STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 10

LEAGUE OF WOMEN VOTERS
OF WISCONSIN,

Plaintiff,

v.

Case No. 2022CV2472
Code: 30701
Declaratory Judgment

WISCONSIN ELECTIONS COMMISSION et al.,

Defendants.

PLAINTIFF'S COMBINED REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND BRIEF IN OPPOSITION TO DEFENDANTS' AND INTERVENOR-DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

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INTRODUCTION

Defendants Wisconsin Elections Commission ("WEC" or "Commission"), its individual Commissioners, and Administrator Meagan Wolfe (collectively, "Defendants") and Intervenor-Defendant the Wisconsin State Legislature ("the Legislature") have opposed Plaintiff League of Women Voters of Wisconsin's ("the League") motion for summary judgment on Count II of its Second Amended Complaint, the 1964 Civil Rights Act claim, and cross-moved for summary judgment on the same. Each of their arguments fails.

Defendants do not dispute the League's interpretation of 52 U.S.C. § 10101 (a)(2)(B) ("the Materiality Provision") or that federal law is violated when an absentee ballot is rejected due to an immaterial error or omission on the certificate envelope. But rather than concede the validity of the League's federal claim or conform WEC's guidance to its strategic litigation position, they oppose the League's claim with several overlapping non-merits arguments:

First, Defendants assert that the League's Count II, a *federal* claim brought under 42 U.S.C. § 1983, is foreclosed by *Wisconsin* cases on "justiciability," the availability of declaratory and injunctive relief, and whether the proper parties have been named. However, because the League has asserted a federal claim, its resolution must be governed by federal law. The state cases and statutes upon which Defendants rely are irrelevant.

Second, Defendants try to deflect all responsibility and blame Wisconsin's 1,850 municipal clerks for the rejection of absentee ballots with immaterial witness-

address errors or omissions. Defendants assert that federal law governing Section 1983 actions precludes the issuance of declaratory and injunctive relief against an entity that—so it claims—has no control over, and no duty to intervene in, the ongoing violations of Wisconsin voters' federal statutory rights. Not so. The Wisconsin elections code makes clear that WEC has authority over clerks' application of Wis. Stat. § 6.87(6d), the witness address requirement, and a duty to ensure compliance with state and federal election laws and any court order construing them.

As federal courts have found, WEC cannot evade litigation to vindicate voters' rights by taking a strategic litigation position that agrees with plaintiffs, while otherwise remaining silent on the ongoing violations of federal law. The League has identified, and marshalled evidence of, four categories of known and ongoing applications of the witness address requirement in Wis. Stat. § 6.87(6d) that violate the Materiality Provision (and Defendants have conceded this violation as to three categories). Defendants cannot dodge declaratory and injunctive relief for these as-applied federal law violations by taking the position that the state-law requirement is satisfied by absentee ballots the League has identified. WEC has not issued guidance that clearly explains these types of ballots must be counted to ensure compliance with the Civil Rights Act and, unsurprisingly, these ballots continue to be rejected for immaterial errors or omissions as a direct result of the legal void and uncertainty WEC has created.

For its part, the Legislature argues in passing that the League's Count II should be rejected for the same reasons the Court dismissed Count I, even though the

Legislature did not move to dismiss it. The Legislature devotes most of its attention to opposing the League on the merits, making three arguments, each of which is foreclosed by the plain text of the Materiality Provision or the cases interpreting it.

First, the Legislature asserts that "Section 6.87(6d) does not relate to whether a voter is 'qualified under State law to vote' under Section 10101(a)(2)(B)," because absentee voters have already registered to vote. (Dkt. 138 at 8.) Arguably an admission of facial invalidity, this attempted rewrite of the Civil Rights Act is belied by its plain text, which extends its protection to any vote threatened with rejection due to an immaterial "error or omission on any record or paper relating to any application . . . or other act requisite to voting." 52 U.S.C. § 10101(a)(2)(B). Voting, and all regulations thereof, happen after the moment of registration, and the Civil Rights Act covers more than registration. Nor is there any "voter-qualification stage." (Dkt. 138 at 18.) The Wisconsin election code's plain text makes clear that a voter's qualifications may be challenged, investigated, or otherwise implicated in a multitude of ways after registration. Finally, federal case law also forecloses this argument, as the Materiality Provision has been routinely applied to errors or omissions on absentee ballot certificate envelopes. A recent *dissenting* opinion in *Ritter v. Migliori*, 142 S. Ct. 1824 (2022) is neither controlling nor persuasive, as its reasoning also contradicts the Civil Rights Act's plain text.

Second, the Legislature posits that so long as voters have another means to vote, their absentee ballots may be rejected for an immaterial error or omission. There is no textual support for this contention, and the one case cited by the Legislature as

support, *Vote.Org v. Callanen*, 39 F.4th 297 (5th Cir. 2022), is distinguishable on its facts. Since many absentee ballots are cast at the last minute and Wis. Stat. § 6.87(9) does not require clerks to provide notice or return a defective ballot, many absentee voters ensnared by the witness address requirement do not learn of their ballot's rejection until it is too late to vote in person.

Third, the Legislature argues that the League's reading of the Civil Rights Act would eviscerate all rules governing voting that do not concern voter qualifications. This is wrong. Leaving aside the fact that the witness address requirement implicates and plays a role in enforcing voter qualifications, the Materiality Provision only regulates "error[s] or omission[s] on any record or paper." 52 U.S.C. § 10101(a)(2)(B). In this way, this federal statutory provision is far narrower than the Legislature imagines, and its enforcement will not lead to the invalidation of all voting requirements.

Fourth, the Legislature argues that the League's evidence of absentee ballot rejections "amounts only to isolated incidents of ballot rejections in a couple of localities, falling far short of the necessary degree of conflict that the League must show for statewide relief." (Dkt. 138 at 42.) This assertion—another stab at arguing that the League may only sue municipal clerks, not WEC—has no legal authority and seeks to invent a new equitable factor for the issuance of injunctions. WEC's failure to issue guidance in line with its litigation position in this case has created a systemic violation of the Civil Rights Act that disenfranchises voters.

ARGUMENT

I. Defendants' and the Legislature's "non-justiciability" arguments are premised on state law and, therefore, inapplicable to the League's federal 42 U.S.C. § 1983 claim.

Defendants and the Legislature first argue that the League's 1964 Civil Rights Act claim is non-justiciable. This argument is premised entirely on Wisconsin case law and therefore invalid. When analyzing whether it may adjudicate the League's Section 1983 claims, this Court may rely *only* on federal law—Wisconsin state law does not control Defendants' and the Legislature's "justiciability" arguments.

When reviewing the merits of any federal claim, including the League's Section 1983 claim, Wisconsin courts apply federal law. *See, e.g.*, *Lindas v. Cady*, 150 Wis. 2d 421, 428, 441 N.W.2d 705 (1989) ("State judges, like federal judges, are bound by the supremacy clause to apply federal law in state courts."). Both the Wisconsin Supreme Court and the U.S. Supreme Court "recognize that just as federal courts are constitutionally obligated to apply state law to state claims, so too the Supremacy Clause imposes on state courts a constitutional duty to proceed in such manner that all the substantial rights of the parties under controlling federal law are protected." *Shaw v. Leatherberry*, 2005 WI 163, ¶31, 286 Wis. 2d 380, 706 N.W.2d 299 (citing *Felder v. Casey,* 487 U.S. 131, 151 (1988) (cleaned up)[1]). In *Shaw*, the Supreme Court of Wisconsin held that "[i]nasmuch as the burden of proof is *substantive*, . . .

[1] This brief uses the signal "cleaned up" when internal quotation marks, ellipses, and other metadata have been omitted from a quotation to improve its readability without altering its meaning. *See* Jack Metzler, *Cleaning Up Quotations*, 18 J. App. Prac. & Process 143 (2017).

Available at: https://lawrepository.ualr.edu/appellatepracticeprocess/vol18/iss2/3.

under the Supremacy Clause, the lower federal burden of proof applies in § 1983 excessive force cases in state court." *Id*. (emphasis added).

Accordingly, where the rule in question is substantive—not purely procedural, like a time limit—the federal rule trumps its state-law analogue. Wisconsin courts may apply state *procedural* rules to federal claims, but under *Shaw*, when a rule determines *substantive* rights and obligations, federal law preempts state law. *Felder v. Casey,* 139 Wis. 2d 614, 627, 408 N.W.2d 19 (1987), *point affirmed in* 487 U.S. 131, 138 (1988) ("States may establish the rules of procedure governing litigation in their own courts. However, where state courts entertain a federally created cause of action, the federal right cannot be defeated by the forms of local practice." (cleaned up)). Justiciability, and the proper defendants for purposes of issuing declaratory and injunctive relief, implicate substantive rights and obligations arising under federal law (here, the Civil Rights Act), and are therefore governed by federal law. The kinds of purely procedural rules that may be determined by state law do no apply here.

Notably, even the Legislature, which sought and obtained the dismissal of the League's state-law claim (Count I) as non-justiciable, did not move to dismiss the League's *federal* claims on the same basis. (Dkt. 74, Leg. Br. in Supp. of Mtn. to Dism. Ct. I at 6–8.) The Legislature's belated, half-hearted attempt to now apply state-law reasoning to the League's federal Civil Rights Act claim fails for the same reason as WEC's. (Dkt. 138, Leg. Comb. Br. at 39.) *State law* justiciability doctrines and rules governing declaratory and injunctive relief do not apply in adjudicating a *federal* claim. Because Defendants' and the Legislature's justiciability arguments would

prevent plaintiffs from vindicating rights conferred upon them by federal statutes, they must be evaluated under federal law. Subjecting the League's federal statutory claim to Wisconsin's Uniform Declaratory Judgments Act, Wis. Stat. § 806.04 and Wisconsin cases construing that statute, justiciability, and adversity would turn the Supremacy Clause on its head. Defendants may challenge the League's standing to sue under *federal* law, but they have not done so.

Because federal law—not state law—governs the determination of substantive rights and obligations among the parties to a federal claim, even one brought in state court, the state-law precedents and statutes upon which Defendants and the Legislature rely have no application to the League's federal 42 U.S.C. § 1983 claim. Accordingly, Defendants' threshold justiciability argument based on state law fails.

II. This Court has the power to issue declaratory and injunctive relief against Defendants to prevent further violations of the Civil Rights Act's Materiality Provision.

A. Defendants are proper targets for declaratory and injunctive relief because they have broad authority to administer and enforce compliance with election laws.

WEC, the Commissioners, and the WEC Administrator—not the 1,850 municipal clerks over whom WEC exercises its statutory authority to administer elections and enforce the Wisconsin elections code—are the appropriate defendants to sue for violations of the 1964 Civil Rights Act's Materiality Provision. *See* Wis. Stat. §§ 5.05(1), 5.05(2m), 5.06(1). WEC has general authority to administer elections and enforce state *and federal* election laws and, therefore, may be enjoined to remedy violations of federal law committed by municipal clerks who administer elections at the local level. *See* Wis. Stat. § 5.05(1) ("The elections commission shall have the

responsibility for the administration of chs. 5 to 10 and 12 *and other laws* relating to elections and election campaigns . . .") (emphasis added); *Frank v. Walker*, 196 F. Supp. 3d 893, 918 (E.D. Wis. 2016), *aff'd in part, rev'd in part sub nom. Luft v. Evers*, 963 F.3d 665 (7th Cir. 2020) (WEC has the responsibility to administer state law governing elections and "other laws relating to elections," and that "carrying out a federal court's order concerning the state's election procedures would qualify as administering the state's election laws and other laws relating to elections (*which includes federal laws relating to elections*)" (cleaned up) (emphasis added)); Wis. Stat. § 5.061(4) (WEC has a duty to enforce the federal Help America Vote Act and "order appropriate relief" when a violation has occurred); Wis. Stat. § 5.35 (WEC has duty to prescribe general information concerning voting rights under applicable federal law). Seeking declaratory and injunctive relief against enforcing entities is the basic way plaintiffs obtain prospective relief. *See Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923) ("If a case for preventive relief be presented, the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding.").

Although municipal clerks make the initial decision about whether to reject an absentee ballot, WEC and its Commissioners are proper defendants because they have the power to review those decisions and investigate violations of election laws. Wis. Stat. §§ 5.06(1), (4). Defendants also certify the final results of congressional and statewide elections (among others)—tallies which omit ballots that have been rejected in violation of the Materiality Provision, 52 U.S.C. § 10101(a)(2)(B). Wis.

Stat. § 7.70(3)(d). Specifically, WEC records and preserves the vote tallies it receives from the county clerks and collects any delinquent or erroneous results. Wis. Stat. § 7.70(1). The WEC Chair, or a designee, then canvasses the returns for various offices. Wis. Stat. § 7.70(3). WEC records the statements from the statewide canvass and transmits certificates of election. Wis. Stat. § 7.70(5).

WEC also provides instruction on many of the statewide procedures for election administration, including how absentee-ballot certificate envelopes are handled. Indeed, WEC must "[p]rescribe all official ballot forms," Wis. Stat. § 7.08(1), and creates a standardized certificate envelope (Form EL-122), which it has recently updated.[2] WEC promulgates rules and issues guidance that applies statewide. Wis. Stat. §§ 5.05(1)(f), 227.01(3m)(a); *Teigen v. Wisconsin Elections Comm'n*, 2022 WI 64, ¶196, 403 Wis. 2d 607, 976 N.W.2d 519 (Hagedorn, J., concurring). Pursuant to statute, WEC provides uniform instructions for municipalities to provide to absentee voters, including information regarding requirements for photo identification. Wis. Stat. § 6.869. The Commission prepares and publishes election manuals, trains election officials, and conducts voter education. Wis. Stat. §§ 7.08(3), 5.05(7), 5.05(12). Each of these functions is a part of WEC's duties to administer Wisconsin elections and would be affected by the declaratory relief sought in this case.

WEC also has authority to bring and adjudicate complaints related to elections:

[2] WEC, *Absentee Envelopes Get an Upgrade* (Aug. 11, 2023), https://elections.wi.gov/news/absentee-envelopes-get-upgrade.

> Whenever any elector of a jurisdiction or district served by an election official believes that a decision or action of the official or the failure of the official to act with respect to any matter concerning … election administration or conduct of elections is contrary to law … the elector may file a written sworn complaint with the commission requesting that the official be required to conform his or her conduct to the law, be restrained from taking any action inconsistent with the law . . . .
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> ***
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> The commission may, on its own motion, investigate and determine whether any election official, with respect to any matter concerning nominations, qualifications of candidates, voting qualifications, including residence, ward division and numbering, recall, ballot preparation, election administration or conduct of elections, has failed to comply with the law or abused the discretion vested in him or her by law or proposes to do so.

Wis. Stat. §§ 5.06(1), (4). After receiving a complaint filed under Section 5.06, or on its own motion, WEC may investigate and determine whether a violation has occurred, as well as, "summarily decide the matter before it and, by order, require any election official to conform his or her conduct to the law, restrain an official from taking any action inconsistent with the law or require an official to correct any action or decision inconsistent with the law." *Id.* §§ 5.06(2), (6). And WEC does, in fact, decide such complaints and, when appropriate, issue orders to local election officials. *See, e.g.*, *Weidner et al. v. Coolidge*, No. EL 22-24 (WEC, Sept. 30, 2022).

WEC also has statutory authority to receive and process complaints against anyone accused of committing a crime related to elections. *See* Wis. Stat. § 5.05(2m). WEC may prosecute alleged civil violations of election laws and sue for injunctive relief. *Id.* §§ 5.05(1)(c)–(d). For example, if a voter whose vote was not counted in the most recent election, because the certificate had one of the immaterial witness-address errors or omissions that the League has identified, filed a complaint, WEC

would have to adjudicate that voter's complaint based on the declaratory judgment's interpretation of Wis. Stat. § 6.87(6d). Additionally, WEC must record and preserve the results from the counties, canvas the returns for various offices, and record the statements from the statewide canvass and transmit certificates of election and ascertainment. Wis. Stat. §§ 7.70(1), (3), (5).

Since WEC is the entity with statutory enforcement authority, a request for declaratory and injunctive relief must be filed against WEC. *See Mellon*, 262 U.S. at 488 (injunctive relief targets the "acts of the official" and "not the execution of the statute"). Here, the League requests declaratory relief construing the application of the federal Materiality Provision to each of the four categories of immaterial witness-address errors or omissions identified by the League, and injunctive relief requiring WEC to issue guidance to the clerks regarding that judicial determination. Therefore, the League must seek relief against WEC directly, and Count II states a claim for relief against the proper defendants.

B. Defendants may not disown their responsibility for violations of federal law.

Defendants claim that, because their interpretation of the law broadly aligns with the League's, they have not violated the law. They attempt to abdicate responsibility for municipal clerks' interpretation and application of Wis. Stat. § 6.87(6d), as if the municipal clerks who rejected the valid ballots simply went rogue.

Just last year, a federal district court rejected WEC's attempt to dodge responsibility based on the same basic argument. *See Carey v. Wis. Elections Comm'n*, 624 F. Supp. 3d 1020, 1030 (W.D. Wis. 2022). In *Carey*, voters with disabilities

challenged WEC's failure to issue guidance that expressly affirmed their right to receive assistance in returning their absentee ballots under Section 208 of the Voting Rights Act. *Id*. As a litigation position, WEC claimed that it *would* allow people with disabilities to receive assistance, even though that appeared to violate state law, and, therefore, that no controversy existed between the parties. *Id*. WEC's memoranda on the subject merely referred to other disability laws that clerks might consult but "provide[d] no guidance on how to apply those laws." *Id*. WEC did warn clerks in a disclaimer that the memorandum did not constitute a legal opinion on the Wisconsin statute in question. *Id*. The court rejected WEC's argument that it could evade responsibility in this manner: "The message to voters and clerks is unstated but clearly implied: 'We can't tell you whether disabled voters are entitled to assistance in returning their ballots. You're on your own.'" *Id*. The court held that WEC cannot blithely dismiss federal statutory protections by remaining silent.

Likewise, the district court did not credit WEC's interpretation of the relevant federal and state statutes, dismissing it as "just a litigation position," because, in practice, WEC had failed to take any action to guarantee voters' federal statutory rights with clear guidance. *Carey*, 624 F. Supp. 3d at 1024. A convenient argument in litigation does not amount to concrete guidance, and it certainly "doesn't communicate to voters what their rights are or to clerks what their responsibilities are." *Id*. As the court noted, a litigation position "doesn't eliminate a threat of enforcement because a litigation position isn't binding, and the relevant parties could change their mind on a whim." *Id*. at 1030; *see also United States v. Windsor*, 570

U.S. 744, 759 (2013) ("[E]ven where 'the Government largely agree[s] with the opposing party on the merits of the controversy,' there is sufficient adverseness and an 'adequate basis for jurisdiction in the fact that the Government intended to enforce the challenged law against that party.'").

Crucially, WEC had done "nothing to disavow the view" of the lawfulness of assisting voters with disabilities, *id*. and its silence had left "voters vulnerable and municipal clerks confused." *Carey*, 624 F. Supp. 3d at 1024. Accordingly, the court rejected WEC's attempt to bootstrap its abdication of responsibility for protecting voters' federal statutory rights into a shield against federal litigation alleging a violation of the same. *Id*. at 1030. WEC's "refusal to provide guidance [could not] be relied on to show the absence of a dispute." *Id*.

WEC further claimed that the plaintiffs should have sued the municipal clerks, not WEC, because only municipal clerks would reject ballots returned with assistance. *Id*. at 1024. The court outright rejected this argument:

> [D]efendants say that it is municipal clerks who are going to make that call in the first instance, so plaintiffs should have sued them instead. But defendants are also responsible for enforcing election laws, and it is defendants, not clerks, who are charged with providing guidance on how to apply the law.

Id. The court held that WEC was the proper defendant because, although "municipal clerks make the first call on whether to accept or reject a ballot[,] the commission plays an important role in enforcing election laws too." *Id*. at 1029; *see also Democratic Nat'l Comm. v. Bostelmann*, 488 F. Supp. 3d 776, 796 (W.D. Wis. 2020) (finding that "WEC's overall statutory responsibility for the administration of

Wisconsin's elections" was not "erased" simply because the U.S. Postal Service and local election officials were also involved in the violation).

The simple fact that WEC's role comes *after* the municipal clerks' does not lift WEC's responsibility for enforcing and ensuring compliance with state and federal election laws: "If the court were to accept defendants' argument, it would mean that any plaintiffs seeking statewide relief on a challenge to voting requirements would have to sue more than 1,800 municipal clerks. That isn't feasible, and it isn't what the law requires." *Id*. Thus the court would not allow WEC to "punt the question" to the municipal clerks. *Id*.

In this case, just as in *Carey*, Defendants have left voters vulnerable, and clerks unaware of, or confused about, their responsibilities under the law, because they have failed to issue guidance instructing clerks to count absentee ballots with one of the four types of immaterial errors or omissions that the League has identified. As far as municipal clerks know, such ballots must be rejected for some hyper-technical non-compliance with Wis. Stat. § 6.87(6d). Indeed, the undisputed facts demonstrate that municipal clerks throughout the state *have been rejecting such ballots* in the absence of any instructions to the contrary. (Dkt. 135, WEC Resp. to P's Prop. Findings of Undisp. Fact, ¶¶44–52; Dkt. 135, Leg. Resp. to P's Prop. Findings of Undisp. Fact, ¶¶44–52.)

Defendants purport to agree with the League's interpretation of 52 U.S.C. § 10101(a)(2)(B)—at least as applied to the first three categories of witness-address errors or omissions—and even posit that such ballots do not breach their definition

of "address" in Wis. Stat. § 6.87(6d). (Dkt. 137 at 15–19.) Nevertheless, their refusal to issue guidance conforming to these litigation positions has led to the systemic rejection of ballots in violation of voters' federal statutory rights. Until WEC issues a directive that shields these types of ballots from rejection, they stand in violation of the Materiality Provision, and its application of Section 6.87(6d) to the four categories of witness-address errors or omissions is preempted by that federal law.

C. This Court can order declaratory and injunctive relief against Defendants under 42 U.S.C. § 1983.

Defendants misstate what the League must establish to enforce the rights granted to voters by federal statutes, through 42 U.S.C. § 1983. While showing personal involvement is critical for a claim for *damages* under Section 1983, personal involvement is "irrelevant" when evaluating a request for *injunctive relief*. *Gonzalez v. Feinerman*, 663 F.3d 311, 315 (7th Cir. 2011). The League does not seek damages here: it has sued Wisconsin state officials in their official capacities, and seeks only declaratory and injunctive relief. (Dkt. 94, ¶¶ 29-30.) Despite what Defendants assert in their brief, the Seventh Circuit is clear: To state a claim for injunctive relief under Section 1983, the League need show only that Defendants "would be responsible for ensuring that any injunctive relief is carried out." *Gonzalez*, 663 F.3d at 315.

In *Gonzalez*, the court found that the warden of a prison was a proper defendant even though the plaintiff did not allege any specific involvement of the warden in the medical treatment at issue. 663 F.3d at 315; *see, e.g.*, *Griffin v. Wexford Health Sources, Inc.*, 244 F. Supp. 3d 787, 790 (N.D. Ill. 2016) (finding the warden was a proper target of injunctive relief); *Walters v. Liaw*, No. 3:20-CV-316-JD-MGG,

2020 WL 2097543, at *3 (N.D. Ind. May 1, 2020) (same). Because a warden has "both the authority and responsibility to ensure" prison medical care meets constitutional requirements, the warden is a proper defendant when seeking injunctive relief. *See also Jones v. Wexford Med. Servs.*, No. 3:19-CV-778-DRL-MGG, 2020 WL 887750, at *1 (N.D. Ind. Feb. 21, 2020) (citing *Gonzalez*, 663 F.3d at 315).

This premise applies outside the prison context. In *Siebers v. Barca*, the court relied on *Gonzalez* to find that plaintiffs who were challenging a state law could pursue injunctive relief against the Secretary of the Wisconsin Department of Revenue. No. 20-CV-1109-JDP, 2022 WL 2438605, at *10 (W.D. Wis. July 5, 2022). Because he was the "department's secretary and would have this responsibility" of implementing the prospective relief. *Id*. It did not matter that he had no personal involvement in the violation. *Id*. In *Garrett Rose v. State of Illinois*, the court relied on *Gonzalez* to find that the Director of Central Management Services was an appropriate defendant for injunctive relief even though he had not been involved in the alleged constitutional violation. No. 3:22-CV-02534-GCS, 2023 WL 6295672, at *4 (S.D. Ill. Sept. 26, 2023).

Just as a warden has responsibility for compliance with constitutional rights and rules at their prison, Defendants are the appropriate parties to effectuate the relief requested by the League here because they are responsible for the administration and enforcement of election laws in Wisconsin. *See Gonzalez*, 663 F.3d at 315. WEC is charged with issuing guidance or advisory opinions or commencing

rulemaking to revise the administrative rules, following any court decision implicating relevant election law:

> Within 2 months following the publication of a decision of a state or federal court that is binding on the commission and this state, the commission shall issue updated guidance or formal advisory opinions, commence the rule-making procedure to revise administrative rules promulgated by the commission, or request an opinion from the attorney general on the applicability of the court decision.

Wis. Stat. § 5.05(5t). Section 5.05(5t) expressly contemplates that courts will issue decisions that are "binding on the commission," not just on municipal clerks. Therefore, the League properly seeks declaratory and injunctive relief against the *only* state actors who can issue binding guidance regarding Wisconsin election procedures and bring the state's municipal clerks into compliance with federal law.

Such a power is within their purview, as Wis. Stat. § 5.05(f) empowers WEC to "[p]romulgate rules under ch. 227 applicable to all jurisdictions for the purpose of interpreting or implementing the laws regulating the conduct of elections or election campaigns." WEC is the state agency in Wisconsin tasked with administering or enforcing the state's election laws, including effectuating and ensuring compliance with the judgments of state and federal courts implicating said laws. Wis. Stat. § 5.05(1) ("The elections commission shall have the responsibility for the administration of chs. 5 to 10 and 12 and other laws relating to elections and election campaigns, other than laws relating to campaign financing"). Accordingly, Defendants may be found in violation of federal statutory rights through a Section 1983 action, and declaratory judgments and injunctions may run against them.

Alternatively, even if the Court finds that some level of personal involvement is required, the League meets that bar. WEC's statutory duties to interpret and administer Wisconsin election law, certify final election results, and issue guidance following state and federal court decisions underscore that Defendants have played a central role in the unlawful rejection of absentee ballots for immaterial witness-address errors or omissions and their exclusion from the final, certified results. *Burks v. Raemisch*, 555 F.3d 592 (7th Cir. 2009), does not apply here because the League's claim does not rest on a premise of vicarious liability but rather direct liability for Defendants' actions and inaction. *Burks* merely reaffirms the unremarkable proposition that "[l]iability depends on each defendant's knowledge and actions, not on the knowledge or actions of persons they supervise." 555 F.3d at 594.

As argued above in detail, *see supra* Section II.B, though they may blame clerks for the rejection of absentee ballots for immaterial errors or omissions in the witness-address field on the certificate envelope (on a hyper-formalistic understanding of responsibility), Defendants' decisions and actions have created this exact situation where Wisconsin absentee voters' rights under the 1964 Civil Rights Act are routinely violated. *See Carey*, 624 F. Supp. 3d at 1024 (failure to issue clear guidance leaves "voters vulnerable and municipal clerks confused"). Defendants cannot bury their heads in the sand when it comes to the Civil Rights Act implications of their actions and inaction, and thereby evade responsibility for the *inevitable* rejection of absentee ballots due to immaterial witness-address errors or omissions. Absent the type of clear guidance or instruction that only Defendants can issue, which is precisely what

the court required in *Carey*, municipal clerks will continue to reject absentee ballots accompanied by certificate envelopes with immaterial errors and omissions, thereby disenfranchising qualified voters.

Lastly, though there may be no general duty of rescue, there is a well-known exception to that rule—which Defendants fail to note—in which the named defendant is "responsible for creating the peril that creates an occasion for rescue." *Richman v. Sheahan*, 512 F.3d 876, 885 (7th Cir. 2008). As the Seventh Circuit observed:

> But there is an exception for the case in which the officer is responsible for creating the peril that creates an occasion for rescue, as when, having arrested a drunken driver, the officer removes the key from the ignition of his car, as a result stranding the passengers late at night in an unsafe neighborhood, and he does nothing to protect them and they are robbed by local marauders and sue him for battery or for having deprived them of (a form of) liberty without due process of law. *Wood v. Ostrander*, 879 F.2d 583, 586–87 (9th Cir. 1989); *see Monfils v. Taylor*, 165 F.3d 511, 517 (7th Cir. 1998).

Id.

Here, Defendants created the peril resulting in the rejection of absentee voters' ballots for immaterial errors or omissions in violation of federal law. Defendants agree that rejecting absentee ballots in at least the first three categories the League identifies violates the Materiality Provision (Dkt. 137 at 17–18), and Defendants have the power to instruct clerks on the proper application of the Civil Rights Act in these scenarios, yet refuse to do so. Defendants are directly liable for these federal law violations, and, at a minimum, their conduct is akin to that of an indifferent official who knows or has reason to know of a federal law violation and fails to act. Defendants have a duty to intervene and prevent these ongoing federal law violations

by municipal clerks who look Defendants for guidance on interpretation and enforcement of state and federal election laws. Accordingly, Defendants may be held liable under Section 1983 for shirking this duty and creating the peril.

D. The League satisfies the equitable factors for injunctive relief.

As discussed in its brief in chief, the League satisfies all the equitable factors necessary for the Court to award it the declaratory and injunctive relief it seeks. (Dkt. 114, Pl. Mem. of Law in Supp. of Summ. Judg. at 44–47.) Neither Defendants' nor the Legislature's briefs, in opposition to the League's motion for summary judgment and in support of their respective cross-motions for summary judgment, respond to or dispute the League's arguments that declaratory and injunctive relief is warranted under the four equitable factors: "(1) that [the plaintiff] has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156–57 (2010) (cleaned up); (Dkt. 137, Def. Comb. Br.; Dkt. 138, Leg. Comb. Br.) Therefore, Defendants and the Legislature have waived this argument, and the League meets the threshold for declaratory and injunctive relief under the equitable factors.[3] *Minett v. Overwachter*, 433 F. Supp. 3d 1084, 1091 (W.D.

[3] Waiver occurred when Defendants and the Legislature failed to respond to the arguments contained in the League's summary judgment brief. Defendants and the Legislature cannot remedy this waiver after the fact by attempting to raise a response to the equitable factors in their upcoming reply briefs. *See Kelso v. Bayer Corp.*, 398 F.3d 640, 643 (7th Cir. 2005); *United States v. Ford Motor Co.,* 463 F.3d 1267, 1276-77 (Fed.Cir.2006) (arguments raised for first time in a reply brief are waived).

Wis. 2020) ("[B]ecause [nonmovant] does not respond to [movant]'s arguments . . . I will assume that he has abandoned that aspect of his claim."); *C & N Corp. v. Kane*, 756 F.3d 1024, 1026 (7th Cir. 2014) (same); *Dewey v. Bechthold*, 387 F. Supp. 3d 919, 922 (E.D. Wis. 2019) (same).

Additionally, the Legislature provides no support for its broad and baseless claim that "none of the four categories of evidence that the League offers comes close to establishing its entitlement to the sweeping, *statewide* [injunctive] remedy that it seeks." (Dkt. 138, Leg. Comb. Br. at 39.) Federal courts determine whether a plaintiff is entitled to injunctive relief by weighing and balancing the four equitable factors for injunctive relief. *Monsanto Co.*, 561 U.S. at 156–57. These are the exclusive factors to weigh when considering the League's request for permanent injunction. *Id.* However, when arguing that statewide injunctive relief is not warranted for the League's claims, the Legislature neither provides argument nor evidence to demonstrate that the equitable factors weigh against the League's request for injunctive relief. (Dkt. 138, Leg. Comb. Br. at 39–41.)

Further, the Legislature provides no legal authority to support its dual propositions that there exists an injury threshold for statewide injunctions and that the League has failed to meet this alleged threshold. Therefore, the League's request for injunctive relief meets the standard under the four equitable factors. *See Always Towing & Recovery, Inc. v. City of Milwaukee*, 2 F.4th 695, 707 (7th Cir. 2021) (failing to provide legal support for an argument waives it); *Schreiner v. United Wis. Ins. Co.*,

626 F. Supp. 2d 892, 912 (W.D. Wis. 2009) ("Plaintiff's argument is undeveloped, which means that it is waived.").

III. The Legislature's merits arguments fail.

Each of the Legislature's arguments on the merits of the League's Materiality Provision claim fails for two reasons. First, the 1964 Civil Rights Act's Materiality Provision covers much more than simply the act and time of voter registration. Second, the fact that Wisconsin allows alternative options for voting does not excuse the rejection of ballots for immaterial errors or omissions.

A. The 1964 Civil Rights Act's Materiality Provision is not limited to the act and time of voter registration.

The Legislature first argues that Wis. Stat. § 6.87(6d) "does not relate to whether a voter is 'qualified under State law to vote' under Section 10101(a)(2)(B), given that the witness-address requirement applies only to absentee voters who are permitted to request an absentee ballot and so are already deemed qualified to vote." (Dkt. 138 at 8.) Similarly, citing *Friedman v. Snipes*, 345 F. Supp. 2d 1356, 1371 (S.D. Fla. 2004) and *Schwier v. Cox*, 340 F.3d 1284, 1297 (11th Cir. 2003), the Legislature also contends that "Section 6.87 does not relate to whether an absentee voter may '*register* to vote'"—*i.e.* whether the voter meets the eligibility criteria outlined in Wis. Stat. §§ 6.02(1), 6.03(1) and Wis. Const. art. III, § 1. (Dkt. 138 at 23.) Arguably, this position requires judgment in the League's favor.

The Materiality Provision states that:

> No person acting under color of law shall . . . 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).

If Section 6.87(6d)'s witness address requirement "does not relate to whether a voter is 'qualified under State law to vote'" because it sequentially comes after voter registration (Dkt. 138, Leg. Comb. Br. at 8), then a witness's failure to record their address is *per se* immaterial and cannot serve as the basis for rejecting the absentee voter's ballot, requiring summary judgment in favor of the League. However, contrary to what the Legislature argues in Section 1.C of its brief, the League has not argued for the facial immateriality and facial invalidity of Wis. Stat. § 6.87(6d), but rather for its preemption under the 1964 Civil Rights Act as applied to four categories of purported errors or omissions in the witness address field.[4]

Nonetheless, assuming the Legislature does not intend to kick the ball into its own goal and reading its argument in the most favorable light, the Legislature is contending that the 1964 Civil Rights Act's Materiality Provision does not apply once a voter is registered. Stated another way, the Legislature posits that absentee voting rules like the witness address requirement in Wis. Stat. § 6.87(6d) may not even be scrutinized under 52 U.S.C. § 10101(a)(2)(B) because an absentee voter has been

[4] The Legislature devotes an entire section of its brief to rebutting an argument that the League does not make. (Dkt. 138, Leg. Comb. Br. at 31–36.) The League has asserted essentially four as-applied challenges to particular applications of Section 6.87(6d), not a facial challenge. Therefore, Section I.C of the Legislature's brief is irrelevant to this case. (Dkt. 138 at 31–36.) Section II.B of its brief is also drafted as if the League were seeking facial invalidation (*id*. at 37–43), but the League is not. Even if the League prevails in this case, Section 6.87(6d) will not be preempted on its face and may still be enforced. It just would not be enforceable as to the four categories of witness address errors or omissions on the absentee ballot certificate envelope that the League has outlined.

deemed qualified already by the time they are voting. This argument fails for the following reasons.

First, the plain text of the Materiality Provision covers any "error or omission on any record or paper relating to any application, registration, *or other act requisite to voting*." 52 U.S.C. § 10101(a)(2)(B) (emphasis added). Had Congress intended to limit this provision's protection to records and papers involved in voter registration, it would have said that. *Simmons v. Himmelreich*, 578 U.S. 621, 627 (2016) ("Absent persuasive indications to the contrary, we presume Congress says what it means and means what it says."). Indeed, there are whole statutes that deal exclusively with voter registration such as the National Voter Registration Act, 52 U.S.C. § 20501, *et seq*.

However, by its express terms, the Materiality Provision is broader in scope, extending to "any application" and "any . . . other act requisite to voting." 52 U.S.C. § 10101(a)(2)(B). The Legislature urges an impermissibly narrow interpretation that cannot be squared with that language. Courts "are obliged to give effect, if possible, to every word Congress used." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979); *see also Leocal v. Ashcroft*, 543 U.S. 1, 12 (2004) ("[W]e must give effect to every word of a statute wherever possible."). Moreover, "[c]anons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings." *Reiter*, 442 U.S. at 339. The Legislature's argument contradicts these longstanding principles of statutory construction.

Additionally, though the legislative history is focused on discriminatory registration practices from the Jim Crow South, the statutory text is clearly not limited to voter registration-related records and papers. As the U.S. Supreme Court has written, "[i]f the text is clear, it needs no repetition in the legislative history; and if the text is ambiguous, silence in the legislative history cannot lend any clarity." *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1143 (2018); *see also Hearn v. W. Conf. of Teamsters Pension Tr. Fund*, 68 F.3d 301, 304 (9th Cir. 1995) ("[L]egislative history . . . can't override statutory text."). Given the plain text, which includes "any . . . other act requisite to voting" in a disjunctive series, the legislative history is most naturally read as establishing a floor, not a ceiling.

Second, the plain text of Section 10101(a)(2)(B) ends with the clause: "if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election[.]"[5] This clause is also not limited to voter registration, as is underscored by subsection (e)'s expansive definition of "vote" which:

> includes all action necessary to make a vote effective including, but not limited to, registration or other action required by State law prerequisite to voting, casting a ballot, and having such ballot counted and included in the appropriate totals of votes cast with respect to candidates for public office and propositions for which votes are received in an election.

[5] The League has consistently argued that "qualified under State law" embraces voting eligibility or qualification requirements as set forth in Wisconsin law. (Dkt. 16, Pl. Br. in Supp. of Mtn. for Temp. Inj. at 20.) Instead of that phrase, the last item in the following series "any record or paper relating to any application, registration, or *other act requisite to voting*" is what extends the Materiality Provision's reach to any requirement to record certain information on any record or paper as a prerequisite to voting. 52 U.S.C. § 10101(a)(2)(B) (emphasis added). Such requirements are a mere subset of "all rules bearing on whether an elector's vote is counted under state law." (Dkt. 138 at 23.)

52 U.S.C. § 10101(e); *see also id*. § 10101(e)(3)(A) (applying subsection (e)'s definition to subsection (a)).

Despite this clear text, the Legislature refers to a "voter-qualification stage" (Dkt. 138 at 18) and posits that absentee ballot requests and absentee voting occur only "after a voter is deemed eligible to vote" (Dkt. 138 at 24), implying the qualifications to vote have no relevance and are never again invoked after the point of initial registration. This is false. A voter's eligibility may be challenged, investigated, evaluated, or otherwise addressed at many other points in the electoral process following registration.

The argument that the Materiality Provision does not apply to errors and omissions on records and papers after the point of registration because voters are found qualified upon registration is belied by Wisconsin election law. For example, a voter may challenge another voter's registration on the grounds that they are not qualified to vote. Wis. Stat. § 6.48. Additionally, any election inspector or voter may "challenge for cause any person offering to vote whom the [inspector or elector] knows or suspects is not a qualified elector." Wis. Stat. §§ 6.92, 6.925. Absentee voters' qualifications may be challenged as well. Wis. Stat. § 6.93. Wisconsin law contains numerous requirements and procedures that implicate a voter's qualifications after registration. *See* Wis. Stat. § 6.32 (verification of certain registrations), §§ 6.27, 6.325 (disqualification of electors), § 6.56 (verification of voters not appearing on registration list), § 6.86 (methods for obtaining an absentee ballot).

A voter's qualifications may also be called into question by a later investigation by Wisconsin election officials or law enforcement and, for that reason, many "post-registration rules" (Dkt. 138, Leg. Comb. Br. at 9) implicate and reinforce voter qualification requirements. Wis. Stat. § 6.87(6d) is one such "post-registration" rule that may enable officials and law enforcement to "determin[e] whether such individual is qualified under State law to vote." 52 U.S.C. § 10101(a)(2)(B). Aside from the Legislature, the other parties (and the U.S. Department of Justice) generally agree that requiring a witness address may provide a way to enforce voter qualification requirements. (Dkt. 137 at 17 (citing Dkt. 53 at 10; Dkt. 114 at 31 n.25.)) After all, the putative objective of the witnessing requirement in Wis. Stat. § 6.87(2) and the witness address requirement in Wis. Stat. § 6.87(6d) is to enable state and local election officials, as well as law enforcement, to contact the absentee voter's witness, should that become necessary due to a "post-registration" challenge or fraud investigation, either of which could implicate the voter's qualifications. Nonetheless, the Legislature argues Section 6.87(6d)'s only function is to "verify and validate absentee ballots submitted by already-qualified voters," as if this validation had nothing to do with giving officials a potential means to investigate and corroborate a voter's qualifications. (Dkt. 138 at 23, 38.)

Accordingly, even assuming for argument's sake that the Materiality Provision only applies when voter qualifications are implicated, voter and witness certifications *do* implicate and enforce voter qualifications. The Legislature declares that Section 6.87(6d) "ensur[es] the franchise is protected from fraud and abuse" but resists or

ignores the inexorable conclusion that this anti-fraud purpose is fulfilled by providing another mechanism to investigate and corroborate the voter's qualifications to vote. (Dkt. 138 at 38–39.) Therefore, the Legislature fails in its attempt to segregate requirements related to voter qualifications from "election-integrity laws that regulate the ballots themselves" or "ballot-validity requirements"—two opaque categories that the Legislature does not substantiate with legal authorities or definitions. (Dkt. 138 at 24, 26.) No such separation is possible. The Legislature posits that the Materiality Provision "does not apply" to such "election-integrity laws . . . after a voter is deemed eligible to vote," (Dkt. 138 at 24), but the "validity" of the ballot is inextricably tied to the voter's qualification to vote.

If, by contrast, the witnessing and witness address requirements bore no connection to, and did not at least preserve, the possibility of investigating and assessing a voter's qualifications down the line, then these requirements would not be supported by an "important regulatory interest[]," *Burdick v. Takushi*, 504 U.S. 428, 434 (1992), and would therefore violate the U.S. Constitution. If the sole justification for Wis. Stat. § 6.87(6d)'s existence was eliminated and recording a witness's address amounted to a meaningless technicality serving no anti-fraud purpose connected to assessing the voter's qualifications, then Section 6.87(6d) would be facially immaterial to determining a voter's qualifications. The Legislature's ill-conceived gambit to persuade this Court that the Materiality Provision has no application to the League's as-applied challenge to four applications of Section 6.87(6d) culminates in a solid argument for its facial invalidity.

Third, the dissent in *Ritter v. Migliori*, 142 S. Ct. 1824 (2022) does not rescue the Legislature's statutory interpretation arguments either. The Legislature points to Justice Alito's dissent from the Supreme Court's denial of the application for a stay for the proposition that "[t]echnical ballot requirements . . . have nothing to do with the 'requirements that must be met in order to establish eligibility to vote,' and thus are not covered by the provision." (Dkt. 138 at 21 (quoting *Migliori*, 142 S. Ct. at 1825 (Alito, J., dissenting))). But, once again, 52 U.S.C. § 10101(a)(2)(B) is both narrower and broader than the Legislature suggests. Perhaps the most basic element of the Materiality Provision is that there be an "error or omission on any *record or paper* relating to any application, registration, or other act requisite to voting." 52 U.S.C. § 10101(a)(2)(B) (emphasis added). The Materiality Provision is not implicated by "rules setting the date of an election, the location of the voter's assigned polling place, the address to which a mail-in ballot must be sent," *Ritter*, 142 S. Ct. at 1825 (Alito, J., dissenting), because none involves an "error or omission on any record or paper." 52 U.S.C. § 10101(a)(2)(B).

By contrast, as numerous courts have found, the failure to record certain required information on an absentee ballot certificate envelope's voter or witness certifications is an "error or omission on a[ ] record or paper." *Id.*; *see, e.g.*, *La Unión del Pueblo Entero v. Abbott*, 604 F. Supp. 3d 512, 541 (W.D. Tex. 2022) (finding the Materiality Provision applies to "the preparation and submission of an application to vote by mail, as well as the preparation and submission of a mail ballot carrier envelope"); *Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1308–09 (N.D. Ga. 2018)

(holding Materiality Provision forbids rejecting a ballot because a voter incorrectly recorded or omitted their birth year on an "absentee ballot envelope"); *League of Women Voters of Ark. v. Thurston*, No. 5:20-cv-5174, 2021 WL 5312640, at *3–4 (W.D. Ark. Nov. 15, 2021) (applying Materiality Provision to absentee ballot request forms and return envelope certificates). Contrary to the Legislature's assertions, rejecting an absentee ballot based on immaterial errors or omissions on the certificate envelope can constitute a violation of the Materiality Provision, and, indeed, courts have recently ruled that it does. *In re Georgia Senate Bill 202*, No. 1:21-CV-01259-JPB, 2023 WL 5334582, at *10 (N.D. Ga. Aug. 18, 2023); *La Unión del Pueblo Entero v. Abbott*, No. 5:21-CV-0844-XR, dkt. 724, at **5–6 (August 17, 2023).

Justice Alito's dissent contravenes the plain statutory text of 52 U.S.C. § 10101(a)(2)(B), which refers to "any . . . other act requisite to voting." And again, even if we assume the Materiality Provision may only apply when voter qualifications are implicated, voter and witness certifications *do* implicate a voter's qualifications.

Consequently, the Legislature is wrong when it claims that the League's, the Defendants', and the U.S. Department of Justice's shared interpretation of the Materiality Provision "would potentially render a wide range of state election laws unlawful," "would preclude a large swath of state voting requirements," and "would revoke state authority to enact and enforce innumerable election laws nationwide, prohibiting application of election-integrity laws relating to absentee voting [and] times for closing polling places." (Dkt. 138 at 21, 34, 36.) Section 10101(a)(2)(B) only applies to errors or omissions on records or papers. The Materiality Provision applies

to voter registration forms, absentee ballot applications, absentee ballot certificate envelopes, voter identification cards, and any "other record or paper relating to any . . . other act requisite to voting." 52 U.S.C. § 10101(a)(2)(B).

However, it cannot be applied to a statute regulating, for example, the collection or mailing of absentee ballots, certain restrictions on voter assistance, deadlines for registering to vote or requesting an absentee ballot, and all manner of registration and voting requirements *that do not involve recording information on records or papers*. By its express terms, the Materiality Provision does not apply and *cannot* be "applied to all aspects of a State's election code." (Dkt. 138, Leg. Comb. Br. at 25.) The Legislature's assertion that voters could sue over the requirement to verbally "state" their name and address at the polls, Wis. Stat. §§ 6.79(2)–(3), or the requirement to cast a ballot or join a line at the polling place by 8:00 p.m., Wis. Stat. § 6.78, is wrong. (Dkt. 138 at 22, 35.) Since both requirements lack any connection to a "record or paper," let alone a requirement to put certain information down on that record or paper, voters absolutely could not challenge these laws under 52 U.S.C. § 10101(a)(2)(B).

Given this Civil Rights Act provision's narrow focus on errors or omissions on records or papers requisite to voting, it is misleading for Defendants to argue that enforcing it according to its plain terms will lead to the upending of technical voting requirements that have no connection to requirements to put down information on records and papers as acts requisite to voting. (Dkt. 138 at 21–22.) This provision has existed and been enforced for nearly 60 years without any such upheaval.

All laws governing voting apply after the moment of registration. The Legislature interprets the Materiality Provision in such a way that all voting laws are exempt from its reach.

B. Alternative options to vote do not excuse the unlawful rejection of ballots for immaterial errors or omissions.

The Legislature's second principal argument is that absentee voters are not "den[ied] the right . . . to vote" within the meaning of 52 U.S.C. § 10101(a)(2)(B) because Wisconsin law offers other opportunities to vote. This contention also lacks merit.

First, both Section 10101(a)(2)(B) and subsection 10101(e)'s definition of "vote" have no support for the argument that Congress intended to create exceptions to the Materiality Provision when state law affords voters the means to cure an error or omission or other means to register or to vote. Subsection (e) explicitly states that the term "vote":

> includes all action necessary *to make a vote effective* including, but not limited to, registration or other action required by State law prerequisite to voting, casting a ballot, and *having such ballot counted and included in the appropriate totals of votes cast* . . .

52 U.S.C. § 10101(e) (emphasis added); *see also id.* § 10101(e)(3)(A) (applying subsection (e)'s definition to subsection (a)). The use of "a vote" and "having such ballot counted" indicate that the Materiality Provision is concerned with protecting, not merely the opportunity to vote, but also the ballot the voter has cast. *See La Unión del Pueblo Entero*, 604 F. Supp. 3d at 540 (applying Materiality Provision to absentee-ballot application requirements) ("The [Civil Rights Act] . . . defines the term 'vote'

broadly: it includes all action necessary to make a vote effective."). Absentee ballots are protected under the Materiality Provision because a voter's cast absentee ballot is that voter's vote. *See In re Georgia Senate Bill 202*, 2023 WL 5334582, at *10 ("When a voter returns an absentee ballot to the clerk or registrar, the ballot contained in the inner envelope is the voter's vote.").

Subsection (e) also belies the Legislature's notion that an absentee ballot and its certificate envelope are not records or papers "related to any . . . act *requisite* to voting." (Dkt. 138 at 30 (emphasis added)). This argument ignores that: (a) the witness address requirement is a "prerequisite to . . . having *such ballot counted* and included in the appropriate totals of votes cast," 52 U.S.C. § 10101(e) (emphasis added), and (b) for many absentee voters, there is no alternative to voting by mail due to work, travel, disability, illness, or other reasons. And the Legislature's argument ignores the nature of the disenfranchisement. The types of immaterial errors or omissions reflected in the undisputed facts simply not being counted, without notice to the voter or any ability for them to then vote by another method. Wisconsin law makes it optional for municipal clerks to inform voters of such errors. Wis. Stat. § 6.87(9). It is no help to a voter who has returned such a ballot that they otherwise could have voted in a different way. By the time their ballot is rejected, they are deprived of that alternative.

All told, Congress declined to include the exceptions the Legislature wishes it had. The availability of curing or alternative means to vote do not give Defendants the license to reject ballots for immaterial errors or omissions. *La Unión del Pueblo*

Entero, 604 F. Supp. 3d at 541. The Materiality Provision "provides that state actors may not deny the right to vote based on errors or omissions that are not material; it does not say that state actors may initially deny the right to vote based on errors or omissions that are not material as long as they institute cure processes." *Id*. No court has adopted the view that a materiality claim challenging absentee ballot requirements is defeated by the availability of alternate means to vote or potential ways to cure their ballot. *See La Unión del Pueblo Entero*, No. 5:21-CV-0844-XR, dkt. 724, at *5; *In re Georgia Senate Bill 202*, 2023 WL 5334582, at *7; *Vote.org v. Georgia State Election Bd.*, No. 1:22-CV-01734-JPB, 2023 WL 2432011, at *8 (N.D. Ga. Mar. 9, 2023); *Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1309 (N.D. Ga. 2018); *Eakin v. Adams Cnty. Bd. of Elections*, No. 1:22-CV-340, 2023 WL 3903112, at *5 (W.D. Pa. June 8, 2023); *Pennsylvania State Conf. of NAACP v. Schmidt*, No. 1:22-CV-339, 2023 WL 3902954, at *7 (W.D. Pa. June 8, 2023); *League of Women Voters of Arkansas v. Thurston*, 2021 WL 5312640, at *4.

Second, even if the Legislature's argument were not foreclosed by the Civil Rights Act's plain text, many absentee voters whose ballots bear a fatal error or omission in the witness address field will never learn of that error or omission in time to cure or spoil the ballot and cast a ballot by other means. Wis. Stat. § 6.87(9) provides as follows:

> If a municipal clerk receives an absentee ballot with an improperly completed certificate or with no certificate, the clerk *may* return the ballot to the elector, inside the sealed envelope when an envelope is received, together with a new envelope if necessary, *whenever time permits the elector to correct the defect and return the ballot within the period authorized under sub. (6).*

(Emphasis added.) That subsection gives municipal clerks discretion to notify voters with fatal absentee ballot errors or omissions but does not impose any obligation to do so. There is also no obligation to otherwise contact voters just to inform them that their ballot will be rejected due to the witness address defect or omission and give them an opportunity to spoil the ballot.

Further, as subsection 6.87(9) acknowledges, time is an ultimate limitation, and at some point, there will be no feasible way to return that defective ballot to the voter and allow them to vote another ballot or vote by other means. The evidence is quite to the contrary and, in any event, the 1964 Civil Rights Act plainly does not create such an easy out for its violators. The undisputed facts in this case demonstrate how Wis. Stat. § 6.87(6d) has operated, resulting in the rejection of ballots due to immaterial errors or omissions. By contrast, the Legislature provided no evidence that these voters were contacted prior to the rejection of their elections or evidence that municipal clerks, let alone voters, even learned of these witness errors and omissions until the canvass of ballots on or after Election Day. Accordingly, the Legislature's "just go vote in person" defense fails.

Accordingly, the Legislature's citation to the Fifth Circuit's decision in *Vote.Org v. Callanen*, 39 F.4th 297 (5th Cir. 2022), is inapposite to this case. Whatever the merits of the Fifth Circuit's conclusion that "alternative means to register" defeated the Section 10101(a)(2)(B) claim against strict enforcement of Texas's "wet signature" rule for voter registration applications, in Wisconsin, municipal clerks'

interpretation of Wis. Stat. § 6.87(6d) is "depriv[ing]" eligible voters of their "right to vote" without any meaningful recourse or alternative. *Id*. at 305–06.

Vote.Org hinged on the fact that mail and fax registrants who failed to provide a wet signature have, pursuant to statute, ten days to cure the error following notice of the error by the county registrar. *Id*. at 306. As registrants in Texas must file their registration application 30 days or more days before an election, even the latest registration applicants have the right and opportunity to cure their signature error before the election. Tex. Elec. Code § 13.143.

By contrast, Wisconsin law does not require clerks to provide notice of a witness address error on an absentee ballot, nor does the law create a right to cure. Wis. Stat. § 6.87(9) ("[T]he clerk *may* return the ballot to the elector…*whenever time permits* the elector to correct the defect and return the ballot within the period authorized under sub. (6)."") (emphases added). Moreover, as discussed previously, time does not permit voters who submit their absentee ballot on election day and/or whose ballot is received by the canvassing deadline with an opportunity to cure or an opportunity to use an alternate form of voting, and that is assuming clerks use their discretion to notify absentee voters of witness address errors. These are key facts, as the Legislature has adduced no evidence to establish that absentee voters ensnared by Section 6.87(6d) have meaningful, timely options to cast a ballot by other means. *See Sixth Dist. of Afr. Methodist Episcopal Church v. Kemp*, 574 F. Supp. 3d 1260, 1282 (N.D. Ga. 2021) (rejecting defendant's dispositive motion, the court found "State Defendants have not provided any support for their argument that the opportunity

to cure an error rehabilitates any potential violation of § 10101(a)(2)(B), and the statute is silent on this point").

Accordingly, the Legislature's argument that a Section 10101(a)(2)(B) claim against a requirement to record certain information on an absentee ballot certificate envelope is defeated by the availability of other means to vote is not supported by the plain text or applicable cases.

IV. Defendants have withdrawn their argument regarding the League's fourth category.

On June 1, 2023, the parties filed a joint stipulation filed that included the following:

> 4. The Parties further stipulate pursuant to Wis. Stat. § 802.09(2) that, in addition to the categories of absentee ballot witness certifications currently identified and described in Count Two of the Second Amended Complaint (see dkt. 94, ¶¶69–71), the League may also request relief regarding absentee ballot witness certifications in which the witness recorded only their street number, street name, and zip code, and that any such ballots shall be deemed to be subject of Count Two of the Second Amended Complaint.

In recognition of that joint stipulation, on October 2, 2023, Defendants withdrew their argument regarding the League's fourth category of absentee ballot witness address errors or omissions: absentee ballot witness certifications in which the witness recorded only their street number, street name, and zip code. (Dkt. 145 at 3.) As described in Defendants' motion, the League reserves its right to respond to any additional arguments Defendants make regarding such ballots in a sur-reply brief.

CONCLUSION

For the foregoing reasons, Plaintiff League of Women Voters of Wisconsin respectfully requests that this Court grant summary judgment in its favor on Count Two of its Second Amended Complaint and deny Defendants' and the Legislature's cross-motions for summary judgment.

DATED**:** October 5, 2023

Respectfully submitted,

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