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 RAE STOTTLER, *in her official capacity as city clerk for the City of Janesville*,

Defendants.

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

THE WISCONSIN STATE LEGISLATURE'S REPLY IN SUPPORT OF MOTION TO DISMISS OR STAY

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INTRODUCTION

The oppositions of Defendants (hereinafter collectively referred to as "the Wisconsin Elections Commission" or "WEC") and of Plaintiffs to Intervenor-Defendant the Wisconsin State Legislature's ("Legislature") request that this Court either abstain from adjudicating this case or otherwise stay these proceedings are unpersuasive. While both Plaintiffs and WEC argue that this case does not satisfy the traditional elements of the *Younger* abstention doctrine, *SKS & Assocs., Inc. v. Dart*, 619 F.3d 674 (7th Cir. 2010), fully answers that argument. There, the Seventh Circuit held that abstention is appropriate—even in cases that do not strictly satisfy *Younger*—where deciding the case in the face of pending state-court litigation "implicates the principles of equity, comity, and federalism that are the foundation for *Younger* abstention." *Id.* at 677. Those exact concerns are present here, because this Court's adjudication of this case could preclude the Wisconsin state courts from considering whether the absentee-ballot witness requirement is consistent with the Wisconsin Constitution in a pending case. Plaintiffs' and WEC's arguments against staying the case fare no better. This case is in the early stages, given that motions to dismiss are still pending, and staying this case could simplify or moot the issues here by allowing the Wisconsin state courts to first resolve the parallel litigation involving the same provision of Wisconsin law: Wis. Stat. § 6.87.

If this Court does proceed to the merits, Plaintiffs have failed to rebut the Legislature's multiple independently sufficient arguments supporting dismissal. As for Count I, Plaintiffs cannot show that the absentee-ballot witness requirement is a

"prerequisite" to voting, given that in-person voting is fully available in Wisconsin and does not require compliance with this requirement. Nor can they show that the absentee-ballot witness requirement requires absentee voters to "prove [their] qualifications by the voucher of registered voters or members of any other class," relying instead on unpersuasive interpretations of Section 6.87 and Section 201 of the Voting Rights Act in an attempt to make out their case. As for Count II, Plaintiffs argue that the Civil Rights Act's materiality provision is not limited to a voter's qualifications to vote, but the text of that provision, applicable caselaw, and the traditional role of the States in election administration all refute Plaintiffs' position. Further, Plaintiffs cannot show how the absentee-ballot witness requirement denies any voter the right to vote, so as to trigger the materiality provision, when in-person voting remains fully available. Finally, even if this Court were to conclude that the materiality provision did apply to the absentee-ballot witness requirement, Plaintiffs have no persuasive response to the Legislature's straightforward showing that this requirement is "material" because it relates to whether an absentee voter is "qualified" to cast his or her absentee ballot under Wisconsin law.

ARGUMENT

I. This Court Should Abstain Under The Analogue To The *Younger* Abstention Doctrine Or Stay This Case Under Its Inherent Authority

A. This Court should either 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), that this Court recognized in *SKS*, Dkt.49 at 13–16, or at least stay this case, Dkt.49 at 16–17. The "principles of equity, comity, and

federalism that provide the foundation for *Younger*" require dismissal here, *SKS*, 619 F.3d at 678, where a state trial court is considering whether Wisconsin's absentee-ballot witness requirement complies with the Wisconsin Constitution, Dkt.49 at 15 (citing *Priorities USA v. WEC*, No. 2023CV001900 (Wis. Cir. Ct. Dane Cnty.)). This case threatens to deprive the Wisconsin state courts of the opportunity to adjudicate the state-constitutional claim pending in *Priorities USA*—a claim that implicates "important state interests," *FreeEats.com, Inc. v. Indiana*, 502 F.3d 590, 596 (7th Cir. 2007) (citation omitted)—and thus will "intrude" impermissibly on the "independence of the state courts and their ability to resolve the cases before them," *SKS*, 619 F.3d at 677; Dkt.49 at 15. And Plaintiffs have not pointed to any "extraordinary circumstances" that would prevent them from bringing their claims in state court. *FreeEats.com*, 502 F.3d at 596 (citation omitted); Dkt.49 at 16. In the alternative, this Court should exercise its inherent powers and stay this case pending resolution of *Priorities USA* and *League of Women Voters of Wisconsin v. WEC*, No. 2022CV2472 (Wis. Cir. Ct. Dane Cnty.), the other cases challenging the Wisconsin state-law provisions at issue here. Dkt.49 at 16–17.

B. Plaintiffs and WEC argue that *Younger* abstention is inapplicable because Plaintiffs have not sought an injunction against any state-court proceedings, including in *Priorities USA*. Dkt.52 at 1–3. These parties misunderstand the Seventh Circuit's *SKS* decision. In *SKS*, the Seventh Circuit acknowledged that *Younger* applies to civil cases only under specific circumstances, 619 F.3d at 677; Dkt.51 at 3, but held that, even when a case "falls outside the scope" of the traditional

Younger abstention doctrine, abstention may still be appropriate if a case "implicates the principles of equity, comity, and federalism that are the foundation for *Younger* abstention." 619 F.3d at 677. As the Supreme Court has recognized, "the various types of abstention [doctrines]" recognized by the 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) (quoting *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11 n.9 (1987)). Here, the Legislature is making just the type of argument that *SKS* blessed: although this case does not satisfy all of the traditional elements of the *Younger* abstention doctrine, "the same principles of equity, comity, and federalism" found in *Younger* nevertheless apply here and warrant this Court's abstention. Dkt.49 at 14–16.

Plaintiffs' and WEC's attempts to distinguish factually *SKS* are irrelevant. Dkt.52 at 2–3; Dkt.51 at 3. *SKS* held that abstention may be warranted even in cases that do not "completely fit" the contexts presented by *Younger* or the other foundational abstention cases. 619 F.3d at 677–78; Dkt.49 at 14–15. "[A] federal court may, and often must, decline to exercise its jurisdiction where doing so would intrude upon the independence of the state courts and their ability to resolve the cases before them." *SKS,* 619 F.3d at 677. That is the case here, since an order from this Court declaring that federal law preempts the absentee-ballot witness requirement would preclude the Wisconsin state courts from considering whether that requirement is consistent with the Wisconsin Constitution in the first place, in a pending case. Dkt.49 at 15.

Moving to Plaintiffs' and WEC's arguments regarding the Legislature's request for a stay, these too are unpersuasive.

Plaintiffs criticize the Legislature for requesting a stay because, in their view, that request conflicts with the Legislature's representations in its papers supporting its Motion To Intervene. Dkt.52 at 3–4. *But the Legislature filed its proposed Motion To Dismiss Or Stay simultaneously with its intervention motion*, thus its stay request could not possibly be inconsistent with its intervention papers. Dkts.28, 28-2. Indeed, in granting the Legislature's Motion To Intervene, this Court found that the Legislature's unique request for a stay was a basis for granting the Legislature's Motion, explaining: "The [L]egislature identifies several issues it wishes to raise that the other defendants have not raised, including a contention that the court should dismiss or stay the case in light of parallel proceedings in state court." Dkt.47 at 4.

Next, and contrary to Plaintiffs' contention, Dkt.52 at 4, this case does remain at an early stage, *Grice Eng'g, Inc. v. JG Innovations, Inc.*, 691 F. Supp. 2d 915, 920 (W.D. Wis. 2010), which weighs in favor of a stay. Plaintiffs filed their Complaint on October 2, 2023, and this Court has not yet even ruled on the pending motions to dismiss that Complaint. Dkts.19, 48. Plaintiffs cite no case, from any court, for the proposition that a case where a motion to dismiss is still pending—and thus where the defendant has not even yet even filed an answer—is not in an early stage.

Plaintiffs' and WEC's arguments that they would suffer prejudice from a stay, Dkt.51 at 4–5; Dkt.52 at 4–5, are flawed as well. While Plaintiffs claim that a stay would prejudice their attempt to "seek clarity" on absentee-voting issues "in advance

of the 2024 election cycle," Dkt.52 at 4, Plaintiffs do not address the fact that their counsel is actively litigating the *Priorities USA* case—which specifically challenges the absentee-ballot witness requirement—and, thus, that they could have brought the very federal claims they seek to adjudicate here in the pending state-court proceedings, Dkt.49 at 9, thereby avoiding any federal-state conflict. WEC, for its part, presents similar concerns about the need to resolve this case prior to the 2024 election, but it also recognizes the possibility that the *Priorities USA* case may be appealed. Dkt.51 at 4–5. Accordingly, the legality of the absentee-ballot witness requirement could remain in dispute throughout the 2024 election cycle regardless of whether this Court stays the proceedings here.

Finally, WEC disputes that a stay pending the resolution of *Priorities USA* and *League of Women Voters* could simplify the issues here, Dkt.51 at 4–5, but WEC is wrong. *Priorities USA* and *League of Women Voters* involve challenges to Wisconsin's absentee voter laws, including, among others, the absentee-ballot witness requirement in Section 6.87—one under the Wisconsin Constitution and the other under the federal Civil Rights Act of 1964. *Supra* at p.3. To resolve such claims, Wisconsin state courts must authoritatively construe Section 6.87 and then declare whether it is constitutional under the Wisconsin Constitution or valid under the Civil Rights Act. Those outcomes could "simplify the issues in question" here in a number of ways, *Grice*, 691 F. Supp. 2d at 920 (citation omitted), including by mooting this case entirely if the Wisconsin state courts declare that the absentee-ballot witness requirement is unconstitutional under the Wisconsin Constitution or is preempted.

And even if the Wisconsin courts do not throw out the witness signature requirement—for example, in *Priorities USA*, as a matter of constitutional avoidance—Wisconsin courts' authoritative readings of this provision may resolve disputes about the meaning of certain terms or provisions here. *Compare* Compl. ¶ 76, *Priorities USA*, No. 2023CV001900 (Wis. Cir. Ct. Dane Cnty. July 20, 2023) (alleging, as part of plaintiffs' claim that the witness requirement is not necessary or narrowly tailored as required by the Wisconsin Constitution, that "[m]any Wisconsin voters who rely on absentee ballots . . . do not have an eligible witness in their household"), *with* Dkt.1 ¶ 53 (alleging, as part of Plaintiffs' Section 201 claim, that the witness requirement is "a requirement of a voucher by a member of a class because both 'US citizens' and 'adults' are classes of persons"); *compare* Second Am. Compl. ¶ 69 *League of Women Voters*, No. 2022CV2472 (Wis. Cir. Ct. Dane Cnty. Dec. 23, 2022) (alleging, as part of plaintiffs' materiality provision claim, that an absentee-ballot witness's omission of certain address information is not material and thus should not result in the denial of an absentee ballot), *with* Dkt.1 ¶ 61 (alleging, as part of Plaintiffs' materiality provision claim, that the absentee-ballot witness requirement "substantially increases absentee voters' risk of ballot rejection").

II. If The Court Entertains This Action, It Should Dismiss The Complaint For Failure To State A Claim

A. Plaintiffs' Count I Fails To State A Claim Under Section 201 Of The Voting Rights Act Of 1965

1. As the Legislature explained, Plaintiffs' Count I—which alleges a violation of Section 201 of the Voting Rights Act ("VRA")—fails as a matter of law for three independent reasons. Dkt.49 at 22–26. First, to constitute a prohibited "test or

device" under Section 201, the challenged state law must function as a "prerequisite" to voting, 52 U.S.C. § 10501(b), but Wisconsin law provides for the traditional method of in-person voting, which does not require compliance with the absentee-ballot witness requirement, thus that requirement is not a "prerequisite" to voting, *id.*; Dkt.49 at 18–20; 22–23. Second, Section 10501(b) prohibits only those state-law "prerequisite[s]" that relate to a voter's "qualifications" to vote, 52 U.S.C. § 10501(b), but the absentee-ballot witness requirement does not relate to the voter's "qualifications" to vote, *id.*; rather, it ensures that the qualified absentee voter complies with the required absentee voting procedures, Dkt.49 at 20–21, 23–25. Finally, Section 10501(b) prohibits only those tests or devices that require the "voucher of registered voters or members of any other class," 52 U.S.C. § 10501(b), which does not apply to the absentee-ballot witness requirement, given that any adult U.S. citizen (or, for military or overseas voters, any adult) can serve as a witness, Dkt.49 at 21–22, 25–26.

2. Plaintiffs' counterarguments are all unpersuasive.

First, Plaintiffs fail to rebut the Legislature's arguments that the absentee-ballot witness requirement is *not* a "prerequisite" to voting. Dkt.52 at 5–7.

Plaintiffs begin by arguing that the absentee-ballot witness requirement is an unlawful "prerequisite" to voting under Section 201 because *Section 202* of the VRA requires "each State [to] provide by law for the casting of absentee ballots for . . . President and Vice President, by all duly qualified residents of such State who may be absent . . . on the day such election is held and who have" timely "applied" for such

ballots and timely "returned such ballots." 52 U.S.C. § 10502(d); Dkt.52 at 5–6. Plaintiffs' Section 202 point is, with respect, difficult to follow, but they appear to be arguing that the absentee-ballot witness requirement must operate as a prerequisite at least as to those individuals who intend to use Section 202's federal right to vote absentee for President and Vice President, since those voters do have a federal right to vote via absentee ballot but must nevertheless comply with the absentee-ballot witness requirement in order to submit an absentee ballot for President and Vice President. *See* Dkt.52 at 5–6. This argument fails, including because Section 202(c)—a subsection that Plaintiffs do not cite or discuss—expressly conditions this federal right to vote absentee for President and Vice President on the absentee voter "hav[ing] complied with the requirements prescribed by the law of such State or political subdivision providing for the casting of absentee ballots in such election." 52 U.S.C. § 10502(c); *see, e.g.*, *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (statutes must be interpreted "by reference to . . . the specific context in which th[e] language is used, and the broader context of the statute as a whole"). Further, Section 202(d) itself requires States to "provide by law for the casting of absentee ballots for . . . President and Vice President," 52 U.S.C. § 10502(d), further authorizing the States to regulate the absentee-voting process for President and Vice President with state-law requirements like the absentee-ballot witness requirement. And even if Plaintiffs were somehow correct that the absentee-ballot witness requirement infringed on Section 202, that would only support a claim for a small

number of named Plaintiffs as related to their votes for President and Vice President only.

Next, Plaintiffs contend that, if a State like Wisconsin provides for absentee voting, it must "do so in a manner that complies with federal law," Dkt.52 at 6–7, but that argument is circular. Section 201 only prohibits the use of a "test or device" that operates as a "prerequisite" to voting, 52 U.S.C. § 10501(b), but because voting by absentee ballot is not mandatory, a limit on that type of voting cannot be a "prerequisite" to voting under the VRA. And while Plaintiffs cite hypotheticals about restrictions that would apply only to voting on Election Day, Dkt.52 at 6–7, this case does not involve the right to vote in person on Election Day, since the witness requirement applies only to absentee voting.

Relatedly, Plaintiffs argue that the witness requirement is a "prerequisite" to voting despite the availability of alternative voting methods, Dkt.52 at 5–7, but that is atextual, *see* Dkt.49 at 18–20; 22–23. A "prerequisite" is "[s]omething that is necessary before something else can . . . be done." Prerequisite, *Black's Law Dictionary* (11th ed. 2019). A procedure cannot be a "prerequisite" if an alternative means of achieving the same result exists without completing that procedure. *See* Dkt.49 at 18–20, 22–23. So, here, because compliance with the absentee-ballot witness requirement is not "necessary," *Black's Law Dictionary*, *supra*, to voting in Wisconsin, the absentee-ballot witness requirement is not a prerequisite to exercising the right to vote. Dkt.49 at 22–23. Or, as the Eleventh Circuit held in *Greater Birmingham Ministries v. Secretary of State for State of Alabama*, 992 F.3d 1299,

1334–35 (11th Cir. 2021), a state law "requirement" is not a "prerequisite" to voting under Section 201 if voters can avoid the "requirement" by exercising other available options to vote. Dkt.49 at 19–20. Thus, in *Greater Birmingham Ministries* itself, the challenged voter identification law was not an unlawful prerequisite because a voter could avoid having to comply with that law by either voting with a photo ID or casting and curing a provisional ballot. 992 F.3d at 1336; Dkt.49 at 20. While Plaintiffs claim that *Greater Birmingham Ministries* is distinguishable because the photo ID there "was not a categorial barrier to voting in a certain manner," Dkt.52 at 7, Section 201 does not speak about "manners" of voting: it concerns the "right to vote," 52 U.S.C. § 10501(a). And, just as in *Greater Birmingham Ministries*, Wisconsin voters may avoid the challenged state-law provision here by simply choosing another way to casting a ballot. Dkt.49 at 22–23.

Second, Plaintiffs cannot rebut the Legislature's argument that the absentee-ballot witness requirement does not require absentee voters to "prove" their "qualifications" to vote. Dkt.52 at 7–9.

In claiming that the absentee-ballot witness requirement requires witnesses to certify an absentee voter's qualifications to vote, Plaintiffs offer an interpretation of Section 6.87(2) that ignores the plain meaning of the provision and does not account for its statutory context. Dkt.52 at 7–8. Among other things, Section 6.87(2) requires an absentee voter to certify that he is "entitled to vote" and that he executed the absentee ballot in the required manner by "exhibit[ing] the enclosed ballot unmarked to the witness, . . . then in (his) (her) presence and in the presence of no other person

mark[ing] the ballot and enclos[ing] and seal[ing] the same in this envelope in such a manner that no one but [himself] . . . could know how [he] voted." Wis. Stat. § 6.87(2). The witness, in turn, must certify that "the above statements are true and the voting procedure was executed as there stated." *Id.* Section 6.87(2) does not state that the absentee-ballot witness must attest to "*all* of the above statements." Section 6.87(2)'s reference to the "above statements" most naturally refers to the absentee-voting process that the witness observes—that the absentee voter voted on behalf of himself, rather than another; that he presented his ballot to the witness; and that he marked and sealed the ballot in the presence of the witness, for example. *Id.*; Dkt.49 at 24–25 (citing *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 681 N.W.2d 110, 124 (Wis. 2004)). Further, an absentee voter is *already* deemed qualified to vote by the time the absentee-ballot witness completes the attestation, so requiring the witness—who, unlike a municipal clerk or poll worker, may not have the capacity to confirm a voter's qualifications—to also attest to those qualifications makes little sense. *See* Dkt.49 at 24–25. While Plaintiffs reference other provisions of Wisconsin law that provide for "re-verification" throughout the election process, those provisions support the Legislature's position, as clerks or poll workers—not private citizens—complete that re-verification process. Dkt.52 at 8–9 (citing Wis. Stat. § 6.79(2)).

Plaintiffs characterize the Legislature's explanation of Section 6.87(2)'s anti-voter-fraud statutory purpose as "a confusing sidebar," with little elaboration. Dkt.52 at 9. Section 6.87(2)'s manifest purpose of reducing voter fraud provides further important contextual evidence relevant to the statute's interpretation here. Dkt.49

at 25. The point of the witness requirement is to ensure that the person completing and submitting the absentee ballot *is voting on behalf of himself*—therefore, it makes perfect sense to interpret the witness requirement as a means of confirming that the absentee voter voted on behalf of him or herself but not as somehow requiring the witness to verify the voter's registration status.

Third, Plaintiffs cannot show that the absentee-ballot witness requirement requires "the voucher of registered voters or members of any other class." 52 U.S.C. § 10501(b). Plaintiffs argue that because both "'U.S. citizens' and 'adults' are classes," the fact that an absentee ballot must be witnessed by an "adult US citizen" (or, for military or overseas voters, any adult), makes the witness requirement unlawful under Section 201. Dkt.52 at 9. That interpretation of "class" is wrong and absurd. Plaintiffs' interpretation ignores the fact that, by its plain meaning, "class" most naturally refers to a subset of the population—not a category that comprises most of the population. Indeed, Plaintiffs' interpretation of "class" as used in Section 201 broadens the scope of the statute beyond any conceivable limit and would, as applied here, apply to *any* limitation or qualification—no matter how small—on who can act as a witness. But for the witness requirement to serve any true anti-voting-fraud purpose, it must have some limitations—a young child, for example, surely would not grasp the meaning of the witness certification or the significance of the required attestation, thus state law must obviously preclude such individuals from serving as witnesses. Moreover, Section 201 "undoubtedly" refers to the inherently discriminatory voucher practices that motivated Congress to pass the Voting Rights

Act in the first place. Dkt.49 at 21 (quoting *Davis v. Gallinghouse*, 246 F. Supp. 208, 217 (E.D. La. 1965)). While Congress extended the voucher prohibition in 1970 and then made it permanent in 1975, Act of Aug. 6, 1975, Pub. L. 94-73, tit. I, § 102, 89 Stat. 400, 400, these amendments still necessarily continued Congress' focus on ending "inherently discriminatory voucher" practices in States like Alabama, *Greater Birmingham Ministries*, 992 F.3d at 1336, a fact that provides essential historical context for interpreting the plain terms of this statute.[1]

B. Plaintiffs' Count II Fails To State A Claim Under 52 U.S.C. § 10101(a)(2)(B)

1. Plaintiffs' Count II—which alleges a violation of the materiality provision of the Civil Rights Act—also fails for three independently sufficient reasons. Dkt.49 at 26. First, Section 10101(a)(2)(B) is inapplicable here because the absentee-ballot witness requirement applies only after a voter has proven his eligibility to register, and has registered, to vote. Dkt.49 at 27–33. Second, Section 10101(a)(2)(B) also does not apply here because the absentee-ballot witness requirement does not deny any voter the right to vote, given that Wisconsin law provides voters with multiple means of accessing the ballot box, such as through in-person voting, and with multiple opportunities to correct absentee-ballot errors. Dkt.49 at 33–37. Third, and in the alternative, should the Court find that Section 10101(a)(2)(B) does apply here,

[1] Plaintiffs' criticism of the Legislature's reliance on *Thomas v. Andino*, Dkt.52 at 10, is unpersuasive because that case expressly held that where a state law—just like the absentee-ballot witness requirement at issue here—"allows for a *myriad of competent individuals* to witness the oath whether the witness themselves are registered to vote or not," 613 F. Supp. 3d 926 (D.S.C. 2020) (emphasis added), that state law does not require a voter to "prove his qualifications by the voucher of registered voters or members of any other class," 52 U.S.C. § 10501(b).

the witness requirement passes muster under this provision because it constitutes a "material" qualification to vote under Wisconsin law. Dkt.49 at 37–40.

2. Plaintiffs' attempts to rebut the Legislature's three independently sufficient arguments with respect to Count II are unsuccessful, providing three independent reasons for this Court to dismiss Count II for failure to state a claim.

a. Plaintiffs fail to rebut the Legislature's argument that the absentee-ballot witness requirement falls outside the materiality provision's scope.

To begin, Plaintiffs claim that the State's rejection of an absentee ballot for non-compliance with the absentee-ballot witness requirement constitutes an effective denial of the right to vote that falls with Section 10101(a)(2)(B)'s scope. Dkt.52 at 11. Plaintiffs ignore the distinction between "voting" and "requisite to voting" in the Civil Rights Act, impermissibly broadening the materiality provision's statutory scope. The materiality provision prohibits only the denial of the right to vote "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) (emphases added). "[R]equisite to voting" is a narrow phrase that encompasses voter registration and qualification, but not other actions enumerated in Section 10101(e)'s definition of "vote," such as "casting a ballot." Dkt.49 at 28 n.6. The statute's tying of materiality to an individual's qualifications reinforces this narrow scope of the materiality provision, a point that Plaintiffs do not address. Dkt.49 at 27–28. In contrast to Plaintiffs' position, the Legislature's

interpretation—that the materiality provision covers only the State's eligibility criteria and voter registration requirements—presents the most harmonious reading of the statute, affording significant protection of voting rights while protecting States' "well-established and long-held . . . powers to determine the conditions under which the right of suffrage may be exercised." *Friedman v. Snipes*, 345 F. Supp. 2d 1356, 1370 (S.D. Fla. 2004) (citation omitted); *see also Common Cause Ind. v. Lawson*, 977 F.3d 663, 665 (7th Cir. 2020); Dkt.49 at 37–38. And, under that reading, the absentee-ballot witness requirement does not implicate the materiality provision, as it is unrelated to voter qualification or registration. Dkt.39 at 32–33.

Plaintiffs' critique of the merits of Justice Alito's dissent in *Ritter v. Migliori*, 142 S. Ct. 1824 (2022) (Mem.), is incorrect. Plaintiffs criticize Justice Alito for concluding that the materiality provision "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), because, as they see it, the materiality provision's "express terms . . . plainly contemplate[ ] [application to] a broad range of records and papers *in addition* to registration forms." Dkt.52 at 12. But as explained immediately above, that is an incorrect, atextual interpretation of Section 10101(a)(2)(B). *See supra* at pp.15–16. And while Plaintiffs note that Justice Alito's opinion in *Ritter* reflects "only" the views of a minority of Justices, Dkt.52 at 11, such separate writings from Supreme Court Justices serve as persuasive authority for the lower federal courts, which explains why the Seventh Circuit repeatedly cites such separate writings in its majority opinions. *See, e.g.*, *Helbachs*

Café LLC v. City of Madison, 46 F.4th 525, 529 (7th Cir. 2022) (favorable citing *TransUnion LLC v. Ramirez*, 594 U.S. 413, 445–48 (2021) (Thomas, J., dissenting)); *Suggs v. United States*, 705 F.3d 279, 284 (7th Cir. 2013) (favorably citing *Magwood v. Patterson*, 561 U.S. 320, 351–52 (2010) (Kennedy, J., dissenting)); *Kolman v. Sheahan*, 31 F.3d 429, 433–34 (7th Cir. 1994) (favorably citing *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 111–12 (1990) (Scalia, J. dissenting)).

None of the cases that Plaintiffs cite here—including the Third Circuit's opinion in *Migliori v. Cohen*, vacated by the Supreme Court, 36 F.4th 153 (3d Cir. 2022), in *Ritter*—grappled adequately with the statutory text, Dkt.52 at 12–13. Again, the materiality provision applies only to errors or omissions that are "material in determining" whether an individual is "qualified under State law to vote." 52 U.S.C. § 10101(a)(2)(B). And here, as noted, the absentee-ballot witness provision applies only after a voter has *already proven* that he is so qualified by registering to vote, meaning that it does not fall within the materiality provision's narrow scope. Dkt.49 at 27. Thus, none of Plaintiffs' cited decisions should serve as persuasive authority here.[2] Further, Plaintiffs fail to discuss *many* of the multiple contrary cases that the Legislature relied on in its Memorandum. Dkt.49 at 28–32. Plaintiffs address only *Schwier v. Cox*, 340 F.3d 1284 (11th Cir. 2003), Dkt.52 at 16, offering a

[2] Although this Court concluded in *Common Cause v. Thomsen*, 574 F. Supp. 3d 634 (W.D. Wis. 2021), that "the text of § 10101(a)(2)(B) isn't limited to race discrimination or voter registration," *id.* at 636, the Court ultimately rejected the materiality-provision claim in that case because the challenged state law *was* material to determining whether an individual was qualified to vote under Wisconsin law. The same is true of the absentee-ballot witness requirement, as set forth below. *See infra* Part.II.B.c.

cursory discussion that does not undermine *Schwier*'s holding that the materiality provision applies only to requirements "for voter registration," 340 F.3d at 1294.

Plaintiffs also only perfunctorily engage with the Legislature's arguments that a narrow interpretation of the materiality provision respects States' obligation to regulate election administration within their borders and best comports with the boundary set out by the Tenth Amendment and Elections Clause. Dkt.49 at 39–40; *see* Dkt.52 at 16–17. Plaintiffs develop no substantive argument at all for how a broad interpretation of the materiality provision would not disrupt the balance between state and federal power with respect to election administration. *Compare* Dkt.49 at 39–40, *with* Dkt.52 at 16–17. As for the Elections Clause, Dkt.52 at 17, while Congress can preempt state law under this Clause, it must do so with a "clear and manifest purpose," especially where, as here, the state's traditional role in the affected subject matter is so deeply engrained. *See Miller Brewing Co. v. Dep't of Indus., Lab. & Hum. Rels.*, 563 N.W.2d 460, 464 (Wis. 1997) (citation omitted). Notwithstanding Plaintiffs' conclusory statement to the contrary, Dkt.52 at 17, the materiality provision does not manifest such an intent and therefore does not displace state-law provisions like the absentee-ballot witness requirement, Dkt.49 at 29.

Finally, Plaintiffs offer no meaningful response to the Legislature's point that Plaintiffs' position is unworkable and would invalidate a host of common state laws relating to election administration. Dkt.52 at 16–19. Plaintiffs concede that, under their interpretation of the materiality provision, a voter could fail or refuse to provide an address to election officials when requesting an absentee ballot, contrary to state

law, and then sue to invalidate that state-law requirement under the materiality provision. Dkt.52 at 17. All that Plaintiffs have to offer is hand waiving, asserting that any claims brought by such a voter would fail for reasons "unrelated to the merits," if the voter did not provide a means to receive his or her absentee ballot. Dkt.52 at 17. Next, Plaintiffs claim that their interpretation would not require the State to deliver an absentee ballot to an applicant who submits his application late, contrary to state law, because a late absentee-ballot application is not an error "*on* a 'record or paper.'" Dkt. 52 at 17. But it is difficult to see why that is so, as this untimeliness is clearly an "error" related to the submission of that "paper." 52 U.S.C. § 10101(a)(2)(B). Finally, Plaintiffs ignore the Legislature's point that Plaintiffs' expansive interpretation would require the State to prove that every ballot rejected for noncompliance with state law involved a detail that was "material" to a determination of the voter's qualifications to vote. Dkt.49 at 32. Congress could not have intended that unadministrable outcome, *contra* Dkt.52 at 17–18, especially given the State's 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.*, 977 F.3d at 665.

b. Plaintiffs' responses to the Legislature's second independent argument—that the absentee-ballot witness requirement does not deny any voter the right to vote because state law provides such voters with ample alternative methods to cast their ballot, Dkt.49 at 33–37—also misses the mark.

Plaintiffs argue that the existence of in-person voting (which does not require compliance with the absentee-ballot witness requirement), does not change the fact that an absentee voter whose ballot is rejected for non-compliance with the absentee-ballot witness requirement is "denied" the right to vote, because Section 10101(e) defines "vote" as including any acting "necessary to make a vote effective." Dkt.52 at 13–14. But, as the Legislature explained, "Section 10101(a)(2)(B) . . . does not, by its own terms, supplement the constitutional right to vote with additional protections and privileges." Dkt.49 at 34. And, under the Wisconsin Constitution, the right to vote does not include the right to vote via absentee ballot. Dkt.49 at 34–35. This is why the Legislature's reliance on *Tully v. Okeson* ("*Tully I*"), 977 F.3d 608 (7th Cir. 2020), and other constitutional right-to-vote cases is on point. *Contra* Dkt.52 at 13–14.[3] So, where a State provides in-person voting procedures that do not require compliance with a challenged provision of state law, that challenged provision does not "deny" anyone the right to vote. And contrary to Plaintiffs' suggestion, Dkt.52 at 14, Section 10101(e)'s statutory definition of "vote" reinforces the Legislature's position, as it defines "vote" expansively to include "all action *necessary* to make a vote effective." 52 U.S.C. § 10101(e) (emphasis added). Here, the absentee-ballot

[3] Plaintiffs criticize the Legislature's reliance on *Tully I* because that the case was decided in a preliminary-injunction posture, and when the Seventh Circuit fully turned to the case on the merits, the court noted that *Tully I*'s analysis was not binding. Dkt.52 at 14 n.7 (citing *Tully v. Okeson ("Tully II")*, 78 F.4th 377, 381 (7th Cir. 2023)). But when *Tully I* held that "the fundamental right to vote does not extend to a claimed right to cast an absentee ballot by mail" and that, "unless a state's actions make it harder to cast a ballot at all, the right to vote is not at stake," it relied on *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802, 807 (1969), the first in a line of cases from the Supreme Court confirming that the right to vote does not include the right to vote absentee, Dkt.49 at 34 (collecting cases)—which Plaintiffs do not address.

witness requirement is not "necessary" to make a vote effective, given that an individual can easily avoid this requirement entirely by voting in person on Election Day.[4]

Finally, to the extent Plaintiffs suggest that noncompliance with the absentee-ballot witness requirement denies a voter the right to vote in contravention of *Section 202* of the VRA, Dkt.52 at 13–14, that argument fails for the same reasons set forth above, *see supra* at pp.8–10. Section 202 is irrelevant to Plaintiffs' position here: that Section merely requires States to provide procedures for absentee voting for President and Vice President, 52 U.S.C. § 10502(d), and prohibits States from denying absentee voters the right to vote "because of the failure of such citizen to be physically present in such State . . . *if such citizen shall have complied with the requirements prescribed by the law of such State* . . . providing for the casting of absentee ballots in such election," 52 U.S.C. § 10502(c) (emphasis added), Wisconsin has enacted a statutory absentee voting regime and Section 202 contemplates that, to have their vote counted, the absentee voter "*shall have complied with*" the State's

[4] Plaintiffs also criticize the Legislature for relying on *Vote.Org v. Callanen*, 39 F.4th 297, 306 (5th Cir. 2022)–a motions-panel opinion that concluded that a challenged state-law provision does not violate the materiality provision if alternative means of voting exist—because the merits panel in that case eventually "'set aside' much of the motions panel's analysis, and rejected the argument that a voter registration requirement does not deny the right to vote whenever alternative means of voter registration remained available," Dkt.59 at 12. But the merits-panel decision in *Vote.org* expressly left for "a later case" the question of whether "the need to cure an immaterial requirement creates a hurdle for . . . the right to vote" and did "not rely [ ] on the fact [that] alternatives exist." *Vote.Org v. Callanen*, No. 22-50536, 2023 WL 8664636, at *19 (5th Cir. Dec. 15, 2023). Thus, the merits panel never addressed—and therefore did not undermine—the Legislature's position here.

specific requirements—such as the absentee ballot witness requirement. *Id.* (emphasis added).

c. Finally, Plaintiffs' points with respect to the Legislature's third independent argument—that, if the materiality provision does apply here, the absentee-ballot witness requirement is "material in determining whether such individual is qualified under State law to vote"—likewise fail. Dkt.49 at 37.

Plaintiffs first contend that the absentee-ballot witness requirement is "not relevant, and thus immaterial, to determining whether a Wisconsin voter has satisfied" all state-law qualifications to vote, Dkt.52 at 18–19, but that is wrong. While Plaintiffs focus narrowly on what an individual must show in order to *register* to vote under Wisconsin law (*i.e.*, that he or she is 18 years of age and meets the relevant residency requirements), *id.*, as this Court explained in *Common Cause v. Thomsen*—a case upon which Plaintiffs' themselves elsewhere rely, *see* Dkt.52 at 12—the phrase "qualified under State law" may refer to other state laws that bear on the ability of an individual to cast a vote, not just those "substantive qualifications" such as a voters age, citizenship, and residency, 574 F. Supp. 3d at 639–40. So in *Common Cause*, this Court considered a challenge to Wisconsin's voter identification law requiring that an ID show certain types of information and found that required information on an ID was "material" to determining whether an individual was qualified to vote under Wisconsin law. *Id.* Similarly, in *Vote.org*—another case upon which Plaintiffs rely, *see* Dkt.52 at 12, 13, 20, 21—the Fifth Circuit found that Texas' wet signature requirement was a "material requirement" and part of an individual's

qualifications to vote, 2023 WL 8664636, at *21. Here, an absentee voter may not vote without a witness under Wisconsin law, Dkt.49 at 38, just as Wisconsinites may not vote without proper identification, *Common Cause*, 574 F. Supp. 3d at 639, or as Texas voters may not vote without a wet signature on their applications, *Vote.org*, 2023 WL 8664636, at *21.

Plaintiffs' next argument that the Legislature has somehow "concede[d]" that the absentee-ballot witness requirement is not "material," Dkt.52 at 19, is wrong. The Legislature has argued that Plaintiffs' challenge to the absentee-ballot witness requirement fails because that requirement is not relevant to "any application, registration, or other act requisite to voting," and thus does not fall within the scope of Section 10101(a)(2)(B). Dkt.49 at 26–32; *supra* at pp.14–19. Then, as an *alternative* argument, the Legislature has also maintained that, if this Court were to find that Section 10101(a)(2)(b) does reach the State's election rules unrelated to voter qualifications or registration (which it should not), Plaintiffs' challenge then fails for the separate reason that the absentee-ballot witness requirement is "material" to whether a Wisconsin voter may vote by absentee ballot. Dkt.49 at 37–40. Thus, the Legislature has conceded nothing by presenting these alternative arguments. *Accord* Fed. R. Civ. P. 8(d)(2) (allowing for "Alternative Statements of a . . . Defense").

Plaintiffs further criticize the Legislature because, in their view, under the Legislature's interpretation of the witness certifications, the witness "only verif[ies] that an individual filled out an absentee ballot on their own," with the witness being

"entirely unable to confirm that the person filled out their own ballot." Dkt.52 at 19–20 (emphasis omitted). But, as the Legislature explained, the witness requirement is just one way to "deter[ ] and detect[ ] voter fraud." Dkt.49 at 38–39 (citing *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191 (2008)). An individual may be less willing to execute illegally another's absentee ballot or engage in infamous ballot-harvesting schemes if the individual must cast those illicitly obtained ballots in front of a witness, who elections official may contact to verify that the absentee-ballot procedures were observed. Further, and relatedly, everyone agrees that the absentee-ballot witness requirement requires the absentee-ballot witness to verify that the absentee voter has followed the requisite procedures—including that no third party has coerced the absentee voter to vote his absentee ballot in a particular way. Dkt.49 at 39; Dkt.52 at 8. That procedure-verification role of the absentee-ballot witness requirement independently (and unquestionably) furthers the State's anti-voter fraud objections, further demonstrating that this is "material."

Finally, Plaintiffs try to dispose of the Legislature's final argument that an expansive reading of the materiality provision that prohibits common state-law provision like the absentee-ballot witness requirement would unconstitutionally intrude on traditional state authority over state and local elections, Dkt.49 at 39–40, by stating that this concern "has no application here, because there is no statutory ambiguity," Dkt.52 at 26 (quoting *United States v. Oakland Cannabis Buyers Co-op.*, 532 U.S. 483, 484 (2001)). That blithe assertion is incorrect. The key term here is the word "material" in Section 10101(a)(2)(B), a statutorily undefined term that is

facially capable of numerous alternative meanings. *See Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 418 (1992). Given that ambiguity in the term, the powerful constitutional concerns that the Legislature has raised come in full force, counselling this Court to interpret this statute in a manner that avoids invalidating Wisconsin's absentee-ballot witness requirement.

CONCLUSION

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

Dated: December 22, 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd 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