

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,

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

Defendants.

THE WISCONSIN STATE LEGISLATURE'S
RESPONSE IN OPPOSITION TO PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiffs' Motion For Summary Judgment is the mirror-image of the Legislature's Motion For Summary Judgment, and thus Plaintiffs' Motion fails for the same reasons that the Legislature is entitled to judgment, as the Legislature explained in its Motion. The contrary arguments that Plaintiffs raise are without merit, including because Plaintiffs confuse Wisconsin's generous decision to offer broadly the privilege of absentee voting with the right to vote in person, and because Plaintiffs claim that Congress buried within the Civil Rights Acts of 1964 and Voting Rights Act of 1965 a previously unknown prohibition against States employing commonly used tools like witness requirements to combat absentee voting fraud. Plaintiffs further take the remarkable position that this Court should rush forward with the present case during two state court appeals dealing with the same state law provision that Plaintiffs challenge here, while giving preclusive effect against the State to one of those ongoing state cases. This Court should deny Plaintiffs' Motion.

STATEMENT¹

A. Wisconsin's Voting Laws, Including Its Absentee-Ballot Witness Requirement, Make Voter Registration And Voting Easier

Wisconsin has "lots of rules that make voting easier" in the State, from the registration process to the actual casting of a ballot. *Luft v. Evers*, 963 F.3d 665, 672 (7th Cir. 2020); *Frank v. Walker*, 768 F.3d 744, 748 & n.2 (7th Cir. 2014).

¹ The Legislature repeats the same background statement as in its Motion For Summary Judgment, *see* Dkt.65 at 3–17, given the overlap between the Legislature's Motion and Plaintiffs' present Motion.

“Registering to vote is easy in Wisconsin.” *Frank*, 768 F.3d at 748 & n.2. Any competent adult U.S. citizen without a felony conviction and who has resided at her current address for at least 28 consecutive days prior to the election is qualified to vote in Wisconsin. Wis. Stat. §§ 6.02(1), 6.03(1); Wis. Const. art. III, § 1; Legislature PFOF ¶ 3. Qualified voters may register to vote in several ways: in person before Election Day; by mail; by online application; or at their polling place on Election Day. Wis. Stat. §§ 6.30, 6.33–.34, 6.55; Legislature PFOF ¶ 4.

Casting a ballot is similarly easy in Wisconsin. *See Luft*, 963 F.3d at 672; *accord Frank*, 768 F.3d at 748. Registered voters may choose to cast their ballots in person on Election Day at polling places any time from 7 a.m. until 8 p.m., and they are entitled to cast their ballots as long as they are in line when the polls close. Wis. Stat. § 6.78(1m), (4); Legislature PFOF ¶¶ 6–7. Alternatively, voters may utilize curbside voting on Election Day, where local clerks offer this statutorily permissible option. Wis. Stat. § 6.82(1); Legislature PFOF ¶ 8. Wisconsiners are also entitled to take time off from work to vote, and employers may not penalize their employees for doing so. Wis. Stat. § 6.76; Legislature PFOF ¶ 9. For disabled voters, Wisconsin law allows them to request assistance in casting their ballots at polling places, to use paper ballots at municipal polling places using electronic voting machines, or to request other accommodations that help them exercise their right to vote. *See Wis. Stat. §§ 6.82(2)–(3), 5.36; Legislature PFOF ¶ 10.*

Wisconsin has also long provided a generous absentee voting regime for qualified, registered voters who are “unable or unwilling to appear at the polling place

in [their] ward or election district[s].” Wis. Stat. § 6.85(1); *see* 1999 Wis. Act 182, §§ 90m, 95p (creating Wisconsin’s current absentee-voting regime, requiring the absentee voter to vote in the presence of one witness, in 2000);² 1965 Wis. Act 666, § 1 (creating Wis. Stat. § 6.87 in 1966 and imposing a “2 witnesses” requirement);³ Legislature PFOF ¶ 11. Today, this regime permits voters to exercise the “privilege” of absentee voting, Wis. Stat. § 6.84(1), in numerous, convenient ways, Legislature PFOF ¶ 12. Voters may request absentee ballots in person, by mail, Wis. Stat. § 6.86(1)(a)(1)–(6); Legislature PFOF ¶ 13, or—in certain circumstances (such as military voters, those living overseas, or nursing home residents)—by email or fax, Wis. Stat. §§ 6.865, 6.86(ac), 6.86(2)(a), 6.87(3)(d), 6.875; Legislature PFOF ¶ 13. “[T]he privilege of voting by absentee ballot must be carefully regulated to prevent,” among other risks, “overzealous solicitation of absent electors”; “undue influence on an absent elector to vote” in a particular manner; and other “similar abuses,” like ballot-harvesting schemes. Wis. Stat. § 6.84(1).

Studies show that “[a]bsentee ballots [are] the largest source of potential voter fraud,” as the landmark Carter-Baker Commission on Federal Election Reform concluded. Legislature PFOF ¶ 14 (citing Ex. A to Decl. of Kevin M. LeRoy (“LeRoy Decl.”), Carter-Baker Comm’n on Fed. Elections Reform, *Building Confidence in U.S. Elections* 46 (2005) (citing *Balancing Access and Integrity: The Report of the Century Foundation Working Group on State Implementation of Election Reform* at 67–69

² Available at <https://docs.legis.wisconsin.gov/1999/related/acts/182.pdf> (all websites last visited Mar. 8, 2024).

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

(N.Y., Century Foundation Press, 2005)). “Absentee balloting is vulnerable to abuse in several ways.” Legislature PFOF ¶ 15 (citing Ex. A to LeRoy Decl. at 46). “Blank ballots mailed to the wrong address or to large residential buildings might get intercepted,” and “[c]itizens who vote at home, at nursing homes, at the workplace, or in church are more susceptible to pressure, overt and subtle, or to intimidation.” Legislature PFOF ¶ 16 (citing Ex. A to LeRoy Decl. at 46). “Vote buying schemes are far more difficult to detect when citizens vote by mail.” Legislature PFOF ¶ 17 (citing Ex. A to LeRoy Decl. at 46). Accordingly, in Wisconsin, “[w]hile the legislature has recognized absentee voting has many benefits for voters, the legislature has also enacted safeguards designed to minimize the possibility of fraud.” *Teigen v. Wis. Elections Comm’n*, 976 N.W.2d 519, 543 (Wis. 2022); *see also Jefferson v. Dane County*, 951 N.W.2d 556, 561 (Wis. 2020); *Lee v. Paulson*, 623 N.W.2d 577, 579 (Wis. Ct. App. 2000).

In Wisconsin, like in many other States, absentee voters must fill out their ballots in the presence of a witness. Wis. Stat. § 6.87(2), (4)(b)1; Legislature PFOF ¶¶ 19–20.⁴ Under the current version of Wis. Stat. § 6.87, absentee voters must mark and fold their ballots before a witness who is an adult U.S. citizen and then place the ballot in the official absentee-ballot envelope. Wis. Stat. § 6.87(2), (4)(b)1; Legislature PFOF ¶ 21. The absentee voter and witness must then complete certain attestations on the printed certificate provided with each absentee ballot envelope. Specifically,

⁴ *See, e.g.*, Ala. Code § 17-11-9; Alaska Stat. § 15.20.203; La. Rev. Stat. § 18:1306; Minn. Stat. § 203B.07; N.C. Gen. Stat. § 163-231; S.C. Code §§ 7-15-380, 7-15-220.

the voter certifies that she is “a resident” of a particular political subdivision, that she is “entitled to vote” in that subdivision, that she is “not voting at any other location,” and that she “exhibited the enclosed ballot unmarked to the witness” before marking the ballot “in [the witness’s] presence and in the presence of no other person.” Wis. Stat. § 6.87(2); Legislature PFOF ¶ 23. After observing the absentee-voting process, the witness “certif[ies] that [he or she is] an adult U.S. citizen and that the above statements are true and the voting procedure was executed as there stated,” and then signs the certification. Wis. Stat. § 6.87(2); Legislature PFOF ¶ 24. These certifications are printed on the back of the ballot envelope sent to each absentee voter, as reproduced immediately below:

STEP 2 **VOTER must complete this part**

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

- I am a resident of the ward or of the aldermanic district of the municipality in the county of the state of Wisconsin indicated hereon **OR** I am entitled to vote in the ward or aldermanic district at the election indicated hereon
- I am not voting at any other location in this election
- I am unable or unwilling to appear at the polling place in the ward on Election Day, or I have changed my residence within the state from one ward to another less than 28 days before the election
- I displayed the ballot unmarked to the witness and in the presence of no other person marked the ballot and enclosed and sealed it in this envelope in a manner that no one but myself and an assistant under s. 6.87 (5), if I requested assistance, could know how I voted
- I requested this ballot and this is the original or a copy of that request

X


Voter Signature

Certification of Assistant (If applicable)
I certify that the voter is unable to sign their name due to a disability and that I signed the voter's name at the direction and request of the voter

Assistant Signature

STEP 3 **WITNESS must complete this part**

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



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

X

Witness Signature

Witness Printed Name

Witness Address (Number, Street Name, City)

Legislature PFOF ¶ 25 (citing Ex. B to LeRoy Decl., *Official Absentee Ballot Application/Certification*, WEC⁵).

The Wisconsin Elections Commission (“WEC”) issues uniform instructions for absentee voters, which instructions currently provide, in relevant part, that the absentee voter must: “[m]ark [the] ballot in the presence of [the] witness”; “[r]efold

⁵ Available at <https://elections.wi.gov/wec-form/official-absentee-ballot-application-certification>.

[the] voted ballot and place it inside of the return envelope”; “[s]eal the envelope in the presence of [the] witness”; “[f]ill out the required sections of the absentee return envelope”; and “[r]eturn [the] ballot.” Legislature PFOF ¶ 26 (citing Ex. C to LeRoy Decl., *Uniform Instructions for Wisconsin Absentee Voters*, WEC⁶). The instructions also recommend that the voters mail back the ballot “at least one week” before Election Day. Legislature PFOF ¶ 27 (citing Ex. C to LeRoy Decl.).

Finally, WEC provides a ballot tracking service to all absentee voters. Legislature PFOF ¶ 28 (citing Ex. D to LeRoy Decl., *Track My Ballot*, WEC⁷). The “Track My Ballot” tool allows voters to check the status of their ballot by simply providing their names and dates of birth. Legislature PFOF ¶ 29 (citing Ex. D to LeRoy Decl.). The tracker allows them to see if their ballots have been received and if there are any errors that will need to be cured in order to have their ballots counted. Legislature PFOF ¶ 30 (citing Ex. D to LeRoy Decl.). The website also allows voters to request an entirely new ballot if they are concerned their ballot has been lost or may not make it to its destination by Election Day. Legislature PFOF ¶ 31 (citing Ex. D to LeRoy Decl.).

B. Pending Parallel State-Court Cases—Including One Filed By Plaintiffs’ Counsel—Challenge The Absentee-Ballot Witness Requirement On State Constitutional Grounds, And The Witness Address Requirement Under The Materiality Provision

The Wisconsin state appellate courts are currently considering multiple state-court parallel cases to the pending federal case here.

⁶ Available at <https://elections.wi.gov/wec-form/uniform-absentee-ballot-instructions>.

⁷ Available at <https://myvote.wi.gov/en-us/Track-My-Ballot>.

First, before filing the Complaint here, counsel for Plaintiffs in this case filed a four-count complaint in the Circuit Court for Dane County, Wisconsin, on behalf of plaintiff Priorities USA, among others, against WEC, challenging the same absentee-ballot witness requirement at issue here under the Wisconsin Constitution. Legislature PFOF ¶ 36 (citing Ex. E to LeRoy Decl., Dkt.2, *Priorities USA v. Wis. Elections Comm'n*, No. 2023CV1900 (Wis. Cir. Ct., Dane Cnty. July 20, 2023) (“*Priorities USA*”). The Legislature successfully intervened in those proceedings as a Defendant. Legislature PFOF ¶ 37 (citing Ex. F to LeRoy Decl., Dkt.73, *Priorities USA* (Sept. 11, 2023)). The Dane County Circuit Court recently granted a motion to dismiss in *Priorities USA*, dismissing the plaintiffs’ facial constitutional challenge to Wis. Stat. § 6.87(4)(b)1 (among other statutes), Legislature PFOF ¶ 38 (citing Ex. G to LeRoy Decl., Dkt.100, *Priorities USA* (Jan. 24, 2024)), and then accepted the plaintiffs’ notice of voluntary dismissal of their more limited, “hybrid” constitutional claim against the witness requirement, Legislature PFOF ¶ 39 (citing Ex. H to LeRoy Decl., Dkt.103, *Priorities USA* (Jan. 29, 2024)). The *Priorities USA* plaintiffs appealed the Circuit Court’s final judgment to the Wisconsin Court of Appeals, Legislature PFOF ¶ 40 (noting appeal docketed as *Priorities USA v. Wis. Elections Comm'n*, No. 2024AP164 (Wis. Ct. App.)), and then petitioned the Wisconsin Supreme Court to bypass the Court of Appeals in light of the approaching November 2024 General Election, Legislature PFOF ¶ 41 (citing Ex. I to LeRoy Decl., *Petition to Bypass, Priorities USA v. Wis. Elections Comm'n*, No. 2024AP164 (Feb. 9, 2024)).

Second, a separate state case challenges the absentee-ballot witness requirement as preempted by federal law. Legislature PFOF ¶ 42 (citing Ex. J to LeRoy Decl., Dkt.94, *League of Women Voters of Wis. v. Wis. Elections Comm'n*, No. 2022CV2472 (Wis. Cir. Ct., Dane Cnty. Dec. 23, 2022) (“*LWV*”). Specifically, in *LWV*, the plaintiffs argued that denial of the right to vote due to “omission of certain witness address components would violate” Section 10101(a)(2)(B) of the Civil Rights Act, specifically challenging “the prohibition on denying a vote based on an immaterial omission or error.” Legislature PFOF ¶ 43 (citing Ex. J to LeRoy Decl.) Section 10101(a)(2)(B), known as the Materiality Provision, is one of the same federal statutes that Plaintiffs invoke here. The Legislature intervened in the *LWV* proceedings. Legislature PFOF ¶ 44 (citing Ex. K to LeRoy Decl., Dkt.34, *LWV* (Oct. 7, 2022)). The Dane County Circuit Court entered summary judgment in the *LWV* plaintiffs’ favor, finding that the Materiality Provision applies to the witness address requirement and that the witness’ address is not “material to whether a voter is qualified.” Legislature PFOF ¶ 45 (citing Ex. L to LeRoy Decl., Dkt.157 at 5, *LWV* (Jan. 2, 2024)). Following that decision, the Circuit Court entered judgment as to the Materiality Provision claim and issued an injunction providing that “no absentee ballot may be rejected” with “witness certifications” falling into the following four categories: (a) “[t]he witness’s street number, street name, and municipality are present, but there is neither a state name nor a ZIP code provided”; (b) “[t]he witness’s street number, street name, and ZIP code as present, but there is neither a municipality nor a state name provided”; (c) “[t]he witness’s street number and street

name are present and match the street number and street name of the voter, but no other address information is provided”; and (d) “[t]he witness certification indicates that the witness address is the same as the voter’s address” with use of specified language or other markings. Legislature PFOF ¶ 46 (citing Ex. M to LeRoy Decl., Dkt.161, *LWV*(Jan. 30, 2024)). Both plaintiffs and the Legislature appealed, and the Court of Appeals has consolidated those cases. Legislature PFOF ¶ 47 (noting appeals docketed as *League of Women Voters of Wis. v. Wis. Elections Comm’n*, No.2024AP166 (Wis. Ct. App.) (“*LWV*”). The Dane County Circuit Court and the Wisconsin Court of Appeals recently denied a request from the Legislature to stay the Circuit Court’s injunction pending appeal, Legislature PFOF ¶ 48 (citing Ex. N to LeRoy Decl., Dkt.177, *LWV* (Feb. 5, 2024); Ex. X to LeRoy Decl., Order, *LWV*, No.2024AP166 (Feb. 8, 2024)), and merits briefing on the Legislature’s appeal has yet to commence, Legislature PFOF ¶ 49 (citing *LWV*, No.2024AP166 (Wis. Ct. App.)).

Third, another case filed in Wisconsin’s Dane County Circuit Court seeks an order judicially defining a witness’ “address” for purposes of the absentee-ballot witness address requirement. Legislature PFOF ¶ 50 (citing Ex. O to LeRoy Decl, Dkt.160, *Rise v. Wisconsin Elections Comm’n*, No. 2022CV2446 (Wis. Cir. Ct., Dane Cnty. Mar. 24, 2023) (“*Rise*”). Again, the Legislature moved to intervene, and the Dane County Circuit Court granted the motion. Legislature PFOF ¶ 51 (citing Ex. P to LeRoy Decl, Dkt.71, *Rise* (Oct. 6, 2022)). The Circuit Court recently granted the *Rise* plaintiffs’ motion for summary judgment, holding that the term “address” as

used in Wis. Stat. § 6.87 means “a place where a person or organization may be communicated with.” Legislature PFOF ¶ 52 (citing Ex. Q to LeRoy Decl., Dkt.233, *Rise* (Jan. 2, 2024)).⁸ Following that decision, the Circuit Court issued an injunction ordering that clerks may not “reject[] or return[] for cure any absentee ballot based on a witness’s address, if the face of the certificate contains sufficient information to allow a reasonable person in the community to identify a location where the witness may be communicated with.” Legislature PFOF ¶ 54 (citing Ex. S to LeRoy Decl., Dkt.238, *Rise* (Jan. 30, 2024)). The Circuit Court further ordered WEC to “rescind” or “revise and reissue” its guidance defining the term “address” and to notify municipal clerks of “their obligation not to reject, return for cure, or refuse to count any absentee ballot based on a witness’s address,” if that address complies with the Circuit Court’s “address” definition. Legislature PFOF ¶ 55 (citing Ex. S to LeRoy Decl.). The Legislature appealed to the Wisconsin Court of Appeals, Legislature PFOF ¶ 56 (noting appeals docketed as *Rise v. Wis. State Legislature*, No. 2024AP165 (Wis. Ct. App.)), and the Dane County Circuit Court and the Wisconsin Court of Appeals recently denied the Legislature’s request to stay the Circuit Court’s injunction pending appeal, Legislature Supplemental (“Supp.”) PFOF ¶¶ 2–3 (citing Ex. Y to Second Decl. of Kevin M. LeRoy (“Second LeRoy Decl.”), Dkt.252, *Rise* (Feb. 5, 2024); Ex. Z to Second LeRoy Decl., *Rise v. Wis. Elections Comm’n*, No. 2024AP165 (Wis. Ct. App. Feb. 27, 2024)). The Wisconsin Court of Appeals set expedited briefing

⁸ On August 23, 2023, the Circuit Court procedurally consolidated *Rise* with *LWV* as companion cases for purposes of trial. Legislature PFOF ¶ 53 (citing Ex. R to LeRoy Decl., Dkt.203, *Rise* (Aug. 23, 2023)).

on the merits due to the nature of the issues involved in the case, and the Legislature's opening brief is currently due April 3, 2024. Legislature Supp. PFOF ¶ 4 (citing Ex. Z to Second LeRoy Decl., *Rise*, No. 2024AP165 (Wis. Ct. App. Feb. 27, 2024); Ex. AA to Second LeRoy Decl.).

Following the Dane County Circuit Court's decisions in *LWV* and *Rise*, WEC issued a series of new guidance documents to municipal and county clerks throughout Wisconsin informing them of the *LWV* and *Rise* courts' decisions and providing guidance on implementing those decisions for the upcoming elections in the State. Legislature PFOF ¶ 58 (citing Ex. U to LeRoy Decl., *LWV* Clerk Communication (Feb. 9, 2024); Ex. V to LeRoy Decl., *Rise* Clerk Communication (Feb. 9, 2024)).

C. Plaintiffs Bring This Action, Alleging That Wisconsin's Absentee-Ballot Witness Requirement Violates Federal Law, And The Legislature Successfully Intervenes As A Defendant

1. On October 2, 2023, Plaintiffs filed a two-count Complaint against WEC, its six commissioners, its administrator, and three individual municipal clerks for the cities of Brookfield, Madison, and Janesville, challenging Wisconsin's absentee-ballot witness requirement under federal law. *See generally* Dkt.1. WEC is the state agency responsible for administering Wisconsin's elections laws, *see* Wis. Stat. § 5.05(1), while city clerks in Wisconsin are the local-government officials charged with supporting municipal governments' administrative functions, including by managing election procedures in their respective jurisdictions, *see id.* §§ 5.02(10), 5.84, 5.89, 5.72, 6.87, 7.41.

Plaintiffs' Complaint challenges the absentee-ballot witness requirement in its entirety, claiming that Section 6.87 either violates the Voting Rights Act of 1965 or,

alternatively, is unlawful under the 1964 Civil Rights Act's Materiality Provision. Dkt.1 ¶¶ 50–61. Plaintiffs bring Count I under Section 201 of the Voting Rights Act, which provides, in relevant part, that “[n]o citizen shall be denied . . . the right to vote” “because of his failure to comply with any test or device,” including a “requirement that . . . as a prerequisite for voting,” the voter must “prove his qualifications by the voucher of registered voters or members of any other class.” 52 U.S.C. § 10501. According to Plaintiffs, Section 6.87’s absentee-ballot witness requirement constitutes an unlawful voucher requirement under Section 201 of the Voting Rights Act because it prohibits election officials from counting absentee ballots unless the witness first certifies that the voter’s qualifications to participate in the election “are true.” Dkt.1 ¶ 53. In Count II, Plaintiffs assert an alternative claim against Section 6.87 under the Civil Rights Act’s Materiality Provision. *Id.* ¶ 58. The Materiality Provision prohibits, as relevant here, the States from denying “any individual” the right “to vote in any election 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). If the Court determines that the Section 6.87’s absentee-ballot witness requirement does not violate the Voting Rights Act (per Count I), Plaintiffs contend that the requirement must then “not [be] material in determining whether [an] individual is qualified under State law to vote,” meaning that it cannot lawfully

serve as the basis for disqualifying an absentee voter or rejecting her ballot under the Materiality Provision. Dkt.1 ¶¶ 59, 61.

2. On October 30, 2023, the Legislature moved to intervene as a Defendant here on behalf of the State, seeking to protect the State’s unique, sovereign interests in the continued validity of Wisconsin law and to defend the exercise of its own constitutional powers, including to “[p]rovid[e] for absentee voting.” Dkt.29 at 2 (citing Wis. Const. art. III, § 2). This Court granted the Legislature’s motion on December 5, 2023, noting the “the significant differences between the legislature’s and other defendants’ arguments.” Dkt.47 at 5.

D. The Legislature Moves To Dismiss Or Stay, And This Court Denies That Motion Without Prejudice, While Granting A Partial Stay

Contemporaneously with its motion to intervene, the Legislature filed a proposed motion to dismiss or stay adjudication of this case, which proposed motion the Court accepted for filing after the Court granted the Legislature’s request to intervene. *See generally* Dkt.49. The Legislature explained that the Court should abstain from hearing this case or stay it pending the Wisconsin state courts’ resolution of *Priorities USA* and *LWV*, given that they both involve challenges to Wisconsin’s absentee-ballot witness requirement. *Id.* at 12–17. But if the Court did reach the merits of Plaintiffs’ claims here, the Legislature argued that both claims should be dismissed under Federal Rule of Civil Procedure 12(b)(6). *Id.* at 17–40. Count I should be dismissed because the absentee-ballot witness requirement is not a “prerequisite” to voting under Section 201, does not relate to a voter’s “qualifications” to vote, and does not require the “voucher” of any members of a class.

Id. at 17–26. And Count II should be dismissed because either the absentee-ballot witness requirement falls outside the scope of Section 10101(a)(2)(B) or because it constitutes a permissible “material” qualification to vote under Wisconsin law. *Id.* at 26–40.

On January 17, 2024, this Court issued a decision denying the Legislature’s motion to dismiss “without prejudice to defendants’ renewing their arguments in a motion for summary judgment,” Dkt.56 at 2, while also “conclud[ing] that a partial stay is appropriate on both of plaintiffs’ claims,” *id.* at 11–12, so the Court could “reserve a ruling on the merits . . . while related cases are pending in state court,” *id.* at 2. As the Court explained, “*Priorities USA* could resolve or simplify plaintiffs’ claim under the Voting Rights Act.” *Id.* at 13. This is because the case “will likely require the Wisconsin courts to construe § 6.87 and to resolve the dispute regarding the scope of what the witness must certify,” thus “[i]f the state court sides with defendants on that issue, plaintiffs’ claim under the Voting Rights Act fails.” *Id.* at 12. And the Court recognized that the recent summary-judgment decision in *LWV* “potentially complicates the decision in this case” because “there is significant overlap in the arguments raised by the parties in both cases, and the state court’s interpretation of the Materiality Rule has implications beyond the issue of the witness’s address.” *Id.* at 14–15. But due to “the time-sensitive nature” of the claims

presented, the Court decided to “allow the parties to continue litigating,” including by filing summary judgment motions under current deadlines. *Id.* at 13.⁹

The Court’s January 17 Order directed the parties to discuss three particular issues in their summary-judgment briefing: (1) “whether principles of issue or claim preclusion will affect” this Court’s decision regarding the Civil Rights Act Materiality Provision claim “once judgment is entered in [LWV]”; (2) “if neither issue nor claim preclusion applies, whether this court should stay resolution of the Civil Rights Act claim pending resolution of [LWV] or the 2024 election, and, if so, what authority supports such a stay”; and (3) “if the court were to decide the Civil Rights Act claim, how confusion can be avoided or minimized in the event that this court reaches a different conclusion than the state court in [LWV].” *Id.* at 15.

Finally, the 2024 election cycle in Wisconsin is fast-approaching. On April 2, 2024, Wisconsin will hold a Presidential Preference Primary as well as a Spring General Election. See Legislature PFOF ¶ 32 (citing Ex. W to LeRoy Decl., *Wisconsin Elections Commission 2024 Calendar of Election Events*, WEC¹⁰). Then, on August 13, 2024, Wisconsin will hold a Fall Primary. Legislature PFOF ¶ 33. Finally, on

⁹ This Court also granted WEC’s request to be dismissed from the case on sovereign-immunity grounds, finding that Plaintiffs had “not even attempt[ed]” to show abrogation of sovereign immunity. *Id.* at 7. The Court found that the “[i]ndividual state officials are not entitled to sovereign immunity when a plaintiff seeks prospective relief for ongoing violations of federal law.” *Id.* at 8 (citing *McDonough Assocs., Inc. v. Grunloh*, 722 F.3d 1043, 1049 (7th Cir. 2013)). Thus, the Court declined to dismiss them from the case. *Id.* at 10.

¹⁰ Available at <https://elections.wi.gov/resources/quick-reference-topics/2023-2024-calendar-election-events>.

November 5, 2024, the State will hold the Fall General Election. Legislature PFOF ¶ 34.

STANDARD OF REVIEW

This Court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). “Material facts” are those that “might affect the outcome of the suit,” and a dispute is “genuine” if “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson*, 477 U.S. at 248. “[T]he plain language of Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). “In such a situation, there can be ‘no genuine issue as to any material fact,’ since a complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.” *Id.* at 322–23 (citation omitted). The moving party is thus “entitled to a judgment as a matter of law.” *Id.* at 323.

“Where, as here, the parties filed cross-motions for summary judgment, [the court] construe[s] all inferences in favor of the party against whom the motion under consideration is made.” *Cremation Soc’y of Ill., Inc. v. Int’l Bd. of Teamsters Loc. 727*, 869 F.3d 610, 616 (7th Cir. 2017) (quoting *Rupcich v. United Food & Com. Workers Int’l Union, Loc. 881*, 883 F.3d 847, 853 (7th Cir. 2016)). The basic standard

for prevailing at summary judgment remains the same in the face of cross-motions: “Summary judgment is proper only ‘if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.’” *Id.* (quoting Fed. R. Civ. P. 56(a)).

ARGUMENT

I. Plaintiffs Are Not Entitled To Summary Judgment On Count I Under Section 201 Of The Voting Rights Act Of 1965

A. For the reasons in the Legislature’s Memorandum In Support Of Motion For Summary Judgment Or, In The Alternative, To Stay, Dkt.65 at 18–28, and briefly summarized below, the Legislature is entitled to summary judgment on Count I, which is based upon a purported violation of Section 201 of the Voting Rights Act of 1965, codified at 52 U.S.C. § 10501.

First, the absentee-ballot witness requirement does not violate Section 201(b)’s “test or device” prohibition because the provision is not a “prerequisite for voting or registration for voting.” 52 U.S.C. § 10501(b); Dkt.65 at 19–22. “Prerequisite” means “[s]omething that is necessary before something else can . . . be done.” Prerequisite, *Black’s Law Dictionary* (11th ed. 2019). Thus, courts have interpreted Section 10501(b) as “bar[ring] a State from denying the right to vote in any federal, state, or local election because of ‘any test or device,’” *Oregon v. Mitchell*, 400 U.S. 112, 144–45 (1970) (plurality opinion) (citing 52 U.S.C. § 10501(b)), and “prohibiting the denial of the right to vote in any election for failure to pass a [covered] test,” *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2331 (2021); accord *NAACP v. New York*, 413 U.S. 345, 350–51 (1973) (discussing similar language now found in 52 U.S.C.

§ 10303(c) and explaining that it “prohibit[s] the use of tests or devices . . . when the effect is to deprive a citizen of his right to vote”). The absentee-ballot witness requirement does not “condition[] the right to vote” on a voter satisfying a prohibited test or device, *Puerto Rican Org. for Pol. Action v. Kusper*, 490 F.2d 575, 579 (7th Cir. 1973), because, under Wisconsin law, absentee voting is a “privilege,” not a “right,” Wis. Stat. § 6.84(1); *Teigen*, 976 N.W.2d at 543; *see also Greater Birmingham Ministries v. Sec’y of State for State of Ala.*, 992 F.3d 1299, 1335 (11th Cir. 2021).

Second, the absentee-ballot witness requirement is not a “test or device” that, as relevant here, requires 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); Dkt.65 at 22–27. The absentee voting procedures provided in Section 6.87 require the absentee voter to follow detailed procedures when executing the ballot and make certain certifications, including that she meets the residency requirements to vote, will not vote in person on Election Day, and followed all absentee voting procedures. Wis. Stat. § 6.87(4)(b)(1), (2). The witness, in turn, then certifies that “the above statements are true and the voting procedure was executed as there stated.” *Id.*; *see* Legislature PFOF ¶ 25 (citing LeRoy Decl. Ex. B (reproducing absentee-ballot certifications, including the witness certification)). Considering the statute’s context, *see State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 681 N.W.2d 110, 124 (Wis. 2004), the best reading of Section 6.87’s witness certification is that the witness must certify only that the absentee voter completed the procedures required under Section 6.87 and is not required to verify the accuracy of the voter’s statements related to her

qualifications such as her residency or inability to vote in person on Election Day. The private citizen witness can only certify as to what she has witnessed—*i.e.*, that the voter followed all required procedures—and requiring the private citizen to perform verification duties would be pointless and duplicative. *See Thomas v. Andino*, 613 F. Supp. 3d 926, 961 (D.S.C. 2020). A clerk may only issue an absentee ballot to an absentee voter *after* the voter has satisfied all eligibility and registration requirements. Wis. Stat. §§ 6.20, 6.85, 6.86. WEC’s own instructions for absentee voting are in accord with this reading of Section 6.87, as they make no mention of the voter needing to produce an ID, provide his address, or share any other information. Legislature PFOF ¶ 26 (citing Ex. C to LeRoy Decl.).

Third, Section 6.87 does not violate Section 201 of the Voting Rights Act because it does not require verification of absentee voters’ qualifications by a “member[]” of a certain “class.” 52 U.S.C. § 10501(b)(4); Dkt.65 at 27–28. Section 6.87 allows all “adult U.S. citizens” to witness an absentee ballot, Wis. Stat. § 6.87(4)(b)1, and is not the sort of “inherently discriminatory voucher” that Section 10501(b)(4) targets, *Greater Birmingham Ministries*, 992 F.3d at 1336; *see Davis v. Gallinghouse*, 246 F. Supp. 208, 217 (E.D. La. 1965). 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. Thus, Section 6.87’s absentee-ballot witness requirement does not require the voucher of a witness from a particular “class” and does not violate Section 10501(b)(4).

C. All of Plaintiffs’ arguments with respect to Count I fail.

1. Plaintiffs have not established that the absentee-ballot witness requirement is a “prerequisite” to voting. Dkt.68 at 8–10.

While Plaintiffs argue that the absentee-ballot witness requirement is a “prerequisite” to the “right to vote,” 52 U.S.C. § 10501, because “an absentee voter must comply with the witness requirement for the absentee ballot to be counted,” Dkt.68 at 8, they overlook the distinction between the *right* to vote and the *privilege* of absentee voting in Wisconsin. *See supra* pp.3, 19. So while Plaintiffs claim that if a State chooses “to offer a manner of voting to some class of voters, it must do so in a way that complies with federal law,” Dkt.68 at 8, this argument merely begs the question as to what Section 201 prohibits. As explained, the absentee-ballot witness requirement does not implicate Section 201 at all, because that requirement does not affect the “right to vote,” *see* 52 U.S.C. § 10501(a), and instead only implicates the privilege of absentee voting under Wisconsin law, *Teigen*, 976 N.W.2d at 543, putting it outside of Section 201 entirely. Plaintiffs’ hypothetical—asking whether Wisconsin could “require any voter who wished to vote at the polls to pass a literacy test” if it also “offered voucher-free absentee voting,” Dkt.68 at 9—is thus a red herring. Such a restriction on in-person voting would implicate the “right to vote” under Wisconsin law and thus Section 201. *See* 52 U.S.C. § 10501. As for any restrictions placed on the privilege of absentee voting, while such restrictions could well violate other provisions of federal law or the U.S. Constitution, they would not implicate Section 201.

None of the caselaw that Plaintiffs rely on support their position. *See* Dkt.68 at 8–10. In *Voto Latino v. Hirsch*, Nos. 1:23-CV-861, 1:23-CV-862, 2024 WL 230931 (M.D.N.C. Jan. 21, 2024), the plaintiffs challenged North Carolina’s rules regarding same-day voter registration, which allowed election officials to discard ballots if cards mailed to same-day voters were returned undeliverable. This case did not involve absentee voting, nor did it involve Section 201’s “test or device” prohibition. *See id.* at *20–28. While the plaintiffs’ challenge in *Saucedo v. Gardner*, 335 F. Supp. 3d 202 (D.N.H. 2018), did involve absentee voting, the issue there was whether New Hampshire’s signature-match requirement for absentee ballots—which required election officials to reject absentee ballots without notice to the voter if the official determined that the signature on the voter’s absentee-ballot application did not match the voter’s signature on an accompanying affidavit—was unconstitutional. *See id.* at 205–06. The plaintiffs did not contend that the challenged law violated Section 201 and the *Saucedo* court even acknowledged that absentee voting is a “privilege” distinct from the “fundamental right to vote.” *Id.* at 217 (citations omitted).

Plaintiffs’ reliance on Section 202 of the Voting Rights Act fares no better. According to Plaintiffs, the absentee-ballot witness requirement “fall[s] within Section 201’s ambit” because Section 202 of the Voting Rights Act, codified at 52 U.S.C. § 10502(d), provides qualified voters who “may be absent from their election district” on Election Day with a federal right to vote absentee in presidential and vice-presidential elections. Dkt.68 at 9. They argue that “Wisconsin may not condition

the exercise of an express federal right to vote absentee on a voucher that is prohibited by the immediately preceding section of the very same law.” *Id.* But Section 202 expressly conditions this federal right to vote absentee for President and Vice President on the absentee voter “hav[ing] complied with the requirements prescribed by law of such State or political subdivision providing for the casting of absentee ballots in such election.” 52 U.S.C. § 10502(c). It further instructs the States to “provide by law for the casting of absentee ballots for . . . President and Vice President.” *Id.* § 10502(d). In other words, the Voting Rights Act explicitly authorizes States to regulate absentee voting with state-law requirements and that is exactly what the Legislature has done here through the absentee-ballot witness requirement. Even if Section 201 were to apply to Wisconsin’s absentee-voting regime to the limited extent that federal law guarantees a right to vote absentee in presidential and vice-presidential elections, Plaintiffs do not limit their Voting Rights Act challenge to this narrow category of presidential and vice-presidential election absentee ballots. They have, instead, sought to invalidate Wisconsin’s absentee-ballot witness requirement *on its face*, and so Plaintiffs’ Count I fails on its own terms. *See 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.” (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987))).

Finally, Plaintiffs try to support their “prerequisite” arguments by distinguishing the Eleventh Circuit’s decision in *Greater Birmingham Ministries*,

stating that the voter identification law at issue therein acted as a “failsafe” available to voters who lacked proper identification, thus expanding the options for voters. Dkt.68 at 10. But while *Greater Birmingham Ministries* does describe the State’s positive identification provisions as a “failsafe,” the Eleventh Circuit’s key point was that “positive identification by another individual is not a *requirement* to vote in Alabama” and so Section 201 did not apply. 992 F.3d at 1335–36 (emphasis added). As the Eleventh Circuit explained, the positive identification law was “only one of the options available to voters,” *id.* at 1336, and the same is true here. Although voters must comply with Wisconsin’s absentee-ballot witness requirement to exercise the privilege of voting absentee, it is not a “requirement to vote” in Wisconsin. *See id.* (“the facts related to the ease of obtaining a photo ID show that no one in Alabama is ‘required’ to rely on the positively identify provision because they have the option of acquiring a photo ID with little to no effort and no cost” (citation omitted)).

2. Plaintiffs next contend that the absentee-ballot witness requirement forces absentee voters to prove their qualifications, Dkt.68 at 10–12, but their interpretation of Section 6.87 ignores its plain meaning, statutory context, and purpose.

Plaintiffs argue that the only proper reading of Section 6.87 is one that requires a witness to certify that the absentee voter is qualified to vote. *Id.* at 10–11. When Section 6.87 states that the witness must certify that “the above statements are true and the voting procedure was executed as there stated,” Wis. Stat. § 6.87(2), according to Plaintiffs, it must mean that the witness is required to verify both the preceding statements related to the voter’s qualifications and the procedures

followed, Dkt.68 at 11. But, as noted above, Section 6.87(2) does not state that the witness must certify “all the above statement are true.” Wis. Stat. § 6.87(2). Further, the statute must be considered in its context, and the witness does not need to re-verify the voter’s credentials, nor does he have the means to do so, making any reading requiring the witness to perform such duties “absurd” and “unreasonable.” *Kalal*, 681 N.W.2d at 124; *Thomas*, 613 F. Supp. 3d at 961.

Next, Plaintiffs contend that in *LWV*, the Commission Defendants conceded that the absentee-ballot witness requirement involves the witness’ vouching for the qualifications of the absentee voter in defending the absentee-ballot witness address requirement in a case under the Civil Rights Act’s Materiality provision, Dkt.68 at 11, and that a “witness’s attestation cannot be material to substantive qualifications if the witness attests only to procedural compliance,” *id.* at 12. Initially, the Legislature has consistently maintained the same position throughout these proceedings that the absentee-ballot witness requirement does not require the voter to prove her qualifications. Dkt.49 at 24. Further, and as explained in detail below, *infra* pp.35–36, the absentee-ballot witness requirement plays a critical and material role in the absentee voting process. The purpose of rules like the absentee-ballot witness requirement is to “deter[] and detect[] voter fraud, *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191 (2008); Wis. Stat. § 6.84; accord *League of Women Voters of Wis. Educ. Network, Inc. v. Walker*, 851 N.W.2d 302, 314 (Wis. 2014), and a witness does not need to verify the voter’s qualification to serve such a function. When a witness certifies that the absentee voter completed a single, unmarked ballot

in the presence of the witness and no one else, Wis. Stat. § 6.87(2), (4)(b)(1), the witness helps protect against the notorious types of fraud and abuse inherent in absentee voting, see Legislature PFOF ¶¶ 14–17 (citing Ex. A to LeRoy Decl., at 46). The witness confirms that the voter was not completing multiple ballots and that she was not voting under the visible influence of another individual. *Id.*

After incorrectly arguing that Section 6.87 requires the witness to verify the absentee voter's qualifications, Plaintiffs purport to distinguish *Thomas* and *Merrill*, cases in which courts held that laws did not violate Section 201(b)(4). In *People First of Alabama v. Merrill*, the Northern District of Alabama considered an Alabama witness provision that required the witness to vouch as to the identity of the absentee voter. 467 F. Supp. 3d 1179, 1225 (N.D. Ala. 2020). The court held that because the requirement did not ask the witness to vouch to the absentee voter's qualifications to vote, it did not violate Section 10501(b)(4). *Id.* Similarly, in *Thomas*, the District Court for South Carolina considered an absentee witness law that required only that the witness "confirm that the voter complete[d] the voter's oath and sign[ed] the document." 613 F. Supp. 3d at 961. The court held that the law was not a prohibited "test or device" under Section 10501(b) because the law did not require the witness to "confirm that the voter [was] registered to vote or 'qualified' in any way. *Id.* Plaintiffs argue that the case at hand is distinguishable because unlike the laws at issue in *Merrill* and *Thomas*, the absentee-ballot witness requirement *does* require verification of the voters' qualifications, Dkt.68 at 12, but such argument hinges on this Court's adoption of Plaintiffs' erroneous interpretation of the witness

certification in Section 6.87. For the reasons stated above, *supra* pp.19–20, the absentee-ballot requirement does not involve the voucher of a voter’s qualifications and thus does not violate Section 201, just as in *Thomas* and *Merrill*.

3. Finally, Plaintiffs incorrectly argue that because the witness requirement specifies that an adult U.S. citizen must serve as the witness, it requires a voucher by “members of any other class.” Dkt.68 at 12–13. That interpretation of “class” is absurd, as “class” in this context is most naturally read to refer to something more specific than a category that encompasses all of the Nation’s eligible voters. And Plaintiffs’ interpretation of “class” ignores completely Section 201 and the Voting Rights Act’s historical context. In Section 201, “Congress undoubtedly meant” 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. *Davis*, 246 F. Supp. at 217. For example, in *United States v. Logue*, 344 F.2d 290 (5th Cir. 1965) (per curiam), a case upon which Plaintiffs themselves rely, Dkt.68 at 9, the Fifth Circuit addressed this type of voucher requirement, noting that it “impos[ed] . . . a heavier burden” on Black voters who had to “obtain [their] supporting witness from the ranks of the white population.” *Id.* at 292. Section 201 targets these “inherently discriminatory voucher” practices, *Greater Birmingham Ministries*, 992 F.3d at 1336, a fact that provides essential historical context for interpreting the plain terms of this statute.

II. Plaintiffs Are Not Entitled To Summary Judgment On Count II Under The Materiality Provision Of The Civil Rights Act Of 1964

In Count II, Plaintiffs allege that the absentee-ballot requirement violates Section 10101(a)(2)(B) of the Civil Rights Act of 1964, known as the “Materiality Provision.” Section 10101(a)(2)(B) provides that “[n]o person acting under color of law shall” “deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election.” 52 U.S.C. § 10101(a)(2)(B). The absentee-ballot witness requirement does not violate this provision, as the requirement does not deal with voters’ qualifications and does not deny Wisconsinites the right to vote, and, thus, does not fall within the Materiality Provision’s scope. In the alternative, even if this Court were to find that Section 6.87 is covered by the Materiality Provision, Plaintiffs’ claim in Count II fails because the absentee-ballot witness requirement is “material.”

A. The Legislature is entitled to summary judgment on Count II and, again, summarizes arguments set forth in its own memorandum here. Dkt.65 at 29–42.

First, the absentee-ballot witness requirement does not violate Section 10101(a)(2)(B) 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. Section 10101(a)(2)(B) does not regulate all laws affecting “voting”—Congress added specific qualifiers, restricting Section 10101(a)(2)(B)’s reach to those laws affecting whether an individual is “qualified” to vote and prohibiting certain acts or rules “relating to any application,

registration, or other act requisite to voting.” *Id.* § 10101(a)(2)(B). It does not “apply to the counting of ballots by individuals *already deemed qualified to vote.*” *Friedman v. Snipes*, 345 F. Supp. 2d 1356, 1371 (S.D. Fla. 2004) (emphasis in original).

Second, Section 10101(a)(2)(B) does not apply for the additional reason that the absentee-ballot witness requirement does not “deny the right of any individual to vote.” 52 U.S.C. § 10101(a)(2)(B); Dkt.65 at 35–38. In line with Supreme Court precedent and other federal court decisions, the Seventh Circuit held in a preliminary injunction posture that an absentee voting law was unlikely to fall within Section 10101(a)(2)(B)’s reach because “[t]he fundamental right to vote means the ability to cast a ballot, but not the right to do so in a voter’s preferred manner, such as by mail.” *Tully v. Okeson*, 977 F.3d 608, 613 (7th Cir. 2020); *see also Vote.Org v. Callanen*, 39 F.4th 297, 306 (5th Cir. 2022). And, as explained, *supra* pp.3, 19, absentee voting in Wisconsin is a “privilege,” not a right. Wis. Stat. § 6.84; *Teigen*, 976 N.W.2d at 543. Neither the text of the Civil Rights Act nor the Constitution alter the meaning of the fundamental right to vote to include absentee voting. *See* 52 U.S.C. § 10101(a)(2)(B); *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).

Third, and in the alternative, if this Court were to find that Section 6.87 is controlled by Section 10101(a)(2)(B) as a law affecting voters’ qualifications to vote, it is “material in determining whether such individual is qualified under State law to

vote in such election” under any reasonable interpretation of Section 10101(a)(2)(B). 52 U.S.C. § 10101(a)(2)(B); Dkt.65 at 38–42. The parties agree that under Wisconsin law, “[t]he statutory requirements governing absentee voting must be completely satisfied or ballots may not be counted.” *Teigen*, 976 N.W.2d at 539 (citing Wis. Stat. § 6.84(2)). Thus, assuming that Section 10101(a)(2)(B) applies to the absentee-ballot witness requirement, it surely plays a material—*i.e.*, “significant,” “serious,” and “substantial,” *Material*, Black’s Law Dictionary (11th ed. 2019); *Material*, Oxford English Dictionary Online (2023)¹¹—role in the absentee-voting process. Further, as this Court explained in *Common Cause v. 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, and residency. 574 F. Supp. 3d 634, 639–40 (W.D. Wis. 2021) (holding voter identification law requiring ID to display certain information was “material” under Section 10101(a)(2)(B)); *see also Vote.Org v. Callanen*, 89 F.4th 459, 489 (5th Cir. 2023) (finding Texas’ wet signature requirement was a “material requirement” and part of a voter’s qualifications to vote). Wisconsinites may not vote absentee without the certification of a witness, rendering the absentee-ballot witness requirement “significant” or of “substantial import” “to a determination whether an individual may vote under Wisconsin law.” *Common Cause*, 574 F. Supp. 3d at 640.

B. Plaintiffs’ counterarguments all fail.

¹¹ Available at https://www.oed.com/dictionary/material_adj?tab=meaning_and_use#37801431 (last visited March 8, 2024) (subscription required).

1. Initially, Plaintiffs contend that rejection of a voter’s absentee ballot for noncompliance with the witness requirement denies the “right to vote,” Dkt.68 at 20–22, but their arguments are meritless.

To begin, Plaintiffs point to the broad statutory definition of “vote,” Dkt.68 at 20, and the Supreme Court’s statement that the right to vote includes “the right to have one’s vote counted,” Dkt.68 at 20 (quoting *Reynolds v. Sims*, 377 U.S. 533, 554 (1964)). But Section 10101(a)(2)(B) deals with the “error[s] or omission[s] on any record or paper relating to any application, registration, or other *act requisite to voting*,” 52 U.S.C. § 10101(a)(2)(B) (emphasis added), not just “voting.” “[R]equisite to voting” is a narrow phrase that encompasses voter registration and qualification, but not other actions enumerated in Section 10101(e)’s definition of “vote,” such as “casting a ballot.” *Supra* pp.28–29. The statute clearly ties the relevant materiality to a voter’s *qualifications*. Even if “the Supreme Court has long confirmed that the constitutional right to vote includes ‘the right to have one’s vote counted,’” Dkt.68 at 20 (quoting *Reynolds*, 377 U.S. at 554), that does not change Section 10101(a)(2)(B)’s narrow scope.

Next, Plaintiffs refer to a series of cases in which courts have held that the Materiality Provision prohibits laws like the absentee-ballot witness requirement at issue here, which, as Plaintiffs state, “require election officials to reject absentee ballots because of immaterial paperwork errors or omissions made in the process of submitting them.” Dkt.68 at 20–21. But none of the cases that Plaintiffs cite—including the Third Circuit’s opinion in *Migliori v. Cohen*, 36 F.4th 153 (3d Cir. 2022),

vacated by the Supreme Court in *Ritter v. Migliori*, 142 S. Ct. 1824 (2022)—grappled adequately with the statutory text, Dkt.68 at 21. The Materiality Provision applies only to laws dealing with 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). When an absentee voter reaches the point in the absentee voting process where she must comply with the witness requirement, she has already proven her qualifications through the registration process, causing the witness requirement to fall outside the Materiality Provision’s scope. *Supra* p.20. The cases that Plaintiffs cite are unpersuasive and directly contrary to a slew of cases adopting the Legislature’s position. *See, e.g., Schwier v. Cox*, 340 F.3d 1284, 1294 (11th Cir. 2003); *Thrasher v. Ill. Republican Party*, No.4:12-cv-4071-SLD-JAG, 2013 WL 442832, at *3 (C.D. Ill. Feb. 5, 2013); *Snipes*, 345 F. Supp. 2d at 1370–71; *McKay v. Altobello*, No.CIV.A. 96-3458, 1996 WL 635987, at *1 (E.D. La. Oct. 31, 1996); *accord Ritter*, 142 S. Ct. at 1826 (Alito, J., dissenting from the denial of a stay, joined by Justices Thomas and Gorsuch).¹²

Finally, Plaintiffs argue, incorrectly, that the fact that the absentee-ballot witness requirement is a restriction on absentee voting rather than in-person voting is of no moment. Dkt.68 at 22. They assert that “[o]nce a voter invokes their right to

¹² Separate writings from Supreme Court Justices serve as persuasive authority for the lower federal courts, which explains why the Seventh Circuit repeatedly cites such separate writings in its majority opinions. *See, e.g., Helbachs Café LLC v. City of Madison*, 46 F.4th 525, 529 (7th Cir. 2022) (favorably citing *TransUnion LLC v. Ramirez*, 594 U.S. 413, 445–48 (2021) (Thomas, J., dissenting)); *Suggs v. United States*, 705 F.3d 279, 284 (7th Cir. 2013) (favorably citing *Magwood v. Patterson*, 561 U.S. 320, 351–52 (2010) (Kennedy, J., dissenting)); *Kolman v. Sheahan*, 31 F.3d 429, 433–34 (7th Cir. 1994) (favorably citing *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 111–12 (1990) (Scalia, J. dissenting)).

vote by absentee ballot, any rejection of that ballot necessarily denies that right.” *Id.* But as explained above, *supra* pp.3, 19, Wisconsin does not provide a right to vote absentee. Wis. Stat. § 6.84; *Teigen*, 976 N.W.2d at 543.

Additionally, Plaintiffs’ argument on this point highlights the constitutionally suspect and unworkable nature of their reading of the Materiality Provision. States have “well-established and long-held . . . powers to determine the conditions under which the right of suffrage may be exercised,” *Snipes*, 345 F. Supp. 2d at 1370 (citation omitted), as the Constitution provides that the administration of federal elections is a responsibility shared by the States and the federal government, U.S. Const. art. I, § 4, cl. 1. Were this Court to find that Section 10101(a)(2)(B) reaches voter rules beyond those related to voter registration and qualification, that would call into question the validity of basic state laws regulating election administration, “upset[ting] the usual constitutional balance of federal and state powers,” *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991), and creating significant constitutional concerns for the Materiality Provision. Further, if Section 10101(a)(2)(B) applies to “any rejection” of a ballot, Dkt.68 at 22, a voter could sue with each rejection. States would face a heavy burden if any of these voters filed a Civil Rights Act challenge: to prevail in the face of a Section 10101(a)(2)(B) challenge, the State would need to show that each rejection met the precondition that the “error or omission” was “material.” 52 U.S.C. § 10101(a)(2)(B). This sort of regime would be significantly constrain States in exercising their core authority to “devis[e] a set of rules under which everyone who

takes reasonable steps to cast an effective ballot can do so.” *Common Cause Ind. v. Lawson*, 977 F.3d 663, 665 (7th Cir. 2020).

2. Plaintiffs also contend that the information included on a witness certification “is not material in determining whether such individual is qualified under State law to vote.” Dkt.68 at 22–24 (quoting 52 U.S.C. § 10101(a)(2)(B)). Plaintiffs again are wrong.

First, as they argue with respect to their Voting Rights Act claim, Dkt.68 at 12, Plaintiffs suggest that if Section 6.87 does not require the absentee witness to certify to the absentee voter’s qualifications to vote, it cannot be material, Dkt.68 at 23. That is wrong. The absentee-ballot witness requirement plays an essential role in “prevent[ing] the potential for fraud [and] abuse,” while still affording voters the “privilege of voting by absentee ballot.” Wis. Stat. § 6.84(1); *accord Brnovich*, 141 S. Ct. at 2348; *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989); *Lee*, 623 N.W.2d at 579. Wisconsin protects its important interest in “detering and detecting voter fraud,” *Crawford*, 553 U.S. at 191, by requiring voters to cast their absentee ballots in the presence of a witness. Asking the witness to certify that the voter completed an unmarked ballot in his presence and in the presence of no one else protects against the varieties of voter fraud inherent in absentee voting such as “overzealous solicitation of absent electors” and “undue influence” on absentee voters. Wis. Stat. § 6.84(1). For example, an individual may be less willing to execute illegally another’s absentee ballot or multiple ballots, *see* Legislature PFOF ¶ 16 (citing Ex. A to LeRoy Decl., at 46), if the individual must cast those illicitly obtained

ballots in front of a witness, who election officials may contact to verify that the absentee-ballot procedures were observed. The witness' procedure-verification role also furthers Wisconsin's anti-voter fraud objective by ensuring that the ballot process is completed in the statutorily prescribed manner.

Second, Plaintiffs contend that “[i]mmaterial requirements cannot be transformed into ‘material’ ones merely because they are imposed by state law,” noting that a State’s enactment of voting laws does not “automatically neuter” application of Section 10101(a)(2)(B). Dkt.68 at 24. This argument is irrelevant because the state law at issue here—the absentee-ballot witness requirement—serves the core purpose of supporting the integrity of Wisconsin’s absentee voting regime, and is thus “material.” *See* 52 U.S.C. § 10101(a)(2)(B). The purpose of Section 10101(a)(2)(B) is to ensure “the qualifications established by the State [are] applied with an even hand and nondiscriminatory.” 110 Cong. Rec. 1695 (1964). When a State enacts sensible, nondiscriminatory rules governing how and whether individuals may cast a vote, those rules should not be based on arbitrary or discriminatory factors like “race, color, previous condition of servitude, or sex.” *Id.* at 1696. The absentee-ballot witness requirement is not a discriminatory or arbitrary requirement of the kind Congress prohibited through the Materiality Provision. *See* 110 Cong. Rec. 1695 (1964). The requirement aids Wisconsin in “prevent[ing] the potential for fraud [and] abuse,” while still affording voters the “privilege of voting by absentee ballot.” Wis. Stat. § 6.84(1); *accord Lee*, 623 N.W.2d at 579; *Brnovich*, 141 S. Ct. at 2348; *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989).

Wisconsin holds an important interest in “detering and detecting voter fraud,” *Crawford*, 553 U.S. at 191, and requiring absentee voters to mark their ballots in the presence of a witness helps the State guard against the varieties of voter fraud inherent in absentee voting. *Supra* pp.25–26, 34–35. Under Plaintiffs’ approach, States’ hands would be tied in protecting their citizens against fraud in absentee voting, as they would be unable to enforce a common anti-fraud measure relied upon by several states throughout the country. *See, e.g.*, Ala. Code § 17-11-9; Alaska Stat. § 15.20.203; La. Rev. Stat. § 18:1306; Minn. Stat. § 203B.07; N.C. Gen. Stat. § 163-231; S.C. Code §§ 7-15-380, 7-15-220.

III. This Court Should Continue To Stay Its Resolution Of Plaintiffs’ Claims And Deny Plaintiffs’ Preclusion Request

This Court should continue to stay its decision in this case pending resolution of *Priorities USA* and *LWV*. While the Dane County Circuit Court’s decision in *LWV* does not preclude any parties’ argument before this Court, the resolution of *LWV* and *Priorities USA* may significantly impact this case, meriting a further stay.

A. As the Legislature explained in its Motion, this Court has inherent authority to stay the cases before it. Dkt.65 at 42 (citing *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)). The Court has broad discretion “to stay proceedings pending the resolution of other suits” where, as here, the litigation is at an early stage and the stay will not “unduly prejudice or tactically disadvantage the non-moving party,” will simplify the issues, and will “reduce the burden of litigation on the parties and on the court.” *Grice Eng’g, Inc. v. JG Innovations, Inc.*, 691 F. Supp. 2d 915, 920 (W.D. Wis. 2010) (citation omitted). 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). “Court orders affecting elections, especially conflicting orders, 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). Concerns related to voter confusion thus also serve as a basis to stay a case.

This Court should continue to stay its decision here pending the Wisconsin appellate court’s resolution of *Priorities USA*, 2024AP164, and *LWV*, 2024AP166, and through the 2024 election cycle to avoid inconsistent rulings and voter confusion. Resolution of both *Priorities USA* and *LWV* in the appellate courts could simplify the issues here and, as a result, significantly reduce the burden of this litigation. *Grice*, 691 F. Supp. 2d at 920. If the Wisconsin Court of Appeals or the Wisconsin Supreme Court concludes in *Priorities USA* that the absentee-ballot witness requirement violates the Wisconsin Constitution, that decision would moot Plaintiffs’ claims here. *Id.* As to *LWV*, while not preclusive, the Wisconsin appellate courts’ interpretation of the Materiality Provision could also serve as persuasive authority for this Court, and if the United States Supreme Court ultimately reviews *LWV*, its interpretation of the Materiality Provision would be binding. The other factors similarly weigh in favor of a stay. While this Court has now ruled on motions to dismiss, the case is still at an early stage. *Id.* This Court has not yet ruled on any of the parties’ claims on the merits, such that the benefits of a stay—which this Court has already recognized, *see* Dkt.56—still apply. In its Order on the motions to dismiss, this Court concluded

that a stay “could resolve or simplify plaintiffs’ claims” and further noted that (i) “[t]he decision in *League of Women Voters* potentially complicates the decision in this case,” (ii) there is “significant overlap in the arguments raised by the parties” here and in *LWV*, and (iii) “the state court’s interpretation of the Materiality Rule has implications beyond the issue of the witness’s address.” Dkt.56 at 13–15. A stay will not prejudice any of the parties to this case. *Grice*, 691 F. Supp. 2d at 920.

To be clear, while the *Priorities USA* and *LWV* decisions are important and have the potential to significantly impact the outcome of this litigation, the Wisconsin courts’ decisions in each are by no means preclusive. Issue preclusion only applies “when a factual or legal issue was actually litigated and determined in the prior proceeding by a valid judgment in a previous action and the determination was essential to the judgment,” so long as giving an issue-preclusive effect “would be fundamentally fair.” *Clarke v. Wis. Elections Comm’n*, 998 N.W.2d 370, 391–92 (Wis. 2023) (citations omitted). This limits the application of issue preclusion to the parties in the prior action or those with “a sufficient identity of interest with any of the [] parties.” *Id.* at 392 n.23 (citation omitted). Further, where the State is involved in a prior action, “nonmutual offensive collateral estoppel simply does not apply” against the State in the subsequent action. *United States v. Mendoza*, 464 U.S. 154, 162 (1984); see generally *Michelle T. by Sumpter v. Crozier*, 495 N.W.2d 327, 331 (1993) (“The development of the doctrine of collateral estoppel in Wisconsin was similar to that in the federal courts.”). Here, the district court’s judgment in *LWV* does not have issue-preclusive effect in this case because, and at a minimum, the parties in *LWV*

are not the same parties here and do not share an identity of interests. *Clarke*, 998 N.W.2d at 391–92, 392 & n.23. And, significantly, this Court should not apply nonmutual offensive collateral estoppel against Defendants to this case given that this doctrine “simply does not apply” against the State. *Mendoza*, 464 U.S. at 162; *see generally Michelle T.*, 495 N.W.2d at 331.

C. Plaintiffs’ contrary position on these issues is wrong, and the pairing of their positions on the stay and preclusion issues is particularly indefensible.

Starting first with preclusion, Plaintiffs rely on the Dane County Circuit Court’s *LWV* decision to argue that “the Court should preclude Commission Defendants and the Legislature 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 at 16–19. But, as noted, the parties in *LWV* are different than the parties here and do not share an identity of interests, *Clarke*, 998 N.W.2d at 391–92, 392 & n.23, and Plaintiffs cannot rely on nonmutual offensive collateral estoppel against the State, *Mendoza*, 464 U.S. at 162. The doctrine of nonmutual offensive collateral estoppel “simply does not apply” against the State, including because any other result would “freez[e] the first final decision” on any legal issue, “substantially thwart[ing] the development of important questions of law.” *Id.* at 160–64; *Klauser on Behalf of Whitehorse v. Babbitt*, 918 F. Supp. 274, 279 (W.D. Wis. 1996). Further, and notably, the Legislature is currently appealing the Dane County Circuit Court’s ruling, and the Wisconsin appellate courts may well disagree with the Circuit Court’s conclusions regarding the scope of the

Materiality Provision. If this Court were to accept Plaintiffs' invitation to apply issue preclusion and the Dane County Circuit Court is subsequently overturned, this Court will have given preclusive effect to a state court's nonbinding, legally erroneous interpretation of federal law. So, while the Legislature disagrees with Plaintiffs that preclusion applies under these circumstances, Plaintiffs' preclusion arguments provide further reason to stay this matter while the state courts resolve their cases.

Turning to Plaintiffs' stay arguments, with respect to *LWV*, Plaintiffs ignore the various ways in which decisions from the appellate courts could assist this Court in reaching its own decision. For instance, those decisions might assist this Court in a factual determination of whether the absentee-ballot witness requirement increases the chances that ballots will be rejected or through a persuasive (although not binding) interpretation of the Civil Rights Act's Materiality Provision. *Supra* pp.37–38. A continued stay will thus serve the interests of judicial efficiency. *See, e.g., Bear Archery, Inc. v. AMS, LLC*, No. 18-CV-329-JDP, 2019 WL 430941, at *2 (W.D. Wis. Feb. 4, 2019) (even if other proceedings would not totally moot the parties' dispute, resolution of the other case would "affect how [the defendant] would present its [] case"). And as to *Priorities USA*, Plaintiffs fail to address the fact that the plaintiffs there (who are represented by the same counsel as Plaintiffs here) seek to invalidate the same absentee-ballot witness provision challenged in this litigation, and have asked the Wisconsin Supreme Court to take up their challenge on bypass. *See supra* p.8. There is thus no point in this Court—at the behest of the same lawyers litigating *Priorities USA*—adjudicating whether Wisconsin has violated federal law

while there is an open dispute as to whether Wisconsin's statute complies with the Wisconsin Constitution. If the *Priorities USA* plaintiffs prevail on that claim, no further action from this Court would be required. *See supra* p.37. Further, Plaintiffs' bypass petition addresses the validity of the Wisconsin Supreme Court's decision in *Teigen*, a case that articulates Wisconsin's distinction between the *privilege* of absentee voting and the *right* to vote absentee. *See* 976 N.W.2d at 543. A Supreme Court ruling addressing that aspect of *Teigen* could well inform the Legislature's argument as to the Materiality Provision. *See supra* p.29. Accordingly, Plaintiffs' assertion that none of the questions to be resolved by the Wisconsin Supreme Court in the event it grants Plaintiffs' bypass petition would affect this case is plainly wrong. *See* Dkt.68 at 25–26.

Further, a stay pending resolution of *Priorities USA* will not, as Plaintiffs suggest, infringe the right to vote or inflict any harm. Dkt.68 at 26 (citing *Democratic Nat'l Comm. v. Bostelmann*, 451 F. Supp. 3d 952, 969 (W.D. Wis. 2020) and *Wis. Term Limits v. League of Wis. Muns.*, 880 F. Supp. 1256, 1266 (E.D. Wis. 1994)). As the Legislature has repeatedly explained, laws affecting the privilege of voting absentee simply do not affect the fundamental right to vote. Wis. Stat. §6.84(1); *Teigen*, 976 N.W.2d at 543. Wisconsin's current no-excuses-needed absentee voting regime has, moreover, been in place and has included a witness requirement since 2000, 1999 Wis. Act 182, §§ 90m, 95p, undercutting any arguments related to exigency.

Finally, Plaintiffs incorrectly suggest that there is no risk of voter confusion absent a stay, arguing that any decision here can be reconciled with the Dane County

Circuit Court's decision in *LWV* and that Wisconsin election officials have extensive experience complying with court orders. Dkt.68 at 27. With respect to the first point, Plaintiffs concede that any decision by this Court contrary to that of the Dane County Circuit Court will cause confusion, arguing only that the "best way to avoid confusion" is to give the Circuit Court's non-binding interpretation of the Materiality Provision preclusive effect. Dkt.68 at 27. But even if Plaintiffs were entitled to rely on offensive issue preclusion in these circumstances (they are not, *see supra* pp.38–40), the preclusive effect of the Dane County Circuit Court's ruling would disappear if the Legislature prevails in its pending appeal, resulting in maximum confusion for Wisconsin's voters. *Supra* p.37. And as to Plaintiffs' second point, regardless of how much experience Wisconsin's election officials have in implementing court orders, were this Court and the Dane County Circuit Court to enter conflicting orders concerning whether the Materiality Provision applies to the absentee-ballot witness requirement, this conflict would inevitably cause confusion as to which ruling should govern officials' interpretation and application of Wisconsin law.

CONCLUSION

This Court should deny Plaintiffs' Motion For Summary Judgment. Alternatively, this Court should continue to stay its adjudication of this case.

Dated: March 8, 2024.

Respectfully submitted,

/s/Misha Tseytlin

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CERTIFICATE OF SERVICE

I hereby certify that on March 8, 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