STATE OF WISCONSIN, CIRCUIT COURT, RACINE, COUNTY

Case Caption (Case Name)
Kenneth Brown, Plaintiff,

v.

Wisconsin Elections Commission and Tara McMenamin, City Clerk of the City of Racine, Defendants,

and

Democratic National Committee, Black Leaders Organizing for Communities, and Wisconsin Alliance for Retired Americans, Intervenor-Defendants

DOCKETING STATEMENT

Circuit Court Case No. 22-CV-1324

Case Number Issued by Court of Appeals
2024AP000232

Appellant(s) (Cross-Applicant)	Attorney's Name and Address
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	Attorney's Telephone Number 414-727-7415
Respondent(s) (Cross-Respondent)	Attorney's Name and Address

Wisconsin Elections Commission,	Steven C. Kilpatrick Gabe Johnson-Karp Wisconsin Department of Justice P.O. Box 7857 Madison, WI 53703 (p) 608-266-1792
Tara McMenamin,	Ian R. Pomplin Scott R. Letteney Racine City Attorney's Office 730 Washington Avenue, Room 201 Racine, WI 53403 (p) 262-636-9115
Wisconsin Alliance for Retired Americans,	Diane M. Welsh Pines Bach, LLP 122 W. Washington Ave., Suite 900 Madison, WI 53703 (p) 608-251-0101 David R. Fox Christina A. Ford Samuel T. Ward-Packard Elias Law Group LLP 250 Massachusetts Ave. NW, Suite 400 Washington, D.C. 20036
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	Attorney's Telephone Number See above

CRITERIA FOR EXPEDITED APPEALS

- This Docketing Statement is used solely to determine whether an appeal should be placed on the expedited appeal calendar. The respondent is not required to respond to the Docketing Statement. Generally, an appeal is appropriate for the expedited appeal calendar if:
  1. no more than 3 issues are raised;
  2. the parties' briefs will not exceed 15 pages in length; and
  3. the briefs can be filed in a shorter time than normally allowed.

  These requirements can be modified somewhat in appropriate cases.
- Parties should assume that the appeal will proceed under regular appellate procedure unless the court notifies them that the appeal is being considered for placement on the expedited appeals calendar.

JURISDICTION

Has judgment or order appealed from been "entered" (filed with the clerk of circuit court)?
☒ Yes ☐ No If yes, date of entry January 10, 2024.
Is appeal timely? *(See §808.04, Wisconsin Statutes)*
☒ Yes ☐ No
Is judgment or order final (does it dispose of the entire matter in litigation as to one or more of the parties)?
☒ Yes ☐ No *(If "no", explain jurisdiction basis for appeal on separate sheet.)*

NATURE OF ACTION – Briefly describe the nature of action and the result in circuit court:

Plaintiff sought to reverse a decision of Wisconsin Elections Commission dismissing his complaint that: (1) Defendant McMenamin used absentee voting sites that were not "as near as practicable to the office of the municipal clerk," in violation of Wis. Stat. § 6.855; (2) Defendant McMenamin used alternate absentee voting sites that "afford[ed] an advantage to [a] political party," in violation of Wis. Stat. § 6.855; (3) Defendant McMenamin allowed "function[s] related to voting and return of absentee ballots … conducted at the alternate site [to] be conducted in the office of the municipal clerk," in violation of Wis. Stat. § 6.855; (4) Defendant McMenamin used mobile alternate absentee voting sites, in violation of Wis. Stat. § 6.855 and other related Wisconsin statutes; (5) Defendant McMenamin used alternate absentee voting sites that were not available for use through the relevant election, in violation of Wis. Stat. § 6.855.

The circuit court found for Plaintiff on claims (2) and (4), and reversed WEC's decision, finidng: that Defendant McMenamin's alternate voting sites afforded an advantage to one political party in violation of Wis. Stat. § 6.855, and that Defendant McMenamin's use of the mobile election unit (MEU) violated Wis. Stat. § 6.855 and other related Wisconsin statutes. The court ruled against Plaintiff on claims (1), (3), and (5).

Defendants and intervenor-defendants have appealed the decision finding for the Plaintiff. Plaintiff is now filing a notice of cross-appeal regarding the Court's finding against the Plaintiff on claims (1), (3), and (5), where the Court held that Wis. Stat. § 6.855 alternate absentee voting sites do not have to be as close as possible to the Clerk's office, that the alternate absentee voting site located in the same building as the Clerk's office was not an extension of the Clerk's office in violation of § 6.855, and that the use of alternate absentee voting sites for only a few hours on single days during the election period did not violate the statutory requirement that alternate sites remain in use throughout the relevant election period.

ISSUES – Specify the issues to be raised on appeal: *(Attach separate sheet if necessary.)*
(Failure to include any matter in the docketing statement does not constitute waiver of that issue on appeal. The court may impose sanctions if it appears available information was withheld. Court of Appeals Internal Operating Procedures, sec. VII(2)(b).)

Whether the circuit court erroneously interpreted Wis. Stat. § 6.855 with respect to the use of alternate absentee voting sites including when they may be used, where they may be located, and their availability throughout the election period.

STANDARD OF REVIEW – Specify the proper standard of review for each issue to be raised, citing relevant authority:
De novo. The interpretation of a statute is a question of law reviewed de novo, see Estate of Miller v. Storey, 2017 WI 99, para. 25, 378 Wis.2d 358, 903 N.W.2d 759.

Do you wish to have this appeal placed on the expedited appeals calendar? *(See Criteria For Expedited Appeals.)*
☐ Yes ☒ No If "no", explain : This appeal does not meet the criteria for an expedited appeal, including that there are multiple issues in dispute that will require more than 15 pages of briefing.

Will a decision in this appeal meet the criteria for publication in Rule 809.23(1)?
☒ Yes ☐ No

Will you request oral argument?
☒ Yes ☐ No

List all parties in trial court action who will not participate in this appeal:

Party	Attorney's Name and Telephone Number	Reason for not Participating

Are you aware of any pending or completed appeal arising out of the same or a companion trial court case that involves the same facts and the same or related issue?
☒ Yes ☐ No Name of Case Brown v. Wisconsin Elections Commission , et al.

Appeal Number 24-AP-232

/s/ Electronically Signed by Lucas T. Vebber
Signature of Person Preparing Docketing Statement

Lucas T. Vebber
Name Printed or Typed

Lucas@will-law.org
Email Address (if any)

March 8, 2024
Date

Appellant Note:
You MUST file this form and attachments with the Clerk of the Circuit Court.
You MUST attach a copy of the following trial court documents to this form:
1. Trial court's judgment or order and findings of fact.
2. Conclusions of law.
3. Memorandum decision or opinion upon which the judgment or order is based.

You MUST also serve all parties with a copy of this completed Docketing Statement and attached trial court documents.

The clerk of circuit court shall forward this form to the Court of Appeals.

STATE OF WISCONSIN CIRCUIT COURT RACINE COUNTY

Kenneth Brown,
Plaintiff,
vs.
Wisconsin Elections Commission,
Tara McMenamin,
Defendants.
And
Wisconsin Alliance for Retired Americans,
Democratic National Committee,
Black Leaders Organizing for Communities,
Intervenors.

Case No. 2022CV1324

FILED

JAN 10 2024

CLERK OF CIRCUIT COURT
RACINE COUNTY

AMENDED DECISION AND ORDER

The above-styled matter is before this Court on the Plaintiff's claim for declaratory judgment seeking reversal of a Wisconsin Election Commissions (WEC) decision of November 4, 2022, finding the existence of no probable cause and dismissal of his complaint against Racine City Clerk, Tara McMenamin, [Doc. 59 pp. 112-122 (hereinafter "R" and reference to Bates numbering)] for the complaint filed with WEC on August 10, 2022. [R. pp. 2-11]

Pursuant to the oral decision and order of Judge Nielsen on March 15, 2023, this Court's role on appeal of the WEC's decision of finding no probable cause or violation of statutory law will be a summary proceeding in which this Court shall affirm, reverse, or order further proceedings before WEC. [Doc. 82 pp. 14-15]. This Court's review will be limited to the law and legal issues. [Doc. 82 p.15]. Succinctly put, this Court will declare what the applicable statutory law is with regard to the facts of this case.

Again, pursuant to Judge Nielsen's prior ruling, this Court will determine whether the use of the van[1] was either lawful or unlawful during the primary election cycle of 2022 at issue under the applicable election law statutes. This Court, pursuant to Judge Nielsen's oral decision, will disregard all references to the general election of 2022. [Doc. 82 p. 17].

Judge Nielsen further ordered that WEC's administrative record and decision on the Plaintiff's complaint regarding this matter be filed, although the record reflects that it had previously been filed as documents 56, 57, 58, and 59.

Lastly, Judge Nielsen, utilizing his discretionary authority, allowed the intervention of the Democratic National Committee, Wisconsin Alliance for Retired Americans, and the Black

[1] What the City of Racine refers to as "Mobile Election Unit MEU"

Leadership Organizing Committees. All of the permissive intervenors did file briefs and all briefs filed in this case have been read by this Court.

Unfortunately, Judge Nielsen sustained health issues that prevented him from returning to the bench following his oral ruling and the undersigned took over his civil rotation duties on December 18, 2023. This Court's review of this matter will be limited to and in conformity with Judge Nielsen's previous rulings.

At its core, the complaint alleges non-compliance with specific chapters of Wisconsin election laws regarding the use of a van to facilitate absentee voting and either a misinterpretation or misapplication of the relevant statutes by WEC in that regard, or in the alternative, an abuse of discretion by WEC based on a misinterpretation or misapplication of relevant election law statutes.

SPECIFIC CLAIMS

The following claims were raised by the Plaintiff in his complaint before WEC:

1. Claim that the locations selected by City Clerk McMenamin were not as close as possible to the City Clerk's office and violate the "shall be located as near as practicable to the office of the municipal clerk or board of election," verbiage of Wis. Stat. § 6.855.
2. Claim that the locations selected for use by City Clerk McMenamin afford an advantage to citizens who are members of the Democratic Party or have a history of voting Democratic.
3. Claim a violation of Wis. Stat. § 6.855 in allowing absentee voting in the same physicial building (City Hall) where the Office of the City Clerk is located.
4. Claim that the City failed to comply with Wis. Stat. § 6.855 in failing to have alternate site designations in effect for the requisite mandatory statutory time period.
5. Claim that the use of a van (MEU) as an alternate absentee ballot site violated Wis. Stat. § 6.855.

In this complaint, the Plaintiff asserts the lack of authority by WEC Administrator Wolfe to generate the adverse decision on behalf of WEC dated November 4, 2022.

The Respondent proffers the following:

1. Lack of standing on the part of the Plaintiff to bring this suit, and
2. The validity of the decision being authored and signed by Administrator Wolfe, the designation argument.

ISSUE SUMMARY

The case asks whether the Municipal Clerk for the City of Racine, Tara McMenamin, complied with the requirements of Wis. Stat. § 6.855 when administering an early voting period for the August 2022 primary election that included the use of a van in various locations previously approved by the City of Racine Common Council for discrete, scheduled periods of time as a polling place.

SUMMARY OF RELEVANT FACTUAL BACKGROUND

Plaintiff, Kenneth Brown, is a registered voter in the City of Racine. [R.2,¶ 1]. The Defendant, Tara McMenamin, is the Municipal Clerk for the City of Racine. [R.2,¶ 2]. The City of Racine consists of more than seventy-seven thousand people spread across over fifteen and a half square miles. [R. p. 54]. The Wisconsin Elections Commission (WEC) is a six-member bipartisan body assigned by law to oversee statewide election issues. *See* Wis. Stat. § 5.05 *et seq.* At all times pertinent to this lawsuit, the WEC Administrator was Meagan Wolfe. [R. 112].

In December 2021, the City of Racine Common Council approved approximately 150 alternative early voting (absentee) in-person locations for use during the elections to be held in 2022.[R. 32-35][2] From the approved locations, City Clerk McMenamin chose twenty-two locations to be used during the primary election of 2022. [R. 15-21]. These locations included community centers, schools, a museum, a park, a beach, a mall, a coffee shop, among others, that were available for voting during designated three-hour periods for in-person absentee voting. [*Id.*]. Additionally, in-person absentee voting also took place at City Hall, which was located within the same physical building as the location of the City Clerk's office, although absentee voting was located in a different room on a different floor level of City Hall. [R. 7-8, 29-32].

With the exception of the location within City Hall, the in-person early voting locations approved by the City and used during the primary of 2022 were not the actual places approved for use. Rather, the City of Racine, with the assistance of CTCL funding[3] conducted voting out of a mobile voting van, Mobile Elections Unit, (MEU), that was driven to these locations and parked nearby [R.5, 38-39]. The dates and times the MEU would be near the designated areas were posted by the Defendant Clerk [R. 13-22]. Voters entered the van to cast their ballots. The Plaintiff witnessed early in-person absentee voting in the MEU parked at the Regency Mall. [R. 5].

On August 10, 2022, the Plaintiff, Brown, filed a verified written complaint with the Defendant, Wisconsin Elections Commission, against the City Clerk's use of the MEUs. [R.1-49]. The City

[2] Pursuant to Judge Nielsen's prior ruling, the scope of this decision is limited to the primary election use of these sites in 2022.

[3] This assertion is derived by a submission by the Plaintiff's counsel, the Wisconsin Institute for Law and Liberty and has not been disputed.[R.38]. It is further undisputed that the Racine Common Council approved the purchase of the van they refer to as "MEU".

Clerk filed a response on August 29, 2022 [R. 51-97], and the Plaintiff filed a reply brief on September 13, 2022. [R. 98-111]. WEC issued its written decision on November 4, 2022 [R. 112-125]. The decision was signed by Administrator Wolfe on behalf of WEC.[4]

STANDARD OF REVIEW

Wisconsin statute 5.06(9) provides that a reviewing Court shall "summarily hear and determine all contested issues of law" while "according due weight to the experience, technical competence and specialized knowledge of the commission, pursuant to the applicable standards for review of agency decisions under s. 227.57." The "due weight" standard "will not 'oust the court as the ultimate authority or final arbiter' of the law," but instead demands that the court give "respectful, appropriate consideration to the agency's views" while exercising "its independent judgment in deciding questions of law." ***Tetra Tech EC, Inc. v. Wis. Dep't of Revenue,*** 2018 WI 75, ¶ 78, 382 Wis.2d 496, 914 N.W.2de 21. ***Tetra Tech*** stands for the proposition that the judicial branch of government (courts), not an arm of the executive branch (administrative agencies), determines what the law is in Wisconsin.[5]

DISCUSSION ADMINSTRATOR WOLFE'S AUTHORITY

All filings received in the course of a complaint proceeding under Wis. Stat. § 5.06 must be provided to all Commissioners and posted on the Commission's website. A complaint must set forth facts sufficient to show probable cause to believe that a violation of law or abuse of discretion has occurred or will occur, and must be filed promptly, so as not to prejudice the rights of any party. Wis. Stat. § 5.06 (1) and (3). Under Wis. Admin. Code EL § 20.04(1), the Administrator initially reviews each complaint to determine if it is timely, sufficient as to form, and states probable cause. If the complaint does not meet those standards, the Administrator must return it to the complainant, with a written explanation of any defects and how they may be cured. Wis. Admin. Code EL § 20.04(2).

[4] This Court can and does take judicial notice of Wisconsin law and applicable Wisconsin Administrative Code provisions. Wis. Admin. Code § EL 20.04(10) allows WEC to delegate to the Administrator (Wolfe) the authority to resolve complaints. The record reflects that WEC made such a delegation on February 20, 2020 [Doc. 3 pp. 93-94]. This action disposes of the decision authority argument by Plaintiff.

[5] "If we conclude 'that the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action,' we will 'set aside or modify the agency action' or 'remand the case to the agency for further action under a correct interpretation of the provision of the law'" ***Town of Ledgeview v. Livestock Facility Sitting Revocation. Bd.,*** 2022 WI App 58, ¶8, 405 Wis. 2d 269, 983 N.W. 2d 685 (citing Wis. Stat. § 227.57(5)). "When reviewing questions of law decided by an agency, including statutory interpretation, our review is de novo." ***DOR v. Microsoft Corp.,*** 2019 WI App 62, ¶13, 389 Wis. 2d 350, 936 N.W. 2d 160 (citing ***Tetra Tech EC, Inc. v. DOR***, 2018 WI 75, ¶84, 382 Wis. 2d 496, 914 N.W.2d 21); § 227.57(11) ("Upon review of an agency action or decision, the court shall accord no deference to the agency's interpretation of law.") Pursuant to § 227.57(11), we accord no deference to an agency's interpretation of law.

If a complaint meets the threshold standards, then the Commission may conduct such investigation as it deems appropriate, may order an election official to transfer relevant documents to the Commission, and may conduct a contested case hearing, if it believes such action to be appropriate. Wis. Stat. § 5.06(1), (4)-(5). The Commission may direct the Administrator how to proceed in investigation and hearing the complaint; if no such directive is in effect, then the Administrator is authorized to determine how to proceed after consulting with the Commission Chair. Wis. Admin. Code EL § 20.04(6).

The record in this case reflects the proffered arguments and materials utilized by the Administrator in conducting the investigation into the present complaint. *See* [R. 1-125]. As previously noted in footnote 4, WEC delegated authority to Administrator Wolfe to investigate the present complaint and to issue WEC's finding of no probable cause. There is a process whereby individual WEC commissioners may submit comments to the proposed Administrator's determination on a complaint or request a special meeting to discuss the final decision prior to its dissemination. *See* Wis. Admin. Code EL §20.04(6), (10).

The record reflects no such objection or request for further inquiry by WEC Commissioners and the decision in question was written on WEC letterhead [R. 112], referenced "Commission review" [R. 112], and was signed by Administrator Wolfe on behalf of WEC. [R. 125]. This Court finds that Administrator Wolfe was within her authority to review, investigate, and write the decision in this matter on behalf of WEC.

RELEVANT APPLICABLE STATUTES

Generally speaking the issues presented involve review of Wisconsin Statutes Chapter 5 entitled "Elections—General Provisions; Ballots and Voting Systems" and Chapter 6 entitled "The Electors." Specific reference is made to Wis. Stat. § 6.855(1) through (5) which read as follows:

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

(2) The municipal clerk or board of election commissioners shall prominently display a notice of the designation of the alternate site selected under sub. (1) in the office of the municipal clerk or board of election commissioners beginning on the date that the site is designated under sub. (1) and continuing through the period that absentee ballots are available for the election and for any primary under s. 7.15 (1) (cm). If the municipal clerk or board of election commissioners maintains a website on the Internet, the clerk or board of election commissioners shall post a notice of the designation of the alternate site selected under sub. (1) on the website during the same period that notice is displayed in the office of the clerk or board of election commissioners.

(3) An alternate site under sub. (1) shall be staffed by the municipal clerk or the executive director of the board of election commissioners, or employees of the clerk or the board of election commissioners.

(4) An alternate site under sub. (1) shall be accessible to all individuals with disabilities.

(5) A governing body may designate more than one alternate site under sub. (1).

The history of the legislature's modification to Wis. Stat. § 6.855 is noteworthy. Originally drafted, Wis. Stat. § 6.855 limited municipalities to a single alternate absentee ballot site. If a municipality designated an alternate site, the legislature limited how that one location could be located: "[t]he designated site shall be located as near as practicable to the office of the municipal clerk." This has become to be known as the "one-location" rule.

The one-location rule no longer exists nor did it exist at the time of this dispute. In 2015, a federal court in the Western District of Wisconsin determined that the one-location rule was unconstitutional, violating the First and Fourteenth Amendments of the United States Constitution, and the Voting Rights Act. ***One Wisconsin Inst., Inc. v. Thomsen,*** 198 F. Supp. 3d 896, 963 (W.D. Wis. 2016) *aff'd in part, vacated in part, rev'd in part sub nom.* ***Luft v. Evers,*** 963 F.3D 665 (7th Cir. 2020). Judge Peterson's decision addressed the clearly disproportionate result created by Wis. Stat. § 6.855(2013-14) and the obvious logistical differences between forcing a few voters from using a single location and forcing a few hundred thousand voters to use a single location. ***One Wisconsin***, 198 F. Supp. at 934. Judge Peterson also addressed how this logistical difference was disproportionately foisted upon Wisconsin's voters of color, the largest share of which reside in Wisconsin's municipalities. ***One Wisconsin***, 198 F. Supp. at 958-960. The ***One Wisconsin*** decision permanently enjoined the one-location provision as being invalid under the First, Fourteenth Amendments and the Voting Rights Act.

Before ***One Wisconsin*** reached the Court of Appeals, the Wisconsin legislature reformulated Wis. Stat. § 6.855 under 2017 Act 369 adding a fifth and final subsection to sec. 6.855 authorizing a municipality to "designate more than one alternate site." The Act did not, however, remove the singular language found in other preceding parts of sec. 6.855. The federal Court of Appeals determined that the addition of subsection (5) rendered its determination of the legality of the one-location rule moot. ***Luft v. Evers,*** 963 F.3d 665, 674 (7th Cir. 2020).

Also of importance to this Court was Wis. Stat. § 5.01 entitled "Scope" and Wis. Stat. § 6.84 entitled "Construction" under "Voting Absentee." They read as follows:

5.01 Scope.

(1) Construction of chs. 5 to 12. Except as otherwise provided, chs. 5 to 12 shall be construed to give effect to the will of the electors, if that can be ascertained from the proceedings, notwithstanding informality or failure to fully comply with some of their provisions.

6.84 Construction.

(1) Legislative policy. The legislature finds that voting is a constitutional right, the vigorous exercise of which should be strongly encouraged. In contrast, **voting by absentee ballot is a privilege exercised wholly outside the traditional safeguards of the polling place.** The legislature finds that **the privilege of voting by absentee ballot must be carefully regulated to prevent the potential for fraud or abuse; to prevent overzealous solicitation of absent electors who may prefer not to participate in an election; to prevent undue influence on an absent elector to vote for or against a candidate or to cast a particular vote** in a referendum; or **other similar abuses.**

(2) Interpretation. Notwithstanding s. 5.01 (1), **with respect to matters relating to the absentee ballot process**, ss. 6.86, 6.87 (3) to (7) and 9.01 (1) (b) 2. and 4. **shall be construed as mandatory**. Ballots cast in contravention of the procedures specified in those provisions may not be counted. Ballots counted in contravention of the procedures specified in those provisions may not be included in the certified result of any election. (emphasis added)

As pointed out in ***Teigen vs. Wisconsin Elections Commission,*** 2022 WI 64, 403 Wis. 2d 607, 976 N.W. 2d 519, "the legislature has supplied the lens through which absentee voting statutes are to be viewed." ***Teigen,*** 2022 WI 64, ¶ 103.

Wisconsin Statute § 6.84 provides:

> [V]oting by absentee ballot is a privilege exercised wholly outside the traditional safeguards of the polling place. **The legislature finds that the privilege of voting by absentee ballot must be carefully regulated to prevent the potential for fraud or abuse**; to prevent overzealous solicitation of absent electors who may prefer not to participate in an election; to prevent undue influence on an absent elector to vote for or against a candidate or to cast a particular vote in a referendum; or other similar abuses.

Furthermore, regarding interpretation of the absentee voting statutes, the legislature has mandated that:

> [W]ith respect to matters relating to the absentee ballot process, ss. 6.86, 6.87(3) to (7) and 9.01(1)(b)2. and 4. **shall be construed as mandatory**. Ballots cast in contravention of the procedures specified in those provisions may not be counted. Ballots counted in contravention of the procedures specified in those provisions may not be included in the certified result of any election. (emphasis added).

Other relevant statutory provisions will be discussed hereinafter as applicable.

STATUTORY INTERPRETATION

In 2004, in ***State ex rel Kalal v. Circuit Court of Dane Co.,*** 2004 WI 58, ¶¶ 38-55, 271 Wis.2d 633, 681 N.W.2d 110 (hereinafter ***Kalal***), the Wisconsin Supreme Court addressed the evolving practice of legislative interpretation and clarified future statutory interpretation practices for the courts.

They stated that for more than 25 years preceding that decision "this court made the following observation about statutory interpretation:

> There are two accepted methods for interpretation of statutes. The first, determining legislative intent, looks to extrinsic factors for construction of the statute. The second, determining what the statute means, looks to intrinsic factors such as punctuation or common meaning of words for construction of the statute. 2A Sutherland, *Statutory Construction* (4th ed. 1973), secs. 45.05, 45.07 and 45.14. Whichever of these methods is used, the cardinal rule in interpreting statutes is that the purpose of the whole act is to be sought and is favored over a construction which will defeat the manifest object of the act. *Statutory Construction, supra*, at pp. 56-57, sec. 46.05. ***Student Ass'n v. Baum***, 74 Wis.2d 283, 294-95, 246 N.W.2d 622 (1976). ***Kalal*** at ¶ 38.

The Court addressed the difference between the "statutory meaning" and "legislative intent" approaches to statutory interpretation citing Justice Holmes' famous quotation:

> [The "statutory meaning" approach] was stated by Justice Holmes in his remark that "we do not inquire what the legislature meant; we ask only what the statute means." [Holmes'] preference for the meaning of the statute over legislative intent as a criterion of interpretation has been expressly endorsed by Justices Jackson and Frankfurter, the latter of whom said that he even tried to avoid using the term "legislative intent." Courts have also supported the Holmes view. ***Kalal*** at ¶ 39

The United States Supreme Court added to the interpretation of Justice Holmes' statement when it stated : "We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." ***Kalal*** at ¶ 39.

The Court indicated and implied endorsement of an express preference for "common, ordinary, natural, normal, or dictionary definitions of statutory language" used and a "policy favoring conventional meanings and general understandings over obscurely evidenced intention of the legislators is supported in the oft-repeated premise that intention must be determined primarily

from the language of the statute itself." ***Kalal*** at ¶ 41.

Finally, the Court addressed the difference between "intrinsic" and "extrinsic" aids. As a general matter, extrinsic aids are useful to decisions based on the intent of the legislature, while intrinsic aids have greater significance for decisions based on the meaning of the statute as understood by people in general. ***Kalal*** at ¶ 42.

The Court indicated that prior to its decision Wisconsin's statutory interpretation case law has evolved in a combined fashion, generating some analytical confusion. The Court stated:

> The typical statutory interpretation case will declare that the purpose of statutory interpretation is to discern and give effect to the intent of the legislature, but will proceed to recite principles of interpretation that are more readily associated with a determination of statutory meaning rather than legislative intent — most notably, the plain-meaning rule. *See, e.g.*, ***State ex rel. Cramer v. Schwarz***, 2000 WI 86, ¶¶ 17-18, 236 Wis. 2d 473, 613 N.W.2d 591. Although ascertainment of legislative intent is the frequently-stated goal of statutory interpretation, our cases generally adhere to a methodology that relies primarily on intrinsic sources of statutory meaning and confines resort to extrinsic sources of legislative intent to cases in which the statutory language is ambiguous. Id.; see also ***Seider v. O'Connell***, 2000 WI 76, ¶¶ 43-53, 236 Wis. 2d 211, 612 N.W.2d 659; ***State v. Setagord***, 211 Wis. 2d 397, 406-07, 565 N.W.2d 506 (1997); ***State v. Williams***, 198 Wis. 2d 516, 525-27, 544 N.W.2d 406 (1996); ***State v. Martin***, 162 Wis. 2d 883, 893-94, 470 N.W.2d 900 (1991). ***Kalal*** at ¶ 42.

The Court then concluded that "the general framework for statutory interpretation in Wisconsin requires some clarification," proclaiming use of the following principles: ***Kalal*** at ¶ 44-52

- A solemn obligation of the judiciary is to faithfully give effect to the laws enacted by the legislature, and to do so requires a determination of statutory meaning.
- Judicial deference to the policy choices enacted into law by the legislature requires that statutory interpretation focus primarily on the language of the statute.
- It will be assumed that the legislature's intent is expressed in the statutory language.
- Extrinsic evidence of legislative intent may become relevant to statutory interpretation in some circumstances, but is not the primary focus of inquiry.
- It is the enacted law, not the unenacted intent, that is binding on the public.
- The purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect.
- Statutory interpretation begins with the language of the statute. If the meaning of the statute is plain, ordinarily inquiry stops.
- Statutory language is given its common, ordinary, and accepted meaning, except that technical or specifically-defined words or phrases are given their technical or special definitional meaning.
- Context is important to meaning.

- Structure of a statute in which operative language appears is also important to meaning.
- 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.
- Statutory language is read where possible to give reasonable effect to every word.
- If the foregoing process of analysis yields a plain, clear statutory meaning, then there is no ambiguity, and the statute is applied according to that ascertainment of meaning.
- In construing or interpreting a statute a court is not at liberty to disregard the plain, clear words of the statute.
- A statute is ambiguous if it is capable of being understood by reasonably well-informed persons in two or more senses.
- If a statute is ambiguous, the Court turns to the scope, history, context, and purpose of the statute.
- Scope, context, and purpose are perfectly relevant to a plain-meaning interpretation of an unambiguous statute as long as the scope, context, and purpose are ascertainable from the text and structure of the statute itself, rather than extrinsic sources, such as legislative history.
- A statute's purpose or scope may be readily apparent from its plain language or its relationship to surrounding or closely-related statutes—a coherent whole.
- Resorting to legislative history is not appropriate in the absence of a finding of ambiguity.
- Resorting to legislative history will not allow a reviewing court to tap legislative history to show that an unambiguous statute is ambiguous.
- The foregoing rule prevents the use of extrinsic sources of interpretation to vary or contradict the plain meaning of a statute.
- Legislative history need not be and should not be consulted except to resolve an ambiguity in the statutory language.
- Legislative history however, can confirm or verify a plain-meaning interpretation.

The ***Kalal*** Court concluded: "The principles of statutory interpretation that we have restated here are rooted in and fundamental to the rule of law. Ours is a 'government of laws not men,' and 'it is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated' Antonin Scalia, *A Matter of Interpretation,* at 17 (Princeton University Press, 1997). It 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." *Id.* ***Kalal*** ¶ 52.

In addition to these rules of legislative interpretation the Wisconsin Supreme Court pronounced additional rules relevant to this case in ***Teigen v. Wisconsin Elections Commission,*** 2022 WI 64, 403 Wis.2d 607, 976 N.W.2d 519. The case involved a challenge to the use of "drop boxes" authorized by the WEC and the interpretation of the very Wisconsin Chapter at issue in this case. Although only a plurality decision regarding specific issues, the following principles are instructive:

- Statutory interpretation is a question of law to be determined by the courts. *Id at* ¶14
- Since ***Tetra Tech EC, Inc. v. Wis. Dep't of Revenue,*** 2018 WI 75, ¶ 3, 382 Wis.2d 496, 914 N.W.2d 21, Wisconsin courts rejected the practice of deferring to administrative agencies' conclusions of law.
- The plain meaning of a statute may be derived by looking at differences between two statutes and noting the legislature know how to draft [different] language when modifying an original statute. ***Teigen***, 2022 WI 64, ¶ 49
- The court should read statutes in harmony with one another. *Id at* ¶ 50
- The provisions of a text should be interpreted in a way that renders them compatible, not contradictory. *Id at* ¶ 50
- 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 at* ¶ 50.
- The plain meaning approach is not literalistic; rather it is the ascertainment of meaning involving a process of analysis focused on deriving the fair meaning of the text itself. *Id at* ¶ 62
- A preamble, purpose clause, or recital is a permissible indicator of meaning. *Id at* ¶ 62
- A legislature does not alter the fundamental details of a regulatory scheme in vague or ancillary provisions. *Id at* ¶ 63
- Courts are not permitted to read words into a statute that the legislature did not insert itself. *Id at* ¶ 98
- Courts should construe closely related statutes in the context in which the legislature placed them. *Id at* ¶ 102
- If a word or words are used in one subsection but are not used in another subsection, the court must conclude that the legislature specifically intended a different meaning. *Id at* ¶ 223

In addition, it has been a long-standing proposition of statutory interpretation that the legislature is presumed to be aware of existing case law at the time it changes statutes. ***Kenosha County v. Frett,***¶ 11, 2014 WI App 127, 359 Wis.2d 246, 858 N.W.2d 397. Another long-standing statutory interpretation is "[A]n earlier act will be considered to remain in force unless it is so manifestly inconsistent and repugnant to the later act that they cannot reasonably stand together." ***Kienbaum v. Haberny,*** 273 Wis. 413, 420, 78 N.W.2d 888 (1956).

DISCUSSION
Introductory Comments

"The right of voting for representatives is the primary right by which other rights are protected." Thomas Paine, Dissertation on First Principles of Government (1795), reprinted in Thomas Paine: Rights of Man, Common Sense and Other Political Writings 398 (2008). ***Teigen v. Wisconsin Elections Commission,*** 2022 WI 64, ¶ 31, 403 Wis.2d 607, 976 N.W.2d 519. As the United States Supreme Court has recognized, "[n]o right is more precious in a free country than that of having a voice in the election of those who make laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." ***Weberry v. Sanders,*** 376 U.S. 1, 17; ***Teigen,*** *Id at* ¶ 31.

Wisconsin has also recognized the right to vote as a "sacred right of the highest character." ***State ex rel McGrael v. Phelps,*** 144 Wis. 1, 15, 128 N.W. 1041 (1910).

This Court has taken the liberty to borrow the sentiment expressed by Justice Hagedorn in his concurring (in part) opinion in ***Teigen*** . The principle issue in this case involves the lawfulness of the use of the MEU by the City Clerk during the primary election cycle in 2022. "This case is not about ensuring everyone who wants to vote can, nor should we be concerned with making absentee voting more convenient and secure. Those are policy concerns, and where the law does not speak, they are the business of the other branches, not the judicial branch." ***Teigen,*** 2022 WI 64, ¶ 145. This case, like the question presented in ***Teigen*** is about applying the law as written; that's it. To find out what the law is, this Court reads it and give the words of the statutes the meaning they had when they were written by the legislature.

Indeed this Court agrees with Justice Hagedorn's statement that "[t]he election law statutes we are asked to consider are by no means a model of clarity. Many of the controlling provisions were originally enacted over 100 years ago and have been layered over with numerous amendments since. Reasonable minds might read them differently." ***Teigen ,*** 2022 WI 64, ¶ 150.[6]

" [S]ome citizens will cheer this result; others will lament. But the people of Wisconsin must remember that judicial decision-making and politics are different under our constitutional order. Our obligation is to follow the law, which may mean the policy result is undesirable or unpopular. Even so, we must follow the law anyway. To the extent the citizens of Wisconsin wish the law were different, the main remedy is to vote and persuade elected officials to enact different laws. This is the hard work of democracy." ***Teigen,*** 2022 WI 64, 151.

This Court could not possibly have expressed the present task any more eloquently than the words and sentiment chosen by Justice Hagedorn.

[6] Differing interpretations of a statute alone do not create ambiguity. ***State ex rel. Angela M.W. v. Kruzicki***, 209 Wis. 2d 112, 561 N.W.2d 729 (1997).

Municipal Clerk Responsibilities

Wisconsin statute § 7.15(1) specifically provides: "Each municipal clerk has charge and supervision of elections and registration in the municipality. The clerk shall perform the following duties and any others which may be necessary to properly conduct elections or registration…" These duties include those required by Chs.5 to 12 relating to elections.

The Clerk's duties and responsibilities are not insubstantial or by any means easy. The Clerk's duties must be executed to foster the ability of all those who wish to vote the ability to access and vote in their municipalities.

THRESHOLD ISSUE
STANDING

Although this is a defensive claim, it is pivotal to this Court's consideration of the complaint. Should standing not exist, this Court need not decide the remaining claims.

It is the opinion of this Court that the ***Teigen*** plurality decision puts to rest the standing argument made in the present matter. Unlike the ***Teigen*** case, the Plaintiff in this case did comply with the procedural underpinnings of Wisconsin Chapter 5.06.

While standing in federal court is constitutionally confined, Wisconsin is only limited by prudential considerations. "Because our [Wisconsin] constitution lacks the jurisdiction-limiting language of its federal counterpart, 'standing in Wisconsin is not a matter of jurisdiction, but of sound judicial policy'" ***Teigen*** 2022 WI 64, ¶ 16.

Judicial policy favors hearing cases presenting "carefully developed and zealously argued" issues. ***Teigen Id.*** at ¶ 17. "This standard is quite liberal; even "'a trifling interest' may suffice" provided the asserted interest generates sufficient adversity." ***Teigen Id.*** at¶ 17.

Wisconsin has adopted a two-prong test for standing to challenge an agency action under chapter 227 of the Wisconsin statutes: "(1) does the challenged action cause the petitioner injury in fact? and (2) is the interest allegedly injured arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question?" ***Teigen Id.*** at ¶ 19. The first inquiry is a "low bar." ***Teigen Id.*** at ¶ 20. The second inquiry is untethered to the text of chapter 227. ***Teigen Id.***

Here the Plaintiff alleges an injury in fact to his right to vote. The Wisconsin legislature finds that voting is a constitutional right, the vigorous exercise of which should be strongly encouraged and that Wisconsin voters, such as the Plaintiff here, are entitled to have the election in which they participate to be administered properly under the law. *See* Wis. Stat. § 6.84(1); ***Teigen Id.*** at ¶ 21.

"Election outcomes obtained by unlawful procedures corrupt the institution of voting, degrading the very foundation of free government. Unlawful votes do not dilute lawful votes so much as they pollute them, which in turn pollutes the integrity of the results. ***Clark v. Quick,*** 377 Ill. 424, 36 N.E.2d 563 (1941) cited with approval in ***Teigen,*** 2022 WI 64, at ¶ 25. As stated by Sen. Lyndon B. Johnson in Congress, a man with an obscured vote may as well be "a man without a vote," and without the opportunity for judicial review, such a man "is without protection; he is virtually helpless." *See* 106 Cong. Rec. 5082, 5117, (1960); ***Teigen*** *Id* at ¶ 25.

A review of the present case reveals the same claimed injury and philosophical importance as found in the ***Teigen*** fact scenario. As referenced in the plurality decision in ***Teigen***, this Court finds the Plaintiff has standing in the present matter.

That the locations selected by the City Clerk were not as close as possible to the City Clerk's Office and sites utilized afforded an advantage to a political party

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One cannot decide the merits of this claim without considering the 2018 Amendment to Wis. Stat § 6.855, which eliminated the one-location rule previously in existence. There has not been provided an explanation why "singular" [site] language exists in previous subsections of Wis. Stat. § 6.855 after the legislature enacted 6.855(5). A cardinal principle of legislative interpretation is that the legislature was aware of court interpretation of existing law at the time a modification is made. It is a fact that the modification to sec. 6.855 (adding subsection (5)) was made after a Wisconsin federal court had found the statute unconstitutional under the First and Fourteenth Amendments of the U.S. Constitution and the federal Voting Rights Act. It was further known that the legislature understood the federal court decision on sec. 6.855 to have a disparate effect on minority voters in Wisconsin. The legislature adopted the revision, adding subdivision five in response to the federal district court decision and while the matter was on appeal. Indeed the appellate court determined that the addition of subsection five rendered the then pending appeal moot. It is another example of how legislative piece-work and revisions to statutes can lead to multiple interpretations.

We know that at the time of the present matter the "one-location" rule was no longer in existence. Subsection five clearly allows the governing body (City of Racine Common Council and the Municipal Clerk) to designate more than one alternate absentee voting site under Wis. Stat. § 6.855 (1)

The remaining language in subdivision one which was not affected by the 2018 Amendment still mandates that (1)"The designated site shall be located as near as practicable to the office of the municipal clerk or board of election commissioners and (2) "no site may be designated that affords an advantage to any political party." These additional provisions are at issue in the present case.

This Court is persuaded by the defense position that the term "as near as practicable" encompasses consideration beyond a pure geographic standard. *See* ***Ashwaubenon v. Pub. Serv. Comm.,*** 22 Wis.2d 38, 50-51, 125 N.W.2d 647 (1963). In fact, treating this legal term of art as purely distance-based would be an "erroneous concept of law." ***Id.*** Accordingly, this Court rejects that the elections

statutes and election statutory scheme in Wisconsin required that the alternate absentee balloting sites be as physically near to the City Clerk as possible. Such a reading is not consistent with long standing Wisconsin law, and would be contrary to Judge Peterson's decision in ***One Wisconsin***, a decision that served as the catalyst for adding sub (5) by the legislature.[7]

The statute in question clearly and unequivocally indicates that chosen alternate absentee balloting sites "cannot afford an advantage to any political party." It is the requirement of either the common council in choosing alternate sites or the municipal clerk to see that sites chosen comply with this mandatory language. In the present case, the Plaintiff provided a statistical study, which utilized the known historical data available at the time of the primary election that concluded that the sites chosen clearly afforded an advantage to members of the Democratic Party or those having Democratic Party leaning. Even more troubling is the discounting of the Plaintiff's submitted statistical study [R. pp. 37-49] by WEC when nothing opposed it existed in the record. Equally troubing is Administrator Wolfe's decision inserting the terminology "relatively politically equitable," [R. p.120] and that site distribution is "geographically equal," [R. 120] and an assertion that compliance with the statutory language would be "an extremely complex undertaking," and "may never have a universally applicable legal standard to apply," [R. 120]. Plain, unambiguous mandatory language in a statute (law) may not be overlooked because compliance with it would be difficult.

This self-interpretation of compliance with a statute and failing to do so cannot stand under any statutory construction technique known to this Court or cited by any party. Such is at a minimum misinformation or non-compliance with the law and/or an *ultra vires* action by WEC. The filings in this case clearly indicated that the alternate sites chosen clearly favored members of the Democratic Party or those with known Democratic Party leanings. In this regard, this Court finds error in interpretation of law by WEC.

Simultaneous Use of the City Clerk's Office and an Alternate Site in the Racine Governmental building.

The claim here is that the municipal clerk's offering an alternate absentee site in the City Hall violates the following language of Wis. Stat. § 6.855(1) "If the governing body of a municipality makes an election under this section, no function related to voting and return of absentee ballots that is to be conducted at the alternate site may be conducted in the office of the municipal clerk or board of election commissioners."

Here, the Court is persuaded that there existed no violation of the statutory prohibition by the municipal clerk or by WEC. This Court rejects the notion that the alternate site (room 207 of City Hall which is located in a distinct and separate room on another building floor within City Hall) was simply an extension of the municipal clerk's office. The designated room was not an extension

[7] Wisconsin courts are not bound to follow federal court interpretation of Wisconsin law. Such pronouncements can provide helpful insights for the Wisconsin Judiciary. ***Kieninger v. Crown Equipment Corp.***, 2019 WI 27, 386 Wis.2d 1, 924 N.W.2d 172.

of the clerk's office but was set up and physically independent of the Clerk's office and was fully compliant with the statute. This Court affirms this action by the municipal Clerk and the finding of WEC in this regard.

Fixed and Continuous Use Requirement.

The applicable statute is, again, Wis. Stat. § 6.855(1) and its continuous use requirement which reads as follows:

> An election by a governing body to designate an alternate site under this section shall be made no fewer than 14 days prior to the time that absentee ballots are available for the primary under s. 7.15 (1) (cm), if a primary is scheduled to be held, or at least 14 days prior to the time that absentee ballots are available for the election under s. 7.15 (1) (cm), if a primary is not scheduled to be held, and shall remain in effect until at least the day after the election. If the governing body of a municipality makes an election under this section, no function related to voting and return of absentee ballots that is to be conducted at the alternate site may be conducted in the office of the municipal clerk or board of election commissioners.

Although this Court believes that this claim is intertwined with the City's use of the MEU's, the Court will address them separately. This Court agrees with the interpretation that the statute requires the designation of the alternate absentee site to remain in effect throughout the full election cycle not the location itself. The evidence in this case clearly indicates that the municipal clerk gave appropriate notice of the dates, times, and locations the MEU would be available to absentee voters [R. pp. 13-24]. It is not the notice requirement that is critical to this Court's analysis but rather the use of the MEU's during the primary election.

This Court, again, is troubled by Administrator Wolfe's writing in the WEC decision indicating that the pandemic, fires, and floods have necessitated last minute alternative/temporary/backup sites being utilized. As addressed in ***Teigen***, the pandemic and other natural disasters do not allow non-compliance with statutory mandates.

Use of Mobile Alternate Absentee Voting Vehicle-MEU

This Court finds that none of the election statutes allow for the use of a mobile alternate absentee voting vehicle. Indeed, all relevant statutes refer to physical structures such as specifically geographically located buildings or structures. Nowhere can this Court find or has been provided any authority allowing the use of a van or vehicle as an alternate absentee voting vehicle. Interpretation of the election statutes and specifically Wis. Stat. § 6.855 to allow them is "a bridge

too far."[8]

WEC's interpretation of state statutes allowing use of MEU's is inconsistent with state law[9] in the context of Wis. Stat. § 6.84(1), where voting absentee is a privilege exercised wholly outside the traditional safeguards of the polling place. As was quoted with approval in ***Teigen,*** "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." ***Teigen***, 2022 WI 64 at ¶ 50. This Court reads Wis. Stat. § 6.855 with Wis. Stat. § 6.84 and the clear legislative directive toward construction: "The legislature finds that the privilege of voting by absentee ballot must be carefully regulated to prevent potential for fraud or abuse"[§6.84(1)] and the legislative directive of "mandatory" provisions in subsection (2). [§ 6.84(2)]. These statutory provisions and the privilege of absentee voting and its potential for abuse demands strict compliance with the relevant statutory privileges regarding absentee voting[10].

No defendant or intervenor can point to any statute authorizing the use of mobile (van) absentee ballot sites; instead, the defendants argue no statute expressly prohibits them. The absence of an express prohibition, however, does not mean mobile absentee ballot sites comport to procedures specified in the election laws. Nothing in the statutory language detailing the procedures by which absentee ballots may be cast mentions mobile van absentee ballot sites or anything like them. Such an interpretation was and is contrary to law.

By this ruling, this Court is not expressing an opinion regarding the efficacy of the use of mobile vans to further the popular use of in-person absentee balloting. This ruling stands for the proposition that such determinations are for the legislature to direct and cannot be a novel creation of executive branch officials.

Accordingly, upon all the files, pleadings and proceedings heretofore had in this matter,

IT IS ORDERED, that the determination of WEC in this matter is reversed as not being in conformity with the elections laws of this State.

Dated this 10th of January, 2024,

Honorable Eugene A. Gasiorkiewicz

CIRCUIT COURT ☆ RACINE COUNTY ☆ WISCONSIN

[8] Taken from the 1977 Hollywood production of a failed allied operation in Nazi occupied Netherlands.
[9] WEC cited to Weidner et al. v. Coolidge, EL 22-24 in their decision apparently as an attempt to bolster their opinion that using a MEU at alternate absentee vote sites are authorized under Wisconsin law if the mobile unit is compliant with applicable ADA regulations. [R. p. 121]. Prior compliance with a misinterpretation of the law does not convert the action into a legal one.
[10] This Court by reciting this statutory language is not determining that there existed any fraud or abuse in the use of the MEU and ballots cast in the primary election of 2022. There exists no evidence in this record that such had occurred.