STATE OF WISCONSIN
SUPREME COURT
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.

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

Honorable Paul V. Malloy Presiding

Circuit Court Case No. 19-CV-449

RESPONSE TO DEFENDANTS-APPELLANTS' EMERGENCY MOTION

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INTRODUCTION

This is an action against the Wisconsin Elections Commission ("WEC") and five of the Commissioners of the Wisconsin Elections Commission (the "WEC Commissioners") (collectively "the Defendants") based upon the Defendants' failure and refusal to comply with what the Circuit Court concluded was clear state law. The Defendants' emergency motion (to which this filing responds) is the latest in a number of attempts by the Defendants to do everything in their power to avoid complying with clear election law until the upcoming elections have passed.

The Defendants' gambit this time around is to frighten this Court with a parade of horribles into temporarily exempting the Defendants from their statutory obligations until it is too late for Plaintiffs-Respondents Timothy Zignego, Frederick G. Luehrs, III, and David W. Opitz (collectively "the Plaintiffs") to obtain the relief they have been seeking since October, 2019: clean voter rolls in advance of the upcoming elections.

On December 13, 2019, the Circuit Court ordered the Defendants to comply with the law and, in light of the imminent

elections, denied the Defendants' motion for a stay. They immediately requested a stay and the Circuit Court denied that request, citing the importance of complying with the law in advance of upcoming elections. Pet. to Bypass App. ("App.") 297-98.[1] They have requested a stay from the Court of Appeals. It has not been granted.

Yet to date—**almost a full four weeks later**—the Defendants *still* have not complied with the Circuit Court's Writ of Mandamus. Apparently they have even sent out absentee ballots for the special Seventh Congressional District election on February 18 *without* deactivating the flagged Movers at issue in this case despite being under compulsion of a writ of mandamus to act otherwise. It is doubtful a private citizen subject to such a Court Order would enjoy the same luxury to ignore a court order. Few would have the temerity to even try.

Having spent the last three months resisting every request

[1] Because the Defendants have left the Plaintiffs with precious little time to prepare this response, the Plaintiffs will cite to the Appendix provided to this Court in relation to its Petition to Bypass, as the Defendants have done.

by the Plaintiffs for the Defendants to follow the law and having spent the last three weeks unsuccessfully attempting to convince the Court of Appeals to stay the case, and facing contempt proceedings in Circuit Court based on their defiance of the Circuit Court's Order, the Defendants now ask this Court for last minute, extraordinary relief and, as they did before the Court of Appeals, seek that relief before the Plaintiffs even have a chance to respond in defense of the valid judgment they obtained below. *See* Defs.' Emerg. Mot. 3 n.1 (arguing that "[t]his Court does not need to wait for a response to this motion" and citing the Plaintiffs' briefing on the stay issue in the Court of Appeals, while declining to rest on their *own* stay briefing below).

Although the merits of the motion for a stay are discussed in detail below, it must be noted at the outset of this response that, despite asking for extraordinary relief, the Defendants come to this Court with unclean hands. Each and every one of the problems the Defendants cite as justifying emergency relief is of the Defendants' own creation:

First, the Defendants argue that "[t]he writ directs changes to election procedures *in the midst of* the election process." Defs' Emerg. Mot. 1. Conspicuously absent is any mention of the fact that the Plaintiffs filed an internal complaint with WEC alerting the Defendants of their clear obligations under state law as far back as *October 16, 2019*. *See* App. 119. The Defendants declined to take this complaint seriously, dismissing it without even discussing the merits.

WEC said that it was "untimely" even though it was filed less than a week after the Defendants sent out the notices that are the subject matter of this case. App. 120, 197. And the Defendants have continued to delay from October 2019 to the present day. In fact, because they have declined to comply with the Circuit Court's Writ of Mandamus for several weeks now, the Defendants face contempt proceedings below. The Defendants file this emergency motion just days before the contempt hearing in the hope that this Court will rescue them from a finding of contempt.

Second, despite the utter unambiguousness of state law, the Defendants decided not to inform potential Movers on the notices they sent out that deactivation was a possibility. In other words, they not only ignored what the Circuit Court found to be a plain legal duty. They told recipients of the notice that they would not follow the law. The Defendants now argue that **their own conduct** in this regard is some type of "poison pill" that exempts them from having to comply with the law. It does not, for two reasons: (1) no provision of state law requires such language in the notice that was sent, and (2) if the Defendants actually believed that this was a problem they could have fixed it at any time since October 16, 2019, when the Plaintiffs first complained to WEC about the failure to follow the law.[2]

Here is the unvarnished truth. The Defendants have had almost a month to rectify any confusion caused by their own

[2] In fact, the Defendants could still easily fix any such problem, by deactivating the voters at issue in this case as required by law and then simply notifying them by mail that they have been deactivated and how to reregister if necessary.

conduct. They could have sent a follow-up notice informing recipients of the notice of the Circuit Court order and informing them of the steps that they should take to continue their registration (*i.e.*, re-registering on-line or by mail or at the polls.) We indicated at the December 13 hearing that we would not oppose such a notice. They could have done so without conceding the correctness of the order below or compromising this appeal. Yet they now claim that their own unexplained failure to act is a basis for ignoring an extant court order and continuing to ignore their plain legal duty. The Defendants should not be allowed to evade their legal obligations by their own conduct allegedly making it more difficult for them to follow the law.

In fact, at a special meeting held by the Defendants on December 30, 2019, to determine how to respond to the Circuit Court's Order, the WEC staff laid out four options for the Defendants to consider with respect to compliance with the Circuit Court's Order including options that involved a new notice that would fix the problem discussed above, but the

Defendants approved none of the four options and instead chose a fifth option to take no action, *i.e.*, to not comply.

After that meeting, the Defendants posted the following statement in the "Latest News" section of the WEC website https://elections.wi.gov/ effective December 30, 2019:

> At a special meeting today, the Wisconsin Elections Commission did not pass any motion directing staff to take action on the movers mailing list.

Third, for reasons passing understanding (and completely unexplained by the Defendants in their brief), the Defendants have for over two weeks declined to file a motion for a stay before this Court and choose to do so only now in an attempt to avoid the upcoming hearing for contempt.

Fourth, the Defendants know full well that a stay by this Court of the Circuit Court judgment—even a temporary stay—would likely render impossible an award of the relief the Plaintiffs seek, namely clean voter rolls in advance of the upcoming elections.

Indeed, in a move that should shock the conscience not only of this Court but of the Circuit Court as well, the Defendants

apparently mailed out absentee ballots for the special Seventh Congressional District election on February 18 without deactivating the voter registrations at issue in this case despite being under compulsion by a valid Order of the Circuit Court to deactivate those registrations.

The Defendants ignored the Circuit Court Order even though: (1) the Plaintiffs have argued throughout this action (*i.e.*, for months) that the Defendants need to take action before the February 18 election; (2) the Circuit Court refused to issue a stay in light of the upcoming elections, including the February election; and (3) the Court of Appeals' refused to issue a stay. The Defendants now gallingly warn this Court as an additional reason for emergency relief that "[t]here is no precedent or procedure in the Wisconsin statutes for retroactively withdrawing completed ballots based on subsequent deactivation from the voter rolls." The Defendants obviously knew this fact before they mailed out the ballots.

There is a clear pattern to the Defendants actions: delay,

refuse to comply, and attempt to make it as difficult to extricate themselves from their illegal conduct as possible. Thus the only sources of the "confusion" cited by the Defendants in this matter are the actions of the Defendants themselves. This Court should decline to facilitate the Defendants' efforts.

Fortunately, this Court does not have to do so (especially not on two days' notice as requested by the Defendants). The Defendants have the opportunity to explain any problems that exist with compliance with the Circuit Court's Order to the Circuit Court on Monday, January, 13, when the Circuit Court considers the Plaintiffs' motion for contempt. The Circuit Court is well acquainted with the factual and legal background of this case and can deal with any of the problems asserted by the Defendants in their brief to this Court.[3]

As shown below, in addition to the reasons discussed above,

[3] The Defendants argue that the "Plaintiffs have themselves recognized that a decision by the appellate courts should issue before next steps occur." Emerg. Mot. 2. As the contempt proceedings below illustrate with clarity, that is false.

the Defendants' are not entitled to an emergency stay because they satisfy none of the factors justifying such extraordinary relief. The circuit and the court of appeals correctly declined to issue stays. The emergency motion should be denied and the Defendants should finally do their jobs as required by state law.

BACKGROUND

A. Factual Background

The material facts are not in dispute. Because the Defendants reiterated and elaborated upon their view of the facts previously set forth in their response to the Petition to Bypass in their brief in support of this emergency motion, we will restate our position as well for ease of reference. 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. (App. 168.)

As part of ERIC, Wisconsin receives reports regarding what are sometimes referred to as "Movers." (App. 169.) This refers to Wisconsin residents who have actually reported an address

different from their voter registration address *in an official government transaction*. (App. 169-70; 187 at 3-4.)

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

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. (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.

(App. 169.)

The process as described by WEC in the March 11 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 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." (App. 182.) Thus, WEC is enabling a voter who had 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. It is allowing an outdated registration to remain on the rolls contributing to inaccurate rolls that make administration of elections difficult and providing potential avenues for fraud.

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. (App. 186-196.)

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") (App. 197-205.)

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 did 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. (App. 182.)

B. Procedural Background

On October 16, 2019, the Plaintiffs filed a complaint with WEC asking WEC to revoke that decision and to instead follow state law. (App. 119.) The Plaintiffs 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." (App. 119-121.)

The Plaintiffs thereafter sued the Defendants in Ozaukee County Circuit Court, asking the Court for a preliminary injunction or, in the alternative, a writ of mandamus. (App. 101-161.) On December 13, 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. (App. 300-301.) The Court declined the Defendants'

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. (App. 298.) The Court also entertained, and denied, a motion to intervene in this lawsuit by the League of Women Voters of Wisconsin. (App. 302-03.)

The Court signed its order issuing a writ of mandamus on December 17, 2019. (App. 300-01.) The same day, the Defendants 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. 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. *See League of Women Voters v. Knudson*, No. 19-cv-1029 (W.D. Wis. 2019).

On December 18, the Court of Appeals ordered the Plaintiffs to file a response to the motion for a stay pending appeal.

On December 20, however, the Plaintiffs filed a petition for bypass with this Court. Under Wis. Stat. 809.60(3), the filing of that petition "stays the court of appeals from taking under submission the appeal or other proceeding," including the Defendants' (earlier) motion for a stay pending appeal.

Consequently, the appeal before the Court of Appeals, including the Defendants' (earlier) 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). In *Holmes*, after the Supreme Court granted the petition to bypass, it (and not the Court of Appeals) decided the petition for supervisory writ.

On January 7, 2019, the Court of Appeals ordered the motion to stay before it held in abeyance. The Defendants thereafter filed this motion.

ARGUMENT

The Defendants ask this Court to reverse the Court of Appeals' decision to hold the stay motion below in abeyance pending a decision by this Court on the Petition to Bypass, or, alternatively, for this Court itself to order the writ of mandamus stayed. These requests are addressed in reverse order below.[4]

"A stay pending appeal is appropriate where the moving party: (1) makes a strong showing that it is likely to succeed on the merits of the appeal; (2) shows that, unless a stay is granted, it will suffer irreparable injury; (3) shows that no substantial harm will come to other interested parties; and (4) shows that a stay will do no harm to the public interest." *State v. Gudenschwager*, 191 Wis.2d 431, 440, 529 N.W.2d 225, 229 (1995).

The Defendants have made no showing that they are likely to succeed. As discussed *infra*, their arguments all fail.

[4] As the Defendants note, a stay motion was briefed below and many of the relevant issues were discussed in the briefing on the Petition to Bypass. Again, for the convenience of the court, many of those discussions are repeated here and updated to respond to the Defendants new arguments.

The Defendants argue they will suffer harm if the stay is not granted, yet all of the harm here is created by their own wrong-doing. By law, WEC should have taken action the week of November 11, 2019 (30 days after the notices were sent during the week of October 7, 2019). They failed to do so, and now continue to delay, compounding the harm to the Plaintiffs.

"[T]he probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury the plaintiff will suffer absent the stay. In other words, more of one factor excuses less of the other." *Gudenschwager*, 191 Wis. 2d at 441. Here, WEC has shown no likelihood of success, *and* will suffer no harm.

Meanwhile, for the reasons herein, the Plaintiffs and the public interest will suffer grave harms if the stay is granted. WEC's motion for a stay should thus be denied. Further, the Circuit Court did not erroneously exercise its discretion in denying the motion for a stay, and the Court of Appeals properly

held the subsequent stay motion in abeyance pending a decision by this Court on the Petition to Bypass.

I. WEC has not shown they are likely to succeed on the merits of their appeal

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.*

"We review a decision regarding a petition for a writ of mandamus under the erroneous exercise of discretion standard." *Watton v. Hegerty*, 2008 WI 74 ¶ 6 (citing *State ex rel. Lewandowski v. Callaway*, 118 Wis. 2d 165, 171, 346 N.W.2d 457 (1984)).

The writ of mandamus here was appropriate. The Defendants makes two arguments to this Court regarding why they would be ultimately successful in claiming that the Circuit

Court erroneously exercised its discretion in granting the writ of mandamus: (1) they claim Wis. Stat. § 6.50(3) is not applicable to them; and (2) they argue the writ of mandamus was improper because the Defendants must make a determination that certain data is "reliable information." But the Defendants are wrong on both counts.

A. Wis. Stat. § 6.50(3) is clearly applicable here

In their motion to stay the Defendants argue that the duty to deactivate voter registrations under Wis. Stat. § 6.50(3) did not belong to WEC but instead was solely the duty of municipal clerks and municipal boards of election commissioners, but the Circuit Court easily rejected that argument. (App. 288-90.)

The Circuit Court noted that WEC has, in fact, undertaken this duty in the past and understood it to be their duty. (*Id.*) The relevant language of Wis. Stat. § 6.50(3), broken into two parts and with the references to the board of election commissioners 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.

WEC contends 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. WEC 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.

Further, WEC's own conduct establishes that WEC is wrong. Under Wis. Stat. § 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. (App. 169-70.)

2. WEC acknowledges that it did so under Wis. Stat. § 6.50(3)) (*Id.* at 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. (App. 217 at ¶ 30.)

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. (App. 151-59.)

Whatever WEC now argues, they believed in both 2017 and 2019 that they had the power under Wis. Stat. § 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 Wis. Stat. § 6.50(3).

Under Wis. Stat. § 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." (App. 127 (emphasis added).)

4. Thus, it is impossible to read Wis. Stat. § 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. (App. 213 at ¶ 18.)

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 (App. 216 at ¶ 24.)

That WEC has performed these duties is unsurprising. It is the entity charged with maintaining the registration list. 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").[5] Prior to Act 265, municipalities maintained their own voter registration lists. But all of that changed when Wisconsin went to a top-down

[5] *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).

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.

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 WEC's 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 Wis. Stat. § 6.50(3).

Act 265 authorized WEC to perform the obligations formerly placed on local officials by Wis. Stat. § 6.50(3). But it did not change the nature of those duties. WEC may exercise the powers set forth in Wis. Stat. § 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 Wis. Stat. § 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 WEC is now arguing, WEC exercised the power under Wis. Stat. § 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). WEC's argument that the statute does not apply to WEC flies in the face of the statutory duties imposed on WEC and is belied by its own behavior.

B. The ERIC information is "reliable"

If WEC receives "reliable" information that a voter has moved, it must take the steps required by Wis. Stat. § 6.50(3). The data in question here is objectively "reliable" data such that it triggers Wis. Stat. § 6.50(3). The Wisconsin legislature has chosen to belong to ERIC and has appropriated tax dollars to

receive and act upon the data that ERIC gathers. WEC, itself, has determined that the ERIC reports are sufficiently reliable to trigger the requirements of Wis. Stat. § 6.50(3). Based on ERIC data, WEC has decided to send notices to hundreds of thousands of voters and to adopt a procedure for removal of non-responding voters from the rolls.

But WEC does not want to actually follow the procedures set forth in Wis. Stat. § 6.50(3). It seeks to pick and choose and modify its statutory obligations. Whether this is rooted in disagreement with the law (a conviction that the agency "knows" better) or bureaucratic malaise (doing nothing is easier than doing something) is of no importance. Agencies do not get to change or "improve" the law. *Koschkee v. Taylor*, 2019 WI 76, ¶20, 387 Wis. 2d 552, 929 N.W.2d 600 (reaffirming that "an agency's 'powers, duties and scope of authority are fixed and circumscribed by the legislature'" (emphasis added) (quoting *Martinez v. Dep't of Indus., Labor & Human Relations*, 165 Wis. 2d 687, 698, 478 N.W.2d 582 (1992)). If WEC believes that

deactivating registrations after 30 days' notice is too harsh, then it can ask the legislature to adopt a more forgiving regime. Until then, it must exercise its responsibility to maintain the registration list and administer Chapter 6 as the legislature has mandated.

Notwithstanding the legislative command to join ERIC and pay for and use its reports and ignoring its own conduct, WEC now argues that the ERIC mover report is not "reliable." In doing so, it misconstrues the meaning of the term "reliable" in the context of § 6.50(3) and distorts the facts to suggest an "error" rate that is clearly wrong – preposterously so.

The meaning of the term "reliable" must be ascertained in light of the statute's structure. *See Kalal*, 271 Wis. 2d 633, ¶46 ("Context is important to meaning. So, too, is the structure of the statute in which the operative language appears. Therefore, statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes . . ."). It is

clear that the legislature, in choosing the term, did not mean that reliable information must be "perfect" or in no need of verification.

Wis. Stat. § 6.50(3) clearly contemplates that "reliable" information need not be 100% accurate. It requires that this "reliable" information be verified (by notice to the voters with an opportunity to respond) and sets forth the particular process by which it is to be verified and the conditions under which voter registrations may be deactivated. If "reliable" meant perfect or sufficiently accurate to be acted upon without additional verification, there would be no need for this verification process or for restrictions on the deactivation of registrations. "Reliable" in the context of the statute means sufficiently accurate to trigger the requirements of Wis. Stat. § 6.50(3).

WEC's own data shows the following. In 2017, it sent notices to 341,855 potential "movers." After two election cycles, including the record-breaking 2018 midterms, only 14,746 of these 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.[6]

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 "nonmovers" is likely to be no greater than 5-6%.

Given the structure of § 6.50(3), an accuracy rate of approximately 95% is, objectively, "reliable." If a screening test for cancer accurately identified persons suffering from the disease 90-95% of the time, it would clearly be sufficiently "reliable" to

[6] 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.

warrant further action. And it is sufficiently reliable to ask voters to affirm their registration.

WEC's problem is that it wishes the legislature would have required more elaborate or forgiving verification procedures than a notice that must be responded to within thirty days. Whatever the merits of that objection, it is not WEC's call to make. Wisconsin has a legitimate and compelling interest in maintaining its voter rolls and ensuring that only the votes of eligible voters are counted.

It is up to the legislature – not WEC – to determine what steps need be taken to verify that a voter who has a 95% probability of having moved has actually moved. Moreover, Wisconsin has same day registration. Thus, deactivation of registration does not result in disqualification or disenfranchisement of a single voter who is authorized to vote from their existing residential address. WEC may wish that the legislature imposed fewer requirements on voters and election

officials but balancing the need for accurate rolls and ballot integrity with the ease of voting is not its call.

C. WEC has a plain duty under the statute

As discussed *supra*, the ERIC movers data is objectively reliable and thus Wis. Stat. § 6.50(3) confers a plain duty upon WEC to act. Further, contrary to the Defendants' argument, "[d]eactivation of an elector's registration pursuant to Wis. Stat. § 6.50(3)" is *not* "triggered only when there is 'reliable information' that a particular voter has permanently changed residences to one outside the municipality currently registered." Defs. Emerg. Mot. 16. It is triggered by a voters' failure to respond to WEC's notice within 30 days of the date the notice is mailed. Wis. Stat. § 6.50(3). It is the *mailing* that is triggered by the "receipt of reliable information."

Having mailed those notices, WEC may not now decline to comply with the rest of Wis. Stat. § 6.50(3). Appropriately, then, the writ of mandamus ordered WEC "to comply with the provisions of § 6.50(3) and deactivate the registrations of those electors who have failed to apply for continuation of their

registration within 30 days of the date the notice was mailed under that provision." (App. 300-01.) This is a clear and unequivocal duty, and mandamus was wholly appropriate here.

II. The Defendants have not shown they will suffer irreparable harm without a stay

The Defendants do not identify any irreparable harm that would justify staying the Circuit Court's order.

To attempt to show harm, the Defendants rely primarily—almost exclusively—on the fact that there are elections coming up. But that is exactly why the Circuit Court granted the Plaintiffs' request for a writ of mandamus and denied WEC's request for a stay. (App. 297-98.)

As the Circuit Court held, and as demonstrated above, WEC has a clear legal duty to remove outdated registrations from the voter rolls when there is a reliable indication that a voter has moved. If this Court grants a stay, the voter rolls for the upcoming elections will contain stale registrations, in violation of state law. Thus, the upcoming elections cut *against* a stay, rather than for one.

Notably, the Defendants do not claim that they cannot comply with the Circuit Court's order (and state law) before the upcoming elections. They briefly *imply* that deactivating voter registrations would be difficult because it is "not a simple flip of a switch." Defs.' Emerg. Mot. 15. But they do not explain what it *would* take for WEC to comply with the Court's order, nor do they provide any evidence or affidavits to support the implication that deactivating the outdated registrations would be difficult, and, quite conspicuously, they do not affirmatively assert that WEC *cannot* remove the stale registrations before the upcoming elections. WEC already has a list of the registrations that need to be deactivated—after all, it sent out notices back in October. (App. 230.) And the voter registration list is undoubtedly stored in an electronic database, so it should not be *that* difficult to update the database, even if it is not just a "flip of a switch."[7]

[7] The Defendants briefly argue that the "Plaintiffs now appear to seek removal of only those who may have moved to a different municipality," as opposed to those who moved within a municipality, "which does not match the relief they sought in the circuit court." But this action has never concerned intra-municipality Movers, who are covered by a different part of §

Regardless, any difficulty WEC staff might have in timely complying with the Circuit Court's order is the Defendants' own doing, and therefore cannot be the basis for irreparable harm sufficient for a stay. The Circuit Court issued its decision on December 13, so the Defendants have already had weeks to comply with the Court's Order. If the Defendants have not begun to prepare, in the hopes of getting a stay, then that is on them. The Defendants have also been on notice that the Circuit Court might order them to follow state law since at least the middle of November, when the Plaintiffs filed this lawsuit with a request

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6.50(3). Under the statute, intra-municipality movers are *immediately* deactivated by WEC at their original address but then automatically reregistered at their new address. Consequently, none of those movers would have received one of the October notices that are the subject of this case. If they did that would have been a major mistake and a significant statutory violation by WEC.

Regardless, WEC has never produced any data in the lawsuit or otherwise that would support the idea that a portion of the voters who received October notices were intra-Municipality movers. And even if such data exists, the Defendants provide zero support for their allegation that "[d]isaggregating those electors who moved within a municipality from those who moved to a different municipality is no simple task." Defs. Emerg. Mot. 15. In any event, WEC is required by law to deactivate those voters and reregister them at their new address, and they need to do so.

for a preliminary injunction and/or writ of mandamus. And the only reason any of this is necessary at this late stage is because the Defendants chose to disregard the process set forth by the legislature.

The Defendants argue that following the statutory procedure and deactivating the stale registrations means that "thousands of Wisconsin voters now face the imminent risk of being improperly removed from the voter rolls." Defs.' Emerg. Mot. 1. This is not an irreparable harm, for multiple reasons. First, the data from WEC's 2017 experience show that only a small subset of the deactivations will be "in error"—the Circuit Court found that only between 4 and 5% of the electors identified on the ERIC list in 2017 ultimately indicated that they had not moved by either responding to the notice, or re-registering and voting at their old address. (App. 289; *see also* App. 262-63.) And this small set of voters has had the opportunity to respond to the notice by affirming their addresses by returning the postcard provided by WEC with the notice or doing so on-line.

In addition, for any remaining voters in that small set who, for whatever reason, chose not to respond, having their registrations deactivated will not cause any harm because Wisconsin has same-day registration. Any voter deactivated in error can simply reregister at the polls.

Furthermore, there is nothing preventing the Defendants from sending a new notice to every voter who will be deactivated that they have been deactivated and what they must do to reregister if they have not moved. The next election is not until February 18, so the Defendants have more than enough time to send this new notice, especially given that they already have the list prepared and have done one mass mailing to it already.

Importantly, this point refutes the Defendants' suggestion that the deactivations will harm voters removed in error because "they may not know that they [were] removed" and "may not bring to the polls the proof of residence needed to register." Defs.' Emerg. Mot. 12. The Defendants have more than enough time to notify everyone on the list before February 18 that they have

been deactivated. So if anyone is so affected it would be due to the Defendants' failure to notify them.

Finally, the Defendants argue that a stay is necessary to prevent the voter rolls from being "in flux" during an election cycle, Defs. Emerg. Mot. 14, but that fact cuts against issuing a stay. If this Court *grants* a stay, if might then affirm on the full merits, reinstating the order, and then the voter rolls would be "in flux" closer to the spring elections.

III. A stay will cause significant harm both to the Plaintiffs and to the public interest

Federal law requires states to "ensure that voter registration records in the State are accurate and are updated regularly." 52 U.S.C. § 21083(4). The Legislature delegated that duty to WEC, *see* Wis. Stat. §§ 5.05(15), 6.36, and has set forth various procedures WEC must follow to ensure that the voter registrations lists are properly maintained and updated. Wis. Stat. § 6.50 (including, but not limited to, the procedure at issue in this case under subsection (3)).

The United States Election Assistance Commission has explained that updating voter registration lists "is essential to protecting election integrity," *see Fact Sheet: Voter Registration List Maintenance*, Election Assistance Commission, https://www.eac.gov/assets/1/6/FACT_SHEET_-_Voter_Confidence_and_NVRA.pdf (last visited Dec. 18, 2019), and serves at least three important functions. First, proper maintenance "produces an accurate result based on each eligible voter casting a single ballot in their proper jurisdiction." Updating registration lists also "enfranchises voters because it lowers the likelihood of lines at the polls, reduces voter confusion and decreases the number of provisional ballots." And finally, keeping lists up-to-date "allows election administrators to plan, to better manage their budget and poll workers, and to improve voter experience."

Courts, too, have long recognized that "keeping accurate, and up-to-date voter registration lists is an important state interest." *Hoffman v. Maryland*, 928 F. 2d 646, 640 (4th Cir.

1991). And, especially relevant here, "[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 (3rd Cir. 1994)

The entire purpose of Wis. Stat. § 6.50(3) and statutes like it is to protect election integrity by ensuring that the Wisconsin voter rolls are up to date. If this Court were to grant a stay, allowing WEC to retain outdated registrations for the upcoming elections in violation of state law, it would significantly undermine all of the important interests just described. 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).

A stay here would effectively leave on the voter registration lists the names of hundreds of thousands of individuals who are not legally entitled to vote at the addresses where they are

registered, which in turn could dilute the votes of those who are entitled to vote in those districts. *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).

In *Ohio Republican Party v. Brunner*, for example, the court granted an injunction ordering state officials to comply with federal requirements to properly maintain registration lists because an outdated list "would demean the voting process and unlawfully dilute the votes of qualified voters." 582 F. Supp. 2d 957, 965 (S.D. Ohio 2008), *vacated on other grounds*, *Brunner v. Ohio Republican Party*, 555 U.S. 5 (2008). Conversely, in *Democratic Party of Virginia v. Virginia State Board of Elections*, 2013 WL 5741486, Civil Action No. 1:12-cv-1218 (E.D. Va. 2013),

the court *denied* plaintiff's request for an injunction that would have *prevented* the state from removing stale registrations from the voter rolls as required by state law because the state had a legitimate interest in having up-to-date registration lists and because voters could simply reregister if they were wrongfully removed.

The Plaintiffs timely sought a temporary injunction or a writ of mandamus to avoid the harms from outdated voter rolls at the next scheduled election. A stay here would cause all the harms that warranted a writ of mandamus, and there is no way to undo the harm once it occurs.

IV. The Circuit Court did not erroneously exercise its discretion in denying the motion for a stay pending appeal

A trial court's decision to grant or deny a stay pending appeal should be reviewed under an erroneous exercise of discretion standard. *Gudenschwager*, 191 Wis. 2d at 439. "An appellate court will sustain a discretionary act if it finds that 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, (citing *Loy v. Bunderson*, 107 Wis.2d 400, 414–15, 320 N.W.2d 175, 184 (1982).)

Here, the Circuit Court clearly examined the relevant facts, for the reasons explained *supra*, applied a proper standard of law, and used a demonstrated rational process. The Circuit Court's denial of WEC's motion for a stay pending appeal should stand, and this court should deny their appeal.[8]

V. The Court of Appeals did not err in holding the Defendants' stay motion in abeyance

On December 20, Plaintiffs-Respondents filed a petition for bypass with this Court. Under Wis. Stat. 809.60(3), the filing of that petition "stays the court of appeals from taking under submission the appeal or other proceeding," including the Defendants' (earlier) motion for a stay pending appeal.

[8] In ruling on the stay, the circuit court referred to "the reasons that I've talked about" and "everything I've done here [today]" as "contraindicat[ing]" a stay. App. 298. It also referenced the "very tight time frame." *Id.*

Consequently, the entire appeal before the Court of Appeals, including the Defendants' (earlier) 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). In *Holmes*, after this Court granted the petition to bypass, it (and not the Court of Appeals) decided the petition for supervisory writ.

The Defendants nevertheless argue that the Court of Appeals was wrong to hold the Defendants' motion for an expedited stay in abeyance pending action by this Court. But the Defendants' arguments in support of this view misapprehend applicable law.

First, the Defendants' position ignores the plain text of Wis. Stat. § 809.60. Sub. (3) prohibits this Court from "taking under submission the appeal or other proceeding" while the Petition to Bypass pends. That quoted phrase is obviously not a synonym for "issue a decision on the merits of an appeal," as the

Defendants' erroneously contend, because a case may be "tak[en] under submission" without being decided.

The more natural import of that provision is that the Court is not even to consider the appeal until the Supreme Court has disposed of the Petition to Bypass, which it may do either by granting the petition "upon such conditions as it considers appropriate," Wis. Stat. § 809.60(4) (such as granting a stay request), or by denying it. *See Benson v. City of Madison*, 2017 WI 65, ¶25, 376 Wis. 2d 35, 897 N.W.2d 16 ("Without some indication to the contrary, general words (like all words, general or not) are to be accorded their full and fair scope. They are not to be arbitrarily limited. This is the general-terms canon." (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 101 (2012)).

Sub. (5) of Wis. Stat. § 809.60 supports this reading; it provides that "[u]pon the denial of the petition by the supreme court the appeal or other proceeding in the court of appeals *continues as though the petition had never been filed*." (Emphasis

added.) The emphasized language would essentially be rendered meaningless surplusage if, as the Defendants argue, everything *except* a final decision is to proceed as normal in the Court of Appeals while the Supreme Court considers the Petition to Bypass.

Second, the Defendants' reading puts this Court in the untenable position of having to shoot at moving target—that is, to decide whether to take a case while important issues are still being litigated below. By their nature, petitions to bypass involve time-sensitive matters calling for quick and definitive resolutions. It would be bizarre if the drafters of Wis. Stat. § 809.60(3) sought, in such circumstances, to create a scenario whereby *two* courts were simultaneously adjudicating matters in the case. Indeed, the entire purpose of a petition to bypass is to bypass the court of appeals. That relief is impaired before the Supreme Court has a chance to grant or deny it if the court of appeals is able to exercise authority over a case while the request pends.

Third, the Defendants are simply wrong when they suggest that the Plaintiffs' position would bar litigants from obtaining timely relief. That relief is still easily accessible—it is simply for this Court, not the Court of Appeals, to dispense as it sees fit. Defendants can easily take their request for a stay to this forum, as they gave done here.[9]

Finally, the Defendants' citation to Wis. Stat. § 808.05(1) proves too much. It conflates this Court's power to accept an appeal for merits review and this Court's power to exercise preliminary authority over a case, such as by issuing a stay request, while it considers whether to take it.

The Petition to Bypass in this case is already before the Supreme Court. If the Defendants wish to obtain a stay while the Petition is decided, it can simply ask this Court for relief as it has done here. If the Petition to Bypass is denied, the Court of Appeals can then decide whether to grant a separate stay while it

[9] It remains unclear why the Defendants did not seek a stay from this Court earlier.

decides the merits of the appeal. But the Court of Appeals should not rule on questions that this Court might like to decide immediately. The Court of Appeals agreed, and it was right to do so.

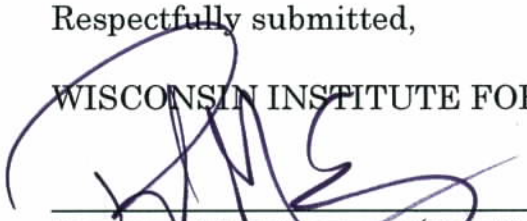
CONCLUSION

For the reasons stated herein, the Plaintiffs respectfully request that this Court DENY the Defendants' emergency motion.

Dated: January 9, 2019.

Respectfully submitted,

WISCONSIN INSTITUTE FOR LAW & LIBERTY



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