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Clerk of Circuit Court
Waukesha County
2022CV001395

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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REPLY BRIEF IN SUPPORT OF DEFENDANT WISCONSIN ELECTIONS COMMISSION'S MOTION FOR SUMMARY JUDGMENT

Nancy Kormanik challenges the validity of the Wisconsin Elections Commission's August 2022 memorandum and press release (the guidance) clarifying spoiled absentee ballot procedures. The guidance provides that electors may spoil an absentee ballot and receive a replacement if they made a mistake or changed their minds, even if they already returned their ballot to the clerk.

The Commission is entitled to summary judgment on several grounds. The court lacks competency over the case because Kormanik failed to serve the

Joint Committee for Review of Administrative Rules (JCRAR). Even if she had, the guidance is permissible under Wisconsin's elections statutes; it did not require a two-thirds vote by commissioners; and it does not constitute an unpromulgated rule. And a permanent injunction is unwarranted. None of Kormanik's responses merit summary judgment in her favor, or a permanent injunction.[1]

I. The Court lacks competency to proceed to the merits due to Kormanik's failure to serve a copy of her pleadings upon JCRAR.

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First, the case should be dismissed because Kormanik failed to serve the Joint Committee for Review of Administrative Rules (JCRAR), which is required for all Wis. Stat. § 227.40(1) declaratory judgment challenges. That failure results in the Court's loss of competency to proceed to the merits. (Doc. 143:11–14.) Kormanik asserts that she complied with this service requirement by sending a copy of her pleadings by email to a private attorney who was representing the Wisconsin State Legislature in another case. (Doc. 147:18–19.) That is not proper service.

Wisconsin Stat. § 227.40(5) generally provides that "[t]he joint committee for review of administrative rules shall be served." More specifically, Wis. Stat.

[1] Kormanik points out that the Commission did not file a notice of motion and motion for summary judgment and has forfeited its opportunity to do so. (Doc. 147:19). The Commission has now filed the notice and motion with an accompanying affidavit. In any event, a court may grant summary judgment to a party that has not moved for summary judgment. Wis. Stat. § 802.08(6).

§ 13.56(2) states that "[t]he cochairpersons of the joint committee for review of administrative rules or their designated agents shall accept service made under ss. 227.40(5) and 806.04(11)."

Kormanik has supplied this Court with no evidence that the cochairpersons of JCRAR were served with a copy of her pleadings at all. Rather, she relies upon providing the documents to Attorney Misha Tseytlin, who she says is a "designated agent" of the cochairpersons. Kormanik asserts that Tseytlin was "counsel for the Wisconsin State Legislature" (Doc. 147:19–20) and that Tseytlin "previously intervened on behalf of the Wisconsin State Legislature, and asserting the interests of the Joint Committee for Review of Administrative Rules (JCRAR), in *White v. Wisconsin Elections Commission*, Waukesha County Case No. 22-CV-1008, which was ongoing at the time this action was commenced." (Doc. 146:2).

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Those facts do not make Tseytlin the JCRAR cochairpersons' designated agent at the time of the email. Kormanik points to no authorization for Taseytlin to generally act as the JCRAR chairs' agent for service under Wis. Stat. § 227.40(5). His acting as litigation counsel (and for the Legislature, not JCRAR) does not make him JCRAR's authorized agent for service. And he is not counsel for any party in this case.

Under Wis. Stat. § 13.56(2), *after* the cochairpersons or their designated agents accept service of pleadings in a matter, JCRAR can work with a

different legislative committee, the Joint Committee on Legislative Organization, to determine whether the Legislature should intervene in that matter and, if so, whether outside counsel should be hired. If JCRAR "determines that the legislature should be represented in the proceeding, it shall request the joint committee on legislative organization" to designate the legislature's representative for the proceeding. Wis. Stat. § 13.56(2).

This statute illustrates the difference between the cochairpersons' designated agent for service and the Legislature's litigation counsel in a court proceeding. So, even if Tseytlin appeared in *White* "asserting the interests of [JCRAR]," as she claims,[2] that does not make him the JCRAR cochairpersons' designated agent for court filings, including Kormanik's pleadings.

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Kormanik did not serve JCRAR as required by Wis. Stat. § 227.40(5). Therefore, this Court lacks competency to proceed to the merits of Kormanik's Wis. Stat. § 227.40(1) challenges. *See Kruczek v. DWD*, 2005 WI App 12, ¶ 46, 278 Wis. 2d 563, 692 N.W.2d 286 ("Failure to serve the committee deprives the

[2] Kormanik does not support her assertion that Tseytlin would or could represent JCRAR in *White v. Wisconsin Elections Commission*, Waukesha County Case No. 22-CV-1008. A quick review of CCAP reveals that Tseytlin appeared as counsel for the "Wisconsin State Legislature," not for JCRAR. And JCRAR and the Legislature are not one in the same. As the supreme court explained, "JCRAR was created by the legislature by the enactment of sec. 13.56, States." *Richards v. Young*, 150 Wis. 2d 549, 552, 441 N.W.2d 742 (1989).

court of jurisdiction to hear a challenge to the rule."). Summary judgment should be granted to the Commission and this case dismissed.

II. The Commission's guidance does not violate state election law.

Even if the Court determined that it has competency, the Commission is entitled to summary judgment on the merits of the case. Wisconsin's absentee voting statutes permit an elector to spoil an already-returned absentee ballot and obtain a replacement. Kormanik's two arguments to the contrary fail.

Wisconsin Stat. § 6.86(5) regulates absentee ballots and provides that when an elector returns a spoiled absentee ballot to the municipal clerk, and the clerk believes the ballot was issued to that elector, the clerk must issue a replacement ballot and destroy the spoiled one. Kormanik first contends that the Commission errs in interpreting that provision in concert with Wis. Stat. § 6.80(2)(c), which provides that any in-person elector at the polling place on election day who "spoils or erroneously prepares a ballot may receive another, by returning the defective ballot" up to three times. Wis. Stat. § 6.80(2)(c). She asserts that the latter statute addresses election day voting, not absentee voting, and that an absentee voter already submitted her ballot when she returned it to the clerk.

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Both Wis. Stat. § 6.80(2)(c) and § 6.86(5) pertain to spoiling of ballots. It is appropriate to examine their language within the statutory context and structure as a whole, in relation to surrounding or closely-related statutes.

State ex rel. Kalal v. Cir. Ct. for Dane Cnty., 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. In-person and absentee voting are closely-related topics in closely-related statutes. Wisconsin Stat. § 6.80(2)(c) provides cues to understanding Wis. Stat. § 6.86(5).

Wisconsin Stat. § 6.80(2)(c) states that ballots may be spoiled by accident or mistake. And it exhibits intent to allow a ballot to be spoiled up until the time it is cast. Interpreted in harmony with Wis. Stat. § 6.80(2)(c), Wis. Stat. § 6.86(5) allows an absentee elector to spoil her ballot because of a mistake, and before her ballot is *actually cast* by being placed in the ballot machine, not just returned to the clerk.

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Kormanik's second argument is that the Commission overstates the importance of the statute's statement that a voter may spoil a ballot by mistake. She also suggests that the words "accident or mistake" only appear in Wis. Stat. § 8.60(2)(c) because polling places have a limited number of ballots and cannot issue replacements to electors who intentionally or repeatedly spoil their ballots. (Doc. 147:6.) Her assumption is that the statute references mistake purely to protect the ballot supply.

But the statutes say no such thing, and "mistake" is a broad term encompassing an error, misconception, misunderstanding, or erroneous belief. *Mistake*, Black's Law Dictionary (11th ed. 2019). This includes a mistaken vote for the wrong candidate and later changing one's mind. Kormanik's alternative

definition, limiting a spoiled ballot to one "cast in a form or manner that does not comply with the applicable rules" (Doc. 132:9)—would exclude any ballot that is correctly completed. As this Court has already acknowledged, a ballot may be spoiled for a much broader set of reasons. (Doc. 104:81.)

The Commission's guidance comports with the law.

III. The Commission's guidance did not require a two-thirds affirmative vote.

The guidance was also not issued in violation of Wis. Stat. § 5.05(1e), which states 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." A vote is not required to approve every written communication the Commission issues.

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Kormanik responds to just one of the Commission's arguments on this issue. She asserts that Wis. Stat. § 5.05(1e)'s affirmative vote requirement covers not just the actions in the powers and duties enumerated in Wis. Stat. § 5.05(1), but instead to *all* acts the agency conducts.

Statutes must be construed to avoid unreasonable results. *Kalal*, 271 Wis. 2d 633, ¶ 46. If "one reasonable interpretation of a statute yields absurd results while the other interpretation yields no such absurdities, the latter interpretation is preferred." Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* (7th ed.2007) § 45:12, at 101, 107.

Here, it would be unworkable to mandate a two-thirds vote before each and every Commission action. Not only would a vote be needed on ordinary communications like the one in this case, but also to approve day-to-day operations, such as answering elector inquiries, trainings, webinars, outreach to lawmakers, collecting data, testing equipment, and audits. Commissioners are volunteers, do not convene every week, or even every month,[3] and do not have unlimited time. Kormanik does not respond to the Commission's arguments that a vote requirement on ordinary communications would be impracticable, nor does she acknowledge the Commission's many other statutorily-authorized duties requiring no vote. (*See* Doc. 143:21–23.) A burdensome vote requirement would prevent the Commission from fulfilling its duty to administer the state's election system. The Commission was not required to vote before issuing the guidance.[4]

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[3] *See Past Events*, Wisconsin Elections Commission https://elections.wi.gov/news-events/events/past (last visited August 18, 2023).

[4] Kormanik seeks leave to amend if the Court determines that she has waived this issue for not raising it in her complaint. (Doc. 143:14). When the deadline for matter-of-course amendment has passed, a court may grant leave to amend when justice requires and in its discretion. Wis. Stat. § 802.09(1); *Mach v. Allison*, 2003 WI App 11, ¶ 20, 259 Wis. 2d 686, 656 N.W.2d 766. Amendment is not appropriate here: Kormanik missed the six-month deadline, the case has a long procedural history, and summary judgment is almost concluded. Amendment this late in the case would only delay resolution. *See Com. Bluff One Condo. Ass'n, Inc. v. Dixon*, 332 Wis. 2d 357, 798 N.W.2d 264, (Ct. App. 2011).

IV. The Commission's guidance is not an unpromulgated rule because it does not have the effect of law.

Alternatively, Kormanik asserts that the Commission engaged in unpromulgated rulemaking by issuing the guidance. (Doc. 147:13–14.) The guidance documents are not administrative rules because they do not have the effect of law. (Doc. 143:28–32.)

Kormanik first argues that the "memoranda include directives that are indisputably mandatory, such as ballot receipt deadlines," and that the "memoranda do not distinguish between those mandatory directives and the directives on spoiling ballots." (Doc. 147:16.) She cites the statement in the memorandum that "If an absentee ballot has been returned to the clerk, or is in the mail, a voter cannot spoil their returned ballot at the polling place and request a new one." (Doc. 147:15 (quoting Doc. 130:37).) While it is true that mandatory language can be a factor in deciding whether a "rule" exists, (*see* Doc. 143:28–29), Kormanik *did not challenge* the provision she quotes.

Kormanik also asserts that "Nothing in the memoranda implies election officials have discretion when applying WEC's spoiled ballot rule." (Doc. 147:15.) But as the Commission pointed out in its opening brief, the memorandum did not order clerks to take certain action but rather, as an example, suggests that "care should be taken" with particular procedures. (Doc. 143:31.) Kormanik's view that "should" is mandatory (Doc. 147:16)

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conflicts with the proposition she cites holding that "mandatory terms can be directory under certain contexts." *Cholvin v. DHFS*, 2008 WI App 127, ¶ 29, 313 Wis. 2d 749, 758 N.W.2d 118. In the context here, the Commission used "should" in a directory, not mandatory, way. The Commission merely advised clerks to take care; it did not order them to take any substantive action.

Finally, Kormanik argues that, the memorandum and press release operate in a mandatory way purely by virtue of the Commission's authority over local election officials under Wis. Stat. §§ 5.05 and 5.06 and its responsibility to administer election laws, (Doc. 147:17.) The plaintiffs in *Teigen v. WEC* made the same argument, but a majority of the supreme court declined to adopt it. 2022 WI 64, ¶¶ 200–01, 403 Wis. 2d 607, 976 N.W.2d 519 (Hagedorn, J., concurring).

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The fact that clerks followed the Commission's memorandum does not transform advice into a rule. As Justice Hagedorn explained, even "widely-followed advice can still simply be advice. Even general acceptance does not make guidance legally binding or otherwise give it the force of law." *Id.* ¶ 200 (Hagedorn, J., concurring). Wisconsin's election structure is an additional factor that weighs against Kormanik's argument. "Wisconsin's method for conducting elections is unlike that of most other states in the union. Our election administration system is highly decentralized." *Id.* ¶ 195 (Hagedorn, J., concurring). "Rather than a top-down arrangement with a central state

entity or official controlling local actors, Wisconsin gives some power to its state election agency ([WEC]) and places significant responsibility on a small army of local election officials." *State ex rel. Zignego v. WEC*, 2021 WI 32, ¶ 13, 396 Wis. 2d 391, 957 N.W.2d 208. "It is local clerks who have the 'primary role in running Wisconsin elections.'" *Teigen,* 403 Wis. 2d 607, ¶ 195 (Hagedorn, J., concurring) (quoting *Zignego*, 396 Wis. 2d 391, ¶ 15). Thus, "Wisconsin's local election officials who lead the charge in election administration *have an independent responsibility* to read and follow the law." *Id.* ¶ 200 (emphasis added).

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Given this structure, and the discretionary language used in the memorandum and press release, these Commission documents do not have the effect of law and are therefore not rules. No promulgation was required.

V. Kormanik is not entitled to a permanent injunction because she cannot show irreparable harm.

And aside from the weaknesses of Kormanik's statutory reading, she cannot justify a permanent injunction. To obtain a permanent injunction, Kormanik must establish, among other things, that she will suffer irreparable harm in the future if the injunction is not granted. *Pure Milk Prod. Co-op. v. Nat'l Farmers Org.*, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979). Kormanik cannot show such an injury.

Kormanik contends that she needs to show only that the guidance violates her statutory right to enforcement of election laws. Her argument conflates the quantum of injury necessary for standing with that needed to justify an injunction. Even assuming Kormanik has standing,[5] the harm that is sufficient for standing does not justify all forms of relief. *See, e.g., Wis. Mfrs. & Com. v. Evers*, 2021 WI App 35, ¶ 27, 398 Wis. 2d 164, 960 N.W.2d 442 (standing injury does not entitle party to seek declaratory judgment). Harm for injunction purposes is a high bar. The injury "must be real, serious, material, and permanent, or potentially permanent." *Kocken v. Wis. Council 40, AFSCME, AFL-CIO*, 2007 WI 72, ¶ 27 n.12, 301 Wis. 2d 266, 732 N.W.2d 828 (citation omitted). A permanent injunction is "an extremely powerful instrument" that may not be "issued lightly. The cause must be substantial." *Pure Milk*, 90 Wis. 2d at 800.

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Kormanik cites *Teigen,* but that case says nothing about whether harm sufficient for standing would support a permanent injunction. 403 Wis. 2d 607, ¶ 14. That issue was not raised by the parties or addressed by the court.

Kormanik also discusses *Joint Sch. Dist. No. 1, City of Wis. Rapids v. Wis. Rapids Educ. Ass'n*, 70 Wis. 2d 292, 234 N.W.2d 289 (1975), but that case does

[5] *Teigen's* ruling on standing is not the law because it did not receive the requisite supreme court votes. *See Rise, Inc. v. Wisconsin Elections Comm'n*, No. 2022AP1838, 2023 WL 4399022, at *1 (Wis. Ct. App. July 7, 2023) (unpublished).

not help her, either. While the court noted that there was some support in Wisconsin authorities for the idea that when the Legislature expressly makes certain conduct illegal (in this case a municipal employee strike) an injunction may be issued without evidence of further harm, the court ultimately concluded that it "should not restrain illegal acts merely because they are illegal." *Id.* at 300. Rather, the injury must be actually real or threatened. *Id.* In upholding the injunction there, the court relied on specific concrete harms in addition to the illegal nature of the strike: inability to operate the school, denial of educational benefits to students, and cancellation of school events, among others. *Id.* at 309, 312–313.

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Here, in contrast, Kormanik points to no statute expressly making the conduct illegal and demonstrates no real injury. The guidance that she seeks to permanently enjoin has already been withdrawn; it will not automatically be reinstated if the temporary injunction is lifted. Further, Kormanik seeks to avoid highly speculative injuries related to voter fraud, harassment, and disenfranchisement, harms she neither explains nor supports with evidence. Kormanik is not entitled to a permanent injunction.

CONCLUSION

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

Dated this 18th day of August 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 *Reply Brief In Support of Defendant Wisconsin Elections Commission'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 18th day of August 2023.

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