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SUPREME COURT

IN THE SUPREME COURT OF WISCONSIN
No. 2024-AP-232

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.

OPENING BRIEF OF DEMOCRATIC NATIONAL COMMITTEE

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ISSUES PRESENTED[1]

1. Whether Plaintiff Kenneth Brown is a "person aggrieved" within the meaning of Wisconsin Statutes Sections 5.06(8) and 227.53(1) and therefore has statutory standing to appeal from the Wisconsin Elections Commission's no-probable-cause determination with respect to the matters alleged in Brown's Section 5.06(1) administrative complaint against the Racine City Clerk?

Answer below: Despite substantial briefing by the Democratic National Committee on this issue, the circuit court did not analyze whether Brown had standing under Wisconsin Statutes Sections 5.06(8) and 227.53(1) (or even cite to those statutes). Instead, in a conclusory discussion, and relying solely on the "vote-pollution" theory advocated in the three-Justice lead opinion in *Teigen v. Wisconsin Elections Commission*, it declared that Brown had standing.

Appellant's answer: No.

2. Whether the circuit court erred in holding, contrary to the Wisconsin Elections Commission's determination, that the City of Racine's use of multiple "alternate absentee ballot sites" distributed throughout the City provided an unlawful "advantage to any political party" in violation of Wisconsin Statutes Section 6.855(1), even though Section 6.855(5) expressly authorizes municipalities to provide multiple alternate absentee ballot sites throughout their jurisdictions.

[1] Pursuant to this Court's May 3, 2024 order, and in the interest of avoiding duplication and repetitive briefing, DNC will not be addressing any of the issues raised by co-appellants surrounding the lawfulness of Racine's use of a mobile election unit.

Answer below: The circuit court held that the Wisconsin Elections Commission erred in interpreting Wisconsin Statutes Section 6.855(1) because "the alternate sites chosen clearly favored members of the Democratic Party or those with known Democratic Party leanings," despite that conclusion being unsupported by the administrative record and unhinged from Section 6.855(1)'s text.

Appellant's Answer: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is warranted in this matter under the standards in Wisconsin Statutes Section (Rule) 809.22(2). Publication is proper under the standards in Wisconsin Statutes Section (Rule) 809.23(1) because the issues raised here are of statewide import and will provide guidance relevant to future election administration and litigation.

INTRODUCTION

Upset about the 22 alternate absentee ballot sites that the City of Racine used to facilitate in-person absentee voting for the August 2022 primary election, Plaintiff Kenneth Brown filed a complaint with the Wisconsin Elections Commission ("WEC") pursuant to Wisconsin Statutes Section 5.06(1) alleging that City Clerk Tara McMenamin had violated Section 6.855(1). When WEC dismissed Brown's complaint, having determined after investigating his allegations that the complaint failed to establish probable cause sufficient to warrant further proceedings, Brown appealed to the circuit court for judicial review of WEC's determination.

As a threshold matter, and as the Democratic Committee ("DNC") argued in depth to the circuit court, Brown lacks standing to appeal WEC's dismissal of his complaint. While Wisconsin law authorizes any voter to bring concerns to WEC's attention, not every concern raised by every voter confers standing to challenge WEC's decision. Wisconsin Statutes Section 5.06(8) allows complainants "aggrieved by an order" to appeal to the circuit court, but Brown was not "aggrieved" in a way that opened the courthouse doors. The circuit court failed to even acknowledge DNC's standing arguments, instead relying solely on the "vote-pollution" theory advocated in the three-Justice lead opinion in *Teigen v. Wisconsin Elections Commission*, 2022 WI 64, ¶¶16-25, 403 Wis. 2d 607, 976 N.W.2d 519, *reconsideration denied*, 2022 WI 104, to conclude that "the present case reveals the same claimed injury and philosophical importance as found in the *Teigen* fact scenario," which "puts to rest the standing argument made in the present matter." (R. 99 at 13-14; App. 023-24) But that opinion is not Wisconsin law, the vote-pollution theory is dangerous and risks chaos, and this Court should expressly reject the theory here.

To make matters worse, after casting aside the glaring standing issues, the circuit court proceeded to reach the merits of Brown's arguments and, in adopting Brown's proffered statutory interpretation, distorted the text of Section 6.855(1) by reading a host of words and requirements into Section 6.855(1) that the Legislature did not include. In so doing, the circuit court contravened binding Wisconsin precedent on statutory interpretation while reimposing a vestige of an outdated

statutory scheme, effectively barring municipalities from designating multiple alternate absentee ballot sites distributed throughout their jurisdictions.

By going down this misguided legal path, the circuit court failed to give proper effect to Section 6.855(5), a 2018 statutory amendment that repealed the prior "one-location" restriction and authorized municipalities to "designate more than one alternate site," with no limit on the number of total sites. The circuit court's failure to give effect to Section 6.855(5) is no small matter, as the Wisconsin Legislature enacted that provision specifically in response to a ruling by a Wisconsin federal district court that the one-location restriction violated the First and Fourteenth Amendments to the United States Constitution and Section 2 of the Voting Rights Act of 1965 ("VRA"). *See One Wis. Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896 (W.D. Wis. 2016), *vacated in relevant part as moot sub nom. Luft v. Evers*, 963 F.3d 665, 674 (7th Cir. 2020). The absence of multiple voting sites, the *One Wisconsin Institute* court found, imposed disparate burdens on African American and Latino voters—burdens linked to the state's historical conditions of discrimination. *Id.* at 952–60. Here, by adopting a completely undefined "partisan-advantage prohibition" and striking down Racine's designation of alternate voting sites, the circuit court directly undermined the purpose of Section 6.855(5) and raised the specter of reverting back toward the unconstitutionally discriminatory one-location restriction. Indeed, the circuit court's undefined standard presents significant burdens and challenges for Racine and other jurisdictions across the state

that must designate alternate voting sites in less than two weeks for the state's upcoming elections.

In contrast to the circuit court's (and Brown's) flawed statutory reading, Clerk McMenamin adopted a common-sense, plain meaning interpretation of the statutory prohibition against an alternate absentee ballot site that "affords an advantage to any political party." That is, the statute precludes designating overly partisan places—like a political party's local office or a large-scale political rally or event—as alternate absentee ballot sites. This manageable standard gives effect to both Sections 6.855(1) and 6.855(5) by protecting against political party advantage while also giving clerks the clarity they need to designate multiple alternate voting sites and avoid the pernicious effects of the legally invalid one-location restriction. Under this standard, Brown was unable to show that any political advantage was afforded here—he did not (and could not) point to an alternate absentee ballot site located at or near a party's headquarters, a candidate's headquarters, a scheduled political rally, etc. Accordingly, WEC appropriately issued a no-probable-cause determination.

This Court should reverse the circuit court's decision and reinstate WEC's determination because Brown lacked standing to appeal WEC's determination in the first instance. In the alternative, should this Court reach the merits, it should conclude that the circuit court erred in applying Section 6.855(1)'s prohibition on alternate absentee ballot sites affording an advantage to any political party and,

based on the statutory language and the administrative record, reinstate WEC's no-probable-cause determination.

STATEMENT OF THE CASE

In light of this Court's May 3, 2024 order, which advises against repetitive briefing and encourages joint briefing when possible, DNC incorporates and adopts by reference the statement of the case in WEC's opening brief.

STANDARD OF REVIEW

This Court reviews questions of standing and of statutory interpretation *de novo*. *Friends of Black River Forest v. Kohler Co.*, 2022 WI 52, ¶10, 402 Wis. 2d 587, 977 N.W.2d 342 (standing); *Greenwald Family Ltd. P'ship v. Mukwonago*, 2023 WI 53, ¶15, 408 Wis. 2d 143, 991 N.W.2d 356 (statutory interpretation).

"When an appeal is taken from a circuit court order reviewing an [administrative] agency decision, [this Court] review[s] the decision of the agency, not the circuit court." *Hilton ex rel. Pages Homeowners' Ass'n v. DNR*, 2006 WI 84, ¶15, 293 Wis. 2d 1, 717 N.W.2d 166. In addition, in reviewing WEC's disposition of a Section 5.06(1) complaint, the Court must "accord[ ] due weight to the experience, technical competence and specialized knowledge of the commission" with regard to factual issues. Wis. Stat. § 5.06(9); *see also Tetra Tech EC, Inc. v. DOR*, 2018 WI 75, ¶¶78-79, 382 Wis. 2d 496, 914 N.W.2d 21 (lead op.) ("'due weight' means giving 'respectful, appropriate consideration to the agency's views'" where "its experience, technical competence, and specialized knowledge give its view of the law a significance or perspective unique amongst the parties").

ARGUMENT

I. Brown lacks standing to appeal WEC's no-probable-cause determination.

WEC determined "that [Brown] did not show probable cause to believe that a violation of law or abuse of discretion occurred." (R. 59 at 47; *see also id.* at 54-56, 60; App. 028, 35-37, 41) Brown claims he has standing to seek judicial review of that determination "pursuant to Wis. Stat. § 5.06(8) and, to the extent necessary, pursuant to § 227.40." (R. 3, ¶7) As demonstrated below, the circuit court should have dismissed this appeal because Brown is not a "person aggrieved" within the meaning of Sections 5.06(8) or 227.53(1) (the provision governing standing in declaratory judgment actions under Section 227.40), and thus lacks statutory standing to appeal WEC's dismissal of his complaint. *See* Part I-B below.

The circuit court wholly ignored the statutory standing issues raised by DNC (and others); it did not even cite the relevant statutes. Instead, it declared in conclusory fashion that "[i]t is the opinion of this Court that the *Teigen* plurality decision puts to rest the standing argument made in the present matter," because "the present case reveals the same claimed injury and philosophical importance as found in the *Teigen* fact scenario." (R. 99 at 13-14; App. 023-24 (citing *Teigen*, 2022 WI 64, ¶¶16-25 (three-Justice lead opinion))). The circuit court reiterated its reliance on "the [*Teigen*] plurality decision finding standing" in its decision denying DNC's motion for a stay pending appeal. (App. 009)

The circuit court's reliance on *Teigen* fails on multiple grounds. As demonstrated in Part I-A below, the views about "vote-pollution" standing in the three-Justice lead opinion in *Teigen* were expressly rejected by a majority of the Justices in that case and are not law in Wisconsin. To the contrary, Wisconsin state and federal courts repeatedly have rejected claims of "vote-pollution" standing (often labeled as "vote-dilution" standing) ***except*** where the alleged dilution results from classifications based on "race, sex, economic status, or place of residence within a State," in which "the favored group has full voting strength and the groups not in favor have their votes discounted." *Reynolds v. Sims*, 377 U.S. 533, 555 n.29, 561 (1964); *see also id.* at 567 ("The fact that an individual lives here or there is not a legitimate reason for overweighting or diluting the efficacy of his vote."). The sort of alleged "vote-pollution" standing at issue in *Teigen,* however, does not result from any invidious classifications targeted at disfavored groups, but instead constitutes the kind of "generalized grievance" shared by all lawful voters with respect to alleged election-law violations. Moreover, the circumstances of *Teigen* are, in any event, readily distinguishable from those of this case.

A. The lead opinion in *Teigen* does not control the outcome here and is wrong about "vote-pollution" standing.

The circuit court relied exclusively on the "vote-pollution" theory of standing advocated by three Justices in *Teigen*, 2022 WI 64, ¶¶14-36 (lead op.). (R. 99 at 13-

14; App. 023-24)[2] The circuit court's one-page standing discussion cited the *Teigen* lead opinion thirteen times and cited only one other decision—a 1941 Illinois case cited in the *Teigen* lead opinion that does not address individual voter standing. *See Teigen,* 2022 WI 64, ¶25 (citing *Clark v. Quick*, 377 Ill. 424, 36 N.E.2d 563, 566 (1941)).[3]

The vote-pollution theory of standing advocated by the three-Justice lead opinion was ***expressly rejected*** by a majority of the Court in *Teigen*. Justice Hagedorn characterized the vote-pollution theory in his concurrence as "***unpersuasive***" and called out that it did "***not garner the support of four members of this court***." 2022 WI 64, ¶167 (Hagedorn, J., concurring) (emphases added). The three Justices in dissent likewise emphasized that the paragraphs in the lead opinion discussing vote-pollution standing "***do not constitute precedential authority***." *Id.*, ¶205 n.1 (A.W. Bradley, J., dissenting) (emphasis added). Lower courts have

[2] Most of the court decisions addressing this sort of claimed standing based on "generalized grievances" use the term "vote dilution" rather than "vote pollution." Again, as emphasized above in text, this type of alleged vote dilution based on generalized grievances must be distinguished from situations like *Reynolds v. Sims* in which the weight of an elector's vote is diluted based on illegal classifications such as race or geography. This case does not involve that type of legally recognized "vote-dilution" theory of recovery under federal precedents but instead presents the question of whether a "vote dilution" or "pollution" theory under Wisconsin law—no matter how labeled—may provide standing for what are nothing more than widely-shared generalized grievances.

[3] *Clark v. Quick* was a recount dispute between two candidates for county clerk. The court held that certain "mandatory" absentee-ballot-return laws must be enforced as written, even though there was "nothing in the record … to indicate that any of [the absentee ballots] were actually tampered with by any unauthorized person." 36 N.E.2d at 566. But there was no question that the defeated candidate had standing to appeal. The case has nothing to do with whether ***an individual voter*** can sue any election official over any allegedly improper vote by someone else.

recognized that the vote-pollution theory of standing was squarely rejected in *Teigen* and have criticized the theory as "weak" and lacking any "clear legal authority." *See, e.g.*, *Rise, Inc. v. Wis. Elections Comm'n*, 2022AP1838, 2023 WL 4399022, ¶27 & n.6 (Ct. App. July 7, 2023) (authored, unpublished opinion).[4]

The four Justices who rejected the vote-pollution theory in *Teigen* are in good company on this point. Federal judges in Wisconsin and throughout the country—representing all points on the ideological spectrum—have repeatedly rejected theories like those argued by Brown and embraced by the circuit court below. Wisconsin courts treat federal decisions about standing as "persuasive authority." *Friends of Black River Forest*, 2022 WI 52, ¶17.[5] And, as one federal court recently observed, "[d]istrict courts across the country have consistently dismissed complaints premised on the theory of unconstitutional vote dilution in the aftermath of the 2020 election." *Soudelier v. Dep't of State of La.*, Civ. No. 22-2436, 2022 WL 17283008, at *3 (E.D. La. Nov. 29, 2022 (citing cases), *aff'd sub nom. Soudelier v. Office of Sec'y of State, La.*, No. 22-30809, 2023 WL 7870601 (5th Cir. Nov. 15, 2023); *see also Graeff v. U.S. Election Assistance Comm'n*, No. 4:22-CV-682 RLW, 2023 WL 2424267, at *5 (E.D. Mo. Mar. 9, 2023) ("Courts across the country have

[4] The *Rise* opinion is included in the appellate record. (*See* R. 90 at 3-27.)

[5] *See also McConkey v. Van Hollen*, 2010 WI 57, ¶15 n.7, 326 Wis. 2d 1, 783 N.W.2d 855 (Wisconsin courts "look to federal case law as persuasive authority regarding standing questions"); *Wis.'s Env't Decade, Inc. v. PSC*, 69 Wis. 2d 1, 11, 230 N.W.2d 243 (1975) (federal standing decisions "are certainly persuasive as to what the [Wisconsin] rule should be"); *Reetz v. Advocate Aurora Health, Inc.*, 2022 WI App 59, ¶8 n.1, 405 Wis. 2d 298, 983 N.W.2d 669 ("[T]his court considers federal case law as persuasive authority regarding standing questions because Wisconsin's standing analysis is conceptually similar to the federal analysis[.]").

dismissed dozens, if not hundreds, of suits challenging election laws on the ground that the plaintiffs failed to allege particularized injuries in fact.").

This near unanimity among federal courts is no surprise given the United States Supreme Court's repeated admonitions that an individual voter's allegation "that the law … has not been followed" is "precisely the kind of undifferentiated, generalized grievance about the conduct of government" that is insufficient to support standing. *Lance v. Coffman*, 549 U.S. 437, 442 (2007). This rule has been enforced in numerous federal cases involving Wisconsin voters. *See, e.g.*, *Gill v. Whitford*, 585 U.S. 48, 68 (2018) (Wisconsin voters in certain legislative districts did not have standing to challenge alleged "statewide" gerrymandering, which was an "'undifferentiated, generalized grievance about the conduct of government'" rather than an "'individual and personal injury'" (quoting *Lance*, 549 U.S. at 442)); *Feehan v. Wis. Elections Comm'n*, 506 F. Supp. 3d 596, 608-09 (E.D. Wis. 2020) (rejecting claims "that a single voter has standing to sue as a result of his vote being diluted by the possibility of unlawful or invalid ballots being counted" (citations omitted)), *appeal dismissed*, Nos. 20-3396 & 20-3448, 2020 WL 9936901 (7th Cir. Dec. 21, 2020); *Wis. Voters Alliance v. Pence*, 514 F. Supp. 3d 117, 120 (D.D.C. 2021) (Wisconsin voters lacked standing because their "interest in an election conducted in conformity with the Constitution … merely assert[ed] a 'generalized grievance' stemming from an attempt to have the Government act in accordance with their view of the law" (quoting *Hollingsworth v. Perry*, 570 U.S. 693, 706 (2013))). These Wisconsin-related decisions reflect the overwhelming weight of

federal authority rejecting vote-dilution claims of standing (outside the context of alleged classifications based on "race, sex, economic status, or place of residence within a State," *Reynolds*, 377 U.S. at 561).[6]

The generalized vote-pollution theory adopted by the circuit court should be clearly and firmly repudiated by this Court. If perpetuated, this theory would invite far-reaching and destabilizing impacts on Wisconsin's electoral system. It could bog down the 2024 election by facilitating waves of vote-pollution litigation claims in which disgruntled voters could deluge courts with individual suits against local election officials in any or all of Wisconsin's 72 counties to challenge virtually any aspect of the registration, voting, recount, and certification processes, as well as suits seeking to reverse certified election results or challenge individual voters' credentials, all brought entirely outside the prescribed statutory channels, regardless of what losing candidates did.

Wisconsin is especially vulnerable to such litigation abuses because, unlike many places around the country, it has a highly decentralized system for election administration. *State ex rel. Zignego v. Wis. Elections Comm'n*, 2021 WI 32, ¶13,

[6] For federal appellate authority on this point just from the past two federal election cycles (there is much more pre-dating 2020), *see, e.g.*, *Jerusalem v. Dep't of State, La.*, No. 23-30521, 2024 WL 194174, at *1 (5th Cir. Jan. 18), *cert. denied*, No. 23-998, 2024 WL 2116318 (U.S. May 12, 2024); *O'Rourke v. Dominion Voting Sys., Inc.*, No. 21-1161, 2022 WL 1699425, at *2 (10th Cir. May 27), *cert. denied*, 143 S. Ct. 489 (2022); *Hotze v. Hudspeth*, 16 F.4th 1121, 1124 (5th Cir. 2021); *Wood v. Raffensperger*, No. 20-14813, 2021 WL 3440690, at *2 (11th Cir. Aug. 6, 2021), *cert. denied*, 142 S. Ct. 1211 (2022); *Hudson v. Haaland*, 843 F. App'x 336, 338 (D.C. Cir. 2021); *Wood v. Raffensperger*, 981 F.3d 1307, 1314 (11th Cir. 2020), *cert. denied*, 141 S. Ct. 1379 (2021); *Bognet v. Sec'y Commw. of Pa.*, 980 F.3d 336, 356-57 (3d Cir. 2020), *vacated as moot sub nom. Bognet v. Degraffenreid*, 141 S. Ct. 2508 (2021).

396 Wis. 2d 391, 957 N.W.2d 208. Whereas most states administer elections at the state or county level, Wisconsin's elections are conducted at the municipal level by the clerks of 1,852 cities, towns, and villages, overseen by the 72 elected county clerks, and ultimately subject to WEC, which is responsible for the overall supervision and administration of Wisconsin's election system. *See* Wis. Stat. §§ 5.05-.06, 7.08, 7.10, 7.15. 8.10, 8.15, 8.21. Under the vote-pollution theory of standing, any or all of these 1,900+ election officials could be sued by a disgruntled citizen who claims her or his vote is "polluted" or "diluted" by the potential misdeeds of others. This is a recipe for electoral and judicial chaos, confusion, and gridlock.

Justice Ann Walsh Bradley's dissenting opinion in *Teigen*, joined by two other Justices and echoed in Justice Hagedorn's concurrence, best reflects current Wisconsin law on this point. Her words merit close attention:

> [T]he majority/lead opinion … extends the doctrine [of standing] beyond recognition. … [It] attempts to create a free-for-all. It delineates no bounds whatsoever on who may challenge election laws. Instead, it relies on broad pronouncements regarding the import of our election laws and their general effect on all people. But just because all people are subject to a law does not mean that any and all people are entitled to challenge it. Indeed, "Courts are not the proper forum to air generalized grievances about the administration of a government agency." … Yet a "generalized grievance" is just what Teigen brings to this court. … Taken to its logical conclusion, the [vote-pollution theory] indicates that any registered voter would seemingly have standing to challenge any election law. ***The impact of such a broad conception of voter standing is breathtaking and especially acute at a time of increasing, unfounded challenges to election results and election administrators***.

2022 WI 64, ¶¶210, 212-14 (A.W. Bradley, J., dissenting) (cleaned up; emphasis added); *see also id.*, ¶215 (characterizing lead opinion's "approach to standing in this case" as "unbridled" and "untethered to any limiting principle, which in effect

renders the concept of standing entirely illusory"); *id.*, ¶167 & n.8 (Hagedorn, J., concurring).

In sum, the *Teigen* lead opinion does not reflect Wisconsin law on standing and is not, by itself, a valid authority on which to rest a standing analysis. The circuit court here sought no other support and engaged in no analysis. Instead, it simply averred that Brown has standing because of the *Teigen* lead opinion's endorsement of the vote-pollution theory of standing. The circuit court's standing analysis constitutes error as a matter of law.

B. Brown was not "aggrieved" by WEC's no-probable-cause determination.

As DNC demonstrated in its briefing below, the proper resolution of the statutory standing issue is straightforward. (*See* R. 89 at 4-10.) The circuit court did not even acknowledge DNC's analysis, let alone take issue with it.

Wisconsin's carefully crafted "compliance review" procedures authorize "***any elector*** of a jurisdiction or district served by an election official" to file a "sworn written complaint" with WEC if the elector believes the official has violated an election law or "abused the discretion vested in him or her by law with respect to" election administration. Wis. Stat. § 5.06(1) (emphasis added). But the right to appeal from WEC's disposition of the complaint is restricted to "[a]ny election official or complainant who is ***aggrieved by an order*** issued under sub. (6)." *Id.* § 5.06(8) (emphasis added). Though "***any*** elector" is authorized to file a complaint

with WEC, only an "***aggrieved*** complainant" may seek judicial review of a no-probable-cause determination by WEC.[7]

This is a distinction with a critical difference. "Aggrieved" is a statutory term of art with a longstanding, well-settled meaning. Wisconsin courts apply federal standards in defining what it means to be "aggrieved," requiring both a direct "injury in fact" and that the plaintiff fall within the "zone of interests" protected by the statute in issue. *Friends of Black River Forest*, 2022 WI 52, ¶¶18-21. This means an appellant is "aggrieved" only "[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***." *Auer Park Corp. v. Derynda*, 230 Wis. 2d 317, 320, 601 N.W.2d 841 (Ct. App. 1999) (emphases added). Claimed injuries will not be recognized if they are "***unsupported by any evidence***" or rest on "***pure[] supposition***." *Id.* at 322 (emphases added); *see id.* (appellant must be "***appreciably and adversely injured***" to be "aggrieved" (emphasis added)); *Friends of Black River Forest*, 2022 WI 52, ¶21 (appellant is not "aggrieved" by alleged injuries that are merely "***hypothetical***" and "***conjectural***" (emphases added)).

Thus, Wisconsin law holds that an appellant is "aggrieved" only if he or she has "a ***personal stake*** in the outcome of the controversy," which "requires a '***distinct***

[7] Wisconsin Statutes Section 227.53(1), which governs standing to bring a declaratory judgment proceeding under Section 227.40(1) to challenge "the validity of a rule or guidance document," similarly limits the right to appeal an agency decision to those who are "aggrieved" by the decision, with "person aggrieved" defined in Section 227.01(9) as "a person or agency whose substantial interests are adversely affected by a determination of an agency." For all the reasons Brown is not "aggrieved" under Section 5.06(8), he is not "aggrieved" under Section 227.53(1) either.

and palpable injury' to the appellant, and also a 'fairly traceable' ***causal connection*** between the claimed injury and the challenged conduct." *Kiser v. Jungbacker*, 2008 WI App 88, ¶12, 312 Wis. 2d 621, 754 N.W.2d 180 (emphases added) (quoted source omitted); *see also id.*, ¶20 (challenged order must "bear[] '***directly and injuriously***' upon [appellant's] interests" (emphasis added) (quoted source omitted)).

Applying these principles, Wisconsin courts repeatedly have emphasized that the express right to initiate and participate in an agency proceeding does not automatically convey standing to appeal the agency's decision for subsequent judicial review. *See, e.g.*, *Waste Mgmt. of Wis., Inc. v. DNR*, 144 Wis. 2d 499, 502 n.2, 424 N.W.2d 685 (1988) ("Under Wisconsin law, it is clear that, just because a party has requested and been granted an administrative hearing, the party does not obtain thereby the standing to challenge the resulting administrative decision." (citation omitted)); *Fox v. DHSS*, 112 Wis. 2d 514, 526, 334 N.W.2d 532 (1983) ("Standing to challenge the administrative decision is not conferred upon a petitioner merely because that person requested and was granted an administrative hearing." (citations omitted)); *Town of Delavan v. City of Delevan*, 160 Wis. 2d 403, 466 N.W.2d 227 (Ct. App. 1991) (same); *Cornwell Pers. Assocs., Ltd. v. DILHR*, 92 Wis. 2d 53, 62, 284 N.W. 2d 706 (Ct. App. 1979) (participation in agency proceeding did not confer standing to appeal; appellant's disagreements with the outcome were nothing more than "generalized grievances about the administration of a governmental agency"). Put another way, a private citizen's statutory right to

request an enforcement action does not confer any "right to direct, settle, compromise, ***appeal*** or substitute counsel in a case brought" pursuant to such a request. *State v. Zien*, 2008 WI App 153, ¶25, 314 Wis. 2d 340, 761 N.W.2d 15 (emphasis added).[8]

These decisions dictate the outcome here: neither Brown's initiation of, nor his participation in, a WEC proceeding creates standing that would allow him to appeal WEC's no-probable-cause determination because he is not legally "aggrieved" by that determination. Brown's disagreements with the location of early voting sites are nothing more than "generalized grievances about the administration of a governmental agency" that do not support his individual standing. *Cornwell*, 92 Wis. 2d at 62. This conclusion is bolstered by the rule that, since Sections 5.06(8) and 227.53(1) are legislative waivers of the State's sovereign immunity from suit, they must be narrowly construed and strictly enforced. *See* Wis. Const. art. IV, § 27; *Kuechmann v. Sch. Dist. of La Crosse*, 170 Wis. 2d 218, 223–25, 487 N.W.2d 639 (Ct. App. 1992).

[8] *Zien* involved Wisconsin's Open Records Law, which allows an open records "requester" whose request for access to public records is denied to then ask the local district attorney or the Attorney General "to bring an action for mandamus asking a court to order release of the record to the requester." Wis. Stat. § 19.37(1). *Zien* held that a "private citizen requester" who succeeds in prompting DOJ to file a mandamus action does not have standing to appeal a resolution of that action because, however much she may disagree with the outcome, she is not legally "aggrieved" by it. 2008 WI App 153, ¶37 (holding that "'aggrieved party' cannot mean a person or entity who is not happy with the outcome of the attorney general's or district attorney's litigation"); *see also id.*, ¶33 ("[T]he legislature did not intend to allow a requester to control or appeal a mandamus action brought by the attorney general[.]").

Brown also argued to the circuit court that he "has an interest and a statutory right, under Wis. Stat. § 5.06(1), in ensuring that Wisconsin's elections laws are followed." (R. 3, ¶¶4, 24–25) This argument appears to be based on Justice Hagedorn's contention in his lone *Teigen* concurrence that an elector can be "aggrieved" within the meaning of Section 227.53 by a WEC guidance document that threatens to cause local election officials to act in ways that violate the elector's protected interests under Section 5.06(1). *See* 2022 WI 64, ¶¶164–66 (Hagedorn, J., concurring). This "aggrievement" issue under Section 227.53 was not briefed in *Teigen*, and Justice Hagedorn's analysis was rejected by all six of the other Justices. *See* 2022 WI 64, ¶22 n.12, ¶¶32–36 (lead op.); *id.*, ¶¶210–15 (A.W. Bradley, J., dissenting).

The circuit court ignored this issue as well and instead seemed to assume that this, too, was resolved by the "lead" *Teigen* opinion's views about vote-pollution standing. Putting to one side that the "statutory right" theory of standing was only advocated by a single Justice in *Teigen*, Section 5.06(1) does not confer standing here because the statutory right it creates is limited to filing a "sworn written complaint" with WEC for that agency to investigate and resolve. It does not extend to "ensuring that Wisconsin's elections laws are followed" in accord with a voter's preferred interpretation of those laws (R. 3, ¶4), nor to having local election officials "follow the law" as the voter purports to understand it, *Teigen,* 2022 WI 64, ¶164 (Hagedorn, J., concurring).

Even assuming *arguendo* that an individual voter can be aggrieved by a WEC guidance document, Justice Hagedorn emphasized in *Teigen* that his "standing analysis applies only to challenges under Section 227.40(1) to WEC rules and guidance documents." *Id.*, ¶167 n.8. The case for standing is far more attenuated where, as here, the elector is seeking to challenge a considered, ***discretionary*** determination by WEC that no probable cause exists to pursue further enforcement proceedings against a local election official. That would be a much greater intrusion into WEC's core enforcement and prosecutorial functions than the chapter 227 review of WEC guidance documents conducted in *Teigen*.[9]

Moreover, the Legislature anticipated—and resolved—this issue when it created the citizen-complaint mechanism in Section 5.06(1). "Aggrieved" complainants may seek judicial review under Section 5.06(8), but others can seek to work around WEC by going directly to their local district attorney and/or the Attorney General. *See* Wis. Stat. § 5.07 (authorizing "the attorney general or the district attorney of the county where the violation occurs or is proposed to occur [to] sue for injunctive relief, a writ of mandamus or prohibition, or other such legal or equitable relief as may be appropriate to compel compliance with the law").

[9] *See, e.g.*, *Fleszar v. U.S. Dept. of Labor*, 598 F.3d 912, 914 (7th Cir. 2010) (agency's "decision whether to investigate and prosecute is not … open to judicial review"; "[p]rosecutorial decisions are committed to agency discretion"); *State v. Steffes*, 2013 WI 53, ¶29, 347 Wis. 2d 683, 832 N.W.2d 101 ("As long as a charging decision is not based on an arbitrary or discriminatory classification such as race or religion, prosecutors have broad discretion in deciding what charges to bring."); *State v. Krueger*, 224 Wis. 2d 59, 69, 588 N.W.2d 921 (1999) (emphasizing "well-accepted law governing prosecutorial discretion in charging decisions").

Brown therefore lacks standing as a matter of law to pursue this appeal under either the *Teigen* "vote-pollution" theory or the "aggrievement" requirement in Sections 5.06(8) and 227.53(1). This Court should reverse the circuit court's determination that Brown has standing, clearly articulate that "vote-pollution" theories based on generalized grievances do not suffice for standing under Wisconsin law, and remand to the circuit court with a mandate to dismiss this appeal in its entirety.

II. The circuit court erroneously reversed WEC's determination and concluded that Racine's use of multiple alternate absentee ballot sites afforded an advantage to a political party, in violation of Sections 6.855(1) and (5).

Racine's decision to use multiple alternate absentee ballot sites was expressly authorized by the 2018 statutory amendment that repealed the prior "one-location" restriction and authorized municipalities to "designate more than one alternate site," with no limit on the number of total sites. Wis. Stat. § 6.855(5). Under Brown's statutory interpretation, the ability of municipalities to designate multiple sites would be effectively eliminated, thereby rendering Section 6.855(5) a nullity. As Brown would have it, all alternate sites must be placed in "ward[s] that ha[ve] the *same* political makeup as the one in which the clerk's office is located." (R. 59 at 40) But there is no language in Section 6.855 to support this interpretation, which would unlawfully hamstring municipalities in offering conveniently located alternate sites. The practical effect would be to return to a facsimile of the one-location restriction and limit alternate sites to areas within the same ward as the

clerk's office. This would violate the plain language of Section 6.855(5) and, as discussed below, would contradict the legislative and judicial history underlying that provision.

Likewise, the circuit court's ruling undermines the purpose of Section 6.855(5) by finding that Racine's selection of alternate voting sites violated what the circuit court (at Brown's urging) called the "partisan-advantage prohibition"—words that appear nowhere in the statute. (*See, e.g.*, App. 006.) The circuit court provided no definition of that alleged prohibition and no standard for determining the existence of a "partisan advantage." Moreover, in finding that Racine's selection of sites produced such an advantage, the circuit court relied on a deeply flawed statistical study that Clerk McMenamin and WEC both rejected. Unless reversed, that ruling will put Racine and every other municipality wanting to provide convenient access to multiple early-voting sites in the predicament of not knowing how to comply with the circuit court's judicially invented and undefined "partisan-advantage" standard, a result that not only threatens to seriously constrain the designation of the alternate sites that Section 6.855(5) is designed to facilitate but also to embolden groups to bring a wave of jurisdiction-by-jurisdiction challenges based on alternate absentee ballot sites.

When the one-location restriction established by Section 6.855(1) is read in conjunction with the express elimination of that restriction in Section 6.855(5) and the legislative and judicial history of Subsection (5), it becomes clear that Brown's

statutory interpretation (which the circuit court adopted) is unsupported and that the circuit court erred as a matter of law on multiple grounds.

A. Wisconsin Statute Section 6.855(1) cannot be understood without considering *One Wisconsin Institute* and the subsequent enactment of Section 6.855(5).

In 2005, the Legislature enacted Section 6.855(1), which limited each municipality to designating a single location for in-person absentee voting (the "one-location restriction"). *See* 2005 Wisconsin Act 451, § 67; *One Wis. Inst.*, 198 F. Supp. 3d at 931. Under that provision, each municipality, regardless of size or population, had a choice: it could either conduct early in-person absentee voting at the municipal clerk's office itself, ***or*** it could conduct such voting at a ***single*** alternate absentee ballot site in lieu of at the clerk's office. The same statutory sentence that restricted a municipality to a single alternate site also required that single alternate site to be located "as near as practicable" to the clerk's office and to not "afford[] an advantage to any political party." Wis. Stat. § 6.855(1).[10]

In May 2015, One Wisconsin Institute and other plaintiffs filed a federal voting rights lawsuit in the U.S. District Court for the Western District of Wisconsin alleging that certain provisions of Wisconsin's election laws—including the one-location restriction in Section 6.855(1)—were unconstitutional and violated Section

[10] Section 6.855(1) provides in full: "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 or board of election commissioners and no site may be designated that affords an advantage to any political party***." (Emphasis added)

2 of the VRA. *One Wis. Inst.*, 198 F. Supp. 3d 896. After discovery, multiple rounds of briefing, and a two-week trial, the court held, among other things, that the one-location restriction violated the First and Fourteenth Amendments to the United States Constitution as well as VRA Section 2.

With regard to the court's conclusion that the one-location restriction violated the First and Fourteenth Amendments, it reasoned that "[r]equiring all municipalities to have one location for in-person absentee voting may have a superficial appeal. But uniformity for uniformity's sake gets the state only so far." *Id.* at 934. The court noted that in 2014 the number of adults per Wisconsin municipality ranged from 33 to 433,496 and thus "[t]he state's one-location rule ignores the obvious logistical difference between forcing a few dozen voters to use a single location and forcing a few hundred thousand voters to use a single location." *Id.* The court also emphasized that "[h]aving only one location creates difficulties for voters who lack access to transportation," particularly voters in larger cities. *Id.* at 932. The court concluded that most of the challenged in-person absentee voting provisions, including the one-location restriction, violated the First and Fourteenth Amendments for three reasons: (1) the burdens they imposed were "not justified by the state's proffered interests"; (2) local communities should have control over the number and dispersion of early voting sites; and (3) the purported consistency of limiting all voting jurisdictions—whether the City of Milwaukee or a crossroads village—to a single early-voting site was "illusory." *Id.* at 934–35.

The court held the one-location restriction violated Section 2 of the VRA because it imposed disparate burdens on African American and Latino voters, and those burdens were linked to the state's historical conditions of discrimination. *Id.* at 952–60. As the court explained, "Wisconsin's rules for in-person absentee voting all but guarantee that voters will have different experiences with in-person absentee voting depending on where they live: voters in large cities will have to crowd into one location to cast a ballot, while voters in smaller municipalities will breeze through the process." *Id.* at 956. Since "most of Wisconsin's African American population lives in Milwaukee, the state's largest city, the in-person absentee voting provisions necessarily produce racially disparate burdens." *Id.* These burdens followed historical patterns of discrimination, because "[d]isparities in housing, education, and employment, have left minority groups condensed into high-density urban areas, which makes them particularly vulnerable to Wisconsin's rules for in-person absentee voting." *Id.* at 959. Ultimately, "basic math confirms that one location in a larger municipality will have to contend with a larger volume of voters than one location in a smaller municipality will have to confront." *Id.* In light of its holding that Section 6.855(1) violated both constitutional guarantees and the VRA, the federal court permanently enjoined the application of the one-location restriction. *Id.* at 964. WEC promptly appealed.

While the appeal was pending, the Legislature added a new provision—Subsection (5)—to Section 6.855 in December 2018. *See* 2017 Wis. Act 369, § 1js. Subsection (5) was intended to render a portion of the *One Wisconsin Institute*

dispute moot, and it achieved its intended effect. When the Seventh Circuit finally issued its opinion in June 2020, it recognized the addition of Subsection (5), emphasizing that "***[t]he one location rule is gone***, and its replacement ***is not substantially similar to the old one***." *Luft*, 963 F.3d at 674 (emphases added). The Seventh Circuit vacated this portion of the district court's decision as moot. *Id.*

This statutory history is critical to properly understanding and applying Section 6.855(1). WEC's decision regarding Brown's complaint recognized Subsection (5)'s effect on the statutory language. Brown, by contrast, has assiduously avoided virtually any reference to subsection (5) or its statutory history—a materially misleading omission. Wisconsin law requires this Court to engage in a plain-meaning analysis, which necessarily includes the consideration of statutory history and context. *See, e.g.*, *Wis. Just. Initiative, Inc. v. Wis. Elections Comm'n*, 2023 WI 38, ¶19, 407 Wis. 2d 87, 990 N.W.2d 122 ("[T]he focus in statutory interpretation is on the language of the statutory text, read reasonably, along with relevant statutory context and structure.").

When the Wisconsin Legislature enacted Section 6.855(5) in 2018, it fundamentally changed the requirements of Section 6.855(1). The new provision grants each municipality the authority to "designate more than one alternate [in-person absentee voting] site under sub (1)"—thus repealing the one-location restriction. According to the Wisconsin Legislative Council's analysis of the legislation, because the "single alternate location for in-person absentee voting contained in prior law [was] not enforceable at the time [of the bill], based on the

decision of the federal court in *One Wisconsin Institute*," the new section operated to "allow[] the governing body of a municipality to designate more than one alternate site for in-person absentee voting."[11]

When it enacted Section 6.855(5), however, the Legislature did not amend the text of Section 6.855(1), and that provision on its face still purports to allow only a single designated site "located as near as practicable to the office of the municipal clerk" and designated without "afford[ing] [] advantage to a political party." But the plain language and legislative history of Section 6.855(5) leave no question that the one-location restriction no longer exists.

B. Clerk McMenamin's interpretation of Section 6.855(1) (as approved by WEC) is sound, easy to apply, addresses the voting-rights concerns identified in *One Wisconsin Institute*, and respects the relevant statutory history.

Section 6.855(1) dictates that "no [alternate absentee ballot] site may be designated that affords an advantage to any political party." The statute does not provide any definition, guiding metric, or specifications to assist in determining if, or when, such an "advantage" has been afforded. So, in construing what the prohibition means, the statutory language must be given its "common, ordinary, and accepted meaning." *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110.

[11] https://docs.legis.wisconsin.gov/2017/related/lcactmemo/act369.pdf.

Clerk McMenamin provided WEC with a common-sense, plain meaning interpretation of the statutory prohibition against an alternate absentee ballot site that "affords an advantage to any political party" that is in stark contrast to Brown's proffered, atextual reading (which the circuit court adopted). That is, the statute precludes designating overly partisan places—like a political party's local office or a large-scale political rally or event—as alternate absentee ballot sites. Such locations would undoubtedly directly and unambiguously advantage a particular political party. (*See* R. 59 at 50; App. 031 (WEC noting Clerk McMenamin's position that a "more reasonable reading would be to have the city prevent direct and unambiguous advantages, such as placing a site near a party's local office or near a party's political rally).) WEC explicitly noted and approved this interpretation: "the parties to this complaint mention a few examples that might warrant more thorough factual analysis if they were to occur (*e.g.* an alternate absentee site located near the Democratic Party's office, a site near a Republican Party get out the vote rally, etc.)." (R. 59 at 56; App. 037) WEC also reiterated the import of *One Wisconsin Institute* and the subsequent enactment of Section 6.855(5) by noting that, in the context of the City of Racine, any allegation of political advantage was "undermined by the sheer volume of alternate absentee sites, which are widely distributed" throughout the City. (*Id.*)

The circuit court failed to give WEC's findings – which were rooted in its election-related expertise – any weight, much less the "due weight" required by Section 5.06(9). But the statutory interpretation that Racine implemented, and which

WEC approved, is straightforward to apply and provides clerks with the necessary clarity to designate the multiple alternate voting sites encouraged by Section 6.855(5). Under that interpretation, clerks can give effect to the "political advantage" language of Section 6.855(1) when selecting alternate absentee ballot sites, not through standardless statistical analysis, but by exercising common sense and judgment guided by the factors identified in *One Wisconsin Institute* and the purposes underlying Section 6.855(5). This statutory interpretation also aligns with the deeply-rooted and widely-accepted discretion that clerks and other local elections officials have always been afforded in making decentralized determinations about what is "necessary," "proper," and "practicable" in administering elections in the context of their specific communities. *See, e.g.*, Wis. Stat. §§ 5.25(1), 5.81(1), 7.15, 7.25(6), 7.37(1).

C. WEC properly rejected Brown's interpretation of Section 6.855(1), which is unmoored from the statutory text and unsupported by the administrative record.

In contrast to Clerk McMenamin's proffered statutory interpretation that comports with the plain language of Section 6.855 (and which WEC ultimately adopted), Brown argued that the prohibition against affording "an advantage to any political party" means that, when identifying where to place alternate absentee ballot sites, "the goal" is to place all such sites in "a ward that has the ***same*** political makeup as the one in which the clerk's office is located" because "[n]o party, whether Republican, Democrat, or a third party, is made worse off if the alternate site or sites are located in that same ward." (R. 59 at 40 (emphasis added)) Brown

refers to this as the "partisan advantage" prohibition—a phrase that appears nowhere in Section 6.855(1). To Brown, an unlawful "partisan advantage" is created whenever an alternate absentee ballot site is located within a ward that does not have voters distributed among various political parties in the *identical* proportion as the ward containing the municipal clerk's office because it "necessarily benefits those parties with a greater concentration of voters in the new ward." (R. 3, ¶¶52-53; R. 59 at 40) Therefore, in Brown's estimation, when Racine established alternate in-person absentee voting sites in any ward other than the ward in which the Clerk's office was located (or a ward with the identical voter breakdown), it acted unlawfully.

Brown submitted a highly flawed statistical analysis prepared by the Wisconsin Institute for Law & Liberty ("WILL") to WEC in support of his conclusion and statutory interpretation. Inexplicably, the circuit court asserted that "WEC had improperly disregarded" WILL's "***unopposed*** statistical study found in the record that, if considered, would have provided a basis for a probable cause finding." (App. 006 (emphasis added)) The circuit court found WEC's supposed "discounting" of this study to be "troubling" because "nothing opposed it existed in the record" [sic]. (R. 99 at 15; App. 025) But the opposite is true. Clerk McMenamin and WEC both addressed WILL's "statistical study" at length, and WEC determined that Clerk McMenamin had "submitted ***compelling arguments as to the inaccuracy of the Complainant's data analysis and misinterpretation/misapplication of the statutes***." (R. 59 at 55; App. 036 (emphasis added)) Since the circuit court did not

even acknowledge WEC's detailed analysis of the flaws in WILL's statistical study, it necessarily follows that the circuit court failed to "accord[ ] due weight to the experience, technical competence and specialized knowledge of the commission" with regard to the complex factual issues relating to the report. Wis. Stat. § 5.06(9); *see also Tetra Tech*, 2018 WI 75, ¶79 (lead op.) ("due weight" standard requires "giving 'respectful, appropriate consideration to the agency's views'").

WEC's no-probable-cause determination should be upheld, as Brown's interpretation of Section 6.855(1) and his statistical analysis are both riddled with errors. Some are departures from (or outright distortions of) the statutory text itself; others are fundamental errors in his application of statistics to his allegations. The circuit court accepted Brown's arguments in full, without addressing, much less rebutting, these flaws, and improperly placed Brown's statistical analysis on a pedestal, despite WEC's express finding that it was inaccurate and a misapplication of the statutory language. Some of the flaws with Brown's interpretation and statistical analysis are explained below, in turn, and illustrate why WEC's determination should be sustained.

First, Subsection 6.855(1) nowhere mentions the word "ward," much less dictates that, to avoid affording a statutorily prohibited advantage, an alternate absentee ballot site must be located within a ward that has voters distributed among various political parties in the same proportions as does the ward containing the municipal clerk's office. Any argument that the voting trends of a ward should be the baseline in the "advantage to any political party" analysis has been created out

of thin air by Brown and his counsel with no tether to the statutory text, as is the notion that a municipal clerk is required to undertake some sort of time-consuming ward-by-ward statistical analysis. (*See* R. 86 at 13 ("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").)

Contrary to Brown's position, the statute does not say "the sites selected should confer no partisan advantage" or that whether such an advantage exists should be "determined by using the voting practices of the residents within the ward where the Clerk's office is located as a baseline." That interpretation reads numerous words and phrases into the statute, contrary to well-settled principles of statutory interpretation. *See, e.g.*, *State v. Fitzgerald*, 2019 WI 69, ¶24, 387 Wis. 2d 1, 929 N.W.2d 165 ("We do not read words into a statute . . . rather, we interpret the words the legislature actually enacted into law." (quoted source omitted)); *Jefferson v. Dane Cnty.*, 2020 WI 90, ¶25, 394 Wis. 2d 602, 951 N.W.2d 556 ("We will not add words into a statute that the legislature did not see fit to employ.")

Second, notwithstanding the circuit court's claim that Brown's "statistical study" was "unopposed" (App. 006), Clerk McMenamin and WEC both emphasized that the study was based on outdated (and therefore irrelevant) ward information. As Clerk McMenamin emphasized in her response brief, Brown's statistical analysis focused on alternate absentee ballot sites for the August 2022 primary election and claimed there were ***36*** wards in the City of Racine. (R. 57 at 7) However, on May 17, 2022, Racine approved new district wards as part of the redistricting process.

(*Id.*) At the time of the August 2022 primary election there were actually ***49*** wards in the City of Racine, not ***36***. Racine's wards were completely redrawn and renumbered before the August 2022 primary; therefore, Brown's model was outdated and irrelevant from the outset since he failed to account for massive changes in ward boundaries. Brown may as well have used the wards from the 1970s (or the 1870s) to conduct his analysis. (*See* R. 59 at 50; App. 031 (WEC noting Clerk McMenamin's argument that "the Complainant's math is based on incorrect information, and on May 17, 2022, the City of Racine approved new district wards as part of the redistricting process.").) Brown's report was therefore substantively meaningless. Additionally, as Clerk McMenamin emphasized, Brown and his counsel at WILL have never analyzed or addressed whether they still contend the alternate absentee ballot sites to be biased based on the new ward boundaries that took effect for the August 2022 primary election. (R. 57 at 7)

Third, Brown improperly focused on the voting habits of residents on a ward-by-ward basis and the (incorrect) assumption that only residents of a particular ward can (or do) cast ballots at alternate absentee ballot sites within that ward. Yet, any eligible voter can use any alternate absentee ballot site—whether it is located in the ward in which they live, work, go to school, grocery shop, exercise, use a branch public library, etc. (*See* R. 59 at 50; App. 031 (WEC noting Clerk McMenamin's argument that Brown "ignores other factors that impact how a voter may rely on an alternate absentee site (*e.g.* business districts, bus routes, etc.)).)

Brown's singular focus in his statistical analysis on the Democratic ward share (the only independent variable he identifies) failed to account for a host of other independent variables and controls (any one of which would likely alter the results of his analysis). Alternate absentee ballot sites may be chosen for myriad legitimate reasons that are completely distinct from the Democratic vote share in the ward containing the site. As Clerk McMenamin emphasized, for example, alternate absentee ballot sites can be chosen because they are easily accessible and near public transportation lines. (R. 57 at 7)[12]

Fourth, Brown illogically treats the ward in which the clerk's office is located as the sole benchmark to which a clerk must adhere in determining where to locate alternate absentee ballot sites. Yet, under Brown's own methodology, Ward 1 (where the municipal clerk's office is located), has a 71% Democratic makeup. (R. 59 at 40) Accordingly, if every alternate absentee ballot site had to be located in a ward with that political make-up, as Brown advocates, political imbalance would be perpetuated throughout all alternate voting sites.

Fifth, Section 6.855(1) prohibits an advantage to "***any*** political party," a statutorily defined term. *See* Wis. Stat. §§ 5.02(13), 11.0101(26). That definition encompasses third parties like the Green Party and Libertarian Party. Brown's own

[12] As Clerk McMenamin also noted, some alternate absentee ballots sites were situated on the borders of wards. For example, the Cesar Chavez Community Center was on the border of old wards 11 and 17. (*See* R. 57 at 9-10.) While the community center was nominally within the borders of ward 17, it was equally accessible to the voters in ward 11. Yet Brown treats that site as if it were accessible and advantageous only to voters residing in ward 17. This is just one type of nuance that Brown's clumsy statistical analysis wholly misses.

reading of the statute (allowing clerks to only place alternate absentee ballot sites in wards with the same vote distribution as the ward where the clerk's office is located) would disadvantage "a political party" because the split would be 71% in favor of Democrats, as would placing an alternate absentee ballot site in a ward where the vote is split evenly between Republicans and Democrats (it would show preference for the two major parties at the expense of third parties).

Sixth, it is entirely unclear which election results clerks are supposed to use under Brown's approach in creating ward-by-ward statistical analyses of Democratic vote share. Would it be the most recent election? Several elections aggregated together? For which office(s)? These unanswered questions further demonstrate the arbitrariness and unworkability of Brown's approach.

Finally, the circuit court's review was limited to the use of early in-person absentee voting sites during the August 9, 2022 ***partisan primary election***. By definition, it is impossible to afford an advantage to a political party in such a contest, because in a partisan primary, parties do not compete against one another; instead, candidates compete for the nomination of their chosen party. Wis. Stat. § 8.16. That is, there is no competition among candidates from opposing political parties, so any concern about affording an advantage to members of one party over members of another is inapposite.

D. In adopting Brown's interpretation of Section 6.855(1), the circuit court essentially reverted to the one-location restriction struck down in *One Wisconsin Institute* and repealed by Section 6.855(5).

While Clerk McMenamin's interpretation of Section 6.855 allows a municipal clerk to consider the factors enunciated in *One Wisconsin Institute* and uphold the rationale underlying the rejection of the unconstitutional one-location restriction, Brown's standard (as adopted by the circuit court) conflicts with *One Wisconsin Institute* and effectively renders Section 6.855(5) a nullity. Brown's standard would prohibit any alternate absentee ballot site located outside the ward where the clerk's office is located—making voting less accessible. That is, it would essentially be impossible to find two wards that have the same exact political makeup or voting results, as Brown's standard requires.

As part of its petition for bypass, BLOC reviewed the 2022 ward-by-ward voting results for the 20 largest municipalities in Wisconsin, and (unsurprisingly) none of them had a single ward with voting results that matched those as the ward containing their respective clerk's office. (R. 135 at 19–20) Thus, Brown's theory in the real world would require any alternate absentee ballot sites to be concentrated in the same ward as the clerk's office, rather than dispersed throughout the municipality, in direct violation of *One Wisconsin Institute* and Section 6.855(5).

Courts must avoid statutory interpretations that create absurd or unreasonable results and that "would render the relevant statute contextually inconsistent or [] 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. Brown's interpretation of Section 6.855(1)

violates this basic principle, as it would render Section 6.855 contextually inconsistent and directly contradict the statutory history and policy judgments underlying the enactment of Subsection (5).

***

WEC, after carefully assessing the parties' arguments, determined that Brown's complaint failed to establish probable cause sufficient to warrant further proceedings. The circuit court erred in reversing WEC's determination, as underscored by the circuit court's failure to analyze and interpret the statutory text, its clearly erroneous assertions about Clerk McMenamin' arguments and WEC's analysis, and its reliance on a statistical analysis that WEC found inaccurate and a misapplication of the statutory language. Even if the circuit court had legitimate concerns about the implications and results of the statistical analysis that Brown presented to WEC, the proper remedy would have been a remand for the contested-case proceeding Brown had requested. Instead, the circuit court simply decreed that WEC's dismissal of Brown's complaint "is reversed as not being in conformity with the elections laws of this State." (R. 99 at 17; App. 027)

CONCLUSION

For the reasons stated above, this Court should reverse the circuit court's decision and reinstate WEC's no-probable cause determination.

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Respectfully submitted,

Electronically signed by Douglas M. Poland

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CERTIFICATION OF COMPLIANCE WITH WIS. STAT. § 809.19(8g)(a)

I hereby certify that this brief conforms to the rules contained in s. 809.19(8) (b), (bm), and (c) for a brief. The length of this brief is 9,615 words.

Dated June 3, 2024.

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