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

SUSAN LIEBERT; ANNA HAAS; ANNA POI; and ANASTASIA FERIN KNIGHT, Plaintiffs, v. WISCONSIN ELECTIONS COMMISSION, *et al.*, Defendants, WISCONSIN STATE LEGISLATURE, Intervenor-Defendant.	Civil Action No. 3:23-cv-00672-JDP

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Commission Defendants and the Legislature insist with some stridency that absentee ballot witnesses in Wisconsin do not vouch to anything. Indeed, both suggest, notwithstanding the plain text of the statute, that such a reading would be "absurd." Comm'n Defs.' Resp. in Opp'n to Mot. for Summ. J. 8, ECF No. 82; Legislature's Resp. in Opp'n to Mot. for Summ. J. 25, ECF No. 85. This argument is a sharp break with Commission Defendants' position, taken just a few months ago in *League of Women Voters*, that "Wisconsin's requirements to have a witness for the casting of an absentee ballot . . . and to have that witness provide an address . . . *both are material to determining whether the absentee voter in question is qualified to cast that absentee ballot in that election*." Decl. of Uzoma N. Nkwonta ("First Nkwonta Decl."), Ex. G. at 16, ECF No. 74-7 (emphasis added). The best explanation for the marked shift in position between the two cases is the nature of the claims—*League* presented only a Materiality Provision claim, while this case adds a Section 201 claim, and so forces the parties opposing relief to grapple with the full implications of a defense premised on the idea that the witness requirement is material.

Even taking Commission Defendants and the Legislature at their word, Plaintiffs are entitled to summary judgment. If the Court holds, as the opposing parties urge, that the witness does not attest to qualifications, it follows that rejecting a voter's ballot simply because of a missing witness certification is a cut-and-dried Materiality Provision violation. If, however, the Court concludes that the witness certificate is material to voter qualifications, it follows that the witness is vouching, and that the requirement must be enjoined on that basis instead.

ARGUMENT

I. The Court should grant summary judgment to Plaintiffs on the Materiality Provision claim.

Commission Defendants' and the Legislature's opposition briefs repeatedly insist that the witness attestation is irrelevant to voter qualifications. According to Commission Defendants, it "would be unnecessary" for a witness to attest to voter qualifications because that information has "already been verified according to absentee ballot procedures." ECF No. 82 at 7–8. The Legislature concurs and further points out that using a witness to verify qualifications "would be pointless and duplicative" because "[a] clerk may only issue an absentee ballot . . . after the voter has satisfied all eligibility and registration requirements." ECF No. 85 at 20 (emphasis omitted). If that's true, these concessions all but confirm that a witness attestation is not material to voter qualifications. And because Commission Defendants and the Legislature either concede, or fail to rebut, or are precluded from contesting that the Materiality Provision's remaining elements are satisfied here, Plaintiffs are entitled to summary judgment.

A. The rejection of a voter's absentee ballot due to a missing or incomplete witness certificate is a denial of the right to vote.

Commission Defendants do not contest that the first element of Plaintiffs' Materiality Provision claim is satisfied. The Legislature's arguments, meanwhile, are foreclosed by the statute's text. First, the Legislature argues that the Materiality Provision applies only where the individual is denied the right to register to vote. *See* ECF No. 85 at 31. That simply is not what the statute says. The law prohibits any person acting under color of law from "deny[ing] the right of any individual *to vote*," 52 U.S.C. § 10101(a)(2)(B) (emphasis added), and, eliminating any potential ambiguity, the same section of the Civil Rights Act defines the word "vote" to include "all action necessary to make a vote effective[,] including . . . having such ballot counted and included in the appropriate totals of votes cast," *id.* § 10101(a)(3)(A), (e). Because otherwise-valid

ballots would be counted and included in the election totals but for the incomplete witness certificate, the witness requirement necessarily deprives voters of their right to have their ballot counted—which is to say, it deprives them of their right to vote.

Aside from the definition of "vote," the Materiality Provision's plain language extends beyond the voter registration context and applies to an official's review of "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). As the Supreme Court unanimously recognized, "[t]he use of 'other' in [a] catchall provision" confirms congressional categorization of the previous terms. *Sw. Airlines Co. v. Saxon*, 596 U.S. 450, 459 (2022). Thus, applications and registrations are included within the broader category of "act[s] requisite to voting." 52 U.S.C. § 10101(a)(2)(B). And this is further confirmed by the fact that the term "applications" is not synonymous with "registrations."[1] For example, voters in many states *register* to vote, but then separately *apply* to vote by absentee ballot.[2]

The Legislature's mantra that "absentee voting in Wisconsin is a 'privilege,' not a right," ECF No. 85 at 29, continues to misread—or ignore—relevant law. For one, the right to "vote" is *statutorily* defined for purposes of the Materiality Provision and provides no distinction based on the means of casting a ballot. 52 U.S.C. § 10101(a)(3)(A) (citing 52 U.S.C. § 10101(e)). And Plaintiffs have explained in detail why the Legislature's passing references to *McDonald*, *Tully*,

[1] "*Ejusdem generis* neither demands nor permits that we limit a broadly worded catchall phrase based on an attribute that inheres in only one of the list's preceding specific terms." *Saxon*, 596 U.S. at 462.

[2] *Compare Voter Registration Deadlines*, Nat'l Conf. of State Legislatures (Dec. 11, 2023), https://www.ncsl.org/elections-and-campaigns/voter-registration-deadlines (cataloguing states' registration deadlines), *with Table 5: Applying for an Absentee Ballot, Including Third-Party Registration Drives*, Nat'l Conf. of State Legislatures (July 12, 2022), https://www.ncsl.org/elections-and-campaigns/table-5-applying-for-an-absentee-ballot Feb. 26, 2024 (cataloguing states' absentee ballot application processes).

and other cases are of no avail. *See* Pls.' Consolidated Opp'n to Mots. For Summ. J. 13–15 & nn.5, 7, ECF No. 78 (explaining that none of these cases stands for the proposition that absentee voting, once authorized, is not subject to federal law's protections for the right to vote).

Even if the Legislature were correct in its assertion, Wisconsin cannot disqualify ballots, in violation of federal law, merely because it deems the means of casting those ballots to be a "privilege." *See Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1319–20 (11th Cir. 2019). The Wisconsin Constitution's explicit authorization for the provision of absentee voting, as a means of "[i]mplementation" of the right to vote, is far from a relegation to so-called "privilege" status, Wis. Const. art. III, § 2, and the Legislature's sole basis for asserting that absentee voters are entitled to less protection under Wisconsin law is a statement of legislative policy lacking any binding legal impact. *See* Wis. Stat. § 6.84(1); *see also infra* Section II.A. (explaining that Wisconsin law does not treat absentee voting as a "privilege" in the relevant respects). The Legislature's reliance on several lines from *Teigen v. Wisconsin Elections Commission*—a fractured opinion that just quotes that same statute without further analysis—similarly misses the mark. 2022 WI 64, ¶ 71, 403 Wis. 2d 607, 976 N.W.2d 519 (quoting Wis. Stat. § 6.84(1)).

B. A voter's noncompliance with the witness requirement is an "error or omission" on a paper requisite to voting.

Commission Defendants argue that the Materiality Provision applies only to "a needless provision of data about the voter, like her social security number." ECF No. 82 at 16. This conclusion follows from their so-called "plain language reading" of the phrase "error or omission on any record or paper." But Commission Defendants' interpretation is far from plain. An "error" is simply a mistake. *Error*, Black's Law Dictionary (11th ed. 2019) (citing *Mistake*, Black's Law Dictionary (11th ed. 2019)). An "omission" is a "failure to do something" or the "act of leaving something out." *Omission*, Black's Law Dictionary (11th ed. 2019). Commission Defendants'

insistence that these broad and simple terms must be cabined to the "provision of data" is not supported by their straightforward definitions. Quite to the contrary, to accept Commission Defendants' argument, the Court would have to read into the statute additional limitations that are simply not reflected in its plain text. But a court "cannot replace the actual text with speculation as to Congress' intent." *Magwood v. Patterson*, 561 U.S. 320, 334 (2010).

And Commission Defendants' reading becomes even more divorced from the statutory text, as they next argue that the witness requirement is instead a "required *procedure*, reasonably designed to ensure the integrity of absentee voting." ECF No. 82 at 16 (emphasis in original). Neither the "design" of the witness requirement, nor its characterization as a "procedure," is relevant here, because compliance with the requirement is determined solely by the face of the written certificate: If the document is incomplete, the ballot cannot be counted, regardless of what procedures the voter may have followed. *See* Wis. Stat. § 6.88(3)(b). And even under Commission Defendants' theory, the "provision of data" can itself be characterized as a "procedure." *Procedure*, Black's Law Dictionary (11th ed. 2019) (defining "procedure" as a "specific method or course of action"). Thus, Commission Defendants' atextual distinction between "procedures" and "provision of data" is both incorrect and irrelevant.

The Legislature argues that the Materiality Provision applies only at the voter registration stage, ECF No. 85 at 32, but that position is not reconcilable with the statute's text, which includes and explicitly extends beyond registration-related activities. *See* 52 U.S.C. § 10101(a)(2)(B) (applying protections to "any record or paper related to any application, registration, *or other* act requisite to voting" (emphasis added)). The Legislature ignores this text and disregards the long line of authority rejecting its interpretation without any further analysis or attempt to distinguish

the facts and holdings. *See* ECF No. 85 at 32 (deeming cases cited by Plaintiffs to be "unpersuasive").

Meanwhile, the Legislature's own string cite remains inadequate. *See id.* For example, although *Schwier v. Cox* concerned voter registration activities, that decision nowhere *limits* the scope of the Materiality Provision to voter registration *alone*. *See* 340 F.3d 1284, 1294–97 (11th Cir. 2003). *Thrasher v. Illinois Republican Party*'s discussion of the Materiality Provision's scope is dicta—the decision in that case turned on the plaintiff's request to "apply the statute to the inner workings and negotiations of a state political party convention" without any "claim that the Republican Party prevented him from registering to vote or from casting a ballot . . . nor that his vote in the primary was not counted." No. 4:12-cv-4071-SLD-JAG, 2013 WL 442832, at *3 (C.D. Ill. Feb. 5, 2013). For purposes of denying a preliminary injunction, the district court in *Friedman v. Snipes* concluded that the Materiality Provision was not "*intended* to apply to the counting of ballots by individuals *already deemed qualified to vote*." 345 F. Supp. 2d 1356, 1370–71 (S.D. Fla. 2004) (first emphasis added). But that two-decade-old conclusion—reached only for purposes of a preliminary injunction—holds little persuasive value and is dwarfed by more recent and more persuasive precedent, including from this Court. *See, e.g.*, *Migliori v. Cohen*, 36 F.4th 153, 162 n.56 (3d Cir.), *vacated as moot sub nom. Ritter v. Migliori*, 143 S. Ct. 297 (2022) (mem.);[3] *La*

[3] The Legislature asserts that "[s]peerate writings from Supreme Court Justices serve as persuasive authority for the lower federal courts." ECF No. 85 at 32 n.12. But the three Seventh Circuit cases it lists each cited to a Justice's dissent in a case that was fully litigated, briefed, and argued before the Supreme Court. Any persuasive value that Justice Alito's dissent in *Ritter* may have otherwise had is entirely undermined by the fact that it was a dissent from denial of an application to stay while the petition for *certiorari* was pending, without full briefing or oral argument. And even Justice Alito conceded that his opinion was "based on the review that [he] ha[d] been able to conduct in the time allowed," thus he could not "rule out the possibility that" his "current view" would prove "unfounded" after full briefing. *See Ritter v. Migliori*, 142 S. Ct. 1824, 1824 (2022) (Alito, J., dissenting). And as Plaintiffs have repeatedly explained, the Third Circuit's opinion in *Migliori* remains highly persuasive. *See, e.g.*, ECF No. 78 at 22 n.13.

Unión del Pueblo Entero v. Abbott, No. 5:21-CV-0844-XR, 2023 WL 8263348, at *22 (W.D. Tex. Nov. 29, 2023), *stayed pending appeal sub nom. United States v. Paxton*, No. 23-50885 (5th Cir. Dec. 15, 2023), ECF No. 80 (per curiam); *Pa. State Conf. of NAACP v. Schmidt*, No. 1:22-CV-00339, 2023 WL 8091601, at *30 n.38 (W.D. Pa. Nov. 21, 2023), *stayed pending appeal sub nom. Pa. State Conf. of NAACP v. Northampton Cnty. Bd. of Elections*, No. 23-3166 (3d Cir. Dec. 13, 2023), ECF No. 43 (per curiam); *In re Georgia Senate Bill 202*, No. 1:21-mi-5555-JPB, 2023 WL 5334582, at *10 (N.D. Ga. Aug. 18, 2023); *Common Cause v. Thomsen*, 574 F. Supp. 3d 634, 636 (W.D. Wis. 2021). Lastly the decision in *McKay v. Altobello*, nearly a decade older, similarly involved denial of a preliminary injunction and it relied on doctrinal assumptions that have since been thoroughly refuted.[4] No. CIV. A. 96-3458, 1996 WL 635987, at *1 (E.D. La. Oct. 31, 1996). The overwhelming weight of authority confirms what the text of the statute already makes clear: The Materiality Provision applies to all "act[s] requisite to voting," including the completion of a witness certificate. 52 U.S.C. § 10101(a)(2)(B); *see also supra* Section I.A.

Lastly, the Legislature again hints at undeveloped constitutional questions that would purportedly arise if its reading were not adopted. ECF No. 85 at 33. But it offers no more than a conclusory statement about the supposedly "heavy burden" of demonstrating a challenged practice is "material." *Id.*[5] As Plaintiffs have explained, there is no constitutional problem created by applying the Materiality Provision with the full force of its plain terms. *See* ECF No. 78 at 23–24.

[4] Federal courts have repeatedly confirmed that the Materiality Provision: (i) can be enforced by private parties, *Vote.org v. Callanen*, 89 F.4th 459, 473–78 (5th Cir. 2023); *Schwier*, 340 F.3d at 1296; (ii) is not limited to discriminatory practices, *Migliori*, 36 F.4th at 162 n.56; (iii) is not limited to arbitrary enforcement of voting requirements, Pls.' Opp'n to Legislature's Mot. to Dismiss 20–21, ECF No. 52 (collecting cases); and, of course, (iv) extends beyond voter registration, *Thomsen*, 574 F. Supp. 3d at 636. *See also* ECF No. 78 at 16–19.

[5] The Legislature's griping about the burden of defending a challenged law is particularly unpersuasive given that the Legislature *volunteered* for the task by intervening here.

The Elections Clause and the Fourteenth and Fifteenth Amendments all provide Congress with constitutional authority to enact the Materiality Provision. *Abbott*, 2023 WL 8263348, at *25; *see also Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 9 (2013). And the Materiality Provision is "a congruent and proportional exercise of congressional power" under the Fourteenth and Fifteenth Amendments. *Vote.org*, 89 F.4th at 486–87 & n.11; *cf. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 310 (2023) (Gorsuch, J., concurring) ("[T]he Civil Rights Act of 1964 stands as a landmark on this journey and one of the Nation's great triumphs. We have no right to make a blank sheet of any of its provisions.").

C. The witness certificate is not material in determining whether a voter is qualified under Wisconsin law.

The Materiality Provision asks whether the "error or omission" on a voter's record or paper is "material in determining whether such individual is *qualified* under State law." 52 U.S.C. § 10101(a)(2)(B) (emphasis added). It *does not*, contrary to Commission Defendants' attempted re-writing, *see* ECF No. 82 at 9, ask whether the "error or omission" is material in determining whether such individual's vote may be *counted* under State law. *See Bostock v. Clayton County*, 590 U.S. 644, 674 (2020) ("The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration."). It is no surprise, then, that courts continue to hold that election practices like the witness requirement violate the Materiality Provision. As the District of Arizona recently explained, "Congress intended materiality to require some probability of actually impacting an election official's determination of a person's eligibility to vote." *Mi Familia Vota v. Fontes*, No. CV-22-00509-PHX-SRB, 2024 WL 862406, at *37 (D. Ariz. Feb. 29, 2024) (cleaned up). The court concluded a requirement that voters provide their birthplace on their voter registration forms was not material to voter qualifications and thus violated the Materiality Provision. *Id.* at *38. The same is true here,

where a voter's compliance with the witness requirement "does not determine whether he is a U.S. citizen, is 18 years of age, or meets the applicable residency and competency requirements." Legislature's Mem. in Supp. of Mot. for Summ. J. 35, ECF No. 65; *see also* Comm'n Defs.' Br. in Supp. of Mot. to Dismiss 14–15, ECF No. 20; Comm'n Defs.' Reply in Supp. of Mot. to Dismiss 3–8, ECF No. 44; Legislature's Mem. in Supp. of Mot. to Dismiss or Stay 32–33, ECF No. 49; Legislature's Reply in Supp. of Mot. to Stay or Dismiss 8, 11–12, ECF No. 53; Comm'n Defs.' Br. in Supp. of Mot. for Summ. J. 15–16, ECF No. 59; ECF No. 65 at 23–24; ECF No. 82 at 7–8; ECF No. 85 at 19–20.[6]

Commission Defendants' additional assertions—that the witness certificate "enabl[es] election officials to locate and contact the absentee voter's witness" and that the witness requirement is "one of the statutory protections for absentee voting," ECF No. 82 at 17–18—are of no help to their argument. These alleged functions, which Commission Defendants do not support with evidence, are ultimately irrelevant to the standard demanded by the Materiality Provision. *See Vote.org*, 89 F.4th at 487; *see also* ECF No. 68 at 24 (explaining that exempting voting requirements codified by state law from the Materiality Provision "would shield the same immaterial requirements that Congress sought to abolish" in enacting the Civil Rights Act). The same goes for the Legislature's oft-repeated reference to anti-fraud interests purportedly furthered by the witness requirement. *Compare* ECF No. 85 at 34–36 (Legislature's brief asserting that alleged anti-fraud and election integrity purposes of witness requirement render it material), *with*

[6] In discovery responses, Clerk Defendants admitted that the witness certificate does not provide information relevant to determining a voter's citizenship status or age. First Nkwonta Decl., Ex. D, ECF No. 74-4 (Brookfield's Resps. to Reqs. for Admis. Nos. 3–4); First Nkwonta Decl., Ex. E, ECF No. 74-5 (Janesville's Resps. to Reqs. for Admis. Nos. 3–4); First Nkwonta Decl., Ex. F, ECF No. 74-6 (Madison's Resps. to Reqs. for Admis. Nos. 3–4). And none of the Clerk Defendants stated that they use the witness requirement to determine a voter's residency. ECF Nos. 74-4, 74-5, 74-6 (Resps. to Req. for Admis. No. 5).

ECF No. 78 at 21–22 (Plaintiffs' brief explaining that state interests are irrelevant and limiting Materiality Provision to discriminatory and arbitrary actions is contrary to its text).

Finally, neither *Common Cause v. Thomsen* nor the Fifth Circuit's merits-panel decision in *Vote.org v. Callanen* defeat Plaintiffs' claims. *Thomsen*, like *League*, involved a Materiality Provision challenge to a *component* of a requirement imposed by state law. The Court's conclusion that the signature component of the voter identification requirement was material rested upon an implicit assumption that the voter identification requirement itself is material. *See Thomsen*, 574 F. Supp. 3d at 636 ("Under Wisconsin law, an individual is not qualified to vote without a compliant ID."). But here, Plaintiffs argue that the *entire* witness requirement is irrelevant to, and therefore immaterial in, determining a voter's qualifications.

Commission Defendants' and the Legislature's passing citations to *Vote.org*, meanwhile, omit the portion of the opinion where the Fifth Circuit explicitly "reject[s]" the argument "that States may circumvent the Materiality Provision by defining all manner of requirements, no matter how trivial, as being a qualification to vote and therefore material." 89 F.4th at 487; *see also* ECF No. 68 at 23–24; ECF No. 78 at 20–22. Indeed, if the Commission Defendants' and Legislature's interpretations were correct, every state law requirement could be labeled a "qualification" to vote, which would render the Materiality Provision powerless to address the same devices of suppression that led Congress to enact the law to begin with. *See* Commission on Civil Rights, Voting: 1961 Commission on Civil Rights Report, Book 1 at 56.[7] And if complying with the witness requirement is in fact a "qualification," then it runs headlong into the Vouching Rule. *See infra* Section II. There is simply no way around the interlocking defenses the Voting Rights Act and Civil Rights Act erect against unlawful disenfranchisement.

[7] Available at https://perma.cc/CC7B-T888.

D. The Court should apply issue preclusion to the first three Materiality Provision elements.

Commission Defendants and the Legislature both misunderstand the governing legal principles for issue preclusion. At the outset, Commission Defendants appear to conflate issue and claim preclusion. *See* ECF No. 82 at 15; *see also id.* at 21 ("The *League* plaintiffs [sic] did not raise the *claim* at issue here[.]" (emphasis added)). While they are correct that the plaintiff in *League* made different *claims*—which were limited to specific applications of the witness-address requirement—they are wrong to say that there was no overlap in issues. To resolve the claims in *League*, the Dane County Circuit Court necessarily resolved three threshold *issues* that are relevant here: whether failure to comply with the witness requirement (of which the witness-address requirement is part) 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. Because each of these issues is an element of a Materiality Provision claim, the *League* court logically could not have ruled for the plaintiff without deciding these three issues in the *League* plaintiff's favor. *See* ECF No. 68 at 17–18.

Commission Defendants also insist there is "a big difference between a witness's failure to print his ZIP code on the certification and the witness requirement altogether," ECF No. 82 at 15, but never explain the relevance of that observation. The distinction is puzzling—the witness address itself appears on the witness certificate and is part of the witness requirement. If the rejection of a ballot for failure to list a witness address is a denial of the right to vote, the same is true when that rejection results from a blank witness certificate. If a missing witness address is an error or omission on a record or paper (*i.e.*, the witness certification on the absentee ballot envelope), so too is a missing witness name or signature. And if filling out the address on a witness certificate is an act requisite to voting, the same conclusion applies to the full witness certificate.

This is not just a matter of law but also of logic—the witness requirement as a whole comprises the sum of its parts.[8]

Commission Defendants also assert that Wisconsin courts are "reluctant" to apply issue preclusion against state agencies. ECF No. 82 at 21. But they cite only one case that reflects any such reluctance, *see id.* (citing *Gould v. Dep't of Health & Soc. Servs.*, 216 Wis. 2d 356, 370, 576 N.W.2d 292, 298 (Wis. Ct. App. 1998))—the same case Plaintiffs acknowledged and thoroughly distinguished in their opening brief, ECF No. 68 at 16 n.4. And Commission Defendants neither discuss *Gould*'s reasoning nor refute Plaintiffs' arguments that its reasoning does not apply here.

The Legislature's arguments on this point are notably different, but no more compelling. It begins by misstating the law of issue preclusion, suggesting that mutuality of the parties is required. ECF No. 85 at 38. That is incorrect, as Plaintiffs' opening brief established with extensive authority. *See* ECF No. 68 at 16; *see also Robbins v. Med-1 Sols., LLC*, 13 F.4th 652, 657 (7th Cir. 2021) (explaining that issue preclusion "does not require identity of the parties"); *Coleman v. Lab. & Indus. Rev. Comm'n of Wis.*, 860 F.3d 461, 469 (7th Cir. 2017) (recognizing that "the requirement of mutuality has been abandoned" for issue preclusion). Nor does *Clarke v. Wisconsin Elections Commission* suggest that Wisconsin has recently elected to reinstate mutuality as a requirement for issue preclusion. *See* 2023 WI 79, ¶ 45 & n.23, 410 Wis. 2d 1, 998 N.W.2d 370. The passage the Legislature cites to imply as much in fact stands for the settled proposition that offensive issue preclusion may not be applied *against* a nonparty to the precluding action. *Id.* That passage would help the Legislature only if it (and Commission Defendants) had not been

[8] Commission Defendants' suggestion that Plaintiffs somehow forfeited the issue preclusion argument, ECF No. 82 at 16, is risible. Plaintiffs devoted six pages to the issue in their affirmative brief and cited and analyzed the relevant state and federal authority in detail.

defendants in *League*; but since they were, applying issue preclusion against them is entirely appropriate under *Clarke*.

The Legislature also suggests that "'nonmutual offensive collateral estoppel simply does not apply' against the State in the subsequent action." ECF No. 85 at 38 (quoting *United States v. Mendoza*, 464 U.S. 154, 162 (1984)). This misunderstands *Mendoza*. Here is the complete quote: "We hold, therefore, that nonmutual offensive collateral estoppel simply does not apply against the *government* in such a way as to preclude relitigation of issues such as those involved in this case." *Mendoza*, 464 U.S. at 162 (emphasis added). The "government," in this case, means the *United States*, not a state. The issue of whether and when state instrumentalities may be precluded turns on different considerations—including the nature of the instrumentality, state-law preclusion principles, and considerations of federalism—and *Mendoza* does not purport to settle that issue. So, although the Legislature describes *Mendoza* no less than three separate times as a case forbidding application of issue preclusion against a *state*, that is inaccurate at best. Moreover, even if *Mendoza* had discussed states, rather than the federal government, it still would not control. As Plaintiffs explained, and as the Legislature has conceded, the preclusive effect of a state-court judgment is a question of state law. *See* ECF No. 78 at 26 (collecting cases); *see also* ECF No. 65 at 46. The Legislature cites no Wisconsin case forbidding application of offensive issue preclusion against it or the Commission Defendants, and accordingly has forfeited the issue.

II. If the witness requirement is material to a voter's qualifications, the Court should grant summary judgment to Plaintiffs on the Vouching Rule claim.

Insofar as the Court concludes that the witness requirement *is* material to a voter's qualifications, it should grant summary judgment to Plaintiffs on the Section 201 claim. If the witness assists in verifying the voter's qualifications, then, *ipso facto*, the requirement is a voucher

of qualifications. The other elements of a Vouching Rule claim also are satisfied, and all parties agree that no dispute of material fact precludes summary judgment.

A. The witness requirement is a "prerequisite" to voting.

A requirement that, when violated, causes an otherwise-qualified voter's ballot to be disqualified is necessarily a "prerequisite" to voting for purposes of the Vouching Rule. Applying that principle to this case, Wisconsin may not authorize absentee balloting, send a qualified voter a ballot, accept return of that ballot, and then disqualify the ballot on election night—when the voter has no recourse—because the voter is deemed to have failed a "test or device." Any other holding would eviscerate Section 201. Commission Defendants do not even attempt to contest this point, and the Legislature's arguments fail.

As Plaintiffs explained, ECF No. 68 at 8, once a state elects to offer a manner of voting, it must comply with federal law in handling the ballots cast in that manner, *see Voto Latino v. Hirsch*, Nos. 1:23-CV-861 & -862, 2024 WL 230931, at *26 (M.D.N.C. Jan. 21, 2024); *Saucedo v. Gardner*, 335 F. Supp. 3d 202, 217 (D.N.H 2018). The Legislature purports to distinguish *Hirsch* and *Saucedo* on the grounds that they were not Section 201 cases, ECF No. 85 at 22, but that was never Plaintiffs' argument. Rather, those cases confirm that a state may not do whatever it wishes to ballots cast in a certain manner just because the state could have elected not to permit that manner of voting at all. In *Hirsch*, the ballots were early-voting ballots cast by same-day registrants, and in *Saucedo* they were absentee ballots. In both cases, the courts made clear that once the state authorized voters to cast their ballots in a certain way, all federal law protections for the right to vote applied in full force. *Hirsch* and *Saucedo* thus stand for the principle—never actually contested by the Legislature—that it is no defense to a federal-law voting-rights claim to say that the state could eliminate the manner of voting in question if it so chose. *See also Lee*, 915

F.3d at 1321 ("[W]e have no trouble finding that Florida's [absentee ballot signature matching] scheme imposes at least a serious burden on the right to vote.").

That principle suffices to refute the Legislature's reliance on Wis. Stat. § 6.84(1), which terms absentee voting a "privilege." The label Wisconsin law applies to absentee voting does not control. What matters under Section 201 is that absentee ballots are disqualified if the voter is found not to have satisfied the witness requirement—that disqualification renders the requirement a "prerequisite" to vote. As Plaintiffs noted in their opposition to the Legislature's motion, ECF No. 78 at 3, the Legislature's own citations confirm this understanding of "prerequisite." Most notably, *Puerto Rican Organization for Political Action v. Kusper* establishes that the right to vote, for purposes of the Voting Rights Act, "encompasses the right to an *effective* vote." 490 F.2d 575, 580 (7th Cir. 1973) (emphasis added). The witness requirement plainly denies that right, because a ballot that is disqualified on election night is not "effective." Moreover, *Kusper* flatly *rejects* the Legislature's narrow interpretation of the right to vote as the right only "to enter a voting booth and cast a ballot." *Id.* at 579.

Nor is it fully accurate to claim that Wisconsin law in fact treats absentee voting as a "privilege" rather than a right. Section 6.84(1) uses the term "privilege," to be sure, but it is just a legislative policy statement. The statutes having substantive force entitle voters meeting certain conditions to vote absentee, *see* Wis. Stat. § 6.85, and require that their ballots be counted if the applicable requirements are satisfied, Wis. Stat. § 6.88(1). The Legislature would be hard-pressed to argue that a voter who *satisfies* the witness requirement does not have a right to have their ballot counted because absentee voting is a "privilege." The question in this case is just whether one of those requirements—the witness requirement—violates federal law. It does not follow from that claim that absentee voting is a privilege rather than a right in any meaningful substantive sense.

The question, rather, is just what requirements a voter must satisfy to cast an absentee ballot that must then, *by right*, be counted.

For similar reasons, the Legislature fails to refute Plaintiffs' hypothetical. The Legislature concedes that a literacy test imposed on in-person voters *would* be a prerequisite to voting because it would "implicate the 'right to vote' under Wisconsin law." ECF No. 85 at 21. Yet the Legislature insists that the same is not true of absentee voting because it is a "privilege." Put differently, Commission Defendants' and the Legislature's logic would categorically *exclude* all absentee voters from Section 201's protections, including both the Vouching Rule *and* the prohibition against literacy tests. And if the distinction in state-law labels is what matters, Wisconsin could pass a law saying that the right to vote at the polls is a "privilege," then proceed to impose restrictions on in-person voting that flatly violate federal law, including literacy tests. Such a holding would gut Section 201—and the Legislature appears to concede as much.

Finally, the Legislature's response to Section 202 is tortured. The Legislature says that Section 202 authorizes states "to regulate absentee voting with state-law requirements." ECF No. 85 at 23 (citing 52 U.S.C. § 10502(c)). But those requirements may not be of a sort that violate *other provisions of federal law*—and certainly may not violate the immediately preceding section of the very same act. Thus, any voter who will not be "physically present" in the jurisdiction for a presidential election has an express federal right to vote by absentee ballot free of tests or devices. 52 U.S.C. § 10502(c).

B. If the witness attestation is material to qualifications, the witness requirement is a voucher.

As explained above, Commission Defendants' and the Legislature's insistence that the witness does not vouch for anything backs them into conceding an open-and-shut violation of the Materiality Provision. But insofar as the Court rejects the Materiality Provision claim and holds

that the witness requirement is material to qualifications, it follows that it is a prohibited voucher of qualifications. At no point in any of their briefs has either Commission Defendants or the Legislature explained how the witness's signature—let alone the witness's zip code—could be material to qualifications if the witness's attestation is anything *less* than a voucher of qualifications. The closest either has come to an attempt is in Commission Defendants' opposition brief. It argues that the witness requirement "is not a state 'substantive qualification'" but "is nonetheless material to the counting of absentee voter's ballot." ECF No. 82 at 9. This clumsy grasp at a distinction gives the game away. The Materiality Provision prohibits disqualifying ballots because of omissions that are not material to *qualifications*. *See supra* Section I.C. Commission Defendants cannot invent an atextual distinction between "substantive qualifications" and non-substantive qualifications to elude liability on both claims. If the witness is irrelevant to qualifications, then the omission of the witness's signature, address, or any of the other information comprising the witness requirement cannot be material to qualifications. *See supra* Section I.

C. Adult U.S. citizens constitute a "class."

Absent any justification for a limiting principle that would allow a contrary construction—and neither Commission Defendants nor the Legislature offer any such principle—the Court should hold that adult U.S. citizens constitute a "class" for purposes of Section 201. Adult U.S. citizens fit the dictionary definition of that term; the requirement that the witness be in that category is exclusionary, including for Plaintiff Haas's fiancé; and no authority supports Commission Defendants' and the Legislature's contrived limits on the term.[9]

[9] Plaintiffs' opposition brief explains why Commission Defendants are wrong to suggest that Ms. Haas's fiancé may serve as her witness when Ms. Haas is overseas. ECF No. 78 at 8–9. *Contra* ECF No. 82 at 11 n.1.

Commission Defendants first suggest that U.S. citizens are not a class because the statute identifies one class, "registered voters," and then adds to that category a prohibition of vouchers by "any other" class. ECF No. 82 at 11. This logic is backward. "Registered voters" is a very broad class that does not, in many states, overlap with the racial categories Commission Defendants elsewhere say Congress had in mind in enacting Section 201. And "any other" expands the term "class" *beyond* even that very broad category. The words Commission Defendants want the court to focus on thus support Plaintiffs' argument.

Falling back again on their favorite bit of invective, Commission Defendants and the Legislature both suggest that Plaintiffs' reading of the term "class" would be "absurd." ECF No. 82 at 12; ECF No. 85 at 27. But they do not say why, and the assertion is hardly intuitive. Congress might reasonably have enacted Section 201 without including the third element at all. Such a law would not be "absurd" given the long and deplorable history in many jurisdictions of deploying tests and devices for voter-suppression purposes of all sorts. It follows that it is not absurd to read the term "class" exactly as broadly as Congress wrote it—as including "*any* other class" that would be understood as a class as a matter of plain language, including adult U.S. citizens. Commission Defendants and the Legislature are asking for a judge-made limit on an unambiguous statute.

Finally, Commission Defendants and the Legislature also continue to press on *Davis v. Gallinghouse*, 246 F. Supp. 208, 217 (E.D. La. 1965), and continue to overestimate its relevance. As Plaintiffs have explained, *Davis* pre-dates the Voting Rights Act Amendments of 1970 and 1975, employs a discredited purposivist approach to statutory construction, and is plainly distinct on the facts. *See* ECF No. 78 at 10. It does not control here.

III. The Court should resolve this case promptly.

A. The Court should not stay its decision pending *League* and *Priorities*.

The Legislature asks this Court to stay deciding this case "through the 2024 election cycle" even though, after today, dispositive motions will be fully briefed. *See* ECF No. 85 at 36–42. According to its brief, the resolution of *League* and *Priorities* "*may* significantly impact this case." ECF No. 85 at 36 (emphasis added). But in attempting to substantiate this call for an apparently indefinite stay, the Legislature's argument falls apart.

For one, it argues that a decision for the plaintiffs in *Priorities* "would moot Plaintiffs' claims here." *Id.* at 37. But the vindication of federal rights is not precluded whenever similar relief may also be available in another action in state court, in a different case brought by *different plaintiffs* under state law. *Cf.* Op. & Order 11, ECF No. 56 (citing *Huon v. Johnson & Bell, Ltd.*, 657 F.3d 641, 645–46 (7th Cir. 2011)); *Adkins v. VIM Recycling, Inc.*, 644 F.3d 483, 498–99 (7th Cir. 2011) ("First, and most simply, the parties are different. . . . Second, the claims in these cases are different."). In any event, the Wisconsin Supreme Court granted the *Priorities* plaintiffs' petition to bypass but only to decide the issue of whether a prior holding by that court involving drop boxes should be overruled. Third Decl. of Uzoma N. Nkwonta ("Third Nkwonta Decl."), Ex. A at 1.[10] And the court provided a briefing schedule with oral argument set for May 13, 2024. *Id.* at 2. It makes little sense to stay a decision in this case, pending *Priorities*' resolution, when litigation on the purportedly related claim in *Priorities* is not even moving forward at present.

[10] The Wisconsin Supreme Court ordered "that the petition to bypass is granted and the appeal is accepted for consideration in this court. The court, however, will consider only . . . whether to overrule [its] prior holding . . . that Wis. Stat. § 6.87 precludes the use of secure drop boxes for the return of absentee ballots . . . all other issues in the appeal are held in abeyance." Third Nkwonta Decl., Ex. A at 1. It further stated that "the plaintiffs-appellants may not raise or argue issues not set forth in this order." *Id.*

The Legislature next claims that Wisconsin appellate courts' interpretations of the Materiality Provision in *League* "*could* also serve as persuasive authority." ECF No. 85 at 37 (emphasis added). But the case here seeks broader relief than that sought in *League*, and although the state court's ruling has preclusive effect here, *see supra* Section I.D., it provides limited *persuasive* value as to the proper construction of *federal* law. *RAR, Inc. v. Turner Diesel, Ltd.*, 107 F.3d 1272, 1276 (7th Cir. 1997)). The Legislature goes on to assert that "if the *United States Supreme Court* ultimately reviews [*League*], its interpretation of the Materiality Provision would be binding." ECF No. 85 at 37 (emphasis added). But *League* is currently pending before the Wisconsin *Court of Appeals*—the exceedingly slim possibility that the U.S. Supreme Court might, several years from now, grant *certiorari* to review some portion of it is not cause to hold Plaintiffs' rights under the Voting Rights and Civil Rights Acts in abeyance in the interim.

And contrary to the Legislature's brazen assertion that "a stay . . . will not . . . infringe the right to vote *or inflict any harm*," *id.* at 41 (emphasis added), staying this case through the 2024 elections threatens Plaintiffs—and thousands of similarly situated voters throughout Wisconsin—with disenfranchisement should they fail to properly comply with the witness requirement when voting by absentee ballot. Thus, even if absentee voting were a mere "privilege," as the Legislature asserts, *id.*—and it is not, *see supra* Sections I.A. & II.A.—there is still a *harm* inflicted upon voters by rejecting their absentee ballots for noncompliance with the witness requirement. And, because the 2024 general election will occur only once, that harm is irreparable. *See Democratic Nat'l Comm. v. Bostelmann*, 451 F. Supp. 3d 952, 969 (W.D. Wis. 2020); *Wis. Term Limits v. League of Wis. Muns.*, 880 F. Supp. 1256, 1266 (E.D. Wis. 1994) ("[E]ach election is unique and cannot be replicated.").

Astonishingly, the Legislature argues that this "case is *still at an early stage*." ECF No. 85 at 37 (emphasis added). But as of today, Plaintiffs' claims have survived motions to dismiss, *see* ECF No. 56, discovery has concluded, Prelim. Pretrial Conf. Order 2–3, ECF No. 46, and dispositive motions have been fully briefed, ECF No. 46 at 1. Thus, Commission Defendants have it right: "This Court should not stay this case pending the outcome of either *League* or *Priorities*," ECF No. 82 at 23, and should instead promptly render its judgment.

B. The Court does not risk generating voter confusion by deciding this case.

As the Legislature correctly notes, the *Purcell* doctrine cautions against "alter[ing] the election rules on the eve of an election" because such "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls." ECF No. 85 at 36–37 (first quoting *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020); then quoting *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006)). But the Legislature provides only unsubstantiated claims that deciding this case could generate voter confusion, while again requesting that the Court stay its decision "*through the 2024 election cycle*." *Id.* (emphasis added). The 2024 election cycle runs through the November 5 general election—this brief was filed on March 22 and, alongside others filed on this date, it concludes briefing of dispositive motions. *See* ECF No. 46.

In any event, as Plaintiffs have explained, granting relief here poses zero risk of voter confusion. *See* ECF No. 78 at 28–30. And the ongoing appellate proceedings in both *League* and *Priorities* do not risk generating voter confusion either. Although it is true that Plaintiffs' opening brief described application of issue preclusion as the "best way to avoid confusion," ECF No. 85 at 41–42 (quoting ECF No. 68 at 27), that is far from a "concession" that any *voter* confusion could result from the combination of rulings in *League* and here. The relevant measure of "confusion" for *Purcell* purposes is not the potential confusion of legal issues in the context of parallel

litigation, but "*voter* confusion and consequent incentive to remain away from the polls." *Purcell*, 549 U.S. at 4–5 (emphasis added). For the Court's convenience, Plaintiffs reproduce the following chart illustrating the clear rule that will follow from any combination of rulings in these cases:

	League		
Liebert		Judgment for Plaintiff	Judgment for Defendants
	Judgment for Plaintiffs	Ballots may not be rejected for any error or omission on the witness certificate.	Ballots may not be rejected for any error or omission on the witness certificate.
	Judgment for Defendants	Ballots may not be rejected for certain address errors or omissions on the witness certificate.	Ballots may be rejected according to the standards in place before the cases were brought.

ECF No. 78 at 28. Commission Defendants agree: They represent that they "can easily reconcile [a] ruling [here] with any ruling in *League*." ECF No. 82 at 23.

Furthermore, the Legislature has not explained how any outcome in *Priorities*—a case involving state constitutional claims against multiple absentee voting procedures, including the witness requirement, but which is proceeding only on a drop-box related claim—could generate "inconsistent rulings and voter confusion," let alone such a significant risk that the Court should stay its decision here "through the 2024 election cycle." ECF No. 85 at 37. And even if the *Priorities* plaintiffs' state constitutional challenge to the witness requirement were being considered by the Wisconsin Supreme Court, *but see* Third Nkwonta Decl., Ex. A, another table illustrates the total lack of any risk of voter confusion:

	Priorities		
Liebert		Judgment for Plaintiffs on Witness Requirement Claim	Judgment for Defendants on Witness Requirement Claim
	Judgment for Plaintiffs	Ballots may not be rejected for any error or omission on the witness certificate.	Ballots may not be rejected for any error or omission on the witness certificate.
	Judgment for Defendants	Ballots may not be rejected for any error or omission on the witness certificate.	Ballots may be rejected according to the standards in place before the cases were brought.

Ultimately, "the primary concerns underlying the *Purcell* principle—confusion and disruption—don't apply here." *Carey v. Wis. Elections Comm'n*, 624 F. Supp. 3d 1020, 1035 (W.D. Wis. 2022) (Peterson, J.) (citing *Merrill v. Milligan*, 142 S. Ct. 879, 880–81 (2022) (Kavanaugh, J., concurring)). And the Legislature does not even attempt to demonstrate how injunctive relief here could potentially confuse, and thereby disenfranchise, voters. Relief in this case would mean only that Wisconsin voters' otherwise-valid ballots will be counted regardless of whether they comply with the witness requirement. "A voter filling out an absentee ballot will be entirely unaffected by an order enjoining" Defendants from enforcing the witness requirement, and "the process for submitting an absentee ballot will remain unchanged." *Self Advoc. Sols. N.D. v. Jaeger*, 464 F. Supp. 3d 1039, 1055 (D.N.D. 2020).

CONCLUSION

This Court should grant Plaintiffs' motion for summary judgment.

Respectfully submitted this 22nd day of March, 2024.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that all counsel of record who are deemed to have consented to electronic service are being served this 22nd day of March, 2024, with a copy of this document via the Court's CM/ECF system.

/s/ Uzoma N. Nkwonta
Uzoma N. Nkwonta