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SUPREME COURT

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.

Appeal from the Circuit Court of Ozaukee County
Honorable Paul V. Malloy, Presiding
Case No. 19-CV-449

BRIEF AND APPENDIX OF PLAINTIFFS-RESPONDENTS-PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page Number**

Statutes

Other

STATEMENT OF THE ISSUES

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

Circuit Court and Court of Appeals' Decisions: 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. 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?

Circuit Court and Court of Appeals' Decisions: The Circuit Court granted the Writ of Mandamus because WEC's obligation to comply with the statute was clear. 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?

Circuit Court and Court of Appeals' Decisions: 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 Court of Appeals held that the finding of contempt was in error.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This case involves important questions of statutory interpretation, state election requirements and the rule of law. This case also raises issues of state law that must be resolved prior to the November 2020 election. With this brief, Plaintiffs-Respondents-Petitioners are filing a motion for expedited review. We ask that the Court either (1) decide this case on the briefs; or (2) schedule this case for oral arguments as soon as possible.

STATEMENT OF THE CASE

Between October 7 and October 11, 2019, WEC staff sent notices to approximately 234,000 Wisconsin voters informing the voters that WEC had information that the voters had moved and that if the voter had not moved they should inform WEC that they were still living at the address where they were registered to vote (the "October 2019 Notices"). (Pet.App. 196.) WEC had previously decided that even if the voters did not respond to the notice, that WEC would delay taking the action required under Wis. Stat. §6.50(3) – removal of the voters, at their old addresses, from the voter registration list – for up to two years. (Pet.App. 181.) In other words, these voters who had moved would nevertheless be

permitted to vote in elections from their old, incorrect addresses for as long as two years.

On October 16, 2019, the Petitioners, each of whom is a registered Wisconsin voter and a Wisconsin taxpayer,[1] filed a verified complaint with WEC asking WEC to follow state law and deactivate the non-responsive voters who WEC had reason to believe had moved ("Movers"). (Pet.App. 164; Ct. App. Dec. at ¶16.[2]) 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. 164.)

The Petitioners thereafter filed suit against WEC and five of the WEC commissioners (collectively the "Defendants")[3] in Ozaukee County Circuit Court, asking the court for a preliminary

[1] Although the Circuit Court concluded that the Petitioners had standing to file their complaint, and the Court of Appeals assumed without deciding that the Plaintiffs have standing, the Defendants raised the issue again in their response to the Petition for Review. The Petitioners note they clearly have standing to bring their claims as both taxpayers and as electors. Because the Defendants raised the issue in their response to the Petition, the Petitioners have addressed the standing issue in Section IV, supra.

[2] The Court of Appeals decision can be found at Pet.App. 101.

[3] The sixth WEC commissioner currently on WEC was not on the commission when WEC took the action being challenged herein.

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 Defendants' request for a stay of the decision, noting the "very tight time frame" and the "importan[ce] that the Commission" begin complying with the law. (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' ex parte request for a stay and ordered a response from the Petitioners, which was then timely filed. (R. 84.)

The Circuit Court's Writ thus remained in effect, and on December 30, 2019, WEC again convened, and again took no action to comply with the Circuit Court's order. (Pet.App. 156-158.)

In light of the upcoming elections and the Defendants' weeks-long, repeated refusal to comply with the Circuit Court's

[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.

Writ, on January 2, 2020, the Petitioners 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 Appeals 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.) The Petitioners thereafter filed a Petition for Review with this Court, which was granted on June 1, 2020.

STATEMENT OF FACTS

By statute, Wisconsin participates in what is called the Electronic Registration Information Center ("ERIC"). *See* Wis. Stat. §6.36(1)(ae). ERIC is a multi-state consortium formed to improve the accuracy of voter registration data. (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, *in an official government transaction*, have reported an address different from their voter registration address. *(Id.)* Every voter identified as a mover in the

ERIC report has provided information to the government in an official transaction 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, it 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. 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 requirements of Wis. Stat. §6.50(3), the Defendants decided that "instead of deactivating their voter registrations within approximately 30 days, 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.)

The Defendants' refusal to remove these invalid registrations makes it possible for 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

allows absentee ballots to be requested in the names of persons who are no longer eligible to vote at their registered address.

ARGUMENT

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 question and the law requires it.[5] The legal questions here are whether (1) this unambiguously stated statutory obligation applies to WEC, the agency that the Legislature created in order to comply with federal law and has charged with maintenance of the state voter rolls, (2) if it does, whether WEC has the power to refuse to comply with that obligation. The case also asks what the consequences may be for a state agency's refusal to comply with a Court Order.

These questions are especially important and timely given in light of the COVID pandemic. In the most recent statewide election, some 75% of all votes were cast by absentee ballot and it is expected that a similar number may choose to vote absentee this fall. Defendants have already announced they will attempt to increase absentee voting by mailing instructions to virtually all registered voters in Wisconsin. Ballots may then be requested in

[5] 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.

the names of those voters and cast in the district where those names are registered. All of this will be done without any personal contact between the person requesting and casting the ballot and election officials. The law permits this and Petitioners have no objection to it. But the law also requires that our election officials undertake certain steps to ensure that the voter rolls are accurate and that they not be loaded with the names of persons who have moved and are no longer eligible to vote under their old registration. As more of us vote by mail, it becomes even more important than ever that our voter registration lists are accurate, and that the process, mandated by state law, is followed.

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

The Court of Appeals concluded that WEC has no duty to maintain accurate voter rolls under §6.50(3), but this is wrong for 4 reasons: (1) the statute imposes this obligation on an undefined "board of election commissioners" and the common, ordinary, and accepted meaning of the words would include WEC, which is a public body of six commissioners charged with administering elections; (2) a textualist approach to interpreting the law leads straight to the conclusion that WEC is covered by the statute, because it's structure and context makes clear that WEC must be the agency charged with the duty imposed by it; (3) excluding WEC from the duties required by §6.50(3) leads to an unreasonable result, because it would mean that there is no agency or public

official with the power to carry out the duties imposed by the Legislature under §6.50(3); and (4) this interpretation is reflected in WEC's practice.

A. The common, ordinary and accepted meaning of the words "board of election commissioners" includes WEC and that term is neither technical nor specially-defined.

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, 271 Wis.2d 633, 663, 681 N.W.2d 110, 124, in which this Court said that "[s]tatutory 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, despite the fact that the Court of Appeals never shows that the phrase at issue is either technical or "specifically-defined." 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 Petitioners have cited no authority for that proposition. But WEC has never before refused to do what sec. 6.50(3) requires. In this case of first impression, it is not clear what authority could be cited other than common meaning and common sense. A "board" is "a group of persons having

managerial, supervisory, investigatory, or advisory powers." "Board." Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/board. Accessed 8 Jun. 2020. The members of WEC are called "election commissioners." The Court of Appeals concludes that because WEC is a "commission," it cannot be a "board." It relies on Wis. Stat. §15.07 that refers to persons on a board that run a "department or independent agency" as "members." WEC may not be one of the boards identified in sec. 15.07, but nothing in the statute says that the term "board" may never be used in reference to a group of commissioners.

The Court of Appeals used §15.07 to do work it was never intended to do. We know that the legislature can and does refer to a group of commissioners as a board because §6.50(3) does precisely that. WEC is under the direction and supervision of a board. If, as the Court of Appeals suggests, the legislature has drawn a sharp 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 Court of Appeals were correct, the term "board of election commissioners" would not exist in the law. But it does.

Instead of giving the phrase "board of election commissioners" its common, ordinary and accepted meaning, the Court of Appeals skipped to the second half of this Court's rule of

construction, but the phrase "board of election commissioners" is not a "specifically defined" term. In fact, the Court of Appeals 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 Petitioners (*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 defined or technical terms. It is undisputed that the term "board of election commissioners" is not defined. Further, nothing in the term "board of election commissioners" is technical or beyond the ken of ordinary citizens. The term "board of election commissioners" is not a "technical" term. *See Weber v. Town of Saukville*, 209 Wis.2d 214, 227, 562 N.W.2d 412, 417 (Wis. 1997) (applying a "technical" meaning to the term "mineral extraction operations" as applied to the mining industry, finding that "The technical meaning should govern in a technical context."). The Court of Appeals did not point to any legislative direction or anything in the language that suggests that the phrase "board of election commissioners" has a technical meaning such that it cannot, especially, refer to WEC.

B. The context in which the term "board of election commissioners is used" leads straight to the conclusion that WEC is covered by Wis. Stat. §6.50(3).

This conclusion is buttressed by the context in which the term is used and its place within the statutory structure. This is not a departure from textualism but part of its application. Textualism requires consideration of the context in which the words were 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. For at least the past eighty years, there has been some form of Wis. Stat. §6.50(3) on the books requiring voter registration lists to be updated by an election official or entity based upon the receipt of "reliable information" that a voter has moved. *See,* e.g. Wis. Stat. §6.18(5) (1941). Over the intervening decades, these statutes would eventually evolve into what we now know as Wis. Stat. §6.50(3).

These statutes, of course, existed long before Wisconsin maintained a centralized statewide voter registration list. When the voter lists were the province of local municipalities, it made sense that the statute applied to those municipal officials who

maintained the lists – only they had the ability and duty to update their municipality's voter registration list. That §6.50(3)'s description of municipal clerks and a "board of election commissioners" only applied to local officials was nothing but a reflection of that fact.

In 2003, however, in order to comply with the federal Help America Vote Act ("HAVA"), Wisconsin established, for the first time, a statewide voter registration list with the enactment of 2003 Wisconsin Act 265 ("Act 265").[6] 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 in order to comply with HAVA.

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 the statute was the State Elections Board, but that duty now applies to WEC (the successor agency) under the same statute. Thus, by law, WEC now has the duty to

[6] *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).

maintain the registration list (and not municipal clerks or municipal boards of election commissioners). Not only does WEC maintain the list, it may require municipalities to adhere to whatever procedures it properly establishes for maintenance of the list. *Id.* And municipal clerks must use the one and only voter list maintained by WEC, not some other list devised or amended by them, or anyone else.

That is the context in which to read §6.50(3) and determine the meaning of the phrase "board of election commissioners". And in that context, WEC is the logical entity encompassed by the phrase because municipal clerks and municipal boards of election no longer have the responsibility to remove registrations from the state-wide list and cannot use any list other than the one that WEC maintains. Indeed, if Wisconsin were to allow localities to go it alone and maintain their own lists, it would violate HAVA.

HAVA mandates that states have statewide voter registration lists maintained and administered by the chief election official in the state[7] in a *uniform and nondiscriminatory manner*. *See*, 52 U.S.C §21083. As a result, the 1,850 municipal entities in Wisconsin[8] lack the legal ability to administer the lists. And, even if they had the ability, decisions with regard to the

[7] By statute, the Administrator of WEC is the chief election official of the state. *See* Wis. Stat. §5.05(3g).

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

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 *uniform and nondiscriminatory manner*).[9]

Thus, it makes perfect sense to read the term "board of election commissioners" to mean precisely what it did before the amendments occasioned by HAVA, and the legislature's decision to move to statewide voter rolls. The legislature wanted those who maintained the rolls to keep them accurate by removing the registrations of those who have moved in the way required by §6.50(3). Because the phrase "board of election commissioners" can, in ordinary and common parlance, be read to refer to the older State Elections Board or more recent Wisconsin Elections Commission, it is an error to read the failure to amend §6.50(3) as a change in the statutory framework.

Thus, that WEC did not exist when the phrase "board of election commissioners" was first used by the Legislature,

[9] Given the federal constraints imposed on the State the only way to read Wis. Stat. §6.36(1)(c) which provides that the statewide list "shall be designed in such a way that the municipal clerk or board of election commissioners of any municipality and any election official who is authorized by the clerk or executive director of the board of election commissioners may, by electronic transmission, add entries to or change entries on the list for any elector who resides in, or who the list identifies as residing in, that municipality and no other municipality" is that they may do so at the direction and instruction of WEC.

buttresses, rather than undercuts, the Petitioners' interpretation. The noted textualist, Justice Scalia, pointed out that in interpreting the Second Amendment we do not only protect those "arms" in existence in the 18th century, but rather apply that amendment to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding. *D.C. v. Heller*, 554 U.S. 570, 582 (2008). Likewise, the First Amendment protects modern forms of communications, [citing *Reno v. American Civil Liberties Union,* 521 U.S. 844, 849 (1997)], and the Fourth Amendment applies to modern forms of searches [citing, *Kyllo v. United States,* 533 U.S. 27, 35–36 (2001)]. *Id.*

Wisconsin courts handle statutory interpretation in the same way. For example, in *Lueders v. Krug*, 2019 WI App 36, ¶ 16, 388 Wis. 2d 147, 158, 931 N.W.2d 898, 904 the court held, without debate, that electronic emails and the associated metadata were "records" within the meaning of Wis. Stat. §19.32(2) even though emails and metadata did not exist when the Open Records Act was first promulgated.

So, the "board of election commissioners" referred to in §6.50(3) does not need to have existed when the statute was first promulgated, but must instead reasonably fit within the language chosen by the Legislature when it adopted those words. Here, the phrase "board of election commissioners" is a flexible phrase sufficiently broad to refer to whatever entity has the responsibility

for maintaining the voter rolls. In 2020, that entity is WEC. A textualist approach – giving the words in the law their common, ordinary and accepted meaning considering the context of the statute – leads straight to the conclusion that WEC is a board of election commissioners within the meaning of §6.50(3). To conclude otherwise would be illogical.

And 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, as noted *supra* and discussed further *infra*, in the context of the state and federal election law mandates – such municipal clerks and boards no longer have the power to do so. Thus, the Court of Appeals' decision violates the bedrock principles of statutory interpretation. *See, e.g.*, *Kalal*, 2004 WI 58, ¶46 ("Statutory language is read where possible to give reasonable effect to every word . . . .")

C. Excluding WEC from the duties under §6.50(3) leads to an unreasonable result because it would mean that there is no agency or public official with the power to carry out the duties imposed by the Legislature under §6.50(3).

Under the Court of Appeals logic there is no such thing as a state board of election commissioners. As a result, there is no

state agency that can perform the obligations imposed by §6.50(3). Moreover, as discussed *supra*, as a matter of state and federal law, there is no municipal entity with the power to maintain or administer the statewide voter registration list.

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. This simple fact demonstrates why the Petitioners' interpretation of the statutes is the more reasonable one.

As discussed *supra*, once Wisconsin moved to a statewide voter registration list in 2003, in order to comply with HAVA, it was no longer the responsibility of (or within the power of) local municipalities to manage the lists. 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 registrations from the statewide voter registration list simply ignores state and federal law.

But this Court has previously pointed out (in reversing the Court of Appeals) that when courts "examine the statute's contextualized words, put them into operation, and observe the results" they "ensure we do not arrive at an unreasonable or absurd conclusion." *Wisconsin Carry, Inc. v. City of Madison*, 2017 WI 19, ¶ 20, 373 Wis. 2d 543, 559–60, 892 N.W.2d 233, 240. This Court expressly noted that statutory language is interpreted reasonably, to avoid absurd or unreasonable results. *Id.* One type of absurd result "may arise where 'an interpretation would render the relevant statute contextually inconsistent or would be contrary to the clearly stated purpose of the statute.'" *Sorenson v. Batchelder*, 2016 WI 34, ¶41, 368 Wis. 2d 140, 885 N.W.2d 362 (quoting *State v. Grunke*, 2008 WI 82, ¶31, 311 Wis. 2d 439, 752 N.W.2d 769).

Here, the Court of Appeals' interpretation of the statute would 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.").[10]

The Court of Appeals violated these rules regarding avoiding implied repeal and avoiding unreasonable results. It interpreted a statute without fully addressing the statute in context and in a manner which conflicts with the obvious purpose of the statute. 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

[10] 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)'s broad wording, amending the provision following Wisconsin's transfer to a "top-down" system run by WEC was simply unnecessary.

maintenance of the rolls is to be performed, but the Court of Appeals' decision results in a conclusion that there is no agency or entity that can maintain the rolls in that manner.

As Judge Learned Hand stated 75 years ago, it is important "to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning." *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir.), aff'd, 326 U.S. 404, 66 S. Ct. 193, 90 L. Ed. 165 (1945). Here, Wis. Stat. §6.50(3) has a purpose – updated and accurate voter rolls administered in a uniform and nondiscriminatory manner – which cannot be accomplished if the statute is interpreted so as not to apply to WEC.

D. The Court of Appeals' conclusion that the words "board of election commissioners" unambiguously refers solely to a municipal board of election commissioners and not to WEC does not withstand scrutiny

In its decision, the Court of Appeals concluded that the phrase "board of election commissioners" as used in §6.50(3) is unambiguous (Ct. App. Dec. at ¶36) and that the reference to the "board of election commissioners" in the statute does not refer to WEC, but only to a municipal board of election commissioners under Wis. Stat. §7.20. But the Court of Appeals failed to account for the following ambiguities that arise under its interpretation.

First, 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, 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). In other words, the Legislature has used more than one term to refer to WEC, likely due in part to the many amendments of the elections statutes over the years to reflect new procedures and new agencies. If the Legislature uses different terms to refer to WEC in certain places, why couldn't WEC be a "board of election commissioners" in other places, particularly given that the legislature has given it the responsibility for the very thing – maintenance of the voter rolls – that §6.50(3) governs?

Second, in response to the Petition for Review, the Defendants argued that the Legislature referred to a "board of election commissioners" numerous times in the statutes and it would not make sense to conclude that the only time that phrase refers to WEC is in §6.50(3). (*See* Response to Petition for Review at 10-11.) But the Defendants' premise is wrong. The phrase "board of election commissioners" should be read to apply to WEC in §6.50(4) (changing registration status of deceased electors by checking vital records statistics reports), §6.50(5) (reviewing the registration status of an elector whose address is listed at a building which has been condemned for human habitation),

§6.50(7) (requiring a notation in the registration list whenever there is a status change for an elector) and §6.50(8) (acquiring and receiving change of address data from the U.S. Postal Service) as well. In each of those subsections of the statutes, it makes sense to read the phrase "board of election commissioners" to apply to WEC.

Third, 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. It did not do so in §6.50(3).

Fourth, if the Legislature meant "board of election commissioners" to mean a municipal board of election commissioners and not WEC, the Court of Appeals never offers an explanation for why the Legislature ordered WEC (and not the municipal boards of election commissioners) to belong to ERIC and to get the Movers reports. Nor does the Court of Appeals explain why the Legislature ordered WEC (and not the municipal boards of election commissioners) to be responsible for the maintenance of the voter registration lists.

Finally, the Court of Appeals does accurately point out that there are numerous anomalies in the election laws regarding the language used to reference WEC and municipal boards of election

commissioners. The Court of Appeals says that the Petitioners only point out those that favored their approach and try to ignore the others (Ct. App. Dec. at ¶¶54-56), but by failing to address these many ambiguities the Court of Appeals has done the same thing. The proper way to deal with these ambiguities is not to impose an artificial consistency that presumes, without direction or evidence drawn from the context, statutory structure or legislative history, that a phrase must have an unexpressed exclusive meaning. As noted, the elections statutes have been amended many times over the years to reflect repeated changes in state and federal election law. These amendments have, at times, left the relevant statutes a bit of a hodgepodge, and there is little doubt that the Legislature could have drafted §6.50 with more care and precision.

Nevertheless, that ought not affect the right and fair reading of the statute, and this Court is tasked with choosing the most reasonable interpretation among imperfect alternatives, as it often must do. As the U.S. Supreme Court has noted in a similar context:

> We have little doubt that "Congress could have drafted [§ 1101(a)(43)] with more precision than it did." [*citation omitted*]. But the same could be said of many (even most) statutes; as to that feature, § 1101(a)(43) can join a well-populated club. And we have long been mindful of that fact when interpreting laws. Rather than expecting (let alone demanding) perfection in drafting, we have routinely construed

> statutes to have a particular meaning even as we acknowledged that Congress could have expressed itself more clearly. The question, then, is not: Could Congress have indicated (or even did Congress elsewhere indicate) in more crystalline fashion [its meaning]? The question is instead, and more simply: Is that the right and fair reading of the statute before us?

Torres v. Lynch, 136 S. Ct. 1619, 1633–34, 194 L. Ed. 2d 737 (2016) (emphasis added).

The Court of Appeals' decision never explains how the statute can "unambiguously" refer solely to a municipal board of election commissioners given the above facts.

This Court should reverse the Court of Appeals and give the statute its proper interpretation 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 lawful, uniform and nondiscriminatory manner.

E. WEC, the Petitioners, and the Circuit Court all understood the phrase "board of election commissioners" to include WEC.

What the Petitioners have pointed to as persuasive evidence of common meaning is that WEC, itself, understood the statute to apply to it until this lawsuit was filed. Likewise, the Petitioners understood the words to have that meaning and so did the Circuit Court and no municipal clerk ever suggested that the words carried a different meaning to them. That may not be a random

sample of the population as a whole but it does cover the parties to this action and the public officials most familiar with the statute.

The Defendants and the Court of Appeals have both said that WEC's past interpretation of the statute is beside the point because WEC's authority is determined by the law and not by WEC, itself. But the Petitioners' point is not that WEC's prior interpretation is binding on a court, but rather that, in the past, people (including WEC), have read the words in the statute consistent with the ordinary understanding - that WEC is a board of election commissioners.

With respect to WEC's own reading of the statute prior to this lawsuit, here is what WEC said with respect to what WEC was doing in 2017 with respect to the Movers list: "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))." It was WEC, itself, that said it was following the process in § 6.50(3) for the names on the Movers list. (Pet.App. 168). The only way that makes sense is if WEC believed that it was a board of election commissioners within the meaning of that statute.

With respect to what WEC decided to do in 2019 this is what WEC said:

> "staff recommends the plan include continuing to send postcards to voters identified by ERIC as in-state movers each year. However, *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 after the postcard was sent, in the summer after each General Election." (Emphasis added.)

(Pet.App. 174.) WEC again specifically referenced §6.50(3). And again, that reference only makes sense if WEC believed that it was covered by the statute.

With respect to how WEC proceeded in the past, the following evidence is undisputed:

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. In 2017, WEC acknowledged that it did so under Wis. Stat. §6.50(3)). (Pet.App. 168.)

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. (Pet.App. 196.)

5. 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).

6. 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.)

7. 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.)

Moreover, items 2, 4, 6 and 7 also speak to the understanding of municipal clerks and municipal boards of election commissioners as to the meaning of the words in the statute because they acquiesced to WEC's taking charge of the process in a manner which would only be appropriate if the WEC was a "board of election commissioners" within the meaning of the statute.

In that regard, 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.

Obviously, the Petitioners agreed with the fact that WEC was a board of election commissioners under the statute because they sued WEC and the Circuit Court also agreed. So, until WEC advanced the proposition for the first time in defense of this case, there is no evidence that anyone thought that WEC was not a board of election commissioners as referenced in Wis. Stat. §6.50(3). The evidence is abundant that the common, ordinary and accepted meaning of the phrase "board of election commissioners" includes WEC.

After WEC sent notices to Movers in 2017, it was WEC that actually removed the voters who did not respond to the notices from the registration list and the WEC Administrator acknowledged in an affidavit that 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, for example, by the Milwaukee board of election commissioners (R. 23:9.). That is because the list is maintained by WEC (and not the local municipalities) as required by HAVA.

II. The Writ of Mandamus was properly issued

The Court of Appeals concluded that the Writ of Mandamus was not properly issued because the Petitioners 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, 252 Wis.2d 1, 20, 643 N.W.2d 72, 81, *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, as it did here, WEC has acknowledged that the information is reliable. And, in

fact, WEC has conceded in writing 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 make it appear that they moved…" (Pet.App. 176). 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 correct the Court of Appeals misreading of the statute 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 since it permits voters who have not actually moved to easily maintain their registration at their actual address.

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 Petitioners 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, and 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." As noted above, the legislature mandated that steps be taken to confirm whether or not a voter has moved and specified what those steps should be. 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.

Recent data from Defendants supports the conclusion that the data in the Movers list used in this case is objectively reliable. At the Defendants' public meeting on May 20, 2020, they were presented with additional information regarding the current status of the Movers, which confirms that the Movers list data is overwhelmingly accurate. (Pet.App. 207).[11] That data, which notes it was based upon data available on May 8, 2020, showed that of the 232,579 individuals who received a Movers postcard, just 4,709 of them, or just over 2%, either continued their registration or voted at their original address. (Pet.App. 208). That 2% constitutes an "error" or "non-mover" rate that is even less than the 2017 mailing.

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

[11] These facts were presented in a memorandum prepared by the Wisconsin Elections Commission staff for the Commission meeting on May 20, 2020, a copy of which is included in Petitioners' Appendix, as cited. We request the Court take judicial notice of these facts pursuant to Wis. Stat. §902.01.

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 some of 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 Contemnors 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. 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." (Pet.App. 147.) 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,[12] 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 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 is a critically important point here for purposes of the judiciary. 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.

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

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.") Here the Contemnors refused to comply with the Mandamus Order for 32 days. Allowing that precedent by State actors, simply encourages all Wisconsin citizens to ignore court orders with which they disagree.

If this Court reverses the Court of Appeals on the merits, then it should reinstate the contempt order to insure that the Contemnors comply promptly with the Mandamus Order and with §6.50(3).

IV. The Petitioners have standing.

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)

The Petitioners filed a formal complaint with WEC on October 16, 2019. (Pet.App. 164; Ct. App. Dec. at ¶16). By letter dated October 25, 2019, WEC dismissed the Complaint without addressing it on the merits. (Pet.App. 164-166.)

Pursuant to Wis. Stat. §5.06(2), once WEC disposed of the complaint, the Petitioners were entitled to 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 the Petitioners did by commencing an action in the Ozaukee County Circuit Court on November 13, 2019.[13]

The Legislature, in promulgating §5.06(2), specifically granted them standing to do so and the Petitioners' 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 Petitioners had and have the clear legal right under §5.06(2) to test the validity of WEC's action in court and pursuant to Wis. Stat. §6.50(3) the Petitioners were and are entitled to the relief that they seek – properly updated voter rolls.

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[13] The Petitioners did not appeal 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 Petitioners to appeal. Rather, they filed a circuit court action as allowed under §5.06(2) where WEC disposed of the case without a formal decision.

As voters, the Petitioners 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 Petitioners 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).

Second, the Petitioners 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), this 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 the Petitioners' Appendix at 167-206. The Petitioners have a clear legal right to challenge this illegal expenditure of taxpayer money.

Here, the Petitioners have standing to bring this action both as voters under §5.06(2) and as taxpayers because of the illegal expenditure of taxpayer money by WEC to create and implement WEC's illegal policy to evade Wis. Stat. §6.50(3).

CONCLUSION

For the reasons stated herein, the Petitioners request that this Court reverse the decision of the Court of Appeals and affirm the Circuit Court's Mandamus Order and Contempt Order.

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Dated this 9th day of June, 2020.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with proportional serif font. The length of this brief is 10,400 words, calculated using the Word Count function of Microsoft Word.

Dated this 9th day of June, 2020.

Lucas T. Vebber

LUCAS T. VEBBER

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19 (12). 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 the court and served on all opposing parties.

Dated this 9th day of June, 2020.

Lucas T. Vebber

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