IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

SUSAN LIEBERT; ANNA HAAS; ANNA POI; and ANASTASIA FERIN KNIGHT, Plaintiffs, v. WISCONSIN ELECTIONS COMMISSION, *et al.*, Defendants, WISCONSIN STATE LEGISLATURE, Intervenor-Defendant.	Civil Action No. 3:23-cv-00672-JDP

MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The franchise is a fragile inheritance, a foundational right that is vulnerable to malicious attack and to well-meaning overregulation, to sudden dissolution and to gradual erosion. Recognizing these dangers, Congress has enacted extensive prophylactic legislation, including the landmark Civil Rights Act of 1964 ("CRA") and the subsequent Voting Rights Act of 1965 ("VRA"). These two laws endure today—the VRA further strengthened by amendment—and they continue to liberate voters from all manner of impediments imposed on the casting and counting of ballots. *See Allen v. State Bd. of Elections*, 393 US. 544, 565 (1969) (recognizing VRA "was aimed at the subtle, as well as the obvious," discriminatory state voting regulations).

By requiring absentee voters to procure a witness's certification, Wisconsin law necessarily conflicts with these federal protections. Like a baserunner caught in a pickle, in one direction Wisconsin's witness requirement runs right into a VRA violation, while the only alternative interpretation of the state law dead ends in a CRA violation. The VRA violation is unavoidable from the witness requirement's plain text: on the absentee ballot envelope, directly below the voter's affirmation of their own voting qualifications and compliance with voting procedures, the witness must certify "that the above statements are true"—which necessarily includes statements about qualifications—"and the voting procedure was executed as there stated." Wis. Stat. § 6.87(2). The VRA's Vouching Rule, however, *prohibits* such a requirement that a voter "prove his qualifications by the voucher" of a witness. 52 U.S.C. § 10501(b).

The only way to avoid finding a Voucher Rule violation is to blue pencil the witness certification to attest merely that "*one of* the above statements is true *because* the voting procedure was executed as there stated." If, contrary to the witness requirement's enacted text, the witness does not certify the voter's statements about qualifications, then the witness requirement is not a voucher of qualifications prohibited by the VRA. But that would also mean the certification

necessarily is not *material* to qualifications, and the witness requirement thereby violates the CRA's Materiality Provision. *See* 52 U.S.C. § 10101(2) (prohibiting election officials from refusing to count a ballot merely because a voting-related paper suffers an error or omission that is not material to determining voter qualifications).

Thus, Wisconsin's witness requirement burdens eligible voters in a manner that, one way or another, is proscribed by federal law's robust voter protections. Plaintiffs—four Wisconsin voters who intend to invoke their state and federal rights to vote absentee in upcoming elections—move for summary judgment and a permanent injunction. Their claims present purely legal questions about the proper construction of state and federal statutes. And because recent state court challenges to the witness requirement are unlikely to further illuminate any of the issues presented in this case, there is no reason for this Court to stay its resolution of this motion. In fact, the judgment in *League of Women Voters of Wisconsin v. Wisconsin Elections Commission*, No. 22-CV-2472 (Cir. Ct. Dane Cnty. Jan. 2, 2024), should facilitate an expeditious ruling in this matter because members of the Wisconsin Election Commission and the Legislature—defendants both here and there—are precluded from relitigating three of the four elements of Plaintiffs' Materiality Provision claim. Once this motion is ripe, the Court should grant judgment to Plaintiffs.

BACKGROUND

I. Absentee Voting and the Absentee Ballot Witness Requirement

Any qualified, registered voter in Wisconsin may request an absentee ballot if he or she is "for any reason . . . unable or unwilling to appear at the polling place in his or her ward or election district." Wis. Stat. § 6.85(1). Wisconsin law requires an absentee voter to complete the ballot in the presence of a witness. *Id.* § 6.87(2), (4)(b)1. The witness must be a U.S. citizen and 18 years of age or older. *Id.* § 6.87(4)(b)1. However, where the voter is (i) a military elector or (ii) an

overseas elector who lacks a current U.S. domicile, the witness need not be a U.S. citizen, but still must be 18 years of age or older. *Id.*; *see* Wis. Stat. § 6.24(1).

An absentee voter completes the absentee ballot as follows: The voter (i) exhibits the ballot unmarked to the witness; (ii) marks the ballot and encloses and seals it in the ballot envelope in the presence of the witness but no other person; and (iii) executes the voter attestation on the ballot certificate (which is printed on the reverse side of the ballot envelope). *See id.* § 6.87(2), (4)(b)1. The voter's attestation provides:

> I, ..., certify subject to the penalties of s. 12.60(1)(b), Wis. Stats., for false statements, that I am a resident of the [.... ward of the] (town) (village) of ...., or of the .... aldermanic district in the city of ...., residing at ....* in said city, the county of ...., state of Wisconsin, and am entitled to vote in the (ward) (election district) at the election to be held on ....; that I am not voting at any other location in this election; that I am unable or unwilling to appear at the polling place in the (ward) (election district) on election day or have changed my residence within the state from one ward or election district to another later than 28 days before the election. I certify that I exhibited the enclosed ballot unmarked to the witness, that I then in (his) (her) presence and in the presence of no other person marked the ballot and enclosed and sealed the same in this envelope in such a manner that no one but myself and any person rendering assistance under s. 6.87(5), Wis. Stats., if I requested assistance, could know how I voted.

Id. § 6.87(2) (alterations in original). After the voter seals the ballot in the envelope and executes the voter attestation, the witness must execute the witness attestation, which provides:

> I, the undersigned witness, subject to the penalties of s. 12.60(1)(b), Wis. Stats., for false statements, certify that I am an adult U.S. citizen and that the above statements are true and the voting procedure was executed as there 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.

Id.

"If a municipal clerk receives an absentee ballot with an improperly completed certificate or with no certificate, the clerk may return the ballot to the elector, inside the sealed envelope when an envelope is received, together with a new envelope if necessary, whenever time permits the

elector to correct the defect and return the ballot within the period authorized under sub. (6)." *Id.* § 6.87(9). If an absentee ballot certification, including the certification from the witness, is "insufficient" at the time that absentee ballots are counted, the absent ballot "shall not [be] count[ed]." *Id.* § 6.88(3)(b).

II. Parties

Plaintiffs Susan Liebert, Anna Haas, Anna Poi, and Anastasia Ferin Knight filed their complaint on October 2, 2023, bringing alternative claims against the witness requirement under the Vouching Rule and Materiality Provision. *See* ECF No. 1. Plaintiffs are qualified Wisconsin voters who rely on absentee voting but are burdened by the absentee ballot witness requirement. *See* Proposed Findings of Fact ("PFOF") ¶¶ 13–40.

Plaintiff Liebert, a Janesville absentee voter, is a senior citizen with significant health problems and disabilities that largely confine her to her home. *Id.* ¶¶ 13–14, 17. Liebert's age, disabilities, health concerns, and confinement make it difficult for her to procure the assistance of an absentee ballot witness—she generally must arrange for someone to visit her at her home to serve as the witness. *Id.* ¶ 18. The COVID-19 pandemic compounded Liebert's health concerns about inviting others into her home and so she has primarily relied on her son to serve as witness. *Id*. ¶ 19. But Liebert's son now resides in Waukesha County, an hour-plus drive from Janesville, which makes it even more difficult to enlist him as a witness for her absentee ballot. *Id.* ¶ 20. Liebert plans to vote absentee in all future elections, including the November 2024 election. *Id.* ¶ 16.

Plaintiff Haas is a Brookfield voter whose work entails long-term travel outside the state, requiring her to vote by absentee ballot when such travel overlaps with an election. *Id.* ¶¶ 21, 24. Haas is also engaged to be married to a noncitizen and must vote by absentee ballot whenever her trips overseas to visit his family overlaps with an election. *Id.* ¶ 25. Though he is often the most

convenient witness available to her, Haas's fiancé is not eligible to serve as her absentee ballot witness because he is not a citizen. *Id.* ¶ 27. And when Haas travels outside the United States to visit her fiancé's family, she does not have reliable access to any adult U.S. citizen to serve as her absentee ballot witness. *Id.* ¶ 28. In 2024, Haas plans to travel overseas in April and again in the fall, and expects that her fall travel will make it necessary for her to vote by absentee ballot in the November general election. *Id.* ¶¶ 23, 26. But Haas will have difficulty identifying a U.S. citizen to serve as her witness while traveling. *See id.* ¶¶ 25–28.

Plaintiff Poi, a Madison voter, is an undergraduate student at the University of Minnesota-Twin Cities. *Id.* ¶¶ 29–30. Because Wisconsin requires that a voter produce the original absentee ballot witness to cure a defective absentee ballot certificate, Poi generally prefers to have another Wisconsin voter witness her ballot. *Id.* ¶ 32. Using a Wisconsin voter as her witness ensures that Poi will be able to locate and rely on the witness if it becomes necessary to cure the certificate, and minimizes the risk that her ballot will be rejected. *Id.* ¶ 33. But coordinating a meeting with another Wisconsin voter in order to fill out an absentee ballot imposes a significant logistical burden on Poi. *Id.* ¶ 34. Poi plans to vote by absentee ballot in all 2024 elections. *Id.* ¶¶ 31, 35.

Plaintiff Knight, also a Madison voter, is a graduate student at the School of the Art Institute of Chicago. *Id.* ¶¶ 36–37. Because Knight lives alone, she must identify a citizen willing to serve as a witness and coordinate a meeting at a location where she can fill out her ballot in the witness's presence. *Id.* ¶ 39. Knight currently lives out of state and she plans to vote absentee in the upcoming 2024 elections. *Id.* ¶ 38.

The Wisconsin Elections Commission, through its commissioners and administrator (the "Commission Defendants"), is the governmental body that administers, implements, and enforces Wisconsin's laws "relating to elections and election campaigns, other than laws relating to

campaign financing." Wis. Stat. § 5.05(1); *see also* Wis. Stat. § 5.05(1e) (requiring any action taken by the Commission, except an action relating to internal procedure, to obtain the affirmative vote of at least two-thirds of the commissioners); *id.* § 5.05(2m) (prescribing duties of administrator); *id.* § 5.05(3d) (similar). Commission Defendants prescribe uniform instructions for absentee electors, *id.* § 6.869, and a uniform absentee ballot certificate, which doubles as the ballot return envelope for absentee-by-mail voters, *id.* § 7.08(1)(a). Commission Defendants also prepare and publish the Wisconsin Election Administration Manual and Election Day Manual, *id.* § 7.08(3); PFOF ¶¶ 3–6, and they hear and decide complaints against election officials related to the administration of elections, Wis. Stat. § 5.05(2m).

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 (collectively, "Clerk Defendants"), are charged by law with administering or enforcing various Wisconsin elections procedures, including the statutorily prescribed absentee voting procedures. *See* Wis. Stat. § 6.87; PFOF ¶¶ 8–12.

The Wisconsin Legislature has also intervened as a Defendant. *See* ECF No. 47.

III. Procedural History

On January 17, 2024, this Court issued an Opinion and Order granting in part and denying in part the Commission Defendants' and Legislature's respective motions to dismiss. *See* ECF No. 56. The Court dismissed the Commission—but not its commissioners or administrator—on sovereign-immunity grounds and denied the motions as to the remaining defendants. ECF No. 56 at 7–10. The Court also rejected the Legislature's abstention arguments, but nonetheless concluded that "a partial stay is appropriate on both of plaintiffs' claims." *Id.* at 11–12. The Court identified two pending state court actions—*Priorities USA v. Wisconsin Elections Commission*, No. 23-CV-

1900 (Cir. Ct. Dane Cnty.) (state constitutional challenge to various Wisconsin election rules, including the witness requirement), and *League of Women Voters of Wisconsin v. Wisconsin Elections Commission*, No. 22-CV-2472 (Cir. Ct. Dane Cnty.) (Materiality Provision challenge to requirement that absentee ballot witnesses include their address in their attestation)—and suggested that these cases could illuminate (or complicate) issues in this case. ECF No. 56 at 10–15. Accordingly, the Court indicated that it was inclined to stay any merits decision and invited further briefing on *Priorities* and *League*'s implications here. *Id.* at 15.

The parties conducted very abbreviated discovery—no Defendant served any request on any Plaintiff—reflecting the strictly legal disputes at issue here.

LEGAL STANDARD

"Summary judgment is appropriate when, after both parties have the opportunity to submit evidence in support of their respective positions and the Court has reviewed such evidence in the light most favorable to the nonmovant, there remains no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Springs Window Fashions LP v. Novo Indus. LP*, 249 F. Supp. 2d 1111, 1112 (W.D. Wis. 2002) (citing Fed. R. Civ. P. 56). "Disputes over unnecessary or irrelevant facts will not preclude summary judgment. *Id.* "Under Rule 56(e) it is the obligation of the nonmoving party to set forth specific facts showing that there is a genuine issue for trial." *Id.*

ARGUMENT

I. The witness requirement violates the Voting Rights Act's Vouching Rule.

The Vouching Rule, enacted as Section 201 of the Voting Rights Act, squarely prohibits voting restrictions like Wisconsin's witness requirement. Section 201 provides that:

> (a) No 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.

> (b) As used in this section, the term 'test or device' means 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.***

52 U.S.C. § 10501 (emphasis added). Because the witness requirement is (i) a requirement that a person as a prerequisite for voting (ii) prove qualifications by voucher (iii) of a member of a class, it is a test or device prohibited by the Vouching Rule.

A. The witness requirement is a "prerequisite" to voting.

This element is easily satisfied because, under Wisconsin law, an absentee voter must comply with the witness requirement for the absentee ballot to be counted. Wis. Stat. § 6.88(3)(b). By statute, the officials who process and count absentee ballots may not count an absentee ballot if its certificate is found "insufficient," *id.*, and a certificate that does not reflect full compliance with the witness requirement is by law insufficient, *see id.* § 6.87(2), (4)(b)1., (6d); *cf. id.* § 6.84(2). The witness requirement is thus a prerequisite to voting for purposes of Section 201's Vouching Rule.

The Legislature argued in its motion to dismiss papers that no restriction on absentee voting could *ever* qualify as "a prerequisite for voting" because Wisconsin also permits in-person voting. ECF No. 49 at 18–20. That argument continues to miss the mark. As a general matter, once a state chooses to offer a manner of voting to some class of voters, it must do so in a way that complies with federal law. *See, e.g.*, *Voto Latino v. Hirsch*, Nos. 1:23-CV-861 & 862, 2024 WL 230931, at *26 (M.D.N.C. Jan. 21, 2024) ("[T]he State, having offered the option of *voting* during [same-day registration], cannot discard [same-day registrants'] *ballots* due to governmental error and without notice and an opportunity to be heard simply on the ground that the voters should have known not to take such a risk."); *Saucedo v. Gardner*, 335 F. Supp. 3d 202, 217 (D.N.H. 2018) ("Having induced voters to vote by absentee ballot, the State must provide adequate process to ensure that voters' ballots are fairly considered and, if eligible, counted.").

Section 201 is no exception. Wisconsin cannot offer no-excuse absentee balloting, induce voters to vote absentee, and then disqualify their ballots because the voters failed to comply with a state-law requirement that violates federal law's supreme command. Put another way: Wisconsin's decision to allow in-person voting without a voucher does not immunize its absentee balloting regime from compliance with the Voting Rights Act. Such a loophole would render Section 201 a functional nullity, as illustrated by simply reversing the scenario: So long as Wisconsin offered voucher-free absentee voting, could it require any voter who wished to vote at the polls to pass a literacy test—another test or device barred by Section 201—and deprive Plaintiffs of any recourse? Of course not. *See United States v. Logue*, 344 F.2d 290, 292–93 (5th Cir. 1965).

The obligatory conclusion that restrictions on absentee voting necessarily fall within Section 201's ambit is further confirmed by Section 202 of the VRA—the very next section—which vests any qualified voter who "may be absent from their election district" on election day with a federal right to vote absentee for president and vice president. 52 U.S.C. § 10502(d). This express federal right to vote absentee traces to the same act, the Voting Rights Act Amendments of 1970, that extended the Vouching Rule nationwide. *See* Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, § 6, 84 Stat. 314, 314–17 (1970). Here, several Plaintiffs' uncontroverted testimony establishes that they will likely be absent from their election districts on the date of the 2024 presidential election. PFOF ¶¶ 25–26 (Haas); *id.* ¶¶ 30–31 (Poi). Those Plaintiffs, and any other qualified Wisconsin voters who meet the same criteria, have an express federal right to vote by absentee ballot under the Voting Rights Act itself. Wisconsin may not condition the exercise of an express federal statutory right to vote absentee on a voucher that is prohibited by the immediately preceding section of the very same law. "It is," after all, "well

established that statutes must be read as a whole." *United States v. Ryan*, 428 F. Supp. 3d 31, 40 (W.D. Wis. 2019) (cleaned up).

The Eleventh Circuit's decision in *Greater Birmingham Ministries v. Secretary of State for State of Alabama*, 992 F.3d 1299, 1334–35 (11th Cir. 2021), is not to the contrary. That case concerned Alabama's "positive identification" procedure, under which a voter "who does not have valid photo identification in his or her possession at the polls shall be permitted to vote if the individual is positively identified by two election officials." Ala. Code § 17-9-30(f). Although such identification is plainly a voucher, it is not a "prerequisite" to voting; it is a "failsafe" that is available to those who lack proper identification. *See Greater Birmingham Ministries*, 992 F.3d 1299 at 1335. Because Alabama's voucher provision adds to the ways that a voter may prove their identify, enjoining that provision necessarily would have reduced the number of qualified voters who could cast a ballot: from voters with valid identification *plus* voters who can procure the appropriate witnesses, to *only* voters with valid identification. Wisconsin's witness requirement is the opposite. Enjoining its operation would *expand* the number of potential absentee voters from "all voters who can procure the appropriate witness" to "all qualified voters." Because Wisconsin's witness requirement is a prerequisite that all absentee voters must satisfy, rather than one among several ways that a voter might prove their identify, *Greater Birmingham Ministries* does not control and the first element of Plaintiffs' VRA claim is satisfied.

B. The witness requirement forces voters to prove qualifications by voucher of a witness.

By the witness requirement's plain terms, an absentee voter must attest that they: (i) satisfy all of Wisconsin's qualifications and (ii) executed the absentee voting procedure as required by statute. Wis. Stat. § 6.87(2). The voter's witness, in turn, must attest that "the above *statements* are true *and* the voting procedure was executed as there stated." *Id.* (emphases added). Because the

witness's attestation is part of what establishes the voter's qualifications, the witness requirement is, *ipso facto*, a voucher of qualification.

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

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

> Wisconsin's requirements to have a witness for the casting of an absentee ballot, Wis. Stat. § 6.87(4)(b)1, and to have that witness provide an address, Wis. Stat. § 6.87(2), *both are material to determining whether the absentee voter in question is qualified to cast that absentee ballot in that election*.

Ex. G to Decl. of Uzoma N. Nkwonta ("Nkwonta Decl.") at 16 (Combined Br. of Defs. in Opp. to Pls.' Mot. for Summ. J. & ISO Defs.' Cross-Mot. for Summ. J. at 16, *League*, No. 22-CV-2472 (Cir. Ct. Dane Cnty. Sept. 21, 2023), Doc. 137) (emphasis added). Insofar as the witness's attestation is material to qualifications, it follows directly that the witness requirement is a voucher of qualifications. A witness's attestation cannot be material to substantive qualifications if the witness attests only to procedural compliance.

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

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

The witness requirement is a voucher by "members of [a] class" because only adult U.S. citizens can execute the certification. *See* 52 U.S.C. § 10501(b). The VRA does not define the term "class," so the Court should "look to the plain and ordinary meaning of the term" and may "look

to dictionary definitions." *United States v. Johnson*, 47 F.4th 535, 543 (7th Cir. 2022). In this case, the relevant definition of "class" is "a group, set, or kind sharing common attributes." *Class*, Merriam–Webster, https://www.merriam-webster.com/dictionary/class (last updated Feb. 11, 2024); *see also, e.g.*, *Class*, Black's Law Dictionary (11th ed. 2019) ("A group of people, things, qualities, or activities that have common characteristics or attributes.").

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

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

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

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

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

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

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

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

In its January 17, 2024, order on Defendants' motions to dismiss, the Court directed the parties to address "whether principles of issue or claim preclusion will affect this case once judgment is entered in *League of Women Voters*." ECF No. 56 at 15. Judgment in that case has since been entered against Commission Defendants and the Legislature (which, as here, intervened to oppose relief). *See* Nkwonta Decl. Ex. J at 1–3 (Declaratory J. and Permanent Inj. at 1–3,

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

League, No. 22-CV-2472 (Cir. Ct. Dane Cnty. Jan. 30, 2024), Dkt. 161) ("*League* Order"). In an order entered on January 30, the Dane County Circuit Court declared that:

> [T]he Materiality Provision prohibits rejecting absentee ballots based upon one of the following errors or omissions: (1) witness certifications containing the witness's street number, street name, and municipality, but not other address information such as state name or ZIP code; (2) witness certifications by a member of the voter's household who lists a street number and street name, but omits other information, such as a municipality; (3) witness certifications using terms like "same" or "ditto" or other means to convey that their address is the same as the voter; and (4) witness certifications with a street number, street name, and ZIP code, but not the municipality or state name.

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

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

The preclusive effect of a state-court judgment is a question of state law. *Creation Supply, Inc. v. Selective Ins. Co. of Se.*, 51 F.4th 759, 763 (7th Cir. 2022); *see also Jensen v. Foley*, 295 F.3d 745, 748 (7th Cir. 2002) ("Federal courts must give state court judgments the same preclusive effect as would a court in the rendering state."). Under Wisconsin law, offensive issue preclusion "applies when two criteria are met." *Rinaldi v. Wisconsin*, No. 19-CV-3-JDP, 2019 WL 3802465, at *5 (W.D. Wis. Aug. 13, 2019). First, "the question of fact or law that is sought to be precluded actually must have been litigated in a previous action and [have been] necessary to the judgment." *Id.* (quoting *Mrozek v. Intra Fin. Corp.*, 2005 WI 73, ¶ 17, 281 Wis. 2d 448, 699 N.W.2d 54). Second, the Court must "determine whether it is fundamentally fair to employ issue preclusion given the circumstances of the particular case at hand." *Id.* (quoting *Mrozek*, 2005 WI 73, ¶ 17). Issue preclusion, moreover, "does not require identity of the parties." *Robbins v. Med-1 Sols., LLC*, 13 F.4th 652, 657 (7th Cir. 2021); *see also Coleman v. Lab. & Indus. Rev. Comm'n of Wis.*, 860 F.3d 461, 469 (7th Cir. 2017) (recognizing "the requirement of mutuality has been abandoned" for issue preclusion).[4]

Applying those criteria, the Dane County Circuit Court's decision in *League* should be given issue-preclusive effect in this case. Specifically, the Court should preclude Commission Defendants and the Legislature from contesting whether the witness requirement results in

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

(i) denial of the right to vote (ii) because of an error or omission on a record or paper (iii) related to an act requisite to voting.

First, those three "question[s] . . . of law" were "actually . . . litigated" in *League* and were "necessary to the judgment" in that case. *Rinaldi*, 2019 WL 3802465, at *5. Regarding the first element, denial of the right to vote, the Dane County Circuit Court expressly rejected the Legislature's argument—also made here—that the witness requirement "doesn't deny the right to vote because Wisconsin offers numerous ways to vote." *League* Decision at 7; *see also* Nkwonta Decl. Ex. H at 19–24 (Intervenor-Def. the Wis. State Leg.'s Combined Br. ISO Mot. for Summ. J. & Resp. Opposing Pl.'s Mot. for Summ. J. at 19–24, *League*, No. 22-CV-2472 (Cir. Ct. Dane Cnty. Sept. 21, 2023), Dkt. 138). The court also noted that the Legislature's citations in support of that argument were to "cases that concern 52 U.S.C. § 10301," not the Materiality Provision. *League* Decision at 7. As to the second element, the error-or-omission requirement, the court held that Wisconsin's witness requirement punishes an error or omission on a record or paper—namely, the absentee ballot certificate. *Id.* at 4. As to the third element, the requisite-to-voting requirement, the court held that because state law "requires a witness address in order for the absentee ballot to be cast and counted," completing the witness certification is "an 'action necessary' to vote." *Id.* at 4–5. Again, the court rejected the same arguments the Legislature has made here. *Compare id.* at 7, *with* Nkwonta Decl. Ex. H at 23–24. Thus, all three issues were actually litigated in *League*. And the court's disposition of these three issues was necessary to the judgment because the court

had to find all four Materiality Provision elements satisfied before declaring a violation. *See League* Decision at 4–5.[5]

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

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

> (1) Was appellate review of the prior judgment available?
>
> (2) Is the question a legal question involving a distinct claim from the prior proceeding, or has the law shifted since the prior proceeding?

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

> (3) Are there significant differences between the quality or extensiveness of the proceedings in the two courts?
>
> (4) Did the party seeking preclusion have a lower burden of persuasion in the first action than in the second?
>
> (5) Would public policy or the individual circumstances make it fundamentally unfair to apply issue preclusion?

Gallo v. Harris, No. 19-CV-591-JDP, 2020 WL 2473671, at *3 (W.D. Wis. May 13, 2020) (citing *Estate of Rille v. Physicians Ins. Co.*, 2007 WI 36, ¶ 60, 300 Wis. 2d 1, 728 N.W.2d 693). None of these factors weighs against preclusion here. Appellate review of the *League* judgment is available; indeed, the Legislature has already noticed an appeal and "[t]he pendency of an appeal doesn't suspend the preclusive effect of the judgment being appealed." *DeGuelle v. Camilli*, 724 F.3d 933, 935 (7th Cir. 2013). The *League* Order issued just two weeks ago, also concerns a Materiality Provision claim, and the law governing such claims has not shifted in the interim. The proceedings in the Dane County Circuit Court were extensive and of high quality; all parties were represented by experienced election-law attorneys and the court thoroughly analyzed the relevant issues. The plaintiff bore the burden of proof, just as in this case. And no public policy or individual circumstance militates against issue preclusion.[6]

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

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

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

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

When a Wisconsin voter's absentee ballot is not counted because of noncompliance with the witness requirement, that result constitutes denial of the right to vote for purposes of the Materiality Provision. 52 U.S.C. § 10101(a)(2)(B). The relevant provision of the Civil Rights Act expressly defines the word "vote" to include "all action[s] necessary to make a vote effective including . . . having [a] ballot counted and included in the appropriate totals of votes cast." 52 U.S.C. § 10101(e); *see id.* § 10101(a)(3)(A) (incorporating this definition for purposes of the Materiality Provision's use of the term "vote"). And the Supreme Court has long confirmed that the constitutional right to vote includes "the right to have one's vote counted." *Reynolds v. Sims*, 377 U.S. 533, 554 (1964); *see also id.* at 563 n.40; *United States v. Classic*, 313 U.S. 299, 318 (1941) (explaining that right to vote includes both "right to cast a ballot" and to "have it counted"). An otherwise valid absentee ballot that does not comply with the witness requirement is disqualified, Wis. Stat. § 6.88(3)(b); *see also* PFOF ¶¶ 10–12, and so is not "counted and included in the appropriate totals of votes cast," 52 U.S.C. § 10101(e). Consequently, a voter's failure to comply with the witness requirement results in denial of the right to vote in violation of the Materiality Provision.

Numerous other federal courts have concluded that the Materiality Provision prohibits enforcement of state laws, like Wisconsin's witness requirement, that require election officials to reject absentee ballots because of immaterial paperwork errors or omissions made in the process

of submitting them. *See, e.g.*, *Migliori v. Cohen*, 36 F.4th 153, 164 (3d Cir.) (concluding that rejecting mail ballots due to omission of date on outer envelope "violate[s] the Materiality Provision by denying [v]oters their right to vote"), *vacated as moot sub nom. Ritter v. Migliori*, 143 S. Ct. 297 (2022);[7] *Abbott*, 2023 WL 8263348, at *22–23 (holding that ID "number-matching provisions of S.B. 1 require election officials to deny the [Materiality Provision]'s broadly defined right to vote"), *stayed pending appeal sub nom. United States v. Paxton*, No. 23-50885 (5th Cir. Dec. 15, 2023) (per curiam); *Pa. State Conf. of NAACP v. Schmidt*, No. 1:22-CV-00339, 2023 WL 8091601, at *30–31 (W.D. Pa. Nov. 21, 2023) (holding that "immaterial error or omission of a date [on mail ballot outer envelope] resulted in rejection of ballots and disenfranchised the Plaintiffs" in violation of Materiality Provision); *In re Ga. Senate Bill 202*, No. 1:21-CV-01259, 2023 WL 5334582, at *7–11 (N.D. Ga. Aug. 18, 2023) (holding that invalidating ballots for failure to write birthdate on absentee ballot outer envelope denies right to vote in violation of Materiality Provision); *Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1308–09 (N.D. Ga. 2018) (concluding that rejection of absentee ballots "on the basis of a birth year error or omission" on envelope violates Materiality Provision). Similarly, when an absentee ballot is rejected in Wisconsin because it has

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

a noncompliant witness certificate, that rejection denies the right to vote in violation of the Materiality Provision.

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

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

The witness requirement's satisfaction of the Materiality Provision's second and third elements is established by "the straightforward application of legal terms with plain and settled meanings." *See Bostock v. Clayton County*, 590 U.S. 644, 663 (2020). The Commission prescribes a uniform certificate, and municipalities include that certificate with absentee ballots. PFOF ¶¶ 1–2, 9. A witness certificate deemed noncompliant with the witness requirement necessarily suffers "an error," whereas a wholly missing or incomplete witness certificate presents an "omission." 52 U.S.C. § 10101(a)(2)(B). The ballot envelope on which the certificate appears is undoubtedly a "paper." *Id.* And proper completion of the witness certificate is an "act requisite to voting." *Id.*; *see also Migliori*, 36 F.4th at 162 n.56 ("find[ing] that the mail-in ballot squarely constitutes a paper relating to an act for voting"); *see supra* Section II.B.1.[8]

[8] It makes no difference that compliance with the witness requirement takes place after the registration process. The Materiality Provision's terms—encompassing "*any* record or paper relating to *any* application, registration, *or other act requisite to voting*," 52 U.S.C.

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

If compliance with the witness requirement does not require a witness to vouch for the voter's qualifications, *but see supra* Part I, then it is necessarily immaterial in "determining whether [an] individual is qualified under State law to vote." 52 U.S.C. § 10101(a)(2)(B). The Civil Rights Act provides that "qualified under State law" in this context "shall mean qualified according to the laws, customs, or usages of the State." 52 U.S.C. § 10101(e). And Wisconsin law provides that "[e]very U.S. citizen age 18 or older who has resided in an election district or ward for 28 consecutive days before any election where the citizen offers to vote is an eligible elector," and that "[a]ny U.S. citizen age 18 or older who moves within this state later than 28 days before an election shall vote at his or her previous ward or election district if the person is otherwise qualified." Wis. Stat. § 6.02; *see* Wis. Const., art. III, § 1; *see also* Wis. Stat. § 6.15 (allowing new residents with less than 28 days' residency to vote for president and vice president only). If the witness is not confirming the voter's statements about their own qualifications, then the witness certificate does not provide information relevant to determining the voter's citizenship status, age, or residency. Thus, procedural compliance with the witness requirement would be entirely irrelevant, and therefore immaterial, to determining whether an absentee voter is qualified to vote under Wisconsin law.[9]

§ 10101(a)(2)(B) (emphasis added)—explicitly contemplate a broad range of records and papers *in addition to* registration forms. *See Common Cause v. Thomsen*, 574 F. Supp. 3d 634, 636 (W.D. Wis. 2021) (Peterson, J.) ("text of § 10101(a)(2)(B) isn't limited to . . . voter registration"); *Abbott*, 2023 WL 8263348, at *18–19 (similar).

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

Immaterial requirements cannot be transformed into "material" ones merely because they are imposed by state law. The Fifth Circuit recently rejected the notion that "States may circumvent the Materiality Provision by defining all manner of requirements, no matter how trivial, as being a qualification to vote and therefore 'material.'" *Vote.org*, 89 F.4th at 487; *see also Abbott*, 2023 WL 8263348, *14 (rejecting same "tautological[]" argument and recognizing that such "logic would erase the Materiality [Rule] from existence, by defining *whatever* requirements might be imposed by state law in order to vote, no matter how trivial," as material in determining voter qualifications). A state's codification of a voting requirement does not automatically neuter application of the Materiality Provision; to the contrary, "[t]he Materiality [Rule] is a standard that a State's [voting requirements] must satisfy." *Vote.org*, 89 F.4th at 487; *cf. Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 17 (2013) (distinguishing between setting qualifications and obtaining information necessary to confirm those qualifications). Interpreting the Materiality Provision in any other way would shield the same immaterial requirements that Congress sought to abolish. For example, in the 1960s, the Louisiana Constitution required voters to provide their age, not only in years but also in months and days, in order to register to vote. *See* Commission on Civil Rights, Voting: 1961 Commission on Civil Rights Report, Book 1 at 56.[10] The Civil Rights Act was enacted in direct response to this context of disenfranchisement. *Id.* Permitting states to circumvent the Materiality Provision by codifying requirements like these "not only would defy common sense, but also would defeat Congress' stated objective." *Quarles v. United States*, 139 S. Ct. 1872, 1879 (2019). Courts "should not lightly conclude that Congress enacted a self-defeating statute." *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted this 16th day of February, 2024.

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

CERTIFICATE OF SERVICE

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

/s/ Uzoma N. Nkwonta
Uzoma N. Nkwonta