IN THE CIRCUIT COURT FOR STONE COUNTY, WISCONSIN

CAREY KLEINMAN, *et al.*,	)
	)
Plaintiffs,	)
	)
v.	)
	)
STONE COUNTY MUNICIPAL CLERKS, WISCONSIN GOVERNMENT ACCOUNTABILITY BOARD,	)
	)
Defendants	)

REPLY BRIEF OF DEFENDANT,
STONE COUNTY MUNICIPAL CLERKS

STATEMENT OF THE ISSUE

Whether the Stone County Municipal Clerks' decision to deny voters the opportunity to recast absentee ballots is a violation of Plaintiffs' rights under the Equal Protection Clause.[1]

STATEMENT OF THE CASE

This is a brief in opposition to Plaintiff's request for emergency injunction to compel the Stone County municipal clerks ("Clerks") and the Wisconsin Government Accountability Board ("G.A.B.") to allow voters who had over-voted in the November 2014 election to destroy their previously submitted ballot and recast a ballot on Election Day.

SUMMARY OF THE ARGUMENT

Wisconsin statute precludes a voter who has submitted his or her ballot to retrieve and recast his or her ballot. Thus, Clerks have not violated voters' equal protection rights by denying the voters an opportunity to recast their ballots. Although other municipal clerks have permitted voters to recast their ballots, illegal activity by some officials, in

[1] This hypothetical scenario derives from teaching and scholarship conducted at William & Mary Law School with the assistance of Edward Foley of Moritz College of Law of the Ohio State University. This brief is based on a fictional scenario. The two attorneys arguing each side of this hypothetical case are doing so as part of the exercise and do not actually represent clients in this hypothetical matter. True to their commitment to professional norms and to the spirit of this exercise, for purposes of this war game, the attorneys will argue zealously as if the fictional parties were in fact real clients.

contravention of statute, does not constitute an equal protection violation. Furthermore, the ballot design does not, in and of itself, disenfranchise voters, even if, as Plaintiffs attest, the design has led to voter confusion. Absentee voting is not a fundamental right, and therefore, the court must apply a rational basis test in evaluating classifications that burden absentee voting. The state's goals of preventing fraud and promoting efficiency in elections justifies Clerks' policy.

ARGUMENT

1. Wis. Stat. § 6.86 precludes an elector who mails or delivers an absentee ballot to revote.

Wisconsin statute prohibits a voter who has cast an absentee ballot via mail or in the clerk's office prior to Election Day from casting a ballot in the same election on Election Day. Wis. Stat. § 6.86 (6) ("An elector who mails or personally delivers an absentee ballot to the municipal clerk at an election is not permitted to vote in person at the same election on election day."). The statute gives voters one chance to successfully cast their ballot; a voter may cast only one ballot, and he or she does not have the opportunity to revote.

The statute also specifically precludes election officials from returning a ballot to a voter in the position of Plaintiffs. *Id.* ("[I]f an elector mails or personally delivers an absentee ballot to the municipal clerk, the municipal clerk shall not return the ballot to the elector."). Once a voter has cast a ballot, election officials may not return the ballot for the voter to spoil and allow the voter to cast a new ballot. Thus, if Clerks allow voters who had previously submitted their ballots to subsequently retrieve and resubmit their ballots, this would contradict the statute.

The statute allows a voter to recast or amend his or her ballot only under specific conditions. First, when a voter has spoiled the ballot before sending the ballot to the clerk, the clerk may reissue a ballot. *Id.*; *see also* Wis. Stat. §6.80(2)(c) ("Any elector who, by accident or mistake, spoils or erroneously prepares a ballot may receive another, by returning the defective ballot, but not to exceed 3 ballots in all."). This provision allows a voter, who is still in possession of his or her ballot, to spoil a ballot and receive a new ballot; it does not allow a voter who has submitted a ballot to recast his or her vote. Second, a municipal clerk may contact a voter who has failed to properly complete the certificate on the envelope of his or her absentee ballot; in such a circumstance, the clerk may allow the voter to amend the certificate. Wis. Stat. § 6.78(9). Plaintiffs have neither returned a spoiled or blank ballot, nor have they improperly completed the certificate. There is no provision in the statute that allows voters to change their vote. Plaintiffs are therefore not entitled to cast a new ballot. *Id.*

2. Clerks' decision to prevent Plaintiffs from recasting votes is not a violation of the Equal Protection Clause.

a. Minor variations in election administration do not rise to the level of equal protection violations.

Plaintiffs argue that they were denied their equal protection rights when Clerks failed to allow them to recast their ballots. They argue, on the grounds of equal protection, that Clerks should permit the voters to correct their ballots in light of the alleged issues with ballot design and that municipal clerks in other areas of the state allowed voters to recast their ballots. Minor variations in election administration, however, do not rise to the level of equal protection violations. *Bush v. Gore*, 531 U.S. 98 (2000); *Griffin v. Burns*, 570 F.2d 1065, 1076 (1st Cir. 1978); *see also Nick v. State Highway Comm'n*, 124 N.W.2d 574, 577 (Wis. 1963) ("Mere inconsistency on the part of an administrative agency does not of itself rise to the dignity of a violation of the constitutional right to equal protection before the law.").

Clerks' action does not rise to the level of "arbitrary and disparate" action that constitutes an equal protection violation. *Bush v. Gore*, 531 U.S. 98, 105 (2000). When it created Wis. Stat. § 6.86 (6), the legislature implemented a single standard for voters who have submitted ballots prior to Election Day; voters should not be allowed to recast their ballots. This is a uniform standard intended to apply to all absentee voters. Such a uniform standard is neither arbitrary nor disparate.

i. Clerks do not need to contravene the law in order to treat all voters the same.

The other clerks throughout the state, who allowed voters to recast their ballots, acted contrary to law. These actions, therefore, are insufficient to demonstrate that Clerks have acted in an "arbitrary and disparate" fashion. *Bush v. Gore*, 531 U.S. 98, 105 (2000); *see also State ex rel. Watts v. Combined Cmty. Services Bd. of Milwaukee Cnty.*, 362 N.W.2d 104, 110 (Wis. 1985) ("The fundamental determination to be made when considering a challenge based upon equal protection is whether there is an arbitrary discrimination in the statute or its application."). In fact, the other clerks' actions were in direct contravention to Wisconsin statute. In this case, "disparate treatment of voters here resulted, not from a 'narrowly drawn state interest of compelling importance,' but instead from local misapplication of state law." *Hunter v. Hamilton County Bd. of Elections*, 635 F.3d 219, 238 (6th Cir. 2011).

Furthermore, the erroneous actions do not justify an order that Clerks contravene the statute to compensate for the error; illegality does not invite more illegality. *See, e.g.*, *Smith v. City of Chicago*, 457 F.3d 643, 649 (7th Cir. 2006) (finding that prior misapplication of the law does not "estop the City from applying it correctly in a subsequent case"). It is not a logical conclusion to require Clerks to contravene the statute simply because election officials elsewhere in the state broke the law. See Snowden v. Hughes, 321 U.S. 1, 8 (1944) (finding that the unlawful administration of a state law, which leads to discriminatory results, is not an equal protection violation in the absence of intentional or purposeful discrimination); *State v. Fleetwood*, 334 N.W.2d

590 (Wis. Ct. App. 1983) ("Unequal treatment is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination.").

In addition, in *Snowden v. Hughes*, the United States Supreme Court found that to find a violation of the Equal Protection Clause, a court must find intent to discriminate. 321 U.S. 1, 8 (1944). Here, the legislature did not intend to grant some voters special rights that it denied to other voters. *Id*. The United States Supreme Court held that "an erroneous or mistaken performance of [a] statutory duty, although a violation of the statute, is not without more a denial of the equal protection of the laws." The Supreme Court of Wisconsin has also found that intentional or purposeful discrimination is required for a finding of an equal protection violation: "inconsistencies in enforcement, like inconsistencies in decisions, however regrettable, do not, standing alone, invalidate an otherwise valid regulation. There must, in addition, be a clear indication of intentional or purposeful discrimination." *Kachian v. Optometry Examining Bd.*, 170 N.W.2d 743, 747 (Wis. 1969). Clerks, in implementing the statute, did not intend to discriminate between voters, but to apply a uniform standard for absentee voting. In the absence of intentional discrimination, there has been no equal protection violation.

ii. The ballot design issue does not require that Clerks allow voters the opportunity to cast an additional ballot.

Plaintiffs argue that the ballot design confused and thus disenfranchised voters and therefore, Clerks should permit voters to recast their ballots. They assert that this error is analogous to that of Ohio poll-workers in *Northeast Ohio Coal. for Homeless v. Husted*, 696 F.3d 580 (6th Cir. 2012) (hereinafter "*NEOCH*"). Beyond the fact that *NEOCH* is not binding on the court, these cases are distinguishable. The court's decision in *NEOCH* was highly dependent on the fact that poll workers had regularly disenfranchised voters by directing them to the wrong precinct. *Id*. at 598. ("In light of the well-documented problem of wrong-precinct provisional ballots caused by poll-worker error, resulting in the rejection of thousands of provisional ballots each year, we have no basis on which to disagree with the district court's finding of a likely due process violation."). A subsequent consent decree provided remedy for some voters, but not others, and the 6th Circuit decided that this was a violation of the voters' equal protection rights. *Id*.

In this case, however, the G.A.B., which designed and implemented the ballot, did not directly disenfranchise voters. Presumably, many absentee voters have successfully completed the ballot. In Ohio, voters who followed poll-worker instruction were disenfranchised; in the case at hand, voters who followed the directions on the face of the ballot were not inhibited from casting a valid vote. Plaintiffs failed to properly complete the ballot according to instructions. The ballot reads that, "When voting for governor or lieutenant governor, you may vote only for the candidates *on one ticket* jointly or by writing in the names of persons in both spaces" (emphasis added). A single ballot design applied to all absentee ballots; the G.A.B. treated voters uniformly.

States, in the scope of their authority to regulate elections, can implement different voting systems and ballots, and courts have consistently allowed states to implement

varying standards even when presented with evidence that some systems may have higher risk of error. *See e.g.*, *Bush v. Gore*, 531 U.S. 98, 103 (2000); *Weber v. Shelley*, 347 F.3d 1101 (9th Cir. 2003). Such administration is not comparable to the poll-workers' incompetence at issue in *NEOCH*. The Minnesota Supreme Court has held that "The distinction between errors by voters and errors by election officials is an important one"; requiring voters to comply with regulations is different from allowing mistakes or intentional misconduct to disenfranchise voters. *In re Contest of Gen. Election Held on November 4, 2008, for Purpose of Electing a U.S. Senator from State of Minnesota*, 767 N.W.2d 453, 462 (Minn. 2009). Here, it was the failure of the voters, not the G.A.B. itself, that caused the voters to improperly cast their ballots.

b. The court should apply a rational basis standard of review to examine differences in treatment.

If the court determines that Clerks have treated these absentee voters differently from other voters, the applicable level of scrutiny should be rational basis. A rational basis test should apply to state regulations that do not burden the fundamental right to vote. *McDonald v. Bd. of Election Com'rs of Chicago*, 394 U.S. 802, 809, 89 S. Ct. 1404, 1408, 22 L. Ed. 2d 739 (1969); *State v. Smart*, 652 N.W.2d 429, 433 (Wis. Ct. App. 2002) ("Unless it infringes on a 'fundamental right,' a statute will generally survive a substantive due process challenge if it is rationally related to a legitimate government interest."). The law in question simply cuts off the timeline during which voters can cast their ballots; it does not burden the fundamental right to vote.

In addition, Wisconsin statute clarifies that, unlike Election Day voting, absentee ballot is a privilege, not a right. Wis. Stat. § 6.84 states that, "the legislature finds that voting is a constitutional right, the vigorous exercise of which should be strongly encouraged. In contrast, voting by absentee ballot is a privilege exercised wholly outside the traditional safeguards of the polling place." Thus, absentee voting is not a fundamental right that requires the court to apply strict scrutiny. The court must therefore apply a rational basis test. Therefore, as long as the "statute creating a classification is 'rationally related to a valid legislative objective,' it does not violate the constitutional right to equal protection." *State v. Jorgensen*, 667 N.W.2d 318, 328 (Wis. 2003). In addition, in situations in which the right to vote by absentee ballot has been at stake, the United States Supreme Court has applied a rational basis test. *McDonald v. Bd. of Election Com'rs of Chicago*, 394 U.S. 802, 807 (1969) (finding that the Illinois statute did not impact the "ability to exercise the fundamental right to vote" on the grounds that it was the right vote by absentee ballot, not the right to vote, that was at stake).

c. The statute in question serves an important state interest and would survive a rational basis test, as well as a heightened standard of scrutiny.

The state has a rational basis for applying these distinctions, and even if the court applies a heightened level of scrutiny, the state's policy can be "justified by a narrowly drawn state interest of compelling importance." *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 190 (2008).

First, by restricting absentee voters from making changes to their absentee ballots after they have submitted their absentee ballots, the legislature and Clerks accomplish their goal of preventing "the potential for fraud or abuse." Wis. Stat. § 6.86(6). Allowing voters to essentially vote twice increases the potential that prior ballots will not be properly destroyed or traced to the correct voters, or that voters will attempt to commit other fraudulent acts, such as impersonating voters who have already cast their ballots by absentee voting. The state has a compelling interest in protecting the integrity of elections and preventing voter fraud. *State v. Baron*, 769 N.W.2d 34, 45 (Wis. 2009).

The United States Supreme Court has acknowledged the value of running "efficient and equitable elections." *Clingman v. Beaver*, 544 U.S. 581, 582 (2005). It is within the purview of the state to enact reasonable regulations "to reduce election- and campaign-related disorder." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997). It is within the authority of Clerks to implement such regulations. If the state were to allow all absentee voters to recast in-person votes at the clerk's office, this would potentially create chaos. Short-staffed municipalities will need personnel to spend time retrieving absentee ballots, destroying absentee ballots, and reissuing ballots to voters. Election officials will be unable to focus their resources on ensuring that voters who have not yet had the opportunity to cast a ballot can exercise their right to vote.

Wisconsin law routinely imposes deadlines on voters; the inability for a voter to retrieve his or her vote is not unlike any other type of deadline, such as the cut-off for voter registration, or the closing times for the polls. *Marston v. Lewis*, 410 U.S. 679, 680 (1973) (finding that states could impose voter registration deadlines); *State ex rel. Shroble v. Prusener*, 517 N.W.2d 169, 173 (Wis. 1994) (upholding recount deadlines on the basis that "[t]he need for finality in elections and continuity of governance is not arbitrary, but is a rational basis for the legislature to set such a time limit."). State regulations do not allow voters unlimited opportunities to cast ballots; G.A.B. regulations allow each voter only three ballots, even when they have complied with statutory requirements to spoil their ballots. Wis. Stat. §6.80(2)(c) ("Any elector who, by accident or mistake, spoils or erroneously prepares a ballot may receive another, by returning the defective ballot, but not to exceed 3 ballots in all."). This is not an equal protection violation; it is an administrative practicality enacted in order to make elections practicable and efficient.

If the court were to find "ordinary and widespread burdens like these severe," the court would therefore "subject virtually every electoral regulation to strict scrutiny, hampering the ability of States to run efficient and equitable elections." *Clingman v. Beaver*, 544 U.S. 581, 593 (2005). Mere "garden variety" irregularities in election administration are not sufficient to establish that the state has denied a party equal protection rights. *Snowden v. Hughes*, 321 U.S. 1, 8 (1944). The statute, as well as Clerk's actions in precluding voters from recasting their ballots, fulfill a rational and legitimate state policy.