Supreme Court of Wisconsin

No. 2024AP408

NANCY KORMANIK,
PLAINTIFF-RESPONDENT,

v.

THE WISCONSIN ELECTIONS COMMISSION,
DEFENDANT,

RISE, INC.
INTERVENOR-APPELLANT-PETITIONER,

DEMOCRATIC NATIONAL COMMITTEE,
INTERVENOR-CO-APPELLANT.

PETITION TO BYPASS

Diane M. Welsh,
State Bar No. 1030940
PINES BACH LLP
122 W. Washington Ave.,
Suite 900
Madison, WI 53703
Telephone: (608) 251-0101
Facsimile: (608) 251-2883
dwelsh@pinesbach.com

David R. Fox*
Richard A. Medina*
Samuel T. Ward-Packard,
State Bar No. 1128890
ELIAS LAW GROUP LLP
250 Massachusetts Ave. NW,
Suite 400
Washington, DC 20001
Telephone: (202) 968-4490
Facsimile: (202) 968-4498
dfox@elias.law
rmedina@elias.law
swardpackard@elias.law

* Admitted *pro hac vice* pursuant to SCR 10.03(4)(b)

Attorneys for Rise, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

The Waukesha County Circuit Court allowed Plaintiff Nancy Kormanik to challenge WEC guidance that did not affect her in the slightest. Before it was enjoined, that guidance allowed an absentee voter who had already returned her ballot to contact the clerk, request the ballot back, spoil the old ballot, and vote a new one. Kormanik herself never tried to spoil her own ballot. Nor did she identify any instance in which someone attempted to spoil another person's ballot. Kormanik's only stake in the issue was a nebulous concern about "vote pollution": she thinks it somehow devalues her vote if other *admittedly qualified* voters cast their ballots using a procedure she disagrees with.

This is exactly the type of claim that the standing doctrine should bar. But two years ago, in *Teigen v. Wisconsin Elections Commission*, 2022 WI 64, 403 Wis. 2d 607, 976 N.W.2d 519, three Justices of this Court proposed an unworkable expansion of the doctrine of standing. According to that plurality, *any* voter who alleges that other eligible voters have cast their ballots using an unlawful procedure has standing to sue the Wisconsin Elections Commission or municipal clerks—nothing more concrete or specific is needed. The plurality styled this novel theory of standing "vote pollution." *Id.* ¶ 25 (plurality op.).

Vote-pollution standing is not the law in Wisconsin. Four justices in *Teigen* rejected the attempt to stretch standing's limits; the concurring Justice, whose vote controlled the disposition of the case, called the plurality's standing reasoning "unpersuasive." *Teigen*, 2022 WI 64, ¶ 167 (Hagedorn, J., concurring in judgment). Yet in recent cases involving crucial questions of election administration, some circuit courts have assumed otherwise, treating vote pollution as Wisconsin's newest path to standing.

That assumption is wrong. As a matter of precedent and sound judicial policy, allegations of vote pollution do not confer standing. As to precedent, a plaintiff challenging WEC guidance must show what any other Chapter 227 plaintiff must show: an "injury in fact" to an interest that the statutes on which she relies "recognizes or seeks to regulate or protect." *Friends of Black River Forest v. Kohler Co.*, 2022 WI 52, ¶¶ 21, 28, 402 Wis. 2d 587, 977 N.W.2d 342 (quoting *Waste Mgmt. of Wis., Inc. v. Wis. Dep't of Nat. Res.*, 144 Wis. 2d 499, 505, 424 N.W.2d 685 (1988)). *Teigen* did not change that fact—three-Justice lead opinions do not make new law. And throwing open the courthouse doors to plaintiffs like Kormanik is far from "sound judicial policy." *Id.* ¶ 18 (quoting *McConkey v. Van Hollen*, 2010 WI 57, ¶ 15, 326 Wis. 2d 1, 783 N.W.2d 855). Doing so invites disruptive election-eve litigation by litigants with no real stake in the issues. If Kormanik has standing, then *any voter* may bring suit to disrupt Wisconsin election administration at any time—so long as they use the magical incantation "vote pollution."

Prompt clarification from this Court is needed. Recent years have witnessed an explosion in pre-election emergency litigation, and 2024 is likely to follow the trend. Unless the Court grants this petition and repudiates vote-pollution standing, Wisconsin courts are likely to see a series of lawsuits brought by litigants who have no real injury but seek to use the judiciary to disrupt the functioning of the state's election system.

This case presents the ideal opportunity to stem the tide before the fall 2024 election cycle. Kormanik's cause of action, claim, and theory of standing all match those of the *Teigen* plaintiffs, so this appeal presents all the same questions *Teigen* left muddled. The Court should grant bypass and make clear that

Wisconsin courts are not open for business to any plaintiff who wishes to make voting more difficult for others.

Bypass is also appropriate for a second reason: The circuit court's decision was wrong on the statutory merits and should be corrected before the fall election. Guidance in effect since at least 2014 has authorized an absentee voter to request that the clerk return a previously submitted absentee ballot to the voter, allowing the voter to spoil the ballot and exchange it for a new one. The circuit court held this guidance unlawful based on an improbably narrow reading of Wis. Stat. § 6.86, which authorizes an elector to make a "request for a replacement ballot" "within the applicable time limits." Its ruling, like its dramatic expansion of standing, was error.

For these reasons and those given below, the Court should grant the Petition and order expedited briefing and argument.

STATEMENT OF ISSUES PRESENTED

The issues presented for review are:

(1) Whether a voter has standing to challenge the procedures by which other voters submit their ballots based solely on a theory of "vote pollution"—*i.e.*, that invalidating other voters' votes would give the plaintiff's own vote more weight.

Plaintiff Nancy Kormanik challenged Wisconsin Elections Commission guidance related to voter-directed ballot spoiling on the theory that it was causing her to suffer vote pollution. She did not allege any more concrete or specific injury, nor identify any evidence of fraud at summary judgment. The circuit court ruled that Kormanik had standing. App. 15–17 (R.160:6–8).[1]

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

Kormanik challenged August 2022 Wisconsin Elections Commission guidance authorizing such return on the grounds that it violated the relevant statutes. The circuit court held that Wisconsin law does not authorize return of a previously submitted absentee ballot except for the purpose of certificate correction, App. 17–24 (R.160:8–15), and entered a declaratory judgment in Kormanik's favor to that effect, App. 5–9 (R.172).

---

[1] Parallel citations to R.# in this brief refer to document number and page number in the record on appeal. As of this filing, the record has not yet been assembled or transmitted, *see* Wis. Stat. § 809.15(4)(a); thus, all primary citations to record materials are to the Appendix.

STATEMENT OF THE CASE

I. Statutory Framework

Wis. Stat. § 227.40 provides the "exclusive means of judicial review of the validity of a rule or guidance document." Under that statute:

> The court shall render a declaratory judgment in the action only when it appears from the complaint and the supporting evidence that the rule or guidance document or its threatened application interferes with or impairs, or threatens to interfere with or impair, the legal rights and privileges of the plaintiff.

Wis. Stat. § 227.40(1).

Wis. Stat. § 6.86(6) provides that "if an elector mails or personally delivers an absentee ballot to the municipal clerk," the clerk may not "return the ballot to the elector" except "as authorized in [Wis. Stat. §§ 6.86(5) or 6.87(9)]."[2]

The first sentence of Wis. Stat. § 6.86(5) requires a municipal clerk to issue a new ballot to an elector "whenever an 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."

The second sentence of Section 6.86(5) authorizes an elector to make a "request for a replacement ballot" "within the applicable time limits."

---

[2] Wis. Stat. § 6.87(9) provides that "[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 . . . whenever time permits the elector to correct the defect and return the ballot."

II. Factual Background

Wisconsin's election administration agency has issued guidance about absentee voters' options for obtaining replacement ballots on several occasions over the past decade. This case concerns the validity of guidance issued on August 1 and 2, 2022, for purposes of the August 9, 2022, partisan primary. App. 150–53 (R.3); App. 154–55 (R.4).

The August 1 document advised clerks that an absentee voter could "request to spoil their absentee ballot and have another ballot issued as long as the appropriate deadline to request the new absentee ballot [had] not passed." App. 150 (R.3:1). As an alternative, it indicated that a voter could "request to have their returned absentee ballot spoiled and instead vote in person, either during the in-person absentee period or at their polling place on election day," subject to the same timing requirement. *Id*. The August 2 document, a press release directed to voters, provided equivalent procedural guidance, and cited Sections 6.86(5) and (6) as the authority permitting voter-directed absentee ballot spoiling. App. 154 (R.4:1).[3]

The circumstances in early August 2022 provide important context for the Commission's guidance issued at that time. Over much of the summer of 2022, Wisconsin witnessed a hotly

[3] The earliest guidance in the record is from 2014. That year, the Government Accountability Board—the Elections Commission's predecessor body in operation until 2016—issued a flowchart directing clerks how to process ballot-replacement requests. App. 156–58 (R.56:1). The 2014 flowchart authorized a clerk to issue a replacement ballot whenever a voter made a timely request. *Id.* In October 2020, the Commission issued more detailed, but materially similar, guidance about absentee ballot spoiling for purposes of the November 2020 election. App. 159–62 (R.57). The 2022 guidance at issue here is substantially identical to that 2020 guidance.

contested race for the Democratic nomination for U.S. Senate. Then, in the course of a few days in late July—just two weeks before election day—three of the four major candidates unofficially withdrew and endorsed the eventual Democratic nominee.[4] Despite having dropped out, the three withdrawn candidates received a total of more than 90,000 votes. Many of these wasted votes were likely from absentee ballots cast before those candidates dropped out.

The Commission's August 1 guidance document, issued in this context, noted that "[m]any voters" were contacting the Commission with questions about "spoiling their absentee ballot." App. 150 (R.3:1). The August 2 press release similarly indicated that "[v]oters and the media have been contacting the Wisconsin Elections Commission with questions about the process and rules for spoiling absentee ballots." App. 154 (R.4:1). The guidance indicated that voters' concerns included damaged ballots, errors made when voting their ballots, and changes of heart about which candidate to support, App. 150 (R.3:1)—understandable where

[4] *See* Bill Glauber, *Tom Nelson drops out of Wisconsin Democratic U.S. Senate primary, throws support to Mandela Barnes*, Milwaukee J. Sentinel (July 25, 2022), https://www.jsonline.com/story/news/politics/elections/2022/07/25/tom-nelson-bows-out-wisconsin-senate-race-supports-mandela-barnes/10140218002; Bill Glauber & Daniel Bice, *'Mandela won this race': Alex Lasry drops out of Wisconsin Democratic U.S. Senate primary, endorses Lt. Gov. Mandela Barnes*, Milwaukee J. Sentinel (July 27, 2022), https://www.jsonline.com/story/news/politics/elections/2022/07/27/alex-lasry-dropping-out-democratic-u-s-senate-race-sources-say/10161418002/; Bill Glauber, Daniel Bice & Ben Baker, *Sarah Godlewski withdraws from Wisconsin U.S. Senate Democratic primary, clearing path for Lt. Gov. Mandela Barnes*, Milwaukee J. Sentinel (July 29, 2022), https://www.jsonline.com/story/news/politics/elections/2022/07/29/sarah-godlewski-withdraws-democratic-u-s-senate-primary/10182719002/.

three of four leading candidates in the state's highest-profile race had withdrawn just days earlier.

III. Procedural History

A. Complaint and Parties

In a complaint filed on September 23, 2022—well after the primary and less than two months before the November general election—Plaintiff Nancy Kormanik challenged the validity of the Commission's August 2022 ballot-spoiling guidance. App. 167–68 (R.2, ¶¶ 11–18). Kormanik's complaint described her as a "registered voter who has voted via absentee ballot in prior elections in Waukesha County, including the August 2022 primary," and who planned to vote by absentee ballot in November 2022 as well. App. 165 (R.2, ¶ 2). The complaint raised a single claim, for "declaratory relief." App. 170 (R.2:8) (capitalization altered); *see also* App. 170–71 (R.2, ¶¶ 29–37). Kormanik sought a categorical declaration that "municipal clerks are prohibited from returning an absentee ballot after it was previously completed and returned to the clerk by the elector who was issued the absentee ballot." App. 172 (R.2:10).[5] Kormanik named the Wisconsin Elections Commission as the sole defendant. App. 165 (R.2:3).

Rise, Inc. moved to intervene on September 29, 2022. App. 174–77 (R.31). Rise is a nonprofit working to empower students to advocate for free public higher education and to end homelessness, housing insecurity, and food insecurity among college students. App. 178 (R.29, ¶ 2). Rise's intervention papers explained that it

[5] Kormanik subsequently conceded that a clerk may return a ballot and envelope to the voter for the purpose of certificate correction, *see* Wis. Stat. § 6.87(9), and may replace a ballot that is already spoiled or damaged upon receipt by the clerk, *see* Wis. Stat. § 6.86(6).

was in the midst of an extensive get-out-the-vote effort for Wisconsin's November 2022 election, and that absentee voting was a key component of that effort. App. 179–80 (R.29, ¶¶ 6–7). Rise indicated that Kormanik's lawsuit, filed "just six weeks before the election, and after absentee voting has already begun," threatened, if successful, to disrupt voters' options for curing defective absentee ballots. App. 181–82 (R.29, ¶¶ 12–13). The circuit court granted Rise's motion to intervene. App. 183 (R.84). The court also granted the Democratic National Committee's motion to intervene. App. 184 (R.72).

B. Temporary Injunction Litigation

Shortly after filing her complaint, Kormanik moved for a temporary restraining order and temporary injunction against the August 2022 guidance. Kormanik claimed that emergency relief was necessary because the guidance was harming her "in several ways": by creating "uncertainty as to whether a lawful vote submitted by absentee ballot to a municipal clerk may later be invalidated," by contributing to "the unequal administration of Wisconsin's election system, and by permitting "the counting of votes cast in violation of Wisconsin law, as such votes dilute or otherwise diminish the value of her vote." App. 189 (R.16:5). But Kormanik did not argue, never mind establish, that these generalized concerns fell in particular on her. Kormanik also complained of "potential disenfranchisement by identity theft and voter fraud," App. 194 (R.16:10), but introduced no evidence that such fraud was occurring, let alone that she was a likely victim of it.

The circuit court nonetheless granted a temporary injunction at the conclusion of a hearing on October 5. App. 25–27 (R.106) (order); App. 104–48 (R.104:77–121) (oral ruling at

hearing). The court enjoined the Commission from continuing to display, apply, or disseminate its August 2022 guidance or any equivalent guidance authorizing voter-directed ballot spoiling. App. 26 (R.106:2). And it directed the Commission to notify local elections officials of the court's decision. App. 26–27 (R.106:2–3). After this Court issued a supervisory writ directing transfer of Rise's petition for leave to appeal from District IV to District II, *see State ex rel. Kormanik v. Brash*, 2022 WI 67, 404 Wis. 2d 568, 980 N.W.2d 948 (R.115), the Court of Appeals denied leave, *Kormanik v. Wis. Elections Comm'n*, 2022AP1720-LV & 2022AP1727-LV (Ct. App. Oct. 27, 2022) (App. 198–201) (R.111).

C. Summary Judgment Litigation

After the 2022 election, Kormanik moved for summary judgment. Rise, the Commission, and the DNC all cross-moved.

Regarding her injury, Kormanik continued to argue that the challenged guidance was "pollut[ing] 'lawful votes.'" App. 219 (R.132:18) (quoting *Teigen*, 2022 WI 64, ¶ 25). And she again claimed that the guidance exposed her and "Wisconsin absentee voters in general" to a risk of "potential disenfranchisement by identity theft and voter fraud." App. 218 (R.132:17). But Kormanik offered no factual support for either allegation. Kormanik's affidavit—the only one she submitted—asserted only that she (i) was a registered voter; (ii) had voted by absentee ballot in "prior elections"; (iii) had voted by absentee ballot in August and November 2022 and in April 2023; and (iv) intended to vote "in the upcoming elections in the State of Wisconsin by absentee ballot and return such completed absentee ballots to [her] municipal clerk in compliance with Wisconsin law." App. 222–23 (R. 131:1–2).

Rise explained that because Kormanik's cause of action was Section 227.40(1), she had to satisfy this Court's two-part test for standing to bring a Chapter 227 action against an agency. App. 229–31 (R.139:6–8); App. 246 (R.156:3). Under that test, a plaintiff must show that the agency has (i) caused her an "injury in fact" to (ii) an interest that the statutes on which she relies "recognizes or seeks to regulate or protect." *Black River Forest*, 2022 WI 52, ¶¶ 21, 28 (quoting *Waste Mgmt. of Wis.*, 144 Wis. 2d 499, 505). Rise further explained that *Teigen* had not lowered the bar for what constitutes such an injury. App. 230–33 (R.139:7–10). To the contrary, four Justices in *Teigen* had *rejected* vote pollution as an actionable category of injury. *Teigen*, 2022 WI 64, ¶ 167 (Hagedorn, J., concurring in judgment); *id.* ¶¶ 210–15 (Walsh Bradley, J., dissenting).

The circuit court nevertheless held that Kormanik had standing and granted a declaratory judgment in her favor. In analyzing standing, the circuit court never cited this Court's controlling decision in *Black River Forest*, let alone analyzed Kormanik's evidentiary submissions under the two-part test the Court set out there. *See* App. 15–17 (R.160:6–8). And although the circuit court purported not to be relying entirely on *Teigen*, the only injury it attributed to Kormanik was vote pollution resulting, apparently, from the unsubstantiated *possibility* of fraud. *See* App. 16–17 (R.160:7–8) ("[E]lection fraud cannot be repaired. Once it happens, people are disenfranchised by improperly cast votes. A candidate will get votes improperly, and there is no way to adjust the vote count.").

Remarkably, the circuit court suggested that Kormanik had standing, among other reasons, because:

> if this court finds that Kormanik does not have standing to challenge WEC's memoranda, then it is very likely some other plaintiff will, and it would be an awful shame to have put the litigants here, taxpayers, since counsel for WEC are publicly employed attorneys, and another court through the tremendous work that has been expended all over again.

App. 16 (R.160:7). The circuit court cited no case to support the novel proposition that a court may hear a case brought by a plaintiff without standing because the court finds the prospect of wasted litigation efforts would otherwise be "an awful shame."

On the merits, the circuit court agreed with Rise that Kormanik's reading created a surplusage problem yet still ruled for Kormanik. *See* App. 21 (R.160:12). All that the court had to say about Rise's construction—the only reading offered by any party that avoided that surplusage problem—was the following:

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

Id. The circuit court did not indicate what portions of the statute Rise's construction "rewrites," or how.

The court entered final judgment in Kormanik's favor on March 4, 2024. App. 5–9 (R.172). Rise immediately noticed this appeal and requested expedited treatment of the appeal to allow for a decision in time for the fall 2024 election cycle. Kormanik objected, and the Court of Appeals declined to expedite on March 12, citing the lack of agreement by the parties. *See* Letter Regarding Briefing (Mar. 12, 2024).

STATEMENT OF REASONS TO GRANT THE PETITION

This Court's review is appropriate because this case presents "real and significant" questions of state law, Wis. Stat. § 809.62(1r)(a), regarding (i) standing in election-administration challenges and (ii) a voter's express statutory right to be the master of her ballot. This Court's fractured standing analysis in *Teigen* has contributed to substantial confusion in the lower courts, which only this Court is empowered to clarify. A decision by this Court will therefore help to "develop, clarify[, and] harmonize" "question[s] of law of the type that [are] likely to recur unless resolved by" this Court. Wis. Stat. § 809.62(1r)(c).

Bypass is appropriate because the importance of the questions presented means that the Court will likely "choose to consider [them] regardless of how the Court of Appeals might decide." Wisconsin Supreme Court Internal Operating Procedures at 8. Further, "there is a clear need to hasten the ultimate appellate decision" to resolve the applicable standards sufficiently in advance of the fall 2024 election cycle. *Id.*

The Court should grant bypass. And, as it has done in other time-sensitive election-related cases, it should do so now, before briefing in the Court of Appeals. *See* Order, *Teigen v. Wis. Elections Comm'n*, No. 2022AP91 (Jan. 28, 2022); Order, *Priorities USA v. Wis. Elections Comm'n*, No. 2024AP164 (Mar. 12, 2024). The fast-approaching fall election cycle justifies expedited review of the issues presented.

I. Bypass is warranted to clarify the law of standing before the fall 2024 election cycle.

This Court's fractured discussion of standing in *Teigen* has left the lower courts without clear guidance about how to analyze standing in election-law cases. Some courts have understood *Teigen* to recognize a new class of actionable injury—vote pollution—while others have voiced open frustration at *Teigen*'s lack of clarity. One court even described *Teigen* as a "tortured decision" that it was "loath to wade into." *Braun v. Wis. Elections Comm'n*, No. 2022CV1336, slip op. at 6 (Waukesha Cnty. Cir. Ct. Sept. 5, 2023) (App. 263).

This state of affairs is untenable. As this Court well knows, emergency litigation in an election year is as inevitable in Wisconsin as winter snow. Judges, litigants, and voters require prompt clarity about what sort of injury a plaintiff must allege and show when asking a court to intervene in urgent matters of election administration. This case allows the Court to provide such clarity in time to avoid further confusion and unnecessary litigation in the 2024 election cycle. The Court should grant the petition for bypass and make clear that the decision below was wrong: Naked, unsubstantiated allegations of vote pollution do not give a plaintiff standing under Chapter 227.

A. *Teigen*'s fractured discussion of election-law standing has caused confusion in the lower courts.

The Court's discussion of standing in *Teigen* has thrown that essential doctrine into disarray in the lower courts. Bypass is necessary to bring about clarity before the fall 2024 election cycle and the litigation it is sure to bring.

Teigen, like the instant case, was a Section 227.40 challenge to the validity of several WEC guidance documents. 2022 WI 64, ¶ 2 (majority op.). The guidance at issue authorized the return of absentee ballots to secure drop boxes. *Id.* ¶ 3. A hotly disputed threshold issue was whether the plaintiffs had standing to challenge such guidance. *Id.* ¶ 14. In total, four Justices said they did, but based on two quite different understandings of the relevant injury.

The three Justices who joined the lead opinion would have recognized vote pollution as an actionable injury in fact. *See id.* ¶ 25 (plurality op.). According to the lead opinion, "the failure to follow election laws is a fact which forces everyone . . . to question the legitimacy of election results. . . . Unlawful votes do not dilute lawful votes so much as they pollute them, which in turn pollutes the integrity of the results." *Id.* Thus, it sufficed to establish injury for the plaintiffs to "claim proper voting procedures were not followed" because of the challenged guidance. *Id.* ¶ 27.

Justice Hagedorn concurred in the holding that the plaintiffs had standing. *Id.* ¶¶ 163–66 (Hagedorn, J. concurring in judgment). But he rejected the lead opinion's reasoning, calling it "unpersuasive" and noting that it did not "garner the support of four members of this court." *Id.* ¶ 167. Instead, Justice Hagedorn credited plaintiffs with a statutory injury related to the conduct of election officials. He read Section 5.06 to give the plaintiffs a "legal right . . . to have local election officials in [their] area comply with the law." *Id.* ¶ 165. And he concluded that "unlawful WEC guidance can threaten harm to" that statutory right by "mak[ing] it likely local election officials will not follow election law." *Id.* ¶ 166.

Three dissenting Justices rejected both the lead opinion's and Justice Hagedorn's approaches to standing. *Id.* ¶¶ 210, 216 n.8 (Walsh Bradley, J., dissenting). The dissent reasoned that the lead opinion, in particular, extended the doctrine of standing "beyond recognition." *Id.* Its approach would "create a free-for-all" because it "delineate[d] no bounds whatsoever on who may challenge election laws." *Id.* ¶ 212. In so doing, the lead opinion invited the sort of "generalized grievances" that Wisconsin courts have long eschewed. *Id.* ¶¶ 213–14.

Given its lack of a four-Justice majority, *Teigen* did not change the law of standing. This Court's longstanding rule is that "a majority of the participating judges must have agreed on a particular point for it to be considered the opinion of the court." *State v. Elam*, 195 Wis. 2d 683, 685, 538 N.W.2d 249 (1995). And this Court, unlike the U.S. Supreme Court, does not apply the so-called *Marks* Rule to its own opinions. *Compare id.*, *with Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." (internal quotation marks omitted)); *see also State v. Lynch*, 2016 WI 66, ¶ 145, 371 Wis. 2d 1, 885 N.W.2d 89 (Abrahamson & Walsh Bradley, JJ., concurring in part) ("[T]he precedential effect (or lack thereof) of a 'lead opinion' is uncertain."); *Johnson v. Wis. Elections Comm'n*, 2022 WI 14, ¶ 243, 400 Wis. 2d 626, 971 N.W.2d 402 (Grassl

Bradley, J., dissenting) ("This court has never applied the *Marks* Rule to interpret its own precedent.").[6]

Yet the lower courts have not consistently understood *Teigen*'s standing discussion to be what it plainly is: a fractured one-off with little to no precedential value. In several recent cases, courts have assumed that *Teigen* established vote pollution as a binding principle of Wisconsin law. *See, e.g.*, *Brown v. Wis. Elections Comm'n*, No. 2022CV1324, slip op. at 13–14 (Racine Cnty. Cir. Ct. Jan. 10, 2024) (App. 289–90) ("It is the opinion of this Court that the *Teigen* plurality decision puts to rest the standing argument made in the present matter.");[7] Tr. of Judge's

---

[6] Consistent with these principles, the Court of Appeals concluded in an unpublished opinion affirming denial of a motion to intervene that *Teigen* did not make new law about what counts as an actionable injury. *See Rise, Inc. v. Wis. Elections Comm'n*, 2023 WI App 44, ¶ 27 & n.6, 995 N.W.2d 500, 2023 WL 4399022 (App. 270–71). The Court of Appeals explained that *Teigen* paragraph 25—the paragraph of the lead opinion embracing the vote-dilution concept—"does not have precedential value because no four justices in that fractured opinion expressed agreement with any point made in that paragraph." *Id.* ¶ 27 n.6 (citing *Elam*, 195 Wis. 2d at 685). For that reason, the Court of Appeals questioned whether "vote dilution" amounted to "an actual, concrete injury" under Wisconsin law. *Id.* ¶ 27. Even so, the Court of Appeals then "assume[d] without deciding that the vote-dilution theory could be a related interest that favors intervention." *Id.* ¶ 28.

[7] This Court currently has pending before it two bypass petitions in *Brown*. *See* Intervenor Black Leaders Organizing for Communities' Memorandum in Support of Petition for Bypass, *Brown v. Wis. Elections Comm'n*, No. 2024AP232 (filed Feb. 16, 2024); Petition for Bypass of the Wisconsin Elections Commission, *Brown v. Wis. Elections Comm'n*, No. 2024AP232 (filed Mar. 5, 2024). One of those petitions, that of the Commission, presents the issue whether "a voter who wants to see the law followed" is "aggrieved" in the sense required to bring a Section 5.06 complaint and appeal from such a complaint. Commission Pet. at 6. That question is related to, but distinct from, the standing question in this case, because it implicates a voter's statutory rights under Section 5.06. The Court should thus grant the instant petition whether or not it grants one or both of the petitions in *Brown*.

Decision at 22, *White v. Wis. Elections Comm'n*, No. 2022CV1008 (Waukesha Cnty. Cir. Ct. Sept. 7, 2022) (App. 315) ("Plaintiffs are further harmed by the counting of votes cast in violation of Wisconsin law as such votes dilute or otherwise pollute their votes and or other lawful votes including the votes of some of the Republican Party of Waukesha County.").

And in other cases, courts have struggled to determine what standing framework applies after *Teigen*. *See, e.g.*, *Braun*, slip op. at 6 (App. 263) ("This Court is loath to wade into the tortured decision that the Wisconsin Supreme Court gave lower courts in *Teigen*[.]"); *see also id.* ("While the Supreme Court was unable to give lower court's [sic] clear guidance on the standing issue in the context of election law cases, what can be gleaned from *Teigen* is that a majority of justices held that a voter . . . does have standing to bring the type of action against WEC as is brought here.").

In this case, the circuit court took a particularly odd tack. It first indicated that "the fractured nature of the plurality on the standing issue left [*Teigen*] of little help," App. 16–17 (R.160:7–8), but then promptly held Kormanik to have standing based on what can only be described as vote-pollution reasoning, *id.* ("Once it happens, people are disenfranchised by improperly cast votes. A candidate will get votes improperly, and there is no way to adjust the vote count.").

B. Clarity about standing in election-law cases is needed before the 2024 election cycle.

The post-*Teigen* confusion and error plaguing the lower courts' analysis of election-law standing demand this Court's intervention. And that intervention should be prompt, for two related reasons.

First, past experience indicates that Wisconsin's courts are likely to be inundated with fast-moving election-law cases in the coming months. In 2022 alone, at least six separate cases challenging WEC guidance were filed in July or later.[8] The last of those, *Concerned Veterans*, was filed just *two business days* before election day. And all but one of those six cases entailed temporary injunction litigation. Given the frequency and speed of emergency election litigation, clear rules of the road are indispensable. And standing is a fundamental issue likely to arise in every case.

Second, last-minute election litigation is by nature rather insulated from this Court's review. A circuit court's grant of a temporary injunction is not normally appealable as of right. *See* Wis. Stat. § 808.03(1). And a denial of leave to appeal by the Court of Appeals, *see id.* § 808.03(2), is a category of decision this Court reviews very rarely, *see In re J.S.R.*, 111 Wis. 2d 261, 262–63, 330 N.W.2d 217 (1983) (per curiam). This case illustrates the consequences of those barriers to review. For all practical purposes, Rise "lost" this case nearly two years ago, when the court granted Kormanik complete relief from the challenged guidance in a temporary injunction entered on *October 10, 2022*. Yet because the Court of Appeals denied Rise's petition for leave to appeal that decision (and, more recently, denied Rise's request to expedite), Rise now finds itself forced to seek bypass in order to obtain full appellate review in advance of *the November 2024 election*.

---

[8] *See* App. 165 (R.2:3) (Complaint in this case filed Sept. 23, 2022); *White v. Wis. Elections Comm'n*, No. 2022CV1008 (Waukesha Cnty. Cir. Ct.) (filed July 12, 2022); *Braun v. Wis. Elections Comm'n*, No. 2022CV1336 (Waukesha Cnty. Cir. Ct.) (filed Sept. 15, 2022); *Rise, Inc. v. Wis. Elections Comm'n*, No. 2022CV2446 (Dane Cnty. Cir. Ct.) (filed Sept. 27, 2022); *League of Women Voters of Wis. v. Wis. Elections Comm'n*, No. 2022CV2472 (Dane Cnty. Cir. Ct.) (filed Sept. 30, 2022); *Concerned Veterans of Waukesha Cnty. v. Wis. Elections Comm'n*, No. 2022CV1603 (Waukesha Cnty. Cir. Ct.) (filed Nov. 4, 2022).

Because a circuit court's failure to properly analyze standing in a fast-moving pre-election dispute may take two years or more to reach this Court, it is essential that the Court provide clear guidance well in advance.

C. This case is an ideal vehicle to clarify standing in election-law cases.

Granting bypass in this case will allow the Court to undo *Teigen*'s damage and clarify standing in election-law cases. As in *Teigen*, Kormanik's cause of action is Section 227.40(1), so the applicable statutory framework is identical. And as in *Teigen*, Kormanik challenges WEC guidance on the grounds that it authorizes clerks to take an action—returning unspoiled, undamaged absentee ballots to voters—that she claims the statutes do not permit. To succeed in that claim, Kormanik must establish through her "complaint and the supporting evidence that the [challenged guidance] or its threatened application interferes with or impairs, or threatens to interfere with or impair, [her] legal rights and privileges." Wis. Stat. § 227.40(1).

Kormanik has sued only the Commission, not local officials, and has not brought a Section 5.06 administrative complaint. She therefore lacks any credible argument to have standing based on that statute. *Contra Teigen*, 2022 WI 64, ¶¶ 165–66 (Hagedorn, J., concurring in judgment). Instead, Kormanik must show an "injury in fact" to an interest that the statutes on which she relies

"recognizes or seeks to protect." *Black River Forest*, 2022 WI 52, ¶¶ 21, 28 (quoting *Waste Mgmt. of Wis.*, 144 Wis. 2d 499, 505).[9]

Yet Kormanik bases her standing on the bare assertion that other voters are casting their ballots using an unlawful procedure–the implication being that her own vote would have more weight if those ballots were discarded. Kormanik's complaint alleged that the challenged guidance caused a risk of fraud, voter confusion, and identity theft, but Kormanik introduced no evidence to that effect at summary judgment, nor did she show that she is in any way personally exposed to such risks. These utterly speculative injuries are therefore irrelevant to the standing analysis at summary judgment—"the put up or shut up moment in a lawsuit." *Springer v. Durflinger*, 518 F.3d 479, 484 (7th Cir. 2008) (cleaned up).

Because the cause of action, nature of the claim, and the plaintiff's theory of standing all match *Teigen*, this case presents an ideal opportunity to answer the questions left open by *Teigen*. By granting bypass and deciding the appeal before the fall 2024 election cycle, the Court will thus provide much-needed clarity to the lower courts, litigants, the Commission, and voters.

D. The Court should repudiate the erroneous vote-pollution theory of standing.

The above points warrant a grant of bypass whatever one's view of the merits. Standing in election-law matters is simply too

[9] *Black River Forest* involved a petition for review under Sections 227.52 and 53, whereas Kormanik sought a declaratory judgment under Section 227.40(1). The statutory language governing who may bring claims under those provisions—and thus the standing inquiry—differs somewhat, but none of the provisions' text authorizes suit by someone, like Kormanik, who is not personally affected by the challenged conduct.

important a question to leave unsettled on the cusp of the fall 2024 election cycle. That said, bypass is also warranted in light of the merits, because the circuit court's analysis was egregiously wrong. Vote pollution is not an actionable injury at all, as a multitude of other courts have held. This Court has never recognized it as such and should not do so now. The Court should instead reject vote-pollution-based standing wholesale and hold that voters are not injured by alleged procedural irregularities in how other voters' ballots are cast. The Court should therefore hold that Kormanik lacks standing as a matter of law.

As a threshold matter, such a holding would not entail overruling *Teigen*. *See supra* Section I.A. No "majority of the participating judges" in *Teigen* "agreed on a particular point" related to vote pollution, meaning that the decision did not make law in that respect. *Elam*, 195 Wis. 2d at 685. There is thus nothing in *Teigen*'s discussion of standing to overrule.

For at least two reasons, a plaintiff who asserts only procedural irregularities in the casting of other voters' ballots does not have standing to bring a claim under Section 227.40(1). *First*, vote pollution is an archetypal "generalized grievance." *Teigen*, 2022 WI 64, ¶ 214 (Walsh Bradley, J., dissenting). By its nature, any voter may allege a polluted vote, and taken "to its logical conclusion . . . any registered voter would seemingly have standing to challenge any election law." *Id.* As the Eleventh Circuit has explained:

> No single voter is specifically disadvantaged if a vote is counted improperly, even if the error might have a mathematical impact on the final tally and thus on the proportional effect of every vote. Vote dilution in this context is a paradigmatic generalized grievance that cannot support standing.

Wood v. Raffensperger, 981 F.3d 1307, 1314–15 (11th Cir. 2020) (cleaned up).

Wisconsin courts have long recognized that they "are not the proper forum for citizens to 'air generalized grievances' about the administration of a governmental agency." *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) (quoting *Flast v. Cohen*, 392 U.S. 83, 106 (1968)); *see also Teigen,* 2022 WI 64, ¶ 213 (Walsh Bradley, J., dissenting) (same); *cf. Clarke v. Wis. Elections Comm'n*, 2023 WI 79, ¶ 140, 410 Wis. 2d 1, 998 N.W.2d 370 (Ziegler, C.J., dissenting) ("Parties alleging generalized grievances lack standing to demand the extreme statewide remedy they seek.").[10] There is no reason to treat vote pollution as an exception to this settled principle.

A "veritable tsunami" of federal courts agree and have uniformly rejected vote pollution's federal-law analogue, so-called vote dilution. *O'Rourke v. Dominion Voting Sys. Inc.*, No. 20-CV-03747-NRN, 2021 WL 1662742, at *9 (D. Colo. Apr. 28, 2021) (collecting cases), *aff'd,* No. 21-1161, 2022 WL 1699425 (10th Cir.

[10] Notwithstanding Chief Justice Ziegler's dissent in *Clarke*, the analysis in redistricting cases is different, because districting may cause voters' votes to be weighted differently. As the Eleventh Circuit has explained, such vote dilution injuries "require[] a point of comparison. For example, in the racial gerrymandering and malapportionment contexts, vote dilution occurs when voters are harmed compared to 'irrationally favored' voters from other districts." *Wood*, 981 F.3d at 1314 (quoting *Baker v. Carr*, 369 U.S. 186, 207–08 (1962)). Here, by contrast, no single Wisconsin voter's ballot is alleged to be polluted more than any other. That distinguishes Kormanik's claim from a claim that a law minimizes a voter's or a group of voters' voting strength or ability to access the political process *as compared to other voters*. *See, e.g.*, *Baker*, 369 U.S. at 207–08.

May 27, 2022).[11] As one federal district court wrote last month, a plaintiff alleging vote dilution is "simply raising a generalized grievance which is insufficient to confer standing." Mem. Op. at 9, *Hall v. D.C. Bd. of Elections*, No. 1:23-cv-1261 (D.D.C. Mar. 20, 2024), ECF No. 20 (App. 333). Because "Wisconsin has largely embraced federal standing requirements," this overwhelming federal-court consensus is strong persuasive authority. *Black River Forest*, 2022 WI 52, ¶ 17; *see also McConkey*, 2010 WI 57, ¶ 15 n.7.

Second, vote-pollution standing undermines the important objective of "ensuring that the issues and arguments presented will be carefully developed and zealously argued." *McConkey*, 2010 WI 57, ¶ 16. A plaintiff alleging vote pollution need not investigate the effects of the challenged law or policy before preparing the complaint. And such a plaintiff's lack of real and concrete personal stake in the dispute creates little incentive to develop a fulsome record as the case progresses.

---

[11] *See also, e.g.*, *Wash. Election Integrity Coal. United v. Wise*, No. 2:21-CV-01394-LK, 2022 WL 4598508, at *4 (W.D. Wash. Sept. 30, 2022) (collecting cases concluding that vote dilution does not create standing); *Feehan v. Wis. Elections Comm'n*, 506 F. Supp. 3d 596, 608 (E.D. Wis. 2020) (noting that several courts have concluded that similar claims of vote dilution are "generalized grievance[s]"); *Martel v. Condos*, 487 F. Supp.3d 247, 253 (D. Vt. 2020) ("If every voter suffers the same incremental dilution of the franchise caused by some third-party's fraudulent vote, then these voters have experienced a generalized injury."); *Paher v. Cegavske*, 457 F. Supp. 3d 919, 926 (D. Nev. 2020) ("But Plaintiffs' purported injury of having their votes diluted due to ostensible election fraud may be conceivably raised by any Nevada voter. Such claimed injury therefore does not satisfy the requirement that Plaintiffs must state a concrete and particularized injury."); *Am. C.R. Union v. Martinez-Rivera*, 166 F. Supp. 3d 779, 789 (W.D. Tex. 2015) ("[T]he risk of vote dilution[is] speculative and, as such, [is] more akin to a generalized grievance about the government than an injury in fact.").

This case illustrates the predictable results. Kormanik's complaint contained only vague, conclusory allegations about the challenged guidance's purportedly harmful effects: that it would increase the "risk of chaos, fraud, or other illegalities in the absentee voting process" and so would "impact a multitude of voters in the upcoming November 8, 2022 general election." App. 168 (R.2, ¶ 18). Her temporary injunction briefing added nothing of substance. *See* App. 189, 194 (R.16:5, 10). And her summary judgment briefing, filed well after the November 2022 election, failed utterly to deliver the promised impact on "a multitude of voters." *See* App. 218–19 (R.132:17–18). Instead, Kormanik doubled down on conclusory allegations, insisting that voter-directed ballot spoiling *risked* "identify theft and voter fraud" without a shred of evidence. *Id.*

The resulting judicial opinion was similarly light on concrete facts. Its three-page discussion of standing identifies no real-world instance of fraud, identity theft, voter confusion, or any other concrete injury to anyone at all, never mind Kormanik. App. 15–17 (R.160:6–8). Indeed, the circuit court's opinion did not even concretely find Kormanik to have suffered *vote pollution*. Instead, it speculated that in some unnamed future election, a "candidate will get votes improperly, and there is no way to adjust the vote count." *Id.* One purpose of standing doctrine is to ensure that the parties inform "the court of the consequences of its decision." *McConkey*, 2010 WI 57, ¶ 16. As the decision below illustrates, this Court's sanctification of vote-pollution standing would undermine that purpose.

II. Bypass is warranted to ensure that voters may direct the spoiling of their ballots in the fall 2024 primary and thereafter.

The time-sensitive nature of the underlying statutory issue in this appeal provides an additional reason to grant bypass. Wisconsin is sure to have hotly contested primary races this year. Three candidates are already pursuing the Democratic nomination in CD-3. The recently announced vacancy in CD-8 will likely lead to a contested Republican primary. And the just-concluded 2024 legislative redistricting moved quite a few incumbents into shared districts. In the event of late withdrawals from any of the resulting primaries—as happened in the 2022 Democratic senate primary—voters may once again seek to spoil their previously submitted ballots so as to cast effective votes. But under the circuit court's order, the WEC guidance authorizing such voter-directed ballot spoiling is enjoined.

The circuit court was wrong on the statutory merits. Statutory language must be "interpreted in the context in which it is used; not in isolation but as part of a whole;" and "where possible to give reasonable effect to every word, in order to avoid surplusage." *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110. Here, the disputed provisions read:

> **(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).
>
> **(6)** Except as authorized in sub. (5) and s. 6.87 (9), if an elector mails or personally delivers an absentee ballot to the municipal clerk, the municipal clerk shall not return the ballot to the elector. An elector who mails or personally delivers an absentee ballot to the municipal clerk at an election is not permitted to vote in person at the same election on election day.

Wis. Stat. § 6.86(5)–(6).

These provisions have three key features. *First*, subsection (6) expressly indicates that subsection (5) authorizes a clerk to "return" a previously submitted absentee ballot to the voter in some unspecified circumstance. *Second*, subsection (5)'s first sentence *requires* a clerk to "issue a new ballot" when the voter's first ballot is already spoiled or damaged upon submission to the clerk—no request by the voter is necessary. And *third*, subsection (5)'s second sentence plainly allows a voter to make a "*request* for a replacement ballot" within the applicable time limits.

Reading these provisions as a whole and to avoid surplusage, only one construction makes sense: A voter may request that the clerk return a previously submitted *unspoiled* ballot, spoil that ballot, then request a replacement ballot. Only that construction gives effect to every word, harmonizes the two subsections, and avoids all surplusage. That reading, moreover, makes good practical sense: So long as time allows, the voter should be the master of the ballot. Because "each election is unique and cannot be replicated," loss of the opportunity to cast an effective vote is a profound and irreparable harm. *Wis. Term Limits v. League of Wis. Muns.*, 880 F. Supp. 1256, 1266 (E.D. Wis. 1994). Granting bypass and reversing the circuit court will therefore ensure that

Wisconsin voters are not deprived of their "fundamental political right," *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886), this August or thereafter.

CONCLUSION

The Court should grant the petition for bypass and order an expedited briefing schedule that allows for resolution of this case well in advance of the fall 2024 election cycle.

Dated: April 4, 2024.

Respectfully submitted,

Electronically signed by Diane M. Welsh
Diane M. Welsh,
State Bar No. 1030940
PINES BACH LLP
122 W. Washington Ave.,
Suite 900
Madison, WI 53703
Telephone: (608) 251-0101
Facsimile: (608) 251-2883
dwelsh@pinesbach.com

David R. Fox*
Richard A. Medina*
Samuel T. Ward-Packard,
State Bar No. 1128890
ELIAS LAW GROUP LLP
250 Massachusetts Ave. NW,
Suite 400
Washington, DC 20001
Telephone: (202) 968-4490
Facsimile: (202) 968-4498
dfox@elias.law
rmedina@elias.law
swardpackard@elias.law

* Admitted *pro hac vice*
pursuant to SCR 10.03(4)(b)

Attorneys for Rise, Inc.

CERTIFICATIONS

I hereby certify that this petition conforms to the rules contained in Sections 809.19(8)(b), (8)(bm), (8g); 809.62(2), (4); and 809.81 of the Wisconsin Statutes. I further certify that this petition has been produced with a proportional serif font. The length of this petition is 7,702 words.

Dated: April 4, 2024.

Respectfully submitted,
Electronically signed by Diane M. Welsh