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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 REPLY IN SUPPORT OF RISE'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The Court should grant Rise's motion for summary judgment. Plaintiff Nancy Kormanik lacks standing, her interpretation of the pivotal statute would render much of its language surplus, and her procedural claims are not properly before the Court and are foreclosed by binding precedent.

ARGUMENT

I. Kormanik lacks standing.

Kormanik lacks standing to bring her claims. A plaintiff may challenge the validity of a guidance document "*only when it appears from the complaint and the supporting evidence* that the . . . 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). The Wisconsin Supreme Court therefore requires Chapter 227 plaintiffs like Kormanik to show that the challenged agency action—here, the Guidance—has caused an "injury in fact" to an interest of the plaintiff that the statute invoked "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; *see* Rise Br. at 6–8.[1]

Kormanik has not shown in her evidence or briefing that the Challenged Guidance has caused any "injury in fact" to any of her statutorily protected interests. *See* Rise Br. at 8–10. Her own opening brief describes the purported risk of disenfranchisement traceable to the Challenged

[1] This Reply cites the other briefs in this case as follows:

- "Kormanik Brief" refers to "Plaintiff's Brief in Support of Motion for Summary Judgment and Declaratory Judgment," dkt. 132.
- "Rise Brief" refers to "Intervenor Rise, Inc.'s Brief in Support of Rise's Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment," dkt. 139.
- "Kormanik Reply" refers to "Plaintiff's Reply Brief in Support of Motion for Summary Judgment, and in Opposition to Defendants' Motions for Summary Judgment," dkt. 147.

Guidance as merely "potential," not factual. Kormanik Br. at 17. And her evidentiary submissions do not show even "potential" disenfranchisement. Kormanik has not identified a single instance of confusion, identity theft, or disenfranchisement to *anyone* caused by the Guidance. And she certainly has not shown any direct threat to her *own* rights. She thus lacks standing under *Black River Forest*.

Kormanik's rejoinders all fail. First, her conclusory assertion that purportedly "unlawful" election procedures "necessarily impair voter confidence, cause voter confusion, and disenfranchise voters," Kormanik Reply at 1, lacks any evidentiary support. She has not produced any evidence that the Guidance has ever had any of those effects, and she does not even assert—much less show—that it has had those effects *on her*, as would be needed to give her standing. To the contrary, Kormanik's affidavit asserts only that she is a registered voter, has voted absentee, and plans to continue to do so. *See* Aff. of Nancy Kormanik in Supp. of Pl.'s Mot. for Summ. J., dkt. 131.

Second, Kormanik's citations to *Purcell v. Gonzalez* and *McConkey v. Van Hollen* are off point. *Purcell* is a federal case that stands only for the uncontroversial proposition that when fraud occurs, it harms voter confidence. *See* 549 U.S. 1, 2–4 (2006) (per curiam). That does nothing to help Kormanik, who offers no evidence of fraud or of harm to voter confidence. As for *McConkey*, there the voter plaintiff showed actual injury to an "at least . . . trifling interest": an amendment he opposed had been presented to the voters (including to him) in a manner that he alleged violated constitutional requirements. 2010 WI 57, ¶ 17, 326 Wis. 2d 1, 783 N.W.2d 855. Kormanik, in contrast, demonstrates no interference with *her own* voting rights—not even a "trifling" one. Moreover, the Court in *McConkey* explained that it was "*troubled* by . . . broad general voter standing," and emphasized that it was reaching the merits because of "the *unique* circumstances

of [the] case" where delaying adjudication would have generated problematic uncertainty over the validity of a constitutional amendment defining marriage. *Id.* ¶¶ 17–18. (emphasis added). The decision otherwise affirmed the general rule that standing requires "an actual injury to a legally protected interest." *Id.* ¶ 15. Kormanik misleadingly presents *McConkey* as a path-marking case endorsing expansive voter standing, but it turns out to be an unusual one-off with wholly dissimilar facts.

Third, *Teigen v. Wisconsin Elections Commission*, 2022 WI 64, 403 Wis. 2d 607, 976 N.W.2d 519, does not save Kormanik's standing. For starters, the novel vote-pollution theory of voter standing garnered only three votes in *Teigen* and has not been adopted in any other case, so it is not the law. Rise Br. at 7–8 & n.1 (discussing *Teigen*); *see Rise, Inc. v. Wis. Elections Comm'n*, No 2022AP1838, unpublished slip op. ¶ 27 n.6 (Ct. App. July 7, 2023). The problem with Kormanik's reliance on *Teigen* is not just that it was a "split decision," as Kormanik puts it, Kormanik Reply at 3, but that four justices outright *rejected* her vote pollution theory as a basis for standing, *Teigen*, 2022 WI 64, ¶ 167 (Hagedorn, J., concurring in part) (pointing out that the lead opinion's standing analysis did not "garner the support of four members of this court"); *id.* ¶¶ 210–15 (Walsh Bradley, J., dissenting). And even under the *Teigen* lead opinion's expansive view of standing, a plaintiff seeking summary judgment must build a record of undisputed facts showing that vote pollution *is actually occurring*. *See id.* ¶ 24 (lead opinion). In *Teigen* itself, the record showed that "hundreds of ballot drop boxes [had] been set up in past elections, prompted by the memos, and thousands of votes [had] been cast via this unlawful method." *Id.* Kormanik has not made an equivalent showing here, because she has not introduced any evidence of the Challenged Guidance's acceptance, implementation, or effects.

Finally, Kormanik's last-ditch resort to the Uniform Declaratory Judgments Act is an irrelevant tangent. This Court may invalidate guidance "*only*" if it finds that the "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). Whether Kormanik *also* satisfies Section 806.04(1)'s requirements is beside the point. *See* Rise Br. at 8. Rise has never argued that Sections 227.40(1) and 806.04(1) are "conflicting," as Kormanik claims. Kormanik Reply at 4. Rise's point is that Section 227.40(1)'s plain text imposes a specific, additional standing requirement on challenges to guidance. *See* Rise Br. at 6–8. Kormanik has now had two opportunities to meet that requirement but still has not. Accordingly, the Court should grant summary judgment to Rise on all claims.

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

Rise's interpretation of Section 6.86 is consistent with the statute's plain text and gives effect to all its words. Specifically, under Rise's interpretation, Section 6.86(5) allows a voter to request that a municipal clerk return their ballot so that they may spoil it and exchange the now-spoiled ballot for a replacement. Rise Br. at 11. This interpretation of subsection (5) makes perfect sense of subsection (6), which states that "[e]xcept as authorized in sub. (5) and s. 6.87(9)," previously delivered ballots may not be returned to voters. Wis. Stat. § 6.86(6). In contrast, on Kormanik's interpretation, subsection (5) would *never* authorize a municipal clerk to "return" a ballot to the voter, rendering that portion of subsection (6) entirely superfluous.

A. Section 6.86(6) contains two independent exceptions, and the Court must give effect to both.

Kormanik's Reply confirms that she believes there is only *one* scenario in which a clerk may return an already-delivered ballot to the voter—when there is a defect in the certificate, "as authorized in . . . s. 6.87(9)." Kormanik Reply at 7. But, as Rise explained, Rise Br. at 11, Section

6.86(6) contains *two* exceptions. The first sentence reads: "Except 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." Wis. Stat. § 6.86(6) (emphasis added). To give meaning to all the words of the statute, the first exception—"as authorized in sub. (5)"—must sometimes authorize the municipal clerk to "return the ballot to the elector." Kormanik offers no alternative reading that would give effect to *both* exceptions set forth in Section 6.86(6).

Kormanik instead suggests that, because they are "referenced together," Sections 6.86(5) and 6.87(9) must be "read together" as a single exception to the general rule in Section 6.86(6). Kormanik Reply at 7. But Section 6.86(5) and Section 6.87(9) appear in different sections and deal with entirely different subjects. Section 6.86(5) addresses the procedure for spoiling ballots and issuing replacement ballots. Section 6.87(9) addresses ballots with "an improperly completed certificate or with no certificate." Kormanik provides no explanation of how, exactly, these disparate provisions can be "read together" as addressing a single subject. Rather, even on Kormanik's reading, only Section 6.87(9) authorizes the return of a ballot to a voter. Kormanik Reply at 7. If Kormanik were correct, there would be no reason for the Legislature to refer to *both* provisions as exceptions to Section 6.86(6)'s prohibition on returning ballots to voters. The exact same result could be accomplished by the simpler phrase "Except as authorized in s. 6.87(9)."

Kormanik's proffered interpretation therefore renders part of subsection (6) superfluous. The Court should reject it.

B. Rise's interpretation of Section 6.86(5) is readily available and gives effect to both exceptions set out in Section 6.86(6).

To give effect to all the words of Section 6.86(6), Section 6.86(5) must sometimes authorize the municipal clerk to "return the ballot" that the elector had previously delivered to the clerk. Under Rise's interpretation, it does just that. Specifically, Section 6.86(5) allows a voter to

"request . . . a replacement ballot under" subsection (5) by getting their original ballot back, spoiling it, and returning the now-spoiled ballot for a replacement. Kormanik's textual responses to Rise's interpretation of subsection (5) are unpersuasive.

First, Rise's interpretation does not render the phrase "under this subsection" in subsection (5) superfluous. *See* Kormanik Reply at 7–8. Rise's interpretation finds authorization to return a ballot in "this subsection"—that is, subsection (5).

Second, contrary to Kormanik's contention, the word "shall" in Section 6.86(5) is plainly mandatory. "Generally, the word 'shall' is presumed mandatory when it appears in a statute." *Bank of N.Y. Mellon v. Carson*, 2015 WI 15, ¶ 21, 361 Wis. 2d 23, 859 N.W.2d 422 (internal quotation marks omitted). And "when the legislature uses the terms 'shall' and 'may' in the same statutory section, it supports a mandatory reading of the term 'shall' as the legislature is presumed to be aware of the distinct meanings of the words." *Id.* ¶ 23. The word "may" appears *seventeen times* in Section 6.86—including twice in the subsection that immediately precedes subsection (5). Wis. Stat. § 6.86(4). The mandatory language in subsection (5) thus *requires* the municipal clerk to issue a replacement ballot to the elector "[w]henever an elector returns a spoiled or damaged absentee ballot to the municipal clerk." *Id.* § 6.86(5). That provision is triggered automatically—there is nothing to "request."[2] The second sentence of subsection (5), which authorizes a "request" for a replacement ballot, therefore must contemplate a procedure whereby a voter may ask for their ballot back, spoil it, and request a new one.

[2] Kormanik's argument that this mandatory obligation would "eliminate the possibility of voters returning spoiled ballots because they want to vote in person" is incorrect. Kormanik Reply at 8–9. Under Wisconsin law, a voter who has received but not returned an absentee ballot may still vote in person. *See* Wis. Stat. § 6.86(6); Wisconsin Elections Commission, *Election Day Manual* 40–41 (Sept. 2020), *available at* https://elections.wi.gov/resources/manuals/election-day-manual. Kormanik has not challenged this aspect of WEC guidance.

Third, each of the steps for "requesting a replacement ballot" appears in the statute's text. The second sentence of subsection (5), when read in conjunction with subsection (6), authorizes the municipal clerk to "return" a ballot to a voter upon the voter's "request," so that the voter may "spoil" the ballot as provided in the *first* sentence of Section 6.86(5). Upon the return of the spoiled ballot, the municipal clerk has a mandatory obligation to issue a new ballot—as indicated by the word "shall" in the first sentence of subsection (5). All of that must be accomplished "within the applicable time limits under subs. (1) and (3)(c)." Wis. Stat. § 6.86(5). Rise's interpretation gives effect to all the words of Section 6.86, while adding nothing to the statute's text that is not already there.

Finally, Kormanik's dismissal of Section 6.86(6)'s plain text as an "opaque cross-reference," Kormanik Reply at 9, ignores the fundamental precept that courts "must not examine a portion of a statute in isolation ignoring the overall intent of the statutory scheme," *State ex rel. Rupinski v. Smith*, 2007 WI App 4, ¶ 14, 297 Wis. 2d 749, 728 N.W.2d 1. Rise's reading harmonizes the entire statutory scheme by reading subsections (5) and (6) together, thereby giving meaning to all the words of the statute.

For all these reasons, the Court should reject Kormanik's narrow reading of Section 6.86(5) and adopt Rise's interpretation, which is the only interpretation that gives effect to the statutory text as a whole.

C. Under Rise's interpretation, Kormanik's requested injunctive relief must be denied.

Contrary to Kormanik's argument, Rise's interpretation of Section 6.86 is relevant because it forecloses the particular injunctive relief Kormanik seeks. The Court's temporary injunction, which Kormanik seeks to make permanent, prohibits WEC from promulgating any guidance stating 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).” Order for Temporary Injunction, dkt. 106. Under Rise’s interpretation, the relief that Kormanik seeks would be contrary to law: under Section 6.86(5), clerks may also return previously submitted ballots to electors so that the electors can spoil them and get new ones. This is also consistent with the August 1, 2022 WEC Memorandum, which specifies that absentee voters “can request to spoil their absentee ballot and have another ballot issued,” Compl. Ex. A, dkt. 3—just as Rise argues the statute allows.

D. Kormanik does not dispute that Section 6.87(9) allows voters to request and then spoil ballots with defective certificates.

As Rise explained in its opening brief, the second exception in Section 6.86—“as authorized in . . . s. 6.87(9)”—authorizes municipal clerks to return ballots with defective certificates to voters. And a voter whose ballot is “returned” because of a defective certificate may either (i) cure the defective certificate and re-submit the ballot or (ii) spoil the ballot and receive a new one under Section 6.86(5). *See* Rise Br. at 15–16. Kormanik does not dispute either of these points. At a minimum, any declaration or injunction should preserve this right to request and then spoil a ballot in need of cure, and thereby obtain a replacement ballot.

III. Kormanik’s procedural challenge under Section 5.05(1e) fails.

Kormanik also argues that the Challenged Guidance is procedurally unlawful under Section 5.05(1e). That claim fails for two reasons. The first is simple pleading requirements. A plaintiff must identify her claims in the complaint. Wis. Stat. § 802.02. Kormanik admits that she did not do so. She asserts that the 5.05(1e) claim was preserved because her attorney twice mentioned it in passing at the temporary injunction hearing. Kormanik Reply at 14 & n.4. But that only illustrates the problem. If Kormanik wanted to amend her complaint to add a Section 5.05(1e) claim after the hearing, she had six months after filing to do so. Wis. Stat. § 802.09. She did not,

and that window has long since closed. Nor is Kormanik entitled to rely on supposed "express or implied consent" to litigate an unpleaded claim, Kormanik Reply at 14, because the statute she cites requires "express or implied consent *of the parties*," Wis. Stat. § 802.09(2) (emphasis added). Rise is one of the parties. "When a party intervenes, it becomes a full participant in the lawsuit and is treated just as if it were an original party." *Kohler Co. v. Sogen Int'l Fund, Inc.*, 2000 WI App 60, ¶ 12, 233 Wis. 2d 592, 608 N.W.2d 746. And, far from consenting to litigate the Section 5.05(1e) claim, Rise explained in its opening brief that the claim is not properly before the Court. Rise Br. at 16–17.[3]

The second problem with Kormanik's Section 5.05(1e) claim is that it gets the law wrong. The Supreme Court held in *SEIU v. Vos* that guidance documents do not constitute agency "action," and that the Legislature therefore may not impose procedural requirements on their issuance. 2020 WI 67, ¶¶ 106–08, 393 Wis. 2d 38, 946 N.W.2d 35. Kormanik responds that *SEIU* did not explicitly discuss Section 5.05(1e)'s use of the term "action." Kormanik Reply at 13. But that misses the point. In the very next sentence of her Reply, Kormanik admits that *SEIU* was a constitutional separation-of-powers decision. *Id.* Its holding that the Legislature may not impose procedural requirements on the issuance of nonbinding guidance therefore controls here. The requirement of a formal two-thirds WEC vote is an archetypal procedural requirement. The term "action" in Section 5.05(1e) plausibly may be construed not to include the issuance of mere guidance. Accordingly, it must be construed to avoid conflict with *SEIU*'s constitutional holding. *See, e.g.*,

[3] Kormanik's suggestion that WEC consented at the injunction hearing, Kormanik Reply at 14, is also quite misleading. In reality, WEC's attorney suggested the argument had been "forfeited" because the hearing was the first anybody had heard of it. Transcript of Oct. 5, 2022 Hearing, dkt. 104, at 47–48. His passing remark about the claim's being "raised further down the road" was likely just acknowledging Kormanik's right to amend her complaint, not consent binding on all Defendants to litigate an unpleaded claim going forward.

In re Termination of Parental rights to Max G.W., 2006 WI 93, ¶ 20, 293 Wis. 2d 530, 716 N.W.2d 845.

IV. The Challenged Guidance is mere guidance.

Kormanik's assertion that the Challenged Guidance is an invalid unpromulgated rule also fails. Kormanik's argument elides the central distinction between "communications *about* the law" (guidance documents) and "the law itself" (rules and statutes). *SEIU*, 2020 WI 67, ¶ 102. The Challenged Guidance falls unambiguously in the former category: it explains WEC's interpretation of statutory requirements and obligations, rather than purporting to impose new obligations of its own. WEC's August 2, 2022 press release, for example, explains that "*Wis. Stat. § 6.86(5)* authorizes a voter to spoil his or her absentee ballot and be issued a new one." Compl. Ex. B, dkt. 4 (emphasis added). Such documents are guidance rather than rules because they "contain [WEC]'s interpretation of the laws" but do not themselves have legal effect. *SEIU*, 2020 WI 67, ¶ 106. *SEIU* is very clear: documents that "communicate intended applications of the law," but that "are not the actual execution of the law," are mere nonbinding guidance documents, not rules. *Id.* ¶ 102. And it makes no difference that the documents are phrased in mandatory terms, because they are explaining statutory rules that are themselves mandatory. As Kormanik herself recognizes, the asserted mandates come from the underlying statutes, not from the guidance. *See* Kormanik Reply at 16 (arguing that WEC is responsible for administering "the election laws" and "can investigate and prosecute violations of those laws").

The Challenged Guidance comprises a press release directed to voters rather than clerks, Compl. Ex B., dkt. 4, and a clerk communication memo expressly entitled "Guidance" that advises clerks as to how WEC thinks they should handle ballot spoiling, Compl. Ex. A, dkt. 3. Neither of those documents executed the law or imposed a new legal obligation of its own, nor would any clerk have understood them to do so. Rather, as Rise pointed out, Rise Br. at 18, and as Kormanik

continues to ignore, the statutes in dispute are by their own terms executed by "municipal clerks," not WEC, *see* Wis. Stat. §§ 6.86(5), 6.87(9). Accordingly, when it comes to those statutes, clerks are free to agree with WEC's statements about those statutes or to disagree with them. *See State ex rel. Zignego v. Wis. Elections Comm'n*, 2021 WI 32, ¶ 29, 396 Wis. 2d 391, 957 N.W.2d 208. The underlying statutes control, and if the clerks are bound, it is by the underlying statutes, not by WEC's interpretation of them.

CONCLUSION

The Court should grant Rise's motion for summary judgment.

DATED this 18th day of August, 2023

Electronically signed by Diane M. Welsh
Diane M. Welsh, SBN 1030940
PINES BACH LLP
122 W. Washington Ave, Suite 900
Madison, WI 53703
Telephone: (608) 251-0101
Facsimile: (608) 251-2883
dwelsh@pinesbach.com

David R. Fox*
Richard A. Medina*
Samuel T. Ward-Packard, SBN 1128890
ELIAS LAW GROUP LLP
250 Massachusetts Ave. NW, Suite 400
Washington, D.C. 20001
Telephone: (202) 968-4652
dfox@elias.law
rmedina@elias.law
swardpackard@elias.law

Attorneys for Intervenor Rise, Inc.

*Admitted *pro hac vice*