STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY
BRANCH 6

NANCY KORMANIK,

Plaintiff,

v.

WISCONSIN ELECTIONS COMMISSION,

Defendant,

and

RISE, INC., and the DEMOCRATIC NATIONAL COMMITTEE,

Intervenor-Defendants.

Case No. 2022CV1395
Case Code: 30701
Hon. Brad Schimel

INTERVENOR-DEFENDANT DEMOCRATIC NATIONAL COMMITTEE'S REPLY BRIEF IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT

I. Introduction and Summary of the Argument

Intervenor-Defendant Democratic National Committee (DNC) submits this reply brief in support of its Cross-Motion for Summary Judgment (Doc. 145). Plaintiff Nancy Kormanik claims "[t]he DNC's [opening] brief is largely unresponsive to Plaintiff's arguments," Doc. 147 at 11, but DNC's brief actually responds directly and in detail to Plaintiff's arguments regarding the ballot spoiling issues.[1] Indeed, it is *Plaintiff* who fails to respond to most of the points and authorities in *DNC's brief.* Plaintiff's responses to DNC's opening brief are largely confined to a single

[1] Page citations to Plaintiff's reply brief (Doc. 147) are to the bottom page numbers, not to the different pagination in the docket headers.

paragraph on page 11 of her brief. Part II of this brief replies to the three cryptic responses that Plaintiff makes in that lone paragraph. Part III of this brief responds further to Kormanik's mistaken views about how, when, and for what reasons absentee voters may "spoil" their ballots and how and when absentee ballots are actually "cast."

As demonstrated below and in DNC's opening brief, the term "spoiled absentee ballot" in Wis. Stat. § 6.86(5) should be construed to include a previously returned absentee ballot that, pursuant to a clear communication from the elector to the clerk, no longer reflects the elector's discernable intent. Where it is feasible for the clerk to retrieve and destroy the prior ballot and issue a new one consistent with statutory deadlines and the recordkeeping and chain-of-custody protocols recommended by the Wisconsin Elections Commission (WEC) in its challenged guidance, the "will of the elector" must be honored and the elector must be allowed to obtain a replacement ballot. Wis. Stat. § 5.01(1).[2]

II. Plaintiff's Limited Responses to DNC's Opening Brief are Unavailing.

Plaintiff makes three arguments in the lone paragraph that responds to DNC's opening brief.

First, DNC demonstrated in its opening brief that WEC's spoiling guidance was in place from at least 2014 until this Court's October 7, 2022 Temporary Injunction took effect; that WEC's guidance was followed for nearly eight years by voters and candidates across the political spectrum, by political parties, and by local election officials through two Presidential elections and dozens of additional federal and state election contests; and that there is no evidence of any voting

[2] As with DNC's opening brief, DNC agrees with and adopts the reply arguments of Defendant Wisconsin Elections Commission in support of WEC's Cross-Motion for Summary Judgment. And once again, given the extensive briefing on a range of issues before the Court, DNC will forego repeating all the factual, procedural, and legal arguments made by WEC and the other Intervenor-Defendant, Rise, Inc., and instead continue to focus on the several key points addressed in its opening brief.

fraud or other difficulty in the fair and accurate implementation and administration of WEC's spoiling guidance over this eight-year period. Doc. 144 at 3–5, 11–12.

Plaintiff responds that the 2014 version of this spoiling guidance did not "explicitly" say a voter could "change her mind," declare her ballot "spoiled," and obtain a replacement ballot, whereas the 2022 version of WEC's guidance said so "explicitly." Doc. 147 at 11. But that was a necessary implication of the 2014 guidance, which provided that, even where an "[a]bsentee ballot has been returned to the clerk," a voter could still declare the returned ballot "spoiled or damaged," have the clerk "destroy" it, and obtain a replacement ballot. Doc. 56. Voters, candidates, and election officials understood this procedure to allow voters to change their minds based on perceived changed circumstances. One example offered by DNC in its opening brief involved efforts by then-candidate Donald Trump late in the 2016 campaign to persuade Wisconsin voters who already had voted absentee for Secretary Hillary Clinton to change their minds based on late-breaking developments, spoil their ballots, and obtain replacement ballots. *See* Doc. 144 at 4–5 (citing *Trump: Go vote again, this time for me,* 11 ALIVE (Nov. 2, 2016), https://www.11alive.com/article/news/politics/trump-go-vote-again-this-time-for-me/281-346255901 (quoting Mr. Trump as stating at a Wisconsin rally: "This is a message for any Democratic voters who have already cast their ballots for Hillary Clinton and are having a bad case of buyers' remorse—in other words you want to change your vote—Wisconsin is one of several states where you can change your early ballot if you think you've made a mistake. A lot of stuff has come out since your vote")).

President Trump made similar appeals late in the 2020 campaign, arguing that voters in Wisconsin and elsewhere who already had returned their absentee ballots for former Vice President Joseph Biden should change their votes based on the final Presidential debate. Trump tweeted:

> Strongly Trending (Google) since immediately after the second debate is CAN I CHANGE MY VOTE? This refers to changing it to me. The answer is most states is YES. Go do it. Most important Election of your life!

Can you change your vote? Trump thinks people should, ABC News (Oct. 27, 2020), https://abcnews.go.com/Politics/change-vote-trump-thinks-people/story?id=73854468.[3]

Plaintiff's suggestion that WEC only recently began allowing voters to "change their minds" under the spoiling guidance is belied by the historical record.

Plaintiff also argues that "[t]he antiquity of a rule of law cannot alone justify its perpetuation." Doc. 147 at 11 (citation omitted). But DNC is not claiming that the most recent 2022 WEC spoiling guidance is immune from challenge because earlier versions were followed for at least eight years (and probably much longer). Rather, DNC is arguing that WEC's long-standing spoiling guidance is a reasonable construction of the somewhat confusing interplay of Wisconsin's various in-person and absentee ballot "spoiling" and "replacement" procedures; that this construction was embraced on a bipartisan basis and created no apparent problems or disputes until Plaintiff's lawsuit; that this construction ensured absentee ballots would reflect the true intent of voters; and that WEC's guidance never led to a single suspected instance of fraud or other problems during two of the most contentious Presidential elections in Wisconsin history. These are highly relevant factors in the construction of this statutory scheme.

Second, DNC demonstrated in its opening brief that WEC's spoiling guidance best comports with the overarching "will of the electors" standard prescribed in Wis. Stat. § 5.01(1), while protecting against any potential risk of double-voting or undermining ballot integrity. Doc.

[3] The article cited above also quotes President Trump's late-October 2020 exhortation at one rally: "You know, did you hear the number one thing on Google was: 'How do I change my vote?' Did you know that? How do I change my vote? Something like hashtag—Did you hear that? Hashtag: 'How do I change my vote?' They watched the debate. I wanted—remember I wanted that debate to move way up, you know, because a lot of people voted by this crazy ballot deal. Wait until you see the mess that thing is going to be in."

144 at 5–11; *see Stahovic v. Rajchel*, 122 Wis. 2d 370, 376, 380, 363 N.W.2d 243 (Ct. App. 1984) (emphasizing "the fundamental principle that, in construing election laws, the will of the electorate is to be furthered"; courts should "avoid[] thwarting the will of the electors"). Plaintiff's sole response is that the "will of the electors" standard is "inapplicable" in its entirety to absentee voting issues because Wis. Stat. § 6.86 is "mandatory" rather than "directory" under § 6.84(2). Doc. 147 at 11.

But DNC previously explained why § 6.84(2) does not apply to this question of statutory interpretation, *see* Doc. 144 at 9–10, and Plaintiff does not even attempt to respond to DNC's points and authorities. The "mandatory" designation does not affect how ambiguous statutory language is construed; instead, it determines how the statute will be enforced once its provisions have been interpreted under the usual canons of construction. As the Wisconsin Supreme Court explained long ago, "[t]he difference between mandatory and directory provisions of election statutes lies in *the consequence of nonobservance*: an act done in violation of a mandatory provision is void, whereas an act done in violation of a directory provision, while improper, may nevertheless be valid." *Sommerfeld v. Bd. of Canvassers of St. Francis*, 269 Wis. 299, 303, 69 N.W.2d 235 (1955) (emphasis added) (cleaned up).[4] This is specified in § 6.84(2) itself: the consequence of a "mandatory" designation is that "[b]allots cast in contravention of the procedures specified in those [mandatory] provisions may not be counted" and "may not be included in the certified result of any election." Thus, if § 6.86(5) clearly prohibited a voter from spoiling a previously returned absentee ballot and voting a replacement ballot, any ballot spoiled or replaced

[4] As discussed in DNC's prior brief (Doc. 144 at 10 n.6), a majority of Justices in *Teigen* held that the ballot-return statute that *Sommerfeld* had treated as "directory" must now be treated as "mandatory" given the Legislature's intervening enactment of § 6.84(2).

in violation of that prohibition would be void because the provision is "mandatory" under § 6.84(2).

Section 6.86(5), however, includes no such clear prohibition; it provides for the destruction of a "spoiled or damaged ballot" and its "replacement" with a "new ballot," without defining what it means to be "spoiled" or dictating when the voter must declare the ballot to be spoiled and request a replacement (other than requiring the voter to request a replacement by the deadline to request absentee ballots, typically the Friday before the election). In these circumstances, § 6.86(5) must be "construed to give effect to the will of the electors, if that can be ascertained from the proceedings." Wis. Stat. § 5.01(1). When a voter clearly expresses to her clerk a change of mind in her voting preference, and it is feasible to retrieve and destroy the prior ballot and issue a new one consistent with statutory deadlines and the WEC's recordkeeping and chain-of-custody protocols, refusing to honor that change in preference undermines the right to vote and violates the "will of the elector" for no sound reason.

Third, DNC demonstrated in its opening brief that, even after a full opportunity to take discovery and assemble a factual record substantiating her claims, Plaintiff has been unable to point to any evidence of even a single instance of electors "having their votes changed by someone else, thrown out by accident, or diluted by unlawful double votes" as a result of WEC's spoiling guidance; being "disenfranchise[d] by identity theft and voter fraud" caused by that guidance; or being "subject … to endless undue solicitation after they have already voted." Doc. 132 at 7, 17. Nor has Plaintiff pointed to even one example of how WEC's longstanding spoiling guidance has supposedly caused an "unlawfully diluted or polluted vote, or a fraudulent one," or might be expected to do so in the future. *Id.* at 18.

Plaintiff attempts to defend her lack of proof by citing two U.S. Supreme Court decisions for the proposition that a State is "not obligated to wait" until its political system is actually damaged before taking preventive and "corrective action." Doc. 147 at 11 (quoting *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2348 (2021), and *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986)). The State must, however, be able to point to a genuine, realistic potential abuse before imposing restrictions on longstanding voting practices, as those practices have actually been regulated and implemented. *Brnovich* held that Arizona did not need to point to "evidence that fraud in connection with early ballots had occurred *in Arizona*," "*within its own borders*," before acting to prevent such fraud. 141 S. Ct. at 2348 (emphasis added). But that was only because of evidence that election fraud of this sort "has had serious consequences in other States" and created "real risk." *Id.* Similarly, *Munro* held that a State could adopt reasonable ballot-access restrictions without having to make a "particularized showing … demonstrating empirically" the probable in-state effects of crowded ballots, especially where the legislative history showed "the state legislature's perception that the general election ballot was becoming cluttered with candidates from minor parties who did not command significant voter support." 479 U.S. at 194–96. Plaintiff points to absolutely no evidence of any perceived problems in administering or enforcing WEC's spoiling guidance during the eight years it was in effect, let alone any evidence of any threatened "fraud," "double voting," "identify theft," "dilution," or other electoral harms, which cannot happen under WEC's stringent recordkeeping and chain-of-custody procedures that apply to all "spoiled" and "destroyed" absentee ballots. Doc. 144 at 3, 12. *See, e.g.*, *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 246 (4th Cir. 2016) ("[S]tates cannot burden the right to vote to address dangers that are remote and only theoretically imaginable." (quotations and citations omitted)); *Milwaukee Branch of NAACP v. Walker*, 2014

WI 98, ¶ 39, 357 Wis. 2d 469, 851 N.W.2d 262 (court must "consider[] the 'legitimacy and strength' of the State's specifically identified interests" (citation omitted)); *id.* ¶ 75 (concluding that "the identified interests are significant and compelling"). It is simply not true that *Brnovich*, *Munro*, or other cases permit Plaintiff to claim such potential harms without *any* evidence.

Plaintiff also relies on what she erroneously calls the "plurality" opinion in *Teigen v. Wisconsin Elections Commission*, 2022 WI 64, ¶ 23, 403 Wis. 2d 607, 976 N.W.2d 519, *reconsideration denied*, 2022 WI 104. *See* Doc. 147 at 11. Plaintiff quotes ¶ 23 of *Teigen* in arguing that "the DNC overlooks the nature of Plaintiff's injury," because "[v]oters are necessarily injured when 'elections are conducted outside of the law.'" *Id.* But ¶ 23 of *Teigen* reflected the views of only three Justices and was affirmatively rejected by a majority of the Court—Justice Hagedorn in concurrence and the three Justices in dissent. *See Teigen*, 2022 WI 64, ¶¶ 149 n.1, 158–67 (Hagedorn, J., concurring); *id.* ¶¶ 210–15 (A.W. Bradley, J., joined by Dallet and Karofsky, JJ., dissenting). Justice Hagedorn characterized ¶ 23 and other portions of the lead opinion as "**unpersuasive**" and emphasized they **did "not garner the support of four members of this court**." *Id.* ¶ 167 (Hagedorn, J., concurring) (emphasis added). The three Justices in dissent likewise emphasized that ¶ 23 and its affiliated paragraphs "**do not constitute precedential authority**." *Id.* ¶ 205 n.1 (A.W. Bradley, J., dissenting) (emphasis added).

In a case released earlier this summer, the Wisconsin Court of Appeals addressed a party's citation to a portion of *Teigen* that likewise lacked the force of law. *See Rise Inc. v. Wis. Elections Comm'n*, No. 2022AP1838, 2023 WL 4399022 (Wis. Ct. App. July 7, 2023) (Blanchard, P.J.) (publication decision pending). In *Rise*, appellants quoted and relied on ¶ 25 from the lead opinion in *Teigen*. The Court of Appeals chastised them for "improper citations to case law" and reminded counsel of "obligations to properly cite to and discuss legal authorities." 2023 WL 4399022, at*5

n.6. The Court noted the paragraph from *Teigen* that appellant relied on "does not have precedential value because no four justices in that fractured opinion expressed agreement with any point made in that paragraph." *Id.* The same is true here.[5]

Plaintiff also argued in her opening brief that, "when voters see clerks changing votes based on unmonitored phone calls without sufficient checks built around the process, they can lose faith in the system." Doc. 132 at 17. DNC demonstrated in its opposition brief that this argument simply ignores the many recordkeeping, chain-of-custody, and voter ID requirements governing the spoliation and replacement process, and that those many safeguards and "checks," properly understood, should strengthen "faith in the system." Doc. 144 at 3–4, 8, 11–12. Plaintiff offers no response, and therefore concedes the point. *See United Coop. v. Frontier FS Coop.*, 2007 WI App 197, ¶ 39, 304 Wis. 2d 750, 738 N.W.2d 578.

Likewise, Plaintiff warned in her opening brief that WEC's challenged guidance "risks enveloping clerks in an onslaught of phone calls after an October surprise," and "invites chaos and undermines faith and trust in the democratic system." Doc. 132 at 2, 18. But here again, the guidance was in place from 2014, including through two contentious Presidential elections that

[5] In addition to emphasizing that the cited *Teigen* paragraph lacked "precedential authority," the Wisconsin Court of Appeals in *Rise* also criticized the underpinnings of the vote-dilution theory. *See* 2023 WL 4399022, at *5 (noting the failure "to provide clear legal authority to support the vote-dilution theory"); *id.* at *6 ("The vote-dilution theory as now presented … is weak."). Federal courts in Wisconsin and throughout the county also have repeatedly rejected vote-dilution theories of standing. *See, e.g.*, *Soudelier v. Dep't of State of La.*, Civ. No. 22-2436, 2022 WL 17283008, at *3 (E.D. La. Nov. 29, 2022) ("District courts across the country have consistently dismissed complaints premised on the theory of unconstitutional vote dilution in the aftermath of the 2020 election." (citing cases)), *appeal filed sub nom. Soudelier v. Off. of the Sec'y of State*, No. 22-30809 (Dec. 27, 2022); *Wis. Voters Alliance v. Pence*, 514 F. Supp. 3d 117, 120 (D.D.C. 2021) (rejecting Wisconsin voters' dilution claims because their "interest in an election conducted in conformity with the Constitution … merely assert[ed] a 'generalized grievance' stemming from an attempt to have the Government act in accordance with their view of the law" (quoting *Hollingsworth v. Perry*, 570 U.S. 693, 706 (2013))); *Feehan v. Wis. Elections Comm'n*, 506 F. Supp. 3d 596, 608–09 (E.D. Wis. 2020) (rejecting claims "that a single voter has standing to sue as a result of his vote being diluted by the possibility of unlawful or invalid ballots being counted," which is "no more than a generalized grievance common to any voter," rather than "a particularized, concrete injury sufficient to confer standing" (citing cases)), *appeal dismissed*, Nos. 20-3396, 20-3448, 2020 WL 9936901 (7th Cir. Dec. 21, 2020).

produced plenty of "October surprises" and interest in spoiling returned ballots and obtaining replacements (*see* Doc. 144 at 4–5), and Plaintiff has pointed to no evidence of any problems with Wisconsin's ballot-spoliation procedures from those campaigns or any others.

As DNC previously argued, the real risk to voters' "faith in the system," Doc. 132 at 17, is not WEC's longstanding spoiling guidance, but the potential for ignoring the true intent of some absentee voters based on unfounded allegations that WEC's guidance has caused or may lead to "fraud," "double voting," "identify theft," "dilution," or other electoral harms. Doc. 144 at 3, 12. The best way to avoid "undermin[ing] faith and trust in the democratic system" is to stop making unfounded, unsupported allegations about longstanding bipartisan election administration practices and procedures. Plaintiff is silent in response to these arguments too.

Plaintiff's claims of potential fraud are particularly far-fetched given the many administrative recordkeeping, chain-of-custody, and voter ID procedures for "spoiled or damaged" absentee ballots prescribed by WEC. DNC detailed these WEC safeguards in its opening brief and will not repeat them here, especially since Plaintiff has not even acknowledged these many safeguards designed to prevent precisely the kinds of spoiled-ballot abuses that Plaintiff warns against.

III. WEC's spoiling guidance fully complies with relevant statutes and best comports with the overarching "will of the elector" standard.

DNC's opening brief demonstrated that WEC's guidance faithfully tracks and implements the sometimes-ambiguous language of Wis. Stat. § 6.86 and related election statutes. *See* Doc. 144 at 5–11. Although Plaintiff argues that WEC's guidance "contradict[s] the clear words of the statute," Doc. 147 at 5, the guidance provides for the destruction by the clerk of a "spoiled or damaged absentee ballot" returned by an elector and the issuance of a "replacement ballot" to the elector, subject to "applicable time limits," all as specified in § 6.86(5). That section does not

define what it means for a returned ballot to be "spoiled," so WEC appropriately looks to other election statutes using "spoiled" and related terms in construing what "spoiled" means in the context of § 6.86(5). Thus, electors voting in person at their polling place on election day are entitled to receive a replacement ballot when they, "by accident or mistake, spoil[] or erroneously prepare[] [their] ballot." Wis. Stat. § 6.80(2)(c). Similarly, all voting systems must "provide[] an elector with the opportunity to change his or her votes and to correct any error or to obtain a replacement for a spoiled ballot prior to casting his or her ballot." *Id.* § 5.91(16). Thus, an absentee ballot is "spoiled" under § 6.86(5) where the elector has completed it through error, mistake, or accident. "When reasonably possible, we read statutes in harmony, and a harmonious reading is quite reasonable in this case." *See Teigen*, 2022 WI 64, ¶ 50. Such a "harmonious reading" is entirely feasible here and is reflected in WEC's guidance.

Plaintiff appears to argue, however, that because terms like "mistake," "accident," "error," and "erroneously prepare" appear in other statutes about ballot spoiling, they cannot apply to the term "spoiled ballot" as used in § 6.86(5), perhaps because of § 6.86's status as a "mandatory" provision. Doc. 147 at 5–6. As shown above, the "mandatory" designation goes to the enforcement of a statute once it has been construed, not how to construe the meaning of the statute. There is no sound reason to construe "spoiled ballot" to mean one thing in the context of in-person voting and something entirely different in the absentee context. Indeed, if "spoiled" were defined to *exclude* voter accidents, mistakes, errors, and the like in the § 6.86(5) context, it is difficult to see what would remain of the absentee "spoiled ballot" protections in that section. Plaintiff's reading appears to make those protections meaningless.

WEC's reading is correct for another compelling reason: an absentee voter is the only individual who will ever know whether his ballot is spoiled. Wisconsin statutes include numerous

prohibitions against clerks or other election officials ever examining an elector's ballot. *See, e.g.,* Wis. Stat. § 6.88(1) ("When an absentee ballot arrives at the office of the municipal clerk, . . . the clerk shall enclose it, unopened, in a carrier envelope which shall be securely sealed …."); *id.* § 6.88(3)(a) (on election night, election officials must "open the carrier envelope only" and then, after verifying all the information on the ballot-return envelope, open that envelope, "take out the ballot without unfolding it or permitting it to be unfolded or examined," and deposit it in the ballot box). Because clerks and other officials are prohibited from examining absentee ballots, they have no basis for questioning or investigating voters' declarations that their ballots have been "spoiled." Only absent electors control that decision. Electors may realize they have made an accident, mistake, or error in completing their ballot at the time they return it to the municipal clerk, and those electors may promptly obtain a replacement ballot. *See id.* § 6.86(5). But some electors may not realize until later that they completed their ballot through mistake, accident, or error. An elector may have erred in marking his ballot, meaning to vote for one candidate but designating another. Depending on the contest, he may have voted for too many or too few candidates. Or he may realize he made a mistake and error in the candidates he voted for. His ballot is now "spoiled," even if previously returned. It no longer reflects his will. So long as his ballot has not yet been formally "cast," § 6.86(5) gives him the ability to instruct the clerk to "destroy" the previously returned ballot (which remains inside the unopened ballot-return envelope) and obtain a "replacement ballot" to correct his error (so long as the statutory deadline has not passed).

Plaintiff at one point characterizes the issue as whether "an elector can **cast** an absentee ballot, later change her mind, and then revote." Doc. 147 at 11 (emphasis added). Plaintiff argues that, "just as an in-person voter cannot rescind an already-**submitted** ballot, neither can an absentee voter." *Id.* at 6 (emphasis added). But as WEC demonstrates in its opening brief, "[f]or an absentee

ballot, the ballot is cast when it is placed into a voting machine on election day—not when it is returned to the clerk." Doc. 143 at 15. WEC has explained in another context that "[a]bsentee voting procedures allow an elector to complete a ballot before election day. However, absentee ballots are not considered cast until election day."[6]

All qualified Wisconsin electors cast their votes on election day. Some choose to cast their ballots in person at their polling place. *See* Wis. Stat. § 6.80(2)(a). Others, because they are either "unable or unwilling" to do so, choose to vote absentee. *Id.* § 6.85(1). Regardless, each vote in every election is *cast* on the same day: election day. Qualified electors may vote absentee prior to election day, but they must return their absentee ballots "so [they are] delivered to the polling place no later than 8 p.m. on election day." *Id.* § 6.87(6). The municipal clerk is responsible for delivering all returned absentee ballots to the proper polling place or alternative canvassing location so that they may be cast on election day. *See id.* §§ 6.87(6), 6.88(1)–(2).

Election officials process the absentee ballots "in the same room where votes are being cast." *Id.* § 6.88(3)(a); *see also id.* § 5.02(15) (defining "polling place" as "the actual location wherein the elector's vote is cast"). Only after election officials have ensured that the ballot envelope certifications are proper, the absentee elector is qualified, and the absentee elector has not already voted do they "deposit the ballot into the proper ballot box" and "enter an indication on the poll list next to the [absent elector]'s name indicating **an absentee ballot is cast by the elector**." *Id.* § 6.88(3)(a) (emphasis added). Thus, whether the elector is voting in person at the polls on election day or by absentee ballot, his ballot is officially "cast" only when it is placed into

[6] *See* https://elections.wi.gov/faq/if-voter-casts-absentee-ballot-dies-election-day-can-ballot-be-counted. This WEC advice pertains to Wis. Stat. § 6.21, which addresses the potential "casting of the [absentee] ballot of a deceased elector," which is not considered until "absentee ballots are canvassed" on election day. *See also id.* § 6.88(3)(b) ("[I]f proof is submitted to the inspectors that an elector voting an absentee ballot has since died, the inspectors shall not count the ballot.").

the ballot box on election day. *See also* WEC, *Election Day Manual for Wisconsin Election Officials* at 142 (Sept. 2020), https://elections.wi.gov/sites/default/files/legacy/2022-02/Election%2520Day%2520Manual%2520%25282020-09%2529_0.pdf (defining a "cast ballot" as "a ballot marked by the voter to reflect his or her preference for a candidate or referendum and **placed in the ballot box**") (emphasis added). Moreover, after processing the ballot, officials "enter the absent elector's name or voting number after his or her name on the poll list in the same manner as if the elector had been present and voted in person." *Id.* And absent electors are counted alongside in-person electors when determining the total number of electors "served by the polling place who voted at the election." Wis. Stat. § 5.85(4).

WEC's spoiling guidance is entirely consistent with Wisconsin's statutory policy of "provid[ing] an elector with the opportunity to change his or her votes and to correct any error or to obtain a replacement for a spoiled ballot **prior to casting his or her ballot**." *Id.* § 5.91(16) (emphasis added). Plaintiff obscures the issue by trying to use the words "cast" and "submit" interchangeably, so that they mean one thing for in-person voters (casting the ballot by placing it in the ballot box on election day) and something else for absentee voters ("submitting" the ballot by mailing or delivering it in person to the clerk). Plaintiff argues the statutes contain "clear words," Doc. 147 at 5, but the word she claims is in the statutes ("submit") is nonexistent: the term "submit" is never used in the relevant statutes to indicate when a ballot is officially cast. WEC's reading best comports with the relevant statutes' actual terms as well as the overarching "will of the electors" standard, Wis. Stat. § 5.01(1), while protecting against any potential risk of double-voting or undermining ballot integrity.

IV. Conclusion

Plaintiff has failed to meet the requirements for obtaining summary judgment. Defendant WEC and the Intervenor-Defendants, on the other hand, have established their entitlement to a judgment upholding WEC's *August 2022 Guidance* and dismissing Plaintiff's claims in their entirety.

Dated: August 18, 2023

Respectfully submitted,

Electronically signed by Charles G. Curtis, Jr.

Charles G. Curtis, Jr. (SBN 1013075)
ccurtis@perkinscoie.com
Will M. Conley (SBN 1104680)
wconley@perkinscoie.com
PERKINS COIE LLP
33 East Main Street, Suite 201
Madison, WI 53703
Telephone: (608) 663-5411
Facsimile: (608) 663-7499

Attorneys for Intervenor-Defendant Democratic National Committee

John M. Devaney*
jdevaney@perkinscoie.com
PERKINS COIE LLP
700 Thirteenth Street, N.W., Suite 800
Washington, D.C. 20005-3960
Telephone: (202) 654-6200
Facsimile: (202) 654-6211

**Admitted Pro Hac Vice*

CERTIFICATE OF SERVICE

I certify that, in compliance with Wis. Stat. § 801.18(6), I am filing this Reply Brief in Support of DNC's Cross-Motion for Summary Judgment with the Clerk of Court using the Wisconsin Circuit Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated: August 18, 2023

Electronically signed by Charles G. Curtis, Jr.

Charles G. Curtis, Jr. (SBN 1013075)
ccurtis@perkinscoie.com
PERKINS COIE LLP
33 East Main Street, Suite 201
Madison, WI 53703
Telephone: (608) 663-5411
Facsimile: (608) 663-7499

Attorneys for Intervenor-Defendant Democratic National Committee