UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

LEAGUE OF WOMEN VOTERS OF WISCONSIN, PATRICIA ANN VILLARREAL, SASHA ALBRECHT,

Plaintiffs,

v. Civil Action No. 19-cv-1029

DEAN KNUDSON, JULIE M. GLANCEY, ROBERT F. SPINDELL, JR., MARK L. THOMSEN, ANN S. JACOBS, MARGE BOSTELMANN, in their official capacity as members of the Wisconsin Elections Commission, MEAGAN WOLFE, in her official capacity as the Administrator of the Wisconsin Elections Commission,

Defendants.

PROPOSED INTERVENORS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS (OR IN THE ALTERNATIVE STAY) BASED ON PULLMAN ABSTENTION AND RESPONSE TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

In November, Proposed Intervenors (hereafter the "*Zignego* Plaintiffs") filed an action in state court seeking an order to compel the Wisconsin Election Commission ("WEC") to comply with state law, specifically, a process for deactivating stale voter registrations when WEC receives reliable information that a voter may have moved. The Ozaukee County Circuit Court agreed with the *Zignego* Plaintiffs, ordered WEC to follow state law, and then denied WEC's request for a stay of that order. On December 17, WEC appealed and sought a stay pending appeal, and on December 20, the *Zignego* Plaintiffs petitioned for bypass to the Wisconsin Supreme Court, which ordered a response by January 3, both of which are pending. The League of Women Voters (the "League"),

Plaintiffs in this action, sought to intervene in that state court action to oppose the *Zignego* Plaintiffs' claim, but the Circuit Court rejected the League's intervention request and then denied the League's request for a stay of the proceedings pending its appeal of this denial of its intervention request.

Having failed to intervene in the pending state court proceeding, the League has now filed this federal action in an attempt to interfere with an order from the state court, directed at a state agency, to comply with state law. The League's theory is that deactivating voter registrations without sending a particular type of notice will violate voters' due process rights. Even if the League were correct about that—and it is not—the obvious solution would be simply for WEC to notify any deactivated voter that they have been deactivated, what that means, and what they can do to reregister if they have not in fact moved. As they explained at the state court hearing, the *Zignego* Plaintiffs have no objection to WEC sending such a notice to any voters who have registrations that will be deactivated as a result of the state court's order, and nothing in the state court's order prevents WEC from doing so.

If a new notice were all the League were asking for, there would be no need for the *Zignego* Plaintiffs to intervene in this action. But the League's request is not so limited; the League instead seeks a preliminary injunction from this Court, ordering WEC *not* to comply with the state court order, until this Court *first* orders, and then confirms, that a new notice has been sent out. In effect, the League seeks a federal court stay of a state court's order to follow state law and collateral review by a federal court of the state court's denial of a stay.

WEC has not sent that notice, instead asking the state Court of Appeals to stay the Circuit Court's order regarding deactivation of the registrations in question. That request is pending. What the Plaintiffs are attempting here is an end run around the state court proceeding, seeking the

intervention which was denied and the relief which was denied and now is being appealed. Moreover, they are mounting this collateral attack on a state court order that is the subject of an appeal in a pending state court proceeding by asserting the deprivation of a posited interest created under state law—some type of legal interest in maintaining a voter registration and not having to re-register to vote—whose very existence is at issue in the state court proceeding. If state law really requires deactivation of the registrations, then there is no legal interest to which a due process claim could attach. Even if, as noted above, the plaintiffs here are still entitled to notice as a matter of federal constitutional law, there is no reason to suppose that, should WEC not obtain a stay, that it will not provide that notice. And even if that doesn't happen, nothing would preclude a state court from ordering it to do so—relief that the *Zignego* Plaintiffs do not oppose. There is no reason to suppose that a federal court is in a better position to superintend such notice than state courts.[1]

The League's extraordinary request violates fundamental principles of comity and respect that federal courts typically give to state court rulings. This Court should not issue any injunction that would prevent WEC from complying with state court orders to immediately follow state law.[2] Rather, this Court should dismiss this case or abstain under the Pullman doctrine, because the pending state court litigation will likely moot the League's federal claims, regardless of the outcome.

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[1] The State Court Plaintiffs do oppose delaying compliance with state law until after the February and April elections.

[2] Indeed, as discussed below, WEC's refusal to comply with the state court order is currently the subject of contempt proceedings. If this Court orders WEC not to comply, it will put WEC in the position of having to choose which court order to disobey.

FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Background

The material facts are not in dispute. By statute, Wisconsin 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. Mar. 11, 2019 WEC Memo, ECF No. 11-1.

As part of ERIC, Wisconsin receives reports regarding what are referred to as "Movers." ECF No. 11-1 at 3. These are Wisconsin residents who have reported an address different from their voter registration address in an official government transaction. ECF No. 11-1 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. ECF No. 11-6 at 41.

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. ECF No. 11-1 at 3. 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.
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> ECF No. 11-11 at 3.

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

> Upon receipt of reliable information that a registered elector has changed his or her residence to a location outside of the municipality, the municipal clerk or board of election commissioners shall notify the elector by mailing a notice by 1st class mail to the elector's registration address stating the source of the information. All

> municipal departments and agencies receiving information that a registered elector has changed his or her residence shall notify the clerk or board of election commissioners. *If the elector no longer resides in the municipality or fails to apply for continuation of registration within 30 days of the date the notice is mailed, the clerk or board of election commissioners shall change the elector's registration from eligible to ineligible status*. Upon receipt of reliable information that a registered elector has changed his or her residence within the municipality, the municipal clerk or board of election commissioners shall change the elector's registration and mail the elector a notice of the change. This subsection does not restrict the right of an elector to challenge any registration under s. 6.325, 6.48, 6.925, 6.93, or 7.52 (5).

(Emphasis added).

Despite being aware of the statute and acknowledging the appropriate process, WEC has decided that "instead of deactivating their voter registrations within approximately 30 days under Wis. Stat. § 6.50(3), deactivation would take place between 12 months and 24 months, giving the Movers a chance to vote in both the General Election and following Spring Election." June 11, 2019 WEC Memo, ECF No. 11-2 at 4. Thus, WEC is enabling voters who have actually moved to vote in at least two elections at the old address, quite possibly for a candidate in a district where the voter no longer resides.

WEC received a new ERIC Movers report in 2019. WEC staff reviewed and vetted the information contained in the report prior to taking any action on the ERIC report. *Zignego v. WEC* Complaint (Ozaukee County Circuit Court), ECF No. 11-6 at 41.

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"). ECF No. 11-6 at 50.

However, WEC refused to comply with Wis. Stat. § 6.50(3) with respect to the October 2019 notices and refused to change the registration status of voters who did not respond to the notice after 30 days, as required by law. Instead WEC 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. ECF No. 11-2 at 4. There is no dispute that the overwhelming majority of registrations on the Movers Report involve persons who no longer reside at the registration address and are ineligible to vote here. WEC's concern—and plaintiffs' claim here—is limited to a small percentage of voters who may be on the Movers Report but who still reside at the registration address.[3]

B. Procedural Background

On October 16, 2019, the *Zignego* Plaintiffs filed a complaint with WEC asking WEC to revoke that decision and to instead follow state law. ECF No. 11-6 at 7. The *Zignego* 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." ECF No. 11-6 at 20.

The *Zignego* Plaintiffs thereafter sued WEC in Ozaukee County Circuit Court, asking for a preliminary injunction or, in the alternative, a writ of mandamus. ECF No. 11-6. On December 13, 2019, 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. *Zignego v. WEC*, Writ of Mandamus, ECF No. 11-8. The Circuit Court declined WEC's request for a stay of its decision, noting the "very tight time frame" and the "importan[ce] that the Commission" begin complying

[3] 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. *Zignego v. WEC*, Transcript of Preliminary Injunction Hearing, ECF No. 11-7, at 70; *see also id*. at 43–44. And WEC concedes that the ERIC report is "largely accurate." Mar. 11, 2019 WEC Memo, ECF No. 11-1 at 11. All of these persons would be able to re-register, including on election day.

with the law. *Zignego v. WEC*, Transcript of Preliminary Injunction Hearing, ECF No. 11-7 at 80. The Circuit Court also entertained, and denied, the League's motion to intervene in the state court lawsuit. ECF No. 11-7 at 35-36.

The Circuit Court issued a writ of mandamus on December 17, 2019. ECF No. 11-8. That same day, WEC filed a notice of appeal and asked the Wisconsin Court of Appeals to stay the order pending appeal by December 23. The League, in the meantime, filed this federal lawsuit in this Court asserting that deactivation of non-responsive Movers without sending a new notice would violate the Due Process Clause of the Fourteenth Amendment. ECF No. 1.

On December 18, the Wisconsin Court of Appeals ordered the *Zignego* Plaintiffs to file a response to the motion for a stay pending appeal by December 23. ECF No. 11-12.

On December 20, the *Zignego* Plaintiffs filed a petition for bypass with the Wisconsin Supreme Court, asking them to take the appeal, and the Wisconsin Supreme Court ordered any responses to the petition to bypass be filed by January 3, 2020. ECF No. 11-14. The *Zignego* Plaintiffs argued that, 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 WEC's motion for a stay pending appeal, but WEC has disputed that interpretation. *See* § 809.60(3). On December 23, the *Zignego* Plaintiffs filed a response to WEC's motion for a stay pending appeal. Both the *Zignego* Plaintiffs' petition for bypass and WEC's motion for a stay pending appeal are currently pending. Finally, because WEC has to date not complied with the Ozaukee County Circuit Court's order, on January 2, 2020, the *Zignego* Plaintiffs filed a motion in that court to hold WEC and the named commissioners in that suit in contempt of court. A hearing on that motion is scheduled for January 13, 2020.

ARGUMENT

I. This Court should abstain from doing anything until the state courts decide whether to grant a stay, which will likely moot the League's claims regardless of outcome

The Supreme Court has recognized that "federal courts have the power to refrain from hearing cases … in which the resolution of a federal constitutional question might be obviated if the state courts were given the opportunity to interpret ambiguous state law. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716–17 (1996) (citing *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 500 (1941)). This doctrine, known as "Pullman abstention," is appropriate when "(1) there is a substantial uncertainty as to the meaning of the state law and (2) there exists a reasonable probability that the state court's clarification of state law might obviate the need for a federal constitutional ruling." *Wisconsin Right to Life State Political Action Comm. v. Barland*, 664 F.3d 139, 150 (7th Cir. 2011). The purpose of abstaining from such cases is to "avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication." *Pullman*, 312 U.S. at 500. *Pullman* abstention "entail[s] a full round of litigation in the state court system before any resumption of proceedings in federal court." *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1156 (2017).

This Court should abstain from doing anything in this case until the state courts decide whether to grant a stay pending appeal. As described in detail above, the *Zignego* Plaintiffs and WEC are currently litigating in state court whether WEC is required under 6.50(3) to deactivate the registrations of voters that the ERIC report indicated have moved, and if so, when. On December 13, the Ozaukee County Circuit Court ordered WEC to deactivate certain registrations and denied a stay. *See* ECF No. 11-8. On December 17, WEC appealed and sought a stay pending appeal, and on December 18, the Court of Appeals denied an immediate stay but ordered the

Zignego Plaintiffs to respond to the stay motion by December 23. *See* ECF No. 11-12. On December 20, the *Zignego* Plaintiffs filed a petition for bypass to the Wisconsin Supreme Court, and the Wisconsin Supreme Court ordered WEC to respond by January 3. *See* ECF No. 11-13. Thus, 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, and may also decide the ultimate merits question of whether 6.50(3) requires WEC to deactivate certain voter registrations.

Whatever the outcome of these issues in the state court proceedings, their resolution will very likely moot the claims the League raises. Most obviously, if the Wisconsin Supreme Court or Court of Appeals either grants WEC's request for a stay pending appeal, or decides on the merits that 6.50(3) does not require WEC to deactivate any voter registrations, then there is no need for this Court to issue a preliminary injunction.

Even if the state courts deny WEC's request for a stay pending appeal, there is still no need for this Court to issue a preliminary injunction because WEC can, and likely will, send exactly the type of notice that the League *concedes* would remedy its concerns. While the Circuit Court ordered WEC to follow the procedure set forth in state law for deactivating stale registrations, it did not dictate how WEC comply with that order. *See Zignego v. WEC*, Transcript of Preliminary Injunction Hearing, ECF No. 11-7, at 76, ("I'm going to compel the Election Commission to comply with the thirty-day notice. I can't tell them how to do that. … They'll have to figure that out."); ECF No. 11-8 (Writ of Mandamus). And the *Zignego* Plaintiffs, throughout the state court litigation, have *suggested* that WEC can and should send a new notice to the address of any registrations that WEC deactivates. *See, e.g.*, *Zignego v. WEC*, Transcript of Preliminary Injunction Hearing, ECF No. 11-7, at 77–78 ("Now, if the Commission wants to send a notice out

to those people telling them that they've been deactivated, and that if they've been deactivated in error, that what they need to do is reregister on line, which they can do, or go to their clerk's office, or reregister, or reregister at the polls. That's a relatively simple thing to do, and I'm confident they can do it.").

So, if WEC loses its request for a stay pending appeal and is required to deactivate voter registrations, it can promptly send a new notice to deactivated voters about what has happened and what voters must do to reregister if they have not moved. WEC thus far has not given any indication that it cannot or will not send such a notice if it loses its motion for a stay pending appeal. Even if avoiding the need to re-register or receiving a different form of notice is a protected liberty or property interest, *but see infra* Part III, the League has no case against WEC for violating the due process clause until it does so. Right now, WEC has asked to be relieved from the obligation to deactivate Movers' registrations. In other words, it does not wish to deactivate registrations at all, much less without notice. If WEC is unsuccessful, it can send a notice that would obviate any due process claim *and there is no reason to suppose it will not*. The next election is not until February 18, so WEC has 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.

The League's pleadings acknowledge that a new notice would remedy any due process violation. Indeed, the ultimate relief the League seeks in its complaint is an order requiring WEC to send a new notice containing "an adequate and clear explanations and instructions on (i) why the notice letter is being sent, (ii) how the voter can confirm or update the address associated with their voter registration, (iii) what will happen if the voter fails to take one of the actions in response to the notice letter to confirm or update the address associated with their voter registration, and (iv) the deadline under state law by which the voter must take one of the actions in response to the

notice." Complaint, ECF No. 1, at 29. While the League argues that due process requires this notice to be sent *before* any voter registrations are deactivated, the League is incorrect about that, for the reasons explained in more detail below. *Infra* Part III. So, even if WEC loses their request for a stay pending appeal, there will be no need for this Court to issue a preliminary injunction because WEC can simply send a new notice to any deactivated voters—exactly the type of notice the League describes—and this notice will fully resolve the League's concerns.

Most illustrative, perhaps, of the inappropriateness of federal court intervention at this stage of the litigation is the fact that WEC's refusal to comply with the state court order is currently the subject of contempt proceedings. Consequently, were this Court to issue injunctive relief ordering WEC not to comply with the state court order, it would put WEC in the position of having to choose which court order to disobey.

Given that the pending litigation in state court creates "substantial uncertainty as to the meaning" of Wis. Stat. 6.50(3), and that, regardless of the outcome, the state courts' resolution will likely "obviate the need for a federal constitutional ruling," this case presents a paradigm set of facts for *Pullman* abstention. *Barland*, 664 F.3d at 150.

II. This Court should not issue any injunction that would prevent WEC from complying with a direct order from state courts to follow state law

As argued in Part I, *supra*, this Court should refrain from doing anything in this case until the state courts decide whether to grant WEC a stay pending appeal. And even if WEC is denied a stay, such that it must immediately deactivate certain voter registrations, there is still likely no need for *any* preliminary injunction, because WEC can, and likely will, on its own, immediately send a new notice to any deactivated voter, which will resolve any due process problem. *Supra* Part I; *infra* Part III. But even if this Court believes an injunction is necessary to ensure that WEC

does, in fact, send a new notice, it should not issue any injunction that would interfere with or prevent WEC from immediately complying with a direct order from the state courts to comply with state law. Any such injunction would significantly disrupt the comity and respect federal courts typically give to state courts in our federal system.

The Supreme Court has repeatedly emphasized the "importance to the States of enforcing the orders and judgments of their courts" and that federal courts must carefully consider the principles of "federalism" and "comity" when they are asked to "interfere with the execution of state judgments." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 14 (1987); *Mitchum v. Foster*, 407 U.S. 225, 243 (1972). While federal courts may be "anxious … to vindicate and protect federal rights and federal interests," they must "always endeavor[ ] to do so in ways that will not unduly interfere with the legitimate activities of the States." *Younger v. Harris*, 401 U.S. 37, 44 (1971). Based upon these principles, the Court has recognized a variety of circumstances in which federal courts either cannot, or should not, interfere with state court proceedings. *See Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996) (surveying various such doctrines). Two doctrines are particularly illustrative here.

First is the case law interpreting the Anti-Injunction Act, 28 U.S.C. § 2283, which prohibits federal courts from "grant[ing] an injunction to stay proceedings in a State court" except in "three specifically defined exceptions." *Atl. Coast Line R. Co. v. Bhd. of Locomotive Engineers*, 398 U.S. 281, 286 (1970). The Act "embodies a fundamental principle of federalism: state courts are free to conduct their own litigation, without ongoing supervision by federal judges." *O'Keefe v. Chisholm*, 769 F.3d 936, 939 (7th Cir. 2014). Thus, the Supreme Court has held that "[a]ny doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of

permitting the state courts to proceed in an orderly fashion to finally determine the controversy." *Atl. Coast*, 398 U.S. at 287.

In *Mitchum v. Foster*, 407 U.S. 225 (1972), the Supreme Court concluded that Section 1983 suits fit one of the three exceptions to the Anti-Injunction Act, but even then, "the principles of equity, comity, and federalism … must restrain a federal court when asked to enjoin a state court proceeding." *Id.* at 243. The Seventh Circuit has reiterated the point: "Although § 1983 creates an exception to the full force of [the Anti-Injunction Act] [citing *Mitchum*] a federal court must consider principles of federalism and comity before issuing an injunction." *Owens-Corning Fiberglas Corp. v. Moran*, 959 F.2d 634, 635 (7th Cir. 1992); *see also O'Keefe*, 769 F.3d at 937.

Another doctrine designed to preserve the comity between state and federal courts is the "Rooker-Feldman" doctrine, which generally prohibits lower federal courts from sitting in "collateral review" of state court decisions. *See Crestview Vill. Apartments v. U.S. Dep't of Hous. & Urban Dev.*, 383 F.3d 552, 556 (7th Cir. 2004). The doctrine bars "claims that directly seek to set aside a state court judgment" and "claims [that] are inextricably intertwined with a state court judgment." *Jakupovic v. Curran*, 850 F.3d 898, 902 (7th Cir. 2017). In other words, when "a state court judgment is the cause of a plaintiffs' injury, Rooker-Feldman bars federal review." *Swartz v. Heartland Equine Rescue*, 940 F.3d 387, 391 (7th Cir. 2019).

While the Supreme Court has held that both the Anti-Injunction Act and the Rooker-Feldman doctrine do not generally apply to non-parties to the corresponding state court litigation, *see Lance v. Dennis*, 546 U.S. 459, 464 (2006); *County of Imperial v. Munoz*, 449 U.S. 54, 59–60 (1980); *Hale v. Bimco Trading, Inc.*, 306 U.S. 375, 377–78 (1939), both doctrines show that the League's requested injunction would be a significant intrusion into the comity and respect typically shown to state courts. Here, the League attempted to intervene in a state court action, and, having

been denied the opportunity to do so, the League is effectively asking a federal court to provide it with the relief that it might have sought on appeal. It is seeking a stay of a state court order directing WEC to follow state law. Even if not squarely within the strictures of the Rooker-Feldman doctrine or Anti-Injunction Act, this form of collateral attack violates the principles of comity and federalism which they embody. Given the Supreme Court's holding in *Mitchum* that courts must carefully weigh the "principles of equity, comity, and federalism" even where the Anti-Injunction Act does not fully apply, 407 U.S. at 243, and the Court's emphasis on "the importance to the States of enforcing the orders and judgments of their courts," *Pennzoil Co.*, 481 U.S. at 13, this Court should, consistent with the Anti-Injunction Act and Rooker-Feldman lines of cases, decline to issue any injunction that would interfere with the state court's orders in the *Zignego* litigation.

The League asks this Court to enter a preliminary injunction "barring" WEC from deactivating voter registrations "*until*" this Court enters "a permanent injunction … requiring WEC to mail new notice letters." Preliminary Injunction Motion at 1. Such an order would "stay proceedings in a State court," 22 U.S.C. § 2283, by preventing WEC from immediately complying with the state courts' order. The Circuit Court has already found that WEC has a "plain and positive duty" to follow the procedure set forth in 6.50(3) and that the *Zignego* Plaintiffs will "suffer substantial damages or injury" unless WEC promptly complies with 6.50(3). ECF No. 11-8. The Circuit Court denied a stay of its order for similar reasons. *Zignego v. WEC*, Transcript of Preliminary Injunction Hearing, ECF No. 11-7, at 78–79. If the Wisconsin Supreme Court or Court of Appeals denies WEC's request for a stay pending appeal, it will necessarily be agreeing with the Circuit Court that WEC's failure to follow state law immediately will do substantial harm and that this harm outweighs any potential harm from immediately deactivating the stale registrations. Thus, a preliminary injunction from this Court ordering WEC *not* to immediately follow state law

would effectively stay a state court order that the state courts explicitly decided should *not* be stayed. Moreover, as noted above, WEC's refusal to comply with the state court order is currently the subject of contempt proceedings in state court. If this Court orders WEC not to comply, it will put WEC in the position of having to choose which court order to disobey.

There is no reason for this Court to disrupt the state-federal balance in this way. The League's primary concern is the notice sent to the voters being deactivated, in case any are deactivated in error. *See* Compl., ECF No. 1, at 29. But WEC can send a new notice, in substantially the form the League proposes, at the same time or shortly after it deactivates the registrations in compliance with state law and a state court order. Such a notice could inform voters that their registration has been deactivated and what they can do to reactivate it if they did not, in fact, move, including simply re-registering on Election Day. As explained further below, such a notice would be more than sufficient to resolve any possible due process concerns, especially given that Wisconsin allows for same-day registration. *Infra* Part III.

While this Court could order WEC to promptly send out a new notice as soon as practicable *after* it deactivates registrations, this too would interfere with the ability of state courts to efficiently and effectively resolve a state law issue. As noted above, the state courts might decide that the registrations should not be deactivated, and sending out a notice that they have been will create greater confusion. Or the state courts may decide both that the registrations must be deactivated under state law and that WEC should send a notice telling voters that this has occurred and what steps need be taken to register at the current address if they have not moved. Even if no such order is forthcoming, intervention by this Court is not warranted since WEC likely will voluntarily send such a notice if it is denied a stay. *Supra* Part I. All that said, the *Zignego* Plaintiffs

have no objection to this Court entering a more limited injunction like this that will not interfere with WEC following state law, as determined by state courts.

The League's attempt to use the federal system to collaterally stay a state court order is especially egregious given that it could have, but did not, pursue this argument in state court. The League attempted to intervene in the state court action, but raised largely the same arguments as WEC. Indeed, the League's intervention motion explained that "its whole basis for seeking intervention is to attack the accuracy and reliability of information in the ERIC list." ECF No. 11-11:15. The League mentioned only briefly, in a single sentence, any due process problem with deactivating registrations in compliance with state law. ECF No. 11-11:17. Similarly, at the hearing on the League's motion to intervene, the League made only a passing reference to due process. ECF No. 11-7:25. After the court denied the League's intervention motion, the League could have appealed and sought a stay pending appeal, as WEC has done, *see Wengerd v. Rinehart*, 114 Wis. 2d 575, 582, 338 N.W.2d 861, 866 (Ct. App. 1983), or sought to intervene in WEC's appeal to raise its due-process argument, *see* Wis. Stat. 809.13; *City of Madison v. Wisconsin Employment Relations Comm'n*, 2000 WI 39, ¶8, 234 Wis. 2d 550, 610 N.W.2d 94. Instead, the League ran to federal court to get a collateral stay of a state court order.

III. The League has not identified any due process violation that warrants its extraordinary request to enjoin WEC from complying with a state court order

There are at least two reasons why the League's due process claims do not warrant a preliminary injunction that would prevent WEC from complying with a state court order. As a preliminary matter, the League has simply failed to identify any deprivation of a right. But more importantly to the *Zignego* Plaintiffs here, even if the League has identified a protected right, due process does not require WEC to send a new notice *before* deactivating stale registrations in

compliance with a state court order and state law, so the League's claims cannot possibly justify the injunction they seek.

The first step in any due process analysis is to determine whether there is "a property or liberty interest protected by due process," *Bradley v. Vill. of Univ. Park, Illinois*, 929 F.3d 875, 882 (7th Cir. 2019), and whether there has been (or in this case, will be) a "depriv[ation] of [that] protected interest." *Grant v. Trustees of Indiana Univ.*, 870 F.3d 562, 571 (7th Cir. 2017). "Whether any procedural protections are due depends on the extent to which an individual will be condemned to suffer grievous loss," that is, "whether the nature of the interest is one within the contemplation of the 'liberty or property' language of the Fourteenth Amendment." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

"Once it is determined that due process applies, the question remains what process is due." *Morrissey*, 408 U.S. at 481. That answer depends on the individual circumstances. "It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands." *Id*. In other words, "[l]ess process is due where less is at stake." *Knutson v. Vill. of Lakemoor*, 932 F.3d 572, 577 (7th Cir. 2019).

Consequently then, "identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (internal citations omitted).

The *only* right the League identifies is "a *statutory* entitlement in voter registration," which, the League argues, includes "the right to remain continuously registered until deactivation is triggered." Preliminary Injunction Motion at 20 (emphasis added). But given that the right the League alleges is statutory, the scope of any such right is necessarily defined by *all* of the relevant statutes. Indeed, the League even appears to concede that any "statutory entitlement in voter registration" exists only until "deactivation is triggered," including by "a move." Preliminary Injunction Motion at 20 (citing Wis. Stat. 6.50(3)). The very issue being litigated in state courts is the effect of 6.50(3), which addresses what to do when there is a reliable indication that a voter has moved. If the state courts hold that 6.50(3) requires the Commission to deactivate voters on the ERIC list, then, *ipso facto*, voters on that list cannot possibly have a *statutory* right to "remain continuously registered" despite a statutory deactivation requirement to the contrary.

The League does not argue, nor could it, that deactivating stale registrations under 6.50(3) will deprive anyone of the right *to vote*. Wisconsin is one of the easiest states in which someone can register to vote, allowing for same-day registration at the polls on Election Day. Wis. Stat. 6.55(2). In fact, Wisconsin protects would-be voters so much that it is one of the few states exempt from the requirements of the National Voter Registration Act ("NVRA"). *See* Wisconsin Election Commission, *FAQ on the National Voter Registration Act*, https://elections.wi.gov/sites/elections.wi.gov/files/publication/65/faq_the_national_voter_registration_act_of_1993_pd_17504.pdf. Thus, even if some small number of voters are deactivated but have not moved, they can simply re-register on (or before) Election Day. The League argues that some of these voters may not bring proof of residence with them, Preliminary Injunction Motion 25, but Wisconsin allows for a broad range of documents to establish residence, *see* Wis. Stat. §

6.34(3)(a), and even if voters do not have this documentation with them, they can file a provisional ballot under the process set forth in Wis. Stat. § 6.79.

Second, and more importantly, even if the League has identified a right that warrants some procedural due process protection, it has not established that due process requires WEC to *first* send a new notice to voters *before* it deactivates voter registrations in compliance with state law. WEC can, instead, *after* it deactivates registrations in compliance with any state court order, promptly send a letter to any deactivated voters that they *have been* deactivated and what they must do to re-register if they have not moved.

The lack of process that the plaintiffs complain of here is the absence of notice informing a voter of the need to continue his or her registration. There is no contention that voters who have that notice and are still eligible to vote at their registration address will be denied the opportunity to do so. Given that, even on Plaintiffs' view, notice is the only issue. From a voter's perspective, it makes no difference whether their registration is deactivated before or after a new notice is sent out, so there is no additional "value," *Mathews*, 424 U.S. at 335, for due process purposes, to enjoining the Commission from following a state court order until it *first* sends a new notice. The League concedes that voters can be required to do *something* if they have not actually moved. *See* Complaint, ECF No. 1, at 29 (asking this Court to order that the notice must include "how the voter can confirm or update the address associated with their voter registration."). And the process for voters to confirm that they have not actually moved would be the same whether a new notice is sent before or after the registrations are deactivated. If a new notice were sent *first*, as the League asks for, it would inform voters that they will be deactivated unless they, for example, update their registration online or send in a postcard, and if they do not, that they will have to re-register at the polls. *See* ECF No. 11-5 (sample notice sent in 2017 when WEC followed 6.50(3)). If, on the other

hand, the Commission first deactivates the registrations and then sends a new notice, the content of the notice, and the steps required of voters who have not moved, would be substantially the same—voters would be informed that they have been deactivated, and if they have not moved, to reregister online, send in a postcard, or re-register at the polls.

The League cites *Simpson v. Brown Cty.*, 860 F.3d 1001, 1006 (7th Cir. 2017), for the proposition that "due process requires *pre*-deprivation procedures" (and therefore pre-deactivation notice), but it is wrong, for a number of reasons. First, the Supreme Court has made very clear that "due process is flexible and calls for such procedural protections as the particular situation demands," *Morrissey*, 408 U.S. at 481, and *Simpson* obviously did not overrule the Supreme Court on that point. Second, even if voters have a due-process-protected right to a "continuous registration" despite state-law deactivation procedures, *but see supra*, there is no real deprivation until a voter goes to vote. Deactivating the registrations now and sending a new notice shortly *thereafter* will give voters plenty of time before the next election—which is not until February 18—for them to re-register. Wisconsin permits online and mail registration until 20 days before an election, or in person at the municipal clerk's office until 5 p.m. on the Friday before an election. Any voter (including those who have been de-activated) who does not so register before an election may still register when they show up to vote on the day of an election. *See VOTER REGISTRATION: Information Provided by the Wisconsin Elections Commission*, available at https://elections.wi.gov/sites/elections.wi.gov/files/2019-01/25%20Voter%20Registration_0.pdf.

A new notice sent shortly *after* WEC deactivates registrations in compliance with a state court order would also fully resolve WEC's claim based on "detrimental reliance." Preliminary Injunction Motion 28–32. Any voters that received and are relying upon WEC's prior notice but did not move will therefore also receive a new notice from WEC informing them that they have

now been deactivated and will need to either reregister online or at the polls (with proof of residence).[4]

Likewise, the risk of erroneous deprivation is exactly the same regardless of whether WEC deactivates first and then notifies voters or notifies voters first and then deactivates them. Either way, voters will have advance notice of the need to re-register (or to confirm that they have not moved) by February 18.

The League has not identified any right that is even subject to due process protections, but even if it has, the League has not given this Court any reason why a notice sent after voters have been deactivated would be insufficient, so this Court should not substantially disrupt state-federal relations by issuing any injunction that would prohibit WEC from complying with a state court order.

CONCLUSION

This Court should dismiss this case or abstain from doing anything in it until the state courts decide whether to grant WEC's request for a stay pending appeal and, if the courts deny a stay, WEC indicates how it intends to comply with that order. And if, as a result of those proceedings, WEC is required to deactivate voter registrations in compliance with state law, this Court should not issue any injunction that would prevent WEC from immediately complying with such an order, like prohibiting WEC from deactivating voters *until* it has first sent out a new notice.

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[4] The League's "detrimental reliance" argument also runs against the "longstanding rule that "ordinarily the government may not be estopped because of erroneous or unauthorized statements of government employees when the asserted estoppel would nullify a requirement prescribed by [the Legislature]." *OPM v. Richmond*, 496 U.S. 414, 419 (1990); *Matamoros v. Grams*, 706 F.3d 783, 793–94 (7th Cir. 2013). The gist of the League's argument is that WEC's prior notice now prevents WEC from following state law. But WEC does not have the power to change state law through its own misinterpretation. *See Richmond*, 496 U.S. at 427–29. At most, WEC can be required to correct its misstatements, but not in a way that subverts the procedure enacted by the Legislature.

Instead, this Court should, at most, order WEC to promptly send out a new notice to any voters who *have been* deactivated in compliance with state law.

Date: January 2, 2020

Respectfully submitted,

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