

STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY
BRANCH 6

NANCY KORMANIK,
Plaintiff,

v.

WISCONSIN ELECTIONS
COMMISSION,
Defendant.

Case No. 2022-CV-1395
Case Code: 30701
Declaratory Judgment

**PROPOSED INTERVENOR-DEFENDANT RISE, INC.'S OPPOSITION TO
PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND
TEMPORARY INJUNCTION**

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Proposed Intervenor-Defendant Rise, Inc., by its attorneys, submits this brief in opposition to the motion for a temporary restraining order and temporary injunction filed by Plaintiff Nancy Kormanik.

I. INTRODUCTION

Absentee voting is underway in Wisconsin. It is proceeding according to state statutes and guidance interpreting those statutes issued by the Wisconsin Elections Commission (“WEC”)—the same guidance that governed the August 2022 partisan primary, and which is materially identical to that which governed the 2020 general election. Plaintiff did not challenge this guidance when WEC first issued it in 2020. She did not challenge it when WEC re-issued it two months ago. Instead, she waited until the November 2022 general-election absentee voting process had already begun to file her lawsuit. Now, Plaintiff seeks a temporary injunction that would impose sweeping changes to how (and, as a practical matter, whether) voters can cure problems with their absentee ballots. Specifically, Plaintiff asks that this Court compel WEC to issue so-called “corrected guidance” imposing an array of new restrictions on absentee voting after that voting process has already begun in a significant statewide election. In doing so, Plaintiff asks this Court to impose additional, unjustifiable burdens on lawful voters, election officials who are engaged in administering the current election, and organizations like Rise, whose efforts to safeguard voting rights will be seriously impeded if Plaintiff is successful. The relief that Plaintiff seeks would also inject significant, debilitating confusion into the process at an unjustifiably late date, threatening not just the fundamental rights of individual voters, but the integrity of the election process as a whole. Plaintiff fails to carry her burden to justify her request that the Court issue this extraordinary relief.

First, courts have discretion to issue a temporary injunction only when doing so is necessary to preserve the status quo. Plaintiff’s request for relief asks this Court to do precisely

the opposite. Plaintiff seeks not only to enjoin absentee ballot guidance that has been on the books since October 2020, and at the same time asks that the Court compel WEC to issue entirely novel restrictions on absentee voting in the middle of an ongoing election. Such an order would not only upend the status quo, it would compel WEC to take affirmative steps that “constitute all or part of the ultimate relief sought,”—a clear abuse of the Court’s discretion. 8 Jay E. Grenig, Wis. Pleading & Prac. Forms § 71:31 (5th ed. 2021).

Second, Plaintiff claims that her request is justified based on a purported risk of voter fraud. But Plaintiff does not cite a shred of evidence that the WEC guidance at issue has ever led to voter fraud, miscast votes, or any other improper result—an unsurprising omission given that the challenged guidance contains clear safeguards against absentee-ballot fraud. Given that the guidance at issue governed both the 2020 general election and 2022 partisan primary, Plaintiff’s failure to cite anything beyond bare speculation in either her complaint or her motion speaks volumes. Such a theoretical, unsubstantiated risk does not come close to demonstrating “irreparable harm,” as Plaintiff must to secure a temporary injunction. By contrast, it is certain that issuance of the temporary injunction Plaintiff seeks would cause direct and widespread harm by injecting confusion into the voting process, requiring WEC to issue brand new guidance and Wisconsin’s 1800-plus election officials to interpret and apply that new guidance during an ongoing election.

Third, Plaintiff fails to show that she is likely to succeed on the merits. Plaintiff’s claims hinge on her assertion that Wisconsin law categorically prohibits clerks from returning absentee ballots, but the plain text of the very provision on which she relies dispels this theory. And even accepting all of Plaintiff’s arguments on their face, her proposed injunction sweeps far broader than is necessary to remedy the harm she claims. Plaintiff does not dispute that Wisconsin law

authorizes clerks to return, by mail or in person (at the clerk's office or a designated alternative site, as applicable) absentee ballots that lack properly completed witness certificates. Wis. Stat. § 6.87(9); see Pls.' Br. in Supp. of Mot. for Temporary Inj. ("Br.") at 3 n.2, 8 n.3. At a minimum therefore, this process must be exempted from any relief.

Plaintiff's failure to satisfy any one of these elements requires denial of her motion. As the Wisconsin Supreme Court has instructed, regardless of the ultimate merits of a plaintiff's claims, temporary injunctions "are not to be issued lightly, but *only where necessary to preserve the status quo of the parties and [remedy] irreparable injury.*" *Pure Milk Prods. Coop. v. Nat'l Farmers Org.*, 64 Wis. 2d 241, 251, 219 N.W.2d 564, 569 (1974) (emphasis added). Here, a temporary injunction would do the opposite on both scores, upending the status quo and irreparably harming lawful Wisconsin voters by denying them the franchise. The Court should deny Plaintiff's motion.

II. BACKGROUND

Wisconsin law provides that "if an elector mails or personally delivers an absentee ballot to the municipal clerk," the clerk may "not return the ballot to the elector" "[e]xcept as authorized in sub. (5) and 6.87(9)." Wis. Stat. § 6.86(6) (emphasis added). Section 6.86(5) requires clerks to issue a new ballot to an elector "[w]henever an elector returns a spoiled or damaged absentee ballot to the municipal clerk," so long as any request for a replacement ballot is made "within the applicable time limits under subs. (1) and (3)(c)."¹ *Id.* § 6.86(5). Section 6.87(9), in turn, provides that "[i]f a municipal clerk receives an absentee ballot with an improperly completed certificate or

¹ Those time limits provide that mailed requests for a new ballot must be received "no later than 5 p.m. on the 5th day immediately preceding the election," while in-person requests must be made "no earlier than 14 days preceding the election and no later than the Sunday preceding the election." Wis. Stat. § 6.86(1)(b).

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.”

Consistent with those statutory directives, WEC issued guidance (the “Absentee Ballot Guidance”) setting forth the process and rules by which voters can “spoil” absentee ballots. Compl., Exh. A; Wis. Elections Comm’n, *Spoiling Absentee Guidance for the 2022 Partisan Primary* (Aug. 1, 2022), available at <https://elections.wi.gov/memo/spoiling-absentee-guidance-2022-partisan-primary>; Compl., Exh. B; Wis. Elections Comm’n, *Rules about ‘Spoiling’ Your Ballot* (Aug. 2, 2022), available at <https://elections.wi.gov/news/rules-about-spoiling-your-ballot-0>. The Absentee Ballot Guidance governed the partisan primary that took place this past August and is materially identical to the WEC guidance that governed the November 2020 general election. See Wis. Elections Comm’n, *Rules about ‘Spoiling’ Your Ballot* (Oct. 29, 2020).²

The Absentee Ballot Guidance provides, among other things:

- A voter who returned an absentee ballot may request in writing or in-person that their returned absentee ballot be spoiled so they can either (i) vote a new one, or (ii) vote on election day.
- A voter cannot appear at the polls on election day and spoil their absentee ballot at that time.
- A voter who mailed an absentee ballot to the clerk cannot vote at the polls on election day if the voter has not spoiled their ballot by the applicable deadline, even if the clerk has not received the ballot.
- A voter who received an absentee ballot but did not return the ballot can vote in person.
- A voter can spoil their election day ballot in person at the polls.

² Available at <https://elections.wi.gov/news/rules-about-spoiling-your-ballot>.

See Rules about ‘Spoiling’ Your Ballot (Aug. 2, 2022) at 1–2; Compl., Exh. B, pp. 1-2; *Spoiling Absentee Guidance for the 2022 Partisan Primary* (Aug. 1, 2022) at 1–2; Compl., Exh. A, pp. 1-2.

Absentee voting for the 2022 general election is now well underway. Clerks were required to send absentee ballots by September 22 to all electors with valid requests on file, *see* Wis. Stat. §§ 7.10(3), 7.15(1)(c), (cm), and by September 24 to all military and overseas voters with valid requests on file, 52 U.S.C. § 20302(a)(8).

Nearly two months after WEC issued the most recent Absentee Ballot Guidance—and after the absentee voting process had already begun—Plaintiff filed this suit. Plaintiff seeks to drastically limit the ability of Wisconsin voters to cure defects in their absentee ballots or accompanying certifications. She alleges that WEC’s guidance—which voters have relied on, in some form, since at least the 2020 general election, including in the primary election held in August—is inconsistent with several provisions of Wisconsin law. Specifically, Plaintiff alleges that the guidance impermissibly allows municipal clerks to (1) return a ballot to a voter in some circumstances, and (2) spoil a ballot upon the voter’s request. Compl. ¶¶15, 16.

Plaintiff then filed the instant motion for a temporary injunction. Plaintiff seeks to enjoin the Absentee Ballot Guidance and to require WEC to “promptly” issue so-called “corrected guidance” setting new rules for absentee voting, including that (1) a clerk is prohibited from returning a previously completed and submitted absentee ballot to a voter; (2) a clerk has no power to “spoil” a voter’s previously submitted absentee ballot; and (3) in order to spoil an absentee ballot, a voter must spoil the ballot before requesting a new absentee ballot. Pl.’s Am. Notice of Mot. & Mot. for a TRO & Temporary Inj. (“Mot.”) at 2.

Proposed Intervenor-Defendant Rise, Inc. promptly filed a motion to intervene on September 29. That motion remains pending.

III. LEGAL STANDARD

A circuit court may issue a temporary injunction only if the movant establishes four criteria: “(1) the movant is likely to suffer irreparable harm if a temporary injunction is not issued; (2) the movant has no other adequate remedy at law; (3) a temporary injunction is necessary to preserve the status quo; and (4) the movant has a reasonable probability of success on the merits.” *Milwaukee Deputy Sheriffs’ Ass’n v. Milwaukee County*, 2016 WI App 56, ¶20, 370 Wis. 2d 644, 883 N.W.2d 154 (citing *Werner v. A.L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520–21, 259 N.W.2d 310 (1977)). “[I]njunctive relief is addressed to the sound discretion of the trial court; competing interests must be reconciled and the *plaintiff must satisfy* the trial court that on balance equity favors issuing the injunction.” *Carlin Lake Ass’n v. Carlin Club Props., LLC*, 2019 WI App 24, ¶44, 387 Wis. 2d 640, 929 N.W.2d 228 (quoting *Columbia County v. Bylewski*, 94 Wis. 2d 153, 163, 288 N.W.2d 129 (1980)). “This burden reflects that ‘injunctions are not to be issued lightly but only to restrain an act that is clearly contrary to equity and good conscience.’” *Id.* (quoting *Bartell Broads., Inc. v. Milwaukee Broad. Co.*, 13 Wis. 2d 165, 171, 108 N.W.2d 129 (1961)).

IV. ARGUMENT

Plaintiff seeks—after absentee voting has already begun—to make sweeping changes to whether and how Wisconsin voters can cure problems in their absentee balloting materials. But, as shown below, Plaintiff fails to carry her burden to show that a temporary injunction is appropriate. The Court should deny her motion.

First, it is blackletter law that a temporary injunction may be issued “*only when necessary to preserve the status quo.*” *Werner*, 80 Wis. 2d at 520 (emphasis added). Here, Plaintiff seeks to

do precisely the opposite. Wisconsin held its 2020 general election under the same guidance Plaintiff now challenges. It held the August 2022 partisan primary under that guidance as well. Clerks, voters, and organizations like Rise are familiar with and have relied on that WEC guidance and these recent experiences to prepare for the coming general election. Plaintiff seeks to upend this orderly process mid-stream, with the election just weeks away. And Plaintiff asks the Court to order WEC to take the affirmative step of issuing so-called “corrected guidance,” imposing entirely *new* restrictions on the absentee ballot process.

Second, Plaintiff cannot demonstrate that she is likely to suffer irreparable harm if the injunction is not granted. In fact, the opposite is true. The primary supposed harm Plaintiff cites is a hypothetical risk of fraud or tampering with the electoral process. But Plaintiff cites no evidence that the WEC guidance at issue has ever led to voter fraud or any other improper result. Such a vague, speculative, and unsubstantiated risk does not come close to the sort of irreparable harm necessary to warrant a temporary injunction. By contrast, the harm that would flow from granting the injunction Plaintiff seeks is concrete, certain, and significant. Plaintiff’s requested relief would unlawfully restrict countless voters’ ability to cure spoiled ballots and create significant and unwarranted confusion just weeks before the election (and when absentee voting is already in progress). Instead of challenging WEC’s absentee ballot guidance promptly—when it issued in 2020 or as soon as it reissued in 2022—Plaintiff sat on her rights, waiting to file her complaint until after absentee voting had already begun. Because of Plaintiff’s delay, her proposed relief—if granted—threatens to grind the absentee ballot cure process to a halt in much of the state. Wisconsin’s elections are run by local clerks in more than 1,800 municipalities. These 1,800-plus clerks (most of whom are not lawyers) cannot be expected to properly and consistently implement

a brand new, judicially imposed cure process mid-election cycle. The inevitable practical effect will be to strip many Wisconsinites of their most fundamental right.

Third, Plaintiff cannot demonstrate a likelihood of success on the merits. Plaintiff's claims hinge on her assertion that Wisconsin law categorically prohibits clerks from returning or spoiling absentee ballots, but the provision on which she relies contains clear exceptions that authorize the Absentee Ballot Guidance. Plaintiff's proposed temporary injunction would eliminate the Legislature's carefully delineated exceptions and must be rejected.

A. Plaintiff's requested relief would dramatically alter the status quo while voting is underway.

That the relief that Plaintiff requests would radically alter the status quo is not only a basis for denying the motion, it compels that result. "The function of a temporary injunction is to maintain the status quo, not to change the position of the parties or compel the doing of acts which constitute all or part of the ultimate relief sought." *Codept, Inc. v. More-Way N. Corp.*, 23 Wis. 2d 165, 173, 127 N.W.2d 29 (1964); *see also Pure Milk Prods. Coop. v. Nat'l Farmers Org.*, 64 Wis. 2d 241, 251, 219 N.W.2d 564, 570 (1974). Here, Plaintiff's motion seeks to do both and should be denied on that basis alone.

"The status quo is the last uncontested status which preceded the pending controversy." *Westinghouse Elec. Corp. v. Free Sewing Mach. Co.*, 256 F.2d 806, 808 (7th Cir. 1958). Here, Plaintiff challenges guidance issued by WEC in August 2022, and claims an injunction is necessary to return to the status quo "that existed before WEC" issued this guidance two months ago. Br. at 12. But this ignores that the August 2022 guidance is materially identical to WEC guidance issued in October 2020, and which governed the November 2020 election. Of particular relevance, both sets of guidance include an *identical* statement about the subject of Plaintiff's concern: "Voters who have who have already returned an absentee ballot by mail may request in writing that their

returned absentee ballot be spoiled so they can vote a new one.” *Compare* Wis. Elections Comm’n, *Rules about ‘Spoiling’ Your Ballot*, (Aug. 2, 2022); Compl., Exh. B, p. 1; *with Rules about ‘Spoiling’ Your Ballot*, (Oct. 29, 2020).³ Plaintiff’s requested relief therefore would not restore the status quo—it would fundamentally alter Wisconsin’s settled and lawful procedures for curing spoiled absentee ballots. This is unlawful. *See Werner*, 80 Wis. 2d at 520; *Codept*, 23 Wis. 2d at 173; *Mogen David Wine Corp. v. Borenstein*, 267 Wis. 503, 509, 66 N.W.2d 157, 160 (1954) (denial of temporary injunction proper where requested relief would have upset the status quo).

Even if Plaintiff is right that the status quo is what existed before WEC issued its guidance in October 2020 (and she is not), her requested relief is still unlawful because it seeks far more than a rescission of WEC’s absentee ballot-guidance. Specifically, Plaintiff asks this Court to order WEC to “promptly issue” new guidance that imposes a host of new restrictions on absentee voting, including that (i) clerks are “prohibited from returning a previously completed and submitted absentee ballot” to a voter, (ii) clerks have no power to “‘spoil’ an elector’s previously submitted ballot,” and (iii) “in order to spoil an absentee ballot, an elector or an elector’s agent must declare and return the spoiled absentee ballot before requesting re-issuance of a new absentee ballot.” Mot. at 1–2; *see also* Compl. ¶¶1–6. As discussed more fully below, none of these restrictions is supported by the statutes on which Plaintiff relies. *See infra* Section C.

But even more fundamentally, it has long been the rule in Wisconsin that temporary injunctions may not “compel the performance of some affirmative action.” *Carpenter Baking Co. v. Bakery Sales Drivers Local Union*, 237 Wis. 24, 31, 296 N.W. 118, 122 (1941). Plaintiff’s motion must accordingly be denied because it requests the Court to compel “acts which constitute all or part of the ultimate relief sought.” *Codept, Inc.*, 23 Wis. 2d at 173. To find otherwise would

³ Available at <https://elections.wi.gov/news/rules-about-spoiling-your-ballot>.

be an abuse of discretion. *See, e.g., School Dist. of Slinger v. Wis. Interscholastic Athletic Ass'n*, 210 Wis. 2d 365, 374, 563 N.W.2d 585, 589 (Ct. App. 1997) (finding circuit court abused discretion by issuing temporary injunction that “provide[d] the desired result” sought in the complaint).

B. Plaintiff fails to demonstrate that she is likely to suffer irreparable harm.

Plaintiff fails to carry her burden to demonstrate that she is likely to suffer irreparable harm if a temporary injunction is not issued for at least two independent reasons.

First, the supposed harm Plaintiff cites—“potential disenfranchisement by identity theft and voter fraud,” Br. at 10—is both speculative and wholly unsubstantiated. Materially identical guidance governed both the November 2020 general election and the August 2022 partisan primary. Yet Plaintiff does not identify a single instance of confirmed (or even alleged) identity theft or voter fraud that resulted from that guidance. On the other side of the coin, the harm that would result from Plaintiff’s proposed injunction—widespread confusion among voters and election officials about how to participate in and administer an absentee voting process that has already begun—is certain. That such confusion will result in the disenfranchisement of lawful Wisconsin voters is also certain. This is the very definition of irreparable harm; “[i]t is axiomatic that there is no post hoc remedy for a violation of the right to vote.” *Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1310 (N.D. Ga. 2018). This fact alone mandates denial of Plaintiff’s motion. *See Werner*, 80 Wis. 2d at 520 (movant must satisfy each of the four temporary injunction criteria to win relief).

Second, Plaintiff’s significant delay in bringing this suit is a separate, additional reason to deny her motion. *See Hawkins v. Wisconsin Elections Comm’n*, 393 Wis.2d 629, 635, 948 N.W.2d 877, 880 (“Even if we would ultimately determine that the petitioners’ claims are meritorious, given their delay in asserting their rights . . . it would be unfair both to Wisconsin voters and to the

other candidates on the general election ballot to interfere in an election that, for all intents and purposes, has already begun.”). “Injunction is an equitable remedy, and a court in accordance with ancient doctrines and established decisions will lend its aid only to the vigilant, active and faithful.” *Diehl v. Dunn*, 13 Wis. 2d 280, 286–87, 108 N.W.2d 519, 522–23 (affirming denial of an injunction where plaintiffs “sat on their rights for three and one-half years” and defendants relied to their detriment on the status quo). WEC issued the challenged guidance on August 1 and 2, 2022, in advance of the partisan primary held that month. This guidance was nothing new; rather, it was (and is) materially identical to that WEC issued in advance of (and which governed) the 2020 election. *See Wis. Elections Comm’n Rules about ‘Spoiling’ Your Ballot*, (Oct. 29, 2020).⁴ Plaintiff did not challenge the guidance in 2020. She did not challenge the guidance when WEC re-issued it in advance of the August primary. Instead, she waited until after absentee voting for the November election had already begun to come to the Court and ask it to issue the extraordinary relief she requests.

This inexcusable delay would warrant denial of the requested relief in any circumstance. *Hawkins*, 393 Wis. 2d at 635; *Diehl*, 13 Wis. 2d at 286. That is particularly so in the election context when the plaintiff seeks “late, judicially imposed changes to . . . election laws and procedures.” *Merrill v. Milligan*, 142 S. Ct. 879, 880–81 (2022) (Kavanaugh, J., concurring) (suggesting that a preliminary injunction should not issue in the period close to an election if the plaintiff has “unduly delayed bringing the complaint to court”). These considerations are particularly acute here. It is one thing for a plaintiff to seek an injunction “[w]hen an election is close at hand” given the need to ensure that “the rules of the road [are] clear and settled.” *Id.* It is quite another for a plaintiff to seek to re-write those rules *after the election has already begun*.

⁴ Available at <https://elections.wi.gov/news/rules-about-spoiling-your-ballot>.

Plaintiff's attempt to compare this case to *Jefferson v. Dane County* fails. Br. at 11 (discussing *Jefferson v. Dane County*, No. 2020AP557-OA (Wis. Sup. Ct. Mar. 31, 2020) (Dorsey Aff. Ex. E.)). While *Jefferson* granted an injunction ordering a county election official to remove election guidance posted on Facebook several weeks before the April 2020 primary election, that relief was sought *two days* after the guidance was posted. *See* Dorsey Aff. Ex. E at 1–2. Plaintiff, by contrast, waited two months to file this suit and seek an injunction.

C. Plaintiff fails to carry her burden to show that she is likely to succeed on the merits.

Finally, Plaintiff's motion should be denied because she has failed to show that she is likely to succeed on the merits. The Absentee Ballot Guidance is consistent with Wisconsin law. Plaintiff insists that under the relevant provisions of the Election Code, clerks may *never* return completed absentee ballots to voters, but this is directly contradicted by the express carve-outs in the very statutory provisions she cites. Plaintiff further contends that Wisconsin law bars clerks from spoiling a ballot after it is returned, despite statutory language allowing a voter to request that their ballot be spoiled so long as the request is made by the applicable deadlines. And although Plaintiff insists that WEC's guidance unlawfully permits voters to spoil their ballots if they change their minds about who to vote for, nothing in Wisconsin law limits the reasons a voter may choose to spoil.

Further, even if the Court were to accept Plaintiff's arguments wholesale—which it should not do—Plaintiff's requested injunction sweeps far too broadly and would disenfranchise countless lawful voters. In particular, the Absentee Ballot Guidance indicates that voters who return spoiled absentee ballots (or who do not return absentee ballots at all) are entitled to vote at the polls on election day. *See Spoiling Absentee Guidance for the 2022 Partisan Primary* at 2; Compl. Exh. A, p. 2; *Rules about 'Spoiling' Your Ballot* at 1-2; Compl. Exh. B, pp. 1-2. Plaintiff has not challenged this aspect of the Absentee Ballot Guidance, nor is there any basis to do so. Yet her proposed

injunction would eliminate it, going far beyond what could possibly be necessary to cure any supposed flaw in WEC's guidance (even under Plaintiff's incorrect understanding of the law) or maintain the status quo.⁵

1. Clerks may return absentee ballots to voters under Wis. Stat. §§ 6.86(5) and 6.87(9).

At the threshold, Plaintiff has no likelihood of success on her claim that under Wisconsin law, “a municipal clerk or local election official is prohibited from returning a previously completed and submitted absentee ballot to an elector.” *Mot.* at 2. Plaintiff argues that WEC's instruction that “a clerk may return a previously completed and submitted absentee ballot to the elector” is contrary to “the clear and mandatory language of Wis. Stat. § 6.86(6) providing that ‘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.’” *Br.* at 2. This is meritless. As Plaintiff acknowledges, *Mot.* at 8, Section 6.86(6) itself contains two exceptions that allow clerks to return absentee ballots. *See* Wis. Stat. § 6.86(6) (“*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.*”) (emphasis added). Under the plain language of the statute, then, a municipal clerk can return an absentee ballot to the elector where the ballot lacks a properly completed certificate (Section 6.87(9))⁶ or where “an elector returns a spoiled or damaged

⁵ While Rise reiterates that the requested temporary injunction is unlawful in its entirety, in the even the Court issues any injunction, it must be limited to the aspects of the Absentee Ballot Guidance that Plaintiff challenges here. *See Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) (“[T]he scope of injunctive relief is dictated by the extent of the violation established.”). At minimum, therefore, any temporary injunction must preserve the absentee ballot curing process set forth in Section 6.87(9), which plainly authorizes clerks to return absentee ballots lacking a properly completed certificate.

⁶ In particular, “[i]f 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*, inside the sealed

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,” in which case the clerk “shall issue a new ballot to the elector” (Section 6.86(5)).

There accordingly is no merit to Plaintiff’s contention that Wisconsin law categorically prohibits clerks from returning a completed and submitted absentee ballot to an elector. Her interpretation would have this Court rewrite Section 6.86(6) by eliminating the clear statutory language allowing municipal clerks to return absentee ballots “as authorized in sub. (5) and s. 6.87(9).” Wis. Stat. § 6.86(6). But courts “may not rewrite statutes; [they] must simply interpret them as they are written.” *United Am., LLC v. Wis. Dep’t of Transp.*, 2020 WI App 24, ¶ 16. Plaintiff’s request that this Court issue a temporary injunction declaring “that a municipal clerk is prohibited from returning a previously completed and submitted absentee ballot to an elector”—and requiring WEC to issue “corrected guidance” to that effect—is contrary to the plain language of Section 6.86(6) and must be rejected. At minimum, any temporary injunction must preserve the absentee ballot curing process set forth in Section 6.87(9), which plainly authorizes clerks to return via mail or in person (at the clerk’s office or a designated alternative site, as applicable) absentee ballots lacking a properly completed certificate.

2. Voters may spoil absentee ballots after mailing or delivering them to the clerk in accordance with the time limits under Wis. Stat. § 6.86(1) and 3(c).

Nor is there merit to Plaintiff’s contention that under Wis. Stat. § 6.86(5), “only an absentee elector may spoil his or her absentee ballot” and that the elector must do so “before it is returned to the clerk.” Br. at 8. Section 6.86(5) provides in full:

envelope when an envelope is received, together with a new envelope if necessary, whenever time permits the elector to correct the defect and return the ballot within the period authorized under sub. (6).” Wis. Stat. § 6.87(9) (emphasis added).

Whenever an elector returns a spoiled or damaged absentee ballot to the municipal clerk, or an elector's agent under sub. (3) returns a spoiled or damaged ballot to the clerk on behalf of an elector, 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).

Section 6.86(5) plainly authorizes a voter—or a clerk at the voter's direction—to spoil a ballot before or after the ballot is returned to the clerk. The sole directive with respect to the timing of spoiling can be found in the section's final sentence, which provides that “[a]ny request for a replacement ballot under this subsection must be made within the time limits under subs. (1) and (3) (c).” *Id.* Those time limits provide that mailed requests must be received “no later than 5 p.m. on the 5th day immediately preceding the election,” while in-person requests must be made “no earlier than 14 days preceding the election and no later than the Sunday preceding the election.” Wis. Stat. §§ 6.86(1)(b); *see also id.* § 3(c) (providing additional deadlines for requests made by hospitalized voters). And that is precisely what the challenged WEC guidance provides: “Voters can also ask to have their returned absentee ballots spoiled and be issued a new one by mail, but those requests must be made [the appropriate statutory deadline].” Wis. Elections Comm’n, *Rules about ‘Spoiling’ Your Ballot*, Compl., Exh. B, p. 1. That is consistent with the plain language of Section 6.86(5).

Plaintiff contends that “[t]his section is unquestionably clear that the ballot must be spoiled by the elector before it is returned to the clerk—not after,” Br. at 8, but her reading would render the second half of Section 6.86(5) superfluous and therefore must be rejected. “Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage.” *State ex rel. Kalal v. Cir. Ct. for Dane County*, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W2d 110. 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 elector. *Id.* 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) only a voter may spoil a ballot 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 the WEC’s, which properly interprets the second sentence of Section 6.86(5) as a grant of authority to spoil a voter’s previously returned ballot upon that voter’s request by the statutory deadlines set forth above.

The language about “applicable time limits” in the second sentence underscores this point. Those time limits come from Wis. Stat. §§ 6.86(1)(b) and (3)(c). Subsection (1)(b) provides that mailed requests must be received “no later than 5 p.m. on the 5th day immediately preceding the election,” while in-person requests must be made “no earlier than 14 days preceding the election and no later than the Sunday preceding the election.” Subsection (3) sets slightly different deadlines for the special case of requests made by hospitalized voters. The specificity of those deadlines, together with the need to avoid surplusage, leaves no doubt that the legislature intended Section 6.86(5)’s request process to serve some real function. Plaintiff’s reading would require the Court to hold that the Legislature *designed a complex system of deadlines for a process that does not exist*. This is simply not a credible reading of the statute.

Plaintiff’s reading also puts Section 6.86(5) in unnecessary conflict with Section 6.86(6), which states that “if an elector mails or personally delivers an absentee ballot to the municipal clerk”—in other words, if the absentee ballot is out of the voter’s possession and with the clerk—the clerk may only return it pursuant to the exceptions set out in Sections 6.86(5) and 6.87(9). WEC’s interpretation of the statute—which allows voters to request the spoiling of their ballots

“within the applicable time limits under subs. (1) and (3) (c)”—must be adopted because “there can be no justification for needlessly rendering provisions in conflict if they can be interpreted harmoniously.” Antonin Scalia & A. Brian Garner, *Reading Law: The Interpretation of Legal Texts* 180 (2012).

3. Wisconsin law does not restrict the reasons a voter may spoil their ballot.

Finally, there is no merit to Plaintiff’s assertion that Wisconsin law prohibits a voter from spoiling a ballot if that voter changes has a change of heart about who to vote for. Nothing in Wisconsin law restricts the reasons a voter may choose to spoil an absentee ballot. On the contrary, the Election Code states expressly that it “shall be construed to give effect to the will of the electors, if that can be ascertained from the proceedings.” Wis. Stat. § 5.01(1).⁷ WEC’s guidance correctly provides that “[a] voter may wish to spoil his or her absentee ballot to correct several issues, such as a damaged ballot; an error when voting the ballot (such as filling in the wrong circle or voting for too many candidates); or the voter changing his or her mind after returning the absentee ballot.” Wis. Elections Commission, *Rules about ‘Spoiling’ Your Ballot* (Aug. 2, 2022); Compl., Exh. B., p. 1. This guidance furthers the express instructions found in in the Election Code.

Plaintiff’s main rejoinder is that the give-effect canon in Wis. Stat. § 5.01 does not apply to absentee voting. As a matter of legislative policy, Wis. Stat. § 6.84(1) provides that “voting by absentee ballot is a privilege” and so “must be carefully regulated.” But as the same statute’s

⁷ Moreover, as explained above, Section 6.86(5) is best read as creating a process that allows spoiling requests in at least some circumstances. Further, any voter who votes in-person on election day and “who, by accident or mistake, spoils or erroneously prepares a ballot” is entitled to receive another. Wis. Stat. § 6.80(2)(c). Taken together, these provisions make clear that ballot-spoiling requests must be permitted in certain instances. That construction both gives effect to the will of voters, *id.* § 5.01(1) and avoids pointless differentiation between absentee and in-person voters.

interpretation provision makes clear, an absentee ballot must be counted unless it was cast “in contravention of the procedures specified [by statute.]” Wis. Stat. § 6.84(2). It does not authorize the Court—or anyone else—to impose restrictions on absentee ballots that do not affirmatively appear in the Election Code. *See In Interest of P.*, 119 Wis.2d 349, 355, 349 N.W.2d 743 (Ct. App. 1984) (“Nor is it our function to add language or exceptions to a statute.”). That is what Plaintiff asks the Court to do. All Rise asks, in contrast, is that in deciding what procedures the Elections Code requires the Court give the governing statutes their proper construction. And though statutes regulating absentee ballot processes are “mandatory,” absentee voters are entitled to the same solicitude granted to voters who choose to vote in person. *See Obama for Am. v. Husted*, 697 F.3d 423, 428–29 (6th Cir. 2012) (interpreting the U.S. Constitution’s equal protection guarantees).

CONCLUSION

The Court should deny Plaintiff’s motion for a temporary injunction in its entirety. At minimum, any temporary injunction must preserve the absentee ballot curing process set forth in Section 6.87(9), which plainly authorizes clerks to return, by mail or in person (at the clerk’s office or a designated alternative site, as applicable), absentee ballots lacking a properly completed certificate.

Dated: October 3, 2022

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