No. 2024AP232

In the Supreme Court of Wisconsin

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,
DEMOCRATIC NATIONAL COMMITTEE, AND
BLACK LEADERS ORGANIZING FOR COMMUNITIES,
Intervenors-Co-Appellants-Cross-Respondent.

On Appeal From The Racine County Circuit Court,
The Honorable Eugene A. Gasiorkewicz, Presiding

INTERVENOR-CO-APPELLANT-CROSS-RESPONDENT BLACK LEADERS ORGANIZING FOR COMMUNITIES' COMBINED REPLY/RESPONSE BRIEF

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I. Introduction[1]

Wisconsin Stat. § 6.855 (1) does not say what Plaintiff-Respondent-Cross-Appellant Kenneth Brown claims. It does not confine alternate in-person absentee voting sites to the ward containing the municipal clerk's office. It does not arbitrarily assign results from top-of-the-ticket races as the appropriate mechanism to measure "advantage to any political party." And it never says that noncompliance with its terms is fatal. The statute itself supports none of this. Brown just wishes it did. Brown's understanding of Wis. Stat. § 6.855(1) is contrary to the statute's plain language and statutory history, the Wisconsin Constitution, and obvious and absurd results would flow from his flawed understanding. His arguments to the contrary are unconvincing and often irrelevant. Accordingly, this Court should affirm the WEC's dismissal of Brown's complaint.

II. Brown's construction of "advantage to any political party" should be rejected.

Brown's preferred construction of Wis. Stat. § 6.855(1)'s "advantage to any political party" language is divorced from statutory text, arises from a fatally flawed, fundamental premise, and leads to absurd results.

a. The ward hosting the clerk's office is an arbitrary baseline; as a result, no advantage can be demonstrated by merely comparing its election results to that of other wards.

In his response, Brown confirmed that a fatal, faulty assumption is essential to his argument. Brown believes that he can demonstrate a

[1] In accordance with the Court's instruction to "avoid repetition of arguments," Black Leaders Organizing for Communities ("BLOC") confines this reply/response brief to three issues: 1. The proper construction of "advantage to any political party", 2. The unconstitutionality of Wis. Stat. § 6.84, and 3. The proper construction of "as near as practicable."

§ 6.855-prohibited advantage by comparing election results from various municipal wards to those from the "*neutral turf* that [circumscribes] the Clerk's office." (Brown Br. at 37.) Brown's basic argument should be understood like this: because the vicinity of the Clerk's office is (for some reason) "neutral," a bias (advantage) is demonstrated by any deviation from the partisan makeup of that area (even a one-vote deviation![2]).

But the ward hosting the Clerk's office is not neutral, and nothing in the record, or the statute, says it is. This flawed premise—upon which his entire "advantage" argument depends—should end the inquiry. Reflecting the makeup of our state, municipal clerks' offices are commonly found in areas which are predominated by one political party or another. From conservative municipalities in Waukesha and Taylor Counties to their liberal counterparts in Dane and Milwaukee Counties, municipal clerks' offices are found all over Wisconsin's political (and geographic) landscape. There is nothing that renders these places (or the wards in which their clerk's offices sit) "neutral." No authority demands that clerks' offices be placed in "neutral" locations, nor is there any obvious rubric by which "neutrality" could be determined in the first place.

Brown does not—and cannot—point to anything in the record that would establish a practice of locating clerks' offices in "neutral locations." Indeed, in some municipalities the clerk's office is simply the place where the clerk currently lives.[3] Municipalities may provide a permanent

[2] As Brown puts it, "the goal is … a ward that has the *same* political makeup as the one in which the clerk's office is located." (Dkt. 86 at 13; Dkt. 59 at 40 (emphasis in original).)

[3] *See, e.g.* all listing the Clerk's office at a residential address, Town of Oulo Clerk, https://mds.wi.gov/View/Clerk?ID=164; Town of Marcellon Clerk, https://mds.wi.gov/View/Clerk?ID=356; Town of Fort Winnebago Clerk https://mds.wi.gov/View/Clerk?ID=349.

location for its clerk's office, or the clerk may determine the location of the home from which they work, based on any number of reasons: price, availability, personal preference, proximity to other municipal services, etc. But there's no indication that these locations are selected on the basis of political neutrality.

The vicinity of a municipal clerk's office is not politically neutral—so Brown's baseline is arbitrary. As a result, comparing his preferred baseline ward to any other ward does not show an advantage, it merely reaffirms that which is already well-known: Wisconsin has varied political geography. Nothing more.

The fatal flaw in Brown's argument is further revealed by considering what happens if a municipality moves its clerk's office into a different ward. Does this new ward suddenly become "neutral"? Or is the prior ward forever designated as the "neutral" one? Would the cross-advantages between the old ward and the new foreclose *both* from alternate sites (and thus impose a no-locations rule)? Who knows. Now that Brown has confirmed the logical infirmity of his argument (by acknowledging the baseless "neutrality" presumption at its core), the Court should avoid the absurdities that could result from its extension.

b. Brown does not dispute the outlandish results that would result from his preferred construction of Wis. Stat. § 6.855.

Brown's § 6.855(1) standard would lead to absurd, discriminatory results. This Court "decline[s] to read statutes in a way that produces absurd, implausible, or unreasonable results, or results that are at odds with the legislative purpose." *Anderson v. Aul*, 2015 WI 19, ¶51, 361 Wis. 2d 63, 862 N.W.2d 304. Brown's preferred construction of § 6.855(1)

yields two noteworthy, and absurd, examples, neither of which he disputes.

First, of Wisconsin's largest municipalities (and likely many more), *zero* could host alternate sites in any wards other than the one containing the municipal clerk's office. Brown does not engage with this, and in fact impliedly concedes that his rule would confine *all* municipalities to designating alternate sites within the boundaries of the ward hosting the clerk's office. (Brown Br. at 36 ("Brown's method … pulls together the various requirements set out in § 6.855 [because] … sites in the same ward as the Clerk's Office are as near as practicable … and offer no advantage.").) Such a result is inconsistent with the plain language of the statute, which never suggests that municipalities should be limited in this fashion. To the contrary, the Legislature amended § 6.855 to expressly authorize multiple alternate sites within a single municipality, and it did not say they must all be within the same ward. As the Legislature amended the statute in response to constitutional protections (as described in *One Wisconsin*) which compel *more* alternate sites in larger cities, Brown's extreme restriction would obviously undermine those same protections. Yet, Brown never disputes that this absurd result does, in fact, flow from his reading of the statute.

Second, Brown's invented ward limitation would discriminate against Black voters. For example, the Milwaukee ZIP code with the highest concentration of Black Wisconsinites would be prohibited from hosting alternate sites altogether, while the ward containing the Clerk's office (where fewer Black folks live) would be the only possible location for one. This result conflicts with both our federal and state guarantees of equality as well as a municipal clerk's statutory obligation to "inspect

systematically and thoroughly the conduct of elections in the municipality so that elections are … *uniformly* conducted." Wis. Stat. § 7.15(1)(e). Here, again, Brown does not dispute that this consequence would result from his preferred construction of § 6.855. Because the results that flow from Brown's preferred construction are absurd (and undisputed), his interpretation of § 6.855 fails to pass legal muster and should be rejected.

Instead of engaging with the substance of these issues, Brown first claims that BLOC's argument must be disregarded because it is not in the administrative record. But the information BLOC provided is intended to aid the Court's statutory interpretation, which "presents a question of law." *Priorities USA v. Wis. Elections Comm'n*, 2024 WI 32, ¶12, ___ Wis. 2d. __, __N.W.2d __. It is not intended to weigh on the specific facts that were at issue before WEC. And BLOC is not the only party to submit additional material to supplement a statutory construction argument. Brown, himself, did the same by relying upon hundreds of pages of drafting material that he left out of the administrative record. (Brown Br. at 26–32, nn. 6–9, 11–13.) There is no reason to ignore BLOC's submissions while accepting Brown's.

Brown's next argument is a distraction. He points to the mere existence of *potential* alternate sites within the ward hosting the Racine Clerk's office. But the existence of these potential sites is irrelevant. Potential alternate sites in one ward have nothing to do with whether the Wisconsin Constitution would sanction a construction of § 6.855 that prohibits Wisconsin's Black community from hosting any alternate sites in its own neighborhoods. And it has nothing to do with the absurdity of confining all alternate sites to the ward hosting the clerk's office,

especially when the statute never mentions wards and expressly authorizes the designation of multiple IPAV sites.

Brown attempts to dismiss as absurd BLOC's contention that § 6.855 carried a "discriminatory past" (one that could be reignited under Brown's interpretation). But the federal court in *One Wisconsin* determined that, as originally written, § 6.855 violated the Fourteenth Amendment and § 2 of 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).

This is no trifling matter. "[T]he Fourteenth Amendment was a pragmatic step in the aftermath of the Civil War to protect the rights of African Americans who had been freed from slavery." *Matter of Adoption of M.M.C.*, 2024 WI 18, ¶57, 411 Wis. 2d 389, 5 N.W.3d 238 (Dallet, J., concurring). And § 2 of the Voting Rights Act prohibits any "qualification or prerequisite to voting or standard, practice, or procedure … which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. § 10301. A holding that § 6.855 violated these fundamental civil rights laws demonstrates a "discriminatory past." And the (undisputed) consequences of reading § 6.855(1) as Brown urges, including as prohibiting Wisconsin's blackest ZIP code from hosting any alternate site, *would* pull this statute back into its discriminatory past.

c. The history of § 6.855 rejects the notion that alternate sites must be confined to the immediate vicinity of a municipal clerk's office.

The statutory history of § 6.855—from its adoption to *One Wisconsin* and through the implementation of subsection (5)—contravenes Brown's preferred construction. Brown's own brief reinforces this conclusion. After describing how the Legislature expanded access to absentee voting over the last 125 years, Brown later concludes that "the Legislature has steadily been making it easier to vote via absentee ballot (in-person or not) over the past several decades." (Brown Br. at 26, 41.) Precisely. The statutory history of absentee balloting confirms that § 6.855 is part of a larger legislative purpose to increase access to voting—a principle incompatible with Brown's notion that alternate sites must be gerrymandered, to his liking, into the narrowest footprint possible.

Brown's preferred understanding of § 6.855 disregards the evolution of absentee balloting, the lessons from *One Wisconsin*, and the Legislature's adoption of § 6.855(5). Instead, Brown relies on a subset of § 6.855's drafting materials to argue that statutory history (but really, this is legislative history) endorses his cramped understanding of "advantage to any political party." But the dozens, if not hundreds, of pages of material he submits do not illuminate the Legislature's intent in adopting Wis. Stat. § 6.855.

The only support Brown has identified for his position—in the entirety of the drafting materials—is *one* sentence written to the attention of *one* state senator. It is not penned by a member of the Legislature. The memo briefly reviews ten different proposals and uses only a sentence or two to describe each. One of those ten proposals

ultimately became the "advantage to any political party" piece of § 6.855. But the opinion of one staff attorney, sent to only one legislator, is not probative of the opinion of any legislator (much less the Legislature), nor does it reflect any larger legislative intent in enacting the language at issue. And because the memo does not reckon with statute's *actual* language ("advantage to any political party" rather than "partisan advantage") its overall significance is, at best, trivial. Certainly, this one sentence cannot suffice to overwhelm the plain language of the text and the 120 years of statutory history demonstrating our state's default preference for broader access to absentee voting. *See Kilian v. Mercedes-Benz USA, LLC*, 2011 WI 65, 335 Wis. 2d 566, 583, 799 N.W.2d 815 ("we do not rely on legislative history when a statute is unambiguous on its face" (internal citation omitted)).

III. Wisconsin Stat § 6.84 is unconstitutional. Until Brown confirms that § 6.855 is a directory statute, the validity of § 6.84 remains a live issue because his argument depends upon its fatal language.

This Court has repeatedly confirmed that, in the field of absentee voting, the Legislature cannot reflexively disenfranchise voters for violations of absentee ballot statutes—even when those statutes are understood to be "mandatory." This limit on legislative power results from the right to vote's preeminence under the Wisconsin Constitution. Because § 6.84(2) demands such disenfranchisement and is therefore inimical to the right to vote, it cannot stand under the Wisconsin Constitution.

This provision's relevance here arises from the statutory construction argument Brown advances. He asks that this Court read § 6.855(1) in the most exacting fashion conceivable. But for election

statutes, courts apply such "mandatory" consequences only when statutory language renders non-compliance fatal. Brown's argument is inconsistent and thus unclear. Either § 6.855(1) is a directory statute, so Brown's draconian standard should be rejected, *or* the application of § 6.84 renders § 6.855(1) mandatory. And if Brown refuses to concede that § 6.855(1) is directory, any reliance he places upon § 6.84 should be rejected as unconstitutional.[4] (*See* BLOC's Op. Br. at 26–40.)

a. Brown's case hinges on a mandatory construction of § 6.855. Until he concedes that this provision is directory, § 6.84 remains inexorably intertwined with his argument.

Unless noncompliance "is expressly declared to be fatal," election statutes are generally understood to be directory, not mandatory. *State ex rel. Ahlgrimm v. State Elections Bd.*, 82 Wis. 2d 585, 594, 263 N.W.2d 152 (1978). Facially, § 6.855(1) is not expressly declared to be fatal. The only candidate, for "mandatory" purposes, is § 6.84(2), which expressly declares that casting *or* counting absentee ballots in noncompliance with related statutes is fatal (the consequence is disenfranchisement). *See Priorities USA*, 2024 WI 32, ¶45. But § 6.84(2) has no purchase here; it does not list § 6.855(1) among those provisions it purports to transform from directory to mandatory.

Although Brown concedes that Wis. Stat. § 6.855 is not listed in § 6.84(2), his argument implies that § 6.855(1) is nonetheless a mandatory provision; among other things, he asserts that even a one-vote discrepancy between wards would, in his view, provide an illegal

[4] Brown also discourages this Court to rule on § 6.84's unconstitutionality by suggesting that BLOC is somehow prohibited from raising any constitutional infirmity. (Brown Br. at 55, n. 19.) But if the law is unconstitutional, it would be an obvious injustice to apply it at all. "If a law can only be applied unconstitutionally, it is our duty to say so." *Serv. Emps. Int'l Union, Loc. 1 v. Vos*, 2020 WI 67, ¶42, 393 Wis. 2d 38, 65, 946 N.W.2d 35, 49.

"advantage to a[] political party." He insists, "local election officials must comply with the law in that regard and compliance is not optional." (Brown Br. at 53.) Brown is wrong.

Without an express declaration that noncompliance is fatal, "provisions regulating absentee voting are directory, and … *strict compliance therewith is not required*." *Pet. of Anderson*, 12 Wis. 2d 530, 534, 107 N.W.2d 496 (1961)(emphasis added); *see also Matter of Hayden*, 105 Wis. 2d 468, 483, 313 N.W.2d 869 (Ct. App. 1981) ("[S]trict compliance with a directory statute is not required."). Nothing in § 6.855 expressly declares that noncompliance with its terms is fatal. So, unless § 6.84 applies to § 6.855, § 6.855 is a directory statute, and the strict compliance that Brown advances is misplaced.

Likely for this reason, Brown stops short of conceding that § 6.84 has no relevance here. He only goes so far as to acknowledge that he "has not argued … that § 6.84 operates to disqualify ballots collected by the MEU." (Brown Br. at 57-58.) Yet, he *needs* the language of § 6.84(2) to make any "mandatory" argument. *See Ahlgrimm*, 82 Wis. 2d at 594. This is how the circuit court understood Brown's argument, explaining that it "reads Wis. Stat. § 6.855 with Wis. Stat. § 6.84" to find the MEU illegal. (R. 99 at 17; BLOC App. (dated June 3, 2024) at 20.) And Brown argued this was appropriate, affirming that he has *always* believed § 6.84 supports his § 6.855 argument in one way or another:

> [Appellants have no likelihood of success on appeal.] The issues in this case are not complicated, and Wisconsin law is clear. The Legislature has directed that absentee voting procedures "must be carefully regulated to prevent the potential for fraud and abuse; to prevent overzealous solicitation of absent electors who may prefer not to participate in an election" and "to prevent undue influence on an absent elector." Wis. Stat. § 6.84(1).

(R. 153 at 6; BLOC App. (dated July 23, 2024) at 9.)[5] Now, before this Court, Brown contends that § 6.84 has relevance even for absentee statutes not listed within subsection (2). (*See* Brown Br. at 45 (applying § 6.84 to § 6.88).) Until Brown concedes that § 6.855 is a directory statute, it appears that § 6.84 remains inexorably intertwined with his position. Either Brown concedes that § 6.855, like most election statutes, is directory, or he relies on the application of § 6.84, which is constitutionally infirm. Because his understanding of the statute fails under both options, this Court should reject Brown's argument no matter how he chooses to proceed.

b. Although the Legislature may provide for absentee voting, the right to vote limits legislative power when Wisconsinites are "*voting* by absentee ballot."

Brown argues that § 6.84 is constitutional because Art. III § 2 authorizes the legislature to pass laws "[p]roviding for absentee voting." Of course, the Legislature can pass laws providing for absentee voting—indeed, § 6.855 is one of them. But this does not address the basic point: the constitutional guarantee of the right to vote limits legislative power when voting itself is at stake. For this reason, § 6.84(2) is inconsistent with the Wisconsin Constitution.

By its plain language, § 6.84 targets voting. Under its first subsection, the Legislature declares that "*voting by absentee ballot* is a privilege …" and that "the privilege of *voting by absentee ballot* must be carefully regulated." In both clauses, "by absentee ballot" describes the word "voting." This language targets *voting by absentee ballot*, rather than absentee ballots themselves or the administration of an absentee

[5] Brown's understanding of § 6.84(1) was later rejected. "Section 6.84(1) is merely a declaration of legislative policy." *Priorities USA*, 2024 WI 32, ¶32.

balloting system. And § 6.84(2) goes much further; in targeting not only voting by absentee ballot, but also the counting of already submitted ballots, it reaches conduct beyond any Wisconsin voter's control. This is no "deliberate misread" (Brown Br. at 56)—the Legislature's language targets *voting* and is thus incompatible with our state constitution.

The authority Brown references (but does not seriously examine) is not directly on point or is altogether irrelevant. (*See* Brown Br. at 56.) Neither *Brnovich v. Democratic National Committee* nor *Crawford v. Marion County Election Board* arose under the Wisconsin Constitution—they are not persuasive, much less controlling, here. *See* 549 U.S. 647, 683–87 (2021); 553 U.S. 181, 191 (2008).

Brown's Wisconsin authority fares no better. In *League of Women Voters of Wisconsin Education Network, Inc. v. Walker*, this Court upheld Wisconsin's voter identification law. *See* 2014 WI 97, ¶4, 357 Wis. 2d 360, 365, 851 N.W.2d 302, 305. But the *League of Women Voters* opinion also re-asserts that in Wisconsin, the right to vote is not a privilege. *Id.* at ¶19. But demoting absentee voting to a privilege is precisely what § 6.84 (1) declares as the intent of the statute, and precisely what § 6.84 (2) carries out. Simply because a different type of voting regulation was found to pass constitutional muster does not weigh upon whether the same should follow for § 6.84. Also irrelevant, *State ex rel Frederick v. Zimmerman* considered whether the Wisconsin Constitution allowed the Legislature to transform certain statewide elections "from an election to a primary if more than two candidates should file for these offices respectively." 254 Wis. 600, 604–05, 37 N.W.2d 473, 476 (1949). This Court answered that question affirmatively but never considered whether the Legislature may, consistent with the right to vote,

automatically disenfranchise voters for *any* deviation from an election statute. And as the overwhelming weight of authority shows, (BLOC Op. Br. at 26-40) this is something the Wisconsin Constitution forbids.

Next, Brown claims that BLOC conflates the right to vote with the "privilege of exercising" the right to vote via absentee ballot. The notion that someone could have "the privilege" of "exercising a right" is nonsensical, contrary to the very notion of rights. Read most generously, Brown urges that two things should be understood separately. And here, BLOC agrees. *First*, the Legislature is not obligated to provide for absentee ballots.[6] *Second*, once the Legislature has done so and someone uses an absentee ballot to vote ("voting by absentee ballot," as described in § 6.84(1)) the issue is no longer about whether the Legislature may provide for absentee ballots; at that point, the right to vote protects against needless disenfranchisement, a point repeatedly confirmed by this Court's case law.

Time and time again, this Court has recognized that the Legislature cannot disenfranchise voters who fail to comply with all minutiae in Wisconsin's absentee balloting scheme. This Court has repeatedly rejected the type of reflexive disenfranchisement embodied in § 6.84. *See, e.g., Lanser v. Koconis,* 62 Wis. 2d 86, 93, 214 N.W.2d 425 (1974); *Pet. of Anderson*, 12 Wis. 2d at 534; *In re Burke*, 229 Wis. 545, 282 N.W. 598, 602 (1938); *State v. Barnett*, 182 Wis. 114, 195 N.W. 707, 711 (1923). And the Court of Appeals has followed suit, explaining that, "despite the directive that improperly delivered ballots shall not be

[6] There are categories of voters who can *only* exercise their right to vote via absentee ballot. This includes certain voters with disabilities, as well as voters who will not be in Wisconsin on election day because they are located overseas and/or are a member of the armed forces. *See Carey v. Wisconsin Elections Comm'n*, 624 F. Supp. 3d 1020, 1027 (W.D. Wis. 2022); *see also* Wis. Stat. §§ 6.22–6.24.

counted, the statute governing the delivery of absentee ballots must be construed as directory." *Matter of Hayden*, 105 Wis. 2d at 478.[7] Brown's inability to refute the weight of this precedent should be taken at face value: there is no strong argument to the contrary.

When Wisconsinites use an absentee ballot, they are voting. Under this Court's precedent, the right to vote will overwhelm any statutory provision that would diminish that right to a mere privilege. Because this is exactly what § 6.84 purports to do, it is unconstitutional. For this reason, to the extent § 6.84 is relied upon by Brown, it cannot carry any weight at all.

IV. Per Brown, "as near as practicable" is seemingly indivisible from the now-repealed "one-location" rule. Brown's heavy reliance on it is misguided and should be rejected.

Voters in Wisconsin may cast absentee ballots by returning them to their municipal clerk. Wis. Stat. § 6.87(4)(b)1. When enacted, § 6.855 provided that municipalities could designate *one* alternate absentee ballot site to serve in place of the municipal clerk's office for voters to request and vote absentee ballots. *See* Wis. Stat. § 6.855 (2013-14). Then, if a municipality were to make such a designation, "[t]he designated site shall be located as near as practicable to the office of the municipal clerk … and no site may be designated that affords an advantage to any political party." *Id*.

Brown argues that these clauses ("as near as practicable" and "advantage to any political party") should be understood together. But

[7] As the Court has held, this principle—that the right to vote is paramount in the face of legislative regulation of absentee ballots—holds even under seemingly extreme examples of noncompliance with relevant statutes. *See Schmidt v. City of W. Bend Bd. of Canvassers*, 18 Wis. 2d 316, 321-22, 118 N.W.2d 154 (1962).

reading these clauses as interwoven weakens Brown's argument considerably. This becomes clear when one considers what statutory language remains in force after the adoption of § 6.855(5).

To briefly review: In 2015, a federal court enjoined the one-location rule because it was unconstitutional and violated the Voting Rights Act. *One Wisconsin*, 198 F. Supp. 3d at 963 (W.D. Wis. 2016). Before *One Wisconsin* reached the Seventh Circuit, the Legislature repudiated the one-location rule by amendment. In 2017 Wis. Act 369, the Legislature added subsection (5) to Wis. Stat. § 6.855, authorizing a municipality to "designate more than one alternate site." Thus, the one-location rule was repealed.

Yet, the Legislature did not write Wis. Stat. § 6.855(5) to expressly disclaim the one-location rule. Indeed, it never mentioned it. So how do we know which pieces of § 6.855 remain in force after the adoption of its final subsection? Wisconsin's doctrine of implied repeal provides the answer. This Court teaches that "an 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). So, the issue becomes whether any language of § 6.855 "cannot reasonably stand together" with the language in (5).

Some pieces of § 6.855 are still easily understood—the timing of a designation, for example. But a geographical limitation no longer makes sense. The "as near as practicable" language once clarified where "the designated site" (singular) could be located. Wis. Stat. § 6.855(1) (2013-14). But a municipality may now "designate more than one alternate site," and *multiple* sites cannot simultaneously be "as near as

practicable" to the same place.[8] When considered in context of § 6.855(5)'s history, this geographic limitation cannot be squared with the current statute. So, "as near as practicable" is "manifestly inconsistent and repugnant" to § 6.855(5)—and therefore has been impliedly repealed.

Yet, Brown seems to concede that any implied repeal must go further. He explains that *both* the "as near as practicable" and the "advantage to any political party" language from § 6.855(1) should be read together: "the Legislature required alternate sites to be as close as possible to the clerk's office—such a rule avoids, and guards against, conferring advantages to political parties." (Brown Br. at 36.[9]) He later concludes, "[g]iven that the two requirements in this sentence were added altogether at the same time, it is reasonable to read these two requirements as being related." (*Id*. at 69.) If Brown is right, then it should follow that the entirety of this sentence (the bases for his various arguments) has been impliedly repealed.

Brown's counterargument is self-defeating. He claims that "multiple sites can be designated by simply selecting the closest practicable site, and then the next closest practicable site." (Brown Br. at 72.) But the "next closest practicable site" is obviously not "as near as practicable." The "next closest practicable site" is not "as near as practicable" if another designated site was more proximate—these are manifestly inconsistent concepts. Again, this is why an appropriate reading of § 6.855(1) would give no meaning to the "as near as practicable" language at all.

[8] Unless, perhaps, they are designated along a perfect circle around the Clerk's office.
[9] The words Brown uses, "as close as possible," were never part of the statutory text.

Brown also claims that, because equality of access is not listed under § 6.855, Clerk McMenamin was prohibited from considering it while administering Racine's IPAV program. (Brown Br. at 68.) Yet, ignoring this issue altogether would violate the law. To start, the "theory of our government is, that socially and politically, all are equal." *Knowlton v. Bd. of Sup'rs of Rock Cty.*, 9 Wis. 410, 411 (1859). And equal protection under the law is guaranteed by the Wisconsin Constitution. Wis. Const. art. I, § 1; *State v. Whitcom*, 122 Wis. 110, 99 N.W. 468, 472-73 (1904). So is the right to vote. Wis. Const. art. III, § 1. Wisconsin law also *affirmatively obligates* clerks to pursue equal access in their various jurisdictions. Under Wis. Stat. § 7.15(e) the municipal clerk "shall" conduct elections "uniformly," *i.e.*, equally throughout the municipality. Federal law accords with these state principles, and even provided the authority for the *One Wisconsin* opinion to enjoin § 6.855 in the first place. *Supra*. Ultimately, Brown's claim that equal access may not be considered in operating alternate sites fails.

Brown's construction also seems to leave no room for the local clerk to exercise reasonable independent judgment. The Legislature vested clerks with significant discretion in the administration of our elections. *Priorities USA*, 2024 WI 32, ¶27. The municipal clerk "has charge and supervision of elections and registration in the municipality." Wis. Stat. § 7.15(1). The clerk has responsibility of activities as integral and varied as: "equip[ping] polling places," "[p]rovid[ing] for the purchase and maintenance of election equipment," preparing absentee ballots, "[d]ischarg[ing] election officials," "[r]ecording [e]lectors," and providing "voter education" and maintaining a voter support hotline. Wis. Stat. § 7.15(1)-(10). Brown's attempt to deny that discretion is inconsistent

with "the statutory scheme, as a whole, under which Wisconsin's 1,850 municipal clerks serve the "primary role" in running elections via our "decentralized" system." *Priorities USA*, 2024 WI 32, ¶28.

Ultimately, the "as near as practicable" language from § 6.855(1) cannot *reasonably* stand together with the addition of (5). Any meaning Brown gives to it should be rejected.

V. Conclusion

For the foregoing reasons, this Court should affirm the WEC's dismissal of Brown's complaint.

Dated: July 23, 2024

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE WITH WIS. STAT. § 809.19(8g)(a)

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief, as well as this Court's Order regarding page length. The length of this brief is 5,117 words.

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