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,

v.

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

Defendants-Appellants.

DEFENDANTS-APPELLANTS' EMERGENCY MOTION TO REVERSE THE COURT OF APPEALS' DECISION TO HOLD THE STAY MOTION IN ABEYANCE, OR FOR THIS COURT TO ISSUE A STAY OF THE WRIT OF MANDAMUS ENTERED BY THE CIRCUIT COURT FOR OZAUKEE COUNTY DECEMBER 17, 2019

INTRODUCTION

The Wisconsin Elections Commission (the "Commission") moves this Court to either (1) reverse the court of appeals' decision to hold the pending expedited stay motion in abeyance, with directions to decide it by January 10, 2020; or (2) for this Court to enter a stay of the writ of mandamus, entered December 17, 2019, by the Ozaukee County Circuit Court. The writ directs the Commission "to comply with the provisions of § 6.50(3) and deactivate the registrations" of over 200,000 voters who did not apply for continuation of their registration within 30 days of an October 2019 Commission mailing. That mailing said nothing about deactivation, but rather told voters they could simply vote in the next election to confirm their registration status.

The circuit court's order conflicts with the plain text of the statute in multiple ways, as summarized below and in more detail in the Commission's response to the pending bypass petition. Based on that misapplication, thousands of Wisconsin voters now face the imminent risk of being improperly removed from the voter rolls. Indeed, the Commission is currently subject to a contempt motion in the circuit court to be heard on Monday, January 13, 2020, for allegedly failing to comply with the writ. Although the contempt motion should be denied, the appellate courts should act prior to that hearing to avoid confusion and ensure orderly appellate review can take place.

The writ directs changes to election procedures *in the midst of* the election process. For example, the absentee-stage of the special Seventh Congressional District election to be held on February 18 already is underway—the absentee ballots have been mailed out and voting is currently happening. There is no precedent or procedure in the Wisconsin statutes for retroactively withdrawing completed ballots based on subsequent deactivation from the voter rolls.

That and the subsequent Spring elections are upon us as a practical matter. The writ creates a significant risk of voter confusion and interference with the Commission's and clerks' election administration duties, which are already under way. Perhaps most importantly, if deactivation occurs now, it would be all but inevitable that the pending Spring elections—on February 18 and April 7 and, perhaps, May 12—would take place before the appellate courts could issue a final merits decision correcting the erroneous ruling and deactivations. An immediate stay is necessary to prevent these irreparable harms.

The Commission moved for a stay from the circuit court, which orally denied the motion. The Commission then immediately moved for an expedited stay from the court of appeals on December 17, 2019. On January 7, that court issued an order holding the motion in abeyance pending action by this Court. The Commission now seeks emergency action from this Court. Indeed, Plaintiffs have themselves recognized that a decision by the appellate courts should issue before next steps occur: "in the near future, either the Wisconsin Supreme Court or the Wisconsin Court of Appeals (depending on whether the Supreme Court grants the petition for bypass) will decide whether WEC is entitled to a stay of the Circuit Court's order pending appeal." *League of Women Voters v. Knudson*, No. 19-CV-1029 (W.D. Wis.), at Dkt. 25:9.

The Commission respectfully requests that the Court act as soon as possible on this motion and either reverse and direct the court of appeals to immediately decide the pending stay motion by Friday, January 10, or grant that motion

directly no later than Friday, January 10, given the pending contempt hearing on Monday, January 13.[1]

BACKGROUND

Plaintiffs Timothy Zignego, David Opitz, and Frederick Luehrs, III, are Wisconsin taxpayers and registered voters. (App. 104 (Compl. ¶¶ 5–7).)[2] 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).)

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[1] This Court does not need to wait for a response to this motion before ruling because Plaintiffs already have been heard on the subject. The stay issue has been briefed in the court of appeals, and this Court may refer to Plaintiffs' arguments there. In addition, this Court has before it the arguments in the bypass briefing. However, in the event this Court does wish to entertain further briefing on a stay, it should at least order temporary relief until that occurs.

[2] Citations in this motion are to Plaintiffs' appendix submitted to this Court with their petition to bypass.

To date, the Commission has received two ERIC Movers reports: one in 2017 and another in 2019. Based on its experience with the 2017 Movers report, 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. 212–17 (Wolfe Aff. ¶¶ 16–27), 226–27, 263–64, 274–75, 281.) Hasty 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).)

Given these problems, 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 mailing, 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).)

Plaintiffs filed suit against the Commission and five of its six commissioners in their official capacities. They 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. 103–18 (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 the 30-day notice provision of Wis. Stat. § 6.50(3). (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 courts may grant a stay. (App. 297–98 (Tr. 78:23–79:19).) The court then issued and entered a written writ of mandamus on December 17, 2019. It directed the Commission to comply with the provisions of section 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. 300–01 (Final Order).)

The Commission immediately filed a notice of appeal and a motion for an expedited stay. (App. 304–06 (Notice of Appeal), 307–22 (Motion for Stay).) Plaintiffs then filed a petition to bypass the court of appeals, and the Commission filed a response. That petition is pending. Late on January 7, 2020, the court of appeals issued an order holding the

Commission's stay motion in abeyance pending action by this Court.

In the meantime, Plaintiffs have returned to the circuit court and on January 2, 2020, filed a motion for contempt and remedial sanctions against the Commission for allegedly failing to comply with the writ. A contempt hearing is scheduled for January 13, 2020, at 11:00 a.m.

STAY STANDARD AND STANDARD OF REVIEW

This Court may stay a circuit court's judgment pending appeal, under Wis. Stat. § 808.07(2) and § (Rule) 809.12, where a movant has made a showing of (1) more than the mere "possibility" of success on the merits; (2) unless a stay is granted, the moving party will suffer irreparable injury; (3) no substantial harm will come to other interested parties; and (4) the stay will do no harm to the public interest. *State v. Gudenschwager*, 191 Wis. 2d 431, 440–41, 529 N.W.2d 225 (1995). The "probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury the [movant] will suffer absent the stay. In other words, more of one factor excuses less of the other." *Id.* at 441.

This Court reviews a decision on a stay for "an erroneous exercise of discretion." *Id.* at 439. An appellate court will sustain a discretionary act if it concludes the trial court (1) examined the relevant facts; (2) applied a proper standard of law; and (3) using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. *Id.* at 440.[3]

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[3] The circuit court provided little explanation of its reasoning and, instead, essentially deferred to the appellate courts. To the extent it provided reasoning, the court appeared to believe that its ruling on the merits justified denying the stay. (App. 297–

ARGUMENT

The Court should either reverse the court of appeals' decision to hold the expedited stay motion in abeyance, with directions to decide it immediately, or should act directly to grant a stay of the writ of mandamus.

The Court should take action immediately because of the statewide effect of the writ *in the midst of an election* and should do so before the Commission is forced to appear at an imminent contempt hearing. Although there is no proper basis to find it in contempt, it remains the case that a contempt motion is pending and will be heard on January 13, 2020. Thus, immediate action to preserve the status quo is appropriate.

Further, not only is a stay justified to preserve the status quo, but also there are compelling legal reasons why the Commission is likely to prevail in this appeal. The circuit court has issued a writ directing the Commission to deactivate thousands of electors based solely on data that does not always reliably indicate an individual has changed her voting residence. Not only that, but the statute, on its face, does not even apply to the Commission, and Plaintiffs have failed to show they have any right under Wis. Stat. § 6.50(3) to seek the kind of mass deactivation ordered here.

The circuit court fundamentally misapplied Wis. Stat. § 6.50(3) and mandamus principles in the midst of election

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98 (Tr. 78:23–79:19).) That reasoning was flawed and, in any event, that is an insufficient reason to deny a stay: "[I]t is not to be expected that a circuit court will often conclude there is a high probability that it has just erred." *Scullion v. Wis. Power & Light Co.*, 2000 WI App 120, ¶ 18, 237 Wis. 2d 498, 614 N.W.2d 565. In turn, the court of appeals effectively denied the expediated stay by erroneously holding it in abeyance.

preparations and absentee voting. It thus is especially important that the status quo be preserved.

I. This Court should reverse the court of appeals' decision to hold the expedited stay motion in abeyance and remand with directions to decide the motion by January 10.

On December 17, 2019, the Commission immediately appealed and moved for an expedited stay from the circuit court's mandamus order, including on an ex parte basis, if necessary. However, instead of deciding that stay motion, the court of appeals—nearly three weeks later, on January 7, 2020—ordered that the motion be held in abeyance pending a decision on the bypass before this Court.

That was done in error, and this Court should reverse and direct the court of appeals to decide the stay no later than Friday, January 10.[4]

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[4] The Court may do so by exercising its ordinary powers of review of the court of appeals' abeyance order, which is effectively a denial of the emergency stay. In the alternative, the Court may construe this motion as a petition for a supervisory writ under Wis. Stat § (Rule) 809.71 against the court of appeals, District IV. Courts, especially this Court, have discretion to construe filings as appropriate, regardless of their label: "[W]e look to the facts pleaded, not to the label given the papers filed, to determine whether the party should be granted relief." *E.g.*, *Amek bin-Rilla v. Israel*, 113 Wis. 2d 514, 521–22, 335 N.W.2d 384 (1983) (construing motion as a petition for a writ); *In re John Doe Proceeding*, 2003 WI 30, ¶ 7 n.2, 260 Wis. 2d 653, 660 N.W.2d 260 (explaining that the court of appeals construed a motion for leave to appeal a non-final order as a petition for supervisory writ). This Court's constitutional superintending authority "is as broad and as flexible as necessary to insure the due administration of justice in the courts of this state." *In re Kading*, 70 Wis. 2d 508, 520,

In ordering that the expediated stay be held in abeyance, the court of appeals has effectively denied it, as the stay sought immediate relief. In doing so, the court simply stated, "we now inform the parties that we do not anticipate ruling on the motion to stay . . . pending action by the supreme court." The court of appeals identified no legal authority for declining to decide the expedited stay motion while the petition for bypass is pending, and the Commission is aware of none.

Plaintiffs had argued that Wis. Stat. § (Rule) 809.60(3) prevented action on the stay motion, but that statute merely provides that "[t]he filing of the petition stays the court of appeals from taking under submission the appeal or other proceeding." Barring the court of appeals from "taking under submission the appeal" simply means that it may not issue a decision on the merits of an appeal, once a bypass petition is filed.[5]

That does not override the court of appeals' broad authority under Wis. Stat. § 808.07(2)(a)1. to "[s]tay execution or enforcement of a judgment or order" "[d]uring the pendency of an appeal." Indeed, Wis. Stat. § 808.05(1) confirms that the court of appeals retains jurisdiction over a pending appeal until this Court grants a bypass petition: "The supreme court

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235 N.W.2d 409 (1975); *see also Arneson v. Jezwinski*, 206 Wis. 2d 217, 225, 556 N.W.2d 721 (1996).

[5] Indeed, the court of appeals' own operating procedures reflect that distinction. Its Internal Operating Procedure ("IOP") No. VI(4) recognizes that "taking under submission," the only thing Wis. Stat. § (Rule) 809.60(3) prevents, means the process of receiving and reviewing the merits briefs in anticipation of issuing a final decision on the appeal. Those same procedures distinguish the "submission" process from resolving "motions for relief pending appeal" like the stay motion at issue here. *Compare* IOP VI(3)(f), *with* IOP VI(4).

may take jurisdiction of an appeal or any other proceeding pending in the court of appeals *if* . . . [i]t grants direct review upon a petition to bypass filed by a party." The court of appeals thus retains jurisdiction and must carry out its duties until that time.

The leading treatise on Wisconsin appellate procedure agrees. It explains that Wis. Stat. § (Rule) 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 and Procedure in Wisconsin*, § 24.3 (7th Ed. 2016).

It would make little sense if the court of appeals lacked power to act while a bypass petition is pending. It is inconsistent with the statutes and would undermine litigants' ability to obtain needed expedited relief under Wis. Stat. § 808.07(2) and § (Rule) 809.12 while this Court decides whether to exercise jurisdiction over the appeal. By simply filing a bypass petition, a litigant could force parties to make stay motions with this Court in the first instance, even though this Court has not yet decided whether to hear the case directly, likely leading to delays.

Time is often of the essence, as it is here, and the court of appeals must carry out its duties and make what everyone agrees is a necessary appellate decision on whether to stay the circuit court's writ. This Court should reverse the court of appeals' decision effectively denying the pending expediated stay and direct the court to decide the now three-week-old stay motion no later than Friday, January 10.

II. If this Court does not reverse the court of appeals and instruct it to immediately rule, then this Court should act directly to stay the writ pending appeal or, at a minimum, pending upcoming deadlines.

The Commission is currently facing contempt proceedings in the circuit court, meaning an immediate decision by the appellate courts on its pending stay motion is appropriate. If this Court does not direct the court of appeals to make that decision, this Court should issue the stay pending appeal itself. Or at a minimum, this Court should stay the circuit court's writ through the pending Spring election deadlines, as Wisconsin already is in the midst of those elections, including absentee voting and pre-election preparations. Further, the election dates themselves are imminent: there are elections on February 18, April 7, and May 12—which almost certainly will be impacted if no stay is issued during merits briefing. Alternatively, and at a very minimum, this Court should issue a temporary stay while it decides whether to grant bypass to allow either this Court or the court of appeals time to decide a more permanent stay, as allowed by statute. *See* Wis. Stat. § (Rule) 809.12.

Restated, in some manner, this Court should take immediate action to allow for proper appellate consideration of the legal issues. Action now is especially appropriate given the contempt hearing set for January 13 in Ozaukee County Circuit Court. While there is no proper basis to find the Commission in contempt, it remains the case that Plaintiffs have filed the motion and that the hearing is imminent. If the Commission is held in contempt, Plaintiffs have asked for a

fine of $2,000 per day per Defendant until they comply with the writ.[6]

If deactivation occurs now, appellate review would be undermined in terms of the ongoing and pending Spring elections. For example, there appears to be no realistic possibility that a final appellate merits decision would issue before the February 18 election and, likely, before the April 7 and perhaps May 12 elections, much less in time for the pre-election procedures and absentee voting, some of which already are underway. *See* Wis. Stat. § 5.05.

If the Commission is forced to immediately deactivate the registrations of voters, it will undermine appellate review of the wholly novel statutory interpretation applied by the circuit court, at least in terms of the Spring elections. It will result in voters who should not be deactivated being deactivated for the Spring elections because, as everyone agrees, the ERIC data relied upon by the circuit court is not always correct.

Significantly, while the Commission sent out letters to those electors who may have changed their residences (or may not have, as ERIC data is not always an accurate indicator of that), those letters did not notify the electors that their registrations would be deactivated or that they had a specific deadline to respond. (App. 217–18 (Wolfe Aff. ¶¶ 29–31).) Thus, the electors whose registrations would be deactivated by the circuit court order were not provided with warning of deactivation, much less of deactivation within 30 days of the mailing. And election day registration would not necessarily remedy this harm. Electors removed from the poll list by the court order may not know that they are removed, meaning

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[6] The Commission notes, however, that the circuit court's writ applies on its face only to the Commission (i.e., one defendant), and not the individual commissioners.

they may not bring to the polls the proof of residence needed to reregister. Even if they have a valid photo identification for purposes of voting, that identification would not necessarily provide proof of residence for registration purposes. *See* Wis. Stat. §§ 5.02(6m) (definition of "identification"), 6.79(2) (voting procedure), 6.34(3) (documents used to establish proof of residence).[7]

Everyone agrees that appellate review is appropriate here: the circuit court explicitly contemplated appellate review, and the parties agree that appellate review is warranted; they simply disagree on which appellate court should review the case in the first instance. (App. 295, 297–98 (Tr. 76:21–24, 78:23–79:19).) Given this agreement and the looming contempt hearing, this Court should take immediate action so that the appellate courts have an opportunity to review the circuit court's decision before further steps occur.

In addition, without a stay, there is a significant risk of voter confusion and interference with the Commission's election administration duties, including an ongoing election. The United States Supreme Court has warned that courts should be very reluctant to issue orders that change the rules just before an election because of the risk of voter confusion and chaos for election officials. *Purcell v. Gonzalez*, 549 U.S. 1, 5–6 (2006) (per curiam). That is just what the circuit court's order did here. In fact, it now is even worse: the absentee stage of the special Seventh Congressional District election to be held on February 18 is underway, with voting currently occurring on absentee ballots. As required by law, municipal

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[7] While it is possible to *re*activate voters at a later time, that will not prevent the immediate harm related to the processes already underway and the pending Spring elections.

clerks have delivered absentee ballots 47 days before the primary. *See* Wis. Stat. § 7.15(1)(cm).

It is therefore incumbent upon this Court to stay the writ to maintain the status quo this close to (and in the midst of) elections.

In addition to the ongoing absentee voting, the most immediate impact is on three upcoming elections: the Spring Primary and Special Primary for Congressional District 7 on February 18; the Spring Election and Presidential Primary on April 7; and the Special Election for Congressional District 7 on May 12. *See 2020 Wisconsin Elections Dates,* Wis. Elections Commission, https://elections.wi.gov/index.php/ (last visited Jan. 8, 2020). As required by statute, preparations for these elections are well underway, and many of these preparations require a final elector registration list.

And more acts are imminent: clerks are required to deliver absentee ballots for the Spring Primary by January 28 (21 days before the primary). Wis. Stat. § 7.15(1)(cm). Also in late January, registration for the February 18 primary closes, and municipal clerks can begin printing and distributing poll lists to the various polling locations. *See* Wis. Stat. §§ 6.28(1) (registration closes on 3rd Wednesday preceding election), 6.29(1) (with limited exceptions, no names added to registration list after close of registration). Populous cities, like Milwaukee, must begin this process as early as possible given the city's numerous polling places. And challenges to elector registrations in Milwaukee are heard before the municipal board of election commissioners on the last Wednesday before the election, which for the February 18 primary is February 12. *See* Wis. Stat. § 6.48(2). These pre-election tasks all require a registration list that is not in flux.

It would be chaotic to force compliance with the writ without taking account of these many deadlines, past and

future, that may be affected by deactivation. Municipal clerks are responsible for verifying elector registrations for these absentee voters, and they rely on the registration list to perform this duty. *See* Wis. Stat. §§ 6.20, 7.15(1).

And, notably, the activation and deactivation of over 200,000 voter registrations is not a simple flip of a switch. Further aggravating the problem, Plaintiffs now appear to seek removal of only those who may have moved to a different municipality, which does not match the relief they sought in the circuit court. (Pet. 1.) Disaggregating those electors who moved within a municipality from those who moved to a different municipality is no simple task, if it can be done with complete accuracy, at all.

Finally, Plaintiffs will not be harmed by a stay. In the circuit court, they claimed they would suffer harm without an injunction because their votes would be diluted by other electors who voted when they were not eligible to vote. This theory is without support. It assumes that the ERIC data is always accurate (which it is not) and that the improperly registered electors will commit voter fraud by voting at their former residence's polling place. Plaintiffs provided no evidence of this type of voter fraud, which is addressed by other laws that are designed to prevent it. Their alleged harm is entirely speculative and is far outweighed by the actual harm to the orderly administration of elections and to electors who are immediately removed from the poll list, rendering them ineligible to vote.

III. The Commission is likely to succeed on the merits of this appeal.

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). "[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. v. Vill. Of Lyndon Station,* 101 Wis. 2d 472, 493–94, 305 N.W.2d 89 (1981).

Wisconsin Stat. § 6.50(3) simply does not impose the required unequivocal and non-discretionary duties on the Commission. The statute's "reliable information" standard requires a judgment-based inquiry that is inappropriate for mandamus relief, and the Commission has no positive and plain duty to act under the statute because the statute does not, on its face, even apply to it.

A. Mandamus was improper based on Wis. Stat. § 6.50(3)'s "reliable information" standard.

A writ of mandamus cannot compel the performance of an act that requires the exercise of judgment and discretion. *Beres,* 34 Wis. 2d at 231–32. Deactivation of an elector's registration pursuant to Wis. Stat. § 6.50(3) is triggered *only* when there is "reliable information" that a particular voter has permanently changed residences to one outside the municipality currently registered. This standard necessarily requires a judgment-based inquiry about "reliability," thereby precluding mandamus relief. Worse, here, there was no inquiry into reliability by the circuit court, *at all*, or any effort to distinguish between those who moved *within* a municipality.

ERIC Movers data is not per se "reliable information" that an elector has permanently changed his or her voting residence. 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 that a move was intended to establish a new, permanent voting residence.[8] (App. 225–26 (Tr. 6:24–7:4, 12–15), 262 (Tr. 43:4–6), 211–12 (Wolfe Aff. ¶¶ 12–13).)

At a minimum, the standard in Wis. Stat. § 6.50(3) requires an actual legal and factual analysis of whether there is "reliable information" as to particular voters, which would necessarily need to consider other information to meaningfully assess "reliability." 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.

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[8] "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).

And, even on that local basis, those decisions would not be subject to the kind of mass-deactivation mandamus relief issued here. Second-guessing judgment calls is not what mandamus is for, much less on a mass scale. As discussed in the Commission's bypass response, Plaintiffs have identified no basis in the statute or in standing principles that would allow them to even seek the kind of mass deactivation here, much less based on a theory that effectively ignores the statutory "reliability" standard.

B. The Commission has no positive and plain duty under Wis. Stat. § 6.50(3) because the statute does not, on its face, 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 local 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.

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.

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 "the 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." Wis. Stat.

§ 6.50(2).[9] 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.[10]

To conclude that 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. This is what the circuit court did and, therefore, its decision is likely to be overturned on appeal. This strongly supports a stay.

* * * *

This is the quintessential case for a stay pending appeal. It presents an issue of novel statutory interpretation

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

[10] 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."

affecting thousands of voters throughout the State, and it almost certainly will evade meaningful appellate review for the upcoming Spring elections if deactivation proceeds now. Not only is there that exigency but also the novel statutory interpretation on review is seriously flawed in multiple ways. These important questions of election law need to be addressed carefully and based on the fundamental principles of statutory interpretation, which has not yet occurred. There should be no serious question that a stay is appropriate.

CONCLUSION

This Court should either reverse the court of appeals' decision to hold the stay motion in abeyance, or grant that stay motion itself. In either instance, the Commission respectfully requests that the stay be decided by January 10, 2020, at least on a temporary basis.

Dated this 8th day of January, 2020.

Respectfully submitted,

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