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 REPLY BRIEF

This case concerns whether the Racine Clerk's administration of the August 2022 primary election violated the legislatively-imposed requirements for alternate sites under § 6.855, and whether WEC's action in relying on a delegation order providing decision-making authority in deciding Plaintiff's § 5.06 complaint is contrary to law. This Court should reverse WEC's decision because, as previously argued and set forth below, only Plaintiff's interpretation of § 6.855 accounts for all of the words in the statute. Additionally, or in the alternative, WEC impermissibly delegated the decision of Plaintiff's complaint to its Administrator and the decision should be reversed on this basis.

I. Plaintiff has standing.

WEC and the DNC[1] assert that Plaintiff lacks standing to challenge WEC's denial of the order. They are wrong. Under Wisconsin law, standing is not a matter of jurisdiction, but rather of sound judicial policy, the purpose of which is to "ensure that the issues and arguments presented will be carefully developed, zealously argued, and allow the court to understand the consequences of its decision." *McConkey v. Van Hollen*, 2010 WI 57, ¶¶ 15-16, 326 Wis. 2d 1, 783 N.W.2d 855. The law of standing "is construed liberally, and even an injury to a trifling interest may suffice." *Id.*, ¶ 15 (quoting *Fox v. DHSS*, 112 Wis. 2d 514, 524, 334 N.W.2d 532 (1983)). Plaintiff easily satisfies the requirements for standing here.

The following facts are undisputed: 1) Plaintiff Brown is a qualified elector for purposes of the statute; 2) Plaintiff filed a written, sworn complaint relating to the August 2022 primary, which was received by WEC, briefed by Brown and the Clerk, and resulted in a written determination by the agency rejecting Brown's claim; 3) WEC's decision included language giving him thirty days to seek judicial review; and 4) Plaintiff timely did so. (R.2, ¶ 1; R.1-49; R.51, R.98, R.112; Dkt. 3.) There is therefore no dispute that Plaintiff followed the statutory procedure and exhausted his administrative remedies before coming to court.

WEC and the DNC instead contend: 1) WEC's order denying Plaintiff's complaint is not an "order" for purposes of § 5.06, and therefore Brown cannot appeal

[1] It is somewhat ironic that the DNC leads the charge on standing, when the DNC itself could never be a party to a § 5.06 complaint because neither it nor its members are qualified electors or election officials. *See* Dkt. 37:7-13.

WEC's decision not to issue such an order; 2) even if it is an order, Plaintiff is not "aggrieved" by it; and 3) there are other ways of expressing disagreement with WEC, so the fact that (1) and (2) would create no right of review is acceptable. None of this is correct.

As an initial matter, Plaintiff has not waived or forfeited any right to confirm that he has standing in this matter. *See* Dkt. 89:10 n.1. Plaintiff was not required to affirmatively anticipate and defend against the entire laundry list of affirmative defenses filed by the various parties[2] in his opening brief "just in case." Plaintiff need only stand ready to rebut those that have now been raised.

For completeness, and as noted in his complaint in this matter and the record below, Brown is a qualified elector in Racine. (R.2.) He filed a written, sworn complaint with WEC following the August 2022 primary after he personally witnessed both in-person absentee voting taking place at both a mobile van parked near the Regency Mall and absentee voting processes taking place within the Clerk's office. (R.2-12.) He alleged that this violated § 6.855 for five reasons. He and the Clerk briefed the issue with WEC, which issued a decision in the Clerk's favor. (R.112.)

WEC's position that its decision resolving his complaint is not a reviewable order makes no logical sense. This is not a situation, as in *Kuechmann v. Sch. Dist. of La Crosse*, 170 Wis. 2d 218, 487 N.W.2d 639 (Ct. App. 1992), in which Plaintiff

[2] These include but are not limited to defenses like mootness and laches, which were asserted by various parties but never actually raised. *See* Dkt. 18:24-25; 45:14-15. Requiring that Plaintiff brief these issues and others that were not issues in this case would have ballooned the already extensive briefing in this matter by dozens of pages for no reason.

rushed to the courthouse before receiving a WEC decision and therefore failed to exhaust his administrative remedies. He followed the statutory procedure and then appealed from an adverse disposition. The statute—Wis. Stat. § 5.06(8)—expressly grants him standing for the appeal. WEC now seems to take the position that because the dispositive document uses the word "decision" instead of "order" (R.124), or because the agency did not "order" anyone to do anything, that it is not appealable. But this approach both elevates form over substance and makes no logical sense. It is tantamount to telling a plaintiff in any civil case that has lost after summary judgment or a trial that he cannot appeal the decision because the court or a jury found he did not meet his burden of proof.

None of the cases cited by WEC or DNC compel this conclusion. They relate either to appeals of non-final orders or involve instances of litigants attempting to craft a private cause of action where the Legislature has not provided for one. Neither is true here. In *Cornwell Personnel Assocs., Ltd. v. DILHR*, 92 Wis. 2d 53, 284 N.W.2d 706 (Ct. App. 1979), an employer was not given the right to participate in judicial review of an unemployment determination because its "reserve account was wholly unaffected by the department's determination." *Id.* at 55. But the unemployment compensation scheme in Wisconsin does not implicate a fundamental right like voting, and the unemployment statutes and regulations do not provide an employer with an explicit right to judicial review, as § 5.06(8) does upon receipt of an administrative decision by WEC. WEC points out that the *Cornwell* Court noted that the agency's decision to provide notice to the employer did not independently confer

standing. That is all well and good, but it has nothing to do with the situation at issue here, where the Legislature has explicitly provided a procedure for electors like Brown to challenge unlawful actions by local election officials. The procedure provides for administrative consideration and explicitly provides for judicial review. Wis. Stat. § 5.06(8).

This is not a matter of WEC accidentally or incorrectly sending Plaintiff a notice of appeal rights as part of its decision, as was the case in *Sierra Club v. Dep't of Nat. Resources*, 2007 WI App 181, 304 Wis. 2d 614, 738 N.W.2d 918. It is not an instance of a party attempting to craft a cause of action that is not legally cognizable under state law. *See Friends of Black River Forest v. Kohler Co.*, 2022 WI 52, ¶¶ 36, 41-45, 402 Wis. 2d 587, 977 N.W.2d 342 (statement of purpose did not confer private right of action); *contrast Teigen v. Wis. Elec. Comm'n*, 2022 WI 64, ¶¶ 34, 164, 403 Wis. 2d 607, 976 N.W.2d 519 (§ 5.06 provides action for electors who have filed a complaint). This is also not Plaintiff attempting to appeal a determination that was not a final decision, as was the case in *Container Life Cycle Mgmt. LLC v. Wis. Dept' of Nat. Resources*, 2022 WI 45, ¶ 41, 402 Wis. 2d 337, 975 N.W.2d 621 (letters at issue were part of an "ongoing review" by the agency rather than a "decision supported by a record and based upon findings of fact and conclusions of law" and "although not dispositive . . . [the letter] did not contain a statement of appeal rights") and *Sierra Club*, 2007 WI App 181, ¶ 28 (ALJ order at issue was not final because it did "not fully resolve the modifications to be made regarding the cooling tower emissions"

relating to pending permit), cited by others. This was WEC deciding in favor of the Clerk on the merits. There was nothing left for the agency to do.

As noted in *Teigen*, voters have a cognizable interest in holding their local election officials to the law. 2022 WI 64, ¶¶ 34, 164. It is not a "generalized grievance" to assert that elections are being conducted contrary to law, as asserted by DNC, particularly not where Plaintiff has outlined five different ways in which the August 2022 primary violated the statute at issue. Therefore, it is also incorrect to say that Plaintiff is not "aggrieved" by the decision, or that the *Teigen* decision (which controls, unlike the smattering of unpublished authority DNC cites from lower courts and other jurisdictions, Dkt. 89:10 n.5; Dkt. 90) does not confirm that Plaintiff has standing as a voter. Plaintiff has an interest in the administration of free and fair elections as a qualified elector. Were this not the case, the Legislature would not have created the § 5.06 compliance review process to allow voters like Brown to hold local election officials like the Clerk to account.

DNC's reading of *Teigen*, Dkt. 89:9, ignores the fact that not one, but *four* justices explicitly held that a voter has a statutory right to raise election-law violations with the Commission through the § 5.06 process. *Teigen*, 2022 WI 64, ¶ 164 (Hagedorn, J. concurring) ("Wis. Stat. § 5.06 gives voters . . . a statutory right to have local election officials in the area where he lives comply with election laws"); *id.*, ¶ 34 (plurality op.) (quoting the same favorably, but concluding in that case, where a local election official's conduct was not at issue, that a declaratory judgment action was the proper vehicle for review).

In *Teigen*, the Court addressed a generally applicable guidance document, which had not been issued by an "election official" like the Clerk. Here, this Court is reviewing WEC's decision concerning the actions of one particular Clerk, which is properly subject to § 5.06 and its process, but the standing analysis for the purposes of what constitutes an injury is the same. If the challenged action "threaten to interfere with or impair [Plaintiff's] right to have local election officials comply with the law," the Plaintiff has standing. *Id.*, ¶ 166 (Hagedorn, J., concurring); *see also id.*, ¶ 14 (plurality op.) (noting the memos at issue "interfere[] with or impair, or at the very least, threaten[] to interfere with or impair, the Wisconsin voters' legal rights and privileges—specifically their rights and privileges as registered voters") (internal quotation marks and citation omitted).

DNC's contention that *Teigen* does not confirm standing for qualified electors like Plaintiff is incorrect. This position would deprive voters of any judicial review of action by the Clerk, and that is not what the Legislature decided. It created the administrative process for compliance complaints against election officials to provide electors like Brown with the avenue to challenge unlawful conduct under the election statutes. Any conclusion to the contrary would read out of existence the explicit statutory language affording a "complainant" the right to "appeal the decision of the commission to circuit court." Wis. Stat. § 5.06(8).

As a voter, Plaintiff has an interest in ensuring that his local election official's conduct complies with the law. *Teigen*, ¶¶ 34, 164. The Legislature has authorized the § 5.06 process, including the option of filing for judicial review within thirty days

of a final decision by WEC, to do just that. Both *Teigen* and the language of the statute confirm that Plaintiff has a "legally cognizable" interest in pursuing judicial review of WEC's decision. *Cf. Friends of Black River Forest*, 2022 WI 52, ¶ 33 (a statute that "merely express[es] a statement of purpose" does not "protect[], recognize[], or regulate[] any person's interest or contemplate[] a challenge to the agency's decision") (citation omitted). Because Plaintiff has timely followed all of the administrative processes attendant to the § 5.06 process, he is properly before this Court and has standing.

DNC also argues using an analogy to Wisconsin's public records law that Plaintiff has other recourse outside of the judicial review process. But DNC's cited case, *State v. Zien*, 2008 WI App 153, 314 Wis. 2d 340, 761 N.W.2d 15, is wholly inapplicable here. Under Wisconsin's public records law, a requester whose request is denied has two options for seeking judicial review: 1) the "requester may bring an action for mandamus"; or 2) "the requester may, in writing, request the district attorney . . . or request the attorney general, to bring an action for mandamus." Wis. Stat. § 19.37(1)(a), (b). In *Zien*, the requester came to this fork in the road and selected the latter option (likely because, at the time the suit was brought, the requester also *was* the attorney general), then also demanded the ability to direct the action. The court rejected this position, noting that the "plain language of Wis. Stat. § 19.37(1) dictates distinct courses of action, and prescribes different remedies for each course." *Zien*, 2008 WI App 153, ¶ 36. *Because the requester elected* to pursue the "attorney general" enforcement route in the statute, she was not an aggrieved party; the

"statutes provide[d] a clear and meaningful alternative for private citizens." *Id.* The requester could not claim she was aggrieved by "the *outcome* of the attorney general's . . . litigation"—but that did not mean that she was not aggrieved by the initial *denial* of her request. *Id.*, ¶ 37.

All *Zien* says is that once a party chooses a procedural fork in the road under § 19.37(1), she cannot have her cake and eat it too by treating the Attorney General's office "as a sort of private counsel" for her case. *Id.*, ¶ 36. It does not say that the requester is required to ask the district attorney or attorney general to take the case, as opposed to the requester pursuing her own case. And it certainly does not say that someone who receives a denial of a records request from a government body is not "aggrieved."

DNC argues that because the district attorney could pursue certain election law violations, there is adequate judicial review under § 5.06. But that both renders § 5.06(8) and its judicial review prong superfluous and ignores the fact that DNC's cited provision, § 5.08, provides that a petition for enforcement may be made "*[i]n addition to or in lieu of* filing a complaint." It does not provide that petitioning the district attorney or the attorney general is *required* before filing one's own complaint. This distinction is important because the Legislature knew how to make such a procedure mandatory and has done so in other instances. *Cf.* § 19.97(1), (4) (requiring citizen challenging open meetings law violation to first petition either district attorney or attorney general to file suit before authorizing private action). The Legislature did not do so in § 5.06 or § 5.08.

Plaintiff undisputedly complied with all procedural requirements in § 5.06 and has standing as a qualified elector to seek judicial review of WEC's adverse determination. Any determination to the contrary vitiates meaningful review of the agency's decision and would inappropriately subvert this Court's authority to that of an administrative agency (and, as provided in Claim II, a single employee of the agency at that). This outcome is contrary to both Wisconsin law and common sense, and this Court should reject the opposing parties' arguments.

II. The Clerk's administration of the August 2022 primary violated the letter and spirit of Section 6.855.

As an initial matter, several parties raise *One Wisconsin Institute, Inc. v. Thomsen*, 198 F. Supp. 3d 896 (W.D. Wis. 2016) and note that Plaintiff did not raise it in his moving papers, but the reason for that is neither complicated nor nefarious: the old version of § 6.855 at issue in that case did not control during the August 2022 primary and is therefore not at issue here. The *OWI* case, which primarily challenged Wisconsin's Voter ID law (also not at issue here), was based on Section 6.855's predecessor—and the only aspect of the case that could have been relevant here was "moot[ed]" by the passage of the current law. *Luft v. Evers*, 963 F.3d 665, 674 (7th Cir. 2020). The only pertinent allegation in *OWI* was that the limitation of municipalities be limited to a single site for in-person absentee voting had a disparate impact on certain groups. In *OWI*, the district court noted that the "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,"

OWI, 198 F. Supp. 3d at 934, and observed that the former statute imposed a "moderate burden" for "partisan gain," which was "not a valid interest." *Id.* The Wisconsin Legislature then amended the statute to its current form, which permits (but does not always compel) multiple in-person absentee voting locations. *See* Wis. Stat. § 6.855. As the Seventh Circuit noted in *Luft*, the "one-location rule is gone, and its replacement *is not substantially similar to the old one*.". 963 F.3d at 674 (emphasis added).

There has been no allegation here that Section 6.855 in its current form—including its explicit requirements related to proximity to the clerk's office, political advantage, use of the clerk's office, or availability through election day—is unconstitutional under either state or federal law, and Plaintiff's argument that the plain language of the entire statute should be given meaning does not compel any such conclusion. In fact, Plaintiff's position is the *only* one in this litigation that accounts for all of the language in the statute.

To accept the interpretations provided by the remaining parties and intervenors to this litigation, this Court is required to ignore at least some of the language of the statute itself. This outcome is inconsistent with Wisconsin's longstanding case law on statutory interpretation. *State ex rel. Kalal v. Circuit Ct. for Dane Cty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110 ("In construing or interpreting a statute the court is not at liberty to disregard the plain, clear words of the statute.") (quoting citation omitted). Put simply, a case interpreting a now-defunct version of the law does not control over the plain language of a statute, nor

do the comments of legislators or other extraneous sources cited by the intervenors. As set forth previously and below, WEC's decision should be reversed.

A. The absentee ballot locations violated the statute's command that the sites be "as near as practicable" to the clerk's office.

The remaining parties to this litigation seem to insist that the requirement that alternate sites under § 6.855 "shall be located s near as practicable to the office of the municipal clerk" should either be ignored completely or subordinated to language not found in the statute. Neither is true; the language of the controlling statute is still paramount under Wisconsin law. *Kalal*, 2004 WI 58, ¶¶ 47, 50, 271 Wis. 2d 633, 681 N.W.2d 110, ("Statutory interpretation involves the ascertainment of meaning not a search for ambiguity . . .Wisconsin courts do not consult extrinsic sources of statutory interpretation unless the language of the statute is ambiguous"). "If the statutory language is plain, [courts] end the inquiry and give the language its 'common, ordinary, and intended effect, except [courts give] technical or specially-defined words or phrases . . . their technical or special definitional meaning.'" *State v. Lopez*, 2019 WI 10, ¶ 10, 389 Wis. 2d 156, 936 N.W.2d 125 (quoting *Kalal*, 2004 WI 58, ¶ 45).

Chapters 5 and 6 contain many technical definitions, *see generally* § 5.02, but "as near as practicable" is not one of them. This is a basic phrase that can be easily interpreted by any ordinary layperson. But even if this Court accepts opposing parties' arguments that the phrase is a statutory "term of art" (Dkt. 88:5), it does not follow that this Court should accede to their demand that it ignore the "as near as

practicable" language altogether, as the Clerk undisputedly did here. (R.54) (sites were chosen "on the basis of making voting accessible to every single legal voter in the City of Racine" and "to achieve the City's goals these alternate absentee ballot sites needed to be spread across the City").

Nothing in *Town of Ashwaubenon v. Pub. Serv. Comm'n*, 22 Wis. 2d 38, 125 N.W.2d 647 (1963) dictates ignoring the statutory language. In that case, the Wisconsin Supreme Court considered a review of the location of a proposed bulkhead line along the existing shore. The Court noted that the agency "may have entertained the erroneous concept of law that the statutory phrase 'as nearly as practicable' is solely a geographical standard." *Id.* at 50. Rather, the standard "contemplated an evaluation of many factors"—but the Court also noted that these factors were "*in addition to geography*"; the Court did not ignore the reality that the word "near" contemplated distance in order to reach a particular result. *Id.* at 50-51 (emphasis added).

Assuming *arguendo* that the same interpretation should be applied to the phrase in § 6.855, it does not follow that geographic proximity disappears as a factor and should simply be cast aside. As Plaintiff has previously argued, absentee ballot sites that are near the clerk's office *and* also satisfy the remaining statutory requirements (including avoiding partisan advantage and having the sites available through Election Day, etc.) comply with the statute. This was not a situation in which the sites had to be dispersed due to road construction or traffic patterns (Dkt. 88:6)—Racine's express motivation was to spread the sites as far and wide as possible. (R.54.)

The Clerk is certainly free to encourage voting by as many qualified electors as possible, *so long as she does so in accordance with the statute*. Deliberately ignoring the language of state law, including the phrase "as near as practicable," is an abuse of discretion and requires reversal.[3]

Nor does Plaintiff's interpretation—that alternate sites should be located in the same ward as the Clerk's office to satisfy the requirement—mean that only one alternate site is available in contravention of Wis. Stat. § 6.855(5), *One Wisconsin Institute*, or *Luft*. The concern over the prior version of § 6.855 *was* a concern over accessibility—the concern that a statute mandating only a single in-person absentee voting location would create long lines and discourage qualified electors from voting. *OWI*, 198 F. Supp. 3d at 934 ("The state's *one-location rule* ignores the obvious *logistical* difference between forcing a few dozen voters to use a single location and forcing a few hundred thousand voters to use a single location.") (emphasis added).

If that is the problem the Clerk was trying to address, then she could have done so by having multiple locations, all near the Clerk's office and that also meet the remaining statutory criteria. But that is not what she did. Nothing in the *OWI* decision, or in *Luft* in partially overruling it, spoke to a requirement that a municipality must create multiple absentee voting locations (much less

[3] The *BLOC* intervenors also argue that the *OWI* decision invalidated § 6.855 "root and branch" and that the "as near as practicable" language was "repealed" as a result. (Dkt. 94:3-4.) But there is no dispute either that the language is still enshrined in Wisconsin law, despite the Legislature having made the change to create sub. (5) or that *Luft* overruled *OWI*'s conclusion that the statute violated the Voting Rights Act in any way. *Luft*, 963 F.3d at 672-74.

geographically dispersed locations that expire after a three-hour a period). While the district court in *OWI* raised concerns that § 6.855 was written to "rein in the big cities in the state, principally for political purposes," 198 F. Supp. 3d at 934 (internal quotation marks and citation omitted), the Seventh Circuit rejected the district court's contention that plaintiffs in that case could make out a case of discrimination on that basis. *Luft*, 963 F.3d at 670 (citing *Rucho v. Common Cause*, 139 S.Ct. 2484 (2019)).

In fact, the *Luft* court endorsed using locations near the clerk's office:

> [I]f the single authorized location is convenient for one racial group and inconvenient for another, that could violate § 2's equal-treatment principle. The opportunity to participate may decrease as distance increases.[4] *Yet the Milwaukee clerk's office is centrally located.* What is more, 2017 Wis. Act 369 §1JS amended Wis. Stat. § 6.855 to authorize municipalities to designate multiple sites for in-person voting. *See* Wis. Stat. § 6.855. The *one-location rule is gone*, and its replacement is not substantially similar to the old one.

Luft, 963 F.3d at 674 (emphasis added). The *Luft* court also explicitly rejected *OWI*'s concerns that the changes to § 6.855 were racially discriminatory; to the extent parties to this case attempt to make those same arguments based on *OWI*, they don't go anywhere.[5] *Luft*, 963 F.3d at 670 (*OWI*'s approach "is incompatible with the standard for discriminatory intent" because "[r]acial discrimination, as a

[4] There is nothing in the factual record indicating that using locations close to the clerk's office has any effect on a particular racial group.

[5] The *BLOC* intervenors attempt to insert matters not a part of the record—namely dangling the scepter that administering absentee voting according to the statute's language will return voting to a "discriminatory history" and result in something less than equal access to voting (Dkt.94:6-7)—as an additional issue. But there is nothing in the administrative record from either party reflecting anything of the sort, and it is not properly before the Court here.

constitutional matter, occurs only when a public official intends to hold a person's race against him") (citations omitted). If making it to a location near the Clerk's office is difficult for any particular group, other options for voting absentee are available, including using mail-in ballots or certain options for voters in senior care facilities and hospitals, among other special situations (and, of course, in addition to voting on Election Day). *See*, *e.g.*, Wis. Stat. §§ 6.86(1)(b), (3); 6.875; 6.87(4)(b)(1); *Teigen*, 2022 WI 64, ¶ 69, 403 Wis. 2d 607, 976 N.W.2d 519.

Applying the language of the statute as written and following the remaining considerations as Plaintiff set forth in his opening brief and below, alternate sites that are located near the clerk's office provide the capacity to address the problems one could encounter with a single site without disregarding the statutory language. Dispersing sites throughout the city, on the other hand, subverts or outright ignores the statutory language to serve the Clerk's desire to prioritize another, non-statutory objective. There may be any number of sites near the Clerk's office that would comply with the statute. It is simply wrong to argue that abiding by the "as near as practicable" language limits in-person absentee voting to a single site. There could be two sites that qualify, or there could be two dozen, but what is not in dispute here based on the record is that the Clerk expressly ignored sites closer to the Clerk's office in favor of dispersing them. Ignoring the statute is not a proper exercise of discretion.

WEC then compounded this error by agreeing with the Clerk. WEC argues that neither it nor this Court is permitted to "second-guess" the Clerk's decision to scatter the sites across the city. But Plaintiff is not asking this Court to do any such thing.

WEC did not even consider whether the sites selected were as near as practicable, and thus abused its discretion by not exercising any in the first place. The sum total of WEC's analysis was that because § 6.855(5) allows for multiple sites, it would "be illogical to argue that the distribution of multiple alternate absentee voting sites throughout the geographic confines of a city need be 'near as practicable to the office of the municipal clerk." (R.120.) In other words, WEC made the same mistake that the remaining parties to this litigation make—namely, that the statutory language pertaining to locations should just be ignored completely rather than given meaning and harmonized with the remaining provisions. Such a result is inconsistent with Wisconsin case law. *Kalal*, 2004 WI 58, ¶ 44 ("Judicial deference to the policy choices enacted into law by the legislature requires that statutory interpretation focus primarily on the language of the statute . . . It is the enacted law, not the unenacted intent, that is binding on the public.").

This is not a situation in which Plaintiff asks this Court to revisit the wisdom of having a site on Third Street as opposed to Fourth Street. This is a situation in which both the Clerk and the agency below essentially argue that election officials don't have to follow the words the Legislature and Governor put into law. The language in § 6.855 either has meaning, or it doesn't. Only Plaintiff's interpretation provides meaning to every word in the statute, and this Court should reverse WEC's determination on that basis. *See id.*, ¶ 46 ("Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage.") (citations omitted).

B. The sites conferred partisan advantage in contravention of statute.

State law could not be clearer: "no site may be designated that affords an advantage to any political party." Wis. Stat. § 6.855(1). Brown's proposed interpretation of state law gives this provision the effect the legislature intended it to have. When the City designated sites throughout the city, each one necessarily conferred an advantage on one party or the other that would not have existed had the sites been located near the Clerk's office.

First, and as Brown explained in his opening brief, WEC's administrative decision "did not weigh the evidence by setting out what it considered and why it found one side or the other to be more credible." Dkt. 86:12. WEC responds by stating that Brown "did not make the requisite showing that any site actually afforded a partisan advantage." Dkt. 91:13. But again, WEC has never explained *how* it made such a determination, and therefore erred as a matter of law and should be overturned.

The intervenors' and the clerk's arguments fare no better. The intervenors argue that Plaintiff's proposed reading of the statute goes beyond its words. *E.g.*, Dkts. 87:18; 92:8. But Brown never made such an argument. Brown's position simply gives the words the Legislature adopted the meaning they clearly intended. The statute's prohibition requires an analysis of the political makeup of the voting location; there is no other way to read the statute.

Intervenor WARA argues that this is immaterial because one of the elections was a primary. But of course, making it easier for more voters of one party to vote in

a primary vis-à-vis another party necessarily confers a partisan advantage, and because there is no party registration in Wisconsin and any voter can vote in *either* party's primary, the location of the polling places is still relevant. It would be just as wrong to prevent Democrats from voting in in a Democratic primary as it would be to try to prevent Republicans from doing the same.

Intervenor BLOC argues this standard is "absurd." But again, Brown is simply giving meaning to the words of the statute – intervenors' position would be to just completely ignore this requirement altogether, as they do the location requirement. *State ex rel. Kalal v. Cir. Ct. for Dane Cty*., 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110 ("Statutory language is read where possible to give reasonable effect to every word . . ."). The DNC argues that Brown's statutory interpretation somehow reads the words out of the statute, and that what the language really "seems to envision" is a prohibition on being near "overly partisan places, like a political party's local office or a large-scale political rally or event." Dkt. 89:20. But the statute does not limit itself so. Finally, the Clerk argues that because "absentee voters can attend any voting site" the location is immaterial. Dkt. 88:9. Such an argument again would defeat the purpose of the statute, which is designed to ensure that no one party is given an unfair advantage by having to travel shorter distances to the ballot return site.

At bottom: Brown's reading of the statute is the only one that gives the partisan advantage language any meaning, and does so within the context of the statute.

C. Designating sites for a three-hour window violates the requirement that they be in effect until the day after the election.

Designating and using sites for single, three-hour voting windows violates the statutory requirement that designated sites remain in effect until at least the day after the election. As Plaintiff has already explained, the question here is "…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)… complies with the components" of Wis. Stat. § 6.855. Dkt. 86:15. It does not.

Opposing parties argue that Plaintiff's interpretation of Wis. Stat. § 6.855(1)'s "shall remain in effect" language is flawed because it "attempts to read additional requirements into the statute." Dkt. 88:10; *See also* Dkt. 87:17–18, Dkt. 89:21–23, Dkt. 91:11 (arguing that Plaintiff's interpretation would "require significant intervention by the Commission in local election administration, which is contrary to the substantial discretion that Wisconsin Statutes vest in local election officials…"), and Dkt. 94:11–12. But this ignores the necessary, logical application of the statutory language, without which the statute has no meaning.

Contrary to opposing parties' assertions, the alternate voting sites at issue here did not "remain in effect until at least the day after the election." Instead, they were used as locations for one-off voting as the Clerk saw fit, and most were used for only a few hours on a single day. Opposing parties posit that the "shall remain in effect" language has no bearing on the "use" of the site, and instead merely means that the "designation" of each site as an alternate location must remain valid until at

least the day after the election. *See* Dkt 87:18; Dkt 88:10; Dkt. 89:21–22; Dkt. 91:10–11; Dkt. 94 at 11–12. But this cannot be true. As Plaintiff explained to WEC, "the concept of 'designation' apart from use lacks any meaning." (R.109-110.) "Designation" of an alternate site makes "use" of that site possible, and therefore, "designation" and "use" are "inextricably intertwined." *Id.* at 110.

Moreover, opposing parties' "designation," not "use," interpretation renders the "shall remain in effect until at least the day after the election" language meaningless. If their interpretation were accepted, and the "shall remain in effect…" language removed, there would be no change in the city's ability to act and, accordingly, the "shall remain in effect until…" language does not serve any function. Such interpretations "must be avoided." *State v. Kruse*, 101 Wis. 2d 387, 395, 305 N.W.2d 85 (1981)("A construction of a statute rendering a portion of it meaningless must be avoided."). By contrast, Plaintiff's interpretation of the statute–that the alternate sites a clerk elects to use must remain operative during the election period–is the only interpretation that gives the statute meaning.

Finally, accepting Plaintiff's interpretation of this language would not "demand the impossible" Dkt. 87:17, impose a "legal impossibility", Dkt. 88 :11, "lead to absurd and unreasonable results," Dkt. 89:22, or "open the door to a variety of problematic applications and issues" by over interpreting the statute. Dkt. 3, ¶ 90. Plaintiff's position is not that alternate sites must be available and staffed 24/7, but rather that alternative sites, when elected for use, must be used such that the public has advance notice of their availability and can reliably depend on them until the

election has concluded. Defendant McMenamin's use of multiple locations for one-off voting is illegal because it contravenes the purpose of the statute and exploitatively uses the "shall remain in effect" language "to greenlight the intentionally temporary nature of the Clerk's selected sites." Dkt. 86:15. The statute was never intended to enable this type of in-person early voting, and this Court should ensure that it does not do so now.

D. The use of the clerk's office in addition to the mobile voting sites violated § 6.855.

As Plaintiff has already explained, use of the Clerk's office, in addition to the mobile voting sites, violates Wis Stat. § 6.855. Dkt. 86 at 15–18. Wis. Stat. § 6.855 states that "*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). In other words, early voting may be offered at an alternate site *only if* no early voting methods or functions related to those methods are available at the Clerk's office. All opposing parties suggest that no early voting occurred at the Clerk's office because Room 207–the room *near* the clerk's office in which voters who voted at City Hall were directed to vote–constitutes an alternate site. Dkt. 87:18–19; Dkt 88:12–13; Dkt. 89:25–26; Dkt. 91:9 (describing its administrative decision); Dkt. 94:10. In addition, some contend that storing returned absentee ballots is not a "function" related to completing and returning absentee ballots, Dkt. 88:13; Dkt. 89:24, Dkt. 91:10 (describing its administrative decision), and two explicitly argue that storing the completed ballots at the clerk's office was permissible because Section

6.855 only requires that the Clerk's office and the alternative sites do not engage in overlapping tasks. Dkt. 87 at 18–19; Dkt. 94 at 11. Each of these claims is devoid of logic.

According to the Wisconsin Supreme Court, "'[a]n alternate site' serves as a *replacement* for 'the office of the municipal clerk,' rather than an additional site for absentee voting." *Teigen v. WEC,* 2022 WI 64, ¶ 59, 403 Wis. 2d 607, 976 N.W.2d 519 (emphasis added). WEC encourages municipalities to designate multiple sites as "alternate" voting locations because "it gives voters ample advance notice of a *potential backup site* and ensures compliance with statutory approval requirements and timelines," regardless of whether those sites are ultimately used. Dkt. 3 at 91 (emphasis added). But the Clerk viewed the city's alternative voting sites not as *replacements* for the clerk's office, but as voting sites that could be made available *in addition to* the clerk's office, and her actions blatantly violated Wis. Stat. § 6.855 for two separate reasons.

First, there is the fact that early voting was available at the Clerk's office and advertised as such. On its website, the City specifically told voters that they could "request and vote an absentee ballot *in the clerk's office* or other specified location during the days and hours specified for casting an absentee ballot in person." Dkt. 3, ¶ 29. That voters who came to vote at Clerk's office were directed, upon arrival, into a separate, nearby room where they actually voted does not establish that the separate room was an alternate voting site that "replaced" voting at the Clerk's office. The fact remains that voting at the Clerk's office was specifically advertised by the

city and that voters were directed by signage, within the City Hall, to vote in a nearby room–Room 207. (R.106) The Clerk did not deny these facts. *Id*. As such, Room 207 was merely an extension of the clerk's office, not an alternate voting location.

Moreover, accepting the opposing parties' position on this issue would lead to absurd results. As Plaintiff has explained, opposing parties' interpretation "defies logical sense" and, if accepted, would mean that the "Clerk could simply move her desk three feet into the hallway outside her office and declare it an 'alternate site.'" Dkt 86 at 16. This is, effectively, what the Clerk did to avoid the fact that Wis. Stat. § 6.855 allows in-person absentee voting at the clerk's office or at alternate sites, *but not both*. Such behavior suggests an attempt to have it both ways despite express statutory directives to the contrary. Opposing parties cannot deny what the law is, and their arguments in defense of the Clerk's actions depend on a "hyperliteral" reading of Wis. Stat. § 6.855, (R.107), that would render the "Legislature's choice to eliminate the Clerk's office as a voting location once alternate sites were established totally meaningless." Dkt. 86:17. Again, such statutory interpretations "must be avoided." *State v. Kruse*, 101 Wis. 2d 387, 395, 305 N.W.2d 85 (1981).

Second, storing the completed and returned absentee ballots at the clerk's office violated Wis. Stat. § 6.855. Ballot storage is a *function* of the early voting process, and to conclude otherwise is nonsensical. If votes cannot be counted until Election Day, then storage of completed and returned absentee ballots is necessarily a function of the early voting process. Contrary to opposing parties' assertions, Wis. Stat. § 6.855 is not intended to be parsed out such that certain functions may be

performed by the Clerk's office as long as they are not also being performed at the alternate sites. The statute does no such thing; for example, it does not make an exception for the storage of absentee ballots. Rather, the terms of Wis. Stat. § 6.855(1) are clear: "*no function related to* voting and return of absentee ballots" may be conducted at the clerk's office if alternate sites are being used for the early voting process, and these "functions" include storage of the completed and returned ballots. Wis. Stat. § 6.88, which addresses the chain-of-custody of absentee ballots, reinforces this point, stating, "The clerk shall keep the ballot in the clerk's office *or at the alternate site, if applicable* until delivered [to election canvassers], as required in sub. (2)". Wis. Stat. § 6.88(1) (emphasis added). That the Clerk opted to store the completed ballots at the Clerk's office, rather than the alternate sites, demonstrates a violation of Wis. Stat. § 6.855 and indicates that the mobile voting unit–given its transient nature and inability to store completed ballots at the alternate sites–is an unlawful polling place that violates statutory directives.

E. The use of a mobile voting unit is not contemplated by statute.

The Clerk's use of the voting van violated state law because the statute simply does not contemplate roving absentee ballot collection sites. The other parties to this litigation argue, in essence, that nothing in § 6.855 expressly prevents the use of a vehicle as an alternate site, so WEC was correct in deferring to the Clerk's decision that one was acceptable. While it is true that the statute does not expressly prohibit voting out of the back of a van (or from a park bench, or any location other than the Clerk's office if an alternate site is used), the Legislature's failure to anticipate every

exigency and expressly prohibit it does not actually mean that these are permissible alternate sites. The use of an "alternate site" is, reasonably and practically, just that: a site. A "site" is necessarily a fixed point in space, not a vehicle that can be driven down the street at fifty miles per hour, and to conclude otherwise creates an absurd result.

The remaining parties also argue that the Common Council in designating the dozens of alternate sites (and the Clerk in selecting from among them) was entitled to discretion in the decision to use the voting van because, in some cases, it may be "impracticable" to use a public building as a polling place. *See* § 5.25. While one intervenor goes so far as to say that the Common Council found that the van was necessary because the use of the buildings of themselves was impracticable, Dkt. 94:12-13, there is no citation to anything in the record for this proposition, and for good reason—there is *nothing* in the documents submitted by Plaintiff or the Clerk below to WEC (and so nothing in the record before this Court) providing that impracticability was the reason given by either the Common Council or the Clerk for the use of the van. The only evidence in the record is the dozens of sites designated by the Common Council and the website evincing the Clerk's choice from among them. (R.15-22, 32-36.) This Court must therefore discount any post-hoc statements by other parties that this was the motivating force behind the use of the van.

WEC perpetuated this error by making references to impracticability in its determination, but it never actually found that impracticability was at issue *here*, nor did it conclude that the reason the City used the van rather than a building (or even

just a fixed location without a structure) was that doing so would be impracticable. (R.125.) Indeed, it would have been error to do so given that there is no such evidence in the record. Instead, WEC seems to take the position that the Clerk's discretion is essentially boundless, and merely argues that the examples provided by Plaintiff (the use of a private residence or the back of a pickup truck, for example) weren't actually used here—the implication apparently being that these situations could conceivably be acceptable if among those designated by the council and then selected by the Clerk.

III. Additionally or in the alternative, WEC's decision should be reversed because it was improperly issued by the Administrator and not the Commission.

The parties and intervenors in this litigation ask this Court to elevate form over substance in addressing Plaintiff's second claim, which is that the Delegation Order improperly places decision-making authority in the hands of a single Administrator when the statute calls for decisions in Section 5.06 appeals like this one to be made by "the Commission." No party seriously disputes that the Delegation Order does just that, or could do just that in any given case, shielding the Commission from any real public accountability. Instead, the parties and intervenors throw up procedural arguments in an effort to keep this Court from reaching the troubling merits of that order. None of their counterarguments have merit.

A. *The second claim remains in the case, and this Court has the power to reverse or modify WEC's decision on this basis.*

Earlier in these proceedings, this Court struck certain portions of the complaint, including portions of the relief Plaintiff requested. Dkt. 82. The remaining parties to this litigation now read that order to eviscerate the entirety of Plaintiff's second claim, even though this Court did *not* strike those paragraphs or the claim itself from the complaint. *Id.* The fact that the Court did strike other paragraphs relating to the November election means that it certainly could have stricken the second claim in its entirety if that was its intent. It did not. The Court may still affirm, reverse, or modify WEC's decision on any legal basis it chooses, whether based on a procedural error or on the merits. *See* § 5.06(9). The only restriction imposed upon this Court's authority is that 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 determination."[6] Wis. Stat. § 5.06(9). Plaintiff has not asked the Court to do anything of the sort here. The facts underlying Plaintiff's claims related to the August 2022 primary are not in dispute, nor has WEC disputed that the Delegation Order was in effect nor its contents. *See* Dkt. 15, ¶¶ 81-85, 88.

[6] Plaintiff could not have "properly presented the disputed matters" relating to the Delegation Order before WEC itself because until a decision is issued, Plaintiff would have no way of knowing whether the full Commission or the Administrator signed it.

Nor does this Court's decision to strike the delegation order as an exhibit eliminate the claim. It is a public document issued by a government agency appropriate for judicial notice. *Perkins v. State*, 61 Wis. 2d 341, 346, 212 N.W.2d 141 (1973) (judicial notice includes "those facts capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy" (internal quotation marks and quoting citation omitted); Wis. Stat. § 902.01(2)(b).[7] This Court should therefore consider the legality of the Delegation Order on the merits.

B. *Plaintiff has standing to bring the delegation claim and was not required to bring this claim as a standalone declaratory judgment action.*

Plaintiff was not required to bring the challenge to the Delegation Order as a standalone declaratory judgment action under § 227.40. Notably, WEC's position on how a challenge to this order should proceed changes based upon the procedural option the challenger selects; the DOJ has taken the position in other litigation both that such a challenge must be brought as a separate action and that it must be brought in the context of a Section 5.06 claim. This Court can and should take judicial notice of this fact. *Cf.* Spitz Aff. Ex. 1 (alleging challenge to delegation of 5.06 complaints to administrator should be brought in a separate action) *with id.* Ex. 2 (arguing for dismissal of independent action by same plaintiff because there was no

[7] The Delegation Order is available here: https://elections.wi.gov/sites/default/files/legacy/2020-02/J.%2520%2520Comm%2520Memo_Delegation%2520of%2520Authority_2_27_20.pdf (last visited Nov. 16, 2023).

"live controversy" due to the underlying § 5.06 complaint having been resolved on other grounds). WEC should not be able to evade a court's determination of the Delegation Order's validity in perpetuity by taking conflicting positions.

It is also incorrect on the merits that Plaintiff was required to make a separate challenge under the declaratory judgment provisions of chapter 227. Section 5.06(9) provides that a circuit court "shall summarily hear and determine all contested issues of law." While the fact that the Delegation Order was in effect and its language is undisputed, the lawfulness of that order is a contested issue of law. Subsection (9) goes on to state that the court shall make its determination "pursuant to the applicable standards for review of agency decisions under s. 227.57." That section provides, in pertinent part, that the Court "shall separately treat disputed issues of agency procedure [and] interpretations of law . . . within the agency's exercise of delegated discretion," that the Court "shall remand the case to the agency" if "either the fairness of the proceedings or the correctness of the action has been impaired by a material error in procedure," and that the Court "shall reverse or remand the case to the agency if it finds that the agency's exercise of discretion is outside the range of discretion delegated to the agency by law . . . or is otherwise in violation of a constitutional or statutory provision." Wis. Stat. § 227.57(3), (4), (8). These provisions, and not § 227.40's more general challenge to an administrative rule, govern per the particular language of § 5.06(8) and (9). This Court is fully within its purview to consider the claim Plaintiff has raised with regard to the Delegation Order in this proceeding.

The argument that Plaintiff's claim is actually a challenge to EL 20.04 is not correct. That rule provides that certain preliminary matters in § 5.06 complaints are delegated to the Administrator, but it makes clear that the Commission is to be the final authority in decision-making.

If the last section of EL 20.04(10) definitively covered situations like Plaintiff's, the Delegation Order itself would be both unnecessary and redundant. The logical reading of EL 20.04 is that the administrator has the authority to resolve certain complaints—after the Commission has taken action (authorizing the Administrator to act by a "duly adopted motion" or, through its chair, has directed the Administrator to take an action). Under the rule, the initial authority remains with the Commission to delegate. The Delegation Order, on the other hand, reverses the chain of command. It *assumes* that the Administrator may take any and all actions, right up through issuing a decision, without consulting the Commission as a whole. As described in Plaintiff's opening brief, once the Administrator complies with sending the pleadings in a 5.06 complaint to the commissioners, the Delegation Order provides a number of decision points at which either the Administrator on her own or in consultation with the Chair can simply exclude Commissioners from the process. (Dkt. 86:23-25.) This is a very different outcome than what EL 20.04(10) contemplates—the delegation of authority by the Commission to the Administrator *in a particular case.*

If, however, the Court agrees with WEC that the Delegation Order is just a restatement of EL § 20.04, Plaintiff has properly pled a challenge to that rule under § 227.40. A party may plead claims for relief in the alternative, and in fact theories

"need not be consistent with one another." *Mohns Inc. v. BMO Harris Bank Nat. Ass'n*, 2021 WI 8, ¶ 52, 395 Wis. 2d 421, 954 N.W.2d 339 (quoting citation omitted). If this Court rejects Plaintiff's claim that the Delegation Order is invalid, he has also pled that the rule upon which WEC now claims it is based is invalid. Plaintiff has pled that EL § 20.04 was improperly promulgated, harms his rights as a Wisconsin voter, and impairs his legal rights. (Dkt. 3, ¶ 99.) Plaintiff's arguments as to why the Delegation Order is an unlawful delegation likewise apply to EL § 20.04 if WEC's interpretation of it is accepted.

WEC is also incorrect that Plaintiff was required to seek a stay of proceedings for thirty days if it takes the position that § 227.40 applies because a § 227.40(1) action challenging the validity of an administrative rule or guidance document is specifically exempted from the 30-day stay provision in § 227.40(3) ("In any judicial proceeding *other than one under sub. (1) or (2)* . . .) (emphasis added). Indeed, seeking a stay in a scenario like this one both conflicts with the language of § 227.40(3) and makes little practical sense, as all parties and this Court has emphasized that there is no "trial of the proceeding" in a case like this one.

Finally, the DNC argues that Plaintiff's claim should be barred by laches, but this argument fails as well. Unless or until an elector receives an adverse decision from WEC on a § 5.06 complaint, he will not know with certainty who will issue that decision—the Commission or the Administrator. There is therefore no way to challenge the delegation order prior to receiving a decision by WEC; to conclude otherwise would, in effect, require a party to demand an appeal of a decision before

that decision is ever issued. Undoubtedly, attempting to challenge the order outside the context of a 5.06 complaint like this one or asserting the challenge prior to the decision at the WEC level would result in arguments that someone like Plaintiff has no "live controversy" in the first instance and has only an unripe claim in the second—and, as noted, WEC has made such conflicting arguments. *See* p. 29-30, *supra*. Plaintiff acted promptly by including this claim in his complaint, which was filed just days after he received WEC's rejection of his § 5.06 complaint.

No party disputes the authenticity of the Delegation Order or the effect that it has in removing decision-making authority from the Commission itself. That the other parties to this litigation are not troubled by consolidating the power to decide complaints in one individual is concerning, but it does not change the fact that the Legislature used specific language to explicitly delegate certain tasks to the Administrator while leaving such language out of §§ 5.06 and 6.855—the statutes at issue in this case. And, as noted above, EL 20.04 did not take the extra step of automatically assigning the task of decision-making to the Administrator, as the Delegation Order does.

CONCLUSION

For the foregoing reasons and those set forth in Plaintiff's initial brief, WEC's decision should be reversed.

Dated this 17th day of November, 2023.

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