No. 24AP166

IN THE WISCONSIN COURT OF APPEALS
DISTRICT 1

LEAGUE OF WOMEN VOTERS OF WISCONSIN,

Plaintiff-Appellant/Cross-Respondent,

v.

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

Defendants-Respondents,

THE WISCONSIN STATE LEGISLATURE,

Intervenor-Defendant-Respondent/Cross-Appellant.

ON APPEAL FROM THE DANE COUNTY CIRCUIT COURT
The Honorable Ryan D. Nilsestuen and
The Honorable Nia Trammell, Presiding
No. 2022CV2472

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT/CROSS-RESPONDENT AND URGING AFFIRMANCE ON THE ISSUES ADDRESSED HEREIN**

(*see inside cover for counsel*)

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## INTEREST OF THE UNITED STATES

This cross-appeal involves the proper interpretation of the Materiality Provision of the Civil Rights Act of 1964, 52 U.S.C. 10101(a)(2)(B). The United States, through the Attorney General, is charged with enforcing the Provision, 52 U.S.C. 10101(c), and therefore has a significant interest in the statute's proper interpretation.

The United States files this brief under Wis. Stat. § 809.19(7) (2021-22).

## BACKGROUND

Section 101 of the Civil Rights Act of 1964, 52 U.S.C. 10101, contains several voting safeguards, including the Materiality Provision, which 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). The statute defines "vote" expansively to "include[] all action necessary to make a vote effective including, but not limited to, registration or other action required by State law prerequisite to voting, casting a ballot, and having such ballot counted." 52 U.S.C. 10101(a)(3)(A) and (e).

Plaintiff-appellant/cross-respondent League of Women Voters of Wisconsin (the League) contends that Wis. Stat. § 6.87(6d) (2017-18), as applied by certain state election officials, violates the Materiality Provision. Wisconsin requires voters casting absentee ballots to do so in front of a witness who must complete and sign a written verification that includes the witness's address. *Id.* § 6.87(2) and (4)(b)1. Under the challenged provision, an absentee ballot "may not be counted" if the certification is missing the witness's address. *Id.* § 6.87(6d).

In applying Section 6.87(6d), some election officials have rejected otherwise valid absentee ballots based on technical defects, such as the witness's address lacking a ZIP code, or a witness indicating that their address was the same as the

voter's rather than writing it out. Doc. 157, at 2-3.[1] The circuit court granted summary judgment to the League on its Materiality Provision claim, holding that the rejection of absentee ballots based on such technical defects violates the statute. *Id.* at 8.

## ARGUMENT

The circuit court properly interpreted the Materiality Provision's scope. First, contrary to intervenor-defendant-respondent/cross-appellant Wisconsin State Legislature's view, the Provision applies to the entire voting process, not only to voter-qualification determinations. Second, rejecting an absentee ballot denies the right to vote, as broadly defined by the statute. Finally, the Legislature's argument that Wisconsin's witness-address requirement is material merely because the requirement is mandatory under state law to vote by absentee ballot is tautological and, if accepted, would nullify the Provision.

### I. The Materiality Provision applies outside the context of voter-qualification determinations.

The Materiality Provision contains two clauses. The first clause defines the Provision's scope as "error[s] or omission[s] on *any* record or paper relating to *any* application, registration, *or other act requisite to voting*." 52 U.S.C. 10101(a)(2)(B) (emphases added). And the second clause, which is phrased conditionally, specifies under what circumstances an "error or omission" that falls within the statute's scope can be the basis for "deny[ing] the right . . . to vote." *Ibid.*

The statute's scope is plain from its text. "[O]ther act requisite to voting," as used in the first clause, means that the Materiality Provision covers actions besides "application" and "registration" that are required to vote. Congress's repetition of the word "any" also makes clear that the statute applies beyond processes like registration that determine voters' qualifications. The first use requires a "broad"

[1] "Doc. ___, at ___" refers to the docket entry number and relevant pages of documents filed in the circuit court. "Leg. Br. ___" refers to the relevant pages of the Legislature's cross-appellant's brief.

reading that reaches documents "of whatever kind." *Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 218-219 (2008) (citation omitted). And the second use requires a similarly "broad" reading of the occasions when an immaterial error might occur, *ibid.*: during the processes of applying, registering, or undertaking whatever act is "requisite to voting." The statutory definition of "vote" confirms this. That definition "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." 52 U.S.C.10101(e). On its face, that language applies the Provision not just to determinations of voter qualifications, but to the entire voting process.

Spurning this straightforward reading (Leg. Br. 67-76), the Legislature heavily relies on the Third Circuit's divided decision holding that the Provision applies only to the "process" of "determining whether an individual is qualified to vote." *Pennsylvania State Conf. of NAACP Branches v. Secretary Commonwealth of Pa.*, 97 F.4th 120, 131-133 (3d Cir. 2024) (*Pennsylvania NAACP*); s*ee also Liebert v. Millis*, No. 23-cv-672, 2024 WL 2078216, at *14 (W.D. Wis. May 9, 2024) (adopting *Pennsylvania NAACP*'s reasoning). The majority reached that conclusion by reading the words "in determining" in the statute's second clause to mean that the Provision applies only to "voter qualification determinations." *Pennsylvania NAACP*, 97 F.4th at 131. Given that context, the majority then concluded, based on an apparent application of the *ejusdem generis* canon,[2] that—contrary to its plain meaning—the phrase "act requisite to voting" must be limited to records or papers used in the voter-qualification determination process. *Id.* at 132. The majority also pointed to the legislative history's many references to "registration" to confirm its reading, *id.* at 132-133, and warned that a broader

[2] The *ejusdem generis* canon concerns "the idea that a general phrase following an enumeration of things should be read to encompass only things of the same basic kind." *Muldrow v. City of St. Louis*, 144 S. Ct. 967, 975 (2024).

construction of the statute would "tie state legislatures' hands in setting voting rules unrelated to voter eligibility," *id.* at 134.

*Pennsylvania NAACP*'s reasoning subverts the statutory language and Congress's intent. First, the majority's narrow construction of the Materiality Provision depends on reading the words "in determining" in the statute's *conditional* clause to mean that the Provision's *scope* is limited to "voter qualification determinations." *Pennsylvania NAACP*, 97 F.4th at 131. Not only does that reading conflate the distinct functions of the statute's first and second clauses, but it renders superfluous the words "other acts requisite to voting" in the statute's scope clause. *Id.* at 138 (acknowledging this problem but excusing it because "no matter how we read a statute there will be redundancies" (citation and internal quotation marks omitted)). In the majority's view, reading the Provision to extend beyond the voter-registration context would render superfluous the statute's "deliberate references to 'registration' and 'application.'" *Ibid.* But recent Supreme Court decisions demonstrate that this was a misapplication of the *ejusdem generis* canon.

In *Muldrow v. City of St. Louis*, 144 S. Ct. 967 (2024), for example, the Supreme Court considered Title VII of the Civil Rights Act of 1964, which makes it unlawful to "fail or refuse to hire or to discharge any individual, or *otherwise to discriminate* against any individual with respect to his compensation, terms, conditions, or privileges of employment." 42 U.S.C. 2000e-2(a)(1) (emphasis added). The City of St. Louis argued that the "otherwise discriminate" residual clause should be read in light of the statute's specific hiring and discharge terms to include a "significant-harm requirement." *Muldrow*, 144 S. Ct. at 975. But the Court rejected that argument, holding that "discrimination [that] occurs by way of an employment action" is "a more than sufficient basis to unite the provision's several parts and avoid *ejusdem generis* problems." *Ibid.*; *see also Fischer v. United States*, 144 S. Ct. 2176, 2183 (2024) (stating that a residual clause must "cover some set of matters not specifically contemplated by" the statute's narrower terms (citation and internal quotation marks omitted)); *Bissonnette v. LePage Bakeries*

*Park St., LLC*, 601 U.S. 246, 255 (2024) (refusing to read a statute's residual clause as "swallow[ing] up" a statute's "narrower terms"). Similarly, construing "other act requisite to voting" to reach all "prerequisite[s] to voting, casting a ballot, and having such balloted counted," 52 U.S.C. 10101(e), unites the Materiality Provision's various components, consistent with the statutory definition of "vote."

Moreover, contrary to the majority's reasoning, Congress could not have clearly conveyed the Materiality Provision's broad scope by simply stating that the statute "applies to 'any record or act requisite to voting.'" *Pennsylvania NAACP*, 97 F.4th at 138. Such phrasing would be ambiguous as to how proximate to casting a ballot the act in question must be to fall within the Provision's scope. By including the specific terms "registration" and "application" in the Provision's scope clause, Congress made clear that the statute applies to steps in the voting process other than actually casting a ballot. At the same time, "other act requisite to voting" makes clear that the statute is not limited to those earlier steps. A proper reading of the Provision's scope clause thus leaves "work to do" for each of its constituent parts. *Fischer*, 144 S. Ct. at 2185. The Legislature's reading does not.

Second, the majority's discussion of the Materiality Provision's legislative history is both incomplete and ignores the bigger picture. Congress enacted the Provision to "prohibit[] the disqualification of an individual because of immaterial errors or omissions in papers or acts relating to . . . voting." H.R. Rep. No. 914, 88th Cong., 2d Sess. 2394 (1963). As the circuit court observed, "the purpose of the Materiality Provision would be lost if after qualifying to vote, a voter's ballot would not be counted by reason of obstacles that the statute was enacted to prohibit in the first place." Doc. 157, at 7 (citation and internal quotation marks omitted). And although the legislative history is primarily focused on voter registration (because that is the stage in the voting process where most of the disenfranchisement was occurring in the 1960s), it is consistent with the view—supported by the statute's text—that Congress intended the Provision to cover the entire voting process. Indeed, summaries entered into the *Congressional Record* described the

Provision as proscribing denials of the right to vote "because of immaterial errors or omissions *in any step of the voting process*." 110 Cong. Rec. 6970 (1964) (statement of Sen. Scott) (emphasis added); *accord* 110 Cong. Rec. at 6998 (statement of Sen. E. Long); 110 Cong. Rec. at 8915 (statement of Sen. H. Williams).

Finally, the majority's concerns about restricting States' ability to set neutral rules for casting ballots, *Pennsylvania NAACP*, 97 F.4th at 134, and the Legislature's related concerns in this case (Leg. Br. 69-70) are unfounded. Although the Materiality Provision applies to the entire voting process, it is limited in other ways that preserve States' significant election-administration authority:

**Records and papers.** As the circuit court pointed out, the Materiality Provision applies only to "'record[s] and paper[s]' related to voting." Doc. 157, at 8; *see also Pennsylvania NAACP*, 97 F.4th at 136 (acknowledging that the Provision's scope is limited in this respect). The statute therefore does not limit States' ability to designate voting deadlines, polling locations, or other voting regulations effectuated by means other than requiring voters to provide written or documentary information. *Ibid*. And although, as the Legislature points out (Leg. Br. 69-70), an absentee ballot is a "paper," a voter's failure to timely return a ballot is not an "error or omission *on*" a paper. 52 U.S.C. 10101(a)(2)(B) (emphasis added).

**Errors or omissions.** The Materiality Provision also applies only to "error[s] or omission[s]." 52 U.S.C. 10101(a)(2)(B). In a vacuum, the term "omission" could be read to encompass anything "le[ft] out" from voting-related paperwork. *Omit*, Merriam-Webster Online Dictionary, https://perma.cc/JX5M-8UPJ (last visited July 17, 2024). But based on the *noscitur a sociis* canon, "omission" must be construed in light of its neighboring term, "error." *See Yates v. United States*, 574 U.S. 528, 543-545 (2015) (plurality opinion). An "error" is "an act involving an *unintentional* deviation from truth or accuracy." *Error*, Merriam Webster's Online Dictionary (emphasis added), https://perma.cc/VYP3-FMQR

(last visited July 17, 2024). When a voter could comply with a paperwork requirement but chooses not to, such purposeful omissions aimed at thwarting voting rules do not fall within the Provision's ambit. For example, a proper reading of the Provision would not permit a voter to "refus[e] to sign her absentee ballot envelope," despite having the ability to do so, as the Legislature suggests. Leg. Br. 69. This scope limitation addresses the policy concerns that so troubled the *Pennsylvania NAACP* majority. 97 F.4th at 134.

**Vote denials material to voter qualifications.** The Materiality Provision expressly permits vote denials so long as the paperwork errors or omissions upon which they are based are material to determining a voter's substantive qualifications under state law. 52 U.S.C. 10101(a)(2)(B). For example, measures like voter-ID or signature requirements can be material in determining whether individuals are qualified, if they are in fact used to indirectly verify individuals' identities.

**Indiscernible voter intent.** The Materiality Provision does not require States to count votes when a voter's intent is indiscernible. For example, when a voter overvotes for a particular office or fills out a ballot in a prohibited ink color that cannot be read by voting machines, there is no practical way for election officials to reflect the voter's selection for the particular office in question in the vote totals. Laws regulating overvotes and other situations when a voter's intent cannot be discerned therefore do not deprive individuals of their right to vote. Instead, they instruct how election officials should tabulate votes under such circumstances. *See Pennsylvania NAACP*, 97 F.4th at 154 n.27 (Schwartz, J., dissenting). And, of note, a different federal statute—the Help America Vote Act of 2002—conditions the receipt of federal funding on States taking measures to minimize overvotes and other errors that make a voter's intent indiscernible. 52 U.S.C. 20901(a), 21081(a)(1)(A).

The policy concerns expressed by the Legislature and that animated the *Pennsylvania NAACP* majority opinion therefore do not justify departing from the Provision's plain text.

## II. Rejecting an absentee ballot denies the right to vote.

The Legislature also argues that the rejection of an absentee ballot for noncompliance with the witness-address requirement does not "deny the right . . . to vote," 52 U.S.C. 10101(a)(2)(B), because other methods of voting are available to Wisconsin voters. Leg. Br. 76-83. That argument ignores the statutory definition of "vote." *See* 52 U.S.C. 10101(e).

The term "vote," as used in the Materiality Provision, does not depend, as the Legislature suggests, on how Wisconsin defines the right to vote. Leg. Br. 79 ("[A]lthough the Wisconsin Constitution guarantees the right to vote, the ability to cast an absentee ballot is merely a 'privilege' under Wisconsin law." (quoting Wis. Stat. § 6.84(1) (2021-22)). The definition of "vote" that applies is the one in the statute being interpreted, and that definition "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." 52 U.S.C. 10101(e). It does not mandate that Wisconsin provide absentee voting. But because the State has elected to do so, the Provision's broad definition of "vote" means that its safeguards apply to its witness-address requirement, which is a "prerequisite" to having an absentee ballot "counted."

That Wisconsin has established procedures to "cure" absentee ballots with errors or omissions (Leg. Br. 78, 80 n.10, 81) makes no difference. The Materiality Provision 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." *La Unión del Pueblo Entero v. Abbott*, 604 F. Supp. 3d 512, 542 (W.D. Tex. 2022). In any event, Wisconsin's cure process is permissive, not mandatory. Wis. Stat. § 6.87(9) (2017-18) (providing that elections officials "may" return absentee ballots with improperly completed certificates). And voters—particularly servicemembers or other citizens residing overseas—oftentimes will not have sufficient time to cure any defects on their absentee ballots, particularly if they submit them close to the voting deadline.

## III. States cannot define away the Materiality Provision's protections.

Finally, the Legislature argues that because Wisconsin's witness-address requirement is mandatory under state law to vote absentee, it must be material. Leg. Br. 86. But the Materiality Provision distinguishes between the few prerequisites that one must meet to be "qualified" to vote and the many additional procedural requirements that are part of a State's voting process. 52 U.S.C. 10101(a)(2)(B). The Provision's conditional clause refers only to certain "substantive qualifications needed to vote" such as age and citizenship. *Vote.Org v. Callanen*, 89 F.4th 459, 488 (5th Cir. 2023); *see also Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 668 (1966) (describing voting qualifications as those "germane to one's ability to participate intelligently in the electoral process"); Wis. Const. Art. III, § 1; Wis. Stat. §§ 6.02(1) (2011-12), 6.03(1) (2015-16). All other voting regulations fall outside that category. *See Smiley v. Holm*, 285 U.S. 355, 366 (1932). While procedural requirements might help officials enforce the States' qualifications, they do not themselves *become* voter qualifications simply because state law mandates them. *See, e.g., Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 17 (2013) (distinguishing setting qualifications and "obtaining the information necessary to enforce" those qualifications).

The Legislature's contrary interpretation would nullify the Materiality Provision. If any procedural requirement a legislature imposes becomes a voter qualification, then errors or omissions in meeting *any* aspect of state election law automatically would be material to determining whether the voter is qualified. *Vote.Org*, 89 F.4th at 487 (rejecting the idea "that States may circumvent the Materiality Provision by defining all manner of requirements, no matter how trivial, as being a qualification to vote and therefore 'material'"). Congress did not intend such an ineffectual role for the Provision.

## CONCLUSION

For the foregoing reasons, this Court should affirm the circuit court's construction of the Materiality Provision's scope.

Respectfully submitted,

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## CERTIFICATE REGARDING FORM AND LENGTH

I hereby certify that this brief complies with the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c) (2021-22). This brief contains 2989 words.

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Date: August 9, 2024