

FILED
01-24-2024
CIRCUIT COURT
DANE COUNTY, WI
2023CV001900

BY THE COURT:

DATE SIGNED: January 24, 2024

Electronically signed by Ann Peacock
Circuit Court Judge

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 12

DANE COUNTY

PRIORITIES USA, et al.,

Plaintiffs,

v.

Case No. 23-CV-1900

WISCONSIN ELECTIONS
COMMISSION, et al.,

Defendants.

**DECISION AND ORDER
ON MOTIONS TO DISMISS**

INTRODUCTION

In this declaratory judgment action, the Plaintiffs—Priorities USA, Wisconsin Alliance for Retired Americans, and William Franks, Jr. (collectively Plaintiffs)—challenge three absentee voting provisions in state law: the witness-certification requirement, the prohibition on drop boxes, and the election-day cure deadline. The Defendants—Wisconsin Elections Commission (WEC) and the Wisconsin State Legislature (Legislature)—filed motions to dismiss. The Plaintiffs’ lawsuit largely raises facial constitutional challenges, which are the most difficult of constitutional

challenges. Regardless of whether the challenged absentee ballot provisions are wise or necessary, the allegations in the complaint, if proven, would not meet the high hurdle for a facial challenge. Therefore, I am granting the motion to dismiss the facial constitutional challenges. However, I am denying the motion to dismiss the Plaintiffs' hybrid constitutional challenge to the witness requirement and the constitutionality of Wis. Stat. § 6.84(2) because dismissal is not appropriate at this stage of litigation.

A declaratory action states a claim when a controversy is justiciable. *Loy v. Bunderson*, 107 Wis. 2d 400, 410, 320 N.W.2d 175 (1982). The Defendants have different positions on the justiciability analysis. The WEC concedes that Plaintiffs meet the justiciability requirements with regard to three of the four declarations sought in this lawsuit. WEC Supp. Br., Dkt. 97:2. But the Legislature argues that justiciability is not present for any of the four declarations. Legislature Supp. Br., Dkt. 99:1-2. For the reasons set forth below, I conclude that this controversy is justiciable.

A decision on justiciability does not end the motion to dismiss analysis given the issues raised in this particular case. In deciding a motion to dismiss in a declaratory judgment action involving challenges to the constitutionality of statutes, this Court also analyzes the specific challenges and determines whether the complaint states a viable cause of action. *See Serv. Emps. Int'l Union, Loc. 1 ("SEIU") v. Vos*, 2020 WI 67, ¶¶ 26-29, 73, 77, 83, 393 Wis. 2d 38, 946 N.W.2d 35 (holding that the circuit court should have granted the motion to dismiss particular facial constitutional challenges). Here, in order to succeed on their facial constitutional challenges, the Plaintiffs must show that the challenged absentee voting provisions cannot be constitutionally enforced "under any circumstances." *League of Women Voters of Wisconsin Educ. Network, Inc. v. Walker*, 2014 WI 97, ¶ 15, 357 Wis. 2d 360, 851 N.W.2d 302. In an attempt to show this,

Plaintiffs argue that the provisions are unconstitutional under any circumstances because “(e)ach of the Challenged Restrictions imposes a burden on *every* Wisconsin absentee voter—that is, on every person to whom the Restrictions apply.” Pl. Br., Dkt. 85:18 (emphasis in original). Under the controlling legal standard, however, Plaintiffs’ allegations do not support a facial constitutional claim because Plaintiffs’ own allegations show that the provisions are not unconstitutional in *all* circumstances. For example, the absentee ballot drop box prohibition does not impose a burden on absentee voters who do not intend to use that method of ballot return regardless of its availability. And the cure deadline does not impose a burden on absentee voters who do not need to use the cure process.

Setting aside the facial challenges, the Plaintiffs pursue one hybrid constitutional challenge. Specifically, the Plaintiffs argue that the witness requirement “particularly burdens the hundreds of thousands of Wisconsin voters without anyone in their household to witness their ballot.” Pl. Br., Dkt. 85:19. Further factual development is necessary to determine whether a strict scrutiny analysis or rational basis analysis is applicable to this hybrid challenge and, if so, whether the witness requirement survives the applicable level of review. Thus, with respect to a hybrid challenge to the witness requirement and the constitutionality of Wis. Stat. § 6.84(2), the allegations set forth in Plaintiffs’ Complaint are sufficient to survive a motion to dismiss.

BACKGROUND

Plaintiffs allege that particular statutory provisions related to absentee voting are unconstitutional under the Wisconsin Constitution. Specifically, Plaintiffs seek the following declarations:

1. Wis. Stat. § 6.87(4)(b)1. unconstitutionally requires another person to witness the

signing of any absentee ballot;

2. Wis. Stat. § 6.87(4)(b)1. unconstitutionally prohibits the use of drop boxes;
3. Wis. Stat. § 6.87(6) unconstitutionally requires absentee voters to cure any defect on or before the day of the election; and
4. Wis. Stat. § 6.84, a declaration of policy preceding the substantive parts of Wisconsin's absentee voting statutes, unconstitutionally prefers votes cast in person over votes cast absentee.

Compl. ¶¶ 70-112, dkt. 2. Plaintiffs further seek declarations that any guidance document¹ created by the Wisconsin Elections Commission consistent with these provisions is itself unlawful. *Id.*

Both Defendants filed motions to dismiss. On October 31, 2023, this Court heard oral arguments. Based on those arguments, the Court ordered supplemental briefing and the motions to dismiss are now fully briefed.

LEGAL STANDARD

A declaratory action states a claim when a controversy is justiciable. A controversy is justiciable when four factors are present:

- (1) A controversy in which a claim of right is asserted against one who has an interest in contesting it. (2) The controversy must be between persons whose interests are adverse. (3) The party seeking declaratory relief must have a legal interest in the controversy—that is to say, a legally protectable interest. (4) The issue involved in the controversy must be ripe for judicial determination.

Loy, 107 Wis. 2d at 410.

¹ A guidance document means “any formal or official document or communication issued by an agency ...” that either “1. Explains the agency’s implementation of a statute or rule ...” or “2. Provides guidance or advice with respect to how the agency is likely to apply a statute or rule ... *SEIU*, 2020 WI 67, ¶89.

DISCUSSION

I. The justiciability of the controversy and challenges to the constitutionality of the absentee voting provisions.

Plaintiffs' claims meet the requirements of justiciability. The Plaintiffs assert that the challenged absentee voting provisions violate their fundamental right to vote. "Without question, the right to vote is a fundamental right and in many respects, it is protective of other rights." *Milwaukee Branch of NAACP v. Walker*, 2014 WI 98, ¶ 23, 357 Wis. 2d 469, 851 N.W.2d 262. While the Legislature argues that this case is not justiciable, its arguments are focused on the merits of Plaintiffs' claims. And "[t]he merits of plaintiffs' cause of action do not determine its justiciability," so "[t]he merits of the constitutional issues presented need not and should not be addressed" in assessing whether a claim is justiciable. *Tooley v. O'Connell*, 77 Wis. 2d 422, 433–35, 253 N.W.2d 335 (1977); *see also Moustakis v. Dep't of Justice*, 2016 WI 42, ¶ 3 n. 2, 368 Wis. 2d 677, 880 N.W.2d 142 (holding that whether a plaintiff "falls within the ambit" of a statutory right should be decided "as a matter of statutory interpretation rather than as a matter of standing").

The Legislature further argues that all of Plaintiffs' claims fail because the challenged provisions are completely immune from review for constitutionality. Specifically, the Legislature argues that "Plaintiffs' claims all fail because the Wisconsin Constitution contains no right to vote absentee, *see* Wis. Const. art. III, so the challenged statutory provisions—each of which regulates only the privilege of absentee voting in Wisconsin, or simply recognize that absentee voting is a privilege—do not burden the constitutional right to vote." Legislature Br., Dkt. 60:12. The argument is misplaced. As WEC puts it, "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." WEC Resp. Br., Dkt. 65:8. Indeed, numerous federal courts have reviewed absentee

voting laws to determine whether they unfairly burden the right to vote, regardless of how that right is exercised. Plainly put, “[t]he voter-plaintiffs have an associational right to vote in political party elections and that right is burdened when the state makes it more difficult for these voters to cast ballots.” *Price v. N.Y. State Bd. of Elections*, 540 F.3d 101, 108 (2nd Cir. 2008) (citations omitted) (challenge to New York absentee voting statutes); *see, e.g., Texas Dem. Party v. Abbott*, 978 F.3d 168, 193 (5th Cir. 2020) (challenge to Texas absentee voting statutes); *Ohio State Conf. of NAACP v. Husted*, 768 F.3d 524, 540 (6th Cir. 2014), *vacated on other grounds*, 2014 WL 10384647 (6th Cir. Oct. 1, 2014) (challenge to Ohio absentee voting statutes). As such, I conclude that the Plaintiffs’ claims are justiciable and the absentee ballot provisions can be constitutionally challenged.

II. The constitutional challenges.

Given the constitutional claims at issue in this case, a finding of justiciability does not itself require denial of the pending motions to dismiss. The Wisconsin Supreme Court’s decision in *SEIU* indicates that a circuit court also analyzes the specific challenges and determines whether the complaint states a viable cause of action when deciding a motion to dismiss in a declaratory judgment action involving challenges to the constitutionality of statutes. *See SEIU*, 2020 WI 67, ¶¶ 26-29, 73, 77, 83 (holding that the circuit court should have granted the motion to dismiss particular facial constitutional challenges). Thus, I undertake the below analysis in deciding the instant motions.

A. The facial constitutional challenges.

When a plaintiff brings a facial constitutional challenge, the plaintiff “claims that the law is unconstitutional on its face—that is, it operates unconstitutionally in all applications. [The Wisconsin Supreme Court has] repeatedly reaffirmed that to successfully challenge a law on its

face, the challenging party must show that the statute cannot be enforced ‘under any circumstances.’ This is no small wall to scale. Proving a legislative enactment cannot ever be enforced constitutionally ‘is the most difficult of constitutional challenges’ and an ‘uphill endeavor.’” *SEIU*, 2020 WI 67, ¶¶ 38-39; *see also League of Women Voters*, 2014 WI 97, ¶ 15. If a challenger succeeds in a facial attack on a law, the law is void “from its beginning to the end.” *State v. Wood*, 2010 WI 17, ¶ 13, 323 Wis. 2d 321, 780 N.W.2d 63 (quoting *State ex rel. Comm'rs of Pub. Lands v. Anderson*, 56 Wis. 2d 666, 672, 203 N.W.2d 84 (1973)).

Voting absentee, to summarize the process, begins when an elector makes a “written application to the municipal clerk ... for an official ballot ...” Wis. Stat. § 6.86(1). The clerk must then mail or otherwise provide a ballot to the elector. Wis. Stat. § 6.87(3). The elector may then complete the ballot, but they must do so in the presence of a witness. Wis. Stat. § 6.87(4)(b)1. Finally, the elector returns the ballots by mail or to the municipal clerk. *Id.* Plaintiffs allege that three statutory provisions in the absentee voting process burden the right to vote. In doing so, the Plaintiffs argue that the challenged absentee voting provisions cannot be constitutionally enforced under any circumstances by arguing that the provisions impose a burden on all absentee voters:

[U]nder the facts as Plaintiffs allege them the Challenged Restrictions may not constitutionally be enforced against anyone. Each of the Challenged Restrictions imposes a burden on every Wisconsin absentee voter—that is, on every person to whom the Restrictions apply. Every Wisconsinite who votes absentee must complete their ballot in the presence of a witness, must drop off that ballot somewhere other than a secure and accessible drop box, and must ensure that ballot is perfectly completed before the Election Day cure deadline. Plaintiffs contend that these burdens are never constitutionally justified, for any voter, and therefore properly challenge them on their face.

Pl. Br., Dkt. 85:18-19. But a facial challenge requires the Plaintiffs to show that the challenged provisions impose a burden on all voters, not just absentee voters. Even assuming that the Plaintiffs could pursue a facial challenge by identifying absentee voters as a burdened group, the

Plaintiffs fail to state a facial constitutional claim as to any of the challenged provisions.

The Plaintiffs first challenge the witness-certification requirement. This statute requires, in relevant part:

A military elector or an overseas elector voting absentee, regardless of whether the elector qualifies as a resident of this state under s. 6.10, shall make and subscribe to the certification before one witness who is an adult but who need not be a U.S. citizen. The absent elector, in the presence of the witness, shall mark the ballot in a manner that will not disclose how the elector's vote is cast. The elector shall then, still in the presence of the witness, fold the ballots so each is separate and so that the elector conceals the markings thereon and deposit them in the proper envelope.

Wis. Stat. § 6.87(4)(b)1. Plaintiffs say this severely burdens the right to vote because 600,000 Wisconsin voters have no other person in their household to witness an absentee ballot. Pl. Br., dkt. 85:21 (citing *DNC v. Bostelmann*, 488 F. Supp. 3d 776, 793 (W.D. Wis. 2020)). But by arguing that only a subset of voters will have difficulty meeting the witness requirement, this allegation itself demonstrates that Plaintiffs have not sufficiently alleged facts to support a facial constitutional challenge.

The Plaintiffs' second challenge is the prohibition on drop boxes. In *Teigen*, the Wisconsin Supreme Court interpreted § 6.87(4)(b)1 to prohibit drop boxes because that statute requires voters either "mail" their ballot or "deliver [the ballot] in person, to the municipal clerk" *Teigen* 2022 WI 64, ¶55. This precluded the use of drop boxes, the Wisconsin Supreme Court explained, because "[a]n inanimate object, such as a ballot drop box, cannot be the municipal clerk." *Id.* The Plaintiffs say the drop box prohibition creates a severe burden because "an absentee voter may now have their valid absentee ballot rejected due to unanticipated mail delivery delays" Pl. Br., Dkt. 85:23. Or, fearing their ballot will be lost in the mail, Plaintiffs say the drop box prohibition could create a severe burden by compelling "[v]oters with disabilities, those who lack easy access

to reliable personal transportation or have less economic resources” to drop off their ballots in person. *Id.* Again, these specific allegations demonstrate that the absence of ballot drop boxes does not affect all voters or even all absentee voters.

The third absentee voting provision challenged by the Plaintiffs is the election-day cure deadline in § 6.87(6). That statute requires, in full:

The ballot shall be returned so it is delivered to the polling place no later than 8 p.m. on election day. Except in municipalities where absentee ballots are canvassed under s. 7.52, if the municipal clerk receives an absentee ballot on election day, the clerk shall secure the ballot and cause the ballot to be delivered to the polling place serving the elector's residence before 8 p.m. Any ballot not mailed or delivered as provided in this subsection may not be counted.

Wis. Stat. § 6.87(6). Plaintiffs say this creates a severe burden because “voters may be disenfranchised due to minor deficiencies in their ballot certificates that they could otherwise have cured.” Pl. Br., Dkt. 85:25. Specifically, Plaintiffs focus on potential mail delays and allege that “an absentee voter may be deprived of the ability to remedy a curable defect in the ballot certificate due to unanticipated mail delivery delays entirely outside of the voter’s control.” Compl. ¶¶ 53-56, dkt. 2. Like the allegations set forth for the other two challenged provisions, these allegations show that the challenged provision doesn’t affect all voters or even all absentee voters. The election-day cure deadline could not be unconstitutional in all applications given that most absentee voters will not need to use the cure process and, even if they need to cure, the voters without mail difficulties will meet the deadline.

While the challenged absentee voting provisions undoubtedly create some burden to some subset of absentee voters, I find that the facts alleged in the complaint do not support an inference that any of the challenged statutory provisions could plausibly burden all voters or even all absentee voters. Many voters will neither seek to vote absentee nor suffer any burden from these

restrictions. Imagine, for example, two adult voters who live and spend time together, both of whom are physically capable of handing one another their absentee ballot to complete the certification process. The Plaintiffs have never explained why that sort of voter faces a burden except to speculate that “they need to coordinate” Tr. of Oct. 31 Mot. Hr’g, dkt. 95:11. This is a problem for the plaintiffs because “[u]nder our well-established law, a facial challenge succeeds only when every single application of a challenged provision is unconstitutional.” *SEIU*, 2020 WI 67, ¶ 4. Because Plaintiffs have failed to show that any of the three challenged absentee voting provisions is unconstitutional in every single application, their facial constitutional challenges do not state a viable claim.

B. The hybrid constitutional challenge to the witness requirement.

When a plaintiff brings a hybrid challenge to a category of application under a statute, the plaintiff “must meet the standard for a facial challenge” as to the challenged category of application. *Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, ¶ 29, 376 Wis. 2d 147, 897 N.W.2d 384. That is, the challenger must “demonstrate that the disputed portions of [the statute] cannot be constitutionally enforced” within the identified category “under any circumstances.” *Id.* (citation omitted).

The Plaintiffs bring a hybrid challenge with respect to the witness requirement. They allege that there is a significant subset of absentee voters who do not live with another person that could serve as their witness and that the witness requirement severely burdens at least a subset of voters who live alone. If those allegations are accurate and are borne out by factual development in discovery, the witness requirement may be subject to a strict scrutiny analysis and that may result in a meritorious claim. *See Milwaukee Branch of NAACP*, 2014 WI 98, ¶¶ 86-109 (Crooks, J., dissenting). As such, dismissal is not appropriate for the hybrid constitutional challenge of the

witness requirement.

C. The challenge to Wis. Stat. § 6.84.

The Plaintiffs acknowledge that subsection 1 of Wis. Stat. § 6.84 is a policy statement that is not subject to review. Tr. of Oct. 31, 2023 Mot. Hr'g, dkt. 95:24-25. However, they maintain that subsection 2 of that statute is unconstitutional to the extent that any of the challenged provisions are unconstitutional. Subsection 2 dictates that “[b]allots cast in contravention of the procedures specified in [several statutes, including Wis. Stat. § 6.86] those provisions may not be counted. Ballots counted in contravention of the procedures specified in those provisions may not be included in the certified result of any election.” Wis. Stat. § 6.84(1). If the Plaintiffs ultimately succeed on a hybrid challenge to the witness requirement in Wis. Stat. § 6.86, subsection 2 would be unconstitutional to the extent that its direction to not count ballots would conflict with a finding that the witness provision in Wis. Stat. § 6.86 is unconstitutional. Because the constitutionality of subsection 2 is dependent on the success of a hybrid constitutional claim on the witness requirement, this claim survives the motion to dismiss.

III. This Court doesn’t have the authority to revisit the soundness of the statutory interpretation in *Teigen*.

The Plaintiffs’ Complaint also references one statutory interpretation argument. Specifically, Plaintiffs allege that, in the alternative to a declaratory judgment by this Court, “the Wisconsin Supreme Court should revisit its decision in *Teigen* and confirm that § 6.87(4)(b)1 allows the use of drop boxes consistent with the statutory text and constitutional principles.” Compl. ¶¶ 93-96, dkt. 2. Even if I agree that *Teigen* was incorrectly decided, I must follow the *Teigen* precedent and I leave any revisiting of that decision to the Wisconsin Supreme Court.

ORDER

For the reasons set forth above, the motions to dismiss are denied in part and granted in part. Defendants' motions to dismiss are granted with respect to Plaintiffs' facial constitutional challenges. Defendants' motions to dismiss are denied with respect to Plaintiff's hybrid constitutional challenge on the witness requirement and the constitutionality of Wis. Stat. § 6.84(2).

Given the importance of timely disposition in this case, the Court will hold a scheduling conference to set an expedited schedule for summary judgment briefing on the remaining issues. If the Plaintiffs determine that they do not wish to further pursue a hybrid constitutional claim on the witness requirement, the Plaintiffs should notify the Court and the other parties of that position prior to the scheduling conference.