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Clerk of Circuit Court
Racine County
2022CV001324

STATE OF WISCONSIN CIRCUIT COURT RACINE COUNTY

KENNETH BROWN,

Plaintiff,

v.

Case No. 22-CV-1324
Case Code 30703

WISCONSIN ELECTIONS COMMISSION,

and TARA MCMENAMIN,

Defendants.

DEFENDANT MCMENAMIN'S RESPONSE BRIEF

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Defendant Tara McMenamin, in her capacity as City Clerk of the City of Racine, by and through her attorneys, the City of Racine City Attorney's Office by City Attorney Scott Letteney and Assistant City Attorney Ian Pomplin, hereby submits the following response to the Plaintiff's Opening Brief.

INTRODUCTION

Mobile election units, including that which was used by City of Racine City Clerk Tara McMenamin in the August 9, 2022, Fall Primary Election, are permitted pursuant to Wisconsin Statutes section 6.855. A simple reading of the plain language makes this clear. Equally as clear is that the Plaintiff's methods of statutory interpretation are internally inconsistent and frequently require statutory interpretation that goes far beyond the text of the statute. Thus, this Court should affirm the Wisconsin Elections Commission's decision.

Further, Plaintiff's challenge to the alleged delegation of authority performed by the Wisconsin Elections Commission attempts, once again, to induce this Court to reach a decision

that is beyond its competency under Wisconsin Statutes section 5.06, as such would require the Court to consider material outside of the record upon review. Therefore, any allegation pertaining to improper delegation cannot be entertained and must be dismissed.

PERTINENT BACKGROUND FACTS

Plaintiff Kenneth Brown is a voter in the City of Racine. Defendant Tara McMenamin is the City Clerk for the City of Racine, charged with the administration of elections. The Wisconsin Elections Commission ("WEC") is a board assigned by law to administer and enforce elections laws in the State of Wisconsin. *See* Wis. Stat. § 5.05, *et seq.*

In December 2021, the City of Racine approved various locations for potential in-person absentee voting throughout the City of Racine for all elections that would occur within the year 2022. It was decided that twenty-two of these approved locations would be used for every election in 2022. The City of Racine and Clerk McMenamin determined that the best way to administer in-person absentee voting at these locations was by the continued use of the City of Racine's mobile elections unit ("MEU"). These locations were scheduled and posted in accordance with state law. The MEU visited each location at the scheduled time and allowed for eligible voters within the City of Racine to cast in-person absentee ballots.

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On August 10, 2022, Plaintiff Brown filed a complaint with the Wisconsin Elections Commission against Clerk McMenamin. Clerk McMenamin filed a response on August 29, 2022, and Plaintiff Brown filed a reply on September 13, 2022. The WEC issued a decision on November 4, 2022, finding in favor of Clerk McMenamin on every single legal argument raised by Plaintiff Brown. Before this Court is Plaintiff Brown's appeal of the WEC's decision. His appeal, however, contains material that was beyond the scope of the record as developed by the WEC. Consequently, Clerk McMenamin filed a partial motion to dismiss on January 19, 2023. After briefing, the Court

on March 15, 2023, struck all exhibits attached to the complaint, stated it would ignore all allegations beyond the scope of the appeal, and instructed the Plaintiff to contain his argument to those issues developed at the administrative level.

STANDARD OF REVIEW

Under Wisconsin Statutes section 5.06(9), this Court "shall summarily hear and determine all contested issues of law and shall affirm, reverse or modify the determination of the commission." Further, this Court must afford "due weight to the experience, technical competence and specialized knowledge of the commission." *Id.*

When analyzing questions of law, courts no longer give any deference to administrative agencies' legal conclusions and give only "due weight" to an agency's experience, technical competence, and specialized knowledge. *Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 2018 WI 75, ¶ 108, 382 Wis. 2d 496, 914 N.W.2d 21; *see also* Wis. Stat. § 227.57(10). Due weight is merely persuasive, and a court exercises independent judgment to decide questions of law. *Tetra Tech*, 2018 WI 75, ¶ 78.

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This Court may not conduct a *de novo* proceeding and must confine itself to the administrative record. *See* Wis. Stat. 5.06(9).

ARGUMENT

This Court should affirm the decision of the WEC because the City of Racine and Clerk McMenamin followed the law as it applies to alternate absentee ballot sites. The Plaintiff makes five arguments in an effort to prevent the City of Racine from allowing as many legal voters as possible to vote. All five of these arguments fail, and many are internally inconsistent.

All alternate absentee ballot sites were designated in accordance with the law. These sites did not provide an advantage to any political party. The City did not allow contemporaneous voting

both at alternate sites and at the office of the municipal clerk. The designated sites were in effect for the appropriate amount of time. Further, nothing in the relevant statutes prevent the use of a mobile election unit as an alternate absentee ballot site.

Finally, the Plaintiff's allegations and argument regarding whether delegation is proper is beyond the competency of this Court and must be wholly ignored.

I. THE COURT SHOULD AFFIRM THE DECISION OF THE WEC

Statutory interpretation starts with the plain language of the statue. *State ex rel . Kalal v. Circuit Court for Dane Cty.,* 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. "Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." *Id.* Further, "statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Id.* The Plaintiff's analysis of the statutory language of Wisconsin Statutes 6.855—the statute for alternate absentee ballot sites--strays far from a plain reading of the text of this statute. Clerk McMenamin asks that this Court read the plain language of this statute and affirm the decision of the WEC.

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A. The Term "As Near As Practicable" Is A Term Of Art.

The Plaintiff neglects to treat the term "as near as practicable" as a legal term of art, and he reads additional restrictions and requirements regarding in-person absentee voting into Wisconsin Statutes section 6.855. *See* Ptf. Brief p. 7. Specifically, Plaintiff contends that "[t]he term 'practicable' is not a technical term." *Id.* This assertion is legally incorrect and does not align with the case law on this term.

The Plaintiff alleges that the locations selected by the Common Council of the City of Racine were not "as near as practicable" to the municipal clerk's office, as required under Wisconsin Statutes section 6.855. However, the term "as near as practicable" is a legal term of art, and thus is necessarily a technical term. It is long standing precedent that the phrase "as near as practicable" encompasses something other than simply a pure geographic standard resolved through the use of a ruler on a map. *See Ashwaubenon v. Pub. Serv. Com.*, 22 Wis. 2d 38, 50-51, 125 N.W.2d 647, 654 (1963). In fact, treating the legal term of art "as near as practicable" as purely distance-based is an "erroneous concept of law." *Id.* The use of the word "practicable" automatically encompasses evaluating many factors to determine appropriate locations.[1]

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[1] Clearly, the *Ashwaubenon* case, which involves the approval of a bulkhead line on a river, is based upon a set of facts quite different from the instant matter. Importantly, however, the concept of "as near as practicable" or "as nearly as practicable" has been interpreted in a wide variety of circumstances as not being capable of definition based upon a strict geographical or mathematical calculation. *See, e.g., Kirkpatrick v. Preisler*, 394 U.S. 526, 530, 89 S. Ct. 1225, 1228, 22 L. Ed. 2d 519, 524 (1969) (In a case involving congressional redistricting, "[t]he whole thrust of the 'as nearly as practicable' approach is inconsistent with adoption of fixed numerical standards."); *United States v. Delgado-Hernandez,* 283 Fed. Appx. 493, 499 (9th Cir. 2008) (A driver momentarily leaving his lane of travel does not violate a statute requiring a vehicle to be driven "as nearly as practicable" within a single lane.); *Lee v. City of San Diego*, 492 F. Supp. 3d 1088 (S.D. Cal. 2020) (A municipal ordinance that made it unlawful for a pedestrian to stand on the sidewalk "except as near as practicable" to the building line or curb line, was unconstitutionally vague, as it failed to provide notice to the public and guidance to officers.); *State ex rel. Martin v. Howard*, 96 Neb. 278, 290, 147 N.W. 689, 693 (Neb. 1914) (The words "as nearly as practicable" in a statutory provision requiring a specific insurance form contract be used "should be construed to mean as nearly as practicable considering the other provisions contained in the insurance code which in anywise are inconsistent with or modify the provisions."); *Losier v. Consumers Petroleum Corp.*, 131 Conn. 161 38 A.2d 670 (Conn. 1944) (Whether a stop sign complied with the statutory requirement that it be located as near as practicable to the entrance to a through way was a question of fact based upon the particular circumstances involved.); *Frye v. Tobler*, 2 Ohio App. 3d 358, 442 N.E.2d 98 (Ohio App. 1981) (Whether a pedestrian was walking as near as practicable to the edge of the roadway is a question of fact based upon the particular circumstances involved.); *State v. McBroom*, 179 Ore. App. 120, 124-125, 39 P.3d 226, 228 (Ore. App. 2002) (In a case involving travel within a single lane of traffic, "[p]racticable means 'possible to practice or perform,' 'capable of being put into practice, done or accomplished' or 'feasible.' What is practicable or feasible will vary with the circumstances of each case."); *Farmer v. Baldwin,* 346 Ore. 67, 77-78, 205 P.3d 871, 877 (Ore. 2009) (An Oregon rule of appellate procedure providing that a litigant must "attempt to present his or her claims in proper appellate brief form, as nearly as practicable" "does not require exact compliance with the forms and rules of appellate briefing that lawyers observe.")

Of particular note, *see Beck v. Board of Comm'rs*, 105 Kan. 325, 338, 182 P. 397, 403 (Kan. 1919 Kan.) (A statutory requirement that the county settlement of public welfare institutions be located "'[a]s near as practicable to the county seat,' does not mean within one-half mile, nor within one mile, nor within two miles, nor within any other prescribed distance; but it does mean that the settlement shall be located at a place as near to the county seat as will supply all the conditions necessary to enable the county commissioners to carry out the purposes of the law.")

The WEC rejected Plaintiff's distance-based argument, so the Plaintiff now alleges that the phrase "as near as practicable" provides a *municipal clerk* with discretion in only three discreet areas. Such is littered with incorrectness. Foremost, the City of Racine Common Council—not the municipal clerk--selected the locations for in-person absentee voting. Next, WEC provides examples where deviations from geographical closeness are allowable, such as when polling locations are under construction. The WEC's examples make clear that numerous considerations must be made when determining which locations are "practicable" under section 6.855. Such indicates that the phrase "as near as practicable" encompasses many different considerations that reach well-beyond accessibility to the disabled and the avoidance of political advantage, which the Plaintiff defines by means of his own statistical analysis.

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Besides the two concerns identified by the Plaintiff, many other concerns may guide the selection of polling places that would still encompass a "near as practicable" analysis. For example, this may include road construction, traffic flow, security, non-disability related accessibility, parking, the presence of other events, the presence of planned political rallies, noise concerns, or public transit routes. It is an absurd reading of the statute to require that the Common Council of the City of Racine ignore all these considerations, so long as the in-person absentee voting location is accessible to the disabled and fits the Plaintiff's preferred statistical methodology for evaluating political advantage.

When interpreting the statute, the Plaintiff wades into his own view of the legislative intent behind the statute, when he stated that "[t]he logical explanation is that the Legislature wanted early, in-person absentee voting to occur at the Clerk's office but if for some reason it could not, then the alternate location or locations should be as close to the Clerk's office as practical." Ptf. Br. p. 9. However, this is clearly an impermissible analysis. Nearly twenty years of statutory

interpretation makes clear that what "the Legislature wanted" is not the analysis that is used in the State of Wisconsin when interpreting statutes. *Kalal* cannot be clearer that "[i]t is the law that governs, not the intent of the lawgiver. . . . Men may intend what they will; but it is only the laws that they enact which bind us." *State ex rel . Kalal v. Circuit Court for Dane Cty*., 2004 WI 58, ¶ 52, 271 Wis. 2d 633, 681 N.W.2d 110 (citing Antonin Scalia, A Matter of Interpretation, 17 (Princeton University Press, 1997). Plaintiff does not even cite any extrinsic material indicating that this is the Legislature's intent, but relies instead only upon supposition. The statute cannot be interpreted under this lens.

Further, this analysis would be bereft if it failed to include the impact of subsection (5) of the statute, which permits the enactment of multiple alternate in-person absentee voting locations. In fact, it has been suggested by at least one justice of the Wisconsin Supreme Court that municipalities may have over 200 in-person absentee voting locations. *See Trump v. Biden*, 2020 WI 91, ¶ 99, 394 Wis. 2d 629, 951 N.W.2d 568 (Roggensack, C.J., dissenting) ("It is conceivable that the 200 sites […] could have become alternate absentee ballot sites.") The Plaintiff ignores this portion of the statute in its entirety because its presence necessarily proves the Plaintiff's statutory interpretation to be incorrect. When read with the idea that multiple, even over a hundred, locations may be enacted by a municipal body, the idea that each individual location must be geographically as close as it can be to the clerk's office is ludicrous. It is virtually impossible for two hundred locations to be as close as geographically possible to the clerk's office. It is highly improbable that any municipality could locate even two in-person absentee voting locations equally as close as geographically possible. The Plaintiff's preferred interpretation of the statute rejects the technical meaning of "as near as practicable," relies upon a supposition of Legislative

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intent, and is unworkable both theoretically and in practice. It must be rejected and the decision of the WEC affirmed.

B. No Partisan Advantage Was Conferred By The Use Of The Selected Sites.

The Plaintiff alleges that the City of Racine and Clerk McMenamin must conduct a statistical analysis before placing in-person absentee voting locations, despite the statute not requiring such statistical analysis and the Plaintiff's methodology being fundamentally flawed. The WEC soundly rejected this assertion and this Court should affirm that decision.

The statute states, as relevant to this argument, that "no site may be designated that affords an advantage to any political party." It does not state how that advantage is determined. It certainly does not state the Plaintiff's position, "that the sites selected should confer no partisan advantage using the political makeup of the ward where the Clerk's office is located as a baseline." Ptf. Br. p. 13. In fact, if the Legislature wanted a statistical analysis to be performed, and for that analysis to be based upon the municipality's wards, it would have stated just that. But it did not. This statistical requirement is not present within the statute, and thus the Plaintiff's read-in requirements flagrantly violate the very basics of statutory interpretation.

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The statute requires solely that the sites not be designated to afford an advantage to a political party. The in-person absentee voting locations established by the Common Council of the City of Racine did just that. The Plaintiff provides no evidence, besides his flawed statistical analysis, that demonstrates that a political advantage was given to any particular party. No voting location was located at or impermissibly near a party headquarters, a candidate headquarters, a known political rally, or any other expression of partisan activity. A plain reading of the statute suggests that these concerns are deemed "political advantage," not an out-of-date ward map that is overlayed with alleged statistics.

The Plaintiff relies solely on misguided and outdated statistical models. The statistical model incorporates old ward boundaries with new in-person absentee voting locations. As required by redistricting, the City of Racine approved new district wards on May 17, 2022. These wards were in effect for the August 9, 2022, election. The Plaintiff instead uses data from 2016, 2018, and 2020, all years of which encompass the old wards, to prove that the 2022 in-person voting locations provided partisan advantage. If a statistical analysis were required, and it were required at the ward-level (and not some other designation, such as by neighborhood or city block), it would seem prudent that such would use accurate ward boundaries.

Further, the Plaintiff wholly ignores the difference between in-person absentee voting and election day voting. Election Day voting has voters assigned to a specific polling location, whereas absentee voting at an alternate site is not confined to strict boundaries. *Compare* Wis. Stat. § 6.77 and Wis. Stat. § 6.855. Put another way, on Election Day, a voter in old ward 17 must vote at the voter's assigned polling place; whereas, if that voter chooses to vote absentee, that voter could attend any of the alternate absentee ballot sites, even those not in the voter's assigned ward, and the clerk would ensure that the voter received the correct ballot.

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Some locations are situated at the border of wards. For example, the Cesar Chavez Community Center, located at 2221 Douglas Avenue, Racine, is on the border of old ward 17 and old ward 11. While the Community Center is nominally in old ward 17, it is just as likely that voters in old ward 11 seeking to use an alternate absentee site would use this site. According to Plaintiff's data, old ward 17 votes for the Democratic Party 73% of the time, while old ward 11 votes for the Democratic Party 62% of the time. The Plaintiff reports that the City's average vote for the Democratic Party is 66%, meaning that this site services individuals in old wards that both voted more often *and* less often for the Democratic Party than the City as a whole. This is not

reflected in the Complainant's statistics and indicates that the use of statistics in this manner is fundamentally flawed. Ward boundaries are simply lines on maps, voters are free to vote at any alternate absentee site they so choose, including those closer to their home but outside their ward boundary. Plaintiff's attempt at a statistical analysis does not account for the ability of a voter to vote at an in-person absentee ballot site that is not in the voter's ward.

The Plaintiff's interpretation of prohibition against affording an advantage to a political party is far beyond the plain text of the statute, is unworkable in practice, and importantly, does not actually indicate political advantage at the *in-person absentee* voting location. The decision of the WEC must be affirmed.

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C. The Alternate Sites Were Properly Designated and Staffed.

In its entirety, Wisconsin Statutes section 6.855 is comprised of a single, lengthy sentence regarding designation requirements.

> An election by a governing body to designate an alternate site under this section shall be made no fewer than 14 days prior to the time that absentee ballots are available for the primary under s. 7.15 (1) (cm), if a primary is scheduled to be held, or at least 14 days prior to the time that absentee ballots are available for the election under s. 7.15 (1) (cm), if a primary is not scheduled to be held, and shall remain in effect until at least the day after the election.

Wis. Stat. § 6.855. While wordy, it may be broken down into components. The first portion of the statute controls when the governing body may designate the alternate absentee in-person absentee voting locations, and the second portion requires that these designations be in effect until the day after the election is held. Notably, the emphasis is on the designation, not on the operation of the in-person absentee voting location. This statute is specific, as it states the designation "shall remain in effect." It does not say "shall remain in operation." It does not say "shall be open to voting." Nor does it say "shall be staffed." Again, the Plaintiff attempts to read additional requirements into the statute. The decision of the WEC to reject these additional requirements must be affirmed.

It would be a legal impossibility to operate an in-person absentee voting location in the manner proposed by the Plaintiff, which indicates that his statutory interpretation is unreasonable. Specifically, if the Plaintiff is advocating for all designated in-person absentee voting locations to be operated the full fourteen days before the election, and the day after the election, this would require municipalities to staff in-person absentee voting locations on days they are legally prohibited from being used.

In-person absentee voting is prohibited on the Monday preceding election day and on election day itself. Wis. Stat. § 6.86(1)(b). ("If [the absentee ballot application] is made in person, the application shall be made no earlier than 14 days preceding the election and no later than the Sunday preceding the election.") Nor can an individual vote the day after the election, absentee or otherwise. It would be an absurd interpretation of the statute to read this as a mandate to operate an in-person absentee voting location outside of the designated period in which in-person absentee voting is permitted.

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Instead, a reasonable reading of the statute requires reading the statute as a whole. It is clear that the statute requires that the same in-person absentee voting locations be designated for both the primary *and* general election, and that the designation does not expire until the end of the entire voting period. In other words, the plain reading of this statute prohibits a governing body from enacting polling locations in some places for in-person absentee voting during the primary election and then changing those locations for in-person absentee voting during the general election. No allegation has been brought that Clerk McMenamin or the City of Racine had different voting locations between a primary and a general election. Further, the Plaintiff has not established that this is an operation requirement, and not a designation requirement, as plainly stated within the statute. Accordingly, this Court must affirm the decision of the WEC.

D. No Voting Occurred in The Clerk's Office And Storing Ballots Is Not A Function Related To Voting And The Return Of Absentee Ballots.

Wisconsin Statutes section 6.855(1) states in part, 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." The Plaintiff argues that Clerk McMenamin violated this directive in two ways. First, by establishing an in-person absentee voting location that was not in her office, but elsewhere in City Hall. Second, that the storage of election materials constitutes either "voting" or the "return of absentee ballots," though it is not clear under which term the Plaintiff wishes storage to fall. Both arguments neglect to interpret the statute based upon the plain language contained within and thus should be rejected. Accordingly, the decision of the WEC should be affirmed.

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Regarding his first argument, the Plaintiff wishes to characterize the entire City Hall building as the municipal clerk's office without providing any authority under which he may do so. It would be a surprise to the Department of Public Works that their offices are deemed the municipal clerk's office. It would be a surprise to every government employee in City Hall that all of the conference rooms, hallways, bathrooms, and staircases are deemed a part of the municipal clerk's office. This interpretation also necessarily contradicts the argument addressed under section 1.B, in which the Plaintiff argues that the voting locations are too far from the municipal clerk's office. The Plaintiff cannot have it both ways-- that locations dispersed within the community are disallowed under this scheme and also that locations near to the municipal clerk's office are disallowed.

The plain language of section 6.855 states "in the office of the municipal clerk". It does not state "within the same building as the office of the municipal clerk." Plaintiff provides no authority for his altering of this statute. Likewise, he provides no authority that the term "office of the municipal clerk" is a term of art that encompasses the entire city hall building. There is an

interesting potential argument regarding the periphery of the clerk's office, i.e., whether the term "clerk's office" means the literal individual office that the individual municipal clerk works out of every day, or whether the term incorporates the broader department area that is titled "clerk's office." However, that did not occur in this case, leading that question to be resolved another day. The Plaintiff's brief admits that the clerk's office and the location within City Hall designated for in-person absentee voting were in different rooms, and even on different floors. Ptf. Br. at p 16. Statutory interpretation begins with the language of the statute. If the meaning of the statute is plain, the inquiry stops. *Kalal,* 2004 WI 58, ¶ 45. The plain meaning of the language "office of the municipal clerk" clearly means "the office of the municipal clerk" and not the entire building in which the municipal clerk's office is located.

In his second argument, the Plaintiff alleges that storing ballots is akin to "voting" or the "return of absentee ballots." However, the Plaintiff cites no authority for this interpretation. At best, the Plaintiff argues that storage of ballots is part of a "function related to voting," yet he provides no authority supporting this supposition. A plain reading of the phrase "function related to voting" would encompass voting itself, as well as the issuance of in-person absentee ballots. It clearly is not all encompassing of every single act that may occur regarding an election, or the accompanying phrase "return of absentee ballots" would be read as surplusage, which is a prohibited result under Wisconsin's methods of statutory interpretation. *Kalal,* 2004 WI 58, ¶ 46. It is not a plain reading of the statute to incorporate the storage of ballots as a "function related to voting."

Further, the Plaintiff's interpretation, when accompanied by his other arguments, results in a number of absurdities. It is an absurd result that the municipal clerk would be prohibited from analyzing how best to secure absentee ballots, and instead would be required to store them in

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potentially insecure locations that may be used for voting, like a high-traffic community center or a private building that is not fully under the municipal clerk's control (e.g. a VFW Hall). When you combine this assertion with Plaintiff's argument regarding the selection of sites found in Section 1.A of his brief, the result would be that the municipal clerk may be *forced* to select an unsecure site because it is the location nearest to the municipal clerk's office, especially considering the Plaintiff's assertion that the only two statutory factors to consider are disability accessibility and the statistical model of alleged partisan distribution. It is irrational to consider that the Legislature would highly constrain the selection of in-person absentee locations, as the Plaintiff describes, through implication instead of clear statutory language.

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E. The Statutes Do Not Require the Voting to Be Done Within A Static Building.

The WEC was correct when it determined that Wisconsin Statute section 5.25 does not prohibit the use of a mobile election unit, such as the one used by the City of Racine. Section 5.25 includes two specific exemptions to the public building requirement. The first, allowing for deviation from the use of a public building if impracticable and, the second, allowing for a nonpublic building to be used if it better serves the needs of the electorate. Further, section 5.25 does not contemplate in-person absentee voting locations, only traditional polling places used on election day. The correct statute to determine the appropriate location for an in-person absentee voting location is section 6.855, which contains no building requirement. Regardless, even if section 5.25 does apply, the City of Racine's use of the MEU falls squarely within the first exemption, because the use of a public building was impracticable for the City of Racine, as determined by the Common Council of the City of Racine.

While a public building is likely the most commonly used location for in-person absentee voting, the WEC recognized that numerous other clerks have used unique and non-static structures

in the past. R. at 125. Further, the WEC found that a reasonable interpretation of the statute requires that the needs of clerks be recognized when administering the location of in-person absentee voting locations. The Common Council of the City of Racine determined that, due to the large amount of election equipment required to run an election, it was impracticable to use a public building and to instead use the MEU to administer in-person absentee voting. This was within the scope of Wisconsin Statutes section 5.25, and this determination should not be overturned.

The Plaintiff argues in a footnote that the WEC's determination in a prior election complaint that the MEU was inaccessible to disabled individuals consists of reversible error. While this is a correct characterization of the WEC determination in *Weidner et al. v. Coolidge*, EL 22-24, the City of Racine has remedied the accessibility of the MEU. If reversed solely on accessibility grounds, the City of Racine and Clerk McMenamin would use the accessible version of the MEU at the next election, and the Plaintiff would be back to filing another WEC complaint. Further, the Plaintiff did not make this argument at the administrative level, nor was it an integral part of the WEC decision. Thus, the decision reached by the WEC must be affirmed.

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II. THE COURT SHOULD IGNORE PLAINTIFF'S DELEGATION ARGUMENT

As determined on March 15, 2023, this Court's competency only extends under Wisconsin Statutes section 5.06(9), and this Court is limited to the evidence presented before the WEC. After evaluating the briefing of the parties and the record developed before the WEC, the Court determined that it may only "affirm, reverse, or modify the determination of the commission." Wis. Stat. § 5.06. The Court then determined that it shall strike each and every exhibit from the Plaintiff's Complaint, including Exhibit I, an alleged delegation order issued on February 27, 2020.

See. Dkt. 3, Ex. I. Yet, the Plaintiff insists once again to make arguments outside the scope of the Court's competency, whereby attempting to induce this Court into making a reversible error.

After exacting review of the record certified by the WEC, it appears that a copy of the "Delegation Order," as it is referred to by the Plaintiff, was not included in any material submitted by the Plaintiff to the WEC during the pendency of the administrative action. Further, the date on this Delegation Order predates the filing of the Plaintiff's WEC complaint by over two years, indicating that this is not recently discovered evidence. The crux of the Plaintiff's allegations within this second section of his brief is premised upon document, and this document has already been excluded by this Court. This Court should not revisit the determination made to strike each and every exhibit from the Plaintiff's complaint.

Without the Delegation Order exhibit, the Plaintiff cannot articulate whether the determination made upon the Plaintiff's election complaint was set forth through impermissible delegation, permissible delegation, an opinion written by the Commissioners and signed by WEC Administrator Wolfe, an opinion in which an oral discussion was had between Administrator Wolfe and the Commission and the decision reflects the consensus of the commissioners, or any number of ways this decision may have been reached. Whether this type of delegation is permissible may be an interesting question, but it is a question far beyond the scope of an appeal under Wisconsin Statutes section 5.06. Perhaps the Plaintiff should have submitted this document during the pendency of the complaint before the WEC or perhaps he should have filed a "clean" challenge to what he believes to be an error in rule promulgation, but he did not. Without the exhibit, the Plaintiff cannot cogently craft an argument that any delegation occurred within this case. Accordingly, this argument should be rejected without consideration.

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To the extent that the Plaintiff wishes to challenge the ability of the WEC to perform delegation, perhaps he should challenge that ability through a "clean challenge," not a collateral attack on a WEC decision reached under section 5.06. Even if this Court were to find that the WEC's alleged delegation is improper, under section 5.06 this Court cannot use extrinsic evidence to reverse the decision of the WEC. Likewise, the text of section 227.40 does not provide for the ability of this Court to reverse an administrative determination made under section 5.06 even on a successful challenge to agency rulemaking.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Wisconsin Elections Commission and find that Clerk McMenamin properly administered the August 9, 2022, election through her use of the Mobile Elections Unit.

Dated this 27th day of October, 2023.

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Respectfully submitted,

Electronically signed by Ian R. Pomplin

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