STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV
No. 2023AP001985

Khary Penebaker and Mary Arnold,
Plaintiffs-Cross-Respondents,

Bonnie Joseph,
Plaintiff-Appellant-Cross-Respondent,
v.

Andrew Hitt, Robert F. Spindell, Jr., Bill Feehan, Kelly Ruh, Carol Brunner, Edward Scott Grabins, Kathy Kiernan, Darryl Carlson, Pam Travis, and Mary Buestrin,
Defendants,

James R. Troupis,
Defendant-Respondent-Cross-Appellant,

Kenneth Chesebro,
Defendant-Respondent,

State Farm Fire and Casualty Company,
Intervenor-Respondent.

ON APPEAL FROM THE
CIRCUIT COURT FOR DANE COUNTY
THE HONORABLE FRANK J. REMINGTON PRESIDING

OPENING BRIEF OF PLAINTIFF-APPELLANT-CROSS-RESPONDENT BONNIE JOSEPH

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INTRODUCTION

Donald Trump lost the 2020 presidential election to Joseph Biden, both nationally and here in Wisconsin. But Trump and some of his supporters refused to accept that result. When it became clear he had not received enough votes to win, Trump and his allies came up with a plan for nullifying the will of the voters. In several key swing states that Trump lost, including Wisconsin, Republicans purporting to be presidential electors met at the direction of Trump's advisors, signed fraudulent electoral college certificates claiming he won, and transmitted them to federal and state officials as though they were legitimate electoral votes.

The aim of this fraudulent elector scheme was to sow chaos at the Joint Session of Congress on January 6, 2021, where the electoral votes would be officially counted. The schemers wanted Vice President Michael Pence, in his role as President of the Senate, to count the fake votes and declare Trump the winner of the election. Even if Pence declined, Trump and his allies hoped that confusion over the dueling slates of electors would force Congress to send the election back to state legislatures to sort out. Although it ultimately failed, the scheme contributed to the violent attack on the United States Capitol on January 6 and caused permanent and irreparable damage to democracy both in Wisconsin and across the nation.

This lawsuit seeks to hold accountable those who conceived of and participated in the fraudulent elector scheme in Wisconsin. The suit was filed by Appellant Bonnie Joseph, a Wisconsin voter, taxpayer, and citizen, along with her co-Plaintiffs, Khary Penebaker and Mary Arnold, two of the legitimate presidential

electors from Wisconsin for the 2020 presidential election. They brought claims for civil conspiracy, public nuisance, and quo warranto against the ten Republicans who cast fraudulent electoral votes for Donald Trump in Wisconsin (the "Elector Defendants"). They also brought civil conspiracy and public nuisance claims against Kenneth Chesebro and James Troupis, two lawyers who helped devise and implement the scheme.

Since Plaintiffs filed suit, there have been several notable developments in the circuit court. The Elector Defendants and Troupis filed separate motions to dismiss, which the circuit court largely rejected. On a motion for reconsideration filed by Troupis, the circuit court dismissed Joseph from the case for lack of standing, while allowing the claims of the other two Plaintiffs, Penebaker and Arnold, to move forward. Plaintiffs then reached a settlement with the Elector Defendants. Penebaker and Arnold continue to litigate the case in the circuit court against the remaining Defendants, Troupis and Chesebro.

This appeal concerns a narrow sliver of that larger case. Plaintiffs filed two types of public nuisance claims. First, Penebaker and Arnold brought a public nuisance claim on their own behalf under Wis. Stat. § 823.01. Second, all three Plaintiffs brought a public nuisance claim as relators on behalf of the State of Wisconsin under Wis. Stat. § 823.02. The circuit court granted Plaintiffs permission to proceed on behalf of the State. But based upon its determination that Joseph lacked a cognizable injury as either a taxpayer or voter, the circuit court dismissed

all of her claims, including her public nuisance claim as the State's relator under § 823.02.

In this appeal, Joseph challenges only the circuit court's dismissal of her public nuisance claim on behalf of the State. Even assuming the circuit court correctly held that Joseph had failed to show a particularized injury as a taxpayer or voter, the circuit court still erred in dismissing her public nuisance claim brought as the State's relator. The plain meaning of the statutory text is that a plaintiff need not show a peculiar injury different from that of the general public to proceed with a public nuisance claim in the name of the State under § 823.02. Precedent from the Wisconsin Supreme Court requires the same conclusion. This Court should therefore reverse the dismissal of Joseph's public nuisance claim under § 823.02. At a minimum, this Court should reverse the dismissal of that claim with respect to Chesebro, who never filed a motion to dismiss.

STATEMENT OF THE ISSUE

Does Joseph have standing to prosecute a public nuisance claim as a relator on behalf of the State under Wis. Stat. § 823.02 without showing a peculiar injury?

The circuit court answered no.

This Court should answer yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither oral argument nor publication is warranted, as this case turns on the application of established law to the facts.

STATEMENT OF THE CASE

I. Legal and factual background.

The fraudulent elector scheme violated numerous state and federal election laws. Joseph begins by describing that legal framework, before recounting the factual and procedural history of this case. Because this appeal is from the circuit court's orders on motions to dismiss, the following facts are drawn from Plaintiffs' amended complaint.

A. Legal framework governing presidential elections.

Every four years, the President and Vice President of the United States are chosen by presidential electors appointed by each state. U.S. Const. art. II, § 1, cl. 2. For its entire history, Wisconsin has assigned its electors to the winner of the statewide presidential election. (R. 107 ¶28; App. 018.) In October of a presidential election year, each qualifying political party nominates a slate of candidates for the office of elector. Wis. Stat. § 8.18. Wisconsinites then choose among those slates on Election Day when they vote for their preferred candidates for President and Vice President. "Although the names of the electors do not appear on the ballot and no reference is made to them, a vote for the president and vice president named on the ballot is a vote for the electors of the candidates." Wis. Stat. § 5.10.

Wisconsin law sets out a specific process for determining which slate of electors has prevailed in a presidential election. After Wisconsinites' votes are counted and tallied at the ward level, they are canvassed at the municipal, county, and state levels. (R. 107 ¶¶37–40; App. 019–20.) Following the state canvass, the

Wisconsin Elections Commission ("WEC") prepares a certificate listing the names of the individuals chosen as presidential electors, and the Governor signs the certificate and affixes the great seal of the State. Wis. Stat. § 7.70(5)(b). Federal law refers to this document as a certificate of ascertainment. 3 U.S.C. § 5.

Wisconsin law also prescribes a detailed set of procedures for resolving any disputes that arise regarding which slate of electors the State's voters chose. The losing candidate in a presidential election may petition for a recount if that candidate trails the leading candidate by one percent of the vote or less. Wis. Stat. § 9.01(1)(a)1–5. Any candidate aggrieved by the recount can appeal to circuit court, and any party aggrieved by a circuit court order can appeal further. *Id.* § 9.01(6)–(9). This set of procedures "constitutes the exclusive judicial remedy for testing the right to hold an elective office as the result of an alleged irregularity, defect or mistake committed during the voting or canvassing process." *Id.* § 9.01(11).

After each State's presidential electors have been chosen, the Constitution requires those electors to meet in their respective States and cast their electoral college votes for President and Vice President. U.S. Const. amend. XII. Under federal law, the meeting of the electors takes place on a single day in December following the election. 3 U.S.C. § 7.[1] Wisconsin law sets forth additional requirements for the State's lawfully elected presidential electors, including that

[1] For the 2020 election, federal law provided that the meeting of the electors would take place "on the first Monday after the second Wednesday in December." 3 U.S.C. § 7 (2020). That statute has since been amended so that the meeting of the electors now takes place "on the first Tuesday after the second Wednesday in December." 3 U.S.C. § 7 (2022).

they meet at the State Capitol at noon on the day designated for the meeting of the electors, fill any vacancies in the office of elector that have arisen, and vote by ballot for the presidential and vice-presidential candidates of the electors' nominating party. Wis. Stat. § 7.75.

Once electors cast their votes, federal law provides that those votes must be certified and transmitted to the President of the Senate—who, under the Constitution, is the Vice President of the United States, U.S. Const. art. I, § 3, cl. 4—as well as to the chief election officer of the State, the Archivist of the United States, and the judge of the federal district court in which the electors met. 3 U.S.C. § 11. The Constitution then dictates the procedures for counting the electoral votes: The President of the Senate "shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted." U.S. Const. amend. XII. And "[t]he person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed." *Id.* This Joint Session of Congress takes place "on the sixth day of January succeeding every meeting of the electors." 3 U.S.C. § 15.

B. The 2020 presidential election in Wisconsin.

For the 2020 presidential election, the Democratic Party nominated Joseph Biden and Kamala Harris as its candidates for President and Vice President, respectively, and the Republican Party nominated Donald Trump and Michael Pence. In October, each political party in Wisconsin nominated its candidates for the office of presidential elector. The Democratic Party of Wisconsin nominated

Meg Andrietsch, Shelia Stubbs, Ronald Martin, Mandela Barnes, Khary Penebaker, Mary Arnold, Patty Schachtner, Shannon Holsey, Tony Evers, and Benjamin Wikler. (R. 107 Ex. B; App. 082.) The Republican Party of Wisconsin nominated Andrew Hitt, Robert F. Spindell, Jr., Bill Feehan, Kelly Ruh, Tom Schreibel, Carol Brunner, Edward Scott Grabins, Darryl Carlson, Pam Travis, and Mary Buestrin. (R. 107 Ex. C; App. 084.)

Under federal law, Election Day in 2020 was November 3, and the meeting of the presidential electors was set for December 14. On Election Day, a record number of Wisconsinites cast their ballots. (R. 107 ¶65; App. 024.) Based on a preliminary canvass, the WEC reported that Biden and Harris had won the State. (R. 107 ¶66; App. 024.) On November 18, Trump and Pence petitioned the WEC for a partial recount, and on November 30, the WEC confirmed Biden and Harris's victory. (R. 107 ¶¶67–68; App. 024.) That same day, the Chair of the WEC certified that the Democratic nominees for the office of presidential elector were the duly elected presidential electors for Wisconsin, and the Governor signed a certificate of ascertainment recognizing the same. (R. 107 ¶¶69–70; App. 024–25.) Trump and Pence sought judicial review, which culminated in a decision affirming the results of the recount that was issued by the Wisconsin Supreme Court on the morning of December 14—the same day that the electors were set to meet at noon. *See Trump v. Biden*, 2020 WI 91, 394 Wis. 2d 629, 951 N.W.2d 568.

At that appointed time, Wisconsin's duly elected presidential electors—Andrietsch, Stubbs, Martin, Barnes, Penebaker, Arnold, Schachtner, Holsey, Evers,

and Wikler—convened in a public meeting at the State Capitol and cast their electoral college votes for Biden and Harris. (R. 107 ¶¶75–76; App. 025–026.) After the meeting, and in accordance with federal law, they sent valid, official documents reflecting the lawful disposition of Wisconsin's ten electoral votes to the President of the United States Senate, the Wisconsin Secretary of State, the Archivist of the United States, and the Chief Judge of the United States District Court for the Western District of Wisconsin. (R. 107 ¶77, Ex. F; App. 026, 098–099)

C. The meeting of the fake electors, and the scheme to overturn the election.

At the same time that the duly elected presidential electors were convening at the State Capitol, so too were nine of the Republican elector nominees and an individual who purported to replace the tenth. This group of fake electors met pursuant to a scheme that Trump and his allies concocted in the days immediately following Election Day. (R. 107 ¶¶83–86; App. 027–028.) Trump's team sought to ensure that, in select swing states, losing Republican nominees for the office of presidential elector would falsely assume that office and purport to cast their States' electoral votes for Trump and Pence on December 14. (R. 107 ¶80; App. 026–027.) Once these fake electors' votes were cast, Trump and his allies would pressure Pence—who, as President of the Senate, would preside over the Joint Session of Congress on January 6—to reject the votes of the duly elected presidential electors from each State and give the Presidency to Trump, overriding the results of the election. (R. 107 ¶¶81–82; App. 027.) Even if Pence declined to give the election to

Trump, the schemers hoped that Congress would send the disputed electoral votes back to the states for further deliberation. (R. 107 ¶82 n.22; App. 027.)

Two attorneys, James Troupis and Kenneth Chesebro played key roles in developing and carrying out this fake elector scheme. Troupis was the lead lawyer for the Trump campaign in Wisconsin and was Chesebro's initial point of contact with the campaign. (R. 107 ¶87; App. 028–029.) Chesebro laid the scheme's foundation through several memoranda he drafted and sent to Troupis in November and December 2020. (R. 107 ¶88; App. 029.)

In a November 18 memorandum, titled "The Real Deadline for Settling a State's Electoral Votes," Chesebro argued that if the losing Republican nominees for the office of elector met at the State Capitol on December 14 and purported to cast votes for Trump and Pence, then those votes could be counted on January 6 in the event of an intervening "court decision (or, perhaps, a state legislative determination)" in Trump's favor. (R. 107 ¶90; App. 029; R. 187 Ex. B.) In a December 6 memorandum, titled "Important That All Trump-Pence Electors Vote on December 14," Chesebro took an even more aggressive position, telling Troupis that fake electors' votes could be used to deny Biden the Presidency on January 6 "even if Trump has not managed by then to obtain court decisions (or state legislative resolutions)" in his favor.[2] And in a December 9 memorandum, titled "Statutory Requirements for December 14 Electoral Votes," Chesebro

[2] The December 6 memorandum is available here: https://perma.cc/Y4C6-2XJP.

acknowledged that none of the losing Republican elector nominees in the targeted swing states were "currently certified as having been elected by the voters of their State," but he nevertheless told Troupis that "most of the electors . . . will be able to take the essential steps needed to validly cast and transmit their votes, so that the votes might be eligible to be counted if later recognized (by a court, the state legislature, *or Congress*) as the valid ones that actually count in the presidential election." (R. 107 ¶93 (emphasis added); App. 030; R. 187, Ex. B.) Chesebro then laid out detailed steps for the losing Republican elector nominees to take in the targeted swing states. (R. 107 ¶99; App. 031.)

At the national level, Chesebro coordinated with Trump's inner circle to turn his plans into action. In Wisconsin, Chesebro worked closely with Troupis to execute the scheme. Ahead of December 14, Brian Schimming, who was then another lawyer working with the campaign and is now the head of the Republican Party of Wisconsin, sent Chesebro an email saying: "State party wants Jim [Troupis] to put this statement out before the electors meeting here on Monday. Jim wanted you to get a look . . . ." (R. 107 ¶118 (internal quotation marks omitted); App. 035.) The statement, titled "Proposed Jim Troupis Statement on Electors Meeting," began by stating: "As the legal proceedings continue to work their way through the Wisconsin court system, I have advised the Republican Party of Wisconsin to convene a separate Republican electors meeting and vote at the Wisconsin State Capitol on December 14." (*Id.* (internal quotation marks omitted).) Chesebro replied to Schimming, copying Troupis, and proposed revisions to the statement.

Schimming then forwarded the email chain to Mark Jefferson, the Executive Director of the Republican Party of Wisconsin, with the note: "Slight revision from Cheseboro [sic]; Jim [Troupis] was fine on phrasing." (R. 107 ¶119 (internal quotation marks omitted); App. 035–036.)

Other evidence confirms Troupis's close connection to the scheme. One of the fake Wisconsin electors who met at the State Capitol on December 14 testified that Troupis frequently communicated about the meeting of the electors with Joe Olson, who was outside counsel to the Republican Party of Wisconsin. (R. 107 ¶120; App. 036.) And Troupis himself promoted the scheme, explaining in an email to Trump campaign advisor Boris Epshteyn that "[t]he second slate just shows up at noon on Monday [December 14] and votes and then transmits the results," and "[i]t is up to Pence on Jan 6 to open them." (R. 107 ¶122 (internal quotation marks omitted); App. 036–037.) Troupis described this proposal as "*[o]ur strategy*, which we believe is replicable in all 6 contested states." (*Id.* (emphasis added; internal quotation marks omitted).) Troupis likewise promoted Chesebro's proposal to Trump campaign official Justin Clark, who said that he first heard of the idea from Troupis and that Troupis sent him a copy of one of Chesebro's memoranda. (R. 107 ¶123; App. 037.)

Troupis and Chesebro both knew that the fake elector scheme was potentially unlawful. Although Troupis had endorsed the scheme as "replicable in all 6 contested states," Chesebro's December 9 memorandum described the scheme as "slightly problematic in Michigan . . . somewhat dicey in Georgia and Pennsylvania

. . . and very problematic in Nevada." (R. 107 ¶126; App. 038.) And although Chesebro had said in an email that it "[m]ight be good" for fake electors to include a caveat that they were purporting to cast their states' votes for Trump and Pence "on the understanding that it might later be determined that we are the duly elected and qualified Electors," those participating in the scheme ultimately omitted such qualifying language from the certificates they drafted in Wisconsin and most of the other states. (R. 107 ¶127 (internal quotation marks omitted); App. 038–039.)

Notwithstanding any misgivings they may have had, Troupis and Chesebro continued to promote the scheme. In Wisconsin, nine of the ten Republican elector nominees met at the State Capitol on December 14 at the same time as the duly elected presidential electors. Chesebro was also present at the meeting. (R. 107 ¶132; App. 040.) Before casting their fake electoral votes, the attendees learned that the Wisconsin Supreme Court had affirmed the results of the partial recount sought by Trump and Pence, and that the exclusive process that Wisconsin law identifies for challenging the outcome of a presidential election in Wisconsin had therefore been exhausted. (R. 107 ¶¶138–139; App. 040–041.) The fake electors nevertheless conducted their meeting as if they had the powers assigned by law to the duly elected presidential electors for the State. (R. 107 ¶140; App. 041.) They began by purporting to fill a vacancy created by the absence of Tom Schreibel, one of the ten Republican elector nominees, replacing him with Kathy Kiernan. (R. 107. ¶¶141–143; App. 041.) They then executed a document titled "Certificate of the Votes of the 2020 Electors from Wisconsin," in which they falsely represented that they were

"the duly elected and qualified Electors for President and Vice President of the United States of America from the State of Wisconsin." (R. 107 Ex. G; App. 101–104.) The document also falsely certified that the Republican electors had met at the State Capitol "to perform the duties enjoined upon" them and had cast Wisconsin's electoral votes for Trump and Pence. (*Id.*) The document was then transmitted, with a cover memorandum titled "Wisconsin's Electoral Votes for President and Vice President," to the President of the United States Senate, the Archivist of the United States, the Wisconsin Secretary of State, and the Chief Judge of the United States District Court for the Western District of Wisconsin. (R. 107 ¶150; App. 042.)

D. January 6 and the aftermath of the scheme.

Once the fake electors in Wisconsin and other states had purported to cast their votes, Trump and his allies began exerting pressure on Pence and preparing for January 6. One aspect of this pressure campaign was the filing of frivolous legal challenges intended to cast doubt on the legitimacy of the election results in the targeted swing states. (R. 107 ¶161; App. 044.) By giving the appearance that there was a plausible basis for calling these results into question, Trump sought to provide Pence with an excuse to disregard the votes of each swing state's duly elected presidential electors. (R. 107 ¶162; App. 044.) Even more aggressively, Trump and his allies planned to argue that the fake electors' purported votes should be counted regardless of how their legal challenges fared. (R. 107 ¶165; App. 045.)

This pressure campaign culminated on January 6. That morning, Troupis personally attempted to arrange delivery of Wisconsin's fake electoral votes to the

Vice President after Wisconsin Republicans learned that the Archivist had not received the copy sent in the mail. (R. 107 ¶¶152–154; App. 042–043.) At noon, Trump began speaking at a rally near the White House, where he called on Pence to reject the votes of lawfully elected presidential electors, and he told those at the rally to "walk down to the Capitol" and "demand that Congress do the right thing and only count the electors who have been lawfully slated." (R. 107 ¶¶181–184; App. 049.) Less than an hour later, Trump's supporters broke into the Capitol and violently swept through the building. Amid chants of "hang Mike Pence," many of them sought to forcibly prevent the Vice President and Congress from counting the valid electoral votes and certifying Biden's victory.[3] Despite the riot at the Capitol, the votes of the duly elected presidential electors in Wisconsin and other swing states were ultimately counted, and the presidential election results were properly certified.

The fraudulent elector scheme nevertheless caused permanent and irreparable damage to the country's political institutions generally and to representative government in Wisconsin specifically. Mere months after the attack on the Capitol, Wisconsin Assembly Speaker Robin Vos announced his appointment of former Wisconsin Supreme Court Justice Michael Gableman to oversee an "investigation" of the 2020 presidential election. (R. 107 ¶196; App.

[3] *See* Ashley Parker, Carol D. Leonnig, Paul Kane & Emma Brown, *How the Rioters Who Stormed the Capitol Came Dangerously Close to Pence*, Wash. Post (Jan. 15, 2021), available at https://www.washingtonpost.com/politics/pence-rioters-capitol-attack/2021/01/15/ab62e434-567c-11eb-a08b-f1381ef3d207_story.html.

051–052.) Gableman, who had publicly accused the WEC of "steal[ing] our vote," later issued a report in which he told Assembly members that they "ought to take a very hard look" at decertifying the results of the 2020 presidential election. (R. 107 ¶¶198, 200–201, 204 (internal quotation marks omitted); App. 052–054.) He made that recommendation even though the Assembly's nonpartisan attorneys had already confirmed that "[t]here is no mechanism in state or federal law for the Legislature to reverse certified votes cast by the Electoral College and counted by Congress." (*Id.*)

The idea of decertifying the 2020 presidential electors later took hold among a number of politicians, becoming a flash point in Wisconsin. (R. 107 ¶207; App. 054.) And although Vos ultimately terminated Gableman's contract, the harms generated by the fake elector scheme have persisted, including through widespread public distrust of Wisconsin's election administration. (R. 107 ¶¶213–217; App. 056–057.) Some of the architects of the scheme—including Troupis—refuse to disavow their actions or disclaim their intention to engage in similar schemes going forward. (R. 107 ¶223; App. 058.) This lawsuit aims to remedy the harms caused by these attempts to overturn the election and to prevent such harms from recurring in the future.

II. Procedural history.

Plaintiffs Khary Penebaker, Mary Arnold, and Bonnie Joseph filed this lawsuit on May 17, 2022. (R. 13.) Penebaker and Arnold were duly elected presidential electors for Wisconsin for the 2020 presidential election. And all three

Plaintiffs are Wisconsin voters and taxpayers. The original defendants in the case were Troupis, Chesebro, and the Elector Defendants, who purported to cast Wisconsin's votes for Trump and Pence on December 14, 2020.

In their operative complaint, Plaintiffs alleged that Defendants created a public nuisance by falsely assuming—and conspiring with, aiding, and abetting others in falsely assuming—the office of presidential elector for the State of Wisconsin.[4] (R. 107 ¶¶271–303; App. 067–071.) Penebaker and Arnold sued under Wis. Stat. § 823.01, which allows any individual to "maintain an action to recover damages or to abate a public nuisance from which injuries peculiar to the complainant are suffered." They alleged that they had suffered peculiar injuries because Defendants undermined their claims to legitimacy as presidential electors and harmed their reputations by casting doubt on their status as electors. (R. 107 ¶¶286–287; App. 069.) In addition, all three Plaintiffs sued under Wis. Stat. § 823.02, which provides that "[a]n action to enjoin a public nuisance may be commenced and prosecuted in the name of the state . . . upon the relation of a private individual . . . , having first obtained leave therefor from the court." They alleged that the State, along with its taxpayers and voters, had suffered an injury because the fake electors made unlawful use of public resources during their meeting at the

[4] Plaintiffs also brought claims for civil conspiracy, quo warranto, and punitive damages, as well as a claim under Wis. Const. art. I, § 9. (R. 107 ¶¶230–270, 304–336; App. 060–067, 071–076) Those claims are not at issue in Joseph's appeal, although several of them are at issue in Troupis's cross-appeal.

State Capitol on December 14, and because Defendants interfered with Wisconsinites' right to vote. (R. 107 ¶¶297–300; App. 070.)

Plaintiffs filed a separate motion for leave to proceed in the name of the State under Wis. Stat. § 823.02, in which they explained that a claim under § 823.02, unlike a claim under § 823.01, does not require a showing of peculiar injury. (R. 14.) They further argued that their injuries as voters and taxpayers, although shared by many Wisconsinites, are sufficient to confer standing to sue on behalf of the State. (*Id.*)

On June 7, 2023, the Elector Defendants and Troupis each filed motions to dismiss the operative complaint. (R. 185, 190.) Chesebro filed an answer and affirmative defenses (R. 199), but he did not join in either of the motions to dismiss. In their briefs, the Elector Defendants and Troupis argued as a general matter that Plaintiffs lacked standing to bring any of their claims, and they argued specifically that Plaintiffs' public nuisance claims failed as a matter of law. (R. 186 at 27–29, 36–38; R. 191 at 17–24, 33–38.) Troupis also argued that Plaintiffs failed to show a peculiar injury for their nuisance claims. (R. 191 at 34 n.15.)

Plaintiffs responded to these motions in a consolidated opposition. (R. 207 at 2–6, 19–26.) They explained that Penebaker and Arnold had alleged a peculiar injury sufficient to bring a claim under Wis. Stat. § 823.01. And they contended that, in any event, all Plaintiffs had standing to proceed under § 823.02 based on the injuries to the State and their injuries as voters and taxpayers, given that § 823.02 does not require a peculiar injury. (*Id.* at 19–20 (citing *State ex rel. Cowie v. La*

Crosse Theaters Co., 232 Wis. 153, 157, 286 N.W. 707 (1939)). The circuit court subsequently solicited additional briefing on the motion for leave to proceed under § 823.02 that Plaintiffs had filed at the beginning of the case. (R. 217.) The Elector Defendants and Troupis largely rehashed and supplemented the arguments from their motions to dismiss. (R. 219, 220.) Plaintiffs addressed these points and explained, yet again, that a peculiar injury is not required to sue under § 823.02. (R. 225 at 5 (citing *Cowie*, 232 Wis. at 157).)

On August 10, the circuit court granted Plaintiffs' motion for leave to proceed under § 823.02 and substantially denied Defendants' motions to dismiss the complaint. (R. 226; App. 112–148.) As relevant to this appeal, the circuit court held that the reputational harm allegedly suffered by the duly elected presidential electors was sufficient to satisfy the damages elements of Plaintiffs' claims. (R. 226 at 24–25; App. 135–136.) The circuit court reached a contrary conclusion regarding Plaintiffs' theory that they were injured as taxpayers, and it declined to address Plaintiffs' theory that they were injured as voters. (R. 226 at 21–24; App. 132–135.) The circuit court incorrectly described Joseph as a presidential elector, and it referred to Plaintiffs collectively as "Penebaker." (R. 226 at 1; App. 112.)

The circuit court held that Plaintiffs could sue under Wis. Stat. § 823.02 because "the complaint alleges each element of a public nuisance," and "[o]ur legislature has already made the policy decision to allow private citizens to abate public nuisances in its name." (R. 226 at 28; App. 139.) With respect to the elements of Plaintiffs' public nuisance claim, the circuit court held that Plaintiffs had satisfied

their obligation to allege that Defendants "caused significant harm" because "[t]he plaintiff here is not only Penebaker, but also the State of Wisconsin, in whose name Penebaker has leave to seek to enjoin the nuisance." (R. 226 at 29; App. 140.) In the circuit court's view, the complaint plausibly alleged that Defendants caused harm "to the State because the nuisance interfered with the right to vote, 'a right which the law protects and enforces.'" (*Id.* (quoting *State v. Phelps*, 144 Wis. 1, 128 N.W. 1041 (1910)).)

Troupis filed a motion for reconsideration of the circuit court's August 10 decision. (R. 229.) Among other arguments, he noted that the circuit court had incorrectly described Joseph as a presidential elector, and he argued again that Joseph lacked standing. (R. 230 at 5.) Plaintiffs promptly responded with a letter filing that acknowledged that Joseph was not an elector but contended that she nevertheless "has standing because she has suffered injury as a voter." (R. 231 at 1.) In any event, Plaintiffs reiterated, "Ms. Joseph has standing as a relator on the public nuisance claim made on behalf of the state." (*Id.*) Plaintiffs argued that the circuit court could "deny Mr. Troupis's motion based on the comprehensive briefing already in the record," but they stated further that "[i]f additional briefing or argument would be helpful to the Court, . . . Plaintiffs' counsel will gladly provide it." (*Id.* at 2.)

The circuit court did not solicit further briefing or argument; instead, on September 5, it issued a decision granting Troupis's motion in relevant part. (R. 232; App. 149–157.) After acknowledging that it had erred in describing Joseph as a

presidential elector, the circuit court addressed whether Joseph had standing to sue based on her status as a voter—a question, as noted, that it had declined to address in its prior order denying the motions to dismiss. (R. 232 at 2–3; App. 150–151.) Based on its reading of the Wisconsin Supreme Court's fractured decision in *Teigen v. WEC*, 2022 WI 64, 403 Wis. 2d 607, 976 N.W.2d 519, the circuit court held that "voters do not have standing as voters" and that Joseph had failed to allege any "individual harm." (R. 232 at 4–5; App. 152–153.) The circuit court also held that Joseph could not proceed under Wis. Stat. § 823.02, and it criticized Plaintiffs' letter filing as lacking "argument or citation to any authority" to the contrary. (R. 232 at 6; App. 154.)

The circuit court acknowledged that "a legislature can enact a qui tam statute to enable a private party to invoke the standing of the government," but it stated that Joseph failed to "explain why Wisconsin's public nuisance statute is the sort of legislative pronouncement that confers standing to a relator who suffered no harm of her own." (*Id.* (internal quotation marks and footnote omitted).) And the circuit court added that it would "decline to search, on [its] own, for some reason why Wisconsin might have a qui tam public nuisance cause of action, or any other reason why Joseph might have standing to seek to abate a public nuisance." (*Id.*) Because the circuit court concluded that Joseph lacked standing to bring any of her claims, it dismissed her as a plaintiff. (R. 232 at 9; App. 157.)

Plaintiffs moved for reconsideration of the September 5 decision to the limited extent that it held that Joseph lacked standing to sue under Wis. Stat.

§ 823.02. (R. 258.) Plaintiffs explained that, contrary to the circuit court's description, they had in fact developed arguments in their briefing—which were incorporated by reference in their letter filing—that supported Joseph's ability to bring a public nuisance claim on behalf of the State. (*Id.* at 3–4.) And Plaintiffs noted that they had repeatedly cited the Wisconsin Supreme Court's decision in *Cowie*, which had "considered and rejected the contention that a plaintiff must show a unique injury different from the one suffered by the general public in order to enjoin a public nuisance claim as the State's relator." (*Id.* at 4.) Plaintiffs also highlighted the Wisconsin Supreme Court's later decision in *State ex rel. Priegel v. Northern States Power Co.*, 242 Wis. 345, 356, 8 N.W.2d 350 (1943), which reaffirmed the rule that "private injury need not be shown" in public nuisance actions brought on behalf of the State. Given the circuit court's conclusion that the alleged nuisance had injured the State by interfering with the right to vote, Plaintiffs argued that voters like Joseph could sue on the State's behalf, even in the absence of a particularized harm. (R. 258 at 5.)

On September 27, the circuit court denied Plaintiffs' motion in a two-page decision. (R. 261; App. 158–159.) Without explanation, the circuit court stated that Joseph had failed to meet the standard governing motions for reconsideration because it had "considered all of the parties' standing arguments" in its prior decisions. (R. 261 at 2; App. 159) In any event, the circuit court concluded, Joseph's "motion is moot" because her "two co-plaintiffs both continue to seek to abate the

same public nuisance Joseph would like abated," and "Joseph does not need three relators to seek one form of relief." (*Id.*)

On October 20, Joseph filed a notice of appeal. (R. 266.) She seeks review of whether the circuit court erred in holding that she lacked standing as a relator to prosecute the public nuisance claim on behalf of the State. (R. 268.)

Plaintiffs have since reached a settlement with the Elector Defendants and have dismissed all claims against them. (R. 327.) As part of that settlement, the Elector Defendants acknowledged that their false electoral votes were used as part of an effort to overturn the results of the 2020 election and disrupt the peaceful transfer of power; affirmed that President Biden won the 2020 presidential election; and agreed not to serve as electors in the next presidential election or to sign a certificate of electoral votes in any future presidential election in which they are not duly certified electors under Wisconsin state law.

STANDARD OF REVIEW

Standing is a question of law that appellate courts review de novo. *City of Mayville v. Dep't of Admin.*, 2021 WI 57, ¶15, 397 Wis. 2d 496, 960 N.W.2d 416 ("Whether a party has standing is a question of law that we review independently.").

ARGUMENT

The circuit court erred when it dismissed Joseph's public nuisance claim on behalf of the State under Wis. Stat. § 823.02 for lack of standing. For that type of claim, the plaintiff stands in the shoes of the State and need not assert a particularized injury different from that of the public. In any event, the circuit court

should not have dismissed Joseph's nuisance claim against Chesebro because he never filed or joined a motion to dismiss.

I. The circuit court erred in dismissing Joseph's public nuisance claim brought on behalf of the State pursuant to Wis. Stat. § 823.02.

Joseph can bring a public nuisance claim on behalf of the State of Wisconsin without showing a particularized injury. Wisconsin law creates two separate ways in which a private individual can seek to abate a public nuisance. First, under Wis. Stat. § 823.01, a plaintiff may "maintain an action to recover damages or to abate a public nuisance from which injuries peculiar to the complainant are suffered." Second, under Wis. Stat. § 823.02, "[a]n action to enjoin a public nuisance may be commenced and prosecuted in the name of the state . . . upon the relation of a private individual . . . , having first obtained leave therefor from the court." Here, Joseph sought to abate the public nuisance caused by the fake elector scheme only in the latter fashion, on behalf of the State. When a plaintiff proceeds under § 823.02, they need not show a peculiar injury, as the Wisconsin Supreme Court has recognized. The circuit court thus erred in dismissing Joseph's claim brought as the State's relator.

The Wisconsin Supreme Court addressed and resolved this issue in *Cowie*, 232 Wis. 153.[5] The plaintiff in that case filed a public nuisance action as the State's relator against a theater company, alleging that the theater's "bank night" was an unlawful lottery and thus a public nuisance. *Id.* at 157. The defendant theater argued

[5] *Cowie* interpreted Wis. Stat. § 280.02, the predecessor statute to Wis. Stat. § 823.02.

that "[a] private person cannot bring an action to abate a public nuisance unless he sustains some special injury not sustained by the general public." *Id.* But the Wisconsin Supreme Court disagreed and explained that, although a particularized injury is required in "actions brought by a private person in his own name and right," there is no such requirement in "actions by the state brought on relation of a private person." *Id.* When proceeding on behalf of the State, a plaintiff need not "suffer some injury peculiar to himself." *Id.* Lest there be any doubt about what *Cowie* held, the Wisconsin Supreme Court reiterated in a later case "the rule of [*Cowie*] that private injury need not be shown" in actions brought in the name of the State. *Priegel*, 242 Wis. 345. What matters instead is whether the public generally has suffered a cognizable injury. *Id.*

The circuit court initially granted Plaintiffs, including Joseph, leave to seek to enjoin the alleged nuisance as the State's relators. (R. 226 at 27–28; App. 138–139.) The circuit court granted leave based on the State's "policy decision to allow private citizens to abate public nuisances in its name" and the State's need "to prevent all those practices which tend to subvert the electorate." (R. 226 at 28 (internal quotation marks omitted); App. 139.) And, in its discussion of the merits of that nuisance claim, the circuit court held that the operative complaint alleges a cognizable injury "to the State because the nuisance interfered with the right to vote." (R. 226 at 29; App 140.) Under *Cowie*, that harm to the State—and, accordingly, to all of the State's voters—is sufficient to establish standing for the claim brought in the State's name. And that is true even without any showing by

Joseph of a particularized harm different from the one suffered by the voters of the State generally.

Statutory context confirms that conclusion. *See State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110 (explaining that statutory language is "interpreted in the context in which it is used, not in isolation but as part of a whole, in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results."). Under Wis. Stat. § 823.01, a plaintiff seeking to abate a public nuisance in her own name can obtain damages or an injunction so long as she shows "injuries peculiar to [her]." By contrast, under Wis. Stat. § 823.02, a plaintiff seeking to abate a public nuisance in the name of the State can obtain an injunction without showing a peculiar injury, but damages are unavailable. The tradeoff is clear: a plaintiff needs to show a peculiar injury only if she wants damages.

If a plaintiff proceeding in the name of the State were required to show an individualized injury to have standing as a relator, the distinctions between § 823.01 and § 823.02 would break down. Plaintiffs would be required to show peculiar injury under both § 823.01 and § 823.02. But proceeding under § 823.01 would present the benefit of potentially obtaining damages, while proceeding under § 823.02 would impose the burden of seeking leave to proceed on behalf of the State. If that were the rule, plaintiffs would rarely if ever file suit under § 823.02. The Legislature could not have intended to render § 823.02, which on its face is a

powerful tool for addressing nuisances in this State, all but a nullity. But that is the effect of the circuit court's order.

Plaintiffs' interpretation of Wis. Stat. § 823.02 is also consistent with federal precedent on the standing of relators filing suit under the False Claims Act to proceed on behalf of the United States. As the Supreme Court of the United States has held, in a False Claims Act case, "the United States' injury in fact suffices to confer standing" on a relator proceeding on behalf of the government. *Vermont Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 774 (2000). Likewise, when a plaintiff proceeds in the name of the State under § 823.02, she constructively becomes an assignee of the State's interest in abating the nuisance and shares in the injury that nuisance inflicts on the State. There can be little doubt that the fraudulent elector scheme harmed the State of Wisconsin and its voters.

The Wisconsin Supreme Court's fractured decision in *Teigen*, 2022 WI 64, does nothing to undermine the ability of a plaintiff proceeding as the State's relator pursuant to Wis. Stat. § 823.02 to abate a public nuisance that harms the State's democratic processes and thus impairs the right to vote. That case concerned the standing of an individual voter, proceeding in his own name, to assert generalized harms to his right to vote. When an action is brought on behalf of the State, the reasoning of *Teigen* does not apply. The State may properly assert an injury to the right to vote in an effort to enjoin a public nuisance infringing the voting rights of the public generally, even if an individual voter would not have standing to bring such a claim. Indeed, the circuit court recognized as much when it correctly

observed that "[t]he plaintiff here is not only Penebaker, but also the State of Wisconsin," and when it correctly held that Plaintiffs had alleged a cognizable harm "to the State because the nuisance interfered with the right to vote, 'a right which the law protects and enforces.'" (R. 226 at 29 (quoting *Phelps*, 144 Wis. 1); App. 140.)

The circuit court's suggestion that Joseph failed to develop these arguments was incorrect. Joseph explained repeatedly in her briefing to the circuit court that a public nuisance claim on behalf of the State under Wis. Stat. § 823.02 requires no showing of peculiar injury. (*See* R. 14, R. 207 at 19–20; R. 225 at 5; R. 231 at 1; R. 258 at 3–4.) The circuit court also erred in suggesting that Joseph's claim under § 823.02 was moot merely because Penebaker and Arnold have standing to pursue that claim. The circuit court initially granted leave to all three Plaintiffs to proceed as relators for the State, evidently on the understanding that more than one plaintiff may proceed on behalf of the State in the same case. (*See* R. 226 at 27–28; App. 138–139.) Nothing in Wisconsin law supports the notion that as long as one plaintiff has standing, that moots the ability of any other plaintiff to pursue the same claim. If that were true, there could only ever be one plaintiff in a case (or at least only one plaintiff per claim). In Wisconsin, a claim becomes moot only "when the decision sought by the parties cannot have any practical legal effect upon a then existing controversy." *State ex rel. Vill. of Newburg v. Town of Trenton*, 2009 WI App 139, ¶7, 321 Wis. 2d 424, 773 N.W.2d 500. Here, the controversy between Joseph, as a relator for the State, and Troupis remains live.

This Court should therefore reverse the circuit court's decision dismissing Joseph's public nuisance claim on behalf of the State brought pursuant to Wis. Stat. § 823.02.

II. The circuit court erred in dismissing Joseph's claims against Chesebro, who did not file or join a motion to dismiss.

At a minimum, this Court should reverse the circuit court's order dismissing Joseph's public nuisance claim under Wis. Stat. § 823.02 with respect to Chesebro. In response to the amended complaint, Chesebro filed an answer. (R. 199.) He never filed a motion to dismiss, nor did he join in either of the motions to dismiss filed by the Elector Defendants and Troupis. Chesebro thus never challenged Joseph's standing to sue.

In Wisconsin, "[s]tanding is not a question of jurisdiction, but of sound judicial policy." *Zehetner v. Chrysler Fin. Co., LLC*, 2004 WI App 80, ¶12, 272 Wis. 2d 628, 679 N.W.2d 919; *Friends of Black River Forest v. Kohler Co.*, 2022 WI 52, ¶17, 402 Wis. 2d 587, 977 N.W.2d 342. Because standing is not jurisdictional, courts have no obligation to consider the issue unless the parties raise it. And standing arguments are subject to forfeiture and waiver. To be sure, courts in Wisconsin enjoy some leeway to raise issues sua sponte. *See State v. Holmes*, 106 Wis. 2d 31, 39, 315 N.W.2d 703 (1982). But here, the circuit court should have confined its judgment dismissing Joseph to the Defendants who actually sought that relief. Chesebro decided to file an answer rather than a motion to dismiss, and accordingly, at an absolute minimum, Joseph's claims against him should move forward.

CONCLUSION

For the foregoing reasons, this Court should reverse the circuit court's order dismissing Joseph's public nuisance claim brought on behalf of the State pursuant to Wis. Stat. § 823.02.

Dated February 5, 2024.

Respectfully submitted,

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CERTIFICATION REGARDING FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 7,793 words.

Dated February 5, 2024.

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