WISCONSIN COURT OF APPEALS
DISTRICT I
No. 2024AP166

LEAGUE OF WOMEN VOTERS OF WISCONSIN,

Plaintiff-Appellant-Cross-Respondent,

v.

WISCONSIN ELECTIONS COMMISSION, DON MILLIS, JULIE M. GLANCEY, ROBERT F. SPINDELL, JR., MARK L. THOMSEN, ANN S. JACOBS, MARGE BOSTELMANN, AND MEAGAN WOLFE,

Defendants-Respondents,

WISCONSIN STATE LEGISLATURE,

Intervenor-Respondent-Cross-Appellant.

Appeal from the Circuit Court for Dane County
The Honorable Ryan D. Nilsestuen and
the Honorable Nia Trammell, Presiding
Circuit Court Case No. 2022-CV-2472

COMBINED BRIEF OF PLAINTIFF-APPELLANT-CROSS-RESPONDENT LEAGUE OF WOMEN VOTERS OF WISCONSIN

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INTRODUCTION

Like all statutory terms that lack a technical or specifically defined meaning, the word "missing" in Wis. Stat. § 6.87(d) should be given its plain meaning—a witness address is "missing" only if it fails to contain any component part or indicia of the witness's address. The Legislature's arguments minimize the broad power of Wisconsin courts to relieve parties from uncertainty, and its definition of "missing" defies common sense. Plaintiff-Appellant-Cross-Respondent League of Women Voters of Wisconsin's (the "League") claim for declaratory judgment over this disputed issue is justiciable, and this Court should interpret the statute to mean what it says and reverse the circuit court's order dismissing Count One of the League's Second Amended Complaint.

ARGUMENT

I. The League's claim against WEC regarding the definition of "missing" is justiciable.

A claim for declaratory relief is justiciable when there is sufficient adversity between parties to ensure that the issue is properly and fully litigated. The Wisconsin Elections Commission ("WEC") has an interest in contesting the League's claims, has done so, and was therefore the proper defendant below. The League has a legally protectable interest in clarifying the law so it can advise its members and protect the rights of voters in Wisconsin. The issue is ripe for this Court's determination since clerks across Wisconsin have been rejecting ballots for witness-address errors, and resolution of the issue will relieve the parties from uncertainty. Finally, the League stated a claim for injunctive relief.

A. WEC—not the municipal clerks—is the proper defendant.

The League appropriately sought statewide declaratory and injunctive relief against WEC as the sole actor with "the responsibility for the administration of chs. 5 to 10 and 12 and other laws relating to elections and election campaigns, other than laws relating to campaign financing." Wis. Stat. § 5.05(1).

WEC's statutory responsibility distinguishes the agency from the defendants in the cases the Legislature relies upon—*Wisconsin Pharmaceutical Association v. Lee*, 264 Wis. 325, 58 N.W.2d 700 (1953) and *Wisconsin Educational Association Council v. Wisconsin State Elections Board*, 2000 WI App 89, 234 Wis. 2d 349, 610 N.W.2d 108. (*See* Leg. Br. 25-26.) In *Wisconsin Pharmaceutical Association*, the defendant agency was charged only with investigating and prosecuting violations. 264 Wis. at 329. In *Wisconsin Educational Association Council*, the sole issue was the Election Board's refusal to issue an opinion regarding Republican legislators' campaign contributions. 2000 WI App 89, ¶¶3-4, 14-18. By contrast, here the League has identified at least two separate ways in which WEC has violated the law: (1) issuing guidance implying that a partial (but not missing) address is insufficient; and (2) canvassing and certifying election results that fail to include absentee ballots with witness-address errors. (League Br. 22–25.)

Moreover, requiring civic engagement groups to pursue litigation against the 1,850+ municipal clerks who administer Wisconsin's elections would unreasonably burden plaintiffs like the League and produce inconsistent results. Despite the Legislature's insistence to the contrary, *Carey* agreed with the League's position here: "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. Wis. Elections Comm'n*, 624 F. Supp. 3d 1020, 1029 (W.D. Wis. 2022).

That the *Carey* plaintiffs sought an injunction under federal law does not negate its persuasive value here. Citing *Ex Parte Young*, 209 U.S. 123 (1908), the Legislature argues that this Court should ignore *Carey*'s reasoning. (Leg. Br. 31.) But *Young*, which establishes that a federal court may grant an injunction against a state defendant, does not limit actions of state courts. This Court has broad authority to grant statewide declaratory and injunctive relief against WEC under Wis. Stat. § 806.04. (League Br. 20, 28–29.)

If this Court accepted the Legislature's argument, the League's state-law questions would evade judicial review until ***after*** a clerk violated a voter's rights, except in the rare circumstance of a municipality publicizing its interpretation and implementation of Wis. Stat. § 6.87(6d) before an election. This would require the League (and voters) to go into elections facing the prospect of mass disenfranchisement. The law does not require voters to forego the protections of the law until after a violation occurs. *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶43, 309 Wis. 2d 365, 749 N.W.2d 211. Even if it were feasible to sue clerks individually,[1] filing those actions would clog court dockets and yield only piecemeal relief against specific clerks, leaving hundreds of other clerks with discretion to decide whether to comply with the order. Moreover, it would impose defense costs on individual municipalities for statewide legal issues, and it could yield inconsistent rulings across jurisdictions.

B. WEC's inaction has created a justiciable controversy.

A justiciable controversy against WEC exists because WEC has not merely stood aside but has engaged in conduct that demonstrates a violation of the law. *Cf. Wis. Educ. Ass'n Council*, 2000 WI App 89, ¶16. Moreover, the Legislature misconstrues *Wisconsin Pharmaceutical Association* as holding that a justiciable controversy exists ***only*** if "an agency has taken some action that has caused harm or will cause imminent harm." (Leg. Br. 32 (citing 264 Wis. at 330).) But *Wisconsin Pharmaceutical Association* does not examine whether an agency's action or failure to take action, which establishes adversity, can nonetheless escape judicial review. In fact, the Court noted, "[i]f the statute in question did prescribe their activities as pharmacists, a different situation would arise." 264 Wis. at 330. WEC has a general duty to administer Wis. Stat. § 6.87(6d), as well as specific duties to canvass votes,

[1] The Legislature's comparison to *Rise* is misplaced. (Leg. Br. 28-29.) While the *Rise* plaintiffs sued several individual clerks, their relief was not limited to those defendants. Rather, the circuit court granted, and this Court affirmed, statewide relief against WEC. *Rise, Inc. v. Wis. Elections Comm'n*, 2024 WI App 48, ___ N.W.3d ___.

certify election results, and issue certificates of election based on those results. As described in the League's opening brief, WEC has performed those duties contrary to the plain meaning of Wis. Stat. § 6.87(6d).

C. WEC has an interest in contesting—and has contested—the League's claims.

WEC contests the League's claims ***and*** continues to refuse to issue guidance, as required by law. The Legislature leans on *Wisconsin Educational Association Council*, 2000 WI App 89, ¶12, to claim that a dispute over an agency's failure to issue an opinion that interprets a statute, without more, is not a basis to obtain legal relief. (Leg. Br. 32.) But there, the Board "did not offer any argument or analysis" regarding the interpretation of the law during litigation in the circuit court and had "made it known that it did not necessarily disagree with [the plaintiff's] suggested construction of the statute." 2000 WI App 89, ¶7. Here, WEC's litigation position and its ongoing refusal to issue guidance bear directly on the question of whether the agency has an interest in contesting the League's position. It does, and it is.

D. The League has a legally protectable interest in defending Wisconsin voters' rights.

The League has a legally protectable interest in protecting its members' right to vote and more generally in knowing the law so it can advise its members. The Legislature mistakenly relies on Wis. Stat. § 6.84(1) to argue—or imply—that the League may not have an interest in protecting its members' right and ability to vote by absentee ballot because voting by absentee is a "privilege." (Leg. Br. 33.) But as the Wisconsin Supreme Court recently commented, "[a]ll § 6.84 does is set forth the consequences of a statutory violation." *Priorities USA v. Wis. Elections Comm'n*, 2024 WI 32, ¶31, 412 Wis. 2d 594, 8 N.W.3d 429. The League and its members have a constitutionally protected interest in their right to vote, whether that right is exercised via absentee ballot or at the polls.

The League need not show that its members face the risk of being disenfranchised for future witness-address errors. (*See* Leg. Br. 34.) A member organization may seek declaratory judgment even if a member's rights have not yet been violated. *Milwaukee Dist. Council 48 v. Milwaukee Cnty.*, 2001 WI 65, ¶38, 244 Wis. 2d 333, 627 N.W.2d 866. *Milwaukee District Council 48* acknowledged the multifaceted role of the union: "The union has a tangible interest in knowing what the law is and what rights its members have, so that it can do its duty." *Id*. Likewise, the League has a tangible interest in knowing what the law is and what rights its members, and voters generally, have regarding absentee voting, so it can fulfill its mission of advancing the voting rights of all Wisconsinites.

The Legislature also fails to cite any authority that because "only" 67 ballots were rejected for witness-address errors in the November 2022 general election, the League could not have a legally protectable interest. (Leg. Br. 34.) No minimum number of voters must be disenfranchised before a voting rights organization has a legally protected interest in defending voters. Moreover, those 67 ballots represent only ***examples*** of ballots rejected because they contained partial addresses. In total, over 2,000 ballots were rejected in the 2022 general elections due to insufficient witness certifications. (R. 157 at 2, App. 009.)

E. This issue is ripe for adjudication.

The issue of WEC's failure to issue guidance regarding the definition of "missing" is ripe. Ripeness in a declaratory judgment action requires a different analysis than in other cases. *Milwaukee Dist. Council 48*, 2001 WI 65, ¶41; *Olson*, 2008 WI 51, ¶43. The Legislature claims, without citation, that the likelihood of absentee ballots with witness-address errors being rejected in upcoming elections does not render the League's claim ripe. (Leg. Br. 34.) It is precisely ***because of*** WEC's refusal to issue guidance that ballots with witness-address errors will likely be rejected, so the issue remains ripe.

Consistent with the purpose of Wis. Stat. § 806.04, "a plaintiff seeking declaratory judgment need not actually suffer an injury before availing himself of the [Uniform Declaratory Judgments] Act" and "[w]hat is required is that the facts be sufficiently developed to allow a conclusive adjudication." *Olson*, 2008 WI 51, ¶43. Following the Waukesha County Circuit Court's decision in *White*, the League correctly alleged that ballots with partial witness addresses would be rejected. (*See* League Br. 25.) Rejection on this basis is the core issue here, and the Legislature identifies no other facts that must be developed.

F. The League's claim for injunctive relief is justiciable.

The League sought an injunction to require WEC to issue guidance informing clerks of the proper definition of "missing" following a declaratory judgment. This is proper and in full accord with Wisconsin law. Wis. Stat. § 5.05(5t); *Town of Blooming Grove v. City of Madison*, 275 Wis. 328, 336, 81 N.W.2d 713 (1957).

The Legislature rehashes its justiciability argument to claim that the League has no grounds for obtaining an injunction. (Leg. Br. 35–37.) The Legislature is wrong. This Court may issue injunctive relief subsequent to, or as part of, a declaratory judgment, Wis. Stat. § 806.04(8), and the League stated a claim for declaratory relief upon which relief may be granted. Moreover, while Wis. Stat. § 5.05(5t) does not provide a separate cause of action, it establishes that WEC must issue appropriate guidance following such a judgment.

II. As used in Wis. Stat. § 6.87(6d), "missing" means failing to contain any component or indicia of the witness's address.

The word "missing" in Wis. Stat. § 6.87(d) should be given its plain meaning—a witness address is "missing" only if it fails to contain any component part or indicia of the witness's address.[2] This definition not only best applies the

[2] The League explained in its opening brief, and the Legislature does not dispute, that given the upcoming election in November, and because this is a strictly legal question, this Court should address the merits of the League's state-law claim. (League Br. 31–32.)

statutory text, it provides municipal clerks a clear rule that works with any definition of "address." The Legislature would instead have this Court rewrite the statute and equate "missing" with "incomplete" or "partial," contrary to the statute's plain text, context, and purpose.

Plain text. The Legislature's proffered definitions support the League's position. The Legislature admits that "missing" means "not present" or "not to be found." (Leg. Br. 39.) This should end the inquiry. *State ex rel. Kalal v. Cir. Ct. of Dane Cnty.*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. Something is "not present" only when it is ***fully absent***. If only half of a football team arrives for a game, the team is not missing, but rather incomplete or only partially present. To say otherwise would be absurd—the team is present, albeit partially, by virtue of having some players there. And a phone number is not "missing" when it lacks an area code. Here too, the Legislature would insist that an absent ***component*** somehow nullifies the ***entirety*** of the object. But that argument finds no purchase in the plain text of the statute.

The Legislature's use of "partial" and "incomplete" in its definition is similarly telling, as both words are distinct from "missing." (Leg. Br. 39.) "Partial" means "[r]elating to or involving a part of something rather than the whole; not general or total; constituting only a part; incomplete." *Partial*, Oxford English Dictionary Online (Mar. 2024). Being incomplete, or not total, is a far cry from being missing. Nonetheless, the Legislature urges this Court to conflate these distinct concepts or terms. A partial address is not absent, but merely incomplete.

Context. The context of Wis. Stat. § 6.87(6d) supports the League's interpretation. The Legislature points to one other use of "missing" in the election law statutes—Wis. Stat. § 6.80(2)(d)—which requires two inspectors to initial ballots for in-person voting and directs the voter to return the ballot to the inspectors

"[i]f the initials are missing."[3] The Legislature assumes, without explanation or authority, that the relevant initials are "missing" even if one set of initials is present. (Leg. Br. 40.) Just as in Wis. Stat. § 6.87(6d), it is more consistent with the plain language of the statute that the relevant information is "missing" only when it is completely absent, not when only part (*i.e.* partial initials or a partial address) is present.

More helpful than the Legislature's misreading of Wis. Stat. § 6.80(2)(d), and in addition to the many locations where the statutes specify a "complete address" (League Br. 33), are the statutes in which the Legislature used "partial," showing that the Legislature knows the difference between when an item is missing and when it is partially present.[4] There are at least three examples in the election law statutes. *See* Wis. Stat. §§ 5.15(2)(bm) ("Every city electing the members of its common council from aldermanic districts shall assemble the blocks ***wholly or partially*** contained within the city into wards …."); 7.60(4)(a) ("If a municipal judge elected under s. 755.01(4) serves a municipality that is located ***partially*** within the county … ."); 8.17(6)(c) ("For each assembly district lying ***partially*** within one county … .") (emphases added).

Things may be present even if they are incomplete. And the Legislature was capable of drafting the law as it would now have the Court interpret it: "If the certificate contains a ***partial or incomplete*** witness address, the ballot may not be counted." Indeed, the Legislature has recently attempted but failed to enact legislation providing exactly this type of requirement, seriously undermining the Legislature's argument here that this concept is already part of the statute. 2021 S.B.

[3] The Legislature also cites Wis. Stat. § 7.34(4), which appears to be an error. (Leg. Br. 40.) Wisconsin Stat. § 7.37(4) establishes the requirement that inspectors initial the ballot. Wisconsin Stat. § 6.80(2)(d) describes what should occur when the initials are missing.

[4] The Legislature has also used "incomplete" in various statutes to mean something less than absent. *See, e.g.*, Wis. Stat. §§ 804.12(1)(b), 403.115(1); 69.18(2)(f)2.

935, §§ 2–3; *see also Priorities USA*, 2024 WI 32, ¶¶23–24 (examining legislation in considering statutory interpretation).

Purpose. The League's plain-text reading of "missing" aligns with the purpose of the statutes and the policy decisions underlying the absentee-voting statutes. As this Court recently pointed out, the statutory history of Wisconsin's absentee-voting laws reveal two purposes: (1) "to ease limitations on the ability of voters to cast absentee ballots"; and (2) "to retain procedural safeguards in the absentee voting process." *Rise*, 2024 WI App 48, ¶¶50–51. By using "missing," the Legislature balanced these two objectives: witnesses must provide address information, which may be useful in some instances, but the omission of ***some*** witness address information does not command disenfranchisement.

The League's definition also aligns with the Legislature's goal of streamlining the absentee-voting process because it gives clear direction to clerks statewide. The Legislature does not explain why a clerk would need to infer the remainder of a witness's address. If a component is present, the ballot should be counted. If not, the clerk should contact the voter to try to remedy the issue. If the clerk must contact the voter (or the witness), they have any number of means to do so, including the voter's registration and publicly available information.

The Legislature's resort to Wis. Stat. § 6.84 is of no help. The Wisconsin Supreme Court recently rejected the Legislature's argument that § 6.84 establishes a rule of strict construction for other election laws. *Priorities USA*, 2024 WI 32, ¶45. Even if strict construction were required, however, that would favor holding the Legislature to the exact term it adopted in Wis. Stat. § 6.87(6d) and construing "missing" according to its plain meaning.

CONCLUSION

For the foregoing reasons, and those stated in the League's opening brief, this Court should reverse the dismissal of Count One of the League's Second Amended Complaint.

[*The Signature and Certification are after the following section of this combined brief*]

LEAGUE OF WOMEN VOTERS OF WISCONSIN'S RESPONSE TO CROSS-APPELLANT'S BRIEF

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ISSUES PRESENTED

Does the enforcement of Wis. Stat. § 6.87(6d) violate, and is it preempted by, the 1964 Civil Rights Act's Materiality Provision, 52 U.S.C. § 10101(a)(2)(B), with respect to errors or omissions in the address field of the witness certification for absentee ballots?

Circuit Court's Answer: Yes, for four categories of errors or omissions:

- (1) "The witness's street number, street name, and municipality are present, but there is neither a state name nor a ZIP code provided;"
- (2) "The witness's street number, street name, and ZIP code are present, but there is neither a municipality nor a state name provided;"
- (3) "The witness's street number and street name are present and match the street number and street name of the voter, but no other address information is provided; or"
- (4) "The witness certification indicates that the witness address is the same as the voter's address with any or any combination of the following words: "same," "same address," "same as voter," "same as above," "see above," "ditto," or by using quotation marks and/or an arrow or line pointing to or from the voter address."

(R. 161 at 2; App. 006.)

Cross-Respondent's Answer: The witness certification for absentee ballots implicates and facilitates voter-qualification determinations and the four categories of witness-address errors or omissions identified by the circuit court are wholly inconsequential and immaterial to those eligibility assessments. The circuit court's decision should be affirmed.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The League agrees with the Legislature that, given the significance of this action, this case is appropriate for oral argument and publication. (Leg. Br. 50.)

INTRODUCTION

The circuit court ruled in favor of the League on Count Two of its Second Amended Complaint, finding that four specific, narrow applications of Wisconsin's witness-address requirement violate the 1964 Civil Rights Act's Materiality Provision, 52 U.S.C. § 10101(a)(2)(B) (the "Materiality Provision"). Each of these four as-applied violations is based on a separate category of errors or omissions in the witness-address field on an absentee-ballot certificate.

The League successfully argued that rejecting absentee ballots based on the witness-certification errors or omissions in those four categories violates the Materiality Provision because they are not material in determining voters' qualifications. Accordingly, this case presents the prototypical Materiality Provision violation: a denial of the right to vote based on technical, inconsequential errors or omissions on a record or paper that plays a role in determining voters' qualifications. The circuit court's summary judgment order and permanent injunction apply the Materiality Provision's clear text to just four categories of ballots, harmonizing state law with a 60-year-old federal requirement. The circuit court's judgment is narrowly tailored to the record evidence of rejected absentee ballots and consistent with the overwhelming weight of precedent. This determination is also consistent with the ***holding*** of the Third Circuit's recent decision in *Pennsylvania State Conference of NAACP Branches v. Secretary Commonwealth of Pennsylvania*, 97 F.4th 120 (3d Cir. 2024) (hereinafter "*Pennsylvania NAACP*"). The panel majority held the Materiality Provision's applicability is limited to voter-qualification determinations. *Id*. at 131-35.

This Court should reject the Legislature's cramped interpretation of the Materiality Provision and affirm the circuit court's determination that its coverage is not confined to the voter-registration process. However, given recent federal court decisions restricting the Materiality Provision's scope to voter-qualification determinations, this Court should affirm on a narrower basis. This case is straightforward because, by its plain text, Wisconsin's witnessing requirement implicates one or more voter qualifications and, for this reason alone, the Materiality Provision applies to the witness certification. The circuit

court also correctly found that rejecting absentee ballots for errors or omissions in the mandatory witness-address field violates the Materiality Provision. Though the circuit court reasoned that the witness address is wholly immaterial to determining voter qualifications (a facial argument the League did not advance), a narrower reason is sufficient to affirm. Each of four specific categories of witness-address errors or omissions is immaterial because, notwithstanding these specific technical defects, officials can always locate and contact a witness based on the address information the witness supplied.

Keen to rewrite the Materiality Provision to suit its preferred outcome, the Legislature places undue weight on dicta in *Pennsylvania NAACP*, even though no part of the ***holding*** alters the analysis here. The Materiality Provision is not limited to voter-registration paperwork; it applies whenever a record or paper is connected to the determination or ***re***-determination of at least one voter qualification. Here, the witness certification on a Wisconsin absentee-ballot envelope implicates and facilitates voter-qualification determinations, and the four identified categories of witness-address errors or omissions are wholly inconsequential and immaterial to those eligibility assessments. As such, the circuit court's judgment on Count Two of the League's Second Amended Complaint should be affirmed.

STATEMENT OF THE CASE

The League will not repeat any legal, factual, or litigation background the Legislature's Statement of the Case accurately describes (Leg. Br. 51-65.) The League notes only that its claim under the Civil Rights Act of 1964 neither seeks to invalidate on its face nor challenges the Legislature's authority to enact Wis. Stat. § 6.87(6d). Rather, the League seeks to prevent Wisconsin election officials from violating the Materiality Provision by applying the witness-address requirement to four specific categories of absentee ballots. The League's claim focuses on four specific errors or omissions that witnesses make when filling out their address. While Wis. Stat. § 6.87(6d) violates the Materiality Provision as applied to these specific categories, the League has ***not*** brought a sweeping facial challenge.

LEGAL STANDARD

This is an appeal from the circuit court's decision on summary judgment, which this Court reviews *de novo*, using the same methodology as the court below. *Bauer v. Wis. Energy Corp.*, 2022 WI 11, ¶11, 400 Wis. 2d 592, 970 N.W.2d 243. This Court may affirm a judgment on a different basis than the circuit court when supported by the record. *Weyenberg Shoe Mfg. Co. v. Seidl*, 140 Wis. 2d 373, 383, 410 N.W.2d 604 (Ct. App. 1987); *see also Vanstone v. Town of Delafield*, 191 Wis. 2d 586, 595, 530 N.W.2d 16 (Ct. App. 1995) ("[W]e may affirm on grounds different than those relied on by the trial court.")

ARGUMENT

I. The circuit court correctly determined that the Materiality Provision applies to absentee ballot certificates.

The circuit court properly found that the 1964 Civil Rights Act prohibits denying an individual the right to vote because of errors or omissions on a record or paper that are not material in ascertaining the elector's qualifications to vote. Specifically, the Materiality Provision 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). Congress enacted this provision to protect voters from disenfranchisement due to technical defects that have no material impact on officials' ability to determine whether an individual is qualified to vote. The Materiality Provision is a *per se* prohibition against this type of disenfranchisement. As the U.S. Department of Justice noted in its Statement of Interest filed in the circuit court, the provision does not create a balancing test. (R. 56 at 10.)

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." 52 U.S.C. § 10101(e) (emphases added); *id*.

§ 10101(a)(3)(A) (applying subsection (e)'s definition to subsection (a)); *La Unión del Pueblo Entero v. Abbott*, 604 F. Supp. 3d 512, 540 (W.D. Tex. 2022) ("The [Civil Rights Act] ... defines the term 'vote' broadly ...."). Therefore, a certification on the return envelope, to be completed by an absentee voter and their witness in order to "hav[e] such ballot counted," 52 U.S.C. § 10101(e), is a "record or paper relating to" an "act requisite to voting," *id.* § 10101(a)(2)(B), and falls within the Materiality Provision's protection.

Courts routinely apply this provision to records or papers relating to requesting and casting absentee ballots. *See, e.g.*, *La Unión del Pueblo Entero*, 604 F. Supp. 3d at 541 (finding Materiality Provision applies to "preparation and submission of an application to vote by mail, as well as the preparation and submission of a mail ballot carrier envelope"); *In re Georgia Senate Bill 202*, No. 1:21-mi-55555-JPB, 2023 WL 5334582, at *10 (N.D. Ga. Aug. 18, 2023) ("[T]he Court finds that completing the outer envelope is an 'act requisite to voting' because without it, the vote will not count."), *appeal filed*, 2023 WL 5334582 (11th Cir. Oct. 3, 2023); *League of Women Voters of Ark. v. Thurston*, No. 5:20-CV-05174, 2023 WL 6446015, at *16, *judgment entered*, 2023 WL 6445795 (W.D. Ark. Sept. 29, 2023) (finding Materiality Provision applies to absentee ballot applications); *Common Cause v. Thomsen*, 574 F. Supp. 3d 634, 636 (W.D. Wis. 2021) (observing that Materiality Provision "isn't limited to ... voter registration"); *Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1308–09 (N.D. Ga. 2018) (holding Materiality Provision forbids rejecting ballots because voters incorrectly recorded or omitted their birth years on "absentee ballot envelope"). Even in one of the Legislature's principal cases, *Friedman v. Snipes*, the court applied the Materiality Provision to Florida's absentee-ballot-receipt deadline "based on the express language of the provision." 345 F. Supp. 2d 1356, 1371 (S.D. Fla. 2004). Here too, the circuit court properly found that, by its terms, the Materiality Provision protects the right "to vote in any election," notwithstanding an immaterial error or omission on an absentee-ballot certificate.

II. This Court should reject the Legislature's cramped interpretation of the Civil Rights Act.

A. The Materiality Provision's coverage is not confined to the voter-registration process.

A claim under the Materiality Provision must establish five elements: (1) the prohibited conduct must be committed by a person "acting under color of law"; (2) it must have the effect of "deny[ing]" any individual "the right ... to vote"; (3) that denial must be attributable to "an error or omission on any record or paper"; (4) the "record or paper" must be "relat[ed] to any application, registration, or other act requisite to voting"; and (5) the error or omission must not be "material in determining whether such individual is qualified under State law to vote." 52 U.S.C. § 10101(a)(2)(B). As in *Pennsylvania NAACP*, 97 F.4th at 130, the parties agree on the interpretation of the first and third elements and that they are satisfied here. Officials "acting under color of law" reject absentee ballots with "an error or omission" on the return envelope's absentee-ballot certificate, which is indisputably a "record or paper." 52 U.S.C. § 10101(a)(2)(B). Accordingly, the League focuses on the second, fourth, and fifth elements, but addresses them in reverse order.

The parties dispute several aspects of element (5): that the error or omission is "not material in determining whether such individual is qualified under State law to vote." 52 U.S.C. § 10101(a)(2)(B). The question is whether the Materiality Provision applies to errors or omissions in the witness certification of an absentee-ballot certificate. The League argues the Materiality Provision applies whenever voter qualifications are implicated, determined, or re-determined. The Legislature argues the Materiality Provision categorically does not apply here because the rules governing absentee voting, like Wis. Stat. § 6.87 (6d)'s witness-address requirement, exist outside "the voter-registration context." (Leg. Br. 69, 71–72, 84.)[5] The Legislature contends that Wis. Stat. § 6.87(6d)

[5] Throughout its brief, the Legislature alternately (and inconsistently) refers to limiting the Materiality Provision's scope to the "voter-registration context" and then abruptly pivots to "[c]onstruing the statute as only applying to ***voter-qualification*** determinations." (Leg. Br. 69 (emphasis added).) The Legislature conflates voter qualification with voter registration, ignoring that the former often occurs outside the latter.

may not even be scrutinized under the Materiality Provision because the latter regulates only voter registration. (*Id*. at 68.)

The Legislature relies heavily on the majority opinion in *Pennsylvania NAACP*, which held the Materiality Provision applies only to laws relating to voter-qualification determinations: "The thrust of subsection (a)(2) in which the Materiality Provision lives thus appears clear: it governs voter qualification determinations." 97 F.4th at 131. The majority reasoned:

> [T]he text does not say the error must be immaterial "to" whether an individual is qualified to vote. It uses the words "in determining," and that choice must mean something… Read naturally, we believe they describe a process—namely, determining whether an individual is qualified to vote.

Id. Pennsylvania's requirement that absentee and mail-in voters record the date they sign the declaration on their ballots' return envelopes does not concern voter qualifications. *Id*. at 139. On that basis, the majority found that the Materiality Provision did not apply and could not be invoked to force the counting of ballots with missing or incorrect handwritten dates. *Id*. at 125. Insofar as *Pennsylvania NAACP* holds that "the Materiality Provision is concerned only with the process of determining a voter's ***eligibility*** to cast a ballot," 97 F.4th at 135 (emphasis in original), the League assumes *arguendo* that this construction limiting coverage to ***any and all*** processes to determine voter qualifications is sound.[6]

Even assuming the Third Circuit properly read the Materiality Provision's scope as limited to "voter qualification determinations," *id*. at 131, the circuit court's judgment in this case should be affirmed. Wisconsin's witness-certification requirement relates to the determination or re-determination of at least one voter qualification. *See infra* Section III. By their plain text, Wis. Stat. § 6.87(2) and the Official Absentee Ballot Certificate and Application (Form EL-122[7]) provide that (i) absentee voters must certify that they satisfy the residence qualification for Wisconsin voters and (ii) their witnesses must certify to the

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[6] The League does not contest this holding here but does not concede that the *Pennsylvania NAACP* majority's interpretation of the Materiality Provision is legally correct.

[7] Available at https://elections.wi.gov/sites/default/files/documents/EL-122%20Standard%20Absentee%20Ballot%20Certificate%20%28rev.%202023-08%29_2.pdf.

truth of the voter's statement of qualification. This connection to at least one voter qualification triggers the Materiality Provision's protection and prohibition. There may be no connection between voter qualifications and requirements for handwritten dates on absentee-ballot certificates, as the *Pennsylvania NAACP* court found, but in ***this*** case, Wisconsin's witnessing requirement ***expressly*** implicates voter qualifications and facilitates voter-qualification determinations (or re-determinations).

The *Pennsylvania NAACP* dicta and the Legislature err in asserting, without authority, that voter-qualification determinations are confined to the ***registration*** process—*i.e.*, that qualifications are never re-evaluated after registration. Not so. While there is a voter-registration "stage," there is no voter-qualification "stage." 97 F.4th at 129–30, 136. The Legislature suggests there is a fixed voter-qualification stage, after which election laws do not implicate or regulate voter qualifications: "once a voter satisfies those state-law qualification requirements, he or she is 'qualified under State law' to vote in that State." (Leg. Br. 68.) But the notion that a voter's qualifications are never revisited, scrutinized, or regulated after initial registration is false. It only makes sense that voter qualifications can be revisited because certain qualifications such as residence or disqualifications such as felony conviction status are mutable.

Wisconsin law makes this plain: a Wisconsin voter's qualifications may be challenged, investigated, evaluated, or otherwise addressed at numerous points. For example, one voter may challenge another's registration on the grounds that they are not qualified. Wis. Stat. § 6.48. And an election inspector or person qualified to be a voter may challenge for cause another voter, including an absentee voter's ballot, if they believe the voter is not qualified. Wis. Stat. §§ 6.92-6.93. Wisconsin law contains other procedures that implicate a voter's qualifications after registration. *See* Wis. Stat. §§ 6.32 (verification of certain registrations), 6.325 (disqualification of electors), 6.56 (verification of voters not appearing on registration list).

A voter's qualifications may also be called into question in a later investigation by Wisconsin election officials or law enforcement and, for that reason, many "post-registration" rules concern and reinforce voter-qualification requirements. *See* Wis. Stat.

§§ 5.05(2m) (WEC's authority to investigate election law violations); 12.13(1)(a) (criminal prohibition on voting if person does not meet qualifications). One of the central objectives of the witness requirements in Wis. Stat. §§ 6.87(2), 6.87(4)(b)1., and 6.87(6d) is to enable election officials and law enforcement to contact the absentee voter's witness, should that become necessary due to a "post-registration" challenge, recount, or fraud investigation, all of which can implicate voters' qualifications.

At first, the *Pennsylvania NAACP* majority concludes that the Materiality Provision is triggered by any connection to voter-qualification determinations, and that voter-registration paperwork is merely one example of a record or paper with that connection:

> [T]he information containing an error or omission, material or not, must itself relate to ascertaining a person's qualification to vote (***like paperwork submitted during voter registration***), and it is only in that context that "officials are prohibited from using" a mistake to deny ballot access unless it is "material 'in determining' whether" the applicant indeed is ***qualified to vote***.

97 F.4th at 131 (emphases added; citation omitted); *see also id*. at 132 (emphasizing "the statute's voter ***qualification*** focus" (emphasis added)). This is the *Pennsylvania NAACP* court's narrow holding. Applying *Pennsylvania NAACP*, a recent Western District of Wisconsin decision hews precisely to the voter-qualification line, stating "the Materiality Provision applies ***any time*** an election official determines whether a person is qualified under state law to vote." *Liebert v. Millis*, No. 23-cv-jdp-672, 2024 WL 2078216, at *15 (W.D. Wis. May 9, 2024) (emphasis added). The district court in *Liebert* was careful not to limit its holding to the voter-registration context. *Id*. Had the *Pennsylvania NAACP* majority stopped here, at least for purposes of this litigation, the League would not dispute its interpretation.

However, in dicta, the *Pennsylvania NAACP* majority described the Materiality Provision's scope as applying only to paperwork involved in ***voter registration***. 97 F.4th at 131–35. This was unnecessary to the holding because the majority had already concluded the challenged law did not concern voter qualifications. *See, e.g.*, *Friedman's Liquidating Trust v. Roth Staffing Co. LP*, 738 F.3d 547, 552 (3d Cir. 2013) ("If a determination by our Court is not necessary to our ultimate holding, 'it properly is classified as dictum.'"

(citation omitted)); *United States v. One Parcel of Real Est. Located at 25 Sandra Ct., Sandwich, Ill.*, 135 F.3d 462, 465 (7th Cir. 1998) (finding statements in prior opinion "merely dicta, in the classic sense that it was unnecessary to the holding in the case"). *Pennsylvania NAACP* concludes the Materiality Provision "targets rules that require unnecessary information during voter ***qualification*** processes," consistent with its essential holding, but then proceeds unnecessarily to assert that the provision only "prohibits disqualifying individuals making immaterial errors or omissions in paperwork related to ***registration***." 97 F.4th at 137 (emphases added). The latter statement is both textually unsupported and superfluous to resolving the case. Voter ***qualification*** and voter ***registration*** are neither interchangeable nor coextensive.

Similarly, the *Pennsylvania NAACP* majority unnecessarily attempts to draw a bright line between "rules governing voter qualification" and "vote-casting rules." 97 F.4th at 134. Here, too, the opinion is initially narrower, stating that "[i]t makes no sense to read the Materiality Provision to prohibit enforcement of vote-casting rules ***that are divorced from the process of ascertaining whether an individual is qualified to vote***." *Id*. (emphasis added). This formulation indicates that ***some*** vote-casting rules may ***not*** be so "divorced" from voter qualification determinations; otherwise, the *Pennsylvania NAACP* court would have ended the sentence at "vote-casting rules." Elsewhere, however, the majority asserts that "vote-casting rules … have nothing to do with determining who may vote." *Id*. at 135. But as Wisconsin law reflects, this assertion presents a false dichotomy that does not reflect how voter-qualification determinations and re-determinations always work in Wisconsin, including in the context of challenges, recounts, and election-fraud investigations. For this reason, any gratuitous distinction gleaned from *Pennsylvania NAACP* between rules that govern "***who*** votes" and rules that govern "***how*** ballots are cast" contravenes the reality of how elections are administered. *Id.* at 130–31.

B. The phrase "any record or paper relating to any application, registration, or other act requisite to voting" confirms Congress intended the Materiality Provision to apply beyond voter registration.

The Legislature also seeks to confine the Materiality Provision's scope to voter registration alone by pointing to another part of 52 U.S.C. § 10101(a)(2)(B). It argues that the phrase "any record or paper relating to any application, registration, or other act requisite to voting" does not mean what it says and instead excludes any records or papers used beyond voter registration. (Leg. Br. 60.) This counterintuitive, extratextual argument as to element (4) is incorrect for at least five reasons.

First, both the Legislature and *Pennsylvania NAACP* modify the Materiality Provision in reciting its elements, changing the expansive word "any" to the narrower "an." (Leg. Br. 59; *Pennsylvania NAACP*, 97 F.4th at 130.) That alteration is consequential. As recently as 2018, the U.S. Supreme Court found that interpreting a disjunctive phrase in "a narrow" manner was "an unnatural fit" because "[i]t begins with the word 'any'" which "bespeaks breadth." *Encino Motorcars, LLC v. Navarro*, 584 U.S. 79, 88 (2018). Similarly, the Court found the phrase "any other law enforcement officer" was "all-encompassing," "suggest[ed] a broad meaning," and included law enforcement officers of any kind. *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 218-19, 227 (2008). Justice Thomas, writing for the majority, emphasized that the Court had "previously noted that '[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *Id*. (quoted source omitted). By deleting "any," the Legislature is trying to steer this Court to a narrower interpretation. But even if this Court concludes the term "any" does not support a broad reading on its own, in the alternative, the *ejusdem generis* canon strongly supports the League's interpretation. *See infra* at 35-36; *accord, e.g.*, *Ali*, 552 U.S. at 225 (rejecting *ejusdem generis* argument to defeat breadth of phrase including "any," noting "the phrase is disjunctive, with one specific and one general category").

***Second*,** the fundamental problem with construing "any record or paper relating to any application, registration, or other act requisite to voting" as limited to the act and time of voter registration is that it reduces a fifteen-word phrase with three categories to just

"voter-registration paperwork." This cannot be the meaning Congress intended. Leaving aside the phrase "other act requisite to voting," even the term "application" is not limited just to voter-registration applications, as voters must submit applications for absentee ballots.

In failing to give effect to the term "application," the Legislature's interpretation runs afoul of longstanding principles of statutory construction. Courts "are obliged to give effect, if possible, to every word Congress used." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). Moreover, "[c]anons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings." *Id*. Even if the meanings of different terms overlap to some extent, the notion that Congress obscured its intent to restrict this provision to the voter-registration context within a fifteen-word phrase belies a common understanding of this language. The U.S. Supreme Court has repeatedly stated that courts applying federal statutes must "give effect, if possible, to every clause and word of a statute." *United States v. Menasche*, 348 U.S. 528, 538–39 (1955) (citation and quotation marks omitted); *see also*, *Polselli v. IRS*, 598 U.S. 432, 441 (2023) ("We ordinarily aim to give effect to every clause and word of a statute." (citation and quotation marks omitted)). And as explained below, ignoring the term "application" or denying its full scope has downstream consequences for the Legislature's interpretation of the balance of this statutory phrase.

Additionally, the Legislature again relies on *Pennsylvania NAACP* in construing "any ... other act requisite to voting," but that incorporates the erroneous conflation of voter qualification and voter registration. As previously explained, this conflation is not consistent with Wisconsin election laws and procedures. *See supra* Section II.A.

Third, the Legislature reads "any ... other act requisite to voting" out of the Materiality Provision. However, Congress deliberately included this residual category and "that choice must mean something." *See Pennsylvania NAACP*, 97 F.4th at 131. Had Congress intended to limit the protection to voter registration records and papers, it would have said that. *See Simmons v. Himmelreich*, 578 U.S. 621, 627 (2016) ("Congress says what it means and means what it says."). While some courts have construed this last

component as a mere redundancy for emphasis, the phrase is properly read to expand the provision's reach beyond the two specific categories of records and papers that precede it. *Pennsylvania NAACP*, 97 F.4th at 138. It anticipated state legislatures or state election officials might respond to the Materiality Provision by simply avoiding the use of labels like "application" or "registration" or by pushing voter-qualification determinations to later stages of the voting process or incorporating additional such determinations in these later stages. *See, e.g.*, *La Unión del Pueblo Entero v. Abbott*, No. 5:21-cv-0844, 2023 WL 8263348, at *21 (W.D. Tex. Nov. 29, 2023) ("Congress's enactment of a broader rule is entirely rational: after identifying a record of a problem at the registration stage, Congress was not limited to crafting a solution with an obvious loophole allowing officials to use forms at later stages in the same way, and for the same purpose.").

Courts construe general statutory terms that follow specific terms under the *ejusdem generis* canon, which counsels that "a general or collective term at the end of a list of specific items is typically controlled and defined by reference to' the specific classes ... that precede it." *Fischer v. United States*, 603 U.S. ___, 144 S. Ct. 2176, 2184 (2024) (cleaned up). "[W]here general words follow an enumeration of specific items, [they] are read as applying only to other items akin to those specifically enumerated." *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 588 (1980); *see also Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001) (noting that catch-all phrase can be construed "to embrace only objects similar in nature to those objects enumerated by the preceding specific words") (quoted source omitted).

Applying this canon to the three listed categories of "record[s]" and "paper[s]" strongly favors the League's interpretation. It bears underscoring that this Court is not deciding the boundaries of "any ... other act requisite to voting," but rather the scope of "***any record or paper relating to*** any ... other act requisite to voting." 52 U.S.C. § 10101(a)(2)(B) (Emphasis added.) The *ejusdem generis* canon indicates that this residual category is not restricted to voter-registration paperwork, but rather embraces records or papers similar in kind to records and papers relating to any registration form or application requisite to voting. The terms "application" and "registration" embrace records or papers

that require aspiring voters to supply information about themselves and sign sworn affirmations under penalty of perjury—that is the common denominator. And the return envelope's "Official Absentee Ballot Certificate ***and Application***" (Form EL-122, emphasis added) fits those parameters. This combined certificate/application requires Wisconsin voters and their witnesses to record personal information about themselves and sign sworn certifications. It also facilitates the verification of the voter's identity and the re-determination of at least one voter qualification. *See infra* Section III.

Fourth, this interpretation is consistent with the history of the Civil Rights Act. Even if Congress could not foresee every other record or paper that might one day be "requisite to voting," it aimed to prohibit disenfranchisement for immaterial errors or omissions on such records or papers. Knowing that it was addressing a protean threat to black voters' rights in the Jim Crow South that would adapt to new federal law requirements, Congress included "any ... other act requisite to voting" to preempt evasion of the new statutory protection by mislabeling voter-qualification determinations or shifting them to a different, later stage of the voting process. *See, e.g.*, *Pennsylvania NAACP*, 97 F.4th at 150 & n.19 (Shwartz, J., dissenting) (noting that "[t]he history shows that Congress investigated the problem of voter discrimination and learned that it was pervasive, adaptable, and destructive" and that "in framing the problem, Congress understood from the [U.S. Commission on Civil Rights'] initial report that 'where there is will and opportunity to discriminate against certain potential voters, ways to discriminate will be found.'"). Though the district court in *Liebert* ultimately did not give separate effect to "any ... other act requisite to voting," it agreed with this argument in principle:

> [T]hat provides one reasonable understanding of the purpose in adding the phrase "or other act requisite to voting." Specifically, it prevents government officials from creating a new voter qualification process and avoiding the requirements of the Materiality Provision simply by calling the process something besides "registration" or "application." Under this view, "other act requisite to voting" serves as a sort of fail-safe against manipulation by election officials.

2024 WL 2078216, at *15. This is an additional reason to interpret the provision expansively, not restrictively—not in an unlimited manner, but certainly not confined only

to voter-registration paperwork as the Legislature non-textually and non-historically insists.

Fifth and finally, a few decisions like *Pennsylvania NAACP* and *Liebert* have settled on a highly restrictive construction of this statutory phrase because they have struggled with a specific line-drawing question. That question is whether "other act requisite to voting" also embraces marking and filling out the ballot. *Pennsylvania NAACP*, 97 F.4th at 133-35; *Liebert*, 2024 WL 2078216, at *11–12, 14. To these courts, an expansive reading of this statutory language would invalidate a variety of mundane but essential rules for filling out a ballot, such as the prohibition on overvoting or requirements to fill out the ballot in a certain manner. *Id*.

The *ejusdem generis* canon resolves this issue as well since a ballot is not similar in kind to an application or voter-registration form. The ballot does not call for voters' or witnesses' personal information, just their choices for various elections. Nor does the ballot itself require voters or witnesses to sign any sworn certifications or affirmations. The rules governing filling out a ballot are mostly designed to ensure that optical scan voting machines can scan a legible vote or that human canvassers can read the vote and ascertain which selections a voter has made on their ballot. Notably, optical scan machines were not widely in use at the time the Materiality Provision was enacted. Consequently, it is unsurprising that Congress's formulation does not protect voters from ballot rejection due to errors or omissions on the ballot itself that render the voter's selection unascertainable.

C. Alternatives like in-person voting or curing do not excuse unlawful disenfranchisement for immaterial errors or omissions.

As to element (2) for a claim under the Materiality Provision, the Legislature argues that absentee ballot rejections do not "deny the right to vote." 52 U.S.C. § 10101(a)(2)(B).[8] This argument flies in the face of the Civil Rights Act's definition of "vote," which "includes ***all action necessary to make a vote effective*** including, but not limited to,

[8] *Pennsylvania NAACP* does not offer a distinct, robust interpretation of this phrase; rather, its interpretation follows inexorably from its interpretation of the other phrases in the Materiality Provision.

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." *Id.* § 10101(e) (emphases added); *id*. § 10101(a)(3)(A) (applying subsection (e)'s definition to subsection (a)). Absentee ballots cast according to all other rules and rejected due to an immaterial error or omission are not counted until Election Day in Wisconsin, Wis. Stat. §§ 6.88(3), 7.52(3), and their rejection constitutes the denial of the only ballot those voters have cast and the only ballot those voters ***can*** cast.

Furthermore, there is no authority for the assertion that the availability of alternative voting options or curing provides an end-run around the Materiality Provision. The Legislature argues that, so long as absentee voters have another means to vote, they are not denied the right to vote under Wisconsin law such that their absentee ballots may be lawfully rejected for immaterial errors or omissions. (*See* Leg. Br. 80.) This argument fails as well.

First, both 52 U.S.C. § 10101(a)(2)(B) and the definition of "vote" in subsection 10101(e) undermine the argument that Congress intended to create exceptions when state law affords voters the means to cure or alternative ways to vote. The use of "a vote" and "having such ballot counted" in subsection 10101(e) indicate that the Materiality Provision is concerned with protecting, not merely the ***opportunity to vote***, but also the ***actual ballot cast***. *See La Unión del Pueblo Entero*, 604 F. Supp. 3d at 540 ("The [Civil Rights Act] ... defines the term 'vote' broadly ...."). The Materiality Provision "provides that state actors may not deny the right to vote based on errors or omissions that are not material; it does not say that state actors may initially deny the right to vote based on errors or omissions that are not material as long as they institute cure processes." *Id.* at 541; *see also Sixth Dist. of Afr. Methodist Episcopal Church v. Kemp*, 574 F. Supp. 3d 1260, 1282 (N.D. Ga. 2021).

Second, for many absentee voters, there is no alternative to voting by mail, whether due to work, travel, disability, or illness. Not all mail-in voters can simply "vote in person on Election Day." (Leg. Br. 80.) *See, e.g.*, *Carey v. Wis. Elections Comm'n*, 624 F. Supp. 3d 1020, 1027 (W.D. Wis. 2022). Many absentee voters whose ballots bear a fatal error or omission in the witness-address field will not learn of the issue in time to cure or spoil the

ballot and vote. Indeed, Wis. Stat. § 6.87(9) provides a curing process only at the discretion of municipal clerks:

> 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, inside the sealed envelope when an envelope is received, together with a new envelope if necessary, ***whenever time permits the elector to correct the defect and return the ballot within the period authorized under sub. (6)***.

(Emphases added.) This subsection makes it optional for municipal clerks to notify voters with fatal absentee ballot errors or omissions, including witness-address defects; absentee voters have no absolute right to cure under Wisconsin law. The Legislature erroneously assumes that the voter will necessarily receive notice of a witness-address defect. But it produced no evidence to establish that absentee voters ensnared by Wis. Stat. § 6.87(6d) are given timely notice and meaningful options to cast a ballot by other means or to cure the witness-address defect.

D. The witness-address requirement is not *per se* "material" to determining voter qualifications simply because it is a law regulating absentee voting in Wisconsin.

Finally, the Legislature erroneously contends that the League asserted a facial challenge to Wis. Stat. § 6.87(6d) and argues that the witness-address requirement is "material" ***on its face*** to determining voter qualifications. (Leg. Br. 84–87.) But the League has asserted only that this state law requirement is immaterial ***as applied*** to four categories of absentee ballots with specific witness-address errors or omissions. The League has not asserted a facial challenge against either the witness requirement or the witness-address requirement. Nevertheless, the Legislature contends that Wis. Stat. § 6.87(6d) is "material" *per se* because it is a state law "qualification" to vote absentee. But "qualified under State law" in the Materiality Provision means ***eligible to vote*** under state law, not that every technical voting requirement has been satisfied.

The Civil Rights Act provides that the phrase "qualified under State law" means "qualified according to the laws, customs, or usages of the State." 52 U.S.C. § 10101(e). To be qualified to vote under Wisconsin law, 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 due to a felony conviction, or adjudicated incompetent to vote, Wis. Stat. § 6.03(1); *see also* Wis. Const. art. III, § 1. Therefore, in Wisconsin, an error or omission in the witness certification is a valid reason to reject the ballot under the Civil Rights Act only if the erroneous or omitted information is "material" to whether the voter satisfies those voting eligibility criteria. *See, e.g.*, *Martin*, 347 F. Supp. 3d at 1308–09 (comparing requirement to record correct year of birth on absentee ballot envelope against voting eligibility criteria and finding requirement immaterial "to determining a voter's eligibility").

By contrast, compliance with all voting requirements beyond the voter qualifications, such as requirements to date an absentee-ballot-return envelope or have a witness record their address on the certificate envelope, is not contemplated by the phrase "qualified under State law." To interpret the phrase "qualified under State law" to include compliance with all voting requirements would render the Materiality Provision meaningless. If all registration and voting laws are "voting qualifications," then any failures to comply with said laws are *per se* material to determining a voter's qualifications. This is circular. As the U.S. Department of Justice wrote in its Statement of Interest in this case, the Materiality Provision "does not permit the circular logic that all information that state law requires on a paper or record is necessarily material to determining a voter's qualifications to vote by virtue of its enactment into state law …." (R. 56 at 14.)

III. Wisconsin's witnessing requirement concerns voter qualifications and, therefore, the Materiality Provision applies.

Having rebutted the Legislature's central arguments on interpreting the Materiality Provision, all that remains is to establish that (a) the Materiality Provision applies to the witnessing requirement at issue here and (b) absentee ballots are being rejected for immaterial errors and omissions. The Legislature would have this Court ask only whether the witness-address requirement is connected to voter qualifications, but that is improperly narrow. Properly framed, the relevant question is whether the witness certification ***as a whole*** has any bearing on determining one or more voter qualifications. Properly read, Wis.

Stat. § 6.87(2) confirms that it does. Then separately, the Court must resolve whether errors or omissions in the witness-address field of that certification are material in determining a voter's qualifications.

A. Wisconsin case law on statutory interpretation.

In Wisconsin, courts "faithfully give effect to the laws enacted by the legislature." *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶44, 271 Wis. 2d 633, 681 N.W.2d 110. A court's objective when "interpreting a statute is to discern and give effect to the intent of the legislature." *Anderson v. Aul*, 2015 WI 19, ¶49, 361 Wis. 2d 63, 862 N.W.2d 304 (quoted source omitted). To that end, the Wisconsin Supreme Court has delineated tools of statutory interpretation to establish the Legislature's intent. A court's statutory analysis begins with the language of the statute. *Kalal,* 2004 WI 58, ¶45. The statute's words must be interpreted according to their common, ordinary, and accepted meaning, while technical words and phrases are interpreted according to their technical meaning. *Id.* If this analysis yields a plain meaning, a court ends its inquiry. *Id.*

Importantly, a court should not embrace a statutory construction that "creates an avoidable surplusage problem"; "[i]f possible, every word and every provision is to be given effect ... None should be ignored." *Enbridge Energy Co. v. Dane Cnty*., 2019 WI 78, ¶28, 387 Wis. 2d 687, 929 N.W.2d 572 (citations omitted). To do otherwise would conflict with the fundamental presumption that the "legislature says in a statute what it means and means in a statute what it says there." *Milwaukee Dist. Council 48 v. Milwaukee Cnty.*, 2019 WI 24, ¶25, 385 Wis. 2d 748, 924 N.W.2d 153 (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)).

Further, because statutory interpretation calls for "the ascertainment of meaning, not a search for ambiguity," a court should also consider "the context in which [statutory language] is used," as well as the relationship between the statutory language and "the language of surrounding or closely-related statutes." *Kalal*, 2004 WI 58, ¶¶46-47; *see also Anderson*, 2015 WI 19, ¶50 ("[I]t is often valuable to examine the statute in context."). Critically, "[i]f a word or words are used in one subsection but are not used in another

subsection, [a court] must conclude that the legislature specifically intended a different meaning." *Priorities USA v. Wis. Elections Comm'n*, 2024 WI 32, ¶23, 412 Wis. 2d 594, 8 N.W.3d 429 (citations omitted). When searching for context, a court may consult the statutory history to inform its interpretation. *Kalal*, 2004 WI 58, ¶48.

Finally, a court's interpretation must "avoid absurd or unreasonable results," *id.*, ¶46, and must not "render the legislature's selected terms ... meaningless." *Stroede v. Soc'y Ins.*, 2021 WI 43, ¶18, 397 Wis. 2d 17, 959 N.W.2d 305.

B. Statutory history of the witnessing requirement—Wis. Stat. § 6.87.

The Legislature enacted the current version of the witness certification in 2000. *See* 1999 Wis. Act 182. However, the requirement dates back to Wisconsin's first comprehensive absentee-voting regime from 1915. *See* 1915 Wis. Act 461. Before the modern witnessing requirement, absentee voters were required to sign and swear to an affidavit before a designated official, usually an officer authorized by law to administer oaths. Wis. Stat. § 11.58 (1915). Through the 1915 statute, the Legislature created the requirement that the voter attest they are a resident of their voting precinct and are entitled to vote in that precinct, which remains a part of today's witnessing procedure. Wis. Stat. § 11.58 (1915); Wis. Stat. § 6.87(2).

In 1966, as part of reforming the election code, the Legislature enacted the witness requirement. 1965 Wis. Act 666, § 1. As an alternative to swearing to an affidavit before a designated officer, absentee voters could instead ask two witnesses to sign and certify their ballot. *See id.* (creating Wis. Stat. § 6.87). As part of the new procedure, the voter attested to the following:

> I, [voter], (certify) (do solemnly swear) subject to the penalties of ch. 12, Wis. Stats. for false statements that I am a resident of the [number designation] precinct of the (town) (village) of [municipality], or of the [number designation] ward in the city of [municipality], residing at [address] in said city, and the county of [county name],state of Wisconsin, and am entitled to vote in such precinct at the election to be held on [date]; that I cannot appear at the polling place in the precinct on election day because I expect to be absent from the municipality or because of sickness, physical disability, religious reasons, or because I have changed my residence within the state within 20 days before the election but have not changed my address. I (certify) (swear) that I exhibited the enclosed ballot unmarked to the (2 witnesses) (person administering the oath), that I then in (their) (his)

> presence and in the presence of no other person marked the ballot and enclosed and sealed the same in this envelope in such a manner that no one but myself and assistance rendered under s. 6.87(5), Wisconsin Statutes, if I requested assistance, could know how I voted.

Id. If the voter used the witnessing procedure, the two witnesses signed the following certification underneath the voter's attestation:

> We the undersigned witnesses, qualified electors of the state of Wisconsin, subject to the penalties of ch. 12, Wis. Stats. for false statements certify that the above statements are true and the voting procedure was executed as there stated. Neither of us is a candidate for any office on the enclosed ballot. The elector was not solicited or advised by us to vote for or against any candidate or measure.

Id. Regarding the separate affidavit option, the sentence order of the designated officer's attestation was rearranged, but the overall language remained the same:

> Subscribed and sworn to before me this [date] day of [month], A.D., [year], and I hereby certify that I am not a candidate on the ballot upon which the affiant voted, that the voting procedure above was executed as therein stated, and that the affiant was not solicited or advised by me to vote for or against any candidate or measure.

Id. Witnesses were required to certify the truthfulness of "the above statements," whereas the designated official was not.

In 2000, the Legislature modernized the witness requirement.[9] 1999 Wis. Act 182, § 95P. This revision to the absentee-ballot procedure expanded the availability of absentee voting to anyone unwilling to appear at their polling place on Election Day. *Id.* It retained the witness requirement and certification form from the earlier version of the statute but reduced the number of required witnesses from two to one. *Id.* Finally, in 2005, the Legislature amended the witness requirement to add the requirement that a witness must be an adult U.S. citizen. 2005 Wis. Act 451, § 75.

[9] Sometime between 1966 and 1975, the Legislature removed the requirement that witnesses be "qualified electors of the state of Wisconsin." *Compare* 1975 Wis. Act 85 *with* 1965 Wis. Act 666.

C. The witness certifies that the voter satisfies certain qualifications to vote in the election.

1. The plain language of the statute requires that the witness certify that the voter is a resident.

The plain meaning of the witness statement demonstrates the Legislature's intent for a witness attest that the absentee voter is a resident of the relevant election precinct, who is entitled to vote in that precinct. *Kalal,* 2004 WI 58, ¶45 (noting statute's nontechnical words must be interpreted according to their "common, ordinary, and accepted meaning").

The current absentee-voting procedure requires the voter to make two certifications. Wis. Stat. § 6.87(2). The voter must sign under the two following certifications:

> I,...., certify subject to the penalties of s. 12.60 (1) (b), Wis. Stats., for false statements, that I am a resident of the [....ward of the] (town) (village) of...., or of the....aldermanic district in the city of...., residing at.... *in said city, the county of...., state of Wisconsin, and am entitled to vote in the (ward) (election district) at the election to be held on....; that I am not voting at any other location in this election; that I am unable or unwilling to appear at the polling place in the (ward) (election district) on election day or have changed my residence within the state from one ward or election district to another later than 28 days before the election.
> I certify that I exhibited the enclosed ballot unmarked to the witness, that I then in (his) (her) presence and in the presence of no other person marked the ballot and enclosed and sealed the same in this envelope in such a manner that no one but myself and any person rendering assistance under s. 6.87 (5), Wis. Stats., if I requested assistance, could know how I voted.

Id. The witness, in turn, must sign the following certification:

> I, the undersigned witness, subject to the penalties of s. 12.60 (1) (b), Wis. Stats., for false statements, certify that I am an adult U.S. citizen** and ***that the above statements are true*** and the voting procedure was executed as there stated. I am not a candidate for any office on the enclosed ballot (except in the case of an incumbent municipal clerk). I did not solicit or advise the elector to vote for or against any candidate or measure.

Id. (emphasis added). By requiring the witness to certify "that the above statements are true," the Legislature demonstrated its intention that the witness affirm the truth of ***both*** of the voter's "I certify" statements.

The Legislature's intent is discernible through the plain meaning of "the above statements" and "certify" as the terms were defined near the time of the statute's enactment.

Kalal, 2004 WI 58, ¶45. The word "above" means higher. *Above*, Black's Law Dictionary (Revised 4th ed. 1968).[10] Alternatively, "the above" (or "above") means what is "written or discussed higher on the same page or on a preceding page." *Above*, Webster's Seventh New Collegiate Dictionary (1963);[11] *see The Above*, Merriam-Webster Dictionary,[12] ("something that is mentioned at an earlier point in the same document"). The term "statement" means "a declaration of matters of fact." *Statement*, Black's Law Dictionary, *supra*; *see Statement*, Webster's Seventh New Collegiate Dictionary ("a single declaration or remark"). Thus, the whole phrase, "the above statements," means ***multiple declarations of matters of fact written earlier in the same document***.

Thus, by certifying the above statements, the witness attests to each of the voter's "I certify" clauses. Each "I certify" clause is a single declaration. This interpretation is supported by the plain meaning of "certify." The term "certify" means "[t]o testify in writing" and importantly "to make a declaration about a writing." *Certify*, Black's Law Dictionary, *supra*; *see also Certification*, Webster's Seventh New Collegiate Dictionary, ("a certified statement"). The statement "I certify," therefore means ***I make the declaration***. By stating "I certify" twice, the voter has made two independent declarations. Accordingly, by stating "I certify ... that the [voter's] above statements are true," the witness is stating: "***I declare that the [voter's] earlier declarations of matters of fact are true***." This language demonstrates that the Legislature's intent that witnesses attest to the truthfulness of the voter's two "I certify" statements. *Milwaukee Dist. Council 48*, 2019 WI 24, ¶25 (reasoning that "legislature says in a statute what it means and means in a statute what it says there" (quoted source omitted)). If the Legislature had intended the witness to certify only one of the voter's declarations but not the other, the statute would, for example, read "I certify ... the above statement that the voting procedure was executed as there stated is true." This, however, is not how the Legislature wrote the witness certification.

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[10] Available at http://heimatundrecht.de/sites/default/files/dokumente/Black%27sLaw4th.pdf.

[11] Available at https://archive.org/details/webstersseventhn1963spri/page/n7/mode/2up?q=above.

[12] Available at https://www.merriam-webster.com/dictionary/the%20above.

Through Wis. Stat. § 6.87, the Legislature intended that witnesses would attest to the truthfulness of the voter's two "I certify" statements. Pursuant to this plain-language interpretation, the witness attests to at least one of the voter's qualifications—the voter's residency in the election district.[13] Wis. Stat. § 6.87(2); Wis. Const. art. III, § 1. Further, the statute's plain language indicates that the witness attests to all other qualifications that make the voter "entitled to vote in the (ward) (election district) at the election to be held on [date]," such as age and citizenship status. Wis. Stat. § 6.87(2); Wis. Const. art. III, § 1. As the intent of Wis. Stat. § 6.87's witness certification rules is evident from the plain statutory language, this Court's interpretation of Wis. Stat. § 6.87 should end. *Kalal*, 2004 WI 58, ¶46.

Accordingly, this Court should disregard the holding in *Liebert.* To reach the conclusion that the Materiality Provision does not apply to the witness certification, the federal district court violated several key guiding principles for interpreting Wisconsin statutes. *Liebert*, 2024 WL 2078216, at *11–13. Because state law governs the interpretation of state statutes, this Court should not defer to the district court's interpretation. *St. Augustine Sch. v. Taylor*, 2021 WI 70, ¶23, 398 Wis. 2d 92, 961 N.W.2d 635. A lower federal trial court's interpretation of a Wisconsin statute cannot supersede a Wisconsin appellate court's review of that statute. *State ex rel. Henderson v. Raemisch*, 2010 WI App 114, ¶27, 329 Wis. 2d 109, 790 N.W.2d 242.

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[13] In addition to providing the language of the witness certification, the Legislature specified the procedure by which a witness must certify a ballot. To certify a voter's ballot and thus authenticate at least the voter's residency, if not all the voter's qualifications, the witness must record their signature and address under the certification. Wis. Stat. §§ 6.87(2), 6.87(6d). The Materiality Provision applies when at least one voter qualification is implicated, such as a voter's age. *See, e.g.*, *Schwier v. Cox*, 340 F.3d 1284, 1294 (11th Cir. 2003) (Materiality Provision enacted to combat "tactic[s]" such as "disqualify[ing] an applicant who failed to list the exact number of months and days in his age" (cleaned up)). A witness is incapable of certifying a voter's ballot unless the witness also provides an address. The Legislature's argument illogically disaggregates the statutory scheme and mischaracterizes the central question posed by *Pennsylvania NAACP*. The errors or omissions at issue here are errors and omissions within the witness-address field, but these errors and omissions invalidate the witness certification as a whole—of which the address is just a part. And therefore, it is the witness certification that must bear a nexus with voter-qualification determinations under *Pennsylvania NAACP*. The Legislature assumes what it is trying to prove: that witness addresses bear no relation to voter-qualification determinations. This argument ignores the explicit, textually confirmed relevance of witnessing to voter-qualification determinations.

The district court in *Liebert* failed to thoroughly examine the plain meaning of Wis. Stat. § 6.87(2). As described above, Wis. Stat. § 6.87(2) is clear on its face—the witness attests to the truthfulness of the voter's two independent declarations, which include affirmation of their qualifications as a resident. If the Legislature had intended for the statute to be read differently, it would have used different or more specific language. *Milwaukee Dist. Council 48*, 2019 WI 24, ¶25. The district court nonetheless rejected the plain meaning of Wis. Stat. § 6.87(2) and turned the phrase "the above statements are true" into surplusage. The district court's decision thereby violates the bedrock rules for interpreting Wisconsin's statutes. *Kalal,* 2004 WI 58, ¶45 (a statute's nontechnical words must be interpreted according to their "common, ordinary, and accepted meaning."); *Enbridge Energy Co*., 2019 WI 78, ¶28 (noting a court should give meaning to every word; "[i]f possible, every word and every provision is to be given effect" (quoted source omitted)). For that reason alone, this Court should disregard the *Liebert* court's interpretation of Wis. Stat. § 6.87(2).

2. The statutory context of Wis. Stat. § 6.87 affirms the unambiguous plain meaning of the phrase "the above statements are true."

Although this Court should end its analysis at the plain meaning of Wis. Stat. § 6.87, the context around the statute's enactment, which the *Liebert* court failed to consider, further confirms the statute's unambiguous plain meaning. Reviewing the initial enactment of the witnessing requirement demonstrates the Legislature created a novel procedure for ballot witnessing that stood as a distinct alternative to the long-established affidavit procedure. *Compare* Wis. Stat. § 11.58 (1915) *with* Wis. Stat. § 6.87(2) (1966). After the Legislature created the witnessing procedure in 1966, voters had the option to either swear to an affidavit before a designated official or certify a statement before two witnesses. If a voter chose the affidavit procedure, they would swear to an affidavit before a designated official, who would then certify that "that the voting procedure above was executed as therein stated." Wis. Stat. § 6.87(2) (1966). Alternatively, since 1966, the voter could choose to have two witnesses certify under penalty of law "that the ***[voter's] above***

statements are true and the voting procedure was executed as there stated." *Id*. (emphasis added). Comparing the distinct witness and affidavit procedures demonstrates that only witnesses were required to attest to the truthfulness of "the [voter's] above statements," a requirement which remains in the current version of Wis. Stat. § 6.87(2).[14] By creating this independent, distinct requirement, it is clear that the Legislature intended for witnesses to review more than just compliance with the voting procedure. *See Priorities USA*, 2024 WI 32, ¶23 (noting that when "a word or words are used in one subsection but are not used in another subsection, [a court] must conclude that the legislature specifically intended a different meaning" (quoted source omitted)). If the Legislature had not intended this, it would have simply copied the affidavit language into the witness certification.

Thus, in rejecting the plain meaning of Wis. Stat. § 6.87(2) and failing to review the context of the statutory language, the district court in *Liebert* failed to adhere to Wisconsin's rules for statutory construction and reached an incorrect result. Accordingly, this Court should reject the *Liebert* court's flawed reasoning.

3. Both the statutory context and extrinsic sources in the legislative record reinforce that the Legislature intended for witnesses to at least verify the voter's residency, if not all of the voter's qualifications.

Again, Wis. Stat. § 6.87(2) has a plain, unambiguous meaning and, therefore, this Court's statutory interpretation should end there. Nevertheless, the statutory context and legislative history reinforce the conclusion that the Legislature intended witnesses to authenticate whether a voter possesses certain constitutional qualifications to vote. "[T]he legislature has the authority to pass laws that allow election officials to ascertain whether a potential voter possesses the constitutional qualifications required of an elector." *League of Women Voters of Wis. Educ. Network, Inc. v. Walker*, 2014 WI 97, ¶29, 357 Wis. 2d 360, 851 N.W.2d 302. This authority "includes the ability to require a potential voter to identify himself or herself in some fashion, thereby answering the question, 'Are you who you say

[14] This language is mirrored in the witness certification printed on the Official Absentee Ballot Certificate and Application (Form EL-122).

you are, a constitutionally qualified elector?'" *Id.* Voter authentication regulations serve as "a mode of identifying those who possess constitutionally required qualifications," and can be "classified as a regulation pertaining to an existing voting qualification." *Id.*, ¶¶35, 37. Reviewing nearby statutes and extrinsic sources demonstrates that the witness requirement, Wis. Stat. §§ 6.87(2), (6d) is one such regulation.

Closely related statutes surrounding Wis. Stat. § 6.87(2) demonstrate that the witness requirement serves as a voter authentication measure analogous to proof of identification. *Kalal*, 2004 WI 58, ¶49 ("A statute's purpose or scope may be readily apparent from ... its relationship to surrounding or closely-related statutes—that is, from its context or the structure of the statute as a coherent whole."). Specifically, statutes both within the same section and the subsequent section provide that witness certification may be used by confined absentee voters as an alternative to the proof of identification requirement. Wis. Stat. §§ 6.87(4)(b)2. (indefinitely confined voters only need signature and address of witness to satisfy photo ID requirement), 6.87(4)(b)5. (voters at care facility in nursing home only need signature of care facility representative to satisfy photo ID requirement), 6.875(6)(c) (for voters in care facility, witness and photo ID requirements are satisfied by signatures and addresses of two Special Voting Deputies); Wisconsin Election Commission, *Absentee Voting in Residential Care Facilities and Retirement Homes* (Jan. 2024) (WEC Guidance on Wis. Stat. §§ 6.87(4)(b)2, 6.87(4)(b)(5), 6.875(6)(c)).[15] As witnessing under certain circumstances serves as a primary form of voter identification or authentication, it logically follows that the general practice of witnessing is a secondary check on a voter's identity and qualifications.

Moreover, legislative materials demonstrate that witness certification was designed to be a voter authentication measure. When the witness requirement was first enacted in 1966, it was designed such that "necessary safeguards [were] included to prevent election fraud." Report of the Wisconsin Legislative Council, Volume 1, *Conclusions and*

[15] Available at https://elections.wi.gov/resources/manuals/absentee-voting-residential-care-facilities-and-retirement-homes-svd-voting.

Recommendations of the Election Laws Committee and the Legislative Council (April 1965).[16] As a necessary safeguard, the Legislature required two qualified Wisconsin electors to provide sworn witness statements on the absentee voter's behalf, subject to criminal penalty.[17] When the witness requirement was amended during the 1999-2000 session, voter authentication remained a central theme. During the amendment process, the Legislature classified the witness-certification rules as "Topic: Authentication of absentee ballots" and referred to the amendment reducing the number of witnesses as "allowing ***authentication of absentee ballots*** by one witness, rather than 2." Wis. Senate, SA1-AB700, Reg. Sess. 1999-2000 (emphasis added).[18]

* * *

The sum of these extrinsic sources further reinforces the plain meaning of Wis. Stat. § 6.87(2) articulated above. Through Wis. Stat. § 6.87, the Legislature intended the witness certification requirement to serve as a backstop authentication procedure for verifying the voter's identity and at least one voter qualification.

IV. The circuit court correctly found that Wisconsin's witness-address requirement for absentee voters violates the Materiality Provision as applied to four specific categories of immaterial errors or omissions.

The circuit court granted summary judgment in the League's favor, finding the following four categories of technical errors or omissions in the witness-address field immaterial to determining voters' qualifications:

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[16] Available at https://www.google.com/books/edition/Conclusions_and_Recommendations_of_the_E/SMVhAAAAMAAJ?hl=en&gbpv=0.

[17] Originally, false witness certifications were criminalized as perjury. 1965 Wis. Act 666, § 7 (creating Wis. Stat. § 12.59(4)); Currently, false witness certifications are criminalized as election fraud. Wis. Stat. §§ 12.60(1)(b), 12.13(i).

[18] *See* 1999 A.B. 700, Analysis by the Legislative Reference Bureau ("This bill makes various changes in election laws. Significant provisions include ... [the] *Authentication of absentee ballots*."); *see also* Wis. Assembly, AA2-AB700, Reg. Sess. 1999-2000.

- (1) "The witness's street number, street name, and municipality are present, but there is neither a state name nor a ZIP code provided;"
- (2) "The witness's street number, street name, and ZIP code are present, but there is neither a municipality nor a state name provided;"
- (3) "The witness's street number and street name are present and match the street number and street name of the voter, but no other address information is provided; or"
- (4) "The witness certification indicates that the witness address is the same as the voter's address with any or any combination of the following words: 'same,' 'same address,' 'same as voter,' 'same as above,' 'see above,' 'ditto,' or by using quotation marks and/or an arrow or line pointing to or from the voter address."

(R. 161 at 2, App. 006.) The League marshalled evidence of rejected absentee ballots across all four categories, and the circuit court summarized its factual findings with respect to these rejections in its order. (R. 157 at 2-3, App. 009-010; *see also* R. 157 at 4, App. 011 ("[A]bsentee 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.").)

To be "material," an error or omission must be important in determining whether a voter is qualified under state law. The Civil Rights Act does not define "material," so this Court must construe it according to its "ordinary, contemporary, common meaning." *United States v. Melvin*, 948 F.3d 848, 852 (7th Cir. 2020).[19] To do so, this Court must examine what the word "meant when the statute was enacted, often by referencing contemporary dictionaries." *Id.* If the meaning of the words at the time of enactment is unambiguous, the inquiry ends. *Id.*

[19] Federal law governs interpretation of the substantive rule of decision here. *Shaw v. Leatherberry*, 2005 WI 163, ¶31, 286 Wis. 2d 380, 706 N.W.2d 299.

When Congress enacted the Civil Rights Act, "material" was defined as "[i]mportant; more or less necessary; having influence or effect; going to the merits; having to do with matter, as distinguished from form." *Material*, Black's Law Dictionary, *supra*. With this contemporaneous understanding of the meaning of "material," it is plain that the Materiality Provision unambiguously holds that an omission or error is material only when it is ***important*** or ***more or less necessary*** to,[20] ***has influence*** over, or ***goes to the merits*** of determining whether an individual is qualified under state law to vote in an election. Rejecting ballots due to deviations from technical requirements that have no functional impact on officials' ability to verify the voter's qualifications, *e.g.* by locating and contacting the voter's witness, is the core of what Congress prohibited when it enacted the Materiality Provision.

The circuit court reasoned that the rejection of absentee ballots in each of these four identified categories violated the Materiality Provision. As the circuit court explained, the errors or omissions in each of these categories were immaterial because "a witness's address says nothing about the voter's citizenship, age, or residency" and, therefore, "[t]he address is simply not material to determining the eligibility of a voter." (R. 157 at 5, App. 012.) This Court could affirm on that broader, categorical basis, but the League has not sought facial invalidation of Wis. Stat. § 6.87(6d) and has argued in this brief for affirming on narrower grounds. *See Vanstone*, 191 Wis. 2d at 595.

First, this Court should find that the Materiality Provision applies to Wisconsin's witnessing requirement in Wis. Stat. § 6.87 because it concerns voter qualification determinations or re-determinations, and not simply because Wisconsin law commands the rejection of an absentee ballot with a witness certification that is "missing" the witness address. Wis. Stat. § 6.87(6d). ***Second***, each of the errors or omissions concerning the witness-address field identified by the League in the four as-applied categories enumerated above are immaterial under the Civil Rights Act because they have no material effect on

[20] "More or less" necessary can alternately be defined as "substantially" necessary, "more or less" meaning substantially. *More or less*, Black's Law Dictionary, *supra*.

any official's ability to use the address information the witnesses provided to locate and contact them in determining one or more voter qualifications. The League does not contend that the witness-address requirement is *per se* irrelevant to determining voters' qualifications and, notwithstanding the circuit court's reasoning, the League has not sought the requirement's facial invalidation.

CONCLUSION

For the foregoing reasons, this Court should affirm the circuit court's judgment as to Count Two of the League's Second Amended Complaint.

Dated: September 3, 2024 Respectfully submitted,

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CERTIFICATION REGARDING FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wisconsin Statutes sections 809.19(6)(c) and 809.19(8) (b), (bm), and (c) for a brief. The length of the appellant portion of this combined brief is 2,991 words and the length of the cross-respondent portion of this combined brief is 10,672 words.

Dated September 3, 2024 *Electronically signed by Douglas M. Poland*
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