STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

DENNIS EUCKE, et al.,

Plaintiffs

v.

WISCONSIN ELECTIONS COMMISSION, et al.,

Defendants

Case No. 2024CV0007822

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT CITY OF MILWAUKEE ELECTION COMMISSION'S UNTIMELY MOTION TO DISMISS

INTRODUCTION

Plaintiffs Dennis Eucke, Justin Gavery, and Joe Nolan ("Plaintiffs") brought this lawsuit under the election laws to ensure that Defendants Wisconsin Elections Commission ("WEC") and City of Milwaukee Election Commission ("MEC") perform their legal duties to confirm that the voter rolls for a given jurisdiction list as "inactive" people who have permanently left that jurisdiction. (Doc. No. 3 ¶ *prayer for relief*.) To be clear, this action will not remove anyone from the voter rolls. Nor will it place any burdens on eligible voters. As discussed below, preventing or remedying one's classification as "inactive" is as easy as voting.

Having disregarded the Court's Order to file its brief in support of its motion to dismiss by no later than October 8, 2024, and having gained advanced knowledge of Plaintiffs' response arguments from Plaintiffs' brief in compliance with that Order, MEC has now filed a brief seeking dismissal two weeks late, and less than a week before the Court's October 28, 2024 hearing. Such gamesmanship and disregard for the Court's orders should not be permitted. For this reason alone, MEC's untimely motion to dismiss should be denied as waived.

But even if the Court were to reach the merits of MEC's untimely motion (the Court should not), this motion fails. As an initial matter, MEC's brief is most notable for what it does not say. Nowhere does MEC state it has taken any action (as it is legally required to do) to correct the large swaths of voters who are improperly identified as "active" on the voter rolls when these individuals have moved and no longer reside at the address contained on the rolls. This is so—even though Plaintiffs repeatedly put MEC on notice of this problem beginning earlier this year.

Rather, it is clear that MEC has no intention of performing its duties under the state's election laws. MEC argues this case should be dismissed under Wisconsin Statute § 5.06(2) because Plaintiffs did not bring an administrative action against MEC under Wisconsin Statute § 5.06(1). These statutes require that an elector "file a written sworn complaint with" WEC against "an individual who is charged with any duties relating to the conduct of an election" prior to bringing an action against that individual. Wis. Stat. §§ 5.02(4e), 5.06(1)–(2). But nothing in this statute allows or requires § 5.06(1) complaints against non-"individual" persons such as MEC. Indeed, the Wisconsin Supreme Court has confirmed that such complaints are not required. *See Teigen v. Wis. Elections Comm'n*, 2022 WI 64, ¶¶ 46–47, 403 Wis. 2d 607, 640–42, 976 N.W.2d 519, 536–37 (2022), *overruled on other grounds by Priorities USA v. Wis. Elections Comm'n*, 2024 WI 32, ¶ 5, 412 Wis. 2d 594, 600, 8 N.W.3d 429, 432.

In response to this reality, MEC seeks to turn the binding rules of authority on their heads, citing administrative regulations and WEC's practices as more authoritative than the Wisconsin Statutes—and citing a Court of Appeals case (where the applicability of § 5.06(1)–(2) was not even challenged) as more authoritative than a more recent Wisconsin Supreme Court case. Such topsy-turvy reasoning is wholly meritless.

Nor is there any merit to MEC's argument that mandamus is improper because MEC supposedly does not have a clear duty to comply with the law. Wisconsin Statute § 6.50(3) plainly says that "[u]pon receipt of reliable information that a registered elector has changed his or her residence to a location outside of" Milwaukee, WEC "shall" take the actions Plaintiffs seek. It is well-established that "shall" signifies a mandatory duty. Thus, § 6.50(3) gives MEC a clear and unequivocal duty to act when presented with information that is objectively reliable.

MEC, however, attempts to seize upon the word "reliable" as supposedly giving it discretion in this matter, and thus, mandamus is improper. MEC is wrong. Not only does the statute fails to support this argument, but the statute specifically identifies the very data at issue in this case as data upon which authorities like MEC can rely: Here, Plaintiffs' data comes from the U.S. Postal Service's change of address information, and a later subsection of § 6.50 says that entities like MEC may "arrange with the U.S. postal service pursuant to applicable federal regulations, to receive change of address information with respect to individuals residing within the municipality for revision of the elector registration list." Wis. Stat. § 6.50(8). Accordingly, MEC's motion to dismiss should be denied.

FACTUAL AND PROCEDURAL HISTORY

A. MEC Has a Statutory Duty to Perform Certain Actions to Maintain the Voter Rolls

This is a simple case to enforce the election laws that are already on the books. Like other states, Wisconsin requires voters to be citizens of the jurisdiction where they vote. Specifically, the law provides that "[e]very U.S. citizen age 18 or older who has resided in an election district or ward for 28 consecutive days before any election where the citizen offers to vote is an eligible elector." Wis. Stat § 6.02(1). "If a person moves to another state with an intent to make a permanent residence there, . . . the person loses Wisconsin residence." Wis. Stat. § 6.10(10).

Local election officials and bodies such as MEC have a duty to maintain the voter rolls to ensure compliance with these statutes. One of these statutory duties is as follows:

> Upon receipt of reliable information that a registered elector has changed his or her residence to a location outside of the municipality, the . . . 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. . . . 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 . . . board of election commissioners shall change the elector's registration from eligible to ineligible status.

Wis. Stat. § 6.50(3).

Notably, this statute expressly endorses the use of the U.S. Postal Service's change of address information to determine where electors currently reside. Wis. Stat. § 6.50(8) ("Any municipal governing body may direct the . . . board of election commissioners to arrange with the U.S. postal service . . . to receive change of address information with respect to individuals residing within the municipality for revision of the elector registration list.").

To be clear, electors who are transferred to "ineligible" (also commonly referred to as "inactive") status under § 6.50(3) are not removed from the voter rolls. In the event that an ineligible elector becomes eligible again (or an eligible elector is mistakenly marked as ineligible), this will not prevent the elector from voting: An ineligible elector can cast a vote in-person at a municipal clerk's office up until the Friday before the election—or at a polling place on election day. *See Voter Registration and Proof of Residence*, WIS. ELECTIONS COMM'N, https://elections.wi.gov/Register (last accessed Oct. 4, 2024).

Thus, the notices under § 6.50(3) pose no risk to any voter: Any voter who plans to submit an absentee ballot can just as easily submit a response to the § 6.50(3) notice and thereby avoid being marked as ineligible (or inactive), and any voter who plans to vote in person can do so even if he or she has been mistakenly marked as ineligible/inactive.

B. MEC Has Failed to Perform Its Statutory Duties

On several occasions throughout this year, Plaintiffs have obtained publicly-available data from the U.S. Postal Service regarding individuals who have changed their addresses and have told the Postal Service that their change in residence is "permanent." (Doc. No. 3 ¶¶ 24–25, 34.) Plaintiffs have also obtained publicly-available voter rolls from WEC. (*Id.* at ¶¶ 22, 34.) By comparing these sets of data, Plaintiffs were able to identify numerous voter registrations statewide that were for electors who had informed the U.S. Postal Service that they had permanently moved out of the state or out of the Wisconsin county where they are registered.

Contrary to the implications of certain would-be intervenors, none of the data used by Plaintiffs contained information regarding any individual's political affiliation, race, ethnicity, or other demographics. Nor did Plaintiffs have any interest whatsoever in such demographic facts. All Plaintiffs were interested in—and the only information they had—was the addresses where the electors were registered and which electors had permanently moved from those addresses. And while Plaintiffs reside in Milwaukee County, their analysis encompasses the entire state.

The anomalies Plaintiffs found are highly problematic. That is because the listing of invalid voter registrations as "active" threatens to disenfranchise Plaintiffs and other voters who are citizens of Milwaukee County and the State of Wisconsin. For example, if an absentee ballot is cast in the name of a voter who is no longer a citizen of Wisconsin (whether by that voter or by someone else), that vote dilution disenfranchises all Wisconsinites. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) ("[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.").

In March 2024, Plaintiffs appeared at a hearing before MEC and informed MEC that over 50,000 active voter registrations in Milwaukee were for invalid or inaccurate addresses. This

included many registrations where the associated voters had explicitly told the U.S. Postal Service that they had permanently left Milwaukee County. Plaintiffs asked MEC to verify these registrations as required by Wisconsin Statute § 6.50(3) to ensure these voters still resided in Milwaukee. MEC refused to even consider this matter. Instead, MEC told Plaintiffs that they needed to obtain tens of thousands of affidavits—one for each anomalous registration—before it would act. There is no statutory requirement to do such a thing.

In June 2024, Plaintiffs provided MEC with updated data showing that the problems still existed. (Doc. No. 3 ¶ 30–32 & Ex. A.) MEC did not respond to this information in any way. (*Id.* at ¶ 33.)

In August 2024, Plaintiffs received additional publicly-available data confirming that Defendants had ignored the anomalous registrations in Milwaukee. (*Id.* at ¶¶ 34–35.) This data further showed that nearly 100,000 active registrations statewide were for voters who had told the U.S. Postal Service that they had permanently relocated outside of Wisconsin or outside of the county where they were registered to vote. (*Id.* at ¶ 34.) This confirmed that Defendants *still* had not made any effort to confirm that the addresses on the active voter rolls corresponded to the jurisdictions where the voters actually resided. (*Id.* at ¶ 36.)

C. Plaintiffs Brought this Action to Require MEC to Perform Its Statutory Duty

On September 30, 2024, well before the November election (and because Defendants had repeatedly ignored Plaintiffs' requests to remedy the problem),[1] Plaintiffs filed the present action, seeking declaratory, injunctive, and mandamus relief against WEC and MEC. Plaintiffs seek to have MEC to perform its legal duties, including its duty under Wisconsin Statute § 6.50(3), to

[1] While Wisconsin does not set a deadline for lawsuits related to elections, analogous federal laws allow such lawsuits to be brought up to 30 days before the election. *Cf., e.g.*, 52 U.S.C. § 20510(b)(3).

confirm that the voter rolls for Milwaukee County do not include people who have permanently left that jurisdiction. (Doc. No. 3 ¶ *prayer for relief*.) Specifically, Plaintiffs seek to have MEC send notices to the addresses for the anomalous registrations to determine whether the associated voters still live there, and move to "inactive" status any registrations where the voters have left the jurisdiction, as specifically required by § 6.50(3). (*Id.*) Plaintiffs also seek to have WEC to instruct the election officials in other counties to do likewise. (*Id.*)

Again, to be clear, Plaintiffs have not asked WEC or MEC to remove anyone from the voter rolls. (*See id.* at ¶¶ 51–54, 60, 68–69.) Rather, Plaintiffs simply want MEC and the election officials of Wisconsin's other counties to confirm the addresses of voters who appear to have permanently left the jurisdiction and mark any permanently departed voters as "inactive". (*Id.*) This request applies throughout the entire state of Wisconsin, and applies to *all* voter registrations with invalid addresses (e.g., for voters who have informed the U.S. Postal Service that they permanently left the jurisdiction)—regardless of any voter's political affiliation or other demographic information (which Plaintiffs do not even possess). Plaintiffs want *all* anomalous registrations in Wisconsin to be investigated and remedied as the elections statutes require.

D. MEC Disregards the Court's Orders and Files Its Dismissal Brief Half a Month Late

On October 4, 2024, the Court heard oral argument on Plaintiffs' motion to expedite. (Doc. No. 14.) At this hearing, Defendants orally moved to dismiss this action. The Court ordered both Plaintiffs and Defendants to file briefs on the motions to dismiss by no later than October 8, 2024, and scheduled an evidentiary hearing for October 9, 2024.[2]

[2] The undersigned counsel have ordered a copy of the October 4, 2024 hearing transcript that reflects this Order by the Court. Once we receive this transcript, we will provide it to the Court.

Dissatisfied with this ruling, WEC requested and received a substitution of the judge. (Doc. No. 34.) In response, the Court removed the October 9, 2024 hearing from the docket. **However, at no point did the Court rescind its order requiring all Parties to file briefs on the motions to dismiss by October 8, 2024.**

Plaintiffs timely filed their response to Defendants' motions to dismiss on October 8, 2024. (Doc. No. 46.) Defendants, however, did not file their briefs as ordered. The Court later scheduled a hearing for October 28, 2024. (Doc. No. 77.)

On October 22, 2024—two weeks after the deadline set by the Court and less than a week before the hearing and two weeks before the election—MEC filed its present motion to dismiss. (Doc. No. 82.) Notably, this motion relies heavily on information obtained from Plaintiffs' October 8, 2024 response brief. (*See* Doc. No. 83 ("MEC's Br.") 14–15.) Now, with less than a week remaining before the Court's hearing, Plaintiffs must file their response to MEC's motion, including the new (meritless) arguments that MEC has raised in response to Plaintiffs' prior brief.

ARGUMENT

A. MEC's Motion is Untimely, and MEC Has Waived its Right to File One

By ignoring the Court's Order, MEC has waived its arguments for dismissal. At the October 4, 2024 hearing in this case, the Court ordered MEC and WEC to file briefs in support of their oral motions to dismiss by no later than October 8, 2024. The Court likewise ordered Plaintiffs to file their response brief that same day. While the Court later canceled its October 9, 2024 hearing on these motions, it did *not* rescind the Order that the parties file their briefs by October 8, 2024. Accordingly, all of the parties—both Plaintiffs and Defendants—were required to file their briefs on Defendants' pending motions to dismiss by no later than October 8, 2024.

In compliance with the Court's Order, Plaintiffs filed their brief on October 8, 2024. However, MEC did not file such a brief by the Court's deadline. Instead, MEC waited half a month until October 22, 2024 before filing its present brief. (*See* Doc. No. 82.) Because MEC did not file its brief in accordance with the Court's Order, its motion should be considered untimely and waived.

Moreover, MEC's choice to disregard the Court's Order has prejudiced Plaintiffs in multiple ways. First, because MEC filed its brief less than a week before the October 28, 2024 hearing, Plaintiffs had to rush to respond to MEC's brief in case the Court reaches this motion at the October 28 hearing. Second, to the extent the Court does not reach this motion at the hearing, the delay caused by MEC's belated motion will make it impossible for this case to be decided in time for the upcoming election. Third, because Plaintiffs timely filed their response brief on October 8 and MEC did not file its opening brief until October 22, MEC had two weeks' advance knowledge of Plaintiffs arguments. These issues—and particularly the delay caused by MEC's belated motion—make the untimely filing of MEC's motion highly prejudicial to Plaintiffs.

For all of these reasons, the Court should deny MEC's motion to dismiss as untimely and filed in violation of the Court's October 4, 2024 Order.

B. Plaintiffs Were Not Required (or Permitted) to File an Administrative Complaint Under § 5.06(1) Before Bringing This Suit

But even if the Court reaches the merits of MEC's untimely motion to dismiss (the Court should not do so), that motion fails. MEC primarily argues that Plaintiffs were required to file an administrative complaint under Wisconsin Statute § 5.06(1) before bringing this lawsuit and that this statute provides an adequate remedy for Plaintiffs. According to MEC, because Plaintiffs never filed an administrative complaint before initiating the instant suit, Wisconsin Statute § 5.06(2) supposedly deprives the Court of jurisdiction over this action. This argument fails. Both

the plain language of the statute and binding Supreme Court authority provide that § 5.06(1)–(2) only applies to *individual* officials, not to entities like MEC. While MEC tries to use lower authorities to "underrule" this binding authority, these attempts fail as a matter of law.

Wisconsin Statute § 5.06(1) permits an aggrieved voter (also referred to as an "elector" in the election statutes) to "file a written sworn [administrative] complaint with" WEC against "an election official" before bringing a lawsuit against that individual. Wis. Stat. § 5.06(1). Wisconsin Statute § 5.06(2) disallows lawsuits against "any election official" where such an administrative complaint has not been brought and pursued to completion. Wis. Stat. § 5.06(2). This chapter expressly defines "election official" as "an ***individual who*** is charged with any duties relating to the conduct of an election." Wis. Stat. § 5.02(4e) (emphasis added). Thus, this statute's plain language makes it clear that § 5.06(1) only allows challenges against "individuals," and § 5.06(2) only restricts lawsuits against "individuals." Due to its size, Milwaukee is not served by a single municipal clerk like jurisdictions in the rest of the state. Rather, the city is served by MEC, which is a group with multiple members. Because MEC is not "an individual," § 5.06(1)–(2) does not apply to it like it would to a municipal clerk. In other words, when filing a lawsuit against MEC, a plaintiff need not—and may not—first file an administrative complaint with WEC.

Binding authority confirms this fact. Two years ago, the Wisconsin Supreme Court considered and rejected the same argument that MEC now tries to make here—that is, that § 5.06(1)–(2) applies to claims against a commission. *Teigen v. Wis. Elections Comm'n*, 2022 WI 64, ¶¶ 46–47, 403 Wis. 2d 607, 640–42, 976 N.W.2d 519, 536–37 (2022), *overruled on other grounds by Priorities USA v. Wis. Elections Comm'n*, 2024 WI 32, ¶ 5, 412 Wis. 2d 594, 600, 8

N.W.3d 429, 432.[3] The Wisconsin Supreme Court expressly held that § 5.06(1) only allows challenges against "specific 'individuals' (not 'persons')" and thus does not allow complaints against a group, such as a commission. *Id.* at ¶ 47, 403 Wis. 2d at 641–42, 976 N.W.2d at 537. Had the legislature intended to require challenges against commissions under § 5.06(1)–(2), it would have defined "election official" using the word "person" rather than the term "individual." *See id.* That is because unlike "individual," "person" "includes all partnerships, associations and bodies politic or corporate," which would include both the individual municipal clerks and bodies like MEC. *Id.* at ¶ 47 n.22, 403 Wis. 2d at 641 n.22, 976 N.W.2d at 537 n.22 (quoting Wis. Stat. § 990.01(26)). As the Supreme Court recognized, the legislature's choice to use the specific term "individual" indicates that it did *not* intend the term "election official" to include groups like MEC. *Id.* at ¶ 47, 403 Wis. 2d at 641, 976 N.W.2d at 537. And while *Teigen* involved WEC, the Court's analysis and construction of the term "election official" in § 5.06(1)–(2) applies equally to MEC.

In response to this binding authority, MEC notes that both Administrative Code EL 20.02(5) and MEC's own practices deviate from the plain language of Wisconsin Statutes §§ 5.02(4e), 5.06(1)–(2). (MEC's Br. 13–14.) According to MEC, Administrative Code EL 20.02(5) allows § 5.06(1) complaints against entities (not just individuals), and WEC has heard such complaints against MEC. To the extent this is the case, the plain language of the statutes—which the Wisconsin Supreme Court has already interpreted and found unambiguous—prevails.

It is well established that "[i]f an administrative rule conflicts with an unambiguous statute . . . the rule is invalid." *Wis. Ass'n of State Prosecutors v. Wis. Emp't Rels. Comm'n*, 2018 WI 17,

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[3] MEC may try to argue at the hearing that *Teigen* is no longer good law. Such an argument would be misleading at best. The Wisconsin Supreme Court has only overruled *Teigen*'s ruling on the legality of ballot drop boxes (which is not at issue here). *See Priorities USA*, 412 Wis. 2d at 600, 8 N.W.3d at 432. The Supreme Court did ***not*** overrule *Teigen*'s holding that § 5.06(1)–(2) only applies to complaints against individuals and not commissions.

¶ 36, 380 Wis. 2d 1, 22, 907 N.W.2d 425, 436 (quoting *Wis. Citizens Concerned for Cranes & Doves v. DNR*, 2004 WI 40, ¶ 14, 270 Wis. 2d 318, 677 N.W.2d 612); *accord* Wis. Stat. § 227.10(2) ("No agency may promulgate a rule which conflicts with state law."). As noted, the statutes make it clear that administrative complaints under § 5.06(1) are only permitted against "an individual"—not against a body like MEC. Likewise, the Supreme Court held in *Teigan* that § 5.06(1) only allows challenges against "specific 'individuals' (not 'persons')." 2022 WI 64 at ¶ 47, 403 Wis. 2d at 641–42, 976 N.W.2d at 537. These binding authorities overrule any contrary statements in the Administrative Code and any contrary practices by MEC.

MEC also discusses at length *Kuechmann v. School District of La Crosse*, 170 Wis. 2d 218, 487 N.W.2d 639 (Ct. App. 1992), a Court of Appeals case that rejected a lawsuit against a school district for failure to first file an administrative complaint under § 5.06(1). (MEC's Br. 9–12.)[4] MEC's reliance on *Kuechmann* is misplaced for two reasons.

First, the plaintiffs in *Kuechmann* never argued that § 5.06(1)–(2) does not apply to organizations, as opposed to individuals, so that question was not squarely before the court. *See* 170 Wis. 2d 218, 487 N.W.2d 639. Indeed, the plaintiffs had themselves had brought a § 5.06(1) complaint against the defendant entities but had failed to complete the administrative process. *Id.*

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[4] MEC also argues in a footnote that Plaintiffs could have brought an administrative action against the individual members of MEC. If Plaintiffs had done so, WEC would surely have rejected that action on the basis that the duties Plaintiffs ask MEC to perform are the duties of MEC as an entity, not its individual commissioners. Moreover, because § 5.06 allows a complaint against "an election official" in the singular, Plaintiffs would have had to bring separate complaints against each member of MEC. These complaints would have been meaningless because each official could simply point to the other officials and say that they were the ones who should have taken action. For Plaintiffs to obtain meaningful relief, they needed to bring an action against MEC itself, not against its individual members piecemeal.

Regardless, § 5.06(2) only applies to lawsuits against "any election official," and thus does not restrict actions against non-individuals like MEC. Because MEC is not "an ***individual*** who is charged with any duties relating to the conduct of an election," Wis. Stat. § 5.02(4e) (emphasis added), it cannot seek dismissal of a complaint against it under § 5.06(2).

at 221–22, 487 N.W.2d at 640. Thus, the question of whether § 5.06(1)–(2) applies to entities rather than individuals was not squarely before the Court of Appeals in that case.

Second, even if *Kuechmann* stood for the proposition that § 5.06(1) complaints must be brought against entities (and not just individuals), that lower court holding from 1992 would have been overruled by the Supreme Court's subsequent ruling in *Teigan*. Thus, *Kuechmann* does not and cannot help MEC here.

Because the Wisconsin Supreme Court has held that the plain language of Wisconsin Statute § 5.06(1)–(2) does not apply to commissions such as MEC, but only to "specific individuals," *Teigen*, 2022 WI 64 at ¶ 47, 403 Wis. 2d at 641–42, 976 N.W.2d at 537, Plaintiffs were not required to file an administrative complaint before bringing this lawsuit. Thus, MEC's argument for dismissal under § 5.06(2) on this basis is meritless.

C. MEC Has Failed to Propose an Adequate Alternative Remedy at Law

For this same reason, MEC's argument that "alternative adequate remedies exist"—i.e., an administrative complaint under Wisconsin Statute § 5.06(1)—also fails. (MEC's Br. 14–15.) A "remedy" that the Wisconsin Supreme Court has held is not permitted by that statute's plain language is not an "adequate alternative remedy," whatever MEC may claim. Because MEC's proposed alternative remedy is prohibited by both the statutory text and the Supreme Court's binding authority, this remedy cannot be considered adequate.

Moreover, the full phrase—"adequate alternative remedy *at law*"—refers to money damages (i.e., a remedy from the "law" side of the traditional distinction between law and equity), not simply other avenues for seeking relief. *See, e.g.*, *Ash Park, Ltd. Liab. Co. v. Alexander & Bishop, Ltd.*, 2010 WI 44, ¶57, 324 Wis. 2d 703, 730, 783 N.W.2d 294, 307 (treating the question of whether "there is an adequate remedy at law" as synonymous with the question of whether

"money damages were inadequate").[5] MEC does not, and cannot, argue that money damages would adequately compensate Plaintiffs for the disenfranchisement by vote dilution and loss of confidence in the electoral process that they seek to prevent. For this reason also, no adequate alternative remedies at law exist.

D. Plaintiffs' Complaint Asserts a Clear Duty for MEC to Act Here

Finally, MEC argues that Plaintiffs are not entitled to mandamus relief because § 6.50(3) supposedly does not impose on MEC a clear and unequivocal duty to act. (MEC's Br. 15–16.) Section 6.50(3)'s plain language, as confirmed by Wisconsin Supreme Court precedent, demonstrates that MEC's argument here is meritless. Wisconsin Statute § 6.50(3) provides in relevant part:

> Upon receipt of reliable information that a registered elector has changed his or her residence to a location outside of the municipality, [MEC] ***shall*** notify the elector by mailing a notice by 1st class mail to the elector's registration address stating the source of the information. . . . 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, [MEC] ***shall*** change the elector's registration from eligible to ineligible status.

Wis. Stat. § 6.50(3) (emphasis added).

"Whenever [courts] encounter a dispute over the meaning of 'shall,' [the courts] presume it is introducing a mandate." *State v. Cox*, 2018 WI 67, ¶11, 382 Wis. 2d 338, 345, 913 N.W.2d 780, 783. MEC does not deny that "shall" is mandatory here. (*See* MEC's Br. 15–16.) As such, the duties in § 6.50(3) are mandatory, not discretionary.

In an attempt to avoid this reality, MEC seizes upon the word "reliable," arguing that this word transmogrifies its duties under § 6.50(3) from mandatory to discretionary. (*See id.*)

[5] The portion of *Kuechmann* that MEC cites on this issue did *not* discuss the requirement of a lack of an "adequate remedy at law" as a prerequisite to other relief, but instead held that an administrative action cannot be futile. 170 Wis. 2d at 224–25, 487 N.W.2d at 641–42.

Specifically, MEC argues that even if § 6.50(3) requires it to send out notices when presented with reliable information, it can always avoid sending out those notices by declaring the information it is presented with unreliable. (*See id.*) This argument fails under the statute's plain language. Nothing in § 6.50 indicates that the term "reliable information" means "information that MEC chooses to consider reliable" rather than "information that is objectively reliable." Whether information is objectively reliable is a question for the Court.

However, the Court need not even belabor this question, because in this case, the statute itself provides the answer. Wisconsin Statute § 6.50 expressly identifies the U.S. Postal Service's change of address information as intrinsically reliable information to use in revising the registration list. The statute states in relevant part:

> Any municipal governing body may direct the municipal clerk or board of election commissioners to arrange with the U.S. postal service pursuant to applicable federal regulations, to receive change of address information with respect to individuals residing within the municipality for revision of the elector registration list.

Wis. Stat. § 6.50(8). This establishes that the U.S. Postal Service's change of address information is "reliable information" for purposes of § 6.50. *See generally, e.g.*, *State v. White*, 2004 WI App 237, ¶ 10, 277 Wis. 2d 580, 587, 690 N.W.2d 880, 883 ("The supreme court has held that the language of one subsection of a statute should be construed in a way that makes it consistent with other subsections of the same statute.").

Indeed, it is well-established that the U.S. Postal Service's records are reliable. *See Richardson v. Trump*, 496 F. Supp. 3d 165, 174 n.12 (D.D.C. 2020) (specifically holding that the U.S. Postal Service is "a reliable source"). For example, courts regularly take judicial notice of such records, deeming them to be "sources whose accuracy cannot reasonably be questioned." *E.g.*, *Wilmington PT Corp. v. Tiwana*, __ F. Supp. 3d __, No. 19-CV-2035 (DG) (TAM), 2023 U.S. Dist. LEXIS 102106, *25 & n.14, 2023 WL 4673777 (E.D.N.Y. June 12, 2023) (taking

judicial notice of postal service records, and noting that other courts have done the same); *cf. State v. Yellow Freight Sys., Inc.*, 101 Wis. 2d 142, 157 n.17, 303 N.W.2d 834, 841 n.17 (1981) (collecting cases) ("We take judicial notice of this document as it is a public record."). *See generally* Wis. Stat. § 902.01(2) (providing that a fact that is not common knowledge is subject to judicial notice only if it is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned"); Fed. R. Evid. 201(b)(2) (same).

Thus, as a matter of law, the U.S. Postal Service's change of address information qualifies as "reliable information" for purposes of Wisconsin Statute § 6.50.

That said, the Court need not reach this issue. That is because MEC has not even attempted to argue that the U.S. Postal Service data that Plaintiffs have presented here was not reliable. And even if MEC had made such an argument, that would be a question for summary judgment or trial, not for a motion to dismiss.

That § 6.50(3) places upon MEC a clear and unequivocal duty to act is further implied by Supreme Court precedent. The Wisconsin Supreme Court has held that "Wis. Stat. § 6.50 sometimes directs [WEC] to act, and other times it directs municipal officials to do so." *State ex rel. Zignego v. Wis. Elections Comm'n*, 2021 WI 32, ¶ 26, 396 Wis. 2d 391, 405, 957 N.W.2d 208, 214. The Supreme Court went on to note "the obligations imposed by [§ 6.50(3)] . . . [on] the board of election commissioners." *Id.* at ¶ 29, 396 Wis. 2d at 406, 957 N.W.2d at 215. And notably, when the Court held that mandamus could not issue against WEC under § 6.50(3), it did so on the basis that § 6.50(3) applies to municipal officials (like MEC) rather than to WEC, *not* on the basis that the duties under § 6.50(3) are not clear and unequivocal. *See id.*

Wisconsin Statute § 6.50(3) gives MEC a "clear and unequivocal duty to act" when presented with reliable information. Plaintiffs have sufficiently alleged that MEC was presented

with such reliable information here. To the extent that there is any dispute about this information's reliability, § 6.50 itself confirms that this information is reliable as a matter of law. *See* Wis. Stat. § 6.50(8). Accordingly, MEC's motion to dismiss Plaintiffs' mandamus claim[6] should be denied.

CONCLUSION

By disregarding the Court's Order requiring it to file its motion to dismiss brief by no later than October 8, 2024, and instead filing its brief half a month later and less than a week before the October 28, 2024 hearing, MEC has waived its arguments for dismissal. But even if it had not, these arguments are precluded by both the plain language of the statutes and binding Wisconsin Supreme Court precedent. For all of these reasons, MEC's motion to dismiss should be denied.

Dated: October 28, 2024

Respectfully submitted,

Electronically signed by: /s/ *Jennifer T. DeMaster*
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[6] To be clear, MEC's argument on this point only applies to Plaintiffs' request for mandamus relief. (*See* MEC's Br. 15–16.) This portion of MEC's motion does *not* seek dismissal of Plaintiffs' claims for declaratory and injunctive relief.

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