STATE OF WISCONSIN CIRCUIT COURT RACINE COUNTY
BRANCH 4

KENNETH BROWN,

Plaintiff,

v. Case No. 22-CV-1324

WISCONSIN ELECTIONS COMMISSION and TARA MCMENAMIN,

Defendants,

and

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

Intervenors.

RESPONSE BRIEF OF THE WISCONSIN ELECTIONS COMMISSION

Respectfully submitted,

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INTRODUCTION

Plaintiff Kenneth Brown, an elector of Racine County, asks this Court to opine broadly about an election that occurred over a year ago, seeking a judicial declaration about "whether the August 2022 primary election was conducted lawfully." (Doc. 82:7.)

The controlling statute, however, does not ask so broad a question. *See* Wis. Stat. § 5.06(9). Rather, by statute the Court's review is confined to whether the Wisconsin Elections Commission abused its discretion when it declined to issue a noncompliance order to Racine City Clerk Tara McMenamin about her administration of the August 2022 primary in Racine.

But this Court need not reach even that narrow issue because Brown's appeal suffers multiple, threshold defects. For one, Wis. Stat. § 5.06(8) authorizes judicial review only of "an order issued under [Wis. Stat. § 5.06(6)]." Here, however, there is no such order—indeed, that's what Brown is complaining about: he wanted the Commission to issue Clerk McMenamin a noncompliance order, but the Commission declined to do so. With no reviewable order, Brown has no right under the statute to bring this appeal.

If the Court looks past that defect, Brown faces another fatal defect: he lacks standing for his challenge. His arguments rest on McMenamin's alleged violations of Wis. Stat. § 6.855, but Brown makes no effort to show that that statute "protects, recognizes, or regulates" his individual interests.

Friends of Black River Forest v. Kohler Co., 2022 WI 52, ¶ 25, 402 Wis. 2d 587, 977 N.W.2d 342, *recon. Denied sub nom. Friends of Black River Forest v. DNR*, 2022 WI 104. Even if he now tried to make that showing on reply, nothing in the text of Wis. Stat. § 6.855 supports a private right of action like Brown asserts.

If the Court reaches the merits, the Commission's decision not to issue a noncompliance order was reasonable and should be sustained. While Brown offers his competing view of what should have occurred in the administration of Racine's elections, he fails to establish that the Commission abused its discretion by not taking the extraordinary step of ordering the clerk to conduct the election differently. Given the narrow review provided by statute, Brown has not shown that reversal is warranted.

For any of the multiple threshold deficiencies, or on the merits, Brown's challenge should be dismissed.

Brown also argues for reversal of the Commission's decision based on the contention that it was issued pursuant to an invalid delegation order allowing its administrator to resolve complaints submitted under Wis. Stat. § 5.06. This second claim should be dismissed because it is procedurally defective. Moreover, because the delegation order is based on a lawful administrative rule, it is valid.

BACKGROUND

This case arises from a complaint that Brown filed with the Commission pursuant to Wis. Stat. § 5.06. (*See* Doc. 56–59 (administrative record).) Brown alleged that the Clerk of the City of Racine violated multiple parts of Wis. Stat. § 6.855(1) in the course of administering the August 2022 primary election. (*See* Doc. 56:3–48.)

I. The statute – Wis. Stat. § 6.855.

Wisconsin Stat. § 6.855 governs the designation and administration of alternate absentee ballot sites. The statute authorizes the governing body of a municipality (such as a city council) to "designate a site other than the office of the municipal clerk . . . as the location from which electors of the municipality may request and vote absentee ballots and to which voted absentee ballots shall be returned by electors for any election." Wis. Stat. § 6.855(1). The governing body "may designate more than one alternate site under [this provision]." Wis. Stat. § 6.855(5). The municipal clerk plays no role in designating the alternate sites. *See* Wis. Stat. § 6.855.

If the governing body elects to designate alternate sites, the designations must account for three factors relevant in this case. *See* Wis. Stat. § 6.855(1), (4). The designated sites must be "as near as practicable to the office of the municipal clerk," Wis. Stat. § 6.855(1); "no site may be designated that affords an advantage to any political party," Wis. Stat. § 6.855(1); and every alternate

site "shall be accessible to all individuals with disabilities," Wis. Stat. § 6.855(4).

Additionally, any alternate-site designation the governing body makes "shall be made no fewer than 14 days prior to the time that absentee ballots are available for [the election for which the designations will be in place], and shall remain in effect until at least the day after the election." Wis. Stat. § 6.855(1).

Finally, if the governing body elects to designate alternate sites, "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." Wis. Stat. § 6.855(1).

II. The Racine City Council designates multiple sites as eligible for in-person absentee voting in 2022, and the Racine City Clerk selects active sites.

In December 2021, the Racine City Council designated over 150 alternate sites as eligible to be used for in-person absentee balloting in the City of Racine in 2022. (*See* Doc. 56:8, 34.)

Following the Council's designation, the Racine City Clerk (Respondent McMenamin) selected 22 sites to be used for in-person absentee voting for the August 2022 primary election. (*See* Doc. 56:6.)

The Clerk established a schedule for the selected in-person absentee voting sites. For the alternate site closest to the Clerk's office (inside City Hall),

in-person absentee voting would be available regular business days and hours, and two Saturdays during the in-person absentee voting period. (Doc. 56:7.) For the 21 remaining alternate sites, the Clerk established three-hour blocks that each site would be open. (Doc. 56:6–7.) On each day during the in-person absentee voting period, two alternate sites would be open each day.[1] (Doc. 56:6–7.)

During the time that each absentee voting site was open, Racine's Mobile Voting Unit would be at the site and voters could request and vote absentee ballots at the site, inside the Mobile Voting Unit. (Doc. 56:7, 39–49.)

III. Brown's complaint with the Wisconsin Elections Commission.

On August 10, 2022, Brown filed a complaint with the Commission alleging that Clerk McMenamin's selection of multiple alternate in-person absentee voting sites violated multiple elements of Wis. Stat. § 6.855. Much of Brown's "evidence" in support of his complaint came from a report prepared by his law firm. (*See* Doc. 56:39–50.)

First, Brown alleged that McMenamin violated the requirement that alternate sites be "as near as practicable to the office of the municipal clerk," since some of the City's Council's designated sites were closer to the Clerk's

[1] One site, the Racine Art Museum, was open twice during the absentee voting period. (Doc. 56:6.)

office than the sites that McMenamin chose to use for in-person absentee sites. (*See* Doc. 56:8 (quoting Wis. Stat. § 6.855(1)).)

Second, Brown claimed that all the alternate sites afforded advantage to one political party or the other. (Doc. 56:9.) His argument was based on the premise that the baseline for determining partisan advantage is the political makeup of the ward in which the clerk's office is located: i.e., if the clerk's-office ward contains 60/40 registered Democratic voters vs. Republican voters, any in-person absentee site must be located either (A) in the clerk's-office ward, or (B) in another ward with the exact spread of registered Democratic and Republican voters. (*See* Doc. 59:39–40.) Brown thus claimed that locating any alternate site anywhere other than that conferred impermissible partisan advantage. (*See* Doc. 56:6, 44–49; 59:39–40.)

Third, Brown argued that one of the alternate in-person absentee ballot sites (located in City Hall) violated Wis. Stat. § 6.855(1) because the Clerk's Office is also in City Hall, and the statute prohibits certain voting-related activities from being conducted "in the office of the municipal clerk" if alternate sites are used. Brown argued that allowing the alternate City Hall site would make a "mockery" of the statute.[2] (Doc. 56:9–10.)

[2] Brown also argued in his reply brief to the Commission that the clerk violated the statute by using her office to store absentee ballots collected from the alternate sites. (Doc. 59:42.)

Fourth, he argued that the hours of many of the alternate sites violated the requirement in Wis. Stat. § 6.855(1) that a governing body's designation of an alternate site "shall remain in effect until at least the day after the election," since the sites were not used through "the day after the election." (Doc. 56:10.)

Fifth and finally, Brown argued that using a mobile voting unit at the alternate absentee ballot sites violated multiple statutes, which he argued collectively require that voting occur only "in a building." (Doc. 56:11–13.)

Following receipt of Brown's complaint, the Commission called for a response from Clerk McMenamin and allowed a reply from Brown. (Doc. 57:2–15; 59:33–46.)

IV. The Commission's decision declining to issue a noncompliance order.

After hearing from both parties on the alleged violations of Wis. Stat. § 6.855, the Commission issued a decision explaining that it did not find grounds to issue Clerk McMenamin an order of noncompliance. (*See* Doc. 59:47–60.)

A. "As near as practicable."

First, the Commission found that Brown did not carry his burden to establish that McMenamin violated the requirement that alternate sites be located "as near as practicable" to the clerk's office. (Doc. 59:55 (quoting Wis. Stat. § 6.855(1)).) Because the statute authorizes multiple

alternate sites, the Commission explained that "practicability" under the statute necessarily required consideration of more than mere physical proximity to the clerk's office; otherwise, multiple alternate sites all would have to be clustered near the clerk's office. (Doc. 59:55.) The Commission explained that the clerk's consideration of other factors—such as whether the alternate sites were "politically equitable, geographically equal, and otherwise lawful in their distribution"—reasonably reconciled the "as near as practicable" requirement with the statutory allowance of multiple sites. (Doc. 59:55.)

The Commission also rejected Brown's argument that alleged voter confusion supported his "practicability" argument. The statutes vest local election officials with authority and discretion to make these types of decisions, and without some evidence of actual confusion or impracticability of the alternate sites, the Commission concluded that Brown had failed to establish noncompliance with Wis. Stat. § 6.855(1) on this ground. (Doc. 59:55.)

B. Partisan advantage.

The Commission also explained that Brown failed to carry his burden to show that the alternate sites afforded partisan advantage, and thus declined to find noncompliance on that allegation. (Doc. 59:55.)

The Commission stated that, as a factual matter, McMenamin had presented "compelling arguments as to the inaccuracy of the Complainant's data analysis." (Doc. 59:55.) Given the "fact-intensive" nature of showing actual partisan advantage, the Commission explained that Brown did not make the requisite showing that any site actually afforded partisan advantage. (Doc. 59:55.) Given the lack of factual support for any actual partisan advantage, the Commission rejected Brown's legal theory that the alternate sites conferred partisan advantage as a matter of law merely by being located in a ward other than the clerk's-office ward or one with an identical political makeup. (Doc. 59:55–56.)

C. Use of a conference room in City Hall as an alternate site.

The Commission next rejected Brown's argument that using a conference room in City Hall violated Wis. Stat. § 6.855(1)'s prohibition on conducting any function voting-related function "in the office of the municipal clerk" if those functions are being conducted at an alternate site. (Doc. 59:56–57.)

The Commission determined that Brown failed to carry his burden to show a violation of the statute. (Doc. 59:56–57.) First, the Commission pointed out that Brown had not adequately explained why the separate conference room should be construed to be "in the office of the municipal clerk," given that the room was not, in fact, in the office of the clerk and was instead in a separate part of City Hall. (Doc. 59:57.) Second, the Commission also determined that

the chosen conference room gave practical effect to the statutory requirement regarding sites being "as near as practicable" to the clerk's office. (Doc. 59:57.) In light of that requirement, and the fact that the conference room was not "in the office of the municipal clerk," the Commission concluded that it would not issue McMenamin a noncompliance order. (Doc. 59:57.)

The Commission also rejected Brown's argument—raised on reply—that McMenamin violated the statute by storing absentee ballots in the clerk's office after they were collected from the absentee sites. (Doc. 59:57–58.) In addition to noting the tardiness of the argument, the Commission questioned whether storage of ballots constituted a "function related to voting or return of absentee ballots." (Doc. 55:57.) And ultimately, the Commission declined to interfere in the clerk's determination of how ballots should be most safely stored, finding that "[t]hat critical decision needs to rest with the officials responsible for safeguarding and delivering ballots." (Doc. 59:58.)

D. Requirement that designation of alternate sites remain in effect "until at least the day after the election."

The Commission also did not find a violation based on Brown's theory that the alternate sites are unlawful because they do not remain in use "until at least the day after the election." (Doc. 59:58–59.) For one thing, the Commission concluded that the statutory text requires a "designation" to remain in effect through the day after the election, not that any designated

site actually be used for voting purposes "until at least the day after the election." (Doc. 59:58–59.)

Not only did this interpretation better align with the statutory text, the Commission explained that it also comported with practical considerations—namely, that alternate sites often are not open for the same number of hours or days, such that the majority of alternate sites would be in violation of the statute under Brown's reading. (Doc. 59:59.) The Commission also noted again that Brown's proffered 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 on matters such as days and hours of operation for in-person absentee ballot sites. (Doc. 59:59.)

Given these interpretations and the lack of any evidence that Racine had not maintained the designations for the required statutory period, the Commission declined to find noncompliance on this basis, as well. (Doc. 59:59.)

E. Use of a mobile voting unit.

Finally, the Commission rejected Brown's arguments that the use of a mobile voting unit at absentee ballot sites violated Wis. Stat. § 6.855 and a handful of other elections laws, which Brown claimed prohibited voting other than inside a building. (*See* Doc. 59:59–60.) The Commission first noted that "compliance determinations" on this issue "require fact-specific review," and,

for example, the Commission had found in a separate complaint that Racine's use of a mobile voting unit did violate state and federal accessibility requirements for differently abled voters. (*See* Doc. 59:59.)

However, the Commission concluded that Brown failed to establish that a per se violation of Wis. Stat. § 6.855 occurs merely because the distribution and voting of absentee ballots does not occur inside a building. (Doc. 59:59–60.) In declining to find a per se violation, the Commission pointed to the discretion the statutes vest in local election administrators to determine how best to "serve[ ] the needs of the electorate," including discretion about where to locate polling places. (Doc. 59:60 (quoting Wis. Stat. § 5.25(1)).)

The Commission thus concluded that Brown failed to demonstrate that "a violation of law or abuse of discretion has occurred with regard to the City of Racine's use of alternate absentee voting sites and mobile facilities." (Doc. 59:60.)

V. The current litigation.

Brown filed an appeal to this Court pursuant to Wis. Stat. § 5.06(8). Clerk McMenamin moved to dismiss (Doc. 11–12), and multiple parties moved to intervene (Doc. 18–19, 25–26, 45–48), which this Court granted (*see* Doc. 64–65, 71).

On the motion to dismiss, the Court agreed with Clerk McMenamin that issues related to the November 2022 general election were irrelevant and beyond the scope of the complaint and thus not properly before the Court. (Doc. 82:16–17.) The Court also held that Brown's requests for declaratory relief are beyond the Court's authority in this case, and that the Court would "limit [its] rulings" pursuant to Wis. Stat. § 5.06. (Doc. 82:16–18.) Finally, the Court made clear that it would not issue any permanent injunctive relief, since "[a]ny injunctive relief must come from the WEC," if at all. (Doc. 82:18.)

The Court then set the current merits briefing schedule. (*See* Doc. 85.)

STANDARDS GOVERNING JUDICIAL REVIEW OF THE COMMISSION'S DECISION

Wisconsin statutes dictate the standards by which courts review a decision by the Commission under Wis. Stat. § 5.06. *See* Wis. Stat. §§ 5.06(9); 227.57.

First, appeal may be taken only from "an order" issued by the commission "requir[ing] any election official to conform his or her conduct to the law, restrain[ing] an official from taking any action inconsistent with the law or requir[ing] an official to correct any action or decision inconsistent with the law." Wis. Stat. § 5.06(6), (8).

When reviewing an order of the Commission, a reviewing court "may not conduct a de novo proceeding with respect to any findings of fact or factual matters upon which the commission has made a determination, or could have made a determination if the parties had properly presented the disputed matters to the commission for its consideration." Wis. Stat. § 5.06(9).

Applying this approach, the court's review is limited to "summarily hear[ing] and determine[ing] all contested issues of law," and must "accord[ ] due weight to the experience, technical competence and specialized knowledge of the commission, pursuant to the applicable standards for review of agency decisions under s. 227.57." Wis. Stat. § 5.06(9). The court's review "shall be confined to the record," Wis. Stat. § 227.57(1), which refers to the administrative record that was before the agency when it made the decision being challenged. *See Holtz & Krause, Inc. v. DNR*, 85 Wis. 2d 198, 210, 270 N.W.2d 409 (1978); *cf. Wis. Emp. Rels. Bd. v. J.P. Cullen & Son*, 253 Wis. 105, 107, 33 N.W.2d 182 (1948) (under comparable statutory procedure for judicial review of administrative decisions, recognizing that "[t]he court is without power to go beyond the record made before the board.").

When reviewing agency decisions involving an exercise of discretion, a court's review is governed by Wis. Stat. § 227.57(8), which provides that "the court shall not substitute its judgment for that of the agency on an issue of discretion." This means that a reviewing court "may reverse only if the

agency failed to exercise its discretion or if it exercised its discretion in violation of the law or agency policy or practice." *Galang v. State Med. Examining Bd.*, 168 Wis. 2d 695, 699–700, 484 N.W.2d 375 (Ct. App. 1992). This is based on the recognition that where the Legislature "has conferred discretionary power on a legislative body or administrative officer, a court will not set aside an exercise of that power unless it is clear that the power has been abused or exercised beyond the limits conferred by the legislature." *State ex rel. Knudsen v. Bd. of Educ., Elmbrook Sch., Joint Common Sch. Dist. No. 21*, 43 Wis. 2d 58, 67, 168 N.W.2d 295 (1969). Courts likewise "cannot compel [the] officer to perform a discretionary act in any particular manner," and will therefore limit any decision to assessing whether the official undertook the action with discretion and reasoning "and not as a result of arbitrary conduct," or simply failed to exercise discretion, which also "constitutes the abuse of discretion." *Id.*; *see also Robertson Transp. Co. v. PSC*, 39 Wis. 2d 653, 661, 159 N.W.2d 636 (1968) ("Arbitrary action is the result of an unconsidered, wilful or irrational choice, and not the result of the 'sifting and winnowing' process.").

On legal questions, a reviewing court shall determine all contested issues of law and "shall affirm, reverse or modify the determination of the commission." Wis. Stat. § 5.06(8); *see also* Wis. Stat. § 227.57(5) (court may set aside or modify the agency action only "if it finds that the agency has erroneously interpreted a provision of law and a correct interpretation compels

a particular action," or the court may "remand the case to the agency for further action under a correct interpretation of the provision of law"). This standard means that a reviewing court "will generally uphold" an agency's decision unless the challenger shows that "the agency has erroneously interpreted a provision of law." *Clean Wis., Inc. v. DNR*, 2021 WI 72, ¶ 9, 398 Wis. 2d 433, 961 N.W.2d 611.

Ultimately, a reviewing court "shall affirm the agency's action" "[u]nless the court finds a ground for setting aside, modifying, remanding or ordering agency action or ancillary relief under a specified provision of [Wis. Stat. § 227.57]." Wis. Stat. § 227.57(2).

ARGUMENT

I. Brown has failed to follow the statutory procedures under Wis. Stat. § 5.06 and has failed to challenge a reviewable decision.

Brown's appeal should be dismissed at the threshold because he failed to follow the procedures for exhaustion and judicial review established in Wis. Stat. § 5.06(2), (6), and (8). Rather than following those procedures, he has challenged a decision that is not reviewable by statute, and therefore his current complaint is barred.

Wisconsin Statutes § 5.06 authorizes two pathways for complainants to proceed to court following the Commission's disposition of a complaint under the statute. First, under Wis. Stat. § 5.06(2), a complainant "may commence

an action or proceeding to test the validity of" decisions or actions of an election official on any matters specified in Wis. Stat. § 5.06(1), but *only after* "filing a complaint" with the Commission and *after* "disposition of the complaint by the commission." Wis. Stat. § 5.06(2). This is an exhaustion requirement: "[W]here a statute sets forth a procedure for review of administrative action and court review of the administrative decision, such remedy . . . must be employed before other remedies are used." *Nodell Inv. Corp. v. City of Glendale*, 78 Wis.2d 416, 422, 254 N.W.2d 310 (1977).

This means that a complainant under Wis. Stat. § 5.06(1) must follow the procedures in sub. (1) & (2) before filing a separate action against an election official as contemplated under sub. (2) (for example, an action for mandamus). The triggering event for a separate action against an election official is "disposition of the complaint by the commission." Wis. Stat. § 5.06(2).

The other way a complainant may come to court is established under Wis. Stat. § 5.06(8), which authorizes judicial review of "an order issued under sub. (6)." Subsection (6) authorizes the Commission, if it finds a violation of the election laws, to issue an "order . . . requir[ing] any election official to conform his or her conduct to the law, restrain[ing] an official from taking any action inconsistent with the law or requir[ing] an official to correct any action or decision inconsistent with the law." Wis. Stat. § 5.06(6). Under this second procedure for coming to court, certain parties who are "aggrieved by an order

issued under sub. (6)" may seek judicial review of the order. Wis. Stat. § 5.06(8).

Brown has not followed either of the two available procedures. He has not proceeded against McMenamin in a separate action under sub. (2). Understandably so, since under that approach he would be required to prove a violation of Wis. Stat. § 6.855(1) under, for example, the demanding test for mandamus relief, which requires a plaintiff to prove (among other things) that that the respondent violated a "positive and plain" legal duty and that the plaintiff "will be 'substantially damaged'" by the failure to perform that duty. *State ex rel. Zignego v. WEC*, 2020 WI App 17, ¶ 30, 391 Wis. 2d 441, 941 N.W.2d 284 (quoting *Lake Bluff Hous. Partners v. City of S. Milwaukee*, 197 Wis. 2d 157, 170, 540 N.W.2d 189 (1995)), *aff'd as modified*, 2021 WI 32, 396 Wis. 2d 391, 957 N.W.2d 208.

Brown's appeal also does not come within the narrow statutory procedure for judicial review of "an order under sub. (6)," as there is no such order (*see* Doc. 59:60)—indeed, Brown's entire case takes issue with the fact that there is no such order.

Neither the procedure under sub. (2) nor that under sub. (8) authorize a complainant to challenge a decision by the Commission *declining* to issue an order under sub. (6), just like the statutes do not authorize an action against

the Commission under sub. (2) if it would "conclude[ ] its investigation without a formal decision." Wis. Stat. § 5.06(2).

The lack of a reviewable order is dispositive and deprives this Court of jurisdiction. "[O]rders of administrative agencies are not reviewable unless made so by statute." *Container Life Cycle Mgmt., LLC v. DNR*, 2022 WI 45, ¶ 28, 402 Wis. 2d 337, 349, 975 N.W.2d 621 (quoting *Waste Mgmt. of Wis., Inc. v. DNR*, 128 Wis. 2d 59, 87, 381 N.W.2d 318 (1986)). And "[w]here a specified method of review is prescribed by the legislature, that method is exclusive." *Graney v. Bd. of Regents of Wis. Sys,*, 92 Wis.2d 745, 755, 286 N.W.2d 138 (Ct. App. 1979)). If a party attempts to seek judicial review "from a nonappealable order, the court lacks jurisdiction for any purpose, except to dismiss the action." *Container Life Cycle Mgmt., LLC*, 402 Wis. 2d 337, ¶ 28.

Because Brown seeks judicial review from the *lack* of an order directed at McMenamin finding a violation of Wis. Stat. § 6.855(1), this Court is without jurisdiction to take any action on Brown's appeal,[3] "except to dismiss the action." *Container Life Cycle Mgmt., LLC*, 402 Wis. 2d 337, ¶ 28.

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[3] *Kuechmann v. Sch. Dist. of La Crosse*, 170 Wis. 2d 218, 222, 487 N.W.2d 639 (Ct. App. 1992), is not to the contrary. That case involved a complaint for declaratory relief filed in court "two days before the Elections Board rendered its final decision"—i.e., without awaiting the disposition of the administrative complaint under Wis. Stat. § 5.06(2). The court of appeals therefore held that the declaratory-judgment action was barred by failure to follow the statutory procedures. *See id.* at 223. Insofar as *Kuechmann* might be read to authorize judicial review of something other than "an order issued under sub. (6)," that reading would be inconsistent with the statute. Wis. Stat. § 5.06(8).

Brown may argue that the Commission's decision declining to find a violation included a notice of appeal rights (*see* Dkt. 59:60), and that the decision is thus necessarily reviewable. Case law is directly to the contrary, recognizing that "the fact that [agency] order in this case attached a notice of the manner and conditions for obtaining judicial review . . . does not mean that the order is [subject to judicial review]." *Sierra Club v. DNR*, 2007 WI App 181, ¶ 14, 304 Wis. 2d 614, 736 N.W.2d 918. So while that notice "may well have prompted" Brown to file this complaint for judicial review, the notice cannot transform an unreviewable decision into one that comes within the statute authorizing judicial review. *See id.* At bottom, Wis. Stat. § 5.06(8) controls and does not authorize judicial review of the decision here.

II. Brown lacks standing to challenge the Commission's decision not to issue a noncompliance order to the Racine City Clerk.

Even if the Commission's decision were construed as reviewable under Wis. Stat. § 5.06(8), Brown is not "aggrieved" by the Commission's decision not to issue an order and therefore lacks standing to bring this challenge. *See Friends of Black River Forest*, 402 Wis. 2d 587, ¶¶ 25–28.

To establish that he is "aggrieved," Brown is required to show that he suffered "an injury 'to an interest which the law recognizes or seeks to regulate or protect.'" *Id.* ¶ 28 (quoting *Waste Mgmt. of Wis., Inc. v. DNR*, 144 Wis. 2d 499, 505, 424 N.W.2d 685 (1988)). Brown makes no attempt to do so and his

appeal could be rejected on that basis alone. *Id.* ¶¶ 26, 31 (recognizing that challenger bears burden "to show" that agency action had "direct effect on his legally protected interests" (quoting *Wis.'s Env't Decade, Inc. v. PSC*, 69 Wis. 2d 1, 9, 230 N.W.2d 243 (1975))).

Even if Brown would try to make this showing on reply, he would be unable to establish that Wis. Stat. § 6.855 grants him a "legally protectable interest" or that the statute otherwise recognizes, regulates, or protects any other of Brown's individual interests. *See Friends of Black River Forest*, 402 Wis. 2d 587, ¶ 36. Rather, the statute focuses on administrative features of the in-person absentee voting process, requiring the "governing body of a municipality" to take certain steps to designate in-person absentee sites, and imposing certain constraints on that body's decision making (i.e., sites must be "as near as practicable" to clerk's office; alternate sites may not afford "advantage to any political party"). *See* Wis. Stat. § 6.855(1); *cf. Friends of Black River Forest*, 402 Wis. 2d 587, ¶¶ 35–45.

The statute is thus comparable to the multiple statutes at issue in *Friends of Black River Forest*, none of which, the court held, supported an individual challenger's standing. *See id.* ¶¶ 31–45. In that case, the challengers pointed to multiple statutes and administrative rules about the administration of state parks and public lands, and argued that a decision by the Wisconsin Natural Resources Board violated their rights under those statutes and rules.

See id. The supreme court rejected their claims, holding that they lacked standing to challenge the Board's decision because none of the laws "protect, recognize, or regulate the interests of private parties who may wish to challenge agency action under them." *Id.* ¶ 43.

The same analysis applies here. Like the general park-administration laws in *Friends of Black River Forest*, there is "nothing in the text [of Wis. Stat. § 6.855 that] protects, recognizes, or regulates any person's interest in [election administration] or contemplates a challenge to agency action related [thereto]." *Id.* ¶ 34. Thus, just like the challenger in that case, Brown "lacks standing to challenge the [Commission's] decision" about McMenamin's administration of its absentee election procedures and his complaint should be dismissed on this basis. *See id.*

III. The Commission reasonably declined to issue a noncompliance order based on Brown's allegations.

As described above, the Commission provided a comprehensive explanation of its reasoning for declining to issue McMenamin a noncompliance order. (*See* Doc. 59:47–60.) If this Court reaches the merits of Brown's current claims, each of the Commission's grounds was reasonable and consistent with both the requirements of Wis. Stat. § 6.855 and the discretion vested in the Commission under Wis. Stat. § 5.06.

A. The Commission reasonably found that Brown's complaint failed to support a noncompliance order.

Throughout its decision, the Commission acknowledged that Wisconsin election statutes vest local officials with substantial discretion on how to administer elections in their municipality.[4] (*See* Doc. 59:55–60.) This was evident, for example, in the Commission's discussion of Brown's argument about whether the selected absentee balloting sites were actually "as near as *practicable*" to the clerk's office. (*See* Doc. 59:55 (quoting Wis. Stat. § 6.855(1).) The Commission explained that the term "practicability" allows the decisionmaker substantial leeway to consider relevant factors, including geographic proximity and other factors specifically enumerated under the statute (avoiding partisan advantage, providing accessibility to differently able voters), as well as any other considerations the clerk reasonably determines might affect "practicability." (*See* Doc. 59:55.)

Case law confirms the wide discretion encompassed in statutory standards like "practicability" and "necessity." These sorts of terms represent the Legislature's vesting of quasi-legislative authority in an official to

[4] As one clear illustration of the discretion vested in local officials, Wis. Stat. § 7.15 provides that "[e]ach municipal clerk has charge and supervision of elections and registration in the municipality. The clerk shall perform [certain enumerated] duties and any others which may be necessary to properly conduct elections or registration . . . ." As discussed in the text, these sorts of delegations of discretionary authority—authorizing local officials to determine what is "necessary" for the proper conduct of elections—give those officials a "wide berth" to make that determination, with a very limited role for the Commission or courts on review. *See Town of Ashwaubenon v. State Highway Comm'n*, 17 Wis. 2d 120, 131, 115 N.W.2d 498 (1962).

determine how best to fulfill the statutory directive. *See Town of Ashwaubenon v. PSC*, 22 Wis. 2d 38, 51, 125 N.W.2d 647 (1963) (recognizing that standard of "as nearly as practicable" allowed PSC to consider multiple factors in addition to geographic proximity when assessing proposed placement of bulkhead line in waterway); *see also Hixon v. PSC*, 32 Wis. 2d 608, 618–21, 146 N.W.2d 577 (1966) (recognizing vesting of quasi-legislative discretion in PSC to determine whether placement of bulkhead line was "in the public interest"). And when courts are called on to review determinations made under these types of quasi-legislative standards, courts give the decisionmakers a "wide berth" and will not disturb their decisions unless there is a clear abuse of discretion. *See Town of Ashwaubenon v. State Highway Comm'n*, 17 Wis. 2d 120, 131, 115 N.W.2d 498 (1962); *see also, e.g.*, *Town of Beloit v. City of Beloit*, 37 Wis. 2d 637, 644, 155 N.W.2d 633 (1968) (recognizing that determinations like "necessity" or "in the best interest" of the public are "an exercise of legislative power"); *see also Kammes v. State Mining Inv. & Loc. Impact Fund Bd.*, 115 Wis. 2d 144, 156, 340 N.W.2d 206 (Ct. App. 1983) (holding board's discretionary power to make distributions "as the board deems necessary" was a legislative function).

Based on the statute's vesting of discretion in local clerks to make practicability determinations in the first instance, *see* Wis. Stat. § 6.855(1), the Commission reasonably concluded that Brown failed to show that the clerk

abused that discretion in selecting and administering the chosen alternate sites in the August 2022 election. (Doc. 59:55–60).

Second and relatedly, much of the Commission's decision is based on Brown's failure to meet the burden of proving a violation of law. (*See* Doc. 59:55–60.) Stated another way, in declining to issue McMenamin a noncompliance order, the Commission was not endorsing McMenamin's actions but rather determining that Brown had not presented sufficient facts to establish that her actions warranted an extraordinary order mandating or restraining certain actions. (*See* Doc. 59:55–60.)

It is thus a red herring for Brown to frame his challenge as asking this Court to decide "whether the August 2022 primary election was *conducted lawfully*." (Doc. 82:7 (Brown's statement of issue presented); *see also* 86:1 (Brown's opening brief, stating issue in the case as "whether the municipal clerk for the City of Racine complied with the requirements of Section 6.855").) Because Wis. Stat. § 5.06 does not authorize the Commission to make such a sweeping pronouncement, and because the Commission here *did not* make such a sweeping pronouncement, this Court should reject Brown's attempt to seek broader relief than is authorized under Wis. Stat. § 5.06.

Based on the limited evidence that Brown presented and the substantial discretion vested in local election officials, the Commission reasonably concluded that Brown failed to carry his burden to show that a noncompliance order was warranted. (Doc. 59:55–60.)

B. Brown fails to establish that the Commission abused its discretion in declining to issue a noncompliance order.

On judicial review of the Commission's decision, Brown bears the burden to show that the Commission's decision was unreasonable. *See* Wis. Stat. §§ 5.06(9), 227.57(2), (8). This required Brown to show that discretion was erroneously exercised at two levels. First, as noted, the clerk exercises discretion in administering local elections, including determining how best to locate absentee balloting sites under Wis. Stat. § 6.855. The Commission also exercises discretion in determining whether to issue a noncompliance order based on the evidence Brown presented. Brown fails to carry his burden to show that both the Commission and the clerk abused their respective discretions, and therefore fails to support reversal.

1. "As near as practicable."

Brown's argument on this point seems to ask this Court to undertake its own assessment of "practicability"—suggesting, for example, that this Court determine whether the clerk should have selected one of the "many alternatives that were in closer physical proximity to the Clerk's office than

many of the sites selected." (Doc. 86:8.) But this sort of de novo review is expressly prohibited by Wis. Stat. § 5.06(9).

In light of the narrow review authorized under Wis. Stat. § 5.06(9), it is not this Court's task to assess whether each of the clerk's selected sites was in fact a "practicable" choice. (*Contra* Doc. 86:6–9.) That is precisely the same type of second-guessing of highly discretionary decisions that the court rejected in *Town of Ashwaubenon*, 17 Wis. 2d at 130–31. That case involved a request that the court review a decision of the Highway Commission about the placement of a highway. By statute, the Commisssion had been delegated authority to determine the proper placement of highways "if it deems that the public good is best served by making such change." *Id.* at 129. In light of this standard, the court recognized that decisions by the Commission about placement of highways are a "legislative function" and that courts should "desist from all unnecessary intrusions" on review of the commission's determinations, just as if it were made by the Legislature. *See id.* Other courts have recognized the quasi-legislative nature of standards like "necessity" and "practicability," and have been equally chary to second guess decision making under those standards. *See, e.g.*, *Town of Ashwaubenon*, 22 Wis. 2d at 51; *Hixon*, 32 Wis. 2d at 618–21; *Town of Beloit*, 37 Wis. 2d at 644; *Kammes*, 115 Wis. 2d at 156.

Here, practicability was determined by the Clerk, and, unless her determination is shown to be an abuse of the wide discretion vested in her, was not subject to interference by the Commission through a noncompliance order, and is not subject to the de-novo type review that Brown urges.

Brown's argument also ignores the illogic of focusing on geographical proximity given that the statutes contemplate multiple sites. *See* Wis. Stat. § 6.855(5). Under his view of Wis. Stat. § 6.855(1), Racine was required to clump all of its absentee sites as near as geographically possible to the clerk's office, without regard to any other factors the clerk might have found relevant in assessing "practicability." (*See* Doc. 86:8–9.) Rather than confront the illogic of this argument, Brown barely acknowledges that the statute authorizes multiple alternate absentee sites, and he does not cite Wis. Stat. § 6.855(5) even once. (*See generally* Doc. 86; *see also* Doc. 59:55–60.)

2. Alleged partisan advantage.

Brown's argument relating to partisan advantage is off base, as well. It is based on a false premise: that an alternate site necessarily affords partisan advantage if it is located in a ward with a different spread of registered Democratic and Republican voters than does the ward in which the clerk's office is located. (*See* Doc. 86:10–13; *see also* Doc. 59:40 (Brown's brief before Commission, explaining that goal is to locate sites in "a ward that has

the *same* political makeup as the one in which the clerk's office is located").) This argument has no basis in statutory text, evidence, or common sense.

First, nothing in the text of Wis. Stat. § 6.855 (or any other election statute) suggests that the baseline for determining "partisan advantage" in this context means the spread of registered partisan voters in a given ward. Brown fails to provide any statutory support for his notion of partisan advantage. It appears that it comes from a report prepared by his attorneys' law firm (*see* Doc. 56:44–50), but that report provides no explanation of why ward makeup is what the Legislature had in mind.

Second and relatedly, Brown's theory is not based on evidence of actual partisan advantage. The Commission reasonably found that Brown failed to show that any individual site actually afforded advantage to one political party or another. (Doc. 59:56.)

Third, Brown's notion of "partisan advantage" ignores how his rule would work out in practice. Under his view, the baseline would vary from municipality to municipality, since (presumably) the clerk's-office ward in differing communities will have different spreads of voters from each party. This means that the statute would be violated by a municipality whose clerk's-office ward skews 90/10 in favor of voters for one political party versus the other, if the clerk opted for an alternate site in a ward that was split evenly among voters of the two parties. This makes no sense.

The Commission was correct to decline to find a violation of the statute on Brown's novel, atextual theory.

3. Requirement that alternate site designation remain in effect until day after election.

Brown next argues that the use of a mobile voting unit violated the requirement that alternate-site designations "remain in effect until at least the day after the election." (Doc. 86:13–15; *see also* Wis. Stat. § 6.855(1).) He claims that because the alternate sites were not open throughout the entire early voting period, "the alternate sites did not 'remain in effect until at least a day after the election.'" (Doc. 86:13.)

But the statute says nothing about *alternate sites* "remain[ing] in effect"; instead, what must "remain in effect" is the city council's "election to designate" alternate sites. *See* Wis. Stat. § 6.855(1). Thus, as long as the Racine City Council's designation of 150 available alternate sites "remained in effect" until the day after the election (which it did, which Brown does not seem to dispute), this provision of the statute was satisfied. The Commission reasonably rejected Brown's argument on this basis. (Doc. 59:58–59.)

Brown again offers no textual basis for his theory that "remaining in effect" requires some analysis of the number of days and hours an alternate site is used. (Doc. 86:13–15.) Rather, he simply asserts that "shall remain in effect" prohibits a mobile voting unit, faulting the Commission and the clerk

for not explaining why that is not so. (Doc. 86:14–15.) This again ignores that, as the complainant, Brown bears the burden to prove his case. It also ignores the Commission's plain language reading of the statute. Given the lack of textual basis and multiple problems with his interpretation, the Commission reasonably declined to find a violation based on Brown's theory.

4. "[F]unctions related to voting" conducted at the clerk's office.

Brown next claims that the Commission erred in declining to issue a noncompliance order based on the storage of ballots at the clerk's office and the use of a conference room in City Hall as an absentee site. (Doc. 86:15–18.) These arguments again ignore clear statutory text.

Brown's first argument rests on the premise that an alternate site within City Hall violates the prohibition on conducting any function related to voting "in the office of the municipal clerk," since the clerk's office is in the same building as the conference room that was used as an alternate site. (Doc. 86:15–17.) While Brown concedes that no voting-related activity actually occurred "in the office of the municipal clerk," he nonetheless argues that the Commission should have found a violation since allowing voting in the same building as the clerk's office runs against the perceived legislative purpose of "eliminat[ing] the Clerk's office as a voting location once alternate sites were established." (Doc. 86:17.)

But there's no need to try to guess *why* the Legislature prohibited voting functions "in the office of the municipal clerk"; all that matters is that no voting-related functions actually occurred "in the office of the municipal clerk." Given the clear statutory text and undisputed facts, the Commission reasonably declined to find a violation based on Brown's theory of legislative purpose.

Brown's belated second argument, about storage of ballots at the clerk's office, also ignores the statutes. He claims that McMenamin violated the statute on the theory that storage of ballots constitutes a "function related to voting," and thus that function could not be conducted at the clerk's office. (Doc. 86:17–18.)

That argument ignores an entire clause of the statute on which he relies. The statute does not prohibit *any* "function related to voting or the return of absentee ballots" from being conducted at the clerk's office; rather, it prohibits any of those activities "that is to be conducted at the alternate site." Wis. Stat. § 6.855(1). The clerk's stated reason for storing ballots at her office is that she was *not* planning to do so at each of the individual alternate sites. (*See* Doc. 57:14.) Given that there would be no overlap in functions between the clerk's office and any absentee site, the Commission reasonably declined to find a violation on this basis.

5. Use of a mobile voting unit.

Brown's final argument about alleged violations of Wis. Stat. § 6.855 is that "the Wisconsin statutes do not contemplate the use of a moving polling place" for absentee balloting. (Doc. 86:18.) This argument suffers multiple fatal flaws.

For one, it again ignores the narrow scope of review under Wis. Stat. § 5.06. The question is not whether the Wisconsin statutes generally authorize or prohibit "the use of a moving polling place," but rather whether the Commission acted unreasonably in declining to find a violation of the statutes. *See* Wis. Stat. § 5.06(9).

Second, while Brown asserts that the Commission's decision means that a clerk could "literally designate anywhere—a street corner, her private residence, the back of a pickup truck," he does not actually point to any improper designations. (*See* Doc. 86:18–20; *see* also Doc. 56:34–37.) Brown thus failed to establish any violations of the designation statute, even under his building-centric theory.[5] (Doc. 86:19–20.)

Finally, Brown again fails to confront the substantial discretion that the statutes vest in local election administrators, a central component of the Commission's decision not to find a violation. (*See* Doc. 86:18–20; *see also*

[5] Brown's argument about a clerk "designating" a site also ignores that it is the City Council, and not the clerk, that does the "designating" under Wis. Stat. § 6.855(1) and which made the designations at issue here (*see* Doc. 56:34–37).

59:59–60.) In asking for a blanket rule—buildings only, no exceptions—Brown asks this Court to not only reach beyond the scope of review provided under Wis. Stat. § 5.06(9), but also to ignore multiple statutes that, for example, vest local officials with authority to determine what is "practical" or what "better serves the needs of the electorate" for a given polling place. Wis. Stat. § 5.25(1).

Given the wide discretion the statutes vest in local officials, Brown fails to establish that the Commission erred in declining to find a violation in Clerk McMenamin's administration of alternate absentee sites in August 2022.

IV. Brown's appeal of the Commission's decision based on a challenge to a delegation order should be dismissed.

Brown brings a second claim in this § 5.06 appeal against only the Commission. (Doc. 3 ¶¶ 75–99.) He complains of the procedure by which the Commission disposed of his complaint. (Doc. 3 ¶ 77; 86:1–2, 20–28.) Brown challenges the Commission's decision by asserting that Administrator Wolfe decided his complaint, rather than the six commissioners; and that the vehicle by which Wolfe decided the complaint, a delegation order,[6] is unlawful. (Doc. 86:20–28; 3:93–94 (delegation order).) At the threshold, this claim is barred for multiple reasons, including that this Court already rejected it. And at bottom, because the delegation order Brown challenges is based on an

[6] The delegation order was merely attached as an exhibit to Brown's complaint. (Doc. 3:93–94.) It is not part of the agency record. (*See generally* Doc. 56–59.)

administrative rule, Wis. Admin. Code EL § 20.04(10), Brown must challenge the validity of that rule, which he has failed to do. Brown's second claim therefore fails.

A. Brown's challenge to the delegation rule is procedurally barred.

1. This Court has already rejected Brown's requested relief for a declaratory judgment on the Commission's delegation order.

This Court has already rejected Brown's requested relief for a declaratory judgment that the Commission's delegation order to resolve complaints is unlawful and that the Commission's disposition of his complaint without a vote by the commissioners is unlawful.

In a March 15 oral ruling on a motion to dismiss, this Court rejected paragraph D in Brown's "Request for Relief" section of his complaint "as exceeding [its] authority." (Doc. 82:17.) The stricken paragraph asked this Court to "[e]nter a declaratory judgment that (1) WEC's delegation to the Administrator and/or Chair to resolve § 5.06 complaints instead of the Commissioners is unlawful; and (2) WEC's disposition of the Plaintiff's complaint without a vote by the Commissioners was unlawful[.]" (Doc. 3:25–26.)

Despite this ruling, Brown argues in his merits brief that the Commission's decision should be reversed because it was issued by Administrator Wolfe pursuant to a delegation order rather than a vote by the commissioners. (Doc. 86:20 ("WEC committed reversible error when it delegated the decisionmaking authority on § 5.06 complaints . . . to a single, unelected Administrator or to the Administrator and Chair.").)

As the Commission argues *infra*, a challenge to the delegation order necessarily requires a challenge to an administrative rule, Wis. Admin. Code EL § 20.04(1), because the order is based on the rule. This rule reads, in pertinent part: "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." Wis. Admin. Code EL § 20.04(1). To challenge the validity of an administrative rule, a party must invoke Wis. Stat. § 227.40, which Brown acknowledges in his complaint. (Doc. 3 ¶ 97 (alternatively, "Brown intends this complaint to include a challenge to the lawfulness of [EL § 20.04(10)] under Wis. Stat. § 227.40.").) Wisconsin Stat. § 227.40 governs an action "for declaratory judgment" as to the validity of a rule. *See* Wis. Stat. § 227.40(1) and (2).

Brown cannot obtain reversal of the Commission's decision in his Claim II without challenging an administrative rule through declaratory judgment. But this Court has already held that Brown may not obtain such a declaratory

judgment. (Doc. 82:17 (Motion Hearing17:24–25, March 15, 2023).) To the extent the Court hasn't already done so, Claim II must be dismissed.

2. Brown has failed to challenge the validity of the administrative rule on which the delegation order is based.

While Brown asserts that the delegation order is invalid, that order is based on an administrative rule, as Brown acknowledges. (Doc. 3 ¶ 97.) Brown's challenge to the delegation order thus necessarily raises a challenge to the administrative rule. Brown's challenge fails from the outset, however, because he has not followed the statutory procedure for challenging an administrative rule in this court proceeding.

Wisconsin Stat. § 227.40 governs challenges to the validity of administrative rules. Other than as provided in subsection (2), a declaratory judgment action through subsection (1) is "the exclusive means of judicial review of the validity of a rule." Wis. Stat. § 227.40(1). Subsection (2) recognizes that some challenges to administrative rules may be part of other judicial proceedings. Wis. Stat. § 227.40(2). Proceedings under Wis. Stat. § 5.06, like Brown's here, are not included under subsection (2). *Id.* Subsection (3), on the other hand, applies to "any judicial proceeding other than one under sub. (1) or (2), in which the invalidity or validity of a rule . . . is material to the cause of action." Wis. Stat. § 227.40(3)(ag). Brown's § 5.06 appeal (to the extent it is proper) qualifies.

To challenge a rule under sub. (3), a party must set forth the invalidity of a rule in his pleading. *Id.* The party must then, within 30 days after the service of that pleading, "apply to the court in which the proceedings are had for an order suspending the trial of the proceeding until after a determination of the validity of the rule . . . in an action for declaratory judgment under sub. (1)." *Id.* If satisfied that the validity of the rule is material to the issues of the action, the circuit court stays the proceeding until the validity of the rule is determined in a separate sub. (1) declaratory judgment rule action. Wis. Stat. § 227.40(3)(ar) –(b). The circuit court is then bound by the declaratory judgment resulting from the sub. (1) action. Wis. Stat. § 227.40(3)(b).

Here, since Brown commenced a § 5.06 action, he was required to raise a challenge to EL § 20.04(10) by following the procedural requirements under Wis. Stat. § 227.40(3). *See* Wis. Stat. § 227.40(3)(ag). While he pled a rule challenge in his pleading (Doc. 3 ¶ 97), he failed to seek a stay of this proceeding within 30 days to initiate a sub. (1) declaratory judgment rule challenge as required by Wis. Stat. § 227.40(3)(ag). Brown's failure to seek a stay order from this Court to allow him to commence a separate sub. (1) declaratory judgment action challenging the validity of EL § 20.04(10) is dispositive to the second claim in his complaint. The statute is clear that failure of the party "to commence a declaratory judgment proceeding within a reasonable time pursuant to the order of the court or to prosecute the declaratory judgment

action without undue delay *shall preclude* the party from asserting or maintaining that the rule . . . is invalid." Wis. Stat. § 227.40(3)(c). The court of appeals agrees. *See State ex rel. Bryson v. Carr*, 2022 WI App 34, ¶ 9 n.7, 404 Wis. 2d 307, 978 N.W.2d 595 (holding that court of appeals would not consider challenge to administrative rule in a certiorari proceeding because plaintiff did into "raise the issue during the circuit court proceedings in the manner required by Wis. Stat. § 227.40(3)"). Brown's Claim II is dead on arrival. This Court must dismiss it.[7]

B. Even if the Court were to address the delegation order, it is not invalid because it is based on a valid rule.

Given that Brown has failed to raise a proper challenge to EL § 20.04(10) and this rule is therefore valid, the delegation order is also valid.

Brown acknowledges that the delegation order grants to the Commission's administrator the authority to resolve complaints (Doc. 86:22–23), but he nonetheless argues that the delegation order is invalid.[8] He claims the order is invalid because Wis. Stat. § 5.06(6) and (8) require

[7] Likely because he did not commence the required separate declaratory judgment rule challenge, Brown's brief does not raise a challenge to Wis. Admin. Code EL § 20.04(10) at all. (*See* Doc. 86:20–28.) That rule is therefore presumed valid, and Brown has abandoned any challenge to the administrative rule. *Reiman Assocs., Inc. v. R/A Advert., Inc.*, 102 Wis. 2d 305, 307, 306 N.W.2d 292 (Ct. App. 1981) (unbriefed issue deemed abandoned). And Brown may not raise an argument that the rule is invalid for the first time in his reply brief. *Wal-Mart Real Est. Bus. Tr. v. City of Merrill*, 2023 WI App 14, ¶ 32, 406 Wis. 2d 663, 987 N.W.2d 764.

[8] Brown alleges that the delegation order was voted on and passed by the commissioners. (Doc. 3:21–22, 93–94.)

"the commission," not its administrator or administrator and chair, to "decide" complaints, including his. (Doc. 86:20–21.) He contends that Wis. Stat. § 5.05(1e) requires an affirmative vote of at least two-thirds of the commissioners on any action by the Commission and any action includes deciding his complaint. Thus, he says, because under the delegation order the six commissioners do not need to affirmatively vote to resolve a § 5.06 complaint, the delegation order is invalid. Brown is wrong.

The Legislature has granted the Commission the responsibility for the administration of chapter 5 to 10 and 12 of the Wisconsin statutes and other laws relating to elections. Wis. Stat. § 5.05(1). Pursuant to that responsibility, the Commission may promulgate rules "applicable to all jurisdictions for the purpose of interpreting or implementing the laws regulating the conduct of elections." Wis. Stat. § 5.05(1)(f). In addition, the Legislature has permitted the Commission to assign duties to the administrator in the administration of these chapters. Wis. Stat. § 5.05(3d) ("The administrator shall perform such duties as the commission assigns to him or her in the administration of chs. 5 to 10 and 12."). Exercising that power, the Commission promulgated a rule regulating the conduct of elections. Wisconsin Admin. Code EL § 20.04(10), in pertinent part, states: "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." Wis. Admin. Code

EL § 20.04(10). The delegation order grants the administrator the authority to "issue compliance review orders under the provisions of Wis. Stat. § 5.06." (Doc. 3:93.)

Here, Brown's chapter 5 complaint relates to the conduct of elections. *See* Wis. Stat. § 5.05(1)(f). The Commission's subsequent decision states that there was "no probable cause to believe a violation of law or abuse of discretion occurred with regard to the City of Racine's use of alternate absentee voting sites and mobile facilities as alleged." (Doc. 59:60.) Therefore, even assuming Wolfe acted pursuant to the delegation order and issued the November 4, 2022, decision, the decision is valid because the delegation order is valid as a result of the Commission's authority to delegate resolution of election complaints to the administrator under EL § 20.04(10).

Brown's reliance on Wis. Stat. § 5.05(1e), requiring an affirmative vote of at least two-thirds of the commissioners on any Commission action, is misplaced. More specific statutes control. "[G]enerally where a specific statutory provision leads in one direction and a general statutory provision in another, the specific statutory provision controls." *Marder v. Bd. of Regents of Univ. of Wis.,* 2005 WI 159, ¶ 23, 286 Wis. 2d 252, 706 N.W.2d 110. Here, Wis. Stat. § 5.05(1)(f) governs the authority of the Commission to promulgate rules "applicable to all jurisdictions for the purpose of interpreting or implementing the laws regulating the conduct of elections." And Wis. Stat. § 5.05(3d) permits

the Commission to assign duties to the administrator. The Commission promulgated EL § 20.04(10) pursuant to these more specific statutes.

Brown's challenge to the delegation order fails procedurally and on its merits.

CONCLUSION

The Court should affirm the Commission's decision in its entirety and dismiss Petitioner Brown's complaint.

Dated this 27th day of October 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed the documents this *Response Brief of the Wisconsin Elections Commission* clerk of court using the Wisconsin Circuit Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 27th day of October 2023.

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