IN THE UNITED STATES DISTRICT COURT
FOR THE 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 CARRIE RIEPL, 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.	Civil Action No. 3:23-cv-00672

PLAINTIFFS' RESPONSE BRIEF IN OPPOSITION TO WISCONSIN ELECTIONS COMMISSION DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

The Wisconsin Elections Commission and its commissioners and administrator (the "Commission Defendants") are in a double bind. To defend against Plaintiffs' Voting Rights Act ("VRA") claim, they insist that Wisconsin's requirement that absentee voters supply a witness signature with their ballot (the "Witness Requirement") is not a voucher of qualifications, as Section 201 of the VRA prohibits. Yet to defend against Plaintiffs' alternative claim under the Civil Rights Act ("CRA"), they insist that the Witness Requirement is material to those same qualifications, as the CRA's Materiality Provision requires. Both cannot be true. If the witness attests to the voter's qualifications, as the plain text of the relevant Wisconsin statutes suggests, then the Witness Requirement constitutes an open-and-shut Section 201 violation. If, notwithstanding the statutory text, the witness does *not* attest to the voter's qualifications, then the witness's role is by necessity not material to those qualifications. In that case, rejecting ballots because of witness-related omissions violates the Civil Rights Act, because those omissions are not material to voter qualifications either. One way or another, the Witness Requirement violates federal law. Because Plaintiffs have pleaded valid claims within the Court's jurisdiction, Commission Defendants' motion to dismiss should be denied.

BACKGROUND

Plaintiffs bring federal Voting Rights Act and Civil Rights Act claims against the requirement under Wisconsin law that a voter procure the assistance of an adult U.S. citizen witness to cast a valid absentee ballot. *See* Compl. for Declaratory & Injunctive Relief, ECF No. 1; *see also* Wis. Stat. § 6.87(2), (4)(b), (6d), (9). Plaintiffs allege that this Witness Requirement compels voters to prove qualifications by voucher of a member of a class, which violates Section 201's test-or-device prohibition. ECF No. 1, ¶ 55; *cf.* 52 U.S.C. § 10501. In the alternative, Plaintiffs allege that if the Witness Requirement is not a voucher requirement, then it is necessarily

not material in determining whether a voter is qualified to vote, thus it violates the CRA's Materiality Provision. *Id.* ¶ 61 (quoting 52 U.S.C. § 10101(a)(2)(b)).

Plaintiffs bring this action against the Commission Defendants in their official capacities, and against the municipal clerks for the cities of Brookfield, Madison, and Janesville (the "Clerk Defendants") in their official capacities. On October 25, 2023, Commission Defendants moved to dismiss Plaintiffs' Complaint under Rules 12(b)(1) and 12(b)(6), arguing that "[b]oth claims fail to state a claim and are barred by the Eleventh Amendment." Comm'n Defs.' Br. in Supp. of Mot. to Dismiss 1, ECF No. 20.[1]

LEGAL STANDARDS

A motion to dismiss under Rule 12(b)(1) challenges a court's subject-matter jurisdiction. *Silha v. ACT, Inc.*, 807 F.3d 169, 173 (7th Cir. 2015). A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the complaint. *Gunn v. Cont'l Cas. Co.*, 968 F.3d 802, 806 (7th Cir. 2020). To survive a motion to dismiss, a complaint must state a claim to relief "that is plausible on its face." *Page v. Alliant Credit Union*, 52 F.4th 340, 346 (7th Cir. 2022). On a motion to dismiss, a court takes all factual allegations as true and draws all reasonable inferences in the plaintiff's favor. *Id.*

ARGUMENT

The Eleventh Amendment does not strip this Court of subject-matter jurisdiction over either of Plaintiffs' claim. The Voting Rights Act expressly abrogates state sovereign immunity for purposes of the Section 201 claim. And under the *Ex parte Young* doctrine, both claims, which

[1] On November 3, 2023, Restoring Integrity and Trust in Elections ("RITE") moved for leave to file an *amicus curiae* brief in support of Commission Defendants' motion to dismiss. ECF No. 31. The Court has not ruled on that motion as of this filing; in an abundance of caution, Plaintiffs briefly respond to RITE's principal arguments below.

seek prospective injunctive relief, overcome the state officers' immunity assertions. On the merits, Plaintiffs have stated valid claims under the Voting Rights Act and Civil Rights Act. The Court should deny the motion to dismiss.

I. The Eleventh Amendment does not deprive the Court of subject-matter jurisdiction over either claim.

Sovereign immunity, as secured to the states by the Eleventh Amendment, is a jurisdictional defense but is subject to several familiar exceptions, two of which apply here. First, "Congress may abrogate the state's immunity through a valid exercise of its powers under recognized constitutional authority, such as by later constitutional amendments." *Ind. Prot. & Advoc. Servs. v. Ind. Fam. & Soc. Servs. Admin.*, 603 F.3d 365, 371 (7th Cir. 2010) (cleaned up). The Voting Rights Act does just that, and it gives the Court jurisdiction over Plaintiffs' Section 201 claim. Second, notwithstanding an assertion of sovereign immunity, "under *Ex parte Young*, a plaintiff may file suit against state officials seeking prospective equitable relief for ongoing violations of federal law." *Id.* Here, Plaintiffs seek prospective equitable relief against the individual Commission Defendants to enjoin their ongoing violations of federal law.

A. The Voting Rights Act abrogates Wisconsin's Eleventh Amendment immunity.

Commission Defendants' assertion of immunity from the Section 201 claim fails because the Voting Rights Act abrogates state sovereign immunity. All three federal courts of appeals to consider the issue—and, to Plaintiffs' knowledge, every federal court of any sort except one—have agreed with that conclusion. *Ala. State Conf. of NAACP v. State of Alabama*, 949 F.3d 647, 655 (11th Cir. 2020), *vacated as moot*, 141 S. Ct. 2618 (2021); *OCA-Greater Hous. v. Texas*, 867

F.3d 604, 614 (5th Cir. 2017); *Mixon v. Ohio*, 193 F.3d 389, 398–99 (6th Cir. 1999).[2] Commission Defendants cite the only case to hold otherwise, *Simpson v. Hutchinson*, 636 F. Supp. 3d 951, 960–61 (E.D. Ark. 2022) (three-judge panel), but do not acknowledge that *Simpson* is a one-off with a great weight of authority against it, ECF No. 20 at 22–23.

This Court should adopt the consensus view of federal courts that the Voting Rights Act abrogates Eleventh Amendment immunity rather than *Simpson*'s outlier reasoning. "Congress may abrogate the States' Eleventh Amendment immunity when it both unequivocally intends to do so and acts pursuant to a valid grant of constitutional authority." *Toeller v. Wis. Dep't of Corrections*, 461 F.3d 871, 874 (7th Cir. 2006) (quoting *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001) (cleaned up)). As the Fifth, Sixth, and Eleventh Circuits have all recognized, the Voting Rights Act checks both boxes. *E.g.*, *Ala. State Conf. of NAACP*, 949 F.3d at 650–55.

To satisfy the first requirement, unequivocal intent, "an express abrogation clause is not required." *Id.* at 650. Instead, courts "may look to the entire statute, and its amendments, to determine whether Congress clearly abrogated sovereign immunity." *Id.* (citing *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 76 (2000)). Taking that approach, courts have consistently read Sections 2 and 3 of the Voting Rights Act together to express Congress's unequivocal intent to abrogate the states' immunity from Section 2 claims. *Id.* at 651 (collecting cases). Section 2 applies the Voting Rights Act's prohibitions to "any State or political subdivision." *Id.* (quoting 52 U.S.C.

[2] *See also, e.g.*, *Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, 1:21-CV-05337-SCJ, 2023 WL 7037537, at *141–42 (N.D. Ga. Oct. 26, 2023); *Rose v. Raffensperger*, 511 F. Supp. 3d 1340, 1362–63 (N.D. Ga. 2021); *People First of Ala. v. Merrill*, 479 F. Supp. 3d 1200, 1208 (N.D. Ala. 2020); *Christian Ministerial All. v. Arkansas*, No. 4:19-cv-402, 2020 WL 12968240, at *5 (E.D. Ark. Feb. 21, 2020); *Ala. State Conf. of NAACP v. State of Alabama*, 264 F. Supp. 3d 1280, 1291–93 (M.D. Ala. 2017); *Ga. State Conf. of NAACP v. State of Georgia*, 269 F. Supp. 3d 1266, 1274–75 (N.D. Ga. 2017) (three-judge panel); *Reaves v. U.S. Dep't of Justice*, 355 F. Supp. 2d 510, 515–16 (D.D.C. 2005) (three judge panel) (per curiam).

§ 10301(a)). In turn, Section 3, as amended in 1975, makes "explicit" that "private parties can sue to enforce the VRA." *Id.* It does so by authorizing suits by not only the attorney general but any "aggrieved person." *Id.* (quoting 52 U.S.C. § 10302). Thus, "[t]he language of § 2 and § 3, read together, imposes direct liability on States for discrimination in voting and explicitly provides remedies to private parties to address violations under the statute." *Id.* at 652. And it is not plausible "that Congress designed a statute that primarily prohibits certain state conduct, made that statute enforceable by private parties, but did not intend for private parties to be able to sue States." *Id.*

The same reasoning establishes that Congress unequivocally intended Section 201 to abrogate sovereign immunity. Section 201's test-or-device prohibition applies to the same actor as Section 2: "any State or subdivision." *Compare* 52 U.S.C. § 10501(a), *with* 52 U.S.C. § 10301(a). And Section 201, like Section 2, is enforceable in a private suit by any "aggrieved person" under Section 3, subsection (b) of which contemplates "a proceeding instituted by . . . an aggrieved person" in a test-or-device case specifically. 52 U.S.C. § 10302(b). Read together, VRA Sections 201 and 3 thus impose liability on states that institute tests or devices and provide for enforcement by private parties.

As for the second requirement, a valid grant of power, it is long settled that Congress may abrogate state immunity "under its enforcement powers pursuant to § 5 of the Fourteenth Amendment." *Ala. State Conf. of NAACP*, 949 F.3d at 655 (citing *Garrett*, 531 U.S. at 364); *see Nelson v. La Crosse Cnty. Dist. Att'y* 301 F.3d 820, 829 (7th Cir. 2002) (explaining that "by ratifying the Fourteenth Amendment, the States agreed to relinquish a portion of the sovereign immunity they previously enjoyed under the Constitution and the Eleventh Amendment"). And although the Supreme Court has not directly addressed whether the Fifteenth Amendment authorizes Congress to abrogate sovereign immunity, "[b]oth § 5 of the Fourteenth Amendment

and § 2 of the Fifteenth Amendment, using identical language, authorize Congress to enforce their respective provisions by appropriate legislation." *Ala. State Conf. of NAACP*, 949 F.3d at 654. The Supreme Court accordingly treats them as "'parallel' powers to enforce the Civil Rights Amendments." *Id.* (citing *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997)). It follows that if the Fourteenth Amendment authorizes Congress to abrogate state sovereign immunity, "so too must § 2 of the Fifteenth Amendment." *Id.* (collecting cases). As the Voting Rights Act implements "the Fifteenth Amendment and, in some respects, the Fourteenth Amendment," *United States v. Bd. of Comm'rs of Sheffield*, 435 U.S. 110, 126–27 (1978), it abrogates sovereign immunity pursuant to a valid grant of power, *Ala. State Conf. of NAACP*, 949 F.3d at 654–55.

B. Individual Commission Defendants are not immune from suit.

Even if Congress had not abrogated Wisconsin's immunity through the Voting Rights Act, the Commission's commissioners and administrator (the "individual Commission Defendants") are still subject to suit under *Ex parte Young* as officers with "*some connection* with the enforcement of the act[s]." *Ex parte Young*, 209 U.S. 123, 157 (1908) (emphasis added). Entrusted with the powers and responsibilities of the Commission, "[e]ach of these individuals is an . . . official who *may or must* take enforcement actions." *Whole Woman's Health v. Jackson*, 595 U.S. 30, 45 (2021) (emphasis added); *see also Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 326, (2015) ("federal courts may in some circumstances grant injunctive relief against state officers who are violating, or planning to violate, federal law"). "The relevant inquiry is whether the suit seeks prospective relief against an ongoing violation of federal law." *Driftless Area Land Conservancy v. Valcq*, 16 F.4th 508, 523 (7th Cir. 2021). And "[a]n ongoing violation of federal law is one that is 'continuing.'" *Id.* at 522 (quoting *Green v. Mansour*, 474 U.S. 64, 68 (1985)).

Commission Defendants do not contest that this suit seeks prospective relief, as outlined in Plaintiffs' Complaint. *See* ECF No. 1, ¶ 62. Plaintiffs have also adequately alleged that the

individual Commission Defendants "may or must take . . . actions" enforcing the Witness Requirement, thereby satisfying the requirement for an ongoing violation of federal law. *Whole Woman's Health*, 595 U.S. at 45. Individual Commission Defendants have prescribed uniform instructions for municipalities providing that a voter "must vote [their] ballot in the presence of an adult witness." ECF No. 1, ¶ 35. Individual Commission Defendants have not indicated that they intend to revise these instructions to remove the Witness Requirement. Individual Commission Defendants have also prescribed official ballot forms that include a witness certificate, which the requisite witness must complete in order to certify the truth of the voter's "above statements," including the voter's attestation that they are qualified to vote. ECF No. 1, ¶ 36. There is no indication of any plan to prescribe an official ballot form without the required witness certificate. And individual Commission Defendants have issued an official Election Administration Manual—updated as recently as September 2023—which provides that the "[g]eneral [p]rocedures" for "[a]bsentee [v]oting" require that "[t]he Absentee Ballot Certificate Envelope (EL-122) is then completed and signed by the absentee voter, *witnessed by an adult U.S. Citizen*, and mailed." ECF No. 1, ¶ 37 (quoting Election Administration Manual at 98) (emphasis added). Because Plaintiffs "seek[] prospective relief against an ongoing violation of federal law" by the commissioners and administrator, those individual Commission Defendants are not entitled to Eleventh Amendment immunity. *Valcq*, 16 F.4th at 523.

Commission Defendants do not dispute that they have at least some connection to the enforcement of the Witness Requirement; rather they conflate the *Ex parte Young* requirements with their argument on the merits by claiming, in effect, that the relevant materials prescribed by the Commission do not explicitly describe the Witness Requirement as a voucher of the voter's qualifications. ECF No. 20 at 23–25. But no such explicit statement is required for *Ex parte Young*

to apply.[3] Plaintiffs have pleaded that the Commission Defendants enforce the Witness Requirement through uniform instructions, the absentee ballot certificate envelope, and the Election Administration Manual, all of which require Wisconsin voters to obtain the assistance of a witness in order to complete their absentee ballot and have it counted. And that witness must certify that the voter's "above statements are true." ECF No. 1, ¶¶ 36, 53. Thus, the "continued enforceability" of this unlawful requirement by individual Commission Defendants amounts to an ongoing violation of federal law. *Valcq*, 16 F.4th at 523; *see infra* Section II.A. Nothing more is required.

Commission Defendants further argue that because one paragraph of Plaintiffs' Complaint describes the burdens inflicted by the Witness Requirement as including Clerk Defendants' adoption of "different and inconsistent standards for absentee ballot witness addresses," ECF No. 1, ¶ 44, Commission Defendants are immune from Plaintiffs' alternative Materiality Provision claim, ECF No. 20 at 26. They reason that the Complaint "contains no allegations that any of the individual Commission defendants participated in that activity." ECF No. 20 at 26. This unusual contention verges on irrelevance. Plaintiffs do not assert their alternative Materiality Provision claim against the individual Commission Defendants based on "different and inconsistent standards for absentee ballot witness addresses," ECF No. 20 at 26, but rather because Commission Defendants' continued enforcement of the Witness Requirement—through the forms and instructions prescribed by the Commission—denies absentee voters the right to vote because of errors or omissions that are "not material in determining whether such individual[s] [are] qualified" to vote under State law. 52 U.S.C. § 10101(a)(2)(B); *see infra* Section II.B.

[3] Commission Defendants' argument also relies on a false premise. The witness certification is a voucher of the voter's qualifications—regardless of whether the materials they prescribe say so explicitly—and for that reason it violates Section 201.

II. Plaintiffs adequately plead claims under the Voting Rights Act and the Civil Rights Act.

A. The Witness Requirement violates Section 201 of the Voting Rights Act.

Plaintiffs have stated a valid claim that Wisconsin's Witness Requirement violates the federal Voting Rights Act's test-or-device prohibition. Section 201 provides that:

> (a) No 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.
>
> (b) As used in this section, the term 'test or device' means 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.***

52 U.S.C. § 10501 (emphasis added). Rather than grappling with the plain language of this provision, Commission Defendants attempt to inject a nebulous historical inquiry into Section 201's straightforward prohibition, and an atextual limitation on scope of the witness certification under Wis. Stat. § 6.87(2). The Court should reject their invitation to rewrite both federal and state law and deny Commission Defendants' motion to dismiss.

1. The Witness Requirement compels absentee voters to prove qualifications by voucher of a witness.

Section 6.87 requires the voter to attest that:

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

Wis. Stat. § 6.87(2) (alterations in original). And it requires the witness to attest that:

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

Id.

In other words, by the statute's plain terms, the absentee voter must attest that they: (i) meet all the Wisconsin qualification requirements and (ii) executed the absentee voting procedure as required by statute. *Id*. And the witness, in turn, must attest that "the above *statements* are true *and* the voting procedure was executed as there stated." Wis. Stat. § 6.87(2) (emphasis added). Commission Defendants suggest that the term "statements," as used in the witness certification, refers only to the voter's confirmation that they "exhibited the enclosed ballot unmarked to the witness," and marked and sealed the ballot "in the presence of no other person." *Id*. But nothing in the statutory language supports this litigation-driven limitation on the scope of the witness certification. To the contrary, the witness must separately attest that "the voting procedure was executed as there stated"—and that clause would be redundant and unnecessary if, as Commission Defendants argue, the witness certification only addressed the voter's attestation to procedural compliance. Wisconsin courts, like federal courts, "read statutes to avoid surplusage" and "assume that the legislature used all the words in a statute for a reason." *State v. Matasek*, 2014 WI 27, ¶ 18, 353 Wis. 2d 601, 846 N.W.2d 811; *see also, e.g.*, *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (explaining that courts should be "reluctant to treat statutory terms as surplusage in any setting").

Applying those principles here, Section 6.87's Witness Requirement is an explicit and unambiguous requirement to prove qualifications by a witness's voucher.[4]

Commission Defendants' more wide-ranging attempts to distance the Witness Requirement from the VRA's prohibition on vouchers fare no better. First, that clerks validate a voter's qualifications before issuing an absentee ballot, ECF No. 20 at 12–13, is irrelevant. Qualifications are routinely verified and re-verified at different stages of the registration and voting process. *See, e.g.*, Wis. Stat. § 6.32 (requiring verification of qualifications to register); Wis. Stat. § 6.79(2) (requiring re-verification of qualifications to vote in person). The Witness Requirement may entail a voucher of qualifications even if qualifications must also be proven at other stages. Second, if requiring the witness to vouch for the voter's qualifications makes "no sense" because witnesses will sometimes lack relevant knowledge, ECF No. 20 at 14, then perhaps the Witness Requirement is bad policy. Plaintiffs do not disagree. It does not, however, also follow that the law complies with Section 201. Third, the "Commission's guidance," *id.* at 14, does not control statutory meaning. Under Wisconsin law, agency guidance "cannot affect what the law is, cannot create a policy, cannot impose a standard, and cannot bind anyone to anything." *Serv. Emps. Int'l*

[4] Unlike Commission Defendants, proposed *amicus curiae* RITE argues that the Witness Requirement does not deny Plaintiffs the right to vote because absentee voters may also vote in person. ECF No. 32 at 8–10. Insofar as the Court grants RITE's motion and considers its brief, this decidedly novel argument fails. Most straightforwardly, the Voting Rights Act itself gives any qualified voter who "may be absent from their election district" on election day a federal right to vote absentee for president and vice president. 52 U.S.C. § 10502(d). The Complaint pleads facts that establish that at least three of the four plaintiffs plausibly will satisfy those criteria in the upcoming presidential election. *See* ECF No. 1, ¶¶ 14–16. Those Plaintiffs accordingly have an express federal right to vote by absentee ballot under the Voting Rights Act itself. In any case, federal courts overwhelmingly agree that states that choose to offer absentee balloting may not disqualify absentee ballots in ways that violate federal law. *See, e.g.*, *Saucedo v. Gardner*, 335 F. Supp. 3d 202, 217 (D.N.H. 2018) ("Having induced voters to vote by absentee ballot, the State must provide adequate process to ensure that voters' ballots are fairly considered and, if eligible, counted.").

Union, Loc. 1 v. Vos, 2020 WI 67, ¶ 105, 393 Wis. 2d 38, 946 N.W.2d 35. And in any case, as pleaded in the Complaint, the Commission *does* enforce the Witness Requirement as a voucher. The Commission's absentee ballot certificate, for instance, requires the witness to attest that "the above statements are true," *including* the voter's statements about qualifications. ECF No. 1, ¶¶ 32, 36.

Commission Defendants' citations to ongoing state-court litigation, ECF No. 20 at 15, further undercut their argument that the Witness Requirement is not a voucher of qualifications. That litigation, which consists of two consolidated cases, concerns the statutory requirement that an absentee ballot certificate include the witness's "address." *Rise, Inc. v. Wis Elections Comm'n*, No. 22-CV-2446 (Cir. Ct. Dane Cnty.); *League of Women Voters of Wis. v. Wis. Elections Comm'n,* No. 22-CV-2472 (Cir. Ct. Dane Cnty.). In the *League* case, the plaintiffs challenge the witness-address requirement under the Materiality Provision. All Commission Defendants here are also defendants in that case and, there, they argued that the witness address requirement did not violate the Civil Rights Act's Materiality Provision because the witness *attests to voter qualifications*:

> Wisconsin's requirements to have a witness for the casting of an absentee ballot, Wis. Stat. § 6.87(4)(b)1, and to have that witness provide an address, Wis. Stat. § 6.87(2), *both are material to determining whether the absentee voter in question is qualified to cast that absentee ballot in that election*.

Combined Br. of Defs. in Opp. to Pls.' Mot. for Summ. J. & ISO Defs.' Cross-Mot. for Summ. J. at 16, *League of Women Voters*, No. 22-cv-2472 (Cir. Ct. Dane Cnty. Sept. 21, 2023), Doc. 137 (emphasis added). Commission Defendants need to make up their minds—do witnesses attest to qualifications or not? The officials charged with running Wisconsin's elections cannot simply

change their answer to that question to be whatever best serves their defenses on any given day in court.[5]

Commission Defendants' reliance on *People First of Alabama v. Merrill* and *Thomas v. Andino* is also misplaced. *See* ECF No. 20 at 16. *People First* rejected a Section 201 challenge to Alabama's requirement that "an absentee voter 'have a notary public (or other officer authorized to acknowledge oaths) or two witnesses witness his or her signature to the [absentee voting] affidavit.'" 467 F. Supp. 3d 1179, 1224 (N.D. Ala. 2020) (quoting Ala. Code § 17–11–9 (2020)) (alteration in original). But the Alabama statute at issue required the notary or witnesses to certify only that "the affiant is known (or made known) to me to be the identical party he or she claims to be." Ala. Code § 17–11–7 (2020). That requirement to confirm identity is a far cry from the Witness Requirement's express instruction that the witness must attest to the truth of the voter's "above statements," including the voter's own attestation about qualifications. And *Thomas* is even less apposite—the statute at issue there did not require the witness to *attest* to anything at all, just to "witness the oath taken by the voter." 613 F. Supp. 3d 926, 961 (D.S.C. 2020); *see* S.C. Code § 7–15–380 (2020). These nonbinding, out-of-circuit authorities shed no light on Wisconsin's very different statutory scheme.

2. The Witness Requirement permits only adult citizens to sign the certification.

The Witness Requirement is a voucher by "members of [a] class" because only adult U.S. citizens can execute the certification. *See* 52 U.S.C. § 10501(b). The Voting Rights Act does not

[5] Although Commission Defendants are correct that some of Plaintiffs' counsel here also represents the plaintiffs in the *Rise* case, which is consolidated with the *League* case, Plaintiffs in this case are not parties to the *Rise* or the *League* litigation. Moreover, the *Rise* case, unlike the *League* case, does not include a Materiality Provision claim—the only question there is the proper definition of "address" under Wisconsin law.

define the term "class," so the Court should "look to the plain and ordinary meaning of the term" and may "look to dictionary definitions." *United States v. Johnson*, 47 F.4th 535, 543 (7th Cir. 2022). In this case, the relevant definition of "class" is "a group, set or kind, sharing common attributes." *Class*, Merriam–Webster (last updated Nov. 2, 2023); *see also, e.g.*, *Class*, Black's Law Dictionary (11th ed. 2019) ("A group of people, things, qualities, or activities that have common characteristics or attributes."). To satisfy the Witness Requirement, the witness generally must be "an adult U.S. citizen" (but "need not be a U.S. citizen" in the rare case when the voter is a military or overseas elector). Wis. Stat. § 6.87(2), (4)(b)(1). Both "U.S. citizens" and "adults" are classes, as is the joint category of "adult U.S. citizens." U.S. citizens share the attribute of full political membership in the American polity, adults share the attribute of having obtained the age of majority, and adult U.S. citizens share both those attributes.

Commission Defendants nonetheless assume that the Witness Requirement "does not limit potential witnesses to potential voters or any other relevant class" because "it permits *any* adult U.S. citizen to serve as a witness." ECF No. 20 at 16. But they never explain why "adults" or "U.S. citizens" are not, in their terms, "*relevant* class[es]" for purpose of Section 201—and in fact the word "relevant" does not even appear in Section 201. A broad class is still a class. Tellingly, Wisconsin law lifts one of the class requirements (U.S. citizenship) for individuals serving as witnesses for overseas voters. Wis. Stat. § 6.87(4)(b)(1). Commission Defendants have simply invented a limitation on what constitutes a "class" for purposes of Section 201 but make no attempt to ground their interpretation in the statutory text. As for Commission Defendants' citation to *Thomas*, the court in that case held the "class" element of the claim was not established because

the witness requirement at issue did not "specify who must witness the oath" *at all*. 613 F. Supp. 3d at 962.[6]

3. No additional historical showing is necessary to state a Section 201 claim.

Commission Defendants' fundamental objection to this case appears to be that "Section 201 prohibits practices that parallel . . . historical, racially discriminatory voting practices," not "non-discriminatory voting regulations." ECF No. 20 at 8. In other words, notwithstanding Section 201's clear and unambiguous prohibition of vouchers of all sorts, Commission Defendants do not think the Witness Requirement was what Congress had in mind.

The Court should reject Commission Defendants' attempt to graft a nebulous and atextual purposive standard onto Section 201. Put simply, "th[e] Court is not free to rewrite the statute to the Government's liking." *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 583 U.S. 109, 123 (2018). Nor can the Court "replace the actual text with speculation as to Congress' intent." *Magwood v. Patterson*, 561 U.S. 320, 334 (2010). To the contrary, "even the most formidable argument concerning the statute's purpose" cannot "overcome the clarity we find in the statute's text." *Nichols v. United States*, 578 U.S. 104, 112 (2016). Section 201 sets out a simple three-part test for what constitutes an improper voucher, 52 U.S.C. § 10501(b)(4), and by its plain text does not require any inquiry into whether the challenged law "parallel[s]" a "historical, racially discriminatory voting practice[]." *See* ECF No. 20 at 8.[7]

[6] In 2022, the statute at issue in *Thomas*, S.C. Code § 7–15–380, was amended to require that the witness be "at least eighteen years of age." *See* 2022 Act No. 150 (S. 108), § 6 (eff. July 1, 2022). But that amendment post-dated the 2020 *Thomas* decision by two years.

[7] Nor do Commission Defendants propose any judicially manageable standard for that inquiry. In any case, imposing a witness requirement on voters *does* parallel past racially discriminatory voting practices. *See, e.g.*, *United States v. Logue*, 344 F.2d 290, 291 (5th Cir. 1965) (per curiam).

The most telling evidence of Congress's intent, besides the text itself, suggests Section 201 test-or-device challenges are not limited to state laws that may have been enacted with discriminatory animus. As Plaintiffs explained in their Complaint, the test-or-device prohibition at first applied only temporarily, and only to select jurisdictions subject to preclearance because of their history of pervasive racial discrimination in voting. ECF No. 1, ¶ 2 (citing the Voting Rights Act of 1965, Pub. L. No. 81-110, § 4(c), 79 Stat. 437, 438–39 (1965)). But Congress elected to extend the tests-or-devices prohibition nationwide in 1970. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, § 6, 84 Stat. 314, 315 (1970). And it made the prohibition permanent in 1975. Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, § 102, 89 Stat. 400, 400 (1975). This history is powerful evidence that Section 201 is not limited in the manner Commission Defendants propose. To the contrary, Congress aimed to root out voucher requirements of all sorts nationwide and in perpetuity, so it passed a law that does just that.

Commission Defendants' handful of citations, ECF No. 20 at 9–10, do not support its atextual standard in any way. *Davis v. Gallinghouse*, 246 F. Supp. 208 (E.D. La. 1965), was decided in 1965, five years *before* Congress extended Section 201 to the entire country. It is thus no surprise that the court in *Davis* took a narrow view of Section 201's intended scope. *Davis*'s mode of analysis is, moreover, very dated—rather than construing and applying the plain text, it speculates about what "Congress undoubtedly meant . . . to hit at." *Id.* at 217. *But see* Harvard Law School, The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes (Nov. 25, 2015) ("We're all textualists now."). And in any case the "ingenious theory" rejected in *Davis*—that requiring identification to vote violates the voucher requirement because it entails the voucher of the people who issue "driver's licenses, library cards, rent receipts, postmarked envelopes, etc.", *id.*—was far more attenuated from Section 201's text than the theory

advanced here. As for *People First* and *Thomas*, as explained above, those cases rejected test-or-device claims after applying Section 201's three-part standard to the state statues at issue and concluding that they were not vouchers. *See supra* Section II.A.1. Neither case lends any support to Commission Defendants' invented rule.

* * *

Wisconsin's Witness Requirement is a cut-and-dried voucher requirement, and it accordingly violates Section 201's prohibition of tests or devices. On that basis, the Court should deny Commission Defendants' motion to dismiss for failure to state a claim.

B. Alternatively, the Witness Requirement violates the Materiality Provision of the Civil Rights Act.

To the extent the Witness Requirement is not deemed an unlawful voucher requirement in contravention of the Voting Rights Act, it then inherently violates the Materiality Provision of the Civil Rights Act. The Materiality Provision prohibits the "den[ial of] the right of any individual to vote . . . because of an error or omission on any record or paper relating to any . . . act requisite to voting . . . [that] 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). In other words, the Materiality Provision protects voters from having their ballots rejected due to noncompliance with a requirement that is immaterial to the determination of their voting qualifications. The Materiality Provision consists of three clauses, giving rise to a three-element claim. First, the election regulation at issue must result in the "den[ial of] the right of any individual to vote." *Id.* Second, that denial must be caused by "an error or omission on any record or paper relating to any application, registration, or other act requisite to voting." *Id.* Third, that "error or omission" must not be "material in determining whether such individual is qualified under State law to vote in such election." *Id.*

1. Rejection of an absentee ballot for noncompliance with the Witness Requirement constitutes a denial of the right to vote.

When a voter's absentee ballot is not accepted because of noncompliance with the Witness Requirement, that rejection constitutes denial of the right to vote. 52 U.S.C. § 10101(a)(2)(B). This aligns with longstanding U.S. Supreme Court precedent and the Civil Rights Act's own definitions. In *United States v. Classic*, the Supreme Court explained that the right to vote includes not only the "right to cast a ballot," but also to "*have it counted*." 313 U.S. 299, 318 (1941) (emphasis added). And in enacting the Civil Rights Act of 1964, Congress wrote this understanding directly into the Materiality Provision by expressly defining the word "vote" to include "all action[s] necessary to make a vote effective including . . . having [a] ballot counted and included in the appropriate totals of votes cast." 52 U.S.C. § 10101(e); *see id.* § 10101(a)(3)(A) (incorporating this definition for purposes of the Materiality Provision's use of the term "vote"). If an otherwise valid absentee ballot is rejected because it does not comply with the Witness Requirement, there can be no question that the ballot has been prevented from being "counted and included in the appropriate totals of votes cast." *Id.* § 10101(e).

Applying this unambiguous definition of the right to vote in the context of the Materiality Provision, federal courts have repeatedly concluded that the statute prohibits enforcement of state laws, like the Witness Requirement, that require election officials to reject a ballot because of paperwork errors or omissions made in the process of submitting it. *See, e.g.*, *Migliori v. Cohen*, 36 F.4th 153, 164 (3d Cir.) (concluding that rejecting ballots due to omission of date on mail ballot outer envelope would "violate the Materiality Provision by denying Voters their right to vote"),

vacated as moot sub nom. Ritter v. Migliori, 143 S. Ct. 297 (2022);[8] *In re Georgia Senate Bill 202*, No. 1:21-CV-01259, 2023 WL 5334582, at *7–*11 (N.D. Ga. Aug. 18, 2023) (holding plaintiffs "substantially likely to succeed on the merits" of Materiality Provision claim in challenge against requirement that absentee voters write birth date on absentee ballot envelope); *Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1309 (N.D. Ga. 2018) (enjoining county from rejecting absentee ballots due to voter's failure to write correct year of birth on envelope because doing so likely violates Materiality Provision); *Ford v. Tenn. Senate*, No. 06-2031-DV, 2006 WL 8435145, at *11 (W.D. Tenn. Feb. 1, 2006) (explaining right to vote as defined in Materiality Provision "includes not only the registration and eligibility to vote, but also the right to have that vote counted" and thus Materiality Provision prohibits rejecting voter's ballot because of voter's failure to sign both ballot and poll book).

Similarly, when an absentee ballot is rejected in Wisconsin because it has an incomplete witness certificate, that rejection denies the "right to vote" in violation of the Materiality Provision.[9]

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[8] Despite its vacatur, *Migliori* is instructive, both in the Third Circuit and here, where it is directly on point. For its part, the Third Circuit has confirmed that an opinion vacated on non-merits grounds remains highly persuasive. *See Real Alternatives, Inc. v. Sec'y Dep't of Health & Hum. Servs.*, 867 F.3d 338, 356 n.18 (3d Cir. 2017) ("Although our judgment . . . was vacated by the Supreme Court, it nonetheless sets forth the view of our Court. . . . [The Supreme Court] vacated our judgment, . . . but did not attack our reasoning. . . . While [the vacated opinion] is no longer controlling, there is nothing that would require us—or anyone else—to conclude that our reasoning in that opinion was incorrect."); *see also Christianson v. Colt Indus. Operating Corp.*, 870 F.2d 1292, 1298 (7th Cir. 1989) (recognizing as persuasive a decision vacated on other grounds).

[9] Although Commission Defendants do not contest that this element is satisfied here, RITE argues that such rejection does not deny anyone the right to vote because, even if the right to vote were implicated, the Materiality Provision only applies to voter registration, not to casting a vote, ECF No. 32 at 17–19. RITE's argument not only contradicts the definition of "vote" provided by Congress within the statute, *see* 52 U.S.C. § 10101(a)(3)(A), (e), but it also conflicts with the language of the Materiality Provision itself, *id.* § 10101(a)(2)(B) (covering "application[s],

2. An incomplete or missing witness certificate is an error or omission on a paper relating to an act requisite to voting.

When an absentee ballot is returned with a noncompliant witness certificate, its subsequent rejection is "because of an error or omission on any record or paper relating to . . . [an] act requisite to voting." 52 U.S.C. § 10101(a)(2)(B). The absentee ballot is a "paper relating to . . . [an] act requisite to voting." *Id.*; *see also Migliori*, 36 F.4th at 162 n.56 ("find[ing] that the mail-in ballot squarely constitutes a paper relating to an act for voting"). And an incomplete or blank witness certificate is an "error or omission" on that "paper." 52 U.S.C. § 10101(a)(2)(B).

Commission Defendants' assertion that the Witness Requirement instead imposes a "required *procedure*" lacks merit. ECF No. 20 at 17. The Materiality Provision does not differentiate between "procedures" and "act[s] requisite to voting," 52 U.S.C. § 10101(a)(2), nor is that distinction relevant. *See, e.g.*, *Schwier v. Cox*, 340 F.3d 1284, 1285–86, 1297 (11th Cir. 2003) (recognizing that plaintiffs "claimed that Georgia's voter registration procedure and Voter Registration Form violated . . . [Materiality Provision]" without distinguishing between the two); *La Union del Pueblo Entero v. Abbott*, 604 F. Supp. 3d 512, 541 (W.D. Tex. 2022) ("preparation and submission of an application to vote by mail, as well as the preparation and submission of a mail ballot carrier envelope, are actions that voters must take in order to make their votes effective"); *cf. In re Georgia Senate Bill 202*, 2023 WL 5334582, at *10 ("The text of the Materiality Provision does not distinguish between, for instance, 'an act requisite to voting *absentee*' and 'an act requisite to voting *in person*.'"). Furthermore, whether such procedures are helpful in ensuring election "integrity," ECF No. 20 at 17, is simply not part of the Materiality

registration[s], or other act[s] requisite to voting"). The Materiality Provision's broad statutory language undermines RITE's attempt to narrow its scope beyond its "plain terms." *See Bostock v. Clayton County*, 140 S. Ct. 1731, 1742–43 (2020).

Provision analysis, *see* ECF No. 20-2 at 8–9 (arguing in United States statement of interest that Materiality Provision's "unconditional terms admit of no balancing tests or trade-offs" and apply "regardless of any other purported rationale for eliciting the information at issue").

Semantics aside, the Materiality Provision covers any "*action* necessary to make a vote effective including . . . having [a] ballot counted." 52 U.S.C. § 10101(e) (emphasis added); *id.* § 10101(a)(3)(A); *see Abbott*, 604 F. Supp. 3d at 541 (recognizing that Materiality Provision reaches "the preparation and submission of a mail ballot carrier envelope"). Completion of the witness certificate is in fact an "action necessary to make a vote effective" because absentee voters must comply with the Witness Requirement for their ballot to be counted. Wis. Stat. § 6.87(6d), (9); *see also id.* § 6.84(2) ("Ballots cast in contravention of the procedures specified in those provisions may not be counted."). Because this Court must "presume Congress says what it means and means what it says," *Simmons v. Himmelreich*, 578 U.S. 621, 627 (2016), it must reject Commission Defendants' unfounded theory.[10]

[10] Meanwhile, RITE attempts to dispute this element by once again interpreting the Materiality Provision to apply only to applications and registrations. Faced with the provision's explicit reference to "other act[s] requisite to voting," however, RITE relies on an *ejusdem generis* argument to dismiss the catchall phrase as an afterthought. ECF No. 32 at 19–21. But RITE's argument falls flat after the Supreme Court's unanimous decision in *Southwest Airlines Co. v. Saxon*, which recognized that "[t]he use of 'other' in [a] catchall provision" confirms congressional categorization of the previous terms. 142 S. Ct. 1783, 1790 (2022). Here, the statute's structure emphasizes that the category covered by the Materiality Provision is "act[s] requisite to voting," which includes applications and registrations, rather than limiting the "broadly worded catchall phrase." *Id.* at 1792. RITE later asserts a variation of this argument, suggesting that "if completion of the required certification is an 'act requisite to voting,' §10101(a)(2)(B) [then] it really establishes a qualification to vote." ECF No. 32 at 24. For the same reasons, *Saxon* precludes such a reading.

3. The witness certificate is immaterial to the determination of a voter's qualifications under Wisconsin law.

If the Witness Requirement does not require voucher of a voter's qualification, *but see supra* Section II.A, then it is by definition *immaterial* in "determining whether [an] individual is qualified under State law to vote." 52 U.S.C. § 10101(a)(2)(B). By the Materiality Provision's own definition, "'qualified under State law' shall mean qualified according to the laws, customs, or usages of the State." 52 U.S.C. § 10101(e); *see also Migliori*, 36 F.4th at 162–163. Wisconsin law provides that "[e]very U.S. citizen age 18 or older who has resided in an election district or ward for 28 consecutive days before any election where the citizen offers to vote is an eligible elector," and that "[a]ny U.S. citizen age 18 or older who moves within this state later than 28 days before an election shall vote at his or her previous ward or election district if the person is otherwise qualified." Wis. Stat. § 6.02; *see* Wis. Const., art. III, § 1; *see also* Wis. Stat. § 6.15 (allowing new residents with less than 28 days' residency to vote for president and vice president only). Commission Defendants appear to concede this, recognizing that "the witness's certification simply confirms that the voter followed the absentee voting procedure." ECF. No. 20 at 18.[11] Procedural compliance is clearly not a determination of a voter's qualifications—and, in fact, a voter who has received an absentee ballot has *already confirmed their qualifications* in order to receive that ballot by mail. *See* Wis. Stat. §§ 6.32; 6.33; *see also* §§ 6.20; 6.85; 6.86; 6.87(1), (2); *cf. In re Georgia Senate Bill 202*, 2023 WL 5334582, at *8 ("determination of whether an

[11] Whether or not the witness certificate is "material to the *validity of the ballot*," ECF No. 20 at 18 (emphasis added), is irrelevant to the inquiry under the Materiality Provision, which only asks whether completion of the witness certificate is "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).

individual is qualified to vote occurs through the absentee ballot application process and is therefore complete before a voter ever receives an absentee ballot").[12]

Commission Defendants press forth by mischaracterizing a statement of interest filed by the United States in a case involving related, but different, legal issues. *See* ECF No. 20 at 19 (citing *League of Women Voters of Wis. v. Wis. Elections Comm'n*, No. 22CV2472 (Cir. Ct. Dane Cnty. Oct. 14, 2022) (Doc. 53)); ECF No. 20-2. Although they provide no specific page citation, Commission Defendants appear to refer to the passage stating:

> The United States takes *no position* . . . on what specific pieces of witness address information are material to determining a voter's qualification to vote. And the United States *assumes* . . . that a witness address in some form *may be* material to determining a voter's qualification to vote under State law.

ECF No. 20-2 at 8 (emphases added). The United States, understandably, did not provide any citations or arguments in reaching this neutral assumption. That is because the assumption does not stand for what Commission Defendants suggest: In that lawsuit, which specifically considered the sufficiency and completeness of the witness's *address* as part of the witness certificate, the United States submitted the "Statement of Interest for the limited purpose of assisting the Court's analysis by describing the appropriate construction of" the Materiality Provision. ECF No. 20-2 at 1. The relevant "error or omission" there was limited to "some portion" of the witness address and no more. And thus, the United States made its assumption to argue that *if* the court there reached the Materiality Provision claim *and if* it "conclude[d] that *some portion* of a witness address is not material to determining a voter's qualification to vote under Wisconsin law, [*then*] rejection of absentee ballots based on such errors or omissions would implicate" the Materiality Provision.

[12] RITE similarly appears to argue that "witnesses must certify the truth of the information in the second sentence alone" of the "above statements," the "first sentence" of which includes the voter's certification of their qualifications to vote. ECF No. 32 at 11–13. If so, then the witness certificate is inherently immaterial to the determination of the voter's qualifications.

ECF No. 20-2 at 8 (emphasis added). Therefore, the United States' underlying assumption—and the fact that it has not yet brought a Materiality Provision challenge against the Witness Requirement—is ultimately of no help to Commission Defendants' hollow argument.[13]

But this Court's decision in *Common Cause v. Thomsen* is consistent with Plaintiffs' claim here. In *Thomsen*, plaintiffs "challenge[d] the statutory requirements that a student ID must display the following four things: (1) an issuance date, (2) an expiration date, (3) an expiration date not more than two years after the issuance date, and (4) a signature" to satisfy Wisconsin's voter ID requirement. 574 F. Supp. 3d 634, 636 (W.D. Wis. 2021) (referencing Wis. Stat. § 5.02(6m)(f)). This Court concluded that "any required information on an ID is indeed 'material' to determining whether the individual is qualified to vote," because "an individual is not qualified to vote without a compliant ID." *Id.* (citing 52 U.S.C. § 10101(e)). In other words, a fully compliant ID is necessary to determine a voter's "*substantive* voting qualifications, such as being a citizen, a resident of Wisconsin, and at least 18 years old," despite the fact that the "signature [itself] is not a substantive qualification of this type." *Id.* Here, if the Court accepts Commission Defendants' argument that the witness certificate serves no role in determining such substantive voting qualifications, then it cannot be material for purposes of the Materiality Provision.

RITE, meanwhile, advances a radical interpretation of the Materiality Provision that would apply only to "discriminatory practices of registrars through *arbitrary enforcement* of registration requirements, not to eliminate State legislatures' authority to determine what those requirements

[13] There are several considerations distinct from the legal merits that a governmental agency may weigh when deciding whether to bring an enforcement action, including resource allocation and the availability of a private right of action. *Cf. Citizens for Resp. & Ethics in Washington v. Fed. Election Comm'n*, 993 F.3d 880, 886 (D.C. Cir. 2021) (recognizing FEC's "prudential and discretionary considerations relating to resource allocation and the likelihood of successful enforcement"); *United States v. Ribota*, 792 F.3d 837, 840 (7th Cir. 2015) (recognizing that government "decision whether to prosecute involves consideration of myriad factors").

ought to be." ECF No. 32 at 25 (cleaned up). That argument not only departs from the statutory language, but it would effectively gut the Materiality Provision by exempting *every* State law from its reach. The few cases cited by RITE merely confirm that the Materiality Provision also reaches discretionary actions; they do not support the sweeping argument that the Materiality Provision is *limited* to such actions, nor do they provide any reason to ignore the raft of court decisions that applied the Materiality Provision to State law requirements. *See, e.g.*, *Migliori*, 36 F.4th at 157; *In re Georgia Senate Bill 202*, 2023 WL 5334582, at *2–3; *Abbott*, 604 F. Supp. 3d at 516–17. In fact, none of the cases RITE relies on suggest—let alone establish—that information required by State law is wholly immune from scrutiny under the Materiality Provision. *See Thomsen*, 574 F. Supp. 3d at 636 (holding only that a statutorily compliant ID *is* material to determining voter qualifications); *see also Org. for Black Struggle v. Ashcroft*, 493 F. Supp. 3d 790, 803 (W.D. Mo. 2020) (holding voter's name, address, and attestation signature to be "material to determining voter qualification"); *Martin*, 347 F. Supp. 3d at 1308–09 (enjoining county from rejecting absentee ballots due to voters' failure to write correct birth year on absentee ballot envelopes, a practice allowed but not required under Georgia law); *Schwier v. Cox*, 412 F. Supp. 2d 1266, 1276 (N.D. Ga. 2005) (holding social security numbers to be immaterial, despite *being required by Georgia law*, because "Georgia is not permitted to require this disclosure" under the Privacy Act).

In sum, the Witness Requirement is unrelated to any individual's qualifications to vote "according to the laws, customs, or usages of" Wisconsin. 52 U.S.C. § 10101(e). And if it were related to voter qualifications—despite Commission Defendants' claims to the contrary—it would violate Section 201 of the Voting Rights Act. *See supra* Section II.A.

CONCLUSION

For the reasons set forth above, the Court should deny the Commission Defendants' motion to dismiss.

Respectfully submitted this 15th day of November, 2023.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that all counsel of record who are deemed to have consented to electronic service are being served this 15th day of November, 2023, with a copy of this document via the Court's CM/ECF system.

/s/ Uzoma N. Nkwonta
Uzoma N. Nkwonta