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CLERK OF WISCONSIN
SUPREME COURT

No. 2024AP408

IN THE SUPREME COURT OF WISCONSIN

NANCY KORMANIK,
Plaintiff-Respondent,

v.

WISCONSIN ELECTIONS COMMISSION,
Defendant,

RISE, INC.,
Intervenor-Appellant-Petitioner,

DEMOCRATIC NATIONAL COMMITTEE,
Intervenor-Appellant.

PLAINTIFF-RESPONDENT'S RESPONSE IN OPPOSITION TO PETITION FOR BYPASS

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INTRODUCTION

Petitioner asks this Court to bypass the Court of Appeals, claiming that such an unusual approach is justified because of the upcoming November 2024 election. But that urgency is of its own making. Petitioner did not request this Court's review of the temporary injunction that has been in place for the last year and a half, over the course of multiple elections. It never requested an expedited schedule in the Circuit Court's merits proceedings during that time. And it did not request a stay of the judgment entered by the Circuit Court. When it did finally ask for some expedited treatment in the Court of Appeals, its request was swiftly rejected. Only now, on the eve of the 2024 elections, including upcoming primary elections in August, does it demand the extraordinary actions of both bypassing the usual proceedings and expediting review in this Court.

Petitioner rests all its hopes for bypass on *Teigen v. Wisconsin Elections Commission*, 2022 WI 64, 403 Wis. 2d 607, 976 N.W.2d 519. By invoking *Teigen*, Petitioner hopes to tie this case to what it views as unfavored precedent. But the connection is manufactured. The Circuit Court in this case did not rely on *Teigen*. It mentioned *Teigen* once in passing, and only to note that *Teigen* was unhelpful in resolving the issues here.

Even if Petitioner were right about the connection to *Teigen*, that would be even more reason to let this case proceed through the normal course. This Court has already granted review in *Priorities USA*, which expressly considers whether to overrule *Teigen*. *See* Order, *Priorities USA v. Wis. Elections Comm'n*, No. 2024AP164 (Mar. 12, 2024). And the Court has already expedited proceedings, scheduled argument, and is midway through briefing in *Priorities USA*. Adding an ancillary case to reconsider *Teigen* is at best superfluous. Likely, it

will confuse the issues, introduce vehicle problems, and delay both cases.

Election cases require clarity and precision, not manufactured last-minute decisions that bypass half the judiciary. Indeed, even disputes involving a question of law would still benefit from an initial review and analysis by the Court of Appeals. *See, e.g.*, *Einhorn v. Culea,* 2000 WI 65, ¶ 59, 235 Wis. 2d 646, 612 N.W.2d 78. This Court should deny the petition for bypass.

ISSUES PRESENTED

1. Whether Plaintiff has standing such that this Court can consider whether the Wisconsin Elections Commission violated the law by promulgating guidance that allows voters to re-vote absentee ballots.

2. Whether Wis. Stat. §§ 6.86 and 6.87 authorize a municipal clerk to return a voter's previously submitted absentee ballot to the voter for any purpose other than certificate correction.

STATEMENT OF THE CASE

Wisconsin law generally prohibits election officials from returning absentee ballots to voters. Wis. Stat. § 6.86(6). That rule is subject to a pair of exceptions. One is that if an absentee ballot lacks a witness certification, an election official may return the ballot to the voter for correction. *Id.* § 6.87(9). The other exception is that an election official may return an absentee ballot to a voter if the original ballot was returned in a "spoiled" or "damaged" condition. *Id.* § 6.86(5). State law thus allows election officials to return absentee ballots under those narrow circumstances. Otherwise, the absentee ballots are sealed, sent to the board of absentee ballot canvassers, and left unopened until election day. *Id.* § 6.88. Election officials "shall not return" those ballots to voters. *Id.* § 6.86(6).

In 2022, the Wisconsin Elections Commission (WEC) issued guidance flouting that law. On August 1, 2022, WEC published a memorandum advising that "[a]bsentee voters can request to spoil their absentee ballot and have another ballot issued as long as the appropriate deadline to request the new absentee ballot has not passed." Pet. App. 150. That is, a voter who returned a final absentee ballot in pristine condition could, for any reason, request that a clerk or election official spoil it on her behalf and send the ballot back so the voter may alter her selections. WEC then published another memorandum on August 2 advising that a voter may "spoil his or her absentee ballot" after having previously submitted the ballot, due, in part, to "the voter changing his or her mind after returning the absentee ballot." Pet. App. 154. In those circumstances, WEC directs the municipal clerk to "invalidate" such a "spoiled ballot" on behalf of the elector. Pet. App. 154. But Wisconsin law says that clerks and elections officials "shall not return" those ballots. Wis. Stat. § 6.86(6). Likewise, nothing in Wisconsin law authorizes a clerk or election official to spoil an absentee voter's otherwise pristine ballot.

In September 2022, Plaintiff filed this lawsuit to stop WEC from violating Wisconsin law. Petitioner, along with the Democratic National Committee (DNC), was granted permissive intervention, meaning it has never established any concrete interest in the enforcement of WEC's guidance. The Waukesha County Circuit Court temporarily enjoined WEC from these unlawful practices. Petitioner, along with its co-parties, tried and failed to appeal that order for the November 2022 election. Pet. App. 25-27, 104-48. In their attempt to undermine the injunction, they even tried to move the appeal to the wrong district. This Court granted a supervisory writ, unanimously quashing Defendants' venue move and sending the case back to District II. *See State ex rel. Kormanik v. Brash*, 2022 WI 67, ¶ 1, 404 Wis. 2d 568, 570, 980 N.W.2d 948. District II quickly lifted the stay on the

injunction and denied the petitions for leave to appeal. *See Kormanik v. Wis. Elections Comm'n*, 2022AP1720-LV & 2022AP1727-LV (Ct. App. Oct. 27, 2022), Pet. App. 198-201. No party, including Petitioner, sought this Court's review of that decision.

Over the course of the next seventeen months, the parties litigated the case. They filed extensive briefing on cross-motions for summary judgment. At no point did Petitioner request expedited proceedings in the Circuit Court or mention the need to obtain a judgment and appellate review before any election, let alone the 2024 election. The Circuit Court granted summary judgment in favor of Plaintiff on November 29, 2023. Pet. App. 10-24. Over the next three months, the Court took briefing and held a hearing regarding the proper relief. Again, no mention from Petitioner that it required an expedited judgment. It sat silent through that process as well.

On March 4, 2024, the court entered final judgment in Plaintiff's favor. Pet. App. 5-9. WEC, the party enjoined, has not appealed. Only thereafter did Petitioner consider it in its interest to expedite proceedings, and the Court of Appeals promptly denied that request. The parties have not yet submitted briefs in the Court of Appeals. Nevertheless, Petitioner asks this Court not only to bypass the Court of Appeals, but also to "order expedited briefing and argument." Pet. 11. Petitioner is alone in requesting these extraordinary measures. WEC has not appealed the case. And even though the DNC will be a party to the appeal, it did not request bypass.

ARGUMENT

In appropriate cases, this Court may take "jurisdiction of an appeal" that is currently "pending in the court of appeals" upon "a petition to bypass filed by a party." Wis. Stat. § 808.05. Under the Court's internal operating procedures, "[a] matter appropriate for bypass is

usually one which meets one or more of the criteria for review [under Wis. Stat. § 809.62(1r)], and one the court concludes it will ultimately choose to consider regardless of how the Court of Appeals might decide the issues." Sup. Ct. IOP § III.B.2.

The Section 809.62(1r) criteria include whether this Court's review "will help develop, clarify or harmonize the law" in a case that "calls for the application of a new doctrine," presents a "novel" question, or presents "a question of law of the type that is likely to recur." Wis. Stat. § 809.62(1r)(c). Only "[a]t times" will a petition for bypass "be granted where there is a *clear need* to hasten the ultimate appellate decision." Sup. Ct. IOP § III.B.2 (emphasis added).

Bypass is not warranted where the Court would benefit from further development of the issues in the Court of Appeals. That is particularly true when the petitioner, as is expressly the case here, is not asking this Court to overturn precedent but is instead asking the Court to clarify existing legal doctrines. And an expedited briefing schedule only diminishes the opportunity for full, considered development of the legal issues. When this Court exercises its discretion to accept a petition for appellate review, and especially a petition for bypass, the legal theories should be fully developed. Anything less sets up this Court for divergent reasoning and fractured decisions.

I. Petitioner does not satisfy the criteria for bypass.

The Court should deny the petition for several independent reasons: (1) the issues are best suited for the Court of Appeals in the normal course, not a rushed decision by this Court; (2) this Court should not step in to solve Petitioner's self-inflicted urgency; (3) Petitioner's rationale for its urgency is speculative; and (4) the approaching election is reason to deny bypass, not to rush this case past the Court of Appeals.

First, the issues presented in the petition are best resolved by the Court of Appeals. When it comes to questions of law such as standing, this Court often notes that it "benefit[s] from the circuit court's analysis." *Teigen*, 2022 WI 64, ¶ 10; *see also In re T.L.E.-C.*, 2021 WI 56, ¶ 13, 960 N.W.2d 391, 396 ("benefitting from the analyses of the circuit court and court of appeals"). And because "'standing in Wisconsin is not a matter of jurisdiction, but of sound judicial policy,'" prudence counsels in favor of hearing the considered judgment of the Court of Appeals on these issues before taking action. *Friends of Black River Forest v. Kohler Co.*, 2022 WI 52, ¶17, 402 Wis. 2d 587, 977 N.W.2d 342.

Second, Petitioner's manufactured urgency does not warrant bypass. Petitioner asks this Court to rush this case before the 2024 election, but it demonstrated no urgency until now. Petitioner did not seek expedited consideration of the motion for temporary injunction in the Circuit Court. Nor did it seek this Court's review of the temporary injunction after it was granted and leave to appeal was denied. Thereafter, it did not request expedited briefing in the Circuit Court, even though that temporary injunction was in place throughout 17 months of the litigation, including 3 months after summary judgment had been granted. Defendants and the citizens of Wisconsin have operated under those rules for the past year and a half, including for the 2022 general election, the 2023 spring election, and the 2024 spring election. They will do so again in the August 2024 elections. Petitioner's rush to set aside those rules is a self-inflicted urgency that it wants this Court to fix, but retroactively curing the party's delays is not one of this Court's criteria for granting bypass.

Third, Petitioner's bypass rationale is speculative. Its concern is not even about this case, but about "a series of lawsuits" that it predicts will occur if this Court doesn't grant the bypass petition. Pet. 10. It doesn't cite a single example of such a lawsuit, even though the

Circuit Court's temporary injunction has been in place for well over a year. That history rebuts Petitioner's imagined dangers and undermines its assertion that this case presents a question of law "likely to arise in every case." Pet. 27.

Although standing is a legal question, it is one that critically depends on the context, facts, and circumstances of each case. Whatever this Court may eventually decide about standing in this case may have little, if any, applicability to future cases, even in those regarding election administration. And the dangers of future lawsuits, imagined or not, are not legitimate reason to rush review in this case. Wisconsin courts are well equipped to deal with any future lawsuits that might arise. This Court should not bypass appellate review in *this case* based on the facts or legal issues of other, hypothetical cases.

Fourth, the approaching elections weigh against bypass, not in favor of it. The State is on the eve of the August primaries, and the November general election is just around the corner. As the U.S. Supreme Court has "repeatedly emphasized," courts should not issue injunctions "changing the election rules" determining which ballots may be counted "so close to the election date." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020). That is because late orders changing such rules inherently produce "judicially created confusion." *Id.* (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006)). Plaintiffs' requested relief would alter WEC guidance and voting rules. By the time this Court were to consider the petition, grant the petition, receive briefing, hear argument, and issue a decision, it would be "too late to grant [Plaintiffs] any form of relief that would be feasible and that would not cause confusion." *Hawkins v. Wis. Elections Comm'n*, 2020 WI 75, ¶ 5, 393 Wis. 2d 629, 948 N.W.2d 877 (denying petition for original action). Election cases are sensitive and risk politicizing the law. That is why the Court does not—and should not—fast-track every election case, particularly when the Petitioner has slept on its

rights and the express purpose of its rush is to affect a major upcoming election.

II. Petitioner has not established its standing to appeal the judgment.

Petitioner has not shown it has standing to appeal, let alone to bypass the Court of Appeals. Before this Court or the Court of Appeals can entertain this case, Petitioner must first show it has standing to appeal the judgment. *See Mut. Serv. Cas. Ins. v. Koenigs*, 110 Wis. 2d 522, 526, 329 N.W.2d 157, 159 (1983). "A party has standing or a right to appeal from a judgment or order if that party has been aggrieved in an appreciable manner by the court's action." *Auer Park Corp. v. Derynda*, 230 Wis. 2d 317, 320, 601 N.W.2d 841, 843 (Ct. App. 1999). That is, "the judgment or order appealed from must bear directly and injuriously upon the interests of the appellant; he must be adversely affected in some appreciable manner." *Tierney v. Lacenski*, 114 Wis. 2d 298, 302, 338 N.W.2d 522, 524 (Ct. App. 1983) (citing *Mut. Serv. Cas. Ins.*, 110 Wis. 2d at 526, 329 N.W.2d at 159). It is usually obvious who the aggrieved party is: the plaintiff whose case was dismissed, or the defendant whose conduct is enjoined. Petitioner is neither.

As an intervenor, Petitioner is unaffected by the judgment it appeals. "[T]he injunction, by its very terms, does not require the [Intervenor] Defendants to do anything," and "the injunction could not be enforceable against the [Intervenor] Defendants through contempt." *Schultz v. Alabama*, 42 F.4th 1298, 1317 (11th Cir. 2022), *cert. denied sub nom. Hester v. Gentry*, 143 S. Ct. 2610 (2023). In this circumstance, federal courts often rule that intervenors lack standing to appeal a judgment against state officials even where, as here, "the state officials chose not to appeal." *Hollingsworth v. Perry*, 570 U.S. 693, 705-06 (2013) ("The only individuals who sought to appeal [the injunction] were petitioners, who had intervened in the District Court. But the

District Court had not ordered them to do or refrain from doing anything.").

The cases in which this Court and the Court of Appeals have recognized the appellate standing of a non-enjoined party prove that Petitioner likely can't meet the standard. Here, Petitioner is not requesting bypass due to a judgment determining that Petitioner "could not be indemnified for any damages." *Mut. Serv. Cas. Ins.*, 110 Wis. 2d at 527, 329 N.W.2d at 159. It is not an insurer responsible for covering the judgment. *See Tierney*, 114 Wis. 2d at 303, 338 N.W.2d at 525. Nor is it a fiduciary partially responsible for enforcing the judgment. *N. Air Servs., Inc. v. Link*, 2011 WI 75, ¶ 94, 336 Wis. 2d 1, 42, 804 N.W.2d 458, 478 (ruling that the appellant "does not have standing to appeal" because he "is no longer a shareholder' in the organization subject to the judgment). Nor is it an interested person in a guardianship proceeding, for which special rules might apply. *See In re Guardianship & Protective Placement of Carl F.S.*, 2001 WI App 97, ¶ 57, 242 Wis. 2d 605, 609, 626 N.W.2d 330, 333 (noting that under a since-repealed statute "any interested party at any time during the guardianship may petition for a rehearing seeking revocation of the guardian-ward status").

Petitioner presents a novel case of appellate standing that is best heard by the Court of Appeals, subject to review by this Court. Petitioner has not shown whether it is injured or how it is injured, nor has it explained its theory of standing. To the extent Petitioner claims some incidental monetary loss, for example, it must provide "evidence," not "supposition." *Auer Park Corp.*, 230 Wis. 2d at 322, 601 N.W.2d at 843. And even if Petitioner can ultimately show it is "aggrieved in an appreciable manner by the court's action," *Id.* at 320, 601 N.W.2d at 843, that determination is best made by the Court of Appeals, where the parties can brief the issue and introduce evidence in the first instance. Bypassing the Court of Appeals will deprive the parties and this Court of a considered resolution of Petitioner's

standing. And it will likely require this Court to take in evidence submitted by Petitioner to justify its standing, which will further delay and complicate the case.

III. This case does not concern *Teigen*.

Petitioner cites *Teigen* on nearly every page of its brief. It is Petitioner's only hope for bypass. But the Circuit Court mentioned *Teigen* only once in its summary judgment order, and only to say that "the fractured nature of the plurality on the standing issue left that case of little help." Pet. App. 16. Petitioner's brief gives the impression that the court relied exclusively on *Teigen*, but its attempt to manufacture a *Teigen* issue is only further reason to deny the petition.

Several cases independently confirm Plaintiff's standing. Wisconsin courts "construe the law of standing 'liberally, and even an injury to a trifling interest may suffice.'" *Friends of Black River Forest*, 2022 WI 52, ¶ 19 (citation omitted). "The 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." *McConkey v. Van Hollen*, 2010 WI 57, ¶ 16, 326 Wis. 2d 1, 783 N.W.2d 855 (cleaned up). That is why the Supreme Court has heard challenges by voters to the facial validity of election rules without ever questioning a voter's standing to bring the case. *See Jefferson v. Dane Cty.*, 2020 WI 90, 394 Wis. 2d 602, 951 N.W.2d 556 (original action resolving a challenge brought by a voter and the Republican Party to unlawful interpretations of election laws by county clerks while voting was underway and ongoing).

Under these liberal principles, Plaintiff meets both elements of standing: (1) WEC's unlawful rules cause her injury in fact, and (2) Plaintiff's injury is "arguably within the zone of interests to be

protected or regulated" by her cause of action under section 227.40. *Friends of Black River Forest*, 2022 WI 52, ¶ 18.

First, Plaintiff suffers an injury in fact when WEC conducts election in violation of state law. It is indisputable that "voting is a constitutional right." Wis. Stat. § 6.84(1). Given that standing in Wisconsin is broad, even a plaintiff's "trifling interest in [her] voting rights" can suffer an injury in fact that supports a challenge to the facial validity of a law, notwithstanding that in some cases it might be "difficult to determine the precise nature of the injury." *McConkey*, 2010 WI 57, ¶ 17. Unlawful election procedures that permit voters to change their votes on any of the many questions presented on the ballot affect the final tally of votes cast on each of those questions. Those altered tallies necessarily harm individual voters by reducing their chances of electing at least one, if not more, of their preferred candidates. *Teigen* aside, these principles are well-established in Wisconsin law.

Second, Plaintiff's interests are at least "arguably within the zone of interests to be protected or regulated" by section 227.40(1). *Friends of Black River Forest*, 2022 WI 52, ¶ 18. "[W]hether a statute protects, recognizes, or regulates the asserted interest is a purely statutory inquiry…." *Id.* ¶ 25. And the plain text of section 227.40 protects against a "rule or guidance document" that "interferes with or impairs, or threatens to interfere with or impair, the legal rights and privileges of the plaintiff." Wis. Stat. § 227.40(1). Voting is a legal right recognized by the Wisconsin Constitution and the Legislature. *See* Wis. Const. art. III, § 1 ("Every United States citizen age 18 or older who is a resident of an election district in this state is a qualified elector of that district."); Wis. Stat. § 6.84 ("[V]oting is a constitutional right, the vigorous exercise of which should be strongly encouraged."). WEC's illegal rules on spoiling absentee ballots at least arguably "threatens to interfere" with Plaintiff's rights. *Friends of Black River Forest*, 2022 WI 52, ¶18.

Particularly given the prudential nature of standing, there are "[n]umerous reasons" that Plaintiff has standing in this case. *McConkey v. Van Hollen*, 2010 WI 57, ¶ 18, 326 Wis. 2d 1, 13, 783 N.W.2d 855, 860. Plaintiff "has competently framed the issues and zealously argued [her] case." *Id.* Dismissing this case on standing grounds would raise "judicial efficiency concerns" because a future plaintiff with standing "would bring an identical suit" raising the same arguments and claims. *Id.* "[T]he consequences of [the] decision are sufficiently clear," and "a different plaintiff would not enhance [the court]'s understanding of the issue[] in this case," which is the purely legal question of whether WEC's memoranda violate the plain language of the statute. *Id.* Finally, whether the election administration body for the entire State is violating state law is a "policy consideration[]" that justifies hearing this case, even if there were no "specific injury" at stake. *Id.* Given these numerous reasons justifying standing, it is no surprise that this Court has found standing in election lawsuits by voters in nearly identical situations. *See Jefferson v. Dane Cnty.*, 2020 WI 90, ¶ 1, 394 Wis. 2d 602, 606, 951 N.W.2d 556, 558.

As the Circuit Court recognized, *Teigen* is "of little help" to resolving these issues. Pet. App. 16. In part, that's because the harm to voters in this case is more acute than the harm that justified standing in *Teigen*. The harm to the voters in *Teigen* from unlawful, unsecured drop-boxes was that they might serve as a means for nefarious actors to inject ballots from persons other than qualified voters into the election. Those drop-box-enabled unlawful ballots, if they materialized, would dilute the efficacy of lawful ballots, create doubt about the fairness of the process, and erode confidence in the election. *Teigen*, 2022 WI 64, ¶ 21 (plurality op.). The harm in this case is different and far less speculative. Plaintiff does not allege that she might be harmed by the possible injection of invalid ballots into the election caused by an unauthorized ballot collection method. It is far more concrete than

that. When a voter changes her vote in a certain race, it necessarily weakens the votes of some and amplifies the votes of others. A voter may not know the extent of that injury until after the election, but "even a 'trifling interest' may be sufficient to confer standing." *Fox v. Wis. Dep't of Health & Soc. Servs.*, 112 Wis. 2d 514, 524, 334 N.W.2d 532, 537 (1983). In other words, the harm to voters in this case caused by unlawfully changing the final tally is both certain and individualized in ways that the harm allegedly caused by allowing drop-boxes is not.

Petitioner's efforts to shoehorn *Teigen* into this case is a veiled attempt to associate this case with *Priorities USA*. But unlike the petitioners in *Priorities USA*, the Petitioner here doesn't ask the Court to overrule *Teigen*. Indeed, it expressly disclaims that argument. Petitioner says that the ruling it requests from this Court "would not entail overruling *Teigen*." Pet. 30. Because no single standing theory in *Teigen* obtained a majority of the Court, "[t]here is … nothing in *Teigen*'s discussion of standing to overrule." Pet. 30. Petitioner wants clarity on standing. And whereas the Courts of Appeals cannot overrule precedents of this court, it can provide the clarity Petitioner ostensibly seeks—or at least further illuminate the issue.

Regardless, to the extent this case raises issues similar to *Teigen*, bypass is even less appropriate. The Court has already granted expedited review of *Priorities USA*, in which it will squarely consider whether to overrule *Teigen*. Adding another expedited case raising ancillary issues will complicate both cases, delay proceedings, and confuse the issues. If this Court thinks that *Teigen* is an issue in this case, the best course is to deny the petition for bypass, decide *Priorities USA*, and permit the Court of Appeals to address the effect of *Priorities USA* on this case after that decision issues.

IV. Petitioner's interpretation of the statute is both wrong and irrelevant to resolving the merits.

This Court should also deny the petition for the independent reason that the issues presented are meritless, which defeats any criteria in Section 809.62(1r) that would otherwise warrant this Court's review. *See* Sup. Ct. IOP § III.B.2.

Wisconsin law unambiguously prevents WEC from spoiling or returning ballots to voters. Under Section 6.86(6), "the municipal clerk shall not return [a] ballot to the elector" other than as "authorized in § 6.86(5) or § 6.87(9)." Wis. Stat. § 6.86(6). That is, clerks are forbidden from returning ballots to voters unless authorized by one of the two cited provisions.

Under the latter provision, a clerk may return a ballot that lacks the required witness certification on the outside of absentee ballot envelope. *Id.* § 6.87(9). That exception is not at issue here. The former provision says that "the clerk shall issue a new ballot to the elector" when "[the] elector *returns* a spoiled or damaged absentee ballot to the municipal clerk … and the clerk believes that the ballot was issued to or on behalf of the elector who is returning it." *Id.* § 6.86(5) (emphasis added). These are the only two means by which an elector may once again come to possess a ballot after it has been returned to the municipal clerk. Otherwise, the ballot moves on to the next phases of the process: the clerk must place the ballot in "a carrier envelope which shall be securely sealed and endorsed with the name and official title of the clerk." *Id.* § 6.88(1). The envelope must say: "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…." *Id.* And in all events, "the municipal clerk shall not return the ballot to the elector." *Id.* § 6.86(6).

WEC's memoranda created a new, unlawful exception to the general rule that the elector's role is complete upon having returned to the clerk a non-spoiled, non-damaged ballot. It instructed clerks to "cancel[] an already returned absentee ballot" upon the request of the voter "so the voter can request another absentee ballot." Pet. App. 154. In fact, according to WEC's memoranda, the voters don't even have to show up in person. WEC's August 2 memorandum permitted voters to "request in writing that their returned absentee ballot be spoiled" by the municipal clerk, and provided that "the municipal clerk shall not return the spoiled ballot to the elector." Pet. App. 154. WEC's August 1 memorandum even "strongly recommended that the voter request to spoil their ballot in writing (by mail or email)," rather than in person or over the phone. Pet. App. 151.

Ballots that reflect valid votes at the time they are returned by the elector are not "spoiled or damaged." Absent illegal intervention, they would be included in the certified tabulation. And as the statute makes clear, the only time a clerk may give a ballot with a completed witness certification back to an elector is when she "returns" a ballot in a "spoiled or damaged" condition—and even then only if the clerk independently observes the spoliation and damage within a certain number of days before the election concludes. Wis. Stat. § 6.86(5). As evidenced by WEC's own guidance, the ballots at issue in this case will have indisputably been returned by the elector to the clerk in an unspoiled condition. Otherwise, it would be impossible for the elector to subsequently "request to spoil" the ballot. An already spoiled ballot cannot be spoiled again.

Section 6.86(5) and section 6.87(9) must be read together. Section 6.86(5) sets a general requirement that absentee ballots that are spoiled at the time they are returned to the municipal clerk must be destroyed, and requires the clerk to issue a new ballot. Section 6.87(9) provides one exception: "an absentee ballot with an improperly

completed certificate or with no certificate," may be returned to the elector to cure the improper certificate. Other than that one exception, the only ballot that may be given to a voter is a "replacement ballot" in the event the voter "returns a spoiled or damaged ballot." *Id.* § 6.86(5). The legislature provided a thorough process outlining *when* and *how* ballots may be handled, returned, spoiled, and cured.

Election officials must apply the plain meaning of the statute. The Legislature has expressly instructed that the procedure in Section 6.86 "shall be construed as mandatory" and that "ballots cast in contravention of the procedures specified in those provisions may not be counted." *Id.* § 6.86(2). Courts, too, must adhere to the plain meaning of the statute. *Brown Cnty. v. Brown Cnty. Taxpayers Ass'n*, 2022 WI 13, ¶ 3, 400 Wis. 2d 781, 971 N.W.2d 491 ("When interpreting statutes, we begin with the language of the statute. If the meaning of the statute is plain, we need not inquire further." (citation omitted)). WEC's guidelines contradict the plain text.

Petitioner makes one argument on the merits: surplusage. *See* Pet. 34-35. But "[n]o party agree[d]" with that argument below, including Petitioner's own co-defendants. Pet. App. 21. Petitioner was "alone on this limb" because there's no surplusage in the circuit court's interpretation. Pet. App. 21. Petitioner argues that its construction gives meaning to the second sentence of subsection 5, which permits a voter to "request … a replacement ballot … within applicable time limits." Wis. Stat. § 6.86(5). There are several obvious problems with that reading. The first is that the "replacement ballot" referred to in that sentence is, quite obviously, the "new ballot" referred to in the preceding sentence—the one that addresses what happens when the clerk receives an already spoiled or damaged ballot. The second is that neither subsection 5 nor any other section "authorize[s]" clerks to return non-spoiled, non-damaged ballots to voters (with the one exception for improperly completed certificates in section 6.87(9)). *Id.*

The third is that no provision anywhere authorizes clerks to spoil ballots on behalf of electors. And the fourth is that it would be passing strange for the legislature to have specifically limited when clerks may issue a "new ballot" to certain circumstances, only to authorize a "replacement ballot" for any reason at all in the very next sentence of the very same provision. Such a reading of the second sentence would swallow the first sentence whole. Legislatures do not "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

In the end, Petitioner's reading does not avoid surplusage, but it "add[s] language to the statute that is not there." Pet. App. 21. Neither the parties nor the Court would be served by bypassing the Court of Appeals on an argument that "plainly rewrites whole portions of the statute." Pet. App. 21.

Even if Petitioner were right that the statute contained some surplusage, that would not be a reason to reverse. As the Circuit Court recognized, surplusage in a statute is far from dispositive of the best interpretation. Pet. App. 21. "[R]edundancies are common in statutory drafting," and "'[s]ometimes the better overall reading of the statute contains some redundancy.'" *Barton v. Barr*, 140 S. Ct. 1442, 1453 (2020) (collecting cases). The Wisconsin election code is a set of comprehensive instructions on the handling of ballots. *See* Wis. Stat. §§ 6.76-6.89. In light of the Legislature's careful planning for various situations, it would be strange for the Legislature to bury a desire for previously voted ballots to be returned upon request for any reason in an opaque cross-reference. "Cross-references in statutes should not be used to pervert an otherwise harmonious statutory scheme." *Porter v. Mich. Mut. Liab. Co.*, 263 N.W.2d 318, 324 (Mich. Ct. App. 1977), *aff'd in part, remanded in part sub nom. Underhill v. Safeco Ins.*, 284 N.W.2d 463 (Mich. 1979).

Finally, the bypass petition should be denied because Petitioner's reading of the statute has nothing whatsoever to do with this case. Petitioner requests an interpretation of the statute that would allow "[a] voter [to] request that the clerk return a previously submitted unspoiled ballot, spoil that ballot, then request a replacement ballot." Pet. 35. But the question presented in this case is whether WEC's guidance is consistent with Wisconsin law. Both Petitioner and Respondent *agree* that whatever Wisconsin law permits with respect to the handling of submitted ballots, *any* spoiling that occurs must be done *by the voter*. By contrast, WEC's guidance permitted clerks to spoil ballots on behalf of the voter. Under WEC's guidance, voters could "request in writing that their returned absentee ballot be spoiled" by the municipal clerk and that "the municipal clerk shall not return the spoiled ballot to the elector." Pet. App. 154. WEC even "strongly recommended that the voter request to spoil their ballot in writing (by mail or email)," rather than in person or over the phone. Pet. App. 151. Whether the Court adopts Petitioner's interpretation of the statute or not, the result is the same: WEC's rules are unlawful since section 6.86 does not allow a municipal clerk to spoil an absentee ballot. That Petitioner has not fashioned a merits argument that would warrant reversal only further proves the need for further development in the Court of Appeals.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for bypass.

Dated this 18th day of April, 2024.

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CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c) for a response produced with a proportional serif font. The length of this brief is 5,780 words.

Dated this 18th day of April, 2024.

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CERTIFICATION OF SERVICE

I certify that on this day I electronically filed this response with the clerk of court using the appellate court's electronic filing system, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 18th day of April, 2024.

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