

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
Green Bay Division

DAWN McCOLE
and
JEANETTE MERTEN
Plaintiffs,

v.

Case No.: 24-CV-1348

WISCONSIN ELECTIONS COMMISSION
Defendant.

**PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO
DEFEDANT'S MOTION TO DISMISS**

COME NOW the plaintiffs, Dawn McCole and Jeanette Merten, by counsel, and for their Memorandum of Law in Opposition to Defendant the Wisconsin Elections Commission's ("WEC") Rule 12(b)(6) Motion to Dismiss, argue the following:

Introduction

Plaintiffs are registered Wisconsin voters and electors¹ who sued "to enjoin the WEC from using its online voter registration system to allow voters to register to vote, and request absentee ballots due to inadequate security measures that jeopardize the integrity of the electoral process and the personal data of Wisconsin voters"². The Complaint alleges the WEC is a commission and entity created by the Wisconsin legislature to "administrate and oversee elections within the state of Wisconsin"³. The Wisconsin legislature created the WEC as an independent and decentralized Commission operating through a network of state and local officials. The Complaint

¹ Complaint, Paragraphs 4 and 5.

² Complaint, Paragraph 1.

³ Complaint, Paragraph 6.

alleges⁴ the WEC is tantamount to a state agency or quasi-agency insofar as it performs governmental functions, subjecting it to the safeguards and rights conferred by and guaranteed by the 14th Amendment. The Complaint alleges the WEC operates the My Vote online website portal, and it poses “significant risks to the integrity of the electoral process and the personal data of Wisconsin voters” due to “the inadequate cybersecurity safeguards present within the My Vote website”⁵. Defendant the WEC moves to dismiss the Complaint (1) based upon 11th Amendment immunity and (2) because, they argue, the facts do not state a substantive claim for injunctive relief. Plaintiffs disagree.

Standard of Review

A Rule 12(b)(6) motion to dismiss for failure to state a claim challenges the legal sufficiency of a Complaint. A Complaint must include “a short and plain statement of the claim showing that the pleader is entitled to relief.” Rule 8(a)(2). A Complaint must allege enough facts, accepted as true, to “state a claim for relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged”. *Id.* Here, the plaintiffs alleged facts which, if true, establish liability under the 14th Amendment for due process violations, and violation of the equal protection guarantee of the US Constitution.

The 11th Amendment Immunity Defense

Defendant argues the WEC enjoys sovereign immunity under the 11th amendment of the US Constitution; however, the WEC has previously waived and abandoned any sovereign

⁴ Paragraph 6, Footnote 1.

⁵ Complaint, Paragraph 9.

immunity it enjoys regarding election law cases. *See Teigen v. Wisconsin Elections Comm'n*, 2022 WI 64, ¶ 43, 403 Wis. 2d 607, 639, 976 N.W.2d 519, 536, *reconsideration denied*, 2022 WI 104, ¶ 43, 997 N.W.2d 401, and *reconsideration denied*, 2024 WI 4, ¶ 43, 5 N.W.3d 610, and *overruled by Priorities USA v. Wisconsin Elections Comm'n*, 2024 WI 32, ¶ 43, 412 Wis. 2d 594, 8 N.W.3d 429 (overruled in part on issues unrelated to sovereign immunity). Moreover, the WEC's decentralized role in election administration, with significant responsibilities placed on local election officials, further complicates its claim to sovereign immunity. Indeed, while a lawsuit could be brought against the individual commissioners instead of the WEC, the WEC created and operates the My Vote portal, not any particular commissioner, and should be the defendant ordered to fix it. Moreover, Wisconsin courts have noted the WEC and “the board of election commissioners are separate and distinct governmental entities established by the Wisconsin legislature with separate and distinct duties concerning the election laws”. *State ex rel. Zignego v. Wisconsin Elections Comm'n*, WI App 17, ¶ 3, 391 Wis. 2d 441, 450, 941 N.W.2d 284, 288, *aff'd as modified*, 2021 WI 32, ¶ 3, 396 Wis. 2d 391, 957 N.W.2d 208 (2020). Accordingly, while the WEC is tantamount to a state agency, it operates independently, and any sovereign immunity rights the WEC has under the 11th Amendment are not absolute, and nevertheless have been previously waived and abandoned in the context of election law. To the extent this Court disagrees, Plaintiffs seek leave to amend their Complaint under Rule 15(a)(2) which countenances courts to “freely give leave when justice so requires”. Here, justice would require granting Plaintiffs leave to amend their Complaint against the commissioners individually, although Plaintiffs contend the WEC has already consented to being sued in election law cases.

Due Process Claims

Under the U.S. Constitution, a citizen of Wisconsin may assert a due process claim under the 14th Amendment where the WEC develops and operates a grossly unsecured website to allow votes to be cast from anyone other than a lawfully registered Wisconsin voter. The 14th Amendment's Due Process Clause prohibits states from depriving any person of life, liberty, or property without due process of law. In the context of election law, a Wisconsin federal court recently evaluated a procedural due process claim by invoking the "test established in *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), which requires the court to balance: (1) the interest that will be affected by the state action; (2) the risk of erroneous deprivation of this interest through the procedures used by the state and the probable value, if any, of additional procedural safeguards; and (3) the state's interest, including the fiscal and administrative burdens that the additional procedure would entail". *Democratic Nat'l Comm. v. Bostelmann*, 466 F. Supp. 3d 957, 967 (W.D. Wis. 2020) (holding the plaintiff stated a procedural due process claim and overruling the defendant's Rule 12(b)(6) Motion to Dismiss). Application of that balancing test here likewise militates in favor of overruling the WEC's Motion to Dismiss.

First, the interest affected by the WEC's action is sacrosanct—the integrity of the electoral system, and the rights of voters to have their votes counted, and not outweighed and diluted by unlawfully cast votes. Second, the risk of erroneous deprivation of due process rights from the My Vote portal is obvious and extreme—there are almost no cybersecurity safeguards in place, as demonstrated by the facts set forth in the Harry Wait Criminal Complaint, attached as Exhibit 1 to Plaintiffs' Complaint. Third, it would not be difficult or burdensome to ensure appropriate cybersecurity safeguards are installed and applied within the My Vote online website portal—every Wisconsin financial institution, medical provider, law firm, etc. are already expected to

ensure the cybersecurity of their online website portals. As such, Plaintiffs' Complaint states claims for procedural due process violations of the 14th Amendment.

Equal Protection Claims

It is axiomatic that “the right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another”. *Bush v. Gore*, 531 U.S. 98, 104–05, 121 S. Ct. 525, 530, 148 L. Ed. 2d 388 (2000). In the case *Democratic Nat'l Comm. v. Bostelmann*, 466 F. Supp. 3d 957, 968 (W.D. Wis. 2020), a Wisconsin federal court found the plaintiff-voters “were subject to arbitrary and disparate treatment” where the plaintiffs alleged “that: (1) the application of documentation requirements varied broadly; (2) voters received conflicting guidance on the witness requirement; (3) the standards for what constituted a valid postmark varied across localities; and (4) the “indefinitely confined” exception is defined and enforced differently by local election officials”; and, therefore, denied the defendant’s Rule 12(b)(6) Motion to Dismiss. Here, the plaintiffs have also alleged facts showing arbitrary and disparate treatment, and dilution of their lawful votes.

Plaintiffs alleged at Paragraph 11 of the Complaint: “Because My Vote not only can be used to register voters (electors) fraudulently, but can also be used to obtain absentee ballots fraudulently, Plaintiff and other lawful voters and electors are subject to being irreparably harmed and disenfranchised by people and/or entities using My Vote for such untoward purposes, illegally voting via absentee ballots mailed to addresses not associated with their registered voters, diminishing the weight of lawfully cast votes”. Dilution of lawfully cast votes constitutes arbitrary and disparate treatment *per se* under the controlling case of *Bush v Gore*, and can easily be rectified

by requiring the My Vote website developers to ensure appropriate cybersecurity standards are observed and applied. If the WEC's My Vote portal was a bank, its cybersecurity shortfalls would be the functionally equivalent of leaving the doors to the bank and vault inside unlocked and unwatched. Such preposterous security would not be tolerated, and likewise, the WEC's woefully vulnerable My Vote portal should also not be tolerated. As such, the Court should deny the WEC's Motion to Dismiss Plaintiffs' equal protection claims.

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CERTIFICATE OF SERVICE

I HEREBY certify this pleading has been filed using the Clerk's ECF Filing System on this 27th day of November 2024, and will automatically be transmitted and served electronically on counsel for the defendant as set forth below.

Electronically signed by: Wendy A. Patrickus

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