No. 2024AP232

IN THE WISCONSIN SUPREME COURT

KENNETH BROWN,
Plaintiff–Respondent–Cross-Appellant,

V.

WISCONSIN ELECTIONS COMMISSION,
Defendant–Co-Appellant–Cross-Respondent,

TARA MCMENAMIN,
Defendant–Appellant–Cross-Respondent,

BLACK LEADERS ORGANIZING FOR COMMUNITIES, DEMOCRATIC NATIONAL COMMITTEE, AND WISCONSIN ALLIANCE FOR RETIRED AMERICANS,
Intervenors–Co-Appellants–Cross-Respondents,

NON-PARTY BRIEF OF THE REPUBLICAN NATIONAL COMMITTEE AND THE REPUBLICAN PARTY OF WISCONSIN IN SUPPORT OF PLAINTIFF-RESPONDENT

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INTEREST OF AMICI

The Republican National Committee ("RNC") is a national committee under 52 U.S.C. § 30101. It manages the Republican Party's business, coordinates election strategy, and supports Republican candidates nationwide.

The Republican Party of Wisconsin ("Wisconsin GOP") is a recognized political party that works to promote Republican values and assist Republican candidates in federal, state, and local races. In the upcoming November general election, Republican candidates will appear on the ballot throughout Wisconsin for local, state, and federal office.

The RNC and the Wisconsin GOP have extensive expertise in election law, election administration, and voting rights. They have filed dozens of amicus briefs in election-related cases across the country, including in this Court during this election cycle.

ARGUMENT

I. This Court should respect the Legislature's judgment in creating a cause of action for voters to challenge lawless actions of election officials.

Election integrity requires public accountability. "The State's interest in preserving the integrity of the electoral process is undoubtedly important." *John Doe No. 1 v. Reed*, 561 U.S. 186, 197 (2010). And "[t]his 'interest in preserving electoral integrity is not limited to combating fraud. It extends more generally to promoting transparency and accountability in the electoral process.'" *Chula Vista Citizens for Jobs & Fair*

Competition v. Norris, 782 F.3d 520, 538 (9th Cir. 2015) (cleaned up) (quoting *Reed*, 561 U.S. at 197).

The Wisconsin Elections Commission ("WEC") was established in 2016 under a law that replaced part of the duties of the now-dissolved Government Accountability Board. The Board was led by six retired judges appointed by the Governor, and its mission was to "enhance representative democracy by ensuring the integrity of the electoral process." Wis. Gov't Accountability Bd., *2013-2015 Biennial Report*, perma.cc/62U7-8CBM. But the Legislature grew concerned that a veil of "non-partisan" descriptions concealed a growing political bias. Seeking transparency, the Legislature designed WEC for balanced partisanship instead of non-partisanship. WEC leadership is therefore split between three Republican commissioners and three Democratic commissioners, all of whom are appointed by different executive and legislative officials. *See* Wis. Stat. § 15.61(1)(a).

But WEC's design isn't a guarantee against partisan decisions. In 2020, for example, WEC staff refused to allow the Green Party's presidential ticket, Howie Hawkins and Angela Walker, access to the ballot for the November 2020 election. *Hawkins v. Wis. Elections Comm'n*, 2020 WI 75, ¶1, 393 Wis. 2d 629, 948 N.W.2d 877. The Green Party candidates "satisfied all requirements necessary to secure their spot on the ballot as candidates of the Green Party." *Id.* ¶ 84 (Grassl Bradley, J., dissenting). But their "nomination papers were nonetheless rejected by unknown and unaccountable Wisconsin Elections Commission staff, not by a majority vote of the Commission itself." *Id.* ¶ 32 n.2 (Ziegler, J., dissenting).

This Court refused to take the case, but three Justices criticized the decisions of WEC's staff. By closing the ballot to a political party that had satisfied all the rules, WEC had committed a serious "injustice" in the midst of the 2020 election. *Id.* ¶ 30 (Ziegler, J., dissenting). Even though "over half of the commissioners commented that their decision would, and should, be challenged in court," *id.* ¶ 33, the commissioners themselves did not fix the "blatant illegal action," *id.* ¶ 32. WEC thus held "no accountability to the people for its transgressions." *Id.* ¶ 86 (Grassl Bradley, J., dissenting). And the result "irreparably impair[ed] the integrity of Wisconsin's elections, and undermine[d] the confidence of American citizens" on those elections. *Id.* ¶ 86.

The Wisconsin Legislature foresaw the problems of agency partisanship. To help foster agency accountability, the Legislature created a complaint process for voters who "believe[] that a decision or action" of an election official "is contrary to law, or the official has abused the discretion vested in him or her by law." Wis. Stat. § 5.06(1). A voter can file such a complainant "with respect to any matter concerning nominations, qualifications of candidates, voting qualifications, … recall, ballot preparation, election administration or conduct of elections." *Id.* Once WEC acts on the complaint, the voter "may commence an action or proceeding to test the validity of any decision" in court. *Id.* § 5.06(2).

Statutorily created private rights of action are common mechanisms that legislatures adopt to hold government institutions accountable. For example, citizens can bring actions to enforce records requests against agencies that delay or withhold public records.

Id. § 19.37(1). And "any person aggrieved by" certain agency decisions is "entitled to judicial review of the decision." *Id.* § 227.53(1). Like Wisconsin, federal law makes good use of private rights of action in the election context. The National Voter Registration Act, for example, provides for a cause of action for any "person who is aggrieved by a violation" of the law. 52 U.S.C. § 20510(b)(1).

This Court's standing principles do not nullify Brown's statutory right to sue. "'[S]tanding 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 (citation omitted). Wisconsin courts thus "construe the law of standing 'liberally, and even an injury to a trifling interest may suffice.'" *Id.* ¶ 19 (citation omitted). "The gist of the requirements relating to standing is to assure that the party seeking relief has alleged such a personal stake in the outcome of the controversy as to give rise to that adverseness necessary to sharpen the presentation of issues for illumination of constitutional questions." *McConkey v. Van Hollen*, 2010 WI 57, ¶ 16, 326 Wis. 2d 1, 783 N.W.2d 855 (cleaned up). The Supreme Court has heard challenges by voters to the facial validity of election rules, sometimes without ever questioning a voter's standing to bring the case. *See Jefferson v. Dane Cty.*, 2020 WI 90, 394 Wis. 2d 602, 951 N.W.2d 556 (resolving a similar challenge brought by a voter to unlawful interpretations of election laws by county clerks).

And when the Legislature creates a cause of action, this Court owes that decision respect. Federal courts know this well. When federal courts evaluate Article III standing, they must "must afford due respect to

Congress's decision" to create a private right of action. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021) (citing *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340-41 (2016)). The legislature's judgment is "instructive and important" because the legislature is "well positioned to identify intangible harms" that meet the constitutional requirements for standing. *Spokeo*, 578 U.S. at 341. In fact, legislatures can "'articulate chains of causation that will give rise to a case or controversy where none existed before.'" *Id.* And Congress can "'elevate to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law." *TransUnion*, 141 S. Ct. at 2204-05.

Even the strict jurisdictional requirements of federal standing require courts to defer to legislative judgment in creating a cause of action. "Wisconsin has largely embraced federal standing requirements." *Friends of Black River Forest*, 2022 WI 52, ¶ 17. And this Court "look[s] to federal case law as persuasive authority regarding standing questions." *McConkey*, 2010 WI 57, ¶ 15 n.7.

This Court requires legislative deference, too. "Judicial deference to the policy choices enacted into law by the legislature requires that statutory interpretation focus primarily on the language of the statute." *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. And the Legislature could not have been clearer in giving voters the right to challenge and sue for administrative violations of election law. The "complainant who is aggrieved by an order" rejecting the complaint—or failing to act on it—can "appeal the decision of the commission to [the] circuit court for the county where the official conducts business or the complainant resides

no later than 30 days after issuance of the order." Wis. Stat. § 5.06(8). "Pendency of an appeal does not stay the effect of an order unless the court so orders." *Id.* These detailed procedures establish when, where, and how a complainant files a judicial action.

The Legislature's explicit right to "appeal" to a "circuit court" in Section 5.06 stands in stark contrast to the nebulous statutes invoked by the plaintiffs in *Friends of Black River Forest*. In that case, a conservation group challenged a land exchange between a private company and the Department of Natural Resources. *Friends of Black River Forest*, 2022 WI 52, ¶ 1. They relied on one statute setting out the legislature's policy goals "to provide areas for public recreation and for public education in conservation and nature study." Wis. Stat. § 27.01(1). But "[m]erely expressing a statement of purpose" did not "establish[] the requisite 'substantive criteria' by which petitioners could challenge" the land sale. *Friends of Black River Forest*, 2022 WI 52, ¶ 33. So, the plaintiffs tried another statute that gave the department power over "the general care, protection and supervision of all state parks." Wis. Stat. § 23.11. But like the statement of purpose, nothing that "text protects, recognizes, or regulates any person's interest in state parks or contemplates a challenge to agency action related to state parks." *Friends of Black River Forest*, 2022 WI 52, ¶ 34.

The plaintiffs then pointed to provisions that prescribed agency powers. They pointed to a statute that governed when the Natural Resources Board could "sell, at public or private sale, lands and structures owned by the state," Wis. Stat. § 23.15(1), required the Board to "present to the governor a full and complete

report" of the details of the land sale, *id.* § 23.15(2). But those regulations on *the Board* did not "empower[] private parties alleging environmental injuries to challenge Board decisions under this land-management provision." *Friends of Black River Forest*, 2022 WI 52, ¶ 36.

With no statutes supporting their standing, the plaintiffs next tried agency regulations. The Administrative Code provided that "[s]tate-owned lands within state park boundaries shall not be sold or otherwise disposed of." Wis. Admin. Code § NR 1.47(1). But that provision suffered from the same flaws as the statutes: "[n]othing in the text of these regulations indicate[d] they establish procedures designed to protect individuals or entities who may be interested in the lands." *Friends of Black River Forest*, 2022 WI 52, ¶ 43. The closest the plaintiffs came was citing a regulation that required "[t]he public" to "be provided opportunities to participate throughout the planning process for a property." Wis. Admin. Code § NR 44.04(7). But that statute didn't contemplate a right to judicial review of agency decisions, and the plaintiffs didn't allege that they were denied an "opportunit[y]" to "participate" in the "planning process" for the land-sale proceedings. *Friends of Black River Forest*, 2022 WI 52, ¶ 44. Because "[n]one of the statutes" the plaintiffs relied on "protects, recognizes, or regulates their asserted interests," they did not have standing to challenge the regulatory land sale. *Id.* ¶ 47.

This case is different because the statute is different. Mirroring language in other state and federal laws, Wis. Stat. § 5.06 gives a right of appeal to any "complainant who is aggrieved by an order issued" by WEC declining to act on the complaint. Unlike the

statutes in *Friends of Black River Forest*, Section 5.06 is an explicit "textual indication that this statute protects, recognizes, or regulates" an "individual's interests" in ensuring that WEC act on election officials' legal violations. *Friends of Black River Forest*, 2022 WI 52, ¶ 36.

"It is, of course, a solemn obligation of the judiciary to faithfully give effect to the laws enacted by the legislature, and to do so requires a determination of statutory meaning." *Kalal*, 2004 WI 58, ¶ 44. This case is not about vote dilution. It is about whether the Legislature created a statutory right to appeal WEC's order. It did, and this Court should "afford due respect" to that decision. *TransUnion*, 141 S. Ct. at 2204.

II. Clerks violate state law when they establish alternate absentee-ballot collection sites that result in an advantage to a political party.

Just a few months ago, this Court concluded that it is well equipped to analyze the partisan consequences of election administration. It ruled that it "will consider partisan impact when evaluating remedial maps" for redistricting. *Clarke v. Wis. Elections Comm'n*, 2023 WI 79, ¶ 69, 410 Wis. 2d 1, 998 N.W.2d 370. And it decided to consider partisan redistricting effects even though the Wisconsin Constitution and federal law are silent on that issue. *See id.* ¶¶ 64-67.

This case should be much easier. State law provides that "no site" for absentee-ballot collection "may be designated that affords an advantage to any political party." Wis. Stat. § 6.855(1). Unlike the redistricting context, the statute here explicitly prohibits rules that

skew in favor of one political party. Nevertheless, several parties in this case resist that conclusion.

Read naturally, the law prohibits designating sites that result in a political party's benefit. At least two textual features confirm that the Legislature was concerned about the partisan effects of alternate absentee-balloting locations. First, the Legislature drafted the prohibition in passive voice. "[N]o site," it said, "may *be designated* that affords an advantage to any political party." Wis. Stat. § 6.855(1) (emphasis added). Of course, the "governing body of a municipality" is the party that does the designating. *Id.* There is no ambiguity there. But by drafting the prohibition on political advantage in passive voice, the Legislature "framed" the statute "without respect to any actor's intent or culpability." *Bartenwerfer v. Buckley*, 598 U.S. 69, 75-76 (2023). Whether the "governing body of a municipality" targets a particular party or intends to benefit a particular party are irrelevant. Wis. Stat. § 6.855(1). The "passive voice" imports a "natural breadth" to the object of the action. *Bartenwerfer*, 598 U.S. at 77.

Second, the verb phrase applies to the "site," not to the "governing body." Wis. Stat. § 6.855(1). That is, the Legislature did *not* write that the "governing body shall not afford an advantage to any political party" when designating an alternate site. Instead, it prohibited designating any "site … that affords an advantage to any political party." *Id.* In other words, the Legislature targeted the advantageous *effects* of a site for "any political party." *Id.* Sites don't make decisions. They don't give out money or favors that would benefit corporate entities. The only plausible reading is that the law regulates the effects of a site. And when those

effects "afford[] an advantage to any political party," the "governing body" is prohibited from designating such a "site." *Id.* That is the definition of a partisan effect.

Brown's analysis of the effects of Racine County's alternate locations fits comfortably within the statute's effects-oriented language. The record supports the conclusion that the alternate locations benefited Democratic voters and the Democratic Party. *See* Brown Br. at 32-34. The other parties largely dispute the validity of Brown's methodology. *See* McMenamin Br. at 13; DNC Br. at 34-40; WARA Br. at 20-28; WEC Br. at 39-41; BLOC Br. at 19-21. But a "fact-intensive inquiry," Dkt. 59:55, does not absolve WEC of complying with state law.

Were there any doubt about the site locations' partisan effects, the Court need only look at the Democratic National Committee's intervention in their defense. The DNC asserts "a strong interest in this litigation" because overturning WEC's decision would "interfere with DNC's core mission of supporting the election of Democratic candidates to federal, state, and local offices." Dkt 19:7. The "DNC's interests would be directly harmed by Plaintiff's requested relief," which is why the circuit court permitted the "DNC to defend those interests in this action." Dkt. 19:10. The Court should take the DNC at its word.

There is also no difference between a "partisan advantage" and an "advantage" to a "political party." They describe the same thing. As defined under Wisconsin law, political parties exist to elect "candidates" to public office—a necessarily partisan endeavor. *See* Wis. Stat. § 11.0101(26)(a) (defining "political party"). A partisan advantage to Democrats is thus an

"advantage" to the "political party" of Democrats. *Id.* § 6.855(1). Nothing in the statute narrows the advantage to specific kinds of benefits that affect "a political party's operations" or budgets, for example. WEC Br. at 40. Benefits come in all shapes and sizes, and the statute does not distinguish between large or small, budgetary, or political. After all, the DNC did not intervene in this case to defend its corporate status as a political committee, or the location of an office. It intervened to defend its "partisan interests" in elections. Dkt. 19:11.

Attempts to add words to the statute—such as an "overtly" partisan advantage—also fail. DNC Br. 33. "One of the maxims of statutory construction is that courts should not add words to a statute to give it a certain meaning." *State v. Neill*, 2020 WI 15, ¶ 23, 390 Wis. 2d 248, 938 N.W.2d 521 (citation omitted). Nothing in the statute requires Brown to show that the advantage to a political party is "overt," "egregious," or "obvious." So long as the partisan advantage is present, it is prohibited.

CONCLUSION

For the foregoing reasons, the Court should affirm the circuit court's judgment and overturn WEC's decision.

Dated this day August 2, 2024

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CERTIFICATION

I hereby certify that this non-party brief conforms to this Court's May 3, 2024 briefing order in this case and to the rules contained in Rule 809.19(8)(b), (bm), and (c) for a brief produced with a proportional serif font. The length of this brief is 11 pages and 2,864 words.

Dated this day August 2, 2024

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