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

PLAINTIFFS' CONSOLIDATED OPPOSITION TO COMMISSION DEFENDANTS' AND THE LEGISLATURE'S MOTIONS FOR SUMMARY JUDGMENT

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INTRODUCTION

Commission Defendants and the Wisconsin Legislature propose that requiring Wisconsin absentee voters to procure a witness's written attestation in order to have their votes counted is good public policy. Congress, however, decided otherwise, and its enactments govern. The Voting Rights Act's Vouching Rule and the Civil Rights Act's Materiality Provision shield voters from particular kinds of disenfranchisement—the very kinds that Wisconsin's witness requirement imposes—and they do so without any of the ambiguity that Defendants seek to inject. The Vouching Rule protects against efforts by states to condition a ballot's acceptance on the voter's ability to acquire the written endorsement of a third party. And the Vouching Rule's one potential loophole—where the witness does not attest to qualifications—is clinched shut by the Materiality Provision. Like two deep safeties each patrolling half the field, these statutes operate in tandem to provide sideline-to-sideline coverage against threats like the witness requirement.

Yet again, Commission Defendants and the Legislature seek to duck and weave around plain statutory language, flout on-point caselaw, and rebuke the supremacy of federal law. But the facts are settled and the law is clear. The witness requirement is incompatible with federal voting rights guarantees and must be enjoined. This Court should deny both Commission Defendants' and the Legislature's motions for summary judgment, and grant summary judgment for Plaintiffs. And it need not defer its ruling for any ongoing litigation: state-court appellate proceedings do not provide any prospect of further clarifying the issues at stake here, nor does the corresponding remedy risk any voter confusion.

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ARGUMENT

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

The Vouching Rule 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 mandates that a person, as a prerequisite for voting, prove qualifications by voucher of a member of a class, it violates the Vouching Rule. *See* ECF No. 68 at 7–8; Wis. Stat. § 6.87(2). Commission Defendants' and the Legislature's arguments to the contrary all fail.

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

Commission Defendants do not dispute that the witness requirement is a "prerequisite" to voting for purposes of Section 201. Nor could they. "Voting" necessarily includes having one's vote counted. *See* ECF No. 68 at 8; *see also Reynolds v. Sims*, 377 U.S. 533, 554 (1964). And once a state chooses to offer a method of voting, it may not discount votes cast by that method for reasons that federal law forbids, *see* ECF No. 68 at 8 (collecting cases)—including failure to comply with a "test or device"; *see also Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1319–21 (11th Cir. 2019) ("[W]e have no trouble finding that Florida's [absentee voting] scheme imposes at least a serious burden on the right to vote."). Wisconsin is thus no more free to disenfranchise *absentee* voters for their failure to satisfy a voucher requirement than it would be to disqualify *election-day* voters who failed a literacy test. *See* ECF No. 68 at 8. Because complying with the witness requirement is a prerequisite to having one's absentee ballot counted, it is a "prerequisite for voting" under Section 201.

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The Legislature attempts to contest this element, *see* ECF No. 65 at 21–22, but the authorities it cites refute its argument. In particular, the Legislature relies on *Puerto Rican Organization for Political Action v. Kusper*, 490 F.2d 575, 579 (7th Cir. 1973), which analyzed the scope of "the right to vote" in the context of the Voting Rights Act. *See* ECF No. 65 at 20. The Legislature fails to mention the Seventh Circuit's answer: "that 'the right to vote' encompasses the right to an *effective* vote." 490 F.2d at 580 (emphasis added). *Kusper* flatly rejected the Legislature's narrow view of the "right to vote" as the mere "right to enter a voting booth and cast a ballot." *Id.* at 579. Rather, it supports Plaintiffs' broader construction of "voting."

The Legislature's other citations further confirm that the witness requirement is a "prerequisite" to voting because a voter's noncompliance results in disenfranchisement. *See* ECF No. 65 at 20. For instance, *Brnovich v. Democratic National Committee* characterizes Section 201 as "prohibiting the denial of the right to vote in any election for *failure to pass* a test." 141 S. Ct. 2321, 2331 (2021) (emphasis added). Described that way, the prohibition plainly applies here. When an elections inspector examines an absentee ballot during the election night count, the inspector applies a "test"—by checking to see whether the witness properly vouched for the voter—and, if the ballot certificate "fail[s] to pass" the test, the inspector disqualifies the ballot. Wis. Stat. § 6.88(3)(b). The voter is thereby "deni[ed] the right to vote," *Brnovich*, 141 S. Ct. at 2331, in the most direct and literal sense imaginable. The Legislature also quotes *NAACP v. New York*, which indicates that Section 201 prohibits "the use of tests or devices . . . when the *effect* is to deprive a citizen of his right to vote." 413 U.S. 345, 350–51 (1973) (emphasis added). It is

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beyond dispute that such deprivation is the effect of the witness requirement. Why the Legislature thinks any of these cases help it is a mystery—the Legislature never says.[1]

The Legislature also suggests that under Wisconsin law, voting absentee is a "privilege." ECF No. 65 at 21 (quoting Wis. Stat. § 6.84(1)). But Wisconsin may not disqualify ballots on grounds that violate federal law by the simple expedient of designating a method of voting it has chosen to offer a "privilege." *See Lee*, 915 F.3d at 1319–20; *see also* ECF No. 68 at 8 (collecting cases). Moreover, a state statute does not and cannot control whether a requirement to have one's ballot counted qualifies as a "prerequisite" to voting under federal law; federal courts do not "distort federal law to accommodate conflicting state law." *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 623 (2011). As just explained—and as the Legislature's own cases confirm—Section 201 prohibits laws that make compliance with a prohibited test or device a prerequisite to have one's ballot counted. How Wisconsin law characterizes absentee voting is simply beside the point. By the same logic, it makes no difference that voters who "do not wish to comply" with the witness requirement, ECF No. 65 at 21, may vote in person on election day. The point is that once a voter has voted by absentee ballot, that ballot may not be disqualified based on a test or device.[2]

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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), does not suggest otherwise. *Contra* ECF No. 65 at 20–21. As Plaintiffs explained in their affirmative brief, ECF No. 68 at 10, the key

[1] The Legislature also repeatedly cites *Oregon v. Mitchell* without explanation, ECF No. 65 at 20, 22, but that case's entire discussion of Section 201 reads as follows: "Section 201 bars a State from denying the right to vote in any federal, state, or local election because of 'any test or device' which is defined, inter alia, to include literacy." 400 U.S. 112, 144–45 (1970). *Mitchell* says nothing that supports the Legislature's cramped reading of "prerequisite."

[2] Moreover, as Plaintiffs pointed out in their affirmative brief, at least two Plaintiffs will have an express federal right to vote by absentee ballot in the upcoming presidential election. *See* ECF No. 68 at 9–10 (discussing 52 U.S.C. § 10502(d)).

fact in that case was that Alabama's positive-identification procedure is not a "prerequisite" to voting but rather a "failsafe" that is available to those who lack proper identification. *See Greater Birmingham Ministries*, 992 F.3d 1299 at 1335. When a voter is denied the right to vote under Alabama Code § 17-9-30(f), the cause of the denial is the voter's lack of valid identification, not noncompliance with a voucher requirement. The Legislature's cherrypicked quotes, ECF No. 65 at 21, in no way support the idea that a state may impose any test or device it wants so long as it offers one exempted method of voting. As Plaintiffs previously explained, the results of such a reading of "prerequisite" would be quite absurd—it would allow the very sorts of tests or devices that the Legislature and Commission Defendants *agree* must be prohibited under any reading of the statute. *See* ECF No. 68 at 9 (citing *United States v. Logue*, 344 F.2d 290, 292–93 (5th Cir. 1965)).

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

To complete the absentee ballot certificate, a voter must attest both that they complied with the absentee balloting procedure and that they are qualified to vote by absentee ballot. Wis. Stat. § 6.87(2). The witness, in turn, must attest that "the above *statements* are true *and* the voting procedure was executed as there stated." *Id.* (emphasis added). By its plain text, the witness requirement is a forbidden voucher: It is satisfied only if the witness vouches for the truth of the voter's claim to be a qualified absentee voter.

To resist this conclusion and avoid the plain violation of federal law that follows from it, Commission Defendants and the Legislature urge the court to adopt a patently atextual statutory construction: that the phrase "above statements" encompasses only the voter's attestation as to *procedure*. But Wisconsin law requires that a statute be given "its common, ordinary, and accepted meaning." *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681

N.W.2d 110. Absent any indication that it is more limited, the phrase "the above *statements*"—plural—plainly encompasses all the voter's attestations. And when, as here, the "meaning of the statute is plain," the inquiry ends. *Id.*; *cf. Bostock v. Clayton County*, 590 U.S. 644, 662 (2020). Moreover, Wisconsin law requires that 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"). Commission Defendants and the Legislature's reading is particularly implausible because the witness specifically attests that "the voting procedure was executed as . . . stated." Wis. Stat. § 6.87(2). If "the above statements" meant only the voter's attestation about procedure, the entire second clause would be surplusage.

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Commission Defendants' and the Legislature's arguments to disregard these bedrock principles of statutory construction are unavailing. Commission Defendants first suggest that Plaintiffs improperly "conflate" witnessing with vouching. ECF No. 59 at 11, 15–16. But that reasoning elevates labels over substance—it is the witness's function, not the term applied to the function, that matters. *Logue* confirms as much: The requirement at issue in that case was known as the "'supporting witness' requirement," 344 F.2d at 291, yet Commission Defendants and the Legislature treat *Logue* as an archetypal instance of a prohibited voucher, *see* ECF No. 59 at 8; ECF No. 65 at 28. Commission Defendants also repeatedly beg the question, asserting that the witness is "not charged to independently ascertain information about the voter's status as an eligible qualified absentee voter" and that any other reading would be implausible. ECF No. 59 at 15. But those assertions lack any citation or other support, no doubt because the statute itself expressly requires the witness to attest to the truth of the voter's statements. Finally, Commission

Defendants suggest that their guidance does not treat the witness requirement as a voucher. But the Commission's guidance instructs witnesses and voters to execute the statutorily mandated attestations, *see* ECF No. 62, ¶¶ 2, 3, and therefore necessarily incorporates the substance of those attestations. And, in any case, an agency's interpretation of a contested statute is owed no deference under Wisconsin law. *Tetra Tech EC v. Wis. Dep't of Rev.*, 2018 WI 75, ¶ 84, 382 Wis. 2d 496, 914 N.W.2d 21.[3]

The Legislature, for its part, suggests that the witness requirement needs to be read as "a safeguard to 'potential voter fraud' inherent in absentee voting." EFC No. 65 at 24; *see also id.* at 26. But the Legislature's only evidence that such fraud exists comprises two pages of an inadmissible two-decade-old report, *id.* (citing ECF No. 66 ¶¶ 14–17), and that report does not discuss whether or how absentee voting contributes to voter fraud *in Wisconsin*, *see* ECF No. 67-1 at 46–47. More to the point, the primary example of documented voter fraud identified in the Carter-Baker Report is registration and voting by non-citizens. *Id.* at 46. But even accepting the Legislature's implausible premise—that a statute enacted in the 1960s aims to prevent categories of fraud catalogued in a report from 2005—such a purpose would not save the witness requirement from the mandates of federal law.

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Finally, both Commission Defendants and the Legislature cite *Thomas v. Andino*, 613 F. Supp. 3d 926 (D.S.C. 2020), and *People First of Alabama v. Merrill*, 467 F. Supp. 3d 1179 (N.D. Ala. 2020), to argue that Section 201 does not apply to Wisconsin's witness requirement. ECF No. 59 at 9–10, 16–17; ECF No. 65 at 22–23. As Plaintiffs' affirmative brief explained, these cases are

[3] Commission Defendants also persist in citing briefing filed by several of Plaintiffs' counsel on behalf of different clients in a different case. ECF No. 59 at 17–18; *see also* ECF No. 20 at 15. No plaintiff in *Rise* is a Plaintiff here, and that case concerns the proper construction of the statutory term witness "address," not the purpose of the witness requirement as a whole.

distinct because neither concerned a witness requirement that operated as a voucher of qualifications. ECF No. 68 at 12.

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

Turning to the final Vouching Rule element—whether the voucher is restricted to a certain class—Commission Defendants and the Legislature continue to press atextual arguments. As Plaintiffs have explained, the plain and settled meaning of "class" is "a group, set, or kind sharing common attributes." ECF No. 68 at 13 (quoting *Class*, Merriam–Webster, https://www.merriam-webster.com/dictionary/class (last updated Mar. 6, 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."). Wisconsin's witness requirement may be satisfied, for most voters' purposes, only by an adult U.S. citizen. Wis. Stat. § 6.87(2), (4)(b)1.; *see also* Wis. Stat. § 6.24(1). And U.S. citizens indisputably constitute "a group of people" that share "common characteristics or attributes"—which is to say, a "class." Nor is the witness requirement's class restriction without effect: Plaintiff Haas's fiancé, for one, may not witness her absentee ballot either at home or overseas, because he is not a U.S. citizen. Pls.' Additional Proposed Findings of Fact ("APFOF") ¶ 6.

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Commission Defendants suggest that Plaintiff Haas's fiancé could serve as her absentee ballot witness while Haas is traveling overseas. ECF No. 59 at 19 n.6. This is incorrect. Commission Defendants appear to concede that under the plain text of the Wisconsin statutes, Haas would not qualify as an "overseas voter" (and so be excused from the citizen-witness requirement) while traveling overseas because she maintains a Wisconsin domicile. *See id.*; *see also* Wis. Stat. § 6.24(1) (defining "overseas elector" to include only nonresident electors). Commission Defendants indicate, however, that Wisconsin has entered into a consent decree

providing certain overseas voters with protections consistent with the federal Uniformed and Overseas Citizens Absentee Voting Act, ECF No. 59 at 19 n.16 (citing 52 U.S.C. §§ 20301 *et seq.*), and that one of these protections operates to excuse temporary overseas voters from the requirement that their witness be a citizen, *id.* But the consent decree they submit to support that claim does not contain any provision exempting temporary overseas voters from Wisconsin's citizen-witness requirement. *See* ECF No. 60-9. To the contrary, it provides temporary overseas voters with only two specific UOCAVA protections: (1) the right to receive ballots electronically and (2) the right to utilize the federal write-in absentee ballot as a back-up. *See id.* ¶ 14. Neither of those protections bears on Wisconsin's requirement that an absentee ballot witness be a citizen. And the consent decree in question indicates that it expired on January 31, 2020. *Id.* at 8. Commission Defendants' attempts to contort an apparently expired consent decree to say something it does not proves the point: U.S. citizens constitute a class, and limiting eligible witnesses to that class injures Plaintiffs and other Wisconsin voters.

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Commission Defendants counter by again citing *Thomas*, 613 F. Supp. 3d at 961–62, but admit that the statute at issue did not limit eligible witnesses to adult citizens or any other class. ECF No. 59 at 19–20. They nonetheless argue that adult U.S. citizens are not a class either, because "an elector voting absentee will not be constrained in locating someone to witness the marking of the ballot." *Id.* But Plaintiff Haas's unrebutted, uncontested testimony establishes that voters *are* "constrained" by the citizen-witness requirement. When she is in the United States, Haas's fiancé may not witness her absentee ballot, and when she travels abroad, Haas generally lacks access to *any* eligible witness. APFOF ¶¶ 6–8. A law that undisputedly deprives a Plaintiff of the option to rely on her most convenient witness in all circumstances, and of *any* eligible witness in some circumstances, imposes a significant constraint.

The Legislature, for its part, suggests that adult U.S. citizens are not a class because the witness requirement is not an "inherently discriminatory voucher." ECF No. 65 at 27 (quoting *Greater Birmingham Ministries*, 992 F.3d at 1336). But the Legislature does not explain what that extratextual gloss means, where in the VRA's statutory scheme it comes from, or why a rule that discriminates against voters married to noncitizens is not "discriminatory." And despite the Legislature's citation to it in the section of its brief that discusses the "class" element, *Greater Birmingham Ministries* sheds no light on the meaning of the term "class" in Section 201. As explained above, *Greater Birmingham Ministries* is a case concerned with Section 201's *first* element, not its third, and is distinct from this case even with respect to that element. *See supra* Section I.A. The Legislature's argument thus boils down to a naked assertion that states "could not use any witness requirement" under Plaintiffs' view of the law. ECF No. 65 at 28. That misses the mark: What states may not do is subject voters to a witness requirement that functions as a class-based voucher of qualifications. Because Wisconsin's witness requirement does just that, it violates Section 201's plain text.

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Finally, both Commission Defendants and the Legislature invoke *Davis v. Gallinghouse*, 246 F. Supp. 208 (E.D. La. 1965), but both overestimate its significance. *See* ECF No. 59 at 9; ECF No. 65 at 27. In *Davis*—a case decided five years before the Voting Rights Act Amendments of 1970 extended the Vouching Rule nationwide—the court rejected the "ingenious theory" that requiring identification to vote violates the Vouching Rule because it entails the voucher of the class of people who issue "driver's licenses, library cards, rent receipts, postmarked envelopes, etc." 246 F. Supp. at 217. Although *Davis* said that was not the sort of "class" the Vouching Rule covers, *Davis* does not bear on whether U.S. citizens are a "class," for purposes of this case, for several reasons.

First, *Davis* is an anachronism: Congress's decision to extend the Vouching Rule nationwide in 1970 confirms what its plain text makes quite clear. It prohibits covered tests or devices of all sorts, not just those that closely resemble the explicitly racial tests applied in the Jim Crow South. Second, *Davis*'s mode of analysis is also out of date: Rather than construing and applying the plain text, it speculates about what "Congress undoubtedly meant . . . to hit at." *Id.* at 217. *Contra Bostock* , 590 U.S. at 653 ("Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. . . . But the limits of the drafters' imagination supply no reason to ignore the law's demands."); *id.* at 674 ("The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration."); *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2469 (2020) ("There is no need to consult extratextual sources when the meaning of a statute's terms is clear. Nor may extratextual sources overcome those terms."). And third, Wisconsin's witness requirement has far more in common with discriminatory historical voucher practices than the ID requirement at issue in *Davis*.

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

If a witness attesting to the truth of the voter's "above statements" is not unlawfully vouching for a voter's qualification, then rejecting an absentee ballot for a missing or incomplete witness certificate violates the Materiality Provision of the Civil Rights Act, which provides that:

> 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 must satisfy the following elements: The election regulation at issue must result in the "den[ial of] the right of any individual

to vote." *Id.* That denial must be caused by "an error or omission" on "any record or paper relating to any application, registration, or other act requisite to voting." *Id.* And that "error or omission" must not be "material in determining whether such individual is qualified under State law to vote in such election." *Id.* Because Plaintiffs satisfy each of these elements here, Commission Defendants' and the Legislature's motions for summary judgment should be denied.

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

Commission Defendants correctly do not dispute that the first element of this claim is satisfied. *See generally* ECF No. 59 at 20–27. But the Legislature proposes that the right to vote is *not* denied when a voter's ballot is rejected for non-compliance with the witness requirement because absentee voting is not protected, either under federal or state law. ECF No. 65 at 35–37. This argument misses the mark several times over. First, the Materiality Provision does not distinguish between rights accorded to in-person and absentee voters. The word "vote," as used in the Civil Rights Act, includes "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 Materiality Provision's use of the term "vote").[4] The Legislature never explains why Congress's protections for "*all* action necessary to make a vote effective" would not reach *all* means of voting. 52 U.S.C. § 10101(e). And as mandated under Wisconsin law, and conceded by Defendants here, an otherwise valid absentee ballot that does not comply with the witness requirement is disqualified and is not "counted and included in the appropriate totals of votes cast," 52 U.S.C. § 10101(e). *See* Wis. Stat.

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[4] Supreme Court precedent also confirms 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").

§ 6.88(3)(b); APFOF ¶¶ 3–5. Thus, the consequence for a voter's noncompliance with the witness requirement is to "deny the right of [that] individual to vote." 52 U.S.C. § 10101(a)(2)(B).

There is no need to look further than the Civil Rights Act's clear text to confirm that the witness requirement denies the right to vote, and none of the cases that the Legislature cites are to the contrary. For one, the Legislature's reliance on *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802 (1969), for the proposition that voters do not have a constitutional right to vote absentee is entirely misplaced. Unlike the inmates who sued in *McDonald*, Plaintiffs do not claim voting rights derived from the U.S. Constitution—their right to vote absentee is explicitly provided by Wisconsin law, Wis. Stat. § 6.20, and, in elections for president and vice president, by Section 202 of the Voting Rights Act, 52 U.S.C. § 10502(d). In *McDonald*, in contrast, the plaintiffs claimed a "right to *receive*" absentee ballots, which state law generally did not permit. 394 U.S. at 807 (emphasis added).[5] But the Court also recognized that once a means of exercising the right to vote has been provided, it must be administered in accordance with federal law. *See id.* ("we have held that once the States grant the franchise, they must not do so in a discriminatory manner"). Because Wisconsin has provided for absentee voting, *see* Wis. Stat. § 6.85, it must comply with federal law when determining whether absentee ballots are counted.

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[5] This reading is confirmed by the Legislature's own case citations. *See, e.g.*, *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 n.6 (1969) ("at issue [in *McDonald*] was not a claimed right to vote but a claimed right to an absentee ballot"); *Hill v. Stone*, 421 U.S. 289, 300 n.9 (1975) ("In *McDonald* . . . the only issue before the Court was whether pretrial detainees in Illinois jails were unconstitutionally denied absentee ballots."). Likewise, *Goosby v. Osser* merely held that plaintiffs' challenge in that case could be heard because, unlike in *McDonald*, the Pennsylvania statutory scheme at issue "affirmatively exclude[d] persons confined in a penal institution from voting by absentee ballot, and because requests by members of petitioners' class to register and to vote . . . had been denied." 409 U.S. 512, 521–22 (1973) (cleaned up). And *Bullock v. Carter* provides no more than a cursory reference to *McDonald*: "Of course, not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review." 405 U.S. 134, 143 (1972) (citing *McDonald* generally).

Moreover, the U.S. Constitution's protections for the right to vote do not depend upon the means by which a voter chooses to exercise that right. The Supreme Court has explained that the "disposition of the claims in *McDonald* rested on failure of proof" that the challenged statute prohibited the plaintiffs from voting, rather than on some broad exemption of absentee voting from the protections of federal law. *O'Brien v. Skinner*, 414 U.S. 524, 529 (1974). When plaintiffs presented evidence of a burden on their right to vote in a later case challenging an absentee voting restriction, the Court held the restriction unconstitutional. *See id*. at 530.

Numerous federal courts of appeals have also recognized that *McDonald* does not shield restrictions on absentee voting from requirements imposed by federal law.[6] Yet the Legislature appears to either misunderstand or misinterpret the court of appeals cases that it cites without discussion, instead building a house of cards from motions-panel decisions.

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One strand of the Legislature's flawed citations is based on *Tully v. Okeson*, 977 F.3d 608 (7th Cir. 2020) ("*Tully I*"). *See* ECF No. 65 at 36 (arguing that "fundamental right to vote means the ability to cast a ballot, but not the right to do so in a voter's preferred manner" (quoting *Tully I*, 977 F.3d at 613)). But *Tully I* was a motions panel decision—when the Seventh Circuit considered the case on the merits, it noted that *Tully I*'s "truncated legal analysis" was not binding, and it rejected the notion that the right to vote is abridged only where voters are rendered "worse off" than they were before a challenged law was enacted. *Tully v. Okeson* (*"Tully II*"), 78 F.4th 377, 381, 387 (7th Cir. 2023); *see also id.* at 381 ("The Supreme Court has held that legal and

[6] *See, e.g.*, *Price v. N.Y. State Bd. of Elections*, 540 F.3d 101, 108–09 & n.9 (2d Cir. 2008); *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 193 (5th Cir. 2020); *Ohio State Conf. of N.A.A.C.P. v. Husted*, 768 F.3d 524, 540 (6th Cir. 2014) ("In *McDonald*, the Supreme Court did not apply rational basis review to the challenged Illinois statute allowing only certain categories of voters to receive absentee ballots solely because absentee ballots were at issue."), *vacated on other grounds* No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014).

factual rulings made as part of a preliminary-injunction analysis are not binding upon panels when they later consider the matter on the merits." (citing *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981)). Seemingly unaware of the Seventh Circuit's recent rebuke, the Legislature stacks its cards on the flimsy foundation of *Tully I*. *See* ECF No. 65 at 36 (citing *Common Cause Ind. v. Lawson*, 977 F.3d 663, 664 (7th Cir. 2020) (relying on *Tully I* in granting stay), and *Org. for Black Struggle v. Ashcroft*, 978 F.3d 603, 607–08 (8th Cir. 2020) (relying on *Lawson* in granting stay)).

The other strand of the Legislature's citations also quickly unravels. After a Fifth Circuit motions panel proclaimed that "*McDonald* lives," *Tex. Democratic Party v. Abbott* ("*Texas Democratic Party I*"), 961 F.3d 389, 406 (5th Cir. 2020), the subsequent merits panel—to which the Legislature cites—explicitly reproached the motions panel's application of *McDonald*, *see Tex. Democratic Party v. Abbott* ("*Texas Democratic Party II*"), 978 F.3d 168, 193 (5th Cir. 2020). As the Fifth Circuit explained in *Texas Democratic Party II*, it was "hesitant to hold that *McDonald* applies," in part because "the Supreme Court [has] interpreted a post-*McDonald* limitation on absentee voting as potentially violative of equal protection even though, like the statute in *McDonald*, it left open other options for voting." *Id.* at 193 (citing *Am. Party of Tex. v. White*, 415 U.S. 767, 794–95 (1974)). And the discussion to which the Legislature cites merely reiterates that *McDonald* involved the "claimed right to *receive* absentee ballots." *Texas Democratic Party II*, 978 F.3d at 185 (quoting *McDonald*, 394 U.S. at 807).[7]

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[7] *Mays v. LaRose* similarly simply restated this proposition, 951 F.3d 775, 792 (6th Cir. 2020) (citing *McDonald*, 394 U.S. at 807), which is distinct from the proposition that regulations of absentee voting, once provided, cannot deny or infringe upon the right to vote. And *Vote.org v. Callanen*, 39 F. 4th 297, 306 (5th Cir. 2022) involved a challenge to Texas's wet-signature requirement for voter registration applications; the court did not consider whether restrictions on absentee ballots implicate the right to vote. Regardless, the subsequent *merits* panel explicitly "set aside that holding," *Vote.org v. Callanen*, 89 F.4th 459, 487 (5th Cir. 2023). *See also id.* at 469 ("[The] motions panel decision does not bind us as a merits panel.").

The Legislature's last resort is to celebrate the alleged ease of registration and voting in Wisconsin, which even the Legislature immediately concedes is "not legally relevant here." ECF No. 65 at 37. Whether the Legislature feels that "voting is easy" and "not burdensome," ECF No. 65 at 36–37, does not affect the scope of federal civil rights protections. Setting aside for rejection a Wisconsin voter's otherwise-valid absentee ballot for noncompliance with the witness requirement constitutes a denial of that voter's right to vote.

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

Neither Commission Defendants nor the Legislature contest that errors or omissions are what render a witness certificate noncompliant, that the witness certificate is printed on paper, or that the witness requirement is, in fact, a requirement. Because satisfying this element "involve[s] no more than the straightforward application of legal terms with plain and settled meanings . . . that should be the end of the analysis." *Bostock*, 590 U.S. at 662 (quotation omitted).

Instead, Commission Defendants contend that the witness requirement is immune from the protections of the Materiality Provision because it is "a required *procedure*," rather than "a needless provision of data." ECF No. 59 at 22 (emphasis in original). A "procedure" is a "specific method or course of action." *Procedure*, Black's Law Dictionary (11th ed. 2019). But Commission Defendants fail to explain how voters "provid[ing] their driver's license[,] . . . Social Security numbers[,] . . . [or] year of birth," ECF No. 59 at 22 (citing requirements that have been subject to Materiality Provision), are not also following "a specific method or course of action." The Materiality Provision makes no such distinction between procedural and non-procedural prerequisites to voting, for good reason—any challenged requirement could be characterized as a "procedure." The decisions of other federal courts confirm that Commission Defendants' semantic games are of their own invention. *See, e.g.*, *Schwier v. Cox*, 340 F.3d 1284, 1285–86, 1297 (11th

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Cir. 2003) (recognizing that plaintiffs "claimed that Georgia's voter registration procedure and Voter Registration Form violated" Materiality Provision, without distinguishing between the two); *La Unión del Pueblo Entero v. Abbott*, 604 F. Supp. 3d 512, 541 (W.D. Tex. 2022) ("[P]reparation and submission of an application to vote by mail, as well as the preparation and submission of a mail ballot carrier envelope, are actions that voters must take in order to make their votes effective."). Whether it is framed as a provision of information or a required procedure, the rejection of an absentee ballot for noncompliance with the witness requirement—*i.e.*, because of an incomplete or missing witness certificate—is a rejection "because of an error or omission on [a] record or paper." 52 U.S.C. § 10101(a)(2)(B).

For its part, the Legislature presents a circular argument that "[t]echnical ballot requirements" are unrelated to qualification determinations, and therefore somehow fall outside the scope of the Materiality Provision's rule against requirements that are immaterial to qualification determinations. *See* ECF No. 65 at 31. This upside-down logic "would essentially render the [Materiality] [P]rovision meaningless . . . by arguing that the very immateriality of the [witness] requirement takes it outside the statute's reach." *La Unión del Pueblo Entero v. Abbott*, No. 5:21-CV-0844-XR, 2023 WL 8263348, at *26 (W.D. Tex. Nov. 29, 2023) (quoting *In re Georgia Senate Bill 202*, No. 1:21-mi-5555-JPB, 2023 WL 5334582, at *10 (N.D. Ga. Aug. 18, 2023)), *stayed pending appeal sub nom. United States v. Paxton*, No. 23-50885 (5th Cir. Dec. 15, 2023) (per curiam). 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). And courts "should not lightly conclude that Congress enacted a self-defeating statute." *Id.*

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The Legislature cites myriad out-of-circuit cases purporting to limit the Materiality Provision to only the registration phase of voting, ECF No. 65 at 31–32, while ignoring this Court's own conclusion that "the text of [the Materiality Provision] isn't limited to . . . voter registration," *Common Cause v. Thomsen*, 574 F. Supp. 3d 634, 636 (W.D. Wis. 2021) (Peterson, J.).[8] Nothing in the Eleventh Circuit's opinion in *Schwier v. Cox*, for example, limits its scope to only voter registration. *See* 340 F.3d at 1294–97.[9] And as the court in *Abbott* explained, if the Materiality Provision were so limited, "Congress could have said so"—instead, its text "confirms that . . . denying the statutory right to vote based on an error or omission that disqualifies a voter from only a *single* election violates" the Materiality Provision. 2023 WL 8263348, at *18–19. If Congress had not intended the Materiality Provision to broadly cover every stage of the voting process, it would have "persuasive[ly] indicat[ed] to the contrary." *Simmons v. Himmelreich*, 578 U.S. 621, 627 (2016). "Indeed, a rule protecting voter *registration* only, but allowing registered voters to

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[8] For example, *Thrasher v. Illinois Republican Party*'s discussion of the Materiality Provision's scope is dictum, as the decision in that case hinged on the plaintiff's request to "apply the statute to the inner workings and negotiations of a state political party convention," without any "claim that the Republican Party prevented him from registering to vote or from casting a ballot . . . nor that his vote in the primary was not counted." No. 4:12-cv-4071-SLD-JAG, 2013 WL 442832, at *3 (C.D. Ill. Feb. 5, 2013). And in denying a preliminary junction, *McKay v. Altobello* is even further astray, as it relied on several doctrinal assumptions that have been thoroughly refuted in the decades since that case was decided. No. CIV. A. 96-3458, 1996 WL 635987, at *1 (E.D. La. Oct. 31, 1996). For example, federal courts have recently and repeatedly confirmed that the Materiality Provision: (1) contains a private right of action, *Vote.org*, 89 F.4th at 473–78; (2) is not limited to discriminatory practices, *Migliori v. Cohen*, 36 F.4th 153, 162 n.56 (3d Cir.), *vacated as moot sub nom. Ritter v. Migliori*, 143 S. Ct. 297 (2022); (3) is not limited to arbitrary enforcement of voting requirements, ECF No. 52 at 20–21 (collecting cases); and (4) extends beyond voter registration.

[9] For purposes of denying a preliminary injunction, the Southern District of Florida in *Friedman v. Snipes* concluded that the Materiality Provision was not "*intended* to apply to the counting of ballots by individuals *already deemed qualified to vote*." 345 F. Supp. 2d 1356, 1370–71 (S.D. Fla. 2004) (first emphasis added). That conclusion holds little persuasive value, especially as it is outweighed by more recent precedent, including from this Court. *See, e.g.*, *Migliori*, 36 F.4th at 162 n.56; *Thomsen*, 574 F. Supp. 3d at 636; *Abbott*, 2023 WL 8263348, at *22; *Schmidt*, 2023 WL 8091601, at *30 n.38; *In re Georgia Senate Bill 202*, 2023 WL 5334582, at *10.

still be denied an *effective* vote based on irrelevant paperwork errors, would not have accomplished Congress' broader, well-documented aim of eradicating all manner of arbitrary and discriminatory denials of the right to vote." *Abbott*, 2023 WL 8263348, at *21 (citing H.R. Rep. No. 88-914 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2394, 2485–87, 2491)).

The Legislature then urges this Court to read its preferred limits into the unambiguous text because the statute's scope would otherwise "be unworkable." ECF No. 65 at 33. But the Legislature's parade of horrible quickly unravels, as none of its hypotheticals exemplify "an error or omission on any record or paper relating to any . . . act requisite to voting" that is immaterial "in determining" whether a voter is qualified to vote. 52 U.S.C. § 10101(a)(2)(B). Delivering a ballot late to the polling place for same-day-absentee voting—or appearing at a polling place on the wrong date or after polls closed—is not "an error or omission *on* any record or paper." *Id.* (emphasis added). And even if the provision of a voter's name to poll workers was such an "omission *on* [a] record or paper," the Legislature does not explain how a voter's name would be immaterial to determining whether the individual is qualified to vote. In its attempt to trigger alarm, the Legislature instead demonstrates that applying the Materiality Provision—with the full force that its broad terms deserve—does not open Pandora's box of election maladministration.

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C. The witness certificate is not material in determining whether an individual is qualified to vote under Wisconsin law.

If the Legislature is correct that, in its telling, a voter's compliance with the witness requirement "does not determine whether he is a U.S. citizen, is 18 years of age, or meets the applicable residency and competency requirements," ECF No. 65 at 35, then compliance with that requirement necessarily 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).[10] None of Commission Defendants' or the Legislature's attempts to wriggle out of this clear admission are successful.

For example, Commission Defendants and the Legislature argue that procedural requirements imposed by state laws are inherently material in determining whether a voter is qualified merely because those requirements are imposed by state law. ECF No. 59 at 25–26; ECF No. 65 at 38–40. But codification of a voting requirement does not automatically defeat a Materiality Provision claim—in fact, "[t]he Materiality Provision is a standard that a State's [voting requirements] must satisfy." *Vote.org*, 89 F.4th at 487; *see also* ECF No. 68 at 24 (explaining that exempting codified voting requirements from Materiality Provision "would shield the same immaterial requirements that Congress sought to abolish" in enacting the Civil Rights Act). Commission Defendants' and the Legislature's argument relies on this Court's prior decision in *Common Cause v. Thomsen*, 574 F. Supp. 3d 634 (W.D. Wis. 2021). *See* ECF No. 59 at 25–26; ECF No. 65 at 38–40. But *Thomsen*, like *League*, involved a Materiality Provision challenge to a *component* of a requirement imposed by state law. The conclusion in *Thomsen*—that the signature component of the voter identification requirement was material—relied upon an implicit assumption that the voter identification requirement itself is material. But that assumption has no bearing as to whether the witness requirement is material here, where Plaintiffs argue that the *entire* requirement is irrelevant to, and therefore immaterial in, determining a voter's qualifications. Any other interpretation would "erase the Materiality [Provision] from existence" by relabeling *all* state laws, customs, and usages as qualifications. *Abbott*, 2023 WL 8263348, at *14.

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[10] The Legislature's attempt to recast the test to excuse any requirement that plays a significant, serious, or substantial "role in the absentee-voting process," ECF No. 65 at 40, is not the law.

Unable to take on the witness requirement's alleged immateriality on the merits, Commission Defendants argue that the witness requirement provides "statutory protection[]" against "fraud and abuse." ECF No. 59 at 23–24. Likewise, the Legislature asserts that the witness requirement "plays a . . . significant, serious, and substantial . . . role in the absentee-voting process . . . [and] an essential role in preventing the potential for fraud and abuse . . . [and] promotes confidence in our electoral system." ECF No. 65 at 40–42 (cleaned up). But as the United States noted—in the same statement of interest that Commission Defendants later rely on—the Materiality Provision's plain and "unconditional terms admit of no balancing tests or trade-offs" and apply "regardless of any other purported rationale for eliciting the information at issue." ECF No. 20-2 at 8–9.[11] Alleged state interests play no role in establishing whether a requirement is "material" for purposes of the Materiality Provision. *See* 52 U.S.C. § 10101(a)(2)(B).[12]

The Legislature is also wrong to assert that the Materiality Provision applies only to "discriminatory or arbitrary requirement[s]." ECF No. 65 at 38–41. Although the Materiality

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[11] Oddly, Commission Defendants suggest that the statement of interest supports their argument that the witness requirement is material because it states:

> The United States takes *no position* . . . on what specific pieces of witness address information are material to determining a voter's qualification to vote. And the United States *assumes* . . . that a witness address in some form *may be* material to determining a voter's qualification to vote under State law.

ECF No. 20-2 at 8 (emphases added). But the state-court proceedings in *League* considered only the sufficiency and completeness of the witness's *address*. Thus, the United States made the assumption in question in the course of arguing that *if* the court there reached the Materiality Provision claim *and if* it "conclude[d] that *some portion* of a witness address is not material to determining a voter's qualification to vote under Wisconsin law, [*then*] rejection of absentee ballots based on such errors or omissions would implicate" the Materiality Provision. ECF No. 20-2 at 8 (emphasis added). The fact the United States did not make, in an entirely different case, the precise argument that Commission Defendants wish to counter here, ECF No. 59 at 23–24, is not affirmative support for their intended counterargument.

[12] In this way, the Materiality Provision's statutory test is entirely distinct from the *Anderson–Burdick* constitutional standard for identifying undue burdens on the right to vote.

Provision surely extends to such applications, it is not so limited. For example, myriad federal courts—including this Court—have concluded that the Materiality Provision "isn't limited to race discrimination." *Thomsen*, 574 F. Supp. 3d at 636; *see also Vote.org*, 89 F.4th at 482; *Migliori v. Cohen*, 36 F.4th 153, 162 n.56 (3d Cir.), *vacated as moot sub nom. Ritter v. Migliori*, 143 S. Ct. 297 (2022);[13] *Abbott*, 2023 WL 8263348, at *23; *Pa. State Conf. of NAACP v. Schmidt*, No. 1:22-CV-00339, 2023 WL 8091601, at *23 n.31 (W.D. Pa. Nov. 21, 2023), *stayed pending appeal sub nom. Pa. State Conf. of NAACP v. Northampton Cnty. Bd. of Elections*, No. 23-3166 (3d Cir. Dec. 13, 2023) (per curiam). Likewise, numerous federal courts have applied the Materiality Provision beyond arbitrary and discretionary actions, to requirements imposed directly by state law. *See, e.g.*, *Vote.org*, 89 F.4th at 468 (citing Tex. Elec. Code Ann. § 13.143(d-2)); *Migliori*, 36 F.4th at 156–57 (citing 25 Pa. Cons. Stat. §§ 3146.6(a), 3150.16(a)); *Abbott*, 2023 WL 8263348, at *4–6 (citing provisions of Texas Senate Bill 1); *In re Georgia Senate Bill 202*, 2023 WL 5334582, at *2 (citing Ga. Code § 21-2-386). Meanwhile, the Legislature does not cite a single case that would support the limitations that it asks this Court to graft onto the plain text.

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[13] 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*, 89 F.4th at 476–77, 479–80 & n.7; *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 Justices 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).

D. Applying the Materiality Provision is not unconstitutional.

The Legislature's passing references to constitutional concerns and the risk of encroachment on state powers cannot justify its atextual reading of the Materiality Provision, ECF No. 65 at 33, 41–42, primarily because there is no constitutional problem to avoid here. For one, Congress relied on its authority under the Elections Clause "in enacting the [Civil Rights Act of 1965]." *Abbott*, 2023 WL 8263348, at *25. The Elections Clause "functions as 'a default provision; it invests the States with responsibility for the mechanics of congressional elections, but only so far as Congress declines to pre-empt state legislative choices.' The power of Congress . . . 'is paramount, and may be exercised at any time.'" *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 9 (2013) (quoting *Foster v. Love*, 522 U.S. 67, 69 (1997), and *Ex parte Siebold*, 100 U.S. 371, 392 (1880)).

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Second, as the Fifth Circuit recently concluded, the Materiality Provision is "a congruent and proportional exercise of congressional power" under the Fourteenth and Fifteenth Amendments. *Vote.org*, 89 F.4th at 486–87 & n.11. Because "Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct," *Nev. Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721, 727–28 (2003)—including voting-related limitations that "unduly lend themselves to discriminatory application, either conscious or unconscious," *City of Boerne v. Flores*, 521 U.S. 507, 526 (1997) (quoting *Oregon v. Mitchell*, 400 U.S. 112, 216 (1970) (Harlan, J., concurring in part and dissenting in part))—it is a wholly rational exercise of congressional power to "prohibit those acting under color

of law from using immaterial omissions, which were historically used to prevent racial minorities from voting, from blocking any individual's ability to vote," *Vote.org*, 89 F.4th at 487.[14]

Nevertheless, the constitutional-avoidance canon that the Legislature urges "has no application in the absence of statutory ambiguity." *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 494 (2001). It applies "only . . . where a statute has 'more than one plausible construction.'" *Johnson v. Arteaga-Martinez*, 596 U.S. 573, 581 (2022) (quoting *Jennings v. Rodriguez*, 583 U.S. 281, 296 (2018)). The Materiality Provision's plain terms are unambiguous and the Legislature's proposed interpretations are implausible, *see supra* Section II.B, thus the canon does not apply here.

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III. The Court should issue its decision once dispositive motions are fully briefed.

The primary relevance of the *League of Women Voters v. Wisconsin Elections Commission* and *Priorities USA v. Wisconsin Elections Commission* state court actions is that Defendants are precluded from relitigating issues that they lost in *League*. Otherwise, as Commission Defendants correctly note, "[t]he *League of Women Voters* case will not address the broader issue raised by Plaintiffs here." ECF No. 59 at 32. And because the *Priorities USA* case involves entirely distinct claims under the Wisconsin Constitution, ECF No. 60-5 ¶¶ 71–82, there is no reason to delay judgment here if the Court finds violations of federal statutory law.

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

The Court can and should apply issue preclusion to the first three elements of the Materiality Provision claim, as Plaintiffs' affirmative brief argued in detail. *See* ECF No. 68 at 14–

[14] Review of Congress's Fifteenth Amendment legislation is even more deferential as Congress "may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting." *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966). In any event, the Materiality Provision easily satisfies both standards. *Vote.org*, 89 F.4th at 486–87.

19. Both Commission Defendants and the Legislature participated in *League*, made functionally the same arguments they make here, and lost. *See id.* Offensive issue preclusion therefore applies. *Rinaldi v. Wisconsin*, No. 19-CV-3-JDP, 2019 WL 3802465, at *5 (W.D. Wis. Aug. 13, 2019).

Commission Defendants do not argue otherwise. *See* ECF No. 59 at 28–30. To the contrary, they agree that "issue preclusion would bind the Commission Defendants" with regard to *League*'s disposition of the issues actually decided in *League*. *Id.* at 28. Although Commission Defendants frame the issues that case decided in terms of *League*'s ultimate holding—about certain categories of witness addresses—that ruling necessarily depended on upstream holdings about whether the first three Materiality Provision elements apply to the witness requirement. *See* ECF No. 65 at 9–10. Commission Defendants thus implicitly concede that issue preclusion settles those issues for purposes of this case.

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The Legislature, by contrast, argues that issue preclusion does not apply, ECF No. 65 at 47–48, but it fatally misunderstands the applicable law in two ways. First, the Legislature suggests that issue preclusion requires mutuality or identity of interests. But that requirement applies only to the party *being precluded*, as the Legislature's own citation confirms. *See Clarke v. Wis. Elections Comm'n*, 2023 WI 79, ¶ 45 & n.23, 410 Wis. 2d 1, 998 N.W.2d 370; *see also, e.g., Robbins v. Med-1 Sols., LLC*, 13 F.4th 652, 657 (7th Cir. 2021); *Coleman v. Lab. & Indus. Rev. Comm'n of Wis.*, 860 F.3d 461, 469 (7th Cir. 2017). Because both the Legislature and Commission Defendants participated in *League* and had a full and fair opportunity to litigate the Materiality Provision issue in that case, issue preclusion may be applied against them here even though Plaintiffs were not party to *League*.

Second, the Legislature asserts that nonmutual offensive issue preclusion *never* applies "against the State." ECF No. 65 at 47 (citing *United States v. Mendoza*, 464 U.S. 154, 162 (1984)).

But that principle comes from federal law, which does not control here. The preclusive effect of a state-court judgment—such as the *League* 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."). Indeed, the Legislature concedes this choice-of-law principle on the preceding page of its own brief. ECF No. 65 at 46 (quoting *Savory v. Cannon*, 947 F.3d 409, 413 (7th Cir. 2020)). And as Plaintiffs' affirmative brief explains, ECF No. 68 at 16, although one Wisconsin case has warned against "broad application" of issue preclusion against state instrumentalities, *Gould v. Dep't of Health & Soc. Servs.*, 216 Wis. 2d 356, 370, 576 N.W.2d 292, 298 (Wis. Ct. App. 1998), no decision Plaintiffs are aware of has forbidden it categorically. Nor does the Legislature identify any such state-court decision. The Court may therefore apply issue preclusion so long as doing so "would be fundamentally fair." ECF No. 65 at 47 (quoting *Clarke*, 2023 WI 79, ¶ 44). The Legislature does not argue that it would not be. *See id.* at 47–48; *see also* ECF No. 68 at 18–19 (discussing Wisconsin's fundamental fairness considerations in detail).

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B. Ongoing state-court proceedings do not justify a stay.

This Court should not stay a ruling on the parties' cross-motions for summary judgment. Plaintiffs are entitled to lawful election procedures, which can be implemented without controversy this spring or summer, and there is little use predicting how long the appeals in the state-court actions may take to run their course. More fundamentally, there is no reasonable likelihood that any of the state court actions will fully address the claims brought here.

Plaintiffs seek to enjoin the witness requirement regardless of whether the witness includes an address in their certification, and thus this action will necessarily persist notwithstanding the ultimate lawfulness of the subsidiary address requirement, which is all that is at issue in *League*.

In *Priorities*, meanwhile, the Legislature argued that "even if [the Wisconsin Supreme] Court were to grant the [Bypass] Petition and expeditiously resolve this appeal entirely in favor of Petitioners before November 5, 2024 . . . this would not provide Petitioners with any relief against the challenged absentee-voting statutes." Second Decl. of Uzoma N. Nkwonta ("Nkwonta Decl."), Ex. G at 18. The Legislature cannot have it both ways and turn around here to suggest the opposite. In any event, nothing filed before the circuit court, the court of appeals, or the Wisconsin Supreme Court in *Priorities* indicates that any party or court expects to adjudicate the proper construction of the witness requirement as relevant to claims brought under the Vouching Rule or Materiality Provision. *See, e.g.*, ECF No. 60-5 (*Priorities* Complaint); ECF No. 60-6 (*Priorities* Decision and Order on Motions to Dismiss); Nkwonta Decl., Ex. E (*Priorities* Docketing Statement); ECF No. 60-8 (*Priorities* Petition to Bypass); Nkwonta Decl., Ex. F (Commission Response to *Priorities* Petition to Bypass); Nkwonta Decl., Ex. G (Legislature Response to *Priorities* Petition to Bypass).

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Relief in federal court is not precluded whenever similar relief may also be available in another action in state court, let alone when such a relief is sought by *different plaintiffs* in a different case under a different source of law. *Cf.* ECF No. 56 at 11 (citing *Huon v. Johnson & Bell, Ltd.*, 657 F.3d 641, 645–46 (7th Cir. 2011)); *Adkins v. VIM Recycling, Inc.*, 644 F.3d 483, 498–99 (7th Cir. 2011) ("First, and most simply, the parties are different. . . . Second, the claims in these cases are different."). The Legislature's arguments in support of a seemingly indefinite stay fall flat. The concerns this Court asked the parties to address in summary judgment briefing focused on judicial efficiency and clarity in deciding this case (as well as on avoiding confusion from any corresponding remedy). ECF No. 56 at 14–15. Because the state-court proceedings in *League* and *Priorities* will not provide additional context or clarity in evaluating the claims here, there is no reason for the Court to stay its decision.

C. Invaliding the witness requirement will not cause confusion.

There is no reasonable likelihood that a decision on Plaintiffs' Materiality Provision claim will create confusion with the state courts' ultimate resolution of *League*. A simple chart illustrates the clear rule that will follow from any combination of rulings in these two cases:

		League	
		Judgment for Plaintiff	Judgment for Defendants
Liebert	Judgment for Plaintiffs	Ballots may not be rejected for any error or omission on the witness certificate.	Ballots may not be rejected for any error or omission on the witness certificate.
	Judgment for Defendants	Ballots may not be rejected for certain address errors or omissions on the witness certificate.	Ballots may be rejected according to the standards in place before the cases were brought.

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Because there is no risk of voter confusion posed by invalidating the witness requirement with respect to *any* of the upcoming 2024 elections in Wisconsin, the Legislature's appeal to the *Purcell* doctrine holds no water. Ultimately, "[t]he concerns that troubled the Supreme Court in *Purcell* are not present in this instance" because "[a] voter filling out an absentee ballot will be entirely unaffected by an order enjoining" Defendants from enforcing the witness requirement. *Self Advoc. Sols. N.D. v. Jaeger*, 464 F. Supp. 3d 1039, 1055 (D.N.D. 2020).

Purcell v. Gonzalez, the case after which the doctrine is named, stands for the proposition that courts should avoid issuing "orders affecting elections, especially conflicting orders, [that] can themselves result in voter confusion and [a] consequent incentive to remain away from the polls." 549 U.S. 1, 4–5 (2006). Importantly, however, the district court *denied* injunctive relief in that case. *Gonzalez v. State of Arizona*, No. CV 06-1268-PHX, 2006 WL 3627297, at *10 (D. Ariz. Sept. 11, 2006), *aff'd sub nom. Gonzalez v. Arizona*, 485 F.3d 1041 (9th Cir. 2007). The plaintiffs then "appealed the denial, and the Clerk of the Court of Appeals set a briefing schedule that concluded on November 21, two weeks after the upcoming November 7 election." *Purcell*, 549

U.S. at 3. Responding to plaintiffs' request for an injunction pending appeal, a two-judge motions panel of the Ninth Circuit then issued, "[o]n October 5, . . . a four-sentence order enjoining Arizona from enforcing Proposition 200's provisions." *Id.*[15] In this context, the Supreme Court reversed the Ninth Circuit's injunction, which notably "offered no explanation or justification for its order." *Id.* The Court explained that:

> [B]y failing to provide any factual findings or indeed any reasoning of its own the Court of Appeals left this Court in the position of evaluating the Court of Appeals' bare order . . . . There has been no explanation given by the Court of Appeals showing the ruling and findings of the District Court to be incorrect. In view of the impending election, the necessity for clear guidance to the State of Arizona, and our conclusion regarding the Court of Appeals' issuance of the order we vacate the order of the Court of Appeals. . . . Given the imminence of the election and the inadequate time to resolve the factual disputes, our action today shall of necessity allow the election to proceed without an injunction suspending the voter identification rules.

Id. at 5–6. Thus, because the *Purcell* doctrine concerns the risk of "voter confusion and consequent incentive to remain away from the polls," *id.* at 4–5, it is ultimately a question of remedies dependent upon the circumstances in each case. *See e.g.*, *Robinson v. Ardoin*, 86 F.4th 574, 599–600 (5th Cir. 2023) (recognizing that where "the injunction deadline would present no difficulties for Louisiana's election calendar, and the deadlines that impact voters were not until October[,]

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[15] The order, issued in the form of a minute entry, stated only that:

> [Appellant's] emergency motion for injunction pending interlocutory appeal is granted. The court enjoins implementation of Proposition 200's voting identification requirement in connection with Arizona's 11/7/06 general election; and enjoins [Proposition] 200's registration proof of citizenship requirements so that voters can register before the 10/9/06 registration deadline. This injunction shall remain in[ ]effect pending disposition of the merits of [this] appeal. The briefing schedule previously established by [this] court on 9/27/06 remains in effect.

Nkwonta Decl., Ex. H (Order, *Gonzalez v. Arizona*, No. 06-16702 (9th Cir. Oct. 5, 2006)).

. . . *Purcell* did not bar the preliminary injunction" entered over five months before the election "nor require it to be stayed").

"[T]he primary concerns underlying the *Purcell* principle—confusion and disruption—don't apply here." *Carey v. Wis. Elections Comm'n*, 624 F. Supp. 3d 1020, 1035 (W.D. Wis. 2022) (Peterson, J.) (citing *Merrill v. Milligan*, 142 S. Ct. 879, 880–81 (Kavanaugh, J., concurring)). And the Legislature has not even attempted to demonstrate how confusion from an injunction here could potentially disenfranchise voters. Instead, the Legislature merely observes that the April primary "is less than seven weeks away," while conceding that "there is more time before the Fall Election on November 5." ECF No. 65 at 50. A conclusory statement that "confusion and administrability concerns would result from this Court enjoining the absentee-ballot witness requirement," ECF No. 65 at 51, is sheer empty letter. In fact, injunctive relief here creates no *Purcell* concerns, not only because the November election is still months away, but also because there is zero risk of confusing voters. An injunction preventing enforcement of the witness requirement would mean that voters' ballots will be counted regardless of whether they omit or include a completed witness certificate; "the process for submitting an absentee ballot will remain unchanged." *Jaeger*, 464 F. Supp. 3d at 1055. In sum, the Court should not hesitate to press forth once dispositive motions are fully briefed.

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CONCLUSION

For the reasons set forth above, the Court should deny the Commission Defendants' and the Legislature's motions for summary judgment.

Respectfully submitted this 8th day of March, 2024.

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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 8th day of March, 2024, with a copy of this document via the Court's CM/ECF system.

<u>/s/ Uzoma N. Nkwonta</u>
Uzoma N. Nkwonta

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