No. 3:23-cv-00672-slc

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

Susan Liebert, et al.

Plaintiffs

v.

Wisconsin Elections Commission, et al.,

Defendants

BRIEF OF *AMICUS CURIAE* RESTORING INTEGRITY AND TRUST IN ELECTIONS IN SUPPORT OF MOTION TO DISMISS

Matthew M. Fernholz
CRAMER MULTHAUF LLP
1601 E. Racine Ave., Suite 200
Waukesha, WI 53186
mmf@cmlawgroup.com

Benjamin M. Flowers (*PHV pending*)
Counsel of Record
ASHBROOK BYRNE KRESGE LLC
P.O. Box 8248
Cincinnati, Ohio 45249
bflowers@ashbrookbk.com
312.898.3932

Counsel for Amicus Curiae Restoring Integrity and Trust in Elections

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INTRODUCTION

"Wisconsin law allows voters to vote absentee without an excuse, no questions asked." *DNC v. Wisconsin State Legislature*, 141 S. Ct. 28, 36 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay); *accord* Wis. Stat. §6.85. But mail-in voting comes with risks. Among other things, citizens "who vote at home, at nursing homes, at the workplace, or in church are more susceptible to pressure, overt and subtle, or to intimidation." Comm'n on Fed. Election Reform, *Building Confidence in U.S. Elections* 46 (2005), https://perma.cc/VCH4-4P99. This case concerns a provision of Wisconsin law—the Witness Requirement—aimed at shoring up these vulnerabilities.

By way of background, Wisconsin requires absentee voters to complete their ballots according to a process that, if followed, reduces opportunities for "pressure" and "intimidation." *Id. accord* Wis. Stat. §6.87. More precisely, voters must complete their ballots in the presence of only a single witness, and they must do so in a manner that prevents the witness from observing the ballot's contents. Wis. Stat. §6.87(2). Voters must then certify the truth of statements describing that process and attest to having followed it. *Id.* The Witness Requirement, for its part, helps officials confirm that voters followed the process. It requires the witness to attest,

"subject to the penalties … for false statements," that the voter's "statements are true and the voting procedure was executed as there stated." Wis. Stat. §6.87(2).

Susan Liebert and her co-plaintiffs argue that this common-sense requirement violates both Section 201 of the Voting Rights Act, 52 U.S.C. §10501, and the "materiality" provision of the Civil Rights Act, 52 U.S.C. §10101(a)(2)(B). Compl., Doc. 1 at 18–22, ¶¶50–62. It does not. That follows as a matter of law, as the Wisconsin Elections Commission and its members explained in the brief they filed supporting their motion to dismiss. *See* Commission Defs.' Br. in Supp. of Mot. to Dismiss ("Comm'n Br."), Doc. 20 at 6–20. This brief offers additional arguments to bolster that conclusion.

STATEMENT

When the government wants truth, it sometimes punishes lies. In court, for example, witnesses "swear or affirm" that they will tell the truth because doing so "preserve[s] the integrity of the judicial process by awakening the witness' conscience and making the witness amenable to perjury prosecution if he fibs." *United States v. Zizo*, 120 F.3d 1338, 1348 (7th Cir. 1997). Similarly, federal law allows for the use of unsworn declarations made "under penalty of perjury," 28 U.S.C. §1746(1), because the threat of perjury "impresses upon the declarant the specific

punishment to which he or she is subjected for certifying to false statements." *In re World Trade Ctr. Disaster Site Litig.*, 722 F.3d 483, 488 (2d Cir. 2013).

The challenged provision in this case rests on the same insight: when the government wants to deter misconduct with respect to matters occurring outside its supervision, it can require that a witness attest, subject to penalties for false statements, that no misconduct occurred.

First, some background. For most of American history, "States typically required nearly all voters to cast their ballots in person on election day and allowed only narrow and tightly defined categories of voters to cast absentee ballots." *Brnovich v. DNC*, 141 S. Ct. 2321, 2339 (2021). That changed in the last few decades, as States began allowing voters to cast absentee ballots without establishing their inability to vote in person. "As of January 1980, only three States permitted no-excuse absentee voting." *Id.* And during the 1990s, most States allowed early and absentee voting only in cases where the voter proved some sort of hardship. *See* Paul Gronke et al., *Early Voting and Turnout*, 40 PS: Pol. Sci. & Pol. 639, 641 (2007), available at https://perma.cc/R5PL-GUC9. But as of 2022, twenty-seven States and Washington D.C. offered no-excuse absentee voting, while eight other States conducted elections exclusively by mail. *See Table 1: States with No-Excuse Absentee Voting*, National Conference of State Legislatures (July 12, 2022), https://perma.cc/B2RW-79S3.

Voting by mail can be convenient. It is also subject to abuse. In the aftermath of the controversial election of 2000, the bipartisan Carter-Baker Commission conducted a study and released a report about weaknesses in American elections. The Carter-Baker Commission concluded that "absentee balloting is vulnerable to abuse in several ways." *Building Confidence in U.S. Elections* at 46. "Citizens who vote at home, at nursing homes, at the workplace, or in church are more susceptible to pressure, overt and subtle, or to intimidation." *Id.* Further, "[v]ote buying schemes are far more difficult to detect when citizens vote by mail." *Id.*

Now turn to the challenged law, which addresses some of the vulnerabilities the Carter-Baker Commission identified. Section 6.87(2) of the Wisconsin Statutes requires that absentee voters complete their ballots in the presence of a single witness. Under the law's Witness Requirement, witnesses must sign a certification "subject to the penalties … for false statements" set forth in Wisconsin law. Wis. Stat. §6.87(2). That certification confirms that no one else (aside from anyone authorized by law to assist with the ballot's completion) was present when the elector completed the ballot. *Id.* The witness must also confirm that he is not a candidate for election on the ballot, that he did not "solicit or advise the elector to vote for or against any candidate or measure," and that the ballot was completed in such a manner that no one (aside from an individual authorized by law to assist with the ballot's

completion) could know how that elector voted. *Id.* Though it is not necessary for understanding this brief, here is the (rather unwieldy) statutory text, in relevant part:

> … the municipal clerk shall place the ballot in an unsealed envelope …. The envelope shall have the name, official title and post-office address of the clerk upon its face. The other side of the envelope shall have a printed certificate …. The certificate shall be in substantially the following form:
>
> [STATE OF ...
>
> County of ...]
>
> or
>
> [(name of foreign country and city or other jurisdictional unit)]
>
> 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.
>
> Signed ...
>
> …

The witness shall execute the following:

> 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.
>
> ...(Printed name)
>
> …(Address)[]
>
> Signed ...
>
> …
>
> **--An individual who serves as a witness for a military elector or an overseas elector voting absentee, regardless of whether the elector qualifies as a resident of Wisconsin under s. 6.10, Wis. Stats., need not be a U.S. citizen but must be 18 years of age or older.

Wis. Stat. 6.87(2) (some alterations in original)

The law thus functions in precisely the same way as rules requiring that witnesses testify, and that declarants sign statements, under penalty of perjury. The threat of penalty for a false statement gives witnesses incentive to ensure the accuracy of their words. And since those words confirm the absence of improper pressure, the Witness Requirement gives voters and witnesses incentive to ensure that no voter is improperly influenced.

Wisconsin adopted the Witness Requirement decades ago. There is no evidence that it ever prevented anyone, including the plaintiffs, from casting a ballot. Their concern is not that the requirement has denied them their right to vote, but

only that the requirement has made it less convenient to vote absentee than they would like. So they are asking this Court to wipe Wisconsin's democratically enacted law from the statute books. They raise two theories. First, they contend that the requirement violates Section 201 of the Voting Rights Act. *See* 52 U.S.C. §10501. Second, they urge that the requirement violates the so-called "materiality" rule of 52 U.S.C. §10101(a)(2)(B).

The Wisconsin Elections Commission and its members moved to dismiss the plaintiffs' complaint under Rule 12(b)(6) for failing to state a claim upon which relief can be granted.

ARGUMENT

The Wisconsin Elections Commission's brief provides sufficient reasons for dismissing the plaintiffs' claims. This brief builds upon those arguments, providing additional textual bases for concluding that the plaintiffs failed to state a claim upon which relief can be granted.

I. The Witness Requirement does not violate Section 201 of the Voting Rights Act.

Section 201 of the Voting Rights Act forbids "den[ying]" anyone "the right to vote" in an election "because of his failure to comply with any test or device." 52 U.S.C. §10501(a). The same law defines "test or device" to include "any requirement that a person as a prerequisite for voting … prove his qualifications by the

voucher of registered voters or members of any other class." §10501(b). All told, Section 201 forbids States from requiring would-be voters to find a registered voter (or a member of some other class of individuals) who can vouch for their qualifications.

The Witness Requirement does not violate Section 201 for multiple reasons. This brief discusses just two. *First*, Section 201 does not protect a right to cast a mail-in ballot where, as here, no such right exists. *Second*, the Witness Requirement does not require that anyone, let alone a registered voter or the member of a defined class of individuals, vouch for any voter's "qualifications."

A. None of the plaintiffs have alleged facts establishing that the Witness Requirement could deny them the right to vote.

Section 201 prohibits using tests or devices to "den[y]" anyone "the right to vote." §10501(a). Thus, to survive a motion to dismiss, plaintiffs must allege that the challenged law denies them their right to vote. They cannot do so. Because Wisconsin law permits them to vote in person, no limit on their ability to vote by mail-in ballot would "den[y]" them their "right to vote." Their claim fails as a matter of law.

When, as here, "the state allows voting in person, there is no constitutional right to vote by mail." *Common Cause Indiana v. Lawson*, 977 F.3d 663, 664 (7th Cir. 2020); *see also Frederick v. Lawson*, 481 F. Supp. 3d 774, 792 (S.D. Ind. 2020). Thus, States may outright deny their citizens the ability to vote absentee without denying

them the right to vote. *See McDonald v. Bd. of Election Comm'rs of Chicago*, 394 U.S. 802, 810–11 (1969). And for nearly all of American history, few voters even had the option, let alone the right, to vote absentee. *Brnovich*, 141 S. Ct. at 2339.

The recent vintage of no-fault absentee voting confirms that a right to vote absentee is not encompassed by the "right to vote" that Section 201 protects. When a "practice … 'has been open, widespread, and unchallenged'" since the enactment of a legal prohibition, the prohibition is best interpreted not to cover that practice. *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2567 (2019) (quoting *NLRB v. Noel-Canning*, 573 U.S. 513, 572 (2014) (Scalia, J., concurring in judgment)). That principle matters here, because when Congress enacted Section 201 in 1965, when it amended the law in 1975 to make it applicable in every State, and for decades thereafter, States did not permit no-fault absentee balloting. Instead, "States typically required nearly all voters to cast their ballots in person on election day and allowed only narrow and tightly defined categories of voters to cast absentee ballots." *Brnovich*, 141 S. Ct. at 2339. Because this narrow and tightly restrained approach to absentee voting was open, widespread, and unchallenged at the time of Section 201's enactment and amendment, Section 201 should not be read to prohibit that approach. Instead, the Court should hold that the "right to vote" that Section 201 protects does not include a right to vote absentee in States, like Wisconsin, that allow in-person

voting. The contrary reading would mean that nearly all States were violating Section 201 from the day it first applied to them. And that reading would require embracing the even-more-implausible conclusion that voting-rights litigants failed to obtain a judicial decision redressing this widespread error.

In sum, the plaintiffs do not allege that the Witness Requirement interferes with the "right to vote" that Section 201 protects. They allege only that it interferes with the convenience of voting absentee. Their claim thus fails as a matter of law.

To be sure, if the government barred some voter from casting an in-person vote (by, for example, deploying that person to serve abroad in the military), that voter could argue on an as-applied basis that the Witness Requirement affected his "right to vote." §10501(a). (The easy-to-comply-with Witness Requirement would not "deny" him that right, however. *See below* 11–16.) But none of the plaintiffs allege comparable circumstances; they all allege that voting absentee is simply more convenient than voting in person. Regardless, even if the plaintiffs did allege such circumstances, they would be entitled only to as-applied relief. Here, however, the plaintiffs seek facial relief—they argue that the Witness Requirement violates Section 201 in all its applications. That claim fails as a matter of law for the reasons just discussed.

B. The Witness Requirement does not require witnesses to vouch for any voter's "qualifications."

Beyond alleging a harm not covered by Section 201, the plaintiffs' complaint fails because the Witness Requirement is not a "test or device" prohibited by Section 201. The Witness Requirement does not require "that a person as a prerequisite for voting … prove his qualifications by the voucher of" anyone else. §10501(b).

Return to the text of the challenged law. When a Wisconsin voter completes an absentee ballot, she must sign a certification. The relevant contents appear in two sentences, separated in what follows for the sake of clarity:

> ***[Sentence 1:]*** 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.
>
> ***[Sentence 2:]*** 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) (first alteration in original) (ellipsis in original).

All told, the voter certification contains "two sets of information." Comm'n Br.13. "One set," which appears in the first sentence, "relates to [the voter's] residence, entitlement to vote, and that she is not voting at another polling place or in person." *Id.* The second set, which appears in the second sentence, "relates to the process she has used to vote, including showing the unmarked ballot to the witness, voting in the witness's presence, casting the ballot in a way that no one can see how she voted, and sealing the ballot in the envelope." *Id.*

This case does not directly concern the voter certification. Instead, it concerns the witness certification that builds upon it. That certification provides:

> 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.

Wis. Stat. §6.87(2) (emphasis added).

The plaintiffs' challenge to the Witness Requirement turns on a contested interpretation of the italicized words. According to the plaintiffs, the italicized words require the witness to certify the truth of *all* information in the voter certification, including information in the first sentence of that certification. Because that sentence includes information concerning the voter's eligibility to vote in the election,

the plaintiffs read the Witness Requirement as obligating the witness to certify the voter's eligibility to vote. This, they say, constitutes a requirement that voters prove their "qualifications by the voucher" of another person, triggering Section 201.

The Commission convincingly shows that the plaintiffs' reading is wrong; witnesses must certify the truth of the information in the second sentence alone. Comm'n Br.13–16. Two textual clues, and two interpretive tiebreakers, show why.

The Witness Requirement states that a "*witness*" must execute a statement, which begins with the phrase "I, the undersigned *witness*." Wis. Stat. §6.87(2) (emphasis added). A "witness," in this context, is "one who sees or knows something and testifies about it." Bryan A. Garner, *A Dictionary of Modern Legal Usage* 938 (2d ed. 1995). Thus, a statute requiring a "witness" to sign a certification is most naturally read as requiring that person to certify the truth of statements concerning something he saw or knows. Here, that means "the witness attests to what he has seen: the voting process," which the second sentence of the voter certification, not the first, speaks to. Comm'n Br.14. It would be passing strange to speak of a "witness" signing a statement certifying the truth of statements based on events and facts of which the signatory has no first-hand knowledge. Yet, that is what the plaintiffs' reading entails.

Further, the Witness Requirement does not refer to "the above statements" in a vacuum. Instead, the statement appears in the following sentence: "I, the undersigned witness, … certify that … the above statements are true *and the voting procedure was executed as there stated*." Wis. Stat. §6.87(2) (emphasis added). The phrase "the above statements" is thus tied to an affirmation about "the voting procedure … as there stated." *Id.* As stated where? As stated in the "above statements" concerning the voting procedure. Those statements appear only in the second sentence, suggesting those are the only statements to which the certification refers. This way of speaking is common in everyday speech. Imagine a mayor presiding over a heated debate about the siting of a new school building. Many citizens object to the cost of building a school on that site. Many others object to the inconvenience of busing students to that location. Suppose, when the public-comment period ends, the mayor were to say: "The comments tonight are correct and the school will be difficult to service with buses." Would anyone understand the mayor to be saying that *every* comment was correct? Or only those to which the second half of the conjunctive statement speaks? Surely the latter. So too here.

Insofar as the statute's meaning is ambiguous, two other principles break the tie in favor of the Commission's reading.

Begin with the principle that a "textually permissible interpretation that furthers rather than obstructs the document's purpose should be favored." *Town of Rib Mountain v. Marathon Cnty.*, 386 Wis. 2d 632, 650 (2019) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law* §4, p.63 (2012)). The Witness Requirement exists to help implement Wisconsin's absentee-voting laws. Those laws broadly permit absentee voting; "any otherwise qualified elector who for any reason is unable *or unwilling* to appear at the polling place in his or her ward or election district" may vote absentee. Wis. Stat. §6.85(1) (emphasis added). The plaintiffs' reading of the Witness Requirement would "obstruct" that manifest purpose. *Rib Mountain*, 386 Wis. 2d at 650. Exceedingly few witnesses would be able to truthfully certify that a voter is "entitled to vote in" a particular ward or district at a particular election. Wis. Stat. §6.87(2). Thus, if the Witness Requirement were read to require such certifications, it would dramatically narrow—and in a quite-inconspicuous way—the generous no-excuse, absentee-voting regime that Wisconsin law expressly seeks to facilitate. Such readings are not favored.

Then there is the constitutional-doubt canon. When "'the constitutionality of a statute is at issue, courts attempt to avoid an interpretation that creates constitutional infirmities.'" *State v. Stenklyft*, 281 Wis. 2d 484, 495 (2005) (quoting Pa*nzer v. Doyle*, 271 Wis. 2d 295, 339 (2004). The Commission's reading eliminates any risk

that the Witness Requirement contravenes Section 201. It thus eliminates any risk that the provision is constitutionally infirm under the Supremacy Clause of the United States Constitution. That too counsels in favor of breaking any tie in the Commission's favor.

* * *

In sum, the Witness Requirement neither "denie[s]" anyone the "right to vote" nor requires any witness to vouch for a voter's "qualifications." §10501(a)–(b). For these reasons, and for the other reasons laid out in the Commission's brief, the plaintiffs' Section 201 claim fails as a matter of law.

II. The Witness Requirement does not violate 52 U.S.C. §10101(a)(2)(B).

The plaintiffs' second claim seeks relief under the "materiality provision" of the Civil Rights Act. That provision forbids:

> deny[ing] the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election.

52 U.S.C. §10101(a)(2)(B).

"This provision has five elements." *Ritter v. Migliori*, 142 S. Ct. 1824, 1825 (2022) (Alito, J., dissenting from the denial of the application for stay). *First*, the plaintiff must show that the alleged lawbreaker was "'acting under color of law.'" *Id.*

(quoting §10101(a)(2)(B)). *Second*, the alleged violation "must have the effect of "denying" an individual "the right to vote." *Id.* (alterations accepted). *Third*, "this denial must be attributable to 'an error or omission on a record or paper.'" *Id.* (alterations accepted) (quoting §10101(a)(2)(B)). *Fourth*, "the 'record or paper' must be 'related to an application, registration, or other act requisite to voting.'" *Id.* (alternations accepted) (quoting §10101(a)(2)(B)). *Fifth*, "the error or omission must not be 'material in determining whether such individual is qualified under State law to vote in such election.'" *Id.* (quoting §10101(a)(2)(B)).

The plaintiffs' challenge to the Witness Requirement fails under the second, fourth, and fifth elements.

Element 2. The Witness Requirement will never "deny the right of any individual to vote … because of an error or omission on any record or paper …" §10101(a)(2)(B). And that is true even assuming *arguendo* that the "right of any individual to vote," for purposes of the materiality provision, encompasses the right to vote by absentee ballot. *Id.*

"Casting a vote … requires compliance with certain rules." *Brnovich*, 141 S. Ct. at 2338. "Even the most permissive voting rules must contain some requirements." *Ritter*, 142 S. Ct. at 1825 (Alito, J., dissenting from the denial of the application for stay). For example, every State requires voters to cast their votes by a certain

date, to return mail-in ballots to specified addresses, and so on. Those who fail to comply with such requirements are not *denied* the right to vote, they simply fail to properly exercise it. Put differently, the "failure to follow those rules constitutes the forfeiture of the right to vote, not the denial of that right." *Id.* For that reason, the materiality provision cannot be read to "apply to the counting of ballots by individuals *already deemed qualified to vote*"—it has no bearing on individuals who are eligible to vote but who fail properly to do so. *Friedman v. Snipes*, 345 F. Supp. 2d 1356, 1371 (S.D. Fla. 2004) (emphasis in original).

The same logic applies to the Witness Requirement. That provision sets forth a rule with which voters must comply when "[c]asting a vote." *Brnovich*, 414 S. Ct. at 2338. "When a mail-in ballot is not counted because" the required certification is missing or "not filled out correctly, the voter is not denied 'the right to vote.'" *Ritter*, 142 S. Ct. at 1825 (Alito, J., dissenting from the denial of the application for stay). "Rather, that individual's vote is not counted because he or she did not follow the rules for casting a ballot." *Id.* The individual was not denied the right to vote—she forfeited it, just as an individual who returned the ballot to the wrong address or mailed the ballot after the election ended would forfeit the right. Indeed, under the plaintiffs' logic, States would have to find ways to accommodate voters who misaddress their ballots—the erroneous address would be an "error" on a "record" related

to voting. That is not, however, the type of error this civil-rights law was enacted to capture. The materiality provision "was intended" not to forgive non-compliance with rules regarding the casting of ballots, but rather "to address the practice of requiring unnecessary information for voter registration with the intent that such requirements would increase the number of errors or omissions on the application forms, thus providing an excuse to disqualify potential voters." *Schwier v. Cox*, 340 F.3d 1284, 1294 (11th Cir. 2003).

Element 4. The plaintiffs contend that ballots not counted because of non-compliance with the Witness Requirement are discounted because of "an error or omission on [a] record or paper." §10101(a)(2)(B). That would satisfy the materiality provision's third element. But to satisfy the fourth, the plaintiffs would need to show that the "record or paper" in question "relat[es] to any application, registration, or other act requisite to voting." *Id.* As a matter of law, they cannot make that showing.

The Witness Requirement pertains to a certification attached to the envelope in which absentee ballots are cast. That envelope does not "relat[e] to any application" or "registration," *id.*, as no voter will receive a ballot unless he has already registered or applied to vote. Thus, the plaintiffs can satisfy element four *only if* the required certification "relat[es] to any … other act requisite to voting." *Id.* And the certification does not relate to any other act requisite to voting; the witness

certification is submitted as part of the act of voting itself, not as part of an "act requisite to voting." *Id.* This follows for several reasons.

Consider first the *ejusdem generis* canon. "*Ejusdem generis* is a textual canon that seeks to clarify a broad or general term by looking to the specific items preceding that term for clues as to how that term should be construed." *Citizens Ins. Co. of Am. v. Wynndalco Enterprises, LLC*, 70 F.4th 987, 999 (7th Cir. 2023). It provides that, when "'general words follow specific words ..., the general words are usually construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.'" *Id.* (ellipsis in original) (quoting *Yates v. United States*, 574 U.S. 528, 545 (2015) (plurality op.)). This canon applies fully to the following phrase in the materiality provision: "application, registration, or other act requisite to voting." §10101(a)(2)(B). This list includes two specific words, "application" and "registration," followed by a general phrase, "other act requisite to voting." *Id.* Applications and registrations are records and papers that citizens must complete to establish their eligibility to vote—these documents are "requisite to" the act of voting in that they make it possible to vote. They are not, however, part of the act of voting itself. The general phrase "other act requisite to voting" should be understood to be similarly limited. And because the Witness Requirement governs the act of voting

itself, rather than some step citizens must take to establish their eligibility to vote, it falls outside the materiality provision's scope.

Surrounding context bolsters this interpretation. The materiality provision *permits* state laws barring citizens from voting based on errors or omissions that are "material in determining whether such individual is *qualified* under State law to vote in such election." *Id.* (emphasis added). The statute is thus trained on errors or omissions in documents that establish voter qualifications, not errors or omissions in documents, such as mail-in ballots, that voters use to carry out the act of voting itself.

Finally, interpreting the materiality provision to govern errors or omissions on ballots themselves would contravene the rule that "Congress does not 'hide elephants in mouseholes.'" *Owner-Operator Indep. Drivers Ass'n, Inc. v. United States Dep't of Transportation*, 840 F.3d 879, 889 (7th Cir. 2016) (quoting *Whitman v. Am. Trucking Ass'ns.*, 531 U.S. 457, 468 (2001)). This is easiest to see "by considering what would happen if" the materiality provision "were applied to a mail-in voting rule that is indisputably important, namely, the requirement that a mail-in ballot be signed." *Ritter*, 142 S. Ct. at 1826 (Alito, J., dissenting from the denial of the application for stay). "Suppose a voter did not personally sign his or her ballot but instead instructed another person to complete the ballot and sign it using the standard notation employed when a letter is signed for someone else: 'p. p. John or Jane Doe.'"

Id. "Or suppose that a voter, for some reason, typed his or her name instead of signing it." *Id.* Or suppose the voter simply refused to sign. "Those violations would be material in determining whether a ballot should be counted, but they would not be 'material in determining whether such individual is qualified under State law to vote in such election.'" *Id.* Thus, if omissions on mail-in ballots constituted errors or omissions in records or papers "relating to any … other act requisite to voting," §10101(a)(2)(B), the materiality provision would preempt nearly every state law requiring that voters complete or sign or attest to a fact on their ballots. And a signature or attestation is just the beginning. Mail-in ballots are replete with requirements the voter must perform, all made suspect and subject to federal oversight under the plaintiffs' reading of the materiality clause. Had Congress meant to make so sweeping a change, it would have said so clearly.

In sum, the materiality provision covers only errors or omissions in documents needed to establish voter eligibility. It does not extend to errors or omissions in documents submitted as part of the act of voting. And while the Third Circuit held otherwise in one thinly reasoned opinion, *see Migliori v. Cohen*, 36 F.4th 153, 163–64 (3d Cir. 2022), the Supreme Court later vacated the decision, *Ritter v. Mgliori*, 143 S. Ct. 297 (2022). No appellate precedent, and certainly no *binding* appellate precedent, counsels interpreting the materiality provision as applying to documents submitted

as part of the act of voting. (And in one recent decision, the Fifth Circuit expressed skepticism that the materiality provision applies to "acts" one undertakes when "casting a ballot." *Vote.Org v. Callanen*, 39 F.4th 297, 305 n.6 (5th Cir. 2022) (quoting *Ritter*, 1452 U.S. 1824 (Alito, J., dissenting from the denial of the application for stay)). Because the Witness Requirement is submitted during the process of voting, any errors or omissions relating to that requirement do not implicate the materiality provision.

Element 5. Suppose the foregoing is wrong, and that completion of the required witness certification really is an "other act requisite to voting." §10101(a)(2)(B). That would help the plaintiffs satisfy the fourth element. But it would doom their chances of satisfying the fifth. Plaintiffs would escape the frying pan only to land in the fire.

To see why, one need look no further than this Court's decision in *Common Cause v. Thomsen*, 574 F. Supp. 3d 634 (W.D. Wis. 2021). The plaintiffs in *Common Cause* challenged a Wisconsin law that required in-person voters to identify themselves with ID cards bearing their signatures. "Common Cause Wisconsin contend[ed] that a voter ID is a 'record or paper' relating to voting, and that the omission of a signature [was] not material to determining whether" anyone "is qualified to vote." *Id.* at 636. Therefore, Common Cause argued, the requirement violated the

materiality provision, since it denied the right to vote based on an omission "not material [to] determining whether [an] individual is qualified under State law." §10101(a)(2)(B). This Court disagreed. It recognized that §10101 defines the phrase "qualified under State law" to mean "qualified according to the laws, customs, or usages of the State." *Common Cause*, 574 F. Supp. 3d at 636 (quoting §10101(e)). "Under Wisconsin law, an individual is not qualified to vote without a compliant ID." *Id.* Because complaint IDs require a signature, the "omission" of a signature is always "material" to "determining whether [an] individual is qualified under State law to vote." §10101(a)(2)(B). Common Cause, therefore, could not satisfy the fifth element of §10101(a)(2)(B), since it could not establish the immateriality of the supposed "omission." *See also Org. for Black Struggle v. Ashcroft*, 493 F. Supp. 3d 790, 803 (W.D. Mo. 2020) (recognizing that the materiality provision allows election officials to "reject applications and ballots that do not clearly indicate the required information required by Missouri statute").

Return to this case. If the certification requirement really does relate to an "act requisite to voting," then the plaintiffs' claim fails under the sound reasoning of *Common Cause*. For if completion of the required certification is an "act requisite to voting," §10101(a)(2)(B)—if it really establishes a qualification to vote—then "an individual is not qualified to vote" absentee "[u]nder Wisconsin law" without the

completed certification. *Common Cause*, 574 F. Supp. 3d at 636. Therefore, the omission of a completed certification is "material [to] determining whether an individual is qualified under State law," §10101(a)(2)(B), and the plaintiffs cannot satisfy the fifth element as a matter of law.

One might counter: If the materiality provision does not displace state-law requirements, what use is it? The answer is that it prevents administrative abuse. Congress enacted the materiality provision "to eliminate the discriminatory practices of registrars through *arbitrary enforcement* of registration requirements," *McKay v. Altobello*, No. Civ. A. 96-3458, 1996 WL 635987, at *1 (E.D. La. Oct. 31, 1996), not to eliminate State legislatures' authority to determine what those requirements ought to be, *see Common Cause*, 574 F. Supp. 3d at 636; *Org. for Black Struggle*, 493 F. Supp. 3d at 803. Thus, county officials that reject documents for failing to include information (like birth years and social-security numbers) that state law does not require may run afoul of the materiality provision. *See, e.g.*, *Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1308 (N.D. Ga. 2018); *Schwier v. Cox*, 412 F. Supp. 2d 1266, 1276 (N.D. Ga. 2005). But the materiality provision plays no role in cases where administrators enforce requirements imposed, and thus deemed "material," by state law. *See Common Cause*, 574 F. Supp. 3d at 636 (distinguishing *Martin* on these grounds).

CONCLUSION

The Court should grant the Wisconsin Elections Commission's motion to dismiss.

Matthew M. Frenholz (SBN: 1065765)
CRAMER MULTHAUF LLP
1601 E. Racine Ave., Suite 200
Waukesha, WI 53186
mmf@cmlawgroup.com

/s/ Benjamin M. Flowers
Benjamin M. Flowers (*PHV pending*)
Counsel of Record
ASHBROOK BYRNE KRESGE LLC
P.O. Box 8248
Cincinnati, Ohio 45249
bflowers@ashbrookbk.com
312.898.3932

Counsel for Amicus Curiae Restoring Integrity and Trust in Elections

CERTIFICATE OF SERVICE

All counsel of record who are deemed to have consented to electronic service are being served today, November 3, 2023, with a copy of this document via the Court's CM/ECF system.

/s/ Benjamin M. Flowers
Benjamin M. Flowers (*PHV* pending)
Counsel of Record
ASHBROOK BYRNE KRESGE LLC
P.O. Box 8248
Cincinnati, Ohio 45249
bflowers@ashbrookbk.com
312.898.3932

Matthew M. Fernholz (SBN: 1065765)
CRAMER MULTHAUF LLP
1601 E. Racine Ave., Suite 200
Waukesha, WI 53186
mmf@cmlawgroup.com