IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ONE WISCONSIN INSTITUTE, INC., et al.,

Plaintiffs,

v. Case No. 15-CV-324

GERALD C. NICHOL, et al.,

Defendants.

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS

The Court should dismiss these claims because the plaintiffs have not shown why the Court should allow their equal protection claims (Count III) and partisan fencing claims (Count IV) to proceed. The defendants will not address the claims that the plaintiffs have agreed should be dismissed (Counts I and II and the part of Count III relating to military and overseas electors).

ARGUMENT

I. Count III should be dismissed in its entirety.

As to the equal protection claim, the plaintiffs' response is based on a misunderstanding of the standard used to assess a motion to dismiss a claim that a law lacks a rational basis. Plaintiffs cannot survive a motion to dismiss by merely alleging that a law lacks a rational basis. Instead, "[t]o survive a motion to dismiss for failure to state a claim, a plaintiff must allege facts

sufficient to overcome the presumption of rationality that applies to government classifications." *Wroblewski v. City of Washburn*, 965 F.2d 452, 460 (7th Cir. 1992). The plaintiffs have failed to do that in this case.

A district court does not just accept the plaintiffs' allegation that there is no rational basis; it "must apply the resulting 'facts' in light of the deferential rational basis standard." *Id.* at 460. The Seventh Circuit developed this standard because although

> [t]he rational basis standard requires the government to win if any set of facts reasonably may be conceived to justify its classification; the Rule 12(b)(6) standard requires the plaintiff to prevail if relief could be granted under any set of facts that could be proved consistent with the allegations.

Id. at 459. As the defendants argued in the motion to dismiss, the facts alleged in the Amended Complaint do not overcome the presumption of rationality because there is a "conceivable and plausible" basis for the classifications. *Id.*

A. Wisconsin's differing treatment of voters who move within 28 days of an election is rational.

The plaintiffs do not even address the primary reason behind Wisconsin's differing treatment of those who move from outside of the state from those who move within the state: the Voting Rights Act requires it. The State of Wisconsin has a 28-day durational residency requirement for voting, Wis. Stat. § 6.02(1). Wisconsin makes an exception to the 28-day durational residency requirement for those that move within the state,

Wis. Stat. § 6.02(2), by allowing these electors to vote at their old election ward. There is no exception, however, for those electors who move from outside of the state. They are simply ineligible to vote. The plaintiffs are not challenging any of these provisions because the Supreme Court has recognized the valid state interest behind durational residency requirements. *E.g.*, *Marston v. Lewis*, 410 U.S. 679, 680-81 (1973) (per curiam).

The plaintiffs have not alleged facts showing that there is no "reasonably conceivable state of facts that could supply a rational basis," *Heller v. Doe*, 509 U.S. 312, 320 (1993), for Wisconsin's narrow exception allowing those who move from outside of the state to vote for president and vice president, codified at Wis. Stat. § 6.15. In fact, the plaintiffs do not even address the "state of facts" that led Wisconsin to adopt this provision: it is required to do so by federal law. *See* 52 U.S.C. § 10502(c). Wisconsin treats these voters differently from those who move within the state because Congress has mandated that they be allowed to vote for president and vice president without regard to the durational residency requirement. They are allowed to vote at their new election ward because there is nowhere else for them to vote given that they recently moved to the state.

There is no fact question for this Court to resolve with regard to the alleged burdens placed on voters who move within the state. The fact that absentee voting is available to those who must vote at their old ward provides

the legislature with a rational basis for not also offering the limited voting opportunity under Wis. Stat. § 6.15 to those who move within the state. The legislature could rationally have concluded that, given the availability of absentee voting, even those voters who moved a substantial distance would still be able to exercise the vote without the need for an accommodation like Wis. Stat. § 6.15. This "rational speculation" is sufficient to defeat the rational basis claim, which "is not subject to courtroom fact-finding." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993).

B. Wisconsin's decision to limit the acceptable forms of identification is rational.

The plaintiffs' claim regarding the acceptable forms of photo identification fails for the same reasons noted above. The plaintiffs' mere allegation that there is no rational basis for the distinctions drawn does not allow them to survive a motion to dismiss. *Wroblewski*, 965 F.2d at 459-60. The motion should be granted because the plaintiffs have not provided any "facts sufficient to overcome the presumption of rationality that applies to government classifications." *Id.* at 460.

The plaintiffs' response to the State's rationale for the classification does not come close to meeting their "burden to negative every conceivable basis which might support it." *Beach*, 508 U.S. at 315 (internal quotation marks omitted). Instead, the plaintiffs merely suggest that the State must have no basis for limiting forms of identification when some of the

unacceptable forms of identification are similar to the forms that are accepted. The decision on where to draw the lines on acceptable forms of identification, however, is classic legislative line-drawing which "renders the precise coordinates of the resulting legislative judgment virtually unreviewable." *Id.* at 316. The plaintiffs' argument turns this principle on its head by suggesting that Wisconsin must prove in court why it does not accept all forms of identification that have some of the characteristics of other forms that it does accept. The fact that Wisconsin accepts several different identification forms from Indian tribes does not mean that it is constitutionally required to accept identification from every other state in the country.

C. There is no dispute between the parties with regard to technical college identification.

The defendants in this case, the members of the Government Accountability Board, have promulgated an emergency rule that puts into effect the relief the plaintiffs seek in this claim: the acceptance of technical college identification cards as a form of identification for voting. That emergency rule is in effect at this time and will remain in effect until at least October. EmR 1515, Text of Rule, Section 3. The GAB is in the process of promulgating a permanent rule that would make the emergency rule

permanent. Thus, the plaintiffs do not need relief from this Court at this time and the need for future relief is purely speculative.

D. A stay of the claims is appropriate under the circumstances.

Should the Court not dismiss all of the rational basis challenges, the claims related to particular forms of identification meet all the criteria for a stay. This case was just filed, the non-moving party will not be prejudiced because another court is considering these issues (and thus is closer to a decision), and the case will be simplified by removing several issues, which should reduce the burdens on the parties and the court. *See Grice Eng'g, Inc. v. JG Innovations, Inc.*, 691 F. Supp. 2d 915, 920 (W.D. Wis. 2010).

II. Count IV should be dismissed because the plaintiffs cite no authority supporting a "fencing out" claim when no class of voters is explicitly denied the right to vote.

There is simply no authority supporting a "fencing out" claim in which a particular class of people is not prohibited by law from voting. The plaintiffs rely on isolated statements made in cases that were not "fencing out" claims. Justice Kennedy's concurrence in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), provides no support because it was the concurring opinion of one justice made in a partisan gerrymandering case (and which actually ruled in favor of dismissing the claim in that case). *Id.* at 314 (Kennedy, J., concurring in the judgment). Similarly, *Williams v. Rhodes*, 393 U.S. 23 (1968), was an equal

protection case, and *Anderson v. Celebrezze*, 460 U.S. 780 (1983), was a case involving an alleged substantial burden on the right to vote. The cases that actually apply the "fencing out" doctrine require actual fencing out by a prohibition on the right to vote, not disproportionate burdens that allegedly make it more difficult for some members of a particular group to vote. (*See* Dkt. at 22 at 26-28.)

Lastly, the plaintiffs' "parade of horribles" argument falls flat. The fact that the "fencing out" doctrine does not apply to a law does not mean that legislatures have *carte blanche* to pass the law. The hypothetical laws posed by the plaintiffs are more easily addressed as equal protection claims because they explicitly treat groups differently without any apparent rational basis. The *Williams* Court granted relief under the equal protection clause to smaller political parties from laws that benefited the Republican and Democratic parties, 393 U.S. at 32-34, and courts surely could grant relief under the equal protection clause if laws explicitly disadvantaged members of particular parties in the ways suggested by the plaintiffs. A "fencing out" claim would merely complicate the analysis of these claims.

CONCLUSION

The Court should dismiss Counts I and II as they relate to the voter ID law, and Counts III and IV in their entirety.

Dated this 21st day of August, 2015.

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