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Clerk of Circuit Court
Racine County
2022CV001324

STATE OF WISCONSIN CIRCUIT COURT RACINE COUNTY

KENNETH BROWN,

Plaintiff,

v.

WISCONSIN ELECTIONS COMMISSION and TARA McMENAMIN,

Defendants,

and

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

Intervenor-Defendants.

Case No. 22-CV-1324
Case Code: 30703

BRIEF OF DEMOCRATIC NATIONAL COMMITTEE IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Plaintiff Kenneth Brown objects to the 21 alternate absentee ballot sites that the City of Racine used to facilitate in-person absentee voting for the August 2022 primary election. Invoking Wis. Stat. § 5.06(1), Brown complained to the Wisconsin Elections Commission ("WEC"), alleging that City Clerk Tara McMenamin violated Wis. Stat. § 6.855. When WEC denied Brown's complaint after investigating his allegations, having determined it failed to establish probable cause sufficient to suggest wrongdoing, Brown sought review

of WEC's determination in this Court. On summary judgment, Brown rehashes arguments he presented to WEC that fundamentally misinterpret Wis. Stat. § 6.855(1). Those arguments fail here, too.

As a threshold matter, Brown's objections are not justiciable in this Court. Wisconsin law authorizes any voter to bring concerns to WEC's attention. But not every concern raised by every voter confers standing to challenge an agency's decision. Under Wisconsin precedent, Brown is not "aggrieved" in a way that opens the courthouse doors.

Even if this Court reaches the merits, Brown fails there, too. Racine's decision to use multiple alternate absentee ballot sites was expressly authorized by a 2018 statutory amendment that repealed the prior "one-location" restriction and authorized municipalities to "designate more than one alternate site," with no limit on the number of total sites. Wis. Stat. § 6.855(5). Incredibly, Brown cites neither § 6.855(5) nor the 2018 legislation that created it. Brown also ignores the federal-court decision that prompted the Legislature to adopt this new provision and reverse the policy he is asking this Court to enforce. *See One Wis. Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896 (W.D. Wis. 2016). The Seventh Circuit recognized the dramatic overhaul enacted by the addition of § 6.855(5) in 2018, declining to adjudicate the appeal of this portion of the Western District's decision because, "[t]he one location rule is gone, and its replacement is not substantially similar to the old one." *Luft v. Evers*, 963 F.3d 665, 674 (7th Cir. 2020).

Nonetheless, Brown omits this history in favor of a myopic focus on vestigial language in Wis. Stat. § 6.855(1), requiring that "*[t]he* designated site shall be located as near as practicable to" the clerk's office. The "practicability" language must be read in light

of the subsequent, express authorization for municipalities to use multiple alternate absentee ballot sites and in conjunction with the federal-court holding that the one-location rule, by preventing the widespread dispersion of conveniently located early-voting sites, violated the United States Constitution and the Voting Rights Act. Brown disregards the critical statutory history and litigation context because they undermine his core arguments.

Brown's other arguments interpret Wis. Stat. § 6.855(1) in nonsensical ways. These arguments press the Court to read words into § 6.855(1) that the Legislature did not use and contravene precedent that guides this Court's statutory interpretation. Brown has also asserted here an additional claim—which this Court dismissed earlier in the case, but that he nonetheless briefs on summary judgment—based on a distortion of WEC's delegation of authority to WEC Administrator Meagan Wolfe, Wisconsin's chief elections official.

Recognizing that there will be extensive briefing, DNC does not repeat the factual and procedural background but proceeds directly to its arguments. ***First***, Brown's case should be dismissed out of hand because he lacks standing to appeal WEC's determination under Wis. Stat. § 5.06(8) or the Wisconsin Administrative Procedure Act. ***Second***, even if the Court were to proceed and address the merits of Brown's claims about Racine's use of alternate absentee ballot sites, those arguments fail because they are based on a legally unsustainable interpretation of Wis. Stat. § 6.855, especially as amended in 2018. ***Third***, Brown's claim about WEC's delegation of authority is not properly before this Court, and, even if it were, lacks merit and cannot support reversing WEC's decision.

This Court should deny Brown's summary judgment motion and affirm WEC's decision.

ARGUMENT

I. Brown Lacks Standing to Appeal WEC's No-Probable-Cause Determination.

WEC determined "that [Brown] did not show probable cause to believe that a violation of law or abuse of discretion occurred." (Dkt. 3, Ex. H at 1; *see also id.* at 8-10, 14) Brown seeks to appeal that determination "pursuant to Wis. Stat. § 5.06(8) and, to the extent necessary, pursuant to § 227.40." (Dkt. 3, ¶7) This Court should dismiss the appeal because Brown is not a "person aggrieved" within the meaning of § 5.06(8) or § 227.53(1), and thus lacks statutory standing to bring this appeal under either § 5.06(8) or the Wisconsin Administrative Procedure Act.

Wisconsin's carefully crafted "compliance review" procedures at issue here authorize "***any elector*** of a jurisdiction or district served by an election official" to file a "sworn written complaint" with WEC if the elector believes the official has violated an election law or "abused the discretion vested in him or her by law with respect to" election administration. Wis. Stat. § 5.06(1) (emphasis added).[1] WEC has broad authority to investigate and resolve such complaints, including through a determination of no probable cause to believe the law has been violated. *See id.* § 5.06(4)–(6). Judicial review of WEC's

[1] Wisconsin Stat. § 5.06(1) provides in relevant part that, "[w]henever ***any elector*** of a jurisdiction or district served by an election official believes that a decision or action of the official or the failure of the official to act with respect to any matter concerning nominations, qualifications of candidates, voting qualifications, including residence, ward division and numbering, recall, ballot preparation, election administration or conduct of elections is contrary to law, or the official has abused the discretion vested in him or her by law with respect to any such matter, the elector may file a written sworn complaint with the commission requesting that the official be required to conform his or her conduct to the law, be restrained from taking any action inconsistent with the law or be required to correct any action or decision inconsistent with the law or any abuse of the discretion vested in him or her by law." (emphasis added).

disposition of a § 5.06(1) complaint is available only through an appeal to the "circuit court for the county where the official conducts business or the complainant resides," with the court required to "accord[] due weight to the experience, technical competence and specialized knowledge of the commission." *Id.* § 5.06(8)–(9).

But the fact that the statute authorizes "any elector" to file a complaint with WEC does not mean that "any elector" has standing to appeal WEC's considered disposition of that complaint to a circuit court. The right to appeal is restricted to "[a]ny election official or complainant who is ***aggrieved by an order*** issued under sub. (6)." *Id.* (emphasis added).[2] Therefore, while "***any*** elector" may file a complaint with WEC, only an "***aggrieved*** complainant" may seek judicial review of a no-probable-cause determination by WEC.[3]

This is a distinction with a critical difference. Brown does not have statutory standing to appeal under Wis. Stat. § 5.06(8) because he is not "aggrieved" by WEC's determination of no probable cause. "Aggrieved" is a statutory term of art with a longstanding, well settled meaning. An appellant is "aggrieved" only "[i]f the appealed judgment or order ***directly injures*** his or her interests," and "the injury must adversely affect the party's interests ***in an appreciable way***." *Auer Park Corp. v. Derynda*, 230 Wis. 2d 317, 320, 601 N.W.2d 841 (Ct. App. 1999) (emphases added). Claimed injuries will not

[2] Wisconsin Stat. § 5.06(8) provides in relevant part that "[a]ny election official or complainant who is ***aggrieved by an order*** issued under sub. (6) may appeal the decision of the commission to circuit court for the county where the official conducts business or the complainant resides no later than 30 days after issuance of the order" (emphasis added).

[3] Wisconsin Stat. § 227.53(1) similarly limits the right to appeal an administrative action to those who are "aggrieved" by the action, with "person aggrieved" defined in Wis. Stat. § 227.01(9) as "a person or agency whose substantial interests are adversely affected by a determination of an agency." For all of the reasons Brown is not "aggrieved" under Wis. Stat. § 5.06(8), he is not "aggrieved" under § 227.53(1) either.

be recognized if they are "***unsupported by any evidence***" and rest on "***pure[] supposition***." *Id.* at 322 (emphases added); *see id.* (appellant must be "***appreciably and adversely injured***" to be "aggrieved" (emphasis added)); *Friends of Black River Forest v. Kohler Co.*, 2022 WI 52, ¶21, 402 Wis. 2d 587, 977 N.W.2d 342 (appellant is not "aggrieved" by alleged injuries that are merely "hypothetical" and "conjectural"). Thus, Wisconsin law holds that an appellant is "aggrieved" only if he or she has "a ***personal stake*** in the outcome of the controversy," which "requires a '***distinct and palpable injury***' to the appellant, and also a 'fairly traceable' ***causal connection*** between the claimed injury and the challenged conduct." *Kiser v. Jungbacker*, 2008 WI App 88, ¶12, 312 Wis. 2d 621, 754 N.W.2d 180 (emphases added); *see also id.* ¶20 (challenged order must "bear[] '***directly and injuriously***' upon [appellant's] interests" (emphasis added)).

It follows that an appellant is not "aggrieved" merely because he participated in the administrative proceeding below and disagrees with the outcome. *Cornwell Personnel Associates, Ltd. v. DILHR*, 92 Wis. 2d 53, 284 N.W. 2d 706 (Ct. App. 1979), is closely on point. A state agency found, over the strong objections of the claimant's former employer, that the claimant was entitled to unemployment-compensation benefits. When the former employer sought judicial review, the Court of Appeals held the former employer lacked standing to appeal; while the employer had a statutory right to participate in the agency proceeding, it lacked standing to seek judicial review because its "unemployment reserve account was wholly unaffected by the department's determination." *Id.* at 55. "The rules governing standing before an administrative agency are not necessarily the same as the rules governing standing to seek judicial review." *Id.* at 63. Standing to seek judicial review

requires that the appellant be "aggrieved," and the employer's generalized claims that all employers would suffer if unqualified claimants received benefits were "remote," "purely speculative," and nothing more than "generalized grievances about the administration of a governmental agency." *Id.* at 62.

This rule against standing to appeal applies even where the agency proceeding was initiated by the person seeking to appeal the agency's decision. Applying the logic of *Cornwell*, courts repeatedly have held that "[s]tanding to challenge the administrative decision is not conferred upon a petitioner merely because that person requested and was granted an administrative hearing*." Fox v. DHSS*, 112 Wis. 2d 514, 526, 334 N.W.2d 532 (1983) (citations omitted); *see also Waste Mgmt. of Wis., Inc. v. DNR*, 144 Wis. 2d 499, 502 n.2, 424 N.W.2d 685 (1988) ("Under Wisconsin law, it is clear that, just because a party has requested and been granted an administrative hearing, the party does not obtain thereby the standing to challenge the resulting administrative decision.").

An unsuccessful appeal under Wisconsin's Open Records Law, Wis. Stat. §§ 19.31-19.39, further illustrates that a person can be statutorily entitled to initiate an agency proceeding yet not be entitled to judicial review of the agency's ultimate resolution. *See State v. Zien*, 2008 WI App 153, 314 Wis. 2d 340, 761 N.W.2d 15. Someone who makes an open records request is defined as a "requester." Wis. Stat. § 19.32(3). If a request is denied, the "requester" has the option to ask the local district attorney or Attorney General "to bring an action for mandamus asking a court to order release of the record to the requester." *Id.* § 19.37(1)(b). *Zien* held that a "private citizen requester" who succeeds in prompting DOJ to file a mandamus action does not have standing to appeal a resolution of that action

because, however much she may disagree with the outcome, she is not legally "aggrieved" by it. A private citizen has the right to ***request*** that prosecutors bring an action, but not any "right to direct, settle, compromise, appeal or substitute counsel in a case brought by the attorney general pursuant to" that request. *Zien*, 2008 WI App 153, ¶25; *see id.* ¶¶33–39. The Court of Appeals carefully parsed the meaning of "aggrieved" and held that, "[i]n the context of the open records statutes, 'aggrieved party' cannot mean a person or entity who is not happy with the outcome of the attorney general's or district attorney's litigation[.]" *Id.* ¶37.

> We find no evidence that the legislature intended such an outcome or in any way authorized private parties to insert themselves into actions brought, ***albeit at their request***, to further the State's interest in obtaining compliance with its statutes. We decline to create such a public policy quagmire by reading into the statutes a result neither specifically authorized nor apparently even contemplated by the legislature.

Id. (emphasis added); *see also id.* ¶33 ("the legislature did not intend to allow a requester to control or appeal a mandamus action brought by the attorney general").[4]

These decisions dictate the outcome here: Brown's initiation of and participation in the WEC proceeding do not create standing that would allow him to appeal WEC's no-probable-cause determination because he is not legally "aggrieved" by that determination. As in *Zien,* Brown's statutory right to initiate an administrative proceeding gives him no "right to direct, settle, compromise, ***appeal*** or substitute counsel" in connection with that

[4] *Zien* is an unusual case on its facts. The so-called "private citizen requester" was not just anyone, but the former Attorney General who had been in office when the open-records mandamus action was first filed. She was engaged in a struggle with the new Attorney General over control of the action, and she lost. *See* 2008 WI App 153, ¶¶22–25. Importantly, the Court of Appeals emphasized that the former Attorney General was being afforded (at her request) the same rights as any "private citizen requester." *Id.* ¶25. It follows that the *Zien* analysis applies with equal force to Brown.

proceeding. 2008 WI App 153, ¶25 (emphasis added). This conclusion is bolstered by the rule that, since Wis. Stat. §§ 5.06(8) and 227.53(1) are legislative waivers of the State's sovereign immunity from suit, they must be narrowly construed and strictly enforced. *See* Wis. Const. art. IV, § 27; *Kuechmann v. Sch. Dist. of La Crosse,* 170 Wis. 2d 218, 223–25, 487 N.W.2d 639 (Ct. App. 1992).

Brown also claims that, "[a]s an elector, [he] has an interest and a statutory right, under Wis. Stat. § 5.06(1), in ensuring that Wisconsin's elections laws are followed," and complains that he "personally observed" voting practices that he believes are inconsistent with statutory requirements for early in-person absentee voting (as he construes those requirements). (Dkt. 3, ¶¶4, 24–25) But, as explained above, Brown's "statutory right" is limited to filing a "sworn written complaint" with WEC for that state agency to investigate and resolve; it does not extend to "ensuring that Wisconsin's elections laws are followed" in accord with his preferred interpretation of those laws. (*Id.* ¶4)

Brown's "statutory right" argument is somewhat analogous to Justice Hagedorn's contention in his lone concurrence in last year's sharply fractured *Teigen* decision (involving the legality of absentee-ballot drop boxes) that an elector can be "aggrieved" within the meaning of Wis. Stat. § 227.53 by a WEC guidance document that threatens to cause local election officials to act in ways that violate the elector's protected interests under Wis. Stat. § 5.06(1). *See Teigen v. Wis. Elections Comm'n*, 2022 WI 64, ¶¶164–66, 403 Wis. 2d 607, 976 N.W.2d 519 (Hagedorn, J., concurring). This "aggrievement" issue under § 227.53 was not briefed in *Teigen*, and Justice Hagedorn's analysis was rejected by all six of the other Justices. *See* 2022 WI 64, ¶22 n.12, ¶¶32–36 (lead op.); *id.* ¶¶210–15

(A.W. Bradley, J., dissenting). Even assuming *arguendo* that an individual voter can be aggrieved by a WEC guidance document, the case for standing is far more attenuated where the elector is seeking to challenge a considered determination by WEC that no probable cause exists to pursue further enforcement proceedings against a local election official. That would be a much great intrusion into an agency's core enforcement and prosecutorial functions than the chapter 227 review of the WEC guidance documents conducted in *Teigen*.[5]

Moreover, the Legislature appears to have anticipated—and resolved—this issue when it created WEC. Electors who believe that WEC has been insufficiently responsive to their concerns have additional options, which do not include seeking judicial review for which he lacks standing. Disappointed electors can work around WEC by going directly to their local district attorney and/or the Attorney General. *See* Wis. Stat. § 5.08.

[5] Brown has not cited to *Teigen* in his summary judgment brief, nor has he claimed to have standing under the "vote-dilution" theory advocated by three Justices in that case—the notion that each lawful voter's vote is "diluted" whenever an unlawful vote is cast. 2022 WI 64, ¶¶14–31. Brown has thereby waived any such claim. Brown's failure to raise this theory of standing is understandable: it was ***expressly rejected*** by a majority of the Justices in *Teigen*. *See id.* ¶149 n.1, ¶¶158–67 (Hagedorn, J., concurring); ¶¶210–15 (A.W. Bradley, J., dissenting). In Justice Ann Walsh Bradley's words, "[t]he impact of such a broad conception of voter standing is breathtaking and especially acute at a time of increasing, unfounded challenges to election results and election administrators." *Id.* ¶214. Lower courts have emphasized that the vote-dilution theory of standing was rejected in *Teigen* and have criticized the theory as "weak" and lacking any "clear legal authority." *Rise Inc. v. Wis. Elections Comm'n*, No. 2022AP1838, 2023 WL 4399022, at *5–6 (Wis. Ct. App. July 7, 2023) (Blanchard, P.J.) (publication decision pending); *see also* Decision and Order, *Werner v. Dankmeyer*, Case No. 22-CV-555, Dkt. 102 at 12–16 (La Crosse Cnty. Cir. Ct., Sept. 18, 2022) (Levine, J.). Federal judges in Wisconsin and throughout the country also have repeatedly rejected the vote-dilution theory of standing. *See, e.g.*, *Wis. Voters Alliance v. Pence*, 514 F. Supp. 3d 117, 120 (D.D.C. 2021); *Feehan v. Wis. Elections Comm'n*, 506 F. Supp. 3d 596, 608–09 (E.D. Wis. 2020), *appeal dismissed*, Nos. 20-3396, 20-3448 (7th Cir. Dec. 21, 2020 and Feb. 1, 2021).

II. Brown Wholly Ignores Both Wis. Stat. § 6.855(5) and Statutory History.

Brown is hyper-focused on Wis. Stat. § 6.855(1), to the exclusion of the statute as a whole. In pressing the Court to read the language "as near as practicable" as creating a purely geographic standard to govern a municipality's selection of alternate absentee ballot sites, he misses the forest for the trees. He insists in essence that the "as near as practicable" language means that any alternate absentee ballot sites must be lined up across the street from the clerk's office—or as close to this absurd result as "practicable." Any other locations are, he says, by definition farther away than the statute allows. The glaring problem with Brown's laser focus on § 6.855(1) and the "as near as practicable" language is that he does not acknowledge, let alone discuss, the relevant statutory history surrounding Wis. Stat. § 6.855 or the addition of § 6.855(5) to the statute. Instead, he presses this Court to interpret § 6.855(1) in a vacuum, which would violate settled Wisconsin law on statutory interpretation. Section 6.855's statutory history, the extensive litigation over subsection (1), and the resulting enactment of subsection (5) all necessarily inform how this Court should interpret § 6.855(1) today.

In 2005, the Legislature enacted Wis. Stat. § 6.855, which limited each municipality to designating a single location for in-person absentee voting (the "one-location restriction"). *See* 2005 Wisconsin Act 451, § 67; *One Wis. Inst.*, 198 F. Supp. 3d 896. Under the statute as adopted at that time, each municipality, regardless of size or population, had a choice: it could either conduct early in-person absentee voting at the municipal clerk's office itself, ***or*** it could conduct such voting at a ***single*** alternate absentee ballot site. The

same statutory sentence that limited a municipality to a single alternate site required that site to be located "as near as practicable" to the clerk's office. Wis. Stat. § 6.855(1).

In May 2015, One Wisconsin Institute filed a federal lawsuit alleging that certain provisions of Wisconsin's election laws—including the one-location restriction in Wis. Stat. § 6.855(1)—were unconstitutional and violated Section 2 of the Voting Rights Act. *One Wis. Inst.*, 198 F. Supp. 3d 896. After discovery, multiple rounds of briefing, and a two-week trial, the Court ruled. As relevant here, the Court held that the one-location restriction violated the First and Fourteenth Amendments to the United States Constitution and Section 2 of the Voting Rights Act ("VRA").

With regard to the Court's conclusion that the one-location restriction violated the First and Fourteenth Amendments, it reasoned that "[r]equiring all municipalities to have one location for in-person absentee voting may have a superficial appeal. But uniformity for uniformity's sake gets the state only so far." *Id.* at 934. The Court noted that in 2014 the number of adults per Wisconsin municipality ranged from 33 to 433,496 and thus "[t]he 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." *Id.* The Court also emphasized that "[h]aving only one location creates difficulties for voters who lack access to transportation," particularly voters in larger cities. *Id.* at 932. The Court concluded that most of the challenged in-person absentee voting provisions, including the one-location restriction, violated the First and Fourteenth Amendments for three reasons: (1) the burdens that they imposed were "not justified by the state's proffered interests"; (2) local communities should have control over the number

and dispersion of early voting sites; and (3) the purported consistency of limited all voting jurisdictions—whether the City of Milwaukee or a crossroads hamlet—to a single early-voting site was "illusory." *Id.* at 934–35.

The Court held the one-location restriction violated Section 2 of the VRA because it disparately burdened African Americans and Latinos, and those burdens were linked to the state's historical conditions of discrimination. *Id.* at 952–60. "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," the Court explained. *Id.* at 956. Since "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.* These burdens followed historical patterns of discrimination, because "[d]isparities in housing, education, and employment, have left minority groups condensed into high-density urban areas, which makes them particularly vulnerable to Wisconsin's rules for in-person absentee voting." *Id.* at 959. Ultimately, "basic math confirms that one location in a larger municipality will have to contend with a larger volume of voters than one location in a smaller municipality will have to confront." *Id.* at 959.

In light of the court's holding that Wis. Stat. § 6.855 violated both constitutional guarantees and the VRA, it enjoined the application of the one-location restriction. *Id.* at 964. The Legislature promptly appealed.

While the appeal was pending, the Legislature added a new provision, subsection (5), to Wis. Stat. § 6.855. *See* 2017 Wis. Act 369 § 1js. The new provision granted each municipality authority to "designate more than one alternate [in-person absentee voting] site under sub (1)"—thus repealing outright the one-location restriction. According to the Wisconsin Legislative Council analysis of the new legislation, because the "single alternate location for in-person absentee voting contained in prior law [was] not enforceable at the time [of the bill], based on the decision of the federal court in *One Wisconsin Institute*," the new section operated to "allow[] the governing body of a municipality to designate more than one alternate site for in-person absentee voting."[6] The Legislature thereby acceded to the federal court ruling and changed the law to allow municipalities to designate however many alternate absentee ballot sites they determined were appropriate for their particular circumstances. Other than adding subsection (5), the Legislature did not amend the text of § 6.855(1)–(4) in adopting 2017 Wisconsin Act 369. Thus, subsection (1) on its face still only purports to allow a single designated site, and still provides that "[t]he designated site shall be located as near as practicable to the office of the municipal clerk," even though the subsequently enacted subsection (5) authorizes an unlimited number of alternate sites.

The new subsection (5) was intended to render this portion of the *One Wisconsin Institute* dispute moot, and it achieved its intended effect. When the Seventh Circuit issued its opinion in June of 2020, it recognized the addition of subsection (5), noting that "[t]he one location rule is gone, and its replacement ***is not substantially similar to the old one***."

[6] https://docs.legis.wisconsin.gov/2017/related/lcactmemo/act369.pdf

Luft v. Evers, 963 F.3d 665, 674 (7th Cir. 2020) (emphasis added). The Seventh Circuit vacated this portion of the district court's decision as moot. *Id.*

This statutory history is critical to the proper understanding and application of Wis. Stat. § 6.855. WEC's decision recognized subsection (5)'s effect on the "as near as practicable" language. Brown, by contrast, has avoided any reference to subsection (5) or its statutory history—perhaps because it is fatal to his preferred interpretation of § 6.855(1). That is a materially misleading omission. Wisconsin law requires this Court to engage in plain-meaning analysis, which necessarily includes considering both statutory history and context. *See, e.g.*, *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110 ("A statute's purpose or scope may be readily apparent from its plain language ***or its relationship to surrounding or closely related statutes—that is, from its context or the structure of the statute as a coherent whole***.") (emphasis added); *Brey v. State Farm*, 2022 WI 7, ¶20, 400 Wis. 2d 417, 970 N.W.2d 1 ("Statutory history, which involves comparing the statute with its prior versions, may also be used as part of plain meaning analysis. … [S]tatutory history constitutes an intrinsic source that is part of the context in which we interpret the words used in a statute." (internal quotation marks and citations omitted)).

III. Brown's Proposed Reading of Wis. Stat. § 6.855(1) Ignores Context, Requires the Court to Read Words into the Text, and Creates Unreasonable and Absurd Results.

Brown incorrectly interprets several portions of Wis. Stat. § 6.855(1), which this section addresses in turn.

A. Brown's Reading of the "As Near as Practicable" Language Ignores Context and Creates Unreasonable and Absurd Results.

Subsection (1) reads, in pertinent part:

> 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.***

Wis. Stat. § 6.855(1) (emphasis added). The emphasized portion sets forth two restrictions: first, that the alternate site shall be "located as near as practicable to the office of the municipal clerk or board of election commissioners," and, second, that "no site may be designated that affords an advantage to any political party." *Id.*

In reading subsection (1), Brown concludes that it is simply "a matter of geography" and that Clerk McMenamin necessarily erred in her selection of the 21 sites when she did not choose one of the "many alternatives that were in closer proximity to the Clerk's office than many of the sites selected." (Dkt. 86 at 8) In Brown's view, while the Clerk could choose 21 alternate sites, they *all* had to be located "as close as practicable" to the clerk's office. Taken to its logical extreme, this would require all alternate absentee ballot sites to encircle or crowd around the Clerk's office, and the existence of any available site between the Clerk's office and any given designated alternate site would render that designation unlawful. Such a reading fails for many reasons.

1. Subsection (1) cannot be understood without considering *One Wisconsin Institute* and subsection (5).

There is no way to construe subsection (1) without acknowledging that the "as near as practicable" restriction is a vestige of the old statutory scheme (from 2005-2016) that promulgated the one-location restriction—that is, before the enactment of subsection (5). The "as near as practicable" language applied by its terms to "***[t]he*** designated site"—to the single site allowed under the original enactment. That practicability language now must be read in light of the enactment of subsection (5), which repealed the one-location restriction and authorized each municipality to designate as many alternate absentee ballot sites as it deems appropriate. This provision also needs to be read in conjunction with the *One Wisconsin Institute* decision and its holdings that the one-location restriction violated the First and Fourteenth Amendments as well as Section 2 of the VRA.

Brown claims that "geographic distribution [of alternate absentee voting sites] violates the plain language of the statute." (Dkt. 86 at 12) That claim willfully ignores the Legislature's adoption in 2018 of subsection (5). In arguing that all alternate absentee ballot sites must be clumped in immediate proximity to the Clerk's office, Brown asks this Court to mandate that Wisconsin revert to an approximation of the one-location restriction, notwithstanding that a federal court held the rule unlawful and the Legislature deliberately overturned the one-location policy. The Court should reject Brown's request. Allowing multiple alternate absentee ballot sites but requiring that they be piled atop one another contravenes subsection (5); this Court should not read subsection (1) to negate the policy determination enshrined in the subsequent adoption of subsection (5) because the

Legislature could not reasonably have meant to give municipalities broad authority with one hand while cynically taking it away with the other. *See, e.g.*, *State v. Matasek*, 2014 WI 27, ¶18, 353 Wis. 2d 601, 846 N.W.2d 811 (court "assume[s] that the legislature used all the words in a statute for a reason."); *Wisconsin Just. Initiative, Inc. v. Wis. Elections Comm'n*, 2023 WI 38, ¶19, 407 Wis. 2d 87, 990 N.W.2d 122 ("[T]he focus in statutory interpretation is on the language of the statutory text, read reasonably, along with relevant statutory context and structure.")

Brown's preferred reading of subsection (1) also undermines the *One Wisconsin Institute* holding that motivated subsection (5)'s adoption. Indeed, accepting Brown's preferred reading would thrust Wisconsin back into the circumstances that led a federal court to find that the State was violating both the United States Constitution and the VRA. The federal court struck down the one-location restriction because it precluded the designation of early voting sites at convenient and widespread locations throughout a municipality. That rendered the one-location restriction unlawful because "[w]ith only one location for in-person absentee voting, voters must travel farther than they would otherwise have to travel if municipalities could establish more locations" and "[h]aving only one location creates difficulties for voters who lack access to transportation," particularly voters in larger cities. *One Wis. Inst.*, 198 F. Supp. 3d at 932, 959.

2. Brown's interpretation of practicability is flawed and overrides any consideration of partisan advantage.

The Wisconsin Supreme Court has made clear that the phrase "as near as practicable" when used in statutes encompasses something ***more*** than simply a pure

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

Brown assumes that practicability is a strict, straightforward term to apply. Not so. The term "practicable" is not statutorily defined. Accordingly, this Court should employ a common, ordinary definition, consulting a dictionary if that is helpful. *See, e.g.*, *Kalal*, 2004 WI 58, ¶49. Black's Law Dictionary defines "practicable" as "reasonably capable of being accomplished; feasible in a particular situation; capable of being used; usable." *Practicable*, Black's Law Dictionary (11th ed. 2019). The Merriam Webster Dictionary similarly defines practicable as "capable of being put into practice or of being done or accomplished; capable of being used." *Practicable*, Merriam Webster Online Dictionary (2023), https://www.merriam-webster.com/dictionary/practicable. The Legislature's use of this broad, general term grants municipal clerks discretion in determining where alternate balloting sites will be situated. It would be error for this Court to read "as near as practicable," which is an inherently broad and subjective standard, to practically invalidate subsection (5)'s express grant of authority to designate multiple sites.

In light of the broad definition of "practicable" and *One Wisconsin Institute*, a clerk must strike a balance—distributing alternate absentee ballot sites in a fair, even-handed way throughout a municipality consistent with the *One Wisconsin Institute* decision's

findings regarding ease of access, wait times, and potential racial disparities. As WEC noted in its decision below, this is no easy task: it is "difficult to fit the 'near as practicable' requirement into a statutory mold that allows multiple sites, and thus we look to the other requirements placed upon those sites (*e.g.*, does not afford an advantage to any political party, broad and relatively equal distribution, etc.)." (Dkt. 3, Ex. H at 9)

In his myopic focus on geography, Brown reads the statutory language prohibiting partisan advantage right out of subsection (1). That language, which cautions that "no site may be designated that affords an advantage to any political party," must be given meaning. The prohibition against a site that affords partisan advantage seems to envision overly partisan places, like a political party's local office or a large-scale political rally or event. Again, a clerk needs to meaningfully give purpose to this prohibition (not through some complicated statistical analysis, but by exercising common sense), and also do it while balancing the factors enunciated in the *One Wisconsin Institute* decision.

The Wisconsin Supreme Court has oft repeated the mantra that statutory language is to be read "reasonably, to avoid absurd or unreasonable results." *Kalal*, 2004 WI 58, ¶46; *see also Watton v. Hegerty*, 2008 WI 74, ¶26, 311 Wis. 2d 52, 751 N.W.2d 369 ("We avoid statutory interpretations that lead to absurd results."). The "absurd or unreasonable results" canon precludes interpretations that "would render the relevant statute contextually inconsistent or would be contrary to the clearly stated purpose of the statute." *State v. Grunke*, 2008 WI 82, ¶31, 311 Wis. 2d 439, 752 N.W.2d 769. Brown's interpretation of subsection (1), specifically the "as near as practicable" language, violates this cardinal rule because it would render Wis. Stat. § 6.855 contextually inconsistent and would directly

contradict the statutory history and the policy judgment underlying the enactment of subsection (5).

B. Brown's Remaining Arguments Require the Court to Read Words into the Statute and Create Unreasonable, Absurd Results.

Brown throws a number of other arguments at the wall about how Clerk McMenamin's administration of the August 2022 primary violated Wis. Stat. § 6.855(1), separate and apart from choosing where the alternate absentee ballot sites were located. Unfortunately for Brown, none of these arguments stick, as they require the Court to read words into the statute and lead to unreasonable or absurd results.

1. "Shall remain in effect"

Subsection (1) also provides that

> ***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***."

Wis. Stat. § 6.855(1) (emphasis added). Brown reads the "shall remain in effect" language as relating to the ***use*** of an alternate absentee ballot site. That is, he avers that a designated absentee ballot site must be continually open and available for early absentee voting until the day after the election. However, the "remain in effect" language is clearly related to the ***designation*** of alternate absentee ballot sites, not to micromanaging each site's operations.

The requirement that the designation remain in effect through the full election cycle does not mean that the designated site actually has to be ***used*** the entire time. It makes

sense that a designation should remain in place until after election day, so that there is a back-up option in place. That is, a designation can be made to ensure there is at least one pre-approved location for conducting absentee voting processes if the primary site becomes unavailable for any reason. According to WEC, it "has long advised taking this precaution in the context of approving polling places, … [which] gives the voters ample advance notice of a potential backup site and ensures compliance with statutory approval requirements and timelines." (Dkt. 3, Ex. H. at 13)

Brown appears to take issue with WEC's view that "municipalities should be free to designate as many sites as they wish, whether they have an intention to use them or not, so that they may adapt as necessary in the event of an emergency." (Dkt. 86 at 14) Yet, that is exactly the discretion and flexibility that Wis. Stat. § 6.855 as a whole affords clerks. If there was any doubt that municipalities had authority to designate back-up sites, the adoption of subsection (5)—"A governing body may designate more than one alternate site under sub. (1)"—laid that doubt to rest.

Brown's proposed interpretation—that every alternate absentee ballot site must always be open and available—leads to absurd and unreasonable results. Even putting aside the sheer amount of time, staffing, and resources that it would take to keep these alternate sites open continuously (*see* Wis. Stat. § 6.855(3), requiring that alternate absentee ballot sites be staffed by the clerk's staff), doing so makes no sense and would disqualify most places willing to serve as alternate absentee ballot sites. For example, a church might be happy to let people vote there on days other than during Sunday services; same for a synagogue except on Saturdays; or schools may allow use of their space for voting on

weekends or after school, but for security reasons may not want to be open to all comers during school hours when students are in the building. Brown's argument that every site seemingly must be open the same hours on exactly the same days not only defies logic and common sense, but also contravenes historical practice.[7]

2. "Function related to voting and return of absentee ballots"

Subsection (1) also requires that, "[i]f the governing body of a municipality makes an election under this section, no function related to voting and return of absentee ballots that is to be conducted at the alternate site may be conducted in the office of the municipal clerk or board of election commissioners." Wis. Stat. § 6.855(1). Brown asserts that Racine violated this provision because, despite there being several designated alternate absentee ballots sites, the clerk collected, stored, and secured all ballots in her office until they could be counted on Election Day. This contention, like Brown's others, fails to withstand scrutiny.

According to Brown, completed ballots were required to have been held at the 21 alternate absentee ballot sites until Election Day, and the fact that completed ballots were not stored at any of the alternate sites demonstrates that Clerk McMenamin designated them unlawfully. That position not only defies common sense but also finds no support in the statutory text. Subsection (1) says that "no function related to voting and return of

[7] *See, e.g.*, Ridah Syed, *Milwaukee area early-voting locations for 2022 spring primaries*, Milwaukee J. Sentinel (Jan. 27, 2022), available at https://www.jsonline.com/story/news/2022/01/27/milwaukee-area-early-voting-locations-2022-spring-primaries-waukesha-ozaukee/6592362001/; City of Madison, *In-Person Absentee Voting Hours and Locations*, https://www.cityofmadison.com/clerk/elections-voting/voting/vote-absentee/in-person-absentee-voting-hours-and-locations.

absentee ballots that is to be conducted at the alternate site" can also occur at the Clerk's office. Wis. Stat. § 6.855(1) (emphasis added). But that does not preclude the secure storage of completed, returned absentee ballots at the Clerk's office until the time to count them if comparable secure storage is not available at the alternate site(s). Brown's reading does not account for the statutory text; it departs from that text in an effort to achieve his preferred policy outcome of making it impracticable for municipalities to use alternate absentee ballot sites. Furthermore, no form of the words "collect," "store," or "secure" appears in the statute, which makes the duty Brown insists upon an atextual one. Nor is it a duty reasonably implied by the text: securely storing ballots is not a "function related to voting and return of absentee ballots," as it is not the active part of filling out one's ballot (voting) or returning that completed ballot to the clerk; instead, it would be a part of the clerk's administrative responsibilities that occurs only ***after*** a voter had taken the actions listed in the statutory text.

It is no surprise that the statute does not require what Brown suggests, as his approach makes no policy sense whatsoever. Insisting that absentee ballots ***must*** remain at alternate sites until Election Day could pose serious security concerns, chain-of-custody concerns, and staffing issues for some municipalities. Most municipalities likely have security equipment or protocols in place to ensure that ballots are stored securely at the clerk's office. While some municipalities may have equivalent security protocols transferrable to, and appropriately secure storage available at, alternate absentee ballot sites, that may not always be the case. That is why Wisconsin's 1850+ voting municipalities need discretion in making this determination. As WEC noted, "it would be a significant

infringement on the authority of local election officials for the Commission to opine on the most secure and appropriate location at which to store ballots. That critical decision needs to rest with the officials responsible for safeguarding and delivering ballots." (Dkt. 3, Ex. H. at 12)

3. "Conducted in the office of the municipal clerk or board of election commissioners"

Brown next conflates the clerk's office with the entirety of the building in which that office is located. He asserts that he "observed voters casting in-person absentee ballots at City Hall—in the same building where the Clerk's office is located." (Dkt. 86 at 16) He then insists this violated Wis. Stat. § 6.855. (*Id.*) His argument misconstrues the statutory language, reading "*in the office of* the municipal clerk or board of election commissioners," Wis. Stat. § 6.855(1), as saying "within the same building as the office of the municipal clerk." There is no textual basis for Brown's position—the word "building" does not appear in this part of the statute, nor should the Court read that language in. *See DOC v. Schwarz,* 2005 WI 34, ¶20, 279 Wis. 2d 223, 693 N.W.2d 703 ("courts should not add words to a statute to give it a certain meaning" (quoted source omitted)); *Dawson v. Town of Jackson*, 2011 WI 77, ¶42, 336 Wis. 2d 318, 801 N.W.2d 316 ("We decline to read into the statute words the legislature did not see fit to write."); *State v. Wiedmeyer*, 2016 WI App 46, ¶13, 370 Wis. 2d 187, 881 N.W.2d 805 ("It is not up to the courts to rewrite the plain words of statutes.").

This argument is also absurd in the context of large municipal facilities. For example, the fact that a municipal clerk's office is located in an 8-story structure that has

several wings does not mean the entire facility should be off-limits as an alternate absentee ballot site. Any conclusion to the contrary would not only be absurd but would unnecessarily rob clerks of the discretion they are provided in determining the alternate absentee ballot sites in a way that makes the most sense for their communities, which was the whole point of the 2018 adoption of Wis. Stat. § 6.855(5). *See Watton*, 2008 WI 74, ¶26 ("We avoid statutory interpretations that lead to absurd results.").

4. Brown's Delegation Argument Fails for Several Reasons.

Brown presses one claim here that he never presented to WEC below—that WEC's delegation of authority to Administrator Wolfe is illegal. (*See* Dkt. 3, ¶¶75–99) As a threshold matter, this issue is not properly before the Court because it was stricken from Brown's complaint earlier in this litigation. In the alternative, this claim exceeds the narrowly prescribed judicial-review process for complaints filed under Wis. Stat. § 5.06. The Court should decline to decide this issue and should ignore pages 20–28 of Brown's brief.

The prayer for relief in Brown's complaint features the following request in paragraph D: "Enter a declaratory judgment that (1) WEC's delegation to the Administrator and/or Chair to resolve § 5.06 complaints instead of the Commissioners is unlawful; and (2) WEC's disposition of the Plaintiff's complaint without a vote by the Commissioners was unlawful." (*See* Dkt. 3 at p. 25-26) At the March 15, 2023, hearing on Racine's motion to dismiss, the Court struck this entire part of Brown's requested relief, reasoning "I will not issue a broader declaration than that which is necessary to decide this case. I reject therefore Paragraph B and D of the request for relief as exceeding my authority." (Dkt. 82

at 17:21-25) Brown's briefing of an issue that has already been dismissed is superfluous and should be disregarded.

Even if this Court had not already struck this claim in its entirety, the Court should still decline to address the issue in light of the narrowly prescribed judicial review process delineated by the Legislature: "The court may not conduct a de novo proceeding with respect to any findings of fact or factual matters upon which the commission has made a determination, ***or could have made a determination if the parties had properly presented the disputed matters to the commission for its consideration***." Wis. Stat. § 5.06(9) (emphasis added). That is, § 5.06 authorizes limited judicial review covering only those issues properly presented to and decided by WEC. The Legislature has not waived the State's sovereign immunity with regard to additional issues. *See* Wis. Const. art. IV, § 27; *Kuechmann*, 170 Wis. 2d at 223–25.

It is not even clear whether Brown's delegation claim relies upon the document he identifies as Exhibit I to his complaint,[8] in which WEC "delegated its authority to review and resolve complaints under Wis. Stat. § 5.06 to the Administrator and, to an extent, to the WEC Chair" (Dkt. 3, ¶81), or upon Wis. Admin. Code § EL 20.04(10), which provides that, "[a]fter all pleadings are filed under s. 5.06, Stats., the administrator shall proceed as the commission authorizes by duly adopted motion or…the administrator shall proceed after consultation with the commission's chair. Where the commission has delegated to the

[8] The Court struck all of the exhibits to Brown's complaint at the March 15, 2023 motion hearing, making Brown's citation to Exhibit I even more improper and problematic. *See* Dkt. 82 at 17:13-18 ("In the case of the exhibits, they are ordered stricken from the complaint.")

administrator the authority to resolve complaints, the administrator shall issue an order making findings and resolving the complaint." The Commission adopted the document in Exhibit I in 2020; and the rule codified at § EL 20.04(10) was promulgated in 2016.

Regardless of whether he relies upon the 2020 document or the 2016 rule, Brown faces numerous roadblocks in pursuing this claim. To the extent his complaint relates to the 2016 rule, Brown failed to abide by the mandatory procedures for challenging the lawfulness of a rule under Wis. Stat. § 227.40. In particular, a party must "apply to the court ... for an order suspending the trial of the proceeding until after a determination of the validity of the rule." Wis. Stat. § 227.40(3)(ag). Brown never did so. To the extent his complaint really takes issue with the 2020 document, Brown fails to explain why he never raised the issue before WEC, as he seems to be making a broader argument regarding the delegation of duties generally, not just an argument focused on the adjudication of his specific complaint on these issues.[9]

Whether his gripe is with the 2016 rule or the 2020 document, laches should apply and preclude the Court from reaching this issue. Under Wisconsin law, the application of laches requires proof of three elements: "(1) a party unreasonably delays in bringing a claim; (2) a second party lacks knowledge that the first party would raise that claim; and (3) the second party is prejudiced by the delay." *Wis. Small Bus. United, Inc. v. Brennan*, 2020 WI 69, ¶12, 393 Wis. 2d 308, 946 N.W.2d 101. Where the facts are undisputed and there is only one reasonable inference, the court may conclude as a matter of law that the

[9] While Brown's complaint contains allegations specific to this case (*see, e.g.*, Dkt. 3, ¶78), no such allegations appear in his summary judgment brief.

elements have been met. *Sawyer v. Midelfort*, 227 Wis. 2d 124, 159, 595 N.W.2d 423 (1999). Each of the elements of laches is satisfied in this case with respect to DNC, which as an intervenor, "is a full participant in the proceedings, having all of the same rights as all other parties to the action," including the power to raise any legal claims and defenses. *DNC. v. Bostelmann*, 2020 WI 80, ¶9, 394 Wis. 2d 33, 949 N.W.2d 423.

First, Brown filed his complaint with this Court in December 2022, raising this issue for the very first time. The 2016 rule had been in place for over 6 years, and WEC had been following the process outlined in the 2020 document for almost 3 years. Brown proffers no explanation as to why he waited for so long to pursue this issue or why he could only raise it in the context of this Wis. Stat. § 5.06 appeal.

Second, DNC did not have any notice or knowledge that Brown would be bringing this claim, especially so far removed from either the promulgation of the 2016 rule or WEC's issuance of the February 2020 document.

Finally, DNC is prejudiced by Brown's significant delay in bringing this claim. Brown seeks a significant alteration of the rules and processes by which WEC currently adjudicates voter complaints under Wis. Stat. § 5.06. DNC, as one of two national parties that consistently has candidates running in Wisconsin elections, has an interest in the processes that WEC employs in dealing with election-related challenges and it has an interest in those challenges being resolved efficiently, effectively, and transparently. We are on the eve of the 2024 election year, which is sure to be incredibly contentious. Yet, despite this critical juncture, Brown now asks the Court to invalidate WEC's internal

processes that have been in place for years, and which DNC and other electoral actors have become accustomed to and relied upon.

If the Court is inclined to reach the delegation issue and does not believe that any of its prior rulings, Wis. Stat. § 227.40(3)(ag), Wis. Stat. § 5.06(9), or the doctrine of laches bars such present adjudication, the Court should be aware that it is standard practice for WEC Administrator, Meagan Wolfe, to sign ***all*** WEC dispositions, decisions, etc.[10] Brown baselessly assumes that because Administrator Wolfe is the only signatory on the decision, she was the exclusive decisionmaker. (Dkt. 86 at 1-2) Brown's factually unsupported position is also belied by repeated comments throughout the decision itself indicating that it represents the ***Commission's*** determination that he did not show probable cause to believe that a violation of law or an abuse of discretion occurred. (*See, e.g.*, Dkt. 3, Ex. H at 1 ("The Commission has reviewed the complaint and the City of Racine Clerk's response. The Commission provides the following analysis and decision."); *id.* at 14 ("Based upon the above review and analysis, the Commission finds no probable cause to believe that a violation of law or abuse of discretion occurred"; "This letter constitutes the Commission's resolution of this complaint"))

CONCLUSION

For the reasons stated above, the Court should deny Brown's motion for summary judgment and affirm WEC's decision.

[10] *See* Wis. Stat. § 5.05(3d), (3g); s*ee also, e.g.*, https://elections.wi.gov/sites/default/files/legacy/2021-12/Decision%2520Letter_Pellegrini%2520v.%2520Igl_FINAL.pdf; https://elections.wi.gov/sites/default/files/documents/Decision%20Letter_Bolter%20v.%20Woodall-Vogg.pdf.

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Respectfully submitted,

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