

LEAGUE OF WOMEN VOTERS  
OF WISCONSIN,

*Plaintiff,*

Case No. 2022CV2472

v.

WISCONSIN ELECTIONS COMMISSION, et al.,

*Defendants.*

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**INTERVENOR DEFENDANT THE WISCONSIN STATE LEGISLATURE'S  
REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

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## INTRODUCTION

In its Summary Judgment Motion, the Legislature raised three independent arguments for rejecting Plaintiff's challenge to the witness-address requirement: (1) that requirement does not affect whether anyone is "qualified under State law" to vote in elections; (2) it does not "deny the right of any individual to vote"; and (3) compliance with the requirement is "material" to whether a voter is "qualified under State law to vote." 52 U.S.C. § 10101(a)(2)(B). In its Response, Plaintiff does not address the Legislature's third independent argument as to materiality, and this concession by silence is reason enough to grant judgment to the Legislature. As to the Legislature's other two independent arguments, if this Court decides that it does need to reach those issues despite Plaintiff's concession on materiality, Plaintiff argues, primarily, that filling out an absentee-ballot witness certificate is an "act requisite to voting" under Section 10101(a)(2)(B), but that statute's plain text, context, and purpose demonstrate conclusively that Plaintiff is wrong.\*

## ARGUMENT

### **I. Plaintiff's Failure To Respond To The Legislature's Argument That Missing Witness Addresses Are "Material" Is Sufficient To Require Judgment In The Legislature's Favor**

In its Summary Judgment Motion, Dkt.138 ("Mot.") 24–29, the Legislature argued that even if Wis. Stat. § 6.87(6d) were subject to Section 10101(a)(2)(B) as a

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\* The Legislature does not address here Plaintiff's responses to the Legislature's argument that Plaintiff's evidence is insufficient to support the overbroad relief that Plaintiff requested in its summary judgment motion. See Dkt.114 at 21–37; Dkt.138 at 30–36. The Legislature made those arguments in opposition to Plaintiff's summary judgment motion, and not in support of its own Motion For Summary Judgment, to which this reply relates.

voter-qualification provision—*but see infra* pp.3–10—Plaintiff’s claim would still fail because Section 6.87(6d)’s witness-address requirement is “material.” 52 U.S.C. § 10101(a)(2)(B). Section 10101(a)(2)(B) only prohibits voting requirements that are not “material in determining whether [an] individual is qualified under State law to vote in [an] election.” *Id.* “[M]aterial,” in turn, is ordinarily understood to mean “[o]f such a nature that knowledge of the item would affect a person’s decision-making,” “significant,” or “essential.” *Material*, Black’s Law Dictionary (11th ed. 2019). Here, Wisconsin has a legitimate interest in “detering” the types of “fraud” that can occur during absentee voting, *see Crawford v. Marion Cnty. Elections Bd.*, 553 U.S. 181, 191 (2008), including by wrongdoers who may cast a fraudulent ballot. The witness-address requirement provides a “significant,” *Material*, Black’s Law Dictionary, safeguard against such fraud by requiring an absentee voter to vote in the presence of a witness whom election officials can contact at the witness’s address, if necessary to determine whether the putative voter has actually cast the ballot, so the witness-address require is “material,” 52 U.S.C. § 10101(a)(2)(B).

Plaintiff does not respond to this argument in its Response Brief, *see generally* Dkt.149 (“Resp.Br.”) 22–37, which “failure to respond is fatal to any argument it means to make on this issue,” *State v. Cundy*, 2023 WI App 41, ¶ 36, 995 N.W.2d 266. “An argument to which no response is made may be deemed conceded,” *Hoffman v. Econ. Preferred Ins. Co.*, 2000 WI App 22, ¶ 9, 232 Wis. 2d 53, 606 N.W.2d 590. Here, Plaintiff’s failure to respond to the Legislature’s argument that Section 6.87(6d)’s witness-address requirement is “material” under any construction of that term that

could survive constitutional scrutiny, Mot.24–29, is a concession that ends this case. Again, Plaintiff must establish that the witness-address requirement is not “material” to determining whether individuals are “qualified [to vote] under State law.” 52 U.S.C. § 10101(a)(2)(B); *supra* pp.1–2. Despite the Legislature’s fully developed argument that this requirement is, in fact, “material,” Mot.24–29, Plaintiff offers no response whatsoever. Because Plaintiff “remains silent on th[is] issue” in its Response, *Schlieper v. State Dep’t of Nat. Res.*, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994), this Court should award summary judgment in the Legislature’s favor on this basis alone, *see id.* at 321; *Hoffman*, 2000 WI App 22, ¶ 9.

**II. Plaintiff Cannot Rebut The Legislature’s Showing That Section 10101(a)(2)(B) Does Not Apply Because Section 6.87(6d) Does Not Affect Voter-Qualification Determinations**

1. As the Legislature has explained, Mot.11–19, Section 10101(a)(2)(B) does not apply to Section 6.87 at all because Section 6.87 has no effect on whether voters are “qualified under State law” to vote in elections. 52 U.S.C. § 10101(a)(2)(B). By its plain text, Section 10101(a)(2)(B) only reaches election rules or state officials’ actions that relate to an individual voter’s ability to qualify and register to vote, such as eligibility criteria and voter-registration requirements. *See id.*; *id.* § 10101(e); *Schwier v. Cox*, 340 F.3d 1284 (11th Cir. 2003). Ordinary balloting rules, like Section 6.87’s mandatory witness-address requirement for absentee ballots, have nothing to do with the “requirements that must be met in order to establish eligibility to vote.” *Ritter v. Migliori*, 142 S. Ct. 1824, 1825–26 (2022) (Alito, J., dissenting from denial of stay). Indeed, Section 6.87 applies only to persons who already have their absentee

ballots, *see* Wis. Stat. § 6.87 (6d), meaning it only applies “to the counting of ballots by individuals *already deemed qualified to vote*,” *Friedman v. Snipes*, 345 F. Supp. 2d 1356, 1371 (S.D. Fla. 2004), with the design being to protect against voter fraud by determining whether the claimed absentee voter is the one casting the ballot. This tailored understanding of Section 10101(a)(2)(B)’s scope aligns with States’ broad authority to regulate and administer elections, *see Moore v. Harper*, 600 U.S. 1, 29 (2023), and to enact provisions, including absentee-ballot rules, *see McDonald v. Bd. of Election Comm’rs of Chi.*, 394 U.S. 802, 810–11 (1969), that “determine the conditions under which the right of suffrage may be exercised,” *Snipes*, 345 F. Supp. 2d at 1370 (quoting *McDonald*, 394 U.S. at 807).

2. Plaintiff claims, first, that filling out an absentee-ballot certificate is an “act requisite to voting,” 52 U.S.C. § 10101(a)(2)(B), such that Section 10101(a)(2)(B) applies, Resp.Br.24–25. Plaintiff is wrong. When given its “ordinary” meaning, *Sw. Airlines Co. v. Saxon*, 596 U.S. 450, 455 (2022), the phrase “act requisite to voting” means an act “necessary” to be able to vote, *see Requisite*, Oxford English Dictionary Online (2023),<sup>†</sup> that is, an act relating to voter registration or eligibility. The statutory context confirms as much, as each of Section 10101(a)(2)(B)’s surrounding provisions relates only to ensuring that citizens “who are otherwise qualified by law to vote” are in fact “allowed to vote.” 52 U.S.C. § 10101(a)(1); *id.* § 10101(a)(2)(A) (officials must apply the same “standards, practices, or procedures” to everyone when

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<sup>†</sup> Available at [https://www.oed.com/dictionary/requisite\\_adj?tab=meaning\\_and\\_use#25901657](https://www.oed.com/dictionary/requisite_adj?tab=meaning_and_use#25901657) (last visited Oct. 19, 2023).

“determining whether any individual is *qualified*” to vote (emphasis added); *id.* § 10101(a)(2)(C) (officials may not “employ any literacy test as a *qualification* for voting” (emphasis added)). Section 10101(a)’s provisions govern voter-qualification laws and practices, not laws like Section 6.87(6d), which do not relate to whether a citizen is allowed to exercise the franchise but rather ensure others are not committing fraud by, for example, voting absentee under the registered voter’s name. *See Sw. Airlines*, 596 U.S. at 455.

Plaintiff is also wrong to suggest that the canons of statutory construction support its reading of Section 10101(a)(2)(B). Resp.Br.24. The relevant canon—*eiusdem generis*—shows that “act requisite to voting,” 52 U.S.C. § 10101(a)(2)(B), means an act relating to voter registration or eligibility. When “general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.” *Cir. City Stores, Inc. v. Adams*, 532 U.S. 105, 114–15 (2001). Here, “registration” and “application” precede the general phrase “other act requisite to voting,” 52 U.S.C. § 10101(a)(2)(B), meaning that this general phrase should be interpreted by reference to the more specific terms “registration” and “application,” *see Cir. City Stores*, 532 U.S. at 114–15, which denote papers submitted so that one can exercise the franchise, rather than the actual ballot itself.

Next, Plaintiff asks this Court to give Section 10101(a)(2)(B)’s phrase “act requisite to voting” the same expansive definition as the term “vote” in Section 10101(e), Resp.Br.25–26, but this argument is misplaced. Plaintiff argues

that because Section 10101(e)'s definition of the term "vote" is broad enough to encompass filling out an absentee-ballot certificate, *see* 52 U.S.C. § 10101(e), the phrase "act requisite to voting" must be similarly broad. Resp.Br.25–26. But Section 10101(e)'s text shows that "act requisite to voting" in Section 10101(a)(2)(B) is significantly narrower than the term "vote." Section 10101(e) defines "vote" to mean "all action necessary to make a vote effective including, but not limited to, [i] registration or other action required by State law prerequisite to voting, [ii] casting a ballot, and [iii] having such ballot counted and included in the appropriate totals of votes cast with respect to candidates for public office and propositions for which votes are received in an election." 52 U.S.C. § 10101(e). Section 10101(a)(2)(B)'s narrow phrase "application, registration, or other act requisite to voting," *id.* § 10101(a)(2)(B), mirrors only one aspect of Section 10101(e)'s definition of "vote," namely, "registration or other action required by State law prerequisite to voting," *id.* § 10101(e). That narrow phrase does not extend to the other actions enumerated in Section 10101(e)'s broad definition of the term "vote," namely, "casting a ballot" or "having such ballot counted." *Id.* § 10101(e). Section 6.87's witness-address requirement is—as even Plaintiff concedes—a step absentee voters must take in order to "hav[e their] ballot counted," Resp.Br.33 (quoting 52 U.S.C. § 10101(e)), and so does not implicate any "act requisite to voting" for purposes of Section 10101(a)(2)(B).

While Plaintiff points to Wisconsin laws allowing a voter's qualifications to be challenged after the voter registers to vote, Resp.Br.26–27, these laws do not change the fact that Section 6.87(6d)'s witness-address requirement does not implicate any



“act requisite to voting,” 52 U.S.C. § 10101(a)(2)(B), and so does not implicate Section 10101(a)(2)(B). Plaintiff’s argument that Section 10101(a)(2)(B) applies to Section 6.87 because Section 6.87 provides election officials a “mechanism to investigate and corroborate” an absentee voter’s “qualifications to vote,” Resp.Br.27–28, fails for the same reason. Section 10101(a) protects against barriers that would prevent an otherwise-qualified citizen from exercising the franchise, *see supra* pp.3–6, which is why Section 10101(a)(2)(B) extends only to “application[s], registration[s], or other act[s] requisite to voting,” 52 U.S.C. § 10101(a)(2)(B). Section 6.87(6d), by contrast, is a rule that absentee voters must follow in order to “hav[e their] ballot counted,” *id.* § 10101(e), as Plaintiff concedes, Resp.Br.33—and is there to make sure the actual voter is voting his or her own ballot.

Finally, Plaintiff cannot sidestep the significant constitutional problems posed by its expansive interpretation of Section 10101(a)(2)(B) by noting that this provision relates only to “error[s] or omission[s] on any *record or paper*.” Resp.Br.29–32. As the Legislature previously explained, Mot.18–19, none of the cases that Plaintiff cites ruled on the scope of Section 10101(a)(2)(B) or concluded the provision applies outside of the specific voter-registration context, *contra* Resp.Br.29–30. And, tellingly, Plaintiff’s own examples of rules that would not implicate its broad reading of the provision conflict with that construction. For example, Plaintiff claims that a “rule[ ] . . . setting the address to which a mail-in ballot must be sent” would not be covered by Section 10101(a)(2)(B), Resp.Br.29 (citation omitted), but if a voter makes an error or omission in that address while completing his or her absentee ballot, then that

would involve an “error or omission on any record or paper” under Plaintiff’s expansive interpretation of Section 10101(a)(2)(B). Because Plaintiff’s reading would license voters to ignore any reasonable ballot requirements, if that requirement had any connection to a voting “record or paper,” Resp.Br.29–31, States would find themselves regularly in court—usually in federal court—fighting over and again about whether a particular ballot error is “material” or not, see Mot.17–18.

### **III. Plaintiff Cannot Explain How Section 6.87(6d) “Den[ies]” The “Right” To “Vote” When Any Wisconsinite Can Easily Vote Either Through Election-Day Voting Or By Simply Complying With The Witness Signature Requirement**

1. Section 10101(a)(2)(B) also does not apply to Section 6.87(6d) for the independent reason, Mot.19–24, that Section 6.87(6d) does not “deny” absentee voters “the right” to vote. 52 U.S.C. § 10101(a)(2)(B); see *Vote.Org v. Callanen*, 39 F.4th 297, 306 (5th Cir. 2022). Voting by absentee ballot is a privilege under Wisconsin law, not a right, Wis. Const. art. III, § 2; Wis. Stat. § 6.84(1); see also *McDonald*, 394 U.S. at 807, so restrictions on this privilege—such as Section 6.87’s witness-address requirement—do not “deny [ ] the right” to “vote” as defined in Section 10101(a)(2)(B). See 52 U.S.C. § 10101(a)(2)(B); *id.* § 10101(a)(3)(A). In any event, a voter’s failure to follow Wisconsin’s simple rules for casting an absentee ballot “constitutes,” at the very most, a “forfeiture of the right to vote, not the denial of that right.” *Ritter*, 142 S. Ct. at 1825 (Alito, J., dissenting from denial of stay).

2. Plaintiff responds, first, by renewing its argument that Section 10101(e)’s definition of the term “vote” is expansive enough to cover the absentee-balloting process, and so should extend to Section 6.87. Resp.Br.32–33. But Section

10101(a)(2)(B) applies only to “error[s] or omission[s]” that work to “deny the *right* of any individual to vote,” 52 U.S.C. § 10101(a)(2)(B) (emphasis added), and Section 10101(e) does not create any right to vote absentee or otherwise supplement the constitutional right to vote with additional privileges or protections, *see id.* § 10101(e); Mot.20. The relevant question is not whether Section 10101(a)(2)(B) could extend to absentee voting in a State that does guarantee the right to vote absentee, such as Maine or Michigan, *see, e.g.*, Maine Const. art. II, § 4; Mich. Const. art. II, § 4, but rather whether the challenged law “den[ies] the right . . . to vote,” 52 U.S.C. § 10101(a)(2)(B), which is impossible in this case because Wisconsin does not recognize a right to vote by absentee ballot, Wis. Const. art. III, § 2; Wis. Stat. § 6.84. And while Plaintiff broadly contends that “for many absentee voters, there is no alternative to voting by mail due to work, travel, disability, illness, or other reasons,” Resp.Br.33, it provides no support for this statement of fact which, in any event, does not change the fact that Section 6.87’s witness-address requirement does not burden the fundamental “right” to vote, *see* 52 U.S.C. § 10101(a)(2)(B).

Plaintiff is also wrong to argue, Resp.Br.33–34, that the availability of other methods of voting does not eliminate any burden that Section 6.87(6d) may otherwise impose on the “right of [an] individual to vote in [an] election,” 52 U.S.C. § 10101(a)(2)(B). No voter “*must* comply” with the witness-address requirement, as Wisconsin provides voters “plenty of alternative means” to vote, so “it is hard to conceive how the [witness-address requirement] deprives anyone of the right to vote.” *See Vote.Org*, 39 F.4th at 306. And while Plaintiff cites a handful of federal district

court decisions that have applied Section 10101(a)(2)(B) to absentee-voting laws, *see* Resp.Br.34, none of these cases were for purposes of Wisconsin, which does not provide any right to vote absentee, and none of these cases advance a persuasive interpretation of Section 10101(a)(2)(B)'s reach.

Finally, while Plaintiff contends that the fact that county clerks are not required to or may not have time to notify absentee voters of ballot-certificate defects means that Section 6.87(6d)'s witness-address requirement denies the right to vote, Resp.Br.34–37, this too is wrong. Absentee voters may easily track their ballots online via WEC's "Track My Ballot" tool, which alerts voters to any "problem[s]" with a returned absentee ballot. Mot.4 (quoting Dkt.144, Ex.1 at 1). For voters who "submit their absentee ballot on election day," Resp.Br.36, these absentee voters could confirm with the municipal clerk that their witness has properly provided an address under Section 6.87. And for absentee voters who mail their ballots in too close to the deadline to ensure time to cure, that does not mean, as Plaintiff suggests, that absentee voters do not have "meaningful, timely options to cast a ballot," Resp.Br.36, as Wisconsin law requires that absentee ballots be sent to any voter with an absentee application on file at least 47 days before a partisan election and 21 days before any other election, Wis. Stat. § 7.15(1)(cm).

## CONCLUSION

This Court should grant the Legislature's Motion For Summary Judgment.

Dated: October 19, 2023

Respectfully submitted,

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