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Waukesha County
2022CV001395

BY THE COURT:

DATE SIGNED: November 29, 2023

Electronically signed by Brad D. Schimel
Circuit Court Judge

STATE OF WISCONSIN **CIRCUIT COURT BRANCH 6** **WAUKESHA COUNTY**

Nancy Kormanik,
Plaintiff,

vs.

Wisconsin Elections Commission.
Defendant.

DECISION AND ORDER

Case No. 22CV1395

DECISION

The matter is before the court on cross-motions for summary judgment filed by Plaintiff, Defendant and both Intervenor-Defendants, as well as Plaintiff's petition for a Permanent Injunction. Briefing was concluded and the court heard oral arguments on August 28, 2023. Upon conclusion of arguments, the court indicated it would issue a written decision.

FACTUAL BACKGROUND

The parties all seem to agree that the significant facts are not in dispute. Many voters in Wisconsin choose to vote via absentee ballot. This is not a new phenomenon, and it appears to be a growing trend. Plaintiff is one of those voters who has historically voted by absentee ballot. Prior to the August 9, 2022, partisan primary, many voters contacted WEC with questions regarding spoiling of absentee ballots, which prompted WEC to issue the two challenged documents: 1) a memo to municipal clerks dated August 1, 2022, entitled "Spoiling Absentee Guidance for the 2022 Partisan Primary"; and 2) a public press release issued August 2, 2022, entitled "Rules about 'Spoiling' Your Ballot."

Both documents, among other things, advised that Wisconsin law authorizes a voter to seek to spoil their previously submitted absentee ballot and be issued a new one. The documents advised that voters who have already returned an absentee ballot by mail may request that their returned ballot be spoiled so they may vote a new one.

PROCEDURAL BACKGROUND

This case arose out of a lawsuit filed by Nancy Kormanik, a Waukesha County voter, against the Wisconsin Elections Commission ("WEC"). The complaint alleged that the above-referenced documents issued by WEC erroneously interpreted portions of the election statutes. Specifically, Plaintiff objects to WEC's interpretation of the election statutes to permit election clerks to "spoil" an absentee ballot at the request of the voter after the voter had already returned their completed absentee ballot to the clerk.

The complaint seeks:

> "1. A declaration that municipal clerks are prohibited from spoiling a previously completed and returned absentee ballot by the elector who was issued the absentee ballot.
>
> 2. A declaration that municipal clerks are prohibited from returning an absentee ballot after it was previously completed and returned to the clerk by the elector who was issued the absentee ballot.
>
> 3. A declaration that any WEC publication that indicates that a municipal clerk may spoil a previously returned absentee ballot, or that a municipal clerk may return a previously submitted absentee ballot, when a voter changes his or her mind is contrary to Wisconsin law and shall be rescinded or otherwise removed from any WEC publication or document available to the public.
>
> 4. A declaration that WEC failed to promulgate its interpretations in the August 1, 2022 Spoiling Absentee Guidance for the 2022 Partisan Primary as administrative rules pursuant to, and as required by, Chapter 227, Wis. Stats.
>
> 5. A temporary and permanent injunction requiring that WEC cease and desist in offering incorrect guidance concerning the above-described matters, and directing clerks to no longer rely on the above-described guidance and/or documents.

6. An order directing WEC to promptly issue corrected guidance to all Wisconsin municipal clerks and election officials statewide consistent with the relief sought herein.

7. All statutory costs and disbursements incurred in pursuing this action.

8. Judgment for such other and further relief the Court may deem just and equitable."

The court granted the motions of Rise, Inc., and the Democratic National Committee to intervene.

The parties briefed and the court heard oral arguments on Plaintiff's motion for a temporary injunction on October 5, 2022. The court granted the temporary injunction, and denied motions to stay the order. Defendants appealed the order issuing the temporary injunction. The court of appeals granted a temporary stay of the order and set an expedited briefing schedule. Ultimately, the court of appeals denied the petitions for leave to appeal and ordered that the temporary stay of the injunction would remain in effect until October 28, 2022, at which point the stay would be lifted and the temporary injunction would be in effect.

There was subsequent appellate activity in the case relating to the proper venue for the appeal, but the temporary injunction originally issued on October 5, 2022, remains in effect, and the parties agree that WEC has complied in all ways with the court's order.

This brings us to the present proceedings in which all parties have filed motions for summary judgment. WEC, the DNC and Rise raise some arguments in common, but there are some aspects about which they have taken differing positions. It is not necessarily important, in the court's view, to as to each argument identify which Defendant or Defendants has made the particular argument, and at times, the court will simply refer to the argument as made by at least one Defendant.

Before getting to the arguments relating to the proper interpretation of the election statutes and the propriety of the WEC-issued documents, there are two threshold jurisdictional issues which must be addressed: competency of the court to hear the case, and standing of the plaintiff to bring the case.

COMPETENCY

Plaintiff brings her action for declaratory relief under both sections 806.04 and 227.40, Wis. Stats. Both statutes require service of the action on the Wisconsin Legislature's Joint Committee for Review of Administrative Rules (JCRAR) when a party challenges the validity of an administrative agency action. Secs 227.40(5) and

806.04(11), Wis. Stats. Both use the mandatory term "shall" in reference to providing service on JCRAR. Thus, if a party fails to serve JCRAR, the court lacks competency to hear the case, and may take no action, other than to dismiss the claim.

Neither section provides an explicit time frame for completing service on JCRAR. The Wisconsin Supreme Court addressed that question in *Richards v. Young*, 150 Wis. 2d 549 (1989). It concluded that to accommodate the purposes of the statutory requirement for serving JCRAR, that service must be completed within 60 days of the filing of the complaint. The purpose of the statutory mandate, the court held, "is to give the JCRAR either the opportunity to avoid the litigation by suspending the rule or defend the rule in court which it has previously approved." *Id.*, p. 555. The sole issue in *Richards* was the time frame for completing service. In order to achieve the purpose of the statute, the court held, JCRAR must be served early enough to exercise its statutory privilege to become a party to the case. *Id.*, p. 556. The court concluded that the 60 day time frame set forth in sec. 893.02, Wis. Stats. was applicable. Id., p 557.

At the time *Richards* was decided, sec. 893.02, Wis. Stats. apparently required service in 60 days, but the current version of the statute sets the time limit at 90 days. Since the *Richards* court concluded that the limit was 60 days based upon the statute, the fact that the statute changed means that the holding in *Richards* should now be the 90 days in the current statute. The parties all seem to agree that this is correct, as they argue that the applicable time frame for service is 90 days.

At the time WEC filed its brief in support of its motion for summary judgment and in opposition to Plaintiff's motion for summary judgment, the record did not contain any proof of service upon JCRAR. Subsequent to WEC raising this issue in its brief, Plaintiff's counsel filed an affidavit setting forth that he served a file-stamped copy of the summons and complaint on counsel for the Wisconsin State Legislature via email on September 29, 2022. That was well within the 90 day time limit set forth in *Richards*, but that does not end the issue. WEC challenges that this means of service was insufficient.

Plaintiff counsel asserts that the attorney served was at the time representing the Wisconsin State Legislature, and was specifically asserting the interests of JCRAR in *White v. WEC*, Waukesha County Case No. 22-CV-

1008. Plaintiff counsel correctly asserts that litigation in that other case was ongoing and at the time of service, was actively representing the legislature. It further appears correct that the attorney was officially representing the legislature, but representing the interests of JCRAR, of sub-body of the legislature. A review of the court filings in Waukesha County Case No. 22-CV-1008 reveals that in the filings from that attorney, he repeatedly references that "WEC's actions "def[y] the Joint Committee [for Review of Administrative Rules ('JCRAR')]'s oversight authority, in violation of the law and core separation of powers principles, and result[ ] in an unlawful attempt to circumvent the [JCRAR] rejection of the substantively identical Emergency Rule 2209." *See, White v. WEC*, Waukesha County Circuit Court Case No. 22-CV-1008, Doc. 178, p. 7.

The Defendant in that Waukesha case, like this one, was WEC. The intervenors were similar parties to those in the present case. The case involved the very same kind of litigation as the present case. It involved WEC guidance to election clerks regarding absentee ballot procedures and a motion seeking declaratory and injunctive relief. In fact, there was even overlap of Plaintiff counsel and some of Defendant counsel.

Plaintiff further asserts, "[that same attorney] continues to represent the Wisconsin State Legislature and the interests of JCRAR as its registered agent in pending matters in Dane County in which the Wisconsin State Legislature intervened and which concern challenges to rules, guidance, or directives issued by the [WEC] concerning absentee ballots." Doc. 146, p. 2. The court has not checked these assertions, but no party disputes them.

WEC cites several cases beyond *Richards* for the proposition that service on JCRAR is mandatory, and that it must be completed in 90 days. In each of the cases cited, however, JCRAR was either never served or, as in *Richards*, was served well over a year after the complaint was filed and after briefing on a dispositive motion was complete. In each of those cases, JCRAR was not put on notice or was not given sufficient notice to be able to timely exercise its right to intervene in the cases in any kind of effective way.

In the present case, it certainly would have been preferable, if nothing else just from the perspective of the legal research and writing necessary on this issue, if Plaintiff would have just served the co-chairs of the JCRAR. That said, service on the attorney representing the legislature and specifically the interests of JCRAR was

sufficient to accomplish the goal of the statutes in question, namely that JCRAR be able to exercise its privilege to join a case as a party if it so chooses early enough that they may effectively either avoid litigation by withdrawing a rule or to defend the rule in court. Secs. 227.40(5) and 806.04(11), Wis. Stats., both provide that service on JCRAR must be on the "cochairpersons of the [JCRAR] or their designated agents." The attorney representing a client can certainly be characterized as a designated agent for purposes of service. Attorneys accept and acknowledge service for their clients routinely.

In the other cases, that attorney has taken steps to have his legislative client joined as parties. If JCRAR or the legislature wished to join this litigation, that attorney was certainly a conduit to make that happen. For what its worth, there has been no complaint from JCRAR or any other body of the legislature as to this case that they have been cut out of litigation in which they wished to be involved. The purpose of the rule is met. Whether the letter of the rule is met is a closer call, but this court concludes that adequate, if perhaps not ideal, service was accomplished on JCRAR and this court does not lack competence to hear this matter.

STANDING

The second jurisdictional or threshold issue is standing. [S]tanding in Wisconsin is not a matter of jurisdiction, but of sound judicial policy. Standing requirements in Wisconsin are aimed at ensuring that the issues and arguments presented will be carefully developed and zealously argued, as well as informing the court of the consequences of its decision." *McConkey v. Van Hollen*, 326 Wis. 2d 1, pars 15-16 (2010). "[T]he gist of the requirements relating to standing… is to assure that the party seeking relief has alleged such a personal stake in the outcome of the controversy as to give rise to that adverseness necessary to sharpen the presentation of issues for illumination of constitutional questions." *Id., citing, In re Carl F.S.*, 242 Wis. 2d 605, par. 5 (2001).

In *McConkey*, the plaintiff challenged the language submitted for the now unconstitutional Marriage Amendment. Even though direct harm to the plaintiff was difficult to determine, the court found that he had a least a trifling interest in his voting rights. The court also noted that the unique circumstances of a claim as to the validity of language on the ballot for a constitutional amendment warranted a consideration of the merits of the claim. *Id.*, par. 17.

It was important to the *McConkey* court that the plaintiff "competently framed the issues and zealously argued his case." Also important was that if his claim were dismissed on standing grounds, someone else may very well come along with a stronger claim for standing and bring an identical suit. That would be detrimental to judicial efficiency. Further, the plaintiff before the court was able to make the consequences of the court's decision clear enough that a different plaintiff would not be able to frame the issues more clearly. *Id.*, par. 18. There were other factors cited by the court, but these seem the most relevant in the present case.

Like the plaintiff in *McConkey*, Kormanik has at least a trifling interest in her voting rights. There are, also, unique characteristics to this case, in that the memoranda being challenged were distributed to all election clerks statewide and via a public press release, respectively, and thus it is appropriate for a court to adjudicate the merits of the claim, as a great many public officials and electors are affected by the issues presented.

Also like *McConkey*, Kormanik has competently framed the issues and zealously litigated the matter.

Further, if this court finds that Kormanik does not have standing to challenge WEC's memoranda, then it is very likely some other plaintiff will, and it would be an awful shame to have put the litigants here, taxpayers, since counsel for WEC are publicly employed attorneys, and another court through the tremendous work that has been expended all over again. We have been through a hearing on a temporary injunction, an appeal of that decision, a petition to the supreme court for a supervisory writ, which resulted in a transfer of venue for the court of appeals, discovery and now all the briefing arguments, research and decision process. What a waste that would be to do this all over again. Additionally, the parties, which included two intervenor defendants, have made very clear the consequences of the court's decision, and there is no plaintiff who might bring a future suit who will enhance the court's understanding of them.

A lot of effort was put in by the parties arguing about the usefulness of *Teigen v. WEC*, 403 Wis. 2d 607 (2022). Ultimately, even though much of the discussion on standing in *Teigen* cited to cases, like *McConkey*, which are good law, the fractured nature of the plurality on the standing issue left that case of little help, except for the very detailed history of the standing issue in Wisconsin and in the federal courts. Given how similar the parties were in that case, a clear majority ruling would have been very useful and cut down on much of the debate in

this case, but it is what it is. It seems worth noting that, with plaintiffs very similarly situation to Kormanik in terms of the injury, a majority of the court did find that there was standing, albeit not all on the same grounds. I further note that the absentee voting statutes are somewhat unique in the way they seem to frame standing. In sec. 6.84, "Legislative Policy," the legislature expressed that it was putting very strict and mandatory rules, with severe consequences for failure to follow them, when it came to absentee voting. Significant to the standing discussion, the legislature did not just seek to guard against fraud or abuse. They went so far as to explicitly say they were guarding against potential fraud.

Why would they do that? Because election fraud cannot be repaired. Once it happens, people are disenfranchised by improperly cast votes. A candidate will get votes improperly, and there is no way to adjust the vote count. The only section the court found that provides some shifting of votes when there is a violation of the election laws is sec. 6.87(7), Wis. Stats., which provides that if a candidate on the ballot serves as a witness for an absentee voter, that candidate shall be penalized by the discounting of a number of votes for them equal to the number of certificate envelopes bearing their signature. As noted, the rules relating to absentee balloting are strict and the consequences are particularly tough.

Based upon all of this, I find that the Plaintiff has described an injury in fact from the challenged guidance that is sufficient to confer standing. As sec. 227.40I1) Wis. Stats., sets forth, that injury needs only to threaten to interfere with or impair the legal rights and privileges of the plaintiff.

At least one of the Defendants argues that the WEC memoranda are not binding on any election clerk or voter. If that is the case, then the potential harm from the memoranda are even greater than if they are binding, because it would likely lead to inconsistent application from district to district, which would mean some voters would have more rights than others when it came to casting their absentee ballots. That sounds like an injury to this court.

THE STANDARD FOR SUMMARY JUDGMENT

There are a few things about which the parties all agree. Each of the parties sets forth and they agree on the standards for summary judgment. Also, they all agree that there are no disputed material facts, and the case is ripe for summary judgment.

The court is to start with a review of the complaint and determine whether it states a claim for relief. Then the court is to examine the answer to determine whether an issue of fact or law is joined. The court already issued a temporary injunction over a year ago, and addressed these issues to some degree then, but the court finds Plaintiff does state a claim upon which relief may be granted, and the Defendants responded by joining issues, largely of law, since the parties agree there are not genuine issues of material fact. Thus, summary judgment is warranted, and each party seeks it in their favor.

THE ABSENTEE VOTING STATUTES ARE NOT AMBIGUOUS

The heading of this section seemed a little odd to write, since the parties have submitted about two hundred pages of briefs and affidavits airing their disagreements about what the statutes in question say and mean. The Defendants do not even completely agree with each other on all of the arguments. Counsel are unquestionably reasonable people with reasonable minds, but they are also advocates who are trying to prevail for their clients, so they say they see things differently. The court finds that the statutes governing the absentee voting process are generally unambiguous. The legislature clearly set forth what are the rules are, with one possible exception that will be discussed below.

The parties cite numerous portions of the statutes in their arguments, and the court will address almost all of them, but the primary focus is on secs. 6.86(5), 6.86(6) and 6.87(9), Wis. Stats. As indicated there are others cited, but these are the ones around which WEC built most of the support for the positions it took in the challenged memoranda.

The parties all agree that when determining the meaning of a statute, one must not read it in isolation, but must read it in context and in a way that harmonizes all of the related statutes. The court, of course, agrees. Note: the court does not intend to cite to cases for the propositions for which there is no significant dispute.

I start with subsection 6.86(6), since it refers us back to the other two. It says very clearly that, with two enumerated exceptions, "the municipal clerk shall not return the ballot to the elector."

One of the exceptions in subsection (6) is subsection 6.86(5), which says very clearly that an elector may return an absentee ballot that is spoiled or damaged to the clerk and obtain a replacement, as long as there is still time to accomplish that before election day.

The other exception is found in section 6.87(9), which clearly instructs a municipal clerk what they may do if they receive a returned absentee ballot with an improperly completed certificate. The clerk may return that incomplete ballot to the elector in a sealed envelope, as long as time permits the elector to remedy the problem and return it to the clerk before election day.

At this point, the parties part ways significantly. Plaintiff maintains that this is all clear, and that the assertions in the challenged WEC memoranda draw improper conclusions. One disputed item is whether there is room in the statutory scheme for the absentee voter to return a perfectly good and completely certified ballot to the clerk, but to then later have a change of heart and get a new ballot.

Plaintiff further argues that there is no authorization, contrary to the assertions in the WEC memoranda, for a clerk to ever spoil a ballot, whether at the request of the voter or not.

WEC, and the Intervenor Defendants maintain that, as long as it is not too close to the election to accomplish it, an absentee voter can change their mind about their votes and contact the clerk to ask the clerk to spoil their already submitted ballot and send them a new one. None of the Defendants point to any explicit language in the statutes that would authorize the scheme whereby a clerk spoils the ballot for the elector, at their request, and sends out a new blank ballot for a do-over. Instead, they argue that these things are implied from a reading of various portions of the election statutes as a whole.

THE LEGISLATIVE POLICY

The court just found, in the last section, that the absentee voting statutes are essentially not ambiguous. So that should be the end of it. The court should say what the plain language says and be done, but the legislative policy language for Subchapter IV, Voting Absentee, is so strong that it needs to be recognized as setting very firm guardrails to curb the analysis. I begin by noting that Voting Absentee has its own subchapter with all of the unique and specific procedures for doing so set forth within. The absentee process is separate from most of the rest of the voting statutes, with relatively few cross-references to other parts of the election laws.

Sec. 6.84(1) begins by observing that "voting is a constitutional right, the vigorous exercise of which should be strongly encouraged." Sec. 6.84(1) Amen!

The subsection continues with a caveat, however, that unlike in-person voting on election day, absentee voting is not a right, but a privilege, and that it is "exercised wholly outside the traditional safeguards of the polling place." The legislature then goes on to expressly identify specific dangers that Subsection IV is designed to prevent. Fraud or abuse could happen with any type of voting. But with absentee voting, the legislature concludes the dangers are higher, and it is concerned not just with preventing actual fraud or abuse, but even the potential for them. The subsection continues to enumerate several other dangers about which the legislature is concerned that seem more uniquely related to absentee voting. The court will not cite all of them here. They can be found in sub. (1).

Sec. 6.84(2) contains the "or else" provisions of the very strong legislative policy. First, the legislature exempts out the "will of the voter" provisions of sec. 5.01(1), and replaces them with a requirement that all matters relating to absentee voting "shall be construed as mandatory." They leave no room for the sometimes difficult to pin down will of the voters. The rules are strict. Further, if any of the rules are violated, ballots cast in contravention "may not be counted," and ballots counted in contravention of any of the procedures "may not be included in the certified result of any election." That is arguably a harsh rule, because it could result in a voter not having their vote counted, and it might not be the fault of the voter that the procedures were not followed. The point: WEC and all election clerks had better get it right, or voters will be disenfranchised. This court had better get it right, too.

SURPLUSAGE

Defendants assert that the clear reading this court sees is not possible, because it leaves superfluous language in the statute. There is something to that. There is one phrase in sec. 6.86(6) that does not seem to belong. The subsection says ballots may not be returned to electors, except as authorized in sub. (5) and sec. 6.87(9). The latter is not a problem. It clearly authorizes a clerk to help a voter when they have submitted a ballot without a proper and complete certification by sending the ballot back so they have a chance to fix it. It clearly authorizes that the incomplete ballot may be returned to the elector. It makes sense to identify this as an exception to the "no returns" rule. But this is the only place where return of a submitted absentee ballot to a voter is permitted.

That is the problem. Subsection (6) identifies 2 exceptions to the rule that a ballot may never be returned to the voter. The first enumerated is sub (5). But sub (5) does not in its plain and unambiguous language permit a clerk to return a ballot to a voter.

Defendants say this results in surplus language, and this court agrees. Why say this is an exception to the "no returns" rule, when it is not an exception to that rule at all? We are to avoid reading statutes in ways that create superfluous language, but this court cannot make any connection between sub (5) and any other statutory provision that permits a return of a ballot. So why, then, does the legislature identify sub (5) as an exception to the rule that a clerk may not return a ballot to an elector? What are we supposed to do with these extra words and numbers?

Plaintiff says it is not superfluous at all, and everything is accounted for, but the court can't reconcile that position with the plain language of the statute. The problem, however, is that the remedies Defendants offer do not help. Actually, they result in what this court estimates to be a much worse problem than surplusage: Defendants' proposals add language to the statutes that is not there.

THE PROBLEMS WITH THE SOLUTIONS

WEC concludes in the advice they have given to clerks and the public in the contested memorandum and press release, that the way to resolve this is to conclude that, since sub. (5) is listed as an exception to the rule in sub. (6), sub. (5) must authorize a voter to ask for a properly completed returned to be spoiled by the clerk, and then a new one sent to the voter. But this does not really solve the surplusage problem, since this still would not result in a ballot being returned to an elector. So it does not resolve the sub. (5) exception problem.

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

As the court noted above, a bigger problem than surplusage is that WEC's "solution" requires us to add language to the statute that is not there. Nowhere does any statute authorize a clerk to spoil a ballot. It seems

that pursuant to sec. 6.84(2), if a clerk does so, it will violate the absentee ballot procedures, and that could result in the elector's vote being prohibited from being counted.

WEC's solution also writes something else into the statutes. WEC says a voter may change their mind after they have returned their ballot and get a new one. To be fair, WEC suggests that there could be other reasons beyond just indecisiveness on the part of the voter. They assert that they could have discovered that they made a mistake and voted for too many candidates for an office or learned that someone tampered with the ballot. Whatever the case, though, no authority for the clerk to return the ballot or spoil it for the voter is anywhere in the statutes, and such activities put the elector's vote at risk of not being included in the count.

The WEC memoranda apply to ballots that are complete and in totally acceptable condition and were properly returned in an unspoiled and undamaged state. Once that is done, the statutes provide no basis upon which the voter may ever possess that ballot again. Support for this is found in sec. 6.88, which provides the process for voting and recording the absentee ballot. Subsection (1) sets forth that when the absentee ballot arrives at the office of the clerk, "the clerk shall enclose it, unopened, in a carrier envelope which shall be securely sealed and endorsed with the name and official title of the clerk, and the words 'This envelope contains the ballot of an absent elector and must be opened in the same room where votes are being cast at the polls during polling hours on election day....'"

Subsection (1) is full of more very mandatory language. Recall the warning in sec. 6.84 that if any of the procedures are not strictly followed, the ballot shall not be counted.

Section 6.88(1) requires that upon arrival at the clerks office, the ballot shall be sealed in a carrier envelope and must be opened when and where election day votes are being cast. There is no room in this process for the clerk to receive a contact from an absentee voter who wishes to get their returned ballot spoiled so they may get a new one. Once the clerk has that returned ballot, it is to be sealed until election day. Note that the legislature used the term "securely" sealed and decreed that the carrier envelope must be opened in the same room and at the same time as votes are cast on election day.

Subsection (3)(a) also requires that this whole process take place in such a manner that members of the public may hear and see the procedures. There is no wiggle room from which to conclude that a clerk may do anything, such as spoiling a ballot, outside the public eye and ear.

The sub. 6.86(5) language about spoiled or damaged ballots is written in a very specific way. It says that "[w]henever an elector returns a spoiled or damaged absentee ballot...." The only way to read that is that the spoiling or damaging were already done when the ballot was returned. Spoliation occurred prior to the return, and there is no support for flipping that language to suggest it may be spoiled after it was returned.

Besides, if the legislature intended that a clerk could spoil a ballot for an elector, it would have been an easy thing to say so. Defendant's suggest that the legislature intended that and it is implied in the context. As the late Justice Scalia famously said in a dissent, "[the legislature] ...does not, one might say, hide elephants in mouseholes." *EPA v. EME Homer City Generation*, 572 U.S. 489, 528 (2014)(Scalia dissenting).

This court is not sure there is any way to read this statutory scheme without some part of it being superfluous, but that is far preferable to writing whole phrases into the statute out of thin air. Defendants talk about a supposed interrelationship between secs. 6.86(5) and 6.80(2)(c). But 6.80 is part of the Subchapter III, which sets forth the procedure for in person voting on election day. Defendants assert that we should read those in conjunction with each other, because both have language about spoiled ballots. That they both contain some iteration of the word "spoil" is the only connection. Section 6.80(2)(c) contains a limitation of 3 times that the voter may receive another ballot after spoiling one. Nowhere is Subchapter IV is there any language about such limitation on the number of replacement ballots. Neither is sec. 6.80(2)(c)'s language about mistake or accident found anywhere in sec. 6.86(5). Subchapter III and Subchapter IV set forth completely different procedures that have very little in common until election day when absentee ballots are cast at the same time and in the same place as the in-person votes. There is no basis, considering the strict language of sec. 6.84, to conclude that the legislature intended a process for absentee ballots that is more permissive than the procedures for in-person voting.

Defendants suggest that the word "whenever" in sec. 6.86(5) means that an elector may spoil an absentee ballot even after it is returned. That requires moving the word into a different part of the sentence. That can't be right.

They cite to sec. 5.91(16) as a basis to conclude that absentee votes may have an opportunity to change their votes or obtain a replacement ballot for a spoiled ballot right up until the time the vote is cast. Section 5.91 has nothing to do with absentee voting procedures. It sets for minimum standards for certification of an electronic voting system. This reference by Defendants is wildly out of context.

The August 1, 2022, memorandum to clerks and August 2, 2022, public press release both set forth information that is contrary to the statutes, and are illegal.

IMPROPERLY PROMULGATED RULE

Plaintiff also claims that WEC improperly promulgated a rule without a 2/3 vote of the commissioners. Defendants argue that Plaintiff never raised this claim in her complaint, and thus may not raise it now. This court is not so sure Plaintiff has not properly raised the improper promulgation claim, since Plaintiff enumerates a claim of failure to properly promulgate the rule under Chapter 227 in item 4 on page 10 of her complaint. However, given that the court has concluded that the guidance issued by WEC in the memorandum and press release are contrary to the statutes, it is not necessary for the court to reach this issue.

CONCLUSION

For the foregoing reasons, the court grants Plaintiff's Motion for Summary Judgment and Declaratory Judgment against Defendant Wisconsin Elections Commission.

The Court grants a permanent injunction against the Wisconsin Elections Commission which will contain substantially the same terms as the previously issued Temporary Injunction, which will be vacated upon the court signing the permanent injunction.

The court grants in favor of Plaintiff statutory costs.

The court will set a hearing to hear from the parties their positions regarding the precise language of the Declaratory Judgment and Permanent Injunction.