

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

SUSAN LIEBERT; ANNA HAAS; ANNA POI;
and ANASTASIA FERIN KNIGHT,

Plaintiffs,

v.

WISCONSIN ELECTIONS COMMISSION;
DON M. MILLIS, ROBERT F. SPINDELL,
MARGE BOSTELMANN, ANN S. JACOBS,
MARK L. THOMSEN, *and* JOSEPH J.
CZARNEZKI, *in their official capacities as*
commissioners of the Wisconsin
Elections Commission; Meagan Wolfe,
in her official capacity as administrator
of the Wisconsin Elections Commission;
MICHELLE LUEDTKE, *in her official*
capacity as city clerk for the City of
Brookfield; MARIBETH WITZEL-BEHL, in
her official capacity as city clerk for the
City of Madison; and LORENA RASE
STOTTLER, in her official capacity as city
clerk for the City of Janesville,

Case No. 3:23-cv-00672-sl

Defendants.

THE WISCONSIN LEGISLATURE'S
MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO DISMISS OR STAY

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INTRODUCTION

Absentee voting has a long history in Wisconsin, and the State currently has one of the country's most generous absentee voting regimes. Plaintiffs challenge a straightforward and common feature of Wisconsin's generous absentee-voting regime—the requirement that an absentee voter cast his or her ballot in the presence of a qualified witness. Plaintiffs ask this Court to do away with this absentee-ballot witness requirement on the grounds that it conflicts with two federal laws, but Plaintiffs' request is legally unjustified and would undermine Wisconsin's right to adopt common rules that ensure that absentee voters are voting their own ballots.

As an initial matter, this Court should abstain from adjudicating this case, as Plaintiffs seek relief from this Court that would necessarily implicate proceedings currently pending in Wisconsin's state courts. In particular, Wisconsin state courts are presently adjudicating a case brought by Plaintiffs' own counsel, which challenges the very law at issue here on state constitutional grounds. Because granting Plaintiffs' request to declare the absentee-ballot witness requirement unlawful in this federal case would rob Wisconsin state courts of the opportunity to adjudicate these already-pending state constitutional challenge against the requirement, principles of equity, comity, and federalism counsel in favor of abstention.

Alternatively, if the Court does address Plaintiffs' complaint on the merits, it should dismiss both counts that Plaintiffs assert.

Count I, asserting a violation of Section 201 of the Voting Rights Act, fails for three independently sufficient reasons. First, under Section 10501, a state law can

only be a prohibited “test or device” if it operates as a required “prerequisite” to voting and the State conditions the right to vote on compliance with that law without providing voters with an alternate path to voting. 52 U.S.C. § 10501(b). But in Wisconsin, no voter is required to comply with the absentee-ballot witness requirement because the State provides the alternate voting path of in-person voting on Election Day. Second, the absentee-ballot witness requirement does not require an absentee voter to prove his or her qualifications to vote to a witness, thus it is not a prohibited “test or device” requiring “pro[of] [of] *qualifications* by the voucher of registered voters or members of any other class.” *Id.* (emphasis added). Instead, the absentee-ballot witness verifies that the person completing the absentee ballot is voting on behalf of themselves, rather than on behalf of another—as could happen, for example, in infamous absentee-ballot-harvesting schemes. Finally, given that the absentee-ballot witness requirement allows any adult U.S. citizen (or, for military or overseas voters, any adult) to be a witness, this requirement does not require “voucher of *registered voters or members of any other class.*” *Id.* (emphasis added).

Count II, alternatively asserting a violation of the Civil Rights Act’s materiality provision, 52 U.S.C. § 10101(a)(2)(B), also fails because the absentee-ballot witness requirement does not affect voter-qualification determinations and does not deny any absentee voters the right to vote. The absentee-ballot witness requirement falls outside of Section 10101(a)(2)(B)’s narrow scope because the witness requirement is only implicated after Wisconsin voters have already satisfied all eligibility and registration requirements. Further, the absentee-ballot witness

requirement does not deny the right to vote because Wisconsin voters have the option of voting in-person without triggering the requirement at all or, if voting absentee, voters can easily comply with the requirement and are given multiple chances to correct any errors they may make. And even if the absentee-ballot witness requirement falls within Section 10101(a)(2)(B)'s scope, it is not prohibited because it is a "material" qualification to vote under Wisconsin law representing a permissible, common method for preventing fraud in absentee voting.

This Court should grant the Legislature's Motion To Dismiss.

STATEMENT

A. Wisconsin's Voting Laws, Including Its Absentee-Ballot Witness Requirement

Wisconsin has enacted "lots of rules that make voting easier" in Wisconsin, *Luft v. Evers*, 963 F.3d 665, 672 (7th Cir. 2020); *Frank v. Walker*, 768 F.3d 744, 748 & n.2 (7th Cir. 2014), both with respect to registering to vote and to casting a ballot.

As for voter registration, "[r]egistering to vote is easy in Wisconsin," *Frank*, 768 F.3d at 748 & n.2, given the straightforward eligibility requirements and flexible registration procedures prescribed by Wisconsin's statutes. A person is qualified to vote in Wisconsin if he or she is a U.S. citizen, is at least 18 years old on the day of the election, has resided at his or her current address for at least 28 consecutive days prior to the election, and has satisfied the competency and lack-of-felony-conviction requirements. Wis. Stat. §§ 6.02(1), 6.03(1); Wis. Const. art. III, § 1. Wisconsin law provides qualified voters with numerous ways to register to vote, including in person

prior to Election Day, by mail, by electronic application, and at the polling place on Election Day itself. Wis. Stat. §§ 6.30, 6.33–.34, 6.55.

Like registering to vote, casting a ballot is also “easy in Wisconsin.” *Frank*, 768 F.3d at 748. Wisconsin law provides for robust, in-person voting procedures, which procedures allow registered voters to easily cast their ballots on Election Day. To facilitate the Election Day voting process, polling places in Wisconsin must remain open from 7 a.m. until 8 p.m. on Election Day, Wis. Stat. § 6.78(1m), and any voter who is in line when the polls close is entitled to cast a ballot, *id.* § 6.78(4). Wisconsin law authorizes employees to take time off from work to vote and prohibits employers from penalizing employees for any absences related to voting. Wis. Stat. § 6.76. Curbside voting on Election Day is also statutorily permissible. *Id.* § 6.82(1). And Wisconsin law permits disabled voters to request assistance inside the polling place, *id.* § 6.82(2); to cast their vote via paper ballot in municipalities that use voting machines, *id.* § 6.82(3); or to request other accommodations that enable them to exercise their right to vote, *id.* § 5.36.

In addition to in-person voting on Election Day, Wisconsin also has a long history of providing for absentee voting. Absentee voting in Wisconsin dates back to the Civil War when the Legislature enacted a law allowing military personnel serving at the time of an election to vote absentee. *See* 1862 Wis. Act. 11 (Special Sess.).¹ In 1915, the Legislature expanded the ability to vote absentee to other Wisconsinites,

¹ Available at <https://docs.legis.wisconsin.gov/1862/related/acts/62ssact011.pdf> (all websites last visited Oct. 25, 2023).

passing a comprehensive absentee-voting regime, while including extensive provisions aimed at preventing fraud or abuse. *See* 1915 Wis. Act. 461;² *Teigen v. Wis. Elections Comm’n*, 976 N.W.2d 519, 568 (Hagedorn, J., concurring); 1915 Wis. Act. 461, § 44m—1–2, 5–6, 14. These provisions included requirements that qualified electors swear an affidavit before a designated official and return it with the properly completed ballot “to the officer issuing the ballot,” and both the elector and official were subject to penalties for failing to comply with the relevant provisions. *Id.*

The present iteration of Wisconsin’s absentee voting regime is one of the country’s most generous. Wis. Stat. § 6.84. Any qualified, registered voter in Wisconsin may request an absentee ballot if he or she is, “for any reason . . . unable or unwilling to appear at the polling place in his or her ward or election district.” *Id.* § 6.85(1). A voter may request an absentee ballot in numerous ways, *id.* § 6.86(1)(a)(1)–(6), including by requesting an absentee ballot in person, by mail, or by email or fax in certain circumstances, *id.*; *id.* § 6.86(ac). Absentee voters can then cast their ballots by mail, *id.* § 6.87(4)(b)(1); by delivering them in person during designated “early voting” times, *id.* § 6.855; or by delivering them to the municipal clerk’s office or designated polling place before or on Election Day, *id.* § 6.87(4)(b)(1), (5). Wisconsin also offers additional options for obtaining and casting absentee ballots to voters in less common circumstances. Specifically, voters who are in the military or otherwise living overseas can receive a ballot via fax or email. *Id.* §§ 6.87(3)(d), 6.865. Voters residing in qualified nursing or retirement homes can

² Available at <https://docs.legis.wisconsin.gov/1915/related/acts/461.pdf>.

cast absentee ballots in person in their residential facilities. *Id.* § 6.875. And voters who are indefinitely confined due to age, illness, infirmity, or disability can request to receive an absentee ballot “automatically for every election.” *Id.* § 6.86(2)(a).

Wisconsin, like many other States, imposes an absentee-ballot witness requirement, requiring absentee voters to complete their ballots in the presence of a witness. *Id.* § 6.87(2), (4)(b)1.³ Under Section 6.87, an absentee voter must mark and fold his or her ballot in the presence of an adult witness before placing it within the official absentee-ballot envelope. *Id.* Each absentee ballot envelope contains a printed certificate, upon which both the voter and the witness must make certain attestations. The voter must certify that she is “a resident” of a particular political subdivision, that she is “entitled to vote” in that subdivision, that she is “not voting at any other location,” and that she “exhibited the enclosed ballot unmarked to the witness” before marking the ballot “in [the witness’s] presence and in the presence of no other person.” *Id.* § 6.87(2). The witness—who must observe the absentee-ballot voting process—must in turn “certify that [he or she is] an adult U.S. citizen and that the above statements are true and the voting procedure was executed as there stated,” and then must sign the certification. *Id.* (also providing that a witness for military or overseas voters need only be at least 18 years old, not a U.S. citizen). The Wisconsin Elections Commission’s (“WEC”) uniform instructions for absentee voters accord with these statutory requirements, providing, as particularly relevant here,

³ This requirement is consistent with the law in several other States. *See, e.g.*, Ala. Code § 17-11-9; Alaska Stat. § 15.20.203; La. Rev. Stat. § 18:1306; Minn. Stat. Ann. § 203B.07; N.C. Gen. Stat. Ann. § 163-231; S.C. Code Ann. § 7-15-380.

that: the absentee voter must “[s]tart by showing the witness [the] unmarked ballot”; the absentee voter must “[m]ark [the] ballot in the presence of [the] witness”; and that “[the] witness must confirm that [the absentee voter] [is] the one completing [the] ballot.” Dkt.1 ¶ 35 (reprinting WEC’s Form EL-128, promulgated pursuant to Wis. Stat. § 6.869).

B. Counsel For Plaintiffs Have Filed A Parallel State-Court Case, Challenging The Absentee-Ballot Witness Requirement On State Constitutional Grounds

On July 20, 2023—before the filing of the Complaint here—counsel for Plaintiffs in this case filed a four-count state-court complaint related to this case, on behalf of Priorities USA, Wisconsin Alliance for Retired Americans, and William Franks, Jr. and against the Wisconsin Elections Commission, in the Circuit Court for Dane County, Wisconsin. Dkt.1, *Priorities USA, et al. v. Wisconsin Elections Commission*, No. 2023CV001900 (Wis. Cir. Ct., Dane Cnty. July 7, 2023). In that case, the plaintiffs challenge, as relevant here, the absentee-ballot witness requirement, Wis. Stat. § 6.87(4)(b)(1). Dkt.2 at 22–25, *Priorities USA*, (Wis. Cir. Ct. Dane Cnty. July 20, 2023). Specifically, the *Priorities USA* plaintiffs contend that this requirement unconstitutionally burdens the right to vote, in violation of Article III of the Wisconsin Constitution, and seek a corresponding declaratory judgment. The Circuit Court has already granted the Legislature’s motion to intervene in those proceedings, Order, *Priorities USA* (Wis. Cir. Ct. Dane Cnty. Sept. 11, 2023), and the parties have fully briefed motions to dismiss, which motions the Dane County Circuit Court will hear on October 31, 2023, Dkt.74, *Priorities USA* (Wis. Cir. Ct. Dane Cnty. Sept. 7, 2023).

C. Plaintiffs File Their Two-Count Complaint, Claiming That Wisconsin’s Witness Requirement Violates Federal Law

1. On October 2, 2023, Plaintiffs Susan Liebert, Anna Haas, Anna Poi, and Anastasia Ferin Knight (collectively, “Plaintiffs”) filed this lawsuit against WEC; WEC’s six commissioners, Don M. Millis, Robert F. Spindell, Marge Bostlemann, Ann S. Jacobs, Mark L. Thomsen, and Joseph J. Czarnezki; WEC’s Administrator Meagan Wolfe; and City Clerk for the City of Brookfield Michelle Luedtke, City Clerk for the City of Madison Maribeth Witzel-Behl, and City Clerk for the City of Janesville Lorena Rae Stottler. WEC is a state agency charged with overseeing and administering Wisconsin’s election laws. *See Wis. Stat.* § 5.05(1). Municipal clerks, like those named as Defendants here, are local-government officials tasked with providing administrative support to city governments, including by overseeing election procedures in their respective municipalities. *See Wis. Stat.* §§ 5.02(10), 5.84, 5.89, 5.72, 6.87, 7.41.

In their Complaint, Plaintiffs broadly challenge Wisconsin’s absentee-ballot witness requirement, claiming that this requirement is unlawful under the Voting Rights Act of 1965 and, alternatively, the Civil Rights Act of 1964. Count I asserts a claim under Section 201 of the Voting Rights Act of 1965. Dkt.1 ¶¶ 50–56. That Section provides, as relevant here, that “[n]o citizen shall be denied . . . the right to vote” “because of his failure to comply with any test or device,” including a “requirement that . . . as a prerequisite for voting,” the voter must “prove his qualifications by the voucher of registered voters or members of any other class.” 52 U.S.C. § 10501. Plaintiffs contend that the statutory absentee-ballot witness

requirement, Wis. Stat. § 6.87(2), (4)(b)1, is unlawful under Section 201 because it requires a witness to certify that the voter's qualifications to participate in the election "are true" before the vote may be counted, Dkt.1 ¶ 53. Count II asserts a claim under the Materiality Provision of the Civil Rights Act of 1964. Dkt.1 ¶ 58. The Materiality Provision prohibits, in relevant part, a State from denying "any individual" the right "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). Plaintiffs contend that, if the absentee-ballot witness requirement is not construed as an unlawful voucher requirement under the Voting Rights Act, it is "by definition not material in determining whether [an] individual is qualified under State law to vote," and, as such, cannot be the basis for an absentee voter's disqualification or the rejection of his or her ballot. Dkt.1 ¶¶ 59, 61.

LEGAL STANDARD

A motion to dismiss for failure to state a claim tests the legal sufficiency of a complaint. *See* Fed. R. Civ. P. 12(b)(6). A complaint only survives muster under Federal Rule of Civil Procedure 12(b)(6) if it "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Although a court must accept a complaint's well-pleaded factual allegations as true and draw all reasonable inferences from those allegations in the

plaintiff's favor, it is "not obliged to accept as true legal conclusions or unsupported conclusions of fact." *Hickey v. O'Bannon*, 287 F.3d 656, 658 (7th Cir. 2002). Accordingly, dismissal "is warranted if the plaintiff can prove no set of facts in support of its claims that would entitle it to relief." *Gen. Elec. Cap. Corp. v. Lease Resol. Corp.*, 128 F.3d 1074, 1080 (7th Cir. 1997).

A motion to dismiss for lack of jurisdiction, Fed. R. Civ. P. 12(b)(1), based on the face of the complaint applies "the same analysis used to review whether a complaint adequately states a claim: [C]ourts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party," to decide whether, as a matter of law, the Court has jurisdiction. *Silha v. ACT, Inc.*, 807 F.3d 169, 173 (7th Cir. 2015) (brackets in original).

ARGUMENT

I. This Court Should Abstain From Adjudicating Plaintiffs' Complaint Either By Dismissing The Complaint Under The Analogue To The *Younger* Abstention Doctrine Or By Staying The Case Under Its Inherent Authority

A federal court should abstain from a case—either by dismissing the case entirely or by staying it—when the case sufficiently "implicates the principles of equity, comity, and federalism that are the foundation for [the various] abstention" doctrines. *See SKS & Assocs., Inc. v. Dart*, 619 F.3d 674, 677 (7th Cir. 2010). The Dane County Circuit Court is currently adjudicating multiple state constitutional challenges to the very absentee-ballot witness requirement at issue in this case, in a case filed by Plaintiffs' counsel here. *See Priorities USA*, No. 2023CV001900 (Wis. Cir. Ct., Dane Cnty.). Thus, and in light of principles of equity, comity, and

federalism, this Court should abstain from exercising jurisdiction and dismiss this case under the *SKS* variant of the *Younger* doctrine. *Infra* Part I.A.⁴ Alternatively, this Court should exercise its inherent authority to stay this case until the Wisconsin state courts have fully resolved *Priorities USA* and *League of Women Voters of Wisconsin v. WEC*, No. 2022CV2472 (Wis. Cir. Ct., Dane Cnty.), another Wisconsin state-court case considering a challenge to Wisconsin’s absentee voting laws under the Civil Rights Act’s materiality provision, First Amended Compl., *League of Women Voters*, No. 2022CV2472 (Wis. Cir. Ct. Dane Cnty. Oct. 3, 2022).

A. The Court should dismiss this case under the analogue to *Younger* abstention, *Sprint Commc’ns, Inc. v. Jacobs*, 571 U.S. 69, 73 (2013); *see also Younger v. Harris*, 401 U.S. 37 (1971), as the Seventh Circuit discussed in *SKS*. Dismissal, rather than a stay, is proper where, as here, the relief that plaintiffs seek is fully obtainable in state court. *See FreeEats.com, Inc. v. Indiana*, 502 F.3d 590, 599 (7th Cir. 2007).

“The *Younger* doctrine requires federal courts to abstain from taking jurisdiction over federal constitutional claims that seek to interfere with or interrupt

⁴ “[T]he various types of abstention [doctrines]” recognized by the Supreme Court “are not rigid pigeonholes into which federal courts must try to fit cases.” *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 359 (1989) (*NOPSI*) (quoting *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11 & n.9 (1987)). Thus, this Court could alternatively consider abstaining on grounds similar to those articulated in *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941), *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), and their progeny. Under each doctrine, courts have stayed federal challenges to state laws, allowing “parties to litigate first in the state courts questions of state law,” *Meredith v. City of Winter Haven*, 320 U.S. 228, 236 (1943) (citing *Pullman Co.*, 312 U.S. 496), and “avoid entanglement with state efforts to implement important policy programs,” *Grace Ranch, L.L.C. v. BP Am. Production Co.*, 989 F.3d 301, 313 (5th Cir, 2021) (citing *Burford*, 319 U.S. 315).

ongoing state proceedings.” *SKS*, 619 F.3d at 677; *FreeEats.com*, 502 F.3d at 596. One variant of *Younger* applies to civil state court proceedings “that implicate a State’s interest in enforcing the orders and judgments of its courts.” *Sprint*, 571 U.S. at 72–73 (citation omitted).⁵ As the Seventh Circuit put it, “*Younger* and its progeny require federal courts to abstain from enjoining ongoing state proceedings that are (1) judicial in nature, (2) implicate important state interests, and (3) offer an adequate opportunity for review of constitutional claims, (4) so long as no extraordinary circumstances—like bias or harassment—exist which auger against abstention.” *FreeEats.com*, 502 F.3d at 596 (citation omitted). At bottom, the doctrine is designed to protect the State’s important interest in “enforcing the orders and judgments of their courts” and in “protecting the authority of the judicial system, so that its orders and judgments are not rendered nugatory.” *Pennzoil*, 481 U.S. at 13, 14 n.12.

The Seventh Circuit’s decision in *SKS* is instructive. There, a federal-court plaintiff brought a claim under 42 U.S.C. § 1983 and sought an injunction, in federal court, to speed up ongoing state court eviction proceedings. 619 F.3d at 676. The Seventh Circuit abstained under *Younger*, although the case “d[id] not completely fit” within the traditional understanding of *Younger* abstention, “because th[e] case implicates the same principles of equity, comity, and federalism that provide the foundation for *Younger*,” and because the federal plaintiff had at least three adequate,

⁵ *Younger*’s other two variants pertain to “cases in which there is a parallel, pending state criminal proceeding” or “particular civil proceedings that are akin to criminal prosecutions.” *Sprint*, 571 U.S. at 72.

possible remedies in state court. *Id.* at 677–83; accord *Courthouse News Serv. v. Brown*, 908 F.3d 1063 (7th Cir. 2018).

Like *SKS*, this suit “implicates the same principles of equity, comity, and federalism that provide the foundation for *Younger*,” *SKS*, 619 F.3d at 678, and involves “important state interests,” *FreeEats.com*, 502 F.3d at 596 (citation omitted), even if it does not “completely fit” within *Younger*’s traditional doctrinal boundaries, *SKS*, 619 F.3d at 678. In particular, in *Priorities USA*, the Wisconsin state courts are already considering—in a case brought by the very same attorneys or law firms as in this case—whether the absentee-ballot witness requirement complies with the Wisconsin Constitution. *Priorities USA*, 2023CV001900 (Wis. Cir. Ct. Dane Cnty.). In the midst of those state-court proceedings, the same attorneys or law firms here rushed to federal court to challenge the same absentee-ballot witness requirement, now on federal statutory grounds. If Plaintiffs receive their sought-after relief in this case—namely, a declaration that the absentee-ballot witness requirement is unlawful under federal law and an injunction prohibiting its enforcement—the Wisconsin state courts in *Priorities USA* will have no opportunity to adjudicate finally the state-constitutional claim against the absentee-ballot witness requirement already pending there. That interference from this federal court “would intrude upon the independence of the state courts and their ability to resolve the cases before them,” *SKS*, 619 F.3d at 677, which “would reflect a lack of respect for the state’s ability to resolve the cases properly before its courts,” *id.* at 679.

Plaintiffs also have the ability to raise their claimed federal concerns in the Wisconsin state courts. *Id.* at 676–81; *accord FreeEats.com*, 502 F.3d at 596. Indeed, Wisconsin’s circuit courts are courts of “general jurisdiction” that can hear “all civil . . . actions,” including those raising federal statutory claims, Wis. Stat. § 753.03, and state officers like WEC’s commissioners are proper defendants in declaratory-judgment actions challenging the legality of their actions, *see Lister v. Bd. of Regents of Univ. Wis. Sys.*, 240 N.W.2d 610, 623 (Wis. 1976). Plaintiffs have not even attempted to allege any form of “extraordinary circumstances,” such as “bias or harassment,” that would preclude them from having their case heard in state court. *FreeEats.com*, 502 F.3d at 596 (citation omitted).

B. Alternatively, this Court should stay this case as an exercise of its inherent powers. *Grice, Eng'g, Inc. v. JG Innovations, Inc.*, 691 F. Supp. 2d 915, 920 (W.D. Wis. 2010).

“The District Court has broad discretion to stay proceedings as an incident to its power to control its own docket,” *Clinton v. Jones*, 520 U.S. 681, 706 (1997), and the court should use this power to maximize “economy of time and effort for itself, for counsel, and for litigants,” *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). Whether to issue a stay requires analyzing four factors: “(1) whether the litigation is at an early stage, (2) whether a stay will unduly prejudice or tactically disadvantage the non-moving party; (3) whether a stay will simplify the issues in question and streamline the trial; and (4) whether a stay will reduce the burden of litigation on the parties and on the court.” *Grice*, 691 F. Supp. 2d at 920 (citation omitted); *see also*,

e.g., *Waterstone Mortg. Corp. v. Offit Kurman, LLC*, Civ. No. 17-cv-796-jdp, 2019 WL 367642, at *1 (W.D. Wis., Jan 30, 2019).

Based on these four factors, the Court should stay further proceedings until the Wisconsin state courts fully resolve *Priorities USA*. To begin, this lawsuit is obviously “at an early stage,” *Grice*, 691 F. Supp. 2d at 920, as Plaintiffs filed their complaint on October 2, 2023, less than a month ago. Next, analyzing the third and fourth elements together, staying this case until resolution of *Priorities USA* could simplify the issues in this lawsuit and significantly reduce the burden of litigation on both the parties and on the court, *Grice*, 691 F. Supp. 2d at 921 (citing *Landis*, 299 U.S. at 256). Finally, a stay will not unduly prejudice or otherwise disadvantage Plaintiffs, *Grice*, 691 F. Supp. 2d at 920, given that Plaintiffs remain able to raise their arguments in state court, if they so wish, *see supra* pp.12–13.

II. If The Court Does Address Plaintiffs’ Complaint, It Should Dismiss The Complaint For Failure To State A Claim For Relief

If this Court does decide to exercise its jurisdiction in this case, *but see supra* Part I, this Court should dismiss Plaintiffs’ Complaint, since both of Plaintiffs’ counts fail to state a legal claim, *Gen. Elec. Cap. Corp.*, 128 F.3d at 1080.

A. Plaintiffs’ Count I Fails To State A Claim Under Section 201 of the Voting Rights Act Of 1965, Because The Absentee-Ballot Witness Requirement Is Not A Prerequisite To Voting, Does Not Require Absentee Voters To Prove Their Qualifications, And Does Not Require A Voucher By Any Member Of A Class

Plaintiffs’ Count I alleges that Wisconsin’s absentee-ballot witness requirement runs afoul of Section 10501, within the Voting Rights Act. Dkt.1, ¶¶ 50–56. But that claim fails as a matter of law. *Gen. Elec. Cap. Corp.*, 128 F.3d at 1080.

1. Section 10501 provides that “[n]o citizen shall be denied, because of his failure to comply with any test or device, the right to vote in any Federal, State, or local election conducted in any State or political subdivision of a State.” 52 U.S.C. § 10501(a). Section 10501 specifically defines the term “test or device” to include, as particularly relevant here, “any requirement that a person as a prerequisite for voting or registration for voting . . . (4) prove his qualifications by the voucher of registered voters or members of any other class.” *Id.* § 10501(b). The term “test or device” also includes “any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, [or] (3) possess good moral character.” *Id.* Section 10501 operates as a *per se* ban on a “test or device” falling within its scope. *See Briscoe v. Bell*, 432 U.S. 404, 410 n.9 (1977) (“The Act suspends the operation of all ‘tests and devices[.]’”); *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 338 (2000) (the Voting Rights Act now “bars certain types of voting tests and devices altogether”).

Three features of the Section 10501 framework are especially relevant here.

First, by its plain text, *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997), Section 10501 applies only to state laws that impose a “*requirement*” that a voter must satisfy “as a *prerequisite*” to “vot[e] or regist[er] for voting,” 52 U.S.C. § 10501(b) (emphasis added); *Greater Birmingham Ministries v. Sec’y of State for State of Ala.*, 992 F.3d 1299, 1335 (11th Cir. 2021). That is, Section 10501 only “bars a State from denying” a voter “the right to vote in any federal, state, or local election because of

‘any test or device.’” *Oregon v. Mitchell*, 400 U.S. 112, 144–45 & n.9 (1970) (plurality opinion) (citing Section 201(b) of the VRA, codified at Section 10501); *see also Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2331 (2021) (“prohibiting the denial of the right to vote in any election for failure to pass a [covered] test”); *accord NAACP v. New York*, 413 U.S. 345, 350–51 (1973) (discussing similar language now found in 52 U.S.C. § 10303(c) and explaining that it “prohibit[s] the use of tests or devices . . . when the effect is to deprive a citizen of his right to vote”). This provision prohibits a State from “conditioning the right to vote” on a voter satisfying a prohibited test or device. *Puerto Rican Org. for Pol. Action v. Kusper*, 490 F.2d 575, 579 (7th Cir. 1973). But where a State provides a voter with “an alternate voting path” that does not require compliance with a particular state law, that particular state law is not a “*requirement*” that must be satisfied “as a *prerequisite*” to voting and so cannot possibly be a prohibited “test or device” under Section 10501. *Greater Birmingham Ministries*, 992 F.3d at 1335 (quoting 52 U.S.C. § 10501(a)–(b)).

The Eleventh Circuit’s recent decision in *Greater Birmingham Ministries* helpfully illustrates this feature of Section 10501. There, the Eleventh Circuit considered a challenge under Section 10501 to an Alabama law that “provides that a registered voter who lacks the photo ID required to vote in person on election day may cast a regular ballot if she or he is positively identified by two election officials as a voter on the poll list who is eligible to vote” and those officials aver as such in an affidavit. *Id.* at 1305–06. The plaintiffs claimed, as relevant here, that this state law “constitutes an illegal ‘test or device’ in violation of” Section 10501, *id.* at 1315,

because, in their view, it “require[ed], as a prerequisite to voting, that otherwise eligible registered voters who lack the required photo ID prove their qualifications by the voucher of two election officials,” *id.* at 1334–35. The Eleventh Circuit rejected that claim because Alabama had other voting “options available to voters” that did not require compliance with the challenged state-law provision, meaning that “no one in Alabama is ‘required’ to rely on the [challenged state-law provision]” in order to vote. *Id.* at 1335–36. Specifically, a voter could simply vote with a readily obtainable photo ID on Election Day or “cast a provisional ballot and ‘cure’ that ballot by later presenting a photo ID at the registrars’ office” after Election Day. *Id.* Indeed, given these available “options,” the challenged state-law provision “actually increases the opportunities for [] voters to be able to cast a ballot.” *Id.* at 1335.

Second, with respect to Section 10501’s prohibition on a test or device requiring that the voter “prove his qualifications by the voucher of registered voters or members of any other class,” in particular, 52 U.S.C. § 10501(b), the plain text of this prohibition, *Robinson*, 519 U.S. at 340, extends only to state laws “requir[ing] a voter to prove his or her *qualifications*” to vote via the voucher of a “registered voter[] or member[] of any other class,” *Greater Birmingham Ministries*, 992 F.3d at 1335 (emphasis added); *see also Thomas v. Andino*, 613 F. Supp. 3d 926, 961 (D.S.C. 2020); *People First of Ala. v. Merrill*, 467 F. Supp. 3d 1179, 1225 (N.D. Ala. 2020) (preliminary-injunction posture); *Howlette v. City of Richmond*, 485 F. Supp. 17, 23–24 (E.D. Va.), *aff’d per curiam*, 580 F.2d 704 (4th Cir. 1978). So, for example, this prohibition within Section 10501 would not bar a state absentee-voting law that

requires an absentee voter to secure a “witness . . . to confirm that the voter completes the voter’s oath and signs the document,” where the “voter’s eligibility has already been verified by [the state election commission] according to the absentee procedure.” *Thomas*, 613 F. Supp. 3d at 961; *see also Howlette*, 485 F. Supp. at 23–24. Nor would it bar a law requiring a “witnesses’ signature” that “indicates only that they observed the voter sign the affidavit,” where the “witnesses do not vouch that the voter is over 18, that she is a citizen, that she is a resident of the state, or that she is not disqualified from voting as a convicted felon or for any other reason.” *People First of Ala.*, 467 F. Supp. 3d at 1225 (preliminary-injunction posture).

Third, and relatedly, Section 10501’s prohibition on a test or device requiring that the voter “prove his qualifications by the voucher of registered voters *or members of any other class*,” 52 U.S.C. § 10501(b) (emphasis added), “undoubtedly” refers to the inherently discriminatory voucher practices that motivated Congress to pass the Voting Rights Act in the first place, *see Davis v. Gallinhouse*, 246 F. Supp. 208, 217 (E.D. La. 1965); *accord Greater Birmingham Ministries*, 992 F.3d at 1336 (comparing a challenge law to the “inherently discriminatory voucher” in *United States v. Logue*, 344 F.2d 290 (5th Cir. 1965)). Those inherently discriminatory practices included, for example, Alabama’s requirement that any person registering to vote produce an already qualified voter as a supporting witness to vouch for the person, which requirement was more difficult for Black residents of Alabama, who had more difficulty finding registered voters to vouch for them. *Logue*, 344 F.3d at 292. Thus, Section 10501(b)’s “members of any other class” language does not extend to, for

example, a nondiscriminatory requirement that a voter demonstrate proof of residency through one of “a variety of documents”—although such a requirement could be “ingenious[ly]” framed as requiring the voter to obtain a voucher from a member of “the class of people who issue driver’s licenses, library cards, rent receipts, postmarked envelopes, etc.” *Davis*, 246 F. Supp. at 217. Nor does this language extend to a “[w]itness [r]equirement” for an absentee ballot oath, where that requirement “allows for a myriad of competent individuals to witness the oath whether the witness themselves are registered to vote or not.” *Thomas*, 613 F. Supp. 3d at 962.

2. Here, Plaintiffs’ 52 U.S.C. § 10501(b) claims fail for three independently sufficient reasons, each requiring dismissal.

First, and critically, Wisconsin’s absentee-ballot witness provision is not a “requirement” imposed on Wisconsin voters as a “prerequisite” to voting, 52 U.S.C. §10501(b), so it does not operate as a “bar[]” to a voter casting a ballot, *Oregon*, 400 U.S. at 144–45 & n.9; *see also Brnovich*, 141 S. Ct. at 2331, or a “condition[]” on “the right to vote,” *Puerto Rican Org. for Pol. Action*, 490 F.2d at 579. Wisconsin has a robust “alternate voting path” available to all Wisconsin voters that does not depend in any way on the absentee-ballot witness requirement, *Greater Birmingham Ministries*, 992 F.3d at 1335: specifically, in-person voting on Election Day, *supra* p.6. *Greater Birmingham Ministries* is directly on point. As with the challenged state-law provision in Alabama, “no one” in Wisconsin “is ‘required’ to rely on” the absentee-ballot witness requirement in order to vote, given the availability of in-person voting.

Id. at 1335–36. Wisconsin’s permissive absentee-voting regime just “increases the opportunities for [] voters to be able to cast a ballot,” *Greater Birmingham Ministries*, 992 F.3d at 1335–36—voters may vote via absentee ballot, including by complying with the absentee-ballot witness requirement, or they may vote in person on Election Day with no need to comply with the absentee-ballot witness requirement, *supra* pp.5–6. This defeats Plaintiffs’ challenge to the absentee-ballot witness requirement under Section 10501.

Second—and independently sufficient to defeat Plaintiffs’ claim under Section 10501—the absentee-ballot witness requirement does not involve voters’ “prov[ing] [their] qualifications” to vote to a witness. 52 U.S.C. § 10501(b).

Section 6.87 requires absentee voters to follow particular procedures, including complying with the absentee-ballot witness requirement, and to make certain certifications. Thus, Section 6.87 instructs the absentee voter to show the unmarked ballot to the witness, “mark the ballot in a manner that will not disclose how the elector’s vote is cast,” and place the ballot in the “proper envelope.” *Id.* § 6.87(4)(b)1. The absentee voter must then certify that he is resident of the locality claimed in his registration, that he is not going to vote “at any other location” in the present election, and that he is either “unable or unwilling to appear at the polling place . . . on election day” or has relocated to another locality “later than 28 days before” the present election. *Id.* § 6.87(2). The absentee voter must also certify that he followed the proper absentee-voting procedures, swearing: “I certify that I exhibited the enclosed ballot unmarked to the witness, that I then in [his] presence . . . marked the ballot

and enclosed and sealed the same in this envelope in such a manner that no one but myself . . . could know how I voted.” *Id.*

Section 6.87 then requires the absentee-ballot witness to make certain certifications of his own, but those certifications relate only to the absentee-ballot voting process—not to the absentee voter’s qualifications to vote. *See Greater Birmingham Ministries*, 992 F.3d at 1335; *see also Thomas*, 613 F. Supp. 3d at 961; *People First of Ala.*, 467 F. Supp. 3d at 1225 (preliminary-injunction posture); *Howlette*, 485 F. Supp. at 23–24. Specifically, the absentee-ballot witness must “certify that [he or she] [is] an adult U.S. citizen and that *the above statements* are true and the voting procedure was executed as there stated.” Wis. Stat. § 6.87(2) (emphasis added). Considering the statutory context, *see State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 681 N.W.2d 110, 124 (Wis. 2004), the “above statements” to which the absentee-ballot witness certifies relate only to those facts that the absentee-ballot witness must observe: namely, that the absentee voter voted on behalf of himself, established by his “exhibit[ing] the enclosed ballot unmarked to the witness” and “mark[ing] the ballot” and “seal[ing] the same in th[e] envelope” in the presence of the witness and “no other person.” Wis. Stat. § 6.87(2). Further, other provisions within the absentee-voting law reinforce that conclusion. *Kalal*, 681 N.W.2d at 124. A clerk may only issue an absentee ballot to an absentee voter *after* the voter has satisfied all eligibility and registration requirements, Wis. Stat. §§ 6.20, 6.85, 6.86, thus Section 6.87(2) requiring the absentee-ballot witness to somehow also certify to the voter’s qualifications would serve no function, *see Thomas*, 613 F. Supp. 3d at 961

(“voter’s eligibility has already been verified by [the state election commission] according to the absentee procedure”). And WEC’s statutorily mandated instructions are in accord, which instructions, as relevant here, provide that “[the] witness must confirm that [the absentee voter] [is] the one completing [the] ballot.” Dkt.1 ¶ 35 (reprinting WEC’s Form EL-128, promulgated pursuant to Wis. Stat. § 6.869).

In this way, the absentee-ballot witness requirement is part of Wisconsin’s securing of its important interest in “detering and detecting voter fraud,” *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191 (2008); accord *League of Women Voters of Wis. Educ. Network, Inc. v. Walker*, 851 N.W.2d 302, 314 (Wis. 2014), by ensuring that the absentee voter actually casts his absentee ballot on behalf of himself, rather than someone else casting the ballot for him. As the Legislature recognized in Section 6.84 itself, that kind of fraud is inherent in absentee voting, whether it be through the “overzealous solicitation of absent electors,” the “undue influence on an absent elector to vote for or against a candidate or to cast a particular vote,” or “other similar abuses,” like ballot-harvesting schemes. Wis. Stat. § 6.84(1).

Third and finally, even if the absentee-ballot witness requirement did require a voter to “prove his qualifications by the voucher” of the witness, there is no requirement within Section 6.87 that the witness be a “registered voter[] or member[] of any other class” within the meaning of Section 10501(b)’s terms. 52 U.S.C. § 10501(b). Section 6.87 provides that an absent-ballot witness may be *any* “adult U.S. citizen” without further requirements. Wis. Stat. § 6.87(4)(b)1; *id.* § 6.87(2) (also providing that witnesses for military and overseas electors need not be

U.S. citizens). Thus, the absentee-ballot witness requirement allows for “myriad of competent individuals” to be a witness, taking it outside of Section 10501(b)’s “members of any other class” language. *Thomas*, 613 F. Supp. 3d at 962. Similarly, this neutral, nondiscriminatory, and easy-to-satisfy requirement is wholly unlike the “inherently discriminatory voucher” practices that motivated Congress to enact the Voting Rights Act, *Greater Birmingham Ministries*, 992 F.3d at 1336, which again shows that it falls beyond Section 10501(b)’s “members of any other class” language, *Davis*, 246 F. Supp. at 217.

B. Plaintiffs’ Count II Fails To State A Claim Under 52 U.S.C. § 10101(a)(2)(B), The Materiality Provision Of The Civil Rights Act Of 1964

Plaintiffs’ second claim that the absentee-ballot witness requirement violates the materiality provision of the Civil Rights Act also fails.

The materiality provision, Section 10101(a)(2)(B) of Title 52 of the U.S. Code, prohibits States from denying any individual the right to vote based on 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). To prevail on a claim for violation of Section 10101(a)(2)(B), a plaintiff ultimately must prove the following five elements: (1) the challenged conduct must be performed by a person who is “acting under color of law”; (2) it must have the effect of “deny[ing]” a person “the right . . . to vote”; (3) the denial must be attributable to “an error or omission on [a] record or paper”; (4) the “record or paper” must be “related to [an] 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 in such election.” *Id.*

Plaintiffs’ contention that the absentee-ballot witness requirement violates Section 10101(a)(2)(B) fails three of the necessary elements for any claim under Section 10101(a)(2)(B), each of which suffices to preclude Plaintiffs’ claim. Plaintiffs thus fail to state a claim in Count II. *Gen. Elec. Cap. Corp.*, 128 F.3d at 1080.

1. The Absentee-Ballot Witness Requirement Does Not Affect Voter-Qualification Determinations, So Section 10101(a)(2)(B) Does Not Apply

Because the absentee-ballot witness requirement does not affect whether an individual is “qualified . . . to vote,” it falls outside the scope of Section 10101(a)(2)(B).

a. Section 10101(a)(2)(B) requires that an error or omission be “material in determining whether such individual is *qualified under State law to vote in such election.*” 52 U.S.C. § 10101(a)(2)(B) (emphasis added). Section 10101(e) defines the phrase “qualified under State law” as “qualified according to the laws, customs, or usages of the State.” *Id.* § 10101(e). Once a voter satisfies the State’s eligibility criteria and voter registration requirements, that voter is “qualified under State law” to vote in that State. *Id.*; *see id.* § 10101(a)(2)(B). As such, under the plain language of the statute, Section 10101(a)(2)(B) simply does not reach States’ election rules and actions unrelated to voter qualification. Instead, Section 10101(a)(2)(B) covers only

the actions of state officials that relate to an individual voter's ability to qualify for and register to vote.⁶

Section 10101(a)(2)(B)'s narrow focus on qualification and registration barriers for eligible voters aligns with the traditional role of the States in election administration. The Supreme Court has recognized the need for States to have broad authority to regulate elections, explaining “[e]lections are complex affairs, demanding rules that dictate everything from the date on which voters will go to the polls to the dimensions and font of individual ballots.” *Moore v. Harper*, 600 U.S. 1, 29 (2023). It is “clear that States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder,” *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (citation omitted), *see also Smiley v. Holm*, 285 U.S. 355, 369 (1932); *Ohio v. Hildebrant*, 241 U.S. 565, 567 (1916), including absentee-ballot rules like the absentee-ballot witness requirement, *McDonald v. Bd. of Election Comm’rs of Chi.*, 394 U.S. 802, 810–11 (1969). The vast majority of courts confronting Section 10101(a)(2)(B) have taken a measured approach to that provision. *Thrasher v. Ill. Republican Party*, No. 4:12-cv-4071-SLD-JAG, 2013 WL 442832, at *3 (C.D. Ill. Feb. 5, 2013); *Friedman v. Snipes*,

⁶ Although the Civil Rights Act broadly defines the term “vote” as “all action necessary to make a vote effective, including . . . registration or other action required by State law prerequisite to voting, casting a ballot, and having such ballot counted,” § 10101(e), the materiality provision is significantly narrower in scope. Indeed, the materiality provision, by its own terms, applies only to “act[s] requisite to voting”—a narrow phrase that clearly encompasses voter registration, *id.* § 10101(a)(2)(B), but not the other actions enumerated in Section 10101(e)'s definition, such as “casting a ballot” or “having a ballot counted,” *id.* § 10101(e). Because the absentee-ballot witness requirement is a necessary step a voter must take to have his or her ballot counted, it does not implicate an “act requisite to voting” under Section 10101(a)(2)(B).

345 F. Supp. 2d 1356, 1370 (S.D. Fla. 2004); *McKay v. Altobello*, No. CIV.A. 96-3458, 1996 WL 635987, at *1 (E.D. La. Oct. 31, 1996). Consistent with “the well-established and long-held principle that States ‘have broad powers to determine the conditions under which the right of suffrage may be exercised,’” *Snipes*, 345 F. Supp. 2d at 1370 (quoting *McDonald*, 394 U.S. at 807), courts should be hesitant to read federal law to displace States’ own administration of elections.

In *Schwier v. Cox*, 340 F.3d 1284 (11th Cir. 2003), the Eleventh Circuit considered a Section 10101(a)(2)(B) challenge to a Georgia voter-registration form requiring voters to disclose their social security numbers and in doing so opined on Section 10101(a)(2)(B)’s scope and purpose. The court concluded that Section 10101(a)(2)(B) “was intended to address the practice of requiring unnecessary information *for voter registration* with the intent that such requirements would increase the number of errors or omissions on the application forms, thus providing an excuse to disqualify potential voters.” *Id.* at 1294, 1297 (citing *Condon v. Reno*, 913 F. Supp. 946, 949–50 (D.S.C. 1995)) (emphasis added). For example, a prompt asking an applicant to “list the exact number of months and days in his age” on his registration form would be the type of impermissible regulations Section 10101(a)(2)(B) is meant to target. *Id.* at 1294 (citation omitted). With this understanding of Section 10101(a)(2)(B)’s scope, the Eleventh Circuit remanded for the district court to determine whether a requirement that Georgia voters disclose their social security number on a voter registration form is “*material*” to determining whether a person is qualified to vote under Georgia law. *Id.* at 1297. In doing so, the

Eleventh Circuit made clear that Section 10101(a)(2)(B) is about voter-qualification requirements.

Several Supreme Court Justices agree with this understanding of Section 10101(a)(2)(B). *Ritter v. Migliori*, 142 S. Ct. 1824, 1825–26 (2022) (Alito, J., dissenting from denial of stay). When the Third Circuit held that Pennsylvania’s law requiring mail-in ballot envelopes to include a handwritten date with the voter declaration signature violated Section 10101(a)(2)(B)—a decision that the Supreme Court later vacated as moot, *Migliori v. Cohen*, 36 F.4th 153, 164 (3d Cir. 2022), *cert. granted, judgment vacated sub nom. Ritter v. Migliori*, 143 S. Ct. 297 (2022)—Justice Alito, joined by Justices Thomas and Gorsuch, explained that Section 10101(a)(2)(B) “applies only to errors or omissions that are not material to the question whether a person is qualified to vote,” *Ritter*, 142 S. Ct. at 1826 (Alito, J., dissenting from denial of stay). Technical ballot requirements, including mandatory mail-in ballot requirements, have nothing to do with the “requirements that must be met in order to establish eligibility to vote,” and thus are outside the scope of Section 10101(a)(2)(B). *Id.* at 1825.

Expanding the scope of Section 10101(a)(2)(B) to cover voter rules beyond those related to voter qualification and registration would call into question the validity of typical state election laws regulating the administration of elections and create significant constitutional issues. While the Constitution makes clear that the administration of *federal* elections is shared between the States and the federal government, U.S. Const. art. I, § 4, cl. 1, “the Constitution grants to the *States* a broad

power to prescribe the ‘Times, Places and Manner of holding Elections for Senators and Representatives,’ which power is matched by state control over the election process for state offices.” *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986) (emphasis added) (quoting U.S. Const. art. I, § 4, cl. 1). Further, States “may, and inevitably must, enact reasonable regulations of . . . ballots to reduce election- and campaign-related disorder,” *Timmons*, 520 U.S. at 358, and it is indisputable that “[c]asting a vote, whether by following the directions for using a voting machine or completing a paper ballot, requires compliance with certain rules,” *Brnovich*, 141 S. Ct. at 2338. Allowing Section 10101(a)(2)(B) to invalidate basic laws regulating when and where elections are to occur would violate the well-established principle that Congress does not preempt state law without a “clear and manifest purpose,” *Miller Brewing Co. v. Dep’t of Indus., Lab. & Hum. Rels.*, 210 Wis. 2d 26, 35, 563 N.W.2d 460 (1997) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)), and “would upset the usual constitutional balance of federal and state powers,” *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991); *see also Gomez v. United States*, 490 U.S. 858, 864 (1989) (“It is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question.”).

Applying Section 10101(a)(2)(B) outside the voter-qualification context would also be unworkable. If all election-administration rules are within the provision’s scope, any voter who makes an error or omission that results in the failure to obtain a ballot or in ballot rejection—whether an absentee ballot or one submitted at the

polls—could bring a Section 10101(a)(2)(B) lawsuit against the State. Consider, for example, a voter who fails (or refuses) to provide his correct address for the mailing of absentee ballot, *see* Wis. Stat. § 6.86(1)(a)1, (2m)(a), or who submits his application for an absentee ballot outside the statutory window, Wis. Stat. § 6.86(1)(b). If Section 10101(a)(2)(B) applies to election administration, rather than just voter qualification, the voter could sue the State because he or she was not permitted to vote. Similarly, States would not be able to lawfully reject ballots that are noncompliant with statutory requirements for casting a ballot unless the State proved that each rejection met the precondition that the rejection was “material” to a determination of whether the voter was qualified to vote. In sum, applying Section 10101(a)(2)(B) outside the voter registration process would prevent the State from exercising its core authority to “devis[e] a set of rules under which everyone who takes reasonable steps to cast an effective ballot can do so.” *Common Cause Ind. v. Lawson*, 977 F.3d 663, 665 (7th Cir. 2020).

b. Here, the absentee-ballot witness requirement does not relate to whether an absentee voter may “register to vote,” *Snipes*, 345 F. Supp. 2d at 1371; *see supra* Part II.A.2, and thus does not fall within Section 10101(a)(2)(B). The witness requirement does not relate to whether an absentee voter meets the qualifications for registration under Wisconsin law, namely whether he or she is a U.S. citizen; is at least 18 years old; or satisfies the residency, lack-of-felony-conviction, and competency requirements. Wis. Stat. §§ 6.02(1), 6.03(1); Wis. Const. art. III, § 1. Instead, the absentee-ballot witness requirement relates only “to the counting of ballots by

individuals *already deemed qualified to vote*,” *Snipes*, 345 F. Supp. 2d at 1371; see *supra* Part II.A.2, because it applies only to persons who have already successfully obtained their ballots to vote absentee, see Wis. Stat. §§ 6.86(1), 6.87(2), (4)(b)(1) (“[A]n elector voting absentee . . . shall make and subscribe to the certification before one witness who is an adult U.S. citizen.”). Because Wisconsin voters must satisfy all eligibility and registration requirements *before* the clerk or responsible official can even issue an absentee ballot, *supra* pp.7–8, the absentee-ballot witness requirement is not implicated until after all voter-qualification determinations have been made, rendering this requirement outside of Section 10101(a)(2)(B).

2. The Absentee-Ballot Witness Requirement Does Not “Deny” Absentee Voters “The Right To Vote” And Thus Does Not Meet Another Key Requirement Of Section 10101(a)(2)(B)

Section 10101(a)(2)(B) also does not apply to the absentee-ballot witness requirement for the separate, independently dispositive reason that it does not “deny [absentee voters] the right” to vote. 52 U.S.C. § 10101(a)(2)(B); see *Vote.Org v. Callanen*, 39 F.4th 297, 306 (5th Cir. 2022).

a. Section 10101(a)(2)(B) applies only when a state law “deprive[s]” the voter “of the right to vote.” *Vote.Org*, 39 F.4th at 305–06. Where in-person voting is fully available, the voter is not denied “the right to vote” merely because he or she must cast his ballot in the presence of a witness. *Brnovich*, 141 S. Ct. at 2333, 2338; accord *supra* Part I.A.2.

“[T]he fundamental right to vote means the ability to cast a ballot, but not the right to do so in a voter’s preferred manner, such as by mail,” *Tully v. Okeson*, 977

F.3d 608, 613 (7th Cir. 2020), thus, restrictions on the privilege of absentee voting do not “deny” the right to vote as a matter of law. “[V]ote” in Section 10101(a)(2)(B) is defined as “all action necessary to make *a vote* effective,” 52 U.S.C. § 10101(e) (emphasis added); *see id.* § 10101(a)(3)(A), and does not, by its own terms, supplement the constitutional right to vote with additional protections or privileges. If state law either allows a voter to vote via “other means” that do not depend upon the challenged law or allows the voter to “cure” a violation of that challenged law, then that law does not come within Section 10101(a)(2)(B)’s scope. *Vote.Org*, 39 F.4th at 305–06. A law does not fall within Section 10101(a)(2)(B)’s scope unless it places “the right to vote . . . at stake” by “mak[ing] it harder to cast a ballot at all.” *Tully*, 977 F.3d at 611 (citation omitted).

“[T]he fundamental right to vote does not extend to a claimed right to cast an absentee ballot by mail.” *Tully*, 977 F.3d at 611; *see Lee v. Paulson*, 623 N.W.2d 577, 579 (Wis. 2001). The Supreme Court has affirmed this understanding numerous times, *see McDonald*, 394 U.S. at 807–08; *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 n.6 (1969); *see also Hill v. Stone*, 421 U.S. 289, 300 n.9 (1975); *Goosby v. Osser*, 409 U.S. 512, 521 (1973); *Bullock v. Carter*, 405 U.S. 134, 143 (1972), as have other federal courts of appeals, *see, e.g., Lawson*, 977 F.3d at 664; *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 185 (5th Cir. 2020); *Mays v. LaRose*, 951 F.3d 775, 792 (6th Cir. 2020); *see also Org. for Black Struggle v. Ashcroft*, 978 F.3d 603, 607 (8th Cir. 2020). The Wisconsin Legislature has also provided that “voting by absentee ballot is a privilege exercised wholly outside the traditional safeguards of the polling

place” that “must be carefully regulated.” Wis. Stat. § 6.84(1); *see Teigen*, 976 N.W.2d at 543; *Jefferson v. Dane Cnty.*, 951 N.W.2d 556, 561 (Wis. 2020); *Lee*, 623 N.W.2d at 579.

b. Here, the absentee-ballot witness requirement does not deny Plaintiffs the right to vote. Indeed, Wisconsin law makes it “easy,” *Frank*, 768 F.3d at 748, to vote in-person on Election Day—a process that does not trigger the absentee-ballot witness requirement at all. Wis. Stat. §§ 6.76–.78, 6.80; *see* Part I.A.2

Alternatively, even if a voter chooses to vote by absentee ballot, the absentee-ballot witness requirement is easy to satisfy, and therefore cannot be said to deny the voter the “right . . . to vote in any election.” 52 U.S.C. § 10101(a)(2)(B). The rules dictated by Section 6.87 are straightforward, requiring a voter to simply fill out their ballot in the presence of a U.S. citizen witness, seal the ballot in its return envelope, and complete and sign the envelope certifications. Wis. Stat. § 6.87. Notably, the Wisconsin Legislature created an exception to the U.S. citizen-witness requirement for those who may find it slightly more difficult to comply, stating that “military” and “overseas” electors “shall make and subscribe to the certification before one witness who is an adult but who need not be a U.S. citizen.” Wis. Stat. § 6.87(4)(b)1. Wisconsin law also permits absentee voters to “cure” violations of the Witness Requirement under the process set forth in Section 6.87(9), *Vote.Org*, 39 F.4th at 305–06, which authorizes a clerk who “receives an absentee ballot with an improperly completed certificate or with no certificate” to “return the ballot to the elector . . .

whenever time permits the elector to correct the defect and return the ballot within the period authorized under sub. (6),” Wis. Stat. § 6.87(9).

Wisconsin law ensures that voters are well advised of the absentee-voting requirements, have sufficient time to complete their ballots, and correct any errors in their submissions. Section 7.15(1)(cm) requires clerks to send absentee ballots to voters with requests on file “no later than the 47th day before” a general election, *id.* § 7.15(1)(cm), thereby allowing voters to “plan[] ahead and tak[e] advantage of the opportunities allowed by state law” to ensure their votes are counted, *Democratic Nat’l Comm. v. Bostelmann*, 977 F.3d 639, 642 (7th Cir. 2020); *Lawson*, 977 F.3d at 665 (noting that voters “who act at the last minute assume risks”). For one thing, a voter may correct an error brought to his or her attention by a clerk. Wis. Stat. § 6.87(9). Absentee voters may track their ballots online via WEC’s “Track My Ballot” tool, which allows voters to make sure the ballot is received by the clerk’s office and alerts them of any potential ballot deficiencies in advance of Election Day. *See Track My Ballot, MyVote Wisconsin*, Wis. Elec. Comm’n.⁷ This tool permits a voter to request a replacement ballot before Election Day if any problems do arise. Thus, absentee voters who makes an error on their ballots, including an error related to the

⁷ Available at <https://myvote.wi.gov/en-us/Track-My-Ballot>. In ruling on a motion to dismiss, a district court may take judicial notice of “matters of public record,” *Ennenga v. Starns*, 677 F.3d 766, 773 (7th Cir. 2012), whose “accuracy cannot reasonably be questioned,” Fed. R. Evid. 201. Courts routinely take judicial notice of information on publicly available government websites. *See Garross v. Medtronic, Inc.*, 77 F. Supp. 3d 809, 818 (E.D. Wis. 2015); *Evans v. Associated Banc-Corp*, No. 21-C-60, 2022 WL 4638092, at *3 (E.D. Wis. Sept. 30, 2022). Thus, this Court taking judicial notice of the contents of WEC’s website is appropriate here.

absentee-ballot witness requirement, have multiple opportunities to correct that error.

3. If Section 10101(a)(2)(B) Applied Here, It Would Satisfy That Provision Because Section 6.87(4)(b)(1) Is “Material”

Finally, even if the absentee-ballot witness requirement were a voter-qualification provision that impacted certain voters right to vote—which it plainly is not, *see supra* Part II.B.1—Plaintiffs’ claim still fails because the absentee-ballot witness requirement is “material,” 52 U.S.C. § 10101(a)(2)(B), under any reasonable interpretation of Section 10101(a)(2)(B).

a. As discussed above, Section 10101(a)(2)(B) proscribes voting requirements that are “not material in determining whether such individual is qualified under State law to vote in such election.” As a textual matter, the plain meaning of “material,” which term is not defined in Section 10101(a)(2)(B) itself, *see id.*, is “[o]f such a nature that knowledge of the item would affect a person’s decision-making.” *Material*, Black’s Law Dictionary (11th ed. 2019). In other words, “material” means “significant,” or “essential.” *Id.*; *see also Material*, Oxford English Dictionary Online (2023) (“Of serious or substantial import; significant, important, of consequence[;] [p]ertinent, relevant; essential.”).⁸ Section 10101(a)(2)(B) also proscribes only those voting requirements that are not “material to a determination whether an individual may vote” under the law of the relevant state—here, Wisconsin. *Common Cause v. Thomsen*, 574 F. Supp. 3d 634, 640 (W.D. Wis. 2021). As proponents of Section

⁸ Available at https://www.oed.com/dictionary/material_adj?tab=meaning_and_use#37801431 (subscription required).

10101(a)(2)(B) emphasized, “each State has exclusive authority to set the qualifications of its voters so long as there is no denial or abridgement on account of race, color, previous condition of servitude, or sex.” 110 Cong. Rec. 1,696 (1964). Because Section 10101 does not establish voting qualifications, the function of Section 10101(a)(2)(B)’s materiality requirement is to ensure “the *qualifications established by the State* [are] applied with an even hand and nondiscriminatory.” *Id.* at 1695 (emphasis added).

b. If Section 10101(a)(2)(B) were expanded to cover absentee-ballot requirements, *but see supra* Part II.A.2,⁹ the absentee-ballot witness requirement would still survive this Court’s review as it is “material” to whether a Wisconsin voter may vote by absentee ballot. Under Wisconsin law, that “[t]he statutory requirements governing absentee voting must be completely satisfied or ballots may not be counted.” *Teigen*, 976 N.W.2d at 539 (citing Wis. Stat. § 6.84(2)). The absentee-ballot witness requirement, for its part, constitutes one of the ways the Legislature has endeavored to “prevent the potential for fraud or abuse,” while still affording voters the “privilege of voting by absentee ballot.” Wis. Stat. § 6.84(1); *accord Lee*, , 623 N.W.2d 577, 579; *Brnovich*, 141 S. Ct. at 2348; *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989). Because Wisconsin maintains an

⁹ The absentee-ballot witness requirement applies only to persons who *already* have their absentee ballots, Wis. Stat. § 6.87(6d), such that it only impacts “the counting of ballots by individuals *already deemed qualified to vote*,” *Friedman*, 345 F. Supp. 2d at 1371 (emphasis added). In other words, the requirement is designed not to determine *whether* a citizen is allowed to vote, but rather to ensure that others are not committing fraud by, for example, voting absentee in the registered voter’s name.

important interest in “detering and detecting voter fraud,” *Crawford*, 553 U.S. at 191, including the types of fraud inherent in absentee voting, such as the “overzealous solicitation of absent electors” and the “undue influence on an absent elector to vote for or against a candidate or to cast a particular vote,” Wis. Stat. § 6.84(1), requiring absentee voters to make their selections in the presence of a witness is appropriate. In this manner, the absentee-ballot witness requirement functions a “significant” safeguard to ensure that the absentee voter is the individual who filled out their own ballot, and did so without outside pressure during the voting. *Material*, Black’s Law Dictionary; *Material*, Oxford English Dictionary Online, a mandatory requirement for all absentee voters. Accordingly, even if Section 10101(a)(2)(B)’s materiality requirement did apply to *absentee* voting qualifications and procedures, the absentee-ballot witness requirement clearly satisfies that provision of federal law.

Finally, adopting an expansive reading of Section 10101(a)(2)(B) would also render it unconstitutional as applied to state elections. The “Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections,” *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 217 (2009) (citation omitted), in particular “reserv[ing] to the States the power to set voter qualifications in state and local elections, except to the limited extent that the people through constitutional amendments have specifically narrowed the powers of the States,” *Oregon*, 400 U.S. at 125 (plurality opinion), and thereby establishing “state control over the election process for state offices,” *Tashjian*, 479 U.S. at 217. But if Section 10101(a)(2)(B) is read to prohibit basic

election laws like the witness requirement, the CRA would revoke state authority to enact and enforce innumerable election laws nationwide, prohibiting application of election-integrity laws relating to absentee voting, times for closing polling places, and the like, all because they are not sufficiently “material” to the minimum qualifications for voting established by the State. 52 U.S.C. § 10101(a)(2)(B). This interpretation of the statute would render it unconstitutional, or at least constitutionally suspect, as it would render Section 10101(a)(2)(B) a grave congressional intrusion into state prerogatives in administering state and local elections. *Holder*, 557 U.S. at 217; *Oregon*, 400 U.S. at 125 (plurality opinion); *Tashjian*, 479 U.S. at 217. This Court should approach any such interpretation with great caution under the constitutional-doubt canon. *See Gray-Bey v. United States*, 201 F.3d 866, 869 (7th Cir. 2000) (“[C]ourts must if they can interpret statutes to avoid constitutional problems.”); *Gomez*, 490 U.S. at 864. And preventing courts from enjoining election safeguards also “promotes confidence in our electoral system—assuring voters that all will play by the same, legislatively enacted rules.” *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1284 (11th Cir. 2020).

CONCLUSION

This Court should grant the Legislature's Motion To Dismiss Or Stay.

Dated: December 6, 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of December, 2023, a true and accurate copy of the foregoing was served via the Court's CM/ECF system upon all counsel of record.

/s/Misha Tseytlin

MISHA TSEYTLIN