No. 2019AP2397

In the Supreme Court of Wisconsin

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

PLAINTIFFS-RESPONDENTS-PETITIONERS,

v.

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

WISCONSIN COURT OF APPEALS,

DEFENDANTS-APPELLANTS-RESPONDENTS.

No. 2020XX53

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PLAINTIFFS-RESPONDENTS-PETITIONERS,

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

WISCONSIN COURT OF APPEALS,

DEFENDANTS-APPELLANTS-RESPONDENTS.

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

EMERGENCY PETITION FOR SUPERVISORY WRIT AND IMMEDIATE TEMPORARY RELIEF

RICHARD M. ESENBERG (WI BAR NO. 1005622)
BRIAN MCGRATH (WI BAR NO. 1016840)
ANTHONY LOCOCO (WI BAR NO. 1101773)
LUCAS T. VEBBER (WI BAR NO. 1067543)
Wisconsin Institute for Law & Liberty
330 East Kilbourn Avenue, Suite 725
Milwaukee, Wisconsin 53202-3141
(414) 727-9455; rick@will-law.org

Attorneys for Plaintiffs-Respondents-Petitioners

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ISSUES PRESENTED

1. Whether this Court should issue a supervisory writ because the Court of Appeals violated a plain duty by staying the enforcement of the Circuit Court's writ of mandamus and contempt order without explaining its reasoning, in contravention of this Court's decision in *State v. Scott*, 2018 WI 74, 382 Wis. 2d 476, 914 N.W.2d 141.

2. Regardless of the Court of Appeals' reasoning for granting these stays, whether this Court should issue a supervisory writ because the Court of Appeals has a plain duty not to grant stays in this case.

RELIEF SOUGHT

Timothy Zignego, David W. Opitz, and Frederick G. Luehrs III (the "Petitioners") respectfully ask this Court to issue a supervisory writ pursuant to its authority under Wis. Stat. § 809.71 (1) vacating the stays of the writ of mandamus and contempt order granted by the Court of Appeals and (2) declaring

that the Court of Appeals has a plain duty not to issue stays pending disposition of this case in the Court of Appeals.

Additionally, the Petitioners seek immediate temporary relief under Wis. Stat. § 809.52 while this Petition for a Supervisory Writ is decided. *See* Wis. Stat. § 809.52; § 809.71. Specifically, the Petitioners ask that this Court temporarily lift the stays issued by the Court of Appeals while this Court considers this petition.

INTRODUCTION

This is an action against the Wisconsin Elections Commission ("WEC") and five of the Commissioners of WEC,[1] (collectively the "Respondents"), based upon the Respondents' failure and refusal to comply with unambiguous state election law requiring them to ensure clean voter rolls in advance of the upcoming 2020 elections.

In December 2019, the Circuit Court issued a Writ of

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

Mandamus ordering the Respondents to follow applicable election law set forth in the Wisconsin statutes. However, despite the fact that a primary reason for the filing of this suit was to protect the integrity of elections occurring as early as February 2020, WEC and three of its Commissioners (Commissioners Glancey, Jacobs, and Thomsen) simply declined to comply with the Writ. On at least two occasions, these Commissioners (two of whom are lawyers) voted against compliance with an extant court order. One of them even suggested that an order of a circuit court was not the law. *See* Shawn Johnson, *Elections Panel Split On Next Steps After Voter Purge Ruling*, Wisconsin Public Radio (Dec. 16, 2019), https://www.wpr.org/elections-panel-split-next-steps-after-voter-purge-ruling ("The law isn't the law until the Court of Appeals says what it is.").

So, on January 13, 2020, the Circuit Court issued an Order holding these four Respondents (the "Contemnors") in continuing contempt of that court. The Writ and the Contempt Order have been appealed.

This Court is by now familiar with this action, having recently considered and deadlocked on the Petitioners' Petition to Bypass, denying that Petition. Consequently, this Introduction will pick up where this Court left off.

At the time of this Court's action on Bypass, the situation on the ground was materially different. Notwithstanding the Commission's failure to comply, the Circuit Court's order was in effect. But on January 14, 2020 – fewer than 24 hours after this Court declined to take this case on Bypass – the Court of Appeals granted the Respondents' request for a stay of the Writ of Mandamus. The order contained no reasoning. Instead, it stated that it was the Court's understanding that WEC was scheduled to meet that day and that therefore the Court's "reasoning [would] be set forth in greater detail in a separate order to follow at a later date." The obvious implication was that an immediate stay was granted so that when the Commission voted on whether or not to comply with the Circuit Court's Writ in light of the contempt finding, the Contemnors did not need to be concerned about the

consequences of the vote.

At the same time, a judge of the Court of Appeals issued an *ex parte* order granting the Respondents' request for a stay of the Circuit Court's contempt order. Once again, no reasoning was offered – the judge simply noted the stay of the Writ of Mandamus. The stays had the predictable effect: WEC again voted not to comply with the Circuit Court's Writ of Mandamus. *See, e.g.*, Briana Reilly, *With voter purge on hold, Wisconsin Elections Commission deadlocks over GOP calls to act*, The Cap Times (Jan. 14, 2020), *available at* https://madison.com/ct/news/local/govt-and-politics/with-voter-purge-on-hold-wisconsin-elections-commission-deadlocks-over/article_f5db37cc-a1f1-5b4d-bff0-7a86e578cf4a.html.

The Petitioners have made clear that a primary purpose of this lawsuit is to ensure that the four elections that are held this year are conducted in accordance with state law. They obtained court orders requiring the Respondents to fix the voter rolls before these elections and even holding them in contempt for failing to do

so in a timely manner. But now, with the February election less than one month away, the Court of Appeals has stayed the writ and order *without even explaining its reasoning or notifying the parties when an explanation is forthcoming*. Moreover, unless the Court of Appeals resolves this case within a fraction of the time that it normally does, the Petitioners' claims will be substantially or entirely mooted – perhaps without a final decision by the Court of Appeals and, in all likelihood, without an opportunity for review by this Court.

Thus, expeditious resolution of this case is critical – not only for the Petitioners but for the electors of Wisconsin. The Court of Appeals has blocked enforcement of the Circuit Court's order, but it has done so with nothing more than an *ipse dixit*. While we appreciate the commitment to offer reasons later, the absence of a rationale makes it impossible for the Petitioners to discern a path forward under circumstances where the clock is ticking and what would otherwise be small delays cause them irreparable harm.

Case law imposes a demanding standard for the issuance of

a stay pending appeal; "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." *Scott,* 382 Wis. 2d 476, ¶46 (citing *State v. Gudenschwager*, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995)). The Court of Appeals has apparently found this difficult burden met but it has not even stated the relevant factors, much less demonstrated how they have been satisfied.

The actions of the Court of Appeals contravene clear case law of this Court requiring reasoned decision-making buttressing the issuance of a stay. Just two years ago, this Court *unanimously* concluded that the Court of Appeals' "failure to explain its exercise of discretion" as to whether to grant a stay "is an erroneous exercise of discretion." *State v. Scott*, 2018 WI 74, ¶40, 382 Wis. 2d 476, 914 N.W.2d 141. But that is exactly what the Court of

Appeals has done here. The Court of Appeals' promise to provide reasoning at some (unknown) date is insufficient. It grants one side the relief it seeks without granting the other side the ability to understand its reasoning and, therefore, potentially challenge the award of that relief.

While in most cases, a weeks' delay may not be material, it is here. A constant refrain of WEC is that it is "too late" to do anything about its error. It has argued that it cannot do anything after the date for release of absentee ballots – a deadline that it unilaterally let pass in defiance of a court order with respect to the February election and which is rapidly approaching in connection with the April election.

The failure of the Court of Appeals to comply with *Scott* warrants immediate issuance of a supervisory writ. But even if the Court of Appeals does release its reasoning at some later date, stays are plainly inappropriate here. Given the time frames involved, the Petitioners should not be forced to file a *second* petition for a supervisory writ challenging new stays. In light of

the clear law, the upcoming elections, and the interest in the preservation of scarce judicial resources, this Court can and should not only vacate the stays issued by the Court of Appeals but also hold that given the *Gudenschwager* factors the Court of Appeals has a plain duty not to issue any future stays in this case.

Finally, for the reasons explained below, the Petitioners respectfully request that this Court issue immediate temporary relief while this Petition for Supervisory Writ pends. Specifically, the Petitioners ask that this Court lift the stays issued by the Court of Appeals while it considers this Petition for Supervisory Writ.

The Petitioners accept and respect this Court's decision on Bypass and understand that the merits of this appeal are now before the Court of Appeals. But it would be an extraordinary thing if the 2020 election cycles passed without review of this critical public question by the highest court of this state. A stay threatens to moot all or a significant portion of the Petitioners' claims. For that to happen, a very strong case for a stay must be

had. It hasn't been. It can't be.

FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Background

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

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

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

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

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

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

(*Id.*)

The process as described by WEC 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.

(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." (Pet.App. 182.) Thus, WEC is enabling a voter who has actually moved to vote in at least two elections at the old address, quite possibly for a candidate in a district where the voter no longer resides. It is allowing absentee ballots to be requested in the names of persons who are no longer eligible to vote at their registered address.

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. (Pet.App. 186.)

After taking steps to confirm the accuracy of the ERIC

report, WEC staff relied on the report to send notices to approximately 234,000 Wisconsin voters between October 7 and October 11, 2019 (the "October 2019 Notices"). (Pet.App. 197.)

However, WEC is refusing to comply with Wis. Stat. § 6.50(3) with respect to the October 2019 Notices and is refusing to change the registration status of voters who 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. (Pet.App. 182.)

B. Procedural Background

On October 16, 2019, the Petitioners filed a complaint with WEC asking WEC to follow state law. (Pet.App. 165.) The Petitioners asked that WEC take this action in advance of the Spring Primary Election scheduled for February 18, 2020. On October 25, 2019, WEC dismissed the complaint without addressing it on the merits, in part citing potential "prejudice" to

"the rights and duties of Commission staff." (Pet.App. 167.)

The Petitioners thereafter sued the Respondents in Ozaukee County Circuit Court, asking the court for a preliminary injunction or, alternatively, a writ of mandamus. (Pet.App. 101.) On December 13, 2019, the Circuit Court concluded that a writ of mandamus should issue because WEC had a "plain and positive duty" under Wis. Stat. § 6.50(3) to deactivate the registration of non-responsive Movers. (Pet.App. 300.) The Court declined the Respondents' 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. (Pet.App. 298.)

On December 16, 2019, the Respondents met by teleconference and declined to take action to comply with the Writ of Mandamus. *See, e.g.*, Briana Reilly, *Wisconsin Elections Commission deadlocks over response to order purging 200,000 voters from rolls*, The Cap Times (Dec. 16, 2019), https://madison.com/ct/news/local/govt-and-politics/wisconsin-elections-commission-deadlocks-over-response-to-order-purging-

voters/article_6675794c-cd9d-5c90-a234-ee1924097d58.html.

The Court signed its order issuing a Writ of Mandamus on December 17, 2019. (Pet.App. 300.) That same day, the Respondents appealed, designating venue in District IV, and asked the Court of Appeals to stay the Circuit Court's decision *ex parte* by December 23. (Pet.App. 304; 307.)

The Court of Appeals denied the Respondents' request for *ex parte* relief and ordered a response from the Petitioners. (Pet.App. 449.) But on December 20, 2019, the Petitioners filed a Petition to Bypass the Court of Appeals, which temporarily stayed the proceedings there. (Pet.App. 451.); *see* Wis. Stat. § 809.60(3).

On December 30, 2019, the Respondents convened again via teleconference and again voted to take no action to comply with state law. *See, e.g.*, Patrick Marley, *Wisconsin Elections Commission deadlocks, keeps voters on the rolls for now* (Dec. 30, 2019), https://www.jsonline.com/story/news/politics/2019/12/30/wisconsin-elections-commission-deadlocks-keeps-voters-rolls/2773817001/.

In light of the upcoming elections and the Respondents' refusal to comply with the Circuit Court's Writ, on January 2, 2020, the Petitioners filed a motion in the Circuit Court to hold the Respondents in contempt of court. (Pet.App. 485.) After a hearing, the Circuit Court issued a contempt order on January 13, 2020, denying the Respondents' request for a stay of the order. (Pet.App. 501; 538.) The same day, as noted above, this Court denied the Petitioners' Petition to Bypass. (Pet.App. 540.) The Court of Appeals, having regained jurisdiction of the case, immediately stayed both the Writ of Mandamus and the Contempt Order the following morning without explaining its reasoning. (Pet.App. 546; 548.) The Respondents met again and once more declined to take any action to update Wisconsin's voter rolls. *See* Reilly, *With voter purge on hold*, *supra*.

This Petition for Supervisory Writ follows.

ARGUMENT

This Petition for Supervisory Writ is not a relitigation of the Petition for Bypass. This Petition instead addresses a subsidiary

question: what should the posture of this case be while the Court of Appeals decides it? Should the Writ of Mandamus and Contempt Order be stayed pending the litigation or not?

Both sides will readily admit that given the exigencies of this case the question of a stay is of massive importance. On average, a three-judge panel of District IV of the Court of Appeals takes 368 days to decide a case, and 186 days even if the case is on a "fast track." Court of Appeals Annual Report 2 (2018), available at https://wicourts.gov/ca/DisplayDocument.pdf?content=pdf&seqNo=239772. Thus, a merits decision will certainly occur after the upcoming Spring Elections and likely after the November Election as well. Even a "fast track" resolution of the case would result in a Court of Appeals decision in June, making it almost impossible for this Court to review the case prior to the August 11 primary and perhaps difficult to do so even before the November election. In this case, "justice delayed is justice denied" is more than a cliché.

After all, the illegal action challenged in this case is WEC's decision to deactivate Movers after 12-24 months have elapsed from the Movers' failure to respond to a mailing rather than 30 days as required by law. If the Respondents obtain a stay and are only several months later ordered to update the rolls, they have achieved much or all of the illegal goal they originally sought.

Even assuming that this Court believes that a decision on a stay should be made by the Court of Appeals in the first instance, the Court of Appeals has spoken here. It issued stays and declined to provide reasoning until a later date. This Court's case law is clear that that was an erroneous exercise of discretion and the stays should be vacated.

But this Court should not merely vacate the stays. This would leave the Court of Appeals to issue new stays, which, given the burden that must be met for a stay to be granted, the Petitioners would be forced to challenge again in this Court in a second Petition for a Supervisory Writ. Such a back-and-forth

wastes judicial resources and would create unacceptable uncertainty in light of the upcoming elections.

"A party may request a supervisory writ from this court by petition." *State ex. rel. Department of Natural Resources v. Wisconsin Court of Appeals, District IV*, 2018 WI 25, ¶9, 380 Wis.2d 354, 909 N.W.2d 114 (citing Wis. Stat. § 809.71) (footnote omitted). "To justify the writ, a petitioner must demonstrate that: '(1) an appeal is an inadequate remedy; (2) grave hardship or irreparable harm will result; (3) the duty of the [lower] court is plain and it . . . acted or intends to act in violation of that duty; and (4) the request for relief is made promptly and speedily.'" *Id.* (quoting *State ex. rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58 ¶17, 271 Wis. 2d 633, 681 N.W.2d 110) (alteration in original).

Importantly, this Court's "deliberation on whether to issue the writ 'is controlled by equitable principles and, in [the Court's] discretion, [it] can consider the rights of the public and third parties." *Id.* (quoting *Kalal*, 271 Wis. 2d 633, ¶9).

All four factors justifying the issuance of a supervisory writ are present here. The Court of Appeals' twin duties will be considered first, followed by the remaining three factors.[2]

I. The Court of Appeals Acted in Violation of its Plain Duty to Support with Reasoning its Stays of the Writ of Mandamus and Contempt Order

Until 2018, no Wisconsin case "require[d] the court of appeals to explain the reasons underlying its discretionary decisions." *Scott*, 382 Wis. 2d 476, ¶40. That changed with this Court's decision in *State v. Scott*. In *Scott* the circuit court ordered the involuntary medication of a defendant but stayed the order for 30 days to allow the defendant to obtain appellate review. *Id.* at ¶17. The defendant sought leave to appeal, and the Court of Appeals not only denied leave but lifted the stay of the medication order. *Id.* at ¶18. The defendant then appealed as a matter of

[2] The decision on the stay of the contempt order was given its own appeal number. The Petitioners do not believe that the decision on the contempt order is subject to a Petition for Review under Wis. Stat. § 809.62. To avoid waiving that issue, however, the Petitioners hereby request that the Court grant the Petitioners leave to file a Petition for Review if the Court determines that such a petition is preferable.

right and filed an emergency motion for a stay of the order. *Id.* at ¶19. The Court of Appeals denied the motion for a stay without providing any explanation, and involuntary medication began. *Id.* at ¶19.

On bypass, this Court concluded that the Court of Appeals had erroneously exercised its discretion by denying the stay motion without explaining its decision. *Id.* at ¶41. It noted that the court of appeals "should explain its discretionary decision-making to ensure the soundness of that decision-making and to facilitate judicial review." *Id.* at ¶40.

Scott makes this an easy case. The dual two-page orders issued by the Court of Appeals and a judge of the Court of Appeals, respectively, are devoid of reasoning. The only wrinkle in this case is that the Court of Appeals has promised to provide reasoning at a later date. But *Scott* shows that this is insufficient: the two justifications this Court identified requiring on-the-record explanations, "to ensure the soundness of [the] decision-making" and "to facilitate judicial review," are not served by a deferred-

explanation approach. Real-world consequences attend the issuance of a court order, and a party may (as in this case) have the need to seek immediate relief from those consequences. Without a reasoned explanation, assessment of the soundness of the decision-making and judicial review are virtually impossible. In *Scott*, which also involved emergency circumstances, the unexplained order led to the involuntary medication of the defendant. In this case, the unexplained orders mean WEC is excused from compliance with election law during the limited window before upcoming elections. Reasoning at some later, unknown date would not help the defendant in *Scott*, and it does not help the Petitioners here. In effect, the Court of Appeals is circumventing *Scott*'s clear rule.

The Court of Appeals' orders staying the writ of mandamus and contempt order are unreasoned and thus subject to vacatur under *Scott*.

II. Even If It Had Supplied Reasoning or Subsequently Does So, the Court of Appeals Has a Plain Duty Not to Issue Stays in this Case

This Court recently affirmed that "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." *Scott,* 382 Wis. 2d 476, ¶46 (citing *State v. Gudenschwager*, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995)

This is an exacting burden. There have been a number of recent cases before this Court involving hotly contested issues of public policy such as Act 10 and Voter ID. These cases ultimately resulted in reversal of circuit orders, but those orders were not stayed pending appeal.

And none of the factors for a stay are met here. Consequently, the Court of Appeals has a plain duty not to issue stays in this case. Even if a Writ issues based on failure to follow *Scott*, the Court of Appeals would presumably renew the stay and

offer its reasons. While the Petitioners could seek review, there is no basis on which such a stay could be issued. Given the urgency presented by this case, the Petitioners ask this Court to make clear that no such stays are warranted, *i.e.*, that the Court of Appeals has a plain duty not to issue them.

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

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*.

The Writ of Mandamus here was appropriate. The Respondents have made two arguments as to why they say 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 Respondents must make a determination that certain data is "reliable information." But the Respondents are wrong on both counts.

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

The Respondents have argued that the duty to deactivate voter registrations under Wis. Stat. § 6.50(3) does 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.

But 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. WEC has performed that duty:

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. WEC has performed that duty:

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. *See* Wis. Stat. § 5.05(15). Prior to 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").[3] Prior to Act 265, municipalities maintained their own voter registration lists. But all of that changed when Wisconsin went to a top-down system of voter registration.

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. WEC's actions to remove Movers from the rolls are therefore 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

[3] *See generally* Wisconsin Legislative Council, Act Memo for Act 265, https://docs.legis.wisconsin.gov/2003/related/lcactmemo/ab600.pdf (last visited January 16, 2019).

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. 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, e.g.*, *Kalal*, 271 Wis. 2d 633, ¶46.

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'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.

2. 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.

It is not the "reliability' of the information that WEC objects to, but what state law requires it to do with that information. It wants a more "relaxed" approach and so it seeks to pick and choose and modify its statutory obligations. But 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. If WEC believes that deactivating registrations after 30 days' notice is too harsh, then it can ask the legislature to adopt a different 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. 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 process by which it is to be verified and the conditions under which voter registrations

shall 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.[4]

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

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 warrant further action. We often act on information that is not perfect but is reliable enough to act upon. Sometimes we employ safeguards to provide for cases in which otherwise reliable information is wrong. The ERIC list is sufficiently reliable to ask voters to affirm their registration. This is particularly so in light of the fact that Wisconsin has same day registration. Thus, deactivation of registration does not result in disqualification or disenfranchisement of a single voter.

WEC's problem is that it wishes the legislature would have required different safeguards – namely, a longer time to respond. 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.

B. 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. And importantly, deactivation of an elector's registration pursuant to Wis. Stat. § 6.50(3) is *not* triggered when there is reliable information that a particular voter has moved. 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 (and, thus, having acknowledged that the ERIC information was reliable), 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.) WEC has a clear and unequivocal duty.

C. The Respondents have not shown they will suffer irreparable harm without a stay

To date the Respondents have not identified any irreparable harm that would justify staying the Circuit Court's order.

To attempt to show harm, the Respondents have relied primarily—almost exclusively—on the fact that there are elections coming up. But that is exactly why the Circuit Court granted the Writ of Mandamus and denied WEC's request for a stay. (App. 297-98.) The point is to clean up the voter rolls *before* the elections, consistent with the law in effect both before and after WEC made its unlawful decision. A stay allows the voter rolls for the upcoming elections to contain stale registrations, in violation of

state law. Thus, the upcoming elections cut *against* a stay, rather than for one.

Nor can any difficulty the Respondents might assert in timely complying with the Circuit Court's order be the basis for irreparable harm sufficient for a stay. The Circuit Court issued its decision on December 13, so the Respondents have already had weeks to comply with the Court's Order. If the Respondents have not begun to prepare, in the hopes of getting a stay, then that is on them. And the only reason any of this is necessary at this late stage is because the Respondents chose to disregard the process set forth by the legislature in the first place.[5]

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[5] The Respondents have at times argued that the Petitioners below sought removal of intra-municipality Movers but now seek only removal of inter-municipality Movers. But this action has never concerned intra-municipality Movers, who are covered by a different part of § 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. *See* Wis. Stat § 6.50(3). 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 Respondents have provided zero support for their more recent allegations that

The Respondents have also argued that following the statutory procedure and deactivating the stale registrations risks the erroneous removal from the voter rolls of thousands of Wisconsin voters.

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. (Pet.App. 289; *see also id.* at 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.

WEC would face difficulties in separating inter-municipality Movers from intra-municipality Movers. 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.

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 Respondents 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 Respondents 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 any suggestion that the deactivations will harm voters removed in error because they may not know about the removal and may fail to bring proof of residence with them when they vote for purposes of reregistration.

D. A stay will cause significant harm both to the Petitioners 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 registration list is properly maintained and updated. Wis. Stat. § 6.50.

Updating voter registration lists serves important functions. First, it produces an accurate result based on each eligible voter casting a single ballot in their proper jurisdiction. Second, it makes election administration (and, thus, voting) more efficient. It lowers the likelihood of lines at the polls, reduces voter confusion and decreases the number of provisional ballots.

Courts 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. The stays issued by the Court of Appeals undercut all of these legitimate state purposes by allowing WEC to retain outdated registrations for the upcoming elections in violation of state law.

A stay here would effectively leave on the voter registration list 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. 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. 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.

III. An Appeal is an Inadequate Remedy, and It is Impractical to Seek a Petition for Supervisory Writ in the Court of Appeals.

This Court has explained that it "will not issue a supervisory writ when an appeal provides an adequate remedy." *Kalal*, 2018 WI 25, ¶41. But for reasons already discussed, given the timing of this case and the relief sought an appeal is not an adequate remedy here. *See Dep't of Nat. Res.*, 380 Wis. 2d 354, ¶41.

Finally, per Wis. Stat. § 809.71, the Petitioners are required to explain to this Court "why it was impractical to seek the [supervisory] writ in the court of appeals." Obviously that approach is not possible where the Court of Appeals issued the challenged stays and is itself the subject of the requested supervisory writ.

IV. Grave Hardship and Irreparable Harm Will Result if this Court Does Not Issue a Supervisory Writ.

For the reasons stated in Part II-D above, which part discusses a factor virtually identical to this one, grave hardship and irreparable harm will result if this Court does not issue a supervisory writ.

V. The Petitioners Made this Request for Relief Promptly and Speedily.

There can be little dispute that this Petition was made in a timely manner, as it was filed one week after the harm giving rise to this request, namely the issuance of the challenged stays by the Court of Appeals.

VI. Temporary Relief is Appropriate while this Court Considers this Petition.

All of the factors relevant to a grant of temporary relief while this Court considers this petition have already been discussed and for simplicity's sake will not be repeated here: the Petitioners are likely to succeed on the merits; the Petitioners will suffer irreparable injury if the stays are not immediately lifted; temporary relief will not harm the Respondents or the public interest. *See Scott,* 382 Wis. 2d 476, ¶46 (citing *State v. Gudenschwager*, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995)).

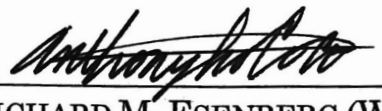
This Court should lift the stays issued by the Court of Appeals while it considers this petition.

CONCLUSION

For the foregoing reasons, this Court should lift the stays of the writ of mandamus and contempt while considering this Petition for Supervisory Writ, grant this petition, vacate the stays, and declare that the Court of Appeals has a plain duty not to issue stays pending disposition of this case in the Court of Appeals.

Dated: January 21, 2020.

Respectfully submitted,
WISCONSIN INSTITUTE FOR LAW & LIBERTY
Attorneys for Plaintiffs-Respondents-Petitioners



RICHARD M. ESENBERG (WI BAR NO. 1005622)
BRIAN MCGRATH (WI BAR NO. 1016840)
ANTHONY LOCOCO (WI BAR NO. 1101773)
LUCAS T. VEBBER (WI BAR NO. 1067543)
Wisconsin Institute for Law & Liberty
330 East Kilbourn Avenue, Suite 725
Milwaukee, Wisconsin 53202-3141
(414) 727-9455; rick@will-law.org
FAX: (414)727-6385

WIS. STAT. § 809.51(4) STATEMENT

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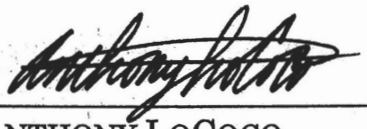

ANTHONY LOCOCO