

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

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SUSAN LIEBERT, et al.,

Plaintiffs,

v.

Case No. 23-CV-672

WISCONSIN ELECTIONS  
COMMISSION, et al.,

Defendants,

WISCONSIN STATE LEGISLATURE,

Intervenor-Defendant.

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**COMMISSION DEFENDANTS' RESPONSE TO THE WISCONSIN  
STATE LEGISLATURE'S PROPOSED FINDINGS OF FACT**

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Commission Defendants respond to the Wisconsin State Legislature's proposed findings of fact in support of its motion for summary judgment, as follows:

1. Wisconsin has "lots of rules that make voting easier" in the State, from the registration process to the actual casting of a ballot. *Luft v. Evers*, 963 F.3d 665, 672 (7th Cir. 2020); *Frank v. Walker*, 768 F.3d 744, 748 & n.2 (7th Cir. 2014).

**Response:** This assertion is, in whole or part, legal argument, not a factual matter, and should, therefore, be disregarded by the Court.

2. “Registering to vote is easy in Wisconsin.” *Frank*, 768 F.3d at 748.

**Response:** This assertion is, in whole or part, legal argument, not a factual matter, and should, therefore, be disregarded by the Court.

3. Any competent adult U.S. citizen without a felony conviction and who has resided at her current address for at least 28 consecutive days prior to the election is qualified to vote in Wisconsin. Wis. Stat. §§ 6.02(1), 6.03(1); Wis. Const. art. III, § 1.

**Response:** This assertion is, in whole or part, legal argument, not a factual matter, and should, therefore, be disregarded by the Court.

4. Qualified voters may register to vote in several ways: in person before Election Day; by mail; by online application; or at their polling place on Election Day. Wis. Stat. §§ 6.30, 6.33–.34, 6.55.

**Response:** This assertion is, in whole or part, legal argument, not a factual matter, and should, therefore, be disregarded by the Court.

5. Casting a ballot is similarly easy in Wisconsin. *See Luft*, 963 F.3d at 672; *accord Frank*, 768 F.3d at 748.

**Response:** This assertion is, in whole or part, legal argument, not a factual matter, and should, therefore, be disregarded by the Court.

6. Registered voters may choose to cast their ballots in-person on Election Day at polling places any time from 7 a.m. until 8 p.m. Wis. Stat. § 6.78(1m).

**Response:** This assertion is, in whole or part, legal argument, not a factual matter, and should, therefore, be disregarded by the Court.

7. Qualified voters are entitled to cast their ballots as long as they are in line when the polls close. *Id.* § 6.78(4).

**Response:** This assertion is, in whole or part, legal argument, not a factual matter, and should, therefore, be disregarded by the Court.

8. Alternatively, voters may utilize curbside voting on Election Day, where local clerks offer this statutorily permissible option. *Id.* § 6.82(1).

**Response:** This assertion is, in whole or part, legal argument, not a factual matter, and should, therefore, be disregarded by the Court.

9. Wisconsinites are also entitled to take time off from work to vote, and employers may not penalize their employees for doing so. *Id.* § 6.76.

**Response:** This assertion is, in whole or part, legal argument, not a factual matter, and should, therefore, be disregarded by the Court.

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

**Response:** This assertion is, in whole or part, legal argument, not a factual matter, and should, therefore, be disregarded by the Court.

11. Wisconsin has also long provided a generous absentee voting regime for qualified, registered voters who are “unable or unwilling to appear at the polling place in [their] ward or election district[s].” *Id.* § 6.85(1); see 1999 Wis. Act 182, §§ 90m, 95p (creating Wisconsin’s current absentee-voting regime, including the requirement that the absentee voter votes in the presence of one witness, in 2000);<sup>1</sup> 1965 Wis. Act 666, § 1 (creating Wis. Stat. § 6.87 in 1966 and imposing a “2 witnesses” requirement).

**Response:** This assertion is, in whole or part, legal argument, not a factual matter, and should, therefore, be disregarded by the Court.

12. Today, this regime permits voters to exercise the “privilege” of absentee voting, Wis. Stat. § 6.84(1), in numerous, convenient ways.

**Response:** This assertion is, in whole or part, legal argument, not a factual matter, and should, therefore, be disregarded by the Court.

13. Voters may request absentee ballots in person, by mail, *id.* § 6.86(1)(a)(1)–(6), or—in certain circumstances (such as military voters, those living overseas, or nursing home residents)—by email or fax, *id.* §§ 6.86(ac), 6.86(2)(a), 6.865, 6.87(3)(d), 6.875.

**Response:** This assertion is, in whole or part, legal argument, not a factual matter, and should, therefore, be disregarded by the Court.

14. Studies show that “[a]bsentee ballots [are] the largest source of potential voter fraud,” as the landmark Carter-Baker Commission on Federal Election Reform concluded. Ex. A to Declaration of Kevin M. LeRoy (“LeRoy Decl.”), Carter-Baker Comm’n on Fed. Elections Reform, Building Confidence in U.S. Elections 46 (2005) (citing Balancing Access and Integrity: The Report of the Century Foundation Working Group on State Implementation of Election Reform at 67–69 (N.Y., Century Foundation Press, 2005)).

**Response:** The cited evidentiary material is inadmissible hearsay pursuant to Fed. R. Evid. 802 and should, therefore, be disregarded by the Court.

15. “Absentee balloting is vulnerable to abuse in several ways.” *Id.*

**Response:** The cited evidentiary material is inadmissible hearsay pursuant to Fed. R. Evid. 802 and should, therefore, be disregarded by the Court.

16. “Blank ballots mailed to the wrong address or to large residential buildings might get intercepted,” and “[c]itizens who vote at home, at nursing homes, at the workplace, or in church are more susceptible to pressure, overt and subtle, or to intimidation.” *Id.*

**Response:** The cited evidentiary material is inadmissible hearsay pursuant to Fed. R. Evid. 802 and should, therefore, be disregarded by the Court.

17. Further, “[v]ote buying schemes are far more difficult to detect when citizens vote by mail.” *Id.*

**Response:** The cited evidentiary material is inadmissible hearsay pursuant to Fed. R. Evid. 802 and should, therefore, be disregarded by the Court.

18. Accordingly, “[w]hile the [L]egislature has recognized absentee voting has many benefits for voters, the [L]egislature has also enacted safeguards designed to minimize the possibility of fraud.” *Teigen v. Wis. Elections Comm’n*, 976 N.W.2d 519, 543 (Wis. 2022); *see also Jefferson v. Dane Cnty.*, 951 N.W.2d 556, 561 (Wis. 2020); *Lee v. Paulson*, 623 N.W.2d 577, 579 (Wis. Ct. App. 2000).

**Response:** This assertion is, in whole or part, legal argument, not a factual matter, and should, therefore, be disregarded by the Court.

19. In Wisconsin, absentee voters must fill out their ballots in the presence of a witness. Wis. Stat. §§ 6.87(2), (4)(b)1.

**Response:** This assertion is, in whole or part, legal argument, not a factual matter, and should, therefore, be disregarded by the Court.

20. Many other States have similar witness requirements. *See, e.g.*, Ala. Code § 17-11-9; Alaska Stat. § 15.20.203; La. Rev. Stat. § 18:1306; Minn. Stat. § 203B.07; N.C. Gen. Stat. § 163-231; S.C. Code §§ 7-15-380, 7-15-220.

**Response:** This assertion is, in whole or part, legal argument, not a factual matter, and should, therefore, be disregarded by the Court.

21. The current version of Wis. Stat. § 6.87 requires absentee voters to mark and fold their ballots before a witness who is an adult U.S. citizen and then place the ballot in the official absentee-ballot envelope. Wis. Stat. § 6.87(4)(b)1.

**Response:** This assertion is, in whole or part, legal argument, not a factual matter, and should, therefore, be disregarded by the Court.

22. The absentee voter and witness must then complete certain attestations on the printed certificate provided with each absentee ballot envelope. *Id.*

**Response:** This assertion is, in whole or part, legal argument, not a factual matter, and should, therefore, be disregarded by the Court.

23. Specifically, the voter certifies that she is “a resident” of a particular political subdivision, that she is “entitled to vote” in that subdivision, that she is “not voting at any other location,” and that she “exhibited the enclosed ballot unmarked to the witness” before marking the ballot “in [the witness’s] presence and in the presence of no other person.” *Id.* § 6.87(2).


**Response:** This assertion is, in whole or part, legal argument, not a factual matter, and should, therefore, be disregarded by the Court.

24. After observing the absentee-voting process, the witness “certif[ies] that [he or she is] an adult U.S. citizen and that the above statements are true and the voting procedure was executed as there stated,” and then signs the certification. *Id.*

**Response:** This assertion is, in whole or part, legal argument, not a factual matter, and should, therefore, be disregarded by the Court.



25. These certifications are printed on the back of the ballot envelope sent to each absentee voter, as reproduced immediately below:

<b>STEP 2</b>	<b>VOTER must complete this part</b>
	I certify, subject to the penalties for false statements of Wis. Stat. § 12.60(1)(b), that:
<ul style="list-style-type: none"><li>• I am a resident of the ward or of the aldermanic district of the municipality in the county of the state of Wisconsin indicated hereon OR I am entitled to vote in the ward or aldermanic district at the election indicated hereon</li><li>• I am not voting at any other location in this election</li><li>• I am unable or unwilling to appear at the polling place in the ward on Election Day, or I have changed my residence within the state from one ward to another less than 28 days before the election</li><li>• I displayed the ballot unmarked to the witness and in the presence of no other person marked the ballot and enclosed and sealed it in this envelope in a manner that no one but myself and an assistant under s. 6.87 (5), if I requested assistance, could know how I voted</li><li>• I requested this ballot and this is the original or a copy of that request</li></ul>	
<b>X</b>	
<b>Voter Signature</b>	
<b>Certification of Assistant</b> (if applicable) I certify that the voter is unable to sign their name due to a disability and that I signed the voter's name at the direction and request of the voter	
<b>Assistant Signature</b>	
<b>STEP 3</b>	<b>WITNESS must complete this part</b>
	I the undersigned witness, subject to the penalties for false statements of Wis. Stat. § 12.60(1)(a), certify that:
	<ul style="list-style-type: none"><li>• I am an adult U.S. citizen</li><li>• The above statements are true and the voting procedure was executed as stated</li><li>• I am not a candidate for any office on the enclosed ballot (except in the case of an incumbent municipal clerk).</li><li>• I did not solicit or advise the elector to vote for or against any candidate or measure</li></ul>
<b>X</b>	
<b>Witness Signature</b>	
<b>Witness Printed Name</b>	
<b>Witness Address (Number, Street Name, City)</b>	

Ex. B to LeRoy Decl., *Official Absentee Ballot Application / Certification*, WEC

**Response: No dispute.**

26. The Wisconsin Elections Commission (“WEC”) issues uniform instructions for absentee voters, which instructions currently provide, in relevant part, that the absentee voter must: “[m]ark [the] ballot in the presence of [the] witness”; “[r]efold [the] voted ballot and place it inside of the return envelope”; “[s]eal the envelope in the presence of [the] witness”; “[f]ill out the required sections of the absentee return envelope”; and “[r]eturn [the] ballot.” Ex. C to LeRoy Decl., Uniform Instructions for Wisconsin Absentee Voters, WEC.4

**Response: No dispute.**

27. The instructions also recommend that the voters mail back the ballot “at least one week” before Election Day. *Id.*

**Response: No dispute.**

28. WEC provides a ballot tracking service to all absentee voters. See Ex. D to LeRoy Decl., *Track My Ballot*, WEC.5

**Response: No dispute.**

29. The “Track My Ballot” tool allows voters to check the status of their ballots by simply providing their names and dates of birth. *Id.*

**Response: No dispute.**

30. The tracker allows them to see if their ballots have been received and if there are any errors that they will need to cure in order to have their ballots counted. *Id.*

**Response: No dispute.**

31. The website also allows voters to request an entirely new ballot if they are concerned their ballot has been lost or may not make it to its destination by Election Day. *Id.*

**Response: No dispute.**

32. On April 2, 2024, Wisconsin will hold a Presidential Preference Primary as well as a Spring General Election. Ex. W to LeRoy Decl., Wisconsin Elections Commission 2024 Calendar of Election Events, WEC.

**Response: No dispute.**

33. On August 13, 2024, Wisconsin will then hold the 2024 Partisan Primary. *Id.*

**Response: No dispute.**

34. On November 5, 2024, the State will hold the 2024 General Election. *Id.*

**Response: No dispute.**

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

**Response: No dispute.**

36. First, before filing the Complaint here, counsel for Plaintiffs in this case filed a four-count complaint in the Circuit Court for Dane County, Wisconsin, on behalf of plaintiff Priorities USA, among others, against the WEC, challenging the same absentee-ballot witness requirement at issue here under the Wisconsin Constitution. Ex. E to LeRoy Decl., Dkt.2, *Priorities USA v. Wis. Elections Comm'n*, No.2023CV1900 (Wis. Cir. Ct. Dane Cnty. July 20, 2023) ("*Priorities USA*").

**Response: No dispute.**

37. The Legislature successfully intervened in those proceedings as a Defendant. Ex. F to LeRoy Decl., Dkt.73, *Priorities USA* (Sept. 11, 2023).

**Response: No dispute.**

38. The Dane County Circuit Court recently granted a motion to dismiss in *Priorities USA*, dismissing the plaintiffs' facial constitutional challenge to Wis. Stat. § 6.87(4)(b)1 (among other statutes). Ex. G to LeRoy Decl., Dkt.100, *Priorities USA* (Jan. 24, 2024).

**Response: No dispute.**

39. The Dane County Circuit Court then accepted the plaintiffs' notice of voluntary dismissal of their more limited, "hybrid" constitutional claim against the witness requirement. Ex. H to LeRoy Decl., Dkt.103, *Priorities USA* (Jan. 29, 2024).

**Response: No dispute.**

40. The *Priorities USA* plaintiffs appealed the Dane County Circuit Court's final judgment to the Wisconsin Court of Appeals. *Priorities USA v. Wis. Elections Comm'n*, No.2024AP164 (Wis. Ct. App.).

**Response: No dispute.**

41. They have also petitioned the Wisconsin Supreme Court to bypass the Court of Appeals in light of the approaching November 2024 General Election. Ex. I to LeRoy Decl., Petition to Bypass, *Priorities USA v. WEC*, No.2024AP164 (Feb. 9, 2024).

**Response: No dispute.**

42. Second, a separate state case challenges the absentee-ballot witness requirement as preempted by federal law. Ex. J to LeRoy Decl., Dkt.94, *League of Women Voters of Wis. v. WEC*, No.2022CV2472 (Wis. Cir. Ct. Dane Cnty. Dec. 23, 2022) ("LWV").

**Response: No dispute.**

43. Specifically, in *LWV*, the plaintiffs argued that denial of the right to vote due to “omission of certain witness address components would violate” Section 10101(a)(2)(B) of the Civil Rights Act, specifically challenging “the prohibition on denying a vote based on an immaterial omission or error.” Ex. J to LeRoy Decl., Dkt.94, *LWV* (Dec. 23, 2022).

**Response: No dispute.**

44. The Dane County Circuit Court allowed the Legislature to intervene in the proceedings. Ex. K to LeRoy Decl., Dkt.34, *LWV* (Oct. 7, 2022).

**Response: No dispute.**

45. The Dane County Circuit Court entered summary judgment in the *LWV* plaintiffs’ favor, finding that the Materiality Provision applies to the witness address requirement and that the witness’ address is not “material to whether a voter is qualified.” Ex. L to LeRoy Decl., Dkt.157 at 5, *LWV* (Jan. 2, 2024).

**Response: No dispute.**

46. Following that decision, the Dane County Circuit Court entered judgment as to the Materiality Provision claim and issued an injunction providing that “no absentee ballot may be rejected” with “witness certifications” falling into the following four categories: (a) “[t]he witness’s street number, street name, and municipality are present, but there is neither a state name nor a ZIP code provided”; (b) “[t]he witness’s street number, street

name, and ZIP code as present, but there is neither a municipality nor a state name provided”; (c) “[t]he witness’s street number and street name of the voter, but no other address information is provided”; and (d) “[t]he witness certification indicates that the witness address is the same as the voter’s address” with use of specified language or other markings. Ex. M to LeRoy Decl., Dkt.161, *LWV* (Jan. 30, 2024).

**Response: No dispute.**

47. Both plaintiffs and the Legislature appealed to the Wisconsin Court of Appeals, and the Court of Appeals has consolidated those cases. *LWV v. Wis. Elections Comm’n*, No.2024AP166 (Wis. Ct. App.).

**Response: No dispute.**

48. The Dane County Circuit Court and the Wisconsin Court of Appeals recently denied a request from the Legislature to stay the Dane County Circuit Court’s injunction pending appeal. Ex. N to LeRoy Decl., Dkt.177, *LWV* (Feb. 5, 2024); Ex. X to LeRoy Decl., Order, *LWV v. Wis. Elections Comm’n*, No.2024AP166 (Wis. Ct. App. Feb. 8, 2024).

**Response: No dispute.**

49. Merits briefing on the Legislature’s appeal has yet to commence. *LWV*, No.2024AP166.

**Response: No dispute.**

50. Third, another case filed in Wisconsin's Dane County Circuit Court seeks an order judicially defining a witness's "address" for purposes of the absentee-ballot witness address requirement. Ex. O to LeRoy Decl., Dkt.160, *Rise v. Wis. Elections Comm'n*, No.2022CV2446 (Wis. Cir. Ct. Dane Cnty.) (Mar. 24, 2023) ("Rise").

**Response: No dispute.**

51. Again, the Legislature moved to intervene, and the Dane County Circuit Court granted the motion. Ex. P to LeRoy Decl., Dkt.71, *Rise* (Oct. 6, 2022).

**Response: No dispute.**

52. The Dane County Circuit Court recently granted the Rise plaintiffs' motion for summary judgment, holding that the term "address" as used in Wis. Stat. § 6.87 means "a place where a person or organization may be communicated with." Ex. Q to LeRoy Decl., Dkt.233, *Rise* (Jan. 2, 2024).

**Response: No dispute.**

53. On August 23, 2023, the Circuit Court procedurally consolidated Rise with LWV as companion cases for purposes of trial. Ex. R to LeRoy Decl., Dkt.203, *Rise* (Aug. 2, 2023).

**Response: No dispute.**



54. Following the summary judgment decision, the Dane County Circuit Court then issued an injunction ordering that clerks may not “reject[ ] or return[ ] for cure any absentee ballot based on a witness’s address, if the face of the certificate contains sufficient information to allow a reasonable person in the community to identify a location where the witness may be communicated with.” Ex. S to LeRoy Decl., Dkt.238, *Rise* (Jan. 30, 2024).

**Response: No dispute.**

55. The Dane County Circuit Court further ordered WEC to “rescind” or “revise and reissue” its guidance defining the term “address” and to notify municipal clerks of “their obligation not to reject, return for cure, or refuse to count any absentee ballot based on a witness’s address,” if that address complies with the Circuit Court’s “address” definition. *Id.*

**Response: No dispute.**

56. The Legislature appealed to the Wisconsin Court of Appeals. *Rise v. Wis. Elections Comm’n*, No.2024AP165 (Wis. Ct. App.).

**Response: No dispute.**

57. The Legislature is currently seeking a stay of the Dane County Circuit Court’s decision pending appeal in the Court of Appeals proceedings. Ex. T to LeRoy Decl., *Rise*, No.2024AP165 (Feb. 6, 2024).

**Response: No dispute.**

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

**Response: No dispute.**

Dated this 8th day of March 2024.

Respectfully submitted,

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Electronically signed by:

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