

STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY  
BRANCH 8

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RICHARD BRAUN,

Plaintiff,

v.

Case No. 22-CV-1336

WISCONSIN ELECTIONS COMMISSION,

Defendant.

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### **DEFENDANT'S REPLY BRIEF IN SUPPORT OF SUMMARY JUDGMENT**

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The Wisconsin Elections Commission is entitled to summary judgment for two reasons. First, Richard Braun does not have standing. Second, Braun's claims fail as a matter of law. Wisconsin's acceptance of the National Voter Registration Form (the "Form") is lawful and does not require administrative rulemaking.<sup>1</sup>

#### **I. Braun's declaratory judgment action fails for lack of standing.**

Standing requires both (1) direct harm and (2) a legally protected interest. Here, Braun fails to satisfy both prongs of the analysis: nothing about the use of the Form in Wisconsin harms him or gives him a cognizable cause of action.

The parties agree that Wisconsin's law of standing follows a two-part analysis. The first step is to determine whether the complained of infraction "directly causes

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<sup>1</sup> The Commission previously opposed Braun's summary judgment motion in part because he had failed to establish timely service on JCRAR as required under Wis. Stat. § 227.40(5). (Doc. 82:17-18.) It is well-settled that the "party serving the process has the burden to show that process was sufficient." *Dietrich v. Elliott*, 190 Wis. 2d 816, 826, 528 N.W.2d 17 (Ct. App. 1995). In response, Braun produced evidence showing that he had, in fact, served JCRAR, notwithstanding his failure to file proof of service in advance of his dispositive motion. (Doc. 94.) The Commission therefore withdraws this argument.

injury” to the plaintiff. *Fox v. DHSS*, 112 Wis. 2d 514, 524, 334 N.W.2d 532 (1983) (citation omitted). The injury must be concrete, not hypothetical or conjectural. *Id.* at 525. “The second step is to determine whether the interest asserted is recognized by law.” *Id.* at 524 (citation omitted). Under this inquiry, courts look to the “provision on which the claim rests” and ask whether it “properly can be understood as granting persons in the plaintiff’s position a right to judicial relief.” *Foley-Ciccantelli v. Bishop’s Grove Condo. Ass’n, Inc.*, 2011 WI 36, ¶ 46, 333 Wis. 2d 402, 797 N.W.2d 789 (citations omitted). Restated, the plaintiff must have an injury to “a legally protectible interest.” *Id.* ¶ 47 (citation omitted).<sup>2</sup>

**A. Braun’s status as a voter does not confer standing.**

Braun argues that he has standing because he is a voter, using the same vote dilution theory advanced by the plaintiffs in *Jefferson v. Dane County*—i.e., the Commission’s conduct here results in “illegal votes” that dilute Braun’s vote as a lawfully registered voter. (Doc. 93:9 (citing *Jefferson v. Dane Cnty.*, 2020 WI 90, 394 Wis. 2d 602, 951 N.W.2d 556).) But nothing about use of the Form results in illegally cast ballots. Even *if* the Form was inconsistent with the content and formatting requirements of Wis. Stat. § 6.33(1), local clerks are still responsible for screening registration requests to ensure that the voter provides sufficient information to accomplish lawful registration, and that only eligible persons are

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<sup>2</sup> Braun mischaracterizes the second prong of the Wisconsin standing analysis, saying that it is the same as the federal “zone of interests” test. (Doc. 93:8–9.) He cites *Kohler* to support this proposition, but *Kohler* says the opposite. See *Friends of Black River Forest v. Kohler Co.* (“*Kohler*”), 2022 WI 52, ¶ 2, 402 Wis. 2d 587, 977 N.W.2d 342 (distinguishing the “zone of interests” test and declining to apply it in lawsuit challenging agency action).

registered to vote. *See* Wis. Stat. § 6.32(4). Unsurprisingly, Braun has not alleged that use of the Form has caused a clerk to register anyone who is ineligible to vote, or that use of the Form has resulted in someone ineligible to vote casting a ballot.

In *Teigen v. WEC*, the most recent Wisconsin Supreme Court case addressing voter standing, confirms that Braun does not have standing. 2022 WI 64, 403 Wis. 2d 607, 976 N.W.2d 519. In *Teigen*, Braun’s second theory of voter standing—that all voters suffer an injury to their right to vote when the Commission administers elections in a manner other than that required by law (Doc. 93:10)—failed to garner the support of a majority of justices on the court. It is thus *not* the law in Wisconsin.

The *Teigen* plaintiffs had standing only because a fourth justice, Justice Hagedorn, found that voters have a legally protected interest, conferred by Wis. Stat. § 5.06, in requiring their local election officials to comply with election laws. *See* 403 Wis. 2d 607, ¶¶ 164–66. Voters thus have standing when the Commission’s conduct interferes with that legally protected interest. *Id.* Here, the complained of conduct—the Commission’s alleged failure to carry out its statutory obligation to prescribe registration forms—does not interfere with Braun’s right to have his local election officials comply with the law.<sup>3</sup> Braun does not have voter standing.

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<sup>3</sup> Braun also claims, incorrectly, that the three justices from the lead minority opinion in *Teigen* applied the “zone of interests” test. (Doc. 93:10.) They did the opposite, rejecting the “zone of interests” framework based on the court’s recent decision in *Kohler*, an “analogous” case for purposes of standing. *See Teigen*, 403 Wis. 2d 607, ¶ 20, n.9 (citation omitted).

**B. Braun's status as a taxpayer does not confer standing.**

Braun also does not have standing just because he is a taxpayer, and he misstates the law of taxpayer standing in Wisconsin. Taxpayer standing requires the extra spending of funds tied to unlawful government action, which is absent here.

First, taxpayer standing requires a showing that the complaining taxpayer “sustained, or will sustain, some pecuniary loss; otherwise the action could only be brought by a public officer.” *S.D. Realty Co. v. Sewerage Comm’n of Milwaukee*, 15 Wis. 2d 15, 21–22, 112 N.W.2d 177 (1961). The pecuniary loss must come from an *extra* expenditure of public funds, not merely any expenditure of public funds. In *S.D. Realty*, the plaintiff had standing because he alleged that a *greater expenditure of public funds* would be required to construct a tunnel than would be required if the city took different action, and the extra expense served no legitimate purpose. *Id.*

Additionally, taxpayer standing requires pecuniary loss tied to government action. See *Wis. Mfrs. & Com. v. Evers*, 2021 WI App 35, ¶ 30, 398 Wis. 2d 164, 960 N.W.2d 442, *review granted*, 2022 WI 90, *aff’d*, 2022 WI 38, *reconsideration denied*, 2023 WI 5. (“[T]o establish taxpayer standing a plaintiff must show that the government action that it seeks a court order to enjoin is ‘unlawful.’”) (citation omitted). For example, in *Fabick v. Evers*, the court found standing to sue the governor regarding the COVID-19 emergency declarations because the governor deployed the National Guard pursuant to the declarations—an action resulting in the extra expenditure of taxpayer funds. 2021 WI 28, ¶ 11, 396 Wis. 2d 231, 956 N.W.2d 856.

It is thus not enough to complain, as Braun does, that the Commission *failed to do* something.

Here, the only government *action* that Braun identifies is the Commission's regular issuance of the Election Manual, which states that Wisconsin accepts use of the Form. But the statement in the Election Manual involves no extra expenditure of public funds; the Commission would issue the Election Manual regardless. Braun has neither voter nor taxpayer standing and his case must be dismissed.

## **II. Braun's claims fail on the merits.**

Even if Braun did have standing, the Commission would still be entitled to summary judgment because his claims fail on the merits.

### **A. Use of the Form in Wisconsin is lawful.**

Braun's declaratory judgment claim contends that use of the Form for voter registration by mail is illegal "because the Form is inconsistent with" the requirements for registration forms under Wis. Stat. § 6.33(1). (Doc. 93:1.) Braun's theory fails because Wis. Stat. § 6.33(1) relates only to what the Commission must do when creating Wisconsin's voter registration forms. The statute does not impose those same requirements on *all* acceptable mail registration forms, such as the two federal forms prescribed by the Commission. Even Braun admits that at least one federal registration form is acceptable despite not specifically meeting the requirements of Wis. Stat. § 6.33(1)—the Federal Post Card Application.

Contrary to Braun's arguments, the requirements for mail registration forms are not set by Wis. Stat. § 6.33(1); they are set by Wis. Stat. § 6.30(4). Wisconsin Stat. § 6.30(4) allows a voter to register by mail using a form "prescribed by the

commission” and “designed to obtain the information required in s. 6.33(1).”<sup>4</sup> The Form meets these requirements and thus may be used by a voter to register by mail.

Alternatively, if the Form must satisfy *all* of the content and formatting requirements that apply to Wisconsin’s registration forms under Wis. Stat. § 6.33(1), instead of just being “designed to obtain the information required” under Wis. Stat. § 6.33(1), the details of the statute are directory, and the Form substantially complies.

**1. The Form is lawful pursuant to Wis. Stat. § 6.30(4).**

Wisconsin Stat. § 6.30(4) says that a voter may register by mail using a form that is “prescribed by the commission” and “designed to obtain the information required in s. 6.33(1).” The Form meets these requirements.

First, *the Form is prescribed by the Commission*. The Form has been accepted for use in Wisconsin for over two decades, meaning that initial administrative approval of the Form did not come from the Commission, an agency created in 2016. This does not mean, however, that the Form has not been *prescribed* by the Commission, and Braun’s definition of prescribe is too narrow. (Doc. 93:1, 13.) Merriam-Webster defines prescribe as “to lay down as a guide, direction, or rule of action.” *Prescribe*, Merriam-Webster.com Dictionary, <https://www.merriam-webster.com/dictionary/prescribe>. It is undisputed that the Election Manual—a guidance document approved by the Commission—states that Wisconsin accepts use of the Form for registration by mail, along with the Wisconsin Voter Registration

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<sup>4</sup> Wisconsin Stat. § 6.30(4) also requires that a mail registration form “contain a certification by the elector that all statements are true and correct,” but Braun does not dispute that the NVRA Form meets this requirement.

Application and the Federal Post Card Application. (Doc. 2 ¶ 7.) The Commission thereby prescribed use of these three forms for registration by mail.

Second, the Form is *designed to obtain the information required in Wis. Stat. § 6.33(1)*. Wisconsin Stat. § 6.33(1) is a lengthy statute regarding the content and format of registration forms designed by the Commission. It contains the following directives: (1) the Commission shall “design the form to obtain from each elector information” demonstrating their eligibility to vote; (2) the form shall include “a space for the elector’s signature” and, below that, the statement that “Falsification of information on this form is punishable under Wisconsin law as a Class I felony”; and (3) the form shall include “space” for certain additional notations by the official who receives the registration form, including space for “any other information required to determine the offices and referenda for which the elector is certified to vote.” *Id.* Thus, only part of Wis. Stat. § 6.33(1) concerns what “information” is required from the elector to ensure eligibility to vote, matching the language used in Wis. Stat. § 6.30(4). And the Form is designed to obtain this same information.

The Form is designed to obtain the information required in Wis. Stat. § 6.33(1), as required by Wis. Stat. § 6.30(4), because the Form lists all the same information that section 6.33(1) requires to determine voter eligibility and then requires the voter to swear/affirm that he or she meets these eligibility requirements. (Doc. 57:6, 29.) It does not matter that some of the eligibility information is requested through the Form’s state-specific instructions because, as explained by *amicus curiae*, the state-specific instructions are an integral part of the

Form. (Doc. 86:7–9 (citing 11 C.F.R. § 9428.3(a) (Federal law requires that the Form consists of three parts: the application, general instructions, and state-specific instructions.))) The Form also sets aside ample space that may be used for entering the municipal clerk notations referenced in Wis. Stat. § 6.33(1). (Doc. 57:6–7.)

In sum, the Form meets the requirements of Wis. Stat. § 6.30(4) and thus may be lawfully used for voter registration by mail in Wisconsin.

Braun wants this Court to ignore what Wis. Stat. § 6.30(4) requires and instead look to Wis. Stat. § 6.33(1), reading in additional requirements. Particularly, Braun says that Wis. Stat. § 6.33(1) should be interpreted as requiring “non-military and non-overseas voters to register to vote by mail using a form approved by WEC and meeting the requirements of Wis. Stat. § 6.33(1).” (Doc. 93:16.) But that is not what the statute says, and this Court cannot add language that is not there. *See Fond du Lac Cnty. v. Town of Rosendale*, 149 Wis. 2d 326, 334, 440 N.W.2d 818 (Ct. App. 1989). Wisconsin Stat. § 6.33(1) concerns only what *the Commission* must do when designing registration forms; it says nothing about what constitutes proper voter registration by mail generally, and it does not say that the Commission may not also prescribe federal forms for use that are designed to obtain the same information required in Wis. Stat. § 6.33(1).

**2. Alternatively, the Form is lawful because it substantially complies with Wis. Stat. § 6.33(1).**

Even if Braun were correct and all registration forms must meet the content *and* formatting requirements of Wis. Stat. § 6.33(1), the Form substantially complies, which is all that is required. Wisconsin’s election statutes are generally construed as



directory, not mandatory. *See In re Chairman in Town of Worcester*, 29 Wis. 2d 674, 681, 139 N.W.2d 557 (1966). An election statute such as Wis. Stat. § 6.33(1), which “merely provides that certain things shall be done in a given manner” and “without declaring that conformity to such provisions is essential to the validity of the election,” should be construed as directory. *Lanser v. Koconis*, 62 Wis. 2d 86, 91, 214 N.W.2d 425 (1974) (citation omitted). Strict compliance is not required for a directory statute. *Matter of Hayden*, 105 Wis. 2d 468, 483, 313 N.W.2d 869 (Ct. App. 1981). Braun is wrong when he argues that the Form must strictly match the content and formatting requirements provided under Wis. Stat. § 6.33(1).

The Form substantially complies with Wis. Stat. § 6.33(1) because (1) it is designed to obtain all required information to determine voter eligibility; (2) it requires an elector to certify that the information provided is true under penalty of perjury, and acknowledge that if the elector has provided false information, he or she may be fined, imprisoned, or (if not a U.S. citizen) deported;<sup>5</sup> and (3) it sets aside space that may be used for entering the municipal clerk notations referenced in Wis. Stat. § 6.33(1). This substantial compliance is all that is required.

**B. The Form is not an unpromulgated administrative rule.**

Braun also alleges that the Commission cannot endorse use of the Form without first promulgating an administrative rule. This claim is based on the Form’s

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<sup>5</sup> This is substantially the same as the admonishment provided in Wis. Stat. § 6.33(1), which is: “Falsification of information on this form is punishable under Wisconsin law as a Class I felony.”

inclusion of boxes where an applicant has *the option* to state his or her political party and race. Rulemaking is not required based on an optional opportunity.

“No agency may implement or enforce any standard, requirement, or threshold” that is not “explicitly required or explicitly permitted by statute” without engaging in rulemaking. Wis. Stat. § 227.10(2m). But here, provision of information regarding political party and race on the Form is explicitly optional for Wisconsin electors. The mere opportunity to provide optional information is not a “standard, requirement, or threshold” implemented or enforced by the Commission. *Id.*

Braun jumps to the exceptions to the definition of “[r]ule” in Wis. Stat. § 227.01(13), and asserts that the form doesn’t qualify as an exception under subsection (q). (Doc. 93:19.) But there is no need to look for an exception because use of the Form does not meet the definition of a rule to begin with.

Braun realizes that providing the information is optional, so he argues that rulemaking is nonetheless required on the theory that a Wisconsin voter would only know that “if he or she read the instructions.” (Doc. 93:19.) But as noted above, the instructions are a required and integral component of the Form. *See* 11 C.F.R. § 9428.3(a). Accordingly, the application portion of the Form repeatedly refers to and incorporates the state-specific instructions, and voters who use the Form must swear under oath that they have reviewed their state’s specific instructions. Braun’s unpromulgated rule argument fails.

## CONCLUSION

The Commission’s summary judgment motion should be granted.

Dated this 14th day of March 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 Reply Brief in Support of 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 24th day of March 2023.

Electronically signed by:

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