STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 12

PRIORITIES USA, et al.,

Plaintiffs,

v. Case No. 23-CV-1900

WISCONSIN ELECTIONS COMMISSION,

Defendant.

BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS THE COMPLAINT

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INTRODUCTION

Plaintiffs seek a declaration that four provisions of state statutes governing Wisconsin elections law are unconstitutional under the Wisconsin Constitution.

Their complaint fails to state a claim under governing legal standards. Whether under the federal *Anderson/Burdick* balancing test or the Wisconsin Supreme Court's most recent iteration in *Milwaukee Branch of NAACP*, voting statutes that do not severely burden the right to vote pass muster if they could rationally further a legitimate state interest. All four measures here satisfy that standard. And the fourth claim is also non-justiciable.

While the Wisconsin Elections Commission has acted, when able, to promote access to vote early and absentee, Plaintiffs' desire for different measures regulating those options is not tantamount to a constitutional right.

BACKGROUND

Plaintiffs Priorities USA and Wisconsin Alliance for Retired Americans are two public interest groups and one individual, William Franks, Jr., who challenge four provisions of Wisconsin election law relating to absentee ballots. (Doc. 2 ¶¶ 7–14.) They assert their missions include educating voters and that the laws require them to spend more dollars on that effort. (Doc. 2 ¶¶ 8, 11.) Defendant Wisconsin Elections Commission (the "Commission") is a state

agency responsible for administering and enforcing Wisconsin's election laws, including by providing guidance regarding those laws. (Doc. 2 ¶¶ 15, 24.)

The challenged laws are Wis. Stat. § 6.87(4)(b)1.'s witness requirement (Doc. 2 ¶¶ 75–77); Wis. Stat. § 6.87(4)(b)1., as interpreted by *Teigen v. Wisconsin Elections Commission*, 2022 WI 64, 403 Wis. 2d 607, 976 N.W.2d 519, *reconsid. denied*, 2022 WL 17574138 (Wis. Sup. Ct. Sept. 19, 2022), as lacking drop boxes as an absentee ballot return method (Doc. 2 ¶ 84); Wis. Stat. § 6.87(6), which sets a deadline to cure mistakes on absentee ballot certifications by 8 p.m. on election day (Doc. 2 ¶ 98); and Wis. Stat. § 6.84, a general provision with a statement of policy and requirement that certain election procedures be treated as mandatory (Doc. 2 ¶¶ 108, 112). Plaintiffs also challenge parallel Commission guidance giving information about those provisions.

Plaintiffs seek a declaration that the challenged statutes are facially unconstitutional under the guarantee of the right to vote under Wis. Const. art. III, § 1 and the Legislature's option to provide for absentee voting under Wis. Const. art. III, § 2.

ARGUMENT

I. Ballot requirements that do not severely burden the right to vote are subject to rational basis review, and Plaintiffs must prove that the laws unconstitutionally burden Wisconsin voters as a group.

Plaintiffs face a high hurdle in seeking to facially invalidate four different Wisconsin Statutes. Under governing law, voting laws that do not severely burden voting are reviewed for whether the law could further a legitimate state interest. And for a facial challenge, Plaintiffs cannot simply identify a group of voters who are burdened by a law; they must demonstrate the law's unconstitutionality across Wisconsin voters as a whole.

A. Under either *Anderson/Burdick* or *Milwaukee Branch of NAACP*, laws that do not severely burden voting are analyzed under rational basis review, and they must be assessed in the context of all opportunities to vote.

Plaintiffs claim that the four election features are constitutional only if they pass strict scrutiny review, and that the laws cannot meet that standard. That is not the governing test.

Courts vary the degree of constitutional scrutiny depending on the severity of any burden the challenged law may impose on the overall opportunity to vote. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (referencing *Anderson* and *Burdick*); *Milwaukee Branch of NAACP v. Walker*, 2014 WI 98, ¶¶ 22, 40, 357 Wis. 2d 469, 851 N.W.2d 262 (same).

1. The *Anderson/Burdick* standard results in rational basis review for challenges to absentee voting regulations.

Under what is commonly called the *Anderson/Burdick* test, a court weighs "the character and magnitude of the asserted injury" against "the precise interests" the state is seeking to serve. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (discussing *Anderson v. Celebrezze*, 460 U.S. 780 (1983)). A regulation deserves strict scrutiny only when it places "severe burdens on plaintiffs' rights." *Timmons*, 520 U.S. at 358. When the burden is not severe, the review is "less exacting" and a "State's 'important regulatory interests' will usually be enough to justify 'reasonable, nondiscriminatory restrictions.'" *Id.* (quoting *Burdick*, 504 U.S. at 434; *Anderson*, 460 U.S. at 788).

In analyzing laws regulating absentee ballots, courts have recognized that the *Anderson/Burdick* test results in rational basis review. In *McDonald v. Chicago Board of Election Commissioners*, 394 U.S. 802, 804–05 (1969), the U.S. Supreme Court held that, as long as voters' opportunity to vote in person is not reduced, constitutional challenges to rules for absentee ballots are considered under rational basis review. The U.S. Court of Appeals for the Seventh Circuit has concluded that harmonizing *McDonald* and *Anderson/Burdick* results in rational basis review: "all election laws affecting the right to vote are subject to the *Anderson/Burdick* test, but election laws that do not curtail the right to vote need only pass rational-basis

scrutiny." *Tully v. Okeson*, 977 F.3d 608, 616 (7th Cir. 2020). *Tully* concluded that absentee ballot requirements fall in the latter category because voters generally can still vote in person. *Id.*; *see also Common Cause Ind. v. Lawson*, 977 F.3d 663, 664 (7th Cir. 2020) ("As long as it is possible to vote in person, the rules for absentee ballots are constitutionally valid if they are supported by a rational basis and do not discriminate based on a forbidden characteristic such as race or sex.").

Rational basis review for absentee ballots is consistent with the more general principle that rules for voting be assessed in the context of the whole electoral system. *Luft v. Evers*, 963 F.3d 665, 671–72 (7th Cir. 2020). Thus, whether a limit on absentee voting unconstitutionally affects voters must be assessed in the context of other opportunities to cast a ballot, including in person. If the law does not curtail that more general right, it need only pass rational basis scrutiny. *Tully*, 977 F.3d at 611 ("[U]nless a state's actions make it harder to cast a ballot at all, the right to vote is not at stake."); *see also Common Cause v. Thomsen*, 574 F. Supp. 3d 634, 636 (W.D. Wis. 2021) (reviewing constitutionality of requirements for student IDs for voting under rational basis review because students could also use forms of ID available to all voters).

2. Wisconsin courts have followed the equivalent of the *Anderson/Burdick* standard.

While the Wisconsin Supreme Court has not considered a challenge to rules for absentee ballots under the state constitution, Wisconsin courts reviewing challenges to in-person voting statutes generally follow the federal courts' lead. The supreme court's most recent review of a state constitutional challenge to a voting statute created the equivalent of an *Anderson/Burdick* test.

In *Milwaukee Branch of NAACP*, the supreme court considered a challenge to Wisconsin's voter ID law under the state constitution. The court held that a voter regulation is subject to strict scrutiny if it creates a severe burden on the right to vote, but that it is otherwise presumed valid, and reviewed under rational basis. *Milwaukee Branch of NAACP*, 357 Wis. 2d 469, ¶¶ 22, 40 (referencing *Anderson* and *Burdick*).

The court first assessed whether the time, inconvenience, and cost imposed by the voter ID law on in-person voting were severe. *Id.* ¶¶ 40–71. It concluded they were not, reasoning that the state could not charge a fee for ID cards and the time and inconvenience to get a card were "in many respects no more of an imposition than is casting an in-person ballot on election day." *Id.* ¶¶ 71, 77.

The court then turned to a rational basis review of the law. *Id.* ¶¶ 71, 80. It concluded that "[i]t should be beyond question that the State has a significant and compelling interest in protecting the integrity and reliability of the electoral process, as well as promoting the public's confidence in elections." *Id.* ¶ 73. It further reasoned that because voter ID did not severely burden the exercise of the franchise, the state needed only a legitimate state interest and the measures were a reasonable means of serving that interest. *Id.* ¶¶ 75–76.

The supreme court's recognition that the right to vote is properly subject to reasonable regulation was consistent with longstanding precedent. In *State ex rel. Runge v. Anderson*, 100 Wis. 523, 76 N.W. 482 (1898), for example, the court reaffirmed that reasonable regulations further the exercise of the franchise:

> Manifestly, the right to vote, the secrecy of the vote, and the purity of elections, all essential to the success of our form of government, cannot be secured without legislative regulations. Such regulations, within reasonable limits, strengthen and make effective the constitutional guaranties instead of impairing or destroying them. Some interference with freedom of action is permissible and necessarily incident to the power to regulate at all, as some interference with personal liberty is necessary and incident to government; and so far as legislative regulations are reasonable and bear on all persons equally so far as practicable in view of the constitutional end sought, they cannot be rightfully said to contravene any constitutional right.

Id. at 533–34. Similarly, in *State ex rel. Frederick v. Zimmerman*, 254 Wis. 600, 614, 37 N.W.2d 473 (1949), the court confirmed that while the right to cast a

ballot cannot be substantially impaired, "the legislature has the constitutional power to say how, when and where his ballot shall be cast."

B. Plaintiffs' facial constitutional challenges face an uphill climb.

Beyond the standard of review, Plaintiffs' task in proving the facial unconstitutionality of the four laws is daunting.

Plaintiffs do not focus on a specific group of voters facing significant in-person voting disabilities, for example. That is for good reason, because it is settled that voters with a disability are entitled to assistance in casting their absentee ballots. *Carey v. WEC*, 624 F. Supp. 3d 1020, 1032–33 (W.D. Wis. 2022). Such assistance would extend to complying with the witness requirement, timely returning a ballot, or curing any error on the certification.

Plaintiffs instead assert that the four laws are generally unconstitutional across all voters. Thus, Plaintiffs must show that the broad application of the laws to all voters imposes burdens on the right to vote that are severe enough and widespread enough—when considered in relation to the law's legitimate sweep—to justify the strong medicine of facial invalidation. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 199–200, 202–03 (2008).

In *Crawford*, the plaintiffs alleged that voter ID requirements, as generally applied to all voters, imposed an unconstitutional burden on the

right to vote. *Id.* at 187. The U.S. Supreme Court did not analyze the burdens on particular voters or groups, but rather "consider[ed] only the statute's *broad application to all Indiana voters*." *Id.* at 202–03 (emphasis added). That is the standard Plaintiffs here would need to satisfy.

II. The election laws at issue pass constitutional muster as a matter of law.

None of Plaintiffs' four claims can surmount those high hurdles. Under either *Anderson/Burdick* or *Milwaukee Branch of NAACP*, the measures do not severely burden the ability to vote across all voters. That means that they are valid because they could further legitimate state interests. And the fourth claim is not justiciable, but merely seeks an advisory opinion.

A. The witness requirement is constitutional.

Plaintiffs challenge the requirement in Wis. Stat. § 6.87(4)(b)1., requiring an elector to mark her absentee ballot in the presence of a witness, as a violation of Wis. Const. art. III, § 1.[1] This fails to state a claim as a matter of law.

[1] For each challenged absentee voting provision, Plaintiffs also challenge the Commission's Uniform Instructions for Wisconsin Absentee Voters (EL-128) and Election Administration Manual to the extent that those documents simply restate the law.

1. The witness requirement does not severely burden the right to vote.

Under *Anderson*/*Burdick* or *Milwaukee Branch of NAACP*, a court "weigh[s] 'the character and magnitude of the asserted injury'" to voting rights "against 'the precise interests put forward by the State as justifications for the burden imposed by its rule.'" *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789); *Milwaukee Branch of NAACP*, 357 Wis. 2d 469, ¶¶ 22, 40. Under this framework, election laws that do not curtail the right to vote need only pass rational-basis scrutiny. *Milwaukee Branch of NAACP*, 357 Wis. 2d 469, ¶¶ 22, 40; *Tully*, 977 F.3d at 616.

Plaintiffs' challenge focuses on a specific group of voters: those who "rely on absentee ballots" and live alone. (Doc. 2 ¶¶ 76–77.) Because this is a facial challenge, limiting the claim to this subset is insufficient to invalidate the law as to all voters.

Further, even for that group, the question is whether the burden "may be overcome with some reasonable effort." *Democratic Nat'l Comm. v. Bostelmann*, 451 F. Supp. 3d 952, 979 (W.D. Wis. 2020), *rev'd in part on other grounds*, 2020 WL 3619499 (7th Cir. Apr. 3, 2020). It can.

In *Bostelmann*, the Seventh Circuit rejected a constitutional challenge to applying the statute even in the initial days of the COVID-19 pandemic, when voters were confined at home and had limited interaction with

others. *Bostelmann*, 2020 WL 3619499, at *2 (order staying preliminary injunction, in part). Staying a district court's preliminary injunction, the court pointed to the available options for voters as discussed in Commission guidance to municipal clerks. They included "at least five concrete alternative suggestions for how voters can comply with the state's witness and signature requirements in light of the extraordinary challenges presented by the COVID-19 crisis." *Id.*

Plaintiffs also assert the witness requirement severely limits the right to vote by secret ballot (Doc. 2 ¶ 77), but the statutes protect against that outcome. Under Wis. Stat. § 6.87(4)(b)1., the elector must mark the ballot in the presence of the witness in a way that will not reveal her vote. The elector must also, in the presence of the witness, fold the ballot to conceal the marking and place it in the proper envelope. Wis. Stat. § 6.87(4)(b)1. Therefore, on its face, the statute is carefully written so that compliance by the elector will not reveal her choice.

Plaintiffs allege that an absentee elector could have her vote revealed if she slides the "ballot under the door to a stranger" in an attempt to get a certificate signed. (Doc. 2 ¶ 76.) This scenario is purely speculative, much less the basis for a facial constitutional claim.

Under Wisconsin Statutes, a voter who can visit the clerk's office or alternative voting site can mark their ballot in front of a municipal clerk (or

agent) who can act as the witness. The state's early voting procedures are actually in-person absentee voting procedures; the statute does not require an absentee elector to vote at home. *See* Wis. Stat. §§ 6.855, 6.86(1)(b); *Teigen*, 403 Wis. 2d 607, ¶ 227 ("'alternate absentee ballot sites' . . . are commonly referred to as early in person absentee voting, or simply 'early voting'") (Bradley, A.W., J., dissenting); *Luft*, 963 F.3d at 669 ("Wisconsin also has a variant of early voting: voters may cast their absentee ballots in person.").

Whomever a voter chooses to be a witness, the voter can follow the statutory procedure for carefully marking, folding, and placing the absentee ballot in the envelope and explain that the witness should not open the envelope. That person can also assist them in ensuring that the ballot is timely returned. *Carey*, 624 F. Supp. 3d at 1032–33.

2. The witness requirement could further legitimate state interests.

Given that the burden caused by the witness requirement is not severe, the question is whether such a policy choice could further legitimate state interests. The choice would rationally relate to two legitimate state interests.

The Wisconsin Legislature has identified fraud and undue influence as interests in regulating absentee ballots: "the privilege of voting by absentee ballot must be carefully regulated to prevent the potential for fraud or abuse; to prevent overzealous solicitation of absent electors who may prefer not to

participate in an election; to prevent undue influence on an absent elector to vote for or against a candidate or to cast a particular vote in a referendum; or other similar abuses." Wis. Stat. § 6.84(1).

Courts have recognized that these interests are legitimate and that witness requirements, including Wisconsin's, further those interests. The U.S. Supreme Court has explained that "States certainly have an interest in protecting the integrity, fairness, and efficiency of their ballots and election processes as means for electing public officials." *Timmons*, 520 U.S. at 364. The Court has recognized that fraud discourages participation in democracy: "[v]oter fraud drives honest citizens out of the democratic process and breeds distrust of our government." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006).

In an order staying a preliminary injunction during the COVID-19 pandemic, the Seventh Circuit recognized that Wisconsin's witness signature requirement reflects the state's "substantial interest in combatting voter fraud." *Bostelmann*, 2020 WL 3619499, at *2. And a federal district court found that North Carolina's similar absentee voter witness requirement "plays a key role in preventing voter fraud and maintaining the integrity of elections, much like an in-person voter is required to state their name and address upon presenting themselves at an in-person polling place; the act of identification, as witnessed by the poll worker, acts as the same deterrent from committing

fraud." *Democracy N.C. v. N.C. State Bd. of Elections*, 476 F. Supp. 3d 158, 206 (M.D.N.C. 2020).

Wisconsin Stat. § 6.87(4)(b)1.'s witness requirement for absentee ballots could further the legitimate state interests in deterring voter fraud and preventing undue influence. It would be rational to require another person to witness the act of the absentee elector's marking of her ballot to ensure that the elector is the person voting the ballot, and to ensure that they are not being unduly influenced by another to vote a certain way.

Plaintiffs contend there is no evidence that the absentee voter witness requirement advances that state interest of deterring voter fraud. (Doc. 2 ¶ 79.) No evidence is needed: "[a] statute will survive a constitutional challenge if this court can conceive of a rational basis for the law." *State v. Radke*, 2003 WI 7, ¶ 27, 259 Wis. 2d 13, 657 N.W.2d 66; *see also Madison Teachers, Inc. v. Walker*, 2014 WI 99, ¶ 82, 358 Wis. 2d 1, 851 N.W.2d 337 ("Legislative acts must be upheld when this court can conceive of any facts upon which the legislation reasonably could be based.").

Plaintiffs also argue that other anti-fraud components of the statute would be enough (Doc. 2 ¶ 81), or that the witness requirement does not prevent all voter fraud because an elector could deceive a witness about their true identity or fill out the witness certification themselves (Doc. 2 ¶ 80). But the state is not required to select the measures Plaintiffs believe are the

minimum required or the most effective. "[U]nder a rational basis test, it need not be a perfect solution. It must only be a step in the right direction." *State v. Jorgensen*, 2003 WI 105, ¶ 39, 264 Wis. 2d 157, 667 N.W.2d 318 (also quoting *State v. Smart*, 2002 WI App 240, ¶ 7, 257 Wis. 2d 713, 652 N.W.2d 429, holding "there is no requirement the legislature choose the wisest or most effective means" to achieve its goal).

Judgment on Claim I should be entered for failure to state a claim.

B. Excluding absentee ballot drop boxes is constitutional.

Plaintiffs next assert that Wis. Stat. § 6.87(4)(b)1. is facially unconstitutional since the Wisconsin Supreme Court's ruling in *Teigen*, 403 Wis. 2d 607, because, under that ruling, the statute excludes drop boxes as an option for returning absentee ballots.[2] They claim that such an exclusion is facially unconstitutional under article III, sections 1 and 2 of the Wisconsin Constitution.[3] (Doc. 2 ¶ 84.)

[2] Plaintiffs say the supreme court "should revisit its decision in *Teigen* and confirm that § 6.87(4)(b)1. allows the use of drop boxes." (Doc. 2 ¶ 96.) The Commission argued in *Teigen* that the statute does not prohibit the use of absentee ballot drop boxes. This Court, however, cannot reverse a decision of the supreme court. The supreme court "is the only state court with the power to overrule, modify or withdraw language from a previous supreme court case." *Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997).

[3] Wisconsin Const. art. III, § 1 provides that "[e]very United States citizen age 18 or older who is a resident of an election district in this state is a qualified elector of that district." Wisconsin Const. art. III, § 2 provides that the Legislature "may" enact laws "[p]roviding for absentee voting," among other things.

This challenge fails to state a claim. While the Commission agrees that drop boxes can facilitate absentee voting, the lack of drop boxes is not a constitutional violation under *Anderson/Burdick* and *Milwaukee Branch of NAACP*.

1. Not offering drop boxes does not severely burden the right to vote.

Under *Anderson/Burdick* and *Milwaukee Branch of NAACP*, not having drop boxes does not severely burden voting.

Voters have multiple options for casting ballots absentee. Absentee voters may return their absentee ballots either through the U.S. mail or in person at their municipal clerk's office. Wis. Stat. § 6.87(4)(b)1. A registered voter may also vote absentee in person, beginning two weeks before election day, by simultaneously requesting and casting an absentee ballot at the clerk's office or at another designated location. *See* Wis. Stat. §§ 6.855, 6.86(1)(a)2., (b). Voters with a disability who need help returning their ballot—including delivery to the clerk's office—are entitled to help from an assistant whom they choose for that purpose. *Carey*, 624 F. Supp. 3d at 1032–33.

Given the availability of the multiple options for returning an absentee ballot—including the option to return an absentee ballot by U.S. mail—the absence of drop boxes does not severely burden the right to vote.

Plaintiffs do not allege that the U.S. Postal Service systematically fails to deliver ballots. Instead, they assert that it is slower than using drop boxes would be, and that a voter's ballot might be delivered too late. (Doc. 2 ¶¶ 42–49.) But courts have not required that voters who cast absentee ballots be free of any risk that the ballot will not arrive on time, *see Common Cause Ind.*, 977 F.3d at 664, and the same is true with the Wisconsin Constitution.

Plaintiffs' real complaint is not that their ballots won't be delivered, but that they need to deposit their ballot further in advance. (Doc. 2 ¶ 87.) They acknowledge that voters can "guarantee timely delivery," but only by "moving up the deadline for returning absentee ballots by several days." (Doc. 2 ¶ 87.) No current case has found a constitutional right not to vote in advance if a voter wants to use a mail-in ballot. Instead, "the fundamental right to vote means the ability to cast a ballot, but not the right to do so in a voter's preferred manner," *Tully*, 977 F.3d at 613, and "[a] state satisfies all constitutional requirements by devising a set of rules under which everyone who takes reasonable steps to cast an effective ballot can do so." *Common Cause Ind.*, 977 F.3d at 665.

In *Luft*, the Seventh Circuit considered a constitutional challenge to a Wisconsin Statute prohibiting election officials from sending most voters an absentee ballot via email or fax. 963 F.3d at 676. The court rejected the claim as "not a plausible application" of *Anderson/Burdick*. *Id.* The court emphasized

that "all parts of the electoral code must be considered," and Wisconsin electors have many ways to vote: that some voters may be "inconvenience[d]" by not being able to get their absentee ballot emailed or faxed to them "does not permit a court to override the state's judgment that other interests predominate." *Id.* at 676–77.

2. Not having drop boxes could rationally relate to legitimate state interests.

Given that the burden caused by the absence of drop boxes is not severe, the question is whether such a policy choice could further legitimate state interests. Excluding drop boxes from the return options for absentee ballots could rationally relate to two legitimate state interests.

First, it could relate to the state's interest in promoting election security. Wisconsin has "a significant and compelling interest in protecting the integrity and reliability of the electoral process, as well as promoting the public's confidence in elections." *Milwaukee Branch of NAACP*, 357 Wis. 2d 469, ¶ 73 (citing *Crawford*, 553 U.S. at 196); *Teigen*, 403 Wis. 2d 607, ¶ 6 (citing former Commission guidance, based on standards for increasing efficacy and security of ballot drop boxes of a subunit of the federal Cybersecurity and Infrastructure Security Agency, stating "drop boxes can be used for voters to return ballots but clerks should ensure they are secure, can be monitored for security purposes, and should be regularly emptied" (citation omitted)). Excluding drop

boxes that lack uniform security guidelines could rationally relate to that interest given that such drop boxes might raise greater security concerns in some settings.

Second, it could relate to the state's interest in promoting uniformity, which in turn promotes the fair administration of elections. Courts recognize that states have a legitimate interest in the fair and orderly administration of elections. *See Crawford*, 553 U.S. at 196. Permitting drop boxes would give local election officials discretion in determining the number, location, and security features of drop boxes within their jurisdiction. This would result in significant variation among jurisdictions.

Here, as in *Luft*, any additional advance planning required by the absence of drop boxes is not a severe burden, and there are rational reasons why the state would have such a policy.

Judgment on Claim II should be entered for failure to state a claim.

C. The requirement to cure a mistake on an absentee ballot certificate by the end of election day is constitutional.

Plaintiffs' Claim III challenges Wisconsin's election-day deadline to cure errors on an absentee ballot certificate; Plaintiffs say it should instead be 4:00 p.m. on the Friday after an election. (Doc. 2 ¶ 57.) But courts have consistently recognized election-related deadlines, including those governing absentee ballots and ballot curing, as constitutional.

Wisconsin law allows an absentee ballot to be "returned so it is delivered to the polling place no later than 8 p.m. on election day." Wis. Stat. § 6.87(6). This deadline works together with Wis. Stat. § 6.87(9), which allows a clerk to return a ballot with an improperly completed certificate or no certificate, and the Election Manual's statement that a voter can return the corrected certification by mail, at the clerk's office, or at the polling place. (Election Manual 99, https://elections.wi.gov/sites/default/files/documents/Election%20Administration%20Manual%20%282022-09%29.pdf.) Only if the voter cures the certificate at the clerk's office or at the polling place must they do so in the presence of the original witness. (*Id.*)

1. The election-day curing deadline does not severely burden the right to vote.

This system for curing does not pose a severe burden under *Anderson/Burdick* and *Milwaukee Branch of NAACP*.

Generally speaking, requiring voters to abide by relevant election deadlines "does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." *Feldman v. Ariz. Sec'y of State's Off.*, 208 F. Supp. 3d 1074, 1090 (D. Ariz. 2016) (quoting *Crawford*, 553 U.S. at 198); *see also ACORN v. Bysiewicz*, 413 F. Supp. 2d 119, 145 (D. Conn. 2005) (election registration deadlines do not constitute per se severe burdens on the right to vote). "An absentee voter is responsible for

acting with sufficient time to ensure timely delivery of her ballot, just as a voter intending to vote in person must take appropriate precautions by heading to the polls with a sufficient cushion of time to account for traffic, weather, or other conditions that might otherwise interfere with their ability to arrive in time to cast a ballot." *DCCC v. Ziriax*, 487 F. Supp. 3d 1207, 1232 (N.D. Okla. 2020). These steps do not severely burden the right to vote.

More specifically, courts have held that election-day deadlines for receipt of absentee ballots, including cure deadlines, do not severely burden voters.

Arizona Democratic Party v. Hobbs examined an election-day cure deadline nearly identical to Wisconsin's. 976 F.3d 1081 (9th Cir. 2020). Arizona election rules set a 7:00 p.m. election day cutoff to return absentee ballots, along with a signed affidavit. *Id.* at 1085. If an early elector returned a ballot with an unsigned affidavit, the state provided an opportunity to cure, but only up until the close of polls. *Id.* The court concluded that the deadline "imposes, at most, a 'minimal' burden on those who seek to exercise their right to vote" under the *Anderson/Burdick* framework. *Id.*

Similarly, in *New Georgia Project v. Raffensperger*, 976 F.3d 1278, 1281 (11th Cir. 2020), the court concluded that Georgia's election-day absentee ballot deadline did "not implicate the right to vote at all." This was because numerous other avenues to vote, including traditional voting, remained

available to electors. *Id.*; *see also Common Cause Ind.*, 977 F.3d at 665 (Indiana's election-day deadline for receipt of all ballots would not prevent electors from casting ballots; electors could protect themselves by using other approved and available voting methods); *DCCC*, 487 F. Supp. 3d at 1231 (Oklahoma's election-day receipt deadline for absentee ballot deadlines did not burden voters because they had other ways to timely return their ballots).

Here, too, the election-day cure deadline simply requires voters to plan ahead by requesting ballots early, completing ballots and arranging witnesses in a timely manner, and posting ballots with sufficient time to cure, if necessary.

Plaintiffs do not allege that Wisconsin's election-day cure deadline is more burdensome than the laws upheld in other states. They complain that it is burdensome to require the presence of the original witnesses when curing at the polling place or clerk's office, but voters have the option of curing certifications on their own and delivering their corrected ballot to the polling place without a witness present. And voters do not have a constitutional right not to plan ahead.

2. The election-day cure deadline could rationally relate to legitimate state interests.

Given that the burden caused by an election-day cure deadline is not severe, the question is whether such a policy choice could further legitimate

state interests. The choice would rationally relate to two legitimate state interests.

First, states have a legitimate interest in "[c]ounting the votes, and announcing the results, as soon as possible after the polls close." *Common Cause Ind.*, 977 F.3d at 665. An election-day absentee ballot cure deadline advances this interest by giving voters a uniform and reasonable cut-off time to finalize and cast their ballots, which in turn allows elections workers to begin, and finish, processing ballots as soon as the election is over. Prompt results also serve the recognized state interest in "preserving the integrity of its election process." *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989).

States also have a recognized interest in averting administrative costs associated with elections. *Ariz. Democratic Party*, 976 F.3d at 1086. An election-day cure deadline could rationally relate to this legitimate state interest by avoiding the need to employ election workers to assist electors in curing ballots for a grace period beyond election day.

The *Arizona Democratic Party* and *New Georgia Project* courts both concluded that the minimal burdens, if any, of election-day deadlines were outweighed by legitimate state interests.

The *Arizona Democratic Party* court explained: "All ballots must have some deadline, and it is reasonable that Arizona has chosen to make that

deadline Election Day itself so as to promote its unquestioned interest in administering an orderly election and to facilitate its already burdensome job of collecting, verifying, and counting all of the votes in timely fashion." 976 F.3d at 1085. Extending the cure deadline, as plaintiffs had requested, would have increased administrative burdens on the state. *Id*.

In *New Georgia Project*, the court concluded that Georgia's election-day absentee ballot deadline meaningfully affected only a limited subset of absentee voters who received or returned their ballots later than usual, and that the state interests in conducting an efficient election, maintaining order, quickly certifying results, and preventing voter fraud "easily" justified the deadline. 976 F.3d at 1282.

Wisconsin's election-day cure deadline for absentee ballots does not severely burden the right to vote and could rationally relate to legitimate state interests.

Judgment on Claim III should be entered for failure to state a claim.

D. Plaintiffs' challenge to Wis. Stat. § 6.84, which makes certain absentee procedures mandatory rather than directory, is non-justiciable and fails to state a claim.

Plaintiffs' fourth claim asks the Court to "declare that Wis. Stat. § 6.84 violates the Wisconsin Constitution by impermissibly differentiating between votes cast in person and votes cast by absentee ballot in a manner which unnecessarily risks disenfranchising absentee voters." (Doc. 2 ¶ 112.) That

claim fails as a matter of law because the challenged statute is not a substantive enactment, but rather is a statement of legislative policy which, in itself, does not harm any voters or give rise to any justiciable controversy. In the alternative, even if the claim were justiciable, it would fail on the merits as a matter of law. It is well established that it is permissible for state election procedures to distinguish between in-person and absentee voting and to make some election procedures mandatory.

1. Plaintiffs' attempt to invalidate a legislative policy statement is not justiciable.

Plaintiffs' attack on Wis. Stat. § 6.84 is subject to dismissal at its threshold because it is non-justiciable. It is well established that a declaratory judgment claim may not be maintained unless it presents a justiciable controversy. *See Loy v. Bunderson*, 107 Wis. 2d 400, 409–10, 320 N.W.2d 175 (1982).

A controversy is justiciable when four factors are present: (1) a claim of right is asserted against one who has an interest in contesting it; (2) the controversy is between persons whose interests are adverse; (3) the party seeking declaratory relief has a legal interest in the controversy—a legally protectable interest; and (4) the issue involved is ripe for judicial determination. *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶ 29, 309 Wis. 2d 365, 749 N.W.2d 211. Absent such a justiciable controversy, a

declaratory judgment would be a mere advisory opinion, which courts will not enter. *See State ex rel. La Follette v. Dammann*, 220 Wis. 17, 22–23, 264 N.W. 627 (1936).

The requirement of justiciability in declaratory judgment cases overlaps with and includes the requirement of standing. *Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n, Inc.*, 2011 WI 36, ¶ 47, 333 Wis. 2d 402, 797 N.W.2d 789. "'Standing' is a concept that restricts access to judicial remedy to those who have suffered some injury because of something that someone else has either done or not done." *Krier v. Vilione*, 2009 WI 45, ¶ 20, 317 Wis. 2d 288, 766 N.W.2d 517 (citation omitted). The issues in a proper case thus must be presented "in a 'concrete factual context'" that is "'conducive to a realistic appreciation of the consequences' of the court's decision," and that "allows the court to make a decision without worrying that its decision will have unforeseen consequences in cases presenting different facts." *Foley Ciccantelli*, 333 Wis. 2d 402, ¶ 128 (Prosser, J., concurring) (quoting *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982)); *see also Friends of Black River Forest v. Kohler Co.*, 2022 WI 52, ¶ 21, 402 Wis. 2d 587, 977 N.W.2d 342 (challenged agency action must cause actual injury to the interest asserted by the plaintiff that is not hypothetical or

conjectural); *Zehner v. Vill. of Marshall*, 2006 WI App 6, ¶ 13, 288 Wis. 2d 660, 709 N.W.2d 64 (justiciable controversy requires existence of present and fixed rights, not hypothetical or future rights).

Here, Plaintiffs lack standing to facially challenge Wis. Stat. § 6.84 because that statute, on its face, does nothing to harm absentee voters. Wisconsin Stat. § 6.84 is an interpretive preamble to subchapter IV of Wis. Stat. ch. 6. That subchapter contains numerous *other* statutes that themselves specifically govern absentee voting procedures. The preamble provided by Wis. Stat. § 6.84, in contrast, does nothing concrete to any voters. The first subsection merely states a legislative policy which recognizes that, although voting is a constitutional right, voting by absentee ballot is a privilege that is "exercised wholly outside the traditional safeguards of the polling place," and that therefore "must be carefully regulated to prevent the potential for fraud or abuse." Wis. Stat. § 6.84(1). The statute's second subsection specifies several substantive provisions governing absentee voting procedures and requires that they "be construed as mandatory" and "[b]allots cast in contravention of the procedures specified in those provisions may not be counted." Wis. Stat. § 6.84(2).

Plaintiffs' claim seeks no relief from any electoral procedure that is alleged to improperly burden the opportunity to vote, but instead contends that, on its face, Wis. Stat. § 6.84's policy of carefully regulating absentee

voting through mandatory procedural requirements violates the right to vote by treating absentee votes as less valuable and less worthy of protection than votes cast in-person. (Doc. 2 ¶¶ 59, 108, 110–11.) But such non-specific complaints about the "value" and "worth" of absentee votes is a philosophical disagreement, not an actual controversy between the parties. Such a disagreement is far too vague and abstract to give plaintiffs standing to facially challenge Wis. Stat. § 6.84.

Courts have long held that introductory statutory statements of legislative policy and purpose like Wis. Stat. § 6.84 are not substantive enactments. *See Schilling v. Crime Victims Rights Bd.*, 2005 WI 17, ¶ 14, 278 Wis. 2d 216, 692 N.W.2d 623; *Wis.'s Envtl. Decade, Inc. v. Pub. Serv. Comm'n of Wis.*, 69 Wis. 2d 1, 18, 230 N.W.2d 243 (1975); *Smith v. City of Brookfield*, 272 Wis. 1, 5–7, 74 N.W.2d 770 (1956); *see also* 2A Norman J. Singer, *Sutherland Statutory Construction* § 47:4 (7th ed. 2014). They may be considered by courts as an instructive aid in construing the intended meaning and implementation of other, substantive statutory provisions, but they do not themselves determine the scope and operation of statutory requirements. *See Milwaukee Dist. Council 48 v. Milwaukee Cnty.*, 2019 WI 24, ¶ 21, 385 Wis. 2d 748, 924 N.W.2d 153; *Schilling*, 278 Wis. 2d 216, ¶ 14; *see also Dist. of Columbia v. Heller*, 554 U.S. 570, 578 (2008) (a prefatory clause does not limit or expand the scope of the operative clause).

Abstract policy statements and interpretative guidelines like those in Wis. Stat. § 6.84 thus do not cause or threaten the kind of concrete harm that may give rise to a justiciable controversy. *See AT & T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 386 (1999); *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 506–07 (1989). Because "[s]uch a statutory statement of purpose . . . 'is not in itself substantive,'" it "does not provide for an independent, enforceable claim." *Friends of Black River Forest*, 402 Wis. 2d 587, ¶ 33 (quoting *Schilling*, 278 Wis. 2d 216, ¶ 14).

Here, nothing in the language of Wis. Stat. § 6.84 indicates that it is meant to provide private parties like Plaintiffs a vehicle for protecting their individual preferences about the abstract nature of voting rights. To the contrary, that policy statement—examined on its face and apart from the operation of any substantive voting statute—gives rise to no concrete controversy between Plaintiffs and the Commission. Plaintiffs' facial challenge to Wis. Stat. § 6.84 is a textbook example of trying to use the declaratory judgment mechanism for the improper purpose of obtaining an advisory opinion. The claim is not justiciable and should be dismissed on that basis.

2. Alternatively, Plaintiffs' challenge to Wis. Stat. § 6.84 fails on the merits as a matter of law because it is constitutionally permissible for state election laws to distinguish between in-person and absentee ballots and to make some election procedures mandatory.

In the alternative, even if Plaintiffs' facial attack on Wis. Stat. § 6.84 were viewed as justiciable, it would fail on the merits as a matter of law because courts routinely uphold election regulations that impose different requirements—including mandatory requirements—on different electoral procedures.

Plaintiffs advance a sweeping, one-size-fits-all view of the constitutional right to vote as barring any regulation that seeks to protect the integrity of the election system by imposing different requirements on different voting procedures. They characterize this as impermissibly giving greater "value" and "worth" to some votes than to others. But, as discussed regarding Plaintiffs' other claims, it is constitutional to regulate absentee ballots differently from in-person ballots. Plaintiffs' facial challenge to Wis. Stat. § 6.84 thus fails on its merits as a matter of law.

Accordingly, if Plaintiffs' fourth claim is not dismissed as non-justiciable, the Court should rule that Claim IV fails as a matter of law and enter judgment on it in the Commission's favor.

CONCLUSION

The Commission asks that the Court enter judgment on Claims I, II, and III in the Commission's favor because they fail to state a claim. Regarding Claim IV, the Commission asks that the Court either dismiss the claim as non-justiciable or enter judgment in the Commission's favor because it fails to state a claim.

Dated this 7th day of September 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this Brief in Support of Defendant's Motion to Dismiss the Complaint with the clerk of court using the Wisconsin Circuit Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 7th day of September 2023.

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