

FILED
10-13-2023
CIRCUIT COURT
DANE COUNTY, WI
2023CV001900

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 12

PRIORITIES USA, et al.,

Plaintiffs,

v.

Case No. 23-CV-1900

WISCONSIN ELECTIONS COMMISSION,

Defendant.

**DEFENDANT WISCONSIN ELECTIONS COMMISSION'S
REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS**

Plaintiffs' response falters on three foundational misunderstandings: they assume there is a fundamental right to vote absentee; that voting regulations are generally subject to strict scrutiny; and that they can state a claim for facial relief based on allegations relating to small groups of voters. None of these assumptions are right, and without them, Plaintiffs' case fails at the outset.

First, while all agree there is a fundamental right to vote, there is no fundamental right to vote absentee instead of in person. Second, under both Wisconsin and federal law, strict scrutiny applies only if a plaintiff can show that a particular voting regulation "severely burdens" an elector's overall right to vote; otherwise, rational basis applies. Third, to state a claim for facial relief, a plaintiff must allege that the challenged voting regulation severely burdens all voters, not just a small subset.

Analyzed under black letter standards applicable to the review of voting regulations and to facial challenges, the challenged voting statutes easily pass muster as a matter of law, and judgment should be entered for Defendants.

I. Plaintiffs rely on core misassumptions about the standards to review a constitutional claim and for facial challenges to a statute.

A. There is no fundamental right to vote absentee.

Each of Plaintiffs' claims depends on the incorrect premise that Wisconsin voters have a constitutional right to vote absentee. To the contrary, the fundamental right to vote protected in the Wisconsin Constitution is the right to cast a ballot. There is no fundamental right to vote absentee.

The Wisconsin Constitution guarantees the right to vote in article III, § 1. Not only is there no guarantee of the right to vote absentee, but the Constitution expressly makes it optional: the Legislature "may," but need not, enact laws "[p]roviding for absentee voting." Wis. Const. art. III, § 2. The Constitution rebuts Plaintiffs' premise outright. While the Legislature has opted to enact such laws, and absentee voting is one way to cast a ballot in Wisconsin, that statutory opportunity does not convert absentee voting into a constitutionally protected, fundamental right.

Plaintiffs' position finds no support in Wisconsin law and, as far as the Commission is aware, in no other jurisdiction, either.

B. Plaintiffs misconstrue the applicable standard for challenges under the Wisconsin Constitution.

Plaintiffs largely dismiss the many cases holding that rational basis review applies to absentee voting regulations as long as voters can vote in person, asserting that their claims are different because they are brought under the Wisconsin Constitution. They ignore the fact that, under precedent binding on this court, Wisconsin courts apply a test that is functionally equivalent to *Anderson/Burdick*.

Under *Milwaukee Branch of NAACP v. Walker*, a case brought under the Wisconsin Constitution, a voting regulation is subject to strict scrutiny only if it creates a severe burden on an elector's "right to vote;" otherwise, the law is presumed valid and subject to rational basis review. 2014 WI 98, ¶¶ 22, 40, 357 Wis. 2d 469, 851 N.W.2d 262. The Wisconsin Supreme Court looks to U.S. Supreme Court decisions, including the *Anderson/Burdick* balancing test, to guide its analysis. *Id.* at ¶¶ 26–39.

Plaintiffs fail to apply *Milwaukee Branch of NAACP* correctly in two important ways.

First, because *Milwaukee Branch of NAACP* makes clear that Wisconsin uses the equivalent of the federal *Anderson/Burdick* framework for challenges under the Wisconsin Constitution, *id.*; see also *Wagner v. Milwaukee Cnty. Election Comm'n*, 2003 WI 103, ¶ 76, 263 Wis. 2d 709, 666 N.W.2d 816, federal cases applying *Anderson/Burdick* are plainly relevant. Plaintiffs' view that federal cases "shed[] little light on the correct analysis under the Wisconsin Constitution" (Doc. 85:24) is simply incorrect.

Second, *Milwaukee Branch of NAACP* suggests nothing about a fundamental right to vote absentee: it speaks only to a right to vote generally. Because there is no fundamental right to vote absentee where electors remain able vote in person, the question is merely whether there is a rational basis for the voting regulation. See *Tully v. Okeson*, 977 F.3d 608, 616 (7th Cir. 2020); *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.”). No Wisconsin or any other court has recognized a fundamental right to vote absentee; Plaintiffs offer no support for their core premise.

C. A voting statute may be facially invalidated only if it is broadly unconstitutional as to all Wisconsin voters.

Plaintiffs have challenged four statutes on their face, requiring them to prove that they cannot be applied to anyone without violating the constitution. *League of Women Voters of Wis. Educ. Network, Inc. v. Walker*, 2014 WI 97, ¶ 13, 357 Wis. 2d 360, 851 N.W.2d 302. In the elections context, the U.S. Supreme Court has said that voting regulations may be facially invalidated only when the burden on the right to vote is sufficiently severe and widespread across *all* voters. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 199–200, 202–03 (2008).

Plaintiffs do not even attempt to plead what they would need to survive a motion to dismiss on a facial claim. Their speculations about how limited numbers of voters might be affected, even if later proven in litigation, could not invalidate the statutes on their face.

Plaintiffs could have, but chose not to, bring a claim on behalf of specific individuals or groups of individuals whose disabilities require them to vote absentee to access the franchise. The Commission believes that the voter assistance required under federal law ensures that the challenged statutes are not unduly burdensome for these disabled voters. *Carey v. WEC*, 624 F. Supp. 3d 1020, 1032–33 (W.D. Wis. 2022). But that debate is for another day, because Plaintiffs did not bring such a limited claim here.

II. The challenged voting statutes are constitutional as a matter of law.

Each of Plaintiffs' challenges depends on the incorrect assumptions above. With no claims that the laws severely burden all voters, rational basis applies.

A. The witness requirement is facially constitutional.

The requirement that an absentee voter mark the absentee ballot before an adult citizen witness, Wis. Stat. § 6.87(4)(b)1., is a reasonable regulation that could further the state's legitimate interests in deterring voter fraud and preventing undue influence upon the voter to vote a certain way.

Plaintiffs rely on a distinguishable case and facts relating to the height of the pandemic. *State of Alaska v. Artic Village Council*, 495 P.3d 325 (Alaska 2021), (Doc. 85:27), was an as-applied challenge to a witness requirement during the height of the COVID pandemic. *Id.* at 315–18. Two of the plaintiffs were elderly and lived alone, one in a log cabin, and at increased risk of severe illness from COVID-19 exposure due to underlying health conditions. *Id.* at 316–17. Under these particular circumstances, the court held that enforcement of the requirement forced them to choose between their safety and exercising their right to vote. *Id.* at 322.

Here, in contrast, Plaintiffs bring a facial challenge; their Complaint hinges in no way on a public health crisis or shelter-in-place order; no plaintiff is alleged to have severe health issues; and the Complaint does not even plead a subgroup of such plaintiffs. Plaintiffs disagree with the Seventh Circuit's decision in *Democratic National Committee v. Bostelmann*, Nos. 20-1538, 20-1546, 20-11539, 20-1545; 2020 WL 3619499 (W.D. Wis. Apr. 3, 2020) (unpublished), that, even during the pandemic, the opportunities for Wisconsin voters to find witnesses were adequate. (Doc. 85:21–

22.) But that disagreement is beside the point: no one claims that voters as a group today are confined by stay-at-home orders and risk of death. Plaintiffs simply have no allegations that state a claim for facial relief.

Artic Village shows when it is appropriate to require more than rational basis review: when a regulation severely burdens the plaintiff, so that strict scrutiny applies. 495 P.3d at 322–23. Plaintiffs here have shown no such severe burden, so rational basis review applies.

Plaintiffs claim that the witness requirement is a “bad fit” for deterring fraud on the theory there is no way for the elector to mark her ballot in a way that will not reveal her vote. (Doc. 85:22.) That concern is belied by common sense—a witness need not sit or stand anywhere near the voter while she marks her ballot, much less loom over her shoulder. Plaintiffs offer no evidence for their speculation that electors cannot comply with the statute’s requirement that they “mark the ballot in a manner that will not disclose how the elector’s vote is cast.” Wis. Stat. § 6.87(4)(b)1. Plaintiffs also raise one situation in which the witness requirement might not deter voter fraud (Doc. 85:27), but under a rational basis test, the law need not be a perfect solution. *State v. Jorgensen*, 2003 WI 105, ¶ 39, 264 Wis. 2d 157, 667 N.W.2d 318.

Plaintiffs assert that the witness requirement is “unnecessary” because a majority of states do not have one. (Doc. 85:27–28.) But the constitutionality of a Wisconsin law is not determined by the number of other states that do not follow it. *See Nat’l Ass’n for Advancement of Psychoanalysis v. California Bd. of Psychology*, 228 F.3d 1043, 1053 (9th Cir. 2000) (rejecting argument that because other states

have less restrictive licensing scheme the California law is irrational: “It simply is not the function of the courts to tell California how to craft its legislation.”)).

Wisconsin Stat. § 6.87(4)(b)1. is not facially unconstitutional.

B. Excluding absentee ballot drop boxes is facially constitutional.

The lack of drop boxes as a return option for absentee ballots under Wis. Stat. § 6.87(4)(b)1. also is not facially unconstitutional.

The exclusion of drop boxes could conceivably further legitimate state interests in election security and uniformity. Contrary to Plaintiffs’ claim, “evidence” that the law furthers these interests is not required to satisfy rational basis review. *State v. Radke*, 2003 WI 7, ¶ 27, 259 Wis. 2d 13, 657 N.W.2d 66.

Plaintiffs do nothing to show that the law poses an across-the-board severe burden so that strict scrutiny would apply. They dismiss the Seventh Circuit case law illustrating why their drop box claim fails under rational basis review, *Tully*, 977 F.3d at 613; *Common Cause Ind.*, 977 F.3d at 665, as irrelevant because it applies the *Anderson/Burdick* framework, but that is the appropriate standard under *Milwaukee Branch of NAACP*.

Under rational basis, the law easily passes muster as a matter of law. “An absentee voter is responsible for acting with sufficient time to ensure timely delivery of her ballot” *DCCC v. Ziriak*, 487 F. Supp. 3d 1207, 1232 (N.D. Okla. 2020). Voters in Wisconsin have numerous options to achieve that goal, including voting in-person absentee up to two weeks in advance, returning the absentee ballot to the

clerk, mailing the ballot earlier,¹ or voting in person on Election Day. Disabled voters who need help returning their ballot are entitled to assistance under *Carey*.

Plaintiffs suggest that some voters—with disabilities, without access to reliable personal transportation, or with conflicting work schedules—may find it “exceedingly difficult” to vote without drop boxes. (Doc. 85:23–24.) That is irrelevant given that Plaintiffs bring a facial challenge. *See Serv. Emps. Int’l Union, Loc. 1 v. Vos*, 2020 WI 67, ¶ 38, 393 Wis. 2d 38, 946 N.W.2d 35. Plaintiffs even concede that the other options may be viable options for non-elderly and disabled voters (85:24), which alone ends their facial challenge.

C. The Election Day cure deadline is not facially constitutional.

Wisconsin’s cure deadline is rational and serves the recognized state interests of reducing election costs and timely certifying election results. Plaintiffs cite no case invalidating a cure deadline. And they disregard the large body of caselaw cited by Defendants upholding election-related deadlines, so long as they do not block access to the voting franchise. Nothing about Wisconsin’s cure deadline denies access to voting—voters can avoid that deadline entirely by voting in person, carefully completing a ballot, or planning ahead.

Plaintiffs cite cases for the idea that administrative burdens alone do not justify burdening the fundamental right to vote. (Doc. 85:30). That begs the question of whether the right was severely burdened; none of these cases involves due process claims or the *Anderson/Burdick* framework. Plaintiffs assert that the absentee-ballot

¹ Plaintiffs’ Complaint agrees that ballots will be timely received if they are mailed sufficiently in advance. (Doc. 2 ¶ 87.)

cure deadline should be extended to match the provisional-ballot cure deadline. As an initial point, absentee and provisional voting are not the same thing, and it is not plausible that this change would cost no more clerk time. But more importantly, Plaintiffs' policy preferences do not create a constitutional requirement.

Plaintiffs offer a sort of undeveloped equal protection argument, that absentee voters whose ballots arrive close to Election Day lack the same timeframe to cure as absentee voters who returned their ballots earlier. (Doc. 85:25.) But the two groups are not similarly situated, and there is no requirement that all absentee voters must be given equal time to cure ballot defects no matter when they choose to return their ballot. As with the drop box statute, voters have numerous alternatives if they are concerned that a last-minute absentee ballot will be rejected due to error.

Wisconsin's absentee-ballot cure statute is not facially unconstitutional.

D. Plaintiffs' challenge to Wis. Stat. § 6.84 is non-justiciable, and alternatively, the statute is constitutional.

Plaintiffs lack standing to facially challenge § 6.84 because it is a statement of legislative policy that does not itself harm any voters. Their argument that § 6.84 unconstitutionally treats absentee votes as less valuable than in-person votes is an abstract, philosophical disagreement, not an allegation of concrete harm.

In response, Plaintiffs do not even try to argue that they are concretely harmed by the general statement of legislative policy in § 6.84(1). Instead, they now focus entirely on subsection (2) which, they argue, harms them by making mandatory the three separate requirements they specifically challenge. (Doc. 85:14, 33.)

The alleged harm caused by those other requirements, however, does not give Plaintiffs standing to facially challenge § 6.84. While it is true that § 6.84(2) makes each of those challenged requirements mandatory, it is equally true that § 6.84(2) also applies to other statutory requirements that are not challenged here. Plaintiffs have neither alleged nor argued that the Wisconsin Constitution prohibits making those unchallenged requirements mandatory. They thus have not pleaded that every application of § 6.84(2) is unconstitutional, or that its application as to other statutes would injure them.

In the alternative, Plaintiffs fail to state a claim that § 6.84 is facially unconstitutional for the same reasons discussed above. Plaintiffs' alleged burdens on their voting rights relate only to the three separately challenged requirements, and not to other potential applications of § 6.84. Plaintiffs thus have failed to state a claim that § 6.84, on its face, unconstitutionally burdens their voting rights in all of its possible applications.

Dated this 13th day of October 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 *Reply 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 13th day of October 2023.

Electronically signed by Steven Kilpatrick
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