

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY  
BRANCH 6

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LEAGUE OF WOMEN VOTERS  
OF WISCONSIN,

Plaintiff,

v.

Case No. 2022CV2472

Code: 30701

Declaratory Judgment

WISCONSIN ELECTIONS COMMISSION,

Defendant.

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**PLAINTIFF'S NOTICE OF MOTION AND  
MOTION FOR EMERGENCY DECLARATORY RELIEF AND  
TEMPORARY INJUNCTION**

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**NOTICE**

**TO: Wisconsin Elections Commission  
201 W. Washington Ave.  
Second Floor  
Madison, WI 53703**

PLEASE TAKE NOTICE that Plaintiff the League of Women Voters of Wisconsin ("LWVWI or the "League") will appear before the Honorable Nia Trammell, Branch 6, in her usual courtroom located at the Dane County Courthouse, 215 South Hamilton Street, Madison, Wisconsin 53703, at such date and time as shall be set by the Court, and shall then and there present the following Motion for Emergency Declaratory Relief and Temporary Injunction.

## **MOTION**

1. The League filed this lawsuit to address an intolerable gap in Wisconsin election laws and federal law violations created by a recent Waukesha County Circuit Court decision.

2. Contrary to longstanding practice over the past six years, Wisconsin's election officials have now been forbidden from curing errors in witness addresses on absentee ballot certificates. Ballots that are "missing" such addresses may not be counted under Wis. Stat. § 6.87(6d), but there is no definition or guidance on what it means for an address to be "missing."

3. Additionally, even if ballots with certain partial witness address information or certain notations in the witness address field are deemed "missing" under Wis. Stat. § 6.87(6d), they must nevertheless be counted despite such immaterial omissions under the 1964 Civil Rights Act's materiality provision, specifically 52 U.S.C. 10101(a)(2)(B).

4. Furthermore, municipal clerks are under no obligation under Wisconsin law to provide absentee voters with notice of omissions or errors in the witness address field and the opportunity to cure such defects.

5. Immediate injunctive relief is needed to clarify clerks' responsibilities under state and federal law when there is some defect in the address provided by a witness on an absentee ballot certificate, and to protect absentee voters' right to vote a ballot that will count in the November 2022 election.

6. A movant must show four things to obtain a temporary injunction: “(1) the movant is likely to suffer irreparable harm if a temporary injunction is not issued; (2) the movant has no other adequate remedy at law; (3) a temporary injunction is necessary to preserve the status quo; and (4) the movant has a reasonable probability of success on the merits.” *Milwaukee Deputy Sheriffs’ Ass’n v. Milwaukee Cnty.*, 2016 WI App 56, ¶ 20, 370 Wis. 2d 644, 659, 883 N.W.2d 154, 161.

7. Without an injunction, the League will suffer irreparable harm, as will Wisconsin voters served by the League, including its members.

8. The League has no other adequate remedy at law.

9. A temporary injunction is necessary to preserve the status quo of the last six years.

10. The League is likely to succeed on the merits of its claims.

11. A temporary injunction is in the public interest.

12. The League’s arguments are laid out in full in the memorandum of law and affidavits accompanying this motion.

WHEREFORE, the League seeks emergency declarator relief and a temporary injunction as follows:

- (a) A declaratory judgment construing “missing” in Wis. Stat. § 6.87(6d) to mean the witness address field in an absentee ballot certificate envelope’s witness certification is left completely blank
- (b) Temporary and permanent injunctions barring Defendant Wisconsin Elections Commission’s respective agents, officers, employees, successors, and all

persons acting in concert with the Wisconsin Elections Commission, including but not limited to Wisconsin's municipal and county clerks, the Milwaukee County Election Commission and the Milwaukee City Election Commission, from rejecting absentee ballots with certificates that bear partial witness address information;

(c) A declaratory judgment finding that Wis. Stat. § 6.87(6d) violates the 1964 Civil Rights Act, 52 U.S.C. § 10101(a)(2)(B), as applied to Wisconsin absentee voters who cast or will return absentee ballots with certificates upon which the witness has recorded their street number, street address, and municipality but has omitted one or more address components outside of those three components of WEC's existing definition of "address" for purposes of Wis. Stat. § 6.87(6d), and as applied to ballots with certificates from household member witnesses who record the same street number and street name as the voter but do not duplicate the municipality, and ballots with certain notations—such as "SAME," ditto marks, or arrows pointing up to the voter's information;

(d) Temporary and permanent injunctions barring Defendant Wisconsin Elections Commission's respective agents, officers, employees, successors, and all persons acting in concert with the Wisconsin Elections Commission, including but not limited to Wisconsin's municipal and county clerks, the Milwaukee County Election Commission and the Milwaukee City Election Commission, from rejecting such ballots as described in subsection (c);

- (e) A declaratory judgment finding that Defendant's enforcement of Wis. Stat. § 6.87(9), which lacks a mandate to provide notice to all voters facing a witness address defect or omission that will result in their ballot's rejection pursuant to Wis. Stat. § 6.87(6d), violates the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution, and temporary and permanent injunctions requiring Defendant Wisconsin Elections Commission's respective agents, officers, employees, successors, and all persons acting in concert with the Wisconsin Elections Commission, including but not limited to Wisconsin's municipal and county clerks, the Milwaukee County Election Commission and the Milwaukee City Election Commission, to use any means available, including but not limited to phone, email, and expedited mailings to provide voters with notice of any witness address defect or omission that will result in their absentee ballot's rejection pursuant to Wis. Stat. § 6.87(6d); and
- (f) Temporary and permanent injunctions requiring Defendant to issue updated guidance or instructions to Wisconsin's municipal and county clerks, the Milwaukee County Election Commission and the Milwaukee City Election Commission, advising them that they must notify voters of any witness address defect or omission that will result in their absentee ballot's rejection pursuant to Wis. Stat. § 6.87(6d).

**DATED:** October 4, 2022

Respectfully submitted,

By: /s/Daniel S. Lenz

Daniel S. Lenz, SBN 1082058

Elizabeth M. Pierson, SBN 1115866

LAW FORWARD

P.O. Box 326

Madison, WI 53703-0326

dlenz@lawforward.org

epierson@lawforward.org

608.556.9120

Jon Sherman\*

D.C. Bar No. 998271

FAIR ELECTIONS CENTER

1825 K St. NW, Suite 450

Washington, DC 20006

jsherman@fairelectionscenter.org

Phone: (202) 331-0114

Jeffrey A. Mandell, SBN 1100406

Douglas M. Poland, SBN 1055189

STAFFORD ROSENBAUM LLP

222 West Washington Ave., Suite 900

Post Office Box 1784

Madison, Wisconsin 53701-1784

jmandell@staffordlaw.com

dpoland@staffordlaw.com

608.256.0226

*\*Motion to be admitted pro hac vice pending*



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## INTRODUCTION

The League of Women Voters of Wisconsin (“LWVWI” or the “League”) seeks a temporary injunction to ensure that eligible Wisconsin voters who vote absentee will have their ballots counted in the upcoming November election as required by Wisconsin and federal law, even if their witnesses provide a partial address on the absentee ballot certificate.

For approximately six years, municipal clerks and their staffs relied on guidance from the Wisconsin Elections Commission (“WEC”) to cure immaterial omissions or errors in witness addresses on absentee ballot certificates. With that guidance in place, there was no need and no basis to throw out votes based on technical defects in witness addresses, because municipal clerks<sup>1</sup> would fill in omitted information. Recently, however, the Waukesha County Circuit Court ruled that this WEC guidance was invalid and ordered WEC to withdraw it. WEC has since done so. Clerks now lack WEC’s authorization to complete witness address information on absentee ballot certificates where the witness provided some, but not all, of their address information, and Wisconsin voters will be disenfranchised as a result.

Pursuant to Wis. Stat. § 6.87(6d), a clerk may reject an absentee ballot only if the address in the witness certification is “missing.” Though that term is not defined in the statute, the plain meaning of “missing” indicates that ballots with partial

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<sup>1</sup> This brief refers to municipal clerks (who administer elections in municipalities with populations less than 500,000 people) and boards of election commissioners (who administer elections in cities with populations over 500,000 people) collectively as “clerks” or “municipal clerks.” See Wis. Stat. § 7.21(1).

addresses must be counted, and Plaintiff seeks a binding judicial interpretation to that effect. Notwithstanding the outcome of that question of statutory construction, even if certain witness addresses are found invalid under Wisconsin law, federal law requires that absentee ballots accompanied by certificates with immaterial omissions or defects be counted. Plaintiff respectfully requests immediate declaratory and injunctive relief pursuant to the Civil Rights Act of 1964 to shield three categories of absentee ballots from unlawful rejection.

Additionally, Wisconsin law provides a wholly inadequate procedure for handling ballots with insufficient witness certifications, one that threatens to be too little, too late in many cases: “If a municipal clerk receives an absentee ballot with an improperly completed certificate or with no certificate, the clerk may return the ballot to the elector . . . whenever time permits the elector to correct the defect and return the ballot . . .” Wis. Stat. § 6.87(9). When the right to vote is at stake, it is not enough to say that a clerk *may* return a ballot with a defective witness address to a voter. This Court should issue immediate declaratory and injunctive relief to ensure that municipal clerks *must* give voters notice and an opportunity to cure any witness address defects that may result in their disenfranchisement. Adequate notice of an omission or error that will cause a ballot to be rejected, as well as an adequate opportunity to cure that fatal defect, are required under federal due process precedents.

Plaintiff’s requested declaratory judgment as to the meaning of “missing” in Section 6.87(6d) might ensure that the processing of absentee ballots in Wisconsin

does not violate the Civil Rights Act; at a minimum, it would limit the scope of the issues for resolution under Plaintiff's federal claims, as well as the number of voters ensnared by Wis. Stat. § 6.87(6d). If, however, this case cannot be partially resolved or narrowed by way of Count One, Wis. Stat. § 6.87(6d) would violate the Civil Rights Act with respect to absentee voters with certain types of partial addresses or certain notations in the witness address field on the absentee ballot certificate envelope, and Wis. Stat. § 6.87(9) would violate the Due Process Clause.

### **BACKGROUND**

This case seeks a declaration regarding when a witness's address on an absentee ballot certificate may be deemed "missing" such that it cannot be counted; when such ballots must nonetheless be counted under federal law; and what steps municipal clerks must take to ensure voters are given notice and an opportunity to cure defective witness addresses. This brief incorporates by reference the factual allegations in the Complaint, which are summarized here.

In 2016, 2015 Wisconsin Act 261 became law, including a provision requiring an absentee voter's witness to fill in their address on the ballot's certificate envelope, as a condition for the vote to be valid: "If a certificate is missing the address of a witness, the ballot may not be counted." Wis. Stat. § 6.87(6d). The statute does not define the word "missing"; and WEC has never issued guidance to define that word. Instead, WEC issued guidance in response to the new law, instructing clerks that if an absentee ballot certificate had an error in the witness's address, clerks should, if possible, correct the error by using reliable sources or contacting the voter (among other means) and then count the ballot. (Dkt. 3, Ex. 1, WEC guidance Oct. 2016). This



guidance was in effect for six years, through multiple elections. *See Trump v. Biden*, 2020 WI 91, ¶18, 394 Wis. 2d 629, 951 N.W.2d 568 (“The process of handling missing witness information is not new; election officials followed guidance that WEC created, approved, and disseminated to counties in October 2016. It has been relied on in 11 statewide elections since, including in the 2016 presidential election when President Trump was victorious in Wisconsin.”). WEC issued guidance in 2020 reiterating the instruction. (Dkt. 4, Ex. 2., WEC guidance Oct. 2020). Wisconsin law also states that if a municipal clerk receives an absentee ballot with an improperly completed certificate, the clerk *may*, at their discretion and if time allows, return the ballot to the voter. Wis. Stat. § 6.87(9). Providing notice to the voter of the witness address defect is entirely optional under Wisconsin law.

On September 7 of this year, two months before the November general election, the Waukesha County Circuit Court ordered WEC to withdraw all guidance on curing witness addresses on absentee ballot certificates, and not to issue any further guidance on the issue. (Affidavit of Daniel S. Lenz (“Lenz Aff.”), ¶2, Ex. 1, *White v. WEC*, 22-CV-1008 (Waukesha Cnty. Cir. Court) (Order on Temporary Injunction, Sep. 8, 2022)); (Lenz Aff., ¶3, Ex. 2, Sep. 7 Hearing Tr. at 25:8–26:19). However, the court expressly did not reach the definition of “address” that WEC provided in that guidance, which includes a street number, street name, and municipality name. *See White v. WEC*, 22-cv-1008 (Waukesha Cnty. Cir. Ct.) (Hearing on Motion to Stay Temporary Injunction, Sep. 13, 2022) (Lenz Aff., ¶4, Ex. 3, Sep. 13 Hearing Transcript at 51:23–52:2). The court’s final order makes that explicit: “Nothing herein is

intended, nor shall be construed, to enjoin WEC from issuing or distributing its guidance regarding the definition of ‘address’ as used in Wis. Stat. § 6.87.” (Lenz Aff., ¶5, Ex. 4, *White v. WEC*, 22-CV-1008 (Waukesha Cnty. Cir. Court) (Order Granting Final Judgment to Plaintiffs and Intervenor Plaintiff the Wisconsin State Legislature) (Oct. 3, 2022)).

The court also declined to reach federal law arguments about the need for ballot curing to avoid violations of the U.S. Constitution and the 1964 Civil Rights Act’s materiality provision. (Lenz Aff., ¶3, Ex. 2, Sep. 7 Hearing Tr. at 20:21–21:13.) The Judge stated that he believed the unlawful *curing* of ballots could be enjoined without deciding whether a ballot with a partial witness address could be *counted* under the relevant federal and state laws. (*Id.*)

The problem now is threefold. First, Wisconsin’s election officials have received no guidance on when an address is “missing” under Wis. Stat. § 6.87(6d), such that a ballot must be rejected. Second, certain subgroups of absentee ballots with certificates deemed to be “missing” witness addresses face rejection in violation of the 1964 Civil Rights Act’s materiality provision, 52 U.S.C. § 10101 (a)(2)(B). Third, if the municipal clerks conclude that a witness address is “missing,” they are not required to provide voters with notice of and an opportunity to cure that fatal defect and, at their discretion, may simply decline to return the ballot to the voter. As a result, in the current legal landscape, there is a serious risk that this November some absentee voters will lose the right to vote based solely on a witness’s mistake in recording their address. This suit seeks to remedy the above problems by securing a ruling that

contains a binding judicial construction of the term “missing,” ensures that ballots with immaterial omissions or errors are counted, and requires clerks to provide voters with notice of defects on their absentee ballot certificates, in accordance with Wisconsin and federal law.

## **LEGAL STANDARD**

Wisconsin law provides that:

When it appears from a party’s pleading that the party is entitled to judgment and any part thereof consists in restraining some act, the commission or continuance of which during the litigation would injure the party, or when during the litigation it shall appear that a party is doing or threatens or is about to do, or is procuring or suffering some act to be done in violation of the rights of another party and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act.

Wis. Stat. § 813.02. A movant must make four showings to obtain a temporary injunction: “(1) the movant is likely to suffer irreparable harm if a temporary injunction is not issued; (2) the movant has no other adequate remedy at law; (3) a temporary injunction is necessary to preserve the status quo; and (4) the movant has a reasonable probability of success on the merits.” *Milwaukee Deputy Sheriffs’ Ass’n v. Milwaukee Cnty.*, 2016 WI App 56, ¶20, 370 Wis. 2d 644, 883 N.W.2d 154. Once a movant has established these four elements, it is within the court’s discretion to grant a temporary injunction. *Id.* Appellate courts review the circuit court’s decision on temporary injunctive relief for abuse of discretion. *Id.*

## **ARGUMENT**

The League is entitled to the relief sought. The League satisfies all four requirements necessary to obtain an injunction from this Court: it will suffer

irreparable harm without injunctive relief; it has no other adequate remedy at law; a temporary injunction will preserve for voters the status quo that has been in place since 2016 and across many elections;<sup>2</sup> and the League has not just a reasonable probability of success on the merits, but a high likelihood of success. Finally, the Court should exercise its discretion to grant the League's motion because the temporary injunction requested will enhance the public interest by vindicating all qualified Wisconsin voters' right to cast a ballot that counts. Denying the injunction would eviscerate that most fundamental right of U.S. citizens.

**I. Plaintiff is highly likely to succeed on the merits of its claims.**

Plaintiff brings claims under Wisconsin Statute § 806.04, the Civil Rights Act of 1964, the United States Constitution, and 42 U.S.C. § 1983. Plaintiff has a strong likelihood of prevailing on all claims.

**A. Plaintiff is highly likely to succeed in obtaining a declaratory judgment as to the meaning of “missing” in Wis. Stat. § 6.87(6d).**

Wis. Stat. § 6.87(6d) permits a municipal clerk or board of election commissioners to exclude an absentee ballot from counting only when the address is “missing”: “If a certificate is missing the address of a witness, the ballot may not be counted.” Wis. Stat. § 6.87(6d). “Missing” is not a defined term. *Trump*, 2020 WI 91, ¶49 (Hagedorn, J., concurring).

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<sup>2</sup> In his opinion for the court in *Trump v. Biden*, Justice Hagedorn noted that, as of December 14, 2020, WEC's previous guidance had been in place for 11 statewide elections. *Trump*, 2020 WI 91, ¶18. There have been at least five more statewide elections since then.

Pursuant to Wis. Stat. § 806.04, “Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed.” Wis. Stat. § 806.04(1). The purpose of this statute is “to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations . . .” Wis. Stat. § 806.04(12).

Because the term “missing” in Wis. Stat. § 6.87(6d) is undefined, and the recent injunction issued by the Waukesha County Circuit Court bars clerks from filling in “missing” address information, there is now uncertainty as to how election officials should treat absentee ballots enclosed in a certificate envelope that lacks one or more of the three required components of a witness “address” under WEC’s definition. (Affidavit of Tara McMenamin (“McMenamin Aff.”) ¶ 2 (describing Racine City Clerk’s office’s intent to return ballots missing state names and zip codes “out of an abundance of caution lest a later court ruling require state name and zip code be placed on the ballot certificate and those voters would thereby be disenfranchised”)); (*id.* (“No decision has yet been made as to what Racine will consider a ‘missing’ address for ballots during the in-person absentee ballot period.”)). But Wisconsin law makes clear that partial witness addresses are not “missing” within the meaning of Wis. Stat. § 6.87(6d).

A plain-text reading of “missing” indicates that a ballot should be rejected only if the address is *completely absent*. “Missing” means “absent,” *not* “partial” or “incomplete.” See *Missing*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/missing> (last visited Sept. 12, 2022); *State ex rel. Kalal v. Cir.*

*Ct. for Dane Cnty.*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110 (“[W]e have repeatedly held that statutory interpretation begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.”) (cleaned up).<sup>3</sup> Any other reading of this term would require election officials or this Court to redefine “missing” in the statute to mean something else, like “incomplete,” “partial,” or “erroneous,” or to rewrite the statute to include these other terms in a disjunctive series. Similarly, any use of “missing” to encompass situations in which a particular data point (*i.e.* state name or zip code) is missing would require the Court to rewrite the term “address” in Wis. Stat. §§ 6.87(2) and (6d) as “an address *containing the following specific components*” or as the standard statutory language “complete address.” *May v. Tri-Cnty. Trails Comm’n*, 220 Wis. 2d 729, 737, 583 N.W.2d 878 (Ct. App. 1998) (“[W]e are not free to rewrite the statute.”); *La Crosse Lutheran Hosp. v. La Crosse County*, 133 Wis. 2d 335, 338, 395 N.W.2d 612 (Ct. App. 1986).

Where the Legislature has sought to define “address” to include specific components or to require a “*complete* address,” it has done so explicitly, including in other provisions of Chapter 6. *See, e.g.*, Wis. Stat. § 6.34(3)(b)(2) (proof of residence requirement for voter registration) (“A current and *complete* residential address, including a numbered street address, if any, and the name of a municipality.”) (emphasis added); Wis. Stat. § 185.05(1)(k) (“The complete address, including street

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<sup>3</sup> This brief uses the signal “cleaned up” when internal quotation marks, ellipses, and other metadata have been omitted from a quotation to improve its readability without altering its meaning.

number, city, town or village, county and zip code of its principal office . . .”); Wis. Stat. § 601.715(2)(a)(3.) (“The complete address of the registered agent, as changed.”).

But the Legislature chose to use a different word here—“missing”—and this Court must give effect to the actual language in the statute. *See Gister v. Am. Family Mut. Ins. Co.*, 2012 WI 86, ¶33, 342 Wis. 2d 496, 818 N.W.2d 880 (“Where the legislature uses similar but different terms in a statute, particularly within the same section, we may presume it intended the terms to have different meanings.” (cleaned up)); *In re Incorporation of Portion of Town of Sheboygan*, 2001 WI App 279, ¶9, 248 Wis. 2d 904, 637 N.W.2d 770 (“It is presumed that the legislature is cognizant of what language to include or omit when it enacts laws.”). Section 6.87(6d)’s use of “missing” is also consistent with the very few other uses of the term in Wisconsin election laws, which signal absence, not incompleteness. *See, e.g.*, Wis. Stat. § 6.80(2)(d) (“If the initials are missing, the inspectors shall supply the missing initials.”).

Concrete examples help demonstrate why this reading of “missing” is compelled by the plain language of Section 6.87(6d). If a witness records their street name and street address, but omits their municipality, it is not logical, reasonable, or consistent with the dictionary definition of “missing” to say that the witness’s address is “missing.” Additionally, if a witness uses the word “SAME” or ditto marks to indicate clearly that they live in the same household as the voter, the address, once again, is not “missing”; it is simply not duplicated in the witness certification. This is enough to end the inquiry. The Legislature chose to use “missing” and the meaning of that term, both in its plain language and as used elsewhere, is clear.

Reading “missing” literally, to mean that a ballot should be rejected only if the address is entirely absent, would also keep Wis. Stat. § 6.87(6d) in accord with another crucial statutory provision: “Except as otherwise provided, chs. 5 to 12 shall be construed to give effect to the will of the electors, if that can be ascertained from the proceedings, notwithstanding informality or failure to fully comply with some of their provisions.” Wis. Stat. § 5.01(1). The clear legislative intent to reject ballots *only* when a witness address is “missing” comports with Wis. Stat. § 5.01(1) and the legislative policy of the elections code. *Trump v. Biden*, 2020 WI 91, ¶38 (“[W]e have a long history of construing [chapters 5 through 12] to give effect to the ascertainable will of the voter...”)

Wis. Stat. § 6.84 is a partial exception to the rule set forth in Wis. Stat. § 5.01(1) and demands mandatory compliance with certain procedures for voting via absentee ballot, including Wis. Stat. § 6.87(6d). Wis. Stat. § 6.84(2). However, there is no conflict between reading the requirement of Wis. Stat. § 6.87(6d) as mandatory and reading the word “missing” literally to give effect to the will of the electors. To the contrary, it is the *only way* to fulfill the requirement of Wis. Stat. § 6.84(2) and make sure the statute is carefully followed. If one takes the requirements of Wis. Stat. § 6.84 seriously, it must mean that the listed statutes, like Wis. Stat. § 6.87(6d), are to be read carefully and precisely. “[Wis. Stat. § 6.84(2)] tells us that, to the extent an absentee ballot does not comply with certain statutory requirements, it may not be counted.” *Trump*, 2020 WI 91, ¶39. The “certain statutory requirement” of Section 6.87(6d) is that the witness address is present. If it is, the ballot must be counted.



Finally, the common-sense, plain-language definition of “missing” to mean circumstances in which the address field is left completely blank—*i.e.*, in which the witness provides no address information at all—may avoid or narrow the federal issues discussed in Counts 2 and 3, *see infra*. This may eliminate or narrow the risk that Wisconsin election law and practices run afoul of and are preempted by a federal statute, namely the Civil Rights Act of 1964. *See Kenosha Cnty. Dep’t of Human Servs. v. Jodie W.*, 2006 WI 93, ¶20, 293 Wis. 2d 530, 716 N.W.2d 845 (“Where the constitutionality of a statute is at issue, courts attempt to avoid an interpretation that creates constitutional infirmities.”) (cleaned up); *see infra* Section I.B.

Therefore, Plaintiff is highly likely to succeed in its claim pursuant to Wis. Stat. § 806.04 declaring that an absentee ballot may be found to have a “missing” witness address and thereby excluded from counting under Wis. Stat. § 6.87(6d) only if there is no witness address information contained on the absentee ballot certificate. Plaintiff is further entitled to temporary and permanent injunctions pursuant to Wis. Stat. §§ 813.01 and 813.02 requiring WEC to instruct Wisconsin’s municipal clerks, county clerks, and boards of elections that they shall not exclude from counting or return any ballot pursuant to Wis. Stat. §§ 6.87(6d), 6.87(9) unless the witness address field is completely blank.

**B. Plaintiff is highly likely to succeed on the merits of its claim under the materiality provision of the Civil Rights Act of 1964.**

Refusing to count a ballot because the voter’s witness made an immaterial mistake in their address would violate of the Civil Rights Act of 1964. The “materiality provision” of the Act provides:

No 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). An absentee ballot certificate or envelope is a “record or paper” related to an “act requisite to voting” within the meaning of 52 U.S.C. 10101(a)(2)(B). Under Section 10101, “the word ‘vote’ includes all action necessary to make a vote effective, including, but not limited to, registration or other action required by State law prerequisite to voting, casting a ballot, and having such ballot counted and included in the appropriate totals of votes cast with respect to candidates for public office and propositions for which votes are received in an election.” 52 U.S.C. § 10101(e). Section 10101(e) further provides that the words “qualified under State law” mean “qualified according to the laws, customs, or usages of the State.” *Id.*

Therefore, a ballot may be rejected for technical defects, thereby denying the right to vote, only when the defect is material to the qualifications to vote under state law. To be qualified to vote under the Wisconsin Constitution and Wisconsin statutes, a person must be a “U.S. citizen age 18 or older,” Wis. Stat. § 6.02(1), have “resided in an election district or ward for 28 consecutive days before any election where the citizen offers to vote,” *id.*, and not be disenfranchised for a felony conviction, or adjudicated incompetent to vote. Wis. Stat. § 6.03(1). *See also* WIS. CONST. art. III, § 1 (“Every United States citizen age 18 or older who is a resident of an election district in this state is a qualified elector of that district.”). Therefore, in Wisconsin, a requirement for particular information on absentee ballot certificate envelopes is

valid under the Civil Rights Act *only* if that information is material to a voter's citizenship status, age, Wisconsin residence (or the duration of that residence), felony status, or whether they have been adjudicated incompetent to vote. The witness address does not qualify.

The U.S. Court of Appeals for the Third Circuit recently decided, in a similar case, that absentee ballots in Pennsylvania cannot be rejected where the voter fails to provide the date next to the voter's declaration on the envelope, even though Pennsylvania law requires the voter to do so. *Migliori v. Cohen*, 36 F.4th 153, 157, 162–64 (3d Cir. 2022). The Third Circuit reasoned that a voter's failure to date the voter declaration on the return envelope had no bearing on that voter's qualifications to vote under Pennsylvania law, and thus concluded that rejecting a ballot due to such an omission was prohibited by the materiality provision. *Id.* at 163–64. In *Migliori*, the court noted that ballots were rejected only if the date was *missing*, and not if it was blatantly incorrect (dated after election day even though it had been received by election day, for example). 36 F.4th at 164. So too, here: there is no legal requirement that a Wisconsin absentee ballot be rejected if the address appears incorrect or partial—only if it is *missing*. Wis. Stat. § 6.87(6d). Additionally, the court explained that the state's interest in preventing fraud plays no role in a materiality claim. *Id.* at 163 (“Fraud deterrence and prevention are at best tangentially related to determining whether someone is qualified to vote.”). Section 10101(a)(2)(B) does not trigger a balancing test, as rejecting ballots for immaterial omissions or errors is *per se* forbidden.

As a threshold matter, this case is unlike any other Civil Rights Act materiality cases ever decided in that the omitted information at issue concerns a third-party witness, *not* the voter. Plaintiffs’ counsel has not located any Section 10101(a)(2)(B) case in which the erroneous or omitted information in question pertains to a third party. Accordingly, any argument that a witness address is material starts from a weakened position. At best, a witness address on the absentee ballot certificate provides a way to contact that witness and confirm the identity and qualifications of the voter, should that be needed.<sup>4</sup> Plaintiff does not contend that the witness address requirement is on its face immaterial under the Civil Rights Act. Instead, LWVWI submits that the Civil Rights Act is violated with respect to three categories of absentee ballots with witness address defects.

***First***, the omission of the state name, zip code, or any other witness address information beyond the three components itemized in WEC’s existing definition of a witness “address” is “not material in determining whether [the voter] is qualified under State law to vote in such election.” 52 U.S.C. § 10101(a)(2)(B). Clerks, canvassers, election inspectors, and/or law enforcement will be able to readily identify the witness based on their street number, street name, and municipality name *i.e.*, even if the state name and/or zip code are omitted. And they can always contact the voter, who is required by statute to complete their absentee ballot in the presence of

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<sup>4</sup> So long as the witness address is present, the certificate envelope may be opened and the ballot counted. Wisconsin Elections Commission, ELECTION DAY MANUAL, at 92–95, *available at* <https://elections.wi.gov/resources/manuals/election-day-manual>. There is no instruction to verify the witness address or use it any other way.

their witness, to obtain additional information. *See* Wis. Stat. § 6.87(4)(b)1. In reality, however, ballots accompanied by certificates that omit witness state names and/or zip codes are already threatened with rejection. For instance, just last week, the Green Bay City Clerk’s office issued a notice requiring the inclusion of that immaterial information, or it would be returned to the voter: “To respond to this change in the law, the Clerk’s office will mail back certificates that lack a voter signature, witness signature and/or a complete witness address including house number, street name, city, state and zip code.”<sup>5</sup> Similarly, the Racine City Clerk’s office intends to return ballots to voters if the witness address lacks a state name or zip code: “For any omission in the witness address field on an absentee ballot certificate envelope, even if it is just the state name or the zip code, a member of my staff returns the ballot . . . to the voter.” (McMenamin Aff. ¶ 2.)

Rejecting ballots that lack a witness’s state name and/or zip code will result in widespread disenfranchisement. The Legislative Audit Bureau reviewed a random sample of 14,710 certificates from ballots cast in the November 2020 election and found that:

1,022 certificates (6.9 percent) in 28 municipalities had partial witness addresses because they did not have one or more components of a

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<sup>5</sup> City of Green Bay Clerk, Press Release: “A Change in the Absentee Ballot Curing Process” (Sept. 26, 2022), *available at* <https://greenbaywi.gov/CivicAlerts.aspx?AID=465>. Respectfully, this would not be a harmless error by a clerk. A ballot returned to the voter, of course, will not be counted unless it is returned, again, to the clerk before 8:00 pm on Election Day. Wis. Stat. § 6.87(6). Any time the ballot is returned to the voter when not required by law, there is a risk of erroneous disenfranchisement. The voter may not get the ballot in time to send it back, they may be absent from that address, or may believe they have simply been sent a second ballot in error.

witness address, such as a street name, municipality, state, and zip code, including 799 certificates (5.4 percent) that did not have a zip code and 364 certificates (2.5 percent) that did not have a state[.]

Wisconsin Legislative Audit Bureau, Report 21-19 “Elections Administration” (Oct. 2021), at 42-43.<sup>6</sup> Even if one focuses just on the 799 certificates without zip codes (5.4 percent), this category of omission alone would result in an extremely large population of unlawfully disenfranchised voters. If approximately 840,000 Wisconsin voters return absentee ballots (Wisconsin’s current estimated voting age population<sup>7</sup> multiplied by 60 percent, the turnout percentage for the 2018 General Election<sup>8</sup>, and assuming only 30 percent absentee voting<sup>9</sup>), then about 45,000 voters would be at risk of losing their right to vote under an interpretation of Section 6.87(6d) that disqualified ballots submitted without the witnesses’ zip codes.<sup>10</sup>

**Second**, household members will often witness each other’s absentee ballots. Such witnesses sometimes fail to record more than their street number and street

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<sup>6</sup> Available at <https://legis.wisconsin.gov/lab/media/3288/21-19full.pdf>.

<sup>7</sup> Wisconsin Demographic Services Center, “Official Preliminary Estimates, 1/1/2022, Wisconsin Counties, with Comparison to Census 2020,” p. 3, available at [https://doa.wi.gov/DIR/Prelim\\_Est\\_Co\\_2022.pdf](https://doa.wi.gov/DIR/Prelim_Est_Co_2022.pdf) (last visited Oct. 3, 2022).

<sup>8</sup> Wisconsin Elections Commission, “Voter Turnout Partisan-NonPartisan Through November 2020,” available at <https://elections.wi.gov/statistics-data/voter-turnout> (last visited Oct. 3, 2022).

<sup>9</sup> In the 2016 General Election, 27.3 percent of votes were absentee. In 2020, that number was 59.6 percent. Wisconsin Legislative Audit Bureau, Report 21-19 “Elections Administration” (Oct. 2021), at 38-39. Thirty percent is a conservative estimate.

<sup>10</sup> Notably, the data shows that it is exceedingly rare for the witness to entirely omit their address, and the LAB does not even record how many ballots were missing the municipality.

name and omit their municipality name.<sup>11</sup> When a witness's street number and street name match the voter's street number and street name—in this specific scenario—the witness's omission of their municipality is immaterial to determining the voter's qualifications. The municipality name is already reflected in the voter certification and rejecting the ballot for failure to duplicate the municipality in the witness certification would violate the materiality requirement.

***Third and finally***, the Civil Rights Act's materiality provision forbids rejecting absentee ballots that bear certain notations including but not limited to "SAME," ditto marks, and/or arrows pointing up to the voter's address, all of which individually or in combination clearly convey that the witness was indicating their address is identical to the voter's address. This is not an "omission" of the witness's address at all—it definitively communicates the exact same information as if the witness re-wrote the voter's address. Alternatively, even if it is an omission, it is not material to determining the voter's qualifications to vote under Wisconsin law.

Rejecting ballots for deviations from technical requirements that do not have any material impact on officials' ability to verify the voter's qualifications is the core of what Congress prohibited when it enacted 52 U.S.C. § 10101(a)(2)(B). The legislative history makes this clear. For an April 9, 1964 hearing in the U.S. Senate, one summary of the statute explained that "[o]fficials cannot reject an application for

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<sup>11</sup> Patrick Marley, *Absentee Ballots At Risk of Being Tossed*, MILWAUKEE JOURNAL-SENTINEL (Oct. 7, 2016), available at <https://www.jsonline.com/story/news/politics/elections/2016/10/07/absentee-ballots-risk-being-tossed/91728826/>.

voting registration for reasons, such as trivial mistakes or omissions on application forms, that have nothing to do with the applicant's actual qualification." 110 Cong. Rec. 7,480 (1964); *see also* 110 Cong. Rec. 1,547 (1964) ("If a registrar...is disqualifying people—let us say he is asking how old the person is and the person said, 'Well, I am 40 years and 8 months old,' and the registrar says, 'I see you were born on such-and-such a date, you are 40 years and 9 months old, hence you are not qualified to vote;' that is what we are driving at."). More directly, during a February 3, 1964 hearing, supporters in the U.S. House of Representatives stated that erroneously recording an address on a voter registration application is one type of immaterial error that cannot be used to disqualify an eligible voter under the materiality provision. 110 Cong. Rec. 1,691 (1964) ("Let us say as an example there is a lawsuit filed, and it is said, 'He denied me the right to vote because when he asked me where I lived I said 1854 West 10th Street, and it turned out I lived at 1809 West 10th Street' . . . In other words, if you ask a picayune question or use some kind of an excuse that is not material to determine whether or not he is qualified to vote, that is an immaterial question and hence the judge is authorized to say, 'Now, Mr. Registrar, you have not the right to disqualify this man on that alone.'"). Congress intended to safeguard voters from disenfranchisement based on technical defects that have no bearing on officials' ability to determine the voter is qualified to vote. Omitting a state name or zip code from an otherwise clearly identified address, as well as omitting a municipality name when the witness records the same street number and street name identified in the voter certification, fall squarely within the prohibition in



Section 10101(a)(2)(B). These requirements have nothing to do with the actual qualifications of the voter.

Congress was aware that some number of voters would deviate from instructions, but this statutory language safeguards their ballots where that deviation has no material effect on determining the voter's qualifications. 110 CONG. REC. 1,693–94 (1964) (Pointing to an incident in which a registrar rejected a Black registrant's application after telling him "you underlined "Mr." when you should have circled it" as an example of the type of error that "shall not be deemed fatal" under Title I's materiality provision.). So, too, here. A witness who uses a notation to indicate they live in the same household as the voter instead of writing out their address has deviated from the technical instructions, but that deviation is immaterial to assessing the voter's qualifications or corroborating the same by identifying and contacting the witness.

Accordingly, no Wisconsin voter can be denied their right to vote based on the immaterial omissions and/or errors described above, and the League is entitled to the injunctive relief it seeks as to each group of absentee ballots described above.

**C. Plaintiff is highly likely to succeed on the merits of its due process claim.**

The League is highly likely to succeed on the merits of its due process claim. In the absence of WEC's previous cure guidance, Wisconsin law makes it possible to deprive someone of their right to cast a ballot without due process. This is unconstitutional. Unlike Count Two, Count Three is intended to address all absentee voters with defective witness addresses, regardless of whether the witness recorded

partial address information or no address whatsoever. Depending on the outcome of Count One, however, this claim may be narrowed in scope or in the relief required.

Under WEC's previous cure guidance, now withdrawn, Section 6.87(9) did not pose a due process problem. Under that guidance, clerks were required to "do all that they can reasonably do" to ascertain this information, including contacting the voter, and no ballots were returned to voters under Section 6.87(9) without first notifying them of the defects and their options for curing their ballot or spoiling that ballot and casting a new one. (Dkt. 3, Ex. 1.) But clerks are now prohibited from curing immaterial witness address omissions and errors, and no Wisconsin law or WEC guidance instructs them to provide notice to absentee voters of fatal witness address omissions or defects. Instead, clerks are left with a vague statute giving them the *option* to return a ballot with an invalid witness address to the voter. But due process is not optional; it is a constitutional guarantee.

The Due Process Clause of the Fourteenth Amendment prohibits the deprivation of "life, liberty, or property, without due process of law." U.S. CONST. amend. XIV. At a minimum, "[t]o meet the requirements of due process, the state must afford notice and an opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Morrell v. Mock*, 270 F.3d 1090, 1095 (7th Cir. 2001) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). Courts tasked with reviewing procedural due process claims face two questions: "(1) is there a property or liberty interest protected by due process; and (2) if so, what process is due, and when must that process be made available?" *Simpson v. Brown Cty.*, 860 F.3d 1001, 1006 (7th

Cir. 2017). Answering these questions requires balancing three interests: “first, the private interest at stake; second, the risk of erroneous deprivation and the value, if any, of additional procedural safeguards; and third, the government’s countervailing interests.” *Id.* (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976)).

The right to vote is a liberty interest protected by due process. A liberty interest can be created by the Constitution or “may arise from an expectation or interest created by state laws or policies.” *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005). Wisconsin law creates a liberty interest and a statutory entitlement in one’s vote, by guaranteeing the right to register and cast a ballot to every U.S. citizen at least 18 years old who is a resident of the state and who registers to vote in accordance with the procedures established under state law and regulations. Wis. Stat. § 6.02. Eligible, registered voters enjoy an “individual and personal” right to vote under Wisconsin law. *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018) (quoting *Reynolds v. Sims*, 377 U.S. 533, 561 (1964)); *see also Luft v. Evers*, 963 F.3d 665, 669 (7th Cir. 2020) (“[T]he right to vote is personal.”).

Further, absentee voters have an established liberty interest and statutory entitlement in their right to vote by absentee ballot. *See* Wis. Stat. § 6.85(1) (defining “absent elector” as “any otherwise qualified elector who for any reason is unable or unwilling to appear at the polling place in his or her ward or election district”), § 6.85(3) (“An elector qualifying under this section may vote by absentee ballot under ss. 6.86 to 6.89.”). All registered Wisconsin voters are entitled to vote by absentee ballot. *See* Wis. Stat. § 6.20 (“Any qualified elector of this state who registers may

vote by absentee ballot under ss. 6.84 to 6.89.”). Federal courts consistently agree that state absentee voting laws vest eligible voters with a statutory entitlement to or liberty interest in absentee voting that triggers due process requirements. *See, e.g., Frederick v. Lawson*, 481 F. Supp. 3d 774, 793 (S.D. Ind. 2020) (collecting cases) (“[T]here is no dispute that Indiana law confers upon certain categories of voters, including the individual Plaintiffs, an explicit statutory right to vote by mail. In so doing, Indiana altered the rights of those electors who participate in the program, creating a sufficient liberty interest in exercising their right to vote in such a manner.”) (cleaned up); *id.* (“We therefore hold, in line with the vast majority of courts addressing this issue, that, having extended the privilege of mail-in absentee voting to certain voters, the State must afford appropriate due process protections to the use of mail-in absentee ballots.”) (cleaned up).

As to the second *Mathews* factor, now that WEC has withdrawn its absentee ballot certificate cure guidance in compliance with the September 7, 2022 injunction in *White*, there is a high risk of erroneous deprivation of a liberty interest or statutory entitlement without sufficient notice or opportunity to cure. Most or all absentee voters whose ballot certificates omit some or all of the witness address will nevertheless be qualified to vote in Wisconsin. The only issue is whether their witnesses have recorded their address, as required.

Finally, as to the third *Mathews* factor, the state cannot advance any interests that outweigh the risk of denying an eligible, registered Wisconsin voter’s right to vote an absentee ballot that will count. In assessing the government’s interest, courts

consider “the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” *Riano v. McDonald*, 833 F.3d 830, 834 (7th Cir. 2016) (cleaned up). Defendant has no legitimate justification for failing to provide voters with notice of a fatal witness address defect or omission that will compel the rejection of their ballots. For nearly six years, under the now-enjoined WEC guidance, clerks were directed to either unilaterally cure or contact voters about witness address defects; this relief would simply ensure the continued provision of notice to voters.

To the contrary, state and local election officials have a weighty interest in meeting federal constitutional requirements. Any administrative or fiscal burden entailed in providing notice to the voters whose ballots have a witness address omission is a problem of the state legislature’s making and cannot justify denying the voters their rights. Constitutional rights do not bend to administrative convenience and financial considerations. *See, e.g., Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 218 (1986) (striking down Connecticut’s closed primary law on First Amendment associational rights grounds) (“[T]he possibility of future increases in the cost of administering the election system is not a sufficient basis here for infringing appellees’ First Amendment rights.”). In any event, Plaintiff’s requested relief would impose far less of an administrative burden than was required under the now-withdrawn WEC cure guidance.

Wis. Stat. § 6.87(9) fails to require notice to voters of the omission in the witness address field that will result in the ballot’s rejection. *See Frederick*, 481 F.

Supp. 3d at 788 (collecting cases holding absentee voting systems that do not afford adequate process to voters whose ballots will be rejected, violate due process). It even fails to require municipal clerks to return ballots to voters—an inadequate means of notifying voters, in any event, due to U.S. Postal Service delays. There is no WEC guidance instructing clerks to provide notice to absentee voters whose ballots have a witness address problem. The *White v. WEC* injunction has left Wisconsin’s mail-in absentee voters in a precarious position, as Wisconsin law now does not require municipal clerks to provide any notice whatsoever to voters that their ballot will be rejected due to a “missing” witness address. The clerk may send the ballot back to the voter or simply retain the ballot, not inform the voter of the fatal defect, and reject it under Section 6.87(6d). Under this arbitrary system, some voters will receive notice and an opportunity to cure their ballot; others will not. Some clerks are returning ballots to voters but will not otherwise notify voters of the witness address defect or omission. (McMenamin Aff. ¶ 3 (“Beyond returning the absentee ballot with the missing or incomplete witness address, my office will not be contacting voters to notify them of witness address defects.”)).

Mailing a ballot back to a voter, alone, does not confer adequate notice and an adequate opportunity to cure. Given the well-documented U.S. Postal Service delays over the last three years,<sup>12</sup> simply mailing a ballot back to a voter does not constitute

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<sup>12</sup> The reliability of on-time U.S. Postal Service (“USPS”) delivery of mail-in absentee ballots has deteriorated over the last few years. Administrative and cost-cutting measures at USPS undermined its performance during the 2020 general election. *See, e.g.,* Jacob Bogage & Christopher Ingraham, *USPS processed 150,000 ballots after*

adequate notice. These delays demonstrate the need for timely notice by any means available to the clerk, including but potentially not limited to email, phone, and expedited mailings. Without adequate notice, there can be no adequate opportunity to cure. This due process violation becomes only more acute as Election Day approaches and the risk increases that the time for a voter to receive, cure, and return their ballot threatens to run out. Ballots returned to voters closer to Election Day are increasingly unlikely to notify voters adequately and timely of the witness address defect, let alone provide a reasonable opportunity to cure by the deadline.

Even if the absentee ballot was timely returned by Election Day, voters are still entitled to notice after Election Day that the witness address field on their absentee ballot's certificate envelope was not properly completed and an adequate opportunity to cure. *See, e.g., Self Advoc. Sols. N.D. v. Jaeger*, 464 F. Supp. 3d 1039, 1054 (D.N.D. 2020) (finding plaintiffs likely to succeed on procedural due process claim challenging lack of any opportunity to cure perceived signature discrepancy

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*Election Day, jeopardizing thousands of votes*, Wash. Post (Nov. 6, 2020), <https://www.washingtonpost.com/business/2020/11/05/usps-late-ballots-election/>; Erin Cox, *et al.*, *Postal Service warns 46 states their voters could be disenfranchised by delayed mail-in ballots*, Wash. Post (Aug. 14, 2020), [https://www.washingtonpost.com/local/md-politics/usps-states-delayed-mail-in-ballots/2020/08/14/64bf3c3c-dcc7-11ea-8051-d5f887d73381\\_story.html](https://www.washingtonpost.com/local/md-politics/usps-states-delayed-mail-in-ballots/2020/08/14/64bf3c3c-dcc7-11ea-8051-d5f887d73381_story.html); Bryan Naylor, *Delays Still Plague Mail Deliveries As Election Day Nears*, NPR (Oct. 31, 2020), available at <https://www.npr.org/2020/10/31/929826650/delays-still-plague-mail-deliveries-as-election-day-nears>. It was also a subject of a lawsuit brought by the State, and other states, against USPS in 2020. *See* Wis. Dept. of Justice, "Press Release: AG Kaul Files Lawsuit Over Trump Administration's Attempts to Undermine the U.S. Postal Service," (Aug. 18, 2020), available at <https://www.doj.state.wi.us/news-releases/ag-kaul-files-lawsuit-over-trump-administration%E2%80%99s-attempts-undermine-us-postal-service>.

and noting feasibility to offer cure process after Election Day). In accord with due process, provisional voters who do not present voter ID at the polls are given an opportunity to cure their provisional ballots until the Friday after Election Day. Wis. Stat. § 6.97(b). By the same token, voters whose witness addresses were improperly completed should have the same grace period to correct the defect.

For all of these reasons, the League is likely to succeed on the merits of its federal due process claim. The League has requested an injunction that requires notice be provided to any and all voters with a Section 6.87(6d) problem on their ballot certificates, such that they have an adequate and meaningful opportunity to cure that defect or omission. This should include contacting the voter by any means available to the clerk including by phone, email, and/or expedited mailing.

## **II. An injunction is necessary to avoid irreparable harm.**

An injunction is necessary to prevent disenfranchisement of the Wisconsin voters served by the League. The violation of the right to vote in any given election is an irreparable harm. *See Common Cause Ind. v. Lawson*, 327 F. Supp. 3d 1139, 1155 (S.D. Ind. 2018) (“As has been held by numerous other courts, the Court determines that a violation of the right to vote is presumptively an irreparable harm.”), *aff’d*, 937 F.3d 944 (7th Cir. 2019); *Ezell v. City of Chicago*, 651 F.3d 684, 699 (7th Cir. 2011) (“[F]or some kinds of constitutional violations, irreparable harm is presumed.”) (citing Charles Alan Wright et al, Federal Practice & Procedure § 2948.1 (2d ed. 1995) for the proposition that “[w]hen an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary”); *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247



(4th Cir. 2014) (“Courts routinely deem restrictions on fundamental voting rights irreparable injury.”) (collecting cases); *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) (“A restriction on the fundamental right to vote . . . constitutes irreparable injury.”); *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (explaining that the loss of constitutional “freedoms ... unquestionably constitutes irreparable injury”).

The Seventh Circuit has recognized that once a constitutional violation has been demonstrated, no further showing of irreparable injury is necessary. *See Ezell*, 651 F.3d at 699; *Preston v. Thompson*, 589 F.2d 300, 303 n.3 (7th Cir. 1978) (“The existence of a continuing constitutional violation constitutes proof of an irreparable harm.”). “[T]he violation of a fundamental constitutional right constitutes irreparable harm, even if temporary.” *Jones’El v. Berge*, 164 F. Supp. 2d 1096, 1123 (W.D. Wis. 2001). This principle applies here, so the League satisfies this prong of the temporary injunction inquiry.

In addition, under Wisconsin law, irreparable harm is closely linked to the question of what remedies are available. As one court put it, “Irreparable harm is that which is not adequately compensable in damages.” *Allen v. Wisconsin Pub. Serv. Corp.*, 2005 WI App 40, ¶30, 279 Wis. 2d 488, 694 N.W.2d 420 (citing *Pure Milk Prods. Co-op v. National Farmers Org.*, 90 Wis.2d 781, 800, 280 N.W.2d 691 (1979)); see also *Kocken v. Wisconsin Council 40, AFSCME, AFL-CIO*, 2007 WI 72, ¶27 n. 12, 301 Wis. 2d 266, 732 N.W.2d 828 (“A permanent injunction will not be granted unless there is the threat of irreparable injury that cannot be compensated with a remedy at law”) (citing *Am. Mut. Liab. Ins. Co. v. Fisher*, 58 Wis.2d 299, 305, 206 N.W.2d 152 (1973));

*Carey v. Wis. Elec. Comm’n*, No. 3:22-CV-402-jdp, Dkt. 39, slip op. at 20 (W.D. Wis. Aug. 31, 2022) (in case brought under Voting Rights Act, noting “plaintiffs risk losing their right to vote, which qualifies as an irreparable harm”). As discussed in more detail in the following section, there is no remedy available at law for violations of the right to vote.

In addition to the interests of its members, some of whom may be disenfranchised, LWVWI also has institutional interests that would be irreparably harmed absent injunctive relief. LWVWI is dedicated to encouraging its members and the people of Wisconsin to exercise their right to vote as protected by the U.S. Constitution, the Voting Rights Act, and the Civil Rights Act of 1964. LWVWI’s mission is to empower voters and defend democracy. LWVWI does this by promoting political responsibility through informed and active participation in government and acting on selected governmental issues. The League seeks to maximize eligible voter participation through its voter registration, education, and outreach efforts and to encourage civic engagement through registration and voting. (Affidavit of Debra Cronmiller (“Cronmiller Aff.”) ¶ 3). The League spends considerable time, resources, and effort to achieve these outcomes, including through litigation. (Cronmiller Aff. ¶¶ 5–12). *See, e.g. League of Women Voters of Wis. Educ. Network, Inc. v. Walker*, 2014 WI 97, ¶2, 357 Wis. 2d 360, 851 N.W.2d 302. Without an injunction, those institutional interests will be irreparably harmed, as the very voting rights for which the League advocates will be irreparably infringed. (Cronmiller Aff. ¶¶ 17–19). The League will also be compelled to divert its resources, money, and staff time from core

mission activities on the eve of a general election to educate voters on the new reality regarding witness address defects and how it may disenfranchise them—even without prior notice. (Cronmiller Aff. ¶ 19).

### **III. Traditional legal remedies cannot adequately protect Plaintiff's rights.**

There is no adequate remedy at law for Wisconsin voters who do not receive notice of a deficient witness address. If Plaintiff is denied injunctive relief, its members and the other Wisconsin voters it serves will face potential disenfranchisement. Wisconsin courts have long recognized the special status of the right to vote. *See State v. Phelps*, 144 Wis. 1, 128 N.W. 1041, 1046 (1910) (right to vote is “a sacred right of the highest character”); *see also Milwaukee Branch of NAACP v. Walker*, 2014 WI 98, ¶5, 357 Wis.2d 469, 851 N.W.2d 262 (referencing the “Wisconsin tradition of jealously guarding and protecting the fundamental right to vote.”) (internal quotations omitted). Once an election “comes and goes, there can be no do-over and no redress.” *League of Women Voters of N.C.*, 769 F.3d at 247; *see also Common Cause Ind.*, 327 F. Supp. 3d at 1153-54 (finding “no adequate remedy at law” when an individual’s right to vote is violated, because “an individual cannot vote after an election has passed”).

Likewise, monetary damages cannot compensate for Plaintiff’s irreparable harm—the right to vote is priceless. *See Common Cause Ind.*, 327 F. Supp. 3d at 1154; *Democratic Nat’l Comm. v. Bostelmann*, 451 F. Supp. 3d 952, 969 (W.D. Wis. 2020) (“[I]nfringement on a citizens’ [sic] constitutional right to vote cannot be redressed by money damages, and therefore traditional legal remedies [are] inadequate[.]” (citing

*Christian Legal Soc’y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006)); *People First of Ala.*, 491 F. Supp. 3d at 1180 (“Because no monetary sum could compensate for this injury [abridgment of the right to vote], legal remedies are inadequate.”).

**IV. The requested temporary injunction would maintain the status quo of the last six years.**

A temporary injunction is necessary to ensure that the November 2022 election is administered with these requested safeguards for absentee voters in place. For the last six years, no such protections were necessary as WEC’s cure guidance for clerks ensured that Sections 6.87(6d) and 6.87(9) did not infringe Wisconsin voters’ federal constitutional and statutory rights. Voters depend on and trust in an absentee voting system that is not inherently riddled with risk and the potential for disenfranchisement by technical error. They reasonably expect that their ballots will be counted notwithstanding immaterial omissions and certainly not without pre-deprivation notice and an adequate opportunity to cure the defect.

The WEC guidance that the court enjoined in *White* had been in effect for almost as long as the law it interpreted, Section 6.87(6d). There is no status quo for enforcement of this statute aside from how elections were administered under that guidance. And although that court has ruled the guidance unlawful, that guidance was simply one way of ensuring that Wisconsin law remained compliant with federal law and the U.S. Constitution (as the League argued repeatedly to both WEC and the Legislature, (Cronmiller Aff. ¶¶ 13–16 & Exs. 1–3). This Court must take steps to return Wisconsin’s election administration to compliance with the Civil Rights Act of 1964 and the Due Process Clause. Such a ruling is the only way to preserve the status

quo, which was severed just days before absentee ballots were mailed out for a general election.

From October 2016 until September 2022—through more than a dozen statewide elections—voters whose witnesses made immaterial errors in their addresses had protection from being disenfranchised due to those immaterial errors, because clerks were under instructions to cure such errors. Now that clerks are prohibited from curing witness address defects, another mechanism is required to protect voters from disenfranchisement. Voters have surely grown accustomed to submitting absentee ballot certificates with witness addresses that cannot reasonably be deemed “missing” and do not omit any material information but may nevertheless omit a state name or zip code. Such voters reasonably believe that the clerk will know the zip code of their town and will be blindsided if identical certificates, and the ballots within, are returned as defective, or simply not counted. A voter whose witness completed the witness certification one way in 2020, and had their ballot counted without issue, may now have their ballot rejected (without notice) despite following the exact same procedure as before. The requested injunction will ensure that immaterial defects do not prevent ballots from being counted and will give voters a chance to correct any material defects in the witness address.

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The League has thus met all four elements required for the Court to grant the declaratory and injunctive relief it requests.

**V. The Court should exercise its discretion to grant Plaintiff's motion in service of the public interest.**

Finally, the Court should exercise its discretion to grant the Plaintiff's motion because doing so will serve the public interest. *See Village of Hobart v. Brown Cty.*, 2007 WI App 250, ¶24, 305 Wis. 2d 263, 742 N.W.2d 907 (public interest is an equitable consideration in whether to grant an injunction); *see also Forest Cnty. v. Goode*, 219 Wis. 2d 654, 684, 579 N.W.2d 715 (1998) (same). The right to vote is enshrined in the Wisconsin Constitution. Injunctions consistent with the Constitution are in the public interest, and Defendant's interests are—at best—secondary. *See Joelner v. Vill. of Washington Park*, 378 F.3d 613, 620 (7th Cir. 2004); *see also O'Brien v. Town of Caledonia*, 748 F.2d 403, 408 (7th Cir. 1984) (“[T]he public has a strong interest in the vindication of an individual's constitutional rights.”); *Christian Legal Soc’y*, 453 F.3d at 859 (“[I]njunctions protecting First Amendment freedoms are always in the public interest.”); *Rodgers v. Bryant*, 942 F.3d 451, 458 (8th Cir. 2019) (“[I]t is always in the public interest to protect constitutional rights.” (cleaned up)).

Furthermore, the right to vote is “preservative of all rights.” *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 667 (1966). The public therefore has a “strong interest in the fundamental political right to vote.” *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). That public interest is “best served by favoring enfranchisement and ensuring that qualified voters' exercise of their right to vote is successful.” *Hunter v. Hamilton Cty. Bd. of Elections*, 635 F.3d 219, 244 (6th Cir. 2011); *see also Am. Council of Blind of Ind. v. Ind. Election Comm’n*, 2022 WL 702257, at \*10 (S.D. Ind. Mar. 9, 2022)

("[T]he Court finds that the public interest would be served by prohibiting discrimination in voting."). In sum, "[t]he public interest ... favors permitting as many qualified voters to vote as possible." *Obama for Am.*, 697 F.3d at 437.

Wisconsin law also favors resolution of this case in a way that best effects the will of the voters. *See* Wis. Stat. § 5.01(1). In all, granting Plaintiff's motion will serve the public interest in the vindication of constitutional rights and the lawful administration of elections.

### CONCLUSION

For the foregoing reasons, Plaintiff League of Women Voters of Wisconsin respectfully requests that the Court grant its motion for a temporary injunction.

**DATED:** October 4, 2022

Respectfully submitted,

By: /s/ Daniel S. Lenz

Daniel S. Lenz, SBN 1082058  
Elizabeth M. Pierson, SBN 1115866  
LAW FORWARD  
222 W. Washington Ave., Suite 250  
Madison, WI 53703-0326  
dlenz@lawforward.org  
epierson@lawforward.org  
608.556.9120

Jon Sherman\*  
D.C. Bar No. 998271  
FAIR ELECTIONS CENTER  
1825 K St. NW, Suite 450  
Washington, DC 20006  
jsherman@fairelectionscenter.org  
Phone: (202) 331-0114

Jeffrey A. Mandell, SBN 1100406  
Douglas M. Poland, SBN 1055189  
STAFFORD ROSENBAUM LLP  
222 West Washington Ave., Suite 900  
Post Office Box 1784  
Madison, Wisconsin 53701-1784  
jmandell@staffordlaw.com  
dpoland@staffordlaw.com  
608.256.0226

*\*Motion to be admitted pro hac vice  
pending*