FILED
12-22-2023
CIRCUIT COURT
DANE COUNTY, WI
2023CV001900

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 12

PRIORITIES USA,

WISCONSIN ALLIANCE FOR RETIRED AMERICANS,

and

WILLIAM FRANKS, JR.,

Plaintiffs,

v.

WISCONSIN ELECTIONS COMMISSION,

Defendant,

WISCONSIN STATE LEGISLATURE,

Intervenor-Defendant.

Declaratory Judgment
Case Code: 30701
Case No. 2023-CV-1900

Hon. Ann Peacock

PLAINTIFFS' SUPPLEMENTAL BRIEF IN OPPOSITION TO DEFENDANT WEC'S AND INTERVENOR-DEFENDANT WISCONSIN STATE LEGISLATURE'S MOTIONS TO DISMISS

Plaintiffs file this supplemental brief regarding footnote 25 in *Teigen v. Wisconsin Elections Commission*, 2022 WI 64, 403 Wis. 2d 607, 644, 976 N.W.2d 519, pursuant to the Court's November 21, 2023 Order, Dkt. 96. For the reasons that follow, footnote 25 does not affect Plaintiffs' claims in this case.

First, the focus on justiciability is misplaced: Footnote 25's effect, if any, would be with respect to the merits of Plaintiffs' claims, not as a threshold justiciability concern. Where plaintiffs seek a declaratory judgment that challenged state action is unconstitutional, their claims present a

justiciable controversy whether or not the claims will succeed on the merits. *Tooley v. O'Connell*, 77 Wis. 2d 422, 433–35, 253 N.W.2d 335 (1977). "The 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. *Id.*; *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 opinion in *Wisconsin Manufacturers & Commerce v. Evers* contains some unclear language on this point, and it relies on some out-of-context language from *Moustakis*. 2021 WI App 35 ¶¶ 8, 11, 28, 382 Wis.2d 164, 960 N.W.2d 442. But its holding was ultimately based on the merits, not on justiciability. *Id.* ¶ 39 ("[I]n light of our conclusion that the complaint does not plausibly allege that the release of the list would be unlawful, the complaint fails to state a claim upon which relief can be granted.").

Here, as in *Tooley*, "there can be no question that a controversy exists" for justiciability purposes because Plaintiffs "contend that the [challenged conduct] by the defendants is unconstitutional." *Tooley*, 77 Wis. 2d at 435. "Whether the plaintiffs can establish a constitutional violation is beyond the scope of" review for justiciability. *Id.* The first justiciability factor is satisfied here because Plaintiffs assert that the challenged absentee voting laws violate the fundamental right to vote. And the third justiciability factor is satisfied because Plaintiffs—a voting-centric progressive advocacy organization, a membership organization whose members include thousands of Wisconsin voters, and an individual Wisconsin absentee voter—all have what they allege is a legally protectable interest in the ability of Wisconsin voters to cast absentee ballots and have those ballots counted. *See* Dkt. 2 ¶¶ 7–14; *see Tooley*, 77 Wis.2d at 436 (explaining that for justiciability purposes, the "question is not . . . what the plaintiffs have established, but rather

what they have pleaded" and that it is enough that plaintiffs "*alleg[e]* several Wisconsin constitutional violations" (emphasis added)).

Second, footnote 25 in *Teigen* does not bar Plaintiffs' claims on the merits. *Teigen* involved only a question of statutory interpretation: whether WEC's guidance authorizing drop boxes violated Wis. Stat. §§ 6.87 and 6.855. The questions of Wisconsin constitutional law central to Plaintiffs' claims here were therefore not before the *Teigen* Court. And the footnote's significance is unclear at best. It states that "rules governing the casting of ballots outside of election day . . . affect only the privilege of absentee voting and not the right to vote itself." *Teigen*, 2022 WI 64, ¶ 52 n.25. But the footnote does not specify whether it makes that statement as a matter of Wisconsin statutory law, Wisconsin constitutional law, or federal constitutional law.

Footnote 25 is most reasonably understood to be reciting a matter of statutory law, because Wis. Stat. § 6.84—but not the Wisconsin Constitution—defines absentee voting as a "privilege," as the footnote states. Alternatively, it is possible the footnote refers to federal constitutional law, which the Seventh Circuit—unlike many other federal circuits—had earlier held distinguishes between the "right to vote" and "a claimed right to cast an absentee ballot by mail." *Tully v. Okeson*, 977 F.3d 608, 611 (7th Cir. 2020) ("*Tully I*").[1] In contrast, there is no reason to think the sentence refers to Wisconsin constitutional law, because—as Plaintiffs explain at length in their brief, Dkt. 85 at 7–10—there is no basis for concluding that absentee voting somehow falls outside the fundamental right to vote that the Wisconsin Constitution protects.

[1] The Seventh Circuit more recently declined to follow *Tully I*'s reasoning in a subsequent appeal in that same case. *See Tully v. Okeson*, 78 F.4th 377, 379 (7th Cir. 2023) (*Tully II*) ("Given the circumstances under which we issued *Tully I*, that decision does not constitute the law of the case; nor do we consider ourselves bound by its reasoning.").

Confirming this point, footnote 25 does not consider any of the factors that are relevant to the analysis of the constitutional right to vote under Wisconsin law. *Teigen* did not consider the burdens on the constitutional right to vote imposed by any of the challenged provisions, nor did it balance those burdens against the state's purported interests. Footnote 25 therefore says nothing that binds this court regarding the proper interpretation of the right to vote under the Wisconsin Constitution.

Should this Court disagree with that analysis, Plaintiffs respectfully request that the Court expedite any decision to allow Plaintiffs to promptly appeal in advance of the 2024 election cycle. Plaintiffs would argue on appeal that the statement should be properly limited, as previously discussed, or in the alternative, that the Wisconsin Supreme Court should expressly overrule the statement in question, which was not essential to the determination of the issue in *Teigen*. The Supreme Court has recognized "two disparate lines of Wisconsin cases defining dicta." *Zarder v. Humana Ins. Co.*, 2010 WI 35, ¶ 52 n.19, 324 Wis.2d 325, 785 N.W.2d 682. The first suggests a statement is dicta only if it is not germane to the controversy. *See id.* Another, competing line of cases defines dictum as "a statement or language expressed in a court's opinion which extends beyond the facts in the case and is broader than necessary and not essential to the determination of the issues before it." *Id.* (internal quotation marks omitted). Under either definition, *Teigen*'s footnote 25 is plainly dicta. The discussion of the right to vote was not "germane to … the controversy," which involved only statutory, and not constitutional claims. And it certainly was not "essential to the determination of the issues" before the Court. *Id.* (ellipsis in original).

The Supreme Court has held that "the court of appeals may not dismiss a statement from an opinion by this court by concluding that it is dictum." *Zarder*, 2010 WI 35, ¶ 58. But as Justice Hagedorn has explained, *Zarder* did not "call into question the existence of dicta as a general

matter." *Wis. Just. Initiative, Inc. v. Wis. Elections Comm'n*, 2023 WI 38, ¶ 148, 407 Wis.2d 87, 990 N.W.2d 122 (Hagedorn, J., concurring). Nor did it hold that "[e]very description or discussion" in a Supreme Court opinion "constitutes a precedential holding of [the Supreme Court]." *Id.* ¶ 147. The Supreme Court "has never held—in what would be a dramatic departure from basic norms of American jurisprudence—that the bench and bar must respect every word or discussion in [its] opinions as precedent," or that "lower courts should feel compelled to bow before every prior pen-stroke in [its] opinions." *Id.* ¶¶ 147, 150. And however this Court construes footnote 25, that footnote plainly will not be binding precedent *for the Wisconsin Supreme Court*, and Plaintiffs will argue that to the extent it purports to address the Wisconsin Constitution, it is mistaken.

CONCLUSION

For the reasons set forth above, footnote 25 in *Teigen* does not affect the justiciability of this case or change the proper analysis under the Wisconsin Constitution. For the reasons given in Plaintiffs' opposition brief, Dkt. 85, the Court should deny the motions to dismiss.

DATED this 22nd day of December, 2023.

Respectfully submitted,

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