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Supreme Court of Wisconsin

No. 2024AP232

KENNETH BROWN,
PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

v.

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

TARA MCMENAMIN,
DEFENDANT-APPELLANT-CROSS-RESPONDENT,

BLACK LEADERS ORGANIZING FOR COMMUNITIES,
DEMOCRATIC NATIONAL COMMITTEE, AND
WISCONSIN ALLIANCE FOR RETIRED AMERICANS,
INTERVENORS-CO-APPELLANTS-CROSS RESPONDENTS

OPENING BRIEF OF WISCONSIN ALLIANCE FOR RETIRED AMERICANS

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INTRODUCTION

The Wisconsin Elections Commission properly dismissed Kenneth Brown's complaint alleging that the City of Racine's designation of alternate absentee voting locations for the 2022 primary election violated Wis. Stat. § 6.855. Brown's complaint, which construed that statute so narrowly that it would have prohibited Wisconsin's municipalities from offering in-person absentee voting at more than a handful of clustered locations in a single ward, presented an implausible reading of Section 6.855. The statute's text and amendment history reflect the legislature's intention to make in-person absentee voting more accessible, not less.

Although Brown was entitled to file his complaint with the Commission under Wis. Stat. § 5.06(1), he was not sufficiently aggrieved by the Commission's denial of his complaint under Wis. Stat. § 5.06(8) to challenge that denial on appeal at the circuit court. The circuit court erred in concluding otherwise, and particularly in holding that Brown had standing under *Teigen v. Wisconsin Elections Commission*, 2022 WI 64, 403 Wis. 2d 607, 976 N.W.2d 519. The circuit court understood *Teigen* to mean that electors have standing to challenge any alleged illegality in election practices that might pollute their votes. *Teigen* held no such thing—a majority of the Court in *Teigen* rejected that theory of standing. This Court should confirm as much to prevent a flood of lawsuits brought by litigants who have no real injury but seek to use the judiciary to disrupt the state's election system, just as Brown did here.

On the merits, although the circuit court properly affirmed the Commission's dismissal of several of Brown's claims, it erred in reversing the Commission in two specific respects.

First, the Commission properly rejected Brown's claim that Racine's alternate absentee voting sites in the 2022 partisan primary election afforded an advantage to the Democratic Party. Racine's absentee voting sites could not possibly have afforded an advantage to one party in a primary election—an election in which opposing political parties do not compete with each other. And regardless, Racine's alternate absentee voting sites were widely dispersed across the city, at politically neutral locations like community centers, churches, public schools, parks, and more. The Commission reasonably concluded that such locations did not afford an advantage to the Democratic Party.

Second, the Commission properly rejected Brown's claim that Racine's mobile election unit was illegal under Wisconsin law because it permitted ballots to be cast outside of fixed, physical buildings. As the Commission recognized, Brown's argument relied on statutes that have no bearing on Section 6.855, the statute which governs Racine's conduct here. The circuit court erroneously relied on Brown's flawed argument by reading in a requirement that is found nowhere in Section 6.855.

This Court should vacate the circuit court's order and remand with instructions to dismiss Brown's appeal from the Commission's decision for lack of standing. If the Court reaches the merits, the Court should affirm the Commission's rejection of Brown's challenge and reverse the circuit court's order.

ISSUES PRESENTED

The Court's May 3, 2024, Order granted bypass and assumed jurisdiction over this entire action. The Alliance's opening brief presents the following issues, each of which was raised by one or more of the petitions for bypass:

1. Was Brown, an elector in Racine County, sufficiently aggrieved by the Commission's denial of his complaint such that he has standing to appeal to the circuit court?

The circuit court answered, "Yes."

2. Did Racine's alternate absentee sites in the August 2022 primary election afford an advantage to the Democratic Party in contravention of Section 6.855?

The Commission answered, "No."

The circuit court answered, "Yes."

3. Did Racine's use of its mobile election unit violate Wisconsin law?

The Commission answered, "No."

The circuit court answered, "Yes."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

In its May 3, 2024, Order granting bypass, the Court indicated it would set argument for the fall of 2024. The Alliance agrees that oral argument and publication are appropriate in light of the importance of the proper standards for alternate absentee balloting sites.

STATEMENT OF THE CASE

The Alliance joins the Commission's Statement of the Case and provides the following additional context regarding Section 6.855—the statute at the heart of this case.

Section 6.855 presently provides, in full:

6.855 Alternate absentee ballot site.

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

(2) The municipal clerk or board of election commissioners shall prominently display a notice of the designation of the alternate site selected under sub. (1) in the office of the municipal clerk or board of election commissioners beginning on the date that the site is designated under sub. (1) and continuing through the period that absentee ballots are available for the election and for any primary under s. 7.15 (1) (cm). If the municipal clerk or board of election commissioners maintains a website on the Internet, the clerk or board of election commissioners shall post a notice of the designation of the alternate site selected under sub. (1) on the website during the same period that notice is displayed in the office of the clerk or board of election commissioners.

(3) An alternate site under sub. (1) shall be staffed by the municipal clerk or the executive director of the board of election commissioners, or employees of the clerk or the board of election commissioners.

(4) An alternate site under sub. (1) shall be accessible to all individuals with disabilities.

> **(5)** A governing body may designate more than one alternate site under sub. (1).

The first four subsections of the statute were originally enacted in 2005. *See* 2005 Wis. Act 451, § 67. At that time, the function of the provision, its text suggests, was to allow a municipality to move absentee balloting activities out of the clerk's office—most likely for space or other logistical reasons. But in creating that option, Section 6.855 imposed a one-location-per-municipality limit on such sites.

In 2015, a coalition of civic organizations and voters brought a federal lawsuit challenging several of Wisconsin's election laws, including Section 6.855's one-location limitation on in-person absentee balloting sites. *See One Wis. Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 931 (W.D. Wis. 2016). Plaintiffs argued that this provision violated both the First and Fourteenth Amendments of the United States Constitution and Section 2 of the federal Voting Rights Act (VRA). *Id.* at 929–30, 951. After a lengthy and fact-intensive trial that included multiple experts and dozens of fact witnesses, *id.* at 902, the court in *One Wisconsin Institute* ruled for the plaintiffs on both challenges to Section 6.855.

First, the court found that Section 6.855's one-location rule imposed a "burden on the right to vote" that was unsupported by the state's purported justification for the rule (avoiding voter confusion), rendering it unconstitutional. *Id.* at 930, 934–35. As the court explained, the state's one-location rule was particularly burdensome for the voters in Wisconsin's larger cities:

> The state's one-location rule ignores the obvious logistical difference between forcing a few dozen voters to use a single location and forcing a few hundred thousand voters to use a single location. There is simply no evidence that a one-location rule prevents voter confusion, or that any confusion would be as

> widespread or burdensome as the types of difficulties that voters face when having only one location at which to vote in-person absentee.

Id. at 934. Indeed, the court called the State's approach to in-person absentee voting "backward: rather than *expanding* in-person absentee voting in smaller municipalities, the state *limited* in-person absentee voting in larger municipalities." *Id.* The court concluded that the one-location rule violated the First and Fourteenth Amendments to the U.S. Constitution. *Id.* at 934–35.

Second, the court found that the one-location rule also violated Section 2 of the VRA because it "disparately burden[ed] minorities" for "substantially the same reasons:"

> Wisconsin's rules for in-person absentee voting all but guarantee that voters will have different experiences with in-person absentee voting depending on where they live: voters in large cities will have to crowd into one location to cast a ballot, while voters in smaller municipalities will breeze through the process. And because most of Wisconsin's African American population lives in Milwaukee, the state's largest city, the in-person absentee voting provisions necessarily produce racially disparate burdens.

Id. at 956. Accordingly, the court held Section 6.855's one-location rule "invalid under the Voting Rights Act." *Id.* at 960.

The Wisconsin Legislature responded to that decision by amending Section 6.855 to eliminate the one-location rule. The new subsection (5) provides that "[a] governing body may

designate more than one alternate site under sub. (1).” 2017 Wis. Act 369, § 1JS. Act 369 did not otherwise amend Section 6.855.[1]

The result of this history is that the present Section 6.855 is something of a chimera: four subsections originally drafted in contemplation of just one alternate absentee ballot site, combined with a fifth subsection expressly authorizing municipalities to nevertheless designate multiple such sites. Brown’s arguments in this case have consistently ignored that feature of the statute, failing to grapple with the legislature’s express authorization of multiple absentee ballot sites.

Racine’s designation of multiple alternate sites across the city was consistent with the current practice in many of Wisconsin’s larger municipalities. As the Alliance explained in its intervention papers, cities have designated multiple alternate sites to meet demand for early voting ever since the legislature gave them the option to do so in 2018. *See* R.26:3. In the 2023 spring election, for instance, the City of Milwaukee operated seven alternate absentee voting locations, and the City of Madison operated twenty-eight. R.26:3. Such sites are extremely popular with voters: 32 percent of Racine absentee voters in 2022 cast in-person absentee ballots, as did 46 percent of Racine absentee voters in 2020. R.26:4.

[1] The Seventh Circuit held that the amendment rendered moot the question whether the prior one-location rule complied with federal law. *Luft v. Evers*, 963 F.3d 665, 674-75 (7th Cir. 2020). The Seventh Circuit explained that the “one-location rule is gone, and its replacement is not substantially similar to the old one.” *Id.* at 674. And, the court continued, “it seems unlikely that Wisconsin would return to a single-site requirement if allowed to do so.” *Id.* The court accordingly vacated the Western District’s orders related to the one-site-per-municipality restriction as moot. *Id.* at 681.

STANDARD OF REVIEW

This Court reviews the circuit court's determination that Brown had standing to appeal de novo. *Krier v. Vilione*, 2009 WI 45, ¶ 14, 317 Wis. 2d 288, 766 N.W.2d 517.

In evaluating the merits of Brown's claims, this Court reviews the Commission's order dismissing those claims, not the circuit court's decision concerning that order. *Hilton ex rel. Pages Homeowners' Ass'n v. Dep't of Nat. Res.*, 2006 WI 84, ¶ 15, 293 Wis. 2d 1, 717 N.W.2d 166 ("When an appeal is taken from a circuit court order reviewing an agency decision, we review the decision of the agency, not the circuit court.").

The Court reviews underlying questions of statutory construction de novo. *State ex rel. Hensley v. Endicott*, 2001 WI 105, ¶ 6, 245 Wis. 2d 607, 629 N.W.2d 686.

SUMMARY OF THE ARGUMENT

The Court should dismiss Brown's appeal for lack of standing. Brown was not aggrieved by the Commission's denial of his complaint, and *Teigen* did not change what it means to be aggrieved by an agency determination. Although the circuit court understood *Teigen*'s plurality opinion to break new ground in this regard, only three justices joined that opinion's standing analysis. The other four justices expressly rejected it. And the *Teigen* plurality's standing analysis was a dangerous expansion of the doctrine: It would empower voters across the state to act as officious intermeddlers with respect to minutiae of election procedure that harm no one, disenfranchising other voters in the process. This Court should use this opportunity to squarely reject it.

If this Court reaches the merits, it should affirm the Commission. The Commission properly concluded that Racine's alternate absentee sites for the 2022 primary election did not afford an advantage to the Democratic Party. The concept of such an advantage makes no sense in a primary election. And regardless, the city's sites were widely dispersed across the city at highly accessible, politically neutral locations like parks, churches, schools, and the public beach. Brown thus provided no adequate basis for concluding that Racine acted to afford an advantage to one party over another.

The Commission also properly concluded that Racine's use of a mobile voting unit was lawful. Nothing in Section 6.855, which governs in-person absentee locations, requires absentee voting to take place in fixed, physical buildings. That statute therefore stands in sharp contrast to Section 5.25, which governs traditional polling places and does impose such a requirement. The Court "must conclude" that the legislature's choice to impose such a requirement on election-day polling places but not alternate absentee ballot sites means that "the legislature specifically intended a different meaning." *Responsible Use of Rural & Agric. Land (RURAL) v. Pub. Serv. Comm'n of Wis.*, 2000 WI 129 ¶ 39, 239 Wis. 2d 660, 619 N.W.2d 888.

ARGUMENT

I. Brown lacks standing to appeal because he is not aggrieved by the Commission's denial of his complaint.

As the circuit court correctly recognized, the court could hear Brown's challenge to Racine's use of alternate absentee voting sites only if Brown had standing to appeal. *See* R.99:13. The circuit court erred, however, in holding that Brown possessed such standing. Its

decision rested on the assumption that *Teigen*'s "plurality decision" had "put[] to rest the standing argument made in the present matter"—that is, that voters like Brown who allege nothing more concrete than "vote pollution" lack standing. R.99:13–14 (citing *Teigen*, 2022 WI 64, ¶¶ 16–25). That assumption was wrong: four justices rejected the "vote pollution" theory of standing in *Teigen*. And they did so for good reason: such a theory would empower voters across the state to sue over harmless, trivial variations in election procedure. This Court should fully and finally repudiate the "vote pollution" theory of standing, hold on that basis that Brown lacks standing to press this appeal, and vacate and remand with instructions to dismiss.

A. Wisconsin law permits Brown to appeal the Commission's decision only if he is "aggrieved" by the Commission's order.

Brown appealed under Section 5.06(8). Under that statute, a voter may appeal an order of the Commission only if he is "aggrieved" by it. Wis. Stat. § 5.06(8). The statute's language restricting appeals of Commission decisions to only "aggrieved" persons is notably different from its more permissive language allowing complaints before the Commission itself, which permits "any elector" who "believes that a decision or action" of an election official is unlawful to file a complaint with the Commission. *See* Wis. Stat. § 5.06(1).

To be considered "aggrieved" by an agency decision, Brown must "show a direct effect on his legally protected interests." *Friends of the Black River Forest v. Kohler Co.*, 2022 WI 52, ¶ 20, 402 Wis. 2d 587, 977 N.W.2d 342 (quoting *Fox v. Wis. Dep't of Health & Soc. Servs.,* 112 Wis. 2d 514, 524, 334 N.W.2d 532 (1983)). To determine whether a party seeking review of an agency

decision satisfies that standard, this Court asks two questions: First, the Court determines whether the party has alleged "injuries that are a direct result of the agency action." *Id.* ¶ 21 (citation omitted). The Court has "likened this approach" to the first prong of the equivalent federal-law inquiry: "Does the challenged action cause the petitioner injury in fact?" *Id.* ¶ 18 (internal quotation marks omitted). "Abstract injury is not enough." *Fox*, 112 Wis. 2d at 525. That is, "the injuries must be neither hypothetical nor conjectural." *Black River Forest*, 2022 WI 52, ¶ 21. The second question is "whether the injury is to an interest which the law recognizes or seeks to regulate or protect." *Id.* ¶ 28 (quotation and citation omitted).

Brown fails to meet this standard because his complaint appealing the Commission's order alleges no direct injury at all, let alone one that is concrete and particularized, rather than hypothetical and conjectural. Brown's complaint alleges nothing more than that he "has an interest and a statutory right, under Wis. Stat. § 5.06(1), in ensuring that Wisconsin's elections laws are followed." R.3.2. Brown does not allege, for example, that Racine's alternate absentee voting sites prevented him from voting in the August 2022 primary, made it more difficult for him to vote, or caused him to suffer anything else that might be considered an injury. Brown simply "observed" voters casting ballots at Racine's election van, decided that conduct was inconsistent with Section 6.855, and sought judicial redress. R.3:6–7.

But a person is not "aggrieved" by an agency proceeding simply because they disagree with its outcome. "Standing to challenge [an] administrative decision is not conferred upon a petitioner merely because that person requested and was granted an administrative hearing" and received an adverse decision. *Fox*,

112 Wis. 2d at 526; *see also Cornwell Pers. Assocs., Ltd. v. Dep't of Indus., Lab., & Hum. Rels.*, 92 Wis. 2d 53, 62, 284 N.W. 2d 706 (Ct. App. 1979) (rejecting argument that petitioner who received an adverse decision was "aggrieved" where its only interest was "in seeing that the act is properly administered," an interest which was too remote to confer standing). "Courts are not the proper forum for citizens to 'air generalized grievances' about the administration of a governmental agency." *Cornwell*, 92 Wis. 2d at 62.

If the legislature had wished to confer on Brown the right to appeal *any* adverse decision of the Commission, it could have done so, just as it permits "any elector" who "believes that a decision or action" of an election official is unlawful to file a complaint with the Commission. *See* Wis. Stat. § 5.06(1). Instead, however, the legislature restricted appeals of Commission decisions to only those electors who are "aggrieved" by a decision, plainly a higher standard. And "[w]hen the legislature prescribes the method to review alleged deficiencies in election procedure, the legislature must deem that procedure to provide an adequate review." *Kuechmann v. Sch. Dist. of La Crosse*, 170 Wis. 2d 218, 224, 487 N.W.2d 639 (Ct. App. 1992) (interpreting the judicial review procedures in Section 5.06 strictly). Permitting Brown to appeal, and determining that he is "aggrieved" simply because he disagrees with the Commission's decision, would "defy the legislature's decision to the contrary." *Id.*

B. This Court did not recognize vote pollution as a new category of actionable injury in *Teigen*.

Contrary to the circuit court's conclusion, *Teigen* did not change this Court's approach to standing in the election-law context. As the circuit court saw it, *Teigen*'s "plurality decision

put[] to rest" any challenges to Brown's standing. R.99:13. The court apparently took *Teigen* to have recognized a new "vote pollution" theory of standing, per which electors have standing to challenge unlawful election procedures under the theory that they "pollute" the integrity of the results. R.99:13–14 (citing *Teigen*, 2022 WI 64 ¶¶ 21, 25).

But *Teigen* did no such thing. Only three justices endorsed vote-pollution standing in *Teigen*. *See* 2022 WI 64, ¶ 25 (plurality op.). The other four Justices rejected the attempt to stretch standing's limits; the concurring Justice, whose vote controlled the disposition of the case, called the plurality's standing reasoning "unpersuasive" and expressly noted that it did "not garner the support of four members of this Court." *Id.* ¶ 167 (Hagedorn, J., concurring in judgment); *see also id.* ¶¶ 210, 216 n.8 (Walsh Bradley, J., dissenting). This Court has long held that "a majority of the participating judges must have agreed on a particular point for it to be considered the opinion of the court." *State v. Elam*, 195 Wis. 2d 683, 685, 538 N.W.2d 249 (1995). Accordingly, *Teigen* does not establish that Brown's vote-pollution injury confers standing.[2]

Nor should the Court accept an argument that vote pollution constitutes an actionable injury. As the *Teigen* dissent appropriately recognized, the plurality opinion's conception of standing extended the doctrine "beyond recognition" and

[2] The Court of Appeals has appropriately concluded in an unpublished opinion that *Teigen* did not make new law about what counts as an actionable injury. *See Rise, Inc. v. Wis. Elections Comm'n*, 2023 WI App 44, ¶ 27 & n.6, 995 N.W.2d 500, 2023 WL 4399022. The Court of Appeals explained that *Teigen*'s vote-pollution theory of standing, expressed in paragraph 25 of the opinion, "does not have precedential value because no four justices in that fractured opinion expressed agreement with any point made in that paragraph." *Id.* ¶ 27 n.6 (citing *Elam*, 195 Wis. 2d at 685).

threatened to "create a free-for-all" because it "delineate[d] no bounds whatsoever on who may challenge election laws." 2022 WI 64, ¶ 212 (Walsh Bradley, J., dissenting). Indeed, *Teigen*'s vote-pollution theory of standing would, if adopted, allow voters across the state to use the judiciary to officiously intermeddle in harmless minutiae of election procedure, disrupting the state's election system and potentially disenfranchising voters in the process.[3]

The Court should confirm that *Teigen* did not change the law in Wisconsin to allow any elector who is dissatisfied with their jurisdiction's administration of election laws to bring suit without an independent showing of injury. This Court should reverse the contrary opinion of the circuit court and dismiss Brown's appeal.

II. Racine's site designations for the 2022 primary did not afford "an advantage to any political party."

On the merits, the Commission correctly concluded that that Brown failed to carry his burden to show that Racine's alternate absentee balloting site designations for the August 2022 primary "afford[ed] an advantage to any political party" in violation of Section 6.855(1). Brown's challenge focused myopically on a single arbitrary criterion: the partisan makeup of the city wards in which the sites were located as compared against the ward containing city hall. Nothing in the statutory text makes that the test, or even suggests that a ward-based analysis is appropriate or relevant. And Brown grounded his argument about that criterion entirely on a facially flawed policy brief that failed to account for municipalities' right, after the 2018 statutory amendment, to provide equitable, citywide access to early voting. The Commission

[3] For this reason, among others, federal courts have consistently rejected analogous standing theories, as Intervenor–Co-Appellant–Cross-Respondent Democratic National Committee's brief explains in detail.

therefore reasonably concluded that Brown had failed to show a violation of 6.855(1) based on "advantage to a political party." The circuit court erred in ruling otherwise, and if the Court reaches the merits, it should affirm the Commission.

Section 6.855(1) provides, among other things, that no alternate absentee ballot site "may be designated that affords an advantage to any political party." These statutory terms are undefined, so they must be given their "common, ordinary, and accepted meaning[s]." *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. And they must also be construed to account for Section 6.855(5)'s express provision that municipalities "may designate more than one alternate site under sub. (1)." The legislature "is presumed to act with knowledge of the existing case law." *Maurin v. Hall*, 2004 WI 100, ¶ 75, 274 Wis. 2d 28, 682 N.W.2d 866. Here, the legislature authorized municipalities to designate multiple sites specifically for the purpose of bringing Wisconsin law into compliance with the U.S. Constitution and the VRA after *One Wisconsin Institute* held the single-site limitation unlawful. *See* 2017 Wis. Act 369 § 1JS; *One Wis. Inst.*, 198 F. Supp. 3d at 931. Achieving that purpose requires a standard that permits large municipalities like Racine to designate multiple, geographically distributed alternate absentee balloting sites.

Brown's partisan-advantage submission to the Commission was entirely inconsistent with that plain-meaning approach and with the legislature's purpose in authorizing multiple alternate sites. The Commission properly rejected it out of hand.

At the outset, Brown's submission ignored the nature of the August 2022 primary election that was the subject of his Commission complaint. *See* R.99:1; R.161:3. That was *a primary*

election, and primary elections do not entail competition between opposing political parties. *See* Wis. Stat. § 8.16. Rather, primaries are intraparty competitions to determine which person will represent a given party at the general election. *See id.* § 8.16(1) ("[T]he person who receives the greatest number of votes for an office on *a party ballot* at any partisan primary . . . shall be *the party's candidate* for the office . . . .") (emphasis added)). "[S]tatutory language is interpreted in the context in which it is used." *Kalal*, 2004 WI 58, ¶ 46. In the context of Section 6.855—a statute governing where and how people vote—the phrase "an advantage to a political party" plainly means some sort of *electoral* advantage. No such advantage could have existed here because no party was competing with any other party during the election at issue. Racine's alternate-site designations for that primary therefore did not confer any "advantage to any political party" in contravention of Section 6.855(1).

Even putting that fundamental issue to one side, Brown's submission still fell far short of showing "an advantage to any political party" in violation of Section 6.855(1). His argument in his WEC complaint relied entirely on a policy brief prepared by the Wisconsin Institute for Law & Liberty—the law firm representing him—that considered just one factor: past election results by party in the city ward in which each absentee site was located. R.56:39–50 (policy brief); *see also* R.56:9, ¶¶ 25–28 (complaint). Brown argued that the policy brief showed there were more sites designated in wards with a higher historic Democratic vote share. R.56:44–46. But there were many problems with the policy brief's analysis, and the Commission properly rejected it as insufficient to show an unlawful "advantage to a political party" from Racine's sites.

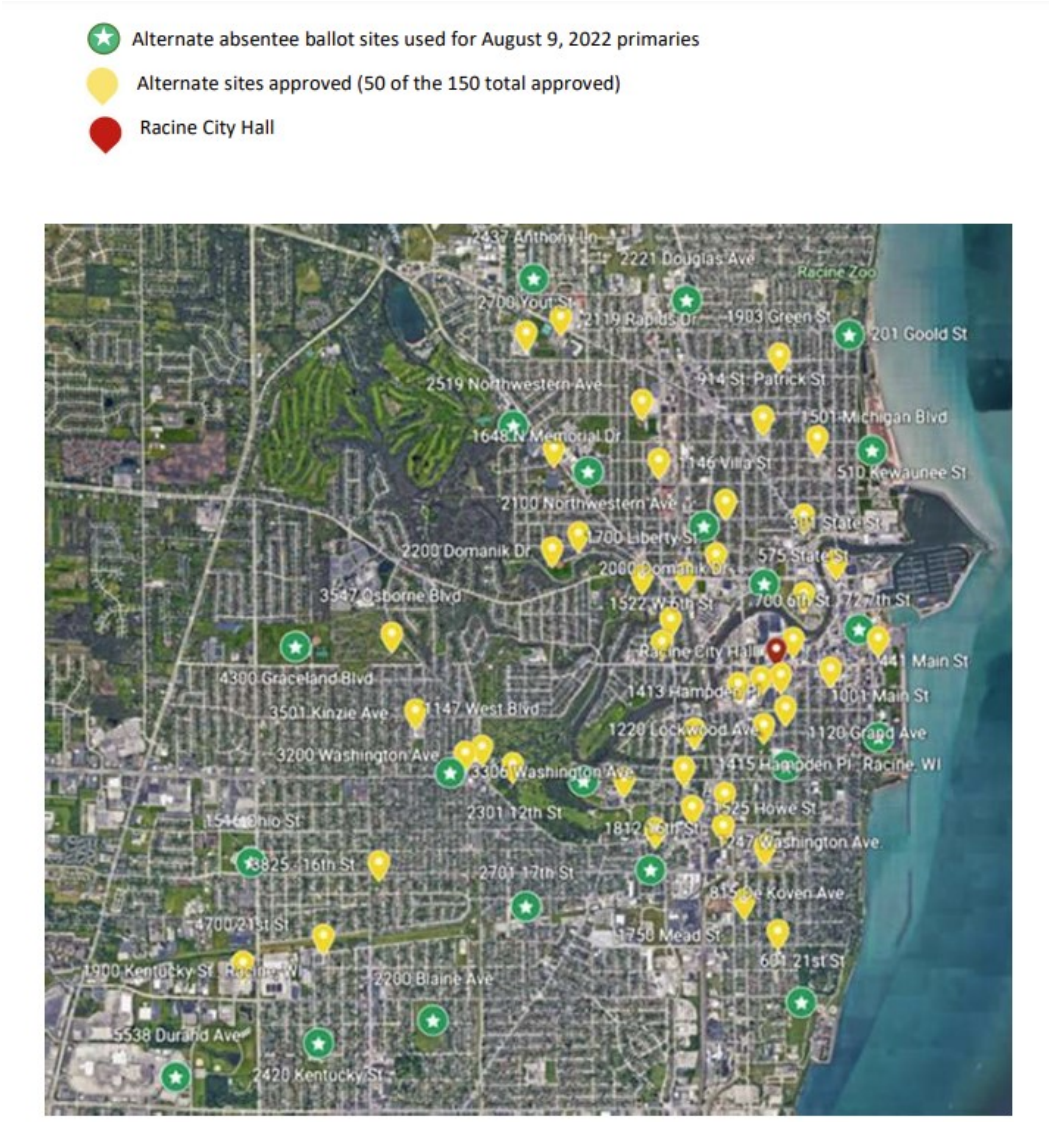
First, Section 6.855(1) says nothing about wards—it is focused on the effects of each specific "site" that is designated. That's no surprise—under Wisconsin law, wards may change frequently as populations shift or other exigencies demand, *see* Wis. Stat. § 5.15(1)(a)2., and so are a poor baseline for benchmarking. Indeed, Brown's own analysis illustrates this problem; he had to rely on data from past elections that used different ward boundaries to prepare his report. *See* R.56:48. Obviously, each ward contains many possible sites, and neither Brown's complaint nor his law firm's policy brief made an effort to show that any *particular* site "afford[ed] an advantage to any political party," which is all that the statute prohibits.

Second, the policy brief assumes without any basis that placing a site in a particular ward necessarily affords an advantage to the political party historically favored by the voters who *live* in that ward. That is not at all obvious. *See* R.57.7. The sites included a public beach, a public park, a shopping mall, a community college, and multiple schools, museums, and churches. R.56:15–21. Each site was open to *any* Racine voter, regardless of where they lived. And other than city hall, each site was open only briefly, for a few hours during just one or two days, mostly weekdays. R.56:15–21. As Racine's response to Brown's WEC complaint pointed out, many such sites were at least as likely to be convenient for workers, shoppers, students, or visitors who lived elsewhere in Racine as for residents of the immediately surrounding ward. *See* R.57:7. The policy brief does not address this issue and therefore provides no reason to think that the site designations did anything to afford an advantage to the party favored by voters who live in the area, rather than (say) the party favored by area shoppers, beachgoers, students, or parishioners. It

just assumes without basis that the sites benefitted only residents of the relevant ward.

Third, the policy brief expressly refuses to consider other possible explanations for the purported correlation between a ward's past voting patterns and the number of designated sites. R.56:48. But alternative explanations are plainly relevant, because they are likely to undermine any inference of advantage to a political party by showing that Racine had other, politically neutral reasons for choosing the sites that it did. The policy brief's failure to address or rule out such explanations means that it provides insufficient grounds to conclude that the sites afforded an advantage to any particular party.

Finally, Brown's other evidence itself shows that far from being concentrated unevenly in particular corners of the city, the designated sites were widely distributed and accessible to all, just as the legislature intended when it amended Section 6.855 to authorize multiple sites:



R.56:38. As the map reflects, the city council approved sites all across the city. Clerk McMenamin then conducted early voting at a similarly distributed subset of those sites. After 2018, municipalities are entitled to do exactly what Racine and Clerk McMenamin did in order to ensure widespread, equitable access to early voting.

In his reply brief to the Commission and, in particular, on appeal to the circuit court, Brown pivoted to an even narrower argument: that Section 6.855(1) flatly prohibits designating sites in any ward with historical election results that differ from those of *the ward containing the clerk's office*. R.59:39–40 (Brown's reply in Commission proceeding); R.3:15–16, ¶¶ 51–53 (Brown's complaint in the circuit court). Even the circuit court rejected this approach. *See* R.161:3, 5. And nothing in the statute supports it. Again, the term "ward" does not even appear in Section 6.855. To make the clerk's office ward the benchmark for "advantage" under Section 6.855 would require a full judicial rewrite of the statute. Nor would such a rewrite make sense, as that ward may itself have a sharp partisan lean.

Moreover, Brown's clerk's-office-ward-focused approach would effectively write the 2018 amendment out of the statute. Such a rule would, in practice, require all sites to be located in the same ward as the clerk's office, as no other ward would have identical historical election results. Brown's argument therefore went hand-in-hand with his separate claim that Racine's sites were not as close possible to the clerk's office. *See* R.59:52. But the circuit court rejected that claim, citing the *One Wisconsin Institute* decision and 2018 amendment, and invoking the "cardinal principle of legislative interpretation . . . that the legislature was aware of court interpretation of existing law at the time a modification is made." R.99:14.

Given the gaping holes in Brown's analysis, the Commission properly concluded that he had not carried his burden to show that Racine's site designations were "contrary to law." Wis. Stat. § 5.06(1). The Commission considered the relevant factors and reached a reasonable conclusion. First, the Commission found

little value in Brown's ward-based "data analysis," R.59:55, which Racine had impeached as relying on outdated ward boundaries and unwarranted assumptions about the importance of ward residents' voting patterns, *see* R.57:6–8. Among other things, Racine pointed out that Brown had not accounted for "where voters work or attend school," proximity to places "people shop or recreate," and the availability of public transit. R.57:7. Second, the Commission indicated that in most contexts, including redistricting, restrictions on partisan inequality require a "fact-intensive inquiry." R.59:55. The Commission therefore reasonably concluded that it was Brown's "prerogative" as the complainant, not the Commission's, to provide a statutorily grounded way to conduct that fact-intensive inquiry. R.59:56. Brown did not meet that burden; instead, he just invented a rule that ensured he would win. And third, the Commission noted that Racine's alternate absentee sites were "widely distributed," diluting the suggestion that they created "political advantage." R.59:56.

To be sure, the Commission's analysis of this issue was concise. But the Commission is a small agency with limited resources. And it is bound by rule to make probable cause determinations within ten days of filing and otherwise to rule on 5.06 complaints swiftly. *See* Wis. Admin. Code § EL 20.04(1), (8). Brown's shotgun administrative complaint made nearly a dozen arguments to support his five discrete claims. *See* R.59:47–49. In the circumstances, the Commission's disposition of Brown's complaint was entirely appropriate.

If, however, the Court thinks that more analysis is needed, it should remand the matter to the Commission. It is long-settled that remand is the appropriate remedy when an agency fails to adequately explain its decision. *Stas v. Milwaukee Cnty. Serv.*

Comm'n, 75 Wis. 2d 465, 475, 249 N.W.2d 764 (1977). The circuit court's only quarrel with the Commission on this issue involved its analysis, not its conclusion: it thought the Commission did not give due weight to Brown's study or otherwise develop and apply a legal principle to govern Brown's partisan-advantage claim. *See* R.99:14–15. Nothing in the circuit court's analysis justified the substantive conclusion that Racine's sites were advantaging Democrats, particularly in light of those sites' wide geographic dispersion.

III. The Commission properly denied Brown's challenge to Racine's use of a mobile voting van, which Brown failed to show was prohibited by Wisconsin law.

If this Court does not dismiss Brown's appeal for lack of standing, it should also affirm the Commission's decision that Section 6.855 does not require alternate absentee voting sites to be fixed, physical buildings, as Brown argued. R.3:90–91. Both the circuit court's contrary reasoning and Brown's contrary arguments applied the wrong statute, and so improperly added restrictions to Section 6.855 that are found nowhere in its text.

A. Section 6.855 does not require that alternate absentee voting sites be located within fixed, physical buildings.

"Statutory interpretation begins with the language of the statute." *Est. of Miller v. Storey*, 2017 WI 99, ¶ 35, 378 Wis. 2d 358, 903 N.W.2d 759 (cleaned up) (quoting *Kalal*, 2004 WI 58, ¶ 45, and citing Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56–58 (2012)). In relevant part, Section 6.855 provides: "The governing body of a municipality may elect to designate a site other than the office of the municipal clerk or board of election commissioners as the location from which

electors of the municipality may request and vote absentee ballots and to which voted absentee ballots shall be returned by electors for any election." Wis. Stat. § 6.855(1). The statute establishes other requirements, of course—for instance, that sites "shall be accessible to individuals with disabilities," *see* Wis. Stat. § 6.855(4). But nowhere does the statute limit such sites to fixed, physical buildings, as the Commission recognized in dismissing Brown's complaint. R.59:59–60.

In suggesting that Wisconsin law *does* impose such a requirement, Brown (and later the circuit court) improperly looked to another statute altogether: Section 5.25. That statute, titled, "Polling places," requires polling places to be located within "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." Wis. Stat. § 5.25(1). Although both Brown and the circuit court assumed Section 5.25 was the "relevant statute" in question, R.99:16, that statute has no bearing on the proper construction of Section 6.855, the controlling statute here, because Wisconsin law treats polling places and alternate absentee voting sites differently—a distinction the Alliance raised below, R.87:22–23, and the circuit court entirely neglected to address.

This distinction is critically important because Wisconsin's election statutes make clear that absentee voting does not take place in polling places. For example, Wisconsin law introduces the concept of absentee voting by noting that "voting by absentee ballot is a privilege exercised wholly outside the traditional safeguards of the polling place." Wis. Stat. § 6.84. And it defines an "absent elector" as "any otherwise qualified elector who for any reason is unable or unwilling to appear at the polling place in his or her

ward or election district." Wis. Stat. § 6.855(1). The election statutes also repeatedly describe "polling places" and "alternate sites" for absentee voting as separate locations. *See, e.g.*, Wis. Stat. § 12.035 (prohibiting the distribution of election-related material at certain places, including "polling places" and "at the office of the municipal clerk or at an alternate site under [Section] 6.855"); Wis. Stat. § 12.03 (prohibiting electioneering in "polling places" and in "the municipal clerk's office or at an alternate site under [Section] 6.855"); Wis. Stat. § 7.41 (permitting public observation "at any polling place, in the office of any municipal clerk whose office is located in a public building on any day that absentee ballots may be cast in that office, or at an alternate site under [Section] 6.855 on any day that absentee ballots may be cast at that site"). If alternate absentee voting sites were already considered polling places under Wisconsin law, entire sections of these statutes would be rendered superfluous—a result which is to be avoided. *See State v. Matasek*, 2014 WI 27, ¶ 12, 353 Wis. 2d 601, 846 N.W.2d 811 ("Statutes are interpreted to give effect to each word and to avoid surplusage.").

If anything, Section 6.855's lack of regulation of the types of locations where absentee voting sites may be located, when contrasted with Section 5.25's imposition of such regulations, is itself telling. "If a word or words are used in one subsection but are not used in another subsection, we must conclude that the legislature specifically intended a different meaning." *RURAL*, 2000 WI 129, ¶ 39. The Court therefore "must conclude" that the legislature's decision not to specify in Section 6.855 that clerks locate alternate absentee-voting sites in buildings reflects a legislative choice not to impose such a requirement. The statute instead leaves municipal clerks free to decide the types of locations

where alternate absentee voting sites may be located—subject, of course, to Section 6.855's substantive requirements.

B. This Court should not read in a requirement that is absent from the statute's text.

The circuit court also erred in concluding that mobile, non-static structures could not serve as alternate absentee-voting sites simply because no statute expressly authorizes them. R.99:16–17. The circuit court's reasoning that mobile alternate sites were therefore not permitted closely tracked this Court's reasoning in *Teigen*, which concluded that drop boxes were not permitted for the same reason. *Compare Teigen*, 2022 WI 64, ¶ 54 ("[N]o defendant can point to any statute authorizing ballot drop boxes; instead, the defendants argue no statute expressly prohibits them. The absence of an express prohibition, however, does not mean drop boxes comport with 'the procedures specified' in the election laws"), *with* R.99:17 ("No defendant or intervenor can point to any statute authorizing the use of mobile (van) absentee ballot sites; instead, the defendants argue no statute expressly prohibits them. The absence of an express prohibition, however, does not mean mobile absentee ballot sites comport to procedures specified in the election laws."); *see also* R.161:4 n.2 (circuit court acknowledging that *Teigen* "was influential in this Court's decision in the present case").

This Court, of course, currently has before it a case in which it will decide whether to overrule *Teigen*. *See Priorities USA v. WEC*, No. 2024AP166. Regardless of the outcome in *Priorities*, however, basic principles of statutory interpretation confirm the circuit court erred in reading requirements into Section 6.855 where none exist. "[I]t is a seminal canon of textual interpretation that [courts] do not insert words into statutes or constitutional

text." *State v. Schultz*, 2020 WI 24, ¶ 49, 390 Wis. 2d 570, 939 N.W.2d 519. Courts therefore "will not read into [a] statute a limitation the plain language does not evidence." *County of Dane v. Lab. & Indus. Rev. Comm'n*, 2009 WI 9, ¶ 33, 315 Wis. 2d 293, 759 N.W.2d 571. Because Section 6.855 contains no requirement that alternate absentee balloting sites be located within fixed, physical buildings, *see supra* Section III.A., the Commission's decision to reject Brown's complaint in this regard should be affirmed.

Section 6.84 is not to the contrary—indeed, it has no application here at all. The first subsection of Section 6.84 does no more than express the legislature's general view that "voting by absentee ballot must be carefully regulated." Wis. Stat. § 6.84(1). This is at most an effort to justify the legislature's enacted regulations of the absentee voting process. It does not license the Court to adopt additional regulations that the legislature has not seen fit to enact. The operative portion of Section 6.84 is subsection (2), which provides that certain specified provisions of Wisconsin law must "be construed as mandatory," rather than directory, and that ballots "cast in contravention of" those specified procedures cannot be counted. Wis. Stat. § 6.84(2). But the governing statute here—Section 6.855—*is not among the listed statutes*. *See* Wis. Stat. § 6.84(2). Thus, whatever the precise effect of Section 6.84(2) on the statutes that provision covers, it has no effect on Section 6.855. The circuit court erred in holding otherwise.

CONCLUSION

The Court should vacate the circuit court's decision and remand with instructions to dismiss the appeal for lack of standing. If the Court reaches the merits, it should affirm the Commission's dismissal of Brown's complaint.

Dated: June 3, 2024. Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 7,045 words.

Dated: June 3, 2024.

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