FILED
07-12-2023
Clerk of Circuit Court
Waukesha County
2022CV001395

STATE OF WISCONSIN CIRCUIT COURT BRANCH 6 WAUKESHA COUNTY

NANCY KORMANIK,

Plaintiff,

v.

WISCONSIN ELECTIONS COMMISSION,

Defendant,

DEMOCRATIC NATIONAL COMMITTEE,

RISE, Inc.,

Intervenors.

Case No. 2022CV1395
Case Code: 30701
Declaratory Judgment

Hon. Brad Schimel

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RISE, INC.'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

PLEASE TAKE NOTICE that Intervenor RISE, Inc., by and through its undersigned attorneys, hereby moves the Court to enter summary judgment on all counts against Plaintiff Nancy Kormanik. RISE sets out the grounds for this Motion in the accompanying Brief in Support and Affidavit.

PLEASE TAKE FURTHER NOTICE that RISE will present its Motion to the Honorable Brad D. Schimel at the Waukesha County Courthouse, 515 West Moreland Blvd., Waukesha, WI, at 1:30 pm on August 28, 2023.

DATED this 12th day of July, 2023.

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INTERVENOR RISE, INC.'S BRIEF IN SUPPORT OF RISE'S MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiff Nancy Kormanik is an individual voter who objects to guidance from the Wisconsin Elections Commission advising that other voters can request the return of their previously delivered absentee ballots so that they can spoil them and vote new absentee ballots or vote in person. Kormanik claims that the guidance is contrary to law and moves for summary judgment, requesting a permanent injunction. But Kormanik's motion fails at the threshold because she lacks standing. She offers no evidence of a concrete injury in fact to her that is traceable to the challenged guidance, instead raising only conjectural and speculative fears of fraud without any evidentiary basis.

Kormanik's challenge also fails on the merits. Her construction of the relevant statutes ignores critical portions of their text, rendering the text surplus, when an alternative, readily available reading makes sense of the statutes as a whole. And Kormanik's last-ditch procedural arguments fare no better. Her claim that the guidance violates Section 5.05(1e) appears nowhere in her Complaint and so is not properly before the Court. And her argument that WEC needed to promulgate the guidance as a rule is foreclosed by a 2020 Supreme Court opinion. The Court should deny Kormanik's motion and enter summary judgment for RISE and WEC on all claims.

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BACKGROUND

Wisconsin law provides that "if an elector mails or personally delivers an absentee ballot to the municipal clerk," the clerk may not "return the ballot to the elector," "*[e]xcept* as authorized in [Wis. Stat. § 6.86(5) and 6.87(9)]." Wis. Stat. § 6.86(6). Section 6.86(5), in turn, *requires* a municipal clerk to issue a new ballot to an elector (or the elector's agent) "whenever an elector [or the elector's agent] returns a spoiled or damaged absentee ballot to the municipal clerk . . . and the clerk believes that the ballot was issued to or on behalf of the elector who is returning it." Wis. Stat. § 6.86(5). Section 6.86(5) also allows voters to make a "request for a replacement ballot"

"within the applicable time limits under subs. (1) and (3)(c)." And Section 6.87(9) provides that "[if] a municipal clerk receives an absentee ballot with an improperly completed certificate or with no certificate, the clerk may return the ballot to the elector . . . whenever time permits the elector to correct the defect and return the ballot."

Consistent with those statutory directives, WEC issued guidance (the "Challenged Guidance") setting forth the process and rules by which voters may "spoil" absentee ballots under Section 6.86(5). Dkt. 3, Compl. Ex. A; Dkt. 4, Compl. Ex. B. The Challenged Guidance governed the August 2022 partisan primary. It is identical to WEC guidance that governed the November 2020 general election, Dkt. 57, Wolfe Aff. Ex. B, and is materially equivalent to the guidance that governed Wisconsin elections from 2014 to 2020, Dkt. 56, Wolfe Aff. Ex. A.

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The Challenged Guidance provides, among other things, that:

- A voter who has returned an absentee ballot may request in writing or in person that their returned absentee ballot be spoiled so they can either (i) vote a new absentee ballot, or (ii) vote on election day.
- A voter cannot appear at the polls on election day and spoil their absentee ballot at that time.
- A voter who has mailed an absentee ballot to the clerk cannot vote at the polls on election day if the voter has not spoiled their ballot by the applicable deadline, even if the clerk has not received the ballot.
- A voter who has received an absentee ballot but has not returned that ballot can vote in person on election day.
- A voter can spoil their election day ballot in person at the polls.

In September 2022, after absentee voting was already underway, Plaintiff Nancy Kormanik brought this lawsuit, seeking a temporary injunction of the Challenged Guidance for the 2022 general election. Kormanik sought sweeping relief far beyond the scope of any alleged deficiency in the Challenged Guidance. Specifically, she sought an order directing WEC to issue "corrected guidance" with new rules for absentee voting, including that (i) a clerk is prohibited from returning

a previously completed and submitted absentee ballot to a voter; (ii) a clerk has no power to "spoil" a voter's previously submitted absentee ballot; and (iii) to spoil an absentee ballot, a voter must spoil the ballot before requesting "a new absentee ballot." Dkt. 22, Pl.'s Am. Notice of Mot. & Mot. for a TRO & Temporary Inj. at 2.

On October 7, 2022, this Court entered a more limited temporary injunction, directing WEC to withdraw the Challenged Guidance and prohibiting WEC from issuing any guidance or communication stating "(i) that a municipal clerk or local election official may return a previously completed and submitted absentee ballot to an elector, except as otherwise provided in Wis. Stat. § 6.87(9); or (ii) that a municipal clerk or local election official is authorized to spoil an absentee ballot on behalf of an elector." Dkt. 106, TI Order at 2.

Kormanik now moves for summary judgment seeking a permanent injunction against the Challenged Guidance.

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LEGAL STANDARD

"Summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Schmidt v. N. States Power Co.*, 2007 WI 136, ¶ 24, 305 Wis. 2d 538, 742 N.W.2d 294. "Any reasonable doubt as to the existence of a genuine issue of material fact must be resolved against the moving party for summary judgment." *Id.* (internal quotation marks omitted).

ARGUMENT

Kormanik's claims fail at the threshold because she lacks standing to challenge WEC's ballot-spoiling guidance. They also fail on the merits. The Challenged Guidance is consistent with the relevant statutes and was properly adopted in accordance with Wisconsin administrative procedure.

I. Kormanik lacks standing.

Kormanik does not have standing. A plaintiff may seek a declaratory judgment as to "the validity of a rule or guidance document" only under Section 227.40(1). To have standing under Chapter 227, Kormanik must show that the Challenged Guidance has caused her an "injury in fact" to an interest that the statutes on which she relies "recognizes or seeks to regulate or protect." *Friends of Black River Forest v. Kohler Co.*, 2022 WI 52, ¶¶ 21, 28, 402 Wis. 2d 587, 977 N.W.2d 342. Neither the Supreme Court's recent, fractured opinion in *Teigen v. Wisconsin Elections Commission*, 2022 WI 64, 403 Wis. 2d 607, 976 N.W.2d 519, nor the Uniform Declaratory Judgments Act, Wis. Stat. § 806.04, offers an alternative basis for standing. And Kormanik's barebones factual submissions do not satisfy the causation or injury-in-fact requirements under Chapter 227. Kormanik therefore lacks standing, entitling Rise to summary judgment on all of Kormanik's claims.

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A. Kormanik must satisfy the Chapter 227 standard for standing.

The usual Chapter 227 standard for standing applies to Kormanik's claims. An action for declaratory judgment under Chapter 227 is "the *exclusive* means of judicial review of the validity of a rule or guidance document." Wis. Stat. § 227.40(1) (emphasis added). A plaintiff may bring such an action "*only* when it appears from the complaint and the supporting evidence that the rule or guidance document or its threatened application interferes with or impairs, or threatens to interfere with or impair, the legal rights and privileges of the plaintiff." Wis. Stat. § 227.40(1) (emphasis added); *see also Teigen*, 2022 WI 64, ¶ 159 (Hagedorn, J., concurring) ("In legal parlance [the Wis. Stat. § 227.40(1)] harm requirement is called standing."). The Wisconsin Supreme Court has developed a two-part test for assessing a plaintiff's standing to bring a Chapter 227 administrative-law challenge to an agency action: the plaintiff must show that (i) the agency

action has caused her an "injury in fact" to (ii) an interest that the statutes on which she relies "recognizes or seeks to regulate or protect." *Black River Forest*, 2022 WI 52, ¶¶ 21, 28.

As the Court of Appeals has expressly recognized, the Supreme Court's decision in *Teigen* did not alter this standard. At least four justices in *Teigen* agreed that the *Black River Forest* standard governs Section 227.40(1) challenges to the validity of rules or guidance documents just as much as it applies in other actions arising under Chapter 227. *See Teigen*, 2022 WI 64, ¶ 19 (lead opinion) (citing *Black River Forest*); *id.* ¶ 159 (Hagedorn, J., concurring); *cf. id.* at ¶¶ 210–19 (Walsh Bradley, J., dissenting) (concluding that the *Teigen* plaintiffs likely lacked standing without discussing the applicable standard). But a majority of justices *rejected* the portion of the lead opinion in *Teigen* that purported to expand Chapter 227 standing to voter plaintiffs like Kormanik based on a vote-pollution theory. *See Teigen*, 2022 WI 64 ¶¶ 21, 24–25 (lead opinion). Justice Hagedorn, whose vote was controlling, called the lead opinion's standing analysis "unpersuasive" and pointed out that it did not "garner the support of four members of this court." *Id.* ¶ 167 (Hagedorn, J., concurring in part); *see id.* ¶¶ 210–15 (Walsh Bradley, J., dissenting). Justice Hagedorn concluded that the plaintiffs had standing under a different theory based on a different statute—Section 5.06—but all *six* other justices rejected that view. *See id.* ¶¶ 32–34 (lead opinion); *id.* ¶¶ 210–15 (Walsh Bradley, J., dissenting). The lead opinion's novel theory extending standing to voters whose only alleged injury is vote pollution drew only three votes.

Because no view on standing garnered the support of a majority of justices, *Teigen* did not change Wisconsin's law of voter standing—as the Court of Appeals recently concluded in another case. *See Rise, Inc. v. Wisconsin Elections Comm'n*, No. 2022AP1838, unpublished slip op. ¶ 27

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n.6 (Ct. App. July 7, 2023).[1] Thus, Kormanik must still satisfy the broader *Black River Forest* standard for Chapter 227 standing by producing particularized evidence of an injury in fact *to her* caused by the Challenged Guidance.

Kormanik's brief cites the Uniform Declaratory Judgments Act, Wis. Stat. § 806.04, rather than Chapter 227 as the basis for her declaratory judgment request. *See* Dkt. 132, Pl.'s Br. ISO Mot. for Summ. J. & Declaratory J. ("Kormanik Br.") at 5. But Section 227.40(1) provides the "exclusive" means of judicial review of the validity of a guidance document; Section 806.04(1) concerns the "construction or validity [of] . . . [an] instrument, statute, ordinance, contract or franchise," *not* a rule or guidance document. Kormanik must therefore satisfy the standing requirements that accompany that claim under the *Black River Forest* test.

B. Kormanik has not shown and cannot show that the Challenged Guidance has caused her an injury in fact.

Kormanik's meager factual submissions do not satisfy the first requirement for Chapter 227 standing under *Black River Forest*: an "injury in fact" to the plaintiff that is "a direct result of the agency action" and is not "hypothetical nor conjectural." *Black River Forest*, 2022 WI 52, ¶ 21 (internal quotation marks omitted). Kormanik makes no such showing, and it is hard to see how

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[1] A Wisconsin Supreme Court opinion creates a controlling rule of law only when a majority endorses the rule in question. *Compare State v. Dowe*, 120 Wis. 2d 192, 194, 352 N.W.2d 660, 662 (1984) ("It is a general principle of appellate practice that a majority must have agreed on a particular point for it to be considered the opinion of the court."), *with Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." (internal quotation marks omitted)); *see also State v. Lynch*, 2016 WI 66, ¶ 145, 371 Wis. 2d 1, 885 N.W.2d 89 (Abrahamson & Walsh Bradley, JJ., concurring in part) ("[T]he precedential effect (or lack thereof) of a 'lead opinion' is uncertain."); *Johnson v. Wisconsin Elections Comm'n*, 2022 WI 14, ¶ 243, 400 Wis. 2d 626, 971 N.W.2d 402 (Grassl Bradley, J., dissenting) ("This court has never applied the *Marks* Rule to interpret its own precedent.").

she could possibly do so. She contends that the Challenged Guidance unlawfully allows voters to spoil their ballots and vote new ones, but even on her own account Kormanik is free to decline that option. And Kormanik herself is not injured when other voters spoil and revote their own ballots.

Kormanik argues that the Challenged Guidance creates a risk to her and "Wisconsin absentee voters in general" of "potential disenfranchisement by identity theft and voter fraud," Kormanik Br. at 17. But Kormanik offers no factual support for the conclusion that identify theft or fraud is at all likely. In full, Kormanik attests in her affidavit as follows: (i) she is a registered voter in Waukesha County; (ii) she has voted by absentee ballot in "prior elections"; (iii) she voted by absentee ballot in August and November 2022 and in April 2023; and (iv) she intends to vote "in the upcoming elections in the State of Wisconsin by absentee ballot and return such completed absentee ballots to my municipal clerk in compliance with Wisconsin law." Dkt. 131, Aff. of Nancy Kormanik at 1–2. None of those assertions demonstrates that Kormanik faces any actual risk of identity theft or fraud as a direct result of the challenged agency action. Nor has she presented any evidence of a generalized risk of fraud, identity theft, or confusion traceable to the guidance. And although Kormanik's brief also refers to "confusion and administrative complication," Kormanik Br. at 3, she offers no evidence of either. As a result, Kormanik's claims of harm are worse than being entirely "hypothetical [and] conjectural," *Black River Forest*, 2022 WI 52, ¶ 21, they are wholly and utterly conclusory, and cannot confer standing. Summary judgment is "the put up or shut up moment in a lawsuit, when a party must show what evidence it has that would convince a trier of fact to accept its version of the events." *Springer v. Durflinger*, 518 F.3d 479, 484 (7th Cir. 2008) (cleaned up). Kormanik's account of her injury falls far short of that mark.

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Without standing, Kormanik's claims must fail. As explained, Section 227.40(1) provides that a court "shall render a declaratory judgment" in cases like this one "*only* when it appears from

the complaint and the supporting evidence that the rule or guidance document or its threatened application interferes with or impairs, or threatens to interfere with or impair, the legal rights and privileges of the plaintiff" (emphasis added). Because Kormanik has not made and cannot make such a showing, the Court should grant WEC's and Intervenors' motions for summary judgment. At a minimum, because Kormanik has not established a necessary prerequisite to her claims, she has failed to make out her prima facie case and the Court should deny her motion.

II. The Challenged Guidance does not violate the Wisconsin election statutes.

Kormanik's claims also fail on the merits because the Challenged Guidance is consistent with Wisconsin law. Read together, Sections 6.86(5) and (6) allow voters to ask for their previously delivered absentee ballots back, spoil them, and return the now-spoiled ballots for replacement ones. Kormanik's contrary argument is inconsistent with the provisions' plain language. And at an absolute minimum, the Court should make clear that—as was the case under the Court's temporary injunction—voters whose ballots will be rejected for incomplete certificates can get those ballots back under Section 6.87(9), spoil them, and obtain replacement ballots instead of curing their certificates.

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A. Sections 6.86(5) and (6) together authorize municipal clerks to return absentee ballots to voters so the voters can spoil them and request replacements.

It is undisputed that Section 6.86(5) allows voters who have not yet returned their absentee ballots to spoil them, return the spoiled ballots to their municipal clerks, and request new ones. But what if a voter wants to spoil a ballot after returning it? Kormanik argues that Section 6.86(5) demands the ballot be already spoiled before it is returned. But even accepting that argument, a possibility remains: can the voter get their ballot back, spoil it, and *then* return the spoiled ballot in exchange for a new one under Section 6.86(5)? The plain text of Section 6.86(5) and (6)

authorizes voters to do just that, just as the Challenged Guidance allows. Kormanik's claims therefore fail on the merits, and Defendants are entitled to summary judgment.

The key language is in Section 6.86(6), which provides that "[e]xcept as authorized in sub. (5) and s. 6.87(9), if an elector mails or personally delivers an absentee ballot to the municipal clerk, the municipal clerk shall not return the ballot to the elector." This language does two things: (i) it establishes a general rule that municipal clerks usually may not give voters back their already delivered absentee ballots, and (ii) it expressly states that two other statutory provisions—Sections 6.86(5) and 6.87(9)—*each* "authorize[]" municipal clerks to do just that.

For this language to make sense, Section 6.86(5) must in fact sometimes "authoriz[e]" municipal clerks to give voters back their already delivered absentee ballots. Such a reading of Section 6.86(5) is readily available. Section 6.86(5) provides:

> Whenever an elector returns a spoiled or damaged absentee ballot to the municipal clerk, . . . and the clerk believes that the ballot was issued to or on behalf of the elector who is returning it, the clerk shall issue a new ballot to the elector or elector's agent, and shall destroy the spoiled or damaged ballot. Any request for a replacement ballot under this subsection must be made within the applicable time limits under subs. (1) and (3)(c).

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This language is perfectly consistent with a voter going to their municipal clerk and "request[ing] a replacement ballot under" subsection (5) by getting their original ballot back, spoiling it, and returning the now-spoiled ballot for a replacement. This scenario does not raise the temporal issues that Kormanik describes, Kormanik Br. at 8–9, because it requires the voter to "return[]" an already "spoiled or damaged" ballot—after getting the ballot back from the clerk and spoiling it—before receiving a new one. Wis. Stat. § 6.86(5). And this reading is consistent with subsection (6), too, because returns "authorized in sub. (5)" are expressly exempted from subsection (6)'s general prohibition on clerks giving voters back their already voted absentee ballots. Kormanik Br. at 8.

In contrast, Kormanik's reading is impossible to square with subsection (6)'s express statement that subsection (5) sometimes "authorize[s]" clerks to give voters back their previously delivered ballots. According to Kormanik's construction, subsection (5) would *never* authorize a municipal clerk to return a previously delivered ballot to a voter. Kormanik says that clerks may not return unspoiled ballots to voters. Kormanik Br. at 10. And under subsection (5)'s plain text, clerks do not "return" spoiled ballots to voters under subsection (5), either—they "destroy" them. Wis. Stat. § 6.86(6). So under Kormanik's approach, there is no scenario in which any ballot may be "return[ed]" to the voter under subsection (6). Kormanik's approach thus makes surplusage of subsection (6)'s proviso for returns "authorize[d]" by subsection (5).

The Court's temporary injunction order, which largely adopted Kormanik's approach, illustrates the surplusage problem. The Court ordered WEC not to return absentee ballots to voters "except as otherwise provided in Wis. Stat. § 6.87(9)." TI Order. The order contained no equivalent provision for subsection (6)'s separate exception for returns authorized by subsection (5). The order thereby effectively deleted that separate exception from the statute. But the Court may not rewrite a statute—it must interpret it as written. *United Am., LLC v. Wis. Dep't of Transp.*, 2020 WI App 24, ¶ 16, 392 Wis. 2d 335, 944 N.W.2d 38, *aff'd,* 2021 WI 44, 397 Wis. 2d 42, 959 N.W.2d 317.

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Kormanik tries to dodge the surplusage problem by arguing that subsection (6)'s reference to subsection (5) covers subsection (5)'s authorization to "provide electors with a new ballot" if their ballot is spoiled when they first return it. Kormanik Br. at 3–4. But this reading is untenable. On Kormanik's account, all that subsection (5) allows is for a voter to return an already-spoiled ballot and for the clerk to destroy it and provide the voter with a new one. But under subsection (6)'s plain text, neither the voter's delivery of their original ballot to the clerk nor the clerk's giving

of a new ballot to the voter can possibly be the "return" that subsection (6) says subsection (5) authorizes.

Start with the voter's original delivery of their ballot to the clerk. Subsection (5) does refer to this as a "return." But it is, of course, a return *by the voter*, *to the clerk*. And subsection (6) plainly states that subsection (5) authorizes "the municipal clerk [to] return the ballot to the elector," rather than the other way around. So that "return" cannot be the "return" that subsection (6) says subsection (5) allows.

The clerk's giving of a *new* absentee ballot to a voter who delivers a spoiled one cannot be the return that subsection (6) says subsection (5) authorizes, either. Giving a voter a *new* ballot is not a "return" at all. *See Return*, Merriam-Webster, https://www.merriam-webster.com/dictionary/return (last visited July 11, 2023) (defining "return" as "to bring, send, or put back to a former or proper place," or "to send back"). And providing a new ballot certainly is not a return of "*the* ballot" that the voter had mailed or personally delivered to the municipal clerk, which is what subsection (6) says subsection (5) authorizes. *See The*, Merriam-Webster, https://www.merriam-webster.com/dictionary/the (last visited July 11, 2023) (explaining that "the" "indicate[s] that a following noun or noun equivalent is definite or has been previously specified by context or by circumstance").

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WEC's reading of the statute, as set forth in the Challenged Guidance, poses none of these problems. If, as the Guidance provides, voters may ask municipal clerks to return their previously delivered ballots to them, spoil them, and thereby get new absentee ballots, the statute makes sense as a whole: subsection (5) indeed "authorize[s]" municipal clerks to return a previously delivered ballot to a voter, just as subsection (6) says it does. Statutes must "be construed to give effect to each and every word, clause and sentence, and a construction that would result in any portion of a

statute being superfluous should be avoided wherever possible." *Wagner v. Milwaukee Cnty. Election Comm'n*, 2003 WI 103, ¶ 33, 263 Wis. 2d 709, 666 N.W.2d 816 (internal quotation marks omitted). The Court should therefore adopt the only reading of the statute that makes sense of subsections (5) and (6) together—the reading set forth in the Challenged Guidance.

The construction in the Challenged Guidance also avoids a second problem with Kormanik's reading: it renders the second sentence of Subsection 5 entirely superfluous. The first sentence of Section 6.86(5) creates a mandatory obligation for clerks: Upon receiving "a spoiled or damaged absentee ballot," a clerk *must* issue a new ballot to the voter. *Id.* The second sentence further provides: "Any *request* for a replacement ballot under this subsection must be made within the applicable time limits under subs. (1) and (3)(c)." *Id.* (emphasis added). But there is no need for a process through which a voter may "request" a new ballot if (i) a voter may spoil a ballot only before returning it to the clerk and (ii) a clerk who receives a ballot spoiled by the voter has an automatic and immediate obligation to replace it. The voter has nothing to "request" in that circumstance. The only account of the statute that gives effect to every word is WEC's, which properly interprets the second sentence of Section 6.86(5), in light of Section 6.86(6), as a grant of authority to return a voter's previously returned ballot upon that voter's "request" so that the voter can spoil it and receive a replacement ballot by the statutory deadlines set forth above.

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Finally, Kormanik's argument that the Challenged Guidance will cause "cascading violations" of Section 6.88(1) is an unfounded distraction. Section 6.88(1) specifies the procedure for storing absentee ballots in a sealed "carrier envelope" at the office of the municipal clerk and then delivering those ballots to election officials for canvassing. But Section 6.86(6) expressly contemplates that some previously returned absentee ballots may be returned to voters as authorized by Section 6.86(5), and even Kormanik agrees that this may be done as authorized by

Section 6.87(9). If doing what the statute expressly authorizes causes practical problems under Section 6.88(1)—and Kormanik offers no evidence that it does—Kormanik's quarrel is with the legislature, not with WEC.

B. Section 6.87(9) allows voters to request and then spoil ballots with defective certificates.

The second exception identified in Section 6.86(6) is Wis. Stat. § 6.87(9). That provision authorizes the municipal clerk to return an absentee ballot to the voter whenever the clerk "receives an absentee ballot with an improperly completed certificate or with no certificate," provided "time permits the elector to correct the defect and return the ballot within the period authorized under sub. (6)." Wis. Stat. § 6.87(9). Kormanik does not dispute that Section 6.87(9) authorizes municipal clerks to return ballots with defective certificates to voters. Although her Complaint seeks an unqualified "declaration that municipal clerks are prohibited from returning an absentee ballot after it was previously completed and returned to the clerk by the elector who was issued the absentee ballot," Dkt. 2, Compl. at 10, Kormanik now acknowledges that municipal clerks may return such a ballot to the voter where necessary to cure a defective certificate under Section 6.87(9), *see* Kormanik Br. at 3–4.

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Regardless of how the Court resolves the rest of the parties' dispute, it should make one thing clear: under the plain text of Section 6.86(5), once a municipal clerk returns a ballot to a voter for cure under Section 6.87(9), the voter can choose to spoil the ballot instead of curing it. A voter might prefer to spoil the existing ballot and either vote a new absentee ballot—with a new witness—or vote in person instead of absentee. Such a cure procedure is consistent even with Kormanik's narrow reading of Section 6.86(5), because it involves what Kormanik acknowledges is an authorization for clerks to return ballots to voters and it contemplates that the voter will spoil the ballot while it is in the voter's possession, "before returning it" to the municipal clerk to receive

a new one. Kormanik Br. at 8. Such a procedure is also consistent with the Court's temporary injunction. At a minimum, any permanent injunction should preserve this right to request and then spoil a ballot in need of cure.

III. The Challenged Guidance is procedurally valid.

Kormanik also makes two procedural challenges to the Challenged Guidance, but both fail. Kormanik has not shown that the Guidance was issued in violation of Section 5.05(1e)—and, in any case, such a challenge is not properly before the Court because Kormanik did not plead it. And the Challenged Guidance is not an unlawful unpromulgated rule because it satisfies the definition of and standards for nonbinding administrative guidance set out in the Supreme Court's 2020 decision in *Service Employees International Union v. Vos*, 2020 WI 67, 393 Wis. 2d 38, 946 N.W.2d 35 (hereafter "*SEIU*").

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A. Kormanik has not established that the Challenged Guidance was issued in violation of Section 5.05(1e).

Kormanik's first procedural argument—that the Challenged Guidance was issued in violation of Section 5.05(1e) because it did not receive the votes of at least two-thirds of the commission, *see* Kormanik Br. at 12–13—fails for three reasons. First, no such allegation appears anywhere in the Complaint, so Kormanik may not rely on it as a reason to grant her summary judgment. Second, Kormanik does not carry her affirmative evidentiary burden to establish that the Challenged Guidance did not receive a two-thirds vote. Third, Kormanik does not establish, as a matter of law, that Section 5.05(1e) applies to the mere issuance of guidance.

First, Kormanik did not adequately plead her reliance on Section 5.05(1e). Indeed, she did not plead it at all. The operative Complaint, *see* Dkt. 2, makes no allegations about what share of commissioners voted to issue the Challenged Guidance. Nor does it ever cite Section 5.05(1e). This is fatal to the argument. "Every decision on a motion for summary judgment begins with a

review of the complaint to determine whether, on its face, it states a claim for relief." *Butler v. Advance Drainage Sys., Inc.*, 2016 WI 102, ¶ 18, 294 Wis. 2d 397, 717 N.W.2d 760. As relates to any claim based on Section 5.05(1e), Kormanik's Complaint and Motion do not clear even this minimal bar. And, understandably, neither WEC's Answer nor Intervenors' Answers "join issue" with any Section 5.05(1e) argument. *See Butler*, 2016 WI 102, ¶ 18.

Second, Kormanik has not carried her prima facie burden to prove a violation of Section 5.05(1e). As the movant, Kormanik has the burden to come forward with evidence that "establish[es] a prima facie case for summary judgment." *Butler*, 2016 WI 102, ¶ 18. But Kormanik just makes a naked allegation in her brief that the Challenged Guidance was not "promulgated by the body with a two-thirds vote." Kormanik Br. at 12. She then attempts improperly to shift the prima facie burden to WEC, asserting that "WEC's Commissioners have never established that they voted to approve the memoranda at issue in this suit." Kormanik Br. at 13. But WEC had no reason to do so, because Kormanik's summary judgment brief is the first time she has ever raised that issue. Kormanik simply does not offer any evidence to warrant summary judgment on this theory.

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Third, Section 5.05(1e)'s supermajority vote requirement does not apply to the promulgation of nonbinding guidance. Section 5.05(1e) requires in full that: "Any action by the commission, except an action relating to procedure of the commission, requires the affirmative vote of at least two-thirds of the members." Nonbinding guidance is not "action" at all. It "merely explain[s] statutes and rules," constituting the "written record of the executive's thoughts about the law and its execution." *SEIU*, 2020 WI 67, ¶ 106. As the Supreme Court has explained, that sort of "[t]hought must *precede* action." *Id.* (emphasis added). Guidance documents therefore are

not themselves "action" under that term's plain meaning so as to be potentially subject to Section 5.05(1e)'s requirement.

B. The Challenged Guidance is guidance, not an unlawful unpromulgated rule.

The Challenged Guidance is, by definition, not an unpromulgated rule because it does not have the force of law. To qualify as a rule under Wisconsin law, an administrative document must "ha[ve] the force of law." Wis. Stat. § 227.01(13). And guidance documents "do not have the force or effect of law" if "they simply 'explain' statutes and rules, or they 'provide guidance or advice about how the executive branch is 'likely to apply,' a statute or rule." *SEIU*, 2020 WI 67, ¶ 102. That is all that the Challenged Guidance does here—it explains WEC's interpretation of Section 6.86. The "creation and dissemination of guidance documents fall within the executive's core authority," so they are constitutionally exempt from the procedural requirements imposed on rulemaking. *Id.* ¶ 105.

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Kormanik's scattershot citations to supposedly supportive cases are all distinguishable, out-of-date, or both. The pandemic-era emergency order at issue in *Wisconsin Legislature v. Palm*, 2020 WI 42, ¶ 1, 391 Wis. 2d 497, 942 N.W.2d 900, *required* Wisconsinites to stay at home and refrain from travel; shut down all nonessential businesses; and authorized fines or imprisonment as sanctions for noncompliance. The Supreme Court's conclusion that such a mandate was subject to emergency rulemaking procedures, *id.* ¶ 2, does not change the fact that the Challenged Guidance as issue here is mere guidance. *Frankenthal v. Wisconsin Real Estate Brokers' Board*, 3 Wis. 2d 249, 257–58, 89 N.W.2d 825, 826–27 (1958), concerned a policy that the agency was citing to justify its rejection of license applications. The Challenged Guidance, in contrast, is nonbinding, and the statutes it interprets are not administered by WEC at all, but rather by "municipal clerks," Wis. Stat. §§ 6.86(5)–(6), 6.87(9), who are free to follow nonbinding WEC guidance or to ignore it. *Cf. State ex rel. Zignego v. Wis. Elections Comm'n*, 2021 WI 32, ¶ 29, 396

Wis. 2d 391, 957 N.W.2d 208 (explaining that the Wisconsin election statutes confer some duties on local officials and others on WEC). The same fact distinguishes *Cholvin v. Wisconsin Department of Health & Family Services*, 2008 WI App 127, ¶ 29, 313 Wis. 2d 749, 758 N.W.2d 118, which concerned a mandatory agency instruction issued to subordinate officials who had "no discretion as to whether to apply" that instruction. Furthermore, *SEIU* subsequently clarified that an agency's "communications *about* the law," including an agency's nonbinding interpretation of mandatory statutory requirements, still constitute guidance documents, even though the underlying statute is of course mandatory. 2020 WI 67, ¶ 102. And nonbinding guidance on the application of admittedly binding statutes is all that the Challenged Guidance provides here. Finally, *Milwaukee Area Joint Plumbing Apprenticeship Committee v. Department of Industry, Labor & Human Relations*, 172 Wis. 2d 299, 321 n.12, 493 N.W.2d 744, simply holds—in a footnote—that one specific agency manual contained instructions fitting the statutory definition of rules. In short, none of these cases provides a sufficient counterweight to the unambiguous instruction of *SEIU*—a Supreme Court opinion from just three years ago—that WEC is entitled to issue nonbinding guidance like that at issue here without following legislatively created promulgation procedures.

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CONCLUSION

The Court should deny Plaintiff Kormanik's motion for summary judgment and grant Intervenor Rise's motion for summary judgment.

DATED this 12th day of July, 2023

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FILED
07-12-2023
Clerk of Circuit Court
Waukesha County
2022CV001395

STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY
BRANCH 6

NANCY KORMANIK,

Plaintiff,

v.

WISCONSIN ELECTIONS COMMISSION,

Defendant,

DEMOCRATIC NATIONAL COMMITTEE,

RISE, Inc.,

Intervenors.

Case No. 2022CV1395
Case Code: 30701
Declaratory Judgment

Hon. Brad Schimel

INTERVENOR RISE, INC.'S BRIEF IN SUPPORT OF RISE'S MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiff Nancy Kormanik is an individual voter who objects to guidance from the Wisconsin Elections Commission advising that other voters can request the return of their previously delivered absentee ballots so that they can spoil them and vote new absentee ballots or vote in person. Kormanik claims that the guidance is contrary to law and moves for summary judgment, requesting a permanent injunction. But Kormanik's motion fails at the threshold because she lacks standing. She offers no evidence of a concrete injury in fact to her that is traceable to the challenged guidance, instead raising only conjectural and speculative fears of fraud without any evidentiary basis.

Kormanik's challenge also fails on the merits. Her construction of the relevant statutes ignores critical portions of their text, rendering the text surplus, when an alternative, readily available reading makes sense of the statutes as a whole. And Kormanik's last-ditch procedural arguments fare no better. Her claim that the guidance violates Section 5.05(1e) appears nowhere in her Complaint and so is not properly before the Court. And her argument that WEC needed to promulgate the guidance as a rule is foreclosed by a 2020 Supreme Court opinion. The Court should deny Kormanik's motion and enter summary judgment for RISE and WEC on all claims.

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BACKGROUND

Wisconsin law provides that "if an elector mails or personally delivers an absentee ballot to the municipal clerk," the clerk may not "return the ballot to the elector," "*[e]xcept* as authorized in [Wis. Stat. § 6.86(5) and 6.87(9)]." Wis. Stat. § 6.86(6). Section 6.86(5), in turn, *requires* a municipal clerk to issue a new ballot to an elector (or the elector's agent) "whenever an elector [or the elector's agent] returns a spoiled or damaged absentee ballot to the municipal clerk . . . and the clerk believes that the ballot was issued to or on behalf of the elector who is returning it." Wis. Stat. § 6.86(5). Section 6.86(5) also allows voters to make a "request for a replacement ballot"

"within the applicable time limits under subs. (1) and (3)(c)." And Section 6.87(9) provides that "[if] a municipal clerk receives an absentee ballot with an improperly completed certificate or with no certificate, the clerk may return the ballot to the elector . . . whenever time permits the elector to correct the defect and return the ballot."

Consistent with those statutory directives, WEC issued guidance (the "Challenged Guidance") setting forth the process and rules by which voters may "spoil" absentee ballots under Section 6.86(5). Dkt. 3, Compl. Ex. A; Dkt. 4, Compl. Ex. B. The Challenged Guidance governed the August 2022 partisan primary. It is identical to WEC guidance that governed the November 2020 general election, Dkt. 57, Wolfe Aff. Ex. B, and is materially equivalent to the guidance that governed Wisconsin elections from 2014 to 2020, Dkt. 56, Wolfe Aff. Ex. A.

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The Challenged Guidance provides, among other things, that:

- A voter who has returned an absentee ballot may request in writing or in person that their returned absentee ballot be spoiled so they can either (i) vote a new absentee ballot, or (ii) vote on election day.
- A voter cannot appear at the polls on election day and spoil their absentee ballot at that time.
- A voter who has mailed an absentee ballot to the clerk cannot vote at the polls on election day if the voter has not spoiled their ballot by the applicable deadline, even if the clerk has not received the ballot.
- A voter who has received an absentee ballot but has not returned that ballot can vote in person on election day.
- A voter can spoil their election day ballot in person at the polls.

In September 2022, after absentee voting was already underway, Plaintiff Nancy Kormanik brought this lawsuit, seeking a temporary injunction of the Challenged Guidance for the 2022 general election. Kormanik sought sweeping relief far beyond the scope of any alleged deficiency in the Challenged Guidance. Specifically, she sought an order directing WEC to issue "corrected guidance" with new rules for absentee voting, including that (i) a clerk is prohibited from returning

a previously completed and submitted absentee ballot to a voter; (ii) a clerk has no power to "spoil" a voter's previously submitted absentee ballot; and (iii) to spoil an absentee ballot, a voter must spoil the ballot before requesting "a new absentee ballot." Dkt. 22, Pl.'s Am. Notice of Mot. & Mot. for a TRO & Temporary Inj. at 2.

On October 7, 2022, this Court entered a more limited temporary injunction, directing WEC to withdraw the Challenged Guidance and prohibiting WEC from issuing any guidance or communication stating "(i) that a municipal clerk or local election official may return a previously completed and submitted absentee ballot to an elector, except as otherwise provided in Wis. Stat. § 6.87(9); or (ii) that a municipal clerk or local election official is authorized to spoil an absentee ballot on behalf of an elector." Dkt. 106, TI Order at 2.

Kormanik now moves for summary judgment seeking a permanent injunction against the Challenged Guidance.

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LEGAL STANDARD

"Summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Schmidt v. N. States Power Co.*, 2007 WI 136, ¶ 24, 305 Wis. 2d 538, 742 N.W.2d 294. "Any reasonable doubt as to the existence of a genuine issue of material fact must be resolved against the moving party for summary judgment." *Id.* (internal quotation marks omitted).

ARGUMENT

Kormanik's claims fail at the threshold because she lacks standing to challenge WEC's ballot-spoiling guidance. They also fail on the merits. The Challenged Guidance is consistent with the relevant statutes and was properly adopted in accordance with Wisconsin administrative procedure.

I. Kormanik lacks standing.

Kormanik does not have standing. A plaintiff may seek a declaratory judgment as to "the validity of a rule or guidance document" only under Section 227.40(1). To have standing under Chapter 227, Kormanik must show that the Challenged Guidance has caused her an "injury in fact" to an interest that the statutes on which she relies "recognizes or seeks to regulate or protect." *Friends of Black River Forest v. Kohler Co.*, 2022 WI 52, ¶¶ 21, 28, 402 Wis. 2d 587, 977 N.W.2d 342. Neither the Supreme Court's recent, fractured opinion in *Teigen v. Wisconsin Elections Commission*, 2022 WI 64, 403 Wis. 2d 607, 976 N.W.2d 519, nor the Uniform Declaratory Judgments Act, Wis. Stat. § 806.04, offers an alternative basis for standing. And Kormanik's barebones factual submissions do not satisfy the causation or injury-in-fact requirements under Chapter 227. Kormanik therefore lacks standing, entitling Rise to summary judgment on all of Kormanik's claims.

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A. Kormanik must satisfy the Chapter 227 standard for standing.

The usual Chapter 227 standard for standing applies to Kormanik's claims. An action for declaratory judgment under Chapter 227 is "the *exclusive* means of judicial review of the validity of a rule or guidance document." Wis. Stat. § 227.40(1) (emphasis added). A plaintiff may bring such an action "*only* when it appears from the complaint and the supporting evidence that the rule or guidance document or its threatened application interferes with or impairs, or threatens to interfere with or impair, the legal rights and privileges of the plaintiff." Wis. Stat. § 227.40(1) (emphasis added); *see also Teigen*, 2022 WI 64, ¶ 159 (Hagedorn, J., concurring) ("In legal parlance [the Wis. Stat. § 227.40(1)] harm requirement is called standing."). The Wisconsin Supreme Court has developed a two-part test for assessing a plaintiff's standing to bring a Chapter 227 administrative-law challenge to an agency action: the plaintiff must show that (i) the agency

action has caused her an "injury in fact" to (ii) an interest that the statutes on which she relies "recognizes or seeks to regulate or protect." *Black River Forest*, 2022 WI 52, ¶¶ 21, 28.

As the Court of Appeals has expressly recognized, the Supreme Court's decision in *Teigen* did not alter this standard. At least four justices in *Teigen* agreed that the *Black River Forest* standard governs Section 227.40(1) challenges to the validity of rules or guidance documents just as much as it applies in other actions arising under Chapter 227. *See Teigen*, 2022 WI 64, ¶ 19 (lead opinion) (citing *Black River Forest*); *id.* ¶ 159 (Hagedorn, J., concurring); *cf. id.* at ¶¶ 210–19 (Walsh Bradley, J., dissenting) (concluding that the *Teigen* plaintiffs likely lacked standing without discussing the applicable standard). But a majority of justices *rejected* the portion of the lead opinion in *Teigen* that purported to expand Chapter 227 standing to voter plaintiffs like Kormanik based on a vote-pollution theory. *See Teigen*, 2022 WI 64 ¶¶ 21, 24–25 (lead opinion). Justice Hagedorn, whose vote was controlling, called the lead opinion's standing analysis "unpersuasive" and pointed out that it did not "garner the support of four members of this court." *Id.* ¶ 167 (Hagedorn, J., concurring in part); *see id.* ¶¶ 210–15 (Walsh Bradley, J., dissenting). Justice Hagedorn concluded that the plaintiffs had standing under a different theory based on a different statute—Section 5.06—but all *six* other justices rejected that view. *See id.* ¶¶ 32–34 (lead opinion); *id.* ¶¶ 210–15 (Walsh Bradley, J., dissenting). The lead opinion's novel theory extending standing to voters whose only alleged injury is vote pollution drew only three votes.

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Because no view on standing garnered the support of a majority of justices, *Teigen* did not change Wisconsin's law of voter standing—as the Court of Appeals recently concluded in another case. *See Rise, Inc. v. Wisconsin Elections Comm'n*, No. 2022AP1838, unpublished slip op. ¶ 27

n.6 (Ct. App. July 7, 2023).[1] Thus, Kormanik must still satisfy the broader *Black River Forest* standard for Chapter 227 standing by producing particularized evidence of an injury in fact *to her* caused by the Challenged Guidance.

Kormanik's brief cites the Uniform Declaratory Judgments Act, Wis. Stat. § 806.04, rather than Chapter 227 as the basis for her declaratory judgment request. *See* Dkt. 132, Pl.'s Br. ISO Mot. for Summ. J. & Declaratory J. ("Kormanik Br.") at 5. But Section 227.40(1) provides the "exclusive" means of judicial review of the validity of a guidance document; Section 806.04(1) concerns the "construction or validity [of] . . . [an] instrument, statute, ordinance, contract or franchise," *not* a rule or guidance document. Kormanik must therefore satisfy the standing requirements that accompany that claim under the *Black River Forest* test.

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B. Kormanik has not shown and cannot show that the Challenged Guidance has caused her an injury in fact.

Kormanik's meager factual submissions do not satisfy the first requirement for Chapter 227 standing under *Black River Forest*: an "injury in fact" to the plaintiff that is "a direct result of the agency action" and is not "hypothetical nor conjectural." *Black River Forest*, 2022 WI 52, ¶ 21 (internal quotation marks omitted). Kormanik makes no such showing, and it is hard to see how

[1] A Wisconsin Supreme Court opinion creates a controlling rule of law only when a majority endorses the rule in question. *Compare State v. Dowe*, 120 Wis. 2d 192, 194, 352 N.W.2d 660, 662 (1984) ("It is a general principle of appellate practice that a majority must have agreed on a particular point for it to be considered the opinion of the court."), *with Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." (internal quotation marks omitted)); *see also State v. Lynch*, 2016 WI 66, ¶ 145, 371 Wis. 2d 1, 885 N.W.2d 89 (Abrahamson & Walsh Bradley, JJ., concurring in part) ("[T]he precedential effect (or lack thereof) of a 'lead opinion' is uncertain."); *Johnson v. Wisconsin Elections Comm'n*, 2022 WI 14, ¶ 243, 400 Wis. 2d 626, 971 N.W.2d 402 (Grassl Bradley, J., dissenting) ("This court has never applied the *Marks* Rule to interpret its own precedent.").

she could possibly do so. She contends that the Challenged Guidance unlawfully allows voters to spoil their ballots and vote new ones, but even on her own account Kormanik is free to decline that option. And Kormanik herself is not injured when other voters spoil and revote their own ballots.

Kormanik argues that the Challenged Guidance creates a risk to her and "Wisconsin absentee voters in general" of "potential disenfranchisement by identity theft and voter fraud," Kormanik Br. at 17. But Kormanik offers no factual support for the conclusion that identify theft or fraud is at all likely. In full, Kormanik attests in her affidavit as follows: (i) she is a registered voter in Waukesha County; (ii) she has voted by absentee ballot in "prior elections"; (iii) she voted by absentee ballot in August and November 2022 and in April 2023; and (iv) she intends to vote "in the upcoming elections in the State of Wisconsin by absentee ballot and return such completed absentee ballots to my municipal clerk in compliance with Wisconsin law." Dkt. 131, Aff. of Nancy Kormanik at 1–2. None of those assertions demonstrates that Kormanik faces any actual risk of identity theft or fraud as a direct result of the challenged agency action. Nor has she presented any evidence of a generalized risk of fraud, identity theft, or confusion traceable to the guidance. And although Kormanik's brief also refers to "confusion and administrative complication," Kormanik Br. at 3, she offers no evidence of either. As a result, Kormanik's claims of harm are worse than being entirely "hypothetical [and] conjectural," *Black River Forest*, 2022 WI 52, ¶ 21, they are wholly and utterly conclusory, and cannot confer standing. Summary judgment is "the put up or shut up moment in a lawsuit, when a party must show what evidence it has that would convince a trier of fact to accept its version of the events." *Springer v. Durflinger*, 518 F.3d 479, 484 (7th Cir. 2008) (cleaned up). Kormanik's account of her injury falls far short of that mark.

Without standing, Kormanik's claims must fail. As explained, Section 227.40(1) provides that a court "shall render a declaratory judgment" in cases like this one "*only* when it appears from

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the complaint and the supporting evidence that the rule or guidance document or its threatened application interferes with or impairs, or threatens to interfere with or impair, the legal rights and privileges of the plaintiff" (emphasis added). Because Kormanik has not made and cannot make such a showing, the Court should grant WEC's and Intervenors' motions for summary judgment. At a minimum, because Kormanik has not established a necessary prerequisite to her claims, she has failed to make out her prima facie case and the Court should deny her motion.

II. The Challenged Guidance does not violate the Wisconsin election statutes.

Kormanik's claims also fail on the merits because the Challenged Guidance is consistent with Wisconsin law. Read together, Sections 6.86(5) and (6) allow voters to ask for their previously delivered absentee ballots back, spoil them, and return the now-spoiled ballots for replacement ones. Kormanik's contrary argument is inconsistent with the provisions' plain language. And at an absolute minimum, the Court should make clear that—as was the case under the Court's temporary injunction—voters whose ballots will be rejected for incomplete certificates can get those ballots back under Section 6.87(9), spoil them, and obtain replacement ballots instead of curing their certificates.

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A. Sections 6.86(5) and (6) together authorize municipal clerks to return absentee ballots to voters so the voters can spoil them and request replacements.

It is undisputed that Section 6.86(5) allows voters who have not yet returned their absentee ballots to spoil them, return the spoiled ballots to their municipal clerks, and request new ones. But what if a voter wants to spoil a ballot after returning it? Kormanik argues that Section 6.86(5) demands the ballot be already spoiled before it is returned. But even accepting that argument, a possibility remains: can the voter get their ballot back, spoil it, and *then* return the spoiled ballot in exchange for a new one under Section 6.86(5)? The plain text of Section 6.86(5) and (6)

authorizes voters to do just that, just as the Challenged Guidance allows. Kormanik's claims therefore fail on the merits, and Defendants are entitled to summary judgment.

The key language is in Section 6.86(6), which provides that "[e]xcept as authorized in sub. (5) and s. 6.87(9), if an elector mails or personally delivers an absentee ballot to the municipal clerk, the municipal clerk shall not return the ballot to the elector." This language does two things: (i) it establishes a general rule that municipal clerks usually may not give voters back their already delivered absentee ballots, and (ii) it expressly states that two other statutory provisions—Sections 6.86(5) and 6.87(9)—*each* "authorize[]" municipal clerks to do just that.

For this language to make sense, Section 6.86(5) must in fact sometimes "authoriz[e]" municipal clerks to give voters back their already delivered absentee ballots. Such a reading of Section 6.86(5) is readily available. Section 6.86(5) provides:

> Whenever an elector returns a spoiled or damaged absentee ballot to the municipal clerk, . . . and the clerk believes that the ballot was issued to or on behalf of the elector who is returning it, the clerk shall issue a new ballot to the elector or elector's agent, and shall destroy the spoiled or damaged ballot. Any request for a replacement ballot under this subsection must be made within the applicable time limits under subs. (1) and (3)(c).

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This language is perfectly consistent with a voter going to their municipal clerk and "request[ing] a replacement ballot under" subsection (5) by getting their original ballot back, spoiling it, and returning the now-spoiled ballot for a replacement. This scenario does not raise the temporal issues that Kormanik describes, Kormanik Br. at 8–9, because it requires the voter to "return[]" an already "spoiled or damaged" ballot—after getting the ballot back from the clerk and spoiling it—before receiving a new one. Wis. Stat. § 6.86(5). And this reading is consistent with subsection (6), too, because returns "authorized in sub. (5)" are expressly exempted from subsection (6)'s general prohibition on clerks giving voters back their already voted absentee ballots. Kormanik Br. at 8.

In contrast, Kormanik's reading is impossible to square with subsection (6)'s express statement that subsection (5) sometimes "authorize[s]" clerks to give voters back their previously delivered ballots. According to Kormanik's construction, subsection (5) would *never* authorize a municipal clerk to return a previously delivered ballot to a voter. Kormanik says that clerks may not return unspoiled ballots to voters. Kormanik Br. at 10. And under subsection (5)'s plain text, clerks do not "return" spoiled ballots to voters under subsection (5), either—they "destroy" them. Wis. Stat. § 6.86(6). So under Kormanik's approach, there is no scenario in which any ballot may be "return[ed]" to the voter under subsection (6). Kormanik's approach thus makes surplusage of subsection (6)'s proviso for returns "authorize[d]" by subsection (5).

The Court's temporary injunction order, which largely adopted Kormanik's approach, illustrates the surplusage problem. The Court ordered WEC not to return absentee ballots to voters "except as otherwise provided in Wis. Stat. § 6.87(9)." TI Order. The order contained no equivalent provision for subsection (6)'s separate exception for returns authorized by subsection (5). The order thereby effectively deleted that separate exception from the statute. But the Court may not rewrite a statute—it must interpret it as written. *United Am., LLC v. Wis. Dep't of Transp.*, 2020 WI App 24, ¶ 16, 392 Wis. 2d 335, 944 N.W.2d 38, *aff'd,* 2021 WI 44, 397 Wis. 2d 42, 959 N.W.2d 317.

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Kormanik tries to dodge the surplusage problem by arguing that subsection (6)'s reference to subsection (5) covers subsection (5)'s authorization to "provide electors with a new ballot" if their ballot is spoiled when they first return it. Kormanik Br. at 3–4. But this reading is untenable. On Kormanik's account, all that subsection (5) allows is for a voter to return an already-spoiled ballot and for the clerk to destroy it and provide the voter with a new one. But under subsection (6)'s plain text, neither the voter's delivery of their original ballot to the clerk nor the clerk's giving

of a new ballot to the voter can possibly be the "return" that subsection (6) says subsection (5) authorizes.

Start with the voter's original delivery of their ballot to the clerk. Subsection (5) does refer to this as a "return." But it is, of course, a return *by the voter*, *to the clerk*. And subsection (6) plainly states that subsection (5) authorizes "the municipal clerk [to] return the ballot to the elector," rather than the other way around. So that "return" cannot be the "return" that subsection (6) says subsection (5) allows.

The clerk's giving of a *new* absentee ballot to a voter who delivers a spoiled one cannot be the return that subsection (6) says subsection (5) authorizes, either. Giving a voter a *new* ballot is not a "return" at all. *See Return*, Merriam-Webster, https://www.merriam-webster.com/dictionary/return (last visited July 11, 2023) (defining "return" as "to bring, send, or put back to a former or proper place," or "to send back"). And providing a new ballot certainly is not a return of "*the* ballot" that the voter had mailed or personally delivered to the municipal clerk, which is what subsection (6) says subsection (5) authorizes. *See The*, Merriam-Webster, https://www.merriam-webster.com/dictionary/the (last visited July 11, 2023) (explaining that "the" "indicate[s] that a following noun or noun equivalent is definite or has been previously specified by context or by circumstance").

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WEC's reading of the statute, as set forth in the Challenged Guidance, poses none of these problems. If, as the Guidance provides, voters may ask municipal clerks to return their previously delivered ballots to them, spoil them, and thereby get new absentee ballots, the statute makes sense as a whole: subsection (5) indeed "authorize[s]" municipal clerks to return a previously delivered ballot to a voter, just as subsection (6) says it does. Statutes must "be construed to give effect to each and every word, clause and sentence, and a construction that would result in any portion of a

statute being superfluous should be avoided wherever possible." *Wagner v. Milwaukee Cnty. Election Comm'n*, 2003 WI 103, ¶ 33, 263 Wis. 2d 709, 666 N.W.2d 816 (internal quotation marks omitted). The Court should therefore adopt the only reading of the statute that makes sense of subsections (5) and (6) together—the reading set forth in the Challenged Guidance.

The construction in the Challenged Guidance also avoids a second problem with Kormanik's reading: it renders the second sentence of Subsection 5 entirely superfluous. The first sentence of Section 6.86(5) creates a mandatory obligation for clerks: Upon receiving "a spoiled or damaged absentee ballot," a clerk *must* issue a new ballot to the voter. *Id.* The second sentence further provides: "Any *request* for a replacement ballot under this subsection must be made within the applicable time limits under subs. (1) and (3)(c)." *Id.* (emphasis added). But there is no need for a process through which a voter may "request" a new ballot if (i) a voter may spoil a ballot only before returning it to the clerk and (ii) a clerk who receives a ballot spoiled by the voter has an automatic and immediate obligation to replace it. The voter has nothing to "request" in that circumstance. The only account of the statute that gives effect to every word is WEC's, which properly interprets the second sentence of Section 6.86(5), in light of Section 6.86(6), as a grant of authority to return a voter's previously returned ballot upon that voter's "request" so that the voter can spoil it and receive a replacement ballot by the statutory deadlines set forth above.

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Finally, Kormanik's argument that the Challenged Guidance will cause "cascading violations" of Section 6.88(1) is an unfounded distraction. Section 6.88(1) specifies the procedure for storing absentee ballots in a sealed "carrier envelope" at the office of the municipal clerk and then delivering those ballots to election officials for canvassing. But Section 6.86(6) expressly contemplates that some previously returned absentee ballots may be returned to voters as authorized by Section 6.86(5), and even Kormanik agrees that this may be done as authorized by

Section 6.87(9). If doing what the statute expressly authorizes causes practical problems under Section 6.88(1)—and Kormanik offers no evidence that it does—Kormanik's quarrel is with the legislature, not with WEC.

B. Section 6.87(9) allows voters to request and then spoil ballots with defective certificates.

The second exception identified in Section 6.86(6) is Wis. Stat. § 6.87(9). That provision authorizes the municipal clerk to return an absentee ballot to the voter whenever the clerk "receives an absentee ballot with an improperly completed certificate or with no certificate," provided "time permits the elector to correct the defect and return the ballot within the period authorized under sub. (6)." Wis. Stat. § 6.87(9). Kormanik does not dispute that Section 6.87(9) authorizes municipal clerks to return ballots with defective certificates to voters. Although her Complaint seeks an unqualified "declaration that municipal clerks are prohibited from returning an absentee ballot after it was previously completed and returned to the clerk by the elector who was issued the absentee ballot," Dkt. 2, Compl. at 10, Kormanik now acknowledges that municipal clerks may return such a ballot to the voter where necessary to cure a defective certificate under Section 6.87(9), *see* Kormanik Br. at 3–4.

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Regardless of how the Court resolves the rest of the parties' dispute, it should make one thing clear: under the plain text of Section 6.86(5), once a municipal clerk returns a ballot to a voter for cure under Section 6.87(9), the voter can choose to spoil the ballot instead of curing it. A voter might prefer to spoil the existing ballot and either vote a new absentee ballot—with a new witness—or vote in person instead of absentee. Such a cure procedure is consistent even with Kormanik's narrow reading of Section 6.86(5), because it involves what Kormanik acknowledges is an authorization for clerks to return ballots to voters and it contemplates that the voter will spoil the ballot while it is in the voter's possession, "before returning it" to the municipal clerk to receive

a new one. Kormanik Br. at 8. Such a procedure is also consistent with the Court's temporary injunction. At a minimum, any permanent injunction should preserve this right to request and then spoil a ballot in need of cure.

III. The Challenged Guidance is procedurally valid.

Kormanik also makes two procedural challenges to the Challenged Guidance, but both fail. Kormanik has not shown that the Guidance was issued in violation of Section 5.05(1e)—and, in any case, such a challenge is not properly before the Court because Kormanik did not plead it. And the Challenged Guidance is not an unlawful unpromulgated rule because it satisfies the definition of and standards for nonbinding administrative guidance set out in the Supreme Court's 2020 decision in *Service Employees International Union v. Vos*, 2020 WI 67, 393 Wis. 2d 38, 946 N.W.2d 35 (hereafter "*SEIU*").

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A. Kormanik has not established that the Challenged Guidance was issued in violation of Section 5.05(1e).

Kormanik's first procedural argument—that the Challenged Guidance was issued in violation of Section 5.05(1e) because it did not receive the votes of at least two-thirds of the commission, *see* Kormanik Br. at 12–13—fails for three reasons. First, no such allegation appears anywhere in the Complaint, so Kormanik may not rely on it as a reason to grant her summary judgment. Second, Kormanik does not carry her affirmative evidentiary burden to establish that the Challenged Guidance did not receive a two-thirds vote. Third, Kormanik does not establish, as a matter of law, that Section 5.05(1e) applies to the mere issuance of guidance.

First, Kormanik did not adequately plead her reliance on Section 5.05(1e). Indeed, she did not plead it at all. The operative Complaint, *see* Dkt. 2, makes no allegations about what share of commissioners voted to issue the Challenged Guidance. Nor does it ever cite Section 5.05(1e). This is fatal to the argument. "Every decision on a motion for summary judgment begins with a

review of the complaint to determine whether, on its face, it states a claim for relief." *Butler v. Advance Drainage Sys., Inc.*, 2016 WI 102, ¶ 18, 294 Wis. 2d 397, 717 N.W.2d 760. As relates to any claim based on Section 5.05(1e), Kormanik's Complaint and Motion do not clear even this minimal bar. And, understandably, neither WEC's Answer nor Intervenors' Answers "join issue" with any Section 5.05(1e) argument. *See Butler*, 2016 WI 102, ¶ 18.

Second, Kormanik has not carried her prima facie burden to prove a violation of Section 5.05(1e). As the movant, Kormanik has the burden to come forward with evidence that "establish[es] a prima facie case for summary judgment." *Butler*, 2016 WI 102, ¶ 18. But Kormanik just makes a naked allegation in her brief that the Challenged Guidance was not "promulgated by the body with a two-thirds vote." Kormanik Br. at 12. She then attempts improperly to shift the prima facie burden to WEC, asserting that "WEC's Commissioners have never established that they voted to approve the memoranda at issue in this suit." Kormanik Br. at 13. But WEC had no reason to do so, because Kormanik's summary judgment brief is the first time she has ever raised that issue. Kormanik simply does not offer any evidence to warrant summary judgment on this theory.

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Third, Section 5.05(1e)'s supermajority vote requirement does not apply to the promulgation of nonbinding guidance. Section 5.05(1e) requires in full that: "Any action by the commission, except an action relating to procedure of the commission, requires the affirmative vote of at least two-thirds of the members." Nonbinding guidance is not "action" at all. It "merely explain[s] statutes and rules," constituting the "written record of the executive's thoughts about the law and its execution." *SEIU*, 2020 WI 67, ¶ 106. As the Supreme Court has explained, that sort of "[t]hought must *precede* action." *Id.* (emphasis added). Guidance documents therefore are

not themselves "action" under that term's plain meaning so as to be potentially subject to Section 5.05(1e)'s requirement.

B. The Challenged Guidance is guidance, not an unlawful unpromulgated rule.

The Challenged Guidance is, by definition, not an unpromulgated rule because it does not have the force of law. To qualify as a rule under Wisconsin law, an administrative document must "ha[ve] the force of law." Wis. Stat. § 227.01(13). And guidance documents "do not have the force or effect of law" if "they simply 'explain' statutes and rules, or they 'provide guidance or advice about how the executive branch is 'likely to apply,' a statute or rule." *SEIU*, 2020 WI 67, ¶ 102. That is all that the Challenged Guidance does here—it explains WEC's interpretation of Section 6.86. The "creation and dissemination of guidance documents fall within the executive's core authority," so they are constitutionally exempt from the procedural requirements imposed on rulemaking. *Id.* ¶ 105.

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Kormanik's scattershot citations to supposedly supportive cases are all distinguishable, out-of-date, or both. The pandemic-era emergency order at issue in *Wisconsin Legislature v. Palm*, 2020 WI 42, ¶ 1, 391 Wis. 2d 497, 942 N.W.2d 900, *required* Wisconsinites to stay at home and refrain from travel; shut down all nonessential businesses; and authorized fines or imprisonment as sanctions for noncompliance. The Supreme Court's conclusion that such a mandate was subject to emergency rulemaking procedures, *id.* ¶ 2, does not change the fact that the Challenged Guidance as issue here is mere guidance. *Frankenthal v. Wisconsin Real Estate Brokers' Board*, 3 Wis. 2d 249, 257–58, 89 N.W.2d 825, 826–27 (1958), concerned a policy that the agency was citing to justify its rejection of license applications. The Challenged Guidance, in contrast, is nonbinding, and the statutes it interprets are not administered by WEC at all, but rather by "municipal clerks," Wis. Stat. §§ 6.86(5)–(6), 6.87(9), who are free to follow nonbinding WEC guidance or to ignore it. *Cf. State ex rel. Zignego v. Wis. Elections Comm'n*, 2021 WI 32, ¶ 29, 396

Wis. 2d 391, 957 N.W.2d 208 (explaining that the Wisconsin election statutes confer some duties on local officials and others on WEC). The same fact distinguishes *Cholvin v. Wisconsin Department of Health & Family Services*, 2008 WI App 127, ¶ 29, 313 Wis. 2d 749, 758 N.W.2d 118, which concerned a mandatory agency instruction issued to subordinate officials who had "no discretion as to whether to apply" that instruction. Furthermore, *SEIU* subsequently clarified that an agency's "communications *about* the law," including an agency's nonbinding interpretation of mandatory statutory requirements, still constitute guidance documents, even though the underlying statute is of course mandatory. 2020 WI 67, ¶ 102. And nonbinding guidance on the application of admittedly binding statutes is all that the Challenged Guidance provides here. Finally, *Milwaukee Area Joint Plumbing Apprenticeship Committee v. Department of Industry, Labor & Human Relations*, 172 Wis. 2d 299, 321 n.12, 493 N.W.2d 744, simply holds—in a footnote—that one specific agency manual contained instructions fitting the statutory definition of rules. In short, none of these cases provides a sufficient counterweight to the unambiguous instruction of *SEIU*—a Supreme Court opinion from just three years ago—that WEC is entitled to issue nonbinding guidance like that at issue here without following legislatively created promulgation procedures.

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CONCLUSION

The Court should deny Plaintiff Kormanik's motion for summary judgment and grant Intervenor Rise's motion for summary judgment.

DATED this 12th day of July, 2023

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FILED
07-12-2023
Clerk of Circuit Court
Waukesha County
2022CV001395

STATE OF WISCONSIN CIRCUIT COURT BRANCH 6 WAUKESHA COUNTY

NANCY KORMANIK,

Plaintiff,

v.

WISCONSIN ELECTIONS COMMISSION,

Defendant,

DEMOCRATIC NATIONAL COMMITTEE,

RISE, Inc.,

Intervenors.

Case No. 2022CV1395
Case Code: 30701
Declaratory Judgment

Hon. Brad Schimel

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RISE, INC.'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

PLEASE TAKE NOTICE that Intervenor RISE, Inc., by and through its undersigned attorneys, hereby moves the Court to enter summary judgment on all counts against Plaintiff Nancy Kormanik. RISE sets out the grounds for this Motion in the accompanying Brief in Support and Affidavit.

PLEASE TAKE FURTHER NOTICE that RISE will present its Motion to the Honorable Brad D. Schimel at the Waukesha County Courthouse, 515 West Moreland Blvd., Waukesha, WI, at 1:30 pm on August 28, 2023.

DATED this 12th day of July, 2023.

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