No. 2024AP166

In the Wisconsin Court of Appeals

DISTRICT I

LEAGUE OF WOMEN VOTERS OF WISCONSIN,
PLAINTIFF-APPELLANT-CROSS-RESPONDENT,
v.
WISCONSIN ELECTIONS COMMISSION, DON MILLIS, JULIE M. GLANCEY, ROBERT F. SPINDELL, JR., MARK L. THOMSEN, ANN S. JACOBS, MARGE BOSTELMANN, AND MEAGAN WOLFE,
DEFENDANTS-RESPONDENTS,

WISCONSIN STATE LEGISLATURE,
INTERVENOR-RESPONDENT-CROSS-APPELLANT.

On Appeal From The Dane County Circuit Court,
The Honorable Ryan D. Nilsestuen, Presiding
Case No. 2022CV2472

INTERVENOR-RESPONDENT-CROSS-APPELLANT'S EMERGENCY MOTION TO DISMISS PLAINTIFF-APPELLANT-CROSS-RESPONDENT'S NOTICE OF APPEAL AND TO TRANSFER VENUE

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INTRODUCTION

Intervenor-Respondent-Cross-Appellant the Wisconsin State Legislature ("Legislature") respectfully moves the Court, on an expedited basis, to dismiss the notice of appeal filed by Plaintiff-Appellant-Cross-Respondent the League of Women Voters of Wisconsin ("League") and to transfer this case to District II, per the Legislature's appellate-venue selection under Wis. Stat. § 752.21(2). This Court should dismiss the League's premature notice of appeal for lack of jurisdiction because the Circuit Court has not entered a final judgment containing explicit language disposing of the entire matter under *Wambolt v. West Bend Mutual Insurance Co.*, 2007 WI 35, 299 Wis. 2d 723, 728 N.W.2d 670. So, with the League's premature notice of appeal properly dismissed as void, the Legislature's selection under Section 752.21(2) of District II to hear its own, properly filed appeal should control, meaning that this Court should transfer this case to District II.

STATEMENT

The League's operative, Second Amended Complaint, filed on December 23, 2022, asserts three Counts against Defendant-Respondent the Wisconsin Elections Commission ("WEC").

App.403–36[1] (also naming as Defendants for these claims the WEC commissioners and the WEC administrator, in their official capacities).[2] The League's Count I alleges that the term "missing" under Wis. Stat. § 6.87(6d)—a statute providing that municipal clerks must reject absentee ballots that are "missing" the address of a witness on the absentee-ballot witness certificate—means an address field on the absentee-ballot witness certificate that is "completely absent" or "completely blank." App.426–27. Count II alleges that enforcing Section 6.87(6d) as to absentee ballots with witness certificates that are "missing" certain witness address information violates the Materiality Provision of the Civil Rights Act of 1964, 52 U.S.C. § 10101(a)(2)(B). App.428–30. Count III alleges that Section 6.87(9) violates the U.S. Constitution's Due Process Clause because it does not require clerks who reject absentee ballots with witness-address omissions or errors under Section 6.87(6d) to notify voters or return the defective ballots. App.431–33.

[1] "App." refers to the Legislature's Appendix filed with its contemporaneously filed Emergency Motion For Stay Pending Appeal.

[2] Unless context requires otherwise, this Emergency Motion will hereinafter refer to all Defendants-Respondents collectively as "WEC."

The Circuit Court resolved the three Counts in the League's operative complaint in three separate orders.

First, on March 14, 2023, the Circuit Court—Judge Nia Trammell presiding—granted the Legislature's Motion To Dismiss Count I. App.437–57. As the Circuit Court explained, the League failed to allege in its operative complaint in support of Count I that "WEC has taken any action that has caused harm or will cause imminent harm." App.446. Thus, the Court held that no justiciable controversy existed with respect to this claim. App.446–55. It is undisputed that this order was not appealable when issued by the Circuit Court.

Second, on June 1, 2023, the Circuit Court—again with Judge Trammell presiding—accepted the parties' stipulation to dismiss Count III pursuant to Wis. Stat. § 805.04(1). App.458–61. It is also undisputed that this order too was not appealable when issued by the Circuit Court.

Third, on January 2, 2024, the Circuit Court—now Judge Ryan Nilsestuen presiding[3]—granted summary judgment in the

[3] On August 22, 2023, the Circuit Court granted a motion to consolidate the case below with *Rise Inc. v. WEC*, Case No.2022CV2446 (Dane Cnty. Cir. Ct.), solely for the purposes of trial under Wis. Stat. § 803.04, App.778–81. Thus,

League's favor on its Count II, the League's Materiality Provision claim, and denied the Legislature's and WEC's respective cross motions for summary judgment. App.72–79. In summary, the Circuit Court concluded that Section 6.87(6d) falls within the Materiality Provision's scope and is preempted as to four specific categories of absentee ballots lacking certain witness-address information. App.75. The Circuit Court then explained in this summary-judgment order that it would subsequently schedule a hearing on the League's requested injunctive relief for Count II. App.79.

Finally, on January 30, 2024, the Circuit Court—Judge Nilsestuen presiding—held its hearing on the League's requested injunctive relief as to Count II. App.80–82. In its January 30 Order, which was based on a proposed order that the League had submitted, *compare* App.80–82, *with* App.856–58, the Circuit Court declared that the Materiality Provision preempted Section 6.87(6d) as to the four categories of absentee ballots at issue here and enjoined the application of Section 6.87(6d) as to those

Judge Ryan Nilsestuen, the presiding judge in *Rise*, became the presiding judge of the case below as well.

categories. App.81. The Circuit Court's January 30 Order then issued other associated injunctive relief, again solely as to Count II. *See* App.81–82. The January 30 Order concludes, "[t]his order is final for purposes of appeal," App.82—language that, as the Legislature explains below, accurately describes the appealability of the January 30 Order's injunctions against Section 6.87(6d) under Wis. Stat. § 813.025(3) and does not render this order appealable as of right under Wis. Stat. § 808.03(1). The January 30 Order does not mention either the League's Count I or its Count III, nor does the January 30 Order reference the Circuit Court's non-appealable dismissals of those counts, with Judge Trammell presiding. *See generally* App.80–82. And the Order does not state that it is intended to dispose of this entire matter. *See generally* App.80–82.

Both the Legislature and the League filed notices of appeal on January 30, 2024, after the Circuit Court's entry of its January 30 Order, selecting different Districts under Wis. Stat. § 752.21(2). *See* Order at 1–2, *League of Women Voters of Wis. v. WEC*, No.2024AP166 (Wis. Ct. App. Feb. 1, 2024). In its notice of appeal, the League purported to appeal from the Circuit Court's

March 14 Order dismissing its Count I for failure to state a claim, while claiming that the Circuit Court's January 30 Order regarding a "separate claim" from the League—namely, the League's Count II—"render[s] the March 14, 2023 order final and eligible for appeal as of right." League Notice Of Appeal at 1, *League of Women Voters of Wis. v. WEC*, No.2022AP166 (Wis. Ct. App. Jan. 31, 2024). In the Legislature's notice of appeal, the Legislature stated that it was appealing from the Circuit Court's January 30 Order, the Circuit Court's January 2 Order, and all other prior orders. Legislature Notice Of Appeal at 1, *League of Women Voters of Wis. v. WEC*, No.2022AP166 (Wis. Ct. App. Jan. 31, 2024). In an administrative order dated February 1, 2024, Chief Judge White explained that "a conflict has arisen" over the appellate venue for this case, given the League's and the Legislature's competing appellate-venue selections under Section 752.21(2). Order at 2, No.2024AP166 (Feb. 1, 2024). Chief Judge White's administrative order designated the League as the appellant and the Legislature as the cross-appellant, such that the League's appellate-venue selection under Section 752.21(2) would control. *Id.*

ARGUMENT

I. The Court Should Dismiss The League's Appeal For Lack Of Jurisdiction Because Its Notice Of Appeal Was Premature

A. "To invoke this court's jurisdiction, the notice of appeal must be correctly prepared," *Brown v. MR Grp., LLC*, 2004 WI App 122, ¶ 5, 274 Wis. 2d 804, 683 N.W.2d 481, and the Court must have the legal authority to review the circuit court's judgment sought to be appealed, *see* Wis. Stat. § 808.03; *State v. Malone*, 136 Wis. 2d 250, 256–57, 260, 401 N.W.2d 563 (1987) (describing Section 808.03 as "governing the appellate court's subject matter jurisdiction"); *Jadair Inc. v. U.S. Fire Ins. Co.*, 209 Wis. 2d 187, 212, 562 N.W.2d 401 (1997). Under Section 808.03(1), a party may appeal as of right to this Court from "[a] final judgment or a final order of a circuit court." Wis. Stat. § 808.03(1). Under Wis. Stat. § 813.025, "[i]f a circuit court . . . enters an injunction, a restraining order, or any other final or interlocutory order suspending or restraining the enforcement of any statute of this state, the injunction, restraining order, or other final or interlocutory order is immediately appealable as a matter of right." *Id.* Finally, questions of this Court's jurisdiction—including the legal sufficiency of a notice of appeal—are "question[s] of law" that this

Court decides independently, *Malone*, 136 Wis. 2d at 256, and the parties cannot waive such issues, *Vill. of Trempealeau v. Mikrut*, 2004 WI 79, ¶ 27, 273 Wis. 2d 76, 681 N.W.2d 190.

For a circuit-court decision to be a final order appealable as of right under Section 808.03(1), that order must "dispose[ ] of the entire matter in litigation as to one or more of the parties." Wis. Stat. § 808.03(1). As the Supreme Court explained in its landmark decision in *Wambolt*, 2007 WI 35, this means that the order "must contain explicit language dismissing or adjudging *the entire matter* as to one or more parties." *Id.* ¶ 35 (emphasis added). If a document "do[es] not contain a clear statement that [it is] the document[ ] from which appeal of right may follow," or if it only "arguably" contains such a statement, then the Court must conclude that the document is not a final order or judgment, so as "to preserve the right of appeal." *Id.* ¶ 46. If a "document states that it is final for purposes of appeal under § 808.03(1), but does not actually 'dispose of the entire matter in litigation as to one or more of the parties' as required by § 808.03(1)," that "document cannot be a final order or final judgment under the plain language of the statute." *Id.* ¶ 46, n.19; *see also id.* ¶ 45 (rejecting a

"particular phrase or magic words" rule for final judgments appealable as of right). So, "[c]ircuit courts should therefore be mindful of whether a document stating that it is final for purposes of appeal does in fact dispose of *the entire matter* in litigation as to one or more parties." *Id.* ¶ 46, n.19 (emphasis added).

B. Here, the Circuit Court has not entered a final judgment that satisfies the requirements of *Wambolt* under Section 808.03(1); therefore, the League's notice of appeal is premature, and this Court should dismiss it for lack of jurisdiction.

In its notice of appeal, the League purports to appeal from the Circuit Court's March 14 Order dismissing its Count I for failure to state a claim, while claiming that the Circuit Court's January 30 Order regarding a "separate claim" from the League—namely, the League's Count II—"render[s] the March 14, 2023 order final and eligible for appeal as of right." League Notice Of Appeal at 1, No.2022AP166 (Jan. 31, 2024). But neither the March 14 Order nor the January 30 Order satisfies the requirements of *Wambolt*.

The Circuit Court's March 14 Order—which only dismissed the League's Count I for failure to state a claim—does not contain

any "explicit language dismissing or adjudging *the entire matter* as to one or more parties," as *Wambolt* requires. 2007 WI 35, ¶ 35 (emphasis added); *see* App.437–57. That document relates solely to the League's Count I. *See* App.437–57. Thus, the March 14 Order is not a final order under Section 808.03(1), such that the League could invoke this Court's jurisdiction to review that order as of right by filing a notice of appeal under Section 808.03(1). *Wambolt*, 2007 WI 35, ¶ 35.

The Circuit Court's January 30 Order—entering a declaratory judgment and injunctive relief on the League's Count II—does not contain "explicit language dismissing or adjudging *the entire matter* as to one or more parties" either. *Wambolt*, 2007 WI 35, ¶ 35 (emphasis added). Rather, the January 30 Order considers only a "separate claim" from the League, *see* League Notice Of Appeal at 1, No.2022AP166 (Jan. 31, 2024)—namely, Count II—entered by the Circuit Court with Judge Nilsestuen presiding, App.80–82. The January 30 Order does not reference the Circuit Court's prior interlocutory dismissals of the League's Count I, App.437–57, or the Circuit Court's prior, stipulated dismissal of the League's Count III, App.458–61—both entered by

the Circuit Court with Judge Trammell presiding. Thus, the January 30 Order also is not a final order under Section 808.03(1), such that the League could invoke this Court's jurisdiction to review that order (or any other prior interlocutory orders) as of right by filing a notice of appeal under Section 808.03(1). *Wambolt*, 2007 WI 35, ¶ 35.

While the Circuit Court's January 30 Order does state that "[t]his order is final for purposes of appeal," App.82, this language does not make the January 30 Order a final order "dismissing or adjudging *the entire matter* as to one or more parties," such that the League has an appeal as of right from this order under Section 808.03(1). *Wambolt*, 2007 WI 35, ¶ 35 (emphasis added); *see also id.* ¶ 45 (rejecting a "particular phrase or magic words" rule for final judgments appealable as of right). To begin, that language is accurate here because Section 813.025(3) renders the Circuit Court's January 30 Order immediately appealable because that Order "enters an injunction, a restraining order, or any other final or interlocutory order suspending or restraining the enforcement of any statute of this state." Wis. Stat. § 813.025(3). And that language does not purport to render final and appealable the

"entire matter," including all unrelated interlocutory orders adjudicating the two other claims that the League raised in this case, with sufficient clarity to satisfy *Wambolt*. *See* 2007 WI 35, ¶ 46. This language in the January 30 Order does not reference any of the League's other two claims in this case, even indirectly, and—again—no other language in the January 30 Order makes such a reference either. App.80–82. At a minimum then, this language makes the January 30 Order the kind of nonfinal order recognized in *Wambolt*: a document that "states that it is final for purposes of appeal under § 808.03(1) but does not actually 'dispose of the entire matter in litigation as to one or more of the parties' as required by § 808.03(1)." 2007 WI 35, ¶ 46, n.19. That kind of "document cannot be a final order or final judgment under the plain language of the statute." *Id.*

For the Circuit Court to enter a final order appealable as of right under Section 808.03 that satisfies *Wambolt*, it would have had to include language "explicitly dismiss[ing] or adjud[ging] *the entire matter* in litigation as to one or more parties." *Admiral Ins. Co. v. Paper Converting Mach. Co.*, 2012 WI 30, ¶ 27, 339 Wis. 2d 291, 811 N.W.2d 351 (citing *Wambolt*, 2007 WI 35, ¶ 35) (emphasis

added). For example, to be final for purposes of appeal under Section 808.03, under *Wambolt*, the order should have included language like, "the [other] claims of Plaintiff are dismissed with prejudice," or, "all [other] claims [are] dismissed on the merits." *Id.* ¶ 30 (citations omitted). Yet, the January 30 Order does not include such "explicit language." *Wambolt*, 2007 WI 35, ¶ 35. It was the League that proposed the language that the Circuit Court used to draft its January 30 Order. *Compare* App.80–82, *with* App.856–58. If the League wanted the Circuit Court to enter a final order that disposes of "the entire matter in litigation," so that it could appeal the March 14 Order, the League would have included language referencing the "entire matter" and/or the League's two other Counts. *Wambolt*, 2007 WI 35, ¶ 40.

C. The Legislature's notice of appeal, for its part, is not premature and does confer upon this Court jurisdiction to review the January 30 Order, thus the Legislature's notice of appeal should be the operative notice of appeal here. The January 30 Order enjoined Section 6.87(6d) in certain respects, *supra* pp.5–6, thus it is immediately appealable as to the issues in this case that it decided under Section 813.025(3). Accordingly, this Court has

jurisdiction over the Legislature's notice of appeal, unlike the League's notice of appeal.

II. The Court Should Transfer This Case To District II, Pursuant The Legislature's Appellate-Venue Selection In Its Timely Notice Of Appeal

If this Court properly dismisses the League's notice of appeal, leaving only the Legislature's notice of appeal in this case before the Court, *supra* Part I, this Court should then transfer this case to District II, per the Legislature's appellate-venue selection under Section 752.21(2).

A. Section 801.50(3)(a) provides that, except for exceptions not relevant here, "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." Wis. Stat. § 801.50(3)(a). Section 752.21(2) then provides that "[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."

Wis. Stat. § 752.21(2); *see State ex rel. Dep't of Nat. Resources v. Wis. Ct. of Appeals*, 2018 WI 25, 380 Wis. 2d 354, 909 N.W.2d 114.

B. Here, the Legislature has appellate-venue-selection rights under Section 752.21(2), and it properly selected District II to hear its appeal from the Dane County Circuit Court below. The League's action is solely against the State under Section 801.50(3)(a), and the League "designated" the Dane County Circuit Court as the circuit-court venue under Section 801.50(3)(a). *See* App.403. Thus the Legislature is entitled to "select[ ]" the "court of appeals district" to hear its appeal from any order from the Circuit Court below, so long as that District is not "the court of appeals district that contains the court from which the judgment or order is appealed," Wis. Stat. § 752.21(2); *Dep't of Nat. Resources*, 2018 WI 25. Thus, District II is a proper venue for the Legislature to select for its appeal here.

The League's premature notice of appeal, *supra* Part I, does not divest the Legislature of its appellate-venue-selection rights under Section 752.21(2). A notice of appeal that lacks a legal basis to invoke this Court's jurisdiction is a "jurisdictional[ly] defect[ive]" document, Wis. Stat. § (Rule) 809.10(f), that "voids the

appeal," *Jadair*, 209 Wis. 2d at 213, given that "void" documents have "no legal effect," Void, *Black's Law Dictionary* (11th ed. 2019). Here, the League's notice of appeal is jurisdictionally defective, void, and without legal effect. Wis. Stat. § (Rule) 809.10(f); *Jadair*, 209 Wis. 2d at 212–13; Void, *Black's Law Dictionary*, *supra*. So, the League has *not* "filed" any valid "notice of appeal" here, meaning that there is no other operative notice of appeal that could possibly "conflict" with the Legislature's notice of appeal and associated selection of District II as its appellate venue. Order, No.2024AP166 (Feb. 1, 2024). In other words, the League's void document cannot supplant the Legislature's right to select its appellate venue under Section 752.21(2)(a).

CONCLUSION

This Court should dismiss Plaintiff-Appellant-Cross-Respondent the League of Women Voters of Wisconsin's notice of appeal for lack of jurisdiction and transfer Intervenor-Respondent-Cross-Appellant the Wisconsin State Legislature's appeal to District II.

Dated: February 6, 2024

Respectfully submitted,

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