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 TO PLAINTIFFS' MOTION TO HOLD DEFENDANTS IN CONTEMPT AND FOR REMEDIAL SANCTIONS**

## INTRODUCTION

Shortly before the holidays, this Court issued a writ of mandamus ordering the Wisconsin Elections Commission (the "Commission") "to comply with the provisions of § 6.50(3) and deactivate the registrations" of potentially hundreds of thousands of electors. The Commission immediately appealed and sought a stay of the writ. Importantly, there are *pending* stay motions before both the court of appeals and supreme court. Despite the active appeal and pending stay motions, Plaintiffs have asked this Court to hold the Commission in contempt and issue monetary sanctions against it. Such an order would be wholly inappropriate. Indeed, given the statewide impact and the novel statutory issues, it is vital that the appellate courts be given an opportunity to

weigh in before any further steps are taken, especially since the appellate courts have yet to weigh in on a stay. As explained more below, in a related federal case, Plaintiffs have themselves taken the position that the appellate process should play out: "This Court [i.e., the federal district court] should abstain from doing anything in this case *until the state courts decide whether to grant a stay pending appeal*." *League of Women Voters of Wisconsin v. Knudson*, No. 19-CV-1029 (W.D. Wis.) (Affidavit of Counsel ¶ 13; Ex. J (Dkt. 25:8 (emphasis added)).) That, alone, means this Court should deny the contempt motion.

In addition, there would be other barriers to contempt. This Court's writ, which Plaintiffs themselves submitted to the Court, contains various ambiguities and so it is not the kind of "unequivocal" order that can support a contempt finding. It does not precisely specify what the Commission must do, how it must do it, and, perhaps more to point given the timing, when the Commission must do it.

Not only that, but even Plaintiffs do not seem to find the order to be clear. Their petition for bypass pending before the supreme court addresses a different scope than the relief they requested before this Court: they now apparently seek removal of only a subset of voters mailed the October 2019 letter, those who have moved *outside* a municipality. (Aff. ¶ 6; Ex. C.) That is not what they asked for before. This version of their claim not only is new but

also introduces a new set of practical problems because it is far from clear how the Commission can separate out that subset of voters with complete accuracy, especially on a tight timeframe.

This Court therefore should deny the contempt motion outright and allow the appellate courts, which now have jurisdiction over this case, to address the present circumstances. Although it should be denied outright, if this Court does not deny it, it should, at a minimum, hold it in abeyance while next steps play out in the appellate courts. But under no circumstances should this Court inject itself into the fluid situation in the appellate courts.

## THE WRIT OF MANDAMUS

The writ of mandamus states, in relevant part: "Defendant Wisconsin Election Commission is hereby ordered to comply with the provisions of § 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." (Writ, 2.)

## ARGUMENT

### I. The relevant law of contempt.

Plaintiffs seek a remedial sanction, which, when appropriate, may be "imposed for the purpose of terminating a continuing contempt of court." Wis. Stat. § 785.01(3). Contempt is the "intentional . . . [d]isobedience, resistance or obstruction of the authority, process or order of a court." Wis. Stat.

§ 785.01(1)(b); *Frisch v. Henrichs*, 2007 WI 102, ¶ 33, 304 Wis. 2d. 1, 736 N.W.2d 85. "The court's power to punish for contempt has been characterized as drastic and extraordinary." *Joint Sch. Dist. No. 1 v. Wisconsin Rapids Educ. Ass'n.*, 70 Wis. 2d 292, 317, 234 N.W.2d 289 (1975). A mere failure to comply with a court order is not sufficient to hold a party in contempt. *See Benn v. Benn*, 230 Wis. 2d 301, 309, 602 N.W.2d 65 (Ct. App. 1999). There must be a showing that the party's failure to comply with the order was "intentional." *See* Wis. Stat. § 785.01(1). "Not every failure to obey a judgment constitutes contempt of court. For instance, inability of the alleged contemnor to obey a decree, if not brought upon himself, may be a defense to a charge for contempt." *State ex rel. Ignasiak v. Town of Franklin*, 268 Wis. 295, 297 (1954).

For a party's action or inaction to be punishable by contempt, a circuit court's order must be a *specific* directive to that party to act or refrain from acting. *Carney v. CNH Health & Welfare Plan*, 2007 WI App 205, ¶ 17, 305 Wis. 2d 443, 740 N.W.2d 625. Only an "order or judgment which requires specific conduct (either to do, or to refrain from, specific actions) can be enforced by contempt." *Id.* A court's order must be an "unequivocal" directive. *State v. Dickson*, 53 Wis. 2d 532, 541, 193 N.W.2d 17 (1972). This requirement exists so "the person being enjoined [knows] what conduct must be avoided." *Welytok v. Ziolkowski*, 2008 WI App 67, ¶ 24, 312 Wis. 2d 435, 752 N.W.2d 359.

Plaintiffs, as the moving party, have the burden of proving that Defendants have failed to comply with a general court order. *In re Adam's Rib, Inc.*, 39 Wis. 2d 741, 747, 159 N.W.2d 643 (1968) (movant has the burden of proving violation of a "general" court order, whereas respondent has the burden of providing an explanation of his failure to comply with a "specific and direct order").

## II. The Commission has not intentionally disobeyed the writ of mandamus and the appellate courts are currently considering a stay, meaning no contempt order should properly issue.

This Court should not find the Commission[1] in contempt and issue monetary sanctions against it because, among other reasons, the Commission has taken immediate action to seek a ruling on a stay in the appellate courts, and those motions are still pending. Especially given the novel and statewide claims here, the appellate courts should be given an opportunity to weigh in before there is immediate deactivation of potentially hundreds of thousands of electors' registrations across the state. Indeed, Plaintiffs themselves have

[1] Plaintiffs' motion for contempt and remedial sanctions against the individual commissioner defendants must be dismissed for several reasons. First, the individual defendants were not ordered to comply with the writ by this Court. Only "Defendant Wisconsin Election Commission" was directed to act. (Writ, 2.) Second, individual commissioners cannot act separately from the Commission as an entity. Any action by the Commission requires the affirmative vote of two-thirds of the members. Wis. Stat. § 5.05(1e). Thus, by law it is impossible for the individual commissioners to deactivate electors' registrations. And the "inability to obey that order is a defense to contempt." *Ash Park, LLC v. Alexander & Bishop, Ltd.*, 2010 WI 44, ¶ 79, 324 Wis. 2d 703, 783 N.W.2d 294.

acknowledged as much. Moreover, contempt would be improper because the writ contains various ambiguities that mean it is not so "unequivocal" that it can support a contempt finding. In fact, Plaintiffs' own interpretation of their writ keeps changing.

### A. The Commission is not in contempt because it has taken reasonable action to stay the writ of mandamus by filing motions for a stay, and all involved recognize that an appellate court decision on the pending stay motions should occur before deactivation.

#### 1. The Commission has acted to obtain a stay of the writ.

After this Court issued its writ, the Commission immediately moved for a stay and has continually sought a ruling on it, including by now requesting action by the supreme court. It immediately made an oral motion to stay this Court's ruling at the hearing on December 13, 2019, but this Court denied that motion. (Hr'g Tr. 77:3–6). Then, on December 17, 2019—the day this Court issued the writ of mandamus—the Commission appealed the writ and sought an expedited stay from the court of appeals.[2] (Aff. ¶ 4; Ex. A). The court did not rule on the stay immediately but ordered Plaintiffs to provide an expedited response by December 23, 2019. (Aff. ¶ 5; Ex. B.) On December 20, 2019, Plaintiffs filed a petition for bypass in the supreme court and argued that the

[2] That same day, December 17, 2019, the League of Women Voters of Wisconsin and two electors filed a federal lawsuit alleging that deactivating registrations without prior notice would violate due process. *League of Women Voters of Wisconsin v. Knudson*, No. 19-CV-1029 (W.D. Wis.) (Aff. ¶ 12; Ex. I).

filing of a bypass petition divested the court of appeals of jurisdiction to decide the pending stay motion. (Aff. ¶ 6; Ex. C.) On December 23, 2019, the Commission filed a letter with the court of appeals opposing Plaintiffs' position on the court's jurisdiction to decide the stay motion. (Aff. ¶ 7; Ex. D.) On December 27, 2019, the Commission again asked the court of appeals to immediately issue a decision on the stay by the Commission's scheduled meeting on December 30, 2019. (Aff. ¶ 8; Ex. E.) Then, after the New Year holiday also passed with no decision, the Commission renewed its motion, on January 3, 2020, for an expedited stay and asked the court of appeals to issue its decision or to inform the parties whether a decision would be forthcoming. (Aff. ¶ 9; Ex. F.)

Only late in the day of January 7, 2020, did the court of appeals issue an order explaining that it would hold the Commission's stay motion in abeyance pending action by the supreme court. (Aff. ¶ 10; Ex. G.) The very next day—January 8, 2020—the Commission filed with the supreme court an emergency motion asking the supreme court to order the court of appeals to decide the Commission's stay motion or, alternatively, grant an emergency stay. (Aff. ¶ 11; Ex. H.) That stay motion is currently pending before the supreme court.

In sum, from December 17, 2019—the very day this Court issued the writ—until the date of the filing of this response, the Commission has made repeated and continuing efforts to obtain a stay of this Court's writ but has not

yet obtained an answer from the appellate courts. These repeated attempts at obtaining a decision on a stay of this Court's writ demonstrates that the Commission is not intentionally disobeying it. To the contrary, it is taking the available actions, as everyone agrees is appropriate, to learn if the appellate courts intend to stay it. There can be no contempt in these circumstances.

**2. Both Plaintiffs and this Court acknowledge that the appellate courts should weigh in before any deactivations occur.**

That the Commission is acting appropriately cannot be seriously questioned. Indeed, both this Court and Plaintiffs have indicated that the appellate courts should weigh in. After denying the Commission's oral motion to stay, this Court recognized that "[i]f one of the reviewing Courts wants to grant a stay, that's appropriate." (Hr'g Tr. 78:24–25.) The appellate courts should be given this "appropriate" opportunity to act on the Commission's stay request, one way or the other.

Likewise, in the related federal litigation, Plaintiffs argued that deactivation is *not* imminent precisely because a decision on the stay is still pending. They wrote: "This Court [i.e., the federal district court] should abstain from doing anything in this case *until the state courts decide whether to grant a stay pending appeal*." (Aff. ¶ 13; Ex. J (Dkt. 25:8 (emphasis added)).) Similarly, Plaintiffs recognized that "in the near future, either the Wisconsin Supreme Court or the Wisconsin Court of Appeals (depending on whether the

Supreme Court grants the petition for bypass) *will decide whether WEC is entitled to a stay of the Circuit Court's order pending appeal*." (Aff. ¶ 13; Ex. J (Dkt. 25:9 (emphasis added)).) Finally, Plaintiffs informed the district court that "the state courts might decide that the registrations should not be deactivated." (Aff. ¶ 13; Ex. J (Dkt. 25:15).)

Plaintiffs cannot have it both ways. They cannot argue to a federal court that it should *not* act until there is a decision on the pending stay motions, while simultaneously arguing to this Court that it *should* act by immediately enforcing the writ through contempt proceedings. Their representations to the federal court reflect the common-sense, logically-consistent result that should prevail here: neither the federal court nor this Court should issue further orders until the state appellate courts have a chance to decide whether a stay is appropriate.

Given the upcoming February and April elections, it makes sense for the appellate courts to weigh in first before any action is taken to avoid public confusion and possible flip-flopping of activations, which may interfere with voters' ability to vote in those upcoming elections. Indeed, the February Seventh Congressional District election is already underway: absentee ballots have been mailed by local election officials and voting is currently happening.

Changing the status quo now, especially without appellate input, would irreparably harm electors who have been erroneously deactivated or who are

in the midst of the voting process. As Plaintiffs and this Court have acknowledged, it makes sense that the final word in the courts on the scope of the Commission's statewide obligations under Wis. Stat. § 6.50(3) come from the appellate courts. *See Servomation Corp. v. DOR,* 106 Wis. 2d 616, 620 n.3, 317 N.W.2d 464 (1982) (circuit court decision not precedential); *Cruz v. All Saints Healthcare Sys., Inc.*, 2001 WI App 67, ¶ 21 n.9, 242 Wis. 2d 432, 625 N.W.2d 344 (circuit court decision not binding precedent). *Cf.* Wis. Stat. § 752.41(2) ("Officially published opinions of the court of appeals have statewide precedential effect.").

****

The Commission is not in contempt of the writ of mandamus because it has reasonably and repeatedly sought appellate court review of this Court's stay denial, and no appellate court has decided, let alone denied, its stay motion. Moreover, both parties and this Court have properly anticipated an appellate court ruling prior to any deactivation of voter registrations. This Court should not find the Commission in contempt given this unique procedural posture of the appeal of the writ.

### B. In the alternative, the Commission is not in contempt because the writ of mandamus does not clearly and unequivocally direct the Commission when or how to deactivate electors' registrations.

Apart from the Commission's continuing attempts to obtain an appellate stay, there is a separate reason not to find contempt: the writ, drafted and proposed by Plaintiffs, is not a specific and unequivocal directive. Again, only an "unequivocal" directive can support a contempt finding. *Dickson*, 53 Wis. 2d at 541. Due to the lack of clarity in the writ, there is no basis to find that the Commission has intentionally disobeyed it.

The writ of mandamus orders the Commission to "comply with the provisions of § 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." (Writ, 2.) This language is not a clear directive to the Commission as to when, how, or who to deactivate. *Carney*, 305 Wis. 2d 443, ¶ 17; *Dickson*, 53 Wis. 2d at 541.

The text of this writ can be interpreted multiple ways. One way is to require the Commission to immediately deactivate the registrations of all electors who failed to apply for continuation of their registration within 30 days of the Commission's October 2019 mailing. However, that interpretation leads to several conflicts between the writ and Wis. Stat. § 6.50(3), along with practical problems. Indeed, now before the supreme court, Plaintiffs appear to

have shifted their own view of the writ, stating that it applies only when a "registered elector has changed his or her residence to a location outside of the municipality where he or she is registered"—which is only a subset of those who received the October 2019 mailing. (Aff. ¶ 6; Ex. C.) If the drafters of the writ have difficulty deciding what it means, it certainly cannot be that the Commission is in contempt of it.

Indeed, as explained below, the writ can just as easily be interpreted to avoid these conflicts. Because there are several reasonable interpretations of the writ, the Commission cannot be subject to contempt, especially given the shifting formulations from Plaintiffs themselves. *Welytok*, 312 Wis. 2d 435, ¶ 24.

*First*, the writ does not clearly direct the Commission *when* it must deactivate electors' registrations.

Because the writ instructs the Commission "to comply with the provisions of § 6.50(3) *and* deactivate the registrations of those electors" but is otherwise silent on when that must occur, the statute itself must be consulted regarding the timing of any deactivations. But the statute provides no guidance on deactivation timing, either. It simply reads that "[i]f 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). The condition for being changed from eligible to ineligible status is "fail[ing] to apply for continuation of registration within 30 days of the date the notice is mailed." *Id.* Once that 30-day period passes, an elector's registration status "shall" be changed—but the statute does not say how soon that must occur. *Id.* Put differently, the 30-day period governs how long an *elector* has to respond to the notice mailed, not when the relevant *government entity* shall change an elector's status.

Plaintiffs seem to interpret the writ to require immediate deactivation, likely misreading the 30-day period as requiring deactivation 30 days after the date of the mailing of the Commission's October 2019 notice. But, again, the phrase "within 30 days of the date the notice is mailed" only modifies the phrase "fails to apply for continuation of registration." Wis. Stat. § 6.50(3). The writ is not a clear and unequivocal directive for the Commission to *immediately* deactivate electors.[3] Given this ambiguity, the Commission reasonably interpreted the writ as allowing for time to seek a stay from the appellate courts prior to deactivation.

[3] Another subsection in Wis. Stat. § 6.50 makes this lack of a specific deadline clear. In subsection (2), 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, contains no "on the day" language. Because no such language is included in subsection (3), but is included in subsection (2), the Commission's interpretation is reasonable.

*Second*, the writ does not clearly direct the Commission *how* it must "comply with the provisions of § 6.50(3) and deactivate" electors' registrations. Specifically, it does not address the notice, if any, that electors should receive before being deactivated. Wisconsin Stat. § 6.50(3) contains a notice provision, which 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 by mailing a notice by 1st class mail to the elector's registration address stating the source of the information*."

Plaintiffs interpret the writ to require no further pre-deactivation notice to electors, seemingly based on the writ's reference to "the date the notice was mailed under that provision." (Writ, at 2.) But the writ arguably requires the Commission to "comply with" Wis. Stat. § 6.50(3) by providing another notice *before* deactivating the registrations of any electors. Indeed, this Court stated from the bench: "I'm going to issue the writ of mandamus. *I'm going to compel the Elections Commission to comply with the thirty-day notice*. I can't tell them how to do that. I don't know how to do that. They'll have to figure that out." (Hr'g Tr. 76:12–16 (emphasis added).) Simply put, contempt is not proper where the Commission must "figure out" how to comply with this Court's directive.

Moreover, if there were to be deactivations, providing a more detailed notice, similar to the one the Commission mailed in 2017, would be reasonable—that notice contained a warning that deactivation would occur if the elector did not act to continue their registration. Indeed, whether the Commission's 2019 mailing provided sufficient notice of deactivation is currently the subject of a federal lawsuit and preliminary injunction motion filed against the Commission. (Aff. ¶ 12; Ex. I.)

*Third*, the writ does not clearly notify the Commission whose registrations it must deactivate.

Although, when applicable, Wis. Stat. § 6.50(3) does sometimes require deactivation for a particular elector, it only potentially applies to certain electors that have moved *outside* their registered municipality. Those who have simply moved *within* their registered municipality are not deactivated under that provision. In fact, § 6.50(3) requires the municipal clerk or municipal board of election commissioners to change the elector's registration to the new address, not to deactivate the registration. That would seem to also be part of the mandate "to comply with the provisions of § 6.50(3)."

The deactivation process starts with the "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 stating the source of the information is mailed to the elector. *Id.* If the elector

does not change his or her registration or respond to the notice within 30 days, the elector's registration shall be changed "from eligible to ineligible." *Id.* But upon the "receipt of reliable information that a registered elector who has changed his or her residence *within the municipality*," officials "shall change the elector's registration" and "mail the elector a notice of change." *Id.*

Plaintiffs here asked this Court to order deactivation of everyone mailed Commission letters in October 2019. However, those recipients were not limited to those who had moved outside a municipality, as the letters were not intended to carry out section 6.50(3). The writ is thus unclear regarding which electors should be deactivated. On one reading, it requires the deactivation of *all* electors who received the October 2019 notice. But on another—indeed, the one consistent with Wis. Stat. § 6.50(3)'s plain text—the writ requires deactivation of only the registrations of those electors who moved outside of their original municipality residence. Indeed, Plaintiffs themselves seemed to have belatedly realized this ambiguity since drafting and submitting the writ for this Court to enter, because they have now changed their position before the supreme court by asking that deactivation only occur for those who have moved outside a municipality. This lack of clarity further counsels against finding the Commission in contempt. Indeed, because Plaintiffs never made this distinction before, it has not been litigated whether this differentiation is

even practical based on the October 2019 recipient list, much less on a tight timeframe.

***

A writ of mandamus must be a clear and unequivocal directive before contempt can be found. *Carney*, 305 Wis. 2d 443, ¶ 17. The body to whom the writ is directed must know what conduct to avoid. *Welytok*, 312 Wis. 2d 435, ¶ 24. The writ of mandamus here is not a clear and unequivocal directive to the Commission on how to deactivate electors' registrations in compliance with Wis. Stat. § 6.50(3). Therefore, for this additional reason, the Commission cannot be found in contempt.

## CONCLUSION

This Court should deny Plaintiffs' contempt motion in light of the ongoing proceedings in the appellate courts and undecided stay motions that currently are pending. Further, even absent those compelling reasons, the grounds for contempt are absent. For both reasons, the motion should be denied.

Dated this 10th day of January, 2020.

*[signature page follows]*

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

s/ Karla Z. Keckhaver
KARLA Z. KECKHAVER
Assistant Attorney General
State Bar #1028242

STEVEN C. KILPATRICK
Assistant Attorney General
State Bar #1025452

COLIN T. ROTH
Assistant Attorney General
State Bar #1103985

Attorneys for Defendants

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-6365 (KZK)
(608) 266-1792 (SCK)
(608) 264-6219 (CTR)
(608) 267-2223 (Fax)
keckhaverkz@doj.state.wi.us
kilpatricksc@doj.state.wi.us
rothct@doj.state.wi.us

## CERTIFICATE OF SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed the above *Defendants' Response to Plaintiffs' Motion to Hold Defendants in Contempt and for Remedial Sanctions* 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 10th day of January, 2020.

Electronically signed by:

s/ Karla Z. Keckhaver

KARLA Z. KECKHAVER
Assistant Attorney General