

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 1

OZAUKEE COUNTY

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

Plaintiffs,

v.

Case No. 2019CV000449

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

Code: 30701

Defendants.

**PROPOSED INTERVENOR-DEFENDANT LEAGUE OF WOMEN VOTERS OF
WISCONSIN'S SUPPLEMENT TO ITS BRIEF IN OPPOSITION TO PLAINTIFFS'
MOTION FOR A TEMPORARY INJUNCTION OR IN THE ALTERNATIVE FOR A
WRIT OF MANDAMUS**

On November 27, 2019, proposed Intervenor-Defendant League of Women Voters of Wisconsin (the "League") moved the Court for leave to file its Brief in Opposition to Plaintiffs' Motion for a Temporary Injunction or in the Alternative for a Writ of Mandamus. The League attached its Opposition Brief as Exhibit 1 to the Affidavit of Douglas M. Poland, filed the same day. Whether the League's Opposition Brief will become part of the record rests as a threshold issue on the Court's action on the League's Motion to Intervene. If the Court grants the Motion to Intervene, the League assumes that the Court will grant the League's Motion for Leave to File its Opposition Brief, and the Opposition Brief will become part of the record.

The League submits this Supplement to its Opposition Brief because since the League submitted its Opposition Brief, one of the parties made a material admission that impacts the

League's arguments in its Opposition Brief. Specifically, on December 6, Wisconsin Elections Commission Chair Dean Knudson appeared on a video-recorded episode of "Here and Now," a program broadcast on PBS Wisconsin. A link to that interview on PBS Wisconsin's website is provided in the contemporaneously filed Affidavit of Douglas M. Poland, dated December 12, 2019 ("12/12/19 Poland Aff."), which also attaches as Exhibit A the interview transcript posted on the PBS Wisconsin website. In that video-recording, Commission Chair Knudson states: "So far, since the mailing went out, about a half a percent have gone in and said, 'hey, we do actually still live here. We were a false positive match on the ERIC list match.'"¹ This statement is made at time stamp 4:35 in the video-recording available on the PBS Wisconsin website, and appears on page three of the transcript. *See* 12/12/19 Poland Aff., Ex. A at p. 3.

The main question in this case is whether the **2019** ERIC "movers" list information on purported residential address changes is "reliable" within the meaning of Wisconsin Statute Section 6.50(3). As stated in its Motion to Dismiss (which accompanied the League's Motion to Intervene), the League continues to maintain that, even taking Plaintiffs' allegations as true, the ERIC data is inherently unreliable and cannot support the removal of registered Wisconsin voters within 30 days of a notice's mailing under Wisconsin Statute Section 6.50(3). However, if this Court determines that it must resolve a factual dispute as to this lawsuit's main question, there is strikingly little evidence in the record on the specific question of the **2019** ERIC data's reliability. There is no evidence from the Wisconsin DMV, which provides information to ERIC, and certainly no information as to any procedural or methodological changes made since the 2017-2018 ERIC list was provided to and acted upon by the Commission. There is no information from ERIC as to any changes made since the 2017-2018 list was generated and used

¹ Single quotation marks have been inserted to clarify the statement within the statement.

by the Commission. And there is very little in the Commission's memoranda and very little in the affidavit of Meagan Wolfe, who has not been deposed, save for a few statements on its own *attempts* at identifying false positives. Commission Chair Knudson's statement, therefore, that half a percent of the 234,039 registered Wisconsin voters, or approximately 1,170 voters, have already contacted state and local election officials to inform them that they were sent the notice of an address change in error, is highly relevant to this case. Indeed, it is some of the only concrete evidence anywhere as to the reliability of the 2019 ERIC list, now that notices have been mailed out, and it demonstrates that once again there is a high and climbing error rate. Additionally, this statement underscores that this is a developing situation, and there are still unknowns about the reliability and quality of the 2019 ERIC list data.

Commission Chair Knudson's statement is an admission by a party opponent under Wisconsin Statute Section 908.01(4)(b) because the League seeks to use the statement against Commission Chair Knudson and the Commission, both of which are defendants in the case, and because the statement is one that Commission Chair Knudson made in both his individual capacity and as a representative of the Commission, and it is a statement by a person authorized to make a statement concerning the subject. *See, e.g., City of Stoughton v. Thomasson Lumber Co.*, 2004 WI App 6, ¶ 25, 269 Wis. 2d 339, 356-57, 675 N.W.2d 487 (Ct. App. 2003) ("Under Wis. Stat. § 908.01(4)(b) 4, a statement made by a party's agent within the scope of the agency and offered against the party is not hearsay."), *rev. denied*, 2004 WI 20, 269 Wis. 2d 202, 675 N.W.2d 808.

Although the authenticity of Commission Chair Knudson's video-recorded statement available on PBS Wisconsin's website cannot be subject to any serious challenge – and the League could easily establish its authenticity if provided the opportunity to take a deposition of

Commission Chair Knudson – the Court may also take judicial notice of the facts stated in Commission Chair Knudson’s video-recorded interview under Wisconsin Statute Section 902.01(b) because they are not subject to reasonable dispute in that they are capable of accurate and ready determination, and have in fact already been determined by the Commission itself.

Dated: December 12, 2019

Respectfully submitted,

By: Electronically signed by Atty. Douglas M. Poland

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