

FILED
03-04-2024
CLERK OF WISCONSIN
COURT OF APPEALS

No.2024AP164

In the Wisconsin Court of Appeals
DISTRICT IV

PRIORITIES USA, WISCONSIN ALLIANCE FOR RETIRED
AMERICANS *and* WILLIAM FRANKS, JR.,
PLAINTIFFS-APPELLANTS,

v.

WISCONSIN ELECTIONS COMMISSION,
DEFENDANT-RESPONDENT,
WISCONSIN STATE LEGISLATURE,
INTERVENOR-RESPONDENT.

On Appeal From The Dane County Circuit Court,
The Honorable Ann M. Peacock, Presiding
Case No. 2023CV1900

**INTERVENOR-RESPONDENT'S RESPONSE IN
SUPPORT OF DEFENDANT-RESPONDENT'S
MOTION TO CHANGE VENUE**

INTRODUCTION

Intervenor-Respondent the Wisconsin State Legislature (“Legislature”) respectfully files this response in support of Defendant Respondent the Wisconsin Elections Commission’s (“WEC”) Motion To Change Venue. *See* Wis. Stat. § (Rule) 809.14(1). The Legislature agrees with WEC that Plaintiffs-Appellants Priorities USA, *et al.* (hereinafter “Plaintiffs”) have improperly attempted to venue this appeal in District IV under Wis. Stat. § 752.21(1). But Section 752.21(2) controls the appellate venue here and required Plaintiffs to “select[]” an appellate venue to hear their appeal *other than* District IV, given that Plaintiffs

have appealed a judgment “venued in a county designated by the plaintiff[s]” under Wis. Stat. § 801.50(3)(a). Wis. Stat. § 752.21(2). Because District IV is an improper venue for Plaintiffs’ appeal under Section 752.21(2), this Court must transfer this case to another appellate district of the Court of Appeals.*

While the Legislature agrees with WEC that the Court must transfer venue away from District IV, the Legislature does not agree that, as WEC states, Plaintiffs must be given another opportunity to “promptly select an appellate district other than District IV for this appeal.” Mot.5 Rather, because Plaintiffs failure to “select” a valid appellate venue at the outset of their appeal, this Court should randomly assign this case to a proper appellate venue. That procedure would incentivize appellants to follow Section 752.21(2) by selecting a valid appellate venue in the first instance, rather than filing their appeal in the wrong venue and then waiting for any venue-transfer motion from the

* On February 9, 2024, Plaintiffs filed a Petition To Bypass with the Supreme Court. See Pet. For Bypass, *Priorities USA v. Wis. Elections Comm’n*, No.2024AP164 (Wis. Feb. 9, 2024). The filing of a Petition For Bypass “stays the court of appeals from taking under submission the appeal or other proceeding,” Wis. Stat. § (Rule) 809.60(3), and “[u]pon the denial of the petition by the supreme court the appeal or other proceeding in the court of appeals continues as though the petition had never been filed,” *id.* § (Rule) 809.60(5).

respondents. See Michael S. Heffernan, *Appellate Practice and Procedure in Wisconsin*, Ch.1, pt.IV.B, § 1.6 (9th ed. 2022) (recognizing that “[a]n appropriate practice [to comply with Section 752.21(2)] would be to make the selection in the notice of appeal”).

ARGUMENT

As WEC correctly explains in its Motion, Section 752.21(2)—not Section 752.21(1)—governs the appellate venue in this case and required Plaintiffs to “select[]” an appellate venue other than District IV to hear this case, given that Plaintiffs have appealed a judgment “venued in a county designated by the plaintiff[s]” under Wis. Stat. § 801.50(3)(a); Mot.1–5. Given that the Legislature fully agrees with WEC’s Motion To Change Venue, the Legislature submits this short response only to further explain why the exception to Subsection 801.50(3)(a) found in Wis. Stat. § 801.50(3)(b) does not apply in this case.

A. Under Subsection 801.50(3)(b), “[a]ll actions relating to the validity or invalidly of a rule or guidance document shall be venued as provided in s. 227.40 (1),” meaning that those actions are not venued in the county designated by the plaintiff under Subsection 801.50(3)(a). Wis. Stat. § 801.50(3)(b).

Section 227.40(1), in turn, provides that “the exclusive means of judicial review of the validity of a rule or guidance document shall be an action for declaratory judgment . . . 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 or, if that party is a nonresident or does not have its principal place of business in this state, in the circuit court for the county where the dispute arose.” *Id.* § 227.40(1). When Subsection 801.50(3)(b) governs the venue of a circuit-court action, Section 752.21(1) controls the appellate venue for appeals from that circuit-court action, not Section 752.21(2). Wis. Stat. § 752.21(1).

In *State ex rel. Kormanik v. Brash*, 2022 WI 67, 404 Wis. 2d 568, 980 N.W.2d 948, the Supreme Court explained when a circuit-court action is an “action[] relating to the validity or invalidity of a rule or guidance document,” such that the action is venued under Subsection 801.50(3)(b), rather than Subsection 801.50(3)(a), while resolving a dispute over appellate venue under Section 752.21. *Id.* ¶¶ 8, 22. There, the plaintiff had challenged in the Waukesha County Circuit Court two guidance documents from

WEC that “erroneously interpreted certain election statutes as permitting a clerk to ‘spoil’ an absentee ballot at an elector’s request.” *Id.* ¶ 2. The plaintiff sought four forms of relief: “(1) declare that municipal clerks are prohibited from ‘spoiling’ a previously completed and submitted absentee ballot; (2) declare that any WEC publication that states otherwise shall be rescinded or otherwise removed from availability to the public; (3) declare that the WEC failed to promulgate the documents at issue as administrative rules; and (4) temporarily and permanently require the WEC to cease offering incorrect guidance and to promptly issue corrected guidance.” *Id.*

After the Waukesha County Circuit Court issued a temporary injunction in the plaintiff’s favor, certain opposing parties sought leave to appeal, purporting to select District IV to hear the appeal under Section 752.21(2), rather than filing their appeal with District II under Section 752.21(1). *Id.* ¶¶ 4–5. The Court of Appeals, acting through Chief Judge William Brash, concluded that the plaintiff had venued its circuit-court action under Subsection 801.50(3)(a), rather than under Subsection 801.50(3)(b), such that Section 752.21(2) did entitle the

parties seeking leave to appeal to select their appellate venue for the appeal. *Id.* ¶ 11.

The Supreme Court reversed. *Id.* ¶¶ 28–29. The Supreme Court held that the plaintiff’s “lawsuit clearly ‘relat[ed] to the validity or [invalidity] of a rule or guidance document’ within the meaning of Wis. Stat. § 801.50(3)(b),” *id.* ¶ 21 (brackets in original) (quoting Wis. Stat. § 801.50(3)(b)), “even though [plaintiff] sought injunctive relief” against WEC “in addition to declaratory relief” regarding the validity or invalidity of WEC’s guidance, *id.* This was so because plaintiff’s “claim for injunctive relief” against WEC “was completely dependent upon a favorable decision on her claim for declaratory relief” against the challenged guidance documents, making the action “quintessentially one for declaratory relief.” *Id.*

B. Here, as WEC explains, Subsection 801.50(3)(a) governed the venue for Plaintiffs’ circuit-court action, not Subsection 801.50(3)(b), which means that Section 752.21(2) governs the appellate venue for Plaintiffs’ appeal, not Section 752.21(1). Mot.2–5. Accordingly, District IV—the District in which Plaintiffs have attempted to file this appeal—is an

improper venue, so the Court must transfer this appeal away from District IV. Mot.5.

While Plaintiffs' Complaint claims that their circuit-court action was venued under Subsection 801.50(3)(b) and Section 227.40(1), R.2 ¶ 20, and includes some references to challenges to guidance issued by WEC, R.2 at 28–29, this does not take this case outside of Subsection 801.50(3)(a) or Section 752.21(2). In direct contrast to the action in *Kormanik*, Plaintiffs' purported challenges to WEC's guidance here are “completely dependent upon a favorable decision on” their constitutional challenges to Wisconsin's absentee-voting statutes. 2022 WI 67, ¶ 21. That is, the object of Plaintiffs' action here—as their own Complaint shows, R.2 ¶¶ 70–112; Mot.3–4—is declaratory relief against Wisconsin Statutes, not against agency guidance or rules, thus this case is *not* “quintessentially one for declaratory relief” against agency guidance under Subsection 801.50(3)(b) or Section 227.40(1), *Kormanik*, 2022 WI 67, ¶ 21.

Multiple other filings from Plaintiffs in this case, as well as orders from the Dane County Circuit Court below, further demonstrate that this action is “quintessentially” a constitutional

challenge to statutes, not a challenge to agency guidance or rules. *Id.*; see Mot.3–4 & n.1. In their Docketing Statement to this Court, Plaintiffs describe “the nature of [this] action” as “challenges under the Wisconsin Constitution to [delineated] absentee-voting-related requirements,” and then describe each challenged statutory requirement without reference to any WEC guidance. Pls.’ Docketing Statement at 2, *Priorities USA*, No.2024AP164 (Wis. Ct. App. Feb. 1, 2024). Plaintiffs further explain in that filing that the “issues to be raised on appeal” are challenges to various Wisconsin Statutes, as well as issues related to statutory construction and the standards for facial constitutional challenges to statutes—again, with no reference to any WEC guidance. *Id.* at 2; see also *id.* at 3 (providing the standard of review for questions of statutory and constitutional interpretation only). Further, the Dane County Circuit Court’s order dismissing Plaintiffs’ facial constitutional challenges explained that Plaintiffs’ action was a “declaratory judgment action . . . challeng[ing] three absentee voting provisions in state law,” R.100 at 1, while including only an isolated mention of WEC guidance in the background section of that order, see R.100 at 4 & n.1.

CONCLUSION

This Court should grant Defendant-Respondent the Wisconsin Elections Commission's Motion To Change Venue. However, the Court should randomly assign this case to a proper appellate venue, not provide Plaintiffs with another opportunity to select an appellate district other than District IV for this appeal.

RETRIEVEDFROMDEMOCRACYDOCKET.COM

Dated: March 4, 2024

Respectfully submitted,

Electronically signed by Misha Tseytlin

MISHA TSEYTLIN

State Bar No. 1102199

Counsel of Record

KEVIN M. LEROY

State Bar No. 1105053

SEAN T.H. DUTTON

State Bar No. 1134675

EMILY A. O'BRIEN

STATE BAR NO. 1115609

TROUTMAN PEPPER

HAMILTON SANDERS LLP

227 W. Monroe Street, Suite 3900

Chicago, Illinois 60606

(608) 999-1240 (MT)

(312) 759-1938 (KL)

(248) 227-1105 (SD)

(312) 759-5939 (EO)

(312) 759-1939 (fax)

misha.tseytlin@troutman.com

kevin.leroy@troutman.com

sean.dutton@troutman.com

emily.obrien@troutman.com

*Attorneys for the Wisconsin State
Legislature*