

FILED
09-30-2022
CIRCUIT COURT
DANE COUNTY, WI
2022CV002472
Honorable Nia Trammell
Branch 6

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH ____

LEAGUE OF WOMEN VOTERS
OF WISCONSIN,
612 W. Main St.
Suite 200
Madison, WI 53703

Plaintiff,

v.

Case No. _____

Code: 30701

Declaratory Judgment

WISCONSIN ELECTIONS COMMISSION,
201 W. Washington Ave.
Second Floor
Madison, WI 53707

Defendant.

SUMMONS

THE STATE OF WISCONSIN

To each person named above as a Defendant:

You are hereby notified that the Plaintiff named above has filed a lawsuit or other legal action against you. The Complaint, which is attached, states the nature and basis of the legal action.

Within 45 days of receiving this Summons, you must respond with a written answer, as that term is used in Chapter 802 of the Wisconsin Statutes, to the Complaint. The Court may reject or disregard an answer that does not follow the requirements of the statutes. The Answer must be sent or delivered to the Court,

whose address is Clerk of Circuit Court, Dane County Circuit Court, 215 S. Hamilton Street, Madison, WI 53703, and to Law Forward, Inc., 222 W. Washington Ave., Suite 250, Madison, WI 53703. You may have an attorney help or represent you.

If you do not provide a proper answer within 45 days, the Court may grant Judgment against you for the award of money or other legal action requested in the Complaint, and you may lose your right to object to anything that is or may be incorrect in the Complaint. A Judgment may be enforced as provided by law. A Judgment awarding money may become a lien against any real estate you own now or in the future, and may also be enforced by garnishment or seizure of property.

DATED: September 30, 2022

Respectfully submitted,

/s/Daniel S. Lenz

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**Motion to be admitted pro hac vice
forthcoming*

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COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff League of Women Voters of Wisconsin (“LWVWI” or “the League” or “Plaintiff”) seeks declaratory and injunctive relief and alleges as follows:

NATURE OF ACTION

1. A recent temporary injunction issued in Waukesha County Circuit Court threatens to unlawfully disenfranchise Wisconsin voters.

2. To avoid such disenfranchisement, Plaintiff LWVWI brings this action under Wis. Stat. § 806.04 and 42 U.S.C. § 1983¹ against Defendant under the Civil Rights Act of 1964 and the Due Process Clause of the Fourteenth Amendment.

3. Wis. Stat. § 6.87(6d) reads in full: “If a[n absentee ballot] certificate is missing the address of a witness, the ballot may not be counted.” Neither this section nor any other part of the Wisconsin election code establishes when an address is “missing.”

4. For nearly six years, Wisconsin’s municipal clerks followed Wisconsin Elections Commission (“WEC”) guidance to “cure” returned ballot certificates with defective witness addresses so that they would not be rejected.

5. On September 7, 2022, the Waukesha County Circuit Court granted a temporary injunction in *White v. Wisconsin Elections Commission* (22-CV-1008, Dkt.

¹ State courts have jurisdiction over actions brought under 42 U.S.C. § 1983. *Thorp v. Town of Lebanon*, 2000 WI 60, ¶19, 235 Wis. 2d 610, 623, 612 N.W.2d 59, 67.

167, Sept. 7, 2022), barring WEC's longstanding guidance on this cure process. The following week, WEC withdrew its cure guidance memorandum.²

6. Absent WEC's cure guidance, Wisconsin no longer has *any* guidance regarding when a witness address is "missing" within the meaning of Wis. Stat. § 6.87(6d) such that the ballot may be rejected, *i.e.* whether ballots with partial witness addresses must be counted.

7. While WEC's cure guidance remained in effect, clerks were empowered to resolve address omissions or defects to avoid ballot rejection. So, whether a witness address was "missing" was a purely academic question. No longer. That question now holds the fate of numerous Wisconsin voters.

8. Because of the September 7, 2022 temporary injunction in *White*, Plaintiff LWVWI faces a severe injury to its organization and members if technical, immaterial, and commonplace omissions made by ballot witnesses trigger the rejection of their ballots. The same is true if voters do not receive sufficient notice to cure such omissions before any individual ballot is rejected.

9. Wisconsin voters need an answer to the unresolved legal question of whether a witness's address is "missing." Accordingly, this lawsuit first aims to

² Wisconsin Elections Commission, Temporary Injunction on WEC Guidance re Missing Absentee Witness Address (*White v. WEC*, 22-CV-1008), (Sept. 13, 2022), available at <https://elections.wi.gov/media/16801/download> (last visited Sept. 20, 2022)

secure a judicial interpretation of the term “missing” in Section 6.87(6d).³ Specifically, LWVWI respectfully requests a declaratory judgment that “missing” does not encompass partial witness addresses and an associated injunction prohibiting the rejection of ballots that bear partial witness addresses.

10. Plaintiff’s requested declaratory judgment as to the meaning of “missing” in Section 6.87(6d) may obviate the need to adjudicate Count Two and would at least limit the scope of the issues for resolution under Plaintiff’s federal claims, as well as the number of voters ensnared by Wis. Stat. § 6.87(6d). If, however, this case cannot be partially resolved or narrowed by way of Count One, Wis. Stat. §§ 6.87(6d) and 6.87(9)—on their face or as applied to absentee voters with certain types of partial addresses or certain notations in the witness address field on the absentee ballot certificate envelope—would violate the 1964 Civil Rights Act and the Due Process Clause.

11. The denial of the right to vote for the omission of certain witness address components would violate the 1964 Civil Rights Act, specifically the prohibition on denying a vote based on an immaterial omission or error. 52 U.S.C. § 10101(a)(2)(B). State names and zip codes are immaterial to identifying the voter’s witness.

12. Upon information and belief, some municipal clerks are not adhering to WEC’s longstanding definition of an “address” as comprised of three components—a

³ Another lawsuit, *Rise, Inc. v. Wisconsin Elections Commission*, Dane County Circuit Court Case No. 22-CV-2246, seeks a judicial interpretation of the term “address.” Plaintiff LWVWI does not seek such an interpretation in this action.

street number, a street name, and a municipality name—such that ballots missing the state name and/or the zip code from the witness address will be rejected. Further, with respect to certain other configurations of witness address information described herein and certain notations—such as “SAME,” ditto marks, or arrows pointing up to the voter’s information—any perceived error or omission in the witness address field is immaterial to determining a voter’s qualifications. These ballots must be counted under the Civil Rights Act.

13. Furthermore, since the cure guidance has been enjoined, clerks receiving ballots that are “missing” witness addresses may return those defective absentee ballots to the voters. Wis. Stat. § 6.87(9) provides in full:

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).

The bare minimum that the Due Process Clause requires before depriving a U.S. citizen of their vote is notice and an opportunity to respond. Wis. Stat. § 6.87(9) fails to require notice to voters of the defect or omission in the witness address field that will result in the ballot’s rejection. It even fails to require municipal clerks to return ballots to voters—an inadequate means of notifying voters, in any event, due to U.S. Postal Service delays. The *White v. WEC* injunction has left Wisconsin’s mail-in absentee voters in a precarious position as Wisconsin law now does not require municipal clerks to provide any notice whatsoever to voters that their ballot will be

rejected due a “missing” witness address. The clerk may send the ballot back to the voter or simply retain the ballot, not inform the voter of the fatal defect, and reject it under Section 6.87(6d). Under this arbitrary system, some voters will receive notice and an opportunity to cure their ballot; others will not. Upon information and belief, some clerks are returning ballots to voters but will not notify voters of the witness address defect or omission. Mailing a ballot back to a voter does not confer adequate notice and an adequate opportunity to cure, particularly as Election Day approaches and the risk increases that the time for a voter to receive, cure, and return their ballot will run out.

14. Prior to the *White* injunction, there was no need for this lawsuit: Municipal clerks could remedy a ballot certificate with a defective witness address without contacting the voter, and the cure guidance had required voter contact if clerks could not “remedy the address insufficiency” and needed to resort to ballot return under Section 6.87(9). Now, with that cure guidance enjoined and withdrawn, Wisconsin law fails to define “missing” such that there is clarity and uniformity in processing absentee ballots statewide, threatening countless voters with disenfranchisement for technical omissions, and fails to mandate notice to all voters whose ballot certificates are “missing” a witness address.

JURISDICTION & VENUE

15. This Court has jurisdiction over the subject matter of this dispute pursuant to Article VII, Section 8 of the Wisconsin Constitution and Wis. Stat.

§ 753.03, which provide for subject matter jurisdiction over all civil matters within this State.

16. This Court has jurisdiction to grant declaratory relief pursuant to Wis. Stat. § 806.04.

17. This Court has personal jurisdiction over Defendant Wisconsin Elections Commission. WEC is a state agency organized under the laws of the State of Wisconsin which performs its work and has its principal place of business in Madison, Wisconsin.

18. Venue is appropriate in Dane County, under Wis. Stat. § 801.50, because Defendant WEC does substantial business in Dane County.

PARTIES

19. Plaintiff LWVWI was founded in 1920 by the suffragists who fought to win the right to vote for women through the Nineteenth Amendment. LWVWI is a nonpartisan, nonprofit, non-stock corporation organized under the laws of the State of Wisconsin with its principal office located at 612 West Main St., Suite 200, in the City of Madison, Dane County, Wisconsin. LWVWI is an affiliate of The League of Women Voters of the United States, which has 750 state and local Leagues in all 50 states, the District of Columbia, Puerto Rico, the Virgin Islands, and Hong Kong. The League works to expand informed, active participation in state and local government, giving a voice to all Wisconsinites.

20. LWVWI is dedicated to encouraging its members and the people of Wisconsin to exercise their right to vote as protected by the U.S. Constitution, the Voting Rights Act, and the Civil Rights Act of 1964. LWVWI's mission is to empower voters and defend democracy. LWVWI does this by promoting political responsibility through informed and active participation in government and acting on selected governmental issues. The League seeks to maximize eligible voter participation through its voter registration, education, and outreach efforts and to encourage civic engagement through registration and voting.

21. Just this year, LWVWI has engaged in a wide range of activities to educate and assist mail-in absentee voters. Any threat to the ability of Wisconsinites to cast a ballot is a threat to LWVWI's mission and work. The change in Wisconsin election procedures wrought by the *White v. WEC* injunction undermines absentee voters' understanding of the requirements for voting by mail and requires a significant public education effort to inform voters of a change in the status quo that now mandates the rejection of ballots with immaterial omissions in the witness certification that clerks are forbidden from curing.

22. LWVWI has been directly involved in the issue of witness addresses on absentee ballot certificates since 2016, when it provided public testimony at WEC's October 14, 2016 hearing, regarding the requirements of federal law and its implications for WEC's guidance. LWVWI advocated for the adoption of the previous, now-enjoined policy on curing technical, immaterial omissions or defects in the

witness certification. The letter it sent to WEC, and then-Executive Director Andrea Kaminski's testimony,⁴ outlined the federal law requirements that would be violated by WEC's policy of rejecting ballots omitting one or more of a street number, street name, and/or a municipality name, which threatened the rejection of thousands, if not tens of thousands, of eligible Wisconsin voters' ballots, for technical, immaterial omissions including but not limited to missing municipality names.

23. At the time of WEC's October 14, 2016 meeting and its consideration of LWVWI's arguments, LWVWI made clear that it would file a lawsuit to enforce federal constitutional safeguards, if necessary to prevent the rejection of ballots for technical, immaterial omissions. Such a suit was unnecessary once WEC amended its guidance on this issue and adopted the cure guidance that remained in place until the Court in *White v. WEC* issued its temporary injunction.

24. In the nearly six years since, LWVWI has continued to advocate for WEC guidance and policies that avoid the disenfranchisement of voters for immaterial omissions or defects. It has repeatedly defended the absentee ballot certificate envelope cure guidance that it successfully persuaded WEC to adopt in 2016. Recently, when the Wisconsin Legislature's Joint Committee for the Review of Administrative Rules ("JCRAR") voted in January 2022 to compel WEC to promulgate an emergency rule based on the existing absentee ballot certificate

⁴ Available at <https://wiseeye.org/2016/10/14/wisconsin-elections-commission-meeting-part-1-of-2/> (starting at 39:09) (subscription required).

envelope cure guidance, *see* Wis. Stat. § 227.26(2)(b), LWVWI sent a letter to WEC, restating its federal law arguments for why the cure guidance was required. LWVWI noted that, in addition to the requirements of the U.S. Constitution, Title I of the 1964 Civil Rights Act requires the curing of immaterial omissions on absentee ballot witness certifications. That statute prohibits “deny[ing] 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). Additionally, on July 19, 2022, the day before JCRAR’s executive session where it considered and ultimately voted to suspend the emergency rule WEC had promulgated on absentee ballot certificate envelope curing (Emergency Rule EmR2209), LWVWI submitted written testimony to the committee, making the same federal law arguments.

25. Defendant WEC is an administrative body created under the laws of Wisconsin that administers and enforces Wisconsin election law and is comprised of six appointed members.

26. WEC has “the responsibility for the administration of chs. 5 to 10 and 12 [of the Wisconsin statutes] and other laws relating to elections and election campaigns[.]” Wis. Stat. § 5.05(1).

27. Defendant WEC is tasked with enforcing Wisconsin’s election laws.

FACTUAL ALLEGATIONS

28. Wisconsin law defines voting qualifications in the state Constitution and state laws. Wis. Const., art. 3 § 1 (“Every United States citizen age 18 or older who is a resident of an election district in this state is a qualified elector of that district.”); Wis. Stat. § 6.02(1) (“Every U.S. citizen age 18 or older who has resided in an election district or ward for 28 consecutive days before any election where the citizen offers to vote is an eligible elector.”). Disqualifications for voting are set forth in Wis. Stat. § 6.03.

29. Registered voters in Wisconsin apply for and obtain absentee ballots in a variety of ways: by mail-in application; electronic application; in person at the municipal clerk’s office or at an alternate site under Wis. Stat. § 6.855; by signing a statement and filing a request to receive absentee ballots under Wis. Stat. § 6.86(2) or Wis. Stat. § 6.86(2m)(a) (indefinitely confined voters) or Wis. Stat. §§ 6.22(4), 6.24(4), or 6.25(1)(c) (military and overseas voters); by agent as provided in Wis. Stat. § 6.86(3) (hospitalized voters); by delivering an application to a special voting deputy under Wis. Stat. § 6.875(6) (voters in retirement homes and residential care facilities); and by email or fax as provided in Wis. Stat. § 6.86(1)(ac).

30. Absentee ballots are cast and returned in different ways in Wisconsin. Many absentee voters mail their absentee ballots to the municipal clerk’s office or drop them off in person. Wis. Stat. § 6.87; *see also* Wisconsin Elections Commission,

Uniform Instructions for Wisconsin Absentee Voters.⁵ In-person absentee voters vote prior to Election Day at the office of the municipal clerk or designated alternate sites, but their ballots are not processed and counted until Election Day. Wis. Stat. §§ 6.855, 6.87, 6.88. Mailed ballots must be returned to the municipal clerk’s office by no later than 8:00 p.m. on Election Day. Wis. Stat. § 6.87(6). A voter can also hold onto their absentee ballot and return it to the municipal clerk’s office by Election Day—the clerk must then bring it to the voter’s polling place by 8:00 pm. *Id.*

31. In 2016, the Wisconsin State Legislature passed, and the Governor signed 2015 Wisconsin Act 261 (“Act 261”), which, in addition to authorizing the creation of an online voter registration system, included a provision requiring an absentee voter’s witness to fill in their address on the ballot’s certificate envelope: “If a certificate is missing the address of a witness, the ballot may not be counted.” Wis. Stat. § 6.87(6d).

32. The statute does not define the term “missing”; nor is that term defined in the Wisconsin Election Code’s definitional section, or in general definitions found in Wisconsin statutes. *See* Wis. Stat. §§ 5.02, 990.01.

33. All absentee ballots must be witnessed by an adult U.S. citizen, who need not be a Wisconsin resident. Wis. Stat. § 6.87(4)(b)(1).⁶ The witness requirement

⁵ Available at <https://elections.wi.gov/media/13783/download>

⁶ Wisconsin Elections Commission, Form EL-122, Standard Absentee Ballot Certificate, available at <https://elections.wi.gov/media/11405/download> (last visited Sept. 20, 2022).

and therefore the witness address requirement apply to all absentee voters. *Id.* For in-person absentee voting, the municipal clerks serve as witnesses and must put down the clerk's office address but, upon information and belief, they can just use a stamp. Absentee voting through special voting deputies ("SVDs") at residential care facilities requires the two SVDs to serve as a witness. Wis. Stat. § 6.875(6)(c)1.

34. The absentee ballot certificate contains both a voter certification and a witness certification, which the voter and witness must sign under penalty of perjury.⁷ The voter's address is usually affixed by means of a printed label, so no absentee ballot is likely to be rejected for a missing or partial voter address.

35. The witness address field is labeled with the following: "Address of Witness(s) – street number or fire number and street, or rural route and box number, municipality, state and zip code." The Inspectors' Statement, Form EL-104, contains a code for each potential reason for rejecting an absentee ballot. That list contains the code "RWA" to describe the incident—"There is *no address* of a witness."—but there is no code for missing or partial *voter* addresses. *See* Wisconsin Elections Commission, Form EL-104, Inspectors' Statement, *available at* <https://elections.wi.gov/media/12465/download> (last visited July 28, 2022) (emphasis added).

⁷ Wisconsin Elections Commission, Form EL-122, Standard Absentee Ballot Certificate, *available at* <https://elections.wi.gov/media/11405/download> (last visited Sept. 20, 2022).

36. The Election Day Manual also notes that an absentee ballot certificate envelope must contain the witness's address in order for the ballot to be counted.⁸ Significantly, however, there is no instruction to clerks, election inspectors, or canvassers to verify or do anything else with the witness's address. As long as an address is present, the ballot is counted.

37. In 2016, WEC adopted a definition of "address" for implementation of Wis. Stat. § 6.87(6d) that included three components: street number, street name, and municipality name. WEC also initially advised that "in addition to returning the absentee ballot to the voter to correct the error, a clerk could correct missing information if they received consent from the voter to do so."⁹

38. At the WEC October 14, 2016 meeting, WEC unanimously passed a motion that (a) reaffirmed WEC's three-component definition of "address"; (b) modified "the October 4, 2016 staff policy" to permit "adding a municipality to the witness certificate if the address is reasonably ascertainable from other information on the absentee ballot envelope, or other reliable extrinsic sources that are available" without first obtaining voter consent; and (c) required that any additions to the witness address field should be initialed by the clerk.¹⁰

⁸ Wisconsin Elections Commission, Election Day Manual, p. 91, available at <https://elections.wi.gov/resources/manuals/election-day-manual>.

⁹ Wisconsin Elections Commission, Absentee Witness Address Corrections Webpage, (no longer available via WEC website due to *White v. WEC* injunction).

¹⁰ Wisconsin Elections Commission, "Open Session Minutes," (Oct. 14, 2016), available at <https://elections.wi.gov/media/11815/download> (last visited Sept. 20, 2022).

39. WEC issued an updated guidance memorandum on October 18, 2016, “AMENDED: Missing or Insufficient Witness Address on Absentee Ballot Certificate Envelopes” which defined “a complete address” as containing “a street number, street name and name of municipality.” The guidance instructed clerks to try to cure problems with the witness address, either by correcting the ballot themselves or contacting the voter.¹¹

40. The October 18, 2016 Memorandum provided that clerks may contact voters to address missing certificate information, and then should indicate such assistance by initialing next to the information provided on the certificate.

41. The October 18, 2016 Memorandum remained the most current WEC guidance available on this issue through the 2016, 2017, 2018, and 2019 elections. *See Trump v. Biden*, 2020 WI 91, ¶18, 394 Wis.2d 629, 951 N.W.2d 568 (“The process of handling missing witness information is not new; election officials followed guidance that WEC created, approved, and disseminated to counties in October 2016. It has been relied on in 11 statewide elections since, including in the 2016 presidential election when President Trump was victorious in Wisconsin.”).

42. WEC issued related guidance in the run-up to the 2020 general election: “Please note that the clerk should attempt to resolve any missing witness address information prior to Election Day if possible, and this can be done through reliable

¹¹ Ex. 1, Wisconsin Elections Commission, “AMENDED: Missing or Insufficient Witness Address on Absentee Ballot Certificate Envelopes,” (Oct. 18, 2016) (no longer available on WEC website).

information (personal knowledge, voter registration information, through a phone call with the voter or witness). The witness does not need to appear to add a missing address.”¹² WEC also re-sent its October 18, 2016 memorandum.

43. However, on January 10, 2022, JCRAR, purportedly acting pursuant to Wis. Stat. § 227.26(2)(b), directed WEC to either “cease issuance” of the October 18, 2016 guidance on correcting absentee witness certificates¹³ or promulgate an emergency rule.

44. WEC promulgated an emergency rule, EmR2209, which was identical to WEC’s cure guidance in the October 18, 2016 memorandum and became effective on July 11, 2022.

45. On July 20, 2022, JCRAR voted to suspend EmR2209 pursuant to Wis. Stat. § 227.26(2)(d).

46. Additionally, on July 12, 2022, several individuals and the Republican Party of Waukesha County filed suit under Wis. Stat. § 227.40(1), challenging WEC’s October 18, 2016 guidance and seeking a temporary injunction. The Legislature was granted intervention as a plaintiff and sought a temporary injunction or mandamus.

¹² Ex. 2, Wisconsin Elections Commission, “Spoiling Absentee Ballot Guidance,” (Oct. 19, 2020) (no longer available via WEC website).

¹³ JCRAR actually directed WEC to cease issuance of “guidance relating to completeness of addresses and correction of errors and omissions on absentee *ballots*.” *Letter from JCRAR to WEC*, (Jan. 10, 2022), *available at* <https://elections.wi.gov/media/13655/download> (pp. 9-10) (emphasis added). However, the address is written on the certificate and the witness is not to view the ballot itself. WI Const art. III § 3.

The Court granted Plaintiffs and the Legislature a temporary injunction, *White v. Wisconsin Elections Commission* (see 22-CV-1008, Dkt. 167, Sept. 7, 2022), barring WEC from disseminating, publishing, or advising clerks on this cure guidance:

¶6. WEC is prohibited and enjoined from publicly displaying or disseminating the AMENDED: Missing or Insufficient Witness Address on Absentee Certificate Envelopes (Oct. 18, 2016), marked as Exhibit 2 to the Complaint, the October 19, 2020, memorandum entitled “Spoiling Absentee Ballot Guidance,” marked as Exhibit 3 to the Complaint, or any prior or subsequent version of that substantive guidance relating to missing or adding information to absentee ballot witness certifications in any form.

¶7. WEC is prohibited and enjoined from advising, guiding, instructing, publishing, or otherwise communicating information to Wisconsin municipal clerks and local elections officials that is contrary to Wis. Stat. § 6.87, which provides that 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 by the applicable deadline.

¶8. WEC is prohibited and enjoined from advising, guiding, instructing, publishing or otherwise communicating information to Wisconsin municipal clerks and local elections officials that clerks or local election officials have the duty or ability to modify or add information to incomplete absentee ballot certifications.

¶9. WEC is ordered and required by September 14, 2022, to notify all municipal clerks and local election officials previously receiving the guidance mentioned in paragraph 6 above that this Court has declared that guidance invalid and contrary to law.

Id. ¶¶6-9. The following week on September 13, 2022, WEC withdrew its October 2016 memoranda outlining that cure guidance.¹⁴

47. In issuing its temporary injunction in *White*, the Court confined its ruling to the disputed questions concerning whether clerks, under Wisconsin law, may fill in witness address information on an absentee ballot certificate envelope.

48. Judge Aprahamian expressly declined to address the federal law arguments raised in that action. The Court stated that it believed the unlawful curing of ballots could be enjoined without reaching the further question of whether a ballot with a partial witness address may be counted under the relevant federal and state laws. Furthermore, at the September 13 hearing on the stay motion, the Court stated in no uncertain terms that it did not intend for the temporary injunction to have any effect on existing WEC guidance as to the definition of an “address.”

49. Following the Court’s temporary injunction in *White v. WEC*, the absence of any definition of “missing” for purposes of processing absentee ballots under Wis. Stat. § 6.87(6d) has become an acute problem for Wisconsin voters.

50. Further, if an absentee ballot may not be counted under Wis. Stat. § 6.87(6d), that ballot may be cured by way of the clerk returning the ballot to the voter via regular mail in the optional procedure provided by Wis. Stat. § 6.87(9):

¹⁴ Wisconsin Elections Commission, Temporary Injunction on WEC Guidance re Missing Absentee Witness Address (*White v. Wisconsin Elections Commission*, 22-CV-1008), (Sept. 13, 2022), available at <https://elections.wi.gov/media/16801/download> (last visited Sept. 20, 2022)

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).

51. Section 6.87(9) fails to require clerks to provide notice to voters of witness address defects or omissions and, without notice, there can be no opportunity to cure the certificate. This provision even vests municipal clerks and their staff with complete discretion to return a ballot to voters or not. The clerk has sole discretion to return an absentee ballot with a partial witness address or hold it, never notify the voter of the fatal defect or omission and reject the ballot. In short, a clerk's whims, as well as their guesses as to whether "time permits" another roundtrip for the ballot—*not* the operation of law—dictate whether the voter will receive *any* notice of defects or omissions in the witness address. Accordingly, following the recent *White v. WEC* injunction, clerks may arbitrarily determine whether voters' voices will be heard in the election.

CLAIMS FOR RELIEF

COUNT ONE

(Wis. Stat. § 806.04 Declaratory Judgment as to the Meaning of "Missing" In Wis. Stat. § 6.87(6d))

52. The factual allegations contained in the preceding paragraphs are incorporated into Count One, as though fully set forth herein.

53. Pursuant to Wis. Stat. § 806.04, "Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations

whether or not further relief is or could be claimed.” Wis. Stat. § 806.04(1). The purpose of this statute is “to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations . . .” Wis. Stat. § 806.04(12).

54. Wis. Stat. § 6.87(6d) only permits a municipal clerk or board of election commissioners to exclude an absentee ballot from counting when the address is “missing”: “If a certificate is missing the address of a witness, the ballot may not be counted.” Wis. Stat. § 6.87(6d).

55. “Missing” is not a defined term in Wisconsin statutes governing elections. *Trump v. Biden*, 2020 WI 91, ¶49, 394 Wis. 2d 629, 951 N.W.2d 568 (Hagedorn, J., concurring).

56. WEC guidance has never expressly defined the term “missing.”

57. A plain-text reading of “missing” indicates that a ballot should only not be counted if the address is completely absent. *See Missing*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/missing> (last visited Sept. 12, 2022); *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 663, 681 N.W.2d 110, 124 (cleaned up) (“[W]e have repeatedly held that statutory interpretation begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.”).

58. The common-sense, plain-language definition of “missing” to mean circumstances in which the address field is left completely blank—*i.e.* in which the witness provides no address information at all—avoids or narrows the federal issues

discussed in Counts 2 and 3, *see infra*. See *Kenosha Cnty. Dep't of Human Servs. v. Jodie W.*, 2006 WI 93, ¶20, 293 Wis. 2d 530, 716 N.W.2d 845 (“Where the constitutionality of a statute is at issue, courts attempt to avoid an interpretation that creates constitutional infirmities.”) (internal citation and quotation marks omitted).

59. Therefore, Plaintiffs are entitled to a judgment pursuant to Wis. Stat. § 806.04 declaring that an absentee ballot may only be found to have a “missing” witness address and thereby excluded from counting under Wis. Stat. § 6.87(6d) if there is no witness address information contained on the absentee ballot certificate, temporary and permanent injunctions pursuant to Wis. Stat. §§ 813.01 and 813.02 requiring WEC to instruct Wisconsin’s municipal clerks, county clerks, and boards of elections that they shall neither exclude from counting nor return any ballot pursuant to Wis. Stat. §§ 6.87(6d), 6.87(9) unless the witness address field is completely blank.

COUNT TWO

(Violation of the 1964 Civil Rights Act’s Materiality Provision, 52 U.S.C. § 10101(a)(2)(B) and 42 U.S.C. 1983)

60. The factual allegations contained in the preceding paragraphs are incorporated into Count Two, as though fully set forth herein.

61. An absentee ballot certificate or envelope is a “record or paper” related to an “act requisite to voting” within the meaning of 52 U.S.C. § 10101(a)(2)(B). Further, under Section 10101(e), “the word ‘vote’ includes all action necessary to make a vote effective, including, but not limited to, registration or other action

required by State law prerequisite to voting, casting a ballot, and having such ballot counted and included in the appropriate totals of votes cast with respect to candidates for public office and propositions for which votes are received in an election.” 52 U.S.C. § 10101(e).

62. Section 10101(e) further provides that the words “qualified under State law” mean “qualified according to the laws, customs, or usages of the State.” *Id.*

63. 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 for a felony conviction, or adjudicated incompetent to vote. Wis. Stat. § 6.03(1).

64. A strict requirement for particular information on absentee ballot certificate envelopes is valid under federal law only if that information is material to “determining whether [an] individual is qualified under [Wisconsin] law to vote in such election.” The rejection of a ballot based on the omission of any required information is only legally valid if that information is material to determining a voter’s citizenship status, age, Wisconsin residence (or the duration of that residence), felony status, or competence. *See Migliori v. Cohen*, 36 F.4th 153, 157, 162–64 (3d Cir. 2022) (holding that voter’s failure to date voter declaration on return envelope had no bearing on voter’s qualifications to vote under Pennsylvania law and therefore

concluding that rejecting ballots due to such omissions was prohibited by Section 10101(a)(2)(B)).

65. A witness's omission of their state, zip code, or any other address information beyond the three components itemized in WEC's existing definition of a witness "address" 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). Clerks, canvassers, election inspectors, and/or law enforcement will be able to readily identify the witness based on their street number, street name, and municipality name, *i.e.* even if the state and/or zip code are omitted.

66. Additionally, the Civil Rights Act's materiality requirement forbids rejecting absentee ballots that bear certain notations including but not limited to "SAME," ditto marks, and/or arrows pointing up to the voter's address, all of which individually or in combination clearly convey that the witness was indicating their address is identical to the voter's address. This is not an omission of the witness's address at all. Alternatively, even if it is an omission, it is not material to determining the voter's qualifications to vote under Wisconsin law.

67. Accordingly, no Wisconsin voter can be denied their right to vote based on the immaterial omissions or defects described above.

68. At all relevant times, Defendant has acted under color of state law.

69. By failing to provide guidance that clerks must count ballots notwithstanding the enumerated immaterial omissions or defects outlined above,

Defendant, acting under color of state law, threatens to violate Plaintiff's rights under 52 U.S.C. § 10101(a)(2)(B).

COUNT THREE
(Violation of Due Process Clause and 42 U.S.C. § 1983)

70. The factual allegations contained in the preceding paragraphs are incorporated into Count Three, as though fully set forth herein.

71. Wis. Stat. § 6.87(9) violates the Due Process Clause because it fails to require clerks to provide notice to voters of a defect or omission in the witness address that will result in their ballot's rejection under Wis. Stat. § 6.87(6d). Further, under Section 6.87(9), the municipal clerk is also not required to send the ballot back to the voter, and may instead retain the ballot, not inform the voter of the fatal defect, and reject the ballot.

72. There is a high risk of erroneous deprivation of a liberty interest or statutory entitlement. Most or all mail-in absentee voters whose ballots omit all of or a required part of the witness address will nevertheless be qualified to vote in Wisconsin. The only issue is whether their witnesses have recorded their address, as required.¹⁵

¹⁵ Unlike Count Two, Count Three is asserted on behalf of all mail-in voters with defective witness addresses, regardless of whether the witness recorded partial address information or no address whatsoever. Depending on the outcome of Count One, however, this claim may be narrowed in scope.

73. The state cannot advance any interests that outweigh the risk of denying an eligible, duly registered Wisconsin voter's right to vote a mail-in absentee ballot that will count.

74. Given the well-documented U.S. Postal Service delays over the last three years,¹⁶ mailing a ballot back to a voter does not constitute adequate notice. These delays highlight the need for timely notice by any means available to the clerk. Without adequate notice, there can be no adequate opportunity to cure. This due process violation becomes only more acute as Election Day approaches. Ballots returned to voters closer to Election Day are increasingly unlikely to notify voters of the deprivation, let alone provide a reasonable opportunity to cure by the deadline.

75. Currently, no Wisconsin law, rule, or guidance compels Defendant to instruct municipal clerks to provide notice to voters of the imminent rejection of their ballot due to a witness address defect or omission. That does not conform to federal due process requirements. The right to due process is not guaranteed if government

¹⁶ The reliability of on-time U.S. Postal Service ("USPS") delivery of mail-in absentee ballots has deteriorated over the last few years. Administrative and cost-cutting measures at USPS undermined its performance during the 2020 general election. *See, e.g.,* Jacob Bogage & Christopher Ingraham, "USPS processed 150,000 ballots after Election Day, jeopardizing thousands of votes" WASH. POST (Nov. 6, 2020), <https://www.washingtonpost.com/business/2020/11/05/usps-late-ballots-election/>; Erin Cox, *et al.*, "Postal Service warns 46 states their voters could be disenfranchised by delayed mail-in ballots," WASH. POST (Aug. 14, 2020), https://www.washingtonpost.com/local/md-politics/usps-states-delayed-mail-in-ballots/2020/08/14/64bf3c3c-dcc7-11ea-8051-d5f887d73381_story.html; Bryan Naylor, "Delays Still Plague Mail Deliveries As Election Day Nears," NPR (Oct. 31, 2020), <https://www.npr.org/2020/10/31/929826650/delays-still-plague-mail-deliveries-as-election-day-nears>.

officials may arbitrarily decide to provide or withhold notice and thereby an opportunity to cure.

76. Defendant, acting under color of state law, has deprived and will continue to deprive Plaintiff of its rights under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

PRAYER FOR RELIEF

Plaintiff respectfully requests that this Court enter an order granting Plaintiff the following relief:

- (a) A declaratory judgment construing “missing” in Wis. Stat. § 6.87(6d) to mean the witness address field in an absentee ballot certificate envelope’s witness certification is left completely blank, and temporary and permanent injunctions barring Defendant Wisconsin Elections Commission’s respective agents, officers, employees, successors, and all persons acting in concert with the Wisconsin Elections Commission, including but not limited to Wisconsin’s municipal and county clerks, the Milwaukee County Election Commission and the Milwaukee City Election Commission, from rejecting absentee ballots with certificates that bear partial witness address information;
- (b) A declaratory judgment finding that Wis. Stat. § 6.87(6d) violates the 1964 Civil Rights Act, 52 U.S.C. § 10101(a)(2)(B), as applied to Wisconsin absentee voters who cast or will cast absentee ballot with certificates upon which the witness has recorded their street number, street address, and municipality but

has omitted one or more address components outside of those three components of WEC's existing definition of "address" for purposes of Wis. Stat. § 6.87(6d), and temporary and permanent injunctions barring Defendant Wisconsin Elections Commission's respective agents, officers, employees, successors, and all persons acting in concert with the Wisconsin Elections Commission, including but not limited to Wisconsin's municipal and county clerks, the Milwaukee County Election Commission and the Milwaukee City Election Commission, from rejecting absentee ballots with certificates upon which the witness has recorded their street number, street address, and municipality but has omitted one or more address components outside of those three components of WEC's existing definition of "address" for purposes of Wis. Stat. § 6.87(6d);

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

including but not limited to phone, email, and expedited mailings to provide voters with notice of any witness address defect or omission that will result in their absentee ballot's rejection pursuant to Wis. Stat. § 6.87(6d), and temporary and permanent injunctions requiring Defendant to issue updated guidance or instructions to Wisconsin's municipal and county clerks, the Milwaukee County Election Commission and the Milwaukee City Election Commission, advising them that they must notify voters of any witness address defect or omission that will result in their absentee ballot's rejection pursuant to Wis. Stat. § 6.87(6d);

(d) An order awarding Plaintiff their costs, disbursements, and reasonable attorneys' fees incurred in bringing this action pursuant to 42 U.S.C. § 1988; and;

(e) Such other or further relief as this Court deems just and proper.

DATED: September 30, 2022

Respectfully submitted,

By: /s/Daniel S. Lenz

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**Motion to be admitted pro hac vice
forthcoming*