FILED
05-01-2025
CLERK OF WISCONSIN
COURT OF APPEALS

STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

Case No. 2024AP0408

NANCY KORMANIK,

Plaintiff-Respondent,

v.

WISCONSIN ELECTIONS COMMISSION,

Defendant-Co-Appellant,

DEMOCRATIC NATIONAL COMMITTEE,

Intervenor-Co-Appellant,

RISE INC.,

Intervenor-Appellant.

APPEAL FROM A FINAL JUDGMENT OF THE WAUKESHA COUNTY CIRCUIT COURT, THE HONORABLE BRAD SCHIMEL, PRESIDING

BRIEF OF CO-APPELLANT WISCONSIN ELECTIONS COMMISSION

JOSHUA L. KAUL
Attorney General of Wisconsin

STEVEN C. KILPATRICK
Assistant Attorney General
State Bar #1025452

BRIAN P. KEENAN
Assistant Attorney General
State Bar #1056525

Attorneys for Defendant-Co-Appellant Wisconsin Elections Commission

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1792 (SCK)
(608) 266-0020 (BPK)
(608) 294-2907 (Fax)
kilpatricksc@doj.state.wi.us
keenanbp@doj.state.wi.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Rules

Other Authorities

INTRODUCTION

A Wisconsin elector, Nancy Kormanik, brought suit under Wis. Stat. § 227.40(1) to challenge the validity of a Wisconsin Elections Commission memorandum to local clerks and a corresponding press release. The circuit court issued a final judgment declaring the guidance invalid. The Commission appeals on three grounds.

First, Kormanik failed to serve a copy of her pleadings upon the Legislature's joint committee for review of administrative rules (JCRAR), as required by Wis. Stat. § 227.40(1) and binding supreme court case law. That service failure means that the circuit court lacked competency to proceed to the merits of Kormanik's declaratory judgment action.

Second, Kormanik lacked standing to bring her action. She failed to show that she suffers or will suffer any injury in fact to any legally protected interest. Kormanik raises nothing more than a generalized grievance about the workings of the Commission. This is insufficient to establish standing, especially in light of the supreme court's *Brown v. Wisconsin Elections Commission* decision this Term.

Third, beyond these threshold failures, the Commission guidance conformed with state election law. Wisconsin law permits absentee voters to return a "spoiled" ballot to the local clerk and receive a replacement, so long as it is done by applicable statutory deadlines. A spoiled ballot does not mean a damaged ballot but can include a vote for the wrong candidate. And the Commission guidance was not an unpromulgated rule because it did not have the effect of law.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the circuit court lack competency to proceed to the merits of Kormanik's Wis. Stat. § 227.40(1) declaratory judgment action because she failed to comply with the JCRAR service requirement of Wis. Stat. § 227.40(5)?

The circuit court answered no.

This Court should answer yes.

2. Did Kormanik lack standing to bring this Wis. Stat. § 227.40(1) declaratory judgment action?

The circuit court answered no.

This Court should answer yes.

3. Setting aside lack of competency and lack of standing, were the Commission memorandum and press release, now withdrawn, lawful guidance and not an unpromulgated rule?

The circuit court answered no.

This Court should answer yes.

STATEMENT OF ORAL ARGUMENT AND PUBLICATION

Oral argument is unnecessary because the briefs will fully present the issues and relevant legal authority.

Publication as to the first issue would be proper because an opinion would "[apply] an established rule of law to a factual situation significantly different from that in published opinion." Wis. Stat. § (Rule) 809.23(1)(a)2.

STATEMENT OF THE CASE

I. The Commission issues guidance to clerks about how absentee voters may spoil a ballot and request a new one.

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." (R. 130:36–39, Co-A-App. 23–26.) The memorandum stated 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." (R. 130:36–37, Co-A-App. 23–24.) It stated: "[a]bsentee 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." (R. 130:36, Co-A-App. 23.) The memorandum also explained the applicable deadlines, rules, and procedures for spoiled ballots. (R. 130:36–37, Co-A-App. 23–24.)

The next day, the Commission issued a corresponding press release titled "Rules about 'Spoiling' Your Ballot." (R. 130:40–41, Co-A-App. 21–22.) 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." (R. 130:40, Co-A-App. 21.) The press release also provided answers to common questions about spoiled ballots and explained the safeguards in place to prevent an elector from using the process to vote twice. (R. 130:40–41, Co-A-App. 21–22.)

II. Kormanik sues to challenge the guidance.

Kormanik filed a complaint against the Commission with the Waukesha County Circuit Court on September 23, 2022, to challenge the guidance and press release (R. 2:3–11.) She is a registered voter in Waukesha County who has voted by absentee ballot in prior elections, such as August and November 2022 and April 2023. At the time of her summary judgment motion in June 2023, she testified that she intended 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." (R. 131:1–2.)

Kormanik alleged claims "pursuant to Wis. Stat. §§ 806.04 and/or 227.40" challenging the August 1, 2022, Commission memorandum and August 2 press release. (R. 2 ¶¶ 4, 11, 13; 3–4; 130:36–39, Co-A-App. 23–26; 130:40–41, Co-A-App. 21–22.) Kormanik alleged that the Commission's interpretation was contrary to statutes and an unpromulgated rule. (R. 2 ¶¶ 21, 23–25, 30–31, 34, Relief Requested ¶¶ 1–4.) Kormanik also filed a motion for a temporary restraining order and temporary injunction to require the Commission to cease and desist in offering the guidance and directing clerks to not rely upon it. (R. 6–19, 22, 68.)

Rise, Inc. intervened. (R. 28–31, 84.) The Democratic National Committee (DNC) also intervened. (R. 34–37, 72.) Both parties answered the Complaint. (R. 27, 33.) The Commission opposed Kormanik's motion for a temporary restraining order and temporary injunction (R. 54–60, 67), as did Rise (R. 39–40), and DNC (R. 61–64).

The circuit court granted a temporary injunction on October 7, 2022. (R. 96, 104, 106.) The court directed the Commission to withdraw the guidance no later than October

10 and cease providing further guidance on the subject. (R. 106.)

That day, DNC filed a petition for leave to appeal the temporary injunction and an emergency request to stay with this Court. (R. 99–100, 102.) On October 10, 2022, the Court ordered the temporary injunction temporarily stayed pending a decision whether to grant the petitions for leave to appeal. (R. 108.) Kormanik filed a petition for supervisory writ with the supreme court and, on October 12, the supreme court continued the stay of the temporary injunction. (R. 109.)

On October 26, 2022, the supreme court issued a decision holding that District II was the proper appellate venue to consider the petitions. for leave to appeal. (R. 115); *State ex rel. Kormanik v. Brash*, 2022 WI 67, 404 Wis. 2d 568, 980 N.W.2d 948. This Court then denied the petitions for leave to appeal. (R. 111–112.) The temporary injunction went into effect on October 28, 2022. (R. 112:4.) The Commission withdrew its guidance. (R. 143:10.)

All parties subsequently moved for summary judgment. (R.130–33, 146 (Kormanik); 138–40, 156 (Rise); 141–43, 152–54 (Commission); 144–45, 151 (DNC).)

The circuit court held oral argument on the summary judgment motions on August 28, 2023. (R. 204.) It issued a written decision on November 29, 2023, granting Kormanik's motion. (R. 160:1–15, Co-A-App. 1–15.) The court first held that Kormanik complied with the JCRAR service requirement of Wis. Stat. § 227.40(5) by emailing a copy of the complaint to a private attorney who was representing the Legislature in another case against the Commission. (R. 160:3–6, Co-A-App. 3–6.) It also concluded that Kormanik had standing to bring her declaratory judgment action. (R. 160:6–8, Co-A-App. 6–8.)

The circuit court then addressed the merits of Kormanik's action, holding that the Commission guidance was contrary to the statutes. (R. 160:9–15, Co-A-App. 9–15.)

The court declined to address Kormanik's argument that the Commission guidance was invalid on the ground that the Commissioners did not vote to issue it. (R. 160:15, Co-A-App. 15.)

The court then held a hearing to discuss the precise language of the declaratory judgment and any permanent injunction. (R. 196.) The court held that, given the declaratory judgment and the fact that the Commission had already followed the temporary injunction by removing the memorandum and press release from its website (and notifying clerks and the public), a permanent injunction was not necessary. (R. 196:4–6.)

The circuit court issued a final written order granting judgment to Kormanik on March 4, 2024.[1] (R. 172:1–5, Co-A-App. 16–20.) The circuit court ruled that a clerk may not (1) amend, spoil, or replace a returned absentee ballot that was not spoiled or damaged upon its return, or (2) return such returned ballot to the voter. (R. 172:1–2, Co-A-App. 16–17.)

Rise filed a notice of appeal on March 4 and an amended notice on March 8, 2024.[2] (R. 173, 182.) DNC filed its notice of appeal on April 1 (R. 191) and the Commission filed its notice on May 14. (R. 197).

STANDARDS OF REVIEW

Whether a circuit court lacks competency is a question of law that the appellate courts review independently. *Village of Trempealeau v. Mikrut*, 2004 WI 79, ¶ 7, 273 Wis. 2d 76, 681 N.W.2d 190.

---

[1] The circuit court later entered a money judgment for Kormanik for $545.00 relating to costs to be equally apportioned against and between intervenors Rise and DNC. (R. 177.)

[2] Rise filed a petition to bypass the court of appeals, and the supreme court denied it on May 21, 2024. (R. 203.)

Whether a party has standing is also a question of law this Court reviews independently. *Brown v. WEC*, 2025 WI 5, ¶ 10, 414 Wis. 2d 601, 16 N.W.3d 619.

This Court reviews summary judgment independently as well, applying the same method as the circuit court. *Hoida, Inc. v. M & I Midstate Bank*, 2006 WI 69, ¶ 16, 291 Wis. 2d 283, 717 N.W.2d 17. Summary judgment is proper when there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987); Wis. Stat. § 802.08(2).

ARGUMENT

I. The circuit court lacked competency to proceed to the merits of Kormanik's declaratory judgment action because she failed to comply with Wis. Stat. § 227.40(5)'s service requirement.

Kormanik's Wis. Stat. § 227.40 declaratory judgment action faces a threshold problem: The circuit court lacked competency to reach its merits. The undisputed facts reveal that Kormanik did not serve a copy of her pleadings on the proper legislative committee, as required by Wis. Stat. § 227.40(5).

A. Kormanik's action proceeds under Wis. Stat. § 227.40, not Wis. Stat. § 806.04.

Wisconsin Stat. § 227.40(1) expressly states that, but for exceptions not relevant here, "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."

Here, Kormanik challenged the validity of a Commission memorandum sent to local election clerks and corresponding press release. She alleged that the

Commission's interpretation of Wis. Stat. § 6.86(5)–(6) is contrary to the statutes and is an unpromulgated rule. (R. 2 ¶¶ 10–18, 21; 3–4.) Kormanik's complaint references Wis. Stat. § 227.40 "and/or" Wis. Stat. § 806.04 for jurisdictional purposes. (R. 2 ¶ 4.) While both provisions authorize declaratory judgment actions, section 227.40 provides that it is the "exclusive" means of review of an alleged rule or guidance document. Wis. Stat. § 227.40(1). Further, Kormanik has already represented to the supreme court that she brings a section 227.40(1) declaratory judgment action. *State ex rel. Kormanik*, 404 Wis. 2d 568, ¶ 10. Wisconsin Stat. § 806.04, therefore, is simply not in play.

Because Kormanik's action was commenced under Wis. Stat. § 227.40, she must comply with all procedural requirements of that statute, including the JCRAR service requirement.

B. Kormanik failed to serve the Legislature's Joint Committee for Review of Administrative Rules.

Wisconsin Stat. § 227.40 contains a procedural requirement with which Kormanik did not comply. Subsection (5) of that statute requires a plaintiff to serve the Legislature's Joint Committee for Review of Administrative Rules (JCRAR) with a copy of her pleadings. Case law holds that failing to comply with this requirement strips the circuit court of competency to proceed to the merits. Kormanik's complaint should have been dismissed on this ground alone.

1. Kormanik did not supply evidence of service upon JCRAR.

A plaintiff who files a Wis. Stat. § 227.40(1) action must timely serve a copy of her pleadings upon JCRAR, which enables JCRAR to become a party to the case, if it so chooses. *See* Wis. Stat. § 227.40(5). As to the specific persons to serve,

Wis. Stat. § 13.56(2) states that "[t]he cochairpersons of [JCRAR] or their designated agents shall accept service made under ss. 227.40(5) . . . ."

A failure to comply with Wis. Stat. § 227.40(5)'s service requirement is fatal to a plaintiff's claim. In *Richards v. Young*, 150 Wis. 2d 549, 557, 441 N.W.2d 742 (1989), the supreme court held that, to properly commence a declaratory judgment action under Wis. Stat. § 227.40, a plaintiff must serve JCRAR within the same timeframe as required to serve a defendant. *Id.* (citing Wis. Stat. § 893.02). The JCRAR service requirement is "not permissive," but rather "mandatory." *Id.* at 555. Failure to serve JCRAR within the requisite time period deprives the circuit court of competency over the action. *Id.* at 551–54, 558.

The JCRAR service requirement applies to actions challenging agency materials that are alleged to be unpromulgated administrative rules, as well as 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); *State v. Town of Linn*, 205 Wis. 2d 426, 449, 556 N.W.2d 394 (Ct. App. 1996) (promulgated rule).

Here, Kormanik challenged the Commission's guidance regarding the spoiling of absentee ballots on grounds that it contravenes Wisconsin statutes and is an unpromulgated rule. But she did not establish that she served JCRAR within ninety days of filing her complaint. The circuit court record contains no certificate of service upon JCRAR like the certificate she filed for service upon the Commission. (*See* R. 23.) Kormanik's failure to serve JCRAR means that the circuit court lacked competency to proceed to the merits of her action.

2. Kormanik did not show that she served the designated agent of the JCRAR cochairpersons.

Wisconsin Stat. § 13.56(2) gives a plaintiff the option to serve the "designated agents" of the cochairpersons of JCRAR rather than the cochairpersons themselves. Here, Kormanik supplied the circuit court with no evidence that she served either.

Kormanik pointed to an affidavit of counsel attesting to sending a September 29, 2022, email, attaching a copy of the pleadings, to Misha Tseytlin, an attorney with the Troutman Pepper law firm. (R. 146.) The affidavit states that Tseytlin "previously intervened on behalf of the Wisconsin State Legislature . . . 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." (R. 146:2.) According to the email chain, Kormanik's attorney made Tseytlin "aware of another suit . . . filed" and notified him that a hearing in *Kormanik* was set for the following week. (R. 146:3.) The email also stated: "Let me know if the Legislature has any interest in intervening in this as well." (R. 146:3.) Tseytlin responded: "Thanks. We will take a look." (R. 146:4.)

The circuit court concluded that this email made Tseytlin the designated agent of the JCRAR cochairpersons under Wis. Stat. § 13.56(2) for service purposes. (R. 160:6, Co-A-App. 6.) This ruling was erroneous.

In Wis. Stat. § 13.56(2), "the cochairpersons of [JCRAR] or their designated agents shall accept service" under Wis. Stat. § 227.40(5). Although there is no definition of a "designated agent" in the statutes, a common definition of "agent" is "[a] person authorized by another (principal) to act for or in place of him: one intrusted with another's business."

Agent, Black's Law Dictionary (6th ed. 1990). In the context of Wis. Stat. §§ 13.56(2) and 227.40(5), the designation of an "agent" is for the act of accepting service of legal pleadings in a section 227.40 declaratory judgment action for the principal—the JCRAR cochairpersons.

Under Wisconsin law, it has long been held that "service on a natural person's agent under Wis. Stat. § 801.11(1)(d) constitutes an altogether independent ground to effectuate service on a natural person." *Mared Indus., Inc. v. Mansfield*, 2005 WI 5, ¶¶ 20, 37, 277 Wis. 2d 350, 690 N.W.2d 835. According to the text of that general service statute, service can be made upon "an agent *authorized by appointment*." Wis. Stat. § 801.11(1)(d). In *Mared Indus.*, the supreme court determined what that "authorized by appointment" phrase means. 277 Wis. 2d 350, ¶ 21.

The court recognized the term "appointment" to be "[t]he act of *designating a person*, such as a nonelected public official, for a job or duty." *Id.* ¶ 32 (emphasis added) (quoting Black's Law Dictionary 96 (7th ed. 1999)). It further held that the "authorized by appointment" phrase "requires a showing of actual authority." *Id.* ¶¶ 21, 23; *see also Howard v. Preston,* 30 Wis. 2d 663, 668–69, 142 N.W.2d 178 (1966); *Punke v. Brody*, 17 Wis. 2d 9, 10, 14, 115 N.W.2d 601 (1962). "Actual authority" is "the power of the agent to do an act . . . on account of the principal which, with respect to the principal, he [or she] is privileged to do because of the principal's manifestations to him [or her]." *Id.* ¶ 23.

The supreme court specifically rejected the argument that the phrase "authorized by appointment" within Wis. Stat. § 801.11(1)(d) means "apparent authority." *Id.* ¶¶ 22–23 ("A third person's reasonable observations of an agent's authority have no bearing on determining the scope of an agent's actual authority."), 28.

Importantly, actual authority requires "evidence that the defendant intended to confer that authority upon the agent." *Id.* ¶ 29 (emphasis added) (quoting 4A Wright and Miller, Federal Practice and Procedure § 1097) (citing F. Rule Civ. P. 4(e)(2)). And actual authority must be "express." *Id.* ¶¶ 31, 37–38. Wisconsin Stat. § 801.11(1)(d) "requires the principal to designate the agent to perform the function, job, or duty of accepting service." *Id.* ¶ 33. Although an appointment or designation of an agent "need not be in writing, it must be set forth in clear and unambiguous terms." *Id.* ¶ 33. The court's holding in *Mared* was "bolstered by the policy grounding service, namely 'to ensure that a defendant receives reasonable notice of the action.'" *Id.* ¶ 34 (citation omitted).

Therefore, if the JCRAR cochairpersons designated Tseytlin as their agent for the purpose of accepting service under section 227.40(5), there must be express authorization made by the JCRAR cochairpersons, either through a document or words.

Here, there is no evidence in the record establishing the existence of any explicit agency agreement between the JCRAR joint cochairpersons and Tseytlin. Kormanik supplied no documents or testimony from the JCRAR cochairpersons that they designated Tseytlin as both of their agents to accept service of pleadings on their behalf.

Moreover, even if the email chain between Kormanik's counsel and Tseytlin revealed that Tseytlin represented himself to be the joint cochairpersons' "designated agent" authorized to accept service on their behalf, which it did not, it would not matter, because that would not establish "actual authority." *Mared Indus.*, 277 Wis. 2d 350, ¶ 27 ("the process server's reasonable belief regarding the purported agent's authority could not establish the agent's authority to accept service for the principal") (citing *Punke,* 17 Wis. 2d at 14 ("An agent's authority may not be shown by testimony

describing his declarations to third persons."); *Howard*, 30 Wis. 2d at 668).

Finally, Tseytlin's representation of the Legislature in the *White* proceeding fails for the same reason. That fact is not evidence of any explicit agency agreement between the JCRAR cochairpersons and Tseytlin for the purpose of accepting service under section 227.40(5). Regardless, Tseytlin represented the Legislature, not JCRAR, in *White*. Any implication that JCRAR and the Legislature are one in the same was put to rest by the supreme court decades ago: "JCRAR was created *by the legislature* by the enactment of sec. 13.56, Stats." *Richards*, 150 Wis. 2d at 552 (emphasis added).

Because the undisputed evidence does not show that Kormanik served the JCRAR cochairpersons or their designated agent with a copy of her pleadings, she did not comply with Wis. Stat. § 227.40(5)'s service requirement. The circuit court thus lacked competency to proceed to the merits of her Wis. Stat. § 227.40(1) declaratory judgment action.

II. Kormanik lacks standing to bring her Wis. Stat. § 227.40 declaratory judgment action.

Another second threshold matter prevents this Court from affirming: Kormanik lacks standing.

A. A plaintiff has standing only if she suffers an injury in fact to a legally protected interest.

To establish standing, a plaintiff must suffer an injury, caused by the defendant, and redressable by the application of the judicial power. *See State ex rel. First Nat'l Bank of Wisconsin Rapids v. M & I Peoples Bank of Coloma*, 95 Wis. 2d 303, 307–09, 290 N.W.2d 321 (1980). Standing is not a matter of jurisdiction but of judicial policy. *McConkey v. Van Hollen*, 2010 WI 57, ¶¶ 15–16, 326 Wis. 2d 1, 783 N.W.2d 855.

But sound judicial policy is not "carte blanche" to weigh in on any legal debate that may arise under the law. *Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n, Inc.*, 2011 WI 36, ¶ 131, 333 Wis. 2d 402, 797 N.W.2d 789.

Standing requires a two-part analysis, reaffirmed by the supreme court in *Friends of Black River Forest v. Kohler Co.*, 2022 WI 52, ¶ 18, 402 Wis. 2d 587, 977 N.W.2d 342, and more recently *Brown*, 414 Wis. 2d 601, ¶ 14. The two required showings are: (1) whether the challenged action causes the petitioner injury in fact and (2) whether the injury is "to an interest which the law recognizes or seeks to regulate or protect." *Friends of Black River Forest*, 402 Wis. 2d 587, ¶¶ 18, 30; *Brown*, 402 Wis. 2d 587, ¶ 14.[3]

Consistently, for challenges to rules or guidance documents, Wis. Stat. § 227.40(1) requires that the "rule or guidance document or its threatened application interferes with or impairs, or threatens to interfere with or impair, the legal rights and privileges of the plaintiff." Wis. Stat. § 227.40(1); *Richards v. Cullen*, 152 Wis. 2d 710, 712–13, 449 N.W.2d 318 (Ct. App. 1989).

"In order to have standing to bring an action for declaratory judgment, a party must have a personal stake in the outcome and must be directly affected by the issues in controversy." *Lake Country Racquet & Athletic Club, Inc. v. Village of Hartland*, 2002 WI App 301, ¶ 15, 259 Wis. 2d 107, 655 N.W.2d 189; Wis. Stat. § 806.04. Abstract, hypothetical, and conjectural injury "is not enough." *Fox v. DHSS*, 112 Wis. 2d 514, 525, 334 N.W.2d 532 (1983)

[3] While *Brown v. Wisconsin Elections Commission*, 2025 WI 5, 414 Wis. 2d 601, 16 N.W.3d 619, involved judicial review of a decision under Wis. Stat. § 5.06(8), the court used the test for standing that applies in all cases, not just judicial review actions. *Compare Brown*, 414 Wis. 2d 601, ¶ 14, *with Foley-Ciccantelli*, 333 Wis. 2d 402, ¶ 54.

(quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983)). Nor is a mere disagreement or frustration with the defendant's conduct. *See Hollingsworth v. Perry*, 570 U.S. 693, 700 (2013).[4] Rather, a plaintiff must show that he "'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged official conduct." *Fox*, 112 Wis. 2d at 525 (quoting *Lyons*, 461 U.S. at 101).

A challenger to government action also must establish that the claimed injury pertains to a legally protected interest. *Friends of Black River Forest*, 402 Wis. 2d 587, ¶¶ 25–28. To do so, the challenger must show that the law "recognizes or seeks to regulate or protect" her or his interests. *Id.* ¶ 28 (quoting *Waste Mgmt.* of Wis., Inc. v. DNR, 144 Wis. 2d 499, 505, 424 N.W.2d 685). Stated another way, the challenger must show that the law that was allegedly violated affords him or her a "freestanding right" enforceable by the courts. *Brown*, 414 Wis. 2d 601, ¶ 19.

B. Kormanik does not suffer from an injury in fact to any legally protected interest.

Kormanik is a registered voter in Waukesha County who has voted by absentee ballot several times and intends to again. (R. 131:1–2.) The Commission guidance, when in place, related to the return of absentee ballots and how voters could spoil those ballots and obtain replacements. These undisputed facts do not show that Kormanik suffered any direct injury to a legally protected interest to establish standing.

[4] "Wisconsin has largely embraced federal standing requirements" and so our state courts "look to federal case law as persuasive authority regarding standing questions." *Friends of Black River Forest v. Kohler Co.*, 2022 WI 52, ¶ 17, 402 Wis. 2d 587, 977 N.W.2d 342.

1. Kormanik suffers no injury in fact.

Notably, Kormanik did not submit evidence that the Commission's guidance "personally affected" her, just as the plaintiff in *Brown* failed to do. *Brown*, 414 Wis. 2d 601, ¶ 16. For example, like Brown, Kormanik failed to establish that the alleged illegal election action—here, the guidance—made it more difficult for her to vote. *Id.* The Commission's August 2022 guidance did not prevent Kormanik from voting absentee in the August 2022, the November 2022, or the April 2023 elections. (R. 132:1–2.) Below, Kormanik argued that she suffers an injury because unlawful Commission rules impair confidence in elections. (R. 147:2.) But this is not a direct injury to *her*. Kormanik did not prove that *she* "personally suffered (or will suffer) an injury as a result of WEC's" guidance. *Brown*, 414 Wis. 2d 601, ¶ 16; *see also Lake Country Racquet & Athletic Club, Inc.*, 259 Wis. 2d 107, ¶ 15 (to establish standing, a plaintiff must have a "personal stake" in the outcome of the litigation).

Put another way, Kormanik did not show that she was affected by the Commission guidance in a way that is different than every other absentee voter. She merely raised a generalized grievance about the action of the Commission. That failure sinks her action because Wisconsin "[c]ourts are not the proper forum for citizens to 'air generalized grievances' about the administration of a governmental agency." *Cornwell Pers. Assocs., Ltd. v. DILHR*, 92 Wis. 2d 53, 62, 284 N.W.2d 706 (Ct. App. 1979) (citing *Flast v. Cohen*, 392 U.S. 83, 106 (1968)). A plaintiff "raising only a generally available grievance about government—claiming only harm to [her] and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large"—does not state an injury sufficient to confer standing. *Hollingsworth*, 570 U.S. at 706 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573–74 (1992)).

Kormanik's failure to establish suffering any injury results in a lack of standing.

2. Kormanik did not point to any legally protected interest affected.

In addition, Kormanik did not show that the Commission guidance affected a "legally protected interest" that she possesses under any law. *Cf. Friends of Black River Forest*, 402 Wis. 2d 587, ¶ 20 (quoting *Fox*, 112 Wis. 2d at 524); *see also id.* ¶¶ 30–46; *Brown*, 414 Wis. 2d 601, ¶ 19 (holding that challenger to agency action lacked standing because law on which he relied "creates no such right").

Below, Kormanik referenced Wis. Stat. § 227.40 as the basis for a legally protected interest, (R. 147:3), but that argument fails because that statute is procedural and does not contain "substantive criteria," as required under supreme court precedent. *Friends of Black River Forest*, 402 Wis. 2d 587, ¶ 34. When the statute the plaintiff points to lacks such "substantive criteria," that indicates it does not "protect, recognize, or regulate" her interests as necessary to support standing. *Id.* ¶¶ 33–34, 43.

The circuit court held that Kormanik had standing because she had "at least a trifling interest in her voting rights." (R. 160:7, Co-A-App. 7.) To the extent the court meant that Kormanik suffered an injury to a trifling interest in the right to vote, the court did not expand upon that statement by citing *any* statute in support. Thus, Kormanik cannot point to a law that provides any "substantive criteria" to support any claim of a legally protected interest.

Kormanik failed to establish the second standing requirement.

***

Based on the undisputed facts and the law of standing as to voters as recently held by the supreme court, Kormanik failed to show that she suffers (or will suffer) an injury in fact to a legally protected interest. She failed to establish standing. This Court should reverse the circuit court's summary judgment order.

III. Apart from the circuit court's lack of competency and Kormanik's lack of standing, the Commission guidance conformed with the statutes.

In the event this Court reaches the merits of Kormanik's Wis. Stat. § 227.40(1) declaratory judgment action,[5] this Court should reverse the circuit court's summary judgment decision in her favor. The now-withdrawn Commission guidance conformed with state law and was not an unpromulgated rule.

A. An elector may spoil an absentee ballot by accident or mistake.

Wisconsin Stat. § 6.86(5) states: "[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 shall destroy the spoiled or damaged ballot." *Id.*[6] Although "spoiled" is not

---

[5] Kormanik also challenged any other Commission memoranda, communication, publication, etc. that interpreted the statutes about spoiling ballots and the circuit court ruling applied to such. (R. 172:2, Co-A-App. 17.) For ease of briefing, however, this brief refers to the memorandum and press release and uses the term "guidance."

[6] Another provision cited by Kormanik is Wis. Stat. § 6.86(6), which states, in part: "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

defined in the statutory provision, closely related statutes support the Commission's interpretation that spoiling occurs through an elector's accident or mistake.

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 County*, 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.*

Wisconsin Stat. § 6.80(2)(c) provides insight into the meaning of "spoiled" in Wis. Stat. § 6.86(5). This statute, which governs the "[m]echanics of voting" on election day, refers to "any elector who, *by accident or mistake, spoils* or erroneously prepares a ballot." Wis. Stat. § 6.80(2)(c).

"Accident" and "mistake" are not defined in the statutes, so this Court may consult the dictionary to determine the meaning of these non-technical terms. *Moreschi v. Village of Williams Bay*, 2020 WI 95, ¶ 21, 395 Wis. 2d 55, 69, 953 N.W.2d 318; *Kalal*, 271 Wis. 2d 633, ¶ 53, 681 N.W.2d 110 (explaining that a word's ordinary meaning is "ascertainable by reference to [its] dictionary definition").

"Mistake" means "to blunder in the choice of" and to "confuse with another" and "to be wrong." *Mistake*, Webster's New Collegiate Dictionary (1979 ed.). A "mistake" can also

---

the ballot to the elector." *Id.* However, the Commission guidance did not rely on this statute. (*See* R. 130:39, Co-A-App. 26.) Moreover, the Commission guidance did not advise clerks that they may return to an elector an absentee ballot that was claimed "spoiled" or "damaged." The Commission believes that Wis. Stat. § 6.86(5) and (6) can be read to simply permit *replacement* ballots be given to electors. (*See* R. 143:20.)

mean an "error, misconception, or misunderstanding; an erroneous belief." *Mistake*, Black's Law Dictionary (11th ed. 2019).

"Accident" means "an unfortunate event resulting from carelessness, unawareness, ignorance, or a combination of causes." *Accident*, Webster's New Collegiate Dictionary (1979 ed.). An "accident" is also defined as "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).

Spoiling a ballot by "accident or mistake" could therefore include an elector's choosing multiple candidates when only one is allowed—an error on the face of the ballot. However, contrary to the circuit court's ruling, a "spoiled" ballot may also contain an error that does not appear on the face of the ballot. The spoiling may be the result of an elector's choosing a candidate she does not intend to vote for, choosing no candidates when she intended to choose one or some, choosing a candidate who an elector confuses with another person, or choosing a candidate who the elector misunderstood was still in (or would stay in) the race but had already withdrawn (or later withdraws). Indeed, even the circuit court correctly acknowledged that an elector can spoil a ballot by mistakenly voting for the wrong candidate or marking the wrong line. (R. 104:81.)

A spoiled ballot may be one that the elector completed by "accident or mistake."

B. An absentee ballot may be a "spoiled ballot" after it is returned to the clerk.

The circuit court also held, in agreement with Kormanik, that the Commission guidance was invalid because an absentee ballot cannot become spoiled *after* it is returned to the clerk. (R. 160:14, Co-A-App. 14; 172:1–2, Co-A-App. 16–17.) This is also erroneous, for two reasons.

First, the phrase "returns a spoiled ballot" in Wis. Stat. § 6.86(5) may reasonably refer to the state of the ballot—"spoiled"—at any time it is in the possession of the clerk. That is, the phrase does not necessarily mean that the absentee ballot must be known to be "spoiled" at its time of arrival at the clerk's office. For example, if an elector marks her ballot for the wrong candidate but does not realize that "accident or mistake" until two days after she has returned it, she has still "return[ed] a spoiled . . . ballot." The same is true of an additional scenario, relating to an elector's changing her mind about the candidate for whom she marked on the ballot. If an elector marks her absentee ballot for candidate John Doe and places it in the mail on a Monday, Doe withdraws from the race on Tuesday, and the clerk receives the ballot on Friday, she has "return[ed] a spoiled ballot" because she has made a mistake or accident by voting for a candidate she misunderstood would remain in the race.

In both scenarios, the absentee ballot is in the possession of the clerk in a "spoiled" state; it is therefore a "spoiled" ballot under Wis. Stat. § 6.86(5).

Second, closely related, surrounding statutes exhibit the intent to allow an absentee ballot to be "spoiled" after an elector has returned the ballot but has changed her mind.

As noted above, Wis. Stat. § 6.86(5) allows an absentee elector to obtain a replacement ballot when she has "spoiled" the previous ballot. Wisconsin Stat. § 6.80(2)(c) also provides that a voter at the polling place may spoil her ballot and request a replacement up to three times before her ballot is actually cast. *Id.* Also, the statute 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). All these statutes allow for replacement ballots after spoiling. But none requires the elector to explain how or why the ballot is "spoiled." Neither do they permit the clerk to question the

elector about why she considers it "spoiled" before a replacement ballot is provided. Because all votes are by secret ballot, *see* Wis. Const. art. III, § 3, the clerk may not question the elector as to which candidate she intended to vote for but mistakenly didn't, for example, to determine whether the ballot is "spoiled."

Last, the circuit court issued its ruling—preventing the spoiling of an absentee ballot after it is returned to the clerk—because it opined that once an absentee ballot is returned to the clerk, it cannot be accessed until it is opened on Election Day. (R. 160:13–14, Co-A-App. 13–14.) That is incorrect. Under Wis. Stat. § 6.86(5), when an absentee elector returns a spoiled or damaged ballot, the local clerk "shall destroy the spoiled or damaged ballot." This express language allowing the clerk to destroy the spoiled absentee ballot proves that the clerk is not required to take a "hands-off" approach to returned ballots.

Thus, the statutes allow an absentee elector to communicate that her ballot is spoiled after it is returned to the clerk and to obtain a replacement (as long as the notification is consistent with the statutory deadlines).[7] The Commission guidance was valid.

[7] The Commission guidance included deadlines for notifying a clerk about a spoiled ballot, and all occurred before election day, to comply with Wis. Stat. § 6.86(5) and the last sentence of subsection (6)—"An elector who mails or personally delivers an absentee ballot to the municipal clerk is not permitted to vote in person at the same election on election day." (R. 130:37, Co-A-App. 17 ("If the voter returned their ballot by mail, but their ballot has not been received at their polling place by Election Day, the voter cannot spoil their absentee ballot and get a new ballot."), 39, Co-A-App. 26.)

C. The Commission's guidance did not constitute an unpromulgated rule because it did not have the effect of law.

Although the circuit court did not address Kormanik's purported claim that the Commission's memorandum and press release constituted an unpromulgated administrative rule, (R. 160:15, Co-A-App. 15), if made again to this Court, it would fail.

Wisconsin Stat. § 227.40 is the vehicle to challenge rules or guidance documents. A guidance document is distinct from a rule, and "[e]xplains the agency's implementation of a statute or rule enforced or administered by the agency." Wis. Stat. § 227.01(3m)(a)(1). A guidance document also 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)(2).

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). A rule that is not promulgated in compliance with the statutory requirements is unenforceable. *Wisconsin Legis. v. Palm*, 2020 WI 42, ¶ 58, 391 Wis. 2d 497, 942 N.W.2d 900.

A key element of any rule is that it has the effect of law. *County 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 policy has the effect of law, but a directive's phrasing can be determinative. *Id.*

Materials with mandatory language that "speaks with an official voice intended to have the effect of law" may constitute a rule. *Id.*; *Milwaukee Area Joint Plumbing*

Apprenticeship Comm. v. DILHR, 172 Wis. 2d 299, 321 n.12, 493 N.W.2d 744 (Ct. App. 1992) (materials that "express mandatory language are more than informational"). Agency policy 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. DHFS*, 2008 WI App 127, ¶ 26, 313 Wis. 2d 749, 758 N.W.2d 118.

In contrast, materials that are "couched in terms of advice and guidelines rather than setting forth law-like pronouncements" ordinarily do *not* have the effect of law. *Id.* (citations omitted).

In *Service Employees International Union, Local 1 v. Vos*, the supreme court contrasted guidance documents and rules. 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.* Put simply, guidance documents serve to inform, but not compel. And they are not subject to rule promulgation. *Id.*; Wis. Stat. § 227.01(3m), (13).

Here, the memorandum and press release squarely fit the definition of guidance document, and they lacked the force of law.

First, the guidance was purely informational. It communicated the Commission's interpretation of statutes for spoiling absentee ballots and provides logistics, operating procedures, practices, and deadlines for clerks and voters to follow related to spoiled ballots. It also advised local clerks on

the best practices for tracking absentee ballots and gave advice to voters on the recommended ways to spoil a ballot. (R. 130:36–41, Co-A-App. 23–26.)

Second, the guidance was fundamentally phrased in terms of what voters and clerks can or may do and what the Commission recommends and suggests. For example, the memorandum informed 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." (R. 130:36–37, Co-A-App. 23–24.) Rather than order clerks to take certain actions, the memorandum asked clerks to "please note" various issues and suggested that "care should be taken" with particular procedures. (R. 130:37–38, Co-A-App. 24–25.) The press release was 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. (R. 130:40–41, Co-A-App. 21–22.)

Third, neither document states any consequences for noncompliance. The memorandum and press release are devoid of directives that clerks or electors shall, must, or are required to do anything and, if such action is not taken, consequences result. (R. 130:36–41, Co-A-App. 23–26.)

The Commission memorandum and press release did not have the effect of law. They were merely guidance documents, not an administrative rule that required promulgation.

CONCLUSION

The Wisconsin Elections Commission asks this Court to hold that the circuit court lacked competency to reach the merits of Kormanik's Wis. Stat. § 227.40(1) declaratory judgment action and that Kormanik lacked standing to bring the action, and reverse the summary judgment decision and final judgment in her favor.

Dated this 1st day of May 2025.

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

Steven C. Kilpatrick
STEVEN C. KILPATRICK
Assistant Attorney General
State Bar #1025452

BRIAN P. KEENAN
Assistant Attorney General
State Bar #1056525

Attorneys for Defendant-Co-Appellant Wisconsin Elections Commission

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1792 (SCK)
(608) 266-0020 (BPK)
(608) 294-2907 (Fax)
kilpatricksc@doj.state.wi.us
keenanbp@doj.state.wi.us

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 6,891 words.

Dated this 1st day of May 2025.

Electronically signed by:

Steven C. Kilpatrick
STEVEN C. KILPATRICK
Assistant Attorney General

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this brief with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 1st day of May 2025.

Electronically signed by:

Steven C. Kilpatrick
STEVEN C. KILPATRICK
Assistant Attorney General