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STATE OF WISCONSIN
COURT OF APPEALS, DISTRICT II
CASE NO. 2024AP408

NANCY KORMANIK,

Plaintiff-Respondent,

vs.

WISCONSIN ELECTIONS COMMISSION,

Defendant-Co-Appellant,

DEMOCRATIC NATIONAL COMMITTEE,

Intervenor-Co-Appellant,

RISE, INC.,

Intervenor-Appellant.

On Appeal from the March 4, 2024 Judgment of the
Circuit Court for Waukesha County Case No. 2022CV1395
The Honorable Brad D. Schimel, Presiding

BRIEF AND APPENDIX OF INTERVENOR-CO-APPELLANT DEMOCRATIC NATIONAL COMMITTEE

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INTRODUCTION

This Court ordered last July that briefing in this appeal be held in abeyance pending the Wisconsin Supreme Court's resolution of *Brown v. Wisconsin Elections Commission,* No. 2024AP232, because the two cases present analogous issues about the standing of individual electors to challenge administrative action by the Wisconsin Elections Commission ("WEC"). *See* Order of July 18, 2024, at 2, No. 2024AP408. The Supreme Court decided *Brown* on February 18, 2025, holding that an individual elector lacked statutory standing to seek judicial review of a WEC order declining to take any enforcement action on his administrative complaint "regarding the in-person absentee voting procedures implemented by the Racine City Clerk" because the individual elector was not "***aggrieved by*** [that] order" within the meaning of Wis. Stat. § 5.06(8). *Brown v. Wis. Elections Comm'n*, 2025 WI 5, ¶¶ 1, 4, 414 Wis. 2d 601, 16 N.W.3d 619 (emphasis added).

Brown controls the resolution of the standing issue in this appeal. To be sure, the two cases involve different procedural postures and statutory standing provisions. *Brown* addressed statutory standing to seek judicial review of WEC's disposition of an administrative complaint filed by an individual elector under Wis. Stat. § 5.06(1). This appeal, on the other hand, focuses on an individual elector's statutory standing to seek judicial review of WEC's statewide guidance concerning the spoiling and replacement of previously returned absentee ballots under Wis. Stat. § 227.40(1), which is restricted to guidance that "***interferes with or impairs, or threatens to interfere with or impair, the legal rights and privileges*** of the plaintiff" (emphasis added). Both these statutory standing provisions, however, require a demonstration by plaintiff that she has been ***injured in fact*** by the challenged agency action. *Brown* clarified that, no matter how much an individual elector may disagree with a decision by WEC, that elector lacks standing to challenge it unless the "decision ***personally*** affected him," "made it more difficult for him to vote or affected

him ***personally*** in any manner," caused him to "***personally*** suffer[ ] … any injury," or "injure[d] him ***personally*** in any way." *Id.* ¶¶ 16-17 (emphases added).

As demonstrated in Part I of the argument in this brief, Plaintiff-Respondent Nancy Kormanik falls far short of establishing any sort of personal injury caused by WEC's guidance, and the Circuit Court erred as a matter of law in holding otherwise. And as shown in Part II, even if Kormanik has standing, the Circuit Court erred as a matter of law in its invalidation of WEC's challenged guidance regarding the spoiling and replacement of previously returned absentee ballots, relying on reasoning since foreclosed by the Wisconsin Supreme Court in *Priorities USA v. Wis. Elections Comm'n*, 2024 WI 32, 412 Wis.2d 594, 8 N.W.3d 429. WEC's longstanding guidance is based on a reasonable reading of the relevant election statutes, and best comports with the overarching "will of the electors" standard prescribed at the outset of Wisconsin's election code, *see* Wis. Stat. § 5.01(1), while protecting against any potential risk of double-voting or undermining ballot integrity.[1]

ISSUES PRESENTED

1. Does Plaintiff-Respondent Nancy Kormanik have statutory standing under Wis. Stat. § 227.40(1) to challenge guidance issued by the Wisconsin Elections Commission concerning whether and under what circumstances an elector may direct her local elections clerk to retrieve and destroy a previously returned absentee ballot so that the elector may obtain and vote a replacement ballot?

The Circuit Court answered "yes."

This Court should answer "no."

[1] To reduce duplication among the appellant-side briefs, the DNC will not address the additional issues of (a) the Circuit Court's lack of competency to decide this action because of Kormanik's failure to serve the Wisconsin Legislature's Joint Committee for Review of Administrative Rules as required by Wis. Stat. §§ 227.40(5) and 806.04(11); or (b) Kormanik's argument that WEC's challenged guidance is an improperly promulgated rule. The DNC joins in WEC's arguments on these issues.

2. Under Wis. Stat. § 6.86(5)-(6), may an elector notify her local elections clerk that her previously returned absentee ballot is "spoiled," instruct the clerk to retrieve and destroy that ballot, and obtain and vote a replacement ballot consistent with statutory deadlines and the recordkeeping and chain-of-custody protocols recommended by the Commission in its challenged guidance?

The Circuit Court answered "no."

This Court should answer "yes."

ORAL ARGUMENT AND PUBLICATION

Although *Brown* and *Priorities USA* control the outcome here, this appeal warrants oral argument. The standing and merits issues are complicated, and argument would enable counsel to address any questions the Court may have about the relevant statutory provisions and judicial decisions, and about the implications of the Court's resolution. *See* Wis. Stat. § 809.22.

The Court's opinion should be published in the official reports. This case involves the application of the standing principles enunciated in *Brown* to a new and significantly different regulatory context involving election law. Moreover, there continues to be confusion and disagreement among Wisconsin circuit courts over the scope of individual elector standing in election law cases. In addition, on the merits, the application of the "will of the electors" standard to absentee voting statutes presents issues of substantial and continuing public interest. *See id.* § 809.23.

STATEMENT OF THE CASE

Three appellants are filing briefs in this appeal—the Defendant-Co-Appellant Wisconsin Elections Commission ("WEC"); the Intervenor-Appellant Rise, Inc.; and the Democratic National Committee ("DNC"). For the most part, WEC and Rise's briefs adequately address the matters that must be included under Wis. Stat. § 809.19(1)(d)—"a description of the nature of the case; the procedural status of the case leading up to the appeal; the disposition in the trial court; and a statement

of facts relevant to the issues presented for review." To avoid unnecessary repetition and cut down on excess briefing, the DNC will not include its own full description of these subjects but instead adopts the relevant discussions by WEC and Rise. The DNC offers the following additional discussion of the relevant procedural and factual background.

A. The DNC's participation in this litigation

The DNC moved to intervene as a defendant in this litigation on September 30, 2022, one week after Kormanik first brought suit, and the Circuit Court granted the DNC's motion to intervene on October 5, 2022. (R. 37, 72.[2]) The DNC thereafter participated fully in the 2022 temporary injunction briefing and argument as well as in the subsequent 2023 summary judgment briefing and argument that led to the order and judgment now on appeal. The DNC also participated in the interlocutory appeal proceedings addressed to stay and venue issues. *See, e.g.*, *State ex rel. Kormanik v. Brash*, 2022 WI 67, 404 Wis. 2d 568, 980 N.W.2d 948.

B. The history of the challenged WEC guidance

The challenged WEC guidance on spoiling absentee ballots and obtaining replacement ballots dates back at least to 2014, when WEC's predecessor, the Wisconsin Government Accountability Board ("GAB"), published "comparable," "substantially similar" guidance on procedures to be followed where an "[a]bsentee ballot has been returned to the clerk" but "[t]he voter wishes to vote a new ballot." Oct. 4, 2022 Aff. of Meagan Wolfe ¶ 8 (R. 55); *see* App. 30-32. The GAB guidance specified multiple steps a clerk must follow to protect against any improprieties, including verifying the voter's identity through voter ID or other means; retrieving the returned ballot, while "making a small tear in the envelope containing the ballot

[2] Citations to "R. __" are to the record documents compiled by the Circuit Court (*see* Index, R. 208). Citations to "App. __" are to the Appendix to Opening Brief of Intervenor-Co-Appellant Democratic National Committee.

and writing 'spoiled' on the outside of the envelope"; "[p]lac[ing] the spoiled ballot in the spoiled ballot envelope or container that will be transported to the polling place on Election Day"; and documenting these steps in the official "Absentee Ballot Log." App. 30.

With small revisions, these spoiling procedures were followed without incident in the eight years between 2014 and 2022, prior to the Circuit Court's October 7, 2022 Temporary Injunction. The most recent version of WEC's spoiling guidance was contained in the now-withdrawn WEC guidance document titled *Spoiling Absentee Guidance for the 2022 Partisan Primary* (Aug. 1, 2022) (App. 24-27) ("*August 2022 Guidance*"). That guidance did not contain any new or novel interpretations of Wisconsin law; instead, it emphasized "[t]his has been the law in Wisconsin for many years." App. 25.[3]

Wisconsin was one of several states in the 2016 and 2020 Presidential campaigns in which candidates openly appealed to voters who already had submitted their ballots to "spoil" those ballots and cast replacements, subject to the deadlines and procedures specified by WEC.[4] More recently, a series of late candidate withdrawals from the August 2022 Democratic primary for U.S. Senate and Republican primary for Governor prompted many voters who had cast early ballots for now-

[3] In addition to the sources cited in text, *see, e.g.*, WEC, *Spoiling Absentee Ballot Guidance* (Oct. 19, 2020) (App. 33-36); WEC, *Inbound and Outbound Absentee Ballot Considerations* (Sept. 10, 2020), attached as Ex. G to Conley Aff. (R. 61).

[4] *See, e.g.*, KING Staff, *Trump: Go vote again, this time for me*, 11 ALIVE (Nov. 2, 2016), https://11alive.com/article/news/politics/trump-go-vote-again-this-time-for-me/281-346255901; Rebecca Harrington & Eiza Relman, *If you voted early and changed your mind, you can switch your votes in several states—here's how*, BUSINESS INSIDER (updated Nov. 2, 2020), https://businessinsider.com/how-can-you-change-your-vote-trump-clinton-early-voting-2016-11. The Business Insider article identified Michigan, New York, Connecticut, and New Hampshire as states in addition to Wisconsin that allowed "voters who have a change of heart [to] alter their early vote after casting it." *Id.* The ALIVE article pointed to Pennsylvania, Michigan, Minnesota, Connecticut, New York, and Mississippi as other states in addition to Wisconsin that allowed voters to change their absentee votes. *Id.* All citations in this brief to sources that include an electronic (URL) citation were cited to the Circuit Court in the DNC's summary judgment briefs. *See* R. 144, at 4-5; R. 151, at 3-4, 13-14.

withdrawn candidates to follow WEC's spoiling procedures so that they could cast a meaningful vote for a viable candidate who remained in contention.[5]

C. Alleged potential harms to Kormanik and other Wisconsin voters

Kormanik alleged in the Circuit Court that she and other Wisconsin voters were threatened with several types of injuries by WEC's challenged spoiling guidance. She claimed that she and other voters "face[d] the irreparable harm of disenfranchisement due to the risk of their votes being ***changed by someone other than themselves or diluted by double voting***"; 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"; and 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***." Plaintiff's Br. in Support of Summ. Judg. and Dec. Judg., at 2, 7-8, 17-18 (R. 132) (emphases added).

The summary judgment record is devoid of any evidence that WEC's challenged guidance ever led to any of these claimed injuries. Kormanik and her counsel were given repeated opportunities to take discovery from WEC and/or local election officials and to build a record to substantiate these allegations, but failed to cite even a ***single*** alleged instance of such wrongdoing during the eight years WEC's challenged guidance was in place. And although Kormanik complained that there were not "sufficient checks built around the process," she failed to address any of the recordkeeping, chain-of-custody, or voter ID requirements required by WEC in the spoliation and replacement process or explain how those many safeguards and

[5] See Ben Baker, *Already voted for a candidate who dropped out? Here's how you can change your vote*, MILWAUKEE J. SENTINEL (updated Aug. 8, 2022), https://jsonline.com/story/news/politics/2022/07/29/how-change-your-vote-if-candidate-dropped-out-wisconsin-election-primary/10177652002/.

"checks" were insufficient to prevent the injuries she feared. And as for her claims of potential electoral "chaos," WEC's guidance was in place from 2014, including through two contentious Presidential elections that produced plenty of "October surprises" and calls for re-voting (*see* pp. 13-14 *supra*), and Kormanik failed to point to evidence of any problems with Wisconsin's ballot-spoliation procedures from those campaigns or any others. The only evidence submitted by Kormanik was an affidavit confirming she is a regular absentee voter in Waukesha County, without explaining whether or how WEC's challenged guidance interfered with her absentee voting practices in any respect or otherwise caused her any personal harm. *See* App. 48-49.

Similarly, the Circuit Court expressed concerns about the potential for "fraud or abuse" created by WEC's challenged guidance, the risk that "people [may be] disenfranchised by improperly cast votes," and the possibility that "[a] candidate will get votes improperly." App. 16. Here again, these concerns were not grounded on ***any*** evidence in the record and ignored the many safeguards required by WEC to prevent these potential harms.

STANDARD OF REVIEW

"Whether a party has standing is a question of law [an appellate] court reviews independently." *Brown*, 2025 WI 5, ¶ 10. Where issues of statutory construction also are "[e]mbedded within the question of standing," those issues likewise present questions of law that are reviewed independently. *Id.*

As for the merits of a claim, issues of statutory construction also present questions of law that are reviewed independently of, and without deference to, the Circuit Court. *See Priorities USA*, 2024 WI 32, ¶ 12.

ARGUMENT

I. Kormanik lacks statutory standing to challenge WEC's guidance.

Kormanik lacks statutory standing under Wis. Stat. § 227.40(1) because the challenged WEC guidance did not "interfere[] with or impair[], or threaten[] to interfere with or impair, [her] legal rights and privileges." The authorities cited by the Circuit Court in its decision to the contrary are readily distinguishable.

A. Kormanik has not been personally injured by the challenged WEC guidance.

With some exceptions that do not apply here, "the exclusive means of judicial review of the validity of a rule or guidance document shall be an action for declaratory judgment" under Wis. Stat. § 227.40(1). Declaratory relief under this section is available "only" where the plaintiff demonstrates that "the rule or guidance document or its threatened application ***interferes with or impairs, or threatens to interfere with or impair, [her] legal rights and privileges***" (emphasis added). Section 227.40(1) does not use the word "aggrieved," though Sections 227.52 and 227.53 separately provide that "any person aggrieved" by an "[a]dministrative decision[]" may obtain (again subject to certain inapplicable exceptions) judicial review of that decision.[6]

Although the terminology in these separate chapter 227 standing provisions differs, the Supreme Court of Wisconsin repeatedly has emphasized that the provisions impose similar requirements and are governed by a common body of case law. In deciding a standing issue under Section 227.40(1) regarding a challenge to WEC

[6] Specifically, Section 227.52 provides in relevant part that "[a]dministrative decisions which adversely affect the substantial interests of any person, whether by action or inaction, whether affirmative or negative in form, are subject to review as provided in this chapter," subject to various exceptions. Section 227.53(1) in turn provides that "any person ***aggrieved*** by a decision specified in s. 227.52 shall be entitled to judicial review of the decision as provided in this chapter," subject to specified exceptions (emphasis added). *See also* Wis. Stat. § 227.01(9) ("'Person ***aggrieved***' means a person or agency whose substantial interests are adversely affected by a determination of an agency.") (emphasis added).

guidance, for example, the lead opinion in *Teigen* relied on standing decisions under Sections 227.52 and 227.53 regarding review of agency orders in contested case proceedings, emphasizing that the standing inquiries are "analogous" to one another. *Teigen v. Wisconsin Elections Commission*, 2022 WI 64, ¶ 20 n.9, 403 Wis. 2d 607, 976 N.W.2d 519, *reconsideration denied*, 2022 WI 104, 997 N.W.2d 401, *overruled on other grounds by Priorities USA v. Wisconsin Elections Commission*, 2024 WI 32, 412 Wis. 2d 594, 8 N.W.3d 429.[7] Similarly, the Supreme Court has elsewhere emphasized that, "regardless of the nature of the case and the particular terminology used in the test for standing," the "basic thrust" of the standing inquiry is the same whether the challenge is to a "rule ***or*** decision of an administrative agency." *Foley-Ciccantelli v. Bishop's Grove Cond. Ass'n*, 2011 WI 36, ¶ 44, 333 Wis. 2d 402, 797 N.W.2d 789 (emphasis added). Thus, "[s]tanding for purposes of challenging an administrative decision is similar to the statutory requirements to challenge an administrative rule," and decisions on standing to challenge agency decisions are "conclusive" on standing to challenge agency rules. *Wis. Hosp. Ass'n v. Natural Res. Bd.*, 156 Wis. 2d 688, 702, 457 N.W.2d 879 (1990).

Regardless of which chapter 227 standing provision is invoked, standing to challenge agency action turns on "whether the party whose standing is challenged has a ***personal interest*** in the controversy (sometimes referred to in the case law as a '***personal stake***' in the controversy)." *Foley-Ciccantelli*, 2011 WI 36, ¶ 40 (emphases added). Thus, a litigant has standing only if the challenged agency action "***directly injures*** his or her interests," and "the injury must adversely affect the party's interests ***in an appreciable way***." *Auer Park Corp. v. Derynda*, 230 Wis. 2d 317, 320, 601 N.W.2d 841 (Ct. App. 1999) (emphases added). Claimed injuries will

[7] Thus, although the standing analysis in *Friends of Black River Forest v. Kohler Co.*, 2022 WI 52, 402 Wis. 2d 587, 977 N.W.2d 342, involved review of an administrative decision under Sections 227.52 and 227.53, the lead opinion in *Teigen* based its analysis of standing to challenge agency guidance under Section 227.40(1) on *Black River* because "th[at] case is analogous to this dispute." 2022 WI 64, ¶ 20 n.9.

not be recognized if they are "***unsupported by any evidence***" or rest on "***pure[] supposition***." *Id.* at 322 (emphases added); *see id.* (plaintiff must be "***appreciably and adversely injured***" to have standing (emphasis added)); *Friends of Black River Forest v. Kohler Co.*, 2022 WI 52, ¶ 21, 402 Wis. 2d 587, 977 N.W.2d 342 (standing may not be based on alleged injuries that are merely "***hypothetical***" and "***conjectural***") (emphases added). A litigant challenging agency action must have "a ***personal stake*** in the outcome of the controversy," which "requires a '***distinct and palpable injury***' to [her], and also a 'fairly traceable' ***causal connection*** between the claimed injury and the challenged conduct." *Kiser v. Jungbacker*, 2008 WI App 88, ¶ 12, 312 Wis. 2d 621, 754 N.W.2d 180 (emphases added) (citation omitted); *see also id.* ¶ 20 (challenged agency action must "bear[] '***directly and injuriously***' upon [appellant's] interests" (emphasis added) (citation omitted)).

Kormanik has suffered no "personal injury" from WEC's challenged guidance. As discussed above, the only interest she claimed in her summary judgment affidavit was as a regular absentee voter. *See* App. 48-49. She has not claimed that WEC's guidance interfered with her ability to cast her absentee votes or offered ***any*** evidence in support of her fears that someone else might somehow change her ballot or otherwise undermine her vote. Her disagreements with WEC's guidance about how absentee voters may spoil their ballots and obtain replacements are nothing more than "generalized grievances about the administration of a governmental agency" that do not support her individual standing. *Cornwell Pers. Assocs., Ltd. v. Dep't of Indus., Lab. & Hum. Rels.*, 92 Wis. 2d 53, 62, 284 N.W.2d 706 (Ct. App. 1979). She "claim[s] only harm to [her] and every citizen's interest in proper application of [these] laws," and the relief she seeks "no more directly and tangibly benefits [her] than it does the public at large." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573-74 (1992). This conclusion is bolstered by the rule that, since Section 227.40(1) is a legislative waiver of the State's sovereign immunity from suit, it must be

narrowly construed and strictly enforced. *See* Wis. Const. art. IV, § 27; *Kuechmann v. Sch. Dist. of La Crosse*, 170 Wis. 2d 218, 223-25, 487 N.W.2d 639 (Ct. App. 1992).

In its most recent standing decision, the Supreme Court in *Brown* distilled these various decisions to hold that a plaintiff challenging WEC action only has standing where the challenged action "***personally*** affect[s] him" (such as by "ma[king] it more difficult to vote"), "affect[s] him ***personally*** in any manner," or "injure[s] him ***personally*** in any way." 2025 WI 5, ¶¶ 16-17 (emphases added); *see also id.* ¶ 16 (plaintiff not aggrieved where "he does not show that he has ***personally*** suffered (or will suffer) an injury as a result of WEC's decision" (emphasis added)). Just as Kenneth Brown was not himself personally injured in any manner by WEC's approval of the City of Racine's siting and distribution of early in-person voting sites, Nancy Kormanik was not herself personally injured in any manner by WEC's guidance concerning how absentee voters may spoil and revote their own ballots. If Brown lacked standing, so does Kormanik. The standing issues are materially indistinguishable.

If anything, Kormanik has an even weaker claim to standing than Brown. Brown went to the bother of filing an administrative complaint under Wis. Stat. § 5.06(1) against the Racine City Clerk, which WEC rejected. Three Justices believed Brown's efforts in bringing a complaint and having it rejected were, in and of themselves, sufficient to cause "personal" injury and aggrievement to him, 2025 WI 5, ¶¶ 30-32, 41-43 (Grassl Bradley, J., dissenting), but the majority of the Supreme Court held this was insufficient to establish his standing, *id.* ¶¶ 18-24. Here, Kormanik did not even file a complaint with WEC or suffer a rejection by WEC. Unlike Brown, she apparently did nothing to complain about WEC's challenged action before filing suit.

B. The authorities cited by the Circuit Court are readily distinguishable.

Instead of focusing on the personal injury requirement in Wis. Stat. § 227.40(1), the Circuit Court relied on Wis. Stat. § 6.84—an absentee voting statute that has nothing to do with standing—as well as two inapposite Wisconsin Supreme Court decisions in support of its conclusion that Kormanik has standing to challenge WEC's guidance. None of these authorities supports the Circuit Court's reading.

1. Wis. Stat. § 6.84. The Circuit Court reasoned that absentee voting cases are governed by broader rules of standing than other types of voting cases, noting that "the absentee voting statutes are somewhat unique in the way they seem to frame standing" because they impose "very strict and mandatory rules, with severe consequences for failure to follow them, when it came to absentee voting." App. 16 (citing Wis. Stat. § 6.84); *see id.* (suggesting the standing analysis is different because "the rules relating to absentee balloting are strict and the consequences are particularly tough"). That analysis is foreclosed by *Brown* and other recent decisions. *Brown* also involved absentee voting (at early in-person absentee voting sites), yet there was no hint in either the majority or dissenting opinions that the standing analysis might be affected in any way depending on whether the case involves absentee voting or some other type of voting.

The Circuit Court's reliance on Section 6.84 is further undermined by *Priorities USA*. The Supreme Court in that decision rejected the argument that Section 6.84 imposes "a principle of statutory construction" requiring courts to "strictly construe [statutory] requirements for absentee voting with a skeptical eye." 2024 WI 32, ¶¶ 18, 41. Rather, "all § 6.84 does is set forth the ***consequences*** of a statutory violation"—if, using the normal tools of construction, a court determines that an absentee voting provision covered by Section 6.84 has been violated, it has a "mandatory" duty to exclude the challenged ballots rather than simply the "directory" discretion whether to do so. *Id.* ¶ 31 (emphasis added); *see also id.* ¶ 45 (Section

6.84 "gives us no principles of interpretation that give any insight into the actual ***meaning*** of the absentee balloting statutes that follow it" (emphasis added)).

By the same token, whether an absentee voting provision is "mandatory" or "directory" under Section 6.84 for purposes of determining the ***consequences*** of a violation of that provision says nothing about whether a litigant has ***standing*** to challenge an alleged violation of that provision. Section 6.84 has no bearing on standing to sue; in no way does it impose one set of standing principles in absentee voting cases and a different set of standing principles in all other election cases.

2. *McConkey.* The Circuit Court's standing analysis relied heavily on *McConkey v. Van Hollen*, 2010 WI 57, 326 Wis. 2d 1, 783 N.W.2d 855. *See* App. 14-15. That decision held that, as a matter of "sound judicial policy," an individual elector had standing to challenge the legality of a Wisconsin constitutional amendment that allegedly had been adopted in violation of the "separate amendment rule" in Article XII, Section 1 of the Wisconsin Constitution. 2010 WI 57, ¶¶ 14-19.

McConkey is readily distinguishable on multiple grounds. Perhaps most importantly, it did not involve a jurisdictional (statutory) restriction on standing at all, but instead turned on a common law standing inquiry that was governed by a multi-factor balancing test based on "sound judicial policy." *Id.* ¶ 15. The statutory standing requirement in Section 227.40(1), on the other hand, does not turn on a judicial "balancing" analysis. Moreover, even judged under a "sound judicial policy" balancing analysis, the Supreme Court in *McConkey* cautioned that "it is difficult to determine the precise nature of the injury here," and that it was "troubled" by claims of "broad general voter standing," holding that such claims will be "fit for adjudication" only in "***unique circumstances***." 2010 WI 57, ¶ 17 (emphasis added). *McConkey* ultimately relied on a combination of "judicial policy," a belief that "McConkey has at least a trifling interest in his voting rights," and unspecified "unique circumstances of this case." *Id.* Kormanik has pointed to nothing that is

arguably "unique" about her case and requires a broader rule of standing than any other absentee voting cases. If Brown's case was not "unique" for standing purposes, neither is Kormanik's.

3. *Teigen.* The Circuit Court acknowledged "the fractured nature of the plurality on the standing issue" in *Teigen* "left that case of little help" in the standing analysis in this case. App. 15.[8] Nevertheless, the Circuit Court reasoned, "[i]t seems worth noting that, with plaintiffs very similarly situation [*sic*] 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." *Id.*

None of the "fractured" rationales in support of standing in *Teigen* applies here. Justice Hagedorn's controlling decision in *Teigen*, which provided the crucial fourth vote in support of standing but was not joined by any other Justice,[9] reasoned that the administrative-complaint mechanism in Wis. Stat. § 5.06(1) "gives voters like [Teigen] a statutory right to have local election officials in the area where he lives comply with election laws"—"not only a ***process*** to compel compliance with the law, but also a ***legal right*** held by the voter to h.ave their local election officials follow the law." 2022 WI 64, ¶ 164 (Hagedorn, J., concurring) (emphases added). Justice Hagedorn argued that allegedly "unlawful WEC guidance can threaten harm to the legal rights and privileges Wis. Stat. § 5.06 provides to voters like Teigen" by encouraging local election officials not to follow the law, thereby establishing standing to seek chapter 227 judicial review of the challenged guidance. 2022 WI 64, ¶ 166.

[8] The Supreme Court of Wisconsin recently overruled the merits ruling in *Teigen* related to drop boxes. *See Priorities USA*, 2024 WI 32, ¶49 ("[W]e determine that the court's conclusion in *Teigen*…that the subject statutes prohibit ballot drop boxes was unsound in principle, and as a consequence, we overrule it.") (citation omitted)). The Supreme Court in *Priorities USA* did not address *Teigen*'s standing analysis.

[9] Justice Hagedorn's analysis was rejected by all six of the other Justices. *See* 2022 WI 64, ¶ 22 n.12, ¶¶ 32-36 (lead op.); *id.*, ¶¶ 210-15 (A.W. Bradley, J., dissenting).

The *Brown* majority unambiguously rejected Justice Hagedorn's reading of Section 5.06(1). It held this provision simply "provides a means for an individual elector to file a complaint with WEC when she or he believes that a local election official's decision is 'contrary to law' or that the official has 'abused the[ir] discretion.'" 2025 WI 5, ¶ 19. The majority rejected Brown's claims "that § 5.06(1) establishes a general statutory right for an elector to compel her or his local election officials to comply with the law." *Id.* "[T]he right to complain to an administrative agency about a potential statutory violation does not automatically entail the right to bring an action based on that alleged violation in court." *Id.*; *see also Fox v. Wis. DHSS*, 112 Wis. 2d 514, 526, 334 N.W.2d 532 (1983) ("Standing to challenge [an] administrative decision is not conferred upon a petitioner merely because that person requested and was granted an administrative hearing.").

The other rationale for standing advocated in *Teigen* was the so-called "vote dilution" (or "vote pollution") theory endorsed by three Justices—the notion that every elector's right to vote is "diluted" (or "polluted") any time an election law is violated, because any such violation undermines election integrity and voters' confidence in electoral outcomes. *See Teigen*, 2022 WI 64, ¶ 24 (lead opinion by Grassl Bradley, J., joined by Roggensack, C.J. and Ziegler, J.) ("[A]ll lawful voters … are injured when the institution charged with administering Wisconsin elections does not follow the law, leaving the results in question."); *see also id.* ¶ 25 ("Electoral outcomes obtained by unlawful procedures corrupt the institution of voting, degrading the very foundation of free government. Unlawful votes do not dilute lawful votes so much as they pollute them, which in turn pollutes the integrity of the results. When the level of pollution is high enough, the fog creates obscurity, and the institution of voting loses its credibility as a method of ensuring the people's continued consent to be governed." (citation omitted)).

The vote-dilution/pollution theory of standing advocated by the three-Justice lead opinion in *Teigen* does not support Kormanik's claim of standing either. To

begin, it was ***expressly rejected*** by a majority of the Court in *Teigen*. Justice Hagedorn characterized the vote-pollution theory in his concurrence as "***unpersuasive***" and called out that it did "***not garner the support of four members of this court***." *Id.* ¶ 167 (Hagedorn, J., concurring) (emphases added). The three Justices in dissent likewise emphasized that the paragraphs in the lead opinion discussing vote-pollution standing "***do not constitute precedential authority***." *Id.*, ¶ 205 n.1 (A.W. Bradley, J., dissenting) (emphasis added). Lower Wisconsin courts have recognized that the vote-pollution theory of standing was squarely rejected in *Teigen* and have criticized the theory as "weak" and lacking any "clear legal authority." *Rise, Inc. v. Wis. Elections Comm'n*, 2023 WI App 44, ¶ 27 & n.6, 995 N.W.2d 500 (unpublished) (*see* App. 50-59).

The four Justices who rejected the vote-pollution theory in *Teigen* are in good company on this point. Federal judges in Wisconsin and throughout the country—representing all points on the ideological spectrum—have repeatedly rejected vote dilution/pollution as a valid basis for standing. Wisconsin courts treat federal decisions about standing as "persuasive authority." *Friends of Black River Forest*, 2022 WI 52, ¶ 17.[10] The Supreme Court of the United States has repeatedly admonished that an individual voter's allegation "that the law … has not been followed" is "precisely the kind of undifferentiated, generalized grievance about the conduct of government" that is insufficient to support standing. *Lance v. Coffman*, 549 U.S. 437, 442 (2007). This rule has been enforced in numerous federal cases involving Wisconsin voters. *See, e.g.*, *Gill v. Whitford*, 585 U.S. 48, 68 (2018) (Wisconsin voters in certain legislative districts did not have standing to challenge alleged "statewide"

[10] *See also McConkey*, 2010 WI 57, ¶ 15 n.7 (Wisconsin courts "look to federal case law as persuasive authority regarding standing questions"); *Wis.'s Env't Decade, Inc. v. PSC of Wis.*, 69 Wis. 2d 1, 11, 230 N.W.2d 243 (1975) (federal standing decisions "are certainly persuasive as to what the [Wisconsin] rule should be"); *Reetz v. Advoc. Aurora Health, Inc.*, 2022 WI App 59, ¶ 8 n.1, 405 Wis. 2d 298, 983 N.W.2d 669 ("[T]his court considers federal case law as persuasive authority regarding standing questions because Wisconsin's standing analysis is conceptually similar to the federal analysis.").

gerrymandering, which was an "'undifferentiated, generalized grievance about the conduct of government'" rather than an "'individual and personal injury'" (quoting *Lance*, 549 U.S. at 442)); *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" (citations omitted)), *appeal dismissed*, Nos. 20-3396, 20-3448, 2020 WL 9936901 (7th Cir. Dec. 21, 2020); *Wis. Voters All. v. Pence*, 514 F. Supp. 3d 117, 120 (D.D.C. 2021) (Wisconsin voters lacked standing 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))). These Wisconsin-related decisions reflect the overwhelming weight of federal authority rejecting vote-dilution claims of standing (outside the context of alleged classifications based on "race, sex, economic status, or place of residence within a State," in which "the favored group has full voting strength and the groups not in favor have their votes discounted," *Reynolds v. Sims*, 377 U.S. 533, 555 n.29, 561 (1964)).[11]

In sum, neither Wis. Stat. § 6.84, *McConkey*, nor *Teigen* supports Kormanik's claim of standing, which fails as a matter of law because she was not personally injured in any way by WEC's challenged guidance.

[11] For recent federal appellate authority on this point, *see, e.g.*, *Jerusalem v. Dep't of State*, No. 23-30521, 2024 WL 194174, at *1 (5th Cir. Jan. 18, 2024), *cert. denied*, 144 S. Ct. 2524 (2024); *O'Rourke v. Dominion Voting Sys., Inc*., No. 21-1161, 2022 WL 1699425, at *2 (10th Cir. May 27, 2022), *cert. denied*, 143 S. Ct. 489 (2022); *Hotze v. Hudspeth*, 16 F.4th 1121, 1124 (5th Cir. 2021); *Wood v. Raffensperger*, No. 20-14813, 2021 WL 3440690, at *2 (11th Cir. Aug. 6, 2021), *cert. denied*, 142 S. Ct. 1211 (2022); *Hudson v. Haaland*, 843 F. App'x 336, 338 (D.C. Cir. 2021) (unpublished); *Wood v. Raffensperger*, 981 F.3d 1307, 1314 (11th Cir. 2020), *cert. denied*, 141 S. Ct. 1379 (2021); *Bognet v. Sec'y Commw. of Pa.*, 980 F.3d 336, 356-57 (3d Cir. 2020), *vacated as moot sub nom. Bognet v. Degraffenreid*, 141 S. Ct. 2508 (2021).

II. The challenged WEC guidance is consistent with Wisconsin election statutes and the overarching "will of the electors" standard.

WEC's guidance about spoiling returned absentee ballots and obtaining replacement ballots faithfully tracks and implements the sometimes-ambiguous language of Wis. Stat. § 6.86(5)-(6) and related statutes. It also honors the overarching "will of the electors" standard, *id.* § 5.01(1), while guarding against any potential risk of double-voting or undermining ballot integrity.

The Circuit Court conceded that the interplay of these statutes is ambiguous and that *any* reading of them "leaves surplus language" and creates a "surplusage problem." App. 19-20. Yet rather than relying on the "will of the electors" standard that is supposed to be a tie-breaker in cases of such ambiguity, the Circuit Court held that Wis. Stat. § 6.84, discussed above, "replaces" that standard "with a requirement that ***all matters relating to absentee voting*** 'shall be construed as mandatory,'" resulting in "***strict***" and "***harsh***" rules of construction "leav[ing] no room for the sometimes difficult to pin down will of the voters." App. 19 (emphases added). That reading errs as a matter of law on multiple grounds.

The key statutory language appears at Wis. Stat. § 6.86(5), which provides in full (emphases added):

> (5) Whenever an elector returns a ***spoiled or damaged absentee ballot*** to the municipal clerk, or an elector's agent under sub. (3) returns a ***spoiled or damaged ballot*** to the clerk on behalf of an elector, and the clerk believes that the ballot was issued to or on behalf of the elector who is returning it, the clerk shall issue a new ballot to the elector or elector's agent, and ***shall destroy the spoiled or damaged ballot***. Any request for a replacement ballot under this subsection must be made within the applicable time limits under subs. (1) and (3)(c) (emphases added).

Section 6.86(6) in turn provides that, *"**[e]xcept as authorized in sub. (5) and s. 6.87(9)*** [which deals with correcting errors and omissions in absentee ballot envelope certifications[12]], if an elector mails or personally delivers an absentee ballot to

[12] Wis. Stat. § 6.87(9) provides: "If a municipal clerk receives an absentee ballot with an improperly completed certificate or with no certificate, the clerk may return the ballot to the elector,

the municipal clerk, the municipal clerk shall not return the ballot to the elector" (emphasis added).

As the Circuit Court conceded, the interplay of Subsections (5) and (6) is ambiguous, to say the least. Subsection (6) seems to contemplate the "return" of a ballot spoiled under Subsection (5) "to the elector," but Subsection (5) prohibits the return of a spoiled ballot to the elector, instead requiring the clerk to "destroy the spoiled or damaged ballot." As discussed in Part B of the Statement of the Case above, under WEC's challenged guidance a clerk "destroy[ed]" a spoiled ballot in this context by partially tearing the ballot-return envelope and marking it "spoiled," placing it for safekeeping and further verification in an official "spoiled ballots envelope," and following various recordkeeping and chain-of-custody requirements specified in the *August 2022 Guidance. See* pp. 12-13 *supra.*

Kormanik has advanced several arguments, some accepted by the Circuit Court, in support of her argument that an elector must declare her absentee ballot to be "spoiled" at the time she returns it to her local clerk to qualify to receive a replacement ballot. None of these arguments holds up under scrutiny.

1. Kormanik argued in her briefs and oral argument below that the challenged WEC guidance "instruct[s] municipal clerks to unlawfully ***return***" previously submitted absentee ballots to the electors who submitted them and thereby violates the "categorical prohibition on returning ballots to voters." Plaintiff's Br. in Supp. of Summ. Judg. and Dec. Judg., at 10, 17 (R. 132) (emphasis added); *see also id.* at 6, 8. But as WEC has consistently emphasized, with the exception of ballots contained inside improperly completed ballot return envelopes under Wis. Stat. § 6.87(9), previously submitted ballots are never "returned" to voters but

inside the sealed envelope when an envelope is received, together with a new envelope, if necessary, whenever time permits the elector to correct the defect and return the ballot within the period authorized under sub. (6)."

instead are retained by local election authorities subject to WEC's destruction, recordkeeping, and chain-of-custody protocols. *See* pp. 12-13 *supra.*

2. Kormanik also argued below that, under Section 6.86(5), ***only*** "the voter" may spoil her absentee ballot but that WEC's guidance somehow put electors "at risk of having their votes changed ***by someone else***." R. 132 at 7 (emphasis added). The DNC fully agrees with Kormanik that only a voter who has completed a ballot may "spoil" that ballot but disagrees that WEC's guidance in any way invited other people to change a voter's completed ballot behind the voter's back. That would be an unthinkable result for which there is no evidence in the record. But once a voter has decided in her sole discretion to "spoil" a previously submitted absentee ballot, there is nothing inconsistent with the statutory language for a clerk to follow the voter's instructions to "destroy" the old ballot and issue a new one, provided the request is timely and subject to WEC's recordkeeping and chain-of-custody requirements for spoiled and replacement ballots. Under WEC's guidance, it is the individual voter—not an election clerk or anyone else—who has sole control in deciding whether her previously returned absentee ballot is spoiled. The *August 2022 Guidance* provided that "[a]bsentee voters can request to spoil their absentee ballot and have another ballot issued." App. 24. Under the guidance, without such an unambiguous request from the voter, an absentee ballot could never be spoiled. Thus, there is no basis to believe that the guidance opens the door to rogue clerks or third parties spoiling ballots when that is not the specified intent ("will") of the elector.[13]

[13] Any suggestion that a clerk cannot physically spoil a ballot at an elector's request is similarly unfounded. Wis. Stat. § 6.86 provides for how a municipal clerk may respond when an elector returns a spoiled or damaged ballot. Its language does not prescribe or limit the manner of how or when a ballot may be "spoiled." In addition, allowing the clerk to spoil and destroy a ballot at the voter's direction is consistent with other ministerial acts the clerk does on behalf of the voter, including casting the ballot itself. *See* Wis. Stat. § 6.88(3).

3. The Circuit Court accepted Kormanik's argument that Section 6.86(5) only applies to absentee ballots that are declared by the voter to be "spoiled or damaged" ***at the time they are returned to the clerk***, as opposed to those that the voter declares to be spoiled ***after*** return because she belatedly realizes she made a mistake or has simply changed her mind. App. 21-22. But some voters 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 decided to vote for. His ballot is now "spoiled," even if previously returned. The ballot no longer reflects his "will." So long as his ballot has not yet been formally "cast," *see* pp. 31-34 *infra*, Section 6.86(5) should be read as giving 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).[14]

4. This reading of Section 6.86(5) is reinforced by the election code's overarching rule of construction, codified in its opening provision: "Except as otherwise provided, chs. 5 to 12 shall be construed to ***give effect to the will of the electors***, if that can be ascertained from the proceedings, notwithstanding informality or failure to fully comply with some of their provisions." Wis. Stat. § 5.01(1)

[14] By law, 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 absentee electors control that decision.

(emphasis added). Thus, consistent with the constitutionally guaranteed right to vote, Section 6.86(5) and other election statutes must be construed in a way that honors each voter's discernable "will." *See, e.g.*, *Ollmann v. Kowalewski*, 238 Wis. 574, 300 N.W. 183, 185-86 (1941) (construing "will of the electors" provision consistent with the "constitutional right to vote"); *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"); *see also Milwaukee Branch of NAACP v. Walker*, 2014 WI 98, ¶ 62 n.14, 357 Wis. 2d 469, 851 N.W.2d 262 ("Wisconsin's protection of the right to vote is even stronger [than the protections of federal law] because in addition to the equal protection and due process protections of Article I, Section 1 of the Wisconsin Constitution, the franchise for Wisconsin voters is expressly declared in Article III, Section 1 of the Wisconsin Constitution."); *Ollmann*, 300 N.W. at 185 ("Voting is a constitutional right and any statute that denies a qualified elector the right to vote is unconstitutional and void." (citation omitted)).

The Circuit Court held, however, that Section 6.84(2) "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,'" thereby "leav[ing] ***no room*** for the sometimes difficult to pin down will of the voters" and replacing that standard with a rule of "strict" and "harsh" construction. App. 19 (emphases added); *see also id.* at 18 ("the legislative policy language' of Section 6.84 "is so strong that it needs to be recognized as setting very firm guardrails to curb the analysis" of what ambiguous language in absentee-voting statutes means). This was fundamental error as a matter of law. As discussed above, the Supreme Court's recent decision in *Priorities USA* rejected any reading that would impose a principle of strict statutory construction of absentee-voting provisions, limiting the impact of Section 6.84 to the *consequences* that would follow if an absentee voting

statute were found to have been violated under the usual rules of statutory construction, *including* the "will of the electors" standard. *See* pp. 20-21 *supra*; *Priorities USA*, 2024 WI 32, ¶¶ 31-33, 41-46.

Section 6.86(5) gives a voter the right to request the destruction of a "spoiled or damaged ballot" and its "replacement" with a "new ballot," without addressing *when* the voter must declare the ballot to be spoiled and request a replacement. The question is, at the very least, subject to fair debate. In these circumstances, this ambiguity in Section 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 that she made a mistake or has had 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 WEC's record-keeping 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. These principles require construing the term "spoiled absentee ballot" in Section 6.86(5) to include an absentee ballot that, pursuant to a clear communication from the voter, no longer reflects her discernable intent.

5. Section 6.86(5) also must be read in harmony with other Wisconsin election statutes that permit voters to change their minds and "spoil" their ballots before those ballots are actually "cast" within the meaning of Wisconsin election law. For example, Wis. Stat. § 6.80(2)(c) provides that any elector voting at the polls on election day "who, by accident or mistake, spoils or erroneously prepares a ballot may receive another, by returning the defective ballot, but not to exceed 3 ballots in all." In addition, Wis. Stat. § 5.91(16), which sets requirements for ballots, voting devices, automatic tabulating equipment, and related equipment and materials, requires that any such system 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***" (emphasis added). WEC's

challenged guidance is consistent with these portions of the election code that provide voters an opportunity to correct mistakes or change their minds prior to the time their ballots are actually "cast." "When reasonably possible, we read statutes in harmony, and a harmonious reading is quite reasonable in this case." *Teigen,* 2022 WI 64, ¶ 50.

The Circuit Court denied that the "spoiling" provisions in Sections 5.91(16) and 6.80(2)(c) have any relevance to the "spoiling" provisions in Section 6.86(5). *See* App. 22-23. Here again, the Circuit Court rested its analysis on the false premise that Section 6.84 imposes a rule of "strict" and "harsh" construction on "all matters relating to absentee voting," leaving "no room for the sometimes difficult to pin down will of the voters" standard. App. 19. That reading is wrong as a matter of law, as discussed above. *See* pp. 20-21, 30-31 *supra.* Under the principle of statutory construction known as the "Presumption of Consistent Usage," this Court may assume that a "spoiled" ballot means the same thing no matter how it is ultimately "cast." *See Rise, Inc. v. Wis. Elections Comm'n,* 2024 WI App 48, ¶ 34, 413 Wis. 2d 366, 11 N.W.2d 241.

Kormanik characterizes the issue as whether "an elector can ***cast*** an absentee ballot, later change her mind, and then revote." Pl's Reply Br. in Supp. of Mot. for Summ. Judg. and Dec. Judg., and in Opp. to Def's Mots. For Summ. Judg., at 11 (R. 147) (emphasis added) ["Pl's Reply"]. She argues that, "just as an in-person voter cannot rescind an already-***submitted*** ballot, neither can an absentee voter." *Id.* at 6 (emphasis added). This argument confuses ***casting*** of ballots with ***submission*** of ballots. *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 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).[15]

[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." WEC, *If a voter casts an absentee ballot, but dies before election day, can the ballot be counted?*, https://elections.wi.gov/faq/if-voter-casts-absentee-ballot-dies-election-day-can-

WEC's spoiling guidance with respect to already-returned absentee ballots 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).[16] Kormanik 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). Kormanik argues the statutes contain "clear words," Pl's Reply at 5 (R. 147), but the word "submit" is never used in the relevant statutes to indicate when a ballot is officially "cast." The words are not interchangeable.

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.").

[16] The Circuit Court claimed that "Section 5.91 has nothing to do with absentee voting procedures," and that the "reference" to that section "is wildly out of context." App. 23. Respectfully, there is nothing "wild" about citing to a general principle about an elector's right "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." That principle is on point in this context.

CONCLUSION

The DNC respectfully asks this Court to reverse the Circuit Court's March 4, 2024 Order Granting Final Judgment to Plaintiff (App. 4-8) and to remand this case to the Circuit Court for dismissal with prejudice.

Dated this 1st day of May, 2025.

Respectfully submitted,

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CERTIFICATION REGARDING BRIEF FORM AND LENGTH

Pursuant to Wis. Stat. § 809.19(8g)(a), I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 9,008 words.

Dated: May 1, 2025

Electronically signed by Charles G. Curtis, Jr.
Charles G. Curtis, Jr.

CERTIFICATE OF ELECTRONIC FILING/SERVICE

I certify that on this 1st day of May, 2025, and in compliance with the requirements of Wis. Stat. § 801.18(6), I caused copies of this brief and the accompanying appendix to be electronically filed with the Clerk of Court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic service upon all parties' counsel who are registered users.

Dated: May 1, 2025

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