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.

REPLY BRIEF OF INTERVENOR APPELLANT RISE, INC.

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

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INTRODUCTION

This Court should reverse the circuit court's summary judgment decision because Nancy Kormanik lacks standing to sue and because the circuit court's declaratory judgment misconstrues Wisconsin election law.

First, standing. The "exclusive means of judicial review" in this action challenging guidance documents is a declaratory judgment under Section 227.40, which may proceed only if the challenged guidance "interferes with or impairs, or threatens to interfere with or impair, the legal rights and privileges of the plaintiff." Wis. Stat. § 227.40(1). Kormanik does not meet that standard because the challenged guidance did not affect her, or threaten to affect her, at all. She objects to the procedures other voters used to cast their ballots, but she does not allege that those procedures "made it more difficult for [her] to vote or affected [her] personally in any manner." *Brown v. Wis. Elections Comm'n*, 2025 WI 5, ¶16, 414 Wis. 2d 601, 16 N.W.3d 619. And because Section 227.40 allows a declaratory judgment in a challenge to guidance documents "only when" its standing requirements are met, Kormanik's reliance on the Uniform Declaratory Judgments Act and judicial policy cannot help her evade Section 227.40's requirements.

As for the merits, Kormanik's and the circuit court's interpretation of the relevant statutes renders important words superfluous, leaving Section 6.86(6) with a carveout—"except as authorized in sub. (5)"—that accomplishes nothing at all. In contrast, Rise's reading, which allows municipal clerks to return completed absentee ballots to voters so that voters can spoil them, preserves an independent meaning for every provision of Section 6.86. Neither Kormanik nor the circuit court had any substantial response to this fatal flaw in their statutory construction, and Kormanik's attempts to evade it are irreconcilable with the text of the statute, requiring the court to read "return" in Section 6.86(6) to mean giving a *new* ballot to a voter.

The Court should reverse.

ARGUMENT

I. Kormanik does not have standing.

Kormanik lacks standing because the challenged guidance does not "interfere[] with or impair[], or threaten[] to interfere with or impair, [her] legal rights and privileges," as Section 227.40 requires, Wis. Stat. § 227.40(1); and neither the Uniform Declaratory Judgment Act nor judicial policy can make up for Kormanik's failure to satisfy that statutory requirement.

A. Kormanik fails to satisfy the statutory standing requirements of Section 227.40.

This is an action seeking "judicial review of the validity of a rule or guidance document." Wis. Stat. § 227.40(1). A declaratory judgment action under Section 227.40 is the "exclusive" means of bringing such a challenge. *Id.* But a court may grant relief in 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). As Kormanik admits, in applying this test "courts ask first whether the decision of the agency directly causes injury to the interest of the petitioner, and second whether the interest asserted is recognized by law." Resp. Br. at 31 (quoting *Friends of Black River Forest v. Kohler Co.*, 2022 WI 52, ¶ 18, 402 Wis. 2d 587, 977 N.W.2d 342).

Kormanik lacks standing under Section 227.40(1) because the guidance she challenges does not threaten any "legal right[] or privilege[]" of hers. Wis. Stat. § 227.40(1). She raises four interests in her brief, but none suffices.

First, Kormanik's asserted interest in an "unpolluted" vote is not legally protectible. She claims that she has a "voting interest" protected by Section 6.84(1). Resp. Br. 31. But Section 6.84 is merely a statement of legislative policy "that absentee balloting must be 'carefully regulated[,]'" which is accomplished "through statutes passed by the legislature and signed by the governor." *Priorities USA v. Wis. Elections Comm'n*, 2024 WI 32, ¶ 44, 412 Wis. 2d 594, 8 N.W.3d 429. As

Rise's opening brief explained, a majority of the Wisconsin Supreme Court rejected the argument that Section 6.84(1) conveys a legal right that allows voters to sue over the procedures other voters used to cast their votes. Rise Br. at 19 (citing *Teigen v. Wis. Elections Comm'n*, 2022 WI 64, ¶ 167, 403 Wis. 2d 607, 976 N.W.2d 519 (Hagedorn, J., concurring in part); *id.* ¶¶ 210–15 (Walsh Bradley, J., dissenting); *Rise, Inc. v. Wis. Elections Comm'n*, No. 2022AP1838, unpublished slip op. ¶ 27 n.6 (Ct. App. July 7, 2023)). As Justice Hagedorn explained in *Teigen*, there is no reason "why the text of § 6.84(1) . . . should be read to encompass a right for a voter to challenge any and all election practices." *Teigen*, 2022 WI 64, ¶ 167 (Hagedorn, J., concurring). Kormanik has no answer to this argument—she ignores it. And she cites no Wisconsin case adopting such a broad approach giving every voter standing to challenge the methods *other voters* use to vote.[1]

Second, Kormanik's claimed injury to an interest in "the equal administration of Wisconsin's election laws" is entirely speculative. Kormanik alleges she would suffer from unequal administration "*in the event that* [some] local election officials and municipal clerks may comply with WEC's incorrect guidance," while others "may comply with the express requirements of Wisconsin statutes." R.2:8 ¶26 (emphasis added). But Kormanik never alleges, much less offers evidence, that unequal administration occurred or was likely to occur. *See, e.g.*, R.132:3. Nor does Kormanik explain how any inconsistency in the availability of spoliation would

[1] Lacking Wisconsin precedent, Kormanik cites *Carson v. Simon*, 978 F.3d 1051 (8th Cir. 2020). But *Carson* addressed *candidate* standing, not voter standing. *Id.* at 1058. Even as to candidate standing, *Carson* has been roundly rejected by other courts. *See Bognet v. Sec'y Commw. of Pa.*, 980 F.3d 336, 351 n.6 (3d Cir. 2020); *Bost v. Ill. State Bd. of Elections*, 114 F.4th 634, 643–44 (7th Cir. 2024), *cert. granted*, No. 24-568, 2025 WL 1549779 (U.S. June 2, 2025); *King v. Whitmer*, 505 F. Supp. 3d 720, 736 (E.D. Mich. 2020); *Feehan v. Wis. Elections Comm'n*, 506 F. Supp. 3d 596, 612 (E.D. Wis. 2020); *Bowyer v. Ducey*, 506 F. Supp. 3d 699, 710–11 (D. Ariz. 2020). And a "veritable tsunami" of federal court decisions have rejected "vote dilution" as a basis for *voter* standing. *O'Rourke v. Dominion Voting Sys. Inc.*, No. 20-cv-3747-NRN, 2021 WL 1662742, at *9 (D. Colo. Apr. 28, 2021) (collecting cases).

injure her, when she objects to spoliation and does not wish to use it. If some municipalities allowed spoiling and some did not, that is of no moment to Kormanik, who does not wish to spoil. *Cf. Short v. Brown*, 893 F.3d 671, 677 (9th Cir. 2018) (holding that a law that "makes it easier for some voters to cast their ballots" "does not burden anyone's right to vote").

Third, Kormanik's claimed interest in elections being "administered according to law," Resp. Br. at 33, is merely a re-hash of her alleged "vote pollution" interest, relying again on the *Teigen* plurality's analysis of Section 6.84 that was rejected by a majority of the court. That reliance is misplaced for the reasons already explained. *Supra* at 8–9. Kormanik's analogy to voter Jason Rivera's standing in *Rise, Inc. v. Wis. Elections Comm'n*, 2024 WI App 48, 413 Wis. 2d 366, 11 N.W.3d 241, provides a useful contrast. Resp. Br. at 34. Rivera, unlike Kormanik, was a user of the election procedure he was suing to clarify—he is an absentee voter and was concerned that his ballot would be rejected based on an unlawfully narrow definition of the required witness "address." *See* Affidavit of Jason Rivera in Support of Plaintiffs' Motion for Summary Judgment, *Rise, Inc. v. Wis. Elections Comm'n*, No. 2022CV002446 (Dane Cnty. Cir. Ct. Sept. 18, 2023).

Finally, Kormanik claims the guidance injures her by "undermining her confidence in the integrity of Wisconsin's electoral process." Resp. Br. at 35. But Kormanik makes no attempt to substantiate her concerns about the risk of "fraudulent" spoliation of ballots. *Id.* Her subjective anxiety about hypothetical fraud, unsupported by a shred of evidence that such fraud has ever occurred or is likely to occur, cannot confer standing. *See Black River Forest*, 2022 WI 52, ¶ 21 (for standing under Chapter 227, "the injuries must be neither hypothetical nor conjectural."); *Clapper v. Amnesty Int'l U.S.A.*, 568 U.S. 398, 416 (2013) (plaintiffs "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending").

B. The Uniform Declaratory Judgments Act does not give Kormanik standing.

Kormanik's failure to satisfy Section 227.40's standing requirements is the end of the road for her claims because that statute provides the "exclusive means of judicial review" and allows a declaratory judgment "only when" its standing requirements are met. Wis. Stat. § 227.40(1). But even if Kormanik could "bring[] a declaratory judgment action under the Uniform Declaratory Judgments Act" instead, Resp. Br. at 25, Kormanik fails to satisfy that statute's standing requirements, too.

To maintain 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 (emphases added). Although a plaintiff need not establish that she has *already* suffered an injury to obtain declaratory relief, she must show that she "*will* sustain[] some pecuniary loss or otherwise *will* sustain a substantial injury to his or her interests." *Id.* (emphasis added). And that injury must be "personal" to her. Kormanik has alleged nothing more than purely speculative and hypothetical harms that may or may not ever come to pass and do not affect her "personally."

The cases Kormanik cites to argue that she need not "allege she is 'personally injured' to sue under the Uniform Declaratory Judgments Act" actually refute that view. Resp. Br. at 26. In *Putnam v. Time Warner Cable of Southeastern Wisconsin*, the Wisconsin Supreme Court explained that a plaintiff in a declaratory judgment action need not show a "present harm." 2002 WI 108, ¶ 43, 255 Wis. 2d 447, 649 N.W.2d 626. But it also held that a plaintiff cannot obtain a declaratory judgment based on "remote, contingent, and uncertain events that may never happen." *Id.* ¶ 46 (internal quotation marks omitted). There was a justiciable controversy in *Putnam* only because the alleged future harm—the "imposition of a $5.00 fee for late payment"—was "an imminent and practical certainty." *Id.* ¶ 46. Kormanik does not

face any personal harm at all, much less harm that is "an imminent and practical certainty" rather than based on "remote, contingent, and uncertain events that may never happen." *Id.*

In several of the remaining cases Kormanik cites, relief was denied because there was no imminent injury—just like here. *See Village of Slinger v. City of Hartford*, 2002 WI App 187, ¶ 12, 256 Wis. 2d 859, 650 N.W.2d 81 ("There is nothing in the record upon which to base an inference that [plaintiffs] would be adversely affected by the annexation. The law requires at least an allegation of pecuniary loss or injury."); *Miller Brands-Milwaukee, Inc. v. Case*, 162 Wis. 2d 684, 695, 470 N.W.2d 290 (1991) ("We agree that the case was not ripe for adjudication on the hypothetical 'facts' on which Miller based its action."); *Lister v. Bd. of Regents of Univ. of Wis. Sys.*, 72 Wis. 2d 282, 308, 240 N.W.2d 610 (1976) ("It is not a sufficient ground for declaratory relief that the parties have a difference of opinion as to the proper construction and application of a particular statute."). In other cases, the court did not address standing. *State ex rel. Zignego v. WEC*, 2020 WI App 17, ¶ 27, 391 Wis. 2d 441, 941 N.W.2d 284 ("[W]e decline to decide the standing issue."); *State ex rel. La Follette v. Dammann*, 220 Wis. 17, 264 N.W. 627, 628 (1936) (explaining the origins of declaratory judgment actions without any reference to standing principles). In the rest, at least one plaintiff faced clear and imminent personal harm, justifying the suit. *See Milwaukee Dist. Council 48 v. Milwaukee Cnty.*, 2001 WI 65, ¶¶ 38–39, 244 Wis. 2d 333, 627 N.W.2d 866 (union had interest in protecting its members' pension rights and union member had a personal interest in his own pension); *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶¶ 6–15, 42, 309 Wis. 2d 365, 749 N.W.2d 211 (property owner faced financial loss due to challenged zoning restriction).

C. Kormanik lacks standing as a matter of judicial policy.

Unable to satisfy the statutory standing requirements, Kormanik argues that the Court should excuse them as "a matter of sound judicial policy." Resp. Br. at 28. Although "judicial policy" may guide the standing analysis in some instances,

it cannot overcome the legislature's express requirement in Section 227.40(1) that courts may "render a declaratory judgment" in an action challenging a guidance document "*only when* it appears from the complaint and the supporting evidence that the . . . guidance document or its threatened application interferes with or impairs, or threatens to interfere with or impair, the legal rights and privileges of the plaintiff." Wis. Stat. § 227.40(1) (emphasis added). None of the "judicial policy" standing cases on which Kormanik relies involved Section 227.40 or any similar express statutory restriction on relief. None, therefore, does anything to excuse Kormanik's need to meet Section 227.40's strict requirements.

Moreover, even outside of Section 227.40, "judicial policy" is just one "aspect[] of standing," along with "whether the party whose standing is challenged has a personal interest in the controversy" and "whether the interest of the party whose standing is challenged will be injured." *Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n*, 2011 WI 36, ¶¶ 5–6, 333 Wis. 2d 402, 797 N.W.2d 789. The "essence of determining personal interest, adverse effect, and judicial policy," is "whether there is an injury and whether the injured interest of the party whose standing is challenged falls within the ambit of the statute or constitutional provision involved." *Id.* ¶ 54. Thus, in all cases, a plaintiff must show at least a threatened injury to establish standing.

Kormanik's heavy reliance on the policy considerations addressed by the Wisconsin Supreme Court in *McConkey v. Van Hollen*, 2010 WI 57, ¶ 15, 325 Wis. 2d 1, 783 N.W.2d 855, misses this point. *McConkey* did not find standing based on policy alone—the Court also satisfied itself that the plaintiff had "suffered an actual injury to a legally protected interest," even if it was "difficult to determine the precise nature of the injury." *Id.* ¶¶ 15, 17. In fact, the injury to the voter was straightforward—he had been compelled to vote yes or no on a single amendment that, he alleged, made two separate changes to the Wisconsin Constitution, when he should have been entitled to vote separately on the two separate issues. *See id.* ¶ 2.

Here, in contrast, Kormanik showed no injury at all—she did not want to spoil her ballot, and she did not need to do so.

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.

If the Court reaches the merits, it should reverse because, as Rise has explained, Sections 6.86(5) and (6) together allow voters to ask for their previously delivered absentee ballots back, spoil them, and return the now-spoiled ballots for replacement ones. Rise Br. at 23.

This interpretation is not, as Kormanik argues, "atextual." Resp. Br. at 18. It is, instead, the only interpretation that gives effect to every word of subsections 6.86(5) and (6). Subsection (6) expressly states that ballots shall not be returned to voters "except as authorized" in subsection (5). Wis. Stat. § 6.86(6). For that statement to have meaning, subsection (5) *must* in fact "authoriz[e]" municipal clerks to return already-delivered ballots to voters. Otherwise, the express statement is entirely superfluous.

Kormanik responds by arguing that the "except as authorized in sub. (5)" language in subsection (6) is intended to authorize the issuance of a new ballot to a voter who returns an already spoiled ballot to the clerk. Resp. Br. at 18. That argument does not work. Subsection (5) provides that when an elector returns a spoiled ballot to the clerk, the clerk "shall destroy the spoiled or damaged ballot," and "shall issue a *new* ballot." Wis. Stat. § 6.86(5) (emphasis added).

The clerk's giving of a *new* absentee ballot to a voter who delivers a spoiled one cannot be the return that subsection (6) says subsection (5) authorizes. Giving a voter a *new* ballot is not a "return" at all. *See Return*, Merriam-Webster, https://www.merriam-webster.com/dictionary/return (last visited June 15, 2025) (defining "return" as "to bring, send, or put back to a former or proper place," or "to send back"). And providing a new ballot certainly is not a return of "*the* ballot" that the voter had mailed or personally delivered to the municipal clerk.

Finally, Kormanik observes that Rise's interpretation "would not save WEC's instructions, which require ballots to be spoiled by the municipal clerk, not the voter." Resp. Br. at 20. But even so, Rise's interpretation requires reversal of the circuit court's declaratory judgment "prohibit[ing] clerks or local election officials (i) from returning an elector's previously completed and returned absentee ballot, which was not spoiled at the time it was originally returned, to that elector so that the ballot may thereafter be amended or spoiled, or (ii) from amending, spoiling, or replacing any such ballot." App. 4–5. The circuit court's interpretation of Section 6.86 is wrong and must be reversed, regardless of whether WEC's now-rescinded guidance was correct.

CONCLUSION

The Court should reverse.

Dated: June 17, 2025

Respectfully submitted,

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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 2,972 words.

Dated: June 17, 2025

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