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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 Trammell, Presiding
Case No. 2022CV2472

COMBINED BRIEF OF INTERVENOR-RESPONDENT-CROSS-APPELLANT THE WISCONSIN STATE LEGISLATURE

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INTRODUCTION TO RESPONSE BRIEF

Plaintiff League of Women Voters of Wisconsin filed this lawsuit alleging, as relevant here, that certain municipal and county clerks were rejecting absentee ballots based on an unlawfully stringent understanding of Wis. Stat. § 6.87(6d)'s "missing" witness address mandate. But Plaintiff did not sue any such clerks. Rather, it sued the Wisconsin Elections Commission ("WEC"), without even alleging that WEC or its officials took any allegedly unlawful action with regard to Section 6.87(6d)'s "missing" witness address mandate. Plaintiff's complaint thus stood in stark contrast to other recent actions regarding the interpretation of Wisconsin's absentee voting laws, such as *Rise, Inc. v. Wisconsin Elections Commission*, No.2022CV2446 (Dane Cnty. Cir. Ct.), where the plaintiffs named as defendants the county clerks that they contended were violating the *Rise* plaintiffs' understanding of a different component of Section § 6.87(6d). The *Rise* plaintiffs did that because a party cannot ask a court to render an advisory judgment on the meaning of a statute; it must identify a concrete dispute with a defendant that the plaintiff claims is applying the statute unlawfully.

Plaintiff's strange litigation decision not to sue any of the actual clerks that Plaintiff believes were violating its understanding of Section 6.87(6d) left the Circuit Court with no choice but to dismiss this aspect of Plaintiff's lawsuit as nonjusticiable. As the Circuit Court explained, Wisconsin law

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allows a party to obtain a declaratory judgment *only* against a defendant who has caused, or is likely to cause, some kind of harm to the plaintiff by violating the law. Plaintiff failed to identify *any* action that WEC had taken or was likely to take that was allegedly unlawful with regard to Plaintiff's view of Section § 6.87(6d)'s "missing" witness address mandate, and so the Circuit Court was correct to hold that Plaintiff was not entitled to a declaratory judgment or injunctive relief against WEC on this statutory interpretation issue. This Court should affirm that holding.

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Alternatively, if this Court were to disagree with the Circuit Court's dismissal of Plaintiff's challenge to Section § 6.87(6d) on justiciability grounds, then this Court should affirm the Circuit Court's dismissal on a different basis: Plaintiff is wrong on the meaning of Section 6.87(6d). Plaintiff contends that, under Section 6.87(6d), a clerk may only reject an absentee ballot when the witness fails to include *any* address-related information on the absentee-ballot certificate. In other words, Plaintiff argues that listing, for instance, just a street number or a street name in the witness-address field would render the witness's address not "missing" under Section 6.87(6d). But if a witness provides just her street name, or her street number, then she has failed to provide her "address" and her "address" is therefore "missing." Plaintiff's atextual interpretation would render Section 6.87's witness-address requirement nonsensical.

This Court should affirm the Circuit Court's dismissal of Plaintiff's Section 6.87(6d) count.

RESPONDENT'S STATEMENT OF THE ISSUES

1. Whether the Circuit Court could declare the meaning of the word "missing" in Wis. Stat. § 6.87(6d), when Plaintiff did not sue any state official that has even purported to enforce or apply a contrary view of that term.

The Circuit Court answered no.

2. Whether a witness "address" is "missing" from an absentee-ballot certificate under Wis. Stat. § 6.87(6d) only when the witness fails to provide any component part or indicia of the witness's address—that is, where the witness "provides no component part or indicia of the witness's address at all."

The Circuit Court did not reach the issue.

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ORAL ARGUMENT AND PUBLICATION

Given the issues of statewide importance involved in this action, the Legislature respectfully contends that this case is appropriate for oral argument and publication.

STATEMENT OF THE CASE

A. Legal Background

While the Wisconsin Constitution guarantees the right to vote, Wis. Const. art. III, § 1, absentee voting is a "privilege" under Wisconsin law. Wis. Stat. § 6.84(1); *Teigen v. Wis. Elections Comm'n*, 2022 WI 64, ¶ 52 n.25, 403 Wis. 2d

607, 976 N.W.2d 519 (lead opinion). Recognizing that absentee voting takes place "wholly outside the traditional safeguards of the polling place," Wisconsin law requires that "privilege" to "be carefully regulated to prevent the potential for fraud or abuse," Wis. Stat. § 6.84(1), and provides that "matters relating to the absentee ballot process" be "construed as mandatory," *id.* § 6.84(2). A ballot "cast in contravention" of these mandatory procedures "may not be counted." *Id.*

Pursuant to its constitutional authority to "[p]rovid[e] for absentee voting," Wis. Const. art. III, § 2, the Legislature has authorized absentee voting, in some form, since the Civil War, *see* 1862 Wis. Act 11 (Special Sess.).[1] The Legislature adopted the State's first comprehensive absentee voting regime in 1915, *see* 1915 Wis. Act 461;[2] *Teigen*, 2022 WI 64, ¶ 174 (Hagedorn, J., concurring), which expanded absentee-voting opportunities while curbing the potential for fraud or abuse. 1915 Wis. Act 461, § 44m—1–2, 5–6, 14.

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In 1966, the Legislature simplified the absentee-voting process by allowing absentee voters to "make and subscribe to the certification" on their absentee ballots "before 2 witnesses." 1965 Wis. Act 666, § 1 (creating Wis. Stat.

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[1] Available at https://docs.legis.wisconsin.gov/1862/related/acts/62ssact011.pdf (all websites last visited July 3, 2024).

[2] Available at https://docs.legis.wisconsin.gov/1915/related/acts/461.pdf.

§ 6.87).[3] In 1986, voters ratified a constitutional amendment enshrining the Legislature's authority to enact laws "[p]roviding for absentee voting," Wis. Const. art. III, § 2, and the Legislature shortly thereafter overhauled the entire absentee-voting regime, simplifying the absentee-voting process and clarifying its requirements, *see* 1985 Wis. Act 304.[4] Part of this legislative overhaul involved the enactment of Wis. Stat. § 6.84, which expresses the State's policy goals related to absentee voting and guides the courts on the proper interpretation of laws governing this "privilege," *id.* § 6.84(1).

Wisconsin now has one of the most generous absentee-voting regimens in the Nation, pursuant to which any qualified, registered voter can exercise the "privilege" of voting absentee "for any reason" if he or she is "unable or unwilling to appear at the polling place in his or her ward or election district." Wis. Stat. §§ 6.84, 6.85(1).

Section 6.87 governs the completion and counting of absentee ballots in Wisconsin, including, as relevant here, the absentee-ballot witness requirement. Specifically, and subject to certain exceptions, Section 6.87 requires an absentee voter to mark and fold his or her ballot in the presence of a witness and place it inside the official absentee-

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[3] Available at https://docs.legis.wisconsin.gov/1965/related/acts/666.pdf.

[4] Available at https://docs.legis.wisconsin.gov/1985/related/acts/304.pdf.

ballot envelope. *Id.* § 6.87(4)(b)(1); *see id.* § 6.875. The witness must then write his or her "[a]ddress" on the certificate printed on the absentee-ballot envelope. *Id.* § 6.87(2). "If a certificate is missing the address of a witness, the [absentee] ballot may not be counted." *Id.* § 6.87(6d). Finally, a clerk who "receives an absentee ballot with an improperly completed certificate or with no certificate . . . 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)." *Id.* § 6.87(9).

In guidance issued in October 2016, WEC interpreted "address," as that term is used in Section 6.87, to mean a "street number, street name, and name of municipality." R.3 at 1, Supp.App.409 ("2016 Guidance") (emphasis omitted). The 2016 Guidance also directed clerks to "take corrective actions in an attempt to remedy a witness address error" and authorized clerks to unilaterally correct absentee ballot witness certifications without needing "to contact the voter" if the clerk was "reasonably able to discern any missing information from outside sources." R.3 at 1, Supp.App.409. However, in 2022, the Waukesha County Circuit Court enjoined the latter part of the 2016 Guidance, *see* R.22, Ex.1 at 1–30, Supp.App.370–400 (Tr. of Oral Ruling, *White v. WEC*, No.2022CV1008 (Waukesha Cnty. Cir. Ct. Sept. 7, 2022)), because clerks have no "duty or ability to modify or add information to incomplete absentee ballot certifications," R.22, Ex.1 at 26, Supp.App.395. But the injunction did not

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implicate the 2016 Guidance's interpretation of a witness's "address" in any way, and the court did not otherwise rule on when a ballot certificate is defective. *See* R.22, Ex.10 at 1–3, Supp.App.405–07.

Thereafter, WEC issued new guidance reaffirming its view of the three-part definition of "address" and explaining that the *White* court "had not overturned the existing WEC definition of address contained in the now-invalidated memoranda—namely, *street number, street name, and name of municipality*." *See* R.22, Ex.8 at 1–2, Supp.App.402–03. WEC also revised the absentee-ballot form to clarify that witnesses need only provide their "Number, Street Name, [and] City" in the witness certificate. R.170, Ex.1 at 1, Supp.App.008. WEC's revised absentee-ballot witness certificate includes clear instructions for witnesses to provide their signature, printed name, and their address, consisting of a street number, street name, and city. An image of the current absentee ballot witness certificate is reproduced below:

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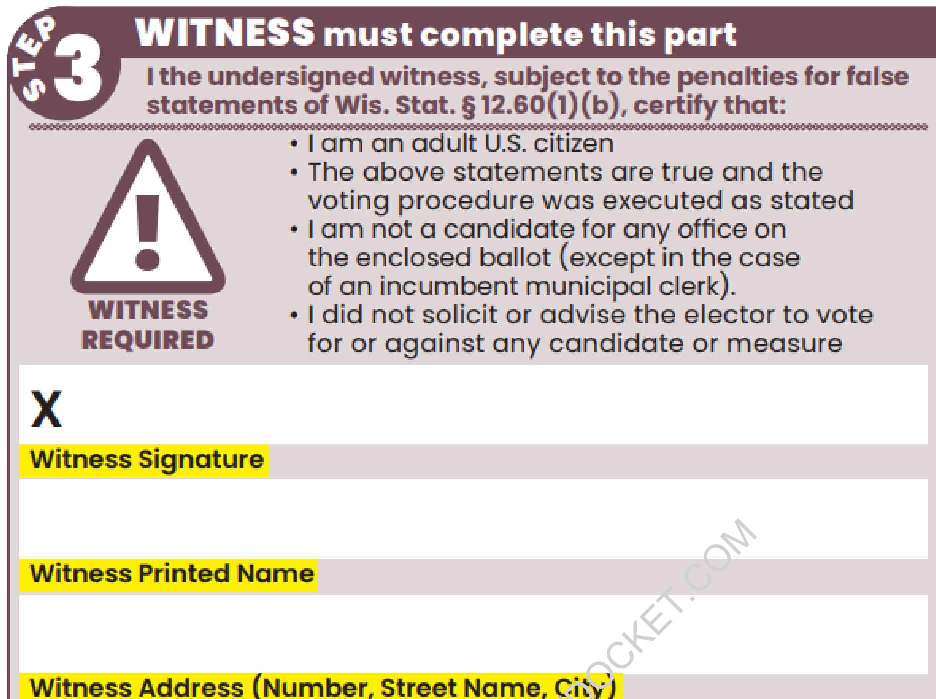

R.170, Ex.1 at 1, Supp.App.008.

Municipal clerks and absentee voters used WEC's new guidance and the Uniform Instructions for Wisconsin Absentee Voters for the first time in the November 2022 general election, with great success. Indeed, in the proceedings below, Plaintiff could only identify sixty-seven instances across the entire State where clerks rejected ballots for witness-address issues, R.114 at 9–11, Supp.App.061–63, which demonstrates that any inconsistent treatment of witness addresses is the result of isolated action by a handful of local clerks, not a statewide problem caused by WEC's guidance about the address requirement or the necessary components thereof (which guidance has never addressed the term "missing" under Section 6.87(6d) at issue in this case).

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On September 30, 2022, Plaintiff filed a three-count Complaint naming WEC as the sole defendant, R.2, and alleging, as relevant here, that an address is "missing" under Section 6.87(6d) if the address field on a witness certificate is "completely absent" or "completely blank," R.2 at 18–20; R.10 at 19–21; R.94 at 20–21, App.060–61.[5]

After filing a First Amended Complaint with the same three claims and WEC as the only named Defendant, R.10,[6] Plaintiff filed a Second Amended Complaint that asserted the same claims, now also including WEC's Commissioners and Administrator as Defendants, R.94 at 1–31, App.037–70.

Next, Plaintiff sought a temporary injunction on October 4, 2022, asking the Circuit Court to (1) apply its proposed definition of "missing" to Section 6.87(6d), (2) enjoin WEC "from rejecting absentee ballots with certificates that bear partial witness address information," and (3) direct WEC

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[5] Plaintiff also alleged that WEC's failure to instruct clerks to count ballots with "missing" address components under Section 6.87(6d) violates Section 10101(a)(2)(B) of the Civil Rights Act of 1964, 52 U.S.C. § 10101(a)(2)(B), R.10 at 21–24; R.94 at 21–24, App.061–64; and that Section 6.87(9) violates the U.S. Constitution's Due Process Clause because it does not require municipal clerks to notify voters or return defective absentee ballots before rejecting them under Section 6.87(6d), R.10 at 24–26; R.94 at 24–27, App.064–67. The Legislature explains why Section 6.87(6d) does not implicate Section 10101(a)(2)(B) in its accompanying Cross-Appeal section of this Brief. *See infra* pp.62–79.

[6] Plaintiff's First Amended Complaint was identical to its initial Complaint in most respects, with most of the minor changes addressing the permanent injunction issued in *White*, No.22CV1008, Dkt.188 (Waukesha Cnty. Cir. Ct. Oct 3, 2022), R.19, Ex.4. *See* R.10 at ¶¶ 6, 9, 48; *supra* pp.14–15.

to instruct municipal clerks to notify voters of witness-ballot errors or omissions, among other relief. R.15 at 2–5. The Legislature intervened on October 7, 2022, R.34, and opposed Plaintiff's motion, R.42. The Circuit Court denied Plaintiff's motion, *see* R.66; *see generally* R.72, Supp.App.349–64, after concluding that the relevant status quo was the plain text of the statute, which did not define the term "missing," and WEC's 2016 Guidance, which "has been instructing clerks all along to inform voters that their ballots would not be counted with an incomplete witness address," R.72 at 12, Supp.App.360. Plaintiff petitioned for leave to appeal that decision, R.68, but the Court of Appeals denied that petition, R.71.

On November 11, 2022, the Legislature moved to dismiss Plaintiff's Count I, R.73, arguing that Plaintiff was "not legally entitled" to a state-law declaratory judgment as to the meaning of "missing" and the injunctive relief it was seeking, R.74 at 6–8. The Legislature explained that the Complaint "fail[ed] to identify any action that WEC has taken that is allegedly unlawful," and thus Plaintiff could not obtain a declaratory judgment against WEC or an order compelling WEC to enforce Plaintiff's desired definition of "missing." R.74 at 1, 6–7. Plaintiff, rather than seeking to enjoin any WEC action, alleged only that there was no guidance regarding when a witness address was "missing" and that such a ballot "may be rejected." R.74 at 6 (quoting R.10 at 2). Thus, Plaintiff's dispute was not with WEC, which had taken

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no action, but with the clerks whom it believed to be unlawfully applying the term "missing" in Wis. Stat. § 6.87(6d). R.74 at 7.

In opposition to the Legislature's motion, Plaintiff argued that Count I properly stated a claim under the Wisconsin Declaratory Judgments Act because Count I sought a declaration as to the meaning of Wisconsin's absentee-ballot laws, and because WEC is solely responsible for administering those laws and occasionally issues guidance concerning their interpretation. R.98 at 2–3. Specifically, Plaintiff suggested that declaratory relief was appropriate because WEC itself might otherwise violate Section 6.87 in the course of its election-administration duties. R.98 at 5–12, 14–17. Plaintiff also argued that Count I stated a claim for injunctive relief because Wisconsin law requires WEC to issue updated guidance in response to a binding court order, such as the one it contemplated the Circuit Court would order in this case. R.98 at 3. Finally, Plaintiff argued that, even if Count I failed as to WEC, Count I was nevertheless cognizable against the Legislature, which sought to defend interests in this litigation that are adverse to those of Plaintiff. R.98 at 16.

In reply, the Legislature explained why Plaintiff's three arguments in favor of maintaining its lawsuit as to Count I fail. First, the Legislature explained that declaratory relief is unavailable where, as here, the opposing party has not caused, or is not likely to imminently cause, any harm. R.100

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at 3. Here, the Legislature noted, Plaintiff never alleged that WEC had taken any action to violate Plaintiff's interpretation of Section 6.87, nor that WEC was likely to do so in the future. R.100 at 3. The Legislature also refuted Plaintiff's attempt to reframe Count I as challenging the manner in which WEC would interpret Section 6.87 in the conduct of its election-administration responsibilities, noting that the Complaint did not allege that WEC had misused, or was likely to misuse, its statutory authority in this context. R.100 at 4. Second, the Legislature explained that Plaintiff's injunctive relief failed for the same reason: WEC has no duty to issue guidance absent a "binding" court order, but there is no basis for such an order, as a matter of justiciability, given the lack of adversity between Plaintiff and WEC. R.100 at 5–6. Finally, the Legislature articulated that Count I did not state a claim against the Legislature because the Complaint sought no such relief, and even if it had, Plaintiff cited no authority setting aside legislative immunity in these contexts or allowing a party to sue the Legislature over an interpretation of a state statute. R.100 at 6–8.

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On March 14, 2023, the Circuit Court granted the Legislature's Motion To Dismiss Count I, R.107, App.016–36; *see* R.94 at 1–4, 20–21, App.041–44, 060–61, holding that no justiciable controversy existed, R.107 at 10–21, App.025–36, because Plaintiff had failed to demonstrate that "WEC has taken any action that has caused harm or will cause imminent harm," R.107 at 8–10, App.023–25. The Circuit Court

explained that Plaintiff had misconstrued the requirements of the Declaratory Judgments Act, R.107 at 13–18, App.028–33; *see id.* at 8–10, App.023–25, and thus "seemingly relie[d] on the inherent power of parties to obtain declaratory relief as the basis for the claim" without articulating any "adversity or controversy between the parties." R.107 at 13, App.028. The Circuit Court further held that "[t]here [wa]s no basis for the Court to grant injunctive relief under Count One," given the Court's conclusion on Plaintiff's declaratory judgment request. R.107 at 18–19, App.033–34. Specifically, the Court held that Wis. Stat. § 5.05(5t) "does not provide the League an independent ground to obtain injunctive relief against the WEC," nor does it "supplant the justiciability standard required in the first instance" to obtain "the binding court order [Plaintiff] sought on the construction of § 6.87(6d)." R.107 at 18–19, App.033–34. The Circuit Court thus dismissed Count I, without reaching the issue of what the term "missing" means for purposes of Section 6.87(6d).

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On July 31, 2023, WEC moved to consolidate this case with *Rise, Inc. v. Wis. Elections Comm'n*, No.2022CV2446 (Dane Cnty. Cir. Ct.) for the purposes of trial under Wis. Stat. § 803.04. *See* R.119–20. On August 22, 2023, the Circuit Court granted WEC's motion over Plaintiff's opposition, R.121, and reassigned the case to Judge Nilsestuen, R.127 at 3–4. In *Rise*, the plaintiffs filed declaratory judgment claims against WEC and three City Clerks, in their official capacities, seeking a declaration that the word "address," as

used in Section 6.87, means "a place where the witness may be communicated with," and that a ballot that contains information from which a clerk "can reasonably discern where the witness may be communicated with is properly completed" under Section 6.87(6d). Supp.App.345. The *Rise* plaintiffs alleged that these defendant clerks were relying upon erroneous interpretations of the term "address" when reviewing absentee-ballot witness certificates, in violation of Section 6.87. Supp.App.338–39.

In *Rise*, the Circuit Court concluded that an "address" under Wis. Stat. § 6.87 means any "place where the witness may be communicated with." Declaratory J. and Permanent Inj. at 1, *Rise, Inc. v. WEC*, No.2022CV2446, Dkt.238 (Dane Cnty. Cir. Ct. Jan. 30, 2024), App.071–73. The Circuit Court granted Plaintiff's motion for summary judgment and denied WEC and the Legislature's cross-motions for summary judgment on January 2, 2024, without addressing the meaning of the term "missing" for purposes of Section 6.87(6d). R.157, App.008–15. On January 30, 2024, the Circuit Court declared that the federal Materiality Provision, 52 U.S.C. § 10101(a)(2)(B), applies to Section 6.87 and prohibits clerks from rejecting certain categories of absentee ballots and issued a declaratory judgment and permanent injunction to that effect. R.161 at 2, App.006. The Circuit Court further directed WEC to both instruct election officials statewide as to this new standard and issue

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"guidance on [the] implementation" of the Circuit Court's order. R.161 at 1–2, App.005–06.

The Legislature moved the Circuit Court for a stay pending appeal the next day, R.168, but the Circuit Court denied that request on February 2, 2024, *see* R.181 at 55. On February 6, 2024, the Legislature moved this Court for a stay pending appeal. Emergency Mot. for Stay, *LWV v. WEC*, No.24AP166 (Feb. 6, 2024). The Court denied the request on February 8, 2024. Order at 3–5, *LWV v. WEC*, No.24AP166 (Feb. 8, 2024). On March 11, this Court also denied the Plaintiff's request to expedite briefing in this matter. Order at 2, *LWV v. WEC*, No.24AP166 (Mar. 11, 2024).

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STANDARD OF REVIEW

This Court "review[s] de novo a lower court's decision to grant or deny a motion to dismiss." *Wis. Mfrs. & Com. v. Evers*, 2022 WI 38, ¶ 7, 977 N.W.2d 374. When reviewing a motion to dismiss, the Court accepts the plaintiff's factual allegations as true, taking "all reasonable inferences that may be drawn from those facts in favor of stating a claim," *Notz v. Everett Smith Grp., Ltd.*, 2009 WI 30, ¶ 15, 316 Wis. 2d 640, 764 N.W.2d 904; *see* Wis. Stat. § 802.06(2)(a), but the Court "cannot add facts in the process of construing a complaint," *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶ 18, 356 Wis. 2d 665, 849 N.W.2d 693. The facts pled must "reveal an apparent right to recover under any legal theory" to be sufficient to maintain a cause of action, *Cattau v. Nat'l*

Ins. Servs. of Wis., Inc., 2019 WI 46, ¶ 4, 386 Wis. 2d 515, 926 N.W.2d 756 (citation omitted). "[T]he sufficiency of a complaint depends on substantive law that underlies the claim," and the Court does not "accept[ ] as true" the plaintiff's legal conclusions. *Data Key Partners*, 2014 WI 86, ¶¶ 18, 31. This Court must affirm the lower court's dismissal if "it appears quite certain that no relief can be granted under any set of facts the plaintiffs might prove in support of their allegations." *Notz*, 2009 WI 30, ¶ 15 (citations omitted).

The Circuit Court's determination that a claim is "not justiciable" is a "legal conclusion" that this Court reviews de novo. *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶¶ 32, 39, 309 Wis. 2d 365, 749 N.W.2d 211. This Court also reviews a lower court's interpretation of a statute de novo, as that too is a "question of law." *City of Waukesha v. Waukesha Bd. of Rev.*, 2021 WI 89, ¶ 12, 399 Wis. 2d 696, 967 N.W.2d 460. Thus, when reviewing a circuit court's order dismissing a claim, this Court must independently "interpret[ ]" any contested "statutory provisions" underlying the plaintiff's claims. *League of Women Voters of Wis. v. Evers*, 2019 WI 75, ¶ 13, 387 Wis. 2d 511, 929 N.W.2d 209; *Wis. Mfrs. & Com.*, 2022 WI 38, ¶ 7.

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ARGUMENT

I. The Circuit Court Correctly Held That Plaintiff's Declaratory Judgment Claim Is Nonjusticiable

A. Wisconsin's Uniform Declaratory Judgments Act authorizes a party "whose rights, status or other legal

relations are affected by a statute" to bring a claim for declaratory judgment. Wis. Stat. § 806.04(2). Before a party "may seek declaratory relief pursuant to the Act, he must demonstrate that his cause of action is properly before the court—namely, that it is justiciable." *Olson*, 2008 WI 51, ¶ 28. For a controversy to be justiciable, four conditions must be met: (1) there must be a "controversy in which a claim of right is asserted against one who has an interest in contesting it"; (2) the "controversy must be between persons whose interests are adverse"; (3) the "party seeking declaratory relief must have a legal interest in the controversy—that is to say, a legally protectible interest"; and (4) the "issue involved in the controversy must be ripe for judicial determination." *Id.* ¶¶ 28–29. Courts should "refuse to render or enter a declaratory judgment" if doing so "would not terminate the uncertainty or controversy giving rise to the proceeding." Wis. Stat. § 806.04(6). Thus, the Act permits a party to obtain relief *only* against a defendant who has caused, or is likely to cause imminently, some harm to the plaintiff by violating the law. *Olson*, 2008 WI 51, ¶¶ 28–29.

In the context of challenges against administrative agencies, the Act is not a vehicle to obtain "an advisory opinion" or "compel the manner in which [agency] discretion shall be exercised." *Wis. Pharm. Ass'n v. Lee*, 264 Wis. 325, 332, 58 N.W.2d 700 (1953); *accord Wis. Educ. Ass'n Council v. Wis. State Elections Bd.*, 2000 WI App 89, ¶¶ 12, 17, 23, 234 Wis. 2d 349, 610 N.W.2d 108. For example, in *Wisconsin*

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Pharmaceutical Association v. Lee, 264 Wis. 325, the Wisconsin Supreme Court ordered dismissal of a pharmacy association's declaratory judgment claim against the State Board of Pharmacy where "[t]he real controversy [was] between plaintiffs and the physicians and their employees," *id.* at 330; *accord Wis. Educ. Ass'n Council*, 2000 WI App 89, ¶ 12; *Putnam v. Time Warner Cable of Se. Wis. Ltd. P'ship*, 2002 WI 108, ¶ 47, 255 Wis. 2d 477, 649 N.W.2d 626. Moreover, "a dispute over [an agency's] failure to issue an opinion" that "interpret[s] [a] statute," without anything more, is not a basis to obtain legal relief under the Act. *Wis. Educ. Ass'n Council*, 2000 WI App 89, ¶ 12. Accordingly, before a plaintiff may obtain any relief against an agency, the plaintiff must sufficiently allege that the agency named in its complaint has taken or is likely to take some allegedly unlawful action. *Olson*, 2008 WI 51, ¶¶ 28–29; *Wis. Pharm. Ass'n*, 264 Wis. at 330; *Wis. Educ. Ass'n Council*, 2000 WI App 89, ¶ 12.

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The failure of a plaintiff's declaratory judgment claim is also fatal to any request for injunctive relief based on that claim. Injunctive relief is only available when a plaintiff presents a "viable legal claim" as the "underlying basis for" the requested "injunction." *Gahl ex rel. Zingsheim v. Aurora Health Care, Inc.*, 2022 WI App 29, ¶ 30, 403 Wis. 2d 539, 977 N.W.2d 756. That is because an injunction request "is not a claim in and of itself." *Id.*; *see Tikalsky v. Friedman*, 2019 WI 56, ¶ 15, 386 Wis. 2d 757, 928 N.W.2d 502. So, where the

cause of action supporting a plaintiff's request for injunctive relief fails to state a claim, the injunction request must similarly be dismissed. *See Aurora Health Care, Inc.*, 2022 WI App 29, ¶ 30.

B. Here, the Circuit Court correctly dismissed Plaintiff's Count I because that claim did not seek any lawfully recognized relief as against Defendants.

Plaintiff's Count I does not allege that WEC has taken, or is likely to take, *any* action that Plaintiff challenges with regard to the meaning of Wis. Stat. § 6.87(6d), and so Count I "is not against one who has an interest in contesting it, nor is it a controversy between persons whose interests are adverse." *Wis. Pharm. Ass'n*, 264 Wis. at 330 (citation omitted); *see Olson*, 2008 WI 51, ¶¶ 28–29. To the contrary, Count I is premised on the assertion that, following the Waukesha County Circuit Court's order enjoining clerks from unilaterally altering witness certificates pursuant to the 2016 Guidance, "Wisconsin no longer has *any* guidance regarding when a witness address is 'missing' [under Wis. Stat. § 6.87(6d)] . . . such that a ballot may be rejected." R.94 at 2, App.042. Count I makes no allegation that WEC has issued any guidance misinterpreting the law or has otherwise taken any unlawful action. *See Wis. Educ. Ass'n Council*, 2001 WI App 89, ¶¶ 12, 17, 23. As alleged against WEC and its officials, Count I merely sets forth "a dispute over [WEC's] failure to issue an opinion" that "interpret[s] [a] statute," and

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so does not state a justiciable declaratory judgment claim. *Id.* ¶ 12.

Plaintiff's "real controversy," *Wis. Pharm. Ass'n*, 264 Wis. at 330, is with certain Wisconsin clerks who Plaintiff believes will reject absentee ballots based upon a different interpretation of Wis. Stat. § 6.87(6d)'s "missing" term than the one Plaintiff espouses. *See* R.2 at 18–20; R.10 at 19–21; R.94 at 20–21, App.056–57. Under Wisconsin's "highly decentralized system for election administration," *State ex rel. Zignego v. Wis. Elections Comm'n*, 2021 WI 32, ¶ 13, 396 Wis. 2d 391, 957 N.W.2d 208; *Jefferson v. Dane Cnty.*, 2020 WI 90, ¶ 24 n.5, 394 Wis. 2d 602, 951 N.W.2d 556, it is the State's local clerks—not WEC—who are responsible for implementing Wisconsin's election procedures, including returning absentee ballots for failure to comply with Wis. Stat. § 6.87(6d). "Unlike many places around the country," Wisconsin's election-law system "gives some power to its state election agency (the Commission) and places significant responsibility on a small army of local election officials," rather than imposing "a top-down arrangement with a central state entity or official controlling local actors." *Zignego*, 2021 WI 32, ¶ 13. Thus, when a plaintiff claims the implementation of an absentee-voting rule has resulted in clerks unlawfully returning or rejecting ballots, as Plaintiff does here, R.94 at 20–21, App.056–57, the proper defendant for such a challenge is the clerk or clerks who returned or rejected those ballots, *Zignego*, 2021 WI 32, ¶ 13.

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Indeed, in *Rise*, the plaintiffs sued multiple municipal clerks whom they claimed had wrongfully rejected ballots under Section 6.87(6d). *See* Supp.App.324–48; *supra* pp.21–22. The proper recourse for Plaintiff in this case would have been to seek a judgment enforcing its interpretation of "missing" against whatever clerks that Plaintiff believes are unlawfully applying the law. *See Zignego*, 2021 WI 32, ¶ 13; *Jefferson*, 2020 WI 90, ¶ 24 n.5. Yet Plaintiff has failed to do so, even after twice amending its Complaint, *supra* p.17, and thus Count I's declaratory judgment claim against WEC and its officials was properly dismissed.

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Plaintiff's request for injunctive relief fails for the same reasons. *See supra* pp.26–27. Plaintiff seeks an injunction ordering WEC to "instruct" clerks that a witness address is only "missing" under Section 6.87(6d) if "the witness address field is completely absent." R.94 at 20–21, App.056–57. But Wisconsin law prohibits this Court from ordering WEC to "instruct" clerks to do anything—including interpret "missing" in any particular way—which is the injunctive relief Plaintiff seeks via its declaratory judgment claim. Section 227.112 governs an agency's adoption of guidance documents, and provides that these documents "do[ ] *not* have the force of law and do[ ] *not* provide the authority for implementing or enforcing a standard [or] requirement." Wis. Stat. § 227.112(3) (emphases added). So, Plaintiff is not entitled to an injunction requiring WEC to "instruct" clerks

as to the meaning of the term "missing" for purposes of Section 6.87(6d).

C. Plaintiff fails to rebut the core defect that the Circuit Court identified—that Plaintiff's state-law claim lacks any allegation that "WEC has taken any action that has caused harm or will cause imminent harm," R.107 at 10, App.025, and "seemingly relies on the inherent power of parties to obtain declaratory relief as the basis for the claim" instead, R.107 at 13, App.028. Plaintiff's silence on this point alone is sufficient for rejecting its appeal. *See generally* Br.21–28.

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Rather than address the Circuit Court's central conclusion that Plaintiff misconstrued the Declaratory Judgments Act's requirements, R.107 at 13–18, App.028–33, Plaintiff contends that the fact WEC has appeared in this case and has contested Plaintiff's interpretation of Section 6.87(6d) is sufficient to render Count I justiciable, *see* Br.21–27. But Plaintiff is wrong, as the Circuit Court properly concluded.

First, Plaintiff argues it "asserted a claim of right against a party who has an interest in contesting it"—namely, WEC, Br.21—but none of its arguments hold water. As WEC explained, it has never "issued guidance defining when a witness address is 'missing' for the purpose of counting or rejecting a ballot under section 6.87(6d)" or "given guidance to election inspectors on when to reject ballots under section 6.87(6d)." R.45 at 11. While Plaintiff suggests that WEC has an "interest in contesting" Count I because it has issued guidance on Section 6.87's term "address," Br.22,

Count I is not premised on WEC's interpretation of "address." And though Plaintiff argues that WEC has an interest in contesting this lawsuit arising from its supposed duty to "determine" whether "reported [election] results" are "appropriate under law" under Wis. Stat. § 7.70(1), Br.24–25, Section 7.70 imposes no such duty.

Plaintiff relies heavily on *Carey v. Wisconsin Elections Commission*, 624 F. Supp. 3d 1020 (W.D. Wis. 2022), Br. 23–24, in support of its argument that it has stated a claim for relief, but *Carey* does not support Plaintiff's position. In *Carey*, the plaintiffs sought a declaration that Section 6.87(4)(b)1 prohibited voters, including disabled voters, from relying on others to return their absentee ballots in contravention of the Voting Rights Act, as well as corresponding injunctive relief. *Id.* at 1024. Because those plaintiffs sought prospective injunctive relief under federal law, they were entitled to file suit against state officials. *See generally Ex Parte Young*, 209 U.S. 123 (1908). Nothing about *Carey*'s holding or reasoning suggests, as Plaintiff here argues, that Wisconsin law permits a litigant to seek an advisory opinion as to the interpretation of a state statute—including Section 6.87—by naming the State or its agencies as defendants. *See supra* pp.27–28. Therefore, the Circuit Court was correct to note that *Carey* "is of no precedential value." R.107 at 18, App.033.

Plaintiff's effort to distinguish the cases upon which the Legislature and the Circuit Court relied to conclude that

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Count I did not present a justiciable controversy, Br.25, is unpersuasive. Plaintiff mentions only *Wisconsin Pharmaceutical Association*, 264 Wis. 325, and attempts to distinguish it by stating that, unlike the State Board of Pharmacy, which was not required to prosecute violations of the "Dangerous Drug Law" where it did not believe a violation had occurred, WEC is statutorily required to administer and enforce Section 6.87(6d). Br.24–25. But WEC has no authority to administer Section 6.87(6d). Further, Plaintiff ignores the operative holding of *Wisconsin Pharmaceutical Association*: that a justiciable controversy does not exist unless there are allegations that an agency has taken some action that has caused harm or will cause imminent harm. *See* 264 Wis. at 330. And, as the Circuit Court explained, Plaintiff's position on how a "missing" address should be defined under Section 6.87(6d) is a disagreement with WEC's definition of "address," and this "definitional difference alone . . . does not raise a justiciable controversy." R.107 at 14, App.029.

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Second, Plaintiff argues that WEC is adverse to it because WEC entered an appearance in this case and challenged the League's proposed definition of "missing." Br.26. Plaintiff ignores an already-clear point of Wisconsin law that "a dispute over [an agency's] failure to issue an opinion" that "interpret[s] [a] statute," without more, is not a basis to obtain legal relief under Wisconsin law. *Wis. Educ. Ass'n Council,* 2000 WI App 89, ¶ 12. In *Wisconsin Education*

Association Council, the plaintiff filed suit seeking a declaration that interpreted a statute to prevent political opponents from transferring money from their personal committees to local county parties after the Board had chosen not to issue a formal opinion interpreting the statute. *Id.* ¶¶ 2, 5–6. The court noted that the Board's opposition to the plaintiff's claim for declaratory relief did not create a justiciable controversy because "a dispute over . . . whether declaratory relief is merited on the present facts[ ] is not a proxy for a dispute over the meaning of the statute which [plaintiff] wants the court to interpret." *Id.* ¶ 12. Here, as there, a difference in opinion over a statutory definition does not generate a proper controversy, and Plaintiff must allege that WEC has taken some action that has caused harm or will cause imminent harm before it can state a claim suitable for a declaratory judgment. *See Wis. Pharm. Ass'n*, 264 Wis. at 330–32; *accord Wis. Educ. Ass'n Council*, 2000 WI App 89, ¶¶ 12, 17, 23.

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Third, Plaintiff contends that it has a "legally protected interest in protecting the right to vote of its members and all eligible Wisconsinites." Br.27. Initially, absentee voting is not a right under Wisconsin law, but a "privilege," Wis. Stat. § 6.84(1); *Teigen*, 2022 WI 64, ¶ 52 n.25 (lead opinion), that must "be carefully regulated to prevent the potential for fraud or abuse," Wis. Stat. § 6.84(1). Nor has Plaintiff pleaded that any of its members were or will be "disenfranchise[d]," Br.27, given that Wisconsin law provides voters with several

avenues for casting a ballot, Wis. Stat. §§ 6.76–.78, 6.80, 6.87(4)(b)(1), (5), as well as procedures for curing defects in an absentee-ballot witness certificate, *id.* § 6.87(9). Indeed, in the proceedings below, Plaintiff only identified sixty-seven instances during the November 2022 general election in which clerks rejected ballots for witness-address errors, not limited to just the errors that fall into the four categories of witness-address errors this lawsuit addresses. R.114 at 9–11, Supp.App.061–63. Those instances, moreover, involved the actions of non-party clerks in a handful of counties. R.114 at 9–11, Supp.App.061–63. And finally, there is no evidence that any voters whose ballots were rejected were members of Plaintiff's organization.

Fourth, Plaintiff argues that Count I is ripe for review, because the "threat" of ballot rejection "remains very real" with "elections around the corner again in 2024 and 2025," Br.27–28, but such an alleged "threat" does not render Plaintiff's declaratory judgment claim ripe as against WEC. Any threat of ballot rejection does not flow from WEC, but rather flows from the local clerks who are responsible for implementing Wisconsin's election procedures. *Supra* pp.27–28. In any event, Plaintiff did not make any showing at all of any such "threat" to members of its own organization.

While Plaintiff relies on *Milwaukee District Council 48 v. Milwaukee County*, 2001 WI 65, 244 Wis. 2d 333, 627 N.W.2d 866, Br.28, that case is distinguishable. There, the plaintiff—a bargaining agent for Milwaukee County

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employees—preemptively sued Milwaukee County and challenged the constriction of eligibility standards for pension benefits. 2001 WI 65, ¶ 20. The plaintiff sought a court order interpreting a county ordinance which did not specify whether the grounds for a "for cause" termination would be considered "fault or delinquency" that could deny anyone terminated for cause vested pension benefits and argued that that statute required a due process hearing before the county could terminate benefits, even if the employee was fired for cause. *Id.* ¶¶ 9–13, 20. Because Milwaukee County had *already* terminated several of the plaintiff's members for cause and subsequently denied them pension benefits, *id.* ¶ 21, there was a live controversy ripe for judicial review, *id.* ¶¶ 43, 45–46. Here, in contrast, Plaintiff failed to allege any actual or imminent harm arising from WEC's actions.

Finally, Plaintiff's effort to rescue its legally flawed request for injunctive relief is misguided. According to Plaintiff, WEC's statutory duty to "issue updated guidance" "following the publication of a decision of a state or federal court that is binding on the commission" would "require [WEC] to issue such information even in the absence of such an injunction." Br.29 (citing Wis. Stat. § 5.05(5t)). But, as the Circuit Court held, Section 5.05(t) does not provide any independent ground for injunctive relief against WEC because, at most, that provision would require WEC to issue written guidance following a court's binding resolution of a justiciable claim. R.107 at 19, App.034. "Section 5.05(t) does

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not supplant the justiciability standard required in the first instance to have gotten [Plaintiff] the binding order it sought on the construction of [Section] 6.87(6d)." *Id.*

While Plaintiff claims that other "state and federal courts . . . have issued such injunctions requiring WEC to instruct, inform, or guide clerks as to the effect of declaratory judgments," Br.30, those cases, unlike this one, involved WEC guidance that conflicted with Wisconsin law, which the court could invalidate under Wis. Stat. § 227.40, which is the exclusive vehicle for challenging agency guidance. For example, in *Teigen*, 2022 WI 64, the plaintiffs challenged a guidance document that authorized clerks to establish absentee ballot drop boxes and allowed voters' agents to return ballots to the boxes, *id.* ¶¶ 6–9 (lead opinion). Because that declaratory-judgment claim challenged specific WEC guidance—an agency action—there was a justiciable controversy for the Supreme Court to review. *Id.* ¶ 72 (Grassl Bradley, J., concurring). Similarly, in *White*, the plaintiffs (and the Legislature as intervenor) challenged WEC's 2016 Guidance to the extent it purported to require clerks to alter deficient witness-address certificates. That case also presented a justiciable controversy because it challenged a specific WEC guidance document and thereby enabled the Court to declare that the challenged portion of such guidance was unlawful. R.22, Ex.1 at 1–30, Supp.App.370–99. In contrast, here, Plaintiff has not challenged any WEC guidance, or even any specific WEC conduct. Instead, its

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Count I merely seeks an advisory opinion against WEC on the meaning of the term "missing" in Section 6.87(6d). *See Wis. Pharm. Ass'n*, 264 Wis. at 332. Wisconsin law does not authorize relief for such a claim; thus, the Circuit Court was right to dismiss it, and this Court should affirm. *Notz*, 2009 WI 30, ¶ 15.

II. Plaintiff's Interpretation Of The Term "Missing" Under Wis. Stat. § 6.87(6d) Is Wrong In Any Event

If this Court disagrees with the Circuit Court's conclusion that Count I is nonjusticiable, it should reject Plaintiff's invitation to define the term "missing" under Section 6.87(6d) as the failure to provide "any component part or indicia of the witness's address." Br.31. Plaintiff's reading is not only contrary to the statutory text but would render Section 6.87(6d)'s witness-address mandate nonsensical.

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A. Wisconsin courts must "faithfully give effect to the laws enacted by the legislature," and fulfilling this "solemn obligation" "requires a determination of statutory meaning." *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. This interpretive inquiry "begin[s] with the language of the statute," *id.* ¶ 45 (citation omitted), which must be given its "common, ordinary, and accepted meaning," unless a technical or special meaning clearly applies. *Id.* Because statutory interpretation calls for "the ascertainment of meaning, not a search for ambiguity," *id.* ¶ 47 (citation omitted), the court should also consider "the context in which [statutory language] is used," as well as the

"relationship between the statutory language" and "the language of surrounding or closely-related statutes," *id.* ¶ 46. In doing so, the court may consult statutory history to inform its interpretation, *id.* ¶ 48 (citations omitted); *Richards v. Badger Mut. Ins. Co.*, 2008 WI 52, ¶ 22, 309 Wis. 2d 541, 749 N.W.2d 581; *State v. Cox*, 2018 WI 67, ¶ 10, 382 Wis. 2d 338, 913 N.W.2d 780. The court must construe the statutory text in such a way that "avoid[s] absurd or unreasonable results" and does not "render the legislature's selected terms . . . meaningless." *Stroede v. Soc'y Ins.*, 2021 WI 43, ¶ 18, 397 Wis. 2d 17, 959 N.W.2d 305 (citing *Kalal*, 2004 WI 58, ¶ 46).

B. Even if Plaintiff's declaratory judgment claim was justiciable, *but see supra* Part I, Count I would fail on the merits because it is premised on a legally incorrect interpretation of Section 6.87(6d). Plaintiff contends that a witness address is "missing" under Section 6.87(6d) only if the witness fails to provide "any component part or indicia of the witness's address." Br.31. In other words, Plaintiff believes an address is not "missing," and therefore sufficient for the purposes of Section 6.87(6d), even if the address "is partial or incomplete." Br.31. But Plaintiff's reading is untenable both because it conflicts with the plain text and context of Section 6.87(6d) and because it leads to unreasonable results. Regardless of what the term "address" itself means—an issue in dispute in *Rise*, currently pending on appeal before District IV, *Rise, Inc. v. Wis. Elections Comm'n*, No.2024AP165 (Wis.

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Ct. App. 2024)—an "address" is "missing" if the witness fails to provide all of the information sufficient to state an address.

To begin, Plaintiff's definition of "missing" conflicts with the "common, ordinary, and accepted" understanding of Section 6.87(6d)'s statutory language. *Kalal*, 2004 WI 58, ¶ 45; *see* Br.32–34. Section 6.87(6d) provides that an absentee ballot "may not be counted" if the witness certificate "is *missing* the address of a witness." Wis. Stat. § 6.87(6d) (emphasis added). As a matter of plain text, "missing," as that term is most commonly understood, *Kalal*, 2004 WI 58, ¶ 45, means "not present" or "not to be found," *Missing*, Oxford English Dictionary Online (Mar. 2024).[7]

This typical understanding reveals that an address is "missing"—*i.e.*, "not present" or "not to be found," *id.*—from an absentee-ballot witness certificate if the witness provides only partial or incomplete address information. For example, if a witness writes only her street name in the witness-address field, she has provided partial address information, but she has not provided an address, which is thus missing. Similarly, if the witness just provides the name of her municipality, she has not provided an address—she has merely stated a municipality name. Absent all the information necessary to state the witness's "address," the address itself is "not present" on (and therefore "missing"

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[7] Available at https://www.oed.com/dictionary/missing_adj?tab=meaning_and_use#36368560 (subscription required).

from) the certificate. *See Missing*, Oxford English Dictionary Online, *supra*.

The context and language used in related statutory provisions further show that Plaintiff's interpretation of "missing" is incorrect. *Kalal*, 2004 WI 58, ¶ 46. Section 7.34(4) requires "2 inspectors" to "write their initials on the back of each [paper] ballot" before a voter may receive his or her ballot, Wis. Stat. § 7.37(4), and "[i]f the initials are *missing*, the inspectors shall supply the *missing* initials," *id.* § 6.80(2) (emphases added). In other words, Section 7.37(4) calls for the initials of *two inspectors*, and those initials are "missing" under Section 6.80(2)(d) if the initials of *either* inspector (or both) are "not present" or "not to be found" on the ballot, *Missing*, Oxford English Dictionary Online, *supra*; *contra* Br.33.

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Section 6.87(4) provides relevant contextual guidance for this interpretive inquiry as well, and requires that an address be deemed "missing" from a witness certification under Section 6.87(6d) if any of the necessary components of an "address" do not appear on the certificate. Section 6.84(2) requires that all "matters relating to the absentee ballot process," including Section 6.87's absentee-ballot witness certificate procedures, must "be construed as mandatory." Wis. Stat. § 6.84(2). This "strict construction requirement . . . is consistent with the guarded attitude with which the legislature views [the absentee-voting] process," *Lee v. Paulson*, 2001 WI App 19, ¶ 7, 241 Wis. 2d 38, 623 N.W.2d

577, and reflects a concern for "prevent[ing] the potential for fraud or abuse" inherent in the absentee-voting process, Wis. Stat. § 6.84(1); *accord Brnovich v. Democratic Nat'l Comm.*, 594 U.S. 647, 686 (2021) ("Fraud is a real risk that accompanies mail-in voting[.]"). The witness-address requirement addresses these election-integrity concerns. That requirement, and Section 6.87(6d)'s mandate that noncompliant ballots be rejected, ensure that election officials can contact the witness to confirm that the absentee voter is who cast his or her own ballot. And to do so, clerks must be able to easily discern the witness's "address." Thus, faithfully adhering to Section 6.84(2)'s interpretive mandate and giving effect to the purpose of the address requirement requires this Court to "strict[ly]" interpret Section 6.87(6d) as requiring all constitutive elements of a witness address to be present before a ballot can be counted—whatever those constitutive elements ultimately may be.

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Plaintiff's interpretation of the term "missing" would gut the purpose of Section 6.87's witness-address requirement, rendering that provision nonsensical. *See Kalal*, 2004 WI 58, ¶ 46. If Plaintiff was correct that a witness address is only "missing" under Section 6.87(6d) if the witness certification "fails to contain any component part or indicia of the witness's address," Br.31, then a witness could simply write in her street number, *or* provide her municipality name. But that information, standing alone, would be insufficient to provide local and municipal clerks with a means of contacting

the witness should there be a need to do so—which is the *entire purpose* of the requirement. For instance, if any questions were to arise about the ballot that the witness has certified, the clerk will have no means of locating the absentee-ballot witness to confirm that the absentee voter cast her own ballot. Accordingly, while a street number, or a municipality name, are surely both "component part[s]" of the witness's address, *see* Br.31, Section 6.87's witness-address requirement is meaningless unless the term "missing" is interpreted to encompass *each* of the necessary component parts of an address.

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C. Plaintiff's contrary arguments are unpersuasive.

First, Plaintiff suggests that reading the term "missing" to mean that a witness must provide an actual address, rather than simply one or more components of an address, is consistent with that term's ordinary definition. Br.32–33. But Plaintiff's gymnastics cannot obscure the clear plain-language reading of the word "missing": an address is "missing," or "not present" or "not to be found," if the witness fails to provide sufficient information to state an address. *Missing*, Oxford English Dictionary Online, *supra*.

Plaintiff attempts to bolster its interpretation by looking to other provisions of Wisconsin Statutes Chapter 6 that include the term "complete address" and argues that the term "missing" in Section 6.87(6d) means that a "complete address" is not required here. Br. 33–34. But the fact that other provisions within Chapter 6 use the phrase "complete

address" in no way suggests that a witness's address is not "missing" if the witness provides only one component part, without providing all of the information necessary to state her address. Rather, if a witness provides only a piece of address information—such as her street number, *or* her municipality, *or* her street name—she has not provided her address, and that address is therefore "missing" under Section 6.87(6d).

Plaintiff's reliance on Section 5.01(1) does not support its argument. Br.34. Section 5.01(1) instructs that election-related statutes "shall be construed to give effect to the will of the electors." But Section 5.01's interpretive rule does not apply here. Wis. Stat. § 5.01(1). Instead, Section 6.84 says that "[n]otwithstanding s.501.(1), with respect to matters relating to the absentee ballot process, ss. . . . 6.87(3) to (7) . . . shall be construed as mandatory." *Id.* § 6.84(2). Accordingly, Section 5.01 does not apply when interpreting Section 6.87(6d) and the terms of Section 6.87(6d) are mandatory.

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Second, Plaintiff claims that its interpretation of "missing" is "practical" and would be easily administered across the State, Br.35, but that is false. Under Plaintiff's definition, whenever a witness includes a portion of his or her address, a clerk would have to infer the other components of the witness's address, creating confusion and complications. For example, how should a clerk treat a ballot if the witness provides just her street name, but omits her street number or municipality? If questions arise about the ballot that the

witness has certified, the clerk will lack the means to locate the absentee-ballot witness and confirm that the absentee voter actually cast her own ballot.

Finally, Plaintiff briefly contends—without analysis—that its definition of "missing" is the only one that avoids running afoul of the Materiality Provision in Section 10101(a)(2)(B) of the Civil Rights Act. Br.35. But the Materiality Provision simply does not apply to Section 6.87(6d) at all, for the several reasons set forth in the Legislature's accompanying Cross-Appeal Brief, as well as in several recent decisions rejecting efforts to rely on the Materiality Provision to undermine state absentee-voting rules—including a challenge to Section 6.87. *Liebert v. Millis*, ___ F.4th ___, No.23-cv-672, 2024 WL 2078216, at *11–13 (W.D. Wis. May 9, 2024) (holding that the Materiality Provision does not apply to Section 6.87's witness-address requirement); *see Pa. State Conf. of NAACP Branches v. Sec'y Commonwealth of Pa.*, 97 F.4th 120, 131–39 (3d Cir. 2024) (holding that the Materiality Provision does not apply to Pennsylvania's requirement that absentee voters sign and date the declaration printed on the absentee-ballot return envelope).

CONCLUSION

This Court should affirm the judgment of the Circuit Court that Plaintiff's Count I is nonjusticiable as against WEC and its officials.

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Dated: July 3, 2024.

Respectfully submitted,

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CERTIFICATION BY ATTORNEY

I hereby certify that this portion of this Combined Brief conforms to the rules contained in s. 809.19 (8) (b), (bm) and (c) for a brief. The length of this brief is 8,575 words.

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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 Trammell, Presiding
Case No. 2022CV2472

CROSS-APPELLANT'S BRIEF

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INTRODUCTION TO CROSS-APPELLANT'S BRIEF

This cross-appeal concerns the interaction between the Materiality Provision, a federal law that prohibits States from "deny[ing]" any individual "the right . . . to vote . . . because of an error or omission on" paperwork related "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," 52 U.S.C. § 10101(a)(2)(B), and Wis. Stat. § 6.87(6d), a state law that requires the rejection of absentee ballots if the witness's address is "missing" from the witness certification on the absentee-ballot envelope. The Circuit Court concluded that the Materiality Provision preempts Wis. Stat. § 6.87(6d), in part, by ruling that (1) the Materiality Provision applies outside of the voter-registration context to ballot-counting rules; (2) Section 6.87(6d) works to "deny" certain absentee voters the right to vote; *and* (3) a witness-address failure is not "material" to a voter's "qualifications to vote under [Wisconsin] law," 52 U.S.C. § 10101(a)(2)(B).

Since the Circuit Court entered its ruling below, two other courts have—in detailed, persuasive opinions—rejected the Circuit Court's understanding of the Materiality Provision in a manner that would, if accepted by this Court, require reversal. First, in *Pennsylvania State Conference of NAACP Branches v. Secretary Commonwealth of Pennsylvania*, 97 F.4th 120, 125 (3d Cir. 2024) (hereinafter,

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"*Pennsylvania NAACP*"), the U.S. Court of Appeals for the Third Circuit rejected a Materiality Provision challenge to state-law requirements for absentee-ballot envelopes, concluding that the Materiality Provision did not apply outside the context of paperwork relating to voter-qualification determinations and does not operate to "deny" anyone the right to vote. The U.S. District Court for the Western District of Wisconsin then reached a similar conclusion in *Liebert v. Millis*, ___ F.4th ___, No.23-cv-672, 2024 WL 2078216 (W.D. Wis. May 9, 2024), ruling that Wis. Stat. § 6.87(6d)'s absentee-witness requirement—the same provision at issue here—did not implicate the Materiality Provision because it does not concern "an election official's determination whether a person is qualified to vote," *id.* at *2.

This Court should reverse the Circuit Court's erroneous decision for three independently sufficient reasons. First, as *Pennsylvania NAACP* and *Liebert* correctly held, the Materiality Provision only applies to voter qualification determinations, 97 F.4th at 131; 2024 WL 2078216, at *2, and therefore does not apply to Section 6.87(6d), which concerns only how a ballot is counted, and not whether the voter was "qualified" to cast that ballot, under Wisconsin law. *Infra* Section I.A. Second, Section 6.87(6d) also falls outside of the Materiality Provision's scope because it does not "deny" any voter the right to vote, including because absentee voting is a privilege, not a right, the State offers several neutral, alternative ways to cast and cure an absentee ballot, and, as

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the Third Circuit persuasively explained in *Pennsylvania NAACP*, the "right to vote" does not "encompass[ ] the right to have a ballot counted that is defective under state law." 97 F.4th at 133; *infra* Section I.B. Finally, even if the Materiality Provision applied, Section 6.87(6d) would not violate it because the absentee-ballot witness requirement is "material" under any constitutionally permissible interpretation of that term. *Infra* Section I.C.

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

ISSUES PRESENTED BY CROSS-APPEAL

1. Whether the Materiality Provision of the federal Civil Rights Act, 52 U.S.C. § 10101(a)(2)(B), prohibits Wisconsin's municipal clerks from rejecting an absentee ballot under Wis. Stat. § 6.87(6d) on the ground that the absentee-ballot witness certificate is "missing" the witness's address.

The Circuit Court answered yes.

ORAL ARGUMENT AND PUBLICATION

Given the issues of statewide importance involved in this action, the Legislature respectfully contends that this case is appropriate for oral argument and publication.

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STATEMENT OF THE CASE AS TO THE CROSS-APPEAL

A. Legal Background

1. The Wisconsin Constitution guarantees Wisconsinites the right to vote, Wis. Const. art. III, § 1, and authorizes the Legislature to enact election-administration laws to regulate the franchise, *id.* § 2. Pursuant to this constitutional authority, the Legislature has enacted "lots of rules that make voting easier." *Luft v. Evers*, 963 F.3d 665, 672 (7th Cir. 2020).

To begin, "[r]egistering to vote is easy in Wisconsin." *Frank v. Walker*, 768 F.3d 744, 748 & n.2 (7th Cir. 2014). To qualify to vote, a person must be a U.S. citizen, be at least 18 years old on the day of the election, and have resided in an election district or ward within Wisconsin for at least 28 consecutive days before the election. Wis. Stat. § 6.02. Wisconsin law provides multiple ways to register to vote, *id.* § 6.30 (allowing in-person, mail, and electronic registration), while accepting a wide range of forms of proof to confirm eligibility under each method, *id.* §§ 6.33–.34. And Wisconsin does not require voters to register in advance of an election but instead allows them to register at their polling place immediately before casting a ballot. *Id.* § 6.55.

Wisconsin offers voters multiple convenient ways to cast their votes. A voter may cast a ballot in person at his or her assigned polling place on Election Day. Wis. Stat. §§ 6.77–.78. Alternatively, the voter can vote in person up to

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two weeks before Election Day during designated "early voting" times at the municipal clerk's office or another site designated by the clerk. *Id.* § 6.855. The voter may also vote absentee by delivering an absentee ballot to the municipal clerk's office before or on Election Day. *Id.* § 6.87(4)(b)1, 5. Finally, the voter may cast an absentee ballot by mail before Election Day. *Id.* § 6.87(4)(b)(1). Wisconsin law makes clear that while "voting is a constitutional right," absentee voting is "a privilege exercised wholly outside the traditional safeguards of the polling place." *Id.* § 6.84(1).[8]

2. The Wisconsin Constitution provides that the Legislature "may . . . enact[ ]" "[l]aws . . . [p]roviding for absentee voting." Wis. Const. art. III, § 2. Because absentee voting is a "privilege" under Wisconsin law, Wis. Stat. § 6.84(1); *Teigen*, 2022 WI 64, ¶ 52 n.25 (lead opinion), Wisconsin law requires absentee-voting procedures to "be carefully regulated to prevent the potential for fraud or abuse," Wis. Stat. § 6.84(1). To that end, Wis. Stat. § 6.84(2) instructs that "matters relating to the absentee ballot process" be "construed as mandatory," and that any ballot "cast in contravention" of the State's absentee-voting provisions "may not be counted," *id.*

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[8] Wisconsin provides additional options for obtaining and casting ballots to voters who are living overseas, Wis. Stat. § 6.87(3)(d), in the military, *id.*; *id.* § 6.865, nursing or retirement home residents, *id.* § 6.875, disabled, *id.* §§ 5.36, 6.82, or indefinitely confined, *id.* § 6.86(2)(a).

Pursuant to its constitutional authority, *see* Wis. Const. art. III, § 2, the Legislature has enacted several absentee-voting laws since the State's founding. The Legislature initially permitted absentee voting only for soldiers during the Civil War, *see* 1862 Wis. Act 11 (Special Sess.), and then later enacted Wisconsin's first comprehensive absentee-voting scheme in 1915, *see* 1915 Wis. Act 461; *Teigen*, 2022 WI 64, ¶ 174 (Hagedorn, J., concurring). While the 1915 law provided absentee-voting opportunities to more voters, it also contained extensive provisions aimed at preventing fraud and abuse. For example, to request an absentee ballot, a qualified voter was required to swear an affidavit before a designated official and then return it with the properly completed ballot to "the officer issuing the ballot," with both the voter and the official facing harsh penalties for any failure to comply with this procedure. 1915 Wis. Act 461, § 44m—1–2, 5–6, 14.

This general scheme governed absentee voting in Wisconsin until 1966, when the Legislature replaced the 1915 regime's affidavit requirement with a simpler witness approach, which allowed voters to "make and subscribe to the certification" on their absentee ballots "before 2 witnesses." 1965 Wis. Act 666, § 1 (creating Wis. Stat. § 6.87). In 1986, Wisconsinites ratified a constitutional amendment recognizing the Legislature's authority to enact laws "[p]roviding for absentee voting." Wis. Const. art. III, § 2. That same year, the Legislature revised the absentee-voting scheme, simplifying the absentee-voting process and

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clarifying its rules. *See* 1985 Wis. Act 304.[9] As part of this statutory overhaul, the Legislature enacted Wis. Stat. § 6.84 to clarify the State's policy goals and the proper interpretation of laws governing the "privilege" of absentee-voting.

Today, Wisconsin's comprehensive absentee-voting regime is one of the most generous in the Nation, allowing any qualified, registered voter to exercise the "privilege" of voting absentee if the voter is "for any reason . . . unable or unwilling to appear at the polling place in his or her ward or election district." Wis. Stat. §§ 6.84, 6.85(1). Under this no-excuses-needed absentee-voting system, there are no supplemental eligibility or registration requirements for absentee voters in Wisconsin. *See generally id.* §§ 6.84–.89. In addition, Wisconsin law provides numerous different methods to request an absentee ballot, *id.* § 6.86(1)(a)1–6, to obtain a requested absentee ballot, *id.* § 6.86(ac), and to cast an absentee ballot, *id.* §§ 6.855, 6.87(4)(b)1, (b)5.

3. Section 6.87 contains the governing procedural requirements for the completion and counting of absentee ballots, including, as relevant here, the absentee-ballot witness requirement. An absentee voter must mark his or her absentee ballot in the presence of one adult witness before folding and placing the ballot in an official absentee-ballot envelope. *Id.* § 6.87(4)(b)1; *see also id.* § 6.875(6)(c)1. The

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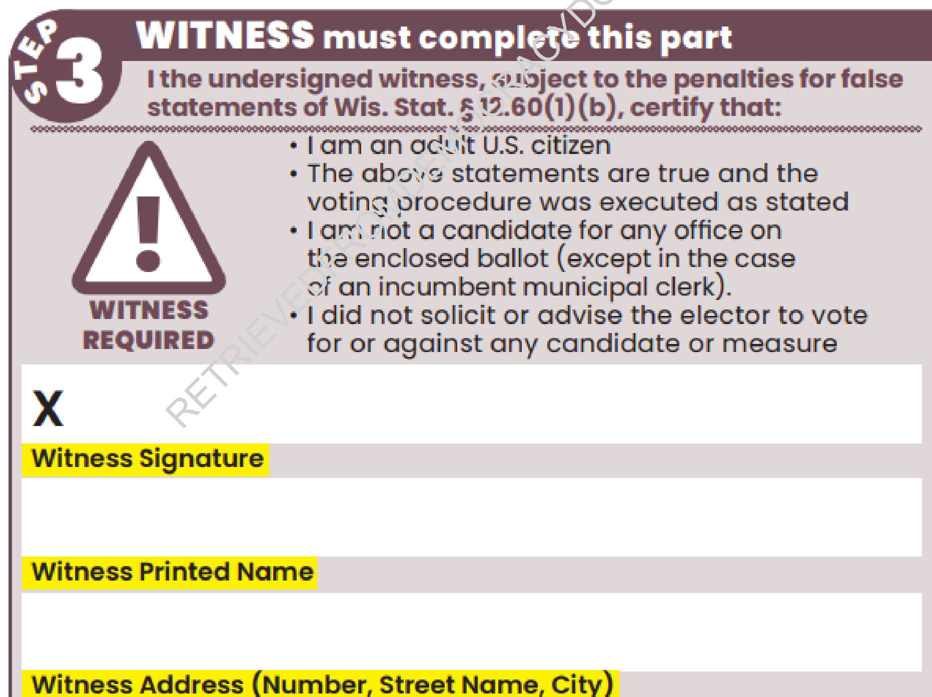
[9] Available at https://docs.legis.wisconsin.gov/1985/related/acts/304.pdf.

witness must then write his or her "[a]ddress" on the witness certificate located on the absentee-ballot envelope. *Id.* § 6.87(2). This witness-address attestation must be completed for the ballot to be cast successfully, as Section 6.87(6d) directs that "the [absentee] ballot may not be counted" if the witness "certificate is missing the address of a witness." *Id.* § 6.87(6d).

WEC's absentee-ballot witness certificate, reproduced immediately below, includes clear instructions for witnesses to provide their signature, printed name, and their address, consisting of a street number, street name, and city:


STEP 3 WITNESS must complete this part

I the undersigned witness, subject to the penalties for false statements of Wis. Stat. § 12.60(1)(b), certify that:

- I am an adult U.S. citizen
- The above statements are true and the voting procedure was executed as stated
- I am not a candidate for any office on the enclosed ballot (except in the case of an incumbent municipal clerk).
- I did not solicit or advise the elector to vote for or against any candidate or measure

WITNESS REQUIRED

X

Witness Signature

Witness Printed Name

Witness Address (Number, Street Name, City)

R.170, Ex.1 at 1, Supp.App.008.

Both Wisconsin law and WEC have processes to help ensure absentee voters can successfully cast their votes. Under Section 6.87(9), if a municipal clerk "receives an

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absentee ballot with an improperly completed certificate or with no certificate," then the clerk "may return the ballot to the elector" so long as "time permits the elector to correct the defect and return the ballot within the period authorized under sub. (6)." Wis. Stat. § 6.87(9). In addition, voters are able to monitor directly the status of their submitted ballots through WEC's online "Track My Ballot" tool, which shows them when the clerk "receive[s]" "returned ballot[s]" and alerts them to any "problem[s]" with their ballots. R.144, Ex.1 at 1–2, Supp.App.014–15.

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For years, WEC has provided clerks and voters guidance on the correct understanding of "address' in Section 6.87's witness-address requirement, issuing comprehensive guidance with this straightforward definition in October 2016. In that guidance, WEC properly defined an "address" under Section 6.87(6d), explaining that "a complete [absentee-witness] address contains a *street number, street name, and name of municipality*," R.3 at 1, Supp.App.409 ("2016 Guidance"). That 2016 Guidance further instructed clerks to "take corrective actions in an attempt to remedy a witness address error" and permitted the clerks to make corrections "directly to the absentee certificate envelope" without needing "to contact the voter" in cases where the clerk was "reasonably able to discern any missing information from outside sources." R.3 at 1, Supp.App.409.

On September 7, 2022, the Waukesha County Circuit Court enjoined only the portion of the 2016 Guidance

instructing clerks to take unilateral corrective action, *see* R.22, Ex.1 at 1–30, Supp.App.370–99 (Tr. of Oral Ruling, *White v. WEC*, 2022CV1008 (Waukesha Cnty. Cir. Ct. Sept. 7, 2022)), holding that clerks had no "duty or ability to modify or add information to incomplete absentee ballot certifications," R.22, Ex.1 at 26, Supp.App.395. The court made clear that this ruling did not implicate the 2016 Guidance's interpretation of a witness's "address," and its decision did not otherwise address when a ballot certificate is defective. *See* R.22, Ex.10 at 1–3, Supp.App.405–07.

Shortly after the Waukesha County Circuit Court's ruling in September 2022, WEC issued new guidance to clerks reaffirming its view of the three-part definition of "address," while also explaining that the *White* court "had not overturned the existing WEC definition of address contained in the now-invalidated memoranda—namely, *street number, street name, and name of municipality*." *See* R.22, Ex.8 at 1–2, Supp.App.402–03. Even though WEC's September 2022 Guidance did not "discuss whether a zip code is an adequate substitute for a municipality name," Br. in Support of Pls.' Mot. for Summary J. at 5, *Rise*, No.2022CV2446, Dkt.213 (Dane Cnty. Cir. Ct. Sept. 18, 2023), Supp.App.031 (citing R.22, Ex.8 at 1–2, Supp.App.402–03), and absentee ballots previously included a space to input zip code information, R.144, Ex.2 at 1, Supp.App.018, WEC subsequently revised the absentee-ballot form to clarify its view that witnesses need only provide their "Number, Street Name, [and] City" in

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the witness certificate, R.170, Ex.1 at 1, Supp.App.008. Likewise, WEC's current Uniform Instructions for Wisconsin Absentee Voters makes clear that additional address components (like a zip code) are not required because an absentee ballot "will not be counted" only if the witness fails to provide one or more of the three required components—"street number, street name, city." R.144, Ex.2 at 1, Supp.App.018; *see* Wis. Stat. § 6.869.

Municipal clerks and absentee voters in Wisconsin used WEC's new guidance and the Uniform Instructions for Wisconsin Absentee Voters for the first time in the November 2022 general election, with very few complications. Indeed, Plaintiff has only identified sixty-seven instances in which ballots were rejected for witness-address issues. R.114 at 9–11, Supp.App.061–63. Many of these instances involve the actions of non-party clerks, including municipal clerks in Appleton, Eau Claire, Waukesha, Oshkosh, and Janesville. R.114 at 9–11, Supp.App.061–63; Rs.115–16, Supp.App.094–322.

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3. Section 10101(a)(2)(B) of Title 52 of the U.S. Code, known as the "Materiality Provision," prohibits States from denying any otherwise qualified individual the right to vote based on 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). The Materiality

Provision was enacted as part of the Civil Rights Act of 1964, to assist Congress in its efforts "[t]o enforce the constitutional right to vote." Pub. L. 88-352, 78 Stat. 241, 241 (1964) (codified as amended at 52 U.S.C. § 10101(a)(2)(B)). It targets the then-prevalent "practice of requiring unnecessary information for voter registration with the intent that such requirements would increase the number of errors or omissions on the application forms, thus providing an excuse to disqualify potential voters," which practice involved "tactic[s]" such as "disqualify[ing] an applicant who failed to list the exact number of months and day in his age." *Schwier v. Cox*, 340 F.3d 1284, 1294 (11th Cir. 2003) (citing *Condon v. Reno*, 913 F.Supp. 946, 949–50 (D.S.C. 1995)).

To challenge the actions of state officials under the Materiality Provision, a plaintiff must prove the following five elements: (1) the challenged conduct must be performed by a person who is "acting under color of law"; (2) it must have the effect of "deny[ing]" a person "the right . . . to vote"; (3) the denial must be attributable to "an error or omission on [a] record or paper"; (4) the "record or paper" must be "relat[ed] to [an] application, registration, or other act requisite to voting"; and (5) the "error or omission" must not be "material in determining whether such individual is qualified under State law to vote in such election." 52 U.S.C. § 10101(a)(2)(B). A related provision, 52 U.S.C. § 10101(e), defines the term "qualified under State law" for purposes of the Materiality Provision as "qualified according to the laws, customs, or

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usages of the State," *id.* § 10101(e). Thus, once a voter satisfies a State's eligibility criteria and voter-registration requirements, that voter is "qualified under State law" to vote in that State. *Id.*; *see id.* § 10101(a)(2)(B). Per its plain text, the Materiality Provision does not reach a State's election rules or practices beyond the voter-qualification stage, *see id.* § 10101(a)(2)(B), which plain-text understanding harmonizes the Materiality Provision's prohibition on immaterial qualification and registration barriers for eligible voters with the well-recognized role of the States in administering elections, *see, e.g.*, *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) ("[It is] clear that States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder." (citation omitted)); *see also Smiley v. Holm*, 285 U.S. 355, 369 (1932); *Ohio v. Hildebrant*, 241 U.S. 565, 567 (1916); *McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 810–11 (1969).

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B. Litigation Background

1. On October 3, 2022, Plaintiff filed a three-count First Amended Complaint against WEC, R.10, alleging that (1) a witness address is "missing" under Section 6.87(6d) only if the address field on the witness certificate is "completely absent" or "completely blank" (with Plaintiff seeking a declaratory judgment to that effect), R.10 at 19–21; R.94 at 20–21, App.60–61; (2) WEC's failure to issue guidance directing

clerks to count ballots with "missing" address components under Section 6.87(6d) violates the Materiality Provision, 52 U.S.C. § 10101(a)(2)(B), R.10 at 21–24; R.94 at 21–24, App.061–64; and (3) Section 6.87(9) violates the U.S. Constitution's Due Process Clause because it does not require clerks who reject ballots with witness-address omissions or errors under Section 6.87(6d) to notify voters or return the defective ballots, R.10 at 24–26; R.94 at 24–27, App.064–67.

On October 4, 2022, Plaintiff moved for a temporary injunction, asking the Circuit Court to (1) recognize its proposed definition of "missing" under Section 6.87(6d), (2) enjoin WEC "from rejecting absentee ballots with certificates that bear partial witness address information," and (3) compel WEC to issue new guidance instructing clerks to notify absentee voters of any witness-certificate errors or omissions on their ballots, among other relief. R.15 at 3–5. On October 7, 2022, the Legislature intervened in the case, R.34, filing an opposition to Plaintiff's motion shortly thereafter, R.42. The Circuit Court then denied Plaintiff's temporary injunction, *see* R.66; *see generally* R.72, Supp.App.349–64, concluding that the status quo was the plain text of the statute, which did not define the term "missing," and WEC's 2016 Guidance, which "has been instructing clerks all along to inform voters that their ballots would not be counted with an incomplete witness address," R.72 at 12, Supp.App.360. Plaintiff attempted to appeal the Circuit Court's denial of emergency injunctive relief, R.68, but

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the Court of Appeals denied the request on the grounds that Plaintiff "fail[ed] to satisfy the criteria for permissive appeal," R.71 at 2.

Plaintiff then filed its Second Amended Complaint, asserting the same three claims while adding WEC's Commissioners and Administrator as additional Defendants. R.94 at 1–30, App.037–70. On March 14, 2023, the Circuit Court granted the Legislature's Motion To Dismiss Count I, *see* R.107, App.016–36; *see* R.94 at 1–4, 20–21, App.041–44, 060–61, reasoning that no justiciable controversy existed as to Plaintiff's state-law claim, R.107 at 10–21, App.025–36, because Plaintiff failed to show that "WEC has taken any action that has caused harm or will cause imminent harm," R.107 at 10, App.025. On June 13, 2023, the Circuit Court accepted the parties' stipulation to dismiss Count III pursuant to Wis. Stat. § 805.04(1). R.110.

On July 31, 2023, WEC moved the Circuit Court to consolidate this case with *Rise* solely for the purposes of trial under Wis. Stat. § 803.04, *see* Rs.119–20, with Plaintiff opposing the motion, *see* R.121. The Circuit Court granted WEC's consolidation request on August 22, 2023, and reassigned the case to Judge Nilsestuen, the same judge handling the *Rise* matter. R.127 at 3–4. In *Rise*, the Circuit Court interpreted the term "address" for purposes of Section 6.87's witness-address requirement, holding that an "address" is any "place where the witness may be communicated with." Declaratory J. and Permanent Inj. at 1,

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Rise, No.2022CV2446, Dkt.238 (Dane Cnty. Cir. Ct. Jan. 30, 2024), App.071–73.

2. On January 2, 2024, the Circuit Court granted Plaintiff's motion for summary judgment and denied WEC and the Legislature's cross-motions for summary judgment. R.157, App.008–15. As relevant, the Circuit Court concluded that Section 6.87(6d)'s witness-address rule falls under the Materiality Provision, holding that this federal law preempts Wisconsin's absentee-ballot witness requirement where there are allegedly "trivial mistakes" in a witness's address. R.157 at 5, App.012. The Circuit Court first explained that, in its view, Section 6.87(6d) falls within the Materiality Provision's scope because it relates to whether a voter is "qualified to vote" under Wisconsin law. R.157 at 5, App.012. The Court also concluded that rejecting a ballot for noncompliance under Section 6.87(6d) effectively "den[ies]" that absentee voter the right to vote, R.157 at 4, App.011, finding that compliance with Section 6.87(6d)'s absentee-ballot witness requirement constitutes an "action necessary" to have an absentee ballot counted and is thus an act "requisite to voting," R.157 at 4–5, 7–8, App.011–12, 014–15. Next, the Circuit Court held that Section 6.87(6d)'s witness-address requirement is not "material to whether a voter is qualified," because it does not implicate the specific constitutional requirements governing voter qualifications. R.157 at 5, App.012 (citing Wis. Const. art. III, § 1). As a result, the Circuit Court concluded that "rejecting ballots for trivial mistakes in the Witness Address

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requirement directly violates the federal Civil Rights Act of 1964." R.157 at 5, App.012.

The Circuit Court then determined that the Materiality Provision "prohibits rejecting [absentee] ballots in the four limited categories identified by the Plaintiff," given that "this is an as-applied challenge" directed at these categories only. R.157 at 8, App.015. The "four discrete categories of errors or omissions" at issue, R.157 at 8, App.015, are: (1) witness certifications containing the witness's street number, street name, and municipality, but not other address information, (2) witness certifications by a member of the voter's household who lists a street number and street name but omits other information, (3) witness certifications using terms like "same" or "ditto" or other means to convey that the witness's address is the same as the voter's, and (4) witness certifications with a street number, street name, and zip code, but no municipality, R.161 at 2, App.006.

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The Circuit Court issued a declaratory judgment and permanent injunction on January 30, 2024, declaring that the Materiality Provision applies to Section 6.87 and bars clerks from rejecting absentee ballots in the four categories listed above. R.161 at 2, App.006. The Circuit Court also ordered WEC both to inform election officials statewide that they may not reject these four categories of absentee ballots and to issue new "guidance on [the] implementation" of the Circuit Court's order. R.161 at 1–2, App.005–06.

3. The day after the Circuit Court issued its judgment, on January 31, 2024, the Legislature moved the Circuit Court for a stay pending appeal. R.168, which the Circuit Court denied, *see* R.181 at 55. On February 6, 2024, the Legislature moved this Court for an emergency stay pending appeal, which request this Court denied on February 8, 2024. Order at 3–5, *League of Women Voters of Wis. v. Wis. Elections Comm'n*, No.24AP166 (Feb. 8, 2024). On March 11, 2024, this Court denied the League's request to expedite briefing in this matter. Order at 2, *League of Women Voters*, No.24AP166 (Mar. 11, 2024).

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STANDARD OF REVIEW

Whether a circuit court has properly granted or denied summary judgment presents a question of law that this Court reviews de novo, *Waity v. LeMahieu,* 2022 WI 6, ¶ 17, 400 Wis. 2d 356, 969 N.W.2d 263, "applying the well-established standards set forth in Wis. Stat. § 802.08," *Benson v. City of Madison*, 2017 WI 65, ¶ 19, 376 Wis. 2d 35, 897 N.W.2d 16 (citation omitted). A circuit court must grant a motion for summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Wis. Stat. § 802.08(2). A grant of summary judgment may be appropriate based upon the circuit court's construction of statutory, *see Waity*, 2022 WI 6,

¶ 18, or constitutional text, *see Appling v. Walker*, 2014 WI 96, ¶ 16, 358 Wis. 2d 132, 853 N.W.2d 888, and this Court reviews issues of statutory and constitutional interpretation de novo, *In re Matthew D.*, 2016 WI 35, ¶ 15, 368 Wis. 2d 170, 880 N.W.2d 107; *Appling*, 2014 WI 96, ¶ 17.

ARGUMENT

I. Section 6.87(6d) Does Not Violate The Civil Rights Act's Materiality Provision

Federal law prohibits a State from denying an individual the right to vote based on 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). Challenges to state action under Section 10101(a)(2)(B)—the "Materiality Provision"—involve five elements: (1) the challenge must concern conduct by a person who is "acting under color of law"; (2) the challenged conduct must "deny" a person "the right . . . to vote"; (3) that "den[ial]" must be attributable to "an error or omission on [a] record or paper"; (4) the "record or paper" must be "relat[ed] to [an] application, registration, or other act requisite to voting"; and (5) the "error or omission" must not be "material in determining whether such individual is qualified under State law to vote in such election." *Id.*

The Circuit Court's holding that Section 6.87(6d) violates the Materiality Provision fails for three

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independently sufficient reasons. First, the Materiality Provision "applies only in the context of an election official's determination whether a person is qualified to vote," *Liebert*, 2024 WL 2078216, at *2; *Pa. NAACP*, 97 F.4th at 131, and so does not apply here, where Wis. Stat. § 6.87 has no bearing at all on voter-qualification determinations. *See infra* Section I.A. Second, Section 6.87 does not "deny" any voter "the right . . . to vote." 52 U.S.C. § 10101(a)(2)(B); *see infra* Section I.B. Third, even if the Materiality Provision applies to Section 6.87, reversal is still appropriate because Section 6.87 is "material." *See infra* Section I.C.

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A. Section 6.87 Does Not Affect Voter-Qualification Determinations

The statute's plain text, context, and history demonstrate that Section 6.87 does not violate the Materiality Provision because it does not relate to whether a person is "qualified . . . to vote" under Wisconsin law, 52 U.S.C. § 10101(a)(2)(B); *see Kalal*, 2004 WI 58, ¶ 44.

A. The Materiality Provision by its text applies only to errors or omissions that are "material in determining whether" a person is "qualified under State law to vote." 52 U.S.C. § 10101(a)(2)(B). The statute defines "qualified under State law" as "qualified according to the laws, customs, or usages of the State." *Id.* § 10101(e). A voter's "qualif[ications]" as referenced in the Materiality Provision are only those that relate to eligibility criteria and voter-registration requirements as defined by state law. And the

Materiality Provision is clear: once a voter satisfies those state-law qualification requirements, he or she is "qualified under State law" to vote in that State. *Id.*; *see id.* § 10101(a)(2)(B). Therefore, only those laws or conduct that relate to a voter's ability to qualify and register to vote fall within the Materiality Provision's scope.

The statutory context is in accord. The Materiality Provision applies only to "application[s], registration[s], and other act[s] requisite to voting," and this latter phrase—"other act requisite to voting"—must, under the ejusdem generis canon, be "construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Liebert*, 2024 WL 2078216, at *13 (quoting *Pa. NAACP*, 97 F.4th at 131–32). Accordingly, the phrase "other act requisite to voting" encompasses only "processes for determining voter qualifications." *Id.* The surrounding provisions reinforce this point, with Section 10101(a)(2)(A) similarly prohibiting the use of discriminatory standards or practices "in determining whether any individual is qualified" to vote, 52 U.S.C. § 10101(a)(2)(A) (emphases added), and Section 10101(a)(2)(C) prohibiting the use of literacy tests "as a *qualification for voting* in any election," *id.* § 10101(a)(2)(C) (emphasis added). It "is unlikely that Congress would 'sandwich' a broad provision governing all aspects of voting in between two provisions focusing on determining voter qualifications." *Liebert*, 2024 WL 2078216, at *13 (quoting *Pa. NAACP*, 97 F.4th at 131).

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A reading of the Materiality Provision that limits its scope to the voter-registration context is also consistent with the legislative history. *Kalal*, 2004 WI 58, ¶ 51. The Materiality Provision "was intended to prevent interference with registration," including to remedy "the problem of elections officials disqualifying Black voters because of minor mistakes on registration forms and applications." *Liebert*, 2024 WL 2078216, at *13. Construing the statute as only applying to voter-qualification determinations is consistent with this legislative history.

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Further, interpreting the Materiality Provision as applying to state laws unrelated to voter qualification would lead to "unreasonable results." *Kalal*, 2004 WI 58, ¶ 46. Such an interpretation would permit Materiality Provision challenges whenever election officials reject a ballot for failing to comply with reasonable ballot regulations that concern a voting "record or paper." *See* 52 U.S.C. § 10101(a)(2)(A); *accord Ritter v. Migliori*, 142 S. Ct. 1824, 1825 (2022) (Alito, J., dissenting from the denial of the stay application). For instance, an absentee voter could sue election officials for rejecting her absentee ballot based on the voter's own refusal to sign her absentee ballot envelope (a "paper"), despite having the capacity to do so. Wis. Stat. § 6.87(2); *see id.* § 6.87(5); *Ritter*, 142 S. Ct. at 1826 (Alito, J., dissenting from the denial of the application for stay) (addressing similar hypothetical situation). An absentee voter who delivers her ballot (a "paper") to the polling place for same-day-absentee

voting after the statutory deadline could bring a similar lawsuit. Wis. Stat. § 6.87(4), (6); *Ritter*, 142 S. Ct. at 1825 (Alito, J., dissenting from the denial of the application for stay) (warning of similar hypothetical). There is no statutory basis for concluding that Congress intended, in enacting the Materiality Provision, to hamstring States in this way.

This interpretation also respects the States' constitutional role in election administration. The U.S. Constitution tasks States with "control[ling] . . . the election process for state offices." *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986) (citing U.S. Const. art. I, § 4, cl. 1). As the U.S. Supreme Court has recognized, this constitutional authority empowers States to impose "reasonable regulations [on] parties, elections, and ballots to reduce election- and campaign-related disorder," *Timmons,* 520 U.S. at 358; *see Moore v. Harper*, 600 U.S. 1, 29 (2023) (elections "demand[ ] rules"); *Brnovich*, 594 U.S. at 669; *see also Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 197 (2008) ("The electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud." (citation omitted)) (plurality opinion of Stevens, J.). Applying the Materiality Provision to state laws that do not concern voter eligibility and registration could invalidate a large array of state election laws, *see supra* pp.65–66, defying the principle that congressional acts do not preempt state law without a "clear and manifest purpose," *Miller Brewing Co. v. Dep't of Indus., Lab. & Hum. Rels.*, 210 Wis. 2d 26, 35, 563 N.W.2d

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460 (1997) (citation omitted)). Courts, in turn, must avoid adopting interpretations of federal statutes that "engender[ ] constitutional issues if a reasonable alternative interpretation poses no constitutional question." *Gomez v. United States*, 490 U.S. 858, 864 (1989). Applying the Materiality Provision outside the voter-registration context "would upset the usual constitutional balance of federal and state powers," *Gregory v. Ashcroft*, 501 U.S. 452, 460–61 (1991), and subject many state election-administration laws to judicial scrutiny on the basis of "materiality" alone, rendering the Materiality Provision unconstitutional as applied here, *see infra* pp.82–83. For instance, applying the Materiality Provision to all statutes "regulating the voting process" would jeopardize state laws "provid[ing] that ballots completed in different colored inks, or secrecy envelopes containing improper markings, or envelopes missing a date, must be discounted," which laws reflect "legislative choices" that the courts should not disturb. *Pa. NAACP*, 97 F.4th at 133; *see supra* pp.65–66.

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Caselaw confirms this understanding of the Materiality Provision's scope, with courts taking a measured and pragmatic approach to Materiality Provision challenges. *See, e.g.*, *Thrasher v. Ill. Republican Party*, No. 4:12-cv-4071, 2013 WL 442832, at *3 (C.D. Ill. Feb. 5, 2013); *Friedman v. Snipes*, 345 F. Supp. 2d 1356, 1370–71 (S.D. Fla. 2004); *McKay v. Altobello*, No.96-cv-3458, 1996 WL 635987, at *1 (E.D. La. Oct. 31, 1996).

Recently, the Third Circuit rejected a Materiality Provision challenge to a Pennsylvania statute that required absentee voters to date their absentee-ballot envelopes on the basis that the Materiality Provision does not apply outside the voter-registration context. *Pa. NAACP*, 97 F.4th 120. In so holding, the Third Circuit focused first on the Materiality Provision's plain text, explaining that the phrase "in determining whether such individual is qualified" to vote must "mean something." *Id.* at 131. That phrase, the court explained, supports the conclusion that the Materiality Provision applies in situations where "the information containing an error or omission . . . relate[s] to ascertaining a person's qualification to vote (like paperwork submitted during voter registration)." *Id.* The Third Circuit concluded that the statutory context and legislative history were in accord, collectively demonstrating that the Materiality Provision only applies to laws that "govern[ ] voter qualification determinations," and "records or papers used in that process." *Id.* at 131–32 (brackets and citation omitted). Thus, the Materiality Provision "does not preempt state requirements on how qualified voters may cast a valid ballot, regardless what (if any) purpose those rules serve." *Id.* at 131.

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Thereafter, in *Liebert*, the Western District of Wisconsin relied on the Third Circuit's reasoning in *Pennsylvania NAACP* to conclude that the Materiality Provision does not apply to Section 6.87's absentee-ballot witness requirement because "election officials do not use the

absentee-ballot envelope to determine a voter's qualifications." 2024 WL 2078216, at *17. Referencing the Third Circuit's analysis of the Materiality Provision's plain text, context, and history, the *Liebert* court explained that "the most reasonable reading of" the Materiality Provision "is that it applies only to determinations of a voter's qualifications." *Id.*

B. Here, Section 6.87(6d) plays no role "in determining" whether an absentee voter is "qualified" to vote, *see Pa. NAACP*, 97 F.4th at 139, and therefore does not fall within the Materiality Provision's scope, *see Liebert*, 2024 WL 2078216, at *11. Wisconsin law sets forth specific voter qualifications: a voter, whether absentee or otherwise, must be a U.S. Citizen, at least 18 years old, and must satisfy certain residency, lack-of-felony-conviction, and competency requirements. Wis. Stat. §§ 6.02(1), 6.03(1); Wis. Const. art. III, § 1. The State "does not use ballots (or envelopes for ballots) to determine" any of these voter "qualifications." *Liebert*, 2024 WL 2078216, at *13. Rather, Section 6.87(6d) is merely a "rule[ ] about ballot preparation," *id.*, that relates to the counting of absentee ballots cast by individuals who have "already been deemed qualified to vote," *Pa. NAACP*, 97 F.4th at 137. In other words, because an absentee voter must satisfy the same eligibility and registration requirements as all other Wisconsin voters before receiving his or her absentee ballot, *see supra* p.47, Section 6.87(6d) does not itself involve or implicate *any* voter qualification requirements or

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determinations, *see Liebert*, 2024 WL 2078216, at *13. Section 6.87(6d) thus does not fall within the Materiality Provision's scope. *See id.*; *Pa. NAACP*, 97 F.4th at 139 (rejecting Materiality Provision challenge to state law requiring voters to date absentee ballots).

The *Liebert* court reached this same conclusion when considering a Materiality Provision challenge to the same state law at issue in this case. Although the challenge in *Liebert* was directed more broadly to the "witness requirement as a whole," 2024 WL 2078216, at *9, rather than the specific "address" component of the witness requirement, *Liebert*'s reasoning is on-point and equally applicable here. As the court explained, Section 6.87 is a "ballot-casting rule," not a "voter-qualification rule[ ]," *id.* at *16, that is "intended to serve legitimate and important purposes, such as deterring voter fraud, undue influence, and ballot harvesting," *id.* And because the Materiality Provision does not contain any "clear textual mandate" to supplant those types of rules, the *Liebert* court refused to "infer that Congress intended to impose arbitrary restrictions on states." *Id.* Thus, because "election officials do not use the absentee-ballot envelope"—which Section 6.87's procedures generally govern—"to determine a voter's qualifications," Section 6.87 "fall[s] outside the scope of the Materiality Provision." *Id.* at *17. The same result obtains here: Section 6.87(6d)'s ballot rejection mechanism is exclusively and specifically concerned with the *casting* of an absentee ballot—*not* with the voter's *qualifications* to do so.

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C. The Circuit Court erroneously held that Section 6.87(6d) relates to whether a voter is "qualified to vote" under Wisconsin law and thus falls within the Materiality Provision's scope. R.157 at 5, App.012. According to the Circuit Court, compliance with the absentee-ballot witness mandate is an "act requisite to voting" because it falls within the Materiality Provision's broad definition of the term "vote," which includes "all action necessary" to have an absentee ballot counted. R.157 at 4–5, 7–8, App.011–12, 014–15.

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Respectfully, the Circuit Court's understanding of the Materiality Provision's scope is simply wrong. As an initial matter, Section 10101(a)(2)(B)'s phrase "act requisite to voting" is not coextensive with the statute's broad definition of the term "vote." As the *Liebert* court explained, "the Materiality Provision does not apply to a record or paper related to a person's 'vote'; it applies to a record of paper related to an 'act requisite to voting.'" 2024 WL 2078216, at *11. The phrase "act requisite to voting" must, moreover, be construed in context. *Supra* p.64. As explained, the Materiality Provision applies only to "any application, registration, or other act requisite to voting," and the general phrase "other act requisite to voting" must be "construed to embrace only objects similar in nature" to the more specific terms "application" and "registration." *Liebert*, 2024 WL 2078216, at *13; *see supra* p.64. Congress could have achieved the result that the Circuit Court envisioned by

drafting the statute to apply "to 'any record or paper relating to an act requisite to voting,' without the reference to 'registration' or application,'" but it did not. *Liebert*, 2024 WL 2078216, at *13. The Circuit Court's expansive interpretation reads the terms "registration" and "application" right "out of the statute." *Id.*

The Circuit Court also raised various hypotheticals, R.157 at 7, App.014, querying, for example, whether a contrary interpretation would permit a law that required voters to guess "the name and favorite color of the poll worker who handed them their ballot." R.157 at 7, App.014. But the fact that the Materiality Provision does not address such hypotheticals does not render them lawful. Such an arbitrary requirement would plainly violate the Fourteenth Amendment's Due Process Clause and a number of other state and federal constitutional provisions. *See, e.g.*, U.S. Const. amend. XIV, § 1; Wis. Const. art. I, § 1; *see also Blake v. Jossart*, 2016 WI 57, ¶¶ 47–48, 370 Wis. 2d 1, 884 N.W.2d 484; *Milwaukee Branch of NAACP v. Walker*, 2014 WI 98, ¶¶ 26–39 & n.8, 357 Wis. 2d 469, 851 N.W.2d 262; *Wagner v. Milwaukee Cnty. Election Comm'n*, 2003 WI 103, ¶ 77, 263 Wis. 2d 709, 666 N.W.2d 816.

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

Section 6.87(6d)'s witness-address requirement also falls outside the scope of the Materiality Provision because it does not "deny" any voter the right to vote—which denial is

another essential element of the claim. 52 U.S.C. § 10101(a)(2)(B).

1. To be within the Materiality Provision's scope, the challenged state law must deny the "right of an[ ] individual to vote." *Id.* In other words, the Materiality Provision operates *only* where the specific state law at issue "deprive[s]" a voter "of the right to vote." *Vote.Org v. Callanen,* 39 F.4th 297, 305 (5th Cir. 2022). While the right to vote is a constitutional guarantee, Wisconsin law provides that voting *absentee* is a privilege that must be "carefully regulated to prevent the potential for fraud or abuse." Wis. Stat. § 6.84(1). Indeed, "the fundamental right to vote does not extend to a claimed right to cast an absentee ballot by mail." *See Tully v. Okeson*, 977 F.3d 608, 611 (7th Cir. 2020) (citation omitted); *see Lee*, 2001 WI App 19, ¶ 7 (citation omitted). The U.S. Supreme Court has made this clear time and time again, *see McDonald*, 394 U.S. at 807–08; *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 n.6 (1969); *see also Hill v. Stone*, 421 U.S. 289, 300 n.9 (1975); *Goosby v. Osser*, 409 U.S. 512, 521–22 (1973); *Bullock v. Carter*, 405 U.S. 134, 143 (1972), as have federal courts of appeals across the country, *see, e.g.*, *Common Cause Ind. v. Lawson*, 977 F.3d 663, 664 (7th Cir. 2020); *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 185 (5th Cir. 2020); *Mays v. LaRose*, 951 F.3d 775, 792 (6th Cir. 2020); *see also Org. for Black Struggle v. Ashcroft*, 978 F.3d 603, 607 (8th Cir. 2020).

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The Materiality Provision does not, by its own terms, supplement the constitutional right to vote with additional protections or privileges. The word "vote," as used in the Materiality Provision's prohibition on laws that "deny the right of any individual to vote," 52 U.S.C. § 10101(a)(2)(B), means "all action necessary to make *a vote* effective," *id.* § 10101(e) (emphasis added); *see id.* § 10101(a)(3)(A). Thus, if absentee voting is one of multiple available voting methods that do not depend upon the challenged law, or if the voter is allowed to "cure" a violation of the challenge law, the voter is not denied "the right to vote." *Brnovich*, 594 U.S. at 671. In other words, "unless a state's actions make it harder to cast a ballot at all, the right to vote is not at stake," *Tully*, 977 F.3d at 611 (citation omitted), and the Materiality Provision is not implicated.

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The Third Circuit's decision in *Pennsylvania NAACP*, 97 F.4th 120, again persuasively clarifies this issue. In addition to holding that the Materiality Provision did not apply outside of the voter qualification context, *see supra* p.68, the Third Circuit also explained that an absentee voter is not "'den[ied] the right to vote' when his ballot is not counted" for non-compliance with a state law requiring the voter to date the absentee ballot envelope, *Pa. NAACP*, 97 F.4th at 133 (citation omitted). The Third Circuit explained that "[c]asting a vote" simply "requires compliance with certain rules," *id.* (quoting *Brnovich*, 594 U.S. at 669), which rules States have the authority to implement in the interest

of “preserv[ing] ‘the integrity and reliability of the electoral process,’” *id.* (quoting *Crawford*, 553 U.S. at 191 (plurality opinion of Stevens, J.)). Based on these principles, the court reasoned, “[i]f state law provides that ballots completed in different colored inks, or secrecy envelopes containing improper markings, or envelopes missing a date, must be discounted, that is a legislative choice that federal courts might review if there is unequal application, but they have no power to review under the Materiality Provision.” *Id.* Any contrary interpretation, the court explained, would “tie state legislatures’ hands in setting voting rules unrelated to voter eligibility” and would ignore Congress’s intent to, when passing the Civil Rights Act, prohibit regulations that “resulted in outright *vote denial*.” *Id.* at 134. Thus, the court explained, “individuals are not ‘denied’ the ‘right to vote’ if non-compliant ballots are not counted.” *Id.* at 135.

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2. Requiring voters to comply with Section 6.87(6d) does not “deny” anyone their constitutional “right . . . to vote,” 52 U.S.C. § 10101(a)(2)(B), for multiple related reasons.

First, although the Wisconsin Constitution guarantees the right to vote, the ability to cast an absentee ballot is merely a “privilege” under Wisconsin law. Wis. Stat. § 6.84(1). In other words, “[t]he fundamental right to vote does not extend to a claimed right to cast an absentee ballot.” *Tully*, 977 F.3d at 611 (citation omitted); *see also McDonald*, 394 U.S. at 807–08; *Kramer*, 395 U.S. at 626 n.6. Thus, Section 6.87(6d)’s limitation on the exercise of this “privilege,”

Wis. Stat. § 6.84(1), in no way prohibits a voter from exercising his or her *right* to vote.

Second, because voters have ample opportunities to cast their 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. A voter can avoid complying with the absentee-ballot witness requirement by exercising the constitutionally guaranteed right to vote in person on Election Day. Wis. Stat. §§ 6.76–6.78, 6.80.[10] Alternatively, a voter may cast an absentee ballot in person at an early voting location or the municipal clerk's office before or on Election Day, *id.* § 6.87(4)(b)1, 5, where the absentee ballot is "completed and signed by the absentee voter, and *witnessed by the municipal clerk or designated staff*," Wis. Elections Comm'n, *Election Administration Manual for Wisconsin Municipal Clerks* 78 (Feb. 2024); Supp.App.417 (emphasis added). None of these options require compliance with the witness-address requirement.

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[10] A voter who must, or would simply prefer, to vote by absentee ballot can make sure his or her ballot is counted by complying with the simple absentee ballot rules, including the witness requirement, Wis. Stat. § 6.87, track his or her ballot to ensure that it is received and counted, *see supra* p.52, and cure any problems that arise provided the ballot was returned to the election clerk in sufficient time, Wis. Stat. § 6.87(9), *see infra* p.77.

Third, Section 6.87(6d) does not deny anyone the opportunity to vote because Wisconsin law provides multiple, "neutrally applied," *see Pa. NAACP*, 97 F.4th at 133, opportunities for voters to cure noncompliant ballots and ensure that they are capable of being counted. For instance, clerks must send absentee ballots to voters with requests on file "no later than the 47th day before" a general election, Wis. Stat. § 7.15(1)(cm); *see, e.g.,* R.144, Ex.4 at 2–3, Supp.App.022–23, affording voters the ability to "plan[ ] ahead and tak[e] advantage of the opportunities allowed by state law" to cast a ballot and make sure it is compliant with all requirements, *Democratic Nat'l Comm. v. Bostelmann*, 977 F.3d 639, 642 (7th Cir. 2020); *Lawson*, 977 F.3d at 665 (noting that voters "who act at the last minute assume risks"). As the Uniform Instructions demonstrate, the absentee-ballot statute imposes requirements that are limited in number and simple in nature—they merely require a voter to fill out his or her ballot in the presence of a witness, seal the ballot in a return envelope, complete and sign the envelope certifications, and finally confirm that the information provided complies with the instructions. R.144, Ex.2 at 1, Supp.App.018. Additionally, an absentee voter who makes an error on his or her ballot, including in the witness certificate, has multiple opportunities to remedy the error. For instance, if a clerk receives a deficient ballot that cannot be counted, that clerk can reach out to the voter and allow the voter to correct the error. Wis. Stat. § 6.87(9). WEC has also

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developed the "Track My Ballot" tool, *see supra* p.52, which allows voters to ensure their ballots are received by the clerk's office and alerts voters to potential problems that could result in a ballot's rejection if left uncorrected, *see* R.144, Ex.1 at 1, Supp.App.014.

Finally, rejecting an absentee ballot for failure to comply with the State's "neutrally applied" witness-address requirement does not "deny[ ] an individual the opportunity to access the ballot in the first instance," which is the only type of regulation the Materiality Provision prohibits. *Pa. NAACP*, 97 F.4th at 133–34. To the contrary, and like the requirement at issue in *Pennsylvania NAACP*, Section 6.87(6d) at most prevents voters from "cast[ing] a defective ballot," *id.* at 134, but there is no "right" to do so, *id.* at 133 ("[W]e know no authority that the 'right to vote' encompasses the right to have a ballot counted that is defective under state law."). Rejecting a ballot for non-compliance with Section 6.87's witness-address requirement, therefore, does not "deny" any voter the ability to exercise his or her right to vote—it simply governs the manner in which a voter must do so in order have his or her vote counted.

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3. The Circuit Court held that Section 6.87(6d) falls within the Materiality Provision's scope because the rejection of an absentee ballot for noncompliance operates to "deny" the right to vote. R.157 at 8, App.015. That is incorrect. In Wisconsin, the Constitution guarantees the right to vote, but there exists no *right* to vote by absentee ballot. *See Teigen*,

2022 WI 64, ¶ 53 (citing Wis. Stat. § 6.84(1), and quoting *Mays*, 951 F.3d at 792 ("[T]here is no constitutional right to an absentee ballot.")) (lead opinion); *accord Lee*, 2001 WI App 19, ¶ 7. Indeed, the "right to vote in any manner . . . [is not] absolute," *Luft*, 963 F.3d at 671 (citation omitted; brackets in original), and absentee voting is a carefully regulated privilege—not a right—under Wisconsin law, Wis. Stat. § 6.84(1). And "every voting rule imposes a burden of some sort," *Brnovich*, 594 U.S. at 669, particularly where, as here, the voting exercise at issue implicates the "potential for fraud or abuse," Wis. Stat. § 6.84. The Third Circuit in *Pennsylvania NAACP* highlighted the importance of these types of "neutral state requirements on how voters may cast a valid ballot," concluding that the Materiality Provision does not "tie state legislatures' hands in setting voting rules related to voting eligibility." 97 F.4th at 134. And in any event, Wisconsin law makes voting as accessible as possible, and the State has enacted many "rules [that] make voting easier than do the rules of many other states," *Luft*, 963 F.3d at 672. Thus, Section 6.87(6d) and other absentee-voting rules *expand* access to the franchise, and in no way operate to deny anyone the right to vote.

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C. Even If The Materiality Provision Applied Outside Of The Voter-Registration Context, Section 6.87(6d) Does Not Violate That Provision Because It Is "Material"

Section 6.87(6d) is also lawful for the independent reason that the absentee-ballot witness requirement is "material" under any interpretation of that term that can survive constitutional scrutiny. 52 U.S.C. § 10101(a)(2)(B).

A. The Materiality Provision applies only to voting requirements that are not "*material* in determining whether such individual is qualified under State law to vote in such election." *Id.* (emphasis added). As commonly understood, "material"—which is not defined in the statute—means "[o]f such a nature that knowledge of the item would affect a person's decision-making," "significant," or "essential." *Material*, Black's Law Dictionary (12th ed. 2024); *see also Material*, Oxford English Dictionary Online, *supra* ("Of serious or substantial import; significant, important, of consequence[;] [p]ertinent, relevant; essential."). Thus, as a textual matter, the Materiality Provision only prohibits the use of voting requirements that are not "essential" to determining "whether an individual may vote *under Wisconsin law*." *Common Cause v. Thomsen*, 574 F. Supp. 3d 634, 640 (W.D. Wis. 2021) (emphasis added).

"Materiality" of an election law does not exist in a vacuum—it is the relevant State's election-law scheme that dictates whether a challenged state-law provision is "material" to an individual's voting qualifications. 52 U.S.C.

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§ 10101(a)(2)(B). As discussed above, *supra* pp.66–67, the U.S. Constitution charges the States with "control[ling] . . . the election process," *Tashjian*, 479 U.S. at 217, which constitutional duty requires the States to impose "reasonable regulation[s] [on] parties, elections, and ballots to reduce election- and campaign-related disorder," *Timmons*, 520 U.S. at 358 (citation omitted). Thus, it is the State's election-law scheme as a whole, and the relevant state interests that the scheme is designed to further—including "deterring and detecting voter fraud," *Crawford*, 553 U.S. at 191 (plurality opinion of Stevens, J.), *accord* Wis. Stat. § 6.84(1)—that determine whether a specific provision within the scheme is "material" to voting qualifications within that State, 52 U.S.C. § 10101(a)(2)(B).

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B. Even if the Materiality Provision did apply to Section 6.87(6d), *contra* Sections I.A, B, Section 6.87(6d) would not violate the Materiality Provision because the absentee-ballot witness requirement is "material" to "whether an individual may vote" by absentee ballot "under Wisconsin law." *Thomsen*, 574 F. Supp. 3d at 640. Whether a voter can take advantage of the *privilege* of voting by absentee ballot requires compliance with certain additional requirements designed to mitigate the risk of "fraud or abuse" inherent in any absentee-voting regime. Wis. Stat. § 6.84(1); *accord Lee,* 2001 WI App 19, ¶ 7; *Brnovich*, 594 U.S. at 685. The witness-address requirement, for its part, furthers these election-integrity goals by ensuring that election officials can contact

the witness to confirm that the absentee voter is who he or she claims to be, if any issues arise. Thus, whether an individual "may vote" in this particular manner under Wisconsin law depends on compliance with both Section 6.02's universal voter-qualification requirements *and* Section 6.87's specific requirements. A qualified voter who cannot—or chooses not to—comply with those requirements may still cast a ballot in a different manner, but is not eligible to cast an absentee ballot in the State. Therefore, compliance with Section 6.87's procedures (including the witness-address requirement, specifically), is obviously "material" to a voter's qualifications *to vote by absentee ballot*. 52 U.S.C. § 10101(a)(2)(B); *Material*, Black's Law Dictionary, *supra*; *Material*, Oxford English Dictionary Online, *supra*.

Moreover, allowing the Materiality Provision to invalidate Wisconsin's witness-address requirement undermines the State's constitutional election-administration authority, including its constitutional role in determining what an absentee voter must do to vote by absentee ballot, specifically. *Contra* R.157 at 8, App.015. Indeed, elections "demand[ ] rules," *Moore*, 600 U.S. at 29, and it is entirely within the purview of the States to dictate those rules. Wisconsin has enacted "rules," *id.*, "providing for absentee voting," Wis. Const. art. III, § 2, which rules must be strictly complied with if an absentee ballot is to be validly cast and counted, Wis. Stat. § 6.84(2). Thus, interpreting Section 6.87 as imposing "material" requirements on the casting of an

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absentee ballot is necessary to respect the State's prerogative in election administration and to avoid rendering all reasonable ballot requirements related to a "record or paper" ineffective as preempted by federal law. R.153 at 7–8.

C. The Circuit Court's conclusion that the absentee-ballot witness requirement is "not material to whether a voter is qualified" because it "says nothing about the voter's citizenship, age, or residency," nor "about whether the voter has been disenfranchised," R.157 at 5, App.012, is incorrect. The Circuit Court failed to recognize that the Materiality Provision applies to state-law requirements that are material to the voter's "qualifi[cation] under *State law*," 52 U.S.C. § 10101(a)(2)(B) (emphasis added), and that the witness requirement is "material" to an absentee voter's qualification *to vote by absentee ballot under Wisconsin law*. Because the witness-address mandate allows an election clerk to confirm the identity of an absentee voter—an essential component of a voter's qualification to vote by absentee ballot, *see* Wis. Stat. § 6.84(1)—the requirement is plainly "material" to the voter's "qualifications" to participate in the absentee-voting regime.

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The Circuit Court also failed to address the fact that applying the Materiality Provision to Section 6.87(6d) and treating its requirement as not "material" would run afoul of the State's federal constitutional role in election administration. R.157 at 8, App.015; *see supra* pp.82–83. Indeed, the expansive interpretation of the Materiality Provision that the Circuit Court adopted would significantly

frustrate Wisconsin's federal constitutional authority to regulate the conduct and administration of elections within state borders, U.S. Const. art. I, § 4, pursuant to which it enacted Section 6.87 to govern the "privilege" of absentee voting and determined that its requirements are mandatory in order to deem an absentee ballot validly cast, Wis. Stat. § 6.84(2).

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.

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Dated: July 3, 2024.

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CERTIFICATION BY ATTORNEY

I hereby certify that this portion of this Combined Brief conforms to the rules contained in s. 809.19 (8) (b), (bm) and (c) for a brief. The length of this brief is 9,520 words.

I further certify that filed with this brief is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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CERTIFICATE OF SERVICE

A copy of this Combined Brief is being served on all opposing parties via electronic mail and paper mail.

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