

Dane County judge allows Madison absentee ballot lawsuit to proceed

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A Dane County judge declared voting absentee is a constitutional right, not a privilege, as he rejected the city of Madison's motion to dismiss a lawsuit filed over the former clerk's failure to count 193 absentee ballots in the November election.

The city and former Madison Clerk Maribeth Witzel-Behl had urged Judge David Conway to dismiss the suit, arguing those who vote absentee are only exercising a statutory privilege.

Conway wrote in Monday's ruling that the ability to vote absentee is a privilege "created by and subject to legislative grace." But those who utilize the option are still exercising their constitutional right to vote.

"Once a voter casts a valid absentee ballot that complies with the Legislature's rules for utilizing the absentee process, the voter has exercised the same constitutional right to vote as someone who casts a valid in-person ballot at a polling place," Conway wrote. "And that right to vote would be a hollow protection if it did not also include the right to have one's vote counted."

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Voters whose absentee ballots weren't counted in the November election have sued seeking monetary damages. Scott Thompson of Law Forward, who represents the voters, praised the ruling.

"At the dawn of another election season, the message is clear: the right to vote protects Wisconsinites whether they vote in-person or absentee," he said.

The defendants in the case made four arguments seeking to have the suit dismissed, but Conway rejected them all in Monday's order.

The contention that absentee voting is a privilege and not a constitutional right drew blowback from Dem Gov. Tony Evers and the Wisconsin Elections Commission, both of which filed briefs urging the court to reject the city's argument.

Along with urging Conway to dismiss the suit for that reason, the defendants also raised three other arguments: there is no right to damages when elections officials inadvertently fail to count ballots; the Wisconsin Elections Commission has exclusive authority to enforce election laws, barring the civil suit; and the voters didn't follow proper procedure in filing their complaint.

Conway rejected them all.

A Madison spokesperson said the city is reviewing the decision before deciding its next steps. Dylan Brogan added the city continues to contend the lawsuit seeks millions in taxpayer dollars for a "regrettable human error."

"The City has a long history of promoting and protecting absentee voting and that policy has not changed," Brogan said. "However, assigning a dollar value to a vote for a human error would mean the money municipalities, like Madison, invest in improving voter access and election processes would be diverted to pay for this human error."