FILED
01-22-2024
CIRCUIT COURT
DANE COUNTY, WI
2023CV003097

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 15

GREAT LAKES WILDLIFE ALLIANCE
d/b/a FRIENDS OF THE WISCONSIN WOLF
& WILDLIFE,

Petitioner,

v. Case No. 23-CV-3097

WISCONSIN NATURAL RESOURCES BOARD
and WISCONSIN DEPARTMENT OF NATURAL
RESOURCES,

Respondents.

RESPONDENTS' BRIEF IN SUPPORT OF MOTION TO DISMISS

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INTRODUCTION

This case is a policy dispute over the State's plan for managing its wolf population dressed up as a lawsuit. As required by statute, the Department of Natural Resources (DNR) and the Natural Resources Board (the "Board") (collectively, "Respondents") recently explained the State's wolf management goals and strategies in an updated "wolf management plan." Respondents adopted that plan after a deliberative two-and-a-half-year process during which DNR collected substantial public input from stakeholders and the general public.

Although the Great Lakes Wildlife Alliance ("Petitioner") could submit public comments just like everyone else—and it did—it alleges that Respondents did not "seriously evaluate[ ] or consider at all" its comments. (Pet. ¶ 84.) In Petitioner's view, by supposedly failing to do so, Respondents violated both administrative procedure requirements and Petitioner's constitutional rights. But Petitioner's quibbles with Respondents' policy choices do not state legal claims, let alone justify invalidating a document that merely explains Respondents' strategies for future action.

First, Petitioner lacks standing to challenge the wolf management plan. Although Petitioner alleges injuries to various of its aesthetic and recreational interests, Wisconsin standing law also requires Petitioner to identify statutes that specifically protect those interests—and it has not done so.

Second, even if Petitioner had standing, it states no valid claims for relief. As for Petitioner's chapter 227 claims, it only cites provisions that apply to administrative rules and decisions that carry the force of law. But the wolf management plan does not itself carry legal force: it is merely a plan for future action, and so none of the cited chapter 227 provisions apply here. And as for Petitioner's constitutional claims related to free speech and the right to petition the government, those fail because individuals have no constitutional right "to a government audience for their views." *Minn. State Bd. for Cmty. Colleges v. Knight*, 465 U.S. 271, 282 (1984). Petitioner's public trust doctrine claim also gets it nowhere because that doctrine protects only state waters, not wildlife.

Petitioner's other arguments also fail to state a claim. Petitioner challenges an administrative rule that Respondents have proposed in parallel with the wolf management plan, but that proposed rule has not yet been promulgated and so it is not subject to judicial review. And Petitioner's open meetings law claim also cannot succeed: no more than three Board members attended any of the three listening sessions Petitioner identifies, and that is insufficient attendance to trigger the Board's open meetings obligations.

Because Petitioner's claims fail as a matter of law due to defects that cannot be cured, the Petition should be dismissed with prejudice.

STATEMENT OF THE CASE

I. Respondents issue the Wolf Management Plan after receiving significant public input.

DNR and the Board, while related, are distinct entities with separate functions. DNR is the agency responsible for administering various environmental and natural-resource statutes under the "direction and supervision" of the Board (Wis. Stat. § 15.34(1)), an independent body that itself has "regulatory, advisory and policy-making" authority over DNR (Wis. Stat. § 15.05(1)(b)). Under Wis. Stat. § 29.185, DNR must "implement a wolf management plan" to guide the hunting and trapping of wolves when they are absent from endangered species lists. Ultimately, the Board approves the plans that DNR drafts. (Pet. ¶¶ 72, 74–76.)

In 2021, DNR began a multi-year effort to draft and issue an updated wolf management plan. (Pet. ¶ 68.) DNR began by spending around a year and a half soliciting feedback from all corners of the public, including tribal representatives and nonprofit advocacy organizations. (Pet. ¶¶ 69–73.) It also conducted a comprehensive public opinion survey. (Pet. ¶¶ 71, 81.) After DNR released a first draft of the management plan in November 2022, it commenced a public comment period and received around 3,500 comments. (Pet. ¶¶ 71, 73, 81.) Petitioner, its members, and sympathetic scientists were among those that submitted comments to DNR. (Pet. ¶¶ 83–85.)

As part of DNR's extensive public outreach campaign, DNR attended a series of listening sessions organized by private associations to hear their views. (Pet. ¶ 92.) The first listening session occurred on February 18, 2023, attended by DNR's Secretary and three Board members. (Pet. ¶ 93.) A similar listening session occurred on April 22, 2023, this one attended by DNR's Secretary and two Board members. (Pet. ¶ 95.) And a third listening session occurred on July 12, 2023, attended by a single Board member. (Pet. ¶ 97.) Respondents did not publicly notice these three listening sessions. (Pet. ¶ 92.)

After receiving public input on the original draft, DNR released a first revision to the wolf management plan on August 1, 2023, and another revision on October 11, 2023. (Pet. ¶¶ 74–75.) The Board approved that second revision (the "Wolf Management Plan" or "Plan") at a properly noticed open meeting held on October 25, 2023. (Pet. ¶ 76.)[1]

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[1] *See* Wis. Dep't of Nat. Res. *October 2023 Agenda and Meeting Materials,* https://dnr.wisconsin.gov/About/NRB/2023/October (last visited Jan. 19, 2024) (online notice of October 25, 2023, Board meeting with agenda and materials). A full text of the wolf management plan approved at this open meeting can be found here: Wis. Dep't of Nat. Res., Natural Resources Board Agenda Item, *Request approval of the Wisconsin Wolf Management Plan 2023.*, Item No. 5.F. (Oct. 11, 2023), https://widnr.widen.net/s/6qxspfwjtc/item-5.f.-wolf-managment-plan-approval (hereinafter the "Wolf Plan"). This material may be considered on a motion to dismiss under the "incorporation-by-reference doctrine." *See Soderlund v. Zibolski*, 2016 WI App 6, ¶¶ 37–38, 366 Wis. 2d 579, 874 N.W.2d 561. Moreover, the Court can take judicial notice of "matters of record in government files." *Sisson v. Hansen Storage Co.*, 2008 WI App 111, ¶ 11, 313 Wis. 2d 411, 756 N.W.2d 667; *see also* Wis. Stat. § 902.01(6) (allowing for judicial notice at "any stage of the proceeding"). All subsequent citations to government documents and records can be considered for the same reasons.

II. Respondents propose the Wolf Management Regulation.

In parallel with creating the Wolf Management Plan, Respondents embarked on a related administrative rulemaking effort. (Pet. ¶ 77.) In short, Respondents have proposed an administrative rule that would make permanent an existing emergency rule and implement some recommendations derived from the new Wolf Management Plan. (Pet. ¶ 78.)[2] The Board approved the proposed rule (the "Wolf Management Regulation" or "Regulation") at the October 25, 2023, open meeting. (Pet. ¶ 77.) The proposed Regulation has since been sent to the Legislature for its review and approval under Wis. Stat. § 227.19 but has not yet been approved and published in the Administrative Register.[3] *See* Wis. Stat. §§ 227.20, 227.21 (describing rule publication process).

III. Petitioner files this challenge to the Wolf Management Plan and the proposed Wolf Management Regulation.

About a month after the Board approved the Wolf Management Plan and the proposed Wolf Management Regulation, Petitioner filed this Petition.

Petitioner pleads five claims: (1) that the three listening sessions in February, April, and June 2023 attended by three or fewer Board members violated Wisconsin's Open Meetings Law (Pet. ¶¶ 100–16); (2) that

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[2] *See also* Wis. Dep't of Nat. Res., Natural Resources Board Agenda Item, *Request that the Board Adopt WM-03-21, Proposed Rules Affecting Chapters NR 10 and 12 Related to Gray Wolf Harvest Regulations*, Item No. 5.G. (Oct. 11, 2023), https://widnr.widen.net/s/shbdgdktks/item-5.g.-wm-03-21-gray-wolf-harvest-regulations-approval.

[3] *See* Wis. State Leg., *Clearinghouse Rule CR 23-047*, https://docs.legis.wisconsin.gov/code/chr/all/cr_23_047 (last visited Jan. 19, 2024).

Respondents violated Wisconsin's Administrative Procedures Act ("APA") by failing to follow various chapter 227 procedures when adopting the Wolf Management Plan (Pet. ¶¶ 117–35); (3) that Respondents violated the APA by adopting the Wolf Management Plan and proposed Regulation without an adequate factual basis (Pet. ¶¶ 136–51); (4) that Respondents violated Petitioner's state constitutional rights to due process, to freedom of speech and association, to petition the government, and to equal protection by "refu[sing] to consider Petitioner's submitted comments and scientific research" when adopting the Wolf Management Plan (Pet. ¶¶ 152–72); and (5) that Respondents violated the constitutional public trust doctrine by "act[ing] in contradiction to their trustee duties and commitment to consider scientific findings to advance sound wildlife management" when adopting the Wolf Management Plan and the proposed Regulation (Pet. ¶¶ 173–87).

Petitioners seek four main kinds of relief: (1) a declaration that the Wolf Management Plan and the proposed Wolf Management Regulation are invalid; (2) a declaration that Respondents' violated Petitioner's state constitutional rights; (3) an injunction against the future authorization of wolf hunts; and (4) costs and attorneys' fees. (Pet. Prayer for Relief ¶¶ a.–h.)

LEGAL STANDARD

"A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint." *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86,

¶ 19, 356 Wis. 2d 665, 849 N.W.2d 693 (citation omitted). A court "accept[s] as true all facts well-pleaded in the complaint and the reasonable inferences therefrom." *Id.* By contrast, "legal conclusions stated in the complaint are not accepted as true, and they are insufficient to enable a complaint to withstand a motion to dismiss." *Id.* Ultimately, "[a] complaint must plead facts, which if true, would entitle the plaintiff to relief." *Id.* ¶ 21.

ARGUMENT

I. Petitioner's open meetings claim fails as a matter of law.

Three fatal defects require dismissal of Petitioner's open meetings claim. First, they have failed to plead it as a relator claim, as the open meetings law requires. Second, DNR is not subject to the open meetings law on these alleged facts, assuming Petitioner intends to include DNR on this claim. Third, as for a claim against the Board, not enough Board members attended the listening sessions Petitioner identifies to trigger the open meetings law.

A. Petitioner's open meetings claim is not properly pleaded.

Petitioner's open meetings claim fails first for a basic procedural reason: Petitioner has not pleaded it as a relator claim. If the district attorney and attorney general decline to pursue an open meetings claim, a private individual "may bring an action . . . in the name, and on behalf, of the state." Wis. Stat. § 19.97(4). In *Fabyan v. Achtenhagen*, 2002 WI App 214, 257 Wis. 2d 310, 652 N.W.2d 649, the court of appeals held that the "failure to title the action

'State ex. rel'" dooms an open meetings claim since it means the plaintiff brings the claim on its own behalf, not on the State's behalf, as Wis. Stat. § 19.97(4) requires. *Id.* ¶ 6. This failure "deprive[s] [a] court of competency to proceed" and requires dismissal. *Id.* ¶ 13.

Because Petitioner has made the same mistake here—it purports to bring its open meetings claim on its own behalf rather than the State's (*see, e.g.*, Pet. ¶¶ 5, 114)—that claim must be dismissed.

B. DNR did not act as a "governmental body" subject to the open meetings law.

The open meetings law is triggered only by a "meeting" of a "governmental body." Wis. Stat. § 19.83(1). If Petitioner directs its open meetings claim partly at DNR, the claim fails because DNR staff and officials did not operate here as a "governmental body" under the open meetings law.

A "governmental body" is "a state or local agency, board, commission, committee, council, department or public body corporate and politic created by constitution, statute, ordinance, rule or order." Wis. Stat. § 19.82(1). To comprise a "governmental body," a group must have the "form" of a collective entity, as opposed to a mere assemblage of individuals. *State ex rel. Krueger v. Appleton Area Sch. Dist. Bd. of Educ.*, 2017 WI 70, ¶ 23, 376 Wis. 2d 239, 898 N.W.2d 35. Accordingly, "[l]oosely organized, ad hoc gatherings of government employees, without more, do not constitute governmental bodies." *Id.* ¶ 26.

And a "meeting" is "the convening of members of a governmental body for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body." Wis. Stat. § 19.82(2). This definition, too, means the open meetings law applies only to a group of persons that has been vested, as a collective unit, with identifiable governmental powers and duties. *Krueger*, 376 Wis. 2d 239, ¶ 24. Likewise, the Wisconsin Supreme Court has held that a "meeting" subject to the open meetings law takes place only if there are enough members present to determine the governmental body's course of action. *See State ex rel. Newspapers v. Showers*, 135 Wis. 2d 77, 102, 398 N.W.2d 154 (1987). That number can be calculated only if the body's membership is numerically definable and the body exercises collective power pursuant to some definition of when that power rightly exists.

The open meetings law thus applies only to a meeting of a multi-member body that has a determinate membership and is authorized, pursuant to law, to collectively exercise power or provide advice on specific matters entrusted to it, acting as a body through some mechanism of collective decision-making. *Krueger*, 376 Wis. 2d 239, ¶ 24.

Under these principles, Petitioner has not alleged a valid open meetings claim against DNR. Petitioner merely alleges that DNR's Secretary attended two listening sessions regarding the wolf management plan. (Pet. ¶¶ 93, 95.) But DNR's Secretary was not a member of a multi-member body with a

determinate membership authorized to approve or reject a wolf management plan. In other words, his presence at the listening sessions was not as part of a "governmental body," but rather as part of a "[l]oosely organized, ad hoc gathering[ ] of government employees" that cannot support an open meetings claim. *Krueger*, 376 Wis. 2d 239, ¶ 26.[4]

C. Petitioner's open meetings claims against the Board fail.

1. None of the three listening sessions included enough Board members to trigger the open meetings law.

Unlike DNR, the Board is a "governmental body," as Wis. Stat. § 19.82(1) defines it. But Petitioner's allegations fail to show that any of the listening sessions constituted a Board "meeting" under Wis. Stat. § 19.82(2).

A "meeting" subject to the open meetings law occurs when a gathering of a body's members satisfies two independent requirements. First, there must be a "purpose to engage in governmental business." *Showers*, 135 Wis. 2d at 102. Second, the "number of members present must be sufficient to determine the [governmental] body's course of action." *Id.* The "purpose" requirement was met here, since the gatherings concerned a wolf management plan. (Pet. ¶ 92.)

But the listening sessions did not meet *Showers*' independent "numbers" requirement. Under Wis. Stat. § 15.07(4), a "quorum to do business" consists

[4] Even if there were some DNR "governmental body" here, only one of its members—DNR's Secretary—attended on its behalf, which cannot possibly constitute a "meeting" under *State ex rel. Newspapers, Inc. v. Showers*, 135 Wis. 2d 77, 102, 398 N.W.2d 154 (1987).

of "[a] majority of the membership of a board." This means "a majority of the number of members fixed by law." Wis. Stat. § 990.01(8m). The Board's total membership is seven. Wis. Stat. § 15.34(2)(a). So, a gathering of fewer than four members lacks a quorum and ordinarily cannot "determine the [Board's] course of action." *Showers*, 135 Wis. 2d at 102. All three of the listening sessions identified by Petitioners involved fewer than four Board members. (Pet. ¶¶ 93, 95, 97.) That is an insufficient number to determine Board action and trigger *Showers*.

To be sure, *Showers* recognizes a narrow exception for subjects that require a supermajority vote. Then, a "negative quorum" of fewer than half a body's members can determine its action by blocking the requisite supermajority; this blocking power triggers the open meetings law. *Showers*, 135 Wis. 2d at 80–81, 102–03. That special rule has no application here because the Board's approval of the Wolf Management Plan did not require a supermajority. So, when fewer than half the Board's members attended the listening sessions, they could not constitute a "negative quorum" that might trigger the open meetings law.

Contrary to *Showers*, Petitioner suggests that a gathering of fewer than half a body's members can trigger the open meetings law not just as to supermajority decisions, but also as to regular majority decisions. Petitioner notes that because four members comprise a quorum of the Board, a majority

of a quorum—*i.e.* three Board members—may sometimes act on Board business. (Pet. ¶ 106.) Moreover, even just two members could block a quorum of four and in that sense sometimes determine the Board's action. (Pet. ¶ 106.) So, Petitioner argues that any gathering of two or more Board members triggers the open meetings law under *Showers*.

This "blocking a quorum" theory finds no support in *Showers*. The court there calculated the numbers requirement not in relation to the body's *quorum* (as Petitioner suggests), but rather in relation to the body's *total membership*. That is, because a supermajority of eight out of 11 *total* members was needed to act on the subject in question, four members could prevent the formation of an eight-member supermajority and thus determine the body's action. *Showers*, 135 Wis. 2d at 81–82, 102–03. Under Petitioner's quorum-focused theory, *Showers* would not have needed to point to a supermajority requirement, nor would it have calculated the supermajority using the body's total membership. Instead, *Showers* could have simply observed—as Petitioner proposes—that four members sufficed to block a six-member quorum, and that this quorum-blocking ability triggered the open meetings law.

But that plainly is not how the *Showers* court viewed the issue. Instead, the court rested its holding on how the "two-thirds vote" requirement allowed "four members . . . to defeat any proposal" on the issue. *Id.* at 102–03. In other words, fewer than half the body's members triggered the open meetings law

only due to the two-thirds supermajority requirement (as applied to the *entire membership*), not because fewer than half could thwart a *quorum* (which is, by definition, always true).

Other cases reinforce this conclusion. In *State ex rel. Badke v. Village Board of Village of Greendale*, 173 Wis. 2d 553, 494 N.W.2d 408 (1993), the court explained, in the context of a non-supermajority issue, that the open meetings law applies "when . . . one-half or more of the members of a governmental body attend a meeting . . . to gather information about a subject over which they have decisionmaking responsibility." *Id.* at 561. It did not say "one-half or more of the members of a *quorum* of a governmental body," as Petitioner would have it. Likewise, in *State ex rel. Plourde v. Habhegger*, 2006 WI App 147, 294 Wis. 2d 746, 720 N.W.2d 130, the court held that, as a matter of law, the presence of six members of a 14-member body did not trigger the open meetings law. *Id.*, ¶¶ 10–11, 15. Under Petitioner's erroneous theory, only five would have sufficed—a majority of the quorum of eight. But since six did not suffice in *Plourde*, five obviously would not either.

2. The fact that the listening sessions involved information that could influence a subsequent Board decision did not trigger the open meetings law.

Petitioner also wrongly suggests that the open meetings law is triggered whenever information acquired at a gathering of a body's members might influence a future decision by the full body. (Pet. ¶¶ 103–04.) Again, under

Showers, a gathering triggers the open meetings law only when it includes enough members to "determine the parent body's course of action." *Showers*, 135 Wis. 2d at 80. *Showers* never says that the open meetings law applies to a gathering of any number of a body's members whenever information considered there could influence the full body's subsequent decision. Indeed, if Petitioner were right, *Showers* would never have considered the numbers sufficient to "determine the parent body's course of action." *Id.*

Petitioner errs by conflating the open meetings law's *purpose* requirement with its independent *numbers* requirement. To be sure, information that Board members gathered at these listening sessions may have satisfied the *purpose* requirement—that Board members gathered with a "purpose to engage in governmental business" through "discussion" and "information gathering." *Showers*, 135 Wis. 2d at 102. But, under *Showers*, a gathering must also have enough members to determine the body's action, and these listening sessions did not for the reasons explained above.

Badke never conflates the two requirements, as Petitioner misleadingly suggests by conjoining unrelated quotations from *Showers* and *Badke*. (Pet. ¶ 103.) Instead, *Badke* makes clear that it is only addressing situations "[*w*]*hen one-half or more members of a governmental body* attend a meeting of another governmental body in order to gather information about a subject over which they have decisionmaking responsibility." *Badke*, 173 Wis. 2d at 576

(emphasis added). Only because the numbers requirement was met in *Badke*—a "*quorum*" of a body "gathered information" regarding a "project over which [it] would later exercise final control," *id.* at 573 (emphasis added)—did it matter that there was a "possibility that a decision could be influenced" by the gathering. (Pet. ¶ 103 (citing *Badke*, 173 Wis. 2d at 573)). In other words, the fact that members of a body "listen[ed] and expos[ed] [themselves] to facts, arguments and statements" (Pet. ¶ 104 (citing *Badke*, 173 Wis. 2d at 572), mattered only because the gathered members constituted a quorum.

Accordingly, the receipt of information at the listening sessions by three or fewer Board members—less than a quorum—did not trigger the open meetings law.

* * *

Because DNR did not act at these listening sessions as a "governmental body," because none of them constituted a Board "meeting," and because merely receiving information that could influence future action did not satisfy the *Showers* numbers requirement, Petitioner's open meetings law claims should be dismissed for failure to state a claim.

II. Petitioner's claims based on Wisconsin's Administrative Procedure Act fail as a matter of law.

Petitioner's second and third claims allege that both the Wolf Management Plan and the proposed Regulation fail to comply with various

provisions in Wis. Stat. ch. 227 that govern administrative agency actions. (Pet. ¶¶ 117–51.) These two claims also fail as a matter of law.

A. The so-called "Wolf Management Regulation" is still merely a proposed rule and thus is not reviewable under Wis. Stat. § 227.40.

Petitioner's various chapter 227 challenges to the so-called "Wolf Management Regulation" (Pet. ¶¶ 143–44, 146–49, 151) all fail for the simple reason that it is a *proposed* administrative rule, not a *promulgated* one, and so there is nothing to review.

Only a "rule" is reviewable under Wis. Stat. § 227.40(1). A "rule" is "a regulation, standard, statement of policy, or general order of general application that has the force of law." Wis. Stat. § 227.01(13). A proposed rule must be promulgated before it has the "force of law," which requires approval by the Legislature, *see* Wis. Stat. § 227.19, filing with the Legislature Reference Bureau, *see* Wis. Stat. § 227.20, and publishing in the Administrative Register, *see* Wis. Stat. § 227.21. Only then does a rule take effect and acquire legal force. *See* Wis. Stat. § 227.22; *see also Serv. Emps. Int'l Union, Loc. 1 v. Vos*, 2020 WI 67, ¶ 79, 393 Wis. 2d 38, 946 N.W.2d 35 ("*SEIU*") ("When promulgated as required by statute, rules have 'the force of law.'").

None of that has happened here. Although the Board approved the proposed Regulation (Pet. ¶ 77), it has not yet made it through the legislative review process, let alone been filed with the Legislature Reference Bureau and

published in the Administrative Register.[5] The proposed Regulation therefore is therefore not a "rule," and so it is not subject to judicial review under Wis. Stat. § 227.40.

B. Petitioner pleads no viable challenge to the Wolf Management Plan.

Petitioner's chapter 227 challenges to the Wolf Management Plan also fail as a matter of law. For one, Petitioner lacks standing to assert them because it identifies no statutes protecting the interests that the Plan supposedly harms. And even if Petitioner had standing, it does not plead any valid chapter 227 claims. Petitioner only cites provisions that apply to "rules" and "administrative decisions," but the Plan is neither one because it lacks the force of law and so none of those provisions apply.

1. Petitioner lacks standing under either Wis. Stat. §§ 227.40 or 227.52.

To establish standing to challenge an administrative action under either Wis. Stat. §§ 227.40 or 227.52, Petitioner must show two separate things. First, it must show it has suffered an "injury in fact," a lenient inquiry in the environmental context that allows for "injur[ies] to aesthetic, conservational, recreational, health and safety interests." *Friends of Black River Forest v. Kohler Co.*, 2022 WI 52, ¶ 22, 402 Wis. 2d 587, 977 N.W.2d 342 ("*Friends I*")

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[5] *See* Wis. State Leg., *Clearinghouse Rule CR 23-047*, https://docs.legis.wisconsin.gov/code/chr/all/cr_23_047 (last visited Jan. 19, 2024).

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(citation omitted). Petitioner's standing allegations focus on this "injury in fact" requirement, and Respondents will assume *arguendo* that these allegations suffice. (*See* Pet. ¶¶ 6–11 (describing various aesthetic and recreational interests).)

But that is not enough to establish standing for a chapter 227 claim. Petitioner must also identify an "adversely affected interest" that is "protected, recognized, or regulated by law." *Friends I*, 402 Wis. 2d 587, ¶ 25. This separate, "purely statutory inquiry" requires Petitioner to "identify a statute protecting or regulating the interests they allege were injured by the decision." *Id.* ¶¶ 25, 32; *see also Teigen v. WEC*, 2022 WI 64, 403 Wis. 2d 607, 724, 976 N.W.2d 519 (applying same two-prong standing test to a claim brought under Wis. Stat. § 227.40(1)).

Friends I, a case about a land-exchange agreement between DNR and a private party, illustrates how this two-step standing analysis works. There, the court assumed that the petitioner's asserted "aesthetic, recreational, conservational, and procedural injuries" satisfied the "injury-in-fact" requirement. 402 Wis. 2d 587, ¶ 32. The court then analyzed whether the petitioner had also identified a "statute" that "protect[ed] or regulate[d]" those interests. *Id.* General policy statements about parks and related duties assigned to DNR did not suffice, since nothing in those statutes "protect[ed], recognize[d], or regulate[d] any person's interest in state parks or

contemplate[d] a challenge to agency action related to state parks." *Id.* ¶ 34. Similarly, "procedural requirements" governing such land exchanges did not themselves "protect[ ], recognize[ ], or regulate[ ] any individual's interests" in a way that generated standing, especially because they did not "confer upon or contemplate the authority of private citizens" to challenge the action. *Id.* ¶¶ 35–36, 40, 43.

Petitioner lacks standing for the same reasons as in *Friends I*. It asserts the same kinds of aesthetic and recreational interests at issue there (Pet. ¶¶ 6–11), which may establish an "injury in fact" but do not themselves show that the interests are "regulated by an identified law." *Friends I*, 402 Wis. 2d 587, ¶ 31. At most, Petitioner identifies procedural statutes that govern how agencies should act when issuing administrative rules and decisions. *See, e.g.*, Wis. Stat. §§ 15.07(2), (4); 29.185(1m); 227.10(2m), (3)(c). But just like in *Friends I*, none of these statutes protect the aesthetic and recreational interests of members of the public who disagree with agency action.

At bottom, Petitioner assumes that it has standing to challenge the Wolf Management Plan based solely on its alleged injury-in-fact. But that ignores the other necessary half of the standing inquiry, which requires a statute protecting Petitioner's asserted interests. Because Petitioner has not identified any such statute, it lacks standing to assert its chapter 227 claims.

2. None of the chapter 227 provisions on which Petitioner relies apply to the Plan.

Even if Petitioner had standing to challenge the Wolf Management Plan, its chapter 227 claims would still fail because Petitioner cites no statutes that apply procedural or substantive requirements to the Plan.

a. The Wolf Management Plan is not a "rule," "administrative decision," or "guidance document."

To determine the proper scope of judicial review of the Wolf Management Plan (if any), one would first need to identify what kind of action the Plan represents. Petitioner offers a grab-bag of three options: an "administrative decision" reviewable under Wis. Stat. § 227.52, a "rule" reviewable under Wis. Stat. § 227.40, or a "guidance document" also reviewable under Wis. Stat. § 227.40. (Pet. ¶ 118.) But the Plan is none of these things.

First, the Plan is plainly not a "rule." Again, only an action with the "force of law" can be considered a "rule." Wis. Stat. § 227.01(13). But Wis. Stat. § 29.185(1m), which merely directs DNR to "implement a wolf management plan," says nothing about the Plan itself carrying the force of law. That presents a stark contrast with the rest of Wis. Stat. § 29.185, which contains provisions that empower DNR to take specific actions that carry legal force. *See, e.g.*, Wis. Stat. § 29.185(3) (allowing DNR to issue wolf harvest licenses), (5) (allowing DNR to open and close wolf harvest zones).

Indeed, a cursory review of the Plan itself shows that it does not even purport to carry the force of law. Rather, it is just what it is called—a plan for future action. While those future actions might carry the force of law, the Plan itself does not. Three sections are merely explanatory, exploring a "scientific overview" of wolves, the "human dimensions of wolf management," and "historical and contemporary information" on wolf management. (Wolf Plan at 3–4.)[6] As for the Plan's fourth section, it contains an "overall wolf management goal" and "objectives, strategies and products to guide wolf management decisions" along with "metrics for evaluating whether the objectives are being realized." (Wolf Plan at 4) The referenced "products" entail specific actions DNR would need to take in the future to manage the wolf population. (*See generally* Wolf Plan at 160–94.) Nothing in that explanation of proposed future action has the force of law that binds anyone to anything. Lacking independent legal force, the Plan itself is not a "rule."

For these same reasons, the Plan also is not an "administrative decision" reviewable under Wis. Stat. § 227.52. (Pet. ¶ 118.) Such a decision must "adversely affect the substantial interests of any person," Wis. Stat. § 227.52, which involves a "pragmatic" inquiry that examines whether "immediate legal consequences attach" to the decision. *Friends of the Black River Forest v. DNR*,

[6] The page numbers referenced by these "Wolf Plan" cites refer to the PDF pages of the document at the hyperlink in footnote 1 above.

2021 WI App 54, ¶ 9, 404 Wis. 2d 590, 964 N.W.2d 342 ("*Friends II*"). That case found to be unreviewable an "environmental impact statement" that merely "consider[ed] the environmental impact of a proposal" and did not itself "determine 'the substantial rights of the parties involved.'" *Id.* ¶ 20 (citation omitted). The Plan here is no different in effect from the environmental impact statement in *Friends II*—neither one itself affected a party's rights, and so neither one is a reviewable "administrative decision."[7]

That leaves only Petitioner's third option: a "guidance document." Such documents "[e]xplain[ ] the agency's implementation of a statute or rule enforced or administered by the agency, including the current or proposed operating procedure of the agency" and "[p]rovide[ ] guidance or advice with respect to how the agency is likely to apply a statute or rule enforced or administered by the agency." Wis. Stat. § 227.01(3m)(a)1.–2. Unlike rules and administrative decisions, guidance documents themselves "do[ ] not have the force of law." Wis. Stat. § 227.112(3). Rather, "guidance documents merely explain statutes and rules, or provide guidance or advice about how the executive is likely to apply them." *SEIU*, 393 Wis. 2d 38, ¶ 106.

[7] Even if the Plan were an "administrative decision," judicial review petitions under Wis. Stat. § 227.52 must be served within 30 days of the challenged decision. *See* Wis. Stat. § 227.53. Petitioner did not serve DNR and the Board until December 8, 2023 (*see* Doc. 17–18), which is more than 30 days after the Board's October 25, 2023, approval of the Plan. Any Wis. Stat. § 227.52 claim would therefore fail anyway.

Although the Wolf Management Plan shares a prominent characteristic with guidance documents—neither has the force of law—the Plan nevertheless is something different. In a few areas, the Legislature has obligated DNR and the Board to develop "plans" for managing natural resources. For instance, DNR prepares "a plan for each state forest that describes how the state forest will be managed," Wis. Stat. § 28.04(3)(a), "master plan[s] for use and management" of state recreation areas, Wis. Stat. § 23.091(2), and "plans for the development of the state parks," Wis. Stat. § 27.01(c). Here, similarly, Wis. Stat. § 29.185(1m) directs DNR to "implement a wolf management plan." In each case, these "plans" entail DNR making quasi-legislative decisions about managing a particular resource, not "explain[ing] statutes and rules, or provid[ing] guidance or advice about how the executive is likely to apply them," as a guidance document does.[8] *SEIU*, 393 Wis. 2d 38, ¶ 106. The Plan is therefore not a guidance document, either.

b. None of the chapter 227 procedures cited in Claim Two apply to the Plan.

Petitioner's procedural chapter 227 arguments (Pet. ¶¶ 117–35) fall apart upon determining that the Wolf Management Plan is not a "rule," "administrative decision," or "guidance document." Although Petitioner argues

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[8] To be sure, DNR described the Plan as a "guidance document for the management of wolves in Wisconsin." (Wolf Plan at 2.) But the label DNR chose to use does not determine whether, as a matter of law, the Plan qualifies as such.

that Respondents' creation of the Plan violated various procedural requirements throughout chapter 227, they cite no procedures that apply here.

First, Petitioner refers to alleged violations of Wis. Stat. § 227.112, which at first glance contains procedures for issuing guidance documents. (Pet. ¶¶ 28, 126.[9]) But *SEIU* invalidated those statutory provisions. *See* 393 Wis. 2d 38, ¶ 108 (invalidating section 38 of 2017 Wis. Act 369, which created Wis. Stat. § 227.112). So, even if the Plan could be considered a "guidance document," these invalidated procedures could not support Petitioner's chapter 227 claims.

Next, Petitioner asserts that the Plan is reviewable under Wis. Stat. § 227.57(4) and (8). (Pet. ¶¶ 119–20, 130, 133.) But, as Petitioner recognizes, those provisions only apply to the review of an "administrative decision." (Pet. ¶¶ 119–20.) Because the Plan is not an "administrative decision," the corresponding review provisions in Wis. Stat § 227.57 do not apply here.

Petitioner also points to Wis. Stat. § 227.40 (Pet. ¶ 121), which allows courts to review administrative rules and guidance documents. That also does not apply here, because the Plan is neither a rule nor a guidance document.

But even if the Plan were a guidance document (it simply cannot be a rule due to its lack of legal force), the scope of review under Wis. Stat. § 227.40

[9] Paragraph 126 of the Petition cites "227.12(1) and (6)," which is presumably an erroneous reference to Wis. Stat. § 227.112(1) and (6). Wisconsin Stat. § 227.12 does not have a subsection (6), and it addresses petitions for a rule; Wis. Stat. § 227.112, by contrast, has a subsection (6) and concerns guidance documents.

does not cover Petitioner's procedural theories. Although subsection (4)(a) mentions judicial review of guidance document "adoption procedures," no such procedures exist after *SEIU* invalidated Wis. Stat. § 227.112. And all the other statutes Petitioner cites are irrelevant to guidance documents:

- Petitioner refers to how DNR operates under the direction of its Secretary and the Board, which acts through a quorum and is led by a chairperson. (Pet. ¶¶ 122–23 (citing Wis. Stat. §§ 15.05(1)(b)–(c) (describing DNR secretary), 15.07(2) (selection of Board chair), 15.07(4) (Board quorum to act); 990.01(8) (majority rule).) These statutes provide no guidance document procedures and Petitioner never alleges that Respondents otherwise violated them.
- Wisconsin Stat. § 227.10(2m) (Pet. ¶ 126) requires an agency's so-called "standard[s], requirement[s], or threshold[s]" to be explicitly authorized by a statute or rule. That has nothing to do with the procedures for creating guidance documents and, in any event, Petitioner never identifies a "standard, requirement, or threshold" in the Plan, let alone one that was not explicitly authorized by statute or rule.
- Wisconsin Stat. § 227.10(3)(c) (Pet. ¶¶ 126–27) applies only to "person[s] affected by a rule," and the Plan is not a "rule." It also applies only to persons "affected by a rule" who receive "benefits" or incur "obligations"; the Plan lacks legal force and so does none of this.

- Wisconsin Stat. § 227.17 (Pet. ¶ 126) also applies only to rulemaking hearings and so is irrelevant to the Plan, which is not a "rule."

In sum, Petitioner does not identify a single statutory procedure that governs the Plan's creation.[10] There is thus no basis to invalidate the Plan under either Wis. Stat. §§ 227.40 or 227.57. Petitioner's second claim should be dismissed.

c. None of the chapter 227 provisions regarding the factual basis for agency decisions cited in Claim Three apply to the Plan.

Petitioner's chapter 227 arguments in its third claim—this one targeting the Plan's factual basis (Pet. ¶¶ 136–51)—fail for basically the same reasons: the provisions Petitioner cites do not apply to the Plan, which is not a "rule," "administrative decision," or "guidance document." Again, Petitioner partly relies on review provisions in Wis. Stat. § 227.57 (Pet. ¶¶ 137–39, 147–48), but those do not apply here given how the Plan is not an "administrative decision." And as for review under Wis. Stat. § 227.40 (Pet. ¶¶ 140, 149), that also is unavailable because the Plan is not a "rule" or "guidance document."

[10] Petitioner tosses in an off-hand reference to federal due process based on Respondents' alleged violation of state procedures. (Pet. ¶ 133.) Leaving aside how Petitioner identifies no applicable procedures (let alone any procedural defects), "there is no constitutional procedural due process right to state-mandated procedures." *GEFT Outdoors, LLC v. City of Westfield*, 922 F.3d 357, 366 (7th Cir. 2019).

Even if the Plan were a guidance document, Petitioner cites no authority that supports reviewing guidance documents for their factual basis. Petitioner relies on *Liberty Homes, Inc. v. Department of Industry, Labor, and Human Relations*, 136 Wis. 2d 368, 401 N.W.2d 805 (1987), but that case addressed "constitutional due process challenges to agency *rules*." *Id.* at 371 (emphasis added). Because the Plan is not an administrative rule, *Liberty Homes* does not justify any kind of factual review here.

Nor should *Liberty Homes* be extended to guidance documents, even if the Plan qualified as one. As *Liberty Homes* recognized, it addressed "agency rules [that] have the full force and effect of legislative enactments"—that is, agency actions with the force of law. *Id.* at 383. Precisely because rules have legal force, a judicial review "check is necessary to assure that the constitutional due process rights *of those regulated by agency rules* are not compromised." *Id.* at 389 (emphasis added). That explains why, in *Liberty Homes*, the court reviewed a rule that required mobile home builders to comply with a formaldehyde concentration limit. *Id.* Because the challenger was compelled by law to comply with the rule, it was appropriate to determine whether the rule violated the challenger's substantive due process rights.

Here, by contrast, the Wolf Management Plan—even if it were a guidance document—lacks the force of law. As a guidance document, it would simply reflect the "executive's exercise of his core constitutional power" to

"communicat[e] . . . his knowledge or intentions to the public." On its own, a guidance document is "entirely inert." *SEIU*, 393 Wis. 2d 38, ¶¶ 102, 108. So, the core reason why *Liberty Homes* applied a substantive due process review to administrative rules—their legal force—does not apply to the Plan.

To be sure, if the executive branch later acts with the force of law when carrying out the Plan in specific circumstances, then it could conceivably be appropriate to review the factual underpinnings of that later legal action through Wis. Stat. §§ 227.42 and 227.57. *Cf. Friends II*, 404 Wis. 2d 590, ¶ 19 (noting that, even though an environmental impact statement itself is not reviewable, it could be challenged when reviewing a subsequent permit decision resting on the statement). But before that happens, there is no legal basis for courts to review whether the "executive's thoughts about the law and its execution" have a sufficient factual basis. *SEIU*, 393 Wis. 2d 38, ¶ 106.

In fact, judicial review of the factual basis for the "executive's thoughts" would be unconstitutional, for the same reasons that the legislature cannot regulate the procedure by which the executive branch describes those thoughts through guidance documents. *Id.* ¶¶ 103–08. In short, "the creation and dissemination of guidance documents fall within the executive's core authority," *id.* ¶ 105, which means that "other branches may not intrude" on this power, *id.* ¶ 104 (citation omitted). Judicial review of a guidance document's factual basis, just like legislatively imposed procedures, would

improperly "control [the executive branch's] knowledge or intentions about those laws" and "mute or modulate the communication of [its] knowledge or intentions to the public." *Id.* ¶ 108. Such a result would be unconstitutional.

* * *

Petitioner's APA claims all fail as a matter of law. The proposed Wolf Management Regulation has not been promulgated and so is not a "rule" that can be reviewed. And as for the Wolf Management Plan, Petitioner lacks standing to challenge it and has not identified any procedural or substantive chapter 227 requirements that apply.

III. Petitioner's constitutional claims fail as a matter of law.

Petitioner alleges in its fourth claim that Respondents violated various constitutional rights in connection with adopting the Wolf Management Plan. (Pet. ¶¶ 152–72.) This claim fails as a matter of law, too.

To the extent Petitioner targets past conduct—how Respondents allegedly "disregard[ed] public comments and scientific studies with which they disagree[d]" (Pet. ¶ 161)—and seeks a declaration that this past conduct violated Petitioner's constitutional rights, sovereign immunity bars that claim.

And if instead Petitioner targets the Wolf Management Plan itself (which represents ongoing conduct, not past conduct), such a claim would need to proceed through Wis. Stat. § 227.40, because that is the only statutory

sovereign immunity waiver that Petitioner has identified. But Petitioner again lacks standing for such a claim, which would fail on its merits, anyway.

A. Respondents have sovereign immunity against a constitutional challenge to their past alleged conduct.

In places, Petitioner suggests that its constitutional claim directly targets Respondents' past conduct in purportedly "rejecting Petitioner's public comments and submissions of scientific studies" (Pet. ¶ 164) and, as relief, seeks a declaration that this past conduct itself (as opposed to the current operation of the Wolf Management Plan) violated Petitioner's constitutional rights. (Pet. Prayer for Relief ¶ e.) But Petitioner identifies no sovereign immunity waiver that would permit a claim targeting this past conduct.

Article IV, § 27 of the Wisconsin Constitution states that "[t]he legislature shall direct by law in what manner and in what courts suits may be brought against the state." This provision means that the State and its agencies can be sued only as authorized by the Legislature. *PRN Assocs. LLC v. DOA*, 2009 WI 53, ¶ 51, 317 Wis. 2d 656, 766 N.W.2d 559. If the Legislature has not "specifically consented to the suit, then sovereign immunity deprives the court of personal jurisdiction" over the state defendants. *Id*. Once sovereign immunity is properly raised, the party suing the state bears the burden to establish jurisdiction. *See Turkow v. DNR*, 216 Wis. 2d 273, 281, 576 N.W.2d 288 (Ct. App. 1998) ("A plaintiff must point to a legislative enactment authorizing suit against the state to maintain his or her action.").

Petitioner cites only two potential statutory waivers: Wis. Stat. §§ 227.40 and 227.57 (which, again, rests on Wis. Stat. § 227.52). (Pet. ¶¶ 169–70.) But those provisions only enable judicial review of rules, administrative decisions, and guidance documents. They do not permit a court to review agency action aside from those three types, like Respondents' standalone, past conduct in allegedly "rejecting Petitioner's public comments and submissions of scientific studies." (Pet. ¶ 164.) If Petitioners argue that violated their constitutional rights—separate and apart from the Wolf Management Plan itself, which has ongoing effect—Wis. Stat. §§ 227.40 and 227.57 do not waive Respondents' sovereign immunity from such a claim. Any such claim must therefore be dismissed.

Nor could Petitioner replead this as an ordinary declaratory judgment claim under Wis. Stat. § 806.04. Such claims against the State must seek "prospective rather than remedial relief," that is, a "remedy which is primarily anticipatory or preventative in nature." *PRN Assocs. LLC*, 317 Wis. 2d 656, ¶ 51 (citation omitted). A declaration that Respondents' past conduct violated Petitioner's constitutional rights would not fall into this category and would thus be barred by sovereign immunity too. *Cf. id.* ¶ 56 (noting how declarations sought improperly "related to the [agency's] past actions").

B. Petitioner fails to state a claim that the Wolf Management Plan itself violates the Wisconsin Constitution.

To the extent Petitioner's fourth claim instead challenges the Wolf Management Plan itself, such a constitutional claim could theoretically proceed under either Wis. Stat. § 227.40 (assuming the Plan is a guidance document) or Wis. Stat. § 806.04 (assuming it is not).[11] But such a claim would still fail for two reasons.

First, for the same reasons discussed above in Argument II.B.1., Petitioner lacks standing to bring such a claim.

Second, even if Petitioner had standing, it does not a state a valid constitutional claim based on due process, free speech, association, equal protection, or the right to petition the government. The United States Supreme Court rejected constitutional claims just like these in *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984). There, plaintiffs challenged a Minnesota statute that required public employers to "meet and confer" only with a bargaining unit's exclusive representatives. The challengers claimed—much like Petitioner here—that the meet-and-confer provisions improperly cut them out of the bargaining process by violating their rights to free speech, due process, equal protection, and to petition their

[11] Sovereign immunity would not bar this kind of Wis. Stat. § 806.04 claim. Unlike the *past* conduct Petitioner also seems to target, the Wolf Management Plan remains in effect and thus represents *ongoing* conduct that can theoretically be challenged by a declaratory judgment claim without triggering sovereign immunity.

government. *See id.* at 273–76. The Court rejected all these theories, holding that individuals have no constitutional right "to a government audience for their views." *Id.* at 286.[12]

Specifically as to due process, the Court explained that there is no right "to be heard by public bodies making decisions of policy." *Id.* at 283. It noted that "[p]ublic officials at all levels of government daily make policy decisions based only on the advice they decide they need and choose to hear." *Id.* at 284. Policymaking would "grind to a halt were [it] constrained by constitutional requirements on whose voices must be heard." *Id.* at 285. Because "the state must be free to consult or not to consult whomever it pleases," the Court "rejected due process as a source of an obligation to listen." *Id.*

The same is true for the First Amendment. "Nothing in the First Amendment . . . suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals' communications on public issues." *Id.* This is so even when the government "amplifies" some views over others, a feature that is "inherent in government's freedom to choose its advisers." *Id.* at 288. "A person's right to speak is not

[12] The Wisconsin Supreme Court has expressly adopted the reasoning of *Knight*, recognizing that there is "no constitutional right as members of the public to a government audience for . . . policy views." *Madison Teachers., Inc. v. Walker*, 2014 WI 99, ¶ 41, 358 Wis. 2d 1, 851 N.W.2d 337 (quoting *Minn. State Bd. for Cmty. Colleges v. Knight*, 465 U.S. 271, 286 (1984)).

infringed when government simply ignores that person while listening to others." *Id.*

Finally, the Court deemed "meritless" the challengers' assertion that excluding them from "meet-and-confer" bargaining violated the Equal Protection Clause. *Id.* at 291. Because the government's decision to listen to one view over another could be supported by many conceivable rational bases, the challenged law easily passed constitutional muster. *See id.* at 291–92.

These principles from *Knight* foreclose Petitioner's materially identical constitutional claims. Its due process, freedom of association, and equal protection claims primarily revolve around the Respondents' supposed "pattern and practice of disregarding public comments and scientific studies with which they disagree, including those submitted by Petitioner's members and wolf experts," (Pet. ¶ 161), and Respondents' alleged "refus[al] to consider" Petitioner's policy positions (Pet. ¶¶ 164–66).

Petitioner's theory amounts to the same purported constitutional "obligation to listen," whether premised on due process, freedom of association, or equal protection, that *Knight* squarely rejected. 465 U.S. at 285. Petitioner's constitutional challenge to the Wolf Management Plan would therefore fail as a matter of law even if Petitioner had standing to bring it.[13]

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[13] Petitioner also recycles its earlier argument that, by ignoring its preferred comments, the Wolf Management Plan lacked adequate factual support in a way that

IV. Petitioner's public trust doctrine claim fails as a matter of law.

Petitioner's fifth claim purports to state a "public trust doctrine" claim under article I, section 26 and article IX, section 1 of the Wisconsin Constitution. (Pet. ¶¶ 174–75.) This alleged constitutional violation, Petitioner asserts, arises because "Respondents have acted in contradiction to their trustee duties and commitment to consider scientific findings to advance sound wildlife management." (Pet. ¶ 182.) This constitutional claim also fails for lack of standing, for the same reasons described above in Argument II.B.I.

But even if Petitioner had standing, Wisconsin law recognizes no such public trust doctrine claim, whether arising from the constitution or otherwise.

A. The constitutional public trust doctrine pertains to navigable waters, not wildlife management, and the constitution only protects the right to hunt.

The public trust doctrine rests on article IX, section 1 of the Wisconsin Constitution, which "commands that the state hold navigable waters in trust for the public." *Rock-Koshkonong Lake Dist. v. DNR*, 2013 WI 74, ¶¶ 70–71, 350 Wis. 2d 45, 833 N.W.2d 800. Relevant here, the provision states that

> [T]he river Mississippi and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the

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also violates substantive due process. (Pet. ¶ 164.) If Argument II.B.2.c. did not already foreclose this argument, *Knight* does. And to the extent Petitioner also asserts here a distinct procedural due process claim (Pet. ¶ 163), that fails because Petitioner has identified no "constitutionally protected property or liberty interest," which is the "first step in a procedural due process analysis." *State v. Ozuna*, 2017 WI 64, ¶ 22, 376 Wis. 2d 1, 898 N.W.2d 20 (citation omitted).

> inhabitants of the state as to the citizens of the United States, without any tax, impost or duty therefor.

Wis. Const. art. IX, § 1.

While Wisconsin courts "have long interpreted this provision broadly" as protecting "more than strictly navigable waters or related commercial navigation rights," *Clean Wisconsin, Inc. v. DNR*, 2021 WI 72, ¶ 12, 398 Wis. 2d 433, 961 N.W.2d 611, its protections always pertain to the public's right to access and use waters of the state. So, for example, the doctrine "safeguards the public's use of the state's waters for even purely recreational purposes," *id.* (citation omitted), and imposes on the state a constitutional obligation "to manage, protect, and maintain waters of the state" for the public benefit, *Lake Beulah Mgmt. Dist. v. DNR*, 2011 WI 54, ¶ 39, 335 Wis. 2d 47, 799 N.W.2d 73. And while the doctrine has been expanded from its original application to "navigable waters," *see Rock-Koshkonong*, 350 Wis. 2d 45, ¶¶ 77–94, to also cover groundwater, *see Lake Beulah*, 335 Wis. 2d 43, ¶¶ 39–43; *Clean Wis.*, 398 Wis. 2d 433, ¶¶ 12–14, 16–19, the doctrine's protections have always been limited to *water*. Accordingly, article IX, section 1 does not recognize a constitutional right relating to "wildlife management."

Nor does article I, section 26 confer any constitutional rights regarding "wildlife management." (Pet. ¶ 182.) It states only that "[t]he people have the right to fish, hunt, trap, and take game subject only to reasonable restrictions as prescribed by law." Wis. Const. art. I, § 26. The supreme court has

interpreted this provision as a codification of "the common law right to hunt that existed prior to its adoption. *Wisconsin Citizens Concerned for Cranes & Doves v. DNR*, 2004 WI 40, ¶ 45, 270 Wis. 2d 318, 677 N.W.2d 612.

Just as this provision does not enshrine an unrestricted right to hunt, nor does it create a "right" that wildlife be protected *from* hunting. Both before and after adopting this constitutional right to hunt, Wisconsin law recognized the State's plenary authority, "in the exercise of its police power, to make all reasonable regulations for the preservation of fish and game within its limits." *Id.* (citation omitted). The State "may ordain closed seasons; it may prescribe the manner of taking, the times of taking, and the amount to be taken within a given time, as it may deem best for the purpose of preserving and perpetuating the general stock." *Id.* (citation omitted). In other words, article I, section 26 "does not impose any limitation upon the power of the state or DNR to regulate hunting, other than that any restrictions on hunting must be reasonable." *Id.* ¶ 46.

B. Petitioner fails to state a claim for violation of the public trust doctrine or the constitutional right to hunt.

Given these principles, Petitioner's "wildlife management" public trust claim has no legal basis. Because the public trust doctrine only protects waters, it imposes on Respondents no "positive duty . . . to manage wildlife, including gray wolves, for the benefit of the public interest." (Pet. ¶ 174.) The same is

true for article I, section 26, which simply protects the right to hunt and does not obligate Respondents to manage wildlife in any particular way.

None of Petitioner's cited cases say otherwise. It cites *Krenz v. Nichols*, 197 Wis. 394, 400 (1928), and *State v. Herwig*, 17 Wis. 2d 442, 446, 117 N.W.2d 335 (1962), for the proposition that "the state holds title to the wild animals *in trust* for the people." (Pet. ¶ 176 (quoting *Krenz*).) That may be true, as far as it goes. But nothing in those cases says the State has an affirmative obligation to regulate wildlife in any specific way. Instead, *Krenz* emphasizes that the State exercises ownership and control over wildlife "in its sovereign capacity" and thus that the State "has great latitude in determining what means are appropriate for its protection." *Krenz*, 197 Wis. at 404 (citation omitted); *see also Herwig*, 17 Wis. 2d at 446 (noting State's ability to enact "hunting regulations . . . in the exercise of the police power"). At bottom, the citizen's "right" to wildlife "is the right which the state leaves to him, no more and no less." *Wisconsin Citizens Concerned for Cranes & Doves*, 270 Wis. 2d 318, ¶ 45 (citation omitted).

Petitioner also cites a statute and three administrative code provisions that supposedly "encode" an affirmative, enforceable wildlife management obligation (Pet. ¶¶ 176, 178–79), but these cannot create a constitutional right that the constitution lacks. Petitioner's attempt to rest a constitutional claim on these other provisions fails for that reason alone.

And even on their own terms, none of these cited provisions contain express language indicating that they create rights enforceable against the State by individuals. Statutes and administrative rules do not create private rights of action absent a "a clear indication of the [drafter's] intent to create such a right." *Grube v. Daun*, 210 Wis. 2d 681, 689, 563 N.W.2d 523 (1997) (applying rule to statutes); *see also Cordova v. Foster*, No. 19-CV-223, 2019 WL 1877232, at *5 (E.D. Wis. Apr. 26, 2019) (applying *Grube* to administrative rule). None of the cited provisions demonstrate this intent:

- Wisconsin Stat. § 29.011 (Pet. ¶ 176) simply places "legal title" to wild animals in the State; it says nothing about private rights in those animals or private actions against the State to protect them.
- Wisconsin Admin. Code NR § 1.015(2) (Pet. ¶ 178) describes the "primary goal of wildlife management" that Respondents should pursue; such a "statement of purpose . . . 'does not provide for an independent, enforceable claim, as it is not in itself substantive.'" *Friends I*, 402 Wis. 2d 587, ¶ 33 (citation omitted).
- Wisconsin Admin. Code NR § 1.11(1) and (7) (Pet. ¶ 179) contain more purpose statements regarding wildlife management and ecological diversity, not specific, enforceable, private rights of action.

- Wisconsin Admin. Code NR § 1.95(2)(d) (Pet. ¶ 178) resides in a provision that applies specifically to "wetlands" and otherwise is just another purpose statement that lacks a private right.

Petitioner may well disagree with the policy views contained in the Wolf Management Plan. It may even believe that Respondents have ignored important science in formulating the Plan. But nothing in the public trust doctrine or the constitutional right to hunt creates a legal claim for this kind of disagreement, and so Petitioner's fifth claim must also be dismissed.

CONCLUSION

The Petition should be dismissed in its entirety. That dismissal should be with prejudice because the Petition's defects cannot be "cured by a subsequent complaint." *State ex rel. Schatz v. McCaughtry*, 2003 WI 80, ¶ 36, 263 Wis. 2d 83, 664 N.W.2d 596.[14]

Dated this 22nd day of January 2024.

Respectfully submitted,

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[14] The sole curable exception would be the open meeting pleading error described in Argument I.A. However, the other two open meeting defects described in Arguments I.B. and I.C. could not be cured by an amended pleading.

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