpret statutes to avoid constitutional problems."); *Gomez,* 490 U.S. at 864. Finally, preventing courts from enjoining election safeguards also "promotes confidence in our electoral system—assuring voters that all will play by the same, legislatively enacted rules." *New Ga. Project v. Raffensperger,* 976 F.3d 1278, 1284 (11th Cir. 2020).

III. Alternatively, This Court Should Continue To Stay Its Resolution Of Plaintiffs' Claims, Pending The Wisconsin Appellate Courts' Resolution Of *Priorities USA* And *League Of Women Voters*

A. Courts maintain inherent authority to stay the cases before them. *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936) ("[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the cases on its docket with economy of time and effort for itself, for counsel, and for litigants."). Their discretion in this area is broad, *Clinton v. Jones*, 520 U.S. 681, 706 (1997), and includes the authority "to stay proceedings pending the resolution of other suits," *Grice Eng'g, Inc. v. JG Innovations, Inc.*, 691 F. Supp. 2d 915, 920 (W.D. Wis. 2010).

In determining whether a stay is appropriate, courts generally balance: "(1) whether the litigation is at an early stage, (2) whether a stay will unduly prejudice or tactically disadvantage the non-moving party; (3) whether a stay will simplify the issues in question and streamline the trial; and (4) whether a stay will reduce the burden of litigation on the parties and on the court." *Id.* at 920 (citation omitted); *see also, e.g.*, *Waterstone Mortg. Corp. v. Offit Kurman, LLC*, No.17-cv-796-jdp, 2019 WL 367642, at *1 (W.D. Wis. Jan 30, 2019).

B. This Court should exercise its authority to stay this case pending the Wisconsin appellate courts' resolution of *Priorities USA*, 2024AP164, and *LWV*, 2024AP166.

Before filing the Complaint here, Plaintiffs' counsel filed *Priorities USA* in Wisconsin Circuit Court, challenging the absentee-ballot witness requirement among other Wisconsin absentee voting laws under the Wisconsin Constitution. PFOF ¶ 36 (citing Ex. E to LeRoy Decl., Dkt.2, *Priorities USA* (July 20, 2023)). The Circuit Court recently granted a motion to dismiss in those proceedings, finding that facial constitutional challenges to the absentee-ballot witness requirement failed to state a claim for relief and entered final judgment in the case. PFOF ¶ 38 (citing Ex. G to LeRoy Decl., Dkt.100, *Priorities USA* (Jan. 24, 2024)); PFOF ¶ 39 (citing Ex. H to LeRoy Decl., Dkt.103, *Priorities USA* (Jan. 29, 2024)). The *Priorities USA* plaintiffs appealed this case to the Wisconsin Court of Appeals, PFOF ¶ 40, and then petitioned the Wisconsin Supreme Court to bypass the Court of Appeals in light of the approaching November 2024 General Election. PFOF ¶ 41.

In *LWV*, plaintiffs argued that denial of the right to vote due to "omission of certain witness address components would violate" Section 10101(a)(2)(B) of the Civil Rights Act, specifically challenging "the prohibition on denying a vote based on an immaterial omission or error." PFOF ¶ 42 (citing Ex. J to LeRoy Decl., Dkt.94 ¶ 12, *LWV* (Dec. 23, 2022)). The Dane County Circuit Court entered summary judgment in plaintiffs' favor, finding that the Materiality Provision applies to the witness address requirement and that the witness' address is not "material to whether a voter is qualified," PFOF ¶ 45 (citing Ex. L to LeRoy Decl., Dkt.157 at 5, *LWV* (Jan. 2, 2024)). Following that decision, the Dane County Circuit Court entered final judgment and issued an injunction enjoining application of the witness address requirement as to four different categories of ballots, PFOF ¶ 46 (citing Ex. M to LeRoy Decl., Dkt.161, *LWV* (Jan. 30, 2024)), which the Legislature has appealed to the Wisconsin Court of Appeals, where merits briefing has not yet commenced, PFOF ¶¶ 47–49.

A stay is appropriate in this case as *Priorities USA* and *LWV* proceed through the state appellate courts of Wisconsin.

To begin, resolution of both *Priorities USA* and *LWV* in the appellate courts could simplify the issues here and thereby significantly reduce the burden of this litigation. *Grice*, 691 F. Supp. 2d at 920. In *Priorities USA*, if the Wisconsin Court of Appeals or the Wisconsin Supreme Court concludes that the absentee-ballot witness requirement violates the Wisconsin Constitution, that decision would moot Plaintiffs' claims in this case entirely. *Id.* As for *LWV*, the Wisconsin appellate courts

will decide whether Section 6.87 may apply to exclude certain categories of absentee ballots with witness address errors, Ex. M to LeRoy Decl., Dkt.161, *LWV* (Jan. 30, 2024), which could influence whether, as Plaintiffs assert as part of their Materiality Provision claim, absentee-ballot witness requirement "substantially increases absentee voters' risk of ballot rejection," Dkt.1 ¶ 61. And a decision by the Wisconsin appellate courts in *Rise*—the companion to *LWV*, where the courts are considering the correct interpretation of the term "address"—could similarly influence this Court's adjudication of Plaintiffs' Materiality Provision claim. Ex. Q to LeRoy Decl., Dkt.233, *Rise* (Jan. 2, 2024). Finally, the Wisconsin appellate courts' interpretation of the Materiality Provision could serve as persuasive authority for this Court, especially because it would arise in the context of Wisconsin's absentee-voting regime. And if the Supreme Court ultimately reviews *LWV*, its interpretation of the Materiality Provision would serve as binding authority for this Court.

Next, this case remains at a sufficiently early stage that a stay is still appropriate. *Grice*, 691 F. Supp. 2d at 920. This case was still only filed a few months ago, and the Court has not yet resolved any of the parties' claims on the merits, meaning that the benefits of a stay still apply. *Id.* Indeed, this Court has recognized the benefits of a stay in its order on the Legislature's Motion To Dismiss. Dkt.56. This Court found that a stay "could resolve or simplify plaintiffs' claims," holding that it would stay resolution if their Voting Rights Act claim pending resolution of *Priorities USA*. *Id.* at 13. This Court further concluded that "[t]he decision in *League of Women Voters* potentially complicates the decision in this case." *Id.* at 14. And

there is "significant overlap in the arguments raised by the parties" in this case and *LWV*, and that "the state court's interpretation of the Materiality Rule has implications beyond the issue of the witness's address." *Id.* at 14–15.

Finally, a stay will not prejudice any of the parties to these proceedings. *Grice*, 691 F. Supp. 2d at 920. Again, and notably, if the *Priorities USA* plaintiffs, represented by Plaintiffs' counsel herein, were to prevail on their appeal and the Wisconsin appellate courts invalidated the absentee-ballot witness requirement as a matter of state law, no further relief could be necessary from this Court.

C. Finally, this Court ordered the parties to address three questions related to Plaintiffs' Civil Rights Act Materiality Provision claim and the pending *LWV* litigation. *Id.* at 15. The Legislature provides its answers here.

First, the Court asked "whether principles of issue or claim preclusion will affect" this Court's decision regarding the Civil Rights Act Materiality Provision claim "once judgment is entered in [*LWV*]." Dkt.56 at 15. The Legislature respectfully submits that neither claim preclusion nor issue preclusion under Wisconsin law would apply here once the Wisconsin appellate courts enter a ruling on appeal in *LWV*. *See generally Savory v. Cannon*, 947 F.3d 409, 413 (7th Cir. 2020) (explaining that "[f]ederal courts apply the preclusion law of the state where the judgment was rendered, so long as the state in question satisfies the applicable requirements of the Due Process clause"). Rather, as argued above, the Legislature submits that resolution of *LWV* (and, in addition, *Priorities USA*) could simplify the

issues here, justifying this Court staying resolution of this case pending the resolution of *LWV* (and *Priorities USA*).

Neither claim preclusion nor issue preclusion would apply here once the Wisconsin appellate courts finally resolve *LWV*.

As for claim preclusion, it "has three requirements" in Wisconsin: "(1) identity between the parties or their privies in the prior and present suits; (2) prior litigation resulted in a final judgment on the merits by a court with jurisdiction; and (3) identity of the causes of action in the two suits." *Clarke v. Wis. Elections Comm'n*, 998 N.W.2d 370, 393 (Wis. 2023) (citation omitted). Here, at minimum, a judgment in *LWV* would not have claim-preclusive effect in this case because the identity-of-parties requirement is not satisfied by the parties in *LWV* and the parties in this case.

Moving to issue preclusion, it applies "when a factual or legal issue was actually litigated and determined in the prior proceeding by a valid judgment in a previous action and the determination was essential to the judgment," so long as giving an issue-preclusive effect "would be fundamentally fair." *Id.* at 391–92 (citation omitted). Among other things, the fundamental-fairness requirement limits the application of issue preclusion to the parties in the prior action or those with "a sufficient identity of interest with any of the [ ] parties." *Id.* at 392 n.23 (citation omitted). Further, where the State is involved in a prior action, "nonmutual offensive collateral estoppel simply does not apply" against the State in the subsequent action. *United States v. Mendoza*, 464 U.S. 154, 162 (1984); *see generally Michelle T. by Sumpter v. Crozier*, 495 N.W.2d 327, 331 (1993) ("The development of the doctrine of

collateral estoppel in Wisconsin was similar to that in the federal courts."). Here, a judgment in *LWV* would not have issue-preclusive effect in this case because, again, and at a minimum, the parties in *LWV* are not the same parties here and do not share an identity of interests. *Clarke*, 998 N.W.2d at 391–92 & n.23. Further, the *LWV* judgment would not allow for nonmutual offensive collateral estoppel against Defendants here, in particular, given that this doctrine "simply does not apply" against the State. *Mendoza*, 464 U.S. at 162; *see generally Michelle T.*, 495 N.W.2d at 331.

Instead of *LWV* having a *preclusive* effect on the litigation here, the Legislature has argued that *LWV* could *simplify* the issues in this case, justifying this Court staying its adjudication of Plaintiffs' claims pending resolution of *LWV* (and, in addition, *Priorities USA*), as explained above. Again, in *LWV*, the Dane County Circuit Court held that rejecting absentee ballots with witness-address errors falling into four specific categories violates the Materiality Provision. *Supra* pp.10–11. If the Wisconsin appellate courts affirm the Circuit Court's judgment, that could influence how this Court resolves Plaintiffs' claim that the absentee-ballot witness requirement "substantially increases absentee voters' risk of ballot rejection." Dkt.1 ¶ 61. Further, the Wisconsin appellate courts' interpretation of the Materiality Provision in the context of Wisconsin's absentee-voting regime in *LWV* (and/or the companion *Rise* case) could serve as persuasive authority for this Court—and, if the Supreme Court ultimately reviews *LWV*, its interpretation of this federal law would

be binding on this court. *Supra* p.45. Those outcomes too would simply the issues in this case, justifying a stay. *Supra* pp.44–45.

Second, the Court asked "if neither issue nor claim preclusion applies, whether this court should stay resolution of the Civil Rights Act claim pending resolution of [*LWV*] or the 2024 election, and, if so, what authority supports such a stay." Dkt.56 at 15. As the Legislature explained above, *supra* Part III.A–B, this Court should stay resolution of this case until resolution of *LWV*, as well as *Priorities USA*, under its inherent stay authority, *Landis*, 299 U.S. at 254; *Clinton*, 520 U.S. at 706; *Grice*, 691 F. Supp. 2d at 920. With respect to the 2024 election cycle, this Court should, at a minimum, stay any injunctive relief provided to Plaintiffs through the Spring and Presidential Preference Election on April 2, 2024. *See* PFOF ¶ 32 (citing Ex. W to LeRoy Decl.).

As explained in detailed above, *supra* pp.43–46, the Court should stay this case pending resolution of *LWV*, as well as *Priorities USA*. Even if the Wisconsin appellate courts' decisions in these cases are not preclusive, they may still be beneficial to this Court as it determines the validity of Wisconsin state law under the federal Voting Rights Act and Civil Rights Act. Further, this Court has already recognized the potential benefits to be gained by waiting until these cases are resolved. Dkt.56 at 13–15.

Next, if this Court decides to proceed to a decision in this case and grants Plaintiffs' requested injunctive relief against the absentee-ballot witness requirement, this Court should stay that injunction through Wisconsin's Fall

Election.[12] The Supreme Court has "repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election," *Republican Nat'l Comm. v. Democratic Na'tl Comm.*, 140 S. Ct. 1205, 1207 (2020) (collecting cases), and "[c]ourt orders affecting elections, especially conflicting orders," which are possible here, "can themselves result in voter confusion and consequent incentive to remain away from the polls," *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006) (per curiam). "In view of the impending election, the necessity for clear guidance to the State of [Wisconsin]," *id.* at 5, weighs heavily in favor of staying any injunction through the April 2, 2024 Primary, which is less than seven weeks away, *see supra* p.17. And while there is more time before the Fall Election on November 5, 2024, *see supra* p.17, a stay of any injunction order from this Court should nevertheless continue through that election to ensure its orderly operation and avoid needless confusion, *Purcell*, 549 U.S. at 4–5. Indeed, Wisconsin created the current no-excuses-needed, one-witness-only regime in 2000, *supra* p.4 (citing 1999 Wis. Act 182, §§ 90m, 95p), thus there would be no exigency to enjoin the operation of the absentee-ballot witness requirement prior to the November 5, 2024 Fall General Election, while the Legislature pursued any appeal of this Court's order before the Seventh Circuit and the Supreme Court, if necessary.

[12] If the Court does not *sua sponte* stay any order enjoining Wisconsin's absentee-ballot witness requirement, the Legislature reserves its right to file a fulsome stay-pending-appeal motion as needed, presenting full, complete arguments on all the factors the Court must consider in addressing motions for stay pending appeal. *See Nken v. Holder*, 556 U.S. 418, 426 (2009).

Third, this Court asked, "if the court were to decide the Civil Rights Act claim, how confusion can be avoided or minimized in the event that this court reaches a different conclusion than the state court in [*LWV*]." Dkt.56 at 15. If this Court determines that the absentee-ballot witness requirement does *not* violate the Materiality Provision, but the appellate courts in *LWV* affirm the Dane County Circuit Court's decision that the absentee-ballot witness-address requirement violates the Materiality Provision as applied to the four enumerated categories of absentee ballots, PFOF ¶ 46 (citing Ex. M to LeRoy Decl., Dkt.161, *LWV* (Jan. 30, 2024)), there should be limited confusion: WEC and its officials would continue to be bound by the *LWV* judgment, but would not have conflicting obligations from a judgment from this Court. If, however, this Court declares that the absentee-ballot witness requirement does violate the Materiality Provision, that would result in substantial confusion and election-administrability issues, as explained above, given the impending 2024 election cycle. *Purcell*, 549 U.S. at 4–5; *supra* pp.50–51. And those confusion and administrability concerns would result from this Court enjoining the absentee-ballot witness requirement regardless of the appellate courts' decisions in *LWV*. So, to reduce that confusion and alleviate election-administrability concerns, this Court should stay any such injunction through the November 5, 2024 General Election. *Purcell*, 549 U.S. at 4–5.

CONCLUSION

This Court should grant the Legislature's Motion For Summary Judgment. Alternatively, this Court should continue to stay its adjudication of this case.

Dated: February 16, 2024.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2024, a true and accurate copy of the foregoing was served via the Court's CM/ECF system upon all counsel of record.

/s/ Misha Tseytlin
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