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Clerk of Circuit Court
Waukesha County
2022CV001336

STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY

RICHARD BRAUN,

Plaintiff,

v.

Case No. 22-CV-1336

WISCONSIN ELECTIONS COMMISSION,

Defendant.

**PLAINTIFF RICHARD BRAUN'S BRIEF IN SUPPORT
OF MOTION FOR SUMMARY JUDGMENT**

This declaratory judgment lawsuit challenges the legality of the National Mail Voter Registration Form (“the Form”), a federal voter registration 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).

At the outset, it should be noted what this lawsuit is not about. This lawsuit is not about whether Wisconsinites should have easy access to a simple means of registration—they undisputedly do, and this case will not change that. Specifically, regardless of the outcome of this suit, voters can continue to register in-person (including on Election Day), or by mail using WEC’s EL-131 Form (which is not challenged here), or online. *See* Wis. Stat. §§ 6.30(1), (4), (5), 6.55; *see also* LoCoco Aff. Ex. B. This case will not affect anyone’s ability to register to vote.

This lawsuit is also not about specific voters. The Plaintiff has explicitly maintained from the beginning of this lawsuit that he is not seeking any action with

respect to electors who have already registered in Wisconsin using the Form. Dkt. 2:6 at ¶12.

Finally, this lawsuit is not about whether the Wisconsin Legislature can, should, or must authorize use of the Form. 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—in particular, the Legislature—to decide. There is no dispute that the Legislature has the authority to accept the Form for use here, but whether it should do so is a policy decision not cognizable in a court of law and not in question in this action.

This lawsuit is, instead, a straightforward statutory interpretation dispute concerning agency authority and the rule of law. The Legislature has directed the Wisconsin Elections Commission (“WEC”) in Wis. Stat. § 6.33(1) 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. Then pursuant to Wis. Stat. § 6.30(4) “[a]ny eligible elector may register by mail on a form prescribed by the commission and provided by each municipality.” Section 6.30(4) further makes clear, however, that any form used to register “shall be

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>.

designed to obtain the information required in s. 6.33 (1).” This case is about WEC’s failure to carry out this statutory obligation.

WEC is permitting the use of the Form in this state despite the fact that it does not comply with § 6.33(1) and is not designed to obtain the information *required by § 6.33(1)*. WEC does not dispute that the Form is being used in this State. *See* Dkt. 2:7 at ¶18; Dkt. 34:4 at ¶18. The proposed Intervenor-Defendant Vote.org indicated in its earlier filing, for example, that it has assisted thousands of voters in Wisconsin to register to vote using the Form. Dkt. 11:8 at ¶20. Whether WEC permits the Form because WEC does not find it convenient to fully comply with § 6.33(1) or because WEC does not agree with the policy choices in § 6.33(1) or for some other reason is not known.

What is known is that WEC knows how to comply with § 6.33(1). WEC has followed the Legislature’s directions in § 6.33(1) in its design and approval of the EL-131 Form, which is the primary form used for voter registration in this State. The EL-131 Form complies in all aspects with § 6.33(1), but the Form challenged herein does not. The simplest way to see this is to review the statute and then view the EL-131 Form and the Form challenged herein side by side for compliance with the statute (the Plaintiff has done that review and will point out the deficiencies in the Form in detail below).

One could argue that the Form’s noncompliance is not a big thing and that the use of the Form in this State may not be of momentous impact, but in all things, whether perceived as big or small, what is important is that state agencies follow the

law. As a creature of the Legislature, WEC is obligated to prescribe the format of all voter registration forms used in this State and to only allow the use of forms that comply with Wis. Stat. § 6.33(1). *See also* Wis. Stat. § 6.30(4). If WEC is allowed to ignore that obligation, then agency compliance with the law becomes a slippery slope. Further, 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. The point is that the Plaintiff's request for relief herein is not a matter of form over substance but instead goes to the heart of our constitutional order and its proper functioning.

STATEMENT OF THE CASE

The facts of this case are not in dispute. This is an action against WEC seeking a declaratory judgment regarding the legality of use of the National Mail Voter Registration Form in Wisconsin. *See* Dkt. 2:3 at ¶1; Dkt. 34:1 at ¶1. The Form is made available by the United States Election Assistance Commission ("EAC") for voter registration by mail. *See* LoCoco Aff. at ¶2 and Ex. A.

WEC's Election Administration Manual (a manual that WEC publishes and makes available to all municipal clerks and the public regarding election administration) provides that the Form is approved for use for voter registration by mail in Wisconsin. *See* LoCoco Aff. Ex. C.

On July 26, 2022, Plaintiff's counsel sent a letter to WEC explaining why use of the Form in Wisconsin is illegal. LoCoco Aff. Ex. D. The letter requested either a legally sufficient explanation from WEC as to why the Form was approved for use in

Wisconsin or withdrawal of approval of the form. *Id.* at 4–5. Because the details of WEC’s approval of the Form are unclear, the letter also made a request under Wisconsin’s Public Records Law, Wis. Stats. §§ 19.31–19.39, for records showing when and by whom the Form was approved for use in Wisconsin. *Id.* at 1.

WEC, apparently believing that it owes the public no explanation for its authorization of the Form, never responded substantively to the July 26, 2022 letter. The response it did provide was a September 14, 2022 email answering the Open Records Request contained within the letter. *See* Dkt. 2:7–8 at ¶20; Dkt. 34:4 at ¶20; LoCoco Aff. Ex. E–F. In that response, however, WEC did not identify or produce the records requested by Plaintiff’s counsel—records which show who approved the Form for use in this State and when such approval was granted—apparently because WEC has no such records.² *See* LoCoco Aff. Ex. E–F. Additionally, WEC has never offered any explanation as to why the Form was approved for use in this State in the first place and refuses to withdraw its approval of the Form. *See* Dkt. 2:7–8 at ¶20; Dkt. 34:4 at ¶20; LoCoco Aff. Ex. E–F.

It is undisputed that Wisconsin residents have used the Form to register to vote in Wisconsin in multiple municipalities. *See* Dkt. 2:7 at ¶18; Dkt. 34:4 at ¶18.

² The assumption underlying this entire case is that the Form is, in fact, legally approved for use in Wisconsin. But that assumption may be incorrect. It is deeply troubling that although WEC affirms in the Election Administration Manual that the Form has been approved for use in this State, to date WEC has refused or been unable to produce any proof that its statement is actually true. The Plaintiff expects that as part of making a prima facie case for summary judgment in its favor that the Form is legal for use in the state, WEC will produce actual proof of lawful approval of the Form—or else simply concede to the Court that the Form is not actually approved for use. If WEC chooses the latter course or refuses to choose either course, the Court should strike down the Form on this basis alone.

The proposed Intervenor-Defendant Vote.org indicated in its earlier filing, for example, that it has assisted thousands of voters in Wisconsin to register to vote using the Form. Dkt. 11:8 at ¶20.

This lawsuit was filed on September 15, 2022. *See* Dkt. 2. The Plaintiff, Rick Braun, is a registered Wisconsin voter and taxpayer. *See* Dkt. 2:6 at ¶13; Dkt. 34:3 at ¶13. He alleges that the Form violates: (1) Wis. Stat. § 6.33(1) setting forth the required content of voter registration forms in Wisconsin; and (2) Wis. Stat. § 227.10 imposing rulemaking requirements on Defendant WEC. *See* Dkt. 2:8–11.

ARGUMENT

Under Wis. Stat. § 802.08(2), summary judgment “shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”

Two claims are asserted here: (1) that the Form cannot be lawfully used in Wisconsin because it does not contain certain information required by state law, and (2) conversely that the Form cannot be used in this State because it requests certain information from Wisconsin voters not authorized by state law. Any approval by WEC of the Form is therefore unlawful. Summary judgment in the Plaintiff’s favor is warranted on both claims.

I. THE FORM VIOLATES WIS. STAT. § 6.33(1) BECAUSE IT IS NOT DESIGNED TO OBTAIN INFORMATION REQUIRED BY STATE LAW.

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

WEC is an administrative agency created by Wis. Stat. § 15.61. As an administrative agency created by statute, WEC has no independent authority beyond that which can be found in the Wisconsin Statutes. *See, e.g., Martinez v. Dep't of Indus., Lab. & Hum. Rels.*, 165 Wis. 2d 687, 697, 478 N.W.2d 582 (1992) (“We have long recognized that administrative agencies are creations of the legislature and that they can exercise only those powers granted by the legislature.”).

The powers granted to WEC are delineated in Wis. Stat. § 5.05. Under § 5.05(1) WEC has “the responsibility for the administration of chs. 5 to 10 and 12 and other laws relating to elections and election campaigns other than laws relating to campaign financing.” Obviously, that grant of authority includes the obligation to administer Chapter 6 of the statutes, which includes Wis. Stat. § 6.33 (the statute at issue here).

Importantly, however, 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.” *Wisconsin Legislature v. Palm*, 2020 WI 42, ¶52, 391 Wis. 2d 497, 942 N.W.2d 900.

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. Further, under Wis. Stat. § 6.30(4),³ 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.

But WEC has approved the use of the Form even though it does not comply with § 6.33(1). Demonstration of this fact requires only comparing the face of the Form with the requirements stated in § 6.33(1). As will be shown below, the form fails to comply with § 6.33(1) in eight separate ways. If the Court agrees with the Plaintiff on any one of these eight deficiencies, then the Form cannot be legally used for voter registration in this State.

The following chart shows the deficiencies in the Form based on the statute:

	Statutory Requirement	Federal Form Complies?
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]	No
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”	No
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.’”	No
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,	No

³ “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).” Wis. Stat. § 6.30(4).

	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.”	No
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”	No
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.”	No
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.”	No

Here is a more detailed review of these eight statutory requirements and the Form’s failure to meet the requirements, one at a time.

1. 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].

The EL-131 Form accomplishes this in Box 1 of the form where the registrant must specifically check a box confirming that the registrant has “resided at the address provided below for at least 28 consecutive days prior to the election and do not currently intend to move.” LoCoco Aff. Ex. B at 1. It is a simple and straightforward mechanism for accomplishing the Legislature’s directive.

The Form has no similar section. It asks for the registrant's home address and their mailing address, if different from their home address, but nowhere is it designed to determine whether the elector has resided at that address for the number of days required by § 6.02. *See* LoCoco Aff. Ex. A. It is noteworthy that § 6.33(1) requires both that the registrant provide their residence location *and* then *separately* whether the registrant has been at that location for the required amount of time. The Form does not comply with § 6.33(1).

2. 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 EL-131 Form also accomplishes this in Box 1 where again the registrant must check a box confirming that the registrant is “not currently serving a sentence including incarceration, parole, probation, or extended supervision for a felony conviction.” LoCoco Aff. Ex. B. at 1. This is another simple and straightforward method of asking for the information required by the statute. Once again, the Form has no equivalent section or question.⁴

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.”

The EL-131 Form complies with this requirement. Indeed, the required language is emphasized in that while most of the form is printed in black text over a

⁴ With respect to this and the previous item, the Form does include a general statement of eligibility and is accompanied by state-specific instructions discussing eligibility; these matters are discussed together below.

white background, the required statement is in white print over a shaded background immediately below the signature line. LoCoco Aff. Ex. B at 1.

The Form, in contrast, fails this requirement. It does not have the required statement in the space for the signature. WEC points out in its Answer that the Form does say off to the side of the signature (not in the space below as required) that the information has been provided by the registrant to the best of their knowledge and under penalty of perjury and it further states that if the registrant has “provided false information” the registrant “may be fined, imprisoned, or (if not a U.S citizen) deported from or refused entry to the United States.” See Dkt. 34:7 at ¶27; LoCoco Aff. Ex. A at 4.

By citing that language in its Answer, WEC appears to be arguing, as the saying goes, that “it is close enough for government work,” but that is insufficient.

First, the Legislature said exactly what it wanted every form to say and the Legislature even put the required language in quotation marks in the statute—presumably, so that WEC would actually use and require those words on all approved forms. It is simple to comply—just use the words set forth in the statute. Importantly, the Legislature wanted registrants to know that providing false information was a *felony*. The Form does not tell registrants that fact. Additionally, the Legislature wanted registrants to know the exact class of felony that applies. There are 9 classes of felony in Wisconsin, with fines ranging from \$10,000 to \$100,000 and imprisonment terms ranging from 3.5 years to life. See Wis. Stat. § 939.50. The Legislature selected Class I and ordered WEC to inform electors of this

fact. Is WEC suggesting that the differences in penalty are immaterial? Close is not good enough.

Second, allowing an agency like WEC to begin offering “close enough” as a justification for failure to comply with the lawful commands of the Legislature will mean the end of regular constitutional order. There is no good way to judge which legislative commands are “important enough” to enforce, and most decisions by WEC will go unchallenged anyway. WEC will cease being a state agency and will become its own mini-legislature unconstrained by its creator. For these reasons, the Plaintiff would love to see the phrase “close enough for government work” made obsolete, at least in Wisconsin, if not elsewhere. The way to do that is not to accept “close enough” as an explanation for failure from the government.

- 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.**

The EL-131 Form meets this requirement in the “for Official Use Only” section below Box 10 where it has a space for the “Official’s Signature.” LoCoco Aff. Ex. B at 1. The Form, however, has no space for the clerk to sign. The only signature line on the Form is for the registrant. *See* LoCoco Aff. Ex. A at 4. This poses a real problem. If questions arise regarding a particular registration it may be unclear who signed off on a particular form and whether they actually did so. This, again, illustrates the point made earlier above that having a form that does not comply with the statute

hinders uniformity and predictability around the administration of elections and increases the risk of error.

- 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.**

The EL-131 Form complies with this part of the Legislature's directive with the bottom row of boxes in the "for Official Use Only" section where this specific information is requested and can be input by the clerk. LoCoco Aff. Ex. B at 1. The Form does not request this information and has no space to include this information. As noted in the statute, the information is necessary to determine for what offices and referenda an elector may vote and the Form is completely deficient in complying with this requirement.

- 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.**

The EL-131 Form has a box in the "for Official Use Only" section for the clerk to check if the form was received by mail. LoCoco Aff. Ex. B at 1. The Form does not request this information and has no place to fill in the information required by the Legislature.

The question might be asked—what difference does it make whether the registration form was received by mail or electronically? One possible answer is that it flags for election staff that certain regulations applying to particular modes of registration must be complied with. Another possible answer is that it might make it easier for a clerk or officials to go back and track where an application came from,

if for example some dispute arises over the legitimacy of the registration. The real answer, however, is it makes a difference because the Legislature has decided that it is important. As stated above, it is not for WEC to second-guess that policy choice or diminish its importance through non-compliance.

- 7. 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.**

The EL-131 Form requests this specific information and has a space where the clerk is to insert this information in the “for Official Use Only” section. LoCoco Aff. Ex. B at 1. The EL-131 Form is notable in that it specifies 13 different types of proof for circling by the clerk. The Form, in contrast, does not request this information and has no space to include this information.

- 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.**

Section 6.47 is the statute that protects the confidentiality of information relating to victims of domestic abuse, sexual assault or stalking. Under § 6.47(3), such a victim may be issued a special form of identification for voting and the serial number on that card may be used for registration. To make sure that confidentiality is protected and the special identification is honored, the Legislature requires that

the registration form have a separate space for that number to be entered instead of the Driver's License number or other ID number that can be used for voting.

The EL-131 Form has a space for "Confidential Elector ID #_____." LoCoco Aff. Ex. B at 1. The Form does not. As a result, the victims to be protected by § 6.47 may be denied that protection if they register using the Form.

As noted above, any one of these eight violations is sufficient to render the Form unlawful for use in this State. That does not mean that the Form is inherently a "bad" form, but it does mean that it does not comply with Wisconsin law. It does not matter if WEC does not find the Wisconsin statutory requirements for voter registration forms to be important, useful, or fair. The Legislature has the prerogative to announce what valid voter registration forms must contain and WEC cannot refuse to follow the Legislature's decision in that regard.

B. The instructions for the Form posted on the EAC website do not cure the deficiencies in the Form.

In paragraph 25 of its Answer, WEC notes that the EAC has posted instructions on its website for use of the Form. Dkt. 34:5-6 at ¶25. WEC appears to be intending to argue that those instructions cure the deficiencies set forth in subparagraphs 1 and 2 above (*i.e.*, that the Form does not require the registrant to state that they have been at their existing residence for 28 days and to state that they are not still serving a sentence for a felony).⁵

⁵ In its Answer, WEC does not point to anything in the instructions that it alleges would cure the other deficiencies in the Form.

Specifically, the Form says in text in the same block as the signature that the registrant swears or affirms that he or she has “reviewed my state’s instructions” (which discuss eligibility requirements) and “meet[s] the eligibility requirements of my state.” LoCoco Aff. Ex. A at 4.

WEC’s position is therefore that: (1) because the instructions say that to be eligible to register you must have been at your existing residence for 28 days and must not still be serving a sentence for a felony, and (2) because the registrant signs a certification that they reviewed the instructions and meet the eligibility requirements in their State, the conclusion is that the Form complies with § 6.33(1) as to these two deficiencies.

But WEC’s syllogism is faulty for two reasons. First, it assumes that the registrant has actually seen, read and understood the online instructions. There is, however, no such evidence in the record for any voter who used the Form much less all of them that have registered using the Form.⁶ And if the assumption is not true, the conclusion fails. There is simply no way to guarantee that the instructions on the website will always be included with the Form when the Form is given to a voter, or if included that they are read and understood by the registrant.

Second, and more importantly, WEC’s approach is not what the statute says. The Legislature did not require in Wis. Stat. § 6.33(1) that the registrant merely

⁶ If anything, the evidence is to the contrary. See Dkt. 11:7 at ¶14 and Attachment A (affidavit of CEO of proposed Intervenor-Defendant Vote.org explaining that users of its service are emailed a copy of a “pre-filled National Form” and providing example that does not include accompanying national instructions).

make a general statement of eligibility. The statute says that voter registration forms must be designed to obtain from each registrant whether the person “has resided within the ward or election district for the number of consecutive days specified in s. 6.02 (1) [and] 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 differences between the EL-131 Form and the Form in this regard are marked. The former is actually “designed” to obtain each specific item of information required by the Legislature; the latter is not. WEC knows the Legislature wanted the more specific information and that is why it designed the EL-131 Form the way it did. Pursuant to § 6.30(4), to lawfully register in this State by mail the registration must be done on a form “designed to obtain the information required in s. 6.33 (1).” The Form is not designed to do so.

Even if the instructions might otherwise be read to cure the deficiencies referenced, there is an even more significant problem with WEC’s position. In paragraph 25 of its Answer, WEC states, “the Form includes state specific instructions for Wisconsin electors.” Dkt. 34:6 at ¶25. It then cites to a footnote that says that the instructions are available on the EAC website. The problem, which WEC blows right past, is that the instructions on the EAC website are *not* part of the Form. The instructions are a separate document which may or may not be provided with the Form, meaning that the legality of the Form must be assessed without reference to the instructions. A plain reading of the relevant statutory language compels this conclusion.

First, the “form” repeatedly referenced in § 6.33(1) cannot, as a textual matter, include the 20+ pages of state instructions on the EAC website. “Statutory language is given its common, ordinary, and accepted meaning.” *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. “Form” as used in § 6.33(1) is not defined in the Wisconsin Statutes. But the ordinary and accepted meaning of the word in this context is well known: “[a] legal document with blank spaces to be filled in by the drafter.” Form, *Black’s Law Dictionary* (11th ed. 2019). The “form” in this context is the one-page legal document with blank spaces that the registrant fills out and sends to the clerk and not the 20+ pages of instructions on a website that the registrant may never have seen and which do not contain any blank spaces for the registrant to fill in.

The Plaintiff’s plain language interpretation is confirmed by context. See *Kalal*, 271 Wis. 2d 633, ¶46 (“[S]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; [and] in relation to the language of surrounding or closely-related statutes . . .”). Wisconsin Stat. § 6.30(4) states that “[a]ny eligible elector may register by mail on a *form* prescribed by the commission.” (Emphasis added.) So, if the 20+ pages of instructions are part of the form then they must be part of what is sent in by the registrant in order to register. Further, § 6.35(3) requires municipal clerks to maintain the “[o]riginal registration *forms*” submitted by electors “at all times.” (Emphasis added.) So, again, if the 20+ pages of instructions are part of the form, then they must be part of the clerk’s files.

Thus, WEC would have this Court believe that the Legislature intended for voters to mail over 20 pages of documents to their clerk and for the clerk to keep those 20+ pages on file at all times for each voter. Yet there is nothing in the WEC Election Administration Manual or any other document generated by WEC that suggests that WEC has ever reached that conclusion in the past (or until its need to argue something in defense of the Form in this case).

Two additional rules of statutory interpretation are relevant to this point: (1) “a plain-meaning interpretation cannot contravene a textually or contextually manifest statutory purpose” and (2) “statutory language is interpreted . . . reasonably, to avoid absurd or unreasonable results.” *Kalal*, 271 Wis. 2d 633, ¶¶46, 49. Clearly, the textually manifest purpose of § 6.33(1) is to ensure that electors provide certain information when they register. But interpreting the Form to be composed of separate materials that may not be included with the Form when provided to a voter would contravene that statutory purpose and constitute an unreasonable result.

Finally, while not a major point, treating the instructions as part of the Form would violate the provision of § 6.33(1) requiring that “each item of information” on voter registration forms “shall be of uniform font size.” The Plaintiff does not know why the Legislature included this requirement—presumably, to prevent WEC from emphasizing or deemphasizing particular items—but it very cleanly separates the Form’s instructions, which are in a larger font size, from the Form itself, which is in a smaller font size. It is impossible to reconcile the Form with this requirement if the items of information in the instructions are considered part of the Form itself.

In sum, when assessing whether the Form complies with § 6.33(1), this Court should not consider the instructions on the EAC website as part of that form. The Plaintiff will reiterate, however, that even if this Court considers the instructions, and even if this Court concludes that the instructions cure the two deficiencies referenced above (regarding length of residency and felony status), the Form still violates half a dozen other provisions of Wis. Stat. § 6.33(1) and therefore should be ruled illegal anyway.

II. THE FORM VIOLATES WIS. STAT. § 227.10.

Although the Form is missing a significant amount of information, it conversely also requests information not authorized by § 6.33(1) for collection. Specifically, the Form includes boxes in which an elector is directed to state his or her political party and race. Aside from the patent inappropriateness of this request, 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.

This is a violation of Wisconsin's rulemaking procedures. Wis. 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." Further, Wis. § 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.” Thus, as a general matter when an agency creates or approves a form that the public is required to use for a particular purpose, the agency must adopt a rule prescribing the form.

There is, however, an exception. Wis. Stat. § 227.01(13)(q) provides that forms, “the content or substantive requirements of which are prescribed by a rule or a statute,” are exempt from rule-making. That exception covers the EL-131 Form because the contents of the EL-131 Form are prescribed by § 6.33(1). So long as WEC creates or approves a form in which the content and substantive requirements are as laid out in § 6.33(1), then WEC’s creation or approval of the form is exempt from the rule-making requirements of Chapter 227. But if WEC goes beyond the content and substantive requirements of § 6.33(1), then the exception no longer applies and any such form would have to go through the rule-making requirements in Chapter 227.

Importantly for this case, neither the registrant’s political party nor race are prescribed by Wis. Stat. § 6.33(1) and, thus, these items could only be added to an approved registration form by rulemaking.

Put differently, in the absence of a statute providing WEC the authority (and there is no such statute), WEC could only ask electors to provide their political party and race when registering to vote by promulgating a rule authorizing itself to do so (and assuming that WEC has the authority to promulgate such a rule). But it has never promulgated such a rule, so asking for such information is illegal.

This is not some technical error. That rulemaking would have provided notice to the public and an opportunity for comment on the propriety of asking electors for

such information in the sensitive context of the franchise. Such rulemaking would also be subject to legislative oversight and control. By failing to promulgate a rule discussing these issues, WEC circumvented those procedural safeguards.

WEC will likely argue that the instructions accompanying the Form state that providing party or race is “[n]ot required.” *LoCoco Aff. Ex. A* at 27. This misses the point entirely. Again, WEC has no authority beyond that which can be found in the Wisconsin Statutes. *See, e.g., Martinez*, 165 Wis. 2d at 697. Thus, it cannot even ask electors to provide information *optionally* without Legislative authorization. The Legislature has made clear that such authorization is contingent on the procedural safeguards of Chapter 227, which WEC did not follow.

Thus, the Form cannot be approved for use in this State because it requests information from registrants that WEC is not authorized to ask for. Any other conclusion would mean that WEC can include all kinds of other requests in voter registration forms in the future, so long as somewhere there is a statement that makes them optional. It could ask electors for their sexual orientation, marital status, income, etc. But none of that is any business of WEC or the clerk. Obviously, such actions would get struck down in Court because WEC would be unable to point to legislative authorization for its actions. The same is true here.

CONCLUSION

For the foregoing reasons, the Plaintiff respectfully requests that this Court grant his Motion for Summary Judgment and provide the following relief: (1) enter a declaratory judgment that the National Mail Voter Registration Form is not a lawful form for voter registration in Wisconsin and that the Wisconsin Elections

Commission's approval of the Form for use in Wisconsin violates Wis. Stat. §§ 6.33(1) and 227.10; (2) 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 Form is approved for use in Wisconsin; (3) enter an injunction requiring WEC to immediately notify all municipal clerks of its previous error in approving the Form and specifically informing the clerks that the Form is not approved for use in Wisconsin; (4) award the Plaintiff such costs as allowed by law; and (5) grant the Plaintiff such other and further relief as the Court deems appropriate.

Dated this 12th day of December, 2022.

WISCONSIN INSTITUTE FOR LAW & LIBERTY, INC.

Electronically signed by Anthony F. LoCoco

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