

FILED
01-25-2023
CLERK OF WISCONSIN
COURT OF APPEALS

No. 2023AP000076

In the Wisconsin Court of Appeals
DISTRICT IV

RICHARD BRAUN,
PLAINTIFF-RESPONDENT,

AND

WISCONSIN ELECTIONS COMMISSION,
DEFENDANT-RESPONDENT,

v.

VOTE.ORG,
PROPOSED-INTERVENOR-APPELLANT.

On Appeal from the Waukesha County Circuit
Court, The Honorable Michael P. Maxwell,
Presiding, Case No. 22CV1336

PLAINTIFF-RESPONDENT'S MEMORANDUM IN
SUPPORT OF MOTION TO CHANGE VENUE

WISCONSIN INSTITUTE FOR
LAW & LIBERTY, INC.

RICHARD M. ESENBERG
LUCAS T. VEBBER
330 E. Kilbourn Ave., Ste. 725
Milwaukee, WI 53202
Phone: (414) 727-9455
Facsimile: (414) 727-6385

Attorneys for Plaintiff-Respondent

INTRODUCTION

Proposed-Intervenor-Appellant Vote.org claims that District IV is the correct venue for this appeal, but they are wrong. This appeal is statutorily required to be in District II. To attempt to have this appeal venued in District IV, Vote.org tries to invoke a non-applicable exception to the general appellate venue statute. In order to invoke this exception, Vote.org chooses not to disclose to this Court one of the two claims asserted in this case.

Specifically, Vote.org acknowledges that if this case “relate[s] to the validity or invalidity of a rule,” venue in District II is appropriate. Vote.org’s Letter to Sheila Reiff (dated January 13, 2023) at 1-2. Vote.org then discusses the *first* claim in this case, which is an assertion that a National Form approved for use in Wisconsin by Defendant-Respondent Wisconsin Elections Commission (“WEC”) violates Wis. Stat. § 6.33 because it does not contain certain information required by that statute. Vote.org then entirely fails to mention Plaintiff-Respondent Richard Braun’s *second* claim in this case, which is that WEC violated the rulemaking provisions of ch. 227 by approving a form including *extra* information not mandated by Wis. Stat. § 6.33. In other words, Mr. Braun argues that WEC’s approval of the form is an invalid,

unpromulgated rule, which under Wisconsin law is explicitly treated as a challenge to the validity of the rule. Vote.org may disagree with Mr. Braun's rulemaking claim, but to fail to discuss that claim in a letter to this Court, and then to argue that this case does not relate to the invalidity of a rule, is unacceptable.

This Court should grant Mr. Braun's motion to change venue to the statutorily mandated venue, District II.

FACTUAL BACKGROUND

Mr. Braun originally brought this action on September 15, 2022, alleging two claims: first, that a particular form adopted by the WEC failed to comply with statutory requirements; and second, that the adoption of that form amounted to the unlawful adoption of an administrative rule and was therefore invalid. Since this action *plainly* relates "to the validity or invalidity of a rule" it was venued as required by Wis. Stat. § 227.40(1), in Waukesha County where Mr. Braun resides.

On September 28, 2022, Vote.org filed a motion to intervene in the circuit court action. The circuit court scheduled a motion hearing for December 2, 2022, and on November 9, 2022 entered an order establishing a briefing schedule. On November 17, 2022, Mr. Braun filed

a response to Vote.org's intervention motion, and on November 23, 2022 Vote.org filed a reply.¹

On December 2, 2022, the circuit court heard argument on Vote.org's motion to intervene, and denied that motion. A written order was entered on December 15, 2022. On January 6, 2023, Vote.org filed a motion seeing leave to file an *amicus curiae* brief with the circuit court. On January 13, 2023, they filed this appeal of the circuit court's December 15, 2022 order denying their motion to intervene. Vote.org designated District IV as the venue for this appeal.

Mr. Braun now files this motion for a change of venue to transfer this appeal to the statutorily-mandated venue, District II.

ARGUMENT

- I. **The appellate venue statutes are clear and unambiguous and generally require an appeal to stay within the appellate district where the case originated.**

This motion for a change of appellate venue requires the Court to engage in statutory interpretation. "[T]he purpose of statutory interpretation is to determine what the statute means so that it may be

¹ WEC filed a letter with the Court on November 17, 2022 stating that it had no opposition to the motion to intervene and did not otherwise participate in the briefing.

given its full, proper, and intended effect.” *State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58, ¶ 44, 271 Wis.2d 633, 681 N.W.2d 110. Here, the language of the appellate general venue statute, Wis. Stat. § 752.21(1), and the limited exception to that general appellate venue statute, Wis. Stat. § 752.21(2), are both clear and unambiguous. Our Supreme Court has “repeatedly held that statutory interpretation begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.” *Kalal*, 271 Wis.2d 633, ¶ 45 (quoting *Seider v. O’Connell*, 2000 WI 76, ¶ 43, 236 Wis.2d 211, 612 N.W.2d 659).

a. The general rule on appellate venue requires that an appeal should be filed in the court of appeals district which contains the circuit court appealed from

“The statute controlling appellate venue is Wis. Stat. § 752.21....” *State ex rel. Dep’t of Nat. Res. v. Wisconsin Ct. of Appeals, Dist. IV*, 2018 WI 25, ¶ 14, 380 Wis. 2d 354, 909 N.W.2d 114. “The first subsection of Wis. Stat. § 752.21 contains the general rule controlling appellate venue.” *Id.* ¶ 13. This subsection provides: “Except as provided in sub. (2), a judgment or order appealed to the court of appeals shall be heard in the court of appeals district which contains the court from which the judgment or order is appealed.” Wis. Stat. § 752.21(1). Because this

provision uses “mandatory” language, “the court of appeals has no discretion with respect to where it must hear the appeal.” *Dep’t of Nat. Res.*, 380 Wis. 2d 354, ¶ 13, *see also State ex. rel. Kormanik v. Brash*, 2022 WI 67, ¶ 19, 404 Wis.2d 568, 980 N.W.2d 948 (2022).

That is, appeals generally must be heard in the court of appeals district containing the circuit court appealed from. The order appealed from in this case was issued by the circuit court for Waukesha County, which is located in District II. *See* Wis. Stat. § 752.11(1)(b). Any appeal must be heard in District II.

b. A limited exception to the general rule applies when the underlying action was venued pursuant to Wis. Stat. § 801.50(3)(a).

There is only one limited exception to the general rule on appellate venue contained in Wis. Stat. § 752.21: namely actions which were originally venued pursuant to Wis. Stat. § 801.50(3)(a). *See* Wis. Stat. § 752.21(2). Under Wis. Stat. § 752.21(2), “A judgment or order appealed from an action venued in a county designated by the plaintiff to the action as provided under s. 801.50 (3) (a) shall be heard in a court of appeals district selected by the appellant but the court of appeals district may not be the court of appeals district that contains the court from which the judgment or order is appealed.”

By its plain language, this exception “applies only to the subset of cases in which the plaintiff designated venue in the circuit court pursuant to Wis. Stat. § 801.50(3)(a).” *Dep’t of Nat. Res.*, 380 Wis. 2d 354, ¶ 13. That is not this case. This case was venued under Wis. Stat. § 801.50(3)(b) and § 227.40(1). (Complaint, Dkt. 2 (attached hereto as Exhibit 1), ¶ 16.) Wisconsin Stat. § 801.50(3)(a) itself has exceptions to its exception to Wis. Stat. § 752.21. *Dep’t of Nat. Res.*, 380 Wis. 2d 354, ¶¶ 16 n.8, 24. Specifically, Wis. Stat. §§ 801.50(3)(b) and (3)(c) are two “exceptions” to the exception set forth in Wis Stat. § 801.50(3)(a). *Dep’t of Nat. Res.*, 380 Wis. 2d 354, ¶ 16 n.8.

Wisconsin Stat. § 801.50(3)(a) expressly states: “Except as provided in pars. (b) and (c), all actions in which the sole defendant is the state, any state board or commission, or any state officer, employee, or agent in an official capacity shall be venued in the county designated by the plaintiff unless another venue is specifically authorized by law.” Wis. Stat. § 801.50(3)(a) (emphasis added).²

² Interestingly, if Vote.org’s argument on appeal is correct (which it is not) that it has the right to intervene, then the state would not be the sole defendant and, as a result, Wisconsin Stat. § 801.50(3)(a) would still not apply to the case even under Vote.org’s own argument. Vote.org seems to be attempting to have it both ways.

For purposes of this appeal, the relevant exception is contained in Wis. Stat. § 801.50(3)(b), which reads in full: “All actions relating to the validity or invalidity of a rule or guidance document shall be venued as provided in s. 227.40 (1).” Under Wis. Stat. § 227.40(1), an action challenging “the validity of a rule or guidance document” must be “brought in the circuit court for the county where the party asserting the invalidity of the rule or guidance document resides or has its principal place of business.” Wis. Stat. § 227.40(1).

“The language of Wis. Stat. § 801.50(3)(a) and (3)(b) is plain, whether considered alone or in conjunction with the appellate venue statute, § 752.21.” *Kormanik*, 404 Wis.2d 568, ¶ 23. *Kormanik* dealt with a similar issue: a case was brought relating to the validity or invalidity of a rule in Waukesha County, and an appeal was improperly filed in District IV. The Court in *Kormanik* made clear that appeals in such actions must be heard according to Wis. Stat. § 752.21(1), rather than Wis. Stat. § 752.21(2) as the appellants here argue. See Vote.org’s Letter to Sheila Reiff (dated January 13, 2023) at 1.

This case challenged state agency rules as invalid because they had not been properly promulgated under chapter 227 (Dkt. 2 (attached hereto as Exhibit 1), ¶¶44-51) and venue in Waukesha County was

specifically based on Wis. Stat. § 801.50(3)(b) (Dkt. 2 (attached hereto as Exhibit 1), ¶16.) Just like the underlying lawsuit in *Kormanik*, this case is “clearly ‘relat[ed] to the validity or [invalidity] of a rule or guidance document’ within the meaning of Wis. Stat. § 801.50(3)(b).” *Kormanik*, 404 Wis.2d 568, ¶ 21.

The venue provision in Wis. Stat. § 227.40(1) applies when a plaintiff challenges a policy as being an unpromulgated rule (which was the precise issue in this action). *See, e.g., Johnson v. Berge*, 2003 WI App 51, ¶¶ 4–5, 260 Wis. 2d 758, 659 N.W.2d 418. Wisconsin law is “clear that a challenge to a policy on the basis that it is actually a rule is to be construed as a challenge to the validity of a rule, and that the requirements of § 227.40 do indeed apply.” *Mata v. Wisconsin Dep’t of Child. & Fams.*, 2014 WI App 69, ¶ 13, 354 Wis. 2d 486, 849 N.W.2d 908. Wisconsin Stat. “§ 227.40 logically encompass[es] policies or other statements, standards, or orders that meet the definition of ‘rule’ under Wis. Stat. § 227.01(13) but have not been promulgated as required by Wis. Stat. § 227.10.” *Id.* (alterations in original) (quoting *Heritage Credit Union v. Off. of Credit Unions*, 2001 WI App 213, ¶ 24, 247 Wis. 2d 589, 634 N.W.2d 593).

II. The limited exception to the general rule on appellate venue does not apply to this case, and the proper venue is District II.

Mr. Braun filed this action in Waukesha County pursuant to Wis. Stat. § 227.40(1), as required by Wis. Stat. § 801.50(3)(b). This appeal must therefore be venued in District II pursuant to Wis. Stat. § 752.21(1).

This action “relat[es] to the validity or invalidity of a rule.” Wis. Stat. § 801.50(3)(b). Mr. Braun challenged WEC’s adoption of a particular voter registration form as amounting to unlawful rulemaking in violation of Wis. Stat. ch. 227, and sought to have that action declared unlawful. Because this lawsuit challenges the validity of an unpromulgated rule, it was required to be venued in circuit court pursuant to Wis. Stat. § 227.40(1). *See, e.g., Johnson*, 260 Wis. 2d 758, ¶¶ 4–5. Mr. Braun properly brought this action in Waukesha County pursuant to Wis. Stat. § 227.40(1) because the that is where Mr. Braun resides.

Vote.org argues in a letter filed with its Notice of Appeal that this form is not issued by the state and could not be a “rule or guidance document.” Vote.org’s Letter to Sheila Reiff (dated January 13, 2023) at 2. Based on this, they argue this is not a rulemaking claim. But Vote.org simply misunderstands this action. Mr. Braun argues that WEC, in

allowing the registration form at issue in this case to be used in Wisconsin, was first required to adopt the requirements of that form by rule. WEC did not do so, and so the use of the form amounts to an unlawfully adopted rule. Vote.org may disagree on the merits of this case, but their stated disagreement on the merits is not enough to change this action from one that “relates to rulemaking” to one that does not.

Since this action was venued pursuant to Wis. Stat. §§ 227.40(1) and 801.50(3)(b), it was plainly *not* venued pursuant to Wis. Stat. § 801.50(3)(a). As a result, on appeal, this action does *not* trigger the Wis. Stat. § 752.21(2) exception to the Wis. Stat. § 752.21(1) general appellate venue rule. Vote.org could have chosen to appeal to District IV *only if* Mr. Braun had designated Waukesha County as the circuit court venue pursuant to Wis. Stat. § 801.50(3)(a). As noted above, the appellate venue exception in section 752.21(2) “applies only to the subset of cases in which the plaintiff designated venue in the circuit court pursuant to Wis. Stat. § 801.50(3)(a).” *Dep’t of Nat. Res.*, 380 Wis. 2d 354, ¶ 13. Because the Plaintiff here venued this action in Waukesha County under section 801.50(3)(b), the general appellate venue rule in section 752.21(1) applies here. As a result, this appeal may only be heard by District II, rather than District IV where Vote.org has filed it.

In sum, because this action was brought in Waukesha County under Wis. Stat. §§ 227.40(1) and 801.50(3)(b), the proper appellate district is District II under Wis. Stat. § 752.21(1).

CONCLUSION

For these reasons, Mr. Braun respectfully requests that the Court grant his motion to change the venue of this appeal from District IV to District II.

Dated this 25th day of January, 2023.

Respectfully submitted,

WISCONSIN INSTITUTE FOR
LAW & LIBERTY, INC.

Electronically signed by Lucas T. Vebber

Richard M. Esenberg (WI Bar No. 1005622)

Lucas T. Vebber (WI Bar No. 1067543)

330 E. Kilbourn Avenue, Suite 725

Milwaukee, WI 53202

Telephone: (414) 727-9455

Facsimile: (414) 727-6385

Rick@will-law.org

Lucas@will-law.org

Attorneys for Plaintiff-Respondent

FILED
09-15-2022
Clerk of Circuit Court
Waukesha County
2022CV001336

STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY

RICHARD BRAUN
S29W29571 Ancestral Drive
Waukesha, WI 53188,

Plaintiff,

v.

Declaratory Judgment
Case Code: 30701
Case No. 22-CV-

WISCONSIN ELECTIONS COMMISSION
201 West Washington Avenue, Second Floor
Madison, WI 53703,

Defendant.

SUMMONS

THE STATE OF WISCONSIN, to each person named above as a Defendant:

You are hereby notified that the Plaintiff named above has filed a lawsuit or other legal action against you. The complaint, which is attached, states the nature and basis of the legal action.

Within 45 days of receiving this summons, you must respond with a written answer, as that term is used in chapter 802 of the Wisconsin Statutes, to the complaint. The court may reject or disregard an answer that does not follow the requirements of the statutes. The answer must be sent or delivered to the court, whose address is **Clerk of Circuit Court, Waukesha County Courthouse, 515 W. Moreland Blvd., Waukesha, WI 53188** and to the Wisconsin Institute for Law



& Liberty, Plaintiff's attorney, whose address is **330 E. Kilbourn Ave., Suite 725, Milwaukee, WI 53202**. You may have an attorney help or represent you.

If you do not provide a proper answer within 45 days, the court may grant judgment against you for the award of money or other legal action requested in the complaint, and you may lose your right to object to anything that is or may be incorrect in the complaint. A judgment may be enforced as provided by law. A judgment awarding money may become a lien against any real estate you own now or in the future, and may also be enforced by garnishment or seizure of property.

Dated this 15th day of September, 2022.

WISCONSIN INSTITUTE FOR LAW & LIBERTY, INC.

Electronically signed by Anthony F. LoCoco

Richard M. Esenberg (WI Bar No. 1005622)

Anthony F. LoCoco (WI Bar No. 1101773)

Lucas T. Vebber (WI Bar No. 1067543)

330 E. Kilbourn Avenue, Suite 725

Milwaukee, WI 53202

Telephone: (414) 727-9455

Facsimile: (414) 727-6385

Rick@will-law.org

ALoCoco@will-law.org

Lucas@will-law.org

FILED
09-15-2022
Clerk of Circuit Court
Waukesha County
2022CV001336

STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY

RICHARD BRAUN
S29W29571 Ancestral Drive
Waukesha, WI 53188,

Plaintiff,

v.

Declaratory Judgment
Case Code: 30701
Case No. 22-CV-

WISCONSIN ELECTIONS COMMISSION
201 West Washington Avenue, Second Floor
Madison, WI 53703,

Defendant.

COMPLAINT

Plaintiff Richard Braun, by his undersigned attorneys at the Wisconsin Institute for Law & Liberty, Inc., hereby alleges as follows:

INTRODUCTION

1. This is an action against the Wisconsin Elections Commission (“WEC”) seeking a declaratory judgment regarding the legality of use of the National Mail Voter Registration Form (the “Form”) in Wisconsin. The form is made available by the United States Election Assistance Commission (“EAC”) at https://www.eac.gov/sites/default/files/eac_assets/1/6/Federal_Voter_Registration_ENG.pdf.

2. According to the EAC, the Form “can be used to register U.S. citizens to vote, to update registration information due to a change of name, make a change of address or to register with a political party.”

3. Pursuant to 52 U.S.C. § 20505(a), states are generally obligated to accept the Form for use in elections for federal office, but Wisconsin is exempt from that provision because it allows same day registration. *See* 52 U.S.C. § 20503(b). Whether Wisconsin accepts the Form for use in our state for voter registration is therefore up to the State to decide.

4. Relevant to this decision, Wisconsin law prescribes, in detail, requirements for any voter registration form used in this state, while delegating the actual creation of the forms to WEC. *See* Wis. Stat. § 6.33(1).

5. As a creature of the Legislature, WEC is obligated to include in any voter registration form it creates or approves those items that Wis. Stat. § 6.33(1) requires.

6. As explained in more detail below, the Form does not comply with Wis. Stat. § 6.33(1) as it is missing several items required by that statute. To take one of many examples, § 6.33(1) requires WEC to “design the form to obtain from each elector information as to . . . whether the elector has been convicted of a felony for which he or she has not been pardoned, and if so, whether the elector is incarcerated, or on parole, probation, or extended supervision.” The Form does not request this information.

7. Despite this noncompliance, WEC’s Election Administration Manual declares that the Form is approved for use for voter registration in Wisconsin. *See*

Wisconsin Elections Commission, *Election Administration Manual*, p. 66 (Sept. 2020) (“The elector must complete and sign a Voter Registration Application (EL-131), enclose a copy of the elector’s proof of residence, and mail the completed application to the municipal clerk’s office. Wis. Stat. § 6.34(2). . . . Wisconsin also accepts the National Mail Voter Registration Form and the Federal Post Card Application.”).

8. This is not the only problem with the Form. As will be explained in more detail below, the Form conversely requests items *not* provided for by any statute or rule. For example, the Form prompts an elector to disclose his or her race.

9. Although Wis. Stat. § 227.01(13)(q) exempts from rulemaking any “form the content or substantive requirements of which are prescribed by a rule or a statute,” to the extent WEC wishes to go *beyond* the “requirements of . . . rule or . . . statute” in its creation of a registration form, it would need to engage in statutorily-authorized rulemaking. See Wis. Stat. §§ 227.01(13), 227.10.

10. But, although WEC has approved use of the Form, it has not engaged in any rulemaking that would permit the inclusion of extraneous items like requests for identification of race, contrary to Wis. Stat. § 227.10.

11. Failure to comply with statutory requirements around the creation and use of voter registration forms in Wisconsin hinders uniformity and predictability around the administration of elections and increases the risk of error. In addition, Wisconsin agencies have no authority to ignore the lawful commands of the Legislature.

12. Given the Form's deficiencies, Plaintiff seeks a declaration that use of the Form in Wisconsin is illegal and an order requiring WEC to withdraw its approval of the Form. Plaintiff is not seeking any action with respect to electors who have already registered in Wisconsin using the Form.

PARTIES

13. Plaintiff Rick Braun is a registered Wisconsin voter and taxpayer residing in the town of Genesee, Waukesha County, Wisconsin, with a mailing address of S29W29571 Ancestral Drive, Waukesha, WI 53188.

14. Defendant Wisconsin Elections Commission is a governmental agency created under Wis. Stat. § 5.05 and charged with the responsibility for the administration of Chapters 5 through 10 and 12 of the Wisconsin Statutes. WEC has its offices and principal place of business at 201 West Washington Avenue, Second Floor, Madison, WI 53703.

JURISDICTION AND VENUE

15. This court has jurisdiction pursuant to either or both Wis. Stat. §§ 806.04 and 227.40.

16. Venue is proper in this Court pursuant to Wis. Stat. §§ 801.50(3)(b) and/or 227.40(1).

BACKGROUND

17. WEC's Election Administration Manual declares that the National Mail Voter Registration Form is approved for use for voter registration in Wisconsin.

18. On information and belief, Wisconsin residents have used the Form to register to vote in Wisconsin in a variety of Wisconsin municipalities. Plaintiff's counsel sent open records requests to certain clerks and received voter registration forms that were submitted to and processed by the clerks and the voters were registered using the Form. Plaintiff's counsel has provided those forms to WEC. They are not being attached to this complaint because the identities of the individual voters are not relevant to this complaint.

19. On July 26, 2022, Plaintiff's counsel sent a letter to WEC explaining why use of the Form in Wisconsin is illegal. Because the details of WEC's approval of the Form remain unclear, the letter made a request under Wisconsin's Public Records Law, Wis. Stat. §§ 19.31-19.39, for records showing when and by whom the Form was approved for use in Wisconsin as set forth in WEC's Election Administration Manual. And given that the Form fails to comply with Wisconsin law, the letter warned that absent either a legally sufficient explanation from WEC or withdrawal of approval of the form, a lawsuit would follow. A true and correct copy of the letter (without attachments) is attached hereto as Exhibit A. The letter is redacted to remove the identities of individual voters referenced because they are not relevant to this complaint.

20. To date WEC has not provided the records requested by Plaintiff's counsel. WEC did send an email on 9/14/22 responding to the Open Records Request but WEC did not identify or produce any documents showing when and by whom the

Form was approved for use in Wisconsin. WEC has provided no other substantive response to the letter.

CAUSES OF ACTION

CLAIM I – Declaratory Judgment – Violation of Wis. Stat. § 6.33(1)

21. Plaintiff realleges and incorporates by reference the preceding allegations of the complaint.

22. Wis. Stat. § 6.33(1) contains the requirements for what must be included in any voter registration application form used in this state.

23. The Form does not comply with all of the requirements of Wis. Stat. § 6.33(1).

24. For example, Wis. Stat. § 6.33(1) requires that voter registration forms obtain information as to “whether the elector has resided within the ward or election district for the number of consecutive days specified in s. 6.02 (1).”

25. The Form does not request this information.

26. Wisconsin Stat. § 6.33(1) requires that voter registration forms obtain information as to “whether the elector has been convicted of a felony for which he or she has not been pardoned, and if so, whether the elector is incarcerated, or on parole, probation, or extended supervision.”

27. The Form does not request this information.

28. Wisconsin Stat. § 6.33(1) mandates the inclusion of the following statement below the space for the elector’s signature or authorization on voter

registration forms: “Falsification of information on this form is punishable under Wisconsin law as a Class I felony.”

29. The Form does not include this statement.

30. Wisconsin Stat. § 6.33(1) requires that voter registration forms include “a space to enter the name of any inspector, municipal clerk, or deputy clerk under s. 6.55 (2) who obtains the form and a space for the inspector, clerk, or deputy clerk to sign his or her name, affirming that the inspector, clerk, or deputy clerk has accepted the form.”

31. The Form does not include such a space.

32. Wisconsin Stat. § 6.33(1) requires that voter registration forms include “a space for entry of the ward and aldermanic district, if any, where the elector resides and any other information required to determine the offices and referenda for which the elector is certified to vote.”

33. The Form does not include such a space.

34. Wisconsin Stat. § 6.33(1) requires that voter registration forms include “a space where the clerk may record an indication of whether the form is received by mail or by electronic application.”

35. The Form does not include such a space.

36. Wisconsin Stat. § 6.33(1) requires that voter registration forms include “a space where the clerk shall record an indication of the type of identifying document submitted by the elector as proof of residence under s. 6.34 or an indication that the elector’s information in lieu of proof of residence was verified under s. 6.34 (2m), the

name of the entity or institution that issued the identifying document, and, if the identifying document includes a number that applies only to the individual holding that document, that number.”

37. The Form does not include such a space.

38. Wisconsin Stat. § 6.33(1) requires that voter registration forms include “a space where the clerk, for any elector who possesses a valid voting identification card issued to the person under s. 6.47 (3), may record the identification serial number appearing on the voting identification card.”

39. The Form does not include such a space.

40. The requirements of Wis. Stat. § 6.33(1) are the established policy of the State of Wisconsin as mandated by the Legislature.

41. WEC does not have the power to set aside the policy decisions of the Wisconsin Legislature in this regard.

42. Notwithstanding the clear and mandatory provisions of Wisconsin law, WEC has approved the Form for use in Wisconsin.

43. WEC’s failure to comply with Wis. Stat. § 6.33(1) harms Plaintiff as a voter and taxpayer.

CLAIM II – Declaratory Judgment – Violation of Wis. Stat. § 227.10

44. Plaintiff realleges and incorporates by reference the preceding allegations of the complaint.

45. Wisconsin Stat. § 227.10(1) provides that “[e]ach agency shall promulgate as a rule each statement of general policy and each interpretation of a

statute which it specifically adopts to govern its enforcement or administration of that statute.”

46. Wisconsin Stat. § 227.10(2m) provides that “[n]o agency may implement or enforce any standard, requirement, or threshold . . . unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule that has been promulgated in accordance with this subchapter,” with exceptions not applicable here.

47. The Form includes boxes in which an elector is directed to state his or her political party and race.

48. Neither item of information is required by Wisconsin statute or rule and conversely no Wisconsin statute or rule authorizes WEC to request the information on its own initiative.

49. Although forms “the content or substantive requirements of which are prescribed by a rule or a statute” are exempt from rule-making, *see* Wis. Stat. § 227.01(13)(q), neither political party nor race are prescribed by Wis. Stat. § 6.33(1) and, thus, these items could only be added to the registration form by rulemaking. That rulemaking—which would have provided notice to the public and an opportunity for comment on the propriety of requesting such information—did not occur here.

50. Consequently, WEC’s approval of the Form is *ultra vires*.

51. WEC’s failure to comply with Wis. Stat. § 227.10 harms Plaintiff as a voter and taxpayer.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

- A. Enter a declaratory judgment that WEC's approval of the National Mail Voter Registration Form for use in Wisconsin violates Wis. Stat. § 6.33(1);
- B. Enter a declaratory judgment that WEC's approval of the National Mail Voter Registration Form for use in Wisconsin violates Wis. Stat. § 227.10;
- C. Enter a permanent injunction requiring that WEC withdraw its approval of the form, cease and desist from failing to comply with Wis. Stat. §§ 6.33(1) and 227.10, and correct the information in Wisconsin's Election Administration Manual indicating that the National Mail Voter Registration Form is approved for use in Wisconsin;
- D. Award the Plaintiff such costs as allowed by law; and
- E. Grant the Plaintiff such other and further relief as the Court deems appropriate.

Dated this 15th day of September, 2022.

WISCONSIN INSTITUTE FOR LAW & LIBERTY, INC.

Electronically signed by Anthony F. LoCoco

Richard M. Esenberg (WI Bar No. 1005622)

Anthony F. LoCoco (WI Bar No. 1101773)

Lucas T. Vebber (WI Bar No. 1067543)

330 E. Kilbourn Avenue, Suite 725

Milwaukee, WI 53202

Telephone: (414) 727-9455

Facsimile: (414) 727-6385

Rick@will-law.org

ALoCoco@will-law.org

Lucas@will-law.org



WISCONSIN INSTITUTE FOR LAW & LIBERTY, INC.
330 E. Kilbourn Avenue, Suite 725, Milwaukee, WI 53202-3141
414-727-WILL (9455)
Fax 414-727-6385
www.will-law.org

FILED
09-15-2022
Clerk of Circuit Court
Waukesha County
2022CV001336

July 26, 2022

VIA ELECTRONIC MAIL TO: elections@wi.gov

Meagan Wolfe, Administrator
Don M. Millis (Chairperson)
Marge Bostelmann
Julie M. Glancey
Ann S. Jacobs
Robert F. Spindell, Jr.
Mark L. Thomsen

RE: National Mail Voter Registration Form

Dear Commissioners and Administrator Wolfe:

I am writing to you regarding the use of the National Mail Voter Registration Form in Wisconsin. The form is made available by the U.S. Election Assistance Commission. If you are not familiar with the form you can find it at this link:

https://www.eac.gov/sites/default/files/eac_assets/1/6/Federal_Voter_Registration_ENG.pdf

Pursuant to 52 U.S.C.A. § 20505 (which is part of the Voter Registration Act) states are generally obligated to accept this form in elections for federal office, but Wisconsin is exempt from that provision because it allows same day registration. *See* 52 U.S.C.A. § 20503. So whether Wisconsin accepts this form for use in our state is up to the state to decide.

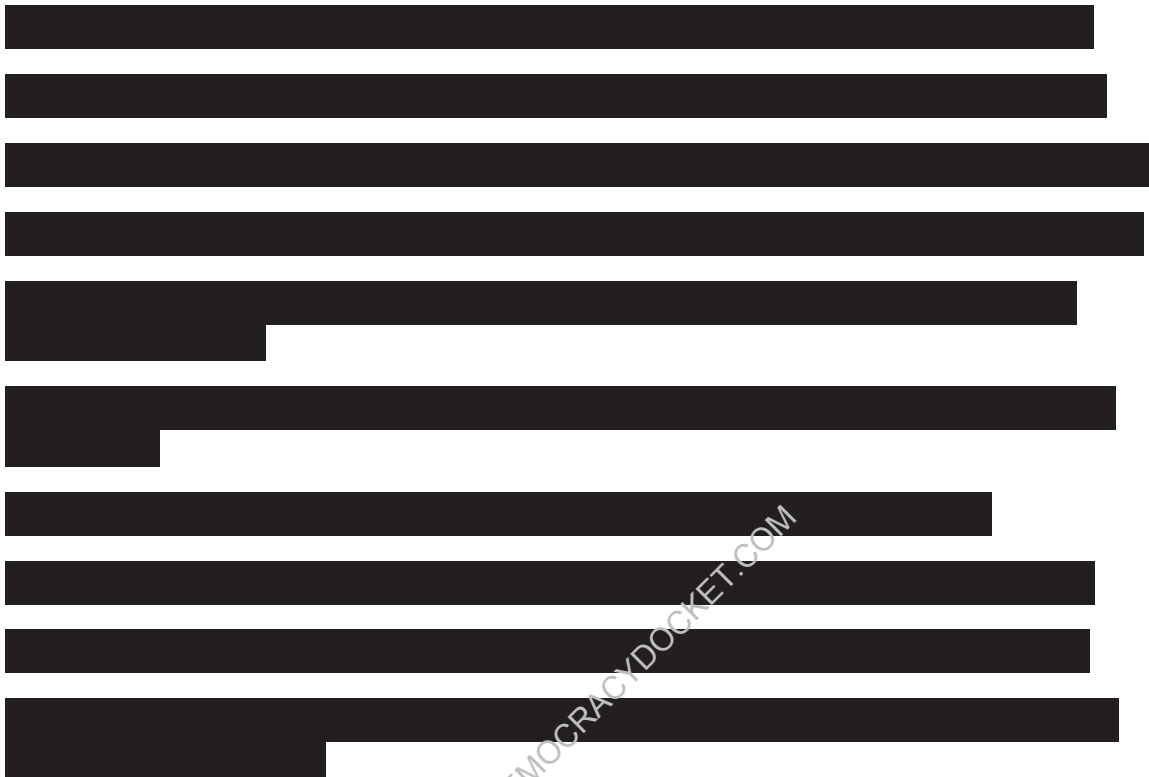
According to page 66 of the WEC Election Administration Manual this form is approved for use for voter registration in Wisconsin. In this letter we are questioning how and why this form is approved for use in this state given that the form does not comply with Wis. Stat. § 6.33(1) which contains the requirements for what must be included in any voter registration application form used in this state.

First, on the “how” question, can you please provide us with records that would show when and by whom this form was approved for use in this state as set forth in the Election Administration Manual? Please consider this letter a request under Wisconsin’s Open Records Law for those records.

Second, with respect to the “why” question we have done some research on this matter and I will briefly summarize what we have found. It would be extremely difficult, if not impossible, to learn how many people have registered to vote in Wisconsin using this form, but we certainly know that some people have done so. For example, here is a list of 10 individuals who have done



so at various different times and in various municipalities (copies of their registration forms are attached hereto):



The number of examples is irrelevant. We simply wanted to show that the form has been accepted by a variety of municipalities over a span of years.

We have also compared the federal form to Wisconsin's requirements as set forth in Wis. Stat. § 6.33(1). The deficiencies in the federal form are listed in the chart below.

	Statutory Requirement	Federal Form Complies?
1	Name	Yes
2	Date	Yes
3	Residence Location	Yes
4	Location of Previous Residence Immediately Before Moving to Current Residence Location	Yes
5	Citizenship	Yes
6	Date of Birth	Yes
7	Age	Yes
8	The number of a current and valid operator's license issued to the elector under ch. 343 or the last 4 digits of the elector's social security account number	Yes

9	Whether the elector has resided within the ward or election district for the number of consecutive days specified in § 6.02(1) (must reside in election district or ward for 28 consecutive days)	No
10	Whether the elector has been convicted of a felony for which he or she has not been pardoned, and if so, whether the elector is incarcerated, or on parole, probation, or extended supervision	No
11	Whether the elector is disqualified on any other ground from voting	Yes
12	Whether the elector is currently registered to vote at any other location	Yes
13	Below the space for the signature or authorization, respectively, the commission shall include the following statement: "Falsification of information on this form is punishable under Wisconsin law as a Class I felony."	No; but the federal form has a substantially equivalent statement
14	A space to enter the name of any inspector, municipal clerk, or deputy clerk under § 6.55(2) who obtains the form and a space for the inspector, clerk, or deputy clerk to sign his or her name, affirming that the inspector, clerk, or deputy clerk has accepted the form	No
15	A space for entry of the ward and aldermanic district, if any, where the elector resides and any other information required to determine the offices and referenda for which the elector is certified to vote	No
16	A space where the clerk shall record an indication of whether the form is received by mail or by electronic application	No
17	A space where the clerk shall record an indication of the type of identifying document submitted by the elector as proof of residence under § 6.34 or an indication that the elector's information in lieu of proof of residence was verified under § 6.34(2m), the name of the entity or	No

	institution that issued the identifying document, and, if the identifying document includes a number that applies only to the individual holding that document, that number	
18	A space where the clerk, for any elector who possesses a valid voting identification card issued to the person under § 6.47(3), may record the identification serial number appearing on the voting identification card	No

If you do a side by side comparison between the federal registration form and the registration form created by WEC (EL-131), the deficiencies in the federal form are glaring.

Given that Wisconsin has the option of whether or not to use this form and given that the form does not comply with Wis. Stat. § 6.33(1), we are wondering if you can provide an explanation as to why the federal form is approved for use in Wisconsin? Absent a legally sufficient explanation, we are requesting that WEC withdraw approval for the use of this form in Wisconsin and inform all municipal clerks that approval of the form has been withdrawn.

A few other things we noticed in our research. Some voters who use this form apparently receive the form from third party groups. A problem sometimes occurs that the voter sends in the form but the voter is already registered. That is a separate problem but we point it out because that may be true for some of the voters listed above.

Also, we note that on some of the forms that the clerks try to make up for the deficiencies in the forms by making notes in the margin (*see the* [REDACTED] form as an example). Those notes are a symptom of the problem and not a cure for the problem. None of the notes made by the clerks cure all of the deficiencies in the form. Moreover, only a few clerks make notes, and even if they do, the notes they make, vary from form to form.

Also, we understand that there is a second page for the federal form that is entitled “For Official Use Only” and that page contains a set of blank lines. It is possible that clerks could insert information on this page that could cure some of the deficiencies noted in boxes 14-18 of the chart above. In our open records requests we specifically asked for both pages. Only one clerk – the clerk in Glenbeulah – sent us a second page. That was for the application of [REDACTED]. That second page was completely blank. We are assuming that the other clerks did not ever receive the second page from the voter. That would further explain why other clerks make notes in the margin of the first page.

In addition to all of the above, the federal form also has boxes for the voter to state their political party and race. Neither is required by the Wisconsin statute. That creates two additional problems. First, while forms “the content or substantive requirements of which are prescribed by a rule or a statute” are exempt from rule-making (*see* Wis. Stat. § 227.01(13)(q)), neither political party nor race are prescribed by Wis. Stat. § 6.33(1) and, thus, could only be added to the

registration form by rule-making (which did not occur here). Second, requesting this information from Wisconsin voters is, at a minimum, intrusive and seems inappropriate in this context. Neither is related to a voter's ability to register.

Given the fact that the federal form fails to comply with Wisconsin law and given the problems caused to the clerks in trying to register a voter with an insufficient form, absent either a legally sufficient explanation from WEC or withdrawal of approval of the form, we would file an action to obtain a declaration that the form is illegal in this state. We would ask that you get back to us within 14 days of the date of this letter.

Sincerely,



Anthony F. LoCoco
Deputy Counsel

Attachments

RETRIEVED FROM DEMOCRACYDOCKET.COM