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, *et al.*, Defendants, WISCONSIN STATE LEGISLATURE, Intervenor-Defendant.	Civil Action No. 3:23-cv-00672

PLAINTIFFS' RESPONSE BRIEF IN OPPOSITION TO INTERVENOR-DEFENDANT WISCONSIN STATE LEGISLATURE'S MOTION TO DISMISS

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INTRODUCTION

In its motion to dismiss, Intervenor the Wisconsin Legislature casts about for any means to delay or quash these proceedings. None has merit. First, Intervenor asks the Court to abstain from enforcing the federal civil rights laws at issue in this case, but it cannot identify any applicable abstention doctrine. Second, despite promising it would not delay these proceedings when it sought to intervene, Intervenor now asks the Court to stay them, disregarding the need for this matter to be resolved quickly so that Wisconsin can prepare for the coming election, as well as the severe prejudice that delay will impose on Plaintiffs' fundamental rights. Finally, Intervenor's arguments that Plaintiffs fail to state a claim ignore the plain text of the ballot certificate and the federal statutes at issue. Because this action does not seek any interference with separate state-court proceedings and because Plaintiffs have stated a claim in each of the Complaint's two counts, Intervenor's motion to dismiss should be denied.

LEGAL STANDARD

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). At this stage, a court takes all factual allegations as true and draws all reasonable inferences in the plaintiffs' favor. *Id.*

ARGUMENT

I. Intervenor has not identified any doctrine or precedent that warrants abstention.

Intervenor's argument to apply a so-called "analogue" to *Younger* abstention, Wis. Leg. Mem. of Law in supp. of Mot. to Dismiss or Stay ("Mot.") at 12, should be rejected out of hand. *Younger* abstention applies only when a plaintiff asks a federal court to "interfere" directly with a state court proceeding. *Mulholland v. Marion Cnty. Election Bd.*, 746 F.3d 811, 815 (7th Cir.

2014). Intervenor admits as much: "*Younger* and its progeny require federal courts to abstain from *enjoining ongoing state proceedings*." Mot. 14 (quoting *FreeEats.com v. Indiana*, 502 F.3d 590, 596 (7th Cir. 2007)) (emphasis added). Here, however, there is no possibility that the Court will be asked to enjoin any ongoing state proceeding. Although Intervenor identifies a pending state-law action challenging Wisconsin's witness requirement under the Wisconsin Constitution, *see Priorities USA v. Wis. Elections Comm'n*, No. 2023CV1900 (Cir. Ct. Dane Cnty.), abstention "is not in order simply because a pending state-court proceeding involves the same subject matter." *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 72 (2013). To the contrary, when a plaintiff is not requesting relief that entails direct federal-court interference in the state proceeding, "*Younger* abstention is not appropriate even when there is a risk of litigating the same dispute in parallel and redundant state and federal proceedings." *Mulholland*, 746 F.3d 811, 816 (7th Cir. 2014).[1]

SKS & Associates, Inc. v. Dart, a self-described "unusual case," does not extend *Younger* to cases that do not seek to interfere directly with a state proceeding. 619 F.3d 674, 676 (7th Cir. 2010). *SKS* simply applied *Younger* to a federal plaintiff's attempt to *accelerate*, rather than halt, a state proceeding. *Id.* The plaintiff there, a property-management company, sought to expedite eviction proceedings that a state court had ordered delayed because of winter weather. *Id.* Although recognizing that *Younger* abstention did not "completely fit" because the plaintiff was not "a target of any effort to enforce state law," the Seventh Circuit nonetheless applied the doctrine because the plaintiff sought "to have a federal court tell state courts how to manage and when to decide a

[1] To illustrate the point further, the Seventh Circuit permits *Younger* abstention in "exactly three classes of cases": (1) where "federal jurisdiction would intrude into ongoing state criminal proceedings," (2) where federal jurisdiction would intrude into "certain civil enforcement proceedings . . . akin to criminal prosecutions," and (3) to prevent federal-court interference with "civil proceedings that implicate a State's interest in enforcing the orders and judgments of its courts." *Mulholland*, 746 F.3d at 815. None of these scenarios applies here.

category of cases pending in the state courts." *Id.* at 679. Thus, *SKS*—like *Younger* itself, and every other case Intervenor cites—sought direct federal-court interference in state proceedings. *Id.* at 682 (explaining that when an action "seeks to impose federal supervision on state court proceedings, the federal courts must defer to the state's sovereignty over the management of its courts"). Plaintiff does not ask the Court to interfere with any state-court proceeding, so *SKS* is distinct.

In any event, Plaintiffs here seek to enforce federal civil rights laws, and federal courts "have a 'virtually unflagging obligation' to exercise the jurisdiction conferred on them by Congress." *AAR Int'l, Inc. v. Nimelias Enters. S.A.*, 250 F.3d 510, 517 (7th Cir. 2001) (quoting *Colo. River Water Cons. Dist v. United States*, 424 U.S. 800, 817 (1976)). For that reason alone, the Court should reject Intervenors' invitation to surrender its jurisdiction in service of freewheeling (and unprecedented) theories about plaintiffs' ability to obtain relief in state court. *Int'l Coll. of Surgeons v. City of Chicago*, 153 F.3d 356, 360 (7th Cir. 1998). This case does not satisfy any of the well-defined, exceptional circumstances that warrant abstention.[2]

II. The Court should not stay this case.

Despite Intervenor's repeated assurances that its participation in this case would not cause delay, ECF No. 38 at 3; *see also, e.g.*, *id.* at 13, 15, its request for a stay attempts to do just that. The Court has entered a comprehensive pretrial conference order. ECF No. 46. That order provides

[2] In a cursory footnote, Intervenor invites the Court to consider applying *Pullman* and *Burford* abstention. Mot. 13 n.4. Undeveloped arguments in footnotes are waived. *Parker v. Franklin Cnty. Cmty. Sch. Corp.*, 667 F.3d 910, 924 (7th Cir. 2012). Even so, *Pullman* abstention is inapplicable because this case involves federal statutory law rather than "a federal constitutional question." *Int'l Coll. of Surgeons*, 153 F.3d at 365 (rejecting *Pullman* abstention where plaintiff was not pressing a federal constitutional claim). And *Buford* abstention does not apply because the state-court cases Intervenor identifies are pending in courts of general jurisdiction, not in courts with "*specialized expertise*" in a technical subject matter. *Adkinds v. VIM Recycling*, 644 F.3d 483, 504 (7th Cir. 2011).

that dispositive motions are due February 16, putting this case on track for resolution by spring. *Id.* The discovery period, moreover, is already underway. And Commission Defendants agree with Plaintiffs about the need to resolve this case in time for the 2024 election cycle. ECF No. 35 at 13. Intervenor's request for a stay thus threatens the very delay it promised not to cause when it was trying to get into the case—a delay that no original party considers appropriate. The stay request should be rejected on that basis.

In any event, Intervenor has not made the necessary showing to warrant a stay. In ruling on a stay request, this Court typically considers: (1) whether the litigation is at an early stage; (2) whether a stay will unduly prejudice or tactically disadvantage the non-moving party; (3) whether a stay will simplify the issues; and (4) whether a stay will reduce the burden of litigation on the parties and court. *Grice Eng'g, Inc. v. JG Innovations, Inc.*, 691 F. Supp. 2d 915, 920 (W.D. Wis. 2010). The movant has the burden to show that these circumstances justify a stay. *Id.* And similar to abstention, the Court's "virtually unflagging obligation" to hear and decide cases within its jurisdiction counsels against a stay. *Id.*

These considerations illustrate why Intervenor's request is improper. For starters, this litigation is no longer at an early stage. The parties have now fully briefed two intervention motions and a motion to dismiss, discovery is ongoing, and the deadline for summary judgment motions is less than three months away. Worse, a stay will prejudice Plaintiffs, who seek clarity about their fundamental rights in advance of the 2024 election cycle. Delay is also likely to tactically disadvantage Plaintiffs—if the Court grants a stay, and then litigation resumes soon before the election, Intervenor or Defendants may invoke the *Purcell* principle in an attempt to postpone vindication of Plaintiffs' federal rights yet further. *See Purcell v. Gonzalez*, 549 U.S. 1 (2006). And delay will also prejudice Defendants—Commission Defendants emphasized in the

intervention briefing that the Commission and Wisconsin's clerks need this case resolved expeditiously so they can prepare lawful ballot certificates in time for the 2024 election. ECF No. 35 at 13. Intervenor's argument for a stay boils down to speculation that the state-court *Priorities* litigation might resolve some of the issues in this case. That minimal showing is not enough to offset the substantial prejudice a stay would inflict on *all other parties* besides Intervenor.

III. The Court should not dismiss this case for failure to state a claim.

Intervenor's arguments on the merits largely rehash points made by the Commission Defendants, and they fail for largely the same reasons. *See generally* ECF No. 42.

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

As Plaintiffs explained in their opposition to Commission Defendants' motion to dismiss, ECF No. 42 at 9–14, Wisconsin's Witness Requirement is a cut-and-dried voucher requirement in violation of Section 201 of the Voting Rights Act. 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). Contorting the Witness Requirement to comply with Section 201 would require the Court to rewrite both federal and state laws.

1. The Witness Requirement is a "prerequisite" to voting.

The Witness Requirement is a prerequisite to voting for purposes of Section 201's prohibition of voucher requirements. Intervenor's contrary arguments, Mot. 18–20, 22–23, fail for several reasons. Most fundamentally, those arguments ignore the immediately following section of the Voting Rights Act itself. VRA Section 202 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, and any other qualified Wisconsin voters who meet the same criteria, have an express federal right to vote by absentee ballot under the Voting Rights Act itself. Wisconsin may not make the exercise of an express federal statutory right to vote absentee conditional on a voucher that is prohibited by the immediately preceding section of the very same law. "It is," after all, "well established that statutes must be read as a whole." *United States v. Ryan*, 428 F. Supp. 3d 31, 40 (W.D. Wis. 2019) (cleaned up). Intervenor never grapples with Section 202, but that provision is fatal to its arguments on this point.

The Witness Requirement is, moreover, a "prerequisite" for voting under more general principles. Once a state makes the choice to offer absentee balloting to some class of voters, it must do so in a manner that complies with 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."). Section 201 is no exception. Wisconsin cannot offer no-excuse absentee balloting, induce voters to vote in that manner, and then disqualify their ballots because the voters failed to comply with a requirement that violates federal law. The existence of an "alternate voting path," Mot. 19, does not render a prerequisite to one manner of voting something other than a prerequisite to voting. Put more plainly, an "alternate voting path" does not render lawful a state's institution of a voucher requirement to gatekeep an entire method of voting. Such an exception would render Section 201 a functional nullity. To illustrate: By Intervenor's lights, so long as a state provided at least one "alternate voting path," it could require any voter who wished to vote at the polls to pass

a literacy test—which is also barred by Section 201—and Plaintiffs would have no recourse. That absurd reading necessarily fails. *See United States v. Logue*, 344 F.2d 290, 292–93 (5th Cir. 1965).

The Eleventh Circuit's decision in *Greater Birmingham Ministries v. Secretary of State for State of Alabama*, 992 F.3d 1299, 1334–35 (11th Cir. 2021), is also off point. Like Intervenor's brief, the Eleventh Circuit's opinion does not ever address the relationship between Sections 201 and 202. And unlike the Witness Requirement, the "positive identification" procedure at issue in *Greater Birmingham Ministries* was not a categorical barrier to voting in a certain manner. It was, instead, a back-up procedure for in-person voters who lacked photo ID. *Id.* at 1335; *see also* Ala. Code § 17-9-30(f) (2021). That is not analogous to the Witness Requirement, which virtually all Wisconsin absentee voters are required to comply with in order to have their ballots accepted and counted. Wis. Stat. § 6.87(4)(b)(1); *see also* Wis. Stat. § 6.875(4).

2. The Witness Requirement is a requirement 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.

The Witness Requirement thus requires the absentee voter to swear under oath 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 swear that "the above *statements* are true *and* the voting procedure was executed as there stated." Wis. Stat. § 6.87(2) (emphasis added). The witness thus necessarily attests to the truth of the voter's claim to be qualified—*i.e.*, vouches for the voter's qualifications.

Intervenor adds nothing of note to the Commission Defendants' arguments for reading the statutory text differently. Like Commission Defendants, Intervenor asserts that the phrase "above statements are true" in the witness certification refers only to the process by which the voter marked the ballot, and not the voter's qualifications. Mot. 24. But the statutory text refutes that reading: The following clause requires the witness to separately attest that "the voting procedure was executed as there stated" and would be rendered superfluous under the Commission Defendants' and Intervenors' theory. *See* ECF No. 42 at 10. 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"). Intervenor also asserts that Plaintiffs' reading must be wrong because clerks verify eligibility before issuing an absentee ballot. Mot. 24. But in Wisconsin, 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); *see also* ECF

No. 42 at 11. Intervenor, like Commission Defendants, provides no reason to think absentee voting is exceptional in this regard, or that the Witness Requirement cannot be a voucher of qualifications just because qualifications are checked at other points.

The one entirely novel point Intervenor contributes is a confusing sidebar about voter fraud. Mot. 25. But Intervenor's speculation about lawmakers' objectives in enacting Section 6.87 does not in any way alter Section 6.87's plain command that a witness attest to the truth of the "above statements"—including the voter's statements about qualifications. Nor does it change Section 201's prohibition of such voucher requirements.

3. The Witness Requirement mandates that the witness be a member of a class.

Intervenor also retreads Commission Defendants' argument that the Witness Requirement complies with Section 201 because the witness need not be a member "of any other class." Mot. 25 (quoting 52 U.S. § 10501(b)). But "class," in this case, means "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," except 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." ECF No. 42 at 14. Intervenor's argument yet again disregards plain statutory text.

Intervenor next invites the Court to impose an atextual and purposive limit on the term "class" based on speculations about Congress's motivations in "enact[ing] the Voting Rights Act" in 1965. Mot. 26. Even if the Court could conduct that inquiry—which it cannot, given the unambiguous text, ECF No. 42 at 16—Intervenor gets the question wrong. The proper question

would be Congress's motivation when it *extended* the voucher prohibition nationwide in the Voting Rights Act Amendments of 1970, and when it made that prohibition *permanent* in the Voting Right Act Amendments of 1975. Given the nationwide focus of those Amendments, there is no reason to assume Congress aimed to prohibit only voucher requirements involving certain *specific* classes.

Finally, Intervenor invokes *Thomas v. Andino*, 613 F. Supp. 3d 926 (D.S.C. 2020). Mot. 26. But Intervenor neglects to mention that 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" only in 2022—two years *after* the *Thomas* decision. *See* 2022 Act No. 150 (S. 108), § 6 (eff. July 1, 2022). When *Thomas* was decided, the South Carolina statute did not limit who could be a witness in any way. That distinguishes it from the Witness Requirement. ECF No. 42 at 14–15 & n.6.

B. If the Witness Requirement does not require voters to prove qualifications by the voucher of other voters, it is immaterial to determining voter qualifications in violation of the Materiality Provision.

The Materiality Provision protects against the rejection of otherwise-eligible voters' ballots due to an error or omission that is immaterial to the determination of their voting qualifications. *See* 52 U.S.C. § 10101(a)(2)(B). Analysis of a claim under the Materiality Provision consists of three elements: *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.*; *see also La Unión del Pueblo Entero v. Abbott*, No. 5:21-CV-0844-XR, --- F. Supp. 3d -----, 2023 WL 8263348, at *8 (W.D. Tex. Nov. 29, 2023) (outlining three elements of Materiality Provision claims). Plaintiffs' Materiality Claim satisfies each of these elements.

1. Rejecting an absentee ballot for a noncompliant witness certificate is a denial of the right to vote.

The Materiality Provision expressly defines 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"). And when an otherwise valid absentee ballot is rejected because it does not comply with the Witness Requirement, the ballot has been prevented from being "counted and included in the appropriate totals of votes cast." *Id.* § 10101(e); *see also United States v. Classic*, 313 U.S. 299, 318 (1941) (explaining that right to vote includes both "right to cast a ballot" and to "have it counted"). Consequently, the rejection of that absentee ballot constitutes denial of the right to vote in violation of the Materiality Provision. 52 U.S.C. § 10101(a)(2)(B); *see also* ECF No. 42 at 18–19.

In framing their arguments, Intervenor and Restoring Integrity and Trust in Elections ("RITE") repeatedly rely on Justice Alito's dissent from the denial of stay in *Ritter v. Migliori*, 142 S. Ct. 1824 (2022) (Mem.), and the Fifth Circuit's stay opinion in *Vote.org v. Callanen*, 39 F.4th 297 (5th Cir. 2022), "two non-binding, non-precedential opinions," *Abbott*, 2023 WL 8263348, at *19, that are neither determinative nor persuasive here.[3] *Ritter* reflects only the views of Justice Alito, joined by Justices Thomas and Gorsuch, in dissent from a denial of an application for a stay while the petition for certiorari was still pending. *See Pa. State Conf. of NAACP v. Schmidt*, No. 1:22-CV-00339, 2023 WL 8091601, at *27–28 (W.D. Pa. Nov. 21, 2023). And Justice Alito conceded that his opinion was "based on the review that [he] ha[d] been able to

[3] The amicus brief submitted by RITE in support of the Commission Defendants' motion to dismiss was accepted after briefing completed on the Commission Defendants' motion. *See* ECF No. 47. Accordingly, Plaintiffs briefly respond to RITE's remaining arguments here.

conduct in the time allowed" and he did not "rule out the possibility that" his "current view" would prove "unfounded" after full briefing. *See Ritter*, 142 S. Ct. at 1824 (Alito, J., dissenting). Meanwhile, the *Vote.org* opinion comes from a Fifth Circuit *motions* panel, which "relied on reasoning in Justice Alito's reasoning in dissent" to "suggest[] in a footnote that" the Materiality Provision is limited to voter registration only. *Abbott*, 2023 WL 8263348, at *19. But that cannot be correct because the Materiality Provision's express terms apply to "any record or paper relating to any application, registration, or other act requisite to voting," 52 U.S.C. § 10101(a)(2)(B)—language that plainly contemplates a broad range of records and papers *in addition to* registration forms. This Court has recognized this previously: "the text of [the Materiality Provision] isn't limited to . . . voter registration." *Common Cause v. Thomsen*, 574 F. Supp. 3d 634, 636 (W.D. Wis. 2021). And on December 15, 2023, the Fifth Circuit issued its merits opinion in *Vote.org v. Callanen*, in which it explicitly "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. No. 22-50536, --- F.4th ----, 2023 WL 8664636, *19 (5th Cir. Dec. 15, 2023).[4]

Numerous other federal courts, meanwhile, have concluded that the Materiality Provision prohibits enforcement of state laws, like the Witness Requirement, that require election officials to reject absentee ballots because of paperwork errors or omissions made in the process of submitting them. *See, e.g.*, *Migliori v. Cohen*, 36 F.4th 153, 164 (3d Cir.) (concluding that rejecting mail ballots due to omission of date on outer envelope "violate[s] the Materiality Provision by

[4] While the court reversed the district court's grant of summary judgment to plaintiffs because, in its view, whether a voter provides an "original" or digitized signature is material to the voter's qualification, *id.* at *21, nothing in the opinion suggests that the Materiality Provision's application is limited to voter registration forms.

denying Voters their right to vote"), *vacated as moot sub nom. Ritter v. Migliori*, 143 S. Ct. 297 (2022);[5] *Abbott*, 2023 WL 8263348, at *22–23 (holding that ID "number-matching provisions of S.B. 1 require election officials to deny the [Materiality Provision]'s broadly defined right to vote"); *Schmidt*, 2023 WL 8091601, at *30–31 (holding that "immaterial error or omission of a date [on mail ballot outer envelope] resulted in rejection of ballots and disenfranchised the Plaintiffs" in violation of Materiality Provision); *In re Georgia Senate Bill 202*, No. 1:21-CV-01259, 2023 WL 5334582, at *7–11 (N.D. Ga. Aug. 18, 2023) (holding that invalidating ballots for failure to write birthdate on absentee ballot outer envelope denies right to vote in violation of Materiality Provision); *Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1308–09 (N.D. Ga. 2018) (concluding that rejection of absentee ballots "on the basis of a birth year error or omission" on envelope violates Materiality Provision). Similarly, when an absentee ballot is rejected in Wisconsin because it has a noncompliant witness certificate, that rejection denies the right to vote in violation of the Materiality Provision.[6]

Intervenor appears to misunderstand the relevant issues here: Plaintiffs do not claim that a "voter is denied 'the right to vote' merely because he or she must cast his ballot *in the presence* of a witness." Mot. 33. Rather, Plaintiffs' Materiality Provision claim argues that *rejecting* an absentee ballot because of a witness certificate that is either incomplete or otherwise deemed

[5] The reasoning of an opinion vacated on non-merits grounds, like *Migliori*, remains persuasive both in the Third Circuit and here, where it is directly on point. *See Real Alts., Inc. v. Sec'y Dep't of Health & Hum. Servs.*, 867 F.3d 338, 356 n.18 (3d Cir. 2017); *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). *Migliori* itself has been considered persuasive in multiple federal court decisions despite its vacatur. *See, e.g.*, *Vote.org*, 2023 WL 8664636, at *10, *12 & n.7; *Abbott*, 2023 WL 8263348, at *8 n.12; *Schmidt*, 2023 WL 8091601, at *25–27; *Eakin v. Adams Cnty. Bd. of Elections*, No. 1:22-CV-340, 2023 WL 3903112, at *4 (W.D. Pa. June 8, 2023).

[6] Notably, Commission Defendants correctly do not contest that this element is satisfied. *See* ECF No. 20 at 17–20.

noncompliant with the Witness Requirement violates the Civil Rights Act. Nonetheless, Intervenor relies on *Tully* to argue that the right to vote is not denied by such a rejection because "in-person voting is fully available" and voting absentee is a "privilege." Mot. 33–34 (citing *Tully v. Okeson* ("*Tully I*"), 977 F.3d 608, 613 (7th Cir. 2020)).[7] But the entire reason for absentee voting is that in-person voting is not available to some voters, and, again, Intervenor appears unaware of Section 202 of the VRA, which 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).

Where absentee voting has already been provided—and is required by federal law—Intervenor's argument finds no support in either *Tully I* or the Materiality Provision's text, which does not distinguish between the manner in which an individual exercises their right to vote. In fact, the statute defines "vote" to include "all action necessary to make a vote effective including, but not limited to, registration or other action required by State law prerequisite to voting, casting a ballot, and having such ballot counted." 52 U.S.C. § 10101(e); *see also id.* § 10101(a)(3)(A).[8] Because compliance with the Witness Requirement is "necessary to make a vote effective," or else the absentee ballot will not be counted, the first element of the Materiality Provision claim is satisfied.

[7] Intervenor also quotes *Tully I*, 977 F.3d at 611, to argue that "[a] law does not fall within [the Materiality Provision]'s scope unless it places 'the right to vote . . . at stake' by 'mak[ing] it harder to cast a ballot at all." Mot. 34. But *Tully I* concerned a preliminary injunction; when the issue returned to the Seventh Circuit on the merits, the court noted that *Tully I*'s "truncated legal analysis" was not binding, and it rejected the notion that the right to vote is abridged only where voters are rendered "worse off" than they were before a challenged law was enacted. *Tully v. Okeson* (*"Tully II*"), 78 F.4th 377, 381, 387 (7th Cir. 2023).

[8] The U.S. Supreme Court's discussion of vote denial under Section 2 of the Voting Rights Act, *see* Mot. 33 (quoting *Brnovich*, 141 S. Ct. at 2333), is not relevant to the claim here under the Civil Rights Act, which provides its own definition of "vote."

2. A noncompliant witness certificate is an error or omission on a paper relating to an act requisite to voting.

The second Materiality Provision element is satisfied because an absentee ballot envelope is a "paper relating to . . . [an] act requisite to voting." 52 U.S.C. § 10101(a)(2)(B); *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"). In arguing otherwise, Intervenor ignores "the straightforward application of legal terms with plain and settled meanings." *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1743 (2020). A witness certificate deemed noncompliant with the Witness Requirement necessarily suffers "an error," whereas a wholly missing or incomplete witness certificate presents an "omission," and a ballot envelope on which the certificate appears is undoubtedly "paper." 52 U.S.C. § 10101(a)(2)(B). Completion of the witness certificate, meanwhile, is necessarily an "action necessary to make a vote effective," 52 U.S.C. § 10101(e); *id.* § 10101(a)(3)(A), 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."). Thus, rejection of an absentee ballot for noncompliance with the Witness Requirement is a rejection "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); *see also* ECF No. 42 at 20–21.

Courts must "presume Congress says what it means and means what it says," *Simmons v. Himmelreich*, 578 U.S. 621, 627 (2016). Intervenor disagrees, suggesting that Congress actually meant something other than what the Materiality Provision provides—that states are free to disenfranchise voters for spurious reasons after their qualifications have initially been established at the registration stage. Mot. 27 (quoting 52 U.S.C. § 10101(e)). But the Materiality Provision is not rendered inert after a voter is deemed qualified. As the court in *Abbott* explained, if the

Materiality Provision were so limited, "Congress could have said so"; instead, its text "confirms that . . . denying the statutory right to vote based on an error or omission that disqualifies a voter from only a *single* election violates" the Materiality Provision. 2023 WL 8263348, at *18–19. And many courts have applied the statute to post-registration rejections of absentee ballots. *See, e.g.*, *id.* at *22 (concluding that Materiality Provision reaches mail ballot carrier envelope); *Schmidt*, 2023 WL 8091601, at *30 n.38 ("to cast a mail-in ballot, the voter must write a date on the envelope near the pre-printed verification. This is necessary to complete the act of voting and, thus, implicates" Materiality Provision); *In re Georgia Senate Bill 202*, 2023 WL 5334582, at *10 ("returning the absentee ballot and completing the outer envelope is . . . an 'act requisite to voting' because without it, the vote will not count").

Intervenor cites *Schwier* to assert that the Materiality Provision "'was intended to address the practice of requiring unnecessary information *for voter registration*.'" Mot. 29 (emphasis in original) (quoting *Schwier*, 340 F.3d at 1294). But nothing in the Eleventh Circuit's opinion limits its scope to voter registration alone. And neither the plain language nor the legislative purpose of the Materiality Provision indicate that Congress chose to ignore other stages in the voting process after registration. *See Abbott*, 2023 WL 8263348, at *21 (citing *Schwier*, 340 F.3d at 1294). "Indeed, a rule protecting voter *registration* only, but allowing registered voters to still be denied an *effective* vote based on irrelevant paperwork errors, would not have accomplished Congress' broader, well-documented aim of eradicating all manner of arbitrary and discriminatory denials of the right to vote." *Id.* (citing H.R. Rep. No. 88-914 (1963), *reprinted at* 1964 U.S.C.C.A.N. 2391, 2394, 2485–87, 2491)).

Intervenor also misinterprets the Elections Clause in suggesting that application of the Materiality Provision to the Witness Requirement would upset the balance of power between the

federal and state governments. Mot. 31 (quoting *Miller Brewing Co. v. Dep't of Indus., Lab. & Hum. Rels., Equal Rts. Div.*, 563 N.W.2d 460, 464 (Wis. 1997)). That argument misunderstands the balance created by the Elections Clause: "the Clause functions as 'a default provision; it invests the States with responsibility for the mechanics of congressional elections, but only so far as Congress declines to pre-empt state legislative choices.' The power of Congress . . . 'is paramount, and may be exercised at any time.'" *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 9 (2013) (quoting *Foster v. Love*, 522 U.S. 67, 69 (1997), and *Ex parte Siebold*, 100 U.S. 371, 392 (1880)).[9] The plain language of the Materiality Provision itself expresses a clear and manifest purpose to displace state laws and applying it as such does not create the constitutional issues that Intervenor claims would result. *See Schmidt*, 2023 WL 8091601, at *35 n.48.

Unable to ground its arguments in the statutory text, Intervenor resorts to complaining that the Materiality Provision is too expansive, Mot. 31, but in doing so relies on inapt hypotheticals. For instance, Intervenor theorizes that an absentee voter who does not provide an address to election officials could assert a Materiality Provision claim if they fail to receive a ballot. Mot. 32 But a lawsuit by a voter who does not provide any means to receive their ballot would likely fail for reasons entirely unrelated to the merits—a court could not order delivery of a ballot to an unknown location. Intervenor's next example involves an individual who submits an application outside the statutory window. *Id.* But that voter has not committed "an error or omission" *on* a "record or paper," 52 U.S.C. § 10101(a)(2)(B). And ultimately, Intervenor's policy considerations are inapposite: "Congress defined 'voting' expansively [and] [t]his Court is bound by the statutory text." *In re Georgia Senate Bill 202*, 2023 WL 5334582, at *10. "To the extent that [Intervenor]

[9] "[I]t is worth remembering that, in enacting the [Civil Rights Act], Congress also relied on its authority under the Elections Clause." *Abbott*, 2023 WL 8263348, at *25.

seek[s] to challenge the wisdom of the Materiality Provision's expansive reach as a policy matter, '[that] is an argument to be addressed to Congress, not to this Court.'" *Abbott*, 2023 WL 8263348, at *21 (quoting *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 593 (1980)).

RITE's reliance on *ejusdem generis* and other statutory-construction arguments also fails to constrict the statutory phrase "other act requisite to voting." ECF No. 32 at 19–22. The Supreme Court's unanimous decision in *Southwest Airlines Co. v. Saxon*, for example, recognized that "[t]he use of 'other' in [a] catchall provision" confirms congressional categorization of the previous terms. 596 U.S. 450, 459 (2022). And the Materiality Provision's structure clearly indicates that the category covered is "act[s] requisite to voting," which includes applications and registrations, and is not somehow limited by the "broadly worded catchall phrase." *Id.* at 462; *see also Abbott*, 2023 WL 8263348, at *18–19 & n.26 ("More importantly, canons of construction such as *ejusdem generis* are applied only to resolve ambiguity, not create it." (citing *Harrison*, 446 U.S. at 588)).

3. Compliance with the Witness Requirement is immaterial to determining whether a voter is qualified to vote.

If compliance with the Witness Requirement does not require a witness to vouch for the voter's qualifications, *but see supra* Section III.A, then it is necessarily immaterial in "determining whether [an] individual is qualified under State law to vote." 52 U.S.C. § 10101(a)(2)(B). Section 10101 provides that "'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 162–63. And 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). Compliance with the Witness Requirement is not relevant, and thus immaterial, to determining whether a Wisconsin voter has satisfied any of these qualification requirements. *See also* ECF No. 42 at 22–25.

Both Intervenor and RITE concede as much. As Intervenor explains: "The [W]itness [R]equirement does not relate to whether an absentee voter meets the qualifications for registration under Wisconsin law[.]" Mot. 32–33 (emphasis in original). And RITE correctly notes that "no voter will receive a ballot unless he has already registered." ECF No. 32 at 19.[10] At least these were their positions when discussing the second element of the Materiality Provision claim. *See supra* Section III.B.2. When discussing whether the third element of the Materiality Provision claim is satisfied, both Intervenor and RITE change their tune. Despite its prior concessions, which should end the inquiry, Intervenor asserts that the Witness Requirement is in fact "material" because it serves as a "safeguard to ensure that the absentee voter is the individual who filled out their own ballot, and did so without outside pressure during the voting." Mot. 38–39. But if the requisite witness is merely confirming that the person before them is the one who filled out the absentee ballot as Commission Defendants and Intervenor suggest, *see*, *e.g.*, Mot. 24–25, then that witness is only verifying that *an* individual filled out *an* absentee ballot on their own. Without knowing anything more about that person, the witness is entirely unable to confirm that the person filled out *their own* ballot. And detection and deterrence of fraud—even if such interests were furthered by the Witness Requirement—are irrelevant. Simply put, such extratextual considerations play no role in the Materiality Provision analysis. *See McGirt v. Oklahoma*, 140 S.

[10] "Once election officials have determined an applicant or voter's identity, additional requirements that confirm identity are not material to determining whether the applicant or voter is qualified to vote." *Abbott*, 2023 WL 8263348, at *18.

Ct. 2452, 2469 (2020) ("There is no need to consult extratextual sources when the meaning of a statute's terms is clear. Nor may extratextual sources overcome those terms.").

Intervenor concludes its argument by conjuring the constitutional avoidance canon, essentially taking another swing at its Elections Clause argument. *Compare* Mot. 39–40, *with id.* at 30–31. Its argument fails again. For one, "the canon of constitutional avoidance has no application here, because there is no statutory ambiguity." *United States v. Oakland Cannabis Buyers Co-op.*, 532 U.S. 483, 484 (2001). Intervenor's obvious policy preferences and opinions on the "wisdom of the Materiality Provision's expansive reach . . . [should] 'be addressed to Congress, not to this Court.'" *Abbott*, 2023 WL 8263348, at *21 (quoting *Harrison*, 446 U.S. at 593).

RITE, in turn, attempts to escape its prior concessions by advancing a radical interpretation of the Materiality Provision, under which the civil rights law 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 ought to be." ECF No. 32 at 25 (cleaned up). Not only does this argument depart from the statute's "plain terms," *see Bostock*, 140 S. Ct. at 1742–43, but it would also "swallow the rule set forth in the Materiality Provision" by exempting *every* State law from its reach, *Abbott*, 2023 WL 8263348, at *23–25.

Although the cases cited by RITE confirm that the Materiality Provision *does* reach 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 numerous court decisions that applied the Materiality Provision to state law requirements. *See, e.g.*, *Vote.org*, 2023 WL 8664636, at *1–2 (citing Tex. Elec. Code Ann. § 13.143(d-2)); *Migliori*, 36 F.4th at 157 (citing 25 Pa. Cons. Stat. §§ 3146.6(a), 3150.16(a)); *Abbott*, 2023 WL 8263348, at *4–6 (citing provisions of Texas

Senate Bill 1); *In re Georgia Senate Bill 202*, 2023 WL 5334582, at *2 (citing Ga. Code Ann. § 21-2-386). And none of the cases RITE relies on even remotely suggests that information required by state law is entirely immune from Materiality Provision scrutiny. *See 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).

Immaterial requirements cannot be transformed into "material" ones merely because they are imposed by state law. The Fifth Circuit recently rejected the notion that "States may circumvent the Materiality Provision by defining all manner of requirements, no matter how trivial, as being a qualification to vote and therefore 'material.'" *Vote.org*, 2023 WL 8664636, *19; *see also Abbott*, 2023 WL 8263348, *14 (rejecting same "tautological[]" argument and recognizing that such "logic would erase the Materiality Provision from existence, by defining *whatever* requirements might be imposed by state law in order to vote, no matter how trivial," as material in determining voter qualifications). A state's codification of a voting requirement does not automatically defeat a Materiality Provision claim; to the contrary, "[t]he Materiality Provision is a standard that a State's [voting requirements] must satisfy." *Vote.org*, 2023 WL 8664636, *19; *cf. Inter Tribal Council of Ariz.*, 570 U.S. at 17 (distinguishing between setting qualifications and obtaining information necessary to confirm those qualifications).

Interpreting the Materiality Provision any other way would shield the same immaterial requirements that Congress sought to abolish. For example, in the 1960s, the Louisiana Constitution required voters to provide their age, not only in years but also in months and days, in order to register to vote. The Civil Rights Act was enacted in direct response to this context of disenfranchisement.[11] RITE's desired "result not only would defy common sense, but also would defeat Congress' stated objective." *Quarles v. United States*, 139 S. Ct. 1872, 1879 (2019). "[Courts] should not lightly conclude that Congress enacted a self-defeating statute." *Id.*

CONCLUSION

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

Respectfully submitted this 18th day of December, 2023.

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[11] *See* Comm'n on Civil Rights, Voting: 1961 Commission on Civil Rights Report, Book 1, 56 (1961), https://perma.cc/CC7B-T888.

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 18th day of December, 2023, with a copy of this document via the Court's CM/ECF system.

/s/ Uzoma N. Nkwonta
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