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DISTRICT IV

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

STATE OF WISCONSIN *ex rel.* TIMOTHY ZIGNEGO,
DAVID W. OPITZ, AND FREDERICK G. LUEHRS, III,*Plaintiffs-Respondents,*

v.

WISCONSIN ELECTIONS COMMISSION, MARGE
BOSTELMANN, JULIE GLANCEY, ANN JACOBS,
DEAN KNUDSEN, AND MARK THOMSEN,*Defendants-Appellants.*

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

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

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INTEREST OF *AMICI*

Amici Felicia Ellzey, Marangelly Quintana Feliciano, and Jennifer Hagen received notices as part of the October 2019 mailing sent by the Wisconsin Election Commission (“WEC”) and are concerned that they will, absent reversal of the circuit court’s orders, be purged from the voter rolls. *See* Ellzey Aff., ¶¶3, 5-11; Feliciano Aff., ¶¶3, 5-9; Hagen Aff., ¶¶3-4, 7-10.¹

Amicus SEIU Wisconsin State Counsel (“SEIUWI”) invests significant resources “in registering, educating, and mobilizing its members and other voters to participate in local, state, and national elections.” Sickel Aff., ¶6. If the orders below are affirmed, SEIUWI “will need to divert efforts from reaching more voters to revisit voters it has already contacted, impair[ing] SEIUWI’s ability to reach as

¹ All cited affidavits were filed in this Court December 20, 2019, with an Intervention Petition in this case.

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

Amici are motivated not only by their own direct interests, but also by the fundamental importance of the right to vote such that it cannot be infringed where, as here, established statutory safeguards have been ignored.

INTRODUCTION

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

provided safeguards that protect registered voters when the voter rolls are maintained.

This brief addresses two of those safeguards relevant to updating the voter rolls when registered voters appear to have moved their residences. *First*, only those officials expressly authorized by the Legislature to maintain the voter rolls in this respect are empowered to act. *Second*, those officials may act only on the basis of reliable information. As explained below, neither safeguard was followed here. Accordingly, Plaintiffs' claims fail and the circuit court's orders must be reversed.

ARGUMENT

I. STATUTORY CONTEXT AND HISTORY BOTH DEMONSTRATE THAT WEC LACKS POWER TO PURGE MOVERS FROM THE VOTER ROLLS.

Plaintiffs insist Wis. Stat. § 6.50(3) imposes a clear and plain duty on WEC. Statutory text, context, and history belie that claim.

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

The relevant statutory language provides for “the municipal clerk or board of election commissioners” to take action after receiving “reliable information that a registered elector has changed his or her residence.” Wis. Stat. § 6.50 (3). The obvious fact that the text does not mention WEC is of no moment to Plaintiffs. They insist that “the ... board of election commissioners” is not a body but a category containing multiple bodies, WEC included. Plaintiffs’ position ignores several aspects of the statutory language, including the laws of grammar. *See, e.g., State v. Arberry*, 2018 WI 7, ¶19, 379 Wis. 2d 254, 905 N.W.2d 832 (quoting *Webster’s Third New Int’l Dictionary* 2368 (1986)) (“‘The’ is a definite article ‘used as a function word to indicate that a following noun or noun equivalent refers to someone or something that is unique.’”).

For its part, WEC insists that “board of election commissioners” is a term of art, defined by Wis. Stat. § 7.20. (WEC Br. at 21.) Plaintiffs reject this position out of hand, though without marshaling much support. (Pls. Br. at 26.) This Court need not look beyond section 6.50 to demonstrate that the phrase, as used in subd. (3) excludes WEC.

Several subdivisions of Section 6.50, “Revision of registration list,”² address circumstances that can trigger changes to the statewide voter rolls:

- (1): registered voters who have “not voted within the previous four years.”
- (3): registered voters who may have moved outside of the municipality containing the address at which they are registered.
- (4): registered voters who have died.

² “The title of a statute cannot defeat the language of the law, but it is persuasive evidence of a statutory interpretation.” *Mireles v. LIRC*, 2000 WI 96, ¶60 n.13, 237 Wis. 2d 69, 613 N.W.2d 875; accord Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012) (“Titles and headings are permissible indicators of meaning.”).

- (5): voters registered at the address of a condemned building.
- (6): registered voters who authorize changes to their registration status.

The statute sets out a process for each circumstance.

The only process requiring WEC to act is that for individuals who were registered for the entirety of the previous four years but did not vote in that period. “[T]he commission shall” identify such voters and “shall mail a notice” to them. Wis. Stat. § 6.50(1). For each notified registrant who does not respond to the notice, “the commission shall change the registration status of that elector from eligible to ineligible on the day that falls 30 days after the date of mailing.” Wis. Stat. § 6.50(2). The statute clearly charges WEC with the duty to effectuate this process.

By contrast, the other processes delineated in Section 6.50 charge municipal actors—not WEC—with acting. Subdivisions (3), (4), and (5) all address “the municipal clerk

or board of election commissioners.” Subdivision (6) addresses only “[t]he municipal clerk.” None mentions WEC or “the commission.”

Plaintiffs’ argument that the phrase “board of election commissioners” “certainly includes WEC” (Pls. Br. at 26) is inconsistent with the statutory text. The Legislature charged different officials with responding to different circumstances. Because WEC can easily determine which registrants have not voted in four consecutive years, subd. (1) is entrusted to WEC. Because other circumstances lend themselves more to local knowledge, subds. (3)-(6) are entrusted to municipal actors. Plaintiffs urge this Court to ignore the Legislature’s allocations of responsibility, even as they correctly note that “an agency’s powers, duties and scope of authority are fixed and circumscribed by the legislature.” (Pls. Br. at 20 (quoting

Koschkee v. Taylor, 2019 WI 76, ¶20, 387 Wis. 2d 552, 929 N.W.2d 600) (internal quotation marks omitted)).³

Even more illuminating is subd. (2g), which authorizes WEC to delegate its duty to update the registration status of inactive registrants. This provision allows WEC to delegate to “a municipal clerk or board of election commissioners.” Wis. Stat. § 6.50(2g). If, as Plaintiffs argue, “board of election

³ This argument is also at odds with statutory history. Before the WEC oversaw elections statewide, the Government Accountability Board (“GAB”) did so. It was not authorized to act under Wis. Stat. § 6.50(3). *Compare* Wis. Stat. § 5.02(1s) (2007-08) (defining “board” as “the government accountability board”) *with id.* § 6.50(3) (2007-08) (authorizing only “the municipal clerk or board of election commissioners” to deal with movers). Before the GAB, the State Elections Board played this role. It, too, lacked the authority that Plaintiffs ascribe to WEC under Wis. Stat. § 6.50(3). *Compare* Wis. Stat. § 5.02(1s) (2005-06) (defining “board” as “the elections board”) *with id.* § 6.50(3) (2005-06) (authorizing only “the municipal clerk or board of election commissioners” to deal with movers).

Plaintiffs insist that the Legislature took power vested solely in municipal election officials since 1927 and in 2014 *sub silentio* expanded that grant to include statewide officials at WEC without changing a single word of Wis. Stat. § 6.50(3). That beggars belief.

commissioners” is intended as a reference to WEC, this delegation would be worded differently.⁴

**B. The Duty of Handling Movers’ Registrations
Has Always Fallen on Municipal Clerks.**

The Legislature’s allocation to municipal officials, rather than WEC, of responsibility for dealing with registered voters who move residences is not surprising. Indeed, it accords with Wisconsin history. As Plaintiffs acknowledge, “[f]or at least the past eighty years, Wisconsin has had some form of the current Wis. Stat. § 6.50(3) on the books.” (Pls. Br. at 1.) This understates matters. For more than nine

⁴ Plaintiffs point to Wis. Stat. § 6.36(1)(c), which references “the municipal clerk or board of election commissioners of any municipality.” (Pls. Br. at 26.) But the coda “of any municipality” works not to exclude WEC from a broad category, but to make clear that officials from any municipality across the State should be able to, “by electronic transmission, add entries to or change entries on the list for any elector” in their municipality. So, too, with Wis. Stat. § 6.50(2g), which appends the words “of a municipality” immediately after “the municipal clerk or board of election commissioners.” Again, the additional words do not narrow the category “board of election commissioners” but instead make clear that WEC can delegate to municipal officials across the State or to officials in as few as one municipality if appropriate.

decades, municipal clerks have borne the duty to monitor which registered voters in the municipality may have moved and to provide notices and make changes to their registrations accordingly. *E.g.*, Wis. Stat. §§ 6.17 (7), 6.18(5) (1927); *id.* § 6.50(2)(c) (1967); *id.* § 6.50(3) (1975).

Notably, for much of our history municipal clerks also bore responsibility for removing inactive, deceased, and withdrawn registrations. *E.g.*, Wis. Stat. § 6.18(1)-(3) (1927); *id.* §§ 6.50(2)(a), (d)-(e) (1967); *id.* §§ 6.50(1), (4), (6) (1975). The Legislature lifted responsibility for inactive voters from municipal clerks less than six years ago, assigning it to the GAB. 2013 Wis. Act. 149 § 1 (enacted Mar. 27, 2014). Less than two years later the Legislature shifted responsibility for inactive voters to the newly created WEC. 2015 Wis. Act 118, § 266(10) (enacted Dec. 16, 2015). After the Legislature made this last change in responsibility under Wis. Stat. § 6.50(1), it revised subd. (3) and *chose not*

to change the identity of the election officials charged with updating the voter rolls when registrants moved. *See* 2015 Wis. Act 261, § 63 (enacted Mar. 16, 2016).

That the Legislature opted to assign responsibility for inactive voters to WEC but not to reallocate responsibility for updating registrations in other circumstances should not be ignored. “[I]t is well-settled that where Congress amends part of a statute and leaves another part unchanged, a court must interpret Congress’s inaction as satisfaction with the unamended portion, or at least tolerance of its inadequacies.” *Regal Stone Ltd. v. Longs Drug Stores Cal., L.L.C.*, 881 F. Supp. 2d 1123, 1129 (N.D. Cal. 2012); *Arctic Sole Seafoods v. Gutierrez*, 622 F. Supp. 2d 1050, 1058 (W.D. Wash. 2008) (quoting *In re Griffith*, 206 F.3d 1389, 1394 (11th Cir. 2000)) (“Where Congress knows how to say something but chooses not to, its silence is controlling.”). *Cf., e.g., State ex rel. Dep’t of Nat. Res. v. Wis. Ct. of Appeals, Dist. IV*, 2018 WI 25, ¶15,

380 Wis. 2d 354, 909 N.W.2d 114; *State ex rel. Schultz v. Wellens*, 208 Wis. 2d 574, 578-79, 561 N.W.2d 775 (Ct. App. 1997).

II. THE ERIC MOVERS DATA IS NOT “RELIABLE INFORMATION” FOR REMOVING REGISTERED VOTERS FROM THE ROLLS.

Since the Legislature first instructed municipal clerks to review the status of registered voters who appear to have moved their residence, the statute has always required that action be taken only upon “reliable information.” *E.g.*, Wis. Stat. §§ 6.17(7), 6.18(5) (1927); *id.* § 6.50(2)(c) (1967). That restriction remains in the current Wis. Stat. § 6.50(3).

All parties agree that the ERIC Movers Data includes false positives. Meaghan Wolfe, “the chief election officer of this state,” Wis. Stat. § 5.05(3g), explained in her affidavit to the circuit court that “[t]he 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.” (R.23 at ¶13.) As a result, the ERIC Movers Data “*is demonstrably inaccurate.*” (WEC Br. at 10.) It follows that ERIC’s data sources are fundamentally unfit bases for disqualifying existing voter registrations.

Plaintiffs, too, recognize the problem, albeit subtly. They describe the ERIC Movers Data as a list of “Wisconsin residents who have actually reported an address different from their voter registration address *in an official government transaction.*” (Pls. Br. at 5-6.) Plaintiffs’ emphasis draws attention away from the key part of their sentence, which is that the acknowledgement that ERIC Movers have identified an alternative *address* but have not necessarily notified any government authority that they changed *residence*. And since residence is the touchstone qualification for voting, *see* Wis. Stat. § 6.10, this is a recognition that the ERIC Movers Data is over-inclusive, erroneously including Wisconsin residents

who have more than one address or people who forward their mail when they are away from home for stretches of time.

Neither Plaintiffs nor WEC successfully paper over this fundamental problem. Plaintiffs argue that the ERIC Movers Data is close enough to be “objectively ‘reliable.’” (Pls. Br. at 23.) They draw an inapposite analogy to a cancer screening (*id.*), which completely inverts where the risk of inaction falls. Plaintiffs’ approach grossly distorts what is at stake here. This is neither horseshoes nor hand grenades. Because the issue is purging registered voters from the rolls, close is definitively *not* good enough.

WEC, for its part, suggests that “reliable” as used in Wis. Stat. § 6.50(3) “requires a judgment based determination applied on a voter-by-voter basis.” (WEC Br. at 10.) WEC’s brief never explains how such determinations occur, though it is clear that Plaintiffs are incorrect when they insist (Pls. Br.

at 23-24) that the process occurred prior to the October 2019 mailing.⁵

Nor do Plaintiffs fare better when they insist that the Legislature's decision that Wisconsin join ERIC means the Movers Data must be reliable. (Pls. Br. at 18-19.) Accepting *arguendo* Plaintiffs' explanation—that "ERIC is a multi-state consortium formed to improve the accuracy of voter registration data" (*id.* at 5)—does not render the Movers Data reliable for purposes of Wis. Stat. § 6.50(3). As WEC

⁵ Plaintiffs assert WEC undertook this process, but the facts contradict their assertion. Had WEC, prior to the October 2109 mailing, screened the reliability of the ERIC Movers List in a compliant fashion, the mailing would not have reached "intra-municipality movers who are not even subject to registration deactivation under Wis. Stat. § 6.50(3)." (Pls. Br. at 26.) Yet the record shows—and no party disputes—that it did. (*See, e.g.*, R.132 at 17:19-25; *see also* Pls. Br. at 38-39.)

The fact that the October 2019 mailing was sent to thousands of suspected intra-municipality movers, who are not within the scope of Wis. Stat. § 6.50(3), demonstrates that the ERIC Movers Data is not reliable and that the October 2019 mailing cannot serve as a predicate for purging the voter rolls. Indeed, WEC told the circuit court as much. (R.132 at 17:22-24 ("one point, again, to make is that the mailing that the Commission sent out was not a mailing under sub 3, so it didn't distinguish between" alleged intra-municipality movers and alleged inter-municipality movers).)

explains, “ERIC helps its member states 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, and voters who may no longer be eligible to vote.” (WEC Br. at 5.) The Movers Data is neither the only reason Wisconsin joined ERIC nor the only information ERIC provides. There is simply no warrant for Plaintiffs’ assertion that, because the Movers Data comes from ERIC, it automatically satisfies the statutory safeguard requiring “reliable information.”⁶

Both parties reference error percentages in discussing the accuracy of the ERIC Movers Data. (*See* WEC Br. at 6; Pls. Br. at 22-23.) But this misses the forest for the trees. The problem here is that the Movers Data is neither collected nor conveyed for the purpose to which Plaintiffs seek to put it—

⁶ Nor can Wisconsin’s participation in ERIC trump statutory safeguards. *Amici* agree with Plaintiffs that no agency can rewrite state law by agreement with a private entity. (*See* Pls. Br. at 19 n.4.)

mass deactivation of registered voters. Using the ERIC Movers Data as Plaintiffs suggest and the circuit court ordered would run roughshod over the statutory safeguard that has protected Wisconsin voters for nearly a century. It is contrary to the statute and to public policy. It must not be allowed.⁷

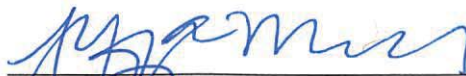
CONCLUSION

The text of Wis. Stat. § 6.50(3) authorizes other officials—*but not WEC*—to send notices to registered voters who might have moved and then to change the registration status of those who do not respond within 30 days. Moreover,

⁷ Purging the voter rolls based on the October 2019 mailing would also violate the federal and state constitutional guarantees of due process. (See R.111 (*League of Women Voters of Wis. v. Knudson*, No. 19-CV-1029 (W.D. Wis.)).) Plaintiffs essentially admit this, though they blithely shrug off this blatant violation of constitutional rights. (See Pls. Br. at 14, 36-37.) While Wis. Stat. § 6.50(3) does not require notice to a registered voter before deactivating that voter's registration (Pls. Br. at 36), due process does so require, and courts always seek to construe statutes in accord with constitutional requirements, *see, e.g., State v. Stenklyft*, 2005 WI 71, ¶8, 281 Wis. 2d 484, 697 N.W.2d 769 ("Courts must apply a limiting construction to a statute, if available, to eliminate the statute's overreach, while maintaining the legislation's constitutional integrity." (internal quotation marks omitted)).

Wis. Stat. § 6.50(3) requires source information with greater reliability than the ERIC Movers Data used to inform the October 2019 mailers. Each of these observations is fatal to Plaintiffs' claims and the circuit court's orders. Because WEC's October 2019 mailing can neither satisfy the requirements nor trigger the consequences of Wis. Stat. § 6.50(3), the circuit court's orders must be reversed.

Dated: February 19, 2020.



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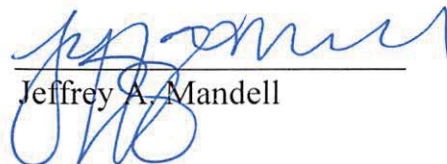
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CERTIFICATIONS

I certify that the foregoing brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of the foregoing brief, exclusive of the caption, Tables of Contents, and Table of Authorities, is 2,963 words.

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

Dated: February 19, 2020.



Jeffrey A. Mandell