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Clerk of Circuit Court
Racine County
2022CV001324

STATE OF WISCONSIN CIRCUIT COURT RACINE COUNTY

KENNETH BROWN,

Plaintiff,

Case No. 22-CV-1324

v.

WISCONSIN ELECTIONS COMMISSION
and TARA McMENAMIN,

Defendants.

PLAINTIFF'S OPENING BRIEF

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This case asks whether the municipal clerk for the City of Racine complied with the requirements of Section 6.855 of the Wisconsin statutes when administering an early voting period for the August 2022 primary election that included the use of a van in various locations for discrete, scheduled periods of time as a polling place.

This case is not about whether Section 6.855, as written, is the best possible mechanism to govern alternate locations for in-person absentee voting. It is not about whether having a mobile voting unit is a good or a bad policy idea. And it is not about voter suppression, encouraging the participation of every eligible voter, or imposing artificial restrictions on any eligible voter's undisputed right to cast a ballot. The question is simply whether the procedures the Clerk used complied with the language of the statute. Because the factual record demonstrates that they did not, WEC erred in rejecting Kenneth Brown's complaint, and the agency's decision should be reversed and modified. In the alternative, WEC's decision to delegate its decisionmaking

authority to a single administrator, who was the only signatory to the agency's decision, violates Wisconsin law and the decision should be reversed on that ground.

PERTINENT FACTUAL BACKGROUND

Plaintiff Kenneth Brown is a registered voter in the City of Racine. (R.2, ¶ 1.)[1] Defendant Tara McMenamin is the municipal Clerk for the City. (R.2, ¶ 2.) The Wisconsin Elections Commission ("WEC") is a six-member, bipartisan body assigned by law to oversee statewide election issues. One of the six commissioners serves as the Chair of the Commission. He or she has certain special duties that include being present for the resolution of tie votes following an election (Wis. Stat. § 5.01(4)(a)), conducting a public lottery to determine which district attorney will prosecute certain election law offenses (Wis. Stat. § 5.05(2m)(c)(15)), and reopening a canvas under certain circumstances (Wis. Stat. § 6.96), but the chairperson holds the same voting power as the remaining five commissioners. WEC also has additional employees, including an Administrator. At all times pertinent to this lawsuit, the WEC Administrator was Meagan Wolfe and the Chair was Don Millis. (R.112).

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In December 2021, the City approved approximately 150 potential absentee voting locations for early absentee voting for the elections to be held in 2022. (R.32-35.) From those locations, 22 were selected for the August 2022 primary election. (R.15-21.) These locations included community centers, schools, a park, and a coffee shop, among others, that were available for voting during designated three-hour

[1] "(R.__)" refers to the administrative record filed by WEC, as paginated by the agency, and is docketed at entries 56-59.

periods for in-person absentee voting.[2] (*Id.*) Additionally, in-person absentee voting also took place at City Hall, which is located within the same physical building as the Clerk's office. (R.7-8, ¶¶ 29-32, R.15.)

But, with the exception of this last location, the in-person early voting locations approved by the City were not the actual places used for voting itself. Rather, the City, with the assistance of CTCL funding in the amount of $120,000, conducted voting out of a mobile voting van that was driven to these locations and parked nearby. (R. 5, ¶¶ 15-16; R.38-39.) Voters entered the van to cast their ballots. Brown witnessed early in-person voting both at City Hall, where the Clerk's office is located, and at the van, which was parked at the Regency Mall, on the same day. (R.5, ¶¶ 17-19.)

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On August 10, 2022, Brown filed a verified written complaint with defendant Wisconsin Elections Commission against McMenamin. (R.1-49.) McMenamin filed a response on August 29, 2022 (R.51-97), and Brown filed a reply on September 13, 2022. (R.98-111.) WEC issued its decision on November 4, 2022. (R.112.) The decision was signed only by Administrator Wolfe. (*Id.*, R.125.) On December 1, 2022, Brown timely appealed WEC's decision to this Court. (Dkt. 3.)

[2] One site, the art museum, was designated for two separate three-hour periods (R.18), but the arguments that apply to the remaining sites also apply to the art museum for the reasons set forth in Section II.C. The one static site, the City Hall location, independently violates Section 6.855 for the reasons listed in Section II.D, *infra*.

ARGUMENT

I. APPLICABLE LEGAL STANDARDS

Section 5.06(9) provides that this Court shall "summarily hear and determine all contested issues of law" while "according due weight to the experience, technical competence and specialized knowledge of the commission, pursuant to the applicable standards for review of agency decisions under s. 227.57." The "due weight" standard "will not 'oust the court as the ultimate authority or final arbiter' of the law," but instead demands that the Court give "respectful, appropriate consideration to the agency's views" while exercising "its independent judgment in deciding questions of law." *Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 2018 WI 75, ¶ 78, 382 Wis. 2d 496, 914 N.W.2d 21 (opinion of Kelly, J.).

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II. THIS COURT SHOULD REVERSE WEC'S ADMINISTRATIVE DECISION

There are several, independently sufficient reasons why the manner in which the Clerk conducted the August 2022 primary violated Wis. Stat. § 6.855. Even one of these errors requires reversal of WEC's determination.

The facts underlying Brown's administrative challenge are not in dispute. Neither WEC as an initial matter, nor this Court in its reviewing posture, includes evaluating the credibility of any witness or resolving a factual dispute among its tasks in this case. Rather, WEC below and this Court now are simply called upon to interpret the plain language of Wis. Stat. § 6.855, as enacted by the Legislature, and apply it to how the election was indisputably conducted.

Statutory interpretation "begins with the language of the statute. If the meaning of the language is plain, [the court's] inquiry ordinarily ends." *Brey v. State Farm Mut. Auto. Ins. Co.*, 2022 WI 7, ¶ 11, 400 Wis. 2d 417, 970 N.W.2d 1 (quoting citations omitted). Interpretation "involves the ascertainment of meaning, not a search for ambiguity." *Sorenson v. Batchelder*, 2016 WI 34, ¶ 13, 368 Wis. 2d 140, 885 N.W.2d 362 (quoting citation omitted). A statute is to be interpreted "in the context in which it is used, not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Noffke ex rel. Swenson v. Bakke*, 2009 WI 10, ¶ 11, 315 Wis. 2d 350, 760 N.W.2d 156 (quoting *State ex rel. Kalal v. Dane Cty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110). A "disagreement about the statutory meaning is not enough to render a statute ambiguous." *Id.* (quoting *Kalal*, 2004 WI 58, ¶ 47).

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Section 6.855(1) of the Wisconsin Statutes provides, in relevant part, that:

> The governing body of a municipality may elect to designate a site other than the office of the municipal clerk . . . as the location from which electors of the municipality may request and vote absentee ballots and to which voted absentee ballots shall be returned by electors for any election. The designated site shall be located as near as practicable to the office of the municipal clerk . . . 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 . . . 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 an alternate site may be conducted in the office of the municipal clerk . . ."

While the statute is lengthy and lists a number of considerations for alternative sites, the language itself is unambiguous and sets out the following requirements for

alternate sites as pertinent to this lawsuit: 1) they must be located "as near as practicable" to the Clerk's office; 2) they must not "afford[] an advantage to any political party"; 3) they must "remain in effect until at least the day after the election"; and 4) if they are used, "no function related to voting and return of absentee ballots" may be conducted at the Clerk's office.

As set out in further detail below, the Clerk's administration of the August 2022 primary violated all of these statutory requirements, and this Court should therefore reverse WEC's decision to the contrary.

A. The alternate voting sites were not located "as near as practicable to the office of the municipal clerk"

As noted above, the City passed a resolution in 2021 that provided the Clerk with roughly 150 separate locations at which it could authorize in-person absentee voting for elections to be held in 2022. (R.32-35.) From these, the Clerk selected 22 alternate sites. With his complaint, Brown submitted a map showing roughly a third of these sites and their location relative to the Clerk's office. (R.36.) Simply glancing at this map makes it clear that the sites the Clerk selected were not located "as near as practicable" to the Clerk's office, despite this requirement appearing in the plain language of the statute. Numerous sites that the City had designated as possible alternate sites were located in closer geographic proximity to the Clerk's office than those she ultimately selected. (*Id.*)

The Clerk did not dispute the fact that these other sites were available or that they are closer to the Clerk's office. Instead, the Clerk argued that a "pure geographic standard" that goes beyond "the use of a ruler on a map" is required. (R.52) This is

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true—while the distance limitation is primarily one of physical proximity, the words "as practicable" must also be given meaning, particularly in light of the remainder of the words in the statute. "Statutes are interpreted to give effect to each word and to avoid surplusage." *State v. Matasek*, 2014 WI 27, ¶ 12 and n.10, 353 Wis. 2d 601, 846 N.W.2d 811. The word "practicable" is not a technical term. It is defined relatively simply as "capable of being put into practice or of being done or accomplished; feasible," or "capable of being used; usable." *Practicable*, Merriam-Webster Online, https://www.merriam-webster.com/dictionary/practicable.

When interpreting Section 6.855, this necessarily means that the geographic limitation must *also* comply with the remaining provisions of the statute—if there is a location that is selected that is closer but, say, affords an advantage to one political party or fails to accommodate disabled voters or is under construction, then it should not be selected. The "as practicable" qualifier provides the Clerk with discretion to ensure that alternate sites can be selected that both satisfy the explicit geographic mandate *and* the remaining integrity considerations (such as avoiding partisan advantage). But there is no dispute that that is not what the Clerk did here. The Clerk unapologetically sought to vindicate another, non-statutory objective instead: to make "voting accessible to every single legal voter in the City of Racine" by intentionally spreading the alternate voting sites all over the City. (R.54.) Doing so simply ignores the Legislature's command that such sites be located as near as practicable to the Clerk's office in favor of doing precisely the opposite.

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Furthermore, the fact that the City, itself, authorized dozens of separate sites as alternatives for in-person early voting that were closer to the Clerk's office than many of those selected demonstrates that its representatives believed that these sites were "practicable" for that purpose. If they were not "practicable" for use as voting locations, why would they be specifically selected and approved as alternate sites? And given that these sites were authorized by public resolution, these alternatives were known to the Clerk, and the Clerk selected the sites ultimately used from among them. The Clerk simply ignored the plain command of the statute that the locations to be used were to be the ones located "as near as practicable" to her office in order to advance an extra-statutory goal.

Brown pointed out in his submissions to WEC that there were many alternatives that were in closer physical proximity to the Clerk's office than many of the sites selected. (R.36.) This fact is not in dispute; it's a matter of geography. Again, whether multiple in-person absentee voting sites in a municipality *should* be geographically dispersed within its borders to encourage or facilitate early voting in person (or for some other purpose) is a policy question for the Legislature, and one on which Brown does not take a position. But, whatever the Clerk's purported goal in locating the sites where she did here, it is not what the statute calls for. Because the Clerk's selection of the sites did not comport with the law, WEC erred when it concluded otherwise.

WEC's decision concluded that it would be "illogical" to argue that the statute means what it says—that multiple sites must all be located as near as practicable to

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the Clerk's office. (R.120.) But WEC's conclusion is what is illogical here. The logical explanation is that the Legislature wanted early, in-person absentee voting to occur at the Clerk's office but if for some reason it could not, then the alternate location or locations should be as close to the Clerk's office as practical. That way no geographic advantage could accrue to any sub-group within the City by moving early, in-person absentee voting from the Clerk's office to an alternate site.

WEC's decision asserts that the "record sufficiently supports Respondent's arguments that the site distribution is geographically equal." (*Id.*) That's all well and good, but the statute does not provide that the sites should be "equally distributed" throughout the municipality; it says the sites are to be located "as near as practicable" to the Clerk's office. WEC's approach, like the Clerk's, is an impermissible rewrite of the statute.

WEC compounded its error below when it concluded that the City's use of a single "static" site (City Hall), on which voters could always rely, protected voters from the possibility of confusion Brown argued could be caused by the scattered, temporary locations available through use of a voting van. WEC's analysis in this regard might be correct were it not for the fact that the use of the Clerk's office for functions related to in-person early absentee voting is itself an independent violation of Section 6.855. As further discussed in subsection D below, the decision to designate alternate sites for early voting explicitly bars the use of the Clerk's office from engaging in any "function relating to the voting and return of absentee ballots." Wis. Stat. § 6.855(1). It cannot be the case that, in order to satisfy one explicit provision of

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the statute, the Clerk may violate another requirement of the same section that is equally specific. WEC's decision should therefore be reversed.

B. The alternate voting sites selected conferred partisan advantage in violation of the statute

In his complaint, Brown also alleged that the sites the Clerk ultimately selected conferred partisan advantage to one political party or the other. Some sites conferred advantage to the Republican party and others to the Democratic party, with an overall advantage to the Democratic party. Brown's complaint included a report comparing ward-level voting data from the 2016, 2018, and 2020 elections and explaining that while Racine is a Democrat-leaning city, there are varying concentrations of Democratic voters in each of its wards. (R.42.) Ward 1 had the largest number of possible locations for the mobile voting unit; it is also the ward in which the Clerk's office is located (and would therefore be "as near as practicable" to that location). (R.43.) Scattering the sites as the Clerk did throughout different wards in the City, including many with higher concentrations of Democratic voters than in Ward 1, where the Clerk's office was located, (such as the Racine Art Museum in Ward 2 (82% Democrat) or Gateway Technical College in Ward 4 (90% Democrat)) was what conferred partisan advantage, not the fact that there is no physical location with a perfectly even 50/50 partisan split. (R.43, 104-105.)

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The Clerk responded not by supplying its own numbers in response to Brown's, but instead by arguing that 1) because some ward lines had been redrawn between 2020 and 2022, Brown's numbers were wrong; and 2) Brown's interpretation was unworkable because the Clerk was not required to conduct her own statistical

analysis, and that partisan advantage is essentially irrelevant because voters may vote at any alternate site they choose, regardless of where their residence is within the City. (R.55-58.) But both the Clerk and WEC misunderstood Brown's argument. His argument, consistent with the statute, is that the alternate sites may not afford any political advantage that differs from the ward in which the Clerk's office is located. (R.104-105.) Brown's interpretation pulls together the various requirements set out in Section 6.855 in a way that the Clerk's approach and WEC's does not. It gives meaning to both the geographic limitation already discussed and the partisan advantage concern that comes from removing elections from the neutral turf that is the Clerk's office. The Clerk's interpretation simply dismissed partisan advantage by, once again, relying on the geographic dispersal of the alternate sites. In this way, Brown's interpretation harmonizes the various concerns the Legislature expressed, while the Clerk's simply ignores them.

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As an initial matter, WEC's decision upholding the Clerk's action over this objection should be reversed because the agency provides absolutely zero analysis for its conclusion that Brown's data analysis was inaccurate or misapplied the statute. It simply said that "Respondent submitted compelling arguments" on this point without actually explaining why WEC was persuaded or by which arguments. This is not some meaningless technical error given that WEC itself acknowledged that the question of political inequity is "an extremely complex undertaking" and one that contemplates "a fact-intensive inquiry." (R.120.) If that is the case and Brown brought forward evidence that the Clerk disputes, it was WEC's duty to explain why it found

one party's position "compelling" and the other's not. *Transport Oil Inc. v. Cummings*, 54 Wis. 2d 256, 263, 195 N.W.2d 649 (1972) ("An administrative agency must indicate its reasons for reaching its findings," including in administrative cases where the provisions of chapter 227 do not otherwise apply). This is not a matter of Brown asking the Court to substitute its judgment for that of the agency; WEC did not itself weigh the evidence by setting out what it considered and why it found one side of the other to be more credible. This did not satisfy its duty, and constitutes error as a matter of law.

What WEC did do was to hedge on the question, stating that the judiciary should come up with a standard for political advantage, while yet maintaining that WEC may need to do so in another case some day. Under these circumstances, the agency claims, it would be required to "develop an impossible standard" and declined to do so. (R.121.) At the same time, WEC committed another error by saying that Brown would have no claim here regardless of the standard because the absentee sites are "widely distributed and otherwise dilute the claim of political advantage." (R.121.) This is, again, simply doubling down on the agency's earlier legal error because geographic distribution violates the plain language of the statute. *See* Section II.A, *supra*.

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WEC's conclusion as to what the test should be is entitled to no deference here in any event. This is because WEC itself admits that these issues "are likely best left to the judiciary" (R.120) and speaks only in a hypothetical manner about future cases that could come before the Commission. Where an agency has no expertise or the

position has been inconsistent such that it provides "no real guidance," courts do not provide its analysis with any deference. *Ellis v. State Dep't of Admin.*, 2011 WI App 67, ¶ 24, 333 Wis. 2d 228, 800 N.W.2d 6 (quoting citation omitted).

WEC also adopts the Clerk's argument that only truly egregious examples could violate the political advantage prong of the statute. (R.121), but this once again simply ignores the restriction that the Legislature put on these types of sites. Brown's position—that the sites selected should confer no partisan advantage using the political makeup of the ward where the Clerk's office is located as a baseline—satisfies both the partisan advantage inquiry and is consistent with the geographic limitation discussed above that alternate sites be located "as near as practicable" to the Clerk's office. The Clerk's decision to geographically disperse alternate sites into wards of varying political makeups satisfies neither objective, and WEC erred when it concluded otherwise without any analysis of Brown's data.

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C. The alternate sites violate the statute because they did not "remain in effect until at least the day after the election"

Although the Clerk's website listed 21 locations (plus the Clerk's office) as early voting sites for the August 2022 primary, all of these alternative sites violated the statute because they were only designated for a three-hour period during the early-voting window. Because the voting sites were temporary (and transient), the alternate sites did not "remain in effect until at least a day after the election," as required by law.

As WEC itself acknowledged below, Brown's questions related to this issue "are important ones." (R.123.) But the agency then went on to throw up and knock down

strawman arguments related to this issue instead of grappling with the real problems associated with transient sites. In WEC's view, 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. (R.124.)

Even if the Court thinks that is a good idea, it does not speak to the temporary and transient nature of the sites at issue here. Perhaps more to the point, designation to allow for a contingency is not at all what the Clerk did here. This was not notice to voters of a "backup site" because the Clerk's office was under construction or lost power in a storm. These sites—or, rather, the sidewalks, streets, or wherever one elected to park a van in the general vicinity of these sites—were specifically selected for use as polling locations for precise timeframes only.

A voter who lives near the Starbuck Middle School had only a three-hour window during a single day of the early voting portion of the election cycle to cast his or her ballot at that location.[3] It is not a fair or logical reading of the statute that making a site available for a specific three-hour window renders it "in effect until the day after the election" simply because the Clerk could change her mind and add another day or window later.

And, contrary to the Clerk and WEC's arguments, complying with the statute does not require a strained or unreasonable reading such that alternative sites need be staffed twenty-four hours a day. It is neither "logical" nor "necessary" (R.124) to

[3] Additionally, and somewhat ironically, the Clerk's stated purpose of making it as easy as possible to cast ballots is not served by such an arrangement.

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interpret a statute that uses the words "shall remain in effect" to greenlight the intentionally temporary nature of the Clerk's selected sites. There is a vast gulf between 24/7 staffed access to a site for a two-week period and a single, three-hour window at a vehicle (not a building) —were that not the case, then *no* clerk in any municipality could administer an election using an alternate site without providing unlimited early voting. That is not what Brown has argued, it is not how any Wisconsin court has interpreted the statute, and it is nothing more than a red herring here. The question WEC was to answer was *not* whether there is some reading of "shall remain in effect" that is so strained as to justify ignoring that language altogether, but whether *the Clerk's decision to administer this particular election* by selecting voting locations for designated, one-off windows of time (and for no other time) and at a mobile vehicle as opposed to a stationary building complies with the requirements of the statute. Plainly, it does not, and consequently WEC's decision to should be reversed.

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D. The City's administration of the August 2022 election violated Wisconsin law because the Clerk's office engaged in "function[s] related to voting and the return of absentee ballots" despite the use of alternate sites.

Section 6.855 provides. "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" (emphasis added). With this statement, the Legislature made clear that, whether a municipality decides to have one alternative site or more than

one, the one location that was then forbidden from taking any role in early voting is the clerk's office.

This statement in Wis. Stat. § 6.855(1) is crystal clear. If alternative sites are used, the clerk's office may not be used for any function "related to" voting and return of absentee ballots. Despite this blanket prohibition, the City undisputedly advertised early voting at the Clerk's office for the August 2022 primary election, while at the same time advertising alternative sites at which the voting van would be parked. (R.15) The website listed the alternative sites, then stated "You may also request and vote an absentee ballot *in the clerk's office* . . . during the days and hours specified for casting an absentee ballot." (*Id.*) (emphasis added). In addition to the City's representation that voting was available in the Clerk's office, Brown personally observed voters casting in-person absentee ballots at City Hall—in the same building where the Clerk's office is located. The Clerk's office simply had a sign directing voters to Room 207; the Clerk's office is located in Room 103 of the same building. (R.6, ¶ 19).

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The Clerk did not deny or dispute any of these facts. Instead, the Clerk argued (and WEC accepted) the argument that selecting another room in the very same building satisfied the statute. This interpretation defies logical sense. The Legislature provides two locations where in-person absentee voting may be conducted: in the Clerk's office *or* at alternate sites. Under the Clerk's and WEC's interpretation, the Clerk could simply move her desk three feet into the hallway outside her office and declare it an "alternate site." What the Clerk actually did here

was not much more than that—the voting location was simply moved within the same building, with signage in the Clerk's office proper directing voters to another room. (R.6, ¶ 19.) Advertising the Clerk's office as a voting location and then using the Clerk's office to post signage directing voters elsewhere are both necessarily "functions related to" the casting of ballots—and to argue otherwise strains the language of the statute and renders the Legislature's choice to eliminate the Clerk's office as a voting location once alternate sites were established totally meaningless. Interpretations that render portions of a statute merely superfluous are disfavored. *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.") (citations omitted).

In addition to advertising early voting at the Clerk's office, the Clerk's office also served the function of storing absentee ballots when they had been cast; they were not held at the various three-hour stops for the election van between the time they were cast and the time they were counted. (R.62.) The Clerk argued that this was permissible because voters were not casting their ballots at the office nor returning them there, but once again the Clerk treats portions of the statutory text as though they do not exist. The statute does not say voters may not vote or return ballots at a location; the statute says that "*no function related to* voting and return of absentee ballots" may be conducted in the office of the municipal clerk. By the Clerk's own admission, the ballots collected by the voting van as it made its various stops were not stored at the locations or in the van itself. They were collected and then secured in the Clerk's office until they would be counted on Election Day. (R.62.)

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Because the storage of those ballots in the Clerk's office violated the terms of Section 6.855, WEC's decision upholding the Clerk's action should be reversed.

E. Whether a van, a bus, or other vehicle, the Wisconsin statutes do not contemplate the use of a moving polling place.

To be clear, this case is not about whether a mobile voting unit is a good idea as a matter of policy, although the Plaintiff does not think it is. Rather, this case is about what state law authorizes as options for in-person, early voting and whether the August 2022 was administered in accordance with the statute governing alternate sites for that purpose.

WEC incorrectly concluded that "mobile, temporary, or non-public structures may be allowable" as alternate sites "and that compliance determinations require fact-specific review." It also specifically found that, while the van actually was not compliant with state and federal accessibility requirements, the van was somehow still compliant with Wis. Stat. § 6.855. (R.124.)[4]

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As part of his submissions, Brown argued that Wisconsin's election statutes related to polling places, found in Chapter 5, contemplate the use of a "building" as a polling place. (R.9, ¶¶ 36-39.) This argument is consistent with longstanding

[4] This, in and of itself, was also reversible error. Wis. Stat. § 5.25(4)(a) provides that "[e]ach polling place shall be accessible to all individuals with disabilities. The commission shall ensure that the voting system used at each polling place will permit all individuals with disabilities to vote without the need for assistance and with the same degree of privacy that is accorded to nondisabled electors voting at the same polling place." That the van—as determined by WEC (R.124.)—did not satisfy this requirement means it could not possibly be an acceptable site because the requirements of Section 5.25 mandate that "all elections" "shall be held at the polling places provided in this section," which includes the accessibility compliance requirement. Wis. Stat. § 5.25(1).

Wisconsin case law, which requires that statutes relating to the same subject matter be "construed together and harmonized in order to give each statute full force and effect." *Logerquist v. Bd. of Canvassers for Town of Nasewaupee*, 150 Wis. 2d 907, 442 N.W.2d 551 (Ct. App. 1989) (citation omitted). They are "not to be interpreted in such a fashion as to indicate a contradictory legislative intent if that can be avoided." *State v. Wachsmuth*, 73 Wis. 2d 318, 326, 243 N.W.2d 410 (1976) (citing *State ex rel. Cabott, Inc. v. Wojcik*, 47 Wis. 2d 759, 177 N.W.2d 828 (1970)).

In support of its conclusion, WEC cites Wis. Stat. § 5.25(1), which provides:

> All elections under chs. 5 to 12 shall be held at the polling places provided in this section. The places chosen shall be public buildings, unless the use of a public building for this purpose is impracticable or the use of a nonpublic building better serves the needs of the electorate, as determined by the authority charged with the responsibility for establishing polling places under sub (2).

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WEC concluded that because the Legislature "drafted that provision to contemplate statutory exceptions," (R.124), the "building" requirement did not apply. The agency also stated—without citation to a specific example—that "Impracticality, and perhaps even impossibility, has prompted the use of unique and non-static structures by clerks in the past." (R.125.)

But WEC's attempt to turn Brown's argument on its head fails. The statutory language contemplates two alternatives: public buildings—which are the default and the preferred method—and "the use of a nonpublic building." Only within these two alternatives is the discretion of "the authority charged with the responsibility for establishing polling places" able to be exercised. Were these two options not the only two options, the language of the second sentence of Section 5.25(1) (and therefore the

entire section) has no meaning. Under WEC's and the Clerk's view, the Clerk can literally designate anywhere—a street corner, her private residence, the back of a pickup truck—as an alternate site that the Clerk may select as a polling place. Nothing in the record, and nothing in the statute, suggests that the Legislature contemplated, much less approved, moving polling places as a permissible alternative for in-person absentee voting.

For the foregoing reasons, Plaintiff respectfully submits that WEC's decision should be reversed.

III. IN ADDITION TO BEING WRONG ON THE MERITS, THE DECISION TO DELEGATE DECISIONMAKING AUTHORITY TO THE ADMINISTRATOR VIOLATES WISCONSIN LAW

Additionally, or in the alternative, WEC committed reversible error when it delegated the decisionmaking authority on § 5.06 complaints, including Mr. Brown's, to a single, unelected Administrator or to the Administrator and Chair. The Legislature explicitly assigned the responsibility for resolving these complaints to the "Commission"—a bipartisan, six-member body. WEC cannot abdicate its responsibility for adjudicating these complaints to a single individual, then hide behind a grant of deference that lawmakers provided to that *body* in an effort to defend its actions.

Section 5.06 of the statutes requires "the Commission" to "decide" complaints filed under that section. Wis. Stat. §§ 5.06(6), (8) (referring to "the decision of the commission"). The Legislature nowhere authorizes the delegation of this decisionmaking authority to some subset of its members, much less to someone who

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is not a member of the Commission. Lest there be any doubt, Wis. Stat. § 5.05(1e) provides that "[a]ny action by the commission, except an action relating to procedure of the commission, requires the affirmative vote of at least two-thirds of the members."

Section 5.06 specifically charges the Commission, as that term is defined in Wis. Stat. § 5.025, with the following powers:

- To conduct a hearing on an elector's complaint. § 5.06(1).
- On its own motion, to investigate and determine whether any election official failed to comply with the law or abused his or her discretion. § 5.06(4).
- To order any election official to transfer documents to the commission to permit review of the official's compliance with election laws. § 5.06(5).
- To "summarily decide" complaints following investigation. § 5.06(6).
- To issue orders requiring election officials from taking any action inconsistent with the law or requiring an official to correct any action or decision inconsistent with the law. § 5.06(6)
- To withdraw, modify, or correct an order in a timely manner. § 5.06(7).

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In contrast, the Legislature did not provide the Administrator with *any* powers under Section 5.06. The term "Administrator" does not even appear in this section of the statute.

When the Legislature assigns an important duty to a multi-member body (like the Commission), that body cannot simply delegate that authority to an employee or

to a smaller subset of its members. For example, in *State ex rel. Mayer v. Schuffenhauer*, 213 Wis. 29, 250 N.W. 767 (1933), the Court held:

> Where authority to do an act of public nature is given by law to more persons than one, or a majority of them, if the act is one which requires the exercise of discretion and judgment, unless the law provides for some exception, the members of the board to whom the authority is given must meet and confer when the act is performed.

Id., 250 N.W. at 768. This principle applies, in particular, to quasi-judicial functions like WEC's responsibility to adjudicate complaints under Section 5.06. As the Court observed in *State v. Haugen*, 160 Wis. 494, 152 N.W. 176, 178-79 (1915), "The very nature of the authority thus granted, repels the idea that it was intended to authorize the [tax] commission to delegate to one of its members, or its secretary or engineer, quasi-judicial duties . . . [W]e have no hesitancy in saying that the requirement clearly indicates that the commission, as a quasi-judicial tribunal, is required to act."

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On February 27, 2020, in contravention of this case law and the plain language of Chapter 5, WEC adopted an order (the "Delegation Order") delegating "to its Administrator," the Commission's power "[t]o issue compliance review orders under the provisions of Wis. Stat. § 5.06." (Dkt. 3, Ex. I.) The Delegation Order, in effect, transferred the ultimate power to make these decisions to the Administrator, who is not a member of the six-member Commission. The Delegation Order does not merely allow the Administrator to draft a proposed order which the six-member Commission then would discuss and deliberate and then affirmatively vote upon and either accept, reject, or amend. Rather, the Delegation Order sets forth the following process:

1. Commissioners receive the parties' filings, which are also posted publicly on the Commission's website;

2. "If time permits," the Administrator and the Commission chair determine whether staff provide a draft decision to all Commissioners before the decision is issued. The Administrator and chair also decide "whether it is feasible *to permit the Commissioners to submit comments regarding the draft*," as well as the amount of time to do so, if permitted;

3. "If time permits, Commissioners who wish to comment on the draft decision may contact the Administrator." The Administrator determines "*whether* any comments or input provided by Commissioners will be incorporated into the final decision."

4. Only in the event that two or more Commissioners ask the Administrator to request a special meeting regarding a decision will one be considered. The Administrator and Chair discuss, and the Chair determines whether to hold a meeting or not.

(Dkt. 3, Ex. I) (emphasis added).

Other than the receipt of the parties' initial filings—which could reflect the same level of participation as any curious member of the public, given that the filings are also posted on WEC's website—the Delegation Order in many cases completely removes the Commissioners from any role in making the decisions the Legislature explicitly charged them to make.

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There are several different junctures at which the Delegation Order takes the authority to weigh in on a 5.06 complaint away from the Commission as a whole, subject to the whims of the Administrator or the Chair. But the Legislature did not grant sole decisionmaking authority to either of these individuals, nor to the two of them jointly, while the full six-member Commission sits out. Consider the following example:

A voter files a 5.06 complaint against her municipal clerk. WEC directs the clerk to respond, the voter replies, and all the submissions are posted on the website and provided to the Commissioners. At that point, there may be a number of outcomes under the Delegation Order, including:

1) The Administrator consults the Chair and issues a decision without providing any opportunity for the remaining five Commissioners to comment;
2) The Administrator and Chair determine it is feasible for the Commissioners to submit comments and one or more do so, but the Administrator decides not to include any comments or input from the Commissioners in the final decision;
3) A Commissioner asks the Administrator to request a special meeting to discuss the complaint, and the Administrator says "no" and the Administrator's decision is issued;
4) Two or more Commissioners ask the Administrator to request a special meeting, but the Chair declines to hold one and the Administrator's decision is issued.

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All of these are possible under the Designation Order and none of them are consistent with the Commissions duties under the statute

Nothing in the Delegation Order requires the Commission members' participation at any stage of the process, and the multiple junctures at which the Administrator or Chair may decide to exclude the Commission members easily exclude or insulate them from any role in the process. The Delegation Order provides that only the Administrator and the Chair have any real say in whether the remaining five Commission members provide input in the decisionmaking process that the Legislature expressly delegated to the entire body.

Chapters 5 and 6 set out a number of election laws. The Administrator is mentioned in approximately two dozen places in chapter 5 and two places in chapter 6. Among the duties the Legislature provided to the Administrator in chapter 5 are: 1) the power to investigate election law violations and make periodic reports to the Commission regarding the same (Wis. Stat. § 5.05(2m)(5)); 2) the power to settle certain election law violations in which the offender pays less than $2,500 (Wis. Stat. § 5.05(2m)(12)); 3) the ability to designate the Commission's legal counsel and to "perform such duties as the commission assigns to him or her in the administration of chs. 5 to 10 and 12" (Wis. Stat. § 5.05(3d)); 4) to create advisory opinions for review by the Commission that have been "requested of" her (Wis. Stat. § 5.05(6a)(4)); 5) to appoint, in consultation with the Commission, an individual to serve as member of the federal election assistance commission standards board (Wis. Stat. § 5.055); 6) to enter into an agreement with the Department of Transportation to match personally

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identifiable information of registered voters with DMV records (Wis. Stat. § 5.056); and 7) to receive written notification when a municipality purchases or updates voting machines (Wis. Stat. § 5.40(7)). The only duties provided to the Administrator in chapter 6 relate to the voter registration list. *See* Wis. Stat. §§ 6.33(5)(a)(3) (administrator may update entries for election day voter registration for up to sixty days); 6.36(2)(a) (administrator's certification on registration list prepared as a poll list).

None of these duties relate to in-person absentee voting or to adjudicating complaints related thereto. In fact, the administrator is mentioned nowhere in Section 5.06 or Section 6.855, though she is mentioned in numerous other places and delegated numerous other duties as described above. That the Legislature chose to designate a number of duties specifically for the Administrator but did not include the adjudication of 5.06 complaints against election officials indicates that the Legislature knew how to delegate duties to the Administrator—and chose not to in this case. *See Clean Wisconsin, Inc. v. Wis. Dep't of Nat. Resources*, 2021 WI 71, ¶ 25, 398 Wis. 2d 386, 961 N.W.2d 346 (use of two different words in the statute indicates "the legislature knew how to use" them and that they "mean different things").

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WEC may argue that the Delegation Order was issued pursuant to the general directive to the Administrator to "perform such duties as the commission assigns to him or her in the administration of chs. 5 to 10 and 12" as provided in Section 5.05(3d). WEC will likely argue that the Commission had the right to delegate its quasi-judicial function to the administrator under this general provision, or that the

Delegation Order is simply an "action relating to procedure of the commission." But neither can be the case if the structure that the Legislature set up for the Commission is to have any meaning. This is not a situation in which the Legislature delegated its authority to the agency simply "to fill up the details." *David Jeffrey Co. v. City of Milwaukee*, 267 Wis. 559, 590, 66 N.W.2d 362 (1954) (quoting *State ex rel. Wis. Inspection Bureau v. Whitman*, 196 Wis. 472, 220 N.W. 929, 941 (1928)). The Legislature explicitly provided the detail of who was to decide 5.06 complaints in that section—the Commission—and the Commission cannot take an action to abdicate that specifically delegated duty to someone else for the sake of expediency, to give themselves cover for public blowback of decisions, or for any other reason.

Nor can WEC reasonably argue that the Delegation Order is merely an "action relating to procedure of the commission." To do so likewise disregards the Legislature's explicit choice to vest decisionmaking authority for 5.06 complaints in the "Commission," and would be analogous to allowing a single member of the Public Service Commission to make decisions (like utility rate increase determinations) to a single member (or non-member the PSC designates) simply because the body is authorized to "adopt reasonable rules to govern its proceedings and to regulate the mode and manner of all . . . hearings." Wis. Stat. § 196.02(3). But it cannot be the case that a multi-member board or body created by the Legislature can skirt its duty to make difficult decisions so easily simply by labeling this type of secondary delegation as procedural. As described above, there are several scenarios in which WEC's Delegation Order permits five of the six Commissioners to abandon their duties to

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decide 5.06 complaints, despite the Legislature's explicit choice to grant only "the Commission" the adjudicatory powers outlined in Section 5.06. To conclude otherwise creates an exception that swallows the rule and is contrary to the case law respecting the Legislature's choice to delegate decisionmaking authority to a designated group of individuals rather than an individual.

CONCLUSION

For the foregoing reasons, this Court should reverse WEC's decision and modify it to direct the Clerk not to engage in similar violations of election law going forward. Additionally, or in the alternative, this Court should reverse the decision because WEC had no authority to issue the Delegation Order vesting decisionmaking power in the Administrator.

Dated this 31st day of August, 2023.

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