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.

COMBINED BRIEF OF INTERVENOR-CO-APPELLANT-CROSS RESPONDENT DEMOCRATIC NATIONAL COMMITTEE

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INTRODUCTION

The Democratic National Committee ("DNC") focuses on two issues in this reply brief.[1] First, a threshold, procedural issue—standing. In the alternative, a substantive merits issue—the statutory interpretation of Wisconsin Statutes Section 6.855(1)'s prohibition on alternate absentee ballot sites that afford an "advantage to any political party." In either case, the circuit court's decision must be reversed and the no-probable-cause determination by the Wisconsin Elections Commission ("WEC") reinstated.

To have standing to have brought his claim below, Brown must have suffered an injury as a voter—but something more than merely a "generalized grievance" that could have been raised by any other voter. What's more, the statutes under which Brown commenced this action, Wisconsin Statutes Sections 5.06(8) and 227.53(1), only permit "aggrieved" parties to appeal WEC's dismissal of Section 5.06(1) complaints. Under clear-cut Wisconsin authorities, Brown's claims are generalized grievances because they could have been brought by any voter in the City of Racine, and Brown was not "aggrieved" by WEC's no-probable-cause determination. Yet, in considering whether Brown had standing to appeal WEC's determination, the circuit court ignored these authorities and instead held that Brown had standing based on the "vote-pollution" theory advocated by the lead

[1] In accordance with this Court's May 3, 2024 order, and in the interest of avoiding duplication and repetitive briefing, DNC focuses this reply on the two principal issues it addressed in its opening brief and in the circuit court below—standing and the meaning of "advantage to any political party" as used in Section 6.855(1)—and leaves the issues related to the lawfulness of Racine's use of a mobile election unit for co-appellants to address.

opinion in *Teigen v. Wis. Elections Commission*, 2022 WI 64, ¶¶16-25, 403 Wis. 2d 607, 976 N.W.2d 519, *reconsideration denied*, 2022 WI 104.[2] Brown's response fails to articulate any unique, personal injury that he suffered that gives him standing under Wisconsin law, nor does he demonstrate he is "aggrieved" under Sections 5.06(8) and 227.53(1). This Court should therefore reverse the circuit court's holding that Brown has standing to sue. And although Brown appears to have abandoned (at least in name) the "vote pollution"/"dilution" theory of standing embraced by the lead opinion in *Teigen* and the circuit court below, it is important that this Court squarely address and repudiate that theory—no matter how labeled—before it is allowed to percolate further among Wisconsin's circuit courts.

On the merits, Section 6.855(1) expressly prohibits clerks from designating alternate absentee ballot sites affording an "advantage to any political party." Racine City Clerk McMenamin adopted a common-sense plain meaning interpretation of this statute (which WEC approved) that gives effect to the plain text, the statutory context (namely Section 6.855(5)), and the federal district court's decision in *One Wisconsin Institute* holding the (now repealed) one-location restriction to be unconstitutional. *See One Wis. Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 931-35, 956 (W.D. Wis. 2016), *vacated in relevant part as moot sub nom. Luft v. Evers*, 963 F.3d 665, 674 (7th Cir. 2020). Yet the circuit court rejected Clerk McMenamin's

[2] This Court recently overruled the merits ruling in *Teigen* related to drop boxes. *See Priorities USA* v. *Wis. Elections Comm'n*, 2024 WI 32, ¶49 ("[W]e determine that the court's conclusion in *Teigen*…that the subject statutes prohibit ballot drop boxes was unsound in principle, and as a consequence, we overrule it.").

interpretation and application of this statute, instead adopting Brown's interpretation, which not only distorts the statutory text by reading a host of words and requirements into the statute that the Legislature did not include, but also flies in the face of the statutory context, statutory history, and judicial history underlying the adoption of Section 6.855(5). This Court, in its decision granting a stay pending appeal, already has concluded that appellants "are likely to succeed on the merits of the appeal" on the statutory interpretation of Section 6.855(1)'s prohibition on alternate absentee ballot sites affording an "advantage to any political party." *Brown v. Wis. Elections Comm'n*, No. 2024AP232, unpublished order at 4 (Wis. June 11, 2024) (hereinafter "Stay Order"). Brown's response brief offers no reason to conclude otherwise. Indeed, Brown's brief does not acknowledge, much less engage with, the Court's concerns detailed in its stay decision, or many of the flaws that DNC pointed out with regard to Brown's statutory interpretation or statistical analysis.

The Court should therefore affirm WEC's determination that that there was no probable cause to pursue further proceedings regarding Brown's complaint that the City of Racine's use of multiple alternate absentee ballot sites for the August 2022 primary election violated Section 6.855(1).

ARGUMENT

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

Brown's response brief essentially abandons the circuit court's standing analysis, which rested entirely on the three-Justice lead opinion in *Teigen*. Without even citing the governing appellate standing provisions (Wis. Stat. §§ 5.06(8) and 227.53(1)), the circuit court held 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. 024-25; *see also* App. 010 (reiterating court's reliance on "the [*Teigen*] plurality decision finding standing")).

Brown now argues that DNC's detailed refutation of the "vote pollution" and "vote dilution" theories of standing embraced by the lead opinion in *Teigen* and the circuit court below "miss[es] the point" because "Brown is not arguing vote pollution" or "vote dilution." (Brown Br. at 21-22[3]) Instead, Brown argues he is "relying upon the statutory standing granted by the Legislature in Wis. Stat. § 5.06 and as recognized in *Teigen*." (*Id.* at 21)

These supposed distinctions fail on many grounds. To begin, the lead opinion in *Teigen* did not rest its standing ruling on Section 5.06 but instead expressly

[3] All cites to "Brown Br." are to Brown's July 3, 2024 Combined Brief. All cites to "DNC Br." are to DNC's June 3, 2024 Opening Brief.

defined the injury as both vote "pollution" and "dilution," with a clear preference for "pollution":

> Electoral outcomes obtained by unlawful procedures corrupt the institution of voting, degrading the very foundation of free government. Unlawful votes do not dilute lawful votes so much as they pollute them, which in turn pollutes the integrity of the results… When the level of pollution is high enough, the fog creates obscurity, and the institution of voting loses its credibility as a method of ensuring the people's continued consent to be governed.

2022 WI 64, ¶ 25. The circuit court, in turn, said nothing about Section 5.06 and instead rested its standing decision on the specific language in paragraph 25 of the lead opinion in *Teigen* quoted above, including the "pollute/dilute" discussion. (*See* R. 99 at 13-14; App. 024-25.) Brown and his lawyers may now want to distance themselves from this language, but these were the terms of analysis used in both the lead opinion in *Teigen* and the circuit court's decision.

Moreover, as DNC demonstrated in its opening brief, Brown's "statutory right" arguments simply attempt to restate a "generalized grievance" using different labels. Claims of "vote pollution" and "vote dilution," that "the law has not been followed," that there has been a "violation of statutorily guaranteed rights," that the government "has not been administered according to the law," that the "integrity of the election process" and "voter confidence" have been harmed, and the like are all variations on the same theme of public officials allegedly failing to enforce the law as it was intended to be enforced, thereby allowing others to violate the law. And

that is a classic "generalized grievance" that Wisconsin courts consistently hold does not confer standing, no matter how it is labeled.[4]

Part I.A shows that Brown is simply pursuing a generalized grievance that is insufficient to confer standing under Wisconsin law. Part I.B demonstrates that Brown is not "aggrieved" within the meaning of Section 5.06(8), a statutory term of art, and thus lacks standing to appeal WEC's no-probable-cause determination. Part I.C explains why a holding that Brown has standing would be extremely *unsound* judicial policy, opening the door to potential electoral and judicial chaos, confusion, and gridlock.

A. Brown lacks standing because he is simply pursuing a "generalized grievance" that he shares in common with all similarly situated electors in the City of Racine.

Brown does not dispute DNC's demonstration in its opening brief that Wisconsin courts treat federal decisions about standing as "persuasive authority." *Friends of Black River Forest v. Kohler Co*., 2022 WI 52, ¶17, 402 Wis. 2d 587, 977 N.W.2d 342; *see* DNC Br. 16 & n.5 (citing additional authorities). The U.S. Supreme Court unanimously reiterated just last month that "a citizen does not have standing to challenge a government regulation simply because the plaintiff believes

[4] As DNC emphasized in its opening brief, there is one type of vote dilution that is sufficient to confer standing—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 alleged vote pollution/dilution standing in this case does not result from any invidious classifications targeted at disfavored groups, but instead is a generalized grievance shared by all lawful voters with respect to alleged election-law violations. (*See* DNC Br. at 15 & n.2.)

that the government is acting illegally," and "may not sue based only on an 'asserted right to have the Government act in accordance with law.'" *Food & Drug Admin. v. Alliance for Hippocratic Med.*, 602 U.S. 367, 381 (2024) (citations omitted). This principle applies with special force in the election-law context. 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 fails to support a claim of standing. *Lance v. Coffman*, 549 U.S. 437, 442 (2007).[5] DNC demonstrated in its opening brief that this principle has repeatedly been enforced in numerous federal cases involving Wisconsin voters in recent election cycles, and was followed by Wisconsin state courts before *Teigen*. *See, e.g.*, *Gill v. Whitford*, 585 U.S. 48, 68 (2018); *Feehan v. Wis. Elections Comm'n*, 506 F. Supp. 3d 596, 608-09 (E.D. Wis. 2020), *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); *Teigen*, 2022 WI 64, ¶¶210, 212-14 (A.W. Bradley, J., dissenting); *Cornwell Pers. Assocs., Ltd. v. DILHR*, 92 Wis. 2d 53, 62, 284 N.W. 2d 706 (Ct. App. 1979); *see also* DNC Br. at 17-18 & n.6.

The only one of the many "generalized grievance" decisions cited by DNC that Brown even acknowledges is *Feehan v. Wisconsin Elections Commission*,

[5] The U.S. Supreme Court emphasized in *Lance* that "[o]ur refusal to serve as a forum for generalized grievances has a lengthy pedigree," citing nearly a century's worth of decisions rejecting claims of standing based on alleged rights in having the Government be administered according to law and similar interests shared equally with all other citizens. 549 U.S. at 439-42 (discussing numerous decisions).

decided by Eastern District of Wisconsin Chief Judge Pamela Pepper during the 2020 recount dispute. (Brown Br. at 21-22) Chief Judge Pepper rejected the claim "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." 506 F. Supp. 3d at 608. Brown argues that *Feehan* doesn't apply here because "that case involved constitutional claims and a broad challenge to a statewide election result," "was decidedly *not* brought under Wis. Stat. §5.06," and did not involve "claims against a local election official, and allegations of conduct personally witnessed" by the plaintiff. (Brown Br. at 21-22)

None of these supposed distinctions holds up. Standing requirements apply to statutory as well as constitutional claims, and Brown points to no differences in standing analyses depending on the constitutional or statutory nature of the claim at issue. And a "grievance" can be "generalized" even if it is directed against local election officials rather than "a broad challenge to a statewide election result." (*Id.* at 22) What is "generalized" depends on the relevant political jurisdiction in question. Here, any other voter in the City of Racine could have raised the identical objections to the City's early in-person absentee voting system. That's a "generalized grievance."[6]

[6] A "generalized grievance" need only be shared by "a large class of citizens," *Warth v. Seldin*, 422 U.S. 490, 499 (1975), and need not be shared statewide. *See, e.g., Protect Our Parks, Inc. v. Chicago Park District*, 971 F.3d 722, 731-32 (7th Cir. 2020) (objections to proposed construction in Chicago's Jackson Park were a "generalized grievance" shared by "[a]ll residents of Chicago"); *Dillard v. Chilton County Comm'n*, 495 F.3d 1324, 1333 (11th Cir. 2007) (proposed intervenors lacked standing because they asserted only generalized grievances and "an undifferentiated harm suffered in common by all citizens of the county"); *Coker v. Warren*, 660 F. Supp. 3d 1308, 1325

Moreover, Section 5.06(8) requires that a complainant be "aggrieved" by a WEC decision to have the statutory right to appeal that decision to circuit court, just like Section 227.53(1). As demonstrated in DNC's opening brief and Part I.B below, the word "aggrieved" is a statutory term of art that does not authorize standing based on generalized grievances. (*See* DNC Br. at 21-23.)

Nor does it make any difference that Brown repeatedly alleges that he "***personally witnessed***" in-person absentee voting "which he believed violated state law," thereby supposedly taking Brown's claims outside the realm of a "generalized grievance." (Brown Br. at 7, 15 (emphasis added); *see also id.* at 22 (insisting that allegations based on "conduct personally witnessed by Brown" are not "generalized grievances"); *id.* at 10, 23)) But there is no such thing as "'offended observer' standing." *City of Ocala v. Rojas*, 598 U.S. ____, 143 S. Ct. 764, 764-65 (2023) (statement of Gorsuch, J., respecting the denial of certiorari); *see also Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 485-86 (1982) (holding that "the psychological consequence

(M.D. Fla. 2023) (city council candidate lacked standing because she raised only "undifferentiated, generalized grievances … about the purportedly discriminatory effects of the City's election practices"); *Texas Voters Alliance v. Dallas Cnty.*, 495 F. Supp. 3d 441, 453 (E.D. Tex. 2020) (plaintiffs lacked standing to sue four counties over receipt of private grant money to help administer elections in those counties; their claims were "undifferentiated, generalized grievance[s] about the conduct of government" insufficient to confer standing); *Garmong v. Lyon Cnty.*, No. 3:17-cv-00701, 2018 WL 5831992, at *2 (D. Nev. Nov. 7, 2018) (challenge to county's approval of a special use permit for a cell tower presented only a "generalized grievance" about "a local government's approval" of the permit). The existence of a generalized grievance does not turn on a threshold number of people affected; rather, it depends on whether plaintiffs are suing solely as citizens of a particular jurisdiction seeking to have that jurisdiction's government follow the law. All non-Wisconsin authorities not already part of the record, as well as any Wisconsin unpublished opinions cited in this brief, are included in DNC's Supplemental Appendix.

presumably produced by observation of conduct with which one disagrees" does not confer standing, which "is not measured by the intensity of the litigant's interest or the fervor of his advocacy"); *Fox v. DHSS*, 112 Wis. 2d 514, 526, 538, 334 N.W.2d 532 (1983) (claims of adverse "psychological effects" are "simply too remote to be considered 'direct injury' so as to confer standing"); *In re Carpenter*, 140 Wis. 572, 123 N.W. 144, 144 (1909) (statutory phrase "person aggrieved" has "from the earliest days been construed to the effect that no one can be aggrieved, in the sense of the statute, unless the determination affects adversely his legal rights; that mere affront to desire or sentimental interest is insufficient").

Although Brown and his counsel have abandoned the "vote pollution"/"dilution" ***label,*** that is clearly the ***theory*** they are continuing to pursue. Vote pollution/dilution was the theory of standing embraced by the three-Justice lead opinion in *Teigen* and the circuit court below. As a matter of sound judicial policy, this Court should squarely address and repudiate that theory—no matter how labeled—before it is allowed to percolate further among Wisconsin's circuit courts. Four Justices in *Teigen* decisively rejected that theory, so it has ***never*** been the law of the State and there is nothing to overrule. *See Teigen*, 2022 WI 64, ¶167 (Hagedorn, J., concurring); *id.*, ¶205 n.1 (A.W. Bradley, J., dissenting); *Rise, Inc. v. Wis. Elections Comm'n*, 2022AP1838, 2023 WL 4399022, ¶27 & n.6 (Wis. App. July 7, 2023) (authored, unpublished opinion) (recognizing that vote-pollution theory of standing was squarely rejected in *Teigen* and criticizing theory as "weak"

and lacking any "clear legal authority").[7] Nevertheless, the "vote pollution" theory of standing (under various labels) has generated substantial confusion, has been followed by some circuit courts and rejected by others, and has opened the door to "generalized grievance" litigation that does not belong in court.[8] This Court should close that door. *See also infra* Part I.C.

B. Brown lacks statutory standing to appeal because he is not "aggrieved" under any recognized definition of that term.

DNC's opening brief demonstrated that the proper question is whether Brown has statutory standing to appeal WEC's no-probable-cause determination under Sections 5.06(8) and/or 227.53(1), the two bases for appellate jurisdiction invoked in Brown's complaint. Brown's bottom line is that, by exercising his statutory right to file a sworn written complaint with WEC asking that agency to investigate and take action against Clerk McMenamin, he is now "aggrieved" because he disagrees with WEC's resolution. Brown's claim to be "aggrieved" fails on multiple grounds.

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

[8] *See, e.g.*, *Kormanik v. Wis. Elections Comm'n*, No. 24AP408, Order at 2 (Wis. Ct. App. Jul. 18, 2024) (holding briefing in abeyance pending outcome in *Brown*; circuit court held that plaintiff has standing); *see also* Plaintiff's Brief in Support of Motion for Judgment on the Pleadings at 13, Dkt. 24, *Oldenburg vs. Wisconsin Elections Comm'n*, Case No. 24-CV-43 (Marinette Cty. Cir. Ct. May 6, 2024) (asserting that plaintiff has standing under *Teigen* "[w]hether by the majority reasoning or that of Justice Hagedorn in his concurrence") (decision pending). *Contra,* Decision and Order, *Werner v. Dankmeyer*, Case No. 22-CV-555, Dkt. 102 at 12–16 (La Crosse Cnty. Cir. Ct., Sept. 19, 2023) (Levine, J.) (holding "it is very clear that the vote-dilution theory of standing … was expressly rejected by a majority of the Court" in *Teigen,* and rejecting claim of standing based on that theory).

1. DNC's opening brief demonstrated that Wisconsin courts repeatedly have rejected Brown's argument, holding that a statutory right to initiate or participate in an administrative proceeding does *not* by itself confer standing to appeal the outcome of that proceeding. (*See* DNC Br. at 21-23.) "Standing to challenge [an] administrative decision is not conferred upon a petitioner merely because that person requested and was granted an administrative hearing." *Fox*, 112 Wis. 2d at 526 (citations omitted). Even where a party has appeared in a contested-case administrative hearing "and introduced evidence and examined witnesses," it is not "aggrieved" by an adverse decision, and thus cannot seek judicial review, unless it demonstrates the decision "directly affect[s] its legal rights, duties or privileges." *City of Milwaukee v. Public Serv. Comm'n*, 11 Wis. 2d 111, 123, 104 N.W.2d 167 (1960).

Wisconsin courts repeatedly have applied this principle in holding that those who seek relief from an administrative agency are not entitled to judicial review if the agency denies relief *unless* they are "aggrieved" by the denial, separate and apart from having participated and lost at the agency level. *See, e.g.*, *Waste Mgmt. of Wis., Inc. v. DNR*, 144 Wis. 2d 499, 502 n.2, 424 N.W.2d 685 (1988) (company that participated as "interested party" at the agency level lacked standing to appeal an adverse outcome because "[u]nder 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)); *Town of Delavan v. City of Delevan*, 160 Wis. 2d 403, 410, 466

N.W.2d 227 (Ct. App. 1991) (distinction between administrative standing and judicial standing "is important because an entity may have standing to participate yet, because not 'aggrieved,' lack standing to take an appeal"); *Cornwell*, 92 Wis. 2d at 62-63 (rejecting argument that if litigant "had standing before the department, it must necessarily have standing to seek judicial review," which is insufficient to make the litigant a "party aggrieved" by the agency decision); *State v. Zien*, 2008 WI App 153, ¶25, 314 Wis. 2d 340, 761 N.W.2d 15 (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" by the Wisconsin Department of Justice pursuant to such a request (emphasis added)).

Brown's response to this weighty authority is simply to ignore it. He does not even cite, let alone try to distinguish, the *City of Milwaukee, Waste Management*, *Town of Delevan*, *Cornwell*, or *Zien* decisions discussed above. He cites *Fox* on a different point (*see* Brown Br. at 15) without recognizing that it stands foursquare ***against*** his claim to be "aggrieved." This weighty authority that Brown ignores demonstrates that a private citizen who initiates an administrative process but is unhappy with the outcome is not thereby "aggrieved" under Wisconsin law.

2. Brown repeatedly argues that cases decided under Wis. Stat. ch. 227 review procedures do not apply to Section 5.06(8) appeals of WEC non-prosecution decisions, and that "aggrieved" in Section 5.06(8) means something different—indeed, the opposite—of what "aggrieved" means in Section 227.53(1). (Brown Br. at 17-18) He contends "the statutory language in the two statutes regarding a right

to appeal is different," and that "[b]y using different language in the two statutes, the Legislature conferred different judicial review rights." (*Id.* at 18 (citation omitted)).

This effort to distinguish Section 5.06 judicial review from judicial review under the Wisconsin Administrative Procedure Act ("APA") fails for multiple reasons. ***First***, Brown's complaint seeks relief under both Section 5.06(8) and the APA, and he has litigated this case under both avenues of review. (R. 3, ¶7; R. 95 at 31-32) Moreover, Section 5.06(8) cross-references to chapter 227 and incorporates several of its provisions. Indeed, the hearing that Brown sought from WEC would have been conducted "in the manner prescribed for treatment of contested cases under ch. 227." Wis. Stat. § 5.06(1); *see also id.* § 5.06(9) (adopting, for WEC proceedings under Section 5.06, "the applicable standards for review of agency decisions under s. 227.57"). Brown cannot simultaneously invoke chapter 227 and argue that its terms are irrelevant.

Second, Brown's argument that the Legislature used "different language in the two statutes" is wrong—it used the ***same*** term, "***aggrieved***." *Compare* Wis. Stat. § 5.06(8) ("complainant who is aggrieved" may appeal) *with id.* § 227.53(1) ("person aggrieved may appeal"). These are not "different terms," but the ***same*** term used in two separate grants of statutory standing to appeal. To be sure, chapter 227 includes a definition of "person aggrieved" whereas chapter 5 leaves the term undefined. Brown argues that the undefined "aggrieved" is "***necessarily something different***" than the defined "aggrieved." This does not follow. As discussed below,

"aggrieved" is a statutory term of art with a longstanding common meaning in many fields of the law. The definition of "person aggrieved" in Section 227.01(9)—"a person or agency whose substantial interests are adversely affected by a determination of an agency"—is simply a codification of one widely accepted definition of "aggrieved" that is materially the same as other common definitions of that term. Nothing in Section 5.06(8) suggests the term "aggrieved" as used in "complainant who is aggrieved" means something just the opposite from "aggrieved" as defined in Section 227.53(1) or in common legal usage.

Third, "aggrieved" is a "term of art" used in many areas of the law, including civil and appellate procedure, administrative law, probate, bankruptcy, tax, and many others. It presumptively has a common meaning. *See, e.g., Director, Office of Workers' Comp. Programs, Dept. of Labor v. Newport News Shipbuilding and Dry Dock Co*., 514 U.S. 122, 126 (1995) ("The phrase 'person adversely affected or aggrieved' is a term of art used in many statutes to designate those who have standing to challenge or appeal an agency decision, within the agency or before the courts."); 6 Jay E. Grenig, *Wisconsin Pleading and Practice* §§ 51:7-51:8 (5th ed.) (collecting Wisconsin "aggrievement" authorities in various areas of the law).[9]

[9] *See also, e.g.,* Wis. Stat. § 68.06 (municipal administrative procedure) ("person aggrieved"); *id.* § 73.01 (Tax Appeals Commission) ("person aggrieved"); *id.* § 102.23(a)(2) (worker's compensation) ("party aggrieved"); *id.* § 788.03 (arbitration) ("party aggrieved"); *id.* § 879.27(1) (probate) ("person aggrieved"); 15 Katherine Lambert, *Wisconsin Practice Series: Death in Wisconsin* § 9:1 (9th ed. July 2023 Update) (collecting cases on right to appeal as a "person aggrieved" in the probate context).

Indeed, this Court has emphasized that the word "aggrieved" presumptively means the same thing whether used in chapter 227 or in a different statutory scheme. In *City of Milwaukee*, for instance, the Court relied on a discussion of "aggrieved" as used in the "school laws" in construing entitlement to review under chapter 227. The Court emphasized that "the expression 'aggrieved party' or a statement of when a person is aggrieved by a judgment or order has ***the same meaning under any section of our statutes unless specifically limited or expanded by the words of the particular statute***." 11 Wis. 2d at 115-16 (emphasis added). Nothing in Section 5.06(8) suggests the term "aggrieved" as used in "complainant who is aggrieved" means something significantly different from the term "aggrieved" as used in Section 227.53(1)'s authorization for a "person aggrieved" by an order to appeal.[10]

3. Brown also falls flat in attempting to distinguish *Auer Park Corp. v. Derynda*, 230 Wis. 2d 317, 320, 322, 601 N.W.2d 841 (Ct. App. 1999), which emphasizes that an appellant is "aggrieved" only if the challenged decision

[10] Other provisions in "the suite of election-related statutes in WIS. STAT. chs. 5 to 12" reinforce that the Legislature knows how to depart from the standard definition of "aggrieved" for election-law purposes when that is its intent. *Rise, Inc. v. Wis. Elections Comm'n*, 2024AP165, 2024 WL 3373576, ¶32 (Wis. App. Jul. 11, 2024) (authored opinion; final publication decision pending) (applying "presumption of common usage" to definition of "address" in Elections Code (chs. 5-12) where "address" is sometimes a defined term and sometimes left undefined). For example, an "aggrieved party" entitled to seek a recount of a disputed candidate election under Wisconsin Statute Section 9.01 is defined as "a candidate who trails the leading candidate" by no more than a certain number or percentage of total votes cast for the contested office. Wis. Stat. § 9.01(1)(a)5.a.-b. If the Legislature had intended to depart from the common definition of "aggrieved" in Section 5.06(8), it knew how to do so, but it failed to include any "modifiers or specifications" on that term as used in that appellate standing provision. *Rise*, 2024 WL 3373576, ¶34.

"***directly***" and "***appreciably***" injures his protected interests (emphases added). Brown argues that those standards do not apply here because *Auer Park* "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." (Brown Br. at 23) But as demonstrated above, "aggrieved" is a statutory term of art that is widely used in civil and appellate procedure, administrative law, bankruptcy, probate, and a variety of other fields. The term has a core meaning that does not vary from statute to statute, ***unless*** a particular statute defines "aggrieved" in a narrower or broader sense. *See supra* pp. 18-19. *Auer Park* is on point, as are other civil appellate decisions cited in DNC's opening brief that Brown likewise ignores. (*See* DNC Br. at 21-22 (citing *Kiser v. Jungbacker*, 2008 WI App 88, ¶12, 312 Wis. 2d 621, 754 N.W.2d 180 (appellant is "aggrieved" only if he or she has "a ***personal stake*** in the outcome of the controversy," which "requires a '***distinct and palpable injury***' to the appellant) (emphases added) (quoted source omitted)).)

Brown argues that, even if the "direct" and "appreciable" requirements apply to him, he meets them under the reasoning of *Tierney v. Lacenski*, 114 Wis. 2d 298, 338 N.W.2d 522 (Ct. App. 1983). (Brown Br. at 23) In that case, an attorney who faced liability for legal malpractice was allowed to appeal an order dismissing his insurer from the litigation on the grounds it "has no liability under the terms of its policy." 114 Wis. 2d at 301. The Court of Appeals held the attorney was "aggrieved" by the dismissal of his insurer because he was left holding the bag on the liability

claims. *Id.* at 302 ("Obviously, he is therefore affected in some appreciable manner by the court's action dismissing American Family.").

Brown explains his reliance on *Tierney* by arguing that "[h]ere, Brown was likewise obviously affected in some appreciable manner by WEC's action dismissing his complaint." (Brown Br. at 23) That is not at all "obvious." Quoting *Tierney*'s language back to the reader does nothing to prove Brown's own claimed "direct" and "appreciable" injury in this case. Exposure to personal liability on a malpractice claim is a much more "direct" and "appreciable" injury than a generalized grievance about where local election officials are locating alternate absentee ballot sites.

4. Brown ultimately is reduced to arguing that the common definition of "aggrieved" as that term is used in civil, appellate, and administrative practice does not apply to the word "aggrieved" as used in Section 5.06(8) because of Justice Hagedorn's description of Section 5.06(1) in his lone *Teigen* concurrence as establishing "a legal right held by the voter to have their local election officials follow the law." (Brown Br. at 16-17, 21 (citing *Teigen*, 2020 WI 64, ¶164 (Hagedorn, J., concurring))). That significantly overreads Section 5.06(1). The statutory right it creates is limited to authorizing "any elector" to file a "sworn written complaint" with WEC for that agency to investigate and resolve. It does not extend to conferring standing on "any elector" to "ensur[e] that Wisconsin's elections laws are followed" in accord with his preferred interpretation of those laws (R. 3, ¶4), nor to conferring standing on "any elector" to bring suit to force local

election officials to "follow the law" as each elector purports to understand it, *Teigen*, 2022 WI 64, ¶164 (Hagedorn, J., concurring). A statutory right to initiate and participate in an investigation at the agency level does not equate to a right to a certain result and to appeal a contrary result.

Moreover, Justice Hagedorn emphasized in his *Teigen* concurrence that his "standing analysis applies only to challenges under Wis. Stat. § 227.40(1) to WEC rules and guidance documents." 2022 WI 64, ¶167 n.8. This is not such a challenge. 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. As DNC demonstrated in its opening brief, this would be a much greater and more disruptive intrusion into WEC's core enforcement and prosecutorial functions than the chapter 227 review of WEC guidance documents authorized in *Teigen*.[11]

Brown and his counsel offer no response to this point. Their silence speaks volumes. WEC's discretionary enforcement and prosecutorial decisions are not subject to judicial challenge by individual electors.

5. Finally, Brown has raised a new argument on appeal he never made below: that Section 5.06(2) "clearly contemplates" that ***any*** disappointed

[11] *See* DNC Br. at 25 & n.9 (citing, *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")).

complainant will be able to appeal to circuit court after WEC "disposes of" his complaint. (Brown Br. at 19-20) As a threshold matter, Brown has waived this argument, and the Court should not consider it. *See, e.g., State v. Huebner*, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727 ("Issues that are not preserved at the circuit court … generally will not be considered on appeal." (citation omitted)).

Even if the Court were to consider this new argument, however, it is meritless. Brown mischaracterizes what Section 5.06(2) says. It provides that "[n]o person who is authorized to file a complaint under [Section 5.06(1)] may commence an action or proceeding" on the same matter without first seeking relief under Section 5.06(1) and awaiting WEC's "disposition of the complaint." Brown insists this exhaustion requirement "clearly confer[s] standing upon complainants to seek further review of WEC decisions" after their complaints have been "disposed of"—"exactly what Brown did." (Brown Br. at 19-20)

Brown confuses the distinction between a necessary and sufficient condition. Section 5.06(2) imposes an exhaustion requirement prior to appealing, but it does not provide that exhaustion is sufficient to grant a right to appeal. The words "[n]o person … may commence an action or proceeding" without first exhausting administrative remedies do not mean that person will automatically have standing to appeal if he loses at the administrative level. That standing question is governed by Section 5.06(8), which restricts appellate standing to a complainant who is "aggrieved" by WEC's disposition.

C. Brown fails to respond to DNC's policy objections to his claims of generalized-grievance standing.

Brown and DNC agree on one thing: "Standing in Wisconsin is not a matter of jurisdiction, but rather of sound judicial policy." (Brown Br. at 14) Wisconsin courts nevertheless follow federal standing principles in determining who is sufficiently "aggrieved" to have standing to appeal an adverse judicial or administrative outcome. (DNC Br. at 16 & n.5) DNC's opening brief demonstrated that Brown's conception of standing would be extremely ***unsound*** judicial policy. It would be "a recipe for electoral and judicial chaos, confusion, and gridlock." (*Id.* at 19; *see also Teigen,* 2022 WI 64, ¶214 (A.W. Bradley, J., dissenting) ("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." (cleaned up)); *see also id.*, ¶215 (lead opinion's "approach to standing in this case … in effect renders the concept of standing entirely illusory"); *id.*, ¶167 & n.8 (Hagedorn, J., concurring)).

Brown ignores all of these "sound judicial policy" points. (Brown Br. at 14) Instead, he argues that if ***he*** does not have standing under Section 5.06(8) to appeal WEC's no-probable-cause determination, WEC will escape judicial supervision and be free to go rogue in administering Wisconsin's elections. (*See, e.g.*, Brown Br. at 14 (dismissal for lack of standing "would vitiate meaningful review of WEC's decisions and would subvert this Court's authority to interpret the law to that of an administrative agency"); *id.* at 15 (dismissal would "make[] this Court subservient

to an administrative agency"); *id.* at 16 (dismissal would make WEC "an unaccountable administrative agency allowed to administer elections in whatever manner WEC determines is best"); *id.* at 24 (dismissal for lack of standing "would eviscerate review of WEC decisions under Wis. Stat. § 5.06(8)" and render that provision "a nullity").)

These overreaching arguments fail across the board. If Brown's appeal is dismissed for lack of standing, WEC decisions under Section 5.06 will continue to be subject to appeal by complainants who ***are*** "aggrieved" by those decisions. Complainants who do not meet the "aggrieved" standing threshold can continue to request action from their local district attorneys and/or the Attorney General, who are authorized 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." Wis. Stat. § 5.07. WEC is subject to additional legislative and judicial oversight and remains subject to suit through various routes by candidates, political parties, other government actors (including the Wisconsin Legislature itself), voters, and other stakeholders. The notion that WEC would somehow become an "unaccountable administrative agency" if Kenneth Brown lacks statutory standing under Section 5.06(8) strains credulity.[12]

[12] Moreover, even if no one else could sue WEC over this issue if Brown lacks standing (which is not the case), "[t]he 'assumption' that if th[is] plaintiff[ ] lack[s] 'standing to sue, no one would have standing, is not a reason to find standing.'" *Alliance for Hippocratic Medicine*, 602 U.S. at 396 (citation omitted).

Sound judicial policy requires this Court to reject claims of generalized grievance standing no matter how labeled. The Court should reiterate and enforce the traditional Wisconsin standing rule that "'[c]ourts are not the proper forum to air generalized grievances about the administration of a government agency.'" *Teigen*, 2022 WI 64, ¶213 (A.W. Bradley, J., dissenting) (*quoting Cornwell*, 92 Wis. 2d at 62). This Court should reverse the circuit court's determination that Brown had standing to pursue an appeal of WEC's no-probable- cause determination, hold that generalized grievances (no matter how labeled) do not suffice for standing under Wisconsin law, and remand for a dismissal of this appeal in its entirety.

II. WEC properly concluded that the City of Racine's use of multiple alternate absentee ballot sites for the August 2022 primary election did not violate Section 6.855(1) and its prohibition against "afford[ing] an advantage to any political party."

Brown's position on appeal essentially asks the Court to ignore *One Wisconsin Institute*, 198 F. Supp. 3d 896, and the Legislature's subsequent adoption of Section 6.855(5), and to rule that alternate absentee ballot sites are unlawful unless they are located in the same ward as the clerk's office and are proximate to that office. Brown's atextual reading of Section 6.855 must be rejected, as it threatens to reinstate the unconstitutionally discriminatory one-location restriction struck down in *One Wisconsin Institute*. Moreover, Brown arrives at his reading of Section 6.855 through an interpretive process that violates every tenet of Wisconsin law under *State ex rel. Kalal v. Cir. Ct. for Dane Cnty*. 2004 WI 58, ¶44, 271 Wis. 2d 633, 681 N.W.2d 110. In fact, the governing statutory text, context, and statutory

history all confirm Clerk McMenamin's reading of Section 6.855 (as approved by WEC). That reading preclude clerks from selecting an alternate absentee ballot site if it would provide a "direct and unambiguous advantage" to a political party—like a political party's local office or a large-scale political rally or event—a manageable and easy-to-apply standard for clerks statewide. (R. 59 at 50; App. 031) This Court should uphold WEC's no-probable-cause determination and its conclusion that Brown failed to demonstrate that the City of Racine's use of multiple alternate absentee ballot sites "afford[ed] an advantage to any political party."

A. Brown fails to address, much less rebut, many of the flaws identified with his proffered statutory interpretation and statistical analysis.

DNC's opening brief explained some of the many flaws with Brown's interpretation and statistical analysis, further bolstering why the Court should reverse the circuit court's decision adopting Brown's read of Section 6.855(1) and reinstate WEC's no-probable-cause determination. (*See* DNC Br. at 36-40, outlining seven key objections.) Brown's response brief fails to address, much less rebut, many of those objections and underlying issues with his statutory interpretation. This was no mere oversight; Brown did not counter some of these points because there is ***no*** satisfactory response. Rather than repeat each of these arguments at length here, DNC will briefly note the uncontested arguments for the Court's consideration:

- Brown does not dispute DNC's demonstration that his statistical analysis relied on outdated (and therefore irrelevant) ward information, rendering

his analysis substantively meaningless and unhelpful to any determination of there was an "advantage" afforded to "any political party" for the August 2022 partisan primary election. While Brown noted in passing Clerk McMenamin's argument that "some ward lines had been redrawn between 2020 and 2022," he did not elaborate or say why this is a non-issue. (Brown Br. at 34) Also, although Brown insinuates that the ward changes were minor or cosmetic, that is inaccurate. As DNC explained, Brown's statistical analysis relied on ***36 wards*** but as of August 2022 there were actually ***49 wards*** (13 new wards were created) in the City of Racine. (DNC Br. at 37-38) The magnitude of the changes effected by redrawing and renumbering the City of Racine's wards cannot, and should not, be understated or overlooked for purposes of this analysis.

- Brown does not address DNC's demonstration that his reading of Section 6.855(1), requiring every alternate absentee ballot site to be located in the ward containing the clerk's office (which Brown claims has a "71% democratic makeup"), would simply perpetuate a political imbalance. (DNC Br. at 39-40) Instead, he continues to double down on his references to the ward containing the clerk's office as "neutral turf" and praising the "neutrality of the clerk's office." (Brown Br. at 37, 70)
- Brown does not address the nuances that his statistical analysis failed to consider and account for, including the fact that alternate absentee ballot sites were situated on the borders of wards. (DNC Br. at 39)
- Brown does not address which election results should be considered when conducting the ward-by-ward statistical analysis that he claims Section 6.855(1) requires. Is it the most recent election? Aggregated results from several elections? Or something else? And for which office? What about ticket-splitters? (*Id.* at 40)

- Brown does not address the fact that because this case involves a partisan primary election where parties were not competing against one another, it would have been ***impossible*** for the City of Racine to afford an advantage to any political party under the facts of this case. (*Id.*)

Brown's failure to address these arguments concedes them. *See*, *e.g.*, *Singler v. Zurich Am. Ins. Co.*, 2014 WI App 108, ¶28, 357 Wis. 2d 604, 620, 855 N.W.2d 707 ("Arguments not refuted are deemed conceded.").

B. Clerk McMenamin's common-sense interpretation of Section 6.855 (as approved by WEC) is grounded in the statutory text and statutory history and is easy to apply, while Brown's standard is untethered to the statutory text and fails to meaningfully engage with *One Wisconsin Institute* and its implications.

Clerk McMenamin's interpretation (which WEC approved), is tied to the statutory text and statutory history and is easy for clerks to apply. Under Clerk McMenamin's interpretation, the statute precludes designating alternate absentee ballot sites that provide a "direct and unambiguous advantage" to a political party—like a political party's local office or a large-scale political rally or event. (DNC Br. at 33) That interpretation is manageable—it does not require clerks to complete standardless statistical analyses; instead, it tasks them with exercising common sense and judgment, guided by the factors identified in *One Wisconsin Institute* and the purposes underlying Section 6.855(5). Clerk McMenamin's statutory interpretation also aligns with the deeply rooted and widely accepted discretion that clerks have consistently been afforded in making determinations about election administration in their own jurisdictions. (*Id.* at 34)

Indeed, this Court recently underscored the "discretion afforded to municipal clerks in running Wisconsin's elections at the local level." *Priorities USA*, 2024 WI 32, ¶26. There, this Court read another provision in Chapter Six of the Wisconsin Statutes as "entrust[ing] some discretion to municipal clerks in how best to conduct elections in their respective jurisdictions" and reiterated that "[s]uch discretion is consistent with the statutory scheme as a whole, under which Wisconsin's 1,850 municipal clerks serve the 'primary role' in running elections via our 'decentralized' system." *Id.*, ¶28 (quoted source omitted). So, too, here—clerks should be provided the discretion to make determinations about alternate absentee ballot sites when administering elections in the context of their specific communities, which they know best.

In stark contrast to the common-sense plain meaning interpretation that WEC approved, Brown's proposed standard would require this Court to add words to Section 6.855 that the Legislature did not include. Indeed, the phrase "partisan advantage" is not used. (DNC Br. at 35, 37) The Legislature chose to adopt the phrase "advantage[s] to any political party," which is in part a defined term (*see* DNC Br. at 39), as opposed to "partisan advantage," which is an undefined, amorphous phrase. Wisconsin case law is clear that the "legislature is presumed to 'carefully and precisely' choose statutory language to express a desired meaning." *Southport Commons, LLC v. DOT*, 2021 WI 52, ¶32, 397 Wis. 2d 362, 960 N.W.2d 17 (quoted source omitted). Brown accuses DNC of asking the Court to read Section 6.855 as a "literal prohibition on only providing an advantage to a political party

itself, rather than partisan advantage" (Brown Br. at 30), ***but that is exactly what the statutory language says***. DNC's interpretation of Section 6.855(1) is not "hyper-literal," it is simply applying the words the Legislature saw fit to adopt. Had the Legislature wanted to set the standard as "partisan advantage," it could have done so, but it did not. *See, e.g.*, *Milwaukee J. Sentinel v. City of Milwaukee*, 2012 WI 65, ¶36, 341 Wis. 2d 607, 815 N.W.2d 367.

Moreover, Brown's interpretation would require clerks to complete complicated statistical analyses using historical voting data (which, as described below, does not even prove an advantage to any political party anyway). Brown asserts that "alternate sites may not afford any political advantage ***that differs from the ward in which the Clerk's office is located***." (Brown Br. at 35 (emphasis added)) Brown appears to have pulled this language out of thin air, as it is wholly absent from the statutory text. As DNC explained in its opening brief, and as this Court noted in its order granting a stay pending appeal, there is no reference to "wards" in Section 6.855(1). (DNC Br. at 36; Stay Order at 4) There is also no justification for analyzing ward-by-ward data or using the clerk's office as a "baseline" for determining whether such an advantage exists. (DNC Br. at 36-37)[13]

[13] Brown had previously argued before WEC and the circuit court that alternate absentee ballot sites must be located in the ward in which the clerk's office is located ***or*** in a ward with "the ***same*** political makeup as the one in which the clerk's office is located." (R. 59 at 40; *see also* R. 86 at 13.) Now, on appeal, Brown appears to abandon his second proposal for siting alternate absentee ballots sites. Perhaps Brown is acknowledging that it would essentially be impossible to find two wards within a municipality that have the same exact political makeup or voting results, as DNC argued in its opening brief and the Court noted in its motion granting a stay pending appeal. (*See* DNC Br. at 41; *see also* Stay Order at 5 (Court describing Brown's "view" as potentially having "dramatic effects across the state as few municipalities, especially large cities, possess multiple

Brown insists that "there is no other way to determine whether a location would confer such an advantage without looking at voting data…and ward-level data is the only data within a municipality that can be broken out." (Brown Br. at 36) But Section 6.855 contemplates no such analysis of voting data when determining whether an advantage has been afforded to any political party. Moreover, just because wards are the smallest geographic units on which vote totals are reported does not mean that vote totals in wards cannot be easily aggregated and classified in any number of the ways Clerk McMenamin identified in her opening brief. (*See* McMenamin Br. at 16 (noting that vote totals in wards can be aggregated by aldermanic districts, county supervisor districts, Racine Unified School District voting districts, etc.).) In sum, Brown fails to meaningfully engage with the plain language of Section 6.855(1) and his interpretation leaves more questions than answers.

In addition, Brown's reading of the statute, requiring all alternate absentee ballot sites to essentially encircle City Hall, contradicts the statutory history underlying Section 6.855, as it would effectively reinstate a version of the one-location restriction, which was struck down in *One Wisconsin Institute.* (*See* DNC Br. at 28-32.) *One Wisconsin Institute* is plainly important to the statutory

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wards with political demographics that match those of the ward in which the clerk's office located.").) Or, perhaps, Brown realized that this reading of Section 6.855(1)'s prohibition on affording an "advantage to any political party" directly conflicted with his reading of the "as near as practicable" language in the same statute. That is, a ward with the same exact political makeup as the ward containing the clerk's office (if one existed) could be located on the opposite side of the City of Racine—miles from what Brown refers to as the "neutral turf that is the Clerk's office." (Brown Br. at 37)

interpretation questions presented in this case—as the circuit court repeatedly acknowledged in its decision and as this Court emphasized in its order granting a stay pending appeal. The circuit court noted that "[o]ne cannot decide the merits of this claim without considering the 2018 Amendment to Wis. Stat. 6.855…" (R. 99 at 14; App. 024; *see also id.* at 15 (noting that Brown's "reading is not consistent with long standing Wisconsin law, and would be contrary to Judge Peterson's decision in *One Wisconsin*, a decision that served as the catalyst for adding sub (5) by the legislature")) This Court, in granting a stay on the "advantage to any political party" issue, recognized that Brown's statutory interpretation (as accepted by the circuit court in overruling WEC's no-probable-cause determination) "is questionable because the statute does not reference wards at all, but rather 'sites,' and because this interpretation runs the risk of reinstating the requirement that municipalities could designate just one alternate absentee ballot location—a rule that was held unconstitutional in *One Wisconsin Institute*." (Stay Order at 4-5)

Perhaps realizing the obvious issues that plague his proffered statutory interpretation in light of *One Wisconsin Institute*, Brown defers until the very end of his brief to acknowledge the opinion and, in doing so, attempts to distinguish it by mischaracterizing its holdings. Brown frames *One Wisconsin Institute* as a decision simply about the need for there to be several alternate absentee ballot locations in light of potentially long lines and high demand for absentee voting in big cities. (*See, e.g.,* Brown Br. at 42 ("[I]f 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[.]"); *id.* at 42 ("Operating some 28 sites for the August 2022 primary election would have more than met the demand for in person absentee voting.").) Brown claims that is not an issue in this case since the City of Racine could have employed dozens of alternate absentee ballot sites in Ward 1, eradicating any concern about long lines. But *One Wisconsin Institute*'s holding was not just about a concern over voters waiting in long lines in larger communities—that is a grossly underdeveloped view of the case.

Instead, the *One Wisconsin Institute* Court made clear that "[w]ith only one location for in-person absentee voting, voters must ***travel farther*** than they would otherwise have to travel if municipalities could establish more locations" and "[h]aving only one location creates ***difficulties for voters who lack access to transportation***," particularly voters in larger cities. *One Wis. Inst.*, 198 F. Supp. 3d at 932, 959 (emphases added). Therefore, simply having several alternate absentee ballot sites encircling City Hall would not address the underlying reasons the *One Wisconsin Institute* Court found 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.

C. Brown's reliance on the *legislative* history of Section 6.855(1) violates foundational canons of statutory interpretation.

Instead of addressing the arguments raised in the appellants' opening briefs[14] or meaningfully engaging with the statutory text or statutory history, Brown, for the first time on appeal, discusses ***legislative*** history and asserts that "partisan advantage" is what the Legislature really meant when it said "advantage to any political party" in Section 6.855(1). (Brown Br. at 26-30) According to Brown, the first draft of Section 6.855 did not have any language about "as near as practicable" or "advantage[s] to a political party." But Senator Leibham, as part of a bipartisan study committee on election law convened by the Joint Legislative Council, insisted on amending the bill 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." (*Id.* at 28) The following language, now seen in Section 6.855, was eventually added: "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." That draft legislation was eventually introduced and unanimously adopted by both houses of the Legislature and signed by then-Governor Doyle. (*Id.* at 29) According to Brown,

[14] Brown continues to assert—incorrectly—that Clerk McMenamin did not respond to Brown's complaint or dispute the numbers or analysis he presented. (*See* Brown Br. at 38 (asserting that WEC did not "actually explain[] why it was ultimately persuaded by McMenamin's arguments or which arguments from Brown's report it considered compelling.").) As detailed in DNC's opening brief, WEC carefully and thoroughly addressed the issues Brown raised and found Clerk McMenamin's arguments more compelling. (DNC Br. at 35-36)

this ***legislative*** history—*i.e.,* one statement in the drafting records by Senator Leibham referring to partisan advantage—"makes clear" that the "intent" of Section 6.855 "was to ensure that any alternate absentee balloting location selected conferred no 'partisan' advantage to either party." (*Id.* at 30) There are several glaring issues with Brown's position.

First, Brown's reliance on legislative history is misplaced and improper given that the statutory text is unambiguous. The basic canons of statutory interpretation require that the Court begin its analysis by examining the language of the statute itself because it "assume[s] that the legislature's intent is expressed in the statutory language." *Kalal*, 2004 WI 58, ¶44. The Court gives statutory language "its common, ordinary, and accepted meaning" and, in addition to the statutory text, may consider a statute's context and structure, purpose, and ***statutory*** history so long as these elements "are ascertainable from the text and structure of the statute itself, rather than extrinsic sources, such as legislative history." *Id.*, ¶48 (emphasis added). Significantly, this Court has made it crystal clear that what matters when interpreting unambiguous language is not the pre-adoption ***legislative*** history—which is what Brown relies on here—but instead the post-adoption ***statutory*** history, which this Court has long held should be used when interpreting and applying statutes. "By analyzing the [statutory] changes the legislature has made over the course of several years, we may be assisted in arriving at the meaning of a statute." *Richards v. Badger Mut. Ins. Co.*, 2008 WI 52, ¶22, 309 Wis. 2d 541, 749 N.W.2d 581. If a statute's language, context and structure, purpose, and statutory history

yield a "plain, clear statutory meaning, then there is no ambiguity, and the statute is applied according to this ascertainment of its meaning," without consultation of extrinsic sources of information like legislative history. *Kalal*, 2004 WI 58, ¶46 (citation omitted). Wisconsin courts have cautioned that a statute's history is distinct from the "legislative history" of a statute, which was "never enacted" by the Legislature and includes "interpretive resources outside the statutory text." *Gallego v. Wal-Mart Stores, Inc.*, 2005 WI App 244, ¶13 n.5, 288 Wis. 2d 229, 707 N.W.2d 539; *Kalal*, 2004 WI 58, ¶50. Brown wholly disregards these canons, instead relying heavily on ***legislative*** history (which he erroneously characterizes as "statutory history" (Brown Br. at 32)), particularly Senator Leibham's statement, despite the unambiguous statutory language. That flagrant disregard of the canons of statutory interpretation should be rejected. *Kalal*, 2004 WI 58, ¶51.

Second, even if it were acceptable for Brown to rely on legislative history here in interpreting unambiguous statutory language (which it is not), the legislative history to which he points does not support his claim. Brown insists that 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." (Brown Br. at 36) That proposition is not only wholly unsupported by the legislative history Brown identifies—one statement in the drafting records by Senator Leibham referring to the phrase "partisan advantage," which never even

made it into the draft of a bill—but assumes an unfounded level of omniscience based on nothing other than Brown's (and his counsel's) own suppositions. Brown repeatedly opines on the Legislature's "fears" when he asserts that the "advantage[s] to any political party" language was added to address a concern that "allowing alternate in-person absentee voting sites would open the door to partisan gamesmanship… 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." (*Id.* at 69-70) These extrapolations based off one sentence of legislative history are wholly baseless and unsupported, and the Court should expressly reject them.

D. The historical ward-by-ward voting data that Brown relies on fail to support his case.

Even if the Court were to read Section 6.855(1) in the way that Brown suggests, he has not put forth the evidence he would need to show an advantage to any political party (nor could he). Brown asserts that reviewing the aggregate vote totals by ward for the 2020 presidential election shows that "the number of Democratic top-of-the-ticket voters outside of Ward 1 with an alternate site in their ward was 8,928" (equating to "41.8% of all Democratic top-of-the-ticket voters in Racine") and that the "number of Republican top-of-the-ticket voters in those same wards was 4,007" (equating to "38.1% of all Republican top-of-the-ticket voters in Racine)," meaning 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." (Brown Br. at 33) Brown seems to

imply that more Democratic votes were cast through alternate absentee ballot sites, but that is incorrect—it is not possible to determine the partisanship of early in-person absentee ballots, and Brown offers no data to support his point.

In the City of Racine, absentee ballots are tabulated centrally on Election Day.[15] Brown did not present any information about how many votes were actually cast in the alternate absentee ballot locations for the August 2022 partisan primary election, nor did he show that such records or breakdowns of in-person absentee voting versus voting absentee by mail ***even exist***. Similarly, Brown has not presented any information disclosing which electors voted at which alternate absentee ballots sites and the candidates for whom they voted, nor—again—has he demonstrated that such data ***even exist***.

Additionally, as BLOC noted (and Brown failed to address), Wisconsin does not require voters to register by party affiliation, so voters never formally disclose their party affiliation or membership at any point in the electoral process. (BLOC Br. at 20-21, nn.2-3) All that is known is the total number of votes on a ward-by-ward basis for particular candidates for office. Given that it is not possible to discern from public information the political party affiliation or membership of any individual voters, any alleged "political makeup" reflected by the City of Racine's historical ward-by-ward voting practices is not necessarily indicative of an advantage to "any political party." Because voters need not declare membership or

[15] *See* https://www.racinecounty.com/departments/county-clerk/election-information/election-results.

affiliation with a particular political party, they may vote in any primary contest they wish, regardless of any partisan political preferences or affiliations they have. So, for example, a voter who typically supports and votes for candidates fielded by the Republican Party may, if they wish, cross partisan-political lines and vote in a Democratic primary election for a Democratic candidate the voter feels will be a less viable candidate in the general election. In that instance, simply because the voter cast their ballot for a Democratic candidate does not confer an advantage on the Democratic Party; in fact, it is designed to do precisely the opposite. The same would hold true, of course, for a voter who typically supports and votes for Democratic Party candidates but who, in a primary election, chooses to vote for a Republican Party candidate they feel is more likely to lose to a Democratic Party candidate in the general election that follows.

Bottom line, Brown did not, and could not, show any demonstrable advantage to the Democratic Party by the siting of a specific alternate absentee ballot site. His argument is further belied by the fact that alternate absentee ballot sites are open to ***all*** eligible voters and, as addressed by DNC's opening brief, there are any number of reasons a voter could chose to use an alternate absentee ballot site— whether it is located in the ward in which they live, work, go to school, pick up their child from daycare, grocery shop, exercise, go the neighborhood library, etc. (*See* DNC Br. at 38.)

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Brown's atextual interpretation of Section 6.855 and his evident disdain for *One Wisconsin Institute*'s holdings underscore that this case is nothing more than an overt attempt to overturn *One Wisconsin sub silentio*, discourage early absentee voting, and disproportionately disadvantage voters of color in Wisconsin's larger municipalities.

CONCLUSION

For the reasons stated in this brief, as well as DNC's opening brief, this Court should reverse the circuit court's decision and reinstate WEC's determination because Brown lacks standing to appeal that determination. If the Court reaches the merits, it should conclude that WEC carefully and thoroughly addressed the parties' statutory arguments and should reinstate WEC's no-probable-cause determination.

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

DEMOCRATIC NATIONAL COMMITTEE'S RESPONSE TO CROSS-APPELLANT'S BRIEF

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ISSUE PRESENTED[16]

1. Whether the Wisconsin Elections Commission ("WEC") correctly concluded that the City of Racine did not violate Wisconsin Statutes Section 6.855(1)'s requirement that alternate absentee ballot sites be "as near as practicable to the office of the municipal clerk" in selecting such sites for the August 2022 primary election.

Answer below: The circuit court upheld WEC's determination and emphasized that Brown's "reading is not consistent with long standing Wisconsin law, and would be contrary to Judge Peterson's decision in *One Wisconsin Institute*, a decision that served as the catalyst for adding sub (5) by the legislature."

Cross-Respondent Democratic National Committee ("DNC") Answer: Yes.

INTRODUCTION

Taken to its logical extreme, Brown's position on the "as near as practicable" language in Section 6.855(1) would require all alternate absentee ballot sites to encircle or crowd around the Clerk's office, and the existence of any available site between the Clerk's office and any given designated alternate site would render a

[16] In accordance with this Court's May 3, 2024 order, and in the interest of avoiding duplication and repetitive briefing, DNC is only responding to the first issue raised in Brown's cross-appeal—the meaning of the "as near as practicable" language in Section 6.855(1) —and will incorporate and adopt by reference the arguments put forth by WEC as to the other two issues surrounding election administration.

DNC is omitting a statement on oral argument and publication from its response to Brown's cross-appeal, as that discussion was already included in DNC's opening brief.

designation unlawful. Such a reading must fail, and Brown's focus on Section 6.855(1) in isolation, to the exclusion of the statute as a whole, should be rejected.

As explained in DNC's opening brief and above in DNC's reply brief, the "near as practicable" language and prohibition on "afford[ing] an advantage to any political party" language in Section 6.855(1) cannot be read in a vacuum. Instead, the provisions must be considered in light of *One Wisconsin Institute*'s holding that the one-location restriction violated the First and Fourteenth Amendments and Section 2 of the VRA, as well as the subsequent adoption of Section 6.855(5), which allows communities to designate as many alternate absentee ballot sites as they deem appropriate. *See One Wis. Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 931-35, 956 (W.D. Wis. 2016), *vacated in relevant part as moot sub nom. Luft v. Evers*, 963 F.3d 665, 674 (7th Cir. 2020).

STATEMENT OF THE CASE

While DNC relies on the statement of the case provided in WEC's opening brief (DNC Br. at 12), for the Court's convenience, DNC provides here a brief summary of the procedural posture of the single issue in Brown's cross-appeal to which it is responding.

One of Brown's allegations in his Section 5.06(1) complaint to WEC was that Clerk McMenamin violated the requirement that alternate sites be "as near as practicable to the office of the municipal clerk" since some of the sites designated as eligible by the City of Racine were closer to the clerk's office than the sites that Clerk McMenamin selected. (R. 56 at 8) WEC found that Brown did not establish

that Clerk McMenamin violated the requirement that alternate sites be located "as near as practicable" to the clerk's office. (R. 59 at 55; App. 036) WEC noted that "[i]t is difficult to fit the 'near as practicable' requirement into a statutory mold that allows multiple sites, and thus we look to the other requirements placed upon those sites (*e.g.*, does not afford an advantage to any political party, broad and relatively equal distribution, etc.)" but ultimately found that the "record sufficiently supports Respondent's arguments that the site distribution is geographically equal." (*Id.*) 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.*, 198 F. Supp. 3d 896. (R. 99 at 14-15; App. 024-25)

STANDARD OF REVIEW

The standards of review for Brown's cross-appeal are the same as the standards of review for DNC's appeal. That is, this Court reviews questions of statutory interpretation de novo. *Greenwald Family Ltd. P'ship v. Mukwonago*, 2023 WI 53, ¶15, 408 Wis. 2d 143, 991 N.W.2d 356. Further, this Court is reviewing WEC's decision, not the circuit court's review of that decision. *Hilton ex rel. Pages Homeowners' Ass'n v. DNR*, 2006 WI 84, ¶15, 293 Wis. 2d 1, 717 N.W.2d 166.

ARGUMENT

I. Section 6.855(1)'s "as near as practicable" language cannot be reviewed in a vacuum—it must be analyzed in conjunction with *One Wisconsin Institute* and the subsequent adoption of Section 6.855(5).

There is no way to construe subsection (1) of Section 6.855 without acknowledging that the "as near as practicable" restriction is a vestige of the old statutory scheme (from 2005-2016) that promulgated the one-location restriction—that is, before the enactment of subsection (5). The "as near as practicable" language applied by its terms to the single site allowed under the original enactment. That practicability language now must be read ***in light of*** the enactment of subsection (5), which repealed the one-location restriction and authorized unlimited numbers of alternate absentee ballot sites.

In arguing that all alternate absentee ballot sites must be concentrated in immediate proximity to the Clerk's office, Brown asks this Court to mandate that Wisconsin revert to a scheme that essentially reinstates the one-location restriction, notwithstanding that a federal court held the rule unlawful and the Legislature deliberately overturned the one-location policy. The Court should reject Brown's request because allowing multiple alternate absentee ballot sites but requiring that they be lined up next to each other rather than dispersed throughout the community contravenes subsection (5) and would violate the U.S. Constitution and Voting Rights Act. This Court should not read subsection (1) to negate the policy determination enshrined in the subsequent adoption of subsection (5) because the Legislature could not reasonably have meant to give municipalities broad authority

with one hand while taking it away with the other. *See, e.g., State v. Matasek*, 2014 WI 27, ¶18, 353 Wis. 2d 601, 846 N.W.2d 811 (court "assume[s] that the legislature used all the words in a statute for a reason"). While the Legislature failed to amend the text of Section 6.855(1) when it adopted subsection (5), the plain language and statutory history of Section 6.855 leave no question that the one-location restriction no longer exists.

II. "Practicability" should be construed broadly and in accordance with the widely accepted discretion that clerks are afforded in making decentralized election administration decisions.

This Court has made clear that the phrase "as near as practicable" encompasses something more than simply a pure geographic standard resolved through the use of a ruler on a map. *Town of Ashwaubenon v. Public Serv. Comm'n*, 22 Wis. 2d 38, 50, 125 N.W.2d 647 (1963). The *Ashwaubenon* Court rejected the "erroneous concept of law that the statutory phrase 'as nearly as practicable' is solely a geographical standard." *Id.* Instead, it was "persuaded that the statutory standard contemplated an evaluation of many factors in determining" what is "practicable" under the circumstances of a particular case. *Id.* at 51.

The term "practicable" is not statutorily defined. Consequently, this Court should employ a common, ordinary definition and consult dictionary definitions of the term. *See, e.g., State ex rel. Kalal v. Cir. Ct. for Dane Cnty*. 2004 WI 58, ¶49, 271 Wis. 2d 633, 681 N.W.2d 110. Black's Law Dictionary defines "practicable" as "reasonably capable of being accomplished; feasible in a particular situation; capable of being used; usable." Practicable, Black's Law Dictionary (11th ed. 2019).

The Merriam Webster Dictionary similarly defines practicable as "capable of being put into practice or of being done or accomplished; capable of being used." Practicable, Merriam Webster Online Dictionary (2023), https://www.merriam-webster.com/dictionary/practicable. The Legislature's use of this broad, general term grants municipal clerks discretion in determining where alternate absentee balloting sites should be situated. In light of the broad definition of "practicable" and *One Wisconsin Institute*, a clerk must strike a balance—distributing alternate absentee ballot sites in a fair, even-handed manner throughout a municipality consistent with the *One Wisconsin Institute* decision's findings regarding ease of access, wait times, and potential racial disparities. As WEC noted in its decision below, this is no easy task: it is "difficult to fit the 'near as practicable' requirement into a statutory mold that allows multiple sites, and thus we look to the other requirements placed upon those sites (*e.g.*, does not afford an advantage to any political party, broad and relatively equal distribution, etc.)." (R. 59 at 55; App. 036)

III. Brown's interpretation of practicability is strained and lacks a limiting principle.

Before WEC and the circuit court, Brown argued that because there were "many alternatives that were in closer physical proximity to the Clerk's office than many of the sites selected," Clerk McMenamin's selection of the sites "did not comport with the law." (R. 86 at 8) On appeal, Brown slightly updates his argument. He no longer asserts 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 but

instead argues that it must be the "primary" factor." (Brown Br. at 68) According to Brown, if "strictly applying geography is impracticable," it is acceptable for clerks to use other alternate absentee ballot sites. (*Id.*)

In Brown's estimation, there "may very well be reasons why a particular site is not 'practicable,'" including if it has insufficient capacity, is not ADA-compliant, or is in the process of renovation. (*Id.*) He phrases these determinations about the practicability of a site as the "common sense" decisions seemingly within the discretion of a municipal clerk. While Brown wants to outline a limited subset of situations where a clerk could deem a site "impracticable" in the exercise of their discretion, he seeks to read into the statute a limit to that discretion but provides no real limiting principle and often contradicts himself. For example, in one breath he condones some discretion to clerks, but in the next he asserts that such discretion "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." (*Id.* at 69) Brown's position is non-sensical—either clerks have discretion in making these "practicability" determinations (as WEC concluded), or they do not. The latter interpretation is in line with the broad, general definition of "practicable," and the Court should affirm WEC's understanding of that language.

CONCLUSION

For the reasons stated above, this Court should uphold WEC's no-probable-cause determination as it relates to the City of Racine's use of alternate absentee ballot sites for the August 2022 primary election.

Dated: July 23, 2024.

Respectfully submitted,

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**Admitted pro hac vice by the circuit court*

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

I hereby certify that this combined brief conforms to the rules contained in section 809.19(8) (b), (bm), and (c) for a brief, as modified by the Court's order dated May 3, 2024. The length of this combined brief is 12,312 words.

Dated July 23, 2024.

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