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STATE OF WISCONSIN CIRCUIT COURT OZAUKEE COUNTY

Timothy Zignego
David W. Opitz
Frederick G. Luehrs, III

PLAINTIFFS

Case No: 19-CV-449

vs.

Wisconsin Election Commission,
Marge Bostelmann, Julie Glancey,
Ann Jacobs, Dean Knudsen
Mark Thomsen

DEFENDANTS.

**PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR A TEMPORARY INJUNCTION
OR IN THE ALTERNATIVE FOR A WRIT OF MANDAMUS**

INTRODUCTION

This is an action against the Wisconsin Election Commission (“WEC”) and five of the Commissioners of the Wisconsin Election Commission (the “WEC Commissioners”), (collectively “the Defendants”), based upon the Defendants’ failure and refusal to comply with state law.

Wisconsin Statute § 6.50(3) requires that upon receipt of reliable information that a registered voter has moved, WEC shall notify the voter by mail of that information. The voter then has the ability to respond by informing WEC 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. The Defendants 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 do not respond to the notice.

Wisconsin Statute § 6.50(3) is very clear as to WEC's duty if the 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 do not respond to the notice, WEC will 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 the 30 days as required by the statute.

On October 16, 2019, the Plaintiffs filed a complaint with WEC asking WEC to revoke that decision and to instead follow state law. 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. The Plaintiffs now seek relief from this Court. This brief is submitted in support of the Plaintiffs' motion for a temporary injunction, or in the alternative, for a writ of mandamus requiring the Defendants to comply with their duties under state law.

By law, WEC should be taking the action required by Wis. Stat. § 6.50(3) at some time during the week of November 11, 2019 (which would be 30 days after the notices were sent during the week of October 7, 2019). If WEC followed the law that would mean that the voter registration rolls would be in compliance with the law well prior to the Spring Primary Election scheduled for February 18, 2020. But the Defendants are refusing to follow the law. This brief is submitted in support of Plaintiffs motion for a temporary injunction, or in the alternative, for a writ of mandamus, requesting that the Court put the Plaintiffs in the same position as they would be in if

WEC had complied with the law in the first instance – i.e., with up to date voter registration rolls prior to the next scheduled election as mandated by statute.

BACKGROUND FACTS

The Parties

1. The Plaintiffs are three voters and taxpayers who assert that the Defendants are acting contrary to law. (Complaint ¶¶ 5-8.)

2. The Defendants are the Wisconsin Election Commission, the state agency charged with the responsibility for the administration of Chapters 5 and 6 of the Wisconsin Statutes and other laws relating to elections and five of the Commissioners of the Wisconsin Election Commission sued in their official capacities. (Complaint ¶¶ 9-10.)

Nature of the Complaint

3. 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. (WEC Staff Report dated March 11, 2019, page 1, McGrath Aff. Ex. B.)

4. As part of ERIC, Wisconsin receives reports regarding what are sometimes referred to as “Movers.” (WEC March 11, 2019 Staff Report, page 2.) This refers to Wisconsin residents who have actually reported an address different from their voter registration address *in an official government transaction*. (*Id.* at 2-3; WEC Training Materials at slides 3-4, McGrath Aff. Ex. D.)

5. After receiving the report on Movers from ERIC, WEC undertakes an independent review of the “Movers” information to ensure its accuracy and reliability. (WEC Training Materials at slides 5-6, McGrath Aff. Ex. D.)

6. Once WEC reviews the information from ERIC, then as required by Wisconsin law, WEC sends a notice to those voters, at the address on their voter registration, and asks them to affirm whether they still live at that address. (WEC March 11, 2019 Staff Report, page 2, McGrath Aff. Ex. B.) 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.*)

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

Upon receipt of reliable information that a registered elector has changed his or her residence to a location outside of the municipality, the municipal clerk or board of election commissioners shall notify the elector by mailing a notice by 1st class mail to the elector's registration address stating the source of the information. All municipal departments and agencies receiving information that a registered elector has changed his or her residence shall notify the clerk or board of election commissioners. **If the elector no longer resides in the municipality or fails to apply for continuation of registration within 30 days of the date the notice is mailed, the clerk or board of election commissioners shall change the elector's registration from eligible to ineligible status.** Upon receipt of reliable information that a registered elector has changed his or her residence within the municipality, the municipal clerk or board of election commissioners shall change the elector's registration and mail the elector a notice of the change. This subsection does not restrict the right of an elector to challenge any registration under s. 6.325, 6.48, 6.925, 6.93, or 7.52 (5). (Emphasis added)

8. Despite being aware of the statute and acknowledging the appropriate process, WEC has decided that going forward “instead of deactivating their voter registrations within approximately 30 days under Wis. Stat. § 6.50(3), deactivation would take place between 12 months and 24 months, giving the Movers a chance to vote in both the General Election and following Spring Election.” (June 11, 2019 Staff Report at page 3, McGrath Aff. Ex. C.) Thus,

WEC is enabling a voter who had actually moved to vote in at least two elections at the old address, quite possibly for a candidate in a district where the voter no longer resides.

9. 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. (WEC Training Materials for 2019 Movers Mailing WisVote Webinar, McGrath Aff. Ex. D)

10. 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”). (WEC Memo to Clerks dated October 4, 2019, McGrath Aff. Ex. E.)

11. 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 do 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. (June 11, 2019 Staff Report at page 3, McGrath Aff. Ex. C.)

I. THE PLAINTIFFS ARE ENTITLED TO A TEMPORARY INJUNCTION OR, IN THE ALTERNATIVE, TO A WRIT OF MANDAMUS PROHIBITING THE DEFENDANTS FROM CONTINUING TO IGNORE WIS. STAT. § 6.50(3).

The standards for the issuance of a temporary injunction are well-known. A temporary injunction may be issued when (1) the movant has shown a reasonable probability of ultimate success on the merits, (2) the movant lacks an adequate remedy at law; and (3) the movant can show irreparable harm. *Werner v. A. L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 519-20, 259 N.W.2d 310, 313-14 (1977). Wisconsin courts have sometimes also said that the purpose of the proposed injunction must be to maintain the status quo and treat that consideration as a fourth

factor. *Milwaukee Deputy Sheriffs' Ass'n v. Milwaukee County*, 2016 WI App 56, ¶20, *Shearer v. Congdon*, 25 Wis. 2d 663, 668, 131 N.W.2d 377, 381 (1964).¹

Mandamus is an appropriate remedy to compel public officers to perform duties arising out of their offices. *State ex rel. Oman v. Hunkins*, 120 Wis. 2d 86, 88, 352 N.W.2d, 22 (Ct. App. 1984). The elements needed to secure a writ of mandamus are: “(1) a clear legal right; (2) a plain and positive duty; (3) substantial damages or injury should the relief not be granted; and (4) no other adequate remedy at law.” *Id.*

In essence, the elements necessary for a writ of mandamus are the same as the primary three elements necessary for an injunction and the Plaintiffs can establish the elements needed for both tests. The Plaintiffs will brief the common elements for an injunction and the elements for a writ of mandamus together below.

A. The Plaintiffs have a Reasonable Probability of Success on the Merits and can Show that they have a Clear Legal Right and that the Defendants have a Plain and Positive Duty.

The material facts are not in dispute and the statutory duty of the Defendants is clear. The Defendants' duty under § 6.50(3) is in two parts: (1) upon receipt of reliable information that a voter has moved, WEC **shall** send a notice to the voter stating the source of the information; and (2) if the voter fails to apply for continuation of registration within 30 days of the date the notice is mailed, the board of election commissioners **shall** change the elector's registration from eligible to ineligible status. Here, WEC complied with the first part of its duty and in October 2019 sent

¹ The Plaintiffs do not believe that this actually is or should be a necessary factor for obtaining a temporary injunction and some courts do not mention it as a factor. See, e.g., *Kocken v. Wisconsin Council 40, AFSCME, AFL-CIO*, 2007 WI 72, ¶ 22, 301 Wis. 2d 266, 277, 732 N.W.2d 828, 834 (only factors listed are likelihood of success on the merits, a likelihood of irreparable harm, and an inadequate remedy at law).

approximately 234,000 notices to voters for whom WEC had reliable information that the voter had moved. (WEC Memo to Clerks dated October 4, 2019, McGrath Aff. Ex. E.)

“Reliable” means something that is “consistently good in quality or performance or able to be trusted.” <https://www.lexico.com/en/definition/reliable>. The information contained in the ERIC’s Movers Report is information reported by the voter (and not a third party) in an official government transaction. The source of the information (the voter, himself or herself) and the fact that it is in an official government transaction (a change of address form submitted to the U.S. Post Office, registering a motor vehicle with the DMV, etc.) obviously makes the information trustworthy.

Further, it was the Wisconsin Legislature, itself, that made the decision to join ERIC. *See* Wisconsin Statute § 6.36(1)(ae). The very reason that the Legislature determined that Wisconsin would join ERIC (and pay the required dues) is because ERIC is widely considered as a reliable source of information to be used by member states² to update and improve the accuracy of their voter rolls.

In fact, one of the known benefits of joining and paying dues to ERIC is to receive a Movers Report from ERIC. ERIC’s own website, <https://ericstates.org/>, confirms that the reports that ERIC provides to its member states include “*reports that show voters who have moved within their state, voters who have moved out of state, voters who have died, duplicate registrations in the same state and individuals who are potentially eligible to vote but are not yet registered.*” (Emphasis added.)

Moreover, Wisconsin’s 2017 history with ERIC shows that the ERIC Movers Report is accurate. WEC received a Movers report from ERIC in October 2017. Based on that report, WEC

² There are currently 29 states that are members of ERIC.

sent notices under Wis. Stat. § 6.50(3) to 341,855 voters in November, 2017. (WEC Staff Report dated March 11, 2019, pages 2-6, McGrath Aff. Ex. B.) Of these 341,855 voters, only 6,153 responded to the notice by continuing their registration at their existing address. (*Id.* at p. 3.) The remainder (335,702) were deactivated from the voter registration list as required under Wis. Stat. § 6.50(3). Of those, an additional 18,117³ were reactivated based upon one of the following: (1) the voter contacted their municipal clerk or WEC and stated that they still resided at the address on their voter registration; (b) WEC staff found an error of some sort; or (c) the voter voted in an election in 2018 from the address on their voter registration. (*Id.* at p. 4.)

The total of the voters who returned the post cards (6,153) and the voters who were later reactivated (18,117) is 24,270. That number represents 7% of the voters who were sent notices in 2017. The remaining 93% of the voters who received the November 2017 notice: (a) took no steps to maintain their registration at their original address and; either (b) registered to vote at their new address; or (c) have taken no steps to reregister or vote since their registration was deactivated.

This would mean that even assuming the 7% was a measure of unreliability (which it is not)⁴, the ERIC data from 2017 was still 93% reliable. Indeed, after reviewing the above data WEC staff concluded that **“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 makes it appear that they moved.”** (Emphasis added.) WEC Staff Report dated March 11, 2019, p. 10, McGrath Aff. Ex. B.)

³ This consists of 12,133 who were reactivated by WEC staff and 5,984 who were reactivated based on participation in an election in 2018.

⁴ This number does not represent “unreliability” in the ERIC data. The ERIC report covers voters who submitted an address different than their voter registration address in an official government transaction. The fact that a voter reported a different address to a government agency is a “reliable” indicator that the voter may have moved, even if it turns out that the voter did not actually move.

In fact, other states that, like Wisconsin, have so-called “top down” voter registration systems - meaning that the rolls are maintained by the state and used by municipalities as opposed to being maintained by the local municipalities - rely upon the ERIC Movers report to change the registration status of voters if the voter does not respond to a notice sent to the voter following the state’s receipt of the ERIC Movers Report. (*Id.* at pages 6-7 for Virginia and 7-8 for Minnesota.)

In sum, the ERIC Movers Report is reliable. WEC staff has acknowledged that it is accurate; and WEC, in fact, used it to send the October 2019 notices. Having complied with the first requirement of their statutory duty, the Defendants have no excuse for failing to comply with the second - to change the registration status of voters who do not respond in 30 days from eligible to ineligible. The statute says that “[I]f 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.** Wis. Stat. § 6.50(3) (emphasis added).

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, 295, 832 N.W.2d 121, 128, *amended*, 2013 WI 86, 350 Wis. 2d 724, 838 N.W.2d 87.

There is certainly nothing in the statute permitting WEC to wait up to two years before executing a task that the Legislature has said it “shall” do after 30 days. If WEC could wait two years, why couldn’t it wait ten years? Or twenty? WEC knew that its decision was inconsistent with § 6.50(3) because WEC staff said so in its June 11th Staff Report (McGrath Aff. Ex. C, p. 3).

In that staff report, WEC staff said that under its recommendation:

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.

But changing the amount of time required for WEC to act is not for WEC to decide. And WEC cannot lawfully permit Movers (i.e., voters who have moved) to continue to vote from their previous address for two more elections. It is the Legislature that decides upon and codifies the election law for the State of Wisconsin and WEC does not have the power to ignore, trump or veto the laws passed by the legislature.

WEC does have the statutory power to promulgate rules under chapter 227. *See* Wis. Stat. § 5.05(1)(f). But in exercising that power WEC must comply with the requirements of Chapter 227. Here, the Defendants did not even attempt to do so, so they cannot now try to justify their conduct on that basis.

Moreover, no agency, including WEC, may promulgate a rule which conflicts with state law. *See* Wis. Stat. § 227.10(2) (“No agency may promulgate a rule which conflicts with state law.”) Thus, while WEC has the power to interpret Wis. Stat. § 6.50(3) (and other statutes), the Defendants must do so through formal rule-making and no rule WEC promulgates may be inconsistent with § 6.50(3). *Seider v. O’Connell*, 2000 WI 76, ¶ 28, 236 Wis. 2d 211, 612 N.W.2d 659 (“An administrative rule that conflicts with an unambiguous statute exceeds the authority of the agency that promulgated it.”)

Given all of the above, the duty of the Defendants is plain and positive. It comes directly and clearly from the Wisconsin statutes. In addition, the Plaintiffs are reasonably likely to prevail on the merits because they have a clear legal right to the relief they seek. And the form of relief that the Plaintiffs seek also comes directly from the statutes.

Pursuant to Wis. Stat. § 5.06(1) any voter may file a complaint with WEC if the voter believes that any election official has failed to follow the law with respect to any aspect of election administration. This is consistent with long-standing law in this state that when it comes to the

voter registry “every voter is made or may become an agent in the execution of the law.” *State ex rel. Wood v. Baker*, 38 Wis. 71, 85 (1875)

Further, pursuant to Wis. Stat. § 5.06(2), once WEC has disposed of the complaint, the voter may sue in circuit court to “test the validity of any decision, action or failure to act on the part of any election official.” That is precisely what is occurring here.

The Plaintiffs filed a formal complaint with WEC on October 16, 2019 involving the same unlawful conduct alleged in this Complaint (the “WEC Complaint”). By letter dated October 25, 2019, WEC dismissed the WEC Complaint. (McGrath Aff. ¶ Ex. A.) WEC stated that the ground for dismissal of the WEC Complaint was that it was “not timely” in light of the statutory rule that such complaints “shall be filed promptly *so as not to prejudice the rights of any other party.*” Wis. Stat. § 5.06(3). (Emphasis added.) WEC further stated that given the facts described in the WEC Complaint, there are no circumstances in which the Plaintiffs could assert any additional facts which would “cure the defect” which led WEC to dismiss their complaint. Thus, the Plaintiffs have no practical ability to refile their complaint with WEC at any future time or on any known basis.

WEC’s decision dismissing the complaint was without basis in fact or law.⁵ The WEC Complaint was filed within **one week** after WEC’s final decision to implement the unlawful conduct described in this Complaint by sending the October 2019 Notices to voters between October 7 and October 11, 2019. In fact, the dispute presumably would not have been ripe until WEC sent the October 2019 notices and informed municipal clerks that WEC did not intend to enforce Wis. Stat. § 6.50(3) with respect to the October 2019 notices, which it did in training

⁵ This is not an appeal of a decision of WEC under Wis. Stat. § 5.06(8) because there was no decision on the merits by WEC under § 5.06(6) for the Plaintiffs to appeal. Rather, this is an action as allowed under § 5.06(2) where WEC disposed of the case without a formal decision.

materials in September 2019 (McGrath Aff. Ex. D) and a memo dated October 4, 2019. (McGrath Aff. Ex. E.)

Moreover, no voter would be prejudiced by the date on which the WEC Complaint was filed. The Plaintiffs do not challenge the form of the notice sent to voters. Rather, the Plaintiffs challenge the decision by WEC not to follow up on the notices that were actually sent as required by Wis. Stat. § 6.50(3). Thus, voters received proper notices and the only issue in this case is whether WEC must comply with § 6.50(3) with respect to voters who do not respond to the notices.

Finally, it cannot be the case that WEC's claim of an adverse effect on WEC staff, who have spent time and effort implementing an unlawful plan, can possibly constitute "prejudice to the rights of a party" for purposes of § 5.06(3).

Thus, although WEC stated that its dismissal of the WEC Complaint was without prejudice, its dismissal represents the final disposition of the WEC Complaint, and no further action before WEC is possible. WEC has thus "disposed of" the WEC Complaint and the Plaintiffs are authorized by Wis. Stat. § 5.06(2) to commence an action in this court to "test the validity" of the Defendants' "decision, action or failure to act."

The legislature has specifically granted them standing to do so and the Plaintiffs' rights are within the zone of interests to be protected under Wis. Stat. § 5.06. *In re Guardianship & Protective Placement of Carl F.S.*, 2001 WI App 97, ¶ 5, 242 Wis. 2d 605, 609, 626 N.W.2d 330, 332 (under Wisconsin's law of standing, courts must determine whether the party seeking standing is arguably within the zone of interests to be protected by the relevant statute).

As a result of the dismissal by WEC, the Plaintiffs' have the clear legal right under § 5.06(2) to test the validity of WEC's action before this Court and pursuant to Wis. Stat. 6.50(3) the Plaintiffs are entitled to the relief that they seek – properly updated voter rolls.

As voters, the Plaintiffs are harmed if others are enabled by WEC to vote when, or at a location where, they are not legally eligible to vote. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 196, 128 S. Ct. 1610, 1619, 170 L. Ed. 2d 574 (2008) (“There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters”). The Plaintiffs are also harmed if the Defendants fail to administer elections in a way inconsistent with the law. *Id.* (U.S. Supreme Court held that a substantial interest also exists in the “orderly administration and accurate recordkeeping” for elections). Finally, the Supreme Court pointed out that while “the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear.” *Id.*

Second, the Plaintiffs are each taxpayers who have the right to challenge the illegal expenditure of taxpayer money. In *S.D. Realty Co. v. Sewerage Commission of Milwaukee*, 15 Wis. 2d 15, 112 N.W.2d 177 (1961), the Wisconsin Supreme Court held that taxpayers have standing to challenge any unlawful action by a government entity that results in the expenditure of public funds. *See also Hart v. Ament*, 176 Wis. 2d 694, 500 N.W.2d 312 (1993) (taxpayers have a “financial interest in public funds . . . akin to that of a stockholder in a private corporation” and may sue not only in their own right, but as representatives of all taxpayers); *see also Bechthold v. City of Wauwatosa*, 228 Wis. 544, 277 N.W. 657, 659 *on reh'g*, 228 Wis. 544, 280 N.W. 320 (1938); *Wagner v. City of Milwaukee*, 196 Wis. 328, 330, 220 N.W. 207, 208 (1928).

Here, WEC spent substantial staff time and resources to develop the illegal policy that was adopted by the WEC Commissioners to replace the requirements of § 6.50(3) with a different policy as created by WEC. That can be seen by the amount of staff time needed to create the staff reports, memos, and training materials set forth in McGrath Affidavit Exhibits B, C, D and E. The Plaintiffs have a clear legal right to challenge this illegal expenditure of taxpayer money.

In light of the mandatory language in Wis. Stat. 6.50(3) and the clear nature of the duty involved, the Plaintiffs have a reasonable probability of success on the merits and can establish that they have a clear legal right and the Defendants have a plain and positive duty.

B. The Plaintiffs lack an Adequate Remedy at Law.

The lack of an adequate remedy at law is an element for both a temporary injunction and for a writ of mandamus. A plaintiff lacks an adequate remedy at law when mandamus (or an injunction) is the only method available to the plaintiff to enforce his or her rights. *State ex rel. Milwaukee Cty. Pers. Review Bd. v. Clarke*, 2006 WI App 186, ¶ 54, 296 Wis. 2d 210, 236, 723 N.W.2d 141, 154.

Given that WEC has dismissed their complaint without ever getting to the merits and has acknowledged that the Plaintiffs have no way to obtain relief before it, the Plaintiffs lack any available remedy except resort to this Court for equitable relief. The Plaintiffs went to WEC and asked WEC to undo the unlawful conduct and WEC has refused. Further, The Plaintiffs do not seek and cannot obtain damages to remedy the wrong here. The only way to right this wrong is for this Court to declare WEC's conduct unlawful and to issue an injunction or a writ of mandamus requiring WEC to comply with its statutory duties.

C. The Plaintiffs will Suffer Irreparable Harm.

Under federal law, specifically 52 U.S.C. § 21083⁶, each state must keep and maintain a voter registration list at the state level that contains the name and registration information of every legally registered voter in the state. Under subsection (4) of § 21083, each state must also “**ensure that voter registration records in the State are accurate and are updated regularly.**”

⁶ 52 U.S.C. is part of the Help America Vote Act (“HAVA”). HAVA, unlike the National Voters Right Act (“NVRA”) applies in Wisconsin. Wisconsin is exempt from the NVRA because Wisconsin allows same day registration.

(Emphasis added.) The Legislature has delegated the duty required under federal law to keep and update our state's voter registration list to WEC. *See* Wis. Stat. §§ 5.05(15) and 6.36.

In Wis. Stat. § 6.50, the Legislature has also detailed a few specific forms of maintenance and updating that must be performed by WEC. Under that statute WEC is obligated to update the list by examining the list for registered voters who have not voted in four years and sending notices to such voters, and to update the list because voters have moved, died, or whose registered address has been condemned.

Why do the federal government and the Wisconsin Legislature require that the voter registration list be maintained and periodically updated to assure its accuracy? The answer, according to the U.S. Election Assistance Commission, is that updating voter registration lists “is essential to protecting election integrity,” [https://www.eac.gov/assets/1/6/FACT_SHEET_-_](https://www.eac.gov/assets/1/6/FACT_SHEET_-_Voter_Confidence_and_NVRA.pdf)

[Voter Confidence and NVRA.pdf](https://www.eac.gov/assets/1/6/FACT_SHEET_-_Voter_Confidence_and_NVRA.pdf). It serves least 3 independent functions:

1. It produces an accurate result based on each eligible voter casting a single ballot in their proper jurisdiction.
2. It enfranchises voters because it lowers the likelihood of lines at the polls, reduces voter confusion and decreases the number of provisional ballots.
3. It allows election administrators to plan, to better manage their budget and poll workers, and to improve voter experience.

Id.

The entire purpose of statutes like Wis. Stat. § 6.50(3) is to make sure that the Wisconsin voter registration rolls are maintained in a fashion to keep them up to date and to serve the purposes described above. There exists a valid state interest in preventing voter fraud, and “[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); see also, *Hoffman v. Maryland*, 928 F. 2d 646, 640 (1991) (“keeping accurate, and up-to-date voter registration lists is an important state interest.”).

While the lists should always be as up to date as possible it is particularly important prior to each election. That is when having up to date voter rolls really makes a difference for all three of the purposes described above. The next election in Wisconsin is set for February 18, 2020. If the voter rolls are not up to date prior to the election then the purposes of maintaining the lists fails.

If there are hundreds of thousands of names on the voter registration lists of individuals who are not legally entitled to vote at the addresses where they are registered, then each and every voter who is entitled to vote in those districts and whose votes could be diluted by individuals who are not so entitled is threatened with irreparable harm. *Miller v. Blackwell*, 348 F. Supp. 2d 916, 922 (S.D. Ohio 2004) (action that threatens or impairs Plaintiffs' right to vote constitutes irreparable harm). The harm is irreparable whether it involves a denial of the right to vote or only results in vote dilution. *Montano v. Suffolk Cty. Legislature*, 268 F. Supp. 2d 243, 260 (E.D.N.Y. 2003); *Day v. Robinwood W. Cmty. Improvement Dist.*, No. 4:08CV01888ERW, 2009 WL 1161655, at *3 (E.D. Mo. Apr. 29, 2009).

Consistent with this principle, in *Ohio Republican Party v. Brunner*, 582 F. Supp. 2d 957, 965 (S.D. Ohio 2008) the court granted the plaintiffs a preliminary injunction requiring state officials responsible for voter registration lists to comply with federal requirements to properly maintain those lists in part because allowing unqualified individuals to cast votes “would demean the voting process and unlawfully dilute the votes of qualified voters”), *vacated on other grounds*, *Brunner v. Ohio Republican Party*, 555 U.S. 5 (2008).

Similarly, in *Democratic Party of Virginia v. Virginia State Board of Elections*, 2013 WL 5741486, Civil Action No. 1:12-cv-1218 (Eastern District of Virginia 2013) the plaintiffs were

denied a preliminary injunction to prevent voters' names from being removed from the voter registration list as required by state law because the state had a legitimate interest in having up-to-date registration lists and because no voter would be harmed because the voter can reregister if they were wrongfully removed.

The Plaintiffs are seeking a temporary injunction or a writ of mandamus, here, in order to avoid harm from occurring at the next scheduled election – February 18, 2020. There is no way to undo the harm once it occurs. And on the reverse side there is no harm to anyone if the injunction (or mandamus) is granted. If some voter received the October 2019 notice in error and chose not to respond, it is not the case that they will be denied the opportunity to vote. Rather they will simply have to reregister when they go to the polls which is permitted in Wisconsin because our state has same day registration.

D. A Temporary Injunction would maintain the Status Quo.

In the context of a temporary injunction, the *status quo* does not mean the facts as they exist on the date of the request for an injunction, but rather it means the facts as they existed prior to the defendant's illegal conduct. For example, in *Shearer v. Congdon*, 25 Wis. 2d 663, 131 N.W.2d 377 (1964), one of the seminal Wisconsin cases setting forth the standards for a temporary injunction, the plaintiff sought an injunction requiring the owner of property to keep a private drive-way open to the plaintiff based on the plaintiff's claim of a prescriptive easement.

The facts of the case were that the plaintiff had historically had access to the road but on February 6, 1964, the defendants installed a gate to prevent the plaintiff and the public from using the road. The trial court issued an injunction on March 17, 1964 (more than a month after the gate was in place) requiring the defendants to keep the road open to the plaintiff. *Shearer*, 25 Wis. 2d at 665.

The state of the facts as of March 17th (the date of the injunction) was that the defendant had installed the gate but the court did not find that the facts on March 17th constituted the “status quo” but rather that the state of facts prior to the defendants’ alleged unlawful conduct of installing the gate was the “status quo.”

Here, by analogy, the *status quo* consists of the state of facts that would exist if the Defendants followed the law (as they did when the Movers notices were sent out in 2017). As set forth above, WEC should be taking the action required by Wis. Stat. § 6.50(3) at some time during the week of November 11, 2019 (which would be 30 days after the notices were sent during the week of October 7, 2019). If WEC followed the law that would mean that the voter registration rolls would be in compliance with the law well prior to the Spring Primary Election scheduled for February 18, 2020. The status quo in this case is the existence of voter rolls that are properly updated prior to the next election. But the Defendants are destroying the status quo by refusing to follow the law.

Moreover, Wisconsin recognizes what are sometimes referred to as affirmative injunctions, i.e., an injunction that requires the defendant to take some act (as opposed to prohibiting the defendant from taking some act). *State v. C. Spielvogel & Sons Excavating, Inc.*, 193 Wis. 2d 464, 471, 535 N.W.2d 28, 31 (Ct. App. 1995) (granting an affirmative injunction requiring the defendant to remove certain materials from a landfill). An affirmative injunction, by definition, does not maintain the facts as they exist on the date of the injunction. It forces the defendant to change those facts in the way required by the court’s order in order to maintain the status quo that existed prior to the defendant’s violation of law.

However, if for any reason, this Court disagrees with the above, then as an alternative to an injunction, the Court should grant the Plaintiffs a writ of mandamus (which has no requirement

related to maintaining the status quo) ordering the Defendants to perform the legal duty required of them, i.e., to change the registration status of voters who do not respond to the October 2019 notices from eligible to ineligible, 30 days after the notice was sent and not responded to.

CONCLUSION

For the reasons set forth herein, the Plaintiffs request that this Court issue a temporary injunction, or in the alternative, a writ of mandamus, requiring the Defendants to comply with Wis. Stat. § 6.50(3) and to change the registration of each individual who received one of the October 2019 notices and who did not respond within 30 days from eligible to ineligible.

Respectfully submitted this 14th day of November, 2019.

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