FILED
07-23-2024
CLERK OF WISCONSIN
SUPREME COURT

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 COMBINED RESPONSE AND REPLY BRIEF

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INTRODUCTION

Clerk McMenamin's use of the Mobile Election Unit (MEU) as an alternate absentee ballot site was within the requirements of Wisconsin Statutes section 6.855. The sites selected provided no "political advantage," consistent with statute, and the use of a mobile vehicle for an alternate absentee ballot site is appropriate. Clerk McMenamin argued in her opening brief that Brown's interpretation of "political advantage" is unworkable and in practice would bring the return of the unconstitutional "one location" rule. Brown's response to the argument regarding "political advantage" departed into an analysis of statutory history, an analysis generally prohibited under the jurisprudence of this Court, as well as an argument claiming this would not revive the "one location" rule, relying only on *ipse dixit*. Brown cannot rely upon the understanding of a single legislator to discern the reasoning behind the enactment of a statute by an Assembly of 66 members, a Senate of 33 members, and a Governor. This Court must determine the meaning of the statue via its plain language.

Further, the circuit court's analysis under Wisconsin Statutes section 6.84(1), alleging that the statute required a strict construction of election statutes, was rejected by this Court in *Priorities USA v. Wis. Elections Comm'n,* 2024 WI 32. Wisconsin Statutes section 6.84(1) does not apply a strict interpretative gloss to statutes concerning absentee ballots, nor should this Court revisit the determination made in *Priorities USA* that it does apply that gloss.

This Court should reject these arguments and affirm the decision of the Wisconsin Elections Commission, finding that Clerk McMenamin appropriately used the MEU during the August 2022 Fall Primary Election.

ARGUMENT[1]

I. CLERK MCMENAMIN PROPERLY UTILIZED SITES THAT DID NOT PROVIDE AN ADVANTAGE TO A POLITICAL PARTY.

A. Brown's reliance on legislative history is misguided.

Brown spends pages of his brief arguing that the intentions of one of the drafters of the original bill in committee intended for Wisconsin Statutes section 6.855 to apply to all partisan advantage, not just political parties. Brown's appeal to legislative history is misguided. "Where statutory language is unambiguous, there is no need to consult extrinsic sources of interpretation, such as legislative history." *State ex rel. Kalal v. Circuit Court for Dane Cty. (In re Criminal Complaint)*, 2004 WI 58, ¶48, 271 Wis. 2d 633, 681 N.W.2d 110. This Court has established over the preceding twenty years that legislative intent is not binding on this Court or on the public. *Id.* at ¶ 44. Unless Brown intends to argue that this Court dispense with the customary

[1] In accordance with both this Court's May 3, 2024, order encouraging parties to avoid duplicative briefing, as well as to conform to the arguments made by Clerk McMenamin in her opening brief, she will not be addressing arguments made regarding either standing or the constitutionality of any provision at issue in this matter beyond those arguments made in her opening brief.

method of statutory interpretation and overrule *Kalal*, the opinions of State Senator Joeseph Leibham are wholly irrelevant to this matter.

Statutory language is to be given its "common, ordinary, and accepted meaning, except that technical or specially defined words or phrases are given their technical or special definitional meaning." *Kalal*, 2004 WI 58, ¶45. Section 6.855 explicitly states that it prohibits "afford[ing] an advantage to any political party." Brown cannot distort this unambiguous prohibition to make it somehow ambiguous and open the door to the consideration of legislative history. "[T]raditionally, 'resort to legislative history is not appropriate in the absence of a finding of ambiguity.'" *Kalal*, 2004 WI 58, ¶ 51, (quoting *Seider v. O'Connell*, 2000 WI 76, 236 Wis. 2d 211, P50, 612 N.W.2d 659 (quoting in turn *State v. Sample*, 215 Wis. 2d 487, 495-96, 573 N.W.2d 187 (1998)) (quoting in turn, *State v. Setagord*, 211 Wis. 2d 397, 406, 565 N.W.2d 506). It is fundamental to the rule of law that credence be given to the plain meaning of the statute, not to the whims of the individual lawgiver. "[I]t 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). As stated above, this Court cannot and should not care what Senator Leibham intended when writing this statute. The words of the statute control the interpretation of the statute, not the words of a single man.

Despite this long-standing rule of interpretation, Brown's brief is replete with references to the legislative history, while requesting this Court read extraneous words into the statute. For example, he states that "Appellants ask this court to read the Wis. Stat. § 6.855's "no site may be designated that affords an advantage to any political party" restriction as a literal prohibition on only providing an advantage to a political party itself, rather than a partisan advantage." Brown Combined Brief, p. 30. Here, Brown is absolutely correct, Clerk McMenamin requests that this Court interpret the statute as written, which is the prohibition of sites providing an advantage to a political party. Nothing before this Court nor before the WEC has established that any political party has been actually advantaged

B. Brown has not established actual advantage to a political party

Brown argues that his "statistical analysis" not only is correct but is legally required. He is incorrect, and he provides no legal basis for this claim. The WEC was correct in finding Brown's analysis, performed by his own counsel, was lacking and an incorrect application of law. Clerk McMenamin provided numerous reasons disputing Brown's application of the law as ineffectual and his data inaccurate; Brown does not meaningfully contest any.

A key understanding to the alternate absentee ballot locations is that any voter within the municipality may attend any location, including those locations within their electoral ward and those without their electoral ward. This means that a ward analysis, i.e. an analysis based upon the registered

location of each voter, is inapplicable to alternate absentee ballot location analysis. Absentee voters are not confined to electoral ward lines drawn on a map, they are only confined to their municipality of residence. The WEC held this ward analysis to be inaccurate in its determination. R. at 59-55 ("Respondent submitted compelling arguments as to the inaccuracy of the Complainant's data analysis . . .") Brown's rebuttal of this argument amounts to restating his argument made before the WEC and the circuit court in this matter, arguing that the ward-based analysis should be read into the statute as a requirement. ("[T]here is no way to comply with Wis. Stat. § 6.855 without using ward data.") Brown Combined Brief, p. 36. The entire argument proffered by Brown requiring his specific type of analysis is extra-textual and heavily reliant on some ethereal discernment of legislative intent, a method of statutory interpretation not used by this Court for twenty years. Further, even with that legislative intent, in no way does Brown establish a ward-based analysis is required.

The only reasonable interpretation of the statute, as it is written, is that a municipality is prohibited from establishing alternate absentee ballot sites that provide an actual, demonstrable, advantage to any political party. This includes sites that are located at a political party headquarters, rallies held by political parties, or other similar instances in which a site is providing a readily apparent advantage to a political party. Under Brown's analysis, an individual in every municipality across Wisconsin with a marker and an

afternoon could craft wards that facially comply with his demand for a ward to exactly match the political makeup of the location of the clerk's office, while not actually changing the location of any alternate absentee ballot location at issue. For a city the size of Racine, each electoral ward generally must have no less than 800 inhabitants, nor more than 3,200 inhabitants.[2] Wis. Stat. § 5.15(2)(b)(2). The only population requirement is that wards must be assembled into aldermanic districts with substantially similar populations. Wis. Stat. § 5.15(2)(bm). Surely Brown would agree that crafting wards of differing sizes until the "correct" partisan makeup was reached to allow a municipality to use a community center for voting would violate his proffered definition of "advantage to any political party," so why does he advocate for an analysis that would condone that exact practice? Unlike Brown's interpretation, Clerk McMenamin's interpretation is both practical and useful regardless of man-made lines on a map. It effectuates every word in the clause at issue and is a readily administrable standard that can be followed by the reasonable municipal clerk.

C. Brown's argument regarding the "one location" rule provides no substantive rebuttal.

Brown argues that the City of Racine Common Council's designation of other locations within the electoral ward of the City Clerk's office means that

[2] Numerous exceptions apply to the population requirements regarding the creation of electoral wards, including legislative redistricting, detached municipal territory, and low population municipalities, among others. *See* Wis. Stat. § 5.15, *et. seq*.

his extra-statutory requirement that all alternate absentee ballot locations are placed in the same electoral ward as the Clerk's office moots the argument regarding the "one location" rule. Not so. As explained in Clerk McMenamin's opening brief, the "one location" rule is not just about one literal location, it includes substantially similar location-based limitations on alternate absentee ballot locations. The Seventh Circuit Court of Appeals, when analyzing the addition of subsection (5) to section 6.855 stated that "[t]he one-location rule is gone, and *its replacement is not substantially similar* to the old one"). *See Luft v. Evers*, 963 F.3d 665, 674 (7th Cir. 2020) (emphasis added). Clearly a substantially similar limitation, requiring all citizens attempting to cast an absentee ballot to congregate in limited locations in one area of a city is the "one location" rule in all but name. No consideration in such argument is made for crowding, nor is consideration made for voters who lack access to transportation, two factors analyzed in *One Wisconsin. One Wis. Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 932 (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 offers no other substantive argument on this matter.

Brown's method of alternate absentee ballot location selection, requiring locations only within the electoral ward is a return to the substantive problems underpinning the unconstitutional "one location" rule. Even reading the argument in its most permissive form, it is adopting a "substantially similar" requirement to the one-location rule, which also runs

afoul of the United States Constitution. Establishing alternate absentee ballot locations in the manner proposed by Brown, all of them in the same ward as the municipal clerk's office, is unconstitutional and unworkable. It should not be adopted by this Court.

II. CLERK MCMENAMIN'S USE OF A MOBILE ELECTION UNIT WAS IN ACCORDANCE WITH WIS. STAT. § 6.855

Brown argues both that the word "site" does not encompass the MEU and that other statutes concerning absentee ballots are impossible to follow when using a non-static voting site. Both arguments are incorrect. Brown's own definition of "site" includes a vehicle like the MEU, and Clerk McMenamin properly followed all statutes concerning absentee locations and absentee ballot handling.

A. Brown defines "site" to include the Mobile Elections Unit

The use of the MEU in locations around the City of Racine that have been duly noticed constitutes a "site" as stated in Section 6.855. In fact, Brown's own proffered definition of "site" would encompass Clerk McMenamin's use of the MEU. Two of the three definitions of site provided by Brown define "site" to mean the "place or setting of something" as well as "[a] place or location." Brown Combined Brief p. 44. He tries to avoid the logical conclusion that an alternate absentee ballot "site" is a "place" or "location" where alternate absentee ballot activities are performed by suggesting that the word site could mean the surface of the moon. Perhaps if Clerk McMenamin designated a site on the surface of the moon, Brown's argument

would have merit. However, she did not. His *reductio ad absurdum* falls flat. His own definition of the word "site" allows for the MEU to be a "site," because it is a place or a setting in which an absentee ballot may be requested, voted, and returned. Brown further argues that the context of the statute requires that "site" mean something more than his own supplied definitions, however, none of the four arguments he provides actually require site to mean anything more than the designated "place or location" for which someone can request, vote, and return an absentee ballot.

B. The MEU, as a site within the meaning of Section 6.855, complies with other state election laws.

Clerk McMenamin appropriately stored ballots in accordance with Section 6.88. Brown's first argument is that Clerk McMenamin storing absentee ballots at the Clerk's Office violates section 6.88, and he asserts that the ballots are required to be stored in the same place that they are collected. However, section 6.88(1) gives discretion to the municipal clerk to either store the ballots at "the clerk's office or at the alternate site, if applicable until delivered." Clearly the statute gives discretion to the municipal clerk to store delivered ballots at either the clerk's office or at the alternate site. "The use of different words joined by the disjunctive connector 'or' normally broadens the coverage of the statute to reach distinct, although potentially overlapping sets." *Pawlowski v. Am. Family Mut. Ins. Co.*, 2009 WI 105, ¶22, 322 Wis. 2d 21, 777 N.W.2d 67. There are two locations for which the clerk may store absentee ballots, she may either store them in her office or at the alternate

site. It would be an impossibility to store a ballot at an alternate site without that alternate site existing, therefore, "if applicable" acts as an indicator that the option of storing ballots at an alternate site only exists if an alternate site has been designated. If no alternate site is established under Section 6.855, the law does not provide for the option to store ballots at locations other than the municipal clerk's office. However, there is mandate that the ballots be stored at an alternate site. If this were the case, municipal clerks would be required to store ballots at alternate sites that are less traditionally secure than a municipal clerk's office (e.g., a community center gymnasium). This constitutes an absurd result under the law; it cannot be that the Legislature intended to weaken ballot security.

There is no prohibition in Section 6.855 itself that limits the ability of the municipal clerk to store ballots in her office. Section 6.855 states that "no function related to *voting* and *return* of absentee ballots that is to be conducted at the alternate site may be conducted in the office of the municipal clerk." (emphasis added). Clerk McMenamin did not allow voters to "vote" absentee ballots at her office, nor did she allow voters to "return" absentee ballots to her office. These are the two acts that are prohibited by Section 6.855, the voting of an absentee ballot and the returning of a voted ballot. This language mirrors the first sentence in Section 6.855, allowing the governing body of a municipality to designate a site "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." Clearly the statue is focused on the voting of ballots and the return of voted ballots, not the storage of ballots. If the Legislature intended to prohibit the storage of absentee ballots at the municipal clerk's office, the statute would have included that language to effectuate the choice. The Legislature did not do so, and despite Brown's repeated efforts to read additional language into the statute, this Court should not do so.

The MEU is a site when it is designated as a site and in the location of that designation. Brown's distinction between the MEU itself and the location it sits upon is meaningless. When the MEU is in the location for which it was designated, it is an alternate absentee site. Brown attempts to explain why this distinction is meaningful but fails. For example, he states that the Clerk designated St. Paul's Baptist Church as an absentee location, and then parked the MEU in its parking lot, and attempts to explain that this somehow violated the notice requirement of Section 6.855. Brown Combined Brief, p. 48. This argument presumes that the parking lot of St. Paul's Baptist Church is somehow not part of the church property or located at the church address, which, if true, is something that the church may be shocked to discover.

Each location noticed by Clerk McMenamin was done via an address and the name of the location as a descriptor. For example, the notice for St Paul Baptist Church states that the location of the absentee site is at 1120 Grand Avenue, Racine. R. at 56-23. When voters arrived at the noticed

address during the time provided, the MEU was waiting for them to request, vote, and return absentee ballots. Brown provided no evidence before the WEC that voter confusion occurred or that the MEU was not at the address provided in the notice. This attempted distinction can be dismissed outright as meaningless.

Surrounding statutes do not show that the word "site" is limited to permanent buildings, the statutes indicate that a municipal clerk has significant discretion in administering alternate absentee ballot locations. Brown's first statute cited, Section 5.25(1) established that polling places "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 as determined by the authority charged with the responsibility for establishing polling place" however, Brown's preferred interpretation reads necessary words out of the statute. There are two exceptions to the public building requirement, the first when a public building is impractical, and the second, allowing non-public buildings if the needs of the electorate are better served. "The use of different words joined by the disjunctive connector 'or' normally broadens the coverage of the statute to reach distinct, although potentially overlapping sets." *Pawlowski*, 2009 WI 105 at ¶22. Clerk McMenamin's use of the MEU clearly falls into the first category, she used an alternate absentee ballot location because public buildings were impractical. Brown's reading of the statute, that both exceptions apply only to non-public

buildings, reads the words "non-public building" into the first exception. Clearly, if the Legislature had intended for the first exception to only encompass the use of non-public buildings, they would have written it to do so. Clearly the Legislature specified one exception to apply to all sites, and the other to only apply to non-public buildings, because that is exactly how the statute is written.

There is no meaningful difference between "wherein" and "whereat," and to the extent that Brown argues that Section 5.02(15), defining a polling place to be the location wherein the elector's vote is cast, ballots were cast *within* the MEU. Therefore, to the extent that this Court finds that the MEU was a polling place within the meaning of Section 5.02(15),[3] it complies to the definition provided under statute that it be locations where ballots are cast within.

Brown's final argument, regarding office hours, is incorrect. He references that office hours are required, and that parks, beaches, vans, and fields do not have office hours. This is both incorrect and irrelevant to the legality of Clerk McMenamin's use of the MEU. First, the MEU very clearly had office hours, these were the hours that were posted for which it would be

[3] Clerk McMenamin does not concede that an alternate absentee ballot site established under Section 6.855 is also governed under Section 5.25 as a polling place, however, to reduce redundant briefing and to conform to the arguments made by Clerk McMenamin on her initial brief, she leaves this argument to Intervenor–Co-Appellant-Cross-Respondent Wisconsin Alliance for Retired Americans, among others.

open and accepting the request, vote, and return of ballots. Second, City of Racine owned parks, beaches, vans, and fields do in fact have hours of operations. *See e.g.* City of Racine Ordinance § 70-101(a) – Closing Hours (setting the operating hours of City parks to 6:00am – 10:00pm daily). Brown's retort of "Whoever heard of 'office hours" at a beach?' has no bearing on this litigation, if for no other reason that a beach does in fact have operating hours. Brown Combined Brief at p. 51.[4]

This Court has already indicated that the circuit court in this matter erred when interpreting *Teigen v. Wis. Elections Comm'n*, 2022 WI 64, 403 Wis. 2d 607, N.W.2d 519 to apply a skeptical interpretation to absentee voting statues. *Priorities USA v. Wis. Elections Comm'n*, 2024 WI 32, ¶47 Brown backs off his argument regarding Section 6.84(1), which this Court has recently stated is "merely a declaration of legislative policy setting forth that absentee balloting must be carefully regulated." *Id.* at ¶32. Brown acknowledges that Section 6.855 is not listed within the mandatory provisions of Section 6.84(2), and correctly acknowledges that Section 6.855 is a law that municipal clerks are required to follow. Clerk McMenamin followed the letter of the law in each case. There is no contention from Clerk McMenamin that the absentee statutes are "optional."

[4] If Brown or his counsel have not availed themselves of the award-winning North Beach in the City of Racine, they should pay it a visit. Its hours of operation are from 6:00 a.m. to10:00 p.m. year-round. It is staffed by lifeguards from 10:00 a.m. to6:00 p.m. daily between the first week of June and the last week of August. https://www.cityofracine.org/NorthBeach/

There are no absurd or unreasonable results that flow from administering elections in this matter. Brown phrases the question before the Court nicely, "whether the MEU complies with the requirements imposed by the Legislature or not." Brown Combined Brief p. 53. However, Brown rarely applies the requirements that were actually imposed by the Legislature and prefers to read extra-textual information into some statutes, to read words out of some statutes, and to read a skeptical construction in all but name that was rejected by this Court in *Priorities USA v. Wis. Elections Comm'n,* 2024 WI 32 of yet other statutes. On his argument regarding absurdity, he offers no examples of absurd results but for the fact he simply does not agree with the manner that Clerk McMenamin conducted the August 2022 Fall Primary Election. There is no consistent interpretation throughout. Clerk McMenamin complied with all aspects of Section 6.855 when operating alternate absentee ballot locations, as written by the Legislature in the text of the statute.

CONCLUSION

For the foregoing reasons, this Court should reverse the Circuit Court on these issues and affirm the decision of WEC.

[The Signature and Certification are after the Cross-Appeal section of this combined brief]

CLERK MCMENAMIN'S RESPONSE

TO BROWN'S CROSS-APPEAL

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INTRODUCTION

During the August 2022 Fall Primary, City of Racine City Clerk Tara McMenamin 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, to provide all legal voters within the City of Racine access to in-person absentee voting. *Id.* In furtherance of this goal, Clerk McMenamin 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 McMenamin and the City of Racine Common Council when the voting locations were designated and those voting locations were utilized. R. at 59-60.

While the Wisconsin Elections Commission has found that Clerk McMenamin's use of the MEU was appropriate and within the law, on appeal to circuit court, the Circuit Court in this matter decided otherwise. During that appeal, the Plaintiff–Respondent-Cross-Appellant Kenneth Brown made

five arguments regarding his assertion that Clerk McMenamin's use of the MEU was illegal. The circuit court found in favor of Clerk McMenamin on three of these arguments and found in favor of Brown on the remaining two, ultimately finding that the MEU was not condoned by statute. After Clerk McMenamin filed her appeal, Brown cross-appealed the three other issues.

Brown asserts that the alternate absentee sites were not located as near as possible to the municipal clerk's office, that the entire City Hall Building should be deemed Clerk McMenamin's office, and that the alternate sites were not in effect for the required period. All three arguments fail. Clerk McMenamin and the City of Racine had a goal of making voting accessible to as many eligible voters as possible, and the voting locations were as close as practicable to the municipal clerk's office while achieving that goal and complying with federal law. It would be absurd to determine that the entire City Hall building is Clerk McMenamin's office. Last, the alternate absentee sites were designated for the appropriate amount of time, and designation is required by statute, not use.

This Court should affirm the decision of the circuit court and the WEC as it pertains to these three issues. This Court should find that Clerk McMenamin's use of a mobile election unit was within the meaning of Wisconsin Statutes section 6.855.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Clerk McMenamin reiterates that this case is appropriate for both oral argument and publication for the reasons set forth in her opening brief.

ARGUMENT

I. CLERK MCMENAMIN LOCATED SITES AS NEAR AS PRACTICABLE WHILE ACHIEVING THE GOAL OF VOTING ACCESSIBILITY

Wisconsin Statutes section 6.855(1) includes a requirement that "[t]he designated site shall be located as near as practicable to the office of the municipal clerk." Part of this statute, referring to a singular site, has been abrogated by the enactment of Section 6.855(5). Statutory interpretation starts with the plain language of the statue. *State ex rel. Kalal v. Circuit Court for Dane Cty.,* 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. "Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." *Id.* The word "practicable" in this clause is a legal term of art, encompassing more criteria than a simple analysis of finding the closest possible location to the office of the municipal clerk. Brown contends otherwise and argues that because Clerk McMenamin's use of alternate absentee sites was not in the shadow of the Clerk's Office, her use of alternate sites was illegal. To do so, Brown ignores the legal term of art "near as practicable," fails to adequately address federal constitutionality, and again attempts to introduce legislative history in his argument. Brown's

arguments on this matter must be rejected, and the decision of the WEC and the circuit court affirmed.

It is long standing precedent that the phrase "as near as practicable" encompasses something other than simply a pure geographic standard resolved through the use of a ruler on a map. *See Ashwaubenon v. Pub. Serv. Com.*, 22 Wis. 2d 38, 50-51, 125 N.W.2d 647, 654 (1963). In fact, treating the legal term of art "as near as practicable" as purely distance-based is an "erroneous concept of law." *Id.* The use of the word "practicable" automatically encompasses evaluating many factors to determine appropriate locations.[5]

[5] Clearly, the *Ashwaubenon* case, which involves the approval of a bulkhead line on a river, is based upon a set of facts quite different from the instant matter. Importantly, however, the concept of "as near as practicable" or "as nearly as practicable" has been interpreted in a wide variety of circumstances as not being capable of definition based upon a strict geographical or mathematical calculation. *See, e.g., Kirkpatrick v. Preisler*, 394 U.S. 526, 530, 89 S. Ct. 1225, 1228, 22 L. Ed. 2d 519, 524 (1969) (In a case involving congressional redistricting, "[t]he whole thrust of the 'as nearly as practicable' approach is inconsistent with adoption of fixed numerical standards."); *United States v. Delgado-Hernandez,* 283 Fed. Appx. 493, 499 (9th Cir. 2008) (A driver momentarily leaving his lane of travel does not violate a statute requiring a vehicle to be driven "as nearly as practicable" within a single lane.); *Lee v. City of San Diego*, 492 F. Supp. 3d 1088 (S.D. Cal. 2020) (A municipal ordinance that made it unlawful for a pedestrian to stand on the sidewalk "except as near as practicable" to the building line or curb line, was unconstitutionally vague, as it failed to provide notice to the public and guidance to officers.); *State ex rel. Martin v. Howard*, 96 Neb. 278, 290, 147 N.W. 689, 693 (Neb. 1914) (The words "as nearly as practicable" in a statutory provision requiring a specific insurance form contract be used "should be construed to mean as nearly as practicable considering the other provisions contained in the insurance code which in anywise are inconsistent with or modify the provisions."); *Losier v. Consumers Petroleum Corp.*, 131 Conn. 161 38 A.2d 670 (Conn. 1944) (Whether a stop sign complied with the statutory requirement that it be located as near as practicable to the entrance to a through way was a question of fact based upon the particular circumstances involved.); *Frye v.*

Here, Clerk McMenamin chose to operate alternate absentee sites to ensure that the City's goal of allowing all legal voters to vote in the manner most accessible to each individual. This necessarily has to encompass all manner of factors, including disability accessibility, construction concerns, traffic flow, bus routes, planned political rallies, noise concerns, parking, and others.

Notwithstanding the practical concerns for the selection of alternate absentee sites, the City of Racine Common Council and Clerk McMenamin must keep in mind legal concerns regarding the crowding of absentee voters into limited in-person facilities and the other factors surrounding the *One Wisconsin* litigation. Factors addressed by the *One Wisconsin* and *Luft* courts are addressed more thoroughly in Clerk McMenamin's opening brief, but in

Tobler, 2 Ohio App. 3d 358, 442 N.E.2d 98 (Ohio App. 1981) (Whether a pedestrian was walking as near as practicable to the edge of the roadway is a question of fact based upon the particular circumstances involved.); *State v. McBroom*, 179 Ore. App. 120, 124-125, 39 P.3d 226, 228 (Ore. App. 2002) (In a case involving travel within a single lane of traffic, "[p]racticable means 'possible to practice or perform,' 'capable of being put into practice, done or accomplished' or 'feasible.' What is practicable or feasible will vary with the circumstances of each case."); *Farmer v. Baldwin,* 346 Ore. 67, 77-78, 205 P.3d 871, 877 (Ore. 2009) (An Oregon rule of appellate procedure providing that a litigant must "attempt to present his or her claims in proper appellate brief form, as nearly as practicable" "does not require exact compliance with the forms and rules of appellate briefing that lawyers observe.")

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

short, if Clerk McMenamin had operated absentee voting in a manner that was not cognizant of that litigation, including, but not limited to, the Seventh Circuit Court of Appeals stating that "[t]he opportunity to participate may decrease as distance increases." *Luft,* 963 F.3d at 674, Clerk McMenamin would have been operating an election in violation of federal law.

The City of Racine Common Council authorized numerous locations that were not ultimately utilized by Clerk McMenamin and Brown focuses a large portion of his argument on sites that were located within the same electoral ward as the City Clerk's Office and questioning why the closer sites were not operated in lieu of sites spread throughout the city. Clerk McMenamin operated alternate absentee sites across the City of Racine because a combination of sites physically close to the Clerk's Office would not have complied with the City's goal for voter access, would not have complied with federal litigation in this field, and would not have complied with many other factors often considered to ensure the equal right to vote. It also is not required under a "close as practicable" analysis, which does not exist solely as a measure of distance. Brown argues throughout his brief that he is not requesting this Court enforce a pure geographic standard, and but then requests that specific standard. Brown Combined Brief, p. 70 (Arguing that the Legislature was intending on "[l]ocating sites as close as possible to the clerks' offices"). Regardless of what Brown argues, he is incorrect.

The adoption of Section 6.855(5), allowing multiple alternate absentee sites further complicates Brown's position on this matter. As an initial matter, it is an impossibility to have more than a single site as "near as practicable to the municipal clerk's office" in the manner suggested by Brown. In a list of multiple sites, there will always be a site that is closer than others unless the sites are selected to create an equidistant ring around the municipal clerk's office. This is true even if Brown's assertion that he is seeking only a primary analysis of distance and not a sole analysis of distance. As the Circuit Court in this matter recognized, the near as practicable language does not require a physical proximity to the municipal clerk's office due to the *One Wisconsin* litigation as well as the adoption of Section 6.855(5), allowing for the designation of multiple sites.

It is long standing state law that "as near as practicable" allows for the consideration of numerous factors when determining where site location. Likewise, it is federal law that a municipality may not designate sites in a manner that will lead to crowding, accessibility issues, and without considering distance from voters or bus lines. Further, the inclusion of subsection (5) and the ability to designate multiple sites renders it impossible to designate a single site "as near as possible" to the municipal clerk's office. Brown's position must be rejected.

II. THE ENTIRE CITY HALL BUILDING IS NOT THE OFFICE OF THE MUNICIPAL CLERK

Under Wisconsin Statutes section 6.855(1), the municipal clerk may not conduct voting or accept the return of ballot in her office, if any alternate absentee ballot sites have been designated. Brown argues that the entire City Hall building is the office of Clerk McMenamin. Common sense and basic word definitions say otherwise. This argument should be rejected as preposterous.

Clerk McMenamin legally operated an alternate absentee ballot site in a conference room in City Hall. This conference room was in a different portion of the building and was not in an area regularly used by Clerk McMenamin or her staff. To pretend that the entire City Hall building is the office of Clerk McMenamin is absurd. This analysis would never be accepted as sufficient applied in other situations. For example, the entire State Capitol building is not the courtroom of the Wisconsin Supreme Court. If counsel in this matter appeared to present oral argument at the Governor's Conference Room on the first floor and not the Wisconsin Supreme Court's courtroom on the second floor, counsel would be in the wrong location. It would be absurd for counsel to then argue they were in the correct location and that the entire building is actually the Wisconsin Supreme Court's because some portion of it is occupied by the Wisconsin Supreme Court. Brown's argument here is plainly wrong.

The remainder of Brown's argument focuses on an error made in the notice requirement, where it is alleged that Clerk McMenamin inadvertently noticed the Clerk's Office as a voting location instead of Room 207 in the City

of Racine City Hall. However, Brown did not bring an allegation regarding a defect in the notice, and a defect in the notice is not before this Court. Brown asserts that "the record shows that McMenamin did not view the alternate sites as replacements for the Clerk's Office, but as sites that could be made available in addition to the Clerk's Office." Brown Combined Brief, p. 74. Interestingly, he never actually shows that the Clerk's office was made available for voters to vote or return ballots, not does he allege it beyond insinuation. Surely if Clerk McMenamin had allowed in-person absentee voting in her office, or even the general clerk's office area, Brown would explicitly say so. He does not, and cannot, because she did not do anything of that sort.

Brown argues in his complaint before the WEC that "Room 207 was simply an extension of the clerk's office." R. at 56-10, ¶ 32. In fact, he only alleges that voters arriving at City Hall to cast in-person absentee ballots were directed to Room 207 to do so. R. at 56-8, ¶ 19. This is allowed under the statute. As is common throughout Brown's arguments, he reads requirements into the statutes that do not exist. R. at 56-10, ¶ 33. ("If that location is unavailable or undesirable the Clerk may designate alternate locations, but she may not then permit voting at City Hall.") Nowhere in the statute does it include a prohibition on City Hall voting. If it did, surely Brown would have pointed to it at any point during the pendency of this litigation.

If the Legislature intended to prohibit absentee voting at City Hall when alternate absentee locations are designated, perhaps they would have specified that voting may not occur at City Hall when alternate absentee locations are designated. However, they did not do so, they prohibited voting and returning ballots at the municipal clerk's office. Brown can point to no law that prohibits having an alternate absentee location in the same building as the Clerk's Office, nor can he point to a law that deems Clerk McMenamin to have turned the entire building into her office.

III. ALTERNATE ABSENTEE SITES WERE PROPERLY DESIGNATED THROUGHOUT THE AUGUST 2022 FALL PRIMARY ELECTION.

The City of Racine Common Council appropriately designated absentee sites for the duration required under law and Clerk McMenamin appropriately designated the dates and times for which the locations would be staffed. Section 6.855(1) states, in relevant part, that:

> 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.

Brown's excerpt of the statute in his brief omits the portion regarding the timeline of the designation, specifically that the designation is to occur prior to the issuance of absentee ballots. Brown Combined Brief at p. 65. The portion of the statute that was omitted is illuminative of the purpose of the statute.

It is impossible to use an alternate absentee location prior to the issuance of absentee ballots. Not only is it impossible, but it is also illegal. Wis. Stat. § 6.86(1)(b). Brown's interpretation of the statute, states that his position "that '[d]esignation' of an alternate site makes 'use' of the site possible, so the two terms are "inextricably intertwined." Brown Combined Brief at p. 77. He also explicitly rejects Clerk McMenamin's contention that "it is the designation of the sites, not the operation of the sites themselves, that must remain in effect until at least the day after the election." *Id*. at 76. However, his interpretation that the sites must be operated for the entire duration of the designation is impossible and illegal under law.

The alternate absentee site designations under Section 6.855(1) are required to occur 14 days prior to the mailing of absentee ballots under Section 7.15(1)(cm). Absentee ballots requested prior to 47 days before a partisan primary or general election are required to be mailed on that 47th day, and absentee ballots requested for other elections prior to 21 days before the election are required to be mailed on that 21st day. Wis. Stat. § 7.15(1)(cm). Due to Section 6.855(1) incorporating Section 7.15(1)(cm), this means that alternate absentee ballot sites are required to be designated 68 days before a partisan primary or general election, and 35 days before all other elections. However, Section 6.86(1)(b) prohibits casting in-person absentee ballots earlier than 14 days preceding any election. Under Brown's definition that designation and use are "inextricably intertwined," he advocates that the

Legislature intended to require the municipal clerk to staff alternate absentee ballot sites for a full 54 days prior to the legal commencement of in-person absentee voting at the sites. This is an absurd result. It is wholly unreasonable to interpret Section 6.855(1) as requiring over seven weeks of needlessly staffing a location, all prior to the legal start of in-person absentee voting, in anticipation of it being used as an alternate absentee site in a partisan primary or general election.

Further, Section 6.855(1) states that the designation must remain in effect until at least the day after the election. If "designation" is intertwined with "use," as Brown advocates, his definition would seem to require that the alternate absentee ballot locations be operated on the Monday before election day, election day itself, and the day after election day. Operating in-person absentee voting on these three days is illegal. Wis. Stat. § 6.86(1)(b). It cannot be that the Legislature is requiring municipalities to operate their alternate absentee sites in an illegal manner when it states that the locations must be "designated." This is the definition of an absurd result.

The only reasonable interpretation of this statute reads the word "designated" to be a synonym of the word "selected" or "indicated." This also aligns with the dictionary definition of the word, which is "to indicate and set apart for a specific purpose, office, or duty." *E.g. Designate*, Merriam-Webster.com Dictionary, https://www.merriam-webster.com/dictionary/designate. Prior to the designation deadline, the City

of Racine Common Council properly designated a myriad of alternate absentee locations and Clerk McMenamin chose which locations to staff. Brown includes no allegation that the schedule changed after the designations were posted.

Further, Brown's remaining argument that the words "shall remain in effect" would be deemed superfluous under a reading that the designation of a site is the selection of the site is incorrect. Clearly, the statute would be read the alternate absentee sites, once designated, could not be changed until after the election. This prevents last minute scheduling changes, last minute location changes, or the opening or shuttering of alternate absentee ballot locations without notice. However, Brown does not allege that Clerk McMenamin did anything of the sort. She created a schedule based upon the Common Council's designation, posted the schedule as required, followed the schedule as required, and brought voting access across the City of Racine.

CONCLUSION

For the foregoing reasons, this Court should affirm the Circuit Court on these issues and affirm the decision of WEC.

Dated: July 23, 2024.

Respectfully submitted,

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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 8,191 words, exclusive of the appendix.

Dated: July 23, 2024.

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