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CLERK OF WISCONSIN
COURT OF APPEALS

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

NANCY KORMANIK,

Plaintiff-Respondent,

v. Appeal No.: 2024AP000408

WISCONSIN ELECTIONS COMMISSION,

Defendant-Co-Appellant,

DEMOCRATIC NATIONAL COMMITTEE,

Intervenor-Co-Appellant,

RISE, INC.,

Intervenor-Appellant.

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RESPONSE BRIEF OF PLAINTIFF-RESPONDENT

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

LAW FIRM OF CONWAY, OLEJNICZAK & JERRY, S.C.

231 S. Adams Street
PO Box 23200
Green Bay, WI 54305-3200
(920) 437-0476

Attorney for Plaintiff-Respondent
Kurt A. Goehre, Bar No. 1068003

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Does WEC's spoliation instructions to municipal clerks and the general public violate Wisconsin's Election Code?

   The Circuit Court answered "yes."

   This Court should answer "yes."

2. Are WEC's spoliation instructions invalid because those instructions were neither approved by a two-thirds vote of Commissioners nor submitted for rulemaking?

   The Circuit Court did not reach this question because it concluded WEC's instructions violated Wisconsin's Election Code.

   This Court should answer "yes."

3. Does Kormanik have standing to bring this case?

   The Circuit Court answered "yes."

   This Court should answer "yes."

4. Can Kormanik pursue declaratory relief under the Uniform Declaratory Judgments Act?

   The Circuit Court answered "yes."

   This Court should answer "yes."

5. Was the Circuit Court competent to address Kormanik's case?

   The Circuit Court answered "yes."

   This Court should answer "yes."

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STATEMENT REGARDING ORAL ARGUMENT AND PUBLICATION

Publication is necessary because this case is of "substantial and continuing public importance" addressing not only a Wisconsin voter's standing to obtain declaratory relief about how she can cast a valid vote, but also whether Wisconsin elections will be administered according to statutory directives. Wis. Stat. §809.23(1)(a)(5). Oral argument is unnecessary because the briefs will fully present the issues and relevant legal authority.

INTRODUCTION

This case is about "the assertion of power" by "unelected" administrative bureaucrats in an "unlawful" and "invalid" manner. *Cf. Wis. Legis. v. Palm*, 2020 WI 42, ¶¶1, 59, 391 Wis. 2d 497, 942 N.W.2d 900. In Wisconsin, each agency must "promulgate as a rule each interpretation of a statute which it specifically adopts" to "govern" its "administration of that statute" and "[n]o agency may promulgate a rule which conflicts with state law." Wis. Stat. §227.10(1)-(2). Yet in 2022, the Wisconsin Elections Commission (WEC) did what "[n]o agency" is allowed to do.

WEC adopted an interpretation of the Election Code that directly conflicts with state law, and it didn't even promulgate that interpretation properly through rulemaking. The agency illegally instructed municipal clerks through a statewide memorandum to destroy unspoiled, validly submitted absentee ballots and to give the voter "a new one" in "the event" the voter "changes their mind." (R.3:2). WEC also told Wisconsin voters through a press release that if they "wish" to "spoil" their validly submitted absentee ballots because they changed their "mind" after returning the absentee ballot, clerks could help them do so. (R.4:1). But "[n]owhere does any statute authorize a clerk to spoil a ballot." (R.160:12). The Wisconsin Election Code contains no "buyer's remorse" provision granting a voter the right to flip-flop on their choice of candidate after casting his or her ballot; and there is "no authority for the clerk to return the ballot or spoil it for the voter" if the voter changes his or her mind. (R.160:13). Rather, Wisconsin law mandates that municipal clerks "shall not return" properly submitted absentee ballots to voters. Wis. Stat. §6.86(6).

WEC's illegal instructions put the Wisconsin voters who follow them at risk of being "disenfranchised." (R.160:11). Those instructions "add language to the statutes that is not there" (R.160:12), and create uncertainty about Nancy Kormanik's lawful method to cast her absentee ballot, diminishing her confidence in Wisconsin's electoral system, and putting her vote at risk of pollution by illegally cast ballots. (R.2:8 ¶ 26). To roll back the clouds of doubt, insecurity, and peril that WEC's instructions cast upon her legal privilege to vote by absentee ballot,

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Kormanik sought declaratory relief from Wisconsin's judiciary, whose duty is to "say what the law is." *State ex rel. Wis. Senate v. Thompson*, 144 Wis. 2d 429, 436, 424 N.W.2d 385 (1988).

The Circuit Court brought clarity where WEC's *ultra vires* action had caused confusion, vindicated Kormanik's right to vote, and declared that "Wisconsin law prohibits clerks or local election officials (i) from returning an elector's previously completed and returned absentee ballot, which was not spoiled at the time it was originally returned, to that elector so that the ballot may thereafter be amended or spoiled, or (ii) from amending, spoiling, or replacing any such ballot." (R.172:1-2).[1] This Court should affirm.

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STATEMENT OF THE CASE

I. WEC's Illegal Absentee Ballot Instructions.

Wisconsin's Election Code prohibits municipal clerks from returning absentee ballots to voters. Wis. Stat. §6.86(6). That general prohibition has two narrow exceptions. One is that if an absentee ballot lacks a properly completed certification, a clerk may return the ballot to the voter, inside the sealed envelope, for correction. *Id*. §6.87(9). The other is that a clerk shall issue a new absentee ballot to a voter if the original ballot was submitted in a "spoiled" or "damaged" condition and then destroy the "spoiled" or "damaged" ballot. *Id*. §6.86(5). Otherwise, clerks "shall not return" an absentee ballot to a voter. *Id*. §6.86(6).

In 2022, WEC issued instructions contradicting these statutory requirements. On August 1, 2022, WEC published a memorandum to all Wisconsin municipal and county clerks purporting to interpret Wis. Stat. §6.86(5)-(6). (R.3:1-4). WEC advised clerks that "voters changing their mind after returning their absentee ballots"

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[1] In so ordering, the Circuit Court carved out two exceptions, consistent with Wisconsin's Election Code, indicating that (1) clerks are not prohibited from issuing a replacement ballot to an elector when the elector returns a previously spoiled or damaged ballot to the clerk pursuant to Wis. Stat. §6.86(5); and (2) clerks are not prohibited from returning an absentee ballot inside the sealed envelope when it lacks a properly completed certificate pursuant to Wis. Stat. §6.87(9). (R.172:2).

can "request to spoil their absentee ballot and have another ballot issued" or "request to have their returned absentee ballot spoiled and instead vote in person . . . but they must request their ballot be spoiled by the appropriate deadlines." (R.3:1 (strongly recommending that the "request to spoil be in writing," rather than in-person)). That is, a voter who returned a completed absentee ballot could later request that a clerk spoil it on her behalf and return a new ballot back so the voter may alter her selections. This interpretation of Wis. Stat. §6.86(5)-(6) was promulgated without a vote by WEC commissioners and without WEC submitting its interpretation of Wisconsin law through formal rule-making procedures. (R.104:16-17, 47-48). On August 2, 2022, WEC made its instructions public in a press release, stating that "Wis. Stat. § 6.86(5) authorizes a voter to spoil his or her absentee ballot and be issued a new one. A voter may wish to spoil his or her absentee ballot to correct several issues, such as … changing his or her mind after returning the absentee ballot." (R.4:1).

WEC's instructions put voters who followed them at risk of being disenfranchised since Wisconsin law prohibits returning unspoiled absentee ballots to voters and "ballots cast in contravention" of that prohibition "may not be counted." Wis. Stat. §6.86(2). Yet, in the leadup to the 2022 midterm elections, WEC was actively telling voters they could vote in a manner that violates Wisconsin law. (R.4:1-2). Nothing in Wisconsin law authorizes a clerk to spoil and destroy an undamaged, validly submitted absentee ballot. Moreover, Wisconsin law forbids municipal clerks from returning properly certified and completed absentee ballots to voters. Wis. Stat. §6.86(5)-(6).

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II. Kormanik's Suit.

In September 2022, Nancy Kormanik, a registered voter and resident of Waukesha County who previously voted via absentee ballot and plans to do so again, brought this suit in the County's Circuit Court. (R.2:3-11). She asked the Circuit Court to declare that municipal clerks are prohibited from "spoiling" a previously completed and submitted absentee ballot; declare that any WEC publication that states otherwise shall be rescinded or otherwise removed from availability to

the public; declare that WEC failed to promulgate the documents at issue as administrative rules; and require WEC to correct its instructions. (R.2:10). After Kormanik moved for a temporary injunction, the Democratic National Committee ("DNC") and Rise, Inc. ("Rise"), intervened in the case, and opposed the relief sought. In October 2022, the Circuit Court temporarily enjoined WEC from publishing or otherwise communicating its illegal instructions. (R.106).

The DNC and Rise filed an interlocutory appeal of that order, which was later joined by WEC, from District IV. *See State ex rel. Kormanik v. Brash*, 2022 WI 67, ¶5, 404 Wis. 2d 568, 570, 980 N.W.2d 948. But the Wisconsin Supreme Court granted a supervisory writ, unanimously quashing Appellants' attempt to obtain appellate venue in District IV and sending the case back to this Court. *Id.* at ¶1. This Court denied the petitions for leave to appeal the Circuit Court's temporary injunction and held that WEC and its co-parties failed to show, among other things, "a substantial likelihood of success on the merits." (R.111:3). This Court concluded that "the circuit court's interpretation of the relevant statutes appears reasonable. On its face, Wis. Stat. § 6.86(6) generally prohibits a municipal clerk from returning an absentee ballot to the elector." *Id*.

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III. The Circuit Court's Final Judgment.

After the parties submitted cross motions for summary judgment, on November 29, 2023, the Circuit Court granted summary judgment in favor of Kormanik. (R.160). The Circuit Court held that it was competent to adjudicate the case because Kormanik's counsel properly served the attorney representing the interests of the Joint Committee for Review of Administrative Rules, as required by the Wisconsin Administrative Code. (R.160:3-6). The Court also held that Kormanik had standing because she "has at least a trifling interest in her voting rights," "competently framed the issues and zealously litigated the matter," and "there is no plaintiff who might bring a future suit who will enhance the court's understanding" of the issues of the case. (R.160:6-8).

On the merits, the Circuit Court found that WEC and the DNC's interpretation of Wisconsin's Election Code "add[s] language to the statutes that is not there" and determined that Rise's interpretation "plainly rewrites whole portions of the statute." (R.160:12). As a result, the Circuit Court granted "a permanent injunction" against WEC because "no authority for the clerk to return the ballot or spoil it for the voter is anywhere in the statutes, and such activities put the elector's vote at risk of not being included in the count." (R.160:15). On March 4, 2024, the Court entered final judgment in Kormanik's favor. (R.172:1-2).

Rise filed a petition to directly appeal to the Wisconsin Supreme Court, which the Supreme Court denied. (R.203). Thereafter, briefing in this appeal was held in abeyance until resolution of *Brown v. WEC*, which was decided on February 18, 2025. *Brown v. WEC*, 2025 WI 5, 414 Wis. 2d 601, 16 N.W.3d 619.

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STANDARD OF REVIEW

This Court "applies the same standards as those used by the circuit court" when it determined that Kormanik was entitled to summary judgment and "benefit[s]" from the circuit court's "analyses." *Krier v. Vilione*, 2009 WI 45, ¶14, 317 Wis. 2d 288, 766 N.W.2d 517. Affirming the Circuit Court's grant of summary judgment is appropriate "where there is no genuine issue of material fact" and Kormanik "is entitled to judgment as a matter of law." *Id*. Kormanik's "standing to seek declaratory relief presents a question of law" but "despite our de novo standard of review, we value a trial court's ruling on such a question." *Lake Country Racquet & Athletic Club, Inc. v. Vill. of Hartland*, 2002 WI App 301, ¶13, 259 Wis. 2d 107, 655 N.W.2d 189. Since WEC argues the Circuit Court lacked competency, WEC "has the burden of proving that assertion." *Vill. of Shorewood v. Steinberg*, 174 Wis. 2d 191, 200, 496 N.W.2d 57 (1993).

ARGUMENT

I. WEC's Spoliation Instructions Violate Wisconsin Law.

WEC's August 2022 spoliation instructions are contrary to Wisconsin law. WEC's instructions, essentially allowing "re-voting," run afoul of the Legislature's

simple and clear absentee-ballot process. In particular, WEC unlawfully directs clerks to "spoil" a voter's "ballot and receive a new one in the event the voter … changes their mind." (R.3,4). But voters who have changed their mind did not return a ballot that was "damaged," "spoiled," or "with an improperly completed certificate or no certificate." Wis. Stat. §§6.86(5), 6.86(6), 6.87(9). They are thus prohibited from receiving a new ballot.

Wisconsin law governing the procedures for returning and spoiling absentee ballots are unambiguous. 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)." Under §6.87(9), a clerk may return a ballot that lacks the required witness certification on the outside of absentee ballot envelope, which is not at issue here. Under §6.86(5), "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." WEC's instructions, which apply to completed ballots that are in perfectly fine condition when returned, do not fit within that provision. Ballots that, at the time they are submitted, reflect valid votes are not "spoiled or damaged." To the contrary, they are unspoiled and undamaged at the time submitted to the clerk and, as the statute makes plain, the temporal sequencing of events matters. The only time a clerk may issue a new ballot is when an elector "returns" a ballot in a "spoiled or damaged" condition. Wis. Stat. §6.86(5). In other words, the ballot spoliation or damage precedes the return.

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The plain unambiguous ordinary meaning of the absentee-voting provisions forbid a clerk from returning or spoiling an already completed and validly submitted absentee ballot. The "carefully regulated" procedures concerning absentee ballot voting enacted by the Legislature set forth a policy "to prevent the potential for fraud and abuse" associated with voting by absentee ballot. *Id.* §6.84(1)-(2). That is why the Election Code specifies that ballots cast in contravention of these provisions "may not be counted." *Id.* §6.84(2). As the Circuit Court observed, "[n]one of the

Defendants point to any explicit language in the statutes that would authorize the scheme whereby a clerk spoils the ballot for the elector, at their request, and sends out a new blank ballot for a do-over." (R.160:10). On appeal, Appellants offer nothing to rebut Kormanik's construction of Wisconsin's Election Code, which this Court has already concluded is "reasonable." (R.111:3).

Instead, Appellants seek to rewrite Wisconsin law to create a new statutory exception where none exists. They concoct a "buyer's remorse" exception to the Code's general prohibition that the "municipal clerk shall not return the ballot to the elector." Wis. Stat. §6.86(6). This "buyer's remorse" exception would allow a voter to cast an absentee ballot, then—for any reason or no reason at all—request a clerk spoil the validly submitted absentee ballot and give her a new ballot to re-vote. WEC Br. at 28; DNC Br. at 31. Without any statutory basis for this novel exception and procedure, Appellants attempt to jam it into various sections of the statutory text. None fit.

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A. A Voter's "Buyer's Remorse" After Returning a Completed Absentee Ballot Does Not Equate to a "Spoiled or Damaged" Ballot.

WEC and the DNC argue that their "buyer's remorse" exception fits into the "spoiled or damaged" exception of Wis. Stat. §6.86(5). Their interpretation is wrong for at least three reasons.

First, the statute provides that the spoiling and damaging of the ballot must occur before the elector "returns" the ballot to the municipal clerk. Wis. Stat. §6.86(5). As the Circuit Court observed, "[t]he only way to read" Section 6.86(5) is that "the spoiling or damaging were already done when the ballot was returned" as "there is no support for flipping that language to suggest it may be spoiled after it was returned." (R.160:14). That's fatal to Appellants' "buyer's remorse" exception, under which the ballot is indisputably unspoiled and undamaged when the voter returns the ballot to the clerk. Appellants suggest that an already-cast ballot can be later deemed spoiled or damaged whenever a voter changes his or her mind about who to vote for. But the statutory text only allows a clerk to issue a new ballot to a

voter when the voter "returns a spoiled or damaged" ballot under Wis. Stat. §6.86(5) and does not allow a voter to unilaterally deem a validly submitted ballot spoiled or damaged *after* having submitted it.

Second, WEC's and the DNC's definition of "spoiling" a ballot has no basis in the statute. WEC admits that the term "spoiled" is not defined in the statutory text. WEC Br. at 26-27. But instead of turning to ordinary meaning, they invent their own definition of the term by cherry-picking two words from a different section of the Election Code governing Election Day voting—not absentee ballot voting. In particular, they argue that because Section 6.80(2)(c) allows a voter who "by accident or mistake, spoils" her election-day ballot to receive a new ballot, the term "spoil" in Section 6.86(5) must mean any "accident or mistake." *E.g.*, WEC Br. 27. But the more natural reading is that "by accident or mistake" modifies *how* an in-person elector spoils her ballot. The statute permits in-person voters to receive a new ballot if they spoil their ballot "by accident or mistake," as opposed to intentionally or on purpose. The election-day procedures thus support Kormanik's reading that Section 6.86(5) doesn't permit voters to intentionally spoil their ballot after they've submitted it.

Furthermore, WEC and the DNC overlook that Section 6.80 lays out the "mechanics" of in-person voting, not absentee voting. The in-person and absentee voting provisions "set forth completely different procedures that have very little in common until election day when absentee ballots are cast at the same time and in the same place as the in-person votes." (R.160:14). Under Section 6.80(2)(c), an in-person voter who "by accident or mistake, spoils" a "ballot may receive another, by returning the defective ballot, but not to exceed 3 ballots in all." It is worth emphasizing that the "defective ballot" of an in-person voter has not yet been submitted in this scenario. Wis. Stat. §6.80(2)(c). Section 6.86, which sets the rules for voting by *absentee ballot*, does not allow a voter who "by accident or mistake, spoils" her ballot to receive a new one after mailing that ballot. Rather, an absentee voter must *return* a "spoiled" absentee ballot to the clerk prior to submitting it in order to

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receive a new one in exchange. *Id.* §6.86(5). This provision is meant to parallel Section 6.80(2)(c), not give absentee voters a right to a do-over ballot that doesn't exist for in person voters. In other words, neither in-person nor absentee voters can change their vote after they've submitted it.

Third, WEC and the DNC's "buyer's remorse" exception would render meaningless the Election Code's general prohibition that the "municipal clerk shall not return the ballot to the elector." Wis. Stat. §6.86(6). This statutory command that the "municipal clerk shall not return the ballot to the elector" must be given meaning. *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110 ("Statutory language is read where possible to give reasonable effect to every word."). But the "buyer's remorse" exception that WEC and the DNC advocate would swallow the rule. *Cf. Cuomo v. Clearing House Ass'n*, 557 U.S. 519, 530 (2009) (avoiding interpreting an exception in a manner that "would swallow the rule"). There is no authority supporting WEC and DNC's interpretation, and allowing such an invalid procedure "put[s] the elector's vote at risk of not being included in the count" pursuant to Wis. Stat. §6.84(2). (R.160:13).

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B. The Phrase "Request for a Replacement Ballot" Doesn't Create a "Buyer's Remorse" Exception.

Rise rejects WEC and DNC's attempt to cram the "buyer's remorse" exception into the "spoiled or damaged" exception of Wis. Stat. §6.86(5). Rise Br. at 23. Instead, Rise argues that §6.86(5) "permit[s] a clerk to return an *undamaged, unspoiled* absentee ballot to the voter when the voter wishes to spoil the ballot and vote a new one." *Id*. (emphasis added). Rise attempts to force the "buyer's remorse" exception into the phrase "request for a replacement ballot" in Wis. Stat. §6.86(5). *Id*. at 25. Rise believes this language allows clerks to return a completed, validly cast absentee ballot to the elector so that the elector can retroactively spoil it. *Id*. at 23. As the Circuit Court observed, "Rise is alone on this limb. No party agrees with them, and neither does this court." (R.160:12). Rise's interpretation suffers from at least three defects.

First, Rise's interpretation is atextual. Subsection 5 consists of two sentences that together describe the process for "request[s] for replacement ballots." Wis. Stat. §6.86(5). The first sentence instructs under what circumstances a "clerk shall issue a new ballot" – "[w]henever an elector returns a spoiled or damaged absentee ballot." *Id.* The second sentence provides "time limits" for that process. *Id.* Nothing in those two sentences authorizes the "return" of any ballots to the voter. Rather, Rise's interpretation decouples subsection 5's two sentences, leaving clerks adrift. Subsection 5 describes a single process for replacing ballots returned in a spoiled or damaged state. The first sentence describes "how," and the second sentence describes "when." Once the sentences are read together—as they must be—it is clear that only ballots submitted in spoiled or damaged condition can be replaced. *Kalal*, 2004 WI 58, ¶46.

Rise also argues that Wis. Stat. §6.86(5) & (6), when read together, "'authoriz[e]' municipal clerks" to "return the ballot to the elector." Rise Br. at 23-24. But Rise's interpretation doesn't account for when a municipal clerk is "authoriz[ed]" to return a ballot under Section 6.86(5) or what type of ballot the clerk is allowed to return to the voter. Section 6.86(5) authorizes returning a ballot to an elector "[w]henever an elector returns a spoiled or damaged absentee ballot." Further, that subsection does not authorize a clerk to return a ballot that the voter validly submitted to the clerk in the first place. Rather, it only authorizes a clerk to return a "new ballot" to the voter. Nothing in Section 6.86(5) concerns situations in which a voter changes her mind after already voting and requests to spoil the original ballot. Instead, that statutory subsection provides an exception solely for instances where an absentee ballot is "spoiled or damaged" at the time it is returned and, when that happens, the clerk can return a new ballot to the voter and destroy the spoiled or damaged ballot. Wis. Stat. §6.86(5).

Adopting Rise's reading would require rewriting the statutory text to authorize municipal clerks to return absentee ballots to electors whenever a voter who validly submitted her vote changes her mind and seeks a do-over ballot. Adopting

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Rise's reading would require rewriting the statutory text to allow for clerks to return a voter's original, validly submitted ballot—not a new ballot—so the voter can spoil it and then vote again. As the Circuit Court held, Rise's argument "plainly rewrites whole portions of the statute" and must be rejected. (R.160:12); *see Kalal*, 2004 WI 58, ¶44 (the "policy choices enacted into law by the legislature" demand "judicial deference").

By contrast, the exception set forth in subsection 6 does not rewrite subsection 5 to allow the clerk to return a ballot to the voter. Rather, it plainly notes that, if the clerk complies with subsection 5, it will not constitute returning the ballot to the elector and will not violate that prohibition in subsection 6. Moreover, it is important to remember that a voter can only vote a single ballot, so the clerk is still "return[ing]" the voter's "ballot" to the voter, albeit in new form, under subsection 5. Rise's alternative reading would have the narrow exceptions in subsection 5 swallow the rule in subsection 6, which prohibits municipal clerks from "return[ing] the ballot to the elector" in almost all circumstances. *Cf. Cuomo*, 557 U.S. at 530 (interpreting exceptions to "swallow the rule" is bad statutory interpretation).

Wisconsin law precisely regulates each step in voting and handling absentee ballots. *E.g.*, Wis. Stat. §§6.84-6.89. Given that precision, it would be strange for a legislature to have buried its desire for ballots to be returned to the voter upon request for any reason in an opaque cross-reference. Legislatures do not "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). Courts assume the legislature "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions." *Id*. Rise's interpretation would require the Court to do just that.

Second, Rise's interpretation is a solution in search of a problem. Rise argues that its interpretation must be adopted to prevent surplusage. Rise Br. at 23. However, Rise's semantic gymnastics are not needed to give meaning to Wis. Stat. §6.86(5). On its face, that statute informs when the ballot must be in a spoiled or damaged state—when it is returned—and establishes the time period during which

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a spoiled ballot is eligible for replacement. It is Rise's interpretation that fails to give meaning to the words "under this subsection" in the second sentence. If that sentence were a freestanding authorization for voters to obtain new ballots for any reason, as Rise contends, those words would be entirely unnecessary. But those words have meaning. They refer the reader back to the only other sentence in "this subsection," the first one, describing voters who have returned ballots in an already spoiled or damaged condition, which must be returned within the "applicable time limits." Wis. Stat. §6.86(5).[2]

Third, whether Rise's interpretation is correct misses the point. Kormanik's suit concerns whether WEC's spoliation instructions cohere with Wisconsin law, and the Wisconsin Election Code only enables *clerks* to "destroy the spoiled or damaged ballot." Wis. Stat. §6.86(5). It does not provide for *voters* to "get their [unspoiled] ballot back." *Contra* Rise Br. at 23. WEC's spoliation instructions permit voters to "request in writing that their returned absentee ballot be spoiled" by the municipal clerk. (R.4:1). No party, including Rise, has identified any text that permits voters to recall their validly submitted absentee ballot, upon request or otherwise, to allow the voter to later spoil the ballot. So, even if Rise were correct that Wisconsin law allows a voter to request the return of an unspoiled ballot, those arguments would not save WEC's instructions, which require ballots to be spoiled by the municipal clerk, not the voter. *Id*. Whether under Kormanik's interpretation or Rise's interpretation, the result is the same: WEC's rules are unlawful since Section

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[2] Even if, *arguendo*, the Circuit Court's interpretation did create surplusage, that does not necessarily mean that Rise's reading is better. "[S]ometimes legislatures *do* create surplusage and redundancies of language, and therefore the canon against surplusage is not absolute…. Sometimes drafters *do* repeat themselves and *do* include words that add nothing of substance." *Milwaukee Dist. Council 48 v. Milwaukee Cnty.*, 2019 WI 24, ¶¶17, 24, 385 Wis. 2d 748, 924 N.W.2d 153 (internal quotation and citation omitted). Rise's interpretation, which requires rewriting the statute, is less reasonable than the Circuit Court's reliance on the plain meaning of the words.

6.86 does not allow a voter to "get their [unspoiled] ballot back." *Contra* Rise Br. at 23.

C. The "Will of the Electors" Standard Doesn't Create a "Buyer's Remorse" Exception.

Stymied by the statutory text, the DNC argues that if there's any ambiguity, Section 6.86(5) "must be 'construed to give effect to the will of the electors.'" DNC Br. at 31. The DNC also argues that the statute is ambiguous because its meaning is "subject to fair debate." *Id.* But "a statute is not rendered ambiguous merely because the parties disagree as to its meaning," or even because "courts differ as to its meaning." *Lincoln Sav. Bank, S.A. v. Wis. Dep't of Revenue*, 215 Wis. 2d 430, 573 N.W.2d 522, 527 (1998). Even if the statute here were difficult to interpret, it's not ambiguous because it's not "capable of being understood in two or more different senses." *Id.* And because it's not ambiguous, the Court should not apply substantive canons to favor one interpretation over another. *Id.* Even if the statute is ambiguous, text and precedent require construing such absentee voting rules "as mandatory" requirements, Wis. Stat. §6.84(2), not as options waivable by the voter.

The "will of the electors" language in Section 5.01(1) only applies "[e]xcept as otherwise provided" in Wisconsin's Election Code. Section 6.84 provides that "[n]otwithstanding s. 5.01(1), with respect to matters relating to the absentee ballot process, ss. 6.86 … shall be construed as mandatory." Wis. Stat. §6.84(2). "[I]t is clear that the term 'notwithstanding' means 'in spite of.'" *Adams v. State Livestock Facilities Siting Rev. Bd.*, 2012 WI 85, ¶44, 342 Wis. 2d 444, 820 N.W.2d 404. Consequently, the absentee-ballot provisions are to be construed "in spite of" the "will of the electors" reference in Section 5.01.

Furthermore, Section 6.86 indicates that the "will of the electors" refers to the voter's intent at the time she submitted her ballot. Once the voter casts her ballot, the will of the voter has been established for purposes of that election. Subsection 6 demonstrates that the Legislature is concerned from that point forward with securing the integrity of the ballot against any effort to reach back into the collection of cast

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ballots and prevent those ballots from being accessed, altered or manipulated. This is further confirmed through the strict chain of custody requirements in Wis. Stat. §6.88(1), which requires the clerk to "securely" seal all absentee ballots upon return and forbids a clerk from breaking that seal until "during polling hours on election day." The Legislature reasonably viewed it unwise for cast ballots to be accessed by anyone, and for any reason, after they have been cast and before they have been opened on election day "to prevent the potential for fraud or abuse" and "to prevent undue influence on an absent elector." Wis. Stat. §6.84(1).

Additionally, precedent confirms that the "will of the electors" language doesn't support Appellants' interpretation. DNC argues that under *Priorities USA v. WEC*, "the 'will of the electors' standard" applies. DNC Br. at 30-31. But *Priorities USA* doesn't even mention the "will of the electors." Rather, it reaffirms that Subsection 6 "must be construed as mandatory and that ballots cast 'in contravention' of those procedures 'may not be counted.'" *Priorities USA*, 2024 WI 32, ¶31, 412 Wis. 2d 594, 8 N.W.3d 429. This Court has recognized following *Priorities USA* that the "will of the electors" language doesn't displace the statutes at issue here. *Rise, Inc. v. WEC*, 2024 WI App 48, ¶¶46-47, 413 Wis. 2d 366, 11 N.W.3d 241 (internal quotation and citation omitted). Consequently, "Wisconsin Stat. §6.84(2) mandates that Wis. Stat. §6.86[] be strictly construed" and the DNC's argument must be rejected. *Lee v. Paulson*, 2001 WI App 19, ¶7, 241 Wis. 2d 38, 623 N.W.2d 577.

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II. WEC's Spoliation Instructions Are Invalid Because Those Instructions Were Not Properly Approved or Promulgated.

Even if WEC's instructions didn't violate Wisconsin's Election Code, those instructions are still unlawful because they were not approved by two-thirds of WEC's Commissioners and constitute an improperly promulgated rule. As WEC acknowledges, the parties fully briefed and argued these issues in the Circuit Court proceedings. WEC Br. at 31-33. Although the Circuit Court did not reach these issues, this Court can affirm for any reason supported by the record. *Glendenning's*

Limestone & Ready-Mix Co. v. Reimer, 2006 WI App 161, ¶14, 295 Wis. 2d 556, 721 N.W.2d 704.

As a preliminary matter, WEC's instructions were not approved by the affirmative vote of at least two-thirds of the members of the commission. Wis. Stat. §§5.05(1e), 5.025. Other than actions relating to procedure of WEC (which no party contends is at issue here), that section expressly requires that "[a]ny action by the commission," requires "the affirmative vote of at least two-thirds of the members"—regardless of whether the instructions are a rule or mere guidance. Wis. Stat. §5.05(1e); Wis. Stat. §227.40(4)(a) (even if guidance, the instructions are "invalid" because the instructions were "adopted without compliance" with statutory "adoption procedures" requiring the affirmative vote of two-thirds of the Commissioners). WEC instructing clerks how to handle absentee ballots is certainly an "action" by WEC and WEC does not contest that its Commissioners didn't vote to approve the instructions.[3] WEC's instructions are thus invalid.

Additionally, the instructions were not properly promulgated through rulemaking. WEC must "promulgate as a rule each statement of general policy and each interpretation of a statute which it specifically adopts to govern its enforcement or administration of that statute." Wis. Stat. §227.10(1). "[W]hen an agency, in order to enforce or administer a statute in its purview, adopts its own understanding of that statute, it generally has interpreted the statute." *Tavern League of Wis., Inc. v. Palm*, 2021 WI 33, ¶25, 396 Wis. 2d 434, 957 N.W.2d 261. WEC's instructions interpret Wis. Stat. §6.86(5)-(6) and govern how those provisions will be administered by WEC and municipal clerks. (R.3-4). Yet, WEC failed to promulgate those instructions as a rule. Rulemaking exists precisely "to ensure" that a "controlling,

[3] WEC is required to post on its website its "minutes for each meeting or hearing conducted," which "shall include a summary of every action that the commission voted on, a record of each member's vote for or against every action requiring a vote," among other things, and such minutes must be "accessible to the public at all times." Wis. Stat. §5.05(5s)(a). There are no posted minutes of any WEC meeting demonstrating any vote to approve WEC's spoliation instructions at issue.

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subjective judgment asserted by one unelected official" is "not imposed in Wisconsin." *Wis. Legis.*, 2020 WI 42, ¶28. Since "[t]he procedural requirements of Wis. Stat. ch. 227 must be followed" and WEC's spoliation instructions fail to abide by those requirements, the instructions are "unenforceable." *Id*. ¶58.

WEC argues that its instructions did "not constitute an unpromulgated rule because [those instructions] did not have the effect of law" and were rather "guidance document[s]." WEC Br. at 31-33. But the instructions are an unpromulgated rule because the instructions are a "statement of policy" of "general application and having the effect of law," issued "to interpret" a statute "administered by" WEC. *Cf. Frankenthal v. Wis. Real Est. Brokers' Bd.*, 3 Wis. 2d 249, 89 N.W.2d 825, 826 (1958) (holding that "mimeographed instructions issued by the [Real Estate Brokers' Board] covering renewal of real estate broker's licenses[] constituted a 'rule'"). WEC's instructions constitute its "own understanding" of Wis. Stat. §6.86(5)-(6), a statute that WEC administers, and thus must be promulgated as a rule. *Tavern League of Wis.*, 2021 WI 33, ¶25.

WEC also argues that the instructions "serve to inform, but not compel." WEC Br. at 32. But the instructions impose mandatory requirements on municipal clerks "who have no discretion as to whether to apply" them. *Cholvin v. Wis. Dep't of Health & Fam. Servs.*, 2008 WI App 127, ¶29, 313 Wis. 2d 749, 758 N.W.2d 118. WEC doesn't argue that clerks were allowed to ignore and contravene the instructions. Contrary to WEC's post hoc interpretation, the instructions contain "mandatory language that 'speaks with an official voice.'" *Cf*. WEC Br. at 31 (quoting *County of Dane v. Winsand*, 2004 WI App 86, ¶11, 271 Wis. 2d 786, 679 N.W.2d 885). The instructions require clerks to "invalidate the spoiled ballot," and "issue a new absentee ballot" to a voter who "chang[es] his or her mind after returning the absentee ballot." (R.3-4). "The mandatory provisions are rules," not "guidance document[s]," which "cannot create a policy." *Milwaukee Area Joint Plumbing Apprenticeship Comm. v. Dep't of Indus., Lab. & Hum. Rels.*, 172 Wis. 2d 299, 321

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n.12, 493 N.W.2d 744 (Ct. App. 1992) (even mandatory provisions in internal agency manuals can constitute "an administrative rule").

WEC has authority over municipal clerks since it is generally responsible for "administ[ering]" election laws. Wis. Stat. §5.05(1). WEC can investigate and prosecute violations of such laws, order election officials to conform their conduct to the law, and enjoin violations of election laws. *Id.* §§5.05(2m), 5.06(1). Given WEC's broad powers with respect to election administration, its interpretations of the election statutes—especially when distributed to all municipal clerks around the state through mandatory language—have the force of law.

III. Kormanik has Standing.

Kormanik has standing under the Uniform Declaratory Judgments Act, sound judicial policy, and the Administrative Procedure and Review provisions of Wisconsin law. Each provide an independent basis for Kormanik's standing.

A. Kormanik has Standing Under the Uniform Declaratory Judgments Act.

Kormanik brings a declaratory judgment action under the Uniform Declaratory Judgments Act. When suit is brought under that statute, "Wisconsin courts are to liberally … afford[] relief from an uncertain infringement of a party's rights." *State ex rel. Zignego v. WEC*, 2020 WI App 17, ¶26, 391 Wis. 2d 441, 941 N.W.2d 284 (internal citation and quotation omitted). "A declaratory judgment is fitting when a controversy is justiciable." *Milwaukee Dist. Council 48 v. Milwaukee Cnty.*, 2001 WI 65, ¶37, 244 Wis. 2d 333, 627 N.W.2d 866. A controversy is justiciable if: (1) it is "asserted against one who has an interest in contesting it;" (2) the controversy is "between persons whose interests are adverse;" (3) the party seeking declaratory relief has "a legal interest in the controversy;" and (4) the issue involved in the controversy is "ripe for judicial determination." *Id*. "If all four factors are satisfied, the controversy is 'justiciable,' and it is proper for a court to entertain an action for declaratory judgment." *Miller Brands–Milwaukee v. Case*, 162 Wis.2d 684, 694, 470 N.W.2d 290 (1991).

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Of these four factors, opposing parties challenge only the third, which determines whether Kormanik has standing. *See Vill. of Slinger v. City of Hartford*, 2002 WI App 187, ¶9, 256 Wis. 2d 859, 650 N.W.2d 81 ("the legal interest requirement has often been expressed in terms of standing"). Generally, a litigant must allege facts that demonstrate an actual injury to a legally protected interest to obtain standing. *E.g.*, *State ex rel. First Nat'l Bank v. M & I Peoples Bank*, 95 Wis. 2d 303, 308, 290 N.W.2d 321 (Wis. 1980). But "a plaintiff seeking declaratory judgment need not actually suffer an injury before seeking relief under Wis. Stat. § 806.04(2)." *Milwaukee Dist. Council 48*, 2001 WI 65, ¶41. Rather, "declaratory suit[s]" are "an effort to avoid subjecting" the plaintiff to "loss due to compliance with an ordinance" that the plaintiff believes the government has "no legal or constitutional authority to impose." *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶42, 309 Wis. 2d 365, 749 N.W.2d 211.

Consequently, the opposing parties are mistaken that Kormanik needs to allege she is "personally injured" to sue under the Uniform Declaratory Judgments Act. *Contra* Rise Br. at 17. "The underlying philosophy of the [Act] is to enable controversies of a justiciable nature to be brought before the courts for settlement and determination prior to the time that a wrong has been threatened or committed." *Putnam v. Time Warner Cable of Se. Wis., Ltd. P'ship*, 2002 WI 108, ¶43, 255 Wis. 2d 447, 649 N.W.2d 626 (internal quotation and citation omitted). Indeed, the "preferred view" is "that declaratory relief is appropriate wherever it will serve a useful purpose," which is certainly the case here. *Lister v. Bd. of Regents of Univ. Wis. Sys.*, 72 Wis. 2d 282, 307, 240 N.W.2d 610 (1976).

The Circuit Court's grant of declaratory relief to Kormanik "serve[s] the useful purpose of settling the uncertainty" that she and other Wisconsin voters "face" concerning whether under Wisconsin law they can cast their absentee ballots and then later retrieve them on a whim and then re-vote, an action that is plainly prohibited by Wisconsin law. *Cf. Olson*, 2008 WI 51, ¶42. From her first filing, Kormanik has alleged that she is "a registered voter," who "resides in Waukesha County," has

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"voted via absentee ballot in prior elections," "will vote by absentee ballot" in upcoming elections, and is "uncertain as to the lawful method to cast absentee ballots in the future" due to WEC's illegal instructions. (R.2:8-9). Since Kormanik plans to vote by absentee ballot in upcoming elections, declaratory relief is useful to her in obtaining certainty concerning how WEC's instructions will affect her ability to cast her absentee ballot and whether those memos are consistent with law in the first place. Moreover, since WEC's instructions contradict Wisconsin law, the instructions cast "clouds" on Kormanik's "rights" and create "peril, insecurity, fear, and doubts" about how she can exercise the privilege of casting an absentee ballot. *State ex rel. La Follette v. Dammann*, 220 Wis. 17, 264 N.W. 627, 628 (1936). Relief under the Uniform Declaratory Judgments Act was made for precisely such "situations." *Id*.

WEC argues that Kormanik's interest in voting is not "legally protected" and that the Circuit Court didn't cite "any statute in support" of Kormanik's right to vote. WEC Br. at 23, 25. But as the agency tasked by the Legislature with administering elections, WEC certainly appreciates that Article III, §1(2) of the Wisconsin Constitution gives Kormanik the right to "vote." Additionally, the Circuit Court cited Wis. Stat. §6.84(1)-(2), which establishes that "voting is a constitutional right," and that "voting by absentee ballot is a privilege" subject to "strict" rules that "shall be construed as mandatory." (R.160:10-11). Kormanik has a legally protected interest in voting, and a right to ensure that her privileged absentee ballot is processed pursuant to the mandatory absentee ballot procedures. However, in light of WEC's instructions, her rights as a qualified elector are uncertain and insecure in the absence of declaratory relief. *See Zignego*, 2020 WI App 17, ¶ 26 ("courts are to 'liberally … afford relief from an uncertain infringement of a party's rights").

Therefore, Kormanik has standing under the Uniform Declaratory Judgments Act. *Id*.

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B. Kormanik has Standing as a Matter of Judicial Policy.

Because Wisconsin's "constitution lacks the jurisdiction-limiting language of its federal counterpart, 'standing in Wisconsin is not a matter of jurisdiction, but of sound judicial policy.'" *Friends of Black River Forest v. Kohler Co.*, 2022 WI 52, ¶17, 402 Wis. 2d 587, 977 N.W.2d 342. As a matter of sound judicial policy, the "law of standing" should "not be construed narrowly or restrictively." *Fox v. Wis. Dep't of Health & Soc. Servs.*, 112 Wis. 2d 514, 524, 334 N.W.2d 532 (1983). "'[E]ven an injury to a trifling interest' may suffice." *McConkey v. Van Hollen*, 2010 WI 57, ¶¶14-15, 326 Wis. 2d 1, 783 N.W.2d 855 (quoting *Fox*). "The purity and integrity of elections is a matter of such prime importance, and affects so many important interests, that the courts ought never to hesitate, when the opportunity is offered, to test them by the strictest legal standards." *State v. Conness*, 106 Wis. 425, 82 N.W. 288, 289 (1900). Wisconsin's judicial policy confers standing on voters even when "the precise nature of the injury" is "difficult to determine." *McConkey*, 2010 WI 57, ¶¶5, 17. Wisconsin courts have thus heard challenges by voters and voter organizations to the legal validity of guidance or voting procedures provided by election officials without questioning their standing. *E.g.*, *Jefferson v. Dane Cnty.*, 2020 WI 90, ¶40, 394 Wis. 2d 602, 951 N.W.2d 556 (original action providing declaratory relief to voter concerning erroneous "interpretation[s] of Wisconsin's election laws" by county clerks); *Priorities USA*, 2024 WI 32, ¶7 (declaratory relief that Wis. Stat. §6.87 allows the use of absentee ballot drop boxes). Kormanik has standing under these principles.

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As a preliminary matter, the DNC argues that judicial policy considerations concerning standing are confined to cases involving "a common law standing inquiry" rather than cases involving "statutory" issues. DNC Br. at 21. But "all the cases" confirm that "judicial policy" considerations are part of "the essence of the determination of standing, regardless of the nature of the case." *Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n*, 2011 WI 36, ¶40, 333 Wis. 2d 402, 797 N.W.2d 789.

Judicial policy considerations provide independent support for Kormanik's standing in this case for at least four reasons.

First, Kormanik has "competently framed the issues and zealously argued [her] case." *McConkey*, 2010 WI 57, ¶¶16-18. The Circuit Court agreed. (R.160:7-8). Kormanik has tirelessly litigated this case for almost three years against hundreds of pages of briefing not only from WEC, but from the national political committee of the Democratic Party, and an out-of-state 501(c)(4) organization. She won summary judgment on standing and the merits in the Circuit Court, and she successfully opposed Appellant's petition to bypass review by this Court at the Wisconsin Supreme Court. (R.203). Kormanik has unquestionably zealously argued and competently framed the issues here.

Second, "it is likely that if [Kormanik's] claim were dismissed on standing grounds, another person who could more clearly demonstrate standing would bring an identical suit, raising judicial efficiency concerns." *McConkey*, 2010 WI 57, ¶18. Judicial efficiency concerns were partly why the Circuit Court granted Kormanik standing, acknowledging that "it would be an awful shame to have put the litigants here, taxpayers, since counsel for WEC are publicly employed attorneys, and another court through the tremendous work that has been expended all over again." (R.160:7). The worst part about depriving Kormanik of standing after she has litigated her case at every level of Wisconsin's court system for nearly three years is that it would likely lead to Wisconsin courts later having to address the same merits issues in an emergency posture when a candidate inevitably challenges a voter's absentee ballot that has been illegally cast under WEC's flawed instructions. That will inevitably cause chaos in a future election, and there is no sound or just policy to support such an outcome.

A voter whose ballot is challenged and not counted due to it being cast in contravention of Wisconsin law can demonstrate standing as could a candidate who loses a razor-thin race. This Court need not wait for post-election lawsuits before clarifying the law and voters must not wait until the election is over to bring such

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election challenges. *Trump v. Biden,* 2020 WI 91, ¶¶16, 21-22, 394 Wis. 2d 629, 951 N.W.2d 568. Indeed, "the Judiciary is ill equipped to address problems—including those caused by improper rule changes—through post-election litigation," which "is truncated by firm timelines" and "sometimes forces courts to make policy decisions that they have no business making." *Republican Party of Pa. v. Degraffenreid*, 141 S. Ct. 732, 735 (2021) (Thomas, J., dissenting from the denial of certiorari). Recognizing Kormanik's standing preserves judicial economy by preventing a do-over of the same merits issues in this case in an emergency posture after a closely contested election. It also helps prevent the confusion that could occur if voters cast their votes in reliance upon WEC's illegal instructions, only to later have those votes disallowed.

Third, "the consequences" of the Circuit Court's "decision are sufficiently clear; [and] a different plaintiff would not enhance our understanding of the issues in this case." *McConkey*, 2010 WI 57, ¶18. The Circuit Court acknowledged that "the parties" have "made very clear the consequences of the court's decision, and there is no plaintiff who might bring a future suit who will enhance the court's understanding of them." (R.160:7). This action involves a purely legal challenge to WEC's spoliation instructions where factual development is largely unnecessary. The Circuit Court's ruling is based on the legal conclusion that WEC's instructions conflict with state law. A different plaintiff wouldn't change the meaning of Wisconsin law.

Fourth, "as a law development court," it is "prudent that the citizens of Wisconsin have this important issue of [election] law resolved." *McConkey*, 2010 WI 57, ¶18. Indeed, the Wisconsin Supreme Court has provided declaratory relief to voters concerning absentee ballot instructions provided by county election officials even under its original jurisdiction because such a case significantly affects "the community at large." *Jefferson*, 2020 WI 90, ¶12 (internal quotation and citation omitted). In *Jefferson*, the Wisconsin Supreme Court still granted declaratory relief even though the election had already occurred without spending a sentence on

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standing, noting that "the issue is of great public importance," "the issue is likely to arise again," and "a decision of the court would alleviate uncertainty." *Id*. at ¶15 (internal citation and quotation omitted). If law development is important enough that it would be prudent for Wisconsin's courts to construe *county level* guidance, it is even more important in this case involving *state level* instructions. The same judicial policy that conferred standing on the voters in *McConkey* and *Jefferson* applies here.

C. Kormanik has Standing under Chapter 227.

In "the context of judicial review of an administrative decision," standing is "to be liberally construed." *Friends of Black River Forest*, 2022 WI 52, ¶19 (internal citation and quotation omitted). To determine standing under Chapter 227, "courts ask first whether the decision of the agency directly causes injury to the interest of the petitioner and second whether the interest asserted is recognized by law." *Id*. (internal citation and quotation omitted). Under the first prong, an "[i]njury alleged, which is remote in time or which will only occur as an end result of a sequence of events set in motion by the agency action challenged, can be a sufficiently direct result of the agency's decision to serve as a basis for standing." *Id*. at ¶21 (internal citation and quotation omitted). Under the second prong, Chapter 227 affords broad protection against any "rule or guidance document" that "interferes with" or "threatens to interfere with" the "legal rights and privileges of the plaintiff." Wis. Stat. §227.40(1). Kormanik has at least four legally protectible interests that are injured by WEC's illegal instructions.

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1. WEC's Violations Injure Kormanik's Personal Interest in an Unpolluted Vote.

Kormanik has a legally protectable interest in ensuring that her vote is not polluted. Kormanik is harmed by "a condition of affairs that taints" the integrity of Wisconsin's electoral system. *Conness*, 82 N.W. at 289. Her interest in an unpolluted vote is protected by Wisconsin law. The Circuit Court held that Kormanik's voting interest is protected by Wis. Stat. §6.84(1), which recognizes that absentee

voting is a "privilege" and the voting procedures governing such voting are mandatory. (R.160:7-13). The Circuit Court found that Kormanik "has described an injury in fact from the challenged guidance that is sufficient to confer standing" to her interests protected by Wis. Stat. §6.84. *Id*.

The DNC argues that Kormanik hasn't presented "evidence" of "fraud or abuse" stemming from WEC's illegal instructions. DNC Br. at 15. But Kormanik need not do so to show "injury to a trifling interest" sufficient for standing. *Cf. McConkey*, 2010 WI 57, ¶15. A voter's re-cast ballot violates the rules, so it pollutes otherwise valid ballots. It doesn't need to be fraudulent to pollute the tally. *Cf. Carson v. Simon*, 978 F.3d 1051, 1058 (8th Cir. 2020) (an "inaccurate vote tally" is a concrete and particularized injury). Further, Wisconsin law protects Kormanik's interest in "prevent[ing] the *potential* for fraud or abuse." Wis. Stat. §6.84(1) (emphasis added). As the Circuit Court observed, "[s]ignificant to the standing discussion, the legislature did not just seek to guard against fraud or abuse. They went so far as to explicitly say they were guarding against potential fraud." (R.160:8); see also Wis. Stat. §6.84(1)(absentee ballot voting "must be carefully regulated to prevent the potential for fraud and abuse"). Kormanik's vote is polluted by both the potential for illegal votes and the potential for fraud.

Appellants cite the Wisconsin Supreme Court's recent decision in *Brown v. WEC* to argue that a voter has no cognizable interest in an unpolluted vote. But the *Brown* Court didn't interpret Wis. Stat. §806.04 or §6.84, or deal with any "mandatory" absentee ballot procedural statutes referenced in §6.84(2). Under Section 6.84(2) "matters relating to the absentee ballot process" regulated by Section "6.86" shall be "construed as mandatory." *Brown* reviewed a WEC administrative order issued in response to a voter's complaint filed with WEC under §5.06, based on a claimed violation of §6.855 by the Racine Clerk. 2025 WI 5, ¶¶3-9. All these statutory provisions are entirely irrelevant to Kormanik's standing. Further, the Court noted that the plaintiff in *Brown* did not "submit a 'vote pollution"' theory of standing, so the Court "decline[d] to express an opinion" about whether he would have

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had standing under such a theory. *Id*. ¶16 n.5. *Brown* doesn't disturb Kormanik's legally protectible interest in an unpolluted vote, nor undermine the Circuit Court's correct conclusion that Kormanik's interest in voting free from the potential for fraud or abuse is protected under Wis. Stat. §6.84(1).

2. WEC's Violations Injure Kormanik's Personal Interest in Equal Application of Wisconsin's Election Laws.

Kormanik has a legally protectible interest in the equal administration of Wisconsin's election laws. Wis. Const. Art. I, §1; *see also Arty's, LLC v. Wis. Dep't of Revenue*, 2018 WI App 64, ¶45 n.13, 384 Wis. 2d 320, 919 N.W.2d 590 ("We treat as consistent with each other" the U.S. Constitution's Equal Protection Clause an "the state provision guaranteeing that "[a]ll people are born equally free and independent, and have certain inherent rights" of "Wis. Const., Art. I, § 1."). "The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Trump*, 2020 WI 91, ¶31 n.12 (quoting *Bush v. Gore*, 531 U.S. 98, 104-05 (2000) (per curiam)).

From her first filing, Kormanik has alleged she is "harmed by the unequal administration" of Wisconsin's election laws by "local election officials and municipal clerks" some of whom "may comply with WEC's incorrect guidance, while other[s] may comply with the express requirements of Wisconsin statutes." (R.2:8 ¶26). The Circuit Court recognized that Kormanik alleged "injury" because "[a]t least one of the Defendants" asserts that "WEC memoranda are not binding on any election clerk or voter" and will "likely lead to inconsistent application from district to district, which would mean some voters would have more rights than others when it came to casting their absentee ballots." (R.160:8). No party questions this injury.

3. WEC's Violations Injure Kormanik's Personal Interest in Elections Being Administered According to Law.

"The right to vote presupposes the rule of law governs elections. If elections are conducted outside of the law, the people have not conferred their consent on the

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government." *Teigen v. WEC*, 2022 WI 64, ¶23, 403 Wis. 2d 607, 976 N.W.2d 519 (op. of Grassl Bradley, J.), *overruled on other grounds*, 2024 WI 32, 412 Wis. 2d 594, 8 N.W.3d 429. Kormanik has at least a trifling interest in contesting "invalidly submitted" legal measures that affect her voting rights. *Cf. McConkey*, 2010 WI 57, ¶17. For example, when Jason Rivera, a voter, sought declaratory relief due to uncertainty resulting from WEC instructions concerning the witness certification requirements attached to voting by absentee ballot, this court did not hesitate to reach the merits and review the claimed violations. *Rise, Inc.*, 2024 WI App 48, ¶¶13-16.

While *Teigen's* merits analysis has been overturned, the majority in *Brown* did not address *Teigen* and even the DNC recognizes that *Teigen's* standing analysis is still intact despite *Priorities USA*. DNC Br. at 22 n.8. "A plurality decision" of the Wisconsin Supreme Court is considered by this Court to be "persuasive" authority. *See State v. Lynch*, 2016 WI 66, ¶145, 371 Wis. 2d 1, 885 N.W.2d 89 (Abrahamson & Walsh Bradley, JJ., concurring in part). The Circuit Court considered *Teigen* persuasive because it is a "very similar[] situation to Kormanik in terms of the injury." (R.160:8). The *Teigen* plurality's standing reasoning applies here.

Appellants misunderstand the source of law that protects Kormanik's interest in an election administered according to law. It is not Wis. Stat. §5.06. *Contra* DNC Br. at 22. Instead, Kormanik's legally protectible interest stems from Wis. Stat. §6.84(1)-(2) and Wisconsin's Constitution. Section 6.84(1)-(2) provides that "the privilege of voting by absentee ballot must be carefully regulated to prevent the potential for fraud or abuse" and that absentee "[b]allots cast in contravention of the procedures specified" in Wisconsin's Election Code "may not be counted." The *Teigen* plurality agreed that Wis. Stat. §6.84 "entitled" voters "to have the elections in which they participate administered properly under the law." *Teigen*, 2022 WI 64, ¶21 (internal quotation and citation omitted).

Wisconsin's Constitution further protects Kormanik's interest in an election conducted according to the rule of law. It establishes that all government officials in this State "deriv[e] their just powers from the consent of the governed." *Id*. at ¶22

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(quoting Wis. Const. Art. I, §1). To the extent that WEC is violating Wisconsin's election laws, it is deriving its "power from force and fraud, not the people's consent." *Id*. WEC is "an agency created by the legislature" and possesses "only those powers which are expressly conferred or which are necessarily implied by the statutes under which it operates." *See Kimberly-Clark Corp. v. Pub. Serv. Comm'n of Wis.*, 110 Wis. 2d 455, 461-62, 329 N.W.2d 143 (1983). Nothing in the statutes under which WEC operates permits WEC to promulgate rules that contradict state law. To the contrary, WEC can only "[p]romulgate rules" that "interpret[] or implement[] the laws regulating the conduct of elections" or ensure "their proper administration." Wis. Stat. §5.05(1)(f). WEC cannot administer elections "in violation of governing law." *Teigen*, 2022 WI 64, ¶22. If it could, Kormanik would "possess only a hollow right." *Id*. Kormanik's interest in an election "conducted according to law" is legally protectible and sufficient for standing. *Id*. (internal quotation and citation omitted).

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4. WEC's Violations Injure Kormanik's Personal Interest in Placing Confidence in Wisconsin's Electoral Process.

WEC's illegal instructions injure Kormanik by undermining her confidence in the integrity of Wisconsin's electoral process. From her first filing Kormanik has alleged she is "uncertain" about "the risk that an individual may fraudulently spoil their previously completed and submitted absentee ballot" and believes that WEC's illegal instructions "will only cast doubt on the administration of our elections and cause a lack of voter confidence in our electoral process." (R.2:8 ¶26). The *Teigen* plurality agreed that "[a]llowing WEC to administer [Wisconsin] elections in a manner other than that required by law causes doubts about the fairness of the elections and erodes voter confidence in the electoral process." 2022 WI 64, ¶21 (internal citation and quotation omitted). "[T]he failure to follow election laws is a fact" that can "force[]" a voter to "question the legitimacy of election results" thereby "degrading the very foundation of free government." *Id*. at ¶25. "The people of Wisconsin deserve confidence that our elections are free and fair and conducted in

compliance with the law." *Trump*, 2020 WI 91, ¶58 (Hagedorn, J., concurring); *see also Teigen*, 2022 WI 64, ¶145 (Hagedorn, J., concurring) (discussing interest in "inspiring confidence in elections"). Kormanik's confidence interest inheres in both her right to vote and right to government by consent protected by Wisconsin's Constitution. Wis. Const. Art. I, §1; *id*. at Art. III, §1(2).

IV. Kormanik Can Proceed Under the Uniform Declaratory Judgments Act.

Appellants argue Kormanik cannot proceed under the Uniform Declaratory Judgments Act because Chapter 227 is "the 'exclusive' means of review of an alleged rule or guidance document." *E.g.*, WEC Br. at 16. The Circuit Court concluded the opposite, noting that it was competent to adjudicate Kormanik's case "under both sections 806.04 and 227.40." (R.160:3-6). Appellants misread Wisconsin law. Chapter 227 provides that "the exclusive means of judicial review of the validity of a rule or guidance document *shall be an action for declaratory judgment*" – not that Chapter 227 is the exclusive means of pursuing a declaratory judgment under Wisconsin law. Wis. Stat. §227.40(1) (emphasis added). To the contrary, Chapter 227 provides that "[c]ompliance with this chapter does not eliminate the necessity of complying with a procedure required by another statute." *Id*. at §227.02.

The Uniform Declaratory Judgments Act provides one such procedure. It empowers "[c]ourts of record" to "declare rights." Wis. Stat. §806.04(1). The Act even references Chapter 227's definition of "rule," confirming that the two provisions work together. *Id*. §806.04(11). Neither text nor precedent support Appellants' argument that an individual can't pursue declaratory relief under either the Uniform Declaratory Judgments Act or Chapter 227. Indeed, the Wisconsin Supreme Court indicated *in this case* that claims under Chapter 227 and the Uniform Declaratory Judgments Act are complimentary, not conflicting. *See State ex rel. Kormanik*, 2022 WI 67, ¶21 (citing Wis. Stat. §§227.40(1), 806.04(1)). Accordingly, Kormanik is entitled to declaratory relief under either the Uniform Declaratory Judgments Act or Chapter 227.

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V. The Circuit Court was Competent to Adjudicate Kormanik's Case.

As a last-ditch effort to prevent this Court from addressing the merits of Kormanik's case, WEC invokes the right of a non-party legislative committee to receive a copy of the complaint. It argues the Circuit Court wasn't competent to consider Kormanik's case because she supposedly didn't serve a designated agent of the Joint Committee for Review of Administrative Rules (JCRAR) with a copy of the complaint within 90 days of filing suit. But Kormanik did in fact serve a designated agent of the Joint Committee. Kormanik filed her case on September 23, 2022. (R.160:11). Six days later, on September 29, Kormanik's counsel served a file-stamped copy of the summons and complaint on counsel for the Wisconsin State Legislature. (R.146:2-3). On the same day, counsel for the Wisconsin State Legislature acknowledged service of the complaint as a "designated agent[]" authorized to receive service for the Joint Committee for Review of Administrative Rules. (R.:146:2-4); Wis. Stat. §13.56(2).

Kormanik's service is sufficient. "The purpose of serving" JCRAR is to give the committee "either the opportunity to avoid the litigation by suspending the rule or defend the rule in court which it has previously approved." *Richards v. Young*, 150 Wis. 2d 549, 555, 441 N.W.2d 742 (1989). Kormanik's timely service on counsel complied with the letter and purpose of the rule. As the Circuit Court concluded: "service on the attorney representing the legislature and specifically the interests of JCRAR was sufficient to accomplish the goal of the statutes in question, namely that JCRAR be able to exercise its privilege to join a case as a party if it so chooses." (R.160:5-6).

The Legislature's counsel is a "designated agent[]" authorized to receive service for the Joint Committee for Review of Administrative Rules. Wis. Stat. §13.56(2). It was undisputed, and the Circuit Court found, that the Legislature's counsel was "representing the interests of JCRAR" and had argued in Wisconsin Circuit Court during the time of service that WEC's actions "def[y] the Joint Committee [for Review of Administrative Rules ('JCRAR')]'s oversight authority."

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(R.160:5 (citing *White v. WEC*, No. 22-CV-1008, Doc. 178, at 7 (Waukesha Cnty. Cir. Ct. 2022)). The Circuit Court also found at the time of service that it was undisputed that the "same attorney" continued to represent "the interests of JCRAR as its registered agent in pending matters" which "concern challenges to rules" concerning "absentee ballots." *Id*.

As JCRAR's designated agent, the Legislature's counsel had authority to act on JCRAR's behalf and receive service. "When an attorney at law formally acknowledges the receipt of a document as an attorney on behalf of a client, it may be presumed (in the absence of contradiction) that he was authorized by the client to accept it." *Fontaine v. Milwaukee Cnty. Expressway Comm'n*, 31 Wis. 2d 275, 280, 143 N.W.2d 3 (1966). Here, the opposing parties have presented "no evidence whatsoever" that the Legislature's counsel "did not have authority to act as [JCRAR's] agent" and "[t]he fact" the Legislature's counsel represented JCRAR "previously" provides "additional support to the prima facie case of agency which arose from the written acknowledgment of counsel on the process papers." *Id*. It is undisputed that after Kormanik's attorney served the Legislature's counsel with the process papers, the Legislature's counsel acknowledged receipt. (R.146:4). "[I]n the absence of proof to the contrary the acknowledgment made by" the Legislature's counsel is sufficient evidence of service. *Fontaine*, 31 Wis. 2d at 280.

WEC cites *Mared Industries v. Mansfield* to argue that "there must be express authorization made by the JCRAR co-chairpersons, either through a document or words" that the Legislature's counsel is JCRAR's designated agent. WEC Br. at 20. But *Mansfield* concerned whether service on an employee of a corporation was sufficient service when the president of the corporation was being sued—not service on an attorney representing a client. 2005 WI 5, ¶¶6-8, 277 Wis. 2d 350, 690 N.W.2d 835. *Mansfield* noted that "*Fontaine's* discussion regarding a prima facie showing of agency represents 'special circumstances' for establishing an attorney as a client's agent." *Id*. at ¶21 n.11. So, *Fontaine* applies, and proper service was accomplished when Kormanik sent the Legislature's counsel the complaint and the

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Legislature's counsel confirmed receipt. The Circuit Court thus had competency to adjudicate Kormanik's case.

CONCLUSION

For the foregoing reasons, the Circuit Court's judgment should be affirmed.

Dated this 2nd day of June, 2025.

LAW FIRM OF CONWAY, OLEJNICZAK & JERRY, S.C., Attorney for Plaintiff-Respondent.

By: *Electronically signed by Kurt A. Goehre*
Attorney Kurt A. Goehre, State Bar No. 1068003

231 S. Adams Street
PO Box 23200
Green Bay, WI 54305-3200
(920) 437-0476

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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 produced with a proportional serif font. The length of this brief is 10,794 words excluding the parts that can be excluded.

Dated this 2nd day of June, 2025.

LAW FIRM OF CONWAY, OLEJNICZAK & JERRY, S.C., Attorney for Plaintiff-Respondent.

By: *Electronically signed by Kurt A. Goehre*
Attorney Kurt A. Goehre, State Bar No. 1068003

231 S. Adams Street
PO Box 23200
Green Bay, WI 54305-3200
(920) 437-0476

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CERTIFICATE OF SERVICE

I certify that on this 2nd day of June 2025, I caused a copy of this brief to be served upon counsel for each of the parties via the appellate court's electronic filing system and via e-mail.

Dated this 2nd day of June, 2025.

LAW FIRM OF CONWAY, OLEJNICZAK & JERRY, S.C., Attorney for Plaintiff-Respondent.

By: *Electronically signed by Kurt A. Goehre*
Attorney Kurt A. Goehre, State Bar No. 1068003

231 S. Adams Street
PO Box 23200
Green Bay, WI 54305-3200
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