No. 2019XX2120

In the Supreme Court of Wisconsin

STATE OF WISCONSIN EX REL. TIMOTHY ZIGNEGO, DAVID W. OPITZ AND FREDERICK G. LUEHRS, III,

PLAINTIFFS-RESPONDENTS-PETITIONERS,

v.

WISCONSIN ELECTIONS COMMISSION, MARGE BOSTELMANN, JULIE GLANCEY, ANN JACOBS, DEAN KNUDSEN AND MARK THOMSEN,

DEFENDANTS-APPELLANTS.

On Appeal from the Decision of the Circuit Court of Ozaukee County

Honorable Paul V. Malloy Presiding

Circuit Court Case No. 19-CV-449

PETITION TO BYPASS

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ISSUE PRESENTED

Whether, upon (1) receiving information from the Electronic Registration Information Center that a registered elector has changed his or her residence to a location outside of the municipality where he or she is registered and (2) notifying the elector by first class mail of the source of information, the Wisconsin Elections Commission is required by Wis. Stat. § 6.50(3) to change the elector's registration from eligible to ineligible status if the elector fails to apply for continuation of registration within 30 days of the date the notice is mailed.

The circuit court concluded that the Wisconsin Elections Commission had a "plain and positive duty" under Wis. Stat. § 6.50(3) to deactivate the registration of such electors.

INTRODUCTION

This is an action against the Wisconsin Elections Commission ("WEC") and five of the Commissioners of WEC (the

"WEC Commissioners")[1], (collectively the "Appellants"), based upon the Appellants' failure and refusal to comply with unambiguous state election law.

Wisconsin Statute § 6.50(3) requires that upon receipt of reliable information that a registered voter has moved to a location outside of the municipality where he or she is registered, WEC notify the voter by mail of that information. The voter then has the ability to respond by informing WEC that the voter has not moved and to affirm that the voter remains at the address on their voter registration. A voter who actually has moved is, of course, required to register at their new address. The Appellants sent out such notices to approximately 234,000 voters during the week of October 7-11, 2019. The issue in this case is what happens with respect to the voters who do not respond to the notice.

Wisconsin Statute § 6.50(3) is very clear as to WEC's duty if the voter does not respond to the notice. "If the elector . . . fails to

[1] The sixth commissioner was not on the Election Commission at the time of any of the conduct at issue herein.

apply for continuation of registration within 30 days of the date the notice is mailed, the clerk or board of election commissioners *shall change the elector's registration from eligible to ineligible status*." (Emphasis added.)

Despite the mandatory language in the statute, the Appellants have decided that if voters do not respond to the notice, WEC will not change the voter's registration from eligible to ineligible status until sometime between 12 months and 24 months (depending on where Wisconsin is in the election cycle when the notices are sent) after the notice was mailed and not responded to, rather than in 30 days as required by the statute. Worse, the Appellants adopted this policy without passing a formal administrative rule with its concomitant procedural safeguards designed to give notice and opportunity to comment to the public.

On October 16, 2019, Timothy Zignego, David W. Opitz, and Frederick G. Luehrs III (the "Petitioners"), concerned Wisconsin voters and taxpayers, filed a complaint with WEC asking WEC to revoke that decision and to instead follow state law. The

Petitioners asked that WEC take this action in advance of the Spring Primary Election scheduled for February 18, 2020. On October 25, 2019, WEC dismissed the complaint without addressing it on the merits. The Petitioners thereafter sought relief in the Ozaukee County Circuit Court.

The circuit court, the Honorable Paul V. Malloy presiding, agreed that state law was clear in requiring WEC to deactivate the challenged registrations and that, as a result, the Petitioners had met the standards for the issuance of a writ of mandamus ordering WEC to follow the law. The same day that Judge Malloy signed the Writ of Mandamus, WEC appealed the issuance of the writ to the District IV Court of Appeals, and the Petitioners promptly filed this Petition to Bypass.

The issues in this case are of enormous importance for the people of this state and they demand careful and timely resolution. Although the protection of our democratic processes figure prominently in this case, at bottom this matter is about separation of powers, agency authority, and the rule of law.

The legislature is tasked with determining the best way to ensure an accurate voter registration list, which serves at least three independent functions: (1) it "produces an accurate result based on each eligible voter casting a single ballot in their proper jurisdiction"; (2) it "enfranchises voters because it lowers the likelihood of lines at the polls, reduces voter confusion and decreases the number of provisional ballots"; and (3) it "allow[s] election administrators to plan, to better manage their budget and poll workers, and to improve voter experience." United States Election Assistance Commission, *FACT SHEET: Voter Registration List Maintenance*, https://www.eac.gov/assets/1/6/FACT_SHEET_-_Voter_Confidence_and_NVRA.pdf (last visited December 18, 2019).

In enacting the relevant statutes, including Wis. Stat. § 6.50(3), the legislature engaged in the difficult work of balancing these various policy concerns – election integrity, reduction of the opportunity for fraud, efficiency of administration – in a way that protects the voting rights of Wisconsin citizens. As the Seventh

Circuit has noted, when the state acts to reduce voting fraud, "the right to vote is on both sides of the ledger." *Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949, 952 (7th Cir. 2007), *aff'd*, 553 U.S. 181 (2008). As part of the statutory mechanism for maintaining accurate rolls, the legislature adopted the process in § 6.50(3) for flagging "Movers," notifying them that they have been flagged, and then deactivating them if they do not respond to that notice in 30 days, with the understanding that voters may always reregister at the polls as late as election day itself, *see* Wis. Stat. § 6.55(2). And, finally, the legislature ordered WEC to implement this process.

But despite the legislature's clear command to an administrative agency required to execute laws rather than write them itself, WEC determined that it had a better notion of proper public policy than the legislature and decided it would wait up to two years to deactivate non-responsive Movers.

The circuit court had little trouble ordering WEC to follow the law as enacted by the legislature. WEC should not be permitted to continue to ignore the law by tying this suit up in the

courts for the next one to two years. This Court should take jurisdiction of this case and order WEC to do its job and leave the legislating to the legislature.

BRIEF STATEMENT ON CRITERIA FOR BYPASS

Simply put, this is precisely the type of matter for which this Court's authority to take a case on bypass exists. This Court's internal operating procedures explain:

> A matter appropriate for bypass is usually one which meets one or more of the criteria for review, Wis. Stat. § (Rule) 809.62(1), and one the court concludes it ultimately will choose to consider regardless of how the Court of Appeals might decide the issues. At times, a petition for bypass will be granted where there is a clear need to hasten the ultimate appellate decision.

Wis. S. Ct. IOP III-B-2. Each of these considerations is met here.

First, the matter fulfills this Court's criteria for granting review. Specifically, "[t]he question presented is a novel one, the resolution of which will have a statewide impact," and "[a] decision by [this Court] will help develop, clarify, or harmonize the law." Wis. Stat. § 809.62(1r)(c). As the circuit court below recognized, the statute at issue is one "that has absolutely no case law" and

has "never been interpreted." (Tr. 65-66, Pet.App. 284-285) Yet its interpretation in this case bears on the democratic process in the state, the integrity of state voter rolls, and the disposition of hundreds of thousands of registrations. For the same reasons – the importance of the question presented and the fact that it is one of first impression – this Court will doubtless "choose to consider [the case] regardless of how the Court of Appeals might decide the issues."

Finally, "there is a clear need to hasten the ultimate appellate decision." By law, WEC should have taken the action required by Wis. Stat. § 6.50(3) at some time during the week of November 11, 2019 (which would be 30 days after the notices were sent during the week of October 7, 2019). If WEC had followed the law that would mean that the voter registration rolls would be in compliance with the law well prior to the Spring Primary Election scheduled for February 18, 2020, the Spring Election and Presidential Preference Primary on April 7, 2020, the Partisan Primary on August 11, 2020, and the General and Presidential

Election on November 3, 2020.

But the Appellants are refusing to follow the law and have now appealed the circuit court's order requiring them to do so and are seeking an emergency stay so that the rolls need not be updated prior to the upcoming elections. Given the imminence of the upcoming elections, the pressing need of voters and election officials for certainty, the fact that the Court of Appeals process could take up to a year or more to resolve, and the fact that any decision of the Court of Appeals is likely to be petitioned to this Court, this Court should exercise its discretion to hear the case now.

Additionally, the League of Women Voters of Wisconsin (the "League"), a special interest group which sought to intervene below and was denied, has filed a new, related lawsuit in federal court seeking to derail decision of these matters in state court. *See League of Women Voters v. Knudson*, No. 19-cv-1029 (W.D. Wis. 2019). The League's lawsuit threatens the orderly disposition of these proceedings in state court. Whether the federal courts

choose to abstain pending the resolution of this case or decide to proceed regardless of it, this Court has an interest in moving quickly to protect its prerogative to develop the law of the state.

In sum, this Court should grant this Petition for Bypass and definitively resolve this significant issue of first impression in advance of the upcoming elections.

STATEMENT OF THE CASE

A. The Parties

The Petitioners are three voters and taxpayers who assert that the Appellants are acting contrary to law. (Complaint ¶¶5-8, Pet.App. 104.)

The Appellants are the Wisconsin Elections Commission, the state agency charged with the responsibility for the administration of Chapters 5 and 6 of the Wisconsin Statutes and other laws relating to elections, and five of the Commissioners of the Wisconsin Elections Commission sued in their official capacities. (Complaint, ¶¶9-10, Pet.App. 105.)

B. Factual Background

The material facts are not in dispute. By statute, Wisconsin now participates in what is called the Electronic Registration Information Center ("ERIC"). *See* Wis. Stat. § 6.36(1)(ae). ERIC is a multi-state consortium formed to improve the accuracy of voter registration data. (McGrath Aff. Ex. B, p.1, Pet.App. 168.)

As part of ERIC, Wisconsin receives reports regarding what are sometimes referred to as "Movers." (*Id* at 2, Pet.App. 169) This refers to Wisconsin residents who have actually reported an address different from their voter registration address *in an official government transaction*. (*Id*. at 2-3, Pet.App. 169-170; McGrath Aff. Ex. D, Pet.App. 186.)

After receiving the report on Movers from ERIC, WEC undertakes an independent review of the "Movers" information to ensure its accuracy and reliability. (McGrath Aff. Ex. D., slides 5-6, Pet.App. 188.)

Once WEC reviews the information from ERIC, then, as required by Wisconsin law, WEC sends a notice to those voters at

the address on their voter registration and asks them to affirm whether they still live at that address. (McGrath Aff. Ex. B, p.2, Pet.App. 169.) According to WEC itself, the

> process involves sending the voter a notice in the mail asking the voter if they would like to continue their registration at their current address. If so, the voter signs and returns a continuation form. If the voter does not respond requesting continuation within 30 days or does not complete a new registration at a different address, the voter's registration is marked as inactive and the voter must register again before voting.

(*Id.*)

The process as described by WEC in the March 11th Staff Report is consistent with Wisconsin law. Specifically, Wis. Stat. § 6.50(3) provides as follows:

> Upon receipt of reliable information that a registered elector has changed his or her residence to a location outside of the municipality, the municipal clerk or board of election commissioners shall notify the elector by mailing a notice by 1st class mail to the elector's registration address stating the source of the information. All municipal departments and agencies receiving information that a registered elector has changed his or her residence shall notify the clerk or board of election commissioners. *If the elector no longer resides in the municipality or fails to apply for continuation of registration within 30 days of the date the notice is mailed, the clerk or board of election commissioners shall change the*

> *elector's registration from eligible to ineligible status*. Upon receipt of reliable information that a registered elector has changed his or her residence within the municipality, the municipal clerk or board of election commissioners shall change the elector's registration and mail the elector a notice of the change. This subsection does not restrict the right of an elector to challenge any registration under s. 6.325, 6.48, 6.925, 6.93, or 7.52 (5).

(Emphasis added.)

Despite being aware of the statute and acknowledging the appropriate process, WEC has decided that "instead of deactivating their voter registrations within approximately 30 days under Wis. Stat. § 6.50(3), deactivation would take place between 12 months and 24 months, giving the Movers a chance to vote in both the General Election and following Spring Election." (McGrath Aff. Ex. C, p.3, Pet.App. 182) Thus, WEC is enabling a voter who has actually moved to vote in at least two elections at the old address, quite possibly for a candidate in a district where the voter no longer resides.

WEC received a new ERIC Movers report in 2019. WEC staff reviewed and vetted the information contained in the report prior to taking any action on the ERIC report. (McGrath Aff. Ex.

D, Pet.App. 186.)

After taking steps to confirm the accuracy of the ERIC report, WEC staff relied on the report to send notices to approximately 234,000 Wisconsin voters between October 7 and October 11, 2019 (the "October 2019 Notices".) (McGrath Aff. Ex. E, Pet.App. 197.)

However, WEC is refusing to comply with Wis. Stat. § 6.50(3) with respect to the October 2019 Notices and is refusing to change the registration status of voters who do not respond to the notice after 30 days, as required by law. Instead WEC has decided not to change the registration status of such voters even if they do not respond to the notice for a period of at least 12 and as many as 24 months, depending upon the timing of the next two elections. (McGrath Aff. Ex. C, p.3, Pet.App. 182.)

C. Procedural Background

On October 16, 2019, the Petitioners filed a complaint with WEC asking WEC to revoke its decision and to instead follow state law. (McGrath Aff. Ex. A, Pet.App. 165) The Petitioners asked

that WEC take this action in advance of the Spring Primary Election scheduled for February 18, 2020. On October 25, 2019, WEC dismissed the complaint without addressing it on the merits, in part citing potential "prejudice" to "the rights and duties of Commission staff." (McGrath Aff. Ex. A, p. 3, Pet.App 167.)

The Petitioners thereafter sued the Appellants in Ozaukee County Circuit Court, asking the court for a preliminary injunction or, in the alternative, a writ of mandamus. (Summons and Complaint with Exhibits, Pet.App. 101.) On December 14, 2019, as noted above, the circuit court concluded that WEC had a "plain and positive duty" under Wis. Stat. § 6.50(3) to deactivate the registration of non-responsive Movers. (Writ of Mandamus, Pet.App. 300.) The Court declined the Appellants' request for a stay of the decision, noting the "very tight time frame" and the "importan[ce] that the Commission" begin complying with the law. (Tr. 79, Pet.App. 298.) The Court also entertained, and denied, a motion to intervene in this lawsuit by the League of Women Voters of Wisconsin. (Intervention Order, Pet.App. 302.)

The Court signed its order issuing a writ of mandamus on December 17, 2019. (Writ of Mandamus, Pet.App. 300.) The same day, the Appellants filed a notice of appeal, designating venue in District IV, and asked the Court of Appeals to stay the circuit court's decision by December 23. (Notice of Appeal, Pet.App. 304; Motion for an Expedited Stay, Pet.App. 307.) The Court of Appeals has asked for a response from the Petitioners, due December 23 at 9:00 a.m. (Order Denying Motion for an Expedited Stay, Pet.App 449.) The League, in the meantime, filed a federal lawsuit in the United States District Court for the Western District of Wisconsin asserting that deactivation of non-responsive Movers would violate the Due Process Clause of the Fourteenth Amendment. *League of Women Voters v. Knudson*, No. 19-cv-1029 (W.D. Wis. 2019); (Pet.App. 451.)

On December 20, 2019, the Petitioners filed this Petition to Bypass the Court of Appeals. Under Wis. Stat. § 809.60(3), "[t]he filing of the petition stays the court of appeals from taking under submission the appeal." Consequently, those proceedings,

including the Appellant's motion for a stay, are stayed while this Court considers whether to take this case. *See State v. Holmes*, 106 Wis. 2d 31, 37, 315 N.W.2d 703, 706 (1982) (filing of petition to bypass stayed court of appeals from taking under submission petition for supervisory writ; after this Court granted petition to bypass, it decided the petition for supervisory writ).[2]

ARGUMENT

I. This Court Should Take this Case to Definitively Resolve the Question of Whether Wis. Stat. § 6.50(3) Requires WEC to Deactivate the Registrations of Movers Who Fail to Apply for Continuation of Registration Within 30 Days of the Date WEC Mails Them Notice.

The circuit court correctly recognized that this case raises a narrow question of statutory interpretation and one of first impression in this state: whether Wis. Stat. § 6.50(3) requires WEC to deactivate the registrations of Movers who fail to apply for continuation of registration within 30 days of the date WEC mails

[2] Out of an abundance of caution, the Petitioners plan to comply with the Court of Appeals' deadline for briefing the stay motion by submitting their brief to the Court of Appeals on Monday, December 23, 2019. But they do not concede that the Court of Appeals has the authority to rule on the stay.

them notice. (Tr. 29, 35, 65-66, Pet.App. 248, 254, 284-285.) Despite the limited scope of the question presented, the answer nevertheless has substantial ramifications on election integrity in this state and, in this particular case, will decide whether thousands of voter registrations of voters who have moved will remain activated throughout several upcoming elections.

The Appellants' actions in this case are particularly egregious because their duty under the governing statute is so patent. The Appellants' duty under § 6.50(3) is in two parts: (1) upon receipt of reliable information that a voter has moved, WEC *shall* send a notice to the voter stating the source of the information; and (2) if the voter fails to apply for continuation of registration within 30 days of the date the notice is mailed, WEC *shall* change the elector's registration from eligible to ineligible status. Here, WEC complied with the first part of its duty and in October 2019 sent approximately 234,000 notices to voters for whom WEC had reliable information that the voter had moved. (McGrath Aff. Ex. E, Pet.App. 197.)

"Reliable" means something that is "consistently good in quality or performance or able to be trusted." https://www.lexico.com/en/definition/reliable. The information contained in the ERIC's Movers Report is information reported by the voter (and not a third party) in an official government transaction. The source of the information (the voter, himself or herself) and the fact that it is in an official government transaction (a change of address form submitted to the U.S. Post Office, registering a motor vehicle with the DMV, etc.) obviously makes the information trustworthy.

Further, it was the Wisconsin Legislature, itself, that made the decision to join ERIC. *See* Wis. Stat. § 6.36(1)(ae). The very reason that the Legislature determined that Wisconsin would join ERIC (and pay the required dues) is because ERIC is widely considered as a reliable source of information to be used by member states[3] to update and improve the accuracy of their voter rolls.

[3] There are currently 29 states that are members of ERIC.

In fact, one of the known benefits of joining and paying dues to ERIC is to receive a Movers Report from ERIC. ERIC's own website, https://ericstates.org/, confirms that the reports that ERIC provides to its member states include "*reports that show voters who have moved within their state, voters who have moved out of state,* voters who have died, duplicate registrations in the same state and individuals who are potentially eligible to vote but are not yet registered." (Emphasis added.)

Moreover, Wisconsin's 2017 history with ERIC shows that the ERIC Movers Report is accurate. WEC received a Movers report from ERIC in October 2017. Based on that report, WEC sent notices under Wis. Stat. § 6.50(3) to 341,855 voters in November, 2017. (McGrath Aff. Ex. B., pp. 2-6, Pet.App. 169-173.) After two election cycles, including the record-breaking 2018 midterms, only 6,153 of these 341,855 voters responded to the notice by continuing their registration at their existing address. (*Id.* at 3, Pet.App. 170.) The remainder (335,702) were deactivated from the voter registration list as required under Wis. Stat. §

6.50(3). Of those, an additional 8,573 were reactivated based on participation in an election in 2018. (*Id.* at 4-5, Pet.App. 171-172.) In sum, then, only 14,726 of the 341,855 voters either continued their registration or voted at their original address. This does not mean that the ERIC data was "erroneous"; these voters *did* report a different address in an official government transaction, but for reasons that the voter is not obligated to explain, the voter believes that he or she remains qualified to vote at the old address.[4]

Assuming that all of these voters actually continued to live at this original address, this constitutes an "error" or "non-mover" rate of 4.3%. While there could be additional voters who did not move but failed to vote in either the 2018 or 2019 elections, 2018 turnout was roughly 80% of turnout in a presidential year. The rate of "non-movers" is likely to be no greater than 5-6%.

Thus, even assuming the 4.3% was a measure of

[4] Presumably, such a voter has two different addresses in Wisconsin, one of which is the residence address which is the voter's address for voter registration purposes and the other of which the voter uses for other government transactions such as registering a vehicle.

unreliability (which it is not), the ERIC data from 2017 was still approximately 94%-96% reliable. Indeed, after reviewing the above data WEC staff concluded that "*the in-state movers data is a largely accurate indicator of someone who has moved or who provided information to the post office or DMV which makes it appear that they moved.*" (McGrath Aff. Ex. B, p. 10, Pet.App. 177 (emphasis added).)

Finally, the "reliability" of information is related to the purpose and manner of its use. Under § 6.50(3), reliable evidence indicating that a voter has moved triggers an obligation to notify the voter. Just as a screening test for a medical condition that was 90-95% accurate would be a reliable indicator that additional action be taken, the ERIC Movers Report is reliable for triggering the duties described in § 6.50(3).

In sum, the ERIC Movers Report is reliable. WEC staff has acknowledged that it is accurate; and WEC, in fact, used it to send the October 2019 Notices. Having complied with the first requirement of their statutory duty, the Appellants have no excuse

for failing to comply with the second part of their statutory duty – to change the registration status of voters who do not respond in 30 days from eligible to ineligible. The statute says that "[I]f the elector . . . fails to apply for continuation of registration within 30 days of the date the notice is mailed, the clerk or *board of election commissioners shall change the elector's registration from eligible to ineligible status*. Wis. Stat. § 6.50(3) (emphasis added).

The statute uses the word "shall" and the word "shall" is presumed to be mandatory. *Vill. of Elm Grove v. Brefka*, 2013 WI 54, ¶23, 348 Wis. 2d 282, 832 N.W.2d 121, *amended*, 2013 WI 86, 350 Wis. 2d 724, 838 N.W.2d 87.

There is certainly nothing in the statute permitting WEC to wait up to two years before executing a task that the legislature has said it "shall" do after 30 days. If WEC could wait two years, why couldn't it wait ten years? Or twenty? WEC knew that its decision was inconsistent with § 6.50(3) because WEC staff said so in its June 11th Staff Report. In that staff report, WEC staff said that under its recommendation, "instead of deactivating their

voter registrations within approximately 30 days under Wis. Stat. § 6.50(3), deactivation would take place between 12 months and 24 months, giving the Movers a chance to vote in both the General Election and following Spring Election." (McGrath Aff. Ex. C, p. 3, Pet.App. 170; *see also* McGrath Aff. Ex. B, p.10, Pet.App. 178 ("Previously the process was statutorily designed so that registrations were inactivated within 30 days of the postcard being sent out. . . . The new recommended process would allow the opportunity to participate in at least 4 to 6 elections (and thus the ability to affirm or decline to affirm the address on the poll list) before deactivation.").)

But changing the amount of time required for WEC to act is not for WEC to decide. And WEC cannot lawfully permit Movers to continue to vote from their previous address for two more elections. It is the legislature that decides upon and codifies the election law for the State of Wisconsin and WEC does not have the power to ignore, trump, or veto the laws passed by the legislature.

WEC does have the statutory power to promulgate rules

under chapter 227. *See* Wis. Stat. § 5.05(1)(f). But in exercising that power WEC must comply with the requirements of Chapter 227, which are designed to provide public notice and an opportunity for comment. Here, the Appellants did not even attempt to do so, so they cannot now try to justify their conduct on that basis.

Moreover, no agency, including WEC, may promulgate a rule which conflicts with state law. *See* Wis. Stat. § 227.10(2) ("No agency may promulgate a rule which conflicts with state law.") Thus, while WEC has the power to interpret Wis. Stat. § 6.50(3) (and other statutes), the Appellants must do so through formal rule-making and no rule WEC promulgates may be inconsistent with § 6.50(3). *Seider v. O'Connell*, 2000 WI 76, ¶28, 236 Wis. 2d 211, 612 N.W.2d 659 ("An administrative rule that conflicts with an unambiguous statute exceeds the authority of the agency that promulgated it.")

Given all of the above, the duty of the Appellants is plain and positive. It comes directly and clearly from the Wisconsin statutes.

The circuit court recognized and issued a writ enforcing this duty, but the Appellants seek to delay enforcement and, ultimately, to obtain reversal. This Court should take this case and affirm that the Appellants must comply with Wis. Stat. § 6.50(3), and do it in advance of upcoming elections. To do otherwise would risk permitting an administrative agency to willfully ignore the legislature's painstakingly-calibrated statutory framework for ensuring voter roll and election integrity.

II. The Petitioners Are Entitled to a Writ of Mandamus Ordering WEC to Comply with State Law.

To the extent it is relevant to this Court's determination of whether this case is "one the court . . . ultimately will choose to consider regardless of how the Court of Appeals might decide the issues," Wis. S. Ct. IOP III-B-2., the Petitioners will demonstrate what the circuit court found to be true – that they meet the factors justifying the issuance of a writ of mandamus.[5]

[5] Below, Petitioners alternately argued that they were entitled to a preliminary injunction requiring the Appellants to comply with Wis. Stat. § 6.50(3). Because the Court issued a writ of mandamus, it did not decide this argument. Given that, as noted in the proceedings below, there is substantial

Mandamus is an appropriate remedy to compel public officers to perform duties arising out of their offices. *State ex rel. Oman v. Hunkins*, 120 Wis. 2d 86, 88, 352 N.W.2d 22 (Ct. App. 1984). The elements needed to secure a writ of mandamus are: "(1) a clear legal right; (2) a plain and positive duty; (3) substantial damages or injury should the relief not be granted; and (4) no other adequate remedy at law." *Id.* Each of these elements is met here.

A. The Appellants Have a Plain and Positive Duty to Comply with Wis. Stat. § 6.50(3).

In the circuit court the Appellants argued that the duty to deactivate voter registrations under § 6.50(3) did not belong to the Appellants but instead was solely the duty of municipal clerks and

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overlap in the relevant factors needed to obtain a writ of mandamus and a preliminary injunction, the Petitioners will not separately brief the preliminary injunction question here. However, the Petitioners are not waiving and explicitly reserve their right to argue that the trial court should be affirmed because it could have granted a preliminary injunction and the result would have been the same as the granting of a writ of mandamus. *See, e.g.*, *B & D Contractors, Inc. v. Arwin Window Sys., Inc.*, 2006 WI App 123, ¶4, n.3, 294 Wis. 2d 378, 718 N.W.2d 256 (court of appeals "may affirm the trial court on any ground, whether argued or not," and "a party that prevails in the trial court need not file a cross-appeal to preserve for review an alternative ground to affirm").

municipal boards of election commissioners but the circuit court easily rejected that argument. (Tr. at 69-71, Pet.App. 288-290.)

The circuit court noted that the Appellants have, in fact, undertaken this duty in the past and understood it to be their duty. (*Id.*) The relevant language of § 6.50(3), broken into two parts and with the references to the board of election commissioner emphasized is as follows:

> Upon receipt of reliable information that a registered elector has changed his or her residence to a location outside of the municipality, the municipal clerk or *board of election commissioners* shall notify the elector by mailing a notice by 1st class mail to the elector's registration address stating the source of the information.
>
> If the elector no longer resides in the municipality or fails to apply for continuation of registration within 30 days of the date the notice is mailed, the clerk or *board of election commissioners* shall change the elector's registration from eligible to ineligible status.

The Appellants contend that the references to "the . . . board of election commissioners" in the statute do not refer to WEC but only to a municipal board of election commissioners under Wis.

Stat. § 7.20. It has erroneously maintained that "board of election commissioners" is a statutorily-defined term. It is not. Wisconsin Stat. § 7.20 creates a "municipal board of election commissioners." While the section is captioned "board of election commissioners," section headings are not part of a statute, Wis. Stat. § 990.001(6), and nothing in chapters 5-12 defines "board of election commissioners." Its plain meaning certainly includes WEC, a commission charged with authority over the conduct of elections.

The Appellants' own conduct establishes that the Appellants are wrong.

Under § 6.50(3), the first duty of the board of elections commissioners is to send notices to voters who, based on reliable information, have moved. In that regard:

1. WEC, not any municipal board of election commissioners, sent the notices to movers in 2017. (McGrath Aff. Ex. B, pp. 2-3, Pet.App. 169-170).

2. WEC acknowledges that it did so under Wis. Stat. § 6.50(3)) (*Id*. at 2, Pet.App. 169 ("At the March 14, 2017 meeting, the Commission approved staff's recommendation to follow the statutory process related to voters for whom there is reliable

information that they no longer reside at their registration address (Wis. Stat. § 6.50(3)).”))

3. WEC, not any municipal board of election commissioners, sent the notices to movers in 2019. (Wolfe Aff. ¶ 30, Pet.App. 217.)

4. WEC decided which voters would receive the notices, the form of the notices, and all policies applicable to the notices and then notified municipal clerks and municipal boards of election commissioners of all of those decisions on October 4, 2019, the Friday before the notices were to be sent out. (McGrath Aff. Ex. E, Pet.App. 197)

Whatever the Appellants now argue, they believed in both 2017 and 2019 that they had the power under § 6.50(3) to determine which voters would receive the notices to Movers and the power to send the notices to Movers. The only way they had such power was if WEC was covered under § 6.50(3).

Under § 6.50(3), the second duty of the board of election commissioners is to change the registration status of voters who are sent the notices and who have not responded in 30 days from eligible to ineligible. In that regard:

1. WEC, and not any municipal board of election commissioners, has the statutory authority to compile

and maintain the voter registration list. Wis. Stat. § 6.36(1).

2. WEC, and not any municipal board of election commissioners, has the statutory power to make changes to the list. Municipal boards of election commissioners are not referred to in Wis. Stat. § 6.36(1)(b)1.b. as having the power to make changes to the list.

3. WEC, itself, in comparing Virginia to Wisconsin, explained that "Virginia, *like Wisconsin*, is considered a 'top-down' state as the Department of Elections provides a single application and central storage of registration and election data used by the localities." (McGrath Aff. Ex. B, p. 6, Pet.App. 173 (emphasis added)).

4. Thus, it is impossible to read § 6.50(3) to order that a municipal board of election commissioners has the duty to change the registration of voters who do not respond to the relevant notices when such boards have no power to do so.

5. It was WEC, and not any municipal board of election commissioners that actually changed the registration of the voters who received notices under this statute in 2017. (Wolfe Aff. ¶ 18, Pet.App. 213.)

6. In 2018, when Milwaukee (which has a board of election commissioners) along with Green Bay and Hobart wanted to reactivate the registrations of voters in their communities who had received a movers notice, they had to ask WEC to reactivate them and

> they were reactivated by WEC and not by, for example, the Milwaukee board of election commissioners (Wolfe Affidavit ¶ 24, Pet.App. 216.)

That WEC has undertaken the duties described in § 6.50(3) is not surprising. It is the body that maintains the voter rolls, Until 2003, Wisconsin did not have statewide voter registration and did not maintain a statewide voter registration list. That changed with 2003 Wisconsin Act 265 ("Act 265").[6] Prior to Act 265, municipalities maintained their own voter registration lists. But all of that changed when Wisconsin went to a top-down system of voter registration in order to be in a better position to comply with the federal Help America Vote Act. *Id.*

Act 265 created Wis. Stat. § 5.05(15) to read (and currently still reads):

> Registration list. The board is responsible for the design and maintenance of the official registration list under s. 6.36. The board shall require all municipalities to use the list in every election and may require any municipality to adhere to procedures established by the board for proper maintenance of the list.

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[6] *See generally* Wisconsin Legislative Council, Act Memo for Act 265, https://docs.legis.wisconsin.gov/2003/related/lcactmemo/ab600.pdf (last visited December 19, 2019).

Thus, by law, WEC (and its predecessors) have the duty to maintain the registration list. Not only does WEC maintain the list, it may require municipalities to adhere to whatever procedures it properly establishes for maintenance of the list. *Id.* Thus, WEC's actions to remove Movers from the rolls are part and parcel of WECs legal duties and within its statutory authority.

But that authority must be exercised in accordance with the statutes. Nothing in the statutory changes that authorized WEC to carry out these duties freed it from pre-existing prescriptions as to how those duties were to be performed. WEC is, after all, a board of election commissioners and, thus, literally covered by § 6.50(3).

Act 265 authorized WEC to perform the obligations formerly placed on local officials by 6.50(3). But it did not change the nature of those duties. WEC may exercise the powers set forth in 6.50(3) but only in the way that they are set forth therein.

Any other reading of the law would render the requirement of 6.50(3) superfluous and effectively result in its implicit repeal and that, of course, is disfavored. *See State ex rel. Kalal v. Circuit*

Court for Dane Cty., 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110 ("Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage."); *State v. Villamil*, 2017 WI 74, ¶37, 377 Wis. 2d 1, 898 N.W.2d 482 ("[I]mplied repeal is a disfavored rule of statutory construction."); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 327 (2012) ("[r]epeals by implication are disfavored—"very much disfavored" (quoting James Kent, *Commentaries on American Law* *467 n.(y1) (Charles M. Barnes ed., 13th ed. 1884)).

Again, without regard to what the Appellants are now arguing, the Appellants exercised the power under § 6.50(3) in 2018 to deactivate (and in some cases reactivate) 335,701 voter registrations who had received the 2017 movers notice. WEC cannot have it both ways. It cannot run the operation from start to finish and then argue that it has no legal responsibility for the result. WEC is subject to the command of § 6.50(3).

In the previous section the Petitioners demonstrated that

the duty under Wis. Stat. § 6.50(3) is a plain and positive one and will not repeat that argument here. The circuit court agreed, explaining:

> Now, I don't want to see anybody deactivated, but I don't write the legislation. . . . [T]hat's not my area. It's not my domain. Once the legislature has studied this issue and they've decided how to proceed, that's really their prerogative, and people can disagree with it or agree with it through voting. But I think it's very clear that [WEC] had a legal duty, that they didn't think the policy was appropriate, and they went away from it. . . . I find that . . . [WEC has] a plain, legal duty to follow [the statute].

(Tr. 72-73, Pet.App. 291-292.)

B. The Petitioners have a Clear Legal Right to Compliance by WEC.

The circuit court also concluded that the Petitioners have a clear legal right to the relief they seek. (Tr. 73, Pet.App. 292.) The form of relief that the Petitioners seek comes directly from the statutes.

Pursuant to Wis. Stat. § 5.06(1), any voter may file a complaint with WEC if the voter believes that any election official has failed to follow the law with respect to any aspect of election

administration. This is consistent with long-standing law in this state that when it comes to the voter registry "every voter is made or may become an agent in the execution of the law." *State ex rel. Wood v. Baker*, 38 Wis. 71, 85 (1875)

Further, pursuant to Wis. Stat. § 5.06(2), once WEC has disposed of the complaint, the voter may sue in circuit court to "test the validity of any decision, action or failure to act on the part of any election official." That is precisely what is occurring here.

The Petitioners originally filed a formal complaint with WEC on October 16, 2019 alleging the same unlawful conduct that is alleged in this case (the "WEC Complaint"). (McGrath Aff., Ex. A, Pet.App. 165.) But WEC dismissed the WEC Complaint on October 25, 2019 without addressing it on the merits. (*Id.*) The WEC Administrator stated that the ground for dismissal of the WEC Complaint was that it was "not timely" in light of the statutory rule that such complaints "shall be filed promptly *so as not to prejudice the rights of any other party*." Wis. Stat. § 5.06(3) (emphasis added); (McGrath Aff., Ex. A, Pet.App. 165.).

WEC further stated that given the facts described in the WEC Complaint, there are no circumstances in which the Petitioners could assert any additional facts which would "cure the defect" which led WEC to dismiss their complaint. (McGrath Aff., Ex. A, p. 3, Pet.App. 167) Thus, the Petitioners have no practical ability to refile their complaint with WEC at any future time or on any known basis.

WEC's decision dismissing the complaint was without basis in fact or law.[7] The WEC Complaint was filed within *one week* of WEC's sending the October 2019 Notices to voters between October 7 and October 11, 2019. In fact, the dispute would not have been ripe prior to the notices going out. (Tr. 75-76, Pet.App. 294-295 ("If they filed before those notices went out . . . I don't think it would have been justiciable at that point. Courts don't do advisory decisions. Maybe, maybe not, but I think they went

[7] This is not an appeal of a decision of WEC under Wis. Stat. § 5.06(8) because there was no decision on the merits by WEC under § 5.06(6) for the Petitioners to appeal. Rather, this is an action as allowed under § 5.06(2) where WEC disposed of the case without a formal decision.

quickly . . . .")).

Moreover, no voter would be prejudiced by the date on which the WEC Complaint was filed. The Petitioners do not challenge the form of the notice sent to voters. Rather, the Petitioners challenge the decision by WEC not to follow up on the notices that were actually sent as required by Wis. Stat. § 6.50(3).[8]

Finally, it cannot be the case that WEC's claim of an adverse effect on WEC staff, who have spent time and effort implementing an unlawful plan, can possibly constitute "prejudice to the rights of a party" for purposes of § 5.06(3). Indeed, the circuit court faulted the WEC administrator for having a "little bit of a cavalier attitude . . . when she elevated the rights and the duties of the employees of [WEC] over the rights and duties to the state, to the

[8] WEC argues that it should be excused from complying with the law because the notice it sent (improperly) did not tell voters that registrations would be deactivated unless they requested them to be continued and (erroneously) told voters they could continue the registration by voting at some unspecified "next election." (McGrath Aff., Ex. A, p. 2, Pet.App. 166.) But WEC cannot change the law and its own failure to do what the law requires cannot operate as its own excuse. Petitioners would not object to WEC mailing a second notice telling recipients that registration at their old address has been deactivated and what steps are required to re-register.

electorate," adding that that was not "an appropriate basis for any kind of denial." (Tr. 74, Pet.App. 293.)

Thus, although WEC stated that its dismissal of the WEC Complaint was without prejudice, its dismissal represented the final disposition of the WEC Complaint, and no further action before WEC was possible. WEC thus "disposed of" the WEC Complaint and the Petitioners were authorized by Wis. Stat. § 5.06(2) to commence an action in court to "test the validity' of the Appellants' "decision, action or failure to act."

The legislature has specifically granted the Petitioners standing to do so and the Petitioners' rights are within the zone of interests to be protected under Wis. Stat. § 5.06. *In re Guardianship & Protective Placement of Carl F.S.*, 2001 WI App 97, ¶5, 242 Wis. 2d 605, 626 N.W.2d 330.

As a result of the dismissal by WEC, the Petitioners have the clear legal right under § 5.06(2) to test the validity of WEC's action in court and pursuant to Wis. Stat. 6.50(3) the Petitioners are entitled to the relief that they seek – properly updated voter rolls.

As voters, the Petitioners are harmed if others are enabled by WEC to vote when, or at a location where, they are not legally eligible to vote. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 196 (2008) ("There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters".) The Petitioners are also harmed if the Appellants fail to administer elections in a way inconsistent with the law. *Id.* (a substantial interest exists in "orderly administration and accurate recordkeeping" for elections).

Apart from their standing as voters, the Petitioners are each taxpayers who have the right to challenge the illegal expenditure of taxpayer money. In *S.D. Realty Co. v. Sewerage Commission of Milwaukee*, 15 Wis. 2d 15, 112 N.W.2d 177 (1961), the Wisconsin Supreme Court held that taxpayers have standing to challenge *any unlawful action* by a government entity that results in the expenditure of public funds. *See also Hart v. Ament*, 176 Wis. 2d 694, 500 N.W.2d 312 (1993) (taxpayers have a "financial interest in public funds . . . akin to that of a stockholder in a private

corporation" and may sue not only in their own right, but as representatives of all taxpayers); *see also Bechthold v. City of Wauwatosa*, 228 Wis. 544, 277 N.W. 657, *on reh'g*, 228 Wis. 544, 280 N.W. 320 (1938); *Wagner v. City of Milwaukee*, 196 Wis. 328, 330, 220 N.W. 207 (1928).

Here, WEC spent substantial staff time and resources to develop the illegal policy that was adopted by the WEC Commissioners to replace the requirements of § 6.50(3) with a different policy as created by WEC. That can be seen by the amount of staff time needed to create the staff reports, memos, and training materials set forth at (McGrath Aff. Ex. B, C, D and E, Pet.App. 168-205.) Moreover, it costs money to send out Wis. Stat. § 6.50(3) notices and to maintain the voter registration list and the Appellants have done so in an unlawful and inadequate manner, wasting taxpayer funds. The Petitioners have a clear legal right to challenge this illegal expenditure of taxpayer money.

In light of the mandatory language in Wis. Stat. 6.50(3) and the clear nature of the duty involved, the Petitioners can establish

and have established that they have a clear legal right.

C. The Petitioners Will Suffer Substantial Damages or Injury Should the Relief Not Be Granted.

Under federal law, specifically 52 U.S.C. § 21083[9], each state must keep and maintain a voter registration list at the state level that contains the name and registration information of every legally registered voter in the state. Under subsection (4) of § 21083, each state must also "*ensure that voter registration records in the State are accurate and are updated regularly*." (Emphasis added.) The legislature has delegated the duty required under federal law to keep and update our state's voter registration list to WEC. *See* Wis. Stat. §§ 5.05(15) and 6.36.

As noted above, there are at least three independent purposes for updating voter lists: (1) it "produces an accurate result based on each eligible voter casting a single ballot in their proper jurisdiction"; (2) it "enfranchises voters because it lowers

[9] 52 U.S.C. is part of the Help America Vote Act ("HAVA"). HAVA, unlike the National Voters Right Act ("NVRA") applies in Wisconsin. Wisconsin is exempt from the NVRA because Wisconsin allows same-day registration.

the likelihood of lines at the polls, reduces voter confusion and decreases the number of provisional ballots"; and (3) it "allow[s] election administrators to plan, to better manage their budget and poll workers, and to improve voter experience." United States Election Assistance Commission, *supra*.

Consistent with the first of the three listed purposes, there exists a valid state interest in preventing voter fraud, and "[i]t is well established that purge statutes are a legitimate means by which the State can attempt to prevent voter fraud." *Ortiz v. City of Philadelphia Office of the City Commissioners Voter Registration Division*, 28 F. 3d 306, 314 (3d Cir. 1994); *see also Hoffman v. Maryland*, 928 F. 2d 646, 640 (4th Cir. 1991) ("keeping accurate, reliable and up-to-date voter registration lists is an important state interest").

While the lists should always be as up-to-date as possible it is particularly important prior to each election. That is when having up-to-date voter rolls really makes a difference for all three of the purposes described above. For example, the next election in

Wisconsin is set for February 18, 2020. If the voter rolls are not up-to-date prior to the election then the purposes of maintaining the lists fails. The same concern applies to the other upcoming elections in 2020.

If there are hundreds of thousands of names on the voter registration lists of individuals who are not legally entitled to vote at the addresses where they are registered, then each and every voter who is entitled to vote in those districts and whose votes could be diluted by individuals who are not so entitled is threatened with irreparable harm. *Miller v. Blackwell*, 348 F. Supp. 2d 916, 922 (S.D. Ohio 2004) (action that threatens or impairs plaintiffs' right to vote constitutes irreparable harm). The harm is irreparable whether it involves a denial of the right to vote or only results in vote dilution. *Montano v. Suffolk Cty. Legislature*, 268 F. Supp. 2d 243, 260 (E.D.N.Y. 2003); *Day v. Robinwood W. Cmty. Improvement Dist.*, No. 4:08CV01888ERW, 2009 WL 1161655, at *3 (E.D. Mo. Apr. 29, 2009).

Consistent with this principle, in *Ohio Republican Party v.*

Brunner, 582 F. Supp. 2d 957, 965 (S.D. Ohio 2008) the court granted the plaintiffs a preliminary injunction requiring state officials responsible for voter registration lists to comply with federal requirements to properly maintain those lists in part because allowing unqualified individuals to cast votes "would demean the voting process and unlawfully dilute the votes of qualified voters"), *vacated on other grounds*, *Brunner v. Ohio Republican Party*, 555 U.S. 5 (2008).

The Petitioners sought a temporary injunction or a writ of mandamus below in order to avoid harm from occurring at the next scheduled election – February 18, 2020 – as well as the other upcoming elections this year. There is no way to undo the harm once it occurs. And on the reverse side there is no harm to anyone if a writ of mandamus (or injunction) is granted. If some voter received the October 2019 notice in error and chose not to respond, it is not the case that they will be denied the opportunity to vote. Rather they will simply have to reregister when they go to the polls which is permitted in Wisconsin because our state has same-day

registration. *See* Wis. Stat. 6.55(2).

D. The Petitioners Have No Other Adequate Remedy at Law

Finally, as the court below recognized, the Petitioners simply have no other adequate remedy at law. (Tr. 75-76, Pet.App. 294-295.) A party lacks an adequate remedy at law when mandamus is the only method available to the plaintiff to enforce his or her rights. *State ex rel. Milwaukee Cty. Pers. Review Bd. v. Clarke*, 2006 WI App 186, ¶54, 296 Wis. 2d 210, 723 N.W.2d 141.

The Petitioners initially sought relief before WEC. But given that WEC has dismissed their complaint without ever getting to the merits and has acknowledged that the Petitioners have no way to obtain relief before it, the Petitioners lack any available remedy except resort to the courts for equitable relief. Put differently, the Petitioners went to WEC and asked WEC to undo its unlawful conduct and WEC has refused. Further, the Petitioners do not seek and cannot obtain damages to remedy the wrong here. The only way to right this wrong is for this Court to uphold the circuit court's decision declaring WEC's conduct unlawful and its issuance

of a writ of mandamus requiring WEC to comply with its statutory duties.

CONCLUSION

For the foregoing reasons, this Court should grant this petition requesting that the Court allow the Petitioners to bypass the Court of Appeals and obtain direct appellate review of the circuit court's decision by this Court.

Dated: December 20, 2019.

Respectfully submitted,
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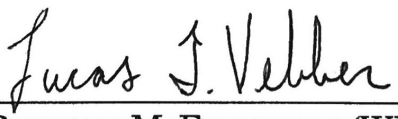

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