STATE OF WISCONSIN
COURT OF APPEALS, DISTRICT I
NO. 22AP1127

Friends of Blue Mound State Park,

Petitioner-Appellant,

vs.

Wisconsin Department of Natural Resources,

Respondent-Respondent.

On Appeal from the Circuit Court for
Iowa County Case No. 21-cv-0114
The Honorable Margaret Mary Koehler, Presiding

OPENING BRIEF OF PETITIONER-APPELLANT FRIENDS OF BLUE MOUND STATE PARK

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INTRODUCTION

In Wisconsin, we have three branches of government: the Legislative, the Executive, and the Judicial. The Legislative branch adopts the laws. The Executive branch - including the Governor and his administrative agencies - executes the laws. And the judiciary interprets and enforces the laws.

All three branches are supposed to serve as checks on one another. For example, and as relevant here, in Wisconsin the Legislature has determined that "administrative decisions which adversely affect the substantial interests of *any person*, whether by action or inaction, whether affirmative or negative in form, are subject to review" by the courts. Wis. Stat. § 227.52 (emphasis added). All a "person" so aggrieved needs to do is file a petition for judicial review pursuant to Wis. Stat. § 227.52.

The Legislature did not separately define "person" in Ch. 227. But in the general corporate provisions, the Legislature did define "person" to "mean[] an individual, business corporation, *nonprofit or nonstock corporation*, partnership, limited partnership, limited liability company, . . . or any other legal or commercial entity." Wis. Stat § 180.0103(11m) (emphasis added). And the Legislature has made clear that nonprofit or nonstock corporations organized under Ch. 181 have " . . . the same powers as an individual to do all things necessary or convenient to carry out its affairs, including the power to do all of the following: (1) Legal actions. Sue and be sued, complain and defend in its corporate name." Wis. Stat. § 181.0302.

Here, it is undisputed that the Petitioner-Appellant, Friends of Blue Mound State Park (Friends), was and has always been incorporated

as a Wisconsin nonprofit, nonstock corporation pursuant to Wis. Stat. Ch. 181.

The Petitioner-Appellant therefore has the capacity to sue because the Legislature has said nonstock corporations can "[s]ue and be sued." Wis. Stat. § 181.0302.

Moreover, the Friends of Blue Mound State Park, as a nonstock corporation, is indisputably a "person", *id.* § 180.0103(11m), that can petition the courts for review of a final agency decision under Wis. Stat. Ch. 227.

And it was undisputed below that the Friends and its members have substantial interests in using and recreating in the park that will be aggrieved by the Wisconsin Department of Natural Resources' (WDNR) decision to build a new snowmobile trail through an ecological sensitive area of the Park. (Petition for Judicial Review, R. 3:6–7; A-App. 6–7)

As such, according to the plain language of the statutes, the Friends have the capacity to sue and seek review from the courts under Wis. Stat. § 227.52.

Nonetheless, the WDNR moved to dismiss the Friends' petitions below - and ultimately convinced the circuit court - that because the agency has adopted *an administrative regulation*, Wis. Admin. Code NR § 1.71(4)(b)(2), which lists five "objectives of friends groups"—one of which is to "Promote department properties and programs"—the WDNR has taken away the Friends' ability to go to court to challenge any of the WDNR's decisions about the Park. The WDNR also argued, and the circuit court agreed, that because the Friends signed a contract with similar language, which the WDNR's regulations mandate be included

in the contract, saying the Friends will "promote" the WDNR, the Friends do not have the right to go to court.

But none of this is the law. Nor should it be.

First of all, the Legislature decides who gets to go to court, not an administrative agency like the WDNR. Yet the lower court's decision, if left to stand, would allow a state agency to adopt an administrative regulation limiting who can sue it, without any specific legislation authorizing the agency to do so.

Second, even if an administrative agency could - via its own administrative regulation - mandate that certain parties cannot sue it, a Legislative pronouncement on the subject to the contrary, such as the one here in Chapter 227, trumps anything the agency might say in an administrative rule. The Legislature has proclaimed that any "person" aggrieved, including "nonprofit or nonstock corporation[s]", may petition for judicial review of any final agency action. Wis. Stat. §§ 227.52; 180.0103(11m). Nothing the WDNR has - or even could - say in one of its own administrative regulations is relevant to the Legislature's intent under Ch. 227.

Third, the Wisconsin Supreme Court has long said that language waiving a party's right to sue must be clear and explicit. *Mulvaney v. Tri State Truck & Auto Body, Inc.*, 70 Wis. 2d 760, 768, 235 N.W.2d 460, 465 (1975). Put another way, language in a contract, rule or statute must be explicit and clear to waive a party's right to go to court. Examples of clear language are easy to imagine: e.g., "the Friends agrees never to challenge any of the WDNR's decisions in court." *Id.* The circuit court below (and the WDNR) ignored this doctrine too, and pointed to language in an administrative regulation and contract saying things like the Friends

will "promote the Department" as clearly and explicitly obliterating the Friends' judicial review rights. This was an error.

At base, this appeal concerns a Wisconsin nonprofit corporation's capacity and standing to challenge a government agency's actions, which indisputably caused injury to the Friends' and its members' interests. The circuit court misapplied fundamental principles of administrative law and ignored the Wisconsin Supreme Court's dictate that language waiving a party's right to go to court must be clear and unequivocal. This Court should therefore reverse.

ISSUES PRESENTED

1. Whether the Friends of Blue Mound State Park, a Wisconsin nonstock corporation, had capacity and standing to file its petitions for judicial review under Wis. Stat. Ch. 227.

ORAL ARGUMENT AND PUBLICATION

The Petitioner-Appellant believes the briefs will adequately address all issues and does not believe oral argument will be necessary. Publication may be appropriate, however, because the case has the potential to clarify the proper scope of Chapter 227, Wis. Stats.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

The Friends of Blue Mound State Park is a private, tax-exempt nonprofit corporation organized under Wis. Stat. Chapter 181. (R. 3:3, ¶ 7; A-App. 7) As a ch. 181 corporation, the Friends have the same statutorily enumerated general powers to take legal action and to make contracts as any other corporation organized under Wisconsin's statutes. Wis. Stat. §§ 181.0302(2) and (7).

Utilizing those general powers, many years ago, the Friends entered into a mutually beneficial contract with the WDNR (the "Friends Agreement"), which allowed the group to be designated as a "friends group" in accordance with Wis. Admin. Code NR § 1.71. (R. 3:3; A-App. 6) Among other things, friends groups are allowed to raise money for, and to otherwise support, state parks. Wis. Stat. §§ 23.098, 27.016.

Over the last three decades, the Friends and its members have worked tirelessly to enhance the Park. (R.3:6, ¶¶ 26 and 27; A-App. 9) The Friends' activities and initiatives have raised over $1 million for use at the Park, and the Friends' volunteers have annually contributed copious volunteer hours towards the Park's enhancement. (R.3:6, ¶ 26; A-App. 9) Additionally, several of the Friends' members live near and/or recreate in the Park on a regular basis. (R.3:6, ¶ 29; A-App. 9)

On December 9, 2020, the WDNR issued a draft master plan and environmental analysis ("Draft Plan") for the Park, which included a new snowmobile trail that would run through WDNR-designated, ecologically important "primary sites" that warrant "high protection and/or restoration consideration." (R.33:11; A-App.78, at 4) The Draft Plan lacked any meaningful discussion of the environmental impacts of

the proposed snowmobile trail on these ecologically fragile areas. (*Id.*) The Draft Plan also failed to explain why the existing snowmobile trail through the Park was somehow insufficient, or why the WDNR was changing its position from its previous decisions not to build a new snowmobile trail in this specific area of the Park.

Notwithstanding the legal and factual deficiencies in the Draft Plan, the Natural Resources Board adopted the Plan on May 26, 2021. (R. 3:1, ¶ 1; A-App. 4) The adopted Final Plan contains only 24 pages of environmental analysis of all of WDNR's proposed plans for the Park, including the snowmobile trail. (R. 23; A. App. 205)

The Friends Group, a Wis. Stat. Ch. 181 non-stock corporation with members who have volunteered hundreds of hours at the Park, raised money for the Park, and routinely and for decades recreated in the Park, petitioned for judicial review, seeking court-review of the WDNR's actions and the Final Plan.[1] (R. 3: 4–5, ¶¶ 14-25; A-App. 7–8).

[1] Shortly after the Friends filed its petitions in this case, two high-ranking WDNR officials requested a meeting with the Friends without either party's counsel present, at which these WDNR officials threatened to terminate the Friends Agreement if the Friends did not drop this lawsuit. While the WDNR has consistently disputed making these unconstitutional retaliatory threats, the Friends received from a third-party an internal meeting agenda prepared by the WDNR's attendees at that meeting. That agenda included two bullet points stating, "We will be initiating our 30 days with an opportunity to cure [in the Friends Agreement] if necessary" and "Only way to cure is to drop the suit." This agenda and the email sharing the agenda between the two WDNR meeting participants was conspicuously omitted from the records WDNR provided in response to the Friends' public records request, which sought all documents related to the August 5, 2021 meeting. (R. 95:5; A. App-86) As such, the Friends were forced to separately file a complaint against WDNR in Iowa County for retaliation due to the behavior of WDNR officials in response to the Friends' petitions. *See Friends of Blue Mound State Park v. Dep't of Nat. Res.*, No. 2021-CV-116 (Wis. Cir. Ct. Iowa Cty. Oct. 19, 2021). The case has since been removed to the United States District Court of the Western District of Wisconsin. *Friends of Blue Mound State Park v. Dep't of Nat. Res.*, No. 21-CV-676 (W.D. Wis. Oct. 26, 2021). *See also* Chris Hubbuch, *Blue Mound volunteer group alleges DNR threats, cover-up in dispute over snowmobile trail*, WISCONSIN STATE JOURNAL (Oct. 21, 2021), https://madison.com/wsj/news/local/govt-and-politics/blue-mound-volunteer-group-alleges-dnr-threats-cover-up-in-dispute-over-snowmobile-trail/article_f8a6ab4c-7e0c-584b-94b4-6ed262c428fd.html.

This is the first time in the Friends' over thirty-years of existence that the group has felt the need to seek a court's review of the WDNR's actions.

II. PROCEDURAL BACKGROUND

On June 25, 2021, the Friends filed a Petition for Judicial Review ("Initial Petition") against the WDNR and NRB in Dane County Circuit Court. (R. 3; A-App. 4) Among other things, the Friends' Initial Petition alleges that the WDNR and NRB's analysis of the snowmobile trail's impacts was woefully deficient, internally inconsistent, and otherwise unlawful. (R.3:3, ¶ 6; A-App. 6)

Concurrently with the filing of its Initial Petition, the Friends also filed a Petition for a Contested Case Hearing pursuant to Wis. Stat. § 227.42, which would have allowed the Friends to present expert witnesses and evidence at an administrative hearing overseen by an independent administrative law judge. The Friends believe they have a statutory right to obtain such an administrative hearing, and to present their own evidence, and to then have an independent ALJ or the WDNR Secretary decide whether the WDNR and NRB's actions here were lawful. *See* Wis. Stat. § 227.42.

Nonetheless, on July 15, 2021, the Friends received a letter from the WDNR denying the Friends' petition for a Contested Case Hearing. (R. 15; A-App-39) The Friends were therefore forced to file another Petition for Judicial Review in Dane County Circuit Court on August 13, 2021, challenging the denial of the Petition for a Contested Case Hearing. (R.3; A-App. 17 [WIDNR])

Having denied the Friends any ability to present their case in an administrative hearing process, on September 2 and 13, 2021, the WDNR and NRB then filed motions to dismiss in Dane County Circuit Court, arguing that the Friends also do not have the right to have the circuit court (or any court) review the WDNR's and NRB's actions. (R.17; A-App. 63)

On October 12, 2021, the Dane County Circuit Court consolidated the two cases and determined that venue was proper in Iowa, rather than Dane County.

On October 1, 2021, the WDNR informed the Friends' counsel that the agency was going to begin building the contested snowmobile trail in thirty days. (R.33: 3)

On October 19, 2021, the Friends filed an emergency motion for stay of construction of the snowmobile trail. (R. 32; A-App. 66)

On October 27, 2021, the circuit court held a hearing on the motion for emergency stay, and at the hearing, the circuit court stayed construction of the new snowmobile trail and the "portions of the challenged Master Plan and [Environmental Assessment] that allow for construction of the new snowmobile trail." (R.94; A-App. 80)

On March 16, 2022, the circuit court held oral arguments on the WDNR's and NRB's motions to dismiss and orally determined that the Friends' lacked capacity and standing to bring their petitions. (R. 103: 43–45; A-App. 177–179) The Friends then orally moved for a stay pending appeal of the circuit court's order.

The circuit court held its decision in abeyance and set a briefing schedule.

On April 4, 2022, the Friends submitted a motion for reconsideration of the court's grant of the motions to dismiss, or in the alternative, for a stay of judgment pending appeal. (R. 107; A-App. 188)

On May 26, 2022, the circuit court denied the Friends' motion for reconsideration, but granted the stay pending appeal. (R. 112; A-App. 203) Construction of the snowmobile trail is therefore currently stayed pending the outcome of this appeal. (*Id.*)

The Friends filed a notice of appeal, seeking review in this Court, on July 6, 2022. (R. 115)

STANDARD OF REVIEW

Review of a circuit court's order granting a motion to dismiss is *de novo*. *Mayo v. Boyd*, 2014 WI App 37, ¶ 8, 353 Wis.2d 162, 844 N.W.2d 652. This Court also need not defer to the WDNR's interpretations of its own regulations or statutes. Wis. Stat. § 227.57 (11).

On review of a motion to dismiss for lack of standing, the court must "take all facts alleged by [the petitioner] to be true in determining whether he has standing to bring his claim." *McConkey v. Van Hollen*, 2010 WI 57, ¶ 14 n.5, 326 Wis. 2d 1, 783 N.W.2d 855 (citing *Repetti v. Sysco Corp*., 2007 WI App 49, ¶ 2, 300 Wis. 2d 568, 730 N.W.2d 189).

ARGUMENT

Friends groups in Wisconsin originate from two sections of the statutes: Wis. Stat. §§ 23.098, 27.016. Both of these statutory sections created WDNR administered grant programs and allow the WDNR to provide grants to "friends groups." *Id.*

Wis. Stat. § 23.098, for example, provides that:

> (2) The department shall establish a program to make grants from the appropriations under s. 20.866 (2) (ta) and (tz) to friends groups and nonprofit conservation organizations for projects for property development activities on department properties. . . .
>
> (3) The department shall promulgate rules to establish criteria to be used in determining which property development activities are eligible for these grants. *Id.*

Similarly, Wis. Stat. § 27.016 provides that:

> (2)(a) The department shall establish a grant program under which friends groups that qualify under par. (b) may receive matching grants for the operation and maintenance

> of state parks, southern state forests or state recreation areas.
>
> (b) To qualify for a grant under this section, a friends group shall have established an endowment fund for the benefit of a state park, a southern state forest or a state recreation area and shall have entered into a written agreement with the department as required by the department by rule. *Id.* § 27.016(2).

Both statutes have slightly different, but similar, definitions of "friends group":

> "Friends group" means a nonstock, nonprofit corporation described under section 501 (c) (3) or (4) of the Internal Revenue Code and exempt from taxation under section 501 (a) of the Internal Revenue Code that is organized to raise funds for state parks, state forests or state recreation areas. *Id.* § 27.016(1)(b).

Nothing in either statute says anything about whether a friends group can sue or be sued.

I. THE CIRCUIT COURT ERRED IN FINDING THAT THE FRIENDS LACK THE CAPACITY TO SUE.

Capacity concerns the right of an entity to "sue and be sued." *Mayhugh v. State*, 2015 WI 77, ¶ 40, 364 Wis. 2d 208, 226, 867 N.W.2d 754, 763. In general, "an action cannot be maintained by one who has no capacity to sue." *Joint Sch. Dist. No. 1, City of Wisconsin Rapids v. Wisconsin Rapids Educ. Ass'n*, 70 Wis. 2d 292, 302, 234 N.W.2d 289, 296 (1975). Case law concerning issues of capacity generally involve

governmental bodies or non-entities that cannot be independently sued.[2]

A. As a Wisconsin nonstock corporation, the Friends have a statutorily created right to sue and be sued.

Here, the Friends' capacity to sue is explicitly enumerated in Wis. Stat. § 181.0302. That statute provides that nonstock corporations organized under Ch. 181, like the Friends, have " . . . the same powers as an individual to do all things necessary or convenient to carry out its affairs, including the power to do all of the following: (1) Legal actions. Sue and be sued, complain and defend in its corporate name." Wis. Stat. § 181.0302.

This is not surprising given that corporations are considered persons under the law and have the same rights as natural persons, including the capacity to sue and be sued. *See, e.g., Town of Fifield v. State Farm Mut. Auto. Ins. Co.*, 119 Wis. 2d 220, 232, 349 N.W.2d 684, 690 (1984) (holding that a corporation is a person under the law that may only speak through its officers). A nonprofit corporation is, after all, just a specific type of corporation. Wis. Stat. § 181.0103(5).

The Friends is not a governmental or quasi-governmental entity like a university athletic department, school board, or community board. The Friends works in concert with the WDNR, but there is a separate

[2] *See, e.g., Mayhugh*, 2015 WI 77, ¶ 46 (holding that the Wisconsin Department of Corrections has the capacity to be sued based on language in its enabling statute); *State v. City of Racine*, 205 Wis. 389, 236 N.W. 553, 555 (1931) (holding that the Wisconsin Board of Education is "not specifically authorized to sue or be sued" and that it is "not a body corporate"); *Seifert v. Sch. Dist. No. 1 of City of Cudahy*, 235 Wis. 489, 292 N.W. 286, 287 (1940) (holding that a school board did not have the capacity to sue or be sued); *Racine Fire & Police Comm'n v. Stanfield*, 70 Wis. 2d 395, 398, 234 N.W.2d 307, 309 (1975) (holding that the police and fire commission has the right to sue and be sued in certain contexts); *Peirick v. Indiana Univ.-Purdue Univ. Indianapolis Athletics Dep't*, 510 F.3d 681, 694 (7th Cir. 2007) (holding that the athletic department was a branch of the public university and could not be independently sued).

contract between the parties outlining each parties' obligations consistent with Wis. Admin. Code NR 1.71(3)(b). In fact, to even be eligible to enter into a "written agreement" to become a formal WDNR friends group, a group must first "organize as a non-profit, non-stock, tax-exempt corporation." Wis. Admin. Code NR 1.71(4)(b)1.

Common sense dictates that there would be no need for an agreement if friends groups were a legislatively created arm of the WDNR without the rights of a nonprofit Wisconsin corporation. Moreover, if the Friends do not have the capacity to sue or be sued, how could the Friends (or the WDNR) even enforce the terms of the contract between the two parties?

The circuit court's determination that the Friends do not have the capacity to sue should be overturned.

B. The Friends did not waive its statutory right to sue and be sued.

The circuit court also seemed to rely on language in the Friends' articles of incorporation to find that the Friends waived its statutory right to sue the WDNR. More specifically, the WDNR argued for the first time in its reply brief on the motion to dismiss that, even if the Friends have capacity to sue and be sued, the Friends waived its right to sue by including certain language, similar to the language in the WDNR's administrative code, in the Friends' articles of incorporation.

The Friends' articles of incorporation state that their purpose is to "conduct any lawful activities of charitable and educational nature to support, assist, and promote the [WDNR]" (R. 12:5; A-App. 35) The WDNR argued, and the circuit court agreed, that the Friends' articles do

not allow the group to sue the WDNR because the articles only state that the Friends will "support, assist, and promote" the WDNR.

This was also an error for numerous reasons.

1. The Friends have never waived their statutory right to sue and be sued.

First, Wisconsin nonstock corporations, such as the Friends, have a statutory right to "[s]ue and be sued, complain and defend in its corporate name" unless they *expressly* waive that right in their articles of incorporation. Wis. Stat § 181.0302(1). Contrary to the Court's ruling, the Friends articles do not *expressly* restrict the Friends' right to sue the WDNR. The articles say nothing about lawsuits, courts, or anything else. The articles certainly do not provide a "clear and specific renunciation" of the Friends' right to sue, as Wisconsin law dictates. *See Mulvaney v. Tri State Truck & Auto Body, Inc.*, 70 Wis. 2d 760, 768, 235 N.W.2d 460, 465 (1975).

For example, a defendant that appeared and defended a suit for over a year in an improper venue did not waive its statutory right to challenge that venue. *Brunton v. Nuvell Credit Corp.*, 2010 WI 50, ¶ 49, 325 Wis. 2d 135, 785 N.W.2d 302. Likewise, a buyer's statement that he would independently run a check on the title of a car did not waive his statutory right to a warranty of good title. *Mulvaney*, 70 Wis. 2d at 767–68. In both cases, while the parties' conduct *suggested* a waiver of the right at issue, there was no evidence of a specific and clear *intent* to waive the right. *Id.*; *Brunton*, 2010 WI 50, ¶ 49. Therefore, the defendant in *Brunton* and the buyer in *Mulvaney* retained the rights given to them by the Legislature. *Mulvaney*, 70 Wis. 2d at 768; *Brunton*, 2010 WI 50, ¶ 49.

In contrast, a school waived its statutory right to initiate Wis. Stat. Ch. 227 proceedings because it clearly and specifically renounced that right in a settlement agreement with the Department of Public Instruction, a state agency. *Ceria M. Travis Acad., Inc. v. Evers*, 2016 WI App 86, ¶ 23, 372 Wis. 2d 423, 887 N.W.2d 904. The agreement, which allowed the school to remain in the Milwaukee Parental Choice Program, stipulated: "the School expressly waives all appeal or other rights it may have including those under Wis. Stat. Chapt. 227." *Id.* ¶ 25. And, because the agreement further stated that the parties knowingly and voluntarily entered into it, the stipulation amounted to a waiver of the school's statutory rights to challenge an agency action under Chapter 227. *Id.* ¶ 26.

The Friends' articles of incorporation state that their purpose is to "conduct any lawful activities of charitable and educational nature to support, assist, and promote the [WDNR]" (R. 12:5; A-App. 35). This language may be read to *suggest* that the Friends are departing from the rights granted to them by statute—like the defendant's conduct did in *Brunton* or the buyer's statements did in *Mulvaney*—but it does not show a *clear and specific intent* to renunciate their statutory right to sue and be sued—like the school's contractual stipulation did in *Ceria*.

The required "specific and clear renunciation" is likewise not present in the Friends' agreement with WDNR, nor in the language of NR § 1.71. Notably, neither document specifically addresses the Friends' capacity to sue. Thus, finding that either document amounts to an express and clear waiver of the Friends' statutory right to sue requires making an inference. The precedent of *Mulvaney, Brunton*, and *Ceria* do not allow such an inferential step. *See also Faust v. Ladysmith-Hawkins*

Sch. Sys., Joint Dist. No. 1, 88 Wis. 2d 525, 532–33, 277 N.W.2d 303, 306, *on reh'g*, 88 Wis. 2d 525, 281 N.W.2d 611 (1979) (per curiam) (as a general rule of contract law, waivers of statutory rights must be clear and express). Therefore, the circuit court erred when it found that the Friends' articles of incorporation amounted to a waiver of the Friends' statutory right to sue.

2. The circuit court also erred by mischaracterizing the significance of WDNR's regulations.

The circuit court found that the friends group requirements enumerated in Wis. Admin. Code NR § 1.71 override the Friends' statutory right to sue as a Wisconsin nonprofit. This was erroneous and contradicts basic principles of administrative law in Wisconsin.

It is undisputed that the respondents, the WDNR and NRB, are administrative agencies that are creatures of statute created by the Legislature. Wis. Stat. § 227.01; Wis. Stat. § 15.43. An agency can only adopt one or more administrative regulations if the Legislature expressly grants the agency the authority to do so. Wis. Stat. § 227.11(2)(a). Agency rules can never conflict with statutes because, by their very nature, agency rules are adopted by an agency, not the elected Legislature. Wis. Stat. § 227.10(2); *Metro. Holding Co. v. Bd. of Rev. of City of Milwaukee*, 173 Wis. 2d 626, 633, 495 N.W.2d 314, 317 (1993).

Wis. Stat. Ch. 227 outlines the various rules WDNR may promulgate, and no provision in Ch. 227 or anywhere else explicitly allows WDNR to promulgate a rule restricting the right of a party to bring a lawsuit or to avail itself of the safeguards in Ch. 227. It would be absurd to interpret the general grant of power to WDNR to "[p]romulgate

rules necessary to govern the conduct of state park visitors, and for the protection of state park property, or the use of facilities" to include the power to limit a friends group's right to judicial review. *See* Wis. Stat. 27.01(2)(j). Put simply, Wis. Admin. Code NR § 1.71 cannot override the right of corporate entities to sue under Wis. Stat. § 181.0302 because it is only an agency regulation—not a legislatively created statute.

3. Other groups formed to support the WDNR have been allowed to bring lawsuits against the WDNR.

Over the past several years, at least three lawsuits have been brought by nonprofits that were created to support WDNR properties, including one by a friend's group that previously operated under an agreement with the WDNR. *See Friends of Black River Forest v. Wisconsin Dep't of Nat. Res.*, 2020 WI App 70, 394 Wis. 2d 523, 950 N.W.2d 685; *Sauk Prairie Conservation Alliance v. Wisconsin Dep't of Nat. Res.*, No. 2016-CV-642 (Wis. Cir. Ct. Sauk Cty. Dec. 8, 2016); *Friends of Stower Seven Lakes Trail v. Wisconsin Dep't of Nat. Res.*, No. 2021-CV-38 (Wis. Cir. Ct. Polk Cty. Feb. 4, 2021). The only difference between the Friends here and the groups that brought the aforementioned cases is that the Friends here operate under an agreement with the WDNR that gives it priority over other groups that serve the Park and allows it to function as "the lead volunteer organization." Wis. Admin. Code NR 1.71(1).

The other groups suing the WDNR also support WDNR properties, as WDNR may accept "benefits from other groups" in addition to formal friends groups. *Id.* Therefore, the fact that the Friends were formed to

support a WDNR property should not restrict its right to challenge the WDNR's decision using Ch. 227.

4. The circuit court erred by improperly relying on an argument not raised in the Respondents' initial motions to dismiss.

Lastly, the circuit court erred by improperly considering and relying on an argument that the Respondents raised for the first time in their reply brief (R. 98: 3–4; A-App. 104–05) There is a "well-established rule that [courts] do not consider arguments raised for the first time in a reply brief." *Bilda v. Cnty. of Milwaukee*, 2006 WI App 57, ¶ 20 n.7, 292 Wis. 2d 212, 713 N.W.2d 661. "The grounds for such a rule are fundamental fairness" because "to withhold an argument from its main brief and argue it in its reply brief . . . would prevent any response from the opposing party." *A.O. Smith Corp. v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 492, 588 N.W.2d 285, 292 (Ct. App. 1998).

Here, in its ruling the circuit court found that the Friends' articles of incorporation "legally restrict [the] Friends from acting in ways that do not support the WDNR's management of the Park." (R. 103:41; A-App. 175). However, Respondents' initial motions to dismiss did not argue that the Friends had waived their capacity to sue based on the language in the Friends' articles of incorporation, nor did they even discuss the specific language in the articles. (R. 107:5; A-App. 191-92). Instead, the WDNR argued that the Friends are an "artificial creature of statute" that does not have the ability to initiate court proceedings. (R. 19:8; A-App. 48). As explained above, however, that description is inaccurate because the Friends are an independent nonstock corporation under state law,

and the Friends are only tied to WDNR by a contractual agreement, which says nothing about the Friends ability to sue. (R. 95:7; A-App. 88)

The only mention of the Friends' articles of incorporation in the Respondents' initial motions was in the factual background section. (R. 19:3–4; A-App. 43–44) The Respondents did not argue that the Friends' articles of incorporation limited the Friends' capacity to sue. (*See id.*) As such, the Respondents' waived this argument by not raising it, and the circuit court's reliance on the Respondents' arguments in their reply brief was improper.

II. THE CIRCUIT COURT ERRED IN FINDING THAT THE FRIENDS LACKED STANDING.

The circuit court's ruling on standing was as curious as was its ruling on capacity. In fact, the circuit court appeared to believe that because the Friends lacked capacity, the Friends therefore lacked standing. This is not, however, how standing works.

Capacity to sue, and standing to sue, are two different things. Capacity has to do with whether a person or legal entity has the ability to use the court system at all. Standing, on the other hand, looks at whether a person or legal entity has a substantial interest in the outcome of the lawsuit they brought.

Nonetheless, the circuit court appeared to find that the Friends did not have standing to file its petitions for judicial review against the WDNR for the same reasons the circuit court determined that the Friends did not have the capacity to file the petitions: "by virtue of its Articles of Incorporation, the Wisconsin Administrative Code NR 1.71(4)(b)1 and its Friends Agreement with the DNR." (R. 103: 44; A-

App. 178) According to the circuit court, because the Friends is a "creature[] of the state" and by way of its "unique affiliation with the DNR," the Friends "has not suffered an injury and is not within the zone of interest under Chapter 227 or the WEPA." (R. 103:43–44; A-App. 177–78)

This is also wrong.

A. The Friends meet both prongs of Wisconsin's standing test.

As a general matter, the law of standing in Wisconsin is construed "liberally, and 'even an injury to a trifling interest' may suffice." *Wisconsin's Environmental Decade, Inc. v. Public Service Commission of Wisconsin*, 69 Wis. 2d 1, 10, 230 N.W.3d 243 (1975). Courts must ask (1) "whether the decision of the agency directly causes injury to the interest of the petitioner" and (2) "whether the interest asserted is recognized by law." *Id.* At the motion to dismiss stage, the court must assume that all facts pled by the petitioner are true. *McConkey v. Van Hollen*, 2010 WI 57, ¶ 14 n.5, 326 Wis. 2d 1, 783 N.W.2d 855 (citing *Repetti v. Sysco Corp.*, 2007 WI App 49, ¶ 2, 300 Wis. 2d 568, 730 N.W.2d 189).

1. The Friends' injuries satisfy the first prong of the Wisconsin standing test.

The Friends satisfies the first prong of the Wisconsin standing test because the WDNR's action—i.e., its unlawful approval of the snowmobile trail at the Park—causes direct and substantial injuries to the Friends' and its members' interests.

The injury-in-fact element of standing is met where the petition "alleges injuries that are a direct result of agency action." *WED*, 69 Wis.

2d at 13; *see also Fox v. Dep't of Health Social Servs.*, 112 Wis. 2d 514, 524, 334 N.W.2d 532 (1983). An "[i]njury alleged, which is remote in time or which will only occur as an end result of a sequence of events set in motion by the agency action challenged, can be a sufficiently direct result of the agency's decision to serve as a basis for standing." *WED.* at 8. The alleged injury should be neither hypothetical nor conjectural. *Milwaukee Brewers Baseball Club v. DHSS*, 130 Wis. 2d 56, 65, 387 N.W.2d 245 (1986).

Where the alleged harm is to the environment, "injuries 'must show a direct causal relationship to a proposed change in the physical environment." *Friends of Black River Forest v. Kohler Co.*, 2022 WI 52, ¶ 22, 402 Wis. 2d 587, 607, 977 N.W.2d 342, 352 (quoting *Applegate-Bader Farm, LLC v. DOR*, 2021 WI 26, ¶ 17 n.7, 396 Wis. 2d 69, 955 N.W.2d 793. "[A]llegations of injury to aesthetic, conservational, recreational, health and safety interests will confer standing so long as the injury is caused by a change in the physical environment." *Milwaukee Brewers Baseball Club v. DHSS*, 130 Wis. 2d 56, 65, 387 N.W.2d 245 (1986). Moreover, "[t]he question of whether the injury alleged will result from the agency action in fact is a question to be determined on the merits, not on a motion to dismiss for lack of standing." *WED*, 69 Wis. 2d at 14.

For example, in *Milwaukee Brewers*, the Supreme Court found that a petitioner had standing to challenge the sufficiency of the Department of Health Services' Environmental Impact Statement (EIS) under the Wisconsin Environmental Policy Act ("WEPA"), based on an alleged injury stemming from the construction of a proposed prison. *Milwaukee Brewers*, 130 Wis. 2d at 68–69. The Court found that the

construction will directly lead to increased traffic congestion and aesthetic injuries. *Id.*

Here, the Friends have alleged direct injuries to various individual members and to the organization itself, including substantial aesthetic, conservation, and recreational interests. (*See* Petition for Judicial Review, R. 3:6–7; A-App. 6–7) For instance, the Friends has several members who live near the Park, who have recreated and will continue to recreate in the Park, and whose use of the Park will be disturbed by the proposed snowmobile trail. (*Id.*) The snowmobile trail, once built, will also negatively impact native plant and animal species habitats that the Friends have worked hard to protect through native savanna cleanup events and invasive species control. (*Id.*). And the Friends' longstanding educational and ecological restoration efforts would also be thwarted by construction of the new snowmobile trail. (R.3:6; A-App. 9–10)

These injuries are not hypothetical or conjectural. In fact, the circuit court granted a stay of the construction of the snowmobile trail precisely because the trail's construction would cause direct injuries to the Friends' and its members' interests. (R. 113) The Friends, both as an organization and through its individual members, therefore allege sufficient direct injuries to satisfy the first prong of the standing test.

2. The Friends also satisfy the second prong of the standing test.

The second prong of the standing test looks at whether the interests asserted are ones the law seeks to protect. *Wisconsin's Environmental Decade, Inc. v. Public Service Commission of Wisconsin*, 69 Wis. 2d 1, 10, 230 N.W.3d 243 (1975). And here, the Friends' and its

members' interests in ensuring that the WDNR follows the law when adopting a master plan for the exact piece of property the Friends are focused on protecting and enhancing is clearly an interest recognized under Wisconsin law.

In fact, the Legislature has said in Wisconsin's administrative procedures act, Ch. 227, that "any person" who is "aggrieved" may petition the courts to ensure that an agency is following the law when it makes its decisions. Wis. Stat. § 227.52-.53. "Person aggrieved" means "a person or agency whose substantial interests are adversely affected by a determination of an agency." *Id.* § 227.01(9).

Here, the WDNR has never disputed that the Friends and its members have "substantial interests" that were "adversely affected" by the WDNR's decision to build a new snowmobile trail through the Park. The Friends' petitions include numerous examples of why the WDNR's decision has, and will continue to, negatively impact the Friends' and its members' substantial interests. In addition to the environmental harm that the new snowmobile trail will cause to ecologically sensitive areas of the park, it is also undisputed that the new snowmobile trail will impede the Friends' members' use of existing trails and their ability to conduct other recreational activities at the Park.

Moreover, the Friends' petitions are alleging that the WDNR's Final Plan and its actions adopting that Final Plan violated numerous statutes and regulations, including the state's master planning procedures for state properties in Wis. Admin. Code NR Ch. 44, the Wisconsin Environmental Policy Act (WEPA), Wis. Stat. § 1.11 and its accompanying regulations, Wis. Admin. Code NR Ch. 150 (R: 7–11; A-

App. 10-14), in addition to various provisions in Wisconsin's administrative procedures act, Chapter 227.

Under the second prong of the standing test, the adversely affected interest must be one "protected, recognized, or regulated by an identified law." *Friends of Black River Forest*, 2022 WI 52, ¶ 31. This inquiry "centers on a textually-driven analysis of the language of the specific statute cited by the petitioner as the source of its claim" in order to determine whether the statute cited "recognizes or seeks to regulate or protect" the interest advanced by the petitioner. *Id.* at ¶ 28.

While previously Wisconsin courts used a "zone of interests" test for the second prong of the standing inquiry, "removing the 'zone of interests' label leaves the test's substance intact: 'the injury' must be 'to an interest which the law recognizes or seeks to regulate or protect.'" *Id.* ¶ 30 (citing *Waste Mgmt. of Wis., Inc. v. DNR*, 144 Wis. 2d 499, 505, 424 N.W.2d 685 (1988) ("The injury must be to a legally protected interest.").

In this case, the Friends first requested a contested case hearing pursuant to Wis. Stat. § 227.42, which provides as follows:

> In addition to any other right provided by law, any person filing a written request with an agency for a hearing shall have the right to a hearing which shall be treated as a contested case if
>
> (a) A substantial interest of the person is injured in fact or threatened with injury by agency action or inaction;
>
> (b) There is no evidence of legislative intent that the interest is not to be protected;
>
> (c) The injury to the person requesting a hearing is different in kind or degree from injury to the

> general public caused by the agency action or inaction; and
>
> (d) There is a dispute of material fact.

The Friends' request for a contested case hearing meets all of the requirements of § 227.42 and is plainly recognized by law. Nonetheless, the WDNR denied the petition, forcing the Friends to go to court and ask the court to overturn the WDNR's denial. The circuit court, however, never reached that question, and has instead now determined that the Friends do not have the capacity or standing to even obtain court review of the WDNR's denial of the Friends request for an administrative hearing. But if the Friends do not have standing to even ask the Court to weigh in on whether the Friends should have been granted an administrative contested case hearing, then the WDNR's decision will never be subject to <u>any</u> review. That cannot, and should not, be the law.

The Friends petitions also asserts that the WDNR's process of adopting, and its actual adoption of, the Final Plan violated various Wisconsin property management laws.

For example, the petition alleges that:

> 38. The WDNR and NRB have . . . failed to abide by their master planning rules and state law regarding master planning for state properties when including the snowmobile trail in the Plan. See Wis. Admin. Code NR § 44.04(2).
>
> 39. The WDNR's and NRB's inclusion of the new snowmobile trail in the Plan also fails to comply with the planning procedures in Wis. Admin. Code NR § 44.04(8). For example, the Plan does not adequately analyze the use, capability, and demand of existing recreation uses when evaluating the need for a new snowmobile trail. The Plan also does not account for the full economic impacts of the proposed snowmobile trail and lacks an analysis of the costs

> associated with building the trail. (Petition for Judicial Review ¶38-39)

These WDNR regulations in NR 44 were adopted pursuant to the WDNR's statutory authority for managing state parks and lands, which can be found in Wis. Stat. Ch. 27 (Public Parks and Places of Recreation) and Wis. Stat. Ch. 23 (Conservation). Wis. Stat. § 27.01 provides:

> (1) Purpose. It is declared to be the policy of the legislature to acquire, improve, preserve and administer a system of areas to be known as the state parks of Wisconsin. The purpose of the state parks is to provide areas for public recreation and for public education in conservation and nature study. An area may qualify as a state park by reason of its scenery, its plants and wildlife, or its historical, archaeological or geological interest. The department shall be responsible for the selection of a balanced system of state park areas and for the acquisition, development and administration of the state parks.
>
> (2) Powers of the Department. In order to carry out the purposes of this section, the department shall have charge and supervision of the state park system. The department also may: . . .
>
> (c) Make, and as rapidly as possible carry out, plans for the development of the state parks, including the layout and construction of roads, trails, camping and picnic areas, buildings, water and sewer and other sanitary installations, and the development of all other facilities considered necessary for the preservation of special features or the overall usefulness of any state park. *Id.*

Moreover, Wis. Stat. Ch. 23, which governs conservation of state properties, provides in section 23.01 that "The purpose of this section is to provide an adequate and flexible system for the protection,

development and use of forests, fish and game, lakes, streams, plant life, flowers and other outdoor resources in this state."

Clearly, the Legislature did not intend to give, nor did they give, the WDNR unfettered, unreviewable authority to make all determinations regarding state parks. Like all other administrative agency decisions, the WDNR's decisions regarding state parks are reviewable as final agency decisions under Wisconsin's administrative procedures act, Ch. 227. Nowhere in the statutes has the Legislature limited the reviewability of the WDNR's decisions or actions with regards to state parks. A nonprofit organization that is focused on preserving and enhancing Blue Mound State Park is surely within the zone of interests these state property statutes were meant to protect.

Finally, the petitions also allege that the WDNR failed to comply with WEPA, the state counterpart of the National Environmental Policy Act ("NEPA", 42 U.S.C. §§ 4321 et seq.). Like NEPA, WEPA requires agencies to follow established environmental review procedures, including reviewing and documenting the environmental impact of their actions. Wis. Stat. § 1.11. WEPA creates an interest in the environment sufficient to give a person (including a corporation) standing to challenge agency compliance with its provisions. *Wisconsin's Env't Decade*, 69 Wis. at 11. The legislative purpose of the act is to "declare a policy which will encourage productive and enjoyable harmony between man and his environment; [and] to promote efforts which will prevent or eliminate damage to the environment," among others. Ch. 274, laws of 1971. The act further provides that "each person should enjoy a healthful environment." *Id*.

The Friends' petition alleges that WDNR did not follow the procedural requirements of WEPA's implementing regulations: Wis. Admin. Code NR 150. (R. 3: 7–9; A-App. 10–11) Ch. 150 prescribes WEPA requirements that are applicable to the WDNR's actions. These regulations ensure that certain procedural requirements are followed when departmental action on "department managed properties" has the potential to impact the quality of the human environment. Wis. Admin. Code NR §§ 44.01, 150.01. The Friends also allege that WDNR failed to adequately evaluate the adverse environmental effects of snowmobile uses in the Park. *See* Wis. Stat. § 1.11(2)(c)(1); Wis. Admin. Code NR 150.03(12m).

The Friends allege injuries to the interests of its members who use the Park for recreational purposes and a direct injury to the organization itself, whose longstanding educational and ecological restoration efforts would suffer with the construction of the snowmobile trail. (R. 3:6–7; A-App. 9–10) WEPA and its supporting regulations, Wis. Admin. Code Ch. NR 150, create a legally recognized interest in the environment. The Friends' injury is both to the environmental interests of its members who recreate in the Park and to the organization itself that has made longstanding efforts in furtherance of its educational and conservational mission. These environmental, recreational, and conservational interests are recognized by WEPA and the administrative regulations on which the Friends rely.

The Friends thus satisfy the recently reframed second prong of the standing analysis in *Friends of Black River Forest* because the Friends' adversely affected interests are ones "protected, recognized, or regulated by an identified law." *Friends of Black River Forest*, 2022 WI 52, ¶ 31. As

explained above, WEPA creates an interest in the environment sufficient to give a person (including a corporation) standing to challenge agency compliance with its provisions. *Wisconsin's Env't Decade*, 69 Wis. at 11; *Friends of Black River Forest*, 2022 WI 52, ¶ 24 (stating that courts "recognize an interest [under WEPA] sufficient to give a person standing to question compliance with its conditions where it is alleged that the agency's action will harm the environment in the area where the person resides.").

Last, there is no evidence of legislative intent, and the WDNR cited to none in the briefing below, that the Friends' and its members' interests are of the type that are not to be protected by any of these laws. And the injury the Friends and its member would suffer is plainly different from the injury to the general public given the Friends' and its members' long-standing efforts and mission in furtherance of the Park's maintenance and enhancement.

In sum, the Friends and its members have recognized legal interests under numerous Wisconsin statutes, and therefore the Friends satisfies the second prong of the standing test.

B. The Friends' "unique affiliations" with the WDNR do not limit its standing.

Finally, the circuit court erred in holding that the Friends is a creature of the state and that because of its "unique affiliations" with the WDNR, the Friends lack standing to bring this lawsuit. (R. 103:44; A-App. 178) In fact, neither the articles of incorporation nor the agreement between the WDNR and the Friends makes any reference to either Chapters 23, 27, 227 or WEPA. The agreement and the language of the

articles of incorporation both stem from the requirements of NR § 1.71(4)(b)1, a regulation created by the WDNR—not a statute enacted by the Legislature.

"An agency charged with administering a law may not substitute its own policy for that of the legislature." *Niagara of Wis. Paper Corp. v. Wis. Dep't of Nat. Res.*, 84 Wis. 2d 32, 48, 268 N.W.2d 153, 160 (1978). The Legislature authorized the WDNR to enter into contracts with groups like the Friends, Wis. Stat. § 27.01(2)(d), but the WDNR received no authorization to essentially negate the broad grant of standing conferred by Chapter 227. Thus, the "unique affiliations" with the WDNR, which are based on a regulation, do not eliminate the Friends' legal interests established under Wisconsin law.

The Friends are also not an arm of the state and, despite their collaborative relationship with the WDNR, they are not an arm of the WDNR. The circuit court called the Friends a "creature[] of the state," (R. 103:44; A-App. 178), but the Friends is no more a creature of the state than any other Wisconsin nonprofit corporation organized under the laws of Wisconsin. The Friends will continue to exist under Wisconsin law as a nonprofit corporation even if they do not renew their Friends agreement with the WDNR. Therefore, the Friends is not a creature of the WDNR as it has an existence that is independent of the WDNR.

In sum, the Friends had standing to file its petitions. The Friends satisfies both prongs of the standing test and is not a creature of the state that would prevent it from being able to bring these challenges to the WDNR's actions. As such, the circuit court erred by holding that the Friends lack standing, and its decision should be reversed.

CONCLUSION

For the reasons set forth above, the circuit court erred when it held that the Friends lack capacity and standing to bring petitions for judicial review against the WDNR. This Court should therefore reverse the decision of the court below.

DATED: October 3, 2022

Electronically signed by Brian H. Potts

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CERTIFICATION REGARDING BRIEF LENGTH

I hereby certify that this brief conforms to the rules contained in s.809.19(8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 8268 words.

Dated: October 3, 2022

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CERTIFICATION REGARDING ELECTRONIC BRIEF

I certify that I have submitted an electronic copy of this brief in compliance with the requirements of Wis. Stat. § 809.19(12). I further certify that the electronic copy of this brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all parties.

Dated: October 3, 2022

Electronically signed by Brian H. Potts
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CERTIFICATE OF SERVICE

I certify that on this 3rd day of October, 2022, I caused a copy of this brief to be served upon counsel for each of the parties via the court's E-filing system.

Electronically signed by Brian H. Potts
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