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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,

Case No. 2023CV1900

v.

WISCONSIN ELECTIONS COMMISSION,

Defendant.

**INTERVENOR DEFENDANT THE WISCONSIN STATE LEGISLATURE'S
SUPPLEMENTAL BRIEF IN SUPPORT OF ITS MOTION TO DISMISS**

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ARGUMENT

The Legislature submits this Supplemental Brief in response to this Court's Order for supplemental briefing on the Wisconsin State Legislature's ("Legislature") and Wisconsin Elections Commission's ("WEC") Motions To Dismiss, Dkt.96, limited to addressing the significance of "paragraph 52, footnote 25" of the Wisconsin Supreme Court's decision in *Teigen v. Wisconsin Elections Comm'n*, 2022 WI 64, 403 Wis. 2d 607, 976 N.W.2d 519, on the pending Motions To Dismiss.

In its Motion To Dismiss, the Legislature argued that this Court should dismiss Plaintiffs' constitutional claims on any of three independently sufficient grounds. First, while Plaintiffs contend that certain of Wisconsin's absentee-voting laws violate the right to vote under Article III of the Wisconsin Constitution, the Wisconsin Constitution does not guarantee any right to vote absentee—rather, it grants the Legislature the choice to allow for such voting at all. Dkt.60 at 12–19; Dkt.88 at 2–5; *Teigen*, 2022 WI 64, ¶ 52 n.25. Second, even if Article III did provide a right to vote absentee—contrary to the Wisconsin Constitution's plain text and history, and to Wisconsin Supreme Court precedent—Plaintiffs have failed to plead that the challenged absentee-voting laws "cannot be enforced under any circumstances" so as to even possibly prevail on their facial and hybrid claims. Dkt.60 at 20 (quoting *Serv. Emps. Int'l Union, Local 1 v. Vos*, 2020 WI 67, ¶ 38, 393 Wis. 2d 38, 946 N.W.2d 35); *see also* Dkt.88 at 5–9. Finally, if this Court were to invalidate the challenged absentee-voting provisions under the Wisconsin Constitution, that would violate the U.S. Constitution's Elections Clause, as it would impermissibly

“distort” state law well “beyond what a fair reading requires” and thus “arrogate to [the judiciary] the power vested” in the Legislature to regulate the “Times, Places and Manner” of federal elections. Dkt.60 at 27–32 (quoting *Moore v. Harper*, 143 S. Ct. 2065, 2088–89 (2023), U.S. Const. art. I, § 4, cl. 1); *see also* Dkt.88 at 9–10.*

At oral argument before this Court on the Legislature’s Motion To Dismiss, counsel for the Legislature presented arguments on each of these grounds for dismissal. Dkt.95 (“Tr.”) at 35–39, 39–41, 41–42. As especially relevant to this Court’s supplemental-briefing order, counsel for the Legislature argued that absentee voting does not implicate Article III’s right to vote, which independently defeats all of Plaintiffs’ claims. Tr.35–39. Counsel for the Legislature also cited paragraph 52, footnote 25, of *Teigen* in support of this argument, explaining that this “encapsulates” the Legislature’s “fundamental position” that the constitutional right to vote does not include any right to vote absentee, per “the text” of Article III, Section 2, Tr.35, and the “long history” of “varying absentee voting regimes of varying degrees of permissiveness,” Tr.36; *see also* Dkt.60 at 3–6 (citing *State ex rel. Chandler v. Main*, 16 Wis. 398, 411 (1863); *Sommerfeld v. Bd. of Canvassers*, 269 Wis. 299, 302 (1955); *Teigen*, 2022 WI 64, ¶ 174); Dkt.88 at 2–3. That is, *Teigen* establishes, in no uncertain terms, that the Legislature’s lead argument in its Motion To Dismiss is correct. *See* Dkt.60 at 12–19; *see also* Dkt.88 at 2–3.

* Further, as to Plaintiffs’ Count Four in particular, which count challenges the Legislature’s policy statement that absentee voting is a “privilege” that “must be carefully regulated,” Wis. Stat. § 6.84, the Legislature also argued that Plaintiffs lacked standing to assert this claim. Dkt.60 at 24–27; Dkt.88 at 8–9.

In paragraph 52, footnote 25, of *Teigen*, the Supreme Court held that there is no constitutional right to vote absentee, contrary to Plaintiffs' claims here. 2022 WI 64, ¶ 52 n.25. There, the Supreme Court majority held that WEC's "authorization of ballot drop boxes was unlawful," as such boxes "appear nowhere in the detailed statutory system for absentee voting." *Id.* ¶ 87. Then, responding to the dissent's contention that the majority's holding erected a "barrier" to the "constitutional right to vote," *id.* ¶¶ 205, 211 (A.W. Bradley, J., dissenting), the majority held—in paragraph 52, footnote 25—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," *id.* ¶ 52 n.25. As the Supreme Court majority explained, the power to "[e]stablish[] rules governing" absentee voting "rests solely" with the Legislature and not with the courts, and "the court must respect the constitutional restraints on [its] power and refuse to act as a super-legislature." *Id.* Plaintiffs here bring Article III challenges to absentee-voting "regulations" enacted by the Legislature, although such regulations from the Legislature do not "affect . . . the right to vote." *Id.* Paragraph 52, footnote 25, of *Teigen* thus requires this Court to dismiss all of Plaintiffs' claims, as any other result would impermissibly undermine "the constitutional restraints on [judicial] power" and require this Court "to act as a super-legislature." *Id.*[†]

[†] Although paragraph 52, footnote 25, of *Teigen* unambiguously shows that the Legislature's lead argument presented both in its briefing and at oral argument is correct, the Legislature's other arguments in support of its Motion To Dismiss, briefly discussed above, also defeat Plaintiffs' claims here as a matter of law. *Supra* pp.1–2. The Legislature did not invoke paragraph 52, footnote 25, of *Teigen* in support of these other independently sufficient arguments.

At oral argument, counsel for Plaintiffs conceded that he “certainly [was] familiar with” this language in *Teigen* and “agree[d] that there’s a statement in [this footnote] about whether rules involving absentee voting do or do not involve the right to vote.” Tr.42–43. Then, counsel for Plaintiffs attempted to distinguish paragraph 52, footnote 25, of *Teigen* on the ground that “the discussion of the constitutional rules applicable to regulations of absentee voting in *Teigen* is dicta,” as “[t]he case did not involve a constitutional claim at all,” but “only a statutory question of whether drop boxes were or were not contemplated within the statutory language.” Tr.43.

Plaintiffs’ attempt to distinguish *Teigen*’s paragraph 52, footnote 25, fails.

As an initial matter, and as counsel for the Legislature explained at oral argument before this Court, Tr.43–44, the Supreme Court has unequivocally held in *Zarder v. Humana Ins. Co.*, 2010 WI 35, 324 Wis. 2d 325, 782 N.W.2d 682, that the lower courts of this State “may not dismiss a statement from an opinion by [the Wisconsin Supreme Court] by concluding that it is dictum,” *id.* ¶ 58. The Supreme Court of this State is “the *only* state court” that may “overrule, modify or withdraw language from a previous supreme court case.” *Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997) (emphasis added). When a lower court “conclud[es] that a statement in a supreme court opinion is dictum” that need not be followed, that lower court “necessarily withdraws or modifies language from that opinion,” which it has no authority to do. *Zarder*, 2010 WI 35, ¶ 57. So, “to uphold the principles of predictability, certainty, and finality,” the lower courts of this State must adhere to

all language in Supreme Court opinions, rather than attempt to disregard any statement on the grounds that it is dicta, not a holding. *Id.* ¶ 58.

Even putting *Zarder* aside, however, paragraph 52, footnote 25, of *Teigen* would be a holding of the Supreme Court under other conceptions of that term. In other jurisdictions, an opinion's holding may comprise only "[the] court's determination of a matter of law pivotal to its decision," or "a principle drawn from [a court's] decision." *Holding, Black's Law Dictionary* (11th Ed. 2019). That applies to paragraph 52, footnote 25, of *Teigen* as well, since it comprises a pivotal part of the Supreme Court majority's interpretation of Wisconsin's absentee-voting statutes as not authorizing the use of drop boxes—specifically, a defense of the constitutionality of this interpretation, in response to the dissent's direct claim that the majority's interpretation "erects yet another barrier for voters." 2022 WI 64, ¶ 52 n.25 (quoting *Teigen*, 2022 WI 64, ¶ 205 (A.W. Bradley, J., dissenting) (brackets altered)).

In sum, this Court should adhere to *Teigen's* admonition that "rules governing the casting of ballots outside of election day" do not "affect . . . the right to vote," *id.*, ¶ 52 n.25, and grant the Legislature's Motion To Dismiss.

CONCLUSION

This Court should grant the Legislature's Motion To Dismiss.

Dated: December 22, 2023

Respectfully submitted,

Electronically signed by Misha Tseytlin

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