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DISTRICT II

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You are hereby notified that the Court has entered the following order:

2023AP76

Richard Braun v. Vote.org (L.C. # 2022CV1336)

Before Brash, C.J.

On January 23, 2023, Vote.org filed a notice of appeal from a December 15, 2022 Waukesha County Circuit Court order that denied Vote.org's motion to intervene in this matter. The notice of appeal selected District IV of the court of appeals to hear the appeal. Counsel for Vote.org informed this court that the district selection was made pursuant to WIS. STAT. § 752.21(2).

On January 25, 2023, respondent Richard Braun moved to change venue for this appeal on grounds that the venue-shifting provision of WIS. STAT. § 752.21(2) does not apply in this case. Braun argued that the proper district to hear the case is District II, which is the district that contains the circuit court from which the order is appealed. *See* § 752.21(1). Vote.org has filed a motion to file a reply along with a proposed reply, which this court accepts.

This court regards the docketing and venue of an appeal as an administrative matter, not a substantive matter in the appeal. The chief judge is “responsible for the administration of the court.” WIS. CT. APP. IOP I (Nov. 30, 2009). Therefore, I am addressing the issue of the proper district to consider the appeal. For reasons explained below, I conclude that the motion to change venue should be granted because the venue-switching provision of WIS. STAT. § 752.21(2) does not apply to this appeal. Therefore, the selection of District IV was improper and this appeal shall be transferred to District II.

WISCONSIN STAT. § 752.21 provides:

- (1) 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.
- (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.

WISCONSIN STAT. § 801.50(3), in turn, provides:

- (a) 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.

(b) All actions relating to the validity or invalidity of a rule or guidance document shall be venued as provided in s. 227.40(1).

Braun argues that this case was not venued in the circuit court pursuant to WIS. STAT. § 801.50(3)(a). He argues that Count II in his complaint alleges that the Wisconsin Election Commission (WEC) has approved the National Mail Voter Registration Form for use for voter registration in Wisconsin; that the form requests information as to party affiliation and race that is not required or authorized by any statute or rule; and that WEC's approval of use of the form amounts to unlawful rulemaking in violation of WIS. STAT. ch. 227.

Braun argues that, based on Count II, this action challenges the validity of an unpromulgated rule, and therefore was venued according to WIS. STAT. §§ 801.50(3)(b) and 227.40(1) (providing that “an action for declaratory judgment as to the validity of [a] rule or guidance document” shall be “brought in the circuit court for the county where the party asserting the invalidity of the rule or guidance document resides”). See *Johnson v. Berge*, 2003 WI App 51, ¶¶4-5, 260 Wis. 2d 758, 659 N.W.2d 418 (explaining that § 227.40 “logically encompasses 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”). Braun asserts that he did not designate venue pursuant to § 801.50(3)(a) because his action was required to be venued in Waukesha County pursuant to WIS. STAT. §§ 801.50(3)(b) and 227.40(1). Braun points out that, in the circuit court, his complaint alleged that venue was proper pursuant to § 227.40(1).

In response, Vote.org argues that Count II is not a challenge to a rule or guidance document and therefore the action was not venued according to WIS. STAT. § 227.40(1). In support of this argument, Vote.org points out that Count II does not cite WIS. STAT. § 227.40. It also argues that Count II does not identify any rule or guidance document that is the subject of Braun's challenge.

It contends that the complaint asserts that WEC has approved use of the National Voter Registration Form, but does not specify how or when. It contends that here, unlike in *Johnson* and related cases, Braun has not alleged that WEC took any specific action to adopt a policy that meets the statutory definition of “rule.”

In reply, Braun argues that Count II of his complaint directly states a rulemaking challenge, triggering WIS. STAT. § 801.50(3)(b). He points out that Count II cites WIS. STAT. § 227.10, and specifically quotes the requirement under § 227.10(2m) 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.” He also points out that, for relief, the complaint seeks “declaratory judgment that WEC’s approval of the National Mail Voter Registration Form for use in Wisconsin violates WIS. STAT. § 227.10.” He argues that Vote.org’s response has stated its disagreement with Braun’s legal claims, but that its disagreement does not change that Braun’s action challenges an unpromulgated rule.

WISCONSIN STAT. § 227.01(13) provides that a “rule” is a “regulation, standard, statement of policy, or general order of general application that has the force of law and that is issued by an agency to implement, interpret, or make specific legislation enforced or administered by the agency or to govern the organization or procedure of the agency.” Based upon the parties’ submissions, and without deciding the merits of the appeal, this court is satisfied that, at least facially, this is an action “relating to the validity or invalidity of a rule or guidance document” under WIS. STAT. § 801.50(3)(b).¹ As such, the action was venued in the Waukesha County circuit court

¹ The court takes no position at this time as to whether any action by WEC at issue in this case amounts to adopting a “rule,” or whether the WEC’s challenged conduct is valid. See WIS. STAT. § 801.50(3)(b).

as provided under WIS. STAT. § 227.40(1). This court having concluded that this is an action under § 801.50(3)(b), and not under § 801.50(3)(a), the appeal “shall be heard in the court of appeals district which contains the court from which the judgment or order is appealed” which, in this case, is District II.

Separately, participation in the Court of Appeals electronic filing system is mandatory for attorneys representing parties in the Court of Appeals.² See WIS. STAT. RULE 809.801. All such attorneys, including those who participated in the circuit court electronic filing for this case and those who are co-counsel on this case, must each opt in to the appellate court electronic filing system for this case and any consolidated cases. All attorneys who are not already opted in for this case are hereby ordered to do so **within five days of the date of this order**. We remind counsel that failure to comply with an order of this court may be grounds for monetary or other sanctions. See WIS. STAT. RULE 809.83(2).

Upon the foregoing,

IT IS ORDERED that the proposed reply is accepted.

IT IS FURTHER ORDERED that the plaintiffs-respondents’ motion to change venue is granted. The appeal shall be venued and docketed in District II of the court of appeals. The clerk of this court shall send out an amended notice of docketing.

IT IS FURTHER ORDERED that, within five days of the date of this order, Attorney Christina A. Ford shall either opt in to participate in the Court of Appeals electronic filing system

² For information on the appellate court electronic filing system, including instructions on opting in for individual cases, visit <https://www.wicourts.gov/ecourts/efileappellate/index.jsp>.

for this case or provide this court with an explanation for not doing so. *See* WIS. STAT. RULE 809.801.

Sheila T. Reiff
Clerk of Court of Appeals

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