STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

NANCY KORMANIK,

Plaintiff Respondent,

v.

Appeal No.
2024AP408

WISCONSIN ELECTIONS COMMISSION,

Circuit Court Case No.
2022CV1395

Defendant Co-Appellant,

DEMOCRATIC NATIONAL COMMITTEE,

Intervenor Co-Appellant,

RISE, Inc.,

Intervenor Appellant.

INTERVENOR APPELLANT RISE, INC'S OPENING BRIEF

On Appeal from the
Circuit Court for Waukesha County
Case No. 2022CV1395
The Honorable Brad D. Schimel, Presiding

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1. Does Nancy Kormanik have standing to bring a challenge to Wisconsin Elections Commission guidance that explains how voters may spoil their ballots on the theory that other voters' decision to spoil their own ballots harms her?

   The circuit court answered **yes**.

   This Court should answer **no**.

   §

2. Do Wisconsin's election statutes permit a municipal clerk to return a voter's previously submitted ballot back to the voter so that the voter can spoil it and vote a new ballot?

   The circuit court answered **no**.

   This Court should answer **yes**.

STATEMENT REGARDING ORAL ARGUMENT AND PUBLICATION

Rise, Inc. requests that the Court hear oral argument in this appeal because it presents the important question of the proper standard for voter standing, a question which is arising with increasing frequency in election litigation. Publication is appropriate for the same reason.

INTRODUCTION

For more than a decade, Wisconsin election officials allowed voters who returned their absentee ballots early to spoil them before election day and vote a new ballot if the voters wanted to do so. But in August 2022, Plaintiff-Respondent Nancy Kormanik filed suit to challenge as unlawful the Wisconsin Election Commission guidance that authorized this practice. The guidance did not directly affect Kormanik, who was—of course—under no obligation to spoil her ballot if she did not want to. But Kormanik objected to *other voters* being offered that option, and the circuit court granted summary judgment in her favor, declaring that the longstanding practice violated Wisconsin law.

This Court should reverse. Kormanik lacks standing because allowing other voters to spoil their ballots before election day and vote new ones does nothing to harm her. Plaintiffs who challenge agency guidance must make a threshold showing under Section 227.40 that the challenged guidance "interferes with or impairs, or threatens to interfere with or impair, [their] legal rights and privileges." Wis. Stat. § 227.40(1). This requires showing that they face (i) an injury in fact to (ii) a legal right or privilege. *Id.* Kormanik presented *no* evidence of any actual or threatened injury to her that would entitle her to summary judgment. She instead relied on unsupported, conclusory, and speculative claims about potential identity theft and fraud. But she offered *no* evidence that the challenged guidance is likely to lead to any of this, let alone that Kormanik herself is likely to *personally* experience any of these hypothetical injuries. Kormanik also broadly laid claim to a "vote pollution" injury, an impossibly broad theory of voter standing asserting that *any* violation of the election laws anywhere in Wisconsin "pollutes" the votes of all Wisconsin voters, giving rise to injury for standing purposes. No appellate court in Wisconsin has adopted that unbounded theory, and a majority of the Wisconsin Supreme Court has rejected it.

Even if the circuit court was correct to reach the merits of the case, its analysis of the relevant statutes was fatally flawed. The circuit court agreed with

Rise and its co-defendants that Kormanik's interpretation of Section 6.86(6) rendered important words of that subsection entirely superfluous. And it said that it could not "reconcile [Kormanik's] position with the plain language of the statute." App. 20 (R.160:12). The circuit court nonetheless adopted Kormanik's interpretation because the alternative, it said, would be "much worse"—"adding language to the statutes that is not there." *Id.* But the interpretation put forward by Rise adds no language to the statute: it gives effect to every word of Section 6.86 while harmonizing its various subsections. The circuit court's contrary view was apparently driven by its mistaken belief that statutory absentee voting procedures had to be narrowly construed. But the Wisconsin Supreme Court has since rejected that approach, explaining instead that absentee voting statutes are construed like any other, and procedures are invalid only if they are "in contravention of the statutory procedures." *Priorities USA v. Wis. Elections Comm'n*, 2024 WI 32, ¶ 45, 412 Wis. 2d 594, 8 N.W.3d 429 (quotation marks omitted). Nothing in Rise's interpretation or the WEC guidance that Kormanik challenged contravenes Section 6.86's plain text.

STATEMENT OF THE CASE

I. Statutory Framework

This appeal presents questions about two discrete statutory provisions.

The first is the statute governing Kormanik's right to bring this case. Wisconsin's Administrative Procedure Code creates a cause of action for a party to challenge "the validity of a rule or guidance document." Wis. Stat. § 227.40(1). Outside a narrow set of exceptional cases, *see* Wis. Stat. § 227.40(2), an "action for declaratory judgment" under this provision is the "exclusive means" to bring such a validity challenge, Wis. Stat. § 227.40(1). As relevant here, a plaintiff bringing such an action must satisfy a statutory standing requirement: "The court shall render a declaratory judgment in the action *only* when it appears from the complaint and the supporting evidence that the rule or guidance document or its threatened application interferes with or impairs, or threatens to interfere with or impair, the

legal rights and privileges of the plaintiff." *Id.* (emphasis added); *see also Teigen v. Wis. Elections Comm'n*, 2022 WI 64, ¶ 159, 403 Wis. 2d 607, 976 N.W.2d 519 (Hagedorn, J., concurring in part) ("In legal parlance, this harm requirement is called standing.").

The second statute at issue governs the circumstances under which election officials may return a previously delivered absentee ballot to a voter. "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). Section 6.86(5), in turn, *requires* a municipal clerk to issue a new ballot to an elector (or the elector's agent) "whenever an elector [or the elector's agent] returns a spoiled or damaged absentee ballot to the municipal clerk . . . and the clerk believes that the ballot was issued to or on behalf of the elector who is returning it." *Id.* § 6.86(5). Section 6.86(5) also allows voters to make a "request for a replacement ballot" "within the applicable time limits under subs. (1) and (3)(c)." And Section 6.87(9) provides that "[if] a municipal clerk receives an absentee ballot with an improperly completed certificate or with no certificate, the clerk may return the ballot to the elector . . . whenever time permits the elector to correct the defect and return the ballot."

II. Factual Background

Wisconsin's election administration agency has issued guidance about absentee voters' options for obtaining replacement ballots on several occasions over the past decade. In 2014, the Government Accountability Board—the Elections Commission's predecessor body in operation until 2016—issued a flowchart directing clerks how to process such requests. R.56:1.[1] In October 2020, the

[1] The 2014 flowchart authorized a clerk to issue a replacement ballot whenever a voter made a timely request. R.56:1. It also instructed the clerk to assess whether the person requesting the ballot was the original voter and contact law enforcement if not. *Id.* And it directed the clerk to "destroy the spoiled or damaged ballot" by making a tear in the ballot

Commission issued more detailed guidance about absentee ballot spoiling for purposes of the November 2020 election. R.57. On August 1, 2022, the Commission reissued similar guidance for purposes of the August 9, 2022, partisan primary. App. 24 (R.3). And on August 2, 2022, the Commission issued a press release entitled "Rules about 'Spoiling' Your Ballot." App. 28 (R.4).

The issue received particular attention in early August 2022 because of events in the hotly contested race for the Democratic nomination for U.S. Senate. Over a few days in late July—just two weeks before the primary election, and after absentee voting had already begun—three of the four major candidates terminated their campaigns and endorsed the eventual Democratic nominee, then–Lieutenant Governor Mandela Barnes.[2]

The Commission's August 1 guidance document, issued in this context, noted that "[m]any voters" were contacting the Commission with questions about "spoiling their absentee ballot." App. 24 (R.3:1). The August 2 press release similarly indicated that "[v]oters and the media have been contacting the Wisconsin Elections Commission with questions about the process and rules for spoiling absentee ballots." App. 28 (R.4:1). The guidance indicates that voters' concerns

envelope and writing "spoiled" on the envelope, to log the spoiling and replacement of the ballot on the Absentee Ballot Log, and to place the spoiled ballot in the spoiled ballot container. *Id.*

[2] *See* Bill Glauber, *Tom Nelson drops out of Wisconsin Democratic U.S. Senate primary, throws support to Mandela Barnes*, Milwaukee J. Sentinel (July 25, 2022), https://www.jsonline.com/story/news/politics/elections/2022/07/25/tom-nelson-bows-out-wisconsin-senate-race-supports-mandela-barnes/10140218002; Bill Glauber & Daniel Bice, *'Mandela won this race': Alex Lasry drops out of Wisconsin Democratic U.S. Senate primary, endorses Lt. Gov. Mandela Barnes*, Milwaukee J. Sentinel (July 27, 2022), https://www.jsonline.com/story/news/politics/elections/2022/07/27/alex-lasry-dropping-out-democratic-u-s-senate-race-sources-say/10161418002/; Bill Glauber, Daniel Bice & Ben Baker, *Sarah Godlewski withdraws from Wisconsin U.S. Senate Democratic primary, clearing path for Lt. Gov. Mandela Barnes*, Milwaukee J. Sentinel (July 29, 2022), https://www.jsonline.com/story/news/politics/elections/2022/07/29/sarah-godlewski-withdraws-democratic-u-s-senate-primary/10182719002/.

included damaged ballots, errors made when voting their ballots, and changes of heart about which candidate to support, App. 24 (R.3:1)—an understandable desire where three of four leading candidates in the state's highest-profile race had withdrawn just days earlier.

The August guidance explained that an absentee voter could "request to spoil their absentee ballot and have another ballot issued as long as the appropriate deadline to request the new absentee ballot [had] not passed." App. 24 (R.3:1). As an alternative, it indicated that a voter could "request to have their returned absentee ballot spoiled and instead vote in person, either during the in-person absentee period or at their polling place on election day," subject to the same timing requirement. *Id*. The press release provided equivalent procedural guidance and cited Section 6.86(5) and (6) as the authority permitting voter-directed absentee ballot spoiling. App. 28 (R.4:1).

III. Procedural History

A. Complaint and Parties

In a complaint filed on September 23, 2022—less than two months before the November general election—Plaintiff Nancy Kormanik challenged the validity of the Commission's August 2022 ballot-spoiling guidance. App. 41–42 (R.2, ¶¶ 11–18). Kormanik's complaint described her as a "registered voter who has voted via absentee ballot in prior elections in Waukesha County, including the August 2022 primary," and who planned to vote by absentee ballot in November 2022 as well. App. 40 (R.2, ¶ 2). The complaint raised a single claim, for "declaratory relief." App. 44 (R.2:8) (capitalization altered); *see also* App. 44–45 (R.2, ¶¶ 29–37). Kormanik sought a categorical declaration that "municipal clerks are prohibited from returning an absentee ballot after it was previously completed and returned to the clerk by the elector who was issued the absentee ballot." App. 46 (R.2:10). Kormanik named the Wisconsin Elections Commission as the sole defendant. App. 39 (R.2:3).

Rise, Inc. moved to intervene on September 29. Rise is a nonprofit organization working to empower students to advocate for free public higher education and to end homelessness, housing insecurity, and food insecurity among college students. R.29, ¶ 2. Rise's efforts to empower and mobilize students as participants in the political process are critical to its mission because building political power within the student population is a necessary condition to achieving Rise's policy goals. R.29, ¶ 3. Rise's intervention papers explained that it was in the midst of an extensive get-out-the-vote effort for Wisconsin's November 2022 election, and that absentee voting was a key component of that effort. R.29, ¶¶ 6–7. Rise indicated that Kormanik's lawsuit, filed "just six weeks before the election, and after absentee voting has already begun," threatened, if successful, to substantially disrupt voters' options for curing their absentee ballots and by extension to divert Rise's limited GOTV resources. R.29, ¶¶ 11–13. The circuit court granted Rise's motion to intervene, along with a motion to intervene filed by the Democratic National Committee. R.72; R.79.

B. Temporary Injunction Litigation

Shortly after filing her complaint, Kormanik moved for a temporary restraining order and temporary injunction against the Commission's continued promulgation of the August 2022 guidance. Kormanik claimed that emergency relief was necessary because the guidance was harming her "in several ways": by creating "uncertainty as to whether a lawful vote submitted by absentee ballot to a municipal clerk may later be invalidated," by contributing to "the unequal administration of Wisconsin's election system," and by permitting "the counting of votes cast in violation of Wisconsin law, as such votes dilute or otherwise diminish the value of her vote." R.16:5. Kormanik did not argue, never mind establish, that these generalized concerns fell uniquely or disproportionately on her. Kormanik also complained of "potential disenfranchisement by identity theft and voter fraud," R.16:10, but introduced no evidence that this was occurring or was in fact likely to occur, let alone that she was a likely victim of it.

Rise, the Commission, and the DNC all opposed Kormanik's requested relief, which amounted to last-minute interference in an ongoing election. R.40; R.60; R.63. Rise's brief emphasized that Kormanik had identified no harm that could plausibly constitute an irreparable injury sufficient to warrant the extraordinary relief she sought. R.40:10. Rather, her alleged injury was "speculative and wholly unsubstantiated." R.40:10. Rise also argued that Kormanik's motion was untimely, would not preserve the status quo, and was wrong on the merits. R:40:6–18.

The circuit court nonetheless granted a temporary injunction at the conclusion of a hearing on October 5. R.104 (hearing transcript); R.106 (order). The court's resulting order enjoined the Commission from continuing to display, apply, or disseminate its August 2022 guidance or any equivalent guidance authorizing voter-directed ballot spoiling. R.106:2. And it directed the Commission to notify local elections officials of the court's decision. R.106:2–3.

Both Rise and the DNC petitioned this Court for leave to appeal from the temporary injunction order. The Court entered an administrative stay of the temporary injunction to allow resolution of the petitions. After a dispute over the proper venue, the Supreme Court issued a supervisory writ to Presiding Judge Brash directing that the petitions be resolved in District II. *See State ex rel. Kormanik v. Brash*, 2022 WI 67, 404 Wis. 2d 568, 980 N.W.2d 948 (R.115). This Court then denied leave to appeal on October 27. *Kormanik v. Wis. Elections Comm'n*, 2022AP1720-LV & 2022AP1727-LV (Ct. App. Oct. 27, 2022) (R.111). The Court held that Rise and the DNC had not shown that leave was necessary to protect them from "substantial or irreparable injury." *Id.* at 2. The Court also indicated that it was "not convinced that the petitioners have shown a substantial likelihood of success on the merits of the appeal," but made no "final and definitive ruling on the matter due to the case's procedural posture." *Id.* at 3–4.

Shortly after the stay was lifted, the Commission complied with the temporary injunction order. It withdrew the challenged August 2022 guidance and

issued a clerk communication to inform local elections officials of that withdrawal and the circuit court's decision.

C. Summary Judgment Litigation

After the 2022 election, Kormanik moved for summary judgment. Rise, the Commission, and the DNC all cross-moved.

Kormanik continued to argue that the challenged guidance injured her by "pollut[ing] 'lawful votes.'" R.132:18 (quoting *Teigen*, 2022 WI 64, ¶ 25). And she again claimed that the guidance exposed her and "Wisconsin absentee voters in general" to a risk of "potential disenfranchisement by identity theft and voter fraud." R.132:17. But Kormanik offered no factual support for either allegation. Kormanik's sole affidavit asserted only that she (i) was a registered voter; (ii) had voted by absentee ballot in "prior elections"; (iii) had voted by absentee ballot in August and November 2022 and in April 2023; and (iv) intended to vote "in the upcoming elections in the State of Wisconsin by absentee ballot and return such completed absentee ballots to [her] municipal clerk in compliance with Wisconsin law." App. 48–49 (R. 131:1–2). She offered no evidence showing any risk of fraud, identity theft, or any other form of injury.

Rise explained that because Kormanik's cause of action was based on Section 227.40(1), she had to satisfy the Wisconsin Supreme Court's two-part test for standing to bring a Chapter 227 action against an agency. R.139:6–8; R.156:3. Under that test, a plaintiff must show that the challenged guidance threatens (i) an "injury in fact" to (ii) an interest that the statutes on which she relies "recognizes or seeks to regulate or protect." *Friends of Black River Forest v. Kohler Co.*, 2022 WI 52, 402 Wis. 2d 587, 977 N.W.2d 342 ¶¶ 21, 28 (quoting *Waste Mgmt. of Wis. v. State of Wis. Dep't of Nat. Res.*, 144 Wis. 2d 499, 505, 424 N.W.2d 685 (1988)). Rise further explained that *Teigen* had not lowered the bar for what constitutes such an injury. R.139:7–10. To the contrary, four justices in *Teigen* had *rejected* vote pollution as an actionable category of injury. *Teigen*, 2022 WI 64, ¶ 167 (Hagedorn, J., concurring in judgment); *id.* ¶¶ 210–15 (Walsh Bradley, J., dissenting).

The circuit court nevertheless held that Kormanik had standing and granted a declaratory judgment in her favor. In analyzing standing, the circuit court never analyzed Kormanik's evidentiary submissions under the two-part test the Court set out in *Black River Forest*. *See* App. 14–16 (R.160:6–8). The court instead upheld Kormanik's standing based merely on the unsubstantiated *possibility* of fraud. *See* App. 15–16 (R.160:7–8) ("[E]lection fraud cannot be repaired. Once it happens, people are disenfranchised by improperly cast votes. A candidate will get votes improperly, and there is no way to adjust the vote count."). To justify this holding, the court emphasized that if Kormanik lacked standing, "it is very likely some other plaintiff will" have it, and reasoned that "it would be an awful shame to have put the litigants here . . . and another court through the tremendous work that has been expended all over again. App. 15 (R.160:7). The circuit court cited no case to support the novel proposition that a court may hear a case brought by a plaintiff without standing because the court finds the prospect of wasted litigation efforts would otherwise be "an awful shame."

On the merits, the circuit court agreed with Rise that Kormanik's reading created a surplusage problem yet still ruled for Kormanik. *See* App. 20 (R.160:12). All that the court had to say about Rise's construction—the only reading offered by any party that avoided that surplusage problem—was the following:

> Defendant Rise proposes a solution to the surplusage problem which concludes that the clerk may return a properly completed, previously returned absentee ballot to the elector so that the elector may retroactively spoil it. Rise is alone on this limb. No party agrees with them, [sic] and neither does this court. Rise's solution plainly rewrites whole portions of the statute.

Id. The circuit court did not indicate what portions of the statute Rise's construction "rewrites," or how.

The court entered final judgment in Kormanik's favor on March 4, 2024. App. 4–8 (R.172). Rise immediately noticed this appeal and requested expedited treatment of the appeal to allow for a decision in time for the fall 2024 election cycle. Kormanik objected, and the Court declined to expedite on March 12, citing

the lack of agreement by the parties. *See* Letter Regarding Briefing (Mar. 12, 2024). Rise then filed a petition for bypass to the Wisconsin Supreme Court, *see* Petition to Bypass (Apr. 4, 2024), which the Supreme Court denied, *see* Court Order (May 21, 2024).

On July 18, 2024, this Court granted Rise and DNC's unopposed motion to hold briefing in this appeal in abeyance pending the Wisconsin Supreme Court's resolution of *Brown v. Wisconsin Elections Commission*, No. 2024AP232. The Supreme Court issued its decision in *Brown* on February 18, 2025. *Brown v. Wis. Elections Comm'n*, 2025 WI 5, 414 Wis. 2d 601, 16 N.W.3d 619.

STANDARD OF REVIEW

This Court reviews summary judgment decisions de novo, applying the same methodology as the trial court. *Kiss v. Gen. Motors Corp.*, 2001 WI App 122, ¶ 9, 246 Wis. 2d 364, 630 N.W.2d 742. Summary judgment is appropriate "where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id.*

ARGUMENT

I. Kormanik does not have standing.

Kormanik lacks standing to bring this declaratory judgment action because she offered no evidence of any real or threatened injury to her own legally protected right.

A. To establish standing under Section 227.40(1), Kormanik must present evidence of injury to a legally protected right.

Kormanik has standing to bring this case only if she satisfies the requirements under Section 227.40(1), because an action for declaratory judgment under that provision is "the *exclusive* means of judicial review of the validity of a rule or guidance document." Wis. Stat. § 227.40(1) (emphasis added). A plaintiff may bring such an action "*only* when it appears from the complaint and the supporting evidence that the rule or guidance document or its threatened application interferes with or impairs, or threatens to interfere with or impair, the legal rights

and privileges of the plaintiff." *Id*. (emphasis added); *see also Teigen*, 2022 WI 64, ¶ 159 (Hagedorn, J., concurring) ("In legal parlance [the Chapter 227] harm requirement is called standing."). Under the express language of Section 227.40(1), the plaintiff must show that (i) the agency guidance threatens to interfere with or impair legal rights or privileges; and (ii) the plaintiff's *own* legal rights or privileges will be impaired. Wis. Stat. § 227.40(1)

Kormanik's citation to the Uniform Declaratory Judgments Act, Section 806.04, in her summary judgment briefing below, does not change this analysis. *See* R.132:5. For one thing, Section 227.40(1) provides the "exclusive" means of judicial review of the validity of a guidance document, and that statute requires a showing of an injury to a legally protected interest. But in any event, even in an action for declaratory judgment under Section 806.04, "a party must have a personal stake in the outcome and be directly affected by the issue in controversy." *Lake Country Racquet & Athletic Club, Inc. v. Village of Hartland*, 2002 WI App 301, ¶ 17, 259 Wis. 2d 107, 655 N.W.2d 189. "This is measured by whether the claimant has sustained, or will sustain, some pecuniary loss or otherwise will sustain a substantial injury to his or her interests." *Id.* The analysis, then, is the same: Kormanik must show that she has been *personally injured* in some way by the challenged guidance to maintain this suit.

B. Kormanik has not established an injury sufficient to satisfy Section 227.40(1).

Kormanik's meager factual submissions do not satisfy the first requirement for Section 227.40 standing: an actual or threatened impairment of her rights that is . "a direct result of the agency action" and is not "hypothetical nor conjectural." *Black River Forest*, 2022 WI 52, ¶ 21 (internal quotation marks omitted). Kormanik made no such showing, and it is hard to see how she possibly could. She contends that the Challenged Guidance unlawfully allows *other* voters to spoil their ballots and vote new ones, but even on her own account Kormanik is free to decline that

option. And Kormanik herself is not injured when other voters spoil and revote their own ballots.

Kormanik argued below that the Challenged Guidance creates a risk to her and "Wisconsin absentee voters in general" of "potential disenfranchisement by identity theft and voter fraud." R132:17. But even at the summary judgment stage, Kormanik offered no factual support for the conclusion that identify theft or fraud is an actual concern. Kormanik offered only her own affidavit, which attests only that: (i) she is a registered voter in Waukesha County; (ii) she has voted by absentee ballot in "prior elections"; (iii) she voted by absentee ballot in August and November 2022 and in April 2023; and (iv) she intends to vote "in the upcoming elections in the State of Wisconsin by absentee ballot and return such completed absentee ballots to my municipal clerk in compliance with Wisconsin law." App. 48–49 (R131:1–2). None of those assertions demonstrates that Kormanik faces any actual risk of identity theft or fraud as a direct result of the challenged agency action. Like the plaintiff in *Brown*, Kormanik therefore has not shown that "WEC's decision *personally* affected [her]." 2025 WI 5, ¶ 16 (emphasis added). She has not shown that the challenged guidance "made it more difficult for [her] to vote or affected [her] personally in any manner." *Id.* Nor has she presented any evidence of even a *generalized* risk of fraud, identity theft, or confusion traceable to the guidance, or offered any evidence to support her contention that the challenged guidance will result in "confusion and administrative complication." R132:3.

As a result, Kormanik's claims of harm are worse than being entirely "hypothetical [and] conjectural," *Black River Forest*, 2022 WI 52, ¶ 21: they are wholly and utterly conclusory, and therefore cannot confer standing. Summary judgment is "the put up or shut up moment in a lawsuit, when a party must show what evidence it has that would convince a trier of fact to accept its version of the events." *Springer v. Durflinger*, 518 F.3d 479, 484 (7th Cir. 2008) (cleaned up). Kormanik offered nothing to the circuit court to substantiate her vague assertions of harm.

Kormanik also argued below that she had suffered an injury because the challenged guidance allowed the counting of unlawful votes that reduced the significance of her vote. R.132:18. But a majority of the Wisconsin Supreme Court rejected this "vote pollution" theory in *Teigen*. While the lead opinion adopted that theory, only three justices joined it. *See Teigen*, 2022 WI 64 ¶¶ 21, 24–25 (lead opinion). Justice Hagedorn, whose vote was controlling, called the lead opinion's standing analysis "unpersuasive" and pointed out that it did not "garner the support of four members of this court." *Id.* ¶ 167 (Hagedorn, J., concurring in part); *see id.* ¶¶ 210–15 (Walsh Bradley, J., dissenting). *Teigen* therefore did not change Wisconsin's law of voter standing—as this Court recently concluded in an unpublished case. *See Rise, Inc. v. Wisconsin Elections Comm'n*, No. 2022AP1838, unpublished slip op. ¶ 27 n.6 (Ct. App. July 7, 2023) (App. 60).[3]

Moreover, while Justice Hagedorn upheld standing in *Teigen* based on a different theory, the Supreme Court has since rejected that theory, too. Justice Hagedorn held that Section 5.06 gave all Wisconsin voters a judicially enforceable statutory right to have election officials comply with the law, even without a further showing of injury. 2022 WI 64 ¶ 165. And he concluded that "unlawful WEC guidance can threaten harm to" that statutory right by "mak[ing] it likely local

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

election officials will not follow election laws." *Id.* ¶ 166. But all *six* other justices rejected that view in *Teigen*. *See id.* ¶¶ 32–34 (lead opinion); *id.* ¶¶ 210–15 (Walsh Bradley, J., dissenting).

And just last year, the Supreme Court held in *Brown v. Wisconsin Elections Commission*, 2025 WI 5, that Section 5.06 does not itself give plaintiffs any judicially enforceable rights. To the contrary, *Brown* held that even a plaintiff who has filed a complaint against an election official under Section 5.06 has no right to appeal the denial of that complaint unless she shows some *other* "interest recognized by law in the subject matter which is injuriously affected by the judgment." *Id.* ¶ 14 (quoting *Town of Greenfield v. Joint Cnty. Sch. Comm.*, 271 Wis. 442, 447, 73 N.W.2d 580 (1955)). "This inquiry is often broken down into two questions," which closely track the *Black River Forest* test under Section 227: "(1) Did the party suffer a threatened or actual injury as a result of the decision? And (2) is that injury recognized by law?" *Id.* Applying that test, the Supreme Court in *Brown* had no difficulty concluding that the Plaintiff lacked standing because he "d[id] not allege that WEC's decision personally affected him. For instance, he d[id] not allege that the challenged election activity . . . made it more difficult for him to vote or affected him personally in any manner." *Id.* ¶ 16.

Brown therefore confirms what was already clear after *Teigen*: to have standing, Kormanik must produce evidence of a concretely threatened injury in fact *to her* caused by the Challenged Guidance. Without such an injury, Kormanik lacks standing and her claims fail. As explained, Section 227.40(1) provides that a court "shall render a declaratory judgment" in cases like this one "*only* when it appears from the complaint and the supporting evidence that the rule or guidance document or its threatened application interferes with or impairs, or threatens to interfere with or impair, the legal rights and privileges *of the plaintiff*." (emphasis added). Because Kormanik has not made and cannot make such a showing, the circuit court erred in granting her summary judgment and denying Rise's cross-motion.

C. The circuit court's standing analysis was fatally flawed.

The circuit court's standing analysis addressed none of these points. It relied almost exclusively on *McConkey v. Van Hollen*, 2010 WI 57, 326 Wis. 2d 1, 783 N.W.2d 855, for the dubious proposition that standing requirements may be effectively ignored in cases like this one. That reliance was misplaced. *McConkey* did not involve a challenge under Section 227.40. And even the plaintiff in *McConkey* showed more of a personal injury than Kormanik showed here. In *McConkey*, 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. Although the "precise nature" of that injury was difficult to determine, the Court nonetheless satisfied itself that the plaintiff had been injured. *Id. McConkey* thus reaffirmed the general rule that standing requires "an actual injury to a legally protected interest." *Id.* ¶ 15. But the circuit court essentially read that requirement out of *McConkey*'s standing analysis.

Without further elaboration, the circuit court held that, "[l]ike the plaintiff in *McConkey*, Kormanik has at least a trifling interest in her voting rights." App. 15 (R.160:7). Nobody doubts that injury to an individual's voting rights constitutes an actual injury to a legally protected interest. But neither Kormanik nor the circuit court ever explained *why* or *how* Kormanik's voting rights are implicated here—that is, how the ballot spoliation guidance at issue here affects *her* right to vote.

Without such a real or threatened injury, there can be no standing under Section 227.40. That is so even if the circuit court thought that "Kormanik has competently framed the issues and zealously litigated the matter," and it would be "an awful shame" to "waste" the resources that have been devoted to this litigation to date. App. 15 (R160:7). Wisconsin courts will dismiss cases for lack of standing even at late stages of litigation. *E.g. Chenequa Land Conservancy, Inc. v. Village of Hartland*, 2004 WI App 144, 275 Wis.2d 533, 685 N.W.2d 573 (reversing, on standing grounds, the circuit court's grant of summary judgment to plaintiff

following its grant of a temporary injunction and denial of a motion to dismiss). Although the circuit court correctly identified some of the policy reasons underlying the injury requirement for standing, as expressed in *McConkey*, it erred by relying on these considerations to bypass the injury requirement altogether.

Next, the circuit court briefly touched on *Teigen*, noting only that "with plaintiffs very similarly situation [sic] to Kormanik in terms of the injury, a majority of the court did find that there was standing, albeit not all on the same grounds." App. 16 (R:160:8). But, as explained above, the fourth vote for standing in *Teigen* came from Justice Hagedorn, whose theory of standing is now foreclosed by *Brown*. 2025 WI 5, ¶ 16.

Finally, the circuit court cited another statute that has no bearing whatsoever on Kormanik's standing in this case: Section 6.84. That section states a general "legislative policy" that "the privilege of voting by absentee ballot must be carefully regulated to prevent the potential for fraud or abuse." Wis. Stat. § 6.84(1). But this statement of "legislative policy" is irrelevant to the factual question of whether Kormanik herself suffered an actual injury to a legally protected right. The circuit court seemed to believe that, because the Legislature thinks it necessary to regulate absentee voting to protect against fraud or abuse, any plaintiff who alleges a violation of absentee voting statutes has necessarily established a likelihood of fraud or abuse. The Wisconsin Supreme Court, however, has subsequently explained that Section 6.84 merely "provides that absentee balloting must be 'carefully regulated.' Indeed it is 'carefully regulated'—through statutes passed by the legislature and signed by the governor." *Priorities USA*, 2024 WI 32, ¶ 44. It does not follow that any voter has standing to challenge any alleged violation of those regulations, even when the voter has not been harmed. *See Brown*, 2025 WI 5, ¶ 18 (rejecting the notion that "a complainant is *always* aggrieved under § 5.06(8) when she or he believes that a local election official engaged in unlawful activity, and WEC issues a decision declining to take corrective action").

II. The elections statutes permit a clerk to return an undamaged, unspoiled absentee ballot to the voter when the voter wishes to spoil the ballot and vote a new one.

The circuit court also erred in its analysis of the merits of Kormanik's challenge because the Challenged Guidance is consistent with Wisconsin's election statutes.

Read together, Sections 6.86(5) and (6) allow voters to ask for their previously delivered absentee ballots back, spoil them, and return the now-spoiled ballots for replacement ones. The interpretation embraced by the circuit court and Kormanik is inconsistent with the statute's plain language and, by the circuit court's own admission, creates surplusage.

It was undisputed below that Section 6.86(5) allows voters who have not yet returned their absentee ballots to spoil them, return the spoiled ballots to their municipal clerks, and request new ones. *E.g.*, R.132:8. But what if a voter wants to spoil a ballot after returning it? The circuit court declared that Section 6.86(5) demands the ballot be *already* spoiled before it is returned. App. 4–5 (R.172:1–2). Even accepting that argument, a possibility remains: can the voter get their ballot back, spoil it, and *then* return the spoiled ballot in exchange for a new one under Section 6.86(5)? The plain text of Section 6.86(5) and (6) authorizes voters to do just that, just as the Challenged Guidance allows.

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

For this language to make sense, Section 6.86(5) must in fact sometimes "authoriz[e]" municipal clerks to give voters back their already delivered absentee

ballots. Such a reading of Section 6.86(5) is readily available. Section 6.86(5) provides:

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

This language is perfectly consistent with a voter going to their municipal clerk and "request[ing] a replacement ballot under" subsection (5) by getting their original ballot back, spoiling it, and returning the now-spoiled ballot for a replacement. This scenario requires the voter to "return[]" an already "spoiled or damaged" ballot—after getting the ballot back from the clerk and spoiling it—before receiving a new one. Wis. Stat. § 6.86(5). And this reading is consistent with subsection (6), too, because returns "authorized in sub. (5)" are expressly exempted from subsection (6)'s general prohibition on clerks giving voters back their already voted absentee ballots.

In contrast, Kormanik's—and the circuit court's—reading is impossible to square with subsection (6)'s express statement that subsection (5) sometimes "authorize[s]" clerks to give voters back their previously delivered ballots. According to Kormanik's construction, subsection (5) would *never* authorize a municipal clerk to return a previously delivered ballot to a voter. Kormanik's approach thus makes surplusage of subsection (6)'s proviso for returns "authorize[d]" by subsection (5).

The circuit court expressly agreed with Defendants that this construction "results in surplus language." App. 20 (R160:12). As the court explained: "Why say this is an exception to the 'no returns' rule, when it is not an exception to that rule at all? We are to avoid reading statutes in ways that create superfluous language, but this court cannot make any connection between sub (5) and any other statutory provision that permits a return of a ballot." *Id.* The circuit court therefore rejected

Kormanik's argument that there was no surplusage problem, explaining that it could not "reconcile [Kormanik's] position with the plain language of the statute." *Id.*

But the circuit court nevertheless adopted Kormanik's reading even though it would effectively read the "except as authorized in sub. (5)" language out of subsection (6). It did so because it believed that Rise's construction of the statutes "add[s] language to the statutes that is not there." *Id.* Rise's construction, however, does no such thing. It simply applies the statutes as written: 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. This does not require "rewrit[ing] whole portions of the statute," App. 20 (R160:12), as the circuit court said.

The circuit court's fundamental error was assuming that *every step* in the spoliation process must be explicitly detailed for that process to be authorized. But that is not how Wisconsin's absentee voting laws operate, as Wisconsin's Supreme Court has since made clear. In *Priorities USA*, the Court rejected the notion that a specific voting mechanism is "prohibited" simply because it is "not specified by the legislature." 2024 WI 32, ¶ 46. In so doing, it overruled a previous decision of the Supreme Court that, like the circuit court here, interpreted the "legislative policy" statement in Section 6.84 to require it to "strictly construe" requirements for absentee voting "with a skeptical eye." *Id.* ¶ 18; App. 18–19 (R160:10-11) (discussing the "legislative policy" in Section 6.84). The Court explained that nothing in Section 6.84's "declaration of legislative policy" "provides any rule of interpretation applying to the statutes that follow." 2024 WI 32, ¶ 32.

With that interpretive guidance in mind, Rise's interpretation of Section 6.86 does not require adding language to Section 6.86(5) or any other provision. Instead, Rise's reading both avoids superfluity and harmonizes all relevant subsections. If, as the WEC Guidance provides, voters may ask municipal clerks to return their previously delivered ballots to them, spoil them, and thereby get new absentee ballots, the statute makes sense as a whole: subsection (5) indeed "authorize[s]"

municipal clerks to return a previously delivered ballot to a voter, just as subsection (6) says it does. Statutes must "be construed to give effect to each and every word, clause and sentence, and a construction that would result in any portion of a statute being superfluous should be avoided wherever possible." *Wagner v. Milwaukee Cnty. Election Comm'n*, 2003 WI 103, ¶ 33, 263 Wis. 2d 709, 666 N.W.2d 816 (cleaned up). The Court should therefore adopt the only reading of the statute that makes sense of subsections (5) and (6) together—the reading set forth in the Challenged Guidance.

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

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the circuit court and remand with instructions to enter judgment against Kormanik.

Dated: May 1, 2025

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8) (b), (bm), and (c) for a brief produced with a proportional-serif font. This brief is set in 13-point Times New Roman and contains 6,960 words.

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