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.

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

INTRODUCTION

Two Wisconsin voters have filed suit against the Wisconsin Elections Commission alleging procedural due process and equal protection claims because MyVote, Wisconsin's online voter registration system, allegedly lacks proper cybersecurity. Their complaint can be dismissed on two independent grounds.

First, Eleventh Amendment immunity bars this suit against the Commission, an independent state agency. Contrary to Plaintiffs' argument, the Commission has not waived its immunity by way of a ruling in a previous unrelated state court case.

Second, Plaintiffs' allegations are insufficient to state constitutional claims. As to their procedural due process claim, Plaintiffs point to no private interest (whether liberty or property) and no deprivation caused by the Commission's use of MyVote. And as to their equal protection claim, Plaintiffs have not alleged or explained what protected class they are members of, how they are being treated differently than anyone outside that protected class, or what discriminatory purpose motivates the Commission in using MyVote. For these reasons, their constitutional claims fail.

Plaintiffs' lawsuit is nothing more than a generalized grievance about the MyVote portal and has no place in federal court.

ARGUMENT

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

The Commission possesses Eleventh Amendment immunity from suit in federal court and, therefore, Plaintiffs' claims against it are barred. And since there are no other defendants, Plaintiffs' complaint must be dismissed.

Plaintiffs first contends that the Commission has waived sovereign immunity "regarding election law cases." (Dkt. 7:2–3 (citing *Teigen v. Wisconsin Elections Commission*, 2022 WI 64, ¶ 43, 403 Wis. 2d 607, 976 N.W.2d 510, 536, overruled in part by *Priorities USA v. Wisconsin Elections*

Commission, 2024 WI 32, 412 Wis. 2d 594, 8 N.W.3d 429).) This state court decision does not support their argument.

First, the holding by the Wisconsin Supreme Court in *Teigen* that the Commission waived *sovereign immunity* in that one case does not equate to a waiver of *Eleventh Amendment* immunity. Indeed, the Eleventh Amendment to the U.S. Constitution "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) (emphasis added) (citing *Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 54 (1996). And because the *Teigen* case was in state court, the Commission had no reason to raise an Eleventh Amendment immunity defense at all. Second, and tellingly, Plaintiffs cite no case law in support of their novel argument that a waiver of sovereign immunity "in the context of election law" in one state court case means that it has waived its Eleventh Amendment immunity in all future cases in the context of election law in federal court. Therefore, it is Plaintiffs who have waived the argument. *See United States v. Berkowitz*, 927 F.2d 1376, 1384 (7th Cir. 1991) ("We repeatedly have made clear that perfunctory and undeveloped arguments*, and arguments that are unsupported by pertinent authority*, are waived (even where those arguments raise constitutional issues).") (emphasis added).

Regardless, the case law goes the other way. Waivers must be made clear, "implicit waivers won't do." *Mueller v. Thompson*, 133 F.3d 1063, 1064 (7th Cir. 1998). And Plaintiffs cannot and do not point to any express waiver of the Commission's Eleventh Amendment immunity in this case.

Plaintiff next acknowledge that their federal claims could have been brought against the individual members of the Commission, but they were not, because the Commission, not its members, created the MyVote portal and the Commission should be the defendant ordered to fix it. (Dkt. 7:3.) Again, Plaintiffs cite no legal authority for the odd proposition that a state agency's Eleventh Amendment immunity can be ignored by a federal court merely because the plaintiff alleges that the state agency is at fault. *See 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) ("State agencies are treated the same as states" and "a state agency *is* the state for purposes of the eleventh amendment."). So, Plaintiffs have waived another argument by not supporting it with legal authority. *See Berkowitz*, 927 F.2d at 1384.

Plaintiffs further argue that while the Commission "is tantamount to a state agency, it operates independently, and any sovereign immunity rights the [Commission] has under the 11th Amendment are not absolute." (Dkt. 7:3.) This argument fails on two grounds. First, the fact that the Commission operates independently from local election boards is irrelevant; and Plaintiffs

do not explain why that matters. Second, and once again, Plaintiffs have cited no legal authority for their contention that the Commission does not possess full Eleventh Amendment immunity. Plaintiff have waived this argument, too. *Berkowitz*, 927 F.2d at 1384.

Plaintiffs' complaint should be dismissed based on Eleventh Amendment immunity grounds. This Court therefore does not need to address any further argument.

II. Plaintiffs' complaint can also be dismissed because it fails to state plausible procedural due process or equal protection claim.

This Court can also dismiss Plaintiffs' complaint because it fails to state any plausible procedural due process or equal protection claim.[1] Plaintiffs' arguments raised in response to the Commission's motion to dismiss are unpersuasive and insufficient to defeat its motion.

A. Plaintiffs fail to state a plausible procedural due process claim.

A procedural due process claim requires a (1) deprivation by state action of a protected interest in life, liberty, or property, and (2) inadequate state process. *Zinermon v. Burch*, 494 U.S. 113, 125 (1990); *Sherwood v. Marchiori*,

[1] Because Plaintiffs have not responded to the Commission's argument that they have not alleged a substantive due process claim (Dkt. 6:8), and their response brief only references a procedural due process claim, (*see* Dkt. 7:4–5), they have abandoned any substantive due process claim. *Bonte v. U.S. Bank, N.A.*, 624 F.3d 461, 466 (7th Cir. 2010) ("Failure to respond to an argument . . . results in waiver.").

76 F.4th 688, 696 (7th Cir. 2023). "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

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." *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009).

As argued in the Commission's initial brief, Plaintiffs' complaint does not contain sufficient allegations to state a plausible procedural due process claim.

Plaintiffs cite *Democratic National Committee v. Bostelmann*, 466 F. Supp. 3d 957 (W.D. Wis. 2020), in support of their claim, but this decision does not help them. (Dkt. 7:4.) In *Bostelmann*, the plaintiffs challenged various Wisconsin election statutes regarding statutory "by-mail and electronic registration deadlines," "requirements that copies of proof of residence and voter photo ID accompany electronic and by-mail voter registration and absentee applications," "the requirement that polling places receive absentee ballots by 8:00 p.m. on election day to be counted," and "the requirement that an absentee voter obtain the signature of a witness attesting to the accuracy of personal information on an absentee ballot." 466 F. Supp. 3d at 961–62. These plaintiffs also sought to "ensure safe and sufficient in-person registration and voting facilities for all voters throughout the State." *Id.* at 962.

The district court granted the plaintiffs leave to amend their complaint, who then added three constitutional claims: an undue burden on the right to vote, procedural due process, and equal protection. *Id.* at 963, 965. The court gave most of its attention to the plaintiffs' claim alleging an undue burden on the right to vote, noting that its analysis of such a claim is governed by the *Anderson-Burdick* framework. *Id.* at 966. Notably, here, Plaintiffs do *not* bring a claim alleging an undue burden on the right to vote, so the *Bostelmann* court's analysis and discussion of such claim is inapplicable. And this is especially important because the *Bostelmann* court also analyzed the plaintiff's separate procedural due process claim under the *Anderson-Burdick* framework. *Id.* at 968. Plaintiffs, however, do not ask this Court to use *Anderson-Burdick* but instead explicitly argue that their procedural due process claim should be analyzed under the three-part balancing test laid out in *Mathews v. Eldridge*, (*see* Dkt. 7:4), which the *Bostelman* court specifically did *not* use, *see Bostelmann*, 466 F. Supp. 3d at 968. Therefore, the *Bostelmann* decision in no way helps Plaintiffs' procedural due process claim.

Plaintiffs argue that their private interests deprived by state action, here the Commission's use of MyVote, are "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." (Dkt. 7:4.) But these interests, as a matter of law, are insufficient to state a procedural due process claim.

As to Plaintiffs' asserted interest in the "integrity of the electoral system," this is not a "private interest" at all, as required by *Mathews*. On the contrary, protection of the integrity of elections is a *state* interest. *See Navarro v. Neal*, 716 F.3d 425, 430 (7th Cir. 2013) ("The Supreme Court has recognized that a state's desire that elections be 'run fairly and effectively' is among these important [regulatory] interests.") (quoting *Munro v. Soc. Workers Party*, 479 U.S. 189, 193 (1986)). It is not a private liberty or property interest.

Also, as for Plaintiffs' alleged interests to have their votes counted and not outweighed and diluted by unlawfully cast votes, Plaintiffs cite no federal case law holding such a private liberty interest supports a procedural due process claim. Therefore, and once again, Plaintiff have waived the argument. *Berkowitz*, 927 F.2d at 1384. Regardless, federal courts, including this one, have consistently rejected vote dilution as a theory of injury for standing purposes. *See Feehan v. Wisconsin Elections Comm'n*, 506 F. Supp. 3d 596, 608 (E.D. Wis. 2020) (collecting cases); *see also Bost v. Illinois State Bd. of Elections*, 684 F. Supp. 3d 720, 731–32 (N.D. Ill. 2023), *aff'd*, 114 F.4th 634 (7th Cir. 2024); *Testerman v. NH Sec'y of State*, No. 23-CV-499-JL-AJ, 2024 WL 1482751, at *5 (D.N.H. Jan. 9, 2024). So, it is not surprising that Plaintiffs cannot cite one decision holding that a plaintiff has a private liberty interest in having her vote counted and not diluted by unlawfully cast vote. Without a private liberty interest, Plaintiffs fail to state a procedural due process claim.

Moreover, Plaintiffs' complaint does not even allege a deprivation of these interests. Plaintiffs allege that, because there are allegedly no cybersecurity safeguards, anyone can register to vote via MyVote, receive an absentee ballot, and then vote. (Dkt. 1 ¶¶ 10–11.) But they also allege, correctly, that fraudulent voter registration is a state crime and that there is a current state prosecution of a voter, Harry Wait, who allegedly used the personally identifying information of two Wisconsin voters without their authorization to request and obtain absentee ballots in their names via MyVote. (Dkt. 1 ¶¶ 8–9.) And, importantly, there is no allegation that Wait ever subsequently voted after obtaining the absentee ballots.

Furthermore, Plaintiffs failed to respond to the Commission's argument that the state's safeguards against any deprivation of any interests here are the state criminal laws that prohibit election fraud—including the current prosecution of Harry Wait. (Dkt. 6:8; 1 ¶¶ 8–9; 1-1.) This failure to respond to the Commission's argument is a concession. *Bonte v. U.S. Bank, N.A.*, 624 F.3d 461, 466 (7th Cir. 2010) ("Failure to respond to an argument . . . results in waiver.").

Therefore, the Commission's use of MyVote simply is not depriving Plaintiffs of their alleged interests in election integrity and having their votes not diluted. Plaintiffs' allegations of deprivation are far too speculative as a matter of law to state a plausible procedural due process claim. *Iqbal*, 556 U.S.

at 678 ("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."); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) ("Factual allegations must be enough to raise a right to relief above the speculative level . . . .").

Rather than focus on the requirements to state a claim, Plaintiffs jump to the *Mathews* balancing test of a procedural due process claim.[2] (Dkt. 7:4.) This analysis is premature, since Plaintiffs have no interest be deprived, and there is no reason for this Court to determine whether and what process is "constitutionally due," *see Mathews*, 424 U.S. at 333–35, but the Commission will respond, nonetheless.

Plaintiffs contend that the risk of erroneous deprivation of a liberty interest from use of the MyVote portal is "obvious and extreme—there are almost no cybersecurity safeguards in place." (Dkt. 7:4.) They also claim that it would not be difficult for the state to install within the MyVote portal the same safeguards applied to online portals in the private sector. (Dkt. 7:4–5.) These arguments do nothing more than prove the Commission's point that

[2] The Supreme Court "identified three factors to be balanced: first, the private interest at stake; second, the risk of erroneous deprivation and the value, if any, of additional procedural safeguards; and third, the government's countervailing interests." *Simpson v. Brown County*, 860 F.3d 1001, 1006 (7th Cir. 2017) (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

Plaintiffs are not concerned about the risk of any erroneous deprivation of their own private interests. Plaintiffs are not arguing that the Commission has not met "the fundamental requirement of due process"—the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *City of Lost Angeles v. David*, 538 U.S. 715, 717 (2002). Instead, Plaintiffs are merely airing their general grievances about the MyVote portal.

Plaintiffs fail to state a plausible procedural due process claim.

B. Plaintiffs fails to allege a plausible equal protection claim.

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).

The Commission argued in its opening memorandum of law that, as to equal protection, none of the allegations in Plaintiffs' complaint allege that they are members of any unprotected class, that there was any unequal treatment imposed upon them, or that the Commission has any discriminatory purpose by using MyVote. (Dkt. 6:9.) Once again, Plaintiffs fail to respond to the Commission's arguments. As a result, they have conceded them. *Bonte*, 624 F.3d at 466. On this basis alone, Plaintiffs fail to state an equal protection claim

Plaintiffs do claim that "[d]ilution of lawfully cast votes constitutes arbitrary and disparate treatment *per se* under the controlling case of *Bush v. Gore*." (Dkt. 7:5.) This dilution argument lacks merit.

First, *Bush v. Gore*, 531 U.S. 99 (2000) (per curiam), is not "controlling" equal protection jurisprudence. Indeed, the Supreme Court expressly wrote in that per curiam opinion: "Our consideration is *limited to the present circumstances*, for the problem of equal protection in election processes generally presents many complexities." *Id.* at 109 (emphasis added).

Second, *Bush v. Gore* had nothing to do with the subject matter here and therefore, is not even persuasive authority. That historic supreme court decision about the Florida recount in the 2000 presidential election concerned how ballots were counted in different counties in that state. *Id.* at 100–03. Plaintiffs' case here concerns Wisconsin's online system allowing all Wisconsin electors to register to vote and request absentee ballots. (Dkt. 1.) No voters are treated differently based on where they live. So, to the extent vote dilution even was a relevant theory of an equal protection claim in the Florida recount of the 2020 presidential election, nothing about *Bush v. Gore* comes close to affecting the analysis or the outcome here.

Third, Plaintiffs once again cite *Bostelmann*, but once again that decision does not support their position. Plaintiffs argue that the *Bostelmann* court allowed an equal protection claim to proceed based on the plaintiffs' alleged

arbitrary and disparate treatment. (Dkt. 7:5.) But the state action in *Bostelmann* is completely different than the state action here. In *Bostelmann*, the plaintiffs alleged the following supposed arbitrary and disparate treatment as to election statutes: "(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." 466 F. Supp. 3d at 968 (emphasis added). The district court allowed the claim to proceed. *Id.*

Here, in contrast, Plaintiffs do not allege that the Commission, through MyVote, is treating them differently from any other voters, or in an arbitrary way. Moreover, this Court is not bound by *Bostelmann* in any event. *See Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.") (citation omitted).

Plaintiffs fail to state a plausible equal protection claim in their complaint.

CONCLUSION

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

Dated this 11th day of December 2024.

Respectfully submitted,

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