

IN THE SUPREME COURT OF WISCONSIN

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

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.

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

**BRIEF OF *AMICUS CURIAE* LEAGUE OF WOMEN
VOTERS OF WISCONSIN**

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INTRODUCTION

Last fall, arguing that the information provided to the Wisconsin Elections Commission (“WEC”) by the Electronic Registration Information Center (“ERIC”) is “reliable information” within the meaning of Wis. Stat. § 6.50(3), Petitioners attempted to force some 230,000 voters from the rolls based on a statutory interpretation that, in essence, seeks to fit a proverbial square peg into a round hole. Since then, thousands of voters have been found to have been erroneously identified by ERIC as having potentially moved, due to flaws in the data provided to ERIC by the State. For these reasons, that information is not “reliable” within the meaning of the law and cannot be used as a basis for cancelling a voter’s registration.

ARGUMENT

Petitioners misread the relevant statutes in this case, cherry-picking details to support their arguments and omitting

those that do not. This approach strains the meaning of Section 6.50(3) and violates this Court’s established rules of statutory construction.

I. Background

In 2015, the Wisconsin Legislature enacted a law requiring the Wisconsin Elections Commission (“WEC” or “the Commission”) to join the Electronic Registration Information Center (“ERIC”), a non-profit organization run by 28 states and the District of Columbia, which works to improve the accuracy of state voter rolls. ERIC ingests voter registration files and government transaction data that the member states provide, namely from Departments of Motor Vehicles (“DMVs”), and uses its matching methodology to identify registered voters who appear to have moved within a state or to a different state, or to have died while out of state. ERIC then aggregates this information and compiles it into an electronic record that it provides to WEC (the “list” or “ERIC

list”). ERIC provided its first list to Wisconsin in 2017, and its second in 2019. The Commission mailed out letters to all registered voters on the 2019-2020 ERIC list.

WEC uses the ERIC list, in part, to identify those registered Wisconsin voters who appear to have changed their residential address from the address at which they are registered to vote, and to mail a letter to those voters suggesting they either confirm that their address is current, or if they have moved within Wisconsin, to register to vote at their new address. In October 2019, the Commission mailed out letters to 232,579 registered Wisconsin voters on the 2019-2020 ERIC list. As of May 20, 2020, 4,709 voters on that list have confirmed that they have *not* moved to a new address.¹

¹ Wisconsin Elections Commission Memorandum, Election Registration Information Center Updates (May 20, 2020), at 2-3, https://elections.wi.gov/sites/elections.wi.gov/files/2020-05/May%2020%2C%202020.Final_.pdf.

Wisconsin is exempt from the entirety of the National Voter Registration Act (the “Motor Voter Law”), 52 U.S.C. §§ 20501 *et seq.* See 52 U.S.C. § 20503(b)(2). Of the ERIC participating states, only Wisconsin and Minnesota need not comply with the federal requirement to provide notice and wait for two general elections with a federal race to pass before removing from the rolls a registered voter who appears to have moved according to the U.S. Postal Service’s National Change of Address (“NCOA”) information. 52 U.S.C. §§ 20507(b)(2), 20507(d)(1)(B).

But critically, Wisconsin is the only ERIC member state that—within 30 days of a notice’s mailing—will remove a registered voter who has merely moved to a different municipality within the state. It only automatically updates a voter’s registration record for a change of residential address *within the same municipality*. Wis. Stat. § 6.50(3). Otherwise, a voter who moves to a new municipality must re-register in

their new municipality. *See id.*² In the 2017-2018 ERIC voter list maintenance period, the Commission found that 82.6 percent of the “movers” on the ERIC list were in-state movers.³

Because Wisconsin is exempt from the NVRA, including 52 U.S.C. § 20504, which requires that voter registration be offered upon any transaction at a DMV office, the state’s DMV forms do not offer customers an opportunity to register to vote or update their voter registration, inform the customer that the address they list will be used for voter registration updates, and do not require the customer to enumerate multiple, differentiated addresses.⁴ For this reason,

² As other *amici* have demonstrated, Section 6.50(3) does not apply to the WEC in any event, neither requiring nor empowering the WEC to deactivate the registrations of any Wisconsin voters for any reason.

³ Compl., Ex. A, Wisconsin Elections Commission Memorandum, *Assessment of Wisconsin’s Electronic Registration Information Center (ERIC) Participation*, at 3 (Mar. 11, 2019). The memorandum did not further disaggregate those statistics by inter- or intra-municipality movers.

⁴ Wisconsin Dep’t of Transportation, Form MV3001, Wisconsin Driver License Application, *available at* <https://wisconsin.gov/Documents/formdocs/mv3001.pdf>. This document is from an official government source, and its existence and

the state DMV transaction file is not an accurate record of residential address changes. *See* WEC Mar. 11, 2019 Memo, at 75 (“These voters were likely unaware that the information provided to the DMV would affect their voter registration status.”); Compl., Ex. C, Wisconsin Elections Commission Memorandum, “Wisconsin’s Electronic Registration Information (ERIC) Movers Analysis,” at 11 (June 11, 2019) (“Some [DMV] customers listed the new address on a vehicle registration form, initiated changes at the DMV Service Center, or listed it at a dealership when they were purchasing a vehicle. Vehicles can be registered at a workplace or other location where the vehicle is kept, which did not correspond

contents are not subject to reasonable dispute. Wis. Stat. § 902.01(2). The contents of Form MV3001 are “capable of accurate and ready determination by resort to [a] source[] whose accuracy cannot reasonably be questioned.” *Id.* § 902.01(2)(b). The League respectfully requests that this Court take judicial notice of Form MV3001.

with a primary residence as the voter record does. These circumstances could present variations in matching records.”).⁵

These inherent flaws in the self-reported data caused immediate problems for Wisconsin’s maiden voyage with ERIC data in the 2017-2018 election cycle. As Petitioners state in their Complaint, 7 percent of the 341,855 registered voters on the 2017-2018 ERIC “movers” list should never have been flagged as having changed their residential address and should never have received the mailed notice. Compl. ¶ 59.⁶ According to the Complaint, “6,153 responded to the [2017] notice by continuing their registration at their existing address,” and “[u]ltimately, 18,117 of the 335,702 voters

⁵ In Michigan, by contrast, state law has long forced an automatic update to the address in the voter registration record upon any change of address with the Michigan Department of State for driver’s license or state ID issuance and vice versa—the two must be the same. Mich. Comp. Laws §§ 168.509o(3), 168.500b(3).

⁶ *Amicus* disputes this figure but nevertheless assumes its truth *arguendo* for purposes of this brief.

whose registration status was deactivated were reactivated based upon one of the following: (a) the voter contacted the municipal clerk or WEC and stated that they still resided at the address on their voter registration, (b) WEC staff found an error of some sort, or (c) the voter voted in an election in 2018 from the address on their voter registration.” Compl. ¶¶ 56, 58 (citing Ex. B, WEC Mar. 11, 2019 Memo). The data was so unreliable that three municipalities, including the state’s largest, Milwaukee, reactivated every previously registered voter on the ERIC “movers” list who did not update their registration address on or before Election Day. Compl., Ex. B, WEC Mar. 11, 2019 Memo at 75-76 (“The municipalities of City of Milwaukee, City of Green Bay, and Village of Hobart requested wholesale reactivation of all movers, based on their authority under Wis. Stat. § 6.50 to determine what constitutes ‘reliable information’ with respect to a change in an elector’s residence. These municipalities determined that the voters

flagged by ERIC . . . was [*sic*] not reliable enough to remove them from the poll list.”). 34,293 were reactivated in Milwaukee, only 9,022 of whom updated their registration to a new address on or before Election Day. *Id.* at 76.

II. Statutory Language

Wisconsin courts undertake to “ascertain and give effect to the intent of the legislature.” *Ball v. Dist. No. 4, Area Bd. of Vocational, Tech. & Adult Educ.*, 117 Wis. 2d 529, 538, 345 N.W.2d 389 (Wis. 1984). A court “assume[s] that the legislature’s intent is expressed in the statutory language” and will give effect to all the words in an unambiguous statute, and only the words in the statute. *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 271 Wis. 2d 633, 662, 681 N.W.2d 110 (Wis. 2004); *see Cty. of Columbia v. Bylewski*, 94 Wis. 2d 153, 164, 288 N.W.2d 129 (Wis. 1980) (“[I]t is a basic rule of statutory construction that in construing statutes, effect is to be given, if possible, to each and every word, clause and sentence

in a statute . . . “); *Rogers-Ruger Co. v. Murray*, 115 Wis. 267, 271, 91 N.W. 657 (Wis. 1902) (“Words should not be read into or read out of a plain statute.”). Additionally, “[n]ontechnical words utilized in the statutes are to be given their ordinary and accepted meaning when not specifically defined and that meaning may be ascertained from a recognized dictionary.” *State v. Wittrock*, 119 Wis. 2d 664, 670, 350 N.W.2d 647 (Wis. 1984).

First, Petitioners argue: “The first indicia of reliability here is that the Legislature required WEC to join ERIC and pay for and use ERIC reports for the purpose of obtaining this data. The Legislature, at least, believes that ERIC reports are reliable.” Petitioners’ Brief at 34. That is the entirety of their only argument on the Legislature’s intent in passing the law that mandated Wisconsin join the ERIC consortium, and they do not even cite that statute, Wis. Stat. § 6.36(1)(ae). This omission is understandable given Section 6.36(1)(ae) makes no

reference to Section 6.50(3); nor does Section 6.50(3) refer to Section 6.36(1)(ae). If the Legislature had considered and desired the application of Section 6.50(3)'s notice-and-removal procedure to ERIC data, it would have surely incorporated cross-references into each of those statutes.

Petitioners apparently regard the Legislature's willingness to pay for the ERIC data as proof that the Legislature considered the data to be reliable under Section 6.50(3). To the contrary, these two statutes, which were enacted decades apart, do not speak to one another. The phrase "reliable information" was inserted in the statute in 1973. *See* 1973 Wis. Sess. Laws c. 164. At the time, the Legislature clearly did not contemplate a multi-state matching system that relied on computerized government transaction data, a substantial portion of which was inherently flawed due to a defect in the way it was collected. *See supra* at 7–8; *see infra* at 15–17.

Second, Petitioners' theory of the case has always been untethered from the plain statutory language of Section 6.50(3). Paragraph 60 of Petitioners' Complaint asserts: "The fact that a voter reported a different address to a government agency is a 'reliable' indicator that the voter *may have* moved, even if it turns out that the voter *did not actually move*." Compl., ¶ 60 (emphasis added). But Section 6.50(3) does not say "upon receipt of reliable information that a registered elector *may have* changed his or her residence....."; it says "upon receipt of reliable information that a registered elector *has* changed his or her residence." Wis. Stat. § 6.50(3) (emphasis added). That textual difference is crucial, because the statute provides for both the mailing of an inquiry notice *and* the removal of a registered Wisconsin voter from the rolls. It does not speak in the probabilistic terms that Petitioners wish it did. That it calls for a greater degree of certainty makes sense, given the notice period is just thirty days.

Petitioners try to beat a path around this obstacle by disaggregating the statute into two separate obligations—the notice obligation and the removal obligation, as they put it. Petitioners’ Brief at 33. But because the obligation to remove a voter inexorably follows from the mailing of a notice letter, Petitioners’ effort to cleave the statute in two fails. The second provision reads: “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) (emphasis added). Accordingly, either way, at a minimum, removal requires “reliable information” that a voter *has moved* to a different residential address in a different municipality or state, or confirmation of the same from the voter.

Third, Petitioners' interpretation of the word "reliable" is untenable. ERIC data is not "reliable information" and, therefore, the statute does not compel the removal of any voters on the ERIC list. The 2017-2018 ERIC list had an error rate of at least seven percent. For the 2019-2020 list, as of May 20, 2020, 4,709 registered voters on that list have confirmed that they have not moved to a new residential address. WEC recently noted that

[o]f the 232,579 voters who were sent the Movers mailing, 2% of them either sent back the continuation postcard, continued their registration on MyVote, have re-registered at their original address, or have signed the affirmation on the poll list that they have not moved. These 4,709 voters have taken an action to affirm they have not moved and are now actively registered at their original address and the watermark has been removed from their poll book record.⁷

⁷ See *supra* note 1, at 2.

Crucially, 4,709 is simply the number of voters who have confirmed that they have not moved *to date*; there has not been a November general election since the notices were sent.

Throughout this litigation, Petitioners have offered no limiting principle for their very lenient definition of “reliable.” Seemingly, any data set may be deemed “reliable” evidence, even if it is wrong approximately once out of every 25 times (a 4.3 percent error rate). *See* Petitioners’ Brief at 35. Even using the current-but-not-final 2 percent error rate for Wisconsin’s 2019-2020 ERIC data, Petitioners seem to think that information on residential address changes can still be “reliable,” even if it is only wrong approximately once out of every 50 times. That defies the common meaning of the word “reliable.” Indeed, Petitioners were initially prepared to accept an error rate of at least 7 percent as “reliable”—that is, a system in which approximately 1 in every 14 registrations are erroneously cancelled. *See* Compl. ¶ 59.

In conducting statutory interpretation, this Court has advised: “First, we look to the statute’s language, and if the meaning is plain, the inquiry typically ends there. Statutory language is given its common, ordinary, and accepted meaning” *State v. Williams*, 355 Wis. 2d 581, 590-91, 852 N.W.2d 467 (Wis. 2014) (internal citations and quotation marks omitted). The Merriam-Webster Dictionary defines “reliable” as “1: suitable or fit to be relied on: DEPENDABLE 2: giving the same result on successive trials.”⁸ Dictionary.com defines “reliable” to mean that something “may be relied on or trusted; dependable in achievement, accuracy, honesty, etc.”⁹ Certainly, one would not call a calculator or thermometer “reliable” if it produced the wrong result or temperature 1 out

⁸ Merriam Webster Dictionary, *available at* <https://www.merriam-webster.com/dictionary/reliable> (last visited July 11, 2020).

⁹ Dictionary.com, *available at* <https://www.dictionary.com/browse/reliable?s=t> (last visited July 11, 2020).

of every 25 times or even 1 out of every 50 times. A voting machine or tabulator that failed to record every 25th or even every 50th ballot would also surely not be deemed “reliable.” And a database that produces the wrong answer to the relevant question—Has this registered voter moved out of their municipality?—2 or 4.3 percent of the time, is per se unreliable.

Here, it is the Petitioners’ burden to prove that ERIC’s information is reliable, not any other party’s burden to disprove its reliability. While *amicus* does not concede that any level of erroneous information in a data set may be found consistent with the statutory phrase “reliable information,” mistakenly flagging nearly 5,000 voters as having moved to a new municipality or state is not a rounding error; it is not *de minimis*.

Lastly in this vein, Petitioners argue that Section 6.50(3) tolerates errors, because it requires notice be provided, but the

notice requirement is a not a seal of reliability and fails to cure the errors that render the ERIC information unreliable. Indeed, even after notice is sent, Section 6.50(3) prohibits the removal of *intra*-municipality movers. Instead, they must be automatically updated in the statewide voter registration database. Therefore, it is clear that the requirement to provide notice is no justification to use unreliable information in voter list maintenance activities.

Finally, the existence of Election Day registration (“EDR”) is entirely irrelevant to whether ERIC data is reliable information within the meaning of Section 6.50(3). The fact that Petitioners feel compelled to even note that there is a fail-safe EDR option for the thousands of voters who will be erroneously removed from the rolls by treating ERIC data as “reliable information” of a true residential address change speaks volumes. If this were indeed reliable information, would such an argument be necessary? Plaintiffs argue that the

availability of Election Day registration minimizes or relaxes the requirement of reliability in Section 6.50(3). By making this argument, Petitioners seek to shift the terrain of the debate: from whether the ERIC list data is “reliable information” to whether or not it is burdensome or difficult for a purged voter to *re-register*. Of course, Section 6.50(3) is solely concerned with the former and says nothing about the latter.

Dated: July 13, 2020.

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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 2,921 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: July 13, 2020.



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CERTIFICATION OF MAILING AND SERVICE

I certify that twenty-two paper copies of the foregoing Brief of *Amicus Curiae* League of Women Voters of Wisconsin were deposited in the United States mail for delivery to the Clerk of the Supreme Court by first-class United States mail on July 13, 2020. I further certify that the copies of the brief were correctly addressed, and postage was prepaid.

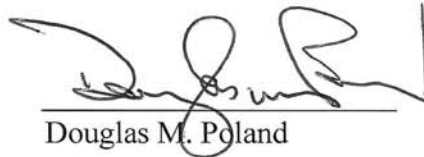
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