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SUPREME COURT

Supreme Court of Wisconsin

No. 2024AP232

KENNETH BROWN,
PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

v.

THE 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

REPLY AND RESPONSE BRIEF OF WISCONSIN ALLIANCE FOR RETIRED AMERICANS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes & Regulations

INTRODUCTION

The Wisconsin Elections Commission properly dismissed Brown's complaint challenging Racine's designation of alternate absentee voting sites for the 2022 primary election. This Court should conclude that Brown lacks standing to appeal that dismissal. To the extent it reaches the merits, the Court should affirm the Commission.

Brown lacks standing to pursue this appeal because he was not "aggrieved" by the Commission's decision. The circuit court held otherwise only by adopting the "vote pollution" theory that a majority of this Court rejected in *Teigen v. Wisconsin Elections Commission*, 2022 WI 64, 403 Wis. 2d 607, 976 N.W.2d 519. On appeal, Brown renounces that theory, relying instead on an asserted interest in having local election officials follow the law. But by authorizing only parties who are "aggrieved" by a Commission decision to appeal, Section 5.06(8) demands more.

If it reaches the merits, the Court should affirm the Commission's dismissal of Brown's complaint. *First*, the Court should hold the Commission properly concluded that Racine's use of a mobile election unit was lawful under Section 6.855. As this Court's recent opinion in *Priorities USA v. Wisconsin Elections Commission*, 2024 WI 32, makes clear, courts are not entitled to read absentee voting statutes skeptically or strictly, as the circuit court did in this case. Nothing in Wisconsin law prohibits the use of a mobile election unit as an alternate absentee voting site. Brown's contrary argument misunderstands the absentee voting process in Wisconsin and would render every kitchen table, mailbox, or post office at which absentee voters complete or submit their ballots an unlawful "polling place" under Wisconsin law.

Second, 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. Brown's only "evidence" of partisan advantage before the Commission rested on multiple false assumptions. The statute at issue simply does not demand that alternate sites be located in wards that match the partisan makeup of the clerk's own office. The better read of the statute, as the Alliance explained in its opening brief, is that the partisan advantage provision requires a multi-factor analysis—not consideration of a single data point. Given the multiple factors that may weigh on whether the designation of an alternate site confers a partisan advantage, the Commission did not err in rejecting Brown's argument, which never attempted to account for other relevant factors.

Third, the Commission properly rejected Brown's claim that Racine's designations violated the statute's "as near as practicable" requirement. Brown's restrictive reading of that provision conflicts with the legislature's 2018 amendment expressly authorizing multiple sites, a change meant to allow municipalities to make reasonable choices about site locations in service of equitable, citywide access to voting. Given the 2018 amendment, the "as near as practicable" requirement must be read to account for the practical need to fairly distribute absentee voting sites across municipalities. To the extent the "as near as practicable" provision would prevent municipalities from doing that, the 2018 amendment repealed it by implication. Either way, Racine's site designations did not violate the statute.

The Alliance joins the arguments of the Commission and Clerk McMenamin concerning whether Clerk McMenamin was authorized to utilize City Hall as an alternate absentee voting site

and whether Racine's alternate sites needed to be continuously in use under Section 6.855. This Court should affirm the Commission's dismissal of the complaint in full.

ARGUMENT

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

The Court should dismiss Brown's appeal for lack of standing. As the Alliance argued in its opening brief, the circuit court erred in holding that Brown had standing under a "vote pollution" theory accepted by just three justices in *Teigen* and rejected by the remainder of the Court. *See* WARA Br. 18–20. Brown now entirely disowns the circuit court's reasoning, saying "he is not arguing vote pollution—and has never done so in this case." Brown Br. 21. The Court should therefore reject the circuit court's indefensible and undefended "vote pollution" rationale, which otherwise threatens to open the floodgates to litigants who are dissatisfied with this state's election system but have suffered no real injury. *See* WARA Br. 19–20.

Brown argues instead that Section 5.06 gives him standing to appeal the Commission's rejection of his complaint, but that argument fails too. True, Section 5.06(1) allows "any elector" who "believes that a decision or action" of an election official is unlawful to file a complaint with the Commission. Brown was therefore fully entitled to file his administrative complaint, as he did. But Section 5.06(8) imposes a sharper limit on who may *appeal* an adverse ruling: only an "aggrieved" party. That "material variation in terms suggests a variation in meaning." *State ex rel. Dep't of Nat. Res. v. Wis. Ct. of Appeals*, 2018 WI 25, ¶ 28, 380 Wis. 2d 354, 909

N.W.2d 114. Any voter can file a complaint, but only an "aggrieved" party can appeal.

Under Section 5.06(8)'s plain text, Brown could therefore appeal the Commission's rejection of his complaint only if he was "aggrieved" by that decision. He was not. The Court's decision in *Friends of the Black River Forest v. Kohler Co.* construes the term "aggrieved" in the directly analogous context of appeals from administrative decisions under the Administrative Procedure Act. 2022 WI 52, 402 Wis. 2d 587, 977 N.W.2d 342. In that context, a petitioner must "show a direct effect on his legally protected interests" to qualify as a "person aggrieved" with standing to sue. *Id.* ¶ 20 (quoting *Fox v. Wis. Dep't of Health & Soc. Servs.*, 112 Wis. 2d 514, 524, 334 N.W.2d 532 (1983)). Under this definition of "aggrieved," "the injuries must be neither hypothetical nor conjectural" and "abstract injury is not enough," such that the injury is akin to the injury-in-fact required for standing under federal law. *Id.* ¶ 21; *Fox*, 112 Wis. 2d at 525. Brown makes no argument that he satisfies this standard, and for the reasons the Alliance gave in its opening brief, he cannot. *See* WARA Br. at 17–18.

Contrary to Brown's argument, *Teigen* does not set forth a different standard or require a different result. *Teigen*'s observation that Section 5.06 authorized voters "to have local election officials . . . comply with election laws," *Teigen*, 2022 WI 64 ¶ 34, was based entirely and explicitly on voters' ability to file an administrative complaint with the Commission under Section 5.06(1). *See id.* (citing Wis. Stat. § 5.06(1)). *Teigen* said nothing about the circumstances under which a Wisconsin voter who files such a complaint may appeal an adverse decision by the Commission. That makes sense, because *Teigen* did not involve a

Section 5.06(1) complaint, much less an appeal from one. Accordingly, *Teigen* did not even address this question, much less authoritatively answer it.

Finally, Brown is wrong to portend that the Alliance's interpretation of Section 5.06(8) would functionally preclude future judicial review. Under the Alliance's standard, any party can appeal an adverse decision so long as the party has a direct interest in the outcome. Many parties to Commission decisions—including many voters who file complaints—will have such interests. If a Commission decision makes it harder for a voter to vote, for example, or otherwise harms a voter in some concrete way, the voter would be aggrieved and entitled to appeal. The problem for Brown is that he alleges *no injury whatsoever* from the Commission's decision; rather, he alleges only his bare disagreement with the outcome.[1]

II. Racine's use of a mobile voting van in the 2022 primary did not violate Wisconsin law.

If the Court reaches the merits, it should first affirm the Commission's decision that alternate absentee voting sites are not required to be located within fixed, physical buildings. No statute imposes such a requirement. Section 6.855 says nothing to require a physical building, nor does any other applicable statute. Although Section 5.25 requires "polling places" to be in "public buildings" or "nonpublic buildings," alternate absentee ballot sites are not "polling places": Wisconsin law makes clear that absentee voting is "exercised wholly outside the traditional safeguards of the

[1] For the same reason, the Commission's decision does not implicate any "protected interest in life, liberty or property" of Brown's that could give him a procedural due process right to appellate review. *See Jones v. Dane County*, 195 Wis. 2d 892, 913, 537 N.W.2d 74 (Ct. App. 1995).

polling place," Wis. Stat. § 6.84(1), and allows voters to vote absentee if they "for any reason [are] unable or unwilling to appear at the polling place in [their] ward or election district," Wis. Stat. § 6.85(1); *see also* WARA Br. at 28–30.

In arguing that Section 5.25's requirements for "polling places" nonetheless apply to alternate absentee ballot sites, Brown points out that Wisconsin law defines "polling place" as "the actual location wherein the elector's vote is cast," Wis. Stat. § 5.02(15), as if that definition settles the matter, Brown Br. 50. It does not. As a matter of plain meaning, it is far from obvious at what point in the voting process an absentee ballot is "cast," and different Wisconsin election statutes imply different answers to that question.

In some instances, the word "cast" is used in Wisconsin election law to refer the process of obtaining and filling out an absentee ballot. S*ee, e.g.*, Wis. Stat. §§ 6.84(2), 6.875(6)(e), 6.87(3)(d). But other provisions describe absentee ballots as "cast" only later, on election day, when the already completed and returned ballot is removed from its carrier envelope and canvassed. Section 6.88(3)(a), for example, provides that "an absentee ballot *is cast* by the elector"—present tense—at the elector's polling place on election day when the ballot is removed from the carrier envelope by election officials and canvassed. Wis. Stat. § 6.88(3)(a) (emphasis added). Similarly, in municipalities that opt to canvass absentee ballots under the alternative procedures of Section 7.52, the "absentee ballot *is cast* by the elector" when the carrier envelope is opened on election day at the Section 7.52 site. Wis. Stat. § 7.52(3)(a) (emphasis added).

For purposes of applying the "polling place" definition in Section 5.02(15) to absentee ballots, "cast" must carry that latter

meaning, denoting the actual counting and canvassing of the ballot on election day at a polling place or Section 7.52 site. Construing "cast" in Section 5.02(15) to instead refer to the location where an absentee ballot is completed or submitted by the voter would have absurd results that the legislature cannot possibly have intended. If absentee ballots were "cast" when voters completed or submitted them, kitchen tables across the state would become unlawful "polling places" when voters filled out their absentee ballots there, and mailboxes and post offices would become unlawful "polling places" when voters dropped their ballots in the mail. *See* Wis. Stat. § 5.25(5)

This is clearly not what the Legislature intended and the Alliance's reading of the statutes at issue avoids that problem. Properly construed, Section 5.02(15)'s definition of "polling place" does nothing to suggest that alternate absentee ballot sites are themselves polling places subject to Section 5.25's requirements, as Brown argues.

The circuit court did not appear to disagree. It acknowledged that no provision of Wisconsin law prohibited the use of Racine's mobile election unit for absentee voting. R.99:17. It stated, however, that Section 6.84(1)'s policy statement that absentee voting "must be carefully regulated" implied that express statutory authorization was needed for a mobile election unit, and it found such express authorization lacking. R.99:16–17. This Court has since rejected that interpretation of Section 6.84(1), holding that "§ 6.84 gives us no principles of interpretation that give any insight into the actual meaning of the absentee balloting statutes that follow it." *Priorities USA*, 2024 WI 32, ¶¶ 45–46. The Court's decision in *Priorities* leaves no room for the circuit court's theory

that statutory silence about mobile absentee voting units implied their prohibition.

Finally, Brown's argument that a mobile election unit is "impossible to square" with the requirements for storing absentee ballots, Brown Br. 45, ignores that municipalities need not conduct all absentee ballot activities at each alternate absentee ballot site. Section 6.855 provides that if alternate sites are used, "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." (Emphasis added.) Thus, a municipality that uses alternate sites must determine which functions to allocate to the alternate sites and which functions to allocate to the clerk's office. Here, Racine used mobile election units to facilitate alternate absentee balloting sites, and it stored returned absentee ballots in the clerk's office. All this complied with subsection (1) because all functions were allocated *either* to the alternate sites or to the clerk's office, but not to both. Put in terms of the statute, "no function" that was "conducted at the alternate site[s]" was also conducted "in the office of the municipal clerk."

Section 6.88 does not change this. It requires simply that "[t]he clerk shall keep the ballot in the clerk's office *or* at the alternate site, if applicable." Wis. Stat. § 6.88 (emphasis added). The statute gives clerks a choice: Ballots may be stored at clerk's office, *or* they may be stored at alternate sites. The "if applicable" portion of the statute does not mandate storage at an alternate site; it simply provides that storage at the alternate site is available if the clerk has chosen to utilize alternate sites under Section 6.855.

In sum, Section 6.855 imposes no requirement that alternate sites be located within static, physical buildings. This Court should not impose such a requirement in contravention of the "seminal canon of textual interpretation that [courts] do not insert words into statutes." *State v. Schultz*, 2020 WI 24, ¶ 49, 390 Wis. 2d 570, 939 N.W.2d 519. The Court should affirm the Commission's decision to reject Brown's complaint against the van.

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

The Commission correctly concluded that Brown had not carried his burden to show that Racine's site designations "afford[ed] an advantage to any political party" in violation of Section 6.855(1). Brown's increasingly convoluted contrary argument suffers from a host of fatal defects. Most straightforwardly, the election at issue in this case is the fall 2022 partisan primary, and primary elections are not competitions that could afford any party a particular advantage because voters are only choosing who will be on the ballot for their preferred party. *See* Wis. Stat. § 8.16; WARA Br. 22. Like the circuit court, which never addressed this point below, Brown says not a word in response to this argument. That is no doubt because he has no good response—a claim of partisan advantage simply makes no sense in the primary election context. The Court can affirm the Commission on this basis without reaching Brown's remaining arguments.

Should the Court reach them, however, Brown's other arguments are just as flawed. As the Alliance explained in its opening brief, the statistical analysis that Brown presented to the Commission—the only evidence of partisan advantage Brown ever put in the record—rested on at least three false assumptions. *See* WARA Br. 22–24.

First, although Brown assumed that Section 6.855 requires a ward-based analysis, the term "ward" appears nowhere in the statute. This Court begins from the premise "that the legislature's intent is expressed in the statutory language." *State ex rel Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. Here, the key term in Brown's reading is notably absent from that statutory language. Nor are wards a logical or intuitive metric for assessing the partisan valence of "site[s]," which is the statutory term the legislature in fact employed. For example, any particular site's features may render it more or less favorable to a party than the surrounding ward. A church or campus, for instance, may be frequented by voters who favor a certain party even though the surrounding ward's residents do not. Or a site in one ward may be equally accessible to voters in other nearby wards.

Second, although Brown assumed that a site favors a party if the surrounding ward's *residents* tend to support that party, the record undermines that assumption. As McMenamin argued in front of the Commission, R.57:7, and as the Alliance pointed out in its opening brief to this Court, WARA Br. 23, nearly all the sites in dispute were open only during business hours on weekdays, and many were in areas that attract large numbers of workers and visitors from elsewhere in the city who were able to vote at the sites, even if they did not live in that ward. It follows that the voting tendencies of workers, customers, and students in the ward were more relevant than those of residents. Brown's evidence made no attempt to adjust for that fact.

Third, Brown refused to consider other possible explanations for the purported correlation between wards' past voting patterns and the number of designated sites, even though

such explanations—such as an effort to place sites in locations near transportation hubs, or where residents from across the city gather—are likely to undermine any inference of advantage to a political party.

Rather than address these points or defend the adequacy of the evidence he submitted to the Commission, Brown doubles down on his argument to the circuit court that "all eighteen sites [outside ward 1] were illegal because they created an advantage for one party or the other," as compared with the clerk's office ward. Brown Br. 32–33. Under this theory, sites may be situated *only* in wards with partisan makeups that *exactly match* the clerk's office ward. In practice, of course, that would limit alternate sites to that ward, as no other ward will exactly match it.

Even the circuit court rejected this approach, *see* R.161:3, 5, and nothing in Section 6.855 supports it. The statute says nothing about "wards," and nothing that would make the partisanship of the ward with the clerk's office the sole barometer of partisan advantage. The idea is absurd. Consider, for example, how such a rule would play out in Madison: The Madison clerk's office is in ward 51, where 93 percent of votes in the last gubernatorial election were for the Democratic candidate.[2] According to Brown, Section 6.855(1) therefore prohibits Madison from situating a site in ward 49, where the Democrat won only 84 percent of the vote—because, on Brown's view, that site designation would *unfairly advantage Republicans*. Statutes are read "reasonably, to avoid

[2] Madison's ward-by-ward results for the 2022 election are available at https://elections.countyofdane.com/Precincts-Result/145/0004.

absurd or unreasonable results." *Kalal*, 2004 WI 58, ¶ 46. Brown's construction does not come close to clearing that bar.[3]

Brown's grab-bag of other arguments does not save his claim. He suggests that there is "no other way" to assess partisan advantage than to look at past voting data by ward. Brown Br. 36. But there are many other relevant considerations for assessing the possibility of partisan advantage besides voting data. As the Alliance argued in its opening brief, Section 6.855 imposes a duty on local officials to balance multiple considerations: it creates an array of requirements that all must be read to allow for multiple sites under subsection (5). *See* WARA Br. 20–21. Read "not in isolation but as part of a whole," *Kalal*, 2004 WI 58, ¶ 46, the partisan-advantage restriction plainly requires a multifactor analysis, not Brown's myopic focus on ward-by-ward results in past elections.

Finally, Brown's complaint that the Commission provided "absolutely zero analysis" in dismissing his complaint, Brown Br. 38, misrepresents the record and misunderstands administrative appeal remedies. With respect to the record, Racine argued before the Commission that Brown's evidence was uninformative because he 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. The Commission, in turn, concluded that Brown had not carried his burden to provide a partisan-advantage

[3] Brown also suggests that the partisan-advantage restriction must be read in harmony with the "as near as practicable requirement." Brown Br. 36. As explained below, that requirement has very limited reach after the 2018 amendment. In any case, it cannot be read as Brown proposes. Clumping sites near the clerk's office does nothing to stave off partisan advantage. Instead, it compounds whatever inequalities—partisan, racial, socioeconomic, or otherwise—the clerk's office ward reflects.

metric that would allow it to conduct the necessary fact-intensive inquiry. *See* R.59:55–56; *see also* WARA Br. 27. Particularly given the Commission's limited resources and obligation to resolve complaints quickly, *see* Wis. Admin. Code § EL 20.04(1), (8), that was a sufficient account of "reasons" for the agency's decision, *Transp. Oil Inc. v. Cummings*, 54 Wis. 2d 256, 263, 195 N.W.2d 649 (1972).

With respect to the remedy, Brown's argument would at most dictate a remand to the Commission for more detailed factfinding—not the flat reversal the circuit court issued and Brown seeks here. *Stas v. Milwaukee Cnty. Serv. Comm'n*, 75 Wis. 2d 465, 475, 249 N.W.2d 764 (1977). Brown does not address *Stas* or otherwise explain how reversal was appropriate.

IV. Racine's site designations for the 2022 primary did not violate the "as near as practicable" requirement.

The Commission and circuit court both correctly concluded that Racine's site designations did not violate Section 6.855(1)'s requirement that a designated site "shall be located as near as practicable to the office of the municipal clerk or board of election commissioners." Brown's argument for reversal rests on a crabbed reading of the statute that puts subsection (1) in violent conflict with subsection (5)'s express authorization of multiple sites. The Court should reject this implausible argument. In light of the 2018 amendment authorizing multiple sites, the "as near as practicable" requirement must be read broadly, to allow municipalities to make reasonable choices about site locations in service of equitable, citywide access to voting. Alternatively, if the Court determines that "as near as practicable" cannot be so read, it should hold the legislature's 2018 amendment to Section 6.855 repealed that

requirement by implication. Either way, Racine's site designations did not violate the statute.

The purpose of statutory interpretation is "to determine the intent of the legislature." *Indus. to Indus., Inc. v. Hillsman Modular Molding, Inc.*, 2002 WI 51, ¶ 6, 252 Wis. 2d 544, 644 N.W.2d 236. A statutory term must therefore be "interpreted in the context in which it is used; not in isolation but as part of a whole . . . and reasonably, to avoid absurd or unreasonable results." *Kalal*, 2004 WI 58, ¶ 46. Here, the key statutory phrase is "as near as *practicable*." Wis. Stat. § 6.855(1) (emphasis added). As this Court has previously concluded with respect to another statute, the phrase "as near as practicable" contemplates "an evaluation of many factors" rather than a strict "geographic standard." *Town of Ashwaubenon v. Pub. Serv. Comm'n*, 22 Wis. 2d 38, 50–51, 125 N.W.2d 647, 654 (1963).

Context and common sense support the same reading here. With respect to context, the statute in dispute expressly authorizes a municipality to "designate more than one alternate site," Wis. Stat. § 6.855(5), and the legislature's purpose in authorizing multiple alternate sites was to redress a federal court ruling that Section 6.855's single-site rule violated the U.S. Constitution and the Voting Rights Act, *see One Wis. Inst. v. Thomsen*, 198 F. Supp. 3d 896, 934–35, 960 (W.D. Wis. 2016). It follows that the legislature intended the 2018 amendment to *fix* the problem identified by the Western District in *One Wisconsin Institute*: namely, the unjustified and disproportionate burden the one-site-

per-municipality imposed on voters in large cities and minority voters. *See id.*[4]

As for common sense, requiring that alternate sites all be clustered as near as *possible* to the clerk's office fixes nothing and is not remotely practicable. The function of multiple alternate sites contemplated by the 2018 amendment is to ensure equitable access to early voting opportunities for all city residents. The best reading of the statute after the 2018 amendment is therefore that it authorizes a municipality to designate a mix of sites at varying distances from the clerk's office if doing so reasonably serves to ensure equitable, citywide access to early voting. Brown has never disputed that Racine's alternate site locations satisfy that criterion. Accordingly, the Commission's determination that Racine complied with the "as near as practicable" requirement should be affirmed.

Brown's contrary arguments are unavailing. As a threshold matter, Brown assumes a faulty premise throughout his brief. Brown focuses his proximity analysis on Clerk McMenamin's selection of sites for use from the larger set of sites designated by the Racine city council. But the restrictions in Section 6.855(1) apply to the designations made by the "governing body of a municipality"—*i.e.*, the city council, not the clerk. Because Brown

[4] Although the Seventh Circuit subsequently vacated the Western District's order as moot, it explained that it was doing so because "it seems unlikely that Wisconsin would return to a single-site requirement if allowed to do so." *Luft v. Evers*, 963 F.3d 665, 674 (7th Cir. 2020); *see also Zessar v. Keith*, 536 F.3d 788, 794 (7th Cir. 2008) ("Amendment or repeal of a challenged statute does not deprive a federal court of its power to determine the legality of the practice unless it is *absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur." (cleaned up) (emphasis added)).

does not even analyze the right sites, nothing in his brief could possibly warrant reversal of the Commission's dismissal order.

In any case, Brown's analysis of the sites selected by the clerk is flawed. Brown reasons that because some of the sites the city council designated were closer to the clerk's office than sites the clerk selected, her designations necessarily violated Section 6.855(1). Brown Br. 68–69. Not so—the statute does not require that sites be as near as *possible* to the clerk's office. Brown makes no showing that the sites nearer the clerk's office that were designated but not used would have achieved the same ends—such as promoting broad, equitable access to absentee voting across the city—as the farther sites that were used. Brown therefore entirely fails to show that it would have been equally "practicable" for the clerk to designate only the closer sites.

Brown is also wrong to argue that giving the phrase "as near as practicable" an expansive meaning renders that phrase "meaningless." Brown Br. 68. Section 6.855(1) requires that a clerk or body designating sites considers, in selecting each site, whether another possible site closer to the clerk's office could "practicabl[y]" serve the same purposes. Given that the purpose of many site designations post-2018 will be to ensure equitable, citywide access to early voting, the answer will often be no. But it does not follow that the phrase is utterly "meaningless"; it is simply constrained—as it must be—by the many other statutory requirements and the overall legislative purpose.

Brown's resort to "legislative history" is no more illuminating. The 2005 legislative history is obsolete, because the 2018 amendment expressly allowing multiple alternate sites fundamentally transformed the statute, vitiating any relevance a single legislator's intent a decade earlier might have. And in any

case, Brown's description of the legislative history shows only that *one* legislator in 2005 had some unspecified concern that compelled him to add the "as near as practicable" requirement to Section 6.855(1). Brown Br. 28–30.

The Seventh Circuit's decision in *Luft* does nothing to change the analysis. All *Luft* held was that *One Wisconsin Institute* had been mooted by subsequent legislation. *See* 963 F.3d at 674. It did not hold, as Brown attempts to imply, that a city may not designate geographically distributed sites if its clerk's office is "centrally located." *See* Brown Br. 72; *see also Luft*, 963 F.3d at 674. It could not have so held—it was a federal court decision that was issued *after* the 2018 amendment to Section 6.855 and rested only on mootness. It has no bearing on the proper construction of a Wisconsin statute.

Finally, if the Court were to agree with Brown that the "as near as practicable" requirement in Section 6.855(1) would preclude the designation of multiple sites equitably located throughout a municipality, then it follows that the 2018 amendment to Section 6.855 that authorized multiple sites also repealed the "as near as practicable" requirement by implication. Repeal by implication occurs when a subsequent legislative enactment "contains provisions so contrary to or irreconcilable with" an earlier enactment "that only one of the two . . . can stand in force." *KW Holdings, LLC v. Town of Windsor*, 2003 WI App 9, ¶ 27, 259 Wis. 2d 357, 656 N.W.2d 752 (internal quotation marks omitted). "While repeal by implication is not favored," that principle "does not control an otherwise clear intent, evidenced by the act itself." *Id.*

Here, if Brown were right that the only way to read "as near as practicable" is as he suggests, the statute would meet the high

standard for repeal by implication. It cannot be correct that the legislature intended to authorize municipalities to designate multiple, distributed alternate balloting sites yet, at the same time, also intended to require that they *all* be as close to the clerk's office as physically possible. The point of allowing multiple alternate sites is to increase the accessibility of early absentee voting citywide and thereby avoid violating federal law. *See One Wis. Inst.*, 198 F. Supp. 3d at 934–35. Allowing alternate sites to be designated only in the part of the city that already has easy access to the clerk's office would utterly frustrate that objective. Brown's reading is therefore "irreconcilable with" the later-in-time 2018 amendment.

Moreover, Section 6.855 bears a key hallmark of repeal by implication: inconsistent terminology. The "as near as practicable" limitation is phrased in terms of a *single* site: "*The designated site* shall be located as near as practicable to the office of the municipal clerk or board of election commissioners." Wis. Stat. § 6.855(1) (emphasis added). That the legislature did not amend subsection (1) to apply to "designated *sites*" suggests it did not mean for the restriction to apply to the new, multiple alternate sites authorized by subsection (5).

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: July 23, 2024. Respectfully submitted,

Electronically signed by Diane M. Welsh

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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, as modified by this Court's May 3, 2024, order granting bypass. The length of this brief is 5,120 words.

Dated: July 23, 2024.

Respectfully submitted,
Electronically signed by Diane M. Welsh