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STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY
BRANCH 6

NANCY KORMANIK,

Plaintiff,

v. Case No. 22-CV-1395

WISCONSIN ELECTIONS COMMISSION,

Defendant,
and

DEMOCRATIC NATIONAL COMMITTEE and RISE, INC.,

Intervenors.

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BRIEF IN SUPPORT OF DEFENDANT WISCONSIN ELECTIONS COMMISSION'S MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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Several days before the August 9, 2022, partisan primary, defendant Wisconsin Elections Commission issued a memorandum and press release clarifying spoiled absentee ballot procedures for municipal clerks and electors, in response to public confusion. The memorandum and press release provided that if electors erred in marking their absentee ballot or later changed their mind, they may inform the clerk that their ballot is spoiled and receive a replacement to correct their vote. This included spoiled absentee ballots that had already been returned to the clerks.

Plaintiff Nancy Kormanik, an elector from Waukesha County, challenges the validity of the memorandum and press release. She incorrectly contends that the memorandum and press release contravene Wisconsin's absentee voting law; were improperly issued without a two-thirds affirmative vote of the commissioners; and are unpromulgated rules in violation of Wisconsin's Administrative Procedure Act. She also seeks a permanent injunction against the memorandum and press release.

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The Commission's motion for summary judgment should be granted, and Kormanik's should be denied. As a threshold matter, the Court lacks competency over the case because Kormanik failed to timely serve her pleadings on the Legislature's joint committee for review of administrative rules ("JCRAR"). Even if the Court could proceed, the statutory language of Wisconsin's absentee ballot provisions permits an elector to spoil an absentee

ballot, even if it has already been returned to the clerk. The Commission was not required to hold a vote of commissioners before issuing the press release and memorandum. And the memorandum and press release do not meet the definition of an administrative rule subject to formal promulgation. Finally, Kormanik is not entitled to the extraordinary remedy of a permanent injunction because she cannot show a genuine risk of irreparable harm.

NATURE OF THE CASE

This case is a declaratory judgment action commenced by Plaintiff Nancy Kormanik, an elector from Waukesha County, against the Wisconsin Elections Commission, filed pursuant to Wis. Stat. §§ 227.40 and 806.04. Kormanik has obtained temporary injunctive relief and now seeks permanent relief.

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RELEVANT LAW

Wisconsin's absentee voting statute affirms the constitutional right of voting, but states that voting by absentee ballot, in contrast, is a privilege exercised outside of the traditional protections of the polling place. Wis. Stat. § 6.84(1). An absentee elector is a qualified voter who is unable or unwilling to appear at the polling place to vote on election day. Wis. Stat. § 6.85(1).

Wisconsin Stat. § 6.86(5) permits an elector who spoils or damages her initial absentee ballot to receive a replacement ballot. It provides: "[w]henever 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 . . . and destroy the spoiled or damaged ballot." Wis. Stat. § 6.86(5). An elector must request a replacement for a spoiled ballot within prescribed statutory deadlines. *Id*. An elector who has returned an absentee ballot may not appear at the polling place on election day, request a replacement for a spoiled ballot for the first time, and vote in person. Wis. Stat. § 6.86(6).

Under Wis. Stat. § 6.86(6), once an elector has submitted an absentee ballot to the clerk, the clerk may not return the ballot to the elector, with two exceptions. First, a clerk may return a ballot to an elector to correct an incomplete or improper certification on a sealed absentee ballot envelope. Wis. Stat. §§ 6.86(6), 6.87(9). Second, a clerk may issue a replacement ballot for a spoiled or damaged ballot under Wis. Stat. § 6.86(5) and destroy the spoiled or damaged ballot. Wis. Stat. § 6.86(6).

When an absentee ballot arrives at the clerk's office, the clerk is required to place it, unopened, into a securely-sealed carrier envelope that is endorsed and meets other requirements. Wis. Stat. § 6.88(1). The clerk must keep the ballot in the clerk's office or an alternate site. *Id*. On or before election day, the clerk "shall enclose the [carrier] envelope in a package and deliver the package to the election inspectors of the proper ward or election district." Wis. Stat. § 6.88(2). Elections officials must open the carrier envelopes and cast the

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absentee ballots on election day at the polling place, in the same room where in-person votes are cast. Wis. Stat. § 6.88(3)(a).

In addition to absentee electors, election-day electors may also obtain a replacement for a ballot spoiled at the polling place. Wisconsin Stat. § 6.80(2)(c) provides that an elector who "by accident or mistake, spoils or erroneously prepares a ballot may receive another, by returning the defective ballot, but not to exceed 3 ballots in all."

Wisconsin's absentee voting provisions are mandatory. Wis. Stat. § 6.84(2). Ballots cast in violation of the statutory procedures may not be counted, and ballots counted in violation of the statutory procedures may not be included the certified results of an election. *Id.*

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RELEVANT UNDISPUTED FACTS

There are no material disputed facts. However, several of Kormanik's proposed facts, while immaterial, are argumentative, and the Commission disputes them. (See, e.g., Doc. 132:2.) Below are the relevant material facts; others will follow in the Argument section of the brief.

On August 1, 2022, several days before the August 9 partisan primary, the Commission issued a memorandum addressed to Wisconsin municipal clerks titled "Spoiling Absentee Guidance for the 2022 Partisan Primary." (Doc. 130:36–39 Ex. C.) The memorandum states that it was issued in response to questions from the public about "damaged ballots, making an error when

voting the ballot (such as filling in the wrong circle or voting for too many candidates), or voters changing their mind after returning their absentee ballots." (Doc. 130:36–37.) It states: "Absentee voters can request to spoil their absentee ballot and have another ballot issued as long as the appropriate deadline to request the new absentee ballot has not passed." (Doc. 130:36.) The memorandum also explains the applicable deadlines, rules, and procedures for spoiled ballots. (Doc. 130:36–37.)

On August 2, 2022, the Commission issued a press release containing similar information titled "Rules about 'Spoiling' Your Ballot." (Doc. 130:40–41 Ex. B.) The press release explained that a "spoiled ballot cancels an already returned absentee ballot so the voter can request another absentee ballot by mail or vote in person at their clerk's office or at the polling place on Election Day." (Doc. 130:40.) The press release also provided answers to common questions about spoiled ballots and explains the safeguards in place to prevent an elector from using the process to vote twice. (Doc. 130:40–41.)

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PROCEDURAL BACKGROUND

On September 23, 2022, Kormanik filed a complaint for declaratory and injunctive relief against the Commission to invalidate the spoiled ballot memorandum and press release (the "guidance"). (Doc. 2.) The complaint alleged that the guidance contravenes Wisconsin election statutes and was issued in violation of Wisconsin's Administrative Procedure Act. (Doc. 2:7.)

Kormanik also sought to temporarily enjoin the guidance on grounds that it would expose her to voter disenfranchisement, fraud, and identify theft. (Doc. 16:10.)

This Court held a hearing on Kormanik's temporary injunction motion on October 5, 2022. (Doc. 104.) At the hearing, the Court temporarily enjoined the guidance, reasoning that Kormanik would likely succeed on the merits because the relevant absentee ballot statutes only permit an elector to spoil a ballot before or while it is being returned. (Doc. 104:89.) The Court also reasoned that Kormanik could suffer irreparable harm without injunctive relief because the guidance created unfair confusion for clerks and could result in improper votes being counted, diluting the legitimate votes of other electors. (Doc. 104:90–92.) The Commission moved to stay the order and the Court denied the request. (Doc. 104:119.) The Court also granted two motions to intervene filed by the Democratic National Committee and Rise, Inc. (Doc. 104:8.)

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Two days later, the Court issued a written order for a temporary injunction. (Doc. 106.) The injunction prohibited the Commission from communicating or publicly disseminating—to clerks, local elections officials, or the public—information or guidance about spoiled ballots that is contrary to its reading of applicable absentee ballot statutes. (Doc. 106:1–2.)

The injunction also required the Commission to notify all clerks and local elections officials that the guidance had been withdrawn. (Doc. 106:2–3.)

The intervenors petitioned for leave to appeal the court's injunction, and the Commission joined the petitions. (Doc. 102.) The court of appeals temporarily stayed the injunction pending its decision on the leave-to-appeal petitions. (Doc. 108.) On October 27, the court of appeals denied the petition for leave to appeal, concluding that "the circuit court's interpretation of the relevant statute appears reasonable." (Doc. 111:2–3; 112:2–3.) The temporary injunction against the guidance went into effect on October 28, 2022. (Doc 112:4.) At that time, the Commission withdrew the memorandum and removed the press release from its website.

On June 2, 2023, Kormanik filed a motion for summary judgment and a permanent injunction. (Doc. 133.) A motion hearing is scheduled for August 28. (Doc. 129.)

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SUMMARY JUDGMENT STANDARD

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

ARGUMENT

This Court should grant summary judgment to the Commission and deny Kormanik's motion. As a threshold matter, the law is clear that this Court lacks competency to proceed to the merits because Kormanik failed to timely serve JCRAR as required by law. Setting aside this dispositive service failure, the now-withdrawn Commission guidance about spoiling absentee ballots conformed with state law. An absentee elector may spoil her ballot after the municipal clerk receives it and obtain a replacement. The Commission was not required to hold a two-thirds affirmative vote before issuing the guidance. And the guidance is not an unpromulgated administrative rule because it does not have the effect of law. Lastly, even if this Court concluded that the guidance is unlawful, Kormanik would not be entitled to permanent injunctive relief because she has failed to show the required irreparable injury.

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I. The Court lacks competency over Kormanik's claims because she failed to comply with the procedural requirements of Wis. Stat. § 227.40.

Kormanik's case faces the threshold problem that the Court lacks competency over her claims. As an initial matter, Kormanik challenges the validity of the guidance, which she may do only under Wis. Stat. § 227.40. And Wis. Stat. § 227.40 requires service of such a claim on JCRAR.

Wisconsin Stat. § 227.40 makes clear that "the exclusive means of judicial review of the validity of a rule or guidance document shall be an action

for declaratory judgment as to the validity of the rule or guidance document brought in the circuit court for the county where the party asserting the invalidity of the rule or guidance document resides." And Wis. Stat. § 227.40 has procedural requirements that Kormanik has not complied with. Specifically, a plaintiff who brings a Wis. Stat. § 227.40 challenge must timely serve a copy of the pleadings on the JCRAR, which enables JCRAR to become a party to the case. Wis. Stat. § 227.40(5). A plaintiff must serve JCRAR within ninety days of filing the complaint. *See Richards v. Young*, 150 Wis. 2d 549, 557, 441 N.W.2d 742 (1989); Wis. Stat. § 893.02. The JCRAR service requirements are "not permissive, but rather are mandatory." *Richards*, 150 Wis. 2d at 555. Failure to serve JCRAR within the requisite time period deprives the circuit court of competency over the case. *Id.* at 551–554, 558.

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The JCRAR service requirements apply to suits challenging promulgated rules, agency materials that are alleged to be unpromulgated administrative rules, and policy or guidance documents purported to conflict with statute. *Id.* (promulgated rules); *Heritage Credit Union v. Off. of Credit Unions*, 2001 WI App 213, ¶¶ 22–25, 247 Wis. 2d 589, 634 N.W.2d 593 (unpromulgated rules); *Mata v. DCF*, 2014 WI App 69, ¶¶ 9–10, 354 Wis. 2d 486, 849 N.W.2d 908 (unpromulgated rules and policy documents); Wis. Stat. § 227.40(1) (guidance documents). In *Mata,* for example, the court lacked competency to decide whether an agency policy was an unpromulgated rule

because the plaintiffs failed to serve JCRAR within the requisite time period. 354 Wis. 2d at 492–94.

Here, Kormanik challenges the Commission's guidance on grounds that it is an unpromulgated administrative rule and that it is contravenes Wisconsin elections statutes. Kormanik, however, has not established that she served JCRAR within ninety days of filing her complaint. The docket contains proof of service on the Commission, but none for JCRAR. (Doc. 23.) And because more than ninety days have elapsed since she filed her complaint, the time to serve JCRAR has come and gone. Kormanik's failure to serve JCRAR is fatal to her case. *Mata*, 354 Wis. 2d 486, ¶ 10 ("the consequence for Mata's failure to properly serve the Joint Committee is lack of jurisdiction to hear the case"); *Kruczek v. DWD*, 2005 WI App 12, ¶ 46, 278 Wis. 2d 563, 692 N.W.2d 286 ("Failure to serve the committee deprives the court of jurisdiction to hear a challenge to the rule."). This Court does not have competency to proceed over the action because JCRAR has not been (and at this point cannot be) timely served.

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Kormanik's complaint invokes not only Wis. Stat. § 227.40 but also Wis. Stat. § 806.04(1), but the latter statute does not excuse her failure to follow the requirements of Wis. Stat. § 227.40. Both provisions authorize declaratory judgment actions, but section 227.40 explicitly provides that it is the exclusive means of review. And it applies specifically to the type of

challenge Kormanik brings. When two conflicting statutes apply to the same subject, the more specific statute trumps the more general one. *State ex rel. Hensley v. Endicott*, 2001 WI 105, ¶ 19, 245 Wis. 2d 607, 629 N.W.2d 686. Therefore, Kormanik may only proceed with her challenge under Wis. Stat. § 227.40.

On this basis alone, this case should be dismissed without further inquiry. The Court should grant summary judgment to the Commission, deny Kormanik's motion, and dissolve the temporary injunction.

II. Assuming competency, the Commission's guidance is consistent with the absentee voting statutes and was not issued in violation of elections statutes or the Administrative Procedure Act.

The Commission's motion for summary judgment should be granted and Kormanik's motion should be denied. Above all, the relevant provisions of Wisconsin's absentee voting statutes permit an elector to spoil an absentee ballot and obtain a replacement, even if the initial absentee ballot has already been returned to the municipal clerk. Additionally, the guidance was not improperly issued in violation of Wis. Stat. § 5.05(1e)'s affirmative vote requirements: the Commission is not required to hold a vote on every written communication that it issues. And the guidance does not constitute an unpromulgated rule under Wis. Stat. Ch. 227. The memorandum and press release are guidance documents exempt from the formal rulemaking process as they lack the force of law.

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A. Wisconsin's absentee ballot statutes permit an elector to spoil an already-returned absentee ballot.

The plain language of Wisconsin's absentee ballot statutes allows an elector to spoil a ballot that has already been returned to the municipal clerk.

In interpreting laws, courts first consider the language of the statute, and if the meaning of the statute is plain, no further inquiry is necessary. *See State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110 Courts also interpret statutory language "in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Id.*

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The central statute at issue here is Wis. Stat. § 6.86(5), which states: "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 . . . and shall destroy the spoiled or damaged ballot."

Wisconsin elections statutes do not define a "spoiled" ballot, but the text of several related provisions illustrate that spoiling is done by the elector, not the clerk. Wisconsin Stat. § 6.86(5) provides that the elector returns "a *spoiled* or damaged *ballot to* the clerk," so the clerk cannot be the one to spoil it. Similarly, Wis. Stat. § 6.80(2)(c), which governs spoiled ballots on election

day, applies to "any elector who, by accident or mistake, spoils or erroneously prepares a ballot." Again, it is the elector who spoils the ballot.

These provisions also contain indications about how and why a ballot becomes spoiled. For example, a spoiled ballot cannot be the same as a damaged ballot, because Wis. Stat. § 6.86(5) creates a distinction between "a spoiled *or* damaged ballot" (emphasis added). Courts must give effect to every word chosen by the legislature so that no words are superfluous. *Klemm v. Am. Transmission Co., LLC*, 2011 WI 37, ¶ 18, 333 Wis. 2d 580, 798 N.W.2d. The statutes also treat a spoiled ballot as different from one that is "erroneously prepared." Wis. Stat. § 6.80(2)(c). Wisconsin Stat. § 6.80(2)(c) further provides that a ballot is spoiled "by accident or mistake."

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Therefore, a spoiled ballot need not contain on its face an error that invalidates it, and an elector may spoil a ballot by accident or by making a mistake. A mistake means an "error, misconception, or misunderstanding; an erroneous belief." *Mistake*, Black's Law Dictionary (11th ed. 2019). Under this definition, an elector could make a mistake by voting for the wrong candidate because of an error, misconception, misunderstanding, or erroneous belief, and later changing her mind. An accident is defined in part as an "unintended and unforeseen injurious occurrence; something that does not occur in the usual course of events or that could not be reasonably anticipated." *Accident*, Black's Law Dictionary (11th ed. 2019). An accident could include an

unintended marking for the wrong candidate, or a vote for the wrong candidate based on unforeseen circumstances. The statute does not restrict the reasons why an elector can spoil a ballot, and it allows an elector to spoil her ballot because she changes her mind.

The statutory language also places no limit on *when* a ballot must be spoiled. Wisconsin Stat. § 8.86(5) states that a clerk must issue a replacement ballot "whenever an elector returns a spoiled or damaged absentee ballot." This does not mean that an elector must inform the clerk that the ballot is spoiled, on the spot, while returning it. Rather, the word "whenever" indicates that an elector can spoil a ballot even after the ballot has been returned. In other words, an elector becomes eligible for a replacement ballot when she decides that a ballot is spoiled. That could take place during the process of completing a ballot, when the elector makes an incorrect marking by accident or mistake, or at the moment the elector realizes she has mistakenly voted for the wrong candidate, even after the ballot has been returned.

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Surrounding statutes also exhibit intent to allow a ballot to be spoiled up until the time it is cast. Wisconsin Stat. § 6.80(2)(c) provides that an election-day voter at the polling place may spoil her ballot and request a replacement up to three times before her vote is cast. A separate elections provision governing electronic voting systems requires any electronic voting

equipment to provide an elector the opportunity "obtain a replacement for a spoiled ballot prior to casting his or her ballot." Wis. Stat. § 5.91(16).

For an absentee elector, the ballot is cast when it is placed into a voting machine on election day—not when it is returned to the clerk. If Wis. Stat. § 6.86(5), Wis. Stat. § 6.80(2)(c), and Wis. Stat. § 5.91(16) are interpreted consistently, an absentee elector may also spoil a ballot as close to the election as possible, consistent with the statutory deadlines.

Requiring a ballot to be spoiled before it is returned would mean that an absentee elector's opportunity to spoil her ballot ends weeks before her ballot is cast. Election-day spoiled ballot provisions permit an elector to complete a ballot, change her mind about the marking made, and request a replacement ballot at any point before casting it—that is, before the ballot is placed into the voting machine. All electronic voting equipment, including machines used to process absentee ballots on election day, must also allow an elector to receive a spoiled ballot replacement before casting her vote. Wis. Stat. §§ 5.91(1), 6.88(3)(a). It makes sense to apply the same interpretation of spoiled ballot provisions to absentee electors. Consistent with the surrounding statutes, Wis. Stat. § 6.86(5) does not require an elector to notify the municipal clerk that her ballot is spoiled before it is returned.

Further, there are situations in which eliminating an absentee elector's ability to spoil an already-returned ballot would jeopardize the right to vote.

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It is possible for an elector to realize that she spoiled her ballot only after returning it. For example, an elector might realize that she voted for too many candidates in a particular field following a conversation with a family member or friend. Or an elector might return her completed absentee ballot only to learn later that a family member tampered with it without telling her, meaning that she submitted a spoiled ballot by mistake. Without procedures to spoil an already-returned absentee ballot, electors who unknowingly submit spoiled absentee ballots could not be reissued replacements and could lose the opportunity to cast a proper ballot altogether.

The election statutes do not require spoiling of the ballot to occur before its return. Nor does the text prohibit spoiling to include changing one's mind about which candidate or question to choose.

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B. Plaintiff's reasons for interpreting Wis. Stat. § 6.86(6) to preclude the spoiling of already-returned absentee ballots are incorrect.

Kormanik contends that the statute does not permit the spoiling of a returned absentee ballot for several incorrect reasons.

Her core argument is that the Commission's guidance violates Wis. Stat. § 6.86(6), which states that "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," with two exceptions. The first exception applies to improper absentee ballot certificates; the second cites the spoiled absentee

ballot statutory provision. Wis. Stat. § 6.86(6). Kormanik asserts that the guidance violates Wis. Stat. § 6.86(6) because it instructs clerks to return ballots to electors who have not actually spoiled their ballots, but who submitted valid ballots in perfectly good condition before later changing their mind. (Doc. 132:6). But it is not clear why Kormanik is invoking Wis. Stat. § 6.86(6). Wisconsin Stat. § 6.86(6) and Wis. Stat. § 6.68(5) together authorize *replacement* ballots to be given to electors, not initial ballots to be *returned* to electors, and it requires the initial spoiled ballot to be *destroyed*.[1] And nothing in Wis. Stat. § 6.86(5) says that a ballot cannot be spoiled if it is in good condition; mistakenly voting for the wrong candidate is an accepted basis for spoiling a ballot.

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Kormanik also relies on a flawed definition of "spoiled ballot" from Black's Law Dictionary, which states that a spoiled ballot is one that is "cast in a form or manner that does not comply with applicable rules." (Doc. 132:9). This definition misses the mark for several reasons. First, the dictionary definition implies that to be spoiled, a ballot must already be cast, but Wisconsin's statutes are clear that, in Wisconsin, a ballot is spoiled before it is cast. Second, a ballot may be spoiled for reasons other than noncompliance

[1] According to the current Election Administration Manual, destroyed spoiled ballots are not discarded, but are torn, labeled "spoiled," placed in a spoiled ballot envelope and transmitted to the polling place on election day. (Hipsman Aff. Ex. A at 1.)

with applicable rules. As the Court has acknowledged, an elector can spoil a ballot by mistakenly voting for the wrong candidate or marking the wrong line. (Doc. 104:81.)

These differences illustrate a deeper problem with Kormanik's reliance on a dictionary definition. The general rule is that in the absence of statutory definitions, dictionaries may be used to determine the meaning of common words, but not technical words or phrases. *Lake City Corp. v. City of Mequon*, 207 Wis. 2d 155, 162, 558 N.W.2d 100, 103 (1997). In this context, a spoiled ballot is a nuanced, technical elections administration term. The discrepancies between the dictionary definition and the statutory treatment of the term demonstrate that "spoiled ballot" lacks an ordinary meaning, and that the definition Kormanik relies on is not suitable for use in this case.

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Next, Kormanik contends that her interpretation of the statute finds support in the legislative policy statement of the absentee voting subchapter. The policy statement says that "voting by absentee ballot must be carefully regulated to prevent the potential for fraud or abuse; to prevent overzealous solicitation of absent electors who may prefer not to participate in an election; to prevent undue influence on an absent elector . . . or other similar abuses." Wis. Stat. § 6.84(1).

Kormanik asserts that the guidance invites these abuses. (Doc. 132:7–8.) But in statutory interpretation, policy considerations do not trump

statutory language. *VanCleve v. City of Marinette*, 2003 WI 2, ¶ 6, 258 Wis. 2d 80, 655 N.W.2d 113. And she offers no explanation or evidence to support this argument. She draws no direct link between the Commission's spoiled ballot guidance and increased fraud or abuse. Despite the Commission's policy of allowing electors to spoil already-returned absentee ballots for almost a decade before this case, she produces no evidence of actual abuse. At summary judgment, speculation and conjecture absent evidence is not enough. *Belich v. Szymaszek*, 224 Wis. 2d 419, 426, 592 N.W.2d 254 (Ct. App. 1999).

Contrary to Kormanik's contention, there are ample statutory safeguards to maintain the integrity of the absentee voting system. For example, absentee electors generally must provide proof of identification. *See* Wis. Stat. § 6.86(1)(ar); Wis. Stat. § 6.87(1). Electors must attest that falsification of information when registering to vote and voting absentee is subject to criminal prosecution. Wis. Stat. §§ 6.33(1), 6.87(2), 12.60(1)(b). When voting, absentee electors must certify that they are an eligible voter, adhere to specific procedures in the presence of a witness, and obtain the witness's signature. Wis. Stat. § 6.87(2). Absentee ballots are counted on election day, out in the open, in the same room where in-person voting takes place. Wis. Stat. § 6.88(3). And elections officials must verify that each absentee elector has submitted a valid certification and ballot, is qualified to vote, and

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has not already voted, before placing the ballot into the voting machine. Wis. Stat. § 6.88(3)(a).

There are also adequate spoiled ballot safeguards. The statutory deadlines for spoiling ballots ensures election officials have time to verify that an absentee ballot has been returned and can be destroyed before issuing a replacement. Wis. Stat. § 6.86(1)(b). Additionally, a clerk may issue a replacement ballot to an elector only if they believe the ballot was issued to the elector who is returning it. Wis. Stat. § 6.86(6). These protections guard against double-voting or identity fraud.

Kormanik also contends that the guidance violates statutory chain of custody requirements for returned absentee ballots. (Doc. 132:11.) Under Wis. Stat. § 6.88(1), when a clerk receives an absentee ballot, the clerk must enclose it in a securely-sealed carrier envelope and keep the envelope in the clerk's office. Before or on election day, the clerk must enclose the carrier envelope in a package and deliver it to election officials in the proper ward. Wis. Stat. § 6.88(2). Kormanik asserts that allowing electors to spoil already-returned ballots would require clerks to open the carrier envelope, remove the ballot, and destroy it—all in violation of Wis. Stat. § 6.88. But nothing in the provision expressly prohibits a clerk from opening a carrier envelope if it becomes necessary. In any event, each absentee ballot is placed

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in its own carrier envelope, so there is no reason why a clerk could not destroy both items together.

Finally, Kormanik makes the generic argument that the primary authority to regulate elections belongs to the Legislature, and that the documents usurp its power. (Doc. 132:11.) The Commission has already explained why the spoiled ballot guidance is consistent with applicable statutes and does not create new rights.

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The Commission's motion for summary judgment should be granted because Wisconsin's election statutes allow already-returned absentee ballots to be spoiled, and the Commission's guidance comports with the law.

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III. The guidance did not require a two-thirds affirmative vote by commissioners.

Kormanik incorrectly contends that the guidance is unlawful because they were not issued with a two-thirds vote by commissioners under Wis. Stat. § 5.05(1e), which provides that "[a]ny 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."

Wisconsin Stat. § 5.05(1e) does not apply to each and every memorandum or communication that the Commission issues. The Commission has independent statutory authority to issue a range of materials to fulfill its

powers and duties. Broadly speaking, the Commission has "the responsibility for the administration of" election laws. Wis. Stat. § 5.05(2w). The administrator "shall perform such duties as the commission assigns to him or her in the administration of" elections law, and "shall appoint such other personnel as he or she requires to carry out the duties of the commission." Wis. Stat. § 5.05(3d).

Commission staff carry out numerous duties without the need for a two-thirds vote from the Commission members. The Commission provides training to municipal elections officials and disseminates information to the public. For example, the Commission is required to provide training to clerks and election officials. Wis. Stat. §§ 7.31(1), 7.315. It must hold meetings for clerks and other elections officials to "explain the election laws and the forms and rules of the commission, [and] to promote uniform procedures." Wis. Stat. § 5.05(7). The Commission may carry out voter education programs about voting procedures, rights, and technology, Wis. Stat. § 5.05(12), and it may coordinate its activities with local officials and respond to local inquiries, Wis. Stat. § 7.08(11). None of these authorized activities has a statutory requirement for a two-thirds vote.

Effective coordination with Wisconsin's municipal clerks to administer the state's elections system requires extensive written communications and guidance. The guidance here is precisely the type of material that the law

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invites, because it seeks to explain absentee ballot laws, promote uniform spoiled ballot procedures, and educate clerks and the public on the proper procedures and deadlines for spoiled ballots.

To construe Wis. Stat. § 5.05(1e) to require the Commission to convene a meeting and approve by a two-thirds majority every single routine task or project would stymy the Commission's day-to-day operations. Mandating a two-thirds vote before each email, website update, or training manual revision would be unfeasible. Further, a two-thirds vote requirement for mundane functions would contradict the statute's directive to the administrator "to promote economic and efficient administration and operation" in agency management. Wis. Stat. § 15.02(4). Kormanik's argument produces absurd results. *Kalal*, 271 Wis. 2d 633, ¶ 46.

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Additionally, the broader structure of Wis. Stat. § 5.05 indicates that that the two-thirds vote requirement does not apply to ordinary communications like the guidance in this case. The section begins with Wis. Stat. § 5.05(1)(a)–(d), which lists five specific actions within the Commission's general authority: issuing subpoenas, bringing and settling civil actions, suing for injunctive relief, issuing orders resolving verified complaints, and promulgating rules under Chapter 227. Immediately following this list, Wis. Stat. § 5.05(1e) establishes that "actions" by the Commission require the support of at least two-thirds of commissioners.

The word "actions" in Wis. Stat. § 505(1e) may be viewed in light of the listed actions that immediately precede it. A provision's location within a statute is relevant to its meaning. *See State v. Hou Erik Vang*, 2010 WI App 118, ¶ 7, 328 Wis. 2d 251, 789 N.W.2d 115. And under the ejusdem generis canon of construction, when general words follow specific words in a statute, the general words should belong to the same class or category as the specific words. *Milwaukee J. Sentinel v. DOA*, 2009 WI 79, ¶ 44, 319 Wis. 2d 439, 768 N.W.2d 700 (citation omitted). Here, given the formal, weighty nature of the listed actions, including issuing subpoenas, filing lawsuits, and formal rulemaking, "actions" in the very next provision cannot be construed to encompass everyday communications like the ones at issue in this case. Wisconsin Stat. § 5.05(1e) does not require two-thirds support to authorize every written communication issued by the Commission, its administrator, or its staff.

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The guidance also did not represent a departure from the agency's prior position. Rather, it reflected the Commission's long-standing spoiled ballot policy for nearly a decade. As early as 2014, the Commission's predecessor, the Wisconsin Government Accountability Board, published substantially similar spoiled ballot guidance in its annual Election Administration Manual. (Doc. 55 ¶ 8 (Wolfe Aff.). The manual included an instructional flowchart guiding clerks how to process already-returned spoiled absentee ballots and issue

replacements. (Doc. 56.) In 2020, the Commission issued a memorandum to clerks and other elections officials titled "Spoiled Absentee Ballot Guidance." (Doc. 57.) Like the 2022 memorandum, the 2020 memorandum explained procedures and deadlines for spoiling absentee ballots, including ballots already returned to clerks. (Doc. 57.) A two-thirds affirmative vote was not needed given the Commission's fixed support for the content of the guidance.

IV. Kormanik's motion for summary judgment should be denied because the memorandum and press release are not subject to rulemaking.

Kormanik incorrectly contends that the Commission did not properly promulgate the memorandum as an administrative rule under Chapter 227 of Wisconsin's Administrative Procedure Act.

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A rule is defined as a "regulation, standard, statement of policy, or general order of general application that has the effect of law and that is issued by an agency to implement, interpret, or make specific legislation enforced or administered by the agency or to govern the organization or procedure of the agency." Wis. Stat. § 227.01(13).

The key element of any rule is that if has the effect of law. *Cnty. of Dane v. Winsand*, 2004 WI App 86, ¶ 11, 271 Wis. 2d 786, 679 N.W.2d 885. There is no established test for determining whether an agency action has the effect of law, but a directive's phrasing can be determinative. *See Teigen*, 2022 WI 64, ¶ 191, 403 Wis. 2d 607, 976 N.W.2d 519 (J. Hagedorn, concurring). On one

hand, reference aids for staff that are "couched in terms of advice and guidelines rather than setting forth law-like pronouncements" ordinarily do not have the effect of law. *Winsand*, 271 Wis. 2d at 796 (citations and quotations omitted). On the other hand, materials that use "express mandatory language are more than informational." *Milwaukee Area Joint Plumbing Apprenticeship Comm. v. DILHR*, 172 Wis. 2d 299, 321 n.12, 493 N.W.2d 744 (Ct. App. 1992). Actions may also have the effect of law when a violation carries criminal or civil penalties, enforcement can affect the legal interest of a class of individuals, or licensure can be denied. *Cholvin v. Wis. DHFS*2008 WI App 127, ¶ 26, 313 Wis. 2d 749, 758 N.W.2d 118.

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Rules must be promulgated in accordance with an extensive process that includes public hearings, a notice and comment period, and review by various government officials and agencies. Wis. Stat. § 227.10–30. A rule that is not promulgated in compliance with the statutory requirements is unenforceable. *Wis. Legislature v. Palm*, 2020 WI 42, ¶ 58, 391 Wis. 2d 497, 507, 942 N.W.2d 900.

In contrast, a guidance document is distinct from a rule, and is defined as:

> [A]ny formal or official document or communication issued by an agency, including a manual, handbook, directive, or informational bulletin, that does any of the following:

> 1. Explains the agency's implementation of a statute or rule enforced or administered by the agency, including the current or proposed operating procedure of the agency.
>
> 2. Provides guidance or advice with respect to how the agency is likely to apply a statute or rule enforced or administered by the agency, if that guidance or advice is likely to apply to a class of persons similarly affected.

Wis. Stat. § 227.01(3m)(a).

In *Service Employees International Union, Local 1,* the supreme court described the "essential attributes" of a guidance document. 2020 WI 67, ¶ 105, 393 Wis. 2d 38, 946 N.W.2d 35. Guidance documents explain statutes and rules or communicate guidance or advice about how an agency is likely to apply a statute. *Id.* They have no force of law and provide no legal authority for establishing or enforcing standards or conditions. *Id.* Guidance documents "are communications *about* the law—they are not the law itself. They communicate intended applications of the law—they are not the actual execution of the law." *Id.* As the court explained in *Teigen*, they serve to inform, but not compel. *Teigen*, 403 Wis. 2d at 719. Guidance documents are not subject to rule promulgation. Wis. Stat. § 227.01(3m), (13); *Serv. Emps. Int'l Union, Loc. 1*, 393 Wis. 2d 38, ¶ 105.

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Here, the memorandum and press release squarely fit the definition of guidance documents and lack the force of law. First, the guidance is purely informational; it explains the rules for spoiling absentee ballots and provides logistics, operating procedures, practices, and deadlines for clerks and voters to follow related to spoiled ballots. Specifically, it advises clerks on the best practices for tracking absentee ballots and advise voters on the recommended ways to spoil a ballot. (Doc. 3:2.) The guidance also communicates the Commission's interpretation of statutes because it cites relevant statutes and explains the rules and procedures that flow from them. (Doc. 3:4; 4:1.)

Second, the guidance is fundamentally phrased in terms of what voters and clerks *can* or *may* do and what the Commission *recommends* and *suggests*. For example, the memorandum informs electors that they "*can* request to spoil" an absentee ballot in writing or "*may* also go to the clerk's office" to request a new ballot, and "[*suggests*] that voters return their ballots as soon as possible." (Doc. 3:2 (emphasis added).) Rather than order clerks to take certain actions, the memorandum asks clerks to "please note" various issues and suggests that "care should be taken" with particular procedures. (Doc. 3:2.) The press release in particular is presented in a question-and-answer format phrased in nonbinding terms about what voters *can*, *may*, and are eligible to do—not what they are required to do under the law.

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Third, neither document states that there are consequences for noncompliance. The documents are devoid of law-like pronouncements or express mandatory language and contain no statements that clerks or electors *shall*, *must*, or are *required* to do anything. They neither compel actions by clerks or electors nor establish new enforceable rights and standards. The guidance does not have the effect of law and does not constitute an unpromulgated rule.

V. Kormanik is not entitled to a permanent injunction.

Kormanik moves to make permanent the court's October 7, 2022, temporary injunction. Her request should be rejected. Even to the extent the Court grants summary judgment to the Commission, the temporary injunction should be vacated because Kormanik shows no irreparable harm.

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To obtain a permanent injunction, Kormanik must establish that: (1) she will suffer irreparable harm in the future if the injunction is not granted; (2) she has no adequate remedy at law; and (3) on balance, equity favors an injunction. *Pure Milk Prod. Co-op. v. Nat'l Farmers Org.*, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979).

Kormanik cannot prove that she will suffer irreparable harm without permanent injunctive relief. Pursuant to the October 7, 2022, temporary injunction, the Commission has withdrawn the memorandum from circulation and removed the press release from its website. An injunction is not designed

to remedy past wrongs, but to prevent future injury. *Id.* at 802. If the Court declines to issue a permanent injunction, the guidance will not automatically go back into effect because it is already inoperative. To reinstate the guidance, the Commission would need to issue new guidance.

More to the point, "in order to warrant an injunction, the injury must be real, serious, material, and permanent, or potentially permanent; the right to the injunction must be clear; and the reasons for granting it strong and weighty." *Kocken v. Wisconsin Council 40, AFSCME, AFL-CIO*, 2007 WI 72, ¶ 27 n.12, 301 Wis. 2d 266, 732 N.W.2d 828 (citation omitted). A plaintiff must show a "sufficient probability" of the harms that she advances. *Nettesheim v. S.G. New Age Prod., Inc.*, 2005 WI App 169, ¶ 21, 285 Wis. 2d 663, 702 N.W.2d 449.

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Kormanik seeks a permanent injunction based on purely speculative harms. For instance, she vaguely speculates that the guidance would expose her and other absentee voters to disenfranchisement by citing identity theft and voter fraud. (Doc 132:17.) But she neither specifies what these terms mean nor explains how the guidance would generate these problems. Her conjecture that the guidance will expose voters to limitless solicitation post-voting is similarly unfounded. (Doc. 132:17.) It is difficult to understand why increased solicitation would come to pass absent an injunction; in any high-stakes

election, electors are subject to solicitation until election day no matter how they vote. And she does not establish why this harm would be irreparable.

Kormanik also hypothesizes that the guidance creates a risk of double voting because clerks might fail to destroy spoiled ballots when issuing replacements. (Doc 132:17.) This is not a genuine threat. Clerks are statutorily mandated to destroy spoiled ballots and are barred from returning spoiled ballots to electors. Wis. Stat. § 6.86(5)–(6). Kormanik offers no reason why clerks would not follow the law. Finally, Kormanik predicts that voters will lose faith in the election system when they "see clerks changing votes based on unmonitored phone calls." (Doc 132:17.) Clerks do not "change votes," or for that matter, indiscriminately distribute replacement ballots to any elector who calls them. Clerks may replace a spoiled ballot only after receiving the original ballet and then only if they "[believe] that the ballot was issued to or on behalf of the elector who is returning it." Wis. Stat. § 6.86(5). Kormanik has not shown a sufficient probability that she will suffer any of these harms because there are safeguards in place to prevent them. And again, she has not identified a single instance of fraud or misconduct that occurred over the nearly ten years that the guidance or comparable policies were in place.

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Kormanik incorrectly contends that she can show irreparable harm under the lead opinion in *Teigen*, which states that "electoral outcomes obtained by unlawful procedures corrupt the institution of voting, degrading

the very foundation of free government. Unlawful votes do not dilute lawful votes so much as they pollute them, which in turn pollutes the integrity of the results." 403 Wis. 2d at 628–29. *Teigen* is in apposite because it was about standing, not injunctive relief. The lead opinion's holding on standing is not the law to begin with because a majority of the supreme court did not agree with the language Kormanik relies on.[2] But more importantly, that opinion applied a "low bar" to establish an injury for standing—noting that a plaintiff need only allege injuries that result from an agency action, and those injuries may be remote.[3] *Teigen*, 403 Wis. 2d at 625. That is not the standard for a permanent injunction. A permanent injunction requires a likelihood of serious, material harm and may not be "issued lightly." *Kocken*, 301 Wis. 2d at 278.

Kormanik cites additional inapplicable cases for the proposition that an election agency's misapplication of an election law automatically constitutes irreparable harm. For example, she cites *State ex rel. DNR. v. Wis. Ct. of Appeals, Dist. IV* for the statement that "losing a statutorily-granted right is a harm." 2018 WI 25, ¶ 47, 380 Wis. 2d 354, 909 N.W.2d 114. That case concerned

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[2] The paragraph containing the quote from *Teigen* that Kormanik cites "does not have precedential value because no four justices in that fractured opinion expressed agreement with any point made in that paragraph." *Rise, Inc. and Jason Rivera v. Wis. Elections Comm'n, et. al.*, No. 2022AP1839 *12 n.6 (July 7, 2023) (unpublished).

[3] The Commission reserves the right to argue that the standing standard in *Teigen* is overly broad.

a supervisory writ related to proper appellate venue, not an injunction to protect against voter harm. She also cites *Jefferson v. Dane County*, in which the supreme court temporarily enjoined a county clerk's Facebook post providing voters with advice that conflicted with election statutes. 2020 WI 90, ¶ 1, 394 Wis. 2d 602, 951 N.W.2d 556; (Doc. 130:43.) But *Jefferson* involved a temporary injunction, granted in part because the Facebook post was still active and circulating around the internet. *Id.* In this case, the guidance that has been withdrawn. Indeed, when the supreme court ultimately resolved *Jefferson*, it granted only declaratory relief. *Id.*

Finally, Kormanik contends that unlawful activity may be enjoined without a showing of irreparable harm, citing *Joint Sch. Dist. No. 1, City of Wis. Rapids v. Wis. Rapids Educ. Ass'n*, 70 Wis. 2d 292, 310, 234 N.W.2d 289 (1975). Rather than support, *Wisconsin Rapids* undercuts Kormanik's argument. *Wisconsin Rapids* noted some support in Wisconsin caselaw for granting an injunction without irreparable harm, but only in the limited context of public employee strikes. *Id.* The court then rejected the approach: "[T]he key prerequisite to injunctive relief—irreparable harm—remains, and a court should not restrain illegal acts merely because they are illegal unless the injury sought to be avoided is actually threatened or has occurred." *Id.* at 311.

Kormanik is not entitled to permanent injunctive relief.

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CONCLUSION

Defendant Wisconsin Elections Commission's motion for summary judgment against plaintiff Nancy Kormanik should be granted. Kormanik's motion for summary judgment should be denied.

Dated this 12th day of July 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

Dated this 12th day of July 2023.

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