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Supreme Court of Wisconsin

No. 2024AP232

Appeal from Racine County Circuit Court, No. 2022CV1324

The Honorable Eugene Gasiorkiewicz, Presiding

KENNETH BROWN,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

v.

WISCONSIN ELECTIONS COMMISSION,

DEFENDANT-CO-APPELLANT-CROSS-RESPONDENT,

TARA MCMENAMIN, *DEFENDANT-APPELLANT-CROSS-RESPONDENT,*

WISCONSIN ALLIANCE FOR RETIRED AMERICANS, BLACK LEADERS ORGANIZING FOR
COMMUNITIES AND DEMOCRATIC NATIONAL COMMITTEE,

INTERVENORS-CO-APPELLANTS-CROSS-RESPONDENTS.

DEFENDANT-APPELLANT TARA MCMENAMIN'S BRIEF

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INTRODUCTION

During the August 2022 Fall Primary, City of Racine City Clerk Tara McMenamini used a legal method to operate appropriately designated in-person alternate absentee ballot sites, pursuant to the Alternate Absentee Ballot Site statute, Wisconsin Statutes section 6.855. R. at 57-3. By statute, the City of Racine Common Council designated in-person absentee voting locations throughout the City of Racine. *Id.* Many, but not all, locations were located at City-owned properties, such as community centers, in an effort to provide all legal voters within the City of Racine access to in-person absentee voting. *Id.* In furtherance of this goal, Clerk McMenamini utilized a mobile election unit (MEU), which is a large vehicle equipped with the same necessary voting equipment found within a bricks-and-mortar building. The MEU, parked at each designated location in lieu of such permanent building, allowed voters to request, vote, and return absentee ballots in-person in the MEU at each location. R. at 59-49. Section 6.855 has certain requirements, all of which were met by Clerk McMenamini and/or the City of Racine Common Council when the voting locations were designated and those voting locations were utilized. R. at 59-60. Notably, no provision of the statute requires the use of a permanent building.

While the Wisconsin Elections Commission has found that Clerk McMenamini's use of the MEU was appropriate and within the law, on appeal to circuit court, the Circuit Court in this matter decided otherwise. This was done with little analysis, stating that the designation of the sites "clearly

avored members of the Democratic Party or those with Democratic Party leanings” and that the use of the mobile election unit was not authorized by law. R. at 99. Both of these findings are incorrect under the law. These conclusions are premised on outdated and misleading statistics that cannot create an “advantage to a political party.” Additionally, no reading of the relevant election statutes suggests that a physical building is required to operate an in-person absentee voting location.

This Court should overturn the decision of the circuit court as it pertains to the use of the MEU and the selection of in-person absentee sites, and decision of the WEC should be affirmed. This Court should find that Clerk McMnamin’s use of a mobile election unit was within the meaning of Wisconsin Statutes section 6.855.

STATEMENT OF ISSUES PRESENTED

1. Whether Clerk McMenamin's use of a mobile election unit to conduct in-person absentee voting was in accordance with Wis. Stat. § 6.855?

Answer by WEC: Yes

Answer by Circuit Court: No.

Clerk McMenamin's answer: Yes

2. Whether Wis. Stat. ch. 5 and/or 6 prohibits the use of a mobile election unit to conduct in-person absentee voting?

Answer by WEC: No.

Answer by Circuit Court: Yes

Clerk McMenamin's answer: No

3. Whether the City of Racine's selection of in-person absentee ballot sites provided a prohibited advantage to a political party?

Answer by WEC: No

Answer by Circuit Court: Yes.

Clerk McMenamin's answer: No

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is warranted in this matter under the standards in Wis. Stat. § (Rule) 809.22(2) and has been provisionally set by this court to occur in Fall 2024. Publication is proper under the standards in Wis. Stat. § (Rule) 809.23(1) because the issues raised here are of statewide import and will provide guidance relevant to future elections administration and litigation.

STATEMENT OF THE CASE

The City of Racine Common Council established several, City-wide, in-person absentee voting locations pursuant to its obligations under Wisconsin

Statutes section 6.855 for the 2022 election year. R. at 57-3. It selected many locations to further the City's goal of providing in-person absentee voting locations that are accessible to all legal voters residing in the City of Racine. *Id.* This selection of sites was performed with no preference towards any political party. *Id.* Many, but not all, locations were established at City-owned properties, such as community centers or at other public buildings. R. at 56-34-37. The City of Racine City Clerk Tara McMenamin was charged with administering elections in the City of Racine. To service voting locations selected by the City of Racine Common Council, Clerk McMenamin used a novel means for these locations, a mobile election unit (MEU) in lieu of a permanent building. R. at 57-3.

This MEU was a large vehicle that housed all election equipment and could travel to each location that was designated by the City of Racine Common Council and selected for staffing by Clerk McMenamin. R. at 99-3. The MEU parked at each posted location, opened its doors, displayed appropriate signage, and allowed legal voters to exercise their ability to request, vote, and return absentee ballots. R. at 59-48. Eligible voters could both register to vote and cast in-person absentee ballots within the confines of the staffed vehicle, the same as they would within a permanent building. *Id.* Each location for which the MEU was located was properly noticed pursuant to section 6.855(2), and in-person absentee election activities were performed only during the designated hours. *Id.*

Plaintiff-Respondent-Cross-Appellant Kenneth Brown, a qualified voter in the City of Racine, observed the use of the MEU during the August 2022 Fall Primary election, and on August 10, 2022, filed a complaint under Wisconsin Statutes section 5.06(1) with the Wisconsin Election Commission (WEC), alleging that the operation of the MEU was contrary to state law. R. at 59-6. Brown argued (1) that the locations were not located “as near as practicable” to the City Clerk’s Office, (2) that the locations provided an advantage to a political party, (3) that voting functions that occurred at City Hall, but not within the City Clerk’s Office, still constituted as occurring within the City Clerk’s Office, (4) that the site designations were not in effect for the requisite period of time, and (5) that nothing in the statute allowed the use of a temporary location for in-person absentee voting. R. at 59-48-49. Robust briefing occurred, and, on November 4, 2022, WEC rejected each and every argument that Brown made and upheld Clerk McMenamin’s use of the MEU and her selection of in-person absentee. R. at 59-60.

Brown appealed the WEC’s decision to the Racine County Circuit Court, alleging that the MEU was improperly used for both the August 2022 Fall Primary Election and the November 2022 Fall General Election. R. at 3. Pursuant to Clerk McMenamin’s motion to dismiss, all claims related to the November 2022 Fall General Election were stricken from the complaint because Brown failed to bring those claims before the WEC. *See. e.g.* R. at 81-22. The case proceeded to briefing; Brown’s arguments to the circuit court

regarding the August 22 Fall Primary Election were nearly identical to the arguments that he made to the WEC. *Compare* R. at 56-4-14 and R. at 86.

On January 10, 2024, the Honorable Judge Eugene Gasiorkiewicz issued an Amended Decision and Order, which stated that Clerk McMenamini complied with the “near as practicable” requirement, the “fixed and continuous use” requirement, and the prohibition against the simultaneous operation of the City Clerk’s Office for voting and in-person absentee voting locations. However, the court found that the selection of in-person absentee voting locations advantaged a political party and that the use of the MEU was not authorized by statute. R. at 99.

Clerk McMenamini timely appealed the portion of the decision that found the MEU was unauthorized under statute and the portion that found that the selection of in-person absentee advantaged a political party. R. at 120. She further joined Defendant-Appellant’s Petition for Bypass on March 1, 2024. Brown filed a timely cross-appeal. R. at 143. This Court granted the petition on May 3, 2024, and issued a briefing schedule.

ARGUMENT

Clerk McMenamini’s use of a Mobile Election Unit in the August 2022 Fall Primary Election occurred within the requirements of Wisconsin Statutes section 6.855, and the decision of the Wisconsin Elections Commission should be upheld by this Court.¹ Nothing within the plain

¹ In accordance with the Court’s May 3, 2024, order, Clerk McMenamini is arguing only issues set forth in the WEC’s Petition for Bypass, joined by Clerk

language of Wisconsin Statutes section 6.855 requires the use of a permanent building, and this Court should not read that requirement into the statute. Further, the selection of designated voting locations did not afford an advantage to any political party. The Court should affirm the decision of the WEC in this matter and reverse the decision of the circuit court as it pertains to the use of the MEU and its finding that selection of in-person absentee sites advantaged a political party.

I. Standard of Review

This Court reviews *de novo* all issues presented here. Statutory interpretation presents questions of law that must be independently reviewed by the Court. *Townsend v. ChartSwap, LLC*, 2021 WI 86, ¶ 11, 399 Wis. 2d 599, 967 N.W.2d 21. The Court is required to “summarily hear and determine all contested issues of law and shall affirm, reverse or modify the determination of the commission.” Wis. Stat. § 5.06(9). This analysis incorporates the general standards for review of agency decisions under Wis. Stat. § 227.57. *Id.*

However, the Court “shall accord no deference to the agency’s interpretation of law” in judicial review of an agency decision. Wis. Stat. § 227.57(11). The Court exercises independent judgment, although it shall give “due weight” to an administrative agency’s experience, technical competence,

McMenamin on March 1, 2024. Further, Clerk McMenamin argues only the narrower set of issues set forth in her Notice of Appeal. She intends to address any other issues decided by the WEC and argued by Brown in her response and/or reply to Brown’s forthcoming brief.

and specialized knowledge. *TetraTech EC, Inc. v. Wisconsin Dep't of Revenue*, 2018 WI 75, ¶ 84, 382 Wis. 2d 493, 914 N.W.2d 21; *see also Wisconsin Dep't of Workforce Dev. v. Wisconsin Labor & Indus. Review Comm'n, et al*, 2018 WI 77, ¶ 4, n.4, 382 Wis. 2d 611, 914 N.W.2d 625; Wis. Stat. § 227.57(10).

II. Clerk McMenamin Did Not Advantage a Political Party, and Brown's Analysis Of the Issue Is Unworkable and Unconstitutional.

Clerk McMenamin did not use in-person absentee voting locations that advantaged any political party, and WEC properly found that the City of Racine Common Council's designation of the locations and Clerk McMenamin's use of locations was appropriate and within the meaning of the statute. R. 59 at 55. This Court should affirm the decision of the WEC.

A. Brown's definition of "political advantage" is absurd and unworkable

Wisconsin Statutes section 6.855 does not articulate a methodology to evaluate whether a political party is advantaged in violation of the statute. Rather, it states, in relevant part, that "no site may be designated that affords an advantage to any political party." The methodology for statutory interpretation is well-settled in the State of Wisconsin; all statutory interpretation starts with the plain meaning of the statute. *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶¶ 45-46, 271 Wis. 2d 633, 681 N.W.2d 110. If the wording of the statute is clear, the interpretation inquiry ends. *Id.* "[S]tatutory 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 46.

A plain reading of Wisconsin Statutes section 6.855 declares that an improperly-designated site is a site that affords an *actual advantage* to a *political party*. Brown fails to demonstrate that the analysis that he argues is required fits into this statutory requirement in four ways. First, he fails to establish that his method of analyzing advantage is condoned by statute; second, even if he establishes that his method is condoned by statute, he fails to establish that it is required by statute; third, he fails to establish that his analysis is correct; and fourth, even if his analysis were correct, he fails to establish that the selected sites in fact afforded an advantage to a *political party*. Further, his interpretation seeks to reestablish the “one-location” rule in violation of the United States Constitution. *One Wis. Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 934-935 (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).

Brown’s interpretation of the relevant statute cannot stand because it would cause absurd results and create unclear requirements for municipal clerks, it would redefine the statutory phrase “political party” into that which Brown characterizes as “partisan advantage,” and it, in application, violates the federal constitution.

Brown bases his argument on a statistical analysis appended to his complaint with the WEC, despite nothing in the statute that requires or

allows such an analysis to demonstrate advantage to a political party.² His statistical analysis alleges that the locations of the in-person absentee voting locations were located in City wards that voted more often for the Democratic Party than the ward in which the City Clerk's office is located. As an initial matter, Brown's statistical analysis uses old ward boundaries from the 2016, 2018, and 2020 elections that fail to accurately reflect the then-current ward boundaries.³ Brown, instead, relied upon outdated wards that were established prior to the 2020 census; meaning, his statistical analysis cannot show political advantage in new ward boundaries. To illustrate, prior to the 2020 census, the City of Racine had 36 electoral wards, and in the 2022 election, the City of Racine had 49 electoral wards. Brown's data does not account for these changes at the ward level, and thus his statistical analysis is inaccurate as to the electoral wards that he claims to be analyzing beneath statutory silence.

Assuming, *arguendo*, that Brown's statistical analysis based upon incorrect ward boundaries were appropriate under statute, his analysis

² Brown cannot argue that the statute's silence on election procedures both requires or allows the use of his ward-based statistical analysis, and, at the same time, forbids that which is not expressly permitted. These arguments cannot co-exist, despite Brown's insistence otherwise and the circuit court's reliance on a statutory-silence theory to prohibit usage of the MEU. R. at 99-17.

³ Pursuant to *Clarke v. Wis. Elections Comm'n*, 2023 WI 79, 410 Wis. 2d 1, 998 N.W.2d 370 and the ensuing legislative and executive action, the ward maps in the City of Racine have changed during the pendency of the instant case.

ignores the fundamental differences between “absentee voting” and “election day voting.” For election day voting, voters are assigned to a specific polling location, although that polling location may not be the most convenient to their whereabouts, such as to their place of employment, on election day. For example, on Election Day, a voter in old ward 17 must vote at his or her assigned polling place, as opposed to at a voting location that would be more convenient for any reason, such as for work schedule, travel plans, or bus routes.

In contrast, for absentee voting, voters who elect to vote by absentee ballot may attend any of the alternate absentee ballot sites, including those sites not in their assigned ward, and the municipal clerk would ensure that those voters received their respective ballots. Some in-person absentee voting locations that were utilized in the Fall 2022 Primary Election were situated at the border of a ward. For example, the site located at the Cesar Chavez Community Center on 2221 Douglas Avenue, Racine, is on the border of old ward 17 and old ward 11. While this Community Center is technically located in old ward 17, it is just as available to voters in old ward 11. In fact, the Chavez Community Center is in some instances closer in proximity to voters in old ward 11 than it is to those voters on the far edge of old ward 17. These nuances are not reflected in Brown’s analysis. Ward boundaries are simply lines on a map, but voters are free to vote at any alternate absentee site they may choose, including those closer to their homes and outside their electoral

ward boundary. Brown's statistical analysis that claims to evaluate "political advantage" does not account for absentee voting; specifically, that voters may choose to vote at an absentee ballot site that is located outside of their assigned ward, which is specifically tied only to the voters' residence.

Notably, nowhere in the statute does it provide for the selection of electoral wards for Brown's statistical measure instead of some other boundary. Why did he not select based upon City of Racine neighborhood? Or based upon City of Racine aldermanic district? Or upon the County Supervisor districts that fall within the City of Racine? Or Racine Unified School District voting district? Or based upon the State Assembly districts in the City of Racine? Or the State Senate Districts in the City of Racine? Brown provides no reasoning for performing the analysis at the ward level, and the statute does not require, or even suggest, an analysis to be performed at the ward level. In fact, the statute says nothing about an analysis whatsoever, and thus Brown's analysis is uniquely his own and statutorily unrecognized.

A rational reading of the statute is one that prohibits actual, demonstrable advantage to a political party, such as prohibiting the placement of an in-person absentee voting location at a political party's local office or at any location where a political party is holding a rally. There are no allegations that the City of Racine Common Council or Clerk McMenamín placed an alternate absentee ballot location at 507 6th Street (the headquarters of the Racine County Democratic Party), 339 Main Street (the

downtown location of the Racine County Republican Party), the home or business of any individual on the ballot, the home or business of any official in a local political party, or at any location in which a political party was holding a rally.

Further, Brown never connected the dots between his assertion that the selection of voting locations in wards that did not match the partisan makeup of the Clerk's Office and actual advantage to a *political party*. While Clerk McMenamin vehemently denies that the selection of voting locations advantaged anyone, the statute is clear that a political party must actually be advantaged, as opposed to a mere theoretical advantage. Were this the Legislature's intention, it would have elected to write that alternative into Wisconsin Statutes section 6.855. But it didn't, and *Kalal* prevents this Court from reading such into the statute. 2024 WI 58, ¶ 47. Brown's analysis stops short of asserting that the selection advantaged a political party. Specifically, his analysis states, "If the mobile voting unit is effective in driving up turnout, concerns that there *may be* a differential partisan effect on turnout are well-founded, given the data presented here." R. at 56-49 (emphasis added). The statute regulates actualities, as opposed to concerns, ifs, and speculations as to whether the MEU increases turnout. *See* Wis. Stat. § 6.855. Additionally, Brown's analysis, even with its most charitable reading, fails to establish that the voting locations selected actually advantage a *political party*. While Clerk McMenamin maintains that the voting location selections do not provide any

partisan advantage, Brown's analysis establishes, at best (and for purposes of only this argument), a general partisan advantage, which is distinct from an advantage to the organization that is a political party. Clerk McMenamin's proposed interpretation of the statute, however, avoids the numerous issues entangled in Brown's analysis, which finds advantage to a political party only through inference, supposition, and pure *ipse dixit*.

B. Brown advocates for the reimplementaion of the unconstitutional one-location rule.

Brown advocates, even if unwittingly, that the one-location rule, though unconstitutional, be reinstated. During the pendency of this litigation, Brown has argued that Wisconsin Statutes section 6.855 forbids all in-person absentee voting sites that are located in a ward with any partisan deviation from that of the electoral ward that contains the City Clerk's Office, claiming such constitutes advantage to a political party. R. 59 at 40 (arguing that "the goal is... a ward that has the same political makeup as the one in which the clerk's office is located"). Were Brown's interpretation of Wisconsin Statutes section 6.855 operative, such would require that all in-person absentee voting sites be located within the shadow of the municipal clerk's office. Brown's proposition is unfounded, unworkable, and unconstitutional.

Prior to 2017, municipalities were limited to a single location for in-person absentee voting. This limitation was challenged in federal court and was found to be in violation of Section Two of the Voting Rights Act and the First and Fourteenth Amendments. *One Wis. Inst., Inc. v. Thomsen*, 198 F.

Supp. 3d 896, 934-935 (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). Specifically, such limitation did not justify the state's proffered interests and thus local control was appropriate to address the needs of the community, and, further, that attempting to achieve consistency statewide was illusory. *Id.*

In response to *One Wisconsin, id.*, the State of Wisconsin enacted Wisconsin Statutes section 6.855(5), which amended the statute to provide that “[a] governing body may designate more than one alternate site under sub. (1).” This statutory augmentation satisfied the Seventh Circuit Court of Appeals and resolved that portion of *One Wisconsin. Luft v. Evers*, 963 F.3d 665, 674 (7th Cir. 2020) (stating that “[t]he one-location rule is gone, and its replacement is not substantially similar to the old one”). At least one justice of this Court has suggested that municipalities lawfully may have over 200 in-person absentee voting locations, so long as those locations are appropriately staffed. *See Trump v. Biden*, 2020 WI 91, ¶ 99, 394 Wis. 2d 629, 951 N.W.2d 568 (Roggensack, C.J., dissenting) (stating that “[i]t is conceivable that the 200 sites [...] could have become alternate absentee ballot sites”).

Delving further, the Western District of Wisconsin found that the constitutionality of the one-location rule hinged on whether there was the widespread ability throughout the community to participate in in-person absentee voting. It was clear that simply having two or more side-by-side

locations would not have sufficed. For example, the court stated that, “[c]ombined with the one-location rule, limiting hours leads to longer lines at clerk's offices, which in turn requires voters to be prepared to devote more time to voting.” *One Wis. Inst., Inc.*, 198 F. Supp. 3d at 932. Also, “[h]aving only one location creates difficulties for voters who lack access to transportation.” *Id.* Additionally, “[t]he state’s one-location rule ignores the obvious logistical difference between forcing a few dozen voters to use a single location and forcing a few hundred thousand voters to use a single location.” *Id.* at 934. “[V]oters in large cities will have to crowd into one location to cast a ballot.” *Id.* at 956. Consequently, “[t]he opportunity to participate may decrease as distance increases.” *Luft*, 963 F.3d at 674.

Brown’s interpretation of Wisconsin Statutes section 6.855, which interpretation supports numerous in-person absentee voting locations, but only in the municipal clerk’s ward, is oblivious to the evolution of law on this matter. Specifically, Brown’s argument ignores the constitutional concerns about impermissibly long lines, as well as the unavoidable transportation, distance, and congestion issues derived from thousands of voters corralled into one location. Consequently, Brown’s statutory interpretation supports the one-location rule and thus is an unconstitutional proposition.

The City of Racine, by designating in-person absentee ballot sites, and Clerk McMenamin, by operating these in-person absentee ballot sites, did not violate the prohibition on providing an advantage to a political party.

Brown has not established that a statistical analysis based on outdated wards is either necessary or allowed under statute. Additionally, Brown has offered no basis on which to conclude that Clerk McMenamín provided an actual advantage to any political party. Further, Brown's statutory interpretation leads to an unconstitutional result. Without room in the law for Brown's proposed methods and interpretations, his arguments fail.

III. Clerk McMenamín's Use Of the Mobile Elections Unit Was Appropriate Under Wis. Stat. § 6.855.

Clerk McMenamín appropriately used a mobile vehicle as an alternate absentee ballot site when she administered the 2022 Spring Primary Election. Nothing within the text of Wisconsin Statutes section 6.855 requires the use of a permanent building at a voting location.; nothing within the text of chapters 5 or 6 prohibits a mobile vehicle, and nothing within the text of section 6.84(1) or (2) disallows the use of a mobile vehicle.

The administration of in-person alternate absentee ballot site requires a considerable amount of equipment, and, in an effort to streamline the process and allow for in-person absentee ballot access to reach more locations across the City of Racine and to further the City's goal of ensuring that all legal voters have the widespread ability to vote, the City of Racine Common Council approved the use of a mobile voting location, called the Mobile Elections Unit (MEU). In doing so, the City of Racine Common Council designated locations at which the MEU would be located, and Clerk McMenamín properly posted the time and location that each site would be

operational in accordance with Wisconsin Statutes section 6.855(2). The MEU then traveled to each approved and posted location, allowing legal voters to request, vote, and return absentee ballots.

At no time during the pendency of this litigation did Brown support his argument against Clerk McMenamin's utilization of the MEU with authority that either requires that in-person absentee ballot sites must be located within a permanent building or that mobile voting locations are prohibited. No such authority exists. Before the WEC, Brown's argument identified statutes that apply only to "polling locations," which state that polling places are often in buildings. However, "polling locations" are fundamentally different than "in-person absentee sites" and are governed under different statutory provisions and chapters. *Compare* Wis. Stat. § 5.25 and Wis. Stat. § 6.855. Even when analyzing the inapplicable statutes, the polling location statute provides for using places other than buildings when the use of a public building is impracticable. *See* Wis. Stat. § 5.25(1) (stating that, "[t]he places chosen shall be public buildings, *unless the use of a public building for this purpose is impracticable* or the use of a nonpublic building better serves the needs of the electorate . . .") (emphasis added). The WEC in this matter found that these statutory sections are separate and govern different aspects of the election, and, even if they were not, the Legislature explicitly allowed for exceptions to the public building requirement, provided that local approval and discretion is exercised. R. 59 – 59-60. As a result,

Brown cannot rely on express authority that either requires a bricks-and-mortar in-person absentee ballot site or prohibits a mobile election site. Additionally, any persuasive authority rooted in polling location law is just as unfavorable to his argument here. Therefore, the decision of the WEC must be upheld by this Court.

In the absence of a statutory prohibition on point and in his favor, Brown must resort to embracing the circuit court's decision and the reasoning thereunder. The circuit court in this matter found that Wisconsin Statutes section 6.84(1)-(2) and *Teigen v. Wis. Elections Comm'n*, 2022 WI 64, 403 Wis. 2d 607, N.W.2d 519, stand for the proposition that anything not explicitly authorized by statute pertaining to absentee voting is in fact prohibited. R. at 99-17. This is an incorrect interpretation of both Wisconsin Statutes 6.84(1)-(2) and *Teigen v. WEC*.

The State Legislature set forth a finding of a legislative directive for the construction of absentee ballot statutes in Wisconsin Statutes section 6.84(1). This directive finds that "voting by absentee ballot is a privilege exercised wholly outside the traditional safeguards of the polling place" and that the privilege of absentee voting must be carefully regulated to prevent abuse. Wis. Stat. § 6.84(1). This statute further enumerates three statutory sections that are mandatory: The methods of obtaining absentee ballots in section 6.86, voting an absentee ballot in section 6.87(3)-(7), and the counting of absentee ballots in section 9.01(1)(b)2-4. *Id.* § 6.84(2). Outside of these

enumerated statute sections, the statute is silent on restrictions placed upon the absentee voting process. The fact that the Legislature thought absentee voting should “be carefully regulated” explains why the Legislature enacted chapter 6, Wis. Stat. However, the Legislature elected neither to clarify the provisions therein nor to license courts to invent new regulations that the Legislature chose not to impose. Notably missing in these mandatory requirements, and fatal to Brown’s argument, is the requirement to operate an alternate absentee ballot site within a building.

It is presumed that the Legislature acted intentionally when it enacted section 6.84(2) and elected not to include section 6.855 as another mandatory provision or to include an express requirement for a physical building. It is longstanding law that “the legislature ‘carefully and precisely’ chooses statutory language to express a desired meaning.” *Ball v. Dist. No. 4, Area Bd. of Vocational, Technical & Adult Educ.*, 117 Wis. 2d 529, 539, 345 N.W.2d 389 (1984). “One of the maxims of statutory construction is that courts should not add words to a statute to give it a certain meaning.” *Fond du Lac Cty. v. Town of Rosendale*, 149 Wis. 2d 326, 334, 440 N.W.2d 818 (Ct. App. 1989). Any interpretation of Wisconsin Statutes section 6.84(1) or (2) to prohibit the use of a mobile alternate absentee ballot site would be just that, adding words to a statute and voiding the careful and precise language selected by the Legislature.

This Court recently addressed the proper interpretation of Wisconsin Statutes section 6.84(2) in its application to absentee ballot drop boxes. *Teigen v. Wis. Elections Comm'n*, 2022 WI 64, ¶ 54, 403 Wis. 2d 607, 976 N.W.2d 519. In *Teigen*, the Wisconsin Elections Commission authorized the use of absentee ballot drop boxes through the use of two advisory documents. However, the Court found that the guidance regarding absentee ballot drop boxes was invalid due to its non-compliance with Wisconsin Statutes section 6.87(3)-(7). *Id.* ¶ 55. Section 6.87(3)-(7) is explicitly listed in section 6.84(2) where it sets forth which statutory provisions are mandatory. Wis. Stat. § 6.84(2).

All requirements set forth by Wisconsin Statutes section 6.87(3)-(7) and reaffirmed by this Court in *Teigen* are met by the MEU, and Brown does not allege that these requirements are lacking. This Court enumerated various ways in which absentee ballot drop boxes did not meet the requirements of section 6.855 and 6.87(3)-(7) when finding that the drop boxes violated section 6.84(2). *Teigen*, 2022 WI 64, ¶¶ 55-61. The first focus of the Court concerning compliance with section 6.855(1) and 6.87(3)-(7) was on whether the sites allowed for requesting, voting, and returning absentee ballots, while the second focus was on whether the drop boxes were adequately staffed. *Id.* Neither issue was raised by Brown, because the MEU allowed for all features of an alternate absentee ballot site designated under section 6.855, and it was appropriately staffed. Clerk McMenamin's use of the

MEU was within the bounds of section 6.87(3)-(7) and, accordingly, the mandatory portion of section 6.84(2).

Considering that neither statute nor *Teigen* prohibit the MEU, the only viable shard left for Brown's taking is that section 6.84(1) and (2) prohibits the use of the MEU through a restrictive penumbra. This argument was adopted, but only slightly developed, by the circuit court below. The circuit court found that:

[t]he 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.

R. at 99-17. However, this principle of “what is not allowed is prohibited” is not reflected in any statutory language within chapter 5 or 6 and appears to be invented out of whole cloth by the circuit court.

This interpretive penumbra, alleging that what is not expressly permitted is denied, is not reflected in Wisconsin's long-standing method of statutory interpretation. Our government 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.” *Kalal*, 2004 WI 58, ¶ 52 (quoting Antonin Scalia, A Matter of Interpretation, at 17 (Princeton University Press, 1997)). The late Justice Scalia further stated that “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.

It is clear that any argument that sets up Wisconsin Statutes section 6.84(1) and (2) as a general principle requiring regulation by penumbra is incorrect and this Court must apply the law as written. The Court should limit section 6.84(2) to its plain language and limit its function to setting the consequences for noncompliance, rather than converting it into a skeptical interpretive gloss that vaguely authorizes intrusions on the constitutionally protected right to vote.

CONCLUSION

This Court should find that Clerk McMenamin’s use of the mobile election unit as an alternate in-person absentee site was lawful under Wisconsin Statutes section 6.855 and that the designation and use of in-person absentee ballot locations did not advantage a political party.

Dated: June 2, 2024.

Respectfully submitted,

Electronically signed by Ian R. Pomplin

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wisconsin Statutes sections 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 6,059 words, exclusive of the appendix.

Dated: June 3, 2024.

Respectfully submitted,

Electronically signed by Ian R. Pomplin

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