STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2019AP2397

STATE OF WISCONSIN ex rel.
TIMOTHY ZIGNEGO, FREDERICK G.
LUEHRS, III, and DAVID W. OPITZ,

Plaintiffs-Respondents-Petitioners,

v.

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

Defendants-Appellants-Respondents.

RESPONSE OF DEFENDANTS-APPELLANTS-RESPONDENTS TO THE PETITION TO BYPASS

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INTRODUCTION

Petitioners are correct that this mandamus case, in a sense, presents a novel question of law. However, the fact that it is novel does not mean it is especially difficult or even bona fide, much less does it justify the extraordinary step of bypass prior to briefing in the court of appeals. Rather, this Court treats a bypass petition, like this one, "as premature because briefs on the appeal ha[ve] not been filed." *Milwaukee Brewers Baseball Club v. DHS*, 130 Wis. 2d 56, 63, 387 N.W.2d 245 (1986).[1]

Indeed, the premature nature of this bypass petition is even more apparent when viewing the readily-correctable errors in the circuit court's ruling. There is simply no statutory basis for the circuit court's mandamus order, much less the kind of clear and unequivocal statutory duty required to issue a writ of mandamus. It is black letter law that a court may not "compel action through mandamus when the duty is not clear and unequivocal and requires the exercise of discretion." *Law Enf't Standards Bd. v. Vill. Of Lyndon Station*, 101 Wis. 2d 472, 493–94, 305 N.W.2d 89 (1981) (citations omitted). These are the kinds of basic errors that the court of appeals can and should efficiently correct.

Perhaps most glaring, there is a serious statutory problem under the circuit court's order regarding the standard for deactivating a voter's registration: deactivation is triggered only by "reliable information" about a particular

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[1] *See also* Michael S. Heffernan, *Appellate Practice and Procedure in Wisconsin* § 24.3 (7th ed. 2016) ("Supreme court orders have stated a policy, not reflected in any rule, that a petition for bypass filed before the respondent's brief is filed will be dismissed as premature.").

voter having changed his or her residence to a location outside of the municipality. However, here, the circuit court did not apply that standard when ordering undifferentiated deactivation of hundreds of thousands of voters based on just one information source *that has been confirmed as inaccurate in some cases.* Of course, whether there is "reliable information" that someone has permanently moved outside their municipality necessarily contemplates an evaluation of whether particular information about a particular person is "reliable." The circuit court undertook no such evaluation. Rather, that is the kind of case-specific inquiry that is addressed by local officials under Wis. Stat. § 6.50(3). It certainly is not the kind of cut-and-dry statutory directive that might support undifferentiated mandamus relief affecting hundreds of thousands of voters. Whether information is "reliable" requires the exercise of judgment and discretion, thereby making mandamus inapplicable.

But that is not the only fundamental problem here. For example, the circuit court decision also completely ignores *which entity* is covered by Wis. Stat. § 6.50(3). The statute contains no mandate directed at the defendant here, the Wisconsin Elections Commission. A statute that does not even apply to the Commission cannot, of course, support a writ of mandamus, which may only issue when a government entity has an unequivocal statutory duty.

While these threshold problems are easy to identify and correct, if left uncorrected, a host of other serious problems arise. For example, the writ apparently contemplates deactivation of voters based on an October 2019 mailing, but there is a mismatch between the court's ruling and that mailing: the mailing told electors they could simply vote in the next election to remain active on the rolls. In contrast, the circuit court's order requires immediate deactivation without warning. That discrepancy has not

gone unnoticed. Indeed, currently pending is a federal lawsuit alleging due process claims directed at that mismatch. Correctly applying the statute's plain language avoids this problem because it never should have been applied here in the first place.

And there are still more problems that arise. The circuit court seemingly contemplated removal of approximately 230,000 voters mailed letters by the Commission in October 2019, even though many thousands of those voters (perhaps 88,000, as publicly stated at the Commission's December 30, 2019 meeting) are not even eligible for removal under section 6.50(3). That is because there is no indication those voters changed their residences to a different municipality, for whom registration deactivation is all Wis. Stat. § 6.50(3) potentially allows.

The basic misreading of the statute can and should be addressed by the court of appeals. There can be no serious argument that this statute supports an unequivocal duty supporting mandamus relief.

The petition should be denied.

GENERAL BACKGROUND

Petitioners Timothy Zignego, David Opitz, and Frederick Luehrs, III, are Wisconsin taxpayers and registered voters. (App. 104 (Compl. ¶¶ 5–7).) The Wisconsin Elections Commission is a state agency responsible for administering election laws in the state. Wis. Stat. § 5.05; (App. 105 (Compl. ¶ 9)).

Wisconsin participates in what is called the Electronic Registration Information Center ("ERIC"). Wis. Stat. § 6.36(1); (App. 210–11 (Wolfe Aff. ¶ 11)). ERIC is a multi-state cooperative that shares information regarding voter registration. Wis. Stat. § 6.36(1); (App. 211 (Wolfe Aff. ¶ 12)).

As part of ERIC, Wisconsin receives a report regarding persons who are sometimes referred to as "Movers." (App. 211–13 (Wolfe Aff. ¶¶ 12–17).) This refers to Wisconsin residents who, in an official government transaction with, for example, the Division of Motor Vehicles or the United States Postal Service, reportedly have stated an address different from their voter registration address. (App. 211 (Wolfe Aff. ¶ 12).)

After receiving the first report on ERIC Movers data in 2017, the Commission mailed postcards to the identified electors directing them to reregister if they had moved or to sign and return the card to the municipal clerk or board of elections commissioners to keep their registration current. (App. 212–13 (Wolfe Aff. ¶ 16).) The Commission stated that the voters had 30 days in which to respond to keep their registration active. (App. 169, 212–13.)

Based on its experience with the 2017 Movers mailing, the Commission learned that some percentage of that ERIC data was not a reliable indicator of whether an elector changed her voting residence, although the precise percentage is not currently established. (App. 212–217 (Wolfe Aff. ¶¶ 16–27), 226–27, 263–64, 274–75, 281.) The quick deactivation of elector registrations caused numerous problems and resulted in the Commission having to reactivate the registrations of electors who may have been deactivated in error. (App. 212–17 (Wolfe Aff. ¶¶ 16–27).)

In 2019, the Commission received another report on Movers data from ERIC. (App. 217 (Wolfe Aff. ¶ 28).) Based on what the Commission learned from the 2017 Movers data and its subsequent mailing, the Commission decided to revise its process for the 2019 Movers data. (App. 175, 182, 217 (Wolfe Aff. ¶ 29).) In October 2019, the Commission sent letters to approximately 230,000 Movers. (App. 217 (Wolfe Aff. ¶¶ 28–30).) The letters asked electors to affirm whether

they still lived at that address. If the voter affirmed that she had not moved, then the voter would remain in active status on the voter rolls at that address. (App. 217–18 (Wolfe Aff. ¶¶ 30–31).) Because the Commission had no immediate plans for deactivation, the letter did not include notice that the elector's registration would be deactivated as a result of a non-response. (App. 217 (Wolfe Aff. ¶¶ 29–30).) To the contrary, the letter told recipients that simply voting in the next election would maintain their status. (App. 217–18 (Wolfe Aff. ¶ 31.)

For the electors who do not respond to the October 2019 mailings, the Commission decided that it would take no action on changing their registration from eligible to ineligible status at this time, but rather would seek guidance from the Legislature to the extent further action was contemplated. (App. 218 (Wolfe Aff. ¶ 32), 431–32 (Suppl. Wolfe Aff. ¶¶ 3–5).)

Petitioners then filed suit against the Commission and five of its six commissioners in their official capacities. Petitioners alleged the Commission violated Wis. Stat. § 6.50(3) by not deactivating the registrations of those electors who did not respond within 30 days after the October 2019 notices were mailed. They sought declaratory and injunctive relief or, in the alternative, a writ of mandamus. (App. 103–118 (Compl.).)

Before the Commission's answer deadline, Petitioners filed a motion for a temporary injunction or, in the alternative, a writ of mandamus, along with a brief and affidavit containing exhibits. The Commission responded to the motion with a brief and affidavit containing exhibits. Petitioners filed a reply. The circuit court held oral argument and issued an oral ruling on December 13, 2019. The circuit court orally ruled that a writ of mandamus would issue to compel the Commission to comply with Wis. Stat.

§ 6.50(3) and deactivate the registration of the electors who did not attempt to continue their registration within 30 days after the mailing of the October 2019 notices. (App. 295 (Tr. 76:12–16).) The Commission orally moved to stay the writ. (App. 296 (Tr. 77:3–15).) The court denied that motion, acknowledging the possibility that the appellate court may grant a stay. (App. 297–298 (Tr. 78:23–79:19).) The court then issued and entered a written writ of mandamus on December 17, 2019. (App. 300–01 (Final Order).)

The Commission immediately filed a notice of appeal and a motion for expedited stay. (App. 304–06 (Notice of Appeal), 307–22 (Motion for Stay).) That stay motion is still pending before the court of appeals. Now before the Court is a petition to bypass the court of appeals.

In the meantime, Petitioners have returned to the circuit court and on January 2, 2020, filed a motion for contempt and remedial sanctions against the Commission for not immediately deactivating the electors who potentially moved to a location outside of the municipality in which they are registered, received the October 2019 mailing, but did not respond to the Commission's October 2019 mailing.

ARGUMENT

I. Petitioners' argument for bypass is unpersuasive; the petition should be denied.

A. There is no immediate need for this Court to clarify, develop, or harmonize the law because the basic flaws in the circuit court's decision can be easily corrected.

While it is true that, in a sense, this case presents a novel question of law that, when resolved, could have statewide impact, there is no need for this Court to develop, clarify, or harmonize the law at this time. *See* Wis. Stat.

§ 809.62(1r). That is because the disharmony in the law is a product of a basic misreading of Wis. Stat. § 6.50(3) and a fundamental misuse of mandamus relief.

The court of appeals, which already is considering a motion to stay the writ in this appeal, is capable of efficiently resolving the basic errors in the first instance. That has the added benefit of likely cleaning up and clarifying what has quickly become a messy case, and of doing so before this Court weighs in on any remaining bona fide issues of statewide importance. Indeed, Petitioners' own issue statement to this Court covers a different set of voters than the issue they presented in their complaint and motion before the circuit court. In other words, Petitioners appear to be still figuring out their own theory.

This appeal of a writ of mandamus presents a simple question of statutory interpretation that can be resolved using established principles of statutory construction. In fact, it can be resolved using the most basic one: reading the statute. As explained more below, Wis. Stat. § 6.50(3) simply has no coherent application here, much less an unequivocal one requiring the Commission to deactivate the registrations of hundreds of thousands of voters.

A key flaw is that the circuit court's mandamus order includes no meaningful application of the statutory trigger: there must be "reliable information" demonstrating that a voter has changed her residence to a location outside of her municipality. The circuit court's undifferentiated mandamus order does not even come close to addressing that standard as to any particular voters. Further, the circuit court completely ignored *who* is directed to act—another necessary component of mandamus. The statute in question applies only to a "municipal clerk" and "board of elections commissioners." As a matter of law, that is not the Commission. The "commission" and "board of elections

commissioners" have specific and *separate* statutory definitions and descriptions, and they are used to refer to separate entities throughout Wis. Stat. § 6.50 and chapter 6. *See, supra* II.A.2.

Like any other question of statutory interpretation, the threshold questions presented here are well within the competence of the court of appeals and may not ultimately merit supreme court review. Indeed, the threshold statutory issues sound more in error correction, which is the typical province of the court of appeals. Nor does the absence of appellate case law interpreting Wis. Stat. § 6.50(3) necessitate this Court's review at this time. Rather, potential review by this Court may benefit from an analysis from the court of appeals, especially since there was little statutory analysis in the circuit court's oral ruling. And, as already noted, the need to "harmonize" the law only arises from a basic misapplication of the statute's plain terms by one circuit court—once that is corrected, the collateral disharmony goes away.

B. Bypass would be inefficient and, in any event, Petitioners' asserted exigency lacks a statutory basis.

Because the Commission filed an expedited motion to stay the circuit court writ, the court of appeals has likely begun work on this case. It would be irregular and inefficient to transfer the case to this Court now.[2] *See Milwaukee Brewers Baseball Club*, 130 Wis. 2d at 63 (explaining that a

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[2] In addition, because of the recusal of Justice Kelly, there is the potential for a split decision by this Court that could deprive the State and its voters of an appellate decision that is necessary to correct the significant errors and provide clarity going forward.

motion like the present one is premature). Further, there is no reason to believe that the court of appeals will delay these proceedings. The Commission requested expedited briefing, and the court of appeals is well-aware of the pending election deadlines.[3]

Finally, any exigency is solely created by Petitioners' erroneous reading of the statute. Wisconsin Stat. § 6.50(3)'s "reliable information" standard does not allow for the kind of mass voter registration deactivation sought by Petitioners based on a single databank, and it does not even apply to the Commission on its face. It is not required to deactivate the registrations of electors flagged as ERIC Movers, at all, much less within a certain timeframe and much less based on the "reliable information" standard in the statute.

After the 2017 Movers mailing, the Commission concluded that deactivation after 30 days was unworkable and resulted in deactivation of some voters in error. It prudently decided to change the process for the 2019 Movers mailing, such that deactivation would occur on a much

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[3] Petitioners' argument that the court of appeals has no jurisdiction to issue a ruling on the Commission's pending stay motion based merely on the *filing* of a bypass petition under Wis. Stat. § 809.60(3) is without merit. The court of appeals has broad authority under Wis. Stat. § 808.07(2) to "[s]tay execution or enforcement of a judgment or order" "[d]uring the pendency of an appeal." Wisconsin Stat. § 808.05(1) confirms that the court of appeals retains jurisdiction over a pending appeal until the supreme court *grants* a bypass petition. The leading treatise on Wisconsin appellate procedure agrees: Wis. Stat. § 809.60(3) "essentially means the court of appeals cannot decide a case once a petition for bypass is filed. In all other respects, however, the case continues on its normal course until the supreme court makes a decision on the petition." Michael S. Heffernan, *Appellate Practice & Procedure in Wisconsin* § 24.3 (7th ed. 2016).

slower timeframe if it occurs at all. (App. 175, 182, 217 (Wolfe Aff. ¶¶ 29–30).) There is no exigency here because the Commission is not required to deactivate anyone's voter registration under Wis. Stat. § 6.50(3). (App. 218 (Wolfe Aff. ¶ 32), 431–32 (Suppl. Wolfe Aff. ¶¶ 3–5).)

II. On the merits, it is clear that Petitioners were not entitled to a writ of mandamus.

The foregoing summarizes why bypass is not merited at this time, in part because basic statutory errors have led to the present state of affairs. To help illustrate why the basic misreading can be readily corrected, the following summarizes the threshold statutory issues.[4] It also explains that there are other serious statutory and practical problems with the circuit court's order.

A. The Commission has no positive and plain duty to act under the statute that is the foundation of Petitioners' case—Wis. Stat. § 6.50(3).

This appeal is of a writ of mandamus, which may only issue when very specific circumstances are present. "[M]andamus will not lie to compel the performance of an official act when the officer's duty is not clear and requires the exercise of judgment and discretion." *Beres v. City of New Berlin*, 34 Wis. 2d 229, 231–32, 148 N.W.2d 653 (1967).

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[4] "Statutory interpretation starts with the text of the statute." *Rock-Koshkonong Lake Dist. v. DNR*, 2013 WI 74, ¶ 127, 350 Wis. 2d 45, 833 N.W.2d 800. "[T]echnical or specially-defined words or phrases are given their technical or special definitional meaning." *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. "If the meaning of the statute is plain, [courts] ordinarily stop the inquiry." *Id.* (citation omitted.)

"[I]t is an abuse of discretion to compel action through mandamus when the duty is not clear and unequivocal and requires the exercise of discretion." *Law Enf't Standards Bd.*, 101 Wis. 2d at 493–94. Wisconsin Stat. § 6.50(3) simply does not impose the required unequivocal and non-discretionary duties on the Commission.

1. The circuit court's application of Wis. Stat. § 6.50(3)'s "reliable information" standard is fundamentally flawed.

A global and fundamental error in the circuit court's ruling relates to the statute's substantive threshold. It was ignored. Wisconsin Stat. § 6.50(3)'s deactivation of an elector's registration is triggered *only* when there is "reliable information" that a particular voter has permanently changed residences to one outside the municipality currently registered. Here, however, the circuit court ordered deactivation of over 200,000 voters without looking at any specific data about any particular voters, much less did it analyze what was "reliable" in light of any particular evidence. Rather, the court took *one* source of data (ERIC Movers) *that is demonstrably inaccurate* as to some voters and applied it without differentiation to hundreds of thousands of voters.

That was clearly wrong. As a basic matter, a writ of mandamus cannot issue under a statute that is triggered by a judgment-based inquiry about "reliability." *Beres,* 34 Wis. 2d at 231–32. And it certainly cannot issue under a "reliability" standard based on one set of mass data that is known to be, at times, an inaccurate indicator of a permanent change of residence.

In other words, the circuit court completely failed to apply the "reliable information" standard either legally or practically. The court did not even attempt to glean more

facts about any voters; it just took, wholesale, one data point.

ERIC Movers data, however, is not collected or reported as a foolproof indicator that someone has actually permanently changed his or her residence. Far from it. Rather, it is simply a database that seeks to identify Wisconsin residents who, in some sort of official government transaction, have reported an address different from their voter registration address. However, because the source data was collected for purposes *other than voter registration* and because of anomalies inherent in the data-matching process, it is undisputed that the ERIC Movers data is not always an accurate reflection of an individual's voting residence; only the percentage of inaccuracy is in dispute. (App. 263–64 (Tr. 44:14–45:12), 274 (Tr. 55:20–23), 211–12 (Wolfe Aff. ¶¶ 12–13).) A record of a government transaction revealing a different address than the elector's registration address does not necessarily mean that the elector has moved or if a move was intended to establish a new, permanent voting residence.[5] (App. 225–26 (Tr. 6:24–7:4, 12–15), 262 (Tr. 43:4–6), 211–12 (Wolfe Aff. ¶¶ 12–13).)

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[5] "Elector residence" is defined in statute and includes consideration of the person's physical presence and intent regarding their voting residence: "The residence of a person is the place where the person's habitation is fixed, without any present intent to move, and to which, when absent, the person intends to return." Wis. Stat. § 6.10(1). The statute then describes various determinations of residence. Wis. Stat. § 6.10(2)–(13). Notably, no person loses residence when he or she leaves home and goes to another state or another municipality within Wisconsin "for temporary purposes with an intent to return." Wis. Stat. § 6.10(5).

Here, however, neither Petitioners nor the court attempted to glean more information to potentially weed out voters who, for example, reported a different address for a business purpose, a temporary purpose, or some other purpose, but yet still permanently resided in their registered address. Likewise, they did not attempt to glean more information to help discern whether there was simply a mistake in some ERIC data. And no voter affected by the court's purported "reliable information" determination was allowed a chance to demonstrate that it was not reliable.

At a minimum, there would have to be an actual legal and factual analysis of whether ERIC Movers data supports a finding of "reliable information" as to particular voters, which would necessarily need to consider other information to meaningfully assess "reliability." That has not occurred, nor does it make sense to take on that kind of task for hundreds of thousands of people at the *state* level.

Rather, as explained more below, Wis. Stat. § 6.50(3) and its "reliability" standard applies to municipal election bodies who, unlike the Commission, are privy to local information that might inform whether ERIC data is truly reliable as to a particular voter. And, even on that local basis, those decisions would not be subject to the kind of mandamus relief issued here. Second-guessing judgment calls is not what mandamus is for. *See Beres,* 34 Wis. 2d at 231–32 (mandamus does not apply to "the exercise of judgment and discretion").

Tellingly, different statutes are specifically designed for individuals (like Petitioners here) to challenge a particular voter's status. Those come with different procedures and more protection for the challenged voter—for example, proof beyond a reasonable doubt—and those statutes are more limited, allowing an individual elector to challenge the individual registration status of a particular

elector; there is no such thing as one elector seeking mass deactivation based on a data set, much less a sometimes-flawed one like the ERIC data here. *See, e.g.,* Wis. Stat. §§ 6.48 ("[a]ny registered *elector* of a municipality may *challenge* the registration of any other registered elector"), 6.325 ("No person may be disqualified as an elector unless the municipal clerk, board of election commissioners *or a challenging elector* under s. 6.48 demonstrates beyond a reasonable doubt that the person does not qualify . . . ."). *See also* Wis. Stat. § 6.925 ("*Any elector may challenge* for cause any person offering to vote whom the elector knows or suspects is not a qualified elector.").

Wisconsin Stat. § 6.50(3) contains no language referring to a "challenging elector," and for good reason. Petitioners have no statutory right, or standing, to bring their mass deactivation challenge under Wis. Stat. § 6.50(3) and its "reliable information" standard, much less to do so simply based on one set of ERIC data. It contemplates no such mass challenge and its statutory threshold cannot be coherently applied to it—much less can mandamus.

2. In addition, the Commission has no positive and plain duty under Wis. Stat. § 6.50(3) because this law on its face does not even apply to it.

Unlike other subsections of Wis. Stat. § 6.50 that expressly apply to the Commission, subsection (3) governs only the acts of two other government entities: "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 . . . . 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." Wis. Stat. § 6.50(3).

Those terms—including the "board of elections commissioners"—have specific statutory definitions and descriptions that do not include the Wisconsin Elections Commission. That, alone, is dispositive: mandamus cannot issue against an entity that is not even covered by a statute.

Wisconsin Stat. § 6.50(3) contemplates an individualized finding of whether there is "reliable information" that a particular voter in a particular municipality has changed residence. Understandably, therefore, subsection (3) does not apply to the Wisconsin Elections Commission. Rather, this subsection applies only to a "municipal clerk or board of election commissioners," the only two entities referenced in that subsection, which are better situated to make the individualized determination required by that law.

The Wisconsin Elections Commission is not a "board of election commissioners" under Wis. Stat. § 6.50(3). The term is explained in Wis. Stat. § 7.20, which refers to "[a] municipal board of election commissioners" and "a county board of election commissioners," which are established in every city over 500,000 population and county over 750,000 population. Wis. Stat. § 7.20(1). "Each board of election commissioners" is comprised of several members who must reside in the municipality or county. Wis. Stat. § 7.20(2)–(3). These commissioners are selected by the mayor and county executive. Wis. Stat. § 7.20(2). A board of election

commissioners is, therefore, a local entity comprised of local officials.[6]

The Wisconsin Elections Commission has a wholly separate statutory definition. By statute, the Wisconsin Elections Commission is a state body consisting of members appointed by various state officials, such as the governor, speaker of the assembly, and senate majority leader. *See* Wis. Stat. § 15.61(1)(a)1.–6. The Legislature has assigned the Commission specific duties. *See* Wis. Stat. § 7.08. And, notably, when referring to the Wisconsin Elections Commission, the statutes tell us that "[i]n chs. 5 to 10 and 12, 'commission' means the elections commission." Wis. Stat. § 5.025. Thus, the Legislature has specifically instructed that, when used in the statutes, the term "commission," alone, means the Wisconsin Elections Commission.

Chapter 6 and Wis. Stat. § 6.50 bear that out. For example, Wis. Stat. § 6.50(1)–(2)'s four-year voter maintenance process is done by "*the commission,*" not any other entity. In subsection (1), "*the commission* shall examine the registration records of each municipality" and "mail a notice to the elector." Wis. Stat. § 6.50(1). Under subsection (2), if an elector who was mailed a "notice of suspension" under the four-year maintenance process in subsection (1) does not respond, "*the commission* shall change the registration status . . . from eligible to ineligible."

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[6] Petitioners claim that the "board of election commissioners" does not have a statutory definition because that term is only in the caption, not the text, of Wis. Stat. § 7.20. (Pet. 29.) However, that misses the point. The language of Wis. Stat. § 7.20 illustrates that the "board of election commissioners" is a *local* entity, separate and distinct from the *state* entity that is "the commission" under Wis. Stat. § 5.025. That is a "technical or special definitional meaning." *Kalal*, 271 Wis. 2d 633, ¶ 45.

Wis. Stat. § 6.50(2).[7] Subsections (1) and (2) show that the Legislature knows how to give the Commission a directive related to changing an elector's registration status: it uses the statutory term, "the commission." Wisconsin Stat. § 6.50(3) contains no such directive to "the commission," as it says nothing about "the commission."

Further demonstrating that "the commission" is not the same as the "board of election commissioners" are subsections (2g) and (7) of Wis. Stat. § 6.50. There, the Legislature uses the terms "the commission," "municipal clerk," and "board of election commissioners" *in the same sentence*. *See* Wis. Stat. § 6.50(2g), (7) ("When an elector's registration is changed from eligible to ineligible status, the commission, municipal clerk, or board of election commissioners shall make an entry on the registration list, giving the date of and reason for the change."). The simultaneous use of these three different terms in the same subsection of Wis. Stat. § 6.50 again demonstrates that they are three different bodies.[8]

To conclude that the Wisconsin Elections Commission (i.e., "the commission") has any duty, much less an unequivocal one, under Wis. Stat. § 6.50(3) means one must ignore the plain text of the statute entirely. Of course, that is not an option.

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[7] Importantly, subsection (3) has no relation to the four-year maintenance process set forth in subsections (1) and (2) of Wis. Stat. § 6.50.

[8] Other election statutes in chapter 6 make it clear that the Commission is not a "board of election commissioners." Wisconsin Stat. §§ 6.275 and 6.56(3) describe communications *between* the "board of election commissioners" and "the commission."

Petitioners ignore this. Rather than apply that express language, they rely on the Commission's past conduct and different statutes and duties, like the duty to maintain the registration list pursuant to Wis. Stat. § 5.05(15). None of these assertions change the mandate in Wis. Stat. § 6.50(3).

First, the Commission's past conduct is irrelevant to whether Wis. Stat. § 6.50(3) requires it to act now. Conduct does not amend or augment statutory authority.[9] It remains the case that the statute applies only to municipal clerks and boards of elections commissioners, which are empowered to make changes to the registration list when the statute is satisfied.

Second, Petitioners cite the Commission's duty to *maintain* the registration list under Wis. Stat. § 5.05(15). But the duty to *maintain* the master list does not dictate when, and by whom, particular *changes* must be made to voters' eligibility. In turn, Wis. Stat. § 5.05(15) comes nowhere close to supporting a clear, unequivocal duty that might support mandamus under Wis. Stat. § 6.50(3)'s mechanism.

Wisconsin Stat. § 6.50 mandates "[r]evisions" to the registration list, when certain circumstances are present. Some of the subsections in section 6.50 require the Commission to make those revisions—for example, subsections (1) and (2)'s four-year maintenance process requires revision in conjunction with that four-year audit process. And, as discussed above, other provisions provide authority to other local government entities—for example,

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[9] In one instance in the past using ERIC Movers data, the Commission decided to give the electors 30 days in which to respond to keep their registration active. (App. 169, 212–13.) That decision was not challenged in court.

subsection (3) directs a municipality to make revisions when the municipality determines there is "reliable information" about a voter's permanent move out of a municipality.

In contrast, Wis. Stat. § 5.05(15) simply recognizes that "the commission is responsible for the design and maintenance of the official registration list." Wis. Stat. § 5.05(15). That does not *mandate* that the Commission make *a change to* an individual voter's registration status. The discretion afforded to the Commission to "maintain" the list cannot support mandamus and does nothing to change the coverage of the subsections in Wis. Stat. § 6.50.

B. Correctly applying Wis. Stat. § 6.50(3) removes the other serious statutory and practical problems with the circuit court's order.

The foregoing explains relatively simple errors in the circuit court's use of Wis. Stat. § 6.50(3) when it failed to truly apply its "reliable information" standard and ignored its express coverage. Those basic errors, in turn, create other serious problems that are completely unnecessary.[10]

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[10] This is not intended to be a comprehensive list, but rather is intended to highlight notable issues. There also would be other legal issues to grapple with. For example, Petitioners claim that the writ requires deactivation within 30 days of the date of the mailing of the October 2019 notice. However, the 30-day requirement in Wis. Stat. § 6.50(3) applies to the time an elector has to continue registration; it is not a deadline imposed upon the deactivation of registration. Also, pursuant to Wis. Stat. § 5.06(8) and (9), a complainant who is aggrieved by a Commission decision may seek judicial review under Wis. Stat. § 227.57. This is the exclusive method of review of a Commission decision. Petitioners expressly disavow this cause of action (Pet. 37 n.7), despite claiming standing based on the Commission's

1. The circuit court writ conflicts with the October 2019 mailing.

In October 2019, the Commission sent a letter to electors flagged as ERIC Movers. (App. 217 (Wolfe Aff. ¶ 30).) The letter did not indicate that the recipients' registration would be deactivated as a result of a non-response to the letter. To the contrary, it told recipients that simply voting in the next election would maintain their status. (App. 217–18 (Wolfe Aff. ¶¶ 30–31).) That made sense because, as discussed above, Wis. Stat. § 6.50(3)'s standard and its coverage does not apply to the Commission or this kind of mass deactivation attempt, so the Commission properly did not provide a deactivation notice. However, the circuit court's decision here has retroactively given that October 2019 letter the status of a deactivation notice *even though* that mailing, as a matter of fact, informed its recipients of no such thing.

The circuit court took no account of that mismatch, which remains to this day. If Wis. Stat. § 6.50(3) and its "reliable information" standard could actually be applied here, this deactivation notice issue would need to be

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decision denying their administrative complaint (Pet. 36). Because this exclusive cause of action was not followed here, the circuit court lacked competency to hear the merits of Petitioners' challenge to it, let alone issue a writ. *Kuechmann v. Sch. Dist. of LaCrosse*, 170 Wis. 2d 218, 223–24, 487 N.W.2d 639 (Ct. App. 1992). Petitioners also have no clear legal right to compliance by the Commission under Wis. Stat. § 6.50(3) by way of their taxpayer standing theory because it is incorrect. Petitioners' novel argument that any agency staff time devoted to a supposed improper activity equates to an "illegal expenditure of [public funds]" supporting standing is without legal authority. (Pet. 41.)

addressed. Indeed, that prospect is not hypothetical. Currently pending is a federal lawsuit alleging that this mismatch violates federal due process principles. *See League of Women Voters of Wisconsin v. Knudson*, No. 19-cv-01029-jdp (W.D. Wis.). This constitutional question could be avoided by the simple application of statutory construction by the court of appeals. And this Court can avoid those constitutional issues altogether by simply denying the petition to bypass.

2. The circuit court writ is overbroad in additional ways.

There also is a significant scope problem: the order seemingly applies overbroadly to intra-municipality movers (about 88,000) who are not even eligible for registration deactivation under Wis. Stat. § 6.50(3). The statute does not require or permit deactivation of all electors' registrations. Deactivation is only permitted and required when the municipal clerk or board of election commissioners receives reliable information that an elector has permanently moved outside of *the municipality*. On the other hand, when reliable information shows a permanent move *within* the municipality, the elector's registration is merely changed, not deactivated. The writ ignores this important distinction and requires deactivation in both circumstances.

Now seemingly aware of that problem, Petitioners' issue statement to this Court is narrower than what they asked for in the circuit court. They now apparently seek removal of only those who may have moved to a different municipality. (*See* Pet. 1.) This error in the scope of the circuit court's ruling also would need to be addressed—but it would disappear if the threshold error applying the subsection to the Commission were corrected.

* * * *

The circuit court writ is problematic but is easily correctable. It creates a host of intractable legal and practical problems that go away if the statute is simply applied as written and if mandamus' requirements are given effect: it only applies to unequivocal statutory duties, free of judgment and discretion, which are wholly absent here.

Petitioners' premise that they (as opposed to the affected voters) are in urgent need of action does not hold up to scrutiny. It requires ignoring the statute's "reliable information" standard, its scope, and its target. It also requires the counterfactual assumption that the 2019 ERIC Movers data is completely accurate. That is not so.

What is needed here is basic error correction to reverse a decision that risks removing properly registered voters, doing so based on an unworkable reading of the statute's coverage and legal standard, and carrying this out in a way that does not correspond to how voters were told the data was being used in October 2019.

The decision on review is unjustified under any standard, much less under mandamus. These errors can and should be addressed by the court of appeals.

CONCLUSION

This Court should deny the petition for bypass

Dated this 3rd day of January, 2020.

Respectfully submitted,

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