STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2024AP0232

KENNETH BROWN,

Plaintiff -Respondent-Cross-Appellant,

v.

WISCONSIN ELECTIONS COMMISSION,

Defendant-Co-Appellant-Cross-Respondent,

TARA McMENAMIN,

Defendant-Appellant-Cross-Respondent,

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

Intervenors-Co-Appellants-Cross-Respondents.

ON APPEAL FROM A FINAL ORDER OF THE RACINE COUNTY CIRCUIT COURT, THE HONORABLE EUGENE A. GASIORKEWICZ, PRESIDING

COMBINED BRIEF OF APPELLANT-CROSS-RESPONDENT WISCONSIN ELECTIONS COMMISSION

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INTRODUCTION

Brown lacks standing to bring this judicial-review proceeding challenging the Commission's decision not to issue a noncompliance order to the Racine Clerk. His arguments to the contrary ignore fundamental principles of standing, especially the distinction between the basic requirements of injury, causation, and redressability—necessary to invoke the "judicial power" in *every case*—and the requirement of "aggrievement" necessary to support statutory standing, as this Court explained in *Friends of the Black River Forest v. DNR*.

If the Court agrees that Brown lacks standing, it need not address the other issues raised in either the appeal or cross-appeal.

If this Court concludes that Brown had standing, the Court should reverse the circuit court on the two issues raised by the Commission and other Appellants-Petitioners: Racine's location of alternate in-person absentee ballot sites and Racine's use of a mobile voting unit.

As to alternate sites, Brown's arguments ignore the statutory text. It says nothing about prohibiting "partisan advantage" and instead prohibits sites that advantage a "political party." And Brown's invented, ward-based methodology for assessing "partisan advantage" further departs from the statute. Brown's view is not only an unreasonable reading of the statute, but it would also reinvigorate the unconstitutional "one-location rule" that the federal courts rejected in *One Wisconsin* and *Luft*.

As to the mobile voting unit, Brown's arguments are again unmoored from text. The Commission concluded that the mobile voting unit did not run afoul of any of the requirements for an in-person alternate absentee voting site, and Brown's suggestions to add new requirements (like requiring clerks to store ballots at such locations rather than

the clerk's office) are not grounded in the statutes. Below, the circuit court rejected the mobile voting unit in part because it was not a service explicitly permitted in the statutes. But that approach does not pass muster under this Court's recent decision in *Priorities USA v. WEC*.

ARGUMENT

I. Brown lacks standing for two separate reasons, neither of which he adequately addresses.

The Commission's opening brief explained two separate reasons why Brown lacks standing: (1) his generalized grievances about election administration do not establish a direct, personal injury, and (2) he fails to establish that he is "aggrieved" for purposes of judicial review under Wis. Stat. § 5.06(8); i.e., that he has suffered an injury to an interest protected by the relevant substantive statute, here Wis. Stat. § 6.855. (Commission Opening Br. 27–39.)

Brown addresses only one of these arguments in his response, namely, his statutory standing under Wis. Stat. § 5.06(8). His arguments on that point fail to establish that he is "aggrieved" within the meaning of Wis. Stat. § 5.06(8) and this Court's recent decision in *Friends of Black River Forest v. Kohler Co.*, 2022 WI 52, ¶¶ 17–31, 402 Wis. 2d 587, 977 N.W.2d 342.

Moreover, Brown's statutory focus ignores the threshold standing analysis. Separate from and preliminary to any analysis of whether a claimed injury comes within Wis. Stat. § 5.06(8), the question is whether Brown claims any injury *at all*, a requirement that applies in *all* cases. That threshold question pertains to the fundamental standing inquiry—i.e., the power of courts to decide a case—and asks whether the plaintiff suffered a direct, personal injury, caused by defendants, and redressable by application of the judicial power. (*See* Commission Opening Br. 27–30,

33–34); *see also State ex rel. First Nat. Bank of Wis. Rapids v. M & I Peoples Bank of Coloma*, 95 Wis. 2d 303, 307–09, 290 N.W.2d 321 (1980); *Hollingsworth v. Perry*, 570 U.S. 693, 704–05 (2013).[1]

Brown lacks standing for this threshold reason, as well as his failure to explain how he is "aggrieved" within the meaning of this Court's framework in *Friends*. The following addresses his arguments within this two-step framework.

A. Brown lacks standing because he alleges no direct, personal injury.

In all Brown's arguments about the import of Wis. Stat. § 5.06 in the standing analysis (*see* Brown Resp. Br. 15–24), nowhere is there any explanation of any direct, personal injury. All he can muster is having "witnessed" elections officials allegedly violating the law (Brown Resp. Br. 10, 15, 22–23), but he does not explain how those observations injured him. His observations and complaints about election officials allegedly violating the law are nothing more than generalized grievances about government administration.

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[1] This Court recently reaffirmed that "the separation of powers framework undergirding the Wisconsin Constitution reflects the principles embodied in the United States Constitution," and that federal precedents "inform our understanding of the separation of powers under the Wisconsin Constitution." *Evers v. Marklein*, 2024 WI 31, ¶ 9 n.8 (quoting *Gabler v. Crime Victims Rts. Bd.*, 2017 WI 67, ¶ 11, 376 Wis. 2d 147, 897 N.W.2d 384); *see also Serv. Emps. Int'l Union, Loc. 1 v. Vos*, 2020 WI 67, ¶ 31, 393 Wis. 2d 38, 946 N.W.2d 35 ("*SEIU*"). Because the doctrine of standing is "built on a single basic idea—the idea of separation of powers," *Allen v. Wright*, 468 U.S. 737, 752 (1984), federal precedents on standing and the separation of powers are instructive here.

1. Wis. Stat. § 5.06 does not afford voters standing to obtain judicial review anytime the Commission declines to adopt the voter's beliefs about election laws.

At the threshold, it is necessary to address a mistaken premise within Brown's standing arguments, which is that the Legislature, by enacting Wis. Stat. § 5.06, has created a "statutory right" and thereby *granted standing* to come to court whenever a voter believes a local election official has violated the law. (Brown Resp. Br. 16–17.) For example, Brown asserts that Wis. Stat. § 5.06 "gives voters the right to complain to WEC if local election officials do not follow the [law]" and "the right to have WEC's decision reviewed by the courts." (Brown Resp. Br. 16.)

Brown conflates the two strands of standing. To be sure, the Legislature can grant statutory causes of action, and has done so in Wis. Stat. § 5.06(8), allowing persons "aggrieved" by a Commission order under Wis. Stat. § 5.06(6) to challenge that order in Court.

But "[f]or standing purposes . . . an important difference exists between (i) a plaintiff 's statutory cause of action to sue a defendant over the defendant's violation of . . . law, and (ii) a plaintiff's suffering concrete harm because of [an alleged violation of law]." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 426–27 (2021). The Legislature "may enact legal prohibitions and obligations," and "may create causes of action for plaintiffs to sue defendants who violate those legal prohibitions or obligations." *Id.* at 427. But "an injury in law is not an injury in fact," and "[o]nly those plaintiffs who have been concretely harmed" with an injury-in-fact have standing to seek redress in court. *Id.*; *see also Pierre v. Midland Credit Mgmt., Inc.*, 29 F.4th 934, 938 (7th Cir. 2022), *cert. denied*, 143 S. Ct. 775 (2023). In other words, without an injury-in-fact, no amount of legislation could allow a plaintiff to come

to Court to complain about alleged violation of laws, since the injury requirement relates directly to the "proper, and properly limited" exercise of the judicial power, *Hollingsworth*, 570 U.S. at 715 (citation omitted), which is not subject to legislative modification. *See* Wis. Const. art. VII, § 2.

Here, this is a non-issue because the statute creating the statutory cause of action, Wis. Stat. § 5.06(8), requires aggrievement, incorporating an injury requirement to establish statutory standing. *See Friends*, 402 Wis. 2d 587, ¶ 21. Brown's premise that that statute alone could authorize his complaint—with no showing of actual injury—is incorrect.

2. Standing does not rest on judicial policy or zealous advocacy.

Brown highlights language from some decisions that have characterized standing in Wisconsin as a matter of "judicial policy," focused primarily on ensuring that cases are "zealously argued." (Brown Resp. Br. 14–15 (*McConkey v. Van Hollen*, 2010 WI 57, ¶¶ 15–16, 326 Wis. 2d 1, 783 N.W.2d 855).) The weight of authority and sound reasoning does not support Brown's conception of standing.

To the contrary, both Wisconsin and federal precedents make clear that the doctrine serves a much more fundamental purpose than ensuring zealous advocacy on both sides of a case. "No aspect of the judicial power is more fundamental than the judiciary's exclusive responsibility to exercise judgment in cases and controversies." *Gabler*, 376 Wis. 2d 147, ¶ 37. And the Wisconsin Constitution's "grant of judicial power therefore encompasses 'the ultimate adjudicative authority of courts to finally decide rights and responsibilities as between individuals.'" *Id.* (quoting *State v. Williams*, 2012 WI 59, ¶ 36, 341 Wis. 2d 191, 814 N.W.2d 460)); *see also, e.g.*, *First Nat. Bank*, 95 Wis. 2d at 307–09; *Feehan v. WEC*, 506 F. Supp. 3d 596, 608–09 (E.D. Wis. 2020); *Wisconsin Voters All.*

v. Pence, 514 F. Supp. 3d 117, 120 (D.D.C. 2021); *Hollingsworth v. Perry*, 570 U.S. at 703–06; *Cornwell Pers. Assocs., Ltd. v. DILHR*, 92 Wis. 2d 53, 62, 284 N.W.2d 706 (Ct. App. 1979).[2] Properly applying the standing doctrine ensures that parties come to court with actual injuries, thereby confining the judicial role to its "proper constitutional sphere." *Hollingsworth*, 570 U.S. at 704–05 (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013)).

Thus, properly applied, the standing doctrine is not addressed by considerations like promoting "zealous advocacy" or as a matter of mere "judicial policy," as Brown urges. (*See* Brown Resp. Br. 14); *Hollingsworth*, 570 U.S. at 705–06 (rejecting argument that the standing analysis leaves room for factors like "[c]onvenience and efficiency"); *see also First Nat. Bank*, 95 Wis. 2d at 308 n.8 (describing "judicial policy" underlying standing analysis as analogous to federal courts' jurisdictional analysis).

3. Brown identifies no direct, personal injury and instead relies on generalized grievances about witnessing alleged misadministration of government.

The clearest statement of what Brown perceives to be his injury is that he "witnessed in-person absentee voting

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[2] Recent precedents provide additional support. *See Murthy v. Missouri*, 144 S. Ct. 1972, 1985–97 (2024); *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 379–80 (2024); *see also Planned Parenthood of Wisconsin v. Urmanski*, No. 2024AP330, Order on Motion to Intervene 4 (July 2, 2024) (Hagedorn, J., concurring) (recognizing that standing "is not a mere technicality," and is instead "the foundational principle that those who seek to invoke the court's power to remedy a wrong must face a harm which can be remedied by the exercise of the judicial power.") (quoting *Teigen v. WEC*, 2022 WI 64, ¶ 160, 403 Wis. 2d 607, 976 N.W.2d 519 (Hagedorn, J., concurring)).

which he believed violated state law." (Brown Resp. Br. 7; *see also id.* 15, 22–23.) Nowhere in his brief does Brown provide any authority for the proposition that "witnessing" alleged violations of law support an injury sufficient to confer standing. To the contrary, "witnessing" unlawful activity is a paradigmatic "generalized grievance," consistently rejected as a basis for standing. *See Hollingsworth*, 570 U.S. at 706; *Feehan*, 506 F. Supp. 3d at 608; *Cornwell Pers. Assocs., Ltd.*, 92 Wis. 2d at 62.

In his attempt to overcome this defect, Brown cites *Teigen v. WEC*, 2022 WI 64, 403 Wis. 2d 607, 976 N.W.2d 519, *overruled by Priorities USA v. WEC*, 2024 WI 32. Brown's reliance on *Teigen* is misplaced and, in any event, his statement of the Court's holding is patently inaccurate.

Brown's reliance is misplaced because any continuing validity of *Teigen* is, at best, unclear following this Court's decision in *Priorities USA v. WEC*, 2024 WI 32, ¶ 49. In that case, after explaining that the substances of the *Teigen* majority's analysis "was unsound in principle," the Court "overrule[d] it." *Id.* If this Court meant for the *Teigen* plurality opinion to retain any precedential value, it did not say so. *Cf. Blum v. 1st Auto & Cas. Ins. Co.*, 2010 WI 78, ¶ 56, 326 Wis. 2d 729, 786 N.W.2d 78 (holding that where this Court "expressly overrule[s]" court of appeals decision, that decision "no longer retains any precedential value, unless this court expressly states that it is leaving portions of the court of appeals decision intact").

Assuming any aspects of *Teigen* remain after *Priorities*, and as the Commission explained previously, the separate opinions in *Teigen* stated no controlling rule on standing. (Commission Opening Br. 32–33.) And the plurality opinion in *Teigen* cannot do the work Brown asks of it, even on its own terms. Brown cites the plurality opinion's discussion of a quotation from a one-judge concurrence, but in the very next

sentence, the lead opinion *rejected* that theory of standing. *See Teigen*, 403 Wis. 2d 607, ¶ 34; (Brown Resp. Br. 16–17).

Brown also tries to distinguish his generalized grievances from those rejected in *Feehan*, arguing that that case involved "constitutional claims and a broad challenge to a statewide election result," whereas this one "involves claims against a local election official, and allegations of conduct personally witnessed by Brown." (Brown Resp. Br. 22.)

Brown offers no explanation why his generalized grievances are judicially cognizable merely because he shares them only with all Racine voters, instead of all statewide voters. Nothing in *Feehan* or any other vote dilution case supports his view. *See* 506 F. Supp. 3d at 608–09; *see also Wood v. Raffensperger*, 981 F.3d 1307, 1314 (11th Cir. 2020); *Bognet v. Sec'y Commonwealth of Pennsylvania*, 980 F.3d 336, 354–55 (3d Cir. 2020) (collecting cases), *cert. granted, judgment vacated sub nom. Bognet v. Degraffenreid*, 141 S. Ct. 2508 (2021); *Wisconsin Voters All.*, 514 F. Supp. 3d at 120.

Brown also tries to distinguish *Feehan* on the ground that the problem there was simply that the plaintiff "had failed to exhaust his administrative remedies under Wis. Stat. § 5.06." (Brown Resp. Br. 22.) But the plaintiff's failure to exhaust in *Feehan* was an issue independent of his lack of standing, and one which the court did not address after it concluded that the plaintiff lacked standing. *See Feehan*, 506 F. Supp. 3d at 617–18.[3]

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[3] Brown asserts that "the state" raised the exhaustion argument in *Feehan* (Brown Resp. Br. 22.) As the court in *Feehan* noted, the exhaustion argument was raised by Governor Evers, not the Commission. *Feehan*, 506 F. Supp. 3d 596, 617–18 (E.D. Wis. 2020); *see also Feehan v. WEC*, No. 20-cv-1771 (E.D. Wis.), (Dkt. 54 (Commission's brief in support of motion to dismiss).)

In sum, although Brown asserts that he "plainly has a cognizable interest" that was "directly harmed by McMenamin's actions" (Brown Resp. Br. 23), he never tells us what that direct harm is. Without this, Brown lacks standing and his complaint should have been dismissed on this basis.

B. Brown also is not "aggrieved" as necessary to support statutory standing under Wis. Stat. § 5.06(8).

Separate from his lack of injury—which is independently fatal—Brown also fails to explain why he is "aggrieved" within the meaning of Wis. Stat. § 5.06(8) and this Court's decision in *Friends of Black River Forest v. Kohler Co.*, 402 Wis. 2d 587, ¶¶ 25–31. Under that analysis, Brown was required to show that the statute he claims Clerk McMenamin violated, Wis. Stat. § 6.855, "protects, recognizes, or regulates" Brown's interests. *Id.* ¶¶ 25, 28.

Brown does not address how Wis. Stat. § 6.855 protects, recognizes, or regulates his interests. Instead, he rests exclusively on the procedures in Wis. Stat. § 5.06, but those arguments ignore this Court's on-point decision in *Friends*, ignore statutory text and context, and ultimately fail to establish how he is "aggrieved" as necessary to support his statutory standing.

1. Brown does not address how Wis. Stat. § 6.855 protects, recognizes, or regulates any of his interests.

As the Commission explained, in light of this Court's decision in *Friends*, Wis. Stat. § 6.855 is central to Brown's assertion of statutory standing, because that statute forms the "gravamen" of his complaint. (*See* Commission Opening Br. 35–36); *see also Friends*, 402 Wis. 2d 587, ¶¶ 25, 28. In *Friends*, this Court explained that the focus of the statutory-standing inquiry is the substantive statutes that

the complainant claims were violated, not the procedural statute under which the proceeding was filed—there, the Administrative Procedure Act, Wis. Stat. ch. 227. *See Friends*, 402 Wis. 2d 587, ¶ 28. The Court made this clear in a detailed discussion of multiple statutes and administrative rules relating to state parks and public lands, inquiring whether those substantive statutes "protect, recognize, or regulate" the challengers' interests. *See id.* ¶¶ 32–45.

Despite that analysis in *Friends*, and despite Wis. Stat. § 6.855 forming the basis for all of his claims against Clerk McMenamin, Brown cites the statute once throughout his standing argument, and only to state that his complaint "alleged five separate reasons why he believed this activity violated Wis. Stat. § 6.855." (Brown Resp. Br. 15.) Nowhere does he explain why that statute protects, recognizes, or regulates his interests, or address the Commission's arguments squarely raising the issue. (*See* Commission Opening Br. 30–32, 35–36.)

"An argument to which no response is made may be deemed conceded for purposes of appeal." *Hoffman v. Econ. Preferred Ins. Co.*, 2000 WI App 22, ¶ 9, 232 Wis. 2d 53, 606 N.W.2d 590 (Ct. App. 1999); *see also State v. Mercado*, 2021 WI 2, ¶ 38 n.13, 395 Wis. 2d 296, 953 N.W.2d 337. Because Brown does not explain why Wis. Stat. § 6.855 protects his interests, much less how any statutorily protected interests are injured, Brown may be held to have conceded this argument.

2. Brown provides no reason to depart from *Friends*.

Brown also claims that *Friends* is "irrelevant" because it addressed the meaning of "aggrieved" under a different statute governing judicial review of agency decisions. (Brown Resp. Br. 17.) He argues that while the general statute governing judicial review of agency decisions at issue in

Friends, Wis. Stat. § 227.53(1), speaks broadly of any "person aggrieved," the statute at issue here applies to a more limited universe consisting of "[a]ny election official or complainant who is aggrieved," Wis. Stat. § 5.06. (Brown Resp. Br. 14.)

While there is no question that the two statutes apply to different groups, Brown provides no good reason why the term "aggrieved" should be interpreted differently across the two statutes. Common sense and straightforward principles of statutory interpretation are to the contrary, recognizing that when lawmakers use the same term "in two different statutes addressing similar topics, [courts] presume that the legislature intended them to have the same meaning in both statutes." *In re Visitation of Z.E.R.*, 225 Wis. 2d 628, 639, 593 N.W.2d 840 (Ct. App. 1999); *accord State v. Mason*, 2018 WI App 57, ¶ 28, 384 Wis. 2d 111, 918 N.W.2d 78. Given that the statute at issue in *Friends* and Wis. Stat. § 5.06 are both statutes providing for judicial review of agency decisions, and that both require a complainant to show that he is "aggrieved" as a prerequisite to bringing an action for judicial review, this Court's analysis in *Friends* applies equally here. *See Friends*, 402 Wis. 2d 587, ¶ 28.

Brown claims that he has standing even in light of *Friends* because "the text of Wis. Stat. § 5.06 . . . explicitly gives electors in Wisconsin 'a statutory right to have local election officials in the areas where they live comply with election laws.'" (Brown Resp. Br. 21 (quoting *Teigen*, 403 Wis. 2d 607, ¶¶ 34, 164).)

Brown's focus on Wis. Stat. § 5.06(8) is directly contrary to *Friends*. (Brown Resp. Br. 20–21.) That procedural statute provides the statutory authorization to bring complaints and seek judicial review, analogous to the role the APA played in *Friends*. 402 Wis. 2d 587, ¶¶ 23, 28. But just as the APA was not the gravamen of the complaint in *Friends*, nor is the procedural statute here. Given this misplaced focus, Brown's statutory-standing analysis cannot succeed.

3. Brown misconstrues multiple components of Wis. Stat. § 5.06.

In his attempt to focus the standing analysis on Wis. Stat. § 5.06, Brown misconstrues multiple provisions of that statute.

For example, Brown asserts that a voter "who brings a complaint under Wis. Stat. § 5.06(1) is *necessarily* aggrieved . . . whenever WEC adversely disposes of their complaint." (Brown Resp. Br. 18.) Brown's interpretation would make the voter's belief the controlling consideration, effectively reading aggrievement out of the statute and authorizing a voter to bring his beliefs to court anytime the Commission declines to adopt those beliefs. An example illustrates the unreasonableness of Brown's interpretation.

Imagine a voter who mistakenly believes that state law requires election officials to throw away all ballots that include votes for a particular party. While this belief is patently inaccurate, there is no doubt that that belief would allow the voter to file a complaint with the Commission under Wis. Stat. § 5.06(1).

But under Brown's view, if the Commission declines to issue a noncompliance order to a clerk who is refusing to throw away ballots, that mistaken voter "is necessarily aggrieved" for purposes of Wis. Stat. § 5.06(8) by the Commission's decision not to issue an order (Brown Resp. Br. 18) and would have an absolute right to raise that belief in court and challenge the Commission's decision not to pursue that complaint. This example illustrates that the Legislature had good reason to use different terms at the complaint and judicial review stages, ensuring that not every belief would give rise to an action for judicial review.

Brown next argues that statutory context supports his argument that he has standing under Wis. Stat. § 5.06(8). He asserts that Wis. Stat. § 5.06(2)'s exhaustion requirement proves that, after a voter files a complaint and the Commission disposes of that complaint (or fails to timely act), a voter can necessarily pursue an action for judicial review under Wis. Stat. § 5.06(8). (Brown Resp. Br. 19.) Brown's argument is flawed for multiple reasons.

For one, exhausting administrative remedies is never sufficient, standing alone, to establish standing. *See Fox v. DHSS*, 112 Wis. 2d 514, 526, 334 N.W.2d 532 (1983).

Second, properly read, the exhaustion procedure most reasonably refers to a requirement for bringing a *separate* action or proceeding directly against an election official (such as an action for mandamus or declaratory judgment),[4] *see, e.g.*, *State ex rel. Zignego v. WEC*, 2021 WI 32, ¶¶ 8–9, 396 Wis. 2d 391, 957 N.W.2d 208, rather than a proceeding for judicial review against the Commission.

Third and relatedly, the judicial review provision includes its own prerequisite: "an order under sub. (6)." Wis. Stat. § 5.06(8). A proceeding for judicial review under Wis. Stat. § 5.06(8) requires more than that the Commission "disposed" of a complaint (as required to exhaust); it requires a particular disposition, namely an order that aggrieves someone. This further supports that Wis. Stat. § 5.06(2)'s

[4] The court of appeals in *Kuechmann v. Sch. Dist. of La Crosse*, 170 Wis. 2d 218, 225, 487 N.W.2d 639 (Ct. App. 1992), concluded that such a separate proceeding was inappropriate. However, the court reached that conclusion only after holding that the challenge was premature and that the complaint was barred on that basis. *See id.* at 223. Any statement in *Kuechmann* suggesting that a separate "action or proceeding" is categorically unavailable is thus dicta, in addition to being contrary to the text of Wis. Stat. § 5.06(2) & (8).

exhaustion requirement applies to "actions or proceedings" other than those for judicial review under Wis. Stat. § 5.06(8).

Wisconsin Stat. § 5.06(2)'s exhaustion requirement does not support Brown's standing under sub. (8).

4. Requiring Brown to have standing will not render Wis. Stat. § 5.06(8) a "nullity," "subvert this Court's authority," or "eviscerate review" of Commission decisions.

Brown's final arguments are variations on the theme that applying the standing requirements will result in a litany of unfavorable results. For example, he claims that reading Wis. Stat. § 5.06(8) as denying him statutory standing in this case would render the statute "a nullity," suggesting he *must* be able to challenge the Commission's decision here because otherwise no one could challenge this decision or others like it.[5] (Brown Resp. Br. 24.)

For one thing, holding that Brown lacks standing will do nothing to alter the statute, much less render it a "nullity."

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[5] Brown also asserts that if he doesn't have standing here, an election official also would not have standing to seek judicial review "because election officials have no cognizable interest in administering elections in an illegal manner." (Brown Resp. Br. 24.) The argument is a distraction and, in any event, incorrect.

It's a distraction because this case does not involve an election official's appeal from a Commission decision, so this Court has no need to decide whether an unidentified election official would have standing in a nonexistent case.

More to the point, it's incorrect because it again does not grapple with what it means to be "aggrieved." An election official who is issued a direct order to act or not act in some way would almost certainly be aggrieved within the meaning of the statute. *See* Wis. Stat. § 5.06(6). In contrast, a voter who simply dislikes how his elected officials are administering elections, but is subject to no such order, suffers no such aggrievement.

Any party "aggrieved by an order under sub. (6)" will still be able to obtain judicial review of such an order. Wis. Stat. § 5.06(8). Brown just isn't such a party.

And even if Brown were correct that no one would have standing, that's no reason to dispense with the standing requirement. Courts consistently reject this type of argument. *See, e.g.*, *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 420 (2013). "The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing." *Id.* (quoting *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 489 (1982)).

He also warns that if this Court holds that he lacks standing, it "would eviscerate review of WEC's decisions under Wis. Stat. § 5.06 and subvert this Court's authority to that of an administrative agency, which would raise significant constitutional issues." (Brown Resp. Br. 24.) This policy argument effectively asks this Court to dispense with standing in any case involving an administrative agency. But policy preferences are an insufficient basis to dispense with such a fundamental requirement as standing. *See Clapper*, 568 U.S. at 420.

At bottom, it is Brown's suggestion that the Court ignore the requirement of standing, not current standing doctrine, that would perpetuate "significant constitutional issues" (Brown Resp. Br. 24): namely, the problem of courts being asked to operate outside the traditional judicial role of providing redress to injured parties. Standing doctrine serves to avoid problems associated with courts being asked to step outside the traditional "judicial" role. *See Hollingsworth*, 570 U.S. at 705–06; *United States v. Richardson*, 418 U.S. 166, 177–79 (1974); *Clapper*, 568 U.S. at 408–09, 420–21; *see also Gabler*, 376 Wis. 2d 147, ¶ 37. Respecting these boundaries will not "eviscerate" judicial review of the Commission's decisions. Rather, it will ensure that parties come to court

with actual injuries, and that courts are not required to opine on every voter's belief about how elections should be administered.

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With no injury and no showing he is "aggrieved," Brown lacks standing and his complaint should have been dismissed on that basis.

II. The Commission reasonably declined to issue Clerk McMenamin a noncompliance order regarding alleged violations of Wis. Stat. § 6.855.

If the Court concludes that Brown had standing to challenge the Commission's decision not to issue Clerk McMenamin a noncompliance order, this Court should reverse the circuit court's decision, specifically as to Brown's claims regarding alternate in-person absentee ballot sites and the use of a mobile voting unit.

A. The Commission reasonably declined to issue a noncompliance order against Clerk McMenamin based on her choices of alternate in-person absentee voting sites.

Under the statute governing alternate absentee in-person voting sites, Wis. Stat. § 6.855, the Commission reasonably declined to issue the Clerk a noncompliance order for Racine's designation of sites. Brown's response relies on the premise that the Legislature meant something far different from what it enacted into law. But nothing suggests that a departure from plain language is warranted here.

Brown suggests that the statute is not talking about a site that advantages a "political party," but instead one conferring a "partisan advantage," a broader and more nebulous term. His statutory reading veers from the text in three fundamental ways.

First, he replaces "political party" with "partisan advantage," a more general term with no necessary connection to political parties as entities. Second, rather than treating "site" as the specific location where voting is held, he interprets it as a neighborhood, proposing that clerks must evaluate the historical voting patterns in the voting ward where a site happens to be located—a concept that appears nowhere in the statutes. And third, he builds on his invented theory about wards to announce that those historical voting patterns must match the historical voting patterns in the ward where the clerk's office is located. "This argument disregards nearly every foundational principle of statutory interpretation." *Zignego*, 396 Wis. 2d 391, ¶ 27.

1. The Commission reasonably interpreted the plain language of Wis. Stat. § 6.855(1), including relevant surrounding language.

Wisconsin Stat. § 6.855(1) prohibits local election officials from designating an alternate absentee ballot site "that affords an advantage to any political party." The Commission reasonably determined that the statute prohibits conducting in-person absentee voting at a site that advantages a "political party," a term defined in the election statutes as "[a] state committee under whose name candidates appear on a ballot . . . and other affiliated committees authorized to operate under the same name," and any such committee "that makes and accepts contributions and makes disbursements to support or oppose a candidate for state or local office or to support or oppose a referendum held in this state." Wis. Stat. § 11.0101(26)(a)1.–2.; *see also* Wis. Stat. § 5.02(13).

That reading is consistent with the statute's plain language. "Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special

definitional meaning." *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 663, 681 N.W.2d 110. "If the meaning of the statute is plain, we ordinarily stop the inquiry," meaning there is no need to consult legislative history to ascertain the statute's meaning. *In re P.M.*, No. 2024 WI 26, ¶ 9 (quoting *Kalal*, 271 Wis. 2d 633, ¶ 45 (quotations omitted)); *see also id.* ¶ 16.

Here, the Commission interpreted Wis. Stat. § 6.855(1)'s plain language: the statute prohibits holding in-person absentee voting at a site that advantages a "political party," a defined term in the election statutes referring to certain political committees. A site could advantage a political party by virtue of the site itself or its proximity to a political party's operations, such as "near the Democratic Party's office," or "near a Republican Party [get-out-the-vote] rally." (R. 59:56.)

Brown offers no plain language interpretation of "political party," the term actually used—and defined—in statute. His attempt to analyze the actual statutory language consists of a single conclusory sentence: an announcement that locating polling places "closer to" some voters who support one political party "necessarily advantages that party." (Brown Resp. Br. 30.) Brown makes no effort to tie his three-tiered scheme—that officials choose sites based on wards, the voting histories in those wards matter, and only sites in wards with voting histories like the ward where the clerk's office is located pass muster—to any language in the statute.

To the contrary, he seems to acknowledge that his scheme is custom built. He announces that his interpretation "pulls together the various requirements set out in Wis. Stat. § 6.855" (Brown Resp. Br. 35–36), requirements he does not explain; that there "is no way to comply with Wis. Stat. § 6.855 *without* using ward data" (Brown Resp. Br. 36); and that his scheme "harmonizes the various concerns" expressed

by the Legislature (Brown Resp. Br. 37). Missing from all of this is any textual foothold. And Brown assumes the point he must prove: whether section 6.855 seeks to address "partisan advantage," a term the statute does not use.

2. Brown relies entirely on legislative history, but identifies no statutory ambiguity that would justify such reliance, and the history supports the Commission's reading, in any case.

Lacking any statutory support for his ward-based and voter history concoction, Brown jumps forward to legislative history. But he identifies no statutory ambiguity that would justify that step, and, in any event, the legislative history doesn't support his interpretation.

In the face of an unambiguous statute, legislative history is not part of the court's interpretation of the statute. *In re P.M.*, 2024 WI 26, ¶ 16. Brown ignores the threshold step of demonstrating that Wis. Stat. § 6.855(1) is ambiguous, and simply charges forward with his view of legislative history. He notes that courts avoid a "literalistic" reading (Brown Resp. Br. 31), but he does not seem to understand what that means. It means only that courts read statutory language in the context of surrounding language, not that they depart from reading the words the Legislature actually wrote. "[A]scertaining the plain meaning of a statute requires more than focusing on a single sentence or portion thereof." *Brey v. State Farm Mut. Auto. Ins. Co.*, 2022 WI 7, ¶ 11, 400 Wis. 2d 417, 970 N.W.2d 1 (quoting *State v. Ziegler*, 2012 WI 73, ¶ 43, 342 Wis. 2d 256, 816 N.W.2d 238). "A statute's context and structure are critical to a proper plain-meaning analysis." *Id.*

Citing *Sojenhomer LLC v. Village of Egg Harbor*, 2024 WI 25, ¶ 15, __ Wis. 2d __, 676 N.W.2d 424, Brown also suggests that his legislative history is proper as part of

"statutory history." (Brown Resp. Br. 32.) But statutory history and legislative history are two different things. As *Sojenhomer* demonstrates, statutory history refers to a statute's enacted versions over time. *Sojenhomer*, 2024 WI 25, ¶ 21. Brown offers no prior version of an enacted statute that supports his argument here.

Even if this Court believed it was appropriate to look at legislative history, it does not help Brown here. The language he points to was simply one of many suggestions made by a member of the Joint Study Committee on Elections, Joseph Leibham, to add language to the elections bill. Even assuming that legislator wanted that specific language, the term "partisan advantage" never made it into any bill, much less the enacted law.

The citation Brown offers is from a memo from a staff attorney at the Wisconsin Legislative Council to Senator Leibham describing the Senator's request back to him:

> This memorandum describes changes you are proposing to LRB-3947/1, relating to the administration of elections. . . . Your proposed amendments would be offered after the draft has been introduced by the [Joint Legislative Council] and referred to a standing committee in the Senate. Your proposed changes are described below.
>
> . . . .
>
> 8. Alternate Absentee Ballot Site. The provisions of the draft concerning the alternate absentee ballot site would be revised to provide that the site . . . not be located to provide a partisan advantage.[6]

While Brown suggests that the term "partisan advantage" then made its way into one of the versions of

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[6] *Pub. Hearing Comm. Recs. 2005-06*, Wis. State Legislature, p. 25–26, https://docs.legis.wisconsin.gov/2005/related/public_hearing_records/sc_labor_and_election_process_reform/bills_resolutions/05hr_sc_lepr_sb0612_pt01.pdf (last visited July 22, 2024).

the bill that became Act 451, that is not the case. Instead, the bill stated that "no site may be designated that affords an advantage to any political party"—the same language that appears in the statute.

Thus, even assuming that a senator suggested the "partisan advantage" language in the memo, that is not what even made it into a draft, much less the act itself. Where the Legislature considers language but rejects it in the final act, it dispels any legislative intent the alternative language might have suggested. *State v. Saternus*, 127 Wis. 2d 460, 475–76, 381 N.W.2d 290 (1986).

The description of the bill presented to the Senate committee reflected the "political party" language actually put in the bill:

> The alternate site "may not be located so as to afford an advantage to any political party. Observation and electioneering laws would apply to alternate locations established under the bill."[7]

The explanation provided to the standing committee illustrates what the legislative history of 2005 Act 451 does evince: a desire to avoid electioneering activities not only at the polling station on Election Day, but also at in-person absentee ballot sites. Prohibiting a site that advantages a political party avoids the risk that voters will vote at a site where people are engaged in campaigning activities.[8]

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[7] *Pub. Hearing Comm. Recs. 2005-06*, Wis. State Legislature, p. 8 of pdf, p. 7 in the original pagination, https://docs.legis.wisconsin.gov/2005/related/public_hearing_records/sc_labor_and_election_process_reform/bills_resolutions/05hr_sc_lepr_sb0612_pt03.pdf (last visited July 22, 2024).

[8] Brown points to nothing in the legislative history supporting his view that choosing a site near the clerk's office is designed to avoid conferring an advantage to a political party. (Brown Resp. Br. 36.)

3. Brown's ward-based idea makes no sense and would be unworkable.

Brown's three-tiered proposal enjoys no statutory support for a reason: it makes no sense and would be unworkable.

The Commission's interpretation of the prohibition on "advantage to a political party" is an administrable standard for clerks and those reviewing clerks' actions. As the Commission explained, an advantage to a political party would likely be much more readily—and immediately—identifiable. An absentee ballot site in a political party's headquarters, for example, could be identified and quickly rectified.

Brown's standard, in contrast, does not even connect to the harm he believes the statute seeks to avoid and would be impossible to administer, to boot.

First, Brown's use of wards as a proxy for convenience to an in-person absentee voting site is mistaken in at least two ways. He relies on the false premise that voters all live in very close proximity to the voting site itself, but wards are not surrounded by walls, and what is most convenient for an in-person absentee voter is not measured by a ward line. An in-person absentee ballot site may be located on the geographic edge of a ward, close to a neighboring ward whose residents have a different history of voting.

Brown also assumes that in-person absentee voters want to vote near their homes (Brown Resp. Br. 35), but many choose to vote at sites located near childcare, school, or especially their workplaces.

Second, Brown's approach would require local election officials to conduct a preemptive analysis of ward-based

voting history to comply with the statute,[9] even before there is any showing of some impermissible "advantage to any political party." And like Brown's own statistical analysis, a clerk's attempt at preemptive statistical analysis likely would not capture that voters vote for different parties in different elections and different races. He provided no evidentiary support to the Commission for his premise that voters are permanent, straight-ticket loyalists to one party or another.

Third, even if local officials could perform the analysis Brown demands, they would search in vain for sites compliant with Brown's proposed test. Almost *no* ballot site, including the clerk's office itself, has a 50-50 split of absentee in-person voters living "close" to it who happened to vote for each major political party in the last election. Every siting choice a clerk could make—even establishing no alternate voting sites and just using the clerk's office—would confer an "advantage" under Brown's view of the statute. That cannot be a reasonable reading.

4. Brown's theory would run afoul of the federal court decisions in *One Wisconsin Institute* and *Luft*.

The Commission's decision not to issue a noncompliance order also was reasonable because it avoided reinvigorating the equivalent of the "one-location" rule that a federal court held unconstitutional. *See One Wisconsin Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 923–24, 931–35, 963 (W.D. Wis. 2016*), aff'd in part*, *vacated in part*, *rev'd in part sub nom. Luft v. Evers*, 963 F.3d 665 (7th Cir. 2020). The circuit court's ruling would have the opposite effect.

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[9] Given the lack of *any* textual basis for Brown's theory, it's entirely unclear how far back in time clerks would be required to look when conducting their voting-history analysis.

Wisconsin Stat. § 6.855 has been the subject of litigation and legislative amendment leading to the current statute, which allows a municipality to designate multiple alternate in-person absentee voting sites. In 2015, the previous version of the statute was challenged on the ground that its allowance of only a single alternate absentee voting site violated the First, Fourteenth, and Fifteenth Amendments and Section 2 of the Voting Rights Act, by making it overly burdensome to vote, particularly for voters in larger municipalities and Black and Latino voters. *See id*. The district court in *One Wisconsin Institute, Inc. v. Thomsen* largely agreed, holding that the one-location rule violated the First and Fourteenth Amendments and Section 2 of the Voting Rights Act. *See id*. at 931–35, 956, 963.

While the appeal in that case was pending, the Legislature amended Wis. Stat. § 6.855 to add current subsection (5), which authorizes designation of multiple alternate sites. *See* 2017 Wis. Act 369 § 1JS.

When the Seventh Circuit subsequently assessed the one-location rule, the court recognized that the concerns the district court identified could, in fact, pose Section 2 problems: "if the single authorized location is convenient for one racial group and inconvenient for another, that could violate § 2's equal-treatment principle," since "[t]he opportunity to participate may decrease as distance increases." *Luft v. Evers*, 963 F.3d 665, 674 (7th Cir. 2020). But in light of the statutory amendment, the court concluded that the challenge to the one-location rule was moot: "The one-location rule is gone, and its replacement is not substantially similar to the old one. It seems unlikely that Wisconsin would return to a single-site requirement if allowed to do so." *Id*.

Here, the circuit court's decision effectively mandates the return of the problem the Seventh Circuit treated as "unlikely:" a replacement "substantially similar" to the one-location law. While the circuit court did not articulate exactly

what standard a site must meet to be acceptable, it granted relief based on Brown's premise that a site must be located in a ward with the "same" Democratic-Republican vote results as the ward where the clerk's office is located. (*Compare* R. 59:40, *with* R. 99:15.)

Brown's proposed solution does not address the constitutional concerns identified in *One Wisconsin Institute* and *Luft*. He suggests that the clerk should simply have limited the designation of in-person absentee voting sites to ones located in the same ward as the clerk's office. (Brown Resp. Br. 41–42.) But designating sites only in one ward would create the same unconstitutional concentration of opportunities for a single group, especially in larger municipalities because "[t]he opportunity to participate may decrease as distance increases," *Luft*, 963 F.3d at 674, and "[h]aving only one location creates difficulties for voters who lack access to transportation," *One Wisconsin Inst., Inc.*, 198 F. Supp. 3d at 932. It is no fix at all to tell voters who live on the far side of the city to take multiple buses to the clerk's-office ward, even if there are two, three, or fifty sites concentrated around the clerk's office.

Brown also announces that the single absentee voting site claim was held "moot" in *Luft* because, while the case was pending, the Legislature passed Wis. Stat. § 6.855(5). (Brown Resp. Br. 43.) Brown misses the point. The court treated the claim as moot only because "the one-location rule is gone, and its replacement is not substantially similar to the old one." *Luft*, 963 F.3d at 674. If Wisconsin courts resuscitated the equivalent of a one-location rule by adopting Brown's interpretation, those constitutional problems would recur.

The Commission's decision avoided these pitfalls, and reasonably declined to issue a noncompliance order to Racine based on Brown's allegations about "partisan advantage."

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The Commission reasonably concluded that Brown failed to show that Clerk McMenamin's designation of alternate in-person voting sites violated Wis. Stat. § 6.855. Brown's vision of the law is not supported by the statute.

B. The Commission reasonably determined that Clerk McMenamin did not violate election statutes in utilizing a mobile voting unit.

The Commission also declined to issue McMenamin a noncompliance order regarding the use of a mobile voting unit at properly noticed locations, concluding that Brown had failed to establish a violation of Wis. Stat. § 6.855(1). That conclusion was reasonable. The circuit court erred in reversing the Commission's decision on this part of its decision, too.

1. Nothing in Wis. Stat. § 6.855 or other elections statutes prohibited Clerk McMenamin from using the mobile voting unit.

The Commission concluded that nothing in Wis. Stat. § 6.855 forbade Clerk McMenamin from utilizing the mobile voting unit.

Brown recognizes this fact himself: the definitions of "site" he offers describe the "place or setting of something" or "[t]he place where a structure or group of structures was, is, or is to be located." (Brown Resp. Br. 44.) Brown seems to concede that nothing in the meaning of "site" itself forbids the use of a mobile voting unit.

Instead, he asserts that the use of the mobile voting unit was incompatible with other statutory requirements. He misunderstands what those statutes mean and require.

First, he argues that the mobile voting unit would violate the statutory requirements about where absentee

ballots are kept until they are received by the municipal clerk. His assumption is that a ballot voted at an alternate in-person absentee voting site must be stored there until Election Day. He asks questions he already knows the answer to: "So what happened to all of these ballots? Did McMenamin store them in the van for 14 days prior to the election?" (Brown Resp. Br. 46.) As the record explained, Clerk McMenamin's election officials transported and kept the voted ballots at the clerk's office. (R. 59:51.)

Brown's inquiries are disingenuous, and nothing imposes the requirement he imagines. He relies on two statutes, neither of which creates such a requirement.

First, he points to Wis. Stat. § 6.88(1), which says that the clerk "shall keep the ballot in the clerk's office or at the alternate site, if applicable until delivered, as required in sub. (2)." As an initial matter, nothing in this statute says that the clerk must keep a ballot at the particular site where it was voted, even before it is received by the municipal clerk to prepare for transmission to the ward on Election Day. But even assuming this requirement were silently part of the law,[10] the statute does not require the ballots to be stored at

[10] The statute also does not require the clerk to exclusively designate one location. Statutory canons do not mechanically interpret an "or" as disjunctive, but rather counsel that courts interpret the word "or" according to context. *See, e.g., Union Ins. Co. v. United States*, 73 U.S. 759, 764, (1867) ("[W]hen we look beyond the mere words to the obvious intent we cannot help seeing that the word 'or' must be taken conjunctively."); *United States v. Hodge*, 321 F.3d 429, 436 (3d Cir. 2003); *Willis v. United States*, 719 F.2d 608, 612–13 (2d Cir. 1983) ("It is settled that 'or' may be read to mean 'and' when the context so indicates."); *see also Noell v. Am. Design, Inc., Profit Sharing Plan*, 764 F.2d 827, 833 (11th Cir.1985) (construing a contract and concluding "[i]t is an established principal that '[t]he word "or" is frequently construed

an alternate in-person absentee voting site until Election Day.

Subsection (1) of section 6.88 refers to subsection (2), which provides that "when an absentee ballot is received by the municipal clerk prior to the delivery of the official ballots to the election officials of the ward in which the elector resides," the municipal clerk must take certain steps, including sealing the ballot envelopes in a carrier envelope, to be delivered to each voter's respective ward. In turn, nothing in Wis. Stat. § 6.88(2) requires absentee ballots to remain at the place where they were voted until Election Day. The statutory requirement Brown would insert would make no sense—requiring alternate sites like public libraries, for example, to securely store ballots for the duration of the in-person absentee voting period—and would prevent clerks from making the most secure arrangements for storing those ballots.

Second, Brown turns to Wis. Stat. § 6.855(1), which says that the clerk may not conduct functions "related to voting and return of absentee ballots"—meaning the voter's return of her ballot—at the clerk's office if alternate sites are designated. Brown asserts this statute prohibits the clerk from receiving voted ballots at her office and preparing them for delivery to the wards if she has designated an alternate site. This theory again adds words and proves too much. (Brown Resp. Br. 45–46.)

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to mean "and," and vice versa, in order to carry out the evident intent of the parties.'") (quotation omitted).

Here, nothing in Wis. Stat. § 6.88(1) indicates that clerks may not choose whether to keep ballots at the clerk's office or one of the alternate in-person absentee voting sites, even before they are delivered to the clerk's office under sub (2).

The statute merely prohibits voting and return of voted ballots at the clerk's office. It does not prohibit the clerk from doing her required work relating to those already-voted ballots, including receiving them from alternate sites and preparing them for delivery to the wards for Election Day.

The Commission held that this function was unrelated to voting and voter return of ballots, and that reading it in that way "would be a significant infringement on the authority of local election officials for the Commission to opine on the most secure and appropriate location at which to store ballots. That critical decision needs to rest with the officials responsible for safeguarding and delivering ballots." (R. 59:57–58.) The Commission's concerns were well founded.

Third, Brown proposes that "site" must be exclusively one of two things: either the physical address where the mobile voting unit is parked, with nothing on it, or the mobile voting unit, standing alone. (Brown Resp. Br. 47–49.) He offers no statutory support for this proposition, and it ignores the obvious third alternative: the site is the physical location *together with* the van parked outside. That is no different from treating a site as a physical location together with a brick-and-mortar building or prefabricated structure set upon it. Either way, the "site" includes both a location—to provide notice to voters of the place voting is available—and a facility where voting operations take place to create a compliant, operational "site."

Fourth, Brown jumps into other chapters of the statutes, but those are unavailing, as well.

He asserts that requirements in that chapter for Election Day "polling places" must apply to in-person absentee voting sites, too. Brown relies on Wis. Stat. § 5.25(1), which states that "polling places" shall be "public buildings, unless the use of a public building for this purpose is impracticable or the use of a nonpublic building better serves

the needs of the electorate, as determined by the authority charged with the responsibility for establishing polling places."

As an initial matter, section 5.25(1) itself recognizes that the authority charged with establishing polling places may choose something other than a public building for that purpose. That decision is left to the determination of the authority for establishing polling places, here the City of Racine. Even assuming the polling-place statute controlled the location of in-person absentee voting sites, here the Racine Common Council "found that the use of a public building was impracticable compared to a mobile alternate absentee site, because of the cumbersome nature of otherwise being required to set up and take down equipment every day." (R. 59:51.)

More to the point, Wis. Stat. § 6.855(1), which governs alternate in-person absentee voting sites, never uses the word "building" at all. When the Legislature chooses to use a term in one section of the statues, but not in a closely related provision, courts presume that a different meaning was intended. *See United America, LLC v. DOT*, 2021 WI 44, ¶ 16, 397 Wis. 2d 42, 959 N.W.2d 317; *Piper v. Jones Dairy Farm*, 2020 WI 28, ¶ 28, 390 Wis. 2d 762, 940 N.W.2d 701. Here, the two statutes use different terms and govern distinct steps in the voting process. As one example, while Election Day voters must vote at the "polling place" in their ward, *see* Wis. Stat. § 5.25(5)(a), in-person absentee voters may choose any designated site, regardless of whether it lies in their ward.

Brown's other statutory forays are even further afield. He cites Wis. Stat. § 5.02(15), which defines a polling place as "the actual location wherein the elector's vote is cast," and he emphasizes the word "wherein." (Brown Resp. Br. 50.) But voting in a mobile voting unit also takes place "in" that structure, just like in a brick-and-mortar building.

He also says that clerks must operate an alternate site "as though it were his or her office for absentee ballot purposes," Wis. Stat. § 7.15(2m), and notes that a statute references "office hours," Wis. Stat. § 10.01(2)(e). He notes that that would be a problem if voting were occurring at a "park, beach, van, or field," musing "[w]hoever heard of 'office hours' at a beach?" (Brown Resp. Br. 50–51.)

But these are not the facts before the Court. The mobile voting unit was a vehicle specifically purchased and equipped to conduct voting. (R. 59:49.) It was not a family minivan, much less an outdoor setting like a beach, park, or field.

As Brown acknowledges, the question is whether the alternate in-person absentee voting site satisfied the statutory requirements for selection, notice to voters of location, hours, staffing, and accessibility. (Brown Resp. Br. 51.) Many outdoor settings may not be able to satisfy all these requirements, but it would depend on the specific facts at hand.[11] The need to evaluate those requirements in the context of a specific site is demonstrated by Brown's agreement that a mobile voting unit parked in the bay of a fire station *would be* a proper site under his view of the law (Brown Resp. Br. 54)—even though voting and the election officials' operations would take place in the mobile voting unit itself.

Here, the specific facts before the Commission, and on review by this Court, are not whether "tents, parking lots, alleys, street corners, open fields" (Brown Resp. Br. 51–52) would fail to meet the requirements. It is whether Racine's

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[11] The need to evaluate a site based on specific facts is further illustrated by the outcome in a different case before the Commission, where the Commission decided that the mobile voting unit did not comply with the statutes. (R. 59:56, 59 (noting previous matter in which mobile unit was found non-compliant with requirements, including federal accessibility statutes).)

mobile voting unit met them, and Brown provided no evidence to the Commission that it did not.

On the facts before it, the Commission reasonably recognized that nothing in Wis. Stat. § 6.855 or any other statute prevented Clerk McMenamin from using Racine's mobile voting unit.

2. The circuit court's search in the statutes for explicit permission for the mobile voting unit ran afoul of proper interpretive methods for election statutes.

In its review, the circuit court here did not just look for prohibitions on Racine's mobile voting unit; it looked to see whether any statute explicitly permitted it. (*See* R. 99:16–17.) Based on Brown's interpretive methodology (R. 59:53–54), the circuit court relied on a gloss of *Teigen*, 403 Wis. 2d 607. The court did not have the benefit of this Court's recent decision in *Priorities USA v. WEC*, 2024 WI 32, __ Wis. 2d __, __ N.W.3d __. Following *Priorities*, it is clear that this Court did not intend for lower courts to so interpret the election statutes.

In *Priorities*, this Court considered how to interpret Wisconsin statutes regarding whether clerks can choose to utilize drop boxes for absentee ballot return when the statutes do not expressly prohibit it. The Court recognized that Wisconsin has a "highly decentralized" system of elections administration, and that "discretion [is] afforded to municipal clerks in running Wisconsin's elections at the local level." *Id.* ¶ 27 (citation omitted). The Court held 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. Based on that framework, the Court concluded that statutory silence about drop boxes did not

mean that drop boxes were prohibited despite being a "mechanism not specified by the legislature." *Id.* ¶ 46.

The same holds true here. Given the discretion vested in clerks by statute, they may choose to utilize election-administration tools so long as they comport with statutory requirements and allow the election to be safely and securely conducted. The circuit court erred in concluding that Clerk McMenamin's utilization of the mobile voting unit was prohibited because the statutes do not explicitly bless it.

In declining to issue a noncompliance order, the Commission correctly recognized that, given the lack of any express prohibition in Wis. Stat. § 6.855(1) and the vesting of substantial discretion in clerks to determine, for example, what is "necessary" to administer local elections, *see* Wis. Stat. § 7.15(1), nothing in Wis. Stat. § 6.855 or any other statute prevented the use of the mobile voting unit. (*See* R. 59:59–60.) That decision was reasonable.

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If this Court reaches the substance of the Commission's rulings as to designation of alternate in-person absentee voting sites and Clerk McMenamin's use of a mobile voting unit, it should reverse the circuit court and affirm the Commission on both issues.

CONCLUSION

Brown lacks standing and this case should have been dismissed on that basis. The circuit court's contrary decision should be reversed. If the Court looks past the lack of standing, the Court should hold that the Commission reasonably declined to issue a noncompliance order relating to Racine's location of alternate absentee ballot sites and its use of a mobile voting unit, and that the circuit court's contrary decision should be reversed.

Dated this 23rd day of July 2024.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this combined brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c), as modified by this Court's orders of May 3 and 9, 2024, for a brief produced with a proportional serif font. The length of the combined reply/response brief is 13,049 words.

Dated this 23rd day of July 2024.

Electronically signed by:

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STATE OF WISCONSIN

I N S U P R E M E C O U R T

Case No. 2024AP0232

KENNETH BROWN,

Plaintiff -Respondent-Cross-Appellant,

v.

WISCONSIN ELECTIONS COMMISSION,

Defendant-Co-Appellant-Cross-Respondent,

TARA McMENAMIN,

Defendant-Appellant-Cross-Respondent,

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

Intervenors-Co-Appellants-Cross-Respondents.

ON APPEAL FROM A FINAL ORDER OF THE RACINE COUNTY CIRCUIT COURT, THE HONORABLE EUGENE A. GASIORKEWICZ, PRESIDING

WISCONSIN ELECTIONS COMMISSION'S APPELLANT-CROSS-RESPONDENT BRIEF

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INTRODUCTION TO RESPONSE BRIEF

Brown's cross-appeal can be rejected for multiple reasons. At the threshold, if this Court concludes that Brown lacked standing to bring this case, that end the inquiry, and there is no need to address the merits of Brown's issues.

Even if the Court reaches the merits, the circuit court correctly rejected the three challenges to the Commission's decision that Brown raises in his cross-appeal.

He claims that the Commission should have issued Racine a noncompliance order because its alternate in-person absentee sites were not "as near as practicable" to the clerk's office, as required by Wis. Stat. § 6.855(1). Brown's focus on geographic proximity ignores the statutory text and the substantial discretion vested in local clerks. The alternate-location statute contemplates multiple non-geographical considerations, including practicability, the fact that multiple sites are explicitly allowed and, in some instances, are required as a matter of federal law. Given these considerations, the Commission reasonably declined to find Racine's sites in noncompliance.

Brown also claims that Racine violated Wis. Stat. § 6.855(1)'s requirement that "no function related to voting and return of absentee ballots that is to be conducted at the alternate site may be conducted in the office of the municipal clerk." Wis. Stat. § 6.855(1). Brown argues that the alternate site located in a City Hall conference room violated that provision because it is in the same building as the Clerk's Office. The Commission reasonably rejected Brown's theory that a different room in a large public building was part of the "clerk's office."

Finally, Brown claims that Racine violated Wis. Stat. § 6.855(1)'s requirement that "An election by a governing body to designate an alternate site . . . shall remain in effect until at least the day after the election." He maintains that this

provision prohibited Racine's use of a mobile voting unit at multiple sites on a staggered schedule, since, according to Brown, those *sites* did not "remain in effect" through the day after the election. The Commission correctly rejected Brown's construction: the statute requires *designations* to remain in effect, not that the sites be in operation 24/7. Brown does not dispute that the relevant designations remained in effect during the relevant time period.

The circuit court correctly rejected all three theories and affirmed the Commission. If the Court does not dismiss Brown's cross-appeal for lack of standing, it should nonetheless affirm.

ISSUES PRESENTED

Did the Commission reasonably decline to issue a non-compliance order based on Brown's claim that the Clerk did not select all of Racine's alternate in-person absentee voting sites "as near as practicable" to the Clerk's office for the August 2022 primary election?

The circuit court answered yes.

This Court should answer yes.

Did the Commission reasonably decline to issue a non-compliance order based on the Clerk's use of a conference room in City Hall as an alternate in-person absentee voting sites for the August 2022 primary election?

The circuit court answered yes.

This Court should answer yes.

Did the Commission reasonably decline to issue a non-compliance order based on Brown's claim that all alternate in-person absentee voting sites were not available for use through the August 2022 primary election?

The circuit court answered yes.

This Court should answer yes.

SUPPLEMENTAL STATEMENT OF THE CASE

Relevant facts are set forth in the Commission's Statement of the Case in its opening brief in support of its appeal, dated June 3, 2024.

STANDARD OF REVIEW

Brown seeks judicial review of the Commission's decision not to issue Clerk McMenamin an order of noncompliance with the election laws. In this type of judicial-review proceeding, appellate courts "review 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.

Wisconsin Stat. § 5.06(9) states: "The court shall summarily hear and determine all contested issues of law and shall affirm, reverse or modify the determination of the commission, according due weight to the experience, technical competence and specialized knowledge of the commission, pursuant to the applicable standards for review of agency decisions under s. 227.57." In a Wis. Stat. ch. 227 judicial review, "[u]nless the court finds a ground for setting aside, modifying, remanding or ordering agency action or ancillary relief under a specified provision of this section, it shall affirm the agency's action." Wis. Stat. § 227.57(2). "The burden in a ch. 227 review proceeding is on the party seeking to overturn the agency action, not on the agency to justify its action." *City of La Crosse v. DNR*, 120 Wis. 2d 168, 178, 353 N.W.2d 68 (Ct. App. 1984).

This Court reviews an agency's interpretation of statutes de novo, while giving due weight to the experience, technical competence, and specialized knowledge of the agency involved. *Citation Partners, LLC v. DOR*, 2023 WI 16, ¶ 32, 406 Wis. 2d 36, 985 N.W.2d 761; Wis. Stat. § 227.57(10).

Additional relevant standards are included in the Commission's Standards of Review in its opening brief in support of its appeal, dated June 3, 2024.

ARGUMENT

On judicial review of the Commission's decision, Brown was required to show that it was unreasonable. *See* Wis. Stat. §§ 5.06(9); 227.57(2), (8). This required Brown to show that discretion was erroneously exercised at two levels. First, the Clerk exercises discretion in administering local elections, such as determining how best to locate alternate in-person absentee voting sites under Wis. Stat. § 6.855. The Commission also exercises discretion in determining whether to issue a noncompliance order directed at the Clerk under Wis. Stat. § 5.06(6) based on the evidence Brown presented. Brown failed to carry his burden on both points, and the circuit court correctly rejected the three theories that he pursues on cross-appeal.

I. If Brown lacks standing, his appeal should be dismissed.

For the reasons explained in the Commission's opening and reply briefs, Brown lacked standing to bring this case. If this Court agrees, his cross-appeal should be dismissed as well.

II. The Commission reasonably declined to issue a noncompliance order based on Brown's claim that not all of Racine's alternate in-person absentee voting sites were "as near as practicable" to the Clerk's office.

Brown first asserts that the Commission's decision declining to issue a non-compliance order against Clerk McMenamin should be overturned because she failed to select alternate in-person absentee voting sites "nearer to her municipal office" than the ones she did select and, therefore,

violated Wis. Stat. § 6.855. (Brown Cross-Appellant Br. 67.) He argues that that geography is the primary factor to consider when asking whether an alternate site is located "as near as practicable" to the Clerk's office. (Brown Cross-Appellant Br. 67—68.) Brown's argument was correctly rejected by both the Commission and the circuit court.

Wisconsin Stat. § 6.855(1) includes multiple requirements a clerk must consider when designating alternate in-person absentee voting site, including that any site "shall be located as near as *practicable* to the office of the municipal clerk," Wis. Stat. § 6.855(1), that a governing body may designate more than one alternate site, *see* Wis. Stat. § 6.855(5), and in some instances may be required to designate more than one to comply with the Constitution or federal law, *see One Wisconsin Institute, Inc. v. Thomsen,* 198 F. Supp. 3d 896, 934–35 (W.D. Wis. 2016). Sites also cannot be designated in a way that would afford an advantage to a political party. Wis. Stat. § 6.855(1).

The Commission explained that it agreed with Clerk McMenamin that it would be illogical to construe the "as near as practicable" language as Brown does in light of the multiple other statutory requirements that clerks must consider, including practicability, the permissibility and sometimes requirement that multiple sites be designated, and the prohibition on affording an advantage to a political party. (R. 59:55.)

Brown's argument fails because he asks this Court to undertake its own assessment of "practicability." (R. 86:8.) This sort of de novo review is expressly prohibited by Wis. Stat. § 5.06(9). It is not this Court's task to assess anew whether each of the Clerk's selected sites was in fact a "practicable" choice. (*Contra* R. 86:6–9.) This is precisely the same type of second-guessing of highly discretionary decisions that courts consistently reject. *See, e.g.*, *Town of Ashwaubenon v. State Highway Comm'n.* 17 Wis. 2d 120,

130–31, 115 N.W.3d 498 (1962); *Holtz & Krause, Inc. v. DNR*, 85 Wis. 2d 198, 210–12, 270 N.W.2d 409 (1978); *State ex rel. Davern v. Rose*, 140 Wis. 360, 122 N.W. 751, 753 (1909).

This Court's recent decision in *Priorities* confirms the highly discretionary nature of various decisions by clerks in the administration of elections. "Such 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. *Priorities USA v. WEC*, 2024 WI 32, ¶ 28 (quoting *State ex rel. Zignego v. WEC*, 2021 WI 32, ¶¶ 13, 15, 396 Wis. 2d 391, 957 N.W.2d 208.)

Here, practicability was determined by the Clerk and, unless her determination is shown to be an erroneous exercise of the discretion vested in her, was not subject to rejection by the Commission or de novo review in court.

Brown's argument that geographical proximity is the "primary factor" in determining practicability also lacks a textual basis. "[S]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes." *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110. Under Brown's view of Wis. Stat. § 6.855(1), the Clerk was required to clump all of Racine's sites as near as geographically possible to her office, without equally considering another factor found in the same sentence containing the "near as practicable" language—the prohibition of alternate sites that give an advantage to a political party. Wis. Stat. § 6.855(1). Given that Brown recognizes that the "as near as practicable" language is found in the same sentence as the "advantage to any political party" language, (*see* Brown Cross-Appellant Br. 69–70), Brown's geographic "primary factor" argument lacks a textual foundation and makes little sense.

Moreover, Brown's argument ignores the illogic of focusing on geographical proximity in light of Wis. Stat. § 6.855(5)'s authorization to use *multiple* alternate in-person absentee voting sites. The circuit court noted that Brown's "reading is not consistent with long standing Wisconsin law, and would be contrary to Judge Peterson's decision in *One Wisconsin*," which, the court recognized, "served as the catalyst for adding sub (5)" to Wis. Stat. § 6.855 authorizing the use of multiple alternate sites. (R. 99:15.)

Brown claims that, despite subsection (5) and the *One Wisconsin* injunction, the Clerk still should have selected 25 different alternate in-person absentee voting sites, all in Ward 1, where the Clerk's office is. (Brown Cross-Appellant Br. 71–72.) This argument ignores the basis for the *One Wisconsin* injunction.

As explained in the Commission's opening and reply briefs, the *One Wisconsin* court found that Wisconsin's one-location rule was constitutionally problematic because "[h]aving only one location *creates difficulties for voters who lack access to transportation*." 198 F. Supp. 3d at 932. So the Clerk could not have selected all alternate sites as close to Ward 1 as practicable without forcing voters to travel to one geographic location in the municipality and potentially running afoul of the federal court's reasoning.

The Commission reasonably determined not to issue a noncompliance order against the Clerk because her selection of alternate in-person absentee voting sites did not violate the "near as practicable to the office of the municipal clerk" provision of Wis. Stat. § 6.855(1).

III. The Commission reasonably declined to issue a noncompliance order based on Racine's use of a conference room in City Hall as an alternate in-person absentee voting site.

Brown next claims that the Commission erred in declining to issue a noncompliance order based on the use of a conference room in City Hall as an alternate in-person absentee voting site. (Brown Cross-Appellant Br. 73–75.) This argument also is unpersuasive and was properly rejected by the Commission and the circuit court.

Under Wis. Stat. § 6.855(1), "[i]f the governing body of a municipality makes an election under this section, no function related to voting and return of absentee ballots that is to be conducted at the alternate site may be conducted in the office of the municipal clerk . . . ." The Commission has referred to this sentence as the "simultaneous use" prohibition. (R. 59:56.)

Brown claims that an alternate in-person absentee voting site within Racine's City Hall—in Room 207, a conference room—violates the prohibition on conducting any function related to voting "in the office of the municipal clerk" because the Clerk's office is also in City Hall. While it is true that both Room 207 and the Clerk's Office are located in one building, there is no evidence showing that every room within City Hall is "an extension of the Clerk's Office," as he argues. As the circuit court correctly explained, there is no merit to "the notion that the alternate site (room 207 of City Hall which is located in a distinct and separate room on another building floor within City Hall) was simply an extension of the municipal clerk's office" (R. 99:15.) Instead, Room 207 was "set up and physically independent of the Clerk's office." (R. 99:16.) Brown even conceded below that the Clerk's office is in Room 103 and the conference room for absentee voting was in Room 207. (R. 86:16.)

Brown now points out that the City's website told voters that they could vote absentee at the Clerk's Office. (Brown Cross-Appellant Br. 74 (citing R. 56:17).) But Brown then admits that when voters arrived at City Hall they were directed, by signage, to Room 207, "where the ballots were actually cast." (Brown Cross-Appellant Br. 74.) The mere fact that the website told voters, erroneously, that they would vote at the Clerk's office does not mean that the separate conference room within City Hall was therefore made an extension of the Clerk's office.

Moreover, as the Commission explained, it was certainly practicable for the Clerk to have used "existing municipal space within existing municipal properties" for an alternate in-person absentee voting site. (R. 59:56–57.) The Commission did acknowledge that there could be instances in which a clerk could use municipal facilities and cause statutory non-compliance,[1] but since none of those circumstances occurred in Racine, the Commission properly declined to hold that Racine had crossed a line regarding use of existing municipal property on the facts before it. (R. 59:57.)

The Commission reasonably determined not to issue a noncompliance order against the Clerk because there was no "simultaneous use" violation of Wis. Stat. § 6.855(1) where Room 207 in City Hall was not a mere extension of her office.

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[1] The Commission noted that some circumstances may violate Wis. Stat. § 6.855(1), such as a clerk's use of interconnected space with a separate entrance like a clerk's conference or storage room, or a clerk using her satellite offices throughout the city as alternate in-person absentee voting sites while performing other clerk functions there. (R. 59:57.)

IV. The Commission reasonably declined to issue a non-compliance order regarding the requirement that the designation of alternate in-person absentee voting sites remains in effect until at least the day after the election.

Brown lastly argues that Racine violated Wis. Stat. § 6.855(1)'s requirement that alternate site designations "remain in effect until at least the day after the election." (Brown Cross-Appellant Br. 76.) He views the provision as requiring that alternate sites remain continuously in operation, full time, until the day after the election. Brown's view violates the basics of statutory interpretation.

Wisconsin Stat. § 6.855(1) provides that "[a]n election by a governing body to designate an alternate site under this section shall be made [within specific time periods] . . . and shall remain in effect until at least the day after the election."

When interpreting statutes, the court "begins with the language of the statute." *State ex rel. Kalal*, 271 Wis. 2d 633, ¶ 45. "If the text of the statute is plain and unambiguous, [the court's] inquiry may stop there." *Greenwald Family Lmt. P'ship v. Village of Mukwonago*, 2023 WI 53, ¶ 16, 408 Wis. 2d 143, 991 N.W. 356.

Here, Brown fails to distinguish between the *designation* of sites, which a municipality does so that the clerk can choose among them, and the *operation* of the sites, which often occurs on a part-time basis. Wisconsin Stat. § 6.855(1) says nothing about alternate sites "remain[ing] in effect"; instead, what must "remain in effect" is the Racine City Council's "election to designate" alternate sites. Brown's entire argument relies on his basic misreading. (Brown Cross-Appellant Br. 76.)

Even assuming that the point of the "remain in effect" portion of the statute were to notify voters where they may go to vote early-absentee, the argument still lacks merit because

Brown concedes that alternate sites do not have to be available and staffed 24/7. (Brown Cross-Appellant Br. 77.) In other words, the "remain in effect" language does nothing to help voters if the alternate sites are not always open for voting. Seemingly acknowledging this, Brown asserts that sites "should be made available for regular voting hours." (Brown Cross-Appellant Br. 77.) But there are no standard "regular voting hours" for alternate in-person absentee voting in the statutes. So, even if the "remain in effect" language of Wis. Stat. § 6.855(1) applied to alternate sites rather than the designation of the sites, voters still would require further communication from clerks to know when sites are open.

As the Commission noted, "continuous designation" "gives the voters ample advance notice of a potential backup site and ensures compliance with statutory approval requirements and timelines." (R. 59:59.) For example, small municipalities may designate an alternate site with little or no intention of using, but designation "could simply be made for the purpose of ensuring a location is approved for conducting absentee voting processes if the primary site becomes unavailable for any reason." (R. 59:59.)

In addition, the Commission explained that Brown's "continuous use" interpretation would lead to a variety of problematic applications and issues. For example, it pointed out that many clerks do not have the staffing, resources, time, or capability of continually using each alternate site. (R. 59:59.) As an example of another problematic application, the Commission asked rhetorically how a clerk could "utilize an alternate absentee ballot voting site that was approved for peak historical periods of return only, or an unexpected influx of absentee voting such as a pandemic, if continuous use is necessary[.]" (R. 59:58.)

So long as Racine's designation of 150 available alternate in-person absentee voting sites "remain[ed] in effect" until the day after the election (which it did, and which

Brown does not seem to dispute), the "continuous designation" provision of Wis. Stat. § 6.855(1) was satisfied. The Commission thus properly declined to issue a noncompliance order against Clerk McMenamin for making alternate in-person absentee voting sites available for only limited times during the August 2022 primary election. (Doc. 59:58–59.)

CONCLUSION

The Court should dismiss Brown's appeal for lack of standing. If it reaches the merits, the Court should affirm the circuit court's order upholding its decision with respect to the three claims Brown raises in his cross-appeal.

Dated this 23rd of July 2024.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this combined brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c), as modified by this Court's orders of May 3 and 9, 2024, for a brief produced with a proportional serif font. The length of the combined reply/response brief is 13,049 words.

Dated this 23rd day of July 2024.

Electronically signed by:

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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 23rd day of July 2024.

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