

STATE OF WISCONSIN

CIRCUIT COURT

WAUKESHA COUNTY

RICHARD BRAUN,

Plaintiff,

v.

Case No. 22-CV-1336

WISCONSIN ELECTIONS COMMISSION,

Defendant.

**PLAINTIFF RICHARD BRAUN'S COMBINED REPLY BRIEF IN SUPPORT OF
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND BRIEF IN OPPOSITION
TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

This action challenges the legality of the National Mail Voter Registration Form (“the Form”) for use in Wisconsin because the Form is inconsistent with the Wisconsin statutory requirements for voter registration forms as set forth in Wis. Stat. § 6.33(1). The numerous legal deficiencies in the Form were described in full in Mr. Braun’s opening brief.

The Defendant Wisconsin Election Commission (“WEC”) is charged by the Legislature with the overall administration of Wisconsin’s election laws, *see*, Wis. Stat. § 5.05(1), and specifically with the duty to “prescribe”¹ the format of voter registration forms to be used in this State and to design such forms to obtain a very specific set of information detailed by the Legislature in the statute. *See*, § 6.33(1).

¹ “Prescribe” means “to tell someone what they must have or do, or to make a rule of something.” *Prescribe*, Cambridge Dictionary Online, <https://dictionary.cambridge.org/us/dictionary/english/prescribe>.

Further, as part of its duties of administering the election laws, WEC must make sure that Wis. Stat. § 6.30(4) is complied with. That statute requires that registration by voters must be “on a form prescribed by the commission” and that any form used to register to vote “shall be designed to obtain the information required in s. 6.33(1).” This case is about WEC’s failure to carry out these statutory obligations.

BACKGROUND

Plaintiff laid out the background facts in his brief in support of his motion for summary judgment and WEC does not dispute any of those facts. WEC submits additional facts in its brief and Plaintiff does not dispute any of WEC’s additional facts. As a result, the parties are in agreement that this case should be resolved, as a matter of law, on summary judgment. *Water Well Sols. Serv. Grp., Inc. v. Consol. Ins. Co.*, 2016 WI 54, ¶ 11, 369 Wis. 2d 607, 881 N.W.2d 285 (citing Wis. Stat. § 802.08(2)) (Summary judgment is appropriate when there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law).

ARGUMENT

WEC spends virtually no time disputing the deficiencies in the Form as described in detail in Mr. Braun’s opening brief. Instead, WEC makes four arguments in an attempt to allow the Form to continue to be used despite its legal deficiencies. First, it argues that Mr. Braun failed to properly plead his claims and serve his pleadings. Second, it argues that Mr. Braun lacks standing to bring his claims. Third, it argues that the challenged form (the “Form”) need not comply with § 6.33(1) or if it does need to comply it comes close enough despite the many legal deficiencies pointed out by Mr. Braun. Fourth, WEC argues that it has done nothing with respect to the Form except give some “guidance” and, as a result, the unlawful use of the Form in Wisconsin is not

WEC's fault. Plaintiff will respond to this fourth argument first and then explain why all of WEC's other arguments fail.

I. WEC's unlawful conduct here is not "guidance;" it is WEC's failure to faithfully carry out the duties given to it by the Legislature.

The Legislature has given WEC the job to administer all of Wisconsin's election laws to ensure honest, safe and legal elections in this State. As part of that, the Legislature also specifically gave WEC the duty to prescribe the voter registration forms being used in Wisconsin and the Legislature said that voters may only register using a form prescribed by WEC. In his opening brief Mr. Braun pointed out that the dictionary definition of "prescribe" is "to tell someone what they must have or do, or to make a rule of something." Cambridge Dictionary Online, <https://dictionary.cambridge.org/us/dictionary/english/prescribe>. WEC does not dispute that definition.

Thus, if voters in this State are being allowed to register using a form that does not meet the statutory requirements, responsibility for that falls directly on WEC. WEC cannot simply ignore the law because WEC believes that it knows best or that the Form is "good enough" even if it does not meet the strict requirements of § 6.33(1). "[W]hatever their motivations, WEC must follow Wisconsin statutes. Good intentions never override the law." *Teigen v. Wisconsin Elections Comm'n*, 2022 WI 64, ¶ 52, 403 Wis. 2d 607, 976 N.W.2d 519, *reconsideration denied*, 2022 WI 104.

Second, WEC's Election Administration Manual (a manual that WEC publishes and makes available to all municipal clerks and the public regarding election administration) states that the Form *is approved* for use for voter registration by mail in Wisconsin. WEC admits that fact and adds that the Manual does so "accurately." Dkt. 82:10. The only way that the Manual could

accurately state that the Form was approved for use in this State is if the Form was prescribed by WEC—i.e., by an affirmative act by WEC—not by “guidance.”

WEC says, and wants this Court to believe, that this case is about “guidance” as that term is used in Chapter 227, but that is not the case. WEC says its guidance on this subject imposes no obligations, sets no standards, and binds no one. Dkt. 82:34. Under WEC’s argument, WEC is like a baseball fan in the stands yelling “safe” or “out” when a runner reaches first base. Like the fan, WEC says it has an opinion but it is just an opinion that is not binding on anyone.

This case is not about “guidance” and WEC is not the baseball fan in the stands. The Legislature has made WEC the umpire in this situation and a form can only be used for voter registration in this state if the form is approved by WEC and WEC can only approve the form if it meets the statutory requirements.

WEC was created by the Legislature and the Legislature has the power to “dictate how any agency power is exercised.” *Wisconsin Legislature v. Palm*, 2020 WI 42, ¶ 189, 391 Wis. 2d 497, 942 N.W.2d 900. The Legislature gave WEC the power to administer Wisconsin’s election laws and then dictated that WEC was to exercise that power by, among other things, tasking WEC—and not any else—with the legal duty to prescribe the forms which are accepted for use in this State and make sure those forms meet the requirements of § 6.33. WEC is the defendant in this case—and not any else—because WEC has failed in that duty.

II. Mr. Braun properly pled his claims.

WEC’s first argument is that Mr. Braun “failed to follow the exclusive statutory procedure for bringing the two claims in his complaint.” Dkt. 82:13. WEC argues that both claims “need to be brought *under* Wis. Stat. § 227.40” (emphasis added). *Id.* That is simply wrong for two reasons. First, Mr. Braun’s first claim is not a challenge to a rule, only his second claim is. Second, even if

both claims challenged a rule, Mr. Braun properly complied with all statutory requirements to make such a challenge. Either way, WEC is wrong as a matter of law.

A. Mr. Braun's first claim is not a challenge to a rule or guidance document.

Mr. Braun's first claim seeks a declaration that the Form does not meet the statutory requirements for a voter registration form in this State and that WEC has failed in its statutory duties with respect to prescribing the form used for voter registration and making sure that voter registrations done by mail comply with the requirements of § 6.33(1). It is **not** a challenge to a rule or guidance document. It is a claim that WEC is violating its statutory duties. But the distinction does not make a difference, because even if the first claim was indeed a challenge to a rule or guidance document, Mr. Braun still complied with all the procedural requirements to bring such a claim, as explained in the next section.

B. Mr. Braun's second claim is plainly a challenge to a rule, or more accurately, a challenge to WEC's failure to promulgate a rule when one is necessary, and Mr. Braun complied with all procedural requirements to make such a claim.

Mr. Braun agrees that his second claim is a rulemaking claim. And as such, he also agrees that his second claim is covered under Wis. Stat. § 227.40. WEC's argument is still wrong, however, because Mr. Braun fully complied with § 227.40.

WEC argues that "Wis. Stat. § 227.40(1) is 'the exclusive means of judicial review of the validity of a rule or guidance document.'" Dkt. 82:13; and that Mr. Braun must bring a claim "under § 227.40" *Id.* at 17. But that's an incomplete reading of what the statute says. What the statute actually says is: "[T]he exclusive means of judicial review of the validity of a rule . . . shall be an action for declaratory judgment as to the validity of the rule . . . brought in the circuit court for the county where the party asserting the invalidity of the rule . . . resides." The statute goes on to describe in which other types of judicial proceeding, *aside from* a declaratory judgment action, a party may seek to invalidate a rule, and sets forth the Court's specific obligations when reviewing

a challenge to the validity of a rule and additional service requirements when the validity of such a rule is challenged. Wis. Stat. § 227.40(2), (4)–(6).

Section 227.40 does not create a new cause of action under Wisconsin law. Instead, it imposes procedural requirements on any action which challenges the validity of rule and Mr. Braun complied with all of the procedural requirements set forth in that statute.

Pursuant to Wis. Stat. § 227.40(1), to challenge the validity of a rule, a Plaintiff must bring a specific type of action (namely, a declaratory judgment action), and in a specific venue for that type of action (the county where the Plaintiff resides). Mr. Braun has done just that: he filed an action for a declaratory judgment in the circuit court for the county where he resides. No one disputes that.

But WEC says Mr. Braun did not comply with the service requirements of § 227.40 because he failed to serve his pleadings on the Legislature's Joint Committee for Review of Administrative Rules ("JCRAR"), as required by Wis. Stat. §§ 227.40(5) and 806.04(11). WEC, however, never says why it believes that Mr. Braun did not serve JCRAR. In fact, on September 19, 2022, the pleadings in this case were served upon JCRAR. (Vebber Aff., ¶ 3, and Exs. 1 and 2.) WEC could easily have discovered this by asking either Plaintiff's counsel or JCRAR if JCRAR had been served. WEC does not say why it did no due diligence before falsely asserting that JCRAR had not been served.

Amicus Curiae Vote.org had similarly asserted that Mr. Braun failed to serve JCRAR (Vote.org states that it had relied upon the representation of WEC in that regard) but when Vote.org found out that JCRAR had, in fact, been served it withdrew that argument. Vote.org informed this Court of all of this in its letter to the Court over two weeks ago. (Dkt. 88.) For unexplained reasons,

WEC still appears to be relying on its assertion that Mr. Braun failed to serve JCRAR, even though it has no basis to believe that assertion is true.

Other than its unsupported argument about lack of service on JCRAR, WEC's entire argument regarding the procedural requirements of § 227.40 is simply all about form over substance. WEC seems to believe (wrongly) that Mr. Braun was required to explicitly state somewhere that he was bringing this claim under Wis. Stat. § 227.40. But that statute does not create a new cause of action which must be plead in order to exist and does not require a Plaintiff to bring a claim "under this section." Instead, as explained *supra*, it requires a Plaintiff to bring *an action for a declaratory judgment*. Which is exactly what Mr. Braun has done.

Put another way, WEC asserts that if Paragraph B of Mr. Braun's Request had requested "a declaratory judgment *under § 227.40*" instead of just "a declaratory judgment," then everything would be fine.

WEC cites no authority for such a proposition and it flies in the face of Wis. Stat. § 802.02(1)(a) that states that a complaint need only contain "A short and plain statement of the claim, identifying the transaction or occurrence or series of transactions or occurrences out of which the claim arises and showing that the pleader is entitled to relief." "A plaintiff is not required to put labels on the allegations in the complaint in order to state a valid claim. It is the sufficiency of the facts alleged that control the determination of whether a claim for relief is properly [pled]." *Strid v. Converse*, 111 Wis. 2d 418, 422–23, 331 N.W.2d 350, 353 (1983).

The facts alleged in the complaint clearly support a claim that the Form conflicts with state law and that WEC has acted unlawfully. There is nothing wrong with Mr. Braun's pleading.

III. Mr. Braun has standing.

Next, WEC argues that Mr. Braun's case must be dismissed because he allegedly lacks standing. Dkt. 82:18. WEC is wrong. Mr. Braun has standing to challenge the validity of the Form

and to challenge WEC's derogation of duty, both in his capacity as a voter, and/or his capacity as a taxpayer.

Standing in Wisconsin "is construed liberally"; even "a trifling interest may suffice." *McConkey v. Van Hollen*, 2010 WI 57, ¶ 15–16, 326 Wis. 2d 1, 783 N.W.2d 855 (citation omitted). It "is not a matter of jurisdiction," but "sound judicial policy," to ensure the issues are "carefully developed and zealously argued." *Id.* If a registered voter and taxpayer does not have standing to challenge unlawful government conduct relating to elections, it is difficult to identify who would ever be able to challenge unlawful WEC conduct and its failure to comply with its statutory duties would be immune from judicial review. That would not be sound judicial policy.

A. Mr. Braun has standing as a voter

WEC argues that "Braun has not explained, much less established, how the Commission's guidance in the Election Manual impairs or threatens to impair his legally protected interests." Dkt. 82:23. But as explained above, this case is not about "guidance." It is about WEC's failure to perform the duties imposed upon WEC by the Legislature with respect to election administration which include making WEC responsible for ensuring that voter registrations are done on forms prescribed by WEC and that meet all of the requirements in § 6.33. Mr. Braun, as a voter, is harmed if WEC fails to administer elections as required by law.

Wisconsin has established a two-step standing analysis which asks, first, whether there is an "injury" to the plaintiff's interest and, second, whether that interest is "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Friends of Black River Forest v. Kohler Co.*, 2022 WI 52, ¶ 18, 402 Wis. 2d 587, 977 N.W.2d 342, *reconsideration denied sub nom.*, *Friends of Black River Forest v. DNR*, 2022 WI 104.

Mr. Braun satisfies both steps of this two-step analysis. First, Mr. Braun has an interest that has been harmed by WEC's failure to lawfully administer the voter registration aspect of

election administration. As a voter, he is entitled to lawful election administration by WEC and he is entitled not to have his vote, as a lawfully registered voter, diluted by illegal votes from improperly registered voters.

For example, with respect to the specific subject of voter registration, the Wisconsin Supreme Court has said that when it comes to the voter registry “every voter is made or may become an agent in the execution of the law.” *State ex rel. Wood v. Baker*, 38 Wis. 71, 85 (1875). That is another way of saying that all voters have an interest in making sure voter registration is administered lawfully and that they are in the zone of interest of voter registration statutes.

In addition, in *Jefferson v. Dane Cty.*, 2020 WI 90, 394 Wis.2d 602, 951 N.W.2d 556, the Supreme Court considered a challenge, brought by a single voter (and the Republican Party), to the unlawful interpretation and application of election laws by the Dane and Milwaukee County clerks, and not a single Justice questioned the voter’s standing. Instead, the Court emphasized that the “erroneous interpretation and application of [Wisconsin’s election laws] affect matters of great public importance.” *Id.* ¶ 15. Again, that is a statement that voters are harmed by the misinterpretation and misapplication of election laws and are within the zone of interests to be protected by the proper interpretation and application of those laws.

Moreover, the voter plaintiff’s theory in *Jefferson v. Dane County* was identical to Mr. Braun’s theory here—that the Defendants’ conduct in that case which would have allowed other voters to cast ballots illegally, interfered with and impaired his right to vote because counting ballots that are not validly cast dilutes votes that were lawfully cast. Mr. Braun has the same claim here. Allowing individuals to vote who were not lawfully registered dilutes his vote as a properly registered voter.

Finally, this Court must consider the Wisconsin Supreme Court's most recent decision in which it considered whether voters have standing to challenge illegal election administration by WEC. That case is *Teigen*, 2022 WI 64. In that case, the Supreme Court found that voters have standing to challenge unlawful conduct by WEC but the Court did so in a fractured opinion with two different analyses of the standing question.

Three Justices (C.J. Ziegler, J. Roggensack and J. Rebecca Bradley) found that voters suffer an injury to their right to vote from illegal election administration because “voters[] are entitled to have the elections in which they participate administered properly under the law. Allowing WEC to administer ... elections in a manner other than that required by law causes doubts about the fairness of the elections and erodes voter confidence in the electoral process.” *Id.* at ¶ 21. They also found that voters are within the zone of interests of the statutes for similar reasons. *Id.* ¶ 23.

A fourth Justice—Justice Hagedorn—concluded that voters have standing to challenge illegal election administration based upon a combination of the Legislature's grant of the right to citizens to challenge illegal election administration under Wis. Stat. § 5.06 (even though just like this case *Teigen* was not, itself, a § 5.06 claim) and the statutory language of § 227.40 (which also applies here based on Mr. Braun's second claim).

Justice Hagedorn said that the question to be asked is whether WEC's conduct “at least threaten[s] to interfere with or impair Teigen's right to have local election officials comply with the law.” *Teigen*, 2022 WI 64, ¶ 165. He then answered that question saying that he concludes that they do. *Id.* But despite the fact that the four Justice used two different rationales, the holding of the case is that voters have standing to challenge illegal election administration by WEC. Even WEC admits that at page 21 of its brief.

In an attempt to avoid this inevitable conclusion WEC argues in a footnote that Justice Hagedorn's concurrence "states the holding of the court" on standing in that case. Dkt. 82:21, fn. 11. That is not accurate. WEC argues that Justice Hagedorn's concurrence is the "narrowest" ground for finding voter standing but it is no narrower than the opinion of Justices Ziegler, Roggensack and R. Bradley. It is different but not narrower. But in the end it does not matter. This Court can adopt Justice Hagedorn's rationale or Justices Ziegler, Roggensack and R. Bradley's rationale, or both but the end result is that Mr. Braun as a voter has standing in this case.

B. Mr. Braun has standing as a taxpayer.

Additionally, Mr. Braun has standing as a Wisconsin taxpayer. Wisconsin taxpayers have standing to "contest governmental actions leading to an illegal expenditure of taxpayer funds" in declaratory judgment actions under Wis. Stat. 806.04(2). *Fabick v. Evers*, 2021 WI 28, ¶10, 396 Wis. 2d 231, 956 N.W.2d 856.

When a plaintiff contests the "illegal expenditure of taxpayer funds," even a "slight loss" of taxpayer funds is enough to satisfy the "injury" that Wisconsin's standing doctrine requires. *Fabick*, 2021 WI 28, ¶¶ 10–11. See also *City of Appleton v. Town of Menasha*, 142 Wis. 2d 870, 878, 419 N.W.2d 249 (1988).

Given that tax dollars are used to fund the salaries and operating expenses of WEC staff who authorized the use of the Form (whenever that occurred), created and paid to publish the Election Administration Manual and who generally administer the election laws, Mr. Braun has a right to challenge WEC's unauthorized expenditure of tax dollars in support of those illegal efforts.

In *Teigen*, the Supreme Court found standing for the plaintiffs as voters, but *did not* decide whether those plaintiffs had taxpayer standing. In fact, the only opinion in *Teigen* that references taxpayer standing whatsoever is Justice Hagedorn's concurrence and, of course, a decision by a

single justice cannot change the law. Thus, Wisconsin's doctrine of taxpayer standing remains as it has always been.

The primary case on taxpayer standing in Wisconsin is *S.D. Realty Co. v. Sewerage Commission of Milwaukee*, 15 Wis. 2d 15, 112 N.W.2d 177 (1961). In that case, the Supreme Court held that taxpayers have standing to challenge any unlawful action by a government entity that results in the expenditure of public funds. That was followed by the Supreme Court's decision in *Hart v. Ament*, 176 Wis. 2d 694, 699, 500 N.W.2d 312, 314 (1993) in which the Court held that the "alleged pecuniary loss need not be substantial in amount. Even a loss or potential loss which is infinitesimally small with respect to each individual taxpayer will suffice to sustain a taxpayer suit."

Wisconsin's doctrine of taxpayer standing is broad and allows taxpayers to sue when a government agency uses taxpayer funds to violate the law. That is precisely what Mr. Braun alleges is occurring here. For example, WEC has spent (and will continue to spend) money to produce and publish the Election Administration Manual, to process voter registrations that use an illegal form, to maintain the statewide voter registration list that contains the names of voters improperly registered using the illegal forms (and will add more such names as time goes on etc.). Mr. Braun has taxpayer standing to challenge that use of taxpayer funds.

Mr. Braun satisfies Wisconsin's standing requirements. If a registered voter and taxpayer does not have standing to challenge unlawful government conduct relating to elections, it is difficult to identify who *would* be able to challenge WEC when it fails to comply with its duties with respect to election administration—a duty that WEC owes to voters and taxpayers. If the

Court concluded that a voter and a taxpayer could not challenge WEC's unlawful conduct, then WEC would be essentially become immune from judicial review.

IV. Mr. Braun should be granted summary judgment on the merits on all claims.

A. The Form does not comply with Wisconsin law and was not lawfully approved.

As a starting point WEC now says that it (or at least one of its predecessors) approved the Form for use in Wisconsin. (Dkt. 82:27.) Although, curiously it cannot say when it was approved or by who. In other words, it does not know if the full commission of one of its predecessors approved it, or an administrator of some type, or just a staff member granted the approval. That would certainly suggest that the Form has not been properly "prescribed" by WEC as required by Wis. Stat. § 6.33(1).

Astonishingly, WEC even blames Mr. Braun for not being able to prove when the Form was approved and by who (Dkt. 82:14–15), even though Mr. Braun sent an Open Records Request to WEC (the agency in charge of the approval) and WEC has said it does not know when it happened and WEC has no records showing when it happened. (Dkt. 57: LoCoco Aff. ¶¶ 5–6). That means that WEC has no minutes, no memos, no directive, no orders—nothing at all—showing that WEC (or its predecessors the Government Accountability Board and the State Elections Board) actually ever approved the Form.

WEC does not dispute that some authorized agency of the State was required to approve the Form, nor does WEC dispute that it is the agency that has the responsibility. To try to paper over this problem WEC just says that it knows the Form was approved at some point by someone.

With all due respect to WEC, the sloppiness here is incredible. WEC is the state agency created by the Legislature and charged with responsibility for administration of the state's election laws and the agency specifically responsible for determining what registration forms may be lawfully used in this state and it has completely fallen down on the job.

It is worth noting that Plaintiff's counsel sent the letter asking for the records showing when and by who the Form had been approved almost 7 months ago (July 26, 2022) and WEC responded on September 14, 2022 (5 months ago). WEC has known for months that it has no evidence that the Form has ever been approved for use in this State and yet WEC has taken no action to correct that problem—further evidence that WEC is ignoring its duties under § 6.33(1) and § 6.30(4).

In an attempt to avoid the issue WEC says that its statement in its Election Administration Manual that the Form is approved for use in Wisconsin is just “guidance.” Just a stray, non-binding opinion, that the Form can be used. Again, with all due respect to WEC, that is sufficient, in and of itself, for this Court to find yet another derogation of WEC's duties. As stated above, WEC was created by the Legislature and the Legislature has the power to “dictate how any agency power is exercised.” *Palm*, 2020 WI 42, ¶ 189. When the Legislature dictated to WEC how to use its powers to administer Chapter 6 by instructing WEC to prescribe the forms used for voter registration and to make sure the forms complied with all of the requirements of § 6.33(1), it cannot be the case that the Legislature intended WEC to do so by giving a non-binding opinion that the Form is “ok.”

WEC's action is clearly not just “guidance,” it has the effect of law. Agency action has the “effect of law” where, among other things, licensure can be denied. *Cholvin v. Wisconsin Dep't of Health and Family Services*, 2008 WI App 127, ¶ 26, 313 Wis. 2d 749, 758 N.W.2d 118. Importantly, “license” is a defined term in Chapter 227, it “includes all or any part of an agency . . . approval, registration . . . or similar form of permission required by law” Wis. Stat. § 227.01(5). WEC publicly and repeatedly stating (as they have in the election manual, and in this action) that the form is “approved” for voter registration has the effect of law because the statutes

explicitly say that registration must be on a form prescribed by the Commission. Wis. Stat. §§ 6.30(4), 6.33(1). It is nonsense for WEC to now say that their repeated public approval of the Form is just meaningless guidance.

But WEC says that “even if this Court were to construe the Commission’s statement regarding Wisconsin’s acceptance of the NVRA Form as not just informational but also as tacit approval of use of the NVRA Form, such approval is not unlawful.” WEC specifically says that “[u]se of the NVRA Form for voter registration is permissible under Wisconsin’s election laws, including Wis. Stat. § 6.33(1).” Dkt: 82:27. The remainder of this brief will show that WEC is clearly wrong about that as well.

In fact, as pointed out in Mr. Braun’s opening brief, showing that WEC is wrong requires only comparing the face of the Form with the requirements stated in § 6.33(1). Mr. Braun used this chart in his opening brief to show the legal deficiencies in the Form and Mr. Braun pointed out that if the Court agrees with him on any one of these eight deficiencies, then the Form cannot be legally used for voter registration in this State.

In his opening brief, Mr. Braun included a chart showing 8 ways in which the Form was deficient from the statute. Dkt. 58:8–9. WEC spends very little time trying to show that the Form actually meets these 8 requirements (which would be an impossible job because just reading the Form shows that it does not). Instead, WEC argues: (1) the statutes expressly allow for multiple forms to be used; (2) state law does not require the use of a form meeting the requirements under Wis. Stat. § 6.33(1); and (3) in any event the form *is designed* to obtain all of the information required by Wis. Stat. § 6.33(1). WEC is wrong on all three of its arguments.

WEC’s first argument is immaterial. Plaintiff agrees that the statutes allow for more than one form. This action concerns only registration by mail under Wis. Stat. § 6.30(4). That statute

provides that “Any eligible elector may register by mail on a form prescribed by the commission and provided by each municipality. The form shall be designed to obtain the information required in s. 6.33 (1)”

While the statutes acknowledge separate forms for military (Wis. Stat. § 6.22(2)–(3)) and overseas (Wis. Stat. § 6.24(3)) voters, that does not change the fact that Wis. Stat. § 6.33(1) only allows non-military and non-overseas voters to register to vote by mail using a form approved by WEC and meeting the requirements of Wis. Stat. § 6.33(1).

WEC’s second argument is odd. WEC asserts at page 27 of its brief that the Form complies with § 6.33(1), but then says at page 28 that “Wis. Stat. § 6.33(1) should not be interpreted as precluding use of a voter registration form, such as the NVRA Form, that does not precisely meet the formatting and content directives of that statute.” In other words, WEC says it doesn’t matter if the Form complies with § 6.33. WEC can approve it whether it complies or not. This is either a complete misreading of § 6.33 or a significant overreach by WEC of its authority.

As pointed out in Mr. Braun’s opening brief, and not disputed by WEC, under Wis. Stat. § 227.10(2m), “[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 relevant here). This is a “legislatively-imposed canon of construction that requires [courts] to narrowly construe imprecise delegations of power to administrative agencies.” *Palm*, 2020 WI 42, ¶52.

Thus, in its administration of § 6.33, if WEC wants to take a particular action—here, approve a voter registration form for use in the state—it must do so applying the standards for such forms explicitly required by that statute. That is made even more clear by Wis. Stat. § 6.30(4),

which requires that voters register using a form “designed to obtain the information required in s. 6.33 (1).” WEC may only approve those forms that comply with Wis. Stat. § 6.33(1). It cannot second-guess the policy choices made by the Legislature.

Mr. Braun already extensively explained in his opening brief how the Form fails to meet the statutory requirements (Dkt. 58:6–15), and he will not repeat the detail of those arguments here. WEC responds to Mr. Braun by saying he “ignores several portions of the NVRA Form which ensure that the Form meets Wisconsin’s specific requirements for voter registration and determining voter eligibility.” Dkt. 82:31. WEC then argues that the Form’s “instructions” combined with the “certifications” on the NVRA Form meet all the requirements under Wisconsin law. But this simply is not the case and Mr. Braun explains why it is not the case at pages 15–20 of his opening brief.

Under WEC’s theory, the registration “form” could be a blank piece of paper and the instructions could say “to register to vote, provide all of the information required by Wisconsin law and then sign the piece of paper at the bottom certifying that you have complied with all aspects of Wisconsin law.” WEC would say that this would result in a form “designed to obtain the information required in s. 6.33 (1).”

As a further illustration, here are the 8 applicable requirements (with WEC’s explanation of how the Form allegedly satisfies them interposed in italics):

1. The commission shall design the form to obtain from each elector 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)” [28 consecutive days]
2. The commission shall 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”

WEC asserts that 1–2 are satisfied with a certification that simply says that the voter meets the eligibility requirements of their state.

3. 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.’”

WEC offers no argument how the Form satisfies this requirement and it obviously does not do so because the statement in quotation marks in the statute is not on the Form.

4. The commission shall include on the form 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.
5. The commission shall include on the form 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.
6. The commission shall also include on the form a space where the clerk may record an indication of whether the form is received by mail or by electronic application”
7. The commission shall also include on the form . . . 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.”
8. The commission shall also include on the form 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.”

WEC asserts that a blank space on the form labeled “For Official Use Only” satisfies 4–8.

Including a generic certification and a “blank space” on a form are a far cry from designing the form to obtain that particular information. WEC knows that. As Mr. Braun explained in his opening brief, WEC’s own form *is* designed to obtain all of the information required by statute. That form is available, and will still be available going forward to allow all eligible voters to register to vote by mail. It fully complies with the law. The Form simply does not.

B. Approval of the Form amounts to unlawful rulemaking.

WEC correctly says that “Braun’s second claim ... alleges that the Commission cannot approve use of the NVRA Form without first promulgating an administrative rule.” Dkt. 82:32. This claim is based upon the fact that the Form includes boxes in which an elector is directed to state his or her political party and race.

Requesting that information from a voter on a voter registration form is not only completely inappropriate (neither piece of information is any of the government’s business) but more importantly here, neither item of information is required by Wisconsin statute or rule and conversely no Wisconsin statute or rule authorizes WEC to approve a form that requests such information.

Approving a form that requests such information without promulgating a rule is a violation of Wisconsin’s rulemaking procedures. As explained in Mr. Braun’s opening brief, agencies can create and approve forms but must do so by rule-making unless the form fits within the exception in Wis. Stat. § 227.01(13)(q) which provides that forms, “the content or substantive requirements of which are prescribed by a rule or a statute,” are exempt from rule-making.

Thus, a form that complies with the requirements in § 6.33(1) fits within this exception and WEC can create or approve such a form without going through rule-making (as it did with its Form EL-131). In that situation, it is only following the writ of the Legislature. But if WEC wants to create or approve a form that goes beyond the requirements in § 6.33(1)—such as one that asks for the voter’s political party and race—then it no longer fits within the exception in § 227.01(13)(q), and it must be done by rule.

To combat this claim, WEC says that it does not need to promulgate a rule because its statement in the Election Manual is just “guidance,” and the information requested on the Form is optional (which the person filling out the form would only know if he or she read the instructions,

because on the face of the Form the information is not said to be optional). Yet again, WEC seeks to avoid responsibility for the duties assigned to it by the Legislature.

The question is: can a form used for voter registration in Wisconsin request a person's race and political party affiliation. WEC says "yes," but WEC is wrong and WEC is the agency created by the Legislature to make sure that a form with such improper questions is not used in this State.

But even if WEC is correct and such a form is permissible in this State, then the only way that could be accomplished would be if WEC promulgated a rule prescribing such a form. Plaintiff would challenge any such rule promulgated by WEC but WEC denied him the ability to do so by failing to promulgate its decision to allow the Form to be used as a rule. That, in itself, is a violation of Chapter 227 and forms a proper basis for Mr. Braun's second claim.

CONCLUSION

For the foregoing reasons, the Plaintiff respectfully requests that this Court DENY WEC's motion for summary judgment, GRANT Plaintiff's motion for summary judgment, and provide the requested relief.

Dated this 27th day of February, 2023.

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