EXHIBIT A

STATE OF WISCONSIN CIRCUIT COURT BRANCH 1 OZAUKEE COUNTY

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

Plaintiffs,

v.

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

Defendants.

Case No. 2019CV000449

Code: 30701

PROPOSED INTERVENOR-DEFENDANT LEAGUGE OF WOMEN VOTERS OF WISCSONSIN'S BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR A TEMPORARY INJUNCTION OR IN THE ALTERNATIVE FOR A WRIT OF MANDAMUS

INTRODUCTION

As is clear from their Motion for a Temporary Injunction or in the Alternative for a Writ of Mandamus ("the Motion"), Plaintiffs are struggling to accept the plain text of Wisconsin Statute Section 6.50(3), the law at the heart of this dispute, and are straining to invent exceptions and add language that the Legislature did not. They argue that a 7 percent rate of data inaccuracy does not make the information unreliable, even though this position defies common sense and a plain-language understanding of the term "reliable." Mot. at 7-8. They argue that if registered Wisconsin voters are in part responsible for the inaccuracies in the address information obtained from Wisconsin DMV transaction data

and used by the Electronic Registration Information Center ("ERIC"), then the Wisconsin Elections Commission ("WEC" or "the Commission") must ignore the information's unreliability and remove voters from the rolls within just 30 days of a notice's mailing. Mot. at 7.

But this idea of "contributory negligence" is found nowhere in the text of Section 6.50(3). The Legislature could have dictated that any address information given by a registered voter to any government agency is per se "reliable," but it did not, and even Plaintiffs' own evidence (tendered to the Court by Plaintiffs in the Affidavit of Attorney McGrath) disproves the ERIC/DMV data's reliability. Plaintiffs even argue that Wisconsin Statute Section 6.36(1)(ae), the statute directing the Commission to participate in ERIC, means that the information received from ERIC is per se "reliable," even though the text of that statute does not say that and did not reference or amend Section 6.50(3). *Id*. These arguments amount to little more than aspirations as to what the Wisconsin Elections Code *should* say, rather than what the text expressly *does* say.

If this Court grants Plaintiffs a temporary injunction, it would require the Commission to cancel the 234,039 registrations at issue. In this way, Plaintiffs ask this Court to order, *not preservation of the status quo pending the final resolution of this action*, but the ultimate relief they have sought in bringing this suit—the immediate removal of all 2019 ERIC "movers" list voters who have not responded to the mailed notice. This would not be a temporary injunction, but a permanent injunction; such a result directly conflicts with clear and longstanding state law.

In the alternative, Plaintiffs request a writ of mandamus, but that requires an even clearer showing on the merits than the temporary injunction standard, and sets a higher bar.

Plaintiffs do not satisfy the factors for issuance of a writ of mandamus. Indeed, the request fails on the first factor. Section 6.50(3) creates a clear legal obligation for the Commission to require "reliable information" before any voter is removed on suspicion of having moved to a new municipality or state. At a minimum, there is a dispute between the parties as to whether the 2019 ERIC "movers" list is premised on "reliable information" of residential address changes within the meaning of Section 6.50(3). Wisconsin precedents make clear that, given this mixed question of law and fact as to reliability, there is no "clear legal right" to relief. Accordingly, this case cannot be resolved by issuing a writ of mandamus, an extraordinary form of relief usually reserved for ministerial, non-discretionary governmental actions, not legal standards or requirements of contested scope and application.

Respectfully, Proposed Intervenor-Defendant requests that this Court deny the Motion in full.

STATEMENT OF FACTS

2015 Wisconsin Act 261 required Wisconsin to join the Electronic Registration Information Center ("ERIC"), a non-profit organization run by and for twenty-eight states and the District of Columbia and devoted to improving the accuracy of state voter rolls and identifying individuals who are eligible to vote but not registered. Compl., Ex. A, at 72. 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 on the rolls who appear to have moved within or to a different state or who appear to have died while out of state, as well as individuals who appear to be eligible but unregistered to vote. *Id*. at 72–73. ERIC also

compares state voter rolls and government transaction data to National Change of Address ("NCOA") information from the U.S. Postal Service, a private, non-governmental entity, the Social Security Administration's Death Master List, and other data sources. *Id*. at 73. ERIC is solely responsible for the reliability of its matching methodology; it is completely dependent upon the states and their agencies for the reliability of the data it receives and matches. That is, if government transaction data submitted to ERIC includes information that does not reflect a true change of residential address, the relevant address for voter registration purposes, ERIC is extremely limited in its ability to detect and exclude those false positives when conducting its multi-state matching process. Ultimately, it is the state agencies' responsibility to ensure that the data is accurate and reliable.

ERIC provided voter list maintenance data to the Commission for the first time in 2017. Compl., Ex. A, at 73. This included 341,855 registered voters who had listed an address other than their voter registration address during a Wisconsin or another state's DMV or other agency transaction or through the Postal Service's NCOA process. *Id*. at 73–74. Commission staff represents that they "vetted the list for changes that were not relevant to the voter's registration, such as changes to mailing addresses or temporary changes"; they do not identify any process for differentiating commercial or workplace addresses. *Id*. at 74. The Commission then mailed out notices to all of these flagged voters, beginning on November 6, 2017, 282,448 of which were mailed within Wisconsin. *Id*. Commission staff heard complaints from voters and readily identified data discrepancies, such as street name spelling variations, missing apartment unit numbers creating a non-match, or missing new addresses in the NCOA, and "proactively marked those voter records for continuation of their registration at their current address . . ." *Id*. at 74–75. It

is unclear whether these corrective measures were taken for all voters on the ERIC list or just for voters who contacted the Commission or a local election office.

Invoking Section 6.50(3)'s requirement to remove voters from the rolls 30 days after the mailing of a notice, the Commission started to cancel voter registrations beginning in January 2018, if (a) the voter did not return the postcard to confirm registration and request continuation at that address, (b) the voter did not update their registration, or (c) the voter's notice was returned as undeliverable. Compl., Ex. A, at 74. 6,153 voters requested continuation; 83,743 notices were returned as undeliverable; and 251,959 failed to respond. *Id*. Commission staff reactivated a total of 12,133 voters after finding they had been erroneously removed, and three municipalities, Milwaukee, Green Bay, and Hobart, requested the "wholesale reactivation of all movers" in their jurisdictions (38,430), citing the unreliability of the information. *Id*. at 75. Less than one-third of those reactivated by those three counties' requests updated their registration to a new address. *Id*. Given these errors, public concerns, and mass corrections of the data on the back end, the Commission created a Supplemental Movers Poll List to give erroneously-removed voters a chance to easily reactivate their registrations at the polls and vote in the 2018 general election. *Id*. The use of Supplemental Movers Poll Lists was terminated at a December 3, 2018 Commission meeting in favor of a procedure that instructs poll workers to call the municipal clerk when a voter claims erroneous removal, and this remains in effect. *Id*. at 76.

The 2019 ERIC "movers" list has 234,039 registered Wisconsin voters on it. Compl., Ex. E. Those notices were mailed out the week of October 7–11. *Id*. Regrettably, the 2019 ERIC notice letter does not inform voters that they will be removed from the rolls

if they fail to take some action such as requesting continuation of registration or voting.[1] Defendants have outlined a 12-to-24-month notice-and-removal period for registered voters on the ERIC list, postponing removal and giving the voter more time to confirm their registration or vote. Compl., Ex. C at 12–14. Plaintiffs have filed this action, claiming that the ERIC "movers" list constitutes "reliable information" within the meaning of Wis. Stat. § 6.50(3) and, accordingly, that this statute requires Wisconsin election officials to remove voters flagged in the ERIC list 30 days after the notices' mailing.

ARGUMENT

I. The Court should deny Plaintiffs' Motion for a Temporary Injunction.

An injunction is an extraordinary and drastic remedy. *Werner v. A.L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520, 259 N.W.2d 310 (1977); *School Dist. of Slinger v. Wis. Interscholastic Athletic Ass'n*, 210 Wis. 2d 365, 370–71, 563 N.W.2d 585 (Ct. App. 1997) (citing *Best Disposal Sys. v. Milwaukee Metro. Sewerage Dist*., 128 Wis. 2d 537, 540, 386 N.W.2d 504 (Ct. App. 1986)). "Injunctions, whether temporary or permanent, are not to be issued lightly. The cause must be substantial." *Werner*, 80 Wis. 2d at 520, 259 N.W.2d 310. Given the significant burdens injunctive relief can impose on nonmovants, any relief granted by the Court must be "tailored to the necessities of the particular case." *State v. Seigel*, 163 Wis. 2d 871, 890, 472 N.W. 2d 584 (Ct. App. 1991). "A circuit court's decision

[1] *See* Affidavit of Douglas M. Poland, dated November 27, 2019 ("11/27/19 Poland Aff."), Ex. B, Excerpt from Wisconsin Elections Commission September 24, 2019 Agenda Documents (Sept. 24, 2019), 2019 ERIC Notice Letter, at 3. This document is from an official government source, and its existence and contents are not subject to reasonable dispute. Wis. Stat. § 902.01(2). The contents of the 2019 ERIC notice letter 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 the 2019 ERIC Notice Letter.

whether to grant injunctive relief is within the sound discretion of the circuit court." *Kocken v. Wis. Council 40*, 2007 WI 72, ¶ 24, 301 Wis. 2d 266, 278, 732 N.W. 2d 828.

To prevail on their request, Plaintiffs must demonstrate (1) they are likely to suffer irreparable harm if the Court does not grant the temporary injunction; (2) they have "no other adequate remedy at law"; (3) "a temporary injunction is necessary to preserve the status quo"; and (4) they have a reasonable probability of succeeding on the merits of their claims. *Milwaukee Deputy Sheriffs' Ass'n v. Milwaukee Cty.*, 2016 WI App 56, ¶ 20, 370 Wis. 2d 644, 659, 833 N.W. 2d 154 (citing *Werner*, 80 Wis. 2d at 520, 259 N.W.2d 310). For reasons set forth below, Plaintiffs cannot meet this burden and, respectfully, the Court should deny their Motion.

A. A temporary injunction in this case will not preserve the status quo—in fact, it will have the exact opposite effect, because it would lead to the cancellation of the registrations in question before the Court can reach the merits of Plaintiffs' claims.

The third factor should be dispositive here, so Intervenor-Defendant League will discuss it first. "The purpose of a temporary injunction is to *maintain the status quo*, not to change the position of the parties or *compel the doing of acts which constitute all or part of the ultimate relief sought.*" *Wis. Interscholastic Athletic Ass'n*, 210 Wis. 2d at 374, 563 N.W.2d 585 (quoting *Codept, Inc. v. More-Way North Corp.*, 23 Wis. 2d 165, 173, 127 N.W.2d 29 (1964)) (internal quotation marks omitted) (emphasis in original). Nor is it to provide the ultimate relief sought or decide the action before trial. *Shearer v. Congdon*, 25 Wis.2d 663, 668, 131 N.W.2d 377 (1964).

Plaintiffs' Motion requests that this Court issue a temporary injunction immediately canceling the registration of every one of the 234,039 registered Wisconsin voters who received a 2019 ERIC notice letter and failed to respond in some fashion. Mot. at 18-19.

This is not a request to preserve the status quo, but rather the sum total of what Plaintiffs request in their prayer for relief as a *permanent* injunction. Plaintiffs' argument that preserving the status quo requires removing these 234,039 from the voter rolls assumes what is in dispute, *i.e.* whether the Commission has violated Section 6.50(3). Mot. at 17-18. As of right now, no one on the 2019 ERIC "movers" list has been removed, and that is the status quo. Therefore, they are not entitled to this injunction under clear Wisconsin precedents. Such effectively-final relief would render the modifier "temporary" meaningless. Plaintiffs appear to recognize the inevitable denial of their temporary injunction motion in seeking a writ of mandamus in the alternative:

> However, if for any reason, this Court disagrees with the above, then as an alternative to an injunction, the Court should grant the Plaintiffs a writ of mandamus *(which has no requirement related to maintaining the status quo)* ordering the Defendants to perform the legal duty required of them, i.e., to change the registration status of voters wo do not respond to the October 2019 notices from eligible to ineligible, 30 days after the notice was sent and not responded to.

Id. (emphasis added). This factor is fatal to Plaintiffs' Motion for Temporary Injunction, but Intervenor-Defendant the League will address each of the equitable factors below. The alternative request for a writ of mandamus is addressed in Section II, *see infra* at 22–23, following the discussion of the temporary injunction factors. Plaintiffs incorrectly analyze these together and conflate the different tests. The multi-factor test for a writ of mandamus is far more restrictive, because the issuance of a writ of mandamus constitutes extraordinary and *final* relief. Mot. at 6.

B. Plaintiffs will not suffer irreparable harm absent an injunction, because the next election in Wisconsin is not until February 2020.

A showing of irreparable harm is "the key prerequisite to injunctive relief" and is met only where "the injury sought to be avoided is actually threatened or has occurred."

Joint Sch. Dist. No. 1, City of Wis. Rapids v. Wis. Rapids Educ. Ass'n, 70 Wis. 2d 292, 311, 234 N.W. 2d 289 (1975). A movant is likely to suffer irreparable injury when it can show that failure to grant a temporary injunction would render a permanent injunction "futile." *Werner*, 80 Wis. 2d at 520, 259 N.W.2d 310.

Additionally, the next election in Wisconsin is the spring primary election in February 2020. Accordingly, there is no need to rush a temporary injunction; any possible harm is not imminent.

C. Even if the Plaintiffs could show any injury by the Commission's refusal to remove affected voters within a 30-day period, they have not shown that a remedy at law would be inadequate for addressing their alleged injury.

The Supreme Court of Wisconsin has said that an injury is irreparable if it is not compensable by damages. *Pure Milk Products Co-Op v. Nat'l Farmers Org.*, 90 Wis.2d 781, 800, 280 N.W.2d 691 (1979) ("To invoke the remedy of injunction the plaintiff must moreover establish that the injury is irreparable, i. e. not adequately compensable in damages."). This factor rises and falls with Plaintiffs' irreparable harm argument. *See* Gabrielle B. Adams et al., Wisconsin Civil Procedure Before Trial § 7.19 (6th ed. 2018) ("[I]rreparable harm and lack of an adequate legal remedy are flip sides of the same coin."). Because Plaintiffs have failed to identify in their Complaint the legal rights and privileges that would be harmed if the Commission does not cancel the registrations at issue in this case, it is unclear whether any other adequate remedy at law such as damages would redress their claimed injuries.

D. Plaintiffs do not have a reasonable probability of succeeding on the merits of their claims.

In determining whether a movant has demonstrated a reasonable probability of success on the merits, courts have generally looked to whether he movant has stated a claim and whether the evidence supports the claim. *See, e.g., Wis. Interscholastic Athletic Ass'n*, 210 Wis. 2d at 374–75, 563 N.W.2d 585 ("The questions in this issue are whether the complaint states a cause of action and whether Slinger presented sufficient evidence at the hearing to permit the conclusion that it had a reasonable probability of success."); *Congdon*, 25 Wis. 2d at 667, 131 N.W.2d 377 ("If the proof sustains the allegations that club members have used the drive for 60 years, that they have paved and maintained portions of the road, and that they have knocked down barricades designed to bar their use, there is a reasonable probability that plaintiffs will succeed in establishing a prescriptive easement."). A movant fails this test "if it appears that no relief can be granted under any set of facts that the plaintiff could prove in support of the allegations." *Noonan v. Northwestern Mut. Life Ins. Co.*, 2004 WI App 154, ¶ 10, 276 Wis. 2d 33, 40, 687 N.W.2d 254 (citing *Quesenberry v. Milwaukee Cty.*, 106 Wis. 2d 685, 690, 317 N.W.2d 468 (1982)).

Additionally, a temporary injunction is not appropriate where there are facts in dispute or there exists an unsettled question of law. *See Bloomquist v. Better Bus. Bureau*, 17 Wis. 2d 101, 104, 115 N.W.2d 545 (1962) ("In another case, we pointed out the existence of sharp issues on the merits as support for the refusal of a temporary injunction."); *Werner*, 80 Wis. 2d at 520 n.5, 259 N.W.2d 310 (quoting *Mogen David Wine Corp. v. Borenstein*, 267 Wis. 503, 509, 66 N.W.2d 157 (1954)) ("The writ (temporary injunction) is to a great extent a preventative remedy; and where the parties are in dispute

concerning their legal rights, it will not ordinarily be granted until the right is established . . ." (internal quotation marks omitted)). Plaintiffs do not have a reasonable probability of success on the merits of their claims.

1. Plaintiffs' First Cause of Action

Wisconsin is unique among the 28 member states plus D.C. that participate in ERIC, and that has created a unique problem that ERIC has not previously encountered in the seven years it has been in operation. Wisconsin election law differs in two major respects from the other ERIC member states.

First, Wisconsin is one of only two ERIC states, the other being Minnesota, that is exempt from the entirety of the National Voter Registration Act (the "Motor Voter Law"), 52 U.S.C. §§ 20501 *et seq.*, because it has continuously had Election Day registration at its polling places since at least August 1, 1994. 52 U.S.C. § 20503(b)(2). Unlike the other 26 states and D.C., Wisconsin and Minnesota need not comply with the requirement to provide notice and wait for two general elections with a federal office 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). The Motor Voter Law, with its much more reasonable and realistic four-year period for voters to confirm their registration status or engage in any voter activity, does not use the word "reliable." 52 U.S.C. § 20507. Because of the state's exemption from the NVRA, Wisconsin DMV data had never been used as evidence of a registered voter's true residential address change prior to the creation of the first ERIC "movers" lists for Wisconsin in 2017.

Second, Wisconsin election law also differs from Minnesota's in that a registered voter must be removed if there is reliable information that they have moved outside the municipality, Wis. Stat. § 6.50(3), whereas Minnesota only requires this if there is information the voter has moved to another state and, even then, only if the mailing is returned as undeliverable. Minn. Stat. § 201.12(3). Instead, Minnesota will automatically update its voter rolls for a change of address *within the state*, Minn. Stat. § 201.12(2.), while Wisconsin will only automatically update a voter's registration record for a change of address *within the same municipality*. Wis. Stat. § 6.50(3). If there is "reliable information" that a registered voter has moved from one municipality to any of the other 1,849 municipalities in Wisconsin, that voter will be queued up for removal under Wis. Stat. § 6.50(3).

Therefore, 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, for example, moving from Grafton to Port Washington.

The above features of Wisconsin election law make it all the more important that the Commission's voter roll maintenance activities be premised upon "reliable information," as Section 6.50(3) requires. Intervenor-Defendant League of Women Voters of Wisconsin does not disagree with Plaintiffs that Section 6.50(3) would require the removal of registered voters within 30 days, *if* the Defendant Wisconsin Elections Commission were acting upon "reliable information" of true residential address changes to different municipalities—but, in this case, it is not. The ERIC "movers" lists generated for Wisconsin were formulated using Wisconsin DMV data that is fatally flawed because, among other reasons, DMV customers obtain driver's licenses, including commercial

driver's licenses, and register vehicles using addresses other than residential addresses at which they have registered to vote and intend to stay registered to vote. It is clear from Plaintiffs' Complaint and proffered evidence that significant numbers of DMV customers: (1) list commercial or workplace addresses when obtaining a commercial driver's license or registering a vehicle for use in a business; (2) record a vacation home address in registering a vehicle; and (3) buy a car for a child who is in college and register it at their own address instead of the child's address on campus. Moreover, there is no way to identify and segregate non-residential addresses from residential addresses in the Wisconsin DMV data. The Commission's March 11, 2019 Memorandum, "Assessment of Wisconsin's Electronic Registration Information Center (ERIC) Participation" (hereinafter, "WEC Mar. 11, 2019 Memo"), stated the following:

> [W]hile available data from the DMV implied many had moved, some of the voters, in fact, had not moved. Some reasons for this include voters who registered a vehicle or obtained a driver's license at an address other than the address they considered to be their voting residence. This included persons who registered a vehicle at a business address, vacation home, or their child's college address, and college students who obtained a driver's license when they are temporarily living away from home. In these situations, the voters may have provided an address in their transaction with the DMV that was different from their voting address, even though DMV asked for their residential address on their forms. These voters were likely unaware that the information provided to the DMV would affect their voter registration status.

Compl., Ex. B, WEC Mar. 11, 2019 Memo, at 74–75; *see also id*. at 77 ("Voters provide alternative addresses to governmental agencies for a variety of reasons that may not correspond to an actual physical move or may not reflect an individual's intent regarding their voting residence."). The Commission reconfirmed this in its June 11, 2019 Memorandum, "Wisconsin's Electronic Registration Information (ERIC) Movers Analysis" (hereinafter, WEC June 11, 2019 Memo):

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

Compl., Ex. C, at 11.

These inherent flaws in the data caused immediate problems for Wisconsin's maiden voyage with ERIC data in the 2017–2018 election cycle. As Plaintiffs state in their Complaint and reiterate in their Motion, 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; Mot. at 7-8.[2] According to the Complaint and Motion, "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 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); Mot. at 7-8. 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

[2] Although the League disputes this figure, the League agrees that the figure is *at least* 7 percent.

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.

The new batch of 234,039 individuals on the ERIC "movers" list who were mailed forwardable notices last month contains the same inherent flaws. Not only is ERIC extremely limited in its ability to differentiate between true residential address changes and all other inapplicable addresses listed in DMV transactions, but Wisconsin DMV itself and the Commission have also not devised a reliable means to do so. The Complaint and the Motion do not contend that there has been any change in Commission or Wisconsin DMV policy or procedures that would allow them to disaggregate or differentiate DMV data and separate out true residential address changes for registered voters from other addresses listed in DMV transactions. Because Wisconsin has always been exempt from the Motor Voter Law, the state's DMV applications and 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, which would allow for much greater data accuracy in voter list maintenance activities.[3] Accordingly, Wisconsin DMV customers'

[3] *See* 11/27/19 Poland Aff., Ex. C, Wisconsin Dep't of Transportation, Form MV3001, Wisconsin Driver License Application, *available at* https://wisconsindot.gov/Documents/formdocs/mv3001.pdf. This document is from an official government source, and its existence and 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

attention is not focused on that possibility at all because driver's licensing and state ID issuance have never had any relation to or impact on voter registration until ERIC's implementation. *See* Compl., Ex. B, 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."). By contrast, in Michigan, 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). But there is still no such rule in Wisconsin and, as is manifest from Plaintiffs' Complaint, Compl. ¶¶ 56, 58–59, and the Commission's memoranda, no notice to DMV customers that a third-party, multi-state matching service might later construe their DMV application address as their residential address for voter registration purposes.

In light of the foregoing, even if ERIC's matching *methodology* is reliable, the 2019–2020 ERIC "movers" list *data* is unreliable. This Court's analysis of Section 6.50(3) should begin and end with the plain meaning of the word "reliable." In conducting statutory interpretation, the Supreme Court of Wisconsin has stated that "[t]he analytical framework for statutory interpretation is well-established. 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*, 2014 WI 64, ¶ 17, 355 Wis. 2d 581, 590–91, 852 N.W.2d 467 (internal citations and quotation marks omitted). The Merriam-Webster Dictionary defines "reliable" as "1: suitable or fit to be

questioned." *Id*. § 902.01(2)(b). The League respectfully requests that this Court take judicial notice of Form MV3001.

relied on: DEPENDABLE 2: giving the same result on successive trials."[4] Dictionary.com defines "reliable" to mean "that may be relied on or trusted; dependable in achievement, accuracy, honesty, etc."[5] Applying these definitions to analogous contexts that involve accuracy, it is clear that one would not call a calculator or thermometer that produced the wrong result 7 percent of the time "reliable." A voting machine or tabulator that failed to record the votes on 7 percent of ballots would not be deemed "reliable." And a database, 7 percent of which is comprised of inaccurate data, is not a "reliable" source of information; indeed, a database that produces the wrong answer to the relevant question—Has this registered voter moved out of their municipality?—7 percent of the time, is per se unreliable.

No reasonable person would deem a car's airbag or brakes "reliable" if they only worked 93 percent of the time. A security system or a carbon monoxide or fire alarm that only functioned correctly 93 percent of the time would also not be "reliable." Protecting the right to vote—the most fundamental right in a democracy—is surely as important as securing our personal safety and property. The U.S. Supreme Court has written that, "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). If a 93 percent success rate is insufficient to protect safety and property interests, then it cannot suffice for the purpose of protecting our right to vote.

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[4] Merriam Webster Dictionary, *available at* https://www.merriam-webster.com/dictionary/reliable (last visited Nov. 20, 2019).

[5] Dictionary.com, *available at* https://www.dictionary.com/browse/reliable?s=t (last visited Nov. 20, 2019).

Plaintiffs argue that the existence of Election Day registration mitigates any errors and harm here, but it cannot make unreliable information reliable; nor can it give rise to a claim under Section 6.50(3). Reliability, which is the sole trigger for application of Section 6.50(3), is not defined in the statute based on whether or not there is a fail-safe technology or back-up procedure to remedy unreliable, inaccurate results. By way of analogy, if a government agency's computer system randomly reflected that 7 percent of employees had already received their biweekly direct deposits into their bank accounts, that system would be per se unreliable, *even if* those employees could later establish with documentary proof, such as a bank account statement, that no such deposit had been made.[6]

Plaintiffs casually dismiss this 7 percent error rate. They seek to compel the Commission to ignore the partial—but very real and consequential—incompleteness and inaccuracy of the DMV data incorporated into the ERIC "movers" list and to over-rely on that list, not only as reasonable grounds to make an inquiry and remove a voter after a 12-to-24-month waiting period, but as a reliable, *i.e.* dependable and accurate, basis to remove voters from the rolls within just 30 days. Customer-reported Wisconsin DMV data cannot support that.

Indeed, mere non-matches in the course of database verification, such as conflicting addresses, have never been considered "reliable information" under Section 6.50(3). For instance, in 2010, the Commission's predecessor, the Government Accountability Board ("GAB"), performed a retroactive database verification on registered voters for voter roll

[6] Further, while people can re-register, even on Election Day, this requires documentary proof of residence, Wis. Stat. § 6.34(2), that not all voters can easily access or will have brought to the polls. These voters should not be burdened to restore their registration when they never should have been flagged and removed in the first place.

maintenance and then, pursuant to Section 6.50(3), mailed notices to registered voters who did not match the information in the DMV database.[7] Crucially, the GAB did not consider non-matching addresses on their own per se "reliable information" of a true residential address change that could justify removal. Rather, it explained that "[t]he letter notifies the voter that G.A.B. has reliable information that the voter no longer resides at the address where they are currently registered, *because a mailing to that address was returned as undeliverable*." GAB Memo at 1 (emphasis added). The memo elaborated on this point:

> These voters were mailed a DMV Ping Letter as part of the Retroactive HAVA Check project, and that letter was returned by the post office as undeliverable. *An undeliverable mailing constitutes reliable information that a voter may no longer reside at the address where they are currently registered to vote.* Sec. 6.50(3) Wis. Stats. outlines the process to be followed if an election official has such reliable information.

Id. at 2 (emphasis added). Even ERIC's membership agreement seems to reflect that a mere non-match is insufficient for removal: "ERIC's membership agreement compels the state to act on all credible ERIC data identifying individual voters and to '. . . 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*." Compl., Ex. B, Mar. 11, 2019 WEC Memo, at 81 (emphasis added).

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[7] *See* 11/27/19 Poland Aff., Ex. D, Wisconsin Government Accountability Board, "30 Day Notice Letter to Retroactive HAVA Check Undeliverables Frequently Asked Questions" (Oct. 8, 2010) ("GAB Memo"), *available at* https://elections.wi.gov/sites/default/files/memo/20/retro_hava_30_day_notice_faq_final_10_11_10_pdf_15767.pdf (last visited Nov. 19, 2019). The League respectfully requests that this Court take judicial notice of this official government memorandum. This document is from an official government source, and its existence and contents are not subject to reasonable dispute. Wis. Stat. § 902.01(2). The contents of this GAB memo regarding undeliverable 30-day notice letters mailed to voters flagged in a retroactive HAVA check is "capable of accurate and ready determination by resort to [a] source[ ] whose accuracy cannot reasonably be questioned." *Id*. § 902.01(2)(b).

However, rather than seeking only to remove registered voters for whom a mailed notice was returned as undeliverable—the limit of Minnesota election law, *see* MINN. STAT. § 201.12—Plaintiffs seek the removal within 30 days of ***all*** registered voters on the ERIC "movers" list, regardless of whether the notice was deliverable or not. If Plaintiffs' interpretation of Section 6.50(3) were adopted by this Court, it would render the word "reliable" superfluous and null. Wisconsin state and local election officials could simply remove registered voters who do not respond within 30 days based upon any information. Plaintiffs' argument begs the question: At what level of erroneous inclusion of false positives would a voter list maintenance system or procedure be considered unreliable? If a 7 percent error rate does not destroy the reliability of a list or database in their view, what about a 10, 15, or 20 percent error rate? Setting a limit would of course be quite arbitrary. Fortunately, this Court need not set an upper bound—or a lower bound—in order to simply conclude that a 7 percent error rate is not de minimis and is not reliable and decide this case alone.

Therefore, it is plain that the Commission has relied on unreliable information, at least in part from the Wisconsin DMV, in using the ERIC "movers" list to initiate this voter roll maintenance process. Accordingly, Section 6.50(3) does not apply and Defendant WEC is not required to remove registered voters on the 2019 ERIC "movers" list within 30 days of the notices' mailing. Taking their allegations as true, Plaintiffs have failed to state a claim upon which relief can be granted and, even considering their proffered evidence, they are not likely to succeed on the merits of their First Cause of Action.

2. Plaintiffs' Second Cause of Action

The League's interest in this case only extends to Plaintiffs' First Cause of Action and to Paragraphs 86 and 87 of the Second Cause of Action, which argue once again that Defendants violated Section 6.50(3). This essentially separate claim makes the same argument as Plaintiffs' First Cause of Action and attacks the Commission's 12-to-24-month waiting period as an *ultra vires* violation of Section 6.50(3). In that respect, the League's interest in rebutting that portion of the Second Cause of Action is nearly the same as the interest in rebutting the First Cause of Action—arguing that the unreliability of a substantial portion of the information in the ERIC "movers" list means that Section 6.50(3) does not apply. This part of Claim 2 rises and falls with Claim 1. If the Court agrees with the League's arguments above that Section 6.50(3) does not apply because the ERIC list relies in substantial part on unreliable, inaccurate information as to whether or not a registered voter has moved to a new residential address, then the Commission did not promulgate a rule in violation of that statute.

As to the balance of Plaintiffs' Second Cause of Action, specifically Paragraphs 80 to 85, at this time, the League can perceive no interest it has in the outcome of that part of the claim. Plaintiffs appear to be arguing that the Commission's policy to wait 12 to 24 months with multiple intervening elections must be made a formal rule. The only way in which this Court would have to reach this part of the Second Cause of Action is if Plaintiffs lose their first claim; if they win their first claim and prove a violation of Section 6.50(3), then the Second Cause of Action is moot in full. If Plaintiffs lose their first claim but nevertheless prove a procedural defect in the creation of the 12-to-24 month waiting period policy, then the only relief they could obtain would be an injunction against using that

longer waiting period and likely a requirement to promulgate a formal rule, as the 30-day removal requirement would not apply. At this time, the League cannot identity any stake it has in whether or not the Commission has adhered to all formal rulemaking requirements.[8] It would appear then that this portion of the Second Cause of Action is not properly directed at the League.

II. Plaintiffs also fail to establish a right to a writ of mandamus.

Mandamus would be a more appropriate vehicle for this case than a temporary injunction, because mandamus requires a government official to engage in an affirmative act, whereas an injunction compels refraining from a certain act or conduct, such as enforcing a particular statute. *State ex rel. Christie v. Vande Zande*, 187 Wis. 2d 591, 594, 523 N.W. 2d 166 (Ct. App. 1994) (quoting State ex rel. Lewandowski v. Callaway, 118 Wis. 2d 165, 171, 346 N.W. 2d 457 (1984)) ("[Mandamus] is the proper remedy to compel a public officer to perform his or her statutory duties."). But the test is much steeper, and Plaintiffs cannot make the requisite showing. For a writ of mandamus to issue, there must be: "(1) a clear legal right; (2) a plain and positive duty; (3) substantial damages or injury should the relief not be granted, and (4) no other adequate remedy at law." *State ex rel. Oman v. Hunkins*, 120 Wis. 2d 86, 88, 352 N.W.2d 220 (Ct. App. 1984); *see also State ex rel. Collins v. Am. Family Mut. Ins. Co.*, 153 Wis. 2d 477, 483, 451 N.W. 2d 429 (1980) ("Mandamus is an extraordinary legal remedy which will issue only where the party seeking the writ establishes that it is based on a clear, specific legal right which is free from substantial doubt.'" (quoting *Eisenberg v. ILHR Dept.*, 59 Wis. 2d 98, 101, 207 N.W. 2d

[8] Nevertheless, the League has strong interests in the resolution of the First Cause of Action and the closely-related allegations of Paragraphs 86 and 87.

874 (1973)). "A writ of mandamus is a discretionary writ in that it lies within the sound discretion of the trial court to either grant or deny." *Miller v. Smith*, 100 Wis. 2d 609, 621, 302 N.W. 2d 468 (1981).

Since Plaintiffs do not have a likelihood of success on the merits of their claim that Section 6.50(3) compels removal 30 days after a notice is mailed out, inexorably they do not have "a clear legal right" to the same. Plaintiffs have failed to establish that the 2019 ERIC "movers" list information is "reliable" within the meaning of Section 6.50(3). They concede a 7 percent error rate in the 2017-2018 ERIC "movers" list, but then fail to allege that WEC or Wisconsin DMV have successfully devised a way to differentiate between government transaction data recording a true residential address change and government transaction records with non-residential addresses listed, which are inapplicable to voter registration. Accordingly, Plaintiffs have not established that there will be any minimization, let alone elimination, of the problems that plagued the 2017-2018 ERIC "movers" list in Wisconsin. This is clear and militates in favor of denying this Motion in full. As pled, the information on purported address changes is unreliable in substantial part, and Plaintiffs have not established with record evidence that there is any way to differentiate between residential and non-residential addresses in this flawed Wisconsin DMV data that ERIC ingests and uses in its matching protocol. This is far from the clarity required to enforce Section 6.50(3) via a writ of mandamus. The League contends that the term "reliable" clearly does not embrace a data set that is only (at most) 93 percent accurate, and has moved to dismiss the First Cause of Action and Paragraphs 86 and 87 of the

Complaint as legally insufficient.[9] By the same token, Plaintiffs have not established that this same data set is *clearly* "reliable"—*i.e.* beyond any factual dispute as to its reliability.

If a temporary injunction is not appropriate where there are facts in dispute or there exists an unsettled question of law, then a writ of mandamus certainly is not. In *State ex rel. Young v. Maresch*, the Supreme Court of Wisconsin held that "[m]andamus should not lie to compel the supervisors to remove an obstruction from a highway when that duty, assuming that it exists, is dependent upon disputed and doubtful facts and when the legal result of the facts is subject to reasonable controversy." 225 Wis. 225, 230, 273 N.W. 225 (1937); *cf. Bloomquist*, 17 Wis. 2d at 104, 115 N.W.2d 545 ("In another case, we pointed out the existence of sharp issues on the merits as support for the refusal of a temporary injunction."); *Werner*, 80 Wis. 2d at 520 n.5, 259 N.W.2d 310 (quoting *Borenstein*, 267 Wis. at 509, 66 N.W.2d 157) ("The writ (temporary injunction) is to a great extent a preventative remedy; and where the parties are in dispute concerning their legal rights, it will not ordinarily be granted until the right is established . . ." (internal quotation marks omitted)). Since the parties dispute the application of the phrase "reliable information" to the facts in this case, mandamus, which would constitute final relief, is inappropriate. Plaintiffs have failed to establish a clear right to this extraordinary relief.

[9] Under Wisconsin Statute Section 783.01, a motion to dismiss a claim seeking a writ of mandamus under Section 802.06(2) is the procedural equivalent of a motion to quash a petition for writ of mandamus. *See also Miller v. Smith*, 100 Wis. 2d 609, 620 n.12, 302 N.W.2d 468 (1981); *State ex rel. Cabott, Inc. v. Wojcik*, 47 Wis. 2d 759, 761, 177 N.W.2d 828 (1970); *Mazurek v. Miller*, 100 Wis. 2d 426, 430, 303 N.W.2d 122 (Ct. App. 1981) ("A motion to quash a writ of mandamus is treated as a motion to dismiss a complaint."), *review denied*, 101 Wis. 2d 741, 309 N.W.2d 846, *and cert. denied*, 454 U.S. 896 (1981). Consequently, should the Court grant the League's Motion to Intervene, its Motion to Dismiss should be treated as a Motion to Quash for the purposes of Plaintiffs' request for a writ of mandamus.

CONCLUSION

As Plaintiffs are not entitled to either a temporary injunction or a writ of mandamus under Wisconsin law, respectfully, this Motion should be denied.

Dated: November 27, 2019 Respectfully submitted,

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**Motions for Pro Hac Vice to be Filed*