Nos. 2019AP2397 and 2020AP112

In the Wisconsin Supreme Court

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,

DEFENDANTS-APPELLANTS-RESPONDENTS.

PETITION FOR REVIEW OF A DECISION OF THE COURT OF APPEALS DISTRICT IV

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Timothy Zignego, David W. Opitz and Frederick G. Luehrs, III, (the "Plaintiffs") respectfully petition the Wisconsin Supreme Court for review of the February 28, 2020 decision of the Court of Appeals in this case, pursuant to Wis. Stat. §§808.10 and 809.62 and, for the reasons in Section IV below, request that the Court do so on an expedited basis.

ISSUES PRESENTED FOR REVIEW

Issue 1: Does Wis. Stat. §6.50(3) apply to the Wisconsin Elections Commission ("WEC")?

Court of Appeals' Decision: The Circuit Court held that Wis. Stat. §6.50(3) placed a plain and positive duty on WEC to change certain voters' registration status from eligible to ineligible. WEC argued on appeal that the statute did not apply to and imposed no duty on WEC. This issue was directly addressed by the parties' respective briefs in the Court of Appeals. The Court of Appeals held that Wis. Stat. §6.50(3) does not apply to WEC.

Issue 2: Was it proper to order WEC to comply with Wis. Stat. §6.50(3) and, as is required by that law, to deactivate the voter registrations of voters within 30 days of sending them a notice and receiving no response?

Court of Appeals' Decision: The Circuit Court granted the Writ of Mandamus because WEC's obligation to comply with the statute was clear. This issue was raised in the parties' respective briefs in the Court of Appeals and the Court of Appeals held that

a Writ of Mandamus was not appropriate because of its conclusion that WEC had the discretion to determine if the information that particular voters had moved was reliable.

Issue No. 3: Was it proper to find WEC and certain of its commissioners in contempt for failing to comply with the Writ of Mandamus for 32 days after the Circuit Court granted the Writ, and for twice voting not to comply with the Writ?

Court of Appeals' Decision: The Circuit Court held WEC and three of the commissioners in contempt because they refused to comply with the Writ of Mandamus for 32 days during which the Writ was in force and no stay had been granted. The contempt issue was raised in the parties' respective briefs in the Court of Appeals. The Court of Appeals held that the finding of contempt was in error.

BRIEF STATEMENT OF CRITERIA FOR REVIEW

This is an action against WEC and five of the Commissioners of WEC,[1] (collectively the "Defendants"), based upon their failure and refusal to comply with state election law requiring them to ensure clean voter rolls in advance of the 2020 elections.[2]

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[1] The current sixth commissioner was not on WEC at the time WEC made the original decision not to comply with Wis. Stat. §6.50(3).

[2] Although the Circuit Court concluded that the Plaintiffs had standing to file their complaint, the Court of Appeals merely assumed without deciding that the Plaintiffs have standing. The Plaintiffs note they clearly have

Wis. Stat. §6.50(3) requires that upon receipt of reliable information that a registered voter has moved to a location outside of the municipality where he or she is registered, those election officials responsible for maintaining the rolls notify the voter by mail of that information. The voter then has the ability to respond that the voter has not moved and to affirm that the voter remains at the address on their voter registration. A voter who actually has moved is, of course, required to register at their new address. While these officials were once municipal clerks and a municipal board of election commissions existing in Milwaukee, the rolls are now maintained by a body of commissioners known as the Wisconsin Election Commission. Thus the clerks and election commissioners identified in §6.50(3) include WEC and its members and the obligations set forth in that section are obligations of WEC. Any other reading of the law would render §6.50(3) a dead letter because clerks and municipal election commissioners no longer maintain the rolls. Any other reading of the statute would render Wisconsin's maintenance of the rolls inconsistent with federal law.

In 2019, the Defendants received a report from the

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standing to bring their claims as both taxpayers and as electors. Here, the Plaintiffs allege an illegal expenditure of public funds by the Defendants. As noted in *S.D. Realty Co. v. Sewerage Commission of City of Milwaukee*, 15 Wis.2d 15, 21-22, 112 N.W.2d 177, 181 (1961) any illegal expenditure of public funds causes taxpayers to sustain a pecuniary loss and, thus, provides taxpayer standing. The Plaintiffs further have standing as electors under Wis. Stat. §5.06.

Electronic Registration Information Center ("ERIC") regarding Wisconsin voters who had moved. WEC reviewed and vetted that report and after determining it was reliable, sent out such notices to approximately 234,000 voters during the week of October 7-11, 2019. The issue in this case is what happens with respect to the voters who did not respond to the notice.

Wisconsin Statute §6.50(3) is very clear as to WEC's duty if a voter does not respond to the notice: "If the elector . . . 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 the mandatory language in the statute, the Defendants have decided that if voters did not respond to the notice, WEC would not change the voter's registration from eligible to ineligible status until sometime between 12 months and 24 months (depending on where Wisconsin is in the election cycle when the notices are sent) after the notice was mailed and not responded to, rather than in 30 days as required by the statute. So although WEC does intend to comply with the legislative directive that it deactivate the voters in question, it has decided that it need not do so on the schedule specified by the statute. As a result, election officials have received reliable information that thousands of people may now reside at an address different from their

registered voting address and yet the mandate of §6.50(3) has not been followed.

The case presents important election law issues for the State of Wisconsin and involves the interpretation of a statute that has never been interpreted by any court. This case meets the criteria for a petition for review because:

1. There are no published cases in Wisconsin that consider the meaning or application of Wis. Stat. §6.50(3). How the statute is interpreted and applied impacts the voting rights of Wisconsin voters and the integrity of Wisconsin elections. Because this is a case of first impression, a decision from this Court interpreting the statute will clarify the law and have statewide impact. Wis. Stat. §809.62(1r)(c)2.

2. By statute, Wisconsin now participates in and receives reports from ERIC regarding what are referred to as "Movers." This refers to Wisconsin residents who have actually reported an address different from their voter registration address *in an official government transaction*. The questions presented here will recur each year that WEC receives a Movers report from ERIC and has to take action based on the report.[3] The issues are not factual in nature, but are questions of law of the type that will recur unless

[3] Although not raised in this case, Wis. Stat. §6.36(1)(ae) requires WEC to enter into an agreement with ERIC, and then to comply with the terms of that agreement. This statute delegates legislative powers to WEC without any oversight from the Legislature, and violates the nondelegation doctrine.

resolved by the Supreme Court. Wis. Stat. §809.62(1r)(c)3.

3. With respect to the part of the Court of Appeals decision reversing the finding of contempt, the issue is a novel one, the resolution of which will have statewide impact. Wis. Stat. §809.62 (1r)(c)(2).

STATEMENT OF THE CASE

On October 16, 2019, the Plaintiffs filed a verified complaint with WEC asking WEC to follow state law. (Pet.App. 164; Ct. App. Dec. at ¶16.) The Plaintiffs asked that WEC take this action in advance of the Spring Primary Election scheduled for February 18, 2020. On October 25, 2019, WEC dismissed the complaint without addressing it on the merits, in part citing potential "prejudice" to "the rights and duties of Commission staff." (Pet.App. 164.)

The Plaintiffs thereafter filed suit against the Defendants in Ozaukee County Circuit Court, asking the court for a preliminary injunction or, alternatively, a Writ of Mandamus. (R. 1.)[4] On December 13, 2019, the Circuit Court concluded that a Writ of Mandamus should issue because the Defendants had a "plain and positive duty" under Wis. Stat. §6.50(3) to deactivate the registration of non-responsive Movers. (Pet.App. 146) The Court declined the Defendant's request for a stay of the decision, noting

[4] Citations to the Record, such as this, are to the record transmitted for Appeal No. 2020AP112. Since this appeal was consolidated, the Circuit Court record was transmitted twice, and the 2020AP112 record is the most recent at the Court of Appeals.

the "very tight time frame" and the "importan[ce] that the Commission" begin complying with the law. (Pet.App. 155.)

On December 16, 2019, the Defendants held a meeting, but took no action to comply with the Writ of Mandamus. (Pet.App. 156.) The Circuit Court signed its order issuing a Writ of Mandamus on December 17, 2019. (Pet. App 146.) That same day, the Defendants appealed and asked the Court of Appeals for a stay of the Circuit Court's Writ of Mandamus. The Court of Appeals denied the Defendants' request for *ex parte* relief and ordered a response from the Plaintiffs, which was then timely filed. (R. 84.)

On December 30, 2019, WEC again convened, and again took no action to comply with the Writ of Mandamus. (Pet.App. 156-158.)

In light of the upcoming elections and the Defendants' repeated refusal to comply with the Circuit Court's Writ, on January 2, 2020, the Plaintiffs filed a motion in the Circuit Court to hold the Defendants in contempt of court. (R. 93.) After a hearing, the Circuit Court issued a contempt order on January 13, 2020, denying the Defendants' request for a stay of the order. (Pet.App. 148.)

On January 14, 2020, the Court of Appeal stayed both the Writ of Mandamus and the Contempt Order. (*See* Ct. App. Orders of January 14, 2020, R. 120 and R. 122.) On February 28, 2020, the Court of Appeals issued a decision on the merits reversing the

Circuit Court both with respect to the Writ of Mandamus and the finding of contempt. (Pet.App. 101.)[5]

STATEMENT OF FACTS

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. 167; Ct. App. Dec. at ¶¶7-8.)

As part of ERIC, Wisconsin receives reports regarding what are referred to as "Movers." (Pet.App. 168; Ct. App. Dec. at ¶10.) This refers to Wisconsin residents who have reported an address different from their voter registration address *in an official government transaction*. (*Id.*) Every voter identified as a mover in the ERIC report has provided information indicating that he or she resides at an address other than the one at which they are registered to vote.

After receiving the report on Movers from ERIC, WEC then undertakes an independent review of the "Movers" information to ensure its accuracy and reliability. (Pet.App. 187.) Once WEC reviews the information from ERIC, then WEC sends a notice to those voters at the address on their voter registration and asks

[5] As this Court is aware, the Plaintiffs twice sought discretionary review by this Court while these events unfolded. (R. 105 (Petition to Bypass, filed December 20, 2019)); *Zignego v. Wisconsin Court of Appeals*, No. 2020AP123-W (Petition for Supervisory Writ, filed January 21, 2020).

them to affirm whether they still live at that address. (Pet.App. 168.)

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.)

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. 187.) 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. 196.)

Despite being aware of the statute and acknowledging the appropriate process, the Defendants 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. 181.)

Thus, the Defendants are 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 and they are allowing absentee ballots to be requested in the names of persons who are no longer eligible to vote at their registered address.

ARGUMENT

This case primarily involves the proper interpretation of Wis. Stat. §6.50(3). The Circuit Court correctly recognized that this case raises questions of first impression in this state: whether Wis. Stat. §6.50(3) requires WEC to deactivate the registrations of

Movers who fail to apply for continuation of registration within 30 days of the date WEC mails them notice. (Pet.App. 150-153.) Neither of the parties to this appeal, nor the Court of Appeals in its February 28, 2020 decision, have cited any cases interpreting the relevant statutory provision, further confirming that this is, in fact, a case of first impression.

Moreover, the questions of law presented herein are of enormous importance to Wisconsin elections and to the rule of law. This case is not about whether it is a "good idea" to maintain accurate voter rolls by removing registrations for voters who appear to have moved to a new address. The Legislature has decided that, and the law requires it.[6] The legal questions here are whether (1) this unambiguously stated statutory obligation applies to WEC, the agency that the Legislature, in order to comply with federal law, has charged with maintenance of the state voter rolls, (2) if it does, whether that agency has the power to refuse to comply with that obligation; and (3) what consequences exist, if any, when a party refuses to comply with a Court Order?

I. Wis. Stat. §6.50(3) applies to WEC.

The Court of Appeals concluded that WEC has no duty under

[6] Notwithstanding that the policy choice has been made, it is easy to see why the Legislature wants accurate rolls, and this has been a policy goal at the federal level as well. *See e.g.,* the Help America Vote Act of 2002, Pub. L. 107-252, October 29, 2002, codified at 52 U.S.C. §§20901-21145.

§6.50(3) and that instead the duty to deactivate voter registrations falls solely on municipal clerks and *municipal* boards of election commissioners. If this Court does not review and reverse that decision it would be directly undercutting the legislative policy decision set forth in §6.50(3) and promises chaos in future election administration. As shown below, if WEC does not have the duty to perform the statutory obligations set forth in §6.50(3) then no state agency does and, under federal law, no municipal entity can be granted the power to do so.

In 2003, Wisconsin moved from local voter registration lists to a statewide list in order to comply with the Help America Vote Act ("HAVA"). Just what this means is informed by HAVA's purposes and requirements. It mandates that states have statewide voter registration lists maintained and administered by the chief election official in the state in a uniform and nondiscriminatory manner. *See*, 52 U.S.C 21083. As a result, the 1,850 municipal clerks in Wisconsin[7] lack the legal ability to administer the lists and, even if they had the ability, decisions with regard to the statewide list made by 1,850 different people would result in chaotic administration of the list and inconsistent treatment of registered voters throughout the State (again in violation of the federal requirement for administration in a

[7] "Directory of Wisconsin Clerks," Wisconsin Election Commission, available at: https://elections.wi.gov/clerks/directory

uniform and nondiscriminatory manner). Thus, the argument, made by the Court of Appeals, that "maintaining" the rolls might not include removing those who are thought to have moved and have not responded to a notice is without support both in the ordinary meaning of the verb "to maintain," the structure of Wisconsin's election law after 2003 and the dictates of HAVA which prompted those changes.

Having determined that WEC will maintain the rolls, the Legislature has commanded that it, and not municipal clerks and municipal boards of election commissioners, be part of ERIC and receive the ERIC reports. What is the point of that if WEC cannot act on that information? Further, as mandated by federal law, the Legislature has commanded that WEC, and not municipal clerks and municipal boards of election commissioners, has the obligation to compile and maintain the state-wide voter registration list. Wis. Stat. §6.36(1). How is WEC to carry out that obligation if the 1,850 municipal clerks and municipal boards of election commissioners are making their own separate decisions as to when and how to deactivate movers from the voter registration lists and doing so in different and potentially inconsistent ways?

The Court of Appeals ignores all of these critical points and concludes 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 the Court of Appeals is wrong.

The starting point in interpreting §6.50(3) is this Court's decision in *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶45, in which this Court said that in interpreting statutes "Statutory language is given its common, ordinary, and accepted meaning, except that technically or specially-defined words or phrases are given their technical or special definitional meaning."

The Court of Appeals completely discounts the first half of this rule of construction and skips immediately to the second half. (Ct. App. Dec. at ¶70.) The Plaintiffs have consistently argued that in ordinary parlance, a body of six commissioners charged with administering elections is a board of election commissioners. The Court of Appeals says that the Plaintiffs cite no authority for that proposition, but it is clear that the term was understood by WEC, itself, that way and by the Circuit Court and it is not clear what other authority could be cited other than common sense.

Moreover, when the Court of Appeals skips to the second half of this Court's rule of construction, it fails to show that the phrase "board of election commissioners" is a technical phrase of any sort and it admits that it is **not** a defined term in the statutes. (Ct. App. Dec. at ¶74.) The Court of Appeals says that the absence of a definition does not compel the conclusion argued by the

Plaintiffs (*id.*), but this gets the questions backward. *Kalal* makes clear that statutes are to be construed in accordance with their ordinary meaning unless they use special or technical terms. The Court of Appeals must find a legislative direction that "board of election commissioners" has a technical or defined meaning such that it can only refer to a municipal board of election commissioners such as that created by §7.20.

The Court of Appeals also says that the phrase "board of election commissioners" as used in §6.50(3) is unambiguous (Ct. App. Dec. at ¶36.), but it ignores the following ambiguities that arise under its interpretation:

- The Court of Appeals starts its reasoning by positing that when the Legislature means to refer to WEC that it always uses the terms the "commission" but that is not so. For example (as the Court of Appeals itself acknowledged), it sometimes calls it the "elections commission." See, Wis. Stat. §§5.01(4)(a), 5.05(2w). 5.40(7), 5.58(2m), 5.60(1)(b) and 6.275(1)(f). Why couldn't it also call it the "board of election commissioners" in other places?
- The Legislature used the phrase "board of election commissioners of any municipality" in Wis. Stats. §6.36(1)(c) and "municipal board of election commissioners" in §5.40(7) as opposed to just "board

of election commissioners," showing that the Legislature knew how to specify a municipal board of election commissioners when it wanted to do so. In any event, such as use of the term "elections commission" did for WEC, it belies any conclusion that "board of election commissioners" always refers to a municipal body.

- The Court of Appeals places emphasis on the fact WEC is a "commission" and not a "board" and then concludes because it is not a board, it cannot be a "board of election commissioners" but under the Court of Appeals' reasoning there could never be such a thing as a "board of elections commissioners." Boards have "members" and not "commissioners." Wis. Stat. §15.07. But if, as the Court of Appeals suggests, there was a distinction between "boards" and "commissions" such that one can never be the other, then "board of elections commissioners" would be an oxymoron. It isn't.
- If the Legislature meant "board of election commissioners" to mean a municipal board of election commissioners and not WEC, why did the Legislature order WEC (and not the municipal boards of election commissioners) to belong to ERIC and to get the

Movers reports? And why did the Legislature order WEC (and not the municipal boards of election commissioners) to be responsible for the maintenance of the voter registration lists?

The Court of Appeals' decision never explains how the statute can "unambiguously" refer solely to a municipal board of election commissioners given these facts, but the bigger problem with the Court of Appeals decision is that it goes too far. Because under the Court of Appeals logic there can be no such thing as a state board of elections commissioners, there could be no state agency that could ever perform the obligations imposed by the statute, and, as a matter of state and federal law, there is no municipal entity with the power to do so.

52 U.S.C. §21083 (part of HAVA) states as follows:

> each State, acting through the chief State election official, shall implement, in a uniform and nondiscriminatory manner, a single, uniform, official, centralized, interactive computerized statewide voter registration list defined, maintained, and administered at the State level.

Under federal law, Wisconsin's voter registration list **must** be administered by the chief State election official (which is the Administrator of WEC, *see* Wis. Stat. §5.05(3g)) and must be maintained and administered in a uniform and nondiscriminatory manner at the State level. It is impossible to comply with federal law and interpret §6.50(3) to say that the 1,850 municipal clerks

and municipal boards of election commissioners and not WEC are responsible for maintaining and administering the list with respect to Movers. That would certainly violate the provision that requires the State to act through the chief election official and almost certainly violate the provision requiring the list to be administered in a uniform and nondiscriminatory manner at the State level.

Once Wisconsin moved to a statewide voter registration list in 2003, in order to comply with HAVA,[8] it was no longer the responsibility of (or within the power of) local municipalities to manage the lists. 2003 Wisconsin Act 265 ("Act 265") created Wis. Stat. §5.05(15) to read:

> 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.

The "board" referred to in Act 265 refers to the State Elections Board that existed at the time and the duty described in §5.05 in the current version of the statutes now applies to WEC. The Court of Appeals conclusion that §6.50(3) empowers municipal boards of election commissioners and not WEC to deactivate

[8] *See generally* Wisconsin Legislative Council, Act Memo for Act 265, https://docs.legis.wisconsin.gov/2003/related/lcactmemo/ab600.pdf (last visited December 19, 2019).

registrations from the statewide voter registration list simply ignores state and federal law.

The Court of Appeals said that the Plaintiffs seek to depart from the text of the statute in determining its interpretation. (Ct. App. Dec. at ¶36.) Nothing could be further from the truth. The Plaintiffs argue for a textualist approach but textualism is not a deracinated exercise resembling John Godfrey Saxe's six blind men from Indostan who attempt to describe an elephant by focusing on only one of its parts, (JOHN GODFREY SAXE, *The Blind Men and the Elephant*, *in* THE POEMS OF JOHN GODFREY SAXE, 259-261 (1873)), Textualism requires consideration of the context in which words are used. *See* Antonin Scalia and Bryan A. Garner, *Reading Law*, 167 (2012) ("Context is a primary determinant of meaning. A legal instrument typically contains many interrelated parts that make up the whole. The entirety of the document thus provides the context for each of its parts.")

In context, it makes perfect sense to read "board of election commissioners" to include WEC. After 2003, it became the entity created for the purpose of maintaining the registration list and enforcing state election law, Wis. Stat. §§5.05(1) and (15) and that has the responsibility under federal law to do so.

On the flip side, in context, it makes no sense to read Wis. Stat. §6.50(3), as the Court of Appeals did, to mean that only municipal clerks and municipal boards of election commissioners

(as opposed to WEC) have the duty to change the registration of voters who do not respond to the relevant notices. Such a reading renders the statute meaningless because such municipal boards no longer have the power to do so.

This reading would thus effectively and implicitly repeal the obligation imposed by Wis. Stat. §6.50(3). It is well-established that such readings are to be avoided where possible—courts give the legislature more credit than to assume that they accidentally or silently undid their own work. *See, e.g.*, *State v. Villamil*, 2017 WI 74, ¶37, 377 Wis. 2d 1, 898 N.W.2d 482 ("[I]mplied repeal is a disfavored rule of statutory construction.").[9]

The Court of Appeals decision in this case places the maintenance and administration of the state voter rolls in chaos. The Legislature has issued a clear directive as to how the maintenance of the rolls is to be performed but the Court of

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[9] In contrast, reading Wis. Stat. §6.50(3) to include WEC does not render meaningless that subsection's *additional* references to municipal clerks or boards of election commissioners besides WEC. The provision preserves flexibility by simply imposing its obligation on whatever state or local entity currently possesses the duty of maintaining the voter registration list. For the reasons already discussed that entity is WEC. But the broad wording of §6.50(3) both (1) affords the legislature the ability to reorganize aspects of election administration in the state without having to amend this provision and (2) affords WEC the ability to delegate tasks related to Wis. Stat. §6.50(3) to local election entities consistent with its authority under Wis. Stat. §5.05(15). Viewed chronologically, in other words, the legislature has acknowledged that given Wis. Stat. §6.50(3) broad wording, amending the provision following Wisconsin's transfer to a "top-down" system run by WEC was simply unnecessary.

Appeals' decision results in a conclusion that there is no agency or entity that can maintain the rolls in that manner.

The decontextualized nature of the Court of Appeals' reading is illustrated by the fact that those involved in actually administering the system have never acted as if municipal clerks and municipal boards of election commissioners have had a role to play in enforcing the requirements of §6.50(3). The point is not that the Court should defer to an agency interpretation of the law but that the actual practice of those who must administer the law belies the Court of Appeals' reading.

The Circuit Court asked both counsel at oral argument the following question:

> I want to ask both of you. This is a statute that has absolutely no case law, never been interpreted. But has either one of you seen a municipal clerk or an elections commission do anything with the notice under 6.53 [sic], or has it always been done by the Wisconsin Election Commission through their employees? Anything on that?

(Pet.App. 152-153.)

Neither counsel was able to point to any instance of a *municipal* clerk or a *municipal* board of elections commissioners taking any action under this statute to send out notices to movers or to deactivate movers who failed to respond to such notices.

Instead, the undisputed evidence was that:

1. WEC, not any municipal clerk or municipal board of election commissioners, receives the Movers list from ERIC. (Ct. App Dec. ¶10.)

2. WEC, not any municipal clerk or municipal board of election commissioners, sent the notices to movers in 2017 and in 2019. (Pet.App. 168-169; Ct. App Dec. ¶¶11 and 14.)

3. 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. (Pet.App. 196.)

Further, it is undisputed that:

1. WEC, and not any municipal clerk or municipal board of election commissioners, has the statutory authority and the duty to compile and maintain the voter registration list. Wis. Stat. §6.36(1).

2. It was WEC, and not any municipal clerk or municipal board of election commissioners that actually changed the registration of the voters who received notices under this statute in 2017. (R. 23:6.)

3. 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 (R. 23:9.)

In discounting these undisputed facts, the Court of Appeals ignored the following very practical question – if WEC, the recipient of ERIC data and custodian of Wisconsin's voter registration list, is not the agency with the duty to perform the obligations set forth by the Legislature in §6.50(3), how will the Legislature's policy decision regarding clean voter lists be carried out?

This Court should accept this case for review to make sure that the policy decisions made by the Legislature are honored by the courts and that there remains an effective manner for maintaining the state voter rolls in a consistent and efficient manner.

II. The Writ of Mandamus was properly issued

The Court of Appeals concluded that the Writ of Mandamus was not properly issued because the Plaintiffs had allegedly not established a positive and plain duty on behalf of WEC to deactivate the registrations of the movers who had not responded to the notice from WEC. The Court of Appeals reasoned that because WEC had the discretion to determine if the information in the movers list from ERIC (as reviewed and vetted by WEC staff) was reliable, mandamus was an inappropriate remedy.

The Court of Appeals was correct that in order for a writ of mandamus to be issued, four prerequisites must be satisfied: (1) a

clear legal right must exist (2) there must be a positive and plain duty on behalf of the defendant (3) substantial damages must exist, and (4) there is no other adequate remedy at law. *Pasko v. City of Milwaukee*, 2002 WI 33, ¶24 *citing Law Enforcement Standards Bd. v. Village of Lyndon Station,* 101 Wis.2d 472, 494, 305 N.W.2d 89 (1981).

But in reversing the Writ of Mandamus in this case on the ground that there was no positive and plain duty on the part of WEC, the Court of Appeals read the statute incorrectly.

A. The Court of Appeals misreads the statute.

The statute contains two different obligations relevant here. The language of the statute broken down into those two different obligations is as follows:

1. 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.

2. 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.

We will refer to the first obligation as the "notice obligation" and the second obligation as the "deactivation obligation." Under

the statute, it is the notice obligation (and only the notice obligation) that contains the reliability criterion. The notice obligation requires WEC to send notices if the information is reliable. Thus, WEC had to make the reliability determination prior to sending the notices. By sending the notices, WEC has acknowledged that the information is reliable. And, in fact, WEC has conceded in writing that the Movers list is "largely accurate." (Pet.App. 176 ("the in-state movers data is a largely accurate indicator of someone who has moved or who provided information to the post office or DMV which make it appear that they moved…").) WEC having made the reliability determination and having complied with the notice obligation, the deactivation obligation then exists if the voter does not reply to the notice.

The deactivation obligation is absolute and unqualified. The Court of Appeals itself points to no discretionary decision that must be made by WEC with respect to the deactivation obligation. The statute uses the word "shall" and the word "shall" is presumed to be mandatory. *Vill. of Elm Grove v. Brefka*, 2013 WI 54, ¶23, 348 Wis. 2d 282, 832 N.W.2d 121, *amended*, 2013 WI 86, 350 Wis. 2d 724, 838 N.W.2d 87. Once WEC sent the notices it had a plain and positive legal duty to change the registration from eligible to ineligible for voters who did not respond to the notice.

This Court should accept this case for review in order to correct the Court of Appeals misreading of the statute and to

ensure that WEC's administration of the process is consistent with the legislative mandate.

B. In any event, the ERIC data is objectively "reliable" and, thus, WEC has a positive and plain duty.

In addition to misreading the statute, the Court of Appeals misconstrues the meaning of the term "reliable" in the context of §6.50(3). The particular data at issue in this case is objectively reliable.

The first indicia of reliability here is that the Legislature required WEC to join ERIC and pay for and use ERIC reports for the purpose of obtaining this data. The Legislature, at least, believes that ERIC reports are reliable.

Second, it is clear that the Legislature, in choosing the term, did not mean that reliable information must be "perfect" or in no need of verification. Wis. Stat. §6.50(3) clearly contemplates that "reliable" information need not be 100% accurate.

It requires that this "reliable" information be verified (by notice to the voters with an opportunity to respond) and sets forth the particular process by which it is to be verified and the conditions under which voter registrations may be deactivated. If "reliable" meant perfect or sufficiently accurate to be acted upon without additional verification, there would be no need for this verification process or for restrictions on the deactivation of registrations. "Reliable" in the context of the statute means

sufficiently accurate to trigger the notice requirements of Wis. Stat. §6.50(3).

Third, the source of the data in the ERIC Movers report is the voters, themselves. Every individual on the "movers" list got there because *they* reported a new address in an *official government transaction*. Thus, the Court of Appeals was wrong to conclude that Plaintiffs are calling for some type of a "group" or "collective" determination of reliability. Each person who is on the Movers list is there because of individual information that he or she has provided. In fact, it was the Court of Appeals that applied a collective determination of reliability, concluded that because some small percentage of Movers had not moved then none of the information on the Movers List is reliable. But, as noted above, perfection is not what the notice provisions of §6.50(3) requires.

Fourth, WEC's own data shows the following: In 2017, WEC sent notices to 341,855 potential "movers" based upon ERIC data. 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. (Pet.App. 169-171.) 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%. Given the structure of Wis. Stat. §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 or treatment. And it is certainly sufficiently reliable to ask voters to affirm their registration.

Finally, to the extent that the Court of Appeals concerns about the reliability of the data are tied to the possible disenfranchisement of voters due to the consequences of having registrations at old addresses deactivated, it must be remembered that Wisconsin has same day registration. Thus, deactivation of a voter's registration at an old address does not result in disqualification or disenfranchisement of any voter.

The ERIC movers data is objectively reliable and Wis. Stat. §6.50(3) confers a plain duty upon WEC to act upon receipt of that data. The Court of Appeals decision reduces to a conclusion that "reliable" must essentially mean "infallible." That is not what that word means either in the abstract or in the context of a statutory scheme that requires voters to request that their registration be continued if they have not moved.

III. The Contempt Order was proper

Having established that the Writ of Mandamus was proper, there is no question that the Contempt Order was as well. The Court of Appeals' conclusion to the contrary is shocking given that the WEC commissioners voted twice to *intentionally disobey* the Writ of Mandamus. Having been denied a stay from the Circuit

Court, the Defendants sought a stay from the Court of Appeals but making that request did not absolve them from complying with the Writ while their request for a stay was pending before the Court of Appeals.

A. Facts relating to finding of contempt.

On December 13, 2019, the Circuit Court issued its oral decision ordering a Writ of Mandamus that the Defendants comply with Wisconsin Statute §6.50(3) with respect to notices that had been sent to approximately 234,000 voters in October, 2019. (Pet.App. 154.) On January 14, 2020, the Court of Appeals issued a stay of the Writ of Mandamus. (R. 122.)

Between December 13, 2019 when the Circuit Court first granted the Writ of Mandamus and January 14, 2020 when the Court of Appeals granted the stay of the Writ the following occurred:

1. On December 16, 2019 the Defendants met to decide how to respond to the Circuit Court's Order. A motion was made at the meeting to immediately comply with this Court's Mandamus Order but the motion was not adopted.

2. The Defendants met again on December 30, 2019 for the express purpose of determining how to proceed with respect to the Circuit Court's Mandamus Order. The Defendants again decided not to comply and noted on the WEC website in the "Latest News" section that "At a special meeting today, the Wisconsin Elections Commission did not pass any motion directing staff to take action on the movers mailing list." https://elections.wi.gov/ (see also Pet.App. 157-158.)

3. The Circuit Court noted at the contempt hearing that one of the Defendants had stated in public that the Circuit Court's Order was just one person's opinion of what the law is. (Pet.App. 159-160.)

4. On January 13, 2020, the Circuit Court found WEC and Commissioners Glancey, Jacobs and Thomsen (collectively the "Contemnors") in contempt. (Pet.App. 148.)

For a period of 32 days (between the Circuit Court's December 13 oral decision and the Court of Appeals' grant of a stay), the Defendants intentionally refused to comply with the Circuit Court's Order because they thought it was wrong and because they believed that they would ultimately get a stay from the Court of Appeals. There is no way around it: they were scofflaws. By excusing that conduct the Court of Appeals places all future court orders in jeopardy.

B. The Defendants were obligated to comply with the Circuit Court's Mandamus Order unless and until it was stayed.

The Court of Appeals focuses on the wrong period of time when it says that the Contempt Order was only in effect for one day before it was stayed. The Circuit Court's *Mandamus* Order was in effect for 32 days - from December 13, 2019 until January 14, 2020 when it was stayed. The question at issue here is: were the Defendants exempt from compliance with the Circuit Court's Mandamus Order during that period of time or were they in

contempt for not complying? The Court of Appeals concludes that the Defendants were not required to comply because the Writ was overbroad. (Ct. App. Dec. ¶¶106-107.) But that is not the case.

The Writ contains a simple order: "to comply with the provisions of Wis. Stat. §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." This provision is clear and is not overbroad.

The Court of Appeals suggests that there is a problem with so-called "intra-city" movers on the movers list; i.e. voters who moved within a municipality as opposed to outside a municipality. The Court of Appeals points out that Wis. Stat. §6.50(3) deals differently with voters who move within a municipality than movers who move outside of their existing municipality. Under the statute, "intra-city" movers have their registrations deactivated at the old address and then are automatically reregistered at their new address.

The Writ of Mandamus is not to the contrary and simply requires WEC "to comply with the provisions of §6.50(3)." If there are intra-city voters on the movers list,[10] then §6.50(3) requires WEC to deactivate those voters at their old address and reregister them at their new address and the Writ of Mandamus simply

[10] The Defendants never established in the record how many, if any intra-city movers were on the movers list.

requires WEC to fulfill that plain statutory duty. WEC should have done this long ago (back in October, 2019) and there is nothing wrong with requiring WEC to do so now.

There are two critically important points here. The first is that the Mandamus Order was in effect until stayed and the Defendants were legally obligated to comply with it (whether or not they thought it was likely to ultimately be reversed). *Wisconsin Employment Relations Bd. v. Milk & Ice Cream Drivers & Dairy Emp. Union, Local No. 225*, 238 Wis. 379, 299 N.W. 31, 41 (1941), citing *State ex. rel. Attorney General v. Fasekas*, 223 Wis. 356, 358, 269 N.W. 700, 701 (1936) ("Whether the order was right or wrong, it was the duty of the defendant to obey it until relieved therefrom in some one of the ways prescribed by law.") If this Court reverses the Court of Appeals, then it should reinstate the contempt order. Even if it does not, there ought to be consequences for over a month of refusing to comply with an existing court order.

IV. The Plaintiffs request that this Court decide this Petition and handle the resulting appeal on an expedited basis.

Plaintiffs do not ask that this Court act prior to the April election. There is simply not enough time for that. But the Plaintiffs do respectfully request that this Court expedite its review of this Petition, and if granted, issue an expedited schedule for briefing and oral argument.

The Partisan Primary election is August 11, 2020. Pursuant to Wis. Stat. §7.10(3)(a), county clerks must distribute ballots to municipal clerks no later than 48 days before the primary, which is June 24, 2020.

Pursuant to Wis. Stat. §7.15(1)(cm), Municipal Clerks must distribute those ballots to all who have requested an absentee ballot by mail, and to each military elector, and overseas elector who has requested one no later than the 47th day before the partisan primary, which is June 25, 2020 (which is a Thursday).

The Defendants have previously stated it will take approximately three business days to deactivate voters on the list. (R. 93:11.) Thus, it is likely that the latest date by which this Court could grant the Plaintiffs' requested relief and reinstate the Writ so as to be effective prior to the August 11th primary would be approximately June 19, 2020 (which is the Friday prior to June 25th), otherwise ballots will be mailed to voters who may not even be eligible to vote in the election at the addresses where they are registered.

Importantly, the Plaintiffs have moved expeditiously to obtain relief throughout this litigation. Among other actions: (1) they filed their complaint within one week of WEC's final decision to implement its unlawful conduct by sending the October 2019 Notices to voters between October 7 and October 11, 2019; (2) they filed their lawsuit less than one month after WEC's rejection of

their complaint; (3) they sought and obtained a judgment just one month after that; (4) they sought and obtained a contempt order to force WEC to comply with the judgment approximately one month later in light of the upcoming elections; (5) they (unsuccessfully) sought to bypass the court of appeals; and (6) they filed this petition for review promptly following the decision of the Court of Appeals. The Plaintiffs have done everything reasonably possible to bring this litigation to a resolution before the fall elections, but WEC's actions have left them only so much time.

In light of the election schedule, the Plaintiffs respectfully request that this Court expedite review of this Petition, and if granted, handle this appeal on an expedited basis that allows for a decision within these time constraints.

CONCLUSION

For the reasons stated herein, the Plaintiffs request grant their Petition for Review and to handle the Appeal on an expedited basis.

[Signature on next page]

Dated this 11th day of March, 2020.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this Petition of Review conforms to the rules contained in section 809.19(8)(b) and (d) for a brief produced with proportional serif font. The length of this petition complies with section 809.62(4) and is 7998 words, calculated using the Word Count function of Microsoft Word 2013.

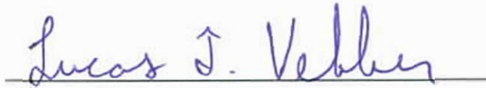
Dated this 11th day of March, 2020.

LUCAS T. VEBBER

CERTIFICATION OF ELECTRONIC FILING

I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of sections 809.19(12) and 809.62(4). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with this Court and served on all opposing parties.

Dated this 11th day of March, 2020.



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