

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

SUSAN LIEBERT, et al.,

Plaintiffs,

v.

Case No. 23-CV-672

WISCONSIN ELECTIONS
COMMISSION, et al.,

Defendants.

**BRIEF IN SUPPORT OF THE COMMISSION DEFENDANTS’
MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

In this 42 U.S.C. § 1983 lawsuit, Plaintiffs, Wisconsin absentee voters, challenge Wisconsin’s absentee ballot witness requirement as an unlawful “voucher” of voter qualifications under Section 201 of the Voting Rights Act and, alternatively, as a violation of the materiality provision of the Civil Rights Act. They bring claims against the six members of the Wisconsin Elections Commission, in their official capacity, and against its administrator, in her official capacity. Plaintiffs seek declaratory and injunctive relief. Based on the undisputed facts, both claims fail as a matter of law and summary judgment should be granted to the Commission Defendants.

The witness requirement does not violate Section 201 of the Voting Rights Act because it does not require a voter to “prove his qualifications by the voucher of a registered voter or members of any other class.” 52 U.S.C. § 10501(b). It is simply a certification that the witness observed (1) the presence of the voter and non-presence of any other person during the voting procedure, and (2) the voter’s following the absentee voter procedure, including signing. And unlike the prohibited vouching that led to Section 201’s enactment, Wisconsin’s witness requirement permits *any* adult U.S. citizen to serve as a witness, not just registered voters or members of another class.

Plaintiffs’ alternative claim fails for similar reasons. Wisconsin’s absentee ballot witness requirement does not run afoul of the Civil Rights Act’s materiality provision, Section 10101, because neither witnessing the voter’s marking of his ballot nor the certification of it requires the voter to provide immaterial information about himself.

Lastly, the Court posed questions about the effect of state-court litigation on this action and the Commission Defendants have answered.

SUMMARY JUDGMENT STANDARD

To succeed on a motion for summary judgment, the moving party must show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Rule 56 “imposes an initial burden of

production on the party moving for summary judgment to inform the district court why a trial is not necessary.” *Modrowski v. Pigatto*, 712 F.3d 1166, 1168 (7th Cir. 2013). The trial court must review the evidence in the light reasonably most favorable to the non-moving party, giving him the benefit of reasonable inferences from the evidence. *White v. City of Chicago*, 829 F.3d 837, 841 (7th Cir.) “Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

ARGUMENT

Summary judgment should be granted to the Commission Defendants because the material facts are undisputed and Plaintiffs’ Voting Rights Act and alternative Civil Rights Act claims fail as a matter of law. Moreover, this Court should decide these claims well before the November general election if possible, but if that is not possible, then a stay of proceedings should occur until after the November 2024 general election.

BACKGROUND

Like other states, Wisconsin has an absentee ballot witness requirement. An absentee voter is required to complete her ballot in the presence of a witness who is an adult U.S. citizen. Wis. Stat. § 6.87(2) and (4)(b)1.

After marking the ballot and sealing it in the envelope provided by the clerk, the voter completes a printed certificate on the envelope, certifying to

two sets of information. One relates to her residence, entitlement to vote, and that she is not voting at another polling place or in person. Wis. Stat. § 6.87(2). The second relates to the process she has used to vote in the presence of the witness and no one else (other than an assistance under Wis. Stat. § 6.87(5)), including showing the unmarked ballot to the witness, marking the ballot in a way that no one can see how she voted, and sealing the ballot in the envelope. Wis. Stat. § 6.87(2).


The witness, who has watched this process in the presence of the voter, executes and signs the certificate. She certifies “that the above statements are true and the voting procedure was executed as there stated.” Wis. Stat. § 6.87(2). (DPFOF ¶ 3.)

The Commission is required by law to “prescribe uniform instructions for municipalities to provide to absentee electors.” Wis. Stat. § 6.869. The Commission’s uniform instructions for absentee voters, Form EL-128, include instructions about the witness requirement:

Uniform Instructions for Wisconsin Absentee Voters



STEP 1 Read and follow the instructions on your ballot.
Mistakes may prevent your votes from being counted.

STEP 2  **You must vote your ballot in the presence of an adult witness:**

- Mark your ballot in the presence of your witness.
- Your witness cannot tell you who or what to vote for and cannot see the choices you make on your ballot.

<p>Who can be a witness?</p> <ul style="list-style-type: none"> <input checked="" type="checkbox"/> A witness must be a U.S. Citizen who is at least 18 years old. <input checked="" type="checkbox"/> For military or overseas voters, your witness must be at least 18 years old but is not required to be a U.S. Citizen. <input checked="" type="checkbox"/> A witness can be a friend, spouse, family member, neighbor, etc. 	<p>Who cannot be a witness?</p> <ul style="list-style-type: none"> <input checked="" type="checkbox"/> A candidate on the ballot for this election.
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If you're having trouble finding a witness or have questions about the witness requirement, please contact your municipal clerk.

STEP 3 Refold your voted ballot and place it inside of the return envelope.



STEP 4 Seal the envelope in the presence of your witness.



Make sure your envelope is completely sealed

STEP 5 Fill out the required sections of the absentee return envelope.

Required Elements

<p>VOTER</p> <p>Your voter information <i>(may already be complete)</i></p> <p>Signature</p>	
<p>WITNESS</p> <p>Signature</p> <p>Printed Name</p> <p>Address</p>	

STEP 6 Return your ballot.

Unless you are a voter with a disability, you must personally return your own ballot and it must be received in time to be delivered to your polling place **no later than 8:00 p.m. on Election Day.**

- Mail it back. Allow at least **one week** for mail.
- Drop it off at your municipal clerk's office.
- Drop it off at your polling place or central count location.
- Voters with disabilities have the right to assistance in returning an absentee ballot. The voter's assistant can be anyone who is not the voter's employer, an agent of the employer, a representative of their labor union, or a candidate on the ballot.
- **Absentee ballots may not be returned by email or fax.**

The Commission is also required to publish an election manual that explains the duties of election officials. Wis. Stat. § 7.08(3). The Commission's current Election Administration Manual, includes guidance about the witness requirement:

An absentee ballot is marked by an absent voter, and sealed in an Absentee Ballot Certificate Envelope (EL-122). The Absentee Ballot Certificate Envelope (EL-122) is then completed and signed by the absentee voter, witnessed by an adult U.S. Citizen, and mailed or delivered in person to the municipal clerk. Wis. Stat. § 6.87(4)(b). . . . Note: The witness for absentee ballots completed by Military, Permanent and Temporary Overseas voters, must be an adult, but does not have to be a U.S. Citizen.

(DPFOF ¶ 1.)

ARGUMENT

Plaintiffs' claims under the Voting Rights Act and Civil Rights Act fail as a matter of law under undisputed facts. Summary judgment should be granted to the Commission Defendants.

I. The Commission Defendants are entitled to summary judgment on Plaintiffs' Voting Rights Act claim.

Plaintiffs challenge Wisconsin's absentee ballot witness requirement, Wis. Stat. § 6.87(2) and (4)(b)1., as violating Section 201 of the Voting Rights Act, codified at 52 U.S.C. § 10501. (Dkt. 1.) They claim that this witness requirement is a voucher of voter qualification, which is prohibited under this federal law. (Dkt. 1:18–19; 42:16–24.) That claim fails because the absentee ballot witness requirement does not prove voter qualifications within the meaning of Section 201, for two reasons. First, it does not require the voter

to “prove his qualifications by voucher” of another person. *See* 52 U.S.C. § 10501(b)(4). It is simply a certification that the witness observed the voter execute the absentee voter procedure and sign the voter certification in his presence only and in a way that no one could see the vote. Second, witnesses are not required to be “registered voters or members of any other class.” *See* 52 U.S.C. § 10501(b)(4). As other courts have concluded, a witness requirement for an absentee ballot does not violate the Voting Rights Act.

A. Section 201 prohibits requiring registered voters or members of another class to vouch for a voter’s qualifications.

Section 201 of the Voting Rights Act provides that “[n]o citizen shall be denied, because of his failure to comply with any test or device, the right to vote in any Federal, State, or local election conducted in any State or political subdivision of a State.” 52 U.S.C. § 10501(a). The term “test or device” includes:

any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

52 U.S.C. § 10501(b). The fourth “test or device” is at issue in this case: whether, “as a prerequisite for voting,” Wisconsin’s witness requirement forces an absentee voter to “prove his qualifications by the voucher of registered voters or members of any other class.” *Id.*; (Dkt. 18:22).

The voucher prohibition was enacted in 1965 and applied only to jurisdictions subject to preclearance and other special provisions in the Voting Rights Act, in response to election practices used to discriminate against Black voters. Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(b), 79 Stat. 437, 438 (1965). In one county in Alabama, for example, in order to register to vote, an applicant had to produce a “supporting witness” who “must affirm that he is acquainted with the applicant, knows that the applicant is a bona fide resident of the county, and is aware of no reason why the applicant would be disqualified from registering.” *United States v. Logue*, 344 F.2d 290, 291 (5th Cir. 1965) (per curiam); *United States v. Ward*, 349 F.2d 795, 799–802 (5th Cir. 1965) (enjoining requirement that two registered voters establish the identity of an applicant); S. Rep. No. 89-162, 1965 U.S.C.C.A.N. 2508, 2549–50 (1965) (citing the *Logue* case as justification for the inclusion of the “voucher requirement” in the Voting Rights Act of 1965). The U.S. Department of Justice had brought a series of cases seeking to enjoin these practices, and Section 201 codified the ban on voucher requirements nationwide in 1970 for a limited time but was later made permanent in 1975. *See* Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, § 102, 89 Stat. 400, 400 (1975).

Section 201 prohibits practices that parallel these historical, racially discriminatory voting practices. It does not prohibit non-discriminatory voting

regulations. Courts have consistently rejected efforts to extend the “test and device” ban—including voucher requirements—beyond the statute’s scope.

For example, shortly after the Voting Rights Act was passed, the court in *Davis v. Gallinghouse*, 246 F. Supp. 208, 217 (E.D. La. 1965), declined to invalidate a state law requiring documentary proof of residency requirements. The plaintiffs had argued that “voucher of . . . members of any other class” within the meaning of Section 201 included “the class of people who issue driver’s licenses, library cards, rent receipts, postmarked envelopes, etc.,” *id.*, and so requiring documentation obtained from those people amounted to a voucher requirement. The court disagreed, reasoning that the plaintiffs’ theory misread what “other class” means in the statute: “Congress undoubtedly meant this ban on ‘vouching’ to hit at the requirement in some states that identity be proven by the voucher of two registered voters, which, where all or a large majority of the registered voters are white, minimizes the possibility of a [Black voter] registering.” *Id.*

On the specific question of witness requirements for absentee ballots, courts have rejected challenges just like Plaintiffs’ here: an argument that such regulations are vouching requirements prohibited by Section 201.

In *People First of Alabama v. Merrill*, 467 F. Supp. 3d 1179, 1224–25 (N.D. Ala. 2020), the court declined to enjoin Alabama’s witness statute, which required that all absentee ballots include an affidavit witnessed by a notary

public or two adult witnesses, based on Section 201. The court concluded the state law did not require witnesses to vouch for a voter's identity or qualifications for voting; the witness's signatures indicated only that they observed the voter sign the affidavit. *Id.*

In *Thomas v. Andino*, 613 F. Supp. 3d 926, 961–62 (D.S.C. 2020), the court declined to enjoin a South Carolina statute requiring that a witness observe the voter sign his absentee ballot based on Section 201. The court concluded that the statute lacked two separate features required for a violation of Section 201.

First, the court concluded that the witness requirement did not “mandate the witness to ‘vouch’ or ‘prove’ that the voter is qualified.” *Id.* at 961. The court reasoned that the witness was not “required to confirm that the voter is registered to vote or ‘qualified’ in any way. Instead, the witness is only standing in to confirm that the voter completes the voter’s oath and signs the document.” *Id.* The court also explained that the voter’s eligibility had already been verified in other ways, because absentee procedures permitted election officials to send absentee ballots to voters only after “verifying the voter’s eligibility to vote absentee.” *Id.* Thus, the court further explained, “[t]here would be no need to . . . require the *witness*, who may or may not know the voter, to sign upon the witness line for the purpose of verifying that the voter is registered or ‘qualified’ to vote.” *Id.* at 962.

Second, the court concluded that the statute did not improperly require anything from a registered voter or member of any other class because it did not require the witness himself to be a “registered voter” or “member of any class’ or subset of society;” rather, the requirement “allow[ed] for a myriad of competent individuals to witness the oath.” *Id.*

B. Wisconsin’s absentee ballot witness requirement does not require a voter to “prove his qualifications by the voucher” of another person.

Wisconsin’s absentee ballot witness requirement does not require the voter to “prove his qualifications by voucher” of another person. Witnessing is not vouching, and Plaintiffs misread what the witness attests to.

1. The voter is not required to “prove his qualifications by voucher” of a witness.

a. Plaintiffs conflate witnessing with vouching.

Plaintiffs point to the voter and witness certification language and argue that by certifying “that the above statements are true and the voting procedure was executed as there stated,” Wis. Stat. § 6.87(2), the witness is necessarily attesting to all the statements in the voter’s certification, including that the voter is entitled to vote in the election on the date and in the jurisdiction in question. (Dkt. 1:18–19; 42:10.) Plaintiffs misunderstand what a witness attests to. The statute requires only that the witness confirm that he was in the presence of the elector and no one else, he observed the elector execute the

absentee voter procedure and sign the voter certification, and no one else could have seen how the elector voted.

The Wisconsin Supreme Court has held that “statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results.” *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110.

An elector’s vote by absentee ballot has two relevant steps: (1) the elector’s request for an absentee ballot; and (2) marking the ballot and completion of the ballot certificate, which she carries out in a witness’s presence.

In the first step, registered voters wishing to vote absentee must submit a written absentee ballot request to the municipal clerk. Wis. Stat. § 6.86(1)(a)–(ac). Importantly, the municipal clerk will not issue an absentee ballot unless the clerk receives a written application from a registered and qualified elector. *See* Wis. Stat. § 6.86(1)(a)–(ar). The clerk will “not issue an absentee ballot to an elector who is required to enclose a copy of proof of identification . . . unless the copy is enclosed and the proof is verified by the clerk.” Wis. Stat. § 6.87(1). Only voters who provide the required information receive an absentee ballot.

In the second step, when the absentee voter chooses to vote, she does so in the presence of a witness. Wis. Stat. § 6.87(4)(b)1. She shows the unmarked ballot to the witness. *Id.* She marks the ballot in a manner that does not disclose the contents of the vote. *Id.* Then, still in the presence of the witness, she folds the ballot and places it into the envelope. *Id.* The voter then completes the certificate on the ballot envelope, certifying to two sets of information.

One set relates to her residence, entitlement to vote, and that she is not voting at another polling place or in person:

I, ..., certify subject to the penalties of s. 12.60 (1) (b), Wis. Stats., for false statements, that I am a resident of the [... ward of the] (town) (village) of ..., or of the ... aldermanic district in the city of ..., residing at ...* in said city, the county of ..., state of Wisconsin, and am entitled to vote in the (ward) (election district) at the election to be held on ...; that I am not voting at any other location in this election; that I am unable or unwilling to appear at the polling place in the (ward) (election district) on election day or have changed my residence within the state from one ward or election district to another later than 28 days before the election.

Wis. Stat. § 6.87(2) (omission in original).

The second set relates to the process she has used to vote, including showing the unmarked ballot to the witness, and, in the presence of only the witness, marking the ballot and sealing the ballot in the envelope in a way that no one could see how she voted:

I certify that I exhibited the enclosed ballot unmarked to the witness, that I then in (his) (her) presence and in the presence of no other person marked the ballot and enclosed and sealed the same in this envelope in such a manner that no one but myself and any person rendering assistance under s. 6.87(5), Wis. Stats., if I requested assistance, could know how I voted.

Wis. Stat. § 6.87(2).

It is this latter information that the witness attests to. The witness, who has watched the process, executes and signs the certificate. He certifies “that the above statements are true and the voting procedure was executed as there stated.” Wis. Stat. § 6.87(2).¹

Plaintiffs’ theory is that the witness certifies to both sentences in Wis. Stat. § 6.87(2), and thus everything the voter certifies to. (*See, e.g.*, Dkt. 42:16–24.) That makes no sense. By certifying “that the above statements are true,” the “witness” is not attesting to the information in the first “I certify” sentence—the voter’s certification about his status, residence, and decision not to vote in person. Instead, the witness attests to what he has seen as to the second “I certify” sentence: that the voter “exhibited the enclosed ballot unmarked to the witness,” that the voter was in the presence of the witness and no other person, that the voter “marked the ballot and enclosed and sealed” it in an envelope “in such a manner that no one” but herself witness could have known how she voted, and the voting procedure itself “was executed as there stated.” Wis. Stat. § 6.87(2). The witness attests to those circumstances and

¹ The certificate must include the witness’ address for the absentee ballot to be counted. Wis. Stat. § 6.87(2), (6d). As explained below, a Dane County (Wis.) Circuit Court issued a final decision, now on appeal, holding that a local clerk violates the Civil Rights Act’s materiality provision if she rejects an absentee ballot certificate that does not contain witness address information under four scenarios. (DPFOF ¶¶ 6–7.)

actions that are directly observable by him; he is not charged to independently ascertain information about the voter's status as an eligible qualified absentee voter.

Indeed, a “witness” under Wis. Stat. § 6.87(2) does nothing more than attest to what he has seen. A “witness” is “[i]n general, one who, being present, personally sees or perceives a thing; a beholder, spectator, or eyewitness.”² A witness is “one who has personal knowledge of something” and “testifies in a cause of before a judicial tribunal.”³ He is “one who testifies to what he has seen, heard, or otherwise observed.” *Wigginton v. Ord. of United Com. Travelers of Am.*, 126 F.2d 659, 666 (7th Cir. 1942).

To vouch, in contrast, as Plaintiffs contend the “witness” is doing under Wis. Stat. § 6.87(2), is “to supply supporting evidence or testimony” or “to give personal assurance.”⁴ The federal hearsay rule illustrates the difference between witnessing and vouching: witness testimony recounting an out-of-court statement is not hearsay so long as it is not offered for the truth of the matter asserted, i.e., does not purport to vouch for the third-party declarant. *See* Fed. R. Evid. 801(c). A witness under Wis. Stat. § 6.87(2) “vouches” for nothing about a voter. Such a certification to the voter's status, residence, and

² *Witness*, Black's Law Dictionary (6th ed.).

³ *Witness*, Merriam Webster Dictionary, <https://www.merriam-webster.com/dictionary/witness> (last visited Feb. 16, 2024).

⁴ *Vouch*, Merriam Webster Dictionary, <https://www.merriam-webster.com/dictionary/vouch> (last visited Feb. 16, 2024).

decision not to vote in person, as Plaintiffs contend, would be unnecessary: the voter's eligibility and qualification have already been verified according to absentee ballot procedure, *see* Wis. Stat. § 6.86(1)(ar), and the voter herself, *see* Wis. Stat. § 6.87(2).

The Commission's guidance is consistent with this position that the "witness" does not vouch for the qualifications of the elector. The Commission instructs voters to "vote your ballot in the presence of an adult witness." (DPFOF ¶ 2.) This guidance does not inform the witness that he must know the voter or confirm his identity. The Commission's manual further advises that the absentee ballot is marked by the voter, sealed in the envelope, "completed and signed by the absentee voter," and "witnessed by an adult U.S. citizen." (DPFOF ¶ 1.) This manual says absolutely nothing about the witness' attesting to the voter's qualifications. Plaintiffs' alternative reading, in contrast, would not limit a witness's job to attesting to what he saw; it would require every witness to attest, under threat of criminal sanction, to facts he may not or cannot know. That is absurd, an outcome prohibited under Wisconsin law. *Kalal*, 271 Wis. 2d 633, ¶ 46.

The only courts to have examined whether witness requirements violate section 201 have concluded they do not. *See People First*, 467 F. Supp. 3d at 1224–25; *Thomas*, 613 F. Supp. 3d at 961–62. As the *Thomas* court reasoned, "[t]here would be no need to . . . require the witness, who may or may not know

the voter, to sign upon the witness line for the purpose of verifying that the voter is registered or ‘qualified’ to vote.” 613 F. Supp. 3d at 962. Plaintiffs’ only answer to *Merrill* and *Thomas* again relies on their misreading of the Wisconsin statute. They say the state statutes at issue in those cases required a witness only to attest to witnessing the vote, not to vouching for the voter’s “own attestation about qualifications.” (Dkt. 42:20.) But attesting about witnessing the vote is all that Wisconsin requires, as well. There is no daylight between those cases and this one.

Lastly, litigation in state court challenging Wisconsin’s witness requirement on other grounds agrees with the Commission Defendants’ interpretation. The plaintiffs there, represented by the same counsel as this case, assert that a witness certifies “that the voter completed those steps properly, and that the witness is an adult U.S. citizen, is not a candidate for office, and did not solicit or advise the voter for or against any candidate or measure.” (Dkt. 20-1:15.⁵) They describe the purpose of the witness certification as to “ensure that the ballot was voted (i) by the qualified voter, not another person, (ii) in a lawful manner, and (iii) without coercion or undue

⁵ Plaintiffs’ brief in support of their motion for summary judgment, which is part of the public court record in *Rise Inc. v. Wisconsin Elections Commission*, No. 2022CV2446 (Wis. Cir. Ct. Dane Cnty. Sept. 18, 2023), was attached as exhibit 1 to the Commission Defendants’ motion to dismiss.

influence by the witness or anyone else.” (Dkt. 20-1:15) This legal position is correct, unlike Plaintiffs’ position here.

Read reasonably and in context, and as the Commission’s voting instructions reflect, Wisconsin’s absentee voter “witness” requirement mandates in Wis. Stat. § 6.87(2) only that the witness confirm his presence during the voting procedure, that no other person was present during the voting procedure, and that he observed the voter execute the absentee voter procedure and sign the voter certification in a way that no person would know how she voted. It fundamentally differs from a voucher requirement, which requires the voter to locate an individual who can independently establish the voter’s identity and qualifications. Like the similar witness requirements in *People First*, 467 F. Supp. 3d at 1224–25, and *Thomas*, 613 F. Supp. 3d at 961–62, the witness requirement here is not a “test or device” whereby the absentee voter must “prove his qualifications by the voucher” of a witness. It is not prohibited by Section 201 of the Voting Rights Act.

C. Witnesses are not required to be “registered voters or members of any other class.”

Wisconsin’s absentee ballot witness requirement is not prohibited for a second reason: witnesses under Wis. Stat. § 6.87(2) are not required to be “registered voters or members of any other class.” 52 U.S.C. § 10501(b).

As explained above, Section 201 targets the practice of conditioning registration or voting by Black electors on the consent of White electors or

another group that could withhold the franchise. *See, e.g., Ward*, 349 F.2d at 799. Unlike the prohibited vouching that led to Section 201’s enactment, Wisconsin’s witness requirement does not limit potential witnesses to registered voters or any other relevant class. Rather, it permits *any* adult U.S. citizen to serve as a witness. *See* Wis. Stat. § 6.87(2), (4).⁶

This case is like *Thomas*, where the court concluded that requiring a witness signature on an absentee ballot did not require the participation of a registered voter or member of any other class. 613 F. Supp. 3d at 962. Plaintiffs say that *Thomas* is different because the competent witnesses there could be anyone, while Wisconsin requires that they be adult U.S. citizens. (*See* Dkt. 42:22–23.) But their suggestion (Dkt. 42:22 n.6) that there cannot be *any* limit on who is a competent witness—even limiting eligibility to adults—ignores the meaning of “class” in Section 201: as the *Thomas* court stated, the point is not that there can be no limitation on who can serve as a witness, but rather that

⁶ Plaintiff Anna Haas alleges that she must find a U.S. citizen to witness her absentee ballot when she is temporarily overseas (for business or personal purposes) because she would be considered a Wisconsin resident under Wis. Stat. § 6.10(1) and thus not qualify as for the “overseas elector” exemption from the U.S. citizen witness requirement per Wis. Stat. § 6.24(1). (*See* Dkt. 1 ¶ 14 & n.1.) Plaintiffs are not correct. The State of Wisconsin and the United States have entered into a consent decree that provides the federal Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”, *see* 52 U.S.C. §§ 20301 et seq.) protections for voters who, like Haas, may not qualify for the state exemption to the U.S. citizen witness requirement, by allowing them to be treated as permanent overseas and military voters who, under Wisconsin law, still need a witness for the absentee ballot but that witness does not need to be a U.S. citizen. (DPFOF ¶ 12.) The Commission’s current guidance is that temporary overseas voters do not need their witness to be a U.S. citizen when voting in any state or federal election.

a “myriad of competent individuals” can serve as a witness. 613 F. Supp. 3d at 962. That means that an elector voting absentee will not be constrained in locating someone to witness the marking of the ballot.

Wisconsin’s absentee ballot witness requirement is not like the statutes discussed in *Greater Birmingham Ministries v. Secretary of State for State of Alabama*, 992 F.3d 1299, 1336 (11th Cir. 2021), where courts invalidated state laws requiring registered voters to vouch for registration applicants because it served as a hurdle for Black voters in communities where there were few registered voters. The Commission Defendants know of no case that has invalidated witness requirements requiring that witnesses be adult U.S. citizens.

Wisconsin’s absentee ballot witness requirement in Wis. Stat. § 6.87(2) and (4)(b)1. asks no one to vouch for a voter’s qualifications and does not run afoul of the Voting Rights Act. Summary judgment should be granted to the Commission Defendants on Plaintiffs’ Voting Right Act Section 201 claim.

II. The Commission Defendants are entitled to summary judgment on Plaintiffs’ alternative Civil Rights Act materiality provision claim.

Plaintiffs allege an alternate claim under the Civil Rights Act. They claim that “[i]f the Witness Requirement [of Wis. Stat. § 6.87(2) and (4)(b)1.] is not a requirement that the witness vouch for the voter’s qualifications to vote under

Wisconsin law—*i.e.*, is not a voucher requirement in violation of the Voting Rights Act—then it is, by definition, ‘not material in determining whether [an] individual is qualified under State law to vote’” in violation of the materiality provision of the Civil Rights Act, codified as 52 U.S.C. § 10101(a)(2)(B). (Dkt. 1:20; 42:24–32.) This claim also fails.

This “materiality provision” of the Civil Rights Act, Section 10101, prohibits states from denying a voter the right to vote due to certain errors or omissions on a record or paper relating to any act requisite to voting. 52 U.S.C. § 10101(a)(2)(B). It provides:

No person acting under color of law shall . . . deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any . . . 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). So, only errors that are “not material in determining whether such individual is qualified under State law to vote in such election” are relevant to this analysis. *Id.*

Plaintiffs’ alternative claim here fails for two reasons: (1) ensuring compliance with voting procedures is not within the scope of what Section 10101 potentially prohibits; and (2) even if it were, the witness’s attestation would be material to determining whether a voter is qualified to vote under Wisconsin law.

A. Requiring a person to witness the voter’s marking of her absentee ballot is not an “error or omission on any record or paper” within the meaning of Section 10101.

As a matter of plain language reading, requiring a person to witness an absentee voter’s marking of her ballot is not an “error or omission on any record or paper.” 52 U.S.C. § 10101(a)(2)(B). It is not a needless provision of data about the voter, like her social security number. It is a required *procedure*, reasonably designed to ensure the integrity of absentee voting.

While Plaintiffs have said the materiality provision has been applied to strike down procedures (Dkt. 42:27–28), the cases they cite don’t support that assertion. *Schwier v. Cox*, 340 F.3d 1284, 1285–86 (11th Cir. 2003), which actually addressed only whether the plaintiffs had a private right of action, involved whether voters could legally be required to provide their Social Security numbers. *La Union del Pueblo Entero v. Abbott*, 604 F. Supp. 3d 512, 540–41 (W.D. Tex. 2022), involved a challenge to voters’ being required to provide their driver’s license or Social Security numbers. And *In re Georgia Senate Bill 202*, 2023 WL 5334582, at *2 (N.D. Ga. 2023), was a challenge to a state law that required voters to provide their year of birth on the ballot envelope.

All these cases challenged requirements that voters provide information about themselves, not procedural requirements about marking ballots. As an example of the difference, the court in *In re Georgia Senate Bill 202* noted that

absentee voters in Georgia must execute an oath that they properly followed the required voting process. But the plaintiffs *didn't* challenge that requirement; they challenged only the requirement to provide year-of-birth information about the voter. *In re Georgia Senate Bill 202*, 2023 WL 5334582, at *1–2.

Plaintiffs offer no case that has held that documenting compliance with a required voting procedure is “an error or omission on any record or paper.” 52 U.S.C. § 10101(a)(2)(B). And the Commission Defendants have located no case that has treated procedural confirmation requirements—confirmations that the voter has properly voted—as a record “relating to an act requisite to voting” within the meaning of Section 10101.

B. Even if a witness’s attestation were a record or paper within the meaning of Section 10101, it would be material to determining whether a voter is qualified to vote under state law.

Even if the materiality provision somehow related to a witness’s certification to an absentee ballot, what the witness certifies to—that the voter actually voted her ballot, in conformance with Wisconsin law and free from influence from others—are material to whether the elector “is qualified under State law to vote.” 52 U.S.C. § 10101(a)(2)(B).

A voter’s absentee ballot counts under Wisconsin law only if her vote is witnessed and she votes (i.e., marks her ballot) in a particular way. Wis. Stat. § 6.87(2), (4)(b)1. Wisconsin Stat. § 6.87(2) requires the witness to provide, on

the absentee ballot certificate, his or her name, address, and a certification. That component facilitates the witness requirement by enabling election officials to locate and contact the absentee voter's witness, should the need arise. The Wisconsin Legislature has stated a policy that absentee voting must be carefully regulated to prevent the potential for fraud and abuse. Wis. Stat. § 6.84(1). Wisconsin Stat. § 6.87(2)'s witness requirement is one of the statutory protections for absentee voting.⁷

The United States, through its Department of Justice, filed a statement of interest in state court litigation about Wisconsin's absentee ballot witness requirement in Wis. Stat. § 6.87(2). (Dkt. 20-2.⁸) In that statement, the United States does not dispute that requiring an absentee witness *address* on the absentee ballot certificate in some form may be material in determining a voter's qualification to vote under state law. (Dkt. 20-2.) If the witness address may be material, certainly the broader, general requirement of an absentee ballot witness is not prohibited. The United States Department of Justice has the authority to enforce the Civil Rights Act's materiality provision. *See* 52 U.S.C. § 10101(c). Its knowledge of Wisconsin's absentee ballot witness

⁷ Many other states have absentee ballot witness or notary requirement statutes. *See* Alaska Stat. § 15.20.203(b)(2); La. Stat. Ann. § 18:1306(E)(2); Miss. Code Ann. § 23-15-627; Mo. Rev. Stat. § 115.283; Okla. Stat. tit. 26, § 14-108; S.C. Code Ann. §§ 7-15-220, 380.

⁸ The United States Department of Justice's brief, which is part of the public record in *League of Women Voters of Wisconsin v. Wisconsin Elections Commission*, No. 22CV2472 (Wis. Cir. Ct. Dane Cnty. Oct. 14, 2022), was attached as exhibit 2 to the Commission Defendants' motion to dismiss.

requirement and lack of enforcement action against the state is further evidence that it would not find Wis. Stat. § 6.87(2) a violation of the Civil Rights Act. Thus, had the U.S. DOJ believed that witness requirements are categorically barred under Section 10101, it seems hard to imagine it would have made such an assumption in a filing that merely concerned the absentee witness and has done nothing more.

This case is like *Common Cause v. Thomsen*, 574 F. Supp. 3d 634 (W.D. Wis. 2021), where this Court held that requiring a signature for a valid ID was “material” to determining whether the individual is qualified to vote. As here, the plaintiff in that case argued that being “qualified” to vote meant only substantive voting qualifications such as being a citizen, a resident of Wisconsin, and at least 18 years old, and that a signature on an ID was not a substantive qualification on that list. *Common Cause*, 574 F. Supp. 3d at 646. This Court rejected the plaintiffs’ challenge because “qualified’ in § 10101(a)(2)(B) is not limited to these substantive qualifications.” *Common Cause*, 574 F. Supp. 3d at 636. It explained:

The phrase “qualified under State law” is defined in § 10101(e): the words ‘qualified under State law’ shall mean qualified according to the laws, customs, or usages of the State.” Under Wisconsin law, an individual is not qualified to vote without a compliant ID. Defendants’ straightforward argument squares with the statutory text: an individual isn’t qualified to vote under Wisconsin law unless he or she has one of the forms of identification listed in § 5.02(6m), so any required information on an ID is indeed “material” to determining whether the individual is qualified to vote.

Id. (footnote omitted).

The same is true here: a voter marking an absentee ballot must comply with certain procedures, including voting before a witness and no one else and in a way that no one can see how she voted. Wis. Stat. § 6.87(4)(b)1. The witness must also certify that he was present and watched these procedures complied with, and he must provide an address on the absentee ballot certificate so that election officials can contact him, if needed, to confirm those facts. Wis. Stat. § 6.87(2). The witness requirement is thus material to determining whether the individual is “qualified under State law” to vote via absentee ballot in that election under Wisconsin law.

Plaintiffs have asserted that *Common Cause* is consistent with their claim, but they misunderstand the case. They describe the underlying facts as a challenge to a form of voter ID that included the same information as the substantive voting qualifications of age, residency, and citizenship. (Dkt. 42:31.) That is incorrect. The question was whether the voter ID *signature* requirement was outside of what it means to be “qualified under State law” to vote for purposes of Section 10101(a)(2)(B). The Court held that the phrase was not limited in the way the plaintiffs proposed. *Common Cause*, 574 F. Supp. 3d at 636.

Plaintiffs’ underlying theory here is that a witness requirement must inherently run afoul of either Section 201 of the Voting Rights Act or Section 10101 of the Civil Rights Act: either the witness is vouching for the person’s

qualifications, violating the first law, or his participation and certification are not material to determine whether the voter is qualified to vote, violating the second. But this premise falls apart quickly when the statutes are read with any attention. Witnessing a vote is not “vouching” for the voter’s compliance with the absentee voting procedure. And requiring a witness to attest to his presence and the voter’s compliance with the voting procedures, among other things, if even possibly within the purview of Section 10101, is material to determining whether the voter is qualified to vote via absentee ballot under Wisconsin law.

Wisconsin’s absentee ballot witness requirement does not violate the Civil Rights Act’s materiality provision. Plaintiffs’ claim should be dismissed and summary judgment granted to the Commission Defendants.

C. The Court’s three questions to the parties.

In its opinion and order granting in part and denying in part the Commission Defendants’ motion to dismiss, the Court posed three questions to the parties for briefing at summary judgment. The Commission Defendants respond to them here.

1. Principles of issue or claim preclusion will not affect this case due to judgment being entered in *League of Women Voters*.

First, the Court asked: “Whether principles of issue or claim preclusion will affect this case once judgment is entered in *League of Women Voters*.” (Dkt.

56:15.) In posing this first question, the Court did not explain whether it was referring to Plaintiffs or Defendants and did not say whether claim or issue preclusion was at stake.

Issue preclusion precludes a party from relitigating an issue actually decided in a prior case and necessary to the judgment. *See Lucky Brand Dungarees, Inc. v. Marcel Fashions Grp., Inc.*, ___ U.S. ___, 140 S. Ct. 1589, 1594 (2020). Claim preclusion prevents parties from raising issues that could have been raised and decided in a prior action—even if they were not actually litigated. *Id.* If a later suit advances the same claim as an earlier suit between the same parties, the earlier suit’s judgment “prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding.” *Id.* (citations omitted).

For purposes of issue preclusion, both state court orders are final. The Wisconsin circuit court’s orders in *League of Women Voters v. Wisconsin Elections Commission* and *Priorities v. Wisconsin Elections Commission* are final and have already been appealed. (DPFOF ¶¶ 6–7, 9–11.)

a. Issue preclusion and the Commission Defendants.

As to the *League of Women Voters* case, issue preclusion would bind the Commission Defendants from challenging a final decision in *League of Women Voters* on a very specific, limited issue: whether the Civil Rights Act bars

elections officials from treating witness address information on absentee ballots as inadequate where a witness not living at the same residence at the voter includes her name, street address, and zip code but does not list her municipality.

In *League of Women Voters*, the second amended complaint asserted neither that (1) an absentee ballot witness requirement generally nor (2) any such witness address requirement violated that federal law. It alleged something much narrower: that four specific “non-material” address omissions violated that provision, including cross-referencing the voter’s address instead of listing it (for witnesses living at the same residence), omitting a state or zip code, or including no municipality. (DPFOF ¶ 4.)

As a matter of interpreting “witness address” under state law, the Commission Defendants asserted that three of the four “non-material” errors alleged in the plaintiff’s complaint were not errors at all. It agreed that a witness provides a complete address if he lives at the same residence as the voter and cross-references the voter’s address either with an arrow or language like “same” or “ditto.” It also agreed that no zip code or state is required for any witness, as long as a name, street address, and municipality is provided. (DPFOF ¶ 5.)

The only point of disagreement between the League and Commission Defendants was whether a witness address is complete when it lists no municipality but includes a postal zip code. That issue does not preclude the Commission Defendants from defending the case at bar because *League of Women Voters* is far narrower than the *Liebert* Plaintiffs' claim. Plaintiffs here allege that requiring the witnessing of an absentee voter's marking her ballot violates the Civil Rights Act. That issue was not litigated in *League of Women Voters*, and the Commission Defendants will not be precluded from arguing that the Civil Rights Act does not bar a witness requirement for absentee voting, regardless of the final outcome in the state court case. That issue was not actually decided in a prior case or necessary to the judgment. *See Lucky Brand Dungarees, Inc.*, 140 S. Ct. at 1594.

Also not litigated or necessary to the judgment, despite the broader language in the state circuit court's ruling (Dkt. 54-1:8; *see also* 56:14 (quoting that language)), is whether requiring *any* witness address violates the Civil Rights Act. Because the *League of Women Voters* complaint did not raise such a claim, the Commission Defendants did not need to defend against it.

As to the *Priorities USA v. Wisconsin Elections Commission* state court litigation,⁹ that complaint sought a ruling, among other claims, that voters have a constitutional right under the Wisconsin Constitution not to need a witness for an absentee ballot. (DPFOF ¶ 8.) The circuit court held that Wisconsin case law bars that relief and ruled against those plaintiffs. (DPFOF ¶¶ 9–10.) Issue preclusion does not bar the Commission Defendants from defending Wisconsin statutes that the circuit court upheld as valid.

The circuit court’s decision is on appeal, with those plaintiffs now asking the Wisconsin Supreme Court to overrule prior holdings. (DPFOF ¶ 11. Should the Wisconsin Supreme Court hold that the Wisconsin Constitution (unlike the U.S. Constitution) includes such a constitutional right, the Commission Defendants will be precluded from arguing in the future that there is no such right. Of course, such a ruling would be precedential on all potential parties, not just the Commission Defendants. Such a ruling, while novel, would obviate the need for Plaintiffs’ lawsuit here.

⁹ While the three questions posed by this Court did not reference the *Priorities USA v. Wisconsin Elections Commission* state court litigation, No. 2023CV1900 (Wis. Cir. Ct. Dane Cnty.), it did reference it earlier in its opinion and order. (See Dkt. 56:10, 13.)

b. Issue preclusion and Plaintiffs.

The Commission Defendants do not have evidence that Plaintiffs in this case and the *League* or *Priorities* plaintiffs are in privity. They assume for purposes of this filing that issue preclusion would not apply to them.

2. This Court should not stay resolution of the Civil Rights Act claim pending resolution of *League of Women Voters* or the November 2024 election.

Second, the Court asked: “if neither issue nor claim preclusion applies, whether this Court should stay resolution of the Civil Rights Act claim pending resolution of *League of Women Voters* or the 2024 election, and, if so, what authority supports such a stay.” (Dkt. 56:13.)

The *League of Women Voters* case will not address the broader issue raised by Plaintiffs here: whether any absentee ballot witness requirement is illegal. This Court should not stay the resolution of a case that seeks broader relief than the *League of Women Voters* plaintiffs have even asked for.

The *Priorities USA* case has a different legal basis from this lawsuit, but one of its claims seeks the same ultimate relief: invalidating the absentee ballot witness requirement altogether. Those plaintiffs have appealed their loss in state circuit court and are asking the Wisconsin Supreme Court to directly hear that appeal on bypass of the court of appeals. If the supreme court accepts that request, and if it holds there is a fundamental right to vote absentee (something no court has held under the U.S. or a state constitution,

as far as the Commission Defendants are aware), it will obviate the need for Plaintiffs' lawsuit here. But the Commission Defendants believe that, in light of the novelty of the relief sought in the *Priorities USA* case, it does not make sense to stay this case.

However, if this Court chooses to stay the proceedings pending the outcome of *Priorities USA* (again, assuming the Wisconsin Supreme Court takes the case), it would possibly be considering a case within six months of the November 2024 election. If it waits that long, it should then wait until after the election. The Commission Defendants strongly believe that this Court should not be changing the rules of the road for absentee voters and local clerks so close to that election. Without a stay, an order that changes the status quo could require the Commission Defendants to quickly revise the aforementioned absentee ballot certificate envelopes, uniform instructions, and Election Administration Manual, not to mention perform likely outreach to clerks and the public. *See, e.g.*, Wis. Stat. § 5.05(7), (12), (13). The Supreme Court has warned lower courts about issuing orders that change the status quo so close to an election. *See Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006) (per curiam) (“Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.”).

3. **If the Court were to decide Plaintiffs' Civil Rights Act claim, there would be no confusion with *League of Women Voters* because the cases address different issues.**

Third, the Court concluded its questions by asking: “If the Court were to decide the Civil Rights Act claim, how confusion can be avoided or minimized in the event that this Court reaches a different conclusion than the state court in *League of Women Voters*.” (Dkt. 56:13.)

As discussed above, this case and *League of Women Voters* involve different issues. The Commission Defendants' position is that absentee ballot witness address information is material but that, potentially, non-material requirements (for example, requiring green ink to complete the certificate) could violate the Civil Rights Act. This Court's agreement with the Commission Defendants on that point would not be inconsistent with having the state courts decide the issue actually raised in the *League of Women Voters* case—whether some specific types of address information, like postal zip codes, are immaterial to whether the elector is qualified under state law to vote.

CONCLUSION

The Commission Defendants ask this Court to grant their motion for summary judgment on both of Plaintiffs' claims and enter final judgment in their favor.

Dated this 16th day of February 2024.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 16, 2024, I electronically filed the foregoing *Brief in Support of the Commission Defendants' Motion for Summary Judgment* with the clerk of court using the CM/ECF system, which will accomplish electronic notice and service for all participants who are registered CM/ECF users.

Dated this 16th day of February 2024.

s/Charlotte Gibson
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