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OF WISCONSIN

Nos. 2019AP2397 & 2020AP112

In the Wisconsin Supreme Court

STATE OF WISCONSIN ex rel. TIMOTHY ZIGNEGO, DAVID W. OPITZ and FREDERICK G. LUEHRS, III,

Plaintiffs-Respondents-Petitioners,

v.

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

Defendants-Appellants-Respondents.

NON-PARTY BRIEF OF HONEST ELECTIONS PROJECT IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST

The Honest Elections Project is a nonpartisan organization devoted to supporting the right of every lawful voter to participate in free and honest elections. Through public engagement, advocacy, and public-interest litigation, the Project defends the fair, reasonable measures that voters put in place to protect the integrity of the voting process. The Project supports commonsense voting rules and opposes efforts to reshape elections for partisan gain. It thus has a significant interest in this important case.

INTRODUCTION & SUMMARY OF ARGUMENT

Must the Wisconsin Elections Commission (WEC) maintain accurate voter rolls, using data solicited by the State for this very purpose? That question is important, unsettled, and warrants this Court's review. And contrary to the decision below, the answer is yes.

I.A. Wisconsin Statutes §6.50(3) charges the "board of election commissioners" with maintaining the voter rolls. That phrase can and does cover WEC, as petitioners explain. Any other conclusion would bring Wisconsin out of compliance with federal law. Specifically, the Help America Vote Act (HAVA) requires States to take responsibility for voter-list

maintenance—a duty that cannot be delegated to local officials. Because this Court construes state law to comply with federal law, not flout it, the entity that §6.50(3) tasks with removing ineligible voters must be WEC—the *state* agency charged with administering and enforcing the election laws.

B. When exercising its duty to maintain accurate voter rolls, WEC must remove voters who are flagged by the Electronic Registration Information Center (ERIC) and do not respond to a notice. Wisconsin's governor and legislature required the State to enroll in ERIC, thus determining (like many other States) that ERIC's data are reliable. Absent highly unusual circumstances not present here, WEC has no discretion to ignore the ERIC-provided data.

II. Laws like HAVA were enacted, and organizations like ERIC exist, for good reason. Accurate voter rolls are needed to stop individuals (either accidentally or fraudulently) from voting in the wrong jurisdiction or in multiple jurisdictions—a well-documented problem in Wisconsin and across the country. List-maintenance programs thus protect the voting rights of eligible voters and the integrity of Wisconsin elections. Because the Court of Appeals' decision weakens these programs, is out of step with

federal law, and violates the will of the other branches, this Court should grant review and reverse.

ARGUMENT

Petitioners are right: This case warrants the Court's review because it presents "novel" and "recur[ring]" questions of law with "statewide impact." Wis. Stat. §809.62(1r)(c)(2)-(3). This brief highlights just a few of the reasons why that's true. Specifically, the Court of Appeals' decision guts statutory provisions that promote the accuracy of voter rolls. Accurate voter rolls, in turn, are essential to the accuracy and integrity of Wisconsin elections.

I. The Court of Appeals misinterpreted a key statute that helps maintain the accuracy of Wisconsin's voter rolls.

According to the Court of Appeals, WEC is not the entity responsible for voter-list maintenance under §6.50(3); and, even if it is, WEC is free to treat ERIC's voter data as unreliable. Both conclusions are mistaken.

A. The Wisconsin Elections Commission is responsible for voter-list maintenance.

Petitioners identify many textual, contextual, purposivist, and historical reasons why WEC is the "board of election commissioners" referenced in §6.50(3). But if any doubts remain, courts should *construe* the statute that way because, if WEC is not in charge of voter-list maintenance, then Wisconsin is violating federal law.

Federal law puts States, not localities, in charge of elections. "[T]he Constitution … anticipate[s] that states would be primarily responsible for establishing election procedures." Thomas, *Congressional Authority to Standardize National Election Procedure*s, Cong. Research Serv. CRS-2 (Feb. 14, 2003). Yet early on, many elections were "conducted almost entirely locally." Shanton, *The State and Local Role in Election Administration*, Cong. Research Serv. 7 (Mar. 4, 2019) (Shanton). To "improve our country's election system," H.R. Rep. 107-329, at 31, Congress "shifted some responsibility for conducting elections to the state level." Shanton 7. Various federal laws, including the Uniformed and Overseas Citizens Absentee Voting Act, P.L. 99-410, 100 Stat. 924; the National Voter Registration Act, 52 U.S.C. §20509; and HAVA, §21083, all impose requirements on States

rather than localities. Today, "[i]n the U.S. system, states generally play the primary decisionmaking role in election administration." Shanton 3.

Unsurprisingly then, federal law puts States, not localities, in charge of voter-list maintenance. "For many years, Congress left it up to the States" to determine how best to "maintain accurate lists of those eligible to vote." *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1838 (2018). But starting in the 1990s, "Congress intervened." *Id.* Among other things, HAVA set a "[m]inimum standard for accuracy of State voter registration records." 52 U.S.C. §21083(a)(4). The statute requires States to "ensure that voter registration records in the State are accurate and are updated regularly" and to make "a reasonable effort to remove registrants who are ineligible to vote from the official list of eligible voters." *Id.* HAVA also directs "each State, acting through the chief State election official," to "implement, in a uniform and nondiscriminatory manner, a single, uniform, official, centralized, interactive computerized statewide voter registration list defined, maintained, and administered at the State level." §21083(a)(1)(A). As its text makes plain, HAVA "plac[es] primary responsibility at the *state* level of government." Burris & Fischer, *The Help America Vote Act and Election Administration: Overview and Selected Issues for the*

2016 Election, Cong. Research Serv. 7 (Oct. 18, 2016) (emphasis added).

Courts have similarly recognized that federal law "centralizes responsibility in the state and in the chief elections officer, who is the state's stand-in." *Scott v. Schedler*, 771 F.3d 831, 839 (5th Cir. 2014). Specifically, federal law provides that each State must designate a statewide official to coordinate election-law compliance. It does so because "requiring states to assign enforcement power to a single person increases the likelihood of … compliance." *Id.*

Importantly, States "may not delegate the responsibility to conduct [voter list maintenance] to a local official and thereby avoid responsibility if such a program is not reasonably conducted." *United States v. Missouri*, 535 F.3d 844, 850 (8th Cir. 2008). Indeed, federal law's "centralization of responsibility counsels against such buck passing." *Schedler*, 771 F.3d at 839. Courts have rejected the view that, "once the state designates" a local entity to assist with complying with federal law, "her responsibility ends." *Harkless v. Brunner*, 545 F.3d 445, 452 (6th Cir. 2008). "[I]f every state passed legislation delegating" their responsibilities "to local authorities, the fifty states would be completely insulated from any enforcement burdens." *Id.*

With this backdrop in mind, Wisconsin law is best read to charge WEC with voter-list maintenance. Section 6.50(3) provides that, "[u]pon receipt of reliable information" that a registered voter has moved, "the municipal clerk or board of election commissioners shall notify the elector" by mail. If the registrant fails to respond to that notice within 30 days, "the clerk or board of election commissioners shall change the elector's registration from eligible to ineligible status." Although the Commission argues otherwise, the statute's reference to "board of election commissioners" refers to WEC. Indeed, WEC is the state entity that has "the responsibility for the administration of … laws relating to elections," Wis. Stat. §5.05(1), and WEC itself states that it "administers and enforces Wisconsin elections law." WEC, *About the Wisconsin Elections Commission* (last visited Apr. 6, 2020), bit.ly/3bppArc.

Even if this were not the best interpretation of §6.50(3), it should be adopted anyway. Allowing WEC to pass off its duties to local officials, as just explained, would violate federal law. Because the Constitution makes federal law "supreme" over state law, U.S. Const., Art. VI, a state law that "conflict[s] with Congress's specific delegation" is "unconstitutional[] under the Supremacy Clause." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 388 (2000). The "cardinal

principle of statutory construction is to save and not to destroy," so courts have a "duty" to "construe a statute so that it will be in harmony with the constitution[]." *Barth v. Vill. of Shorewood*, 229 Wis. 151, 282 N.W. 89, 95 (1938). Similarly, "federal law is part of the law 'in' a state," *Eckstein v. Balcor Film Inv'rs*, 58 F.3d 1162, 1167 (7th Cir. 1995), so courts prefer a "fair and consistent construction" that harmonizes "the acts of the two governments." *Warren v. Russell*, 1814 WL 706, at *4 (Vt. 1814). Only petitioners' interpretation does that.

B. The Wisconsin Election Commission must remove voters who are flagged by the Electronic Registration Information Center and do not respond to a notice.

Wisconsin law is clear: "Upon receipt of reliable information that a registered elector" has moved, WEC must send a notice to that elector and remove him from the voter rolls if he fails to respond within 30 days. Wis. Stat. §6.50(3). Although the statute does not define "reliable," the State has determined that the ERIC-provided data constitute reliable information upon which to initiate the notification and removal process for unresponsive registrants. WEC lacks the power to override that determination.

Developed in 2012, ERIC is "owned, managed, and funded by participating states." Pew Charitable Trusts, *Electronic Registration Information Center*, bit.ly/2Up5zdp. Its "sole mission" is to "assist[] states to improve the accuracy of America's voter rolls and increase access to voter registration for all eligible citizens." *Homepage*, ericstates.org. ERIC "works to identify inaccurate registrations by electronically analyzing and matching" a wide array of data, including "U.S. Postal Service change-of-address records, federal death records, vehicle registrations and voter registration records from member states." Stegmaier & Lindback, *Trump Wants Voter Registration Investigated,* Wash. Post (Jan. 30, 2017), wapo.st/3dooGNC. That data, in turn, enable States to clean up and maintain accurate voter rolls.

In 2016, the legislature passed Wisconsin Act 261, which directed the State's chief election officer to "enter into a membership agreement with Electronic Registration Information Center, Inc., for the purpose of maintaining the official registration list under [State law]." Wis. Stat. §6.36(1)(ae)(1). Governor Scott Walker signed the bill into law, explaining that ERIC "will provide the state with information to help identify duplicate registrations as well as voters who have moved, passed away, or are registered in

neighboring states." Press Release, *Governor Scott Walker Signs Senate Bill 295 Into Law* (Mar. 16, 2016).

By requiring the State to enroll in ERIC, the legislature and governor determined that ERIC's data are reliable. WEC should have abided by that determination. Courts, too, should enforce that determination to ensure "respect for a co-equal branch of government" and "promote[] due deference to legislative acts." *League of Women Voters of Wis. Educ. Network, Inc. v. Walker*, 2014 WI 97, ¶16, 357 Wis. 2d 360, 370, 851 N.W.2d 302, 307-08.

ERIC's data *are* reliable. As of 2020, thirty states and the District of Columbia participate in the program. *Homepage*, *supra*. That the numbers continue to grow indicates that States are finding ERIC's data reliable and useful. Indeed, enrolled States have praised the project. When Florida joined ERIC in 2019, Governor Ron DeSantis stated that "joining ERIC is the right thing to do" because "it will ensure [the State's] voter rolls are up-to-date and it will increase voter participation in [the State's] elections." News Staff, *Florida Joins Electronic Registration Information Center*, GovTech (Aug. 22, 2019), bit.ly/3a3PikQ. Local officials have offered similar praise. For example, the president of the Florida State Association of Supervisors of Elections

explained that ERIC "is an incredible tool to help ensure [that] voter rolls are accurate." *Id.*

Election watchers from across the political spectrum have praised ERIC. Russ Feingold, president of the American Constitution Society and former Democratic Senator from Wisconsin, has commended ERIC for "us[ing] more data points to compare voter information, producing far more reliable results" than other programs. *The Crosscheck Voter Database Is a Security Threat*, The Nation (Feb. 2, 2018), bit.ly/2wdATUJ. And Common Cause has assured its members that ERIC will help voters "be confident that our voter rolls are up-to-date, contain accurate information about the voters in our state, and are secure from any intervention." Common Cause Massachusetts, *The Integrity of Our Elections Is Important to All of Us, No Matter Our Background or Our Political Party* (last visited Apr. 6, 2020), bit.ly/33wlB9H. Moreover, the group praised Massachusetts for "seiz[ing] the opportunity to strengthen the accuracy and security of its voter rolls by joining" the program and extolled ERIC as "a responsible solution to the issue of voting list maintenance." *Id.*

In short, by mandating that the State enroll in ERIC, the Wisconsin legislature and governor made a

determination of its reliability—a determination supported by other States and election watchers alike. WEC has never identified any problems with the data, or taken the position that ERIC is unreliable. Absent highly unusual circumstances not present here, WEC must use ERIC's data.

II. Accurate voter rolls are essential to the integrity and reliability of Wisconsin's elections.

The Court of Appeals' legal errors will have "statewide impact." Wis. Stat. §809.62(1r)(c)(2). By giving WEC a free pass on maintaining the accuracy of voter rolls, the Court of Appeals' decision undermines Wisconsin's paramount interests in "protecting the integrity and reliability of the electoral process, maintaining public confidence in election results and preventing voter fraud." *Milwaukee Branch of NAACP v. Walker*, 2014 WI 98, ¶72, 357 Wis. 2d 469, 504, 851 N.W.2d 262, 279.

Inaccurate voter rolls are a major problem in this country. According to a 2012 study, 24 million voter registrations (one out of every eight) are invalid or inaccurate. For example, 2.75 million people are registered to vote in more than one state. *See* Pew Ctr. on the States, *Inaccurate, Costly, and Inefficient: Evidence that America's Voter Registration System*

Needs an Upgrade (2012), goo.gl/mQV8Ul; *accord A. Philip Randolph*, 138 S. Ct. at 1838. "Inflated voter lists are also caused by phony registrations and efforts to register individuals who are ineligible." Comm'n on Fed. Election Reform, *Building Confidence in U.S. Elections* §2.5 (Sept. 2005). After the 2008 election, the Justice Department "sent letters to a dozen states inquiring about their list maintenance practices" because "there appeared to be significant imbalances between their numbers of registered voters and their citizen populations." U.S. Comm'n on Civil Rights, *Department of Justice Voting Rights Enforcement for the 2008 U.S. Presidential Election* 38 (2009), bit.ly/3bSPeoy.

Unsurprisingly, given the state of voter rolls, American elections are vulnerable to voter fraud. Even setting aside individuals who are never caught or who are never prosecuted, The Heritage Foundation has identified 1,102 recent criminal *convictions* for voter fraud in the United States—many involving false registrations and double voting. *See* Heritage Found., *Election Fraud Cases from Across the United States* (last visited Apr. 6, 2020), heritage.org/voterfraud. Numerous individuals voted in more than one State. Others voted twice in different parts of the same State.

Wisconsin has not escaped this problem. Wisconsinites have been recently convicted of voting in multiple jurisdictions, for example:

- Troy Schiller pleaded guilty to voting in both Dexter and Pittsville in the 2016 primary election.

- Robert Monroe, who prosecutors called "the worst multiple-voter in state history," cast five ballots in the 2012 recall of Governor Walker and two ballots in the 2011 recall of State Senator Alberta Darling. Monroe also voted twice in the 2011 Wisconsin Supreme Court election and twice in the 2012 general election.

- In 2014, a jury convicted Leonard K. Brown of voting twice in the 2012 presidential election—once by absentee ballot and once in person in a different jurisdiction. Just one year earlier, Brown pleaded guilty to five felony counts of illegally voting in West Milwaukee, a city where he didn't live.

- John S. Rohde was convicted of falsifying statements on voter registration forms after voting twice in the November 2014

election. Despite living with his sister in Horicon, Rohde cast ballots in Beaver Dam and Calamus, using a false address.

- In 2014, legislative aid Marcie Malszycki pleaded guilty to voting in Onalaska where she was engaged in campaign work, rather than Madison where she resided.

Id.

Voter-list maintenance programs are an important tool in deterring this kind of fraud. Bloated rolls "create[] a potential for people to fraudulently vote under the names of these illegally registered individuals." U.S. Comm'n on Civil Rights, *supra*, at 12. "The maintenance of accurate and up-to-date voter registration lists is" thus "the hallmark" of fraud prevention and election security. S. Rep. No. 103-6, at 18. Confirming voters' identities requires "[a] good registration list [to] ensure that citizens are only registered in one place." *Crawford v. Marion Cty. Election Bd.,* 553 U.S. 181, 193-94 (2008). And, as this Court has recognized, "[t]he electoral system cannot inspire public confidence if no safeguards exist ... to confirm the identity of voters." *League of Women Voters*, 2014 WI 97, ¶52.

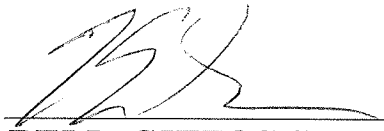
"[P]ublic confidence in the integrity of the electoral process," in turn, "has independent significant, because it encourages citizen participation in the democratic process." *Crawford*, 553 U.S., at 197. "Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). Measures that "enhance the integrity of elections" thus help Wisconsin "strengthen and make effective the constitutional guarant[y]" of suffrage. *League of Women Voters,* 2014 WI 97, ¶51. Indeed, such efforts "tend to certainty and stability in government and render it possible to guard against corrupt and unlawful means being employed to thwart the will of those lawfully entitled to determine governmental policies." *Id.* at ¶20. By letting WEC shirk its duty to maintain accurate voter rolls, the Court of Appeals' decision gravely undermines these critical values.

CONCLUSION

For all these reasons, this Court should grant the petition and reverse the decision below.

Dated this 8th day of April, 2020.

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CERTIFICATIONS

A. Certification as to Form and Length: I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief, not including the caption, tables of contents and authorities, signature blocks, and certification, is 2,943 words. It is produced with a minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, and a maximum of 60 characters per line of body text.

B. Certificate of Compliance with Wis. Stat. § 809.19(12). This brief is being filed in hard copy. Per instructions from the Clerk of Courts, this brief is to be filed electronically only after a favorable ruling from the Court on the contemporaneously submitted motion for leave to file a non-party brief. I understand that, pursuant to Wis. Stat. § 809.19(12), I must file an electronic copy of this brief in a text-searchable PDF format that is identical in content and format to the printed form of the brief filed on this date.

C. Certificate of Service. I hereby certify that one copy of the motion for leave to participate as a non-party, three copies of this brief, and three copies of this Certification have been served on all opposing parties by UPS to their counsel of record listed below:

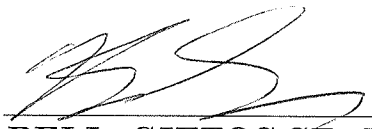
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