STATE OF WISCONSIN
BEFORE THE ELECTIONS COMMISSION

Kenneth Brown
610 Main Street
Racine, WI 53403,

Complainant,

v.

Tara McMenamin
Office of the City Clerk
730 Washington Ave
Racine, WI 53403,

Respondent.

REPLY OF COMPLAINANT KENNETH BROWN

At the outset, it should be noted that the Respondent ("Racine") does not dispute any of the facts alleged by the Complainant. In other words, the parties agree that this is purely a dispute of law over the meaning of Wis. Stat. § 6.855 regulating alternate absentee ballot sites and whether Racine complied with that statute.

On that subject, the Complainant and Racine have drastically differing conceptions of the operation of § 6.855. In the Complainant's view, alternate sites are clearly supposed to approximate the clerk's office, serving as near-identical replacements in circumstances where the clerk's office is closed—that is why, by statute, they must be "as near as practicable" to that office; why they cannot advantage any political party; why they must be available throughout the election in stable locations; and why no absentee ballot voting or return can occur at the clerk's office once alternate sites enter use.

Racine, in contrast, sees alternate sites not as an actual alternative to the clerk's office, but instead as mere tools to "mak[e] voting accessible to every single legal voter in the City of Racine." Because the election integrity restrictions in § 6.855 do not support this view, Racine reinterprets them: sites can be "spread across the City"; they can be placed in locations with much higher concentrations of Democrats or Republicans than exist at the clerk's office; they can be in vehicles (and, logically, many other locations); they need only be available for a few hours; and voting and storage of ballots can continue to occur at the clerk's office (or the building in which the clerk's office is located, which is the same thing).

This "Green Eggs and Ham" approach to alternate sites—on a train, in a tree, in a box, with a fox, here or there, anywhere—renders § 6.855 a nullity. Clerks would have virtually unfettered discretion to conduct in-person absentee voting wherever they wish. But the statutory restrictions in § 6.855, which have to be given meaning, say otherwise. Mobile voting sites may or may not be a good idea, but the Legislature must approve that idea first.

I. RACINE DID NOT LOCATE ITS ALTERNATE SITES AS NEAR AS PRACTICABLE TO THE OFFICE OF THE MUNICIPAL CLERK.

In his complaint, the Complainant showed that Racine's City Council pre-approved many alternate sites much closer to the municipal clerk's office than those sites that were ultimately used, such that Racine violated the rule requiring alternate sites be placed "as near as practicable" to the clerk's office.

In response, Racine spends several pages knocking down the straw man that the Complainant is arguing for a "pure geographic standard resolved through the use of a ruler on a map." But that is untrue—while the distance limitation in § 6.855 is *primarily* geographical, the Complainant agrees that the words "as practicable" must be given meaning.

"Practicable" is a word in common usage with an easily-understood meaning: "capable of being put into practice or of being done or accomplished," "capable of being used," "feasible," or "usable." *Practicable*, Merriam-Webster Online, https://www.merriam-webster.com/dictionary/practicable. The statute asks for a site as close as possible to the clerk's office while recognizing that a site that is not suitable for absentee ballot voting need not be selected even if it is technically closer than another choice. This is a common sense addition to the statute: there could be a great many locations that would otherwise be closer to the clerk's office but that, for some reason, are not "feasible" or "usable"—perhaps because they are not large enough, are not ADA-compliant, are being renovated, or some other reason. Indeed, Racine cites a case that suggests that "practicable" should be read with specific reference to "the other provisions contained in the" written instrument, *see State ex rel. Martin v. Howard*, 96 Neb. 278, 290, 147 N.W. 689 (Neb. 1914). Here that would include, for example, the prohibition on providing an advantage to a political party. The phrase "as practicable" provides the breathing room necessary to allow the geographic restriction to be read in harmony with such restrictions.

In the ordinary course, then, if a voter challenges the location of an alternate site as being too far from the clerk's office and shows that one closer to the clerk's office is available, the relevant municipality could then explain why that alternate location was not "feasible" or "usable." If necessary, WEC or a Court will determine whether that justification was sufficient.

But that is not what happened here. Racine makes no attempt at all to explain why the other locations selected and pre-approved by the City Council were not actually "*capable of being used.*" Instead, Racine simply argues that "practicable" allows it to consider *any* factor it wishes, and, because its goal was to make "voting accessible to every single legal voter in the City of

Racine," it views itself as authorized to "plac[e] alternate absentee ballot sites across the entire city"—intentionally *far away* from the clerk's office.

There are four problems with this interpretation. First, it has nothing to do with the actual dictionary definition of the word "practicable," set forth above. In fact, Racine never explains what "practicable" means—it just says the word "necessarily encompasses evaluating many factors." But statutory language must be "given its common, ordinary, and accepted meaning." *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. That common meaning here requires that if a site is not "practicable," it is due to some legal restriction or physical impossibility—not the individual desires of 1,850 municipal clerks.

Second, Racine's interpretation reads the distance requirement out of the statute, making it entirely illusory. If "practicable" allows a municipality to consider any factor it wishes, then the limitation serves no purpose—the statute would mean the same thing with or without the direction that alternate sites be placed "as near as practicable" to the clerk's office. Here Racine's professed goal was making voting accessible; but some other clerk could choose to locate an alternate site on the far side of a city in service of a goal of avoiding voter confusion (because of proximity to the clerk's office) or helping voters learn about cultural sites, or because it is close to her house or any other reason. The distance limitation disappears. This is contrary to the rule that "[s]tatutory interpretations that render provisions meaningless should be avoided." *Belding v. Demoulin*, 2014 WI 9, ¶17, 352 Wis. 2d 359, 843 N.W.2d 373. The Complainant's interpretation—that the standard is whether a site *can* be used, not whether it is simply preferred in some sense for any of countless reasons—does not violate this canon.

Third, and for similar reasons, even if Racine is correct that the word "practicable" allows clerks to select sites based on a variety of chosen goals, there is one goal that simply cannot be

available: that of spreading locations as far around a municipality as possible. This is because that one goal is directly at odds with the Legislature's stated, statutory purpose of locating sites "near" to the clerk's office. Pursuing a goal that contradicts the statutory text making the statute internally inconsistent. But that is what Racine has done. In effect, it has announced that in implementing the order to make alternate sites as near as practicable to the clerk's office, it has chosen to make the sites as far from the office of clerk as practicable. That is incoherent and is just a way of saying "we choose not to follow the statute." Racine does not have a choice.

Finally, setting all of the foregoing aside, Racine quietly ignores the fact that its City Council, by approving the very locations the Complainant says should have been used, already determined that those locations *were* feasible or capable of being used. The formal selection of these sites by the Council contradicts Ms. McMenamin's attempt to now suggest their use was not "practicable."

Racine cites a great many cases on the application of "practicability" limitations but they are perfectly consistent with the Complainant's interpretation. For example, in the only Wisconsin case cited, the Supreme Court of Wisconsin concluded that "as nearly as practicable" is not "solely a geographical standard." *Town of Ashwaubenon v. Pub. Serv. Comm'n,* 22 Wis. 2d 38, 50, 125 N.W.2d 647, 654 (1963). As already explained, the Complainant agrees. But that *some* circumstances may justify passing over a nearby site does not mean all circumstances do. That is the question at issue in this proceeding. For reasons already stated, a bare desire to spread alternate sites as widely as possible cannot be sufficient.

Racine's only real response to the *Complainant's* interpretation of § 6.855 is to argue that it "contradicts itself" since multiple sites can be designated but "there can only be one closest location." Not so. Once an alternate site is selected, it is no longer part of the pool of possible

sites (no longer "usable") so the next-closest site must be selected. That is perfectly consistent with the statute.

II. RACINE'S ALTERNATE SITES AFFORDED AN ADVANTAGE TO POLITICAL PARTIES.

It is clear that Racine does not understand the Complainant's objection with respect to its violation of § 6.855's prohibition on providing an advantage to a political party. Before explaining why, however, it is important to immediately respond to a point Racine makes regarding that prohibition's interpretation.

Racine argues that "section 6.855 does not specify in what way an alternate absentee ballot site may be determined to 'advantage' any political party"; specifically, that "Complainant has chosen one measure," but that WEC should adopt a contrary, exceedingly narrow interpretation whereby the prohibition is violated only in a few fantastical situations such as when a polling place is set up at Republican party headquarters.

But that is not how statutory interpretation works. "Without some indication to the contrary, general words (like all words, general or not) are to be accorded their full and fair scope. They are not to be arbitrarily limited. This is the general-terms canon." *Benson v. City of Madison*, 2017 WI 65, ¶25, 376 Wis. 2d 35, 897 N.W.2d 16 (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 101 (2012)). Thus, § 6.855 should be interpreted according to its plain language, even though that language has a broad sweep—political advantages of *any* kind, not just the most egregious kind, are forbidden.

And this is where Racine's misunderstanding of the Complainant's objection comes in. Racine suggests that applying the Complainant's interpretation will be too difficult, asking "where exactly would be an allowable place to locate an alternate absentee ballot site?" But that problem only arises when a municipality like Racine illegally scatters alternate sites all over the City. If an

alternate site is instead placed "as near as practicable to the office of the municipal clerk"—which will be within the same ward—then the political makeup of the surrounding area will remain unchanged. Contrary to Racine's suggestion otherwise, the goal is not to find a ward with an even political split (impossible anyway given the presence of third parties) but instead a ward that has the *same* political makeup as the one in which the clerk's office is located. Here, Racine's alternate sites should have remained in Ward 1 (which happens to have a 71% Democrat makeup). No party, whether Republican, Democrat, or a third party, is made worse off if the alternate site or sites are located in that same ward. And, importantly, this interpretation is in harmony with the statutory command *in the same sentence of* § 6.855 that sites be as near as practicable to the clerk's office. It is only when a clerk decides to, for instance, drive a van all around a city that thorny questions regarding political advantage arise.

Racine's point about shifting ward lines is thus a red herring. Complainant has relied on the election data that was available prior to the August primary—the same data on which the City Council would or should have relied when it pre-approved its sites. This data shows that except for the alternate sites in Ward 1, every other alternate site used by Racine provided an advantage to one party or the other and Racine has not rebutted that conclusion. Further, the data showed that the pattern of the alternate sites approved by the City Council and used by Racine provided an overall advantage to the Democrat Party. The notion that an elector must wait until after an election occurs to know whether the alternate sites advantaged a political party—in other words, when it is too late—is silly.

III. RACINE CONDUCTED FUNCTIONS RELATED TO THE VOTING AND RETURN OF ABSENTEE BALLOTS AT BOTH THE OFFICE OF THE MUNICIPAL CLERK AND ITS ALTERNATE SITES.

A. Racine conducted functions related to the <u>voting</u> of absentee ballots at both the clerk's office and alternate sites.

Racine admits that it allowed in-person absentee voting in the same building as the clerk's office but argues this is permissible because the conference room in which it occurred was "not part of the City Clerk's office."

Racine is making another error of statutory interpretation. Words "are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 326 (1816) (per Story, J.). For example, in *Wisconsin Carry, Inc. v. City of Madison*, 2017 WI 19, ¶¶3, 46, 373 Wis. 2d 543, 892 N.W.2d 233, a city could not circumvent a law forbidding cities from passing "ordinances" or "resolutions" regulating firearms by passing "rules" doing so. The Supreme Court condemned a state of affairs in which law-making becomes "comedy, with a hapless legislature chasing about a wily municipality as it first enacts an ordinance on a forbidden subject, and then a policy, then a rule, then a standard, and on and on until one of them wearies of the pursuit or the other exhausts the thesaurus." *Id.* at ¶46. Racine's attempt to suggest that setting up a conference room for voting next to the clerk's office in the same building is the same kind of game-playing.

Let's examine the (undisputed) facts. First, Racine publicly noticed, on its page listing sites for voting by absentee ballots, "You may also request and vote an absentee ballot *in the clerk's office*." (Emphasis added.) The Complainant pointed this out in the complaint (Complaint ¶17) and Racine does not deny it. Racine did not say "You may also request and vote an absentee ballot in the conference room of the Department of Public Works" (or whichever department room 207 belonged to). Second, the room in which voting occurred has the exact same address as the clerk's office. Third, "if voters went to the clerk's office to cast an absentee ballot – as the Clerk's website stated they could – they were directed to Room 207. Room 207 was simply an extension of the clerk's office." (Complaint ¶32). Racine has also not denied this fact. Providing information

on where to vote and return absentee ballots is undoubtedly a "function related to voting and return of absentee ballots" and could not have occurred at the clerk's office. Further, providing this information made Room 207 an extension of the clerk's office.

Only the most hyperliteral reading of § 6.855 allows Racine to argue that informing voters that they can vote at the clerk's office and directing them to a place that shares the same address somehow does not constitute voting at the clerk's office. Although in this case the voting occurred on a separate floor, Racine's interpretation would logically allow voting in an adjacent room. That defeats the manifest purpose of the statute. It is clear what happened here: Racine tried to creatively circumvent a clear statutory prohibition so that it could achieve its personal goal of "accessibility" by conducting voting at both the clerk's office and alternate sites. But the statute forbids clerks from having it both ways. The Complainant is confident that a court will not find Racine's "interpretation" as amusing as Racine apparently does—and neither should WEC.

B. Racine conducted functions related to the <u>return</u> of absentee ballots at both the clerk's office and alternate sites.

In its response Racine actually admits to another violation of the statute. Racine declares that it "opted to store the ballots" collected in its van "at the clerk's office." Storing absentee ballots at the clerk's office is again manifestly a "function related to voting and return of absentee ballots." This is an important point because, as Racine acknowledges, the only other option it has is storage of the ballots at the alternate sites—which in this case is not possible since the sites were set up for only a few hours each. Racine tries to dispute this point by misquoting the statute: "Section 6.855 clearly prohibits two actions at the clerk's office while alternate absentee ballot sites are used, voting a ballot and returning an absentee ballot." That is not what the statute says. The statute says "*no function related to* voting and return of absentee ballots," not just voting and

return of absentee ballots. That is a much broader prohibition, and one that includes the return of ballots for storage.

This single point, by itself, demonstrates that Racine violated § 6.855 when it conducted absentee voting in a mobile van. A van cannot be used consistently with these ballot integrity measures.

IV. RACINE USED A MOBILE VAN RATHER THAN THE BUILDINGS IT ACTUALLY DESIGNATED.

In responding to the Complainant's assertion that use of a van is not authorized by § 6.855, Racine once again misses the forest for the trees. Just this year the Supreme Court of Wisconsin rejected an argument that the absence of an express statutory *prohibition* on certain conduct relating to absentee ballots means that the conduct is legal, *see Teigen v. Wisconsin Elections Comm'n*, 2022 WI 64, ¶54, 976 N.W.2d 519; instead, Racine must point to *authorization* for the use of a van as an alternate site. Obviously, no such authorization exists—vans are nowhere mentioned in the statutes.

But the same is not true for buildings. Buildings are repeatedly referenced in the election laws as the setting for voting. This makes sense since, unlike vans, buildings have addresses that can be publicly noticed. Racine's attempts to distinguish certain of the statutes referencing buildings (§§ 6.55(2)(c)1. and 12.03(2)(b)2.) as applying to election day voting thus misses the larger point that buildings, not vans, are contemplated as voting sites throughout Wisconsin law.

But Racine's argument that the statutes do not contradict its position is also unpersuasive on its own terms. With respect to Wis. Stat. § 5.25, which requires use of a public building for polling places "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," the emphasis on both sides of the disjunctive is patently whether the building will be public or nonpublic. *See, e.g., Benson*, 376

Wis. 2d 35, ¶31 (under *noscitur a sociis* canon of construction, "an unclear statutory term should be understood in the same sense as the words immediately surrounding or coupled with it" (quoting *Wis. Citizens Concerned for Cranes & Doves v. DNR*, 2004 WI 40, ¶40, 270 Wis.2d 318, 677 N.W.2d 612)). Racine instead interprets the first half of the disjunctive to mean that *anything* other than a public building may be used if a public building is impracticable. That absurd interpretation would not only allow a van, but also a tree or an RV or an empty field. That is not a reasonable reading of the statute. Further, neither the City Council nor Ms. McMenamin have explained why the use of buildings, as opposed to a van, was actually impracticable, so even if their interpretation is correct, they have violated the statute anyway.

Finally, Racine has no real answer to § 6.88 regarding storage of ballots. As explained above, § 6.855 prohibited storage of the ballot at the clerk's office, and no storage can occur at a transitory non-building. It is only when the statutes are interpreted to authorize buildings alone that § 6.88 makes any sense.

V. RACINE'S SITE DESIGNATIONS DID NOT REMAIN IN EFFECT UNTIL THE DAY AFTER THE ELECTION.

Racine argues that it complied with § 6.855's requirement that the designation of an alternate site "remain in effect until at least the day after the election" even though most of its sites, being non-permanent, were used for only a few hours on a single day. It suggests a difference between "designation" and "use."

That that difference is illusory can be illustrated with a single question: if Racine is right, how could a municipality ever violate the limitation? Assume a municipality announced that an alternate site was designated *only* for the 3-hour period on the single day in which it was in use. There is no practical difference between that state of affairs and what Racine actually did: 3 hours of voting occurs in each case. In other words, the concept of "designation" apart from use lacks

any meaning. It is the designation that makes use permissible—the two are inextricably intertwined.

This problem can be viewed in another way. If Racine's interpretation is correct, but the "day after the election" restriction were then removed from the statute, what would change? Absolutely nothing at all. A city would not gain any new authority and could continue to act in the same way.

No matter how one slices it, Racine's interpretation renders the restriction meaningless, which is a disfavored interpretation. In contrast, the Complainant's view—that an alternate site, as a proxy for the clerk's office, is supposed to be in place throughout the election cycle, gives meaning to the statute (and makes good practical sense).

CONCLUSION

The Wisconsin Supreme Court recently explained that "[g]ood intentions," including an expressed desire to "make voting as easy as possible," can "never override the law." *Teigen v. Wisconsin Elections Comm'n*, 2022 WI 64, ¶52, 976 N.W.2d 519. The Complainant is not asking this body to conclude that Racine's "innovation" is a bad idea, only that it lacks statutory authorization. If WEC upholds Racine's use of the voting van, § 6.855 loses virtually all meaning. Many more "innovations"—and challenges to those innovations—will follow. That is bad for election integrity and bad for voter confidence. The proper approach is to apply the clear terms of § 6.855 and announce what everybody except Racine already knows: voting is not supposed to take place in a roving van.

Respectfully submitted this 13th day of September, 2022.

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The Complainant, Kenneth Brown, being first duly sworn, state that he has personally read the above reply, and that the above allegations are based on information and belief and the complainant believes them to be true.

Kenneth Brown

Subscribed and sworn to before me
this 13 day of September, 2022.

Notary Public, State of Wisconsin
My Commission expires Permanent
is