

STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT IV

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OF WISCONSIN

Case No. 2019XX\_\_\_\_\_

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WISCONSIN ELECTIONS  
COMMISSION, MARGE  
BOSTELMANN, JULIE GLANCEY,  
ANN JACOBS, DEAN KNUDSEN,  
MARK THOMSEN,

Defendants-Appellants,

v.

TIMOTHY ZIGNEGO, DAVID W.  
OPITZ, FREDERICK G. LUEHRS, III,

Plaintiffs-Respondents.

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APPEAL FROM A FINAL ORDER OF  
THE CIRCUIT COURT FOR OZAUKEE COUNTY,  
THE HONORABLE PAUL V. MALLOY, PRESIDING

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**MOTION FOR AN EXPEDITED STAY OF THE WRIT  
OF MANDAMUS ENTERED DECEMBER 17, 2019,  
EX PARTE CONSIDERATION REQUESTED,  
IF NECESSARY**

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Given pending election deadlines, the Commission requests expedited relief from this Court. It respectfully requests that this Court issue its decision on this stay motion **no later than Monday, December 23**. The movant recognizes that this timeframe is short and so, if necessary, it is requested that the Court consider this motion ex parte for purposes of granting temporary relief, as contemplated by Wis. Stat. § 809.12.

## INTRODUCTION

The Wisconsin Elections Commission (the “Commission”) moves this Court for an expedited order staying the writ of mandamus, entered December 17, 2019, by the Ozaukee County Circuit Court. The writ directs the Commission “to comply with the provisions of § 6.50(3) and deactivate the registrations” of over 200,000 voters who have failed to apply for continuation of their registration within 30 days of an October 2019 notice mailed to them by the Commission.

That writ was issued in error, and a stay should be entered to prevent that deactivation while this Court considers the appeal. Most simply, Wis. Stat. § 6.50(3), on its face, does not apply to the Commission. In turn, it cannot form the basis for a writ of mandamus, which requires an unequivocal statutory duty. The only government entities directed to change an elector’s registration status under Wis. Stat. § 6.50(3) are municipal clerks and boards of election commissioners. The Wisconsin Elections Commission is neither. Other subsections of Wis. Stat. § 6.50 make express reference to “the commission,” but not subsection (3). This foundational statutory flaw shows that the Commission has a reasonable likelihood of success on the merits of its appeal.

In addition, the Commission and the voting public will suffer irreparable harm if the Commission is required to comply with the writ prior to appellate review. It will require the Commission to deactivate hundreds of thousands of registered voters immediately, even though thousands may be correctly registered. And it will be required to do so with no notice to those affected. Rather, to date, those affected received a letter, but they were not informed of a deadline to respond or that deactivation would result if they did not respond. Especially given the likelihood that an appeal will



yield a different result, a stay is warranted to prevent public confusion and improper deactivation.

## GENERAL BACKGROUND

Plaintiffs Timothy Zignego, David Opitz, and Frederick Luehrs, III, are Wisconsin taxpayers and registered voters. (Hearing Transcript 12/13/2019 (“Tr.”) 4:12–13, 46:14–17.)<sup>1</sup> The Wisconsin Elections Commission is a state agency responsible for administering election laws in the state. Wis. Stat. § 5.05.

Wisconsin participates in what is called the Electronic Registration Information Center (“ERIC”). Wis. Stat. § 6.36(1); (Tr. 5:10–11; Dkt. 33:3–4, ¶ 11 (Wolfe Aff.)) ERIC is a multi-state cooperative that shares information regarding voter registration. Wis. Stat. § 6.36(1); (Tr. 5:12–13, 20–25, 6:1–5; Dkt. 33:4, ¶ 12.) As part of ERIC, Wisconsin receives a report regarding what are sometimes referred to as “Movers.” (Tr. 6:11–18; Dkt. 33:4–6, ¶¶ 12–17.) This refers to Wisconsin residents who, in an official government transaction with, for example, the Division of Motor Vehicles or the United States Postal Service, reportedly have stated an address different from their voter registration address. (Tr. 5:20–25, 6:1, 6–10; Dkt. 33:4, ¶ 12.) Based on past experience, some percentage of that ERIC data provides “false positives,” although the precise percentage is not currently established. (Tr. 7:24–25, 8:1–5, 44:14–45:12; 55:20–22, 56:2–6, 62:19–20; Dkt. 33:5–10,

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<sup>1</sup> For efficiency, some background information provided here cites the hearing transcript, which is being appended to this motion. The underlying facts were provided to the circuit court via the affidavit and supplemental affidavit of Meagan Wolfe. These affidavits and exhibits are appended to this motion and referred to as dockets 33 and 63, which represents the circuit court docket entry (since there is no appellate record yet). The circuit court’s final written order, referred to as docket 89, is also appended to this motion.

¶¶ 16–27.) In those instances, the record of a government transaction revealing a different address than the elector’s registration address does not necessarily mean that the elector has changed their voting residence. (Tr. 6:17–25, 7:1–4, 8:1–5; Dkt. 33:5–10, ¶¶ 16–27.) The ERIC Movers Data is intended only to detect a difference in two addresses associated with an individual in two separate governmental databases used for different purposes. Whether the results of the ERIC matching process indicates that an individual has actually moved or changed their voting residence is determined on a case-by-case basis. (Dkt. 33:4–5, ¶¶ 12–13.)

Most recently, after receiving the report on Movers from ERIC, the Commission, in October 2019, sent notices to approximately 234,000 Movers (the “October, 2019 notices”). (Tr. 10:15–19, 11:3–6; Dkt. 33:10, ¶¶ 28–30.) The notices went to the address on the Movers voter registration. (Tr. 10:15–19, 11:4–5.) That mailing asked them to affirm whether they still lived at that address. If the voter affirmed that he or she had not moved, then the voter would remain in active status on the voter rolls at that address. (Tr. 8:22–9:1, 10:15–19; Dkt. 33:10–11, ¶¶ 30–31.)

For the voters who do not respond to the October 2019 notices, the Commission decided that it would take no action on changing the elector’s registration from eligible to ineligible status at this time, but rather would seek guidance from the Legislature as to necessary statutes or rule-making authority. (Tr. 10:1–14, 50:14–25; Dkt. 33:11, ¶ 32; Dkt. 63:1–2, ¶¶ 3–5 (Suppl. Wolfe Aff.).)

Plaintiffs filed suit against the Commission and five of its six commissioners in their official capacities. Plaintiffs allege the Commission violated Wis. Stat. § 6.50(3) by not deactivating the registration status for those electors who did not respond to continue their registration within 30 days after the October 2019 notices were mailed. They sought

declaratory and injunctive relief or, in the alternative, a writ of mandamus. (Tr. 4:11–20.)

Before Defendants’ answer deadline, Plaintiffs filed a motion for a temporary injunction or, in the alternative, a writ of mandamus, along with a brief and affidavit containing exhibits. Defendants responded to the motion with a brief and affidavit containing exhibits. Plaintiffs filed a reply. The circuit court held oral argument and issued an oral ruling on December 13, 2019. The circuit court orally ruled that a writ of mandamus would issue to compel the Commission to comply with Wis. Stat. § 6.50(3) in deactivating the registration of the electors who did not attempt to continue their registration within 30 days after the mailing of the October 2019 notices. (Tr. 76:12–16.) The Commission orally moved to stay of the writ. (Tr. 77:3–15.) The court denied the motion, deferring to the appellate court to grant a stay. (Tr. 78:23–79:19.) The court then issued and entered a written writ of mandamus today, December 17, 2019. (Dkt. 89 (Final Order).)

## STATUTE AT ISSUE

Wisconsin Stat. § 6.50(3) 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.

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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).

## STAY STANDARD AND STANDARD OF REVIEW

This Court may stay a circuit court's judgment pending appeal, under Wis. Stat. §§ 808.07(2) and 809.12, where a movant has made a showing of (1) more than the mere "possibility" of success on the merits; (2) unless a stay is granted, the moving party will suffer irreparable injury; (3) no substantial harm will come to other interested parties; and (4) the stay will do no harm to the public interest. *State v. Gudenschwager*, 191 Wis. 2d 431, 440–41, 529 N.W.2d 225 (1995). The movant need not satisfy "each of the four" factors as if they were "tests." *Scullion v. Wis. Power & Light Co.*, 2000 WI App 120, ¶ 25 n.15, 237 Wis. 2d 498, 614 N.W.2d 565. Instead, the court must "balance the relative strength of each." *Id.* "These factors are not prerequisites but rather are interrelated considerations that must be balanced together." *Gudenschwager*, 191 Wis. 2d at 440. The *Gudenschwager* standard is a sliding scale: "[P]robability of success that must be demonstrated is inversely proportional to the amount of irreparable injury the [movant] will suffer absent the stay. In other words, more of one factor excuses less of the other." *Id.* at 441.

This Court reviews a trial court's decision on a stay for "an erroneous exercise of discretion." *Id.* at 439. An appellate court will sustain a discretionary act if it concludes the trial court (1) examined the relevant facts; (2) applied a proper standard of law; and (3) using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. *Id.* at 440.<sup>2</sup>

## ARGUMENT

The Court should grant a stay of the writ of mandamus pending appeal under its authority in Wis. Stat. §§ 808.07(2)(a)1. and 809.12.

The Commission moved for a stay from the circuit court, which orally denied the motion. The Commission now seeks an expedited order from this Court staying the writ of mandamus directing it to deactivate over 200,000 electors without sufficient notice and based on information that is not always a reliable indicator of whether an individual has changed their voting residence. The Court should grant a stay immediately because the Commission has a strong likelihood of success on the merits of its appeal and a stay would prevent irreparable harm to incorrectly affected electors and avoid voter confusion. On the other hand, a stay would not impose any harm on the individual voter plaintiffs. The status quo should be preserved.

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<sup>2</sup> As noted, the circuit court provided little explanation of its reasoning and, instead, essentially deferred to the appellate courts. To the extent it provided reasoning, the court appeared to believe that its ruling on the merits justified denying the stay. (Tr. 78:23–79:19.) As explained in the text, that reasoning was flawed and, in any event, that is an insufficient reason to deny a stay: "[I]t is not to be expected that a circuit court will often conclude there is a high probability that it has just erred." *Scullion v. Wis. Power & Light Co.*, 2000 WI App 120, ¶ 18, 237 Wis. 2d 498, 614 N.W.2d 565.

**I. The Commission is likely to succeed on the merits of its appeal.**

The circuit court issued a writ of mandamus—an extraordinary remedy that may only issue if an official has violated a clear and express statutory duty. 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). “[I]t is an abuse of discretion to compel action through mandamus when the duty is not clear and unequivocal and requires the exercise of discretion.” *Law Enft Standards Bd. v. Vill. Of Lyndon Station*, 101 Wis. 2d 472, 493–94, 305 N.W.2d 89 (1981) (citations omitted).

Although there are multiple reasons why issuing the writ was erroneous, the simplest is that the subsection in question, Wis. Stat. § 6.50(3), does not even apply to the Commission. It cannot form the basis for mandamus.

**A. Wisconsin Stat. § 6.50(3), the basis for the writ of mandamus, is not applicable to the Commission.**

The circuit court ruled that the Commission violated Wis. Stat. § 6.50(3) by not immediately invalidating the voter registrations of the electors who did not respond within 30 days of its October 7–11, 2019 notices. However, the Commission has no positive and plain duty to follow Wis. Stat. § 6.50(3)—it does not even apply to the Commission.



Wisconsin Stat. § 6.50(3) governs the acts of municipal bodies only: “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).

Those terms—including the “board of elections commissioners”—have specific statutory definitions and descriptions that do not include the Wisconsin Elections Commission. That is dispositive: Under the rules of statutory interpretation, “technical or specially-defined words or phrases are given their technical or special definitional meaning.” *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110.

That relevant statutory language does not apply to the Wisconsin Elections Commission. It is not a “municipal clerk or board of election commissioners.” Wis. Stat. § 6.50(3). Rather, the term “board of election commissioners” is specifically described in Wis. Stat. § 7.20. It refers to “[a] municipal board of election commissioners” or “a county board of election commissioners,” which are established in every city over 500,000 population and county over 750,000 population. Wis. Stat. § 7.20(1). “Each board of election commissioners” is comprised of several members who must reside in the municipality or county. Wis. Stat. § 7.20(2)–(3). A board of election commissioners is, therefore, a local entity comprised of local officials.

The Wisconsin Elections Commission, on the other hand, is separately defined. It is a state body consisting of members appointed by various state officials. *See* Wis. Stat. § 15.61(1)(a)1.–6. When referring to the Wisconsin Elections

Commission, as opposed to municipal election boards, the statutes use the term “the commission.” Indeed, the statutes make that explicit: “the commission” is defined in chapter 5 of the statutes as “the elections commission.” See Wis. Stat. § 5.025. In turn, when referring to the Wisconsin Elections Commission, the statutes in chapter 6 use that term—“the commission.” For example, Wis. Stat. § 6.50(1)–(2)’s four-year audit is done by “*the commission*,” not any other entity. 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). Under subsection (2), if an elector who was mailed a “notice of suspension” under the four-year audit process in subsection (1) does not respond, “*the commission* shall change the registration status . . . from eligible to ineligible.” Wis. Stat. § 6.50(2).<sup>3</sup> Subsection (2) shows that the Legislature knows how to give the Commission a directive related to changing an elector’s status. Wisconsin Stat. § 6.50(3) contains no such directive.<sup>4</sup>

The plain text of Wis. Stat. § 6.50(3) directs only two government entities to act: a “municipal clerk or board of election commissioners.” There is no mention of “the commission.” It follows that mandamus could not properly issue here against the Commission based on Wis. Stat.

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<sup>3</sup> Importantly, subsection (3) has no relation to the four-year audit process set forth in subsections (1) and (2) of Wis. Stat. § 6.50.

<sup>4</sup> Further, in subsections (2g) and (7) of Wis. Stat. § 6.50, the Legislature uses “the commission,” “municipal clerk,” and “board of election commissioners” *in the same sentence*. See Wis. Stat. § 6.50(2g), (7) (“When an elector’s registration is changed from eligible to ineligible status, the commission, municipal clerk, or board of election commissioners shall make an entry on the registration list, giving the date of and reason for the change.”). The simultaneous use of these three different terms in the same statute shows that they are three different entities.

§ 6.50(3). A statute that does not even mention the Commission cannot be an “unequivocal” directive to it, as required to issue a writ.<sup>5</sup>

The analysis does not change if Plaintiffs’ main argument is viewed. (Tr. 39:1–42:6.) Their contention was that a general list-maintenance statute, Wis. Stat. § 5.05(15), somehow causes the Commission to have assumed the obligations specifically imposed on municipal clerks and boards of election commissioners under Wis. Stat. § 6.50(3) for deactivating registrants.<sup>6</sup>

However, that “the commission is responsible for the design and maintenance of the official registration list,” Wis. Stat. § 5.05(15), does not address the question of how and when a voter is *deactivated*. Rather, a different code provision addresses “revision” of the list: Wis. Stat. § 6.50. In particular, it assigns responsibility to municipalities to decide whether Wis. Stat. § 6.50(3) is triggered. That the Commission keeps the list, *once deactivation occurs*, is wholly consistent with that. This is not an unequivocal statutory directive for the Commission to deactivate under Wis. Stat. § 6.50(3)—rather, that section expressly applies to different entities.

For this basic statutory reason, the circuit court’s writ is likely to be overturned on appeal. This strongly supports a stay.

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<sup>5</sup> Moreover, Wis. Stat. s. 6.50(3) does not require deactivation in all circumstances. Deactivation is only permitted and required when the municipal clerk or board of election commissioners receives reliable information that an elector has moved outside of the municipality. Contrary to that more limited scope, here the writ requires deactivation even in circumstances where an elector moves *within* a municipality.

<sup>6</sup> Plaintiffs’ argument relies on the erroneous position that the Commission is a board of election commissioners. (Tr. 41:7–17.)

**B. In addition, mandamus was improper based on the statute's "reliable information" standard.**

Further, even if, for argument's sake, Wis. Stat. § 6.50(3) applied to the Commission, it contains no "plain duty," as is required for mandamus to issue. Rather, its deactivation process is triggered by a standard that is subject to interpretation under the circumstances: It is triggered when a municipality receives what it deems to be "reliable information."

As noted above, ERIC is a database that seeks to identify Wisconsin residents who, in an official government transaction, have reported an address different from their voter registration address. However, because the source data was collected for purposes other than voter registration and because of anomalies inherent in the data-matching process, it is undisputed that the ERIC Movers Data is not always an accurate reflection of an individual's voting residence; only the percentage of inaccuracy is in dispute. (Tr. 44:14–45:12, 55:20–23; Dkt. 33:4–5, ¶¶ 12–13.) A record of a government transaction revealing a different address than the elector's registration address does not necessarily mean that the elector has moved or if a move was intended to establish a new voting residence. (Tr. 6:24–7:4, 12–15, 43:4–6.) Therefore, deciding whether the ERIC Movers Data is "reliable information" that a voter has changed their voting residence necessarily "requires the exercise of judgment and discretion," meaning mandamus is inapplicable. "[M]andamus 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).

This is an additional reason that the Commission is likely to succeed on appeal, further supporting the stay. Wisconsin Stat. § 6.50(3) simply does not impose the required unequivocal duty on the Commission.

**II. The Commission's and the public's interest will suffer irreparable harm without a stay, while the plaintiffs will not be harmed.**

The Commission is charged with the responsibility of administering elections in Wisconsin, including several upcoming spring elections with imminent pre-election deadlines. *See* Wis. Stat. § 5.05. An orderly exercise of those duties is threatened without an expedited stay of the circuit court's judgment.

The most immediate impact is on three upcoming elections: the Spring Primary and Special Primary for Congressional District 7 on February 18, 2020; the Spring Election and Presidential Primary on April 7, 2020; and the Special Election for Congressional District 7 on May 12, 2020. *See*, Wisconsin Elections Commission, <https://elections.wi.gov/index.php/> (last visited Dec. 17, 2019). As required by statute, preparations for these elections are well underway, and many of these preparations require a final elector registration list.

For example, municipal clerks must deliver absentee ballots for the February 18 Special Primary for Congressional District 7 by January 2 (47 days before the primary) and for the Spring Primary by January 27 (22 days before the primary). *See* Wis. Stat. § 7.15(1)(cm). Municipal clerks are responsible for verifying elector registrations for these absentee voters, and they rely on the registration list to perform this duty. *See* Wis. Stat. §§ 6.20; 7.15(1).

Then, in late January, registration for the February 18 primary closes, and municipal clerks can begin printing and distributing poll lists to the various polling locations. *See* Wis. Stat. §§ 6.28(1) (registration closes on 3rd Wednesday

preceding election); 6.29(1) (with limited exceptions, no names added to registration list after close of registration). Populous cities, like the City of Milwaukee, must begin this process as early as possible given the city's numerous polling places. And challenges to elector registrations in the City of Milwaukee are heard before the municipal board of election commissioners on the last Wednesday before the election, which for the February 18 primary is February 12. *See* Wis. Stat. § 6.48(2). These pre-election tasks all require a registration list that is not in flux.

And, notably, the activation and deactivation of over 200,000 voter registrations is not a simple flip of a switch. Given the reduced Commission staff during the upcoming Christmas and New Year holidays, an immediate stay, prior to the holidays, is essential.

Further, if the Commission is required to remove electors from the list while an appeal is pending, it is inevitable, based on past experience, that some electors will be removed in error. Significantly, while the Commission sent out notices to those electors who may have changed their residences (or may not have, as ERIC data is not always an accurate indicator of that), those notices did not notify the electors that their registrations would be deactivated or that they had a specific deadline to respond. (Tr. 58:21–59:5, 60:7–17.) Thus, the electors whose registrations would be deactivated by the circuit court order were not provided with notice of deactivation, much less of deactivation within 30 days of the mailing. And election day registration would not necessarily remedy this harm. Electors removed from the poll list by the court order may not know that they are removed, meaning they may not bring to the polls the proof of residence needed to reregister. Even if they have a valid photo identification for purposes of voting, that identification would not necessarily provide proof of residence for registration purposes. *See* Wis. Stat. §§ 5.02(6m) (definition of

“identification”); 6.79(2) (voting procedure); 6.34(3) (documents used to establish proof of residence).

In addition, given the fast-approaching deadlines, preserving the status quo is especially important because there are increased risks that any changes, much less changes back-and-forth, will lead to public confusion. Without a final poll list, poll workers and voters may be confused about who is properly registered to vote.

Finally, the plaintiffs will not be harmed by a stay. In the circuit court, they claimed they would suffer harm without an injunction because their votes would be diluted by other electors who voted when they were not eligible to vote. This theory is without support. It assumes that the ERIC data is always accurate (which it is not) and that the improperly registered electors will commit voter fraud by voting at their former residence. The plaintiffs provided no evidence of this type of voter fraud. Their alleged harm is entirely speculative and is far outweighed by the actual harm to the orderly administration of elections and to electors who are immediately removed from the poll list, rendering them ineligible to vote.


### CONCLUSION

This Court should immediately stay the writ of mandamus entered by the circuit court pending resolution of this appeal.

Dated this 17th day of December, 2019.

Respectfully submitted,

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*Timothy Zignego, et al. v. Wisconsin Elections  
Commission, et al.*

Case No. 19-CV-0449

(Hearing Transcript, December 13, 2019)



1        STATE OF WISCONSIN    CIRCUIT COURT    OZAUKEE COUNTY

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2        TIMOTHY ZIGNEGO,  
3        DAVID W. OPITZ,  
4        FREDERICK G. LUEHRS, III,  
5                                  Plaintiffs.

6                                  vs.                                  Case No. 2019CV000449

7        WISCONSIN ELECTION COMMISSION,  
8        MARGE BOSTELMANN,  
9        JULIE GLANCEY, ANN JACOBS,  
10       DEAN KNUDSEN, MARK THOMSEN,  
11                                  Defendants.

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12    MOTION

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13    December 13, 2019

14    HONORABLE PAUL V. MALLOY,  
15    CIRCUIT COURT JUDGE, PRESIDING

16        APPEARANCES

17        Richard Esenberg and Anthony LoCoco,  
18        Attorneys at Law,  
19        For the Plaintiffs.

20        Karla Keckhaver and Steven Kilpatrick,  
21        Assistant Attorneys General,  
22        For the Defendants.

23        Douglas Poland and Jon Sherman,  
24        Attorneys at Law,  
25        For the Intervenor.

26    Michelle Jean Yaklovich, RMR  
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30    262-548-7058  
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1 P R O C E E D I N G S

2 THE COURT: I will call the case entitled  
3 Timothy Zignego versus Wisconsin Election Commissions  
4 et al., and that's 19CV449.

5 Can I have appearances, please.

6 ATTORNEY ESENBERG: Good afternoon, Your  
7 Honor. For the plaintiffs, Timothy Zignego, David  
8 Opitz, and Frederick Luehrs, Richard M. Esenberg, of  
9 the Wisconsin Institute for Law and Liberty.

10 My colleague, Anthony LoCoco, is  
11 with me at counsel table.

12 THE COURT: Good afternoon.

13 ATTORNEY KECKHAVER: Hello, Your Honor.  
14 Assistant Attorneys General Karla Keckhaver and Steve  
15 Kilpatrick appearing on behalf of all defendants.

16 THE COURT: Good afternoon to you as well.

17 ATTORNEY POLAND: Good afternoon, Your Honor.  
18 On behalf of the proposed intervenor defendant, the  
19 League of Women Voters of Wisconsin, Doug Poland of  
20 Rathje Woodward.

21 Jon Sherman also seated next to me  
22 of the Fair Election Center of Washington, D.C., who  
23 appears pro hac vice, and also with us today is Erin  
24 Grunze, the executive director of the League of Women  
25 Voters of Wisconsin.

1                   THE COURT: Good afternoon to you as well.

2                   (Whereupon, a discussion was held off  
3 the record.)

4                   THE COURT: I think the thing to do is, I've  
5 read the briefs -- in fact, I've read them, each one of  
6 them, a number of times; and I think what I should do  
7 is make some findings, then we'll talk about the  
8 petition for intervention, and then from there, we'll  
9 go to the second part, which is the injunctive relief  
10 or the mandamus action pled by the plaintiffs.

11                   Unless you folks had thought of  
12 some other way that you'd like to do it, I think that  
13 was probably the best way of outlining it that I could  
14 come up with.

15                   And I did -- I did make notes, and  
16 they came off of the pleadings, they came off of the  
17 memorandum from the Wisconsin Election Commission, and  
18 for the purposes of this proceeding, I would find that  
19 this action was filed on the 13th of November.

20                   And before I start, one thing I  
21 want to tell people is that it's kind of a narrative,  
22 because if the circumstances were different, I would do  
23 a written decision; but I feel that there's a need for  
24 some expediency here to get this process answered one  
25 way or another.

1                   And the reality is is that with the  
2           calendar this Court has, to sit down and take the time  
3           of writing a decision, we'd lose, at a minimum, thirty  
4           days, maybe more, because not everything else would  
5           stop, here.

6                   So if it sounds like I'm kind of  
7           writing from a narrative, that's the reason I'm doing  
8           this. I'm balancing the need to get some finality here  
9           versus what might be a little bit more eloquent  
10          delivery and decision. So you'll have to bear with me.

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11                  But the -- For my findings, I  
12          would find that the action was filed by Mr. Zignego,  
13          Mr. Opitz, Mr. Luehrs, it seeks injunctive relief that  
14          -- from an action of Wisconsin Elections Commissions  
15          that contend that they failed to comply with the  
16          thirty-day deactivation provision of Section 6.53 of  
17          the Wisconsin Statutes. That statute governs voter  
18          registry lists.

19                  In the alternative, they seek a  
20          writ of mandamus compelling the Commission to comply.

21                  The defendants, the Wisconsin  
22          Election Commission, they object on a number of  
23          grounds. They allege that possibly the statute doesn't  
24          apply to them, that the plaintiffs lack standing, or  
25          that they have other failures in their request.

1                   The League of Women Voters has  
2 moved to intervene, first by right, and then by  
3 permissive, is how I would read it.

4                   All of these issues have been fully  
5 briefed, and I've reviewed them.

6                   Procedurally, this action involves  
7 a challenge to the decision of the Election Commission  
8 that altered the procedure it uses in maintaining the  
9 voters list.

10                  By Act 261, in 2015, Wisconsin  
11 joined the Electronic Registration Information Center.  
12 It's either 26 or 28 states and the District of  
13 Columbia that now participate in that.

14                  The purpose, and they call it ERIC,  
15 that's the acronym it goes by, it's intended to find  
16 voters who are not registered and get them to register.

17                  Another partial objective is to  
18 improve the accuracy of the voter registration and to  
19 assist registers -- or voters in registering at their  
20 current address. Uses an analytical program and  
21 matching of information, most of which is self-reported  
22 by the individuals, utilizing addresses that they have,  
23 and it looks to see who is eligible but not registered  
24 to vote and how to try to get them on the poll and who  
25 may not be eligible at a particular location, based on

1 the addresses that they've submitted.

2 They use this matching program and  
3 analytics, and ultimately they pass reports to the  
4 various states that subscribe. There's a subscriber  
5 fee for the ERIC system. It's a nonprofit entity.

6 The information might include  
7 United States Postal Service changes, auto  
8 registration, changes to driver's license, death  
9 registrations through, I believe, Social Security  
10 Administration, I think it was.

---

11 Once that list has been boiled  
12 down, the members get a list, and then the staff at the  
13 Election Commission then vets that list to further  
14 narrow it down to see whether these people are, in  
15 fact, what we call the movers in this case, where  
16 they've moved, and then they would have to reregister  
17 at the new address, or whether there's just been a  
18 failure.

19 For example, the failures you see  
20 might be a lack of a unit. If, for example, it might  
21 not say lower or upper. It might not spell out First,  
22 for example, in Grafton, First Avenue, versus the  
23 numerical first.

24 It might be a situation where  
25 somebody registers their vehicles through their



1 business or a second home or a college kid -- not a  
2 kid, a college student, register -- or takes on a  
3 driver's license at the place where he's attending  
4 school rather than his home, where he would vote.

5 Now, backing up a couple of years  
6 ago, the Commission sent out 341,855 postcards to  
7 individuals instructing them to reregister if they  
8 moved or sign the card and return it with the  
9 registration at the current registration -- at the  
10 registration in order to keep it current. That was in  
11 November of 2017.

12 A number of people responded either  
13 to the Wisconsin Election Commissions or municipal  
14 clerks and were proactively re -- continued at their  
15 address.

16 And then the individuals who did  
17 not respond had their cards returned or had their cards  
18 returned as undeliverable. They were deactivated.

19 And when you say deactivated, that  
20 means they're no longer eligible to vote, but they can  
21 always register on the same day or go to the clerk's  
22 office and reregister, so it's not like it is a  
23 complete disqualification.

24 251,000 of the -- 959 people -- did  
25 not respond from that -- 341,855 number cards -- um --

1       83,743 were marked as nondeliverable, and 6,153  
2       requested a continuation, and later there were a number  
3       of other people came to the -- be known as a -- still  
4       at their current address, they -- and they were  
5       reinstated without problem.

6                   Now, in -- They also maintained a  
7       supplemental polling with the Wisconsin Election  
8       Commission where, if you went to the polls and you were  
9       one of the movers who didn't respond and were  
10      deactivated, you could, by signing that poll, that poll  
11      list, vote, and that would be an affirmation. You  
12      would sign it, and that would be an affirmation that  
13      you were still at that address.

14                   Then in 2018, the Commission went  
15      away from that idea and decided to rely more on  
16      municipal clerks, so that if you appeared at a polling  
17      place, election workers would -- and said you should be  
18      registered, the election workers would contact the  
19      municipal clerk, and they could then be added to the  
20      poll. And nobody reported any calls to the Wisconsin  
21      Election Commission after that was done.

22                   Beginning in 2019, the late winter,  
23      the early spring, the Commission began exploring  
24      different ways of utilizing the movers system, or the  
25      movers list, and the goal was to improve the process,

1 to make it more accurate, more complete.

2 They reviewed the -- how Illinois,  
3 Minnesota, Ohio, and Virginia utilized the ERIC reports  
4 in their jurisdictions, and that's summarized in a  
5 March 2019 memo from the director of the Wisconsin  
6 Elections Commission to the Commission members and  
7 outlines different processes.

8 One of the things I note when I  
9 went through that is that each of those jurisdictions  
10 has a different system. Some are what are called top  
11 down, some are from bottom up, the bottom up being a  
12 more local control. Some are managed by administrative  
13 rules, as opposed to statutes. Others are top down,  
14 and they have a differing system, but they all use the  
15 ERIC information that's been provided to them.

16 One of the things I noted and would  
17 find in that memo is that the language of the memo  
18 indicates that the information from ERICs is listed as  
19 largely accurate information, and that it's kind of  
20 puzzling to me, because the language specifically notes  
21 that previously this was controlled by statute.

22 The word was "previously" used in  
23 there, when we know from this case that, in fact,  
24 there's an argument about whether the statute controls  
25 that thirty-day notice.

1                   Anyway, the Commission received a  
2       -- received that report at its March meeting, and then  
3       at -- at its May or June meeting, it by motion adopted  
4       the proposal.

5                   And the proposal is to expand the  
6       time frame from -- for deactivation from thirty days  
7       that we're discussing today to a twelve to  
8       twenty-four-month time frame, depending on where in the  
9       cycle of elections the notification occurs.

10                   So it would either be four or six  
11       elections, your winter primary, your spring election,  
12       your fall primary, and the general election, and then  
13       in an off year, it would be a primary and a general  
14       election.

15                   And the notices that were  
16       redesigned did not notice the -- did not advise the  
17       recipients to respond in thirty days or they would  
18       result in a -- there would be a deactivation of their  
19       registration as a voter.

20                   I didn't see, and counsel can  
21       address me or correct me if I'm wrong, I didn't see any  
22       rule-making process followed under Chapter 227, which  
23       would require that there be some notification to the  
24       legislature, there would be public hearings, public  
25       comment, before a -- and publication to notify the

1 public before the motion was made in June to adopt this  
2 rule.

3 I think this was done on a motion  
4 vote at a board meeting, and then the notification  
5 cards went out in early October, I think the 11th. I  
6 didn't put the date down, I just put October.

7 The plaintiffs filed their formal  
8 complaint with the Commission. Complaint alleged in  
9 part unlawful conduct on the part of the Commission by  
10 not following this -- or not following the thirty-day  
11 deactivation provision.

12 That complaint was responded to by  
13 Megan Wolfe, who was the director of the Wisconsin  
14 Election Commission, and she denied the request for --  
15 or denied the complaint on the grounds that it was  
16 untimely. Didn't exactly say what the untimeliness  
17 was, but I think the inference was the plaintiff should  
18 have done this in June, when this process was taking  
19 place and getting ready to go to the October mailing.

20 She denied it without prejudice.  
21 For the non-lawyers, that means it could be brought  
22 again, with some additional facts or -- or some basis  
23 for refileing it from the rolls, but also indicated to  
24 them that she couldn't envision anything that would  
25 give them the ability to refile that.

1                   And in the letter she also  
2           indicated that if their goal was to nullify or halt the  
3           movers mailing from October, that would prejudice the  
4           rights of the Commission staff.

5                   On October 11th, this action was  
6           filed. The three plaintiffs within -- One lives in  
7           Ozaukee County, one in -- I believe Hubertis is  
8           Washington County, and one in Waukesha County; and the  
9           League of Women's Voters, I'll call that the League,  
10          moved to intervene on the 22nd of November.

---

11                   And we're here on the motion  
12          seeking either injunctive relief or a writ of mandamus,  
13          and the League, through their pleadings, contends that  
14          they have standing to intervene by right, but if not by  
15          right, I guess I would say by permissive intervention,  
16          and they feel that applying the thirty-day rule in the  
17          statute would impose a substantial burden on the  
18          League.

19                   The League's objective is to  
20          register as many people as possible, get as many people  
21          to the polls as possible, get 'em in the right place at  
22          the right time. They've registered, I think, 12,000  
23          plus new voters this year, they've done over a thousand  
24          voter registration activities, they work on high school  
25          and college campuses.

1                   The Department of Justice, for  
2           their part -- And they also argue the Department of  
3           Justice isn't taking an aggressive enough stance in  
4           defending this action, and they -- They sort of feel  
5           that the Department of Justice -- or not the Department  
6           of Justice, the Election Commission has a vested  
7           interest in defending their work, and the League  
8           believes that's inaccurate and -- and the information  
9           in the ERIC reports is unreliable.

10                   So as I indicated, I want to start  
11           with the -- with the request to intervene.

12                   Intervention is governed by 803.09,  
13           and there are four factors. The plaintiff has to be  
14           timely in its motion to intervene, it has to have an  
15           interest sufficiently related to the subject of the  
16           lawsuit. The disposition of the action would have to  
17           impair or impede the movant's ability to protect that  
18           interest, and the existing parties do not adequately  
19           represent the movant's interest.

20                   Mr. Poland, anything on that?

21                   ATTORNEY POLAND: Your Honor, Attorney  
22           Sherman is going to handle the argument.

23                   THE COURT: All right.

24                   ATTORNEY SHERMAN: Good afternoon, Your  
25           Honor.

1 THE COURT: Welcome.

2 ATTORNEY SHERMAN: Thank you. The League has  
3 a strong interest in the outcome of this litigation,  
4 and the defendants and their counsel simply cannot  
5 adequately represent the League, based on prior  
6 concessions that the Commission has made on the central  
7 issue in this case.

8 I'm gonna first start, because I  
9 think these are the two factors that are most central  
10 here, the League's strong interests and the adequacy of  
11 representation, the inadequacy of representation.

12 The League has a significant  
13 interest in this case, as Your Honor noted -- uh --  
14 because of a substantial part of its year-round work is  
15 devoted to registering voters and turning them out to  
16 the polls. That can be seen in the affidavit of Erin  
17 Grunze -- uh -- from November 22nd.

18 And an interest for intervention  
19 purposes, Your Honor, of course, doesn't need to be  
20 sufficient for the League to file an action in its own  
21 right. The case law from Wolfe and other cases says  
22 there is no requirement that the potential intervenor's  
23 interests be judicially enforceable in a separate  
24 proceeding.

25 We -- And Dairyland Grayhound Park



1       -- uh -- also supports that notion.

2                       The League has demonstrated that  
3       its interests will be directly and immediately harmed  
4       and burdened by an order that immediately purges  
5       234,000 plus -- uh -- registered Wisconsin voters based  
6       on the 2019 ERIC movers list.

7                       Kicking so many registered  
8       Wisconsin voters off the rolls would unravel, of  
9       course, unravel the League's work, its extensive  
10      resource -- resource intensive work, and add to the  
11      League's more -- burden by forcing them to reregister  
12      voters who are kicked off the rolls based on unreliable  
13      information.

14                      That would produce -- And this  
15      case will have implications for the future, of course,  
16      so in the future, this cycle will repeat.

17                      In that reelection cycle, the  
18      League will register 12,000 or more voters, and many of  
19      them will come off the rolls when, after thirty days,  
20      if they're flagged by unreliable information in the  
21      ERIC list.

22                      We have submitted two affidavits,  
23      Your Honor. We move for those to be included here.

24                      One, and I think where there's  
25      smoke, there's fire. They are only two affidavits, but

1       they indicate serious problems with the data that a --  
2       ERIC relies upon.

3                       And that's not -- Again, that is  
4       not a fault of the -- of the ERIC methodology and its  
5       matching system, it's a little bit of just partial  
6       garbage in, partial garbage out.

7                       The Wisconsin DMV form, if I may  
8       for a second, Your Honor, just explain a little bit  
9       about this, we attached this in our --

10                      In our motion for leave to file an  
11       opposition brief, we attached the MV 3001 form that the  
12       DMV uses. Everyone uses the same form, whether they're  
13       applying for a driver's license, a commercial driver's  
14       license.

15                      Now, it does call for a residential  
16       address; but as Your Honor noted, many people do not  
17       put down a residential address. Many people put down  
18       commercial addresses, workplace addresses, vacation  
19       homes, et cetera.

20                      So when it comes time for ERIC to  
21       rely upon this, they are, in fact, relying on -- upon  
22       thousands and thousands of addresses that are not, in  
23       fact, true residential address changes --

24                      THE COURT: I was going to ask the State  
25       people that, but maybe somebody can tell me.

1 Does anybody have a numeric number  
2 of how many of these outliers we are talking about?  
3 From the 344,000, are we talking fifty? Are we talking  
4 a thousand? What's the percentage? Does anybody know?

5 I read the briefs. I did not see  
6 anybody tell me how many people we're talking about.

7 ATTORNEY SHERMAN: I think that's part of the  
8 problem, Your Honor. Discovery might be able to tease  
9 some of that out, which we haven't had an opportunity  
10 to engage in, of course.

11 But part of the problem here is  
12 that I've not seen anything in the record that shows  
13 that the Commission or Wisconsin DMV or even ERIC has  
14 some kind of methodology to differentiate between true  
15 residential address changes and false positives.

16 And that's why you got, even taking  
17 the allegations of plaintiffs as true, you got seven  
18 percent people -- of people on that list of 341,000  
19 were -- were there in error. And we have examples of  
20 that from this time around as well.

21 Patricia Villareal (phonetic), we  
22 submitted an affidavit from her, she's a member of the  
23 League of Women Voters of Wisconsin, and she's  
24 threatened right now with erroneous removal, even  
25 though she has lived in her home for over sixteen

1       years. How has that happened?

2                       It's really quite inexplicable, and  
3       she was so suspicious of the notice letter that was  
4       sent to her, that she tore it up and threw it out.

5                       If she takes no action, and of  
6       course the notice letter doesn't communicate what the  
7       consequences of an action are, a -- she'll be removed  
8       from the rolls.

9                       A similar different situation, but  
10       Bonnie Moist (phonetic), we have an affidavit from her  
11       as well, she did, in fact, move; and she updated her  
12       voter registration four months prior to when she -- uh  
13       -- received a -- the notice letter in October.

14                      So what's so problematic about that  
15       example is that it shows the significant delay, almost  
16       four months, between when ERIC received static data  
17       from a -- the Wisconsin Elections Commission, and then  
18       when the notice letters are ultimately sent out.

19                      So this purge, this threatened  
20       purge, even threatens the most responsible voters, even  
21       the people who, right after they move, and she did this  
22       right after she moved, updated her voter registration  
23       address, even she is threatened with removal from the  
24       rolls.

25                      This is the kind of evidence, and I

1 think this segues into the inadequacy of the -- the  
2 state's representation of the League's significant  
3 interest in the outcome of this litigation. This kind  
4 of evidence has simply not been presented by the  
5 Commission, nor will it be presented.

6 Absent the League's intervention,  
7 voters' interests and the information that can be  
8 provided on the disputed reliability of the 2019 ERIC  
9 list, that's not going to come into the record.

10 Because of the connections and the  
11 work that the League does year round, we're able to tap  
12 into those stories and find out instances that are  
13 representative of larger, systemic problems with the  
14 ERIC data.

15 And I've -- I've not seen anything  
16 in the record that indicates that there's a different  
17 methodology for 2019, and that is really what this case  
18 is about, is the 2019 data, not what --

19 THE COURT: Well, that's -- That brings me  
20 to another thing.

21 Where was the League in 2017 on  
22 this? Because it was even more restrictive in 2017,  
23 and that kind of goes to the directness of their  
24 interest in their -- and their -- their timeliness of  
25 their intervention, here.

1                   Now, if you just look at  
2       intervention from the confines of this litigation,  
3       clearly, you're -- you are timely. I don't think  
4       anybody would dispute that. That's a very short period  
5       of time in the law.

6                   But then you have to take a  
7       broadening, and say, okay, you're asserting all these  
8       arguments, but there wasn't anything about this after  
9       the 2017 mailing with the thirty-day notice.

10                  ATTORNEY SHERMAN: Well, I would submit that  
11       a -- the full extent of the systemic problems from the  
12       2017 to 2018 data were not known a -- quickly, and it  
13       was sort of a slow process of learning, even for the  
14       Commission, to learn what was necessary to a -- work  
15       around or correct and reactivate a people who had been  
16       erroneously removed.

17                  It was a very slow learning process  
18       for the Commission, and it was a slower learning  
19       process for the public and voting rights groups that  
20       needed a -- to know the information before they could  
21       assert a -- their interests.

22                  Yes, people were deactivated within  
23       thirty days -- uh -- but many people took steps -- the  
24       Commission took steps to reactivate a significant  
25       number of people that they found were there

1       erroneously.

2                       Additionally, three municipalities  
3       found on their own terms that the data was so  
4       unreliable that they asked for reactivation, and a --

5               THE COURT: Did they just do that in bulk?  
6       They just asked for every --

7                       I was looking at the statute. I  
8       didn't see a specific statutory provision that looked  
9       like that applied, and it was nothing cited in the  
10      briefs.

11               ATTORNEY SHERMAN: As authority for the  
12      municipalities to do it --

13               THE COURT: Correct, for --

14               ATTORNEY SHERMAN: -- it's --

15               THE COURT: -- Green Bay and Milwaukee.

16               ATTORNEY SHERMAN: I will admit, it's a  
17      little confusing for my -- me my --

18               THE COURT: At least I'm not the only one --

19               ATTORNEY SHERMAN: -- it's -- I'm confused  
20      itself as to who has the authority there. One would  
21      think, in a state with 1,850 municipalities, that you  
22      would have -- you would need some uniformity on this,  
23      it either is reliable information or it's not, I don't  
24      envy the position that the Commission was in, I don't  
25      envy the position that any of the municipal clerks were

1 in because the legislature do not explicitly provide  
2 instructions as to what was supposed to be done with  
3 unrelieved -- with ERIC -- ERIC's data --

4 THE COURT: Okay --

5 ATTORNEY SHERMAN: -- so on the inadequacy of  
6 representation, I -- I think more so than anything  
7 else, more than any other factor, this is really the  
8 heart of it, the clearest evidence of the defendant --  
9 current defendant's inadequate representation of the  
10 League's interests is that they have characterized, as  
11 recently as -- as June of this year, they have  
12 character -- excuse me, as recently as March of this  
13 year, they characterized the ERIC movers list as  
14 reliable, quote-unquote, and quote, largely accurate.

15 And that severely undermines their  
16 litigating position, a -- and their defense in this  
17 action.

18 And I think reading the first  
19 quote, at least, I think is -- is telling. It says, a  
20 -- The Commission has relied on the language and  
21 framework of Wis. Stat 6.50 (3) to treat the mover's  
22 list as reliable information that the individuals  
23 listed have changed their voting residence.

24 That's the heart of this case, and  
25 that seems to be a concession on the heart of this



1 case. These statements from the Commission -- I think  
2 this is crucial as well.

3 That statement was made after all  
4 of the problems that were experienced in 2017 to 2018.

5 Now they say the data is not, per  
6 se, reliable, a -- they're hedging that there -- we see  
7 the data as inherently unreliable because of the  
8 defects from the Wisconsin DMV process.

9 And I forgot to mention one other  
10 point on that, if I may, Your Honor.

11 THE COURT: Sure.

12 ATTORNEY SHERMAN: The Wisconsin DMV  
13 application form, because Wisconsin is one of the just  
14 six states in the country that's exempt from the motor  
15 voter law, the National Voter Registration Act, there  
16 is no opportunity to register to vote when you apply  
17 for a driver's license or State ID at a DMV office or  
18 renew or change your address, and for that reason,  
19 there's no notice on that form that this could have  
20 consequences for your voter registration.

21 I think that accounts a large part  
22 for why -- I -- I haven't done a twenty-eight-state  
23 study of this, but I think these problems are cropping  
24 up in Wisconsin because the State is exempt from the  
25 NVRA and because people have no notice on that DMV form

1       that they -- this could have consequences for their  
2       voter registration.

3                       And the -- And the Commission seems  
4       to even acknowledge that in one of its -- in one of its  
5       memorandum.

6                       The key point on inadequate  
7       representation here, and I would cite to the Supreme  
8       Court of Wisconsin's case in Armada Broadcasting,  
9       normally there's a presumption of adequate  
10      representation when the government entity is a  
11      co-defendant, but one of the ways that can be rebutted  
12      is if the representative fails in the fulfillment of  
13      its duty.

14                      Given the Commission's prior  
15      contradictory statements on the issue of reliability,  
16      to us, we believe there is a concrete, actual  
17      divergence between the State's position on the primary  
18      issue and the potential intervenor's position and a  
19      per se failure by the government to fulfill its  
20      representative duty.

21                      That is partially quoting from  
22      another case, Helgeland.

23                      THE COURT: And I have Helgeland right up  
24      here, and Armanda sitting on my desk. I've reviewed  
25      both of them --

1                   ATTORNEY SHERMAN: If I could --  
2                   THE COURT:   -- sure --  
3                   ATTORNEY SHERMAN:  -- I'll make a few --  
4                   THE COURT:  -- couple minutes and wrap it up,  
5                   okay?  
6                   ATTORNEY SHERMAN:  Sure.  We would submit  
7                   that the League's motion should be considered not just  
8                   in terms of this -- a temporary injunction motion, but  
9                   for the long term, for the scope of the whole case,  
10                  which may include a potential settlement, could  
11                  include, even for whatever -- if they are granted  
12                  relief on their TI motion, whatever relief is granted  
13                  would be a -- relevant, and the League would present  
14                  different information and different arguments as well.  
15                                  As an example here, defendants will  
16                  not argue that they have sent out a deficient notice  
17                  that, in our view, violates constitutional requirements  
18                  of due process.  That is an argument we would make, and  
19                  a requirement, I think even if the plaintiffs were to  
20                  prevail, it would require a new notice to be mailed out  
21                  before any removal from the rolls.  
22                                  If I could, I would also add some  
23                  of the information we've been able to point to, the  
24                  defendants did not raise, such as the Commission Chair  
25                  Knudson's interview in that PBS interview, where he

1       said that half a percentage point of registered voters  
2       on the 2019 ERIC list, they have already called in to  
3       the Commission or the municipal clerk's offices to say  
4       that they are on the list in error.

5                       That works out to be already about  
6       a thousand one hundred and seventy voters who are on  
7       that list. That, to us, already is a significant error  
8       rate, and like I said before, Your Honor, where there  
9       is smoke, there is fire. This is just weeks after the  
10      mailings have gone out, the holidays are on, it  
11      suggests that the problems have been cured, and that  
12      the information is still very much unreliable.

13                      Lastly, if I could, Your Honor,  
14      just have a moment to briefly respond to any arguments  
15      that are --

16                      THE COURT: Okay. Sure. I'll give you --

17                      Mr. Esenberg, anything, briefly?

18                      ATTORNEY ESENBERG: Well, we've opposed  
19      the -- a -- the motion to intervene, and a -- the  
20      interesting thing about this, of course, and given the  
21      nature of the work we do -- um -- we're normally on the  
22      other side of this question. We are trying to  
23      intervene in a case.

24                      And we typically, with all due  
25      respect to counsel for the government -- um -- we often

1       feel that we have some better argument to make or, you  
2       know, a -- we've got some point that we think is a more  
3       brilliant and ingenious than the government lawyers  
4       might have -- um -- but that's the standard for  
5       intervention.

6                       The Courts have made clear that --  
7       um -- differences in trial strategy or differences with  
8       respect to which arguments are to be used are not  
9       dispositive; and the question is, a -- are the  
10      government lawyers -- um -- defending the law, are they  
11      taking the same position -- uh -- that the proposed  
12      intervenor would take.

13                     Now, the proposed intervenors here  
14      have -- have made a number of filings -- um -- in the  
15      past ten days, a -- many of them have attempted to make  
16      points on the merits, and I have yet to see something  
17      -- um -- which departs from the position that the  
18      Government is taking here, and the position that the  
19      Government is taking that -- um -- they believe -- um  
20      -- that the ERIC data is not reliable within the  
21      meaning of the statute.

22                     Now, I think that's wrong. A -- of  
23      the 340,000 plus -- uh -- movers in 2017, only about  
24      14,000 of them ever requested -- um -- that issue that  
25      registration be continued or showed up to vote at the

1       -- um -- original address.

2                       That's about 4.3 percent, and for  
3       reasons that we can get into later, I think that that's  
4       -- um -- more than enough to establish reliability,  
5       within the meaning of the statute.

6                       Chairman Knudson's statement on the  
7       "Here and Now" television show, I, quite frankly, wish  
8       that we would have brought it to the attention of the  
9       Court, because -- um -- it's indicating that at this  
10      point, compared to what happened in 2017, that the

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11     number of people who are saying, oh, no, wait a minute,  
12     we didn't move, and I'd like to continue my  
13     registration, is even less than it was in 2017.

14                      In 2017 it was somewhere between  
15     1.5 and 2 percent, and here he says it's a half a  
16     percent. So it looks to me like a -- the movers list  
17     is more accurate.

18                      But those are things that go to  
19     trial strategy. Those are things that go to the  
20     decisions that all lawyers have to make about what  
21     arguments to make and what arguments not to make, and I  
22     know, Your Honor, from painful experience that that's  
23     not enough to support a motion to intervene.

24                      THE COURT: Which of the two of you is going  
25     to take the lifting more on this one?

1                   ATTORNEY KECKHAVER: Well, Your Honor, the  
2 Commission takes no position on this motion for  
3 intervention.

4                   THE COURT: All right. Well, I think counsel  
5 for the proposed intervenor hit the two cases that I  
6 looked at the most.

7                               When you have an intervention,  
8 there are two types; there's permissive, and there's by  
9 right. You have to have all four of those criteria  
10 that I mentioned before.

11                              They're not viewed in isolation,  
12 and it's not -- It's a highly fact-driven and kind of  
13 flexible concept of whether or not intervention should  
14 be granted.

15                              Chief Justice Abrahamson, and I  
16 think it was the Helgeland case, talked about trying to  
17 strike a balance between the original parties and their  
18 right to conduct their own lawsuit or allowing others  
19 to join in the interest of a speedy and economical  
20 resolution of the -- of the matter without rendering  
21 the lawsuit fruitlessly complex.

22                              So here what I'm doing is I --  
23 looking at a situation, and this is construction of a  
24 narrow statute, and the question is whether or not the  
25 Wisconsin Election Commission did this correctly.

1                   When Courts look at construction of  
2       statutes, they give plain meaning to unambiguous terms,  
3       they look at whatever evidence that might be in the  
4       file, things of that nature, that bear on whether that  
5       -- what that phrase means.

6                   And then the question is are the  
7       plaintiffs entitled to injunctive relief or a mandamus  
8       writ to be issued.

9                   When I read the League's briefs on  
10      this, the League is raising other issues that -- they  

---

11      keep talking about 244,000 registered voters that could  
12      be disqualified, and I think the number comes from the  
13      fact that the Commission did not notify the voters on  
14      the notice that they sent out in October that they'll  
15      be deactivated within thirty days. They decided to go  
16      with a different notice, and so a lot of people may --  
17      the number --

18                  I would say the lack of notice will  
19      correlate to a higher number of people who don't  
20      respond.

21                  And they talk in terms of due  
22      process violations and constitutional issues, and so  
23      the --

24                  They are talking a much more  
25      complex, much more involved litigation than what I am



1 looking at and what has been brought by the plaintiffs.

2 And you have to say, the plaintiffs  
3 brought this. Now, I've already said it's timely. But  
4 I have a concern that nothing was done from 2017 to the  
5 time the plaintiffs brought this action; and it would  
6 seem to me, if this was such a major, direct, immediate  
7 concern to the League, they would have intervened.

8 You know, you talk about the  
9 Armanda Broadcasting case. There's an example of a  
10 direct and immediate character. That involved a school  
11 district that did some investigation of a teacher's  
12 conduct with a -- complaints of some sexually  
13 inappropriate or harassing behavior. A report was  
14 prepared, and then the district had the report, the  
15 broadcasting company saw a copy of it, and part of the  
16 report was released.

17 If the entire report were released,  
18 which is what the company wanted, and there were things  
19 in there that were false or unrebutted, this teacher's  
20 reputation would suffer.

21 So there's a direct correlation  
22 between the release and the teacher's --

23 Here I think there is a much more  
24 indirect, nebulous kind of concept is what going on.

25 Is there some? Sure. I'd give anybody that.

1                   And you know, I want people to  
2           understand, I have no problem with what the League of  
3           Women Voters does. I applaud their efforts. I like to  
4           see voter registration and people going to the polls  
5           and being educated and voting. So I have no animus  
6           towards them at all, so anybody that thinks that is  
7           just wrong.

8                   Then you have another thing that  
9           counsel talked about, and counsel, I'm sorry, I forgot  
10          your last name.

---

11                   ATTORNEY SHERMAN: Sherman.

12                   THE COURT: Okay. Sherman. Talked about the  
13          presumption of when -- a government commission or  
14          agency or a court is governed -- or is represented by  
15          the Attorney General's office, it's presumed that that  
16          is a -- adequate representation.

17                   And, you know, I've read the  
18          briefs, and I've read the things that are in there.  
19          Now, different positions can be taken on different  
20          points, different defenses. Different strongpoints can  
21          be identified.

22                   Just like any other case,  
23          litigation, civil litigation, criminal litigation, the  
24          lawyer and the client can sometimes differ, but that  
25          doesn't necessarily defeat the -- defeat that

1 presumption.

2 And there's no indication here, I  
3 looked, any kind of collusion. There's anything but  
4 collusion. There's -- The two sides just don't see  
5 eye to eye. They're professional, the briefs were well  
6 done, all of that. But there's no collusion here.

7 But this really, to me, reminds me  
8 of the Helgeland versus Wisconsin Municipalities case  
9 at 307 Wis. 2d 1, and I just don't think the case --  
10 that the League has met the criteria. I just don't  
11 think their interest is direct enough in this.

12 I think that they don't have a  
13 sufficiently-related interest to what I am doing here  
14 today.

15 If they want to file an action that  
16 would have the normal discovery provisions and the  
17 discovery process and motions and witness lists and  
18 things like that, that is what they should do.

19 I think that this falls into that  
20 part where Justice Abrahamson is talking about a  
21 fruitlessly complex and unending litigation, when  
22 really, the nut of the litigation is what does that  
23 statute mean, and is the Wisconsin Election Commission  
24 appropriately following that instruction from the  
25 legislature.

1                   And I don't think the League has  
2           met -- the Women Voters has met its burden on that, and  
3           so I'm not going to find that they can intervene by  
4           right.

5                   Now, the other thing that is -- is  
6           there a permissive, and that would require the Court to  
7           look at -- is there -- would this unduly delay and  
8           prejudice the original litigation, litigants.

9                   And you know, this kind of goes  
10          with the same thought that I had before, and certainly,  
11          you know, this Court's decision today can be reviewed  
12          by anybody that -- anybody on the Court of Appeals or  
13          higher court that thinks it's inaccurate, and I'm fully  
14          aware of that.

15                   But I think that permissive  
16          intervention, you're looking at somebody who stepped  
17          up, filed a lawsuit, filed a lengthy litigation  
18          complaint, the -- State promptly briefed it, and now  
19          we're being asked to divert away from what the primary  
20          objective was at that time, so --

21                   In my mind, that balances that this  
22          would unduly delay and prejudice the original  
23          litigants.

24                   The original litigants filed a  
25          complaint. They didn't get an answer from that

1 complaint, so now they're -- they don't have, really, a  
2 legal remedy that this Court could think of, so now  
3 they've resorted to an equitable relief type of  
4 situation, and --

5 It's the timeliness, and there's  
6 almost a laches type of argument that I see. I think  
7 if the League were this concerned about it, they should  
8 have done this on their own, in a separate lawsuit, and  
9 this is not the lawsuit to do it, because I have a  
10 very, very narrow statutory construction to do it in,  
11 to work with, here, and that's all I'm doing. So I'm  
12 going to deny that motion.

13 We're going take a five-minute  
14 break. We'll be back at three and listen to the  
15 remaining litigants.

16 ATTORNEY SHERMAN: Your Honor, if I may be  
17 heard quickly, we're going to seek an interlocutory  
18 appeal of that decision. We respect your decision, but  
19 we will seek review of it --

20 THE COURT: I would expect nothing else. I  
21 was at a court of appeals judge, and he compared it to  
22 wearing a black and white shirt up here, and then the  
23 litigants go to the tent and look at slow speed reviews  
24 of the play, so --

25 ATTORNEY SHERMAN: We would also move -- move

1 the Court for a stay of the proceedings on the TI  
2 motion until such time as the Court of Appeals is able  
3 to review that interlocutory appeal.

4 THE COURT: I'm not gonna do that, because I  
5 have time constraints that I think are very pressing.  
6 You have -- I think a February primary. You have,  
7 then, the April election. I don't think that I can do  
8 that.

9 We are talking, from what you've  
10 told me, about a half a percent of the voters.

---

11 And you're perfectly welcome to  
12 stay and listen to the rest of it, but I'm going to  
13 make a decision today, and then everybody can do what  
14 everybody wants to do.

15 So we'll take -- We'll be back at  
16 five after three. Thank you.

17 (Whereupon, a brief recess was taken in  
18 the hearing.)

19 THE COURT: Thank you. Now we're shifting a  
20 little bit, and we're gonna go to the issue of  
21 injunctive relief for a writ of mandamus.

22 Anything from the plaintiffs on  
23 that?

24 ATTORNEY ESENBERG: Your Honor, thank you for  
25 agreeing to hear us so promptly at what is a very busy

1 time of the year.

2 I will proceed to lay out as  
3 briefly as I can our argument -- um -- in favor of a --  
4 granting the preliminary injunction here.

5 But of course, like all lawyers,  
6 I'm most interested in responding to the Court's  
7 questions, so --

8 THE COURT: Okay. And you know I've read  
9 it --

10 ATTORNEY ESENBERG: -- so -- and so I agree  
11 with Your Honor, that this is a narrow case of  
12 statutory instruction. It's not about a -- the policy  
13 behind sixty fifty three [sic], it's not about whether  
14 or not some other procedure would be better.

15 The legislature, in our view, has  
16 answered those questions, and this is what it has said  
17 about registration lists. It has a -- determined that  
18 if reliable information -- uh -- becomes available that  
19 a person is removed, this triggers an obligation to  
20 send a notice.

21 After the notice is sent, if  
22 there's no response within thirty days seeking  
23 continuation of the registration, then the registration  
24 at the old address is deactivated. This is not  
25 discretionary on the part of the Commission. The

1 statute says that it shall be done.

2 If voters who fail to respond a --  
3 did not move, then, of course, they have the  
4 opportunity to reregister at the polls on election day,  
5 when they present to vote.

6 We believe that we have  
7 demonstrated that there's a reasonable likelihood of  
8 success on the merits. On the merits, a -- the  
9 government makes -- um -- a couple of arguments -- uh  
10 --

---

11 First, they deny that they have any  
12 responsibility to follow Section six fifty point -- sub  
13 three. The Commission argues that the statute only  
14 applies to municipal clerks and a municipal board of  
15 election, a -- that exists in the City of Milwaukee --

16 THE COURT: I looked at that. That municipal  
17 board of elections is cities of 500 or greater and  
18 counties of 750,000.

19 ATTORNEY ESENBERG: That's right.

20 THE COURT: Anywhere else -- So Milwaukee  
21 and Milwaukee County, correct?

22 ATTORNEY ESENBERG: Yeah. I'm not aware of a  
23 board of -- I'm not aware of a municipal board of  
24 election commissioners that exists anywhere else.

25 THE COURT: Okay.



1                   ATTORNEY ESENBERG: Now, if the Commission  
2 was right -- um -- we have a rather anomalous  
3 situation. Since 2003, a local officials no longer  
4 maintain the registration list. We now have a  
5 statewide list, and the Commission has been charged,  
6 has been given, by the legislature, the statutory  
7 responsibility to maintain that list.

8                   The State has further directed the  
9 Commission to enter into a membership agreement with  
10 ERIC to maintain the list -- uh -- so the information  
11 on potential movers is directed to the Commission and  
12 not to local -- uh -- election officials.

13                   Municipalities are bound to use the  
14 list that a -- the Commission maintains. So if the  
15 Commission were right, and six fifty three did not  
16 apply to this, then in -- a -- exercising its  
17 responsibilities to maintain a statewide list and a --  
18 participating in -- in ERIC, a -- the -- a entity that  
19 is now charged with the responsibility of that would  
20 have no obligation -- uh -- to comply with six fifty  
21 point three.

22                   It would essentially be saying that  
23 in creating a statewide registration [sic] list, the  
24 legislature sub silentio repealed six fifty point three  
25 and exempted the Commission from all preexisting

1 obligations with respect to the -- um -- maintenance of  
2 registration lists.

3 There's nothing a -- in the law at  
4 all to indicate a -- that that happened, and of course,  
5 that construction is a disfavor. It would result in a  
6 situation where the Commission can pick or choose from  
7 those obligations that it wishes to follow, using them  
8 as a, quote, model, closed quote -- uh -- and ignoring  
9 them when it doesn't want to -- uh --

10 That may be a bureaucrat's dream --

---

11 um -- but it's a public nightmare, and it's not the  
12 law.

13 The legislature clearly wanted a  
14 statewide list. It wanted to use data generated by  
15 ERIC, and it wanted persons for whom there was some  
16 reliable indication that they no longer resided at the  
17 address they're registered at to be given notice of  
18 that fact and a -- to either request continuation of  
19 their registration or have their registration -- um --  
20 deactivated.

21 I think this -- um -- relates to  
22 the Court's observation earlier -- uh -- that a -- the  
23 Court was puzzled by a reference by the commission that  
24 a -- the -- uh -- that this matter of handling movers  
25 was previously controlled by statute.

1                   I think that that statement reveals  
2     the Commission's apparent belief that 6.50 sub 3 was  
3     somehow repealed and is now a dead letter, but that  
4     type of repeal by implication is disfavored, a -- we  
5     know that, and I don't think it's a reasonable  
6     interpretation of the statute.

7                   First of all, a board of election  
8     commissioners is not a defined term -- um -- it is used  
9     in the heading to section 7.20, which creates this  
10    municipal board in Milwaukee -- uh -- but we know -- uh  
11    -- from a -- 990.001 (6) that the headings of statutes  
12    are not part of the statute, and is certainly a  
13    reasonable reading of the words that are used to  
14    conclude that a commission, a -- that -- that a panel  
15    of commissioners -- uh -- who are charged with  
16    maintaining a statewide registration [sic] list  
17    qualifies a board of election commissioners.

18                  This is buttressed by the context  
19    and the need to read statutes together, because as I  
20    earlier indicated, the legislature has now adopted a  
21    statewide registration list, it has placed  
22    responsibility for maintaining that list with the  
23    Commission, it has directed the Commission to use ERIC  
24    and the data that it generates in the most reasonable  
25    construction of the statute, and one that is

1 consistent, reading them together, and one that is  
2 consistent with past practice, is that -- a -- the  
3 obligations of six fifty point three -- um -- apply to  
4 the Commission, they have been assumed by the  
5 Commission, and the Commission needs to follow them.

6 The second argument that is made is  
7 that the ERIC data is a -- not reliable -- uh -- within  
8 the meaning of 6.50 sub 3.

9 We know from the statute itself a  
10 -- that -- um -- the language of 6.50 (3) and the  
11 process that it envisions, that -- um -- it does not  
12 contemplate that the information, this reliable  
13 information, that a voter has moved -- uh -- must be  
14 perfect or infallible.

15 We know that because what Section  
16 6.50 sub 3 does, is it triggers an additional step. It  
17 requires the Commission a -- to a -- send a notice, a  
18 -- to the elector a -- informing them that they have  
19 been -- uh -- flagged as -- or there's information that  
20 they have changed their address, and informing them  
21 that a -- they may continue their registration at the  
22 prior address, if that -- a information is inaccurate.

23 Only if the elector ignores that  
24 notice and does not respond within thirty days -- uh --  
25 is the -- uh -- elector's registration a -- changed to

1       inactive.

2                       So to -- to borrow, I think,  
3       Mr. Sherman's phrase -- um -- there is a procedure here  
4       -- uh -- to eliminate false positives; and in fact, the  
5       statute itself contemplates that there will be some  
6       false positives.

7                       That, I think, is instructive to us  
8       in determining in this context what the term "reliable"  
9       means.

10                      Reliable particularly means that  
11       this is something that is accurate enough -- um -- to  
12       be trusted -- uh --

13                      In making that determination,  
14       you've got to look at what the information is used for.  
15       In this case you have a -- information that has been  
16       provided by the voter himself, or the voter herself, in  
17       an official action with a government agency in which  
18       they've indicated that they have a different address  
19       than the one that they're registered at.

20                      The information is gathered by  
21       ERIC, who the legislature has directed the Commission  
22       to use, and who the State of Wisconsin, incidentally,  
23       pays to generate this information. It seems to me that  
24       on its face, that's reliable information; and that, of  
25       course, is consistent with the Commission's own

1 concession that this information is largely -- um --  
2 accurate.

3                   Given the fact that what the  
4 information is used for is to trigger a requirement to  
5 send a notice, which gives the voter the opportunity to  
6 say, no, I haven't moved, I still live at my address,  
7 I'd like my registration to be continued, and the  
8 opportunity for a voter to reregister. If it turns out  
9 that, you know, he or she has ignored the notice but  
10 somehow has not -- uh -- moved -- uh -- then it seems  
11 to me a -- conclusion is clear that a -- this  
12 information is sufficiently reliable, and the numbers  
13 bear that out.

14                   A -- The best number I think we  
15 have, with respect to a -- how accurate this  
16 information or how many people on the voter list have  
17 not moved -- um -- is, I think, a -- provided by our  
18 experience with the 2017 -- uh -- deactivations, where  
19 you had a -- 340,000 -- uh -- some notices sent, a -- a  
20 little over 6,000 -- uh -- individuals -- uh --  
21 responded to the notice, said that we -- uh -- sought  
22 to continue their registration and did, and then only  
23 another 8,000 voters, over a -- a series of several  
24 elections, actually presented at their old polling  
25 place a -- to vote.

1                   If you add these two numbers  
2       together -- uh -- you get about 14,000. It seems to me  
3       that -- uh -- for the purposes of this statute and for  
4       what it requires, a -- that's a -- that is a -- uh --  
5       -- a rate of roughly 4.3 percent of people who said  
6       that they didn't move and attempted to vote -- and  
7       voted at the -- at the old address -- um -- that that's  
8       a pretty high -- uh -- a percentage -- a -- that's  
9       pretty high accuracy, as the Commission, prior to this  
10      lawsuit -- um -- had recognized, and -- uh -- that it  
11      clearly falls within a -- the definition of reliable --  
12      um -- for purposes -- um -- of the statute, and a --

13                   That being the case, a Section 6.50  
14      sub 3 -- uh -- has been -- um -- applies in this case,  
15      it applies to the Commission, and it applies to the  
16      ERIC data, and it requires a -- the Commission to  
17      follow the procedure that the legislature has  
18      specified.

19                   You know, the -- the Commission  
20      does have the power to promulgate rules -- uh -- in  
21      fact, it's required to promulgate rules. If it -- uh  
22      -- adopts a standard or policy, it didn't do that in  
23      this case -- uh -- so --

24                   Its action here, I think, is  
25      unlawful, both because of the failure to promulgate a

1 rule as required by Section 227.10, but more  
2 importantly because of the failure to qualify -- uh --  
3 -- or to comply, rather, with Section 6.50 sub 3.

4 The Commission makes a standing  
5 argument -- um -- this is not federal court. We have  
6 taxpayer's standing here in the State of Wisconsin.  
7 Taxpayer standing allows taxpayers to come into court  
8 and challenge the actions of their government wherever  
9 the government is spending money in a way which is  
10 unlawful.

---

11 The Commission clearly spends money  
12 to maintain the voter registration list. If, in fact,  
13 it's maintaining it in an unlawful manner for failure  
14 to comply with 6.50 sub three, then these taxpayers  
15 have a standing to bring this case, and there's a long  
16 line of cases to establish that.

17 They also have standing as voters.  
18 Section 5.06 clearly recognizes a -- an intent on the  
19 part of the legislature to give voters an opportunity,  
20 a -- to challenge failure on the part of election  
21 officials, and commissioners are election officials, to  
22 conduct elections in a way which is -- is lawful.

23 In this case, a -- we filed a  
24 complaint with the Commission -- uh -- they refused to  
25 act on it -- uh -- the administrator said, we're not



1       gonna do anything --

2               THE COURT:  What other remedy would you have  
3       -- I was trying to think.  Did you consider other  
4       remedy other than equitable relief?

5               ATTORNEY ESENBERG:  No.  I -- we -- We have  
6       no remedy other than equitable relief, and we have --

7               Moving on to the -- the other  
8       requisites other than preliminary injunction, we have  
9       no adequate law, remedy at law, and the harm would be  
10      irreparable -- um -- because, as Your Honor noted,  
11      there's gonna be a spring election, a -- in two months.

12              And the -- um -- If, in fact, no  
13      temporary injunction is issued, then that election is  
14      going to be conducted without compliance with Section  
15      6.50 sub 3.

16              There's no way to undo that.  I  
17      mean, we can't find out after the fact which ballots  
18      belonged to voters who shouldn't have been registered  
19      -- uh -- it -- it --

20              It's a harm that's irreparable and  
21      a -- and would result in the very thing that the  
22      legislature didn't want.  It didn't want a -- elections  
23      to proceed with hundreds of thousands of people on the  
24      registration rolls who, in all likelihood, have moved  
25      and are no longer a -- residing at the registration --

1       um -- address.

2                       So we don't think there really is a  
3       -- an alternative, other than the -- uh -- the issuance  
4       of a -- a preliminary injunction here -- uh --

5                       There's some argument that a --  
6       we're not entitled to a preliminary injunction because  
7       a preliminary injunction -- because the -- uh -- it  
8       would not -- um -- be necessary to preserve the status  
9       quo -- um -- I think, if you look at what the Court has  
10      done, sometimes it refers a -- to -- um -- maintaining

11     the status quo as an element of -- of getting a  
12     preliminary injunction. Sometimes not, a --

13                      And in fact, we know that Courts  
14     typically will issue an injunction which requires the  
15     government to do something that it is not currently  
16     doing, right? There are all sorts of affirmative  
17     injunctions.

18                      In this case, I think a -- Even if  
19     we do consider a -- maintaining the status quo as a  
20     requirement, a -- The status quo here is the law, 6.50  
21     sub 3.

22                      The government cannot avoid a --  
23     the issuance of a preliminary injunction which would  
24     otherwise be warranted by saying, look, we've decided  
25     not to follow the law and a -- and a -- therefore,

1       that's the status quo, and a -- for that reason and  
2       that reason alone, you can't get a -- injunctive  
3       relief.

4                       I think that's inconsistent with  
5       the law, it's inconsistent with the practice of the  
6       Courts, and actually makes absolutely no sense. So I  
7       --

8                       You know, I'm happy to -- I don't  
9       want to go on and on, because I know Your Honor has  
10      carefully read the briefs, and I'm happy to respond to  
11      any questions or anything that counsel might say, but I  
12      won't take up more of your time now.

13                      THE COURT: Ms. Keckhaver

14                      ATTORNEY KECKHAVER: Thank you, Your Honor.

15                      THE COURT REPORTER: Use the microphone,  
16      please.

17                      THE COURT: There's a read dot on the base.

18                      ATTORNEY KECKHAVER: Got it. Thank you.

19                      The focus of the plaintiff's entire  
20      case is the statute we've been discussing, 6.50 sub 3.

21                      And we would agree that, at least  
22      at this stage of the proceedings, this is -- it's a  
23      narrow case of statutory construction -- um --

24                      I believe, though, that we've been  
25      focusing on the wrong part of the statute. At this

1 point, the most important thing is that this statute,  
2 6.50 sub 3, does not apply to the Wisconsin Elections  
3 Commission.

4 THE COURT: How are you dealing with that,  
5 then, historically? I mean, there's nothing I see in  
6 the memos. I see you feel you have a broader authority  
7 base under five something and another rule-making  
8 authority, but you didn't do any rule making. So how  
9 are you -- bypassing?

10 This was done on a motion hearing.

11 I don't think there was any publication, I don't think  
12 there was any notice to the legislature. How are you  
13 bypassing the 227 requirements?

14 ATTORNEY KECKHAVER: Well, that's correct,  
15 Your Honor, and as you saw from the recent December 2nd  
16 memo, the Commission has asked the legislature either  
17 for rule-making authority or for statutory authority as  
18 to what the deactivation requirements might be.

19 THE COURT: And they said no. They're  
20 keeping it.

21 ATTORNEY KECKHAVER: Two -- Two senators  
22 responded. I don't know that they speak --

23 THE COURT: Right --

24 ATTORNEY KECKHAVER: -- legislature --

25 THE COURT: -- they were the drafters --

1                   ATTORNEY KECKHAVER:  -- but they responded  
2                   essentially saying, look at the statute, and then they  
3                   proceeded to cite a statute that nobody is talking  
4                   about today, and that's 6.50 sub 1 and 2.  That's the  
5                   four-year maintenance process, that is not sub 3, which  
6                   is the reliable information section that's been  
7                   discussed today and is the focus of the case.

8                                 So it may be that there -- there  
9                   needs to be some rule-making authority or legislation  
10                  -- um -- but it -- sub 3 does not apply to the  
11                  Commission.

12                                So -- um -- they would welcome some  
13                  -- some guidance as to what the legislature wants the  
14                  Commission to do, as far as deactivation, but the ERIC  
15                  agreement doesn't say anything about deactivation -- um  
16                  -- and back in 2017, they did use sub 3 as a model for  
17                  this process, but that, as we know -- um -- didn't turn  
18                  out well, as far as -- um -- determining whether a --  
19                  information was reliable.

20                                But looking at the plain text of  
21                  the statute, it applies only to the municipal clerk and  
22                  board of elections commissioners.

23                                And those terms are specifically  
24                  defined in the statutes -- um --

25                                7.20 discusses what a Board of

1 Elections commissioner is, and is, as Your Honor  
2 mentioned, it is -- in this case would only be the City  
3 of Milwaukee board of elections commissioners.

4 And the Commission is also  
5 specifically defined in the statutes, under 5.025, and  
6 that is defined as the Wisconsin Elections Commission.  
7 They are separate, different entities -- um --

8 Other evidence of this is that  
9 there are numerous provisions throughout the statutes  
10 that describe all three entities in one subsection.

11 They describe the Commission, the clerk, and the Board  
12 of Elections Commissioners.

13 So if those -- If the Commission  
14 is the Board of Elections Commissioners, why would the  
15 legislature have used that language?

16 And then, looking back at sub 3,  
17 the Commission is not mentioned at all, only the  
18 municipal clerk and the Board of Elections  
19 Commissioners.

20 Plaintiffs make the argument in  
21 their brief, their reply brief and then again today,  
22 that when the legislature made the Commission  
23 responsible for the creation and maintenance of the  
24 voter registration list, that had somehow put this  
25 gloss over all the statutes, making the Commission

1 responsible for everything in these -- in the statutes.

2 But the legislature did not change  
3 sub 3. That language is still there, and it only  
4 applies to the clerk and Board of Elections  
5 Commissioners.

6 The plaintiffs also mention that  
7 the -- only the Commission has responsibility for  
8 changing the registration list.

9 And under 6.36, that's not the  
10 case. It's staff from the Commission, it's also -- um  
11 -- municipal clerks, and 7.20, which is the section  
12 that talks about the Board of Elections Commissioners,  
13 or 7.21, which is the next section, mentions that the  
14 Board of Elections Commissioners takes on the duties of  
15 the clerk in the counties and the municipalities that  
16 have boards, which is Milwaukee County and City of  
17 Milwaukee.

18 Plaintiffs also mention that the  
19 Commissions' past conduct shows that sub 3 applies, but  
20 again, as we were just discussing, the Wolfe affidavit  
21 and the memos all show that sub 3 was used as a model  
22 for deactivation in 2017, it is not being used today,  
23 it's not -- that's not the process they used or the  
24 model they used for the 2019 mailing, and sub 3 didn't  
25 apply to the Commission or require it to do anything in

1       either 2017 or 2019, because as I've mentioned, that  
2       section only applies to the Board of Elections  
3       Commissioners and the clerks.

4                       So even if sub 3 does apply to the  
5       Commission -- um -- it doesn't allow for the relief  
6       that the plaintiffs seek, because the ERIC movers data  
7       is not reliable information that a registered elector  
8       has changed their residence for voting purposes.

9                       There's been a lot of discussion  
10       about the 2017 mailing and what the Commission learned  
11       from that mailing. Um -- we talked about sort of these  
12       -- um -- data entry type problems, like the misspelling  
13       of street names or a missing unit number.

14                      There's also the data source  
15       problem, the ERIC data gathers -- the information from  
16       sources that have a different business purpose, like  
17       the DMV and the United States Postal Service, so that  
18       even if the person has moved for those reasons, they  
19       haven't necessarily moved their voting residence -- um  
20       --

21                      And then we also talked about the  
22       notice problem, that the Commission learned that -- um  
23       -- this notice may have been overlooked and that a  
24       thirty-day deactivation was simply too fast, that that  
25       model that they used was not appropriate for ERIC data



1       -- um --

2                       There's nothing in the statutes  
3 talking about deactivation as it -- as it pertains to  
4 ERIC data. The ERIC agreement does not talk about  
5 deactivation, it simply talks about making contact with  
6 voters who show up on this mover list, and that's the  
7 only requirement for -- um -- the ERIC data.

8                       There's also been some discussion  
9 in the briefs and today about the percentages -- um --  
10 I think on this record that -- before the Court right  
11 now, the -- the percentages aren't gonna tell us much,  
12 because -- couple reasons for that.

13                      The Commission memo is those --  
14 those -- The numbers provided in those memos were  
15 provided by Commission staff specifically in response  
16 to questions from the Commission -- um --

17                      So, you know, they were prepared  
18 for this lawsuit, so I think they don't tell us a lot  
19 about -- um -- what those numbers mean.

20                      And then secondly, the exact  
21 percentage, whether we're talking 7 percent, 4.5  
22 percent I think was mentioned today, doesn't -- isn't  
23 relevant here, because under sub 3, which, as  
24 mentioned, we don't think applies, but if it does,  
25 under sub 3, it -- that statute is applied on a case-

1 by-case basis at a very local level.

2 So even if it's the very lowest  
3 percentage that plaintiffs have mentioned -- um --  
4 we're still talking about 14,000 -- um -- electors,  
5 what might have -- be false positives, as far as the  
6 ERIC data goes.

7 Just briefly touching on standing  
8 -- um -- the -- as far as taxpayer standing -- uh --  
9 there's been no expenditure of public funds here for  
10 not acting --

---

11 THE COURT: Well, there was 144,000 spent on  
12 postage and publication, wasn't there?

13 ATTORNEY KECKHAVER: Well, that's -- They're  
14 not challenging that. The mailing is not the problem.  
15 It's what happens next. It's the deactivation, and  
16 nobody's been deactivated at this point, so I don't  
17 know how there's been public money spent --

18 THE COURT: Okay --

19 ATTORNEY KECKHAVER: -- for nonaction --

20 THE COURT: All right --

21 ATTORNEY KECKHAVER: As far as a -- voter  
22 standing, they -- they talk about having standing under  
23 5.06 sub 2, which is more or less like an exhaustion --  
24 um -- statute section as to their complaint under sub  
25 1.

1                   But there's no cause of action in  
2       sub 2. The cause of action is in sub 8, so their  
3       remedy would be to have judicial review under 227.57,  
4       not a declaratory judgment action under sub 2, because  
5       there's no cause of action under sub 2. And that --

6                   THE COURT: What is that statute that gives  
7       that -- that direct action? Is that a certiorari, or  
8       is it -- What kind of action is that?

9                   ATTORNEY KECKHAVER: It's a judicial review  
10      under 227.57.

11                  THE COURT: Okay.

12                  ATTORNEY KECKHAVER: Mm-hmm. To review the  
13      Commission's decision under sub 1.

14                  THE COURT: Okay.

15                  ATTORNEY KECKHAVER: And that segues into  
16      irreparable harm -- um -- their claim is a vote  
17      dilution theory, which assumes a number of things which  
18      aren't shown here.

19                         It assumes the data is accurate,  
20      first of all, and we know that that's not true, that  
21      there's at least some percentage of the ERIC data  
22      that's not accurate for the voter registration purposes  
23      -- um --

24                         It also then assumes that these  
25      people who are improperly registered are going to vote,

1       so we don't know that that's gonna happen, and then it  
2       assumes that they're going to vote improperly at their  
3       -- at a -- at an address for which they're not properly  
4       registered and commit voter fraud. There's no evidence  
5       of that nature of voter fraud in this case.

6                       And the cases that the plaintiffs  
7       cite don't really help them, they're just sort of  
8       general propositions about vote dilution and voter  
9       fraud -- um -- don't say anything specific about how --  
10      um -- individual -- one elector's improper registration  
11      can cause harm to another elector.

12                      Finally, an injunction is not  
13      necessary to preserve the status quo, here.

14                      The status quo in this case is that  
15      these 200,000 some electors are currently registered to  
16      vote. They have been registered to vote. That is the  
17      status quo, and what plaintiffs seek is the ultimate  
18      relief in this case. They seek to change that. They  
19      want those voter registrations to be rendered  
20      ineligible -- um --

21                      That is a complete change of the  
22      status quo, and as we mentioned, because the 2019  
23      mailing -- um -- was a new process, it -- it does not  
24      provide any notice of deactivation, in thirty days or  
25      otherwise -- um -- so the -- um -- this would -- this

1       would change the status quo, deactivate registered  
2       electors without any notice.

3               THE COURT: Because the notice wasn't on the  
4       form.

5               ATTORNEY KECKHAVER: Correct.

6               THE COURT: Well, isn't that kind of letting  
7       the Commission, then, bootstrap the decision to do that  
8       into their right. You know, compounding the error  
9       that, if they made an error. Isn't that kind of doing  
10      that?

11              ATTORNEY KECKHAVER: I'm not sure I  
12      understand the question. They --

13              THE COURT: You're saying, well, we can't now  
14      notify them, because we gave them a form that doesn't  
15      say that we were going to revoke or deactivate their  
16      registration.

17                      But what we're really doing is  
18      we're saying that, even if we're wrong, we committed to  
19      this one practice, and now it's too late to change it,  
20      because we didn't notify these voters; therefore, we  
21      have to go ahead with the policy, even if it's wrong.

22              ATTORNEY KECKHAVER: Well, I don't know that  
23      that's the case. I mean, certainly, the Commission  
24      couldn't have anticipated that this would happen.

25              THE COURT: Mm-hmm. They should have or

1       should not have?

2               ATTORNEY KECKHAVER:  They couldn't have.  How  
3       would they --  They couldn't have anticipated this.  
4       They weren't planning to deactivate these -- these  
5       voters.

6               THE COURT:  Okay.

7               ATTORNEY KECKHAVER:  So their notice was --  
8       was simply the notice provided -- the --  Under the  
9       ERIC mover agreement, they have to reach out to voters  
10      and let them know that there was -- there's been some  
11      indication that they might have moved.

12              You know, that that's all that this  
13      notice was doing.  It was not saying in thirty days  
14      you're gonna be deactivated, it wasn't saying at some  
15      point you're gonna be deactivated, it was saying here  
16      are the steps you can take to -- um -- update the voter  
17      rolls, help us update the voter rolls.

18              So then just briefly on the writ of  
19      mandamus -- um -- it's a higher standard than the  
20      temporary injunction, so a -- you know, the first  
21      element is that their -- the Commission would have a  
22      positive and plain duty to act.

23              And with this statute, this is a  
24      statute that it -- on its face, the plain language of  
25      the statute does not apply to the Wisconsin Elections

1 Commission -- um --

2 So I don't know how they could have  
3 a positive and plain duty to act and to -- that there's  
4 a mandatory duty under this statute -- um -- when  
5 they're not even mentioned.

6 I think that's all I have, Your  
7 Honor.

8 THE COURT: Okay.

9 ATTORNEY KECKHAVER: Thank you.

10 THE COURT: Mr. Esenberg, any brief --

11 ATTORNEY ESENBERG: Just briefly -- um --

12 Board of Election Commissioner is not defined in the  
13 statute. Definite -- statutory definition means  
14 something. It --

15 What we have is section 720, which  
16 -- uh -- creates a municipal Board of Election  
17 Commissioners, that's what it calls it, it's headed  
18 Board of Election Commissioners, but as I indicated  
19 before, statutes clearly provide that headings are not  
20 part of the statute.

21 And so we're left with -- um --  
22 attempting to assess the common sense meaning of the  
23 term, as augmented by the need to -- to read statutes  
24 together.

25 And the absurd result here would

1 be, if we call the Commission's interpretation, is that  
2 the legislature, not having repealed Section 6.50 sub  
3 3, but having given responsibilities to maintain the  
4 registration list, a -- to the Election Commission,  
5 actually intended 6.50 sub 3 to become a dead letter,  
6 and I don't -- I think that that is an interpretation  
7 of the law which is disfavored.

8 We know that statutes -- uh -- are  
9 to be read together, a -- so that the purpose of each  
10 of them will be fulfilled.

11 With respect to the -- uh --  
12 numbers -- uh -- it seems to me that -- um -- the --  
13 the best indication -- uh -- of what the true numbers  
14 are -- uh -- when we're talking about -- um -- people  
15 that didn't move, on the ERIC list, is how many of them  
16 either responded to the notice, or if they didn't  
17 respond to the notice, showed up at their polling place  
18 and tried to vote.

19 That number is about 14,000, or 4  
20 percent. A -- none of these people were  
21 disenfranchised -- uh -- and as I said before, 6.50 sub  
22 3 clearly contemplates that this reliable information  
23 need not be perfect or infallible information, because  
24 it is only a trigger to take additional steps.

25 With respect to standing -- um --



1       it's true that we don't challenge the mailing itself,  
2       but the mailing is supposed to be something that is  
3       done to enforce the requirements of 6.50 sub 3.

4                   If you spend \$144,000 on a mailing,  
5       and then you don't do with it a -- what you're supposed  
6       to do -- uh -- then there's a pecunilary [sic] loss to  
7       taxpayers because you haven't followed the law, and  
8       even if that were not the case, maintaining a voter  
9       registration list like the Commission does costs money.

10                   They have staff members who are  
11       a -- dedicated to that task, so I think there's clearly  
12       taxpayer standing here.

13                   I'm a little confused about a --  
14       the position the Commission is taking -- uh -- with  
15       respect to rule making.

16                   On the one hand, they say, we're  
17       not following 6.50 sub 3 because we have this broad  
18       power under -- I think it's 5.50 sub 15 to do this, but  
19       then at the same time they say, but we have no  
20       rule-making authority.

21                   Well, if they have no rule-making  
22       authority, then they have no authority under the  
23       statute, because you have --

24                   You can't make a rule unless the  
25       law gives you the authority to do it, and they haven't

1       made a rule, and of course, under 227.10, they were  
2       required to do so -- um --

3                   I think that that -- um -- belies  
4       any claim that they're not attempting to follow a 6.50  
5       sub 3 -- um --

6                   With respect to irreparable harm, I  
7       think the statutes are clear about the legislature's  
8       intent to give the voters a -- an opportunity to -- uh  
9       -- compel election commissioners -- uh -- to follow  
10      election procedures -- um --

---

11                   We can't bring an action, a --  
12      seeking judicial review of the Commission decision,  
13      because the Commission refused to make a decision -- um  
14      --

15                   The administer just, you know,  
16      basically sent us a letter saying, we're not gonna do  
17      anything, and there's nothing you can do to make us do  
18      anything. I don't mean to put it in a -- in flip terms  
19      like that, but that's sort of the substance of -- of  
20      what was said to us. The --

21                   Under the Nodal (phonetic)  
22      Investment case and a lot of cases -- um -- it's quite  
23      clear that -- um -- a -- you only -- uh -- the  
24      exhaustion of remedies requirement applies only when  
25      the remedy is available to you.

1                   Since the remedy was not available  
2     to us, since they refused to act on our compliant -- uh  
3     -- we're free to proceed -- um -- and -- uh -- bring a  
4     -- a -- this action -- um --

5                   With respect to -- um -- the nature  
6     of the notice that was sent -- um -- we would -- uh --  
7     we would -- as Your Honor suggested -- um --

8                   What's happening here is, the  
9     Commission has decided that it's not gonna follow the  
10    law and then compounded that mistake by deciding to  
11    tell the voters that they were not gonna follow the law  
12    and now are asserting this as a defense against a --  
13    an action to require them to do what the law requires.

14                  I don't think that equity -- um --  
15    permits that -- um -- the Commission may very well  
16    decide, if an injunction issues in this case -- um --  
17    that it ought to send notice to voters -- uh -- telling  
18    them that they've been deactivated, and that if they've  
19    been deactivated in error, they ought to -- uh -- go  
20    WisVote.com or .gov or go to their municipal clerk and  
21    reregister -- um -- but a -- perhaps this Court would  
22    even order that as a condition or as a part of the  
23    injunction, but it is not a basis for denying  
24    injunctive relief.

25                  THE COURT: I want to ask both of you. This

1 is a statute that has absolutely no case law, never  
2 been interpreted. But has either one of you seen a  
3 municipal clerk or an elections commission do anything  
4 with the notice under 6.53, or has it always been done  
5 by the Wisconsin Election Commission through their  
6 employees? Anything on that?

7 ATTORNEY KECKHAVER: Your Honor, I can answer  
8 that. I mean, this is not in the record, of course,  
9 but sub 3 is used by the clerks in the municipalities.  
10 When they --

11 THE COURT: To send out that thirty-day  
12 notice?

13 ATTORNEY KECKHAVER: Not in the ERIC mover  
14 situation --

15 THE COURT: Okay --

16 ATTORNEY KECKHAVER: -- but in other  
17 situations, there -- it --

18 I can't give you a specific  
19 example, but yes, it is used by those -- by the --

20 THE COURT: In some other aspect of the  
21 process --

22 ATTORNEY KECKHAVER: -- by the entities that  
23 are -- that use it, the municipal clerks and Board of  
24 Elections Commissioners, that section is used, it just  
25 doesn't apply here, and it doesn't apply to the

1 Commission.

2 THE COURT: All right. Mr. Esenberg.

3 ATTORNEY ESENBERG: I have no -- I have no  
4 information about what the facts are. They might have  
5 the authority to do it, but -- but as we said, the  
6 statute here places the responsibility now for  
7 maintaining the statewide registration list with the  
8 Commission and -- and -- and the -- the ERIC data  
9 doesn't go to this local -- uh -- municipalities. It  
10 goes to the Commission.

11 THE COURT: All right. There are a number of  
12 factors in a injunctive relief case where somebody is  
13 seeking a temporary injunction.

14 You have to show a reasonable --  
15 The movant has to show a reasonable probability of  
16 ultimate success on the merit. The movant has to show  
17 that they do not have an adequate remedy at law. They  
18 have to show that they've suffered irreparable harm.

19 The leading case in that is the  
20 Werner versus Grootemaat case.

21 And the purpose of an injunction is  
22 to maintain the status quo. Some Courts say there's a  
23 fourth element to that, and --

24 And the injunction can require  
25 affirmative action. The one that I looked at was, I

1 think, State versus Spivogal (phonetic) out of  
2 Sheboygan County, where the injunction required  
3 Spivogal Excavating Company to remove improper fill  
4 from a landfill.

5 Then the second alternative  
6 remedy that's being asked for is a -- is a writ of  
7 what -- a writ of mandamus. It's an extraordinary  
8 writ. It's to compel officers to perform their  
9 duties arising from their office. The duties have  
10 to be presently due, and that's from Pascal  
11 (phonetic) versus City of Milwaukee, and there are  
12 four elements there, again, once there's a clear,  
13 legal right.

14 So it is a little bit higher  
15 standard of positive and plain duty on the part of  
16 the official or the board to who the writ is  
17 dictated, substantial damages due to nonperformance  
18 of the duty, and no adequate remedy at law.

19 And that comes from the  
20 Milwaukee County Personnel Review Board versus Clark  
21 (phonetic), and that is a fairly recent case -- I  
22 think -- I didn't write the year that -- Yes, I  
23 did.

24 And that really lays out a  
25 outline that, you know, it clearly fits this very

1 well. It's a 2006 case, and you know, I --

2 Before I actually get into the  
3 discussing whether the plaintiffs have met their  
4 burden, I want to talk about a couple of the other  
5 issues and the evidence in the case that I've seen  
6 so far.

7 First, the Wisconsin Election  
8 Commissions argues this section does not  
9 specifically apply to them.

10 It's in a statute that they have  
11 historically, since 2015, been implementing. And  
12 not only did they implement it with the thirty-day  
13 notice, but once they changed the notice, they  
14 continued to implement it with the goal of  
15 monitoring the voter list.

16 And if they didn't have  
17 authority to do that in 2017, I don't know what  
18 we're doing here now, because we wouldn't have the  
19 right party to do this.

20 And I -- I just think  
21 everything I've seen is that there was an implicit  
22 understanding on the part of the Election Commission  
23 that this is their responsibility.

24 There are only two municipal  
25 bodies in the state that have this Board of Election

1       Commissioners, and then there are a thousand  
2       municipal clerks around the state, but none them  
3       have -- Nobody's shown me that any of them apply  
4       6.50 (

5                               3). Instead, what I see from  
6       the readings -- reading the pleadings, and I've read  
7       these extensively, is that their responsibility is  
8       when people come in to register, they verify the  
9       registration information.

10                            I came up with, in 2000 -- in  
11       the '17 numbers were right about 4 percent was the  
12       people who called in, and then people who were  
13       pro-actively reactivated or prevented from being  
14       deactivated by staff.

15                            And if they weren't working on  
16       this thirty-day, I would have no idea why they would  
17       be doing that.

18                            There's just a huge disconnect  
19       between the logic of what's being told here, and I  
20       don't mean to be disrespectful of anybody, I know we  
21       all have different views on things, but they have  
22       exercised control over this process, and they've  
23       looked at this, and in their memo they clearly look  
24       at other -- other states, they note some that are  
25       top down, they note how those are implemented on the



1 local level, are they are implemented from the state  
2 level, how are they notified, things of that nature,  
3 for Minnesota, for Illinois, Ohio, Virginia again.

4 I don't know why they picked  
5 those states. Maybe they were representative of the  
6 group.

7 But everything I see indicates  
8 that they believed this was statutorily required.

9 In fact, the memo from the March  
10 meeting says it was presum -- previously statutorily  
11 established, or language to that --

12 There would be no reason to  
13 recognize the statute, if they had the ability to do  
14 this, so --

15 And there would be no reason for  
16 the Board to accept the report and direct staff to  
17 move forward with developing the proposed changes,  
18 if they didn't think they had jurisdiction to do  
19 that.

20 They don't follow any  
21 rule-making authority. I'm critical of that because  
22 that goes to the timeliness. People are notified as  
23 to what is before a legislative body, be it the  
24 state, one of their agencies, local municipalities,  
25 county government, by publications, and it gets out

1       in the paper, because it goes -- the publication  
2       notices are reviewed by the papers.

3                       And that brings people into the  
4       democratic process of commenting on things.

5                       It also goes to alerting people  
6       as to whether something is going to be maybe  
7       something they want to challenge, like we are here.

8                       Is there clear and positive and  
9       plain legal duty. These are corollaries, and I  
10      think that in my mind, this is a -- that there is a  
11      clear, positive duty.

12                      We deal in all kinds of burdens  
13      of proof. You know, reliable, you know, what the  
14      exact language in the statute, just so everybody  
15      knows what it is, is reliable information. That  
16      means capable of being relied upon. It's something  
17      we would find of high quality.

18                      And we're talking about  
19      relatively low numbers of people who are  
20      deactivated.               Now, I don't want to see  
21      anybody deactivated, but I don't write the  
22      legislation. That's not my germane -- that's not my  
23      area. It's not my domain.

24                      Once the legislature has studied  
25      this issue and they've decided how to proceed,

1       that's really their prerogative, and people can  
2       disagree with it or agree with it through voting.

3                       But I think it's very clear that  
4       they had a legal duty, that they didn't think the  
5       policy was appropriate, and they went away from it.

6                       There's no basis for saying a  
7       year to two years is a good time frame for letting  
8       people come back to the municipality clerks or  
9       whatever and say that they no longer -- that they  
10      reside at that address or they don't reside. It's  
11      not that difficult to do.

12                      I think they had -- I think  
13      they have a clear, legal right to follow the  
14      statute. That's what the statute envisions, that --

15                      We see this all the time. We  
16      have seen -- This is really no different than --  
17      What this is is the legislature's told Wisconsin  
18      Election Commission that this is how you have to do  
19      this. If you don't like it, then I guess you have  
20      to go back to the legislature. They didn't do that.

21                      Instead, they went out on their  
22      own, and they created this rule, and so I find that  
23      the plaintiffs have established a clear right to the  
24      action on the part of the government body, and  
25      there's a plain, legal duty to follow it.

1 I'm not accepting the arguments  
2 made by the Wisconsin Election Commission. They're  
3 not borne out by the evidence.

4 I also, you know, talk about  
5 plaintiffs. I think -- Standing. I think they  
6 have standing.

7 The case I rely on is a -- Burg  
8 (phonetic) versus Ament. It involved the leasing of  
9 the Milwaukee Public Museum. And when you have  
10 election -- or when --

---

11 In that case, money was going to  
12 be spent -- or put on the tax mill by some transfer  
13 of the museum, and the Court said that, no, that  
14 they're like shareholders in a corporation. That's  
15 their money that is being spent.

16 I thought that there was a  
17 little bit of a cavalier attitude on the part of the  
18 director when she elevated the rights and the duties  
19 of the employees of the Wisconsin Election  
20 Commission over the rights and duties to the state,  
21 to the electorate. I didn't find that an  
22 appropriate basis for any kind of denial.

23 So they -- They have suffered  
24 substantial damage. If one -- If somebody in one  
25 of these close elections, where it's a tie and some

1 voters voted that shouldn't have been in that  
2 district because their registration was incorrect,  
3 you really can't undo that, and one person gets the  
4 office usually by a coin flip, and the other person  
5 goes home.

6 The \$144,000, I agree with  
7 Mr. Esenberg, that's the kind of money that the  
8 Court was talking about in the Milwaukee -- in  
9 Ament.

10 Do the plaintiffs have an  
11 adequate remedy at law. I really thought a lot  
12 about -- I did a lot of work on the whole case.  
13 People can disagree entirely with my analysis on  
14 this, and I'm sure it will be reviewed.

15 But the reality is is that I  
16 could not come up with any adequate remedy, here. A  
17 certiorari appeal, I don't know what you would  
18 appeal. A nondecision that on the basis that it  
19 wasn't timely, it was issued as being without  
20 prejudice but concluding with the, oh, P.S., by the  
21 way, there's nothing you can offer that's going to  
22 change the nontimeliness of this, so --

23 And I don't know that the  
24 plaintiffs weren't timely. If they filed before  
25 those notices went out, I -- their objection --

1       their complaint about it, I don't think it would  
2       have been justiciable at that point. Courts don't  
3       do advisory decisions. Maybe, maybe not, but I  
4       think they went quickly, just like everybody in  
5       here.

6                       And then there's a lack of the  
7       publication. I'm critical of that.

8                       They couldn't do a certiorari.  
9       I don't know what other type of relief they could  
10      seek, other than to stop the process, and what I'm  
11      going to do is --

12                      I'm going to issue the writ of  
13      mandamus. I'm going to compel the Election  
14      Commission to comply with the thirty-day notice. I  
15      can't tell them how to do that. I don't know how to  
16      do that. They'll have to figure that out.

17                      But they created this situation,  
18      and they cannot then use the fact that it's gonna be  
19      difficult to undo that as some sort of defense to  
20      the process. It -- That just would be improper.

21                      Now, Mr. Esenberg, would you  
22      file an order to the effect of what I've done here  
23      today as soon as possible so the parties can take  
24      their appeal.

25                      ATTORNEY ESENBERG: We will, Your Honor.

1 Thank you.

2 THE COURT: All right. Thank you.

3 ATTORNEY KECKHAVER: Your Honor, Your  
4 Honor, if I may, the State would like to seek an  
5 immediate stay of the Court's ruling pending our  
6 appeal and -- um -- you know, I think it --

7 There would be irreparable harm  
8 without a stay. We're talking about an election on  
9 February 18th. Ballots have to go out twenty-one  
10 days before that. For the Congressional District 7  
11 special election, ballots go out January 2nd.  
12 Talking about a very tight time frame.

13 If the Commission's duty is for  
14 a efficiency of election administration, you know,  
15 this would create chaos, to do this now.

16 THE COURT: Mr. Esenberg.

17 ATTORNEY ESENBERG: I disagree. I think  
18 it's quite simple -- uh -- the -- uh -- the  
19 Commission -- uh -- under 6.50 (3), 6.50 sub 3, a --  
20 those who didn't respond, their registrations are  
21 deactivated.

22 Now, if the Commission wants to  
23 send a notice out to those people telling them that  
24 they've been deactivated, and that if they've been  
25 deactivated in error, that what they need to do is

1       reregister on line, which they can do, or go to  
2       their clerk's office, or reregister, or reregister  
3       at the polls.

4                       That's a relatively simple thing  
5       to do, and I'm confident they can do it. It  
6       requires some work and will cost some money, but the  
7       reason they have to do it, as Your Honor pointed out,  
8       is their own admission.

9                       But I don't think we can stay  
10      the -- Particularly given Your Honor's finding as  
11      the plain, legal duty here, if we stay this pending  
12      appeal, then we're guaranteeing that this plain,  
13      legal duty -- uh -- found by Your Honor this  
14      afternoon will not be followed in the February  
15      election, because there won't be time to get it  
16      done.

17                      And so a -- seems to me that --  
18      um -- it's relatively simple -- uh -- for the  
19      Commission to -- to fix the error they made; but in  
20      any event, it's a plain, legal duty that they have,  
21      as Your Honor has found, and it -- and they need to  
22      comply with it.

23                      THE COURT: You know what, I'm not going  
24      to grant the stay. If one of the reviewing Courts  
25      wants to grant a stay, that's appropriate.



1                   But for the reasons that I've  
2           talked about, I think a stay would be  
3           contraindicated, and I think it's important that the  
4           Commission get it -- get this into the works,  
5           because we're on a very tight time frame.

6                   This didn't land on my desk  
7           until November 13th, and covered a lot of territory  
8           in the last thirty days, because of the timing of  
9           this.

10                   If there were more time, then I  
11           would have done a written decision. I would have  
12           allowed for the -- you know, the written decision to  
13           be issued in a more timely manner. But I think it's  
14           -- It's contrary to everything I've done here to  
15           say, okay, now I've granted this emergency motion,  
16           but I'll stay it.

17                   Maybe one of the reviewing  
18           Courts might do that, but I don't think I can do  
19           that.

20                   So thank you folks. Everybody  
21           have a good day.

22                   (End of proceedings.)

23                   ---oo0oo---

24

25

1 STATE OF WISCONSIN )  
2 ) SS  
3 OZAUKEE COUNTY )

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I, Michelle Jean Yaklovich, Registered Merit  
Reporter, certify that the foregoing is a true record of the  
proceedings, to the best of my ability, held on the 13th day  
of December, 2019, before the HONORABLE PAUL V. MALLOY,  
Circuit Court Judge, presiding, and reduced to writing in  
accordance with the Stenograph notes made at said time and  
place.

In witness whereof, I have hereunto set my hand at  
Erin, Wisconsin, this 14th day of December, 2019.

Michelle Jean Yaklovich, District Court Reporter

*Timothy Zignego, et al. v. Wisconsin Elections  
Commission, et al.*

Case No. 19-CV-0449

**Docket 33**

(Affidavit of Meagan Wolfe)



FILED  
11-27-2019  
Ozaukee County, WI  
Mary Lou Mueller CoCC  
2019CV000449

STATE OF WISCONSIN CIRCUIT COURT OZAUKEE COUNTY  
BRANCH 1

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TIMOTHY ZIGNEGO, et al.,

Plaintiffs,

v.

Case No. 19-CV-0449

WISCONSIN ELECTION  
COMMISSION, et al.,

Defendants.

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AFFIDAVIT OF MEAGAN WOLFE

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STATE OF WISCONSIN                    )  
  )     ss.  
COUNTY OF DANE                    )

MEAGAN WOLFE, being sworn under oath, says:

1. I am employed as the Administrator of the Wisconsin Elections Commission ("the Commission"). I was appointed Interim Administrator by the Commission in March 2018, and my appointment was confirmed by the Wisconsin Senate in May 2019.

2. The Commission is a governmental agency responsible for administering election laws in Wisconsin. As the Commission's Administrator, I serve as Wisconsin's chief elections officer and am generally responsible for managing the agency's programs, staff, and budget.

3. Much of the information in this affidavit is also included in the memoranda attached as Exhibits B–F to Brian McGrath’s affidavit in support of Plaintiffs’ motion for preliminary injunction. (Dkt. 11:7–46.) Where applicable, I will provide citation to the relevant memorandum.

### **Wisconsin’s Official Voter Registration List**

4. The Commission is responsible for compiling and maintaining electronically an official voter registration list. Wis. Stat. §§ 5.05(15), 6.36. The list is maintained electronically on WisVote, the statewide election management and voter registration system.

5. 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.

6. Wis. Stat. § 6.50 requires revision of the list only under certain circumstances.

7. One such circumstance is when an elector has not voted in the previous four years. The Commission “examine[s] the registration records for each municipality and identif[ies] each elector who has not voted within the previous 4 years if qualified to do so during that entire period” and mails a notice to that elector notifying them that their registration will be suspended unless they apply for continuation of registration within 30 days. Wis. Stat. §

6.50(1). If the elector does not apply for continuation, the Commission then changes their registration status from eligible to ineligible. Wis. Stat. § 6.50(2).

8. Another circumstance requiring revision to the registration list is when a municipal clerk or board of elections commissioners receives reliable information that the elector has changed his or her residence. Wis. Stat. § 6.50(3).

9. Wisconsin Stat. § 6.50(3) mentions only “the municipal clerk or board of elections commissioners.” The term “board of elections commissioners” refers to the City of Milwaukee Board of Elections Commissioners, the only Wisconsin municipality where a board of elections commissioners conducts elections instead of a municipal clerk. *See* Wis. Stat. § 7.20.

10. In practice, when revising the registration list under Wis. Stat. § 6.50(3), the municipal clerk or board of election commissioners may ask the 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 municipal board of election commissioners.

#### **Electronic Registration Information Center, Inc. (ERIC)**

11. 2015 Wisconsin Act 261 directed Wisconsin to join the Electronic Registration Information Center, Inc. (ERIC) for the purpose of maintaining

Wisconsin's official voter registration list. The Act 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)*. A true and correct copy of the ERIC Membership Agreement is attached as **Exhibit A**.

12. 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). (Dkt. 11:7–8.)

13. The ERIC Membership Agreement requires each member state to transmit to ERIC its voter files and motor vehicle records for sharing with other member states. (Exh. A, sec. 2.) The source databases used in the ERIC matching process have different purposes and are not designed with identical fields or with the intent of identifying exact matches for the determination of voter registration eligibility. As a result, the data produced by ERIC regarding individuals who may have moved does not necessarily establish in all instances



that an individual has actually changed their residence or that they intended to change their permanent address for voter registration purposes.

14. The ERIC Membership 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. (Exh. A; sec. 5.a.) And, as relevant to this lawsuit, 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.

(Exh. A, sec. 5.b.)

15. The ERIC Membership 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. (Exh. A, sec. 5.b.)

#### **2017 ERIC Movers Data**

16. 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 postcard to the municipal clerk or board of elections commissioners to keep their registration current. The Commission decided to use the process set forth in Wis. Stat. § 6.50(3) as a model and gave the voters 30 days in which to respond to keep their registration active. (Dkt. 11:8–9.)

17. 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. (Dkt. 11:9.)

18. 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 initially deactivated and 6,153 were not as a result of the 2017 ERIC Movers mailing. (Dkt. 11:9.)

19. 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. (Dkt. 11:9-10.)

20. After talking with affected voters, Commission staff identified several additional situations where voters appeared to have moved based on ERIC 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. (Dkt. 11:10.)

21. In March 2018, Commission staff reactivated the voter registration of 12,133 voters whose mover data was inaccurate and should not have been deactivated. (Dkt. 11:10.)

22. Based on concerns expressed by clerks, media, and citizens 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. (Dkt. 11:10.)

23. 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 on behalf of the clerks, the Commission reactivated the registrations of voters who signed the list. In all, 5,984 voter registrations were reactivated because voters signed the Supplemental List to continue their registration during the 2018 elections. (Dkt. 11:10.)

24. The City of Milwaukee, City of Green Bay, and Village of Hobart concluded that the ERIC Mover data was not reliable enough to remove voters from the poll list. Those municipalities requested reactivation of all movers in their jurisdictions 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. (Dkt. 11:10–11.)

25. 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.

26. 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. (Dkt. 11:12.)

27. 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. (Dkt. 11:12.)

### 2019 ERIC Movers Data

28. In 2019, the Commission received another report on Mover Data from ERIC.

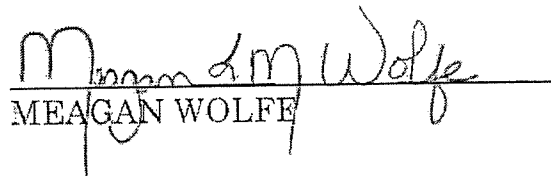
29. Based on what the Commission learned from the 2017 ERIC Movers Data and subsequent mailing, the Commission revised its process for the 2019 ERIC Movers Data.

30. 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. The letter did not include a notification that the recipient's voter registration would be deactivated as a result of a non-response. (Dkt. 11:36.)

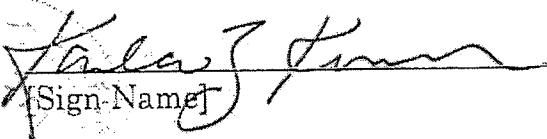
31. To date, the Commission has decided that the recipients of this mailing will remain active and can confirm that their address is valid on MyVote.wi.gov, by returning the postcard attached to the letter to their municipal clerk, or by participating in an election through Spring 2021. If the

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. (Dkt. 11:36, 42-43, 46.)

32. The process that may be used to deactivate ERIC Movers will be determined and finalized at a future Commission meeting.

  
MEAGAN WOLFE

Subscribed and sworn to before me  
this 26<sup>th</sup> day of November, 2019.

  
[Sign Name]

Karla Z. Keckhaver

[Print Name]

Notary Public, State of Wisconsin

My Commission: is permanent.

[illegible]

1. The first step in the process is to identify the problem or issue that needs to be addressed. This involves gathering information and understanding the context of the problem.

1. *Chlorophyll a* (Chl *a*) is the primary photosynthetic pigment in most plants and algae. It is a green pigment that absorbs light energy in the blue and red regions of the visible spectrum.

[illegible]

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*Timothy Zignego, et al. v. Wisconsin Elections  
Commission, et al.*

Case No. 19-CV-0449

**Docket 34**

(Exhibit A of Affidavit of Meagan Wolfe)



## EXHIBIT A

## ELECTRONIC REGISTRATION INFORMATION CENTER, INC.

## MEMBERSHIP AGREEMENT

This membership agreement (this "Agreement") is made and entered into as of the 17<sup>th</sup> day of May 2016 (the "Effective Date"), by and between Electronic Registration Information Center, Inc., a Delaware nonstock corporation ("ERIC") and Wisconsin Government Accountability Board (the "Member").

WHEREAS, ERIC was formed for charitable and educational purposes to engage in meaningful, evidence-based reform of the election system in the United States; and

WHEREAS, ERIC seeks to lessen the burdens of government by facilitating the collaboration of states and local government units to conduct research, develop technology, and perform other charitable and educational activities designed to reduce the costs and increase the accuracies and efficiencies associated with their use of voter registration systems; and

WHEREAS, ERIC seeks the direct involvement of states and local government units in furthering its charitable and educational purposes by such states and local government units becoming members of ERIC and furnishing voter registration and other data to help ERIC understand the needs of states and local government units with respect to their use of voter registration systems, and assist state and local government units in making their voter registration lists and processes more accurate, more complete, and fully compliant with federal, state and local laws; and

WHEREAS, in consideration for the Member's performance as described below, ERIC will provide the service to the Members of sharing and processing data that relates to the maintenance of their voter registration lists and provide regular (at least on a monthly basis) reports to the Member.

NOW THEREFORE, in consideration of the foregoing, the terms and conditions hereinafter set forth and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. Annual Dues. The Member shall pay annual dues to ERIC as determined by the Board of Directors of ERIC (the "ERIC Board") pursuant to Article II, Section 5 of ERIC's Bylaws. If the Member fails to pay dues by the date determined by the ERIC Board, ERIC shall not deliver, nor shall the Member receive, any services or data from ERIC until such payment is received. Any Member that fails to pay dues within ninety (90) days of a dues payment deadline shall be *automatically removed* as a Member in accordance with ERIC's Bylaws (the "Bylaws").
2. Voter Files and Motor Vehicle Records. The Member shall transmit to ERIC the following data related to its voter files and motor vehicle records (collectively, the "Member Data").

## EXHIBIT A

- a. A reasonable time after admission, the Corporation and the Member will agree upon a 'Certification Date' that obligates the Member to the following two sections herein. The Member shall be notified in writing by the Corporation of the Certification Date.
  - b. Within sixty (60) days of the Certification Date, and at least every sixty (60) days thereafter, the Member shall transmit: (1) all inactive and active voter files (excluding those records that are confidential or protected from disclosure by law), including those fields identified in Exhibit B, and (2) all licensing or identification records contained in the motor vehicles database (excluding those fields unrelated to voter eligibility, such as fields related to an individual's driving record), including those fields identified in Exhibit B. Under no circumstances shall the Member transmit an individual's record where the record contains documentation or other information indicating that the individual is a non-citizen of the United States. Should Member believe it has an alternative source of data that is equivalent to or better than the motor vehicle database ("Alternative Data Source"), Member may apply in writing to the Executive Director of ERIC to substitute the Alternative Data Source for motor vehicle data. Such written application shall explain the basis for Member's assertion that the Alternative Data Source is equivalent or better and why using it will effectively serve the goals of ERIC. If, in the Executive Director's assessment, the request is reasonable, the Executive Director shall submit the Member's request to the Board for approval. If membership in ERIC is contingent upon a jurisdiction's ability to use an Alternative Data Source, the jurisdiction may seek approval of a data substitution request in advance of joining ERIC.
  - c. If the Member fails to transmit the required Member Data as described above, ERIC shall not deliver, nor shall the Member receive, any Data or services from ERIC until ERIC receives the required Member Data from the Member. Should Member fail to transmit Member Data in any sixty (60) day period as provided in sub-section b, Member shall, upon written notice from ERIC, have a thirty (30) day grace period in which to provide such Member Data. Should this grace period expire without a transmission to ERIC of Member Data from the Member, the Member shall be *automatically removed* from membership in accordance with the Bylaws. Member may submit a written appeal to the Executive Director of ERIC for a reasonable extension of the grace period deadline if Member is unable to meet that deadline because of a technical issue or a problem accessing or receiving the Member Data. Whether or not to grant the extension or to proceed to automatic removal shall be in the sole discretion of ERIC's Executive Director.
3. State Agency Records. The Member shall use its best efforts to transmit, on a regular basis, data relating to individuals that exists in the records of other agencies within its jurisdiction that perform any voter registration functions, including, but not limited to, those required to perform voter registration pursuant to the National Voter Registration Act, 43 U.S.C. 1973gg-5 ("Additional Member Data"). Notwithstanding this section, a state's failure to transmit Additional Member Data under this section shall not affect the Member's compliance with this Section or its standing as a member of ERIC.

## EXHIBIT A

4. Privacy: Use of Data.

- a. **Use and Protection of Data:** The Member and ERIC shall use their best efforts to prevent the unauthorized use or transmission of any private or protected Member Data; Additional Member Data; and data included in reports provided by ERIC ("ERIC Data") (Member Data, Additional Member Data and ERIC Data shall be collectively referred to as "Data") in its possession. The Member represents and warrants that all uses and transmissions of Data originating from the Member to ERIC and/or ERIC's agents, contractors or subcontractors comply fully with applicable state, federal and local laws, rules and regulations. The Member shall not use or transmit any ERIC Data for any purpose other than the administration of elections under state or federal law. Should a Member receive a request to disclose ERIC Data and determines that it is legally obligated, in whole or in part, to comply with such request, it shall not make the disclosure without first obtaining a court order compelling it to do so, a copy of which shall be provided to ERIC.
- b. **Unauthorized Use or Disclosure of Data-Member:** Should there be an unauthorized or impermissible use, disclosure or transmission of Data, regardless of whether it is accidental or intentional (for example, member intentionally sells, distributes, publishes or uses any ERIC Data for any purpose other than election administration, including any commercial purpose) or the responsibility of a third party (collectively, "Unauthorized Disclosure"), Member shall, within ninety (90) days of ERIC receiving notice of the Unauthorized Disclosure a) explain in writing to ERIC that such Unauthorized Disclosure has been cured and how it was cured or, if the breach is not curable, provides a written explanation to ERIC of what steps it has taken to mitigate the risks to ERIC and its Members resulting from such breach; and b) provide a written explanation of what processes it has implemented to prevent such Unauthorized Disclosure in the future. Upon written application, the Executive Director of ERIC, in consultation with the Board Chair, may extend the deadline for Member to comply with this section. At its first meeting following the Member's compliance with sub-sections a and b above, the Board will consider the information submitted by the Member and vote on Member's continued membership. Should Member fail to provide any information in response to sub-sections a and/or b above, Member shall be *automatically removed*. To the extent permitted under each Member's state law, the Member agrees to indemnify, defend and hold harmless ERIC against any claims related to the Unauthorized Disclosure.
- c. **Notice to ERIC:** Each Member shall report to the Executive Director of ERIC as soon as is practicable if a Member is required by law to sell, distribute, publish, disclose or use any ERIC Data for any purpose other than election administration. Each Member shall report to the Executive Director of ERIC immediately upon learning of any Unauthorized Disclosure.
- d. **Unauthorized Disclosure of Data-ERIC:** Should there be an unauthorized disclosure of motor vehicle data by ERIC, whether accidental or intentional or the

**EXHIBIT A**

responsibility of a third party ("ERIC Unauthorized Disclosure"), ERIC shall immediately give notice to Members. Understanding that ERIC's primary source of funds are fees and dues paid by Members, and subject to consultation and approval by the Board, ERIC agrees to indemnify, defend and hold harmless state motor vehicle agencies against any claims related to an ERIC Unauthorized Disclosure of Data.

This provision 4 shall not be construed to limit any Member's sovereign immunity, rights, claims or defenses which arise as a matter of law or pursuant to any other provision of this Agreement.

5. State Voter Registration Systems. To foster ERIC's goal of improving the accuracy of state voter registration data, Members are strongly encouraged to establish a regular schedule for requesting ERIC Data with a minimum of one request every calendar year. When a Member Representative requests ERIC Data, upon receipt of such ERIC Data, the Member shall take the following actions in connection with the improvement of its state voter registration systems. (If Member rescinds in writing its request for ERIC Data within seven (7) business days of making its original request, the following requirements will not apply.) If a Member fails to make at least one request for ERIC Data for 425 days, ERIC will automatically provide ERIC Data within seven (7) business days of the 425th day, thereby triggering the following requirements.

- a. When the Member receives ERIC Data regarding eligible or possibly eligible citizens who are not registered to vote, the Member shall, at a minimum, initiate contact with each and every eligible or possibly eligible citizen and inform them how to register to vote. Each Member shall have until October 1 or fifteen (15) days before the close of registration, whichever is earlier, of the next Federal General Election year to initiate contact with at least 95% of the eligible or potentially eligible citizens on whom data was provided and address validation was performed, as described above. Members shall not be required to initiate contact with eligible or possibly eligible voters more than once at the same address, nor shall Members be required to contact any individual who has affirmatively confirmed their desire not to be contacted for purposes of voter registration or is otherwise ineligible to vote in the Member's jurisdiction. No later than December 1 (or, if December 1 falls on a weekend, the next business day) following the Federal General Election, the Member Representative shall provide a written certification to the Executive Director of ERIC that Member has or has not complied with the provisions of this section. Members that have not complied with this section, or do not provide the written certification, shall be *automatically removed* from membership. If a Member adopts legislation or policies that have the potential to accomplish the objectives of this section by alternative means, Member may apply to ERIC for an exemption from the requirements of this section of the Membership Agreement by sending a written request to the Executive Director of ERIC and the Chair of the Board. Such written application shall explain the basis for Member's assertion that the alternative means will effectively achieve the objectives of this section. If the Executive Director of ERIC and the Chair of the Board believe the request is

## EXHIBIT A

reasonable, it shall be presented to the Board for a vote and, if granted, a determination on the timing of implementation of the exemption.]

- b. 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.

Within ten (10) business days of the ninetieth day, the Member Representative shall provide a written certification to the Executive Director of ERIC that Member has complied or not complied with this section and, if out of compliance, the extent of such non-compliance. If Member is out of compliance, Member shall have a 30-day grace period, which begins on the 91<sup>st</sup> day, within which to complete the required contacts. Within ten (10) business days following the expiration of the grace period, the Member Representative shall provide a written certification to the Executive Director of ERIC that Member has complied or not complied with this section. If Member is still out of compliance, or fails to provide the certification, Member shall be *automatically removed*.

- c. The Member shall use its best efforts to provide for a mechanism by which any eligible voter whose registration appears to have been erroneously processed or unprocessed shall be offered the opportunity to cast a ballot that will be counted, unless the voter is otherwise ineligible.
  - d. The Member shall use its best efforts to provide for a mechanism by which an eligible voter may register to vote over the internet without need to complete and/or deliver a paper voter registration form.
  - e. The Member shall use its best efforts to provide for a mechanism by which voter registration transactions performed at state agencies is more fully automated and reduces or eliminates paper transactions.
- 6. Single Point of Transfer. The Member shall designate and maintain a single point of transfer of data and a single data source/point of data per data feed.
  - 7. Performance Data. Within 30 days of the date of execution of this agreement, and every one hundred eighty (180) days thereafter, the Member shall report to ERIC data relating to performance under this Agreement, as described in Exhibit C.
  - 8. State Specific Requirements. From time to time, legislation or implementing regulations enabling states to become members of ERIC will contain state-specific membership requirements not applicable to all Members. Such state-specific requirements are set forth in Exhibit D.

**EXHIBIT A**


9. Publicity. The Member shall not make or permit any person connected with it to make any announcement or statement purporting to be on behalf of ERIC, or use any logo, trademark, service mark, or business or trading name of ERIC or any other Member of ERIC without the prior written approval of ERIC or the affected Member, as applicable. Furthermore ERIC shall not make or permit any person connected with it to make any announcement or statement purporting to be on behalf of any Member, or use any logo, trademark, service mark, or business or trading name of any Member of ERIC without the prior written approval of the affected Member.
10. Waiver. No waiver by any party for any breach by the other of any of the provisions of this Agreement shall be deemed a waiver of any preceding or succeeding breach of the same or any other provisions hereof. No such waiver shall be effective unless in writing and then only to the extent expressly set forth in writing.
11. Severability. The provisions of this Agreement are separate and severable, and the invalidity of any of them shall not affect or impair the validity or enforcement of the remaining provisions.
12. Assignment. ERIC may not sell, assign, or otherwise transfer any of its rights or interests or delegate any of its duties or obligations in this Agreement, without the prior written consent of the Members. The Member may not sell, assign, or otherwise transfer any of its rights or interests or delegate any of its duties or obligations in this Agreement, without the prior written consent of ERIC. Any sale, assignment, or transfer in violation of this Section is void and without effect.
13. No Partner or Agency. This Agreement does not constitute or create a partnership or joint venture with any Member or among the Members; appoint any Member as an agent for ERIC or any other Member, or appoint ERIC as an agent for any Member; or create any fiduciary obligations among the Members, except as may be expressly set forth in this Agreement.
14. Amendments. Amendments or modifications of this Agreement shall be effective immediately upon approval of such changes by the entire membership in accordance with Article VI, Section 5 of the Bylaws.
15. Communications; Notices. All communications and notices that are required to be given by ERIC or a Member pursuant to this Agreement must be in writing and sent to the recipient either by electronic mail, personal delivery, overnight commercial courier service, or facsimile. Members may request a preferred method of delivery and the Corporation will make all reasonable efforts to oblige such requests. Communications and notices must be sent using the Notice Details set forth on the signature page of this Agreement, unless these details are changed by delivery of a written notice to ERIC, if the change related to a Member, or the Member, if the change relates to ERIC. The Executive Director of ERIC shall maintain or cause to be maintained a roster of Members that contains a compilation of Notice Details for each Member, and which shall be distributed periodically to the Members.



**EXHIBIT A**

16. Counterparts. This Agreement may be executed in two (2) or more counterparts, each of which when fully executed shall be an original, and all of said counterparts taken together shall be deemed to constitute one and the same agreement.
17. Complete Agreement. This Agreement is the parties' final and binding expression of their agreement and the complete and exclusive statement of its terms. This Agreement cancels, supersedes and revokes all prior negotiations, representations and agreements between the parties, whether oral or written, relating to the subject matter of this Agreement.
18. Headings and Subsections. Section headings are provided for reference and do not constitute part of this Agreement.
19. Definitions. As used herein, the term "state" includes the fifty (50) states, the District of Columbia, and the territories of the United States.

**ELECTRONIC REGISTRATION INFORMATION CENTER, INC.**

By:   
Name: **Angie Rogers**  
Title: Board Chair  
Date:

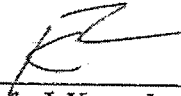
Notice Details:

Name: Angie Rogers  
Title: Board Chair  
Address: P.O. Box 94125  
Baton Rouge, LA 70802-9125  
Phone: (225) 922-0900  
Fax: (225) 922-0945

With a copy to:

Name: John Lindback  
Title: Executive Director  
Address: 1155 F Street NW Suite 1050  
Washington DC 20004  
Phone: (202) 695-3464  
Fax: (866) 200-2651

**Wisconsin Government Accountability Board/Wisconsin Elections Commission**

By:   
Name: **Kevin J. Kennedy**  
Title: Director and General Counsel  
Date: May 17, 2016

Notice Details:

Name: Michael Haas  
Title: Elections Division Administrator/  
Wisconsin Elections Commission Administrator  
Address: PO Box 7984, Madison, WI 53707-7984  
212 E. Washington Ave, Third Floor  
Madison, WI 53703  
Phone: 608-266-0136  
Fax: 608-267-0500

With a copy to:

Name: Ross Hein  
Title: Elections Supervisor  
Address: PO Box 7984, Madison, WI  
212 E. Washington Ave  
Madison, WI 53703  
Phone: 608-267-3666  
Fax: 608-267-0500

Note: Effective June 30, 2016 the Wisconsin Government Accountability Board becomes the Wisconsin Elections Commission.

*Timothy Zignego, et al. v. Wisconsin Elections  
Commission, et al.*

Case No. 19-CV-0449

**Docket 63**

(Supplemental Affidavit of Meagan Wolfe)



FILED  
12-05-2019  
Ozaukee County, WI  
Mary Lou Mueller CoCC  
2019CV000449

STATE OF WISCONSIN CIRCUIT COURT OZAUKEE COUNTY  
BRANCH 1

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TIMOTHY ZIGNEGO, et al.,

Plaintiffs,

v.

Case No. 19-CV-0449

WISCONSIN ELECTION  
COMMISSION, et al.,

Defendants.

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SUPPLEMENTAL AFFIDAVIT OF MEAGAN WOLFE

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STATE OF WISCONSIN                    )  
  )     ss.  
COUNTY OF DANE                    )

MEAGAN WOLFE, being sworn under oath, says:

1.     The purpose of this supplemental affidavit is to provide relevant facts about events that have occurred since I signed my initial affidavit on November 26, 2019.

2.     In paragraph 32 of my initial affidavit, I stated that "[t]he process that may be used to deactivate ERIC Movers will be determined and finalized at a future meeting."

3.     On December 2, 2019, I attended a meeting of the Wisconsin Elections Commission, during which the Commission discussed this process.

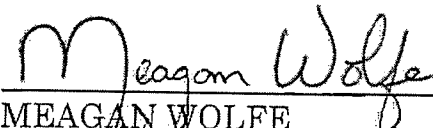
4. Prior to the December 2, 2019 meeting, Commission staff submitted a memorandum, at the request of the Commission, addressing "options for clarifying the legal authority for, and/or seeking more specific legal authority related to, the treatment of voter registration records of those individuals included on the ERIC Movers list." A true and correct copy of the memorandum is attached as **Exhibit B**.

5. At the end of the memorandum, Commission staff recommended that the Commission pass the following motion: "The Commission directs staff to pursue legislation establishing specific procedures governing the ERIC Movers mailing and/or granting rulemaking authority to the Commission."

6. The Commission passed this recommended motion at the meeting on December 2, 2019.

7. There are no official approved minutes of the December 2, 2019 meeting at this time.

8. There will be no further Commission meetings prior to the hearing scheduled for December 13, 2019 in this case.

  
MEAGAN WOLFE

Subscribed and sworn to before me  
this 3rd day of December, 2019.

Michael Hays

[Sign Name]

MICHAEL HAYS

[Print Name]

Notary Public, State of Wisconsin

My Commission: IS PERMANENT





*Timothy Zignego, et al. v. Wisconsin Elections  
Commission, et al.*

Case No. 19-CV-0449

**Docket 64**

(Exhibit B of Affidavit of Meagan Wolfe)



FILED

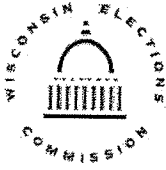
12-05-2019

Ozaukee County, WI

Mary Lou Mueller CoCC

2019CV000449

# Exhibit B



# Wisconsin Elections Commission

212 East Washington Avenue | Third Floor | P.O. Box 7984 | Madison, WI 53707-7984  
(608) 266-8005 | elections@wi.gov | elections.wi.gov

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## MEMORANDUM

**DATE:** For the December 2, 2019 Commission Meeting

**TO:** Members, Wisconsin Elections Commission

**FROM:** Meagan Wolfe  
Administrator

Prepared and Presented by:

Michael Haas  
Staff Counsel

**SUBJECT:** Electronic Registration Information Center (ERIC) – Legal Authority  
Governing ERIC Movers Mailings

### Introduction

On several occasions since 2017, the Wisconsin Elections Commission (WEC) has discussed the voter mailings which are generated as a result of data matching conducted through Wisconsin's membership in the Election Registration Information Center (ERIC). There are no specific statutory directives dictating actions the WEC must take as a result of the ERIC data matching. There is a clear statutory directive to comply with the ERIC Membership Agreement which in turn establishes timelines for contacting voters identified by the mailing. However, the ERIC Agreement does not dictate the method of contact or consequences for individuals who do not respond to a mailing or whose correspondence is returned as undeliverable.

At its March 2019 meeting, the Commission adopted a motion directing staff to report back to the Commission on the status of drafting an administrative rule or proposed statutory change for the Commission's consideration. This memorandum outlines options for clarifying the legal authority for, and/or seeking more specific legal authority related to, the treatment of voter registration records of those individuals included on the ERIC Movers list.

### Relevant Legal Authority

Since its inception, ERIC's goals have been described as balancing voter registration outreach with more regular and accurate voter list maintenance efforts. The intent has been to encourage voter registration activity and updates throughout the year to reduce the volume

*Wisconsin Elections Commissioners*

Dean Knudson, chair | Marge Bostelmann | Julie M. Glancey | Ann S. Jacobs | Robert Spindell | Mark L. Thomsen

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*Administrator*  
Meagan Wolfe

Ex. B

For the December 2, 2019 Commission Meeting  
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of changes and the workload on election officials required immediately prior to elections. This balance is achieved by requiring ERIC member states to contact individuals who appear to be eligible but unregistered electors every two years and to contact annually individuals who appear to have moved.

As noted in the March 11, 2019 staff memorandum to the Commission, Wis. Stat. § 6.36(1)(ae)1. requires the Commission to enter into a membership agreement with ERIC subject to certain conditions which have been met. Wis. Stat. § 6.36(1)(ae)2. states that “If the chief election official enters into an agreement under subd. 1, the chief election official shall comply with the terms of the agreement. . . .” Neither the enabling legislation (2015 Act 261) nor other existing statutes require or authorize the Commission to promulgate administrative rules related to procedures implemented pursuant to the ERIC Agreement.

Regarding the list maintenance aspect of ERIC, the Agreement states the following:

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 shall have 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.

This provision of the ERIC Agreement illustrates the desire of the ERIC member states to retain their own authority and flexibility to determine appropriate voter list maintenance procedures. The role of the ERIC organization is to conduct the matching process resulting in potential contact lists which states use to initiate contact with individuals. The above provision specifically does not dictate specific action that member states are required to take beyond initiating contact. The stated purpose of the contact is to correct inaccuracies and obtain information sufficient to inactivate or update voter records, but there is no specific process outlined or timeline attached to the measures to update or inactivate voter records.

The flexibility reflected in this provision is a significant reason that ERIC’s membership has grown from its initial seven states in 2012 to its current membership of 28 states and the District of Columbia. Most of the other ERIC member states are also subject to the National Voter Registration Act, which contains requirements for voter list maintenance programs, and which does not apply to Wisconsin due to the availability of election day registration.

The March 11, 2019 staff memorandum also noted that the Commission has relied on the framework outlined in Wis. Stat. § 6.50(3) to develop procedures related to the ERIC Movers mailing. That statute provides:

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 1<sup>st</sup>

For the December 2, 2019 Commission Meeting  
Legal Authority Governing ERIC Mailings  
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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 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. . . .

In 2017, the Commission initially used Wis. Stat. § 6.50(3) to help guide its analysis and decision making regarding the treatment of voter registrations subsequent to the ERIC Movers mailing. But that provision clearly does not govern the list maintenance procedures related to the ERIC mailing for two reasons. First, the plain language of the statute applies to actions of municipal clerks and the City of Milwaukee Election Commission ("the municipal board of election commissioners"), not to the WEC. Second, the statute does not define what constitutes reliable information that registered electors have changed their residence and it definitely does not specify that ERIC Movers data qualifies as reliable information that an individual voter has changed their residence in every case.

After analyzing the data resulting from the initial ERIC Movers mailing in 2017, the Commission recognized that, while largely accurate from a statistical perspective, an undeliverable mailing or non-response to the mailing does not accurately indicate in every case that individuals have changed their voting residence. The Commission has adjusted its procedures based upon that evidence. The Commission has also retained the municipal clerk's authority to determine whether the ERIC Movers data and a non-response to the mailing constitutes reliable information sufficient to justify inactivation of voter registrations.

The Commission is also vested with general statutory authority related to maintenance of the statewide voter registration list pursuant Wis. Stat. § 5.05(15):

The commission is responsible for the design and maintenance of the official registration list under s. 6.36. The commission shall require all municipalities to use the list in every election and may require any municipality to adhere to procedures established by the commission for proper maintenance of the list.

Finally, Wis. Stat. § 5.05(1)(f) provides the Commission with general rulemaking authority "applicable to all jurisdictions for the purpose of interpreting or implementing the laws regulating the conduct of elections or election campaigns, other than laws regulating campaign financing, or ensuring their proper administration."

#### Options for Clarifying Legal Authority

As a result of the Commission's March 11, 2019 motion, Commission staff has further analyzed the legal framework related to the ERIC Movers mailing and treatment of voter registrations resulting from that mailing. The accuracy and currency of the voter registration list, as well as the basis for and means by which all states conduct list maintenance

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procedures, is receiving significant and increasing public attention. Therefore, staff believes it would be helpful for the Commission to more specifically determine whether any additional legal authority or framework is required and, if so, provide direction to staff for pursuing changes. Staff has identified the following three options for consideration:

1) Continue with Current Legal Framework

To date, the Commission has been operating within the parameters of the Statutes and the ERIC Agreement. The Legislature has authorized and directed the Commission to be responsible for the maintenance of the voter registration list. Wis. Stat. § 5.05(15). That mandate existed at the time the WEC was directed to join ERIC and to comply with the terms of the Membership Agreement as a result of 2015 Act 261. The Legislature is presumed to be aware of both the existing Statutes and also the terms of the Membership Agreement which are incorporated into the language of Wis. Stat. 6.36(1)(ae)2.

The Statutes and Membership Agreement vest significant authority and discretion in the Commission to determine the specific means and timeline for updating voter registration information and inactivating voter registrations. Many ERIC states do not inactivate voter registrations as a result of the ERIC Movers mailing because they are subject to the National Voter Registration Act. Pursuant to its authority under Wis. Stat. § 5.05(15) and the Membership Agreement, the Commission originally instituted procedures that were consistent with those described for local election officials in Wis. Stat. § 6.50(3) and then modified its procedures based on data and feedback from voters who were incorrectly deactivated and from local election officials.

The Commission could continue this approach, which would not rely on additional actions or policy decisions from the Legislature. It would require the Commission to continue to make determinations regarding voter eligibility without specific guidance in the Statutes.

2) Request Legislation Specifying ERIC Procedures

Apart from directing the Commission to comply with the ERIC Membership Agreement, the Statutes do not establish specific procedures by the WEC or local election officials after the ERIC Movers mailing is sent. The Legislature has not determined that an undelivered ERIC mailing or non-response to the mailing results in a specific consequence for the voter or that it affects the voter eligibility requirements established in the Wisconsin Constitution and Chapter 6 of the Statutes.

This contrasts with the very specific procedures for the Four-Year Maintenance process outlined in Wis. Stat. 6.50(1) and (2), which represent the Legislature's balancing of the goals of maintaining current voter lists and not prematurely removing individual voter names without adequate notice. In that case, the Legislature determined that the combination of not voting over a period covering four years and three general elections, and either a voter's non-response to an outreach mailing or the mailing being returned as

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undeliverable, constitutes a sufficient basis for inactivating an individual's voter registration.

The Commission could request that the Legislature codify the specific procedures and consequences, if any, related to the ERIC Movers mailing. The Commission's experience with the 2017 and 2019 mailings may give policymakers a more concrete basis to make such policy decisions than existed at the time it directed the Commission to join ERIC. The Legislature could, for example, determine that the ERIC data matching process and the Movers mailing warrant an alternate timeline for inactivating voter registrations when a voter does not request continuation of their registration, which is the Commission's current process. Alternatively, the Legislature could decide that a non-response to the ERIC Movers mailing does not carry any additional consequence related to voter registration separate from the timeline for the Four-Year Maintenance process.

As noted in the March 11, 2019 staff memorandum, the Commission's current decision to delay further inactivation of voter registrations resulting from the 2019 ERIC Movers mailing until 2021 allows some time for the Legislature to act. If the Legislature declines to do so or policymakers do not reach consensus regarding a policy approach, however, the Commission will be left to continue to operate under the existing statutory framework.

### 3) Request Legislation Granting Rulemaking Authority

The general statutory authority related to maintenance of the statewide voter registration list under Wis. Stat. § 5.05(15) and the grant of rulemaking authority in Wis. Stat. § 5.05(1)(f) likely is not sufficient legal basis for the WEC to promulgate administrative rules governing ERIC procedures. Pursuant to Wis. Stat. § 227.11(2)(a)2., "A statutory provision describing the agency's general powers or duties does not confer rule-making authority on the agency or augment the agency's rule-making authority beyond the rule-making authority that is explicitly conferred on the agency by the legislature."

The Commission could choose to seek legislation conferring specific rule-making authority related to implementation of the ERIC Agreement. This may represent a middle road between the first two options. It would recognize the agency's authority to promulgate administrative rules in this area and allow greater flexibility than would new substantive statutory provisions for the Commission to modify its approach and procedures based upon data resulting from successive mailings and the lessons learned from those efforts. Administrative rules have the force of law, although the complexity of the rulemaking process might allow less flexibility than currently for the Commission to modify its approach based on new evidence and developments.

On the other hand, only conferring specific rule-making authority without any further direction from the Legislature as to whether or when voter registrations should be inactivated would continue to leave the substantive policy decisions up to the Commission, subject to approvals of the Governor and Legislature during the rulemaking process. If the Commission prefers this option, staff recommends considering a request



For the December 2, 2019 Commission Meeting  
Legal Authority Governing ERIC Mailings  
Page 6

that the Legislature authorize but not require the Commission to promulgate additional administrative rules.

The Commission's statutory responsibility to maintain the voter registration list and the ERIC Membership Agreement has permitted the Commission to consider the data resulting from its first two ERIC Movers mailings and take a deliberative approach to balancing the interests involved. That flexibility to modify procedures has been helpful at the outset of the WEC's experience with ERIC, given Wisconsin's uniqueness among ERIC states. The disadvantage of continuing this approach is that the Commission is unable to cite to specific statutory or administrative rule provisions that dictate the procedures to be followed and that may impact voter eligibility requirements.

Additional substantive legislation or specific rulemaking authority can provide a more specific legal framework to govern the ERIC Movers mailing, or at least more specifically codify the WEC's authority to develop and update procedures based on experience and data. While the options outlined above each carry their own advantages and disadvantages, the consensus of Commission staff is that, on balance, the ERIC Movers process would benefit from additional legislation that either establishes specific procedures or provides the Commission with specific authority to do so through rulemaking or decisions made pursuant to the ERIC Membership Agreement.

### **Recommended Motion**

The Commission directs staff to pursue legislation establishing specific procedures governing the ERIC Movers mailing and/or granting rulemaking authority to the Commission.



*Timothy Zignego, et al. v. Wisconsin Elections  
Commission, et al.*

Case No. 19-CV-0449

**Docket 89**

(Circuit Court's Final Written Order)



FILED  
12-17-2019  
Ozaukee County, WI  
Mary Lou Mueller CoCC  
2019CV000449

DATE SIGNED: December 17, 2019

Electronically signed by Paul V. Malloy  
Circuit Court Judge

STATE OF WISCONSIN

CIRCUIT COURT

OZAUKEE COUNTY

Timothy Zignego  
David W. Opitz  
Frederick G. Luehrs, III  
PLAINTIFFS,

v.

Case No. 19-CV-449

Wisconsin Election Commission,  
Marge Bostelmann, Julie Glancey,  
Ann Jacobs, Dean Knudsen  
Mark Thomsen,  
DEFENDANTS.

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**WRIT OF MANDAMUS**

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To Defendants Wisconsin Election Commission, Marge Bostelmann, Julie Glancey, Ann Jacobs,  
Dean Knudsen Mark Thomsen:

Whereas, this matter having come before the Court for a hearing, on December 13, 2019,  
at 2 pm, at the Ozaukee County Courthouse, this Court hereby finds:

1. The Plaintiffs have a clear legal right, and the Commission a plain and positive duty;
2. Plaintiffs have established that they will suffer substantial damages or injury should the relief not be granted; and
3. Plaintiffs have no other adequate remedy at law,

Therefore, 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.

This order adjudicates the entire matter in litigation between the parties and is a final order for purposes of an appeal under Wis. Stat. § 808.03(1).

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