IN THE CIRCUIT COURT FOR STONE COUNTY, WISCONSIN

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

BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR INJUNCTION

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 FACTS

Petitioners are qualified electors and registered voters in the State of Wisconsin who attempted to exercise their rights to vote absentee pursuant to Article III, Section 1 of the Wisconsin Constitution. All Plaintiffs voted in compliance with relevant state statutes.

Prior to the November 4, 2014 election, employees in the municipal clerks' offices throughout the state observed that due to inadequacies in the design of the ballot, they were issuing many new ballots to voters who had spoiled the ballots by "over voting" and selecting two or more candidates for the position of Governor.

After consulting with the Government Accountability Board (G.A.B.), the election officials in most areas of the state permitted voters to spoil the over voted ballots and vote new ballots, citing the authority of 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."

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[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.

However, in contravening the decision of the G.A.B., the municipal clerks in Stone County informed voters that if they had already submitted their absentee ballots, they were not entitled to ask for new ballots, citing the authority of Wis. Stat. §6.86(6): "[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. 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."

Plaintiff Carey Kleinman, a registered voter in Stone County, is one of the 247 voters in Stone County denied an opportunity to revote an over-voted ballot. Kleinman and others discovered that they had mistakenly cast two votes for the position of Governor of Wisconsin. Kleinman and other similarly situated Plaintiffs (hereinafter the "Kleinman Voters") had already mailed in absentee ballots which were spoiled due to confusing ballot design acknowledged by the G.A.B. and other municipal clerks and reported on widely in Wisconsin (and national) media. *See* Mark Rogers, *Confusing Ballots Baffle Badger Voters*, Milwaukee Journal Sentinel, Mar. 18, 2013, at A1; Hal Marcus, *Cheeseheads Choose Too Many Governors*, USA Today, Mar. 22, 2013, at A14. Upon making requests, Kleinman Voters did not receive new ballots from the Stone County municipal clerk. Thus, those voters were unable to cast a successful vote for Governor.

STATEMENT OF THE CASE

Plaintiffs brought this action in the Stone County Circuit Court seeking an emergency injunction and/or writ of mandamus ordering the clerks to allow the Kleinman Voters to retrieve their spoiled ballots and recast their votes.

PRAYER FOR RELIEF

Petitioner requests that this court require the Stone County municipal clerks to allow Plaintiffs and all similarly situated qualified voters to recast all spoiled absentee ballots assuming they request so within the statutory deadlines and that election officials should then destroy the previously cast but spoiled absentee ballots.

ARGUMENT

This court must require the municipal clerks to allow the Plaintiffs and similarly situated qualified voters to recast their ballots because failure to do so would violate both the United States Constitution and the Wisconsin Constitution. Not only does the statute, which allowed only certain voters to recast spoiled ballots, violate these the United States Constitution and the Wisconsin Constitution, but the clerk's actions leading up to the November 4, 2014 election further contravene the requirements of the fundamental right to vote in Wisconsin.

1. <u>The determination to allow certain absentee voters to recast spoiled absentee ballots while prohibiting other voters from doing so similarly violates the Equal Protection Clause of the United States Constitution and Article I, Section 1 of the Wisconsin Constitution</u>

Pursuant to Wis. Stat. § 6.86(3)(c)(5):

> Whenever an elector returns a spoiled or damaged absentee ballot to the municipal clerk, or an elector's agent under sub. (3) returns a spoiled or damaged ballot to the clerk on behalf of an elector, and the clerk believes that the ballot was issued to or on behalf of the elector who is returning it, the clerk shall issue a new ballot to the elector or elector's agent, and shall destroy the spoiled or damaged ballot.

However, under subsection (3)(c)(6),

> if an elector mails or personally delivers an absentee ballot to the municipal clerk, the municipal clerk shall not return the ballot to the elector. 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.

This statutory distinction as applied in today's election violates Article I, Section 1 of the Wisconsin Constitution, which seeks to provide Equality and Inherent Rights as fundamental principles of the state. This constitutional guarantee of equal protection is identical to that found under the Fourteenth Amendment of the United States Constitution. *County of Kenosha v. C. & S. Management, Inc.*, 223 Wis. 2d 373, 393, 588 N.W.2d 236, 246 (1999); *Doering v. WEA Ins. Group*, 193 Wis.2d 118, 132, 532 N.W.2d 432, 437 (1995). Thus, a violation of one will necessarily result in the violation of the other.

It is unquestioned that the right to vote is a fundamental one in American democracy. *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966). And "[w]hile a rational basis standard applies to state regulations that do not burden the fundamental right to vote, strict scrutiny applies when a state's restriction imposes 'severe' burdens." *Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 592 (6th Cir. 2012) (quoting *Obama for America v. Husted*, 697 F.3d 423 (6th Cir. 2012). There can be no greater burden than denial of the right to cast an unspoiled ballot as is the case here. Plaintiffs have mistakenly voted for two candidates in the same race due to poor ballot design such that their votes will not be counted—all as a result of the state's error in creating a ballot that misled a substantial quantity of voters. Rogers, *Wisconsin Ballots Baffle Badgers*. This sort of state error—of which the Plaintiffs have only been recently made aware—is akin to the sort of poll worker error seen in *Ne. Ohio Coal*. *Id.* at 587. Because this difficult situation was entirely the fault of the state, and because the state has a viable remediation option since there remain two weeks before the election, the state's rationale for denying this most fundamental right must be held under the strictest scrutiny. *See McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 807–09 (1969). That the underlying issue is one raised on behalf of absentee voters does not indicate that it should be tested under rational basis. *McDonald* is inapposite to the extent that it holds that absentee voting is not a right. *Id.* 394 U.S. at 807. The issue in the instant case is a state knowingly denying its citizens the right to cast a meaningful vote. Over half a million Wisconsin voters voted absentee in the November 2012 elections, and so the act of voting absentee should fairly be classified as a right and not merely a privilege. *See* GOVERNMENT ACCOUNTABILITY BOARD, Absentee (Early) Voting Update (Nov.

5, 2012) http://gab.wi.gov/node/2645. Certainly, the outright denial of the vote when that result is evident must fail under strict scrutiny.

For those violations that do not merit strict scrutiny but rise above rational basis, courts are instructed to use the so-called *Anderson*/*Burdick* test.

> [we] must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiffs' rights."

Ne. Ohio Coal. for Homeless 696 F.3d at 592-93 (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (2008)). Here, the clerks' supposed interest in denying these voters their most sacred right is Wis. Stat. § 6.86. That statute arbitrarily distinguishes between two groups of individuals: those who timely mailed in their completed absentee ballots and those who have yet to do so. That trivial distinction has the invidious effect of denying to Plaintiffs the statutory right to spoil their ballot and revote—a right they would have been guaranteed had they dragged their feet in exercising their right to the franchise. It stretches reality to conclude that the state has offered an interest of a magnitude even on the same plane as the loss of the vote suffered by Plaintiffs.

Even under the most relaxed rational basis standard, this distinction between voters who have already mailed their absentee ballots and those who manually return their ballots is undeniably arbitrary. *See Ne. Ohio Coal.*, 696 F.3d at 592. When the modern election administration mechanisms provide quick remedies to spoiled ballots (as evidenced by the actions of the Stone County clerks), then there exists no rational basis to deny an individual the fundamental right to cast his or her ballot.

The statewide decision by the G.A.B. and other municipal clerks to allow certain voters who had over voted through absentee ballots to revote proper ballots pursuant to Wis Stat. § 6.80(2)(c) granted these voters special rights. But the decision by the clerks in Stone County to deny other similarly situated voters this same right impermissibly creates two classes of citizens. As before, the municipal clerks who prohibited the revoting cannot present even a rational basis for this bifurcation of the Wisconsin electorate, much less a compelling one. For those reasons, Wis. Stat. § 6.86 as applied to Plaintiffs is unconstitutional under both the United States and Wisconsin constitutions.

2. <u>The inadequate ballot design, G.A.B. decision, and lack of procedural remedy resulted in the disenfranchisement of perhaps thousands of qualified voters in violation of Article III, Section 1 of the Wisconsin Constitution</u>

The result of the state's errors, from inadequate and confusing ballot design to the clerks' decision to prohibit Plaintiffs and similarly situated voters from revoting or otherwise rectifying the over vote, has resulted in the *de facto* disenfranchisement of hundreds if not thousands of

qualified Wisconsin voters. Phillips Aff. ¶ 14 (Thomas Phillips, a professor at the University of Wisconsin-Madison, estimates using complex statistical analysis, that upwards of 2000 voters may be disenfranchised under the G.A.B.'s decision). This unexplained error and insistence upon upholding a statute that impermissibly and unreasonably distinguishes between voters is a clear violation of Article III, Section 1 of the Wisconsin Constitution, which states unequivocally that "[e]very United States citizen age 18 or older who is a resident of an election district in this state is a qualified elector of that district." As the Supreme Court has pointed out, "even rational restrictions on the right to vote are invidious if they are unrelated to voter qualifications." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 189 (2008). Here, an irrational restriction has been placed on qualified voters—certainly as qualified as those individuals who benefited from the Stone County clerk's decision to permit revoting to certain voters.

3. The municipal clerks' decision to follow Wis. Stat. § 6.86(6) contravenes the G.A.B.'s clear edict to follow Wis. Stat. §6.80(2)(c)

Faced with a similar quandary regarding whether to allow voters to recast absentee ballots with over votes, municipal clerks across Wisconsin consulted with the state's G.A.B. In compliance with that action, those clerks followed Wis. Stat. § 6.80(2)(c), which states that "[a]ny 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 the more appropriate statute to follow because it errs on the side of providing an easy remedy for those individuals threatened with the loss of an important constitutional right. Furthermore, the G.A.B.'s approval of this statutory fix legitimizes it as the correct reading of the state's statutory scheme as it pertains to over voting on absentee ballots.

The clerks in Stone County who denied Plaintiffs the opportunity to recast spoiled ballots erroneously applied Wis. Stat. § 6.86(6). This statute unnecessarily limits the constitutional rights of Wisconsin citizens in light of the easy remedy found in §6.80(2)(c). This error is particularly astonishing considering the fact that the G.A.B. *and every other municipal clerk in the state* has chosen the statutory interpretation that errs in favor of enfranchisement. For this reason, the clerks' decision to follow §6.86(6) instead of § 6.80(2)(c) is erroneous and unjustifiable given the stakes of this election.

4. Wis. Stat. 6.86 is ambiguous in its meaning and should not be construed as limiting voters' rights

The statute under which the clerks made their decision states that "[e]xcept as authorized in sub. (5) and s. 6.87(9), if an elector mails or personally delivers an absentee ballot to the municipal clerk, the municipal clerk shall not return the ballot to the elector." Wis. Stat. 6.86(3)(c)(6). Subsection (5) refers to voters who personably return their spoiled ballots and request new ones. Section 6.87(9) refers to absentee ballots mailed with the certificate improperly completed. Thus, it is possible that certain individuals would read subsection (6) as superseded by those statutes. But rules of statutory interpretation indicate that this should not be the case, or else the subsection would have no meaning.

Furthermore, the subsection continues: "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." It is not irrational to read this clause as allowing voters—such as those involved in this action—to return their ballots so long as it is before election day. Certainly, as evidenced in Stone County, the county clerks do indeed have the resources to allow these voters to revote prior to election day. Under this reading of the statute, clerks could allow the voters to revote without violating the plain language.

And the operative verb in the subsection, "return" is unclear in itself. The voters in question here are not requesting that the same ballot be returned to them. Rather, the Kleinman voters are requesting that the clerks retain the ballots, that the clerks spoil those ballots, and that the clerk issue entirely new blank ballots to be revoted by the voters. Under the plain language of the statute, then, the relief sought by the Kleinman voters does not violate Wis. Stat. § 6.86.

When the clerks rely upon a statute to deny its citizens a fundamental right, that statute's command must be clear and unequivocal—particularly when this decision contravenes the clear edict of the G.A.B. This is not the case here. Section 6.86(3)(c)(6) is ambiguous and the clerks' reading is inappropriate.

CONCLUSION

Because the municipal clerks' reliance upon an arbitrary distinction drawn in state statute, combined with the decision of the G.A.B. and other clerks to allow certain voters to recast their ballots, has left a significant class of qualified Wisconsin voters without the opportunity to exercise their most fundamental right, Plaintiff requests that this court require the municipal clerks in Stone County, Wisconsin to allow Plaintiffs and all similarly situated qualified voters to recast all spoiled absentee ballots assuming they request so within the statutory deadlines and that election officials should then destroy the previously cast but spoiled absentee ballots.