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.

WISCONSIN STATE LEGISLATURE,

Intervenor-Defendant.

COMMISSION DEFENDANTS' REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Plaintiffs have doubled down on their legal gotcha. They argue that Wisconsin's absentee ballot witness requirement either requires the witness to vouch for the voter's qualifications, in violation of the Voting Rights Act, or is not material to determining whether the voter is qualified to vote, in violation of the Civil Rights Act. But this argument collapses when the statutes are read reasonably and in context. Witnessing a vote is not "vouching" for the voter's substantive qualifications, like the voter's residency and entitlement to vote. And requiring a witness to attest to the voter's compliance with the absentee voting procedure is material to determining whether the voter is qualified to vote via absentee ballot under Wisconsin law.

Plaintiffs seek a solution without a problem. No state or local election official interprets the witness requirement the way Plaintiffs do. This Court should grant Defendants' motion for summary judgment, deny Plaintiffs' motion, and dismiss the case.

ARGUMENT

Section 201 of the Voting Rights Act prohibits "any requirement that a person as a prerequisite of voting . . . prove his qualifications by the voucher of registered voters or members of any other class." 52 U.S.C. § 10501(b).

Section 10101 of the Civil Rights Act prohibits denying the right to vote based on 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).

Plaintiffs argue that Wisconsin's absentee ballot witness requirement *must* violate one of these laws. That novel argument is unpersuasive, and this Court should reject it.

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

Plaintiffs' Voting Rights Act claim fails for two independent reasons. First, Wisconsin's absentee ballot witness requirement does not require the voter to "prove his qualifications by voucher" of a witness. *See* 52 U.S.C. § 10501(b). If the Court agrees, the inquiry ends there. But even if the Court

disagrees, Plaintiffs' Voting Rights Act claim still fails because the witness requirement does not require the witness to be a "registered voter[ ] or member[ ] of any other class." *See id*.

A. Wisconsin's absentee ballot witness requirement does not require a voter to "prove his qualifications by the voucher" of another person.

Wisconsin voters who wish to vote absentee must fill out their ballots using a statutorily-mandated process that is observed by a witness. *See* Wis. Stat. § 6.87(4)(b). After completing that process, the voter must sign a certificate, attesting to his residence, entitlement to vote, and that he is not voting at another polling place or in person. *See* Wis. Stat. § 6.87(2). The voter also certifies that he voted his ballot in the presence of a witness and no other person, and that he showed the unmarked ballot to the witness, marked the ballot, and sealed the ballot in the envelope in a way that no one could see how she voted. *Id*. The witness, in turn, also signs a certificate, attesting "that the above statements are true and the voting procedure was executed as there stated." *Id*.

The only reasonable interpretation of the witness certification is that the witness attests to the voting process he just observed and the voter's statements related to that process. It is unreasonable to interpret the witness certification as applying to *both sets* of statements in the voter certification, including those relating to the voter's residence and entitlement to vote,

because the witness may not know that information and is not charged with the responsibility of ascertaining it. *See* Wis. Stat. § 6.87(4)(b). The witness vouches for nothing about the voter; he simply serves as a witness to the voting process.

Plaintiffs argue that Commission Defendants' "reasoning elevates labels over substance" and that "*Logue* confirms as much" because the requirement at issue in that case was known as the "supporting witness" requirement but was found to be a prohibited voucher. (Dkt. 78:14 (citing *United States v. Logue*, 344 F.2d 290, 291 (5th Cir. 1965) (per curiam)). Commission Defendants agree that the requirement in *Logue*, although labeled a "supporting witness" requirement, was actually a voucher, but it is nothing like Wisconsin's law.

The statute at issue in *Logue* required the witness to "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." *Logue*, 344 F.2d at 291. That is a far cry from Wisconsin's absentee ballot witness requirement, which actually involves witnessing the voting process and nothing more. *See* Wis. Stat. § 6.87(4)(b).

Plaintiffs argue that the witness certification must be interpreted to include vouching and is, therefore, a violation of the Voting Rights Act. (Dkt. 78:13–14.) But Plaintiffs provide no evidence that anyone is actually interpreting the certification in that way or that absentee ballots have not been

counted for that reason. In fact, the Commission's guidance—in both the Commission's manual and absentee voter instructions—indicates that the witness does not vouch for the qualifications of the voter. (*See* Dkt. 59:16.)

Plaintiffs argue that "an agency's interpretation of a contested statute is owed no deference under Wisconsin law." (Dkt. 78:15 (citing *Tetra Tech EC v. Wis. Dep't of Rev.*, 2018 WI 75, ¶ 84, 382 Wis. 2d 496, 914 N.W.2d 21.) But that is not the case when the agency is required by law to provide that interpretation. *See Clean Wis. Inc. v. DNR*, 2021 WI 72, ¶ 24, 398 Wis. 2d 433, 961 N.W.2d 611 ("if the legislature clearly expresses in a statute's text that an agency can undertake certain actions, the breadth of the resulting authority will not defeat the legislature's clear expression.") Wisconsin law mandates that the Commission "prescribe uniform instructions for municipalities to provide to absentee electors." Wis. Stat. § 6.869. The Commission has done just that, and its interpretation of the relevant law, therefore, matters.

Finally, Plaintiffs say nothing more about *Thomas v. Andino*, 613 F. Supp. 3d 926 (D.S.C. 2020) and *People First of Alabama v. Merrill*, 467 F. Supp. 3d 1179 (N.D. Ala. 2020). (Dkt. 78:15–16 (citing 68:12), other than that their first brief discussed them. (Dkt. 78:15–16). That silence is for good reason, because both cases are directly on point. Both cases found no violation of section 201 of the Voting Rights Act where the witness requirements at issue required the

witness to attest to witnessing the vote and the oath taken by the voter, not to vouching for the voter's qualifications. That is all Wisconsin law requires, too.

Read reasonably and in context, Wisconsin's absentee ballot witness requirement in Wis. Stat. § 6.87(2) and (4) does not require a voter to "prove his qualifications by the voucher" of another person. If the Court agrees, the inquiry ends there, and the Court need not determine whether the witness is a "registered voter or member of any other class."

B. Witnesses are not required to be "registered voters or members of any other class."

Wisconsin's law does not violate the Voting Rights Act for a second, independent reason. Under Wisconsin law, the absentee ballot witness, in most circumstances, must be an "adult U.S. citizen." Wis. Stat. § 6.87(4). That is not an impermissible "class" within the meaning of section 201.

Plaintiffs advance an extraordinarily broad definition of "class" as the term is used in section 201. They say a "class" is "any group of people" who share "common characteristics or attributes." (Dkt. 78:16.) If that definition applied in this context, then virtually everyone would be a member of a "class" and, thus, prohibited from serving as a witness. For example, adults are a "group of people" who share "common characteristics or attributes." Surely, Plaintiffs are not suggesting that a witness requirement that excludes children from serving as witnesses would run afoul of section 201. As Commission Defendants have explained, the phrase "members of any other class" in section

201 makes sense only when read in the context of the expressly referenced class of "registered voters," thus prohibiting a class who could withhold the franchise (historically, White voters) from vouching for the qualifications of another class (historically, Black voters). (Dkt. 59:9–11, 18–19; 82:11–12.)

Plaintiffs attempt to minimize *Davis v. Gallinghouse*, 246 F. Supp. 208, 217 (E.D. La. 1965), which held that "people who issue driver's licenses, library cards, rent receipts, postmarked envelopes, etc." are not a "class" within the meaning of section 201. *Id.* Plaintiffs argue that "Davis is an anachronism" because "Congress's decision to extend the Vouching Rule nationwide in 1970 confirms what its plain text makes quite clear" that "[i]t prohibits covered tests or devices of all sorts, not just those that closely resemble the explicitly racial tests applied in the Jim Crow South." (Dkt. 78:19.) Plaintiffs don't say why that would be, and, as explained above, the "plain text" must be read in context, including historical context, which is what the *Davis* court appropriately did. *See Davis*, 246 F. Supp. at 217.

To demonstrate that the "class restriction is not without effect," Plaintiffs focus on an extremely narrow situation: Anna Haas, who asserts that she regularly travels overseas but because she is not a resident abroad and maintains a Wisconsin domicile "would not qualify as an 'overseas voter' (and so be excused from the citizen-witness requirement) while traveling overseas." (Dkt. 78:16 (citing Wis. Stat. § 6.24(1)).) Even this unusual situation does not

present the barrier Plaintiffs assert. As explained in Commission Defendants' opening brief, Wisconsin and the United States entered into a consent decree that provides federal Uniformed and Overseas Citizens Absentee Voting Act protections to temporary overseas voters, like Haas, and allows them to use a non-U.S. citizen witness when voting absentee. (Dkt. 59:19 n.6.) While the consent decree itself has expired, the Commission treats it as effective. 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. (Dkt. 61-1:6.)

* * * * *

Wisconsin's absentee ballot witness requirement does not require the voter to "prove his qualifications by voucher" of a witness, and even if it did, it does not require the witness to be a "registered voter[ ] or member[ ] of any other class." 52 U.S.C. § 10501(b). Either way, there is no violation of the Voting Rights Act, and Plaintiffs' claim fails as a matter of law.

II. Commission Defendants are entitled to summary judgment on Plaintiffs' Civil Rights Act claim.

Plaintiffs alternatively argue that if Wisconsin's absentee ballot witness requirement does not require the voter to "prove his qualifications by voucher" of a witness in violation of the Voting Rights Act, 52 U.S.C. § 10501(b), then it is necessarily "not material in determining whether [an] individual is qualified

under State law to vote" in violation of the Civil Rights Act, 52 U.S.C. § 10101(a)(2)(B). This claim fares no better.

A. Witnessing the absentee voting process is not an "error or omission on any record or paper" within the meaning of section 10101.

As a threshold matter, Wisconsin's witness requirement does not violate the materiality provision of the Civil Rights Act because is not an "error or omission on any record or paper." 52 U.S.C. § 10101(a)(2)(B). The witness requirement is a procedure—the witness observes the voting process and certifies that he has done so, along with certifying the voter's statements about the process. That is not a needless provision of data, like the driver's license numbers, social security numbers, and dates of birth at issue in the cases addressing the materiality provision. *See Schwier v. Cox*, 340 F.3d 1284, 1285–86 (11th Cir. 2003) (addressing 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) (challenge to voters' being required to provide their driver's license or social security numbers); *Georgia Senate Bill 202*, 2023 WL 5334582, at *2 (N.D. Ga. 2023) (challenge to a state law that required voters to provide their year of birth on the ballot envelope).

Plaintiffs argue that "any challenged requirement could be characterized as a 'procedure.'" (Dkt. 78:24.) In support of this argument, Plaintiffs point to *Schwier*, where they say the plaintiffs "'claimed that Georgia's voter

registration procedure and Voter Registration Form violated' the Materiality Provision, without distinguishing between the two," (Dkt. 78:25 (quoting *Schwier*, 340 F.3d at 1285–86, 1297)), and to *La Union del Pueblo Entero*, which Plaintiffs characterize as a challenge to "preparation and submission of an application to vote by mail, as well as the preparation and submission of a mail ballot carrier envelope," (Dkt. 78:25 (quoting *La Union del Pueblo Entero*, 604 F. Supp. 3d at 540–41.)

Plaintiffs misrepresent the holdings of those cases. While voters in both cases were required to comply with certain voting procedures, the plaintiffs did not challenge those requirements; they challenged only the requirements that they provide a needless provision of data—a driver's license or social security number—on their voting or registration forms. *See Schwier*, 340 F.3d at 1297; *La Union del Pueblo Entero*, 604 F. Supp. 3d at 540–41.

Plaintiffs provide no legal authority or persuasive argument in support of their novel theory. Verifying compliance with a required voting procedure simply is not "an error or omission on any record or paper." 52 U.S.C. § 10101(a)(2)(B). Plaintiffs' Civil Rights Act claim fails for this reason alone.

B. Even if a noncompliant witness certificate were an error omission on 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 a noncompliant witness certificate were an error omission on a record or paper, the witness requirement is "material in determining whether

[an] individual is qualified under State law to vote," 52 U.S.C. § 10101(a)(2)(B), and, therefore, does not violate the Civil Rights Act.

Wisconsin law requires a voter who wishes to vote absentee to follow a particular procedure: the voter must mark his ballot in the presence of a witness and free from influence of others. *See* Wis. Stat. § 6.87(4)(b). The witness then signs a certificate stating that the voter complied with that procedure. *See* Wis. Stat. § 6.87(2). That certificate is, therefore, material to whether the voter "is qualified under State law to vote." 52 U.S.C. § 10101(a)(2)(B).

Plaintiffs argue that "qualified under State law to vote" refers only to the substantive qualifications of a voter, such as being a citizen, a resident of Wisconsin, and at least 18 years old. (Dkt. 78:27–28.) But this Court rejected that argument in *Common Cause v. Thomsen*, concluding that "'qualified' in § 10101(a)(2)(B) is not limited to these substantive qualifications." 574 F. Supp. 3d 634, 636 (W.D. Wis. 2021). The Court held that a signature on an ID, while not one of the substantive qualifications, was still "material" to determining whether the individual was "qualified under State law to vote" because "[u]nder Wisconsin law, an individual is not qualified to vote without a compliant ID. *Id*; *see Vote.Org v. Callanen*, 89 F.4th 459, 489 (5th Cir. 2023) (holding plaintiff's materiality provision claim challenging Texas' wet signature

requirement was unlikely to succeed because it was a "material requirement" and part of an individual's qualifications to vote).

Plaintiffs attempt to distinguish *Common Cause*, and other cases concluding that "qualified under State law to vote" is not limited to substantive qualifications, by arguing that those cases involved a "challenge to a *component* of a requirement imposed by state law," whereas "Plaintiffs argue that the *entire* requirement is irrelevant to, and therefore immaterial in, determining a voter's qualifications." (Dkt. 78:28.) That is a distinction without a difference. Whether challenging all or part of a state law voting requirement, it is that state law itself that is a qualification for voting, and that law's requirements are, therefore, material to whether the voter is qualified to vote. *See Common Cause,* 574 F. Supp. 3d at 636; *Vote.Org*, 89 F.4th at 489.

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

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

The Commission Defendants agree that this case need not be stayed pending the outcome of either *League of Women Voters v. WEC* or *Priorities USA v. WEC*. The novel constitutional issue raised in *Priorities* will not be decided before the November election. As to *League,* if this Court holds that

the two federal statutes do not bar the witness requirement, the state courts can consider that ruling as the appeal goes forward.

On March 12, 2024, the Wisconsin Supreme Court declined to accept the *Priorities* plaintiffs' petition to bypass the court of appeals and hear their constitutional arguments regarding Wisconsin's witness requirement for absentee voters. Instead, the court held that issue in abeyance while it considers a different issue: whether to overrule that court's holding in *Teigen v. WEC*, 2022 WI 64, 403 Wis. 2d 607, 976 N.W.2d 519, which relates to whether Wisconsin statutes allow clerks to offer drop boxes for returning absentee ballots.[1] Given that order and the Wisconsin Supreme Court's traditional calendar, there is no feasible chance the state supreme court will accept and decide the witness issue in those plaintiffs' favor by November.

As to *League*, Commission Defendants agree with the Legislature that state defendants should not be treated as precluded from arguing the application of federal law to state statutes. But that fact underscores why this case should continue forward: so that the federal courts can weigh in on issues of federal law. Commission Defendants don't understand why the Legislature would want the federal courts to wait and see what a state court says about

[1] Order, *Priorities USA v. WEC,* No. 24AP164 (Wis. Mar. 12, 2024), https://www.wicourts.gov/supreme/docs/2024AP164order.pdf.

the meaning of two federal statutes as applied to state law. (Indeed, the Legislature could, if it chose, seek a stay from the state court of appeals pending the outcome of this case.) The Legislature's speculation that that the U.S. Supreme Court might ultimately review *League* (Dkt. 85:44) seems particularly odd: the chances of such review are slim to none, and of course no more likely than the chance that Court would review this case.

CONCLUSION

Commission Defendants ask this Court to grant their motion for summary judgment on all claims and enter final judgment in their favor.

Dated this 22nd day of March 2024.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 22, 2024, I electronically filed the foregoing *Commission Defendants' Reply Brief in Support of their 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 22nd day of March 2024.

s/Charlotte Gibson
CHARLOTTE GIBSON
Assistant Attorney General