STATE OF WISCONSIN CIRCUIT COURT OZAUKEE COUNTY
BRANCH 1

TIMOTHY ZIGNEGO, et al.,

Plaintiffs,

v. Case No. 19-CV-0449

WISCONSIN ELECTION COMMISSION, et al.,

Defendants.

DEFENDANTS' RESPONSE BRIEF OPPOSING PLAINTIFFS' MOTION FOR A TEMPORARY INJUNCTION OR IN THE ALTERNATIVE FOR A WRIT OF MANDAMUS

INTRODUCTION

Three individual plaintiff electors ask this Court to order the Wisconsin Elections Commission to immediately invalidate the voter registrations of hundreds of thousands of Wisconsin citizens. This drastic request should be denied because Plaintiffs cannot meet the requirements necessary for a temporary injunction.

First, Plaintiffs have no likelihood of success on the merits of their claims for multiple reasons. As a basic matter, the statute on which they rely, Wis. Stat. § 6.50(3), does not even apply to the Wisconsin Elections Commission on its face; its mandate applies only to municipal clerks and municipal boards

of election commissioners. Because the Wisconsin Elections Commission is not even referenced in Wis. Stat. § 6.50(3), it cannot be mandatorily required to deactivate electors' voter registration status pursuant to that statute.

Moreover, even if the statute applies, the Commission would not be required to change electors' registration status unless it received "reliable information that a registered elector has changed his or her residence" to a location outside of the municipality. Here, the information upon which Plaintiffs rely—called 2019 ERIC Movers data— cannot be deemed "reliable information" that an individual elector has changed his or her voting residence in that way. The Commission previously found numerous discrepancies during the matching process for a previous batch of Movers data and concluded that at least 14% of the electors who appeared to have changed their voting residences in any way had in fact not done so.

And, even putting aside these statutory flaws, the individual plaintiff electors have failed to establish standing as voters or taxpayers to even challenge the Commission's action.

Second, Plaintiffs cannot show that they will suffer irreparable harm if the Court does not order the Commission to deactivate the registration status of other electors.

Finally, Plaintiffs cannot make a showing that a temporary injunction is necessary to preserve the status quo. On the contrary, a temporary injunction

would do just the opposite: potentially deactivate tens of thousands of properly registered electors without notice.

Plaintiffs' motion for a temporary injunction is neither supported by the law nor the facts. This motion should be denied.

STATEMENT OF FACTS

I. Wisconsin's Official Voter Registration List

The Wisconsin Elections Commission is responsible for compiling and maintaining electronically an official voter registration list. Wis. Stat. §§ 5.05(15), 6.36(1). The list is maintained electronically on WisVote, the statewide election management and voter registration system. (Wolfe Aff. ¶ 4.) Only Commission employees, municipal clerks, and election officials authorized by municipal clerks may make changes to the list. Wis. Stat. § 6.36(1)(b)1.b.

Revision of the list is required only under certain circumstances. One such circumstance is when an elector has not voted in the previous four years. Pursuant to Wis. Stat. § 6.50(1), the Commission is required to "examine the registration records for each municipality and identify each elector who has not voted within the previous 4 years if qualified to do so during that entire period" and mail a notice to that elector notifying them that their registration will be suspended unless they apply for continuation of registration within 30 days. Pursuant to Wis. Stat. § 6.50(2),

> If the elector to whom the notice of suspension was mailed under sub. (1) has not applied for continuation of registration within 30 days of the date of mailing, 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).

Another circumstance requiring revision to the registration list is when the municipal clerk or board of election commissioners receives reliable information that an individual elector has changed his or her residence. Wis. Stat. §§ 6.50(3), 7.20. (Wolf Aff. ¶¶ 8–9). In practice, when revising the registration list under Wis. Stat. § 6.50(3), the municipal clerk or board of election commissioners may ask Commission staff for assistance because revisions could be numerous or the municipal clerk otherwise needs technical assistance. The Commission does not act on its own under this subsection; it revises the voter registration list only upon the request of the municipal clerk or board of election commissioners. (Wolfe Aff. ¶ 10.)

II. Electronic Registration Information Center, Inc. (ERIC)

In 2015, the Legislature directed Wisconsin to join the Electronic Registration Information Center, Inc. (ERIC) for the purpose of maintaining Wisconsin's official voter registration list. The Legislature required the Commission to enter into a membership agreement with ERIC and to comply with the terms of the agreement. *See* Wis. Stat. § 6.36(1)(ae). (Wolfe Aff. ¶ 11, Ex. A.)

ERIC is a nonprofit consortium of 28 states and the District of Columbia that shares data about voters to help member states improve the accuracy and efficiency of their voter registration systems. ERIC helps its members identify people who may be eligible to vote but are not registered, voters who may have moved since their last registration date, voters who are deceased, voters who may have voted in the same election in more than one state, and voters who may no longer be eligible to vote. ERIC does this by comparing data about registered voters with information from other sources, like the Division of Motor Vehicles (DMV) and the United States Postal Service (USPS). (Wolfe Aff. ¶ 12.)

The ERIC Membership Agreement requires member states to transmit data relating to registration of electors in the state to ERIC for sharing within the state and with other member states. (Wolfe Aff. ¶ 13, Ex. A, sec. 2.) The Agreement also requires member states to use data provided by ERIC to improve the accuracy of the voter rolls. Upon receiving data from ERIC, member states must initiate contact with electors who may be eligible to vote but are unregistered and inform them how to register to vote. (Wolfe Aff. ¶ 14, Ex. A, sec. 5.a.) And member states must also initiate contact with voters whose records may be inaccurate:

> When the Member receives credible ERIC Data (meaning the state has validated the data) indicating that information in an existing voter's record is deemed to be inaccurate or out-of-date, the Member shall, at a

> minimum, initiate contact with that voter in order to correct the inaccuracy or obtain information sufficient to inactivate or update the voter's record. Each Member has ninety (90) days after the data was sent to initiate contact with at least 95% of the voters on whom data indicating a record was inaccurate or out-of-date, as described above, was provided.

(Wolfe Aff. ¶ 14, Ex. A, sec. 5.b.) The Agreement requires member states to reach out to voters appearing on the list maintenance reports, but it does not mandate removal of the person from the voter registration list, nor does it establish a timeframe for determining their status. (Wolfe Aff. ¶ 15, Ex. A, sec. 5.b.)

III. 2017 ERIC Movers data

In October 2017, ERIC provided data indicating that 341,855 registered Wisconsin voters may have moved based on information the voter provided to the DMV, the USPS Change of Address service, or government agencies in other states. The Commission vetted this data for changes that were not relevant to the voter's registration, such as changes to mailing addresses or temporary changes. The Commission then mailed a postcard to the identified voters directing them to reregister if they had moved or to sign and return the card to the municipal clerk or board of election commissioners to keep their registration current. The Commission decided to use the municipal process set forth in Wis. Stat. § 6.50(3) as a model and stated that the voters had 30 days in which to respond to keep their registration active. (Wolfe Aff. ¶ 16.)

Following the mailing, Commission staff identified several discrepancies that caused voters to appear on the list of "Movers" even though they may not have moved. For example, in some cases the street name on the voter's registration was spelled differently than the street name on their DMV record. The registrations of voters affected by these discrepancies were marked for continuation so they would not be deactivated. (Wolfe Aff. ¶ 17.)

In January 2018, the Commission deactivated the voter registrations of voters who did not return postcards or update their registration. Voters whose postcards were returned as undeliverable were also deactivated. In all, 335,701 voter registrations were deactivated and 6,153 were not. (Wolfe Aff. ¶ 18.)

The deactivation of these registrations caused problems for the 2018 Spring Primary because some voters who had not moved or had not changed their voting residence, but had not returned the postcard, were left off the poll book. In other words, the ERIC data implying that the voter had moved did not accurately indicate that the voter had actually moved or had changed their voting address. One reason for this was that some voters had registered a vehicle or obtained a driver license at an address other than their voting address. This included people who registered a vehicle at a business address, vacation home, or child's college address, and college students who obtained a driver license when they were temporarily living away from home. These

voters were likely unaware that the information they provided to the DMV would affect their voter registration status. (Wolfe Aff. ¶ 19.)

After talking with affected voters, Commission staff identified several additional situations where voters appeared to have moved based on ERIC Movers data, but had not actually moved or changed their permanent voting residence. This included situations where the voter registration address included a unit number, but the DMV record did not, or vice versa, as well as voters listed as having moved by the USPS, but no new address was provided. (Wolfe Aff. ¶ 20.)

In March 2018, Commission staff reactivated the voter registration of 12,133 voters whose ERIC Movers data was inaccurate and should not have been deactivated. (Wolfe Aff. ¶ 21.) Then, based on concerns expressed by clerks and others about the deactivation of voters based on potentially inaccurate information, the Commission created and approved a "Supplemental Movers Poll List," a separate list of deactivated voters flagged as in-state Movers. Clerks were permitted to contact voters on the supplemental list or to investigate the addresses using reliable government records available to the clerk to confirm the residency status ahead of the election. Beginning in the 2018 Spring Election, voting officials used both the regular poll book and the Supplemental Movers Poll List. By signing the Supplemental List, voters affirmed that they still lived at the address listed

and their registration was reactivated without a new registration application. (Wolfe Aff. ¶ 22.)

The Supplemental Movers Poll List was used for all subsequent 2018 elections. Clerks submitted the Supplemental List data to Commission staff after each election, and the Commission reactivated the registrations of voters who signed the list on behalf of the clerks. In all, 5,984 voter registrations were reactivated because voters signed the Supplemental List to continue their registration during the 2018 elections. (Wolfe Aff. ¶ 23.)

The City of Milwaukee, City of Green Bay, and Village of Hobart concluded that the ERIC Movers data was not reliable enough to remove voters from the poll list. Those municipalities requested reactivation of all Movers in their jurisdiction based on their authority to determine what constitutes "reliable information" under Wis. Stat. § 6.50(3). In all, 38,430 voter registrations were reactivated in these municipalities. (Wolfe Aff. ¶ 24.)

On December 3, 2018, the Commission approved staff's recommendation to stop using the Supplemental Movers Poll List for the 2019 Spring Primary and Spring Election. Instead, the Commission approved a call-in process where voters could report that they were improperly inactivated on the poll list and election workers would contact the municipal clerk to determine whether the voter's registration should be reinstated and their name added to the poll list. (Wolfe Aff. ¶ 25.)

Following the 2019 Spring Election, Commission staff compiled final statistics on the 2017 ERIC Movers data. Of the 341,855 people flagged as Movers based on data provided by ERIC, 160,863 (47%) updated their voter registrations, 134,517 (39%) were deactivated and remained deactivated, and 46,475 (14%) remained active at their original address. (Wolfe Aff. ¶ 26.)

After analyzing the data from the 2017 ERIC Movers mailing, the Commission concluded that an undeliverable mailing or non-response to the mailing does not accurately indicate in every case that the individual changed their voting address. Voters provide alternative addresses to government agencies for a variety of reasons that may not correspond to an actual move or may not reflect the voter's intent regarding their voting address. In addition, a postcard mailed outside of the voting cycle could easily be overlooked by the recipient as many people do not think about voting until close to the election. (Wolfe Aff. ¶ 27.)

IV. 2019 ERIC Movers data

In 2019, the Commission received another report on Movers data from ERIC. (Wolfe Aff. ¶ 28.) Based on what the Commission learned from the 2017 ERIC Movers data and subsequent mailing, the Commission revised its process for the 2019 ERIC Movers data. (Wolfe Aff. ¶ 29.)

During the week of October 7, 2019, the Commission, on behalf of municipal clerks, mailed letters to 234,039 voters who may have moved based

on the ERIC data. (Wolfe Aff. ¶ 30.) To date, the Commission has decided that the recipients of this mailing will remain active and can confirm that their address is valid on MyVote.wi.gov, by returning the postcard attached to the letter to their municipal clerk, or by participating in an election through Spring 2021. If the voter has moved, they can register their new address through MyVote.wi.gov, submit a new registration to their municipal clerk, or complete an election day registration at their new polling place. Postcards returned to the municipal clerk's office as undeliverable are simply noted in WisVote. (Wolfe Aff. ¶ 31.) The process that may be used to deactivate ERIC Movers will be determined and finalized at a future Commission meeting. (Wolfe Aff. ¶ 32.)

STATUTE ON WHICH PLAINTIFFS' ACTION IS BASED

Plaintiffs allege the Commission has a mandatory duty under Wis. Stat. § 6.50(3), which states in full:

> 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).

Wis. Stat. § 6.50(3) (format changed for readability).

LEGAL STANDARD

Plaintiffs seek a temporary injunction, which "are not to be issued lightly." *Pure Milk Prod. Co-op. v. Nat'l Farmers Org.*, 64 Wis. 2d 241, 251, 219 N.W.2d 564 (1974). "A court may issue a temporary injunction when the moving party demonstrates four elements: (1) the movant is likely to suffer irreparable harm if a temporary injunction is not issued; (2) the movant has no other adequate remedy at law; (3) a temporary injunction is necessary to preserve the status quo; and (4) the movant has a reasonable probability of success on the merits." *Milwaukee Deputy Sheriffs' Ass'n v. Milwaukee Cty.*, 2016 WI App 56, ¶ 20, 370 Wis. 2d 644, 883 N.W.2d 154 (citing *Werner v. A.L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520–21, 259 N.W.2d 310 (1977)).

ARGUMENT

Plaintiffs seek a temporary injunction ordering the Commission to immediately change the registration status "from eligible to ineligible" of hundreds of thousands of voters across the entire state. Plaintiffs' motion for

such drastic action should be denied because they have no likelihood of success on the merits of their action, they will suffer no irreparable harm if the Court does not issue a temporary injunction, and the temporary injunction would alter, instead of preserve, the status quo.

I. Plaintiffs have no reasonable probability of success on the merits.

This Court should deny Plaintiffs' temporary injunction motion because they have no likelihood of success on the merits. Plaintiffs' claims rise and fall on the applicability and interpretation of Wis. Stat. § 6.50(3). They claim the Commission violates Wis. Stat. § 6.50(3) by not invalidating the voter registrations of certain electors within 30 days of its October 7–11, 2019 mailing of notices. They further argue that the Commission's failure to enforce Wis. Stat. § 6.50(3) is an unpromulgated rule. (Dkt. 8:16–17 at ¶¶ 77–78, 83–87.) But Wis. Stat. § 6.50(3) does not apply to the Commission on its face. Further, even if, for argument's sake, Wis. Stat. § 6.50(3) applies to the Commission, it does not allow for the relief Plaintiffs seek. And, even putting aside the gaps in their statutory argument, the three plaintiff electors lack standing to bring a lawsuit changing the registration status of electors across the state.

A. On its face, Wis. Stat. § 6.50(3) does not apply to the Commission.

Plaintiffs seek a temporary injunction "requiring that the Defendants to cease and desist from ignoring and failing to enforce Wis. Stat. § 6.50(3)" and "requiring that [the Commission] shall change the registration status from eligible to ineligible for each voter to whom [the Commission] sent a Movers notice in October 2019 [] and who did not respond to the notice within 30 days." (Dkt. 9:1–2.) But Plaintiffs' have no likelihood of success on the merits because Wis. Stat. § 6.50(3) does not apply to the Commission and, likewise, does not direct the Commission to take the action Plaintiffs want it to.

"[S]tatutory interpretation 'begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.'" *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110 (quoting *Seider v. O'Connell*, 236 Wis. 2d 211, 232, 612 N.W.2d 659 (2000)). "Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." *Id.*

The part of the statute stating what entities are covered reads: "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 . . . . . 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." Wis. Stat. § 6.50(3).

That language does not apply to the defendants here, the Wisconsin Elections Commission and its members. Rather, in addition to a clerk, the statute covers a "board of election commissioners." Wis. Stat. § 6.50(3). Plaintiffs seem to assume that the Wisconsin Elections Commission *is* a covered "board of election commissioners," but they are wrong. The term "board of election commissioners" is specifically defined in Wis. Stat. § 7.20. It is a "municipal" or "county" "board of election commissioners" established in every city over 500,000 in population and every county over 750,000 in population, and is comprised of several members who must reside in the municipality or county. Wis. Stat. § 7.20(1)–(3). The Wisconsin Elections Commission, on the other hand, is a completely different body and consists of different members. *Compare* Wis. Stat. § 15.61(1)(a)1.–6. Plaintiffs' contrary interpretation is not an option: "specially-defined words or phrases are given their technical or special definitional meaning." *Kalal*, 271 Wis. 2d 633, ¶ 45. On its face, Wis. Stat. § 6.50(3)'s reference to the "board of election commissioners" is *not* a reference to the Commission.

In contrast to the defined term "board of election commissioners," the Wisconsin Elections Commission is separately referenced as "the commission" in chapters 5–10 and 12 of the statutes. *See* Wis. Stat. § 5.025. For example, Wis. Stat. § 6.50(1)–(2)'s four-year audit is done by "*the commission*." In subsection (1), "*the commission* shall examine the registration records of each municipality" and "mail a notice to the elector." Wis. Stat. § 6.50(1). And, in subsection (2r), "*the commission* shall publish on its Internet site" a plethora of information. Wis. Stat. § 6.50(2r). Further, in one subsection of Wis. Stat. § 6.50, the Legislature uses "the commission," "municipal clerk," and "board of election commissioners" *in the same sentence*. Wis. Stat. § 6.50(2g). Thus, Plaintiffs' conflating of these terms not only ignores the statutory definition of "board of election commissioners" but also would create surplusage, which is not allowed. *See Kalal*, 271 Wis. 2d 633, ¶ 46.

And, notably, the subsection that Plaintiffs invoke, Wis. Stat. § 6.50(3), makes *no reference* to "the commission."

There can be only one conclusion from the text of Wis. Stat. § 6.50(3): it applies only a municipal clerk or board of election commissioners[1] when referring to changing an elector's registration status from eligible to ineligible.

[1] Obviously, the Commission also is not a "municipal clerk" under Wis. Stat. § 6.50(3). "'Municipal clerk' means the city clerk, town clerk, village clerk and the executive director of the city election commission and their authorized

In sum, under Wis. Stat. § 6.50(3), the municipal "clerk" and municipal "board of election commissioners" are the only two entities that "shall change the elector's registration from eligible to ineligible status" when that subsection is triggered. The Wisconsin Elections Commission is not referenced in that subsection at all. A plain reading of Wis. Stat. § 6.50(3) confirms that this law does not apply to the Commission *on its face*. It necessarily follows that it does not mandatorily require the Commission to change the voter registration status of electors "from eligible to ineligible," as requested by the Plaintiffs' motion. There can be no mandatory duty attached to an entity that is not even mentioned in the statute at issue.

This threshold flaw in Plaintiffs' theory is dispositive of their motion for a temporary injunction. It should be denied.

B. Even if, for argument's sake only, Wis. Stat. § 6.50(3) applies to the Commission, the statute does not allow for the relief Plaintiffs seek.

1. ERIC Movers data is not per se "reliable information" under Wis. Stat. § 6.50(3).

Even assuming, for argument's sake only, that Wis. Stat. § 6.50(3) applies to the Commission, that statute's "reliable information" threshold has

representatives. Where applicable, 'municipal clerk' also includes the clerk of a school district." Wis. Stat. § 5.02(10). And the only *municipal* board of election commissioners in the state is the City of Milwaukee Board of Election Commissioners. (Wolfe Aff. ¶ 9.)

not been triggered. As to each individual recipient, the 2019 ERIC Movers data, by itself, is not "reliable information that a registered elector has changed his or her residence." Wis. Stat. § 6.50(3).

ERIC Movers data, contrary to Plaintiffs' position, is not per se reliable on a case-by-case basis. (Dkt. 10:7–9.) The Commission knows this from its experience with the 2017 Movers data.

In 2017, ERIC provided Movers data to the Commission that 341,855 registered Wisconsin voters may have moved based on information the voter provided to the DMV, the USPS Change of Address service, or government agencies in other states. (Wolfe Aff. ¶ 16.) The Commission mailed a postcard to the identified electors directing them to reregister if they had moved or to sign and return the postcard to the municipal clerk or board of election commissioners to keep their registration current. (Wolfe Aff. ¶ 16.) Then, in January 2018, the Commission deactivated the voter registrations of electors who did not return postcards, who did not update their registration, and whose postcards were returned as undeliverable. (Wolfe Aff. ¶ 18.)

This quick deactivation caused numerous problems and exposed inaccuracies in the Movers data, which included several discrepancies that caused electors to appear on the Movers list, even though they had not moved. For example, in some cases there were errors in the address itself, such as a misspelling of the street name or a missing unit number. (Wolfe Aff. ¶¶ 17, 20.)

In other cases, USPS and DMV data flagged a voter as having moved when no new address was provided or when the elector had simply registered a vehicle at another address. (Wolfe Aff. ¶¶ 19–20.) From this, the Commission learned that electors provide alternative addresses to government agencies for a variety of reasons that may not correspond to an actual move or may not reflect the elector's intent regarding their voting address. (Wolfe Aff. ¶ 27.) The Commission also learned that an undeliverable mailing or non-response to the mailing does not accurately indicate in every case that the elector has changed their voting address. (Wolfe Aff. ¶ 27.)

The Commission's experience with the 2017 ERIC Movers data revealed challenges inherent in matching source data from various independent entities—like the DMV and USPS—which gather and maintain data for their own business purposes. Even when the data may be accurate for the entities' business purposes, it may not be accurate for voter registration purposes because it may not accurately indicate a change in an individual's *elector's* residence.[2] (Wolfe Aff. ¶¶ 12–13.)

[2] "Elector residence" is defined in statute and includes consideration of the person's physical presence and intent regarding their voting residence: "The residence of a person is the place where the person's habitation is fixed, without any present intent to move, and to which, when absent, the person intends to return." Wis. Stat. § 6.10(1). The statute then describes various determinations of residence. Wis. Stat. § 6.10(2)–(13).

Following the 2019 Spring Election, Commission staff compiled final statistics on the 2017 Movers data. Of the 341,855 people flagged as Movers, 160,863 (47%) updated their voter registrations, 134,517 (39%) were deactivated and remained deactivated, and 46,475 (14%) remained active at their original address. This means that *at least* 14% of the 2017 ERIC Movers data did not accurately identify that an individual either moved or changed their voting residence. This percentage is probably much higher given the likelihood that some voter registrations were deactivated even though the voter had not actually moved. In short, for case-by-case determinations of an elector's registration status, the Commission reasonably does not consider ERIC Movers data to be per se "reliable information" under Wis. Stat. § 6.50(3), even if that statute applied to it.

2. Wisconsin Stat. § 6.50(3) does not require the change of an elector's registration status for every change of residence.

Plaintiffs' reading of the statute is also erroneous as to the action to be taken upon receipt of reliable information.

Wisconsin Stat. § 6.50(3) begins by referencing "receipt of reliable information that a registered elector has changed his or her residence *to a location outside of the municipality*." Wis. Stat. § 6.50(3). Based on this information, a notice is first mailed to registered electors. *Id.* If the elector does not change his or her registration or respond to the mailing within 30 days, the

elector's registration is changed "from eligible to ineligible." Later in the subsection, another sentence refers to "receipt of reliable information that a registered elector who has changed his or her residence *within the municipality*." *Id.* But in that case only the following directive is given: "the clerk or board of election commissioners shall change the elector's registration" and "mail the elector a notice of change." *Id.* No 30-day notice is mailed and, importantly, there is no authority to change an elector's registration status from "eligible to ineligible."

So, significantly different action is taken depending upon *where* the elector may have moved. This difference not only reveals that Wis. Stat. § 6.50(3)'s focus is local in nature—not state-wide—but that the law does not require a change in status "from eligible to ineligible" due to every supposed change in residence. Plaintiffs' reading of Wis. Stat. § 6.50(3) does not recognize the different consequences depending upon a registered elector's move inside or outside the municipality. In turn, Plaintiffs' motion demands broad, undifferentiated action in a way that the statute does not allow.

3. Wisconsin Stat. § 6.50(3) does not require changing an elector's status within 30 days of mailing.

Even if Wis. Stat. § 6.50(3) applies to the Commission and even if 2019 ERIC Movers data is "reliable information," the statute does not require a change to an elector's registration status within 30 days of the mailing date of

a notice (i.e., under the facts here, immediately). Under Wis. Stat. § 6.50(3), the phrase "within 30 days of the date the notice is mailed" applies only to the phrase "fails to apply for continuation of registration." *Id.* In other words, the 30 days governs how long *an individual* has to respond to a particular mailing, not when *the government entity* must change an elector's status.

Another subsection in the statute makes this lack of a specific deadline clear. In subsection (2), which is not as issue here, the Legislature directs that "the commission shall change the registration status of [the] elector from eligible to ineligible *on the day that falls 30 days after the date of mailing*." Wis. Stat. § 6.50(2). Subsection (3), however, does not contain this clear language; it does not specify *when* the elector's status shall be changed. Therefore, for the purposes of a temporary injunction, Plaintiffs fail to identify a basis for ordering immediate deactivation, as the statute contains no such clear directive, even if it applied.

C. Plaintiffs lack standing.

In addition to the fundamental flaws with their statutory argument, the Plaintiffs have failed to adequately support their standing to bring this challenge, at all. They fail to explain how they have standing to seek removal of registered voters throughout Wisconsin.

A party seeking declaratory relief must have a legally protectable interest in the controversy. *Voters with Facts v. City of Eau Claire*, 2017 WI

App 35, ¶ 15, 376 Wis. 2d 479, 899 N.W.2d 706, *review granted,* 2017 WI 94, ¶ 15, 378 Wis. 2d 222, 904 N.W.2d 371, and *aff'd on other grounds,* 2018 WI 63, ¶ 15, 382 Wis. 2d 1, 913 N.W.2d 131; *see also Putnam v. Time Warner Cable of Se. Wisconsin, Ltd. P'ship*, 2002 WI 108, ¶ 41, 255 Wis. 2d 447, 649 N.W.2d 626. In deciding whether a party has standing to seek declaratory relief, among other things, courts "inquire whether the plaintiff has . . . 'a personal stake in its outcome.'" *Town of Baraboo v. Vill. of W. Baraboo*, 2005 WI App 96, ¶ 35, 283 Wis. 2d 479, 699 N.W.2d 610 (quoting *Town of Eagle v. Christensen*, 191 Wis. 2d 301, 315–16, 529 N.W.2d 245 (Ct. App. 1995).) Here, the three plaintiffs claim standing "as voters under Wis. Stat. § 5.06, as taxpayers because the Defendants are spending taxpayer money on illegal activities which causes pecuniary harm to the Plaintiffs." (Dkt. 8:4 at ¶ 8.) These two standing theories fail.

1. Plaintiffs lack standing as taxpayers.

Plaintiffs' taxpayer standing theory is incorrect. For taxpayer standing "it must be alleged that the complaining taxpayer and taxpayers as a class have sustained, or will sustain, *some pecuniary loss*; otherwise the action could only be brought by a public officer." *S.D. Realty Co. v. Sewerage Comm'n of City of Milwaukee*, 15 Wis. 2d 15, 21–22, 112 N.W.2d 177 (1961) (emphasis added). "Any illegal expenditure of public funds directly affects taxpayers and causes them to sustain a pecuniary loss." *Voters with Facts*, 376 Wis. 2d 479, ¶ 16.

Here, Plaintiffs complain that the Commission is failing to change elector status from eligible to ineligible. (*E.g.*, Dkt. 8:6 at ¶ 19.) But Plaintiffs do not explain how the Commission spends public dollars by failing to act. And Plaintiffs' novel argument that any agency staff time devoted to a supposed improper activity equates to an illegal expenditure of public funds is without legal authority and may be ignored. (Dkt. 10:19.) *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) ("Arguments unsupported by references to legal authority will not be considered.") Accordingly, Plaintiffs lack standing under a taxpayer theory.

2. Plaintiffs also lack standing as voters.

Plaintiffs also contend that they have standing as voters because they filed an administrative complaint with the Commission pursuant to Wis. Stat. § 5.06(2). (Dkt. 10:11.) This theory fails, as well.

First, Plaintiffs likely had no right to file an administrative complaint in the first place. The administrative complaint statute, Wis. Stat. § 5.06(1), permits complaints to be filed by an elector challenging an "election official['s]" "failure [] to act with respect to . . . voting qualifications, including residence." Wis. Stat. § 5.06(1). The Commission then decides the matter and may order an election official to comply with the law. *E.g.*, Wis. Stat. § 5.06(4). Here, in contrast, Plaintiffs sought to challenge *the Wisconsin Elections Commission's*

action, not an outside "election official's" action. Thus, the administrative review statute had no apparent application.

Second, Plaintiffs purport to appeal to this Court the Commission's decision under Wis. Stat. § 5.06(2). (Dkt. 10:11 n.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.").) However, subsection (2) contains no express cause of action, unlike subsection (8), which Plaintiffs expressly disavow. *Compare* Wis. Stat. § 5.06(2), *with* Wis. Stat. § 5.06(8) ("Any . . . complainant who is aggrieved by an order issued under sub. (6) may appeal the decision of the commission to circuit court . . . .").

Third, and in any event, Wis. Stat. § 6.50(3) (the "reliable information" section that Plaintiffs rely on here) is not a vehicle for an individual elector to challenge the registration status of another elector, let alone on a mass scale. Rather, different statutes with different procedures and thresholds permit an individual elector to challenge the registration status of other electors. *See, e.g.,* Wis. Stat. §§ 6.325 ("No person may be disqualified as an elector unless the municipal clerk, board of election commissioners *or a challenging elector* under s. 6.48 demonstrates beyond a reasonable doubt that the person does not qualify . . . ."), 6.48 ("[a]ny registered *elector* of a municipality may *challenge*

the registration of any other registered elector"), and 6.925 ("*Any elector may challenge* for cause any person offering to vote whom the elector knows or suspects is not a qualified elector.") Wisconsin Stat. § 6.50(3) contains no language referring to a "challenging elector."

In sum, because Plaintiffs are not harmed as taxpayers or voters—"hav[ing] [no] legally protectable interest in the controversy," *Voters with Facts*, 376 Wis. 2d 479, ¶ 15—they lack standing. This is another reason why they are unlikely to succeed on the merits of their suit.

II. Plaintiffs will suffer no cognizable irreparable harm if a temporary injunction is not issued.

In addition to the fundamental problems with their merits theory, Plaintiffs suffer no irreparable harm if this Court denies the motion. Plaintiffs claim irreparable harm because their votes will be diluted by other electors who vote but are not eligible. (Dkt. 10:16.) This argument is unsupported and assumes too much.

Most basically, this theory of harm does not follow from Plaintiffs' premise. First, it requires an assumption that the 2019 ERIC Movers data is completely accurate. But the facts show otherwise, as explained above. Indeed, at least 14% of the registered electors who received the mailing were in the end properly registered. Second, Plaintiffs' theory assumes that the registered electors who have not changed their addresses (and who thus are supposedly

not properly registered) will nonetheless show up at the polls and then cast ballots. However, Plaintiffs have submitted no evidence that there has been voter fraud like this in the past. That is, just because an elector is listed as eligible but is no longer eligible does not mean that he or she will actually vote and commit voter fraud.

Nonetheless, even under Plaintiffs' voter fraud dilution theory of irreparable harm, the cases they cite do not support their position. For example, *Democratic Party of Virginia v. Virginia State Bd. of Elections*, No. 1:13-CV-1218, 2013 WL 5741486 (E.D. Va. Oct. 21, 2013), did not involve a plaintiff seeking to remove other electors from a registration list. Just the opposite: it was a challenge to removal. Plaintiffs also cite *Ohio Republican Party v. Brunner*, 582 F. Supp. 2d 957, 964–65 (S.D. Ohio 2008), which addressed a distinct issue about whether a secretary of state issued a proper directive under the Constitution and federal laws. In issuing a temporary injunction and finding irreparable harm to the movant, the district court's decision was based on the impossibility of later invalidating a ballot cast by an elector who was not properly registered. *Id.* at 964–65. Here, Plaintiffs offer no evidence that someone will commit voter fraud if no injunction issues now. And, in any event, the United States Supreme Court later vacated the temporary restraining order in *Brunner*, so that case offers no support, even if it were otherwise on point. *See Brunner v. Ohio Republican Party*, 129 S. Ct. 5

(2008) (per curiam). And neither *Montano v. Suffolk Cty. Legislature*, 268 F. Supp. 2d 243 (E.D.N.Y. 2003), nor *Day v. Robinwood W. Cmty. Improvement Dist.*, No. 4:08CV01888ERW, 2009 WL 1161655, at *1 (E.D. Mo. Apr. 29, 2009), is on point. *Montano* was a case regarding a challenge to a redistricting plan, and *Day* was a challenge to a local system in which registered voters would receive multiple ballots.

Logically, Plaintiffs have failed to show that they will be irreparably harmed if no temporary injunction is issued, and the cases they cite do not fill in that gap.

III. A temporary injunction is not necessary to preserve the status quo.

Plaintiffs also fail to show, as required, that a temporary injunction is necessary to preserve the status quo.[3] Not only is a temporary injunction not necessary, it would do the complete opposite—force the Commission to deactivate the registration status of potentially tens of thousands of electors, many of whom very likely did not move or change their voting residence and are properly registered.

[3] Plaintiffs claim that preservation of the status quo is not a proper factor for a temporary injunction. (Dkt. 10:6 n.1.) Their argument is without basis. The very decision they cite contains the status quo requirement. (Dkt. 10:5 (citing *Werner v. A.L. Grootemaat & Sons, Inc.,* 80 Wis. 2d 513, 520, 259 N.W.2d 310 (1977).) As does *Shearer v. Congdon*, 25 Wis. 2d 663, 131 N.W.2d 377, 381 (1964), which Plaintiffs claim is "one of the seminal Wisconsin cases setting forth the standards for a temporary injunction." (Dkt. 10:17.)

Plaintiffs' argument is based entirely on the assumption that the Commission should have changed the registration status of eligible electors to ineligible after 30 days of the mailing under Wis. Stat. § 6.50(3), which as discussed above, is incorrect. The registered electors' continued eligibility is the status quo.

Likewise, they cite nothing on point. They rely on *Shearer v. Congdon*, 25 Wis. 2d 663, 131 N.W.2d 377, 381 (1964), in which there was a dispute among landowners about access to a road used for several decades until the appellants installed a gate preventing access to respondents. *Id.* at 664–65. The circuit court temporarily enjoined appellants from interfering with the use of the road. *Id.* at 665. That is the opposite of this case: the blocking of the road changed the status quo and the temporary injunction reclaimed it. Here, in contrast, nothing has been changed but rather the same people who were registered before remain registered. The status quo is the set of facts as they now exist. A temporary injunction would change it. And, as explained above, not only would that change the status quo, but that change would be incorrect for a variety of reasons.

Further, while the Commission sent out notices to those electors who may have changed their residences (or may not have, as the ERIC data is not always an accurate indication of that), those notices did not notify the electors that their registration status could change from eligible to ineligible by not

responding (Wolfe Aff. ¶¶ 30–31), not to mention only 30 days after the mailing. Thus, not only would the injunction alter the status quo, but it would do so without meaningful notice to those affected.

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Plaintiffs have failed to meet all of the requirements for a temporary injunction. For a variety of reasons, their motion for such extraordinary relief should be denied.

IV. This Court should deny Plaintiffs' alternative remedy of mandamus because they cannot meet the requirements for such a writ.

In the alternative, Plaintiffs seek a writ of mandamus against the defendant commissioners directing them to comply with Wis. Stat. § 6.50(3). This claim should be denied based on substantially the same reasons requiring denial of their motion for a temporary injunction.

Mandamus is a writ used "to compel a public officer to perform a duty of his office presently due to be performed." *State ex rel. Marberry v. Macht*, 2003 WI 79, ¶ 27, 262 Wis. 2d 720, 665 N.W.2d 155. It is an extraordinary remedy. *Lake Bluff Hous. Partners v. City of South Milwaukee*, 197 Wis. 2d 157, 170, 540 N.W.2d 189 (1995). "In order for a writ of mandamus to be issued, four prerequisites must be satisfied: '(1) a clear legal right; (2) a positive and plain duty; (3) substantial damages; and (4) no other adequate remedy at law.'" *Voces De La Frontera, Inc. v. Clarke*, 2017 WI 16, ¶ 11, 373 Wis. 2d 348,

891 N.W.2d 803 (citation omitted). Since Plaintiffs cannot meet all of these requirements, this Court should deny their alternative request for a writ of mandamus.

First, "mandamus will not lie to compel the performance of an official act when the officer's duty is not clear and requires the exercise of judgment and discretion." *Beres v. New Berlin,* 34 Wis. 2d 229, 231–32, 148 N.W.2d 653 (1967). Here, there is no positive and plain duty of the Wisconsin Elections Commission to change the registration status of electors from eligible to ineligible. As explained above, Wis. Stat. § 6.50(3) does not apply to the Elections Commission and, therefore, cannot supply a positive and plain duty to change an elector's status in that way in all circumstances. Further, even if, for arguments sake, the statute applied, it contains no "plain duty" but rather just states a general standard of "reliable data." Deciding what is "reliable" necessarily "requires the exercise of judgment and discretion," meaning mandamus is inapplicable. *See id.*

Further, Plaintiffs' petition must show that they will be substantially damaged by nonperformance of the officer's positive and plain duty. *See Vretenar v. Hebron*, 144 Wis. 2d 655, 662, 424 N.W.2d 714 (1988). Here, they can make no such showing for the same reasons Plaintiffs suffer no irreparable harm if the injunction they seek is not issued.

Finally, even if the other factors are met, mandamus should not issue when "inequitable." *Vretenar*, 144 Wis. 2d at 662 (citation omitted). "The rights of the public and of third persons may be considered." *State ex rel. Sullivan v. Hauerwas,* 254 Wis. 336, 340, 36 N.W.2d 427 (1949). Here, the rights of potentially tens of thousands of electors who have not responded to the Commission's 2019 mailing should be considered. It would be inequitable for the Court to order the Commission to change their registration status to ineligible when these electors have had no notice and where, as here, the statute invoked by Plaintiffs does not even apply on its face.

CONCLUSION

Defendants ask this Court to deny Plaintiffs' motion for a temporary injunction or, in the alternative, a writ of mandamus.

Dated this 27th day of November, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed the documents above with the clerk of court using the Wisconsin Circuit Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 27th day of November, 2019.

Electronically signed by:

s/ Steven C. Kilpatrick
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