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2023CV001900



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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December 22, 2023

VIA ELECTRONIC FILING NOTICE

The Honorable Ann Peacock
Circuit Court Judge, Branch 12
Dane County Courthouse
215 South Hamilton Street
Madison, WI 53719

Re: *Priorities USA, et al. v. WEC, et al.*,
Case No. 23-CV-1900

Dear Judge Peacock:

This letter provides the Commission's response to your November 21, 2023, Order requesting supplemental briefing on a narrow issue: whether Plaintiffs have stated at least one "right" and at least one "legally protectable interest" satisfying the justiciable controversy test for purposes of this declaratory judgment action. *See Loy v. Bunderson*, 107 Wis. 2d 400, 410, 320 N.W.2d 175 (1982) (providing the four factors required to establish a justiciable controversy). You have requested this response in light of the Legislature's citation to paragraph 52, footnote 25 of the supreme court's decision in *Teigen v. WEC*, 2022 WI 64, ¶¶ 50–52, 403 Wis. 2d 607, 976 N.W.2d 519, which was raised for the first time at oral argument.

The Commission does not dispute that Plaintiffs have stated a justiciable controversy as to the first three causes of action in its Complaint. Those claims, as the Commission understands them, are premised on the fundamental right to vote protected by article III, § 1 of the Wisconsin Constitution, and their belief that the challenged absentee voting provisions in the Wisconsin Statutes unconstitutionally burden that right. Plaintiffs have thus at least presented a justiciable controversy "in which a claim of right is asserted" and in which they have articulated a "legally protectable interest." *Loy*, 107 Wis. 2d at 410.

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The footnote in *Teigen*, cited by the Legislature, does not change that analysis. In *Teigen*, a majority of justices observed that “[e]stablishing rules governing the casting of ballots outside of election day rests solely within the power of the people’s representatives because such regulations affect only the privilege of absentee voting and not the right to vote itself.” *Teigen*, 403 Wis. 2d 607, ¶ 52 n.25. The Commission interprets this language to merely acknowledge what the Commission has already argued: there is no fundamental right to vote absentee. Indeed, the Constitution expressly makes absentee voting procedures optional: the Legislature “may,” but need not, enact laws “[p]roviding for absentee voting.” Wis. Const. art. III, § 2. While the Legislature has opted to enact such laws, and absentee voting is one way to cast a ballot in Wisconsin, that statutory opportunity does not convert absentee voting into a separate, constitutionally protected right.¹

Aside from justiciability, claims that absentee voting procedures unconstitutionally burden the right to vote are analyzed under rational basis review pursuant to *Milwaukee Branch of NAACP v. Walker*: a voting regulation is subject to strict scrutiny only if it creates a severe burden on an elector’s general “right to vote;” otherwise, the law is presumed valid and subject to rational basis review. 2014 WI 98, ¶¶ 22, 40, 357 Wis. 2d 469, 851 N.W.2d 262; *see also Common Cause Ind. v. Lawson*, 977 F.3d 663, 664 (7th Cir. 2020) (“As long as it is possible to vote in person, the rules for absentee ballots are constitutionally valid if they are supported by a rational basis and do not discriminate based on a forbidden characteristic such as race or sex.”).

Thus, while Plaintiffs have presented a justiciable controversy as to their first three claims because they have standing to bring them, the Commission is still entitled to a judgment as a matter of law. (*See* Doc. 65, 86.) Plaintiffs have pled facial challenges to the absentee voting provisions and, even taking all of the alleged facts as true, these provisions are plainly facially constitutional under rational basis review. Plaintiffs have thus failed to state a claim on which relief may be granted, and judgment may be entered against them under Wis. Stat. § 802.06(2)(a)6.

¹ The statement in *Teigen* should not be construed as saying that, as a matter of law, absentee voting regulations impose no burden at all on the fundamental right to vote. As shown in earlier briefing, even if there is no specific constitutional right to cast an absentee ballot, absentee voting regulations nonetheless are subject to constitutional review under the kind of analysis set forth in *Milwaukee Branch* and *Anderson-Burdick*. Moreover, even if the statement in *Teigen* were construed as saying that absentee voting regulations impose no burden on the fundamental right to vote, that would relate to whether Plaintiffs have stated a claim on the merits, not to justiciability.

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Declaratory judgment actions may be adjudicated at the pleadings stage, even when the plaintiff's claims are justiciable. *League of Women Voters of Wis. v. Evers*, 2019 WI 75, ¶ 42, 387 Wis. 2d 511, 929 N.W.2d 209 (remanding case to the circuit court for dismissal where plaintiff's claims failed as a matter of law). However, in recognition of earlier case law indicating that dismissal may not be the preferred procedure in declaratory judgment actions, and to the extent the Court finds it prudent, the Commission invites the Court to construe its motion to dismiss as a motion for judgment on the pleadings under Wis. Stat. § 802.06(3). *See Barbian v. Lindner Bros.*, 106 Wis. 2d 291, 297 n.2, 316 N.W.2d 371 (1982) ("Rather than granting a judgment dismissing the [plaintiff's] declaratory judgment action, this Court has held that the preferred procedure is for the trial court to make a declaratory adjudication in favor of defendants.") Plaintiffs' claims fail as a matter of law and judgment should be entered against them under either procedural route.

Thank you.

Sincerely,

Electronically signed by:

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cc: All other parties via efile.