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STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY
BRANCH 8

RICHARD BRAUN,

Plaintiff,

v.

Case No. 22-CV-1336

WISCONSIN ELECTIONS COMMISSION,

Defendant.

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

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Defendant Wisconsin Elections Commission (“the Commission”) submits this combined brief in support of its motion for summary judgment and in opposition to Plaintiff Richard Braun’s motion for summary judgment.

INTRODUCTION

Braun seeks declaratory and injunctive relief related to the use of the National Mail Voter Registration Form for voter registration in Wisconsin. Braun’s complaint contends, generally, that this form is incompatible with Wis. Stat. § 6.33(1), the statute prescribing the content of Wisconsin’s voter registration form. (Doc. 2 ¶¶ 21–51 (Compl.)) As to the Commission, Braun specifically takes issue with its Election Administration Manual for Wisconsin Municipal Clerks (the “Election Manual”), which states that Wisconsin “accepts the National Mail Voter Registration Form” for registration by mail, in addition to the Wisconsin Voter Registration Application (EL-131) and the Federal Post Card Application. (Doc. 2. ¶ 7.)

Summary judgment should be entered against Braun for three reasons. First, Braun failed to bring his declaratory judgment action under the proper statute for challenging administrative guidance and has not satisfied the corresponding procedural requirements. Second, Braun has failed to establish standing to sue the Commission as a prerequisite to declaratory relief. Finally, even if this Court permitted Braun’s claims to proceed to an assessment of their merits, Braun has not established that the Commission’s guidance is contrary

to Wisconsin law, nor has he established an administrative rulemaking violation pursuant to Wis. Stat. §§ 227.10 and 227.40.

Braun's motion for summary judgment should be denied and the Commission's motion for summary judgment should be granted.

STATEMENT OF THE CASE

I. Legal background.

A. The National Voter Registration Act of 1993 and the National Mail Voter Registration Form.

The National Mail Voter Registration Form (the "Form") was developed as part of the National Voter Registration Act of 1993 (NVRA). *See* 52 U.S.C. § 20505(a). The objectives of the NVRA are to increase the number of eligible citizens who register to vote in elections for federal office, to protect the integrity of the electoral process by ensuring that accurate and current voter registration rolls are maintained, and to enhance participation of voters in elections for federal office. *See* Fed. Election Comm'n, *The Impact of The National Voter Registration Act of 1993*, at 5, https://www.eac.gov/sites/default/files/document_library/files/The_Impact_of_the_National_Voter_Registration_Act_on_Federal_Elections_1995-1996.pdf, (last visited Jan. 26, 2023). Pursuant to the NVRA, the Federal Election Commission was tasked with developing a national mail voter registration application form in consultation with the chief election offices of the

states. *Id.* at 8. Copies of the NVRA Form were distributed to the states in December 1994. *Id.* at 9.

States are generally obligated to accept the NVRA Form for voter registration in elections for federal office. *See* 52 U.S.C. § 20505(a). A state is exempt from mandatory acceptance of the NVRA Form if the state has no voter registration requirements (North Dakota) or if it allows voters to register to vote at the time of voting (Idaho, Minnesota, New Hampshire, Wisconsin, and Wyoming). *See* 52 U.S.C. § 20503(b).¹ Notwithstanding the exemption, some of these states, including Wisconsin, still accept use of the NVRA Form. (*See* Doc. 57:10–29 (LoCoco Aff.).)

B. The NVRA Form in Wisconsin.

Records related to Wisconsin's administrative approval of the use of the NVRA Form are very limited, (*see* Doc. 57:39–56), and the Commission is unable to determine precisely when, or the circumstances under which, the NVRA Form was first administratively approved for use in Wisconsin. Such administrative approval, however, predates the Commission by over two decades. (*See* Doc. 57:39.) A Voter Registration Guide from 2000 states that “[t]he National Voter Registration Act (NVRA) form is accepted in Wisconsin.”

¹ *See also* The U.S. Dep't of Justice, *The National Voter Registration Act of 1993 (NVRA)*, <https://www.justice.gov/crt/national-voter-registration-act-1993-nvra>, (last updated July 20, 2022) (providing a current listing of states exempt from the NVRA).

indicating that the NVRA Form has been accepted for use since at least 2000. (Doc. 57:41.)

The Commission was not established by the Legislature until 2016, replacing the Government Accountability Board as the state agency tasked with overseeing election administration functions. *See* 2015 Wis. Act 118. The Government Accountability Board was established in 2008, replacing the State Elections Board and Ethics Board. *See* 2007 Wis. Act 1. Kevin Kennedy, the former Executive Director of the State Elections Board from 1983 to 2008, does not recall when, or the circumstances under which, use of the NVRA Form was first approved. (Affidavit of Kevin Kennedy (“Kennedy Aff.”) ¶ 6.)²

Based on the nature of Wisconsin’s voter registration records, the parties agree that it is “extremely difficult, if not impossible” to determine precisely how many Wisconsin voters have registered to vote in Wisconsin using the NVRA Form over the past 30 years. (Doc. 57:34.)

² Additionally, Wisconsin’s voter registration requirements have changed substantially since the NRVA was enacted in 1993. For example, prior to 2004, small municipalities with populations of less than 5,000 were permitted to determine for themselves whether to require voter registration. *See* 2003 Wis. Act 265.

C. Wisconsin voter registration statutes.

In general, any qualified elector other than a military elector³ must register to vote before voting in any election in this state. Wis. Stat. §§ 6.22(3), 6.27. Electors may register to vote in person, by mail, or by electronic application. Wis. Stat. §§ 6.28–6.30. Registrations by mail must be delivered to the elector’s municipal clerk no later than the 3rd Wednesday preceding the election. Wis. Stat. § 6.28(1)(a). If the registration form received is “sufficient to accomplish registration” and the clerk has “no reliable information to indicate that the proposed elector is not qualified,” the clerk shall enter the elector’s name on the registration list. Wis. Stat. § 6.32(4).

Wisconsin Stat. § 6.30(4) describes how an elector may register to vote by mail. Specifically, the statute provides that “[a]ny 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). The form shall contain a certification by the elector that all statements are true and correct.” Wis. Stat. § 6.30(4).

³ A “[m]ilitary elector” is a member of the U.S. Army, Navy, Air Force, Marine Corps, Coast Guard, Merchant Marine of the United States, Peace Corps, the commissioned corps of the Federal Public Health Service, the commissioned corps of the National Oceanic and Atmospheric Administration, civilian employees of the United States and civilians officially attached to a uniformed service who are serving outside the United States, and any spouse and dependents of the above who are residing with or accompanying them. Wis. Stat. § 6.22(1)(b)–(c).

Wisconsin Stat. § 6.33(1), in turn, provides certain directives regarding the content of Wisconsin's voter registration form. Specifically, the statute provides that "[t]he commission shall design the form to obtain from each elector information" as to the specific criteria demonstrating eligibility to vote. Wis. Stat. § 6.33(1). Additionally, "[b]elow the space for the signature" of the elector, "the commission shall include the following statement: 'Falsification of information on this form is punishable under Wisconsin law as a Class I felony.'" *Id.* The form shall also include a space for the applicant's signature; for the signature of the local election official who receives the form, and for the entry of certain supplemental notations by the official, including "any other information required to determine the offices and referenda for which the elector is certified to vote." *Id.* The Wisconsin Voter Registration Application (EL-131), a form created by the Commission, complies with the formatting and content requirements of Wis. Stat. § 6.33(1). (*See* Doc. 57:30–31.)

Notwithstanding Wis. Stat. §§ 6.30(4) and 6.33(1), Wisconsin's statutes contemplate that forms other than the Wisconsin Voter Registration Application (EL-131) may also be used to register electors to vote. For example,

an overseas elector⁴ may register to vote using a form prescribed by the Commission that is “substantially similar to the original form under s. 6.33(1).” Wis. Stat. § 6.24(3). Additionally, a military elector may register to vote using the Federal Post Card Application, even though military electors are not required to register as a prerequisite to voting in Wisconsin. *See* Wis. Stat. § 6.22(2)–(3). Acceptance of the Federal Post Card Application for military voter registration is mandated by federal law. *See* 52 U.S.C. § 20302(a).

II. Factual background.

Braun asks this Court for a declaratory judgment stating that “[the Commission]’s approval” of the NVRA Form violates Wis. Stat. §§ 6.33(1) and 227.10. (Doc. 2:12.) Braun’s motion for summary judgment does not provide any evidence to support his allegation that the Commission has affirmatively approved use of the NVRA Form for voter registration. Rather, Braun points to the Commission’s Election Manual which states, accurately, that Wisconsin “accepts” the NVRA Form for voter registration, as it has since at least 2000. (Doc. 2 ¶ 7; 57:32–33, 39–41.)

⁴ An “overseas elector” is a U.S. citizen “who has attained or will attain the age of 18 by the date of an election at which the citizen proposes to vote and who does not qualify as a resident of this state under s. 6.10, but who was last domiciled in this state or whose parent was last domiciled in this state immediately prior to the parent’s departure from the United States, and who is not registered to vote or voting in any other state, territory or possession.” Wis. Stat. § 6.24(1).

In addition to declaratory relief, Braun requests an injunction requiring the Commission to “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 National Mail Voter Registration Form is approved for use in Wisconsin.” (Doc. 2:12.)

Braun complains that the NVRA form is inconsistent with Wis. Stat. § 6.33(1). (Doc. 2 ¶¶ 6–8.) Particularly, Braun contends that the NVRA Form is “missing several items” required by Wis. Stat. § 6.33(1) while also requesting two items *not* required by Wis. Stat. § 6.33(1). (Doc. 2 ¶¶ 6–8.) He thus purports to have two declaratory judgment claims: “Violation of Wis. Stat. § 6.33(1)” and “Violation of Wis. Stat. § 227.10.” (Doc. 2:8–11.) As to the second claim, Braun contends that the Commission violated Wis. Stat. § 227.10 by failing to promulgate an administrative rule prior to its supposed approval of the NVRA Form. (Doc. 2 ¶¶ 9, 44–51.)

As to his alleged injury, Braun states only that the Commission’s “failure to comply” with Wis. Stat. §§ 6.33(1) and 227.10 “harms [him] as a voter and taxpayer.” (Doc. 2 ¶¶ 43, 51.)

SUMMARY JUDGMENT STANDARD

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. *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)). When reviewing a plaintiff's motion for summary judgment, the reviewing court must first examine the pleadings to determine whether a claim for relief has been stated. *Miller Brands–Milwaukee, Inc. v. Case*, 162 Wis. 2d 684, 693–94, 470 N.W.2d 290 (1991). If no proper claim has been stated, the inquiry ends, and the motion must be denied. *Id.* (citing *Green Spring Farms v. Kersten*, 36 Wis. 2d 304, 315, 401 N.W.2d 816 (1987)).

ARGUMENT

Braun sues the Commission and asks this Court for a declaratory judgment stating that the Commission's "approval" of the NVRA Form violates Wis. Stat. §§ 6.33(1) and 227.10. (Doc. 2:12.) He further requests an injunction requiring the Commission to "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 National Mail Voter Registration Form is approved for use in Wisconsin." (Doc. 2:12.) Braun cannot obtain this requested relief and summary judgment should be entered against him.

First, Braun's claims should have been brought under Wis. Stat. § 227.40(1), "the exclusive means of judicial review of the validity of a rule or guidance document" such as the Election Manual challenged here. Braun

failed to comply with the procedural service requirements of that statute, and thus this Court lacks competency over his claims. Second, Braun lacks standing in the first instance because he has not established a direct injury to his legally protected interests. Finally, even if this Court permits Braun's claims to proceed to an assessment of their merits, Braun has not established that the Commission's guidance is contrary to Wisconsin law, nor has he established an administrative rulemaking violation.

I. Braun failed to bring his lawsuit under Wis. Stat. § 227.40, the exclusive means of judicial review of his claims, and failed to meet the corresponding procedural requirements.

From the start, summary judgment should be granted to the Commission because Braun failed to follow the exclusive statutory procedure for bringing the two claims in his complaint: (1) a challenge to the Commission's guidance regarding Wisconsin's acceptance of the NVRA Form ("Violation of Wis. Stat. § 6.33(1)"); and (2) a claim that the Commission should have engaged in rulemaking ("Violation of Wis. Stat. § 227.10"). (Doc. 2:8–11.)

Both claims need to be brought under Wis. Stat. § 227.40. First, Wis. Stat. § 227.40(1) is "the exclusive means of judicial review of the validity of a rule or guidance document." And Wis. Stat. § 227.40 is also the exclusive method to assert an alleged failure to promulgate an administrative rule. *See Heritage Credit Union v. Off. of Credit Unions*, 2001 WI App 213, ¶¶ 23–24, 247 Wis. 2d 589, 634 N.W.2d 593 (holding that Wis. Stat. § 227.40

encompasses challenges to any agency policy, statement, standard, or order that allegedly meets the statutory definition of a rule but has not been promulgated as such); *see also Mata v. DCF*, 2014 WI App 69, ¶¶ 9–10, 354 Wis. 2d 486, 849 N.W.2d 908 (a challenge to an agency policy on the basis that it is actually a rule shall be construed as a challenge to the validity of a rule under Wis. Stat. § 227.40).

Braun, however, has failed to bring his claims against the Commission under Wis. Stat. § 227.40, and his complaint makes no reference to it.⁵ Braun's motion for summary judgment may be denied on this basis alone.

Braun attempts to recast his guidance document challenge as a claim that the Commission's allegedly improper "approval" of the NVRA Form violates Wis. Stat. §§ 6.33(1) and 227.10. (Doc. 2 ¶¶ 21–51.) But despite having the burden of proof on his own claims, Braun has not established his factual premise: that the Commission has ever taken any affirmative action to approve use of the NVRA Form for voter registration. (*See* Doc. 58:5 (Pl's Br. Supp. Summ. J.)) Indeed, Braun provides *no* evidentiary citation for his approval

⁵ Indeed, Braun's complaint is deficient in that it contains *no* reference to the specific statute under which he pursues his claims for relief. Braun only generally states that "[t]his is an action against the Wisconsin Elections Commission ("WEC") seeking a declaratory judgment regarding the legality of use of the National Mail Voter Registration Form" in Wisconsin. (Doc. 2 ¶ 1.) Presumably, given his failure to comply with the service requirements of Wis. Stat. § 227.40, the declaratory judgment provision of Wisconsin's Administrative Procedure Act, Braun intends to pursue his claims under Wis. Stat. § 806.04, Wisconsin's Uniform Declaratory Judgment Act.

argument, even suggesting that it is *the Commission* that must produce evidence of when and the circumstances under which the NVRA Form was first administratively approved for use in Wisconsin. (Doc. 58:5 n.5.)⁶

Braun's only evidentiary basis for his claims of unlawfulness by the Commission is the Election Manual, which informs municipal clerks that Wisconsin accepts the NVRA Form for voter registration. (Doc. 57:32–33.) Issuance of the Election Manual is thus the only action by the Commission Braun even identifies, and from which he could attempt to assert an injury.

Since he challenges administrative guidance, Braun's claims fall squarely under Wis. Stat. § 227.40. The Election Manual is undoubtedly a “[g]uidance document” under Wisconsin law. *See* Wis. Stat. § 227.01(3m)(a).⁷ And despite his erroneous pleading, the validity of that guidance document—meaning the lawfulness of the Commission's guidance to municipal clerks regarding the NVRA Form—is precisely what Braun challenges. This is

⁶ In reality, and contrary to Braun's unsupported allegations, the Commission's September 2022 response to his counsel's public records request demonstrates that the origins of Wisconsin's administrative approval of the NVRA Form are unclear but, in any event, predate the Commission's existence by over two decades. (*See* Doc. 57:39–41.)

⁷ A “[g]uidance document” means any “formal or official document or communication issued by an agency, *including a manual*, handbook, directive, or informational bulletin” that either explains the agency's implementation of a statute or rule or provides guidance as to how the agency is likely to apply a statute or rule. Wis. Stat. § 227.01(3m)(a).

underscored by Braun’s requested injunctive relief—that the Commission “correct” the Election Manual. (Doc. 2:12.)

Braun’s claim related to rulemaking suffers from the same defect. Braun alleges a “Violation of Wis. Stat. § 227.10” and asserts that the Commission cannot approve use of the NVRA Form without first promulgating an administrative rule.⁸ (Doc. 2 ¶¶ 44–51.) Putting aside whether the Commission “approved” the NVRA Form, this sort of challenge to agency action is also encompassed by Wis. Stat. § 227.40. *See Heritage Credit Union*, 247 Wis. 2d 589, ¶¶ 23–24; *see also Mata*, 354 Wis. 2d 486, ¶¶ 9–10 (a challenge to an agency policy on the basis that it is actually a rule shall be construed as a challenge to the validity of a rule under Wis. Stat. § 227.40).

Indeed, in a recent filing in the appellate case initiated by Vote.org,⁹ Braun expressly admits that his second claim is intended to be a Wis. Stat. § 227.40 unpromulgated rule challenge. (*See* Aff. of Lynn K. Lodahl (“Lodahl Aff.”) Ex. A.) In the context of disputing Vote.org’s choice of appellate venue, Braun explains that his argument here “is that [the Commission] violated the

⁸ Wisconsin 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.”

⁹ Vote.org previously filed a motion to intervene in this case. (Doc. 13.) This motion was denied. (Doc. 60.) On January 13, 2023, Vote.org filed an appeal of the order denying their motion to intervene. (*See* Doc. 66.)

rulemaking provisions of ch. 227 . . . [i]n other words, [the Commission’s] . . . approval of the form is an invalid, unpromulgated rule, which under Wisconsin law is explicitly treated as a challenge to the validity of the rule.” (*Id.* at 2–3.) Braun goes on to say that “[t]he venue provision in Wis. Stat. § 227.40(1) applies when a plaintiff challenges a policy as being an unpromulgated rule (which [is] the precise issue in this action).” (*Id.* at 9.)

In theory, Braun could amend his complaint under Wis. Stat. § 802.09 to properly plead his claims under Wis. Stat. § 227.40. But even if he so amended his complaint, Braun cannot correct his failure to comply with the statute’s procedural requirement of service on the joint committee for review of administrative rules (JCRAR). Wisconsin Stat. § 227.40(5) requires that a plaintiff serve JCRAR within 90 days of filing the complaint. That time has already passed.

Braun’s failure to meet this procedural requirement means that his claims must be dismissed. In *Richards v. Young*, the Wisconsin Supreme Court considered a case in which the plaintiff brought a declaratory judgment action against state officials under both Wis. Stat. §§ 806.04 and 227.40, seeking changes to certain administrative rules. 150 Wis. 2d 549, 549–53, 441 N.W.2d 742 (1989). The court determined that the circuit court lacked competency to proceed in the action because the plaintiff had failed to serve JCRAR with a copy of his complaint within the time limit imposed by

Wis. Stat. § 893.02 for service. *Id.* at 550–58. Accordingly, under *Richards*, a circuit court does not have competency over an action challenging the validity of a guidance document unless the plaintiff has served JCRAR with a copy of the complaint within 90 days of its filing. *Id.*; see Wis. Stat. § 893.02 (providing time limit of 90 days for service).

In sum, Braun’s declaratory judgment action challenging the Commission’s guidance and seeking to require the Commission to engage in rulemaking must be pursued under Wis. Stat. § 227.40, including its procedural requirements. He failed to do this, and so his case must be dismissed.

II. Braun’s declaratory judgment action fails because he has not established standing.

Braun’s case also must be dismissed because he lacks standing to bring it.

A. To have a justiciable controversy, the plaintiff must have standing.

A justiciable controversy must exist before a court may grant declaratory relief. *Miller Brands–Milwaukee, Inc.*, 162 Wis. 2d at 694. A controversy is justiciable when four factors are present:

(1) A controversy in which a claim of right is asserted against one who has an interest in contesting it.

(2) The controversy must be between persons whose interests are adverse.

(3) The party seeking declaratory relief must have a legal interest in the controversy—that is to say, a legally protectible interest.

(4) The issue involved in the controversy must be ripe for judicial determination.

Lake Country Racquet & Athletic Club, Inc. v. Vill. of Hartland, 2002 WI App 301, ¶ 15, 259 Wis. 2d 107, 655 N.W.2d 189 (quoting *Putnam v. Time Warner Cable*, 2002 WI 108, ¶ 41, 255 Wis. 2d 447, 649 N.W.2d 626). The third element of justiciability is assessed in terms of “standing.” *Id.*

B. Standing requires the plaintiff to have an injury to a legally protectible interest.

“Standing’ is a concept that restricts access to judicial remedy to those who have suffered some injury because of something that someone else has either done or not done.” *Krier v. Vilione*, 2009 WI 45, ¶ 20, 317 Wis. 2d 288, 766 N.W.2d 517 (citation omitted). In Wisconsin, standing is not a matter of jurisdiction but of sound judicial policy. *McConkey v. Van Hollen*, 2010 WI 57, ¶¶ 15–16, 326 Wis. 2d 1, 783 N.W.2d 855. Under this policy, “[t]he judiciary does not serve as a roving legal advisor” resolving any questions about the law that may arise; rather, the judiciary resolves questions only in the course of deciding disputes between parties “where there is harm to a party that can be

remedied through the judicial process.” *Teigen v. WEC*, 2022 WI 64, ¶ 160, 403 Wis. 2d 607, 976 N.W.2d 519 (Hagedorn, J., concurring) (citing *Gabler v. Crime Victims Rts. Bd.*, 2017 WI 67, ¶ 37, 376 Wis. 2d 147, 897 N.W.2d 384).

Generally, to have standing to bring a declaratory judgment action, the plaintiff must “be directly affected” such that he or she “has sustained, or will sustain, some pecuniary loss or otherwise will sustain a substantial injury to his or her interests.” *Lake Country Racquet & Athletic Club, Inc.*, 259 Wis. 2d 107, ¶ 17. A claimant must meet both elements of the two-pronged analysis—“direct effect” and “legally protected interests”—to establish standing. *Friends of Black River Forest v. Kohler Co.* (“*Kohler*”), 2022 WI 52, ¶¶ 1–2, 402 Wis. 2d 587, 977 N.W.2d 342. Where a plaintiff would challenge agency action, standing requires an “injury in fact”—i.e., an injury that is a “direct result of the agency action.” *Lake Country Racquet & Athletic Club, Inc.*, 259 Wis. 2d 107, ¶¶ 15–17; *Kohler*, 402 Wis. 2d 587, ¶¶ 1–2, 21.

Here, Braun’s claims fail as a matter of law because he has not alleged a direct injury to a legally protectible interest.

The Wisconsin Supreme Court recently applied the standing analysis in an election administration case involving two individual voters who, like Braun, challenged the lawfulness of certain guidance from the Commission to

municipal clerks.¹⁰ *See Teigen*, 403 Wis. 2d 607, ¶¶ 1–2, 14–31 (plurality opinion), 158–67 (Hagedorn, J., concurring), 210–15 (Walsh Bradley, J., dissenting). The plaintiffs, like Braun, asserted standing based on injury to their interests as voters and as taxpayers. *Id.* ¶ 162. None of the justices concluded that the plaintiffs had standing as taxpayers. *Id.* ¶¶ 14–36, 158–67, 210–15. A majority of the justices did conclude that the plaintiffs had standing as voters, but not in the broadest sense. *Id.* ¶¶ 14–36, 158–67.¹¹

Not every voter has standing to challenge the lawfulness of any guidance document issued by the Commission that he disagrees with. *Compare id.* ¶ 21 (plurality opinion), *with id.* ¶¶ 158–67 (Hagedorn, J., concurring); *see also Cornwell Pers. Assocs., Ltd. v. DILHR*, 92 Wis. 2d 53, 62, 284 N.W.2d 706 (Ct. App. 1979) (“Courts are not the proper forum for citizens to ‘air generalized

¹⁰ The *Teigen* plaintiffs brought their challenge to the Commission’s guidance documents under Wis. Stat. § 227.40. *Teigen*, 403 Wis. 2d 607, ¶ 2. Additionally, the plaintiffs advanced the same two arguments in support of their challenge as Braun: they argued that (1) the guidance issued by the Commission is contrary to Wisconsin law; and (2) the guidance should have been promulgated as an administrative rule. *Id.* The similarity of *Teigen* to the case at hand further illustrates that Braun’s claims should have been brought under Wis. Stat. § 227.40 as well; the only salient difference between the two lawsuits is the substance of the guidance at issue (absentee ballot drop boxes in *Teigen* versus use of the NVRA form for voter registration here).

¹¹ The lead opinion of the supreme court in *Teigen* was a plurality opinion. In such a case, the holding of the court may be viewed as the position taken by those members of the court who concurred in the judgment on the narrowest grounds. *See Vincent v. Voight*, 2000 WI 93, ¶ 46 n.18, 236 Wis. 2d 588, 614 N.W.2d 388. When that principle is applied to *Teigen*, Justice Hagedorn’s concurrence states the holding of the court on standing.

grievances’ about the administration of a governmental agency.”) (citation omitted). In *Teigen*, the plaintiff had standing because every Wisconsin elector has a legally protected interest, conferred by Wis. Stat. § 5.06,¹² in requiring his or her *local election officials* to comply with election laws. 403 Wis. 2d 607, ¶¶ 164–66. If the Commission’s challenged guidance threatens to mislead a voter’s local officials into violating an election law, then, under *Teigen*, the voter has properly alleged a direct injury to his or her legally protectible interests sufficient to establish standing. *Id.*

C. Braun does not have standing to sue the Commission solely by virtue of being a voter or taxpayer.

Braun purports to have two claims against the Commission and asserts standing to pursue both claims based on injury to his interests as a voter and as a taxpayer. (Doc. 2 ¶¶ 43, 51.) Braun does not have standing to sue the Commission under the *Teigen* framework, however, and both of his standing arguments fail.

1. Braun does not have voter standing.

At bottom, Braun alleges that the NVRA Form is inconsistent with Wis. Stat. § 6.33(1) and thus the Commission’s guidance is unlawful. (Doc. 2 ¶¶ 43, 51.) Importantly, Braun has not alleged *any* election law violations on

¹² Wisconsin Stat. § 5.06 allows “any elector of a jurisdiction or district served by an election official” who believes that “a decision or action of the official” with respect to any matter concerning election administration “is contrary to law” to file a complaint with the Commission seeking redress. Wis. Stat. § 5.06(1).

the part of the municipal clerks who are responsible for processing voter registration; he has not alleged that any ineligible person was registered to vote because of the NVRA Form; and he has not alleged any voter fraud. Rather, Braun wants this Court to resolve what he deems a straightforward matter of “agency authority and the rule of law,” and states his view that, while “[o]ne could argue that the Form’s noncompliance is not a big thing . . . what is important is that state agencies follow the law.” (Doc. 58:1–4.) This is precisely the sort of generalized grievance about the administration of a government agency, untethered to standing, that this Court is bound to reject. *See Cornwell Pers. Assocs.*, 92 Wis. 2d at 62.

Braun does not have a freestanding right to obtain a judicial declaration regarding the lawfulness of use of the NVRA Form for voter registration in Wisconsin. Nor does he have a freestanding right to obtain a judicial declaration regarding the lawfulness of the Commission’s guidance concerning use of the NVRA Form. The judiciary may resolve questions about the law only “where there is harm to a party that can be remedied through the judicial process.” *Teigen*, 403 Wis. 2d 607, ¶ 160 (Hagedorn, J., concurring). 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.

The rationale for finding voter standing in *Teigen* does not apply here. Braun has not alleged that the Commission’s challenged guidance threatens to

mislead his local officials into violating an election law. *See id.* ¶¶ 164–66. Indeed, the *only* election law identified by Braun as having been violated is Wis. Stat. § 6.33(1). This statute, however, contains directives to *the Commission* regarding the content of Wisconsin’s voter registration form and has nothing to do with his local election officials. And local clerks have an independent duty to ensure that those seeking to register are eligible to do so. When a clerk receives a registration form, he or she is to make sure that it is “sufficient to accomplish registration” and, if he or she has “no reliable information to indicate that the proposed elector is not qualified,” the clerk shall enter the elector’s name on the registration list. Wis. Stat. § 6.32(4).

In short, Braun has not established that he has been “directly affected” by some action on the part of the Commission such that he has sustained or will sustain “a substantial injury” to his interests as a voter. *Lake Country Racquet & Athletic Club, Inc.*, 259 Wis. 2d 107, ¶ 17.

2. Braun does not have taxpayer standing.

Braun’s claim of taxpayer standing is equally unavailing. In *Teigen*, an analogous case, four of the Wisconsin Supreme Court justices concluded that the plaintiffs did *not* have standing to sue the Commission by virtue of being taxpayers. 403 Wis. 2d 607, ¶¶ 158–67 (Hagedorn, J., concurring), 210–15 (Walsh Bradley, J., dissenting). The remaining three justices did not address arguments regarding taxpayer standing because they found voter

standing. *Id.* ¶¶ 14–31 (plurality opinion). *Teigen* thus indicates that Braun does not have taxpayer standing here.

Taxpayers sometimes have a legal right “to contest governmental actions leading to an illegal expenditure of taxpayer funds.” *See Fabick v. Evers*, 2021 WI 28, ¶ 10, 396 Wis. 2d 231, 956 N.W.2d 856). However, because a declaratory judgment will not determine hypothetical or future rights, a taxpayer plaintiff does not have standing to challenge a provision of law merely because he or she disagrees with it. *See Hart v. Ament*, 176 Wis. 2d 694, 697, 500 N.W.2d 312 (1993). Rather, “[t]he taxpayer must have sustained, or will sustain, some pecuniary loss before he or she has standing.” *Vill. of Slinger v. City of Hartford*, 2002 WI App 187, ¶ 9, 256 Wis. 2d 859, 650 N.W.2d 81. Therefore, there must be an actual expenditure of tax dollars resulting from the government action the taxpayer plaintiff wishes to challenge. *See, e.g., Fabick*, 396 Wis. 2d 231, ¶ 11 (expenditure on deployment of National Guard gave taxpayer standing to challenge Governor’s emergency declaration).

Moreover, the expenditure of tax dollars must be on something more than the mere fact that government staff employees have devoted some time and attention to the challenged policy. *Teigen*, 403 Wis. 2d 607, ¶ 163 (Hagedorn, J., concurring). If taxpayer standing could be construed so broadly, then “any taxpayer could challenge almost any government action,” which

“would practically eliminate standing as a consideration in most challenges to government action.” *Id.* (Hagedorn, J., concurring).

Here, Braun has not alleged any specific expenditure of public funds, nor has he alleged that he has or will sustain some pecuniary loss. Braun’s vague allegation that the Commission’s “failure to comply” with Wis. Stat. §§ 6.33(1) and 227.10 “harms” him as a taxpayer, without elaboration, is simply insufficient to establish standing. (Doc. 2 ¶¶ 43, 51.)

In sum, Braun has failed to establish a direct injury by the Commission to a legally protectible interest. Braun thus lacks standing, a prerequisite to declaratory relief. This Court should dismiss Braun’s claims and enter summary judgment against him.

III. Braun’s claims fail on the merits.

Finally, even if this case were heard on the merits, Braun’s claims would still fail as a matter of law. Braun has not established that the Commission’s guidance is contrary to Wisconsin law (*see* “Claim I”), nor has he established an administrative rulemaking violation (*see* “Claim II”). (Doc. 2:8–11.) Summary judgment against him on both claims is proper.

- A. The Commission's guidance is not contrary to Wisconsin law.**
- 1. The Commission's guidance regarding the NVRA Form is accurate.**

With respect to voter registration by mail, the Election Manual states that "Wisconsin also accepts the National Mail Voter Registration Form" in addition to the Wisconsin Voter Registration Application (EL-131) and the Federal Post Card Application. (Doc. 57:32–33.) As a starting point, this statement is accurate. While the origins of Wisconsin's administrative approval of the NVRA Form are unclear, records show that such approval predates the Commission by over two decades. (See Kennedy Aff. ¶ 7; Doc. 57:39–41.) In other words, Wisconsin does, in fact, accept the NVRA Form, as accurately stated in the Election Manual.

- 2. Use of the NVRA Form for voter registration is permissible under Wisconsin's election laws, including Wis. Stat. § 6.33(1).**

Moreover, 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. Use of the NVRA Form for voter registration is permissible under Wisconsin's election laws, including Wis. Stat. § 6.33(1). This is true for three reasons.

First, Wisconsin's election administration statutes plainly allow for the use of multiple voter registration forms, including *but not limited to* the form prescribed by the Commission pursuant to Wis. Stat. § 6.33(1). For example, an overseas elector may register to vote using a form prescribed by the Commission that is "substantially similar to the original form under s. 6.33(1)." Wis. Stat. § 6.24(3). Additionally, a military elector may register to vote using the Federal Post Card Application, although military electors are not required to register as a prerequisite to voting in Wisconsin. *See* Wis. Stat. §§ 6.22(2)–(3). As such, 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. *See generally State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110 (statutory language must be interpreted not in isolation but as part of a whole, in relation to the language of surrounding or closely related statutes).

Second, Wisconsin's election administration statutes do not say, as Braun implies, that an elector may register to vote *only* using a form that meets the strict specifications of Wis. Stat. § 6.33(1). In fact, Wisconsin's statutes say the opposite. A voter registration form need only be "sufficient to accomplish registration" before the municipal clerk may enter the elector's name on the registration list, provided that the clerk has "no reliable information to indicate

that the proposed elector is not qualified.” Wis. Stat. § 6.32(4). And because local clerks have an independent duty to ensure that voter registration forms are sufficient and that those seeking to register are eligible to do so, any tacit approval of the NVRA Form by the Commission implicitly incorporates the understanding that local clerks retain the responsibility for screening any forms that are insufficient to accomplish voter registration in any particular instance. *See generally State ex rel. Zignego v. Wis. Elections Comm’n*, 2021 WI 32, ¶¶ 13–15, 396 Wis. 2d 391, 957 N.W.2d 208 (Wisconsin has a “highly decentralized system” where “[m]unicipal clerks are the officials primarily responsible for election administration in Wisconsin.”).

Third, the NVRA Form is indeed “designed to obtain the information required in s. 6.33(1),” as required by Wis. Stat. § 6.30(4)—the statute describing “[h]ow to register” by mail. *See* Wis. Stat. § 6.30(4).

Wisconsin Stat. § 6.33(1) requires Wisconsin’s voter registration form to be designed to obtain the following information:

1. The elector’s name, date, residence location, location of previous residence immediately before moving to current residence location, citizenship, date of birth, age, the number of a current and valid operator’s license issued to the elector or the last 4 digits of the elector’s social security number;
2. Whether the elector has resided within the ward or election district for the requisite number of consecutive days specified in Wis. Stat. § 6.02(1);

3. 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; and
4. Whether the elector is disqualified on any other ground from voting and whether he or she is currently registered to vote at any other location.

See Wis. Stat. § 6.33(1).¹³ Additionally, Wis. Stat. § 6.33(1) states that the form shall include “space” for the following:

- a. The elector’s signature or authorization;
- b. The name of the election official who obtains the form and his or her signature, affirming that they accepted the form;
- c. 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;
- d. Indication of whether the form is received by mail or by electronic application;
- e. The type of document submitted by the elector as proof of residence, or indication that the elector’s information in lieu of proof of residence was verified under Wis. Stat. § 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; and

¹³ The statute further directs the Commission to include the following statement below the space for the elector’s signature or authorization: “Falsification of information on this form is punishable under Wisconsin law as a Class I felony.” Wis. Stat. § 6.33(1). This, however, is a formatting directive rather than an item of “information” to “obtain” as contemplated by Wis. Stat. § 6.30(4). See Wis. Stat. § 6.30(4) (the form used by an elector to register by mail “shall be designed to obtain the information required in s. 6.33(1).”).

- f. The serial number appearing on the voting identification card, if the clerk chooses to record it.

See id. Braun complains that the NVRA Form is inconsistent with items **2.**, **3.**, and **b.** through **f.** above. (Doc. 58:8–9.) Braun is incorrect.

Braun's argument ignores several portions of the NVRA Form which ensure that the Form meets Wisconsin's specific requirements for voter registration and determining voter eligibility. First, the NVRA Form requires the following certification from electors:

I have reviewed my state's instructions and I swear/affirm that:

- I am a United States citizen
- I meet the eligibility requirements of my state and subscribe to any oath required.
- The information I have provided is true to the best of my knowledge under penalty of perjury. If I have provided false information, I may be fined, imprisoned, or (if not a U.S. citizen) deported from or refused entry to the United States.

(Doc. 57:6.) Further, the NVRA Form includes state specific instructions for Wisconsin electors, including the following:

To register in Wisconsin you must:

- be a citizen of the United States
- be a resident of Wisconsin and have resided at the registration address for at least 28 days
- be at least 18 years old
- not have been convicted of treason, felony or bribery, or if you have, your civil rights have been restored after completion of your sentence or a pardon
- not have been found by a court to be incapable of understanding the objective of the electoral process

- not make or benefit from a bet or wage depending on the result of an election
- not have voted at any other location in the same election.

(Doc. 57:29.) Together, the certification and the instructions demonstrate that the NVRA Form is “designed to obtain the information required in s. 6.33(1),” as required by Wis. Stat. § 6.30(4), including items **2.** and **3.** listed above.

Next, the NVRA Form sets space aside for municipal clerk notations, such that items **b.** through **f.** may be specifically recorded. The NVRA Form includes a blank box in the upper right section marked: “This space for office use only.” (Doc. 57:6.) Additionally, the entire top half of the following page contains blank lines for additional notations and is marked: “FOR OFFICIAL USE ONLY.” (Doc. 57:7.) The spaces can be used to record the information documenting the individual’s eligibility to vote under Wisconsin law.

In sum, use of the NVRA Form for voter registration is permissible under Wisconsin’s election laws. Braun’s claim that the Commission’s guidance violates Wis. Stat. § 6.33(1) fails as a matter of law.

B. Neither the Election Manual nor the NVRA Form is an unpromulgated rule.

Braun’s second claim, “Violation of Wis. Stat. § 227.10,” alleges that the Commission cannot approve use of the NVRA Form without first promulgating an administrative rule. (Doc. 2 ¶¶ 44–51.) Particularly, Braun complains that

the NVRA Form contains boxes in which an elector *may* state his or her political party and race, two items of information not mentioned in Wis. Stat. § 6.33(1), or otherwise required by any statute or rule. (Doc. 2 ¶¶ 44–51; 57:6.)

To the contrary, the Commission does not need to promulgate a rule: its guidance in the Election Manual is just guidance, and the information Braun complains of on the NVRA Form is explicitly optional.¹⁴ Because neither has the force or effect of law, they are not rules under Wisconsin law.

Rules and guidance documents are particular and distinct types of agency documents. Rules are exercises of delegated legislative power, have the force of law, and thus the Legislature may prescribe the procedures by which an agency may promulgate rules. *See Serv. Emps. Int'l Union, Loc. 1 (“SEIU”) v. Vos*, 2020 WI 67, ¶ 79–80, 393 Wis. 2d 38, 946 N.W.2d 35; *see also* Wis. Stat. § 227.01(13). A guidance document, on the other hand, “does not have the force

¹⁴ The NVRA Form’s “Application Instructions” state as follows:

Box 7 — Choice of Party

In some States, you must register with a party if you want to take part in that party’s primary election, caucus, or convention. To find out if your State requires this, see item 7 in the instructions under your State.

....

Box 8 — Race of Ethnic Group

A few States ask for your race or ethnic group, in order to administer the Federal Voting Rights Act. To find out if your State asks for this information, see item 8 in the instructions under your State.

(Doc. 57:5.) The “State Instructions” specific to Wisconsin, in turn, indicate clearly that information regarding political party and race is “[n]ot required.” (Doc. 57:29.)

of law and does not provide the authority for implementing or enforcing a standard, requirement, or threshold.” Wis. Stat. § 227.112(3).

The Wisconsin Supreme Court has explained that guidance documents “simply ‘explain’ statutes and rules, or they ‘provide guidance or advice’ about how the executive branch is ‘likely to apply’ a statute or rule. They impose no obligations, set no standards, and bind no one. They are communications about the law—they are not the law itself.” *SEIU*, 393 Wis. 2d 38, ¶ 102. Thus, “agencies may issue guidance documents without going through the procedures described in Wis. Stat. ch. 227.” *Teigen*, 403 Wis. 2d 607, ¶ 190 (Hagedorn, J., concurring).

Here, the challenged Election Manual is a guidance document without the force of law. The Commission did not need to follow any rulemaking process before issuing it, and thus there can be no violation of Wis. Stat. § 227.10. And to the extent Braun challenges the information sought on the NVRA Form itself, the Form specifically makes clear that not every applicant completing the Form needs to provide the information Braun complains of, and that Wisconsin electors in particular are “[n]ot required” to provide it. (Doc. 57:5, 29.)

Altogether, both of Braun’s claims fail on the merits and this Court should enter summary judgment against him.

CONCLUSION

The Commission respectfully requests that this Court grant its motion for summary judgment and deny Braun's motion for summary judgment.

Dated this 27th day of January 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed Defendant's Brief in Support of Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment with the clerk of court using the Wisconsin Circuit Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 27th day of January 2023.

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