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CLERK OF WISCONSIN
SUPREME COURT

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

OPENING BRIEF OF THE WISCONSIN ELECTIONS COMMISSION

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INTRODUCTION

Plaintiff Kenneth Brown is a voter who does not like how local election officials in Racine planned to administer an election. He complained to the Wisconsin Elections Commission and when the Commission declined to issue an order against the Racine clerk, he filed this case challenging the Commission's decision. Brown lacked standing to bring this case, and his petition should have been dismissed. Even if he had had standing, the circuit court should have affirmed the Commission's order in full; it correctly applied the law and reasonably declined to find any violation.

As to standing, Brown was not "aggrieved" as is required to bring a petition for judicial review under Wis. Stat. § 5.06(8). First, he pointed to no direct, personal injury: his own right to vote was not impaired, and he does not claim otherwise. He claims he had an interest in making sure that election officials follow the law, but courts consistently reject that "generalized grievance" theory of standing. Second, he did not show he has a legally protected interest under the statute that he claims was violated, Wis. Stat. § 6.855.

If this Court looks past Brown's lack of standing, reversal in part is required on the merits. Brown claimed that Racine City Clerk McMenamin violated the statute governing alternate in-person absentee ballot sites, Wis. Stat. § 6.855, in multiple ways, and asked the Commission to issue McMenamin a noncompliance order. The Commission reasonably declined to issue McMenamin a noncompliance order, and the circuit court was incorrect to reverse that decision in part.[1]

[1] The circuit court affirmed the Commission's decision on some of Brown's claims. The Commission believes that those will be raised in Brown's cross-appeal/petition.

The circuit court held that the Commission was required to issue a noncompliance order on two grounds: that Clerk McMenamin's choices of alternate absentee in-person ballot sites afforded an advantage to a political party; and Racine's use of a mobile voting unit to drive absentee balloting equipment from site to site was not authorized by statute. Those conclusions relied on an atextual reading of Wis. Stat. § 6.855, as well as the same type of interpretive error at issue in *Priorities USA v. WEC*, regarding the interpretive approaches that the Court adopted in *Teigen v. WEC*. As addressed in *Priorities*, those interpretive principles are not part of Wisconsin's election statutes.

Whether for lack of standing or because the Commission's decision was reasonable, the decision below should be reversed.

ISSUES PRESENTED

1. To establish standing to bring a challenge to a decision of the Commission under Wis. Stat. § 5.06(8), a challenger must establish that he is "aggrieved"—that he suffered a direct, personal injury to a legally protected interest. The direct, personal injury prong is not met by generalized grievances with the administration of government, including a theory that votes being unlawfully cast or counted wrongly "dilute" the plaintiff's vote. And the legally protected interest prong requires the challenger to show that the statute that was allegedly violated protects, recognizes, or regulates the challenger's interests.

Here, Brown alleged that he is a voter from the City of Racine, that the Racine City Clerk violated Wis. Stat. § 6.855(1) in multiple ways, and that he, as a voter, had an interest in making sure election officials follow the law. Brown did not establish that the alleged violations directly or personally injured him, or that Wis. Stat. § 6.855(1) protects any of those asserted interests.

Is Brown "aggrieved" within the meaning of Wis. Stat. § 5.06(8)?

The circuit court answered "yes," relying on the plurality opinion in *Teigen v. WEC*.

This Court should answer "no."

If the Court concludes that Brown lacked standing to bring this lawsuit, it need not reach the following issue and sub issues.

2. Wisconsin law authorizes the Commission to receive complaints based on voters' belief that election officials' conduct violates the law and, where supported, to issue an order requiring the official to conform his or her conduct to the law. If the Commission examines the relevant facts and law, adequately explains its reasoning, and reaches a reasonable conclusion, its discretionary decision should not be disturbed on judicial review.

Here, Brown filed a complaint with the Commission alleging that the Racine City Clerk violated the statute governing alternate absentee ballot sites, Wis. Stat. § 6.855, in multiple ways. Two are relevant to Petitioners' appeal: (1) Brown's claim that Clerk McMenamin's selected sites afforded an advantage to a political party, on the theory that the sites were located in wards with voting histories differing from those in the ward where the clerk's office is located; and (2) that using a mobile voting unit at the sites was unlawful because no statute explicitly authorized the clerk to use that tool.

The Commission declined to issue an order finding Clerk McMenamin in noncompliance with the statutes. As to the site selection, the Commission found that Brown's evidence was insufficient to demonstrate that the sites afforded an advantage to any political party and concluded that the statute did not prohibit sites based on the partisan voting history of the ward in which the site was located. The

Commission concluded that the statute prohibits things like locating a site near a political party's headquarters or near a political party's get-out-the-vote rally. As to the mobile voting unit, the Commission concluded that the clerk's use of the unit did not violate any statute, particularly given the authority that Wisconsin statutes vest in local election officials regarding the administration of elections.

a. Did the Commission reasonably decline to issue a noncompliance order based on Brown's claim about alleged advantage to a political party?

The circuit court answered no.

This Court should answer yes.

b. Did the Commission reasonably decline to issue a noncompliance order based on Racine's use of a mobile voting unit to administer alternate-absentee voting sites?

The circuit court answered no.

This Court should answer yes.

STATEMENT REGARDING ORAL ARGUMENT AND PUBLICATION

By granting the petitions for bypass, this Court has indicated that the case is appropriate for oral argument and publication.

STATEMENT OF THE CASE

This case arises from efforts of the City of Racine and the municipal clerk, Respondent McMenamin, to designate alternate in-person absentee ballot sites for the August 2022 primary election. Kenneth Brown filed a complaint with the Commission pursuant to Wis. Stat. § 5.06(1), asserting that the planned locations and operation of the sites violated Wis. Stat. § 6.855(1) in multiple ways. (*See* R. 56:3–48.)

The Commission declined to issue an order against Clerk McMenamin. On the theory he was aggrieved, Brown petitioned to the circuit court for judicial review. The circuit court granted the petition in part and denied it in part, and this appeal and cross-appeal followed.

I. Factual background.

A. Clerk McMenamin chooses sites and hours for in-person absentee voting based on a list of sites designated by the City of Racine.

Wisconsin Stat. § 6.855 authorizes the governing body of a municipality (such as a city council) to "designate a site other than the office of the municipal clerk . . . as the location from which electors of the municipality may request and vote absentee ballots and to which voted absentee ballots shall be returned by electors for any election." Wis. Stat. § 6.855(1). While the original version of the statute authorized only one alternate site, current law authorizes the governing body to "designate more than one alternate site." Wis. Stat. § 6.855(5).

Relevant to the current appeal, designations must account for four factors. The designated sites must be "as near as practicable to the office of the municipal clerk"; "no site may be designated that affords an advantage to any political party"; a site may not be in the clerk's office; and the municipality's designations must remain "in effect until at least the day after the election." Wis. Stat. § 6.855(1).

In December 2021, the Racine City Council designated over 150 alternate sites as eligible to be used for in-person absentee balloting in the City of Racine for elections in 2022. (*See* R. 56:8, 34.)

The Racine City Clerk, Respondent McMenamin, selected 22 of those sites to be used for in-person absentee voting for the August 2022 primary election. (*See* R. 56:6.) Clerk McMenamin established a schedule for the selected absentee voting sites. For the alternate voting site closest to the clerk's office (which was located in a different office in City Hall), in-person absentee voting would be available regular business days and hours, and two Saturdays during the in-person absentee voting period. (R. 56:7.) For the 21 remaining sites, two sites would be open each day of absentee in-person voting. (R. 56:6–7.) Clerk McMenamin established three-hour blocks for each site on its open days. (R. 56:6–7.)

During the time each absentee voting site (other than the one in City Hall) was open, Racine's Mobile Voting Unit would be parked at the site. Voters could request and vote absentee ballots at the site inside the Mobile Voting Unit. (R. 56:7, 39 (picture of unit), 41.)

B. Brown files a complaint with the Wisconsin Elections Commission under Wis. Stat. § 5.06 raising five objections to Clerk McMenamin's plans for alternate absentee voting sites.

On August 10, 2022, Brown filed a complaint with the Commission under Wis. Stat. § 5.06(1), asserting that Clerk McMenamin's selection of multiple alternate absentee voting sites violated Wis. Stat. § 6.855. (R. 56:4–14.) Brown's complaint to the Commission raised five issues, based on a "policy brief" prepared by his law firm.[2] (*See* R. 56:39–50.)

First, Brown claimed that all the alternate sites afforded an advantage to one political party or the other, and that "collectively," the sites provided an advantage to the

[2] For context, the Commission's appeal pertains only to the first two issues discussed here.

Democratic Party. (*See* R. 56:9.) His argument relied on his theory that the measure for determining whether a site "affords an advantage to any political party" is whether the ward where a site is located has a historical voting pattern matching the ward where the clerk's office is located: e.g., if the clerk's-office ward contains 60/40 registered Democratic vs. Republican voters, any in-person absentee voting site must be located either (1) in the clerk's-office ward or (2) in another ward with the same proportion of Democratic and Republican voters as the clerk's-office ward. (*See* R. 59:39–40; 56:6, 44–49.)

Second, Brown argued that using the mobile voting unit at the sites violated multiple statutes, which he argued collectively require that in-person absentee voting occur only "in a building." (R. 56:11–13.)

Third, Brown alleged that 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 McMenamin selected. (*See* R. 56:8 (quoting Wis. Stat. § 6.855(1)).)

Fourth, Brown argued that the alternate in-person absentee ballot site, located at an office in City Hall, violated Wis. Stat. § 6.855(1) because the clerk's office is also in City Hall, and the statute prohibits certain voting-related activities from being conducted "in the office of the municipal clerk" if alternate sites are used. (R. 56:9–10.)

Fifth, he argued that the hours of many of the alternate sites violated the requirement in Wis. Stat. § 6.855(1) that a governing body's designation of an alternate site "shall remain in effect until at least the day after the election," since those sites were not open through "the day after the election." (R. 56:10.)

Brown asked the Commission to issue an order requiring McMenamin to conform her conduct to the law and restraining her from administering Racine's in-person alternate absentee sites in the ways Brown claimed violated § 6.855. (R. 56:13–14.)

C. The Commission declines to issue a noncompliance order.

After briefing, the Commission issued a decision explaining that it did not find grounds to issue an order of noncompliance against Clerk McMenamin. (*See* R. 59:47–60.)

1. "Advantage to any political party."

The Commission determined that Brown failed to carry his burden to show that the alternate sites afforded any advantage to a political party and thus declined to find noncompliance on that allegation. (R. 59:55.)

The Commission found that McMenamin presented "compelling arguments as to the inaccuracy of the Complainant's data analysis and misinterpretation [or] misapplication of the statutes." (R. 59:55.) Given the "fact-intensive" nature of such a claim, the Commission found Brown did not make the requisite showing that any site location afforded an advantage to a political party. (R. 59:55.) The Commission rejected Brown's legal theory that the alternate sites conferred an advantage merely by being located in a ward with a different partisan voting history than the ward in which the clerk's office is located, noting that the statute more reasonably suggests prohibiting practices like "an alternate absentee site located near the Democratic Party's office, [or] a site near a Republican Party [get-out-the-vote] rally." (R. 59:55–56.)

2. Racine's use of a mobile voting unit.

The Commission rejected Brown's arguments that Racine's use of the mobile voting unit at absentee ballot sites violated Wis. Stat. § 6.855 or other elections laws. (*See* R. 59:59–60.) The Commission first noted that "compliance determinations" on this issue are "fact-specific" and that the Commission had previously issued an order on a separate complaint, finding that Racine's mobile voting unit violated state and federal accessibility requirements for voters with disabilities. (*See* R. 59:59.)

But here, the Commission concluded that Brown failed to establish that a per se violation of Wis. Stat. § 6.855 occurs merely because the distribution and voting of absentee ballots does not occur in a building. (R. 59:59–60.) The Commission pointed to the discretion the statutes vest in local election administrators to determine how best to "serve[ ] the needs of the electorate," including discretion about where to locate polling places. (R. 59:60 (quoting Wis. Stat. § 5.25(1)).)

3. Locating sites as near as practicable to the clerk's office, using a different office in City Hall, and maintaining the designation of sites until the day after election day.

The Commission also addressed three other claims that are not at issue in the Commission's appeal.

For one, the Commission found that Brown did not establish that McMenamin violated the requirement that alternate sites be located "as near as practicable" to the clerk's office. (R. 59:55 (quoting Wis. Stat. § 6.855(1)).) Because the statute authorizes multiple alternate sites, the Commission explained that the "practicability" standard requires the clerk to consider more than mere physical proximity to the clerk's office; otherwise, all the alternate sites would have to be clustered near the clerk's office. (*See* R. 59:55.)

The Commission explained that the clerk's consideration of other factors—like whether the alternate sites were geographically equal—reasonably reconciled the "as near as practicable" requirement with the statutory allowance of multiple sites. (R. 59:55.)

The Commission also found that Brown did not carry his burden to show that Racine's use of a conference room in City Hall violated Wis. Stat. § 6.855(1)'s prohibition on conducting any voting-related function "in the office of the municipal clerk" if those functions are being conducted at an alternate site. (R. 59:56–57.) The Commission found that Brown failed to show that the separate conference room should be construed to be "in the office of the municipal clerk," given that the room was not, in fact, in the office of the clerk and was instead in a separate part of City Hall. (R. 59:57.)

The Commission also rejected an argument that Brown raised on reply, that McMenamin violated Wis. Stat. § 6.855(1) by storing absentee ballots in the clerk's office after they were collected from the absentee sites. (R. 59:57–58.) In addition to noting the tardiness of the argument, the Commission questioned whether storage of ballots constituted a "function related to voting or return of absentee ballots." (R. 59:57.) And ultimately, the Commission concluded it would be inappropriate to interfere in the clerk's determination of how ballots should be most safely stored, finding that "[t]hat critical decision needs to rest with the officials responsible for safeguarding and delivering ballots." (R. 59:58.)

Finally, the Commission did not find a violation based on Brown's theory that the alternate sites are unlawful because they do not remain in use "until at least the day after the election." (R. 59:58–59.) The Commission concluded that the statutory text requires a "designation" to remain in effect through the day after the election, not that any designated site actually be used for voting purposes "until at least the day

after the election." (R. 59:58–59.) The Commission explained that this interpretation not only better aligns with the statutory text and common sense, but it also comports with practical considerations—namely, that alternate sites often are not open for the same number of hours or days, such that the majority of alternate sites would be in violation of the statute under Brown's reading. (R. 59:59.) The Commission also noted again that Brown's proffered interpretation would require significant intervention by the Commission in local election administration, which is contrary to the substantial discretion that Wisconsin statutes vest in local election officials on matters such as days and hours of operation for in-person absentee ballot sites. (R. 59:59.)

II. Procedural history of the litigation.

Brown filed an appeal from the Commission's decision in the circuit court for Racine County, citing Wis. Stat. § 5.06(8), naming the Commission and Clerk McMenamin as defendants.[3] He raised the same five issues he raised before the Commission, as well as a claim that the Commission's decision was invalid due to a procedural flaw. (R. 3:5–26.)

After motion practice and merits briefing, the circuit court issued a written decision. (*See* R. 99.) Relevant to the current appeal, the court held that Brown had standing for his challenge, that Racine's use of multiple alternate absentee sites afforded an unlawful "partisan advantage," and that Racine's use of a mobile voting unit was unlawful. (*See* R. 99:13–17.) The circuit court affirmed the Commission regarding Brown's claims that Clerk McMenamin had not located the sites as near as practicable to the clerk's office, that Racine could not locate a site in a different office in City

[3] Multiple parties also moved to intervene, which the circuit court granted. (*See* R. 18–19, 25–26, 45–48, 64–65, 71).

Hall, and that the designation of sites had not remained in place until the day after election day. (R. 99:14–17.)

All defendants and intervenors appealed, and Brown cross-appealed. Multiple appellants filed petitions for bypass with this Court and motions in the circuit court seeking a stay of the Court's judgment pending appeal. The circuit court denied the stay, and the movants then sought a stay from this Court; those requests remain pending.

This Court granted the petitions for bypass and ordered briefing on all issues raised in the appeals and cross-appeal.

STANDARDS OF REVIEW

Whether Brown has standing presents a question of law that this Court reviews de novo. *Friends of Black River Forest v. Kohler Co. ("Friends")*, 2022 WI 52, ¶ 10, 402 Wis. 2d 587, 977 N.W.2d 342, *recon. denied sub nom. Friends of Black River Forest v. DNR*, 2022 WI 104, 997 N.W.2d 400.

If the Court concludes that Brown has standing, he 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.

The relevant question on judicial review is whether the Commission reasonably exercised its discretion in deciding not to issue Clerk McMenamin a noncompliance order. That inquiry involves two nested, discretionary standards of review.

This Court reviews whether the Commission reasonably exercised its discretion when it declined to issue the Clerk a noncompliance order for the Clerk's discretionary actions. *See* Wis. Stat. § 5.06(4) (Commission's review limited to whether local election official "failed to comply with the

law or abused the discretion vested in him or her by law"). These sorts of discretionary decisions generally "will not be disturbed on review," as long as the administrative agency reviewed relevant facts and law, and adequately explained its reasoning. *Holtz & Krause, Inc. v. DNR*, 85 Wis. 2d 198, 210–12, 270 N.W.2d 409 (1978); *see also State ex rel. Davern v. Rose*, 140 Wis. 360, 122 N.W. 751, 753 (1909) (recognizing that generally "courts have no right to interfere" on review of "the exercise of the judgment and discretion committed to [administrative] officials").

Under Wis. Stat. § 5.06(9), this Court shall "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."

The burden is upon the petitioner to show that the agency decision should be overturned. *City of La Crosse v. DNR*, 120 Wis. 2d 168, 178, 353 N.W.2d 68 (Ct. App. 1984); Wis. Stat. § 227.57(2). As to an agency's interpretation of statutes, review is de novo. *Citation Partners, LLC v. DOR*, 2023 WI 16, ¶ 32, 406 Wis. 2d 36, 985 N.W.2d 761.

SUMMARY OF THE ARGUMENT

Brown's complaint should have been dismissed because he has not established any injury to an interest protected by law, and therefore lacks standing.

To establish standing for his challenge under Wis. Stat. § 5.06(8), Brown was required to show he was "aggrieved"—that he suffered a direct and personal injury to an interest protected by law. Courts universally hold that generalized grievances about the administration of government are not a cognizable injury. One category of such generalized

grievances is the "vote dilution" theory, under which a plaintiff claims that his vote is wrongly "diluted" by others' votes that are allegedly cast in violation of election laws. Federal courts have uniformly held that vote-dilution type claims are insufficient to demonstrate injury, and no Wisconsin appellate court has endorsed such a theory of standing.

For purposes of the legally protected interest inquiry, a challenger must show that that statute that was allegedly violated protects, recognizes, or regulates that individual's interests. Because Brown claims that Wis. Stat. § 6.855(1) was violated, he was required to establish that that statute protects or recognizes one of his asserted, individualized interests, rather than standards applicable to the general administration of government.

To support his standing, Brown does not allege that his right to vote has been impaired in any way. Instead, he claims that he has an interest in election officials following the law. That interest does not state an injury and is insufficient to support standing.

Brown also failed to establish any interest protected or recognized under Wis. Stat. § 6.855. In fact, he did not even try to argue that the statute protects his individual interests. Rightly so, because nothing in the text of Wis. Stat. § 6.855 suggests that the statute protects rights like what Brown asserts here. Brown therefore fails to support his standing under this second prong of the inquiry, too.

This isn't changed by the fact that Wis. Stat. § 5.06 authorizes voters to file complaints when they "believe" an election official has violated the law. Wis. Stat. § 5.06(1). While a voter's "belief" is sufficient to support filing a complaint with the Commission, such a belief is not enough to establish standing to file a lawsuit; that requires the plaintiff to show he is "aggrieved" by the Commission's decision to

issue a noncompliance order. *See* Wis. Stat. § 5.06(6), (8). Because Brown cannot make that showing, he cannot satisfy the statutory requirement for standing.

Brown's lack of standing is sufficient to support reversal and dismissal of his complaint. But if the Court looks beyond standing, reversal also is warranted because the Commission reasonably declined to issue Clerk McMenamin a noncompliance order under Wis. Stat. § 5.06. The circuit court was wrong to hold otherwise as to two points: Brown's claims of unlawful "partisan advantage" in the siting of Racine's alternate in-person absentee ballot sites, and Racine's use of a mobile voting unit.

First, the Commission reasonably declined to issue an order based on Brown's alleged "partisan advantage" theory. Brown claimed that siting alternate absentee sites in any ward that has a different partisan voting history than the ward in which the clerk's office is located would constitute unlawful "partisan advantage." For one thing, the controlling statute, Wis. Stat. § 6.855, does not refer to "*partisan* advantage," and instead prohibits affording advantage to a "political party," which is a statutorily defined term. The Commission reasonably concluded that the statute prohibits locating absentee sites at, say, a political party's headquarters. But nothing in the statute contemplates the ward-based analysis of historical voting patterns that Brown suggests.

The circuit court's contrary conclusion is not only contrary to Wis. Stat. § 6.855's text, but it's also unreasonable because it effectively reinvigorates the "one-location" rule that a federal court held unconstitutional in *One Wisconsin Institute v. Thomsen*. Previously, Wisconsin law allowed only one alternate in-person absentee site, but the federal court held that this restriction violated the First and Fourteenth Amendments, and Section 2 of the Voting Rights Act. Based on that decision, the Legislature added a new statutory

subsection authorizing municipalities to designate multiple alternate sites. The circuit court's decision would effectively nullify that amendment and return Wisconsin to the state of affairs the federal court held unconstitutional. The Commission's decision reasonably avoided that result.

Second, the Commission reasonably declined to issue a noncompliance order based on Racine's use of a mobile voting unit. Nothing in the relevant statute, Wis. Stat. § 6.855, requires that an in-person absentee ballot site be located inside a building; to the contrary, the statute speaks of "sites," not "buildings."

Statutory context confirms that the use of the mobile voting unit is not prohibited. The election statutes vest local election officials with substantial discretion, including the authority to determine what actions are "necessary to properly conduct elections." Wis. Stat. § 7.15(1). Viewed against this statutory structure, and because there exists no statutory prohibition on the use of a vehicle like the mobile voting unit, the Commission reasonably declined to issue Racine a noncompliance order for its use of the unit.

The circuit court's contrary conclusion was based on an erroneous interpretation of Wis. Stat. § 6.84, as interpreted by this Court in *Teigen*. In particular, the circuit court held that because statutes relating to absentee voting must be strictly construed, and because no statute expressly authorizes a mobile voting unit, its use is prohibited. As the Commission previously explained in briefing in *Priorities USA v. WEC*, Wisconsin law does not support the *Teigen* majority's analysis on this point. The circuit court's decision on this point, relying on *Teigen*, should be reversed.

ARGUMENT

I. Brown lacks standing because he is neither injured nor "aggrieved."

Brown's complaint should have been dismissed at the threshold because he is not "aggrieved" as required to establish standing under Wis. Stat. § 5.06(8).

A. Wisconsin courts assess standing both as a question of the judicial power to resolve disputes and, where applicable, whether a plaintiff's claims come within the relevant statute.

While federal courts explicitly recognize that the doctrine of standing limits "the judicial power" to deciding only "cases and controversies," *Allen v. Wright*, 468 U.S. 737, 750–51 (1984), Wisconsin courts have generally declined to recognize a constitutional basis for the doctrine of standing. *See State ex rel. First Nat. Bank of Wisconsin Rapids v. M & I Peoples Bank of Coloma*, 95 Wis. 2d 303, 309 & n.5, 290 N.W.2d 321 (1980). But Wisconsin courts recognize that the "judicial power" under the Wisconsin Constitution parallels the limitations under the federal Constitution, and that in Wisconsin "the judicial power is the power to hear and determine controversies between parties before courts." *State v. Williams*, 2012 WI 59, ¶ 36, 341 Wis. 2d 191, 814 N.W.2d 460; *accord Gabler v. Crime Victims Rts. Bd.*, 2017 WI 67, ¶ 37, 376 Wis. 2d 147, 897 N.W.2d 384.

Given the parallel between the scope and limitations of the judicial power under both the federal and state constitutions, Wisconsin courts have long adhered to the federal principles of standing as a matter of "sound judicial policy." *First Nat. Bank of Wis. Rapids*, 95 Wis. 2d at 308–09 n.5. For this reason, Wisconsin courts "largely embrace[ ] federal standing requirements" and "'look to federal case law

as persuasive authority regarding standing questions.'" *Friends*, 402 Wis. 2d 587, ¶ 17 (quoting *McConkey v. Van Hollen*, 2010 WI 57, ¶ 15 n.7, 326 Wis. 2d 1, 783 N.W.2d 855).

To establish standing in Wisconsin, a plaintiff must allege an injury, caused by the defendant and redressable by the application of the judicial power. *See State ex rel. First Nat. Bank of Wisconsin Rapids*, 95 Wis. 2d 307–09. This case primarily involves the question of injury.

1. To establish standing a plaintiff must demonstrate a direct, personal injury; generalized grievances about government administration are insufficient.

To meet the "injury" requirement, a plaintiff must have "suffered 'some threatened or actual injury resulting from the putatively illegal action.'" *Id.* at 308 (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)). This requires the plaintiff to show a "personal stake in the outcome of the controversy." *Id.* at 308–09. Abstract, hypothetical, and conjectural injury "is not enough." *Fox v. DHSS*, 112 Wis. 2d 514, 525, 334 N.W.2d 532 (1983) (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983)). Nor is a mere disagreement or frustration with the defendant's conduct. *See Hollingsworth v. Perry*, 570 U.S. 693, 700 (2013). Rather, a plaintiff must show that he "'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged official conduct." *Fox*, 112 Wis. 2d 525 (quoting *Lyons*, 461 U.S. at 101).

Generalized grievances about the administration of government are insufficient to support standing. *Cornwell Pers. Assocs., Ltd. v. DILHR*, 92 Wis. 2d 53, 62, 284 N.W.2d 706 (Ct. App. 1979). A plaintiff "raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the

Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large"—does not state an injury sufficient to confer standing. *Hollingsworth*, 570 U.S. at 706 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573–74 (1992)); *see also Allen*, 468 U.S. at 754 (recognizing that "an asserted right to have the Government act in accordance with law" is not sufficient to establish an injury for purposes of standing).

One category of such "generalized grievances" is the theory of "vote dilution," under which a voter claims that "the possibility of unlawful or invalid ballots being counted" wrongly "dilutes" the plaintiff's allegedly lawful vote. *See Feehan v. WEC*, 506 F. Supp. 3d 596, 608 (E.D. Wis. 2020). Federal courts have uniformly rejected this vote-dilution theory of standing.[4] *See, e.g.*, *id.* at 608–09 (collecting cases).

Feehan is illustrative. It involved a challenge to the results of the 2020 presidential election, based on voters' allegation that the election was conducted so unlawfully that "Wisconsin's voters, courts, and legislators, cannot rely on" the reported results. *Id.* at 609. The court held that the plaintiffs' alleged injuries were the same "that any Wisconsin voter suffers if the Wisconsin election process were [conducted as unlawfully] as the plaintiff alleges." *Id.* This type of harm, the court held, is not the type of "particularized, concrete injury sufficient to confer standing." *Id.*

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[4] Courts do recognize a different theory of "vote dilution" under the Equal Protection clause. *See Wood v. Raffensperger*, 981 F.3d 1307, 1314 (11th Cir. 2020) (recognizing viability of theory based on "irrationally favor[ing]" certain voters' votes, but rejecting standing for dilution theory based merely on allegedly unlawfully cast or votes). This case does not involve that type of Equal Protection theory of vote dilution.

Courts addressing similar vote-dilution theories across the country are in accord. *See, e.g.*, *Wisconsin Voters All. v. Pence*, 514 F. Supp. 3d 117, 120 (D.D.C. 2021) (quoting *Hollingsworth*, 570 U.S. at 706); *see also Wood v. Raffensperger*, 981 F.3d 1307, 1314 (11th Cir. 2020); *Bowyer v. Ducey*, 506 F. Supp. 3d 699, 712 (D. Ariz. 2020); *Bognet v. Sec'y Commonwealth of Pennsylvania*, 980 F.3d 336, 354–55 (3d Cir. 2020), *cert. granted, judgment vacated sub nom. Bognet v. Degraffenreid*, 141 S. Ct. 2508 (2021).

No Wisconsin appellate court has endorsed the vote-dilution theory of standing, and general principles of standing in Wisconsin law cut sharply against it. *See, e.g.*, *Cornwell Pers. Assocs., Ltd.*, 92 Wis. 2d at 61–62; *First Nat. Bank of Wisconsin Rapids*, 95 Wis. 2d at 308–09; *see, also, e.g.*, *Rise, Inc. v. WEC*, No. 2022AP1838, 2023 WL 4399022, ¶ 27 (Wis. Ct. App. July 2, 2023) (unpublished) (expressing doubt that "vote dilution" theory could ever "amount to an actual, concrete injury that gives [plaintiffs] a justiciable stake" in a case) (unpublished, authored decision cited in accordance with Wis. Stat. § (Rule) 809.23(3)).

2. Statutes allowing "aggrieved" parties to seek review of government action require the complainant to assert an injury to an interest protected under the relevant statute.

The question of standing often arises in the context of challenges to government action, and thus often implicates questions of statutory standing, or whether a challenger is "aggrieved" by the government's action. Wis. Stat. § 5.06(8); *see also* Wis. Stat. § 227.53(1).[5] To establish that he is

[5] This Court's recent decision in *Friends of Black River Forest v. Kohler Co.*, 2022 WI 52, ¶¶ 25–31, 402 Wis. 2d 587, 977 N.W.2d 342, provides the clearest guidance on the statutory-

"aggrieved" by the challenged governmental action, a challenger must show two things: "[1] a direct effect on [2] his legally protected interests." *Friends*, 402 Wis. 2d 587, ¶ 20 (quoting *Fox*, 112 Wis. 2d at 524).

The "direct effect" inquiry asks whether the challenger has alleged "injuries that are a direct result of the agency action" and thus parallels the general injury analysis discussed above. *Id.* ¶ 21 (quoting *Wisconsin's Env't Decade, Inc. v. PSC*, 69 Wis. 2d 1, 8, 230 N.W.2d 243 (1975)); *see also Fox*, 112 Wis. 2d at 524–25.

The "legally protected interest" element requires the challenger to show that the alleged injury pertains to "an interest which the law recognizes or seeks to regulate or protect." *Friends*, 402 Wis. 2d 587, ¶ 28 (quoting *Waste Mgmt. of Wis., Inc. v. DNR*, 144 Wis. 2d 499, 505, 424 N.W.2d 685 (1988)). This "textually-driven" inquiry focuses on the "language of the specific statute cited by the petitioner as the source of its claim to determine whether that statute 'recognizes or seeks to regulate or protect' the interest advanced by the petitioner." *Id.* (quoting *Waste Mgmt.*, 144 Wis. 2d at 505). This means that the relevant provision is not the procedural statute that authorizes judicial review, but rather the statute or constitutional provision "whose violation is the gravamen of the complaint." *Id.* (quoting *Air Courier Conf. of Am. v. Am. Postal Workers Union AFL-CIO*, 498 U.S. 517, 529 (1991)).

That inquiry also requires a challenger to point to "substantive criteria" by which the challenger would establish a violation of his rights under the statute. *Id.* ¶ 33 (quoting

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standing analysis. *Friends* involved claims under the Wisconsin Administrative Procedure Act, Wis. Stat. §§ 227.52–.53, whereas this case involves claims brought under Wis. Stat. § 5.06. Both procedural statutes, however, require a challenger to establish that he is "aggrieved." *See* Wis. Stat. § 227.53(1); Wis. Stat. § 5.06(8).

Chenequa Land Conservancy, Inc. v. Village of Hartland, 2004 WI App 144, ¶ 22, 275 Wis. 2d 533, 685 N.W.2d 573)). If the statute or rule lacks such "substantive criteria," that indicates it does not "protect, recognize, or regulate" the petitioner's interests as necessary to support standing. *Id.* ¶¶ 34, 43.

3. The separate opinions in *Teigen* did not alter Wisconsin's standing analysis.

To support his standing, Brown cited two separate opinions in *Teigen*. (*See* R. 95:6, 7.) However, the separate opinions stated no controlling rule about standing; they relied on separate sources of authority for their conclusions that voters have a judicially cognizable right to have their elected officials follow the law. The plurality opinion grounded its standing analysis in "the right to vote," *see Teigen v. WEC*, 2022 WI 64, ¶ 22, 403 Wis. 2d 607, 976 N.W.2d 519 (R. Bradley, J., plurality opinion), whereas the concurrence found the source of standing in Wis. Stat. § 5.06, *see id.* ¶ 164 (Hagedorn, J., concurring). Because there was no controlling opinion on standing and no "theoretical overlap" between the plurality and concurrence's theories of standing, the separate writings in *Teigen* establish no new rule of standing different from any previous published decision. *See State v. Deadwiller*, 2013 WI 75, ¶ 30, 350 Wis. 2d 138, 834 N.W.2d 362 (discussing application of "*Marks* rule," governing the ascertainment of a binding holding based on "fractured opinions"[6]).

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[6] Although this Court has applied the "*Marks* rule" when ascertaining the binding holding of United States Supreme Court decisions regarding federal law, *see, e.g.*, *State v. Deadwiller*, 2013 WI 75, ¶¶ 30–31, 350 Wis. 2d 138, 834 N.W.2d 362, it has not adopted a similar procedure for ascertaining binding holdings of

To establish standing, a challenger must show a direct, personal injury. For a petition under Wis. Stat. § 5.06(8), "aggrievement" also requires that the alleged injury be to an interest that is protected by the statute that the plaintiff claims was violated. Generalized grievances about government administration—such as claims that government is wrongly allowing others to vote, or to vote in ways not authorized by law—do not demonstrate an injury to support standing.

B. Brown suffered no direct, personal injury and also is not aggrieved under Wis. Stat. § 5.06(8) because the relevant statute, Wis. Stat. § 6.855(1), does not protect the interest he asserts.

At bottom, this case is about Brown's wanting his elected officials to administer elections differently. His complaint stated nothing more than generalized grievances about the administration of government. He lacks standing for two reasons: his complaints are not a direct, personal injury, and they do not make him "aggrieved" for purposes of a judicial review petition under Wis. Stat. § 5.06(8).

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fractured opinions of this Court interpreting Wisconsin law. *See Johnson v. WEC*, 2022 WI 14, ¶ 243, 400 Wis. 2d 626, 971 N.W.2d 402 (R. Bradley, J., dissenting) ("This court has never applied the *Marks* Rule to interpret its own precedent, but only to interpret federal precedent."). This Court need not (and should not) decide here whether a *Marks*-type rule applies because, even if it did, in *Teigen* there was no "theoretical overlap" between the lead/plurality opinion and Justice Hagedorn's concurring opinion, given that they expressly disavowed each other's rationale. *See Teigen v. WEC*, 2022 WI 64, ¶¶ 32–35, 403 Wis. 2d 607, 976 N.W.2d 519 (R. Bradley, J., plurality opinion); *id.* ¶ 167 (Hagedorn, J., concurring).

1. Brown does not have a direct, personal injury.

First, Brown has no direct, personal injury for standing purposes. He did not allege that his right to vote was impaired, or even that any of the challenged actions made it more difficult for him to vote. (*See* R. 3:6–26; *see also* R. 95:2–10.) Instead, Brown alleges only a generalized interest "in ensuring that his local election official's conduct complies with the law." (R. 95:7; *see also* R. 95:6 (asserting "voters have a cognizable interest in holding their local election officials to the law"); 95:6 (phrasing protected interest as an "interest in the administration of free and fair elections as a qualified elector")).

But the desire to "hold [elected officials] to the law" (R. 95:6), is the quintessential generalized grievance about governmental administration, indistinguishable from similar grievances that courts have routinely rejected as a basis for standing. *See, e.g.*, *Feehan*, 506 F. Supp. 3d at 608–09. This is why courts uniformly reject this theory as a basis for standing. *See id.*; *see also Wisconsin Voters All.*, 514 F. Supp. 3d at 120; *Hollingsworth*, 570 U.S. at 706; *Cornwell*, 92 Wis. 2d at 62. And to the extent he would assert that the votes of voters using alternate voting sites or the mobile voting unit "dilute" his vote, no Wisconsin appellate court has held that this is an injury sufficient for standing purposes.

2. Brown does not have a legally protected interest that would make him "aggrieved" under Wis. Stat. § 5.06(8).

The statute under which Brown filed suit, Wis. Stat. § 5.06(8), requires a petitioner to be "aggrieved" to bring suit. In that way, the statute is just like Wis. Stat. § 227.53, the judicial review statute at issue in *Friends*. And just like the petitioners in *Friends*, Brown is not aggrieved because he has

alleged no injury to a "legally protected interest." This is not changed by the fact that he was authorized to bring file an administrative complaint with the Commission under Wis. Stat. § 5.06(1), as that procedure relies on a different standard than "aggrievement."

a. Brown is not "aggrieved."

If the Commission issues an order directed to an election official in response to a voter complaint, "[a]ny election official or complainant who is aggrieved by [that] order issued under sub. (6) may appeal the decision of the commission to circuit court." Wis. Stat. § 5.06(8). That judicial review matter is then heard by the court under standards consistent with those under Chapter 227. Wis. Stat. § 5.06(9).

As this Court explained in *Friends*, establishing "aggrievement" requires analysis of whether the statute that the challenger claims was violated "protects, recognizes, or regulates" the challenger's asserted interests. *Friends*, 402 Wis. 2d 587, ¶ 25. The proper focus of this inquiry is the statute "whose violation is the gravamen of the complaint." *Id.* ¶ 28 (quoting *Air Courier Conf. of Am.*, 498 U.S. at 529).

Here, the "gravamen" of Brown's complaint is not that Wis. Stat. § 5.06 was violated, but rather that the Racine City Clerk violated Wis. Stat. § 6.855 in multiple ways. (*See* R. 3:5–26.)

The statutory standing analysis thus rests on Wis. Stat. § 6.855, and whether there is any textually demonstrable indication that that statute "recognizes or seeks to regulate or protect" Brown's asserted interests. *See Friends*, 402 Wis. 2d 587, ¶ 28 (quoting *Air Courier Conf. of Am.*, 498 U.S. at 529). For example, Wis. Stat. § 6.855 requires that sites "shall be accessible to all individuals with disabilities," Wis. Stat. § 6.855(4), so the interests of a voter with disabilities who

alleges he cannot access a site would be protected under that statute.

In contrast, Wis. Stat. § 6.855 provides no textual indication that it protects individual interests like Brown's generalized desire to see the law followed. (*See* R. 95:2–10.) Indeed, Brown did not even rely on the statutory text, and instead has relied exclusively on the notion that he has an individualized right to "hold . . . election officials to the law." (R. 95:6 (phrasing protected interest as an "interest in the administration of free and fair elections as a qualified elector").) Nothing in the text of Wis. Stat. § 6.855 recognizes such an interest.

b. Brown's ability to file an administrative complaint with the Commission under Wis. Stat. § 5.06(1) does not make him "aggrieved" under § 5.06(8).

For purposes of assessing whether Brown has a legally protected interest, it is irrelevant that the statute under which he brought his administrative complaint, Wis. Stat. § 5.06(1), authorizes a voter to submit a complaint to the Commission based on the voter's "belief" that an election law was violated. *See* Wis. Stat. § 5.06(1). While a voter's "belief" is sufficient to authorize filing a complaint with the Commission, the statute imposes a different standard if the complainant wishes to obtain judicial review; he must be "aggrieved." *See* Wis. Stat. § 5.06(1), (8).

Filing an administrative complaint under Wis. Stat. § 5.06(1) does not confer any procedural or substantive rights on the complainant. Rather, the Commission may take one of many different actions on the complaint: it may dispose of the complaint with no action, *see* Wis. Stat. § 5.06(2); "conduct a hearing on the matter . . . if it believes such action to be appropriate," Wis. Stat. § 5.06(1); independently "investigate

and determine whether any election official . . . failed to comply with the law or abused the discretion vested in him or her by law," Wis. Stat. § 5.06(4), *see also id.* § 5.06(5); summarily decide the complaint, *see* Wis. Stat. § 5.06(6); or issue an order "requir[ing] any election official to conform his or her conduct to the law," Wis. Stat. § 5.06(6). A voter who files a complaint under sub. (1) is not entitled to any of those outcomes.

Rather, the filing of an administrative complaint satisfies an exhaustion requirement, since the statute provides that voters—even voters with standing—"may [not] commence an action or proceeding to test the validity of any decision, action or failure to act on the part of any election official . . . without first filing a complaint under sub. (1), nor prior to disposition of the complaint by the commission." Wis. Stat. § 5.06(2). And satisfying that exhaustion requirement does not confer standing on any voter who has filed a complaint under Wis. Stat. § 5.06(1). Indeed, courts have long recognized that a complainant in court does not necessarily have standing to challenge administrative decision "merely because that person requested and was granted an administrative hearing." *Fox*, 112 Wis. 2d at 526.

Thus, while "belief" is sufficient to file a complaint with the Commission, standing to seek judicial review requires a petitioner to show he is "aggrieved" by the challenged decision. Wis. Stat. § 5.06(8). Brown did not meet that standard here.

3. The circuit court misunderstood the requirements for standing.

The circuit court, in concluding that Brown has standing, held that voters like Brown "are entitled to have the election in which they participate . . . administered properly under the law." (R. 99:13.) Not only is that conception of

standing unmoored from the text of Wis. Stat. § 6.855, that theory does not state a cognizable injury under Wisconsin law.

As support, the circuit court held that "[j]udicial policy favors hearing cases presenting 'carefully developed and zealously argued' issues." (R. 99:13 (quoting *Teigen*, 403 Wis. 2d 607, ¶ 17 (R. Bradley, J., plurality opinion)).) But standing is not a matter of judicial efficiency or a "policy" of hearing zealously argued cases. Rather, the doctrine serves to "keep[ ] the Judiciary's power within its proper constitutional sphere" of deciding disputes between parties with a direct stake in the controversy. *Hollingsworth*, 570 U.S. at 704–05 (2013) (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013); *see also Williams*, 341 Wis. 2d 191, ¶ 36 (recognizing that "judicial power" is "the power to hear and determine controversies between parties before courts"). Properly applied, the standing doctrine leaves no room for considerations like "[c]onvenience and efficiency," *see Hollingsworth*, 570 U.S. at 705–06, and instead requires a plaintiff to show a direct injury redressable by application of the judicial power, *see First Nat. Bank*, 95 Wis.2d at 307–09.

The circuit court also referred to the supposedly low bar for standing in Wisconsin. (*See* R. 99:13.) But however low the standard may be, Brown still was required to show *some* real, direct injury: "Although the magnitude of the injury is not determinative of standing, the fact of injury is." *Fox*, 112 Wis. 2d at 525; *see also First Nat. Bank*, 95 Wis.2d at 309.

And in concluding that Brown suffered some cognizable injury, the circuit court relied on precisely the type of generalized grievances (*see* R. 99:13–14) that courts have rejected as a basis for standing. *See, e.g.*, *Feehan*, 506 F. Supp. 3d at 608–09; *Wisconsin Voters All.*, 514 F. Supp. 3d at 120; *see also Hollingsworth*, 570 U.S. at 706; *Cornwell*, 92 Wis. 2d at 62. The circuit court's analysis of standing is unsupported in Wisconsin law and should be reversed.

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Brown failed to establish a direct and personal injury to a legally protected interest. Brown therefore lacks standing and his petition under Wis. Stat. § 5.06(8) should have been dismissed on this basis.

II. The Commission reasonably declined to issue Clerk McMenamin a noncompliance order based on the alleged violations of Wis. Stat. § 6.855(1).

If the Court agrees that Brown lacks standing, it need not address the remaining issues. But if the Court concludes that Brown has standing, reversal is required on other grounds. The circuit court held that the Commission was required to issue a noncompliance order to Clerk McMenamin on two alleged violations of Wis. Stat. § 6.855: her siting of alternate in-person absentee voting sites and the use of a mobile voting unit. The circuit court's rulings on these issues were incorrect.

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 multiple sites. The circuit court's decision to the contrary should be reversed.

1. The Commission reasonably concluded that Brown did not establish a violation of Wis. Stat. § 6.855(1).

The circuit court erred because the Commission's interpretation of Wis. Stat. § 6.855(1) as to absentee voting sites was reasonable.

Wisconsin Stat. § 6.855(1) prohibits local election officials from designating any alternate absentee ballot site "that affords advantage to any political party." Brown argued that an alternate site affords a "partisan advantage" if it lies in a ward with a different spread of Democratic and Republican voters than the vote spread of the ward in which the clerk's office is located. (*See* R. 86:10–13; *see also* R. 59:40.) His argument has no basis in statutory text, evidence, or common sense.

For one, Wis. Stat. § 6.855(1) does not refer to "*partisan* advantage"; rather, the statute prohibits affording "advantage to any *political party*." This distinction is important because Brown's rewriting urges a broad inquiry into whether any "partisan advantage" exists in the abstract. (*See* R. 86:10–13.) The statute, however, does not operate on abstractions. Instead, it focuses on whether a specific "political party" is advantaged. That term is defined by statute and means "[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).

The statute thus simply prohibits some advantage to these types of political committees by virtue of the specific site itself or its proximity to a political party's operations. *See* Wis. Stat. § 6.855(1). Most reasonably read, the statute prohibits, for example, locating an absentee ballot site "near the Democratic Party's office," or "near a Republican Party [get-out-the-vote] rally." (R. 59:56.)

This means that for Brown to establish a violation of the statute, he had to show that a statutorily defined "political party" obtained some demonstrable advantage by the siting

of a specific absentee ballot site. Brown made no such showing, which is why the Commission declined to issue a noncompliance order. (R. 59:55–56.)

Rather than focusing on the statutory text, both Brown and the circuit court invented a whole different inquiry: focusing on ward-based voting history to conclude that, overall, the way that Racine located alternate sites afforded an advantage to "those with known Democratic leanings." (*See* R. 86:10–13; 99:14–15.) The statute says nothing about assessing ward-level voting behavior, much less determining the "leanings" of voters when deciding where to locate sites.

In addition to being unsupported by text, Brown and the circuit court's reading of Wis. Stat. § 6.855(1) would create unreasonable results. Courts avoid adopting unreasonable interpretations of statutes whenever possible. *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110.

Brown's approach would require local election officials to conduct a preemptive analysis of ward-based voting history, even before there is any showing of some impermissible "advantage to any political party." Nothing in the statutes suggests that this type of statistical analysis is required or appropriate.

2. The circuit court's reading would cause clerks to run afoul of the federal court's holding in *One Wisconsin*.

The Commission's decision not to issue a noncompliance order also was reasonable because it avoided reinvigorating 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.

Wisconsin Stat. § 6.855 has been the subject of litigation and legislative amendment leading to the current statute that 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 African American and Latino voters. *See id*. The district court 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*, 963 F.3d at 674. 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 precisely the problem the Seventh Circuit treated as "unlikely." 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.)

Under the circuit court's reasoning, it is nearly impossible for a municipality to designate an alternate site. In practice, almost no wards will have the same voting results as another ward, so a municipality attempting to follow the circuit court's standard would almost certainly be unable to establish a compliant site. (*See* R. 135:19–20 (review of ward-by-ward voting results for the 20 largest municipalities in Wisconsin, with none having the same voting results as municipality's clerk's-office ward).) Thus, for municipalities that follow the circuit court's theory, voters will have only one option to vote in-person absentee: the clerk's office.

Under the federal court's decision in *One Wisconsin Institute, Inc.*, this result is not just burdensome: it is constitutionally untenable, especially in larger cities where the burdens of a one-location rule fall disproportionately on voters of color. 198 F. Supp. 3d at 931–35, 963.

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." If this Court reaches this question of statutory interpretation, it should reverse the circuit court's decision on this issue.

B. The Commission reasonably exercised its discretion by declining to issue a noncompliance order about Racine's use of a mobile voting unit.

The circuit court also incorrectly reversed the Commission's decision not to issue a noncompliance order for Racine's use of a mobile voting unit to facilitate absentee voting at approved alternate sites throughout the city. The circuit court's decision on this point should be reversed.

1. The Commission reasonably concluded that Wis. Stat. § 6.855(1) does not prohibit clerks from using mobile voting units at properly noticed alternate in-person absentee voting sites.

In declining to issue McMenamin a noncompliance order regarding the use of a mobile voting unit, the Commission concluded that Brown had failed to establish a violation of Wis. Stat. § 6.855(1). That conclusion was reasonable.

First, nothing in Wis. Stat. § 6.855 imposes any requirement that an alternate absentee location must be a fixed structure like a building. Rather, the statute refers to "sites" and says nothing at all about buildings or other structures that must exist at such a site. Wis. Stat. § 6.855(1).

Second, and most relevant, the Commission's decision recognized that nothing in Wis. Stat. § 6.855 or any other statute prevents use a mobile unit in the administration of elections, and that existing statutes recognize broad discretion in local election officials to make just such decisions.

The Wisconsin Legislature has created a "highly decentralized system for election administration." *State ex rel. Zignego v. WEC*, 2021 WI 32, ¶ 13, 396 Wis. 2d 391, 957 N.W.2d 208. Rather than a "top-down" structure headed by a central state official controlling local actors, Wisconsin election statutes "give[ ] some power to its state election agency (the Commission) and place[ ] significant responsibility on a small army of local election officials." *Id.*

Wisconsin's election system relies on the hard work, judgment, and discretion of more than 1,850 municipal clerks to administer fair, secure elections for their municipalities.[7] The statutes charge municipal clerks with the supervision of elections, including any duties "necessary to properly conduct [them]." Wis. Stat. § 7.15(1). In addition to municipal clerks, the statutes confer authority on county clerks, municipal commissioners, county commissioners, and inspectors to carry out various elections-related duties. Wis. Stat. §§ 7.10, 7.20–.22.

Many elections provisions describe this type of broad authority, stating that municipal clerks and other local elections officials may make determinations about what is "necessary," "proper," and "practicable." *See, e.g.*, Wis. Stat. § 5.25(1) (selection of polling places); Wis. Stat. § 5.68(2) (procurement of election materials, supplies, and equipment); Wis. Stat. § 5.15(1)(b) (aspects of ward-creation); Wis. Stat. § 5.81(1) (ballot design); Wis. Stat. § 7.15(1)(d) (election notice preparation); Wis. Stat. § 7.25(6) (setup and arrangement of polling places); Wis. Stat. § 7.36 (supervision of election inspectors); Wis. Stat. § 7.37(1) (polling place relocation on election day); Wis. Stat. § 7.37(2) (maintenance of order during elections, including requests for law enforcement). When carrying out these various responsibilities, clerks select appropriate tools to facilitate the administration of elections.

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

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[7] *Directory of Wisconsin Municipal Clerks*, Wis. Elections Comm'n, https://elections.wi.gov/clerks/directory (last visited May 31, 2024).

any other statute prevents the use of a mobile voting unit. (*See* R. 59:59–60.) That decision was reasonable.

Finally, the Commission's decision comports with common sense. An example highlights this.

Occasionally, a municipality may designate a fire station parking bay as a polling place or alternate absentee site. Using the fire station's parking bay for voting would presumably be entirely permissible under Brown's building-centric approach. But under Brown's view, the same site would become unlawful if the mobile voting unit pulled into the parking bay and voting occurred at the exact same location, but inside the mobile unit parked inside the bay. (*See* R. 95:25–27.)

The Commission's decision avoided this absurdity to reasonably hold that a noncompliance order was not warranted for Racine's use of the mobile unit. (*See* R. 59:59–60.)

2. The circuit court's reading of the statutes rested on a flawed interpretive lens.

In holding that the Commission erred in declining to issue a noncompliance order about the mobile voting unit, the circuit court pointed to the majority decision in *Teigen* stating that Wisconsin courts must demand "strict compliance" with absentee voting statutes; the court repeatedly stated that no statute explicitly permits mobile voting units. (*See* R. 99:16–17.). As the Commission has argued in *Priorities USA v. WEC*, No. 24AP0164, Wisconsin law does not support the *Teigen* majority's analysis for such a premise.

Wisconsin Stat. § 6.84 has two subsections: a policy subsection stating that the privilege of voting by absentee ballot must be carefully regulated to prevent fraud and abuse, Wis. Stat. § 6.84(1); and a mandatory application subsection,

requiring that specific provisions of the absentee voting procedures must be followed for a ballot to be counted, Wis. Stat. § 6.84(2). The *Teigen* majority combined these two subsections to create the novel principle that "Legislative Policy Directs Us to Take a Skeptical View of Absentee Voting." 403 Wis. 2d 607, title preceding ¶ 53.

The statutes do not support the *Teigen* majority's "skeptical view of absentee voting" or its expectation that clerks cannot utilize a tool in administering an election unless that tool is explicitly set forth in statutes. The statutes vest election officials with wide authority, including regarding the administration of absentee voting. Nothing in Wis. Stat. § 6.84 changes those broad grants of authority elsewhere in the statutes. *Cf. Clean Wisconsin, Inc. v. DNR*, 2021 WI 72, ¶ 24, 398 Wis. 2d 433, 961 N.W.2d 611 (recognizing that one statute did not "strip an agency of the legislatively granted explicit authority it already has"). When the Legislature wants a statute to be interpreted in a particular way, it does so by choosing the correct words in that statute, not by codifying a policy-based "canon." Scalia & Garner, *Reading Law*, 233 (2012).

Wisconsin Stat. § 6.84(1) does not support the *Teigen* majority's reading. It says only that certain enumerated statutes relating to the absentee ballot process "shall be construed as mandatory. Ballots cast in contravention of the procedures specified in those provisions may not be counted." § 6.84(2). This is neither a directive nor a license for courts to interpret statutes relating to absentee voting through any policy-based lens toward absentee voting or election administration.

Neither the circuit court nor Brown offered any limiting principle to the approach adopted here—that local election officials may not take *any action* related to absentee voting unless that action is explicitly authorized by statute. (*See* R. 99:17 (holding that mobile unit is unlawful because no

party "can point to any statute authorizing [its] use"). Without such limiting principles, local election officials have no way to know what actions are allowed and which might prompt a complaint to the Commission. For example, would a clerk violate the law merely by using the mobile voting unit (or any other vehicle) to deliver materials to alternate absentee sites? Under the circuit court's decision, likely yes, since the statutes do not authorize the use of any vehicles in connection with the administration of alternate absentee sites. *See generally* Wis. Stat. ch. 5–6.

But the statutes do not place election officials in such a bind. Rather, by explicitly granting local officials broad authority, the statutes ensure that those locally responsible officials can take "any [action] which may be necessary to properly conduct elections." Wis. Stat. § 7.15(1).

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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 the use of a mobile voting unit at such sites, it should reverse the circuit court on both issues.

CONCLUSION

This Court should reverse the decision below, holding that Brown lacks standing. Alternatively, if this Court reaches the merits, it should reverse on the grounds that the Commission reasonably declined to issue a noncompliance order regarding the location of alternate in-person absentee voting sites and the use of a mobile voting unit.

Dated this 3rd day of June 2024.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,841 words.

Dated this 3rd day of June 2024.

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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 3rd day of June 2024.

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