UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

SUSAN LIEBERT; ANNA HAAS; ANNA POI; *and* ANASTASIA FERIN KNIGHT,

Plaintiffs,

v.

WISCONSIN ELECTIONS COMMISSION; DON M. MILLIS, ROBERT F. SPINDELL, MARGE BOSTELMANN, ANN S. JACOBS, MARK L. THOMSEN, *and* JOSEPH J. CZARNEZKI, *in their official capacities as commissioners of the Wisconsin Elections Commission*; Meagan Wolfe, *in her official capacity as administrator of the Wisconsin Elections Commission*; MICHELLE LUEDTKE, *in her official capacity as city clerk for the City of Brookfield*; MARIBETH WITZEL-BEHL, *in her official capacity as city clerk for the City of Madison*; *and* LORENA RAE STOTTLER, *in her official capacity as city clerk for the City of Janesville*,

Defendants.

Case No. 3:23-cv-00672-jdp

THE WISCONSIN STATE LEGISLATURE'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes And Rules

Other Authorities

INTRODUCTION

Plaintiffs fail to rebut the Legislature's multiple independent arguments supporting judgment in the Legislature's favor. For their Voting Rights Act claim, Plaintiffs have not shown that Wisconsin's absentee-ballot witness requirement is a "prerequisite" to voting, as every person has the *right* to vote in person in Wisconsin without a witness. Plaintiffs also have not shown that the witness requirement mandates absentee voters to "prove [their] qualifications by the voucher of registered voters or members of any other class," and ask this Court to instead adopt unpersuasive interpretations of state and federal law. For their Civil Rights Act claim, Plaintiffs' expansive interpretation of the Materiality Provision conflicts with the statutory text, applicable caselaw, and the traditional role of the States in election administration. Nor can Plaintiffs show how the absentee-ballot witness requirement denies any voter the right to vote, so as to trigger the Materiality Provision, when the right to in-person voting is fully available. In any event, Plaintiffs have no viable response to the Legislature's showing that even if the Materiality Provision applies, the absentee-ballot witness requirement is "material" to whether a voter is "qualified" to cast an absentee ballot in Wisconsin.

While the Legislature is right on the merits, Plaintiffs also have no persuasive argument as to why this Court should reach those merits now, rather than staying this matter pending resolution of the Wisconsin state court actions addressing closely related issues. Plaintiffs fail to refute the Legislature's points that a stay would be the least confusing result for Wisconsin's voters and election officials, and would

promote judicial efficiency by simplifying or even mooting the issues here. Plaintiffs' remarkable effort to preclude the Legislature from advocating for the validity of a state statute is similarly misguided, including because Plaintiffs are unable to cite a single example of a Wisconsin court ever precluding a state entity from defending a state law based upon nonmutual offensive issue preclusion.

This Court should grant the Legislature's Motion For Summary Judgment or, alternatively, stay this case pending resolution of the parallel state court litigation.

ARGUMENT

I. The Legislature Is Entitled To Summary Judgment In Its Favor On Count I Under Section 201 Of The Voting Rights Act Of 1965

As the Legislature explained, Plaintiffs' claim under Section 201 of the Voting Rights Act fails for three independent reasons. Dkt.65 at 18–28. First, Wisconsin's absentee-ballot witness requirement is not a "prerequisite" to voting, and so is not a prohibited "test or device" under Section 201. 52 U.S.C. § 10501(b); Dkt.65 at 19–22. Second, the absentee-ballot witness requirement does not relate to the voter's "qualifications" to vote, 52 U.S.C. § 10501(b), but rather ensures that a qualified absentee voter complies with the requisite absentee voting procedures. Dkt.65 at 22–27. Finally, the absentee-ballot witness requirement does not call for the "voucher of registered voters or members of any other class," 52 U.S.C. § 10501(b), instead providing that any adult U.S. citizen (or, for military or overseas voters, any adult) may serve as a witness, Dkt.65 at 27–28. Plaintiffs offer no persuasive response.

A. The Absentee-Ballot Witness Requirement Is Not A Prerequisite To Voting

1. The absentee-ballot witness requirement does not violate Section 201 because it is not a "prerequisite" to voting. Dkt.65 at 18–22. By its plain language, *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997), Section 201 applies only to state laws that create a "requirement" that must be completed "as a prerequisite" to "voting or registration for voting." 52 U.S.C. § 10501(b); *Greater Birmingham Ministries v. Sec'y of State for State of Ala.*, 992 F.3d 1299, 1335 (11th Cir. 2021); Dkt.65 at 19. The absentee-ballot witness requirement is not a "prerequisite" to "voting or registration for voting" because it does not "deny[ ] the right to vote in any federal, state, or local election," *Oregon v. Mitchell*, 400 U.S. 112, 144–45 (1970) (plurality opinion) (citation omitted), for the simple reason that absentee voting is a *privilege* in Wisconsin, distinct from the *right* to vote, Wis. Stat. § 6.84(1); *Teigen v. Wis. Elections Comm'n*, 976 N.W.2d 519, 543 (Wis. 2022); Dkt.65 at 20–21. Voters who do not wish to comply with the absentee-ballot witness requirement do not have to utilize the privilege of absentee voting in order to cast a ballot—they may exercise their *right* under Wisconsin law to vote in person on Election Day. *See Greater Birmingham*, 992 F.3d at 1335–36; Dkt.65 at 21–22.

2. Rather than grapple with the Legislature's dispositive point that Section 201 does not apply here because absentee voting in Wisconsin is a mere privilege and not a right, Plaintiffs merely beg the question. Dkt.78 at 2–4. They contend that once a State decides to offer a particular voting method, that method must comply with federal law. Dkt.78 at 2, 4. The Legislature does not dispute this point, but it is

irrelevant here, where the federal law that Plaintiffs rely on—Section 201 of the Voting Rights Act—has no application to laws governing the "privilege" of voting absentee in Wisconsin. *See* Wis. Stat. § 6.84(1). Similarly, that a voter may have her absentee ballot rejected if she refuses to comply with the absentee-ballot witness requirement does not render that requirement a "prerequisite" for exercising the right to vote in Wisconsin, given that the only right to vote in Wisconsin—in person—does not involve use of the witness requirement at all. *Contra* Dkt.78 at 3–4. Plaintiffs' reliance on *Democratic Executive Committee of Florida v. Lee*, 915 F.3d 1312, 1319–20 (11th Cir. 2019), is inapt, as that case did not address, and thus has no bearing on, the scope of Section 201. Dkt.78 at 4. Rather, the on-point Eleventh Circuit case is *Greater Birmingham*, which explained that Section 201 can apply to an election law only when voters are "required" to comply with that law to vote. 992 F.3d at 1336. "[N]o one in [Wisconsin] is 'required' to rely on the [absentee-ballot witness requirement] because they have the option" of using the right to vote in person without obtaining any witnesses. *See id.* Thus, the absentee-ballot witness requirement is not a "prerequisite" to voting for purposes of Section 201. *See id.*[1]

Plaintiffs' effort to distinguish *Greater Birmingham* is thus unavailing. Dkt.78 at 4–5. Plaintiffs try to evade *Greater Birmingham*'s clear holding, arguing that the Eleventh Circuit held that "[w]hen a voter is denied the right to vote under Alabama

[1] Plaintiffs confusingly cite to *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 623 (2011), for its proposition that federal courts will not "distort federal law to accommodate conflicting state law," Dkt.78 at 4, but that case is irrelevant here. The Legislature is not asking this Court to "distort" Section 201 to accommodate the fraud-prevention laws governing the privilege of voting absentee in Wisconsin.

Code § 17-9-30(f), the cause of the denial is the voter's lack of valid identification, not noncompliance with a voucher requirement." Dkt.78 at 5. But what the Eleventh Circuit held is that a law is "not a requirement or prerequisite to voting" under Section 201 if the voter "can still vote" without complying with the challenged law. *Greater Birmingham*, 992 F.3d at 1336 (citation omitted). As the court explained, "if an Alabama voter possesses a photo ID, or opts to cast a provisional ballot, that voter does not need to be separately identified by another individual in order to cast his or her vote." *Id.* The same is true here: if a Wisconsin voter opts to use the right to an in-person ballot, that voter does not need to comply with the absentee-ballot witness requirement to use the privilege of absentee voting.

Nor can Plaintiffs distinguish the other caselaw supporting the Legislature's position. Dkt.78 at 3–5. They argue that *Puerto Rico Organization for Political Action v. Kusper*, 490 F.2d 575 (7th Cir. 1973), supports their contention that Section 201 applies to the absentee-witness ballot requirement, but it does not. Consistent with *Greater Birmingham*, *Kusper* clarifies that Section 201 only prohibits laws that "condition[ ] the right to vote" on a voter satisfying a prohibited test or device. *Id.* at 579. The absentee-ballot witness requirement simply does not "condition[ ] the right to vote," *see id.*, as Wisconsinites have the right to vote in person, and only a privilege of voting absentee. Plaintiffs' observation that, under *Kusper*, "'the right to vote' encompasses the right to an effective vote," Dkt.78 at 3 (quoting *Kusper*, 490 F.2d at 580), is thus irrelevant. Plaintiffs' effort to rely on *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321 (2021), is confused. Dkt.78 at 3. According to Plaintiffs,

that case supports a theory that the elections inspector's rejection of an absentee ballot during the election night count for failure to comply with the witness requirement is itself a "test" under Section 201. Dkt.78 at 3. The elections inspector does not, however, apply any "test demonstrating literacy, educational achievement or knowledge of any particular subject, or good moral character," *Brnovich*, 141 S. Ct. at 2331 (citation omitted), but rather assesses whether the absentee voter has complied with the requirements for casting a valid absentee ballot in Wisconsin.[2]

Relatedly, Plaintiffs' contention that the witness requirement is a "prerequisite" to voting despite the availability of the right to vote in person, Dkt.78 at 3–4, is atextual. A "prerequisite" is "[s]omething that is necessary before something else can . . . be done." *Prerequisite*, Black's Law Dictionary (11th ed. 2019). An election law cannot be a "prerequisite" if the voter has a right to vote that does not involve the specific mechanism. *See* Dkt.65 at 19–22. Because compliance with the absentee-ballot witness requirement is not "necessary," *Prerequisite*, Black's Law Dictionary, *supra*, to exercising the right to vote in Wisconsin—*indeed, it is irrelevant*

[2] Plaintiffs state in a footnote that two Plaintiffs "will have an express federal right to vote by absentee ballot in the upcoming presidential election," Dkt.78 at 4 n.2 (citing 52 U.S.C. § 10502(d)), but Section 202 of the Voting Rights Act expressly conditions the federal right to vote absentee for President and Vice President on the absentee voter "hav[ing] complied with the requirements prescribed by the law of such State or political subdivision providing for the casting of absentee ballots in such election," 52 U.S.C. § 10502(c). Thus, the Voting Rights Act expressly authorizes Wisconsin to regulate absentee voting with state laws, just as it has done with the absentee-ballot witness requirement. In any event, Plaintiffs have only sought to invalidate Wisconsin's absentee-ballot witness requirement *on its face*, and Count I thus fails on its own terms. *See, e.g.*, *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) ("[A] plaintiff can only succeed in a facial challenge by 'establish[ing] that no set of circumstances exists under which the Act would be valid,' *i.e.*, that the law is unconstitutional in all of its applications." (citation omitted)).

to that right, since that right is only to vote in person—the absentee-ballot witness requirement is not a prerequisite to exercising the right to vote. Dkt.65 at 19–22.

B. The Absentee-Ballot Witness Requirement Does Not Require Absentee Voters To Prove Their Qualifications

1. The absentee-ballot witness requirement does not violate Section 201 for the additional reason that it is not a prohibited "test or device" that requires the voter to prove her voting eligibility to the witness. Dkt.65 at 22–27. Under Subsection 201(b)(4), a law is not a prohibited "test or device" if it does not require the voter to "prove his qualifications by the voucher of registered voters or members of any other class." 52 U.S.C. § 10501(b)(4); *People First of Ala. v. Merrill*, 467 F. Supp. 3d 1179, 1225 (N.D. Ala. 2020); *Thomas v. Andino*, 613 F. Supp. 3d 926, 961 (D.S.C. 2020); Dkt.65 at 22–23. The absentee-ballot witness requirement asks the witness to certify that the voter followed the procedures provided in Section 6.87 and nothing more, and so does not violate Section 201. Dkt.65 at 23–24.

Under Section 6.87's plain text and context, *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 681 N.W.2d 110, 124 (Wis. 2004), the Legislature provides the best interpretation of the absentee-ballot witness certification. Dkt.65 at 24–27. First, Section 6.87 states that the witness must certify that "the above statements are true"; it does not require the witness to certify that *all* of "the above statements are true." Wis. Stat. § 6.87(2); Dkt.65 at 25. Requiring a witness to verify the voter's qualifications would also be "absurd" and "unreasonable," *Kalal*, 681 N.W.2d at 124, because a witness does not generally have the resources to make this sort of verification, and requiring him to do so would be unnecessary, as all absentee voters

must complete the registration process before they receive an absentee ballot, Wis. Stat. §§ 6.20, 6.85, 6.86; Dkt.65 at 25; *see also Thomas*, 613 F. Supp. 3d at 961. Further, requiring only that the witness certify that the voter followed the correct procedures—*i.e.*, that she completed an unmarked ballot in the witness' presence and in the presence of no one else—combats the very types of voter fraud that plague absentee voting, such as one person completing multiple ballots or improperly influencing absentee voters. *See* PFOF ¶ 14–17 (citing Ex. A to LeRoy Decl., at 46); Dkt.65 at 26. Finally, the statutorily mandated instructions promulgated by WEC are also in accord with this interpretation of Section 6.87(2), as they do not instruct the witness to check the voter's ID or any other verification procedures. PFOF ¶ 26 (citing Ex. C to LeRoy Decl.); Dkt.65 at 27.

2. Plaintiffs' characterization of the Legislature's interpretation of the absentee-ballot witness requirement as "patently atextual" is incorrect. Dkt.78 at 5. As noted, the statute contains no requirement that an absentee witness vouch for the absentee voter's qualifications and instead merely asks the witness to attest that "the above statements are true and the voting procedure was executed as there stated," Wis. Stat. § 6.87(2), without requiring the witness to certify that *all* of "the above statements are true." Dkt.65 at 23–27. The statute's instruction that the witness certify that "the voting procedure was executed as there stated," Wis. Stat. § 6.87(2), is not rendered mere surplusage under the Legislature's interpretation, as Plaintiffs suggest, Dkt.78 at 5–6, rather, this latter clause provides critical context for interpreting which of "the above statements" the witness must certify as "true." Read

in context, the latter clause clarifies that the witness's function is to monitor the absentee voter's compliance with "voting procedure" and to attest to the accuracy of the voter's representations regarding that procedure. *See* Dkt.65 at 23–25.

Plaintiffs have no response to the Legislature's argument that any other interpretation of Section 6.87(2) would be "absurd" and "unreasonable," *Kalal*, 681 N.W.2d at 124, and so concede this point, *see generally* Dkt.78 at 5–8. As the Legislature explained, an absentee voter is *already* deemed qualified to vote by the time the absentee-ballot witness completes the witness certificate, so requiring the witness—who, unlike a municipal clerk or poll worker, may not have the capacity to confirm a voter's qualifications—to also attest to those qualifications makes no sense. Dkt.65 at 25. This Court should not countenance Plaintiffs' invitation to adopt an unprecedented, unreasonable interpretation of Section 6.87(2), especially where that interpretation is not mandated under Section 6.87(2)'s plain terms.

Nor do Plaintiffs have a persuasive answer to the Legislature's argument that its interpretation of Section 6.87(2) is the only one consistent with the anti-fraud purpose of the statute. *See generally* Dkt.78 at 7. Section 6.84 of the Wisconsin Statutes expressly recognizes that "the privilege of voting by absentee ballot must be carefully regulated to prevent the potential for fraud or abuse," given that absentee voting occurs "wholly outside the traditional safeguards of the polling place." Wis. Stat. § 6.84(1). The absentee-ballot witness requirement is one measure the Legislature has enacted to "deter[ ] and detect[ ] voter fraud." Dkt.65 at 25–26 (quoting *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191 (2008)). As the

Legislature has explained, witness requirements ensure that the person completing and submitting the absentee ballot is voting on her own behalf, such that it makes sense to interpret Section 6.87(2) as requiring a witness to confirm only that the absentee voter followed the statutorily prescribed procedures, rather than whether the absentee voter is qualified to vote. Dkt.65 at 26. Plaintiffs' only response to this argument is to question whether such anti-fraud measures are necessary, Dkt.78 at 7, without explaining why this Court should—contrary to traditional principles of statutory construction, *see Kalal*, 681 N.W.2d at 124–25—adopt a construction of Section 6.87(2) that is at odds with its undisputed anti-fraud purpose.[3]

Plaintiffs try to distinguish the district courts' decisions in *Merrill* and *Thomas* by arguing that neither of these decisions "concerned a witness requirement that operated as a voucher of qualifications," Dkt.78 at 8, but Plaintiffs' analysis again begs the question. Wisconsin's absentee-ballot witness requirement does not operate as a voucher of qualifications, for the reasons discussed above and in the Legislature's Motion. Dkt.65 at 22–27. *Merrill* and *Thomas* demonstrate that where, as here, an absentee-ballot witness requirement that does not require an absentee witness to

[3] Plaintiffs suggest that the Carter-Baker Commission report cited in the Legislature's Motion For Summary Judgment, Dkt.65 at 26 (citing Ex. A to LeRoy Decl.), is "inadmissible," Dkt.78 at 7, but offer no authority or argument in support of this contention, thereby waiving it. *United States v. Butler*, 58 F.4th 364, 368 (7th Cir. 2023) ("perfunctory and undeveloped arguments are waived" (citing *United States v. Davis*, 29 F.4th 380, 385 n.2 (7th Cir. 2022))). Government reports are admissible, *see* Fed. R. Evid. 803(6), (8), and thus courts regularly cite to the Carter-Baker Commission report in addressing challenges to election laws, *see, e.g.*, *Democratic Nat'l Comm. v. Republican Nat'l Comm.*, 673 F.3d 192, 213 (3d Cir. 2012); *Fla. State Conf. of N.A.A.C.P. v. Browning*, 569 F. Supp. 2d 1237, 1251–52 (N.D. Fla. 2008).

"confirm that the voter is registered to vote or 'qualified' in any way" does not violate Section 201. *Thomas*, 613 F. Supp. 3d at 961; *accord Merrill*, 467 F. Supp. 3d at 1225.

C. The Absentee-Ballot Witness Requirement Does Not Require Voters To Prove Their Qualifications To A Member Of Any Class

1. The absentee-ballot witness requirement does not require the voucher of a "member[ ]" of a certain "class," and so does not violate Section 201 for a third, independently sufficient reason. Dkt.65 at 27–28. As the court explained in *Davis v. Gallinghouse*, 246 F. Supp. 208 (E.D. La. 1965), "Congress undoubtedly meant" Section 201 to "hit at the requirement in some states that identity be proven by the voucher of two registered voters," which, in light of the fact that "all or a large majority of the registered voters are white, minimizes the possibility" of a person of color registering. *Id.* at 217; *accord United States v. Logue*, 344 F.2d 290, 292 (5th Cir. 1965). The absentee-ballot witness requirement allows all "adult U.S. citizen[s]" to witness an absentee ballot, Wis. Stat. § 6.87(4)(b)(1), and is not the type of "inherently discriminatory voucher" practice that Congress meant to target through Section 201, *Greater Birmingham*, 992 F.3d at 1336; Dkt.65 at 28. Section 6.87 "allows for a myriad of competent individuals to witness the oath whether the witness themselves are registered to vote or not," *Thomas*, 613 F. Supp. 3d at 962, and so does not violate Section 201. Dkt.65 at 28.

2. Plaintiffs continue to press an overbroad understanding of "class," arguing that any "group of people" that share "common characteristics or attributes" is a "class" for purposes of Section 201. Dkt.78 at 8. But "class" most naturally refers to a confined subset of the population, rather than a category that comprises most of the

population. *See* Dkt.65 at 27–28. Plaintiffs' understanding of "class" would broaden the scope of Section 201 beyond any conceivable limit and would, as applied here, apply to *any* limitation or qualification on who can act as a witness. This expansive reading conflicts with the statute's purpose: Section 201 "undoubtedly" refers to the inherently discriminatory voucher practices that motivated Congress to pass the Voting Rights Act to begin with. Dkt.65 at 27–28 (quoting *Davis*, 246 F. Supp. at 217). Congress extended the voucher prohibition in 1970 and made it permanent in 1975, Act of Aug. 6, 1975, Pub. L. 94-73, tit. I, § 102, 89 Stat. 400, 400, and these amendments continued Congress' focus on ending "inherently discriminatory voucher" practices in States like Alabama, *Greater Birmingham*, 992 F.3d at 1336, which fact provides essential historical context for interpreting Section 201's plain meaning. Plaintiffs' broad reading, by contrast, would extend the statute far beyond its purpose, while taking away a key limit in the law. *See, e.g.*, S.C. Code Ann. § 7-15-380 (requiring absentee ballot witness to be "at least eighteen years of age").

Although Plaintiffs try to minimize the significance of *Davis*, Dkt.78 at 10–11, that case demonstrates why Plaintiffs' interpretation of the term "class" under Section 201 is incorrect. The *Davis* court assessed the meaning of Section 201's "class" requirement shortly after the enactment of the Voting Rights Act and analyzed Congress's intent in including the "class" term, explaining that "Congress undoubtedly meant . . . to hit at the requirement in some states that identity be proven by the voucher of two registered voters," which "minimize[d] the possibility" of a person of color registering since "all or a large majority of the registered voters

[were] white." 246 F. Supp. 208 at 217. That Congress later acted to extend Section 201's voucher prohibition nationwide, Dkt.78 at 11, does not undermine the *Davis* court's assessment of Congress's intent. Nor is *Davis*'s analysis of congressional intent "out of date," as Plaintiffs' suggest, Dkt.78 at 11, rather, in construing statutes, courts regularly address "circumstances evidencing congressional intent," *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001). Finally, Plaintiffs' unsubstantiated, one-sentence assertion that the absentee-ballot witness requirement "has far more in common with discriminatory historical voucher practices than the ID requirement at issue in *Davis*" must be disregarded, Dkt.78 at 11, where Plaintiffs have presented zero evidence suggesting that the witness requirement is "inherently discriminatory," *see Greater Birmingham*, 992 F.3d at 1336, and have at most identified minor inconveniences for some absentee voters associated with the requirement.

Finally, Plaintiffs' effort to distinguish *Thomas*, Dkt.78 at 9, is unavailing. In that case, the court held that South Carolina's absentee-ballot witness requirement "d[id] not require the witness to be a part of a particular 'member of any class' or subset of society" for purposes of Section 201, when that requirement "allow[ed] for a myriad of competent individuals to witness the oath whether the witness themselves are registered to vote or not." *Thomas*, 613 F. Supp. 3d at 962. Plaintiffs contend that the statute at issue in *Thomas* "did not limit eligible witnesses" to any "class," as Plaintiffs define that term. Dkt.78 at 9. But the key point in *Thomas* was that the statute "allow[ed] for a *myriad of competent individuals* to witness the oath," 613 F. Supp. 3d at 926 (emphasis added), and the same is true here.

II. The Court Should Grant Summary Judgment In Favor Of The Legislature On Count II, Under 52 U.S.C. § 10101(a)(2)(B), The Materiality Provision Of The Civil Rights Act Of 1964

As explained in its Motion, the Legislature is also entitled to summary judgment on Plaintiffs' claim under the Civil Rights Act's Materiality Provision, 52 U.S.C. § 10101(a)(2)(B), for three independently dispositive reasons. Dkt.65 at 29–42. First, the absentee-ballot witness requirement does not affect "whether [an] individual is qualified under State law to vote." Dkt.65 at 29–35. Second, it does not "deny" a person "the right . . . to vote." Dkt.65 at 35–38. Finally, even if the absentee-ballot witness requirement did somehow fall within the Materiality Provision's terms, it is a permissible "material" requirement under the statute. Dkt.65 at 38–42.

A. The Absentee-Ballot Witness Requirement Does Not Affect Voter-Qualification Determinations, So Section 10101(a)(2)(B) Does Not Apply

1. The absentee-ballot witness requirement does not fall within Section 10101(a)(2)(B)'s scope because it does not affect whether an individual is "qualified . . . to vote." 52 U.S.C. § 10101(a)(2)(B); Dkt.65 at 30–35. By providing that Section 10101(a)(2)(B) applies only to those laws "relating to any application, registration, or other act requisite to voting," *id.* § 10101(a)(2)(B), Congress made clear that the Materiality Provision regulates laws that impact an individual's ability to qualify for and register to vote—and does not reach States' election rules unrelated to voter qualification, *see Ritter v. Migliori*, 142 S. Ct. 1824, 1826 (2022) (Alito, J., dissenting from the denial of a stay); *Schwier v. Cox*, 340 F.3d 1284, 1294 (11th Cir. 2003), such as laws affecting "counting of ballots by individuals *already deemed qualified to vote*," *Friedman v. Snipes*, 345 F. Supp. 2d 1356, 1370–71 (S.D. Fla. 2004); Dkt.65 at 30–

32. Expanding the Materiality Provision's scope to laws like the absentee-ballot witness requirement that do not affect the registration process would be inconsistent with the traditional role of States in election administration under the Constitution, Dkt.65 at 32–33, and would be unworkable, Dkt.65 at 33–34.

2. As an initial matter, Plaintiffs appear to misunderstand the Legislature's argument on this prong. Dkt.78 at 17. Relying on *La Unión del Pueblo Entero v. Abbott*, --- F. Supp. 3d ----, 2023 WL 8263348 (W.D. Tex. Nov. 29, 2023), Plaintiffs construe the Legislature as arguing that "the very immateriality of the [witness] requirement takes it outside the statute's reach." Dkt.78 at 17 (quoting *Abbott*, 2023 WL 8263348, at *26). That is not the Legislature's point. Rather, the Legislature's argument is that the Materiality Provision, by its plain terms, only bars denial of the right to vote "because of an error or omission on any record or paper relating to any application, registration, or other act *requisite to voting*, if such error or omission is not material in determining whether such individual is *qualified* under State law to vote in such election." 52 U.S.C. § 10101(a)(2)(B) (emphases added). As the Legislature has explained, "requisite to voting" is a narrow phrase that encompasses voter registration and qualification, but not other actions enumerated in Section 10101(e)'s broad definition of "vote," such as "casting a ballot." *See* Dkt.65 at 30–32. The Materiality Provision's tying of materiality to an individual's qualifications only reinforces the statute's narrow scope. *See* 52 U.S.C. § 10101(a)(2)(B). Had the statute been intended to encompass any "error or omission on any record or paper *relating to voting*," it would be written that way. Instead, Congress chose significantly more

limited language, such that the Materiality Provision covers only the State's eligibility criteria and voter registration requirements. Dkt.65 at 30–33. This reading offers the most sensible interpretation of the statute, providing substantial protection of voting rights while also protecting States' "well-established and long-held . . . powers to determine the conditions under which the right of suffrage may be exercised." *Friedman*, 345 F. Supp. 2d at 1370 (citation omitted); *see also Common Cause Ind. v. Lawson*, 977 F.3d 663, 665 (7th Cir. 2020); *Ritter*, 142 S. Ct. at 1826 (Alito, J., dissenting from denial of stay).

None of the cases that Plaintiffs rely on to support their broad interpretation of the Materiality Provision deal adequately with the statutory text. Dkt.78 at 18–19.[4] As noted, the Materiality Provision applies only to errors or omissions that are "material in determining" whether an individual is "qualified under State law to vote." 52 U.S.C. § 10101(a)(2)(B). The absentee-ballot witness provision, on the other hand, comes into play after a voter has *already proven* that she is so qualified by

[4] On the other hand, the cases the Legislature cites for the proposition that the Materiality Provision is confined to laws and rules affecting individuals' ability to register to vote are on point and serve as persuasive authority to this Court. Dkt.65 at 31. Plaintiffs claim that the court's discussion of the Materiality Provision in *Thrasher v. Illinois Republican Party*, No. 4:12-cv-4071-SLD-JAG, 2013 WL 442832, at *3 (C.D. Ill. Feb. 5, 2013), was mere dicta, Dkt.78 at 18 n.8, but the court provided several reasons why the plaintiff's claim failed without specifying which was its primary holding. The court explained that the plaintiff's injury was "far afield of the actual harms [that] statute protects against: discrimination in the registration of voters" and how "[c]ourts that have applied the statute have done so in the context of voter registration." *Id.* at *3. Plaintiffs attack *McKay v. Altobello*, No. CIV A. 96-3458, 1996 WL 635987 (E.D. La. Oct. 31, 1996), saying that certain aspects of *McKay* are no longer good law, Dkt. 78 at 18 n.8, but they do not cite any case questioning the court's statement that the Materiality Provision "is an anti-discrimination statute designed to eliminate the discriminatory practices of registrars through arbitrary enforcement of registration requirements," *McKay*, 1996 WL 635987, at *1.

registering to vote. Dkt.65 at 30–31. Plaintiffs' effort to distinguish *Schwier*, Dkt.78 at 18, is unpersuasive, where the *Schwier* court expressly acknowledges that the Materiality Provision was only intended to govern laws "for voter registration." 340 F.3d at 1294. And while *Common Cause v. Thomsen*, 574 F. Supp. 3d 634 (W.D. Wis. 2021), noted that "the text of § 10101(a)(2)(B) isn't limited to race discrimination or voter registration," *id.* at 639, the Court ultimately denied the plaintiff's Materiality Provision claim because the challenged state law *was* material to determining whether an individual was qualified to vote under Wisconsin law, *id.* at 639–40, 643. The same is true of the absentee-ballot witness requirement. *See infra* pp.22–24.

Although Plaintiffs take issue with the Legislature's argument that Plaintiffs' expansive reading of the Materiality Provision would be unworkable and would invalidate a host of common state laws relating to election administration, Dkt.78 at 19, they fail to rebut the point. Plaintiffs do not address the Legislature's argument that, under Plaintiffs' interpretation of the Materiality Provision, a voter could refuse to provide an address to election officials when requesting an absentee ballot or refuse to sign his absentee ballot for himself despite the capability to do so, contrary to state law, and then sue to invalidate that state-law requirement under the Materiality Provision. Dkt.65 at 33–34. And while Plaintiffs claim that their interpretation would not require the State to deliver an absentee ballot to an applicant who submits his application late, contrary to state law, because a late absentee-ballot application is not an error "*on* any 'record or paper,'" Dkt.78 at 19, it is hard to see why that would be the case, where untimeliness is an "error" related to the submission of a

"paper." 52 U.S.C. § 10101(a)(2)(B). Plaintiffs also ignore the Legislature's point that Plaintiffs' reading would require the State to prove that every ballot rejected for noncompliance with state law involved a detail that was "material" to a determination of the voter's qualifications to vote, which is unworkable. Dkt.65 at 34.

Finally, Plaintiffs fail to rebut the Legislature's argument that a narrow interpretation of the Materiality Provision respects States' obligation to regulate election administration and best comports with the boundary between state and federal power set out by the Tenth Amendment and Elections Clause. *See* Dkt.78 at 23–24. They argue, first, that the Elections Clause gives Congress broad power to preempt state law, Dkt.78 at 23, but to do so, Congress must act with a "clear and manifest purpose," especially when, as in this case, the State's traditional role in the affected subject matter is so deeply engrained. *See Miller Brewing Co. v. Dep't of Indus., Lab. & Hum. Rels.*, 563 N.W.2d 460, 464 (Wis. 1997) (citation omitted). The Materiality Provision does not evidence any such intent and thus does not displace state-law provisions like the absentee-ballot witness requirement. While Plaintiffs next rely on the Fifth Circuit's decision in *Vote.org v. Callanen*, 89 F.4th 459 (5th Cir. 2023), to argue that the Materiality Provision is constitutional under the Fourteenth and Fifteenth Amendments, Dkt.78 at 23, *Vote.org* did not consider whether to adopt the broad construction of the Materiality Provision that Plaintiffs press here, and did not decide whether such a construction would go beyond Congress' authority under those Amendments. *See id.* at 485–87 (confirming that the Materiality Provision does not require a showing of racial discrimination). And Plaintiffs' contention that the

constitutional avoidance canon would not apply because the "Materiality Provision's plain terms are unambiguous," Dkt.78 at 24, is belied by the several courts across the country reaching an opposite conclusion on that statute's scope than Plaintiffs here, *see* Dkt.65 at 31 (citing cases).

B. The Absentee-Ballot Witness Requirement Does Not "Deny" Absentee Voters "The Right To Vote" And Thus Does Not Meet Another Key Requirement Of Section 10101(a)(2)(B)

1. The Materiality Provision does not cover the absentee-ballot witness requirement for the additional reason that the requirement does not implicate the right to vote. 52 U.S.C. § 10101(a)(2)(B); *see Vote.org v. Callanen*, 39 F.4th 297, 306 (5th Cir. 2022); Dkt.65 at 35–38. The constitutional right to vote does not include the right to vote absentee, *see McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 807–08 (1969); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 n.6 (1969); *see also Hill v. Stone*, 421 U.S. 289, 300 n.9 (1975); *Goosby v. Osser*, 409 U.S. 512, 521–22 (1973); *Bullock v. Carter*, 405 U.S. 134, 143 (1972), and, as noted above, *supra* p.3, absentee voting in Wisconsin is a "privilege," not a right, under state law, Wis. Stat. § 6.84; *Teigen*, 976 N.W.2d at 543; Dkt.65 at 36. Thus, the absentee-ballot witness requirement—which applies only to the privilege of absentee voting—does not deprive anyone in Wisconsin of "the right . . . to vote," 52 U.S.C. § 10101(a)(2)(B), and Section 10101(a)(2)(B) does not apply. Dkt.65 at 36; *see also supra* p.3.

2. Although Plaintiffs try to evade the clear mandates of both the Materiality Provision and Wisconsin law, Dkt.78 at 12–13, none of their arguments suggest that the Materiality Provision should apply here, where the absentee-ballot witness

requirement does not "deny the *right* of any individual to vote," 52 U.S.C. § 10101(a)(2)(B) (emphasis added).

Plaintiffs begin with misdirection, emphasizing the broad definition of the term "vote" in Section 10101(e) as including any act "necessary to make a vote effective" and arguing that this necessarily encompasses absentee voting. Dkt.78 at 12. But this is irrelevant, where an absentee voter's failure to comply with Wisconsin's absentee-ballot witness requirement does not "deny the *right* . . . to vote" under either federal or state law, as required for the Materiality Provision to apply. *See* Dkt.65 at 36–37. Section 10101(a)(2)(B) does not, by its own terms, supplement the constitutional right to vote with additional protections and privileges, *see* 52 U.S.C. § 10101(a)(2)(B), and Wisconsinites exercise their right to in-person voting without needing to comply with the absentee-ballot witness requirement, Dkt.65 at 21–22, 36–37. In any event, Section 10101(e)'s statutory definition of "vote" only reinforces the Legislature's position, as it defines "vote" to include "all action *necessary* to make a vote effective." 52 U.S.C. § 10101(e) (emphasis added). Here, the absentee-ballot witness requirement is not "necessary" to make a vote effective, as voters can easily avoid this requirement entirely by voting in person.[5]

[5] Plaintiffs also criticize the Legislature for relying on *Vote.org v. Callanen*, 39 F.4th 297, 306 (5th Cir. 2022)–a motions-panel opinion that concluded that a challenged state-law provision does not violate the materiality provision if alternative means of voting exist—because the merits panel in that case eventually "set aside that holding," Dkt.78 at 15 n.7 (quoting *Vote.org v. Callanen*, 89 F.4th 459, 487 (5th Cir. 2023)). But the merits-panel decision in *Vote.org* expressly left for "a later case" the question of whether "the need to cure an immaterial requirement creates a hurdle for . . . the right to vote" and did "not rely [ ] on the fact [that] alternatives exist." *Vote.org*, 89 F.4th at 487 (emphasis omitted).

Plaintiffs next suggest that the "right to vote absentee is explicitly provided by Wisconsin law," Dkt.78 at 13, but that is wrong. Wisconsin law provides that absentee voting is a privilege, rather than a right. Wis. Stat. § 6.84(1). The Wisconsin Supreme Court has confirmed that "rules governing the casting of ballots outside of election day . . . affect only the privilege of absentee voting and not the right to vote itself." *Teigen*, 976 N.W.2d at 538 n.25. That is why the Legislature's citation to *Tully v. Okeson* ("*Tully I*"), 977 F.3d 608 (7th Cir. 2020), and other constitutional right-to-vote cases is on point. *Contra* Dkt.78 at 14–15. Plaintiffs criticize the Legislature's citation to *Tully I*, noting that *Tully I* was decided in a preliminary-injunction posture. Dkt.78 at 14–15 (citing *Tully v. Okeson ("Tully II")*, 78 F.4th 377, 381 (7th Cir. 2023)). But when *Tully I* held that "the fundamental right to vote does not extend to a claimed right to cast an absentee ballot by mail" and that, "unless a state's actions make it harder to cast a ballot at all, the right to vote is not at stake," it relied on *McDonald*, 394 U.S. at 807, the first in a line of cases from the Supreme Court confirming that the right to vote does not include the right to vote absentee, Dkt.65 at 35–36 (collecting cases). Notably, while the plaintiffs in *Priorities USA* are currently urging the Wisconsin state courts to rule that the right to vote encompasses the right to vote absentee, that is not the current law, *see* Wis. Stat. § 6.84(1)—although the fact that this argument remains pending in parallel litigation provides yet another reason for this Court to stay this case, *see infra* pp.25–26.

Plaintiffs then fall back on their circular assertion that once the State decided to offer absentee voting, it has to administer its absentee-voting regime "in

accordance with federal law." Dkt.78 at 13–14. But this argument fares no better here than it did in connection with Plaintiff's Voting Rights Act claim. *See supra* pp.3–4. The point is that the Materiality Provision does not apply to the absentee-voting provisions in Wisconsin because, in Wisconsin, absentee voting is only a privilege, Dkt.65 at 30–38, and the text of the Civil Rights Act does not expand the right to vote to include absentee voting, Dkt.65 at 36. Accordingly, Plaintiffs' reliance on cases supporting the proposition that absentee-voting laws in *other* States[6] are not immune from *other* federal laws (such as the Equal Protection Clause challenge at issue in *McDonald*, 394 U.S. at 806) is inapt. Dkt.78 at 14. Regardless of what effect other federal laws may have on the absentee-ballot witness requirement or absentee voting laws in other jurisdictions, the Materiality Provision simply does not apply to absentee voting laws in Wisconsin where there is no right to vote by absentee ballot.

C. If Section 10101(a)(2)(B) Applied Here, It Would Satisfy That Provision Because The Absentee-Ballot Witness Requirement Is "Material"

1. If this Court were to find that Section 10101(a)(2)(B) does apply to laws that deal with the counting of votes rather than registration, the absentee-ballot witness requirement does not violate the Materiality Provision because it is "material." Dkt.65 at 38–42. As this Court explained in *Thomsen*, the phrase "qualified under State law" may refer to all state laws that bear on the ability of an individual to cast a vote, not just those "substantive qualifications" such as a voter's age, citizenship,

[6] In Oregon, for example, all voting is conducted by mail. Or. Rev. Stat. § 254.465. Thus, a law affecting mail-in voting procedures in Oregon may "deny" citizens the right to vote under the Materiality Provision, for reasons not applicable to Wisconsin.

and residency. 574 F. Supp. 3d at 639–40; *accord Vote.org*, 89 F.4th at 489; Dkt.65 at 38. Wisconsinites may not vote absentee without the certification of a witness, rendering the absentee-ballot witness requirement significant "to a determination whether an individual may vote under Wisconsin law." *Thomsen*, 574 F. Supp. 3d at 640; Dkt.65 at 38–40.

2. Plaintiffs first argue, incorrectly, that the absentee-ballot witness requirement is "not material" because a voter's compliance with the witness requirement does not determine whether the voter has met all state-law qualifications to vote. Dkt.78 at 19. But while Plaintiffs focus narrowly on what an individual must show to *register* to vote in Wisconsin—that is, that he or she is 18 years of age and meets the relevant residency requirements, Dkt.78 at 19—as this Court explained in *Thomsen*, the phrase "qualified under State law" may refer to other state laws that bear on the ability of an individual to cast a vote, not just those "substantive qualifications" such as a voter's age, citizenship, and residency, 574 F. Supp. 3d at 639–40. Thus, in *Thomsen*, this Court considered a challenge to Wisconsin's voter identification law requiring that an ID show certain types of information and determined that this information was "material" to whether an individual was qualified to vote under Wisconsin law. *Id.* The Fifth Circuit in *Vote.org* similarly held that Texas' wet signature requirement was a "material requirement" and part of an individual's qualifications to vote. 89 F.4th at 489. Here, an absentee voter may not vote without a witness under Wisconsin law, Dkt.49 at 38, just as Wisconsinites may not vote without proper identification, *Thomsen*, 574 F.

Supp. 3d at 639, or as Texas voters may not vote without a wet signature on their applications, *Vote.org*, 89 F.4th at 489. Although Plaintiffs try to distinguish *Thomsen* by arguing that the court there "relied upon an implicit assumption that the voter identification requirement itself is material," Dkt.78 at 20, that is a distinction without a difference. Like the voter identification requirement, the absentee-ballot witness requirement bears upon the ability of an individual to cast an absentee ballot in Wisconsin. *See supra* pp.22–23.

Plaintiffs further suggest that "state interests play no role" in whether a requirement is "material" under the Materiality Provision, and that the Materiality Provision extends beyond "discriminatory or arbitrary requirements." Dkt.78 at 21–22. Section 10101(e), however, expressly defines "qualified under State law" to mean "qualified according to the laws, customs, or usages of the State." 52 U.S.C. § 10101(e). Wisconsin's specific "laws" and "customs" designed to safeguard the privilege of absentee voting are thus relevant in assessing whether the State's absentee-ballot witness requirement is "material" to whether an absentee voter is "qualified" to vote in Wisconsin. *See id.* § 10101(a)(2)(B).

III. Alternatively, This Court Should Continue To Stay Its Resolution Of Plaintiffs' Claims, Pending The Wisconsin Appellate Courts' Resolution Of *Priorities USA* And *League of Women Voters*

A. As the Legislature has explained, this Court has broad discretion to stay this case, *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936), and should exercise that discretion here, Dkt.65 at 42–51. While the outcomes of *Priorities USA v. Wisconsin Elections Commission*, No. 2024AP164 (Wis. Ct. App.) ("*Priorities USA*") and *League of Women Voters v. Wisconsin Elections Commission*, No. 2024AP166 (Wis. Ct. App.)

("*LWV*"), on appeal will not have a preclusive effect on this case, the appellate courts' decision in each will very likely simplify the issues before this Court. Dkt.65 at 44–48. Resolution of *Priorities USA* could moot Plaintiffs' claims here, Dkt.65 at 44, and resolution of various issues in *LWV* could provide important persuasive authority for the Court's decision, Dkt.65 at 44–45. Further, the Supreme Court has "repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election," *Republican Nat'l Comm. v. Democratic Na'tl Comm.*, 140 S. Ct. 1205, 1207 (2020) (collecting cases), and "[c]ourt orders affecting elections, especially conflicting orders," which are possible here, "can themselves result in voter confusion and consequent incentive to remain away from the polls," *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006) (per curiam). This Court should stay these proceedings until the Wisconsin state courts have resolved *Priorities USA* and *LWV*.

Moreover, issue preclusion does not apply in this case, and thus the outcome of *LWV* is not preclusive on the parties here. Dkt.65 at 47–48. The traditional doctrine of issue preclusion would not apply, because the parties here are different than those in *LWV* and do not share an "identity of interest" with the *LWV* parties. Dkt.47–48 (quoting *Clarke v. Wis. Elections Comm'n*, 998 N.W.2d 370, 393 (Wis. 2023)). Nor would nonmutual offensive issue preclusion apply here because that doctrine "simply does not apply" against the State. Dkt.47–48 (quoting *United States v. Mendoza*, 464 U.S. 154, 162 (1984)).

B. Plaintiffs fail to muster any persuasive arguments against a stay, in light of the pending proceedings in *Priorities USA* and *LWV*. Dkt.78 at 26–27. They

contend, initially, that "this action will necessarily persist notwithstanding the ultimate lawfulness of the subsidiary address requirement" at issue in *LWV*, Dkt.78 at 26, but the Legislature does not dispute this fact. Rather, as the Legislature explained, the Wisconsin state courts' resolution of whether the Materiality Provision applies to the absentee-ballot witness requirement could serve as persuasive authority for this Court, thereby promoting judicial efficiency. Dkt.65 at 49–50. Further, Plaintiffs do not contest, and therefore concede, that the interests of judicial efficiency are served by staying this case in favor of *LWV*. The argument for staying this case in favor of *Priorities USA* is even more compelling, where the plaintiffs there (represented by the same counsel as Plaintiffs here) seek to invalidate the absentee-ballot witness provision altogether, which relief, if eventually granted, would moot Plaintiffs' instant claims entirely. Dkt.65 at 49–50.[7]

Thus, Plaintiffs' assertion that the proceedings in *Priorities USA* and *LWV* "will not provide additional context or clarity" to this Court in assessing Plaintiffs' claim is wrong. Dkt.78 at 27. And while Plaintiffs criticize the Legislature as seeking a "seemingly indefinite stay," Dkt.78 at 27, that is not the case; rather, the Legislature merely requests a limited stay while the Wisconsin state courts resolve overlapping issues regarding Wisconsin's absentee-ballot witness requirement. Like

[7] Plaintiffs cite to the Legislature's briefing in *Priorities USA*, which explains that if the Wisconsin Supreme Court reverses the Dane County Circuit Court's judgment and instead rules in the plaintiffs' favor, the remedy will be a remand for further proceedings, including discovery and summary judgment proceedings. Dkt.78 at 27. This fact does not undermine the Legislature's point that the Wisconsin courts' resolution of the issues in *Priorities USA* could moot Plaintiffs' claims entirely and provide persuasive authority for this Court's resolution of the claims here. *See supra* pp.24–25.

all litigation, the state court proceedings may take some time to resolve, but that fact alone does not support denying a stay here, especially given the substantial overlap in the issues presented by these cases. *See Adaptor, Inc. v. Sealing Sys., Inc.*, No.09-CV-1070, 2010 WL 4236875, at *2 (E.D. Wis. Oct. 21, 2010) ("Though the potential pendency may be longer than desired, it is by no means indefinite.").

With respect to preclusion, Plaintiffs concede that they are limited to asserting, at most, nonmutual offensive issue preclusion, Dkt.78 at 25–26, and contend that they are entitled to application of that doctrine here, despite the fact that nonmutual offensive issue preclusion does not apply against the State, *see* Dkt.65 at 47 (citing *Mendoza*, 464 U.S. at 162). Plaintiffs' only response to the Legislature's point that courts do not apply nonmutual offensive issue preclusion against the State is that this is a principle of federal, rather than state, law. Dkt.78 at 26. But as the Wisconsin Supreme Court has noted, the "development of the doctrine of collateral estoppel in Wisconsin was similar to that in the federal courts." *Michelle T. by Sumpter v. Crozier*, 495 N.W.2d 327, 33 (Wis. 1993). ***Plaintiffs have not identified a single state court case ever applying nonmutual offensive issue preclusion against the State of Wisconsin under Wisconsin law***, let alone a case applying issue preclusion against the State with respect to a question of pure law like the one at issue here. *See* Dkt.78 at 25–26. That makes sense: the government regularly litigates cases of broad public significance that "might warrant relitigation." *Mendoza*, 464 U.S. at 162; *see State of Idaho Potato Comm'n v. G & T Terminal Packaging, Inc.*, 425 F.3d 708, 713 (9th Cir. 2005). Such is the case here, where Plaintiffs seek to invalidate an

important state election law enacted to further the State's policy of "carefully regulat[ing]" absentee voting. *See* Wis. Stat. § 6.84(1).

Indeed, Plaintiffs do not grapple at all with the harmful effects of their position, which would serve to "freez[e] the first final decision" on legal issues litigated against the State, "substantially thwart[ing] the development of important questions of law." *Mendoza*, 464 U.S. at 160–64; *Klauser on Behalf of Whitehorse v. Babbitt*, 918 F. Supp. 274, 279 (W.D. Wis. 1996). This case demonstrates why applying nonmutual offensive issue preclusion against the State is ill-advised, and why Plaintiffs can point to no authority applying issue preclusion under similar circumstances. In *LWV*, the plaintiffs challenged under the Materiality Provision Section 6.87's requirement that absentee-ballot witnesses provide an "address" on the witness certificate, *see* Wis. Stat. § 6.87(2), and requested limited relief with respect to certain categories of witness addresses, *see* Dkt.78 at 25. Here, by contrast, Plaintiffs seek to invalidate Section 6.87's absentee-ballot witness requirement on its face. It would make no sense to stop the State from even litigating the facial validity of Wis. Stat. § 6.87(2) based upon the more limited *LWV* proceedings.

Finally, Plaintiffs are wrong to suggest that a decision entered by this Court on Wisconsin's absentee-ballot witness requirement in parallel to the ongoing state court proceedings will not cause confusion. Dkt.78 at 28–30. If this Court were to enter a conflicting order on whether the Materiality Provision applies to Wisconsin's absentee-ballot witness requirement, clerks and voters will inevitably be confused about which order controls, and how election officials should interpret and apply

Wisconsin law. The same confusion will result if this Court agrees with the Dane County Circuit Court, only to have the Wisconsin appellate courts reverse the Dane County Circuit Court's ruling and hold that the Materiality Provision does not apply to the absentee-ballot witness requirement. The only way to avoid this confusion is to stay this case while the parallel state court litigation is resolved.

CONCLUSION

This Court should grant the Legislature's Motion For Summary Judgment.

Dated: March 22, 2024.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of March, 2024, a true and accurate copy of the foregoing was served via the Court's CM/ECF system upon all counsel of record.

/s/Misha Tseytlin
MISHA TSEYTLIN