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10-25-2023
Clerk of Circuit Court
Racine County
2022CV001324

STATE OF WISCONSIN CIRCUIT COURT RACINE COUNTY
BRANCH 4

KENNETH BROWN,

Plaintiff,

v.

WISCONSIN ELECTIONS COMMISSION,

TARA McMENAMIN,

Defendants,

WISCONSIN ALLIANCE FOR RETIRED AMEERICANS,

DEMOCRATIC NATIONAL COMMITTEE,

BLACK LEADERS ORGANIZING FOR COMMUNITIES

Intervenors.

Case No. 2022CV1324
Case Code: 30703
Hon. Mark F. Nielsen

RESPONSE BRIEF OF INTERVENOR
WISCONSIN ALLIANCE FOR RETIRED AMERICANS

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INTRODUCTION

The key to unlocking this case is to understand the historical context in which Wis. Stat. § 6.855, the statute at the heart of the case, came to be. When Section 6.855 was first enacted in 2005, it allowed municipalities to conduct in-person absentee voting at either the clerk's office or a *single* "alternate absentee balloting site." But a federal court struck down that one-site limitation in 2016 under the U.S. Constitution and Voting Rights Act, and the legislature responded by amending Section 6.855 to expressly authorize multiple such sites. As amended, the statute provides that a municipality "may designate more than one alternate site." Wis. Stat. § 6.855(5). The resulting statutory scheme grafts an express authorization of multiple sites onto language originally drafted to govern a municipality's selection and operation of a single site. It is not the most elegant statute ever written, but at least one conclusion is unavoidable: Section 6.855's pre-amendment requirements cannot be interpreted to implicitly impose the unconstitutional single-site limitation that Section 6.855(5) was amended to expressly reject. Because Plaintiff Kenneth Brown's arguments would do just that, the Wisconsin Elections Commission properly rejected them, and the Court should affirm.

For the fall 2022 primary election, the City of Racine implemented Section 6.855 by offering in-person absentee voting at nearly two dozen alternate sites around the city. One fixed-location site at city hall was open five days a week during normal business hours, while the others were serviced on a set schedule by a specially equipped mobile voting van. Brown says that set-up broke the law—he alleges a handful of violations of Section 6.855(1), the subsection setting out the statute's pre-amendment requirements for a municipality's single alternate balloting site. But his construction of Section 6.855 would require the conclusion that the statute allows only a single such site per municipality. That would be an absurd result—it would reinstate the same

infirmity that led a federal court to strike down the pre-amendment law and would override the legislature's express authorization of multiple sites. Brown has taken care *never* to mention the federal case or its aftermath during this litigation: not in his administrative complaint or briefs to the Wisconsin Elections Commission; not at the motion to dismiss hearing in this Court; and not in his opening brief at issue here. But it is critical context that dooms his argument from the outset.

When Section 6.855 is construed properly—in light of the 2016 lawsuit and subsequent express legislative authorization of multiple alternate sites—Racine's compliance with the statute during the 2022 primary is clear. Racine's site designations did not violate the requirement to account for proximity to the clerk's office because they were made to ensure equitable citywide access to in-person absentee voting—a permissible consideration post-2016. Nor did Racine's site designations confer any advantage on a political party, because they were spread equitably across the city and because, in any event, the election in question was a *primary*, not a partisan contest. Racine also fully complied with the continuous-designation and function requirements for alternate sites; Brown selectively misquotes Section 6.855 to suggest otherwise. And Brown's arguments based on other statutes fare no better. Section 5.25, which Brown reads to prohibit Racine's use of a mobile voting van, does not apply to alternate sites at all. Finally, the Commission's delegation to its Administrator of the authority to decide Section 5.06 complaints is expressly authorized by both rule and statute. The Commission's ruling in favor of Racine should be affirmed in full.

BACKGROUND

I. Statutory and Historical Context

Brown's objections to Racine's use of alternate absentee balloting sites spring mainly from his construction of Section 6.855. Yet he omits any mention of an essential fact about that statute: The legislature amended Section 6.855 in 2018 in response to federal litigation that successfully challenged its constitutionality. And the provision created by that amendment—subsection (5),

which authorizes a municipality to designate multiple in-person absentee balloting sites—largely controls the merits here. Accordingly, the Alliance provides the following background on Section 6.855's enactment, the federal litigation, and the 2018 amendment that added subsection (5).

A. As first enacted in 2005, Section 6.855 authorized municipalities to designate alternate absentee balloting sites but limited each municipality to a single site.

Section 6.855 was created by 2005 Act 451. As originally enacted, it read:

> **6.855 Alternate absentee ballot site.**
>
> **(1)** The governing body of a municipality may elect to designate a site other than the office of the municipal clerk or board of election commissioners as the location from which electors of the municipality may request and vote absentee ballots and to which voted absentee ballots shall be returned by electors for any election. The designated site shall be located as near as practicable to the office of the municipal clerk or board of election commissioners and no site may be designated that affords an advantage to any political party. An election by a governing body to designate an alternate site under this section shall be made no fewer than 14 days prior to the time that absentee ballots are available for the primary under s. 7.15 (1) (cm), if a primary is scheduled to be held, or at least 14 days prior to the time that absentee ballots are available for the election under s. 7.15 (1) (cm), if a primary is not scheduled to be held, and shall remain in effect until at least the day after the election. If the governing body of a municipality makes an election under this section, no function related to voting and return of absentee ballots that is to be conducted at the alternate site may be conducted in the office of the municipal clerk or board of election commissioners.
>
> **(2)** The municipal clerk or board of election commissioners shall prominently display a notice of the designation of the alternate site selected under sub. (1) in the office of the municipal clerk or board of election commissioners beginning on the date that the site is designated under sub. (1) and continuing through the period that absentee ballots are available for the election and for any primary under s. 7.15 (1) (cm). If the municipal clerk or board of election commissioners maintains a Web site on the Internet, the clerk or board of election commissioners shall post a notice of the designation of the alternate site selected under sub. (1) on the Web site during the same period that notice is displayed in the office of the clerk or board of election commissioners.

> **(3)** An alternate site under sub. (1) shall be staffed by the municipal clerk or the executive director of the board of election commissioners, or employees of the clerk or the board of election commissioners.
>
> **(4)** An alternate site under sub. (1) shall be accessible to all individuals with disabilities.

2005 Wis. Act 451, § 67. The primary function of Section 6.855, its text suggests, was to allow a municipality to move absentee balloting activities out of its clerk's office—most likely for reasons to do with space, adequate facilities, or other logistics. But in creating that option, Section 6.855 also imposed all of subsection (1)'s restrictions on in-person absentee balloting sites—including, crucially, a one-location-per-municipality limit on such sites.

B. A federal court held that the one-site-per-municipality restriction violated the U.S. Constitution and federal Voting Rights Act.

In 2015, a coalition of civic organizations and voters brought a federal lawsuit, *One Wisconsin Institute, Inc. v. Thompsen*, challenging "more than a dozen" provisions of Wisconsin election laws. 198 F. Supp. 3d 896, 902 (W.D. Wis. 2016). One subset of the plaintiffs' claims challenged Section 6.855 insofar as it "limited municipalities to one location for in-person absentee voting." *Id.* at 931. Plaintiffs argued that this provision and others violated (i) the First and Fourteenth Amendments of the United States Constitution and (ii) Section 2 of the federal Voting Rights Act. *Id.* at 929–30, 951. After a nine-day trial featuring six expert witnesses and forty-five live witnesses in total, *id.* at 903, the court in *One Wisconsin Institute* ruled for plaintiffs on both challenges to Section 6.855.

First, addressing plaintiffs' constitutional claim under the *Anderson–Burdick* framework, the court found that Section 6.855's one-location rule imposed "a moderate burden on the right to vote." *Id.* at 930–31. And the court found that the State's principal justification for the rule—

avoiding voter confusion—was not supported by the record, particularly vis-à-vis Wisconsin's larger cities:

> The state's one-location rule ignores the obvious logistical difference between forcing a few dozen voters to use a single location and forcing a few hundred thousand voters to use a single location. There is simply no evidence that a one-location rule prevents voter confusion, or that any confusion would be as widespread or burdensome as the types of difficulties that voters face when having only one location at which to vote in-person absentee.

Id. at 934. Indeed, the court called the State's approach to in-person absentee voting "backward: rather than *expanding* in-person absentee voting in smaller municipalities, the state *limited* in-person absentee voting in larger municipalities." *Id.* The court concluded that the one-location rule, along with other restrictions on in-person absentee balloting, violated the First and Fourteenth Amendments because "the moderate burdens that they impose are not justified by the state's proffered interests; local control addresses the needs of the communities; and the purported consistency is illusory." *Id.* at 934–35.

Second, addressing plaintiffs' claim under Section 2 of the Voting Rights Act, the court found that Section 6.855's one-location rule "disparately burden[ed] minorities" for "substantially the same reasons:"

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

Id. at 956. And, drawing on detailed historical evidence and expert testimony adduced at trial, the court found that "the burdens that Wisconsin's in-person absentee provisions impose [on minority

populations] are linked to historical conditions of discrimination." *Id.* at 959–60. Accordingly, the court held those provisions, including Section 6.855's one-site-per-municipality restriction, "invalid under the Voting Rights Act." *Id.* at 960.

C. The legislature amended Section 6.855 to authorize municipalities to establish multiple alternate absentee balloting sites.

The State appealed the Western District of Wisconsin's decision for plaintiffs in *One Wisconsin Institute*. Before that appeal could be resolved, the legislature responded to the decision by amending Section 6.855 to eliminate the one-site-per-municipality restriction. Specifically, 2017 Act 369 created a new subsection (5) in Section 6.855, providing that: "A governing body may designate more than one alternate site under sub. (1)." 2017 Wis. Act 369, § 1JS. Act 369 did not otherwise amend Section 6.855.[1]

Act 369's amendment to Section 6.855 was a direct response to the *One Wisconsin Institute* litigation and order. All relevant legislative history confirms as much. The original drafting request submitted to the Legislative Reference Bureau that yielded subsection (5) was for statutory language "specify[ing] that a municipal clerk or a board of election commissioners may offer more than one *in-person absentee voting location*." Leg. Ref. Bureau, 2017 Drafting Request: Senate Amendment (SA-SB884) (Dec. 3, 2018), at 3 (emphasis added).[2] The Legislative Council memo summarizing the amendment that added the new Section 6.855(5) to 2017 Senate Bill 884 (which eventually became Act 369) expressly noted that the "single alternate location for in-person absentee voting . . . [is] not presently enforceable based on the decision of the federal court in *One Wisconsin Institute*." Wis. Legis. Council, Amendment Memo: 2017 Senate Bill 884 - Senate Sub.

[1] Other than 2017 Act 369, Section 6.855 has been amended only once since it was enacted, and then only to change the phrase "web site" to "website." *See* 2017 Wis. Act 365, § 112.

[2] Available at https://docs.legis.wisconsin.gov/2017/related/drafting_files/wisconsin_acts/2017_act_369_sb_884/03_sa1_sb884/17a2653df.pdf.

Amend. 1, at 3 (Dec. 11, 2018).[3] And the Legislative Council memo summarizing as-enacted Act 369 as a whole included a similar note. *See* Wis. Legis. Council, Act Memo: 2017 Wisconsin Act 369, at 2 n.1 (Dec. 17, 2018).[4]

On appeal from the *One Wisconsin Institute* decision, the Seventh Circuit concluded that Act 369's amendment to Section 6.855 rendered moot the question of that provision's pre-amendment compliance with federal law. *Luft v. Evers*, 963 F.3d 665, 674 (7th Cir. 2020); *see id.* at 675 (noting that "the single-location provision has been rescinded"). The Seventh Circuit explained that the "one-location rule is gone, and its replacement is not substantially similar to the old one." *Id.* at 674. And, the court continued, "it seems unlikely that Wisconsin would return to a single-site requirement if allowed to do so." *Id.* The court accordingly vacated the Western District's orders related to the one-site-per-municipality restriction as moot. *Id.* at 681.

II. Brown's Lawsuit

On December 7, 2021, the Racine Common Council designated over 150 locations around the city as alternate absentee balloting locations for the 2022 calendar year. R. 032–035.[5] Racine City Clerk Tara McMenamin ultimately offered in-person absentee balloting at 22 of those sites for purposes of the August 9, 2022, partisan primary election. R 015–021. Specifically, she offered in-person absentee balloting in city hall room 207 (the assessor's office) on "regular business days" from July 26 through August 5, from 8 AM to 4:30 PM, and on two Saturdays (July 30 and August 6) from 9 AM to 12 noon. R. 015–016. And she offered in-person absentee voting at 21 of the

[3] Available at https://docs.legis.wisconsin.gov/2017/related/lcamendmemo/sb884.

[4] Available at https://docs.legis.wisconsin.gov/2017/related/lcactmemo/act369.pdf.

[5] Citations to R. in this Brief refer to the Bates numbers in the Commission's Administrative Record, Docs. 56–59.

Common Council's designated locations in 3-hour periods between July 26 and August 7. R. 015–021. For instance, she offered in-person absentee voting at Gateway Technical College on Monday, August 1, from 9 AM to 12 noon. R. 018.

Racine's designation of multiple alternate sites was in line with current practice in many of Wisconsin's larger municipalities. As the Wisconsin Alliance for Retired Americans ("the Alliance") explained in its intervention papers, cities have taken advantage of the option to designate multiple alternate sites to meet demand for early voting ever since the legislature gave them the option to do so in 2018. *See* Doc. 26 at 3. In the recent 2023 spring election, for instance, the City of Milwaukee operated seven alternate absentee voting locations, and the City of Madison operated twenty-eight. *Id.* And such sites are extremely popular with voters: 32 percent of Racine absentee voters in 2022 cast in-person absentee ballots, as did 46 percent of Racine absentee voters in 2020. *Id.* at 4.

On August 10, 2022—the day after the primary election—Plaintiff Kenneth Brown filed a Wis. Stat. § 5.06 complaint against Clerk McMenamin with the Wisconsin Elections Commission. R. 001. Brown's administrative complaint alleged that Racine's designation and provision of alternate absentee balloting sites during the primary election had violated Section 6.855 in four discrete ways. R. 001–012. Specifically, Brown charged that Racine had violated (i) the requirement that alternate sites be "as near as practicable" to the clerk's office; (ii) the prohibition of sites that "afford[] an advantage to any political party"; (iii) the requirement that functions conducted at alternate sites not also be conducted in the clerk's office; and (iv) the requirement that a municipality's alternate site designations be made 14 days prior to ballot distribution and remain in effect until at least the day after the election. R. 006–008. Brown also alleged that Racine had violated Section 5.25 because absentee voting at 21 of the 22 sites (all except city hall room

207) had taken place in a specially equipped voting van parked at those locations, rather than inside physical buildings. R. 009–010.

After considering briefing from Brown and Clerk McMenamin, the Commission concluded that Brown's administrative complaint "did not show probable cause to believe that a violation of law or abuse of discretion occurred." R. 112. First, with respect to the "as near as practicable" requirement, the Commission noted the tension between that requirement and Section 6.855's express authorization of multiple sites, and found Racine's site designations warranted based on valid consideration of other factors, including "broad and relatively equal distribution." R. 120. Second, with respect to the allegation of partisan bias, the Commission found that Racine's merely designating multiple sites did not create a political advantage for any party, and that the wide distribution of the sites "otherwise dilute[d] the claim of political advantage." R. 120–121. Third, with respect to the requirement that functions be allocated either to alternate sites or to the clerk's office, the Commission found it satisfied because room 207 at city hall was not part of the clerk's office. R. 121–122. Fourth, with respect to the continuous-designation requirement, the Commission found it satisfied because Racine's designations remained in effect through the election cycle, even if specific locations were not always open for polling. R. 123–124. And fifth, with respect to the purported requirement that alternate balloting sites be inside fixed buildings, the Commission questioned whether Section 5.25 applied to alternate absentee balloting sites at all, and concluded that even if it did, it gave a municipality discretion to make practical determinations about how best to conduct the election. R. 124–125. The Commission's decision was signed by Meagan Wolfe, the Commission Administrator. R. 125; *see also* Wis. Admin. Code § EL 20.04(10) ("Where the commission has delegated to the administrator the authority to resolve

complaints, the administrator shall issue an order making findings and resolving the complaint."); Doc. 3 at 94 (Commission's 2020 order making such a delegation).

Brown appealed the Commission's adverse determination to this Court. Although the Commission proceeding had concerned only the August primary election, Brown's Complaint in this Court made many allegations about the November 2022 general election as well. *See* Doc. 3, ¶¶ 27–33. And Brown sought relief far beyond mere reversal of the Commission's adverse decision. *See id.* at 21–22 (Request for Relief). Specifically, Brown asked this Court to issue a declaratory judgment that Clerk McMenamin had violated the statutes in the five ways alleged before the Commission during *both* the primary and the general elections and a permanent injunction preventing her from engaging in the same conduct in future elections. *Id.* Brown also raised a procedural challenge to the Commission's delegation of the Section 5.06 determination to its Administrator and sought declaratory and injunctive relief from such delegation. *Id.*

Clerk McMenamin moved to dismiss. Docs. 11, 12. While that motion was pending, the Alliance moved to intervene to defend the interests of its Racine members who vote using alternate absentee balloting sites. Docs. 25, 26. After a hearing, the Court granted the motion to dismiss in part. *See* Doc. 82 at 15–18. The Court concluded that its authority was limited under Section 5.06 to reviewing the Commission's decision. *Id.* at 16–18. The Court also held the events of the November 2022 general election to be outside the proper scope of the appeal, and so indicated that it would limit its review to the August 2022 primary. *Id.* at 16–17. And the Court granted the Alliance's motion to intervene along with two others. *Id.* at 27; *see* Doc. 64.[6]

[6] In resolving the motion to dismiss, this Court appropriately held that it lacked authority in this case to enter an injunction or make broad pronouncements of law. Doc. 82 at 16–18. The Court therefore struck requests for relief B, C, D, and E from Brown's Complaint. *Id.* Brown's opening brief, however, asks this Court not only to "reverse the WEC's decision" but also to "direct the

LEGAL STANDARD

In reviewing the Commission's order resolving Brown's Section 5.06 complaint, "the court shall summarily hear and determine all contested issues of law and shall affirm, reverse or modify the determination of the commission, 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 [Wis. Stat. § 227.57]." Wis. Stat. § 5.06(9). "The court may not conduct a de novo proceeding with respect to any findings of fact or factual matters upon which the commission has made a determination, or could have made a determination if the parties had properly presented the disputed matters to the commission for its consideration." *Id.*

ARGUMENT

The Court should affirm the Commission's order in favor of the City of Racine. That order was both correct on the merits and procedurally sound. Racine's use of a mobile van to service alternate absentee balloting sites during the 2022 primary election did not violate any statutes. And the Commission's delegation to the Administrator was authorized by both rule and statute.

I. Racine's designation and operation of alternate absentee balloting sites during the August 2022 primary election complied with governing statutes.

Brown's statutory arguments for reversing the Commission's disposition of his Section 5.06 complaint fail as a matter of law. Four of Brown's arguments rest on his construction of Section 6.855: He argues that Racine's operation of alternate absentee balloting sites during the August 2022 primary violated four different provisions of subsection (1) of that statute. But Brown's arguments conflict with the 2018 amendment to Section 6.855 that expressly authorized

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Clerk not to engage in similar violations of election law going forward," Doc. 86 at 28, which would, of course, entail an injunction. And Brown invites the Court to make sweeping conclusions "about what state law authorizes as options for in-person, early voting." *Id.* at 18. As this Court recognized, its role is limited: to review and affirm, reverse, or modify the Commission's decision.

multiple alternate sites, and he otherwise misquotes or grossly misreads the statute. When Section 6.855 is given its proper construction, Racine's full compliance with it becomes evident. Plaintiff's final statutory argument rests on Section 5.25(1)'s use of the term "building," but that statute applies to polling places, not alternate absentee balloting sites.

A. Racine's designated alternate absentee balloting sites did not violate the "as near as practicable" requirement.

Racine's site designations for the August 2022 primary election did not violate Section 6.855(1)'s requirement that a designated site "shall be located as near as practicable to the office of the municipal clerk or board of election commissioners." Brown's narrow reading of that requirement conflicts with the 2018 amendment's express authorization of multiple alternate absentee balloting sites. The Court should either read the "as near as practicable" requirement broadly, to allow municipalities to make reasonable choices about site locations in service of equitable, citywide access to voting, or—if the Court determines that "as near as practicable" cannot be so read—should hold that the 2018 amendment to Section 6.855 repealed that requirement by implication. Either way, Racine's site designations did not violate the statute.

Brown's construction of Section 6.855 would render the statute self-defeating. According to Brown, subsection (1) requires any alternate site to be located as close as geographically possible to the clerk's office. Doc. 86 at 6–7. Designating a site further from the clerk's office than the closest possible site, he says, is permitted *only* if such a designation is necessary to satisfy the "remaining integrity considerations (such as avoiding partisan advantage)." *Id.* at 7. This construction would, in practice, permit only a single site per municipality—the closest possible site to the clerk's office. Nothing in the statute *requires* a municipality to designate multiple sites. So, by definition, any additional site that is further from the clerk's office than the first designated site would not be as close as geographically possible to the clerk's office. And Brown's so-called

"remaining integrity considerations" do not solve this problem. The only permissible consideration he identifies is avoiding partisan advantage, *id.*, and he elsewhere says that a site satisfies that requirement if (and only if) it is in a ward with the same partisan makeup as the ward in which the clerk's office is located, *id.* at 11. Thus, Brown would allow a municipality to designate only one site: the site in the same ward as the clerk's office that is geographically closest to that office. Such a rule flatly conflicts with subsection (5)'s express authorization of multiple sites.

Even if Brown's statutory construction could somehow be reconciled with a municipality's express right to designate multiple sites, the construction would require that the sites be clustered in a single part of the city, adjacent or nearly adjacent to each other and to the clerk's office. That is an absurd result: All possible benefit from the statute's express authorization of multiple sites would thereby be eliminated. Indeed, Brown expressly argues that a large city like Racine may *not* attempt to make in-person absentee voting accessible to "every single legal voter." Doc. 86 at 7. Brown does not explain how to square that crabbed reading with the 2018 amendment or the *One Wisconsin Institute* decision—to the contrary, *he never discusses the amendment or decision at all*.

The Court may not construe a statute as self-defeating in this way. The purpose of statutory interpretation is "to determine the intent of the legislature." *Indus. to Indus., Inc. v. Hillsman Modular Molding, Inc.*, 2002 WI 51, ¶ 6, 252 Wis. 2d 544, 644 N.W.2d 236. And a statutory term must be "interpreted in the context in which it is used; not in isolation but as part of a whole . . . and reasonably, to avoid absurd or unreasonable results." *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 46, 681 N.W.2d 110, 271 Wis. 2d 633. Here, the context is a statue that expressly permits a municipality to "designate more than one alternate site." Wis. Stat. § 6.855(5). And the legislature's purpose in amending the statute to authorize multiple alternate sites was to redress a federal court's determination that Section 6.855's single-site rule violated the U.S.

Constitution and the Voting Rights Act. *See One Wis. Inst.*, 198 F. Supp. 3d at 934–35, 960. It follows that the legislature intended the 2018 amendment to *fix* the problem identified by the Western District in *One Wisconsin Institute*: namely, the unjustified and disproportionate burden the one-site-per-municipality imposed on voters in large cities and minority voters. *See id.* [7]

The Court should reject Brown's construction and should instead read the phrase "as near as practicable" to authorize a municipality's practical site-designation decisions made in furtherance of equitable, citywide access to early voting—just the sort of designations Racine made here. The "as near as practicable" requirement leaves a question: "as near as practicable" in light of what other considerations? *Cf. Town of Ashwaubenon v. Pub. Serv. Comm'n*, 22 Wis. 2d 38, 50, 125 N.W.2d 647, 654 (1963) (holding that the phrase "as near as practicable to the existing shore" contemplates "an evaluation of many factors" rather than a strict geographic measurement). It is not "practicable" to require that a large city's alternate sites all be clustered as near as *possible* to the clerk's office when the function of alternate sites contemplated in the 2018 amendment is to ensure equitable access to early voting opportunities for all city residents. The better reading of the statute after the 2018 amendment is therefore that it authorizes a municipality to designate a mixture of sites at varying distances from the clerk's office if doing so reasonably serves to ensure equitable, citywide access to early voting. Brown has never disputed that Racine's designated van locations satisfy that criterion—indeed, his brief provides no particularized analysis of any specific

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

sites at all. Accordingly, the Commission's determination that Racine complied with the "as near as practicable" requirement should be affirmed.

Alternatively, the Court could conclude that the 2018 amendment to Section 6.855 authorizing multiple sites repealed the "as near as practicable" requirement by implication. Repeal by implication occurs when a subsequent legislative enactment "contains provisions so contrary to or irreconcilable with" an earlier enactment "that only one of the two . . . can stand in force." *KW Holdings, LLC v. Town of Windsor*, 2003 WI App 9, ¶ 27, 259 Wis. 2d 357, 656 N.W.2d 752 (internal quotation marks omitted). "While repeal by implication is not favored," that principle "does not control an otherwise clear intent, evidenced by the act itself." *Id.*

Any determination that the "as near as practicable" requirement requires alternate sites to be clustered near the clerk's office cannot be reconciled with the 2018 amendment. It simply makes no sense to authorize multiple alternate balloting sites yet, at the same time, to require that they *all* be as close to the clerk's office as physically possible. The point of allowing multiple alternate sites is to increase the accessibility of early absentee voting citywide. *See One Wis. Inst.*, 198 F. Supp. 3d at 934–35. Allowing alternate sites to be designated only in the part of the city that already has easy access to the clerk's office does not further that goal. Moreover, Section 6.855 bears a key hallmark of repeal by implication: inconsistent terminology. All the restrictions in subsection (1) are phrased in terms of a single "alternate site," including the "as near as practicable" provision: "*The designated site* shall be located as near as practicable to the office of the municipal clerk or board of election commissioners." Wis. Stat. § 6.855(1) (emphasis added). That the legislature did not amend subsection (1) to apply to "alternate *sites*" suggests it did not mean for the subsection (1) restrictions to apply to the new, multiple alternate sites authorized by subsection (5).

B. Racine's designation of alternate sites for a primary election could not have afforded an advantage to any political party.

Racine's selection of certain alternate absentee balloting sites did not improperly "afford[] an advantage to any political party." Wis. Stat. § 6.855(1). For purposes of this case, it could not have. This Court has held that its review is limited to the use of the voting van during the August 9, 2022, *partisan primary election only*. Doc. 82 at 16–17. In a partisan primary, parties do not compete against one another; instead, candidates compete for the party's nomination. Wis. Stat. § 8.16. Accordingly, Racine's designation of any given alternate site could not, by definition, have afforded an advantage "to any political party" during the relevant election, which was not a competition between candidates from opposing political parties.

In any case, Brown's proposed standard for partisan advantage makes no sense. *See* Doc. 86 at 10–13. Brown proposes that an alternate absentee balloting site violates Section 6.855(1) if it is located in a ward with a partisan makeup that "differs from the ward in which the Clerk's office is located." *Id.* at 11. But the statute says nothing about using wards as the baseline—Brown has simply conjured that rule out of thin air. And there is no reason to make the specific ward in which the clerk's office is located the baseline, as Brown's standard does. Doing so would simply perpetuate any imbalance caused by the location of the clerk's office, while necessarily making it unlawful to place an alternate site in any other ward—as no ward will ever perfectly match the partisan makeup of the ward in which the clerk's office is located. The effect, once again, would be to undo the 2018 amendment by making it impossible for a municipality to offer equitable, citywide access to early voting.

In light of the 2018 amendment allowing multiple sites, Section 6.855(1) is much more sensibly read to require only that each site designation, considering the city's designations as a whole and the other statutory requirements, not unfairly advantage any political party. Brown

seems to have argued in front of the Commission that Racine's site selections in the August 2022 primary violated that standard, *see* R. 042–046, but Brown abandons that argument in this Court, making clear that his sole "argument . . . is that the alternate sites may not afford any political advantage that differs from the ward in which the Clerk's office is located," Doc. 86 at 11. Brown therefore offers no showing that the Commission reversibly erred in concluding that Racine's site choices were not, overall, unfair.

C. Racine did not violate the requirement that a site designation must remain in effect "until the day after the election."

Racine's site designations complied with the requirement that such designations must remain in effect until the day after the election. The relevant sentence provides: "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 . . . if a primary is scheduled to be held . . . and shall remain in effect until at least the day after the election." Wis. Stat. § 6.855(1). Thus, a municipality wishing to designate alternate sites for an election cycle with a primary election must make those designations at least fourteen days before primary election absentee ballots are sent to voters and may not retract such designations until the day after the general election. Here, undisputed record evidence shows that the Racine Common Council timely designated sites for the August 2022 primary (and all other elections in 2022) in *December 2021*, R. 032–035, long before the fourteen-day deadline. Nor has Brown ever alleged, let alone established, that Racine took any formal steps to de-designate sites prior to the day after the August election. Accordingly, Racine's designation of alternate sites for the 2022 primary was valid.

Brown's contrary argument demands the impossible. Doc. 86 at 13–15. He reads the statute to require "voting sites [to] . . . 'remain in effect until at least a day after the election,'" by which he means that they must be open and available to voters. *Id.* at 13. But of course, a voting site

cannot be open and available to voters on the "day after the election," nor—as the statute also requires—two weeks before *ballots* are printed. And during the absentee voting period, voting locations in general are not normally open 24 hours a day, 7 days a week. So, the "remain in effect" requirement cannot possibly mean that the sites must be open and available the entire time. Rather, the object of the temporal requirement is "[a]n *election* by a governing body to *designate* an alternate site," not the site itself. Wis. Stat. § 6.855(1) (emphasis added). Nothing in the statute prohibits or restricts Racine from designating a site and concurrently designating dates or hours when it will be open—just as it did here.

D. Racine complied with the restrictions on the use of the clerk's office for absentee balloting functions.

Racine's allocation of different absentee balloting functions to different locations complied with Section 6.855. The relevant provision states that if a municipality designates an alternate absentee balloting site, "no function related to voting and return of absentee ballots *that is to be conducted at the alternate site* may be conducted in the office of the municipal clerk or board of election commissioners." Wis. Stat. § 6.855(1) (emphasis added). In other words, a municipality that uses an alternate site or sites must determine which functions to allocate to the alternate sites and which functions to allocate to the clerk's office. Here, Racine used the city hall assessor's office (room 207) and the various voting van locations as alternate absentee balloting sites; stored returned absentee ballots in the clerk's office (room 103); and allegedly posted some signs in or near the clerk's office directing voters to room 207. All this complied with subsection (1) because all functions were allocated *either* to the alternate sites or to the clerk's office, but not to both. Specifically, the alternate sites were used for balloting and ballot return, while the clerk's office was used for ballot storage (and perhaps for signage, though Brown did not put any evidence of

the signs in the record). Put in terms of the statute, "no function" that was "conducted at the alternate site[s]" was also conducted "in the office of the municipal clerk."

Brown once again completely misreads the statute. *See* Doc. 86 at 15–18. He says that "[i]f alternative sites are used, the clerk's office may not be used for any function 'related to' voting and return of absentee ballots." *Id.* at 16. But that is simply not what Section 6.855(1) says. Rather, it says that the clerk's office may not be used for any "function related to voting and return of absentee ballots *that is to be conducted at the alternate site*." Wis. Stat. § 6.855(1) (emphasis added). Brown leaves out the qualifying clause "that is to be conducted at the alternate site," thereby transforming a restriction on *overlapping* functions into a prohibition on the clerk's office performing *any* balloting functions at all. But this Court's "function is not to rewrite the statute." *In Interest of P.*, 119 Wis. 2d 349, 355, 349 N.W.2d 743, 746 (Ct. App. 1984). And Brown does not, in fact, allege any improperly overlapping functions that might violate the statute. For instance, he does not allege that any voting happened in the clerk's office, and he *admits* that returned ballots were stored in the clerk's office, not at the alternate sites. Doc. 86 at 17.

Lastly, Brown takes issue with the use of room 207 as an alternate site, arguing that if such use is permitted, by the same logic "the Clerk could simply move her desk three feet into the hallway outside her office and declare it an 'alternate site.'" *Id.* at 16. Perhaps she could—now that multiple alternate sites are permitted, it is unclear what continuing purpose this restriction in Section 6.855(1) serves, and technical compliance ought to suffice. Regardless, that would be a different case. Here, the question is just whether the clerk's office is sufficiently distinct from a room on a *different floor* of city hall that normally serves as the office of a *different official* (the city assessor). It clearly is. If the legislature had intended to prohibit operation of alternate sites in the same *building* as a clerk's office, Section 6.855 would say that. It does not.

E. Alternate absentee balloting sites are not limited to fixed, physical buildings.

Brown's argument that Racine's voting van violates Wisconsin law because it is not a physical building rests on a fundamental error: Brown assumes that statutes regulating polling places—in particular, Section 5.25, which concerns in-person, election day voting—necessarily apply to alternate absentee balloting sites, and consequently to Racine's van. But Wisconsin law treats polling places and alternate absentee balloting sites differently, and Section 6.855, which specifically regulates alternate absentee balloting sites, imposes no requirement that absentee voting take place in a building.

As Brown explains, Section 5.25, aptly titled, "Polling places," requires such places to be in "public buildings" "unless the use of a public building for this purpose is impracticable or the use of a nonpublic building better serves the needs of the electorate." Wis. Stat. § 5.25(1). Although Brown assumes this statute requires all polling places to be located within buildings—an assumption which notably ignores the impracticability exemption in the text of the statute—Brown never explains why any such restriction also applies to alternate absentee balloting sites.

The better reading is that absentee voting does not occur in polling places at all. For example, Wisconsin law introduces the concept of absentee voting by noting that "voting by absentee ballot is a privilege exercised outside of the traditional safeguards of the polling place." Wis. Stat. § 6.84. And it defines an "absent elector" as "any otherwise qualified elector who for any reason is unable or unwilling to appear at the polling place in his or her ward or election district." Wis. Stat. § 6.85(1). The elections statutes also repeatedly describe "polling places" and "alternate site[s]" for absentee voting as separate locations. *See, e.g.*, Wis. Stat. § 12.035 (prohibiting the distribution of election-related material at certain places, including "polling places" and "at the office of the municipal clerk or at an alternate site under s. 6.855"); Wis. Stat. § 12.03 (prohibiting electioneering in "polling places" and in "the office of the municipal clerk or

at an alternate site under s. 6.855"); Wis. Stat. § 7.41 (permitting public observation "at any polling place, in the office of any municipal clerk whose office is located in a public building on any day that absentee ballots may be cast in that office, or at an alternate site under s. 6.855 on any day that absentee ballots may be cast at that site"). If alternate absentee balloting sites were already considered polling places under Wisconsin law, entire sections of these statutes would be rendered superfluous—a result which is to be avoided. *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.").

The statute that does govern alternate absentee balloting sites, Section 6.855, does not require that such a site be located in a physical building, let alone in a public or nonpublic building. And Brown does not attempt to argue that it does. Because Racine's use of its voting van was wholly consistent with Section 6.855, the Commission's decision should be affirmed in this regard.

II. The Commission's disposition of Brown's complaint was procedurally sound.

The Administrator's dismissal of Brown's Section 5.06 complaint was procedurally sound. Just as his statutory arguments omit all mention of the crucial *One Wisconsin Institute* decision and 2018 amendment, Brown's procedural arguments omit the decisive fact: A valid administrative rule in effect *since 1994* provides that "[w]here the commission has delegated to the administrator the authority to resolve complaints, the administrator shall issue an order making findings and resolving the complaint." Wis. Admin. Code § EL 20.04(10).[8] In February 2020, the Commission

[8] Current Section 20.04 is the materially identical successor rule to rules promulgated by the Wisconsin Elections Commission's two predecessor bodies. In 1994, the State Elections Board promulgated § ElBd 10.04 ("Investigations"). It provided that "[w]here the board has delegated to the executive director the authority to resolve complaints, the executive director shall issue and order making findings and resolving the complaint." Wis. Admin. Code § ElBd 10.04(10) (1994). After the State Elections Board and State Ethics Board merged in 2008 to form the Government Accountability Board (GAB), § ElBd 10.04 became § GAB 20.04 ("Investigations"). It provided

made such a delegation, delegating to the Administrator the authority to "issue compliance review orders under the provisions of Wis. Stat. § 5.06." Doc. 3 at 93. Brown's procedural challenge accordingly fails for two separate reasons. First, to challenge the validity of the Administrator's Section 5.06 determination, Brown needed to challenge the validity of the Section 20.04(10) rule authorizing the Commission to delegate that determination—but he never did, and it is too late for him to do so now. Second, even if Brown had challenged the rule, that challenge would fail, because the rule is a valid exercise of the Commission's statutory authority to delegate matters to the Administrator.

First, Brown's real procedural objection in this case is to Section 20.04(10), but he has not properly challenged it—indeed, his brief never mentions it—and thus he cannot do so now. "When promulgated as required by statute, rules have 'the force of law.'" *SEIU v. Vos*, 2020 WI 67, ¶ 79, 393 Wis. 2d 38, 946 N.W.2d 35 (quoting Wis. Stat. § 227.01(13)). This is because an agency validly exercising its rulemaking authority is exercising delegated legislative power. *See id.* Accordingly, Section 20.04(10)'s provision that where "the commission has delegated to the administrator the authority to resolve complaints, the administrator shall issue an order making findings and resolving the complaint" is—for this Court's purposes—just as decisive as an identically phrased statute would be. And as Brown admits, the Commission delegated to the Administrator the authority to resolve Section 5.06 complaints in its February 2020 delegation order. *See* Doc. 3 at 93; Doc. 86 at 22. Under Section 20.04(10), the Administrator's disposition of Brown's administrative complaint was thus a mandatory duty, not a procedurally improper exercise

that "[w]here the board has delegated to the director the authority to resolve complaints, the director shall issue an order making findings and resolving the complaint." Wis. Admin. Code § GAB 20.04(10) (2008). And in 2016, after WEC replaced the GAB as Wisconsin's elections agency, § GAB 20.04 became § EL 20.04. *See* Wis. Admin. Code § EL 20.04(10) (2016).

of authority she lacked. Brown seems to think the decisive question is whether the 2020 delegation order was validly authorized by *statute*. *See* Doc. 86 at 23. But if it was made pursuant to a valid *rule*, that question is simply beside the point.

Of course, Brown could have challenged the validity of the *rule*—rather than the delegation order—by arguing that it was improperly promulgated or that it substantively violated a statute. *See* Wis. Stat. § 227.40(4)(a). But it is far too late for that now. To the extent that Brown wished to challenge the rule, he was required to comply with Section 227.40, which provides "the exclusive means of judicial review of the validity of a rule." Wis. Stat. § 227.40(1). Specifically, because the validity of the rule is "material" to Brown's procedural claim, within 30 days of serving his opening pleading, Brown was required to apply for an order suspending this proceeding until the validity of the rule could be determined in a *separate* declaratory judgment proceeding. *See* Wis. Stat. § 227.40(3)(ag), (c). The deadline to apply for that order passed on January 5, 2023—over 10 months ago. *See* Doc. 4. Brown's failure to comply with the mandatory Section 227.40 procedures strips this Court of jurisdiction to consider the validity of Section 20.04. *See* Wis. Stat. § 220.40(3)(c) ("Failure . . . to commence a declaratory judgment proceeding within a reasonable time . . . shall preclude the party from asserting or maintaining that the rule or guidance document is invalid."); *Richards v. Young*, 150 Wis. 2d 549, 557, 441 N.W.2d 742, 745 (1989) (holding that compliance with Section 227.40's procedures in challenges to the validity of rules is mandatory and failure to comply strips the court of jurisdiction over the claim). Accordingly, to reject Brown's procedural claim, the Court needs only to hold that Brown has not properly

challenged Section 20.04(10), which unambiguously required the Administrator to decide Brown's administrative complaint.[9]

But *second*, even if Brown's case presented a valid challenge to Section 20.04(10) and the delegation order, that challenge would fail on statutory grounds. Both Section 20.04 and the procedures employed under the delegation order to rule on Brown's administrative complaint are entirely consistent with Wisconsin statutes. Wisconsin law is clear as could be: "The administrator shall perform such duties as the commission assigns to him or her in the administration of chs. 5 to 10 and 12" (the chapters that contain Wisconsin's elections statutes). Wis. Stat. § 5.05(3d). Both Section 20.04(10) and the 2020 delegation order are valid exercises of the Commission's explicit statutory authority to delegate duties to the Administrator.

And despite Brown's contention that the Commission is "charged" with conducting hearings and investigating alleged violations, *see* Doc. 86 at 21, Section 5.06 does not require the Commission itself to act on Section 5.06 complaints. The Commission *may* conduct hearings, and it *may* order election officials to respond, Wis. Stat. § 5.06(1), (5), but it is not required to do so. In fact, the Commission is not required to render a decision when it receives a Section 5.06 complaint at all. Under statute, such a complaint is "deemed disposed of if the commission fails to transmit an acknowledgment of receipt of the complaint within 5 business days from the date of its receipt or if the commission concludes its investigation without a formal decision." Wis. Stat. § 5.06(1). If the Commission does decide to investigate, that investigation is flexible: The Commission may conduct "such investigation as it deems appropriate." Wis. Stat. § 5.06(6). This

[9] Brown's Complaint in this Court purports to "include a challenge to the lawfulness of [§ EL 20.04(10)] under Wis. Stat. § 227.40." Doc. 3, ¶¶ 96, 97. But that is not sufficient to satisfy Section 227.40(3)(ag) and (c), which required Brown not only to assert the invalidity of the rule in his pleading but also to timely apply for a suspension order and timely initiate a separate declaratory judgment proceeding.

statutory scheme makes good sense, given the Commission's limited investigatory and adjudicatory resources and the frequency of wholly frivolous complaints. No doubt recognizing the Commission's need to rationally allocate scarce resources, the legislature wisely vested it with considerable flexibility about how to investigate and dispose of new complaints—including by delegating to its Administrator.[10]

Moreover, Brown overstates the extent to which the Commission lacks control over the Section 5.06 complaint process under the delegation order. The Commission could vote to revoke the delegation order at any time. And under statute, the Commission always retains the ability to "on its own motion, investigate and determine" a violation of the election laws and to "withdraw, modify or correct" a prior determination made under Section 5.06. Wis. Stat. § 5.06(4), (7). Thus, had the Commission disagreed with the Administrator's handling of Brown's administrative complaint, it maintained the authority to act.

CONCLUSION

The Court should affirm in full the Wisconsin Elections Commission's order resolving Brown's administrative complaint in favor of the City of Racine.

[10] This case is thus not the same as those in which courts have held that an agency lacked the authority to delegate decision-making. *See* Doc. 86 at 21–22 (citing *State v. Haugen*, 160 Wis. 494, 152 N.W. 176 (1915), and *State ex rel. Mayer v. Schuffenhauer*, 213 Wis. 29, 250 N.W. 767 (1933)). In both *Haugen* and *Schuffenhauer*, the courts found that the statutes, with their detailed framework and protections, *required* the body as a whole to make a determination, which is not the case here. And in *Haugen* in particular, the Court found that there was no opportunity to review the tax commission's acts, which weighed in favor of requiring the tax commission to act as a body in making such decisions. Determinations under Section 5.06, however, are subject to judicial review. Wis. Stat. § 5.06(9).

DATED this 25th day of October, 2023.

Electronically signed by Diane M. Welsh

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