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**STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV**

RICHARD BRAUN,

Plaintiff-Respondent,

WISCONSIN ELECTIONS
COMMISSION,

Defendant-Respondent,

v.

VOTE.ORG,

Proposed-Intervenor-
Appellant.

Appeal No.
2023AP0076

Circuit Court Case No.
2022CV1336

**VOTE.ORG'S MEMORANDUM IN OPPOSITION TO
PLAINTIFF-RESPONDENT'S MOTION TO CHANGE VENUE**

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On Appeal from the
Circuit Court for Waukesha County
Case No. 2022CV1336
The Honorable Michael P. Maxwell, Presiding

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INTRODUCTION

This appeal is properly docketed in District IV, the appellate district that appellant Vote.org selected pursuant to Wis. Stat. § 752.21(2). That venue provision applies here because the “sole defendant” in the underlying case is the Wisconsin Elections Commission, a state commission. Vote.org was therefore entitled to select any appellate district other than District II, the district that contains the Waukesha County Circuit Court from which this appeal was taken. Vote.org selected District IV.

In challenging Vote.org’s selection, Braun attempts to rewrite the second count of his complaint, which he now claims is a challenge to the “validity or invalidity of a rule or guidance document.” Such a challenge would need to be brought under Wis. Stat. § 227.40, “the exclusive means of judicial review of the validity of a rule or guidance document.” But Count II of Braun’s complaint never cites Section 227.40, Braun did not mention Section 227.40 in his motion for summary judgment, and Braun did not serve his complaint on the Wisconsin Legislature’s Joint Committee for Review of Administrative Rules as required for any claim under Section 227.40, *see* Wis. Stat. § 227.40(5).

Moreover, Count II does not identify any rule or guidance document as the subject of Braun’s challenge. Braun relies on cases holding that challenges to agencies’ adoption of unpromulgated policies that meet the statutory definition of “rule” are governed by Section 227.40. Unlike in those cases, however, Braun’s complaint does not allege that WEC took any specific action to adopt a policy that meets that definition. Braun’s complaint therefore contains no claim under Section 227.40, so venue in this appeal is governed by Section 752.21(2), and properly lies in District IV.

BACKGROUND

In the underlying case, Braun sued WEC to challenge the acceptance in Wisconsin of the “national form,” a nationwide voter registration form authorized

by the National Voter Registration Act, Pub L. No. 103–31, 107 Stat. 77, 42 U.S.C. § 1973gg–1 *et seq.* (1993). Wisconsin voters have used the national form to register to vote since 1995.¹ WEC, which was established in 2016, has indicated in circuit court briefing that it has not been able to locate records showing whether or when either of its predecessor entities approved the national form’s use.² The sole reference to the form in a current WEC document is in the Election Administration Manual, which states only that “Wisconsin ... accepts the National Mail Voter Registration Form” without further comment. WEC, Election Administration Manual at 66 (Sept. 2022).³ The complaint asserts several times that WEC “has approved the use” of the national form, *e.g.*, Compl. ¶ 10,⁴ but it does not specify how or when. Nor does it allege that WEC is itself accepting registrations made using the form; only that local clerks are doing so. Compl. ¶ 18.

Braun filed the complaint in Waukesha County Circuit Court. In the jurisdiction and venue section of the complaint, Braun asserts that venue is proper in that court “pursuant to Wis. Stat. §§ 801.50(3)(b) and/or 227.40(1)” without further explanation. Compl. ¶¶ 15–16. The complaint has two counts. The first is styled as a claim for a “declaratory judgment” based on a violation of Wis. Stat. § 6.33(1). It comprises allegations that the national form lacks eight features that—according to Braun—are required by Section 6.33(1). Compl. ¶¶ 21–43. The second

¹ A Federal Elections Commission press release issued upon the initial publication of the national form in 1994 suggests that Wisconsin first began accepting the national form in 1995. The press release stated that “[c]itizens in all but five states will be able to fill out this form anywhere in the country and use it to register in their home state, beginning in January 1995.” Federal Election Comm’n, National Mail Voter Registration Form Approved (Nov. 8, 1994) (attached as Attachment A). Wisconsin is not listed among the five exceptions.

² *See* Defendant’s Brief in Support of Motion for Summary Judgment and in Opposition to Plaintiff’s Motion for Summary Judgment at 6–7, Braun v. Wis. Elections Comm’n, No. 2022CV1336 (Cir. Ct. Waukesha Cnty. Jan. 27, 2023), Dkt. 82 [hereinafter “WEC Brief”].

³ Available at <https://elections.wi.gov/resources/manuals/election-administration-manual>.

⁴ The complaint is included in Exhibit 1 to Braun’s Memorandum in Support of his Motion to Change Venue at pp. 15-24.

count is styled as a claim for a “declaratory judgment” based on a violation of Section 227.10. It comprises allegations that the national form requests two pieces of information (race and party affiliation) that Section 6.33(1) does not authorize. Compl. ¶¶ 44–51. On that basis, the complaint suggests that WEC should have approved the form by means of formal rulemaking, and that its approval constitutes an invalid unpromulgated rule. Compl. ¶¶ 46–50. The complaint does not identify a cause of action for either claim.

ARGUMENT

I. This appeal is subject to mandatory venue-shifting unless either of two narrow exceptions applies.

Wisconsin’s appellate-venue scheme, as amended by 2011 Act 61, reflects a straightforward legislative choice: When, as here, a plaintiff sues only the State or one of its instrumentalities, venue on appeal normally shifts to a new district. Specifically, when “the sole defendant” to an action is “the state, any state board or commission, or any state officer, employee, or agent in an official capacity,” the plaintiff designates a circuit court as the initial venue. Wis. Stat. § 801.50(3)(a). Then, any subsequent appeal “may *not* be” venued in “the court of appeals district that contains the court” from which the appeal is taken. Wis. Stat. § 752.21(2) (emphasis added). Instead, the appellant must designate one of the three remaining Court of Appeals districts as the venue for the appeal, *id.*, just as Vote.org has done here.

This scheme is subject to two narrow exceptions. First, when the action relates “to the validity or invalidity of a rule or guidance document,” the plaintiff does not designate a circuit court as venue and mandatory venue-shifting on appeal does not apply. *See* Wis. Stat. §§ 801.50(3)(b), 752.21(1)–(2). Instead, circuit court venue follows Section 227.40(1), which provides that challenges to “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.” And appellate venue is in “the court of appeals district which contains the court from

which the judgment or order is appealed.” Wis. Stat. § 752.21(1). The second exception, not relevant here, applies when the action is “commenced by a prisoner.” Wis. Stat. § 801.50(3)(c).

WEC is the “sole defendant” named in this action.⁵ Accordingly, Sections 801.50(3)(a) and 752.21(2) apply, and together require Vote.org to designate an appellate venue other than District II, unless one of the two exceptions set out in Sections 801.50(3)(b) or (c) takes precedence. Braun’s motion to change venue thus turns on a single, simple question: whether this action presents a proper Section 227.40 claim relating to the validity or invalidity of a rule or guidance document. As explained in the next section, it does not.

II. This action does not present a proper Section 227.40 claim.

Braun’s motion to change venue relies entirely on Count II of the complaint, which alleges that the approval of the national form violates Wis. Stat. § 227.10 because the national form has spaces for political party and race, and no statute or rule authorizes WEC to require such information. Compl. ¶¶ 47–48. The complaint alleges that those items “could only be added to the registration form by rulemaking,” which “did not occur here.” Compl. ¶ 49. In his motion to change venue, Braun relies on these allegations to argue that Count II is an administrative-procedure claim under Section 227.40. It is not.

For starters, Count II never cites Section 227.40. Braun should not be allowed to rewrite the complaint on appeal as part of a transparent attempt to manipulate venue. The only citations to Section 227.40 found anywhere in the complaint are in paragraph 15 and 16’s jurisdiction and venue allegations, not in Count II. And had

⁵ In a footnote, Braun argues that if Vote.org’s intervention is granted, then WEC will cease to be the “sole defendant” to the action, meaning Section 752.21(2) will no longer be the governing venue statute. Arguments made only in footnotes are not properly raised. *State v. Santana-Lopez*, 2000 WI App 122, ¶ 6 n.4. Regardless, venue must necessarily be assessed as of the filing of the complaint, because there is no provision to transfer venue after an intervention motion is granted. And WEC is the only defendant named in the complaint.

Braun brought a Section 227.40 claim, he would have been required to serve the Legislature's Joint Committee for Review of Administrative Rules ("JCRAR") within 60 days of filing. Wis. Stat. § 227.40(5); *Richards v. Young*, 150 Wis. 2d 549, 549–53, 441 N.W. 742 (1989). Braun did not do so. *See* WEC Brief, *supra* note 2, at 17. Braun's failure to serve JCRAR confirms that he did not intend Count II to assert a claim under Section 227.40 until such an argument became convenient for venue purposes. Braun's summary judgment brief provides yet more confirmation. Like his complaint, Braun's brief does not argue that Count II is a claim arising under Section 227.40 and never cites that statute. *See* Plaintiff's Brief in Support of Motion for Summary Judgment at 20–22, *Braun v. Wis. Elections Comm'n*, No. 2022CV1336 (Cir. Ct. Waukesha Cnty. Dec. 12, 2022), Dkt. 58. This Court should not allow Braun to manipulate venue by rewriting his pleadings on appeal.⁶

Moreover, Count II does not allege a proper Section 227.40 claim because it does not contain allegations that relate to the validity or invalidity of any rule or guidance document. "Rule," in this context, means an agency-issued regulation, standard, policy, or order that "has the force of law" and either enforces legislation or governs agency procedure. Wis. Stat. § 227.01(13). "Guidance document" is a catchall term for agency publications not having the force of law. *See* Wis. Stat. § 227.01(3m). Braun does not identify any agency publication, statement, or action fitting either definition as the subject of his challenge. The complaint refers in

⁶ This is particularly so because Braun's argument relies entirely on Count II of his complaint, and the basic predicate underpinning Count II—that the approval of the national form requires voters to provide race and party information—is simply false. The national form does not, as a matter of law, require Wisconsin voters to provide race or party affiliation information. The state-specific instructions for Wisconsin—which are part of the form—indicate that "Choice of Party" and "Race or Ethnic Group" are "[n]ot required." *See* National Mail Voter Registration Form at *V (available at https://www.eac.gov/sites/default/files/eac_assets/1/6/Federal_Voter_Registration_ENG.pdf) (last accessed Feb. 3, 2023). Moreover, the form is completely optional—voters are always free to use the state form instead. The Court should not let Braun's decision to tack on such a facially meritless challenge alter the appellate venue analysis for his entire case.

passing to the Election Administration Manual, but neither Braun's motion to transfer venue nor his summary judgment brief relies on that passing reference as the basis for a Section 227.40 claim.

Instead of identifying a rule or guidance document as the subject of his action, Braun argues that WEC's approval of the national form constituted an unpromulgated rule and that Section 227.40 therefore provides the cause of action to challenge it. Pl.-Resp't's Br. at 9. But Braun does not allege any concrete action by WEC that could have required the promulgation of a rule. He does not say when or how WEC supposedly "approved" the use of the national form, Compl. ¶ 19, which has been used in Wisconsin since long before WEC existed, *supra* note 1. And the only officials Braun alleges are accepting the national form are local clerks, not WEC. Compl. ¶ 18. In contrast, the cases Braun cites each challenged a policy *affirmatively adopted by the defendant agency* that allegedly amounted to an unpromulgated rule. In *Heritage Credit Union v. Office of Credit Unions*, 2001 WI App 213, ¶¶ 1, 24–25, 247 Wis. 2d 589, 634 N.W.2d 539, a credit union challenged a reciprocity policy the agency had applied to reject its application to open new offices. In *Johnson v. Berge*, 2003 WI App 51, ¶¶ 2–5, 260 Wis. 2d 758, 658 N.W.2d 418, a prisoner challenged the prison's behavior-modification level system. And in *Mata v. Wisconsin Department of Children and Families*, 2014 WI App 69, ¶¶ 1, 8–10, 354 Wis. 2d 486, 849 N.W.2d 908, a childcare-subsidy recipient challenged part of the agency's manual that had been applied to claw back her benefits. In each case, the plaintiff challenged a specific policy affirmatively adopted by the agency in a manner that this Court held amounted to unpromulgated rulemaking. Braun, in contrast, has not identified *any* affirmative policy adopted by WEC that could constitute an unpromulgated rule. Because there is no WEC "rule" for a court to invalidate, Braun has no plausible argument that this case satisfies Section 227.40(1)'s venue criteria.

In sum, Braun's complaint does not allege a challenge under Section 227.40; if Braun intended to bring a claim under Section 227.40, he failed to properly do so and such a claim would be subject to dismissal. Accordingly, Section 801.50(3)(b) does not apply. The Waukesha County Circuit Court was a proper venue, if at all, only under Section 801.50(3)(a), and Section 752.21(2) required Vote.org to designate a District other than District II for this appeal. Vote.org properly designated District IV.

CONCLUSION

For the foregoing reasons, Vote.org respectfully requests that the motion to change venue be denied.

Dated: February 6, 2023

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FOR IMMEDIATE RELEASE
NOVEMBER 8, 1994

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NATIONAL MAIL VOTER REGISTRATION FORM APPROVED

WASHINGTON -- The Federal Election Commission has approved a national mail voter registration form, as mandated by the National Voter Registration Act of 1993. The Commission will soon be distributing printing specifications and a camera-ready copy of the application booklet to the chief election official in each state. The forms are required to be publicly available by January 1, 1995.

U.S. citizens who reside or have an address in the United States can use the national form to register to vote in their state of residence. They may also report a change of name and/or address to their state election office, or register with a political party, then mail the form back to their respective state election authority.

The national form does not supplant state registration forms but is intended to offer greater flexibility in the times and places citizens can register to vote. The form may also be used in some public agencies required to provide voter registration services under the Act.

Citizens in all but five states will be able to fill out this form anywhere in the country and use it to register in their home state, beginning in January 1995. The five states where the forms will not be available on request are:

- Arkansas and Virginia laws prohibit accepting the form for use in their states until after Jan. 1, 1996.
- New Hampshire will accept the application only as a request for that state's absentee voter mail-in registration form.
- North Dakota does not have voter registration.
- Wyoming will not permit the use of the application for registering voters.

Officials of the National Clearinghouse on Election Administration said the registration form, in camera-ready format, will be sent to state election officials in late November. Each state will be responsible for actual printing and distribution.

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ATTACHMENT A

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