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WISCONSIN SUPREME COURT

Appeal Nos. 19-AP-2397 & 20-AP-112

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.

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

BRIEF OF *AMICI CURIAE* FELICIA ELLZEY, MARANGELLY QUINTANA FELICIANO, JENNIFER HAGEN & SEIU WISCONSIN STATE COUNCIL

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INTEREST OF *AMICI*

Amici Felicia Ellzey, Marangelly Quintana Feliciano, and Jennifer Hagen received notices as part of the October 2019 mailing sent by the Wisconsin Election Commission ("WEC") and are concerned that they will, if the circuit court's orders are resuscitated, be purged from the voter rolls. *See* Ellzey Aff., ¶¶3, 5-11; Feliciano Aff., ¶¶3, 5-9; Hagen Aff., ¶¶3-4, 7-10.[1]

Amicus SEIU Wisconsin State Council ("SEIUWI") invests significant resources "in registering, educating, and mobilizing its members and other voters to participate in local, state, and national elections." Sickel Aff., ¶6. If the court of appeals' decision is reversed, SEIUWI "will need to divert efforts from reaching more voters to revisit voters it has already contacted, impair[ing] SEIUWI's ability to reach

[1] All cited affidavits were filed in the court of appeals on December 20, 2019, with *amici*'s Intervention Petition.

as many Wisconsin voters as possible in the limited time before upcoming elections." *Id.*, ¶7.

Amici are motivated not only by their own direct interests, but also by the fundamental importance of the right to vote.

INTRODUCTION

"Nothing can be clearer under our Constitution and laws than that the right of a citizen to a vote is a fundamental, inherent right." *State v. Cir. Ct. for Marathon Cty.*, 178 Wis. 468, 473, 190 N.W. 563 (1922). "[N]o right is more jealously guarded and protected by the departments of government under our constitutions, federal and state, than is the right of suffrage." *State ex rel. Frederick v. Zimmerman*, 254 Wis. 600, 613, 37 N.W.2d 473 (1949). In recognition of the unique importance of the right to vote, the Legislature has long provided safeguards that protect registered voters when the voter rolls are maintained.

Petitioners urge this Court to demolish the safeguards erected in Wis. Stat. § 6.50(3) and reinstate the circuit court's writ of mandamus against WEC. As the court of appeals held, that cannot be accomplished with any fidelity to the statutory text because "[n]o reasonable reading of the statutes or th[e] statutory history supports Plaintiffs' contention," which finds "no support in the statutory language and, if accepted, would violate the policy choices made by the legislature." (Pet. App. 126 ¶63; *id.* 137 ¶92; *see also, e.g.*, *id.* 103-04 ¶3; *id.* 132-33 ¶78; *id.* 135 ¶84; *id.* 139 ¶99.) Petitioners' request must, therefore, be rejected to apply the law as written. Plain text commands, and statutory history confirms, that the circuit court erred and the court of appeals must be confirmed.

Moreover, Petitioners' new argument that the Help America Vote Act ("HAVA"), 52 U.S.C. §§ 20901-21415, preempts the plain-text meaning of Wis. Stat. § 6.50(3), is

both procedurally improper and substantively incorrect. It cannot be credited.[2]

ARGUMENT

I. PLAIN TEXT ESTABLISHES, AND STATUTORY HISTORY CONFIRMS, THAT WEC CANNOT PURGE MOVERS FROM THE VOTER ROLLS.

Petitioners insist Wis. Stat. § 6.50(3) imposes a clear and plain duty on WEC. The statute belies that claim.

A. Text and Context Make Clear that Wis. Stat. § 6.50(3) Does Not Address WEC.

The obvious fact that Wis. Stat. § 6.50(3) does not mention WEC is of no moment to Petitioners. They insist that "the … board of election commissioners" is not a body but a category containing multiple bodies, WEC included. (Pet'rs'

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[2] In the court of appeals, *amici* also briefed why the ERIC Movers Data are not sufficiently reliable to satisfy the requirements of Wis. Stat. § 6.50(3). Due to limited space, *amici* do not address that issue here. That does not reflect any change of position. *Amici* stand by their arguments below and the court of appeals' correct decision on that issue. (*See* Pet. App. 138-40 ¶¶93-99.) Here, *amici* focus instead on Petitioners' newfound preemption argument; other *amici* will address the reliability issue in greater detail.

Br. at 10-11.) WEC disagrees, noting that "board of election commissioners" has specific statutory meaning, as defined in Wis. Stat. § 7.20. (WEC Br. at 14-17.)

As this court has repeatedly recognized, "[c]ontext is important to meaning." *State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110. For that reason, "statutory language is interpreted … not in isolation but as part of a whole." *Id.* The Court must decide how much context to consider—that is, how far to pan out from the specific subdivision at issue. WEC is correct that section 7.20 provides a clear definition. But the Court need not look to another chapter, or even another section, to resolve this issue.

Section 6.50, considered in full, demonstrates that the phrase "board of election commissioners," as used in subdivision (3), excludes WEC. Several of section 6.50's

subdivisions address circumstances that can trigger changes to the statewide voter rolls:

- subd. (1): registered voters who have "not voted within the previous four years";
- subd. (3): registered voters who may have moved outside of the municipality containing the address at which they are registered;
- subd. (4): registered voters who have died;
- subd. (5): voters registered at the address of a condemned building; and
- subd. (6): registered voters who authorize changes to their registration status.

For each of these circumstances, the statute establishes a specific process.

Of those processes, only one requires WEC action. For individuals who were registered for the entirety of the previous four years but did not vote in that period, "the commission shall" identify such voters and "shall mail a notice" to them. Wis. Stat. § 6.50(1). For each notified registrant who does not respond to the notice, "the

commission shall change the registration status of that elector from eligible to ineligible on the day that falls 30 days after the date of mailing." Wis. Stat. § 6.50(2). The statute clearly charges WEC with the duty to effectuate this process.

By contrast, all of the other processes delineated in Section 6.50 charge local election administrators—rather than WEC—with acting. Subdivisions (3), (4), and (5) all address "the municipal clerk or board of election commissioners." Subdivision (6) addresses only "[t]he municipal clerk." None mentions WEC or "the commission."

Petitioners' arguments that the statutory phrase "board of election commissioners" includes WEC contravene the statutory text. The Legislature charged different officials with responding to different circumstances. Because WEC is best positioned to easily determine which registrants have not voted in four consecutive years, subdivision (1) is entrusted to WEC. Because other circumstances lend themselves more to

local knowledge, subdivisions (3)-(6) are entrusted to local election administrators. Indeed, WEC's "powers, duties and scope of authority are fixed and circumscribed by the legislature." *Koschkee v. Taylor*, 2019 WI 76, ¶20, 387 Wis. 2d 552, 929 N.W.2d 600 (internal quotation marks omitted). Undaunted, Petitioners urge this Court to ignore the Legislature's express allocations of responsibility and create from whole cloth a new responsibility for WEC not delegated to it by statute. This the Court cannot and should not do.

B. Statutory History Confirms that the Plain Text of Wis. Stat. 6.50(3) Does Not Address WEC.

"'A review of statutory history is part of a plain meaning analysis' because it is part of the context in which we interpret statutory terms." *Cty. of Dane v. LIRC*, 2009 WI 9, ¶27, 315 Wis. 2d 293, 759 N.W.2d 571 (quoting *Richards v. Badger Mut. Ins. Co.*, 2008 WI 52, ¶22, 309 Wis. 2d 541, 749 N.W.2d 581). "By analyzing the changes the legislature has made over the course of several years, we may be assisted

in arriving at the meaning of a statute." *Id.* (quoting *Richards*, 2008 WI 52, ¶22). Moreover, this Court will "consult legislative history to show how that history supports our interpretation of a statute otherwise clear on its face." *Seider v. O'Connell*, 2000 WI 76, ¶52, 236 Wis. 2d 211, 612 N.W.2d 659. *Accord, e.g.*, *Kalal*, 2004 WI 58, ¶51; *Anderson v. Aul*, 2015 WI 19, ¶109, 361 Wis. 2d 63, 862 N.W.2d 304 (Ziegler, J., concurring).

Here, statutory history underscores what the plain text conveys. As Petitioners acknowledge, "[f]or at least the past eighty years, there has been some form of Wis. Stat. § 6.50(3) on the books." (Pet'rs' Br. at 13.) This understates matters. For more than nine decades, municipal clerks have borne the duty to monitor which registered voters in the municipality may have moved and to provide notices and make changes to their registrations accordingly. *E.g.*, Wis. Stat. §§ 6.17 (7), 6.18(5) (1927); *id.* § 6.50(2)(c) (1967); *id.* § 6.50(3) (1975).

Petitioners' argument that the text of subdivision (3) necessarily includes WEC is at odds not only with that express allocation, but with the evolution of the state agency overseeing elections. Before the WEC filled that role, the Government Accountability Board ("GAB") did so. It was not authorized to act under Wis. Stat. § 6.50(3). *Compare* Wis. Stat. § 5.02(1s) (2007-08) (defining "board" as "the government accountability board") *with id.* § 6.50(3) (2007-08) (authorizing only "the municipal clerk or board of election commissioners" to deal with movers).

Before the GAB, the State Elections Board played this role. It, too, lacked the authority that Petitioners insist subdivision (3) grants to WEC. *Compare* Wis. Stat. § 5.02(1s) (2005-06) (defining "board" as "the elections board") *with id.* § 6.50(3) (2005-06) (authorizing only "the municipal clerk or board of election commissioners" to deal with movers). Petitioners' assertion that the Legislature took power vested

solely in municipal election officials since 1927, and in 2014 *sub silentio* expanded that grant to include statewide officials at WEC without changing a single word in subdivision (3), beggars belief.

Where the Legislature intended to alter the allocation of authority to remove voters from the rolls, it did so expressly. For much of our history municipal clerks bore responsibility for removing inactive, deceased, and withdrawn registrations. *E.g.*, Wis. Stat. § 6.18(1)-(3) (1927); *id.* §§ 6.50(2)(a), (d)-(e) (1967); *id.* §§ 6.50(1), (4), (6) (1975). The Legislature lifted responsibility for inactive voters from municipal clerks less than six years ago, assigning it to the GAB. 2013 Wis. Act. 149 § 1 (enacted Mar. 27, 2014). Less than two years later the Legislature shifted responsibility for inactive voters to the newly created WEC. 2015 Wis. Act 118, § 266(10) (enacted Dec. 16, 2015). After the Legislature made this last change in responsibility

under Wis. Stat. § 6.50(1), it revised subd. (3) and *chose not to change* the identity of the election officials charged with updating the voter rolls when registrants moved. *See* 2015 Wis. Act 261, § 63 (enacted Mar. 16, 2016).

That the Legislature opted to assign responsibility for inactive voters to WEC but not to reallocate responsibility for updating registrations in other circumstances should not be ignored.[3] The evolution of section 6.50 across time—and the constancy, across nearly a century, of allocating authority over movers to local election administrators—"confirm[s]" and "verif[ies]" the "plain-meaning interpretation" of the text

[3] Legislative decisions not to amend statutes are themselves instructive. "[I]t is well-settled that where Congress amends part of a statute and leaves another part unchanged, a court must interpret Congress's inaction as satisfaction with the unamended portion, or at least tolerance of its inadequacies." *Regal Stone Ltd. v. Longs Drug Stores Cal., L.L.C.*, 881 F. Supp. 2d 1123, 1129 (N.D. Cal. 2012); *Arctic Sole Seafoods v. Gutierrez*, 622 F. Supp. 2d 1050, 1058 (W.D. Wash. 2008) (quoting *In re Griffith*, 206 F.3d 1389, 1394 (11th Cir. 2000)) ("Where Congress knows how to say something but chooses not to, its silence is controlling."). *Cf., e.g., State ex rel. Dep't of Nat. Res. v. Wis. Ct. of Appeals, Dist. IV*, 2018 WI 25, ¶15, 380 Wis. 2d 354, 909 N.W.2d 114; *State ex rel. Schultz v. Wellens*, 208 Wis. 2d 574, 578-79, 561 N.W.2d 775 (Ct. App. 1997).

at issue here. *Kalal*, 2004 WI 58, ¶51. The statutory history, therefore, "supports [the] interpretation of a statute otherwise clear on its face." *Seider*, 2000 WI 76, ¶52.

II. FEDERAL LAW DOES NOT PREEMPT THE PLAIN-TEXT MEANING OF SECTION 6.50(3).

In this Court, Petitioners assert, for the first time in this action, that the plain meaning of the statute is preempted by federal law. This argument fails twice over. *First*, because the preemption argument was neither raised below nor included among the issues accepted for review, it should be disregarded. *Second*, even if the preemption argument has not been forfeited, it lacks merit.

A. Petitioners Forfeited the Preemption Argument by Not Raising It Below or Seeking Review on the Issue.

"It is a fundamental principle of appellate review that issues must be preserved at the circuit court to be raised on appeal as a matter of right." *Schill v. Wis. Rapids Sch. Dist.*, 2010 WI 86, ¶45 n.21, 327 Wis. 2d 572, 786 N.W.2d 177.

This Court regularly declines to adjudicate "a fundamentally different argument than that [] raised and tried before the circuit court." *Bostco LLC v. Milwaukee Metro. Sewerage Dist.*, 2013 WI 78, ¶83, 350 Wis. 2d 554, 835 N.W.2d 160. "Arguments raised for the first time on appeal are generally deemed forfeited." *Tatera v. FMC Corp.*, 2010 WI 90, ¶19 n.16, 328 Wis. 2d 320, 786 N.W.2d 810 (citing *Marotz v. Hallman*, 2007 WI 89, ¶16, 302 Wis. 2d 428, 734 N.W.2d 411). "Furthermore, 'unless ordered otherwise by the supreme court,' a petitioning party is precluded from raising or arguing an issue not set forth in the petition." *Id.* (quoting Wis. Stat. (Rule) § 809.62(6)).

Here, Petitioners made no mention of preemption in the circuit court or the court of appeals. Only after Petitioners sought this Court's review and a DC interest group filed an amicus brief suggesting the preemption angle did Petitioners belatedly decide that federal law necessitated the circuit

court's writ of mandamus. *See* Non-Party Br. of Honest Elections Project in Support of Pet'rs at 3-8 (initially filed with motion for leave on Apr. 8, 2020; leave granted on Apr. 14, 2020).

As in *Tatera*, the issue is not just belated, but beyond the scope of the issues accepted for review. *See* Pet. for Rev. of a Decision of the Ct. of Appeals Dist. IV at 1 (describing issue of Wis. Stat. 6.50(3)'s interpretation as on one "directly addressed by the parties' respective briefs in the Court of Appeals"); *see also* June 1, 2020 Order at 1 ("IT IS ORDERED … that pursuant to Wis. Stat. § (Rule) 809.62(6), the plaintiffs-respondents-petitioners may not raise or argue issues not set forth in the petition for review unless otherwise ordered by the court."). Petitioners fail even to make any effort to explain or excuse their failure to raise this argument in a timely manner.

For all of these reasons, the federal preemption issue has been forfeited and should not be addressed.

B. The Help America Vote Act Does Not Preempt the Plain-Text Meaning of Wis. Stat. § 6.50(3).

Even if the Court addresses preemption, Petitioners' argument fails. Petitioners (and the Honest Election Project, as *amicus*) would have this Court believe that, in adopting HAVA, Congress essentially forbade Wisconsin's highly decentralized system of election administration—but no one has noticed for nearly two decades. This argument is as baseless as it is absurd.

As the Court is undoubtedly aware, no state delegates more authority to local election administrators than Wisconsin does. *See, e.g.*, Mem. of Meghan Wolfe to Wis. Elections Comm'n on "Summary of April 7, 2020 Election" at 1 (describing Wisconsin as "the most decentralized state for election administration," with "1,850 municipal election

officials and 72 county election officials").[4] This is a defining feature of Wisconsin election law that embodies a deliberate decision to devolve power to the local level.

In adopting HAVA's subchapter on Uniform and Nondiscriminatory Election Technology and Administration, Congress respected basic principles of federalism in two relevant ways.

First, it expressly provided that HAVA's requirements for "computerized list maintenance" do not apply to those states—including Wisconsin—exempt from the National Voter Registration Act of 1993 ("NVRA"); those states "shall remove the names of ineligible voters from the computerized list in accordance with State law." 52 U.S.C. § 21083(a)(2)(A)(iii). In other words, HAVA does not

[4] Available at https://elections.wi.gov/sites/elections.wi.gov/files/2020-04/April%207%20Election%20Summary%20and%20Next%20Steps.pdf (last visited July 7, 2020).

preempt Wis. Stat. § 6.50(3), because it expressly adopts Wisconsin law.

Second and conjointly, HAVA expressly recognizes that all states have flexibility in determining how to comply with federal requirements. 52 U.S.C. § 21085 ("The specific choices on the methods of complying with the requirements of this subchapter shall be left to the discretion of the State."). This means that, even if HAVA's requirements for a computerized list maintenance applied to Wisconsin—and they do not, because Wisconsin is exempt from the NVRA—Congress would still defer to state law in determining the specific processes of how to comply.

Taken together, these two provisions provide both belt and suspenders in upholding Wisconsin's authority to effectuate the plain-text meaning of Wis. Stat. § 6.50(3). Congress could not be clearer that HAVA's provisions on computerized list maintenance do not interfere—in any way,

shape, or fashion—with Wisconsin election statutes, including Wis. Stat. § 6.50(3).

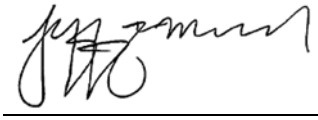
Setting this baseless preemption argument aside leads directly back to implementing the plain text of Wis. Stat. § 6.50(3), which requires affirming the court of appeals.

CONCLUSION

Wisconsin Statutes § 6.50(3) authorizes local election administrators—*but not WEC*—to send notices to registered voters who might have moved and then to change the registration status of those who do not respond within 30 days. The statutory text makes this clear, and statutory history confirms it. Because "[i]t is the enacted law … that is binding," *Kalal*, 2004 WI 58, 44, the plain meaning is fatal to Petitioners' claims. Petitioners' untimely, desperate invocation of federal preemption fails, both procedurally and on the merits, to rescue them from the plain meaning of the

statutory text. Accordingly, the court of appeals decision must be affirmed.

Dated: July 13, 2020.



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CERTIFICATIONS

I certify that the foregoing brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of the foregoing brief, exclusive of the caption, Tables of Contents, and Table of Authorities, is 2,957 words.

I further certify that when an electronic copy of this brief is submitted to this Court, it will comply with the requirements of Wis. Stat. § (Rule) 809.19(12) and will be identical in content to the text of the paper copy of the brief. A copy of this certificate is included with the paper copies of this brief that are submitted for filing with the Court and served on all opposing parties.

Dated: July 13, 2020.

Jeffrey A. Mandell