

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

STATE OF WISCONSIN      CIRCUIT COURT      DANE COUNTY  
BRANCH 12

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PRIORITIES USA, WISCONSIN ALLIANCE FOR  
RETIRED AMERICANS, *and* WILLIAM FRANKS,  
JR.,

*Plaintiffs,*

Case No. 2023CV1900

*v.*

WISCONSIN ELECTIONS COMMISSION,

*Defendant.*

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**INTERVENOR DEFENDANT THE WISCONSIN STATE LEGISLATURE'S  
REPLY IN SUPPORT OF ITS MOTION TO DISMISS**

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MISHA TSEYTLIN  
State Bar No. 1102199  
*Counsel of Record*  
KEVIN M. LEROY  
State Bar No. 1105053  
SEAN T.H. DUTTON  
State Bar No. 1134675  
EMILY A. O'BRIEN  
State Bar No. 1115609  
TROUTMAN PEPPER  
HAMILTON SANDERS LLP  
227 W. Monroe, Suite 3900  
Chicago, Illinois 60606  
(608) 999-1240 (MT)  
(312) 759-1938 (KL)  
(248) 227-1105 (SD)  
(312) 759-5939 (EO)  
(312) 759-1939 (fax)  
misha.tseytlin@troutman.com  
kevin.leroy@troutman.com  
sean.dutton@troutman.com  
emily.obrien@troutman.com

*Attorneys for the Wisconsin State  
Legislature*

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## INTRODUCTION

As the Legislature explained in its Motion to Dismiss, this Court should dismiss this lawsuit on multiple, independently sufficient grounds. First, this lawsuit challenges certain absentee-voting laws as violating Article III of the Wisconsin Constitution, but that Article does not guarantee any right to vote absentee, instead giving the Legislature a choice whether to provide for that form of voting at all. Second, even if Article III protected the right to vote absentee, Plaintiffs fail to plead plausibly that the challenged laws “cannot be enforced under any circumstances,” *Serv. Emps. Int’l Union, Loc. 1 v. Vos* (“*SEIU*”), 2020 WI 67, ¶ 38, 393 Wis. 2d 38, 946 N.W.2d 35 (citation omitted), as would be necessary for their facial and hybrid claims to succeed. Finally, Plaintiffs ask this Court to “distort[ ]” state law and “circumvent” the Legislature’s power to regulate the “Times, Places and Manner” of federal elections, which would violate the U.S. Constitution’s Elections Clause. *Moore v. Harper*, 143 S. Ct. 2065, 2089 (2023) (citation omitted). Plaintiffs’ request that this Court recognize a right to vote absentee has no grounding in Article III’s plain text, history, or the relevant precedent, and would extend state law well “beyond what a fair reading require[s],” thereby violating *Moore*. *See id.*

In their Response, Plaintiffs first claim that Article III of the Wisconsin Constitution does provide the right to vote absentee, while citing no constitutional text or Wisconsin precedent to support that argument. Instead, Plaintiffs rely almost entirely upon federal cases dealing with different constitutional guarantees. Plaintiffs also cannot cite any allegations in their Complaint that would plausibly

support their facial and hybrid challenges, instead making unsupported and implausible *ipse dixit* claims that, for instance, *every* absentee voter is “severely burdened” by finding an adult to witness their absentee ballot or putting that ballot in the mail rather than in a drop box. And Plaintiffs do not even attempt to address meaningfully the Legislature’s Elections Clause argument. In all, none of Plaintiffs’ contentions are persuasive, and this Court should dismiss their Complaint.

## ARGUMENT

### I. Article III Of The Wisconsin Constitution Does Not Protect The Right To Vote Absentee

A. By its plain terms, Article III of the Wisconsin Constitution does not provide for a right to vote absentee, *see* Wis. Const. art. III, so the absentee-voting laws that Plaintiffs challenge in this lawsuit do not violate Article III. While certain other States have adopted a constitutional right to vote absentee, *see, e.g.*, Maine Const. art. II, § 4; Mich. Const. art. II, § 2, Article III of the Wisconsin Constitution clearly only sets out that the Legislature “*may*,” but need not, “[p]rovid[e] for absentee voting,” Wis. Const. art. III, § 2 (emphasis added). Wisconsin did not enact a comprehensive absentee-voting scheme until 1915, 1915 Wis. Act. 461; *see Teigen v. WEC*, 2022 WI 64, ¶ 174, 403 Wis. 2d 607, 976 N.W.2d 519 (Hagedorn, J., concurring), and the Wisconsin Supreme Court has long upheld the Legislature’s authority to limit tightly absentee voting, *see State ex rel. Chandler v. Main*, 16 Wis. 398, 411–15 (1863). The “earliest interpretations” of Article III, Section 2 are in accord. *Applying v. Walker*, 2014 WI 96, ¶ 19, 358 Wis. 2d 132, 853 N.W.2d 888 (citation omitted); Dkt.60 (“Mot.”), at 15–17. Thus, the absentee-voting laws that Plaintiffs challenge in this

lawsuit do not, as a matter of law, violate Article III, which is the sole basis for all of Plaintiffs' claims. Mot.17–19.

B. While Plaintiffs contend that Article III's "text and structure" extends the right to vote to "all forms of voting, including absentee voting," Dkt.85 ("Resp.Br."), at 8, that is just wrong. Article III could not be clearer in providing that the Legislature "may," but need not, "[p]rovid[e] for absentee voting" at all. Wis. Const. art. III, § 2. "The traditional, commonly repeated rule is that *shall* is mandatory and *may* is permissive." *State v. Arberry*, 2018 WI 7, ¶ 22 n.11, 379 Wis. 2d 254, 905 N.W.2d 832 (citation omitted). When a "section of the constitution" conferring legislative authority "is expressly permissive," the choice to exercise "such powers is left, by that section, to the wisdom of the legislature." *State v. Forest Cnty.*, 74 Wis. 610, 43 N.W. 551, 553 (1889).

Plaintiffs are also wrong to suggest that if this Court applies Article III as written, every law relating to absentee voting would be immune from constitutional inquiry. Resp.Br.8–9. Nothing in Article III shields the Legislature's absentee-voting laws from challenge under any other state or federal constitutional guarantee or command, which challenges Plaintiffs did not raise here.

That is also why Plaintiffs' reliance on federal case law falls flat. As the Second Circuit explained in *Price v. New York State Board of Elections*, 540 F.3d 101 (2d Cir. 2008), a case upon which Plaintiffs rely, Resp.Br.10 n.1, the "plaintiffs [there did] not assert a general right to obtain absentee ballots" and instead challenged lack of absentee balloting as violative of First Amendment associational rights, *Price*, 540

F.3d at 107. The other cases that Plaintiffs cite are similar, invoking the Fourteenth Amendment's Equal Protection Clause and the Voting Rights Act of 1965, *Ohio State Conf. of NAACP v. Husted*, 768 F.3d 524, 529–30 (6th Cir. 2014), *vacated on other grounds*, 2014 WL 10384647 (6th Cir. Oct. 1, 2014), and the Twenty-Sixth Amendment's "prohibition against denying or abridging the right to vote on account of age," *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 174 (5th Cir. 2020), and so on. Plaintiffs raise none of these federal claims, nor any plausible claims under the Wisconsin Constitution's plain text, in this lawsuit.

Plaintiffs also falsely equate voter residency and registration laws with absentee-voting laws, suggesting that because a plaintiff may challenge the former laws on Article III grounds, absentee-voting laws are similarly subject to an Article III challenge. Resp.Br.8–9. Not so. The State's voter residency and registration requirements are conditions precedent to voting at all, and thus regulate Wisconsin's access to the franchise itself. *See* Wis. Const. art. III, § 2. Absentee voting, by contrast, is an additional manner of voting that the Legislature is not constitutionally mandated to provide at all.

Finally, Plaintiffs rely upon *SEIU*, 2020 WI 67, ¶ 28, to argue that historical practice and legislative intent are irrelevant to the analysis, Resp.Br.9, but that case did not purport to displace Wisconsin's traditional test for construing constitutional provisions, *see Wis. Just. Initiative, Inc. v. WEC*, 2023 WI 38, ¶ 22, 407 Wis. 2d 87, 990 N.W.2d 122. Here, historical practice and contemporaneous legislative actions

confirm what is already clear from the Constitution's text: there is no constitutional right to an absentee ballot in Wisconsin. *See* Mot.12–17.

## **II. Even If Wisconsin Did Recognize A Right To Vote Absentee, Plaintiffs' Facial And Hybrid Challenges Would Still Fail As A Matter Of Law**

A. Even if Article III of the Wisconsin Constitution did recognize a constitutional right to vote absentee, Plaintiffs' claims would still fail, as Plaintiffs' allegations do not meet the high standard for facially invalidating the challenged absentee-voting laws. Mot.19–24. A facial or hybrid challenge can succeed only when there is “no set of circumstances [ ] under which [the challenged statute] would be valid.” *League of Women Voters of Wis. Educ. Network, Inc. v. Walker*, 2014 WI 97, ¶ 15, 357 Wis. 2d 360, 851 N.W.2d 302 (citation omitted). Thus, Plaintiffs must plausibly allege that “all applications of the law,” rather than just one “specific application,” are “unconstitutional.” *SEIU*, 2020 WI 67, ¶ 37. They fail to do so. As to the witness requirement, Plaintiffs allege only that this provision burdens *some* absentee voters, and so cannot maintain a facial challenge. Mot.21–22. For the drop box prohibition, Plaintiffs acknowledge that voters can “guarantee timely delivery” by “mail[ing] the ballot far in advance of election day,” Compl. ¶ 87, and many voters can vote early and not be burdened, Mot.22–23. As to the cure deadline, Plaintiffs acknowledge that many voters return their ballots sufficiently ahead of Election Day so as to guarantee their ability to cure any hypothetical ballot defect before the cure deadline, thereby defeating Plaintiffs' “facial[ ]” challenge to Wis. Stat. § 6.87(6). Mot.23–24. Finally, Section 6.84 does not place any burden at all on any voters, including Plaintiffs, and so is also nonjusticiable. Mot.24–27.

B. In response, Plaintiffs contend that they have alleged that each of the common absentee-voting laws that they challenge in this lawsuit imposes a “severe” burden on “every” absentee voter, Resp.Br.11–12, but their arguments only confirm the fatal deficiencies in their allegations.

1. Witness Requirement. Plaintiffs first argue that the witness signature requirement is unconstitutional as to all voters on the ground that it “risks revealing a voter’s vote in violation of the right to the secret ballot,” Resp.Br.11, but Plaintiffs have alleged only that “*many* voters”—not all voters—“may” have difficulty secretly marking their ballot in a witness’ presence, Compl. ¶ 33 (emphasis added). That allegation does not meet the high standard for facial invalidity. *SEIU*, 2020 WI 67, ¶ 38; *see* Wis. Stat. 6.87(4)(b)1 (requiring absentee voters to “mark the ballot in a manner that will not disclose how the elector’s vote is cast”).

Plaintiffs’ contention that they have alleged the witness requirement “makes it harder for all voters to cure their ballots,” Resp.Br.11, is similarly incorrect: this purported burden applies only to absentee voters who submit absentee ballots with defective ballot certificates requiring cure, *see* Compl. ¶ 32. Plaintiffs have not alleged that “all applications” of the witness requirement, as opposed to a “specific application,” impose any meaningful burden at all on voters, *SEIU*, 2020 WI 67, ¶ 48; Mot.21–22, let alone the severe burden that Plaintiffs assert.

Plaintiffs then try to reframe this challenge as a hybrid claim, asserting that the witness requirement is facially unconstitutional as to “Wisconsin voters without anyone in their household to witness their ballot.” Resp.Br.11. That is not what their

Complaint alleges, *see* Compl. ¶ 77, but this hypothetical hybrid claim would fail as a matter of law, in any event. To maintain a hybrid challenge, Plaintiffs must allege that the “disputed portions of [the statute] cannot be constitutionally enforced” within the identified category “under any circumstances.” *Gabler v. Crime Victims Rts. Bd.*, 2017 WI 67, ¶ 29, 376 Wis. 2d 147, 897 N.W.2d 384 (citation omitted). The allegations in Plaintiffs’ Complaint do not come close to alleging plausibly that Section 6.87’s witness-address requirement cannot be constitutionally enforced “under any circumstances” against individuals who do not have anyone in their household to serve as a witness. *See id.* Nor could Plaintiffs make such an allegation, as the statute allows any adult, non-candidate U.S. citizen to serve as a witness, *see* Wis. Stat. § 6.87(4)(b)1, including relatives, neighbors, friends, work colleagues, and so forth.

2. Drop Box Prohibition. Plaintiffs’ only defense of their facial challenge to the drop box prohibition—that it “burdens all absentee voters alike by requiring them to rely on the U.S. Postal Service and risk a late delivery,” Resp.Br.11–12—shows that this claim fails as a matter of law. The only burden that Plaintiffs note as to the drop box prohibition is that the U.S. Postal Service *may, perhaps* deliver an absentee ballot too late, Resp.Br.11–12, but many voters can “guarantee timely delivery” by “mail[ing] the ballot far in advance of election day” and so are not burdened, let alone significantly burdened, from the drop box prohibition, Mot.23 (quoting Compl. ¶ 87). In any event, the statute itself provides absentee voters a simple avenue to avoid this alleged burden: they may deliver their ballots in person. Wis. Stat. § 6.87(4)(b)1.

3. Cure Deadline. The only burden that Plaintiffs identify is that the cure deadline “makes it harder for every absentee voter to cure any defect with their ballot and therefore effectively requires every absentee voter to return their ballot early.” Resp.Br.12. But this purported burden by its own terms applies only to those absentee voters who submit a defective ballot requiring a cure, and even as among these voters, at least some can easily mail or deliver their ballots sufficiently ahead of Election Day to ensure that they have time to cure any ballot-certificate defect. Mot.24. Plaintiffs’ Complaint does not allege plausibly that the cure deadline imposes a sufficiently broad burden to justify Plaintiffs’ facial constitutional challenge.\*

4. Section 6.84. Plaintiffs’ brief contention that Section 6.84 “unconstitutionally degrades the voting rights of all absentee voters by increasing the risk of disenfranchisement,” Resp.Br.12, is wrong. Even if Plaintiffs’ challenge to Section 6.84 were justiciable, that provision’s statement of policy—which notes only that absentee voting is a “privilege” that “must be carefully regulated” and requires that the absentee-voting laws “be construed as mandatory”—does not impose *any* burden on voters, let alone on all voters, *contra* Resp.Br.11–12. But that claim is not justiciable, in any event. Mot.24–27; *Friends of Black River Forest v. Kohler Co.*, 2022

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\* The Legislature does not address the balancing of interests at this motion-to-dismiss stage, *see* Mot.21 n.10, but strongly agrees with WEC that, if this Court were to hold that the challenged absentee-voting laws implicate Article III at all, *but see supra* Part I, these laws would easily survive rationality review, which is the standard the Wisconsin Supreme Court relies upon to assess election laws that involve the “familiar burdens” of “time and inconvenience,” *Milwaukee Branch of NAACP v. Walker*, 2014 WI 98, ¶ 46, 357 Wis. 2d 469, 851 N.W.2d 262. Plaintiffs’ assertion that the witness requirement, drop box prohibition, and cure deadline impose a burden on all voters sufficiently “severe” to justify strict scrutiny, Resp.Br.12–18, is, of course, entirely implausible.

WI 52, ¶ 33, 402 Wis. 2d 587, 977 N.W.2d 342. While Plaintiffs contend that the Legislature’s policy judgment that absentee-voting laws “be construed as mandatory,” Wis. Stat. § 6.84(2), “makes absentee voting both more difficult and riskier,” Resp.Br.25, Section 6.84 does no such thing. That provision does not “regulate” the absentee-voting process in any way or impose any specific burdens on Wisconsin’s absentee voters. See Wis. Stat. § 6.83. Invalidating Section 6.84 would not relieve absentee voters from needing to have their absentee ballots witnessed, return those ballots by mailing or personally delivering them to the municipal clerk, or cure any ballot-certificate defects by 8:00 p.m. on Election Day. Section 6.84 does not itself harm Plaintiffs or “affect” the right to vote, see *Friends of Black River Forest*, 2022 WI 52, ¶ 2, so Plaintiffs cannot challenge that provision.

### **III. Plaintiffs’ Requested Relief Would, If Granted, Violate the U.S. Constitution’s Elections Clause**

A. This Court should also dismiss Plaintiffs’ lawsuit because their requested relief, if granted, would violate the U.S. Constitution’s Elections Clause, which gives state “Legislature[s]” the power to “prescribe[ ]” the “Times, Places and Manner of holding Elections.” U.S. Const. art. I, § 4, cl. 1; Mot.27–32. As the U.S. Supreme Court recently explained in *Moore*, the “general rule” that federal courts “accept[ ] state court interpretations of state law” gives way when state courts “distort[ ]” state law “beyond what a fair reading require[s]” and “read [that law] in such a manner as to circumvent federal constitutional provisions,” including the Elections Clause. 143 S. Ct. at 2089 (citation omitted). If this Court were to invalidate the challenged absentee-voting laws under Plaintiffs’ unprecedented Article III theory, that would

supplant the Legislature's role in regulating the "Times, Places and Manner" of federal elections, U.S. Const. art. I, § 4, cl. 1, thereby violating *Moore*.

B. Plaintiffs' only response is that their claims seek "nothing more" than to "apply state constitutional restraints" to state election laws, Resp.Br.27, but that is wrong. Plaintiffs ask this Court to "read [Article III of the Wisconsin Constitution] in such a manner," *Moore*, 143 S. Ct. at 2088, as to invalidate prosaic statutory regulations governing the "Manner" in which absentee ballots must be filled out (in the presence of a witness) and returned (either by mail or personal delivery), as well as the "Time[ ]" by which absentee ballots must be submitted (8:00 p.m. on Election Day), *see* U.S. Const. art. I, § 4, cl. 1. A "fair reading" of Article III of the Wisconsin Constitution—mandated by its plain text, history, and the relevant precedent—does not contain a right to vote absentee, and Plaintiffs' effort to enforce this nonexistent right "distorts" state law "beyond what a fair reading require[s]" and should therefore be rejected under *Moore*. 143 S. Ct. at 2089 (citation omitted).

## CONCLUSION

This Court should grant the Legislature's Motion To Dismiss.

Dated: October 13, 2023

Respectfully submitted,

*Electronically signed by Misha Tseytlin*

MISHA TSEYTLIN

State Bar No. 1102199

*Counsel of Record*

KEVIN M. LEROY

State Bar No. 1105053

SEAN T.H. DUTTON

State Bar No. 1134675

EMILY A. O'BRIEN

State Bar No. 1115609

TROUTMAN PEPPER

HAMILTON SANDERS LLP

227 W. Monroe, Suite 3900

Chicago, Illinois 60606

(608) 999-1240 (MT)

(312) 759-1938 (KL)

(248) 227-1105 (SD)

(312) 759-5939 (EO)

(312) 759-1939 (fax)

misha.tseytlin@troutman.com

kevin.leroy@troutman.com

sean.dutton@troutman.com

emily.obrien@troutman.com

*Attorneys for the Wisconsin State  
Legislature*