No. 2024AP232

In the Supreme Court of Wisconsin

KENNETH BROWN,
PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

v.

WISCONSIN ELECTIONS COMMISSION,
DEFENDANT-CO-APPELLANT-CROSS-RESPONDENT,

TARA MCMENAMIN,
DEFENDANT-APPELLANT-CROSS-RESPONDENT,

BLACK LEADERS ORGANIZING FOR COMMUNITIES,
DEMOCRATIC NATIONAL COMMITTEE AND WISCONSIN
ALLIANCE FOR RETIRED AMERICANS,

INTERVENORS-CO-APPELLANTS-CROSS-RESPONDENTS.

On Appeal from the Racine County Circuit Court,
The Honorable Eugene Gasiorkiewicz, Presiding,
Case No. 2022CV1324

COMBINED BRIEF OF RESPONDENT AND CROSS-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Treatises

INTRODUCTION

State law protects the integrity of our elections by giving voters the ability to file a complaint under Wis. Stat. § 5.06[1] if a local election official (which typically means the local municipal clerk) violates the law. The mechanism under that statute first involves a complaint filed with the Wisconsin Elections Commission ("WEC") and then court review. This appeal is such a case.

Kenneth Brown, a resident and elector in Racine, witnessed in-person absentee voting which he believed violated state law. Brown then filed a complaint with WEC asserting that the municipal clerk in the City of Racine violated state law when selecting the locations for in-person absentee voting for the August 2022 primary election. WEC dismissed his complaint, but the Circuit Court reversed WEC's decision. This appeal turns on the proper interpretation of Wis. Stat. § 6.855, which is the main statute that governs a municipality's use of alternate voting sites (alternate, in this case, meaning locations other than the Clerk's office) for early in-person absentee voting.

This case is not about whether Wis. Stat. § 6.855, as written, is the best possible mechanism to govern alternate locations for early in-person absentee voting. It is not about whether having a mobile voting unit is a good or a bad policy idea. And it is not about imposing artificial restrictions on any eligible voter's undisputed right to cast a ballot. The

[1] All citations to statute are to the current version of the statute unless explicitly noted herein.

question is simply whether the procedures the Clerk used, and the sites the Clerk selected, complied with the language of the statute.

Because the undisputed factual record demonstrates that the Clerk did not comply with the statute in several respects, the Circuit Court held that the Defendant-Co-Appellant-Cross-Respondent Wisconsin Election Commission ("WEC") erred in rejecting Plaintiff-Respondent-Cross-Appellant Kenneth Brown's complaint under Wis. Stat. 5.06 and ruled that the agency's decision should be reversed. This Court should do the same.

ORAL ARGUMENT AND PUBLICATION

Brown agrees with all of the Appellants that this case is appropriate for Oral Argument and Publication.

STATEMENT OF THE CASE

I. Factual Background

This case involves the judicial review of a decision of WEC in a case filed by Brown under Wis. Stat. § 5.06. The question presented to WEC and reviewed by the Circuit Court was whether Racine's City Clerk (Tara McMenamin) complied with the requirements of Wis. Stat. § 6.855 when administering early in-person absentee voting for the August 2022 primary election.

Section 6.855(1) of the Wisconsin Statutes provides, in relevant part, that:

> "The governing body of a municipality may elect to designate a site other than the office of the municipal clerk . . . as the location from which electors of the municipality may request and vote absentee ballots and to which voted absentee ballots shall be returned by electors for any election. The

> designated site shall be located as near as practicable to the office of the municipal clerk . . . and no site may be designated that affords an advantage to any political party. An election by a governing body to designate an alternate site under this section shall be made no fewer than 14 days prior to the time that absentee ballots are available for the primary . . . and shall remain in effect until at least the day after the election. If the governing body of a municipality makes an election under this section, no function related to voting and return of absentee ballots that is to be conducted at an alternate site may be conducted in the office of the municipal clerk . . . ."

While the statute is lengthy and lists a number of considerations for alternate sites, the language itself is unambiguous and sets out the following requirements for alternate sites as pertinent to this appeal: 1) they must be located "as near as practicable" to the Clerk's office; 2) they must not "afford[] an advantage to any political party"; 3) they must "remain in effect until at least the day after the election"; and 4) if they are used, "no function related to voting and return of absentee ballots" may be conducted at the Clerk's office. Brown challenged McMenamin's administration of the August 2022 primary election for violating all four of these requirements.

Wisconsin Stat. § 5.25, which governs "polling places," adds a fifth requirement that polling places shall be in public buildings "unless the use of a public building for this purpose is impracticable or the use of a nonpublic building better serves the needs of the electorate." This last provision is relevant because instead of locating the polling places for early in-person absentee voting in buildings, McMenamin used a "mobile voting unit"—a van—which moved to various locations for limited periods of time as a polling place.

In December 2021, the Racine Common Council approved approximately 150 sites as potential locations for in-person absentee voting for elections to be held in the 2022 calendar year. Dkt. 56:32–35[2]. From that list of approvals, McMenamin selected 21 locations for the August 2022 primary election, including community centers, schools, a park, and a coffee shop, among other locations. Dkt. 56:17–23. Most of the locations selected were only used for a single three-hour period of time. Dkt. 56:18–23. One location, the art museum, was designated for two separate two-and-a-half-hour periods. Dkt. 56:20.

Moreover, none of the locations identified were actually used for voting. Instead, the City purchased a "mobile voting unit", a van, which was driven to these locations and parked nearby. Dkt. 56:7, Dkt. 57:3. Electors wishing to vote absentee ballots in-person would enter the van to cast their ballots. Brown witnessed early in-person absentee voting at the Clerk's office, and at the van when it was parked at the Regency Mall location, on the same day. Dkt. 56:7–8, ¶¶ 17–19.

II. Procedural History

Brown challenged the legality of McMenamin's actions in a complaint filed with WEC under Wis. Stat. § 5.06, which expressly grants electors of the jurisdiction where the Clerk is located the right to do so. Dkt. 56:4-14.

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[2] The administrative record for this appeal is located at Dkts. 56, 57, 58 and 59. The administrative record is also Bates Numbered at the bottom of each page. To avoid confusion, all cites to the administrative record herein will refer to the Document Number and then page number of that particular document, rather than Bates Number.

In his complaint before WEC, Brown raised five separate claims: (1) that McMenamin used absentee voting sites which were not "as near as practicable to the office of the municipal clerk," in violation of Wis. Stat. § 6.855; (2) that McMenamin used alternate absentee voting sites which "afford[ed] an advantage to [a] political party," in violation of Wis. Stat. § 6.855; (3) that McMenamin allowed "function[s] related to voting and return of absentee ballots . . . conducted at the alternate site [to] be conducted in the office of the municipal clerk," in violation of Wis. Stat. § 6.855; (4) that McMenamin's use of the van as an alternate absentee voting site was in violation of Wis. Stat. § 6.855 and other related Wisconsin statutes; and (5) that McMenamin used alternate absentee voting sites, which were not available for use throughout the relevant election, in violation of Wis. Stat. § 6.855. Dkt. 56:13–14.

WEC dismissed the complaint (Dkt. 59:47–60), and Brown brought this action in Circuit Court pursuant to Wis. Stat. § 5.06(8) which again expressly grants electors the standing and right to do so. Dkt. 3. Several parties then intervened: Black Leaders Organizing for Communities ("BLOC"), Wisconsin Alliance of Retired Americans ("WARA"), and the Democratic National Committee ("DNC").

The Circuit Court determined that McMenamin had not, in fact, complied with several of the statutory requirements for alternate in-person absentee voting sites and reversed WEC's decision as to the second and fourth claims noted *supra*. The Circuit Court upheld WEC's decision on the remaining three claims, which are the subject of Brown's Cross-Appeal before this Court.

On January 10, 2024, the Circuit Court issued its amended decision in this case. Dkt. 99. Approximately a month later, on February 9, 2024, intervenor WARA filed a notice of appeal. Dkt. 104. About a week after that, on February 15, 2024, another intervenor, BLOC, filed a notice of appeal. Dkt. 108. The following day, on February 16, 2024, the DNC also filed a notice of appeal. Dkt. 111.

Also on February 16, 2024, BLOC filed a Petition to Bypass. That Petition was joined by DNC on February 19, 2024. McMenamin filed a notice of appeal on February 27, 2024. Dkt. 120. Finally, the Wisconsin Elections Commission ("WEC") filed a notice of appeal on February 29, 2024. Dkt. 127. That same day, DNC filed a Motion with the Circuit Court to Stay the decision pending appeal. Dkt. 131. WEC then filed its own Motion to Stay with the Circuit Court on March 1, 2024. Dkt. 133. That same day, McMenamin joined the BLOC Petition to Bypass and Brown filed his response to the BLOC Petition to Bypass.

On March 5, 2024, WEC filed a second petition to Bypass, and on March 7, 2024, BLOC and McMenamin joined both of the pending stay motions in the Circuit Court. Dkts. 140 and 141.

On March 8, 2024, Brown filed a notice of cross-appeal as to the three claims that the Circuit Court agreed with WEC on: claims one, three and five noted *supra*. Dkt. 143.

Brown then filed his response to both pending stay motions in the Circuit Court on March 15, 2024 (Dkt. 153) and his response to the WEC Petition to Bypass on March 19, 2024. Reply briefs in support of the stay motions were filed by the movants on March 22, 2024. Dkts. 157, 158, 159. The Circuit Court denied those motions on April 1, 2024. Dkt. 161.

More than two weeks later, WEC filed a motion to stay pending appeal with this Court, and on April 23, 2024, DNC filed a letter in support of that motion.

On May 9, 2024, this Court issued an order granting the Petitions to Bypass and took jurisdiction of this appeal. On June 11, 2024, this Court issued an order staying part of the Circuit Court's decision while this litigation pends.

Plaintiff-Respondent-Cross-Appellant Kenneth Brown now files this Combined Response and Cross-Appeal Brief.

STANDARD OF REVIEW

Standing is a question of law that this Court reviews *de novo*. *Friends of Black River Forest v. Kohler Company*, 2022 WI 52, ¶ 10, 402 Wis. 2d 587, 977 N.W.2d 342.

In judicial review of an administrative agency decision, this Court reviews the decision of the agency, not the circuit court. *Clean Wisconsin, Inc. v. Wisconsin Department of Natural Resources*, 2021 WI 71, ¶ 14, 398 Wis. 2d 386, 961 N.W.2d 346. Agency interpretations of law are reviewed de novo. *Citation Partners, LLC v. Wisconsin Department of Revenue,* 2023 WI 16, ¶ 8, 406 Wis. 2d 36, 985 N.W.2d 761.

As relevant here, Wis. Stat. § 5.06(9) states that in reviewing a decision of WEC, Courts "shall summarily hear and determine all contested issues of law and shall affirm, reverse or modify the determination of the commission, according due weight to the experience, technical competence and specialized knowledge of the commission, pursuant to the applicable standards for review of agency decisions under s. 227.57." Wis. Stat. § 5.06(9).

ARGUMENT

I. Brown had standing to bring his appeal in circuit court.

WEC, DNC, and WARA[3] all argue that Brown lacked standing to bring his appeal in circuit court. They are wrong. It is not disputed that Brown complied with all procedural requirements under state law to effectuate his appeal. He has standing as a qualified elector to seek judicial review of WEC's adverse determination of his complaint under Wis. Stat. § 5.06(8) ("Any election official or complainant who is aggrieved by an order issued under sub. (6) may appeal the decision of the commission to circuit court for the county where the official conducts business or the complainant resides no later than 30 days after issuance of the order"). Any determination to the contrary would vitiate meaningful review of WEC's decisions and would subvert this Court's authority to interpret law to that of an administrative agency. That simply cannot be. Brown has standing, and this Court should reach the merits of these issues.

a. Standing in Wisconsin.

Standing in Wisconsin is not a matter of jurisdiction, but rather of sound judicial policy, the purpose of which is to "ensur[e] that the issues and arguments presented will be carefully developed[,] zealously argued, [and allow the court to understand] the consequences of its decision." *McConkey v. Van Hollen*, 2010 WI 57, ¶¶ 15–16, 326 Wis. 2d 1, 783 N.W.2d 855. Standing "is construed liberally, and 'even an injury to a

[3] The remaining appellant-cross-respondents, Clerk McMenamin and BLOC, did not make standing arguments in their opening briefs.

trifling interest' may suffice." *Id.,* ¶ 15 (quoting *Fox v. DHSS*, 112 Wis. 2d 514, 524, 334 N.W.2d 532 (1983)).

Brown is a qualified elector in Racine who filed a written, sworn complaint with WEC under Wis. Stat. § 5.06 following the August 2022 primary election during which he personally witnessed in-person absentee voting occurring at the Regency Mall in the City of Racine. His complaint alleged five separate reasons why he believed this activity violated Wis. Stat. § 6.855. The issues were briefed before WEC, and WEC issued a decision against Brown, denying him any relief from McMenamin's illegal conduct.

WEC, DNC, and WARA all take the position that WEC's decision resolving Brown's complaint is not reviewable by the courts in Wisconsin. At bottom, their argument vitiates Wis. Stat. § 5.06(8) and makes this Court subservient to an administrative agency regarding the interpretation of Wisconsin law.

b. Brown suffered a direct injury to an interest which the law recognizes and seeks to regulate or protect, and Brown is "aggrieved."

It is long recognized in Wisconsin that "[t]here is a presumption that public officials discharge their duties or perform acts required by law in accordance with the law and the authority conferred upon them . . . ." *State ex rel. Wasilewski v. Bd. of Sch. Directors of City of Milwaukee*, 14 Wis. 2d 243, 266, 111 N.W.2d 198, 211 (1961). This case concerns what happens when a particular type of public official, a local election official, is believed to be acting contrary to law. The Legislature addressed this exact situation when enacting Wis. Stat. § 5.06. That statute allows "any

elector of a jurisdiction" to promptly "file a written sworn complaint" with WEC requesting that the official be required to conform his or her conduct to the law. Wis. Stat. § 5.06(1). WEC, upon the receipt of such a written and sworn complaint may, "after such investigation as it deems appropriate, summarily decide the matter before it . . . ." § 5.06(6). Following WEC's decision on a complaint, "[a]ny election official or complainant who is aggrieved" may seek review in circuit court. Wis. Stat. § 5.06(8).

Section 5.06 exists in the context of the Legislature determining the rules for election administration in Chapters 5–12 of the Wisconsin Statutes and the Legislature's creating WEC and giving it the powers set forth in Chapter 5 of the Wisconsin Statutes. The Legislature did not create WEC to be an unaccountable administrative agency allowed to administer elections in whatever manner WEC determines is best. The Legislature, itself, created the rules for election administration in Chapters 5–12 which local election officials *must* follow. In Section 5.06, the Legislature gives WEC the power to make sure that local election officials comply with the rules created by the Legislature, gives voters the right to complain to WEC if local election officials do not follow the rules, and gives both parties (i.e., voters and the local election officials whose actions have been challenged) the right to have WEC's decision reviewed by the courts.

Indeed, in creating Wis. Stat. § 5.06, the Legislature ensured that qualified electors in Wisconsin have a cognizable interest in ensuring that local election officials' conduct comports with the law. And this Court has recognized that "Wis. Stat. § 5.06 gives [Wisconsin voters] a

statutory right to have local election officials in the area[s] where [they] live[] comply with elections laws." *Teigen v. Wisconsin Election Commission*, 2022 WI 64, ¶ 164 (Hagedorn, J. concurring), ¶ 34 (lead op. of three justices favorably quoting the same but concluding in that case, where a local election official's conduct was not at issue, that a declaratory judgment action was the proper vehicle for judicial review), 403 Wis. 2d 607, 976 N.W.2d 519.

This ought to end the standing analysis, but WEC, DNC, and WARA all cite to *Friends of Black River Forest v. Kohler Co.*, 2022 WI 52 (perhaps the only decision in recent years in which this Court concluded a plaintiff lacked standing), to support their claims that Brown lacks standing here. But *Friends* is irrelevant because it is not a Wis. Stat. § 5.06 appeal of a WEC decision, it is a more general Chapter 227 appeal of a decision issued by a different agency, and the statutory language in the two statutes regarding a right to appeal is different.

Wis. Stat. § 5.06(8) gives a right of appeal to "[a]ny *election official or complainant* who is aggrieved by an order issued under sub. (6)" (Emphasis added). On the other hand, Wis. Stat. § 227.53(1), the provision at issue in *Friends*, provides that "any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review of the decision . . . ." A "person aggrieved" for purposes of Chapter 227 is specifically defined by Wis. Stat. § 227.01(9) as "a person or agency whose substantial interests are adversely affected by a determination of an agency," (this is the phrase at issue in *Friends*), but that definition expressly applies *only* to Chapter 227. *See* Wis. Stat. § 227.01 (intro). *See also Friends of Blue Mound State Park v. DNR*, 2023 WI App 38, ¶ 34,

408 Wis. 2d 763, 993, N.W.2d 788 (explaining *Friends* should not be read to cover actions involving different statutory frameworks).

As the Court said in *Clean Wisconsin*, the Legislature knows what the statutory terms are, and if they use different terms, it is presumed that they meant to do so. The Legislature could have directly linked appeals under Wis. Stat. § 5.06(8) to Wis. Stat. Ch. 227, but it did not. It could have used the same language in Section 5.06(8) as in Chapter 227, but again it did not. By using different language in the two statutes, the Legislature conferred different judicial review rights. *See Clean Wisconsin, Inc.*, 2021 WI 71, ¶ 25.

A "complainant or election official who is aggrieved by an order [by WEC]" is not a defined term and is necessarily something different than the statutory definition of a "person aggrieved" under Chapter 227. What the language in Section 5.06(8) means is obvious. Whichever of the two parties to a WEC complaint under Section 5.06—the complainant or the election official—loses is entitled to judicial review.

This makes even more sense with respect to voters rather than election officials (although it covers both) in view of Wis. Stat. § 5.06(1), which explicitly establishes in "any qualified elector" an interest in the lawful administration of elections. The Legislature first created the interest (Wis. Stat. § 5.06(1)), then they created appeal rights to protect that interest (Wis. Stat. § 5.06(8)). Such a qualified elector who brings a complaint under Wis. Stat. § 5.06(1) is *necessarily* aggrieved under Wis. Stat. § 5.06(8) whenever WEC adversely disposes of their complaint and is entitled by that statute to seek judicial review.

Furthermore, this reading of the statute is confirmed by the text of Wis. Stat. § 5.06(2), which says:

> "No person who is authorized to file a complaint under sub. (1), other than the attorney general or a district attorney, may commence an action or proceeding to test the validity of any decision, action or failure to act on the part of any election official with respect to any matter specified in sub. (1) without first filing a complaint under sub. (1), nor prior to disposition of the complaint by the commission. A complaint is deemed disposed of if the commission fails to transmit an acknowledgment of receipt of the complaint within 5 business days from the date of its receipt or if the commission concludes its investigation without a formal decision."

And the appeal rights granted under Wis. Stat. § 5.06(8) must be read in context with the procedure laid out in Wis. Stat. § 5.06(2). That statute clearly contemplates that complainants who are not satisfied with WEC's decision (or who get no decision at all from WEC) can "commence an action or proceeding to test the validity of any decision, action or failure to act on the part of any election official with respect to any matter specified in sub. (1)," but only after filing a complaint and obtaining a "disposition" from WEC.

That the Legislature has clearly conferred standing upon complainants to seek further review of WEC decisions is perhaps most evident by the requirement that no action may be brought until WEC disposes of the complaint in some manner. And if WEC takes *no action* within 5 days of submitting a complaint, the complaint is deemed "disposed of"—sufficient to allow a complainant to "commence an action or proceeding to test the validity of any decision, action, or failure to act on the part of any election official with respect to any matter specified in

[Wis. Stat. § 5.06] sub. (1).” Wis. Stat. § 5.06(2). The mechanism for seeking that very review is an action brought under Wis. Stat. § 5.06(8). That is exactly what Brown did.

WEC claims that “a voter who files a complaint under [Wis. Stat. § 5.06] sub. (1) is not entitled to any of those outcomes” (WEC Br. at 37). There is no *entitlement* to any particular outcome other than the statutory requirement that election officials in the voter’s jurisdiction follow state law. However, electors *are entitled* to procedural due process when ensuring that the election officials in their jurisdictions are indeed complying with the law, and it is Wis. Stat. 5.06, not Chapter 227, that gives them this right.

Moreover, to the extent this Court thinks that *Friends* is relevant, Brown still has standing in this case.

Friends repeated the requirement for standing to bring a general agency appeal under Chapter 227: a challenger must show “a direct effect on his legally protected interests.” *Friends*, 2022 WI 52, ¶ 20 (quoting Fox, 112 Wis. 2d 514, 524, 334 N.W.2d 532 (1983)). And in *Friends,* the Court concluded that the statutes cited by the challengers did not “protect or regulate their asserted interests.” *Friends*, 2022 WI 52, ¶ 32.

Importantly, and a major distinguishing factor between this case and *Friends*, is that the statutes cited by the challengers in *Friends* “d[o] not provide for an independent, enforceable claim” because “nothing [in the statute] establishes the requisite ‘substantive criteria’ by which petitioners could challenge” the agency action (*Id.,* ¶ 33), and “nothing in

the text protects, recognizes, or regulates any person's interest" in the agency's action. (*Id.*, ¶ 34).

This finding stands in stark contrast to the text of Wis. Stat. § 5.06, which explicitly gives electors in Wisconsin "a statutory right to have local election officials in the area[s] where [they] live[] comply with election laws." *Teigen*, 2022 WI 64, ¶¶ 34, 164. What's more, Wis. Stat. § 5.06(1) provides the "substantive criteria" necessary for such a challenge to be brought.

Specifically, the statute protects the right of individual electors to challenge: "a decision or action of the official or the failure of the official to act with respect to any matter concerning nominations, qualifications of candidates, voting qualifications, including residence, ward division and numbering, recall, ballot preparation, election administration or conduct of elections is contrary to law, or the official has abused the discretion vested in him or her by law with respect to any such matter . . . ." Wis. Stat. § 5.06(1).

DNC spends a considerable amount of their brief arguing that the "vote pollution" theory in *Teigen* is inapplicable here. But they miss the point, Brown is not arguing vote pollution—and has never done so in this case. Instead, as already explained *supra*, Brown is relying upon the statutory standing granted by the Legislature in Wis. Stat. § 5.06 and as recognized in *Teigen*.

WEC's related argument, which characterizes Brown's claims as mere "generalized grievances" based on the theory of "vote dilution" fares no better. *See* WEC Br. at 29. Specifically, WEC cites to *Feehan v. WEC*, 506 F. Supp. 3d 596 (E.D. Wis. 2020), to show that "vote dilution" is no

grounds for standing. But that case involved constitutional claims and a broad challenge to a statewide election result, and was decidedly *not* brought under Wis. Stat. § 5.06. *Id*.at 617–18 (explaining that in *Feehan* the state argued the Plaintiff could not bring his claims because he had failed to exhaust his administrative remedies under Wis. Stat. § 5.06). This case, however, involves claims against a local election official, and allegations of conduct personally witnessed by Brown. These are not generalized grievances, and Brown does not argue "vote dilution." He has a right, guaranteed by statute, to ensure that his local election officials follow the law. WEC dismissed Brown's complaint, and Brown explicitly followed all statutory procedures to seek judicial review. He has standing here.

Again, the language of the statute and the decision in *Teigen* confirm that Brown has a "legally cognizable" interest in pursuing judicial review of WEC's decision. *Cf. Friends of Black River Forest*, 2022 WI 52, ¶ 33 (a statute that "merely express[es] a statement of purpose" does not "protect[], recognize[], or regulate[] any person's interest or contemplate[] a challenge to the agency's decision") (citation omitted). Because it is undisputed that Brown has timely followed all of the administrative requirements attendant to the § 5.06 process, he is properly before this Court and has standing.

DNC also cites to *Auer Park Corp. v. Derynda*, 230 Wis. 2d 317, 320, 601 N.W.2d 841 (Ct. App. 1999) to support its argument that Brown is not "aggrieved" to appeal (specifically quoting *Auer:* "[i]f the appealed judgment or order *directly injures* his or her interests," and "the injury must adversely affect the party's interests *in an appreciable way*."

(emphasis original in the brief)). DNC Br. at 21. But that case involved standing to appeal a circuit court action to appellate courts, not administrative agency review, and DNC's attempts to conflate these standing arguments is wrong.

Further, even if it did apply to Brown, Brown meets that standard as well. State law makes clear that "any elector" has an interest in ensuring that election officials in their jurisdiction follow state law. Wis. Stat. § 5.06(1). Such electors, who file complaints and do not get any relief, suffer a *direct* injury to those interests (as already explained), and moreover, that interest is *appreciable*. In *Tierney v. Lacenski*, 114 Wis. 2d 298, 302, 114 Wis. 2d 522 (1983) the Court of Appeals explained that to be "appreciable," "the judgment or order appealed from must bear directly and injuriously upon the interests of the appellant" and further found that the litigant there was "[o]bviously . . . affected in some appreciable manner by the court's action dismissing [another litigant]"). Here, Brown was likewise obviously affected in some appreciable manner by WEC's action dismissing his complaint.

As Brown made clear in his initial complaint, and as the Circuit Court held in this case, McMenamin's actions with respect to election administration or conduct of elections were contrary to law. Brown alleged five reasons why, and this appeal concerns two of those reasons upon which the Circuit Court agreed with Brown. Brown plainly has a cognizable interest here. That interest was directly harmed by McMenamin's actions, which violated state law, and which Brown himself witnessed. Brown suffered a direct harm to his legally protected

interests and is therefore "aggrieved" for purposes of this administrative appeal, and he has standing.

Any other conclusion would eviscerate review of WEC decisions under Wis. Stat. § 5.06 and subvert this Court's authority to that of an administrative agency, which would raise significant constitutional issues. *See generally, Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 2018 WI 75, 382 Wis. 2d 496, 914 N.W.2d 21. Further, under Appellants' approach, if WEC decides a case in favor of the local election official, the voter who brought the case is not aggrieved and could not appeal. But the converse would also be true. If WEC decides the case in favor of the voter, the local election official could not appeal because election officials have no cognizable interest in administering elections in an illegal manner. Section 5.06(8) would be a nullity.

On this point, DNC argues that significantly limiting who may bring an appeal under Wis. Stat. § 5.06(8) is what the Legislature intended because, they argue, a non-aggrieved complainant could ask the attorney general or a district attorney to bring an action to force compliance with the law under Wis. Stat. § 5.07. DNC Br. at 25. But Wis. Stat. § 5.06 was created after 5.07, and 5.06(2) directly references the ability of district attorneys to bring actions based on their broader power to enforce the laws generally, which go beyond just election officials, whereas Wis. Stat. § 5.06(1) is limited exclusively to election officials and complaints filed by electors within the jurisdictions of those election officials. This type of enforcement of statutory rights is not uncommon. For example, in actions brought to enforce the state's public records laws, a record requester may, pursuant to Wis. Stat. § 19.37(1), either bring

their own action for mandamus asking the court to order release of a record, (Wis. Stat. § 19.37(1)(a)), or may request that a district attorney or the attorney general bring such an action (Wis. Stat. § 19.37(1)(b).

The outcome Appellants seek here is contrary to both Wisconsin law and common sense, and this Court should reject the standing arguments made by them here. Brown has standing to bring this appeal, and this Court should reach the merits.

II. Wis. Stat. § 6.855 prohibits alternate absentee ballot collection sites from conferring a partisan advantage, and McMenamin's actions violated that prohibition.

The first merits issue of this appeal is whether WEC wrongly dismissed the claim in Brown's complaint which alleged that McMenamin unlawfully located early, in-person absentee ballot sites at locations which conferred a partisan advantage in violation of Wis. Stat. § 6.855's prohibition of locations that "afford[] an advantage to any political party." The Circuit Court found that WEC wrongly dismissed this claim because the sites selected did, in fact, confer a partisan advantage in violation of the statute. This Court should do the same.

Appellants argue that the words "partisan advantage" appear nowhere in the text of the statute and say that the prohibition is on benefits to "political parties." *See, e.g.,* DNC Br. at 27, McMenamin Br. at 13, WARA Br. at 21, WEC Br. at 25. But this argument is belied by the context of the statute and the legislative history adopting that provision, as explained herein. The proper way to analyze this limitation is to read it as a limitation on partisan benefits.

a. Statutory history of in-person absentee voting in Wisconsin.

Until 2000, absentee voting was restricted to electors who would be absent from their municipality on election day, or electors "who because of age, sickness, handicap, physical disability, jury duty, service as an election official or religious reasons" could not appear at the polling place in their ward. Wis. Stat. § 6.85 (1997). 1999 Wisconsin Act 182, § 90, amended the definition of "absent elector" and expanded it to include "any otherwise qualified elector who is unable or unwilling to appear at the polling place" in their ward. However, early in-person absentee voting was only allowed in the office of the municipal clerk. Wis Stat. § 6.86(1)(a)2. (1997). *See Richards v. Badger Mut. Ins. Co.*, 2008 WI 52, ¶ 22, 309 Wis. 2d 541, 749 N.W.2d 581 (citations omitted) ("A review of statutory history is part of a plain meaning analysis . . . Statutory history encompasses the previously enacted and repealed provisions of a statute. By analyzing the changes the legislature has made over the course of several years, we may be assisted in arriving at the meaning of a statute . . . Therefore, statutory history is part of the context in which we interpret the words used in a statute.").

b. Wis. Stat. § 6.855 prohibits alternate absentee ballot collection sites from conferring a partisan advantage.

Wisconsin Stat. § 6.855, which first allowed early in-person absentee voting at locations *other than* the office of the municipal clerk was created by 2005 Wisconsin Act 451 ("Act 451"). The legislative history shows that Act 451 was the result of more than a year of work by

a bipartisan study committee on election law convened by the Joint Legislative Council.[4]

The study committee met 11 times throughout its existence and ultimately produced a draft bill, referred to as LRB-3947/1, which it recommended at its final December 14, 2005, meeting.[5] The first draft of Wis. Stat. § 6.855 that the committee proposed did not have the provision on partisan advantage, and read as follows:

> "The governing body of a municipality may elect to designate a site other than the office of the municipal clerk or board of election commissioners as the location from which electors of the municipality may request and vote absentee ballots and to which voted absentee ballots shall be returned by electors for any election. An election by a governing body to designate an alternate site under this section must be made no fewer than 14 days prior to the time that absentee ballots are available under s. 7.15 (1) (cm), if a primary is scheduled to be held, or at least 14 days prior to the time that absentee ballots are available for an election under s. 7.15 (1) (cm) if a primary is not scheduled to be held, and shall remain in effect until at least the day after the election. If the governing body of a municipality makes an election under this section, no function related to voting and return of

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[4] The scope of the committee was: "The special committee is directed to examine the election process and the administration of elections in the state, other than campaign financing law. The special committee shall specifically examine the implementation of the federal Help America Vote Act of 2002 (HAVA), state oversight of elections in Wisconsin, and the recount process. The special committee may also examine other election-related issues such as voter registration and identification, new technologies for voting, the adequacy of staffing at polling places, and the adequacy of training received by poll workers." *See* committee website, fn 5.

[5] See generally the website for the 2004 Special Committee on Election Law Review:
https://docs.legis.wisconsin.gov/misc/lc/study/2004/special_committee_on_election_law_review

> absentee ballots that is to be conducted at the alternate site may be conducted in the office of the municipal clerk or board of election commissioners."

See LRB-3947/1, § 68.[6] Following that final meeting, State Senator Joseph Leibham sought further amendment to the bill. Relevant here, he sought to amend the proposed Wis. Stat. § 6.855 to provide that "the site chosen be publicly accessible, as near as practicable to the clerk's office, and not be located to provide a partisan advantage."[7]

To effectuate this request from Sen. Leibham, the drafting attorneys added a new sentence to the draft legislation creating Wis. Stat. § 6.855: "The designated site shall be located as near as practicable to the office of the municipal clerk or board of election commissioners and no site may be designated that affords an advantage to any political party." This language first appears in the drafting file for Act 451

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[6] LRB-3947/1 is included as part of the Legislature's drafting file for Act 451, available at:

https://docs.legis.wisconsin.gov/2005/related/drafting_files/wisconsin_acts/2005_act_451_sb_612/02_sb_612/05_3947df_pt18of34.pdf

[7] Wisconsin Legislative Council, Memorandum to Senator Joseph Leibham. Dated January 18, 2006 (a memo written to Sen. Leibham summarizing the amendments that he was seeking to the proposal). This memorandum is located at pages 25-26 of the records of the Special Committee on Election Law, located at:

https://docs.legis.wisconsin.gov/2005/related/public_hearing_records/sc_labor_and_election_process_reform/bills_resolutions/05hr_sc_lepr_sb0612_pt01.pdf

handwritten into LRB-3947/1,[8] and it became part of the next draft of the bill, LRB-3947/2.[9]

On January 18, 2006, the Joint Legislative Council[10] voted to introduce the draft legislation as amended by Senator Leibham's request that the absentee ballot sites "not be located to provide a partisan advantage."[11]

The Bill was introduced as 2005 Senate Bill (SB) 612. SB 612 was then unanimously adopted by both houses of the Legislature and signed into law by then-Governor Jim Doyle as Act 451.[12] Section 67[13] of that act created Wis. Stat. § 6.855 to read:

> "The governing body of a municipality may elect to designate a site other than the office of the municipal clerk or board of election commissioners as the location from which electors of the municipality may request and vote absentee ballots and to which voted absentee ballots shall be returned by electors

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[8] *See* fn 6, *supra*.

[9] LRB-3947/2 is included as part of the Legislature's drafting file for Act 451, available at:

https://docs.legis.wisconsin.gov/2005/related/drafting_files/wisconsin_acts/2005_act_451_sb_612/02_sb_612/05_3947df_pt22of34.pdf

[10] The Joint Legislative Council is created by statute and consists of 22 members of the legislature from all parties including the leadership in both houses. Wis. Stat. § 13.81(1).

[11] Report to the Legislature, Special Committee on Election Law Review. Dated February 20, 2006. Page 36. Available at:

https://docs.legis.wisconsin.gov/misc/lc/study/2004/special_committee_on_election_law_review/120_report_to_legislature/rl_05_15_elaw

[12] The full legislative history is available on the Legislature's website at: https://docs.legis.wisconsin.gov/2005/proposals/sb612

[13] The full text of the act is available on the Legislature's website at: https://docs.legis.wisconsin.gov/2005/related/acts/451.pdf

> for any election. The designated site shall be located as near as practicable to the office of the municipal clerk or board of election commissioners and no site may be designated that affords an advantage to any political party. An election by a governing body to designate an alternate site under this section shall be made no fewer than 14 days prior to the time that absentee ballots are available for the primary under s. 7.15 (1) (cm), if a primary is scheduled to be held, or at least 14 days prior to the time that absentee ballots are available for the election under s. 7.15 (1) (cm), if a primary is not scheduled to be held, and shall remain in effect until at least the day after the election. If the governing body of a municipality makes an election under this section, no function related to voting and return of absentee ballots that is to be conducted at the alternate site may be conducted in the office of the municipal clerk or board of election commissioners."

As the legislative history makes clear, when created, the intent of Wis. Stat. § 6.855's "no site may be designated that affords an advantage to any political party" prohibition was to ensure that any alternate absentee balloting location selected conferred no "partisan advantage" to either party.

Despite this, Appellants ask this court to read the Wis. Stat. § 6.855's "no site may be designated that affords an advantage to any political party" restriction as a literal prohibition on only providing an advantage to a political party itself, rather than a partisan advantage. Of course, it is not entirely clear that this distinction between the two has any meaning. Providing an advantage to the voters of one political party by locating polling places closer to them vis-à-vis the voters of other political parties, necessarily advantages that party.

But regardless, what Appellants appear to seek is a hyper-literal interpretation of Wis. Stat. § 6.855 which would mean that alternate sites cannot confer advantages upon literal political parties themselves—meaning the corporate entity of the party. WEC, for example, argues that "[t]he [] statute simply prohibits some advantage to these types of political committees by virtue of the specific site itself or its proximity to a political party's operations." WEC Br. at 40. But as explained, the Legislature intended for this statute to prohibit any *partisan* advantage, and any other hyper-literal reading of the statute concluding otherwise would strangle its intended meaning. This Court has rejected such an approach to statutory interpretation. *Brey v. State Farm Mutual Auto. Ins. Co.*, 2022 WI 7, ¶ 11, 400 Wis. 2d 417, 970 N.W.2d 1 ("Properly applied, the plain-meaning approach is not 'literalistic'; rather, the ascertainment of meaning involves a 'process of analysis' focused on deriving the fair meaning of the text itself.") citing to *State ex rel. Kalal v. Cir. Ct. for Dane Cnty*., 2004 WI 58, ¶¶ 46, 52, 271 Wis. 2d 633, 681 N.W.2d 110 (quoting *Bruno v. Milwaukee Cnty.*, 2003 WI 28, ¶ 20, 260 Wis. 2d 633, 660 N.W.2d 656). And others agree. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 355 (2012) ("Literalness may strangle meaning." (quoting *Utah Junk Co. v. Porter*, 328 U.S. 39, 44, 66 S.Ct. 889, 90 L.Ed. 1071 (1946))).

Because the "ordinary meaning of a statute is dictated by more than the literal meaning of a single phrase, read in isolation," this Court has directed that "statutes must be interpreted in their entirety, and in context" and that this approach requires a court to "first analyze the

text" of a statute "as a whole" and then to "evaluate the statutory history and other related statutory provisions." *Sojenhomer LLC v. Village of Egg Harbor*, 2024 WI 25, ¶ 15, 270 Wis. 2d, 676 N.W.2d 424. Using this approach, and with the statutory history already laid out, it is clear that the phrase "no site may be designated that affords an advantage to any political party" prohibits site locations that would confer a partisan advantage in an election.

c. The sites selected by McMenamin, and challenged in this action, violated Wis. Stat. § 6.855 because they conferred an unlawful partisan advantage.

In the complaint he filed with WEC to begin this action, Brown alleged that the sites McMenamin ultimately selected conferred a partisan advantage to one political party over the other, in violation of Wis. Stat. § 6.855.

More specifically, Brown's complaint included a report comparing ward-level voting data from the 2016, 2018, and 2020 elections and explaining that while Racine is a Democrat-leaning city, there are varying concentrations of Democratic voters in each of its wards. Dkt. 56:44. Some of the sites selected conferred advantage to the Republican party and others to the Democratic party, with an overall advantage to the Democratic party.

Of the 18 alternate sites that were located outside of Ward 1, eight were in wards that had top-of-the-ticket democratic percentages higher than that of Ward 1 (creating an advantage for Democrats) and ten were in wards that had such democratic percentages lower than that of Ward 1 (creating an advantage for Republicans). Brown's claim is that all

eighteen sites were illegal because they created an advantage for one party or the other. But Brown also points out that the overall advantage was for the Democratic Party. A detailed analysis supporting Brown's claims is part of the administrative record in this case. Dkt. 56:39-50.

The number of votes cast in the 2020 presidential election by ward are published by the state.[14] A review of those numbers shows as follows: The number of Democratic top-of-the-ticket voters outside of Ward 1 with an alternate site in their ward was 8,928. That number represents 41.8% of all Democratic top-of-the-ticket voters in Racine. The number of Republican top-of-the-ticket voters in those same wards was 4,007, which represents 38.1% of all Republican top-of-the-ticket voters in Racine. This means that, based upon the sites chosen by McMenamin, a disproportionate share of Democratic voters (3% more voters) had easier access to an alternate site relative to Republican voters. This is the exact situation the Legislature sought to avoid when it created Wis. Stat. § 6.855.

Whether McMenamin's intention was to create this turnout advantage for Democrats or not, that is precisely what she did through the sites she selected.

The record also clearly demonstrates that of the sites which were identified as available for in-person absentee voting by the Racine City Council, Ward 1 had the largest number of possible locations for the mobile voting unit; Ward 1 is also the ward in which the Clerk's office is

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[14] 2012-2020 Election Data with 2020 Wards listed available at:

https://gis-ltsb.hub.arcgis.com/datasets/LTSB::2012-2020-election-data-with-2020-wards/explore

located (and would therefore be "as near as practicable" to that location). Dkt. 56:45. Indeed, the Racine City Council had approved up to 28 different locations in Ward 1 to use for in-person absentee voting, and the Clerk selected three of them for the August 2022 primary upon which the complaint in this action was based. *Id.*

Scattering the sites as McMenamin did throughout different wards in the City, including many with higher concentrations of Democratic voters than in Ward 1 (which, again, is where the Clerk's office was located), such as the Racine Art Museum in Ward 2 (82% Democrat) or Gateway Technical College in Ward 4 (90% Democrat), was what conferred partisan advantage, not the fact that there is no physical location with a perfectly even 50/50 partisan split. Dkt. 56:43, Dkt. 59:39–40.

In addition, McMenamin did not respond to Brown's complaint before WEC by disputing Brown's numbers or analysis or by supplying her own numbers in response to Brown's. Instead, McMenamin responded by arguing that: 1) because some ward lines had been redrawn between 2020 and 2022, Brown's numbers were inaccurate; and 2) Brown's interpretation was unworkable because she was not required to conduct her own statistical analysis and partisan advantage is essentially irrelevant because voters may vote at any alternate site they choose, regardless of where their residence is within the City. Dkt. 57:7–9.

On Appeal, McMenamin largely repeats these arguments. First, McMenamin argues that Wis. Stat. § 6.855 "does not articulate a methodology to evaluate whether a political party is advantaged in

violation of the statute." McMenamin Br. at 12. Then, McMenamin claims that Brown's reading of "advantage to a political party" to mean a partisan advantage is wrong for four reasons: (1) Brown's method of analysis is not "condoned by statute"; (2) if it is condoned, then such a method is not required by statute; (3) Brown "fails to establish that his analysis is correct"; and (4) even if Brown's analysis is correct, Brown "fails to establish that the selected sites afforded an advantage to a *political party*." McMenamin Br. at 13.[15] None of these arguments have any merit.

For example, McMenamin's argument that "voters may choose to vote at an absentee ballot site that is located outside of their assigned ward" proves nothing. It is the location of the sites that is at issue in this appeal—and whether or not those locations "afford[] an advantage to a political party." It does not matter that voters *could* vote there, what matters is whether the sites are located in a way that makes it easier for more voters of one political party to vote vis-à-vis voters of another political party. And as the administrative record in this case shows, the sites chosen for the August 2022 primary election did just that.

Furthermore, Brown's method is the only one that makes any sense under the statute. As Brown argued to WEC and the Circuit Court, consistent with the statute, alternate sites may not afford any political advantage that differs from the ward in which the Clerk's office is located. This correct interpretation of the statute pulls together the

[15] Other Appellants argue similarly. *See e.g.*, DNC Br. at 34–40; WARA Br. at 20–28; WEC Br. at 39–41; BLOC Br. at 19–21.

various requirements set out in Wis. Stat. § 6.855 and is consistent with the intent of the Legislature in adopting that provision as discussed *supra*—i.e., sites in the same ward as the Clerk's Office are as near as practicable to the Clerk's Office and offer no advantage to any political party.

Appellants argue that the use of wards is inappropriate because the statute does not mention the use of wards. DNC Br. at 36; WARA Br. at 20; WEC Br. at 41; BLOC Br. at 19–20 (suggesting the same). But there is no other way to determine whether a location would confer such an advantage without looking at voting data where the site is located—and ward-level data is the only data within a municipality that can be broken out. Therefore, there is no way to comply with Wis. Stat. § 6.855 *without* using ward data.

Moreover, the Legislature clearly intended for an "advantage to any political party" to mean a *partisan* advantage. And at the same time, in the same *sentence*, the Legislature *also* added the requirement that alternate sites must be located "as near as practicable to the office of the municipal clerk." That part of the statute is yet another reason why Brown's reading is correct. The Legislature's fear was that municipalities would establish in-person absentee voting locations somewhere that was easy for voters of one party to vote and harder for voters of another party—because making it easier for voters of one party to vote at the expense of others confers a *partisan advantage* which benefits that political party. That is why the Legislature required alternate sites to be as close as possible to the clerk's office—such a rule avoids, and guards against, conferring advantages to political parties.

Indeed, Brown's reading of the statute gives meaning to the partisan advantage concern that comes from removing elections from the neutral turf that is the Clerk's office. And while Brown's interpretation harmonizes the various concerns expressed by the Legislature, Appellants' arguments ignore them altogether.

For example, McMenamin argues that a "rational reading of the statute is one that prohibits an actual, demonstrable advantage to a political party, such as prohibiting the placement of an in-person absentee voting location at a political party's local office or any location where a political party is holding a rally." McMenamin Br. at 16. And yes, those would also violate the statute. But why? It is because locating the sites at those locations makes it easier for the voters who support that political party to vote. That is exactly what the Legislature prohibited, and exactly what Brown's analysis gets at on a city-wide basis.

McMenamin also argues that Brown's "analysis establishes, at best . . . a general partisan advantage, which is distinct from an advantage to the organization that is a political party." McMenamin Br. at 18. But that's a distinction without a difference. First, as explained herein, the Legislature obviously intended to prohibit partisan advantage in the locating of sites. Brown's analysis shows that in locating the sites for the August 2022 primary election, McMenamin sometimes conferred an advantage to Democrats, and sometimes conferred an advantage to Republicans—and this is what the statute explicitly prohibits.

Furthermore, WEC's decision upholding McMenamin's actions over this objection should be reversed because the agency provided absolutely zero analysis for its conclusion that Brown's data analysis was inaccurate or misapplied the statute. WEC simply said that "Respondent submitted compelling arguments" on this point, without actually explaining why it was ultimately persuaded by McMenamin's arguments or which arguments from Brown's report it considered "compelling." Dkt. 59:55. This is not some meaningless, technical error, given that WEC itself acknowledged that the question of political inequity is "an extremely complex undertaking" and one that contemplates "a fact-intensive inquiry." *Id*..

If that is the case, and Brown brought forward evidence that McMenamin disputes, it was WEC's duty to explain why it found one party's position "compelling" and the other's not. *Transport Oil Inc. v. Cummings*, 54 Wis. 2d 256, 263, 195 N.W.2d 649 (1972) ("An administrative agency must indicate its reasons for reaching its findings," including in administrative cases where the provisions of Chapter 227 do not otherwise apply). This is important because Brown does not ask this Court to substitute its judgment for that of the agency, rather, WEC did not itself weigh the evidence by setting out what it considered and why it found one side to be more credible—and that

failure by WEC constitutes error as a matter of law, and their decision must be reversed.[16]

In fact, the only thing WEC *did do* here was hedge on the question, stating that the judiciary should come up with a standard for partisan advantage, while also maintaining that WEC may need to do so in another case on another day. Under these circumstances, the agency claims, it would be required to "develop an impossible standard" and declined to do so. Dkt. 59:56.

WEC's conclusion as to what the test should be is entitled to no deference here in any event. This is because WEC itself admits that these issues "are likely best left to the judiciary" (Dkt. 59:55) and speaks only in a hypothetical manner about future cases that could come before the Commission. That is, by WEC's own admission, they lack the "experience, technical competence and specialized knowledge" necessary to decide this matter. *See* Wis. Stat. § 5.06(9). Where an agency has no expertise or its position has been inconsistent such that it provides "no real guidance," courts do not provide its analysis with any deference. *Ellis v. State Dep't of Admin.*, 2011 WI App 67, ¶ 24, 333 Wis. 2d 228, 800 N.W.2d 6 (quoting citation omitted).

WEC's administrative order, which is what this Court is reviewing, adopted McMenamin's argument that only truly egregious examples could violate the political advantage prong of the statute. Dkt.

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[16] On this point, DNC further argues that the circuit court failed to give "due weight" to WEC's decision. DNC. Br. at 33. The Circuit Court did, but that's really immaterial here because the Court is reviewing WEC's decision in this case, not the Circuit Court's.

59:55. But this, once again, simply ignores the restriction that the Legislature put on these types of sites. Brown's position—that the sites selected should confer no partisan advantage using the political makeup of the ward where the Clerk's office is located as a baseline—satisfies the partisan advantage inquiry and is consistent with the other limitations of the statute as well, including the requirement from the same sentence that the sites must be "as near as practicable" to the Clerk's office. The Clerk's decision to geographically disperse alternate sites into wards of varying political makeups (especially with an overall tilt in favor of the Democratic Party) satisfies neither objective, and WEC erred when it concluded otherwise.

d. Overturning WEC's decision does not reinstate the "one location" rule or run afoul of the federal court's holding in *One Wisconsin*.

Various Appellants' contention that the "one-location" rule–which was challenged in *One Wisconsin Inst., Inc. v. Thomsen,* 198 F. Supp. 3d 896 (W.D. Wis. 2016) –has been reinstated by the Circuit Court's decision is simply incorrect. *See* McMenamin Br. at 18–21; DNC Br. at 41–42; WEC Br. at 41–43; WARA Br. at 26; BLOC Br. at 21–24 (BLOC at times refers to Brown's argument as the "few locations rule").

Brown never argued for a "one location" rule and the Circuit Court never held that a clerk may only use one location. The Circuit Court, rejecting this argument when it was made in favor of the motion to stay filed with the Circuit Court, explained that it never adopted a "one location" rule and was "at a loss to see how any appellant could read its decision otherwise." Dkt. 161:3.

BLOC argues that Brown's argument "drags Wis. Stat. § 6.855 closer to its discriminatory past." BLOC Br. at 21. That is absurd. First, as explained in detail herein, Wis. Stat. § 6.855 was adopted unanimously and the goal was to make it easier to vote by moving in-person absentee voting out of the clerks' offices. The statutory history makes clear that the Legislature has steadily been making it easier to vote via absentee ballot (in-person or not[17]) over the past several decades.

Next, BLOC attempts to insert new data that was never presented to WEC and is not part of the record that WEC considered when it issued the decision that is under review here. This appeal is about McMenamin's compliance with statutory requirements and whether WEC acted properly based upon the *record before it*, so BLOC's attempt to add data ought to go nowhere And as the Circuit Court found, WEC did not reach a proper decision on this issue according to the record before it. Dkt. 99:15.

As explained above, the Racine City Council identified 150 possible locations for in-person absentee voting during the August 2022 primary election, and McMenamin ultimately used a total of 22locations (her office and the 21 alternate absentee sites outside of City Hall) for that purpose. Dkt. 56:32–35. But there were 28 locations available in the same ward as the Clerk's office, and because they were in the same ward, they would have met the standards Brown has presented on this issue and complied the text of Wis. Stat. § 6.855. That is, not only is the "one

[17] The ability to vote absentee by mail, as opposed to in-person, is not impacted in any way by Brown's complaint or any aspect of this litigation.

location" rule not reinstated by overturning WEC's decision here, but McMenamin could have complied with the statute and had even *more* in-person absentee voting sites when doing so. Further, once selected, the statute requires that the sites "shall remain in effect until at least the day after the election." Wis. Stat. § 6.855. Operating some 28 sites for the August 2022 primary election would have more than met the demand for in person absentee voting.

Third, BLOC argues that Brown's reading of the statute "likely violates the Wisconsin Constitution." BLOC Br. at 23. But again, the Clerk could have had up to 28 locations under Brown's reading of the statute (and the City Council could have approved even more than that). Moreover, there is absolutely nothing in the administrative record to support BLOC's argument on this issue whatsoever, and even if there were, BLOC does not (and cannot) answer how having *more locations* for in-person absentee voting somehow violates the equal protection rights of Wisconsinites.

The challenge to the "one location" rule under the Equal Protection Clause is the claim that if only one location is used for early in-person absentee voting, then voters in large cities will be disadvantaged in comparison to voters in small towns because the lines may be longer given the larger number of voters who may try to vote at that one location. Whatever one thinks about the legal merits of such a claim, it makes no sense at all to say that it applies to a situation where the Clerk could have had 28 statutorily compliant voting locations.

What's more, Appellants seem to argue that by adopting Wis. Stat. § 6.855(5), the rest of the requirements were implicitly repealed or no

longer apply. This is wrong. As explained herein, as well as in Brown's Opening Brief on his Cross-Appeal, eliminating the "one location" rule does not mean that sites can be located anywhere in a municipality—the other provisions of the statute still have the effect of law and cannot be ignored.

In addition, overturning WEC does not otherwise run afoul of the federal court's decision in *One Wisconsin.* First, and most obviously, this is because that holding from *One Wisconsin* is now moot: "[t]he one-location rule is gone, and its replacement is not substantially similar to the old one." *Luft v. Evers,* 963 F.3d 665 (7th Cir. 2020). And even though the "one location rule" is gone, the other provisions of Wis. Stat. § 6.855—a validly enacted statute—remain in effect. If Appellants want to challenge other aspects of Wis. Stat. § 6.855, then they would need to bring a separate action to do so.

III. McMenamin violated Wis. Stat. § 6.855 by conducting absentee voting operations out of a van.

The second merits issue of this appeal is whether McMenamin's use of a mobile voting unit (MEU) as a polling place, rather than a building, was unlawful. Brown argued, and the Circuit Court agreed, that the MEU was indeed unlawful. Appellants' arguments to the contrary are not persuasive, and further, BLOC's attempt to argue that Wis. Stat. § 6.84 is unconstitutional falls woefully short.

This Court should also affirm the Circuit Court's decision to overturn WEC on this ground.

a. Use of the voter van was unlawful.

For two weeks before the August 9, 2022 primary, McMenamin arranged for a van to drive to 21 different locations throughout the city and permitted early in-person absentee voting inside the vehicle. Reasonable minds can differ as to whether it was a good idea to "streamline the process" of absentee voting to this extent. McMenamin Br. at 21. But the question in this case is not whether use of the so-called "Mobile Elections Unit" (MEU) was a good idea. The question is whether it violated Wis. Stat. §§ 5.25 and 6.855. It did.

Wisconsin Stat. § 6.855, as its title suggests, authorized the City of Racine to designate "[a]lternate absentee ballot site[s]." A "site" is the "place or setting of something" or "[t]he place where a structure or group of structures was, is, or is to be located." *Site*, The American Heritage Dictionary of the English Language (5th ed. 2022); *see also Site*, Black's Law Dictionary (11th ed. 2019) ("A place or location; esp., a piece of property set aside for a specific use.").

The word "site" could, depending on the context, encompass anything from a schoolyard, to an office, to the surface of the moon, and so the question is what limitations the statutory context imposes on the meaning of the word "site" here. *See, e.g.*, *Cnty. Of Maui, Hawaii v. Hawaii Wildlife Fund*, 590 U.S. 165, 172 (2020) ("context often imposes limitations" on otherwise-broad statutory terms). Appellants' basic position is that nothing in § 6.855 restricts what may constitute a "site" generally or prohibits use of a voting van specifically, so the MEU was legal. In contrast, Brown argues that the word "site," when read in the context of the absentee voting statutes as a whole, contemplates the use

of permanent buildings (as opposed to temporary vehicles). The Circuit Court agreed with Brown. This Court should affirm, for four reasons.

First, the use of an MEU is simply impossible to square with the requirements for storing absentee ballots, and indeed, McMenamin has essentially acknowledged that she violated those requirements in her use of the MEU. Dkt. 57:15 ("McMenamin has opted to store the ballots at the clerk's office.")

Because absentee voting occurs "wholly outside the traditional safeguards of the polling place," Wis. Stat. § 6.84(1), the Legislature reasonably imposed particular chain-of-custody procedures to protect the ballots. *See generally* Wis. Stat. § 6.88. Specifically, under Wis. Stat. § 6.88(2), absentee ballots that "arrive[] at the office of the municipal clerk, or at an alternate site under s. 6.855, if applicable," are enclosed unopened in an envelope marked with a notice that the envelope "must be opened in the same room where votes are being cast at the polls during polling hours on election day or, in municipalities where absentee ballots are canvassed under s. 7.52, stats., at a meeting of the municipal board of absentee ballot canvassers under s. 7.52, stats." The clerk "shall" then "keep the ballot in the clerk's office or at the alternate site, if applicable until delivered," i.e. delivered to the individuals who will count them. Wis. Stat. § 6.88(1) (emphasis added); see § 6.88(2). These two options—the clerk's office and the alternate site—are not equally available. Under Wis. Stat. § 6.855(1), "no function related to voting and return of absentee ballots that is to be conducted at the alternate site may be conducted in the office of the municipal clerk or board of election

commissioners," which is why § 6.88(1) contains directions related to alternate sites "if applicable."

In this case, the alternate site provisions were "applicable." Absentee ballots received were to stay at the alternate site until delivered to the election officials who would count them. This is not a problem when the word "site" is read to mean a permanent, physical building. But, of course, under the McMenamin's scheme, it was not possible to "keep the ballot . . . at the alternate site . . . until delivered," because the MEU stayed at each location for only a few hours.

So what happened to all of these ballots? Did McMenamin store them in the van for 14 days prior to the election, which is little better than storing them in the trunk of a car (illegal)? Or did she deliver them to her office at the end of each day, where "no function related to voting and return of absentee ballots" was to take place while the 21 alternate sites were in effect (also illegal)? Before WEC, McMenamin admitted that she "opted to store the ballots at the clerk's office." Dkt. 59:53. This was unlawful.

McMenamin has argued that § 6.88(1) permits this option but ignores that the statute makes the "clerk's office" available only if alternate sites are not in use, i.e. not "applicable." Her interpretation would make the words "if applicable" under that statute superfluous. McMenamin also maintains that returning voted absentee ballots to her office is not a "function related to [the] voting and return of absentee ballots." Dkt. 59:53. But chain-of-custody procedures are integrally related to the voting and return of absentee ballots—they ensure that the ballots can be safely counted in the first place. This is probably why

the instructions related to custody of the ballots are contained in a section entitled "[v]oting and recording the absentee ballot." *See* Wis. Stat. § 6.88. In sum, the Appellants' interpretation of Wis. Stat. § 6.855 as permitting vehicle-based sites conflicts with the custody requirements of § 6.88(1)-(2).

The second reason that the Appellants' interpretation is unworkable is that the Appellants are unable to apply a consistent definition of the word "site" across all the alternate absentee voting procedures with which they must comply. That is, the Appellants are not consistent in explaining whether the "site" at issue is the MEU itself or the locations at which the MEU is parked. *Compare, e.g.* WEC's Br. 12 (Racine drove its MEU "from site to site") (i.e. MEU is separate from site) and BLOC's Br. 16 ("Racine deployed a van . . . to and from its alternate sites to assist in absentee ballot collection.") (same), with Clerk's Br. 21 ("Clerk McMenamin appropriately used a mobile vehicle as an alternate absentee ballot site . . . .") (i.e. MEU is the site) and WARA's Br. 31 ("The circuit court . . . erred in concluding that mobile, non-static structures could not serve as alternate absentee-voting sites . . . .") (same).

This is not a meaningless distinction. The election statutes impose several requirements on "site[s]." Wis. Stat. § 6.855. And whether a site is a parking lot, for example, or instead the van that sits atop it, affects how those requirements apply. It suffices to discuss just a few such requirements here: notice and staffing.

With respect to notice, under § 6.855(2), the City Clerk was required to "prominently display a notice of the designation of the alternate site[s] selected" in her office from the date of designation

through the absentee voting period, as well as online. As the record shows, for the notice requirement, the City Clerk treated the physical address and/or nearby building rather than the MEU itself as the site, noticing locations like "Racine North Beach[,] 100 Kewaunee St" and "St Paul Baptist Church[,] 1120 Grand Ave." Dkt. 56:17–23.

Yet with respect to staffing requirements—specifically, the municipal clerk "shall operate such [alternate] site as though it were his or her office for absentee ballot purposes and shall ensure that such site is adequately staffed," Wis. Stat. § 7.15(2m)—it is clear that the City Clerk treated the MEU as the "site." Racine North Beach, for example, features about a half-mile of shoreline. Does the City Clerk contend she "staffed" North Beach? With respect to St. Paul's Baptist Church, similarly, the City Clerk presumably just parked the MEU in the nearby parking lot instead of staffing the building that was actually designated as the site.

Another way of viewing the Clerk's inconsistent treatment of the word "site" is that in using the MEU, she violated the notice requirement of Wis. Stat. § 6.855. Because it was impossible for the Clerk to notice the actual location of the MEU—both practically, and because the notice would not have matched the City's actual designation of sites—she frequently noticed physical buildings nearby that she did not actually use. The Clerk knew, as illustrated by her actions, that use of physical buildings was the only real way to make her approach comport with the statutory mandate of notice.

This same problem—the Appellants' inability to explain what constitutes the relevant "site" when the MEU is in use in a way that

allows them to comply with all applicable statutory mandates simultaneously—potentially arises with respect to other requirements as well. *See, e.g.*, Wis. Stat. §§ 7.41(1)–(2) (public has right to observation area "within" an alternate site between 3–8 feet from the registration tables); 6.855(4) (entire "site" must be "accessible to . . . individuals with disabilities").

Third, and now moving past the sheer unworkability of the Appellants' interpretation of "site" as permitting the use of voting in vehicles, is that the context of Wisconsin's election statutes makes clear that permanent buildings are contemplated by the term "site."

This Court is well-aware of the many canons and principles of statutory interpretation suggesting that statutory provisions should be read in harmony. *See Kalal*, 2004 WI 58, ¶ 46 ("[S]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes . . . ."); *State v. Roling*, 191 Wis. 2d 754, 762, 530 N.W.2d 434 (Ct. App. 1995) ("[I]t is a basic precept of statutory construction that the legislature is presumed to act with full knowledge of existing laws."); *State v. Harrison*, 2020 WI 35, ¶35, 391 Wis. 2d 161, 942 N.W.2d 310 ("In construing the plain meaning of a particular statute, we may consider related statutes."). Those rules apply here: surrounding statutes show that the word "site" is limited to permanent structures.

The first such statute is Wis. Stat. § 5.25(1), which establishes that polling places "shall be public buildings, unless the use of a public building for this purpose is impracticable or the use of a nonpublic building better serves the needs of the electorate."

The Clerk resists the notion that polling places (and thus, alternate sites) are always buildings, suggesting that § 5.25(1)'s impracticability exception allows municipalities to use any kind of location as a polling place. But the "better serves the needs" side of the disjunctive in that provision makes clear that the general purpose of sub. (1) is not to require buildings—that much is already assumed by the Legislature—but to require "public" buildings. (Emphasis added.) The two exceptions in the provision are for the use of nonpublic buildings.

The second statute providing relevant context is Wis. Stat. § 5.02(15), which defines "[p]olling place" as "the actual location wherein the elector's vote is cast," (emphasis added), not "whereat" (or "at which"). In other words, voting takes place "in" a polling place (which must be a building), not "at" one. WARA contends that "polling place" is something different and that "absentee voting does not take place in polling places." WARA Br. at 29. But they are simply wrong. Alternate sites are all certainly "polling places" under Wis. Stat. § 5.02(15) because they are all locations wherein the elector's vote is cast.

These are not the only contextual clues that alternate sites must be in buildings. Wisconsin Stat. § 7.15(2m) orders clerks to "operate [an alternate] site as though it were his or her office for absentee ballot purposes." This, together with the ban on conducting absentee vote and return functions at the office, § 6.855(1), signifies that the Legislature expects a very close approximation to the clerk's office at each alternate site. That's not a problem at any other building, but it is a problem at a park, beach, van, or field. Wis. Stat. § 10.01(2)(e), for example, references

"office hours" at alternate sites. Whoever heard of "office hours" at a beach?

The statutory contextual clues all point in the same direction and together with the unworkability of the Appellants' interpretation as already discussed, is compelling evidence that the Circuit Court was correct on this issue.

The fourth and final reason that the Appellants' interpretation fails is because it produces absurd and unreasonable results. *See Kalal*, 2004 WI 58, ¶ 46 ("[S]tatutory language is interpreted . . . reasonably, to avoid absurd or unreasonable results."). "An absurd result follows when an interpretation . . . would be contrary to the clearly stated purpose of the statute." *State v. Grunke*, 2008 WI 82, ¶31, 311 Wis. 2d 439, 752 N.W.2d 769.

The Legislature in § 6.855 specifically mandated numerous details related to alternate sites, such as how they are chosen, how far they should be from the clerk's office, where they should (or rather, should not) be located, how much and what kind of notice should be provided, how long the sites must stay open, what activities can take place at the clerk's office while the designation is in effect, and more (e.g., staffing and accessibility requirements).

The Appellants argue, however, that municipal clerks have essentially boundless discretion to choose what constitutes an alternate absentee "site," perhaps the single most important question of them all. *See, e.g.*, WEC's Br. 44. But this view has virtually no limiting principle and would allow absentee voting not just in vans but also RVs, tents, parking lots, alleys, street corners, open fields—whatever the mind can

conjure. That is an absurd result that militates in favor of a ruling that the MEU is unlawful.[18]

The Appellants' limited defenses of the Clerk's use of the MEU are unpersuasive. For example, they devote much briefing space to whether the provisions of Wis. Stat. § 6.855 are "mandatory" or not within the meaning of § 6.84(2). This gets things wrong in at least two respects. First, Brown has not argued that the provisions of Wis. Stat. § 6.855 are among those listed as mandatory in § 6.84(2). Brown did not do so because they are, in fact, not listed. The importance of whether a specific statute is listed as mandatory in § 6.84(2) is that under § 6.84(2), ballots cast in contravention of the listed statutes may not be counted. But as Brown always made abundantly clear, he is not seeking to throw out any ballots, so the argument is irrelevant.

Second, when it comes to election law, the opposite of "mandatory" as referenced in § 6.84(2) is not "optional." There are only three statutes listed in § 6.84(2) as "mandatory." They are: (1) § 6.86, (2) § 6.87 (3) to (7), and (3) § 9.01(1)(b)2 and 4. That does not mean that everything else in Chapters 5–12 is optional for election officials to obey or disobey.

Wis. Stat. § 6.855 is still a law that must be followed by election officials, and if they do not follow the statute, they can be ordered to do so by WEC under Wis. Stat. § 5.06(6) ("The commission may … by order,

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[18] Notably, the Legislature entrusted the selection of polling places (including alternate sites) not to local election officials and their supposedly limitless discretion (as some of the Appellants can sometimes be read to insinuate) but to larger governing bodies. *See* Wis. Stat. §§ 5.25(1); 6.855.

require any election official to conform his or her conduct to the law, restrain an official from taking any action inconsistent with the law or require an official to correct any action or decision inconsistent with the law.")

The Legislature explicitly defined where and how early in-person absentee voting can take place outside of the Clerk's office. Local election officials must comply with the law in that regard and compliance is not optional just because Wis. Stat. § 6.855 is not listed in Wis. Stat. § 6.84(2). So, the question for this Court is whether the MEU complies with the requirements imposed by the Legislature or not.

On that central question, the Appellants offer very little. Some of the Appellants suggest that Brown is asking this Court to add words to § 6.855 since the Legislature did not specifically use the term "building," *see* WARA Br. at 31, but this is a simplistic view of the work of statutory interpretation. "[C]ontext often imposes limitations" on broad statutory terms like the word "site." *Hawaii Wildlife Fund*, 590 U.S. at 172–73 (concluding that "statutory context limits the reach of the statutory phrase 'from any point source'" even though in isolation "[t]he word 'from' is broad in scope"); *see also, e.g.*, *Watson v. Philip Morris Companies, Inc.*, 551 U.S. 142, 147 (2007) (unanimous) ("The words 'acting under' are broad, and this Court has made clear that the statute must be 'liberally construed.' But broad language is not limitless. And a liberal construction nonetheless can find limits in a text's language, context, history, and purposes." (quoting *Colorado v. Symes*, 286 U.S. 510, 517 (1932) (citations omitted)). The Appellants, no doubt, would of necessity add some limitations to what can constitute a "site." So, the real question

is which limitations this Court must apply via context, not whether any must be imposed in the first place.

WARA, at least, attempts to offer an argument from context, pointing out that Wis. Stat. § 5.25(1) actually refers to buildings, while § 6.855 does not. WARA Br. at 29. But Brown has already addressed this argument. Wisconsin Stat. § 5.25(1) assumes that buildings will be used; its purpose is only to limit those buildings selected to public ones/authorize nonpublic buildings in certain cases. That is unnecessary in the case of § 6.855, since "sites" is facially broad enough to include public and nonpublic buildings and the Legislature apparently has no objection to nonpublic alternate sites as a matter of course.

WEC takes a stab at making its own absurdity argument, asserting that under Brown's interpretation of § 6.855, a fire station parking bay would be permissible as an alternate site until the MEU parked inside the bay. WEC Br. at 46. But that is not Brown's position. Both would be permissible. In WEC's hypothetical, where the MEU is contained inside a structure, the following would be true: absentee voting would be designated at and take place inside a building, notice would match the designation and identify the actual location that voting takes place, ballots would be stored at the actual site as required, the site would be fully staffed, no balloting function would take place at the Clerk's office, and clerks would not have carte blanche to conduct absentee voting operations wherever they wish. Put differently, all of the statutory problems identified in this section would be solved. So while Brown does not endorse WEC's odd suggestion that the City Clerk park an MEU inside each of the community centers, museums, and schools

Racine designated as alternate sites, if she had done so, there would be no need for this claim.

b. Wis. Stat. 6.84 is constitutional.

Wis. Stat. § 6.84(1) states that "voting by absentee ballot is a privilege exercised wholly outside the traditional safeguards of the polling place" and "must be carefully regulated to prevent" abuse. Wis. Stat. § 6.84(2) further provides that "matters relating to the absentee ballot process . . . shall be construed as mandatory . . ." and that "[b]allots cast in contravention of the procedures specified . . . " may not be counted.

This statute is constitutional, despite BLOC spending nearly a third of their opening brief arguing otherwise. *See* BLOC Br. at 26–40. And, more importantly, because the constitutionality of Wis. Stat. § 6.84 is not at issue in this case, this Court need not—and should not—address it.[19] But if it does, the Court should make clear what is plainly obvious: Wis. Stat. § 6.84 is constitutional.

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[19] "The general rule is that state agencies or public officers cannot question the constitutionality of a statute unless it is their official duty to do so, or they will be personally affected if they fail to do so and the statute is held invalid." *Fulton Found. v. Wis. Dep't of Taxation*, 13 Wis. 2d 1, 11, 108 N.W.2d 312 (1961). Although not a "hard and fast rule," normally an agency must be statutorily authorized to attack the validity of a statute, or it must show that its officers will be "held personally liable" if they enforce the purportedly unconstitutional statute. *Id.*, 13. Similarly, in an administrative proceeding, "agencies do not have the power to declare statutes unconstitutional." *Metz v. Veterinary Examining Bd.*, 2007 WI App 220, ¶ 21, 305 Wis. 2d 788, 741 N.W.2d 244.

BLOC does not explain how it can intervene during judicial review of an administrative proceeding and raise a constitutional argument that WEC could not consider, has not considered, and could not raise now. BLOC cannot be allowed to defend WEC's decision by making an argument that WEC itself lacks standing to advance. Notably, nothing prevents BLOC from filing its own action challenging the statute.

Art. III, § 2, of the Wisconsin Constitution expressly states that "[l]aws *may* be enacted" . . . "[p]roviding for absentee voting." (Emphasis added). Note that the word in the Constitution is "may" and not "shall." That is precisely what Wis. Stat. § 6.84 reflects: the Legislature's recognition of the constitutional right to vote, but not the right to do so wherever and whenever an elector may see fit. Furthermore, reasonable regulations on *how* the right to vote may be exercised, consistent with the state's interest in preventing voter fraud and other, related election abuses, have long been recognized as constitutional by both the Wisconsin and U.S. Supreme Courts. *See e.g., Frederick v. Zimmerman*, 254 Wis. 600, 613, 37 N.W.2d 473 (1949); *League of Women Voters of Wisconsin Educ. Network, Inc. v. Walker*, 2014 WI 97, ¶¶ 6, 50–59, 357 Wis. 2d 360, 851 N.W.2d 302 (citing cases); *Brnovich v. Democratic National Committee*, 553 U.S. 647, 683–87 (2021); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191 (2008).

BLOC's attempt to create a constitutional problem with § 6.84 is nonsensical, conflicts with this precedent, and fails to fully engage with the constitutional provision that permits, but does not require, the state to allow absentee voting. Moreover, the Constitution allows the Legislature to pass the laws under which such voting, if permitted, must comply with Wis. Const. art. III, § 2. Indeed, BLOC's argument boils down to nothing more than a deliberate misread of Wis. Stat. § 6.84 in a thinly-veiled attempt to bait this Court into addressing an issue that is not before it.

BLOC acknowledges that "absentee ballots themselves are not guaranteed under the constitution," BLOC Br. at 27, and that

acknowledgment should end this discussion. No one disputes that qualified electors have a constitutional right to vote. No one has claimed that the absentee ballots collected by the MEU should be discarded. And no one claims that those who utilize the absentee voting process that the Legislature has made available are exercising the mere "privilege" of voting, rather the "right" to vote, when doing so.

In addition, and contrary to BLOC's assertions, § 6.84 does not "denigrate[]" the right to vote into a "mere privilege." BLOC Br. at 30. Rather, § 6.84 instructs that exercising the right to vote *through* the absentee voting process is a privilege. Put another way, BLOC's argument conflates the constitutionally-guaranteed right to vote with the *privilege* of *exercising* that right *via absentee ballot* in what can only be explained as a deliberate misreading of the statutory text. As noted above, both Wisconsin law and the Wisconsin Constitution recognize that the Legislature may reasonably dictate how, when, and where voters may exercise the right to vote—including voting by absentee ballot—and such regulations are *not* an unconstitutional infringement on the right itself. Indeed, in *Jefferson v. Dane County*, six Justices joined ¶16, which provides an overview of Wisconsin's election laws and acknowledges the distinction § 6.84 makes between voting as a constitutional right, and the *privilege of exercising* that right *through* the absentee voting process. 2020 WI 90, ¶ 16, 394 Wis.2d 602, 951 N.W.2d 556.

Moreover, the issue here is whether *McMenamin's* decision to use the MEU complied with the statutory requirements of Wis. Stat. § 6.855. Brown has not argued in this case that § 6.84 operates to disqualify the

absentee ballots collected by the MEU, and this Court should not allow BLOC to litigate and obtain a decision on an issue that is simply not present.

For the very same reason, BLOC's attempt to harmonize what it views as a disharmony between cases such as *Grandinjan v. Boho*, 29 Wis. 2d 674, 139 N.W.2d 557 (1966), and *Ollmann v. Kowalewski,* 238 Wis. 574, 300 N.W. 183 (1941*), State ex rel. Symmonds v. Barnett,* 182 Wis. 114, 195 N.W. 707 (1923) and *In re Burke,* 229 Wis. 545, 282 N.W. 598 (1938), among others, is misplaced. While *Grandinjan,* and the other related, fact-intensive cases BLOC cites may have relevance when determining whether already-cast absentee ballots should be counted when a party has made claims that such ballots should be disqualified, that question is not at issue in this action. Again, Brown has not argued in this case that any of the ballots collected by the MEU should be invalidated, so any discussion of the proper way to interpret and apply those cases to the validity of the ballots themselves should be left for another day.

To be clear, Brown's position is that election clerks must comply with the statutory terms of Wis. Stat. § 6.855 when implementing absentee voting. BLOC's argument that Wis. Stat. § 6.84 is somehow unconstitutional is inapposite and raises questions this Court need not, and should not, address**.**

CONCLUSION

For the foregoing reasons, this Court should affirm the Circuit Court on these issues and overturn the decision of WEC.

[The Signature and Certification are after the Cross-Appeal section of this combined brief]

Cross-Appellant's Brief

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

ISSUES PRESENTED

Pursuant to this Court's May 3, 2024 Order, the issues on this Cross Appeal are those "set forth in [Brown's] docketing statement." Accordingly, the issues presented in this Cross Appeal are:

1. Whether the Racine City Clerk, Tara McMenamin, violated Wis. Stat. § 6.855's requirement that alternate in-person absentee voting sites be "as near as practicable to the office of the municipal clerk" in selecting such sites for the August 2022 primary election?
2. Whether McMenamin allowed "function[s] related to voting and return of absentee ballots . . . conducted at the alternate site [to] be conducted in the office of the municipal clerk" in violation of Wis. Stat. § 6.855 for the August 2022 primary election?
3. Whether McMenamin violated Wis. Stat. § 6.855 by not allowing alternate sites to be available for use through the August 2022 primary election?

WEC found there was no violation of Wis. Stat. § 6.855 on each of these issues, and the Circuit Court affirmed WEC on those issues.

This Court should find that Wis. Stat. § 6.855 was violated on each of these three issues and overturn WEC's decision if it finds a violation of any of them.

INTRODUCTION

In this Cross-Appeal, Brown raises three additional reasons why WEC's administrative decision should be reversed beyond the two that the Circuit Court already reversed on[1].

First, most of the sites selected by McMenamin for the August 2022 primary election were spread throughout the City of Racine, and thus were not "as near as practicable to the office of the municipal clerk" in violation of Wis. Stat. § 6.855.

Second, McMenamin continued to allow various functions related to absentee voting and the return of ballots to be conducted in her municipal office, in violation of Wis. Stat. § 6.855.

Third, McMenamin did not use the in person absentee voting locations through the election, in violation of Wis. Stat. § 6.855.

Since McMenamin violated Wis. Stat. § 6.855 in these three additional ways, the Circuit Court got it wrong on these issues, and WEC's administrative decision in favor of McMenamin should be reversed for these reasons as well.

STANDARD OF REVIEW

The standard of review here is the same for this Cross-Appeal as it is for the Appeal. In judicial review of an administrative agency decision, this Court reviews the decision of the agency, not the circuit court. *Clean Wisconsin, Inc. v. Wisconsin Department of Natural Resources*, 2021 WI 71, ¶ 14–15, 398 Wis. 2d 386, 961 N.W.2d 346. Agency interpretations of law are reviewed de novo. *Citation Partners,*

[1] Brown separately briefed those issues in the Response section of this combined brief.

LLC v. Wisconsin Department of Revenue, 2023 WI 16, ¶ 8, 406 Wis. 2d 36, 985 N.W.2d 761.

As relevant here, Wis. Stat. § 5.06(9) states that in reviewing a decision of WEC, Courts "shall summarily hear and determine all contested issues of law and shall affirm, reverse or modify the determination of the commission, according due weight to the experience, technical competence and specialized knowledge of the commission, pursuant to the applicable standards for review of agency decisions under s. 227.57." Wis. Stat. § 5.06(9).

ARGUMENT[2]

For the reasons stated below, this Court should find for Brown on the merits of his cross-appeal and reverse the decision of WEC.

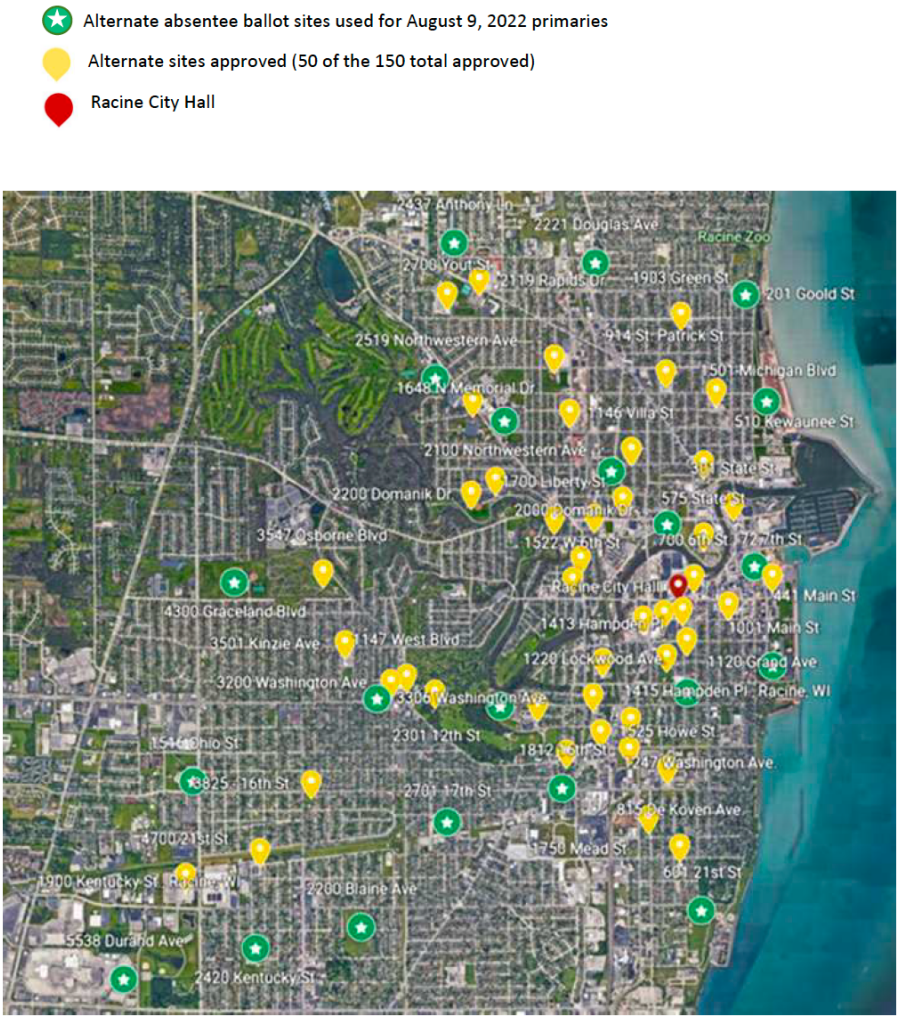
A. Wis. Stat. § 6.855 requires alternate absentee voting sites to be located as near as practicable to the Clerk's office.

Wis. Stat. § 6.855 provides that:

> The governing body of a municipality may elect to designate a site other than the office of the municipal clerk or board of election commissioners as the location from which electors of the municipality may request and vote absentee ballots and to which voted absentee ballots shall be returned by electors for any election. *The designated site shall be located as near as practicable to the office of the municipal clerk …* (Emphasis added.)

[2] Pursuant to Wis. Stat. § 809.19(6)(c)2. Brown is omitting the statement on oral argument and publication and the statement of the case, as those sections were already included in the response portion of this combined brief.

A map of the sites approved, and used, in the August 2022 primary election was attached to the verified complaint as Exhibit D (Dkt. 56:38) and is shown here:



The red marker on the map is City Hall, where McMenamin continued to hold in-person absentee voting. The green markers on the map are the 21 alternate absentee ballot sites used by the Clerk outside of City Hall for the August 2022 primary. The gold markers on the map are some of the alternate sites that were also pre-approved by the Racine City Council in its December 2021 resolution.

Although the City Council pre-approved over 150 locations, Dkt. 56:34–37, the above map only shows 50 such locations because showing them all made the map too cluttered, and the 50 locations displayed sufficiently show that McMenamin had many sites that she could have used that were nearer to her municipal office than the ones she actually used. Thus, McMenamin had options for alternate absentee voting sites that were nearer to her office than the sites she permitted for in-person absentee voting during the August 2022 primary election. After McMenamin's site selections were challenged by Brown, she made no showing (and WEC and the Circuit Court pointed to nothing) indicating that the numerous sites closer to the Clerk's office were impracticable.

Despite these undisputed facts, WEC and the Circuit Court concluded that McMenamin did not violate Wis. Stat. § 6.855's requirement that alternate absentee voting sites must be located "as near as practicable" to the Clerk's office. Dkt. 59:55; Dkt. 99:14–15. In affirming WEC on that issue, the Circuit Court agreed with "the defense position that the term 'as near as practicable' encompasses consideration beyond a pure geographic standard," and held that requiring "alternate absentee balloting sites [to] be as physically near to the City Clerk as possible . . . is not consistent with long standing Wisconsin law, and would be contrary to . . ." *One Wisconsin Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896 (W.D. Wis. 2016). Dkt. 99:14–15. This holding is erroneous and appears to be based, in part, on a misunderstanding of Brown's position.

Brown has never argued—and does not argue now—that geography is the *sole* factor to consider when asking whether an alternate site is located "as near as practicable" to the Clerk's office.

Rather, Brown has argued that, given the language used by the Legislature, geography must be the *primary* factor, but if strictly applying geography is impracticable, then other sites may be used. There may very well be reasons why a particular site is not "practicable" for use as a location for early in-person absentee voting. For example, a particular site may not have sufficient capacity, or may not be ADA-compliant, or may be in the process of renovation, or may be inadequate for some other, justifiable reason. *See* Dkt. 59:36. But none of those examples—or anything similar—applies here.

McMenamin has made no attempt whatsoever to explain why the other, geographically closer locations that had been selected and pre-approved by the City Council *could not be used*. Instead, McMenamin has argued that the term "practicable" allows her to consider *any* factor she wishes and to designate and use alternate sites throughout the entire City, rather than as near as practicable to her office. *See* 57:4–6; Dkt. 88:4–8. And during the August 2022 primary, McMenamin decided that, notwithstanding Wis. Stat. § 6.855(1), she would select sites that she felt were best suited for her goal of making voting accessible throughout the City. *See* Dkt. 3, Ex. H, at 81–82; Dkt. 57:4–6; Dkt. 59:49–50. In other words, McMenamin's position, as affirmed by WEC and the Circuit Court, is that she is free to substitute her subjective judgment as to the best location of sites and to completely ignore the statutory requirements. But that is not the way the law works and by failing to only use locations as near as practicable to her office, McMenamin violated Wis. Stat. § 6.855.

Statutory constructions that render portions of statutes meaningless "must be avoided." *See State v. Kruse*, 101 Wis. 2d 387, 395,

305 N.W.2d 85 (1981), citing *State v. Wisconsin Telephone Co.*, 91 Wis. 2d 702, 714, 284 N.W.2d 41 (1979). And as it stands, WEC's and the Circuit Court's interpretation renders the Legislature's decision to prioritize geography meaningless because it inappropriately reads into the statute permission for clerks to designate sites based on factors *other than* geography when the closest available sites are otherwise "practicable."

This Court has held that it will "consult legislative history to show how that history supports our interpretation of a statute otherwise clear on its face." *Seider v. O'Connell*, 2000 WI 76, ¶ 52, 236 Wis. 2d 211, 612 N.W.2d 659. And that is especially appropriate here, where the meaning is plain and the legislative history of the Wis. Stat. § 6.855 (as discussed in Brown's Response Brief, pp. 26–32, *supra*) supports the plain meaning. In an amendment to Act 451, the Legislature added the sentence: "The designated site shall be located as near as practicable to the office of the municipal clerk or board of election commissioners and no site may be designated that affords an advantage to any political party."

Given that the two requirements in this sentence were added altogether at the same time, it is reasonable to read these two requirements as being related. "The statutory language is examined within the context in which it is used." *State v. Matasek*, 2014 WI 27, ¶ 12, 353 Wis. 2d 601, 846 N.W.2d 811; *see also Clean Wisconsin*, 2021 WI 72, ¶ 10 (citation omitted). The sentence was added because the Legislature feared that allowing alternate in-person absentee voting sites would open the door to partisan gamesmanship, and they sought to ensure that the locations selected for such sites were as close as

practicable to the clerks' offices and that they did not afford an advantage to any political party. Locating sites as close as possible to the clerks' offices, then, was designed to help maintain the neutrality of the clerk's office as the default location.

Moreover, the statutory words—"[t]he designated site shall be located as near as practicable to the office of the municipal clerk"—are not complicated or ambiguous, and are used to combine a geographic requirement (that alternate sites be located as close to the clerk's office as possible) with common sense (that locations which may be geographically closest to the clerk's office do not need to be used if their use is not "practicable" for some reason).

This choice of words does *not* mean that a clerk can substitute her own preferences over that of the Legislature by choosing to make something *other than* the geography her primary consideration, as WEC and the Circuit Court have concluded. Dkt. 59:55; Dkt. 99:14–15. Indeed, WEC's and the Circuit Court's interpretation unlawfully grants clerks permission to decide against abiding by the geographic component of the statute for reasons that have *nothing to do* with "practicability." Dkt. 99:14.

In *Town of Ashwaubenon v. Pub. Serv. Comm.*, a case cited by both WEC and the Circuit Court on this issue, the Court made no suggestion that statutory terms may be ignored and, in fact, explicitly recognized that the term "near" contemplates geography, and that the practicability inquiry takes place "*in addition to* geography." 22 Wis. 2d 38, 50–51, 125 N.W.2d 647 (1963) (emphasis added). Therefore, while the practicability inquiry logically allows a clerk to consider *more than* physical proximity when selecting an appropriate site, it does not follow that *if there is* a

practicable site located close to the Clerk's Office, a clerk can decide to select one further away based on her own subjective judgment as to what is best.

In addition, Brown's interpretation of this aspect of Wis. Stat. § 6.855(1)—that clerks are required to designate alternate sites that are geographically "as near" to the Clerk's office as possible unless those locations are not "practicable"—is not at-odds with *One Wisconsin*. In *One Wisconsin*, the Court held that the one-location rule was unconstitutional because of the *logistical impracticality* and unfairness that would result from requiring tens of thousands of people (in larger districts) to vote at a single location. *See One Wisconsin*, 198 F. Supp. 3d at 934. However, this conclusion does not extend—as opposing parties are likely to argue—to success on the claim that it is somehow unconstitutional to require that alternate sites be located as near as possible to the Clerk's office.

In *Luft v. Evers*, the Seventh Circuit explicitly confirmed that after *One Wisconsin* and the addition of Wis. Stat. § 6.855(5), the one-location rule no longer remains in place. 963 F.3d 665, 674 (7th Cir. 2020). In addition, the Court in *Luft* spoke favorably of using locations near a clerk's office, stating:

> "[I]f the single authorized location is convenient for one racial group and inconvenient for another, that could violate § 2's equal-treatment principle. The opportunity to participate may decrease as distance increases. *Yet the Milwaukee clerk's office is centrally located*." What is more, 2017 Wis. Act 369 §1JS amended Wis. Stat. § 6.855 to authorize municipalities to designate multiple sites for in-person voting. *See* Wis. Stat. § 6.855. The *one-location rule is gone*, and its replacement is not substantially similar to the old one."

Id. (Emphasis added).

Here, there is absolutely no evidence in the record that the Racine Clerk's Office is (or has deliberately been made) more convenient for, or more accessible to, any particular racial group. And there has also been no claim raised by any of the opposing parties that the Racine Clerk's Office is not centrally located. As the above case law demonstrates, the "as near as practicable" component of Wis. Stat. § 6.855 is constitutional, and nothing in the facts of this case suggests differently.

Moreover, nothing about Brown's claim advocates or suggests that the one-location rule should be reimposed: multiple sites can be designated by simply selecting the closest practicable site, and then the next closest practicable site, and so on. In this case, as Brown explained in his Response Brief (p. 34) McMenamin placed three alternate sites in Ward 1, the same ward as the Clerk's Office, and Brown has no problem with those locations, nor could he. There were also 25 other, possible alternate site locations in Ward 1 that had been pre-approved by the City Council and could have been selected but were not. Dkt. 56:45. Therefore, McMenamin had numerous options from which to select even more locations, and to do so in a manner that was still in compliance with the statutory requirement that alternate sites be as near as practicable to the Clerk's Office. She just chose not to exercise those options.

Put simply, McMenamin has no right to ignore a statutory requirement in furtherance of her own, individual goals. And WEC's conclusions otherwise (Dkt. 59:55) are wrong. As an administrative agency and "creature of the legislature," WEC cannot refuse to enforce Wis. Stat. § 6.855(1)'s requirement that alternate voting sites be located "as near as practicable" to the Clerk's Office just because it may disagree

with what the law requires or consider it unimportant. *See Myers v. Wis. Dep't of Natural Resources*, 2019 WI 5, ¶ 21, 385 Wis. 2d 176, 922 N.W.2d 47.

By permitting McMenamin to prioritize other factors over the statutory requirement that alternate sites be located "as near as practicable" to the Clerk's Office—and without any explanation as to why it was not "practicable" to use the myriad of closer, available and approved sites in this action—the Circuit Court erroneously agreed with WEC that McMenamin did not violate Wis. Stat. § 6.855. This Court should overturn WEC and the Circuit Court and conclude that McMenamin indeed violated Wis. Stat. § 6.855 by not selecting locations that were "as near as practicable" to her municipal office.

B. The alternate absentee voting site located in the same building as the Clerk's Office was an extension of the Clerk's Office in violation of Wis. Stat. § 6.855.

Wisconsin Stat. § 6.855(1) states, in relevant part, that if a municipality chooses to use alternate sites for early in-person absentee voting, then "*no function* related to voting and return of absentee ballots that is to be conducted at the alternate site *may be conducted in the office of the municipal clerk*." (Emphasis added). Therefore, according to the plain language, Wis. Stat. § 6.855(1) permits in-person absentee voting at *either* Clerk's Office *or* alternate sites, *but not both*.

Here, however, McMenamin allowed early in-person absentee voting in Room 207 of City Hall, which is located in the same building as her municipal office. Dkt. 56:17–18. McMenamin argued that because this is a different room than her regular municipal office, she was not violating the statute. But the record clearly shows that she *explicitly represented* to voters that in-person absentee voting was taking place at

both the Clerk's Office *and* the alternate sites in violation of § 6.855. *See* Dkt. 3, ¶ 29; Dkt. 56:17..

Indeed, on the City's website, McMenamin *told voters* that they could vote by absentee ballot *at the Clerk's Office,* and then, when voters arrived at City Hall *expecting* to vote in the municipal Clerk's Office, they were directed, by signage, to Room 207, where the ballots were actually cast. *See* Dkt. 3, Ex. A, at 29, Dkt. 56:17. These facts have remained undisputed throughout this case and establish that Room 207 was simply an extension of the McMenamin's office.

Thus, the record shows that McMenamin did not view the alternate sites as *replacements* for the Clerk's Office, but as sites that could be made available *in addition to* the Clerk's Office. That interpretation seeks to have it both ways (i.e., early in-person absentee voting at the Clerk's Office *and* at the alternate sites) in contravention of plain language of Wis. Stat. § 6.855 and, if upheld, renders the "Legislature's choice to eliminate the Clerk's office as a voting location once alternate sites were established totally meaningless." Dkt. 86:17. Again, such statutory constructions are disfavored and should be avoided. *State v. Kruse*, 101 Wis. 2d at 395; *see also State v. Matasek*, 2014 WI 27, ¶ 12 ("Statutes are interpreted to give effect to each word and to avoid surplusage.") (citations omitted).

The Circuit Court, like WEC (Dkt. 59:56–57), concluded that the separate room in City Hall taken over by McMenamin to permit voting was not an extension of the Clerk's Office in violation of Wis. Stat. § 6.855, stating that there was no violation because the room was "set up and physically independent of the Clerk's office and was fully compliant with the statute." Dkt. 99:15–16.

But that is wrong and ignores the undisputed facts. McMenamin advertised voting at "the Clerk's Office" (*see, e.g.,* Dkt. 56:17) and then, when voters showed up, she simply directed them to another room (which she had taken over) in the same building. In its decision, the Circuit Court did not discuss why it was "persuaded that there existed no violation" despite ample, uncontested evidence to the contrary. And under WEC and the Circuit Court's interpretation, voting could have taken place in the hallway outside the Clerk's Office or in a room adjacent to the Clerk's Office and no violation would have occurred. That again would render meaningless the Legislature's requirement that the alternate sites truly be an alternative to the Clerk's Office, and not in addition to it.

In sum, the Circuit Court's decision on this issue was erroneous because, as the undisputed facts show, McMenamin represented to voters that they could vote in the Clerk's Office and then instructed them, upon arrival, to another room within the same building where the ballots were cast by the voters and accepted by the Clerk. That action is inconsistent with Wis. Stat. § 6.855(1).

For this reason, this Court should overturn the Circuit Court and WEC and find that McMenamin violated state law.

C. The use of alternate voting sites for only a few hours on single days during the election period violates Wis. Stat. § 6.855's requirement that alternate sites remain in use throughout the election period.

Finally, McMenamin violated state law by not keeping alternate sites "in use" throughout the primary election. Every in person absentee voting location outside of the City Hall location was only open for a single three-hour window of time during the absentee voting period except for

one location, which was used twice for a total of five hours. Dkt. 56:18–23. That is not permitted.

Although the Circuit Court was "troubled by Administrator Wolfe's writing in the WEC decision indicating that the pandemic, fires, and floods have necessitated last minute alternative/temporary/backup sites being utilized," it nevertheless agreed with WEC and concluded that designating alternate sites for one-off windows of time for voting did not violate Wis. Stat.§ 6.855. Dkt. 99:16; *See also* Dkt. 59:58–59. More specifically, the Circuit Court concluded that McMenamin complied with the statute because "the municipal clerk gave appropriate notice of the dates, times, and locations the MEU would be available to absentee voters," and it is the *designation* of the sites, not the *operation* of the sites themselves, that must remain in effect until at least the day after the election. Dkt. 99:16. That conclusion, and the WEC decision it upheld, is clearly erroneous.

Wisconsin Stat. § 6.855(1) states, in relevant part, "An election by a governing body to designate an alternate site under this section shall be made . . . [within specified time periods] . . . and shall remain in effect until at least the day after the election." And as Brown explains below (and has throughout this case), the *point* of designating an alternate site and having it "remain in effect" until the day after the election is so that voters reliably know where they may go if they wish to vote during the early voting period. *See* Dkt. 59:45; Dkt. 95:21–22.

WEC and the Circuit Court's conclusion that the "designation" of the sites is separate from the "use" of the sites is incorrect because it renders the statute's "shall remain in effect" language meaningless—again, a disfavored interpretation. *Kruse*, 101 Wis. 2d at 395.

The effect of this interpretation is easily illustrated: assume that WEC decision is final and remove the words "shall remain in effect" from the statute altogether. Now ask: what would change about the ability of a municipal clerk to act in such a situation? The answer is absolutely nothing. Clerks would not gain any new authority and could continue to designate and use as many alternate sites as they want for temporary, one-off windows of voting because, in those circumstances, the "shall remain in effect" language does not impose any additional requirements or limitations. Such an interpretation thus renders the statutory language superfluous.

Brown's position, by contrast, does not produce this result. Brown argues, as he has argued throughout this case, that "[d]esignation" of an alternate site makes "use" of the site possible, so the two terms are "inextricably intertwined." Dkt. 59:45. And because the "shall remain in effect" language means that alternate sites should be made available for regular voting hours throughout the early voting period, it logically follows that making sites available for one-off periods of time does not—and cannot—comply with this component of Wis. Stat. § 6.855(1). *See* Dkt. 95:20–22.

In addition, this interpretation does not mean—as opposing parties are likely to argue—that alternate sites must be available and staffed 24/7. It simply means that alternate sites, when designated for use, must be used such that the public has reasonable access to them throughout the election period, rather than requiring the public to abide by an ever-changing three-hours-at-a-time schedule.

WEC and the Circuit Court's interpretation of this language should not be upheld because it contravenes the purpose of the statute

and exploitatively "greenlight[s] the intentionally temporary nature of the Clerk's selected sites." Dkt. 86:15. Wis. Stat. § 6.855(1) was never intended to permit this form of early voting, and this Court should not conclude that it does.

CONCLUSION

For the foregoing reasons, in addition to the reasons in Brown's Response brief, this court should find that Wis. Stat. § 6.855 was violated and overturn WEC's decision.

Dated: July 3, 2024.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this combined response/opening brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief, as modified by this Court's order dated May 3, 2024. The length of this combined brief is 18,429 words.

Dated: July 3, 2024.

Electronically Signed by Lucas T. Vebber

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