

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF WISCONSIN  
GREEN BAY DIVISION

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DAWN MCCOLE and JEANETTE  
MERTEN,

Plaintiffs,

v.

Case No. 24-CV-1348

WISCONSIN ELECTIONS  
COMMISSION,

Defendant.

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**DEFENDANT'S MEMORANDUM OF LAW IN  
SUPPORT OF ITS MOTION TO DISMISS**

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**INTRODUCTION**

Two Wisconsin voters have filed suit against the Wisconsin Elections Commission (WEC) complaining that MyVote, Wisconsin's online voter registration system, is not secure. They seek to enjoin WEC from continuing to use the MyVote portal as a means for Wisconsin citizens to register to vote and request absentee mail-in ballots due to alleged cybersecurity vulnerabilities. Plaintiffs' complaint should be dismissed for two independent reasons. First, Plaintiffs sue only a state entity, which has Eleventh Amendment immunity from suit in federal court. Second, notwithstanding this dispositive reason, Plaintiffs fail to state a plausible claim for relief. They allege that the failure

of MyVote to be a secure system violates their due process and equal protection rights, without further explanation. The complaint's factual allegations, along with its lone mere conclusory legal allegation, is insufficient to survive this motion to dismiss.

### **STATEMENT OF ALLEGED FACTS**

The following alleged facts are considered true only for the purpose of this motion to dismiss.

Plaintiff Dawn McCole is a resident of Oneida, Brown County, Wisconsin, and a registered voter. (Dkt. 1 ¶ 4.) Plaintiff Jeanette Merten is a municipal clerk for the Town of Oshkosh, Winnebago County, Wisconsin, and a registered voter. (Dkt. 1 ¶ 4.) Plaintiffs' voter registration information is maintained in the MyVote website system. (Dkt. 1 ¶¶ 4–5.) Defendant Wisconsin Elections Commission is a state commission generally responsible for the administration of chapters 5 to 10 and 12 related to elections in Wisconsin. (Dkt. 1 ¶¶ 6–7; Wis. Stat. § 5.05(1).)

The Commission has implemented an online voter registration website and absentee ballot request portal (<http://myvote.wi.gov/en-us>) called “MyVote” or the “MyVote portal.” (Dkt. 1 ¶ 8.) It is designed to facilitate the registration of voters and fulfill their requests for absentee ballots, among other things. (Dkt. 1 ¶ 8.) Any person can, via MyVote, request an absentee ballot to any address by inputting a voter's name and birthdate. (Dkt. 1 ¶ 8.)

The MyVote portal does not allow voters to create accounts with usernames and passwords. (Dkt. 1 ¶ 8.)

The State of Wisconsin has brought criminal charges against Harry Wait for using the personally identifying information of two Wisconsin voters without their authorization to commit election fraud on MyVote—illegally requesting and obtaining absentee mail-in ballots in their names. (Dkt. 1 ¶¶ 8–9; Dkt. 1-1.) The MyVote portal, Plaintiffs allege, lacks adequate cybersecurity measures to protect against unauthorized access, data breaches, and other cybersecurity threats. (Dkt. 1 ¶ 8.)

MyVote is being used to register voters for the 2024 (November) general election and to request absentee ballots to be cast in the election. (Dkt. 1 ¶ 10.)

Upon information and belief, Plaintiffs allege that the MyVote portal via a Virtual Private Network (VPN) may allow the changing of a registered voter's personally identifying information, voter history or address. (Dkt. 1 ¶ 10.) A VPN is a service that creates a secure, encrypted connection between a device and the internet. (Dkt. 1 ¶ 12.)

## LEGAL STANDARD

Motions to dismiss are meant to test the sufficiency of the complaint, not to decide the merits of the case. *See Weiler v. Household Fin. Corp.*, 101 F.3d 519, 524 n.1 (7th Cir. 1996).

Federal Rule of Civil Procedure 12(b)(6) allows a court to dismiss all or part of an action for “failure to state a claim upon which relief can be granted.” Federal Rule of Civil Procedure 8(a)(2) requires that a claimant provide “a short and plain statement of the claim showing that the pleader is entitled to relief.”

The complaint does not require detailed factual allegations but must include more than mere legal conclusions. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). It must meet a plausibility threshold. *Id.* at 570. To survive a motion to dismiss, “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp.*, 550 U.S. at 570); *Sherwood v. Marchiori*, 76 F.4th 688, 693 (7th Cir. 2023). A claim is plausible when the plaintiff alleges sufficient facts that would allow a court to reasonably infer that the defendant is liable for the alleged misconduct, but a court may decline to accept as true any allegations that “are no more than conclusions.” *Iqbal*, 556 U.S. at 678–79.

## ARGUMENT

### **I. Plaintiffs' complaint should be dismissed because the Commission has Eleventh Amendment immunity from suit.**

The first reason this Court should dismiss the complaint is because the Commission possesses Eleventh Amendment immunity from suit and, therefore, Plaintiffs' claims are barred.

The Eleventh Amendment provides that “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State . . . .” U.S. Const. amend. XI. “Although by its terms the Amendment applies only to suits against a State by citizens of another State, [the Supreme Court has] extended the Amendment’s applicability to suits by citizens against their own States.” *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001) (collecting cases). The Eleventh Amendment bars suits against a state agency brought by private parties “regardless of the nature of the relief sought.” *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100–01 (1984); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996). “State agencies are treated the same as states” and “a state agency is the state for purposes of the eleventh amendment.” *Kroll v. Bd. of Trs. of Univ. of Ill.*, 934 F.2d 904, 907 (7th Cir.1991), *cert. denied*, 502 U.S. 941 (1991) (citations omitted). In short, it “grants states immunity from private suits in

federal court without their consent.” *Nuñez v. Ind. Dep’t of Child Servs.*, 817 F.3d 1042, 1044 (7th Cir. 2016).

Here, the State of Wisconsin is a sovereign state of the union, *see* Wis. Stat. § 1.01, and Defendant Commission is an independent state agency, *see* Wis. Stat. §§ 5.025, 5.05, 15.61 (creation of the Commission). And Plaintiffs are private parties. The Commission is therefore immune from the claims brought by Plaintiffs in this Court, whatever they may be. As a result, because the complaint names no defendants other than the Commission, not only are the claims against the Commission barred by the Eleventh Amendment, but Plaintiffs’ entire complaint must be dismissed. No further analysis is required.

**II. Alternatively, Plaintiffs’ complaint should be dismissed because they fail to allege any plausible constitutional claims.**

An alternative reason to dismiss Plaintiffs’ complaint is that it fails to state any plausible due process or equal protection claim.

The Fourteenth Amendment to the U.S. Constitution states, in part: “No State . . . shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1.

A substantive due process claim addresses “harmful, arbitrary acts by public officials.” *Geinosky v. City of Chicago*, 675 F.3d 743, 750 (7th Cir. 2012). These claims must meet a high standard, requiring allegations of “conduct

under color of state law that ‘violated a fundamental right or liberty’ and was so ‘arbitrary and irrational’ as to ‘shock the conscience.’” *Nelson v. City of Chicago*, 992 F.3d 599, 604 (quoting *Campos v. Cook Cnty.*, 932 F.3d 972, 975). A procedural due process claim requires a deprivation by state action of a protected interest in life, liberty, or property, and inadequate state process. *Zinermon v. Burch*, 494 U.S. 113, 125 (1990); *Sherwood*, 76 F.4th at 696. And to state an equal protection claim, a plaintiff must allege that she is a member of a protected class, she was treated differently from a similarly situated member of an unprotected class, and the defendants were motivated by discriminatory purposes. *Alston v. City of Madison*, 853 F.3d 901, 906 (7th Cir. 2017).

As noted above, a claim is plausible when the plaintiff alleges sufficient facts that would allow a court to reasonably infer that the defendant is liable for the alleged misconduct, but a court may decline to accept as true any allegations that “are no more than conclusions.” *Iqbal*, 556 U.S. at 678–79.

Here, Plaintiffs generally allege that MyVote does not protect voters from third parties requesting absentee ballots in their names. (Dkt. 1 ¶¶ 8–9; Dkt. 1-1.) They also allege that MyVote lacks adequate cybersecurity safeguards and poses significant risks to the integrity of the electoral process and personal data of Wisconsin voters. (Dkt. 1 ¶ 10.) Plaintiffs then claim that because illegal use of the MyVote portal can lead to fraudulent registration of

voters and receipt of absentee ballots, they “are subject to being irreparably harmed and disenfranchised by people and /or entities using MyVote for such untoward purposes, illegally voting via absentee ballots mailed to addresses non associated with their registered voters, diminishing the weight of lawfully cast votes.” (Dkt. 1 ¶ 11.) Plaintiffs conclude that these inadequate security measures “violate the constitutional rights of Wisconsin voters and electors under the Fourteenth Amendment, which guarantees due process and equal protection under the law.” (Dkt. 1 ¶ 13.)

Even under a liberal reading, Plaintiffs’ allegations do not state any plausible Fourteenth Amendment claim. As for a substantive due process claim, WEC’s administration of the MyVote portal in a way that allows a person to register to vote and to request an absentee ballot without a username or password is not so arbitrary and irrational as to shock the conscience. This is especially true when the State has criminal laws to prevent election fraud, and it takes action to prosecute persons like Harry Wait who is alleged to have used MyVote to requests absentee ballots for persons other than himself.

To the extent Plaintiffs allege a procedural due process violation, it is not clear from the complaint’s allegations what they are being deprived of without adequate state process. That one cannot tell which type of due process claim Plaintiffs are asserting only reinforces that they have not pled a plausible due process violation.



And as to equal protection, none of the allegations even hint at Plaintiffs' being members of any unprotected class, any unequal treatment imposed upon them, or the existence of any discriminatory purpose through MyVote.

The allegations that MyVote's supposed insecurity violates Plaintiffs' Fourteenth Amendment rights are "are no more than conclusions." that the federal courts are not required to accept. *Iqbal*, 556 U.S. at 678–79. And this Court should not accept them.

Plaintiffs' complaint should be dismissed because it fails to state any plausible claim under the Fourteenth Amendment.

### CONCLUSION

Defendant Wisconsin Elections Commission asks this Court to grant its motion dismissing Plaintiffs' complaint.

Dated this 14th day of November 2024.

Respectfully submitted,

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Electronically signed by:

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