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No. 2024AP166

In the Wisconsin Court of Appeals

DISTRICT I

LEAGUE OF WOMEN VOTERS OF WISCONSIN,
PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

v.

WISCONSIN ELECTIONS COMMISSION, DON MILLIS,
JULIE M. GLANCEY, ROBERT F. SPINDELL, JR.,
MARK L. THOMSEN, ANN S. JACOBS,
MARGE BOSTELMANN, AND MEAGAN WOLFE,
DEFENDANTS-RESPONDENTS,

and

THE WISCONSIN STATE LEGISLATURE,
INTERVENOR-RESPONDENT-CROSS-APPELLANT.

On Appeal From The Dane County Circuit Court,
The Honorable Ryan D. Nilsestuen and
The Honorable Nia E. Trammell, Presiding
Case No. 2022CV2472

**REPLY BRIEF OF INTERVENOR-RESPONDENT-CROSS-
APPELLANT THE WISCONSIN STATE LEGISLATURE**

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INTRODUCTION

After the Circuit Court adopted Plaintiff's atextual and overbroad interpretation of the Materiality Provision, the Third Circuit and the U.S. District Court for the Western District of Wisconsin explained why that interpretation is wrong in multiple respects. Rather than defend the errors that it successfully urged the Circuit Court to commit, Plaintiff spends most of its Response Brief building and then tearing down straw-man arguments that the Legislature does not make. While the United States as an *amicus* does attempt to defend the Circuit Court's actual holding, those arguments are unpersuasive for the same reasons that the Third Circuit and Western District of Wisconsin carefully explained. This Court should reverse the Circuit Court's erroneous decision.

ARGUMENT

I. Plaintiff Fails To Justify The Circuit Court's Atextual Expansion Of The Materiality Provision

A. Section 6.87(6d) Does Not Affect Voter-Qualification Determinations

1. As the Legislature explained, relying heavily on *Pennsylvania State Conference of NAACP Branches v. Secretary Commonwealth of Pennsylvania*, 97 F.4th 120 (3d Cir. 2024), and *Liebert v. Millis*, __ F. Supp. 3d ___, No.23-cv-672, 2024 WL 2078216 (W.D. Wis. May 9, 2024), Section 6.87(6d)'s witness-address requirement does not implicate the Materiality Provision because Section 6.87(6d) plays no role

“in determining” whether a person is “qualified . . . to vote” under Wisconsin law. 52 U.S.C. § 10101(a)(2)(B); see Combined Br. Of Intervenor-Respondent-Cross-Appellant The Wis. State Legis. (“Op.Br.”) at 67–74. The Materiality Provision applies only to “record[s] or paper[s] relating to any application, registration, or other act *requisite to voting*.” 52 U.S.C. § 10101(a)(2)(B) (emphasis added). In other words, it governs “application[s]” to vote, “registration[s]” to vote, and “other act[s]” that a State requires to establish that an individual is “qualified under State law to vote.” *Id.*; see Op.Br.67–68. By using the phrase “in determining,” Congress made clear “its intent that the Materiality Provision applies only when the state is ‘determining’ whether a person is qualified to vote.” *Liebert*, 2024 WL 2078216, at *13; Op.Br.72; *Pa. NAACP*, 97 F.4th at 131. Further, under the *ejusdem generis* canon, because an “application” and a “[r]egistration” are “both processes for determining voter qualification,” the language “other act requisite to voting” must similarly “refer[] to processes for determining voter qualifications.” *Liebert*, 2024 WL 2078216, at *13 (citing *Pa. NAACP*, 97 F.4th at 131–32); Op.Br.68. A broader interpretation would undermine this State’s election-administration authority and require invalidation of numerous state rules related to vote casting. *Liebert*, 2024 WL 2078216, at *14; Op.Br.69–71.

2. Unable to rebut the Legislature’s arguments and the *Liebert* and *Pennsylvania NAACP* courts’ careful analyses,

Plaintiff now concedes that the Materiality Provision applies only when “an election official determines whether a person is qualified under state law to vote.” Combined Br. Of Plaintiff-Appellant-Cross-Respondent League Of Women Voters Of Wis. (“Resp.Br.”) at 31 (quoting *Liebert*, 2024 WL 2078216, at *15). This concession is dispositive and requires reversal of the Circuit Court’s order, where Section 6.87(6d) has nothing to do with this State’s voter-qualification determinations. Although Plaintiff resists this latter conclusion, its arguments are wrong.

As a threshold matter, Plaintiff spends much of its brief attacking an argument that the Legislature has not made, namely, that the Materiality Provision applies only to “voter-registration paperwork.” Resp.Br.33–34; see Resp.Br.28–37. While many of the Materiality Provision’s core applications do involve voter-registration paperwork, as *Pennsylvania NAACP* notes, 97 F.4th at 131, the Legislature has clearly argued—consistent with Plaintiff’s concession and the holdings in *Pennsylvania NAACP* and *Liebert*—that the Materiality Provision applies only to papers or records relating to a State’s “determinations of a voter’s qualifications.” See Op.Br.73. Section 6.87 does not fall under that umbrella for all the reasons that the Legislature has explained. See Op.Br.67–76. Plaintiff’s lengthy challenge to *Pennsylvania NAACP*’s so-called “dicta” concerning voter-registration paperwork is therefore irrelevant.

To be clear, Section 6.87(6d)'s absentee-ballot witness-address requirement *does not* relate to any determination as to whether a voter is qualified to vote under state law. *Contra* Resp.44–50. Wisconsinites must be registered to vote to request an absentee ballot, meaning that the State has already determined that the voter is qualified to vote *before* issuing the absentee ballot. *See* Wis. Stat. § 6.86(1)(a).

While Plaintiff points to several Wisconsin statutes that it argues involve voter-qualification *re*-determinations, *see* Resp.Br.30 (citing Wis. Stat. §§ 6.32, 6.325, 6.48, 6.56, 6.92, 6.93), these statutes have nothing to do with the statute at issue here. Section 6.87's witness-certificate requirements relate to the State's processes for deterring fraud and undue influence in the absentee-ballot context by, among other things, helping to ensure that the person voting the absentee ballot is the person to whom that ballot was issued. *See Liebert*, 2024 WL 2078216, at *7. While Plaintiff conflates these anti-fraud procedures with voter-qualification determinations, *see* Resp.Br.48–50, it provides no basis for doing so, and there is none. Plaintiff does not suggest that an election official's failure to count an absentee ballot that is "missing the address of a witness," Wis. Stat. § 6.87(6d), constitutes a determination that the absentee voter is not "qualified" to vote, *see Liebert*, 2024 WL 2078216, at *10. And, notably, Plaintiff fails to identify a single circumstance in which an election official would rely upon a "ballot envelope to determine whether a voter is qualified." *Id.* at *15.

Plaintiff also argues that the absentee-ballot witness certificate “implicates one or more voter qualifications” because it requires “the witness [to] attest[] to . . . the voter’s residency.” Resp.Br.24, 46. But whether the witness certificate “implicates” a voter qualification is not the relevant question under the Materiality Provision; it is whether Section 6.87(6d)’s requirements relate to the State’s *voter-qualification determinations*. See Resp.Br.29; *Pa. NAACP*, 97 F.4th at 131; *Liebert*, 2024 WL 2078216, at *15–16. And so, even if Plaintiff were correct that Section 6.87 requires a witness to attest to the absentee voter’s residency (it does not, for reasons explained immediately below), the Materiality Provision still would not come into play because Section 6.87(6d) still would not relate to Wisconsin’s voter-qualification decisions. See *Pa. NAACP*, 97 F.4th at 131; *Liebert*, 2024 WL 2078216, at *15.*

Regardless, *Liebert* correctly concluded that Section 6.87 does not require the witness to attest to the absentee voter’s residency. *Contra* Resp.Br.40–50. The “only reasonable interpretation of § 6.87(2) requires a witness to certify that the voter prepared the ballot correctly,” and “does

* Plaintiff tries to distinguish *Pennsylvania NAACP* by suggesting that Pennsylvania’s absentee-ballot declaration date requirement “does not concern voter qualification,” Resp.Br.29, but neither does Wisconsin’s witness-address requirement. Moreover, the declaration at issue there expressly required the voter to “attest[] that he is ‘qualified to vote in this election,’” 97 F.4th at 138, similar to what Plaintiff (wrongly) suggests a witness must do under Section 6.87.

not require the witness to certify the voter's qualifications." *Leibert*, 2024 WL 2078216, at *7. "[I]t simply does not make any sense" to require an absentee-ballot witness, many of whom "would be unable to independently verify much of the required information," to determine, among other facts, "the voter's age, residence, citizenship, criminal history," and "whether the voter has voted at another location or is planning to do so." *Id.* at *5. And "[i]t makes no sense to interpret § 6.87 in a way that would make compliance virtually impossible." *Id.* at *6. This interpretation is consistent with Section 6.87(2)'s "text, purpose, and history," including that the "ordinary meaning of a 'witness' denotes someone who is relying on personal observations," *id.*, that the "requirement to obtain a witness when preparing the ballot provides one way to deter some" of the "potential for fraud" that the Legislature noted as one of "its purposes" for enacting "the absentee-voting procedure," *id.* at *7 (quoting Wis. Stat. § 6.84(1)), and that the history of the absentee-voting law indicates a witness' purpose is merely "to verify that the voter followed the required procedure and was not being unduly influenced," *id.*

3. Unlike Plaintiff, the United States as *amicus* does challenge *Pennsylvania NAACP's* and *Liebert's* holding that the Materiality Provision applies only to voter-qualification determinations. See Br. For The United States As Amicus Curiae ("Amicus Br.") at 9–12. This Court need not consider arguments raised only by an *amicus*. See *County of Barron v.*

Lab & Indus. Rev. Comm'n, 2010 WI App 149, ¶ 30, 330 Wis. 2d 203, 792 N.W.2d 584. In any event, *amicus* is wrong.

Contrary to the United States' contention, *Amicus* Br.8–10, the Third Circuit applied the *ejusdem generis* canon consistent with *Muldrow v. City of St. Louis*, 601 U.S. 346 (2024). That case held that “an employment action” was the “common denominator” between the statutory phrases “fail or refuse to hire” and “discharge,” and the general phrase “otherwise . . . discriminate against . . . with respect to . . . employment.” *Id.* at 356–57 (quoting 42 U.S.C.A. § 2000e-2). While the City had argued that the “otherwise” phrase should “apply only to things causing an equal level of harm” to hiring and firing, the Supreme Court refused to inject the extratextual concept “level of harm” into the interpretation when the specific phrases in the “text itself provide[d] a different shared trait.” *Id.* at 357. Similarly, the Third Circuit rejected the argument that the general phrase “other act requisite to voting” should encompass the *entire* voting process when the specific words “application” and “registration” in the text itself provide a different shared trait: “the statute’s voter qualification focus.” *See Pa. NAACP*, 97 F.4th at 132.

The United States also fails to provide any persuasive response to the Third Circuit’s concern that, “[u]nless we cabin the Materiality Provision’s reach to rules governing voter qualification, we tie state legislatures’ hands in setting voting rules unrelated to voter eligibility.” *See id.* at 134. If

the Materiality Provision applies to the “entire voting process,” as *amicus* contends, Amicus Br.8, any “neutral state requirements on how voters may cast a valid ballot” may violate the statute, “no matter the purpose those rules may serve,” *Pa. NAACP*, 97 F.4th at 137. It would not matter, for example, that a voter “purposeful[ly]” refuses to comply with a rule that she sign her absentee-ballot envelope, or that a voter’s “intent is indiscernible” because the ballot is filled out in “a prohibited ink color that cannot be read by voting machines,” see Amicus Br.12, as those rules do not affect a voter’s qualifications and, therefore, would run afoul of *amicus*’ overbroad interpretation of the Materiality Provision.

B. Section 6.87(6d) Does Not “Deny” Absentee Voters The Right To Vote

1. Section 6.87(6d)’s witness-address requirement falls outside the Materiality Provision’s scope for the independent reason that it does not “deny” anyone the right to vote. 52 U.S.C. § 10101(a)(2)(B); Op.Br.76–83. While the Wisconsin Constitution guarantees the right to vote, the ability to cast an absentee ballot is a “privilege.” Op.Br.79–80 (citing Wis. Stat. § 6.84(1)). Since voters have ample opportunities to cast ballots without complying with the absentee-ballot witness requirement, Section 6.87(6d) does not “block ballot box access” in the manner the Materiality Provision was designed to prohibit. *Pa. NAACP*, 97 F.4th at 134; Op.Br.80. Further, Wisconsin law provides multiple, “neutrally applied,” see *Pa. NAACP*, 97 F.4th at 133, opportunities for voters to cure

noncompliant ballots, Op.Br.81–82 (citing Wis. Stat. § 7.15(1)(cm); *Democratic Nat’l Comm. v. Bostelmann*, 977 F.3d 639, 642 (7th Cir. 2020)). Finally, the “right to vote” does not include the right to have an absentee ballot counted if that ballot fails to comply with state law, which is Section 6.87(6d)’s only function. Op.Br.82 (citing *Pa. NAACP*, 97 F.4th at 133–34).

2. Plaintiff does not respond to the Legislature’s arguments that the “right” to vote, 52 U.S.C. § 10101(a)(2)(B), does not encompass the right to vote absentee, nor does it encompass the right to have a noncompliant absentee ballot counted. *See generally* Resp.Br.37–39. These arguments are independently dispositive as to the question of whether the Materiality Provision applies to Section 6.87(6d), and Plaintiff’s failure to respond operates as a concession on both points. *See State v. Mercado*, 2021 WI 2, ¶ 38 n.13, 395 Wis. 2d 296, 953 N.W.2d 337 (“When a party does not respond to an argument, we may deem that argument conceded.”).

Plaintiff instead again engages in misdirection on other arguments that the Legislature made, emphasizing the broad definition of the term “vote” in Section 10101(e) as including any act “necessary to make a vote effective,” including “casting a ballot[] and having such ballot counted.” Resp.Br.37–38 (emphasis omitted); *see* Amicus Br.13. But the fact that the Civil Rights Act defines “vote” broadly to include “having [a] ballot counted,” 52 U.S.C. § 10101(e), does not mean that the “right . . . to vote,” *id.* § 10101(a)(2)(B),

includes the right to have one's ballot counted, even where an absentee voter "fail[s] to follow the rules, neutrally applied, for casting a valid ballot," *Pa. NAACP*, 97 F.4th at 133. "[T]he phrase 'deny the right . . . to vote' in the Materiality Provision must be understood as denying an individual the opportunity to access the ballot in the first instance—not as denying the right to cast a defective ballot." *Id.* at 134 (the Materiality Provision "forbids the practice of disqualifying potential voters for their failure to provide information irrelevant to determining their eligibility to vote" (quoting *Schwier v. Cox*, 340 F.3d 1284, 1294 (11th Cir. 2003))). Accordingly, Wisconsin's decision not to count an absentee ballot where the "certificate is missing the address of a witness," Wis. Stat. § 6.87(6d), does not implicate the Materiality Provision.

Plaintiff also contends that "[t]here is no authority for the assertion that the availability of alternative voting options or curing provides an end-run around the Materiality Provision." Resp.Br.38; see Amicus Br.13. Plaintiff again mischaracterizes the Legislature's position. It may be, as Plaintiff suggests, that certain alternative voting options or curing procedures are not available to all voters at all times. See Resp.Br.38. But the Materiality Provision does not supplement the constitutional right to vote with additional privileges, see 52 U.S.C. § 10101(a)(2)(B), and Wisconsinites exercise their right to in-person voting without needing to comply with the absentee-ballot witness requirement, see Wis. Stat. § 6.77. The Materiality Provision simply does not

apply to absentee-voting laws in Wisconsin where there is no right to vote by absentee ballot and Wisconsin law provides voters multiple paths to exercising the franchise.

II. Even If The Materiality Provision Applied Here, Plaintiff Fails To Rebut The Legislature’s Argument That Section 6.87(6d) Would Not Violate That Provision Because It Is “Material”

A. Even if Section 6.87 related to voter-qualification determinations and so implicated the Materiality Provision (it does not), Section 6.87(6d) would not violate that statute because the absentee-ballot witness requirement is “material” to “whether an individual may vote” by absentee ballot “under Wisconsin law.” Op.Br.84–88 (emphasis omitted). As the Legislature explained, whether an election law is “material” must be assessed by examining a State’s election-law scheme as a whole, and the state interests that the scheme is designed to further. Op.Br.83. The Legislature designed Section 6.87’s witnessing requirements to ensure that election officials can contact the witness to confirm that the absentee voter is who he or she claims to be, and so are material to furthering the State’s interest in mitigating “the risk of ‘fraud or abuse’ inherent in any absentee-voting regime.” Op.Br.85–87 (quoting Wis. Stat. § 6.84(1)); *Liebert*, 2024 WL 2078216, at *7; accord *Lee v. Paulson*, 2001 WI App 19, ¶ 7, 241 Wis. 2d 38, 623 N.W.2d 577. Any contrary holding would undermine Wisconsin’s constitutional election-administration authority

to impose reasonable balloting requirements. Op.Br.86–87 (citing *Moore v. Harper*, 600 U.S. 1, 29 (2023)).

B. Plaintiff contends, first, that “compliance with all voting requirements beyond the voter qualifications” is “not contemplated” by the Materiality Provision’s phrase “qualified under State law,” and therefore if all such laws are interpreted as “qualifications,” then “any failures to comply with said laws are *per se* material to determining a voter’s qualifications,” which is “circular.” Resp.Br.40; see Amicus Br.14. But that is not the Legislature’s position. Compliance with Section 6.87’s absentee-ballot witness requirement is not “material” simply because it has been designated as a state-law requirement; it is “material” to whether a voter can vote *by absentee ballot*, given the risk of “fraud or abuse” inherent in any absentee-voting regime.

Plaintiff further argues that even if the witness-address requirement is “material” as a general matter, the four categories of witness-address errors that Plaintiff has identified are not. Resp.Br.52–53. But the errors that Plaintiff identifies are clearly “material” to election officials’ ability to “locat[e] and contact[] the voter’s witness.” *Contra* Resp.Br.52. In *Rise, Inc. v. Wisconsin Elections Commission*, 2024 WI App 48, ¶ 68, __ N.W.3d __, this Court articulated the governing “standard” for assessing whether a witness has provided an “address” under Section 6.87. Specifically, the “standard for applying the definition of a witness’s address is whether the face of the absentee ballot witness certificate

contains sufficient information to enable a municipal clerk to reasonably identify a place where the witness may be communicated with.” *Id.* ¶ 68. On remand, the *Rise* Circuit Court has now signed a final judgment embodying this standard. *See* Am. Declaratory J. and Permanent Inj., *Rise, Inc. v. Wis. Elections Comm’n*, No.2022CV2446 (Sept. 17, 2024). Accordingly, for any of the four errors that Plaintiff identifies in this lawsuit, those errors would need to be such that, in the context of the particular ballot, the “municipal clerk [could no longer] reasonably identify a place where the witness may be communicated with.” 2024 WI App 48, ¶ 68. Those errors would thus clearly be material, as they would frustrate the core purpose of requiring the witness to provide his or her address under Section 6.87.

CONCLUSION

This Court should reverse the Circuit Court’s grant of summary judgment to Plaintiff and remand for entry of judgment in the Legislature’s and the Defendants’ favor on Plaintiff’s Materiality Provision claim.

Dated: September 18, 2024.

Respectfully submitted,

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CERTIFICATION BY ATTORNEY

I hereby certify that this Reply Brief conforms to the rules contained in s. 809.19 (8) (b), (bm) and (c) for a brief. The length of this brief is 2,997 words.

Dated: September 18, 2024.

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