BY THE COURT:

DATE SIGNED: January 2, 2024

Electronically signed by Ryan D. Nilsestuen
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT BRANCH 10 DANE COUNTY

League of Women Voters of Wisconsin,
Plaintiff

vs.

Wisconsin Elections Commission et al.,
Defendants

Decision and Order on Summary Judgment

Case No. 2022CV2472

INTRODUCTION

The right to vote is a fundamental political right because it helps preserve all other rights. *Yick Wo V. Hopkins*, 118 U.S. 356, 370 (1886). All qualified voters have a constitutionally protected right to vote in state and federal elections. *Reynolds v. Sims*, 377 U.S. 533, 554, 84 S. Ct. 1362, 1378 (1964). In order to protect this fundamental right, the Civil Rights Act of 1964 was enacted which, among other protections, prohibits denying a person the right to vote based on incorrect or missing information on voting paperwork when the information is not needed to determine whether the person is qualified to vote. Some municipal clerks in Wisconsin are rejecting otherwise valid absentee ballots due to incorrect or missing address information for witnesses, such as a missing ZIP code or using colloquial or shorthand terms (*e.g.*, "same"). This case asks the Court to determine whether rejecting these ballots violates federal law. It does.

Before the Court are cross motions for summary judgment. For the reasons stated below, the Court is granting the plaintiff League of Women Voters of Wisconsin's ("Plaintiff") motion for summary judgment, denying the defendant Wisconsin Elections Commission ("Defendant" or "WEC") cross-motion for summary judgment, and denying the intervenor Wisconsin State Legislature's ("Intervenor" or "Legislature") cross motion for summary judgment.

BACKGROUND AND FINDINGS OF FACT

Section 6.87 of the Wisconsin Statutes provides for absentee voting procedures. Among other requirements, an elector completing an absentee ballot must do so in front of a witness. Wis. Stat. § 6.87(4)(b)1. The witness must then complete and sign a written verification. Wis. Stat. § 6.87(2), (4)(b)1. An absentee ballot may not be counted if the certification is missing the witness's "address." Wis. Stat. § 6.87(6d). These related provisions are called the "Witness Address Requirement." State law does not define "address" or specify the minimum address information necessary to comply with this provision.[1] *See Trump v. Biden*, 394 Wis. 2d 629, 642 (2020); *see also id.* at 653 (Hagedorn, J., concurring).

In October 2016, the WEC issued guidance to municipal clerks on the Witness Address Requirement. The guidance defined "address" as consisting of a street number, street name, and municipality. The guidance also directed clerks to add a municipality to the witness certificate if it could be reasonably ascertained from other information or other reliable extrinsic sources. Finally, the guidance directed clerks to cure immaterial errors either by correcting the ballot themselves or contacting the voter. All was fine and well for 31 elections. *See* Wisconsin Elections Commission, *Election Results Archive*, https://elections.wi.gov/elections/election-results/results-all (Listing all elections between 2016 and September 2022) (Last viewed Dec. 19, 2023).

This guidance was struck down, in part, six years later. Specifically, on September 7, 2022, the Waukesha County Circuit Court, through a temporary injunction, prohibited the WEC from issuing guidance to local election clerks on how to cure errors in witness addresses, such as missing ZIP codes. *White v. Wis. Elec. Comm'n,* 22-CV-1008 (Waukesha Cnty. Cir. Ct., Sep. 7, 2022). The court issued its final judgment on October 3, 2022.

This is important because the WEC's guidance ensured that absentee ballots were not rejected for mere technical defects in a witness's address. Without this guidance, municipal clerks throughout Wisconsin are interpreting the Witness Address Requirement differently, with some clerks discarding otherwise valid ballots due to irrelevant and trivial errors, such as a missing ZIP code. In Green Bay and Racine, for example, clerks require a witness address to contain both the state and ZIP code. It is unclear why both a state and a ZIP code are needed to comply with the Witness Address Requirement. In the November 2022 general election, 2,239 absentee ballots were rejected due to insufficient certifications. While there is a range of reasons why a certification may be insufficient, some ballots were rejected for very specific, technical reasons, such as:

- Appleton, Green Bay, and Racine each rejected absentee ballots because the witness address did not contain a ZIP code or municipality;
- Appleton, Eau Claire, Oshkosh, Racine, and Waukesha each rejected absentee ballots because the witness, who lived at the same house as the voter, included the same street number and street name as the voter, but omitted other address information, such as a ZIP code or municipality;
- Oshkosh rejected a ballot because the witness wrote "same as voter's address"; and

[1] This is the question being asked in *Rise, Inc. v. Wisconsin Elections Commission*, 22-CV-2446 (Dane Cnty. Cir. Ct., Jan. 02, 2024). Because of the overlapping nature of this case and that case, the Court granted the WEC's motion to consolidate the cases for the purposes of a trial. Doc. 127.

- Racine rejected numerous ballots because the witnesses included their street number, street name, and ZIP code, but not a municipality.

LEGAL STANDARD

I. Summary judgment methodology

The methodology for summary judgment is well-established. The court first examines the pleadings to determine whether claims have been stated and a material factual issue is presented. *Preloznick v. City of Madison*, 113 Wis.2d 112, 116, 334 N.W.2d 580 (Ct. App. 1983). If so, the court then examines the moving party's submissions to determine whether they establish a prima facie case for summary judgment. *Id*. If the moving party has done so, the court then examines the opposing party's affidavits to determine whether a genuine issue exists as to any material fact. *Id*. Summary judgment may be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Wis. Stat. § 802.08(2). The purpose of summary judgment procedure is to determine the existence of genuine factual disputes in order to avoid trials where there is nothing to try. *Yahnke v. Carson*, 2000 WI 74, ¶ 10, 236 Wis. 2d 257, 264.

II. Section 101 of the Civil Rights Act of 1964

Wisconsin courts have jurisdiction to hear and adjudicate federal claims under 42 USC § 1983. *Terry v. Kolski*, 2005 WI 163, ¶16, 78 Wis.2d 475, 479 (1977). While a state court may apply state procedural rules to a federal claim, the Supremacy Clause provides that federal law preempts state law when a rule determines substantive rights and obligations. *Duello v. Bd. Of Regents of Univ. of Wisconsin Sys*., 220 Wis. 2d 554, 569–70, 583 N.W.2d 863 (Ct. App. 1998).

The Civil Rights Act of 1964 prohibits denying an individual the right to vote due to errors or omissions that are immaterial to determining whether the individual is qualified to vote:

> 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.A. § 10101. This is called the "Materiality Provision," which provides that it is illegal for state actors – such as election clerks – to deny voters their right to vote based on errors or omissions that are immaterial to their statutory qualifications to vote. The word "vote" includes all action necessary to make a vote effective, such as registration or requesting a ballot. 52 U.S.C. §§ 10101(a)(2)(B), (a)(3)(A), and (e).[2] To determine whether an error is "material," the information

[2] The Materiality Provision serves an important purpose. It was enacted to "sweep away such tactics as disqualifying an applicant who failed to list the exact number of months and days in his age." *Condon v. Reno,* 913 F. Supp. 946, 950 (D.S.C. 1995). Such tactics were designed to suppress the right to vote, especially people of color. See, e.g., *South*

being required must be compared to state qualifications to vote. *See, e.g., Fla. State Conf. of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1173 (11th Cir. 2008).

DISCUSSION

The Plaintiff asks me to declare that the Materiality Provision prohibits rejecting absentee ballots with one of the following errors or omissions: (1) witness certifications containing the witness's street name, street number, and municipality, but not other address information such as state name or ZIP code; (2) witness certifications by a member of the voter's household who lists a street number and street name, but omits other information, such as a municipality; (3) witness certifications using terms like "same" or "ditto" or other means to convey that their address is the same as the voter; and (4) witness certifications with a street number, street name, and ZIP code, but no municipality.

The material facts in this case are not in dispute. *Compare* Doc. 113 with Docs. 136, 141, and Doc. 140 with Doc 150.[3] Rather, this case involves interpreting how federal law (i.e., the Materiality Provision) applies to state law and practice. Because no party alleges summary judgment should be denied due to a dispute of material fact, the Court will proceed to determining whether one of the moving parties – either the Plaintiff or the Legislature – is entitled to judgment as a matter of law.

I. The Materiality Provision applies to the Witness Address Requirement.

To state a claim under the Materiality Provision, a plaintiff must allege: (1) a denial of the right to vote (2) because of an error or omission (3) on any "record or paper relating to…an act requisite to voting" (4) that is not material in determining whether the voter is qualified to vote. 52 USC § 10101(e). The Eleventh Circuit stated that this test turns on whether, "accepting the error *as true and correct*, the information contained in the error is material to determining the eligibility of the applicant." *Fla. State Conf. of N.A.A.C.P. v. Browning*, 522 F.3d at 1175 (Emphasis original).

As noted above, absentee ballots have been rejected for each of the categories identified by the Plaintiff. Specifically, the Plaintiff has identified numerous voters in multiple jurisdictions whose right to vote was denied when their absentee ballot was rejected due to an error or omission with the witness address. As such, the first two elements of stating a claim are met.

The Witness Address Requirement is also a "record or paper relating to…an act requisite to voting." Federal law broadly defines "to vote" to include "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…" 52 USC § 10101(e). State law requires a witness address in order for the absentee ballot to be cast and counted. Wis.

Carolina v. Katzenbach, 383 U.S. 301, 86 S. Ct. 803, 15 L. Ed. 2d 769 (1966); *United States v. Cartwright*, 230 F. Supp. 873 (M.D. Ala. 1964); *United States v. Wilder*, 222 F. Supp. 749 (W.D. La. 1963).

[3] The vast majority of the proposed facts submitted by the parties are legal conclusions, a few of which are not supported by the cited case law or statutes. *See e.g.*, Doc. 140 at ¶ 17. Counsel for the Intervenor is reminded of its duty of candor towards the Court.

Stat. § 6.87(6d). As such, it is an "action necessary" to vote. This is a similar conclusion reached by other courts who have found that the Materiality Provision applies to absentee ballots and certifications. *See e.g., La Unión del Pueblo Entero v. Abbott*, 604 F. Supp. 3d 512, 541 (W.D. Tex. 2022); *Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1308–09 (N.D. Ga. 2018); *League of Women Voters of Ark. v. Thurston*, No. 5:20-cv-5174, 2021 WL 5312640, at *3–4 (W.D. Ark. Nov. 15, 2021).

Finally, the Witness Address Requirement is not material to whether a voter is qualified. Under the Wisconsin Constitution and statutes, a person is qualified to vote if they: are a U.S. citizen age 18 or older; have resided in an election district or ward for 28 consecutive days before any election where the citizen offers to vote; and are not disenfranchised due to a felony conviction or adjudicated incompetent to vote. Wis. Const. art. III, § 1; Wis. Stat. §§ 6.02(1) and 6.03(1). As such, an absentee ballot could be permissibly rejected under the Materiality Provision if, for example, the voter failed to sign the certification required under Wis. Stat. § 6.87(2) which addresses residency and eligibility. By contrast, and as should be clear by now, an absentee ballot cannot be rejected for trivial defects, such as a missing ZIP code for the witness's address. After all, a witness's address says nothing about the voter's citizenship, age, or residency. Nor does it say anything about whether the voter has been disenfranchised due to a felony conviction or adjudicated incompetent to vote. The address is simply not material to determining the eligibility of a voter. As such, rejecting ballots for trivial mistakes in the Witness Address requirement directly violates the federal Civil Rights Act of 1964.

The United States, in its statement of interest, accurately and concisely demonstrates why the Materiality Provision prohibits this practice:

> Because inclusion of a witness address is necessary to make an absentee vote effective…rejection of an absentee ballot based on errors or omissions in the witness's address that are not material to determining a voter's qualification to vote are encompassed within Section 101's prohibition, *see La Unión del Pueblo Entero*, 2022 WL 1651215, at *21 (conducting similar analysis of Texas's vote-by-mail requirements). Having created absentee balloting procedures, Wisconsin must operate them in accord with federal law and may not disenfranchise voters who rely on them. *Cf. Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 665 (1966) ("[O]nce the franchise is granted to the electorate… the right of suffrage 'is subject to the imposition of state standards which are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed.'"); *Self Advoc. Sols. N.D. v. Jaeger*, 464 F. Supp. 3d 1039, 1052 (D.N.D. 2020) ("[A] state that creates a system for absentee voting must administer it in accordance with the Constitution.") (internal quotation marks omitted); *Martin v. Kemp*, 341 F. Supp. 3d 1326, 1338 (N.D. Ga. 2018); *Zessar v. Helander*, No. 05-cv-1917, 2006 WL 642646, at *6 (N.D. Ill. Mar. 13, 2006), judgment entered, 2007 WL 1703915, judgment vacated as moot sub nom. *Zessar v. Keith*, 536 F.3d 788 (7th Cir. 2008); *Raetzel v. Parks/Bellemont Absentee Election Bd.*, 762 F. Supp. 1354, 1358 (D. Ariz. 1990).

Doc. 56: 10.

II. The arguments to the contrary are unpersuasive.

a. The claims are justiciable.

The Defendant and the Intervenor argue that the Materiality Provision claim is non-justiciable. The justiciability of a federal claim must be determined by federal law, not state law. *Shaw v. Leatherberry*, 2005 WI 163, ¶ 31, 286 Wis. 2d 380. Federal law provides that a claim for declaratory judgment are justiciable if "'the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.' " *MedImmune*, 549 U.S. at 127, 127 S.Ct. 764, quoting *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273, 61 S.Ct. 510, 85 L.Ed. 826 (1941). "Injury need not be certain. Any pre-enforcement suit entails some element of chance." *Brandt v. Vill. of Winnetka, Ill.*, 612 F.3d 647, 650 (7th Cir. 2010). A trial court has discretion in deciding actions for declaratory relief so long as it applies the proper standard of law and uses a rational process. *Wisconsin Educ. Ass'n Council v. Wisconsin State Elections Bd.*, 2000 WI App 89, ¶ 9, 234 Wis. 2d 349, 356, 610 N.W.2d 108, 112.

The Defendant's arguments on justiciability boil down to an assertion that, because the WEC itself does not directly accept or deny ballots, there can be no injury. The Defendant's finger-pointing to other "responsible" parties is addressed in depth below. However, regarding justiciability alone, the WEC's statutory responsibility to administer the State's elections and provide guidance to local authorities demonstrates their direct adverse relationship to the plaintiffs and their stated injury. *See, e.g., Democratic Nat'l Comm. v. Bostelmann*, 488 F. Supp. 3d 776, 796 (W.D. Wis. 2020) (finding that the adverse parties' injuries, ostensibly caused by local authorities, had a direct connection to the WEC sufficient for standing due to the Commission's responsibilities to those local authorities).

Though the Defendant argues justiciability and its status as a supposedly improper defendant as separate threads, the Court views these as inherently tied together. Its argument against justiciability relies on the Court finding that they were not the party to cause an injury, and therefore some other more proper defendant must exist if an injury is identifiable. The WEC argues that it is not a proper defendant because it is not directly responsible for municipal clerks rejecting absentee ballots due to immaterial errors or omissions in the Witness Address Requirement. Yet this argument ignores the WEC's administrative and enforcement authority under Wisconsin law, which makes it a proper defendant:

> The court isn't persuaded that the commission is an improper party simply because its involvement in the enforcement process comes later. "Injury need not be certain. Any pre-enforcement suit entails some element of chance." For example, plaintiffs asserting a pre-enforcement challenge to a criminal statute may sue the state attorney general to enjoin enforcement, even though police officers are making the initial arrest decisions. The commission is in a similar position to a prosecutor, something it has implicitly acknowledged in previous lawsuits by failing to object on justiciability grounds, even when the lawsuit also involved state laws would be enforced in the first instance by clerks. If the court were to accept defendants' argument, it would mean that any plaintiffs seeking statewide relief on a challenge to voting requirements would have to sue more than 1,800

> municipal clerks. That isn't feasible, and it isn't what the law requires.

Carey v. Wisconsin Elections Comm'n, 624 F. Supp. 3d 1020, 1029 (W.D. Wis. 2022)(Internal citations omitted).

b. The Intervenor turns the Materiality Provision on its head.

The Intervenor takes the curious position that the Materiality Provision is limited to papers or records related to registration, arguing the Witness Address Requirement "does not relate to whether a voter is 'qualified under State law to vote' under [the Materiality Provision], given that the witness-address requirement applies only to absentee voters who are permitted to request an absentee ballot and so are already deemed qualified to vote." Doc. 138 at 1. But that argument ignores the plain language of the Civil Rights Act, which makes it clear that it applies to an "application" to vote and any "other act requisite to voting." Because completing an absentee ballot certification – including the witness address – is "requisite" to having an absentee ballot counted, it squarely falls within the confines of the Materiality Provision. This is the same conclusion reached by numerous other courts. *See*, e.g., *Vote.org v. Georgia State Election Bd.*, No. 1:22-CV-01734-JPB, 2023 WL 2432011, at *7 (N.D. Ga. Mar. 9, 2023); *La Unión del Pueblo Entero v. Abbott*, No. 5:21-cv-844, 2022 WL 1651215, at *22-23 (W.D. Tex. May 24, 2022); *League of Women Voters of Ark. v. Thurston*, No. 5:20-cv-5174, 2021 WL 5312640, at *4 (W.D. Ark. Nov. 15, 2021); *Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1308-09 (N.D. Ga. 2018). As succinctly stated recently in *Penn State*, the purpose of the Materiality Provision "would be lost if after qualifying to vote, a voter's ballot would not be counted by reason of obstacles that the statute was enacted to prohibit in the first place." *Pennsylvania State Conf. of NAACP v. Schmidt*, No. 1:22-CV-00339, 2023 WL 8091601, at *31 (W.D. Pa. Nov. 21, 2023). As such, the Materiality Provision applies throughout the entire process, from registering to vote to casting and counting a ballot.

c. Insignificant errors or omissions in witness addresses can – and have – deprived qualified voters of their right to vote.

The Intervenor also argues that the Witness Address Requirement doesn't deny the right to vote because Wisconsin offers numerous ways to vote. This argument is unpersuasive and relies largely on cases that concern 52 U.S.C. § 10301, as opposed to the Materiality Provision in § 10101. The undisputed record shows that voters have been deprived of their vote due to insignificant errors and omissions in the Witness Address Requirement, not through the types of restrictions on absentee voting procedure imposed in the cases the Intervenor relies upon, such as criminalizing third-party absentee ballot drop-offs or implementing an age requirement for absentee voting. The case at hand concerns voters who are ostensibly allowed to vote absentee, but are being deprived of that right due to immaterial errors of the type explicitly outlined in 52 U.S.C. § 10101.

To argue otherwise would be akin to saying that a requirement that voters at polling stations must write down the name and favorite color of the poll worker who handed them their ballot is not a violation of the Voting Rights Act because they could always elect to vote by mail. The Intervenor in effect argues that states that offer multiple avenues for voting are allowed to circumvent the Materiality Provision. This assertion is unfounded and unsupported. Further, multiple courts have

held that that the Materiality Provision applies to absentee voting despite other methods of voting being available. *See e.g., Pennsylvania State Conference of NAACP, et al. v. Schmidt et al; Sixth Dist. of Afr. Methodist Episcopal Church v. Kemp*, 574 F. Supp. 3d 1260 (N.D. Ga. 2021); *Mi Familia Vota v. Fontes*, No. CV-22-00509-PHX-SRB, 2023 WL 8181307 (D. Ariz. Sept. 14, 2023). As stated above, having created absentee balloting procedures, Wisconsin must operate them in accordance with federal law and may not disenfranchise voters who rely on them. After all, a voter whose ballot is rejected due to a missing ZIP code might not know their vote has been rejected until *after* the polls close. (While Wisconsin law permits clerks to contact voters to cure absentee ballots with improper certification, this is a discretionary – not mandatory – act. Wis. Stat. § 6.87(9)).

d. Applying the Materiality Provision to the Witness Address Requirement will not cause the sky to fall.

The Intervenor finally argues that applying the Materiality Provision to the Witness Address Requirement will "unconstitutionally destroy state election-administration authority" and prevent "Wisconsin (or any State) from holding fair and orderly elections under its own state law." The Intervenor posits that if the Materiality Provision applies to the Witness Address Requirement, then a voter could refuse to give their name and address to poll workers or show up to the polls after 8:00 pm on Election Day. This argument ignores the plain language of the Materiality Provision, which applies to a "record or paper" related to voting. If a voter arrived late to the polls or refused to give her name to a poll worker, it wouldn't implicate the Materiality Provision because neither action involves a "record or paper." Further, this is an as-applied challenge, focusing on four discrete categories of errors or omissions which have resulted in rejected ballots. The Intervenor's parade of horribles treats the Plaintiff's claim as a facial challenge to the Witness Address Requirement, which is not before the Court.

CONCLUSION

Having created absentee ballot voting procedures, Wisconsin must administer them in conformance with federal law, including the Materiality Provision. That provision prohibits rejecting ballots in the four limited categories identified by the Plaintiff. Therefore, the Plaintiff is entitled to summary judgment in its favor.

ORDER

IT IS ORDERED:

(1) The Plaintiff's motion for summary judgment on Count II of its Second Amended Complaint is **GRANTED**.
(2) The Defendant Wisconsin Election Commission's (WEC) cross motion for summary judgment is **DENIED**.
(3) The Intervenor Legislature's cross motion for summary judgment is **DENIED**.
(4) The Court will schedule oral arguments on the requested injunctive relief.