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' RESPONSE BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Voters' challenges to Wisconsin's absentee ballot witness requirement under section 201 of the Voting Rights Act and section 10101 of the Civil Rights Act both fail on the merits. Their claim under the Voting Rights Act conflates witnessing with "vouching" and depends on an unreasonable, novel interpretation of Wisconsin's witness statute, Wis. Stat. § 6.87(2), that neither the Commission nor anyone else espouses. And their Civil Rights Act claim fails because witnessing the voter's marking of his ballot and the certification of it do not require the voter to provide immaterial information about himself for purposes of voting absentee in the election. This Court should therefore deny their summary judgment motion.

ARGUMENT

Plaintiffs' claims under the Voting Rights Act and Civil Rights Act fail as a matter of law under undisputed facts. Their summary judgment motion should be denied.

I. Plaintiffs are not entitled to summary judgment on their Voting Rights Act claim.

Contrary to Plaintiffs' arguments in support of their Voting Rights Act claim, Wisconsin's absentee ballot witness requirement (1) does not require the voter to "prove his qualifications by voucher" of a witness, and (2) does not require the witness to be a member of "any other class."

A. The absentee voting procedure, and the voter and witness certifications.

When the absentee elector chooses to vote, she "shall make and subscribe to the certification before one witness who is an adult U.S. citizen." Wis. Stat. § 6.87(4)(b)1. The voter 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, the voter folds the ballot and places it into the envelope. *Id.*

The voter signs a certification that contains two sentences. The first sentence contains statements related to the voter's 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 sentence of the certification contains a statement that the voter was in the presence of a witness, she was not in the presence of any other person, and, related to the voting procedure, that she 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:

> 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).

In addition to voter certification, the witness signs a certification, which is the subject of this lawsuit:

> I, the undersigned witness, subject to the penalties of s. 12.60 (1) (b), Wis. Stats., for false statements, certify that I am an adult U.S. citizen** and that the above statements are true and the voting procedure was executed as there 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.

Wis. Stat. § 6.87(2). The witness also prints his name and address on the certification. *Id.*

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

Plaintiffs' argument that Wisconsin's absentee ballot witness requirement is an unlawful "voucher" under the Voting Rights Act fails because Plaintiffs misread what the witness attests to.

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.

Here, the structure of Wis. Stat. § 6.87(2) confirms that the witness certifies to only certain voter certifications. The first "I certify" sentence of the voter certification contains five pieces of information a witness might not or cannot know. The second "I certify" sentence includes statements about what the voter did and what the witness observed. By certifying "that the above statements are true and the voting procedure was executed as there stated," Wis. Stat. § 6.87(2), the "witness" does not attest to first "I certify" sentence—the voter's certification about his status, residence, and decision not to vote in person. Instead, the witness attests to the second "I certify" sentence: that the

voter was in the presence of the witness, that she was not in the presence of any other person, and that the voter "exhibited the enclosed ballot unmarked to the witness," "marked the ballot and enclosed and sealed" it in an envelope "in such a manner that no one" but herself and witness could have known how she voted." Wis. Stat. § 6.87(2). Had the Legislature intended for a witness to certify to all eight statements, it would have written a single "I certify" sentence, not two.

Further, Plaintiffs assume that two words in the witness certification—"above statements"—can mean only one thing, but those words are amenable to multiple readings. Plaintiffs focus on the word "above," but that word does not answer the question. Plaintiffs assume it must mean "all of the above." But that is not what was written. Another, and more natural reading, is that it refers to the statements directly "above"—that is, the second set of "I certify" statements. Plaintiffs also assume that the plural "statements" must mean all of the statements, in both sentences, but that too is just one of multiple readings. The second "I certify" sentence has multiple statements within it, and so attesting to everything in that sentence is attesting to the "above statements" Wis. Stat. § 6.87(2).

Plaintiffs contend that Commission Defendants' legal position makes "redundant" the statutory language about certifying that "the voting procedure was executed as there stated." (Dkt. 68:18 (quoting Wis. Stat. § 6.87(2).) Not

so. Plaintiffs fail to read all the content of the voter certification sentence. The second "I certify" sentence contains statements that can be differentiated from the "voting procedure." The fact of the witness's presence is not a "voting procedure," but the witness must attest it to be true. Wis. Stat. § 6.87(2). The fact that no one else was in the presence of the voters is not a "voting procedure," but the witness must attest it to be true. *Id.* And the Legislature also may convey similar information in multiple ways. It can require the witness to attest both to the truth of the statements made by the voter and to the correctness of the voting procedure. As the Wisconsin Supreme Court remarked, "We should be wary . . . of 'creat[ing] unforeseen meanings or legal effects from' what is nothing more than a 'stylistic mannerism'" in *Milwaukee District Council 48 v. Milwaukee County*, 2019 WI 24, ¶ 25, 385 Wis. 2d 748, 924 N.W.2d 153 (alteration in original) (citation omitted).

Regardless, even if "that the above statements are true and the voting procedure was executed as there stated" reveals surplusage, this relevant rule of statutory construction is not set in stone in Wisconsin. According to the Wisconsin Supreme Court, "[S]ometimes drafters do repeat themselves and do include words that add nothing of substance[.]" *Id.* 385 Wis. 2d 748, ¶ 24 (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 176 (2012)). And "[s]tatutory language is read *where possible* to give reasonable effect to every word, in order to avoid surplusage."). *Id.*

(emphasis added). The Wisconsin court of appeals has further explained, "[S]ometimes the most reasonable reading of a statute, one that gives it the legislatively intended effect, is one that renders some language in the statute surplusage." *State v. Mason*, 2018 WI App 57, ¶ 26, 384 Wis. 2d 111, 124, 918 N.W.2d 78. The Supreme Court also has acknowledged the rule against surplusage has exceptions. *See also Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 299 n.1 (2006) ("While it is generally presumed that statutes do not contain surplusage, instances of surplusage are not unknown."). Plaintiffs' reliance on the statutory construction rule against surplusage is an insufficient foundation for its claim attacking this Wisconsin statute.

Also, as explained in Commission Defendants' opening brief, a witness under Wis. Stat. § 6.87(2) "vouches" for nothing about a voter. Rather than vouch, the "witness" does what the label states: she "witnesses" what she has seen and experienced. (*See* Dkt. 59:15–16.) The witness is not charged to independently ascertain information about the elector's status as an eligible qualified absentee voter, as stated in the first "I certify" sentence. Again, these are pieces of information that a witness might not or cannot know. Moreover, such a certification by the witness to the voter's status, residence, and decision not to vote in person 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 elector herself, *see* Wis. Stat. § 6.87(2). As one district court reasoned, "There 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." *Thomas v. Andino*, 613 F. Supp. 3d 926, 962 (D.S.C. 2020). And the Commission's guidance is consistent with this position that the "witness" does not vouch for the qualifications of the elector. (*See* Dkt. 59:16; 62 ¶¶ 1–2; Dkt. 61-1:6; 61-2:1.)

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 state and federal law. *Kalal*, 271 Wis. 2d 633, 663, ¶ 46; *United States v. Vallery*, 437 F.3d 626, 630 (7th Cir. 2006) ("When interpreting statutes, first and foremost, we give words their plain meaning unless doing so would frustrate the overall purpose of the statutory scheme, lead to absurd results, or contravene clearly expressed legislative intent.").

Next, Plaintiffs contend that Commission Defendants have confirmed that they "consider the witness requirement to be a voucher of qualifications." (Dkt. 68:18.) Plaintiffs grab a state-court statement in a brief stating that requiring a witness for a voter casting an absentee ballot is material "to determining whether the absentee voter in question is qualified to cast that absentee ballot in that election." (Dkt. 68:18 (quoting Dkt. 60-2:16).) Plaintiffs

argue that "[i]nsofar as the witness's attestation is material to qualifications, it follows directly that the witness requirement is a voucher of qualifications. A witness's attestation cannot be material to substantive qualifications if the witness attests only to procedural compliance." (Dkt. 68:19.) Plaintiffs' leap in logic lacks merit.

Commission Defendants have merely stated that Wisconsin's requirement to have a witness for an absentee voter (along with a witness's address) is material to whether that voter "is qualified under State law to vote." (Dkt. 60-2:16 (quoting 52 U.S.C. § 10101(a)(2)(B)).) Under state law, an absentee ballot may not be counted if the certification lacks a witness signature or witness address. *See* Wis. Stat. § 6.87(6d). The requirement of a witness for an absentee voter is not a state "substantive qualification" for the voter, such as age, citizenship, and residence, as Plaintiffs argue, but it is nonetheless material to the counting of absentee voter's ballot. Plaintiffs' attempt to turn Commission Defendants' state-court statement in a case about the Civil Rights Act's Materiality Provision into an admission of an unlawful "voucher" under the Voting Rights Act falls flat.

Plaintiffs next try to distinguish or minimalize the only federal court decisions to have examined whether state absentee ballot witness requirements violate section 201, but that effort fails. *See People First of Alabama v. Merrill*, 467 F. Supp. 3d 1179, 1224–25 (N.D. Ala. 2020); *Thomas,*

613 F. Supp. 3d at 961–62; (Dkt. 68:19). Plaintiffs' only answer to *Merrill* and *Thomas* relies again 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 and the oath taken by the voter, not to vouching for the voter's "own attestation about qualifications." (Dkt. 68:19.) But attesting about witnessing the vote is all that Wisconsin requires, as well. There is no daylight between those cases and this one.

Finally, and importantly, Plaintiffs rely on a statutory reading of Wisconsin law that no state or local official has made or used. Plaintiffs' summary judgment evidence offers no indication that the Commission or any clerk in the state interprets Wis. Stat. § 6.87 in the way Plaintiffs propose. Plaintiffs have no support for their announcement that the Commission's reading of the statute is a "litigation-driven limitation." (Dkt. 68:18.) Instead, this case features the opposite problem—Plaintiffs engage in a "litigation-driven" reading of the statute.

Read reasonably and in context, and as the Commission's guidance reflect, Wisconsin's absentee voter "witness" requirement in Wis. Stat. § 6.87(2) and (4) is no voucher requirement.

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). In Wisconsin, a witness for an absentee voter must be an adult U.S. citizen.[1] Wis. Stat. § 6.87(2), (4). Plaintiffs argue that adult U.S. citizens are a type of impermissible "class." (Dkt. 68:19–20.) And Plaintiffs claim that "[i]t makes no difference that the class in question is broad; a broad class is still a class" lacks merit. (Dkt. 68:20.)

Plaintiffs' position fails from the outset because they do not fully read or analyze the statutory language. Rather than attempt to explain what "any other class" means in the context of the expressly referenced class of "registered voters," they attempt to define "member of [a] class." (Dkt. 68:19.) So, Plaintiffs read-out the majority of the statutory language and the most important terms: "registered voters" and "any other." Unsurprisingly, the result of this flawed method is an interpretation that ignores the purpose of the law in the first place.

As explained in Commission Defendants' opening summary judgment brief, 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. (Dkt. 59:8–11); *see also United States v. Ward*, 349 F.2d

[1] As explained in Commission Defendants' opening brief in support of their motion for summary judgment, military and overseas absentee voters do not need to find adult witnesses who are U.S. citizens. (*See* Dkt. 59:19 n.6; *see also* Commission Defendants' Response to Plaintiffs' Proposed Findings of Fact ¶¶ 27–28.)

795, 799–802 (5th Cir. 1965) (court enjoined a state requirement that two registered voters establish the identity of an applicant). A case decided shortly after the Voting Rights Act was passed is on point and defeats Plaintiffs' argument.

In *Davis v. Gallinghouse*, 246 F. Supp. 208, 217 (E.D. La. 1965), 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.* 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). This does not violate the Voting Rights Act.

Plaintiffs' reading of the federal statute leads to an interpretation that is so broad that it is absurd. Under Plaintiffs' dictionary-based interpretation

of "class," *any* "group of people" would be an impermissible "any other class" under the Voting Rights Act. (Dkt. 68:20.) This case is like *Thomas*, where the district court rejected a Voting Rights Act challenge and 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 have been anyone, while Wisconsin requires that they be adult U.S. citizens. (*See* Dkt. 68:20 n.1; 42:22–23.). Plaintiffs' implication that there cannot be *any* limit on who is a competent witness—even limiting eligibility to adults[2]—ignores the meaning of "any other class" in section 201. As the *Thomas* court stated, the point in the federal prohibition is not that there can be no limitation on who can serve as a witness, but rather that 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.

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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

[2] Plaintiffs point out that the South Carolina statute at issue in *Thomas* now requires a witness to be "at least eighteen years of age." (Dkt. 68:20 n.1.) Under Plaintiffs' reading of "member of any other class," a person who is at least 18 years old would be a member of a broad class, so it appears that they would argue that the South Carolina statute now violates the Voting Rights Act.

afoul of the Voting Rights Act. Summary judgment should be granted to Commission Defendants on Plaintiffs' Voting Rights Act section 201 claim.

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

Plaintiffs allege an alternative claim under the Civil Rights Act. They claim that if Wisconsin's absentee ballot witness requirement is not a requirement that the witness vouch for the voter's qualifications to vote, then it is per se "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. 68:21–31.) This claim also fails.

A. Issue preclusion does not prevent Commission Defendants from raising certain arguments in defense of Plaintiffs' Civil Rights Act claim.

As an initial matter, Plaintiffs argue that Commission Defendants should be precluded from arguing that 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. (Dkt. 68:21–26.) This offensive issue-preclusion argument is unpersuasive. Regardless of whether state or federal issue-preclusion law applies, it does not matter because the first factor—the same "question of . . . law that is sought to be precluded"—cannot be met under either choice of law. *Rinaldi v. Wisconsin*, 2019 WL 3802465, at *5 (W.D. Wis. 2019) (citation omitted).

Here, the legal issue is whether Wisconsin's absentee ballot witness requirement violates the Civil Rights Act because it is an error or omission on a record or paper (i.e., the certification). In the state court case with a final judgment, *League of Women Voters of Wisconsin v. WEC* ("*League*"), this issue was *not* litigated and *not* necessary to the judgment. There was no argument that Wisconsin's witness requirement itself was an error or omission to a record or paper. Instead, the *League* plaintiffs argued that the Civil Rights Act's Materiality Provision prohibited clerks from rejecting absentee ballots based upon four sets of errors or omissions *as to the witness address*. (*See* Dkt. 68:22; 60-3:2–3; 60-4:1-2.) Thus, the issue sought to be precluded here by Plaintiffs is not the same as that issue involved in the prior action.

Plaintiffs argue that this distinction between the error or omission requirement issues here and in *League* makes no difference because the "witness-address requirement is part of the witness certification." (Dkt. 68:25.) They assert that "insofar as the witness-address requirement results in denial of the right to vote because of an error or omission on a record or paper related to an act requisite to voting, it follows that the witness requirement, as a whole does the same." (Dkt. 68:25.) There is a big difference between a witness's failure to print his ZIP code on the certification and the witness requirement altogether, but Plaintiffs make no attempt to explain why. This "because we said so" argument is without legal authority. "[P]erfunctory and undeveloped

arguments, and arguments that are unsupported by pertinent authority, are waived." *United States v. Berkowitz,* 927 F.2d 1376, 1384 (7th Cir. 1991); *see also Beard v. Whitley County REMC,* 840 F.2d 405, 408–09 (7th Cir. 1988) ("It is not the obligation of this court to research and construct the legal arguments open to parties, especially when they are represented by counsel.").

Plaintiffs' offensive issue-preclusion argument should be rejected.

B. 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.

Plaintiffs' Civil Rights Act claim fails because Wisconsin's witness requirement is not an "error or omission on any record or papers.".

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. *See, e.g.*, *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). It is a required *procedure*, reasonably designed to ensure the integrity of absentee voting. Plaintiffs argue that a missing or incomplete witness address is an "omission," while a witness certificate deemed noncompliant with the witness requirement "necessarily suffer 'an error'." (Dkt. 68:29 (quoting 52 U.S.C. § 10101(a)(2)(B)).) But Plaintiffs offer no

decision holding 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 Commission Defendants have located no case that has treated procedural confirmation requirements—confirmations that the voter has properly voted—as such. Plaintiffs' lack of legal authority in support of their strained reading of this statutory phrase sinks their claim. *Berkowitz,* 927 F.2d at 1384.

C. Even if a witness's certificate deemed noncompliant were an error 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.

Plaintiffs argue that Commission Defendants "appear to concede" that "procedural compliance with the witness requirement would be entirely irrelevant, and therefore immaterial, to determining whether an absentee voter is qualified to vote under Wisconsin law." (Dkt. 68:30 and n.9.) In support, Plaintiffs cite portions of Commission Defendants' motion-to-dismiss briefs arguing against Plaintiffs' *Voting Rights Act* claim. Commission Defendants did not concede anything as to Plaintiffs' *Civil Rights Act* claim. Plaintiffs' half-hearted argument—that procedural compliance with a witness requirement is immaterial to whether the voter "is qualified under State law to vote"—fails to push the needle their way.

As Commission Defendants have argued, 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 thus one of the statutory protections for absentee voting.

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 that argument and concluded that "'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). *See also 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 ignore *Common Cause* entirely in their brief.

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, 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' 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 within the purview of section 10101 at all, 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' alternative claim should be dismissed, and summary judgment granted to Commission Defendants.

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

1. Issue and claim preclusion as to the Commission.

Plaintiffs agree that claim preclusion has no application here. (Dkt. 68:22 n.3.) As to issue preclusion, Plaintiffs recognize that the *League* litigation can have no preclusive effect on the fourth element of the materiality analysis—the element that Commission Defendants dispute in this case. They do not argue that the *Priorities USA* litigation has any preclusive effect.

Plaintiffs assert that Commission Defendants are precluded from contesting whether "the witness requirement results in (i) denial of the right to vote (ii) because of an error or omission on a record or paper (iii) related to an act requisite to voting." (Dkt. 68:23–24.) As Commission Defendants explained in its opening brief, *League* involved very narrow claims: whether

four specific components of information (or lack thereof) on the witness certification violated the materiality provision. The *League* plaintiffs did not raise the claim at issue here: whether the witness requirement as a whole violates the materiality provision.

As an initial matter, Wisconsin courts are generally reluctant to apply non-mutual issue preclusion offensively against state agencies. *Gould v. Dep't of Health & Soc. Servs.*, 216 Wis. 2d 356, 370, 576 N.W.2d 292, 298 (Wis. Ct. App. 1998); *Teriaca v. Milwaukee Emps.' Ret. Sys.*¸ 2003 WI App. 145, ¶ 15, 265 Wis. 2d 829, 842, 667 N.W.2d 791, 796. That hesitance should weigh especially strongly where two entities purport to be the State and the Commission—the executive branch agency actually charged to carry out the challenged law—cannot control the arguments the Legislature chooses to make.

But even if issue preclusion could apply to state actors in theory, it can never apply where the issues in the two cases are not the same. In such cases, the same "question of . . . law that is sought to be precluded" was not "actually . . . litigated in a previous action and . . . necessary to the judgment." *Rinaldi*, 2019 WL 3802465, at *5 (quoting *Mrozek v. Intra Fin. Corp.*, 2005 WI 73, ¶ 17, 281 Wis. 2d 448, 699 N.W.2d 54).

As to three of the four specific address "errors" at issue in *League*—for example, a witness who cross-referenced the voter's address with a marking

like "same" or "ditto," Commission Defendants did not litigate those questions because it agreed, as a matter of state law, that such markings are a complete witness address, not an error at all. Only the Legislature argued that witnesses must separately fill out a complete address, even if it is identical to the voter's address listed above on the certification. That is why Plaintiffs' extensive discussion of the Dane County decision refers to the Legislature's arguments in the state case, not Commission Defendants'. (Dkt. 68:24.)

As to the fourth type of asserted error at issue in *League*, Commission Defendants (unlike the Legislature) agreed with the *League* plaintiffs that requiring immaterial witness information can potentially violate the materiality provision. But that has no preclusive relevance because it does not bar Commission Defendants from arguing that some types of information *are* material. From Commission Defendants' perspective, the disputed point here is whether witness information is always, as the *Liebert* plaintiffs argue, immaterial if it seeks more than the voter's age and residency. As discussed above in section II.C., Commission Defendants agree with cases like *Common Cause* and *Vote.Org v. Callahan* that "material" in the federal statute includes more than that information. And nothing the court held in *League* precludes that argument. Plaintiffs appear to agree. (Dkt. 68:25 ("Plaintiffs recognize that the parties in *League* did not 'actually litigate' the full scope of possible qualifications to which the witness requirement might be material.").)

2. Whether this Court should stay the case, and implementation in the event that there is a final decision both here and in *League*.

This Court should not stay this case pending the outcome of either *League* or *Priorities USA*.

As to *League*, Plaintiffs agree that the *League* lawsuit will not address the broader issue raised by plaintiffs here: whether all witness requirements are illegal. (Dkt. 68:34.) This Court should not stay the resolution of a case that seeks broader relief than the *League* plaintiffs have even asked for.

As far as implementation, should this Court hold that the materiality provision does not bar a witness requirement, Commission Defendants can easily reconcile that ruling with any ruling in *League*. Should the Court hold that the materiality provision does bar such a requirement, it would render the *League* relief moot, but it would not be difficult to reconcile both rulings.

As to the *Priorities USA* litigation. Plaintiffs and Commission Defendants agree that this Court should not stay the case pending the outcome in *Priorities USA*. The *Priorities USA* plaintiffs seek a far-ranging decision from the Wisconsin Supreme Court changing the standard of review for constitutional challenges to voting regulations, one different from the federal standard and, as far as Commission Defendants are aware, any other state's.

Beyond the unlikelihood that such a change will occur, that appeal will not address how a court would apply that new standard to any particular

voting regulation. The *Liebert* plaintiffs agree that the Wisconsin Supreme Court decision will not assist with the narrow dispute here. (Dkt. 68:33.)

In their petition to bypass to the Wisconsin Supreme Court, the *Priorities USA* plaintiffs say that their appeal to the state supreme court would later be remanded back to the trial court to litigate these individual applications, including the witness requirement. (Dkt. 74-14:8.) It is not reasonable to stay *Liebert* for years while that fact-intensive litigation winds its way through the state courts.

The Legislature argues that this Court should stay this case until the outcome of *Priorities USA* on the theory the court decisions "may still be beneficial." (Dkt. 65:57.) The Legislature does not explain why this would be so and does not take into account the length of delay that waiting for *Priorities USA* would actually entail.

CONCLUSION

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

Dated this 8th day of March 2024.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 8, 2024, I electronically filed the foregoing *Commission Defendants' Response Brief in Opposition to Plaintiffs' Summary Judgment Motion* 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 8th day of March 2024.

s/Charlotte Gibson
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