



PROTECTING THE VOTE FOR ALL AMERICANS

Testimony In Opposition to SB 935

Wisconsin Senate Committee on Elections, Election Process Reform and Ethics
February 7, 2022

Senators Bernier, Darling, Stroebel, Smith, and Roys,

We write in strong opposition to SB 935’s provisions imposing new and needless requirements for absentee ballot certificate envelopes. This bill would compel the rejection of an absentee ballot where either a voter or a witness fails to fill in **any** of twelve separate fields on the certificate envelope. As drafted, these new requirements would be unconstitutional and also violate federal civil rights statutes. State legislatures do not operate in a vacuum, and legislators must comply not only with state constitutional requirements but with the United States Constitution and all federal law.

SB 935 seeks to override a policy put in place by the Wisconsin Elections Commission (“WEC”) over five years ago in response to the League of Women Voters of Wisconsin’s advocacy. Currently, Wisconsin law provides that “[i]f a certificate is missing the address of a witness, the ballot may not be counted.” Wis. Stat. § 6.87(6d). In 2016, WEC had initially construed that requirement to mean that an address was not “missing” if the witness had, at a minimum, recorded their street number, street name, and municipality.¹ In a letter dated October 11, 2016, the League made clear to WEC that that interpretation of Section 6.87(6d), which had been announced a week prior on October 4, would have run afoul of the U.S. Constitution if left unmodified. The revised policy issued on October 18, 2016—which required clerks to do everything they could reasonably do to ascertain a missing witness address or a missing component of a witness address—made it unnecessary to file the federal lawsuit our lawyers had prepared.² It is this policy that SB 935 now threatens to unravel.

Even worse, SB 935 seeks to compound the constitutional deficiencies of the WEC’s previous policy by enumerating additional technical defects that will result in the mandatory

¹ See Wisconsin Elections Commission, Memorandum re: “Missing or Insufficient Witness Address on Absentee Certificate Envelopes” (Oct. 4, 2016), *available at* <http://www.gab.wi.gov/node/4191>.

² Wisconsin Elections Commission, Memorandum to Wisconsin Municipal and County Clerks, “AMENDED: Missing or Insufficient Witness Address on Absentee Certificate Envelopes” (Oct. 18, 2016), *available at* https://elections.wi.gov/sites/elections.wi.gov/files/memo/20/guidance_insufficient_witness_address_amended_10_1_38089.pdf.



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rejection of an absentee ballot, thereby greatly expanding the ways in which Wisconsin voters can be deprived of their right to participate in their democracy. SB 935 would require clerks to reject a ballot because a voter or witness fails to fill in any of the following: the voter’s printed first name, the voter’s printed last name, the voter’s house or apartment number, the voter’s street name, the voter’s municipality, the voter’s signature, the witness’s printed first name, the witness’s printed last name, the witness’s house or apartment number, the witness’s street name, the witness’s municipality, *or* the witness’s signature. This is not a matter of policy preferences and choices, but rather what federal law allows and does not allow. The U.S. Constitution and Title I of the 1964 Civil Rights Act simply do not permit election officials to reject and refuse to count ballots with technical errors or omissions.

As we explained to the Commission back in October 2016, rejecting an absentee ballot for a purely technical defect on the absentee ballot certificate envelope³—such as omitted information that is obvious and/or can be readily ascertained from the face of the certificate or other readily available, commonly-used sources like WisVote or Wisconsin Department of Transportation (“DOT”) databases—would unnecessarily and unlawfully deny the right to vote without advancing a compelling state interest. This would violate the First and Fourteenth Amendments under longstanding U.S. Supreme Court precedents. Under those precedents, any burden on the right to vote must be balanced against a state’s interest in that requirement. The Supreme Court has set forth the following test:

[T]he rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to “severe” restrictions, the regulation must be “narrowly drawn to advance a state interest of compelling importance.” *Norman v. Reed*, 502 U.S. 279, 289, 112 S.Ct. 698, 705, 116 L.Ed.2d 711 (1992). But when a state election law provision imposes only “reasonable, nondiscriminatory restrictions” upon the First and Fourteenth Amendment rights of voters, “the State’s important regulatory interests are generally sufficient to justify” the restrictions. *Anderson*, 460 U.S., at 788, 103 S.Ct., at 1569–1570; *see also id.*, at 788– 789, n. 9, 103 S.Ct., at 1569–1570, n. 9.

Burdick v. Takushi, 504 U.S. 428, 434 (1992). Here, the state’s interest in the voter and witness filling out each of these twelve fields is not nearly significant enough to override the voter’s

³ EL-122, Absentee Certificate Envelope, *available at* <https://elections.wi.gov/sites/elections/files/2020-08/EL-122%20Standard%20Absentee%20Ballot%20Certificate-portrait%20%28rev.%202020-08%29.pdf>.



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overwhelming interest in having their ballot counted. This is so because each of these data points can be readily ascertained and/or supplied by state and local election officials. WEC and municipal clerks can and should pre-populate the absentee ballot certificate, which already bears a unique identifying code assigned to that voter's specific ballot, with all of the voter's information, including the voter's printed first name, the voter's printed last name, the voter's house or apartment number, the voter's street name, and the voter's municipality. Requiring a voter to fill out all of this information is entirely unnecessary and duplicative as this information has already been provided on the voter's absentee ballot application online at myvote.wi.gov or on their print application. The voter should only be required to sign the certificate envelope.

The witness certification must be treated similarly. The legislative intent animating this new witness address requirement is the same as that underpinning the entire witness certification: to facilitate any law enforcement investigation into possible instances of absentee ballot fraud. A witness is not currently required to supply their printed first and last names, but they should be required to do so. However, omitting that information should not result in ballot rejection if that information can be readily ascertained from the face of the certificate, such as the signature. Similarly, the omission of any component of the witness's address cannot lawfully serve as grounds for denying a voter their right to cast a ballot, where this information can be readily ascertained by election officials by reference to available sources like WisVote, or by reference to the name and address information the witness *has* supplied. For example, SB 935, as drafted, would mandate the rejection of a ballot witnessed by a spouse who records the same street address as the voter but omits their municipality, as well as the rejection of a ballot witnessed by a registered voter who records their zip code or enough information to uniquely identify them in WisVote without any voter or witness outreach.

Even missing voter or witness signatures should not result in automatic invalidation. The Fourteenth Amendment's Due Process Clause requires election officials to afford voters an opportunity to cure that defect and sign their ballot in person at the clerk's office or have their witness do likewise.

Rejecting a ballot for easily-curable, technical defects is therefore illegal under federal law. SB 935 would impose an undue burden on such absentee voters' right to vote as protected by the First and Fourteenth Amendments, not justified by a compelling state interest. While the League will not quarrel with the state's purported antifraud objective in requiring a witness to sign and provide their name and address, insisting upon *perfection* in these fields serves no purpose. Where the missing name or address elements can be easily ascertained, the anti-fraud legislative purpose is in no way undermined. Therefore, the state's interest in a draconian certificate policy for voter and witness names and addresses on absentee ballot certificates is neither "compelling" nor "important." *Burdick*, 504 U.S. at 434.

To the extent the state argues its interest in the complete address policy is in minimizing administrative burdens, the U.S. Supreme Court has explicitly stated that constitutional rights do not bend to administrative convenience and financial considerations. *See Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 218 (1986) (striking down Connecticut’s closed primary law on First Amendment associational rights grounds) (“Costs of administration would likewise increase if a third major party should come into existence in Connecticut, thus requiring the State to fund a third major party primary. Additional voting machines, poll workers, and ballot materials would all be necessary under these circumstances as well. But the State could not forever protect the two existing major parties from competition solely on the ground that two major parties are all the public can afford.”). Moreover, the Legislative Audit Bureau’s October 2021 report entitled “Elections Administration” reflects that a very small percentage of absentee ballots bear such technical omissions, so ascertaining missing information does not impose a significant burden on municipal clerks. The Bureau reviewed a random sample of 14,710 certificates and found that:

- 1,022 certificates (6.9 percent) in 28 municipalities had partial witness addresses because they did not have one or more components of a witness address, such as a street name, municipality, state, and zip code, including 799 certificates (5.4 percent) that did not have a zip code and 364 certificates (2.5 percent) that did not have a state;
- 15 certificates (0.1 percent) in 10 municipalities did not have a witness address in its entirety;
- 8 certificates (less than 0.1 percent) in 7 municipalities did not have a witness signature; and 3 certificates (less than 0.1 percent) in 2 municipalities did not have a voter’s signature.

Wisconsin Legislative Audit Bureau, Report 21-19 “Elections Administration,” at 42-43, *available at* <https://legis.wisconsin.gov/lab/media/3288/21-19full.pdf>. Therefore, perceived administrative burdens cannot be grounds to reject these ballots, instead of ascertaining the missing information and ensuring voters have their ballots counted.

The above constitutional principle has been squarely applied in a case concerning immaterial defects and omissions on a certificate envelope. The U.S. Court of Appeals for the Sixth Circuit has ruled on this very issue. In an opinion written by Judge Danny Boggs, who was appointed by President Reagan, and joined by Judge John Rogers, who was appointed by President George W. Bush, the Court found that any state interest Ohio had in rejecting absentee ballots for technical omissions and defects on the certificate envelope was far outweighed by the voter’s significant interest in having their ballot counted: “Ohio ha[d] made no such justification for mandating technical precision in the address and birthdate fields of the absentee-ballot



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identification envelope.” *Northeast Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 632 (6th Cir. 2016). The three-judge panel rejected the notion that a mandatory rejection requirement for technical errors was necessary to fulfill the statute’s anti-fraud objective, as there were alternatives that had proven effective for that purpose in the past:

Before SB 205, boards were instructed to strike ballots if the identification envelope contained “insufficient” information and had discretion to “challenge” absent voters “for cause.” Ohio Rev. Code § 3509.07 (2013). That provision gave boards more than sufficient flexibility to investigate birthdate errors for fraud without the heavy-handed requirement of ballot rejection on a technicality.

Id. at 633. Accordingly, the court found that “the fraud interest does not offset the burden of technical perfection on the identification envelope’s address and birthdate fields.” *Id.* In reaching this conclusion, the court focused on the information’s “sufficien[cy]” to achieve the legislative purpose, not the perfection of the information provided. *Id.* at 632-33.

Furthermore, rejecting absentee ballots for such technical, easily curable omissions on the absentee ballot certificate envelope would also violate federal civil rights law. Title I of the 1964 Civil Rights Act provides that:

No person acting under color of law shall . . . deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, *if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election*[.]

52 U.S.C. § 10101(a)(2)(B). Technical errors or omissions as to the voter’s and witness’s names, addresses, and signatures are “not material in determining whether” a voter is qualified to vote under Wisconsin law. Where such omitted information can be supplied and pre-printed or readily ascertained by municipal clerks, their staff, or law enforcement on the back end, the anti-fraud legislative purpose behind Section 6.87(6d) is not undermined at all.

Therefore, the above federal constitutional and statutory rules prohibit rejecting Wisconsin voters’ absentee ballots and set boundaries on what this legislature can do in directing the rejection of ballots in state law. If a missing name or address component on the absentee certificate envelope can be ascertained by reference to the face of the certificate envelope, readily available and reliable sources such as WisVote or Wisconsin DOT databases, or even by contacting the voter and/or the voter’s witness in some fashion, the state legislature’s anti-fraud objective is still fulfilled, as the voter or witness can be identified and questioned, if need be.



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The Commission and its counsel reviewed these legal arguments back in 2016, agreed with us, and amended the absentee ballot certificate defect correction policy accordingly. Federal law on this issue has not changed since that time, and neither should Wisconsin law outlining the certificate, its requirements, and the process for curing technical, immaterial omissions. With respect, this Committee should vote against SB 935, as the proposal clearly violates the U.S. Constitution and federal law.

Sincerely,

/s/ Jon Sherman

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